CasePrepPlus

August 26, 2022

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

Editor: Bruce Freeman

NEW YORK STATE BAR ASSOCIATION
Serving the legal profession and the community since 1876

FIRST DEPARTMENT

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

THE SMALL CONCRETE PEBBLES UPON WHICH PLAINTIFF ALLEGEDLY SLIPPED DID NOT CONSTITUTE A "SLIPPERY CONDITION" WITHIN THE MEANING OF THE INDUSTRIAL CODE AND WERE NOT IN A "PASSAGEWAY" WITHIN THE MEANING OF THE INDUSTRIAL CODE; THE LABOR LAW § 241(6) ACTION SHOULD HAVE BEEN DISMISSED.

The First Department, reversing (modifying) Supreme Court, determined the Industrial Code did not apply to the small concrete pebbles on which plaintiff allegedly slipped when attempting to install a heavy glass divider: "When plaintiff stepped forward to place the glass into the track, he stepped onto 'minute' pebbles near the track. His right foot slipped forward a few inches, but he did not fall. Plaintiff claims that he sustained injuries, not only because of pebbles he slipped on, but also because of [his employer's] decision to remove one worker from his team when he undertook to move the glass. ... Neither of the Industrial Code regulations that plaintiff relies on apply to the accident. The floor was not in 'a slippery condition' nor were the pebbles a 'foreign substance which may cause slippery footing' within the meaning of Industrial Code § 23-1.7(d) ... . Section 23-1.7 (e)(2) of the Industrial Code also does not apply as this was not a passageway, within the meaning of the regulation. In any event, the pebbles were debris that were an integral part of the construction work. The integral to the work defense applies to things and conditions that are an integral part of the construction, not just to the specific task a plaintiff may be performing at the time of the accident ... " ***Ruisech v. Structure Tone Inc.*, 2022 N.Y. Slip Op. 04941, First Dept 8-16-22**

SECOND DEPARTMENT

CIVIL PROCEDURE, DEBTOR-CREDITOR.

DEFENDANT SHOULD HAVE BEEN ESTOPPED FROM CLAIMING THE ADDRESS IN THE AFFIDAVIT OF SERVICE WAS NOT HIS DWELLING PLACE; DEFENDANT TOOK AFFIRMATIVE STEPS TO MISLEAD THE PARTY ATTEMPTING TO SERVE HIM.

The Second Department, reversing Supreme Court, determined defendant should have been estopped from claiming the address in the affidavit of service was not his "dwelling plaice" because defendant misled the party attempting to serve him: "Estoppel, in this context, may preclude a defendant 'from challenging the location and propriety of service of process if that defendant has engaged in affirmative conduct which misleads a party into serving process at an incorrect address' ... . For example, 'where a defendant willfully misrepresented his address or violated a statutory notification requirement ... , or where he 'engaged in conduct calculated to prevent the plaintiff from learning his actual place of residence' ... , he may be estopped from asserting the defense of defective service' ... . Here, the record established that the defendant engaged in 'affirmative conduct which misl[ed] a party into serving process at an incorrect address' ...". ***Hudson Val. Bank, N.A. v. Eagle Trading*, 2022 N.Y. Slip Op. 04956, Second Dept 8-17-22**

CIVIL PROCEDURE, FORECLOSURE.

AN ACTION CANNOT BE DISMISSED FOR FAILURE TO PROSECUTE PURSUANT TO CPLR 3216 WHEN ISSUE HAS NEVER BEEN JOINED.

The Second Department, reversing Supreme Court, determined the foreclosure complaint should not have been dismissed pursuant to CPLR 3216 because issue had not been joined: " 'A court may not dismiss an action based on neglect to prosecute unless the CPLR 3216 statutory preconditions to dismissal are met, including that issue has been joined in the action' ... . Here, dismissal of the action pursuant to CPLR 3216 was improper, since none of the defendants had interposed an answer to the complaint and, thus, issue was never joined ... . Similarly, under the circumstances of this case, 22 NYCRR 202.27 did not provide a basis for dismissal of the action ...". ***Wells Fargo Bank, N.A. v. Frederic*, 2022 N.Y. Slip Op. 04999, Second Dept 6-17-22**

CIVIL PROCEDURE, LABOR LAW-CONSTRUCTION LAW.

