NEW YORK APPELLATE DIGEST, LLC

Weekly Reversal Report
November 6 – 10, 2023

An Organized Compilation of Summaries of Selected Decisions, Mostly Reversals, Released by Our New York State Appellate Courts November 6 – 10, 2023, and Posted on the New York Appellate Digest Website on November 13, 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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The Second Department, reversing Supreme Court, determined the medical malpractice complaint should not have been dismissed. The original complaint misnamed defendant Mark Gennaro as Michael Gennaro. The amended complaint with the correct name was served after the statute of limitations had run. Pursuant to CPLR 305(c) the amended complaint should have been deemed timely served and filed nunc pro tunc:

"CPLR 305(c) authorizes the court, in its discretion, to 'allow any summons or proof of service of a summons to be amended, if a substantial right of a party against whom the summons issued is not prejudiced'" … . "'Where the motion is to cure a misnomer in the description of a party defendant, it should be granted even after the statute of limitations has run where (1) there is evidence that the correct defendant (misnamed in the original process) has in fact been properly served, and (2) the correct defendant would not be prejudiced by granting the amendment sought'" … . "While CPLR 305(c) may be used to cure a misnomer in the description of a party defendant, it cannot be used after the expiration of the statute of limitations as a device to add or substitute an entirely new defendant who was not properly served" … . "The amendment may be made nunc pro tunc" … .

Here, the evidence established that the defendant, misnamed as Michael Gennaro in the original summons and complaint, was properly served with process within 120 days after the action was timely commenced and, thus, the Supreme Court obtained jurisdiction over the defendant (see CPLR 306-b …). Moreover, there was no evidence that the defendant would be prejudiced by allowing the caption to be amended to correct the misnomer … . The defendant's contention that the plaintiff was improperly attempting to name a new defendant after the expiration of the statute of limitations, instead of merely correcting a misnomer, is without merit …

. Brewster v North Shore/LIJ Huntington Hosp., 2023 NY Slip Op 05584, Second Dept 11-8-23

Practice Point: Here the defendant was misnamed in the original complaint and the corrected complaint was not served until after the statute of limitations had run. The amended complaint should have been deemed timely served and filed nunc pro tunc pursuant to CPLR 305(c).

NOVEMBER 8, 2023

CIVIL PROCEDURE, MOTION TO INTERVENE, REAL PROPERTY ACTIONS AND PROCEEDINGS LAW (RPAPL).

US BANK AS THE CURRENT ASSIGNEE OF THE MORTGAGE SHOULD HAVE BEEN ALLOWED TO INTERVENE IN THIS ACTION TO DISCHARGE AND CANCEL THE MORTGAGE (SECOND DEPT).

The Second Department, reversing Supreme Court, determined US Bank, the current assignee of the mortgage, should have been allowed to intervene in this action to cancel and discharge the mortgage pursuant to RPAPL 1501(4):

"Upon a timely motion, a person is permitted to intervene as of right in an action involving the disposition of property where that person may be adversely affected by the judgment" (… see CPLR 1012[a][3]). Additionally, "a court, in its discretion, may permit a person to intervene, inter alia, when the person's claim or defense and the main action have a common question of law or fact" (… see CPLR 1013). "Whether intervention is sought as a matter of right under CPLR 1012(a), or as a matter of discretion under CPLR 1013, is of little practical significance since a timely motion for leave to intervene should be granted, in either event, where the intervenor has a real and substantial interest in the outcome of the proceedings" … .

Here, in support of its motion, U.S. Bank submitted evidence demonstrating, among other things, that it took possession of the note in June 2018, prior to the commencement of this action, and that it was the current assignee of the mortgage. Under the circumstances, U.S. Bank's submissions were sufficient to demonstrate that it had a real and substantial interest in the outcome of this action … . Maggi v U.S. Bank Trust, N.A., 2023 NY Slip Op 05600, Second Dept 11-8-23

Practice Point: A timely motion to intervene should be granted where the intervenor has a real and substantial interest in the outcome.

NOVEMBER 8, 2023

CONTRACT LAW, CONSTRUCTIVE TRUST, UNJUST ENRICHMENT.

