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ACCOUNTANT MALPRACTICE, FIDUCIARY DUTY, FRAUD.

THE COMPLAINT STATED CAUSES OF ACTION AGAINST AN ACCOUNTING FIRM FOR MALPRACTICE, FRAUD AND AIDING AND ABETTING BREACH OF A FIDUCIARY DUTY; BOTH MOTHER AND SON ARE OWNERS OF A RESTAURANT; IT WAS ALLEGED THE SON'S TAKING A LARGE SALARY AND RECEIVING MILLIONS IN LOANS AGAINST THE BUSINESS WERE DOCUMENTED BY THE ACCOUNTING FIRM BUT NOT DISCLOSED TO MOTHER (FIRST DEPT).

The First Department, in a full-fledged opinion by Justice Renwick, determined the malpractice, fraud and breach of fiduciary duty causes of action against defendant accounting firm should not have been dismissed. Both plaintiff Ellen and her son Kenneth are owners of a restaurant. The complaint alleged Kenneth was looting the restaurant by taking a large salary and talking out loans against the business without Ellen's knowledge. It was alleged defendant accounting firm had a duty to inform Ellen of Kenneth's financial dealings but did not. The accounting firm argued there was no duty-breach and no fraud because all of Kenneth's financial activities were documented in the accountant's records and in the business tax returns. The First Department simply held the complaint stated causes of action for accountant malpractice, fraud and aiding an abetting a breach of fiduciary duty:

> Plaintiffs' claims … are not that defendant was hired to discover Kenneth's wrongdoing, but rather that information obtained by defendant during its business interactions with Kenneth and information used by defendant in order to prepare tax returns and financial statements put defendant on notice about the impropriety of Kenneth's loans to himself such that defendant had a duty to inform plaintiffs of the questionable payments. The law is very clear that an agreement to perform unaudited services does not shield an accountant from liability because an accountant must perform all services in accordance with the standard of a reasonable accountant under similar circumstances, which includes reporting fraud that is or should be apparent … .

In addition, "[o]ne who aids and abets a breach of a fiduciary duty is liable for that breach as well, even if he or she had no independent fiduciary obligation to the allegedly injured party, if the alleged aider and abettor rendered 'substantial assistance' to the fiduciary in the course of effecting the alleged breaches of duty" … 1650 Broadway Assoc., Inc. v Sturm, 2024 NY Slip Op 01864, First Dept 4-4-24

Practice Point: An accounting firm has a duty to disclose fraud. Here the firm documented the potentially fraudulent financial activities of one of the owners of the restaurant but did not disclose those activities to the other owner. The allegations stated causes of action for accountant malpractice, fraud and aiding and abetting breach of a fiduciary duty.

APRIL 4, 2024

AFFIDAVITS OF SERVICE, AMENDMENT.

IF THE ORIGINAL PROCESS SERVER'S AFFIDAVIT OF SERVICE FAILS TO INCLUDE A STATEMENT THAT A MAILING IN COMPLIANCE WITH CPLR 308(2) WAS DONE, THE OMISSION CANNOT BE CURED BY AMENDMENT; THE AMENDED AFFIDAVIT SHOULD NOT HAVE BEEN CONSIDERED BY THE COURT (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the amended affidavit of the process server to add the mailing requirement should not have been accepted by the court. Failing to aver the complaint was mailed in the original affidavit cannot be cured by amendment:

CPLR 308(2) provides that personal service upon a natural person may be acquired "by delivering the summons within the state to a person of suitable age and discretion at the actual place of business, dwelling place or usual place of abode of the person to be served and by either mailing the summons to the person to be served at his or her last known residence or by mailing the summons by first class mail to the person to be served at his or her actual place of business" within 20 days. CPLR 308(2) requires strict compliance and the plaintiff has "the burden of

proving, by a preponderance of the credible evidence, that service was properly effected" … .* * *

… [C]ertain defects in an affidavit of service, which are related to "a defendant's substantial right to notice of the proceeding against him or her, . . . may not be corrected by an amendment" … . These defects include an erroneous address … and an erroneous mailing date … . The omission from an affidavit of service of a statement that a mailing in compliance with CPLR 308(2) was effectuated also is not amenable to correction pursuant to CPLR 305(c) … . Accordingly, the plaintiff's amended affidavit of service should not have been considered. John Doe v Mesivtha, Inc., 2024 NY Slip Op 02172 Second Dept 4-24-24

Practice Point: A process server's affidavit which does not include a statement that a mailing in compliance with CPLR 308(2) was done, the omission cannot be cured by amendment of the affidavit of service.

APRIL 24, 2024

ANTI-SLAPP, ATTORNEY'S FEES.

A DEFAMATION COMPLAINT DISMISSED FOR FAILURE TO STATE A CAUSE OF ACTION LACKS A "SUBSTANTIAL BASIS IN LAW" WITHIN THE MEANING OF THE ANTI-SLAPP LAW (FIRST DEPT).

The First Department, in a full-fledged opinion by Justice Gonzalez, over a two-justice concurrence, determined the defendants were entitled to attorney's fees pursuant to the anti-SLAPP law (see Civil Rights Law §§ 70-a, 76-a; CPLR 3211[g]-[h]). The plaintiffs sued defendant newspaper (The Daily Mail) alleging defamation and several related causes of action. Supreme Court dismissed the complaint for failure to state a cause of action. The defendants argued they were entitled to attorney's fees pursuant to the anti-SLAPP law because the action did not have a "substantial basis in law." The question on appeal was whether a complaint which was dismissed for failure to state a cause of action could still be said to have a "substantial basis in law" such that the defendants would not be able to recover their attorney's fees. The First Department answered "no:"

… [T]he "substantial basis" standard applicable under CPLR 3211(g) is more exacting than the liberal pleading standard applicable to ordinary CPLR 3211(a)(7) motions. Under the CPLR 3211(a)(7) standard, the question is whether a cognizable cause of action is manifested, presuming the complaint's factual allegations to be true, and according the pleading the benefit of every possible favorable inference … . By contrast, a court reviewing the sufficiency of a pleading under CPLR 3211(g) must look beyond the face of the pleadings to determine whether the claim alleged is supported by substantial evidence … .

… [A] complaint which fails to state a claim under CPLR 3211(a)(7) necessarily lacks a "substantial basis in law" for purposes of CPLR 3211(g) … . * * *

… [Plaintiffs'] failure to meet the CPLR 3211(a) standard necessarily establishes their failure to meet the higher CPLR 3211(g) standard. Karl Reeves, C.E.I.N.Y. Corp. v Associated Newspapers, Ltd., 2024 NY Slip Op 01898, First Dept 4-9-24

Practice Point: A complaint which does not state a cause of action lacks a "substantial basis in law" within the meaning of the anti-SLAPP law. Therefore the defendants here were entitled to recover their attorney's fees.

