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BATTERY, INMATES, CORRECTIONS OFFICERS, EMPLOYMENT LAW, RESPONDEAT SUPERIOR.

THE ASSAULT AND BATTERY OF CLAIMANT-INMATE BY CORRECTIONS OFFICERS OCCURRED WITHIN THE SCOPE OF THE OFFICERS' EMPLOYMENT AND WAS REASONABLY FORESEEABLE; THEREFORE THE STATE, AS THE OFFICERS' EMPLOYER, COULD BE LIABLE FOR THE ASSAULT AND BATTERY UNDER THE DOCTRINE OF RESPONDEAT SUPERIOR (THIRD DEPT).

The Third Department, reversing the Court of Claims, determined the alleged assault and battery by corrections officers occurred within the scope of the officers' employment at the correctional facility and was reasonably foreseeable. Therefore the state could be liable under the doctrine of respondeat superior. The Court of Claims had held the assault was conduct outside the scope of the officers' employment and the state therefore was not liable:

… [W]hile it is our view that the correction officers' use of force was excessive, the ensuing investigations of the incident effectively condoned the conduct of the correction officers and tacitly found them to be engaged in actions that were within the scope of employment … . To this end, it was claimant that was found guilty of misbehavior for assaulting prison staff, and prison officials determined that the use of force was "consistent with Departmental Rules[,] and [that] the injuries received, both by staff and the involved [incarcerated individual] are accounted for." This evidence reflects that prison officials determined that the conduct of the correction officers was appropriate under the circumstances and fell within the scope of employment. Finally, in light of claimant's … report accusing Poupore [one of the corrections officers involved] of inappropriate contact with claimant, which preceded the incident, and Poupore's knowledge of same, it was clearly foreseeable that a tense encounter could result during further interactions between Poupore and claimant in the context of normal employment-related activities in the prison … . Altogether, we find that the foregoing establishes by a preponderance of the evidence that the assault occurred within the scope of the correction officers' employment as a reasonably foreseeable consequence of an employment-related

activity and that the verdict in this case must be reversed on the facts and the law. Galloway v State of New York, 2023 NY Slip Op 00137, Third Dept 1-12-23

Practice Point: The assault and battery of claimant-inmate was deemed to be within the scope of the corrections officers' employment and foreseeable. Therefore the state, as the officers' employer, could be liable under the doctrine of respondeat superior.

JANUARY 12, 2023

CIVIL PROCEDURE, VERDICT SHEETS, JUROR CONFUSION.

NO ONE OBJECTED TO THE VERDICT SHEET BEFORE THE VERDICT AND JUROR AFFIDAVITS ALLEGING CONFUSION ARE NOT TO BE CONSIDERED EXCEPT IN EXTRAORDINARY CIRCUMSTANCES NOT PRESENT HERE; THE MOTION TO SET ASIDE THE VERDICT SHOULD NOT HAVE BEEN GRANTED (FIRST DEPT).

The First Department, reversing Supreme Court, determined the verdict should not have been set aside on the ground of jury confusion. No objection was made to the verdict sheet until after the verdict and the juror affidavits alleging confusion should only be considered in extraordinary circumstances:

The trial court should not have set aside the verdict based on a determination that the verdict sheet was, on its face, unclear and confusing. None of the parties or the court perceived any lack of clarity until after the jury was discharged, and there was no evidence in the trial record of substantial juror confusion … . Although the court stated that it gave no consideration to the posttrial juror affidavits stating that they believed that they were supposed to deduct from the damage award the amount of plaintiff's comparative fault, that was the only evidence of jury confusion provided by plaintiff. However, "[j]uror affidavits should not be used to impeach a jury verdict absent extraordinary circumstances," not present here … Moreover, plaintiff did not object to the verdict sheet or the charge until after the jury was discharged, and therefore, waived such objections … . Suarez v Ades, 2023 NY Slip Op 00175, First Dept 1-12-23

Practice Point: The verdict should not have been set aside on jury-confusion grounds. No one objected to the verdict sheet before the verdict and the juror affidavits alleging confusion should only be considered in extraordinary circumstances not present in this case.

JANUARY 12, 2023

CIVIL PROCEDURE, MOTION TO DISMISS, DOCUMENTARY EVIDENCE.

