March 15, 2019

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FIRST DEPARTMENT

CIVIL PROCEDURE, PERSONAL INJURY, EMPLOYMENT LAW.

EVEN WHERE A CAUSE OF ACTION HAS NOT BEEN PROPERLY PLED THE COURT WILL SEARCH THE RECORD TO DETERMINE WHETHER THERE IS AN ACTIONABLE CLAIM IN RESPONSE TO A DEFENDANT'S MOTION FOR SUMMARY JUDGMENT, HERE IN THIS SLIP AND FALL CASE THERE WAS NO EVIDENTIARY SUPPORT FOR CERTAIN CAUSES OF ACTION AGAINST THE BUILDING OWNER.

The First Department noted that, even where a cause of action is not properly pled, on a motion for summary judgment it must search the record to determine whether there is an actionable claim. In this slip and fall case, the building owner was defendant 90 Merrick and the employer of the janitor who allegedly mopped the floor where plaintiff fell was defendant ABM. The First Department held that the 90 Merrick's motion for summary judgment should have been granted: "The complaint's allegations that defendants were negligent in their ownership, operation, control and maintenance of the premises by causing or allowing a dangerous condition on the floor gave no indication that plaintiff's theories of liability would include 90 Merrick's negligent retention of ABM or its vicarious liability for ABM's independent contractor's negligence in performing its duties under the contract ... . Notwithstanding, a motion for summary judgment must be denied if there are issues of fact as to an actionable claim, even if the claim was not properly pleaded ... , and we find that there are no factual issues as to whether ABM was an independent contractor — it was — when the accident happened. The deposition testimony elicited from nonparty CLK Commercial Management, LLC's employee, John S. Burke, the property manager for the building at the time of the accident, and ABM's manager, Victor Orellana, whose duties at the time of the accident included making sure the building was kept clean, shows that 90 Merrick did not direct, supervise or control ABM's work and that an ABM employee had responsibility for supervising and inspecting the work performed by ABM's employees, which comports with the duties and obligations as set forth in defendants' contract ...". ***Burgdoerfer v. CLK/HP 90 Merrick LLC*, 2019 N.Y. Slip Op. 01532, First Dept 3-5-19**

CRIMINAL LAW, EVIDENCE.

PEOPLE DEMONSTRATED THE RAPE KIT AND BLOOD AND SALIVA EVIDENCE RELATED TO A 1988 PROSECUTION HAD BEEN DESTROYED AND DEFENDANT DID NOT DEMONSTRATE THE AVAILABILITY OF THE EVIDENCE WOULD HAVE CHANGED THE VERDICT, MOTION FOR DNA TESTING AND MOTION TO VACATE THE CONVICTION PROPERLY DENIED.

The First Department determined defendant's motion for DNA testing and his motion to vacate his conviction were properly denied. Defendant had been convicted of sodomy in 1988. After a successful habeas corpus petition, a second trial was held and defendant was again convicted. After the habeas corpus petition had been filed, but before it was docketed, the NYPD destroyed the rape kit and blood and saliva samples. No DNA testing had been done on the evidence: "Any defendant, regardless of the date of conviction, may move for DNA testing on specified evidence. The court shall grant the application if it determines that had a DNA test been conducted on the evidence and had the results of that evidence been admitted at trial, 'there exists a reasonable probability that the verdict would have been more favorable to the defendant' (CPL 440.30[1-a][a][1]). Defendant bears the burden of making the 'reasonable probability' showing ... . Where the People assert that the evidence to be tested has been destroyed or cannot be located, the statute provides that the people must make 'a representation to that effect' and submit 'information and documentary evidence in the possession of the people concerning the last known physical location of such specified evidence' (CPL 440.30[1-b][b]). It is the People's burden to show that the evidence could no longer be located and was thus no longer available for testing ... . We find that the People met their burden. .. .[W]e find that defendant has not carried his burden of establishing that, even had he been able to secure the original evidence and perform DNA testing on it, there is a reasonable probability that the verdict would have been different ...". ***People v. Dorsey*, 2019 N.Y. Slip Op. 01526, First Dept 3-5-19**

CRIMINAL LAW, EVIDENCE.

