NEW YORK APPELLATE DIGEST, LLC

Personal Injury
Reversal Newsletter
May 2022

An Organized Compilation of the Summaries of Selected Decisions Addressing Personal Injury (Negligence, Labor Law, Workers' Compensation), Mostly Reversals, Released by Our New York State Appellate Courts and Posted on the New York Appellate Digest Website in May 2022, Distilled to Practice Points, One or Two Sentences Each. The Entries in the Table of Contents Link to the Practice Points Which Link to the Decisions on the Official New York Courts Website. Click on "Table of Contents" in the Header on Any Page to Return There. Right Click on the Citations to Keep Your Place in the Reversal Newsletter.

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Vitucci v Durst Pyramid LLC, 2022 NY Slip Op 02968, First Dept 5-3-22

Practice Point: Here plaintiff fell attempting to stand on the edge of a bathtub to install a shower-curtain rod. The majority concluded the edge of the bathtub was the equivalent of a scaffold and plaintiff's fall was covered under Labor Law 240(1). Two dissenters argued the job could have been performed from ground level.

LABOR LAW-CONSTRUCTION LAW, SUBCONTRACTOR LIABILITY.

ALTHOUGH PLAINTIFF FELL FROM THE SCAFFOLDING SYSTEM CONSTRUCTED BY SWING, A SUBCONTRATOR, PLAINTIFF'S LABOR LAW 240(1) AND 241(6) CAUSES OF ACTION AGAINST SWING SHOULD HAVE BEEN DISMISSED; SWING WAS NOT A CONTRACTOR OR OWNER, OR A CONTRACTOR'S OR OWNER'S STATUTORY AGENT, WITHIN THE MEANING OF THE STATUTES (FIRST DEPT).

Guevara-Ayala v Trump Palace/Parc LLC, 2022 NY Slip Op 03049, First Dept 5-5-22

Practice Point: Here the subcontractor which constructed the scaffolding from which plaintiff fell was not a contractor or owner, or a contractor's or owner's

statutory agent within the meaning of Labor Law 240(1) or 241(6). Therefore the Labor Law 240(1) and 241(6) causes of action against the subcontractor should have been dismissed.

LABOR LAW-CONSTRUCTION LAW, CONTRACT LAW, INDEMNIFICATION CLAUSE.

THE INDEMNIFICATION CLAUSE IN THIS LADDER-FALL CASE STATED THAT THE CONTRACTOR FOR WHOM THE INJURED PLAINTIFF WORKED WOULD HOLD THE "OWNER'S AGENT" HARMLESS AND DID NOT MENTION THE PROPERTY OWNER; THE CONTRACT MUST BE STRICTLY CONSTRUED; THE PROPERTY OWNER'S INDEMNIFICATION ACTION AGAINST THE CONTRACTOR SHOULD HAVE BEEN DISMISSED (FIRST DEPT).

Tavarez v LIC Dev. Owner, L.P., 2022 NY Slip Op 03339, First Dept 5-19-22

Practice Point: Indemnification clauses in contracts must be strictly construed. Here the contract said the contractor for whom the injured plaintiff worked would hold harmless the "owner's agent" and did not mention the owner. Therefore the owner's action against the contractor for indemnification should have been dismissed.

LABOR LAW-CONSTRUCTION LAW.

PLAINTIFF ALLEGEDLY TRIPPED AND FELL CARRYING A PIPE DOWN A PLYWOOD RAMP IN THIS LABOR LAW 200 ACTION; THERE WERE QUESTIONS OF FACT WHETHER THE RAMP CONSTITUTED A DANGEROUS CONDITION AND WHETHER THE DEFENDANTS HAD CONSTRUCTIVE NOTICE OF IT (FIRST DEPT).

Jackson v Hunter Roberts Constr., L.L.C., 2022 NY Slip Op 03321, First Dept 5-19-22

Practice Point: The First Department in this Labor Law 200 action noted that a conflict between the plaintiff's testimony and several of defendants' witnesses on the issue of constructive notice of the allegedly dangerous condition which caused plaintiff's slip and fall was not a sufficient ground for granting defendants' summary judgment motion. The conflict merely raised a credibility issue for trial which is not appropriately determined at the summary judgment stage.

LABOR LAW-CONSTRUCTION LAW.

PLAINTIFF FELL DOWN AN OPEN, UNGUARDED MANHOLE AS HE ATTEMPTED TO STEP OVER IT; PLAINTIFF'S ACTION WAS NOT THE SOLE PROXIMATE CAUSE OF THE FALL BECAUSE THERE WAS NO PROTECTIVE RAILING AROUND THE MANHOLE (FIRST DEPT).

