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COURTS OF APPEALS

APPEALS, CIVIL PROCEDURE.

THE TWO-JUSTICE DISSENT DID NOT PRESENT A QUESTION OF LAW REVIEWABLE BY THE COURT OF APPEALS; THE ORDER DENYING SUMMARY JUDGMENT DID NOT NECESSARILY AFFECT THE FINAL JUDGMENT.

The Court of Appeals, dismissing the appeal, in a brief memorandum decision, held that the two-justice dissent (which would normally require review by the Court of Appeals) did not present a reviewable question of law: "[A]ppeal dismissed, with costs, upon the ground that the two-Justice dissent at the Appellate Division is not on a question of law which would be reviewable by the Court of Appeals (see CPLR 5601 [a]; 5501 [a] [1]). The dissent was predicated on an order denying partial summary judgment that did not necessarily affect the judgment from which the appeal was taken (***see Bonczar v American Multi-Cinema, Inc.*, 38 NY3d 1023** [2022])." ***Shaw v. City of Rochester*, 2022 N.Y. Slip Op. 05197, Ct App 9-15-22**

Below is the summary of *Bonczar v. American Multi-Cinema, Ins.* (cited by the Court of Appeals in *Shaw*, *supra*):

The Court of Appeals determined the Appellate Division order denying summary judgment in this Labor Law § 240(1) ladder-fall case did not "affect the final judgment" after trial. Therefore, the order was not appealable to the Court of Appeals: "The 2018 Appellate Division order may be reviewed on appeal from a final paper only if, pursuant to CPLR 5501 (a), the nonfinal order 'necessarily affects' the final judgment. "It is difficult to distill a rule of general applicability regarding the 'necessarily affects' requirement" … and '[w]e have never attempted, and we do not now attempt, a generally applicable definition' … . That said, to determine whether a nonfinal order 'necessarily affects' the final judgment, in cases where the prior order 'str[uck] at the foundation on which the final judgment was predicated' we have inquired whether 'reversal would inescapably have led to a vacatur of the judgment' … . This is not such a case. In other cases, we have asked whether the nonfinal order 'necessarily removed [a] legal issue from the case' so that 'there was no further opportunity during the litigation to raise the question decided by the prior non-final order' … . In resolving plaintiff's summary judgment motion, the Appellate Division held that factual questions existed as to whether a statutory violation occurred and as to proximate cause, or more specifically as to whether plaintiff's own acts or omissions were the sole proximate cause of the accident … . That nonfinal order did not remove any issues from the case. Rather, the question of proximate cause and liability was left undecided. The parties had further opportunity to litigate those issues and in fact did so during the jury trial." ***Bonczar v. American Multi-Cinema, Inc.*, 2022 N.Y. Slip Op. 02835, CtApp 4-28-22**

FIRST DEPARTMENT

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY, EVIDENCE, APPEALS.

PARTY ADMISSIONS WERE NOT HEARSAY AND SHOULD HAVE BEEN CONSIDERED BY SUPREME COURT IN THIS LABOR LAW §§ 240(1), 241(6), 200 ACTION; THE "PARTY-ADMISSIONS" ARGUMENT, ALTHOUGH NOT RAISED BEFORE SUPREME COURT, CAN BE CONSIDERED AND DEEMED DISPOSITIVE ON APPEAL.

