To Be Argued By:
Si Aydiner, Esq.
Time Requested: 15 Minutes

Supreme Court of the State of New York
Appellate Division: First Department

GREGORY MORRISON,

Plaintiff-Appellant,

-against-

NEW YORK CITY HOUSING AUTHORITY,

Defendant-Respondent.

Appellate Division Docket No. 2022-01770

BRIEF FOR PLAINTIFF-APPELLANT

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Supreme Court, New York County, Index No. 153970/2019

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QUESTIONS PRESENTED

1. Did the trial court improvidently find that defendant-respondent met its burden for summary judgment where it: (a) submitted 4 internal inspection reports identifying that the subject staircase had unsatisfactory treads and (b) submitted an English affidavit from a non-native speaker that required an interpreter at his deposition?

Answer: Yes. Defendant-respondent failed to reconcile or explain its own contradictory proof. As the last internal inspection was only 14 days before this accident, the movant did not meet its burden. Likewise, the movant should not have been able to establish its last pre-accident inspection (negating notice) via an inadmissible affidavit.

2. Did the trial court improvidently find that plaintiff-appellant asserted a new theory of negligence by claiming inadequate coefficient of friction as the basis for his fall?

Answer: Yes. Plaintiff-appellant specifically asserted this theory in the notice of claim.

3. Is there an issue of fact that defendant-respondent application of paint to the treads caused it have inadequate coefficient of friction making it slippery when wet?

Answer: Yes.

PRELIMINARY STATEMENT

In every conceivable way defendant-respondent New York City Housing Authority ("NYCHA") improperly narrowed tort duties owed plaintiff-appellant Gregory Morrison ("Morrison") who slipped inside a NYCHA stairwell. NYCHA successfully met its burden on summary judgment after presenting evidence to the trial court—without any discussion, acknowledgment, or explanation—that the very staircase involved in this accident was noted to have "Unsat[isfactory]" treads on 4 occasions before this accident. (With the last such notation 14 days before this accident.) Likewise, NYCHA met its burden of demonstrating its last inspection of the accident scene by using an inadmissible English affidavit by an apparent non-native speaker who required an interpreter at his deposition.

When confronted with objective scientific evidence that the subject tread had inadequate coefficient of friction, rendering its dangerously slippery, NYCHA successfully argued to the trial court that such a theory was never advanced in Morrison's notice of claim. NYCHA, of course, was wrong. The notice of claim asserted in crystal clear terms Morrison's claim that NYCHA was negligent: "in having a floor without an adequate coefficient of friction." The trial court's order should be reversed.

BACKGROUND

I. THE UNDERLYING FACTS

On 16 May 2018 Morrison entered 120 Baruch Drive in New York County ("building") and took the elevator to the sixth floor to visit a friend named Ricky residing at apartment 6D. (Record on Appeal ("R.") 538, 541). As Morrison was about to knock on the door of apartment 6D, a gentleman in the hallway advised Morrison that: "Ricky don't live there no more." (*Id.* 542-43, 546). Morrison then returned to the elevator where he waited for 5 to 6 minutes before deciding to exist via the stairs. (*Id.* 551). Morrison entered the sixth floor staircase landing, took one step down, and slipped. (*Id.* 562-65). The treads were painted "battleship gray" and Morrison noted, after his accident, a slippery substance on the first tread from the 6th floor landing. (*Id.* 562-63, 566). An ambulance eventually arrived and transported Morrison to Beth Israel hospital. (*Id.* 602-03).

NYCHA designated Amados Santos ("Santos"), a longtime cleaner assigned to the building.[1] Santos confirmed that the stairs were cleaned twice a week and that NYCHA would have the treads painted gray by an outside vendor every 3 years. (*Id.* 695, 702). NYCHA also produced a Building Inspection Report ("BIR") for the subject stairs dated 2 May 2018 (14 days before the accident) where

[1] Discussed later, Santos requested, as his right, to use an interpreter at the deposition. NYCHA, however, improperly used a non-translated English affidavit from Santos to support a critical

NYCHA (thru Santos) acknowledged that the "STEPS & TREADS" were "Unsat[isfactory]." (*Id.* 772-75).[2] There were, also, 3 other prior NYCHA notations concerning the unsatisfactory nature of the treads between August 2017 and July 2016.

After suit was commenced, Morrison retained professional engineer Stanley H. Fein, P.E. ("Fein"), to inspect the subject tread and stairs. Based on his inspection and testing, Fein observed that the steps were, in fact, coated with a paint that caused the tread to be slippery by having inadequate coefficient of friction when wet—in violation of the accepted standards in the renowned American Society for Testing and Materials ("ASTM") and Underwriters Laboratory ("UL").[3] (*Id.* 776-80).

Morrison commenced this suit by summons and complaint on 17 April 2019 in New York State Supreme Court, County of New York. (*Id.* 169-81). NYCHA joined issued with their answer on 9 May 2019. As a result of NYCHA's negligence, Morrison underwent two surgeries to his right knee, including the repair of a ruptured patella tendon. (*Id.* 240-46).

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aspect of their motion.

[2] For the nisi prius court's benefit, the relevant BIR pages were culled from voluminous disclosure and highlighted because of the density of information in the report.

[3] Discussed later, ASTM and UL coefficient of friction standards have been recognized by the common law as platforming a negligence claim.

II. NYCHA'S MOTION AND THE TRIAL COURT'S ORDER

At the close of discovery NYCHA moved for summary judgment. It claimed that the evidence, construed in the light most favorable to Morrison, revealed that it properly maintained the stairs and otherwise had no notice of a dangerous condition. (NYCHA—despite attaching BIR records noting the "Unsat[isfactory]" condition of the treads here—never addressed these records *until* reply.) Morrison opposed the motion by demonstrating that based on the inspection of his engineer, the treads had inadequate coefficient of friction and were slippery when wet in violation of accepted engineering standards. The summary judgment motion was assigned to the Honorable Paul A. Goetz, J.S.C., who, improvidently, granted NYCHA's motion after finding "plaintiff did not create an issue of fact because he improperly tried to introduce a new theory of liability [*i.e.*, inadequate friction] through the opinion of his expert." (*Id.* 9). The trial court, and NYCHA, failed to recognize that the inadequate coefficient of friction was *expressly* pled in Morrison's notice of claim. (*Id.* 45 (alleging "in having a floor without an adequate coefficient of friction.")).

ARGUMENT

I. STANDARD OF REVIEW

In order to obtain summary judgment, a movant must "tender[] sufficient evidence to demonstrate the absence of any material issues of fact." *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324, 508 N.Y.S.2d 923, 925 (1986). The initial burden of showing that there is no material issue of fact lies with the movant. *Ferluckaj v. Goldman Sachs & Co.*, 12 N.Y.3d 316, 321, 908 N.E.2d 869, 872 (2009). Once a movant meets its burden, it shifts to the non-movant to provide evidence showing an issue of fact. *Id.* at 321, 908 N.E.2d at 872.

A fact is material when it can "'affect the outcome of the suit under the governing law.'" *People v. Grasso*, 50 A.D.3d 535, 545, 858 N.Y.S.2d 23, 32 (1st Dep't 2008) (citing *Anderson v. Liberty Lobby, Inc.*, 477 US 242, 248, 106 S. Ct. 2505 (1986)). Because summary judgment is outcome determinative, the evidence—and all inferences—are viewed in the light most favorable to the non-movant. *Sheryll v. L & J Hairstylists of Plainview*, 272 A.D.2d 603, 604, 709 N.Y.S.2d 429, 430 (2d Dep't 2000). And assessments of credibility are improper, *Ferrante v. Am. Lung Ass'n*, 90 N.Y.2d 623, 631, 665 N.Y.S.2d 25, 30 (1997), because "issue-finding, rather than issue-determination," is the genesis of this exercise. *Matter of Corfian Enters., Ltd.*, 52 A.D.3d 828, 829, 861 N.Y.S.2d 392, 393 (2d Dep't 2008).

I. NYCHA FAILED TO MEET ITS BURDEN FOR TWO DISJUNCTIVE REASONS

A) NYCHA Attached Four Building Inspection Reports Documenting Unsatisfactory Treads Before This Accident Without Reconciling Their Own Findings In This Motion

Where a defendant's "own submissions raised issues of fact requiring a trial, they did not meet their burden of making a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case, and summary judgment was improperly granted." *Gjokaj v. Fox*, 25 A.D.3d 759, 760, 809 N.Y.S.2d 156, 157 (2d Dep't 2006) (citing *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 487 N.Y.S.2d 316 (1985)); *accord McGuire v. McGuire*, 197 A.D.3d 897, 900, 153 N.Y.S.3d 280, 285 (4th Dep't 2021) (holding "defendant did not meet his initial burden on the motion because his own submissions raise issues of fact."). Here, Morrison alleged that he slipped on the first step from the 6th floor landing and that NYCHA was negligent in maintaining and allowing the stairs to be slippery. (R. 44-45 (notice of claim), 231-33)).

During discovery, NYCHA produced Building Inspection Reports for the *specific* stairwell between the 6th and 5th floors. (*Id.* 260). And multiple NYCHA BIRs antecedent to Morrison's accident demonstrate NYCHA's actual knowledge, and acknowledgement, of unsatisfactory treads. For example, on 2 May 2018 (14 days before this accident), 2 May 2017, 12 December 2016, and 7 July 2016

NYCHA, apparently thru Santos its designee here, identified unsatisfactory treads. (*Id.* 772-75). Because NYCHA has submitted evidence establishing the dangerous condition of the treads to their motion—and has failed to reconcile these records with the lack of a factual issue—it has not met its burden.

Furthermore, NYCHA improperly waited until reply to address and reconcile its BIR records. As this court has previously held, "a deficiency of proof in moving papers cannot be cured by submitting evidentiary material in reply." *Henry v. Peguero*, 72 A.D.3d 600, 602, 900 N.Y.S.2d 49, 51 (1st Dep't 2010). And here, on reply, NYCHA—transparently feigning—claimed that its BIR findings of unsatisfactory treads at the location of this accident constituted a "general awareness of *dirt*." (R. 795-96 (emphasis added)). Equally disingenuously, NYCHA's claim of tread "dirt" being the basis for its unsatisfactory finding is completely unsupported by the record. Indeed, none of the BIR records actually associate dirt with the treads—this is exactly why *Peguero* precludes a movant from submitted curative proof on reply.

B) <u>NYCHA Improperly Proffers Santos's Affidavit in English When He Used A Spanish Interpreter At His Deposition To Establish The Last Inspection</u>

A premises liability defendant moving for summary judgment is obligated to demonstrate when it "last inspected or cleaned prior to plaintiff's fall, as required to meet its burden on this motion." *Hobbs v. New York City Hous. Auth.*, 168

A.D.3d 634, 635, 91 N.Y.S.3d 685, 686(1st Dep't 2019). In order to establish its last inspection or cleaning, NYCHA annexed the affidavit of Santos—the same person noting on 4 prior occasions the unsatisfactory condition of the treads—to "attest[] that he followed the NYCHA Janitorial Schedule." Santos's affidavit is, however, inadmissible and should be rejected.

In his deposition, Santos—consistent with his right as a witness—demanded the provision of, and used, a Spanish interpreter to communicate. (Santos Dep. 8-9). His affidavit here, however, is in English and contains no certification that it was interpreted to, or even understood, by him and is not in competent evidentiary form. *Leon-Vazquez v. Benjamin*, 2017 N.Y. Misc. LEXIS 7782 at *2-3 (N.Y. Sup. Ct. Jan. 9, 2017) (holding "[a]s to the affidavit, Jose required the services of a Spanish interpreter at deposition; however, the affidavit is written entirely in English. It is not accompanied by a translator's affidavit, which is required of foreign language witnesses. The lack of a translator's affidavit renders Jose's English affidavit facially defective and inadmissible.") (citing *Eustaquio v. 860 Cortlandt Holdings, Inc.*, 95 A.D.3d 548, 548, 944 N.Y.S.2d 78, 78-79 (1st Dep't 2012)).

NYCHA's claim that Santos's English affidavit is admissible under *Ortiz v Food Mach. of Am., Inc.*, 125 A.D.3d 507, 5 N.Y.S.3d 8 (1st Dep't 2015) is misplaced. In *Ortiz* this court noted that an English affidavit and accompanying

Italian Affidavit—"provided for the benefit of the Italian notary"—was admissible when it was undisputed the affiant was fluent in English. The facts, here, are inapposite to *Ortiz* which provides no refuge for NYCHA. NYCHA's designee required an English interpreter for his deposition which obligated NYCHA to have his affidavit interpreted and certified as required by CPLR § 2101(b). Finally, there is nothing in Santos's affidavit, unlike *Ortiz*, establishing English fluency in its written form.[4]

III. NYCHA IS NEGLIGENT BECAUSE THE TREAD HAD INADEQUATE FRICTION COEFFICIENCY BECAUSE OF PAINT NYCHA APPLIED UNDER WET CONDITIONS IN VIOLATION OF ASTM AND UL STANDARDS

A) Morrison's Notice Of Claim Properly Asserts An Inadequate Coefficient Of Friction Claim

As discussed, the trial court improvidently found that Morrison's claim that NYCHA's application of paint to the stair treads caused the tread to be slippery because it had inadequate friction coefficiency was a "new theory." (R. 9). This finding is erroneous and should be reversed.

Initially, a notice of claim is not a device requiring a claimant-plaintiff to itemize all theories of liability in a rote and mechanical manner. *Shmueli v. N.Y. City Police Dep't*, 743 N.Y.S.2d 871, 871, 295 A.D.2d 271, 271 (1st Dep't 2002)

[4] To be clear, the undersigned, also not a native speaker, has no desire to be insensitive on this issue. Rather, we make this argument to show NYCHA's disingenuity and not that of its witness.

(requiring a notice of claim only assert "such a claim or allege any facts from which defendant could have gleaned plaintiff's intention to raise such a claim."). Likewise, the Second Department, in an instructful decision, recently reiterated that "'[t]he Legislature did *not intend that the claimant have the additional burden of pleading causes of action and legal theories, proper for the pleadings*, in the notice of claim. . . . General Municipal Law § 50-e was not meant as a sword to cut down honest claims, but merely as a shield to protect municipalities against spurious ones.'" *Harrison v. City of New York*, 197 A.D.3d 630, 149 N.Y.S.3d 908, (2d Dep't 2021) (emphasis added) (citing *Se Dae Yang v. New York City Health & Hosps. Corp.*, 140 A.D.3d 1051, 35 N.Y.S.3d 350, (2d Dep't 2016)).

Careful review of Morrison's notice of claim reveals that he specifically asserted a theory of inadequate coefficiency of friction. (R. 45 (alleging "in having a floor without an adequate coefficient of friction.")). This is, of course, the very claim advanced by Morrison in opposition to NYCHA's motion. In its underlying reply, NYCHA improperly conflated a *theory* of negligence with the evidentiary *basis* for the theory. For example, NYCHA argued: "Nothing in the Notice of Claim puts NYCHA on notice injuries because of the paint on the stairs or the purported violations of ASTM or Underwriter's Laboratories neither of which was even mentioned in the Notice of Claim." (*Id.* 787). This contention should be rejected.

Morrison's theory of inadequate coefficient of friction is platformed on the application of paint by NYCHA and the resulting violation of ASTM and UL. Stated differently, the tread paint and engineering standards serve as the basis for the theory of negligence—inadequate friction—rather than being *the* theory. NYCHA's position, if accepted, would impose the untenable obligation to every claimant-plaintiff to perform full pre-discovery physical investigations into often complicated and inaccessible areas under the exclusive control of a municipality within 90 days (often less) of an accident. For example, here, Morrison did not know—and could not have known—that NYCHA deliberately caused the treads to be painted before the accident. There is no reading of *Shmueli* supporting this. And this is particularly true given the Second Department's holding in *Harrison* the rejects the extreme concept advanced by NYCHA here.

The trial court improvidently found that Morrison did not assert a claim for inadequate coefficiency of friction and should be reversed.

B) <u>Morrison's Prima Facie Case</u>

A property owner has a non-delegable duty to ensure that its tenants have a safe means of ingress and egress. *Bernstein v. El-Mar Painting & Decorating Co.*, 13 N.Y.2d 1053, 1055, 245 N.Y.S.2d 772, 774 (1963); *accord Richardson v. David Schwager Assocs.*, 249 A.D.2d 531, 531-32, 672 N.Y.S.2d 114, 115 (2d Dep't 1998). A plaintiff must establish that the owner had either actual or constructive

notice of the dangerous condition. *Patterson v. Brennan*, 292 A.D.2d 582, 583, 740 N.Y.S.2d 96, 98 (2d Dep't 2002). However, notice is not required where the evidence demonstrates that the property owner caused or created the condition. *Ortega v. Puccia*, 57 A.D.3d 54, 61, 866 N.Y.S.2d 323, 329 (2d Dep't 2008). And post-accident observations of the dangerous condition implicated in an accident is, contrary to NYCHA's suggestion here, wholly appropriate. *Patrikis v. Arniotis*, 129 A.D.3d 928, 928-29, 12 N.Y.S.3d 174, 175 (2d Dep't 2015) (finding post-accident observation, 2 weeks later, proper).[5]

ASTM D2047-04 and F1637 requires, to achieve adequate slip resistance, a minimum coefficient of friction of 0.50 for a flooring surface. The ASTM standard is buttressed by an identical sister standard in UL 410. The ASTM standard has been specifically recognized by the common law as platforming a negligence claim for inadequate coefficient of friction. *Suponya v. Sr. Louise Demarillac Corp.*, No. 150730-13, 2018 N.Y. Misc. LEXIS 2024, *18 (N.Y. Sup. Ct. 18 May 2018) (holding alleged violation of ASTM D2047-04 can sustain a negligence claim); *Zuniga-Iscoa v. Pasta La Vista, Inc.*, No. 153670-13, 2017 N.Y. Misc. LEXIS 857, *4-5 (N.Y. Sup. Ct. Mar. 7, 2017) (same).

Applying these principles here, Fein performed an inspection of the stairs on 20 October 2020. (R. 777). Fein observed, consistent with Morrison's testimony,

[5] NYCHA's mantra-like claim that Morrison observed the slippery condition *only* after the

that the treads were painted gray. (*Id.*). Testing of the subject tread revealed that it had an inadequate wet coefficient of friction of 0.31. (*Id.*). The paint—applied by a third-party at NYCHA's direction every 3 years—negated the treads' metal traction nodules and dangerously reduced friction in violation of ASTM and UL standards. (*Id.*; *see also id.* 708). Furthermore, even though post-accident observations of the slippery substance are appropriate, Fein opined that it would have been difficult for Morrison to appreciate the slippery substance against the backdrop of metal nodules and dirty gray pain. (*Id.* 778).

Against this backdrop, there is colorable evidence to support NYCHA's negligent maintenance over the stairs. Construed in the light most favorable to Morrison, the non-movant, a jury can find that NYCHA's application of paint on the treads rendered it dangerously slippery when wet in violation of ASTM and UL standards. A jury can further find that NYCHA's 4 prior notations that the treads were unsatisfactory, including a notation 14 days before this accident, establishes that it caused the hazard and was, otherwise, independently aware of it. And because coefficient of friction standards implicates wet surfaces, the provenance of the slippery substance here is largely irrelevant. But for NYCHA's application of paint to the treads, a slippery substance would not have caused the coefficient of friction to drop to an inadequate level.

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accident is irrelevant.

CONCLUSION

For the reasons stated above, the trial court's decision should be reversed and this matter remanded for a trial on liability and damages.

Dated: 21 May 2022
Mineola, New York

Respectfully submitted,

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PRINTING SPECIFICATIONS STATEMENT
PURSUANT TO 22 NYCRR § 1250.8[j]

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Supreme Court of the State of New York
Appellate Division: First Department

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GREGORY MORRISON,

Plaintiff-Appellant,

-against-

NEW YORK CITY HOUSING AUTHORITY,

Defendant-Respondent.

STATEMENT PURSUANT TO CPLR 5531

1. Supreme Court, New York County, Index No. 153970/2019.

2. The full names of the original parties are the same; there has been no change.

3. Action commenced in Supreme Court, New York County.

4. Action was commenced by the filing of a Summons and Complaint, dated April 17, 2019.

5. Nature of action: Torts.

6. This appeal is from the Decision and Order of the Hon. Paul A. Goetz, dated April 20, 2022.

7. Appeal is on the Record (reproduced) method.

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Affidavit of Service by Mail

GREGORY MORRISON v. NEW YORK CITY HOUSING AUTHORITY

Supreme Court, New York County, Index No. 153970/2019

State of New York }
County of Kings }

Jonathan Didia being duly sworn, deposes and says that he is over the age of 18 years of age, is not a party to the action and is employed by Dick Bailey Service, Inc.

on Monday, May 23, 2022 deponent served 1 copy(s) of the within

Brief[X] Record[ ] Appendix[ ] Note of Issue[ ] Other [ ]_____

upon

Leahey & Johnson, P.C.
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Jonathan Didia

Sworn to before me
Monday, May 23, 2022

WILLIAM BAILEY
Notary Public, State of New York
No. 01BA6311581
Qualified in Richmond County
Commission Expires Sept. 15, 2022

98676

68 N.Y.2d 320
Court of Appeals of New York.

Maria ALVAREZ, Respondent,
v.
PROSPECT HOSPITAL et al.,
Defendants,
and
Jesse D. Stark, Appellant.
(And a Third-Party Action.)

Nov. 11, 1986.

Synopsis
Patient brought medical malpractice action against radiologist, treating physicians, and hospital. The Supreme Court, Special Term, Bronx County, Mercorella, J., denied radiologist's motion for summary judgment. Radiologist appealed. The Supreme Court, Appellate Division, 115 A.D.2d 444, 496 N.Y.S.2d 1006, affirmed and certified question. Leave to appeal was granted. The Court of Appeals, Alexander, J., held that: (1) patient failed to create issue of material fact to rebut radiologist's prima facie case that he was not liable, and (2) radiologist, who never performed physical examination on patient and who made timely and accurate diagnosis which formed basis for patient's allegations of malpractice against treating physicians, breached no duty owed to patient and was not liable for medical malpractice.

Reversed.

Attorneys and Law Firms

***321 ***923 **572** Patricia D'Alvia and James B. Reich, New York City, for appellant.

***322** Mitchell D. Kessler and Aaron J. Broder, New York City, for respondent.

*****924 OPINION OF THE COURT**

ALEXANDER, Judge.

In this medical malpractice action, the Appellate Division has affirmed Supreme Court's denial of defendant Stark's motion for summary judgment and has granted leave to appeal to this court on the certified question: "Was the order of Supreme Court, as affirmed by this Court, properly made?" For the reasons that follow, we reverse the order of the Appellate Division, grant defendant Stark's motion for summary ****573** judgment, and answer the certified question in the negative.

Plaintiff Maria Alvarez was admitted to Prospect Hospital twice in 1978 and twice in 1979, each time complaining of abdominal pain. Dr. Stark, as the chief of radiology at the hospital, interpreted several radiological studies performed on plaintiff during these visits. As relevant here, during plaintiff's second visit to the hospital in 1978, Dr. Stark interpreted a barium enema X ray as revealing "cecal neoplasm" of the ***323** cecum of the colon, and so indicated in his written report transmitted to plaintiff's attending physician. Plaintiff was discharged from the hospital a short time later with a diagnosis of gastroenteritis. During plaintiff's second visit in 1979, Dr. Stark again interpreted a barium enema X ray of the plaintiff and again made a finding of "cecal neoplasm", which was indicated in his written report again transmitted to plaintiff's attending physician. A short time later, plaintiff underwent surgery to remove a malignant growth in her colon.

This action was thereafter commenced against the hospital and nine physicians, including Dr. Stark. Plaintiff's amended complaint alleges, in general and unparticularized terms, that the medical care and treatment rendered by each defendant "was so negligent, reckless and careless as to constitute the * * * care and treatment as negligence, carelessness, recklessness, misfeasance, malfeasance and malpractice". In her bill of particulars, plaintiff alleged that she was unable to state with exactitude which specific negligent acts were performed by each particular defendant but claimed that "defendants violated every known medical standard in existence at the time of plaintiff's care and treatment" and in over three pages of boilerplate allegations described acts and omissions constituting medical malpractice. Plaintiff relied almost entirely upon Dr. Stark's reports indicating the presence of a cecal neoplasm in order to establish her claim of malpractice for "failing to discover and/or treat the nature and cause of lesions and/or irregularities noted in barium enemas", "failing to explain, attempt to explain, or perform tests, procedures, examinations, and/or surgery which would have explained

the inconsistency between the normal colonoscopic examination of plaintiff and the lesions and/or irregularities noted upon the barium enema(s) performed" and "failing to determine the origin, nature and/or cause of a lesion which was found in a barium enema".

Following completion of his examination before trial, Dr. Stark moved for summary judgment, including in his motion papers an affirmation of his attorney, to which were attached the relevant hospital records and portions of his deposition testimony. The attorney's affirmation pointed out that plaintiff had adopted Dr. Stark's interpretations of the barium enema X rays as the basis for her claim against the other defendants that there was a failure to diagnose the cecal neoplasm at an early stage of her treatment. Counsel argued that because ***324** plaintiff had not alleged in either her complaint or bill of particulars that Dr. Stark's interpretation of the X rays was erroneous or incomplete, judgment as a matter of law was warranted. It was argued that the hospital records supported the conclusion that Dr. Stark had made a timely and accurate diagnosis which formed the basis for plaintiff's allegations of malpractice against her treating doctors. Dr. Stark's deposition testimony asserted that his diagnosis was correct and that, as a radiologist, he is not required to treat patients and indeed never performed a physical examination on the plaintiff.

*****925** In an attorney's affidavit submitted in opposition to the motion, plaintiff contended that there were issues of fact as to whether Dr. Stark, after having interpreted the radiological studies ordered by the treating physicians, should have discussed such results with the treating physicians and should have monitored the plaintiff's condition to insure that the treating physicians dealt properly with the plaintiff's condition. Supreme Court denied defendant's motion for summary judgment, finding that questions of fact had been raised concerning ****574** the duty, if any, of the defendant with respect to the plaintiff's treatment. A divided Appellate Division affirmed (115 A.D.2d 444, 496 N.Y.S.2d 1006). We now reverse.

As we have stated frequently, the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact (*Winegrad v. New York Univ. Med. Center,* 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316, 476 N.E.2d 642; *Zuckerman v. City of New York,* 49 N.Y.2d 557, 562, 427 N.Y.S.2d 595, 404 N.E.2d 718; *Sillman v. Twentieth Century-Fox Film Corp.,* 3 N.Y.2d 395, 404, 165 N.Y.S.2d 498, 144 N.E.2d 387). Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v. New York Univ. Med. Center, supra,* 64 N.Y.2d at p. 853, 487 N.Y.S.2d 316, 476 N.E.2d 642). Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*Zuckerman v. City of New York, supra,* 49 N.Y.2d at p. 562, 427 N.Y.S.2d 595, 404 N.E.2d 718). In a medical malpractice action, a plaintiff, in opposition to a defendant physician's summary judgment motion, must submit evidentiary facts or materials to rebut the prima facie showing by the defendant physician that he was not negligent in treating plaintiff so as to demonstrate the existence of a triable issue of fact (***325** *Fileccia v. Massapequa Gen. Hosp.,* 63 N.Y.2d 639, 479 N.Y.S.2d 520, 468 N.E.2d 702, *affg.* 99 A.D.2d 796, 472 N.Y.S.2d 127; *Neuman v. Greenstein,* 99 A.D.2d 1018, 473 N.Y.S.2d 806; *Buonagurio v. Drago,* 65 A.D.2d 830, 409 N.Y.S.2d 835, *lv. denied* 46 N.Y.2d 708, 414 N.Y.S.2d 1026, 386 N.E.2d 1337). General allegations of medical malpractice, merely conclusory and unsupported by competent evidence tending to establish the essential elements of medical malpractice, are insufficient to defeat defendant physician's summary judgment motion (*Fileccia v. Massapequa Gen. Hosp., supra; Bustamonte v. Koval,* 98 A.D.2d 739, 469 N.Y.S.2d 441; *Pan v. Coburn,* 95 A.D.2d 670, 463 N.Y.S.2d 223; *Himber v. Pfizer Labs.,* 82 A.D.2d 776, 440 N.Y.S.2d 649; *Baldwin v. Gretz,* 65 A.D.2d 876, 410 N.Y.S.2d 394).

On this record, defendant's submissions in support of his motion for summary judgment satisfy the prima facie showing required to warrant judgment as a matter of law if not rebutted by the plaintiff. A fair reading of the attorney's affirmation, the hospital records and the defendant's deposition testimony compel the conclusion that no material triable issues of fact exist as to the claims of malpractice asserted against the defendant in the amended complaint as amplified by the bill of particulars. The fact that defendant's supporting proof was placed before the court by way of an attorney's affirmation annexing deposition testimony and other proof, rather than affidavits of fact on personal knowledge, is not fatal to the motion (*Olan v. Farrell Lines,* 64 N.Y.2d 1092, 1093, 489 N.Y.S.2d 884, 479 N.E.2d 229). Dr. Stark's deposition testimony is supported by the hospital records and rebuts with factual proof plaintiff's claim of malpractice and thus is sufficient proof that he properly and timely diagnosed the plaintiff's condition and did not depart from the accepted standard of care in the medical community (*Witt v. Agin,* 67 N.Y.2d 919, 501 N.Y.S.2d 816, 492 N.E.2d 1231, *affg.* *****926** 112 A.D.2d 64, 490

N.Y.S.2d 778; *Winegrad v. New York Univ. Med. Center,* 64 N.Y.2d 851, 487 N.Y.S.2d 316, 476 N.E.2d 642, *supra; Fileccia v. Massapequa Gen. Hosp.,* 63 N.Y.2d 639, 479 N.Y.S.2d 520, 468 N.E.2d 702, *affg.* 99 A.D.2d 796, 472 N.Y.S.2d 127, *supra; Neuman v. Greenstein,* 99 A.D.2d 1018, 473 N.Y.S.2d 806, *supra).*

Winegrad, 64 N.Y.2d 851, 487 N.Y.S.2d 316, 476 N.E.2d 642, *supra* is not to the contrary. There, the plaintiff alleged, among other things, that the defendant doctors had misrepresented that the surgery ****575** was completed when in fact they had failed to complete the surgery and alleged further that they were not qualified to treat plaintiff. All that was tendered by the doctors in support of their summary judgment motion was an affidavit by each which did no more than simply state, in conclusory fashion, that they had acted in conformity with the appropriate standard of care. On the record in that case, we held that the "bare conclusory assertions echoed by all three defendants that they did not deviate from good and accepted medical ***326** practices, with no factual relationship to the alleged injury, do not establish that the cause of action has no merit so as to entitle defendants to summary judgment" (*id.,* at p. 853, 487 N.Y.S.2d 316, 476 N.E.2d 642). By contrast, Dr. Stark's papers here refute by specific factual reference the allegations of malpractice made by plaintiff in her amended complaint and bill of particulars.

This case is substantially similar to *Fileccia v. Massapequa Gen. Hosp.,* 63 N.Y.2d 639, 479 N.Y.S.2d 520, 468 N.E.2d 702, *affg.* 99 A.D.2d 796, 472 N.Y.S.2d 127, *supra*, where we affirmed an Appellate Division order granting summary judgment to a defendant radiologist in a medical malpractice action. The plaintiff there was a patient in the emergency room of the hospital and was X-rayed at the attending physician's request because of possible fractures of the cheekbone. The physician interpreted the X rays as not indicating any fractures and plaintiff was discharged. Two days later, defendant, a Board certified radiologist and head of the hospital's pathology department, reviewed the X rays and concurred in the interpretation that no fractures were revealed. Subsequently, plaintiff was diagnosed at another hospital as having sustained fractures of certain facial bones and was hospitalized. Plaintiff commenced a medical malpractice action claiming the defendant radiologist negligently interpreted the X rays. Defendant moved for summary judgment, submitting a personal affidavit, an affirmation of his attorney and his deposition testimony, arguing that he did not perform the X-ray examination, did not treat or examine the plaintiff and that the X rays he had interpreted did not reveal any fractures. In response to defendant's motion, plaintiff submitted an attorney's affirmation to which was annexed copies of the medical records and X-ray reports revealing the alleged fractures. In reversing Special Term and granting summary judgment, the Appellate Division noted that the radiologist had never performed a physical examination of the plaintiff and his only contact with the plaintiff was to read X rays taken of plaintiff by others. Under these circumstances, the court ruled that defendant had established his right to judgment as a matter of law and that plaintiff's submissions were devoid of any medical evidence tending to establish that defendant had negligently read or interpreted the X rays and therefore were not sufficient to defeat the motion for summary judgment (*see also, Witt v. Agin,* 67 N.Y.2d 919, 501 N.Y.S.2d 816, 492 N.E.2d 1231, *affg.* 112 A.D.2d 64, 490 N.Y.S.2d 778, *supra).*

Here, too, defendant's submissions are sufficient to establish his entitlement to judgment as a matter of law and the burden thus shifted to plaintiff to produce evidentiary proof in ***327** admissible form establishing the existence of material questions of fact. Plaintiff's sole submission was an affidavit of her attorney, which attempted for the first time to create a theory of liability against defendant Stark different from that asserted in the amended complaint and the bill of particulars. This new theory was predicated on the *****927** hypothesis that Stark had a duty to consult with the attending physicians concerning his interpretation of the X rays notwithstanding that his reports containing his interpretations were forwarded to the attending physicians. Just as the burden of a party opposing a motion for summary judgment is not met merely by repeating or incorporating by reference the allegations contained in the pleadings or bills of particulars (*Indig v. Finkelstein,* 23 N.Y.2d 728, 729, 296 N.Y.S.2d 370, 244 N.E.2d 61), neither is that burden met by the unsubstantiated ****576** assertions or speculations of plaintiff's counsel that a defendant may have breached a possible duty of care (*Fileccia v. Massapequa Gen. Hosp., supra; Zuckerman v. City of New York, supra,* 49 N.Y.2d at p. 562, 427 N.Y.S.2d 595, 404 N.E.2d 718; *see, Roche v. Hearst Corp.,* 53 N.Y.2d 767, 769, 439 N.Y.S.2d 352, 421 N.E.2d 844; *Barr v. County of Albany,* 50 N.Y.2d 247, 257–258, 428 N.Y.S.2d 665, 406 N.E.2d 481). In this case, in order to defeat defendant's motion for summary judgment some statement of expert medical opinion was required to demonstrate the viability of the new theory of liability hypothesized by plaintiff's counsel (*Witt v. Agin,* 67 N.Y.2d 919, 501 N.Y.S.2d 816, 492 N.E.2d 1231, *affg.* 112 A.D.2d 64, 490 N.Y.S.2d 778, *supra; Fileccia v. Massapequa Gen. Hosp.,* 63 N.Y.2d 639, 479 N.Y.S.2d 520, 468 N.E.2d 702, *affg.* 99 A.D.2d 796, 472 N.Y.S.2d 127, *supra; Immediate v. St. John's*

Queens Hosp., 48 N.Y.2d 671, 421 N.Y.S.2d 875, 397 N.E.2d 385; *Neuman v. Greenstein,* 99 A.D.2d 1018, 473 N.Y.S.2d 806, *supra; Pan v. Coburn,* 95 A.D.2d 670, 463 N.Y.S.2d 223, *supra; Himber v. Pfizer Labs.,* 82 A.D.2d 776, 440 N.Y.S.2d 649, *supra*).

Accordingly, the order of the Appellate Division should be reversed, Dr. Stark's motion for summary judgment granted and the certified question answered in the negative.

WACHTLER, C.J., and MEYER, SIMONS, KAYE, TITONE and HANCOCK, JJ., concur.

Order reversed, with costs, defendant Stark's motion for summary judgment granted, and question certified answered in the negative.

All Citations

68 N.Y.2d 320, 501 N.E.2d 572, 508 N.Y.S.2d 923

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106 S.Ct. 2505
Supreme Court of the United States

Jack ANDERSON, et al., Petitioners
v.
LIBERTY LOBBY, INC. and Willis A. Carto.

No. 84–1602.
|
Argued Dec. 3, 1985.
|
Decided June 25, 1986.

Synopsis

Libel action was brought against magazine, its publisher, and its chief executive officer. The United States District Court for the District of Columbia, 562 F.Supp. 201, granted summary judgment in favor of defendants and plaintiffs appealed. The Court of Appeals for the District of Columbia Circuit, 746 F.2d. 1563,affirmed in part and reversed in part. The Supreme Court, Justice White, held that: (1) ruling on motion for summary judgment or directed verdict necessarily implicates that substantive evidentiary standard of proof that would apply at a trial on the merits, and (2) when determining if genuine factual issue as to actual malice exists in a libel suit brought by a public figure, trial judge must bear in mind the actual quantum and quality of proof necessary to support liability under the *NewYork Times* doctrine.

Vacated and remanded.

Justice Brennan filed a dissenting opinion.

Justice Rehnquist filed a dissenting opinion in which Chief Justice Burger joined.

****2506 *242** *Syllabus*[*]

In *New York Times Co. v. Sullivan,* 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686, it was held that, in a libel suit brought by a public official (extended by later cases to public figures), the First Amendment requires ****2507** the plaintiff to show that in publishing the alleged defamatory statement the defendant acted with actual malice. It was further held that such actual malice must be shown with "convincing clarity." Respondents, a nonprofit corporation described as a "citizens' lobby" and its founder, filed a libel action in Federal District Court against petitioners, alleging that certain statements in a magazine published by petitioners were false and derogatory. Following discovery, petitioners moved for summary judgment pursuant to Federal Rule of Civil Procedure 56, asserting that because respondents were public figures they were required to prove their case under the *New York Times* standards and that summary judgment was proper because actual malice was absent as a matter of law in view of an affidavit by the author of the articles in question that they had been thoroughly researched and that the facts were obtained from numerous sources. Opposing the motion, respondents claimed that an issue of actual malice was presented because the author had relied on patently unreliable sources in preparing the articles. After holding that *New York Times* applied because respondents were limited-purpose public figures, the District Court entered summary judgment for petitioners on the ground that the author's investigation and research and his reliance on numerous sources precluded a finding of actual malice. Reversing as to certain of the allegedly defamatory statements, the Court of Appeals held that the requirement that actual malice be proved by clear and convincing evidence need not be considered at the summary judgment stage, and that with respect to those statements summary judgment had been improperly granted because a jury could reasonably have concluded that the allegations were defamatory, false, and made with actual malice.

