CasePrepPlus

September 21, 2016

An advance sheet service summarizing recent and significant New York appellate cases

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COURT OF APPEALS

INSURANCE LAW, CIVIL PROCEDURE.

QUESTION OF FACT WHETHER LATE NOTICE DEFENSE WAIVED BY FAILURE TO RAISE THE DEFENSE IN DISCLAIMER LETTERS; MOTION TO ADD DEFENSE TO ANSWER PROPERLY GRANTED.

The Court of Appeals, in a brief memorandum decision, determined there was a question of fact whether defendant insurance company waived the late-notice defense by not mentioning the defense in the disclaimer letters. The defense had been raised in earlier communications. Therefore defendants' motion to add the defense in an amended answer was properly granted: "Analyzing the circumstances under the common-law waiver standard, which requires an examination of all factors, defendants cannot be said to have waived their right to assert the late-notice defense as a matter of law by failing to specifically identify late notice in their disclaimer letters. Defendants identified the late-notice defense in early communications with plaintiff before relying on a reservation of rights in two disclaimer letters. '[U]nder common-law principles, triable issues of fact exist whether defendants clearly manifested an intent to abandon their late-notice defense' (*Keyspan Gas E. Corp. v. Munich Reins. Am., Inc.*, 23 NY3d 583, 591 [2014]). Accordingly, Supreme Court properly granted defendants' motion for leave to amend their answer to reassert the affirmative defense of late notice." ***Estee Lauder Inc. v. OneBeacon Ins. Group, LLC*, 2016 N.Y. Slip Op. 06012, CtApp 9-15-16**

FIRST DEPARTMENT

EMPLOYMENT LAW, HUMAN RIGHTS LAW, MUNICIPAL LAW.

EMPLOYMENT DISCRIMINATION CLAIMS UNDER STATE AND CITY HUMAN RIGHTS LAW SHOULD NOT HAVE BEEN DISMISSED AS UNTIMELY.

The First Department determined plaintiff stated causes of action for employment discrimination and retaliation under both the state and city (NYC) Human Rights Law. The court noted that claims after 2011 were time-barred under the state law, but claims going back to 2007 were timely under the city law, which allows otherwise time-barred claims which are part of a continuing course of conduct: "... [P]laintiff's claims under the New York State HRL for failure to promote after May 23, 2011 are timely and should not have been dismissed, as plaintiff alleged sufficient facts to meet his pleading burden for purposes of this motion to dismiss ... . Plaintiff's claims for failure to promote under the City HRL were also improperly dismissed because plaintiff has adequately alleged 'a single continuing pattern of unlawful conduct [starting from his first promotion rejection in 2007] extending into the [limitations] period immediately preceding the filing of the complaint' ... , which permits consideration under the City HRL of all actions relevant to that claim, including those that would otherwise be time-barred ... . Moreover, while, as plaintiff concedes, the continuing violations doctrine only applies to his claims of failure to promote under the City HRL ... , even under the State HRL, he 'is not precluded from using the prior acts as background evidence in support of a timely claim' ...". ***St. Jean Jeudy v. City of New York*, 2016 N.Y. Slip Op. 06045, 1st Dept 9-15-1**

INSURANCE LAW, CONTRACT LAW.

UNAMBIGUOUS TERMS OF POLICY REQUIRED A WRITTEN CONTRACT WITH ANY ADDITIONAL INSURED; THE ABSENCE OF A WRITTEN CONTRACT DIRECTLY WITH THE ADDITIONAL INSURED PRECLUDED COVERAGE, DESPITE A WRITTEN AGREEMENT WITH A THIRD PARTY TO PROVIDE COVERAGE FOR THE ADDITIONAL INSURED.

