NEW YORK APPELLATE DIGEST, LLC

Weekly Reversal Report
August 21 – 25, 2023

An Organized Compilation of Summaries of Selected Decisions, Mostly Reversals, Released by Our New York State Appellate Courts August 21 – 25, 2023, and Posted on the New York Appellate Digest Website on Monday August 28, 2023. The Entries in the Table of Contents Link to the Summaries Which Link to the Full 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 Report.

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ATTORNEYS, CONTRACT LAW.

HERE THE LANGUAGE OF THE CONTRACT DID NOT MAKE IT "UNMISTAKABLY CLEAR" THAT THE LOSER WOULD PAY THE WINNER'S ATTORNEY'S FEES; THEREFORE THE FEE AWARD WAS REVERSED (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, determined the plaintiffs, who prevailed in this contract action (based upon a license to repair damage to plaintiffs' property), were not entitled to have the defendants pay their attorney's fees because the contract did not explicitly so provide:

"Under the general rule, attorney's fees are incidents of litigation and a prevailing party may not collect them from the loser unless an award is authorized by agreement between the parties, statute or court rule" … . "It is not uncommon, however, for parties to a contract to include a promise by one party to hold the other harmless for a particular loss or damage and counsel fees are but another form of damage which may be indemnified in this way" … . "When a party is under no legal duty to indemnify, a contract assuming that obligation must be strictly construed to avoid reading into it a duty which the parties did not intend to be assumed" (id.). "The promise should not be found unless it can be clearly implied from the language and purpose of the entire agreement and the surrounding facts and circumstances" .. . "Inasmuch as a promise by one party to a contract to indemnify the other for attorney's fees incurred in litigation between

them is contrary to the well-understood rule that parties are responsible for their own attorney's fees, the court should not infer a party's intention to waive the benefit of the rule unless the intention to do so is unmistakably clear from the language of the promise" … .

Here, the license did not provide for attorney's fees for the instant litigation. Neither of the paragraphs in the license regarding attorney's fees provided for attorney's fees in litigation between the parties over alleged breaches of the license. Because the parties did not make "unmistakably clear" in the license that they intended to depart from the general rule that the losing party is not responsible for the winning party's attorney's fees, the Supreme Court erred in granting that branch of the plaintiffs' motion which was for an award of attorney's fees … . Giannakopoulos v Figame Realty Mgt., 2023 NY Slip Op 04364, Second Dept 8-23-23

Practice Point: The general rule is each party pays its own attorney's fees. Any contract to the contrary must be "unmistakably clear," not the case here.

AUGUST 23, 2023

CIVIL PROCEDURE, FORECLOSURE.

A HEARING IS REQUIRED TO DETERMINE WHETHER DEFENDANT WAS PROPERLY SERVED IN THIS FORECLOSURE ACTION AND WHETHER DEFENDANT SHOULD BE ESTOPPED FROM CONTESTING SERVICE (SECOND DEPT).

The Second Department, reversing Supreme Court, over a concurrence arguing defendant is estopped from contesting service of process, determined a hearing was required to determine whether defendant was properly served in this foreclosure action and whether defendant should be estopped from contesting service:

The defendant's sworn statements that he had relocated to California and was living there at the time of the purported service, coupled with a copy of the defendant's executed residential lease agreement for an apartment in Los Angeles, were sufficient to warrant a hearing to determine whether service was properly effectuated … . …

… [T]he plaintiff's evidence demonstrating that the defendant failed to update his address with the plaintiff or with the United States Postal Service was insufficient to establish, without a hearing, that the defendant should be estopped from contesting service as a matter of law … . The defendant's statement on a 2015 mortgage assistance application that the subject property was his principal residence also does not establish, as a matter of law, that the defendant is estopped from contesting that the subject property was a valid address for service of process, as the defendant's representation on the mortgage assistance application was made prior to the date when he claims to have relocated to California, and three years prior to the date of purported service at the subject property … . U.S. Bank N.A. v Henry, 2023 NY Slip Op 04391, Second Dept 8-23-23

Practice Point: A party who takes steps to avoid service of process may be estopped from contesting service. Here a hearing on the issue should have been held.

