NEW YORK APPELLATE DIGEST, LLC

Weekly Reversal Report
June 24 – 28, 2024

An Organized Compilation of Summaries of Selected Decisions, Mostly Reversals, Released by Our New York State Appellate Courts June 24 – 28, 2024, and Posted on the New York Appellate Digest Website on Monday, July 1, 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.

Contents

CIVIL PROCEDURE, INSURANCE LAW, NEGLIGENCE.

ALTHOUGH SUCCESSIVE SUMMARY JUDGMENT MOTIONS ARE DISFAVORED; HERE THE ISSUES IN EACH MOTION DID NOT OVERLAP AND APPELLANTS OFFERED A SUFFICIENT REASON. I.E. THE FIRST MOTION PRECEDED DEFENDANT'S DEPOSITION IN WHICH HE ADMITTED SWERVING INTO APPELLANTS' VEHICLE (FIRST DEPT).

The First Department, reversing Supreme Court, determined appellants' second summary judgment motion in this traffic accident case did not violate the prohibition of successive motions. The first motion dealt with whether plaintiff suffered a serious injury within the meaning of the Insurance Law. The second motion addressed defendant's liability. Appellants demonstrated a sufficient reason for the failure to include both issues in a single motion, i.e., the first motion was made before defendant was deposed and admitted swerving into appellants' vehicle:

… [A]ppellants' first motion for summary judgment was on the issue of serious injury. Their second motion was on the issue of liability. The issue of whether plaintiff sustained a serious injury within the meaning of the Insurance Law, "is a threshold matter separate from the issue of fault" and which must, therefore, be determined separately … . "[S]erious injury is quintessentially an issue of damages, not liability" … . Under the facts presented, appellants' failure to raise the issue of liability in their first motion for summary judgment does not run afoul of the general disfavor of successive motions since the issue of serious injury was not germane to the issue of liability … .

Appellants have also established the existence of sufficient cause … . Here, the record indicates that the first motion for summary judgment was filed prior to the deposition testimony of defendant-respondent Phanor. In his testimony Phanor

admitted that he swerved into appellant's vehicle in order to avoid another unidentified vehicle. Priester v Phanor, 2024 NY Slip Op 03554, First Dept 6-27-24

Practice Point: Here the fact that successive summary judgment motions are generally prohibited was overlooked. The issues in the two motions did not overlap (one dealt with plaintiff's damages, the other with defendant's liability). And the first motion was brought before the deposition in which defendant admitted swerving into appellants' vehicle.

JUNE 27, 2024

CIVIL PROCEDURE, MEDICAL MALPRACTICE.

DEFENDANT IN THIS MED MAL CASE WAS NOT PROPERLY SERVED AND PLAINTIFF WAS NOT ENTITLED TO AN EXTENSION OF THE TIME TO SERVE IN THE INTEREST OF JUSTICE (FIRST DEPT).

The First Department, reversing Supreme Court, determined defendant in this medical malpractice case was entitled to dismissal of all claims because he was not properly served:

Defendant Michael B. Shannon, M.D. contends that this action should have been dismissed as against him for lack of timely service under CPLR 306-b … . It is undisputed on appeal that plaintiff failed to properly serve Shannon within 120 days of commencement of this action. Plaintiff does not purport to have demonstrated good cause for the delay. We find that an extension of time to serve Shannon was not warranted in the interest of justice.

Shannon's unrebutted affidavit reflects that service was attempted at an office where he worked only as an independent contractor and that his residence and principal place of business were in Ohio. Plaintiff failed to make any effort to investigate further or to correct this error when Shannon failed to appear or answer. She did not file her default motion until nearly two years after commencing this action, which is well over the one-year deadline to make such a motion (see CPLR 3215[c]). The motion was also filed after discovery and motion practice were well underway. Diaz v Nasir, 2024 NY Slip Op 03536, First Dept 6-27-24

Practice Point: Plaintiff did not exercise due diligence in attempting to serve defendant and did not make a timely motion to extend the time to serve, complaint dismissed.

JUNE 27, 2024

CIVIL PROCEDURE, TRUSTS AND ESTATES, NEGLIGENCE, ATTORNEYS.