APRIL 9, 2024

APPEALS, SERVICE BY EMAIL, FAMILY LAW.

SERVICE OF THE ORDER APPEALED FROM BY EMAIL DOES NOT START THE TIME TO TAKE AN APPEAL; FATHER'S REQUEST FOR TELEPHONIC AND WRITTEN CONTACT WITH HIS DAUGHTER PROPERLY DENIED; FATHER WAS INCARCERATED FOR PREDATORY SEXUAL BEHAVIOR INVOLVING A CHILD ABOUT THE SAME AGE AS HIS DAUGHTER (THIRD DEPT).

The Third Department, affirming Family Court's denial of father's request for telephonic and written contact with his daughter, in a full-fledged opinion by Justice Egan, determined Family Court did not abuse its discretion. Father is incarcerated after pleading guilty to predatory sexual assault against a child, possessing a sexual performance by a child, promoting a sexual performance by a child and use of a child in a sexual performance. The victim of father's crimes was

about the same age as father's daughter and was acquainted with father's daughter. The Third Department noted that the time for perfecting father's appeal never started to run because the notice of the entry of the order appealed from was sent to father by email, which is not an accepted method of service:

… "[A]s the father was served the order by the court via email, which is not a method provided for in Family Court Act § 1113, and there is no indication that he was served by any of the methods authorized by the statute, we conclude that the time to take an appeal did not begin to run and that it cannot be said that the father's appeal is untimely" … . * * *

Family Court observed that the father pleaded guilty to sex offenses relating to a victim who was about the same age as the child at the time of the hearing — and who was, we note, acquainted with the child — and the father's testimony gave no reason to believe that he appreciated how his actions might have impacted the child. Family Court further credited the mother's testimony that she had given the child all of the father's letters after screening them for inappropriate content, and that the child had simply decided, without any interference from the mother, not to respond to them. The child was almost 13 years old at the time of the hearing and, as such, her apparent desire not to communicate with the father was entitled to some weight in assessing her best interests … . We are satisfied that, according deference to Family Court's assessment of witness credibility, the foregoing constitutes a sound and substantial basis in the record for the determination that the presumption favoring visitation with a noncustodial parent had been rebutted and that the best interests of the child would be served by limiting contact with the father to written correspondence to which the child was not required to respond … . Matter of Robert M. v Barbara L., 2024 NY Slip Op 01847, Third Dept 4-4-24

Practice Point: Service of an order by email does not start the 30-day period for taking an appeal of the order.

Practice Point: Family Court did not abuse its discretion by denying the incarcerated father's request for telephonic and written contact with his daughter. Father had pled guilty to predatory sexual behavior involving a victim about the same age as his daughter and with whom his daughter was acquainted.

APRIL 4, 2024

APPEALS, PRESERVATION OF AGAINST-THE-WEIGHT-OF-THE-EVIDENCE ARGUMENT, NO NEED FOR MOTION TO SET ASIDE VERDICT.

THE THIRD DEPARTMENT JOINS THE OTHER DEPARTMENTS IN HOLDING THAT A PLAINTIFF NEED NOT MAKE A MOTION TO SET ASIDE THE VERDICT TO PRESERVE AN "AGAINST THE WEIGHT OF THE EVIDENCE" ARGUMENT ON APPEAL (THIRD DEPT).

The Third Department, affirming the defense verdict in this medical malpractice case, joined the other appellate division departments in finding that a plaintiff may make a "verdict is against the weight of the evidence" argument on appeal without moving to set aside the verdict on that ground:

… [We now join our colleagues in our sister Departments in concluding that plaintiffs were not required to preserve their weight of the evidence contention by moving to set aside the verdict upon that basis … . A trial court has the authority to order a new trial "on its own initiative" when the verdict is contrary to the weight of the evidence (CPLR 4404 [a]), and this Court's power "is as broad as that of the trial court" … . Although we believe it remains best practice for a party to challenge a verdict upon this basis before the trial court, in light of its superior opportunity to evaluate the proof and credibility of witnesses … , we nonetheless agree that this Court is fully empowered to "order a new trial where the appellant made no motion for that relief in the trial court" … . To the extent that our prior decisions have suggested otherwise, they should no longer be followed … . Fitzpatrick v Tvetenstrand, 2024 NY Slip Op 01956, Third Dept 4-10-24

Practice Point: In this decision, the Third Department joined the other departments in holding that a plaintiff need not make a motion to set aside the verdict to preserve an "against the weight of the evidence" argument on appeal.

APRIL 11, 2024

ATTORNEYS, JUDGES, SANCTIONS.

HERE DEFENDANT ASHKENAZY'S COUNSEL TOOK POSITIONS WHICH WERE BASED UPON AN INTERPRETATION OF THE EVIDENCE; THE FACT THAT THE JUDGE DISAGREED WITH THE INTERPRETATION DID NOT WARRANT A FINDING COUNSEL ENGAGED IN FRIVOLOUS CONDUCT OR ACTED IN BAD FAITH; THE IMPOSITION OF SANCTIONS WAS REVERSED (FIRST DEPT).

The First Department, reversing Supreme Court, determined the attorney's (defendant Ashkenazy's counsel's) actions did not amount to "frivolous conduct" and did not warrant the imposition of sanctions:

Conduct is frivolous if it is "completely without merit in law," "undertaken primarily to delay or prolong the resolution of the litigation," or "asserts material factual statements that are false" (22 NYCRR 130-1.1[c]). Here, the record does not support an award of sanctions under any of the prongs. The conduct that Supreme Court found sanctionable does not rise to the level of being frivolous. Supreme Court took issue with counsel's statement that a document squarely addressing the question of timing did not exist. According to Supreme Court, based on its in camera review of documents, there were communications in which the timing of the payment would have been mentioned if it were in fact due on a date other than the five-year paydown date. Supreme Court disagreed with Ashkenazy's counsel's interpretation of the documents, and did so by relying on the absence of a statement in the documents rather than an overt statement contained in the documents. Counsel put forth its interpretation of the documents exchanged during discovery — namely, among other things, Ashkenazy's personal interpretation of the contract, Ashkenazy's deposition testimony, and the deposition testimony of Ashkenazy's drafting counsel — and then made arguments based on its interpretation. Those arguments were not completely devoid of merit. Nor is there any indication in the record that counsel's interpretation and arguments were made in bad faith „, , The fact that the court took a different view of the evidence is not grounds for sanctions…. . Talos Capital Designated Activity Co. v 257 Church Holdings LLC, 2024 NY Slip Op 01786, First Dept 4-2-24

Practice Point: As long as an attorney's argument is based upon an interpretation of the evidence which is not meritless, the attorney's argument is not frivolous or made in bad faith such that sanctions are warranted.

