CasePrepPlus

March 4, 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

CONTRACT LAW, APPEALS, CIVIL PROCEDURE.

THE BREACH OF IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING CAUSE OF ACTION SHOULD HAVE BEEN DISMISSED AS DUPLICATIVE OF THE BREACH OF CONTRACT CAUSE OF ACTION; THE APPEAL FROM AN ORDER WHICH WAS NOT THE PRODUCT OF A MOTION ON NOTICE MUST BE DISMISSED.

The First Department, in a full-fledged opinion by Justice Higgitt which is too comprehensive and detailed to fairly summarize here. determined: (1) the cause of action for breach of implied covenant of good faith and fair dealing was duplicative of the breach of contract cause of action; and (2) an appeal from a supplemental order which was not the product of a motion on notice must be dismissed: "The implied covenant of good faith and fair dealing 'embraces a pledge that neither party shall do anything that will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract' ... , and is breached when a party acts in a manner that deprives the other party of the benefits of the contract … . Generally, a breach of the covenant of good faith and fair dealing is a breach of the contract itself ... . Therefore, a separate cause of action for breach of the covenant cannot be maintained where, as here, 'it is premised on the same conduct that underlies the breach of contract cause of action and is intrinsically tied to the damages allegedly resulting from a breach of the contract' ... . Because a breach of the covenant of good faith and fair dealing is a breach of the contract itself, plaintiffs may press their theory that defendants acted in derogation of the covenant in conjunction with their cause of action for breach of the license agreements ... . We note that to the extent defendants were entitled to exercise discretion in the manner in which they performed their obligations ... , they were, under the covenant (and, by natural extension, under the license agreement itself) prohibited from acting arbitrarily, irrationally, or in bad faith ... . Defendants' appeal from the supplemental order is dismissed because that order was not the product of a motion on notice (see CPLR 2214); rather, the supplemental order was issued in response to an inquiry from counsel seeking clarity regarding the court's decision and order determining the summary judgment motions (see CPLR 5701[a][2] ...)." ***Parlux Fragrances, LLC v. S. Carter Enters., LLC*, 2022 N.Y. Slip Op. 01250, First Dept 2-24-22**

EDUCATION-SCHOOL LAW, CONTRACT LAW.

THE TERM "ECONOMIC SECURITY" IN THE NYU FACULTY HANDBOOK DID NOT PROHIBIT A POLICY (THE "REF" POLICY) TYING A TENURED FACULTY MEMBERS' SALARY-REDUCTION TO THE AMOUNT OF GRANTS PROCURED IN A GIVEN YEAR; THE REF POLICY WAS NOT A DISCIPLINARY PROCEDURE; A SPECIFIC SALARY FIGURE IN A TENURED FACULTY MEMBER'S CONTRACT, HOWEVER, COULD NOT BE REDUCED PURSUANT TO THE REF POLICY.

The First Department, in a full-fledged opinion by Justice Oing, modifying Supreme Court, determined: (1) the term "economic security" in the faculty handbook was prefatory language that did not prohibit the university (NYU) from tying salary reductions for tenured faculty to the amount of grant-money procured by a faculty member (the REF policy); (2) the salary reductions were not part of disciplinary procedure; and (3) the provision in the contract with one of the faculty members, Samuels, setting his salary at a specific amount prohibited the salary reductions tied to grants as to him: "Assuming that the term 'economic security' gives rise to contractual rights, we reject the argument advanced by the Professors and amici curiae that 'economic security' is an ambiguous term of art and that custom and usage in academia define it as prohibiting retroactive salary reductions pursuant to such policies as the REF Policy. * * * A faculty member's failure to comply with the REF Policy is simply not conduct that is subject to discipline. * * * We find that NYU breached the terms of the "2001 Contract" when it reduced Professor Samuels's salary pursuant to the REF Policy and that he is entitled to summary judgment on this claim. ***Monaco v. New York Univ.*, 2022 N.Y. Slip Op. 01125, First Dept 2-22-22**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

THE SCAFFOLD ON WHICH PLAINTIFF WAS STANDING WAS INSECURE, WHICH IS A VIOLATION OF LABOR LAW 240(1); WHETHER THERE WAS SAFETY EQUIPMENT WHICH WAS NOT USED, EVEN IF PLAINTIFF WAS INSTRUCTED TO USE IT, IS IRRELEVANT.