IN THIS TRAFFIC ACCIDENT CASE, THE COURT DID NOT HAVE JURISDICTION TO HEAR A MOTION TO DISMISS BROUGHT ON BEHALF OF THE DECEASED DEFENDANT BY DECEDENT'S FORMER ATTORNEYS WHO HAD NOT BEEN SUBSTITUTED FOR THE DECEDENT; PLAINTIFF'S MOTION TO HAVE DECEDENT'S DAUGHTER SUBSITITUTED AS A REPRESENTATIVE FOR THE DECEDENT REQUIRED NOTICE TO ALL PERSONS INTERESTED IN DECEDENT'S ESTATE (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the death of the defendant in this traffic accident case divested the court of jurisdiction and the motion to dismiss by the decedent's former attorneys, who had not been substituted for the decedent, should not have been considered by the court. The Appellate Division also noted that plaintiff's motion to substitute decedent's daughter as a representative for the decedent required notice to all persons interested in decedent's estate:

"The death of a party divests the court of jurisdiction and stays the proceedings until a proper substitution has been made pursuant to CPLR 1015(a). Moreover, any determination rendered without such substitution will generally be deemed a nullity" .. . "The death of a party terminates his or her attorney's authority to act on behalf of the deceased party" … . Although the determination of a motion pursuant to CPLR 1021 made by the successors or representatives of a party or by any party is an exception to a court's lack of jurisdiction, here, the motion, inter alia, pursuant to CPLR 1021 to dismiss the complaint was made by the former attorneys for the decedent purportedly on behalf of the decedent. Since the former attorneys lacked the authority to act, the Supreme Court lacked jurisdiction to consider the

motion … . Accordingly, so much of the order as granted the motion purportedly made on behalf of the decedent is a nullity.

Further, any motion pursuant to CPLR 1021 requires that notice be provided to persons interested in the decedent's estate … . Here, the plaintiff failed to provide notice to persons interested in the decedent's estate. Accordingly, the Supreme Court should have denied the plaintiff's cross-motion with leave to renew upon service on persons interested in the decedent's estate. Fazilov v Acosta, 2024 NY Slip Op 03470, Second Deppt 6-26-24

Practice Point: Here the defendant in a traffic accident case died. The decedent's former attorneys did not have the authority to make a motion to dismiss and the court should not have considered it.

Practice Point: Here plaintiff's motion to have decedent's daughter substituted for decedent required notice all persons interested in decedent's estate.

JUNE 26, 2024

EDUCATION-SCHOOL LAW, RELIGION, ADMINISTRATIVE LAW.

THE EDUCATION LAW PROVISIONS AND RELATED REGULATIONS (1) REQUIRING NONPUBLIC SCHOOLS TO PROVIDE EDUCATION EQUIVALENT TO THAT PROVIDED BY PUBLIC SCHOOLS, AND (2) ALLOWING PUBLIC FUNDING TO BE CURTAILED AND REQUIRING STUDENTS TO ATTEND A DIFFERENT SCHOOL IF THE EQUIVALENCY TEST IS NOT MET ARE VALID AND ENFORCEABLE; THERE WAS A DISSENT (THIRD DEPT).

The Third Department, reversing (modifying) Supreme Court, in a full-fledged opinion by Justice Garry, over a dissent, determined the regulations promulgated by the Commissioner of Education concerning the evaluation of nonpublic schools and the cutting-off of services provided to those schools if they don't meet the "equivalent-to-public-schools" test are valid and enforceable. The petitioners here are five yeshivas and related organizations:

Petitioners contend that the subject regulation provisions impose a penalty upon nonpublic schools that fail to meet the statute's educational standard, an argument

accepted by the dissent — but "penalty" is not an accurate characterization. First, prior to any negative substantial equivalency determination, nonpublic schools under review are engaged in a lengthy collaborative process, specifically designed to assist them in meeting the basic educational standards set forth within the Education Law (see 8 NYCRR 130.6 [a] [1] [iii]; 130.8 [d] [2]). To be sure, the Commissioner is statutorily authorized to impose civil and criminal penalties against a parent or guardian who fails to fulfill their duty under the compulsory education requirement (see Education Law §§ 3233, 3234), and to withhold certain public moneys from any city or district that "wil[l]fully omits and refuses to enforce" relevant statutory provisions (Education Law § 3234 [1]). The Education Law does not provide for any direct penalty upon nonpublic schools.