AUGUST 23, 2023

CIVIL PROCEDURE, MUNICIPAL LAW, NEGLIGENCE, SLIP AND FALL.

PLAINTIFF'S MOTION TO REARGUE MERELY REPEATED HER EARLIER ARGUMENTS AND DID NOT DEMONSTRATE THE COURT HAD OVERLOOKED OR MISUNDERSTOOD FACTS OR LAW; THE MOTION SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the motion to reargue the summary judgment motion in this slip and fall case should not have been granted. Supreme Court had originally granted the city's motion for summary judgment on the ground it did not have written notice of the dangerous condition. After the motion to reargue was granted, Supreme Court denied the city's motion. Because the motion to reargue did not present new information and merely repeated the earlier arguments, it should have been denied:

A motion for leave to reargue "shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion" (CPLR 2221[d][2]). "Motions for reargument are addressed to the sound discretion of the court which decided the prior motion and may be granted upon a showing that the

court overlooked or misapprehended the facts or law or for some other reason mistakenly arrived at its earlier decision" … . However, "[a] motion for leave to reargue is not designed to provide an unsuccessful party with successive opportunities to reargue issues previously decided or to present arguments different from those originally presented" … . * * *

In support of her motion for leave to reargue, the plaintiff merely repeated her earlier arguments and did not demonstrate that the Supreme Court had overlooked or misapprehended any matter of fact or law in rendering the prior determination … . Hallett v City of New York, 2023 NY Slip Op 04367, Second Dept 8-23-23

Practice Point: A motion to reargue must be based on law or facts allegedly overlooked or misunderstood by the court. Here the motion merely repeated earlier arguments and, therefore, the motion should not have been granted.

AUGUST 23, 2023

CONTRACT LAW, CIVIL PROCEDURE.

TO STATE A CAUSE OF ACTION FOR BREACH OF CONTRACT, THE PROVISIONS OF THE CONTRACT WHICH WERE ALLEGEDLY BREACHED MUST BE IDENTIFIED IN THE COMPLAINT; WHERE IT IS CONCEDED THAT A CONTRACT EXISTS, A CAUSE OF ACTION FOR QUASI CONTRACT MUST BE DISMISSED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the complaint did not adequately allege breach of contract or quasi contract and therefore should have been dismissed:

"[T]o state a cause of action to recover damages for a breach of contract, the plaintiff's allegations must identify the provisions of the contract that were breached" … . Here, the complaint failed to specify the provision of the parties' contract that was allegedly breached … .

… Supreme Court should have granted those branches of the defendant's motion which were pursuant to CPLR 3211(a)(7) to dismiss the causes of action alleging quasi contract sounding in restitution and unjust enrichment. The parties do not

dispute that a contract … exists … . We Transp., Inc. v Westbury Union Free Sch. Dist., 2023 NY Slip Op 04394, Second Dept 8-23-23

Practice Point: A complaint alleging breach of contract does not state a cause of action if the specific provisions alleged to have been breached are not identified.

Practice Point: Where the existence of a contract is conceded, a cause of action for quasi contract must be dismissed.

AUGUST 23, 2023

INSURANCE LAW, NEGLIGENCE, TRAFFIC ACCIDENTS.

PETITIONER WAS ENTITLED TO A HEARING TO DETERMINE WHETHER SHE TOOK ADEQUATE STEPS TO LEARN THE IDENTITY OF THE OWNER AND OPERATOR OF THE CAB IN WHICH SHE WAS A PASSENGER WHEN THE CAB WAS STRUCK BY A HIT AND RUN DRIVER; PETITIONER SOUGHT TO COMMENCE AN ACTION AGAINST THE MOTOR VEHICLE ACCIDENT INDEMNIFICATION CORPORATION (MVAIC) (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the petition to commence an action against the Motor Vehicle Accident Indemnification Corporation (MVAIC) should not have been denied without a hearing. Petitioner was injured when a hit and run driver struck the cab she was riding in. The issue was whether petitioner took adequate steps to learn the identity of the owner and operator of the cab:

MVAIC was created to compensate innocent victims of hit-and-run motor vehicle accidents … . Insurance Law § 5218 sets forth the procedure for applying to a court for leave to commence an action against MVAIC in a hit-and-run case. "This statute provides, inter alia, that a person may apply to a court for an order permitting an action against MVAIC when, as relevant here, there is a cause of action to recover damages for personal injury arising out of the ownership, maintenance, or use of a motor vehicle, and when the identity of the motor vehicle and of the operator and owner thereof cannot be ascertained" … . "If the court, after a hearing, is satisfied that, inter alia, all reasonable efforts have been made to ascertain the identity of the motor vehicle and of the owner and operator and either

the identity of the motor vehicle and the owner and operator cannot be established, then it may issue an order permitting an action against MVAIC" … .