APRIL 2, 2024

COLLATERAL ESTOPPEL, EMPLOYMENT LAW, HUMAN RIGHTS LAW.

PLAINTIFF BROUGHT AN EMPLOYMENT DISCRIMINATION AND RETALIATION ACTION IN FEDERAL COURT; DEFENDANTS WERE AWARDED SUMMARY JUDGMENT IN THE FEDERAL ACTION; BECAUSE THE FEDERAL COURT DID NOT EXERCISE SUPPLEMENTAL JURISDICTION OVER PLAINTIFF'S NYS AND NYC HUMAN RIGHTS LAW CAUSES OF ACTION, PLAINTIFF PURSUED THEM IN STATE COURT; HOWEVER ALL THE STATE ISSUES HAD BEEN ADDRESSED IN THE FEDERAL ACTION; COLLATERAL ESTOPPEL PRECLUDED THE STATE ACTION (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Garcia, over an extensive dissenting opinion, determined that the employment discrimination and retaliation claims brought by plaintiff adjunct professor against New York University under the NYS and NYC Human Rights Law were precluded by the doctrine of collateral estoppel. Plaintiff had brought a federal action based upon the same facts which was dismissed, but the District Court declined to exercise supplemental jurisdiction over the state and city Human Rights Law causes of action. Plaintiff therefore could pursue those causes of action in state court. But because all the issues had been sufficiently dealt with by the federal court, the collateral estoppel doctrine was triggered:

The courts below properly applied our established principles of collateral estoppel in the context of the unique requirements of the City Human Rights Law. Collateral estoppel "bars the relitigation of an issue of fact or law actually litigated and resolved in a valid court determination essential to the prior judgment" and so "the determination of an essential issue is binding in a subsequent action, even if it

recurs in the context of a different claim" … . If there is identity of issues between the prior determination and the instant litigation, and the precluded party had a full and fair opportunity to contest the prior determination, collateral estoppel applies and the prior determination is binding in the subsequent action … . Russell v New York Univ., 2024 NY Slip Op 02226, CtApp 4-25-24

Practice Point: In an employment discrimination and retaliation case brought in federal court, a plaintiff can ask the federal court to exercise supplemental jurisdiction over New York State and New York City Human Rights Law causes of action. Where, as here, the federal court declines to exercise supplemental jurisdiction, the plaintiff may pursue those actions in state court. Here, because plaintiff lost the federal case, and all the issues raised in the state case were addressed in the federal case, the doctrine of collateral estoppel precluded the state action.

APRIL 25, 2024

CONSOLIDATION OF TRIALS, CONTRACT LAW, FRAUD.

A BREACH OF CONTRACT ACTION SHOULD NOT BE CONSOLIDATED WITH A TORT ACTION (FIRST DEPT).

The First Department, reversing Supreme Court, determined the breach of contract action and the fraudulent conveyance action should not have been consolidated:

In 2016, plaintiff commenced a breach of contract action against defendant eCommission Solutions, LLC (eCommission). In 2022, plaintiff commenced a fraudulent conveyance action against eCommission and its president, Paul Hoffman, and his wife, alleging that Hoffman transferred millions from eCommission to himself with the intent to defraud creditors like plaintiff.

… When one action sounds in contract and the other in tort, it is inappropriate to grant consolidation … . Indeed, the breach of contract and fraudulent conveyance actions present different questions of law and fact … . Moreover, the fraudulent conveyance action will be moot if plaintiffs fail to win the breach of contract action … . Finally, the two actions are at different stages, so that consolidation would lead to delay in trying the breach of contract action … .

Discovery in the fraudulent conveyance action should be stayed until the breach of contract action is resolved … . 3B Assoc. LLC v Ecommission Solutions, LLC, 2024 NY Slip Op 02086, First Dept 4-18-24

Practice Point: A breach of contract action should not be consolidated with a tort action (here an action for fraudulent conveyance).

APRIL 18, 2024

CONTINUING JURISDICTION, FAMILY LAW.

BECAUSE FAMILY COURT HAD EXCLUSIVE AND CONTINUING JURISDICTION OVER THIS CUSTODY CASE, MOTHER'S PETITION TO MODIFY CUSTODY SHOULD NOT HAVE BEEN SUMMARILY DISMISSED BECAUSE FATHER AND CHILD RESIDE OUT-OF-STATE (SECOND DEPT).

The Second Department, reversing Family Court, determined mother's petition to modify custody should not have summarily dismissed because father and child were living out-of-state. Because New York has exclusive and continuing jurisdiction pursuant to the Uniform Child Custody Jurisdiction and Enforcement Act, the court should have allowed mother to present evidence on any connections to New York:

Pursuant to the Uniform Child Custody Jurisdiction and Enforcement Act, codified at article 5-A of the Domestic Relations Law, a court of this state which has made an initial custody determination has exclusive, continuing jurisdiction over that determination until it finds, as is relevant here, that it should relinquish that jurisdiction because "neither the child" nor "the child and one parent" have a "significant connection" with New York, and "substantial evidence is no longer available in this state concerning the child's care, protection, training, and personal relationships" … .

… [T]he initial custody determination was rendered in New York. … Family Court should not have summarily dismissed the mother's petitions on the ground that the child was living with the father out of state, without considering whether the court

had exclusive, continuing jurisdiction pursuant to Domestic Relations Law § 76-a(1), and affording the mother an opportunity to present evidence as to that issue … . Matter of Brandon v Brady, 2024 NY Slip Op 01916, Second Dept 4-10-24

Practice Point: Where New York has exclusive and continuing jurisdiction over a custody matter pursuant to the Uniform Child Custody Jurisdiction and Enforcement Act, it is error to summarily dismiss a custody petition on the ground the child lives out-of-state. It must be determined whether there exist sufficient connections with New York to warrant hearing the case in New York.

APRIL 10, 2024

CORPORATION LAW BY ESTOPPEL.

HERE PLAINTIFF CORPORATION, RC, DID NOT EXIST WHEN THE REAL ESTATE CONTRACT WAS ENTERED AND WAS NOT FORMED FOR SEVERAL YEARS UNTIL JUST BEFORE THE INSTANT LITIGATION; BECAUSE DEFENDANT DEALT WITH RC AS A CORPORATION FOR YEARS AND RECEIVED SOME BENEFIT FROM THE CONTRACT, THE DOCTRINE OF "CORPORATION BY ESTOPPEL" PROHIBITED DEFENDANT FROM AVOIDING ITS OBLIGATIONS UNDER THE CONTRACT BY ARGUING A NONEXISTENT CORPORATION CANNOT ENTER A CONTRACT (SECOND DEPT).