… By definition, a nonpublic school that fails to demonstrate substantial equivalency necessarily fails to fulfill the requirements of the compulsory education mandate … . Parents are obligated to comply with this mandate and, as such, the Commissioner's declaration that a particular institution fails to meet the statutory standards required to meet that duty is no more, or less, than a necessary advisory to parents.

… [T]he loss of status as a substantially equivalent nonpublic school is not equivalent to closure; the institutions … continue to operate and provide some form of instruction. … [T]he Education Law, and the corresponding regulations, do not limit the parents' opportunity to enroll their children in any extracurricular instruction or activities that they deem appropriate and helpful, and nothing in the regulations prohibits the children from being enrolled in such institutions — the sole limitation is that the statutory mandate must be met … . Matter of Parents for Educ. & Religious Liberty in Schs. v Young, 2024 NY Slip Op 03523, Third Dept 6-27-24

Practice Point: If a nonpublic school does not provide a level of education equivalent to that provided by the public schools, public funding of those schools can be curtailed and students can be required to attend a different school.

JUNE 27, 2024

FAMILY LAW, JUDGES, APPEALS.

FAMILY COURT HAS THE DECISION-MAKING AUTHORITY TO DETERMINE THE APPROPRIATENESS OF A CHILD'S PLACEMENT IN A QUALIFIED RESIDENTIAL TREATMENT PROGRAM (QRTP) AT EVERY PERMANENCY HEARING (FIRST DEPT).

The First Department, applying an exception to the mootness doctrine (appellate relief had already been granted), determined Family Court has the decision-making authority to determine the appropriateness of a child's placement in a Qualified Residential Treatment Program (QRTP) at every permanency hearing:

… [W]e find that Family Court has the decision-making authority as to the appropriateness of the child's continued placement in a QRTP at every permanency hearing (see Family Ct Act §§ 1088[b], 1089[d][2][viii]). A contrary reading goes against the express purpose of the Family First Act, which is aimed at reducing the use of institutional group placements for children in foster care by limiting the length of time that they can spend there. The Family First Act, codified in New York State through amendments to the relevant provisions in the Family Court Act and Social Services Law, explicitly seeks to "ensure[] more foster children are placed with families by limiting federal reimbursement to only congregate care placements that are demonstrated to be the most appropriate for a child's needs, subject to ongoing judicial review " … . Matter of Malachi B. (Tania H.), 2024 NY Slip Op 03534, First Dept 6-27-24

Practice Point: Family Court has the authority to review and decide the appropriateness of a child's placement in a Qualified Residential Treatment Program (QRTP) at every permanency hearing.

JUNE 27, 2024

FAMILY LAW, JUDGES, ATTORNEYS.

HERE FAMILY COURT ABUSED ITS DISCRETION BY DENYING FATHER'S "CHANGE IN CIRCUMSTANCES" PETITION WITHOUT A HEARING AND REQUIRING FATHER TO PAY MOTHER'S COUNSEL'S FEES EXCEEDING $12,000 BASED UPON A FINDING THAT FATHER HAD CONSUMED ALCOHOL IN VIOLATION OF A COURT DIRECTIVE; FAMILY COURT SHOULD HAVE FOCUSED ON THE BEST INTERESTS OF THE CHILD, NOT "THE NEED TO REGAIN MOTHER'S TRUST" (THIRD DEPT).

The Third Department, reversing Family Court, determined Family Court should not have focused on evidence father may have consumed alcohol in violation of the court's directive and should have focused on the best interests of the child. Based solely on finding father had consumed alcohol and in the absence of a violation petition, father's petition for a modification of custody based upon a change in circumstances was denied without a hearing and father was required to pay mother's counsel's fees exceeding $12,000. The counsel's-fee ruling was reversed and the matter was remitted for a "change in circumstances" hearing:

As we must remit the matter to Family Court, we caution the court away from directing that the father completely abstain from the consumption of alcohol or dictating the specific type of treatment method the father must utilize beyond what is necessary to protect the child during his parenting time … . However, that is not to say that if the father's treatment plan requires abstinence from alcohol that he is not required to comply with such plan. Similarly, we must stress that "the first and paramount concern of the court" must be the best interests of the child … , and that the court should not rely upon the father's apparent need to "regain the trust of the mother" as it had so heavily throughout the orders on appeal.

