NEW YORK APPELLATE DIGEST, INC.

Weekly Reversal Report
November 4 – 8, 2024

An Organized Compilation of Summaries of Selected Decisions, Mostly Reversals, Released by Our New York State Appellate Courts November 4 – 8, 2024, and Posted on the New York Appellate Digest Website on Monday, November 11, 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.

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CIVIL PROCEDURE, ATTORNEYS, EVIDENCE, NEGLIGENCE.

THE ATTORNEY'S "CERTIFICATE OF TRANSLATION" DID NOT INCLUDE SUFFICIENT DETAIL ABOUT THE ATTORNEY'S KNOWLEDGE OF THE SPANISH LANGUAGE; THEREFORE THE TRANSLATION OF PLAINTIFF'S AFFIDAVIT WAS NOT ADMISSIBLE AND SUMMARY JUDGMENT WAS NOT SUPPORTED (SECOND DEPT).

The Second Department, reversing summary judgment in favor of plaintiff in this traffic accident case, determined the attorney's "certificate of translation" was not sufficient to render plaintiff's affidavit, written in Spanish, admissible:

… [P]laintiff submitted an affidavit in which he averred, among other things, that the "affidavit was translated to me from English to Spanish prior to my signing by a person who speaks Spanish as it is my native language and the language I understand best." The plaintiff also submitted a certificate of translation by an associate attorney at his counsel's law office in which the associate attorney affirmed, without elaboration, that she is fluent in English and Spanish and competent to translate documents from one language to the other. Under these circumstances, the conclusory certificate of translation does not contain sufficient detail concerning the extent of the associate attorney's knowledge of the Spanish language. As such, the associate attorney's certificate of translation was insufficient to state the associate attorney's qualifications, rendering the plaintiff's affidavit inadmissible (see CPLR 2101[b] …). Reyes v Underwood, 2024 NY Slip Op 05466, Second Dept 11-6-24

Practice Point: Here plaintiff's affidavit in support of summary judgment was in Spanish. An attorney provided a "certificate of translation" which did not include sufficient detail about the attorney's knowledge of the Spanish language. Therefore the affidavit was inadmissible.

November 6, 2024

CRIMINAL LAW, EVIDENCE, JUDGES.

THE PROOF DID NOT SUPPORT A FINDING THAT THE ASSAULT SECOND AND CRIMINAL POSSESSION OF A WEAPON THIRD CONVICTIONS WERE BASED ON SEPARATE AND DISTINCT ACTS, THEREFORE CONSECUTIVE SENTENCES WERE NOT WARRANTED; DEFENDANT SHOULD NOT HAVE BEEN ADJUDICATED A SECOND FELONY OFFENDER BASED ON A NEW JERSEY CONVICTION WHICH WAS NOT A FELONY IN NEW YORK (SECOND DEPT).

The Second Department, remitting the matter for resentencing, determined consecutive sentences were not supported by the proof and defendant should not have been adjudicated a second felony offender based upon a New Jersey conviction of burglary in the third degree which is not a felony under New York law:

The defendant contends that the Supreme Court erred in imposing consecutive sentences upon his convictions of assault in the second degree and criminal possession of a weapon in the third degree under count 7 of the indictment. Under Penal Law § 70.25(2), a sentence imposed "for two or more offenses committed through a single act or omission, or through an act or omission which in itself constituted one of the offenses and also was a material element of the other . . . must run concurrently" … . Further, "sentences imposed for two or more offenses may not run consecutively: (1) where a single act constitutes two offenses, or (2) where a single act constitutes one of the offenses and a material element of the other" (id. [internal quotation marks omitted]). Here, the defendant correctly argues, and the People correctly concede, that because there was no designation of the alleged dangerous instrument used in committing the offense of assault in the second degree, the People failed to establish that this count and the charge of criminal possession of a weapon in the third degree under count 7 of the indictment were based upon separate and distinct acts … . Therefore, the court erred in sentencing the defendant to consecutive prison terms on the second-degree assault count and the criminal possession of a weapon in the third degree count with respect to his possession of pepper spray … .