The Second Department, modifying Supreme Court, determined the "corporation by estoppel" doctrine prevented defendant from arguing the real estate purchase agreement was invalid because the corporate plaintiff (RC) did not exist at the time the contract was executed. RC was eventually formed years later just before this action commenced. The defendant had dealt with RC as an incorporated entity for several years. Therefore defendant was estopped from denying RC's validity to avoid their obligations under the contract:

Generally, it is true that "'[s]ince a nonexistent entity cannot acquire rights or assume liabilities, a corporation which has not yet been formed normally lacks

capacity to enter into a contract'" … . However, under the doctrine of corporation by estoppel, "one who has recognized [an] organization as a corporation in business dealings should not be allowed to quibble or raise immaterial issues which do not concern him or her in the slightest degree or affect his or her substantial rights" …. Thus, "parties who deal with an entity holding itself out as a corporation and who receive performance from such entity are estopped from avoiding their obligations to it" … . Teva Realty, LLC v Cornaga Holding Corp., 2024 NY Slip Op 01833, Second Dept 4-3-24

Practice Point: Here plaintiff corporation did not exist when the real estate contract was entered but was formed years later just before the instant litigation was commenced. Defendant dealt with plaintiff as a corporation for years and received a benefit from the contract. The doctrine of "corporation by estoppel" prohibited defendant from arguing the contract was not valid because the corporation was not formed at the time the contract was entered.

APRIL 3, 2024

DEFAULT JUDGMENT, FORECLOSURE.

THE BANK IN THIS FORECLOSURE ACTION FAILED TO PROVIDE THE ORIGINAL LOAN DOCUMENT AND THE LOST NOTE AFFIDAVIT WAS INSUFFICIENT; THE MOTION FOR A DEFAULT JUDGMENT SHOULD HAVE BEEN DENIED, CRITERIA EXPLAINED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the bank's motion for a default judgment in this foreclosure action should not have been granted because the original loan document was not provided and the lost note affidavit was insufficient:

A plaintiff moving for leave to enter a default judgment against a defendant must submit proof of service of the summons and complaint, proof of the facts constituting the claim, and proof of the defendant's failure to answer or appear … . Pursuant to UCC 3-804, "[t]he owner of an instrument which is lost, whether by destruction, theft or otherwise, may maintain an action in his [or her] own name and recover from any party liable thereon upon due proof of his [or her] ownership,

the facts which prevent his [or her] production of the instrument and its terms." Here, the plaintiff failed to set forth the facts that prevented the production of the original home equity line of credit agreement … . The lost note affidavit submitted by the plaintiff in support of its motion, inter alia, for leave to enter a default judgment against the defendants failed to state when the search for the credit agreement occurred, did not identify who conducted the search for the credit agreement, or explain when or how the credit agreement was lost … . JPMorgan Chase Bank, N.A. v Morton, 2024 NY Slip Op 01802, Second Dept 4-3-24

Practice Point: Here in this foreclosure action, in moving for a default judgment the bank did not provide the original loan document and did not provide a sufficient lost note affidavit. The motion should have been denied, criteria explained.

APRIL 3, 2024

DISCOVERY, INSPECTION OF ACCIDENT SITE, NEGLIGENCE.

DEFENDANT CARPET AND FLOORING SUBCONTRACTOR'S REQUEST TO INSPECT THE AREA OF THE FLOOR WHERE PLAINTIFF ALLEGEDLY STEPPED INTO AN UNGUARDED VENT HOLE SHOULD HAVE BEEN GRANTED; ALTHOUGH THE VENT COVER HAD BEEN REPLACED, IT CAN NOT BE SAID THE INSPECTION WOULD BE FRUITLESS, OR THAT THE INSPECTION WOULD CAUSE UNREASONABLE ANNOYANCE, EXPENSE, EMBARRASSMENT OR OTHER PREJUDICE (FIRST DEPT).

The First Department, reversing Supreme Court, determined defendant carpet and flooring subcontractor's (S&'s) request to inspect the area of the building where plaintiff stepped into a vent hole from which a cover had been dislodged should not have been denied. Although the vent cover had been replaced, it could not be said for certain that an inspection would be fruitless:

CPLR 3101(a) provides that "[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action." The Court of Appeals has directed that the phrase "material and necessary" in this statute should be

"interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity" … . Under this standard, S&F is entitled to inspect the site of the incident giving rise to plaintiff's allegedly serious injuries.

While the replacement of the … cover might reduce the likelihood that a site inspection will produce evidence useful to S&S's defense, it does not make it certain that an inspection will be useless. … It is for S&F, not its adversary, to determine whether the inspection of the site of the accident is sufficiently likely to produce relevant information to be worth S&F's time and effort. … . …

… [A] court's power to limit otherwise proper use of a disclosure device should be exercised only for the purpose of avoiding "unreasonable annoyance, expense, embarrassment, disadvantage or other prejudice."

We fail to see how an inspection of the site of the accident giving rise to this lawsuit would impose on plaintiff, or on anyone else, any of the burdens enumerated by CPLR 3103(a) to an "unreasonable" extent. Balsamello v Structure Tone, Inc., 2024 NY Slip Op 02251, First Dept 4-25-24

Practice Point: An inspection by defendant of the area where plaintiff was injured should be allowed absent unreasonable annoyance, expense, embarrassment, disadvantage or other prejudice.

APRIL 25, 2024

FAMILY LAW, JUDGES' POWER TO ORDER TREATMENT OR COUNSELING.

THE COURT MAY ORDER A PARENT TO SUBMIT TO COUNSELING OR TREATMENT AS PART OF A CUSTODY OR PARENTAL ACCESS ORDER; BUT THE COURT MAY NOT IMPOSE SUCH CONDITIONS ON SEEKING PARENTAL ACCESS IN THE FUTURE (SECOND DEPT).

The Second Department noted that a court may order a parent to submit to counseling or treatment as part of a custody or parental access order, but the court

cannot not impose those same conditions upon seeking parental access in the future:

"A court deciding a custody proceeding may 'direct a party to submit to counseling or treatment as a component of a [parental access] or custody order'" … . Here, the Family Court properly directed the father to submit to hair follicle, drug, and alcohol testing as a component of his parental access … . However, the court should not have made the father's submission to such testing a condition to seeking future parental access … . Matter of Buskey v Alexis, 2024 NY Slip Op 01917, Second Dept 4-10-24

Practice Point: A court may impose treatment or counseling conditions in a parental access order, but cannot so condition the seeking of future parental access.

APRIL 10, 2024

FORUM SLECTION CLAUSE, CONTRACT LAW, INSURANCE LAW, WORKERS' COMPENSATION.