Supreme Court should not have denied the petition and dismissed the proceeding without first having conducted a hearing. * * * Given the efforts made by the petitioner, there are issues of fact as to whether, under the circumstances, her efforts to ascertain the owner and operator of the livery cab were reasonable. Matter of Benalcazar v Motor Veh. Acc. Indem. Corp., 2023 NY Slip Op 04376, Second Dept 8-23-23

Practice Point: Before the Motor Vehicle Accident Indemnification Corporation could be sued in this traffic accident case, the injured party (petitioner) was required take adequate steps to learn the identity of the owner and operator of the cab in which she was a passenger when the cab was struck by a hit and run driver. The efforts made by petitioner here were sufficient to warrant a hearing on the issue.

AUGUST 23, 2023

LABOR LAW-CONSTRUCTION LAW, AGENCY.

PLAINTIFF IN THIS LADDER-FALL CASE DID NOT DEMONSTRATE THE BUILDING MANAGEMENT COMPANY WAS ACTING AS THE OWNER'S AGENT OR THAT IT HAD SUPERVISORY AUTHORITY OVER THE WORK; THEREFORE SUMMARY JUDGMENT AS AGAINST THE MANAGEMENT COMPANY ON THE LABOR LAW 240(1) CAUSE OF ACTION SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, determined summary judgment in this ladder-fall case should not have been granted as against the building manager (Madison) as opposed to the building owner. Plaintiff did not demonstrate Madison was acting as the owner's agent or that it had supervisory authority over the work. The court noted that the assumption-of-the-risk affirmative defense applies to sports activities, not Labor Law causes of action:

Labor Law § 240(1) imposes liability only on contractors, owners, or their agents. "An agency relationship for purposes of section 240(1) arises only when work is delegated to a third party who obtains the authority to supervise and control the

job. Where responsibility for the activity surrounding an injury was not delegated to the third party, there is no agency liability under the statute" … . Here, the plaintiff failed to demonstrate, prima facie, either that Madison was the managing agent for the building or that Madison supervised or controlled any of the work being performed in the building … . Depass v Mercer Sq., LLC, 2023 NY Slip Op 04363, Second Dept 8-23-23

Practice Point: In order to hold the building management company liable in this ladder-fall Labor Law 240(1) action, the plaintiff was required to demonstrate the management company was acting as the owner's agent and had supervisory control over the work. Plaintiff failed to do so.

AUGUST 23, 2023

LABOR LAW-CONSTRUCTION LAW.

PLAINTIFF PLACED THE BOTTOM OF THE LADDER ON SMALL LANDSCAPING ROCKS WHICH GAVE WAY CAUSING PLAINTIFF TO FALL; DEFENDANTS DID NOT DEMONSTRATE PLAINTIFF'S ACTION WAS THE SOLE PROXIMATE CAUSE OF HIS FALL AND CONTRIBUTORY NEGLIGENCE IS NOT A DEFENSE; DEFENDANTS' SUMMARY JUDGMENT MOTION SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendants' motion for summary judgment in this Labor Law 240(1) action should not have been granted on the ground plaintiff's actions were the sole proximate cause of the ladder-fall. Plaintiff had placed the bottom of the ladder on top of small "landscaping" rocks and fell when the rocks gave way:

A plaintiff may be the sole proximate cause of his or her own injuries when, acting as a recalcitrant worker, he or she "(1) 'had adequate safety devices available,' (2) 'knew both that' the safety devices 'were available and that [he or she was] expected to use them,' (3) 'chose for no good reason not to do so,' and (4) would not have been injured had [he or she] 'not made that choice'" … .

