CasePrepPlus

October 21, 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, EVIDENCE.

IN A CONSTRUCTION CONTRACT TRIAL, IT IS IMPROPER TO DETERMINE ADDITIONAL LABOR COST DUE TO DELAY BY USING A DEFENDANT'S PRECONTRACT ESTIMATE OF LABOR COST.

The First Department, reversing (modifying) Supreme Court in this construction contract case, determined the labor cost associated with a delay could not be determined by using the defendant's precontract estimate of what its labor cost would be: "The trial court should not have awarded damages for additional labor costs due to defendants' delays in the construction project. In general, it is impermissible to calculate delay damages for additional labor costs based on a comparison of the contractor's precontract estimate of what its labor cost would be and what it claimed its labor cost actually turned out to be ... . Nevertheless, in calculating the additional labor costs that plaintiff incurred from defendants' delays, plaintiff's expert improperly used plaintiff's pre-bid estimate of the project's expected labor costs, and Supreme Court erred in basing the award on this improper method of calculation." ***Five Star Elec. Corp. v. A.J. Pegno Constr. Co., Inc./Tully Constr. Co., Inc.*, 2022 N.Y. Slip Op. 05659, First Dept 10-11-22**

CORPORATION LAW.

THE "INTERNAL AFFAIRS DOCTRINE," WHICH ADDRESSES RELATIONSHIPS BETWEEN A COMPANY AND ITS DIRECTORS AND SHAREHOLDERS, APPLIES TO THE OFFICERS AND DIRECTORS AT THE TIME OF THE CONDUCT ALLEGED IN THE LAWSUIT, NOT AT THE TIME THE LAWSUIT WAS BROUGHT; CONTRARY AUTHORITY SHOULD NO LONGER BE FOLLOWED.

The First Department, reversing Supreme Court, determined the "internal affairs doctrine" required the application of the law of the jurisdiction of FanDuel, a Scottish company. The "internal affairs doctrine" addresses the relationships between a company and its directors and shareholders. The doctrine applies to officers and directors at the time of the conduct alleged in the suit, not at the time of the lawsuit. Prior authority to the contrary should not be followed: "We reject plaintiff's argument that the internal affairs doctrine applies only to officers and directors at the time of the lawsuit. Rather, the question is whether defendants were 'current officers [or] directors' ... at the time of the events giving rise to the lawsuit ... . Application of the doctrine to former directors protects the parties' justified expectations, promotes uniformity and predictability of outcome, and prevents different laws from applying to different directors who all engaged in the same challenged transaction simply because of the date on which plaintiff chose to sue ... . To the extent our past decisions could be interpreted as suggesting otherwise we clarify that the internal affairs doctrine applies to an officer or director at the time of the conduct at issue ...". ***Eccles v. Shamrock Capital Advisors, LLC*, 2022 N.Y. Slip Op. 05750, First Dept 10-13-22**

FAMILY LAW, CONTRACT LAW.

THE PHRASE "CONSUMMATION OF THE ANTICIPATED MARRIAGE" IN THE PRENUPTIAL AGREEMENT, A CONDITION PRECEDENT, MEANT THE MARRIAGE CEREMONY, NOT SEXUAL RELATIONS; THE WIFE'S ARGUMENT THAT THE PRENUPTIAL AGREEMENT COULD NOT BE ENFORCED BECAUSE THE COUPLE NEVER HAD SEXUAL RELATIONS WAS REJECTED BY THE APPELLATE COURT.