DEFENDANT'S FLIGHT WHEN APPROACHED BY POLICE IN PLAINCLOTHES AND DRIVING AN UNMARKED CAR DID NOT JUSTIFY PURSUIT, MOTION TO SUPPRESS WEAPON DISCARDED BY THE DEFENDANT SHOULD HAVE BEEN GRANTED.

The First Department, in a full-fledged opinion by Justice Renwick, over two separate full-fledged dissenting opinions, determined that the police did not have justification for pursuing defendant when he ran as the police (in plainclothes driving an unmarked car) approached. The police had a report of a shooting by a black man wearing a black jacket. Defendant was wearing a gray jacket and was walking out of an apartment complex with a black man wearing a black jacket. Defendant's motion to suppress the weapon he discarded during the chase should have been granted: " 'Flight alone, even if accompanied by equivocal circumstances that would justify a police request for information, does not establish reasonable suspicion of criminality and is insufficient to justify pursuit, although it may give rise to reasonable suspicion if combined with other specific circumstances indicating the suspect's possible engagement in criminal activity' ... . 'Police pursuit of an individual 'significantly impede[s]' the person's freedom of movement and thus must be justified by reasonable suspicion that a crime has been, is being, or is about to be committed' ... . [T]he radio report simply indicated a sole perpetrator with a vague description — black man in a black jacket. There was nothing at all about defendant that matched any aspect of the suspect in the radio report, except that he was black. Nor was defendant wearing a black jacket. He was wearing a gray jacket and was with a second individual, several minutes after the radio report of shots fired. The men did not appear to be fleeing the scene, but rather, were exiting an apartment complex. Thus, unlike the cases relied on by the People, defendant did not match any description, general or otherwise ... . Further, there was insufficient evidence to support the conclusion that defendant knew Pengel and his colleagues were police officers... . That defendant was with someone who matched an extremely vague, generic description of the suspect, which contained no information about the suspect's height or weight, was not sufficiently indicative of criminal activity on defendant's part ...". ***People v. Bilal*, 2019 N.Y. Slip Op. 01673, First Dept 3-7-19**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

PLAINTIFF WAS DOING ROUTINE MAINTENANCE WHEN HE FELL FROM A LADDER, NOT COVERED BY LABOR LAW § 240(1).

The First Department determined plaintiff was not engaged in work covered by Labor Law § 240(1) when he fell from a ladder: "Although plaintiff injured his elbow when the ladder he was using in defendant's building fell over, he is not entitled to relief under Labor Law § 240(1) since he was not engaged in construction-related activity at the time of his accident ... . Plaintiff's actions of opening a splice box affixed to the wall and splicing telephone wires therein while on a service call for a customer of his employer did not constitute an alteration of the building, but rather routine maintenance ...". **Spencer v. 322 Partners, L.L.C., 2019 N.Y. Slip Op. 01523, First Dept 3-5-19**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

THAT THE LADDER WAS NOT DEFECTIVE DID NOT MATTER, THE LADDER WAS NOT AN ADEQUATE SAFETY DEVICE UNDER THE CIRCUMSTANCES AND THE LADDER WAS NOT ADEQUATELY SECURED, PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT ON HIS LABOR LAW § 240(1) CAUSE OF ACTION PROPERLY GRANTED.

The First Department determined plaintiff's motion for summary judgment on his Labor Law § 240(1) cause of action was properly granted. The ladder was deemed an inadequate safety device because plaintiff had to step off the ladder onto display cases to do his work. The fact that the ladder was not defective was not dispositive because the ladder was not secured: "Plaintiff, who fell from a ladder while installing light fixtures in [the] building, was forced to install a portion of the light by standing on display cases approximately 20 feet high, and then returning to the top of the ladder to finish that portion of the installation, which was located partially over the cases. While attempting to maneuver himself into position on the ladder, he lost his balance and fell. Whether the ladder shook prior to his fall or during that period in time when he was attempting to recover his balance is of no moment, since the ladder was an inadequate safety device for the work being performed ... . The claim ... that plaintiff was the sole proximate cause of his accident is unpersuasive, since plaintiff's stance was necessary to perform the work ... . It also does not avail defendants that the ladder was not defective, since it is undisputed that the ladder was unsecured, and the worker who had been holding the ladder walked away only minutes before the accident ...". ***Nieto v. CLDN NY LLC*, 2019 N.Y. Slip Op. 01537, First Dept 3-5-19**

LANDLORD-TENANT, CIVIL PROCEDURE, INSURANCE LAW.