Further, although the defendant failed to preserve for appellate review his contention that he was improperly sentenced as a second felony offender, we consider this issue in the exercise of our interest of justice jurisdiction (see CPL 470.15[6] …). The defendant's prior conviction of burglary in the third degree in New Jersey does not constitute a felony in New York for the purposes of enhanced sentencing … . People v Frank, 2024 NY Slip Op 05452, Second Dept 11-6-24

Practice Point: If the record does not demonstrated two convictions were based separate and distinct acts, consecutive sentences are not available.

Practice Point: The New Jersey "burglary third degree" offense is not a felony under New York law and cannot be the basis for second felony offender status.

November 6, 2024

CIVIL PROCEDURE, EVIDENCE.

THERE WAS NO PROOF THE ORDER TO SHOW CAUSE WAS ACTUALLY DELIVERED TO THE INCARCERATED DEFENDANT; DEFAULT JUDGMENT VACATED (FIRST DEPT).

The First Department, reversing Supreme Court, determined the order to show cause was not properly served on the incarcerated defendant, requiring vacation of the default judgment:

"The method of service provided for in an order to show cause is jurisdictional in nature and must be strictly complied with" … . "The failure to give a party proper notice of a motion deprives the court of jurisdiction to entertain the motion and renders the resulting order void" … .

The order granting plaintiff summary judgment on his claims without opposition submitted by defendant and the related Special Referee order awarding damages are vacated. Defendant affirmed that he did not know of, or have access to, the summary judgment motion hand-delivered and served by plaintiff's process server on a receptionist at the prison where defendant is incarcerated until after the order granting summary judgment was entered. Plaintiff's service on the prison employee who assured that the motion would be given to plaintiff did not satisfy the court's order to show cause approving alternative means of service that were applicable to the service of legal papers on the incarcerated defendant, and which required plaintiff to obtain at least some evidence from the prison that the served documents had, in fact, been delivered to the prisoner. The presumption of effective service arising from a valid affidavit of a process server does not apply here. The court approved an alternative means of service on the defendant incarcerated in a foreign prison, and plaintiff failed to comply. Therefore, defendant's unrebutted claim that he did not receive the motion is not conclusory and requires vacatur of the default. Bacon v Nygard, 2024 NY Slip Op 05478, First Dept 11-7-24

Practice Point: Here service of an order to show cause upon the incarcerated defendant was not supported by any evidence the order to show cause was actually delivered to the defendant after it was given to a prison employee, Therefore the default judgment was vacated.

November 7, 2024

CRIMINAL LAW, EVIDENCE.

DEFENDANT, WHO WAS IN CHARGE OF RENTING OUT THE LIMOUSINE, FAILED TO KEEP THE BRAKES IN GOOD REPAIR; BRAKE FAILURE CAUSED A CRASH WHICH KILLED 20 PEOPLE; DEFENDANTS' MANSLAUGHTER CONVICTIONS AFFIRMED (THIRD DEPT).

The Third Department, in a full-fledged opinion by Justice Garry, affirmed the manslaughter convictions of the defendant who was responsible for renting out a limousine which experienced catastrophic brake failure resulting in the deaths of 17 passengers, the driver and two pedestrians: The opinion is too detailed to fairly summarize here. Each argument raised by the defense was rejected after a thorough discussion of the relevant facts:

In October 2018, a stretch limousine for hire crashed at the bottom of a hill in Schoharie County, killing all 17 of its passengers, two pedestrians and the driver of the vehicle. An investigation revealed that the limousine had experienced catastrophic brake failure, attributable to protracted neglect of proper inspection, maintenance and repairs. During the relevant period, defendant was handling the day-to-day affairs of the business that rented out the limousine, including putting the vehicle into service on the day of the accident. Defendant was subsequently indicted on 20 counts of manslaughter in the second degree and 20 counts of criminally negligent homicide. Following his guilty plea to the lesser counts and later withdrawal of that plea, the matter proceeded to trial. A jury found defendant guilty of the manslaughter counts, and Supreme Court sentenced him to 20 concurrent prison terms of 5 to 15 years. * * *

