NEW YORK APPELLATE DIGEST, LLC

An Organized Compilation of Summaries of Selected Decisions, Mostly Reversals, Released by Our New York State Appellate Courts May 13 – 17, 2024, and Posted on the New York Appellate Digest on Monday, May 20, 2024. 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.

Weekly Reversal Report
May 13 – 17, 2024

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ACCOUNT STATED, CONTRACT LAW, ATTORNEYS, FAMILY LAW.

AN ACCOUNT-STATED ACTION IS NOT DUPLICATIVE OF A BREACH-OF-CONTRACT ACTION; HERE PLAINTIFF DIVORCE ATTORNEYS PROPERLY SOUGHT PAYMENT UNDER BOTH ACCOUNT-STATED AND BREACH-OF-RETAINER-AGREEMENT THEORIES AND THE COURT PROPERLY AWARDED SUMMARY JUDGMENT ON THE ACCOUNT-STATED CAUSE OF ACTION (FIRST DEPT).

The First Department, in a full-fledged opinion by Justice Kern, clarified the First Department's position that an account-stated cause of action is not duplicative of a breach-of-contract cause of action. Here plaintiff attorneys represented defendant in a divorce action and sought payment under both an account-stated theory and a

breach-of-the-retainer agreement theory. Supreme Court properly granted plaintiff's motion for summary judgment on the account-stated action:

… [T]his Court wants to make clear that an account stated is an independent cause of action that can be asserted simultaneously with a breach of contract claim and that an account stated claim should not be dismissed as duplicative of a breach of contract claim … . This case falls squarely within our well-established precedent that an attorney can be granted summary judgment on an account stated claim based on the defendant's receipt and retention of a plaintiff law firm's invoices seeking payment for professional services rendered, without objection within a reasonable time, even where there is a retainer agreement. As a result, the court properly granted summary judgment to plaintiffs on their account stated claims. Aronson Mayefsky & Sloan, LLP v Praeger, 2024 NY Slip Op 02657, First Dept 5-14-24

Practice Point: In the First Department account-stated causes of action are not duplicative of breach-of-contract causes of action.

MAY 14, 2024

CONTRACT LAW, CIVIL PROCEDURE, CORPORATION LAW.

AN UNAMBIGUOUS CONTRACT PROVISION CONSTITUTES "DOCUMENTARY EVIDENCE" WHICH WILL SUPPORT A MOTION TO DISMISS PURSUANT TO CPLR 3211 (CT APP).

The Court of Appeals determined the provision of the contract which prohibited plaintiffs from bringing a breach of contract suit was unambiguous. An unambiguous contract constitutes "documentary evidence" which supports a motion to dismiss:

On a motion to dismiss based on documentary evidence pursuant to CPLR 3211 (a) (1), dismissal is warranted only if the documentary evidence conclusively establishes a defense as a matter of law … . A motion to dismiss based on a written agreement that contains a material ambiguity must be denied because such an agreement does not conclusively establish the asserted defense as a matter of law

… . Ambiguity exists if the agreement, "read as a whole, fails to disclose its purpose and the parties' intent . . ., or when specific language is 'susceptible of two reasonable interpretations' " … . On the other hand, the agreement is unambiguous and should be enforced on its plain terms "if the language it uses has 'a definite and precise meaning, unattended by danger of misconception . . ., and concerning which there is no reasonable basis for a difference of opinion' " … .

Contrary to plaintiffs' contention, Section 8.05 unambiguously bars them from commencing an action on their own behalf to enforce their third-party beneficiary rights under the Agreement. Section 8.05 negates any right of the Holders except as "expressly set forth" therein, and it expressly sets forth the right of the Required Holders or the Holder Committee to commence certain types of actions or proceedings. Nothing in Section 8.05 expressly sets forth a right of the Holders to commence an action on their own behalf or otherwise. Mulacek v ExxonMobil Corp., 2024 NY Slip Op 02724, CtApp 5-16-24

Practice Point: Here the contract unambiguously limited the authority to bring a breach of contract action to a certain class of shareholders which did not include plaintiffs. The contract constituted "documentary evidence" which supported dismissal of the complaint pursuant to CPLR 3211(a)(1).

MAY 16, 2024

CRIMINAL LAW, APPEALS, ATTORNEYS.

