NEW YORK APPELLATE DIGEST, LLC

First Department
Quarterly Report
January – March 2021

An Organized Compilation of the Summaries of Selected Decisions Released by the First Department January – March 2021. 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 of Any Page to Return There.

Copyright 2021 New York Appellate Digest, LLC

Contents

Table of Contents

Table of Contents

Table of Contents

Table of Contents

Table of Contents

Table of Contents

Table of Contents

Table of Contents

Table of Contents

ACCOUNTANT MALPRACTICE.

PLAINTIFF DID NOT DEMONSTRATE DEFENDANT ACCOUNTANT DEPARTED FROM THE PROFESSIONAL STANDARD FOR TAX PREPARATION SERVICES (FIRST DEPT).

The First Department, reversing Supreme Court, determined plaintiff did not demonstrate defendant accountant departed from the professional standard for tax preparation:

"A party alleging a claim of accountant malpractice must show that there was a departure from the accepted standards of practice" … . Plaintiff does not identify any applicable professional standard which would have required defendants to inquire whether the transactions at issue were approved in accordance with the procedures contained in the operating agreement. To the contrary, the standards proffered by plaintiff's expert permit an accountant engaged for tax preparation services to rely on information furnished by the taxpayer unless it appears to be incorrect, incomplete or inconsistent. There is no allegation here that the information provided to defendants was incorrect, incomplete or inconsistent. Deane v Brodman, 2021 NY Slip Op 01842, First Dept 3-25-21

ARBITRATION.

CPLR 7515, ENACTED IN 2018, DOES NOT APPLY RETROACTIVELY TO PROHIBIT MANDATORY ARBITRATION OF SEXUAL HARASSMENT CLAIMS (FIRST DEPT).

The First Department, reversing Supreme Court, determined CPLR 7515, enacted in 2018, should not be applied retroactively to prohibit arbitration of a sexual harassment claim:

The provisions of CPLR 7515 relied on by plaintiff are not retroactively applicable to arbitration agreements, like the one at issue, that were entered into preceding the enactment of the law in 2018, so that plaintiff's argument that this law prohibits

arbitration of her claims is unavailing … . Newton v LVMH Moet Hennessy Louis Vuitton Inc., 2021 NY Slip Op 01558, First Dept 3-18-21

ATTORNEYS.

AN EMAIL INFORMING PLAINTIFF THAT DEFENDANT LAW FIRM WOULD NOT APPEAL THE RULING OF THE WORKERS' COMPENSATION APPELLATE PANEL DID NOT UNEQUIVOCALLY TERMINATE THE FIRM'S REPRESENTATION OF PLAINTIFF IN THE WORKERS' COMPENSATION MATTER (FIRST DEPT).

The First Department, reversing Supreme Court, determined an email from the attorney defendants to the plaintiff did not unequivocally terminate the firm's representation of plaintiff before the Workers' Compensation Board:

Where, as here, defendants were retained in writing to represent plaintiff in all proceedings before the Workers' Compensation Board related to his claim, plaintiff made a sufficient showing of a continuing relationship with regard to that proceeding to support his contention of continuous representation … . Defendants' statement in an email that they would not pursue an appeal to the Third Department after having lost before the Workers' Compensation appellate panel on the issue of whether plaintiff was an employee, did not "unequivocally" terminate the representation in the workers' compensation matter, which remained pending following the administrative review … . This is particularly true in light of the terms of the retainer agreement. Schwenger v Weitz, Kleinick & Weitz, LLP, 2021 NY Slip Op 01869, First Dept 3-25-21

CIVIL PROCEDURE.

AFTER TWICE ADMITTING OWNERSHIP OF THE AREA OF PLAINTIFF'S SLIP AND FALL, DEFENDANTS SHOULD NOT HAVE BEEN ALLOWED TO AMEND THEIR ANSWER TO DENY OWNERSHIP AFTER THE STATUTE OF LIMITATIONS HAD RUN (FIRST DEPT).

The First Department, reversing Supreme Court, determined defendants, after twice acknowledging ownership of the area of plaintiff's slip and fall, should not have been allowed to amend their answer to deny ownership after the statute of limitations had run

[Defendants] may not amend their answer in this manner after the statute of limitations has expired; the amendment would be too prejudicial to plaintiff … . Jackson v 170 W. End Ave. Owners Corp., 2021 NY Slip Op 00625, First Dept 2-4-21

CIVIL PROCEDURE.

ALTHOUGH THE COMPLAINT WAS DEFECTIVE, AFFIDAVITS AND OTHER EVIDENCE DEMONSTRATE A POTENTIALLY MERITORIOUS CLAIM; THE COMPLAINT SHOULD NOT HAVE BEEN DISMISSED (FIRST DEPT).

The First Department, reversing Supreme Court, noted that a defective complaint will survive a motion to dismiss if affidavits or other evidence demonstrate a potentially meritorious claim:

The amended complaint is defective because it merely alleges that the Bluestone defendants participated in fraudulent transfers, without alleging that they were a transferee of the assets or benefited in any way from the transfers … . However, a defective complaint will not be dismissed where affidavits and other evidence amplify inartfully pleaded but potentially meritorious claims … . Plaintiffs rely on evidence submitted by the Goldman defendants in opposition to the Bluestone defendants' motion to dismiss which suggests that the Bluestone defendants may

have participated in and benefitted from the alleged fraudulent transfers. This evidence indicates that plaintiffs have potentially meritorious fraudulent conveyance claims against the Bluestone defendants. Ninth Space LLC v Goldman, 2021 NY Slip Op 01853, First Dept 3-25-21

CIVIL PROCEDURE.

DEFENDANTS DID NOT PRESENT SUFFICIENT EVIDENCE IN SUPPORT OF THEIR MOTION TO CHANGE VENUE (FIRST DEPT).

The First Department reversing Supreme Court, determined defendants did not present sufficient evidence in support of their motion to change venue. The plaintiffs alleged the defendants, who were hired to paint newly-constructed residential property, did substandard work. Suit was brought in the county of plaintiffs' residence and business, New York County. The defendants sought to change the venue to Suffolk County where the property is located and defendants reside:

Where venue has properly been designated by the plaintiff based on the residence of either party, a defendant seeking a change of venue under CPLR 510(3) must make a detailed evidentiary showing that the nonparty witnesses will, in fact, be inconvenienced absent such relief. The affidavit of the moving party under CPLR 510(3) must (1) contain the names, addresses, and occupations of witnesses expected to be called; (2) disclose the facts upon which such witnesses are expected to testify, in order that the court may determine whether such witnesses are material and necessary; (3) demonstrate that such witnesses are willing to testify; and (4) show that the witnesses would be inconvenienced absent a change in venue … …

… [D]efendants neglected to show with sufficient particularity the facts upon which nonparty McAulife is expected to testify. … Defendants did not submit an affidavit from McAulife, relying instead on counsel's affirmation wherein he states that McAulife was "familiar with the work performed by defendants at 10 Two Trees Lane," and "familiar with defendants in their business capacity." Without further detail about when, where, and under what circumstances McAulife had occasion to become "familiar with the work," defendants' burden has not been met … . Defendants also fail to set forth McAulife's name, address, and occupation, or how

he would be inconvenienced absent a change in venue. The fact that the case involves work on a property located in Suffolk County does not justify an inversion of the burden of proof or relieve the moving party of its burden of establishing that the convenience of the nonparty witnesses would be served by a discretionary change of venue … . 10 Two Trees Lane LLC v Mahone, 2021 NY Slip Op 01371, First Dept 3-9-21

CIVIL PROCEDURE.

PETITIONERS WERE ENTITLED TO SUMMARY DETERMINATION IN THIS EXECUTIVE LAW 63 SPECIAL PROCEEDING SOUNDING IN FRAUD STEMMING FROM UNCONSCIONABLE EQUIPMENT FINANCE LEASES AND OPPRESSIVE DEBT COLLECTION PRACTICES; RESPONDENTS' REQUEST FOR FURTHER DISCOVERY, WHICH IS DISFAVORED IN SPECIAL PROCEEDINGS, WAS PROPERLY DENIED (FIRST DEPT).

The First Department, in a full-fledged opinion by Justice Webber, determined the respondents in this Executive Law 63 special proceeding were not entitled to additional discovery, including depositions, and petitioners were entitled to summary determination in this fraud and deceptive business practices action. The petition, brought by the NYS Attorney General, alleged respondents engaged in fraud and deception in having small businesses sign unconscionable equipment finance leases (EFLs) for credit card processing equipment leading to oppressive debt collection practices. The court noted that discovery in a special proceeding is disfavored and is permitted only on leave of court upon a showing of "ample need:"

Supreme Court correctly found that petitioners demonstrated respondents' liability under Executive Law § 63(12). Under Executive Law § 63(12), "the test for fraud is whether the targeted act has the capacity or tendency to deceive or creates [*5]an atmosphere conducive to fraud" … . "Executive Law § 63(12) was meant to protect not only the average consumer, but also the ignorant, the unthinking, and the credulous" … . "[P]ublic reports and lawsuits of alleged fraud are sufficient to put a plaintiff on inquiry notice of fraud" … . * * *

We held in our prior decision that allegations that the [respondents] created legal obligations through misrepresentations and fraud and then attempted to enforce those obligations through abusive pre-litigation and litigation practices sufficiently demonstrated that the [respondents'] debt collection activities and procuring of default judgments were "objectively baseless" … . Matter of People of the State of New York v Northern Leasing Sys., Inc., 2021 NY Slip Op 00914, First Dept 2-11-21

CIVIL PROCEDURE.

THE COMMERCIAL LEASE GUARANTEE MET THE DEFINITION OF AN INSTRUMENT FOR THE PAYMENT OF MONEY; THE COVID-19 RESTRICTIONS ON ENFORCEMENT OF COMMERCIAL LEASE GUARANTEES DO NOT APPLY; THE WARRANTY OF HABITABILITY DEFENSE IS NOT AVAILABLE (FIRST DEPT).

The First Department, reversing Supreme Court, determined: (1) although guarantees generally are not instruments for the payment of money within the meaning of CPLR 3213, the language of the guarantee was unconditional and therefore met the criteria of such an instrument; (2) the COVID-19-related provision of the NYC Administrative Code and executive orders, prohibiting enforcement of commercial lease guarantees, do not apply where the business were not required to cease operations; (3) the warranty of habitability was not available as a defense because of the language of the guarantee; and (4) a commercial tenant cannot assert the warranty of habitability:

While a guarantee of both payment and performance does not qualify as an instrument for the payment of money only under CPLR 3213 … , paragraph 1 of the guaranty signed by defendants includes an unconditional obligation to pay all rent and additional rent owed under the sublease, and therefore does so qualify … ; "it required no additional performance by plaintiff[] as a condition precedent to payment or otherwise made defendant[s'] promise to pay something other than unconditional" … .

While the prohibition on the enforcement of commercial lease guaranties against natural persons under Administrative Code of City of NY § 22-1005 applies to businesses that were required to "cease operation" or "close to members of the public" under executive orders 202.3, 202.6, or 202.7, issued in connection with the COVID-19 pandemic, defendants never asserted that the nonparty subtenant ceased operations or closed to the public as a result of those orders.

Defendants' claim that they properly raised warranty of habitability defenses under the sublease is without merit. Such defenses are not available to defendants because all defenses under the guaranty, with the exception of prior payment, were waived. Moreover, a commercial tenant cannot avail itself of the statutory warranty of habitability (see Real Property Law § 235-b …). iPayment, Inc. v Silverman, 2021 NY Slip Op 01846, First Dept 3-25-21

CIVIL PROCEDURE.

THE INFANCY TOLL OF THE STATUTE OF LIMITATIONS IN CPLR 208 APPLIES TO A WRONGFUL DEATH ACTION WHERE THE SOLE DISTUBUTEES ARE INFANTS; THE TOLL, HOWEVER, DOES NOT APPLY TO A RELATED ASSAULT AND BATTERY ACTION WHICH IS PERSONAL TO THE DECEDENT (FRIST DEPT).

The First Department, in a full-fledged opinion by Justice Kapnick, determined the infancy toll of the statute of limitations in CPLR 208 applies where the unmarried father of two children dies intestate. The statute of limitations for the ensuing wrongful death action is tolled until the appointment of a guardian of the children's property. Father was involved in an altercation with a defendant, suffered fatal injuries and died later that day, September 6, 2012. Plaintiffs, the mothers of the two children, were each appointed guardians of the property of their children in 2015. That is when the statute began running on the wrongful death action, rendering the 2016 complaint timely. A wrongful death action directly compensates the distributees, here the children. The assault and battery action, by contrast, is personal to the decedent. Therefore the infancy toll does not apply to the assault and battery cause of action. The First Department explicitly overruled a decision relied upon by

the defendants, Ortiz v Hertz Corp., 212 AD2d 374 (1st Dept 1995). (The opinion is comprehensive and can not be fairly summarized here.):

Today we clarify that Ortiz is not good law, because it was based on an incorrect application and interpretation of Hernandez. Therefore, pursuant to the precedent established in Hernandez [78 NY2d 687] … we hold that when the sole distributees of a decedent's estate are infants, the toll of CPLR 208 applies to a wrongful death claim "until the earliest moment there is a personal representative or potential personal representative who can bring the action whether by appointment of a guardian [of the property of the infant distributee] or majority of [a] distributee, whichever occurs first" … . Machado v Gulf Oil, L.P., 2021 NY Slip Op 01849, First Dept 3-25-21

CIVIL PROCEDURE.

THE ONE-YEAR PERIOD FOR TAKING A JUDGMENT RUNS FROM THE DEFAULT AFTER THE FILING AND SERVING OF THE ORIGINAL COMPLAINT, NOT A SUBSEQUENT AMENDED COMPLAINT (FIRST DEPT).

The First Department, reversing Supreme Court, determined the one-year period for taking a judgment after a default runs from the default after the filing and serving of the original complaint, not the amended complaint:

The mortgage foreclosure action should have been dismissed as against original borrower Melissa Eaton, pursuant to CPLR 3215(c), because plaintiff failed to "take proceedings for the entry of judgment" within one year of Eaton's default. The time to seek a default judgment should be measured from the default in responding to the original, not the amended, complaint … . Although an amended complaint supersedes the original complaint, and therefore requires a new responsive pleading to avoid default … , allowing the filing of an amended complaint to effectively cure a failure to timely move for a default in responding to the original complaint would create an exception that swallows the rule. Because plaintiff did not move for a default judgment until well after one year after Eaton's default in responding to the original complaint, and because plaintiff fails to offer any excuse for this delay … ,

dismissal was appropriate under CPLR 3215(c) — notwithstanding plaintiff's inability to bring a new action due to expiration of the statute of limitations … . MTGLQ Invs., L.P. v Shay, 2021 NY Slip Op 00237, First Dept 1-14-21

CIVIL PROCEDURE.

THE ORDER DISMISSING THE COMPLAINT FOR FAILURE TO SEEK A DEFAULT JUDGMENT WITHIN ONE YEAR DID NOT INLCUDE SPECIFIC FINDINGS OF A PATTERN OF DELAY; THEREFORE THE "FAILURE TO PROSECUTE" EXCEPTION IN CPLR 205 (A) DID NOT APPLY; PLAINTIFF'S ACTION BROUGHT WITHIN SIX MONTHS OF DISMISSAL WAS NOT TIME-BARRED (FIRST DEPT).