TENANT'S ALLEGED FAILURE TO INSURE THE PROPERTY AND ALLEGED IMPROPER ASSIGNMENT OF THE LEASE ARE NOT DEFAULTS THAT CAN BE CURED, THEREFORE THE TENANT IS NOT ENTITLED TO A *YELLOWSTONE* INJUNCTION.

The First Department, reversing Supreme Court, determined the tenant was not entitled to a *Yellowstone* injunction because the alleged failure to insure the property and the alleged improper assignment of the lease were not curable defaults: "The purpose of a Yellowstone injunction, which tolls the period in which a tenant may cure a claimed violation of the lease, is for a tenant to avoid forfeiture after a determination against it has been made on the merits, because the tenant will still have an opportunity to cure ... . A necessary lynchpin of a Yellowstone injunction is that the claimed default is capable of cure. Where the claimed default is not capable of cure, there is no basis for a Yellowstone injunction... . Here, the claimed defaults are the tenant's failure to procure insurance and improper assignment of the lease. The tenant provides various steps that it will take to cure if it is ultimately found to be in material violation of the insurance provisions of the lease. None of these proposed cures involve any retroactive change in coverage, which means that the alleged defaults raised by the landlord are not susceptible to cure ... . * * * We reject the tenant's argument, that even if no Yellowstone injunction is warranted, it is still entitled to a preliminary injunction. Yellowstone injunctions are available on a far lesser showing than preliminary injunctions ... . Because the Yellowstone injunction fails, the preliminary injunction does as well. In any event, no injunction is needed to preserve the status quo because the landlord cannot evict the tenant unless and until there is a determination of the merits in the landlord's favor. If the tenant prevails, then there will be no eviction. The right lost by the denial of a Yellowstone injunction is the right to cure any default." ***Bliss World LLC v. 10 W. 57th St. Realty LLC*, 2019 N.Y. Slip Op. 01509, First Dept 3-5-19**

PERSONAL INJURY.

QUESTION OF FACT WHETHER DEFENDANT IN THIS SLIP AND FALL CASE HAD CONSTRUCTIVE KNOWLEDGE OF MELTED ICE CREAM ON THE STAIRS, THERE WAS EVIDENCE THE ICE CREAM HAD BEEN THERE FOR AT LEAST THREE HOURS, DEFENDANT'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED.

The First Department, reversing Supreme Court, determined there was a question of fact whether defendant had constructive notice of melted ice cream which had spilled onto interior stairs in this slip and fall case. There was evidence the ice cream was on the step for at least three hours: "Although defendants' superintendent testified that he complied with his regular maintenance routine on the day of the accident and never observed the cup of ice cream on the stairs, plaintiff testified that she observed the cup of ice cream in an upright position approximately three hours before her fall when she had returned home from work. Such conflicting testimony, along with a photograph showing a tipped over cup of melted ice cream taken moments after plaintiff's fall, creates a triable issue as to whether defendants had constructive notice of the condition ...". ***Cruz v. Perspolis Realty LLC*, 2019 N.Y. Slip Op. 01531, First Dept 3-5-19**

PERSONAL INJURY.

DEFENDANTS DEMONSTRATED THEY DID NOT HAVE CONSTRUCTIVE NOTICE OF THE WET CONDITION ON THE STAIRS IN THIS SLIP AND FALL CASE, DEFENDANTS' MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED.

The First Department, reversing Supreme Court, determined defendants' motion for summary judgment in this stairway slip and fall case should have been granted. Defendants demonstrated they did not have constructive notice of a wet condition: "Defendants ... relied on plaintiff's testimony that, in the 15 minutes before his accident, he had gone up and down the stairs without incident and did not notice any liquid or water on the steps, demonstrating that the alleged dangerous condition was not visible and apparent for a sufficient time before the accident to provide constructive notice ... . Although plaintiff did testify that he saw a woman with a mop coming down the stairs as he was going upstairs the first time, implying that she could have caused the wet condition, he acknowledged that the surveillance video did not show any woman with a mop. Furthermore, defendants' witnesses stated that the daytime worker for defendant United Building Maintenance Associates, Inc. was only responsible for cleaning the area near the ATM machines on the first floor and never mopped, and that the staircase was cleaned by night personnel." ***Fernandez v. JPMorgan Chase Bank, NA*, 2019 N.Y. Slip Op. 01645, First Dept 5-7-19**

PERSONAL INJURY, ARCHITECTURAL MALPRACTICE.