A FORUM SELECTION CLAUSE IN AN INSURANCE POLICY WHICH VIOLATES NEW YORK LAW IS NOT ENFORCEABLE (SECOND DEPT).

The Second Department, in a full-fledged opinion by Justice Miller, determined that the forum selection clause in an insurance policy which violates New York law is not enforceable. The opinion is comprehensive and discusses several substantive civil procedure, contract law, corporation law, insurance law, workers' compensation law and public policy issues which cannot fairly be summarized here:

This action is just one of many such actions commenced across the country alleging that the defendant Applied Underwriters, Inc. (hereinafter Applied Underwriters), and affiliated entities, all subsidiaries of Berkshire Hathaway, Inc., deceptively circumvented state laws and regulations in the marketing and sale of an unlawful workers' compensation insurance program. Here, the defendants seek to enforce a forum selection clause, in favor of Nebraska, contained in an insurance policy that New York State regulators have found violates New York law. While

parties are generally free to select a forum in which to resolve their contractual disputes, here, where it is alleged by the plaintiff, and found by New York State regulators, that New York law has been violated, a foreign corporation may not profit from such violation to the detriment of New York employers and workers. The forum selection clause contained in an illegal insurance policy is not enforceable. As a matter of public policy, New York companies shall not be compelled to litigate in Nebraska to vindicate their rights. Air-Sea Packing Group, Inc. v Applied Underwriters, Inc., 2024 NY Slip Op 02032, Second Dept 4-17-24

Practice Point: A forum selection clause (designating Nebraska as the forum) in an insurance policy which violates New York law is not enforceable.

APRIL 17, 2024

INFORMAL DISCOVERY.

AFTER PLAINTIFF'S POST-NOTE DEPOSITION SUBPOENA FOR THE NONPARTY WITNESS WAS QUASHED, PLAINTIFF OBTAINED A VOLUNTARY STATEMENT FROM THE NONPARTY WITNESS; OBTAINING THE STATEMENT WAS A PROPER METHOD OF "INFORMAL DISCOVERY" (FIRST DEPT).

The First Department, reversing (modifying) Supreme Court, determined plaintiff properly conducted "informal discovery" by obtaining a voluntary statement from a nonparty witness after plaintiff's post-note deposition subpoena for the witness was quashed:

Supreme Court granted defendant's motion to quash the untimely, post-note deposition subpoena plaintiff served on nonparty witness Harris-Aikens, and to preclude plaintiff from "examining or otherwise taking any sworn testimony from" Harris-Aikens (the December Order), and suspended disclosure pursuant to CPLR 3103(b). …

… [T]he Harris-Aikens witness statement did not constitute "disclosure of the particular matter in dispute" prohibited by CPLR 3103(b). The statement was not an examination or other sworn testimony explicitly prohibited by the December

Order, and was not otherwise an enumerated "disclosure device" under CPLR 3102(a) … . Rather, obtaining the witness statement was plaintiff's proper exercise of ex parte, informal discovery, which the Court of Appeals has long recognized as a permissible and invaluable avenue by which litigants prepare for trial … . Everett v Equinox Holdings, Inc., 2024 NY Slip Op 02276, First Dept 4-30-24

Practice Point: Obtaining a voluntary statement from a nonparty witness here did not violate the court order quashing a deposition subpoena for the same witness. The voluntary statement was a proper form of "informal discovery."

APRIL 30, 2024

JUDICIAL ESTOPPEL, FAMILY LAW.

HERE FAMILY COURT HAD THE INHERENT POWER TO DETERMINE WHETHER RESPONDENT WAS THE CHILD'S FATHER; RESPONDENT WAS JUDICIALLY ESTOPPED FROM CONTESTING PATERNITY BASED ON HIS POSITION IN A PRIOR PROCEEDING (SECOND DEPT).

The Second Department, reversing Family Court, determined Family Court had the power to determine whether father (Gunderson) is responsible for the support of the child and father was judicially estopped from contesting paternity because he was awarded parental access in a prior proceeding:

… [T]he Support Magistrate, sua sponte, dismissed the mother's petition without prejudice on the ground that the Family Court lacked subject matter jurisdiction to enter an order of child support because the parties were never married and there was no acknowledgment of parentage or order of filiation. * * *

… [B]ecause the Family Court has jurisdiction to determine whether an individual parent is responsible for the support of a child (see Family Ct Act § 413[1][a]), in appropriate cases, it also has the inherent authority to ascertain whether a respondent is a child's parent … .

Under the doctrine of judicial estoppel, "a party who assumes a certain position in a prior legal proceeding and secures a favorable judgment therein is precluded from assuming a contrary position in another action simply because his or her

interests have changed" … . Here, Granderson successfully obtained an order awarding him parental access with the child based on his assertion that he was a parent to the child. Matter of Joseph v Granderson, 2024 NY Slip Op 01921, Second Dept 4-10-24

Practice Point: Here, based upon Family Court's authority to determine whether a parent is responsible for the support of the child, Family Court had the inherent authority to determine whether respondent is the child's father.

Practice Point: Here respondent sought and was awarded parental access in a prior proceeding. He was judicially estopped from contesting paternity in this proceeding.

APRIL 10, 2024

JURISDICTION, CORPORATION LAW.

A CORPORATION WHICH ACQUIRES THE ASSETS AND LIABILITIES OF, BUT DOES NOT MERGE WITH, A PREDECESSOR CORPORATION, "INHERITS" THE CONTACTS THE PREDECESSOR CORPORATION HAD WITH NEW YORK STATE FOR PURPOSES OF NEW YORK'S PERSONAL JURISDICTION OVER THE SUCCESSOR CORPORATION (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Halligan, answering a certified question from the Second Circuit, determined that a corporation which acquires all the liabilities and assets of another corporation, but does not merge with the predecessor corporation, acquires the predecessor's contacts with New York for purposes of New York's personal jurisdiction over the successor corporation:

[The relevant] factors tip in favor of allowing successor jurisdiction where a successor purchases all assets and liabilities. … Sophisticated corporate entities such as SGBL [defendant] will undoubtedly engage in robust due diligence before agreeing to acquire all assets and liabilities of another entity. In doing so, they should understand where jurisdiction over such liabilities may lie and the potential cost if ultimately found liable, and will presumably negotiate a purchase price that

is discounted by that prospect … .Lelchook v Société Générale de Banque au Liban SAL, 2024 NY Slip Op 02081, CtApp 4-18-24

Practice Point: A corporation which acquires the assets and liabilities of a predecessor corporation but does not merge with the predecessor corporation "inherits" the contacts the predecessor corporation had with New York for purposes of New York's personal jurisdiction over the successor corporation.