The First Department, reversing Supreme Court, determined the complaint was timely pursuant to the six-month extension afforded by CPLR 205 (a). The dismissal of the complaint did not include any specific findings of a general pattern of delay. Therefore the six-month extension was not precluded:

In 2018, Supreme Court granted defendant's motion pursuant to CPLR 3215(c) to dismiss the complaint in the prior, 2010 foreclosure action for plaintiff's failure to seek a default judgment within one year of defendant's default. The dismissal order did not include any findings of specific conduct demonstrating a general pattern of delay in proceeding with the litigation, as required to preclude the application of CPLR 205(a) for failure to prosecute … . Under the circumstances, the court should not have granted defendant's motion to dismiss the complaint in the present action as time-barred, as this action was timely brought within six months after the motion court dismissed plaintiff's first foreclosure action … . U.S. Bank N.A. v Kim, 2021 NY Slip Op 01876, First Dept 3-25-21

CIVIL PROCEDURE.

THE REQUEST TO POLL THE JURY SHOULD NOT HAVE BEEN DENIED; THE JUDGE SHOULD NOT HAVE DISCHARGED THE JURY FOREMAN FOR ARGUING WITH ONE OR MORE JURORS WITHOUT INTERVIEWING ALL INVOLVED (FIRST DEPT).

The First Department, ordering a new trial in this personal injury action, determined the trial judge should not have denied plaintiff's request to poll the jury and the jury foreman should not have been discharged for arguing with one or more jurors without interviewing all involved:

It is fundamental error to deny a party's request to poll the jury … . Defendants' argument that the issue was not preserved for appeal is unavailing, as plaintiff's counsel clearly requested that the jury be fully polled … . …

It was also reversible error for the court to discharge the jury foreman, who was alleged to have been in a verbal altercations with another juror during deliberations, without interviewing the jury foreman and the other involved juror or jurors to determine the nature and extent of the disagreement … . That jurors have heated exchanges, does not, without more, form a valid basis for substitution of a juror without the consent of the parties … . Garcia v Rosario, 2021 NY Slip Op 01555, First Dept 3-18-21

CIVIL PROCEDURE.

WHERE FRAUD IS THE BASIS OF A CLAIM FOR BREACH OF FIDUCIARY DUTY, THE STATUTE OF LIMITATIONS IS SIX YEARS (FIRST DEPT).

The First Department determined that where the basis of a claim for aiding and abetting breach of fiduciary duty is fraud, the statute of limitations is six years:

[Defendant] Katten contends that even if the claim for aiding and abetting breach of fiduciary duty is taken at face value, the statute of limitations is three years because

plaintiff seeks damages, not equitable relief … . However, "a cause of action for breach of fiduciary duty based on allegations of actual fraud is subject to a six-year limitations period" … . Plaintiff's claim against defendant Albert Hallac for breach of fiduciary duty is based on allegations of actual fraud; hence, the statute of limitations for the claim against Katten for aiding and abetting Hallac's breach of fiduciary duty is six years. Wimbledon Fin. Master Fund, Ltd. v Hallac, 2021 NY Slip Op 01881, First Dept 3-25-21

CIVIL PROCEDURE.

WHERE THERE IS AN INCONSISTENCY BETWEEN AN ORDER OR A JUDGMENT AND THE DECISION UPON WHICH IT IS BASED, THE DECISION CONTROLS (FIRST DEPT).

The First Department noted that where a judgment or order is inconsistent with the decision upon which it is based, the decision controls:

"A written order [or judgment] must conform strictly to the court's decision and in the event of an inconsistency between a judgment and a decision or order upon which it is based, the decision or order controls" … . "Such an inconsistency may be corrected either by way of a motion for resettlement or on appeal" … .

The motion court's decision, amended to grant plaintiff's motion for summary judgment on his first cause of action for breach of the … modified agreement, also found that plaintiff was entitled to a money judgment in his favor for past due amounts owed. Because there is a conflict between the relief the motion court found plaintiff was entitled to in its decision, and the relief granted to plaintiff in the judgment, which made no provision for a money judgment as to plaintiff's first cause of action, the court's decision controls. Schwartzbard v Cogan, 2021 NY Slip Op 01523, First Dept 3-16-21

CONSUMER LAW.

GENERAL BUSINESS LAW 349 (DECEPTIVE BUSINESS PRACTICES) CAUSE OF ACTION PROPERLY SURVIVED THE MOTION TO DISMISS AND THE GENERAL BUSINESS LAW 340 (RESTRAINT OF TRADE) CAUSE OF ACTION SHOULD HAVE SURVIVED IN THIS FRAUD ACTION INVOLVING DIAMOND APPRAISALS (FIRST DEPT).

The First Department, reversing (modifying) Supreme Court, determined the General Business Law 349 (deceptive business practices) cause of action properly survived a motion to dismiss and the General Business Law 340 (restraint of trade) cause of action should have survived in this fraud action involving diamond appraisals:

Plaintiff has alleged that IGI Defendants engaged in deceptive "consumer-oriented" conduct, as the alleged fraud scheme, which involved the issuance of false appraisal certificates for over-graded diamonds, were ultimately directed at misleading consumers into buying diamonds at artificially inflated prices. Indeed, the gravamen of the amended complaint is harm to the public interest … . Plaintiff has standing to bring a claim despite not being a consumer, as courts have permitted business competitors to bring claims under GBL 349 so long as there has been harm done to the public at large … . * * *

Plaintiff has demonstrated a per se restraint of trade by pleading a conspiracy in the form of horizontal price-fixing. As alleged, the conspiracy permits diamond dealers and jewelry manufacturers who participate in the scheme to buy over-graded diamonds at lower prices, and then re-sell them to retailers and consumers at artificially inflated prices. At the same time, dealers and manufacturers who are not part of the conspiracy can only purchase accurately graded stones, or over-grades stones, at a higher price, preventing them from competing with the conspirators. The complaint also alleged an unreasonable restraint of trade under the "rule of reason" standard. Plaintiff has pleaded a conspiracy among [the defendants] and others, and facts showing that the conspirators possessed market power to produce a market-wide anticompetitive effect … . KS Trade LLC v International Gemological Inst., Inc., 2021 NY Slip Op 00259, First Dept 1-19-21

CONTRACT LAW.

A COMPETENT ADULT MAY REVOKE A HEALTH CARE PROXY; HERE PETITIONER'S MOTHER REVOKED THE PROXY BY EXECUTING A DOCUMENT REVOKING ALL DOCUMENTS OF AUTHORITY IN FAVOR OF PETITIONER (FIRST DEPT).

The Second Department determined that a document executed by Angela M., Mark M.'s mother, revoking all documents of authority in favor of Mark M. included a health care proxy:

"A competent adult may revoke a health care proxy by notifying the agent or a health care provider orally or in writing or by any other act evidencing a specific intent to revoke the proxy" (Public Health Law § 2985[1][a]). Angelina M. revoked the health care proxy prior to her incapacitation by executing a written revocation expressly revoking "any and all" documents of authority "of every nature[,] type[,] and description" in favor of Mark M. Contrary to Mark M.'s contention, the revocation is not limited to powers of attorney related to Angelina M.'s interest in real properties and certain limited liability companies and reflects Angelina M.'s intent to revoke all documents of authority in his favor, including the health care proxy. Also contrary to Mark M.'s contention, the revocation is clear and unambiguous, and the Supreme Court properly declined to consider the affidavit of the attorney who drafted the revocation … . Matter of Angelina M. (Mark M.), 2021 NY Slip Op 00649, First Dept 2-4-21

CONTRACT LAW.

ALTHOUGH THE PUBLIC HEALTH LAW GAVE THE DECEDENT'S DAUGHTER THE AUTHORITY TO EXECUTE THE NURSING HOME'S ADMISSION AGREEMENT ON BEHALF OF HER FATHER, THE PUBLIC HEALTH LAW DID NOT GIVE HER THE AUTHORITY TO SIGN A BINDING ARBITRATION AGREEMENT ON HER FATHER'S BEHALF; THEREFORE THE DECEDENT'S WIFE WAS NOT BOUND BY THE ARBITRATION AGREEMENT IN HER SUIT AGAINST THE NURSING HOME (FIRST DEPT).

The First Department, reversing Supreme Court, determined plaintiff wife's adult daughter had the authority, pursuant to the Public Health Law, to execute the nursing home's admission agreement on behalf of plaintiff's husband (her father), who was deemed incapable of making health-care related decisions. In addition to the admission agreement, plaintiff's daughter signed a binding arbitration agreement on her father's behalf. After plaintiff's husband died, plaintiff sued the nursing home which asserted that that the matter was subject to the arbitration agreement. The First Department held that, pursuant to the Public Health Law, plaintiff's daughter had the authority to sign the admission agreement, because it related to her father's health care, but she did not have the authority to sign the arbitration agreement:

The authority of the decedent's daughter to act as a "surrogate" decision-maker pursuant to PHL 2994-d at the time decedent was admitted to JHL was limited to making decisions regarding "[a]ny treatment, service, or procedure to diagnose or treat an individual's physical or mental condition" (PHL 2994-a[12]). Although she had authority, pursuant to PHL 2994-d, to execute the Agreement for purposes of admitting her father into the facility for health care treatment, she did not have the authority to execute the Binding Arbitration Agreement on his behalf. Such agreement was entirely optional and had no bearing on the father's health care. Accordingly, it is entirely outside of the purview of surrogate decision-maker's authority set forth in PHL 2994-d. Gayle v Regeis Care Ctr., LLC, 2021 NY Slip Op 01197, First Dept 2-25-21

CONTRACT LAW.

FORBEARANCE CAN BE ADEQUATE CONSIDERATION CREATING A VALID CONTRACT (FIRST DEPT)

The First Department, reversing (modifying) Supreme Court, in a full-fledged opinion by Justice Gonzalez, determined summary judgment should not have been awarded dismissing the breach of contract cause of action in the multi-million dollar lawsuit involving Russian oil and gas. The opinion is too detailed to summarize here. On the breach of contract cause of action, the court noted that forbearance can be adequate consideration creating a valid contract:

"A valuable consideration, in the sense of the law, may consist either in some right, interest, profit, or benefit accruing to the one party, or some forbearance, detriment, loss, or responsibility given, suffered, or undertaken by the other" … . Indeed, "any basic contemporary definition would include the idea that [consideration] consists of either a benefit to the promisor or a detriment to the promisee" … . "The slightest consideration is sufficient to support the most onerous obligation" … . …

When plaintiff first agreed to join defendants in the oil business, he allegedly did so as a one-third partner. According to the Undisputed Statement of Facts, the parties disputed their respective obligations and "discussed [for several years] options for compensating [plaintiff] for the stock and cash he caused to be transferred." In 2001, when the parties drafted the Investment Agreement, plaintiff agreed to a 15% stake and a 15% share of the profits, a marked reduction in what he would have expected to receive as an alleged one-third partner. Plaintiff also agreed to forego any right to profits pre-dating October 2001. …

The record thus suggests … that the 2001 Investment Agreement was a binding contract supported by plaintiff's forbearance. Notably, … defendants began to perform under the agreement … , … suggesting that it was a binding accord for which plaintiff's forbearance had supplied consideration. Lebedev v Blavatnik, 2021 NY Slip Op 01002, First Dept 2-16-21

CONTRACT LAW.

IN THE CONTEXT OF AN INDEMNIFICATION CLAUSE REQUIRED BY THE WORKERS' COMPENSATION LAW, THE 1ST DEPARTMENT NOTED THAT, UNDER THE COMMON LAW, UNSIGNED DOCUMENTS ARE ENFORCEABLE AS LONG AS THE PARTIES INTENDED TO BE BOUND (FIRST DEPT).

The First Department noted that the written-indemnification-clause requirement in Workers' Compensation Law section 11 does not require that the document be signed to be enforceable:

Plaintiff was injured while engaged in renovation of an apartment in Park Regis's cooperative building. The motion court correctly concluded that ASA, plaintiff's employer, was bound by the provisions of the alteration agreement between Park Regis and the nonparty cooperative shareholder lessees requiring the lessees' general contractor to indemnify and procure insurance in favor of Park Regis (see Workers' Compensation Law § 11 …). …

Even if the alteration agreement were not signed by ASA, ASA would still be bound by it, because the record shows that it intended to be bound by it (see Flores v Lower E. Side Serv. Ctr., Inc., 4 NY3d 363, 369 [2005] ["nothing in the language of (Workers' Compensation Law § 11) or its legislative history (suggests) that, in addition to requiring a written indemnification clause, the Legislature intended to deviate from the common-law rule that written documents can be enforced even if they are not signed"]). ASA's field supervisor and project manager testified that ASA "signs every alteration agreement[]" before commencing work, that he believed ASA had done so in connection with this project, that he understood ASA to be bound by the terms of the alteration agreement requiring it to procure insurance for and indemnify Park Regis, and that ASA had indeed procured insurance for Park Regis as required by the alteration agreement. Shala v Park Regis Apt. Corp., 2021 NY Slip Op 01870, First Dept 3-25-21

CONTRACT LAW.

THE ELEVATOR COMPANY, BY CONTRACT, HAD COMPLETE RESPONSIBILITY FOR ELEVATOR MAINTENANCE; THEREFORE THE BUILDING OWNER AND MANAGER WERE ENTITLED TO SUMMARY JUDGMENT DISMISSING THE COMPLAINT AGAINST THEM IN THIS RES IPSA LOQUITUR ELEVATOR-MALFUNCTION-ACCIDENT CASE (FIRST DEPT).

The First Department, recalling and vacating a decision in this case released on December 8, 2020, determined the building owner (1067 Fifth) and manager (Elliman) did not have constructive or action notice of the defect in the elevator door which allegedly caused it to close on plaintiff's shoulder, pinning her while the elevator descended. However liability may be demonstrated under the res ipsa loquitur theory. But because the building owner and manager had, by contract, relinquished all control over the maintenance of the elevator to defendant elevator company, American, their motions for summary judgment were granted:

… [U]nder the terms of its contract with 1067 Fifth, American was responsible for providing "full comprehensive maintenance and repair services" for the elevators, which included maintaining "[t]he entire vertical transportation system," including "all engineering, material, labor, testing, and inspections needed to achieve work specified by the contract." Further, under the terms of the contract, maintenance "include[s], but is not limited to, preventive services, emergency callback services, inspection and testing services, repair and/or direct replacement component renewal procedures." The contract also provided for American to "schedule [ ] systematic examinations, adjustments, cleaning and lubrication of all machinery, machinery spaces, hoistways and pits," and to do all "repairs, renewals, and replacements . . . as soon as scheduled or other examinations reveal the necessity of the same." Further, American agreed to provide emergency call-back service 24 hours a day, 7 days a week. Given such broad contractual responsibilities, American's contract can be said to have "entirely displaced" the responsibility of 1067 Fifth and Elliman to maintain the safety of the building's elevators, which gave rise to a duty owed directly to plaintiff by American (see Espinal v Melville Snow Contrs., 98 NY2d 136, 140 [2002]). Sanchez v 1067 Fifth Ave. Corp., 2021 NY Slip Op 01522, First Dept 3-16-21

CRIMINAL LAW.

A JUROR WHO WAS A RETIRED DETECTIVE ACTED AS AN UNSWORN EXPERT WITNESS IN THE DELIBERATIONS; "MOLINEUX" EVIDENCE DEFENDANT LOOKED AT PORNOGRAPHY BEFORE ALLEGEDLY COMMITTING THE SEX-RELATED OFFENSES SHOULD NOT HAVE BEEN ADMITTED (FIRST DEPT).