THE EVIDENCE SUBMITTED IN SUPPORT OF THE MOTION TO DISMISS WAS NOT "DOCUMENTARY EVIDENCE" WITHIN THE MEANING OF CPLR 3211(A)(1); THE MOTION SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the defendant-employer's motion to dismiss in this traffic accident case should not have been granted. The employer argued the defendant-employee was driving his own car and was not operating the car in the course of his employment. The evidence submitted by the employer was not "documentary evidence" which would support a motion to dismiss:

"A motion to dismiss on the ground that the action is barred by documentary evidence pursuant to CPLR 3211(a)(1) may be granted only where the documentary evidence utterly refutes the plaintiff's factual allegations, conclusively establishing a defense as a matter of law" … . "[T]o be considered 'documentary,' evidence must be unambiguous and of undisputed authenticity" … . "[J]udicial records, as well as documents reflecting out-of-court transactions such as mortgages, deeds, contracts, and any other papers, the contents of which are essentially undeniable, would qualify as documentary evidence in the proper case" … . "Neither affidavits, deposition testimony, nor letters are considered documentary evidence within the intendment of CPLR 3211(a)(1)" … . Davis v Henry, 2023 NY Slip Op 00076, Second Dept 1-11-23

Practice Point: "Documentary evidence" which will support a motion to dismiss include mortgages, deeds, contracts, etc., not affidavits, deposition testimony or letters.

JANUARY 11, 2023

EMPLOYMENT LAW, HUMAN RIGHTS LAW, LABOR LAW, DISCRIMINATION.

PLAINTIFF STATED CAUSES OF ACTION FOR EMPLOYMENT DISCRIMINATION AND VIOLATIONS OF THE LABOR LAW (FIRST DEPT).

The First Department, reversing Supreme Court, determined plaintiff had stated causes of action for employment discrimination, failure to pay overtime, and failure to pay weekly:

… [P]laintiff has sufficiently stated a cause of action for employment discrimination under both the New York State and New York City Human Rights Laws … . Plaintiff alleges that she is a member of a protected class; that she was qualified for the position by, among other things, having a decade of experience in leadership roles; and that she was subject to an adverse employment action under circumstances giving rise to an inference of discrimination … . Specifically, plaintiff, a Black woman, alleges that her supervisor … , irritated that she had telephoned Human Resources for advice, allegedly stated to her the night before her termination, "Why did you call HR? Blacks . . . I should have never hired her."

… [W]e find that she has sufficiently stated a claim for unpaid overtime under the Labor Law by alleging that she worked more than 40 hours per week and that defendants never paid her for the overtime (CPLR 3013 …).

Plaintiff's claim based on defendants' failure to pay her weekly also is sufficiently pleaded, as she alleges that she was a nonexempt employee under Labor Law § 190, and that defendants were required to pay her each week as a manual worker under New York Labor Law § 191. Kirby v Carlo's Bakery 42nd & 8th LLC, 2023 NY Slip Op 00059, First Dept 1-10-23

Practice Point: Here plaintiff stated causes of action for employment discrimination (a racist remark just prior to her termination), as well as failure to pay overtime and failure to pay weekly in violation of the Labor Law.

JANUARY 10, 2023

NEGLIGENCE, ATTORNEYS, DISCOVERY DISPUTE, AFFIRMATION OF GOOD FAITH.

PLAINTIFFS' COUNSEL'S GOOD-FAITH AFFIRMATION DID NOT INCLUDE DETAILS OF ANY EFFORTS TO RESOLVE THE DISCOVERY ISSUE AND WAS THEREFORE INADEQUATE; PLAINTIFFS' MOTION TO COMPEL DEFENDANT TO SUBMIT TO A DEPOSITION UNDER THREAT OF PRECLUSION SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the motion compelling defendant to appear for a deposition under threat of preclusion should not have been granted because plaintiffs' counsel's good-faith affirmation was inadequate:

Pursuant to 22 NYCRR 202.7(a) and (c), a motion relating to disclosure must be accompanied by an affirmation from moving counsel attesting to a good faith effort to resolve the issues raised in the motion, including the time, place, and nature of the consultation as well as the issues discussed. Here, the affirmation of good faith submitted by the plaintiffs' counsel in support of their motion to compel disclosure and for other related relief failed to provide any detail of their efforts to resolve the issues. Therefore, the plaintiffs' motion should have been denied … . Muchnik v Mendez Trucking, Inc., 2023 NY Slip Op 00100, Second Dept 1-11-23

Practice Pont: Here the affidavit plaintiffs' counsel submitted did not detail the efforts made to resolve the discovery issue and was therefore inadequate. Therefore Supreme Court should not have granted plaintiffs' motion to compel defendant's deposition under threat of preclusion.

JANUARY 11, 2023

NEGLIGENCE, DAMAGES, EVIDENCE, PRIOR INJURY.