The First Department, reversing Supreme Court, determined the phrase "consummation of the anticipated marriage" in the prenuptial agreement meant the marriage ceremony, not sexual relations. In these divorce proceedings, the wife argued the prenuptial agreement was unenforceable because the couple never had sexual relations and "consummation" of the marriage was a condition precedent to the prenuptial agreement: "While the word 'consummation' connotes sexual relations in certain contexts, such as annulment proceedings, that is not the only meaning of the word, which may simply mean achieve or fulfill (see Black's Law Dictionary [11th ed 2019]). The plain meaning of 'consummation,' in the context of the section titled 'Marriage — a Condition Precedent and Effective Date' and defining the effective date of agreement as the date of the parties' marriage, is consummation or fulfillment of the parties' intention to enter into a valid 'marriage.' Reading the contract as a whole, this interpretation of the section effectuates the parties' expressed intention to fix their respective rights accruing upon marriage and to avoid unnecessary and intrusive litigation in the event of divorce, and sets an ascertainable date for determining the effectiveness and enforceability of the prenuptial agreement. In contrast, accepting the wife's position would render the parties' respective rights uncertain and require the court to conduct a highly intrusive hearing into the parties' intimate relations, which is both contrary to the parties' stated intention and impractical." ***Fort v. Haar*, 2022 N.Y. Slip Op. 05660, First Dept 10-11-22**

FAMILY LAW, JUDGES.

THE JUDGE SHOULD NOT HAVE DELEGATED THE COURT'S AUTHORITY TO DECIDE VISITATION ISSUES TO A MENTAL HEALTH PROFESSIONAL; THE PROPER PROCEDURE FOR MODIFYING VISITATION ONCE FATHER HAS GAINED INSIGHT INTO THE CHILD'S NEEDS WAS EXPLAINED.

The First Department, reversing (modifying) Family Court, determined the judge should not have delegated the court's authority to decide visitation issues to a mental health professional: "[T]he court improperly delegated to a mental health professional its authority to determine issues involving the child's best interests — namely, when visits could resume and whether they should be supervised ... . Accordingly, we modify to delete that provision of the order only. Upon an application to resume the father's visits with the child, the applicant shall have the burden to demonstrate changed circumstances and that the modification requested is in the child's best interests ... , at which time the court may consider evidence that includes, but is not limited to, the testimony of a mental health expert about whether the father has gained insight into the child's medical and emotional needs and the impact of his behavior on the child." ***Matter of M.K. v. H. M.*, 2022 N.Y. Slip Op. 05663, First Dept 10-11-22**

SECOND DEPARTMENT

ARBITRATION, CONTRACT LAW, CIVIL PROCEDURE, EVIDENCE.

A QUESTION OF FACT WHETHER THE PARTIES AGREED TO ARBITRATE THE DISPUTE REQUIRES A FRAMED-ISSUE HEARING; THE PROPER PROCEDURE IF ARBITRATION IS REQUIRED IS TO STAY THE UNDERLYING SUIT, NOT DISMISS IT.

The Second Department, reversing Supreme Court, determined: (1) there was a question of fact whether the parties agreed to arbitrate the dispute, requiring a framed-issue hearing; and (2) arbitration is not a defense to an action; so where arbitration is required the underlying action is stayed, not dismissed: "[Q]uestions of fact exist as to whether the parties agreed to arbitrate the instant dispute, which questions require a hearing (see CPLR 7503[a] ...). We therefore remit the matter ... for a framed-issue hearing, and thereafter, a new determination of that branch of [the] motion which was pursuant to CPLR 7503 to compel arbitration. ... Supreme Court should have denied [the] motion which was pursuant to CPLR 3211(a)(1) to dismiss the ... complaint based upon the arbitration agreement. 'An agreement to arbitrate is not a defense to an action,' and '[t]hus, it may not be the basis for a motion to dismiss' ... . The proper remedy, should a valid agreement to arbitrate exist, is an order compelling arbitration, which operates to stay the action (see CPLR 7503[a] ...)." ***Ferarro v. East Coast Dormer, Inc.*, 2022 N.Y. Slip Op. 05679, Second Dept 10-12-22**

CIVIL PROCEDURE.

