



NEW YORK'S HIGH COURT WILL NOT DECIDE WHETHER INSURER MUST SHOW PREJUDICE TO DISCLAIM COVERAGE FOR LATE NOTICE OF LAWSUIT; CERTIFIED QUESTION FROM SECOND CIRCUIT WITHDRAWN

Must an insurance company demonstrate prejudice in order to disclaim coverage for a claim if the insured provided timely notice of the claim but later failed to provide timely notice of the lawsuit that developed from it? In November of 2002, the United States Court of Appeals, Second Circuit, was confronted with this question in connection with a professional liability insurance policy and sought guidance from the New York Court of Appeals. *Mark A. Varrichio and Assoc. v. Chicago Ins. Co.*, 312 F.3d 544 (2d Cir. 2002). When the Court of Appeals agreed to accept the certified question from the Second Circuit the following month, many speculated that New York's status as a "no prejudice" state might be in serious jeopardy. Fears were fueled in part by the Court of Appeals' ruling less than a year earlier that in the context of insurance policies providing Supplementary Uninsured Motorists (SUM) coverage, "insurers relying on the late notice of legal action defense should be required to demonstrate prejudice." *In re Brandon*, 97 N.Y.2d 491, 498, 743 N.Y.S.2d 53 (2002).

Would the Court of Appeals apply the *Brandon* rule to insurance policies in general, or limit it to SUM coverage? In its *per curiam* opinion certifying the question to the Court of Appeals, the Second Circuit weighed in on the issue: "Were we to decide the case ourselves, we likely would conclude that the general principles that the New York Court of Appeals adopted in *Brandon* suggest that the court would not apply the no-prejudice rule in the case before us...[W]e would therefore be inclined to hold that Chicago cannot disclaim coverage based on Varrichio's failure to comply with the policy's immediate notice of suit provision unless it first shows prejudice."

Ultimately, any answer to this question from New York's high court will have to wait, at least for

the time being. The Second Circuit withdrew the certified question in April after Varrichio and Chicago Insurance Company settled their lawsuit. 2003 U.S. App. LEXIS 7609. Although it may not take long for the question to be presented anew to the Court of Appeals, until then, insurers and their counsel may choose to avoid litigating "late notice of suit" lawsuits in New York federal court or the Appellate Division, Third Department, since both forums have now ruled against insurers on this issue either explicitly or in dicta.

(In a pre-*Brandon* ruling, the Third Department explained in connection with a property insurance policy that "the principles governing the failure of an insured to give timely notice of an accident are entirely different from those governing the requirement of notice of suit." *New York Mut. Underwriters v. Kaufman*, 257 A.D.2d 850, 685 N.Y.S.2d 312 (3d Dep't 1999). Writing for the unanimous appellate panel, Judge Bruce Crew explained that late notice of a lawsuit will be "excused" where "no prejudice has inured to the insurer.")

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“FEIGNED ISSUE OF FACT” DOCTRINE PREVENTS PLAINTIFF FROM SUBMITTING NEW EVIDENCE CHANGING LOCATION OF ALLEGED SLIP AND FALL AFTER DEPOSITION IS COMPLETED; COURT GRANTS SUMMARY JUDGMENT TO DEFENDANTS

Distinguishing between “genuine issues of fact” and “feigned issues of fact,” a growing number of New York jurists have refused to allow parties to defeat summary judgment motions by submitting last-minute affidavits or other evidence contradicting a party’s prior testimony. In one of the more recent decisions to apply the “feigned issue of fact” doctrine, Queens County Supreme Court Justice Phyllis Orlikoff Flug ruled that a plaintiff could not amend his bill of particulars to change the site of his alleged accident after the completion of his and the defendants’ depositions, and granted summary judgment to the defendants. *Jones v. City of New York*, Index No. 11558 (Sup.Ct. Queens Co. Feb. 11, 2003).

Plaintiff H. Kimball Jones alleged he sustained personal injuries in the parking lot of Shea Stadium prior to a Mets-Dodgers game on April 15, 1997. Jones stated that while he walked through a row of parked cars outside Gate A of the stadium, he “suddenly flew through the air and fell,” injuring his left arm. According to Jones, a thin rope or twine attached to a metal mobile stanchion had been lying slack on the ground and that when he stepped over the rope, an unknown person pulled it up, causing him to slip and fall. The stanchions were set up to direct pedestrian traffic away from former President William Clinton, who came to the stadium to attend a pre-game event celebrating the 50th anniversary of Jackie Robinson’s entry into the major leagues. The defendants, which included the City of New York (owner of Shea Stadium), Square Industries (a parking contractor), and Sterling Doubleday Enterprises, LLP (Shea Stadium lessee and operator of the New York Mets), maintained during depositions that while barricades were set up in anticipation of the President’s visit, there were no stanchions outside of Gate A, where Jones alleged he tripped.