The First Department, reversing (modifying) Supreme Court, determined many of the causes of action in this Labor Law §§ 240(1), 241(6) and 200 action should not have been dismissed. Plaintiff's decedent, Rosa, was electrocuted when working on live electrical equipment. Rosa's boss, Cuevas (the building manager), testified he told Rosa not to work on the live equipment until he returned with rubber insulation and shut down the power to the building. Decedent's daughter, however, testified Cuevas told her Rosa had to do the work with the power on because there was an upcoming inspection. Cuevas' statement was deemed admissible as a party admission and should have been considered by Supreme Court. The "party-admissions" argument was raised for the first time on appeal: "When 'a party raises a legal issue for the first time on appeal, as long as the issue is determinative and the record on appeal is sufficient to permit review, this Court may consider the new argument' … . We may also consider this testimony in our discretion because [defendants] also relied on it in support of their summary judgment motion … . … [P]laintiff testified to postaccident conversations that Cuevas had with her when he visited Rosa in the hospital, when he admitted to plaintiff that Rosa had to perform the bus duct work without shutting down the electricity because of the imminently scheduled building inspection, so as not to inconvenience the tenants, and to avoid any complaints attendant to a service interruption, such as a lack of elevator service. Cuevas never denied either having those conversations with plaintiff in the hospital or making those statements.... . In any event, assuming hypothetically that these statements were inadmissible hearsay, they may still be considered as they are not the only evidence in this record that the electricity was not shut down when Rosa performed the duct work ...". ***Rosa v. 47 E. 34th St. (NY), L.P.*, 2022 N.Y. Slip Op. 05144, First Dept 9-13-22**

SECOND DEPARTMENT

ATTORNEYS, CIVIL PROCEDURE, FORECLOSURE.

THE FORECLOSURE ACTION WAS AUTOMATICALLY STAYED WHEN DEFENDANT'S ATTORNEY WAS SUSPENDED; EVEN THOUGH THE ORDER GRANTING THE ATTORNEY'S MOTION TO WITHDRAW DIRECTED DEFENDANT TO RETAIN AN ATTORNEY OR PROCEED PRO SE, DEFENDANT WAS NEVER SERVED WITH A NOTICE TO APPOINT AN ATTORNEY REQUIRED BY CPLR 321; THEREFORE THE STAY WAS NOT LIFTED AND DEFENDANT'S MOTION TO VACATE THE SUMMARY JUDGMENT ORDER SHOULD HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined defendant (Simonsen) in this foreclosure action was never given notice to appoint new counsel after his attorney (Sirianni) was suspended and withdrew from the case. Even though, in granting the Sirianni's motion to withdraw, the court directed defendant to retain new counsel or continue pro se, defendant was never provided with the notice required by CPLR 321(c). Therefore defendant's motion to vacate the summary judgment order should have been granted: "CPLR 321(c) provides, inter alia, that '[i]f an attorney dies, becomes physically or mentally incapacitated, or is removed, suspended or otherwise becomes disabled at any time before judgment, no further proceeding shall be taken in the action against the party for whom he [or she] appeared, without leave of the court, until thirty days after notice to appoint another attorney has been served upon that party.' '[D]uring the stay imposed by CPLR 321(c), no proceedings against the party will have any adverse effect' ... , and '[o]rders or judgments that are rendered in violation of the stay provisions of CPLR 321(c) must be vacated' ... . 'It lies within the power of the other side to bring the stay to an end by serving a notice on the affected party to appoint new counsel within 30 days' ... . The protections of CPLR 321(c) can be waived where the party elects to proceed pro se ... . This action was automatically stayed by operation of CPLR 321(c) on ... the effective date of Sirianni's suspension from the practice of law. At no point was Simonsen provided, pursuant to CPLR 321(c), with the required notice to appoint another attorney, either by the court or opposing counsel. Moreover, the withdrawal order, which granted Sirianni's motion pursuant to CPLR 321(b)(2) for leave to withdraw as counsel for Simonsen, had no practical effect as to whether the notice provision of CPLR 321(c) applied to this case ... . [T]he withdrawal order failed to direct service of a notice to appoint another attorney upon Simonsen, and there is no evidence in the record that Simonsen was ever served with a copy of the withdrawal order ... . The record is also devoid of any evidence that ... Simonsen waived the protections of CPLR 321(c) by electing to proceed pro se. Therefore, the automatic stay was not lifted until Simonsen moved, in effect, to vacate the summary judgment order ...". ***JPMorgan Chase Bank, N.A. v. Simonsen*, 2022 N.Y. Slip Op. 05156, Second Dept 9-14-22**

CIVIL PROCEDURE, LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY, EVIDENCE.

A LATE MOTION FOR SUMMARY JUDGMENT SHOULD BE ALLOWED WHERE, AS HERE, DISCOVERY WAS NOT COMPLETE AT THE TIME THE MOTION WAS DUE AND THE DISCOVERY IS ESSENTIAL TO THE MOTION.