The First Department, reversing defendant's sex abuse and burglary convictions, determined: (1) a juror who was a retired detective acted as an unsworn expert witness in the deliberations; and (2) evidence defendant looked at pornography before allegedly committing the crimes was not necessary to prove identity and any probative value was outweighed by the prejudicial effect:

… [A] juror who was a retired detective opined on the feasibility of DNA and fingerprint extraction, the likelihood that tests were conducted and evidence was suppressed regarding a set of keys that were in evidence, and the probability that defendant was lying based on his speech patterns and body language. These opinions, which were communicated to and apparently influenced the jury, were within the scope of the juror's specialized expertise and were explicitly offered on the basis thereof, and at least some of these opinions concerned material issues, including defendant's credibility and whether he entered the victim's apartment by mistake … . …

… [E]vidence that defendant accessed a pornography website on the phone shortly before committing the charged offense should have been excluded at trial as improper propensity evidence. This evidence was not admissible to establish defendant's intent in sexually abusing the victim, which could be readily inferred from the charged conduct itself … . While it may have been admissible to establish defendant's intent in entering the victim's apartment, its probative value was outweighed by its prejudice … . People v Alvarez, 2021 NY Slip Op 00092, First Dept 1-7-21

CRIMINAL LAW.

ALTHOUGH AN INDICTMENT NEED NOT ALLEGE ACCESSORIAL LIABILITY TO BE LEGALLY SUFFICIENT; WHERE THERE IS NO EVIDENCE A DEFENDANT ACTED AS A PRINCIPAL THE JURY MUST BE INSTRUCTED ON ACCESSORIAL LIABILITY; THE FAILURE TO SO INSTRUCT THE JURY HERE RENDERED THE CONVICTION AGAINST THE WEIGHT OF THE EVIDENCE (FIRST DEPT).

The First Department, reversing defendant's conviction, determined the failure to instruct the jury on accessorial liability rendered the conviction against the weight of the evidence. The defendant and a companion were involved in an altercation with the victim. The companion slashed the victim and struck the victim with a baseball bat. There was no evidence defendant attacked the victim. The court noted that the indictment need not allege accessorial liability to be legally sufficient, but the jury must be instructed on the theory where there is no evidence a defendant acted as a principal:

The circumstances supported the inference that defendant was guilty of acting in concert in the attack, but undisputedly failed to support liability as a principal, that is, for personally attacking the victim. However, the prosecutor did not request, either before or after the court's charge, that the court instruct the jury regarding accessorial liability (see Penal Law § 20.00), and the court did not give such an instruction.

Because there is "no legal distinction between liability as a principal or criminal culpability as an accomplice" … , an indictment need not contain any language relating to accessorial liability. However, this does not mean that a conviction may be sustained on an acting-in-concert theory when no such theory was submitted to the jury … . People v Ballo, 2021 NY Slip Op 00810, First Dept 2-9-21

CRIMINAL LAW.

DEFENDANT, A MEMBER OF THE PROUD BOYS, WAS CONVICTED OF ATTEMPTED GANG ASSAULT OF A MEMBER OF ANTIFA; A BOOT IS A DANGEROUS INSTRUMENT; EXPERT TESTIMONY ON THE ANIMOSITY BETWEEN THE PROUD BOYS AND ANTIFA PROPERLY ALLOWED (FIRST DEPT).

The First Department affirmed the conviction of a member of the Proud Boys for the attempted gang assault of an Antifa member. The court held that a boot may constitute a dangerous instrument within the meaning of the assault statutes. In addition, the First Department noted that the People were properly allowed to call an expert witness on extremist groups to explain the animosity between the Proud Boys and Antifa:

Defendants' intent and attempt to cause physical injury were demonstrated by defendant Kinsman, who while wearing brown leather boots, repeatedly kicked the victim while she was still on the ground and after she had just been repeatedly kicked by another Proud Boy and by defendant Hare who punched the victim and also kicked her multiple times while he was wearing Doc Marten boots … . …

The court providently exercised its discretion in permitting the People to call an expert witness on extremist groups. Some background information regarding the ideology and past conduct of the Proud Boys was permissible to explain the preexisting animosity between the Proud Boys and Antifa at the time of the incident at issue … . … While some of the evidence regarding the Proud Boys' practices, and in particular racist remarks made by the group's founder, were immaterial to the issues at trial, and their potential for prejudice outweighed any probative value, the court issued a limiting instruction that the background information provided by the expert was not proof of the defendants' mental states. People v Kinsman, 2021 NY Slip Op 01009, First Dept 2-15-21

CRIMINAL LAW.

SNATCHING A PURSE DANGLING FROM THE VICTIM'S ARM DID NOT INVOVLE THE PHYSICAL FORCE NECESSARY FOR ROBBERY THIRD, RENDERING THE CONVICTION AGAINST THE WEIGHT OF THE EVIDENCE; REDUCED TO PETIT LARCENY (FIRST DEPT).

The First Department, reducing defendant's robbery 3rd conviction to petit larceny, determined that the physical force element was not involved rendering the conviction against the weight of the evidence:

Judgment * * * unanimously modified, on the facts and as a matter of discretion in the interest of justice, to the extent of reducing the robbery conviction to petit larceny and reducing the sentence on that conviction to time served …. .

Defendant's conduct in snatching the purse that was dangling from the victim's arm did not involve the physical force required to sustain a conviction of robbery (see People v Dobbs, 24 AD3d 1043 [3d Dept 2005]; People v Middleton, 212 AD2d 809, 810 [2d Dept 1995]; compare People v Santiago, 62 AD2d 572, 579 [2d Dept 1978], aff'd 48 NY2d 1023 [1980]). Accordingly, defendant's conviction of robbery in the third degree was not supported by legally sufficient evidence, and that verdict was against the weight of the evidence … . People v Kourouma, 2021 NY Slip Op 01011, First Dept 2-16-21

CRIMINAL LAW.

THE DRIVER BEING VISIBLY NERVOUS, COUPLED WITH THE VEHICLE HAVING OUT-OF-STATE PLATES AND BEING IN A HIGH CRIME AREA, DID NOT PROVIDE A FOUNDED SUSPICION OF CRIMINALITY; THEREFORE THE POLICE OFFICER WAS NOT JUSTIFIED IN ASKING WHETHER THERE WERE ANY WEAPONS IN THE CAR, A LEVEL TWO INQUIRY (FIRST DEPT).

The First Department, reversing defendant's conviction of attempted criminal possession of a weapon and dismissing the indictment, determined the police officer

did not have a founded suspicion of criminality when he asked whether any weapons were in the vehicle:

Defendant was a passenger in a car, bearing a Massachusetts license plate, that was stopped for driving through a red light in a "high crime" neighborhood. The driver of the car complied with the demands of one of the officers for his driver's license and that he get out of the car, but was "visibly nervous," breathing heavily, and stammering in his responses to the officer's questions. Moments later, one of the other officers asked whether there were any weapons in the car. This ultimately led to the recovery of a pistol from defendant.

These circumstances did not give rise to the founded suspicion of criminality that was required to authorize this level two inquiry … . Contrary to the People's contention, neither occurrence of the stop for a traffic violation in a "high crime" area, nor the unproven perception of one of the officers that in general out-of-state license plates are more highly correlated with criminality than New York license plates, elevated the suspicion to the level required to authorize a common-law inquiry. People v Jonathas, 2021 NY Slip Op 01954, First Dept 3-30-21

CRIMINAL LAW.

THE JURY WAS NOT INSTRUCTED THAT ACQUITTAL ON THE TOP COUNT BASED ON THE JUSTIFICATION DEFENSE REQUIRED ACQUITTAL ON THE LESSER COUNT; ALTHOUGH DEFENSE COUNSEL DID NOT OBJECT TO THE JURY INSTRUCTIONS, THE APPEAL WAS CONSIDERED IN THE INTEREST OF JUSTICE (FIRST DEPT).

The First Department, reversing defendant's attempted assault conviction, in a full-fledged opinion by Justice Manzanet-Daniels, determined the jury instructions did not make it clear that if defendant was acquitted of the top count (attempted assault first) based upon the justification defense, it must not consider the lesser count (attempted assault second). Defendant was acquitted of attempted assault first and convicted of attempted assault second. Although defense counsel did not object to the jury instruction, the appeal was considered in the interest of justice:

The trial court instructed the jury that defendant had raised justification as a defense with respect to counts one and two and stated that the People were required to prove three elements to establish defendant's guilt on count one, including "that defendant was not justified." With respect to count two, the court stated that defendant had also raised the defense of justification. The court stated that as an element of count two the People were required to prove beyond a reasonable doubt that "the defendant was not justified." * * *

The trial court here did not give the required Velez [131 AD3d 129] instruction. … [T]he trial court indicated to the jury that the attempted first-degree and second-degree assault charges … were wholly independent, even if the prosecution had not disproved justification as to the greater charge. The trial court … charged justification separately with respect to the two counts with no mention on the verdict sheet that acquittal on the greater charge would necessitate an acquittal on the lesser charge … . The court compounded the error by giving the same erroneous instruction in response to a note from the jury. People v Herrera, 2021 NY Slip Op 01148, First Dept 2-23-21

CRIMINAL LAW.

THE SUPPRESSION HEARING SHOULD NOT HAVE BEEN REOPENED; EVIDENCE OF UNCHARGED DRUG TRAFFICKING AS BACKGROUND FOR POSSESSION OF A WEAPON SHOULD NOT HAVE BEEN ADMITTED (FIRST DEPT).

The First Department, reversing defendant's conviction, determined the suppression hearing should not have been reopened and (Molineux) evidence of uncharged drug-trafficking as background for possession of a weapon was too prejudicial:

The People's Voluntary Disclosure Form notified defendant of the People's intent to offer evidence of two statements he made while in custody following his arrest. In each instance, he was overheard urging a codefendant, who was his girlfriend, to tell the authorities that she was the possessor of a pistol recovered at the apartment where they were arrested. The first such statement was overheard by a special agent while defendant and the codefendant were in a holding cell. The second such

statement was overheard by a detective while defendant and the codefendant were being driven to Central Booking.

At the initial Huntley hearing, the People called the special agent as a witness, but not the detective. The court ruled that the statement overheard by the special agent was admissible. No evidence was presented regarding the later statement overheard by the detective.

At a pretrial conference 16 months later, the prosecutor, explaining that the special agent was unavailable to testify because he had been transferred to an assignment outside the United States, asked the court to reopen the suppression hearing to allow the detective to testify to the statement he allegedly overheard. …

The court should not have reopened the hearing. The prosecution had a full and fair opportunity to present both of its witnesses and seek admission of both statements, but chose not to … , and the court had issued a ruling on the suppression motion … . This is not a case in which the omission of evidence at the initial hearing resulted from "a flaw in the proceeding" … . People v Nunez, 2021 NY Slip Op 00266, First Dept 1-19-21

CRIMINAL LAW.

THE THREAT MADE BY DEFENDANT WAS PERSONAL IN NATURE AND WAS NOT DIRECTED AT THE CIVILIAN POPULATION WITHIN THE MEANING OF THE TERRORISM STATUTE (PENAL LAW 490.20); THE CONVICTION WAS NOT SUPPORTED BY LEGALLY SUFFICIENT EVIDENCE AND WAS AGAINST THE WEIGHT OF THE EVIDENCE (FIRST DEPT).

The First Department, reversing defendant's "terrorism" conviction, determined the evidence was legally insufficient and the conviction was against the weight of the evidence. The defendant threatened to shoot "you guys," but the threat was personal in nature and was not directed at a "civilian population:"

The evidence of defendant's "intent to intimidate or coerce a civilian population" (Penal Law § 490.20[1]) was legally insufficient to support the conviction … . We also find that the verdict was against the weight of the evidence in that respect … .

At the end of an altercation, defendant, a Muslim, threatened to shoot "you guys," referring to several Bangladeshi worshippers at defendant's mosque. Although there was evidence presented at trial that defendant bore animus toward Bangladeshi people, the threat mentioned no group or population and instead appears to have been based on a personal dispute defendant had with one or more of his fellow worshippers over money or a missing phone. Accordingly, this threat was not directed at a "civilian population" as that term was explained by the Court of Appeals in People v Morales (20 NY3d 240, 247 [2012]). To find that defendant's act amounted to a terroristic threat would trivialize the definition of terrorism by applying it "loosely in situations that do not match our collective understanding of what constitutes a terrorist act" … . People v DeBlasio, 2021 NY Slip Op 00376, First Dept 1-21-21

CRIMINAL LAW.

DEFENDANT'S MOTION TO SEVER THE TWO OFFENSES, WHICH OCCURRED ON DIFFERENT DATES AND WERE UNRELATED, SHOULD HAVE BEEN GRANTED (FIRST DEPT).

The First Department, reversing defendant's convictions, determined the two separate crimes which occurred on different dates should not have been joined for a single trial. Defendant was charged with leaving the scene of an accident on September 4, 2011, and DWI on January 15, 2012. The officer who arrested defendant in January 2012 for DWI testified he recognized the vehicle and driver from the video and stills taken during the September 2011 incident:

Offenses are joinable even though they are based on different criminal transactions if proof of one offense would be material and admissible as evidence in chief upon a trial of the other offense or the offenses are defined by the same or similar statutory provisions … . Severance of counts contained in a single indictment should be

granted when a defendant shows that the counts were not joinable under the statutory criteria … .

… [N]one of the proof necessary for each offense was material to the other. The facts underlying defendant's conviction for leaving the scene of an accident stemmed from a September 4, 2011 incident. The victim was lying on the road of the Henry Hudson Parkway. After other drivers stopped to try and pull the victim out of the road, a dark Acura ran him over and continued driving without stopping. … There was video footage and still pictures from the toll plaza that showed the cars of the drivers who stopped to help, followed immediately by the dark Acura. … Defendant was the registered owner of the dark Acura.

The DWI conviction was based on an incident that occurred four months later, on January 15, 2012. At that time, defendant was observed by police officers weaving in and out of his lane and driving 85 mph in a 50-mph zone. The officer who arrested defendant for the DWI was permitted to testify relative to the charge of leaving the scene that he recognized the vehicle and driver in the video and stills taken on September 4, 2011 as the same vehicle and person he stopped on January 15, 2012. People v Santiago, 2021 NY Slip Op 00130, First Dept 1-12-21

DEFAMATION.

REPORTING AN ALLEGED SEXUAL ASSAULT TO THE POLICE DOES NOT EVINCE MALICE SUFFICIENT TO OVERCOME THE QUALIFIED IMMUNITY ASSOCIATED WITH MAKING THE REPORT; THE DEFAMATION ACTION SHOULD HAVE BEEN DISMISSED (FIRST DEPT).