THE DA HANDLING THE APPEAL WAS A LAW CLERK TO THE JUDGE WHO PRESIDED OVER THE TRIAL; THE CONFLICT OF INTEREST REQUIRES THE APPOINTMENT OF A SPECIAL PROSECUTOR FOR THE APPEAL (THIRD DEPT).

The Third Department determined the District Attorney handling the appeal had a conflict of interest because she was a law clerk to the County Court judge who presided over the trial. A special prosecutor must be appointed to handle the appeal:

During oral argument on this appeal, the Chief Assistant District Attorney (hereinafter ADA) who appeared on behalf of the People confirmed that she served as the confidential law clerk to the County Court Judge who presided over this matter and did so at the time of the underlying trial. Oral argument was permitted to proceed on the merits, but the Court directed the parties to submit letter briefs addressing the impact, if any, of the ADA's prior position on her ability to represent the People on appeal. Two days later, this Court handed down People v Pica Torres (___ AD3d ___, 2024 NY Slip Op 02345, *1-2 [3d Dept 2024]), which determined that a similar conflict situation required the appointment of a special prosecutor to handle the appeal. In her responding letter brief, the ADA acknowledges that she was personally and substantially involved in this matter as the trial judge's law clerk, raising a conflict of interest under Rule 1.12 of the Rules of Professional Conduct (see Rules of Prof Conduct [22 NYCRR 1200.00] rule 1.12 [d] [1]). In her responding letter, counsel for defendant acknowledges that the appointment of a special prosecutor is required. Given the foregoing, we remit the matter for the expeditious appointment of a special prosecutor to handle this appeal. People v McNealy, 2024 NY Slip Op 02728, Third Dept 5-16-24

Practice Point: If the DA handling the appeal was a law clerk to the judge presiding over the trial there is a conflict of interest requiring the appointment of a special prosecutor for the appeal.

MAY 16, 2024

CRIMINAL LAW, CONSTITUTIONAL LAW, JUDGES, CIVIL PROCEDURE.

FORMER PRESIDENT TRUMP'S PETITION FOR A WRIT OF PROHIBITION CHALLENGING A RESTRAINING ORDER RESTRICTING HIS ABILITY TO MAKE STATEMENTS DIRECTED AT POTENTIAL WITNESSES IN A CRIMINAL TRIAL DENIED (FIRST DEPT).

The First Department determined the restraining order restricting former President Donald Trump's speech during his criminal trial was valid. Trump's petition for a writ of prohibition was denied:

The Federal Restraining Order is nearly identical to the Restraining Order issued against petitioner in the underlying criminal case … .

Petitioner brings this petition because he disagrees with where the circuit court drew the line in balancing the competing considerations of his First Amendment rights to free expression and the effective functioning of the judicial, prosecutorial and defense processes … . Weighing these concerns, the circuit court ultimately concluded that, given the record, the court had "a duty to act proactively to prevent the creation of an atmosphere of fear or intimidation aimed at preventing trial participants and staff from performing their functions within the trial process" … . This Court adopts the reasoning in the circuit court's Federal Restraining Order Decision.

The Federal Restraining Order Decision properly found that the order was necessary under the circumstances, holding that "Trump's documented pattern of speech and its demonstrated real-time, real-world consequences pose a significant and imminent threat to the functioning of the criminal trial process" … . First, the circuit court concluded that petitioner's directed statements at potential witnesses concerning their participation in the criminal proceeding posed a significant and imminent threat to their willingness to participate fully and candidly, and that courts have a duty to shield witnesses from influences that could affect their testimony and undermine the integrity of the trial process … . Justice Merchan properly determined that petitioner's public statements posed a significant threat to the integrity of the testimony of witnesses and potential witnesses in this case as well. Matter of Trump v Merchan, 2024 NY Slip Op 02680, First Dept 5-14-24

Practice Point: A court has the power to restrict speech by a defendant in a criminal trial which is directed at potential trial witnesses and which could threaten the witnesses' willingness to testify.

MAY 14, 2024

CRIMINAL LAW, EVIDENCE.

THE DETECTIVE'S TESTIMONY AT THE SUPPRESSION HEARING THAT THE VEHICLE WAS PULLED OVER BECAUSE OF "EXCESSIVELY TINTED WINDOWS" WAS NOT SUFFICIENT TO DEMONSTRATE PROBABLE CAUSE FOR THE STOP; SUPPRESSION SHOULD HAVE BEEN GRANTED (CT APP).