After party depositions were completed, Jones attempted to amend his deposition testimony to put the location of the accident at the very place where the defendants testified stanchions and other

barricades had been set up. Jones also served an amended bill of particulars changing the location of the alleged accident, again to conform to the defendants’ testimony.

The defendants moved for summary judgment, arguing that these self-serving amendments were improper and did not establish that the defendants created or had knowledge of the specific condition giving rise to Jones’ alleged fall. Justice Flug agreed, explaining that “plaintiff’s attempts to change the location of the accident long after the completion of discovery are improper and prejudicial to the defendants...and therefore, shall be treated as a nullity.” Jones submitted an affidavit from his son in opposition to the defendants’ summary judgment motion attempting to corroborate the information in Jones’ amended bill of particulars concerning the “new” location of the accident. Justice Flug ruled that the affidavit also did not raise any triable issue of fact, and was insufficient as a matter of law to defeat the defendants’ summary judgment motions: “The court finds that it merely seeks to create a feigned issue of fact.”

Sterling Doubleday Enterprises was represented by Carla Varriale of Ohrenstein & Brown. (Anyone wishing a copy of Justice Flug’s order may contact the editor.) ☛

NEW YORK COURT OF APPEALS UPHOLDS TERMINATION OF CO-OP LEASE DUE TO TENANT’S OBJECTIONABLE CONDUCT; “BUSINESS JUDGMENT RULE” SHIELDS DECISION OF CO-OP BOARD

The Court of Appeals recently reaffirmed that New York courts should not second-guess the decisions of residential co-op boards except in rare situations involving bad faith or unauthorized conduct. *40 W. 67th St. Corp. V. Pullman*, __ N.Y.2d __, 760 N.Y.S.2d 745 (2003). In a unanimous ruling, the high court concluded that a co-op board’s decision to terminate a resident’s proprietary lease due to the resident’s “objectionable conduct” was not subject to judicial reevaluation, and must be affirmed under the highly deferential “business judgment rule.”

The plaintiff cooperative owns a building in Manhattan containing 38 residential units. In 1998, defendant David Pullman bought into the cooperative and obtained a proprietary lease for one of the

apartments in the building. Soon after moving in, Pullman engaged in what the cooperative ultimately determined to be “intolerable” behavior. Pullman repeatedly sought changes in the building’s services that the cooperative deemed inadvisable or infeasible. He began to complain incessantly about his upstairs neighbors, who had lived in the building for more than two decades, alleging that they were operating an illegal bookbinding business in their apartment. (The co-op board investigated Pullman’s allegations and determined that they were unfounded.) The hostilities between Pullman and other residents continued to escalate, and included name-calling, cut telephone lines, and physical altercations. Pullman made alterations to his apartment without the co-op board’s approval, commenced four lawsuits against the cooperative and the board president, and attempted to commence three more.

In response to Pullman’s behavior, the cooperative called a special meeting pursuant to a section of the proprietary lease that provides for termination of one’s tenancy if two-thirds of the cooperative determines that “because of objectionable conduct on the part of the Lessee...the tenancy of the Lessee is undesirable.” Notice of the meeting was sent to all co-op shareholders. More than 75% of shareholders attended the meeting; Pullman chose not to attend. By a vote of 2,048 shares to zero, the shareholders who attended the meeting passed a resolution declaring Pullman’s conduct “objectionable” and directing the Board to terminate his proprietary lease and cancel his shares. The board sent a notice of termination to Pullman requiring him to vacate his apartment. Pullman was told that the board would turn over to him all proceeds from the sale of his cooperative shares after deducting unpaid use and occupancy fees and the costs of the sale. Pullman disregarded the notice, prompting the co-op to commence a lawsuit for possession and ejectment, a declaratory judgment cancelling Pullman’s stock, and a money judgment for use and occupancy.