IF THE NOTE OF ISSUE HAS BEEN VACATED, THE CPLR 3404 REQUIREMENTS FOR RESTORING THE ACTION TO THE CALENDAR DO NOT APPLY; THEREFORE, THE MOTION TO RESTORE NEED NOT BE MADE WITHIN A YEAR AND NEED NOT DEMONSTRATE A MERITORIOUS CAUSE OF ACTION, REASONABLE EXCUSE, NO INTENT TO ABANDON, AND LACK OF PREJUDICE TO DEFENDANT.

The Second Department, reversing Supreme Court, determined plaintiff's motion to restore the action to the active calendar should have been granted. Although the action had been stricken from the trial calendar more than a year before, the requirements of CPLR 3404 (demonstration of a meritorious cause of action, reasonable excuse, no intent to abandon and lack of prejudice to defendant) did not apply because the note of issue had been vacated: "Supreme Court erred in denying the plaintiff's renewed motion to restore the action to the active calendar. While a party moving to restore an action more than one year after it was stricken from the trial calendar pursuant to CPLR 3404 must demonstrate a meritorious cause of action, a reasonable excuse for the delay in prosecuting the action, a lack of intent to abandon the action, and a lack of prejudice to the defendant ... , CPLR 3404 did not apply here because the case reverted to its pre-note of issue status once the note of issue was vacated ... . '[S]ince this action could not properly be marked off pursuant to CPLR 3404, the plaintiff was not obligated to move to restore within any specified time frame,' or to establish his entitlement to restoration of the action under the standard applicable to automatic dismissals pursuant to CPLR 3404 ... . Thus, in the absence of a 90-day demand pursuant to CPLR 3216, the plaintiff's renewed motion should have been granted ...". ***Insuasti v. La Boom Disco, Inc.*, 2022 N.Y. Slip Op. 05684, Second Dept 10-12-22**

CIVIL PROCEDURE, FORECLOSURE.

AN ORDER DISMISSING AN ACTION DOES NOT CONCLUDE THE ACTION WHICH CAN ONLY BE ACCOMPLISHED BY A FINAL JUDGMENT ENTERED BY THE CLERK; HERE, ALTHOUGH THE ACTION HAD BEEN DISMISSED BY AN ORDER, ABSENT A JUDGMENT THE ACTION REMAINED VIABLE AND THE COURT SHOULD HAVE CONSIDERED PLAINTIFF'S POST-DISMISSAL MOTION ON THE MERITS.

The Second Department, reversing Supreme Court, in a full-fledged opinion by Justice Dillon, determined: (1) an order dismissing an action does not terminate the action which can only be accomplished by a judgment; and (2) here, although the action had been dismissed, the action was still viable in the absence of a judgment and plaintiff's motion for the appointment of a receiver should have been considered on the merits: "[A]n order of dismissal is not the same as a judgment under CPLR 5011. CPLR 5011 is routinely utilized by practitioners and courts without controversy, as its mechanics are well-understood and not particularly complicated. A judgment is a paper that reflects the resolution of an action or proceeding ... . A judgment may be either interlocutory or final. It 'shall refer to, and state the result of, the verdict or decision,

or recite the default upon which it is based' (CPLR 5011 ...). A judgment is entered by the clerk at the conclusion of an action or proceeding (see CPLR 5016[a]). An action is not actually concluded until a final judgment is entered ...". ***HSBC Bank USA, N.A. v. Rubin*, 2022 N.Y. Slip Op. 05682, Second Dept 10-12-22**

CIVIL PROCEDURE, FORECLOSURE, JUDGES.

THE JUDGE SHOULD HAVE GRANTED DEFENDANTS' ATTORNEY'S REQUEST FOR AN INTERPRETER; A NEW HEARING TO DETERMINE THE VALIDITY OF SERVICE OF PROCESS IN THIS FORECLOSURE ACTION WAS REQUIRED.