THE NONPARTY SUBPOENA SHOULD NOT HAVE BEEN QUASHED AND THE RELATED PROTECTIVE ORDER SHOULD NOT HAVE BEEN ISSUED.

The Second Department, reversing Supreme Court, determined the nonparty subpoena should not have been quashed and the related protective order should not have been issued. The nonparty, Bijari, listed for sale the real property where plaintiff was injured. Plaintiff sought infor-

mation about the sale because the information could be relevant to whether the homeowner's exemption to Labor Law §§ 240(1) and 241(6) applied: "CPLR 3101(a)(4), concerning disclosure from nonparties to an action, provides that "[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof, by: . . . any other person, upon notice stating the circumstances or reasons such disclosure is sought or required" ... .. Under that statute, the party who served the subpoena has an initial minimal obligation to show that the nonparty was apprised of the circumstances or reasons that the disclosure is sought ... . Once that is satisfied, it is then the burden of the person moving to quash a subpoena to establish either that the requested disclosure 'is utterly irrelevant to the action or that the futility of the process to uncover anything legitimate is inevitable or obvious' ... . For a protective order to be issued, the party seeking such an order must make a 'factual showing of 'unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice' ... . 'Trial courts are vested with broad discretion to issue appropriate protective orders to limit discovery. . . . [T]his discretion is to be exercised with the competing interests of the parties and the truth-finding goal of the discovery process in mind' ... . Here, Bijari failed to make the requisite showing pursuant to CPLR 3103(a) to warrant the issuance of a protective order with regard to the subpoena....". ***Nunez v. Peikarian*, 2022 N.Y. Slip Op. 04969, Second Dept 8-17-22**

CRIMINAL LAW, APPEALS.

MARIJUANA AND GRAVITY-KNIFE CONVICTIONS VACATED IN THE INTEREST OF JUSTICE BECAUSE THE "OFFENSES" HAVE BEEN DECRIMINALIZED.

The Second Department vacated defendant's marijuana and gravity-knife convictions because the "offenses" had been decriminalized: "The defendant's conviction of criminal possession of marihuana in the third degree 'became a nullity by operation of law, independently of any appeal, and without requiring any action by this [c]ourt,' pursuant to CPL 160.50(5) ... . Consequently, the appeal from so much of the judgment as convicted the defendant of criminal possession of marihuana in the third degree must be dismissed as academic ... . * * * The defendant contends that the conviction of criminal possession of a weapon in the fourth degree predicated on the defendant's possession of a gravity knife should be vacated because Penal Law § 265.01(1) has since been amended to decriminalize the simple possession of a gravity knife. The People, in the exercise of their broad prosecutorial discretion, agree that the judgment should be modified by vacating that conviction. Even though the statute decriminalizing the simple possession of a gravity knife did not take effect until May 30, 2019 ... , under the circumstances of this case, we vacate that conviction and the sentence imposed thereon, and dismiss that count of the indictment, as a matter of discretion in the exercise of our interest of justice jurisdiction ...". ***People v. Lester*, 2022 N.Y. Slip Op. 04977, Second Dept 8-17-22**

CRIMINAL LAW, JUDGES, EVIDENCE, APPEALS.

THE DENIAL OF DEFENDANT'S REQUEST FOR A ONE-DAY ADJOURNMENT TO ALLOW HIS DAUGHTER TO TRAVEL TO COURT TO TESTIFY, COUPLED WITH THE RELATED GRANT OF THE PEOPLE'S REQUEST FOR A MISSING-WITNESS JURY INSTRUCTION, DEPRIVED DEFENDANT OF A FAIR TRIAL.