The First Department, reversing Supreme Court, determined plaintiff's motion for summary judgment on his Labor Law 240(1) cause of action should have been granted. There were no witnesses to plaintiff's scaffold-fall. Plaintiff testified the unsecured scaffold moved when he started using the chipping gun and the unsecured plywood on which he was standing caused him to lose his balance. The fact that there may have been scaffold railings available and the evidence plaintiff was instructed to use the railings did not defeat summary judgment because comparative negligence is not part of the analysis: "The purpose of Labor Law § 240 (1) 'is to protect workers by placing ultimate responsibility for safety practices at building construction jobs where such responsibility actually belongs, on the owner and general contractor. . . instead of on workers, who are scarcely in a position to protect themselves from accident' ... . Thus, the statute imposes a nondelegable duty on owners and contractors to provide 'devices which shall be so constructed, placed and operated as to give proper protection to' those individuals performing the work ... . 'Under Labor Law § 240 (1) it is conceptually impossible for a statutory violation (which serves as a proximate cause for a plaintiff's injury) to occupy the same ground as a plaintiff's sole proximate cause for the injury' ... . Therefore, if a violation of Labor Law § 240 (1) is a proximate cause of an injury, the plaintiff cannot be solely to blame for it ... . * * * [E]ven if there were evidence that adequate safety devices were readily available at the work site and that plaintiff knew he was expected to use them, it would not render plaintiff the sole cause of the accident, because the unsecured scaffold with unlevel, uneven, and unsecured floor planks initially caused him to lose his balance and fall ...". ***Quiroz v. Memorial Hosp. for Cancer & Allied Diseases*, 2022 N.Y. Slip Op. 01130, First Dept 2-22-22**

LANDLORD-TENANT, MUNICIPAL LAW, NUISANCE, INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS.

PLAINTIFFS-TENANTS STATED CLAIMS FOR STATUTORY HARASSMENT, PRIVATE NUISANCE, INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS AND PUNITIVE DAMAGES FOR FAILURE TO PROVIDE ELECTRICITY, WATER, HEAT AND VENTILATION.

The First Department, reversing Supreme Court, determined plaintiff-tenants stated claims for statutory harassment, private nuisance, intentional infliction of emotional distress and punitive damages in connection with failure to provide electricity, water, heat and ventilation: "The complaint states a cause of action for harassment under Administrative Code of City of NY §§ 27-2005 (d) and 27-2115 (m) ... . Namely, it sufficiently alleges that defendants failed to provide essential services, including electricity, water, heat, and ventilation, resulting in violations of the Housing Maintenance Code, and that that failure was calculated to and did cause plaintiffs to vacate their apartment ... . Defendants do not oppose the reinstatement of the claims for private nuisance or intentional infliction of emotional distress, opting to litigate those claims on the merits. However, contrary to defendants' contention, punitive damages may be appropriate under both causes of action if the alleged acts are shown to be intentional or malicious ...". ***Carlson v. Chelsea Hotel Owner, LLC*, 2022 N.Y. Slip Op. 01117, First Dept 2-22-22**

PERSONAL INJURY, CIVIL PROCEDURE, CONTRACT LAW.

LESSOR OF THE VEHICLE INVOLVED IN THE REAR-END COLLISION WAS ENTITLED TO SUMMARY JUDGMENT PURSUANT TO THE GRAVES AMENDMENT; SUPREME COURT HAD THE AUTHORITY TO SEARCH THE RECORD AND GRANT SUMMARY JUDGMENT EVEN THOUGH NO MOTION HAD BEEN MADE.

The First Department, reversing (modifying) Supreme Court, determined Bancorp, the lessor of the vehicle leased by Fordham and driven by Fajerman, was entitled to summary judgment in this rear-end collision case pursuant to the Graves Amendment. The First Department noted Supreme Court had the authority to search the record and award summary judgment in the absence of a motion: "Bancorp's request to search the record and for summary judgment dismissing the complaint against it under the Graves Amendment (49 USC § 30106) should have been granted. 'On a motion for summary judgment, the court may search the record and, if warranted, grant summary relief even in the absence of a cross motion' ... . 'Under the Graves Amendment, the owner of a leased or rented motor vehicle cannot be held vicariously liable 'for harm to persons or property that results or arises out of the use, operation, or possession of the vehicle during the period of the rental or lease, if — (1) the owner (or an affiliate of the owner) is engaged in the trade or business of renting or leasing motor vehicles; and (2) there is no negligence or criminal wrongdoing on the part of the owner (or an affiliate of the owner)' ... . Here, the commercial lease agreement submitted by Bancorp, as well as the affidavit of Erika Caesar, Chief Diversity Officer of Assistant General Counsel for Bancorp, clearly establish that Bancorp, a commercial lessor of motor vehicles, had leased the vehicle that Fajerman was driving, to defendant Fordham. The commercial lease further establishes that Fordham was responsible for the maintenance and repairs for the vehicle during the period of the lease and during the time in which the accident occurred. Additionally, plaintiff did not allege any mechanical defects in the subject vehicle, and Fajerman also

stated in her affidavit that the car did not have any mechanical defects. As such, Bancorp is entitled to judgment as a matter of law under the Graves Amendment ...". ***Kalair v. Fajerman*, 2022 N.Y. Slip Op. 01244, First Dept 2-24-22**

PERSONAL INJURY, EVIDENCE.