The Court of Appeals, reversing the Appellate Term, determined the police officer's testimony at the suppression hearing the vehicle in which defendant was a passenger was stopped based on "excessively tinted window" was not sufficient to demonstrate probable cause for the vehicle stop. Therefore the drugs seized from the defendant should have been suppressed:

Vehicle and Traffic Law § 375 (12-a) (b) generally provides that "[n]o person shall operate any motor vehicle upon any public highway, road[,] or street" with windows which have a light transmittance of less than 70%. * * *

When a defendant challenges "the sufficiency of the factual predicate for the stop," it is the People's burden "to come forward with evidence sufficient to establish that the stop was lawful" … . "Summary statements that the police had arrived at a conclusion that sufficient cause existed will not do" … . * * *

… Detective Fortunato's testimony that the tint was "excessive" is … a legal conclusion that the tint violated the Vehicle and Traffic Law. Yet, the People failed to elicit any factual basis for this conclusion. The detective did not testify, for example, that the windows were so dark that he could not see into the vehicle … or that he had training and experience in identifying illegally tinted windows or conducting this type of stop … . Nor did the detective testify that he measured the tint after stopping the vehicle and the results confirmed that the tint level violated the Vehicle and Traffic Law, which could have provided objective, corroborative evidence of the reasonableness of his conclusion … . People v Nektalov, 2024 NY Slip Op 02725, CtApp 5-16-24

Practice Point: To demonstrate probable cause for a vehicle stop based upon "excessively tinted windows" there must be some demonstration the tint violated

the Vehicle and Traffic Law (less that 70% light transmittance). Simply testifying the windows were "excessively tinted" is not enough.

MAY 16, 2024

FAMILY LAW, CONTRACT LAW.

A STIPULATIION OF SETTLEMENT DOES NOT IMPOSE A DUTY UPON A PERSON NOT A PARTY TO THE STIPULATION (SECOND DEPT).

The Second Department, reversing Supreme Court, determined a person who was not a party to the stipulation of settlement in a divorce action (Kamaras) cannot be sued for an alleged violation of the stipulation:

The plaintiff opposed Kamaras's motion for summary judgment, contending, among other things, that Kamaras knew of the stipulation and its terms and that Kamaras had a "duty" to "have [Chantal] execute the transfer documents to the marital property and return same to [Walner's counsel]." … .

"'A stipulation of settlement which is incorporated but not merged into a judgment of divorce is a contract subject to principles of contract construction and interpretation'" … . "It is well-settled law that parties to a contract cannot, under its terms, impose any liability upon a stranger to that contract" … . "One cannot be held liable under a contract to which he or she is not a party" … .

Here, Kamaras demonstrated his entitlement to judgment as a matter of law dismissing the complaint insofar as asserted against him by demonstrating that he was not a party to the stipulation and had not assumed any obligations under the stipulation … . Tema v Tema, 2024 NY Slip Op 02720, Second Dept 5-15-24

Practice Point: Even if a person is aware of the terms of a stipulation of settlement, if that person is not a party to the stipulation, the stipulation does not impose a duty to act on them.

MAY 15, 2024

FAMILY LAW, CRIMINAL LAW, EVIDENCE.

EVIDENCE FATHER POSSESSED COCAINE WITH INTENT TO SELL WAS NOT SUFFICIENT TO SUPPORT A NEGLECT FINDING; THERE WAS NO EVIDENCE FATHER USED DRUGS, EXPOSED THE CHILDREN TO DRUG-DEALING, OR STORED THE DRUGS WHERE THE CHILDREN COULD ACCESS THEM (SECOND DEPT).

The Second Department, reversing Family Court, determined the evidence that father possessed four ounces of cocaine did not support the neglect finding. There was not evidence the children were exposed to drug-dealing and the drugs were stored above where the children could access them:

Family Court's finding that the father neglected the children was not supported by a preponderance of the evidence … . … [Father's] intent to sell these illicit drugs was insufficient, without more, to warrant a finding of neglect. The record … contained no evidence establishing that the father engaged in drug transactions within the house or that he otherwise exposed the children to drug-trafficking activities … . Nor was there evidence adduced at the hearing as to whether the father regularly engaged in the sale of drugs, or the manner in which he intended to sell the cocaine. Moreover, although the officers discovered the cocaine within the father's bedroom closet, it was located on a five- or six-foot-high shelf and was otherwise stored in a manner that was not readily accessible to the children … . Finally, there was no indication in the record that the father ever used cocaine or any other illicit drugs. Absent evidence that the father's conduct caused the requisite harm to the children or otherwise placed them in imminent danger of such harm, the court should not have found that he neglected them … . Matter of Jefferson C.-A. (Carlos T.-F.), 2024 NY Slip Op 02701, Second Dept 5-15-24