PLAINTIFF RAISED QUESTIONS OF FACT ABOUT THE EXISTENCE OF AN AGREEMENT WITH DEFENDANT ABOUT EACH HAVING 50% OWNERSHIP OF TWO RESTAURANTS; DEFENDANT USED THE RESOURCES FROM THOSE RESTAURANTS TO OPEN A THIRD; PLAINTIFF'S CONSTRUCTIVE TRUST AND UNJUST ENRICHMENT CAUSES OF ACTION SHOULD NOT HAVE BEEN DISMISSED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff, in her affidavit, had raised questions of fact about the existence of a constructive trust and whether defendant was unjustly enriched. Plaintiff and defendant were in a romantic relationship. Plaintiff alleged she and defendant agreed two restaurants would be jointly owned but would be in defendant's name for tax purposes. After the relationship ended, defendant had used the resources from the two restaurants to open a third:

"To prove unjust enrichment, a party must show that the other party was enriched at his or her expense, and it is against equity and good conscience to permit that person to retain what is sought to be recovered" … . In order to impose a constructive trust, a litigant is generally required to establish four elements by clear and convincing evidence: "(1) a fiduciary or confidential relationship; (2) an express or implied promise; (3) a transfer in reliance on the promise; and (4) unjust enrichment" … . However, the four "elements . . . serve only as a guideline, and a constructive trust may still be imposed . . . provided that those factors are substantially present" … . Further, there is no requirement that the alleged promise be expressly stated; rather, "a promise may be implied or inferred from the very transaction itself" … . Courts have also "extended the transfer element to include instances where funds, time and effort were contributed in reliance on a promise to share in some interest in property, even though no transfer actually occurred" … . Canas v Oshiro, 2023 NY Slip Op 05585, Second Dept 11-8-23

Practice Point: Here plaintiff and defendant were in a romantic (i.e., a confidential) relationship. The alleged oral agreement that they each had a 50% interest in two restaurants supported plaintiff's action for constructive trust and unjust enrichment based upon defendant's using the resources from the restaurants to open a third.

NOVEMBER 8, 2023

CONVERSION, LIEN LAW.

HERE THE DEFENDANT SELF-STORAGE FACILITY DID NOT NOTIFY PLAINTIFF OF THE CHANGED SALE-DATE AND DISPOSED OF PLAINTIFF'S PROPERTY TO A THIRD PARTY AT THE TIME OF THE SALE; PLAINTIFF WAS ENTITLED TO SUMMARY JUDGMENT BASED ON DEFENDANT'S VIOLATION OF THE NOTICE PROVISIONS OF THE LIEN LAW AND DEFENDANT'S SUBSEQUENT CONVERSION OF THE PROPERTY (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff was entitled to summary judgment against defendant self-storage facility based upon defendant's violation of the notice provisions of the Lien Law and conversion of the property:

… [T]he defendants failed to satisfy the notice requirements of Lien Law § 182(7). Specifically, the notice sent to the plaintiff failed to "include the time and place" of the sale of his property … , because the sale did not occur on the date set forth in the notice sent to the plaintiff, but was instead rescheduled without notice to him. …

… [A]lthough the Supreme Court properly determined that the defendants had a valid statutory lien and possessory interest in the plaintiff's property (see Lien Law § 182[6]), such a showing is not sufficient to defeat the plaintiff's cause of action for conversion in the case at bar. The plaintiff's cause of action is not predicated upon the defendants' unauthorized refusal to relinquish possession of the property upon his demand … , but rather upon the defendants' unauthorized disposition of the property to a third party without proper notice … . Magomedov v Self Stor. Mgt., LLC, 2023 NY Slip Op 05601, Second Dept 11-8-23

Practice Point: To sell property held by a self-storage facility, the Lien Law requires that the property-owner be notified of the time and date of the sale. Here the date of the sale was changed and plaintiff was not notified of the change. The self-storage facility was liable for the Lien Law violation and for conversion (the sale if the property).

NOVEMBER 8, 2023

CRIMINAL LAW, PROBATION CONDITION.

THE "CONSENT TO SEARCH" PROBATION CONDITION WAS NOT SUPPORTED BY THE NATURE OF DEFENDANT'S OFFENSE (SECOND DEPT).