Held: The Court of Appeals did not apply the correct standard in reviewing the District Court's grant of summary judgment. Pp. 2509–2515.

(a) Summary judgment will not lie if the dispute about a material fact is "genuine," that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. At the summary judgment stage, the trial judge's function is not himself to weigh the evidence and ***243** determine the truth of the matter but to determine whether there is a genuine issue for trial. There is no such issue unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. In essence, the inquiry is whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law. Pp. 2509–2512.

(b) A trial court ruling on a motion for summary judgment in a case such as this must be guided by the *New York*

Times "clear and convincing" evidentiary standard in determining whether a genuine issue of actual malice exists, that is, whether the evidence is such that a reasonable jury might find that actual malice had been shown with convincing clarity. Pp. 2512–2514.

(c) A plaintiff may not defeat a defendant's properly supported motion for summary judgment in a libel case such as this one without offering any concrete evidence from which a reasonable jury could return a verdict in his favor and by merely asserting that the jury might disbelieve the defendant's denial of actual malice. The movant has the burden of showing that there is no genuine issue of fact, but the plaintiff is not thereby relieved of his own burden of producing in turn evidence that would support a jury verdict. Pp. 2514–2515.

241 U.S.App.D.C. 246, 746 F.2d 1563, vacated and remanded.

WHITE, J., delivered the opinion of the Court, in which MARSHALL, BLACKMUN, POWELL, STEVENS, and O'CONNOR, JJ., joined. BRENNAN, J., filed a dissenting opinion, *post,* p. ——. REHNQUIST, J., filed a dissenting opinion, in which BURGER, C.J., joined, *post,* p. ——.

Attorneys and Law Firms

David J. Branson argued the cause for petitioners. With him on the briefs was *David O. Bickart.*

Mark Lane argued the cause for respondents. With him on the brief were *Linda Huber* and *Fleming Lee.**

* Briefs of *amici curiae* urging reversal were filed for the American Newspaper Publishers Association et al. by *Robert D. Sack, Robert S. Warren, W. Terry Maguire, Richard M. Schmidt, Jr., R. Bruce Rich, Lawrence Gunnels, Harvey L. Lipton, Peter C. Gould,* and *Jane E. Kirtley;* for the Reader's Digest Association, Inc., by *Walter R. Allan* and *Karen J. Wagner.*

Briefs of *amici curiae* urging affirmance were filed for the American Legal Foundation by *Daniel J. Popeo;* and for the Synanon Church et al. by *Jonathan W. Lubell, Philip C. Bourdette, David R. Benjamin,* and *Andrew J. Weill.*

Opinion

***244 **2508** Justice WHITE delivered the opinion of the Court.

In *New York Times Co. v. Sullivan,* 376 U.S. 254, 279–280, 84 S.Ct. 710, 725–726, 11 L.Ed.2d 686 (1964), we held that, in a libel suit brought by a public official, the First Amendment requires the plaintiff to show that in publishing the defamatory statement the defendant acted with actual malice—"with knowledge that it was false or with reckless disregard of whether it was false or not." We held further that such actual malice must be shown with "convincing clarity." *Id.,* at 285–286, 84 S.Ct., at 728–729. See also *Gertz v. Robert Welch, Inc.,* 418 U.S. 323, 342, 94 S.Ct. 2997, 3008, 41 L.Ed.2d 789 (1974). These *New York Times* requirements we have since extended to libel suits brought by public figures as well. See, *e.g., Curtis Publishing Co. v. Butts,* 388 U.S. 130, 87 S.Ct. 1975, 18 L.Ed.2d 1094 (1967).

This case presents the question whether the clear-and-convincing-evidence requirement must be considered by a court ruling on a motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure in a case to which *New York Times* applies. The United States Court of Appeals for the District of Columbia Circuit held that that requirement need not be considered at the summary judgment stage. 241 U.S.App.D.C. 246, 746 F.2d 1563 (1984). We granted certiorari, 471 U.S. 1134, 105 S.Ct. 2672, 86 L.Ed.2d 691 (1985), because that holding was in conflict with decisions of several other Courts of Appeals, which had held that the *New York Times* requirement of clear and convincing evidence must be considered on a motion for summary judgment.[1] We now reverse.

I

Respondent Liberty Lobby, Inc., is a not-for-profit corporation and self-described "citizens' lobby." Respondent Willis Carto is its founder and treasurer. In October 1981, ***245** The Investigator magazine published two articles: "The Private World of Willis Carto" and "Yockey: Profile of an American Hitler." These articles were introduced by a third, shorter article entitled "America's Neo-Nazi Underground: Did *Mein Kampf* Spawn Yockey's *Imperium,* a Book Revived by Carto's Liberty Lobby?" These articles portrayed respondents as neo-Nazi, anti-Semitic, racist, and Fascist.

Respondents filed this diversity libel action in the United States District Court for the District of Columbia, alleging that some 28 statements and 2 illustrations in the 3 articles

were false and derogatory. Named as defendants in the action were petitioner Jack Anderson, the publisher of The Investigator, petitioner Bill Adkins, president and chief executive officer of the Investigator Publishing Co., and petitioner Investigator Publishing Co. itself.

Following discovery, petitioners moved for summary judgment pursuant to Rule 56. In their motion, petitioners asserted that because respondents are public figures they were required to prove their case under the standards set forth in *New York Times.* Petitioners also asserted that summary judgment was proper because actual malice was absent as a matter of law. In support of this latter assertion, petitioners submitted the affidavit of Charles Bermant, an employee of petitioners and the author of the two longer articles.[2] In this affidavit, Bermant stated that he had spent a substantial amount of time researching ****2509** and writing the articles and that his facts were obtained from a wide variety of sources. He also stated that he had at all times believed and still believed that the facts contained in the articles were truthful and accurate. Attached to this affidavit was an appendix in which Bermant detailed the sources for each of the statements alleged by respondents to be libelous.

***246** Respondents opposed the motion for summary judgment, asserting that there were numerous inaccuracies in the articles and claiming that an issue of actual malice was presented by virtue of the fact that in preparing the articles Bermant had relied on several sources that respondents asserted were patently unreliable. Generally, respondents charged that petitioners had failed adequately to verify their information before publishing. Respondents also presented evidence that William McGaw, an editor of The Investigator, had told petitioner Adkins before publication that the articles were "terrible" and "ridiculous."

In ruling on the motion for summary judgment, the District Court first held that respondents were limited-purpose public figures and that *New York Times* therefore applied.[3] The District Court then held that Bermant's thorough investigation and research and his reliance on numerous sources precluded a finding of actual malice. Thus, the District Court granted the motion and entered judgment in favor of petitioners.

On appeal, the Court of Appeals affirmed as to 21 and reversed as to 9 of the allegedly defamatory statements. Although it noted that respondents did not challenge the District Court's ruling that they were limited-purpose public ***247** figures and that they were thus required to prove their case under *New York Times,* the Court of Appeals nevertheless held that for the purposes of summary judgment the requirement that actual malice be proved by clear and convincing evidence, rather than by a preponderance of the evidence, was irrelevant: To defeat summary judgment respondents did not have to show that a jury could find actual malice with "convincing clarity." The court based this conclusion on a perception that to impose the greater evidentiary burden at summary judgment "would change the threshold summary judgment inquiry from a search for a minimum of facts supporting the plaintiff's case to an evaluation of the weight of those facts and (it would seem) of the weight of at least the defendant's uncontroverted facts as well." 241 U.S.App.D.C., at 253, 746 F.2d, at 1570. The court then held, with respect to nine of the statements, that summary judgment had been improperly granted because "a jury could reasonably conclude that the ... allegations were defamatory, false, and made with actual malice." *Id.,* at 260, 746 F.2d at 1577.

II

A

Our inquiry is whether the Court of Appeals erred in holding that the heightened evidentiary requirements that apply to proof of actual malice in this *New York Times* case need not be considered for the purposes of a motion for summary judgment. Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment "shall be rendered forthwith if ****2510** the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." By its very terms, this standard provides that the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported ***248** motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact.

As to materiality, the substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted. See generally 10A C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 2725, pp. 93–95

(1983). This materiality inquiry is independent of and separate from the question of the incorporation of the evidentiary standard into the summary judgment determination. That is, while the materiality determination rests on the substantive law, it is the substantive law's identification of which facts are critical and which facts are irrelevant that governs. Any proof or evidentiary requirements imposed by the substantive law are not germane to this inquiry, since materiality is only a criterion for categorizing factual disputes in their relation to the legal elements of the claim and not a criterion for evaluating the evidentiary underpinnings of those disputes.

More important for present purposes, summary judgment will not lie if the dispute about a material fact is "genuine," that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. In *First National Bank of Arizona v. Cities Service Co.,* 391 U.S. 253, 88 S.Ct. 1575, 20 L.Ed.2d 569 (1968), we affirmed a grant of summary judgment for an antitrust defendant where the issue was whether there was a genuine factual dispute as to the existence of a conspiracy. We noted Rule 56(e)'s provision that a party opposing a properly supported motion for summary judgment " 'may not rest upon the mere allegations or denials of his pleading, but ... must set forth specific facts showing that there is a genuine issue for trial.' " We observed further that

> "[i]t is true that the issue of material fact required by Rule 56(c) to be present to entitle a party to proceed to ***249** trial is not required to be resolved conclusively in favor of the party asserting its existence; rather, all that is required is that sufficient evidence supporting the claimed factual dispute be shown to require a jury or judge to resolve the parties' differing versions of the truth at trial." 391 U.S., at 288–289, 88 S.Ct., at 1592.

We went on to hold that, in the face of the defendant's properly supported motion for summary judgment, the plaintiff could not rest on his allegations of a conspiracy to get to a jury without "any significant probative evidence tending to support the complaint." *Id.,* at 290, 88 S.Ct., at 1593.

Again, in *Adickes v. S.H. Kress & Co.,* 398 U.S. 144, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970), the Court emphasized that the availability of summary judgment turned on whether a proper jury question was presented. There, one of the issues was whether there was a conspiracy between private persons and law enforcement officers. The District Court granted summary judgment for the defendants, stating that there was no evidence from which reasonably minded jurors might draw an inference of conspiracy. We reversed, pointing out that the moving parties' submissions had not foreclosed the possibility of the existence of certain facts from which "it would be open to a jury ... to infer from the circumstances" that there had been a meeting of the minds. *Id.,* at 158–159, 90 S.Ct., at 1608, 1609.

Our prior decisions may not have uniformly recited the same language in describing genuine factual issues under ****2511** Rule 56, but it is clear enough from our recent cases that at the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial. As *Adickes, supra,* and *Cities Service, supra,* indicate, there is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. *Cities Service, supra,* 391 U.S., at 288–289, 88 S.Ct., at 1592. If the evidence is merely colorable, *Dombrowski v. Eastland,* 387 U.S. 82, 87 S.Ct. 1425, 18 L.Ed.2d 577 (1967) (*per curiam*), or is not significantly probative, ***250** *Cities Service, supra,* at 290, 88 S.Ct., at 1592, summary judgment may be granted.

That this is the proper focus of the inquiry is strongly suggested by the Rule itself. Rule 56(e) provides that, when a properly supported motion for summary judgment is made,[4] the adverse party "must set forth specific facts showing that there is a genuine issue for trial."[5] And, as we noted above, Rule 56(c) provides that the trial judge shall then grant summary judgment if there is no genuine issue as to any material fact and if the moving party is entitled to judgment as a matter of law. There is no requirement that the trial judge make findings of fact.[6] The inquiry performed is the threshold inquiry of determining whether there is the need for a trial—whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party.

Petitioners suggest, and we agree, that this standard mirrors the standard for a directed verdict under Federal Rule of Civil Procedure 50(a), which is that the trial judge must direct a verdict if, under the governing law, there can be but one reasonable conclusion as to the verdict. *Brady v. Southern R. Co.,* 320 U.S. 476, 479–480, 64 S.Ct. 232, 234, 88 L.Ed. 239 (1943). If reasonable minds could differ as to the import of the evidence, however, ***251** a verdict should not be directed. *Wilkerson v. McCarthy,* 336 U.S. 53, 62, 69 S.Ct. 413, 417, 93 L.Ed. 497 (1949). As the Court long ago said in *Improvement Co. v. Munson,* 14 Wall. 442, 448, 20 L.Ed. 867 (1872), and has several times repeated:

"Nor are judges any longer required to submit a

> question to a jury merely because some evidence has been introduced by the party having the burden of proof, unless the evidence be of such a character that it would warrant the jury in finding a verdict in favor of that party. Formerly it was held that if there was what is called a *scintilla* of evidence in support of a case the judge was bound to leave it to the jury, but recent decisions of high authority have established a more reasonable rule, that in every case, before the evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury could properly proceed to find a verdict for the party producing it, upon whom the *onus* of proof is imposed." (Footnotes omitted.)

See also *Pleasants v. Fant,* 22 Wall. 116, 120–121, 22 L.Ed. 780 (1875); *Coughran v. Bigelow,* 164 U.S. 301, 307, 17 S.Ct. 117, 119, 41 L.Ed. 442 (1896); *Pennsylvania R. Co. v. Chamberlain,* 288 U.S. 333, 343, 53 S.Ct. 391, 394, 77 L.Ed. 819 (1933).

****2512** The Court has said that summary judgment should be granted where the evidence is such that it "would require a directed verdict for the moving party." *Sartor v. Arkansas Gas Corp.,* 321 U.S. 620, 624, 64 S.Ct. 724, 727, 88 L.Ed. 967 (1944). And we have noted that the "genuine issue" summary judgment standard is "very close" to the "reasonable jury" directed verdict standard: "The primary difference between the two motions is procedural; summary judgment motions are usually made before trial and decided on documentary evidence, while directed verdict motions are made at trial and decided on the evidence that has been admitted." *Bill Johnson's Restaurants, Inc. v. NLRB,* 461 U.S. 731, 745, n. 11, 103 S.Ct. 2161, 2171, n. 11, 76 L.Ed.2d 277 (1983). In essence, though, the inquiry under each is the same: whether the evidence presents a sufficient disagreement to require submission ***252** to a jury or whether it is so one-sided that one party must prevail as a matter of law.

B

Progressing to the specific issue in this case, we are convinced that the inquiry involved in a ruling on a motion for summary judgment or for a directed verdict necessarily implicates the substantive evidentiary standard of proof that would apply at the trial on the merits. If the defendant in a run-of-the-mill civil case moves for summary judgment or for a directed verdict based on the lack of proof of a material fact, the judge must ask himself not whether he thinks the evidence unmistakably favors one side or the other but whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented. The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff. The judge's inquiry, therefore, unavoidably asks whether reasonable jurors could find by a preponderance of the evidence that the plaintiff is entitled to a verdict—"whether there is [evidence] upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the *onus* of proof is imposed." *Munson, supra,* 14 Wall., at 448.

In terms of the nature of the inquiry, this is no different from the consideration of a motion for acquittal in a criminal case, where the beyond-a-reasonable-doubt standard applies and where the trial judge asks whether a reasonable jury could find guilt beyond a reasonable doubt. See *Jackson v. Virginia,* 443 U.S. 307, 318–319, 99 S.Ct. 2781, 2788–2789, 61 L.Ed.2d 560 (1979). Similarly, where the First Amendment mandates a "clear and convincing" standard, the trial judge in disposing of a directed verdict motion should consider whether a reasonable factfinder could conclude, for example, that the plaintiff had shown actual malice with convincing clarity.

***253** The case for the proposition that a higher burden of proof should have a corresponding effect on the judge when deciding whether to send the case to the jury was well made by the Court of Appeals for the Second Circuit in *United States v. Taylor,* 464 F.2d 240 (2d Cir.1972), which overruled *United States v. Feinberg,* 140 F.2d 592 (2d Cir.1944), a case holding that the standard of evidence necessary for a judge to send a case to the jury is the same in both civil and criminal cases even though the standard that the jury must apply in a criminal case is more demanding than in civil proceedings. Speaking through Judge Friendly, the Second Circuit said: "It would seem at first blush—and we think also at second—that more 'facts in evidence' are needed for the judge to allow [reasonable jurors to pass on a claim] when the proponent is required to establish [the claim] not merely by a preponderance of the evidence but ... beyond a reasonable doubt." 464 F.2d, at 242. The court could not find a "satisfying explanation in the *Feinberg* opinion why the judge should not place this higher burden on the prosecution in criminal proceedings before sending the case to the jury." *Ibid.* The *Taylor* court ****2513** also pointed out that almost all the Circuits had adopted something like Judge Prettyman's formulation in *Curley v. United States,* 160 F.2d 229, 232–233 (D.C.Cir.1947):

"The true rule, therefore, is that a trial judge, in passing

> upon a motion for directed verdict of acquittal, must determine whether upon the evidence, giving full play to the right of the jury to determine credibility, weigh the evidence, and draw justifiable inferences of fact, a reasonable mind might fairly conclude guilt beyond a reasonable doubt. If he concludes that upon the evidence there must be such a doubt in a reasonable mind, he must grant the motion; or, to state it another way, if there is no evidence upon which a reasonable mind might fairly conclude guilt beyond reasonable doubt, the motion must be granted. If he concludes that either of the ***254** two results, a reasonable doubt or no reasonable doubt, is fairly possible, he must let the jury decide the matter."

This view is equally applicable to a civil case to which the "clear and convincing" standard applies. Indeed, the *Taylor* court thought that it was implicit in this Court's adoption of the clear-and-convincing-evidence standard for certain kinds of cases that there was a "concomitant duty on the judge to consider the applicable burden when deciding whether to send a case to the jury." 464 F.2d, at 243. Although the court thought that this higher standard would not produce different results in many cases, it could not say that it would never do so.

Just as the "convincing clarity" requirement is relevant in ruling on a motion for directed verdict, it is relevant in ruling on a motion for summary judgment. When determining if a genuine factual issue as to actual malice exists in a libel suit brought by a public figure, a trial judge must bear in mind the actual quantum and quality of proof necessary to support liability under *New York Times.* For example, there is no genuine issue if the evidence presented in the opposing affidavits is of insufficient caliber or quantity to allow a rational finder of fact to find actual malice by clear and convincing evidence.

Thus, in ruling on a motion for summary judgment, the judge must view the evidence presented through the prism of the substantive evidentiary burden. This conclusion is mandated by the nature of this determination. The question here is whether a jury could reasonably find *either* that the plaintiff proved his case by the quality and quantity of evidence required by the governing law *or* that he did not. Whether a jury could reasonably find for either party, however, cannot be defined except by the criteria governing what evidence would enable the jury to find for either the plaintiff or the defendant: It makes no sense to say that a jury could reasonably find for either party without some ***255** benchmark as to what standards govern its deliberations and within what boundaries its ultimate decision must fall, and these standards and boundaries are in fact provided by the applicable evidentiary standards.

Our holding that the clear-and-convincing standard of proof should be taken into account in ruling on summary judgment motions does not denigrate the role of the jury. It by no means authorizes trial on affidavits. Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict. The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor. *Adickes,* 398 U.S., at 158–159, 90 S.Ct., at 1608–1609. Neither do we suggest that the trial courts should act other than with caution in granting summary judgment or that the trial court may not deny summary judgment in a case where there is reason to believe that the better course would be to proceed to a full trial. ****2514** *Kennedy v. Silas Mason Co.,* 334 U.S. 249, 68 S.Ct. 1031, 92 L.Ed. 1347 (1948).

In sum, we conclude that the determination of whether a given factual dispute requires submission to a jury must be guided by the substantive evidentiary standards that apply to the case. This is true at both the directed verdict and summary judgment stages. Consequently, where the *New York Times* "clear and convincing" evidence requirement applies, the trial judge's summary judgment inquiry as to whether a genuine issue exists will be whether the evidence presented is such that a jury applying that evidentiary standard could reasonably find for either the plaintiff or the defendant. Thus, where the factual dispute concerns actual malice, clearly a material issue in a *New York Times* case, the appropriate summary judgment question will be whether the evidence in the record could support a reasonable jury finding ***256** either that the plaintiff has shown actual malice by clear and convincing evidence or that the plaintiff has not.[7]

III

Respondents argue, however, that whatever may be true of the applicability of the "clear and convincing" standard at the summary judgment or directed verdict stage, the defendant should seldom if ever be granted summary judgment where his state of mind is at issue and the jury might disbelieve him or his witnesses as to this issue. They rely on *Poller v. Columbia Broadcasting System, Inc.,* 368 U.S. 464, 82 S.Ct. 486, 7 L.Ed.2d 458 (1962),

for this proposition. We do not understand *Poller,* however, to hold that a plaintiff may defeat a defendant's properly supported motion for summary judgment in a conspiracy or libel case, for example, without offering any concrete evidence from which a reasonable juror could return a verdict in his favor and by merely asserting that the jury might, and legally could, disbelieve the defendant's denial of a conspiracy or of legal malice. The movant has the burden of showing that there is no genuine issue of fact, but the plaintiff is not thereby relieved of his own burden of producing in turn evidence that would support a jury verdict. Rule 56(e) itself provides that a party opposing a properly supported motion for summary judgment may not rest upon mere allegation or denials of his pleading, but must set forth specific facts showing that there is a genuine issue for trial. Based on that Rule, *Cities Service,* 391 U.S., at 290, 88 S.Ct., at 1593, held that the plaintiff could not defeat the properly supported summary judgment motion of a defendant charged with a conspiracy without offering "any significant probative evidence tending to support the complaint." As we have recently said, "discredited testimony ***257** is not [normally] considered a sufficient basis for drawing a contrary conclusion." *Bose Corp. v. Consumers Union of United States, Inc.,* 466 U.S. 485, 512, 104 S.Ct. 1949, 1966, 80 L.Ed.2d 502 (1984). Instead, the plaintiff must present affirmative evidence in order to defeat a properly supported motion for summary judgment. This is true even where the evidence is likely to be within the possession of the defendant, as long as the plaintiff has had a full opportunity to conduct discovery. We repeat, however, that the plaintiff, to survive the defendant's motion, need only present evidence from which a jury might return a verdict in his favor. If he does so, there is a genuine issue of fact that requires a trial.

IV

In sum, a court ruling on a motion for summary judgment must be guided by the *New York Times* "clear and convincing" ****2515** evidentiary standard in determining whether a genuine issue of actual malice exists—that is, whether the evidence presented is such that a reasonable jury might find that actual malice had been shown with convincing clarity. Because the Court of Appeals did not apply the correct standard in reviewing the District Court's grant of summary judgment, we vacate its decision and remand the case for further proceedings consistent with this opinion.

It is so ordered.

Justice BRENNAN, dissenting.

The Court today holds that "whether a given factual dispute requires submission to a jury must be guided by the substantive evidentiary standards that apply to the case," *ante,* at 2513.[1] In my view, the Court's analysis is deeply flawed, ***258** and rests on a shaky foundation of unconnected and unsupported observations, assertions, and conclusions. Moreover, I am unable to divine from the Court's opinion *how* these evidentiary standards are to be considered, or what a trial judge is actually supposed to do in ruling on a motion for summary judgment. Accordingly, I respectfully dissent.

To support its holding that in ruling on a motion for summary judgment a trial court must consider substantive evidentiary burdens, the Court appropriately begins with the language of Rule 56(c), which states that summary judgment shall be granted if it appears that there is "no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." The Court then purports to restate this Rule, and asserts that "summary judgment will not lie if the dispute about a material fact is 'genuine,' that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Ante,* at 2510. No direct authority is cited for the proposition that in order to determine whether a dispute is "genuine" for Rule 56 purposes a judge must ask if a "reasonable" jury could find for the non-moving party. Instead, the Court quotes from ***259** *First National Bank of Arizona v. Cities Service Co.,* 391 U.S. 253, 288–289, 88 S.Ct. 1575, 1592, 20 L.Ed.2d 569 (1968), to the effect that a summary judgment motion will be defeated if "sufficient evidence supporting the claimed factual dispute be shown to require a jury or judge to resolve the parties' differing versions of the truth at trial," *ante,* at 2510, and that a plaintiff may not, in defending against a motion for summary judgment, rest on mere allegations or denials of his pleadings. After citing *Adickes v. S.H. Kress & Co.,* 398 U.S. 144, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970), for the unstartling proposition that "the availability of summary judgment turn[s] on whether a proper jury question [is] presented," *ante,* at ——, the Court then reasserts, again with no direct authority, that in determining whether ****2516** a jury question is presented, the inquiry is whether there are factual issues "that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Ante,* at 2511. The Court maintains that this summary

judgment inquiry "mirrors" that which applies in the context of a motion for directed verdict under Federal Rule of Civil Procedure 50(a): "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Ante,* at 2511.

Having thus decided that a "genuine" dispute is one which is not "one-sided," and one which could "reasonably" be resolved by a "fair-minded" jury in favor of either party, *ibid.,* the Court then concludes:

> "Whether a jury could reasonably find for either party, however, cannot be defined except by the criteria governing what evidence would enable the jury to find for either the plaintiff or the defendant: It makes no sense to say that a jury could reasonably find for either party without some benchmark as to what standards govern its deliberations and within what boundaries its ultimate decision must fall, and these standards and boundaries are in fact provided by the applicable evidentiary standards." *Ante,* at 2513.

***260** As far as I can discern, this conclusion, which is at the heart of the case, has been reached without the benefit of any support in the case law. Although, as noted above, the Court cites *Adickes* and *Cities Service,* those cases simply do not stand for the proposition that in ruling on a summary judgment motion, the trial court is to inquire into the "one-sidedness" of the evidence presented by the parties. *Cities Service* involved the propriety of a grant of summary judgment in favor of a defendant alleged to have conspired to violate the antitrust laws. The issue in the case was whether, on the basis of the facts in the record, a jury could *infer* that the defendant had entered into a conspiracy to boycott. No direct evidence of the conspiracy was produced. In agreeing with the lower courts that the *circumstantial* evidence presented by the plaintiff was insufficient to take the case to the jury, we observed that there was "one fact" that petitioner had produced to support the existence of the illegal agreement, and that that single fact could not support petitioner's *theory* of liability. Critically, we observed that "[t]he case at hand presents peculiar difficulties because the issue of fact crucial to petitioner's case is also an issue of law, namely the existence of a conspiracy." 391 U.S., at 289, 88 S.Ct., at 1592. In other words, *Cities Service* is at heart about whether certain facts can support inferences that are, as a matter of antitrust law, sufficient to support a particular theory of liability under the Sherman Act. Just this Term, in discussing summary judgment in the context of suits brought under the antitrust laws, we characterized both *Cities Service* and *Monsanto Co. v. Spray-Rite Service Corp.,* 465 U.S. 752, 104 S.Ct. 1464, 79 L.Ed.2d 775 (1984), as cases in which "*antitrust law* limit[ed] the range of permissible inferences from ambiguous evidence...." *Matsushita Electric Industrial Co. v. Zenith Radio Corp.,* 475 U.S. 574, 588, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986) (emphasis added). *Cities Service* thus provides no authority for the conclusion that Rule 56 requires a trial court to consider whether direct evidence produced by the parties is "one-sided." To the contrary, in *Matsushita,* the most recent ***261** case to cite and discuss *Cities Service,* we stated that the requirement that a dispute be "genuine" means simply that there must be more than "some metaphysical doubt as to the material facts." 475 U.S., at 586, 106 S.Ct., at 1356.[2]

****2517** Nor does *Adickes,* also relied on by the Court, suggest in any way that the appropriate summary judgment inquiry is whether the evidence overwhelmingly supports one party. *Adickes,* like *Cities Service,* presented the question of whether a grant of summary judgment in favor of a defendant on a conspiracy count was appropriate. The plaintiff, a ***262** white schoolteacher, maintained that employees of defendant Kress conspired with the police to deny her rights protected by the Fourteenth Amendment by refusing to serve her in one of its lunchrooms simply because she was white and accompanied by a number of black schoolchildren. She maintained, among other things, that Kress arranged with the police to have her arrested for vagrancy when she left the defendant's premises. In support of its motion for summary judgment, Kress submitted statements from a deposition of one of its employees asserting that he had not communicated or agreed with the police to deny plaintiff service or to have her arrested, and explaining that the store had taken the challenged action not because of the race of the plaintiff, but because it was fearful of the reaction of some of its customers if it served a racially mixed group. Kress also submitted affidavits from the Chief of Police and the arresting officers denying that the store manager had requested that petitioner be arrested, and noted that in the plaintiff's own deposition, she conceded that she had no knowledge of any communication between the police and any Kress employee and was relying on circumstantial evidence to support her allegations. In opposing defendant's motion for summary judgment, plaintiff stated that defendant in its moving papers failed to dispute an allegation in the complaint, a statement at her deposition, and an unsworn statement by a Kress employee all to the effect that there was a policeman in the store at the time of the refusal to serve, and that it was this policeman who subsequently made the arrest. Plaintiff argued that this sequence of events "created a substantial enough possibility of a conspiracy to allow her to proceed to trial...." 398 U.S., at 157, 90 S.Ct., at 1608.

We agreed, and therefore reversed the lower courts, reasoning that Kress "did not carry its burden because of its failure to foreclose the possibility that there was a policeman in the Kress store while petitioner was awaiting service, and that this policeman reached an understanding with some ***263** Kress employee that petitioner not be served." 398 U.S. at 157, 90 S.Ct., at 1608. Despite the fact that *none of the materials relied on by plaintiff* met the requirements of Rule 56(e), we stated nonetheless that Kress failed to meet its initial burden of showing that there was no genuine dispute of a material fact. Specifically, we held that because Kress failed to negate plaintiff's materials suggesting that a ****2518** policeman was in fact in the store at the time of the refusal to serve, "it would be open to a jury ... to infer from the circumstances that the policeman and a Kress employee had a 'meeting of the minds' and thus reached an understanding that petitioner should be refused service." *Ibid.*

In *Adickes* we held that a jury might permissibly infer a conspiracy from the mere presence of a policeman in a restaurant. We never reached and did not consider whether the evidence was "one-sided," and had we done so, we clearly would have had to affirm, rather than reverse, the lower courts, since in that case there was no admissible evidence submitted by petitioner, and a significant amount of evidence presented by the defendant tending to rebut the existence of a conspiracy. The question we did reach was simply whether, as a matter of conspiracy law, a jury would be entitled, again, as a matter of law, to infer from the presence of a policeman in a restaurant the making of an agreement between that policeman and an employee. Because we held that a jury was entitled so to infer, and because the defendant had not carried its initial burden of production of demonstrating that there was no evidence that there was not a policeman in the lunchroom, we concluded that summary judgment was inappropriate.

Accordingly, it is surprising to find the case cited by the majority for the proposition that "there is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." *Ante,* at 2511. There was, of course, *no* admissible evidence in *Adickes* favoring the nonmoving plaintiff; there was only an ***264** unrebutted assertion that a Kress employee and a policeman were in the same room at the time of the alleged constitutional violation. Like *Cities Service, Adickes* suggests that on a defendant's motion for summary judgment, a trial court must consider whether, as a matter of the substantive law of the plaintiff's cause of action, a jury will be permitted to draw inferences supporting the plaintiff's legal theory. In *Cities Service* we found, in effect, that the plaintiff had failed to make out a prima facie case; in *Adickes* we held that the moving defendant had failed to rebut the plaintiff's prima facie case. In neither case is there any intimation that a trial court should inquire whether plaintiff's evidence is "significantly probative," as opposed to "merely colorable," or, again, "one-sided." Nor is there in either case any suggestion that once a nonmoving plaintiff has made out a prima facie case based on evidence satisfying Rule 56(e) that there is any showing that a defendant can make to prevail on a motion for summary judgment. Yet this is what the Court appears to hold, relying, in part, on these two cases.[3]

As explained above, and as explained also by Justice REHNQUIST in his dissent, see *post,* at 2522, I cannot agree that the authority cited by the Court supports its position. In my view, the Court's result is the product of an exercise ***265** akin to the child's game of "telephone," in which a message is repeated from one person to another and then another; after some time, the message bears little resemblance to what was originally spoken. In the present case, the Court purports to restate the summary judgment test, but with each repetition, the original understanding is increasingly distorted.

****2519** But my concern is not only that the Court's decision is unsupported; after all, unsupported views may nonetheless be supportable. I am more troubled by the fact that the Court's opinion sends conflicting signals to trial courts and reviewing courts which must deal with summary judgment motions on a day-to-day basis. This case is about a trial court's responsibility when considering a motion for summary judgment, but in my view, the Court, while instructing the trial judge to "consider" heightened evidentiary standards, fails to explain what that means. In other words, how does a judge assess how one-sided evidence is, or what a "fair-minded" jury could "reasonably" decide? The Court provides conflicting clues to these mysteries, which I fear can lead only to increased confusion in the district and appellate courts.

The Court's opinion is replete with boilerplate language to the effect that trial courts are not to weigh evidence when deciding summary judgment motions:

> "[I]t is clear enough from our recent cases that at the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter...." *Ante,* at 2511.
>
> "Our holding ... does not denigrate the role of the jury.... Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from

> the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict. The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Ante,* at 2513.

***266** But the Court's opinion is also full of language which could surely be understood as an invitation—if not an instruction—to trial courts to assess and weigh evidence much as a juror would:

> "When determining if a genuine factual issue ... exists ..., a trial judge must *bear in mind the actual quantum and quantity* of proof necessary to support liability.... For example, *there is no genuine issue if the evidence presented in the opposing affidavits is of insufficient caliber or quality* to allow a rational finder of fact to find actual malice by clear and convincing evidence." *Ante,* at 2513 (emphasis added).
>
> "[T]he inquiry ... [is] whether the evidence presents a *sufficient* disagreement to require submission to a jury or whether *it is so one-sided* that one party must prevail as a matter of law." *Ante,* at 2512 (emphasis added).
>
> "[T]he judge must ask himself ... whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented. The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." *Ibid.*

I simply cannot square the direction that the judge "is not himself to weigh the evidence" with the direction that the judge also bear in mind the "quantum" of proof required and consider whether the evidence is of sufficient "caliber or quantity" to meet that "quantum." I would have thought that a determination of the "caliber and quantity," *i.e.,* the importance and value, of the evidence in light of the "quantum," *i.e.,* amount "required," could *only* be performed by weighing the evidence.

If in fact, this is what the Court would, under today's decision, require of district courts, then I am fearful that this new rule—for this surely would be a brand new procedure—will transform what is meant to provide an expedited "summary" ***267** procedure into a full-blown paper trial on the merits. It is hard for me to imagine that a responsible counsel, aware that the judge will be assessing the "quantum" of the evidence he is presenting, will risk either moving for or responding to a summary judgment motion without coming forth with *all* of the evidence he can muster in support of his client's case. Moreover, if the judge on motion for summary judgment really is to weigh the evidence, then ****2520** in my view grave concerns are raised concerning the constitutional right of civil litigants to a jury trial.

It may well be, as Justice REHNQUIST suggests, see *post,* at 2521, that the Court's decision today will be of little practical effect. I, for one, cannot imagine a case in which a judge might plausibly hold that the evidence on motion for summary judgment was sufficient to enable a plaintiff bearing a mere preponderance burden to get to the jury—*i.e.,* that a prima facie case had been made out—but insufficient for a plaintiff bearing a clear-and-convincing burden to withstand a defendant's summary judgment motion. Imagine a suit for breach of contract. If, for example, the defendant moves for summary judgment and produces one purported eyewitness who states that he was present at the time the parties discussed the possibility of an agreement, and unequivocally denies that the parties ever agreed to enter into a contract, while the plaintiff produces one purported eyewitness who asserts that the parties did in fact come to terms, presumably that case would go to the jury. But if the defendant produced not one, but 100 eyewitnesses, while the plaintiff stuck with his single witness, would that case, under the Court's holding, still go to the jury? After all, although the plaintiff's burden in this hypothetical contract action is to prove his case by a mere preponderance of the evidence, the judge, so the Court tells us, is to "ask himself ... whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented." *Ante,* at 2512. Is there, in this hypothetical example, "a sufficient disagreement to require submission ***268** to a jury," or is the evidence "so one-sided that one party must prevail as a matter of law"? *Ibid.* Would the result change if the plaintiff's one witness were now shown to be a convicted perjurer? Would the result change if, instead of a garden-variety contract claim, the plaintiff sued on a fraud theory, thus requiring him to prove his case by clear and convincing evidence?

It seems to me that the Court's decision today unpersuasively answers the question presented, and in doing so raises a host of difficult and troubling questions for which there may well be no adequate solutions. What is particularly unfair is that the mess we make is not, at least in the first instance, our own to deal with; it is the district courts and courts of appeals that must struggle to clean up after us.

In my view, if a plaintiff presents evidence which either directly or by permissible inference (and these inferences are a product of the substantive law of the underlying claim) supports all of the elements he needs to prove in order to prevail on his legal claim, the plaintiff has made out a prima facie case and a defendant's motion for

summary judgment must fail regardless of the burden of proof that the plaintiff must meet. In other words, whether evidence is "clear and convincing," or proves a point by a mere preponderance, is for the factfinder to determine. As I read the case law, this is how it has been, and because of my concern that today's decision may erode the constitutionally enshrined role of the jury, and also undermine the usefulness of summary judgment procedure, this is how I believe it should remain.

Justice REHNQUIST, with whom THE CHIEF JUSTICE joins, dissenting.

The Court, apparently moved by concerns for intellectual tidiness, mistakenly decides that the "clear and convincing evidence" standard governing finders of fact in libel cases must be applied by trial courts in deciding a motion for summary judgment in such a case. The Court refers to this as a "substantive standard," but I think it is actually a procedural ***269** requirement engrafted onto Rule 56, contrary to our statement in *Calder v. Jones,* 465 U.S. 783, 104 S.Ct. 1482, 79 L.Ed.2d 804 (1984), that

> "[w]e have already declined in other contexts to grant special procedural protections to defendants in libel and defamation actions in addition to the constitutional ****2521** protections embodied in the substantive laws." *Id.,* at 790–791, 104 S.Ct., at 1487–1488.

The Court, I believe, makes an even greater mistake in failing to apply its newly announced rule to the facts of this case. Instead of thus illustrating how the rule works, it contents itself with abstractions and paraphrases of abstractions, so that its opinion sounds much like a treatise about cooking by someone who has never cooked before and has no intention of starting now.