The First Department, in a full-fledged opinion by Justice Renwick, over an extensive dissenting opinion by Justice Kahn, determined that, under the unambiguous terms of the policy, the absence of a written contract directly with the additional insured precluded coverage for the additional insured, despite a written agreement with a third party to provide coverage for the additional insured. The lawsuit stemmed from damage to surrounding buildings during construction: "The principal issue in this appeal is the interpretation of the additional insurance endorsement in the policy which provides that an additional insured is 'any person or organization with whom you [the insured] have agreed to add as an additional insured by written contract.' Trial courts have arrived at conflicting interpretations of a similarly worded additional insured clause

as to whether coverage is extended not only to those 'with whom' the insured agreed, but also to those 'for whom' the insured agreed to provide coverage … . We hold that the subject additional insured clause covers only those that have a written contracts directly with the named insured. * * * ... [W]e find that the language in the 'Additional Insured-By Written Contract' clause of the ... policy clearly and unambiguously requires that the named insured execute a contract with the party seeking coverage as an additional insured. Since there is no dispute that [the insured] did not enter into a written contract with the JV (joint venture), [the insured's] agreement in its contract with DASNY (Dormitory Authority of the City of New York) to procure coverage for the JV is insufficient to afford the JV coverage as an additional insured under the ... policy." ***Gilbane Bldg. Co./TDX Constr. Corp. v. St. Paul Fire & Mar. Ins. Co.*, 2016 N.Y. Slip Op. 06052, 1st Dept 9-15-16**

PERSONAL INJURY.

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT IN TRIP AND FALL CASE PROPERLY GRANTED.
The First Department, over a dissent, determined defendants were entitled to summary judgment in this slip and fall case. Plaintiff alleged he tripped over the upturned corner of a rug: "The doorman on duty testified that he observed the carpet, used when there was inclement weather, in its usual location between the door and the elevator less than an hour before the accident and that he did not notice any part of the carpet that was not lying perfectly flat in the area of the elevators ... . He also testified that he did not remember having ever seen a carpet whose corners were not lying flat to the floor at any time during January 2011. Nor did he ever see anyone use tape to keep the corners of the carpet down. Defendants also pointed to plaintiff's testimony that the first time he saw a portion of the carpet raised was when the doorman helped him after he fell ...". ***Reeves v. 1700 First Ave. LLC*, 2016 N.Y. Slip Op. 06050, 2nd Dept 9-14-16**

SECOND DEPARTMENT

CIVIL PROCEDURE.

SUPPLEMENTAL BILL OF PARTICULARS PROPERLY SERVED WITHOUT LEAVE OF COURT; UNDER THE CIRCUMSTANCES, SUPPLEMENTAL BILL SHOULD NOT HAVE BEEN STRUCK BASED UPON PLAINTIFF'S FAILURE TO APPEAR AT A DEPOSITION.
The Second Department, reversing Supreme Court, determined the supplemental bill of particulars served by plaintiff was not an amended bill of particulars (which would have required leave of court) and plaintiff's failure to appear at a deposition scheduled one day before a mediation (which was not fruitful) did not amount to willful and contumacious conduct and did not, therefore, warrant striking the supplemental bill of particulars: "Pursuant to CPLR 3043(b), '[a] party may serve a supplemental bill of particulars with respect to claims of continuing special damages and disabilities,' with the proviso that 'no new cause of action may be alleged or new injury claimed' (CPLR 3043[b] [emphasis added]). Moreover, the statute provides that supplemental bills of particulars may be served 30 days or more prior to trial without leave of court, and that the opposing party is entitled to an opportunity for further disclosure regarding the continuing damages and disabilities. * * * While the striking of a pleading or the preclusion of evidence may be appropriate in those instances where parties engage in the chronic or repeated obstruction of discovery, thereby evidencing a willful disregard of legitimate disclosure requests and court orders ... , the plaintiff's failure to appear for a further deposition on the stipulated date does not, under the circumstances presented, rise to such a level of misconduct. Moreover, the record does not demonstrate any other discovery violations by the plaintiff. Accordingly, no willful and contumacious conduct was established ...". ***Alicino v. Rochdale Vil., Inc.*, 2016 N.Y. Slip Op. 05966, 2nd Dept 9-14-16**

CIVIL PROCEDURE, ARBITRATION.