The First Department, reversing Supreme Court, in a full-fledged opinion by Justice Manzanet-Daniels, determined the defamation action based upon defendant's filing a sexual assault complaint with the police was protected by qualified immunity and the nature of the complaint did not evince the malice required to overcome the qualified immunity. The sexual assault trial ended in a hung jury and defendant agreed to an adjournment in contemplation of dismissal as the disposition of her

charges against plaintiff. Plaintiff was formerly an assistant district attorney and defendant was a reporter for the Daily News:

The doctrine of qualified immunity shields individuals who, like defendant, act "in the discharge of some public or private duty, legal or moral, or in the conduct of [her] own affairs, in a matter where h[er] interest is concerned" … . To overcome the qualified privilege protecting defendant's statements to the police, plaintiff was required to sufficiently allege that she published the statements with actual malice, i.e., that defendant "acted out of personal spite or ill will, with reckless disregard for the statement's truth or falsity, or with a high degree belief that [her] statements were probably false" … . * * *

Plaintiff's allegations fall short of alleging actual malice sufficient to overcome the qualified privilege attaching to defendant's statements to the police. Even as alleged in the complaint, the statements are a straightforward rendition of the incident that defendant claims occurred during a car ride with plaintiff. There was nothing excessive or "vituperative" in the character of the reported statements that would support an inference of actual malice … . Indeed, it is difficult to see how defendant could have been more succinct or restrained in her description of the events while accomplishing her purpose: to report to the police that she had been the victim of sexual assault. Sagaille v Carrega, 2021 NY Slip Op 01369, First Dept 3-9-21

EMPLOYMENT LAW.

CLAIMS BY CORRECTIONS OFFICERS SEEKING TO REQUIRE THE DEPARTMENT OF CORRECTIONS TO PROVIDE TRAINING AND EQUIPMENT FOR DEALING WITH VIOLENT PRISONERS WERE NOT JUSTICIABLE (FIRST DEPT).

The First Department, reversing Supreme Court, determined the allegations by the plaintiff corrections officers concerning training and equipment for dealing with violent prisoners were not justiciable:

These claims are not justiciable. In seeking an order that would require the Department of Correction (DOC) to make specific decisions on staffing, training,

and equipment, plaintiffs would have the courts involved in the management of DOC policy, thereby interfering with the discretion granted to DOC under the New York City Charter … . Unlike the claims brought in Center for Independence of the Disabled v Metropolitan Transp. Auth. (184 AD3d 197 [1st Dept 2020]), plaintiffs' claims, that DOC's current training/equipment scheme for correction officers fails to satisfy the statutory safe workplace requirement, are not well suited for judicial review, because they do not involve the protection of a fundamental right to be free from discrimination but would instead embroil the judiciary in extensive consideration of policy, and the remedy sought would require the courts to take on the improper task of mandating the specifics of DOC's plans and operations. Correction Officers' Benevolent Assn., Inc. v City of New York, 2021 NY Slip Op 00109, First Dept 1-12-21

EMPLOYMENT LAW.

PLAINTIFF POLICE OFFICER RAISED QUESTIONS OF FACT IN THIS EMPLOYMENT DISCRIMINATION CASE ALLEGING AN ANTI-GAY HOSTILE WORK ENVIRONMENT (FIRST DEPT).

The First Department, reversing Supreme Court, determined plaintiff police officer's employment discrimination complaint should not have been dismissed. Plaintiff is a gay man and the complaint alleged actionable discrimination claims under the New York State and New York City Human Rights Law (HRL):

… [P]laintiff was … exposed to two sergeants who quickly surmised, based on [plaintiff's] responses to their constant homophobic slurs directed at civilians and gay officers, that plaintiff was gay. Other officers joined in, condoned and encouraged by the sergeants, and plaintiff thereafter endured over a year of homophobic derision, harassment, and verbal abuse. The foregoing establishes a claim for employment discrimination, via hostile work environment, under the State and City HRLs … .

… [P]laintiff was repeatedly required to enter a holding cell, by himself, with prisoners still inside, while plaintiff carried metal and wooden cleaning implements.

This was potentially dangerous, as plaintiff could have been overwhelmed and attacked by the prisoners.

… .Plaintiff was also required to go on foot patrol alone during the midnight shift in dangerous areas at the 77th Precinct; other officers patrolled with partners. Doe v New York City Police Dept., 2021 NY Slip Op 00009, First Dept 1-5-21

EMPLOYMENT LAW.

PLAINTIFF, A PROBATIONARY EMPLOYEE, WAS TERMINATED FOR MARIJUANA USE; QUESTIONS OF FACT ABOUT WHETHER AN ACCOMMODATION FOR PLAINTIFF AS A MEDICAL MARIJUANA PATIENT SHOULD HAVE BEEN MADE (FIRST DEPT).

The First Department determined there are questions of fact about whether plaintiff probationary employee was entitled to accommodation under the Human Rights Law (HRL). She was terminated for marijuana use. However, the marijuana use was a treatment for an illness, irritable bowel disease (IBD):

… [T]here are issues of fact, for purposes of plaintiff's claim for failure to accommodate under the State Human Rights Law (HRL), as to whether defendant adequately engaged in a cooperative dialogue with plaintiff …. to determine whether it could reasonably accommodate her status as a medical marijuana patient (see PHL 3369[2]). Notably, questions of fact exist as to whether defendant improperly cut the dialogue process short when it discovered that plaintiff was a probationary employee, and refused to consider accommodating her — as it regularly did for permanent employees — by, for example, giving her discipline short of termination, or simply overlooking the one-time technical violation in light of her contemporaneously acquired status as a medical marijuana patient … . …

The State HRL defines status as a medical marijuana patient as a protected disability, but the City HRL does not. Although the City HRL must be construed liberally to ensure maximum protection … , certification as a medical marijuana patient is (other than as specified for purposes of claims under the State HRL) a legal classification.

It is not a "physical, medical, mental, or psychological impairment," which is how disabilities are defined under the City HRL (Administrative Code § 8-102).

Nevertheless, plaintiff's IBD, is a physical impairment and thus a disability under the City HRL. Accordingly, issues of fact exist as to whether defendant should have permitted plaintiff to treat her IBD through the medical use of marijuana, as a reasonable accommodation. Gordon v Consolidated Edison Inc.,2021 NY Slip Op 00492, First Dept 1-28-21

EMPLOYMENT LAW.

THE NYPD OFFICER WHO EMPLOYED A PROHIBITED CHOKEHOLD ON ERIC GARNER, WHICH CONTRIBUTED TO ERIC'S DEATH, WAS PROPERLY DISMISSED FROM THE NYPD (FIRST DEPT).

The First Department determined the police officer who employed a prohibited chokehold on Eric Garner, which contributed to Eric's death, was properly dismissed from employment by the New York Police Department (NYPD):

Substantial evidence supports respondents' conclusion that petitioner recklessly caused injury to Eric Garner by maintaining a prohibited chokehold for 9 to 10 seconds after exigent circumstances were no longer present, thereby disregarding the risk of injury (Penal Law §§ 15.05[3]; 120.00[2] …).

We do not find the penalty "so disproportionate to the offense, in light of all the circumstances, as to be shocking to one's sense of fairness" … . Conduct far less serious than petitioner's has been found by the Court of Appeals to have a "destructive impact . . . on the confidence which it is so important for the public to have in its police officers" … . Matter of Pantaleo v O'Neill, 2021 NY Slip Op 01857, First Dept 3-25-21

FORECLOSURE.

THE BANK DID NOT DEMONSTRATE STRICT COMPLIANCE WITH RPAPL 1304 IN THIS FORECLOSURE ACTION; SUMMARY JUDGMENT SHOULD HAVE BEEN AWARDED TO DEFENDANT (FIRST DEPT).

The First Department, reversing Supreme Court, determined the plaintiff bank's motion for summary judgment should not have been granted and, upon a search of the record, summary judgment should have been granted to defendant in this foreclosure action. The proof of mailing of the notice required by RPAPL 1304 was not sufficient:

Plaintiff failed to establish prima facie its strict compliance with RPAPL 1304 … . The copy of the certified mail receipt it submitted is undated and blank in other parts, and shows the signature of someone other than defendant. The copy of the pre-paid first-class mail envelope has no recipient's name or address on it. Further, the affidavits plaintiff submitted do not demonstrate the loan servicer's employees' familiarity with the mailing practices and procedures of the servicer that had mailed the 90-day notices and the notice of default. U.S. Bank, N.A. v Calhoun, 2021 NY Slip Op 00398, First Dept 1-26-21

FORECLOSURE.

THERE WAS NO PROOF THE NOTICE REQUIRED BY RPAPL 1304 WAS MAILED TO THE PROPER ADDRESS (FIRST DEPT).

The First Department, reversing Supreme Court, determined the notice provisions of Real Property Actions and Proceedings Law (RPAPL) 1304 were not complied with and the bank's motion for summary judgment in this foreclosure action should not have been granted. There was no proof the notice was mailed to the right place:

Plaintiff failed to demonstrate its strict compliance with RPAPL 1304, a condition precedent to the commencement of a foreclosure action … . Although the statute requires that the notice be sent to "the property address and any other address of record," the affidavits submitted by plaintiff show that the notices were mailed

neither to the mortgaged premises nor to defendant's residence. One of the addresses to which the notices were sent not only was never occupied by defendant but also specified a unit that did not exist at that street address. The other was sent to the correct high-rise apartment building of more than 400 units but was missing the unit number. Thus, plaintiff did not send defendant proper notice under RPAPL 1304 … . U.S. Bank N.A. v Moran, 2021 NY Slip Op 00645, First Dept 2-4-21

FREEDOM OF INFORMATION LAW (FOIL).

A WARNING LETTER ISSUED TO THE NYC MAYOR BY THE NYC CONFLICTS OF INTEREST BOARD MUST BE RELEASED PURSUANT TO A FOIL REQUEST BY THE NEW YORK TIMES (FIRST DEPT).

The First Department, in a full-fledged opinion by Justice Acosta, determined that a warning letter issued to the NYC mayor by the Conflicts of Interest Board (Board) must be released pursuant to a Freedom of Information Law (FOIL) request:

At issue in this appeal is whether a "private" warning letter issued to the Mayor of the City of New York by the Conflicts of Interest Board (Board) is subject to disclosure pursuant to the Freedom of Information Law (FOIL). The City of New York office of the Mayor (Mayor's Office) declined to disclose the letter to the New York Times (NYT) on the ground that the letter was exempt pursuant to New York City Charter § 2603(k), which states that "the records, reports, memoranda and files of the board shall be confidential and shall not be subject to public scrutiny." The Mayor's Office argues that since the letter was designated as "private" by the Board, and therefore confidential, it falls within the ambit of § 2603(k). We disagree. As the plain text of section 2603(k) indicates, it is meant to protect the confidentiality of documents in possession of the Board. Once the letter was issued to another entity, the Mayor could not rely on section 2603(k), because the NYT sought disclosure from the Mayor and not from the Board … . The Mayor's Office's privacy arguments are also inconsistent with the public interest in disclosure of warning letters, contrary to its own past practice of disclosing the Board's correspondence, and otherwise have no merit. Accordingly, the letter must be disclosed. * * *

DOI [NYC Department of Investigations] found that the Mayor's Office solicited contributions for CONY [Campaign for One New York] from executives of real estate development firms that likely had or potentially had business pending before the City. Although there was no finding of any quid pro quo, on several occasions, a firm achieved a favorable outcome from a City agency after it had made a donation to CONY … . These findings were transmitted to the Board, whose Chairman declined "for confidentiality reasons," to tell a reporter whether the Board had issued a private warning letter, the only action available … . …

The NYT reporter to whom the Board chairman had spoken then filed a FOIL request with the Mayor's Office for "a copy of a letter" sent by the Board to the Mayor's Office regarding his fundraising for [CONY]." The request was denied on the ground that "the class of records you have requested would be exempt from disclosure pursuant to New York City Charter § 2603(k)." Matter of New York Times Co. v City of New York Off. of the Mayor, 2021 NY Slip Op 01948, First Dept 3-30-21

FREEDOM OF INFORMATION LAW (FOIL).

FOIL REQUEST FOR TRAFFIC VIOLATIONS BUREAU (TVB) RECORDS RELEVANT TO A TRAFFIC ACCIDENT SHOULD HAVE BEEN GRANTED (FIRST DEPT).

The First Department, reversing Supreme Court, determined petitioner's FOIL request for the records relevant to a traffic accident from the Traffic Violations Bureau (TVB) should have been granted:

The only FOIL exemption at issue in this case applies to records that "are compiled for law enforcement purposes and which, if disclosed, would . . . interfere with . . . judicial proceedings" (Public Officers Law § 87[2][e][i]).

… [W]e find that Traffic Violations Bureau (TVB) hearings are "judicial proceedings" … . The TVB of the New York State Department of Motor Vehicles, an administrative agency that was legislatively created to adjudicate traffic violation charges for the purpose of reducing caseloads of courts in New York City … . At a

TVB hearing, the accused motorist has a right to be represented by counsel … and the administrative law judge presiding over the hearing must determine whether the police officer has established the charges by clear and convincing evidence … . Although the CPL and the CPLR are generally "not binding on" TVB … , it has been held that the motorist "is entitled to the issuance of a properly worded judicial subpoena duces tecum under CPLR 2307 requiring the production of relevant records" … .

… NYPD asserts that any release of documents would somehow tip the hand of the TVB's prosecuting attorney or prevent the prosecutor from testing the recollection of witnesses. Yet, NYPD concedes that these documents would be released to the motorist who would not be under any legal admonition not to release the documents to others. Matter of Jewish Press, Inc. v New York City Police Dept., 2021 NY Slip Op 00119, First Dept 1-12-21

FREEDOM OF INFORMATION LAW (FOIL).

PETITIONER WAS ENTITLED TO ATTORNEY'S FEES AS THE PREVAILING PARTY BECAUSE THE POLICE DEPARTMENT TURNED OVER THE REQUESTED BODY CAM VIDEOS VOLUNTARILY WHILE THE PROCEEDING WAS PENDING; THE RESPONDENTS HAD NO REASONABLE BASIS FOR DENYING THE REQUEST (FIRST DEPT).

The First Department, reversing Supreme Court, determined petitioner was entitled to attorney's fees in this FOIL action which sought police body cam videos for an incident involving deadly force. Petitioner was the prevailing party because the respondents voluntarily provided the videos while the proceeding was pending:

… [P]etitioner substantially prevailed when respondents, during the pendency of this proceeding, disclosed the records sought in the FOIL request … . "[T]he voluntariness of . . . disclosure is irrelevant to the issue of whether petitioner substantially prevailed" … . …

… [R]espondents had no reasonable basis for denying access to the records sought. To invoke the FOIL exemption applicable to records that 'are compiled for law

enforcement purposes and which, if disclosed, would . . . interfere with law enforcement investigations' … , an 'agency must identify the generic kinds of documents for which the exemption is claimed, and the generic risks posed by disclosure of these categories of documents' … . 'Put slightly differently, the agency must still fulfill its burden under Public Officers Law § 89(4)(b) to articulate a factual basis for the exemption' … . In response to the FOIL request, NYPD did identify the generic kinds of documents at issue; it is undisputed that the responsive records, which have now been disclosed, were videos recorded by body cameras worn by NYPD officers during an incident in which NYPD used deadly force. However, NYPD's assertions in response to the FOIL request that disclosure would interfere with an ongoing internal investigation into the incident, which was being conducted by the Force Investigation Division at the time, was conclusory in the absence of any factual showing as to how disclosure would have interfered with that investigation." Matter of Dioso Faustino Freedom of Info. Law Request v New York City, 2021 NY Slip Op 00907, First Dept 2-11-21

INSURANCE LAW.

AN ANSWER TO AN AMBIGUOUS QUESTION ON AN APPLICATION FOR INSURANCE COVERAGE IS NOT A MATERIAL MISREPRESENTATION; THEREFORE THE ANSWER DID NOT VOID THE POLICY WHICH REMAINS IN FULL FORCE AND EFFECT (FIRST DEPT).