There is a large class of cases in which the higher standard imposed by the Court today would seem to have no effect at all. Suppose, for example, on motion for summary judgment in a hypothetical libel case, the plaintiff concedes that his only proof of malice is the testimony of witness A. Witness A testifies at his deposition that the reporter who wrote the story in question told him that she, the reporter, had done absolutely no checking on the story and had real doubts about whether or not it was correct as to the plaintiff. The defendant's examination of witness A brings out that he has a prior conviction for perjury.

May the Court grant the defendant's motion for summary judgment on the ground that the plaintiff has failed to produce sufficient proof of malice? Surely not, if the Court means what it says, when it states: "Credibility determinations ... are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict. The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor." *Ante,* at 2513.

The case proceeds to trial, and at the close of the plaintiff's evidence the defendant moves for a directed verdict on the ***270** ground that the plaintiff has failed to produce sufficient evidence of malice. The only evidence of malice produced by the plaintiff is the same testimony of witness A, who is duly impeached by the defendant for the prior perjury conviction. In addition, the trial judge has now had an opportunity to observe the demeanor of witness A, and has noticed that he fidgets when answering critical questions, his eyes shift from the floor to the ceiling, and he manifests all other indicia traditionally attributed to perjurers.

May the trial court at this stage grant a directed verdict? Again, surely not; we are still dealing with "credibility determinations."

The defendant now puts on its testimony, and produces three witnesses who were present at the time when witness A alleges that the reporter said she had not checked the story and had grave doubts about its accuracy as to plaintiff. Witness A concedes that these three people were present at the meeting, and that the statement of the reporter took place in the presence of all these witnesses. Each witness categorically denies that the reporter made the claimed statement to witness A.

May the trial court now grant a directed verdict at the close of all the evidence? Certainly the plaintiff's case is appreciably weakened by the testimony of three disinterested witnesses, and one would hope that a properly charged jury would quickly return a verdict for the defendant. But as long as credibility is exclusively for the jury, it seems the Court's analysis would still require this case to be decided by that body.

Thus, in the case that I have posed, it would seem to make no difference whether the standard of proof which the plaintiff had to meet in order to prevail was the preponderance of the evidence, clear and convincing evidence, or proof beyond a reasonable doubt. But if the application of the standards makes no difference in the case that I hypothesize, one may fairly ask in what sort of case *does* the difference in standards ***271** make a difference in outcome? Cases may be posed dealing with evidence that is essentially documentary, rather than testimonial; but the Court has held in a related context

involving Federal Rule of Civil Procedure 52(a) that inferences from documentary evidence are as much the prerogative **2522 of the finder of fact as inferences as to the credibility of witnesses. *Anderson v. Bessemer City,* 470 U.S. 564, 574, 105 S.Ct. 1504, 1512, 84 L.Ed.2d 518 (1985). The Court affords the lower courts no guidance whatsoever as to what, if any, difference the abstract standards that it propounds would make in a particular case.

There may be more merit than the Court is willing to admit to Judge Learned Hand's observation in *United States v. Feinberg,* 140 F.2d 592, 594 (CA2), cert. denied, 322 U.S. 726, 64 S.Ct. 943, 88 L.Ed.2d 1562 (1944), that "[w]hile at times it may be practicable" to "distinguish between the evidence which should satisfy reasonable men, and the evidence which should satisfy reasonable men beyond a reasonable doubt[,] ... in the long run the line between them is too thin for day to day use." The Court apparently approves the overruling of the *Feinberg* case in the Court of Appeals by Judge Friendly's opinion in *United States v. Taylor,* 464 F.2d 240 (1972). But even if the Court is entirely correct in its judgment on this point, Judge Hand's statement seems applicable to this case because the criminal case differs from the libel case in that the standard in the former is proof "beyond a reasonable doubt," which is presumably easier to distinguish from the normal "preponderance of the evidence" standard than is the intermediate standard of "clear and convincing evidence."

More important for purposes of analyzing the present case, there is no exact analog in the criminal process to the motion for summary judgment in a civil case. Perhaps the closest comparable device for screening out unmeritorious cases in the criminal area is the grand jury proceeding, though the comparison is obviously not on all fours. The standard for allowing a criminal case to proceed to trial is not whether the government has produced prima facie evidence of guilt beyond *272 a reasonable doubt for every element of the offense, but only whether it has established probable cause. See *United States v. Mechanik,* 475 U.S. 66, 70, 106 S.Ct. 938, 941–942, 89 L.Ed.2d 50 (1986). Thus, in a criminal case the standard used prior to trial is much more lenient than the "clear beyond a reasonable doubt" standard which must be employed by the finder of fact.

The three differentiated burdens of proof in civil and criminal cases, vague and impressionistic though they necessarily are, probably do make some difference when considered by the finder of fact, whether it be a jury or a judge in a bench trial. Yet it is not a logical or analytical message that the terms convey, but instead almost a state of mind; we have previously said:

> "Candor suggests that, to a degree, efforts to analyze what lay jurors understand concerning the differences among these three tests ... may well be largely an academic exercise.... Indeed, the ultimate truth as to how the standards of proof affect decisionmaking may well be *unknowable,* given that factfinding is a process shared by countless thousands of individuals throughout the country. We probably can assume no more than that the difference between a preponderance of the evidence and proof beyond a reasonable doubt probably is better understood than either of them in relation to the intermediate standard of clear and convincing evidence." *Addington v. Texas,* 441 U.S. 418, 424–425, 99 S.Ct. 1804, 1808, 60 L.Ed.2d 323 (1979) (emphasis added).

The Court's decision to engraft the standard of proof applicable to a factfinder onto the law governing the procedural motion for a summary judgment (a motion that has always been regarded as raising a question of law rather than a question of fact, see, *e.g., La Riviere v. EEOC,* 682 F.2d 1275, 1277–1278 (CA9 1982) (Wallace, J.)), will do great mischief with little corresponding benefit. The primary effect of the Court's opinion today will likely be to cause the decisions of trial judges on summary judgment motions in libel cases to be *273 more erratic and inconsistent than before. This is largely because the Court has **2523 created a standard that is different from the standard traditionally applied in summary judgment motions without even hinting as to how its new standard will be applied to particular cases.

All Citations

477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202, 54 USLW 4755, 4 Fed.R.Serv.3d 1041, 12 Media L. Rep. 2297

Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.,* 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

1 See, *e.g., Rebozo v. Washington Post Co.,* 637 F.2d 375, 381 (CA5), cert. denied, 454 U.S. 964, 102 S.Ct. 504, 70 L.Ed.2d 379 (1981); *Yiamouyiannis v. Consumers Union of United States, Inc.,* 619 F.2d 932, 940 (CA2), cert. denied, 449 U.S. 839, 101 S.Ct. 117, 66 L.Ed.2d 46 (1980); *Carson v. Allied News Co.,* 529 F.2d 206, 210 (CA7 1976).

2 The short, introductory article was written by petitioner Anderson and relied exclusively on the information obtained by Bermant.

3 In *Gertz v. Robert Welch, Inc.,* 418 U.S. 323, 351, 94 S.Ct. 2997, 3012, 41 L.Ed.2d 789 (1974), this Court summarized who will be considered to be a public figure to whom the *New York Times* standards will apply:

"[The public figure] designation may rest on either of two alternative bases. In some instances an individual may achieve such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts. More commonly, an individual voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues. In either case such persons assume special prominence in the resolution of public questions."

The District Court found that respondents, as political lobbyists, are the second type of political figure described by the *Gertz* court—a limited-purpose public figure. See also *Waldbaum v. Fairchild Publications, Inc.,* 201 U.S.App.D.C. 301, 306, 627 F.2d 1287, 1292, cert. denied, 449 U.S. 898, 101 S.Ct. 266, 66 L.Ed.2d 128 (1980).

4 Our analysis here does not address the question of the initial burden of production of evidence placed by Rule 56 on the party moving for summary judgment. See *Celotex Corp. v. Catrett,* 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed. 265 (1986). Respondents have not raised this issue here, and for the purposes of our discussion we assume that the moving party has met initially the requisite evidentiary burden.

5 This requirement in turn is qualified by Rule 56(f)'s provision that summary judgment be refused where the nonmoving party has not had the opportunity to discover information that is essential to his opposition. In our analysis here, we assume that both parties have had ample opportunity for discovery.

6 In many cases, however, findings are extremely helpful to a reviewing court.

7 Our statement in *Hutchinson v. Proxmire,* 443 U.S. 111, 120, n. 9, 99 S.Ct. 2675, 2680, n. 9 (1979), that proof of actual malice "does not readily lend itself to summary disposition" was simply an acknowledgment of our general reluctance "to grant special procedural protections to defendants in libel and defamation actions in addition to the constitutional protections embodied in the substantive laws." *Calder v. Jones,* 465 U.S. 783, 790–791, 104 S.Ct. 1482, 1487–1488, 79 L.Ed.2d 804 (1984).

1 The Court's holding today is not, of course, confined in its application to First Amendment cases. Although this case arises in the context of litigation involving libel and the press, the Court's holding is that "in ruling on a motion for summary judgment, the judge must view the evidence presented through the prism of the substantive evidentiary burden." *Ante,* at 2513–2514. Accordingly, I simply do not understand why Justice REHNQUIST, dissenting, feels it appropriate to cite *Calder v. Jones,* 465 U.S. 783, 104 S.Ct. 1482, 79 L.Ed.2d 804 (1984), and to remind the Court that we have consistently refused to extend special procedural protections to defendants in libel and defamation suits. The Court today does nothing of the kind. It changes summary judgment procedure for *all* litigants, regardless of the substantive nature of the underlying litigation.

Moreover, the Court's holding is not limited to those cases in which the evidentiary standard is "heightened," *i.e.,* those in which a plaintiff must prove his case by more than a mere preponderance of the evidence. Presumably, if a district court ruling on a motion for summary judgment in a libel case is to consider the "quantum and quality" of proof necessary to support liability under *New*

York Times, ante, at 2513 and then ask whether the evidence presented is of "sufficient caliber or quantity" to support that quantum and quality, the court must ask the same questions in a garden-variety action where the plaintiff need prevail only by a mere preponderance of the evidence. In other words, today's decision by its terms applies to all summary judgment motions, irrespective of the burden of proof required and the subject matter of the suit.

2 Writing in dissent in *Matsushita,* Justice WHITE stated that he agreed with the summary judgment test employed by the Court, namely, that " '[w]here the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.' " 475 U.S., at 599, 106 S.Ct., at 1363. Whether the shift, announced today, from looking to a "reasonable" rather than a "rational" jury is intended to be of any significance, there are other aspects of the *Matsushita* dissent which I find difficult to square with the Court's holding in the present case. The *Matsushita* dissenters argued:

"... [T]he Court summarizes *Monsanto Co. v. Spray-Rite Service Corp., supra,* as holding that 'courts should not permit factfinders to infer conspiracies when such inferences are implausible....' *Ante,* at ——. Such language suggests that a judge hearing a defendant's motion for summary judgment in an antitrust case should go beyond the traditional summary judgment inquiry and decide for himself whether the weight of the evidence favors the plaintiff. *Cities Service* and *Monsanto* do not stand for any such proposition. Each of those cases simply held that a particular piece of evidence standing alone was insufficiently probative to justify sending a case to the jury. These holdings in no way undermine the doctrine that all evidence must be construed in the light most favorable to the party opposing summary judgment.

"If the Court intends to give every judge hearing a motion for summary judgment in an antitrust case the job of determining if the evidence makes the inference of conspiracy more probable than not, it is overturning settled law. If the Court does not intend such a pronouncement, it should refrain from using unnecessarily broad and confusing language." *Id.,* at 600–601, 106 S.Ct., at 1363 (footnote omitted).

In my view, these words are as applicable and relevant to the Court's opinion today as they were to the opinion of the Court in *Matsushita.*

3 I am also baffled by the other cases cited by the majority to support its holding. For example, the Court asserts that "[i]f ... evidence is merely colorable, *Dombrowski v. Eastland,* 387 U.S. 82, 87 S.Ct. 1425, 18 L.Ed.2d 577 (1967) (*per curiam*), ... summary judgment may be granted." *Ante,* at 2511. In *Dombrowski,* we reversed a judgment granting summary judgment to the counsel to the Internal Security Subcommittee of the Judiciary Committee of the United States Senate because there was "controverted evidence in the record ... which affords more than merely colorable substance" to the petitioners' allegations. 387 U.S., at 84, 87 S.Ct., at 1427. *Dombrowski* simply cannot be read to mean that summary judgment may be *granted* if evidence is merely colorable; what the case actually says is that summary judgment will be *denied* if evidence is "*controverted,*" because when evidence is controverted, assertions become colorable for purposes of motions for summary judgment law.

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13 N.Y.2d 1053
Court of Appeals of New York.

George BERNSTEIN, Respondent,
v.
EL-MAR PAINTING & DECORATING CO., Inc., Appellant, and Jack Berman et al., Appellants-Respondents.

Argued Nov. 20, 1963.
|
Decided Nov. 27, 1963.

Synopsis
Action by tenant against landlords and painting contractor for injuries sustained when he fell from scaffold, which contractor's employees had instructed him to walk on to enter apartment building, when the entrance was blocked by scaffolding. The landlords filed cross complaint against contractor. The Supreme Court, Trial Term, Kings County, George Eilperin, J., entered verdict for plaintiff against all defendants and granted motion by landlords for judgment upon their cross complaints and appeal was taken. The Supreme Court, Appellate Division, Second Judicial Department, affirmed and appeals were taken by permission of Court of Appeals. The Court of Appeals held that tenant was not negligent as matter of law and that landlords were not entitled to be indemnified by contractor.

Judgment in favor of landlords reversed and otherwise judgment affirmed.

Fuld, Van Voorhis and Scileppi, JJ., dissented.

Attorneys and Law Firms

*****773 **457 *1054** Lazarus I. Levine, Liberty, for appellant.

James M. McLaughlin, Jr., New York City, for appellants-respondents.

Bernard Meyerson, Brooklyn, for respondent.

MEMORANDUM.
The plaintiff, having followed the instructions of the painters in mounting the scaffold, cannot be held to be negligent as a matter of law. *****774** (***1055** Zurich Gen. Acc. & Liab. Ins. Co. v. Childs Co., 253 N.Y. 324, 171 N.E. 391; Meyer v. West End Equities, 12 N.Y.2d 698, 233 N.Y.S.2d 479, 185 N.E.2d 915; Hamblet v. Buffalo Lib. Garage Co., 222 App.Div. 335, 225 N.Y.S. 716.)

The judgment over, however, in favor of the owners against the defendant contractor upon the cross claim must be reversed, because a landlord has a nondelegable duty to use reasonable care in providing for a safe means of ingress to a tenant (Harrington v. 615 West Corp., 2 N.Y.2d 476, 161 N.Y.S.2d 106, 141 N.E.2d 602). To this duty is added the responsibility that the landlord, who employs the contractor to do work in a place where tenants are in the habit of passing, must see that necessary precautions are taken not to endanger the tenants. (Sciolaro v. Asch, 198 N.Y. 77, 91 N.E. 263, 32 L.R.A., N.S., 945; Dollard v. Roberts, 130 N.Y. 269, 272, 29 N.E. 104, 14 L.R.A. 238.) The failure of the landlord to comply with that duty was an act of negligence which bars indemnity. The codefendants are joint tort-feasors. Where, as here, the codefendants have participated in or concurred in the wrong which caused the damage, there is no right of indemnity (Bush Term. Bldgs. Co. v. Luckenbach S. S. Co., 9 N.Y.2d 426, 214 N.Y.S.2d 428, 174 N.E.2d 516).

****458** DESMOND, C. J., and DYE, BURKE and FOSTER, JJ., concur in Memorandum.

FULD, VAN VOORHIS and SCILEPPI, JJ., dissent and vote to reverse the judgment against defendants Berman and to dismiss the complaint against them upon the ground that the evidence was insufficient to establish any negligence as to them.

Judgment, insofar as appealed from by defendant El-Mar Painting & Decorating Co., Inc., modified in a memorandum by reversing the judgment over in favor of defendants Berman and dismissing their cross complaint,

with costs to defendant El-Mar against defendants Berman; otherwise judgment affirmed, with costs to plaintiff against all defendants.

All Citations

13 N.Y.2d 1053, 195 N.E.2d 456, 245 N.Y.S.2d 772

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95 A.D.3d 548
Supreme Court, Appellate Division, First Department, New York.

Filiberto EUSTAQUIO, et al., Plaintiffs–Respondents,
v.
860 CORTLANDT HOLDINGS, INC., et al., Defendants–Appellants.

May 8, 2012.

Synopsis
Background: Worker injured in fall from ladder brought scaffold law claim. The Supreme Court, New York County, Louis B. York, J., granted worker summary judgment. Defendant appealed.

The Supreme Court, Appellate Division, held that worker was not sole proximate cause of his injuries.

Affirmed.

Attorneys and Law Firms

****78** Rubin, Fiorella & Friedman LLP, New York (Shelley R. Halber of counsel), for appellants.

Gorayeb & Associates, P.C., New York (John M. Shaw of counsel), for respondents.

MAZZARELLI, J.P., SAXE, MOSKOWITZ, RENWICK, FREEDMAN, JJ.

Opinion

***548** Order, Supreme Court, New York County (Louis B. York, J.), entered September 21, 2011, which granted plaintiff's motion for partial summary judgement on the issue of liability on his Labor Law § 240(1) claim, unanimously affirmed, without costs.

Plaintiff met his prima facie burden by submitting his deposition testimony and affidavit showing that he fell from a ladder that was not properly secured or equipped with adequate safety devices (*see e.g. Granillo v. Donna Karen Co.,* 17 A.D.3d 531, 531, 793 N.Y.S.2d 465 [2005], *lv. dismissed in part, denied in part* 5 N.Y.3d 878, 808 N.Y.S.2d 138, 842 N.E.2d 23 [2005]; *Velasco v. Green–Wood Cemetery,* 8 A.D.3d 88, 89, 779 N.Y.S.2d 459 [2004]).

Defendants' evidence was insufficient to raise a triable issue of fact as to whether plaintiff was the sole proximate cause of his injuries. The sworn statement of the foreman of plaintiff's nonparty ****79** employer, prepared by a private investigator during an investigation of plaintiff's claim, was inadmissible. While the statement and the investigator's affidavit state that the foreman's daughter had translated the statement from Greek to English, the statement was not accompanied by an attestation from the daughter setting forth her qualifications and the accuracy of the translation (*see* CPLR 2101[b]; *Reyes v. Arco Wentworth Mgt. Corp.,* 83 A.D.3d 47, 54, 919 N.Y.S.2d 44 [2011]). The deposition testimony of the president of plaintiff's employer was insufficient to show that plaintiff was recalcitrant in failing to secure the ladder with a rope before using it, as the president had no personal knowledge of the accident or the condition of the ladder at the time of the accident (*see Madalinski v. Structure–Tone, Inc.,* 47 A.D.3d 687, 688, 850 N.Y.S.2d 505 [2008]; *Kyle v. City of New York,* 268 A.D.2d 192, 707 N.Y.S.2d 445 [2000], *lv. denied* 97 N.Y.2d 608, 739 N.Y.S.2d 97, 765 N.E.2d 300 [2002]). Defendants failed to preserve their argument that plaintiff was recalcitrant in choosing to use the unsecured ladder instead of an interior staircase, and we decline to review it. In any event, the argument is unavailing, as there is no evidence in the record indicating that the workers had permission to use the internal stairway, or that the use of the ladder to access or leave ***549** the roof constituted a misuse of the device (*cf. Robinson v. East Med. Ctr., LP,* 6 N.Y.3d 550, 554–555, 814 N.Y.S.2d 589, 847 N.E.2d 1162 [2006]). Rather, the evidence shows that plaintiff and the other workers were instructed to use the ladder to access the roof (*cf. Cahill v. Triborough Bridge & Tunnel Auth.,* 4 N.Y.3d 35, 39–40, 790 N.Y.S.2d 74, 823 N.E.2d 439 [2004]). Insofar as defendants argue that harnesses were available at the job site, the evidence does not show that the workers were expected to, or instructed to, use a harness while ascending or descending a ladder (*see Auriemma v. Biltmore Theatre, LLC.,* 82 A.D.3d 1, 10, 917 N.Y.S.2d 130 [2011]; *Gallagher v. New York Post,* 14 N.Y.3d 83, 88–89, 896 N.Y.S.2d 732, 923 N.E.2d 1120 [2010]). Indeed, the general contractor's field supervisor and the president of plaintiff's employer both testified that harnesses were not needed for the roofing work, given the existence of a parapet wall around the

roof.

We have reviewed defendants' remaining contentions and find them unavailing.

All Citations

95 A.D.3d 548, 944 N.Y.S.2d 78, 2012 N.Y. Slip Op. 03565

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12 N.Y.3d 316
Court of Appeals of New York.

Miliha FERLUCKAJ, Respondent,
v.
GOLDMAN SACHS & CO., Appellant, et al., Defendant.
Goldman Sachs & Co., Third–Party Plaintiff,
v.
American Building Maintenance Co., Third–Party Defendant.

April 2, 2009.

Synopsis
Background: Employee of cleaning service company who was injured in fall from desk while cleaning interior surface of window in office building sued cleaning service, building owner, and lessee of office, alleging violations of various Labor Law sections. The Supreme Court, New York County, Rolando T. Acosta, J., granted summary judgment for lessee on employee's scaffold law claim. The Supreme Court, Appellate Division, 53 A.D.3d 422, 862 N.Y.S.2d 473, affirmed as modified. Leave to appeal was granted.

Holding: The Court of Appeals, Smith, J., held that lessee could not be liable under scaffold law, since it was not a contractor, owner or agent and did not control employee's work.

Reversed.

Pigott, J., filed dissenting opinion joined by Chief Judge Lippman and Ciparick, J.

Attorneys and Law Firms

*****879** Wilson Elser Moskowitz Edelman & Dicker LLP, New York City (Christine Bernstock of counsel), for appellant and third-party plaintiff.

Michael J. Gaffney, Staten Island, for respondent.

Thomas J. Maroney, Jericho, Fiedelman & McGaw (Andrew Zajac and Dawn C. DeSimone of counsel), Rona L. Platt, Uniondale, and Brendan T. Fitzpatrick, Albertson, for Defense Association of New York, Inc., amicus curiae.

***318 **869 OPINION OF THE COURT**

SMITH, J.

Plaintiff fell off a desk on which she was standing while cleaning the inside of an office building window, in space leased to defendant Goldman Sachs & Co. We hold that, because uncontroverted evidence shows that Goldman did not hire plaintiff's employer to clean the window and that Goldman exercised no control over plaintiff's ****870 ***880** work, Goldman is not liable to plaintiff under Labor Law § 240(1). Supreme Court and the Appellate Division erred in denying Goldman's motion for summary judgment.

The building in question is at 32 Old Slip, in Manhattan. Goldman leased a number of floors from the building's owner, ***319** Paramount Group, Inc. Paramount hired third-party defendant, American Building Maintenance Co. (ABM), to provide cleaning and janitorial services. Among ABM's duties under its contract with Paramount was to clean the building's windows every three months. Tenants, including Goldman, could and sometimes did contract directly with ABM for "special services," but window cleaning was not treated as a special service. It was provided by Paramount to Goldman in exchange for the rent.

Plaintiff, an ABM employee, fell while she was cleaning a window on a floor that Goldman had not yet occupied. Goldman was scheduled to, and did, begin moving in on the day after the accident. Plaintiff claims, and we assume it to be true, that the cleaning she was working on was not a regular quarterly cleaning, but a special "preoccupancy" cleaning, to get the space ready for Goldman's use. Preoccupancy cleanings, however, were also provided for in the Paramount–ABM contract, which requires ABM to provide such cleanings without extra cost to Paramount: "Prior to tenant occupancy, contractor shall provide the

initial cleaning or [*sic*] all interior windows for which there will be no charge to Paramount Group, Inc. or tenant."

There is no evidence in the record that Goldman hired ABM to perform either a regular quarterly cleaning or a preoccupancy cleaning. The contractor that Goldman used to do renovation work on the space, defendant Henegan Construction Co., Inc., did not subcontract any work to ABM.

In sum, the evidence points clearly and without contradiction to the conclusion that it was Paramount, not Goldman, that hired ABM to do the project on which plaintiff was working when she fell. Plaintiff does not claim that Goldman in fact supervised her work. Goldman therefore has no liability to plaintiff under Labor Law § 240(1). The statute says:

> "All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed."

***320** This statute places a duty on "contractors and owners and their agents." It says nothing about lessees. That does not necessarily mean lessees can never be liable. Appellate Division cases have said that lessees who hire a contractor, and thus have the right to control the work being done, are "owners" within the meaning of the statute (*Frierson v. Concourse Plaza Assoc.,* 189 A.D.2d 609, 611, 592 N.Y.S.2d 309 [1st Dept.1993]; *Sweeting v. Board of Coop. Educ. Servs.,* 83 A.D.2d 103, 114, 443 N.Y.S.2d 910 [4th Dept.1981]; *cf. Bart v. Universal Pictures,* 277 A.D.2d 4, 6, 715 N.Y.S.2d 240 [1st Dept.2000] [occupant of space with power to control the work held "an agent of the fee owner"]). We assume, without deciding, that these cases are right, but they do not apply here. ABM was hired by the landlord, Paramount, ****871 ***881** not by Goldman, so there is no basis for holding Goldman to be an owner or owner's agent (*see Guzman v. L.M.P. Realty Corp.,* 262 A.D.2d 99, 691 N.Y.S.2d 483 [1st Dept.1999]).

Plaintiff concedes that she cannot prevail if Goldman had no right to control ABM's work, but she says that the facts are not clear enough to justify granting Goldman summary judgment. She points out that, under the contract between Paramount and ABM, preoccupancy cleaning was to be done "upon request of Paramount," and notes that the record contains no direct evidence of a "request." Though it is clear that Goldman's contractor, Henegan, did not hire ABM to do this work, plaintiff speculates that, for some reason, Goldman might have done so directly. Plaintiff emphasizes that Goldman did not submit an affidavit denying that such a transaction occurred.

We find plaintiff's theorizing—and the somewhat more elaborate theories offered by the dissent—insufficient to defeat summary judgment. The idea that Goldman chose to hire ABM at its own expense, when ABM was already contractually obligated to Paramount to do the work for free, is farfetched. And if that did happen, plaintiff had an ample opportunity to show it. After taking discovery, she has unearthed no record of any payment for this service from Goldman to ABM, or any relevant communication between the two.

The burden of a party moving for summary judgment is to "make a prima facie showing of entitlement to judgment as a matter of law" (*Alvarez v. Prospect Hosp.,* 68 N.Y.2d 320, 324, 508 N.Y.S.2d 923, 501 N.E.2d 572 [1986]). The moving party need not specifically disprove every remotely possible state of facts on which its opponent might win the case. Goldman's showing here was adequate to shift the burden to plaintiff "to produce evidentiary proof ... sufficient to establish the existence of material issues of fact" (*id.*). Plaintiff has not carried that burden.

***321** Accordingly, the order of the Appellate Division should be reversed, with costs, summary judgment granted dismissing the complaint as against Goldman Sachs & Co., and the certified question answered in the negative.

PIGOTT, J. (dissenting).

We have held time and time again that summary judgment should not be granted when there is "any doubt" (*Sillman v. Twentieth Century–Fox Film Corp.,* 3 N.Y.2d 395, 404, 165 N.Y.S.2d 498, 144 N.E.2d 387 [1957]) as to the existence of a triable issue or when the issue is "arguable" (*id.; Barrett v. Jacobs,* 255 N.Y. 520, 522, 175 N.E. 275 [1931]). "[I]f the issue is fairly debatable a motion for summary judgment must be denied" (*Stone v. Goodson,* 8 N.Y.2d 8, 12, 200 N.Y.S.2d 627, 167 N.E.2d 328 [1960]). In other words, if it is reasonable to disagree

about the material facts or about what may be inferred from undisputed facts, summary judgment may not be granted. Moreover, in deciding whether there is a material triable issue of fact, "the facts must be viewed in the light most favorable to the nonmoving party" (*Matter of Council of City of N.Y. v. Bloomberg,* 6 N.Y.3d 380, 401, 813 N.Y.S.2d 3, 846 N.E.2d 433 [2006], citing *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.,* 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 [1986]). It follows that a split decision, such as this one, in which appellate judges disagree about what disputed facts may be inferred from undisputed facts, should be extremely rare.

A summary judgment motion is governed by a well-established shifting of the burden of proof. The movant's failure to make a prima facie showing of entitlement ****872 ***882** to judgment as a matter of law "requires a denial of the motion, regardless of the sufficiency of the opposing papers" and it is only if the movant succeeds in making this showing that the burden shifts to the party opposing the motion (*Alvarez v. Prospect Hosp.,* 68 N.Y.2d 320, 324, 508 N.Y.S.2d 923, 501 N.E.2d 572 [1986]). Here, Goldman Sachs failed to sustain its initial burden of making a prima facie showing of entitlement to summary judgment.

Under New York case law that the majority does not question, a lessee is liable pursuant to Labor Law § 240(1) if it has "the right to control the work being done" (majority op at 320, citing *Sweeting v. Board of Coop. Educ. Servs.,* 83 A.D.2d 103, 114, 443 N.Y.S.2d 910 [4th Dept.1981], *lv. denied* 56 N.Y.2d 503, 450 N.Y.S.2d 1025, 435 N.E.2d 1100 [1982]; *Frierson v. Concourse Plaza Assoc.,* 189 A.D.2d 609, 611, 592 N.Y.S.2d 309 [1st Dept.1993]; *Bart v. Universal Pictures,* 277 A.D.2d 4, 5, 715 N.Y.S.2d 240 [1st Dept.2000]). The key question is whether "defendant had the right to insist that proper safety practices were followed ... it is the right to control the work that is significant, not the actual exercise or nonexercise of control" ***322** (*Copertino v. Ward,* 100 A.D.2d 565, 567, 473 N.Y.S.2d 494 [2d Dept.1984], citing *Sweeting,* 83 A.D.2d at 114, 443 N.Y.S.2d 910). "[E]vidence that the lessee actually hired the general contractor" is relevant to establishing the right to control, as are "contractual or statutory provisions granting such right" (*Bart,* 277 A.D.2d at 5, 715 N.Y.S.2d 240). The question for this Court is whether Goldman tendered sufficient evidence to eliminate any issue of fact concerning whether it had the right to control plaintiff's work. In my view, it did not.

Here, the majority relies exclusively on one document, a "Services Agreement" between Paramount Group, Inc., the building's owner, and American Building Maintenance Co. (ABM), entered into as of June 1, 1997. An appendix to the contract, titled "EXHIBIT 'C' SPECIFICATIONS"—describing the "base building cleaning specifications" in regard to window cleaning—provides that "[p]rior to tenant occupancy, [ABM] shall provide the initial cleaning [of] all interior windows for which there will be no charge to Paramount Group, Inc. or tenant. Work to be performed upon request of Paramount Group Inc." The majority infers from this single provision that Ferluckaj, who was cleaning the interior side of an exterior window, just prior to occupancy by Goldman, was doing so pursuant to Paramount's orders. This inferential leap cannot be reconciled with the well-established standards of summary judgment outlined above.

The majority writes that "[t]he idea that Goldman chose to hire ABM at its own expense, when ABM was already contractually obligated to Paramount to do the work for free, is far-fetched" (majority op. at 320, 880 N.Y.S.2d at 881, 908 N.E.2d at 871). I cannot agree. Far from answering the dispositive question, of who ordered the cleaning, as a matter of law, the Services Agreement raises several questions. Contrary to the majority's suggestion that window cleaning was not treated as a special service that tenants could contract directly with ABM for (majority op. at 319, 880 N.Y.S.2d at 880, 908 N.E.2d at 870), the Services Agreement expressly states, in a section titled "SPECIAL SERVICES REQUIRED BY TENANTS," that "[a]dditional window cleaning" is one of the extra services that tenants may request and for which they will be directly charged by ABM.

At his deposition, Robert Barriero, a corporate services vice-president at Goldman, ****873 ***883** testified that in his understanding "[a]dditional window cleaning" referred to the cleaning of "[i]nterior glass," such as might be found in an interior doorway. And he insisted that, while Goldman hired ABM directly during occupancy to perform additional cleaning and maintenance services such as carpet cleaning and pantry maintenance, it did not ***323** hire ABM to do any window cleaning. Barriero's testimony is, however, of limited value with respect to preoccupancy events. His knowledge of the "base building cleaning specifications" and the "special services" was confined to their postoccupancy implementation. In fact, Barriero admitted he was unaware of the preoccupancy renovations.

Barriero's testimony was of limited use for another reason—Goldman outsourced its management services at the time in question to a company, Hines Interests Limited, that entered into and maintained all the contracts

for services provided to Goldman at the building. Hines, as Goldman's agent, entered into contracts for services not provided by the base building cleaning specifications contract, including the additional postoccupancy cleaning and maintenance services. Barriero testified that, if there were records concerning the purchase of additional ABM cleaning services by Goldman, they would not be in his possession. It remains undisputed that, under the Services Agreement, special window cleaning by ABM could be separately contracted for.

The Services Agreement is puzzling in another way. As the majority notes, ABM's postoccupancy duties included cleaning the building's windows once every three months. The pertinent provision states that ABM shall "[w]ash and clean all interior and exterior of windows and frames ... on every floor every three (3) months." By contrast, the preoccupancy provision specifies "all interior windows," omitting the possessive. As the majority reads it, the contract envisages three-monthly cleaning of the interior and exterior sides of all windows, plus an initial preoccupancy cleaning that would include the *interior sides of exterior windows*. This is a reasonable interpretation, but it is by no means the only reasonable one.

An alternative reading of the agreement is both literal and plausible. It is that there will be three-monthly cleaning of the interior and exterior sides of all windows, plus an initial preoccupancy cleaning of *interior windows*—glass panels neither side of which is outside the building. These would be precisely the windows that Barriero testified would not be included in "base building cleaning" and would normally be the subject of a separate contract between tenant and ABM. This interpretation makes sense of the clause that provides that "there will be no charge to Paramount Group, Inc. or tenant" for this cleaning. Since the context is a list of base building cleaning services that are provided to tenants at the owner's expense, the added ***324** language specifying that there will be no charge in this one instance is odd. It is explicable if it refers to a service that would normally, postoccupancy, be regarded as an additional service to be paid by the tenant. I conclude that it is reasonable to doubt whether the Services Agreement provided for preoccupancy cleaning of the interior sides of exterior windows.

Moreover, under the Services Agreement, the *only* preoccupancy cleaning of any kind that ABM contracted to do was "the initial cleaning [of] all interior windows." That seems a peculiar choice of item to clean prior to a tenant moving in. One would expect an owner to require the cleaning service it contracts with to carry out further services, such as carpet shampooing, ****874** *****884** wall washing and dusting, before a tenant moves in. Moreover, Goldman retained defendant Henegan Construction Co., Inc., as construction manager, to supervise a "complete renovation" of the floor on which Ferluckaj's accident occurred, prior to occupancy. The accident occurred after the renovation and immediately before occupancy. In these circumstances, unless Henegan and its subcontractors could be relied on to clean up the dust and dirt that their work created (as opposed to the large pieces of debris associated with construction work that laborers would normally remove themselves), extensive cleaning would have to be performed by ABM. In short, there was a large amount of preoccupancy cleaning that ABM was not contractually obliged to do, under the Services Agreement, but which any corporate tenant would surely have expected.

Either the Services Agreement incompletely describes the responsibilities of ABM or tenants contracted separately with ABM for preoccupancy cleaning. We do not know whether Goldman had to hire ABM at its own expense to clean carpets, walls, doors and ceilings, between the renovation and occupancy. (Goldman was required by its lease to use ABM for any additional cleaning services.) If it did, it likely contracted with ABM for preoccupancy cleaning of the interior sides of exterior windows, including those Ferluckaj was cleaning when she fell. I note that ABM was accustomed to doing additional window cleaning work, over and above the base building specifications. Al Hoti, an ABM manager, testified that, although the postoccupancy cleaning of the interior sides of exterior windows was part of base building cleaning, nevertheless "it all depends how many cycles [of cleaning] the contract calls for ... if a tenant requests ... more cleaning, then [ABM] can get more cleaning done."

***325** We simply do not know which contract governed Ferluckaj's cleaning, because discovery did not answer that question. This would be a very different case if Goldman had produced an affidavit stating that the cleaning was done pursuant to the Services Agreement. Then Ferluckaj, if she failed to respond to that affidavit, might be deemed to admit it (*Kuehne & Nagel v. Baiden,* 36 N.Y.2d 539, 544, 369 N.Y.S.2d 667, 330 N.E.2d 624 [1975]). But Goldman produced no such affidavit, and, as noted above, the relevant deposition testimony mainly concerned postoccupancy events, shedding no light on who ordered the preoccupancy cleaning.

Because, having read the Services Agreement, as well as the deposition transcripts and affidavits submitted by the parties in their summary judgment motions, I still have considerable "doubt" (*Sillman,* 3 N.Y.2d at 404, 165 N.Y.S.2d 498, 144 N.E.2d 387) as to whether Goldman

had the right to control Ferluckaj's work, I would affirm the order of the Appellate Division, deny so much of Goldman's motion as sought summary judgment dismissing Ferluckaj's Labor Law § 240(1) claim, and answer the certified question in the affirmative.

I conclude by noting that I would expect the majority opinion in this case to have fairly limited precedential value. This is a fact-specific area of law in which almost every case is sui generis.

Judges GRAFFEO, READ and JONES concur with Judge SMITH; Judge PIGOTT dissents and votes to affirm in a separate opinion in which Chief Judge LIPPMAN and Judge CIPARICK concur.

Order reversed, with costs, that part of defendant Goldman Sachs & Co.'s motion seeking summary judgment dismissing plaintiff's Labor Law § 240(1) claim granted ****875 ***885** complaint against Goldman Sachs & Co. dismissed in the entirety, and certified question answered in the negative.

All Citations

12 N.Y.3d 316, 908 N.E.2d 869, 880 N.Y.S.2d 879, 157 Lab.Cas. P 60,781, 2009 N.Y. Slip Op. 02483

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90 N.Y.2d 623
Court of Appeals of New York.

Martin FERRANTE, Respondent,
v.
AMERICAN LUNG ASSOCIATION,
Appellant.

Oct. 23, 1997.

