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Negligence
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BEDBUGS.

THE MOTION FOR A JUDGMENT AS A MATTER OF LAW (CPLR 4401) FINDING THE NYC HOUSING AUTHORITY LIABLE FOR A BEDBUG INFESTATION SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the motion for a judgment as a matter law (CPLR 4401), finding the NYC Housing Authority (NYCHA) liable for a bedbug infestation of plaintiffs' apartments, should not have been granted:

A motion pursuant to CPLR 4401 should not be granted unless, affording the party opposing the motion every inference which may properly be drawn from the facts presented, and viewing the evidence in the light most favorable to the nonmovant, there is no rational process by which the jury could find for the nonmovant against the moving party … . A court considering a motion for a directed verdict "must not 'engage in a weighing of the evidence,' nor may it direct a verdict where 'the facts are in dispute, or where different inferences may be drawn or the credibility of witnesses is in question'" … .

… [T]he evidence adduced at trial, viewed in the light most favorable to NYCHA, did not establish that there is no rational process by which the jury could find in favor of NYCHA … . The evidence included the plaintiffs' testimony, as well as the parties' competing expert testimony regarding the appropriate protocols for the treatment of a bedbug infestation and competing conclusions by the expert witnesses as to whether NYCHA's bedbug eradication efforts were appropriate. Although a landlord's violation of a municipal ordinance, including, as relevant here, Administrative Code of the City of New York §§ 27-2017 and 27-2018, may constitute some evidence of negligence for the jury to take into account, it does not constitute negligence per se … . Aponte v New York City Hous. Auth., 2021 NY Slip Op 05114, Second Dept 9-29-21

Practice Point: The violation of a municipal ordinance is some evidence of negligence, it is not negligence per se which would support a judgment as a matter of law.

LABOR LAW-CONSTRUCTION LAW, WORKERS' COMPENSATION, COLLATERAL ESTOPPEL.

THE LABOR-LAW CONSTRUCTION-ACCIDENT ACTION WAS PRECLUDED BY THE RESULT OF THE PRIOR WORKERS' COMPENSATION HEARING UNDER THE DOCTRINE OF COLLATERAL ESTOPPEL; THE MOTION TO AMEND THE ANSWER TO ADD THE COLLATERAL ESTOPPEL DEFENSE WAS PROPERLY GRANTED, EVEN THOUGH THE MOTION WAS MADE AFTER THE NOTE OF ISSUE WAS FILED (SECOND DEPT).

The Second Department, in a full-fledged opinion by Justice Dillon, determined the Labor Law 240(1), 241(6) and 200 action was precluded by the doctrine of collateral estoppel based upon the result of a Workers' Compensation hearing. Plaintiff alleged a hoist at a construction site malfunctioned causing knee injuries. Plaintiff was represented by an attorney at the Workers' Compensation hearing and witnesses were cross-examined. The Administrative Law Judge (ALJ) concluded that the incident (hoist malfunction) never occurred. In addition, the Second Department held that the motion to amend the answer to add the collateral estoppel defense, made after the note of issue was filed, was properly granted. Plaintiff could not have been surprised by the defense and suffered no prejudice from the late amendment:

Determinations rendered by quasi-judicial administrative agencies may qualify for collateral estoppel effect so long as the requirements of the doctrine [identity of issues and a full and fair opportunity to contest the controlling decision] are satisfied. Determinations of the Workers' Compensation Board are potentially within the scope of the doctrine … . * * *

… [T]he defendants met their burden of establishing, prima facie, their entitlement to judgment as a matter of law on the ground that the plaintiff's action was barred by the doctrine of collateral estoppel. The ALJ's findings, as affirmed by the Workers' Compensation Board, established as a matter of fact that the accident claimed by the plaintiff did not occur, or did not occur in the described manner as would cause injury. That finding is material and, in fact, pivotal, to the core viability of any personal injury action that the plaintiff could pursue in a court at law regarding

the same incident … . Lennon v 56th & Park(NY) Owner, LLC, 2021 NY Slip Op 04972, Second Dept 9-15-21

Practice Point: Here claimant was represented by counsel at the Workers' Compensation hearing and witnesses were presented and cross-examined. The administrative law judge concluded the accident never occurred. The plaintiff was collaterally estopped from bringing a Labor Law-Construction Law action based on the same alleged incident.