PLAINTIFF TESTIFIED SHE DID NOT KNOW WHAT CAUSED HER SLIP AND FALL BUT STATED IN HER AFFIDAVIT IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT SHE SLIPPED ON ICE; THE AFFIDAVIT CREATED A FEIGNED ISSUE OF FACT; DEFENDANT'S MOTION SHOULD HAVE BEEN GRANTED.

The First Department, reversing Supreme Court, determined plaintiff created only a feigned issue of fact in response to defendant's motion for summary judgment in this slip and fall case: "In this action in which plaintiff sustained injuries when she slipped and fell on the sidewalk owned by defendant, her affidavit that she slipped on ice on the sidewalk contradicted her earlier deposition testimony that she did not know what she slipped on, and thus created only a feigned issue of fact, which was insufficient to defeat defendant's motion ... . Plaintiff's decision to walk on the outside of a shoveled path in front of the building that had been cleared of snow and ice was the sole proximate cause of her accident ...". ***Polanco v. Durgaj*, 2022 N.Y. Slip Op. 01258, First Dept 2-24-22**

PERSONAL INJURY, MUNICIPAL LAW, VEHICLE AND TRAFFIC LAW.

WILLIAMS, THE DRIVER OF THE VEHICLE IN WHICH PLAINTIFF WAS A PASSENGER, WAS NOT NEGLIGENT IN SLOWING DOWN FOR A WORK CREW AHEAD; THE WILLIAMS CAR WAS STRUCK FROM BEHIND BY A POLICE CAR PURSUING ANOTHER VEHICLE; PLAINTIFF WAS ENTITLED TO SUMMARY JUDGMENT.

The First Department, reversing Supreme Court, determined plaintiff was entitled to summary judgment in this traffic accident case. A police officer pursuing another vehicle rear-ended the vehicle in which plaintiff was a passenger as the driver (Williams) was slowing down for a work crew: "Williams's evidence in support of his motion demonstrated prima facie that he was operating his vehicle in a lawful, reasonable manner given the circumstances on the expressway at the time, and that he was not otherwise culpable in causing the police car to strike the rear of his vehicle. The burden having shifted, plaintiff and the City defendants each failed to offer evidence as would raise a factual issue regarding Williams's comparable negligence in the cause of the accident ... . The City defendants failed to proffer a nonnegligent explanation for rear-ending Williams's vehicle, and the claim that the rear-ended vehicle stopped short, standing alone, is insufficient as a nonnegligent explanation for an accident ... . Regardless of whether the actions of the police in this incident are to be considered under the reckless standard set forth in Vehicle and Traffic Law § 1104, the nonliability of Williams, given the unrefuted evidence of his nonculpable role in this accident, remains unchanged ...". ***Grant v. City of New York*, 2022 N.Y. Slip Op. 01121, First Dept 2-22-22**

SECOND DEPARTMENT

CIVIL PROCEDURE, EDUCATION-SCHOOL LAW, NEGLIGENCE, EMPLOYMENT LAW.

PLAINTIFF'S DISCOVERY REQUESTS IN THIS CHILD VICTIM'S ACT ACTION ALLEGING SEXUAL ABUSE BY A CATHOLIC SCHOOL GYM TEACHER WERE PALPABLY IMPROPER.

The Second Department, reversing Supreme Court, determined the plaintiff's discovery requests in this Child Victim's Act action against the Archdiocese of New York were palpably improper and should have been denied (the requests were not described in the decision). Plaintiff alleged sexual abuse by a gym teacher when he was a child in the 1960's: "Notices for discovery and inspection and interrogatories are palpably improper if they are overbroad or burdensome, fail to specify with reasonable particularity many of the documents demanded, or seek irrelevant or confidential information (see CPLR 3120[2] ...). Where the discovery demands are overbroad, the appropriate remedy is to vacate the entire demand rather than to prune it ... . 'The burden of serving a proper demand is upon counsel, and it is not for the courts to correct a palpably bad one' ... . Here, the plaintiff's discovery demand and interrogatories were palpably improper in that they were overbroad and burdensome, sought irrelevant or confidential information, or failed to specify with reasonable particularity many of the documents demanded ...". ***Fox v. Roman Catholic Archdiocese of N.Y.*, 2022 N.Y. Slip Op. 01148**

FORECLOSURE, CIVIL PROCEDURE.

