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Editor: Bruce Freeman

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SECOND DEPARTMENT

CIVIL PROCEDURE, ATTORNEYS, LEGAL MALPRACTICE, NEGLIGENCE, INSURANCE LAW.

IN THIS LEGAL MALPRACTICE ACTION, THE EVIDENCE SUBMITTED BY DEFENDANT ATTORNEYS IN SUPPORT OF THE MOTION TO DISMISS WAS NOT "DOCUMENTARY EVIDENCE"; THE PROOF REQUIREMENTS FOR A MOTION TO DISMISS ARE DIFFERENT FROM THE PROOF REQUIREMENTS FOR SUMMARY JUDGMENT; THE MOTION TO DISMISS SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined the motion to dismiss in this legal malpractice case should not have been granted because the evidence offered in support of the motion (a letter from the insurer denying coverage and the insurance policy) was not "documentary evidence." In addition, the Second Department noted that any deficiencies in the complaint were remedied by plaintiff's affidavit submitted in opposition to the motion to dismiss. The complaint alleged defendant attorneys failed to timely file an action seeking recovery for personal injuries from a disability-insurance carrier: " 'Whether the complaint will later survive a motion for summary judgment, or whether the plaintiff will ultimately be able to prove its claims, of course, plays no part in the determination of a prediscovery CPLR 3211 motion to dismiss' ... . * * * 'A motion to dismiss on the ground that the action is barred by documentary evidence pursuant to CPLR 3211(a)(1) may be granted only where the documentary evidence utterly refutes the plaintiff's factual allegations, [thereby] conclusively establishing a defense as a matter of law' ... . '[T]o be considered 'documentary,' evidence must be unambiguous and of undisputed authenticity' ... . '[J]udicial records, as well as documents reflecting out-of-court transactions such as mortgages, deeds, contracts, and any other papers, the contents of which are essentially undeniable, would qualify as documentary evidence in the proper case' ... . 'Neither affidavits, deposition testimony, nor letters are considered documentary evidence within the intendment of CPLR 3211(a)(1)' ...". ***Maursky v. Latham*, 2023 N.Y. Slip Op. 04115, Second Dept 8-2-23**

CIVIL PROCEDURE, CONTRACT LAW, CORPORATION LAW.

THE DEFENDANT'S AFFIDAVIT SUBMITTED IN SUPPORT OF THE MOTION TO DISMISS WAS NOT "DOCUMENTARY EVIDENCE" WHICH UTTERLY REFUTED THE ALLEGATIONS IN THE COMPLAINT; EVEN THOUGH DEFENDANT MIGHT WIN AT THE SUMMARY JUDGMENT STAGE, THE PROOF REQUIREMENTS FOR DISMISSAL ARE DIFFERENT AND WERE NOT MET.