The Second Department, reversing Supreme Court in this Labor Law §§ 240(1) and 241(6) action, determined Supreme Court properly found plaintiff offered a sufficient reason for making a late motion for summary judgment, i.e., discovery was incomplete at the time the motion was due, but should not have denied the motion on the ground the discovery was not essential to the motion. The discovery dealt with whether plaintiff was engaged in unauthorized work at the time of the accident, which is a defense to Labor Law §§ 240(1) and 241(6) actions: "A party may not move for summary judgment after the deadline to do so has expired, 'except with leave of court on good cause shown' (CPLR 3212[a]). As a result, a court may not consider a late motion for summary judgment unless the moving party offers 'a satisfactory explanation for the untimeliness—rather than simply permitting meritorious, nonprejudicial filings, however tardy' ... . 'While significant outstanding discovery may, in certain circumstances, constitute good cause for a delay in making a motion for summary judgment,' the movant must establish that the discovery was 'essential to its motion' ... . This standard generally requires that the discovery be relevant to resolving disputed issues of fact ... . Even if the discovery is essential, good cause for the delay will only exist if the party promptly moves for summary judgment after securing such discovery ...". ***Fuczynski v. 144 Div., LLC*, 2022 N.Y. Slip Op. 05151, Second Dept 9-14-22**

CIVIL PROCEDURE, PERSONAL INJURY.

THERE WAS VIDEO EVIDENCE OF THE SLIP AND FALL, PHOTOGRAPHIC EVIDENCE OF THE UNLAWFUL DRAIN PIPE WHICH WAS THE SOURCE OF THE ICE ON THE SIDEWALK, AND EXPERT EVIDENCE; DEFENDANTS' MERE HOPE THAT DISCOVERY WOULD REVEAL EVIDENCE TO DEFEAT PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT DID NOT SUPPORT THE DENIAL OF THE MOTION AS PREMATURE.

The Second Department, reversing Supreme Court, determined plaintiffs' motion for summary judgment in this slip and fall case was not premature and should have been granted. There was video evidence and photographs depicting an unlawfully disconnected drain pipe which was the source of the ice on the sidewalk: " 'Although determination of a summary judgment motion may be delayed to allow for further discovery where evidence necessary to oppose the motion is unavailable to the opponent of the motion (see CPLR 3212[f]), '[a] determination of summary judgment cannot be avoided by a claimed need for discovery unless some evidentiary basis is offered to suggest that discovery may lead to relevant evidence' ... . [W]here the icy condition on the sidewalk as well as Sloan's fall are clearly depicted on a surveillance video and the condition of the drain pipe over time is revealed in photographs of the building, the defendants have offered nothing more than hope and speculation that additional discovery might uncover evidence sufficient to raise triable issues of fact regarding the manner in which the accident occurred, the cause of [plaintiff's] fall, and their notice of the defective condition of the drain pipe ...". ***Sloan v. 216 Bedford Kings Corp.*, 2022 N.Y. Slip Op. 05173, Second Dept 9-14-22**

CIVIL PROCEDURE, PERSONAL INJURY, VEHICLE AND TRAFFIC LAW.

DEFENDANT DID NOT DEMONSTRATE DISCOVERY WOULD LEAD TO EVIDENCE ESSENTIAL TO DEFEND AGAINST PLAINTIFF'S SUMMARY JUDGMENT MOTION IN THIS INTERSECTION TRAFFIC ACCIDENT CASE; PLAINTIFF'S MOTION SHOULD NOT HAVE BEEN DENIED AS PREMATURE.