Piccone v Metropolitan Tr. Auth., 2022 NY Slip Op 03458, First Dept 5-26-22

Practice Point: A defense to a Labor Law 240(1) construction-accident cause of action is that the plaintiff's own act or omission was the sole proximate cause of the accident. Here, even if plaintiff's attempt to step over the open manhole was a proximate cause of his fall, the absence of a protective railing around the manhole was also a proximate cause. Plaintiff's comparative negligence is not considered in a Labor Law 240(1) cause of action.

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

PLAINTIFF'S SUMMARY JUDGMENT MOTION ON HIS LABOR LAW 241(6) CAUSE OF ACTION SHOULD HAVE BEEN DENIED BECAUSE IT WAS BASED ON EVIDENCE FIRST PRESENTED IN REPLY; PLAINTIFF WAS COLLATERALY ESTOPPED FROM CLAIMING TRAUMATIC BRAIN INJURY AND COGNITIVE DISORDER BY THE RULING IN HIS WORKERS' COMPENSATION CASE (FIRST DEPT).

Douglas v Tishman Constr. Corp., 2022 NY Slip Op 03344, First Dept 5-24-22

Practice Point: Evidence first presented in reply and which does not address anything raised by the other party's opposition papers should not be considered by the court. A ruling in a Workers' Compensation case, here rejecting the worker's traumatic brain injury and cognitive disorder claims, may preclude the same claims in a Labor Law action pursuant to the collateral estoppel doctrine.

NEGLIGENCE, SLIP AND FALL, CAUSE OF FALL.

PLAINTIFF IN THIS SLIP AND FALL CASE DID NOT SEE THE CONDITION THAT CAUSED HIM TO FALL NEAR A SINK IN DEFENDANTS' BATHROOM, BUT HIS PANTS WERE WET AFTER THE FALL; DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON THE GROUND THAT PLAINTIFF COULD NOT IDENTIFY THE CAUSE OF HIS FALL SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

Redendo v Central Ave. Chrysler Jeep, Inc., 2022 NY Slip Op 03411, Second Dept 5-25-22

Practice Point: Plaintiff did not see the condition which caused him to fall near a sink in defendants' bathroom, but his pants were wet after the fall. Defendants

were not entitled to summary judgment on the ground the plaintiff could not identify the cause of his fall.

NEGLIGENCE, SLIP AND FALL, CONSTRUCTIVE NOTICE.

DEFENDANTS DID NOT DEMONSTRATE THEY DID NOT HAVE CONSTRUCTIVE NOTICE OF THE CONDITION OF THE STAIRS ALLEGED TO HAVE CAUSED PLAINTIFF'S SLIP AND FALL BECAUSE THEY OFFERED NO PROOF OF WHEN THE STAIRS WERE LAST INSPECTED (SECOND DEPT).

Weiss v Bay Club, 2022 NY Slip Op 03026, Second Dept 5-4-22

Practice Point: In a slip and fall case, to warrant summary judgment the defendant must show it did not have constructive notice of the dangerous condition by demonstrating that the area of the fall was inspected close in time to the incident.

NEGLIGENCE, SLIP AND FALL, CONSTRUCTIVE NOTICE.

DEFENDANTS PRESENTED NO PROOF OF WHEN THE AREA OF THE SLIP AND FALL WAS LAST INSPECTED; THERFORE DEFENDANTS DID NOT DEMONSTRATE A LACK OF CONSTRUCTIVE NOTICE (SECOND DEPT).

Ferrer v 120 Union Ave., LLC, 2022 NY Slip Op 03096, Second Dept 5-11-22

Practice Point: For years hundreds of cases were reversed because there was no evidence of when the area of a slip and fall was last inspected by a defendant and therefore defendant did not demonstrate a lack of constructive notice and was not entitled to summary judgment. Now there are just a few cases reversed for this reason in a given year. The bar has learned this lesson.

NEGLIGENCE, SLIP AND FALL, CONTRACTOR LIABILTY.

A CONTRACTOR WHICH CREATES A DANGEROUS CONDITION ON A PUBLIC SIDEWALK MAY BE LIABLE FOR A SLIP AND FALL BY A MEMBER OF THE PUBLIC (SECOND DEPT).

Pizzolorusso v Metro Mech., LLC, 2022 NY Slip Op 03018, Second Dept 5-4-22

Practice Point: Contactors which create a dangerous condition on a public sidewalk or road may be liable to a member of the public who is injured by the dangerous condition. The theory is similar to the "launch an instrument of harm" theory of contractor liability under the Espinal case.

NEGLIGENCE, SLIP AND FALL, LACK OF CONSTRUCTIVE NOTICE.