PURPORTED RISK OF WAIVER OF RIGHT TO COMPEL ARBITRATION WAS NOT A REASONABLE EXCUSE FOR A DELAY IN ANSWERING THE COMPLAINT; MOTION TO VACATE DEFAULT SHOULD NOT HAVE BEEN GRANTED.
The Second Department, reversing Supreme Court, determined defendants' motion to vacate a default judgment should not have been granted. The defendants failed to offer a reasonable excuse for the six-month delay in answering. The court rejected the argument that a timely answer would have risked waiver of the right to compel arbitration: "The defendants asserted that they did not serve a timely answer because, "[h]ad [they] served an answer, they risked waiving the right to compel arbitration." This excuse was not reasonable given the procedural means that were available to the defendants to avoid default while preserving their right to demand arbitration of the dispute (see CPLR 7503[a]; see also CPLR 3211[a], [f]...)." ***Duprat v. BMW Fin. Servs., NA, LLC*, 2016 N.Y. Slip Op. 05970, 2nd Dept 9-14-16**

CIVIL PROCEDURE, EVIDENCE.

SUMMARY JUDGMENT CANNOT REST ON GAPS IN THE OPPOSING PARTY'S PAPERS; MOVING PARTY MUST ADDRESS EVERY NECESSARY ELEMENT WITH SUBSTANTIVE PROOF.
The Second Department, in a dispute among business partners, determined certain motions for summary judgment should not have been granted. The court explained that summary judgment cannot rest on gaps in the opposing party's proof. A

defendant bringing the motion must make out a prima facie case by addressing every issue raised in the pleadings. Where every issue is not addressed with substantive proof, the motion must be denied without reference to the opposing papers: " '[T]he prima facie showing which a defendant must make on a motion for summary judgment is governed by the allegations of liability made by the plaintiff in the pleadings' ... . In this case, the individual defendants failed to affirmatively demonstrate, prima facie, that they did not breach any fiduciary duty owed to the plaintiffs during the course of all of the transactions or occurrences described in the amended complaint ... . Similarly, the individual defendants failed to affirmatively establish, prima facie, that the plaintiffs did not sustain any damages as a result of their alleged misconduct ... . Furthermore, the submissions of the individual defendants were insufficient to establish, prima facie, that the application of the business judgment rule protected all of the transactions or occurrences described in the amended complaint from judicial scrutiny. * * * The individual defendants' representations that all of the challenged conduct outlined in the amended complaint was performed in furtherance of the Partnership's legitimate interests were conclusory, unsubstantiated, and, without more, amounted to bare legal conclusions that were insufficient to establish that the business judgment rule barred judicial inquiry into these matters ...". ***Katz v. Beil*, 2016 N.Y. Slip Op. 05977, 2nd Dept 9-14-16**

CIVIL PROCEDURE, EVIDENCE.

FAILURE TO PRESERVE VIDEO OF UNDERLYING INCIDENT DID NOT WARRANT STRIKING THE ANSWER. The Second Department, modifying Supreme Court, determined striking the answer was too severe a sanction for failure to preserve a video of the underlying incident (spoliation). The court noted that the plaintiff could still prove his case without the video recording. Therefore, an adverse inference jury instruction was an appropriate sanction: " 'Under the common-law doctrine of spoliation, a party may be sanctioned where it negligently loses or intentionally destroys key evidence' ... . 'The party requesting sanctions for spoliation has the burden of demonstrating that a litigant intentionally or negligently dis-posed of critical evidence, and fatally compromised its ability to' prove its claim or defense ... . However, ' striking a plead-ing is a drastic sanction to impose in the absence of willful or contumacious conduct' and, thus, the courts must 'consider the prejudice that resulted from the spoliation to determine whether such drastic relief is necessary as a matter of funda-mental fairness' ... . 'When the moving party is still able to establish or defend a case, a less severe sanction is appropriate' ...". ***Peters v. Hernandez*, 2016 N.Y. Slip Op. 05983, 2nd Dept 9-14-16**

CRIMINAL LAW, ATTORNEYS.

PRO SE DEFENDANT DOES NOT HAVE A CONSTITUTIONAL RIGHT TO STANDBY COUNSEL.
The Second Department determined pro se defendant was not deprived of his right to counsel when his request for standby counsel was denied. A defendant has no constitutional right to so-called "hybrid" representation: "The defendant contends that he was denied his right to proceed pro se. At the beginning of pretrial proceedings, however, the defendant sought standby counsel to assist in his self-representation. 'A criminal defendant has no Federal or State constitutional right to hybrid representation. While the Sixth Amendment and the State Constitution afford a defendant the right to counsel or to self-representation, they do not guarantee a right to both . . . [, and] a defendant who elects to exercise the right to self-representation is not guaranteed the assistance of standby counsel during trial' ... . However, '[b]ecause a defendant has no constitutional right to hybrid representation, the decision to allow such representation lies within the sound discretion of the trial court' ... . Under the circumstances of this case, the County Court providently exercised its discretion in denying the defendant's request for hybrid representation." ***People v. Neree*, 2016 N.Y. Slip Op. 06006, 2nd Dept 9-14-16**

FORECLOSURE, EVIDENCE.