Practice Point: Storing four ounces of cocaine in a closet where the children could not access it, without more, is not sufficient for a neglect finding against father. Although there was evidence father intended to sell the drugs, there was no evidence father used drugs or exposed the children to drug-dealing.

MAY 15, 2024

FAMILY LAW, JUDGES, ATTORNEYS.

MOTHER'S INCONSISTENT STATEMENTS AND EVASIVE TESTIMONY DID NOT AMOUNT TO "FRIVOLOUS CONDUCT" WARRANTING THE AWARD OF ATTORNEY'S FEES AS A SANCTION (SECOND DEPT).

The Second Department, reversing Family Court, determined Family Court should not have awarded petitioner attorney's fees as a sanction against mother based on mother's testimony in the proceedings: Mother's conduct was not "frivolous" within the meaning of 22 NYCRR 131-1.1(a):

Pursuant to 22 NYCRR 130-1.1(a), the court is authorized to award a party in a civil action "reasonable attorney's fees . . . resulting from frivolous conduct." Conduct is frivolous if "(1) it is completely without merit in law and cannot be supported by a reasonable argument for the extension, modification, or reversal of existing law; (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or (3) it asserts material factual statements that are false" … . "A party seeking the imposition of a sanction or an award of an attorney's fee pursuant to 22 NYCRR 130-1.1(c) has the burden of demonstrating that the conduct of the opposing party was frivolous within the meaning of the rule" … .

Here, the petitioner failed to demonstrate that the mother engaged in frivolous conduct within the meaning of the rule. Contrary to the Family Court's determination, the mother's inconsistent statements and evasive testimony were not frivolous conduct within the meaning of 22 NYCRR 130-1.1 … . Matter of Edwin C. v Fenny C., 2024 NY Slip Op 02700,, Second Dept 5-15-24

Practice Point: Here in this Family Court proceeding petitioner was awarded attorney's fees as a sanction pursuant to 22 NYCRR 131-1.1(a) based on mother's "inconsistent statements" and "evasive testimony." Mother's conduct was not "frivolous" within the meaning of 22 NYCRR 131-1.1(a). The petition should not have been granted.

MAY 14, 2024

FAMILY LAW, JUDGES, EVIDENCE.

THE CHILD'S FOSTER PARENTS WERE PERSONS LEGALLY RESPONSIBLE FOR THE CARE OF THE CHILD AND WERE ENTITLED TO A HEARING BEFORE THE CHILD WAS REMOVED FROM THEIR CARE (SECOND DEPT).

The Second Department, reversing Family Court, determined the foster parents, as persons legally responsible for the care of the child, were entitled to a hearing before the child was removed from their care:

Family Court Act § 1028(a) provides that "[u]pon the application of the parent or other person legally responsible for the care of a child temporarily removed under this part . . . , the court shall hold a hearing to determine whether the child should be returned," with two exceptions not relevant here … . Family Court Act § 1028(a) further provides that "[e]xcept for good cause shown, such hearing shall be held within three court days of the application and shall not be adjourned" … .

The phrase "person legally responsible" "includes the child's custodian, guardian, [or] any other person responsible for the child's care at the relevant time" … . "The Court of Appeals, in interpreting Family Court Act § 1012(g), has held that 'the common thread running through the various categories of persons legally responsible for a child's care is that these persons serve as the functional equivalent of parents'" … . Further, "a person may act as the functional equivalent of a parent even though that person assumes temporary care or custody of a child," as long as "the care given the child [is] analogous to parenting and occur[s] in a household or 'family' setting" … . "Factors to be considered in determining whether an applicant is a person legally responsible for the care of a child include '(1) the frequency and nature of the contact, (2) the nature and extent of the control exercised by the [applicant] over the child's environment, (3) the duration of the [applicant's] contact with the child, and (4) the [applicant's] relationship to the child's parent(s)'" … .

