



What must a defendant show under the trivial defect doctrine to be entitled to summary judgment dismissing a personal injury claim as a matter of law? The Second Department held that although an objective measurement of a defect may be the best evidence of triviality, it is not always required to demonstrate that a defect is trivial as a matter of law. Photographs may be sufficient, so long as the trial courts can use them to determine “the height, depth, or other dimensions of an alleged defect” in relation to “other objects of known or standard size that are present, such as a coin, a shoe, a baseball, a soda can, or other objects of uniform size.” Let’s take a look at that opinion and what else has been happening in New York’s appellate courts over the past week.

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FIRST DEPARTMENT

CONTRACT LAW, ARBITRATION, RES JUDICATA

[Gulf LNG Energy, LLC v Eni S.p.A., 2024 Slip Op 04517 \(1st Dept Sept. 24, 2024\)](#)

Issue: Does an arbitration ruling that a contract is terminated for “frustration of purpose” preclude subsequent claims for breach of contract that were not decided in the arbitration?

Facts: When Angola decided to market its liquid natural gas in the U.S., “Gulf LNG Energy, LLC (GLE) and Gulf LNG Pipeline, LLC (GLP, together with GLE, Gulf) were selected to build and operate an LNG import and regasification terminal and a distribution pipeline on the Gulf Coast in Pascagoula, Mississippi.” Gulf and Eni USA Gas Marketing LLC entered into a Terminal Use Agreement (TUA) with a 20-year term in 2007, under which Gulf would build an LNG receiving import terminal facility for the Angolan LNG and agreed to limit its purpose to the receipt, storage, and distribution of the LNG. “In exchange, Eni USA would deliver the LNG to the Facility and make fixed monthly payments for the import and regasification services provided by Gulf, whether or not Eni USA imported LNG to the Facility.” The TUA required arbitration of any disputes between the parties.

In a Parent Direct Agreement (PDA) and Direct Agreement (DA) separately executed around the same time, Eni S.p.A., the indirect parent corporation of Eni USA, guaranteed Eni USA’s payment obligations, and Gulf’s parent, Gulf LNG Energy Port (Gulf Port), warranted to Eni S.p.A. and Eni USA that it would “cause GLE to comply with the provisions of Article 22.3 and Article 22.4 of the Terminal Use Agreement.” The PDA and DA, however, did not contain a mandatory arbitration provision or limit damages.

Before the Facility was completed, the U.S. domestic market for LNG tanked. As a result, Gulf began to explore the addition of liquefaction and export capabilities to the Facility and presented that plan to its TUA customers, including Eni USA. Although Gulf did not anticipate interference with existing services and thought that the TUA customers would be relieved of the burden to make fixed monthly payments under the TUA if the Facility was capable of liquefaction and export, rather than only import, Gulf’s proposal was never carried out.

In March 2016, Eni USA sought to terminate the TUA through arbitration, claiming frustration of purpose and breach of contract. Eni USA claimed that Gulf breached the agreement by pursuing a gas liquefaction and export project in contravention of the terms of the TUA. Gulf denied the claims, noting that no modifications were made to the Facility and argued that if the TUA is terminated due to frustration of purpose, Gulf would be entitled to compensation, on an equitable basis. Following a four-day hearing, the arbitration tribunal determined that the TUA was terminated due to frustration of purpose as of March 1, 2016, and relieved Eni USA of \$1.2 billion in prospective payments under the TUA. The tribunal determined, however, that Eni USA owed Gulf \$462 million in equitable compensation damages in connection with the early termination. The remaining breach of contract claims were not considered or determined. Although Eni USA thereafter applied to correct the award, it “did not seek to have the tribunal consider and determine its TUA contract breach claims or its entitlement to a setoff to Gulf’s substantial damage award. The tribunal corrected the award to clarify that Gulf’s entitlement to retain the TUA payments ended on December 31, 2016, and to direct Gulf to refund payments after that date, noting that “[i]n all other respects, the Award is reaffirmed.” The Delaware Chancery Court confirmed the award, and entered a final judgment in Gulf’s favor. After paying the award in 2019, Eni USA commenced a second arbitration seeking to pursue the breach of contract claims. The Delaware Supreme Court enjoined the second arbitration, however, as an impermissible collateral attack on the first arbitration.

In September 2018, Gulf commenced a suit in New York to enforce Eni S.p.A.’s payment guarantees. Eni S.p.A. counterclaimed, alleging that the payment by Eni USA was made in full and that Gulf exceeded its corporate purpose in breach of the TUA and DA. Supreme Court

granted Eni S.p.A summary judgment and dismissed Gulf's claims, holding that Eni USA paid the arbitration award and thus Eni S.p.A. was no longer obligated after termination of the TUA. The First Department affirmed the decision on appeal.

Seven months later, Eni S.p.A. filed suit against Gulf Port for damages under the PDA, essentially reiterating the same allegations that it made in the DA counterclaim. Eni S.p.A. argued that Gulf breached the TUA, therefore, Gulf Port breached the PDA. Gulf submitted a motion for summary judgment to dismiss the DA counterclaim and the PDA action arguing that the claims were precluded by the arbitration and resulting award. Supreme Court dismissed both claims as barred by *res judicata*.