The First Department, reversing Supreme Court, determined a question in the application for insurance coverage was ambiguous. Therefore the answer to the question was not a material misrepresentation and the policy remains in full force and effect:

A misrepresentation in an insurance application is material, voiding the policy ab initio, if, had the true facts been known, either the insurer would not have issued the policy or would have charged a higher premium … . Even an innocent misrepresentation is sufficient to void the policy … . However, "an answer to an ambiguous question on an insurance application cannot be the basis for a claim of misrepresentation" in procuring insurance … .

Here, on defendants-respondents' insurance application submitted to plaintiff, Question 9, which asked "Any uncorrected code violations?" is ambiguous. While the plain language asks whether there are "any uncorrected fire code violations" and not uncorrected fire code notices of violation, different witnesses provided five different understandings as to what the question was asking. In any event, this Court has used the term "violation" to mean the issuance of a citation … . Indeed, the question is not even posed as a complete sentence but a sentence fragment lacking a verb, which could have clarified the question. Starr Indem. & Liab. Co. v Monte Carlo, LLC, 2021 NY Slip Op 00044, First Dept 1-5-21

INSURANCE LAW.

FAILURE TO SHOW UP FOR AN INDEPENDENT MEDICAL EXAMINATION (IME) IS A "POLICY ISSUE" WARRANTING DENIAL OF NO-FAULT BENEFITS AND THE AWARD OF ATTORNEY'S FEES TO PLAINTIFF (FIRST DEPT).

The First Department, reversing the Appellate Term and disagreeing with other courts, determined the failure to show up for an independent medical exam (IME) is a "policy issue" warranting the denial of no-fault benefits and the award of attorney's fees to plaintiff:

… [A]n insurer who denies a claim for first-party No-Fault benefits on the basis of the injured person's failure to attend an IME properly does so by checking box 4 on the denial of claim form, and therefore an injured person's failure to attend an IME is a "policy issue" both according to the denial of claim form and for purposes of awarding attorneys' fees under 11 NYCRR 65-4.6(c). Kamara Supplies v GEICO Gen. Ins. Co., 2021 NY Slip Op 01848, First Dept 3-25-21

INSURANCE LAW.

THE INSURER'S NEARLY TWO-MONTH DELAY BEFORE DISCLAIMING COVERAGE RENDERED THE DISCLAIMER UNTIMELY AS A MATTER OF LAW (FIRST DEPT).

The First Department, reversing Supreme Court, determined the insurer's disclaimer of coverage was not timely as a matter of law. The delay in notification was about two months:

"[A] timely disclaimer pursuant to Insurance Law § 3420(d) is required when a claim falls within the coverage terms but is denied based on a policy exclusion" … . The purpose of Insurance Law § 3420 is to protect the insured, injured party, or any other claimant with an interest in the outcome, from prejudice based on a delayed denial of coverage … . "[T]imeliness of an insurer's disclaimer is measured from the point in time when the insurer first learns of the grounds for disclaimer of liability or denial of coverage" … . The question as to whether the insurer disclaimed coverage as soon as reasonably possible after it first learns of the ground for disclaimer is necessarily case-specific … . "However, where there is no excuse or mitigating factor, the issue poses a legal question for the court, and courts have found relatively short periods to be unreasonable as a matter of law" … .

Here, defendant's disclaimer, dated December 24, 2014, was untimely as a matter of law. Defendant's position that it only received plaintiff's claim on December 16, 2014 is unpersuasive. Defendant was on notice of the underlying accident several months before it disclaimed coverage and commenced an investigation with respect to the alleged accident. Therefore, defendant was sufficiently aware of the facts that would support a disclaimer, but waited almost two months before disclaiming coverage … . ADD Plumbing, Inc. v Burlington Ins. Co., 2021 NY Slip Op 01498, First Dept 3-16-21

JUDGES.

JUDGE SHOULD NOT HAVE, SUA SPONTE, AFTER A COMPLIANCE CONFERENCE, ISSUED A PRECLUSION ORDER BECAUSE THERE WAS NO MOTION PENDING (FIRST DEPT).

The First Department, reversing Supreme Court, determined the judge should not have, sua sponte, issued a preclusion order after a compliance conference because no motion was pending:

Order … which, upon granting plaintiff's motion to reargue, reinstated his lost earnings claim but precluded the claim for years which tax returns are not produced to defendants, unanimously reversed, without costs, and the claim reinstated without limitation.

The underlying preclusion order should not have been issued sua sponte at a compliance conference, with no motion pending … . Sullivan v Snow, 2021 NY Slip Op 01873, First Dept 3-25-21

LABOR LAW-CONSTRUCTION LAW.

ALTHOUGH PLAINTIFF FELL FROM A LADDER, HIS LABOR LAW 240(1) CAUSE OF ACTION WAS PROPERLY DISMISSED; THERE WAS A VIDEO OF PLAINTIFF'S FALL WHICH SHOWED THE LADDER WAS SECURED TO THE SCAFFOLDING AND DID NOT MOVE (FIRST DEPT).

The First Department determined plaintiff's Labor Law 240(1) cause of action was properly dismissed. Plaintiff fell from a ladder, but there was a video of the fall which showed the ladder did not move and was secured to the scaffolding:

Defendant was properly granted summary judgment dismissing the § 240(1) claim. Surveillance footage of plaintiff falling from the ladder demonstrates that it did not move or shake, refuting plaintiff's testimony to the contrary … . In addition, photographs taken soon after his fall show that the top of the ladder was connected

to the sidewalk bridge and scaffolding above, and tied to the scaffolding structure about one-third of the way up. Cordova v 653 Eleventh Ave. LLC., 2021 NY Slip Op 00490, First Dept 1-28-21

LABOR LAW-CONSTRUCTION LAW.

PLAINTIFF FELL FROM A SCAFFOLD WHICH DID NOT HAVE GUARDRAILS AND WAS ENTITLED TO SUMMARY JUDGMENT ON HIS LABOR LAW 240(1) CAUSE OF ACTION DESPITE DEFENDANTS' ARGUMENTS THAT PLAINTIFF DID NOT LOCK THE WHEELS ON THE SCAFFOLD AND PLAINTIFF MAY HAVE FAINTED OR STEPPED BACKWARDS OFF THE SCAFFOLD (FIRST DEPT).

The First Department, reversing Supreme Court, determined plaintiff was entitled to summary judgment on his Labor Law 240(1)cause of action. Plaintiff apparently fell from a scaffold which did not have guardrails. Defendants unsuccessfully argued plaintiff did not lock the wheels of the scaffold and therefore was the sole proximate cause of the accident:

… [D]efendants failed to raise an issue of fact as to whether plaintiff was the sole proximate cause of his accident. Given the scaffold's inadequacy to protect him from falling, plaintiff's alleged failure to lock the wheels of the scaffold could not be the sole proximate cause of his accident … . It would be at most comparative negligence, which is not a defense to a Labor Law § 240(1) claim … . Defendants' argument, raised for the first time on appeal, that plaintiff was the sole proximate cause because he was not wearing a safety harness is also unavailing … , as is their suggestion that plaintiff may have fainted and/or stepped backwards off the scaffold … . Ordonez v One City Block, LLC, 2021 NY Slip Op 00529, First Dept 2-2-21

LABOR LAW-CONSTRUCTION LAW.

PLAINTIFF HAD TO USE AN A-FRAME LADDER ON TOP OF A SCAFFOLD TO REACH THE WORK AREA; THE SCAFFOLD MOVED AND PLAINTIFF FELL TO THE GROUND; PLAINTIFF WAS ENTITLED TO SUMMARY JUDGMENT ON THE LABOR LAW 240 (1) CAUSE OF ACTION AND DEFENDANT WAS NOT ENTITLED TO SUMMARY JUDGMENT ON THE LABOR LAW 241 (6) CAUSE OF ACTION (FIRST DEPT).

The First Department, reversing (modifying) Supreme Court, determined plaintiff was entitled to summary judgment on his Labor Law 240(1) cause of action and one of the Labor Law 241(6) causes of action properly survived summary judgment. Plaintiff was using a scaffold that wasn't high enough. He therefore used an A-frame ladder in the closed position on top of the scaffold. The scaffold move, the ladder fell over and plaintiff fell to the ground:

… [D]efendants failed to raise a triable issue. Defendants' contention that plaintiff's actions were the sole proximate cause of the accident is unavailing, since he was not provided a proper safety device to prevent his fall, and that failure is a cause of his injuries … .

Additionally, contrary to defendants' argument, there is no requirement for Labor Law § 240(1) purposes that plaintiff know exactly the cause of his accident, or what caused the scaffold or ladder to move, where there is no dispute that the safety devices failed … . Moreover, it is not relevant that the ladder and scaffold were free from defects … .

[Defendant] failed to establish prima facie entitlement to summary judgment dismissing plaintiff's Labor Law § 241(6) claim predicated on alleged violations of Industrial Code §§ 23-1.21(b)(4)(ii) and (iv), as there is sufficient testimony in the record to support such violations, including that the ladder was unsecured and lacked rubber footing, and no one was holding it in place at the time of plaintiff's fall. [Defendant] failed to establish as a matter of law that the alleged violations were not a proximate cause of plaintiff's accident. Martinez v ST-DIL LLC, 2021 NY Slip Op 01513, First Dept 3-16-21

LABOR LAW-CONSTRUCTION LAW.

PLAINTIFF WAS ENTITLED TO SUMMARY JUDGMENT ON HIS LABOR LAW 240(1) CAUSE OF ACTION; THE ROPE AND FRAME USED TO PREVENT A HEAVY OBJECT FROM FALLING WHEN PLAINTIFF DETACHED IT FROM THE WALL DID NOT WORK (FIRST DEPT).

The First Department, reversing (modifying) Supreme Court, determined plaintiff was entitled to summary judgment on his Labor law 240(1) cause of action. Plaintiff was struck by a 200 pound fire damper when it fell from the wall. A co-worker was holding a rope tied to the damper and looped over a temporary frame. When plaintiff broke the last weld securing the fire damper the co-worker who was holding the rope was unable to keep the damper from falling:

… [T]he statute is violated where an object, while being hoisted or secured, falls because of the absence or inadequacy of a safety device of the kind enumerated in the statute … , including where, as here, the inadequacy or absence of a safety device results in the uncontrolled descent of an object … . Here, plaintiff was entitled to summary judgment because the rope proved inadequate to prevent the damper from falling … .

The eight-foot fall of the 200-pound damper that plaintiff was tasked with removing was not an ordinary construction site peril but an elevation-related hazard, within the ambit of Labor Law § 240(1), which was required to be secured against unregulated descent to prevent it from falling on plaintiff … . Further, regulating its descent to prevent it from falling would not have been contrary to the purpose of work … . Mayorga v 75 Plaza LLC, 2021 NY Slip Op 01204, First Dept 2-25-21

LABOR LAW-CONSTRUCTION LAW.

PLAINTIFF WAS USING A CLOSED A-FRAME LADDER WHEN IT SLIPPED OUT FROM UNDER HIM; PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT ON HIS LABOR LAW 240(1) CAUSE OF ACTION SHOULD HAVE BEEN GRANTED (SECOND DEPT).

The First Department, reversing Supreme Court, determined plaintiff's motion for summary judgment in this Labor Law 240(1) action should have been granted. Plaintiff was using a closed A-frame ladder when it slipped out from under him:

A worker's decision to use an A-frame ladder in the closed position is not a per se reason to declare him the sole proximate cause of an accident," and plaintiff here "gave a specific reason why he used the ladder in the closed position" … . Defendants also did not elicit any evidence that it would have been plaintiff's "'normal and logical response'" to use the taller ladder that they allege was available to plaintiff at the time of his accident … . Similarly, as for plaintiff's putative recalcitrance, defendants failed to establish that, among other things: plaintiff knew that the taller ladder was available for his use; he was expected to use the taller ladder for his work; he "'chose for no good reason not to do so'" … ; and, he refused to follow a specific instruction to use the taller ladder for his work … . Ultimately, "[d]efendants' contentions would amount to, at most, comparative negligence, which is not a defense to a Labor Law § 240(1) violation … . Morales v 2400 Ryer Ave. Realty, LLC, 2021 NY Slip Op 00498, First Dept 1-28-21

LABOR LAW-CONSTRUCTION LAW.

PLAINTIFF, WHO WAS STRUCK BY A FALLING REBAR, WAS NOT REQUIRED TO DEMONSTRATE THE EXACT CIRCUMSTANCES WHICH LED TO THE REBAR FALLING; IT IS ENOUGH THAT THE REBAR SHOULD HAVE BEEN SECURED SUCH THAT IT WOULD NOT FALL; PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT ON HIS LABOR LAW 240 (1) CAUSE OF ACTION SHOULD HAVE BEEN GRANTED (FIRST DEPT).

The First Department, reversing Supreme Court, determined plaintiff's motion for summary judgment on his Labor Law 240 (1) cause of action in this falling object case should have been granted. Plaintiff was struck by a falling rebar:

Plaintiff, a journeyman ironworker at the Hudson Yards project, was injured when a piece of rebar fell from 30 feet above, striking him. In moving for summary judgment on his Labor Law § 240(1) claim, plaintiff was not required to show the exact circumstances of how the rebar came to strike him, as his testimony, that a coworker was working with rebar 30 feet above him on the same column immediately before the accident, was sufficient evidence that the rebar, whether it was dropped or fell in some other manner, was material requiring securing … . In that plaintiff made a prima facie showing of entitlement to summary judgment on his testimony alone, the admissibility of his coworker's unsigned deposition transcript is a moot point. Defendants failed to adduce any evidence raising a question of fact to warrant denial of plaintiff's motion. Pados v City of New York, 2021 NY Slip Op 01855, First Dept 3-25-21

LABOR LAW-CONSTRUCTION LAW.

THE ACCIDENT WAS NOT THE TYPE OF GRAVITY-RELATED INCIDENT COVERED BY LABOR LAW 240 (1); BUT THERE WAS A QUESTION OF FACT WHETHER THE GENERAL CONTRACTOR WAS LIABLE PURSUANT TO LABOR LAW 200 (FIRST DEPT).

The First Department, reversing Supreme Court, determined the Labor Law 240(1) cause of action was properly dismissed but the Labor Law 200 cause of action should not have been dismissed. Plaintiff was injured when a pipe rolled over his foot, not the type of gravity-related accident covered by Labor Law 240 (1). But the accident related to the means and methods of the work over which the defendant general contractor (Gilbane) may have exercised supervisory control:

Plaintiff was injured while employed by nonparty Titan Industrial Corporation (TIC) when a pipe rolled onto his foot. On the day of the accident, plaintiff's foreman instructed plaintiff and his two coworkers to insert some pipes under a concrete planter to relocate it. Plaintiff and his coworkers were pushing and pulling the planter from the sides, while the foreman was pushing it with a bobcat, when one of the pipes rolled over plaintiff's foot, causing an injury. …

The operation, according to plaintiff's foreman, was normally performed with two Bobcats, one pushing and one pulling the load; in this case, however, the operation was performed with only one Bobcat because the others were in use elsewhere on the site. Gilbane required that onsite Bobcat operators be licensed and kept track of all such operating engineers; in the event an unlicensed person were found to be operating a Bobcat contrary to instructions, the subcontractor would be notified by Gilbane and instructed to shut down the equipment. It is undisputed that the foreman who was operating the Bobcat involved in plaintiff's accident lacked the required license and, if [the onsite supervisor's] testimony is to be credited, should have been prohibited from doing so by Gilbane. Lemache v MIP One Wall St. Acquisition, LLC, 2021 NY Slip Op 00019, First Dept 1-5-21

LABOR LAW-CONSTRUCTION LAW.