The Second Department, reversing defendant's conviction in the interest of justice, determined the judge's denial of defendant's request for a one-day adjournment to allow defendant's daughter to travel to court to testimony, and the grant of the People's related request for a missing witness jury instruction, deprived defendant of a fair trial: " '[W]hen the witness is identified to the court, and is to be found within the jurisdiction, a request for a short adjournment after a showing of some diligence and good faith should not be denied merely because of possible inconvenience to the court or others' ... . Under the circumstances here, the Supreme Court should have granted a one-day continuance for the defendant's daughter to travel to New York from out of state ... . The failure to grant this continuance cannot be considered harmless error, as there was conflicting testimony as to the defendant's whereabouts at the time of the robbery ... . Although the defendant's contention that the Supreme Court improvidently exercised its discretion in granting the prosecution's request for a missing witness charge is unpreserved for appellate review ... , this issue is inextricably linked with the denial of the defendant's request for a continuance, and this Court will consider the issue in the exercise of our interest of justice jurisdiction ... . 'The failure to produce a witness at trial, standing alone, is insufficient to justify a missing witness charge, '[r]ather, it must be shown that the uncalled witness is knowledgeable about a material issue upon which evidence is already in the case; that the witness would naturally be expected to provide noncumulative testimony favorable to the party who has not called him [or her], and that the witness is available to such party' ...". ***People v. Reeves*, 2022 N.Y. Slip Op. 04979, Second Dept 8-17-22**

CRIMINAL LAW, SEX OFFENDER REGISTRATION ACT (SORA), APPEALS.

HERE DEFENDANT, WHO PLED GUILTY TO BURGLARY AS A SEXUALLY MOTIVATED FELONY, ATTEMPTED TO CHALLENGE HIS CERTIFICATION AS A SEX OFFENDER, PRONOUNCED AT SENTENCING, IN THE SORA RISK-LEVEL ASSESSMENT PROCEEDING; THE SEX OFFENDER CERTIFICATION WAS DEEMED TO BE PART OF THE JUDGMENT OF CONVICTION WHICH CAN ONLY BE CHALLENGED ON DIRECT APPEAL.

The Second Department, in a full-fledged opinion by Justice Rivera, determined that the defendant could not challenge his certification as a sex offender at the SORA risk-level-assessment proceeding. The sex-offender certification is part of the judgment of conviction which must be challenged on direct appeal. Here the defendant pled guilty to burglary as a sexually motivated felony and was designated a sex offender at sentencing: "[W]e take this opportunity to pronounce that where, as here, a defendant challenges certification on the ground that the underlying New York conviction is for an offense which does not require registration under SORA, the issue is one which is properly raised on a direct appeal from the judgment of conviction, not on an appeal from an order designating his or her sex offender risk level....". ***People v. Matos*, 2022 N.Y. Slip Op. 04984, Second Dept 8-17-22**

FORECLOSURE, DEBTOR-CREDITOR, CIVIL PROCEDURE.

THE LETTER SENT TO THE BORROWER BY THE BANK IN THIS FORECLOSURE ACTION DID NOT EXPLICITLY INDICATE THE DEBT WAS BEING IMMEDIATELY ACCELERATED; THEREFORE THE DEBT HAD NOT BEEN ACCELERATED AND THE FORECLOSURE ACTION WAS NOT TIME-BARRED.

The Second Department, reversing Supreme Court, determined the letter sent by the bank to the borrower in this foreclosure action did not accelerate the debt and therefore did not trigger the six-year statute of limitations "... [A] 'letter discussing acceleration as a possible future event, . . . does not constitute an exercise of the mortgage's optional acceleration clause' ... 'The determinative question is not what the noteholder intended or the borrower perceived, but whether the contractual election was effectively invoked' ... . Here, a letter sent to the defendants ... , did not effectively accelerate the mortgage debt, as this letter merely discussed acceleration as a possible future event ...". ***HSBC Bank USA v. Pantel*, 2022 N.Y. Slip Op. 04954, Second Dept 8-17-22**

FORECLOSURE, REAL PROPERTY ACTIONS AND PROCEEDINGS LAW (RPAPL), EVIDENCE, CIVIL PROCEDURE.

PLAINTIFF BANK DID NOT DEMONSTRATE THE RPAPL 1304 NOTICE OF FORECLOSURE WAS PROPERLY MAILED AND THE DEFECT COULD NOT BE CURED BY THE SECOND AFFIDAVIT SUBMITTED IN REPLY.