The … proof was sufficient for the jury to conclude beyond a reasonable doubt that defendant was aware of and consciously disregarded the state of disrepair of the limousine's braking system — including by avoiding proper inspection, neglecting appropriate maintenance and affirmatively rejecting necessary repairs. Given the circumstances, including the age of this oversized vehicle transporting passengers, the jury could find that defendant disregarded a substantial and unjustifiable risk of death. As the proof also made clear that such disregard was a gross deviation from the standard of conduct of reasonable persons in defendant's situation, the People proffered legally sufficient evidence to establish the required mental state for

second degree manslaughter. People v Hussain, 2024 NY Slip Op 05513, Third Dept 11-7-24

Practice Point: Here defendant's failure to keep the brakes of a rental limousine in good repair, leading to the deaths of 20 people when the brakes failed, demonstrated disregard of a substantial and unjustifiable risk of death, warranting the manslaughter convictions.

November 7, 2024

FAMILY LAW, ATTORNEYS, CONSTITUTIONAL LAW, SOCIAL SERVICES LAW, APPEALS.

THE RECORD ON APPEAL DID NOT SUPPORT FAMILY COURT'S RULING MOTHER HAD FORFEITED HER RIGHT TO COUNSEL IN THIS TERMINATION-OF-PARENTAL-RIGHTS PROCEEDING (SECOND DEPT).

The Second Department, reversing Family Court, determined the record on appeal did not support Family Court's ruling mother had forfeited her right to counsel in this termination-of-parental-rights proceeding.

… Family Court granted a second application by the mother's assigned counsel to be relieved and determined that the mother had forfeited her right to be assigned new counsel. The court's determination was based upon, among other things, "suspicions" that the mother had been "involved" in a recent security compromise of the assigned counsel's computer. The court also cited as a basis for its determination the fact that, over the course of the child protective proceeding and this proceeding, the mother had a total of three attorneys assigned to represent her or to act as her legal advisor. The record on appeal does not reflect how long the prior assigned attorneys represented the mother or why they ceased representing her. * * *

A respondent in a proceeding pursuant to Social Services Law § 384-b has the right to the assistance of counsel … . A party may forfeit the fundamental right to counsel by engaging in "'egregious conduct,'" but only as a matter of "'extreme, last resort'" … . Here, the record fails to clearly reflect that the mother engaged in the sort of egregious conduct that would justify a finding that she forfeited her right to assigned counsel … .

The deprivation of the mother's right to counsel requires reversal without regard to the merits of her position … . Matter of Sa'Nai F. B. M. A. (Chaniece T.), 2024 NY Slip Op 05440, Second Dept 11-6-24

Practice Point: Consult this decision for some insight into the criteria for finding a party in a termination-of-parental-rights proceeding has forfeited the right to counsel.

November 6, 2024

FAMILY LAW, CIVIL PROCEDURE, EVIDENCE, JUDGES.

MOTHER MADE OUT A PRIMA FACIE CASE FOR RELOCATING WITH THE CHILD IN THIS CUSTODY PROCEEDING; CREDIBILITY ISSUES PLAY NO ROLE AT THE MOTION-TO-DISMISS STAGE (SECOND DEPT).

The Second Department, reversing Supreme Court, determined mother had made out a prima facie case for relocating to a different county with the child. The petition for a modification of custody should not have been dismissed:

"In deciding a motion to dismiss a petition for failure to establish a prima facie case, the court must accept the petitioner's evidence as true and afford the petitioner the benefit of every favorable inference that can reasonably be drawn therefrom" … . "The question of credibility is irrelevant, and should not be considered" … .