MEDICAL (SURGICAL) RECORDS IN A NO-FAULT FILE RELATED TO A PRIOR INJURY SUFFERED BY PLAINTIFF SHOULD NOT HAVE BEEN ADMITTED IN THIS DAMAGES TRIAL; NEW TRIAL ON DAMAGES ORDERED (FIRST DEPT).

The First Department, reversing the damages judgment and ordering a new trial, determined medical records included the the no-fault file regarding a prior injury suffered by plaintiff should not have been admitted:

The court … should not have allowed into evidence the operative and pathology reports from the 2002 surgical procedure that were contained in the file of the no-fault insurance carrier. While the no-fault file was properly admitted as a business record under CPLR 4518(a), the reports therein were not created by the carrier and, thus, were inadmissible … . There was no evidence of a relationship between the carrier and the surgeon or the hospital where the procedure was performed so as to permit the reports to remain as part of the carrier's file … . Basden v Liberty Lines Tr., Inc., 2023 NY Slip Op 00050, First Dept 1-10-22

Practice Pont: Although the no-fault file re: a prior accident in which plaintiff was injured was admissible, the surgical records included in the file were not. New trial on damages ordered.

JANUARY 10, 2023

NEGLIGENCE, SLIP AND FALL, INDEPENDENT MEDICAL EXAMINATION.

PLAINTIFF SLIPPED AND FELL COMING OUT OF THE SHOWER, INJURING HER GENITAL AND PELVIC AREAS; DEFENDANTS WERE ENTITLED TO AN INDEPENDENT MEDICAL EXAMINATION WHICH MIRRORED THE EXAM DONE BY PLAINTIFF'S OWN PHYSICIAN, INCLUDING A GYNECOLOGICAL EXAM AND A FULL PELVIC EXAM; SUPREME COURT HAD DENIED THE FULL PELVIC EXAM; THERE WAS AN EXTENSIVE DISSENT (FIRST DEPT).

The First Department, in a full-fledged opinion by Justice Renwick, over a full-fledged dissenting opinion, reversing (modifying) Supreme Court, determined defendants in this slip and fall case was entitled to an independent medical examination (IME) of plaintiff which included both a gynecological exam and a full pelvic exam, conducted by a female doctor. Plaintiff alleged she slipped and fell coming out of a shower, injuring her genital and pelvic areas. Supreme Court had allowed the gynecological exam but not the pelvic exam:

… [W]hat we cannot overlook is that plaintiff, who is seeking substantial damages from defendants, has already gone through a comprehensive gynecological examination by her treating physician, without any medically reported adverse effects. The prior comprehensive gynecological exam clearly included a pelvic examination, as indicated by the treating physician's own finding of pelvic- related injuries. Indeed, the treating physician categorized the proposed pelvic examination as a routine practice (i.e., "classic pelvic exam techniques") … .

… [W]e find that plaintiff cannot raise her concerns as a bar to similar tests by the party she charges with responsibility for her current condition and injuries. Defendants do not have to rely upon previous pelvic examinations conducted by plaintiff's treating physician … . Absent any support for the claim that the pelvic examination would be harmful, defendants are entitled to conduct their own pelvic examination for the purpose of refutation or confirmation of plaintiff's alleged serious and permanent injuries, and their correlation to plaintiff's current symptoms.

… [A]pplying basic principles of CPLR discovery to require a plaintiff, who puts her gynecological condition at issue, to submit to an IME in the form of a gynecological examination that includes a routine pelvic examination, is …

consistent with our role as judges to be fair and balanced even in the most difficult cases. A plaintiff who has voluntarily submitted to a routine pelvic examination by her own treating physician without adverse effects should be required to undergo a similar examination that is material and necessary to defend against her claims that she sustained serious gynecological injuries. Pettinato v EQR-Rivertower, LLC, 2023 NY Slip Op 00068, First Dept 1-10-23

Practice Point: Here plaintiff fell coming out of the shower injuring her genital and pelvic areas. Defendants requested an independent medical examination (IME) which mirrored the exam done by plaintiff's physician. The motion court allowed a gynecological exam but denied the full pelvic exam. Because plaintiff's physician had conducted a full pelvic exam to determine the injuries, defendants were entitled to conduct their own full pelvic exam.

JANUARY 10, 2023

NEGLIGENCE, SLIP AND FALL, MUNICIPAL LAW.