The Second Department, reversing Supreme Court, determined defendants' attorney's request for an interpreter should have been granted. Defendant Rowshan claimed she was never served in this foreclosure action and she testified at the hearing on the validity of the service of process: "Pursuant to 22 NYCRR 217.1(a), '[i]n all civil . . . cases, when a court determines that a party . . . is unable to understand and communicate in English to the extent that he or she cannot meaningfully participate in the court proceedings, the clerk of the court or another designated administrative officer shall schedule an interpreter . . . from an approved list maintained by the Office of Court Administration.' 'The determination whether a court-appointed interpreter is necessary lies within the sound discretion of the trial court, which is in the best position to make the fact-intensive inquiries necessary to determine whether there exists a language barrier' so as to require an interpreter ... . Here, the record reflects that Rowshan was unable to meaningfully participate in the hearing due to her limited capacity to understand and communicate in English ... . In multiple instances throughout her testimony, Rowshan's testimony was not responsive to the questions posed to her, Rowshan did not know the meaning of simple words, and she made confusing statements demonstrating her limitations in understanding English. * * * Since the Supreme Court determined, after the hearing, that Rowshan's testimony was lacking in credibility due to 'contradictions, misstatements and inconsistencies,' the record reflects that the denial of the defendants' application for an interpreter may have influenced the court's determination." ***HSBC Bank USA, N.A. v. Parvez*, 2022 N.Y. Slip Op. 05683, Second Dept 10-12-22**

CRIMINAL LAW, CONTRACT LAW, JUDGES.

THERE WERE DISPUTED FACTS CONCERNING WHETHER DEFENDANT BREACHED THE COOPERATION AGREEMENT; THE JUDGE SHOULD HAVE HELD A HEARING TO RESOLVE THE DISPUTED FACTS; DEFENDANT'S CONVICTION BY GUILTY PLEA REVERSED.

The Second Department, reversing defendant's conviction by guilty plea, determined the judge should not have determined defendant breached the cooperation agreement without a hearing. The prosecutor argued defendant breached the agreement by not providing information which defendant didn't reveal until he was about to testify against a codefendant in accordance with the agreement. The defendant argued the information did not relate to the codefendant and he did not believe it was relevant at the time the cooperation agreement was created: " '[S]entencing is a critical stage of the criminal proceeding and . . . 'the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause' ... . Generally, 'a guilty plea induced by an unfulfilled promise either must be vacated or the promise honored' ... , but, where no promises are breached by the People and a defendant fails to abide by the terms of a cooperation agreement, a court is not obligated to permit a defendant to withdraw his plea ... . Under the circumstances present here, these important issues have not been adequately resolved because the Supreme Court failed to hold a hearing or conduct a sufficient inquiry into whether the defendant violated the terms of the cooperation agreement ... . This record reflects that the parties are sharply at odds as to whether there was a material breach of the cooperation agreement when the defendant provided additional information in response to new evidence shown to him during the codefendant's trial ... . The determination of this issue rests on nuanced considerations, including the defendant's intent and the prosecutors' interactions with the defendant while preparing for the codefendant's trial. A hearing would have provided, among other things, an opportunity for the defendant to testify about the nature of the belatedly disclosed information, his reasons therefor, and his understanding of its importance to the case against the codefendant." ***People v. Owensford*, 2022 N.Y. Slip Op. 05716, Second Dept 10-12-22**

FAMILY LAW, EVIDENCE.

THE EVIDENCE SUPPORTED THE FINDING OF A SINGLE INSTANCE OF NEGLECT OF FATHER'S 14-YEAR-OLD DAUGHTER; BUT THAT EVIDENCE DID NOT SUPPORT A FINDING OF DERIVATIVE NEGLECT RE: FATHER'S YOUNGER DAUGHTER.