We also agree with the father's contention that Family Court abused its discretion in awarding $12,385.55 in counsel fees to the mother based upon the foregoing conclusion. "When exercising its discretionary powers [to award counsel fees], a court should review the financial circumstances of both parties together with all the other circumstances of the case, which may include the relative merit of the parties' positions as well as the complexity of the case and the extent of legal services rendered" … . Here, despite no violation petition being filed against the father, the court found that "the father's willful violation" of the prior custody order and his "deceptions concerning his alcohol consumption" warranted the imposition of

counsel fees. Essentially this resulted in sanctioning the father for filing the modification petition based upon his subsequent consumption of alcohol … . Considering our determination as to the court's mistaken determination that the father was unable to demonstrate a change in circumstances, we … reverse the court's award of counsel fees to the mother as an abuse of discretion. Matter of Jacob L. v Heather L., 2024 NY Slip Op 03520, Third Dept 6-27-24

Practice Point: If a Family Court judge focuses on something other than the best interests of the child, here father's apparent consumption of alcohol in violation of a court directive and mother's need to trust father, an appellate court may reverse the judge's rulings as an abuse of discretion, as it did here.

JUNE 27, 2024

FORECLOSURE, EVIDENCE.

PLAINTIFF IN THIS FORECLOSURE ACTION DID NOT SUBMIT THE BUSINESS RECORDS RELEVANT TO DEFENDANT'S DEFAULT, RENDERING THE AFFIDAVIT ALLEGING DEFENDANT'S DEFAULT HEARSAY (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff did not prove defendant's default in this foreclosure action because the relevant business records were not attached to the motion papers:

"In order to establish prima facie entitlement to judgment as a matter of law in a foreclosure action, a plaintiff must submit the mortgage and unpaid note, along with evidence of the default" … . Although the plaintiff submitted the mortgage and the unpaid note, it failed to submit admissible evidence of the default.

"An affiant's assertion regarding the defendant's default, without the business records upon which he or she relied in making such an assertion, constitutes inadmissible hearsay" … . It is the business record itself that serves as proof of the matter asserted and "not the foundational affidavit" … .

Here, the plaintiff submitted an affidavit of an employee of the servicer and attorney-in-fact for the plaintiff, which set forth that, "[a]ccording to the business records that I have reviewed . . . the Defendant Roy Daleo failed to comply with the terms of the Note and Mortgage by defaulting in the monthly payment that was

due on April 1, 2013 and monthly thereafter." The affiant did not attach the business records upon which she relied in making her assertion regarding the defendant's alleged default, and no such records were attached to the plaintiff's motion. The affidavit of the plaintiff's witness was therefore inadmissible hearsay and failed to satisfy the plaintiff's prima facie burden … . MTGLQ Invs., L.P. v Daleo, 2024 NY Slip Op 03477, Second Dept 6-26-24

Practice Point: To prove a defendant's default in a foreclosure action, the affidavit alleging default must be accompanied by the supporting business records. If the records are not provided, the affidavit is hearsay.

JUNE 26, 2024

INSURANCE LAW, CONTRACT LAW.

AVILA WAS INJURED WHEN HER SPOUSE LOST CONTROL OF THE CAR AND STRUCK A PARKED CAR; THE POLICY EXPRESSLY STATED COVERAGE DID NOT EXTEND TO THE INSURED'S SPOUSE; IN THE ABSENCE OF AN EXPRESS PROVISION THE INSURER IS NOT REQUIRED TO COVER THE INSURED'S SPOUSE (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the uninsured motorist claim by the driver's spouse was precluded based on the policy. Avila was a passenger in a vehicle driven by her spouse who lost control of the car:

Pursuant to Insurance Law § 3420(g)(1), "no policy or contract shall be deemed to insure against any liability of an insured because of death of or injuries to his or her spouse or because of injury to, or destruction of property of his or her spouse unless express provision relating specifically thereto is included in the policy." "'[I]n the absence of an express provision in an insured's policy, a carrier is not required to provide insurance coverage for injuries sustained by an insured's spouse'" … . This provision creates "a statutory presumption that interspousal liability is excluded from coverage unless an express provision relating specifically thereto is included in the policy" … . Moreover, here, the language of GEICO's policy provides that its liability coverage does not apply "[t]o any insured for bodily injury to the spouse of that insured." Thus, Avila's uninsured motorist claim was precluded … . Matter of Government Employees Ins. Co. v Avila, 2024 NY Slip Op 03481, Second Dept 6-26-24

Practice Point: Here the insured, Avila's spouse, lost control of the car and hit a parked car. Avila was a passenger and was injured. The policy did not include a provision expressly covering the insured's spouse. In addition, the policy expressly stated the insured's spouse was not covered. Avila's uninsured motorist claim was precluded.