Here, UNF and Protection One [defendants] failed to establish, prima facie, that the plaintiff's actions were the sole proximate cause of his injuries … . Although the plaintiff testified at his deposition that he could have placed the ladder in the

driveway, where it would not have been resting on the rocks, he further testified that "it wasn't safe for me to place it there, because that's where trucks drive in." Further, UNF and Protection One failed to submit evidence that the plaintiff's injuries could have been prevented if the plaintiff had secured the ladder to the light pole with ties, which were available at Protection One's depot, not the job site … . Iannaccone v United Natural Foods, Inc., 2023 NY Slip Op 04372, Second Dept 8-23-23

Practice Point: In a ladder-fall Labor Law 240(1) action, the defendant's placing the ladder on small landscaping rocks which gave way was not deemed to be the sole proximate cause of the accident. Contributory negligence is not considered. Therefore defendants' summary judgment motion should not have been granted.

AUGUST 23, 2023

LABOR LAW-CONSTRUCTION LAW.

QUESTIONS OF FACT WHETHER PLAINTIFF WAS DOING REPAIR WORK OR ROUTINE MAINTENANCE PRECLUDED SUMMARY JUDGMENT ON THE LABOR LAW 240(1) AND 241(6) CAUSES OF ACTION (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, determined there were questions of fact whether defendant had notice of the dangerous condition created by oil dripping on the floor (Labor Law 200), and whether plaintiff was engaged in repair (covered by Labor Law 240(1) and 241(6)) rather than routine maintenance (not covered) when working on the garage door:

There was evidence in the record that automotive services were being performed on the defendants' premises by its employees, including changing oil filters and disposing the used oil filters into oil drums, and that oil was dripping from a spigot attached to a barrel close to the location of the plaintiff's accident. This evidence raises a triable issue of fact as to whether the defendants created a dangerous or defective condition, or had actual or constructive notice of such a condition without remedying it within a reasonable time … . …

… [T]he injured plaintiff testified at his deposition that when the accident occurred, he was attempting to remove a bearing plate in order to replace a broken

spring on the garage door. He also testified that one of the bolts of the bearing plate was stripped, so he had to widen the hole so that it would accept another bolt. …

Labor Law § 240(1) applies where an employee is engaged "in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure," but does not apply to "routine maintenance" … . Here, the evidence raises a triable issue of fact as to whether the injured plaintiff was involved in a repair or routine maintenance at the time of the accident … .

Labor Law § 241(6) applies to construction, excavation, or demolition work. Construction work is defined in 12 NYCRR 23-1.4 as including the "repair, maintenance, painting or moving of buildings or other structures." Thus, there are triable issues of fact as to whether Labor Law § 241(6) was violated in this matter … . Nusio v Legend Autorama, Ltd., 2023 NY Slip Op 04385, Second Dept 8-23-23

Practice Point: Routine maintenance is not covered by Labor Law 240(1) or 241(6) but repair work is. Here plaintiff was working on the garage door mechanism which required replacement of a stripped bolt. There was a question of fact on the repair versus routine-maintenance question.

AUGUST 23, 2023

LABOR LAW-CONSTRUCTION LAW.

THE COLLAPSE OF A TRENCH IN WHICH PLAINTIFF WAS WORKING WAS AN ELEVATION-RELATED ACCIDENT COVERED BY LABOR LAW 240(1) (FIRST DEPT).

The First Department, in a full-fledged opinion by Justice Higgitt, reversing Supreme Court, determined the collapse of a trench in which plaintiff was working was an elevation-related accident covered by Labor Law 240(1):

