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FIRST DEPARTMENT

APPEALS, JUDGES, EVIDENCE, FORECLOSURE.

THERE WERE NO GROUNDS TO DISTURB THE FACTUAL FINDINGS MADE BY THE JUDGE IN THIS BENCH TRIAL OF A FORECLOSURE ACTION, TWO DISSENTERS ARGUED THE FINDINGS WERE AGAINST THE WEIGHT OF THE EVIDENCE.

The First Department, over a two-justice dissent, determined that the evidence at the bench trial in this foreclosure proceeding supported the judge's conclusion that plaintiff bank was not the cause of defendant's inability to obtain financing to payoff the mortgage pursuant to a settlement agreement. The dissenters argued the trial judge's findings were against the weight of the evidence, primarily because the judge found defendant's testimony to be "honest and accurate." The key issue in the appeal was whether there were sufficient grounds to disturb the judge's factual findings: "... [W]e perceive no basis on which to disturb the trial court's determination. As articulated by the Court of Appeals, the standard of review on an appeal from a decision based on findings of fact, resting in large measure on determinations of the credibility of witnesses, made by the court after a bench trial, is as follows: '[T]he decision of the fact-finding court should not be disturbed upon appeal unless it is obvious that the court's conclusions could not be reached under any fair interpretation of the evidence, especially when the findings of fact rest in large measure on considerations relating to the credibility of witnesses' (Thoreson v. Penthouse Intl., 80 NY2d 490, 495 [1992] ...). Supreme Court's rejection of defendant's claim — a claim based on testimony not only lacking support in the contemporaneous documentary evidence, but inconsistent with that evidence — more than passes muster under this highly deferential standard." ***Security Pac. Natl. Bank v. Evans*, 2019 N.Y. Slip Op. 06138, First Dept 8-13-19**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

PLAINTIFF'S INJURIES WERE NOT CAUSED BY A DEFECT IN THE SCAFFOLD OR A FAILURE TO PROVIDE AN ADEQUATE SAFETY DEVICE, LABOR LAW §§ 200, 240(1) AND 241(6) CAUSES OF ACTION PROPERLY DISMISSED.

The First Department, in a full-fledged opinion by Justice Tom, over an extensive two-justice dissent, determined that plaintiff's Labor Law §§ 200, 240(1) and 241(6) causes of action were properly dismissed. Plaintiff was injured attempting to enter a building through a window from a scaffold, a prohibited method of entry. There was evidence plaintiff dislocated his shoulder trying to pull himself up to the window, and there was (possibly conflicting) evidence plaintiff fell backwards onto the scaffold. The majority concluded that in either scenario the injury was not caused by a defect in the scaffold or a failure to provide an adequate safety device, and therefore was not compensable: "Plaintiff's claim was correctly dismissed because defendants demonstrated as a matter of law that plaintiff's injury was not proximately caused by a violation of section 240(1). Plaintiff's own actions were the sole proximate cause of his injuries. Plaintiff conceded that scaffold stairs were available to him to descend several floors and reenter the building. Further, as already noted, he admitted during his deposition that he knew he was not supposed to climb through the window and that it would have been safer to use the scaffold stairs. On appeal, he essentially argues, inter alia, that reentry via the scaffold stairs would have taken more time and would have been an inconvenience. Plaintiff also admitted to unhooking his safety line in order to climb through the window cut-out. Under the circumstances, adequate safety devices were available for plaintiff's use at the job site, and his own actions in unhooking his safety line and climbing through the window were the sole proximate cause of his injuries ... . Because plaintiff's actions were the sole proximate cause of his injuries, the claims for common-law negligence and violation of Labor Law § 200 were also properly dismissed ... . Plaintiff also failed to raise an issue of fact as to a violation of the Industrial Code, as required to support the claim under Labor Law § 241(6) ... . Industrial Code (12 NYCRR) § 23-1.7(d), which requires that an employer 'not suffer or permit any employee to use a floor, passageway, walkway, scaffold, platform or other elevated working surface which is in a slippery condition,' clearly does not include a crossbar, such as the one from which plaintiff allegedly slipped, because it is limited to 'working surfaces.' While a scaffold platform on which workers stand and work would seemingly come within the provision, structural crossbars which simply hold the scaffold together are not working surfaces required for standing or walking ...". ***Biaca-Neto v. Boston Rd. II Hous. Dev. Fund Corp.*, 2019 N.Y. Slip Op. 06142, First Dept 8-13-19**

PERSONAL INJURY, EVIDENCE.