THE CONDITIONAL ORDER OF DISMISSAL OF THIS FORECLOSURE ACTION DID NOT MEET THE REQUIREMENTS OF CPLR 3216; THEREFORE, THE ACTION SHOULD NOT HAVE BEEN DISMISSED AS ABANDONED.

The Second Department, reversing Supreme Court, determined the plaintiff-bank's motion to vacate the conditional order of dismissal in this foreclosure action should have been granted. The conditional order of dismissal did not meet the requirements of CPLR 3216 and therefore did not dismiss the action as abandoned: "[T]he conditional order of dismissal 'was defective in that it failed to state that the plaintiff's failure to comply with the notice 'will serve as a basis for a motion' by the court to dismiss the action for failure to prosecute' ... . Moreover, there was no indication that the plaintiff's counsel was present at the status conference at which the Supreme Court issued the conditional order of dismissal, nor was there evi-

dence that the conditional order of dismissal was ever properly served upon the plaintiff ... . In addition, notwithstanding the statement in the conditional order of dismissal that 'more than one year ha[d] elapsed since the joinder of issue,' there is no dispute that issue was not joined ... . Accordingly, the court should have granted the plaintiff's motion to vacate the conditional order of dismissal, and to restore the action to the active calendar...". ***Deutsche Bank Natl. Trust Co. v. Beckford*, 2022 N.Y. Slip Op. 01143, Second Dept 2-23-22**

FORECLOSURE, CIVIL PROCEDURE.

THE 2007 NOTICE OF DEFAULT IN THIS FORECLOSURE ACTION DID NOT ACCELERATE THE DEBT; THE INITIAL ACTION WAS DISMISSED FOR LACK OF STANDING AND DID NOT, THEREFORE, ACCELERATE THE DEBT.

The Second Department, reversing Supreme Court, determined the 2007 notice of default in this foreclosure action did not accelerate the debt. Also, the initial action was dismissed for lack of standing and, therefore did not accelerate the debt. Therefore, the action should not have been dismissed as time-barred: "Supreme Court erred in denying the defendant's motion to dismiss the complaint. The defendant established that the mortgage was not accelerated. The language in the 2007 notice of default did not serve to accelerate the loan, as it was nothing more than a letter discussing acceleration as a possible future event which does not constitute an exercise of the mortgage's optional acceleration clause ... . Moreover, since the 2008 foreclosure action was dismissed on the ground that the defendant lacked standing, the commencement of that action as purported acceleration was a nullity, and the statute of limitations did not begin to run at the time of the purported acceleration ... . Accordingly, the Supreme Court should have granted the defendant's motion pursuant to CPLR 3211(a)(1) to dismiss the complaint." ***IPA Asset Mgt., LLC v. Bank of N.Y. Mellon*, 2022 N.Y. Slip Op. 01151, Second Dept 2-23-22**

FORECLOSURE, CIVIL PROCEDURE, EVIDENCE.

THE AFFIDAVITS SUBMITTED TO PROVE THE BANK'S STANDING TO BRING THE FORECLOSURE ACTION WERE NOT ACCOMPANIED BY THE RELEVANT DOCUMENTS AND THEREFORE CONSTITUTED INADMISSIBLE HEARSAY.

The Second Department, reversing Supreme Court, determined the affidavits purporting to demonstrate the bank's standing to bring the foreclosure action were not accompanied by the relevant documents and therefore constituted inadmissible hearsay: "[I]n order to establish standing, the plaintiff submitted affidavits from two contract management coordinators of the plaintiff's loan servicer, Ocwen Loan Servicing, each of whom stated that the plaintiff was in possession of the note at the time the action was commenced. However, neither affiant identified any particular document reviewed that pertained to the issue of standing, nor did they attach to their respective affidavits any admissible document to show that the plaintiff possessed the note at the time of the commencement of this action. The affidavits also failed to show that either affiant possessed personal knowledge of whether the plaintiff possessed the note at the time of the commencement of the action. Under these circumstances, the affidavits constituted inadmissible hearsay and lacked any probative value (see CPLR 4518[a] ...). Thus, the plaintiff failed to establish its standing to commence this action." ***Deutsche Bank Natl. Trust Co. v. Idarecis*, 2022 N.Y. Slip Op. 01144, Second Dept 2-23-22**

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

THE BANK'S PROOF OF COMPLIANCE WITH THE NOTICE PROVISIONS OF RPAPL 1304 IN THIS FORECLOSURE ACTION WAS DEFICIENT; THE FAILURE TO SUBMIT THE BUSINESS RECORDS REFERRED TO IN THE BANK'S AFFIDAVIT RENDERED THE AFFIDAVIT INADMISSIBLE HEARSAY.