Synopsis

Former employee brought age discrimination action against his former employer under Human Rights Law. The Supreme Court, New York County, Wilk, J., granted summary judgment in favor of former employer. Former employee appealed. The Supreme Court, Appellate Division, 230 A.D.2d 685, 646 N.Y.S.2d 808, reversed. Former employer was granted leave to appeal. The Court of Appeals, Smith, J., held that genuine issue of material fact as to whether former employer's proffered reasons for discharging former employee were pretext for age discrimination precluded summary judgment.

Affirmed.

Attorneys and Law Firms

***26 *624 **1309** Gerstein & Churchill, P.C., New York City (Robert S. Churchill, of counsel), for appellant.

Robert G. Spevack, New York City, for respondent.

***625** Davis & Eisenberg, New York City (Herbert Eisenberg and Margaret McIntyre, of counsel), for National Employment Lawyers Association/New York, amicus curiae.

***27 **1310 OPINION OF THE COURT**

SMITH, Judge.

The primary issue here is whether plaintiff has demonstrated ***626** that a factual issue exists to withstand defendant's motion for summary judgment to dismiss plaintiff's age discrimination claim under New York's Human Rights Law (Executive Law § 296). We conclude that plaintiff has sufficiently raised a question of fact as to whether defendant's proffered reasons for plaintiff's termination were merely a pretext for age discrimination. Accordingly, the order of the Appellate Division should be affirmed.

Plaintiff alleged that he was employed by defendant as controller from June 21, 1982 until September 12, 1991, at which point plaintiff's employment was terminated by defendant. Plaintiff was 58 years old at the time he was fired. During the almost 10 years plaintiff was employed by defendant, he received salary increases for merit every year until the last such increase on July 6, 1990. In or about that same month, July 1990, plaintiff's supervisor retired from defendant corporation and plaintiff began reporting to a newly hired Chief Financial Officer.

According to plaintiff, his new supervisor "engaged in a campaign of harassment and discrimination against plaintiff culminating in plaintiff's unlawful termination." For example, plaintiff claimed that the new supervisor disparaged and humiliated plaintiff by calling him "the old man" in front of other employees. At his termination, plaintiff claimed that his supervisor failed to provide him with a written explanation or an "exit interview," a procedure typically afforded to terminated employees. Plaintiff noted that a "substantially younger person" assumed plaintiff's former position. On March 10, 1992, plaintiff commenced an action claiming that he was fired in violation of New York State's Human Rights Law (Executive Law § 296).

Following discovery, in December 1994, defendant moved for summary judgment to dismiss plaintiff's complaint. Defendant claimed that plaintiff was fired for nondiscriminatory reasons related to his poor work performance. Among other problems, defendant claimed that plaintiff (1) made serious errors in his financial reporting; (2) failed to prepare preliminary financial statements and job plans in a timely fashion; (3) was remiss in learning the new computer system and arranging for computer training for his staff; and (4) persistently failed to respond to initiatives and suggestions made by his immediate supervisor. The majority of defendant's proof of plaintiff's performance stems from a memorandum written by plaintiff's supervisor. Defendant also tried generally to discredit plaintiff's allegations of disparaging remarks made by the same supervisor.

***627** Though generally conceding the accuracy of many of the claimed deficiencies in his performance, plaintiff countered that such proof was only a pretext to the real reason for his termination—age discrimination. Plaintiff noted that the memorandum that served as the basis for most of defendant's legitimate reasons for his termination was written by the same supervisor who had allegedly made the disparaging remarks to plaintiff about his age, the Chief Financial Officer. Importantly, plaintiff also highlighted the fact that the subject memorandum was dated more than a month after he had been fired. According to plaintiff, the credibility of the memorandum was undermined by the timing of its production and the fact that such posttermination memoranda deviated from defendant's standard procedure. Plaintiff also pointed out that none of the comments made in the memorandum were cited when he was terminated. Finally, plaintiff asserted that none of the negative comments about his performance were raised in any other notes in his personnel file or in any memoranda written at the time his salary was reduced several months before his termination.

The record contains one memorandum that was written by the Chief Financial Officer to plaintiff which explains that the salary decrease was an "adjustment" due to a "change in [plaintiff's] functional and staff responsibility" stemming from the Chief Financial Officer's realignment of "the divisional structure" and procedures of the "information system management and constituent and affiliate reporting." Defendant claimed that *****28 **1311** this memorandum demonstrates that the "salary decrease was based upon [plaintiff's] failure or inability to perform the evolving computer services responsibilities under the controller's position." Plaintiff countered that the salary reduction was "a subterfuge to cloak defendant's true campaign of harassment and discrimination against plaintiff based upon his age." The parties offered similarly disparate characterizations of other documents in the record.

Plaintiff also submitted a memorandum dated November 7, 1991, written by the Chief Operating Officer to the Chief Financial Officer concerning "rumors and second/third hand reports of comments you had made that had upset some people, most of whom work in your division." The memorandum states that:

> "In most cases it is probable that these remarks were meant to be nothing more than good-natured ***628** banter. However, the stress caused by the higher expectations we share for your division has put some people on edge. What could have been perceived as banter has sometimes been given a less benign twist."

On January 2, 1992, two months after the memorandum was written, the Chief Financial Officer resigned from defendant association. Defendant offered no explanation for the subject matter of the memorandum. Plaintiff also contested the evidence as to the number of other employees over 50 years of age who had been "either fired, placed on probation, or slated for removal" by the Chief Financial Officer during the same period. Furthermore, plaintiff noted that defendant advertised in trade publications for a new controller prior to actually terminating him from that position. In fact, plaintiff argued that defendant deviated from many of its usual pretermination procedures when it fired him.

Supreme Court found that plaintiff had proved a prima facie case of age discrimination. However, the court also found that the defendant had come forward with proof of a legitimate, nondiscriminatory reason for plaintiff's termination. In examining the issues raised by the parties, the court granted defendant's motion for summary judgment because plaintiff had "not met his burden of showing by a preponderance of the evidence that the reasons offered by defendants were a pretext for discrimination."

The Appellate Division reversed and denied defendant's summary judgment motion. The Court ruled that "plaintiff was only required to identify a disputed material issue of fact with respect to whether or not defendant's articulated basis for the dismissal was merely a pretext for discriminatory action" (230 A.D.2d 685, 646 N.Y.S.2d 808). The Court noted plaintiff's various arguments concerning the credibility of the performance memorandum written after plaintiff's termination. The Court also noted other issues which revolved around credibility, such as the alleged remarks made by the supervisor. There were also some disputed issues as to other employees who had been fired by defendant who were also over 50 years of age and why defendant had not followed its typical termination procedures with plaintiff. In identifying these various disputed issues, the Appellate Division concluded that plaintiff had raised a question of fact regarding defendant's nondiscriminatory basis for firing him. The Appellate Division granted leave to appeal certifying the following question: "Was the decision and order of this ***629** Court, which reversed the order of the Supreme Court [two Justices dissenting], properly made?"

DISCUSSION

The standards for recovery under section 296 of the Executive Law are in accord with Federal standards under title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e *et seq.*) (*see, e.g., Matter of Laverack & Haines v. New York State Div. of Human Rights,* 88 N.Y.2d 734, 738, 650 N.Y.S.2d 76, 673 N.E.2d 586; *Matter of Miller Brewing Co. v. State Div. of Human Rights,* 66 N.Y.2d 937, 938, 498 N.Y.S.2d 776, 489 N.E.2d 745). On a claim of discrimination, plaintiff has the initial burden to prove by a preponderance of the evidence a prima facie case of discrimination (*Texas Dept. of Community Affairs v. Burdine,* 450 U.S. 248, 252–253, 101 S.Ct. 1089, 1093–1094, 67 L.Ed.2d 207; *McDonnell Douglas Corp. v.* ***29 **1312** *Green,* 411 U.S. 792, 802, 93 S.Ct. 1817, 1824, 36 L.Ed.2d 668). To support a prima facie case of age discrimination under the Human Rights Law, plaintiff must demonstrate (1) that he is a member of the class protected by the statute; (2) that he was actively or constructively discharged; (3) that he was qualified to hold the position from which he was terminated; and (4) that the discharge occurred under circumstances giving rise to an inference of age discrimination (*see, e.g., McDonnell Douglas Corp. v. Green,* 411 U.S., at 802, 93 S.Ct., at 1824; *Woroski v. Nashua Corp.,* 31 F.3d 105, 108 [2d Cir.1994]).

The burden then shifts to the employer "to rebut the presumption of discrimination by clearly setting forth, through the introduction of admissible evidence, legitimate, independent, and nondiscriminatory reasons to support its employment decision" (*Matter of Miller Brewing Co. v. State Div. of Human Rights,* 66 N.Y.2d, at 938, 498 N.Y.S.2d 776, 489 N.E.2d 745; *see also, Texas Dept. of Community Affairs v. Burdine,* 450 U.S., at 253, 101 S.Ct., at 1093–1094; *Matter of Laverack & Haines v. New York State Div. of Human Rights,* 88 N.Y.2d, at 738, 650 N.Y.S.2d 76, 673 N.E.2d 586).

If the trier of fact believes the plaintiff's evidence, and if the defendant is silent in the face of the presumption of discrimination, judgment must be entered for plaintiff because no issue of fact remains in the case (*Texas Dept. of Community Affairs v. Burdine,* 450 U.S., at 254, 101 S.Ct., at 1094). However, if the defendant's evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff, then the presumption raised by the prima facie case is rebutted and " 'drops from the case' " (*St. Mary's Honor Ctr. v. Hicks,* 509 U.S. 502, 507, 113 S.Ct. 2742, 2747, 125 L.Ed.2d 407 [citation omitted]).

Despite the absence of the presumption, plaintiff is still entitled to prove that the legitimate reasons proffered by defendantwere ***630** merely a pretext for discrimination (*see, e.g., McDonnell Douglas Corp. v. Green,* 411 U.S., at 805, 93 S.Ct., at 1826 [claimant "must be given a full and fair opportunity to demonstrate by competent evidence that the presumptively valid reasons for his rejection were in fact a coverup for a * * * discriminatory decision"]). This may be accomplished when it is "shown *both* that the reason was false, *and* that discrimination was the real reason" (*St. Mary's Honor Ctr. v. Hicks,* 509 U.S., at 515, 113 S.Ct., at 2752 [emphasis in original]).

> "The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination. Thus, rejection of the defendant's proffered reasons will *permit* the trier of fact to infer the ultimate fact of intentional discrimination" (*St. Mary's Honor Ctr. v. Hicks,* 509 U.S., at 511, 113 S.Ct., at 2749 [emphasis in original]).

On the other hand, "[i]t is not enough * * * to *dis*believe the employer; the fact finder must *believe* the plaintiff's explanation of intentional discrimination" (*St. Mary's Honor Ctr. v. Hicks,* 509 U.S., at 519, 113 S.Ct., at 2754 [emphasis in original]) for plaintiff to prevail. Thus, even if the employer's reason is "unpersuasive, or even obviously contrived" (*St. Mary's Honor Ctr. v. Hicks,* 509 U.S., at 524, 113 S.Ct., at 2756), plaintiff always has the ultimate burden of proof to show that intentional discrimination has occurred under a consideration of all the evidence (*Texas Dept. of Community Affairs v. Burdine,* 450 U.S., at 253, 101 S.Ct., at 1093–1094; *St. Mary's Honor Ctr. v. Hicks,* 509 U.S., at 507–508, 113 S.Ct., at 2747–2748).

The defendant has confused plaintiff's ultimate burden with the showing needed to withstand a summary judgment motion. Generally, a plaintiff is not required to *prove* his claim to defeat summary judgment (*see, Zuckerman v. City of New York,* 49 N.Y.2d 557, 562, 427 N.Y.S.2d 595, 404 N.E.2d 718; *Sillman v. Twentieth Century–Fox Film Corp.,* 3 N.Y.2d 395, 404, 165 N.Y.S.2d 498, 144 N.E.2d 387 [" 'issue-finding, rather than issue-determination, is the key to the procedure' "] [citation omitted]). As stated in *Criley v. Delta Air Lines,* 119 F.3d 102 [2d Cir.1997], "[t]o defeat a properly supported ***30 **1313** motion for summary judgment in an age discrimination case, plaintiffs must 'show that there is a material issue of fact as to whether (1) the employer's asserted reason for [the challenged action] is false or unworthy of belief *and* (2) more likely than not the employee's age was the real reason' " (*id.,* at 104 [emphasis in original], quoting ***631** *Woroski v. Nashua Corp.,* 31 F.3d 105, 108–109, *supra* [2d Cir.1994]; *see*

also, Gallo v. Prudential Residential Servs., Ltd. Partnership, 22 F.3d 1219, 1225 [2d Cir.1994]).

It is not the court's function on a motion for summary judgment to assess credibility (*see, Glick & Dolleck v. Tri–Pac Export Corp.,* 22 N.Y.2d 439, 441, 293 N.Y.S.2d 93, 239 N.E.2d 725; *S. J. Capelin Assocs. v. Globe Mfg. Corp.,* 34 N.Y.2d 338, 341, 357 N.Y.S.2d 478, 313 N.E.2d 776). Moreover, in accordance with the oft-recited standards for summary judgment, it is the movant who has the burden to establish his entitlement to summary judgment as a matter of law (*see, Zuckerman v. City of New York,* 49 N.Y.2d, at 562, 427 N.Y.S.2d 595, 404 N.E.2d 718; *Sommer v. Federal Signal Corp.,* 79 N.Y.2d 540, 555, 583 N.Y.S.2d 957, 593 N.E.2d 1365). Thus, to prevail in this case, defendant must demonstrate that the firing was based upon nondiscriminatory reasons.

We have stated that "discrimination is rarely so obvious or its practices so overt that recognition of it is instant and conclusive, it being accomplished usually by devious and subtle means" (*300 Gramatan Ave. Assocs. v. State Div. of Human Rights,* 45 N.Y.2d 176, 183, 408 N.Y.S.2d 54, 379 N.E.2d 1183). However, upon a proper showing, summary judgment is "a highly useful device for expediting the just disposition of a legal dispute" (*Matter of Suffolk County Dept. of Social Servs. [Michael V.] v. James M.,* 83 N.Y.2d 178, 182, 608 N.Y.S.2d 940, 630 N.E.2d 636). For example, if the defendant had demonstrated an absence of even a prima facie case, summary judgment would be proper (*see, Ioele v. Alden Press,* 145 A.D.2d 29, 34–36, 536 N.Y.S.2d 1000). Similarly, if plaintiff had been unable to raise a question of fact concerning either the falsity of defendant's proffered basis for the termination or that discrimination was more likely the real reason, summary judgment would have been appropriate. However, here, the credibility issues raised by the plaintiff are sufficient to allow this case to go forward.

The order of the Appellate Division should be affirmed, with costs, and the certified question answered in the affirmative.

KAYE, C.J., and TITONE, BELLACOSA, LEVINE, CIPARICK and WESLEY, JJ., concur.

Order affirmed, etc.

All Citations

90 N.Y.2d 623, 687 N.E.2d 1308, 665 N.Y.S.2d 25, 78 Fair Empl.Prac.Cas. (BNA) 1539, 1997 N.Y. Slip Op. 08773

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25 A.D.3d 759
Supreme Court, Appellate Division, Second Department, New York.

Tony T. GJOKAJ, appellant,
v.
Jean FOX, et al., respondents.

Jan. 31, 2006.

Synopsis

Background: Plaintiff brought action seeking declaratory judgment that he was owner of real property by adverse possession. The Supreme Court, Westchester County, Barone, J., entered summary judgment in favor of defendants, and plaintiff appealed.

Holdings: The Supreme Court, Appellate Division, held that:

prior owners' statements evincing their belief that they had owned disputed land for prescribed period did not constitute hearsay, and

fact issues remained as to whether prior owner adversely possessed disputed area for prescribed period.

Reversed.

Attorneys and Law Firms

****157** Maron Brodnick & Mazzanti, White Plains, N.Y. (Andrew D. Brodnick of counsel), for appellant.

Cuddy & Feder, LLP, White Plains, N.Y. (Thomas R. Beirne and Andrew P. Schriever of counsel), for respondents.

ANITA R. FLORIO, J.P., HOWARD MILLER, ROBERT A. SPOLZINO, and MARK C. DILLON, JJ.

Opinion

***759** In an action for a judgment declaring that the plaintiff is the owner by adverse possession of a certain parcel of real property, the plaintiff appeals from an order of the Supreme Court, Westchester County (Barone, J.), entered September 17, 2004, which granted the defendants' motion for summary judgment dismissing the complaint and denied his cross motion for leave to amend the complaint.

ORDERED that the order is reversed, on the law, with costs, the motion is denied, the cross motion is granted, and the amended complaint is deemed served.

The plaintiff purchased property from Valerie Nelson in 1993. The defendants own a large parcel of land to the east of and adjacent to the plaintiff's property. The plaintiff's property is bounded on three sides by stone walls, and a fourth stone wall runs outside the eastern border of the land described in the plaintiff's deed. The defendants have record title to a triangular patch of land measuring .411 acres, on the western side of the stone wall. That land is the subject of this adverse possession action.

***760** The plaintiff and his father testified that Valerie Nelson and her former husband made statements evincing their belief that they had owned the disputed land for approximately 40 years. The Supreme Court erred in refusing to consider these statements as evidence of "the nature and extent of the possession and the character and quality of the claim of title" (*Gilmartin v. Buchanan,* 134 App.Div. 587, 588, 119 N.Y.S. 489). Used for such a purpose, these statements are not hearsay and are properly admissible (*see Morss v. Salisbury,* 48 N.Y. 636; *Peattie v. Gabel,* 155 App.Div. 786, 140 N.Y.S. 993).

Accordingly, the Supreme Court erred in granting the defendants' motion for summary judgment dismissing the complaint. The Nelsons' statements, along with evidence that Valerie Nelson placed a garden and sheds in the disputed area, used another portion of the disputed area as a dump, and mowed her lawn up to the eastern stone wall which enclosed the area as part of her main property, raised issues of fact as to whether Valerie Nelson adversely possessed the disputed area for the prescribed period, and thereafter transferred her interest to the plaintiff (*see* RPAPL 522; *Belotti v. Bickhardt,* 228 N.Y. 296, 127 N.E. 239; *City of Tonawanda v. Ellicott Creek Homeowners Assn.,* 86 A.D.2d 118, 449 N.Y.S.2d 116; *Bassett v. Nichols,* 26 A.D.2d 569, 271 N.Y.S.2d 33). The fact that the deeds for the plaintiff's property do not contain a description of the disputed area does not compel a different result (*see Bradt v. Giovannone,* 35 A.D.2d 322, 315 N.Y.S.2d 961; *Rasmussen v. Sgritta,* 33 A.D.2d 843, 305 N.Y.S.2d 816). As the defendants' own submissions raised issues of fact requiring a trial, they did

not meet their burden of making a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case, and summary judgment was improperly granted (*Winegrad* ****158** *v. New York Univ. Med. Ctr.,* 64 N.Y.2d 851, 487 N.Y.S.2d 316, 476 N.E.2d 642).

The Supreme Court also erred in denying the plaintiff's cross motion for leave to amend the complaint to include a cause of action for a prescriptive easement. Leave to amend a pleading is to be freely given where, as here, there is no showing of prejudice or surprise to the nonmoving party, and the proposed amendment is not totally devoid of merit (*see* CPLR 3025[b]; *Consolidated Payroll Servs. v. Berk,* 18 A.D.3d 415, 794 N.Y.S.2d 410).

All Citations

25 A.D.3d 759, 809 N.Y.S.2d 156, 2006 N.Y. Slip Op. 00627

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197 A.D.3d 630
Supreme Court, Appellate Division, Second Department, New York.

Nikeya HARRISON, respondent,
v.
CITY OF NEW YORK, et al., defendants,
New York City Health and Hospitals Corporation, et al., appellants.

2019–01458
|
(Index No. 514613/17)
|
Argued—June 3, 2021
|
August 18, 2021

Attorneys and Law Firms

Georgia M. Pestana, Corporation Counsel, New York, N.Y. (Fay Ng and Barbara Graves–Poller of counsel), for appellants.

Zaremba Brown, PLLC, New York, N.Y. (Pollack, Pollack, Isaac & DeCicco, LLP [Brian J. Isaac, Jillian Rosen, and Christopher J. Soverow], of counsel), for respondent.

REINALDO E. RIVERA, J.P., SYLVIA O. HINDS–RADIX, ROBERT J. MILLER, PAUL WOOTEN, JJ.

DECISION & ORDER

***630** In an action to recover damages for medical malpractice, the defendants New York City Health and Hospitals Corporation, Kings County Hospital, Tim Schwartz, Leon Boudourakis, and Valery Roudnitsky appeal from an order of the Supreme Court, Kings County (Marsha L. Steinhardt, J.), dated November 19, 2018. The order, insofar as appealed from, denied that branch of those defendants' motion which was pursuant to CPLR 3211(a) to dismiss the complaint insofar as asserted against them on the ground that the plaintiff failed to serve an adequate notice of claim in accordance with the requirements of General Municipal Law § 50–e.

ORDERED that the order is affirmed insofar as appealed from, with costs.

The plaintiff was admitted to the defendant Kings County Hospital from May 2, 2016, to September 7, 2016, and underwent several surgical procedures that led to the amputation of her right leg below the knee. The plaintiff subsequently commenced this action to recover damages for medical malpractice. The defendants New York City Health and Hospitals Corporation, Kings County Hospital, Tim Schwartz, Leon Boudourakis, and Valery Roudnitsky (hereinafter collectively the defendants) moved, among other things, pursuant to CPLR 3211(a) to dismiss the complaint insofar as asserted against them ****909** on the ground that the plaintiff failed to serve an adequate notice of claim in accordance with the requirements of General Municipal Law § 50–e. In an order dated November 19, 2018, the Supreme Court, inter alia, denied that branch of the defendants' motion. The defendants appeal.

"A timely and sufficient notice of claim is a condition precedent to asserting a tort claim against a municipality or public benefit corporation" (*Matter of Johnson v. County of Suffolk,* 167 A.D.3d 742, 743, 90 N.Y.S.3d 84 [internal quotation marks omitted]; *see* General Municipal Law § 50–e[1][a]). General Municipal Law § 50–e, in pertinent part, "requires that the claimant state the nature of the claim and the time when, the place where, and the manner in which it arose" (*Se Dae Yang v. New York City Health & Hosps. Corp.,* 140 A.D.3d 1051, 1052, 35 N.Y.S.3d 350; *see* General Municipal Law § 50–e[2]). "The purpose of the statutory notice of claim requirement is to afford the public corporation an adequate opportunity to investigate the circumstances ***631** surrounding the [claim] and to explore the merits of the claim while information is still readily available" (*Carroll v. City of New York,* 149 A.D.3d 1026, 1027, 52 N.Y.S.3d 465 [internal quotation marks omitted]). Thus, the "requirements of the statute are met when the notice describes the [claim] with sufficient particularity so as to enable the defendant to conduct a proper investigation thereof and to assess the merits of the claim" (*Conn v. Tutor Perini Corp.,* 174 A.D.3d 680, 681, 105 N.Y.S.3d 508 [internal quotation marks omitted]).

Moreover, "[t]he Legislature did not intend that the claimant have the additional burden of pleading causes of action and legal theories, proper for the pleadings, in the

notice of claim....General Municipal Law § 50–e was not meant as a sword to cut down honest claims, but merely as a shield to protect municipalities against spurious ones" (*Se Dae Yang v. New York City Health & Hosps. Corp.,* 140 A.D.3d at 1052, 140 A.D.3d 1051 [internal quotation marks omitted]). As such, "a claimant need not state a precise cause of action in haec verba in a notice of claim" (*id.* [internal quotation marks omitted]).

Here, the notice of claim alleges that the defendants were negligent over the course of the plaintiff's admission at Kings County Hospital from May 2, 2016, to September 7, 2016, and describes several of the injuries that the plaintiff allegedly sustained during that period. As the notice of claim was sufficient to enable the defendants to conduct a proper investigation and assess the merits of the claim, the Supreme Court properly denied that branch of the defendants' motion which was pursuant to CPLR 3211(a) to dismiss the complaint insofar as asserted against them (*see Se Dae Yang v. New York City Health & Hosps. Corp.,* 140 A.D.3d at 1052–1053, 35 N.Y.S.3d 350; *DeLeonibus v. Scognamillo,* 183 A.D.2d 697, 698, 583 N.Y.S.2d 285).

RIVERA, J.P., HINDS–RADIX, MILLER and WOOTEN, JJ., concur.

All Citations

197 A.D.3d 630, 149 N.Y.S.3d 908 (Mem), 2021 N.Y. Slip Op. 04703

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72 A.D.3d 600
Supreme Court, Appellate Division, First Department, New York.

Robert HENRY, Plaintiff–Respondent,
v.
Pedro L. PEGUERO, et al., Defendants–Appellants.

April 29, 2010.

Synopsis
Background: Plaintiff brought action to recover for personal injuries he sustained in motor vehicle accident. The Supreme Court, Bronx County, Stanley Green, J., upon plaintiff's motion to renew and reargue prior order, entered summary judgment in defendants' favor only to extent of dismissing plaintiff's claims under 90/180–day test. Defendants appealed.

Holdings: The Supreme Court, Appellate Division, held that:

grant of renewal contravened policy of confining motion practice to statutory limits, and

physician's report was insufficient to rebut finding of defendants' physician that plaintiff's affliction was not caused by accident.

Reversed.

Manzanet–Daniels, J., dissented and filed opinion in which Saxe, J., joined.

Attorneys and Law Firms

****50** Baker, McEvoy, Morrissey & Moskovits, P.C., New York (Stacy R. Seldin of counsel), for appellants.

Mitchell Dranow, Mineola, for respondent.

TOM, J.P., ANDRIAS, SAXE, McGUIRE, MANZANET–DANIELS, JJ.

Opinion

***600** Order, Supreme Court, Bronx County (Stanley Green, J.), entered on or about June 1, 2009, which, upon plaintiff's motion to renew and reargue a prior order, same court and Justice, ***601** entered November 10, 2008, granting summary dismissal of the complaint, granted defendants' motion for summary judgment only to the extent of dismissing plaintiff's claims under the 90/180–day test, reversed, on the law, without costs, the motion denied and the order dismissing the entire complaint reinstated. The Clerk is directed to enter judgment accordingly.

Plaintiff alleged that he was injured on September 27, 2006 when a Lincoln Town Car, owned and operated by defendants, struck the passenger side of his Honda Accord. Plaintiff did not seek immediate medical treatment but flew to Florida to visit a friend, initially consulting Dr. Bhupinder S. Sawhney on October 11, 2006, following his return. The doctor's November 20, 2006 report of an MRI of the lumbar spine notes a degenerative condition ("Facet arthropathy from L4 through S1 is evident bilaterally"), and a subsequent report by Dr. Shahid Mian states, "MRI scan of the cervical spine dated 10/12/06 report [*sic*] diffuse disc dessication." On the prior motion, defendants sought dismissal on the ground that plaintiff had failed to demonstrate that he sustained a serious injury (Insurance Law § 5102[d]). Defendants tendered the report of a physician, Dr. Gregory Montalbano, who observed that the November 20, 2006 MRI, consistent with one performed on March 23, 2007, showed "degenerative changes which occur over time." Noting that "[s]ingle level acute disc herniations typically cause incapacitation for two or more weeks and require marked activity modification, bed rest and strong prescription pain medications," Dr. Montalbano concluded that plaintiff "suffers from a pre-existing condition of degenerative disc disease involving the lumbar spine at multiple levels which is reported for both scans."

In opposition, plaintiff submitted an affirmation by Dr. Mian stating that "Mr. Henry's injuries are causally related to the motor vehicle accident of 9/27/06." However, in the order from which renewal was sought, Supreme Court agreed with defendants that plaintiff's "injuries and his subsequent surgery were due to a pre-existing degenerative condition," further finding that plaintiff had "failed to provide an adequate explanation for the gap in treatment."

On his motion for renewal, plaintiff offered an addendum

from Dr. Mian, which concluded that the "disc herniation of L4–5 and L5–S1 of the lumbar spine are causally related to the accident, and not from a pre-existing condition or long standing degenerative process." The addendum adds that "the impact from the subject accident plainly made the disc pathologies symptomatic."

**51 It is apparent that the supplemental medical statement was *602 submitted in the attempt to remedy a weakness in plaintiff's opposition to defendants' original motion, endeavoring to relate the degenerative changes in plaintiff's spine to the motor vehicle accident. As this Court has emphasized, "Renewal is granted sparingly ...; it is not a second chance freely given to parties who have not exercised due diligence in making their first factual presentation" (*Matter of Beiny,* 132 A.D.2d 190, 210, 522 N.Y.S.2d 511 [1987], *lv. dismissed* 71 N.Y.2d 994, 529 N.Y.S.2d 277, 524 N.E.2d 879 [1988]). It is statutorily decreed that a renewal motion "shall be based upon new facts not offered on the prior motion that would change the prior determination" (CPLR 2221[e][2]) and that the application "shall contain reasonable justification for the failure to present such facts on the prior motion" (2221[e][3]). While the statutory prescription to present new evidence "need not be applied to defeat substantive fairness" (*Lambert v. Williams,* 218 A.D.2d 618, 621, 631 N.Y.S.2d 31 [1995]), such treatment is available only in a "rare case" (*Pinto v. Pinto,* 120 A.D.2d 337, 338, 501 N.Y.S.2d 835 [1986]), such as where liberality is warranted as a matter of judicial policy (*see Wattson v. TMC Holdings Corp.,* 135 A.D.2d 375, 521 N.Y.S.2d 434 [1987] [leave to amend complaint]), and then only where the movant presents a reasonable excuse for the failure to provide the evidence in the first instance (*see Tishman Constr. Corp. of N.Y. v. City of New York,* 280 A.D.2d 374, 377, 720 N.Y.S.2d 487 [2001]).

This construction is consistent with this Court's view that motion practice in connection with summary judgment should be confined to the limits imposed by CPLR 2214(b). As we have stated, "We perceive no reason to protract a procedure designed 'to expedite the disposition of civil cases where no issue of material fact is presented to justify a trial' (*Di Sabato v. Soffes,* 9 A.D.2d 297, 299 [193 N.Y.S.2d 184]) by encouraging submission of yet another set of papers, an unnecessary and unauthorized elaboration of motion practice" (*Ritt v. Lenox Hill Hosp.,* 182 A.D.2d 560, 562, 582 N.Y.S.2d 712 [1992]). Thus, a deficiency of proof in moving papers cannot be cured by submitting evidentiary material in reply (*see Migdol v. City of New York,* 291 A.D.2d 201, 737 N.Y.S.2d 78 [2002]), the function of which is "to address arguments made in opposition to the position taken by the movant and not to permit the movant to introduce new arguments in support of, or new grounds for the motion" (*Dannasch v. Bifulco,* 184 A.D.2d 415, 417, 585 N.Y.S.2d 360 [1992]). Nor can a deficiency in opposing a motion be cured by resorting to a surreply (*see e.g. Garced v. Clinton Arms Assoc.,* 58 A.D.3d 506, 509, 874 N.Y.S.2d 18 [2009]).

Supreme Court's grant of renewal in this matter contravenes this Court's policy of confining motion practice to the limits imposed by the CPLR. Neither of the statutory requirements **603 for renewal was satisfied by plaintiff. Dr. Mian's addendum was not the result of any additional examination or medical testing; rather, the doctor's conclusion was based on the medical information previously available to him and could have been included in his original affidavit (*see Cillo v. Schioppo,* 250 A.D.2d 416, 673 N.Y.S.2d 628 [1998]). While, in appropriate circumstances, renewal may be predicated on previously known facts, it is settled that "[t]he movant must offer a reasonable excuse for failure to submit the additional evidence on the original motion" (*Segall v. Heyer,* 161 A.D.2d 471, 473, 555 N.Y.S.2d 738 [1990]), which plaintiff neglected to do.

**52 Even if this Court were to accept the proffered addendum, it is insufficient to rebut the finding of defendants' physician that plaintiff's affliction is degenerative in nature rather than the consequence of a serious injury causally related to the accident (*see Lopez v. American United Transp., Inc.,* 66 A.D.3d 407, 886 N.Y.S.2d 157 [2009]; *Eichinger v. Jone Cab Corp.,* 55 A.D.3d 364, 865 N.Y.S.2d 89 [2008]). While Dr. Mian's addendum states that the accident caused plaintiff's underlying pathology to become manifest, it utterly fails to explain the two-week gap between the accident and the commencement of treatment, which "interrupt[s] the chain of causation between the accident and claimed injury" (*Pommells v. Perez,* 4 N.Y.3d 566, 572, 797 N.Y.S.2d 380, 830 N.E.2d 278 [2005]). Thus, we conclude that defendants submitted "evidence of a preexisting degenerative disc condition causing plaintiff's alleged injuries, and plaintiff failed to rebut that evidence sufficiently to raise an issue of fact" (*id.* at 579, 797 N.Y.S.2d 380, 830 N.E.2d 278).

All concur except SAXE and MANZANET–DANIELS, JJ. who dissent in a memorandum by MANZANET–DANIELS, J. as follows:

MANZANET–DANIELS, J. (dissenting).

The motion court properly entertained plaintiff's motion to renew, based on the addendum report of Dr. Mian, and upon renewal, properly denied defendants' motion to the extent it sought dismissal of plaintiff's claims alleging a significant limitation of use of bodily function or system and a permanent consequential limitation of use of a body organ and/or member. This case, like the recent case of *Linton v. Nawaz,* 62 A.D.3d 434, 879 N.Y.S.2d 82 [2009], presents the vexing question of the quantum of proof necessary to raise a triable issue of fact concerning causation where defendant alleges the existence of a pre-existing, degenerative condition. Defendants failed to present persuasive proof of a pre-existing degenerative condition, as described in *Pommells v. Perez,* 4 N.Y.3d 566, 797 N.Y.S.2d 380, 830 N.E.2d 278 [2005], and plaintiff's submissions sufficiently raised a triable issue of fact as to whether his injuries were attributable to the accident as opposed to a pre-existing, degenerative condition. I would accordingly affirm the order of the motion court in all respects.

***604** Plaintiff, born December 28, 1958, commenced this action to recover damages for personal injuries allegedly sustained in an automobile accident on September 27, 2006. In his bill of particulars, plaintiff identified various injuries including (1) tears of the annulus fibrosis at L4–L5 and L5–S1, (2) disc herniations at L1–L2, L4–L5 and L5–S1, and (3) disc bulges at L3–L4 and L4–L5. In his supplemental bill of particulars, plaintiff noted that he had undergone a percutaneous discectomy at L4–L5 and L5–S1 levels with the Stryker Dekompressor System.

Defendants filed a motion for summary judgment dismissing the complaint on the ground that plaintiff failed to establish the existence of a "serious injury" (Insurance Law § 5102[d]). In support, defendants submitted, inter alia, an affirmation from Dr. Gregory Montalbano, who performed an orthopedic examination of plaintiff on March 14, 2008.

Dr. Montalbano indicated that he had reviewed plaintiff's medical records and had conducted an independent medical examination, including range of motion tests. He concluded that at the time of this examination, plaintiff had normal range of motion in his cervical and lumbar spine, which Dr. Montalbano quantified and compared to the norm, with no orthopedic ****53** disability. The medical records reviewed by Dr. Montalbano included a November 20, 2006 MRI report (but not the films themselves) of plaintiff's lumbar spine, as interpreted by plaintiff's radiologist, Dr. Alan Greenfield. The MRI report found evidence of midline tears in the annulus fibrosis with central disc herniation at L4–L5 and L5–S1, along with disc dessication, and bilateral facet arthropathy from L4 through S1. Dr. Montalbano also reviewed a March 23, 2007 MRI report of the lumbar spine interpreted by Dr. Richard Heiden, which found right sided herniation at L1–L2, bulges at L3–L4 and left-sided herniation at L5–S1.

Dr. Montalbano opined that plaintiff had not sustained an injury to the lower back as a result of the accident. Dr. Montalbano based this conclusion on two factors. First, he noted that immediately after the accident, plaintiff flew to Florida for a week, which was "extremely unusual behavior" for anyone traumatically sustaining not one but two disc herniations. Dr. Montalbano stated that single level acute disc herniations typically caused incapacitation for two or more weeks, and required marked activity modification, bed rest and strong prescription pain medication. Second, Dr. Montalbano opined that the degenerative changes shown in both MRIs, i.e., multiple level disc bulges and herniations and facet arthropathy from L4 ***605** through S1, were the type that would occur over time and not over a two-month period.[1] These degenerative changes were consistent with plaintiff's age and occupation as a boiler fireman. Dr. Montalbano further opined that the discectomy surgery was performed for the purpose of correcting plaintiff's pre-existing lumbar condition.

In opposition to the motion, plaintiff relied on Dr. Greenfield's MRI report of plaintiff's lumbar spine on November 20, 2006; the March 20, 2007 affirmed medical report of his surgeon, Dr. Mian, who opined that plaintiff's injuries were causally related to the accident; the June 3, 2008 affirmed report of neurologist Paul Lerner, who found deficits in lumbar range of motion and opined that plaintiff's injuries were causally related to the accident; and the affirmed report of Dr. Mitchell Kaphan, an orthopedist who examined plaintiff on December 21, 2006 and found range-of-motion limitations in the cervical and lumbar spine, and opined that plaintiff's injuries were causally related to the accident.

By order entered November 10, 2008, the court granted defendants' motion for summary judgment dismissing the complaint in its entirety, finding that defendants had established, prima facie, that plaintiff had not sustained a "serious injury." The court relied, inter alia, upon Dr. Montalbano's opinion, based on his examination of plaintiff and his review of the medical records, that plaintiff did not sustain cervical or spinal injury as a result of the accident, and that the MRI of plaintiff's lumbar spine demonstrated he suffered from pre-existing degenerative disc disease. The court found, in turn, that

plaintiff had failed to raise a triable issue of fact as to whether he had sustained a serious injury within the meaning of the statute. The court noted that "not one of the records or reports" of plaintiff's treating physicians "addresses the pre-existing degenerative disc disease reported by Dr. Greenfield and described in Dr. Montalbano's affirmed report," or "give[s] any objective basis for concluding that plaintiff's ****54** alleged limitations result" from the accident rather than his pre-existing degenerative condition, rendering causality conclusions speculative and insufficient to defeat the summary judgment motion.