The Second Department, reversing Supreme Court, determined plaintiff bank did not demonstrate compliance with the mailing requirements of RPAPL 1304 and the defect was not cured by an affidavit submitted in reply: "[T]he plaintiff submitted the affidavit of Kolette Modlin, an authorized officer of Caliber Home Loans, Inc. (hereinafter Caliber), the loan servicer for the plaintiff's successor in interest. Modlin stated that she had reviewed the plaintiff's business records, which had been verified for accuracy, incorporated into Caliber's records, and relied upon by Caliber in the ordinary course of its business, and determined that 90-day notices were mailed by first-class and certified mail to the defendant at the mortgaged premises. The plaintiff also submitted copies of the 90-day notices that were allegedly sent to the defendant. However, the plaintiff failed to attach, as exhibits to the motion, any documents establishing that the notices were actually mailed ... . Moreover, although Modlin attested that she had personal knowledge of Caliber's records, and that those records included the plaintiff's records, Modlin did not attest to knowledge of the mailing practices of the plaintiff, which was the entity that allegedly sent the 90-day notices to the defendant ... . Contrary to the plaintiff's contention, although it submitted with its reply papers a second affidavit from Modlin, along with documentary evidence in the form of a letter log purportedly establishing the mailing of the 90-day notices, the plaintiff could not, under the circumstances, rely on the second affidavit to correct deficiencies inherent in the original one ...". ***Ditech Fin., LLC v. Cummings*, 2022 N.Y. Slip Op. 04949, Second Dept 8-17-22**

FORECLOSURE, REAL PROPERTY ACTIONS AND PROCEEDINGS LAW (RPAPL), EVIDENCE, CIVIL PROCEDURE, JUDGES.

THE BANK DID NOT PROVE COMPLIANCE WITH THE RPAPL 1304 NOTICE-OF-FORECLOSURE MAILING REQUIREMENTS; THE JUDGE SHOULD NOT HAVE, SUA SPONTE, DISMISSED THE FORECLOSURE COMPLAINT.

The Second Department, reversing Supreme Court, determined the plaintiff bank in this foreclosure action did not prove compliance with the mailing requirements for mailing the RPAPL 1304 notice and the judge should not have, sua sponte, dismissed the complaint: "[P]laintiff failed to submit sufficient evidence to demonstrate that the required RPAPL 1304 notice was sent by first-class mail. In an affidavit in support of its motion, Joanna M. Gloria, the plaintiff's vice president of loan documentation, neither attested that she had personal knowledge of the mailing, nor did she present proof of a standard office mailing procedure designed to ensure that items are properly addressed and mailed. '[T]he mere assertion that the notice was mailed, supported by someone with no personal knowledge of the mailing, in the absence of proof of office practices to ensure that the item was properly mailed, does not give rise to the presumption of receipt' ... . [T]he Supreme Court erred in, sua sponte, directing dismissal of the complaint. 'A court's power to dismiss a complaint, sua sponte, is to be used sparingly and only when extraordinary circumstances exist to warrant dismissal' ... . No extraordinary circumstances were present in this case, as the 'failure to comply with RPAPL 1304 is not jurisdictional' ... , the defendant did not present any proof as to the plaintiff's failure to comply with RPAPL 1304, and did not cross-move for summary judgment dismissing the complaint insofar as asserted against him." ***Wells Fargo Bank, N.A. v. Cascarano*, 2022 N.Y. Slip Op. 04998, Second Dept 8-17-22**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

STORED SHEETROCK PANELS WHICH FELL OVER ON PLAINTIFF DID NOT CONSTITUTE THE KIND OF ELEVATION/GRAVITY-RELATED INCIDENT COVERED BY LABOR LAW § 240(1).

The Second Department determined sheetrock panels which were stored upright and fell over on plaintiff did not constitute an elevation-related hazard within the meaning of Labor Law § 240(1): " 'The extraordinary protections of Labor Law § 240(1) extend only to a narrow class of special hazards, and do 'not encompass any and all perils that may be connected in some tangential way with the effects of gravity' ... . Therefore, to recover under Labor Law § 240(1), the injured plaintiff 'must have suffered an injury as 'the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential' ... . 'With respect to falling objects, Labor Law § 240(1) applies where the falling of an object is related to 'a significant risk inherent in . . . the relative elevation . . . at which materials or loads must be positioned or secured' ... . 'Therefore, a plaintiff must show more than simply that an object fell, thereby causing injury to a worker. A plaintiff must show that, at the time the object fell, it was being hoisted or secured, or that the falling object required securing for

the purposes of the undertaking' ... . Here, [defendant] established ... the injured plaintiff's injuries were not caused by an elevation-related or gravity-related risk within the scope of Labor Law § 240(1) ...". ***Parrino v. Rauert*, 2022 N.Y. Slip Op. 04970, Second Dept 8-17-22**

MEDICAL MALPRACTICE, NEGLIGENCE, CIVIL PROCEDURE.