The Second Department, reversing Supreme Court, determined the bank's proof of compliance with the notice requirements of RPAPL 1304 in this foreclosure action was deficient, and the failure to submit the business records referred to in the bank's affidavit rendered the affidavit inadmissible hearsay: "In support of its motion for summary judgment, the plaintiff submitted the affidavit of Becky J. Layman, an officer of the plaintiff. Layman's assertions that the plaintiff complied with the notice of default provision of the mortgage and that the plaintiff complied with the notice provision of RPAPL 1304 were insufficient, since she failed to provide proof of the actual mailings or attest to knowledge of the plaintiff's mailing practices and procedures ... . Layman's affidavit was also insufficient to establish, prima facie, that the defendant defaulted under the note and mortgage, since her purported knowledge was based upon review of unidentified business records which were not attached to her affidavit ... . Thus, her assertions regarding the defendant's default, without the business records upon which she relied in making those assertions, constituted inadmissible hearsay ...". ***U.S. Bank N.A. v. Campbell*, 2022 N.Y. Slip Op. 01198, Second Dept 2-23-22**

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

THE BANK IN THIS FORECLOSURE ACTION DID NOT DEMONSTRATE COMPLIANCE WITH THE NOTICE REQUIREMENTS OF RPAPL 1304, INCLUDING THE "ONE ENVELOPE" RULE.

The Second Department, reversing Supreme Court. determined the bank in this foreclosure action did not demonstrate strict compliance with the notice provisions of RPAPL 1304, including compliance with the "one envelope" rule: "[T]he

plaintiff failed to establish ... that it strictly complied with the requirements of RPAPL 1304 ... . Moreover, in support of their cross motion, the defendants ... demonstrated, prima facie, that the plaintiff included additional material in the same envelope as the RPAPL 1304 notice, in violation of the separate mailing requirement of RPAPL 1304(2) ...". ***US Bank N.A. v. Kaplan*, 2022 N.Y. Slip Op. 01201, Second Dept 2-23-22**

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

THE BANK FAILED TO SUBMIT THE BUSINESS RECORDS RELIED ON IN ITS AFFIDAVIT IN THIS FORECLOSURE ACTION RENDERING THE AFFIDAVIT INADMISSIBLE HEARSAY; SUPREME COURT'S DETERMINATION THE BANK HAD COMPLIED WITH THE NOTICE PROVISIONS OF RPAPL 1304 AND THE MORTGAGE WAS THE LAW OF THE CASE PRECLUDING RECONSIDERATION OF THE ISSUE PURSUANT TO DEFENDANTS' CROSS MOTION.

The Second Department, reversing (modifying) Supreme Court, determined the failure to identify and attach the documents demonstrating the defendants' default in this foreclosure action rendered the bank's affidavit inadmissible hearsay. The court noted that Supreme Court's determination the bank had complied with the notice requirements of RPAPL 1304 was the law of the case precluding reconsideration of the issue pursuant to defendants' cross motion: "The plaintiff relied upon the affidavit of Richard L. Penno, a vice president of loan documentation for Wells Fargo Bank, N.A. (hereinafter Wells Fargo), the plaintiff's loan servicer. Based upon his review of Wells Fargo's books and records concerning the defendants' loan, Penno attested to the defendants' default in payment. However, Penno did not identify the records he relied upon in order to attest to the defendants' default and did not attach them to his affidavit ... . 'While a witness may read into the record from the contents of a document which has been admitted into evidence, a witness's description of a document not admitted into evidence is hearsay' ... . Thus, Penno's assertions as to the contents of Wells Fargo's servicing records were inadmissible ... . Contrary to the plaintiff's contention, a review of records maintained in the normal course of business does not vest an affiant with personal knowledge ... . [C]ontrary to the defendants' ... contention, the Supreme Court properly denied that branch of their cross motion which was to dismiss the complaint insofar as asserted against them for failure to comply with RPAPL 1304 and the notice of default provision of the mortgage agreement. The plaintiff's strict compliance with RPAPL 1304 and the notice of default provision of the mortgage agreement were both considered and decided in the plaintiff's favor on its motion for summary judgment. Therefore, while it is true that a defense based on noncompliance with RPAPL 1304 may be raised at any time ... , the doctrine of law of the case precluded the court from reconsidering those issues on the defendants' cross motion ... ". ***U.S. Bank N.A. v. Ramanababu*, 2022 N.Y. Slip Op. 01199, Second Dept 2-23-22**

LABOR LAW-CONSTRUCTION LAW, APPEALS.