The Supreme Court denied the co-op’s summary judgment motion and dismissed its cause of action for ejectment to the extent that it was based on the shareholders’ vote and the co-op board’s notice of termination. The court chose not to apply the business judgment rule to the co-op’s proceedings, ruling instead that pursuant to section 711(1) of

New York’s Real Property Actions and Proceedings Law, the co-op had to prove its claim of objectionable conduct to the court before it could terminate Pullman’s proprietary lease. (RPAPL 711(1) states that in a proceeding to recover possession of real property due to the termination of a lease based on a tenant’s “objectionable conduct,” the landlord must present “competent evidence to establish to the satisfaction of the court that the tenant is objectionable.”)

A divided Appellate Division reversed based on the Court of Appeals’ 1990 decision in *Levandusky v. One Fifth Ave. Corp.*, 75 N.Y.2d 530, 554 N.Y.S.2d 807. According to the Appellate Division majority, *Levandusky* prohibited judicial scrutiny of the actions of co-op boards “taken in good faith and in the exercise of honest judgment in the lawful and legitimate furtherance of cooperative purposes.”

Writing for the unanimous Court of Appeals, Justice Arnold Rosenblatt affirmed the Appellate Division’s decision, explaining that the business judgment rule “has long been recognized in New York” and is “a common law doctrine by which courts exercise restraint and defer to good faith decisions made by boards of directors in business settings.” Justice Rosenblatt explained that RPAPL 711(1) did not bar the applicability of the business judgment rule to co-op decisions to terminate proprietary leases. Noting that the statute was originally enacted in 1920 to protect against landlords evicting tenants based on the landlord’s “sole and unfettered” determination that the tenant was objectionable, Rosenblatt observed on behalf of the Court: “We are satisfied that the relationship among shareholders in cooperatives is sufficiently distinct from traditional landlord-tenant relationships that the statute’s ‘competent evidence’ standard is satisfied by the application of the business judgment rule.”

The Court of Appeals cautioned that there are circumstances where, even under the business judgment rule, a co-op board’s decision should not be blindly ratified by courts. Where, for example, a tenant can establish that the board acted (1) outside the scope of its authority; (2) in a way that did not legitimately further the corporate purpose; or (3) in bad faith, the Court explained that “courts should undertake review of board decisions.” Justice Rosenblatt noted that none of these exceptions

applied to the present case and that the termination of Pullman's proprietary lease therefore must be upheld.

The *Pullman* decision is likely to benefit insurers providing coverage to co-op boards under directors and officers policies, cutting short legal challenges to actions taken by a board in good faith and pursuant to the terms of a cooperative's proprietary lease. 🐝

NEW YORK COURT APPLIES "PRIMARY ASSUMPTION OF RISK" DOCTRINE TO CONCERT HEARING LOSS CASE

In a case of first impression, a judge sitting in New York State Supreme Court, New York County, has held that the "primary assumption of risk" doctrine barred a claim for hearing loss brought by a concertgoer.

In *Powell v. The Metropolitan Entertainment Co. et al.*, __ N.Y.S.2d __, 2003 N.Y. Misc. LEXIS 628, 2003 N.Y. Slip Op. 23583, N.Y.Sup. (Apr. 24, 2003), Justice Martin Schoenfeld rejected plaintiff's claim that the promoter, venue operator, and performer (John Fogerty) were responsible for his alleged hearing loss, because of "unsafe levels of the noise" at a Fogerty concert held at the Hammerstein Ballroom in New York City on June 2, 1997.

This appears to be the first reported decision addressing a claim of hearing loss allegedly caused by excessively loud music. Initially, assuming for purposes of the motion that plaintiff did, in fact, suffer a hearing loss as a result of excessive volume at the concert, Justice Schoenfeld noted that there was no standard of care by which a jury could determine whether the defendants had breached a duty owed to the plaintiff. He stated that "without knowing what is 'too loud,' and without knowing how loud the concert actually was, a jury would have to engage in double speculation to conclude that [the] music was unreasonably loud."

Most importantly, Justice Schoenfeld relied on the seminal primary assumption of risk cases - *Turcotte v. Fell*, 68 N.Y.2d 432 (1986) and *Morgan v. State*, 90 N.Y.2d 471 (1997) - and held that the doctrine was applicable, observing that the test established by the New York Court of Appeals in *Turcotte* and reiterated in *Morgan* is whether one

consents to commonly appreciated risks which are inherent in and arise out of the nature of an activity. Justice Schoenfeld then stated that it is "perfectly obvious" and "commonly appreciated" that "loud music can cause hearing impairment."