Here, accepting the petitioner's evidence as true and affording her the benefit of every favorable inference, the petitioner presented sufficient evidence to establish a prima facie case that relocating with the child to Bergen County might be in the child's best interests … . At the hearing, the petitioner and her spouse testified that they wanted to relocate to Bergen County because they would have family support there and the child liked spending time with family members living in that area. The petitioner further testified that if she were permitted to relocate, she would continue the respondent's parental access schedule set forth in the stipulation of settlement and would agree to additional parental access for the respondent. We note that the Family Court did not ascertain from the attorney for the child the position of the then 11-year-old child or conduct an in camera interview with the child … . Matter of Fortune v Jasmin, 2024 NY Slip Op 05443, Second Dept 11-6-24

Practice Point: In considering a motion to dismiss a petition for a modification of custody credibility issues are irrelevant.

November 6, 2024

FAMILY LAW, EVIDENCE.

FATHER'S ABUSE AND NEGLECT OF ONE CHILD, HANNAH D, SUPPORTED THE FINDING FATHER DERIVATIVELY ABUSED TWO OTHER CHILDREN, EVEN THOUGH ONE WAS AN INFANT AND THE OTHER HAD NOT BEEN BORN AT THE TIME OF THE ABUSE OF HANNAH D (SECOND DEPT).

The Second Department, reversing Family Court, determined the abuse of one daughter, Hannah D, supported a finding father derivatively abused two other children, even though one was an infant and the other had not been born at the time of the abuse of Hannah D:

… [A] preponderance of the evidence supported a finding of derivative abuse and neglect. The nature of the father's direct abuse of Hannah D., the frequency of the father's acts, and the circumstances of the father's commission of the acts evidence fundamental flaws in the father's understanding of the duties of parenthood. In addition, the father's actions affirmatively created a substantial risk of physical injury which would likely cause impairment of the subject children's health within the meaning of Family Court Act § 1012 (e)(ii), thus requiring a finding that the subject children have been derivatively abused and neglected … . The finding of derivative abuse and neglect is not undermined by the fact that at the time of the father's abuse of Hannah D., one of the subject children was an infant and the other had not yet been born … . The evidence demonstrates that the father's parental judgment and impulse control are so defective as to create a substantial risk to any child in his care … . Moreover, the father failed to establish by a preponderance of the evidence that the condition cannot reasonably be expected to exist currently or in the foreseeable future … . Matter of Davena A. (Christopher A.), 2024 NY Slip Op 05439, Second Dept 11-6-24

Practice Point: The abuse of one child can support a finding other children were derivatively abused, even if the other children were infants or had not been born at the time of the abuse of the eldest child.

November 6, 2024

FAMILY LAW, EVIDENCE, JUDGES.

MOTHER'S PETITION FOR A MODIFICATION OF CUSTODY SHOULD HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Family Court, determined mother had demonstrated a change in circumstances warranting a modification of custody:

… [T]he record reveals that, in support of her petition, the mother established more than conflict between the parties and difficulties in co-parenting. The evidence at the hearing showed that the parties' relationship had deteriorated to the point that they do not communicate other than by text and do not engage in joint decision-making with respect to the child … . Therefore, joint legal custody is no longer feasible … .

The totality of the circumstances justifies modifying the stipulation so as to award sole legal and residential custody of the child to the mother. The mother has more involvement with the child's needs on a day-to-day basis, and the record reflects that the mother made decisions regarding the child's social and emotional needs … . Moreover, the Family Court failed to give sufficient weight to the strong preference of the child, who was 12 years old at the time of the hearing, to reside with the mother … .

Accordingly, the Family Court should have granted that branch of the mother's petition which was to modify the stipulation so as to award her sole legal and residential custody of the child. Matter of Llanos v Barrezueta, 2024 NY Slip Op 05446, Second Dept 11-6-24

Practice Point: Consult this decision for some insight into the criteria for finding the relationship between mother and father had deteriorated to the point a modification of custody is warranted.

November 6, 2024

LABOR LAW-CONSTRUCTION LAW, EVIDENCE.