DEFENDANTS NOT LIABLE FOR INJURY SUFFERED WHILE PLAINTIFF WAS DOING WHAT HE WAS HIRED TO DO--REPAIR AN ELEVATOR; ISSUE CONSIDERED EVEN THOUGH RAISED FOR THE FIRST TIME ON APPEAL; IN ADDITION, DEFENDANTS ENTITLED TO THE HOMEOWNER'S EXEMPTION FROM LIABILITY.

The Second Department, reversing (modifying) Supreme Court, determined defendants' motion for summary judgment in this Labor Law § 200 and common law negligence action should have been granted. Plaintiff was injured doing the work he was hired to do---repairing an elevator. The issue was considered even though it was first raised on appeal. In addition, defendants were entitled to the homeowner's exemption from liability pursuant to Labor Law § 240(1): "We find merit to the defendants' contention—raised for the first time on appeal but fully briefed by both sides ... —that the injured plaintiff cannot succeed in his causes of action alleging a violation of Labor Law § 200 and common-law negligence, as '[n]o responsibility rests upon an owner of real property to one hurt through a dangerous condition which he [or she] has undertaken to fix'... . Indeed, the evidence in the record conclusively establishes that the injury-producing accident was caused by an unidentified defect in the very elevator that the injured plaintiff's employer had been hired to repair. Accordingly, the defendants were entitled to summary judgment dismissing the causes of action alleging a violation of Labor Law § 200 and common-law negligence. ... The Supreme Court properly granted that branch of the defendants' motion which was for summary judgment dismissing the cause of action alleging a violation of Labor Law § 240(1). The homeowner's exemption to liability under Labor Law § 240(1) is available to 'owners of one and two-family dwellings who contract for but do not direct or control the work.' Here, the defendants, as owners of the single-family townhouse where the accident occurred, established, prima facie, that they did not direct or control the home improvement work being done by the injured plaintiff and his employer at the time of the subject accident ...". ***Soto v. Justin Hochberg 2014 Irrevocable Trust*, 2022 N.Y. Slip Op. 01193, Second Dept 2-23-22**

LANDLORD-TENANT, MUNICIPAL LAW, CIVIL PROCEDURE, PRIVATE NUISANCE, TENANT HARASSMENT.

IN THIS TENANT HARASSMENT AND PRIVATE NUISANCE ACTION BY TENANTS AGAINST THE LANDLORD, SUPREME COURT SHOULD HAVE GRANTED THE PRELIMINARY INJUNCTION ENTIRELY PROHIBITING VIDEO CAMERAS IN THE INTERIOR OF THE BUILDING.

The Second Department, reversing (modifying) Supreme Court, determined the tenant-plaintiffs were entitled to a preliminary injunction prohibiting the landlord from maintaining video cameras in the interior of the building. Supreme Court had only prohibited video cameras outside the bathrooms. The tenants alleged the landlord was taking actions designed to force them to leave and alleged causes of action for tenant harassment and private nuisance: "Generally, the decision to grant or deny a preliminary injunction lies within the sound discretion of the Supreme Court ... . '[A] movant must establish (1) a probability of success on the merits, (2) a danger of irreparable injury in the absence of an injunction, and (3) a balance of the equities in the movant's favor' ... . In granting, in part, those branches of the plaintiffs' motion which were for a preliminary injunction enjoining the defendants from operating the video cameras in the interior portions of the property and from conducting inspections on the property without reasonable notice, the court properly, in effect, determined that the plaintiffs had established a probability of success on the merits, a danger of irreparable injury, and that the equities favor them. The court, however, improvidently exercised its discretion in limiting that preliminary injunction to enjoining the defendants only from operating video cameras that capture persons entering or exiting any bathrooms in the property. Under the circumstances of this case, the court should have granted that branch of the plaintiffs' motion in its entirety, and preliminarily enjoined the defendants from operating video cameras in the interior portions of the property." ***Suchdev v. Grunbaum*, 2022 N.Y. Slip Op. 01195, Second Dept 2-23-22**

LEGAL MALPRACTICE, CIVIL PROCEDURE, ATTORNEYS.

BECAUSE PLAINTIFF'S DECEDENT COULD NOT COMMENCE A LEGAL MALPRACTICE ACTION WHILE THE DEFENDANTS-ATTORNEYS STILL REPRESENTED HIM, THERE WAS A QUESTION OF FACT WHETHER THE ACTION WAS TIMELY.