Plaintiff moved, by order to show cause, for renewal of the order pursuant to CPLR 2221(e), based on the December 11, 2008 "addendum" report of Dr. Mian. Counsel asserted that plaintiff had not submitted the addendum report in his original ***606** opposition papers because both counsel and Dr. Mian were under the belief that the doctor's determination that plaintiff's injuries were causally related to the subject accident—which was based upon his review of the MRI films, the MRI report, his examination of plaintiff and observation of the injured discs during the operation he performed on plaintiff—had been sufficient to rebut Dr. Montalbano's findings of degeneration, which were based solely on the latter's review of the MRI report and not review of the actual MRI films.

In his addendum report, Dr. Mian opined, based on his review of the MRI films, his examination of plaintiff, plaintiff's lack of any prior neck or back injury, and complaints relating to his neck and lower back since the accident, that plaintiff's lumbar disc herniations were causally related to the accident and not a pre-existing condition or long-standing degenerative process. Dr. Mian further opined that "even if the disc pathologies reflected in [plaintiff's] MRI scans were pre-existing or degenerative in nature, given [plaintiff's] complaints relating to his back since the accident and his lack of any prior injury to those parts of his body, the impact from the subject accident plainly made the disc pathologies symptomatic."

By order entered June 1, 2009, the court granted renewal, vacated the prior order, restored the case to the calendar, and granted defendants' motion for summary judgment only to the extent of dismissing the 90/180–day claims. The court noted that although renewal was not generally available when the newly submitted material was available at the time of the original motion, a court had "broad discretion" to grant renewal, and under the appropriate circumstances could do so even upon facts known to the movant at the time of the original motion. The court stated that although it had originally decided that plaintiff's evidence in opposition to the motion was insufficient to raise a triable issue of fact because it failed to address Dr. Montalbano's opinion that plaintiff's injuries were pre-existing and not causally related to the accident, "upon reflection," and "in light of" our recent holding in *Linton,* the court found that the opinions of Drs. Mian and Kaphan with respect to causality were "no more conclusory" that those of Dr. Montalbano, particularly in light of Dr. Mian's addendum report.

I would hold that the lower court properly granted the motion to renew, and thereupon properly denied defendants' motion to dismiss the complaint to the extent indicated above. It was within the court's discretion to grant leave to renew upon facts known to the moving party at the time of the original motion. Plaintiff provided a reasonable justification for the failure ***607** to include information provided in the addendum of his medical witness, citing counsel's belief that the medical submissions in opposition to defendants' summary judgment motion were sufficient to rebut defendants' expert's finding that the injuries claimed by plaintiff were degenerative (*see Rancho Santa Fe Assn. v. Dolan–King,* 36 A.D.3d 460, 829 N.Y.S.2d 39 [2007] [court, in its discretion, may grant renewal, in the interest of justice, upon facts known to the movant at the time of the original motion]; *Nutting v. Associates* ****55** *in Obstetrics & Gynecology,* 130 A.D.2d 870, 515 N.Y.S.2d 926 [1987] [court properly granted motion to renew based on affidavit of medical doctor where defendants reasonably believed plaintiffs' failure to provide an affidavit of merit from a medical expert would preclude plaintiffs from successfully vacating default]).

Indeed, the reports of plaintiff's experts, who had examined him and opined that his injuries were causally related to the accident, were more than sufficient to raise a triable issue of fact (*see Norfleet v. Deme Enter., Inc.,* 58 A.D.3d 499, 870 N.Y.S.2d 783 [2009]). Their conclusions that plaintiff's symptoms were related to the accident were not speculative or conclusory, but rather, based on physical examinations of plaintiff made shortly after the onset of his complaints of pain and other symptoms, which he claimed arose after his involvement in the motor vehicle accident. By attributing plaintiff's injuries to a different, yet equally plausible cause (i.e., the accident), the affirmations of plaintiff's experts raised an issue of triable fact, and a jury was entitled to determine which medical opinion was entitled to greater weight (*see Linton v. Nawaz,* 62 A.D.3d 434, 879 N.Y.S.2d 82, *supra*).

In this case there is no "persuasive" evidence of a

pre-existing injury of the type described in *Pommells v. Perez*, 4 N.Y.3d 566, 797 N.Y.S.2d 380, 830 N.E.2d 278, *supra*. Dr. Montalbano, who examined plaintiff 1 ½ years after the accident, merely opined that the type of injuries revealed by plaintiff's MRI (i.e., multi-level disc bulges and herniations and facet arthropathy) were degenerative changes consistent with plaintiff's age and occupation. Significantly, he did not examine the MRI films themselves, more specifically describe the nature of plaintiff's injuries or explain why he had conclusively determined that plaintiff's injuries were degenerative in origin.[2]

In any event, the addendum provided sufficient evidence to ***608** rebut defendants' expert's finding that disc pathologies were degenerative in nature rather than a serious injury causally related to the accident. Dr. Mian opined that the disc pathologies observed by Dr. Montalbano were causally related to the accident, based on his examination of plaintiff, his review of the MRI films, plaintiff's lack of prior neck or back injury, and the onset of plaintiff's symptoms following the accident. Dr. Mian further opined that even if disc pathologies were pre-existing in nature, the accident served to aggravate them. This was more than sufficient, at this stage, to raise a triable issue of fact regarding causation (*see e.g. Hammett v. Diaz–Frias,* 49 A.D.3d 285, 852 N.Y.S.2d 128 [2008] [report of plaintiff's doctor that her symptoms were caused by accident, and that her condition was permanent in nature and in part an "exacerbation of underlying degenerative joint disease and prior injuries," sufficient to raise a triable issue of fact]).

All Citations

72 A.D.3d 600, 900 N.Y.S.2d 49, 2010 N.Y. Slip Op. 03477

Footnotes

1 Dr. Montalbano noted that the November 20, 2006 MRI of the lumbar spine showed midline tears of the annulus fibrosis; however, he did not specifically opine that this was a degenerative change.

2 Indeed, given the conclusory nature of Dr. Montalbano's opinions regarding causation, it is questionable whether defendants made a prima facie case. However, it is not necessary to determine this question since plaintiff, in moving for renewal, accepted the motion court's rationale that defendants' submissions sufficed to establish a prima facie case, and rather (assuming that a prima facie case had been made), contended that Dr. Mian's submissions were sufficient to raise a triable issue of fact.

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168 A.D.3d 634
Supreme Court, Appellate Division, First Department, New York.

Anna HOBBS, Plaintiff–Respondent,
v.
NEW YORK CITY HOUSING AUTHORITY, Defendant–Appellant.

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ENTERED: JANUARY 31, 2019

Attorneys and Law Firms

Wilson Elser Moskowitz Edelman & Dicker LLP, New York (Patrick J. Lawless of counsel), for appellant.

Arnold E. DiJoseph, P.C., New York (Arnold E. DiJoseph of counsel), for respondent.

Renwick, J.P., Gische, Kapnick, Gesmer, Moulton, JJ.

Opinion

****686 *634** Order, Supreme Court, Bronx County (Llinet M. Rosado, J.), entered on or about March 6, 2018, which denied defendant's motion for summary judgment, unanimously affirmed, without costs.

Plaintiff slipped on urine in an elevator in one of defendant's ***635** buildings sometime between 12:00 a.m. and 1:00 a.m. on Saturday, September 22, 2012. Defendant moved for summary judgment, claiming lack of actual or constructive knowledge of the hazardous condition.

Defendant submitted evidence that custodians were expected to inspect and clean the two elevators in the building twice daily, and that they had "often" responded to reports of urine in the elevators, which they mopped up, but did not record having cleaned. However, defendant presented no evidence at to when the elevator in which plaintiff fell was last inspected or cleaned prior to plaintiff's fall, as required to meet its burden on this motion (*Gautier v. 941 Intervale Realty LLC,* 108 A.D.3d 481, 481, 970 N.Y.S.2d 191 [1st Dept. 2013]).

We have considered defendant's remaining arguments and find them unavailing.

All Citations

168 A.D.3d 634, 91 N.Y.S.3d 685 (Mem), 2019 N.Y. Slip Op. 00686

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52 A.D.3d 828
Supreme Court, Appellate Division, Second Department, New York.

In the Matter of CORFIAN ENTERPRISES, LTD., and Epiros Realty, Ltd. Theano Pappas, etc., petitioner-respondent; Corfian Enterprises, Ltd., et al., respondents-appellants; Theodoros Kalogiannis, respondent-respondent.

June 24, 2008.

Synopsis
Background: Two of three shareholders commenced proceeding for judicial dissolution of corporations. The Supreme Court, Kings County, Kramer, J., denied corporation and third shareholder's renewed motion for summary judgment, and they appealed.

The Supreme Court, Appellate Division, held that genuine issue of material fact existed as to whether shareholders seeking judicial dissolution each possessed requisite 20% ownership interest in the corporations, precluding summary judgment.

Affirmed.

Attorneys and Law Firms

****392** Carter, Ledyard & Milburn, LLP, New York, N.Y. (Aaron R. Cahn and Pamela S. Shelinsky of counsel), for respondents-appellants.

Coffinas & Coffinas, LLP, New York, N.Y. (George G. Coffinas and Kirk P. Tzanides of counsel), for petitioner-respondent.

Georgoulis & Associates, PLLC, New York, N.Y. (Susan R. Nudelman and George Sitaras of counsel), for respondent-respondent.

****393** FRED T. SANTUCCI, J.P., DANIEL D. ANGIOLILLO, RANDALL T. ENG, and CHERYL E. CHAMBERS, JJ.

Opinion

***828** In a proceeding pursuant to Business Corporation Law § 1104–a for the judicial dissolution of Corfian Enterprises, Ltd., and Epiros Realty, Ltd., Corfian Enterprises, Ltd., Epiros Realty, Ltd., and Paul Fotinos appeal from an order of the Supreme Court, Kings County (Kramer, J.), entered September 6, 2007, which denied their renewed motion for summary judgment dismissing the petition.

ORDERED that the order is affirmed, with one bill of costs.

The petitioner, Theano Pappas, commenced this proceeding pursuant to Business Corporation Law § 1104–a seeking the judicial dissolution of Corfian Enterprises, Ltd. (hereinafter Corfian), and Epiros Realty, Ltd. (hereinafter Epiros). According to the allegations in the petition, Pappas, Paul Fotinos, and Theodoros Kalogiannis each are a one-third shareholder of Corfian and Epiros. Corfian, Epiros, and Fotinos (hereinafter ***829** collectively the appellants) served an answer to the petition in which, inter alia, they affirmatively asserted that Fotinos is the sole shareholder of Corfian and Epiros. Kalogiannis joined in the petitioner's request for the dissolution of Corfian and Epiros.

Issue finding, rather than issue determination, is the key to summary judgment (*see Paulin v. Needham,* 28 A.D.3d 531, 812 N.Y.S.2d 658). Contrary to the appellants' contention, they did not establish their prima facie entitlement to judgment as a matter of law dismissing the petition for lack of standing, since they failed to tender sufficient evidence to eliminate any material issues of fact from the case as to whether Pappas and Kalogiannis each possess the requisite 20% ownership interest in Corfian and Epiros necessary to seek dissolution of the two companies (*see* Business Corporation Law § 1104–a). Accordingly, the appellants' renewed motion for summary judgment was properly denied. In light of this determination, we need not examine the sufficiency of the opposing papers of Pappas and Kalogiannis (*see generally Alvarez v. Prospect Hosp.,* 68 N.Y.2d 320, 324, 508 N.Y.S.2d 923, 501 N.E.2d 572; *Winegrad v. New York Univ. Med. Ctr.,* 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316, 476 N.E.2d 642; *Kuri v. Bhattacharya,* 44 A.D.3d 718, 842 N.Y.S.2d 734).

The appellants' remaining contention is without merit.

52 A.D.3d 828, 861 N.Y.S.2d 392, 2008 N.Y. Slip Op. 05928

All Citations

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197 A.D.3d 897
Supreme Court, Appellate Division, Fourth Department, New York.

Jeannie-Marie MCGUIRE, Individually and Suing in the Right of McGuire Development Company, LLC, MCG Real Estate Holdings, LLC, McGuire Acquisitions LLC, McGuire Capital, LLC, and Shamrock Seven ACP, LLC; Kathleen McGuire, Individually and Suing in the Right of McGuire Development Company, LLC, Delaware Avenue Investors, LLC, Genesee Street Investors, LLC, MCG Real Estate Holdings, LLC, McGuire Acquisitions LLC, McGuire Capital, LLC, and Shamrock Seven ACP, LLC; and Michael McGuire, Individually and Suing in the Right of McGuire Development Company, LLC, Delaware Avenue Investors, LLC, Genesee Street Investors, LLC, MCG Real Estate Holdings, LLC, McGuire Acquisitions LLC, McGuire Capital, LLC, and Shamrock Seven ACP, LLC, Plaintiffs-Appellants,
v.
F. James MCGUIRE, Individually and as General Manager of McGuire Development Company, LLC, Delaware Avenue Investors, LLC, Genesee Street Investors, LLC, MCG Real Estate Holdings, LLC, McGuire Acquisitions LLC, McGuire Capital, LLC, and Shamrock Seven ACP, LLC, Defendant-Respondent,
McGuire Development Company, LLC, Delaware Avenue Investors, LLC, Genesee Street Investors, LLC, MCG Real Estate Holdings, LLC, McGuire Acquisitions LLC, McGuire Capital, LLC, McGuire PV Holding L.P., and Shamrock Seven ACP, LLC, Defendants-Respondents. (Appeal No. 1.)

355
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CA 20-01393
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Entered: August 26, 2021

Synopsis

Background: Siblings brought action against their brother, who formed family owned development company to provide real estate development and property management services for other constituent parts of the family business empire, and family businesses for which brother served as manager, alleging, inter alia, breaches of contract and fiduciary duty, and the improper dilution of their membership interests in company, and seeking a declaration of membership interest percentages of all family members in company. The Supreme Court, Erie County, Timothy J. Walker, J., inter alia, granted brother' motion for summary judgment and dismissed breach of contract cause of action, determined that siblings' membership interest percentages at 9.98% each, denied siblings' cross motion for, inter alia, summary judgment, and in a separate order granted brother motion to vacate stipulated standstill order, which was entered into shortly after action was initiated. Siblings appealed both orders and appeals are combined here.

Holdings: The Supreme Court, Appellate Division, held that:

issues of fact as to whether siblings had notice of capital call that actually resulted in the dilution of their membership interests precluded summary judgment;

issues of fact as to whether siblings, via course of conduct, waived strict compliance with notice requirement as to company's capital calls precluded summary judgment;

non-waiver clause and written amendment provision in company's operating agreement did not preclude any possible determination that siblings waived notice provisions of operating agreement;

siblings' conduct with respect to capital calls made by other entities that comprise their family business was irrelevant;

tax estoppel doctrine did not preclude siblings from taking position adverse to that which was stated in company's

tax forms for previous year; and

were not entitled to an accounting of transactions involving assets of company or company defendants.

Ordered accordingly.

****283** Appeal from an order of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered September 24, 2020. The order, inter alia, granted the motion of defendant F. James McGuire for partial summary judgment.

Attorneys and Law Firms

UNDERBERG & KESSLER LLP, ROCHESTER (DAVID M. TANG OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

HARTER SECREST & EMERY LLP, BUFFALO (JOHN G. HORN OF COUNSEL), FOR DEFENDANT-RESPONDENT F. JAMES MCGUIRE, INDIVIDUALLY AND AS GENERAL MANAGER OF MCGUIRE DEVELOPMENT COMPANY, LLC, DELAWARE AVENUE INVESTORS, LLC, GENESEE STREET INVESTORS, LLC, MCG REAL ESTATE HOLDINGS, LLC, MCGUIRE ACQUISITIONS LLC, MCGUIRE CAPITAL, LLC, AND SHAMROCK SEVEN ACP, LLC.

WOODS OVIATT GILMAN LLP, BUFFALO (BRIAN D. GWITT OF COUNSEL), FOR DEFENDANTS-RESPONDENTS MCGUIRE DEVELOPMENT COMPANY, LLC, DELAWARE AVENUE INVESTORS, LLC, GENESEE STREET INVESTORS, LLC, MCG REAL ESTATE HOLDINGS, LLC, MCGUIRE ACQUISITIONS LLC, MCGUIRE CAPITAL, LLC, MCGUIRE PV HOLDING L.P., AND SHAMROCK SEVEN ACP, LLC.

PRESENT: WHALEN, P.J., SMITH, CURRAN, WINSLOW, AND DEJOSEPH, JJ.

MEMORANDUM AND ORDER

***898** It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying the motion of defendant F. James McGuire, reinstating the fifth and sixth causes of action, and vacating subdivision one of the ordering paragraph, and as modified the order is affirmed without costs.

Memorandum: This case centers on a dispute over ownership interests in defendant McGuire Development Company, LLC (MDC). MDC was formed in 2006 by F. James McGuire (defendant) to provide real estate development and property management services for other constituent parts of the McGuire family business empire. Despite their at times tumultuous relationship, defendant invited five of his siblings—the three plaintiffs and nonparties Kelly McGuire (Kelly) and Jackie McGuire Gurney—to join MDC as members. At its creation, the siblings each had equal membership interests in MDC. By 2011, however, the membership interests were no longer equally held; defendant's membership interest in MDC was five percent more than the other members, reflecting his role as general manager. Defendant also acted as general manager for the other entities that make up the McGuire family business, which are the remaining defendants in this action (company ****284** defendants). Plaintiffs are members of most of the company defendants. Unlike plaintiffs, Gurney was employed by MDC.

In 2017, Kelly exited MDC, which resulted in her membership interest being distributed, pro rata, among the remaining siblings. Thus, at the start of 2018, defendant had an approximate 24.8% membership interest in MDC with the remaining members each having approximately an 18.8% membership interest. At around the same time as Kelly's exit, plaintiffs were in the process of negotiating with defendant a buyout of their own interests in MDC. During that same time period, however, i.e., throughout 2018 and early 2019, defendant and Gurney made a series of capital calls for MDC that had the practical effect of diluting plaintiffs' membership interest percentages to approximately 9.98% each. Defendant or Gurney purported to have given plaintiffs notice of each of the MDC capital calls by email.

Plaintiffs did not respond or take any other action with respect to those capital calls, except to object in mid-2019 that a capital call request made earlier in the year was procedurally ***899** defective. During the relevant time period, the only capital contributions to MDC were made by defendant and Gurney in November 2018 and by defendant in February 2019. Plaintiffs' failure to supply additional capital to MDC during that period is what resulted in the aforementioned dilution of their membership interests.

Consequently, in May 2020, plaintiffs commenced this action alleging, inter alia, breaches of contract and fiduciary duty, and the improper dilution of their membership interests in MDC. Specifically, they allege that, under the terms of MDC's operating agreement, they did not receive proper notice of the capital calls in 2018 and 2019 that resulted in the dilution of their membership interests and, accordingly, plaintiffs seek a declaration of the membership interest percentages of all members of MDC. They also seek an equitable accounting of MDC's assets and the company defendants based on the alleged failure of those defendants to provide plaintiffs with access to their financial records. Shortly after the action commenced, the parties entered a stipulated standstill order that prevented defendant from selling all or substantially all of MDC's assets, making requests for additional capital contributions, or engaging in conduct "outside the ordinary course of business," until "further order of the [c]ourt."

In appeal No. 1, plaintiffs appeal from an order that, inter alia, granted defendant's motion for partial summary judgment and dismissed the fifth and sixth causes of action, alleging that defendant breached the MDC operating agreement's notice requirement with respect to the capital calls that resulted in the dilution of plaintiffs' membership interests, determined that plaintiffs' membership interest percentages in MDC are 9.98% each, and denied plaintiffs' cross motion for, inter alia, summary judgment on the fifth cause of action, for breach of contract, and seeking an accounting of transactions involving the assets of MDC and the company defendants. In appeal No. 2, plaintiffs appeal from an order granting defendants' motion to vacate the stipulated standstill order in light of Supreme Court's determination of each party's membership interest percentage in MDC.

With respect to appeal No. 1, we conclude that the court erred in granting defendant's motion for partial summary judgment dismissing the fifth and sixth causes of action and in determining the membership interests in MDC, and we therefore modify the order in appeal No. 1 accordingly. The operating agreement provides, in relevant part, that all "notices, demands ****285** or requests provided for or permitted to be given ***900** pursuant to this [a]greement must be in writing," and requires that such notices "to be sent to any or all of the [m]embers shall be personally delivered or sent by first class mail, postage prepaid." There is no dispute that the challenged capital calls from 2018 and 2019 were sent only by email and thus did not strictly comply with that provision. In their briefs, the parties contend that the principal dispute is whether plaintiffs waived strict compliance with the notice provision through their course of conduct, and consequently whether email notice of the capital calls was sufficient.

In our view, however, defendant did not meet his initial burden on the motion because his own submissions raise issues of fact whether plaintiffs received any notice of the capital calls that resulted in dilution of their membership interests, and whether the calls that were noticed by email were actually responsible for the dilution of plaintiffs' membership interests in MDC (*see generally Winegrad v. New York Univ. Med., Ctr.*, 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316, 476 N.E.2d 642 [1985]; *Armstrong v. United Frontier Mut. Ins. Co.*, 181 A.D.3d 1332, 1333-1334, 121 N.Y.S.3d 488 [4th Dept. 2020]; *Parton v. Piscitello*, 2 A.D.3d 1382, 1383, 768 N.Y.S.2d 883 [4th Dept. 2003]). Specifically, based on defendant's own submissions, the precise amounts, timing, and method of the capital calls do not support the court's calculations of plaintiffs' membership interests in MDC or the court's conclusion about which capital calls actually diluted plaintiffs' membership interests in MDC. For example, although the emails to plaintiffs regarding requests for capital were made in February and July 2018, defendant's submissions establish that the dilution of plaintiffs' interest in MDC did not occur until November of that year. Further, based on defendant's own submissions, the value of the dilution in plaintiffs' interest in November 2018 is not comparable to the value of the capital calls purportedly noticed in the emails dated February and July 2018. Consequently, there are issues of fact with respect to whether plaintiffs had *any notice at all* of the capital call that actually resulted in the dilution of their membership interests in MDC (*see generally Matter of Jacobs v. Cartalemi*, 156 A.D.3d 635, 639-640, 66 N.Y.S.3d 503 [2d Dept. 2017], *lv denied* 32 N.Y.3d 903, 84 N.Y.S.3d 857, 109 N.E.3d 1157 [2018]; *Davies v. Jerry*, 107 A.D.3d 1553, 1554-1555, 966 N.Y.S.2d 797 [4th Dept. 2013]; *MNY 260 Park Ave. S., LLC v. Max 260 Park Ave. S., LLC*, 63 A.D.3d 628, 629, 882 N.Y.S.2d 90 [1st Dept. 2009]). For the same reasons, we conclude that the court erred in determining the respective membership interests in MDC, and that the court properly denied that part of plaintiffs' cross motion seeking summary judgment with respect to the fifth cause of action.

We also conclude that neither defendant nor plaintiffs is ***901** entitled to summary judgment because there are issues of fact whether plaintiffs, via course of conduct, waived strict compliance with the notice requirement with respect to MDC's capital calls. "[W]aiver requires ... the voluntary and intentional abandonment of a known right which, but for the waiver, would have been enforceable" (*Nassau Trust Co. v. Montrose Concrete Prods. Corp.*, 56 N.Y.2d 175, 184, 451 N.Y.S.2d 663, 436 N.E.2d 1265

[1982], *rearg denied* 57 N.Y.2d 674, 454 N.Y.S.2d 1032, 439 N.E.2d 1247 [1982]; *see Fundamental Portfolio Advisors, Inc. v. Tocqueville Asset Mgt., L.P.*, 7 N.Y.3d 96, 104, 817 N.Y.S.2d 606, 850 N.E.2d 653 [2006]). Specifically, the abandonment of a contractual right " 'may be established by affirmative ****286** conduct or by failure to act so as to evince an intent not to claim a purported advantage' " (*Fundamental Portfolio Advisors, Inc.*, 7 N.Y.3d at 104, 817 N.Y.S.2d 606, 850 N.E.2d 653). We may not infer a waiver "from mere silence" (*Coniber v. Center Point Transfer Sta., Inc.*, 137 A.D.3d 1604, 1606, 27 N.Y.S.3d 763 [4th Dept. 2016] [internal quotation marks omitted]).

Of course, "a waiver should not be lightly presumed and must be based on a clear manifestation of intent to relinquish a contractual provision" (*Auburn Custom Millwork, Inc. v. Schmidt & Schmidt, Inc.*, 148 A.D.3d 1527, 1531, 50 N.Y.S.3d 635 [4th Dept. 2017] [internal quotation marks omitted]). "Generally the existence of an intent to forgo such a right is a question of fact" (*Fundamental Portfolio Advisors, Inc.*, 7 N.Y.3d at 104, 817 N.Y.S.2d 606, 850 N.E.2d 653; *see Town of Mexico v. County of Oswego*, 175 A.D.3d 876, 878, 107 N.Y.S.3d 221 [4th Dept. 2019]), and "[a] waiver, not express, but found in the acts, conduct or language of a party is rarely established as a matter of law" (*Alsens Am. Portland Cement Works v. Degnon Contr. Co.*, 222 N.Y. 34, 37, 118 N.E. 210 [1917]).

Here, to the extent that it is preserved for our review, we reject plaintiffs' contention that the nonwaiver clause and written amendment provision of MDC's operating agreement preclude a determination that plaintiffs waived the notice provision of the operating agreement. Even where a contract specifically contains a nonwaiver clause or a provision that it cannot be modified without a writing, a waiver may be established by the parties' course of conduct and actual performance (*see Estate of Kingston v. Kingston Farms Partnership*, 130 A.D.3d 1464, 1465, 13 N.Y.S.3d 748 [4th Dept. 2015]; *Stassa v. Stassa*, 123 A.D.3d 804, 806, 999 N.Y.S.2d 116 [2d Dept. 2014], *lv dismissed* 25 N.Y.3d 960, 8 N.Y.S.3d 256, 30 N.E.3d 899 [2015]; *Aiello v. Burns Intl. Sec. Servs. Corp.*, 110 A.D.3d 234, 245, 973 N.Y.S.2d 88 [1st Dept. 2013]).

Nevertheless, on this record, defendant did not meet his burden of establishing that plaintiffs' conduct constituted a waiver of the notice provision. Critically, in ascertaining whether plaintiffs' conduct in relation to capital call requests ***902** evidenced a waiver of the notice provision, their actions must be considered in the unique business context of the contested capital calls—i.e., that they were all made at a time when plaintiffs were in active negotiations with defendant about a buyout where plaintiffs would exit MDC. There is no dispute that the purported February 2018 capital call was MDC's first ever request for capital contributions, and therefore, there is no historical pattern of conduct that would support the conclusion that plaintiffs waived the notice requirement prior to any of the capital calls at issue here. Moreover, plaintiffs' emails from the time of the capital calls express surprise that MDC required additional capital from them, despite defendant's participation in the ongoing buyout negotiations, and do not reflect any intent to waive the notice requirement.

We further conclude that plaintiffs' conduct with respect to capital calls made by other entities that comprise the McGuire family business is irrelevant to waiver of the notice requirement for MDC because any waiver by plaintiffs with respect to a separate contract or agreement cannot be imputed as a waiver of the notice requirement in MDC's operating agreement. Cases relied on by defendant are inapposite because they involve the prior conduct of parties as it related to the specific agreement at issue in the litigation (*see e.g.* ****287** *Matter of Murphy v. Murphy*, 140 A.D.3d 1168, 1170-1171, 34 N.Y.S.3d 167 [2d Dept. 2016]). Ultimately, within the unique context of the ongoing negotiations of plaintiffs' buyout from MDC, and the lack of any history of capital calls for that entity, we conclude that defendant did not establish, as a matter of law, that plaintiffs intended to waive the operating agreement's notice requirement with respect to the capital calls at issue here.

We agree with plaintiffs that the doctrine of tax estoppel does not preclude them from taking a position adverse to that stated in MDC's tax forms for the year 2018, which purportedly established that plaintiffs' membership interest percentages in MDC were approximately 16.15% each. Tax estoppel does not apply where, as here, the relevant tax documents are neither sworn nor signed by the party against whom they are used (*see generally Matter of Sunburst Assoc., Inc.*, 106 A.D.3d 1224, 1226-1227, 965 N.Y.S.2d 653 [3d Dept. 2013]). Further, that doctrine does not apply because the relevant documents were not prepared by plaintiffs, but rather by a third party at the direction of MDC, which is managed by defendant (*see Matter of Cusimano v. Strianese Family Ltd. Partnership*, 97 A.D.3d 744, 745, 949 N.Y.S.2d 94 [2d Dept. 2012], *lv dismissed in part and denied in part* 20 N.Y.3d 1001, 959 N.Y.S.2d 684, 983 N.E.2d 762 [2013]). It would distort the doctrine of tax estoppel beyond ***903** recognition to conclude that plaintiffs are precluded from taking a position contrary to a tax document they did not swear to or sign, and which was, in effect, prepared by their opponents (*cf. Rizzo v. National*

Vacuum Corp., 186 A.D.3d 1094, 1095, 130 N.Y.S.3d 167 [4th Dept. 2020]; *Matter of Ansonia Assoc. L.P. v. Unwin*, 130 A.D.3d 453, 454, 13 N.Y.S.3d 67 [1st Dept. 2015]).

We reject plaintiffs' contention that the court erred in denying that part of their cross motion seeking an accounting of transactions involving assets of MDC and the company defendants. Plaintiffs did not establish that defendants breached a fiduciary duty owed to plaintiffs with respect to their right to inspect and access the relevant financial records (*see generally Feldmeier v. Feldmeier Equip., Inc.*, 164 A.D.3d 1093, 1095-1096, 84 N.Y.S.3d 609 [4th Dept. 2018]). Specifically, the record contradicts plaintiffs' assertion that they were denied access to the relevant financial records inasmuch as defendants repeatedly offered to make those documents available to plaintiffs. Plaintiffs have not demonstrated that defendants were required to copy and forward the requested financial records to plaintiffs.

In light of our determination in appeal No. 1 that neither defendant nor plaintiffs are entitled to summary judgment, and that the court therefore erred in determining the respective membership interest percentages in MDC, we also conclude that, in appeal No. 2, the court erred in granting defendants' motion to vacate the stipulated standstill order. The court granted that motion on the ground that the order in appeal No. 1 determined the membership interests in MDC. Thus, because we are modifying the order in appeal No. 1 by, inter alia, vacating the court's determination of the membership interests in MDC, we consequently reverse the order in appeal No. 2, deny defendants' motion, and reinstate the stipulated standstill order.

All Citations

197 A.D.3d 897, 153 N.Y.S.3d 280, 2021 N.Y. Slip Op. 04816

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57 A.D.3d 54
Supreme Court, Appellate Division, Second Department, New York.

Javier Alcides ORTEGA, et al., appellants,
v.
Troy PUCCIA, et al., respondents.

Oct. 28, 2008.

Synopsis

Background: Drywall contractor's employee brought action against owners to recover for injuries sustained in construction accident in single-family residence. The Supreme Court, Queens County, Patricia P. Satterfield, J., entered summary judgment in owners' favor, and employee appealed.

Holdings: The Supreme Court, Appellate Division, Dillon, J., held that:

owners were protected under homeowners' exception from liability under scaffold law;

owners were protected under homeowners' exception from liability under statute requiring owners and contractors to provide reasonable and adequate protection and safety for workers and comply with specific safety rules and regulations promulgated by Commissioner of Department of Labor; and

owners were not liable under general workplace safety statute.

Affirmed.

Attorneys and Law Firms

****325** Martin R. Munitz, P.C., New York, N.Y. (Louis A. Badolato of counsel), for appellants.

Kelly, Rode & Kelly, LLP, Mineola, N.Y. (Loris Zeppieri of counsel), for respondents.

STEVEN W. FISHER, J.P., DAVID S. RITTER, MARK C. DILLON, and WILLIAM E. McCARTHY, JJ.

Opinion

DILLON, J.

***55** This appeal presents us with an occasion to discuss the precise standard that must be applied in determining summary judgment motions involving causes of action asserting violations of Labor Law § 200, when an accident arises out of the methods or manner of work at a worksite rather than a dangerous or defective condition of the premises.

***56** *I. Relevant Facts*

The facts underlying this appeal are fairly straightforward. The plaintiff Javier Alcides Ortega (hereinafter the plaintiff) was injured on Sunday, August 8, 2007, while performing work in the scope of his employment with Blue Bird Drywall (hereinafter Blue Bird). On the date of the accident, and for three to five days prior to the accident, the plaintiff performed his work within a single-family house in Bethpage, which was owned by the defendants Troy Puccia (hereinafter Puccia) and Stacey Puccia (hereinafter together the defendants).[1] Blue Bird had been hired by the defendants to perform drywall work on a second story that had been added to the house earlier in the year. Blue Bird's on-site supervisor, Americo Laird, brought a scaffold to the defendants' house on the first day of the drywall project, and assembled it there. The plaintiff and Puccia both testified at ****326** their depositions that they believed that the scaffold had been disassembled on the day before the accident. Their testimony also reveals that the scaffold had been reassembled at some point prior to the accident and that, in the course of reassembly, the wheels with which the scaffold had been equipped were not reattached to it. The scaffold was so large that, when fully assembled, it could not be moved through the hallways of the house.

On the morning of the accident, the plaintiff arrived at the defendants' house to continue taping the walls and ceilings. The parties disagree on what happened next. The plaintiff testified at his deposition that Puccia moved the disassembled scaffold from a bedroom to a great room, where Puccia reassembled it. He asserted that the wheels of the scaffold were attached to it, but the wheels were not locked because the locks were not working. According to the plaintiff, Puccia placed four wood blocks under the

wheels to hold them in place.

In contrast, Puccia testified at his deposition that he never touched the scaffold during the days leading up to the accident, except when he slightly moved it out of his way on two occasions. He further testified that, while the wheels of the scaffold were equipped with a locking mechanism, he did not know whether it functioned properly prior to the accident. Puccia ***57** denied ever touching the scaffold or its wheels on the date of the plaintiff's accident and had no recollection of the presence of wood blocks under the scaffold's wheels at that time. Puccia did, however, recall seeing wood blocks under the scaffold's wheels on earlier occasions.

The parties agree that Puccia left the premises before the accident. The accident occurred between 10:00 A.M. and 11:00 A.M., when the plaintiff allegedly fell from the scaffold. The plaintiff had no specific recollection of his accident, remembering only that he woke up in a hospital. Puccia's wife, Stacey, who was at home at the time, heard a "boom" and found the plaintiff at the bottom of the stairs that led to the great room. Puccia believed that, while he was off-premises, the scaffold had been moved to a new location near the stairs of the great room.

The plaintiff commenced this action to recover damages for personal injuries sustained as a result of the defendants' alleged negligence and violations of Labor Law §§ 200, 240, and 241(6). The plaintiff's wife, Marie Mujica, asserted a cause of action for loss of services. The defendants' answer denied the material allegations of the complaint, the parties proceeded with discovery, and the defendants thereafter moved, along with Alleyne, for summary judgment dismissing all of the claims.

The defendants argued that summary judgment was appropriate under the single-family homeowners' exemption of Labor Law §§ 240 and 241. They also contended that summary judgment was warranted as to the common-law negligence and Labor Law § 200 claims, on the grounds, inter alia, that the plaintiff was in "sole control" of the scaffold at the time of the occurrence, their actions or omissions thus were not proximately related to the accident, and there was no evidence that any scaffold defect was proximately related to the plaintiff's fall.

In opposition, the plaintiff argued that his testimony regarding Puccia's assembly and bracing of the scaffold before the accident raised triable issues of fact as to the defendants' supervision and control of the work, requiring the denial of the defendants' motion for summary judgment dismissing all of the claims.

****327** The Supreme Court, in an order entered February 20, 2007, found that there was no evidence that the defendants exercised supervision or control over the work, and that any dangerous condition arose out of the contractor's own methods. Absent supervision or control over the work, the Supreme Court held that the defendants were entitled to invoke the single- ***58** family homeowners' exemption of Labor Law §§ 240 and 241, and that the defendants were not liable under Labor Law § 200 or for common-law negligence as a matter of law. The court thus granted the defendant's motion for summary judgment dismissing the complaint. For the reasons set forth below, we affirm.

II. Labor Law § 240

Labor Law § 240 requires contractors and property owners, engaged in, among other things, the construction, demolition, or repair of buildings or structures, to furnish or erect scaffolding, ladders, pulleys, ropes, and other safety devices, which must be constructed, placed, or operated as to give proper protection for workers (*see* Labor Law § 240[1]). The statute is intended to protect workers from gravity-related occurrences stemming from the inadequacy or absence of enumerated safety devices (*see Narducci v. Manhasset Bay Assoc.,* 96 N.Y.2d 259, 268, 727 N.Y.S.2d 37, 750 N.E.2d 1085). The duties articulated in Labor Law § 240 are nondelegable, and liability is absolute as to the general contractor or owner when its breach of the statute proximately causes injuries (*see Jock v. Fien,* 80 N.Y.2d 965, 967–968, 590 N.Y.S.2d 878, 605 N.E.2d 365; *Rocovich v. Consolidated Edison Co.,* 78 N.Y.2d 509, 513, 577 N.Y.S.2d 219, 583 N.E.2d 932).

The language of Labor Law § 240(1) expressly exempts "owners of one and two-family dwellings who contract for but do not direct or control the work." This exemption is intended to protect residential homeowners lacking in sophistication or business acumen from their failure to recognize the necessity of insuring against the strict liability imposed by the statute (*see Bartoo v. Buell,* 87 N.Y.2d 362, 368, 639 N.Y.S.2d 778, 662 N.E.2d 1068; *see also Cannon v. Putnam,* 76 N.Y.2d 644, 649, 563 N.Y.S.2d 16, 564 N.E.2d 626; *Mayen v. Kalter,* 282 A.D.2d 508, 509, 722 N.Y.S.2d 760).