The Second Department, reversing Supreme Court, determined defendant contractor's motion to dismiss the complaint against him individually should not have been granted. Defendant, Gabbay, executed the subject home renovation contract on behalf of "Dansha Corp.," an entity which does not exist. Defendant asserted in an affidavit submitted to support the motion to dismiss, that "Dansha Corp." is a trade name for "Dansha Realty Corp.," which does exist. Therefore, defendant argued, he cannot be individually liable on the contract. However, irrespective of what might be determined in a motion for summary judgment, a motion to dismiss which relies on evidence must be supported by "documentary evidence." Defendant's affidavit does not constitute "documentary evidence": " 'Where a party offers evidentiary proof on a motion pursuant to CPLR 3211(a)(7), and such proof is considered but the motion has not been converted to one for summary judgment, 'the criterion is whether the proponent of the pleading has a cause of action, not whether [the proponent] has stated one, and, unless it has been shown that a material fact as claimed by the pleader to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it[,] . . . dismissal should not eventuate' ... . 'Whether the complaint will later survive a motion for summary judgment, or whether the plaintiff will ultimately be able to prove its claims, of course, plays no part in the determination of a prediscovery CPLR 3211 motion to dismiss' ... . 'A motion to dismiss a complaint pursuant to CPLR 3211(a)(1) may be granted only if the documentary evidence submitted by the moving party utterly refutes the factual allegations of the complaint and conclusively establishes a defense to the claims as a matter of law' ... . Although there is 'no individual liability for principals of a corporation for actions taken in furtherance of the corporation's business' ... , 'a person entering into a contract on behalf of a nonexistent corporate entity may be held personally liable on the contract' ... . Here, accepting the allegations in the complaint as true and giving the plaintiff the benefit of every possible favorable inference, the complaint states causes of action against Gabbay to recover damages for breach of contract ... and money had and received ... . There is no dispute that 'Dansha Corp.,' the entity named as the general contractor in the contract, does not exist. Furthermore, the evidence submitted by Gabbay failed to conclusively establish that 'Dansha Realty Corp.' was the intended party to the contract for purposes of a prediscovery CPLR 3211 motion to dismiss ... . The affidavit submitted by Gabbay in support of the motion was not 'documentary' within the meaning of CPLR 3211(a)(1) ... , and the remainder of the evidence, including invoices sent to the plaintiff from 'Dansha Corp.,' do not prove that 'Dansha Corp.' is a trade name for 'Dansha Realty Corp.' ...". ***Churong Liu v. Gabbay*, 2023 N.Y. Slip Op. 04108, Second Dept 8-2-23**

CIVIL PROCEDURE, COURT OF CLAIMS, NEGLIGENCE.

THE "TIME WHEN" ALLEGATIONS IN THE CLAIM IN THIS CHILD VICTIMS ACT SUIT WERE SUFFICIENT, COURT OF CLAIMS REVERSED.

The Second Department, reversing the Court of Claims, over an instructive concurrence, determined the claim in this Child Victims Act action sufficiently alleged the "time when" the sexual abuse allegedly occurred: "[T]he date ranges provided in the claim, together with the other information set forth therein, were sufficient to satisfy the 'time when' requirement of Court of Claims Act § 11(b). The claimant alleged, among other things, that '[i]n approximately 1987, when [he] was approximately sixteen (16) years old, [he] was admitted to' a State-operated psychiatric hospital "for inpatient residential treatment," and that '[while] admitted to the . . . facility' he was 'sexually abused and assaulted' by a staff member on two occasions. Additionally, the claimant identified his alleged abuser in the claim and set forth the details of the two alleged assaults, including the location within the facility where they allegedly occurred. The claimant also alleged that, before the second incident of abuse occurred, he reported to his treating psychiatrist, whom the claimant identified by name, that the alleged perpetrator made the claimant 'uncomfortable.' 'Given that the CVA allows claimants to bring civil actions decades after the alleged sexual abuse occurred, it is not clear how providing exact dates, as opposed to the time periods set forth in the instant claim, would better enable the State to conduct a prompt investigation of the subject claim' ... . We note, however, 'that our determination that the claimant met the 'time when' requirement in the context of this action brought under the CVA does not change our jurisprudence with respect to the 'time when' requirement under different contexts, such as where a 'single incidence of negligence' occurs on a discrete date or other situations where 'a series of ongoing acts or omissions occur[ ] on multiple dates over the course of a period of time' ...". ***Rodriguez v. State of New York*, 2023 N.Y. Slip Op. 04146, Second Dept 8-2-23**

EMPLOYMENT LAW, NEGLIGENCE, FRAUD.

LYFT WAS NOT VICARIOUSLY LIABLE FOR THE ALLEGED SEXUAL ASSAULT BY A LYFT DRIVER; THE COMPLAINT DID NOT STATE A CAUSE OF ACTION FOR FRAUD BASED UPON THE ASSURANCES OF SAFETY ON LYFT'S WEBSITE.