The Second Department, eliminating the "consent to search" probation condition, determined the condition was not supported by the nature of defendant's offense:

Appeal by the defendant from a judgment … convicting him of assault in the second degree, upon his plea of guilty, and sentencing him to a definite term of incarceration of one day, to be followed by a term of probation, which included as a condition Condition No. 28, requiring the defendant to consent to a search by a probation officer or a probation officer and his or her agent of his person, vehicle, and place of abode, and the seizure of any illegal drugs, drug paraphernalia, gun/firearm or other weapon, or contraband found during the search. * * *

… [T]he defendant was a first-time offender and was not armed with a weapon at the time he committed the offense. Additionally, the defendant has not been assessed as being in need of alcohol or substance abuse treatment. Under the circumstances, the consent to search condition of probation was improperly imposed because it was not individually tailored in relation to the offense, and was not, therefore, reasonably related to the defendant's rehabilitation, or necessary to ensure that the defendant will lead a law-abiding life …. . People v Mensah, 2023 NY Slip Op 05622, Second Dept 11-8-22

Practice Point: Here the nature of defendant's offense (assault second), coupled the lack of evidence that defendant abused drugs or alcohol, failed to support the "consent to search" probation condition.

NOVEMBER 8, 2023

EDUCATION-SCHOOL LAW, COLLEGE ADMINISTRATION, VIOLATION OF STUDENT CODE.

THE UNIVERSITY REVIEW BOARD'S FINDING THAT PETITIONER VIOLATED THE STUDENT CODE BY ENGAGING IN SEXUAL MISCONDUCT REVERSED, VIOLATIONS DISMISSED, RECORD EXPUNGED; THERE WAS A DISSENT (SECOND DEPT).

The Second Department, over a dissent, reversing the University Review Board, determined it was not demonstrated that petitioner, a student at Stony Brook University, violated the Student Code by engaging in sexual misconduct. The only issue before the Board and the court was whether S.G., a fellow student, consented to sex. The facts are far to detailed to fairly summarize here. The majority concluded the evidence supported S.G.'s "affirmative consent" to sex. The Student Code violations were dismissed and all references to the Board's finding are to be expunged from the petitioner's academic record. Matter of P. C. v Stony Brook Univ., 2023 NY Slip Op 05604, Second Dept 11-8-23

NOVEMBER 8, 2023

FAMILY LAW, ATTORNEYS, CUSTODY, APPEALS.

MOTHER'S PETITION FOR SOLE CUSTODY SHOULD NOT HAVE BEEN GRANTED UPON FATHER'S FAILURE TO APPEAR; FATHER'S ATTORNEY EXPLAINED FATHER'S ABSENCE AND REQUESTED AN INQUEST; AN APPEAL FROM AN ORDER ENTERED UPON A PARTY'S DEFAULT BRINGS UP FOR REVIEW ONLY THE CONTESTED MATTERS BEFORE THE TRIAL COURT (SECOND DEPT).

The Second Department, reversing Family Court, determined mother's petition for sole custody should not have been granted upon father's failure to appear. Father's attorney explained father's absence and asked that the matter be set down for an inquest. The Second Department noted that, upon appeal from an order made upon a party's default, only the contested matters before the trial court can be heard:

"A custody determination, whether made upon the default of a party or not, must always have a sound and substantial basis in the record" … . Generally, the court's

determination should be made only after "a full and plenary hearing and inquiry" … or, where a party failed to appear, after an inquest … .

Here, the Family Court granted the mother's petition to modify the prior order, upon the father's default, without receiving any testimony or other evidence, despite the fact that the father's attorney proffered a reasonable explanation for the father's absence and that the father did not have a history of missing court dates … . Under the circumstances, the court improvidently exercised its discretion in denying the application of the father's attorney to set the matter down for an inquest … . Matter of Otero v Walker, 2023 NY Slip Op 05607, Second Dept 11-8-23

Practice Point: Generally where a party defaults in a custody matter, an inquest should be held before any ruling.

Practice Point: Upon appeal from an order made upon a party's default, only the contested matters before the trial court come up for review.