Holding: The First Department affirmed, holding that when a cause of action arises from the same set of facts as a claim previously decided through arbitration, *res judicata* bars any claims that could have been litigated in the arbitration, even if they weren't actually decided. After rejecting Eni S.p.A.'s claim that it wasn't in privity with Eni USA, the Court turned to "whether Eni S.p.A. [wa]s barred from litigating the DA counterclaim and the PDA action in the New York litigation under the principles of *res judicata*."

Eni S.p.A. argued "that there was no judgment on the merits of Eni USA's asserted breach of contract claims because the tribunal found that those claims became 'academic' and that there was no need for further consideration upon termination of the TUA for frustration of purpose." The First Department noted that Eni USA sought termination under two theories, which were both fully briefed, argued, and submitted to the tribunal. Once the TUA was terminated for frustration of purpose, no claims could be brought for breach of contract. "Given the DA counterclaim and the PDA action are inextricably intertwined with the breach of contract claims by virtue of the fact that the basis for them stems from article 22 of the TUA, Supreme Court properly dismissed them under the *res judicata* doctrine."

In determining "whether the DA counterclaim and the PDA action [arose] from 'all or any part of the transaction, or series of connected transactions' out of which the prior arbitration arose," the Court held that Gulf's warranty that it would limit its purpose to the development and operation of the LNG facility was central to the TUA, the DA, and the PDA. "The commonality of the claims grounded in article 22 forms the consequential interlocking thread amongst these agreements, the arbitration, and this litigation . . . [t]hus, the claims for breach of the TUA, the DA counterclaim, and the PDA action are all contractually intertwined with one another." Additionally, since the DA counterclaim and the PDA action were both grounded in breach of that warranty, and both arose from the same facts and circumstance that were considered in the arbitration, those claims were barred by the failure to raise and litigate them in the arbitration.

SECOND DEPARTMENT

PERSONAL INJURY, TRIVIAL DEFECT DOCTRINE

Snyder v AFCO Avports Mgt., LLC, 2024 NY Slip Op 04584 (2d Dept Sept. 25, 2024)

Issue: In establishing its *prima facie* burden on a motion for summary judgment that an alleged defect was trivial as a matter of law, must a defendant present evidence of an objective measurement of the alleged defect's dimensions under the trivial defect doctrine?

Facts: On July 20, 2018, one of the plaintiffs was injured after she tripped on what she described as "a piece of raised sidewalk" while walking at an airport with her husband in Orange County. Following the plaintiff's fall, a cone was placed on the sidewalk where the plaintiff had tripped and repairs were made to the sidewalk. The "[r]epairs were made to the sidewalk in the days following this incident, before any objective measurements were made by anyone of the misleveled sidewalk slab where the accident occurred." The plaintiff then filed this suit against defendants, including a company that provides management services for the airport and the commercial lessee of the airport, to recover damages for the personal injuries she sustained as a result of the fall. The defendants moved for summary judgment to dismiss the complaint, claiming that their submissions, which included, among other things, "photographs, deposition testimony, and an affidavit of a human factors expert, established that the alleged sidewalk defect was trivial as a matter of law and, thus, not actionable." In opposition, the plaintiffs argued that the defendants' motion should be denied because defendants failed to, among other things, present evidence of an objective measurement of the defect and because the pictures submitted by defendants "depicted a significant height differential at the location of the accident." Supreme Court granted the defendants' motion, holding that the defendants' evidence demonstrated that the defect on the sidewalk where plaintiff fell was trivial as a matter of law.

Holding: The Second Department reversed and denied summary judgment. At the outset, the Court explained, "[a] defendant seeking dismissal of a complaint on the basis that the alleged defect is trivial must make a *prima facie* showing that the defect is, under the circumstances, physically insignificant and that the characteristics of the defect or the surrounding circumstances do not increase the risks it poses. Only then does the burden shift to the plaintiff to establish an issue of fact." Although an objective measurement of the defect may be the best evidence of triviality, the Court held that it is not always required to demonstrate that a defect is trivial as a matter of law. Thus, the Court explained, "[i]n determining whether a defect is trivial as a matter of law, the court must examine all of the facts presented, 'including the width, depth, elevation, irregularity and appearance of the defect along with the 'time, place and circumstance' of the injury."

The Court held that the evidence submitted by the defendants on their summary judgment motion failed to establish that the defendants were entitled to judgment as a matter of law. Specifically, among the evidence submitted by the defendants were 11 photographs of the accident location taken prior to the underlying accident. In examining the photographs, the Court noted that "a picture . . . is worth a thousand words" and that "even without an objective measurement of the alleged defect, there likely will be situations where the

alleged defect's dimensions reasonably may be inferred from the photographs alone or in conjunction with other evidence." The Court recognized that "[n]o reported case discusses precisely how photographs should be examined to determine whether a defect is trivial," but explained that "[w]here no objective measurement is provided, the height, depth, or other dimensions of an alleged defect ideally should be viewed near other objects of known or standard size that are present, such as a coin, a shoe, a baseball, a soda can, or other objects of uniform size."