THE ACTION, WHICH STEMMED FROM PLAINTIFF'S BEING DROPPED IN THE DELIVERY ROOM IMMEDIATELY AFTER BIRTH, SOUNDED IN MEDICAL MALPRACTICE, NOT NEGLIGENCE, AND WAS THEREFORE TIME-BARRED.

The Second Department, reversing Supreme Court, determined plaintiff's action, which stemmed from being dropped in the delivery room immediately after birth in 1999, sounded in medical malpractice, not negligence, and was therefore time-barred: "CPLR 208 provides that the statute of limitations is tolled throughout the period of infancy, but limits such toll to 10 years in medical malpractice actions ... . In determining whether conduct should be deemed medical malpractice or ordinary negligence, the critical factor is the nature of the duty owed to the plaintiff that the defendant is alleged to have breached ... . A negligent act or omission by a health care provider that constitutes medical treatment or bears a substantial relationship to the rendition of medical treatment by a licensed physician to a particular patient constitutes medical malpractice ... . Here, the defendant established ... the conduct at issue derived from the duty owed to plaintiff by the defendant as a result of the physician-patient relationship and was substantially related to the plaintiff's medical treatment ...". ***Rojas v. Tandon*, 2022 N.Y. Slip Op. 04989, Second Dept 8-17-22**

MEDICAL MALPRACTICE, NEGLIGENCE, CIVIL PROCEDURE.

THE MOTION TO DISMISS ALLEGATIONS OF MEDICAL MALPRACTICE PRIOR TO APRIL 2013 AS TIME-BARRED WAS PROPERLY GRANTED BECAUSE THE CONTINUOUS TREATMENT DOCTRINE DID NOT APPLY; THERE WAS A SUBSTANTIVE DISSENT ARGUING THAT DOCUMENTS SUBMITTED BY THE DEFENDANTS SUPPORTED APPLYING THE CONTINUOUS TREATMENT DOCTRINE AND THE MATTER SHOULD PROCEED TO DISCOVERY.

The Second Department, over an extensive dissent, determined the continuous treatment doctrine did not apply and defendants' motion to dismiss allegations of medical malpractice occurring before April 9, 2013, was properly granted. The decision is detailed and fact-specific and cannot be fairly summarized here: "Accepting the plaintiff's expansive view that the mere status of receiving treatment for menopausal symptoms necessarily encompasses all conditions related to menopause and aging, would undermine the sound policy reasons behind the continuous treatment doctrine ... . Such a result is contrary to the foundational policy reasons for creating the continuous treatment doctrine, and could result in expanding it to virtually all the medical care a patient receives ... . * * * **From the dissent:** The Supreme Court's determination, endorsed by my colleagues in the majority, that the records submitted by the defendants never reference or address osteoporosis is, in fact, belied by those medical records created and submitted by the defendants, which document, inter alia, that, during the relevant period, the defendants assessed, treated, and monitored the plaintiff's bone health, despite their failure to order a bone density test. In sum, the majority's characterization of certain of the defendants' own documents fails to afford the plaintiff the favorable view through which the documents should be read ... . Moreover, no discovery has been conducted yet, and '[t]he resolution of the continuous treatment issue . . . should abide relevant discovery' ...". ***Weinstein v. Gewirtz*, 2022 N.Y. Slip Op. 04997, Second Dept 8-17-22**

MEDICAL MALPRACTICE, CIVIL PROCEDURE, CONTRACT LAW.

AN AGREEMENT SIGNED BY THE PLAINTIFF IN THIS MEDICAL MALPRACTICE ACTION REQUIRING THE DEPOSITION OF EXPERT WITNESSES 120 DAYS BEFORE TRIAL IS VOID AND UNENFORCEABLE AS AGAINST THE POLICY UNDERLYING THE EXPERT DISCLOSURE PROVISIONS OF THE CPLR.