As the parties seeking summary judgment, the defendants bore the initial burden of establishing their prima facie entitlement to judgment as a matter of law (*see Giuffrida v. Citibank Corp.,* 100 N.Y.2d 72, 81, 760 N.Y.S.2d 397, 790 N.E.2d 772; *Friends of Animals v. Associated Fur*

Mfrs., 46 N.Y.2d 1065, 1067, 416 N.Y.S.2d 790, 390 N.E.2d 298). In order to satisfy their prima facie burden on the basis of the "homeowners' exemption," the defendants were required to demonstrate not only that their house was a single- or two-family residence, which is not contested here, but also, that they did not "direct or control" the work being performed (Labor Law § 240[1]; *see Arama v. Fruchter,* 39 A.D.3d 678, 679, 833 N.Y.S.2d 665; *Miller v. Shah,* 3 A.D.3d 521, 522, 770 N.Y.S.2d 739; *Saverino v. Reiter,* 1 A.D.3d 427, 767 N.Y.S.2d 445; ***59** *Stejskal v. Simons,* 309 A.D.2d 853, 854, 765 N.Y.S.2d 886, *affd.* 3 N.Y.3d 628, 782 N.Y.S.2d 397, 816 N.E.2d 186). The statutory phrase "direct or control" is construed strictly and refers to situations where the owner supervises the method and manner of the work (*see Boccio v. Bozik,* 41 A.D.3d 754, 755, 839 N.Y.S.2d 525; *Arama v. Fruchter,* 39 A.D.3d at 679, 833 N.Y.S.2d 665; *Ferrero v. Best Modular Homes, Inc.,* 33 A.D.3d 847, 849, 823 N.Y.S.2d 477; ****328** *Siconolfi v. Crisci,* 11 A.D.3d 600, 601, 783 N.Y.S.2d 627; *Miller v. Shah,* 3 A.D.3d at 522, 770 N.Y.S.2d 739).

Here, contrary to the plaintiffs' contention, the defendants made a prima facie showing that they were entitled to the protection of the homeowners' exemption by submitting evidence demonstrating that they did not direct or control the method and manner of the work being performed (*see Ferrero v. Best Modular Homes, Inc.,* 33 A.D.3d at 849–850, 823 N.Y.S.2d 477; *Cardace v. Fanuzzi,* 2 A.D.3d 557, 558, 768 N.Y.S.2d 381). The defendants hired Blue Bird as an independent contractor, and the plaintiff's supervisor at Blue Bird was Laird. The plaintiff did not speak to the defendants other than to exchange greetings and, on one occasion, to discuss a problem with the framing of the ceiling. At the time of the occurrence, neither defendant was even present in the room where the accident occurred. Puccia's testimony that the scaffold had been moved between the time he left the premises and the time of his return is uncontradicted. The defendants' involvement with the drywall project was no more extensive than that of an ordinary homeowner who was not supervising, directing, or controlling the manner of the work. Consequently, the defendants established their prima facie entitlement to judgment as a matter of law based upon the homeowners' exemption from statutory liability (*see Torres v. Levy,* 32 A.D.3d 845, 846, 821 N.Y.S.2d 127; *Cardace v. Fanuzzi,* 2 A.D.3d at 558, 768 N.Y.S.2d 381; *Decavallas v. Pappantoniou,* 300 A.D.2d 617, 618, 752 N.Y.S.2d 712; *Mandelos v. Karavasidis,* 213 A.D.2d 518, 519–520, 623 N.Y.S.2d 907, *mod.* 86 N.Y.2d 767, 631 N.Y.S.2d 133, 655 N.E.2d 174; *Spinillo v. Strober Long Is. Bldg. Materials Ctrs.,* 192 A.D.2d 515, 516, 595 N.Y.S.2d 825).

In opposition, the plaintiff failed to raise an issue of fact as to the applicability of the homeowners' exception. The plaintiff was working on his own and was in control of the scaffold which had been provided by his employer, Blue Bird. There is no evidence that the defendants instructed the plaintiff how to perform his work or how to use the scaffold (*see Jumawan v. Schnitt,* 35 A.D.3d 382, 383, 825 N.Y.S.2d 728; *Garcia v. Petrakis,* 306 A.D.2d 315, 316, 760 N.Y.S.2d 551; *Jacobsen v. Grossman,* 206 A.D.2d 405, 406, 614 N.Y.S.2d 62). At most, if Puccia moved and assembled the scaffold on one isolated occasion, his actions do not rise to the level of direction ***60** and control, absent evidence that he was also affirmatively directing the plaintiff in the manner of the work or the use of the scaffold (*see Ferrero v. Best Modular Homes, Inc.,* 33 A.D.3d at 849–850, 823 N.Y.S.2d 477; *Garcia v. Petrakis,* 306 A.D.2d at 315–316, 760 N.Y.S.2d 551; *Lang v. Havlicek,* 272 A.D.2d 298, 707 N.Y.S.2d 642).

III. Labor Law § 241

Labor Law § 241(6), which applies to contractors and owners engaged in construction, excavation, and demolition activities, requires that the work be constructed, shored, equipped, guarded, arranged, operated, and conducted as to provide reasonable and adequate protection and safety to persons employed therein. The obligations of Labor Law § 241(6) are non-delegable (*see Ross v. Curtis–Palmer Hydro–Elec. Co.,* 81 N.Y.2d 494, 502, 601 N.Y.S.2d 49, 618 N.E.2d 82; *Long v. Forest–Fehlhaber,* 55 N.Y.2d 154, 159, 448 N.Y.S.2d 132, 433 N.E.2d 115; *Allen v. Cloutier Constr. Corp.,* 44 N.Y.2d 290, 301, 405 N.Y.S.2d 630, 376 N.E.2d 1276), and causes of action invoking that statute must be based upon violations of specific codes, rules, or regulations applicable to the circumstances of the accident (*see* ****329** *Ross v. Curtis–Palmer Hydro–Elec. Co.,* 81 N.Y.2d at 502, 601 N.Y.S.2d 49, 618 N.E.2d 82; *Ares v. State of New York,* 80 N.Y.2d 959, 960, 590 N.Y.S.2d 874, 605 N.E.2d 361; *Adams v. Glass Fab,* 212 A.D.2d 972, 973, 624 N.Y.S.2d 705).

Labor Law § 241(6) contains language identical to that contained in § 240(1) exempting from its application "owners of one and two-family dwellings who contract for but do not direct or control the work" (Labor Law § 241[6]; *see Umanzor v. Charles Hofer Painting & Wallpapering, Inc.,* 48 A.D.3d 552, 852 N.Y.S.2d 205; *Saverino v. Reiter,* 1 A.D.3d at 427, 767 N.Y.S.2d 445). The defendants are entitled to the protection of the homeowners' exemption under Labor Law § 241 for the

same reasons that they are entitled to it under Labor Law § 240 (*see Saverino v. Reiter,* 1 A.D.3d at 427, 767 N.Y.S.2d 445; *Garcia v. Petrakis,* 306 A.D.2d at 316, 760 N.Y.S.2d 551; *Duarte v. East Hills Constr. Corp.,* 274 A.D.2d 493, 494;, 711 N.Y.S.2d 182 *Lang v. Havlicek,* 272 A.D.2d at 298, 707 N.Y.S.2d 642).

IV. Labor Law § 200

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 § 200. Labor Law § 200(1) is a codification of the common-law duty of an owner or general contractor to provide workers with a safe place to work (*see Rizzuto v. L.A. Wenger Contr. Co.,* 91 N.Y.2d 343, 352, 670 N.Y.S.2d 816, 693 N.E.2d 1068; *Comes v. New York State Elec. & Gas Corp.,* 82 N.Y.2d 876, 877, 609 N.Y.S.2d 168, 631 N.E.2d 110; *Lombardi v. Stout,* 80 N.Y.2d 290, 294, 590 N.Y.S.2d 55, 604 N.E.2d 117; ***61** *Ferrero v. Best Modular Homes, Inc.,* 33 A.D.3d at 850, 823 N.Y.S.2d 477; *Brown v. Brause Plaza, LLC,* 19 A.D.3d 626, 628, 798 N.Y.S.2d 501; *Everitt v. Nozkowski,* 285 A.D.2d 442, 443, 728 N.Y.S.2d 58; *Giambalvo v. Chemical Bank,* 260 A.D.2d 432, 433, 687 N.Y.S.2d 728). Unlike Labor Law §§ 240 and 241, § 200 does not contain any single- and two-family homeowners' exemption. It makes sense that since homeowners may be held liable in ordinary negligence, the statute's codification of the common law cannot logically exempt one- and two-family homeowners from its scope.

Cases involving Labor Law § 200 fall into two broad categories: namely, those where workers are injured as a result of dangerous or defective premises conditions at a worksite, and those involving the manner in which the work is performed. These two categories should be viewed in the disjunctive.

Where a premises condition is at issue, property owners may be held liable for a violation of Labor Law § 200 if the owner either created the dangerous condition that caused the accident or had actual or constructive notice of the dangerous condition that caused the accident (*see Azad v. 270 5th Realty Corp.,* 46 A.D.3d 728, 730, 848 N.Y.S.2d 688; *Kerins v. Vassar Coll.,* 15 A.D.3d 623, 626, 790 N.Y.S.2d 697; *Kobeszko v. Lyden Realty Invs.,* 289 A.D.2d 535, 536, 735 N.Y.S.2d 189; *Giambalvo v. Chemical Bank,* 260 A.D.2d at 433, 687 N.Y.S.2d 728).

By contrast, when the manner of work is at issue, "no liability will attach to the owner solely because [he or she] may have had notice of the allegedly unsafe manner in which work was performed" (*Dennis v. City of New York,* 304 A.D.2d 611, 612, 758 N.Y.S.2d 661; *see Comes v. New York State Elec. & Gas Corp.,* 82 N.Y.2d at 877, 609 N.Y.S.2d 168, 631 N.E.2d 110; *Ferrero v. Best Modular Homes, Inc.,* 33 A.D.3d at 851, 823 N.Y.S.2d 477; ****330** *Colon v. Lehrer, McGovern & Bovis,* 259 A.D.2d 417, 419, 687 N.Y.S.2d 130). Rather, when a claim arises out of alleged defects or dangers in the methods or materials of the work, recovery against the owner or general contractor cannot be had under Labor Law § 200 unless it is shown that the party to be charged had the authority to supervise or control the performance of the work (*see Rizzuto v. L.A. Wenger Contr. Co., Inc.,* 91 N.Y.2d 343, 352, 670 N.Y.S.2d 816, 693 N.E.2d 1068; *Russin v. Louis N. Picciano & Son,* 54 N.Y.2d 311, 317, 445 N.Y.S.2d 127, 429 N.E.2d 805; *Gallello v. MARJ Distrib., Inc.,* 50 A.D.3d 734, 735, 855 N.Y.S.2d 602; *Dooley v. Peerless Importers, Inc.,* 42 A.D.3d 199, 204–205, 837 N.Y.S.2d 720; *Guerra v. Port Auth. of N.Y. & N.J.,* 35 A.D.3d 810, 811, 828 N.Y.S.2d 440; *Perri v. Gilbert Johnson Enters., Ltd.,* 14 A.D.3d 681, 683, 790 N.Y.S.2d 25; *Everitt v. Nozkowski,* 285 A.D.2d at 443, 728 N.Y.S.2d 58; ***62** *Reynolds v. John T. Brady & Co.,* 38 A.D.2d 746, 746–747, 329 N.Y.S.2d 624).[2] Although property owners often have a general authority to oversee the progress of the work, mere general supervisory authority at a worksite for the purpose of overseeing the progress of the work and inspecting the work product is insufficient to impose liability under Labor Law § 200 (*see Natale v. City of New York,* 33 A.D.3d 772, 773, 822 N.Y.S.2d 771; *Perri v. Gilbert Johnson Enters., Ltd.,* 14 A.D.3d at 683, 790 N.Y.S.2d 25; *Dos Santos v. STV Engrs., Inc.,* 8 A.D.3d 223, 224, 778 N.Y.S.2d 48). A defendant has the authority to supervise or control the work for purposes of Labor Law § 200 when that defendant bears the responsibility for the manner in which the work is performed.

In this case, the plaintiff's accident did not involve any dangerous or defective condition on the defendants' premises. The accident instead involved the manner in which the plaintiff performed his work, which was not supervised by the defendants, and which was performed on equipment provided by the plaintiff's employer, not by the defendants. As stated by the Court of Appeals, "the duty to provide a safe place to work is not breached when the injury arises out of a defect in the subcontractor's own plant, tools and methods, or through negligent acts of the subcontractor occurring as a detail of the work" (*Persichilli v. Triborough Bridge & Tunnel Auth.,* 16 N.Y.2d 136, 145, 262 N.Y.S.2d 476, 209 N.E.2d 802). In *Persichilli,* the Court of Appeals further stated that while a subcontractor must furnish safe ladders and scaffolds to

its employees, a subcontractor's failure to provide safe appliances does not render the "premises" unsafe or defective. The allegedly defective scaffold should instead ****331** be viewed as a device involving the methods and means of the work. Under such circumstances, Labor Law § 200 imposes no liability upon owners (*see Persichilli v. Triborough Bridge &* ***63** *Tunnel Auth.,* 16 N.Y.2d at 146, 262 N.Y.S.2d 476, 209 N.E.2d 802), absent evidence of the owner's authority to supervise or control the manner and methods of the work.

Here, there is nothing in the record to indicate that the defendants either had the authority to control the manner or method by which the plaintiff performed his work or provided the subject scaffold. Thus, the plaintiffs failed to satisfy the requisite elements of Labor Law § 200 (*see Dupkanicova v. Vasiloff,* 35 A.D.3d 650, 651, 829 N.Y.S.2d 133; *Reilly v. Loreco Constr.,* 284 A.D.2d 384, 385, 726 N.Y.S.2d 142; *Benefield v. Halmar Corp.,* 264 A.D.2d 794, 795, 695 N.Y.S.2d 394).[3]

The plaintiff's inability at his deposition to recall how the accident occurred and what caused him to fall warranted the Supreme Court's granting of that branch of the defendants' motion which was for summary judgment dismissing the Labor Law § 200 claim in any event (*see Blanco v. Oliveri,* 304 A.D.2d at 599–600, 758 N.Y.S.2d 376). In opposition to the defendants' prima facie showing of entitlement to judgment as a matter of law with respect to that claim, the plaintiff, regardless of his theory of recovery pursuant to Labor Law § 200, was unable to raise a triable issue of fact as to whether any scaffold defect was proximately related to his accident (*see Capellan v. King Wire Co.,* 19 A.D.3d 530, 531, 798 N.Y.S.2d 76; *Weingarten v. Windsor Owners Corp.,* 5 A.D.3d 674, 676–677, 774 N.Y.S.2d 537; *Misirlakis v. East Coast Entertainment. Props.,* 297 A.D.2d 312, 746 N.Y.S.2d 307).

V. Common–Law Negligence

The Supreme Court properly granted that branch of the defendants' motion which was for summary judgment dismissing the plaintiff's claim based on common-law negligence, for the same reasons that it appropriately granted that branch of the defendants' motion which was for summary judgment dismissing the claim under Labor Law § 200 (*see Lombardi v. Stout,* 80 N.Y.2d at 295, 590 N.Y.S.2d 55, 604 N.E.2d 117; *Meng Sing Chang v. Homewell Owner's Corp.,* 38 A.D.3d 625, 627, 831 N.Y.S.2d 547; *Blanco v. Oliveri,* 304 A.D.2d at 599–600, 758 N.Y.S.2d 376).

***64** The plaintiffs' remaining contentions either are without merit or have been rendered academic by our determination. Accordingly, the order is affirmed, with costs.

ORDERED that the order is affirmed, with costs.

FISHER, J.P., RITTER and McCARTHY, JJ., concur.

All Citations

57 A.D.3d 54, 866 N.Y.S.2d 323, 2008 N.Y. Slip Op. 08305

Footnotes

1 The caption of the case also names Denise Alleyne as a defendant, and she appears as a respondent on this appeal. Since the plaintiffs' complaint makes no allegations about Alleyne, and the record is otherwise silent as to her, our discussion focuses upon the duties and conduct of Troy Puccia and Stacey Puccia, notwithstanding Alleyne's appellate status.

2 While the cited cases focus on the authority to supervise or control the work activity as a precondition to a defendant's liability under Labor Law § 200, some reported cases appear to require the actual exercise of supervision or control before liability may attach (*see Ross v. Curtis–Palmer Hydro–Elec. Co.,* 81 N.Y.2d at 504–505, 601 N.Y.S.2d 49, 618 N.E.2d 82; *Kwang Ho Kim v. D & W Shin Realty Corp.,* 47 A.D.3d 616, 620, 852 N.Y.S.2d 138). Still others appear to blend both standards (*see Comes v. New York State Elec. & Gas Corp.,* 82 N.Y.2d at 877, 609 N.Y.S.2d 168, 631 N.E.2d 110; *Lombardi v. Stout,* 80 N.Y.2d 290, 294, 590 N.Y.S.2d 55, 604 N.E.2d 117; *McLeod v. Corporation of Presiding Bishop of Church of Jesus Christ of Latter Day Sts.,* 41 A.D.3d 796, 798, 839 N.Y.S.2d 164). To interpret Labor Law § 200 as limiting the imposition of liability to only those situations in which the defendant actually exercised supervision or control would, we believe, encourage defendants to purposefully absent themselves from worksites to provide insulation from liability under the statute, as well as under the common law. Thus, in our view, the better standard to apply when the manner and method of work is at issue in a Labor Law § 200 analysis is whether the defendant had the

authority to supervise or control the work.

3 Cases cited by the plaintiffs in their brief regarding Labor Law § 200 are largely inapplicable, as they involve circumstances where defendant owners created or had actual or constructive notice of dangerous premises conditions (*e.g. Murphy v. Columbia Univ.,* 4 A.D.3d 200, 202, 773 N.Y.S.2d 10; *Abayev v. Jaypson Jewelry Mfg. Corp.,* 2 A.D.3d 548, 549, 769 N.Y.S.2d 563; *Alvarez v. Long Is. Fireproof Door Co.,* 305 A.D.2d 343, 344, 758 N.Y.S.2d 677; *Blanco v. Oliveri,* 304 A.D.2d 599, 758 N.Y.S.2d 376; *Shipkoski v. Watch Case Factory Assoc.,* 292 A.D.2d 589, 590, 741 N.Y.S.2d 57; *Hernandez v. Board of Educ. of City of N.Y.,* 264 A.D.2d 709, 710, 694 N.Y.S.2d 752; *Akins v. Baker,* 247 A.D.2d 562, 563, 669 N.Y.S.2d 63).

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125 A.D.3d 507
Supreme Court, Appellate Division, First Department, New York.

Rafael Galvez ORTIZ, Plaintiff,
v.
FOOD MACHINERY OF AMERICA, INC., Defendant.
Food Machinery of America, Inc., Third–Party Plaintiff–Appellant,
v.
Union Square Restaurant Group, LLC, doing business as Maoz Vegetarian Restaurant, et al., Third–Party Defendants,
La Minerva Omega Group SRL, Third–Party Defendant–Respondent.

Feb. 19, 2015.

Synopsis
Background: Appeal was taken from the order of the Supreme Court, Bronx County, Wilma Guzman, J., granting third-party defendant's motion to dismiss for lack of personal jurisdiction.

Holding: The Supreme Court, Appellate Division, held that motion court did not err in considering affidavit of Italian citizen despite absence of translator's affidavit.

Affirmed.

Attorneys and Law Firms

****8** Law Office of Lori D. Fishman, Tarrytown (D. Bradford Sessa of counsel), for appellant.

Cozen O'Connor, New York (Melissa F. Brill of counsel), for respondent.

TOM, J.P., SAXE, MANZANET–DANIELS, GISCHE, CLARK, JJ.

Opinion

***507** Order, Supreme Court, Bronx County (Wilma Guzman, J.), ***508** entered June 4, 2014, which granted third-party defendant La Minerva Group SRL's motion to dismiss the third-party complaint as against it on the basis of lack of personal jurisdiction, unanimously affirmed, without costs.

The sole argument advanced in support of reversal is that the motion court erred in considering the affidavit submitted by La Minerva in support of its motion to dismiss, because the affidavit was not accompanied by a translator's affidavit. However, the witness's affidavit is in English, and La Minerva's counsel represents that the witness, an Italian citizen, speaks English, and communicated with counsel in English concerning the drafting of the affidavit (*see* CPLR 2101[b]; *Eustaquio v. 860 Cortlandt Holdings, Inc.,* 95 A.D.3d 548, 944 N.Y.S.2d 78 [1st Dept.2012]; *Reyes v. Arco Wentworth Mgt. Corp.,* 83 A.D.3d 47, 54, 919 N.Y.S.2d 44 [2d Dept.2011]). An Italian translation of the affidavit was provided for the benefit of the Italian notary, but the witness provided his sworn statement in English.

All Citations

125 A.D.3d 507, 5 N.Y.S.3d 8, 2015 N.Y. Slip Op. 01526

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129 A.D.3d 928
Supreme Court, Appellate Division, Second Department, New York.

George PATRIKIS, appellant,
v.
Billis ARNIOTIS, et al., respondents.

June 17, 2015.

Synopsis
Background: Worker brought action against homeowners, seeking to recover damages for personal injuries sustained when he fell from ladder while climbing down from roof of homeowners' home, alleging claims of common-law negligence and under Labor Law. The Supreme Court, Queens County, Pineda–Kirwan, J., granted homeowners' motion for summary judgment on negligence cause of action. Worker appealed.

The Supreme Court, Appellate Division, held that fact issues as to condition of ladder, and thus as to cause of fall, precluded summary judgment.

Reversed.

Attorneys and Law Firms

****174** Sacco & Fillas, LLP, Astoria, N.Y. (Andrew Wiese of counsel), for appellant.

Gladstein Keane & Flomenhaft, PLLC, New York, N.Y. (Thomas F. Keane of counsel), for respondents.

****175** PETER B. SKELOS, J.P., JOHN M. LEVENTHAL, LEONARD B. AUSTIN, and ROBERT J. MILLER, JJ.

Opinion

***928** In an action to recover damages for personal injuries, the plaintiff appeals, as limited by his brief, from so much of an order of the Supreme Court, Queens County (Pineda–Kirwan, J.), dated June 23, 2014, as granted that branch of the defendants' motion which was for summary judgment dismissing the cause of action alleging common-law negligence.

ORDERED that the order is reversed insofar as appealed from, on the law, with costs, and that branch of the defendants' motion which was for summary judgment dismissing the cause of action alleging common-law negligence is denied.

The plaintiff allegedly was injured when he fell from an extension ladder owned by the defendants that slipped while he was climbing down from the roof of the defendants' home. The plaintiff returned to the defendants' home two weeks after ***929** the accident and inspected the ladder, and observed for the first time that the rubber feet on the ladder were "totally eaten up, worn," and "destroyed."

The plaintiff thereafter commenced this action and asserted causes of action alleging violations of Labor Law §§ 240, 241, and 200, as well as common-law negligence. Following discovery, the defendants moved for summary judgment dismissing the complaint, and the Supreme Court granted the motion. The plaintiff appeals from so much of the order as granted that branch of the defendants' motion which was for summary judgment dismissing the cause of action alleging common-law negligence.

The Supreme Court erred in granting that branch of the defendants' motion which was for summary judgment dismissing the common-law negligence cause of action. "[W]hen a defendant property owner lends allegedly dangerous or defective equipment to a worker that causes injury during its use, the defendant moving for summary judgment must establish that it neither created the alleged danger or defect in the instrumentality nor had actual or constructive notice of the dangerous or defective condition" (*Chowdhury v. Rodriguez,* 57 A.D.3d 121, 131–132, 867 N.Y.S.2d 123; *see Quituizaca v. Tucchiarone,* 115 A.D.3d 924, 926, 982 N.Y.S.2d 524). While lack of constructive notice can generally be established by evidence demonstrating when the area or condition was last inspected relative to the time of the accident (*see Espinal v. Six Flags, Inc.,* 122 A.D.3d 903, 904, 998 N.Y.S.2d 110; *Griffith v. JK Chopra Holding, LLC,* 111 A.D.3d 666, 666, 974 N.Y.S.2d 790), the absence of rubber shoes on a ladder is a "visible and apparent defect," evidence of which may be sufficient to raise a triable issue of fact on the issue of constructive notice (*Erdely v. Access Direct Sys., Inc.,* 45 A.D.3d 724, 726, 847 N.Y.S.2d 108). Here, the defendants satisfied their prima facie burden with evidence that the ladder had been inspected prior to the accident. The defendant Billis

Arniotis (hereinafter Billis) testified that, since purchasing the ladder 20 years before the accident, he had used it once per week and had inspected its rubber feet each time. Billis last inspected the ladder one or two weeks before the accident and did not observe any wear at that time. However, the plaintiff testified that he inspected the ladder after the accident and found that its rubber feet were "totally eaten up, worn," and "destroyed." This conflicting evidence, coupled with Billis's testimony that the ladder had not been used between the time of the accident and the plaintiff's inspection, raised a triable issue of fact.

****176** Contrary to the defendants' contention, they failed to make a ***930** prima facie showing that the plaintiff cannot identify the cause of his fall without engaging in speculation. A plaintiff's inability to testify exactly as to how an accident occurred does not require dismissal where negligence and causation can be established with circumstantial evidence (*see Costantino v. Webel,* 57 A.D.3d 472, 472, 869 N.Y.S.2d 179; *Cormack v. Cross Sound Ferry Servs.,* 273 A.D.2d 433, 433, 710 N.Y.S.2d 380; *see also Mitgang v. PJ Venture HG, LLC,* 126 A.D.3d 863, 864, 5 N.Y.S.3d 302; *cf. Laskowski v. 525 Park Ave. Condominium,* 93 A.D.3d 822, 824–825, 941 N.Y.S.2d 201). Here, Billis's testimony establishes that he was present at the time of the accident and that he watched the ladder slide down while the plaintiff was on it. Evidence that the ladder's rubber feet were worn down also is sufficient to permit the inference that this defective condition caused the slippage (*see Gayle v. City of New York,* 92 N.Y.2d 936, 937, 680 N.Y.S.2d 900, 703 N.E.2d 758; *Erdely v. Access Direct Sys., Inc.,* 45 A.D.3d at 726, 847 N.Y.S.2d 108; *see also Timmins v. Benjamin,* 77 A.D.3d 1254, 1256, 910 N.Y.S.2d 584). Furthermore, the numerous inconsistencies between the deposition testimony of the plaintiff and Billis raised a triable issue of fact as to the cause of the plaintiff's fall (*see Artoglou v. Gene Scappy Realty Corp.,* 57 A.D.3d 460, 462–463, 869 N.Y.S.2d 172).

Accordingly, the Supreme Court should have denied that branch of the defendants' motion which was for summary judgment dismissing the cause of action alleging common-law negligence.

All Citations

129 A.D.3d 928, 12 N.Y.S.3d 174, 2015 N.Y. Slip Op. 05167

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292 A.D.2d 582
Supreme Court, Appellate Division, Second Department, New York.

Shavon PATTERSON, et al., Appellants,
v.
Ulla BRENNAN, Defendant,
Westhab, Inc., Respondent.

March 25, 2002.

Synopsis
Tenant and children brought personal injury action against landlord, seeking to recover for damages resulting from alleged lead poisoning. The Supreme Court, Westchester County, Lefkowitz, J., granted landlord's motion to dismiss, and plaintiffs appealed. The Supreme Court, Appellate Division, held that dismissal of the complaint was premature.

Reversed in part and vacated in part.

Attorneys and Law Firms

****97** Martin R. Munitz, P.C. (Rock & Rosmarin, LLP, White Plains, N.Y. [Victoria Reilly Lehning] of counsel), for appellants.

Jenkins & Gilchrist Parker Chapin, LLP, New York, N.Y. (Angela Delfino–Vitali and Anne D. Taback of counsel), for respondent.

MYRIAM J. ALTMAN, J.P., ANITA R. FLORIO, HOWARD MILLER and BARRY A. COZIER, JJ.

Opinion

***582** In an action to recover damages for personal injuries, etc., the plaintiffs appeal from (1) an order of the Supreme Court, Westchester County (Lefkowitz, J.), dated June 11, 2001, which granted the motion of the defendant Westhab, Inc., for summary judgment dismissing the complaint insofar as asserted against it, and (2) a judgment of the same court, entered June 21, 2001, which, upon the order, dismissed the complaint insofar as asserted against the defendant Westhab, Inc.

ORDERED that the appeal from the order is dismissed; and it is further,

ORDERED that the judgment is reversed, on the law, the motion is denied without prejudice to renew after the completion of discovery, the complaint insofar as asserted against the defendant Westhab, Inc., is reinstated, and the order dated June 11, 2001, is vacated; and it is further,

ORDERED that the appellants are awarded one bill of costs.

The appeal from the intermediate order must be dismissed because the right of direct appeal therefrom terminated with the entry of judgment in the action (*see Matter of Aho,* 39 N.Y.2d 241, 248, 383 N.Y.S.2d 285, 347 N.E.2d 647). The issues raised on appeal from the order are brought up for review and have been considered on the appeal from the judgment (*see* CPLR 5501[a][1]).

The plaintiff mother alleges that the infant plaintiffs ***583** sustained lead poisoning as a result of exposure to the lead paint in apartments owned by the defendant Westhab, Inc. (hereinafter the defendant).

The defendant moved for summary judgment dismissing the complaint insofar ****98** as asserted against it. However, before the motion was filed, the parties appeared for a preliminary conference, and a preliminary conference order was issued, *inter alia,* directing that examinations before trial be scheduled pending a decision on the motion. Notwithstanding that order, the Supreme Court granted the defendant's motion for summary judgment and entered judgment dismissing the complaint insofar as asserted against the defendant before the scheduled examinations were completed.

To impose liability upon a landlord for a lead paint condition, a plaintiff must establish that the landlord had actual or constructive notice of and a reasonable opportunity to remedy the hazardous condition (*see Chapman v. Silber,* 97 N.Y.2d 9, 734 N.Y.S.2d 541, 760 N.E.2d 329; *Bellony v. Siegel,* 288 A.D.2d 411, 732 N.Y.S.2d 647). A plaintiff may raise a triable issue of fact in opposition to a defendant landlord's claim of entitlement to summary judgment by demonstrating that the landlord "(1) retained a right of entry to the premises and assumed a duty to make repairs, (2) knew that the apartment was constructed at a time before lead-based interior paint was banned, (3) was aware that paint was peeling on the premises, (4) knew of the hazards of lead-based paint to young children and (5) knew that a young child lived in the apartment" (*Chapman v. Silber, supra,* at 15, 734 N.Y.S.2d 541, 760 N.E.2d 329).

Here, the defendant retained a right of re-entry to the premises. The plaintiff mother contends that the defendant received complaints of chipped and peeling paint and failed to remedy the condition. While the record demonstrates that the defendant was aware that the infant plaintiffs resided at the premises, the record is devoid of any information regarding the age of the premises and of the defendant's knowledge concerning the hazards of lead-based paint to young children. Because such information is within the defendant's exclusive knowledge and the defendant had yet to be deposed, the Supreme Court prematurely dismissed the complaint (*see* CPLR 3212[f]; *Sazer v. Marino,* 280 A.D.2d 537, 538, 720 N.Y.S.2d 406; *Sweetland v. Malone,* 223 A.D.2d 539, 636 N.Y.S.2d 389).

All Citations

292 A.D.2d 582, 740 N.Y.S.2d 96, 2002 N.Y. Slip Op. 02514

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50 A.D.3d 535
Supreme Court, Appellate Division, First Department, New York.

The PEOPLE of the State of New York, by Eliot SPITZER, the Attorney General of the State of New York, Plaintiff–Respondent, v. Richard A. GRASSO, et al., Defendants, Kenneth G. Langone, Defendant–Appellant. [And Other Actions].

April 24, 2008.

Synopsis

Background: Attorney General brought action to challenge compensation and benefits awarded to former chief executive officer (CEO) of New York Stock Exchange (NYSE). The Supreme Court, New York County, Charles E. Ramos, J., denied motion of NYSE director and chair of its compensation committee for summary judgment. Director appealed.

Holdings: The Supreme Court, Appellate Division, held that:

fact issue existed as to whether NYSE director and chair of its compensation committee effectively communicated compensation and benefits recommendations for CEO of NYSE to board of directors and whether director's executive compensation recommendations were in best interest of NYSE;

scope of duties of NYSE director and chair of its compensation committee presented question of law for court; and

NYSE director and chair of its compensation committee, who had discretion to recommend 35% of NYSE executives' variable compensation, had responsibility to accurately and completely convey his compensation recommendations to board of directors and had duty to make compensation recommendations that were in interest of NYSE, in good faith and with conscientious fairness, morality, and honesty in purpose.

Affirmed.

McGuire, J., filed dissenting opinion, in which Buckley, J., joined.

Attorneys and Law Firms

****24** Kramer Levin Naftalis & Frankel LLP, New York (Gary P. Naftalis of counsel), for appellant.

Andrew M. Cuomo, Attorney General, New York (Avi Schick of counsel), for respondent.

MAZZARELLI, J.P., SAXE, BUCKLEY, SWEENY, McGUIRE, JJ.

Opinion

***535** Order, Supreme Court, New York County (Charles E. Ramos, J.), entered August 4, 2006, which denied defendant Kenneth Langone's motion for summary judgment dismissing the complaint as against him, affirmed, without costs.

The Attorney General brought this action to challenge compensation and benefits awarded to the former CEO of the New York Stock Exchange, Richard Grasso. A detailed discussion of the background of the litigation and the substance of the complaint is set forth in our decision in *People v. Grasso*, 42 A.D.3d 126, 836 N.Y.S.2d 40 [2007].

This appeal is from the denial of defendant Kenneth G. Langone's motion for summary judgment to dismiss the seventh ****25** cause of action. In that claim, the Attorney General alleges that defendant Langone, a NYSE director and Chair of its Compensation Committee from June 1999 until May 2003, breached his fiduciary duties to the NYSE by failing to make complete and accurate disclosures of Grasso's compensation to the NYSE Board of Directors.[1]

In the early 1990s, the NYSE Compensation Committee determined that the Exchange was at a competitive disadvantage because it was unable to offer its senior executives stock-based forms of deferred compensation. To remedy this problem, in 1997, the Board of Directors approved the NYSE's Capital Accumulation Plan (CAP) for four of its most senior executives. Originally CAP provided a 25% match of variable compensation awards

for eligible executives in a given year. ***536** The variable compensation to which it applied was the NYSE's Incentive Compensation Plan (ICP) and its Long Term Incentive Plan (LTIP). CAP payments were deferred until retirement or termination.

In May 1999, the NYSE Compensation Committee and Board of Directors approved, and Grasso executed, his second employment agreement as Chairman and CEO of the NYSE. The 1999 agreement modified Grasso's 1995 contract and extended his term to May 31, 2005. In fact, Grasso's 1999 employment agreement set forth five components of his annual compensation, which, for the first time included CAP. These were: (1) a base salary of $1.4 million; (2) a discretionary ICP bonus with a minimum target amount of $1 million annually; (3) a LTIP award; (4) a CAP award equal to 50% of his total variable compensation (ICP and LTIP); and (5) a Senior Executive Retirement Plan (SERP) award.

The annual compensation for all of the NYSE senior executives was set each February for the prior calendar year. Between the 1997 institution of CAP awards and Grasso's 2003 resignation, the process for setting executive compensation was as follows: Frank Ashen, the head of human resources, would collect median target compensation for a group of comparator companies from NYSE's compensation consultant, Hewitt Associates. He would also prepare a summary of each NYSE executive's performance for the year, based upon input from operating managers. Next, Ashen compared his raw data against 65 quantitative measurements to reach a score for each executive. That score comprised 65% of the individual's compensation. The Chairman of the Compensation Committee then had discretion to determine the remaining 35% of compensation figures. Thus, during his tenure as Chair of the Compensation Committee, Langone was directly responsible for determining 35% of the compensation of NYSE executives. Also, he interacted with the NYSE Department of Human Resources by making his yearly proposals to Frank Ashen.

After the Chair made his recommendations, Ashen met individually with each of the members of the Compensation Committee to present and discuss the salary proposals. On the first Thursday of each February, the Compensation Committee would meet for a collective discussion and vote on all of the executives' compensation. Later that same day, the full Board of Directors would meet and vote on the same matters. It was the role of the Compensation Committee Chair to make ****26** oral presentations to the Committee and the full Board before they voted.

***537** The first time the Board of Directors had to approve CAP awards was in February 1998. The written materials prepared for the 1998 and 1999 Compensation Committee meetings, under the leadership of then Chair Bernard Marcus, provided the Committee Members with worksheets that gave an exact value of the recommended CAP award for each participant. The "total compensation" column of those worksheets also displayed the recommended sum of each executive's base salary, ICP, LTIP and CAP award for the year. For example, the 1997 salary worksheet for Robert Britz, a NYSE Executive Vice president who received a 25% CAP award, contained the following information (emphasis supplied):

	Base Salary	ICP	LTIP	**CAP**	Total Compensation
Comparator					
Median Target	$400,000	$246,781	$640,020	—	$1,113,458
1996 Actual	$400,000	$350,000	No Payout	—	$ 750,000
1997 Recommended	$435,000	$410,000	No Payout	**102,500**[2]	$ 947,500

After Langone became chair of the Compensation Committee in June 1999, the values of recommended CAP awards were removed from the worksheets distributed to Committee members. In addition, the values for "total variable compensation" and "total compensation" no longer included the recommended CAP awards. For example, the worksheet outlining Grasso's recommended 1999 compensation was as follows:

	Base Salary	ICP	LTIP	Total Compensation	Total Variable Compensation
1998	$1,400,000	$4,204,000	$396,000	$6,000,000	$4,600,000
1999	$1,400,000	$5,652,000	$948,000	$8,000,000	$6,600,000

Grasso's February 2000 recommended 1999 compensation worksheet had the following statement underneath the chart: "Grasso will receive 50% of his variable compensation in the Capital Accumulation Plan." However, the document did not give a value for his 1999 CAP award, which was $3,300,000. The worksheet similarly failed to set forth that his actual recommended compensation was $11,300,000.

After the Committee voted to approve Grasso's compensation, a worksheet quantifying all of the components of Grasso's compensation, including the CAP award, and their sum total, ***538** was sent to the NYSE CFO to effect payment:

	Base Salary	ICP	LTIP	Variable Compensation	Total Cash Compensation	CAP	**Total Compensation**
1998	$1,400,000	$4,204,000	$396,000	$4,460,000	$6,000,000	—[3]	$ 6,000,000
1999	$1,400,000	$5,652,000	$948,000	$6,600,000	**$8,000,000**	**$3,300,000**	**$11,300,000**

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****27** Dale Bernstein, the deputy head of NYSE's Human Resources Department, testified at her deposition that it was her job to prepare the worksheets of executives' compensation. She related that after Langone became Chairman of the Compensation Committee, Frank Ashen told her to remove the CAP column from the materials distributed to the Compensation Committee. Bernstein stated that she told Ashen that she thought the worksheets were clearer with the CAP awards displayed. However, she testified that she deferred to Ashen, who told her that Grasso did not want the CAP columns displayed. Thus, from February 2000 to February 2003, the materials distributed to the Compensation Committee did not have a CAP column. Bernstein stated that after the compensation packages were approved, she gave the finance division worksheets which displayed the values of CAP and total compensation figures.