MUNICIPAL LAW, IMMUNITY.

QUESTIONS OF FACT PRECLUDED SUMMARY JUDGMENT IN THIS ACTION AGAINST THE TOWN; TOWN POLICE HAD CONFISCATED PLAINTIFF'S DECEDENT'S HUSBAND'S GUN AFTER SHE TOLD THE POLICE HE HAD ASSAULTED HER; THE TOWN SUBSEQUENTLY RETURNED THE GUN TO HER HUSBAND AFTER LEARNING HE WAS A RETIRED POLICE OFFICER; HER HUSBAND THEN SHOT AND KILLED PLAINTIFF'S DECEDENT AND TOOK HIS OWN LIFE (SECOND DEPT).

The Second Department determined the town's motion for summary judgment was properly denied. Plaintiff's decedent had called the town police and told them her husband had assaulted her and that she feared for her life. The town police confiscated her husband's gun. The town returned the gun upon learning the husband was a retired police officer, even though he was not licensed to possess a gun in New York. He shot and killed plaintiff's decedent and then took his own life:

Government action, if discretionary, may not be a basis for liability, while ministerial actions may be, but only if they violate a special duty owed to the plaintiff, apart from any duty to the public in general … . Here … the return of the firearm … was not a discretionary function. [Decedent's husband] did not, … produce a license to possess the gun in the State of New York, and did not produce the proper identification under the Law Enforcement Officers Safety Act … . * * *

… [T]he evidence demonstrated the existence of triable issues of fact as to whether the Town, through its police officers, voluntarily assumed a duty on behalf of the

decedent when they confiscated [the] gun in response to the decedent's alleged report that [her husband] had physically assaulted her.

… The Town was not entitled to summary judgment … on the ground that [decedent"s husband's] shooting of the decedent was an intervening act that severed the causal connection between the Town's alleged negligence … and the injuries and death to the decedent … . An intervening act may not serve as a superseding cause, and relieve an actor of responsibility, where the risk of the intervening act occurring is the very same risk which renders the actor negligent … . Santaiti v Town of Ramapo, 2021 NY Slip Op 04986, Second Dept 9-15-21

Practice Point: A municipality may be liable for a ministerial (as opposed to a discretionary) act, here the return of a confiscated firearm to a retired police office (who used it to kill his wife), if the ministerial act violated a special duty owed to the plaintiff. There was a question of fact whether the police owed plaintiff's decedent a special duty based upon their confiscation of the fireman after she had previously alleged an assault by her husband.

SLIP AND FALL, ESPINAL, LAUNCH AN INSTRUMENT OF HARM.

THE "BUILDING" DEFENDANTS AND THE COMPANY WHICH INSTALLED AND MAINTAINED THE AIR CONDITIONING UNIT WHICH ALLEGEDLY LEAKED WATER ON THE FLOOR WERE NOT ENTITLED TO SUMMARY JUDGMENT IN THIS SLIP AND FALL CASE; THE LANDLORD DID NOT DEMONSTRATE IT WAS AN OUT-OF-POSSESSION LANDLORD; THE "BUILDING" DEFENDANTS DID NOT DEMONSTRATE THEY DID NOT HAVE ACTUAL OR CONSTRUCTIVE KNOWLEDGE OF THE CONDITION; AND THE COMPANY WHICH INSTALLED AND MAINTAINED THE AIR CONDITIONER DID NOT SHOW IT DID NOT LAUNCH AND INSTRUMENT OF HARM.