NOVEMBER 8, 2023

FAMILY LAW, CHILD SUPPORT.

FATHER DID NOT DEMONSTRATE THE CHILD WAS CONSTRUCTIVELY EMANCIPATED; THEREFORE FATHER'S SUPPORT OBLIGATION SHOULD NOT HAVE BEEN TERMINATED (SECOND DEPT).

The Second Department, reversing Family Court, determined father did not meet his burden of proof in his attempt to demonstrate the constructive emancipation of the child such that his support obligation should be terminated:

"It is fundamental public policy in New York that parents are responsible for their children's support until age 21" … . "However, under the doctrine of constructive emancipation, a child of employable age who actively abandons the noncustodial parent by refusing all contact and [parental access] may forfeit any entitlement to support. A child's mere reluctance to see a parent is not abandonment" … . "[W]here it is the parent who causes a breakdown in communication with his or her child, or has made no serious effort to contact the child and exercise his or her parental access rights, the child will not be deemed to have abandoned the parent" … . "The burden of proof as to emancipation is on the party asserting it" … .

Here, contrary to the father's contention, the evidence adduced at the hearing failed to demonstrate that he made serious efforts to maintain a relationship with the child during the relevant time period, or that the child actively abandoned her relationship with him … . Matter of Rosenkrantz v Rosenkrantz, 2023 NY Slip Op 05609, Second Dept 11-8-23

Practice Point: The proof requirements for constructive emancipation of a child were not met; criteria explained.

NOVEMBER 8, 2023

FAMILY LAW, CUSTODY.

THE BIOLOGICAL MOTHER OF THE CHILD DIED BEFORE SHE AND PETITIONER WERE TO BE MARRIED; THE BIOLOGICAL FATHER ARGUED PETITIONER DID NOT HAVE STANDING TO SEEK CUSTODY AND FAMILY COURT AGREED; HOWEVER STANDING CAN BE DEMONSTRATED BY EXTRAORDINAY CIRCUMSTANCES WHICH MAY BE PRESENT; MATTER REMITTED FOR A RULING (FIRST DEPT).

The First Department, reversing Family Court, determined standing in a custody matter can be proven by extraordinary circumstances and sent the matter back for a ruling. The child's mother died unexpectedly before she and petitioner were to be married. The petition was denied for lack of standing. However, standing can be proven by extraordinary circumstance which may be demonstrated here:

As a prerequisite to seeking custody or visitation with a child, a party must establish standing. The party may establish standing (1) as a parent pursuant to Domestic Relations Law § 70; (2) as a sibling for visitation pursuant to Domestic Relations Law § 71; (3) as a grandparent for visitation or custody pursuant to Domestic Relations Law § 72; or (4) by showing extraordinary circumstances pursuant to Matter of Bennett v Jeffreys (40 NY2d 543 [1976]) … . * * *

Family Court erred in dismissing petitioner's custody and visitation petitions without permitting petitioner the opportunity to present evidence supporting her argument that she had standing based on extraordinary circumstances. Indeed, the Referee stated on the record during the hearing that she agreed with the biological father's position that petitioner could only present extraordinary circumstances

evidence after she established that she had standing. This is an error of law, as extraordinary circumstances is one of several bases for standing to seek custody and visitation.

Extraordinary circumstances may be found where there has been "a judicial finding of surrender, abandonment, unfitness, persistent neglect, unfortunate or involuntary extended disruption of custody, or other equivalent but rare extraordinary circumstance which would drastically affect the welfare of the child" … . Matter of Lashawn K. v Administration for Children's Servs., 2023 NY Slip Op 05662, First Dept 11-9-23

Practice Point: Standing to bring a custody petition may be demonstrated by extraordinary circumstances. Here the biological mother died unexpectedly before she and petitioner were to be married. The biological father successfully argued petitioner did not have standing. The matter was sent back for Family Court for a ruling on whether petitioner demonstrated standing based upon extraordinary circumstances.

NOVEMBER 9, 2023

FORECLOSURE, STANDING, EVIDENCE.