THE PETITION FOR LEAVE TO FILE A LATE NOTICE OF CLAIM IN THIS ROAD-DEFECT SLIP AND FALL CASE SHOULD NOT HAVE BEEN GRANTED; THE NINE-MONTH DELAY WAS NOT EXPLAINED; THE CITIY DID NOT HAVE TIMELY NOTICE OF THE POTENTIAL LAWSUIT; AND PETITIONER DID NOT SHOW THE CITY WOULD NOT BE PREJUDICED BY THE DELAY (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the petition for leave to file a late notice of claim in this road-defect slip and fall case should not have been granted:

… [T]he petitioner's initial delay in serving a notice of claim upon the City was reasonable, as she provided evidence that she was incapacitated until April 2019 … . However, the petitioner failed to demonstrate a reasonable excuse for the additional nine-month delay between the time she was released from the hospital and the time she commenced this proceeding for leave to serve a late notice of claim … .

… [T]he evidence submitted in support of the petition failed to establish that the City acquired actual knowledge of the essential facts constituting the claim within 90 days after the claim arose or a reasonable time thereafter … . The police accident report, the NYPD investigative documents, and the FOIL requests to the NYPD and the DOT did not contain facts from which it can be "readily inferred that a potentially actionable wrong had been committed" by the City … .

In addition, the petitioner failed to satisfy her initial burden of demonstrating that the City would not be substantially prejudiced in maintaining a defense on the merits as a result of the delay … . Matter of Salazar v City of New York, 2023 NY Slip Op 00095, Second Dept 1-11-23

Practice Point: Here the petition for leave to file a late notice of claim should not have been granted. The nine-month delay was not explained; the city did not have timely notice of the potential lawsuit, and petitioner did not show the city would not be prejudiced by the delay.

JANUARY 11, 2023

NEGLIGENCE, SLIP AND FALL, OUT-OF-POSSESSION LANDLORD.

THE TERMS OF THE LEASE DID NOT DEMONSTRATE DEFENDANT OUT-OF-POSSESSION LANDLORD DID NOT HAVE A DUTY TO MAKE NONSTRUCTURAL FLOOR REPAIRS; THE LANDLORD'S MOTION FOR SUMMARY JUDGMENT IN THIS SLIP AND FALL CASE SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court in this slip and fall case, determined the terms of the lease raised a question of fact whether the out-of-possession landlord was required to repair nonstructural floor defects:

"An out-of-possession landlord is not liable for injuries that occur on its premises unless the landlord has retained control over the premises and has a 'duty imposed by statute or assumed by contract or a course of conduct'" … . "Where the terms of an agreement are unambiguous, interpretation is a question of law for the court" …

. Here, according to the lease agreement, the landlord was required to "make all structural, exterior walls, floor and roof repairs and replacements to Tenant's Building." Contrary to the defendant's contention, pursuant to the lease agreement, its duty to repair the floor was not limited to floor conditions which were structural in nature, and it failed to establish, prima facie, that it had no duty to repair the alleged nonstructural condition at issue … . Weidner v Basser-Kaufman 228, LLC, 2023 NY Slip Op 00126, Second Dept 1-11-23

Practice Point: The lease provided the out-of-possession landlord was required to "make all structural, exterior walls, floor and roof repairs and replacements to Tenant's Building." The landlord was not entitled to summary judgment in this slip and fall case on the ground the lease did not create a duty to make nonstructural floor repairs.

JANUARY 11, 2023

NEGLIGENCE, TRAFFIC ACCIDENTS, MUNICIPAL LAW, IMMUNITY.

THE CITY IS NOT ENTITLED TO GOVERNMENTAL FUNCTION IMMUNITY WHEN ENGAGED IN THE PROPRIETARY FUNCTION OF MAINTAINING ROADS; IN THE ABSENCE OF A STUDY TO DETERMINE THE RISKS OF A HIGHWAY DESIGN, THE CITY IS NOT ENTITLED TO QUALIFIED IMMUNITY; THERE WAS A QUESTION OF FACT WHETHER THE ABSENCE OF SIGNS AND ROADWAY MARKINGS WAS A PROXIMATE CAUSE OF THE INTERSECTION TRAFFIC ACCIDENT (FIRST DEPT).

The First Department noted that the city in this intersection traffic accident case was not entitled to governmental function immunity or qualified immunity. Plaintiff motorcyclist alleged the city, during roadway construction, had removed roadway markings and signs creating confusion for drivers and contributing to the accident:

The City is not entitled to governmental function immunity, as it was engaged in the proprietary function of maintaining the roadways at the time of the accident … . Nor is the City entitled to qualified immunity, given the absence of any evidence

in the record that a study of the risks involved had been conducted … . Floricic v City of New York, 2023 NY Slip Op 00055, First Dept 1-10-23

Practice Point: In this intersection traffic accident case there was a question of fact whether the city's removal of traffic markings and signs during construction was a proximate cause of the accident. Roadwork is a proprietary function so the city was not entitled to governmental function immunity. There was no study of roadway design so the city was not entitled to qualified immunity.