RARE SLIP AND FALL WON BY THE DEFENDANT AT SUMMARY JUDGMENT BY DEMONSTRATING A LACK OF CONSTRUCTIVE NOTICE OF THE PRESENCE OF THE BOX WHICH ALLEGEDLY CAUSED PLAINTIFF'S FALL (FIRST DEPT).

Rodriguez v New York City Hous. Auth., 2022 NY Slip Op 03461, First Dept 5-26-22

Practice Point: In this slip and fall case, the defendant, at the summary judgment stage, presented evidence, including the plaintiff's deposition testimony, which demonstrated the box which allegedly caused plaintiff's fall was not in the walkway long enough to raise a question of fact whether defendant was or should have been aware of it.

NEGLIGENCE, SLIP AND FALL, STORM IN PROGRESS, EXPERT OPINION.

DEFENDANT PROPERTY OWNER DEMONSTRATED THAT THE STORM IN PROGRESS DOCTRINE APPLIED IN THIS SLIP AND FALL CASE (A PROPERTY OWNER WILL NOT BE LIABLE FOR A SNOW AND ICE CONDITION UNTIL A REASONABLE TIME AFTER THE PRECIPITATION HAS STOPPED); THE BURDEN THEN SHIFTED TO PLAINTIFF TO SHOW DEFENDANT'S EFFORT TO REMOVE SNOW HOURS BEFORE THE FALL CREATED THE DANGEROUS CONDITION; TO MEET THAT BURDEN AN EXPERT AFFIDAVIT SHOULD HAVE BEEN, BUT WAS NOT, SUBMITTED (FIRST DEPT).

Colon v Site A – Wash. Hgts., 2022 NY Slip Op 03173, First Dept 5-12-22

Practice Point: Here in this ice and snow slip and fall case, the defendant property owner presented prima facie proof that the storm-in-progress doctrine applied because it was snowing hours before plaintiff fell and was still snowing when plaintiff fell. The burden then shifted to the plaintiff to show that defendant's snow removal efforts undertaken hours before the fall exacerbated the dangerous condition. Because plaintiff did not submit an expert affidavit on that issue, plaintiff's burden of proof was not met.

NEGLIGENCE, TRAFFIC ACCIDENTS, ROADWAY DESIGN.

THE NEGLIGENT ROADWAY DESIGN CAUSE OF ACTION IN THIS TRAFFIC ACCIDENT CASE SHOULD NOT HAVE BEEN DISMISSED; PLAINTIFFS ALLEGED THE ABSENCE OF TURNOUTS FOR DISABLED VEHICLES CREATED A DANGEROUS CONDITION (FIRST DEPT).

Chowdhury v Phillips, 2022 NY Slip Op 03067, First Dept 5-10-22

Practice Point: Where, as here, the municipality (or the state) has undertaken studies which concluded a roadway design, here the absence of turnouts for

disabled vehicles, created a dangerous condition, the city (or the state) will be liable for an accident caused by that dangerous condition.

NEGLIGENCE, TRAFFIC ACCIDENTS, SOVEREIGN IMMUNITY.

PLAINTIFF WAS STRUCK BY A NEW JERSEY TRANSIT CORP (NJT) BUS IN NEW YORK; NJT IS AN ARM OF THE STATE OF NEW JERSEY AND THE SOVEREIGN IMMUNITY DOCTRINE APPLIES; HOWEVER, UNDER NEW JERSEY LAW PLANTIFF CANNOT SUE IN NEW JERSEY BECAUSE THE CAUSE OF ACTION DID NOT ARISE THERE; APPLYING THE FORUM NON CONVENIENS DOCTRINE AS AN ANALYTICAL FRAMEWORK, PLAINTIFF'S NEW YORK LAWSUIT WAS ALLOWED TO GO FORWARD (FIRST DEPT).

Colt v New Jersey Tr. Corp., 2022 NY Slip Op 03343, First Dept 5-24-22

Practice Point: A bus operated by the New Jersey Transit Corp (NJT) struck plaintiff in New York. NJT is an arm of the state of New Jersey to which the sovereign immunity doctrine applies. But, under New Jersey law, the suit cannot be brought in New Jersey. After analyzing the case using the forum non coveniens criteria, the First Department allowed the New York lawsuit to go forward.

NEGLIGENCE, TRAFFIC ACCICENTS, VEHICLE AND TRAFFIC LAW, GRAVES AMENDMENT, LIABILITY OF LESSOR.