Addressing the basic tort law concept that one must assume that every person with whom one comes into contact has an "eggshell skull" and can recover from a tortfeasor who inflicts even the slightest blow to the head, Justice Schoenfeld characterized plaintiff as an "eggshell skull plaintiff" who chose to stand in a thunderous hailstorm and [as such] cannot now be heard to complain."

Steven H. Rosenfeld of Ohrenstein & Brown represented Metropolitan Entertainment and Manhattan Center Studios, the promoter and venue owner. 🐝

APPELLATE DIVISION, FIRST DEPARTMENT, DENIES SUMMARY JUDGMENT TO LABOR LAW 240(1) PLAINTIFF, RULING PLAINTIFF'S OWN MISUSE OF LADDER MAY HAVE BEEN THE SOLE PROXIMATE CAUSE OF HIS ALLEGED INJURIES

Breathing new life into the "recalcitrant worker" defense to Labor Law actions, the New York Appellate Division, First Department, has affirmed an order of the Supreme Court, New York County, denying summary judgment to a worker who allegedly sustained injuries when he fell from an A-frame ladder at a construction site. *Meade v. Rock-McGraw, Inc.*, __ A.D.2d __, 760 N.Y.S.2d 39 (1st Dep't 2003). In a 4-1 decision, the panel concluded that since there was evidence that the plaintiff himself may have been the sole proximate cause of the accident, the plaintiff was not entitled to summary judgment even under Labor Law 240(1), which imposes absolute liability on owners and contractors for certain elevation-related work site accidents.

Patrick Meade, a carpenter, was injured as he was replacing ceiling tiles in a hallway closet while standing on a five-foot wooden A-frame ladder that he had borrowed from another subcontractor at the job site. According to Meade, the ladder was in "good working order." However, Meade claimed that the ladder could not be opened up inside the closet, and that as a result, he had to position the ladder

against the closet wall in a closed position and at a slight angle. Although Meade testified that he checked the ladder's stability before he used it, when he stood on the third step of the ladder and began his work, he felt the ladder slide out from under him. During discovery, Meade's supervisor opined that there was enough room for Meade to have opened the ladder inside of the closet, and that in any event, Meade should have known that using the A-frame ladder in a closed position was improper.

Meade moved for summary judgment on liability under Labor Law section 240(1), claiming that the defendants (including the building owner, lessee, and sublessee) failed to provide him with any safety devices. Meade maintained that he was entitled to judgment because he was forced to use improper equipment. In response, the defendants explained that if Meade had used the A-frame ladder properly, it would have provided the necessary protection. According to the defendants, there was a question of fact as to whether Meade's improper use of the A-frame ladder was the sole proximate cause of his accident. Justice Louise Gruner Gans of the New York County Supreme Court adopted the defendants' proximate cause argument and denied Meade's motion for summary judgment.

Writing for the majority of the Appellate Division panel, Judge Joseph P. Sullivan agreed. The court noted succinctly: "That the ladder was inadequately secured was due to plaintiff's improper use of it, which would not give rise to a Labor Law violation." The court also noted that Meade had provided conflicting accounts of the accident, also warranting the denial of his summary judgment motion. For example, at one point Meade claimed that the ladder fell as a result of dried glue and dust on the closet's concrete floor. Yet in his affidavit filed with his summary judgment motion, he claimed that the ladder fell because the closet floor was slippery. Also, at one point Meade testified that he observed wooden footings on the ladder; in his affidavit, he stated that the ladder did not have footings.

In a lengthy dissent, Judge Angela M. Mazzarelli framed the issue presented in this case as "whether an employer who makes no effort to provide a safety device can be relieved of its statutory responsibility by failing to provide any device and then arguing that plaintiff's adaptation of a borrowed device, here, an A-frame ladder lent by another subcontractor, is

the 'sole proximate cause' of his injuries." Judge Mazzarelli accused the majority of misapplying the "sole proximate cause" exception to Labor Law 240(1) liability, an exception that was meant to be applied only where the plaintiff was 100% responsible for an accident as a result of his or her intentional or irrational conduct. In the present case, Judge Mazzarelli concluded that it was not possible for there to be a finding that the accident was entirely Meade's fault, since the defendants breached the duty they owed to Meade by not providing him with any safety devices of their own, forcing Meade to borrow a ladder from a non-party subcontractor. Also, since there was no evidence that Meade had intentionally or irrationally misused the ladder, and since the Labor Law was intended to protect workers from the very type of risk that Meade faced, Judge Mazzarelli explained that the court below should have granted Meade's summary judgment motion on liability.