The Second Department, reversing Supreme Court, determined the summary judgment motions by several defendants in this slip and fall case should not have been granted in this slip and fall case. Plaintiff alleged she slipped on water dripping from and air conditioning unit in the break room. The landlord did not demonstrate it was an out-of-possession landlord. The defendants failed to show they did not have

actual of constructive notice of the condition. Superior, the company which installed the air conditioner (HVAC system], did not show that it did not launch an instrument of harm:

An out-of-possession landlord and its agent may be liable for injuries occurring on its premises if it has "retained control over the premises and has a duty imposed by statute or assumed by contract or a course of conduct" to perform maintenance and repairs … . … [The defendants] failed to establish … that they were out-of-possession landlords, that they did not assume a duty by course of conduct to maintain the area of the building at issue, including the HVAC system, and that they relinquished control over the premises to such a degree so as to extinguish their duty to maintain the premises … . * * *

… Superior's submissions demonstrated that it entered into a contract with the … defendants' general contractor to install the HVAC system, that the installation was completed approximately eight months before the plaintiff's alleged slip and fall, and that, subsequently, it entered into a contract … to service and maintain at least a part of that HVAC system, and this contract was in effect at the time of the accident. Superior failed to establish … that the source of the leak at issue was not the HVAC system. Superior also failed to eliminate all triable issues of fact as to whether it launched an instrument of harm by creating the alleged recurring condition through its negligent installation or maintenance of the HVAC system … . Taliana v Hines REIT Three Huntington Quadrangle, LLC, 2021 NY Slip Op 05138, Second Dept 9-29-21

Practice Point: Here plaintiff slipped and fell on water which had dripped from an air conditioner. The company which installed and maintained the air conditioner could be liable for the slip and fall despite the absence of a contractual relationship with the plaintiff if the company is deemed to have launched an instrument of harm (Espinal theory).

SLIP AND FALL, ESPINAL, LAUNCH AN INSTRUMENT OF HARM.

QUESTION OF FACT WHETHER A CONTRACTOR WAS LIABLE TO A SUBCONTRACTOR FOR LAUNCHING AN INSTRUMENT OF HARM; THE SUBCONTRACTOR WAS INJURED ATTEMPTING TO FIX THE PROBLEM ALLEGEDLY CREATED BY THE CONTRACTOR (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, determined there was a question of fact whether a contractor, Home Crafts, launched an instrument of harm such that the contractor was liable to a subcontractor, Catalano, who fell from a ladder when attempting to fix the problem. Home Craft had ordered that sheet metal be placed over a chimney during the installation of gas fireplace inserts. The sheet metal caused smoke to back up when the fireplace was tested. Catalano fell when taking the sheet metal off the chimney:

… "[A] contractor may be said to have assumed a duty of care and, thus, be potentially liable in tort, to third persons when the contracting party, in failing to exercise reasonable care in the performance of its duties, launches a force or instrument of harm" … .

Here, Home Crafts failed to establish, prima facie, that it did not launch a force or instrument of harm by directing Catalano to seal the chimney, without alerting the other contractors that the fireplace at issue was rendered inoperable due to the inability to ventilate smoke … . Santibanez v North Shore Land Alliance, Inc., 2021 NY Slip Op 04921, Second Dept 9-1-21

Practice Point: Here a contractor may be liable to a subcontractor under an Espinal theory (for launching an instrument of harm). The contractor had ordered that sheet metal be placed over a chimney during the installation of gas fireplace inserts, causing smoke to back up. Plaintiff subcontractor fell attempting to remove the sheet metal.

SLIP AND FALL, FIREFIGHTERS.

PLAINTIFF FIREFIGHTER ALLEGED DEBRIS ON STAIRS IN DEFENDANT'S HOME CAUSED HIM TO FALL WHILE FIGHTING A FIRE; THE DEBRIS DID NOT VIOLATE THE NYC ADMINISTRATIVE CODE SO THE GENERAL MUNICIPAL LAW 205-A CAUSE OF ACTION WAS PROPERLY DISMISSED; HOWEVER THE COMMON LAW NEGLIGENCE CAUSE OF ACTION SHOULD NOT HAVE BEEN DISMISSED (SECOND DEPT).