JANUARY 10, 2023

NEGLIGENCE, SLIP AND FALL, CIVIL PROCEDURE, WORKERS' COMPENSATION.

HERE THERE IS AN UNRESOLVED QUESTION ABOUT WHETHER PLAINTIFF IS ENTITLED TO WORKERS' COMPENSATION BENEFITS; SUPREME COURT SHOULD GRANTED SUMMARY JUDGMENT TO DEFENDANTS AND REFERRED THE MATTER TO THE WORKERS' COMPENSATION BOARD (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the matter should have been referred to the Workers' Compensation Board and therefore defendants' motion for summary judgment in this slip and fall case should have been granted:

The plaintiff allegedly was injured when she fell at certain property owned by the defendants (hereinafter the property). Thereafter, the plaintiff commenced this action against the defendants to recover damages for personal injuries. The defendants moved for summary judgment dismissing the complaint, contending that the plaintiff was injured in the course of her employment as a housekeeper/household employee at the property and that the Workers' Compensation Law provided the exclusive remedy for the damages alleged in the complaint. The Supreme Court denied the motion, as premature, without prejudice to renew.

Primary jurisdiction with respect to determinations as to the applicability of the Workers' Compensation Law has been vested in the Workers' Compensation Board (hereinafter the Board) and it is therefore inappropriate for the courts to express views with respect thereto pending determination by the Board … . "Where the issue of the applicability of the Workers' Compensation Law is in dispute, and a plaintiff fails to litigate that issue before the Board, a court should not express an opinion as to the availability of compensation, but should refer the matter to the Board because the Board's disposition of the plaintiff's compensation claim is a jurisdictional predicate to the civil action" … .

Here, the Supreme Court should have referred the matter to the Board for a hearing and determination as to whether the plaintiff is relegated to benefits under the Workers' Compensation Law … . Lall v Harnick, 2023 NY Slip Op 00080, Second Dept 1-11-23

Practice Point: Any question about whether plaintiff is entitled to Workers' Compensation benefits must be resolved by the Workers' Compensation Board. Here in this slip and fall case Supreme Court should have granted defendants' motion for summary judgment and referred the matter to the Workers' Compensation Board.

JANUARY 11, 2023

PRODUCTS LIABILITY, UNIFORM COMMERCIAL CODE, IMPLIED WARRANTIES.

THE COMPLAINT DID NOT STATE CAUSES OF ACTION FOR BREACH OF IMPLIED WARRANTY FOR A PARTICULAR PURPOSE OR BREACH OF IMPLIED WARRANTY OF MERCHANTABILITY (FIRST DEPT).

The First Department, reversing Supreme Court, determined the complaint in this products liability case did not state causes of action for breach of warranty. Plaintiff tried the product, an elastic exercise band, which was on display at the store. He secured one end of the band with his foot. That end slipped out and hit him in the eye:

… To begin, plaintiff did not assert a claim in the SAC [second amended complaint] for breach of implied warranty of fitness for a particular purpose (see UCC 2-315). In any event, such a claim requires allegations that defendants had "reason to know any particular purpose for which the goods" are used and that plaintiff relied on defendants' "skill or judgment to select or furnish [those] suitable goods" … . The SAC, however, did not allege any particular purpose of the exercise band other than its ordinary purpose for exercise, and there were no allegations that defendants knew or should have known about any particular purpose for which the goods were purchased, nor were there any allegations that plaintiff relied upon defendants' skill or judgment in selecting those goods … .

Similarly, plaintiff failed to state a claim for breach of the implied warranty of merchantability, which provides under that warranty that goods "are fit for the ordinary purposes for which such goods are used" (UCC 2-314[2][c]). To plead a breach of the implied warranty of merchantability, a plaintiff must allege that goods are defective such that they were not reasonably fit for the ordinary purpose for which they were used, that the defect in the goods was a substantial factor in causing the injury, and that the alleged defect existed at the time the goods left the manufacturer or entity in the line of distribution … . Fiuzzi v Paragon Sporting Goods Co. LLC, 2023 NY Slip Op 00054, First Dept 1-10-23

Practice Point: The complaint in this case did not state causes of action for breach of implied warrant of fitness for purpose of breach of warranty of merchantability, criteria explained.

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