FOUNDATION REQUIREMENTS FOR BUSINESS RECORDS EXCEPTION TO THE HEARSAY RULE NOT MET. BANK'S SUMMARY JUDGMENT MOTION SHOULD NOT HAVE BEEN GRANTED.
The Second Department determined the plaintiff bank failed to satisfy the foundation for the business records exception to the hearsay rule. The bank's motion for summary judgment should have been denied. Although the affiant (Roesner) stated he was familiar with the successor-in-interest's record keeping system, he did not allege he was familiar with the plaintiff bank's record keeping practices and procedures: "On its motion for summary judgment, a plaintiff has the burden of establishing, by proof in admissible form, its prima facie entitlement to judgment as a matter of law ... . The plaintiff failed to demonstrate the admissibility of the records relied upon by Roesner under the business records exception to the hearsay rule (see CPLR 4518[a]), and, thus, failed to establish the appellant's default in payment under the note. "A proper foundation for the admission of a business record must be provided by someone with personal knowledge of the maker's business practices and procedures'... . Roesner, who was employed by the loan servicer ..., did not allege that he was personally familiar with the plaintiff's record keeping practices and procedures. Thus, Roesner failed to lay a proper foundation for the admission of records concerning the appellant's payment history...". ***HSBC Mtge. Servs., Inc. v. Royal*, 2016 N.Y. Slip Op. 05973, 2nd Dept 9-14-16**

FREEDOM OF INFORMATION LAW (FOIL), PISTOL PERMITS.

SAFE ACT DOES NOT AFFECT APPLICABILITY OF FREEDOM OF INFORMATION LAW EXEMPTIONS TO HOLDERS OF PISTOL PERMITS.

In a matter of first impression, the Second Department determined the SAFE ACT, which allows holders of pistol permits to apply to have their names and addresses removed from the public record, does not affect the application of the Freedom of Information Law (FOIL) exemptions to holders of pistol permits which remain on the public record. Therefore, the newspaper's (Gannett's) request for the names and addresses of pistol permit holders (those not "excepted" under the SAFE ACT) was properly granted because none of the FOIL exemptions applied: "The County parties' argument that, pursuant to Public Officers Law §§ 87(2)(b) and 89(2)(b)(ii), disclosure of the names and addresses of pistol permit holders would constitute an unwarranted invasion of privacy because Gannett intends to use the names and addresses of pistol permit holders for solicitation purposes is without merit. Gannett's status as a commercial enterprise does not demonstrate that Gannett intends to use the names and addresses to solicit business ... , and it represented that it did not intend to do so. Moreover, the County parties failed to establish that disclosure of the names and addresses would 'be offensive and objectionable to a reasonable [person] of ordinary sensibilities' ... . The County parties also failed to establish that any other exemptions to the FOIL disclosure requirement are applicable to the records at issue." ***Matter of Inc. v. County of Putnam*, 2016 N.Y. Slip Op. 05999, 2nd Dept 9-14-16**

LANDLORD-TENANT, CONTRACT LAW.

LANDLORD DID NOT HAVE A DUTY TO DISCLOSE LOCAL LAWS RESTRICTING THE USE OF THE PROPERTY.

The Second Department determined the terms of the lease negated the claimed violation of an implied covenant of good faith and fair dealing. The plaintiffs leased defendants' property to operate a car dealership. After learning that a local law prohibited parking cars without license plates on the property, the plaintiffs asked to be released from the lease. The landlord refused. The terms of the lease specifically stated (1) it was subject to any local law restrictions and (2) it made no representations the property was suitable to plaintiffs' intended business: "Imposing a duty on the landlord to disclose zoning or local law restrictions would render [the lease] provisions ineffective ... . These express and specific provisions in the lease itself conclusively establish a defense to causes of action alleging breach of the implied covenant of good faith and fair dealing ...". ***1357 Tarrytown Rd. Auto, LLC v. Granite Props., LLC*, 2016 N.Y. Slip Op. 05981, 2nd Dept 9-14-16**

MUNICIPAL LAW, CIVIL RIGHTS LAW, CIVIL PROCEDURE, PERSONAL INJURY.