A 400-POUND DUCT LIFT TOPPLED OFF AN UNSTEADY RAMP AND STRUCK PLAINTIFF; ALTHOUGH THE LIFT DROPPED ONLY 10 TO 12 INCHES, PLAINTIFF WAS ENTITLED TO SUMMARY JUDGMENT ON THE LABOR LAW 240(1) CAUSE OF ACTION (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, determined plaintiff's motion for summary judgment on the Labor Law 240(1) cause of action should have been granted. Plaintiff was struck by a 400 pound duct lift which toppled off an unsteady ramp. The lift fell only 10 to 12 inches, but met the criteria for a gravity-related accident covered by Labor Law 240(1):

… Supreme Court should have denied that branch of the defendants' motion which was for summary judgment dismissing the cause of action alleging a violation of Labor Law § 240(1), as the defendants failed to satisfy their prima facie burden. Although the defendants submitted evidence establishing that the alleged elevation differential measured only 10 to 12 inches, given the heavy weight of the duct lift and the amount of force it was capable of generating, the elevation differential was not de minimis … . The plaintiff submitted evidence to show that he suffered harm that flowed directly from the application of the force of gravity to the duct lift … .

Moreover, the Supreme Court should have granted that branch of the plaintiff's cross-motion which was for summary judgment on the issue of liability on the cause of action alleging a violation of Labor Law § 240(1). The plaintiff submitted, inter alia, a transcript of his deposition testimony, which established, prima facie, that the defendants violated Labor Law § 240(1) by failing to provide an appropriate safety device, namely a secured ramp, to protect against the elevation-related hazard that was posed by maneuvering the heavy duct lift over the ramp … . Davila v City of New York, 2024 NY Slip Op 05433, Second Dept 11-6-24

Practice Point: A heavy object falling 10 to 12 inches from an unsteady ramp, striking plaintiff, is covered by Labor Law 240(1). The incident was caused by defendants' failure to provided an adequately secured ramp.

November 6, 2024

LABOR LAW-CONSTRUCTION LAW.

PLYWOOD DELIBERATELY PLACED AS A TEMPORARY FLOOR DOES NOT CONSTITUTE "DIRT AND DEBRIS" OR "SCATTERED TOOLS AND MATERIALS" OR "SHARP PROTECTIONS" WITHIN THE MEANING OF THE INDUSTRIAL CODE; THEREFORE PLAINTIFF'S STEPPING IN A HOLE IN THE PLYWOOD AND FALLING IS NOT COVERED BY LABOR LAW 241(6) (FIRST DEPT).

The First Department determined Supreme Court properly dismissed the Labor Law 241(6) cause of action because the plywood used for temporary flooring, which had a hole in it which caused plaintiff to fall, was not "dirt and debris" or "scattered tools or materials" or "sharp projections" within the meaning of the Industrial Code:

… Industrial Code (12 NYCRR) § 23-1.7 (e) (2), … provides:

"Working areas. The parts of floors, platforms and similar areas where persons work or pass shall be kept free from accumulations of dirt and debris and from scattered tools and materials and from sharp projections insofar as may be consistent with the work being performed."

On its face, section 23-1.7(e)(2) does not apply to all potential tripping hazards but only to "accumulations of dirt and debris," "scattered tools and materials," and "sharp projections." As plaintiff admitted in his deposition testimony, the perforated plywood board on which he tripped had been deliberately placed on the stripped floor as a protective measure, in response to plaintiff's own complaints. Thus, as a matter of law, the plywood board, notwithstanding its hole, could not be described as an "accumulation[] of . . . debris" or as part of a "scatter[ing]" of "tools and materials" … . Accordingly, as a matter of law, the plywood board did not fall within the scope of Industrial Code § 23-1.7(e)(2). Cioppa v ESRT 112 W. 34th St., L.P., 2024 NY Slip Op 05482, First Dept 11-7-24

Practice Point: Plywood placed as a temporary floor does not constitute "dirt and debris" within the meaning of the Industrial Code. Therefore stepping in a hole in the plywood and falling is not covered by Labor Law 241(6).

November 7, 2024

MEDICAL MALPRACTICE, EVIDENCE.