DEFENDANT DID NOT DEMONSTRATE WHEN THE STAIRWELL WAS LAST INSPECTED OR CLEANED IN THIS SLIP AND FALL CASE, DEFENDANT'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED.
The First Department, reversing Supreme Court, determined defendant's motion for summary judgment should not have been granted in this slip and fall case. Plaintiff alleged a discarded metrocard was the cause of her slip and fall on a train station stairwell. The defendant did not demonstrate when the stairwell was last inspected or cleaned: "Defendant failed to establish its prima facie entitlement to judgment as a matter of law, in this action where plaintiff ... alleges that he was injured when, while descending stairs in a subway station, he slipped and fell on a discarded Metrocard. Although the cleaner on duty in the station testified he was given a Cleaners Manual and a written cleaning schedule, evidencing that defendant had a 'rational means for dealing with the problem' of strewn MetroCards on the stairwell of train stations, the cleaner conceded that he could not recall whether he had deviated from his usual work schedule on the date of plaintiff's accident and he did not have an independent recollection of when the staircase was last cleaned or inspected prior to the accident ... . Because defendant did not establish its prima facie entitlement to summary judgment, the burden never shifted to plaintiff to establish how long the condition existed ...". ***Carela v. New York City Tr. Auth.*, 2019 N.Y. Slip Op. 06140, First Dept 8-13-19**

THIRD DEPARTMENT

CRIMINAL LAW, EVIDENCE.

THE SOURCE CODE USED TO CONNECT DNA FROM THE MURDER SCENE TO THE DEFENDANT GENERATED A REPORT WHICH IMPLICATED THE DEFENDANT AND WAS THEREFORE TESTIMONIAL, HOWEVER, THE SOURCE CODE, AS A FORM OF ARTIFICIAL INTELLIGENCE, WAS NOT THE DECLARANT; THEREFORE THE FACT THAT DEFENDANT WAS NOT PROVIDED WITH THE SOURCE CODE DID NOT VIOLATE HIS RIGHT TO CONFRONT THE WITNESSES AGAINST HIM.
The Third Department, in a full-fledged opinion by Justice Pritzker, over a concurrence, determined the evidence concerning the TrueAllele source code used to connect the DNA found at the murder scene to the defendant was testimonial, but the source code, as artificial intelligence, was not the declarant. Therefore the fact that the defendant was not provided with the source code (which was not requested by the defendant during the trial) did not deprive defendant of the right to confront the witnesses against him. Rather, the Third Department found, the witness who testified about how the source code was used in the DNA testing was the declarant. Defendant had raised the intriguing question whether the source code, as a form of artificial intelligence, was the actual declarant triggering the right of confrontation: "Cybergenetics was 'acting in the role of assisting the police and prosecutors in developing evidence for use at trial' ... . Also, the report reflects TrueAllele's conclusions 'upon review of the raw data associated with the testing' ... . TrueAllele, by running at the source code's direction, compared DNA found at the crime scene to that of defendant's DNA and generated the report containing the likelihood ratios, which, in effect, implicates defendant in the murder; thus, it is clearly biased in favor of law enforcement … . Accordingly, application of the primary purpose test reveals that the TrueAllele report is testimonial in nature ... . Despite concluding that the TrueAllele report is testimonial, we do not find, given the particular facts of this case, that the source code, even through the medium of the computer, is a declarant. This is not to say that an artificial intelligence-type system could never be a declarant, nor is there little doubt that the report and likelihood ratios at issue were derived through distributed cognition between technology and humans ... . Indeed, similar to many expert reports, the testimonial aspects of the TrueAllele report are formulated through a synergy and distributed cognition continuum between human and machine ... , but this fact alone does not tip the scale so far as to transform the source code into a declarant." ***People v. Wakefield*, 2019 N.Y. Slip Op. 06143, Third Department, 8-15-19**

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