The Second Department, reversing Supreme Court, determined that the vicarious liability and fraud causes of action against defendant Lyft, a livery cab service, should have been dismissed. The complaint alleged infant plaintiff used a mobile app to hire a Lyft driver, Singh, who began masturbating after she got in the car. The complaint failed to allege the driver was acting within the scope of his employment when the alleged sexual assault occurred. The complaint also failed to allege the elements of fraud based on the claim on the Lyft website that its service was safe and the drivers had been screened: " '[W]here an employee's actions are taken for wholly personal reasons, which are not job related, the challenged conduct cannot be said to fall within the scope of employment' ... . 'A sexual assault perpetrated by an employee is not in furtherance of an employer's business and is a clear departure from the scope of employment, having been committed for wholly personal motives' ... . Here, assuming that Singh engaged in the sexual misconduct as alleged in the complaint, it is clear that such conduct was a departure from his duties as a Lyft driver and was committed solely for personal motives unrelated to Lyft's business. As such, the sexual misconduct cannot be said to have been within the scope of employment ... . Accordingly, the Supreme Court should have granted that branch of Lyft's motion which was to dismiss the cause of action alleging vicarious liability under the doctrine of respondeat superior. ... 'The elements of a cause of action for fraud require a material misrepresentation of a fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the plaintiff and damages' ... . 'Each of the foregoing elements must be supported by factual allegations containing the details constituting the wrong sufficient to satisfy CPLR 3016(b)' ... . 'To establish causation, the plaintiff must show that defendant's misrepresentation induced plaintiff to engage in the transaction in question (transaction causation) and that the misrepresentations directly caused the loss about which plaintiff complains (loss causation)' ... . Here, although the complaint alleges that the plaintiffs were aware of alleged representations on Lyft's website that the Lyft service was safe to use, it fails to sufficiently specify which statements on Lyft's website were false, and when those representations were made or accessed by the plaintiffs ... . Moreover, the complaint fails to set forth any facts sufficient to show that any alleged misrepresentations on Lyft's website regarding the safety of Lyft rides directly and proximately caused the plaintiffs' alleged damages, which were otherwise alleged to have been caused directly by Singh's sexual misconduct while operating the vehicle ... . It is not sufficient to merely allege that the infant plaintiff would not have used the Lyft app but for Lyft's alleged misrepresentations regarding safety ...". ***Browne v. Lyft, Inc.*, 2023 N.Y. Slip Op. 04102, Second Dept 8-2-23**

PERSONAL INJURY, EVIDENCE.

THERE WAS NO REASONABLE VIEW OF THE EVIDENCE WHICH SUPPORTED THE JURY'S CONCLUSION THE BUS DRIVER WAS NOT NEGLIGENT IN THIS BUS-PEDESTRIAN ACCIDENT CASE; THE MOTION TO SET ASIDE THE DEFENSE VERDICT SHOULD HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined the motion to set aside the defense verdict in this bus-pedestrian accident case should have been granted: "A jury verdict in favor of a defendant should be set aside as contrary to the weight of the evidence where the evidence preponderates so heavily in the plaintiff's favor that it could not have been reached by any fair interpretation of the evidence ... . 'A driver . . . has 'a statutory duty to use due care to avoid colliding with pedestrians on the roadway (see 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, no fair interpretation of the evidence supports a finding that Ramirez was free from negligence in the happening of this accident. Although it is unclear whether the plaintiff was crossing the entrance ramp in or near the crosswalk at the time that she was struck, Ramirez's failure to observe the plaintiff crossing the entrance ramp at the time of the accident was a violation of his common-law duty to see that which he should have seen through

the proper use of his senses ... . Under these circumstances, the jury's verdict that Ramirez was free from negligence was not supported by any fair interpretation of the evidence." ***Wargold v. Hudson Tr. Lines, Inc.*, 2023 N.Y. Slip Op. 04153, Second Dept 8-2-23**

PERSONAL INJURY, EVIDENCE, CONTRACT LAW.