JUNE 26, 2024

INSURANCE LAW, ENVIRONMENTAL LAW.

IN THIS GROUNDWATER POLLUTION CASE, THE POLLUTION EXCLUSION IN THE INSURERS' POLICIES APPLIED AND THE INSURERS ARE NOT OBLIGATED TO DEFEND AND INDEMNIFY THE INSURED OIL COMPANY (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the pollution exclusion in the plaintiffs' insurance policies applied and plaintiffs were not required to defend and indemnify the defendant, which allegedly caused a gasoline additive (MTBE) to pollute groundwater. The fact that the additive was a legal substance required by the EPA did not matter:

… [I]t is clear that even if MTBE was not a pollutant in the context of its use as a gasoline additive, it was a pollutant in the context of its release into groundwater … . * * *

Qualified pollution exclusions are characterized by an exception for pollution where the discharge or release of the pollutant is "sudden and accidental" … . The terms "sudden" and "accidental" each "have separate meanings, [both] of which must be established for the exception to nullify the pollution coverage exclusion" … .. "[T]he meaning of sudden in the pollution exclusion exception" has a "temporal quality" (id. [emphasis omitted]), which is only met where the discharge occurs "abruptly or within a short timespan, of a significant quantity of the pollutant sufficient to have some potentially damaging environmental effect" … .

Here, with respect to the plaintiffs' … policies that contained qualified pollution exclusions, the defendant failed to meet its burden to "demonstrate a reasonable interpretation of the underlying complaint[s] potentially bringing the claims within the sudden and accidental discharge exception to exclusion of pollution coverage,

or to show that extrinsic evidence exists that the discharge was in fact sudden and accidental" … . In other words, the type of pollution alleged, which occurred undetected over many years, was not sudden within the meaning of the applicable law … . St. Paul Fire & Mar. Ins. Co. v Getty Props. Corp., 2024 NY Slip Op 03510, Second Dept 6-26-24

Practice Point: A "pollution exclusion" in an insurance policy applies where, as here, the pollution occurs over years, as opposed to occurring suddenly and unexpectedly.

Practice Point: A substance can be legal and approved for use in gasoline by the EPA but constitute a "pollutant" when found in groundwater.

JUNE 26, 2024

JUDGES, CIVIL PROCEDURE, FORECLOSURE.

PLAINTIFF'S FAILURE TO MEET THE COURT'S FILING DEADLINE WAS NOT A SUFFICIENT REASON FOR SUA SPONTE DISMISSAL OF THE COMPLAINT IN THIS FORECLOSURE ACTION (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the judge in this foreclosure case did not have sufficient cause to dismiss the complaint sua sponte (another reminder that sua sponte dismissals of complaints rarely survive appeal);

"'A court's power to dismiss a complaint, sua sponte, is to be used sparingly and only when extraordinary circumstances exist to warrant dismissal'" … . "[A] court may not sua sponte dismiss a complaint for failure to move for a judgment of foreclosure and sale by an arbitrary date set by the court" … . "To obtain appellate review of an order or portion of an order issued sua sponte, a party may move to vacate the order or portion of the order and appeal as of right to the Appellate Division if that motion to vacate is denied" … .

Here, the Supreme Court erred in denying the plaintiff's motion to vacate the … order and to restore the action to the court's active calendar, as the plaintiff's failure to comply with the directive to file an application for a judgment of foreclosure and sale by July 26, 2017, was not a sufficient ground upon which to sua sponte direct dismissal of the complaint … . James B. Nutter & Co. v Heirs &

distributees of the estate of Rose Middleton, 2024 NY Slip Op 03472, Second Dept 6-26-24

Practice Point; Failure to meet a filing deadline set by the court was not an adequate reason for the judge's sua sponte dismissal of the foreclosure complaint.