PLAINTIFF DID NOT DEMONSTRATE THE GRAVES AMENDMENT, WHICH RELIEVES THE OWNER OF A LEASED VEHICLE FROM LIABILITY FOR A TRAFFIC ACCIDENT, DID NOT APPLY TO THE DEFENDANT OWNER; THEREFORE PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

Keys v PV Holding Corp., 2022 NY Slip Op 03105, Second Dept 5-11-22

Practice Point: If the owner of a leased vehicle is not negligent (i.e., improper maintenance, etc.), the Graves Amendment relieves the owner of liability for a traffic accident involving the leased vehicle. Here the plaintiff did not demonstrate the Graves Amendment didn't apply. Therefore the burden to prove the amendment did apply never shifted to the defendant vehicle-owner and plaintiff's motion for summary judgment should not have been granted.

NEGLIGENCE, TRAFFIC ACCIDENTS, VEHICLE AND TRAFFIC LAW.

DEFENDANT ATTEMPTED A LEFT TURN IN VIOLATION OF VEHICLE AND TRAFFIC LAW 1141; PLANTIFF'S MOTION FOR SUMMARY JUDGMENT IN THIS INTERSECTION TRAFFIC-ACCIDENT CASE SHOULD HAVE BEEN GRANTED (FIRST DEPT).

Lindo v Katz, 2022 NY Slip Op 03379, Second Dept 5-25-22

Practice Point: A left turn in violation of Vehicle and Traffic Law 1141 is negligence per se.

NEGLIGENCE, TRAFFIC ACCIDENTS.

ALTHOUGH PLAINTIFF WAS STRUCK IN THE ON-COMING LANE WHILE ATTEMPTING A LEFT TURN IN AN INTERSECTION, THERE WERE QUESTIONS OF FACT WHETHER DEFENDANT SHOULD HAVE SEEN THE PLAINTIFF (SECOND DEPT).

Blake v Francis, 2022 NY Slip Op 02974, Second Dept 5-4-22

Practice Point: Although plaintiff may have violated the Vehicle and Traffic Law by making a left turn in the path of defendant's car, there can be more than one proximate cause of an accident. Here there was a question of fact whether defendant should have seen the plaintiff as he attempted the turn.

NEGLIGENT-HIRING, DOCTOR EMPLOYED BY HOSPITAL, PATIENT ASSAULTS.

PLAINTIFF IN THIS NEGLIGENT-HIRING ACTION AGAINST THE HOSPITAL WHICH EMPLOYED A DOCTOR WHO ALLEGEDLY SEXUALLY ASSAULTED HER AND OTHER PATIENTS SOUGHT DISCOVERY; THE IDENTITIES OF THE OTHER ASSAULTED PATIENTS WERE NOT PROTECTED BY THE DOCTOR-PATIENT PRIVILEGE; PARTY STATEMENTS WERE NOT PROTECTED BY THE QUALITY ASSURANCE PRIVILEGE; AND PLAINTIFF WAS ENTITLED TO THE NAMES OF THE DOCTOR'S COWORKERS (FIRST DEPT).

Newman v Mount Sinai Med. Ctr., Inc., 2022 NY Slip Op 03327, First Dept 5-19-22

Practice Point: Here plaintiff was allegedly sexually assaulted by a doctor who pled guilty to assaulting other patients. Plaintiff sued the hospital which employed the doctor under a negligent hiring and retention theory. The names of the other assaulted patients were not protected by the physician-patient privilege. Party

statements were not protected by the quality assurance privilege. And plaintiff was entitled to the names of the doctor's coworkers.

PRODUCTS LIABILITY, ROUTER, SEVERED THUMB.

IN THIS PRODUCTS LIABILITY ACTION WHERE A ROUTER SEVERED PLAINTIFF'S THUMB, THE FAILURE-TO-WARN CAUSE OF ACTION BASED ON THE MANUAL SHOULD HAVE BEEN DISMISSED BECAUSE PLANTIFF NEVER READ IT; THE GENERALIZED FAILURE-TO-WARN CAUSE OF ACTION PROPERLY SURVIVED SUMMARY JUDGMENT; DISAGREEING WITH THE SECOND DEPARTMENT, THE DESIGN-DEFECT CAUSE OF ACTION BASED ON THE LACK OF AN INTERLOCK DEVICE PROPERLY SURVIVED SUMMARY JUDGMENT (FIRST DEPT).

Vasquez v Ridge Tool Pattern Co., 2022 NY Slip Op 03488, First Dept 5-31-22

Practice Point: In this products liability case where plaintiff lost a thumb using a router, there was a question of fact whether plaintiff was familiar enough with the danger of amputation that the defendant should be relieved of liability for the failure to warn. Here the First Department, disagreeing with the Second Department, determined the absence of an interlock device which would shut the router down raised a question of fact on the design-defect cause of action.