APRIL 18, 2024

NOTICE OF CLAIM, CHARTER SCHOOLS, NEGLIGENCE, EDUCATION-SCHOOL LAW, MUNICIPAL LAW.

CHARTER SCHOOLS ARE NOT SUBJECT TO THE NOTICE OF CLAIM REQUIREMENTS IN THE EDUCATION LAW AND GENERAL MUNICIPAL LAW; PLAINTIFF-STUDENT, WHO HAD BEEN BULLIED AND WAS PUSHED TO THE FLOOR BY ANOTHER STUDENT, RAISED QUESTIONS OF FACT SUPPORTING THE NEGLIGENT SUPERVISION CAUSE OF ACTION (SECOND DEPT).

The Second Department, in a full-fledged opinion by Justice Iannacci, determined (1) charter schools are not subject to the notice of claim requirements of the Education Law and the General Municipal Law, and (2) plaintiff student, who allegedly had been bullied and was pushed to the floor by another student when the hallway was unsupervised, raised questions of fact supporting the negligent supervision cause of action:

Since charter schools are independent from school districts with respect to civil liability, financial obligations, and liability insurance coverage, it stands to reason that the extraordinary safeguards of prelitigation notification of claims applicable to school districts, municipalities and other wholly public entities would not apply to charter schools. * * *

The evidence presented triable issues of fact as to whether there were monitors present in the hallway at the time of the incident as required by the School's

policies and procedures and whether the presence of such monitors could have prevented the alleged pushing incident … . A. P. v John W. Lavelle Preparatory Charter Sch., 2024 NY Slip Op 02205, Second Dept 4-24-24

Practice Point: Charter schools are not subject to the notice-of-claim requirement in the Education Law and General Municipal Law; i.e., a plaintiff suing a charter school for negligence need not file or serve a notice of claim as a condition precedent.

APRIL 24, 2024

NOTICE OF CLAIM, MUNICIPAL LAW, NEGLIGENCE.

BECAUSE A CONTEMPORARY REPORT PROVIDED THE CITY WITH NOTICE OF THE NATURE OF THE SLIP AND FALL, THE PETITION FOR LEAVE TO FILE A LATE NOTICE OF CLAIM SHOULD HAVE BEEN GRANTED, DESPITE THE LACK OF A REASONABLE EXCUSE FOR FAILING TO TIMELY FILE (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the petition for leave to file a late notice of claim in this slip and fall case should have been granted. The line-of-duty report provided the city with timely knowledge of the nature of the claim and demonstrate the city would not be prejudiced by the delay in filing the notice. Where a defendant has timely knowledge of the incident, the lack of a reasonable explanation for failing to timely file is often overlooked:

The line-of-duty injury report's specificity regarding the location and circumstances of the incident, permitted the City to readily infer that a potentially actionable wrong had been committed … .

Further, as the petitioner has shown the City's actual knowledge of the essential facts underlying the claim, the petitioner's failure to provide a reasonable excuse for the delay in serving the notice of claim was not fatal to her claim … .

… [A]s the City acquired timely knowledge of the essential facts constituting the claim, the petitioner met her initial burden of showing that the City would not be prejudiced by the late notice of claim … . In response …, the City has failed to

provide particularized evidence establishing that the late notice substantially prejudiced its ability to defend the claim on the merits … . Matter of Steward v City of New York, 2024 NY Slip Op 02058, Second Dept 4-17-24

Practice Point: If the municipal defendant has timely notice of the nature of the incident (here by virtue of a contemporary report) and the city cannot demonstrate prejudice, a petition for leave to file a late notice of claim should be granted, even in the absence of a reasonable excuse for failing to timely file.

APRIL 17, 2024

RES JUDICATA.

PLAINTIFF IS THE SUCCESSOR IN INTEREST TO THE PLAINTIFF IN A PRIOR IDENTICAL ACTION WHICH WAS DISMISSED FOR FAILURE TO COMPLY WITH DISCOVERY DEMANDS AND ORDERS; THE INSTANT ACTION IS PRECLUDED BY THE DOCTRINE OF RES JUDICATA (FIRST DEPT).

The First Department, reversing Supreme Court, determined plaintiff 120 Lexington Ave Corp, as the successor in interest to 122-24 Lexington Ave Corp, was precluded from bringing the action by the doctrine of res judicata. A nearly identical action by 122-24 Lexington Ave Corp had been dismissed based upon plaintiff's failure to comply with discovery demands and orders, which is deemed a dismissal on the merits:

Plaintiff concedes that it is the successor in interest to 122-24 Lexington Avenue Corp., an entity whose nearly identical case against Wesco was dismissed in May 2021 for failure to comply with discovery demands and court orders after the court had issued a conditional preclusion order. Because plaintiff is the successor to 122-24 Lexington, it is in privity with that entity and is bound by prior adjudications against it … . Furthermore, a dismissal based on a failure to provide discovery in the face of a preclusion order is considered an award on the merits, and thus is given res judicata effect … . 120 Lexington Ave. Corp. v Wesco Ins. Co., 2024 NY Slip Op 02004, First Dept 4-16-24

Practice Point: An action which was dismissed because plaintiff failed to comply with discovery demands and orders bars a subsequent action pursuant to the doctrine of res judicata.

APRIL 16, 2024

SANCTIONS, ATTORNEYS, JUDGES.

COUNSEL'S CONDUCT WAS NOT FRIVILOUS OR DESIGNED TO DELAY; COUNSEL WAS NOT GIVEN THE OPPORTUNITY TO BE HEARD BEFORE SANCTIONED; THE JUDGE DID NOT INDICATE WHY THE AMOUNT OF THE SANCTION WAS APPROPRIATE, $100 SANCTION REVERSED (FIRST DEPT).

The First Department, reversing Supreme Court, determined the arguments made by counsel (appellant) were not "frivolous," counsel's conduct was not designed to delay, harass or maliciously injure another, the judge did not give counsel an opportunity to be heard before imposing sanctions, and the judge did not indicate why the amount of the sanction was appropriate:

Appellant properly raised procedural and substantive arguments concerning why the court should not direct petitioner to compel respondent, a 62-year-old woman with end stage renal failure, to undergo painful dialysis three times a week for three hours a day and receive powerful psychotropic medication against her wishes in order to restrain her. …

Although the court warned the parties not to interrupt each other or the court, and admonished appellant a couple of times during the hearing about such conduct, the record does not reflect a pattern of such behavior on her part or demonstrate that it caused delay. Further, the court did not cite any false statements made by appellant sufficient to warrant sanctions.