JUNE 25, 2024

LABOR LAW-CONSTRUCTION LAW, NEGLIGENCE, EVIDENCE.

DEBRIS LEFT BEHIND AFTER WORK ON ANOTHER PROJECT WAS NOT "INTEGRAL" TO THE WORK PLAINTIFF WAS PERFORMING WHEN HE TRIPPED AND FELL; PLAINTIFF WAS ENTITLED TO SUMMARY JUDGMENT ON CERTAIN LABOR LAW 241(6) CAUSES OF ACTION BASED UPON INDUSTRIAL CODE VIOLATIONS; IN ADDITION THE CITY DID NOT DEMONSTRATE A LACK OF CONSTRUCTIVE NOTICE OF THE DEBRIS; THEREFORE THE LABOR LAW 200 AND COMMMON-LAW NEGLIGENCE CAUSES OF ACTION SHOULD NOT HAVE BEEN DISMISSED (FIRST DEPT).

The First Department, reversing (modifying) Supreme Court, determined plaintiff was entitled to summary judgment on certain Labor Law 241(6) causes of action and the city's motion to dismiss the Labor Law 200 and common-law negligence claims should not have been granted. Plaintiff tripped on discarded plastic and rock debris from prior sidewalk demolition and construction. Plaintiff was working on reconstruction of a sidewalk bridge when he fell. Therefore the plastic and rock debris did not constitute material integral to the work plaintiff was performing as Supreme Court had held. In addition, although the city did not exercise supervisory control over the work, the Labor Law 200 and common-law negligence causes of action should not have been dismissed because the city did not demonstrate a lack of constructive notice of the dangerous condition created by the debris:

The plastic and the rock were not integral to the work performed by plaintiff or his coworkers because it constituted an accumulation of debris from previous work that was left in a "passageway" or "working area" which should have been kept free of debris … . * * *

The "task at hand" did not involve demolition. It is uncontested that plaintiff and his coworkers were dismantling and rebuilding a sidewalk bridge at a new location and that plaintiff fell when he slipped and tripped while manually transporting a heavy beam to the new location. While it is undisputed that Padilla was a general contractor that did demolition work, the court's overly broad view of the integral to the work defense reads [Industrial Code] sections 23-1.7(e)(1) and (2) out of existence. Lourenco v City of New York, 2024 NY Slip Op 03540, First Dept 6-27-24

Practice Point: Debris left over from another job was not "integral" to the work being performed at the time of plaintiff's fall, therefore the presence of the debris violated certain provisions of the Industrial Code.

Practice Point: Although the city did not exercise supervisory control over the work, it did not demonstrate a lack of constructive notice of the dangerous condition. Therefore the Labor Law 200 and common-law negligence causes of action should not have been dismissed.

JUNE 27, 2024

LABOR LAW-CONSTRUCTION LAW, NEGLIGENCE.

IN THIS LADDER-FALL CASE, DEFENDANT PROPERTY MANAGER DID NOT DEMONSTRATE A LACK OF CONTRUCTIVE NOTICE OF THE DANGEROUS CONDITION OR THAT IT LACKED CONTROL OVER THE WORK SITE; THE LABOR LAW 200 AND COMMON LAW NEGLIGENCE CAUSES OF ACTION SHOULD NOT HAVE BEEN DISMISSED; IN ADDITION PLAINTIFF WAS ENTITLED TO SUMMARY JUDGMENT ON HIS LABOR LAW 240(1) CAUSE OF ACTION (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendant property management company (Fulton) was not entitled to dismissal of the Labor Law 200 and common-law negligence causes of action and plaintiff was entitled to summary judgment on his Labor Law 240(1) cause of action in this ladder-fall case. Plaintiff fell when a permanent ladder attached to the building came loose:

… [T]he Fulton defendants failed to establish … that they lacked actual or constructive notice of the allegedly dangerous condition of the ladder, which the

plaintiff described in his deposition as rusty and old. The evidence the Fulton defendants submitted in support of their motion "did not eliminate triable issues of fact as to whether the allegedly dangerous condition of the [ladder] should have been discovered upon a reasonable inspection" … . Furthermore, the Fulton defendants failed to establish … that they lacked control over the work site … . * * *

"The collapse of a scaffold or ladder for no apparent reason while a plaintiff is engaged in an activity enumerated under the statute creates a presumption that the ladder or scaffold did not afford proper protection" … . Through the submission of his deposition testimony, the plaintiff established … that he was exposed to an elevation risk within the ambit of Labor Law § 240(1), that the ladder collapsed for no apparent reason, and that the inadequately secured ladder was a proximate cause of his injuries … .