PORTION OF DETECTIVE'S INTERNAL AFFAIRS FILE DISCOVERABLE; DEPOSITION OF ADDITIONAL EMERGENCY MEDICAL TECHNICIANS SHOULD HAVE BEEN ALLOWED.

In an action against a detective and emergency medical technicians (EMT's) alleging negligence during an emergency response, the Second Department determined a portion of the detective's "internal affairs" file was discoverable as "material and necessary" and the deposition of two additional EMT's should have been allowed because sufficient information about the response to the accident had not been provided by the EMT's who had been deposed: "Here, only two EMTs who responded to the accident scene have been deposed thus far, and one of those EMTs is the ... officer who allegedly failed to provide necessary first aid to the decedent. The testimony of these two emergency responders did not provide sufficient information regarding the actions taken by the various EMTs and ambulance workers who responded to the accident, and it is likely that other on-scene EMTs may possess relevant and material information. Under these circumstances, the plaintiffs are entitled to depose the other members of the ambulance company who were present at the accident scene ...". ***Cea v. Zimmerman*, 2016 N.Y. Slip Op. 05968, 2nd Dept 9-14-16**

MUNICIPAL LAW, EMPLOYMENT LAW.

COUNTY HAD AUTHORITY TO IMPOSE A WAGE FREEZE TO ADDRESS A FINANCIAL CRISIS.

The Second Department, interpreting the Public Authorities Law, determined Nassau County had the authority to impose a wage freeze on county employees to address a financial crisis: "... [W]e find that, contrary to the ... petitioners' contention, the Supreme Court correctly determined that NIFA [Nassau County Interim Finance Authority] was authorized under the NIFA Act to impose the subject wage freezes (see Public Authorities Law § 3669[3]). Public Authorities Law § 3669(3) expressly provides for NIFA's authority to declare a control period by enacting a resolution finding a fiscal crisis, and upon such finding, order that all increases in salary or wages of county employees be suspended. Control periods may be declared 'at any time' (Public Authorities Law § 3669[1])." ***Matter of Carver v. Nassau County Interim Fin. Auth.*, 2016 N.Y. Slip Op. 05995, 2nd Dept 9-14-16**

PERSONAL INJURY.

QUESTION OF FACT WHETHER POSITION OF TAXI PARTIALLY IN THE ROADWAY WAS PROXIMATE CAUSE OF PASSENGER'S INJURIES WHEN PASSENGER WAS STRUCK BY ANOTHER CAR APPROACHING FROM THE REAR.

The Second Department, over a dissent, determined there was a question of fact whether a taxi driver (Rahman) breached a duty to a pedestrian (O'Connor) by positioning the cab partially in a traffic lane such that the view of drivers approaching from the rear was obstructed. The pedestrian, who had just gotten out of the cab, was struck by another cab (driven by Aidoo) when he attempted to cross the road. Any breach related to letting the passenger/pedestrian off too far from the curb was not the proximate cause of the injuries: "Rahman's taxicab, which was stopped at least partially in the right travel lane, may have obscured Aidoo's view of O'Connor as O'Connor began to cross the street. This raised a triable issue of fact as to whether Rahman's positioning of his car at least partially in a travel lane was a violation of the traffic rules of the City of New York (see 34 RCNY 4-08[e]), and whether that violation was a proximate cause of the collision and of O'Connor's injuries and death ... .Contrary to the position taken by our dissenting colleague, the duty of a common carrier to safely discharge a passenger is not the sole basis asserted for liability in this action. The asserted liability of Rahman does not depend on whether he breached his duty to O'Connor as his passenger. Rahman's alleged breach of that duty, by letting O'Connor off too far from the curb, did not proximately cause O'Connor's injuries, which resulted from his attempt to cross the street ... . Instead, liability arises, if at all, from Rahman's breach of duty to O'Connor as a pedestrian by positioning his cab partially in a traffic lane, thereby obstructing the view of drivers approaching from the rear ...". ***O'Connor v. Ronnie Cab Corp.*, 2016 N.Y. Slip Op. 05980, 2nd Dept 9-14-16**

PERSONAL INJURY, EVIDENCE.