The Second Department, reversing (modifying) Family Court, determined the evidence supporting the finding that father abused his 14-year-old daughter, Heymi M., on one occasion on a camping trip, but that evidence did not support the finding of derivative neglect re: the younger child, Katherine L.: "[T]here was a nine-year age difference between Heymi M., the child found to have been abused, and the other child, Katherine L. Moreover, the evidence adduced at the hearing shows that the children had different mothers, different living situations, and markedly different relationships with the father. Among other things, the younger child, Katherine L., lived with the father for her entire life but the older child, Heymi M., only started having contact with the father approximately one year before the incident of abuse. Additionally, the record reflects that the abuse occurred on one occasion outside the home, Katherine L. was not in the room when it occurred, and there is no evidence that Katherine L. was aware of the abuse....". ***Matter of Katherine L. (Adrian L.)*, 2022 N.Y. Slip Op. 05691, Second Dept 10-12-22**

FAMILY LAW, EVIDENCE.

ALTHOUGH FATHER DEMONSTRATED HIS FAILURE TO PAY CHILD SUPPORT WAS NOT WILLFUL, FAMILY COURT SHOULD HAVE ENTERED A MONEY JUDGMENT BASED ON HIS FAILURE TO OBEY THE LAWFUL ORDER OF CHILD SUPPORT.

The Second Department, modifying Family Court, determined that although father demonstrated his failure to pay child support was not willful, a money judgment for father's failure to obey a lawful order of child support should have been entered: " 'Proof of failure to pay child support as ordered constitutes prima facie evidence of willful violation of an order of support' ... . Here, the mother presented evidence at the hearing of the father's failure to pay child support as ordered. Specifically, the mother presented evidence that the father had made only one child support payment during the relevant period, and that he owed basic child support in the sum of $19,591.43. Therefore, the mother met her prima facie burden ... . The burden then shifted to the father to offer some competent, credible evidence that his failure to pay child support in accordance with the order was not willful ... . The father testified, and presented proof, that he intended to pay, but his employer and/or the Support Collection Unit had not properly followed through with the wage garnishment procedure. The Support Magistrate found the father's testimony credible. 'Great deference should be given to the credibility determinations of the Support Magistrate, who is in the best position to assess the credibility of the witnesses' ... . Under the circumstances of this case, the father's showing was sufficient to establish that his failure to pay was not willful. Nevertheless, as there was competent proof at the hearing that the father failed to obey a lawful order of child support (see Family Ct Act § 454[1]), a money judgment should be entered in favor of the mother for the amount of child support arrears that accrued during the relevant period ...". ***Matter of Santman v. Schonfeldt*, 2022 N.Y. Slip Op. 05693, Second Dept 10-12-22**

FAMILY LAW, EVIDENCE.

THE EVIDENCE DID NOT SUPPORT THE FINDING MOTHER NEGLECTED HER TWO-MONTH-OLD CHILD BY EXPOSING THE CHILD TO DOMESTIC VIOLENCE; THAT THE CHILD MAY HAVE HEARD LOUD ARGUING BEFORE GRANDMOTHER TOOK THE CHILD TO HER APARTMENT WAS NOT ENOUGH.

The Second Department, reversing Family Court, determined the evidence did not support finding mother abused her two-month-old child. The child, who was removed from the scene by the grandmother before the acts of domestic violence took place: " '[A] finding of neglect is proper where a preponderance of the evidence establishes that the child's physical, mental, or emotional condition was impaired or was in danger of becoming impaired by the parent's commission of an act, or acts, of domestic violence in the child's presence' ... . 'However, 'exposing a child to domestic violence is not presumptively neglectful,'" and "'[n]ot every child exposed to domestic violence is at risk of impairment'. 'The Legislature's requirement of actual or imminent danger of impairment prevents st... ate intrusion into private family life in the absence of 'serious harm or potential harm to the child, not just . . . what might be deemed undesirable parental behavior' ... . While testimony was elicited from the paternal grandmother that the subject child, then under two months old, was somewhere in an apartment with the mother and the father while they yelled at each other, the grandmother testified that she removed the child from that apartment prior to any acts of domestic violence. The evidence that the mother and the father engaged in a loud verbal argument in the presence of their infant child was insufficient to establish that the child's physical, mental, or emotional condition was impaired or in imminent danger of becoming impaired ...". ***Matter of Kingston T. (Diamond T.)*, 2022 N.Y. Slip Op. 05694, Second Dept 10-12-22**