… [I]n opposition … the … defendants … failed to present a plausible view of the evidence—enough to raise a triable issue of fact—that there was no statutory violation and that the plaintiff's own acts or omissions were the sole cause of the accident … . Valentin v Stathakos, 2024 NY Slip Op 03512, Second Dept 6-26-24

Practice Point: Here the permanent ladder which came loose causing plaintiff's fall was "old and rusty" which raised a question of fact whether the defendant property manager had constructive notice of the condition. The Labor Law 200 and common law negligence causes of action should not have been dismissed.

Practice Point: In the absence of evidence plaintiff was the sole proximate cause of the accident, the collapse of a ladder warrants summary judgment on a Labor Law 240(10 cause of action.

JUNE 26, 2024

LABOR LAW-CONSTRUCTION LAW.

IN THIS LABOR LAW 240(1) ACTION, PLAINTIFF STEPPED ON A SMALL WOODEN "PATCH" COVERING A HOLE IN THE FLOOR AND HIS LEG WENT THROUGH THE HOLE; DEFENDANT'S ARGUMENT THE ACCIDENT WAS NOT FORESEEABLE WAS REJECTED; THE PRECISE NATURE OF THE ACCIDENT NEED NOT BE FORESEEN; IT IS ENOUGH PLAINTIFF WAS SUBJECTED TO AN ELEVATION-RELATION RISK AND NO SAFETY EQUIPMENT WAS PROVIDED (FIRST DEPT).

The First Department, reversing Supreme Court, determined plaintiff was entitled to summary judgment on his Labor Law 240(1) cause of action. Plaintiff was walking on a floor which had holes in it where mechanical equipment had been removed. When plaintiff stepped on a 12-inch by 12-inch "patch" which had been placed over a hole his leg went through and he was injured. The First Department rejected defendant's argument that the incident was not foreseeable:

Plaintiff was working in the interstitial space, approximately eight feet from the 11th floor below, and was thus exposed to the effects of gravity. … [T]he affixing of "harnesses and safety lines attached to a safe structure" are the type of safety devices envisioned by § 240(1) to prevent a worker from falling through a collapsing floor … , which plaintiff was not provided.

… "A plaintiff in a case involving the collapse of a permanent structure must establish that the collapse was 'foreseeable,' not in a strict negligence sense, but in the sense of foreseeability of plaintiff's exposure to an elevation-related risk"… . To establish foreseeability, "[a] plaintiff need not demonstrate that the precise manner in which the accident happened, or the injuries occurred was foreseeable; it is sufficient that [plaintiff] demonstrate that the risk of some injury from defendant's conduct was foreseeable" … . This foreseeability analysis … applies to the partial collapse of a permanent structure … . Ciaurella v Trustees of Columbia Univ. in the City of N.Y., 2024 NY Slip Op 03455, First Dept 6-25-24

Practice Point; This is the second Labor Law 240(1) case in recent weeks involving the collapse of a permanent structure (a roof in the prior case and here a floor). In both cases the Appellate Division rejected the argument the accident was not foreseeable.

JUNE 25, 2024

NEGLIGENCE, PRIVATE NUISANCE, TRESPASS.

PLAINTIFFS' ALLEGATION THAT THE WATER MAIN ON DEFENDANTS' NEIGHBORING PROPERTY BROKE CAUSING WATER TO ENTER PLAINTIFFS' BASEMENT STATED A NEGLIGENCE CAUSE OF ACTION UNDER THE RES-IPSA-LOQUITUR THEORY (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, determined the allegation that defendants' water main broke causing water to enter plaintiffs' basement supported a negligence action based on the res-ipsa-loquitur theory. The trespass and private nuisance causes of action should have been dismissed because there was no evidence of defendants' intentional conduct:

… [D]efendants failed to establish their prima facie entitlement to judgment as a matter of law on so much of the cause of action alleging negligence as was based on the doctrine of res ipsa loquitur. "For the doctrine of res ipsa loquitur to apply, a plaintiff must establish three conditions: '[f]irst, the event must be of a kind that ordinarily does not occur in the absence of someone's negligence; second, it must be caused by an agency or instrumentality within the exclusive control of the defendant; and third, it must not have been due to any voluntary action or contribution on the part of the plaintiff'" … . "The doctrine has been applied to water main breaks and this type of event has frequently been cited as a typical example of a case where the doctrine is commonly applicable" … . … Because the defendants did not establish their prima facie entitlement to judgment as a matter of law on so much of the cause of action alleging negligence as was based on the doctrine of res ipsa loquitur, the burden did not shift to the plaintiffs to raise a triable issue of fact in that regard … . Huang v Fort Greene Partnership Homes Condominium, 2024 NY Slip Op 03471, Second Dept 6-26-24

Practice Point: A water main break on defendant's property causing water to enter the neighboring plaintiff's basement states a negligence cause of action under the res-ipsa-loquitur theory.

JUNE 26, 2024

TRUSTS AND ESTATES, EVIDENCE, ATTORNEYS.

A DECEASED PARTY'S ADMISSIONS ARE NOT HEARSAY AS AGAINST THAT PARTY'S ESTATE AND SUPPORT THE PETITIONER-ESTATE'S CONSTRUCTIVE TRUST CLAIM; THE ATTORNEY FOR THE RESPONDENT ESTATE WAS PRESENT DURING DISCUSSIONS AT THE HEART OF THE CONSTRUCTIVE TRUST CLAIM AND MUST BE DISQUALIFIED UNDER THE ADVOCATE-WITNESS RULE (FIRST DEPT).

The First Department, reversing Surrogate's Court, in a full-fledged opinion by Justice Friedman, determined summary judgment dismissing the constructive trust cause of action and denying the motion to disqualify counsel because he would necessarily be a witness should not have been granted. Mother, Isabel, alleged, as Medicaid planning, she transferred $1.6 million to her daughter, Jody, to be held by Jody during Isabel's lifetime and then distributed equally among Jody and her two siblings. Jody, however, predeceased Isabel. Upon learning the accounts set up by Jody had only $255,000 in them, Isabel asserted a claim against Jody's estate for $2 million. Subsequently Isabel died. The lawyer who represents Jody's executor in the instant proceedings, Leibowitz, took notes during a telephone conference among himself, Isabel and Jody when the Medicaid planning transfer was discussed. The facts are too complex to fairly summarize here. Suffice to say that there was sufficient evidence that Jody had made admissions concerning the Medicaid planning agreement which is the basis for the constructive trust cause of action. Jody's admissions are not excludable as hearsay against her estate. The First Department also concluded Leibowitz's status as witness required his disqualification:

… [A]n admission by a party is admissible against that party, as an exception to the hearsay rule, as evidence of the matter asserted in the admission, whether or not the party's statement was against his or her interest at the time the statement was made … . Moreover, "[a]dmissions of a testator or intestate are competent against the estate" … . Accordingly, admissions by Jody are competent evidence against Jody's executor, the representative of her estate. * * *

… [T]he 2009 notes reflect that Leibowitz discussed with Jody and Isabel the transfers at issue in this case, and Robert [Isabel's son and executor of her estate] may examine Leibowitz at trial about Jody's statements to him concerning any agreements, understanding or promises between herself and Isabel relating to those

transfers. While it cannot be determined at this juncture whether Leibowitz's testimony will be of material assistance to Robert in proving his claim, it remains the case that Leibowitz discussed matters related to that claim with Jody, and his recollections of Jody's statements will be admissible against Jody's executor as admissions. Because Leibowitz should be a witness in this case, his continued representation of Jody's executor in this proceeding violates the advocate-witness rule and disqualification pursuant to rule 3.7 of the Rules of Professional Conduct is appropriate. Matter of Newman, 2024 NY Slip Op 03544, First Dept 6-27-24

Practice Point: A deceased party's admissions are not hearsay as against that party's estate.

Practice Point: An attorney who will be called as a witness for the opposing party must be disqualified under the advocate-witness rule.

JUNE 27, 2024