In February 2000, the Compensation Committee[4] was given materials indicating that Grasso's total 1999 compensation was $8 million, notwithstanding that his actual total compensation was $11.3 million. The minutes from the February 2000 Compensation Committee meeting do not indicate that Grasso's CAP award was discussed. However, speaking points prepared for Langone's remarks at the February 3, 2000 Board meeting indicate that Langone specifically told the Board that Grasso's 2000 CAP award was $3.3 million.

One member of the Compensation Committee, D. Maughan, testified at his deposition that the worksheet he was given at the February 2000 Committee meeting would have been clearer if it included a CAP column and a "real total compensation" figure. Two other members of the Compensation Committee gave deposition testimony that they thought Grasso had been awarded approximately $8 million in total compensation for 1999, when in fact, the actual total compensation approved for Grasso in 1999 was $11.3 million. Notably, the $3.3 million discrepancy was the exact value of the CAP award (which, again, was not disclosed on the compensation worksheet). However, four Board members (M. Karmazin, L. Wachner, G. Levin, and ***539** R. Murphy), testified at their depositions that it was clear to them, before they voted, that Langone was recommending that Grasso receive a $3.3 million CAP award for 1999.

Similar to the format for the prior year, the February 2001 worksheet for Grasso's compensation indicated a recommended "total 2000 Cash Comp" of $15 million.

	Base Salary	ICP	LTIP	Variable Comp	Total Cash Comp
1999	$1,400,000	$ 5,652,000	$ 948,000	$ 6,600,000	$ 8,000,000
2000	$1,400,000	$12,519,000	$1,081,000	$13,600,000	$15,000,000

The 2001 and 2002 worksheets added the word "also" to the CAP statement under the chart. They both stated: "Grasso will also receive 50% of his variable compensation in the Capital Accumulation Plan."

However, the February 2001 worksheet did not reveal: (1) that Grasso's 2000 recommended CAP award was $6.8 million, (2) that a $5 million special award ****28** was recommended for Grasso for 2000; or (3) that Grasso's total recommended compensation for 2000 was $26.8 million. The minutes from the February 2001 Compensation Committee meeting do not indicate that Grasso's CAP award was discussed. C. Bocklet, a member of the Compensation Committee,[5] testified at his deposition that he believed that Grasso's total 2000 compensation was $15 million. This was the value in the "total compensation" column of the worksheet, not the $26.8 million Grasso was actually awarded.

The same procedures were followed in February 2002. The worksheet given to the Committee was as follows:

	Base Salary	ICP	LTIP	Variable Comp	Total Cash Comp
2000	$1,400,000	$12,519,000	$1,081,000	$13,600,000	$15,000,000
2001	$1,400,000	$10,600,000	N/A	$10,600,000	$12,000,000

The notations under the chart on the February 2002 worksheet indicated that: (1) Grasso would also receive a CAP equal to 50% of his variable compensation; (2) in February 2001, Grasso was granted a special award of $5,000,000; and (3) in February 2002 Mr. Grasso is proposed for a special award of $10,500,000. Thus, the worksheet (including the table and the proposed $10.5 million special award) itemized a recommended compensation for Grasso of $22.5 million ***540** in 2001.[6] Again, neither Langone's speaking points nor the Compensation Committee minutes indicate a discussion of Grasso's CAP award. Thus, the actual value of Grasso's proposed compensation for 2001, including the $8.05 million CAP award, was $30.55 million.

Compensation Committee member R. Murphy, and Board members W. Harrison and J. Duryea all testified at their depositions that they believed they had voted to approve 2001 compensation for Grasso in the $20 million range. C. Bocklet and R. Murphy also testified that the members of the NYSE would not be happy if they knew that the Compensation Committee was approving paying Grasso $30 million for his work in 2001.

Grasso's employment contracts also entitled him to a lump-sum Supplemental Employee Retirement Plan (SERP) distribution upon his departure from the NYSE. This SERP award was determined based upon the length of his service at the NYSE and the amount of his variable compensation during that time. In the summer of 2002, Grasso sought to extend his contract and accelerate payment of some of his deferred compensation. The Compensation Committee held a special meeting during which some members first learned that Grasso's SERP would be $152 million as of the date of his projected retirement. The Committee was concerned about the rapid, substantial growth of Grasso's deferred compensation, and they decided that a third party should be retained to review the issue. Langone hired Vedder, Price, Kaufman & Kammholz, a consulting firm, for this purpose. Vedder, Price requested ****29** a copy of the materials provided to the Compensation Committee for their February 2002 meeting. However, Ashen provided Vedder, Price with the worksheets that were prepared for the CFO; namely, those which included the actual recommended CAP awards and compensation totals incorporating CAP awards, rather than the worksheet provided to the Committee, which did not display these figures.

Grasso then made a proposal to cap his final pay at $12

million, extend his contract to 2006, and to move $56 million of his accrued SERP benefit into his Supplemental Employee Savings Plan (SESP). The Compensation Committee considered this proposal, because it would lessen the NYSE's accrual expenses, but it made no determination on the matter. Then, in January 2003, Grasso revised his proposal to request the immediate payment ***541** of approximately $140 million in deferred compensation, including more than $11 million in CAP benefits.

At its February 2003 meeting, the Compensation Committee was given worksheets which included, for the first time under Langone's leadership, a figure for Grasso's proposed CAP award. The "Total Compensation" figures in this worksheet also included, again, for the first time under Langone's leadership, the CAP awards. Thus, the format of the February worksheet was inconsistent with those distributed to the Compensation Committee in February 2000, February 2001, and February 2002.

	Base Salary	ICP	LTIP	Variable Comp	Total Cash Comp	CAP	Total Compensation
2000	$1,400,000	$12,519,000	$1,081,000	$13,600,000	$15,000,000	$6,800,000	$21,800,000
2001	$1,400,000	$16,100,000	N/A	$16,100,000	$17,500,000	$8,050,000	$25,550,000
2002	$1,400,000	$7,066,000	N/A	$7,066,666	$7,066,666	$3,533,333	$12,000,000

Grasso's recommended total compensation for 2002 was $12 million. The minutes from the February 2003 Compensation Committee meeting also indicate the disclosure and approval of Grasso's CAP award. However, the Compensation Committee did not vote to approve Langone's recommendation, but referred it for further study of the financial implications for the NYSE.

On August 27, 2003 Grasso executed his third employment agreement with the NYSE. The same day the NYSE issued a press release revealing that $139.5 million would be immediately payable to Grasso. The press release did not reveal that $48 million was also due to be paid Grasso upon his retirement. In September 2003, the Chairman of the Securities and Exchange Commission contacted the NYSE and requested information concerning Grasso's compensation. In response to increasing internal and external pressure, Grasso agreed to forgo future benefit payments. Several weeks later, he resigned.

The Attorney General then brought this action. The complaint alleges that the NYSE paid Grasso an unlawful amount of compensation and seeks the return of such sums to the NYSE. The seventh cause of action alleges that as an officer of the NYSE and chair of its Compensation Committee, Langone violated N–PCL 717(a) by, "among other things," misleading the Board about the CAP awards. Paragraph 207 of the complaint quotes the relevant portion of N–PLC 717(a), a codification of the fiduciary duty owed by all officers and directors of not-for-profit corporations. That section

provides in pertinent part:

> ****30** "Directors and officers shall discharge the duties of their respective positions in good faith and with that degree of diligence, ***542** care and skill which ordinarily prudent men would exercise under similar circumstances in like positions."

In paragraph 208 of the complaint, the Attorney General asserts that as Chairman of the Compensation Committee, Langone breached his fiduciary duties under § 717(a) by misleading its Board of Directors, "which had delegated to him the task of explaining the proposed compensation." Langone's digressions, the complaint continues, are actionable under N–PCL 720(b)[7] and 720(a)(1).[8]

After substantial discovery, including 61 depositions and the exchange of approximately one million documents, Langone moved for summary judgment dismissing the seventh cause of action. Langone asserted that he was falsely accused of misleading the NYSE Board as to Grasso's CAP award. He averred that he personally disclosed Grasso's CAP program to the Board and was present for similar disclosures by others. He stated that Grasso's $3.3 million 1999 CAP award was disclosed to the Board at their February 2000 meeting. Langone also asserted that his presentations in 2001 and 2002 fairly and accurately represented all of the components of Grasso's compensation. He claimed that the "undisputed facts" demonstrated that "[he] and others repeatedly disclosed Grasso's CAP awards, both orally and in writing." Langone's motion contained 45 exhibits. These included Langone's speaking points for various Board meetings, minutes from February 1997, 1999–2002 Compensation Committee meetings, excerpts from the deposition testimony of various Board members, and salary worksheets for the 2000–2002 Compensation Committee meetings. In support of Langone's contention that the Board was fully informed about Grasso's CAP awards, his counsel also annexed, as required by Rule 19–a of the Rules of the Commercial Division, a 23–page "Statement of Material Undisputed Facts."

***543** In opposition, the Attorney General submitted excerpts from the depositions of 26 individuals, including Board members, NYSE employees, Grasso and Langone. He also presented 58 exhibits, a 14–page response disputing aspects of Langone's "Statement of Material Undisputed Facts," and a 32–page " Counter–Statement of Material Undisputed Facts." The Attorney General's submissions pointed to the necessity of annual disclosure of the CAP awards. The Attorney General also submitted excerpts from the deposition testimony of a number of the Board members, including Deryck Maughan, Charles J. Bocklet, David Komansky, James Duryea, William Harrison, Robert Murphy, and H. Carl McCall. These witnesses' testimony, much of which is set forth in the factual recitation, indicated misconceptions as to the magnitude of the compensation that they had voted to approve for Grasso in February 2000–February 2002.

****31** In reply, Langone submitted 29 additional exhibits, including documents and deposition testimony. These were to establish that Langone met his duty to fully inform the Board about Grasso's compensation.

At oral argument and on the record, before deciding the motion, the IAS court inquired as to why, upon Langone's succession to leadership as Chair of the Compensation Committee, compensation worksheets circulated to the Committee members no longer itemized the exact values of CAP awards. Langone's counsel responded that his client had nothing to do with the formatting of the worksheets shown to the Compensation Committee, and that he should not be faulted for those documents' failure to disclose the CAP awards. The Attorney General countered that Langone was the only NYSE director who interacted with the Department of Human Resources, and that he was also responsible for recommending compensation to the remaining members of the Compensation Committee. The Attorney General added that in his role as Chair of the Compensation Committee, Langone had a duty to ensure that the Committee was provided with a complete and accurate presentation of proposed compensation.

Langone's counsel then asserted that the speaking points from the February 2000 Compensation Committee meeting showed, unequivocally, that Langone disclosed the exact amount of Grasso's recommended CAP award to the Committee. However, the Attorney General produced evidence that Grasso's CAP award was not included in Langone's speaking points for the February 2001 or 2002 meetings. The Attorney General also asserted that there was no evidence that the exact values of ***544** Grasso's 2000 or 2001 CAP awards were disclosed to any member of the Compensation Committee or the Board prior to voting to approve his compensation packages.

The IAS court denied Langone's motion. It found issues of fact as to whether Langone breached his duties to the Board. The court held that the worksheets omitting the exact values of Grasso's CAP awards constituted evidence that Langone may have breached his obligation to fully and accurately disclose his salary recommendations to the Board. The court noted that Langone's speaking points for Compensation Committee meetings were inconsistent from year to year. The court also observed that Board members' deposition testimony

indicated that some directors were not aware of the magnitude of the total compensation that they were approving for Grasso.

On appeal, Langone contends that the Attorney General failed to raise an issue of fact as to the claim that he violated his fiduciary duties. He asserts that he had no duty to annually remind the Compensation Committee that it had approved a 50% CAP award for Grasso, and that even if he had such a duty, the undisputed facts reveal that he fulfilled it. Langone also claims that the element of causation has not been met because no Board members could have "reasonably relied" upon the worksheets to conclude that Grasso was not entitled to his contractual CAP award. Finally, Langone contends that any claims which rely upon his purported failure to apprise the Board of Grasso's SERP awards were not pleaded in the complaint, and cannot be a basis for a determination that Langone breached his duties.

In response, the Attorney General asserts that Langone had a duty to disclose Grasso's compensation to the Committee and the Board. He claims that the record is replete with evidence that Langone did not fulfill his obligations, and that his failures led the Board to vote in favor of ****32** compensation packages which were substantially higher than what they had understood. The Attorney General asserts that omissions regarding Grasso's CAP and SERP both preclude summary judgment in favor of Langone.

Pursuant to CPLR 3212(b) a court will grant a motion for summary judgment upon a determination that the movant's papers justify holding, as a matter of law, "that there is no defense to the cause of action or that the cause of action or defense has no merit." Further, all of the evidence must be viewed in the light most favorable to the opponent of the motion (*Marine Midland Bank v. Dino & Artie's Automatic Transmission Co.,* 168 A.D.2d 610, 563 N.Y.S.2d 449 [1990]).

***545** The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact as to the claim or claims at issue (*Alvarez v. Prospect Hosp.,* 68 N.Y.2d 320, 324, 508 N.Y.S.2d 923, 501 N.E.2d 572 [1986]; *Zuckerman v. City of New York,* 49 N.Y.2d 557, 562, 427 N.Y.S.2d 595, 404 N.E.2d 718 [1980]; *Sillman v. Twentieth Century–Fox Film Corp.,* 3 N.Y.2d 395, 404, 165 N.Y.S.2d 498, 144 N.E.2d 387 [1957]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Matter of Redemption Church of Christ of Apostolic Faith v. Williams,* 84 A.D.2d 648, 649, 444 N.Y.S.2d 305 [1981]; *Greenberg v. Manlon Realty,* 43 A.D.2d 968, 969, 352 N.Y.S.2d 494 [1974]; *Winegrad v. New York Univ. Med. Ctr.,* 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316, 476 N.E.2d 642 [1985]).

Once the prima facie showing has been made, the party opposing a motion for summary judgment bears the burden of "produc[ing] evidentiary proof in admissible form sufficient to require a trial of material questions of fact" (*Zuckerman,* 49 N.Y.2d at 562, 427 N.Y.S.2d 595, 404 N.E.2d 718; *see also Romano v. St. Vincent's Med. Ctr. of Richmond,* 178 A.D.2d 467, 470, 577 N.Y.S.2d 311 [1991]; *Tessier v. New York City Health & Hosps. Corp.,* 177 A.D.2d 626, 576 N.Y.S.2d 331 [1991]). The substantive law governing a case dictates what facts are material, and "[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." (*Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 [1986]).

Here, Langone's motion sought dismissal of the seventh cause of action, which alleged that he violated N–PCL 717(a), a codification of the fiduciary duty of corporate officers and directors. The elements of the Attorney General's seventh cause of action are (1) the existence of a fiduciary duty; (2) breach of that duty; (3) and a showing that the breach was a substantial factor in causing an identifiable loss. The first element of the cause of action is not controverted. N–PCL 717(a) expressly provides, and Langone concedes, that as a NYSE director and Chairman of the Board's Compensation Committee, he had a fiduciary obligation to discharge his duties, "with that degree of diligence, care and skill which ordinarily prudent men would exercise under similar circumstances in like positions."

The dissent correctly recognizes that the scope of Langone's duties present a question of law for the court (*532 Madison Ave. Gourmet Foods v. Finlandia Ctr.,* 96 N.Y.2d 280, 288, 727 N.Y.S.2d 49, 750 N.E.2d 1097 [2001]). In *532 Madison Ave.,* the Court of Appeals aptly summarized our role in making this determination, which is to:

> ****33** "fix the duty point by balancing factors, including the reasonable expectations of parties and society generally, the proliferation of claims, the likelihood of unlimited or insurer-like liability, disproportionate ***546** risk and reparation allocation, and public policies affecting the expansion or limitation of new channels of liability. At its foundation, the common law of torts is a means of apportioning risks and allocating the burden of loss. In drawing lines defining actionable duty,

> courts must therefore always be mindful of the consequential, and precedential, effects of their decisions" (*id.* at 288–289, 727 N.Y.S.2d 49, 750 N.E.2d 1097 [internal quotation marks and citations omitted]).

As Chair of the Compensation Committee, Langone had discretion to recommend 35% of NYSE executives' variable compensation. With that discretion, Langone had the responsibility, under N–PCL 717(a), to accurately and completely convey his compensation recommendations to the Board. Langone also had a duty to make compensation recommendations which were in the interest of the NYSE, in good faith and with "conscientious fairness, morality and honesty in purpose" (*see Kavanaugh v. Kavanaugh Knitting Co.,* 226 N.Y. 185, 193, 123 N.E. 148 [1919]; *see also, Pebble Cove Homeowners' Assn. v. Shoratlantic Dev. Co.,* 191 A.D.2d 544, 545, 595 N.Y.S.2d 92 [1993], *lv. dismissed* 82 N.Y.2d 802, 604 N.Y.S.2d 559, 624 N.E.2d 697 [1993] ["directors of a corporation have the fiduciary obligation to act on behalf of the corporation in good faith and with reasonable care so as to protect and advance its interests"]).

The issue of whether Langone breached his duties to the Board and to the Exchange is fact based, and it cannot be determined on the record before us:

> "New York courts have long held fiduciaries to a standard 'stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is ... the standard of behavior.' *Meinhard v. Salmon,* 249 N.Y. 458, 464, 164 N.E. 545 (1928) (Cardozo, *C.J.*). A corporate officer's fiduciary duty includes discharging corporate responsibilities 'in good faith and with conscientious fairness, morality and honesty in purpose' and displaying 'good and prudent management of the corporation.' *Alpert v. 28 Williams St. Corp.,* 63 N.Y.2d 557, 569, 483 N.Y.S.2d 667, 473 N.E.2d 19 (1984) (internal quotations omitted)" (*Gully v. National Credit Union Admin. Bd.,* 341 F.3d 155, 165 [2d Cir.2003]).

In support of summary judgment, Langone submitted excerpts from deposition testimony, minutes from Compensation Committee and Directors meetings, and other documentary evidence. These purported to conclusively establish that Langone effectively communicated Grasso's proposed compensation to the Board in conformity with his duties to his co-directors and the Exchange. Langone asserted that because CAP was a component of Grasso's 1999 employment agreement, a reminder of yearly ***547** CAP awards was not a material element of his presentations to the Board. He alternatively asserted that the Board members were all aware of CAP, that the participants' yearly CAP award was "an automatic contractual consequence" of the Board's other compensation decisions, and that Langone nonetheless made adequate disclosures of recommended CAP awards at the annual February compensation meetings. Langone submitted excerpts from the depositions of a number of Board members who related that they were fully informed as to their compensation decisions under Langone's leadership.

****34** However, in opposition, the Attorney General submitted deposition testimony, minutes from Compensation Committee and Board meetings, and documentary evidence, which demonstrated that while he was Chair of the Compensation Committee, Langone may not have effectively communicated Grasso's compensation to the Board. In addition, the record raises questions as to whether Langone's executive compensation recommendations were in the best interest of the NYSE. The Attorney General's submissions included deposition testimony from seven Board members, which indicated that they did not understand the impact of their votes in favor of Grasso's compensation awards.

First, it is uncontested that the Department of Human Resources was directed to remove both the CAP award column and the total compensation column incorporating CAP awards contemporaneous with Langone's succession to the position as Chairman of the Compensation Committee. It is unclear from the extant record who was responsible for the changes to the format of the compensation worksheets. However, it is also unclear whether Langone adequately explained the newly formatted written materials to the Compensation Committee. Further, some of the Board members testified that they believed Grasso's total compensation for a given year was an amount which, the record reveals, was equal to the value displayed in the total compensation column in the worksheet for that year (a figure which excluded the CAP award referenced in the notations). Whether this was confusion or coincidence is an issue to be explored at trial.

As to damages, the Attorney General asserts that Grasso received exorbitant, unwarranted compensation awards between 2000 and 2002, while Langone was the Chair of the Compensation Committee, at the expense of the NYSE. On this issue, the Attorney General's submissions included the testimony of two Board members who opined that they knew that the NYSE members would not be happy if they had been made aware of ***548** the total compensation Grasso was awarded for his work in 2001.

Finally, the relevant inquiry on the present motion is whether, viewing the submissions in the light most favorable to the Attorney General, Langone has established, as a matter of law, that his actions did not constitute a breach of his duties as Compensation Committee Chair (*see* N–PLC 717).

Further, the court's role is limited to identifying whether there are material issues of fact, not to determine them (*Sillman,* 3 N.Y.2d at 404, 165 N.Y.S.2d 498, 144 N.E.2d 387). Thus, whether any of the directors who testified that they did not comprehend the implications of their votes either could, or should, have either done additional research or asked questions before approving Grasso's compensation is an issue to be explored at trial. The dissent concludes that the notations describing Grasso's CAP award on the 2000–2002 worksheets adequately apprised the Board that Grasso's actual compensation was the "total compensation" figure in the chart plus 50% of the recommended ICP and LTIP awards. However, deposition testimony in the record indicates that the disclosures and the postulated mathematical calculations may not have been as clear to some of the directors voting to approve Grasso's compensation as they are to the author of the dissenting opinion.

This record exemplifies the general rule that "comparison of a party's conduct with the fiduciary standard of care is a question of fact" (*Cramer v. Devon Group, Inc.,* 774 F.Supp. 176, 185 [S.D.N.Y.1991]). For example, the record shows that there were ****35** changes in the format of the worksheets under Langone's leadership which may have required explanation to the Compensation Committee; there is inconsistent deposition testimony about Langone's oral presentations to the Compensation Committee and the Board between 2000 and 2002; and there is deposition testimony indicating that Committee members were confused. Thus, Langone has not established as a matter of law that he fulfilled his obligations under N–PCL 717. Accordingly, we affirm the order appealed denying his motion for summary judgment.

All concur except BUCKLEY and McGUIRE, JJ. who dissent in a memorandum by McGUIRE, J. as follows:

McGUIRE, J. (dissenting).

Defendant Kenneth G. Langone appeals from the denial of his motion for summary judgment dismissing the complaint as to him. The principal issue on this appeal is a simple one: whether there is a triable issue of fact about whether Langone, who was a member of the Board of Directors (the Board) of the New York Stock Exchange (the Exchange) and the Chair of its Compensation Committee at the time of the ***549** Board meetings at issue, failed to inform or remind the Board during three meetings of the Board (in February of 2000, 2001 and 2002) about a contractually-mandated consequence of the decision the Board was to make at each of these meetings on the amount of the bonus it was awarding to its Chair and Chief Executive Officer, Richard A. Grasso. In concluding that there is such an issue of fact, the majority relies on: (1) allegedly misleading worksheets prepared by Exchange staff, and (2) purported contradictory deposition testimony of certain directors of the Exchange. However, the worksheets were never presented to the Board, and thus could not possibly have misled the members of the Board, and the deposition testimony the majority relies upon either expressly supports Langone's position or fails to call it into question. Accordingly, there is no triable issue of fact and Langone is entitled to summary judgment for this reason alone. In addition, as discussed below, the majority fails to come to grips with the two other, independent grounds for reversal advanced by Langone.

On March 4, 1999, during a meeting of the Board, the Board met in "executive session"—i.e., outside the presence of Grasso—to discuss the terms of a new employment agreement with Grasso. Earlier that day, the Compensation Committee of the Board, which was then chaired by Bernard Marcus, had reviewed the agreement and voted to recommend it to the full Board. One of the key provisions of that agreement, Grasso's participation in the Capital Accumulation Plan (CAP or the CAP Program), is central to this appeal. And the central concept of CAP, as one of the Directors, Gerald Levin, stated when he was deposed in this litigation, is "not at all" difficult. That simple concept is that each year Grasso would be entitled under the agreement to an award of deferred compensation (payable upon retirement or termination) in the amount of 50% of his annual "variable compensation," i.e., the annual bonus awarded to him by the Board. Thus, each year the Board would decide the amount of Grasso's bonus and, by operation of law, the employment agreement would dictate an additional benefit set at one half of the bonus in the form of the deferred CAP award.

As the minutes of the Board meeting state, Director Marcus addressed the Board regarding the proposed

employment agreement with Grasso, reviewed its terms and informed the Board that the Compensation **36 Committee had reviewed the agreement and recommended it to the Board. As was testified to by numerous attendees of the Board meeting, both directors and Exchange staff, one of the terms that Director Marcus expressly disclosed to the Board was that Grasso would participate in the *550 CAP Program and receive a deferred 50% match of his annual bonus. Significantly, there is no testimony or any other evidence that Director Marcus did not make this disclosure concerning a central feature of the proposed agreement. The Board unanimously approved the proposed agreement.

In addition to being uncomplicated, the CAP Program was familiar to the Board. In September 1997, some 18 months earlier, the CAP Program was commenced when the Board approved the program, which was then limited to four "Group Executive Vice Presidents" and provided for a deferred 25% match of their variable compensation. As the minutes of the September 1997 Board meeting make clear, and as is undisputed, the CAP Program was explained to the Board by Frank Ashen, the Exchange's Vice President for Human Resources, and he informed the Board, inter alia, that the four participants would receive a deferred 25% match of their annual variable compensation. In addition, the then Chair of the Compensation Committee, Ralph Larsen, who at the time was also the Chair of Johnson & Johnson, told the Board that the Compensation Committee had reviewed the CAP Program and recommended its adoption. By unanimous vote, the Board approved the program.

In June 1999, shortly after Grasso's new employment agreement was approved by the Board, Langone became Chair of the Compensation Committee. By then, a three-step process was already in place for determining and approving the annual incentive compensation awards for the prior year for senior Exchange executives, including Grasso. First, Ashen would meet individually with members of the Committee. The materials Ashen brought to these meetings included worksheets he prepared with proposed incentive compensation amounts for senior executives other than Grasso. During the one-on-one meetings, however, Ashen also reviewed the components of Grasso's possible compensation (the annual salary fixed by the agreement at $1.4 million and his incentive or variable compensation), and his potential CAP award. As Ashen testified, "I would say that he [Grasso] would get 50 percent of his variable compensation wherever it ended up." Second, in early February, the Compensation Committee met to discuss and approve the variable (i.e., incentive) compensation of senior executives, including Grasso. In most years, Ashen circulated a worksheet to Committee members with the proposed variable compensation for Grasso after Grasso left the room. Third, after the Committee approved recommendations for incentive compensation awards for Grasso and other senior executives, the full Board would meet later that same day. Assisted by "Speaking Points" prepared by *551 Ashen, the Committee Chair summarized the recommendations and the Board voted on and approved the compensation awards for the senior executives. When Grasso's compensation was under discussion, Grasso would leave the room and the Board would meet in Executive Session.[1]

**37 At meetings of the Board on February 3, 2000, February 1, 2001 and February 7, 2002 (the February meetings) the Board, in accordance with recommendations of the Compensation Committee, approved variable compensation awards for Grasso of $6.6 million (for 1999), $13.6 million (for 2000) and $16.1 million (for 2001). At the latter two meetings, the Board also approved a "special award" to Grasso of $5 million, a payment that would be excluded from both his variable compensation (and thus from the CAP Program) and his pension plans. Accordingly, pursuant to the 1999 employment agreement, the Board's actions at the February meetings resulted in CAP awards to Grasso of $3.3 million, $6.8 million and $8.05 million.

The crux of the Attorney General's allegations against Langone are set forth as follows in paragraph 208 of the complaint:

> "Langone breached his fiduciary duty to the NYSE by misleading the NYSE Board of Directors—which had delegated to him the task of explaining the proposed compensation—about the amount of the annual compensation the Compensation Committee was recommending be approved by the Board, through, among other things, *his failure to disclose that Grasso would be receiving as deferred compensation an additional 50 percent of his bonus or ICP [Incentive Compensation Plan] award"* (emphasis added).

In moving for summary judgment dismissing the complaint as to him, Langone relied in part on testimony and documentary evidence relating both to the meetings on March 4, 1999 of the Compensation Committee and the Board approving Grasso's employment agreement and to the September 1997 meeting of the Board at which the CAP Program was established. In addition, and in particular, Langone relied on testimony from directors and other attendees at the February meetings of the Board and the Compensation Committee, and on documentary evidence *552 relating to these meetings. For present purposes, suffice it to say that numerous directors and

others present at the February meetings testified that Langone expressly referred to Grasso's CAP award, and that no director or other person present at the February meetings testified that Langone failed to disclose the CAP award. In short, the evidence relating to the February meetings provided further support for Langone's position that: (1) the Board was fully aware that its decisions on Grasso's variable compensation entailed an additional benefit under the CAP Program of an award of deferred compensation in the amount of 50% of his bonus, and (2) he specifically informed the Board at each of the February meetings of the additional CAP award.

Another meeting of the Board, on April 5, 2001, is relevant. At the meeting both Ashen and Langone made presentations to the Board regarding a proposal, approved earlier that day by the Compensation Committee, to eliminate one of the bonus programs and expand the CAP program beyond the six senior executives who were then participating in it. As the Speaking Points prepared for Langone by Ashen state:

> "The Committee recommends expanding the participation in the Capital Accumulation Plan ...
>
> There are presently six participants in the Plan. Dick Grasso, Bob Britz and ****38** Cathy Kinney participate at the 50% of variable compensation level ..."

Ashen and Board members Gerald Levin and Robert Murphy testified that Langone, consistent with the Speaking Points, stated that Grasso was one of the executives participating in the CAP plan at the 50% level. Ashen and Board members Murphy and Mel Karmazin also testified that no Board members stated at the April 2001 meeting that he or she had been unaware two months earlier, when Grasso's 2000 variable compensation was approved, that Grasso also was getting a CAP award of 50% of his bonus. On Langone's motion for summary judgment, none of this testimony was controverted.

As discussed below, Supreme Court denied Langone's motion, ruling that material issues of fact existed that precluded granting the motion and that the testimony Langone relied on "drips of credibility [issues]." On this appeal, Langone argues that his motion should have been granted for three reasons: (1) he was under no duty to remind the Board each year of what the Board unquestionably knew when it approved Grasso's 1999 employment agreement, viz., that Grasso would receive an additional benefit under the CAP Program of an award of deferred compensation in the amount of 50% of his bonus, (2) the ***553** undisputed evidence submitted on the motion demonstrated that he did so remind the Board at the February meetings, and (3) the Attorney General failed to raise an issue of fact concerning causation, because the Board did understand that Grasso was entitled to an additional CAP award and thus any alleged failure so to remind the Board could not have been the cause of any injury to the Exchange. I need not reach the first and third of these arguments as Langone's motion should have been granted on the second of these three grounds.

As Langone correctly maintains, the evidence he presented on his motion for summary judgment demonstrates that he did inform the Board of the amount of Grasso's CAP award at each of the February meetings. The Attorney General, however, failed to meet his burden (*see Zuckerman v. City of New York,* 49 N.Y.2d 557, 562, 427 N.Y.S.2d 595, 404 N.E.2d 718 [1980]) of producing evidentiary proof in admissible form sufficient to establish the existence of a material issue of fact requiring a trial on the question of whether Langone so informed the Board.

The Attorney General and the majority maintain that the worksheets presented to the Compensation Committee members are sufficient to establish a material issue of fact as to whether Langone so informed the Board at the February meetings. To understand why that is incorrect, the worksheets must be discussed in some detail.

The worksheet prepared by Ashen relating to Grasso for the February 3, 2000 meeting of the Compensation Committee contains columns for his 1999 "Base Salary," "ICP" (Incentive Compensation Plan) and "LTIP" (Long Term Incentive Plan), i.e., the two components of his bonus or variable compensation, "Total Compensation" and "Total Variable Compensation." Immediately below these columns a notation states as follows: "In 1999 Mr. Grasso will receive 50% of his variable compensation in the Capital Accumulation Plan." The worksheets prepared by Ashen relating to Grasso for the other two February meetings of the Compensation Committee contain columns for his 2000 and 2001 "Base Salary," "ICP" and "LTIP," "Variable Comp[ensation]" and "Total Cash Comp[ensation]." On both worksheets, immediately below these columns a notation prominently states (in type identical in size to the preceding text) as follows: "Mr. ****39** Grasso will also receive a capital accumulation award equal to 50% of the Variable Compensation."[2]

At most, the first worksheet is ambiguous in that someone ***554** not knowledgeable about Grasso's participation in the CAP Program pursuant to the 1999 employment agreement might understand the notation to mean that the $6.6 million figure in the "Total Variable Compensation" column included a CAP award of $3.3 million. For that to be the case, however, Grasso's award of deferred

compensation under the CAP Program would have to have been set at 100% (rather than 50%) of his variable compensation.[3] Moreover, the amount of "Total Variable Compensation" exactly matches the sum of ICP and LTIP (the two components of Grasso's bonus or variable compensation) and the figure set forth as "Total Compensation" equals that amount plus the "Base Salary," thus indicating that CAP must be an additional category.

Putting aside that the notations in the latter two worksheets unequivocally state that the CAP award is an additional 50% of the variable compensation, the first worksheet is irrelevant in any event. In the first place, even if the worksheet could have ***555** been ambiguous to a director on the Compensation Committee, it does not affirmatively misstate the CAP award, let alone negate or cast doubt on the testimonial and documentary proof both that the Board correctly understood Grasso's participation in the CAP Program and that Langone specifically informed the Board at the February 3, 2000 meeting that Grasso would receive a $3.3 million CAP award ****40** in addition to his bonus of $6.6 million. Perhaps most notable in this regard is the testimony of Linda J. Wachner, a member of the Board. Her uncontradicted testimony was that Langone "was careful to articulate each piece, including the CAP award, the 1999 compensation will be $8 million, and that Dick will also receive another $3.3 [million]." In addition, after making his presentation to the Board, Langone asked the members of the Compensation Committee "if there were any things he left out."[4]

The second reason the worksheet is irrelevant is that only Compensation Committee members received the worksheets. The full Board never received either the lone and ostensibly ambiguous worksheet or any of the other worksheets prepared by Ashen. This undisputed fact—the majority ignores it—is critical because, as noted above, the operative allegation of the complaint is that Langone "misle[d] the *NYSE Board of Directors* ... through ... his failure to disclose that Grasso would be receiving as deferred compensation an additional 50 percent of his bonus" (emphasis added).

Unfortunately, despite their irrelevance, further discussion of the worksheets is necessary given that they are so critical to the majority's position. The majority takes pains to note that "[a]fter Langone became chair of the Compensation Committee in June 1999, the values of recommended CAP awards were removed from the worksheets distributed to Committee members" and that "the values for 'total variable compensation' and 'total compensation' columns no longer included the recommended CAP awards." The majority also maintains that "[i]t is unclear from the extant record who was responsible for the changes to the format of the compensation worksheets."

Why the majority makes these statements and places such ***556** reliance on the changes in the worksheets is bewildering. Langone had nothing whatsoever to do with these changes in the worksheets. Not a shred of evidence is to the contrary. In fact, Ashen testified that Langone never told him "how to do" or "set ... up" the worksheets. The only other relevant testimony on this subject is that of Bernstein. As the majority also notes, Bernstein testified that Ashen told her to remove the CAP column from the worksheets. But Bernstein offered only the hearsay explanation that Ashen told her that *Grasso,* not Langone, did not want "CAP Accumulation" and "Total Compensation" columns to be displayed. It may be unclear whether Grasso played a role in the changes to the format of the worksheets, but the record is not unclear with respect to Langone. Nothing but rank speculation and a blatant fallacy—*post hoc, ergo propter hoc*—would support linking to Langone the hearsay-based attribution of these changes to Grasso. Immediately before its claim that the record is unclear with respect to who was responsible for the format changes, the majority stresses that "it is uncontested that the Department of Human Resources was directed to [make the changes] contemporaneous with Langone's succession to the position as Chairman of the Compensation ****41** Committee." The majority may not overtly commit this fallacy, but it plainly intends to suggest that the mere fact that the changes occurred after Langone became Chair of the Compensation Committee raises an issue of fact regarding who decided to make the changes.

The majority also states that "Bernstein stated that she told Ashen that she thought the worksheets were clearer with the CAP awards displayed." In the first place, however, merely because a statement can be made more clearly, it hardly follows that the statement actually made is not clear, let alone that it is false or misleadingly incomplete. As noted above, the worksheets for the February 2001 and 2002 meetings unambiguously support Langone's position and the worksheet for the February 2000 meeting does not create a material issue of fact. Moreover, the majority fails to mention that Bernstein also testified that she did not "feel uncomfortable" with the changes in the worksheets "because the CAP was footnoted, so I felt that the information was there."

On the subject of the worksheets, finally, the majority also is wrong in asserting that I "conclude[ ] that the notations describing Grasso's CAP award on the

2000–2002 worksheets adequately apprised the Board that Grasso's actual compensation was the 'total compensation' figure in the chart plus 50% of the recommended ICP and LTIP awards." To the contrary, my position ***557** is that the worksheets do not create a material issue of fact precluding summary judgment for at least two reasons. First, and most importantly, the worksheets submitted to the *Committee members* do not undercut or create a material issue of fact regarding the evidence submitted by Langone that he specifically informed the *full Board* at each of the February meetings of the additional CAP award. Second, and as I have noted without contradiction by the majority, the worksheets for the February 2001 and 2002 meetings of the Committee unambiguously support Langone's position while the worksheet for the February 2000 meeting is at most ambiguous.

In its oral decision denying Langone's motion for summary judgment, Supreme Court relied on the absence of any statement in the minutes of the February meetings of either the Board or the Compensation Committee evidencing a discussion of Grasso's CAP award. Indeed, Supreme Court went so far as to opine that "the Attorney General probably makes a prima facie case by just showing the minutes." In attempting to defend its contention that material issues of fact precluded the granting of Langone's motion, the majority does not rely on the minutes. In stating its view of the facts, however, the majority repeatedly notes that the minutes from each of the three February meetings of the Compensation Committee do not indicate that Grasso's CAP award was discussed. On appeal, moreover, the Attorney General continues to rely on the minutes in this regard.