PLAINTIFF RAISED A QUESTION OF FACT WHETHER THE STROKE DIAGNOSIS WAS TIMELY AND WHETHER THE FAILURE TO MAKE A TIMELY DIAGNOSIS DECREASED THE CHANCES OF A BETTER OUTCOME (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff's expert raised a question of fact in this medical malpractice action alleging the failure to timely diagnose a stroke:

Where a plaintiff in a medical malpractice action alleges a failure to timely diagnose a condition, the plaintiff must show that the departures from the standard of care delayed diagnosis and decreased the chances of a better outcome or increased the injury … . The plaintiff submitted an affirmation of an emergency medicine physician who opined, inter alia, that the hospital's staff failed to take a thorough history of the decedent's symptoms and failed to provide an interpreter for that purpose in contravention of the applicable standard of care. The plaintiff also submitted an affirmation of a radiologist, who opined that a CT scan of the decedent's brain performed on the day that the decedent presented to the hospital showed an infarct and that the hospital's radiologist had failed to recognize this evidence of a stroke. The plaintiff's emergency medicine expert opined that had the decedent been properly and timely diagnosed, treatment options were available, including the possible administration of tPA or the use of certain other medications.

Under these circumstances, the plaintiff raised triable issues of fact as to whether there was a departure from the standard of care and whether such departure decreased the chances of a better outcome or increased the decedent's injuries … . Hanna v Staten Is. Univ. Hosp., 2024 NY Slip Op 05435, Second Dept 11-6-24

Practice Point: Here plaintiff's expert raised a question of fact about whether the stroke diagnosis was timely and whether the delay decreased the chances of a better outcome.

November 6, 2024

MUNICIPAL LAW, NEGLIGENCE, CIVIL PROCEDURE, IMMUNITY.

IN THIS CHILD VICTIM'S ACT CASE ALLEGING SEXUAL ABUSE AFTER PLACEMENT IN FOSTER CARE BY THE DEFENDANT COUNTY, THE SECOND DEPARTMENT, DISAGREEING WITH THE FIRST AND FOURTH DEPARTMENTS, DETERMINED THE COUNTY OWED PLAINTIFF A SPECIAL DUTY UPON ASSUMING CUSTODY OVER HER FOR FOSTER-CARE PLACEMENT (SECOND DEPT).

The Second Department, in a full-fledged opinion by Justice Ventura, affirming Supreme Court's denial of the county's motion for summary judgment, expressly disagreeing with contrary rulings in the First and Fourth Departments, determined a municipal agency which assumes custody over a child for the purpose of placing the child in foster care owes a special duty to the child. In this Child Victims Act case, plaintiff alleged sexual abuse during the 1970's by her foster father and, during a different foster placement, by her adult neighbor:

The Court of Appeals has long held that "an agency of government is not liable for the negligent performance of a governmental function unless there existed a special duty to the injured person, in contrast to a general duty owed to the public" … . In this case, we consider how this rule applies in the context of claims against municipalities for the negligent placement and supervision of children in foster care. In contrast to the recent holdings of the Appellate Division, First and Fourth Departments, we conclude that a municipal agency owes a special duty to a foster child upon assuming legal custody of that child. An agency that assumes custody of a foster child, and which selects and supervises that child's foster parents, necessarily owes a duty to the child "more than that owed the public generally" … . Thus, where, as here, a plaintiff asserts causes of action to recover damages for harm suffered by a foster child due to the negligent performance of a governmental function and alleges facts sufficient to show that the defendant municipal agency assumed legal custody over that child, that plaintiff need not prove any additional facts in order to satisfy the special duty rule. Adams v Suffolk County, 2024 NY Slip Op 05428, Second Dept 11-6-24

Practice Point: A municipality's liability for negligence in performing a governmental function is predicated upon owing the injured party a special duty, over and above that owed to the general public. Here, disagreeing with contrary holdings in the First and Fourth Departments, the Second Department held a

county which assumes custody of a child for placement in foster care owes a special duty to that child.

November 6, 2024

NEGLIGENCE, CIVIL PROCEDURE, EVIDENCE.