Here, the evidence in the record was sufficient to support a determination that the foster parents were persons legally responsible for the care of the child. The evidence demonstrated that the child, eight years old at the time of the foster

parents' application, had been under the foster parents' care for most of his life. . Matter of Samson R. (Christopher R.), 2024 NY Slip Op 02710, Second Dept 5-15-24

Practice Point: Here the foster parents had cared for the eight-year-old for most of his life. They were "persons legally responsible for the care of the child" and therefore were entitled to a hearing before removal of the child.

MAY 15, 2024

INSURANCE LAW, CIVIL PROCEDURE.

THE INSURER'S OBLIGATION TO INDEMNIFY SHOULD NOT HAVE BEEN DETERMINED BASED UPON THE ALLEGATIONS IN THE PLEADINGS (FIRST DEPT).

The First Department, reversing Supreme Court, determined that although the insurer (Everest) was required to defend the plaintiff (CCM) in the underlying action, the ruling that Everest must indemnify CCM was premature:

Supreme Court should not have found that Everest was required to indemnify CCM. Although Everest concedes that it must defend CCM, "the duty to defend is broader than the duty to indemnify," because only the latter "is determined by the actual basis for the insured's liability to a third person and is not measured by the allegations of the pleadings" … . In the underlying action, there has been no determination whether the plaintiff's injury was "caused, in whole or in part, by" the acts or omissions of the named insured or of those acting on its behalf … . Therefore, any declaration of the duty to indemnify was premature (… see … Axis Surplus Ins. Co. v GTJ Co., Inc., 139 AD3d 604, 605 [1st Dept 2016] ["It is after the resolution of that action where the extent of plaintiff's indemnification obligations can be fully determined"]). Harleysville Ins. Co. v United Fire Protection, Inc., 2024 NY Slip Op 02663, First Dept 5-14-24

Practice Point: An insurer's obligation to indemnify cannot be determined based on the allegations in the pleadings.

MAY 14, 2024

LABOR LAW-CONSTRUCTION LAW, CIVIL PROCEDURE.

LABOR LAW 240(1) DOES NOT APPLY TO SLIPPING ON A STAIRCASE STEP, THE PERMANENT STAIRCASE IS NOT A SAFETY DEVICE; PLAINTIFF'S MOTION TO AMEND THE PLEADINGS TO ADD AN INDUSTRIAL CODE VIOLATION SHOULD HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, determined (1) Labor Law 240(1) does not apply to slipping on a staircase step; and (2) plaintiff should have been allowed to amend the pleadings to assert a violation the Industrial Code in support of the Labor Law 241(6) cause of action:

"'[L]eave to amend the pleadings to identify a specific, applicable Industrial Code provision may properly be granted, even after the note of issue has been filed, where the plaintiff makes a showing of merit, and the amendment involves no new factual allegations, raises no new theories of liability, and causes no prejudice to the defendant'" … . "Mere lateness is not a barrier" to amendment, absent prejudice … , which exists where the nonmoving party "has been hindered in the preparation of [its] case or has been prevented from taking some measure in support of [its] position" … .

Here, the Supreme Court improvidently exercised its discretion in denying that branch of the plaintiff's motion which was for leave to amend the bill of particulars to allege a violation of 12 NYCRR 23-3.3(e) with regard to the Labor Law § 241(6) cause of action. The plaintiff made a showing of merit, the amendment presented no new factual allegations or new theories of liability, and the amendment did not prejudice the defendants. The defendants were put on sufficient notice through the complaint, the bill of particulars, and the plaintiff's deposition testimony that the Labor Law § 241(6) cause of action related to the defendants' alleged failure to provide proper safety devices, such as a chute or hoist, to be used in the removal of demolition debris from the building during demolition operations. * * *

… [D]efendants established, prima facie, that Labor Law § 240(1) was inapplicable to the facts of this case … . The permanent staircase from which the plaintiff fell was a normal appurtenance to the building and was not designed as a safety device to protect him from an elevation-related risk … . Verdi v SP Irving Owner, LLC, 2024 NY Slip Op 02721, Second Dept 5-15-24

Practice Point: A permanent staircase is not a safety device within the meaning of Labor Law 240(1).

Practice Point: Amendment of pleadings alleging a violation of Labor Law 241(6) to add the violation of an Industrial Code provision should generally be allowed, even if late.

MAY 15, 2024

LABOR LAW-CONSTRUCTION LAW.