COURT SHOULD NOT MAKE CREDIBILITY DETERMINATIONS OR WEIGH THE EVIDENCE AT THE SUMMARY JUDGMENT STAGE, DEFENDANTS' SUMMARY JUDGMENT MOTION SHOULD HAVE BEEN DENIED.

The Second Department, reversing Supreme Court, determined defendants' motion for summary judgment should not have been granted in this vehicle-collision case. Credibility issues can not be resolved at the summary judgment stage: "It is not the court's function on a motion for summary judgment to assess credibility ... . Issue finding, rather than issue determination, is the court's proper function on such a motion ... . Thus, a motion for summary judgment 'should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility' ... . Here, the Supreme Court should have denied the defendants' motion for summary judgment dismissing the complaint. In support of their motion, the defendants submitted evidence including transcripts of the deposition testimony of both the plaintiff and the defendant driver. In those transcripts, the parties gave differing accounts of the manner in which the accident occurred, and issues of fact and credibility were presented which could not be resolved on a motion for summary judgment. Given these issues, the defendants failed to establish their prima facie entitlement to judgment as a matter of law ...". ***Chimbo v. Bolivar*, 2016 N.Y. Slip Op. 05969, 2nd Dept 9-14-16**

PERSONAL INJURY, EVIDENCE.

SIZE OF SIDEWALK DEFECT DID NOT DEMONSTRATE DEFENDANTS SHOULD HAVE HAD NOTICE OF IT.

The Second Department affirmed the grant of defendants' motion for summary judgment in a slip and fall case. The presence of a 1 1/2 inch deep hole in a sidewalk, larger than a silver dollar, with cracks radiating from the hole, was not sufficient to demonstrate the defect existed long enough to give defendants notice of it: "An employee of the restaurant in charge of its day-to-day operations testified at his deposition that he did not observe any defects ... . Further, the plaintiff's deposition testimony established that, although she had visited the restaurant at least 10 times in the year preceding her accident, she had never observed the alleged sidewalk defect prior to her accident. She described the defect which caused her to fall as cracks radiating from a hole 1½ inches deep, with a diameter larger than a silver dollar. That description, did not, by itself, indicate that the alleged defect was present for a sufficient length of time to give the defendants constructive notice of its existence." ***Gallway v. Muintir, LLC*, 2016 N.Y. Slip Op. 05971, 2nd Dept 9-14-16**

PERSONAL INJURY, EVIDENCE.

CRITERIA FOR SUMMARY JUDGMENT BASED UPON RES IPSA LOQUITUR EXPLAINED, NOT MET HERE.

The Second Department determined plaintiffs' cross-motion for summary judgment, based upon the doctrine of res ipsa loquitur, was properly denied in this slip and fall case. Plaintiffs alleged defendant operated a sprinkler in December which caused the icy condition. The court explained the res ipsa loquitur doctrine can rarely be applied as a matter of law. Here the plaintiffs were unable to show that the injured plaintiff did not take a voluntary action which contributed to her injury: "In support of that branch of their cross motion which was for summary judgment on the issue of liability, the plaintiffs relied on the doctrine of res ipsa loquitur. To rely on that doctrine, a plaintiff must show that '(1) the event is of the kind that ordinarily does not occur in the absence of someone's negligence; (2) the instrumentality that caused the injury is within the defendants' exclusive control; and (3) the injury is not the result of any voluntary action by the plaintiff' ... . The doctrine

of res ipsa loquitur permits an inference of negligence to be drawn solely from the happening of an accident ... . Since the circumstantial evidence allows but does not require the jury to infer that the defendant was negligent, res ipsa loquitur evidence does not ordinarily or automatically entitle the plaintiff to summary judgment, even if the plaintiff's circumstantial evidence is unrefuted ... . '[O]nly in the rarest of res ipsa loquitur cases may a plaintiff win summary judgment' ... . 'That would happen only when the plaintiff's circumstantial proof is so convincing and the defendant's response so weak that the inference of defendant's negligence is inescapable' ...". ***Giantomaso v. T. Weiss Realty Corp.*, 2016 N.Y. Slip Op. 05972, 2nd Dept 9-14-16**

PERSONAL INJURY, EVIDENCE.