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

THE AFFIDAVITS SUBMITTED BY PLAINTIFF BANK IN THIS FORECLOSURE ACTION FAILED TO DEMONSTRATE DEFENDANTS' DEFAULT AND PLAINTIFF'S COMPLIANCE WITH THE NOTICE-OF-DEFAULT PROVISIONS OF RPAPL 1304.

The Second Department, reversing Supreme Court, determined plaintiff-bank in this foreclosure action did not present sufficient proof of defendants' default and plaintiff's compliance with the notice-of-default requirements of RPAPL 1304: "[T]he plaintiff failed to establish, prima facie, the defendants' default in payment by submitting the affidavit of Brian Nwabaka, an employee of its loan servicer, Bayview Loan Servicing, LLC (hereinafter Bayview). Nwabaka averred that, based upon his review of unspecified business records, the defendants defaulted in making monthly payments in October 2008. However, Nwabaka did not aver that he had personal knowledge of the defendants' alleged default in payment. Moreover, Nwabaka failed to identify which records he relied on to assert a default in payment, and the notice of default annexed to Nwabaka's affidavit was insufficient to establish the alleged default in payment ... . . [T]he plaintiff submitted, inter alia, the affidavits of Nwabaka and Rosalind Carroll, document coordinator for Bayview, each of whom averred that the 90-day notices were sent by certified and first-class mail. However, neither Nwabaka nor Carroll attached any documents showing proof of mailing by first-class mail, nor did they aver that they had personal knowledge of the purported mailings or were familiar with the mailing practices and procedures of Bayview ... . Although Nwabaka attested to his familiarity with the mailing practices and procedures of Countrywide Home Loan, the prior loan servicer, he did not aver to familiarity with the mailing practices and procedures of Bayview, which purportedly sent the 90-day notices." ***Bank of N.Y. Mellon v. Mannino*, 2022 N.Y. Slip Op. 05675, Second Dept 10-12-22**

MEDICAL MALPRACTICE, PERSONAL INJURY, EVIDENCE.

PLAINTIFF'S EXPERT'S AFFIDAVIT IN THIS MEDICAL MALPRACTICE ACTION WAS CONCLUSORY AND SPECULATIVE; THE AFFIDAVIT, THEREFORE, DID NOT RAISE A QUESTION OF FACT.

The Second Department, reversing Supreme Court, determined plaintiff's expert affidavit in this medical malpractice action was conclusory and speculative, and therefore did not raise a question of fact: "The plaintiff submitted the affidavit of her expert, a physician board certified in vascular surgery, who agreed with [defendant} Mansouri's plan to perform right femoral popliteal bypass surgery. The plaintiff's expert further opined, however, that Mansouri departed from the accepted standard of care by not choosing a different vessel once he found the popliteal artery to be diseased with plaque. The expert's affidavit was conclusory and speculative. While the expert opined that Mansouri should have used a different vessel, he failed to specify which vessel should have been used ... . For that same reason, the assertion by the plaintiff's expert that 'the vessel should have been bypassed more distally' was conclusory and speculative. Moreover, the opinion of the plaintiff's expert that Mansouri deviated from good and accepted medical practice by failing to verify that the plaintiff had sufficient perfusion after the surgery is unsupported by competent evidence ...". ***Coffey v. Mansouri*, 2022 N.Y. Slip Op. 05678, Second Dept 10-12-22**

PERSONAL INJURY, EVIDENCE.