ALTHOUGH THE PIPE WAS A DANGEROUS CONDITION INHERENT IN THE WORK, IT WAS AN AVOIDABLE DANGEROUS CONDITION AND THERE REMAIN QUESTIONS ABOUT MEASURES TAKEN TO MINIMIZE THE TRIPPING HAZARD (FIRST DEPT).

The First Department, reversing (modifying) Supreme Court, determined there were questions of fact which rendered the summary judgment motion premature in this Labor Law 241(6) action. A pipe 5-12 inches above the floor, although a dangerous condition inherent in the work, was an "avoidable dangerous condition." There remain questions of fact about preventative measures taken to minimize the tripping hazard:

Plaintiff, a welder, tripped over electrical conduit piping that rose vertically 5-12 inches in height from the floor surface in the lobby of a new building under construction and was injured. While the presence of the electrical conduit piping was a "dangerous condition" "inherent to the task at hand," the risk of tripping over the conduit was an "avoidable dangerous condition" for which defendants could have utilized preventative measures that would not have made it impossible to complete the work … . Indeed, it is undisputed that plywood boxes ordinarily

were placed on the protruding conduit piping, which mitigated the risk of tripping without rendering the overall work impossible to complete. The plywood boxes, however, were removed at the time of plaintiff's accident. Issues of fact remain regarding the preventative measures taken to mitigate the risks associated with the dangerous condition. Accordingly, summary judgment on the Labor Law § 241 (6) is premature and the claim is reinstated to resolve the issues of fact detailed above. Maldonado v Hines 1045 Ave. of the Ams. Invs. LLC, 2024 NY Slip Op 02666, First Dept 5-14-24

Practice Point: In the context of a Labor Law 241(6) cause of action, even though a dangerous condition is inherent in the work, it may be an avoidable dangerous condition requiring measures to mitigate the risk.

MAY 14, 2024

LANDLORD-TENANT, NEGLIGENCE, BATTERY.

TENANT'S ATTACK ON PLAINTIFF WAS NOT FORESEEABLE; THEREFORE THE LANDLORD WAS NOT LIABLE IN NEGLIGENCE FOR FAILING TO EVICT THE TENANT (FIRST DEPT).

The First Department, reversing Supreme Court, determined a tenant's (Girard's) attack on plaintiff was not foreseeable. Therefore the negligence action against the landlord for failing to evict Girard was dismissed:

Defendant demonstrated … that it was not liable for third-party defendant Girard's attack on plaintiff because it was not reasonably foreseeable … . No evidence was presented that Girard had engaged in criminal conduct prior to the attack or that he was violent, had a propensity toward violence, or had threatened any tenants of the building. Inconsiderate behavior, such as playing loud music at all hours, engaging in loud arguments with his sister in the apartment, and banging on the apartment walls, is insufficient to have placed defendant on notice that Girard would stab plaintiff in response to plaintiff's noise complaints … . While it was conceivable that the dispute might escalate into violence, "conceivability is not the equivalent of foreseeability" … . Plaintiff failed to present evidence sufficient to raise a triable issue of fact concerning whether defendant was negligent in not taking steps to

evict Girard prior to the attack…. . Goris v New York City Hous. Auth., 2024 NY Slip Op 02661, First Dept 5-14-24

Practice Point: Here the tenant who attacked plaintiff, although loud and argumentative, had never been violent. Therefore the tenant's attack was not foreseeable and the landlord could not be held liable in negligence for failing to evict the tenant.

MAY 14, 2024

MEDICAL MALPRACTICE, EVIDENCE.

THE DEFENSE EXPERT'S AFFIRMATION IN THIS MED MAL CASE DID NOT ADDRESS ALL THE MALPRACTICE ALLEGATIONS IN THE PLEADINGS; DEFENDANTS' SUMMARY JUDGMENT MOTON SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined that the defendants' medical expert in this medical malpractice case did not address all the malpractice allegations in the pleadings:

"Medical expert affirmations that fail to address the essential factual allegations in the plaintiff's complaint or bill of particulars fail to establish prima facie entitlement to judgment as a matter of law" … . Bare conclusory assertions that a defendant did not deviate from good and accepted medical practice, with no factual relationship to the alleged injury, do not establish that the cause of action has no merit so as to entitle a defendant to summary judgment … .