The Second Department, in a full-fledged opinion by Justice Maltese, determined the agreement signed by plaintiff in this medical malpractice action which required the deposition of expert witnesses 120 days before trial was void and unenforceable: "The issue on this appeal is whether the defendants Benjamin M. Schwartz, M.D., and Island Gynecologic Oncology, PLLC (hereinafter together the defendants), may enforce a provision in an agreement that the defendant physician's receptionist asked the injured plaintiff to sign among other routine medical releases prior to undergoing surgery. Pursuant to this provision, if a patient commenced a medical malpractice action against the defendant physician, each party's counsel would have the right to depose the other parties' expert witness(es) at least 120 days before trial. We hold that this provision is unenforceable as against public policy and, in any event, the defendants waived the right to enforce the provision. Furthermore, the entire agreement is unenforceable because the Supreme Court found certain other provisions to be unenforceable, the defendants do not challenge the court's holding regarding those provisions on appeal, and those provisions are not severable from the remainder of the agreement, including the provision at issue on appeal. * * * Requiring experts to be made available for deposition 120 days before trial also directly contradicts the provision in CPLR 3101(d)(1)(i) that gives trial courts the discretion to 'make whatever order may be just' in the event that a party retains an expert in an insufficient period of time before the commencement of trial to provide appropriate notice. This statutory provision reflects the important public policy of allowing courts to retain discretion in their role as gatekeeper in determining the admissibility of expert testimony ... . For all of the foregoing reasons, we conclude that, here, the public policy in favor of freedom of contract is overridden by these other important and countervailing public policy interests ...". ***Mercado v. Schwartz*, 2022 N.Y. Slip Op. 04962, Second Dept 8-17-22**

MEDICAL MALPRACTICE, NEGLIGENCE, CIVIL PROCEDURE, EVIDENCE.

CONFLICTING EXPERT OPINIONS IN THIS MEDICAL MALPRACTICE ACTION REQUIRED DENIAL OF DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT; THE FACT THAT THE ISSUE WHETHER ASPIRIN SHOULD HAVE BEEN ADMINISTERED AS TREATMENT FOR STROKE WAS RAISED IN A DEPOSITION (BUT NOT IN THE COMPLAINT OR BILL OF PARTICULARS) ALLOWED PLAINTIFF TO RAISE THE ISSUE IN OPPOSITION TO SUMMARY JUDGMENT.

The Second Department, reversing Supreme Court, determined defendants' motions for summary judgment in this medical malpractice action should not have been granted. The was conflicting expert-opinion evidence about whether plaintiff should have been administered aspirin as treatment for a stroke. Although the aspirin-issue was first raised in opposition to defendants' motions, the issue had been raised in a deposition and was therefore properly raised in the opposition papers: "[T]he plaintiffs raised triable issues of fact as to whether Nandakumar departed from the accepted standard of care in his neurological evaluation and treatment of the injured plaintiff's condition by failing to timely order and administer aspirin to the injured plaintiff, and whether such alleged departures proximately caused her alleged injuries ... . Although the plaintiffs' theory regarding the administration of aspirin was not specifically alleged in the complaint or bill of particulars, this theory was referred to by the plaintiffs' counsel when deposing a ... resident, and thus, was appropriately raised in opposition to [defendant's] motion ." . ***Walker v. Jamaica Hosp. Med. Ctr.*, 2022 N.Y. Slip Op. 04996, Second Dept 8-17-22**

MUNICIPAL LAW, PERSONAL INJURY.

THE COUNTY HAD TIMELY KNOWLEDGE OF THE NATURE OF PETITIONER'S EXCESSIVE-FORCE CLAIM AGAINST THE POLICE AND DID NOT DEMONSTRATE PREJUDICE FROM THE DELAY IN FILING A NOTICE OF CLAIM; THAT PETITIONER DID NOT HAVE AN ADEQUATE EXCUSE WAS NOT DETERMINATIVE; THE APPLICATION TO SERVE A LATE NOTICE OF CLAIM SHOULD HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined petitioner's application to file a late notice of claim in this "excessive force" action against the police should have been granted. The county had timely knowledge of the nature of the claim and the county did not demonstrate prejudice from the delay. The absence of an adequate excuse was not determinative: "[T]he petitioner commenced this proceeding pursuant to General Municipal Law § 50-e(5) for leave to serve a late notice of claim upon the County of Suffolk and the SCPD, alleging, inter alia, that he had sustained personal injuries due to the use of excessive force by the arresting officers. ... In determining whether to grant an application for leave to serve a late notice of claim, the court is required to consider all relevant facts and circumstances, including whether the public corporation acquired actual knowledge of the essential facts constituting the claim within 90 days after the claim arose or a reasonable time thereafter, whether the claimant has a reasonable excuse for the failure to timely serve a notice of claim, and whether the delay would substantially prejudice the public corporation in maintaining its defense ... . [T]he respondents had timely actual knowledge of the essential facts constituting the petitioner's claim, since their employees participated in the acts giving rise to the claim and filed reports and prepared other documentation with respect to the subject incident from which it could be readily inferred that the respondents had committed a potentially actionable wrong ...". ***Matter of Romero v. County of Suffolk*, 2022 N.Y. Slip Op. 04966, Second Dept 8-17-22**