A DRAINAGE GRATE WHICH DOES NOT VIOLATE ANY CODE AND WHICH IS NOT DEFECTIVE IS NOT A DANGEROUS CONDITION SIMPLY BECAUSE IT WAS WET FROM RAIN AT THE TIME OF THE SLIP AND FALL.

The Second Department, reversing Supreme Court, determined that the drainage grate on which plaintiff slipped and fell was not a dangerous or defective condition. The grate did not violate any code and was not defective. The fact that the grate was wet from falling rain did not demonstrate a dangerous condition: "A property owner has a duty to maintain his or her premises in a reasonably safe condition ... . 'In order for a landowner to be liable in tort to a plaintiff who is injured as a result of a dangerous or defective condition upon the landowner's property, the plaintiff must establish, among other things, that a dangerous or defective condition actually existed' ... . Here, the defendant established its entitlement to judgment as a matter of law by demonstrating, prima facie, that the metal drainage grate, which was not in violation of any applicable code, was not in a defective or hazardous condition and that it maintained its premises in a reasonably safe condition ... . The mere fact that the grate was wet from the falling rain was insufficient to establish the existence of a dangerous condition ...". ***Shuttleworth v. Saint Margaret's R.C. Church in Middle Vil.*, 2022 N.Y. Slip Op. 05730, Second Dept 10-12-22**

PERSONAL INJURY, EVIDENCE.

DEFENDANT'S GENERAL AWARENESS THAT PUDDLES FORMED IN THE AREA OF PLAINTIFF'S SLIP AND FALL AND THAT WATER TURNS TO ICE WAS NOT ENOUGH TO DEMONSTRATE DEFENDANT HAD CONSTRUCTIVE NOTICE OF THE ICY CONDITION.

The Second Department, reversing Supreme Court, determined plaintiff did not demonstrate defendant had constructive notice of the icy condition where she slipped and fell. The fact that defendant may have been aware that puddles of water formed in that area was not enough: "The plaintiff's submissions demonstrated that the defendant had a general awareness that puddles of water formed on the portion of the sidewalk or pathway where the plaintiff fell. However, the defendant's general awareness that puddles of water formed in the precise location of the plaintiff's fall is not sufficient to impute actual or constructive notice of the specific ice condition that caused her to fall ... . The plaintiff submitted no evidence to show that the defendant was aware that ice formed in the area of the puddled water where the plaintiff fell ... . General awareness that water can turn to ice is legally insufficient to constitute constructive notice of the particular ice condition that caused the plaintiff to fall ... . The plaintiff's submissions also failed to establish, prima facie, that the ice condition was otherwise visible and apparent, and had formed a sufficient period of time before the accident for the defendant to have discovered and remedied the condition ...". ***McDonnell v. Our Lady of Mercy R.C. Church*, 2022 N.Y. Slip Op. 05686, Second Dept 10-12-22**

NEGLIGENCE, EVIDENCE.

PLAINTIFF BICYCLIST STRUCK THE DOOR OF DEFENDANT'S VAN AFTER DEFENDANT HAD OPENED THE DOOR; DEFENDANT RAISED QUESTIONS OF FACT ABOUT WHETHER HE HAD OPENED THE DOOR SAFELY AND WHETHER PLAINTIFF WAS COMPARATIVELY NEGLIGENT; PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED AND DEFENDANT'S COMPARATIVE NEGLIGENCE AFFIRMATIVE DEFENSE SHOULD NOT HAVE BEEN DISMISSED.