The Second Department, reversing Supreme Court, determined plaintiff motorcyclist's motion for summary judgment in this intersection traffic accident case was not premature, defendant's violation of the Vehicle and Traffic law was negligence per se, and the comparative-negligence affirmative defense should have been dismissed. Plaintiff demonstrate defendant made an illegal left turn in front of him and he could not avoid the collision: "[A] violation of the Vehicle and Traffic Law constitutes negligence as a matter of law ... . 'The operator of an oncoming vehicle with the right-of-way is entitled to assume that the opposing operator will yield in compliance with the Vehicle and Traffic Law' ... . '[A] driver with the right-of-way who has only seconds to react to a vehicle which has failed to yield is not comparatively negligent for failing to avoid the collision' ... . [T]he plaintiff's motion was not premature since the defendants failed to demonstrate that discovery might lead to relevant evidence or that facts essential to justify opposition to the motion were exclusively within the knowledge and control of the plaintiff (see CPLR 3212[f] …)." ***Higgins v. Stelmach*, 2022 N.Y. Slip Op. 05155, Second Dept 9-13-22**

FAMILY LAW, JUDGES, APPEALS.

THERE WAS NO EVIDENCE MOTHER PREVIOUSLY FILED FRIVOLOUS VISITATION PETITIONS; THE JUDGE SHOULD NOT HAVE PROHIBITED HER FROM FILING FUTURE PETITIONS WITHOUT LEAVE OF COURT.

The Second Department, reversing Family Court, determined the judge should have prohibited mother from filing visitation petitions without leave of court: "The Family Court should not have prohibited the mother from filing petitions for visitation after October 22, 2021, without written leave of the court, since there is no basis in the record to demonstrate that the mother filed frivolous petitions or filed petitions out of ill will or spite ...". ***Matter of Genao-Archibald v. Archibald*, 2022 N.Y. Slip Op. 05166, Second Dept 9-14-22**

PERSONAL INJURY, EVIDENCE,

ALTHOUGH PLAINTIFF'S EXPERT IN THIS STAIRWAY SLIP AND FALL COULD NOT TESTIFY THE STAIRWAY VIOLATED ANY STATUTE OR REGULATION, THE EXPERT COULD HAVE TESTIFIED THE SLIPPERY CONDITION VIOLATED A CUSTOM IN THE INDUSTRY AS REPRESENTED BY THE AMERICAN SOCIETY FOR TESTING MATERIALS STANDARDS; THE EXPERT SHOULD NOT HAVE BEEN PRECLUDED FROM TESTIFYING.

The Second Department, reversing Supreme Court, determined plaintiff's expert (Fein) in this stairway slip and fall case should not have been precluded from testifying. Although the expert could not testify the condition of the stairway violated a code or regulation, he could have testified the slippery condition violated a custom in the industry represented by the American Society for Testing Materials standards: "The absence of a violation of a specific code or ordinance is not dispositive of the plaintiff's allegations based on common-law negligence principles ... . Accordingly, a defendant may be held negligent for departing from generally accepted customs and practices even when the allegedly defective condition is in compliance with the relevant codes and ordinances ... . Had Fein been permitted to testify, he could have addressed whether the coefficient of friction of the subject staircase, as measured during his inspection, was a departure from generally accepted customs and practices, and whether the defendants were negligent in failing to correct it ... . Fein could have testified as to the American Society for Testing Materials standards, even though the Supreme Court correctly stated that they were not law. Fein could have testified as to whether those standards represented the general custom or usage in the industry, and the jury could have considered any deviation from those standards as some evidence of negligence . Any purported shortcomings in Fein's testing go to the weight to be given his testimony, not its admissibility ... . [T]he court improvidently exercised its discretion in granting the defendants' motion in limine to preclude the plaintiff from presenting the proposed expert testimony relating to the American Society for Testing Materials standards regarding the coefficient of friction, and the preclusion of this testimony deprived the plaintiff of a fair trial ...". ***Martell v. Dorchester Apt. Corp.*, 2022 N.Y. Slip Op. 05164, Second Dept 9-14-22**

THIRD DEPARTMENT

CRIMINAL LAW, EVIDENCE, ATTORNEYS.

DEFENDANT WAS ENTITLED TO HEARINGS ON HER SECOND MOTION TO VACATE HER CONVICTION ON THE GROUNDS OF NEWLY DISCOVERED EVIDENCE, ACTUAL INNOCENCE, AND INEFFECTIVE ASSISTANCE.