The Second Department, modifying Supreme Court, determined the plaintiff firefighter's General Municipal Law 205-a action was properly dismissed, but the common law negligence action against the owner of the home where plaintiff fell while fighting a fire should not have been dismissed. Plaintiff alleged debris on a stairway caused the fall. The General Municipal Law 205-a cause of action was dismissed because the debris was not a structural defect and did not therefore violate the NYC Administrative Code:

… Supreme Court properly granted that branch of the defendant's motion which was for summary judgment dismissing so much of the cause of action pursuant to General Municipal Law § 205-a as was predicated on violations of Administrative Code of the City of New York §§ 28-301.1 and 29-107.5 i… . The defendant demonstrated, prima facie, that the dangerous condition which allegedly caused the plaintiff's injuries "did not constitute a specific structural or design defect giving rise to liability under the Administrative Code" … . …

… Supreme Court should not have granted that branch of the defendant's motion which was for summary judgment dismissing the cause of action alleging common-law negligence insofar as asserted against him. Contrary to the defendant's contention, the firefighter's rule does not bar this cause of action under the circumstances of this case … . The defendant failed to establish that he lacked constructive notice of the debris on the stairway, including a box, which allegedly caused the plaintiff to fall … . Pomilla v Bangiyev, 2021 NY Slip Op 04984, Second Dept 9-15-21

Practice Point: A firefighter, who was fighting a fire on defendant's property, slipped and fell on debris on a stairway. Because the debris did not violate the NYC Administrative Code, the firefighter could not sue the property owner pursuant to General Municipal Law 205-a. But the firefighter can sue the property owner under a common-law negligence theory.

TRAFFIC ACCIDENTS, PEDESTRIANS, MUNICIPAL LAW.

PLAINTIFF WAS STRUCK AFTER DEFENDANT CROSSING GUARD MOTIONED FOR HIM TO CROSS; THE CROSSING GUARD'S MOTION FOR SUMMARY JUDGMENT PROPERLY GRANTED; THE DISSENT WOULD HAVE DENIED THE MOTION (SECOND DEPT).

The Second Department, over a dissent, affirmed the grant of the crossing guard's (Gandolfo's) and the county's motion for summary judgment in this pedestrian-vehicle accident case. Defendant Gandolfo had assumed her position in the crosswalk and motioned for infant plaintiff to cross the road when plaintiff was struck by a car driven by Upton. The dissent argued there was some evidence that Gandolfo may have been negligent:

Vehicle and Traffic Law § 1102 provides that "[n]o person shall fail or refuse to comply with any lawful order or direction of any police officer or flagperson or other person duly empowered to regulate traffic." Here, the County defendants … [submitted] transcripts of the deposition testimony of Gandolfo, Upton, and an eyewitness to the accident, which demonstrated that Upton's actions were the sole proximate cause of the accident. Gandolfo testified that, upon seeing the infant at the southern corner of the intersection from her post on the northern corner, she entered the crosswalk, and, upon reaching the middle, raised her stop sign toward traffic traveling east on Montauk Highway, and her gloved hand toward traffic traveling west, checked in both directions two times for approaching vehicles, and seeing none, nodded to the infant to enter the crosswalk. Gandolfo further testified that she heard Upton's vehicle, which was traveling east on Montauk Highway, before she saw it, and that, despite Gandolfo's presence in the crosswalk, Upton failed to stop her vehicle, and struck the infant as he had almost reached the middle of the crosswalk. The eyewitness testified that, after dropping her child off at the

high school, she was waiting for the infant to walk through the crosswalk before making a right turn onto Montauk Highway, and the crossing guard, dressed in a crossing guard uniform, was in the middle of the crosswalk holding a stop sign, when the infant was struck as he approached the middle of the crosswalk. During her deposition, Upton, who frequently traveled the route where the accident occurred, testified that, prior to striking the infant, she saw Gandolfo in the road, holding up her stop sign, but did not see the infant until after her vehicle struck him. Christopher W. v County of Suffolk, 2021 NY Slip Op 04922, Second Dept 9-1-21