Here, the affirmation of the defendants' fetal medicine expert was insufficient to establish the absence of any departure from good and accepted medical practice by [two defendants].. The affirmation failed to eliminate triable issues of fact as to whether the plaintiff was in preterm labor … , and whether the preterm delivery could have been prevented … . Neumann v Silverstein, 2024 NY Slip Op 02712, Second Dept 5-15-24

Practice Point: In a med mal case, if the defense expert does not address all the allegations of malpractice the defense motion for summary judgment should not be granted.

MAY 15, 2024

NEGLIGENCE, EVIDENCE.

PLAINTIFF RAISED A QUESTION OF FACT RE: THE NEGLIGENT APPLICATION OF FLOOR WAX IN THIS SLIP AND FALL CASE (FIRST DEPT).

The First Department, reversing (modifying) Supreme Court, determined plaintiff raised a question of fact whether the area where she slipped and fell was excessively waxed:

… [P]laintiff raised an issue of fact as to "the negligent application of wax . . . by evidence that a dangerous residue of wax was present" … . Plaintiff testified that the waxy substance on the floor was on the side of her clothing and that where she fell there was an indentation into the substance. This testimony is sufficient to establish an issue of fact as to whether wax was negligently applied … . This evidence "conflicted with [defendants'] assertions that the area was never waxed, creating triable issues of fact precluding the grant of summary judgment" … . Scaccia v Brookfield Props. One WFC Co., LLC, 2024 NY Slip Op 02677, First Dept 5-14-23

Practice Point: The negligent application of floor wax can result in liability for a slip and fall.

MAY 14, 2024

NEGLIGENCE, MUNICIPAL LAW.

THE REPORT OF THE INCIDENT IN WHICH PETITIONER WAS INJURED DID NOT PROVIDE THE CITY DEFENDANTS WITH NOTICE OF A CONNECTION BETWEEN THE INJURIES AND ANY NEGLIGENCE ON THE PART OF THE DEFENDANTS; THEREFORE THE CITY DEFENDANTS DID NOT HAVE NOTICE OF THE CLAIM WITHIN 90 DAYS; IN ADDITION, IGNORANCE OF THE LAW IS NOT A VALID EXCUSE FOR FAILURE TO TIMELY FILE A NOTICE OF CLAIM; THE PETITION FOR LEAVE TO FILE AND SERVE LATE NOTICES OF CLAIM SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the petition for leave to file and serve late notices of claim in this construction accident case should not have been granted. Although there was a report about the incident, nothing in the report made a connection between petitioner's injuries and negligence on the part of the city defendants. Another incident report made by one municipal entity (MTA Capital Construction) cannot be imputed to other municipal entities:

The evidence submitted in support of the petition failed to establish that the City, NYC Department of Design and Construction, NYC Department of Transportation, and New York City Transit Authority (hereinafter collectively the City appellants) or the MTA [Metropolitan Transportation Authority] acquired actual knowledge of the essential facts constituting the claim within 90 days after the claim arose or a reasonable time thereafter. "'A report which describes the circumstances of the accident without making a connection between the petitioner's injuries and negligent conduct on the part of the public corporation will not be sufficient to constitute actual notice of the essential facts constituting the claim'" … The incident report upon which the petitioner relied did not connect his injuries to negligent conduct on the part of the City appellants or the MTA, and the incident report, prepared by MTA Capital Construction, cannot be imputed to other municipal entities … . Moreover, the petitioner testified at a hearing pursuant to

General Municipal Law § 50-h that only his employer's personnel were present at the construction site when the accident occurred.

The petitioner also failed to provide a reasonable excuse for failing to timely serve the notices of claim. The petitioner's ignorance of the law does not constitute a reasonable excuse … . Furthermore, the petitioner did not adduce sufficient evidence to support his claim that he was unable to timely serve the notices of claim because he was seeking medical treatment and recovering from medical procedures, as he provided evidence only that he was unable to work for intermittent periods during the eight-month interval between the date of the accident and the service of the notices of claim … . Matter of Almeida v City of New York, 2024 NY Slip Op 02699, Second Dept 5-15-24

Practice Point: In order for an incident report to provide notice of a potential lawsuit against a municipality such that a late notice of claim will be excused, the report must connect the injuries to negligence on the part of the municipal defendants (not the case here).

Practice Point: In the context of a petition for leave to file a late notice of a claim against a municipality, an incident report created by one municipal entity will not be deemed to have provided notice of the incident to other municipal entities.