The Second Department, reversing (modifying) Supreme Court, in a decision addressing several issues not summarized here, determined there was a question of fact whether the continuous representation doctrine rendered the legal malpractice action timely: "[T]he plaintiffs raised a question of fact as to whether the continuous representation doctrine tolled the running of the statute of limitations until June 24, 2013, when the Supreme Court ... vacated the March 18, 2013 order, and ... granted W & H's [defendants-attorneys'] motion for leave to withdraw as counsel. Inasmuch as W & H's motion to withdraw as counsel, which was opposed by Michele [plaintiff's decedent] , was initially denied, Michele could not be expected to commence an action to recover damages for legal malpractice against W & H while the representation continued ... . Accordingly, the court erred in granting that branch of the defendants' motion which was pursuant to CPLR 3211(a)(5) to dismiss the legal malpractice cause of action as time-barred." ***Tulino v. Hiller, P.C.*, 2022 N.Y. Slip Op. 01197, Second Dept 2-23-22**

MEDICAL MALPRACTICE, NEGLIGENCE, EVIDENCE.

PLAINTIFF'S EXPERT RAISED A QUESTION OF FACT WHETHER A DELAY IN DIAGNOSIS AFFECTED THE PROGNOSIS; DEFENDANTS' MOTION FOR SUMMARY JUDGMENT IN THIS MEDICAL MALPRACTICE ACTION SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined the medical malpractice action should not have been dismissed. Plaintiff's expert raised a question of fact about whether a delay in diagnosis affected the prognosis: "On February 26, 2014, the plaintiff's decedent presented to the emergency department of the defendant Brookdale Hospital Medical Center (hereinafter Brookdale) complaining of swelling in both legs. The attending emergency room physician, the defendant Morombaye Mbaidjol, diagnosed the decedent with '[l]ikely peripheral vascular disease' and discharged her to her home. The decedent's bilateral leg swelling initially improved, but nine days later, she presented to a different hospital's emergency department again complaining of bilateral leg swelling. An ultrasound revealed acute deep vein thrombosis (hereinafter DVT) of major veins in both lower extremities. Shortly after the ultrasound was performed, the decedent experienced cardiopulmonary arrest and died. An autopsy of the decedent revealed that she died as a result of bilateral DVT of the lower extremities, which led to a bilateral pulmonary embolism, causing cardiac arrest and death. * * * 'Summary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions' ... . Contrary to the Brookdale defendants' contention, the opinions of the plaintiff's expert physician were not speculative and conclusory ... . The plaintiff's expert physician opined ... that the Brookdale defendants departed from the standard of care by failing to take a proper history and perform a proper workup of the decedent, failing to rule out DVT, misdiagnosing the decedent, and failing to institute the proper treatment, which resulted in the progression of the DVT, bilateral pulmonary embolism, and ultimately cardiac arrest and death nine days later. Among other things, '[w]hether a diagnostic delay affected a pa-

tient's prognosis is typically an issue that should be presented to a jury' ...". ***Ivey v. Mbaidjol*, 2022 N.Y. Slip Op. 01152, Second Dept 2-23-22**

PERSONAL INJURY.

THERE REMAINED QUESTIONS OF FACT WHETHER DEFENDANTS CREATED THE ICY CONDITION AND WHETHER THEY HAD CONSTRUCTIVE NOTICE OF THE CONDITION; DEFENDANTS' MOTION FOR SUMMARY JUDGMENT IN THIS SLIP AND FALL CASE SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined the defendant property-owner's and defendant property-manager's motion for summary judgment in this slip and fall action should not have been granted. Plaintiff alleged the defendants created the icy condition and had constructive notice of the condition: "[T]he plaintiff asserted in his bill of particulars that the defendants were negligent ... in failing to maintain the premises, failing to repair the dangerous and defective condition, and in allowing an icy condition to exist. In his fourth supplemental bill of particulars, ... the plaintiff clarified that the defendants created the dangerous condition that caused him to slip and fall by permitting the downspouts from the roof of the premises to deposit water directly onto the sidewalk, and alleged violations of various property maintenance codes related thereto. Thus, in support of their motion for summary judgment, the defendants were ... required to demonstrate that they did not create the alleged dangerous condition ... . The defendants failed to establish ... that the drains played no role in the creation or exacerbation of the icy condition that allegedly caused the accident ... . Moreover, the defendants failed to demonstrate that they did not have constructive notice of the allegedly defective downspouts. While [the] property director testified at his deposition that no tenants raised concerns about drainage issues caused by the downspouts, he acknowledged that, after snow events, his on-site maintenance worker would check for "ponding" on the sidewalks around the premises." ***Messina v. Morton Vil. Realty, Inc.*, 2022 N.Y. Slip Op. 01155, Second Dept 2-23-22**

TRUSTS AND ESTATES, LEGAL MALPRACTICE, NEGLIGENCE, ATTORNEYS.