ARCHITECT'S MOTION FOR SUMMARY JUDGMENT PROPERLY DENIED, THE FACT THAT ANOTHER PARTY PLACED THE ANGLE IRON WHICH INJURED PLAINTIFF IN AN EFFORT TO FIX AN ALLEGED DEFECT IN THE DESIGN OF THE SUBJECT BOILER SYSTEM DID NOT CONSTITUTE A SUPERSEDING CAUSE OF PLAINTIFF'S INJURY AS A MATTER OF LAW.

The First Department determined defendant architect's (Cannon's) motion for summary judgment in this personal injury case was properly denied. Plaintiff was injured when an angle iron used to support part of a boiler system struck him on the head. Cannon argued it did not have any responsibility for the use of the angle iron as a support, which was placed there by a third party. However Cannon approved the boiler system and therefore may have been responsible for the defect which resulted in the need for the angle-iron support. Therefore the placement of the angle iron may not have been a superseding cause of the injury: "[A]ccording to Cannon, even if it was negligent in its review of the component list or in its inspections of the ongoing work, any such negligence was not a proximate cause of the accident, because the installation of angle irons, which it never approved, and the failure of DASNY [building owner] and Martin [HVAC contractor} to heed its remediation recommendation for eight months before the accident occurred were intervening superseding causes. 'When a question of proximate cause involves an intervening act, liability turns upon whether the intervening act is a normal or foreseeable consequence of the situation created by the defendant's negligence' ... . 'The mere fact that other persons share some responsibility for plaintiff's harm does not absolve defendant from liability because there may be more than one proximate cause of an injury' ... . Here, a jury could reasonably conclude that the effort to reinforce the cleanout port covers with angle irons was a normal and foreseeable consequence of the alleged inadequacy of the covers, which Cannon either approved or failed to detect, and which Cannon's principal acknowledged were not the proper covers. Thus, under the circumstances presented in this case, there remain triable issues of fact as to whether, inter alia, the use of the angle iron bracing, as well as DASNY and Martin's failure to replace the covers, despite notice from Cannon, constituted superseding causes of plaintiff's injuries ...". ***Demetro v. Dormitory Auth. of the State of N.Y.*, 2019 N.Y. Slip Op. 01642, First Dept 3-7-19**

SECOND DEPARTMENT

ATTORNEYS, AGENCY, CONTRACT LAW.

ATTORNEY HAD APPARENT AUTHORITY TO SIGN STIPULATION OF SETTLEMENT WHICH THEREFORE BOUND THE PLAINTIFF TO ITS TERMS.

The Second Department, reversing Supreme Court, determined plaintiff's attorney had apparent authority to sign a stipulation of settlement which was therefore binding on plaintiff: " 'A stipulation made by the attorney may bind a client even where it exceeds the attorney's actual authority if the attorney had apparent authority to enter into the stipulation' ... . Here, the plaintiff is bound by the settlement agreement signed by her former attorney. Even if the attorney lacked actual authority to enter into the settlement agreement on the plaintiff's behalf, a finding that he had the apparent authority to do so is warranted by the facts ... . The plaintiff's former attorney participated in the mediation with the plaintiff's knowledge and consent, and represented to the mediator and to defense counsel that a representative from his office had spoken with the plaintiff and obtained authority to settle the action for the sum of $150,000. Additionally, the law firm that employed the attorney who participated in the mediation was the plaintiff's attorney of record in the action, and attorneys from that law firm signed and verified the summons and complaint and signed and certified a note of issue filed in the action ...". ***Amerally v. Liberty King Produce, Inc.*, 2019 N.Y. Slip Op. 01550, Second Dept 3-5-19**

ATTORNEYS, CIVIL PROCEDURE.

SANCTIONS PROPERLY IMPOSED FOR BRINGING A FRIVOLOUS LAWSUIT.