LANDOWNERS NEGATED BOTH POTENTIAL THEORIES OF LIABILITY FOR INJURIES TO WORKER, SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined defendant landowners were entitled to summary judgment dismissing the common law negligence complaint brought by a worker injured constructing a gazebo in the landowners' backyard. The court explained that the defendant had properly addressed and negated both theories of liability raised in the complaint, i.e. liability stemming from supervision of the work and liability stemming from a dangerous condition: "Landowners and general contractors have a common-law duty to provide workers with a reasonably safe place to work ... . To be held liable for common-law negligence for injuries arising from the manner in which work is performed, a defendant must have authority to exercise supervision and control over the means and methods of the plaintiff's work ... . Where a plaintiff's injuries arise not from the manner in which the work was performed, but from a dangerous condition on the premises, a defendant may be liable for common-law negligence if it 'either created the dangerous condition that caused the accident or had actual or constructive notice of the dangerous condition' ... . When an accident is alleged to involve defects in both the premises and the equipment used at the work site, a defendant moving for summary judgment with respect to causes of action alleging common-law negligence is obligated to address the proof applicable to both liability standards ... . A defendant moving for summary judgment in such a case may prevail 'only when the evidence exonerates it as a matter of law for all potential concurrent causes of the plaintiff's accident and injury, and when no triable issue of fact is raised in opposition as to either relevant liability standard' ...". ***Wejs v. Heinbockel*, 2016 N.Y. Slip Op. 05989, 2nd Dept 9-14-16**

REAL ESTATE, EVIDENCE.

HOMEOWNERS ASSOCIATION'S EXERCISE OF RIGHT OF FIRST REFUSAL PROPER UNDER THE BUSINESS JUDGMENT RULE.

The Second Department determined Supreme Court properly rejected plaintiffs' challenge of defendant homeowners association's exercise of a right of first refusal. Plaintiffs had entered a purchase contract for a home within the association, but, pursuant the provisions of the purchase contract and the association's declaration and restrictive covenants (Declaration), the association purchased the property. Applying the business judgment rule, the Second Department held the association had the authority to purchase the home: "In reviewing the actions of a homeowners' association, a court should apply the business judgment rule and should limit its inquiry to whether the action was authorized and whether it was taken in good faith and in furtherance of the legitimate interests of the association ... . The business judgment doctrine does not apply when a board acts outside the scope of its authority ... . * * * The contract ... specifically provided that the purchaser acknowledged that the transaction was subject to the waiver, or deemed waiver, of the right of first refusal held by the Association as set forth in the Declaration. Further, the Board, on behalf of the Association, exercised the right of first refusal within the time period set forth in the Declaration." ***19 Pond, Inc. v. Goldens Bridge Community Assn., Inc.*, 2016 N.Y. Slip Op. 05979, 2nd Dept 9-14-16**

TRUSTS AND ESTATES.

SUMMARY JUDGMENT PROPERLY GRANTED IN ACTIONS AGAINST EXECUTOR FOR BREACH OF FIDUCIARY DUTY AND NEGLIGENCE.

The Second Department determined summary judgment was properly granted in the objectants' actions against the executor (Mahler) for breach of fiduciary duty and negligence. The executor sold the estate asset (real property) to an acquaintance for half of its value. The acquaintance sold the property for nearly double the purchase price: "A fiduciary acting on behalf of an estate is required to employ such diligence and prudence to the care and management of the estate assets and affairs as would prudent persons of discretion and intelligence in their own like affairs ... . '[A] fiduciary owes a duty of undivided and undiluted loyalty to those whose interests the fiduciary is to protect' ... . In performing his fiduciary duty as the executor of the decedent's estate, Mahler was required to use good business judgment ... . To the extent that the sale of the property does not meet this standard, the beneficiaries of the estate may seek to surcharge him ... . 'To obtain such a surcharge, it is not enough for the contestants to show that the representatives of the estate did not get the highest price obtainable; it must be shown that they acted negligently, and with an absence of diligence and prudence which an ordinary [person] would exercise in his [or her] own affairs ...". ***Matter of Billmyer*, 2016 N.Y. Slip Op. 05994, 2nd Dept 9-14-16**