The court also failed to give appellant a reasonable opportunity to he heard on the sanction before it was actually imposed …, and did not indicate why the amount imposed was appropriate … . Matter of Kings County Hosp. v M.R., 2024 NY Slip Op 02016, First Dept 4-16-24

Practice Point: Conduct by counsel in this case was not frivolous; it was not designed to delay and did not involve false statements; sanctions were not warranted.

Practice Point: Before a judge sanctions an attorney, the attorney should be given the opportunity to be heard.

Practice Point: A judge sanctioning an attorney should indicate why the amount of the sanction is appropriate.

APRIL 16, 2024

STATUTE OF LIMITATIONS DEFENSE, JUDGES, FORECLOSURE.

IF THE STATUTE OF LIMITATIONS DEFENSE IS NOT RAISED BY A PARTY IT IS WAIVED AND CANNOT BE ASSERTED, SUA SPONTE, BY A JUDGE; IN ADDITION, A JUDGE CANNOT DECIDE A MOTION ON A GROUND NOT RAISED BY THE PARTIES (SECOND DEPT).

The Second Department, reversing Supreme Court, determined a judge, sua sponte, cannot raise the statute of limitations defense. If it is not raised by the parties, it is waived:

The statute of limitations is an affirmative defense that is waived by a party unless it is raised either in a responsive pleading or by motion prior to the submission of a responsive pleading … . "'A court may not take judicial notice, sua sponte, of the applicability of a statute of limitations if that defense has not been raised'" … .

Here, none of the defendants answered the complaint, and the record does not show that any defendant made a pre-answer motion that raised the statute of limitations … . Therefore, a statute of limitations defense was waived. Moreover, even if the defense was not waived, no defendant opposed the instant motion, and the issue of the statute of limitations was not raised on the motion. Thus, the Supreme Court improperly determined the motion on a ground not raised by the parties … . Associates First Capital Corp. v Roth, 2024 NY Slip Op 01789, Second Dept 4-4-24

Practice Point: The stature of limitations defense cannot be raised, sua sponte, by a judge. If it is not raised by a party it is waived.

Practice Point: A judge cannot not based a motion-decision on a ground not raised by the parties.

APRIL 3, 2024

STATUTE OF LIMITATIONS, CHILD VICTIMS ACT, NEGLIGENCE.

THE SECOND DEPARTMENT JOINED THE FIRST AND THIRD DEPARTMENTS IN HOLDING THAT THE EXTENDED STATUTE OF LIMITATIONS IN THE CHILD VICTIMS ACT APPLIES TO A NEW YORK RESIDENT WHO WAS ABUSED OUT-OF-STATE (SECOND DEPT).

The Second Department, joining the First and Third Departments, determined an action brought under the Child Victims Act by a person who was a resident of New York at the time the cause of action accrued can take advantage of the extended statute of limitations (CPLR 214-g) even where the wrongful conduct occurred out-of-state:

The plaintiff alleges that, when he was a resident of New York, he was the victim of childhood sexual abuse committed against him by Philip Foglietta, a football coach, while attending summer football camp in Vermont in 1972 and in Massachusetts in 1973 and 1975. * * *

… [W]e agree with the Appellate Division, First and Third Departments, that a plaintiff's residence in New York at the time his or her claims or causes of action accrued is sufficient to bring those claims or causes of action within the purview of CPLR 214-g, even where, as here, the wrongful conduct underlying the New York resident's causes of action occurred out-of-state … . * * *

The appellants' focus on the location of the alleged wrongdoing is misplaced in this context, because the subject of CPLR 214-g is not the wrongful conduct itself, but rather the statute of limitations or notice of claim requirements that barred some New Yorkers from recovering damages for the underlying wrongdoing. CPLR 214-g did not criminalize or penalize behavior that was previously lawful,

nor did it create a new private right of action. Rather, the statute revived prior claims or causes of action that already existed but were barred either because of the expiration of the applicable statute of limitations or the plaintiff's failure to file a timely notice of claim (see id. § 214-g). Smith v Pro Camps, Ltd., 2024 NY Slip Op 02074, Second Dept 4-17-24

Practice Point: The Child Victims Act extends the statute of limitations for a plaintiff who was a New York resident at the time the cause of action accrued, even if the abuse took place in another state.

APRIL 17, 2024

STATUTE OF LIMITATIONS, MEDICAL MALPRACTICE, NEGLIGENCE.

RE: IN VITRO FERTILIZATION: RETRIEVING AND FERTILIZING THE EGGS ARE SUBJECT TO THE MEDICAL-MALPRACTICE STATUTE OF LIMITATIONS; STORING AND MAINTAINING THE FROZEN EGGS ARE SUBJECT TO THE ORDINARY NEGLIGENCE STATUTE OF LIMITATIONS; THE MEDICAL MALPRACTICE ACTIONS ARE UNTIMELY; THE ORDINARY NEGLIGENCE ACTIONS ARE TIMELY (FIRST DEPT).

The First Department, reversing (modifying) Supreme Court, in a full-fledged opinion by Justice Shulman, determined plaintiffs' causes of action alleging defendants did not properly freeze, store and maintain embryos for future implantation sounded in negligence, not medical malpractice, and were therefore timely:

The underlying parts of the IVF [in vitro fertilization] process implicate both medical malpractice and ordinary negligence. Retrieving the eggs from the ovaries, fertilizing the egg with a donated sperm, grading the quality of the embryos, and preparing them for cryopreservation are clear acts of medical science or art requiring a specialized skillset appropriately characterized as medical in nature. However, all of these acts concluded on August 11, 2008, when the embryos were cryopreserved, rendering the causes of action based on such treatment untimely (see CPLR 214-a). Further, because those processes firmly ended on that date, the

continuous treatment doctrine does not toll the statute of limitations … . As plaintiffs' causes of action for medical malpractice based upon these allegations are untimely, we need not address their merits.

On the other hand, once cryopreservation has commenced, the mere maintenance of the storage tanks containing the frozen embryos does not comprise acts of "medical science or art requiring special skills not ordinarily possessed by lay persons" … . Where an act is more "'administrative' than medical in nature," conduct is "measured by ordinary negligence standards" … . While the cryopreservation storage tanks … were checked at least twice weekly for leaks and the levels of liquid nitrogen, such acts are more administrative than medical in nature. Thus, once the embryos entered cryopreservation, [defendants] merely owed a duty to plaintiffs to maintain the successful operability of the storage tanks.

The alleged failure in "fulfilling [this] different duty" "sounds in negligence," rather than medical malpractice … . Bledsoe v Center for Human Reproduction, 2024 NY Slip Op 02088, First Dept 4-18-24

Practice Point: The opinion in this "in vitro fertilization" case clearly demonstrates the distinction between medical malpractice and ordinary negligence. The retrieving, fertilizing and grading of the embryos involve specialized medical skills and implicate the medical-malpractice criteria. The storage and maintenance of the frozen embryos, on the other hand, implicate ordinary negligence criteria. Here the medical malpractice causes of action were untimely. But the ordinary negligence causes of action were timely.