THE PAVING CONTRACTOR FAILED TO DEMONSTRATE IT DID NOT LAUNCH AN INSTRUMENT OF HARM (A LIP OR HEIGHT DIFFERENTIAL IN THE ROAD SURFACE) WHICH CAUSED PLAINTIFF'S SLIP AND FALL; THEREFORE, THE CONTRACTOR DID NOT NEGATE THE APPLICABILITY OF THE ESPINAL EXCEPTION TO THE RULE THAT CONTRACTORS ARE GENERALLY NOT LIABLE TO THIRD PARTIES.

The Second Department, reversing (modifying) Supreme Court, determined the defendant paving company (DeBartolo) failed to eliminate a question of fact about whether it created the dangerous condition (i.e., launched the instrument of harm) which is alleged to have caused plaintiff's slip and fall. The complaint alleged DeBartolo paved over existing pavement, created the height-differential over which plaintiff tripped. Although a contractor like DeBartolo ordinarily does not owe a duty of care to a third party who is not a party to the contract, the so-called *Espinal* exceptions apply when a contractor is alleged to have "launched an instrument of harm." Once that theory of liability is alleged, the contractor seeking summary judgment must present evidence negating the allegation which DeBartolo failed to do: "[T]he plaintiffs pleaded in their amended complaint and bill of particulars that DeBartolo Landscaping created the alleged dangerous condition that caused the injured plaintiff to fall as a result of, among other things, failing to properly repave the area. Therefore, DeBartolo Landscaping, in support of that branch of its motion which was for summary judgment dismissing the amended complaint insofar as asserted against it, had to establish, prima facie, that it did not create the dangerous or defective condition alleged (see *Espinal v Melville Snow Contrs.*, 98 NY2d at 140 ...). * * * ... [The] evidence reveals ... that DeBartolo Landscaping resurfaced Shady Glen Court in the area of the crosswalk prior to the subject accident, and that the resurfacing, which involved the application of new asphalt on top of the existing pavement, immediately resulted in a lip or elevation differential at the seam between the existing pavement and new asphalt. Thus, this evidence failed to demonstrate that Debartolo Landscaping did not create the alleged dangerous condition that caused the injured plaintiff to fall ...". ***Camelio v. Shady Glen Owners' Corp.*, 2023 N.Y. Slip Op. 04105, Second Dept 8-2-23**

PISTOL PERMITS, EVIDENCE, JUDGES, CIVIL PROCEDURE.

PETITIONER'S APPLICATION FOR A PISTOL PERMIT SHOULD NOT HAVE BEEN DENIED BASED UPON A 23-YEAR-OLD ARREST THAT DID NOT RESULT IN PROSECUTION; PETITIONER SHOULD HAVE BEEN GIVEN THE OPPORTUNITY TO RESPOND TO THE OBJECTIONS TO THE APPLICATION.

The Second Department, reversing County Court, determined petitioner's application for a residential/sportsman pistol permit should not have been denied based upon a single arrest 23 years before which did not result in prosecution. The Second Department noted that petitioner was not given the opportunity to respond to the objections to his application: "[T]he respondent's determination denying the petitioner's application for a pistol permit was arbitrary and capricious ... . Although the respondent was entitled to consider the petitioner's prior arrest, the circumstances thereof did not, under the particular facts of this case, warrant the denial of the petitioner's application. The record reflects, among other things, that the petitioner properly disclosed his arrest in his application, that the weapon in question belonged to a hitchhiker the petitioner picked up while driving his vehicle when he was 19 years old, that an investigation by the District Attorney's office determined that the weapon belonged to the hitchhiker, that the petitioner testified before a grand jury in connection with the subject matter, that the grand jury entered a no true bill against the petitioner, and that the petitioner has no other criminal record in the 23 years between his single arrest and the date of the pistol permit application. Further, based upon the record before us, it is apparent that the respondent did not give the petitioner an opportunity to respond to the stated objections to his pistol permit application ...". ***Matter of Cambronne v. Russo*, 2023 N.Y. Slip Op. 04121, Second Dept 8-2-23**

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