THERE IS A QUESTION OF FACT WHETHER PLAINTIFF'S WORK ON A BOILER WAS ROUTINE MAINTENANCE OR PART OF A LARGER COVERED ACTIVITY IN THIS LABOR LAW 240(1) AND 241(6) ACTION; DEFENDANTS DID NOT SUPERVISE OR CONTROL PLAINTIFF'S WORK REQUIRING DISMISSAL OF THE LABOR LAW 200 AND NEGLIGENCE CAUSES OF ACTIONS (FIRST DEPT).

The First Department, reversing Supreme Court, determined there was a question of fact whether plaintiff was engaged in a covered activity and not routine maintenance of a boiler. In addition, the First Department held that the defendant did not supervise of control the plaintiff's work and therefore the Labor Law 200 and common law negligence causes of action should have been dismissed:

Labor Law §§ 240(1) and 241(6) do not cover workers engaged in routine maintenance … . The determination of whether a worker was engaged in a covered activity is not made at the moment of injury, but in the context of the entire project … . While plaintiff here was engaged in replacing a boiler steam valve, an activity some courts have deemed routine maintenance … , it was part of a larger project that included removing portions of the boilers via blowtorches and installation of new components by welding, thus raising an issue of fact whether it falls within covered activity … . …

Plaintiff's accident arose from the means and methods of the work, not a defective condition … , and the record is clear that defendants neither supervised nor controlled the work being performed by plaintiff and his coworkers at the time of the accident. Thus, this Court, upon a search of the record, dismisses plaintiff's Labor Law § 200 and common-law claims … . Gaston v Trustees of Columbia Univ. in the City of N.Y., 2021 NY Slip Op 00254, First Dept 1-19-21

LABOR LAW-CONSTRUCTION LAW.

PLAINTIFF APPARENTLY FELL FROM A WET, SLIPPERY WOODEN LADDER; HE WAS ENTITLED TO SUMMARY JUDGMENT ON HIS LABOR LAW 240(1) CAUSE ACTION; NO NEED TO SHOW THE LADDER WAS INHERENTLY DEFECTIVE (FIRST DEPT).

The First Department, reversing Supreme Court, determined plaintiff was entitled to summary judgment on his Labor Law 240(1) without showing the ladder from which he fell was inherently defective:

Plaintiff testified that he was injured when he fell while using a wet and slippery wooden ladder provided by defendants for him to move between the tenth and eleventh floors of the construction site to perform his work. This testimony established prima facie that plaintiff's work exposed him to an elevation-related risk against which defendants failed to provide him with proper protection, as required by Labor Law § 240(1) … . It is clear that the ladder was not adequate to prevent plaintiff from falling and there is no dispute that other than the ladder, no additional safety devices were provided … . Plaintiff was not required to show that the ladder was inherently defective … . Millligan v Tutor Perini Corp., 2021 NY Slip Op 00630, First Dept 2-4-21

LANDLORD-TENANT.

EVICTION WAS TOO SEVERE A PENALTY FOR PETITIONER'S MOMENTARY LOSS OF CONTROL DURING WHICH SHE STRUCK A NYC HOUSING AUTHORITY EMPLOYEE (FIRST DEPT).

The First Department, reversing Supreme Court, determined the NYC Housing Authority (NYCHA) should not have penalized petitioner for striking a NYCHA employee by evicting her:

The termination of the tenancy of petitioner, a now 64-year-old woman who has been a NYCHA tenant without incident for more than 40 years and will be evicted from her home along with her adult daughter because she suffered a momentary loss

of control when she struck respondent's employee, whom she believed to be in a relationship with her former partner, is "so disproportionate to [her] offense, in the light of all the circumstances, as to be shocking to one's sense of fairness" … .

Given the facts presented as well as the lack of any evidence presented by NYCHA that petitioner's continued occupancy presents a concern to the safety of NYCHA employees or a risk to the other NYCHA tenants, this Court finds that a lesser penalty is warranted … . Matter of Bryant v Garcia, 2021 NY Slip Op 00521, First Dept 2-2-21

LANDLORD-TENANT.

THE FOUR-YEAR LOOKBACK CAN BE APPLIED TO DETERMINE WHETHER DEFENDANT ENGAGED IN A FRAUDULENT SCHEME TO DEREGULATE NYC APARTMENTS RECEIVING J-51 TAX BENEFITS (FIRST DEPT).

The First Department, in a full-fledged opinion by Justice Singh, over an extensive dissenting opinion, determined the four-year lookback period can be applied to determine whether there was a fraudulent scheme to deregulate apartments which, under Roberts (12 NY3d 270 [2009]) should not have been deregulated because the landlord was receiving "J-51" tax benefits. Defendant's motion for summary judgment was properly denied and plaintiff's motion to certify a class was properly granted:

… [I]n pre-Roberts cases where landlords relied on DHCR [NYC Division of Housing & Community Renewal] guidance there could be no fraudulent scheme to deregulate. * * *

[W]e have not extended this rule to cases decided after Roberts … . To the contrary, our jurisprudence holds that an owner may not flout the teachings of Roberts. * * *

The hallmarks of a fraudulent scheme to deregulate are present here. … Defendant deregulated the apartment after Roberts was decided and did not re-register with DHCR, despite receiving J-51 tax benefits … . During the four-year period preceding commencement of the lawsuit, plaintiff was still not given a rent-

stabilized lease. … Defendant's actions cannot be deemed to be prompt compliance. Rather, at this stage, plaintiff has sufficiently alleged a six-year scheme to illegally deregulate 27 units or approximately 32% of the building. Montera v KMR Amsterdam LLC, 2021 NY Slip Op 00805, First Dept 2-9-21

LANDLORD-TENANT.

THE NYC HOUSING STABILITY AND TENANT PROTECTION ACT OF 2019 PART I, WHICH IMPOSES RESTRICTIONS ON A LANDLORD'S RIGHT TO REFUSE TO RENEW A RENT-STABILIZED LEASE, DOES NOT APPLY TO THIS HOLDOVER PROCEEDING WHICH WAS PENDING WHEN THE LAW WAS ENACTED (FIRST DEPT).

The First Department, reversing the Appellate Term, determined the Housing Stability and Tenant Protection Act of 2019 (HSTPA) Part I did not apply to did not apply to the instant holdover proceeding which was pending when the HSTPA was enacted:

As amended by HSTPA Part I … , Rent Stabilization Law of 1969 [Administrative Code of City of NY] § 26-511(c)(9)(b), which governs an owner's right to refuse to renew a rent-stabilized lease on the ground that the owner seeks the unit for his or her own personal use and occupancy as a primary residence, limits the owner to the recovery of only one dwelling unit in a building, requires proof of "immediate and compelling necessity" for the owner's use, and requires that the owner provide an equivalent housing accommodation for any tenant over the age of 62 and in occupancy for 15 years or more. …

… [F]our months after Appellate Term issued its decision in this proceeding, the Court of Appeals decided Matter of Regina Metro. Co., LLC v New York State Div. of Hous. & Community Renewal (35 NY3d 332 [2020]), holding that HSTPA Part F, relating to rent overcharges, could not be applied to pending cases because "application of these amendments to past conduct would not comport with our retroactivity jurisprudence or the requirements of due process" … .

We conclude that the same reasoning applies with equal measure to HSTPA Part I. Matter of Harris v Israel, 2021 NY Slip Op 00796, First Dept 2-9-21

LIMITED LIABILITY COMPANY LAW.

THE LIMITED RELIEF AVAILABLE TO A DISSENTING MEMBER AFTER THE MERGER OF TWO LIMITED LIABILITY COMPANIES (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, addressed the relief available to a dissenting member after the merger of two limited liability companies:

Limited Liability Company Law § 1002(f) provides that, subsequent to a merger, a dissenting member possesses no interest in the surviving or resulting business entity, but is instead entitled only to a cash payment of the fair value of his or her membership as of the close of the business day prior to the merger. Moreover, Limited Liability Company Law § 1005 provides for the payment of the value of that interest or, in the event of a dispute, sets forth the procedure for determining the value of that interest.

… Farro's [plaintiff's] membership in the subject businesses was terminated by the merger, and he subsequently sought appraisal of the value of his interest in order to be fairly compensated therefor. Under these circumstances, his exclusive remedy was appraisal and payment, and he was precluded from maintaining any derivative claims on behalf of the subject businesses … .

… [A] member of a merged company who has a right to demand payment for his membership interest "shall not have any right at law or in equity . . . to attack the validity of the merger . . . or to have the merger . . . set aside or rescinded." Moreover, the language of the statute makes clear that an appraisal proceeding is the member's "sole remedy," and no exception exists for alleged fraud or illegality in the procurement of the merger … . Farro v Schochet, 2021 NY Slip Op 00150, Second Dept 1-13-21

MEDICAL MALPRACTICE.

OVERRULING PRECEDENT, THE FAILURE TO TIMELY FILE A CERTIFICATE OF MERIT IN A MEDICAL MALPRACTICE ACTION IS NOT A GROUND FOR DISMISSAL OF THE ACTION; IT IS NOT NECESSARY TO DEMONSTRATE THE ACTION HAS MERIT OR AN EXCUSE FOR THE FAILURE TO FILE IN SEEKING AN EXTENSION TO FILE THE CERTIFICATE (FIRST DEPT).

The First Department, in a full-fledged opinion by Justice Kennedy, overruling precedent, determined that the failure to timely file a certificate of merit pursuant to CPLR 3012-a in a medical malpractice action does not require dismissal of the action. In addition, a showing that the action has merit and an excuse for failing to file are not necessary when seeking an extension for filing:

Had the legislature intended to permit dismissal for failure to comply with CPLR 3012-a, the statute would empower the court to do so … . Accordingly, the sanction of dismissal is not authorized and to the extent that this Court's decisions in Blasoff v New York City Health & Hosps. Corp. (147 AD3d 481), Grad v Hafliger (68 AD3d 543), George v St. John's Riverside Hosp. (162 AD2d 140), and Perez v Lenox Hill Hosp. (159 AD2d 251) are not in accord with the foregoing, they should no longer be followed.

Moreover, generally, a showing of a meritorious action and a reasonable excuse is required to vacate a pleading default and the failure to make this showing necessarily mandates dismissal of the pleading. However, since this sanction is improper in the context of a CPLR 3012-a violation, it follows that the failure to comply with this provision is not a pleading default and a plaintiff is not required to make this showing … .Accordingly, a showing of a meritorious action through the submission of an affidavit of merit and a reasonable excuse for failing to comply with CPLR 3012-a is not required to obtain an extension of time to comply with the statute. Fortune v New York City Health & Hosps. Corps., 2021 NY Slip Op 01122, First Dept 2-18-21

MUNICIPAL LAW.

ALTHOUGH THIS NON-TORT ACTION AGAINST THE NYC DISTRICT ATTORNEY DID NOT TRIGGER THE NOTICE OF CLAIM REQUIREMENT OF THE GENERAL MUNICIPAL LAW, IT DID TRIGGER THE NOTICE OF CLAIM REQUIREMENT OF THE COUNTY LAW (FIRST DEPT).

The First Department determined County Law 52, not General Municipal Law (GML) 50, applied to a "money had and received" lawsuit against the district attorney of New York County. Although the district attorney is considered a city employee for purposes the General Municipal Law, the district attorney is elected by the citizens of New York County and is subject to the provisions of the County Law. The General Municipal Law notice of claim requirement applies only to tort actions. However, the County Law notice of claim requirement applies to this action for money had and received. No notice of claim was filed:

Defendant falls back on the position that, even if no notice of claim was required under GML section 50-k, one was required under County Law section 52. …

Although this section also refers to GML sections 50-e and 50-i, the Court of Appeals has expressly held that it applies to non-tort claims … . Further, County Law section 52 applies to county employees … . Nevertheless, plaintiffs assert that in arguing for application of the County Law, the District Attorney is trying to have it both ways, since he claims to be a city employee for purposes of the General Municipal Law, but a county employee for purposes of the County Law. It is true that New York City law considers the District Attorney to be a city employee … . However, this is no reason not to apply County Law section 52, since there is no county-level government organization in the City of New York that could be considered the District Attorney's employer for administrative purposes such as paying his or her salary. Moreover, the District Attorney is elected by the voters of New York County, not New York City. Finally, this Court has cited County Law section 52 in holding that a notice of claim is required before filing an action against the office of a District Attorney in the City of New York … . Slemish Corp. S.A. v Morgenthau, 2021 NY Slip Op 01370, First Dept 3-9-21

MUNICIPAL LAW.

RARE CASE IN WHICH A SPECIAL RELATIONSHIP BETWEEN THE PLAINTIFF AND THE CITY MAY RENDER THE CITY LIABLE FOR A DELAYED RESPONSE TO A 911 CALL; BECAUSE THE DELAY MAY NOT HAVE BEEN THE RESULT OF A DELIBERATE EXERCISE OF DISCRETION, THE DOCTRINE OF GOVERNMENTAL IMMUNITY MAY NOT APPLY (FIRST DEPT).

The First Department, reversing Supreme Court, determined plaintiff had sufficiently alleged the existence of a special relationship with the city and dismissal based on the doctrine of governmental function immunity was not appropriate. Plaintiff called 911 and was told the ambulance was on its way. Plaintiff had other options for assistance but relied on the 911 operator's statement. Apparently the ambulance response was delayed. Absent a special relationship a municipality may not be held liable for breach of a duty owed to the general public. Governmental immunity generally protects discretionary actions. Here the delayed response may not have been due to the deliberate exercise of discretion and therefore may not be protected by the immunity doctrine:

Plaintiff's allegations are sufficient to establish a special relationship between the City and the decedent that brings her claim within the exception to the general rule that a municipality may not be held liable to a person injured by the breach of a duty that it owes to the general public — such as the duty to provide ambulance service … . The allegation that the 911 operator told plaintiff that "we are on our way" is sufficient to establish defendants' assumption of an affirmative duty to act on the decedent's behalf … . Plaintiff sufficiently alleged justifiable reliance on the call operator's statement through an affidavit submitted in opposition to defendants' motion in which she listed several additional actions she would have taken to secure help but for the operator's assurance … .

Dismissal is also not appropriate at this stage pursuant to the doctrine of governmental function immunity, which shields public entities from liability for "discretionary" actions taken during the performance of "governmental functions" … . It is undisputed that the provision of emergency care by FDNY EMTs constitutes

a governmental function … . It is also clear that determinations of whether and when to dispatch an ambulance, the type of ambulance to dispatch and from where, and the route the ambulance should take are discretionary in nature … . However, it is not clear that the delay at issue here was due to an affirmative exercise of this discretion, rather than an unintentional failure to timely dispatch an ambulance … . Xenias v City of New York, 2021 NY Slip Op 00647, First Dept 2-4-21

MUNICIPAL LAW.

THE COMPLAINT STATED A CAUSE OF ACTION AGAINST PORT AUTHORITY FOR FAILING TO INSTALL FENCING TO PREVENT PLAINTIFFS' DECEDENTS FROM COMMITTING SUICIDE BY JUMPING FROM THE GEORGE WASHINGTON BRIDGE (FIRST DEPT).