The Second Department determined sanctions for frivolous conduct were properly imposed. The action was precluded by collateral estoppel and should not have been brought: " 'The court, in its discretion, may award to any party or attorney in any civil action or proceeding before the court, except where prohibited by law, costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees resulting from frivolous conduct' (22 NYCRR 130-1.1[a]). Conduct is frivolous under 22 NYCRR 130-1.1 if it is 'completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law' or it is 'undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another' (22 NYCRR 130-1.1[c][1], [2] ...). Here, the Supreme Court providently exercised its discretion in granting that branch of the defendant's motion which was pursuant to 22 NYCRR 130-1.1(a) to impose a sanction upon Miller and his attorney consisting of costs in the form of an attorney's fee (see 22 NYCRR 130-1.1[a]). Under the circumstances of this case, the court properly determined that Miller and his attorney engaged in frivolous conduct in commencing this action, as it was completely without merit in law, and could not be supported by a reasonable argument for an extension, modification, or reversal of existing law (see 22 NYCRR 130-1.1[c])." ***Miller v. Falco*, 2019 N.Y. Slip Op. 01589, Second Dept 3-6-19**

CIVIL PROCEDURE, ATTORNEYS.

DELIBERATE ACTS BY DEFENDANT'S ATTORNEY RESULTED IN THE DEFAULT, DEFENDANT'S MOTION TO VACATE THE DEFAULT SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined defendant's attorney's deliberate acts required denial of defendant's motion to vacate the default: "The affirmations of the defendant's attorney reveal that he made a conscious decision not to submit any papers in opposition to the plaintiff's motion even though the Supreme Court gave him ample opportunity to do so. In addition, defense counsel waited until the plaintiff served a proposed default order, more than four months after the court declared the defendant to be in default, before serving the defendant's motion to vacate. Under these circumstances, the defendant's failure to oppose the plaintiff's motion was willful ... . The defendant claims that her default was caused by law office failure based on defense counsel's statement in his affirmation that his 'office will take full responsibility.' At most, defense counsel's advice, and the defendant's decision to follow it, constituted a misguided strategy, not law office failure ... . Thus, the defendant failed to establish a reasonable excuse for her default ...". ***Bove v. Bove*, 2019 N.Y. Slip Op. 01555, Second Dept 3-6-19**

CRIMINAL LAW, EVIDENCE.

POLICE OFFICER'S ALLEGED OBSERVATION OF A DRUG DEAL WAS DEEMED INCREDIBLE AS A MATTER OF LAW, MOTION TO SUPPRESS SHOULD HAVE BEEN GRANTED, INDICTMENT DISMISSED.

The Second Department determined defendant's motion to suppress evidence should have been granted and the indictment dismissed in this drug possession case. The police officer's (Borden's) testimony that he observed the drug transaction, which took place inside a car, through his rearview mirror, was incredible as a matter of law: "[W]e find that the People failed to establish the legality of the police conduct in the first instance, as Borden's testimony was incredible and patently tailored to meet constitutional objections. Borden's claim that he observed the alleged transaction through his rearview mirror with sufficient clarity to see that the object passed between the occupants of the car was Suboxone strains credulity and defies common sense ... . Rather, common experience dictates that the dashboard of the defendant's vehicle would have obscured Borden's view of a hand-to-hand transaction between the defendant and the front-seat passenger. Borden's testimony that the transaction occurred at a height sufficient for 'public view' lacked credibility and suggested that his testimony was tailored to meet constitutional objections ... . Moreover, the difference in size between the eight-inch by two-inch object Borden claimed to have seen passed between the occupants of the vehicle, and the two-inch by one-inch object recovered ... , casts significant doubt on Borden's testimony that he recognized the object as Suboxone. Accordingly, exercising our independent power of factual review, we conclude that the defendant's motion to suppress the physical evidence recovered incident to his arrest should have been granted." ***People v. Maiwandi*, 2019 N.Y. Slip Op. 01618, Second Dept 3-6-19**

FORECLOSURE, EVIDENCE.

PROOF OF STANDING DID NOT MEET THE REQUIREMENTS OF THE BUSINESS RECORDS EXCEPTION TO THE HEARSAY RULE.