… [P]laintiff's injuries were the direct consequence of defendants[']… failure to provide adequate protection against a risk arising from a physically significant elevation differential. Viewing the evidence in the light most favorable to those defendants, the trench was approximately six and a half-feet deep at the time of the incident. Plaintiff is five-and-a-half feet tall and was kneeling at the moment of the right wall's collapse. There was, therefore, well over a one-foot height differential

between the top of the earthen wall and the top of plaintiff's head. That height differential cannot be characterized as de minimis in light of the extent of that differential, the amount of dirt that poured into the trench when the right wall collapsed suddenly, and the amount of force the dirt was capable of generating … . Moreover, the earthen wall, which required securing for the purposes of the undertaking, collapsed because of the effects of gravity, and the makeshift shoring plainly failed to provide adequate protection against the risk arising from the physically significant elevation differential. The harm to plaintiff flowed directly from the application of the force of gravity to the earthen wall; plaintiff's injury is directly attributable to the risk posed by the physically-significant elevation differential … . Rivas v Seward Park Hous. Corp., 2023 NY Slip Op 04415, First Dept 8-24-23

Practice Point: The collapse of the inadequately secured wall of the trench in which plaintiff was working was an elevation-related, gravity-related accident covered by Labor Law 240(1). Plaintiff was entitled to summary judgment.

AUGUST 24, 2023

NEGLIGENCE, SLIP AND FALL.

THE DEFENDANT IN THIS SLIP AND FALL CASE DID NOT PRESENT EVIDENCE DEMONSTRATING WHEN THE AREA OF THE SLIP AND FALL WAS LAST CLEANED OR INSPECTED; ONLY EVIDENCE OF GENERAL CLEANING PRACTICES WAS PRESENTED; DEFENDANT SHOULD NOT HAVE BEEN GRANTED SUMMARY JUDGMENT (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the defendant shopping mall in this slip and fall case did not demonstrate it did not have constructive notice of the oily patch in the parking lot where plaintiff slipped and fell. Plaintiff testified she saw the oily patch on the way into the mall and slipped and fell an hour later. The defendant presented evidence of its general cleaning and inspection practices, but did not demonstrate when the are was last cleaned or inspected:

To meet its burden on the issue of lack of constructive notice, a defendant is required to offer some evidence as to when the accident site was last cleaned or

inspected prior to the accident … . "Mere reference to general cleaning practices, with no evidence regarding any specific cleaning or inspection of the area in question, is insufficient to establish a lack of constructive notice"… .

Here, the defendant failed to establish, prima facie, that it did not have constructive notice of the condition that allegedly caused the plaintiff to fall . The plaintiff testified at her deposition that she saw the oily patch on the ground of the parking lot on her way into the shopping mall, approximately an hour before she slipped and fell after exiting the mall. The defendant's property manager only testified about the defendant's general cleaning and inspection procedures. Armenta v AAC Cross County Mall, LLC, 2023 NY Slip Op 04355, Second Dept. 8-23-23

Practice Point: For years slip and fall cases were reversed on this ground (no proof when the area was last cleaned or inspected) every week, now the reversals have slowed to a trickle but still …

AUGUST 23, 2023

REAL PROPERTY TAX LAW, CIVIL PROCEDURE.

THE REAL PROPERTY TAX LAW (RPTL), NOT THE CPLR, CONTROLS THE COMMENCEMENT OF A REAL PROPERTY TAX FORECLOSURE PROCEEDING (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the city in this property tax foreclosure proceeding properly followed the procedure for commencing the action prescribed in the Real Property Tax Law (RPTL) (as opposed to the CPLR procedure):

Real Property Tax Law provides that a proceeding for the foreclosure of tax liens in rem shall be commenced in the manner provided in Real Property Tax Law article 11, title 3 (see id. § 1120). Title 3 sets forth specific requirements for public notice by publication and personal notice to owners and other persons with a right, title, or interest in affected properties (see id. §§ 1124, 1125). RPTL 1125(3)(c) provides that the service required by that section "shall be deemed to be equivalent to the service of a notice of petition pursuant to [CPLR 403]" … . Thus, the City was required to comply with the service requirements set forth in the Real Property Tax Law, rather than those set forth in the CPLR … . The City established that it

satisfied the notice and service requirements set forth in the Real Property Tax Law and that it is entitled to a default judgment with respect to the parcels of real property identified in the City's motion (see RPTL 1131, 1136[3]). Matter of Foreclosure of Tax Liens (City of Newburgh), 2023 NY Slip Op 04381, Second Dept 8-23-23

Practice Point: The procedure for commencing a real property tax foreclosure action is prescribed by the Real Property Tax Law (RPTL), not the CPLR.

AUGUST 23, 2023