THE AFFIDAVIT WHICH PURPORTED TO DEMONSTRATE PLAINTIFF BANK HAD STANDING TO BRING THE FORECLOSURE ACTION REFERRED TO BUSINESS RECORDS WHICH WERE NOT ATTACHED, RENDERING THE AFFIDAVIT INADMISSIBLE HEARSAY (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff bank did not demonstrate standing to bring the foreclosure action. The affidavit which purported to establish standing referred to business records which were not attached:

… [T]he plaintiff failed to attach the business records upon which Delpesche [an employee of the loan servicing company] relied upon in his affidavit. "Although the foundation for . . . admission of a business record [usually is] provided by the testimony of the custodian, [the author or some other witness familiar with the practices and procedures of the particular business,] 'it is the business record itself, not the foundational affidavit, that serves as proof of the matter asserted'" … .

"'Without submission of the business records, a witness's testimony as to the contents of the records is inadmissible hearsay'" … . Since the plaintiff failed to attach the business records upon which Delpesche relied in his affidavit, his assertions based upon those records constituted inadmissible hearsay … . Wells Fargo Bank, N.A. v Carrington, 2023 NY Slip Op 05632, Second Dept 11-8-23

Practice Point: Where an affidavit refers to and relies on business records which are not attached, the affidavit is inadmissible hearsay.

NOVEMBER 8, 2023

FREEDOM OF INFORMATION LAW (FOIL), MUNICIPAL LAW.

THE FOIL REQUEST FOR THE NUMBER AND LOCATION OF LICENSE PLATE READERS (LPR'S) SHOULD HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, over a dissent, determined the FOIL request for the location of license plate readers (LPR's) should have been granted. The majority decision and the dissent include comprehensive discussions of the relevant caselaw which are far too extensive to fairly summarize here:

In light of the presumption of accessability and the narrow interpretation we are required to apply to a claimed exemption, under the circumstances of this case, we find that the respondents failed to sustain their burden of proving that the law enforcement records exemption pursuant to Public Officers Law § 87(2)(e)(iv) applied to the records pertaining to the number and location of the LPRs sought by the petitioner's request … . Matter of Lane v Port Wash. Police Dist., 2023 NY Slip Op 05605, Second Dept 11-8-23

Practice Point: Here the majority's and dissent's discussion of FOIL request for the number and location of license plate readers (LPR's), which the majority held should have been granted, includes a comprehensive discussion of the relevant caselaw.

NOVEMBER 8, 2023

LABOR LAW-CONSTRUCTION LAW, NEGLIGENCE.

PLAINTIFF TRIPPED OVER A PIECE OF PLYWOOD COVERING A SMALL HOLE; DEFENDANT DID NOT DEMONSTRATE THAT IT LACKED CONSTRUCTIVE NOTICE OF THE CONDITION; THE LABOR LAW 200 CAUSE OF ACTION SHOULD NOT HAVE BEEN DISMISSED (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, determined plaintiff's Labor Law 200 cause of action should not have been dismissed. Plaintiff alleged he tripped and fell when his foot stuck a piece of plywood covering a hole. Defendant did not demonstrate a lack of constructive notice of the condition:

… [T]he defendant failed to show, prima facie, that it lacked constructive knowledge of the alleged dangerous condition … since it did not submit any evidence that the plywood was a latent defect that could not have been discovered upon a reasonable inspection … . Therefore, the defendant failed to establish its prima facie entitlement to judgment as a matter of law dismissing the cause of action alleging a violation of Labor Law § 200. Freyberg v Adelphi Univ., 2023 NY Slip Op 05589, Second Dept 11-8-23

Practice Point: Labor Law 200 causes of action are analyzed under standard negligence principles. Even though the Labor Law 241(6) cause of action was properly dismissed because the Industrial Code provision did not apply to the plywood covering a small hole, the Labor Law 200 cause of action should not have been dismissed because the defendant simply did not address it. To warrant dismissal the defendant was required to demonstrate it did not have constructive knowledge of the alleged tripping hazard.

NOVEMBER 8, 2023

LABOR LAW-CONSTRUCTION LAW.

PLAINTIFF WAS ENGAGED IN AN "ALTERING" ACTIVITY COVERED BY LABOR LAW 240 AND THE ACCIDENT–AN OBJECT FALLING DOWN A MANHOLE AND STRIKING PLAINTIFF–WAS ELEVATION-RELATED (FIRST DEPT).