MAY 15, 2024

WORKERS' COMPENSATION, EVIDENCE

UNDER THE WORKERS' COMPENSATION LAW PRESUMPTION IN SECTION 21, AN ASSAULT AT WORK IS EMPLOYMENT-RELATED AND COMPENSABLE ABSENT SUBSTANTIAL EVIDENCE THE ASSAULT WAS MOTIVATED BY PERSONAL ANIMOSITY (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Halligan, reversing the Appellate Division, determined the presumption that injury from an assault at work is employment-related and compensable applied in this hospital-shooting case. A former hospital employee entered the hospital wearing a white medical coat and shot six people in a non-public area, killing one. Petitioner, a first-year resident,

was one of the wounded. Petitioner did not know and had never had any contact with the shooter. The Appellate Division held that there was no connection between petitioner's employment and the shooting and, therefore, the presumption the assault was work-related did not apply:

The Appellate Division essentially inverted Seymour's "nexus" standard by requiring the Board to come forward with evidence of a nexus to employment. Instead … Seymour stands for the principle that "an assault which arose in the course of employment is presumed to have arisen out of the employment, absent substantial evidence that the assault was motivated by purely personal animosity" (… see … Seymour, 28 NY2d at 409 [presumption cannot be rebutted by the inference of personal animosity "in the absence of substantial evidence to support it"]). To the extent the Appellate Division has read Matter of Seymour to require an additional affirmative showing of a "nexus" with employment when there is a workplace assault, such a showing is not required.

… [I]t is undisputed that the assault occurred in the course of Mr. Timperio's [petitioner's] employment, thereby triggering the WCL [Workers' Compensation Law] § 21 (1) presumption. It is also undisputed that the record includes no evidence of the motivation for the assault or any indication of a prior relationship between the assailant and the claimant; Bello [the shooter] and Timperio never worked together, did not know each other, and had no prior communication. The Appellate Division therefore erroneously disturbed the WCB's [Workers' Compensation Board's] determination that the claim is compensable. Matter of Timperio v Bronx-Lebanon Hosp., 2024 NY Slip Op 02723, CtApp 5-16-24

Practice Point: Here petitioner was shot at work by a former employee he did not know. The presumption that the assault was employment-related (section 21 of the Workers' Compensation Law) applied because there was no evidence the assault was motivated by personal animosity. The injury from the assault was therefore compensable under the Workers' Compensation Law.

MAY 16, 2024

ZONING, EDUCATION-SCHOOL LAW, CIVIL PROCEDURE.

RESIDENTS WHO DO NOT LIVE IN CLOSE PROXIMITY TO THE CHALLENGED FENCE DO NOT HAVE STANDING TO ASSERT A ZONING VIOLATION; BECAUSE THE NYS DEPARTMENT OF EDUCATION AND THE COMMISSIONER OF EDUCATION APPROVED CONSTRUCTION OF THE FENCE, THEY ARE NECESSARY PARTIES IN THIS ZONING-VIOLATION PROCEEDING (SECOND DEPT).

The Second Department, reversing Supreme Court, determined (1) plaintiff property owners who did not live in close proximity to the proposed fence around school property did not have standing to assert a zoning violation; and (2) the NYS Department of Education (SED) and the Commissioner of Education, which authorized construction of the fence, are necessary parties. The plaintiffs alleged the local school district violated local zoning laws by not seeking approval from the village before starting construction of the fence:

A party seeking standing to challenge an administrative action must establish that the injury it sustained was "different in kind and degree from the community generally" … . A party residing "in the immediate vicinity" of the subject property suffers harm greater than the community at large when the subject property violates a zoning law because "loss of value of individual property may be presumed from depreciation of the character of the immediate neighborhood" … . …

… "[N]ecessary parties are persons who might be inequitably affected by a judgment in the action and must be made plaintiffs or defendants" (… CPLR 1001[a]). SED and the Commissioner are necessary parties because the Supreme Court's determination would necessarily determine their rights to set school safety standards and approve plans for school construction … . Matter of Cuomo v East Williston Union Free Sch. Dist., 2024 NY Slip Op 02702, Second Dept 5-15-24

Practice Point: Only residents who live in close proximity to property alleged to violate zoning laws have standing to assert a zoning violation.

Practice Point: When necessary parties have not been included in a lawsuit, the court should try to make them parties.

MAY 15, 2024