PERSONAL INJURY.

THE PLAINTIFF DID NOT KNOW THE CAUSE OF HER STAIRCASE FALL AND DID NOT TIE THE FALL TO THE ABSENCE OF A SECOND HANDRAIL; THERE WAS NO STATUTE OR CODE PROVISION, AND NO COMMON LAW DUTY, REQUIRING TWO HANDRAILS; DEFENDANT'S MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined plaintiff did not know the cause of her staircase fall. The fact that there was only one handrail, which did not violate any statute or code provision, was not tied to the fall: "... '[E]ven if a plaintiff's fall is precipitated by a misstep, where the plaintiff testifies that he or she reached out to try to stop his or her fall, the absence of a handrail, if required by law, may raise an issue of fact as to whether the absence of the handrail was a proximate cause of his or her injury' ... . [T]he plaintiff did not know what had caused her to fall ... . [T]he building was not subject to the particular code provisions relied upon by the plaintiff ... . [T]he plaintiff failed to raise a triable issue of fact as to whether there was an applicable statutory or code provision that required a second handrail on the staircase. The plaintiff also failed to raise a triable issue of fact as to whether the defendant breached her common-law duty to maintain the staircase in a reasonably safe condition by failing to install a second handrail ...". ***Mancini v. Nicoletta*, 2022 N.Y. Slip Op. 04961, Second Dept 8-17-22**

PERSONAL INJURY.

THE DEFENDANT RETAIL STORE IN THIS SLIP AND FALL CASE DID NOT DEMONSTRATE IT DID NOT HAVE CONSTRUCTIVE NOTICE OF AND/OR CREATE THE DANGEROUS CONDITION (A PUDDLE OF LIQUID) WHICH CAUSED PLAINTIFF'S SLIP AND FALL.

The Second Department, reversing Supreme Court, determined defendant store (Whole Foods) did not demonstrated it did not have constructive notice of the puddle of liquid which caused plaintiff's slip and fall: "[V]iewing the evidence in the light most favorable to Yerry [plaintiff] as the nonmovant, the defendants failed to establish, prima facie, that the accident was not the result of the defendants' failure to take appropriate remedial measures within a reasonable period of time after acquiring actual notice of a hazardous condition ... . The evidence submitted by the defendants in support of their motion demonstrated the existence of a triable issue of fact as to whether the defendants'

employees made the condition 'more hazardous by incomplete remedial measures' ...". ***Yerry v. Whole Food Mkt. Group, Inc.*, 2022 N.Y. Slip Op. 05000, Second Dept 8-17-22**

PERSONAL INJURY, MUNICIPAL LAW.

THE INSPECTION PIT, WHICH DID NOT VIOLATE ANY STATUTE OR REGULATION, WAS OPEN AND OBVIOUS AND NOT INHERENTLY DANGEROUS; PLAINTIFF'S FALL INTO THE PIT WAS NOT ACTIONABLE.

The Second Department, reversing Supreme Court, determined the inspection pit into which plaintiff fell was open and obvious and therefore not actionable: "... '[T]here is no duty to protect or warn against an open and obvious condition that, as a matter of law, is not inherently dangerous' ,,, , or 'where the condition on the property is inherent or incidental to the nature of the property, and could be reasonably anticipated by those using it' ... . Here, the defendants established, prima facie, that the inspection pit was an open and obvious condition that was inherent or incidental to the nature of the property and was not inherently dangerous ... . In opposition, the plaintiff failed to raise a triable issue of fact. The speculative and conclusory affidavit of the plaintiff's expert submitted in opposition to the motion did not allege that there was a violation of any applicable statute or relevant industry standard, and it was insufficient to raise a triable issue of fact ...". ***Lebron v. City of New York*, 2022 N.Y. Slip Op. 04960, Second Dept 8-17-22**

PERSONAL INJURY, VEHICLE AND TRAFFIC LAW.