The First Department, reversing Supreme Court, determined plaintiff was engaged in work covered by Labor Law 240 and the accident–an object falling down a manhole and striking plaintiff–was elevation-related:

Plaintiff established that he was engaged in an "altering" activity as enumerated by Labor Law § 240(1). … [P]laintiff's work involved more than "feeding cable through a preexisting hole." Rather, it was part of a much larger, multi-worker project to install a fiber optic network through a 20-manhole structure where none had previously existed, with the ultimate goal of installing the cables into the school buildings, which would necessarily require drilling holes into the foundation of the school buildings in order to reach the communications room … . …

… [T]he vacuum that fell from ground level into the manhole and struck plaintiff on the head posed the type of elevation-related risk covered by Labor Law § 240(1) … . Keilitz v Light Tower Fiber N.Y., Inc., 2023 NY Slip Op 05661, First Dept 11-9-23

Practice Point: Here the plaintiff was installing a fiber optic network and was struck by an object which fell down the manhole he was in. He was engaged in "altering" within the meaning of Labor Law 240. The accident was elevation-related within the meaning of Labor Law 240. He was entitled to summary judgment.

NOVEMBER 9, 2023

LABOR LAW-CONSTRUCTION LAW.

THE TRIPPING HAZARD IN A WALKWAY VIOLATED THE INDUSTRIAL CODE; PLAINTIFF ENTITLED TO SUMMARY JUDGMENT ON THE LABOR LAW 241(6) CAUSE OF ACTION (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff was entitled to summary judgment on the Labor Law 241(6) cause of action. Plaintiff tripped on a bowed piece of Masonite that was in a walkway, a violation of the Industrial Code:

Labor Law § 241(6) imposes a nondelegable duty upon owners and contractors to provide reasonable and adequate protection and safety to workers by complying with specific safety rules and regulations set out in the Industrial Code (12 NYCRR) … . "To succeed on a cause of action alleging a violation of Labor Law § 241(6), a plaintiff must demonstrate that his or her injuries were proximately caused by a violation of an Industrial Code provision that is applicable under the circumstances of the accident" … . The plaintiff here relies upon 12 NYCRR 23-1.7(e)(1), which provides, in pertinent part, that "[a]ll passageways shall be kept free from accumulations of dirt and debris and from any other obstructions or conditions which could cause tripping."

The plaintiff demonstrated his prima facie entitlement to judgment as a matter of law on the issue of liability on the cause of action alleging a violation of Labor Law § 241(6) by tendering evidence establishing that while performing construction work, he fell over a tripping hazard in a passageway … , in the form of a raised or bowed piece of Masonite board, and that this unsafe condition was the proximate cause of his injuries … . Tompkins v Turner Constr. Co., 2023 NY Slip Op 05631, Second Dept 11-8-23

Practice Point: Where the proximate cause of plaintiff's injury is a condition which violates the Industrial Code, here a tripping hazard in a walkway, the plaintiff is entitled to summary judgment on a Labor Law 241(6) cause of action.

NOVEMBER 8, 2023

NEGLIGENCE, STAIRWAY FALL.

PLAINTIFF COULD NOT IDENTIFY THE CAUSE OF HIS STAIRWAY FALL BUT HE TESTIFIED HE REACHED FOR A HANDRAIL AND THERE WAS NONE; DEFENDANTS DID NOT PRESENT ANY EVIDENCE ON THE PRESENCE OR NEED FOR A HANDRAIL; THERE CAN BE MORE THAN ONE PROXIMATE CAUSE OF A FALL; DEFENDANTS WERE NOT ENTITLED TO SUMMARY JUDGMENT (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendants were not entitled to summary judgment in this stairway slip and fall case. Although plaintiff could not identify the initial cause of his fall, plaintiff, in his deposition, testified he reached for a handrail, but there was none. Defendants did not present evidence there was a handrail or a handrail was not required. In the usual case, the inability to identify the cause of a fall is fatal to the action. But here there is a question of fact whether there was an additional proximate cause of the fall, i.e., the absence of a handrail:

… [T]he defendants established, prima facie, that a jury would be required to speculate that cement dust caused the plaintiff to fall. In support of their cross-motion, they submitted the plaintiff's deposition testimony that, after his fall, he noticed concrete dust on his face, hair, and uniform. The plaintiff admitted, however, that he did not notice the cement dust before his fall or see it on the landing of the stairs after his fall, and he failed to point to any additional evidence that might create a reasonable inference that the cement dust, rather than a misstep or loss of balance, was a proximate cause of his fall.