IT WAS ALLEGED DEFENDANTS-ATTORNEYS DID NOT INSTRUCT THE DECEDENT TO REVOKE THE TOTTEN TRUSTS SO THE FUNDS WOULD BE DISTRIBUTED IN ACCORDANCE WITH HER WISHES AS SET OUT IN THE WILL AND TRUST DRAFTED BY DEFENDANTS; DEFENDANTS' MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined defendants-attorneys should not have been granted summary judgment in this legal malpractice action brought by the executor of the estate of attorneys' client. It was alleged two bank accounts were Totten Trusts which passed outside of the will and therefore were not distributed as decedent wished (as was set out in the will and trust drafted by defendants). As a result, one of decedent's sons, whom decedent intended to disinherit, received half of the Totten Trusts: "The Supreme Court should have denied that branch of the defendants' motion which was for summary judgment dismissing the amended complaint. The defendants failed to submit sufficient evidence establishing ... that they exercised the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession. In addition, the court erred in determining that the defendants established, prima facie, that the decedent's estate did not sustain actual and ascertainable damage as a result of the defendants' alleged negligence in failing to advise the decedent to revoke the Totten Trusts prior to her death." ***Schmidt v. Burner*, 2022 N.Y. Slip Op. 01191, Second Dept 2-23-22**

THIRD DEPARTMENT

EMPLOYMENT LAW, MUNICIPAL LAW.

ELIMINATING THE LONGSTANDING PRACTICE OF REIMBURSING RETIREES' MEDICARE PART B PREMIUMS IS AN ISSUE THAT MUST BE NEGOTIATED WITH CURRENT EMPLOYEES; PERB DETERMINATION ANNULLED.

The Third Department, annulling the determination of the Public Employment Relations Board (PERB),determined eliminating the longstanding practice of reimbursing retirees for Medicare Part B premiums was an issue that must be negotiated with current employees: "In its decision, PERB explicitly found that there was a longstanding practice of reimbursing retirees for their Medicare Part B premiums, rendering negotiation mandatory before the City could make any changes to that past practice for active employees who sought continuation of that benefit. Despite that finding, PERB determined that the improper practice charge must be dismissed because 'the City took no action against current employees' since it only notified retirees about the change in the past practice. The fact that PERB only informed retirees of such a change does not mean that it did not affect current employees. PERB's reasoning in that respect fails to account for the actual hearing testimony, which established that many of petitioner's witnesses — who were active employees as of January 1, 2010 — either did not receive Medicare Part B reimbursements after that date or were given reason to believe that they would not be so reimbursed in the future despite representations throughout their employment that the practice would continue ... . Because PERB explicitly found in its decision that "the 25-year[-]long uninterrupted practice" of reimbursing Medicare Part B premiums met the standard of a past practice that was subject to negotiation for active members of petitioner, and there

is no dispute that negotiation did not occur between the City and petitioner prior to implementing the change to the reimbursement policy, the matter is remitted to PERB for a final disposition consistent with these findings." ***Matter of Albany Police Benevolent Assn. v. New York Pub. Empl. Relations Bd.*, 2022 N.Y. Slip Op. 01215, Third Dept 2-24-22**

RETIREMENT AND SOCIAL SECURITY LAW, PERSONAL INJURY.

PETITIONER, A COURT OFFICER, SLIPPED AND FELL ON A WET FLOOR IN THE COURTHOUSE; THE FALL WAS AN ACCIDENT WITHIN THE MEANING OF THE RETIREMENT AND SOCIAL SECURITY LAW.

The Third Department, reversing the Comptroller, determined petitioner court officer suffered a compensable accident when slipped on a wet floor in the courthouse and may therefore be entitled to accidental disability retirement benefits: "Petitioner testified that she was on duty and returning to the security office at the end of her shift when she 'slipped on the wet floor' in the courthouse where she was assigned. Having fallen to the ground on her back, she 'felt the water on the floor' and observed that the whole area appeared to be wet as though recently mopped. She stated that she did not observe that the floor — which was light in color — was wet before her fall and, further, there had been no signs advising of the hazard. She had never seen anyone mopping in the courthouse and was wearing nonslip shoes as part of her uniform at the time of the fall. Like the incidents deemed accidental in *Matter of Knight v McGuire* (62 NY2d 563 [1984] [accident where the petitioner slipped on wet pavement getting into a patrol car]) and *Matter of Gasparino v Bratton* (92 NY2d 836, 838-839 [1998] [accident where the petitioner slipped in water on a bathroom floor]), the precipitating event here was not a risk of the work performed by petitioner. Her description of the incident also demonstrates that her fall was sudden and unexpected ...". ***Matter of Como v. New York State Comptroller*, 2022 N.Y. Slip Op. 01223, Third Dept 2-24-22**

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