APRIL 18, 2024

SUMMARY JUDGMENT, MOTION NOT PREMATURE, LABOR LAW-CONSTRUCTION LAW.

PLAINTIFF FELL THROUGH AN UNGUARDED STAIRWAY OPENING AND WAS ENTITLED TO SUMMARY JUDGMENT ON THE LABOR LAW 240(1) CAUSE OF ACTION; DEFENDANTS DID NOT SHOW THAT THE PRE-DEPOSITION SUMMARY JUDGMENT MOTION WAS PREMATURE (FIRST DEPT).

The First Department, reversing Supreme Court, determined plaintiff should have been awarded summary judgment on the Labor Law 240(1) cause of action and the pre-deposition summary judgment motion was not premature. While transporting large wooden panels past a stairway, plaintiff fell through an unguarded stairway opening:

The court should have granted plaintiff partial summary judgment on the Labor Law § 240 (1) claim because he was not provided with adequate protection to prevent his fall into the unguarded stairway opening … . …

… Labor Law § 240(1) is not dependent on a finding that the owner or general contractor had notice of the violation … …. [D]efendants failed to raise an issue of fact as to whether plaintiff was the sole proximate cause of his injuries. Defendants' assertion that plaintiff removed the plywood barrier is speculative … .

The fact that no depositions have been taken does not preclude summary judgment in plaintiff's favor, as defendants failed to show that discovery might lead to facts that would support their opposition to the motion … . Defendants also failed to show that facts essential to their opposition were within plaintiff's exclusive knowledge … . Blacio v Related Constr. LLC,2024 NY Slip Op 02008, First Dept 4-16-24

Practice Point: A plaintiff's pre-deposition summary judgment motion will not be dismissed as premature unless defendant demonstrates discovery might lead to relevant facts or relevant facts are within plaintiff's exclusive knowledge.

APRIL 16, 2024

SUMMARY JUDGMENT, MOTION NOT PREMATURE.

ALTHOUGH DEFENDANT RAISED A QUESTION OF FACT ABOUT PLAINTIFF'S CONTRIBUTORY NEGLIGENCE IN THIS REAR-END COLLISION CASE, DEFENDANT DID NOT RAISE A QUESTION OF FACT ABOUT HIS OWN LIABILTY; THE JUDGE SHOULD NOT HAVE DEEMED PLAINTIFF'S SUMMARY JUDGMENT MOTION PREMATURE (SECOND DEPT).

The Second Department, reversing Supreme Court in this rear-end collision case, determined that although defendant raised a question of fact about whether plaintiff was contributorily negligent, defendant did not raise a question of fact about the defendant-driver's liability. In addition, plaintiff's motion for summary judgment should not have been deemed premature:

… [T]he defendants submitted an affidavit from the defendant driver, in which he stated that he was "not fully responsible" for the accident. The defendant driver also averred that the traffic light had turned green and that the plaintiff had moved forward and then suddenly stopped, causing the defendant driver to strike the rear of the plaintiff's vehicle despite his efforts to stop his vehicle. This evidence raised a triable issue of fact as to whether the plaintiff was comparatively at fault in the happening of the accident, thereby supporting the denial of that branch of her motion which was for summary judgment dismissing the affirmative defenses alleging comparative negligence … . However, since the defendants' evidence related only to the plaintiff's comparative fault, the defendants failed to raise a triable issue of fact in opposition to that branch of the plaintiff's motion which was for summary judgment on the issue of liability on the cause of action alleging negligent operation of a motor vehicle … .

Furthermore, the Supreme Court erred in determining that the plaintiff's motion was premature. "[W]hile a party is entitled to a reasonable opportunity to conduct discovery in advance of a summary judgment determination, [a] party contending that a summary judgment motion is premature must demonstrate that discovery might lead to relevant evidence or that the facts essential to justify opposition to the motion were exclusively within the knowledge and control of the movant" … .

Here, the defendants had personal knowledge of the relevant facts, and their mere hope or speculation that evidence might be uncovered during discovery was an insufficient basis for denying the plaintiff's motion …. Martin v Copado-Esquivel, 2024 NY Slip Op 01804, Second Dept 4-3-24

Practice Point: In a rear-end collision case, the fact that defendant raises a question of fact about plaintiff's contributory negligence does not preclude granting plaintiff summary judgment on the issue of defendant's liability.

Practice Point: Here, where the facts of the rear-end collision were within defendant's personal knowledge, plaintiff's motion for summary judgment should not have been dismissed as premature.

APRIL 3, 2024

WRITTEN-NOTICE REQUIREMENT, SIDEWALKS, NEGLIGENCE, MUNICIPAL LAW.

A NOTICE OF VIOLATION FROM THE CITY TO THE ABUTTING PROPERTY OWNER REGARDING THE DETERIORATED CONDITION OF THE SIDEWALK RAISED A QUESTION OF FACT WHETHER THE CITY HAD WRITTEN NOTICE OF THE SIDEWALK DEFECT (A PROTRUDING METAL BAR) WHICH CAUSED PLAINTIFF'S SLIP AND FALL (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff had raised a question of fact whether the city had notice of the condition of the sidewalk which allegedly caused her slip and fall; Plaintiff demonstrated a notice of violation had been issued to the abutting property owner concerning the deterioration of the sidewalk. Plaintiff had alleged she tripped over a metal bar protruding from the sidewalk. The notice of violation raised a question of fact whether that specific defect was encompassed by the notice:

The plaintiff submitted … a Notice of Violation from the Department of Public Works, Office of the Commissioner, to the purported owner of the property

abutting the sidewalk on which the plaintiff fell. The Notice of Violation was issued by the Commissioner of the Department of Public Works, the very individual who was statutorily designated to receive written notice of sidewalk defects. The Notice of Violation stated that an inspection, which … found … that "deteriorated and hazardous conditions" existed on the abutting sidewalk. Under the circumstances, the plaintiff raised a triable issue of fact as to whether the City did, in fact, have prior written notice of the alleged defect … . Whether the Notice of Violation "encompassed the particular condition which allegedly caused the subject accident is an issue of fact which should await resolution at trial" … . Douglas v City of Mount Vernon, N.Y., 2024 NY Slip Op 02173, Second Dept 4-24-24

Practice Point: Here a notice of violation issued by the city to the abutting property owner concerning the deteriorated condition of the sidewalk raised a question of fact whether the city had prior written notice of the specific defect, a protruding metal bar, which caused plaintiff's fall.

APRIL 24, 2024