The First Department, reversing Supreme Court, in a full-fledged opinion by Justice Webber, determined the complaint alleging defendant Port Authority was negligent in failing to install fencing to prevent plaintiffs' decedents from jumping from the George Washington Bridge (GWB) to commit suicide should not have been dismissed:

… [P]laintiffs allege that the GWB was unreasonably dangerous because the low four-foot railing on the south walkway facilitated suicides and that the Port Authority had long been aware that the bridge had become a "suicide magnet" based upon hundreds of deaths that had occurred at the bridge over the decades preceding these cases. The complaints allege that suicide attempts at the GWB have occurred at the rate of approximately 1 every 3 1/2 days, and that about 93 deaths occurred from 2009 up to 2016. The complaints assert that the Port Authority, as the owner of the GWB, "owed a duty to the public," including to "protect the public from foreseeable harm," "take reasonable steps to protect public safety," "take reasonable steps to prevent suicide," "not increase the risk of suicide by inaction," and "protect human life." Additionally, plaintiffs allege that the Port Authority "failed to exercise reasonable care in constructing, operating, and maintaining the [GWB]" and were negligent "in falling to provide for the safety and protection for vulnerable or impulsive individuals." …

Viewing the allegations of the complaint in the light most favorable to plaintiff, we find that plaintiffs have set forth sufficient facts which, if true, show that the Port Authority, as owner of the GWB, was acting in a proprietary capacity in the design and maintenance of the bridge, and, therefore was subject to suit under the ordinary rules of negligence applicable to nongovernmental parties. …

We find that the complaints sufficiently allege that the low railing of the bridge, and Port Authority's awareness of the frequent suicide attempts on the bridge over previous decades, give rise to a duty to install fencing to protect against foreseeable harm to withstand a motion to dismiss … . Feldman v Port Auth. of N.Y. & N.J., 2021 NY Slip Op 01719, First Dept 3-23-21

MUNICIPAL LAW.

THE SEVEN-YEAR STATUTE OF LIMITATIONS IN NYC'S VICTIMS OF GENDER-MOTIVATED VIOLENCE PROTECTION LAW (VGM) IS NOT PREEMPTED BY THE ONE-YEAR OR THREE-YEAR CPLR STATUTES OF LIMITATIONS; ALTHOUGH DEFENDANT AND DEFENDANT S CORPORATION MAY BE ONE AND THE SAME, THERE WAS ENOUGH EVIDENTIARY SUPPORT FOR THE NEGLIGENT HIRING AND SUPERVISION CAUSE OF ACTION TO SURVIVE THE MOTION TO DISMISS (FIRST DEPT).

The First Department, in a full-fledged opinion by Justice Acosta, reversing Supreme Court, determined the seven-year statute of limitations in NYC's Victims of Gender-Motivated Violence Protection Law (VGM) was not preempted by the one-year statute of limitations for assault in the CPLR and the negligent hiring and supervision cause of action should have survived the motion to dismiss even though the S corporation (PDR) and the defendant (Rofe) may be one and the same. The complaint alleged plaintiffs were subjected to unwanted sexual touching by defendant Rofe during voice-over coaching sessions offered by defendant S corporation (PDR):

… [W]e find that the legislative intent of the VGM was to create a civil rights remedy or cause of action such as in VAWA, rather than to extend the statute of limitations

for a particular class of assaults. Since the nature of the claim is for a civil rights violation (providing a remedy for those subjected to violence because of their gender), the seven-year limitations period provided in the Administrative Code is not preempted by the CPLR statute of limitations for assault claims. * * *

To be sure, defendants may be correct that PDR essentially has no corporate structure separate from Rofe. Plaintiffs themselves do not appear to distinguish between Rofe and PDR in their brief. Nevertheless, plaintiffs have sufficiently alleged that Rofe was an employee of PDR and, through the submission of additional evidence in opposition to the motion to dismiss, have also sufficiently alleged that there may have been other employees of PDR who either hired, or supervised Rofe or whom Rofe hired or supervised. The acts of a corporation's agent and the knowledge acquired by the agent are presumptively imputed to the corporation … . Thus, Rofe's knowledge (as an alleged agent of PDR) that an employee was potentially violent or prone to sexual assaults would normally be imputed to PDR, potentially requiring PDR to supervise that employee, and the cause of action for negligent hiring and supervision should be reinstated as against PDR … . Engelman v Rofe, 2021 NY Slip Op 01321, First Dept 3-2-21

MUNICIPAL LAW.

TWO ZONING VIOLATION SUMMONSES ADDRESSING THE SAME USE OF THE PROPERTY WERE NOT DUPLICATIVE; THEREFORE THE NYC DEPARTMENT OF BUILDINGS' FAILURE TO APPEAL THE DISMISSAL OF THE FIRST SUMMONS DID NOT PRECLUDE THE SECOND (FIRST DEPT).

The First Department, in a full-fledged opinion by Justice Oing, determined that two actions brought by the NYC Department of Buildings (DOB) seeking the removal of four large industrial shipping containers from petitioner's auto-repair-shop premises were not duplicative. Therefore the DOB's failure to appeal the dismissal of the first summons did not preclude the second summons. The second summons was dismissed by the hearing officer but was reinstated by the OATH [NYC Office of Trials and Hearings] Appeals Unit. The First Department upheld the reversal by

the Appeals Unit. [The decision covers several substantive issues not summarized here]:

Petitioners argue primarily that although the summonses cite to two different provisions of the law — a Zoning Resolution violation and a certificate of occupancy violation pursuant to Administrative Code § 28-118.3.2 — the same proof and arguments were presented at the hearings for both summonses, namely, the certificate of occupancy, photographs depicting storage of the shipping containers on the property, the argument that the shipping containers would be transformed into trucks, and the counterargument that the storage was not a permitted use. They contend that this analysis is sufficient to demonstrate the duplicative nature of the summonses. The argument is unavailing. * * *

Here … the same body of evidence is used to prove two different violations, a violation of the Zoning Resolution, which covers the permitted uses and businesses within a specific area, and a violation of the certificate of occupancy, which applies specifically to the property, and describes the legal occupancy and use of that property. Moreover, the remedy for the two summonses is not the same. The first summons demanded that petitioners discontinue the illegal use, while the second summons provided for alternative remedies — discontinue illegal use or amend the certificate of occupancy. Accordingly, the OATH Appeals Unit's finding that the second summons was not duplicative of the first summons was not arbitrary and capricious. Matter of Karakash v Del Valle, 2021 NY Slip Op 01484, First Dept 3-11-21

REAL ESTATE.

THE TIME-OF-THE-ESSENCE DATE WAS PROPERLY SET; THE BUYER WAS NOT ABLE TO CLOSE ON THAT DATE: DEFENDANTS-SELLERS ENTITLED TO KEEP THE DOWNPAYMENT (SECOND DEPT).

The Second Department determined defendants-sellers were entitled to retain the downpayment after the buyer was not ready, willing and able to close on the time-of-the-essence date:

… [T]he defendants established, prima facie, that they effectively made September 3, 2014, a time of the essence closing date, and that, although they were ready, willing, and able to close on September 3, 2014, the plaintiff was not ready, willing, and able to close on that date … . The defendants also established, prima facie, that the plaintiff was in default by demonstrating that the plaintiff did not appear at the closing and admitted that he did not have the funds to close … . In opposition, the plaintiff failed to raise a triable issue of fact. Accordingly, we agree with the Supreme Court's determination to grant those branches of the defendants' motion which were for summary judgment dismissing the complaint and to cancel the notice of pendency.

A buyer "who defaults on a real estate contract without lawful excuse, cannot recover the down payment," at least where, as here, that down payment represents 10% or less of the contract price … . Ashkenazi v Miller, 2021 NY Slip Op 00140, Second Dept 1-13-21

SLIP AND FALL.

ALTHOUGH THE SIDEWALK DEFECT WAS SMALL, THE AREA WAS DARKENED BY SCAFFOLDING; DEFENDANTS' MOTION FOR SUMMARY JUDGMENT IN THIS SLIP AND FALL CASE SHOULD NOT HAVE BEEN GRANTED (FIRST DEPT).

The First Department, reversing Supreme Court, determined defendant's motion for summary judgment in this sidewalk slip and fall case should not have been granted. There was evidence the defect in the sidewalk, although small, may not have been visible because scaffolding covered the sidewalk. In addition, defendants' expert did not inspect the sidewalk until 3 1/2 years after the accident (after repairs had been made):

Defendants and the motion court relied extensively on the height differential between the sidewalk flags, applying a mechanistic disposition of a case based exclusively on the dimension of a sidewalk defect, which defendants' expert measured to be seven-sixteenths of an inch … .

Plaintiff presented evidence that the height differential was not the only factor that caused her to trip. First, plaintiff established that the sidewalk was covered by a scaffolding that darkened the sidewalk and made it harder to see a sidewalk defect … . Second, plaintiff established through her expert that the expansion joint between the sidewalk flags was recessed an inch below the surface, when it should have been filled in and flush with the surface (see New York City Department of Transportation Highway Rule § 2-09[f][4][v]). The recessed expansion joint, which was repaired by the time defendants' expert examined the sidewalk, added to the hazard …

Moreover, defendants' expert did not inspect the area where plaintiff fell until more than 3 ½ years after plaintiff's accident. Marks v 79th St. Tenants Corp., 2021 NY Slip Op 00629, First Detp 2-4-21

SLIP AND FALL.

ON A COLD DAY DEFENDANTS HOSED DOWN THE SIDEWALK WHERE PLAINTIFF SLIPPED AND FELL ON ICE; ANY COMPARATIVE NEGLIGENCE ON PLAINTIFF'S PART IS NOT A BAR TO SUMMARY JUDGMENT (FIRST DEPT).

The First Department, reversing Supreme Court and recalling and vacating a decision in the same matter dated December 17, 2020, determined defendants' motion for summary judgment in this slip and fall case should not have been granted. Defendant restaurants hosed down the sidewalk where plaintiff, an EMT responding to a call, slipped and fell on ice. Any comparative negligence on plaintiff's part is not a bar to summary judgment:

To obtain partial summary judgment, a plaintiff does not have to demonstrate the absence of his own comparative fault … . Moreover, plaintiff is not required to show that "defendants' negligence was the sole proximate cause of the accident to be entitled to summary judgment" … . The evidence plaintiff submitted in support of his motion shows that defendants-tenants … created the dangerous condition when their employees hosed the sidewalk on a cold winter day … . Defendants-owners Concord Partners 46th Street LLC (Concord) and Elo Equity, LLC, had a non delegable duty to maintain the sidewalk. Elo had notice that the restaurant employees

had created a dangerous condition, because Elo's superintendent had observed the restaurants' employees hosing the sidewalk. The property manager for Concord did not personally observe the restaurant employees hosing down the sidewalk on the date in question; however, he testified that it was the general practice to hose down the sidewalk at approximately 7:30 a.m.

In opposition, defendants did not raise a question of fact with respect to the issue of their liability. Defendant restaurants admit that the evidence shows that their employees hosed the sidewalk with water before the incident occurred. Furthermore, defendants' argument that there are triable issues of fact on the basis that plaintiff should have sought an alternative route to safely care for the patient relates to the issue of comparative negligence and, therefore, does not preclude summary resolution of the issue of their liability … . Benny v Concord Partners 46th St. LLC, 2021 NY Slip Op 01550, First Dept 3-18-21

SLIP AND FALL.

PLAINTIFF ALLEGED HE STUMBLED WHEN HIS FOOT HIT ROLLED UP CARPETS AND THEN HE TRIPPED ON A RAISED SIDEWALK FLAG IN THIS SLIP AND FALL CASE; DEFENDANT DEMONSTRATED IT DID NOT HAVE NOTICE OF THE CARPETS, BUT THERE WERE QUESTIONS OF FACT ABOUT DEFENDANT'S NOTICE OF THE RAISED FLAG AND WHETHER THE FLAG WAS TRIVIAL; THE COURT NOTED THERE CAN BE MORE THAN ONE PROXIMATE CAUSE (FIRST DEPT).

The First Department, reversing Supreme Court, determined defendant in this slip and fall case did not eliminate issues of fact re: notice and nature of the raised sidewalk flag. There were rolled up carpets on the sidewalk, of which defendant had no notice. Plaintiff alleged he stumbled when his foot hit the carpet and then he tripped on the raised flag. The court noted there can be more than one proximate cause of an accident:

… [T]here are issues of fact as to whether defendant had constructive notice of the sidewalk defect, whether the defect was trivial, and whether it proximately caused plaintiff's fall. Defendant failed to offer specific evidence as to when the sidewalk

was last inspected, relying only on vague testimony concerning the manager's occasional visits to the shopping center … . Plaintiff's submission of photographs depicting the height differential in the raised sidewalk flag to be about one inch also raised an issue of fact as to whether the defect was nontrivial … . While plaintiff testified that he first tripped on the rolled-up carpets before coming into contact with the sidewalk defect, "there can be more than one proximate cause of an accident" … . Abraham v Dutch Broadway Assoc. L.L.C., 2021 NY Slip Op 01711, First Dept 3-23-21

SLIP AND FALL.

PLAINTIFF'S INCONSISTENT DEPOSITION TESTIMONY IN THIS STAIRWAY SLIP AND FALL CASE RAISED A CREDIBILITY QUESTION BUT DID NOT REQUIRE SUMMARY JUDGMENT IN DEFENDANT'S FAVOR; PLAINTIFF'S TESTIMONY SHE DID NOT USE THE HANDRAILS REQUIRED DISMISSAL OF THE CLAIM ALLEGING THE HANDRAILS WERE DEFECTIVE (FIRST DEPT).

The First Department, reversing (modifying) Supreme Court in this stairway slip and fall case, determined the plaintiff's inconsistent deposition testimony raised an issue of credibility but did not warrant summary judgment dismissing the action. However the claim relating to the handrails of the should have been dismissed because plaintiff testified she did not use the handrails:

While plaintiff's initial deposition testimony was later contradicted by the affidavit she submitted in opposition to defendant's motion, after a break in the deposition, she testified that she had misspoken, and changed her testimony significantly as to how her fall on defendant's staircase occurred. Plaintiff's latter version of the accident is, in the main, consistent with her affidavit. Thus, while the change of testimony mid-deposition presents an issue of credibility for the jury, the affidavit does not present the kind of feigned issue of fact that requires the court to disregard the affidavit … . Since plaintiff's expert relied upon the version of the accident described in plaintiff's affidavit, his affidavit was properly considered … . Plaintiff's inability to identify uneven riser heights as the cause of her fall is not fatal to her

claim, as her post-break deposition testimony permits the inference that her fall was caused by uneven riser heights … .

However, plaintiff's affidavit presents a feigned issue of fact as to whether her fall was caused by any defect of the staircase handrails and must be disregarded with respect thereto … . Plaintiff testified consistently through the entirety of her deposition that she was not holding the handrail, that it was her custom and practice not to use handrails on short flights of steps, and that at no time during her fall did she attempt, or even think of attempting, to put her hand on the handrail. Dixon v Sum Realty, Co., 2021 NY Slip Op 00367, First Dept 1-21-21

SLIP AND FALL.

QUESTION OF FACT WHETHER AN OPEN AND OBVIOUS CONDITION–A STEEP EMBANKMENT NEXT TO A GRASSY WALKWAY–SHOULD HAVE BEEN MADE SAFE BY THE INSTALLATION OF A RAILING OR BARRIER (FIRST DEPT).