The Second Department, reversing Supreme Court, determined the evidence of standing did not meet the business record exception to the hearsay rule: "Here, since Thrasher [plaintiff's loan officer] did not allege that she was personally familiar with the plaintiff's record-keeping practices and procedures, a proper foundation for the admission of the records was not provided, rendering them inadmissible to establish that the subject note was possessed by or assigned to the plaintiff prior to the commencement of the action. Moreover, even if a proper foundation had been set forth in the Thrasher affidavit, Thrasher's assertions as to the contents of the records is inadmissible hearsay to the extent that the records she purports to describe were not submitted with her affidavit. While a witness may read into the record from the contents of a document which has been admitted into evidence ... , a witness's description of a document not admitted into evidence is hearsay (see CPLR 4518[a]...). Furthermore, although the plaintiff submitted an endorsed copy of the note in support of its motion for summary judgment, after having appended an unendorsed copy of the note to the complaint, the plaintiff failed to eliminate a triable issue of fact as to whether the plaintiff was in possession of the original note at the time the action was commenced ...". ***U.S. Bank Natl. Assn. v. 22 S. Madison, LLC*, 2019 N.Y. Slip Op. 01635, Second Dept 3-6-19**

PERSONAL INJURY.

DEFENDANTS DID NOT SUBMIT EVIDENCE SHOWING WHEN THE SIDEWALK WAS LAST INSPECTED IN THIS SLIP AND FALL CASE, DEFENDANTS' MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined defendants' motion for summary judgment in this sidewalk slip and fall case should not have been granted. Defendants offered no evidence of when the sidewalk was last inspected: "In a trip and fall case, a defendant moving for summary judgment has the initial burden of making a prima facie showing that it neither created the hazardous condition nor had actual or constructive notice of its existence for a sufficient length of time to discover and remedy it ... . A movant cannot satisfy its initial burden by merely pointing to gaps in the plaintiff's

case ... . Here, the defendants failed to establish, prima facie, that they did not have constructive notice of the alleged hazardous condition. In support of their motion, the defendants submitted no evidence as to when the subject sidewalk was last inspected prior to the accident ...". ***Ariza v. Number One Star Mgt. Corp.*, 2019 N.Y. Slip Op. 01551, Second Dept 3-6-19**

PERSONAL INJURY.

DEFENDANTS' PROOF DEMONSTRATED THE SNOW STORM WAS OVER 12 HOURS BEFORE PLAINTIFF'S SLIP AND FALL, DEFENDANTS' MOTION FOR SUMMARY JUDGMENT UNDER THE STORM IN PROGRESS RULE SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined defendants did not demonstrate the applicability of the storm in progress rule in this ice and snow slip and fall case. Therefore defendants motion for summary judgment should not have been granted: "The climatological data submitted by the defendants showed that there was an accumulation of approximately seven inches of snow, which had ceased to fall by 8:00 p.m. on February 3, 2014, more than 12 hours prior to the accident, and that the temperature was 32 degrees when the storm stopped and dropped below freezing during the time prior to the happening of the accident. Further, the defendants submitted a transcript of the deposition testimony of the injured plaintiff, who testified that the walkway from the hotel to the parking lot was clear while the parking lot was icy and had not been cleared by 9:00 a.m. on February 4, 2014, when the accident occurred." ***Casey-Bernstein v. Leach & Powers, LLC*, 2019 N.Y. Slip Op. 01557, Second Dept 3-6-19**

Similar issues and result in ***Yeung v. Selfhelp (KIV) Assoc., L.P.*, 2019 N.Y. Slip Op. 01558, Second Dept 3-6-19**

PERSONAL INJURY.

PLAINTIFF FELL INTO A THREE-FEET-DEEP HOLE, QUESTION OF FACT WHETHER THE HOLE WAS AN OPEN AND OBVIOUS CONDITION, DEFENDANT'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined that defendant's motion for summary judgment should not have been granted in this slip and fall case. Plaintiff fell into a three-feet-deep hole near where a fence was being installed: " 'A landowner has a duty to exercise reasonable care in maintaining [its] property in a safe condition under all of the circumstances, including the likelihood of injury to others, the seriousness of the potential injuries, the burden of avoiding the risk, and the foreseeability of a potential plaintiff's presence on the property' ... . A property owner has no duty to protect or warn against an open and obvious condition provided that, as a matter of law, the condition is not inherently dangerous ... . 'The issue of whether a hazard is latent or open and obvious is generally fact-specific and thus usually a jury question,' but 'a court may determine that a risk was open and obvious as a matter of law when the established facts compel that conclusion . . . on the basis of clear [and undisputed evidence' ... . Further, the law is clear that '[e]vidence that the dangerous condition was open and obvious cannot relieve the landowner' of the burden to exercise reasonable care in maintaining the property in a safe condition ... . In this case, the defendant failed to establish its prima facie entitlement to judgment as a matter of law. The defendant's submissions did not demonstrate, prima facie, that the hole was not inherently dangerous. No evidence was submitted that the hole was too small to create an inherently dangerous condition ... . Even if the condition were open and obvious—and it is by no means clear that it was—that would relate to the issue of comparative fault, and not absolve the landowner of all fault ...". ***Kastin v. Ohr Moshe Torah Inst., Inc.*, 2019 N.Y. Slip Op. 01582, Second Dept 3-6-19**