The Second Department, reversing Supreme Court, determined plaintiff-bicyclist's motion for summary judgment in this traffic accident case should not have been granted. Plaintiff alleged defendant, Stewart, opened the door of his van and plaintiff could not avoid striking the door. Stewart raised questions of fact about whether he was negligent and whether plaintiff was comparatively negligent: "The assertions made in Stewart's affidavit, if credited, would support a finding that the plaintiff was riding his bicycle close to the parked vehicles, at a relatively high rate of speed, and possibly under the influence of alcohol, and he failed to perceive and avoid the van door, which had been open for as long as five seconds ... . Stewart averred that, before opening the van door, he looked in his side-view mirror, where he was able to see the entire northbound lane for approximately 200 feet behind him, and he saw nothing approaching. Approximately five seconds later, the plaintiff's bicycle collided with the van door. These averments were sufficient to raise a triable issue of fact as to whether Stewart failed to see what, by the

reasonable use of his senses, he should have seen, and whether he opened the van door when it was not reasonably safe to do so ...". ***Tucubal v. National Express Tr. Corp.*, 2022 N.Y. Slip Op. 05731, Second Dept 10-12-22**

THIRD DEPARTMENT

PERSONAL INJURY, INSURANCE LAW, EVIDENCE.

THE MAJORITY DETERMINED PLAINTIFF DID NOT TIE HIS DIMINISHED RANGE OF MOTION TO THE TRAFFIC ACCIDENT, AS OPPOSED TO HIS PRE-EXISTING CONDITIONS, AND THEREFORE PLAINTIFF DID NOT DEMONSTRATE "SERIOUS INJURY;" THE DISSENT ARGUED THE NATURE OF THE ACCIDENT (DEFENDANTS' TRUCK REAR-ENDED PLAINTIFF'S CAR AT 45 MILES PER HOUR) SHOULD BE CONSIDERED AND DEFENDANT MUST TAKE THE PLAINTIFF AS HE OR SHE FINDS HIM.

The Third Department, over a two-justice dissent, determined plaintiff did not raise a question of fact about whether he suffered serious injury within the meaning of Insurance Law 5102 in this rear-end traffic accident case. [Editor's Note: Decisions determining whether plaintiff suffered "serious injury" within the meaning of the No-Fault Law are not covered in the New York Appellate Digest because each analysis is necessarily unique and fact-specific. This "serious injury" decision has been summarized because there is a two-justice dissent arguing (1) the nature of the accident, defendants' truck rear-ending plaintiff's car at 45 miles per hour, should have been considered, (2) the defendant must take the plaintiff as he or she finds him, and (3) there are questions of fact whether plaintiff's pre-existing conditions were aggravated by the accident.]: "[P]laintiff did not provide ... objective medical evidence distinguishing his preexisting back condition from its purported exacerbation in the November 2016 accident — such as, for example, proof tying the diminished ranges of motion observed by [plaintiff's expert] in March 2021 to the November 2016 accident rather than plaintiff's prior degenerative back problems — or demonstrating a causal link between any exacerbation and the self-reported limitations on plaintiff's activities for purposes of his 90/180-day claim ... **From the dissent:** The facts regarding the accident are not in dispute. Defendant Alton E. Horn was driving a 1998 Kenworth tractor trailer at a speed of 45 miles per hour when he rear-ended plaintiff. While we could find no postaccident photographs of the vehicles in the record, Horn stated that the impact bent his bumper and pushed the hood up on his tractor trailer, and plaintiff referred to his vehicle as 'totaled.' Plaintiff was removed from the scene by ambulance and was administered morphine en route to the hospital. Although plaintiff was released from the hospital that night, he reported that he was bedridden for the next 10 days. During oral argument, defendants' counsel urged us to ignore these facts attendant to the actual accident, however we could find no case law that mandates that the Court leave its common sense at the door. Simply put, the facts do matter. Finally, it is undisputed that, although plaintiff had not undergone surgery to alleviate the discomfort in his lower back before the accident, he has since. ... [E]very first-year law student is aware of the eggshell plaintiff axiom, namely that the defendant must take the plaintiff as he or she finds him, i.e., the plaintiff may recover to the extent that the accident aggravated his or her preexisting conditions ...". ***Lemieux v. Horn*, 2022 N.Y. Slip Op. 05739, Second Dept 10-13-22**

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