The First Department, reversing Supreme Court, in a full-fledged opinion by Justice Kapnick, over a dissent, determined the defendant property owner's (COU's) motion for summary judgment in this slip and fall case should not have been granted. COU owned a campground for developmentally disabled persons. Plaintiff, a developmentally disabled adult, slipped on a narrow grassy walkway and fell down the adjacent steep embankment, striking his head on one of the rocks at the bottom. The First Department held there were questions of fact whether the accident was foreseeable and whether the area should have been made safe with a barrier or handrail:

… [A]n issue of fact does exist as to whether COU violated its duty to maintain the premises in a reasonably safe condition by failing to erect a railing or barrier along the walkway. "A landowner must act as a reasonable [person] in maintaining [its] 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" … . Indeed, "the duty of the owner or occupier will vary with the likelihood of plaintiff's presence at the particular time and place of the injury. While

[plaintiff's] status is no longer determinative, considerations of who plaintiff is and what [his or her] purpose is upon the land are factors which, if known, may be included in arriving at what would be reasonable care under the circumstances" … .

… [A] landowner or occupier "has a duty to take reasonable precautions to prevent accidents which might foreseeably occur as the result of dangerous terrain on its property by posting warning signs or otherwise neutralizing dangerous conditions" … . "[E]ven if a hazard qualifies as 'open and obvious' as a matter of law, that characteristic merely eliminates the property owner's duty to warn of the hazard, but does not eliminate the broader duty to maintain the premises in a reasonably safe condition" … . "A landlord's duty to maintain premises in a reasonably safe condition … is not satisfied by permitting a highly dangerous — but correctible — condition to remain, simply because the dangerous condition is obvious" … . Aberger v Camp Loyaltown, Inc., 2021 NY Slip Op 01188, First Dept 2-25-21

SLIP AND FALL.

QUESTIONS OF FACT WHETHER DEFENDANT HAD CONSTRUCTIVE NOTICE OF THE RAISED SIDEWALK FLAG AND WHETHER THE DEFECT WAS TRIVIAL IN THIS SLIP AND FALL CASE (FIRST DEPT).

The First Department, reversing Supreme Court, determined there were questions of fact about whether defendant had constructive notice of a raised sidewalk flag and whether the defect was trivial in this slip and fall case:

Although the property manager states that the premises were regularly inspected, and any condition observed would have been reported to him, reference to a generalized inspection practice "is insufficient to satisfy defendant['s] burden of establishing that [he] lacked notice of the alleged condition of the sidewalk prior to the accident" … .

As a general rule, whether a defect is trivial depends on "the facts presented, including the width, depth, elevation, irregularity and appearance of the defect along with the time, place and circumstance of the injury" … . The relevant inquiry is whether the defect was "difficult for a pedestrian to see or to identify as a hazard or

difficult to pass over safely on foot in light of the surrounding circumstances" … . Although defendant relies on photographs to prove his defense that the defect is trivial, summary judgment should not be granted where, as here, "the dimensions of the alleged defect are unknown and the photographs and descriptions inconclusive" … . Trinidad v Catsimatidis, 2021 NY Slip Op 00047, First Dept 1-5-21

SLIP AND FALL.

THE JURY VERDICT FINDING THAT PLAINTIFF'S NEGLIGENCE WAS NOT THE PROXIMATE CAUSE OF HER INJURIES WAS NOT INCONSISTENT AND SHOULD NOT HAVE BEEN SET ASIDE (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the defendants' motion to set aside the jury verdict in this slip and fall case should not have been granted. Plaintiff had double-parked. Her granddaughter ran toward traffic after getting out of the car. Plaintiff ran to stop her granddaughter and tripped over a piece of wood used as shoring by defendants who were installing a gas line. The jury found plaintiff negligent, but found her negligence was not a proximate cause of her injuries:

"A jury's finding that a party was at fault but that such fault was not a proximate cause of the accident is inconsistent and against the weight of the evidence only when the issues are so inextricably interwoven as to make it logically impossible to find negligence without also finding proximate cause" … . "[W]here there is a reasonable view of the evidence under which it is not logically impossible to reconcile a finding of negligence but no proximate cause, it will be presumed that, in returning such a verdict, the jury adopted that view" … . Here, the jury reasonably could have concluded that the plaintiff was negligent, but that such negligence was not a proximate cause of her falling over the piece of wood bracing that was supporting the stack of wood planking. The jury could have adopted the view that the defendants' failure to maintain the wood they were storing in the roadway in a safe condition was the sole proximate cause of the accident … . Cruz-Rivera v National Grid Energy Mgt., LLC, 2021 NY Slip Op 00149, Second Dept 1-13-21

SLIP AND FALL.

THE METEOROLOGICAL DATA WAS NOT SWORN TO; DEFENDANTS THEREFORE DID NOT DEMONSTRATE THERE WAS A STORM IN PROGRESS IN THIS SLIP AND FALL CASE (FIRST DEPT).

The First Department, reversing Supreme Court, determined defendant's motion for summary judgment in this slip and fall case should not have been granted. The defendants asserted the storm in progress defense, but the meteorological data was not in admissible form:

In this action where plaintiff alleges that he was injured after he fell on a snowy or icy condition on defendants' driveway, defendants failed to meet their prima facie burden of establishing entitlement to judgment as a matter of law. The meteorologists' reports relied upon by defendants were not in admissible form … . The reports contain no jurat, stamp of a notary public, or any other indication that the experts were actually sworn … .

In any event, contrary to defendants' contention, the testimony of the parties alone did not establish that the snowstorm was still in progress at the time of the accident, and was therefore insufficient to avail them of the storm in progress defense … . Morales v Gross, 2021 NY Slip Op 00632, First Dept 2-4-21

\

SLIP AND FALL.

THE NYC ADMINSTRATIVE CODE REQUIRES ABUTTING PROPERTY OWNERS TO REPAIR SIDEWALK FLAGS OVER 1/2 INCH; PLAINTIFF PRESENTED EVIDENCE THE FLAG WAS THREE INCHES; DEFENDANT'S MOTION FOR SUMMARY JUDGMENT IN THIS SIDEWALK SLIP AND FALL CASE SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The First Department, reversing Supreme Court, determined defendant's motion for summary judgment in this sidewalk slip and fall case should not have been granted. There was evidence the sidewalk flag was three inches high and the NYC Administrative Code requires the abutting property owner to repair any flags over 1/2 inch:

The Administrative Code of the City of New York requires owners of real property abutting any sidewalk to maintain that sidewalk in a reasonably safe condition, which includes repaving, repairing and replacing defective sidewalk flags (Administrative Code § 7-210[3]). Furthermore, property owners are specifically required to, at their own cost and expense, repave or repair any portion of the sidewalk that constitutes a tripping hazard where "the vertical grade differential between adjacent sidewalk flags is greater than or equal to one half inch" ,,, ,

Plaintiff testified at the 50-h hearing that he tripped on a raised sidewalk flag that was approximately three inches higher than the adjacent flag, There is also photographic evidence that shows a visibly raised sidewalk flag in the area he identified as where his accident occurred. Tropper v Henry St. Settlement, 2021 NY Slip Op 00397, First Dept 1-26-21

SLIP AND FALL.

THE TREE WELL COULD HAVE CONTRIBUTED TO PLAINTIFF'S SLIP AND FALL; THE CITY'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (FIRST DEPT).

The First Department, reversing Supreme Court, determined the city's motion for summary judgment in this slip and fall case should not have been granted. Plaintiff alleged he fell into a hole between a tree well and the sidewalk. The city is responsible for maintaining tree wells:

The City's motion for summary judgment was improperly granted in this action where plaintiff was injured when he tripped and fell in a hole between a tree well and the sidewalk. According to plaintiff, the dirt in the tree well was lower than the sidewalk. The City had the obligation to maintain the tree well located in the sidewalk in a safe condition … . The size, shape, configuration and location of the Big Apple Map's line markings in the same area of the sunken tree well, which indicate a raised or uneven portion of the sidewalk, "raise an issue of fact as to whether the City had prior written notice of the particular defect" … . Although plaintiff's testimony and averments in regard to the precise precipitating cause of his fall are somewhat inconsistent, his consistent statements that a hole in an area between the sidewalk and tree well was a factor in causing him to fall raise triable issues as to whether a tree well defect contributed to his fall. Castro v 243 E. 138th St., LLC, 2021 NY Slip Op 00107, First Dept 1-12-21

THIRD-PARTY ASSAULT.

THE PROPERTY OWNERS AND THE SECURITY COMPANY WERE PROPERLY FOUND LIABLE FOR PLAINTIFF'S SEVERE INJURIES CAUSED BY TWELVE-YEAR-OLD BOYS WHO THREW A SHOPPING CART OVER A FOURTH FLOOR RAILING STRIKING PLAINTIFF ON THE GROUND BELOW (FIRST DEPT).

The First Department, ordering a new trial on damages if the plaintiffs do not stipulate to a reduction from $14.5 to $10 million, determined the defendant property

owners and the security company (PSS) were properly found liable for the injuries caused by two twelve-year-old boys who threw a shopping cart over a fourth floor railing onto plaintiff on the ground below. There had been prior incidents where items were thrown over the railing and down an escalator:

… [T]he jury heard evidence that the Owner Defendants had notice of a recurring hazardous condition at the premises, namely, that youngsters frequented the location and threw various items off the elevated structure. According to witnesses and security log entries, young people threw such items as candy, food, rocks, glass bottles and garbage. Additionally, there was documentary evidence that 20 days before plaintiff's accident, several youths had thrown a shopping cart down the escalator. Yet, according to testimony by one of defendant's managers, the Owner Defendants did not put into place any remedial measures, such as raising the height of the rails, increasing the number of security guards or putting up warning signs, despite having notice of the recurring dangerous condition. Thus, we decline to disturb the jury's findings apportioning liability 65% against Owner Defendants and 25% against defendant PSS. Hedges v Planned Sec. Serv. Inc., 2021 NY Slip Op 00117, First Dept 1-12-21

TRAFFIC ACCIDENTS.

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT IN THIS PEDESTRIAN-VEHICLE ACCIDENT CASE WAS PREMATURE; PLAINTIFF HAD NOT YET BEEN DEPOSED (FIRST DEPT).

The First Department, reversing Supreme Court, determined plaintiff's motion for summary judgment in this pedestrian-vehicle accident case was premature because plaintiff had not been deposed:

Plaintiff alleges that after crossing Pearl Street at the intersection with Whitehall Street he was struck from behind by defendants' box truck, while he was on the curb/lip of the sidewalk. According to the affidavit of the driver, defendant Rosado, plaintiff was distracted by talking on a cell phone, and walked into the side of the truck while it was already making a right turn.

While plaintiff was not required to demonstrate the absence of comparative negligence on his part, his motion was premature in that defendants did not have the opportunity to depose him … . Bey v Rosado, 2021 NY Slip Op 01840, First Dept 3-25-21

WRONGFUL DEATH.

PLAINTIFF'S DECEDENT, A POLICE OFFICER SUFFERING FROM BIPOLAR DISORDER, COMMITTED SUICIDE; THE ESTATE BROUGHT A WRONGFUL DEATH ACTION AGAINST THE CITY; ALTHOUGH THE FACTS SUPPORTED AN EMPLOYMENT DISCRIMINATION CLAIM, THE COMPLAINT DID NOT ALLEGE HUMAN RIGHTS LAW CAUSES OF ACTION; THE COMPLAINT WAS PROPERLY DISMISSED (FIRST DEPT).

The First Department, in a full-fledged opinion by Justice Acosta. determined plaintiff's decedent (Benitez), a police officer who committed suicide, was disabled by bipolar disorder and was entitled to accommodation under the state and city Human Rights Law. However, because the estate brought a wrongful death action, and did not allege Human Rights Law discrimination causes of action, the complaint was properly dismissed:

… [P]laintiff conceded that this case "ha[d] been primarily brought on a claim of negligence," that it had not interposed separate statutory causes of action, and that "this [wa]s a negligence c[ase], not a c[ase] based on discriminatory practices." …

Inasmuch as plaintiff did not raise any Human Rights Law violations for failure to accommodate, we are constrained to affirm … . Supreme Court correctly concluded that defendants did not owe Benitez a duty to prevent him from committing suicide. A defendant owes such a duty where it is either "a facility such as a hospital or jail which is in actual physical custody of an individual" or "an institution or mental health professional with sufficient expertise to detect suicidal tendencies and with the control necessary to care for the person's well-being" … . Here, defendants had neither "actual physical custody" of the decedent nor "the control necessary to care for [his] well-being" before his suicide … . Furthermore, a defendant only breaches

its duty to prevent a decedent's suicide when it "fails to take reasonable steps to prevent a reasonably foreseeable suicide … ," and there is no evidence in this case that the decedent's suicide was "reasonably foreseeable" … .

On appeal, plaintiff argues that the NYPD failed to accommodate Benitez under, among other statutes, the City Human Rights Law (City HRL). However, plaintiff improperly raises elements of disability discrimination in the context of a wrongful death action. Benitez v City of New York, 2021 NY Slip Op 00617, First Dept 2-4-21

ZONING.

SUPREME COURT SHOULD HAVE DEFERRED TO THE NYC BOARD OF STANDARDS AND APPEALS' INTERPRETATION OF AN AMBIGUOUS ZONING RESOLUTION WHICH ALLOWED THE CONSTRUCTION OF A 55 STORY CONDOMINIUM BUILDING; THE BUILDING IS COMPLETE AND THE DOCTRINE OF MOOTNESS APPLIES TO PRECLUDE THE APPEAL (FIRST DEPT).

The First Department, in a full-fledged opinion by Justice Singh, reversing Supreme Court, determined Supreme Court should have deferred o the judgment of the NYC Board of Standards and Appeals (BSA) which allowed the construction of a 55 story condominium building. At issue was an ambiguous Zoning Resolution and the relationship between zoning lots and tax lots. The First Department held that the BSA had the necessary expertise to interpret the relevant statute and Supreme Court should have allowed the BSA's interpretation to stand. In addition, the First Department found that the mootness doctrine had not been waived and the doctrine applied to the appeal because the building was fully completed and so steps to halt construction had been taken during the lengthy litigation:

The BSA's interpretation of the relevant subdivision was "neither irrational, unreasonable nor inconsistent with the governing statutes" … . It rationally interpreted the resolution and properly considered Amsterdam's reliance on the DOB's [NYC Department of Building's] longstanding Minkin Memo and the history of the block, as several other buildings on the block were issued certificates of

occupancy, even though they also include partial tax lots. “When an agency adopts a construction which is then followed for ‘a long period of time,’ such interpretation ‘is entitled to great weight and may not be ignored’” … . …

“[T]he doctrine of mootness is invoked where a change in circumstances prevents a court from rendering a decision that would effectively determine an actual controversy”… . In the construction context, “several factors [are] significant in evaluating claims of mootness[,] [c]hief among them [being] a challenger’s failure to seek preliminary injunctive relief or otherwise preserve the status quo to prevent construction from commencing or continuing during the pendency of the litigation” … . Matter of Committee for Environmentally Sound Dev. v Amsterdam Ave. Redevelopment Assoc. LLC, 2021 NY Slip Op 01228, First Dept 3-2-21

Copyright © 2021 New York Appellate Digest.