PERSONAL INJURY.

DEFENDANT DID NOT SHOW A LACK OF CONSTRUCTIVE NOTICE IN THIS SLIP AND FALL CASE, DEFENDANT'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined defendant's motion for summary judgment in this slip and fall case should not have been granted. Defendant did not demonstrate the absence of constructive notice: "A defendant who moves for summary judgment in a slip-and-fall case has the initial burden of making a prima facie showing that it did not create the hazardous condition which allegedly caused the fall, and did not have actual or constructive notice of that condition for a sufficient length of time to discover and remedy it ... . A defendant moving for summary judgment dismissing a complaint cannot satisfy its initial burden merely by pointing to gaps in the plaintiff's case … . Here, the defendant failed to meet its initial burden as the movant ... . The defendant failed to affirmatively demonstrate that it did not have constructive notice of the condition that allegedly caused the plaintiff to fall ...". ***Seedat v. Capital One Bank*, 2019 N.Y. Slip Op. 01632, Second Dept 3-6-19**

PERSONAL INJURY, EVIDENCE,

PLAYGROUND EQUIPMENT ON WHICH PLAINTIFF'S SON WAS INJURED, ACCORDING TO EXPERT EVIDENCE, WAS IN COMPLIANCE WITH APPLICABLE GUIDELINES AND STANDARDS, WAS PROPERLY MAINTAINED AND WAS NONHAZARDOUS, DEFENDANTS' MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined defendants' motion for summary judgment in this playground equipment injury case should have been granted. Plaintiff's son was injured when his leg was caught in a gap between two platforms: "[T]he defendants submitted, inter alia, an expert affidavit, which established, prima facie, that the playground apparatus was not in violation of any relevant statutes or safety guidelines, that it was maintained in a reasonably safe condition, that the platforms were nonhazardous, and that the gaps between the platforms did not violate any applicable guidelines or standards ... . In opposition, the plaintiff failed to raise a triable issue of fact." ***Valenzuela v. Metro Motel, LLC*, 2019 N.Y. Slip Op. 01639, Second Dept 3-6-19**

PERSONAL INJURY, MEDICAL MALPRACTICE, MUNICIPAL LAW.

LATE NOTICE OF CLAIM IN THIS MEDICAL MALPRACTICE ACTION, SERVED THREE YEARS AFTER THE DEVELOPMENTALLY DELAYED CHILD'S BIRTH, SHOULD HAVE BEEN DEEMED TIMELY SERVED.

The Second Department, reversing Supreme Court, determent the late notice of claim in this medical malpractice action should have been deemed timely served. The notice of claim was served in 2012 and the plaintiff-child was born in 2009. It became apparent in 2010 that the child was unable to bear weight on her legs and her development was delayed: "The record here indicates that the defendant was aware that the child's condition was related to glucose levels, which were not measured at birth. Thus, the defendant acquired actual knowledge of the essential facts constituting the claim immediately after the incident, and well within the 90 day period after the claim arose ... . The delay in serving a notice of claim was also directly attributable to the child's infancy, since it was not apparent that the child had suffered a permanent injury until after the 90-day period expired. When the child's injuries became apparent, the plaintiff served a late notice of claim without leave of court. Although this Court has ruled that actual knowledge of the essential facts constituting the claim cannot be inferred from a late notice of claim served without leave of the court ... , in this case the late notice of claim generated a hearing pursuant to General Municipal Law § 50-h, where the defendant conducted an examination of the plaintiff and the essential facts constituting the claim were explore ...". ***Feduniak v. New York City Health & Hosps. Corp. (Queens Hosp. Center)*, 2019 N.Y. Slip Op. 01564, Second Dept 3-6-19**

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