ACCORDING TO THE MEDICAL RECORDS, PLAINTIFF PROVIDED HER TREATING PHYSICIAN WITH A DESCRIPTION OF HER SLIP AND FALL WHICH DIFFERED FROM HER DESCRIPTION IN HER DEPOSITION TESTIMONY; PLAINTIFF'S MOTION TO QUASH THE SUBPOENA SERVED ON THE PHYSICIAN SHOULD NOT HAVE BEEN GRANTED (FIRST DEPT).

The First Department, reversing Supreme Court, determined plaintiff's motion to quash the subpoena served on plaintiff's treating physician, Dr. Monfett, in this slip and fall case should not have been granted. The medical records revealed plaintiff told the treating physician she tripped and fell breaking up a fight in a subway station. Plaintiff testified she fell because of a broken sidewalk in front of defendant's building. The court noted that the statement in the medical record may be inadmissible hearsay without the physician's testimony linking the statement to the plaintiff:

Dr. Monfett's deposition is material and necessary to the defense because plaintiff's account of her accident to the doctor conflicts with her deposition testimony, and this discrepancy bears directly on defendants' potential liability, as well as plaintiff's credibility … . Furthermore, the deposition is necessary because plaintiff's statements in the medical record likely would be inadmissible as hearsay without the doctor's testimony attributing them to her … . Defendants were not required to demonstrate "special circumstances" warranting Dr. Monfett's deposition because they seek to depose him "solely with regard to plaintiff's account of the accident, not for any expert medical opinion regarding plaintiff's diagnosis or treatment" … . Ogando v 40 X Owner LLC, 2024 NY Slip Op 05491, First Dept 11-7-24

Practice Point: Here defendants subpoenaed plaintiff's treating physician because the statement attributed to plaintiff in her medical records differed from her description of the trip and fall in her deposition testimony. The defendants were not seeking to depose the physician as an expert concerning plaintiff's diagnosis or

treatment, but rather were focused on plaintiff's apparently conflicting account of the accident, which would be inadmissible hearsay without the physician's testimony.

November 7, 2024

NEGLIGENCE, EVIDENCE.

DEFENDANTS DEMONSTRATED THEY DID NOT HAVE ACTUAL OR CONSTRUCTIVE NOTICE OF THE WATER ON THE FLOOR WHERE PLAINTIFF ALLEGEDLY SLIPPED AND FELL; DEFENDANTS' MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendants in this slip and fall case were entitled to summary judgment, in part because they demonstrated they did not have actual or constructive notice of the water on the floor in the laundry room where plaintiff allegedly fell:

… [T]he defendants established, prima facie, that they maintained their premises in a reasonably safe condition and that they did not create the alleged hazardous condition or have actual or constructive notice of its existence … . In support of their motion, the defendants submitted, inter alia, a transcript of the deposition testimony of the plaintiff, who testified that she did not see any water when she was last in the laundry room approximately 40 minutes prior to the accident. The defendants also submitted evidence that the machine was serviced by a vendor three days prior to the incident and that when the vendor left the premises, the machine was in working condition. When the vendor inspected the machine again on the day of the accident, the vendor determined that the machine was in working condition and that any leak was caused by the use of too much soap. In opposition, the plaintiff failed to raise a triable issue of fact as to whether the defendants had actual notice of a recurring hazardous condition and, thus, could be charged with constructive notice of the subject condition. The plaintiff's daughter's affidavit submitted in opposition to the motion merely showed that the defendants had a general awareness that, at times, water leaked from the machine at issue … . Daniel v York Terrace, Inc., 2024 NY Slip Op 05432, Second Dept 11-6-24

Practice Point: In this slip and fall case, defendants demonstrated the area where plaintiff allegedly slipped and fell had been inspected 40 minutes prior to the fall and there was no water on the floor. In addition the defendants demonstrated the washing machine was serviced three days before the fall. That proof was sufficient to demonstrate, prima facie, that defendants did not have actual or constructive notice of the water on the floor.

November 6, 2024