However, "[t]here can be more than one proximate cause of an accident, and [g]enerally, it is for the trier of fact to determine the issue of proximate cause" … . Viewing the evidence in the light most favorable to the plaintiff as the nonmoving party, the defendants failed to establish that a handrail was present or was not required, or that its alleged absence was not a proximate cause of the plaintiff's injuries … . Adzei v Edward Bldrs., Inc., 2023 NY Slip Op 05580, Second Dept 11-8-23

Practice Point: Here plaintiff's inability to identify the cause of his fall was not fatal to the action. There can be more than one proximate cause of a fall. Plaintiff

testified he reached for a handrail but there was none and defendants presented no evidence of the presence or the need for a handrail.

NOVEMBER 8, 2023

REAL ESTATE BROKER FEE, CONTRACT LAW, FRAUD, TORTIOUS INTERFERENCE WITH CONTRACT.

PLAINTIFF REAL ESTATE BROKER'S CAUSES OF ACTION (SEEKING THE REAL ESTATE COMMISSION) AGAINST THE BUYERS WHO SUBSEQUENTLY BOUGHT THE PROPERTY USING A DIFFERENT BROKER SHOULD HAVE BEEN DISMISSED; THE QUANTUM MERUIT, TORTIOUS INTERFERENCE WITH CONTRACT AND FRAUD CAUSES OF ACTION WERE NOT MADE OUT (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the quantum meruit, tortious interference with contract and fraud causes of action should have been dismissed. Plaintiff, a real estate broker, had made an offer on sellers' property on behalf of the Sorkin defendants which was rejected. Subsequently the Sorkin defendants, using a different broker, made another offer on the sellers' property which was accepted. Plaintiff sued for the brokerage commission. The tortious interference with contract cause of action should have been dismissed because the Sorkins did not procure a breach of contract. The quantum meruit cause of action should have been dismissed because plaintiff was not a proximate, as opposed to a remote and indirect, link to the consummation of the sale. The fraud cause of action should have been dismissed because plaintiff could not have detrimentally relied on any alleged misrepresentation by the Sorkins that they were not longer interested in the property:

… [T]he Sorkin defendants demonstrated … that the plaintiff's sole efforts consisted of some brief contacts with the sellers and the Sorkin defendants, and that after the sellers rejected the offers obtained by the plaintiff from the Sorkin defendants, no further negotiations took place between the plaintiff and the sellers regarding a possible sale to the Sorkin defendants. Subsequently, the sellers negotiated a sale of the subject property to the Sorkin defendants through a different broker, and the sale was consummated. Consequently, the Sorkin

defendants established, prima facie, that the plaintiff was "not the direct and proximate link, as distinguished from one that is indirect and remote, between the bare introduction of the sellers to the buyers and the consummation of the sale" … . * * *

[Re: fraud:] Even if the Sorkin defendants misrepresented to the plaintiff that they were no longer interested in purchasing the subject property, there could be no "specific detrimental reliance by plaintiff on this misrepresentation, inasmuch as plaintiff could not have compelled the [Sorkin defendants] to speak with plaintiff" … . City RE Group, LLC v 2633 Ocean Realty, LLC, 2023 NY Slip Op 05586, Second Dept 11-8-23

Practice Point: Although plaintiff real estate broker briefly introduced the buyers to the sellers and submitted an offer which was rejected, plaintiff could not sue for the real estate commission when the buyers submitted another offer through another broker which was accepted. Plaintiff could not make out causes of action for quantum meruit, tortious interference with contract or fraud (based upon the allegation the buyers misrepresented to plaintiff that the were no longer interested in the property).

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