INFANT PLAINTIFF WAS STRUCK BY DEFENDANT DRIVER WHILE IN A CROSSWALK WITH THE WALK SIGNAL ON; SUN-GLARE IS NOT AN "EMERGENCY" WHICH WILL RAISE A QUESTION OF FACT; PLAINTIFFS' SUMMARY JUDGMENT MOTION SHOULD HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined plaintiffs' motion for summary judgment in this pedestrian-cross-walk traffic accident case should have been granted. Defendant driver alleged sun-glare prevented her from seeing the infant plaintiff in the crosswalk. Sun-glare is not an "emergency" and did not raise a question of fact: "[A] 'violation of a standard of care imposed by the Vehicle and Traffic Law constitutes negligence per se' ... . 'A driver who faces a green light has a duty to yield the right-of-way to pedestrians who are lawfully within a crosswalk in accordance with the standard of care imposed by Vehicle and Traffic Law § 1111(a)(1)' ... . 'A driver also has 'a statutory duty to use due care to avoid colliding with pedestrians on the roadway [pursuant to Vehicle and Traffic Law § 1146], as well as a common-law duty to see that which he [or she] should have seen through the proper use of his [or her] senses' ... . Here, the plaintiffs established their prima facie entitlement to judgment as a matter of law on the issue of liability by submitting the police accident report, and an affidavit from a witness who averred that the defendants' vehicle struck the infant plaintiff with its front bumper while the infant plaintiff was crossing Stillwell Avenue in a marked crosswalk with an active 'white pedestrian signal' ... . In opposition to the plaintiffs' prima facie showing, the defendants failed to raise a triable issue of fact as to whether the defendant driver had a non-negligent explanation for the accident ... . By the defendant driver's own admissions in the police accident report and her affidavit, she did not see the infant plaintiff prior to the accident, which she only realized had occurred upon 'hear[ing] the impact,' and she continued to drive into the crosswalk after being 'blinded' by sun glare, which 'caus[ed] her to collide into [the infant plaintiff].' Further, as the plaintiffs contend, the foreseeable occurrence of sun glare while the defendant driver was driving west at sundown did not constitute a 'qualifying emergency' under the emergency doctrine ...". ***E.B. v. Gonzalez*, 2022 N.Y. Slip Op. 04942, Second Dept 8-17-22**

THIRD DEPARTMENT

FAMILY LAW, CIVIL PROCEDURE.

ALTHOUGH NEW YORK DID NOT HAVE JURISDICTION OVER THE MICHIGAN CUSTODY ORDER; FAMILY COURT SHOULD HAVE EXERCISED TEMPORARY EMERGENCY JURISDICTION AND HELD A HEARING ON THE CHILD'S SAFETY; THE CHILD WAS IN NEW YORK DURING FATHER'S PARENTING TIME WHEN FATHER BROUGHT A NEGLECT/CUSTODY PETITION IN NEW YORK.

The Third Department, reversing Family Court, determined, although Family Court properly dismissed father's neglect/custody petition on the ground New York did not have jurisdiction over the Michigan custody order, Family Court should have ordered a hearing about the child's safety pursuant to the court's temporary emergency jurisdiction. The child was in New York during father's parenting time at the time father filed the petition: "Under the UCCJEA [Uniform Child Custody Jurisdiction and Enforcement Act], a New York court has jurisdiction to make an initial child custody determination under certain limited circumstances ... . Here, the parties agreed that, as Michigan is the home state of the child, none of these statutory factors apply. Nevertheless, Domestic Relations Law § 76-c provides that 'New York courts have 'temporary emergency jurisdiction if the child is present in this state and it is necessary in an emergency to protect the child, a sibling or parent of the child' ... . The AFC [attorney for the child] and the father contend that the allegations set forth in the petition were sufficient to warrant Family Court to conduct a hearing. We agree." ***Matter of Chester HH. v. Angela GG.*, 2022 N.Y. Slip Op. 05002, Third Dept 8-18-22**

To view archived issues of CasePrepPlus,
visit www.nysba.org/caseprepplus.