The Third Department, reversing County Court, determined defendant was entitled to a hearing on her motion to vacate her convictions of predatory sexual assault of a child. Defendant presented affidavits from six witnesses stating the victim had recanted her trial testimony. Defendant's motion warranted hearings on: (1) the newly discovered evidence (the recantation); (2) actual innocence; and (3) ineffective assistance (failure to present expert evidence to refute the People's reliance of the Child Sexual Abuse Accommodation Syndrome [CSAAS]): "To prevail [the newly-discovered evidence] claim, a defendant bears the burden of establishing that the evidence meets 'the following requirements: (1) it must be such as will probably change the result if a new trial is granted; (2) it must have been discovered since the trial; (3) it must be such as could have not been discovered before the trial by the exercise of due diligence; (4) it must be material to the issue; (5) it must not be cumulative to the former issue; and[] (6) it must not be merely impeaching or contradicting the former evidence' ... . * * * ... [W]e conclude that the six affidavits, together with the copies of text messages between victim B and some of the affiants were sufficient to

warrant the holding of a hearing, such that County Court's denial of defendant's motion on the ground of newly discovered evidence in the absence of such a hearing was error ... . * * * ... [D]efendant has established her entitlement to a hearing on her claim of actual innocence. 'A prima facie showing of actual innocence is made out when there is a sufficient showing of possible merit to warrant a fuller exploration by the court' ... .* * * ... [A] defendant may establish that he or she was denied meaningful representation in connection with the failure to call an expert witness by 'demonstrat[ing] that such testimony was available, that it would have assisted the jury in its determination or that he [or she] was prejudiced by its absence' ...". ***People v. Werkheiser*, 2022 N.Y. Slip Op. 05188, Third Dept 9-15-22**

LANDLORD-TENANT, CONTRACT LAW, EVIDENCE.

LANDLORD DID NOT DEMONSTRATE TENANT ABANDONED THE LEASED PREMISES AND WAS NOT ENTITLED TO RENT FOR THE PERIODS BEFORE AND AFTER TENANT WAS LOCKED OUT; TENANT WAS ENTITLED TO RECOVER THE VALUE OF THE PERSONAL PROPERTY WHICH REMAINED IN THE LEASED PREMISES AFTER THE LOCKOUT.

The Third Department, reversing the plaintiffs' verdict in this landlord-tenant dispute, determined plaintiffs did not demonstrate defendants had abandoned the leased premises, a restaurant. Therefore, plaintiffs were not entitled to recover rent after defendants were locked out by the plaintiffs, and plaintiffs did not submit sufficient proof of the alleged rent arrears (prior to the lockout). Defendants were entitled to recover on their unjust enrichment counterclaim for the value of the personal property which remained in the restaurant after the lockout: "As relating to commercial premises, 'a landlord may avail himself or herself of a lease provision permitting reentry upon breach of conditions as long as he or she reenters peaceably' ... . Certain evidence indicating abandonment may include failure to pay bills and rent, surrender of keys and physical relocation of business or personal items previously kept at the subject property ... . Contrary conduct found not to demonstrate an intent to abandon a premises includes conduct such as leaving commercial equipment on the premises, paying the utilities, paying lump sum arrears, negotiating the sale of the business that included the leasehold and threatening to call the police on a landlord over a lockout ... . At trial, plaintiffs offered limited evidence of abandonment, namely, that plaintiff Martin P. Patton drove by the restaurant several times in May 2018 or June 2018 and observed it was closed and that defendants were behind on rent, although Patton was not exactly sure what days or what times he drove by or the total amount of rent arrears. In contrast, Chen [the tenant] testified that, although business was declining, he continued to pay the rent and began to contact potential buyers to take over the restaurant and lease. According to Chen, the restaurant operated the day before the lockout and, when he returned the next day to find the locks changed, he called plaintiffs, who did not respond to him, and then he called the police, who generated an incident report. Defendants entered into evidence several photographs of the premises depicting equipment, furniture, powered-on televisions, liquor bottles on display at the bar and other chattel owned by defendants ...". ***Patton v. Modern Asian, Inc.*, 2022 N.Y. Slip Op. 05192, Third Dept 9-15-22**

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