Meade's counsel, David Perecman, reports that he has decided not to seek leave to appeal the decision to the Court of Appeals, preferring to develop a more complete record and to proceed to trial. In the absence of any further appeal, given the right fact pattern, the Meade decision will provide defense counsel in Labor Law cases with new ammunition to challenge summary judgment motions, which typically are filed fairly early on in section 240(1) cases. 📌

NEW YORK STATE INSURANCE DEPARTMENT RULES THAT MOLD EXCLUSIONS IN POLICIES ISSUED BY AUTHORIZED INSURERS ARE UNENFORCEABLE

In an April 1, 2003 opinion letter issued by the Office of General Counsel, the New York State Insurance Department ruled that mold exclusions in insurance policies issued by New York authorized insurers are unenforceable for the time being, at least until the Insurance Department "receives information sufficient to warrant such exclusions or limitations."

The three-page opinion letter noted that while the Insurance Department had received more than one hundred filings from insurers purporting to restrict toxic mold coverage, the Department had

not approved any of them. In light of scientific uncertainty concerning mold-related damages, the Insurance Department “has not yet formulated a policy position but will proceed in such a manner as to ensure that New Yorkers continue to have access to affordable and meaningful insurance coverage.”

Since there is nothing in the Insurance Law that would require an excess line insurer to provide coverage for damage resulting from mold, or that would prohibit an exclusion for damage relating to mold, the Insurance Department’s position will not apply to mold exclusions in excess line policies issued in New York.

The opinion letter can be found online at www.ins.state.ny.us/rg030404.htm.

AMENDMENT TO NEW YORK CITY ADMINISTRATIVE CODE SHIFTS RESPONSIBILITY FOR MAINTENANCE OF SIDEWALKS FROM NEW YORK CITY TO ABUTTING LANDOWNERS

On July 16, 2003, New York City Mayor Michael Bloomberg signed into law a new Administrative Code section that transfers liability from the City of New York to abutting landowners for sidewalk accidents arising from the improper repair, maintenance, or removal of snow from public sidewalks. The new code section will take effect on September 15, 2003 and will apply to accidents occurring on or after this date. The law will not impose liability on one-, two-, or three-family residential real property that is owner occupied (in whole or in part) and used exclusively for residential purposes.

Prior to the passage of the new law, landowners who did not undertake any efforts to repair or maintain abutting public sidewalks were subject to fines by the City but could not be sued by an (allegedly) injured pedestrian.

The new law is significant for insurance carriers and underwriters for at least two reasons. First, property and umbrella insurance policies issued prior to the law’s passage likely were not intended to provide coverage for claims arising out of the insured’s failure to maintain public sidewalks. Nonetheless, the wording of typical insuring agreements will almost certainly provide coverage for such losses. Second, at least in the short term,

there will be little loss history for underwriters to rely upon for purposes of establishing appropriate premium rates on a forward-going basis.

The full text of newly enacted section 7-210 of the New York City Administrative Code is set forth below:

§ 7-210 Liability of real property owner for failure to maintain sidewalk in a reasonably safe condition.

- a. It shall be the duty of the owner of real property abutting any sidewalk, including, but not limited to, the intersection quadrant for corner property, to maintain such sidewalk in a reasonably safe condition.
- b. Notwithstanding any other provision of law, the owner of real property abutting any sidewalk, including but not limited to, the intersection quadrant for corner property, shall be liable for any injury to property or personal injury, including death, proximately caused by the failure of such owner to maintain such sidewalk in a reasonably safe condition. Failure to maintain such sidewalk in a reasonably safe condition shall include, but not be limited to, the negligent failure to install, construct, reconstruct, repave, repair or replace defective sidewalk flags and the negligent failure to remove snow, ice, dirt or other material from the sidewalk. This subdivision shall not apply to one-, two- or three-family residential real property that is (i) in whole or in part, owner occupied, and (ii) used exclusively for residential purposes.
- c. Notwithstanding any other provision of law, the city shall not be liable for any injury to property or personal injury, including death, proximately caused by the failure to maintain sidewalks (other than sidewalks abutting one-, two- or three-family residential real property that is (i) in whole or in part, owner occupied, and (ii) used exclusively for residential purposes) in a reasonably safe condition. This subdivision shall not be construed to apply to the liability of the city as a property owner pursuant to subdivision b of this section.
- d. Nothing in this section shall in any way affect the provisions of this chapter or of any other law or rule governing the manner in which an action proceeding against the city is commenced, including any provisions requiring prior notice to the city of defective conditions.

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