Here, the Court held that the orange construction cone sitting atop the sidewalk where the plaintiff fell was the "best monument . . . that is of known size." Nonetheless, the Court decided that it "cannot with precision quantify the height differential of the adjoining slabs even with the presence of the cone, and also cannot say that the differential depicted is small enough as to be trivial as a matter of law." The Court further noted that there was no evidence that "quantified or estimated the height of the misleveling at the site of the accident." In sum, the Court held that the defendants' photographs did not support Supreme Court's finding of triviality.

THIRD DEPARTMENT

WORKER'S COMPENSATION LAW

Matter of Matter v Google Inc., 2024 NY Slip Op 04646 (3d Dept Sept. 26, 2024)

Issue: Was an employee's injury sustained following an after-work event compensable under the Worker's Compensation Law?

Facts: "Claimant, an account executive for the employer in New York City, sustained serious injuries — including a traumatic brain injury — in October 2021 when he was struck by two motorized bicycles while crossing a street enroute to a bus stop. That evening, claimant had attended an invitation-only event denominated as a 'SADA & Google Cloud — Happy Hour' at a local biergarten for the 'Google Cloud NYC team.' Claimant was injured after he left the event, while attempting to locate a bus stop for the particular bus that he usually took home on the days he worked from Google's local offices." The claimant filed for workers' compensation, but was denied benefits after the Workers' Compensation Law Judge determined that claimant's accident "did not arise out of and in the course of his employment." Claimant appealed to the Workers' Compensation Board, which reversed, holding that "the employer exercised a degree of control sufficient to find a causal nexus at the time of the accident." The Board further held that at the time of his accident, claimant "was acting in furtherance of the employer's business" and that the change in environment and corresponding search for the appropriate bus stop "caused a greater risk of injury during a trip that was necessary to carry out a function of claimant's employment."

Holding: The Third Department affirmed, holding that substantial evidence existed to show a causal nexus between the claimant's accident and his employment. The Court noted that "[g]enerally, accidents that occur outside of work hours and in public areas away from the workplace are not compensable." The Court emphasized, however, that "[v]arious exceptions" exist to this rule, including "where there is a causal nexus between the accident and the employment." Specifically, a causal nexus exists when an employee's activity is "both reasonable and sufficiently work related." Among the factors the Court considered in determining whether a causal nexus existed between the claimant's employment and his accident included the nature of the claimant's off-premises travel, whether the employer derived a benefit from the claimant's activity, and the degree of control the employer exercised during the time of the claimant's accident. With regards to the benefits derived factor, the Court held that the employer did derive a benefit from the claimant's participation in the event because the purpose of the event was to "develop[] and maintain[] business relationships that, in turn, ultimately generated increased sales and revenues for the employer." The Court further held that the record "supports the Board's finding that claimant's attendance at this work-related event 'altered the usual geographical or temporal scheme of travel, thereby altering the risks to which [he was] usually exposed.'" Thus, the Workers Compensation Board properly granted the claimant benefits.

FOURTH DEPARTMENT

CRIMINAL LAW, REVOCATION OF BAIL

People ex. Rel. Cordes v Shelley, 2024 NY Slip Op 04657 (4th Dept Sept. 27, 2024)

Issue: Was being accused of jury tampering an adequate subsequent crime sufficient to modify a securing order to revoke bail under CPL 530.60 (1) or (2)?

Facts: While awaiting trial for murder in the second degree and attempted murder in the second degree, the defendant posted bail and was released from custody. In his subsequent criminal trial, the trial court declared a mistrial as a result of alleged interference from a supporter of the defendant, and then held a bail revocation hearing. Citing CPL 530.60 (1) and (2), County Court revoked defendant's bail, determining that clear and convincing evidence existed that defendant could be charged with a felony resulting from his disruption of the trial and involvement in a potential scheme to choose jurors that could be tampered with.

Holding: The Fourth Department reversed, and granted the defendant's habeas corpus petition. The Court held that an alleged misdemeanor charge of jury tampering is not clear and convincing evidence to support revocation of bail under CPL 530.60 (1) or (2). The Court explained that when "a defendant is initially charged with a felony, released on bail, and subsequently accused of committing an

additional felony, the securing order may be modified by means of either CPL 530.60 (1) or (2).” CPL 530.60 (1) requires a court to consider relevant factors to assess a defendant’s flight risk and how the alleged additional crimes in consideration with the initial bail determination have changed the degree of control needed to ensure the defendant returns for subsequent proceedings. CPL 530.60 (2) requires a court to find by “clear and convincing evidence” that the defendant “committed a felony while at liberty.”

The Court concluded that there was no support in the record to show that the County Court considered the factors or flight risk of the defendant, noting that the decision to revoke defendant’s bail, therefore, must have been determined by subdivision two. The record did not depict what additional felony the defendant could have been charged with and only noted jury tampering as a reason for the mistrial. Because jury tampering in the first or second degree is only a misdemeanor, the Court held that such a charge cannot serve as a valid basis for bail revocation pursuant to CPL 530.60 (2) because the decision to revoke bail must be supported by clear and convincing evidence.

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