The absence of any reference in the minutes to a discussion of Grasso's CAP award is as unsurprising as it is irrelevant. As Langone correctly observes, it is hornbook law that board minutes are meant to reflect the board's actions, not all of its discussions (*see* 5A Fletcher, Fletcher Cyclopedia of the Law of Private Corporations, § 2190 at 155–156 [2004] [minutes "should definitely and positively show what *action* was taken by the corporation in the matters that they purport to memorialize," but the "secretary is not obligated to include everything that is said in the minutes as long as the secretary actually transcribes what has taken place"] [emphasis added]; *see also* Fletcher, Fletcher Cyclopedia of the Law of Private Corporations, § 3:27 at 74 [2005 Supp.] ["Ordinarily ****42** the secretary makes no record of the discussions that take place in the meeting, the *action* which is taken following the discussion being the important thing"] [emphasis added]). The majority offers nothing by way of response to this basic point of corporate law and procedure.

The minutes of the February meetings of the Compensation Committee and the Board do reflect the relevant actions taken, i.e., approval of the incentive compensation awards made to ***558** Grasso and other senior executives. By contrast, approval of the CAP award to Grasso or to any other executive was neither an action that the Committee or the Board did take nor an action that either was required to take. Rather, in each year the approval of the incentive compensation award automatically dictated the CAP award (by virtue of the terms of the 1999 employment agreement in Grasso's case and by virtue of the terms of the CAP Program for the other executives). And as Langone notes, when an action was taken with respect to CAP, the minutes so reflect. Thus, when the CAP award was increased for two executives (from a 25% to a 50% match) in February 2000, the Compensation Committee minutes so reflect, and the April 2001 minutes similarly reflect an expansion of the CAP Program to include additional executives.

In short, the absence of any reference in the minutes to a discussion of Grasso's CAP award is devoid of any significance. It neither undercuts nor creates a material issue of fact regarding the documentary proof and uncontradicted testimony of participants at the February meetings of the Board (and of the Compensation Committee) that Langone did remind the Board anew (and the Committee) about Grasso's CAP award.[5]

Nor is the Attorney General persuasive in urging that a material issue of fact on whether Langone misled the Board is raised by a sentence in the Speaking Points prepared by Ashen for ***559** Langone's use at the February 2002 meeting of the Board in presenting the Compensation Committee's recommendations for Grasso's 2001 compensation. At most, the last sentence of these Speaking Points is ambiguous. The third "bullet-point" notes that in 2000 Grasso received his contractually ****43** fixed salary of $1.4 million and "variable compensation of $13.6 million and a Special Payment of $5 million that will vest fully in February 2006." The Speaking Points then continue as follows:

> "• This year, the Committee recommends that Dick receive, in addition to his salary:
>
> -$16.1 million in variable compensation (up $2.5 million from last year)
>
> -A Special Payment of $5 million that he will receive when he leaves the Exchange that will also be placed in his SESP account—The Exchange's non-qualified Savings Plan

> -Like the Special Payment we made last year, the $5 million will not be eligible for the Capital Accumulation Plan,[6] nor will it be a part of Dick's retirement calculation
>
> • As a result, all in, the Committee recommends that Dick's compensation be raised $2.5 million, including a deferred special payment of $5 million"

If one understands the term "compensation" in the last sentence to include the CAP award, the Speaking Points would be to this extent misleading in that the $2.5 million increase in the variable compensation dictated a $1.25 million increase in the CAP award so that the increase in total "compensation" would be $3.75 million. On the other hand, if one understands the term "compensation" to exclude the CAP award and include only the compensation the Committee was recommending for approval (the funds which, in contrast to the CAP award, were payable immediately) the Speaking Point would not be misleading.[7] Moreover, anyone who understood the basic elements of Grasso's participation in the CAP Plan (which is mentioned in ***560** the preceding sentence of the Speaking Points) would understand that a $2.5 million increase in "variable compensation" would dictate an increase of $1.25 million in the CAP award.

The extent to which the last sentence of these Speaking Points is ambiguous, however, need not be explored any further. First, there is no evidence that Langone read the Speaking Points as written to the Board. To the contrary, and no evidence contradicts him, Langone testified with respect to these and other Speaking Points prepared for him by others, "I don't read [to the Board]." The Attorney General focuses on one snippet of Langone's testimony and asserts that Langone "conceded that he made the 'all in' statement from the speaking points." In fact, the last sentence was read to Langone during his deposition and he was then asked: "Did you tell the Board that?" Langone's response was: "Words to that effect, I did. I wouldn't have read it." Putting aside that the words "in effect" undermine the fatal concession the Attorney General discovers in that one response by Langone, a subsequent question by the Assistant Attorney ****44** General focused specifically on whether Langone had said "all in" during his presentation to the Board. His response was: "Well, first of all, I did not say all in." Of course, a witness's testimony must be viewed as a whole and one snippet of testimony cannot be taken out of its context and used to support or oppose a motion for summary judgment (*see Baillargeon v. Kings County Waterproofing Corp.,* 29 A.D.3d 838, 838–839, 815 N.Y.S.2d 261 [2006]; *Mitchell v. Route 21 Assoc.,* 233 A.D.2d 485, 486, 650 N.Y.S.2d 288 [1996]). Furthermore, as Langone also repeatedly made clear during the questioning on the last sentence of the Speaking Points, the term "compensation" did not include the CAP award.

During this same line of questioning, Langone gave other relevant testimony. With respect to his presentation to the Board, Langone repeatedly stated that the amount of Grasso's CAP award was "give[n]" or "broke[n] ... out" "very clearly." In this regard, Langone also stressed that there was a "full discussion" of the special $5 million payment that, as is reflected in the penultimate sentence of the very Speaking Points on which the Attorney General relies, was not included in the CAP award. Indeed, at other points in the deposition, Langone testified more generally that he always gave to the Board the dollar amount of Grasso's CAP award at all of the February meetings.

Contrary to what the Attorney General argues in his brief, Langone's testimony about his presentation to the Board at the ***561** February 2002 meeting was not contradicted by the testimony of Gerald Levin, another director. When Levin was asked at his deposition (more than three years after the meeting) whether Langone had said during the meeting how much the CAP award was, Levin answered: "Either [Langone] did identify the number, or it wasn't necessary because he was identifying the variable compensation against which the 50 percent CAP was taken. And the fact that the $5 million [special award] was excluded for CAP purposes made it very clear that it [i.e., the CAP award] was $8,050,000."

By not excluding the possibility that Langone had not belabored the obvious, Levin did not with this answer, as the Attorney General argues, "thereby confirm[ ] the existence of at least a factual question about whether Langone made the necessary disclosures to his fellow directors." To the contrary, it confirms that at least for Levin all that was necessary was for Langone to state the amount of the variable compensation. Even assuming without any evidentiary support that this simple concept (divide variable compensation by two to determine the CAP award) was not obvious to all of the other directors, Levin's answer certainly does not preclude summary judgment.[8] Like the last sentence of the February 2002 Speaking Points, it merely "g[i]ve[s] rise to nothing more than a shadowy semblance of an issue" insufficient to defeat summary judgment (*Hooke v. Speedy Auto Ctr.,* 4 A.D.3d 110, 112, 772 N.Y.S.2d 19 [2004] [internal quotation marks omitted]).

****45** The majority relies in crucial part on numerous assertions it makes about the excerpts from the deposition testimony of members of the Board that were submitted

by the Attorney General in opposition to the motion. These assertions are erroneous at best. The broadest of them are the following:

> "The Attorney General also submitted excerpts from the deposition testimony of a number of the Board members, including Deryck Maughan, Charles J. Bocklet [ ], David Komansky, James Duryea, William Harrison, Robert Murphy, and H. Carl McCall. These witnesses' testimony, much of which is set forth in the factual recitation, indicated misconceptions as to the magnitude ***562** of the compensation that they had voted to approve for Grasso in February 2000–February 2002."
>
> "The Attorney General's submissions included deposition testimony from seven Board members, which indicated that they did not understand the impact of their votes in favor of Grasso's compensation awards."

These assertions are notable in at least four aspects. First, the majority does not quote or paraphrase even a *single* example of this supposed testimony. Rather, the majority asserts only that "much" of it is "set forth" elsewhere in its writing. As discussed below, however, the majority can eke no support for its position from the excerpts of the deposition testimony that are referred to elsewhere in its writing. Second, the majority again makes claims only about what is "indicated," not what was testified to, by these Board members. Third, the majority makes no claim that when they voted to approve Grasso's bonus any of these seven Board members had misconceptions about or failed to understand the magnitude or effect of their votes on Grasso's CAP award. Rather, the majority speaks in far more general terms about alleged misconceptions and failures to understand relating to Grasso's "compensation." Fourth, the majority implicitly and illogically assumes that any such misconception or failure to understand by a Board member reflects a disclosure failure by Langone.

The truth is that none of the excerpts contain testimony from any of these directors that at the time of the votes in favor of Grasso's bonus awards, he or she was not aware of or did not understand that Grasso also would receive a CAP award of 50% of the amount of the bonus. The only testimony from any of the excerpts (the Attorney General submitted excerpts from the deposition testimony of 16 members of the Board) that remotely bears on these assertions by the majority was given by David Komansky and Linda Wachner. Mr. Komansky testified that without seeing the relevant documents, he could not remember (not that he did not understand at the time) what the impact of the compensation awards in 2000 and 2001 was on a pension benefit Grasso received, the "Supplemental Executive Retirement Plan" or "SERP" (*not* the CAP award). Ms. Wachner testified only that she did not know how much money was being saved in terms of SERP benefits when the determination was made in February 2001 that the special $5 million bonus would not count for purposes of Grasso's SERP benefits.[9]

****46** The majority's other assertions about supposed deposition ***563** testimony or other ostensible evidence supporting its position also are baseless. The majority writes:

> "[I]t is also unclear whether Langone adequately explained the newly formatted written materials to the Compensation Committee. Further, some of the Board members testified that they believed Grasso's total compensation for a given year was an amount which, the record reveals, was equal to the value displayed in the total compensation column in the worksheet for that year (a figure which excluded the CAP award referenced in the notations)."

The first sentence is unsupported and irrelevant. The worksheets were give to Compensation Committee members by Ashen when he met on a one-on-one basis with the members. Whether Ashen or Langone explained the changes in the format of the worksheets either before or at the February 2000 meeting of the Committee is of no moment at all. The complaint alleges a failure by Langone to make adequate disclosure to the Board, not the Committee, of Grasso's CAP award. Even assuming some unknown member or members of the Committee were confused by the format change in the worksheet prepared by Ashen for the February 2000 meeting of the Committee, any such confusion would be irrelevant to Langone's alleged liability. The relevant and decisive point is that no testimony or documentary evidence creates a material issue of fact that undercuts Langone's evidentiary showing that: (1) the Board understood that Grasso would receive an additional benefit under the CAP Program in the form of deferred compensation in the amount of 50% of his bonus, and (2) he specifically informed the Board at each of the Board meetings of the additional CAP awards.

As for the second sentence, the majority fails to identify the witnesses who purportedly gave such testimony. Presumably, however, the majority is referring to certain testimony (from either Deryck Maughan, Charles Bocklet, Robert Murphy, William Harrison or James Duryea, or all of these Board members) to which it refers, directly or indirectly, elsewhere in its writing. ***564** As discussed below, none of that testimony comes close to raising a material issue of fact that precludes summary judgment.

Before discussing that testimony, other particularly inscrutable references by the majority to the deposition testimony should be noted. At the end of its writing, as if by way of summary, the majority relies on both "inconsistent deposition testimony about Langone's oral presentations to the Compensation Committee and the Board between 2000 and 2002" and "deposition testimony indicating that Committee members were confused." Once again, the majority does not provide any details that would explain what testimony it is relying on or who gave the testimony. Nor does the majority provide any reason to conclude that the "inconsistent deposition testimony" relates to a material issue of fact concerning Langone's statements to the full Board about Grasso's CAP award. The majority is just as uninformative ****47** about the "testimony indicating that Committee members were confused." What were they confused about, when in point of time they were confused and why their confusion is relevant all are matters about which the majority is completely silent.

That silence reflects the simple reality that no member of the Board testified that when voting on Grasso's bonus he or she was "confused" or did not understand Grasso's CAP award. The repeated failures by the majority to provide any relevant particulars are telling. None are provided because they do not exist.

Putting aside the majority's unsupported generalizations about the deposition testimony, no material issue of fact is raised by any of the deposition excerpts the majority paraphrases or quotes. True, Deryck Maughan testified that the February 2000 worksheet prepared by Ashen "would have been clearer for everybody if there had been a column called 'CAP' and then a real total displayed." As already noted, however, any purported ambiguity in the worksheet prepared by Ashen and presented only to Compensation Committee members (who presumably would be even more knowledgeable about the CAP program than other Board members) cannot sensibly be equated with a disclosure failure by Langone, let alone such a failure in the presentation Langone made to the full Board. Moreover, Maughan left the Board in June 2000 and understandably did not have a "good memory of a CAP conversation" in the February 2000 meeting.[10] Nonetheless, despite his "poor memory of the CAP conversation," he knew that it "took [Grasso's ***565** compensation] to some higher number." The perhaps more decisive point about Maughan's deposition is that he never testified that Langone failed to mention Grasso's CAP award in his presentation to the Board in February 2000.

In an apparent reference to Maughan and Charles Bocklet, another director, the majority states that "[t]wo other members of the Compensation Committee gave deposition testimony that they thought Grasso had been awarded approximately $8 million in total compensation for 1999." Similarly, after stating that Bocklet "testified at his deposition that he believed that Grasso's total compensation was $15 million," the majority immediately goes on to write that "[t]his was the value in the 'total compensation' column of the worksheet, not the $26.8 million Grasso was actually awarded."[11] In substance, during their depositions these directors were asked by the Assistant Attorney General to guess, years after the relevant meetings of the Board, what Grasso's total "compensation" was in the years in question. Their incorrect "belief" or recollection is not admissible proof of anything (other than the understandable fallibility of their memories). As a matter of logic, moreover, from their incorrect "belief" about Grasso's total "compensation"—even putting aside the potential ambiguity (discussed above) in that term—it does not follow that any one component of that "compensation" was not disclosed to them. For these reasons, the raw recollections or beliefs of these two ****48** directors "g [i]ve [s] rise to nothing more than a shadowy semblance of an issue" (*Hooke v. Speedy Auto Ctr.,* 4 A.D.3d at 112, 772 N.Y.S.2d 19). Furthermore, like all the other directors and staff who were present at the February meetings, neither Maughan nor Bocklet testified that Langone did not disclose Grasso's CAP award.

The majority also writes that "Compensation Committee member R. Murphy, and Board members W. Harrison and J. Duryea all testified at their depositions that they believed they had voted to approve 2001 compensation for Grasso in the $20 million range." For the reasons just stated, what these directors "believed" years later does not raise a material issue of fact about whether Langone disclosed Grasso's CAP award. Furthermore, even if these directors had such an erroneous belief at the time they voted to approve the compensation—none of them so ***566** testified—that error cannot rationally be equated with a failure of Langone to make adequate disclosure (not, unless, Langone's duty to make adequate disclosure made him a guarantor that all Board members would understand him correctly).[12]

Another reason the majority's reliance on these snippets of deposition testimony is misplaced is that the belief of these directors was correct. The amount of compensation that the Board "voted to approve" ($21.1 million) *was* in the $20 million range. The other components of Grasso's "compensation" (his salary of $1.4 million and his CAP award of $8.05 million) were not voted on but were,

respectively, specified in or dictated by his employment agreement.[13]

That the majority relies on such an irrelevant snippet from Murphy's testimony is particularly unfortunate given other testimony from Murphy that is highly relevant both to an understanding of that snippet and the core allegation of the complaint that Langone failed to make adequate disclosures to the Board about Grasso's CAP award. With specific reference to his testimony that he believed he had voted in 2002 for compensation for Grasso in 2001 in the "low 20s," Murphy testified he had been focusing on the discretionary components of Grasso's compensation that the Compensation Committee actually was approving, that he knew Grasso had other elements of his compensation that were not discretionary and that the CAP award was one of the components that the Committee and the Board did not have to vote on. He also testified that at the February 2002 meeting of the Compensation Committee he understood that by approving an incentive payment to Grasso of $16.1 million, "there would also be a payment into Mr. Grasso's CAP." Indeed, he testified that he understood all the elements of Grasso's compensation for each of the years he was on the Board and voted to approve it.

****49** The majority ignores other highly relevant testimony from ***567** Murphy. Back in 1999, when Grasso's employment agreement was approved, Murphy understood that the 50% match of the CAP benefit to Grasso was in addition to his bonus. Asked if the 50% match was a difficult concept to understand and to apply, Murphy answered, "[n]o." Murphy never heard or saw anything that suggested to him that there was any confusion among Board members about what the 50% match meant. Asked if Langone ever said anything about CAP at any meeting of the Board or the Compensation Committee that he viewed as misleading, Murphy answered "[n]o." In short, far from creating a material issue of fact supporting denial of Langone's motion for summary judgment, Murphy's testimony supported that motion in every relevant respect.[14]

That leaves only the majority's reliance on the excerpt from the deposition testimony of H. Carl McCall that the Attorney General submitted in opposition to the motion. That excerpt consists of three pages of deposition testimony in which McCall testified only that "as a member of the board, we did not receive full information, detailed information about the various components of the compensation" and that it was his "understanding that we did not always receive details about the components, including deferred income as one of the components." But even putting aside the ambiguous scope of the term "compensation," it hardly follows from the asserted fact that full or detailed information was not received, or that members of the Board did not receive even the basic information about Grasso's CAP award. McCall gave testimony on that very subject which was not included within the excerpt submitted by the Attorney General. Specifically, McCall testified that there "were discussions about a CAP program" but that he could not remember the details. Moreover, in the above-quoted testimony, McCall was referring to a memorandum captioned, "H. Carl McCall, Summary Of Events Regarding NYSE Executive Compensation." In another portion of the memorandum, one that the majority and the Attorney General do not mention, McCall states that "[a]lthough the board knew about and voted on annual salaries *and awards,* it was not informed about accumulated benefits and how particular salary actions would lead to *pension* on [sic] long-term accumulations" (emphasis added). In short, nothing in McCall's testimony undercuts Langone's evidence that he disclosed the CAP award. If ***568** anything, the testimony and memorandum actually support Langone's position.

In the course of denying Langone's motion for summary judgment, Supreme Court stated that the issue of the sufficiency of the disclosure was a case of "he said, she said." To the contrary, however, just the opposite is true. As noted above, and as the majority does not dispute, numerous directors and others present at the February meetings of the Board testified that Langone expressly referred to Grasso's CAP award; no director or other person present at the meetings testified that Langone failed to disclose the CAP award. Nor does any documentary evidence raise a triable issue of fact with respect to whether Langone disclosed Grasso's CAP award. Thus, as Langone correctly observes, this is a case of "everyone said, no one said."

One last aspect of the majority's writing warrants a response. Although the complaint ****50** alleges that Langone failed to make adequate disclosures regarding Grasso's CAP award, the majority mints an entirely new theory of liability. Thus, the majority writes, "[i]n addition, the record raises questions as to whether Langone's executive compensation recommendations were in the best interest of the NYSE." This unsupported assertion—the majority refers to nothing in the record—is as irrelevant as it is conclusory and inscrutable. The Attorney General has never asserted that Langone is liable on this ground, not in his complaint, not in opposing Langone's motion and not in the brief he submitted to this Court.

One other contention by the Attorney General must be

addressed. In opposing Langone's motion for summary judgment, the Attorney General charged that Langone also had breached his fiduciary duty to the Exchange by: (1) misleading the Compensation Committee regarding the forfeitable character of Grasso's CAP awards, and (2) failing to disclose Grasso's accumulated pension benefit, the "Supplemental Executive Retirement Plan" or "SERP." On this appeal, Langone asserts in his main brief that these two allegations stating new theories of liability were raised by the Attorney General for the first time in the brief he submitted to Supreme Court in opposition to Langone's motion for summary judgment.

The Attorney General, however, argues that Langone had "adequate notice" of these two theories of liability by virtue of, in part, paragraph 208 of the complaint. Although I have quoted it in full already, paragraph 208 bears repeating here given the specific argument the Attorney General makes. It provides:

> "Langone breached his fiduciary duty to the NYSE by misleading the NYSE Board of Directors—which had delegated to him ***569** the task of explaining the proposed compensation—about the amount of the annual compensation the Compensation Committee was recommending be approved by the Board, through, among other things, his failure to disclose that Grasso would be receiving as deferred compensation an additional 50 percent of his bonus or ICP award."

According to the Attorney General, in light of the phrase "among other things" and "numerous other allegations regarding SERP in the complaint, ... Langone was on notice that his failure to disclose SERP was included as a fundamental aspect of his breach of duty." With respect to the theory of liability premised on the charge that Langone misled the Compensation Committee regarding the forfeitable character of the CAP awards, the Attorney General does not similarly point to any other allegations in the complaint regarding their forfeitable character. Rather, the Attorney General relies only on the words "among other things" in paragraph 208 and interrogatory responses which assertedly "disclose" the charge that Langone had "[c]onceal[ed] the unvested status" of the CAP awards.[15]

****51** For numerous reasons, the two theories of liability charging that Langone had misled the Committee regarding the forfeitable nature of the CAP awards and failed to disclose accumulated SERP benefits are untimely and thus cannot support denial of Langone's motion for summary judgment. First, I agree with the reasoning of the panel of the United States Court of Appeals for the Federal Circuit in *Korody–Colyer Corp. v. General Motors Corp.*, 828 F.2d 1572 [1987] in rejecting the plaintiff's relation-back argument premised in part on the words "among other things" in the complaint. As the panel stated, these words constitute a "catchall and meaningless phrase" (*id.* at 1575) and accepting the plaintiff's relation-back argument on the basis of that phrase "would undermine the notice pleading approach of the Federal Rules of Civil Procedure" (*id.* at 1575–1576), and similarly the pleading requirements of the CPLR (*see* CPLR 3013, 3014). In short, the phrase gives fair notice of nothing.

***570** Second, the phrase is particularly unhelpful to the Attorney General because it refers to the allegation that Langone misled the Board "about the amount of the annual compensation the Committee was recommending be approved by the Board." Thus, at most this phrase purports to indicate that Langone misled the Board about Grasso's "annual compensation" through means other than the one specifically alleged. The new allegations relate to different subjects, the *forfeitability* of the deferred CAP awards and the accumulated *retirement* benefit.

Third, the "other allegations regarding SERP in the complaint" did not give Langone fair notice that he was being charged with breaching his fiduciary duty by failing to disclose Grasso's accumulated SERP benefit. Some of those "other allegations regarding SERP" merely state the fact that SERP was one of the benefits Grasso received (paragraph 37), explain background facts relating to SERP-type benefits generally, Grasso's contractual entitlement to "SERP-like benefits," and the total of the SERP benefit for Grasso as of 2002 (paragraphs 46–48), or relate to and are contained within one of the causes of action against Grasso (paragraphs 167–172). Another alleges the non-disclosure—it does not say anything identifying the person or persons responsible for the non-disclosure—of certain SERP benefits pursuant to Grasso's 1995 and 1999 employment agreements, both of which were entered into before Langone became Chair of the Compensation Committee (paragraphs 70, 78–82). This allegation, moreover, appears to relate to one or more of the six causes of action against Grasso, as it asserts as well that this allegedly undisclosed benefit "unlawfully enriched Grasso by providing him with an interest-free loan at a corresponding cost to the NYSE" (paragraph 70).

Similarly, another of the allegations merely alleges that "information was withheld from the Board" about the effect the compensation awards would have in increasing Grasso's SERP benefit and the amount of the accumulated benefit (paragraph 20[ii], [iii]). Again, nothing is alleged about the identity of the person or persons responsible for withholding this information.[16] To

the extent the complaint alleges any entity or person to be responsible for not disclosing SERP benefits, paragraph 85 refers to an analysis prepared in **52 February 2001 of "the *571 multiplier effect" that a bonus award could have on Grasso's SERP benefit and to an accompanying "spreadsheet detailing the amount of Grasso's accumulated SERP." It then goes on to allege only that "*[t]he NYSE did not transmit* the ... analysis, the information it contained, or the spreadsheet *to the members of the Compensation Committee or Board of Directors* " (emphasis added). Obviously, Langone is not the "NYSE" but was a member of both of the entities to which the information was not transmitted. At no point does the complaint allege that Langone ever received either the analysis, the information it contained, or the spreadsheet.[17] The apparent point of these allegations, moreover, is stated in paragraphs 88 and 89. That is, they support certain of the causes of action against Grasso asserting that the SERP benefit awards are invalid under N–PCL 715(f) and are "void and subject to rescission" (paragraph 89).

Fourth, the Attorney General's reliance on the interrogatory responses to save the two unpleaded theories of liability is meritless. Langone moved for summary judgment by notice of motion dated January 23, 2006. The interrogatory responses are dated May 12, 2006, nearly five months later, a little over a month before the Attorney General's opposing papers were submitted. By the time Langone received the interrogatory responses, the massive discovery efforts of the parties were virtually if not actually completed.[18]

For these reasons, the two unpleaded theories of liability are untimely and cannot support the denial of Langone's motion (*see Abalola v. Flower Hosp.,* 44 A.D.3d 522, 843 N.Y.S.2d 615 [1st Dept.2007] ["Plaintiff's physician expert also improperly raised, for the first time in opposition to the summary judgment motion, a new theory of liability ... that had not been set forth in the complaint or bills of particulars"]; *Mathew v. Mishra,* 41 A.D.3d 1230, 1231, 838 N.Y.S.2d 292 [4th Dept.2007] ["a plaintiff cannot defeat an otherwise proper motion for summary judgment by asserting a new theory of liability ... for the first time in opposition to the motion"] [internal quotation marks omitted; ellipsis in original]; *Pinn v. Baker's Variety,* 32 A.D.3d 463, 464, 820 N.Y.S.2d 129 [2d Dept.2006] ["[r]aised for the first time in opposition to the motion for summary judgment, *572 this theory [of liability] should not have been considered as a basis for defeating summary judgment"]).[19]

Finally, as noted earlier, given my conclusion that Langone is entitled to summary judgment on the ground that the Attorney General failed to raise a material issue of fact on the question of whether he made disclosure of Grasso's CAP award at the February meetings, I need not reach Langone's arguments that he also is entitled to summary judgment on the grounds that he had no duty to remind the Board about the CAP benefit and the Attorney General failed to raise an issue of fact **53 concerning causation. Because it affirms the denial of Langone's motion, however, the majority must come to terms with Langone's additional arguments.

With respect to the issue of the scope of the duty owed by Langone, none of the cases cited by the majority in its brief discussion of the issue hold that the high standard fiduciaries must observe (which, of course, applies as well to the other Board members) required Langone to remind the members of the Board of what they either actually knew about Grasso's CAP benefit (as the submissions on the motion demonstrate) or should have known. After all, each of the other Board members had an independent duty in approving Grasso's compensation awards to act on a reasonably informed basis after making a reasonable inquiry into material matters (*see Hanson Trust PLC v. ML SCM Acquisition Inc.,* 781 F.2d 264, 274–275 [2d Cir.1986]). The majority similarly fails to meet Langone's causality argument. Suffice it to say that it is far from obvious that, even assuming a majority of the Board did not know of Grasso's participation in the CAP program, the Exchange was injured by a breach of a duty that Langone owed rather than a breach by the directors who did not know.

All Citations

50 A.D.3d 535, 858 N.Y.S.2d 23, 2008 N.Y. Slip Op. 03722

Footnotes

1 Members of the NYSE Compensation Committee were all members of the NYSE Board of Directors.

2 Britz's CAP Award was 25% of his variable compensation.

3 Grasso was not eligible for a CAP award until after the execution of the 1999 employment agreement.

4 The 1999 Compensation Committee (as of June 1999) included: K. Langone (Chairman), C. Bocklet, R. Fuld, M. Greenberg, M. Karmazin, D. Komansky, C. Marshall, D. Maughan, A. Trotman, and L. Wachner.

5 The 2000 Compensation Committee (as of June 2000) included: K. Langone (Chairman), C. Bocklet, R. Fuld, M. Greenberg, M. Karmazin, D. Komansky, A. Trotman, and L. Wachner.

6 The 2001 Compensation Committee (as of June 2001) included: K. Langone (Chairman), R. Fuld, M. Greenberg, M. Karmazin, D. Komansky, G. Levin, R. Murphy, and A. Trotman.

7 N–PCL 720(b) authorizes the Attorney General to bring an action against an officer or director of a not-for-profit corporation under N–PCL 720(a)(1).

8 N–PCL 720(a) provides that "[a]n action may be brought against one or more directors or officers of a corporation ...":

> (1) To compel the defendant to account for his official conduct in the following cases:
>
> (A) The neglect of, or failure to perform, or other violation of his duties in the management and disposition of corporate assets committed to his charge.
>
> (B) The acquisition by himself, transfer to others, loss or waste of corporate assets due to any neglect of, or failure to perform, or other violation of his duties.

1 The majority makes repeated references to Langone having "discretion to recommend 35% of NYSE executives' variable compensation." Nothing in the record, however, would support the notion that Langone's authority to make a recommendation was tantamount to the authority to make a determination. In fact, the record evidence is to the contrary. Thus, for example, Ashen testified that the members of the Committee were "[h]igh powered, sophisticated, very savvy executives, not bashful at all." Moreover, "[e]ach meeting [of the Committee] was something of a challenge, because you would get questions sometimes out of left field."

2 The majority pays only lip service to this notation in both worksheets, noting only that the worksheets "added the word 'also' to the CAP statement under the chart." With respect to the February 2001 worksheet, the majority immediately goes on to make the erroneous assertion that the worksheet "did not reveal: (1) that Grasso's 2000 recommended CAP award was $6.8 million[;] (2) that a $5 million special award was recommended for Grasso for 2000; or (3) that Grasso's total recommended compensation for 2000 was $26.8 million." In fact, it was the Committee that first recommended the special $5 million bonus that was to be excluded from the CAP Program and thus it is hardly surprising that the worksheet prepared by staff before the Committee met did not "reveal" that component of Grasso's "compensation." The majority's reference to a "recommended CAP award" is misleading because neither the Committee nor the Board was asked or required to approve a "recommend[ation]" on the CAP award. But the more important point is that the worksheet certainly did "reveal" that Grasso would receive "Total Cash Compensation" of $15 million plus a CAP award of $6.8 million. For anyone who can divide by two, the worksheets for the Compensation Committee meeting in February 2001 and 2002 provided just that figure. After all, both worksheets expressly stated the full value of Grasso's proposed "Variable Compensation" and clearly noted that "Mr. Grasso will also receive a capital accumulation award equal to 50% of the Variable Compensation." Accordingly, the majority also errs when it states that at the February 2003 meeting of the Compensation Committee the members were given worksheets "which included, for the first time under Langone's leadership, a

figure for Grasso's proposed CAP award" (emphasis added).

3 The majority ignores this point. Moreover, the majority is simply wrong in stating that this worksheet "*indicat[ed]* that Grasso's total 1999 compensation was $8 million, notwithstanding that his actual total compensation was $11.3 million" (emphasis added). In fact, it "indicat [ed]" no such thing. Nor is the February 2000 worksheet misleading simply because it does not include the deferred CAP award within the term "compensation." As noted above, the worksheets for the Compensation Committee meetings in February 2001 and 2002 refer to "Total Cash Comp [ensation]" rather than "Total Compensation." As discussed below, any alleged ambiguity in the February 2000 worksheet (to someone not knowledgeable about the CAP Program) is of no moment in any event.

4 Another document prepared by Ashen, Speaking Points for Langone's use in presenting the Committee's recommendations on Grasso's compensation to the Board at the February 2000 meeting, should be noted, especially in light of the Attorney General's reliance on a sentence from other Speaking Points prepared by Ashen for the February 2002 meeting. The February 2000 Speaking Points state that Grasso's "total compensation will be $8,000,000" and that he "will also receive a Capital Accumulation Award of 50% of his variable compensation (or $3,300,000) per his contract to be deferred until his retirement."

5 The Attorney General contends that Langone's "argu[ment] that CAP awards did not have to be approved by the [Board] ... is undercut by the minutes of the February 2003 meeting of the Compensation Committee," because those minutes state that the Committee had approved "Incentive Compensation of $7,066,666 and a *Capital Accumulation Plan Award of $3,533,333 for Mr. Grasso* " (emphasis added). But it is indisputable (i.e., not an "argu[ment]"), that as a result of the 1999 employment agreement Grasso's CAP awards did not have to be approved by the Board. In fact, a breach of contract would have occurred if the Board had awarded an amount less than that prescribed by the CAP formula set forth in Grasso's employment agreement. Nor does the italicized sentence fragment from the minutes of a Compensation Committee meeting occurring a year *after* the last of the three February meetings of the Board (the meetings the complaint puts in issue) create a material issue of fact about Langone's prior disclosures to the Board at the February meetings. Moreover, this contention about the minutes of the February 2003 meeting of the Committee ignores that the minutes of each of the February meetings (in 2000, 2001 and 2002) reflect other "discussion[s]" regarding Grasso's compensation that were not further described. Finally, as Langone correctly maintains, both sides can speculate about why this fragment appears in the February 2003 minutes of the Compensation Committee. But there is no evidence explaining it (such as testimony from the person who prepared the minutes) and the Attorney General's speculation is not a proper basis for denying Langone's motion for summary judgment (*see Batista v. Rivera,* 5 A.D.3d 308, 774 N.Y.S.2d 136 [2004]; *Warden v. Orlandi,* 4 A.D.3d 239, 242, 772 N.Y.S.2d 299 [2004]; *Leggio v. Gearhart,* 294 A.D.2d 543, 544–545, 743 N.Y.S.2d 135 [2002]).

6 The majority states that these Speaking Points do not "indicate a discussion of Grasso's CAP award." Of course the Speaking Points would not indicate any "discussion" by the Board but only the subjects about which Langone was to speak. As is evident, the subject of Grasso's participation in CAP is "indicate[d]" in the Speaking Points.

7 Speaking Points prepared by Ashen two years earlier did so exclude the CAP award from the term "total compensation." Thus, Speaking Points he prepared for Langone's use in February 2000 in presenting the Compensation Committee's recommendations for Grasso's compensation do not include the CAP award as part of the "total 1999 compensation." As noted above, after stating the amount of that "total compensation," the Speaking Points specifically state that "Dick will also receive a Capital Accumulation Award of 50% of his variable compensation (or $3,300,000) per his contract to be deferred until his retirement."

8 Of course, the notion that the sophisticated business leaders and other prominent persons who comprised the Board did not grasp this elementary concept is risible. The majority nonetheless maintains that "deposition testimony in the record indicates that the disclosures and the postulated mathematical calculations may not have been as clear to some of the directors voting to approve Grasso's compensation as they are to the author of the dissenting opinion." Suffice it to say that the majority does not and cannot quote or paraphrase the testimony of anyone to support this claim about what is "indicate[d]" by this unspecified deposition testimony.

9 Presumably, the majority does not rely on testimony given by Komansky during a pre-litigation investigation conducted by the Attorney General at which Langone was neither present nor represented by counsel. Although the Attorney General also submitted an excerpt from this testimony in opposition to Langone's motion, it is not admissible evidence against Langone (*see Bigelow v. Acands, Inc.,* 196 A.D.2d 436, 439, 601 N.Y.S.2d 478 [1993]). In any event, to the extent that excerpt suggests that at the time he was deposed during the investigation Komansky erroneously understood from a document shown to him that the $8 million in "compensation" stated to have been received by Grasso in 1999 included the CAP award, that misunderstanding was refuted in the admissible deposition testimony given by Komansky in this litigation that Langone submitted in reply. Again, moreover, any isolated misunderstanding that a director may have had cannot be equated with a disclosure failure by Langone.

10 The record on appeal is unclear as to whether Maughan is referring to the February meeting of the Compensation Committee or the Board.

11 To be clear, Bocklet never testified that his belief (more accurately, his guess) that Grasso's total compensation was $15 million was derived from or connected to the "total compensation column of the worksheet." Bocklet gave no such testimony. Rather, years after the February 2001 meeting, he simply testified, without reference to the worksheet or any column in it, that he believed Grasso's total compensation for 2000 "[w]as 15 million."

12 Nor for that matter, could the "confusion" the majority relies upon be equated with such a disclosure failure by Langone.

13 Moreover, Harrison testified that he was not in a position to deny that Langone made the CAP disclosures contained in the Speaking Points. Because the majority emphasizes what certain directors "believed," it bears note that Duryea answered "I do not" to a question asking him if he "ha[d] any reason to believe that Mr. Langone misled you in any way concerning Mr. Grasso's compensation." Finally, the majority also relies on opinion testimony from Bocklet and Murphy to the effect, as the majority puts it, that the members of the Exchange "would not be happy" if they knew the Compensation Committee was approving $30 million in compensation for Grasso in 2001. This opinion testimony adds some color to the majority's position but is manifestly irrelevant to the issue of what Langone said to the Board about Grasso's CAP award.

14 Langone asserts in his brief, and the Attorney General does not contend otherwise, that the Assistant Attorney General deposing Maughan and Bocklet never even asked either witness whether Langone had disclosed Grasso's CAP award.

15 In the course of announcing its ruling on the motion for summary judgment, Supreme Court made no mention of either of these two theories of liability; it neither ruled on whether the Attorney General properly had raised them in opposition to the motion nor on whether there was a material issue of fact that precluded granting summary judgment to Langone on either or both of these two theories. At a later proceeding that same day, however, Supreme Court ruled that the Attorney General would be permitted to pursue at trial the allegation relating to the SERP benefits. In doing so, Supreme Court stated that it regarded the Attorney General's interrogatory responses as "the equivalent of an amplification of a pleading."

16 From the immediately preceding paragraph, it would appear that the complaint alleges that Langone was one of the persons from whom the information was withheld. Thus, the complaint asserts that Ashen and one of the Exchange's consultants "have confirmed that the Compensation Committee and Board were misled."

17 Paragraph 86 makes reference to another report prepared by a different consultant to the Exchange. The complaint alleges neither

that Langone withheld it from anyone nor that he ever received it.

18 At oral argument on Langone's motion, his attorney stated that when the motion was made in January, 36 witnesses had been deposed; that the Attorney General wanted more time to respond; and that ultimately 61 witnesses were deposed—resulting in 29,000 pages of deposition testimony—and more than a million pages of documents were produced.

19 Presumably, the majority agrees with this conclusion. After all, the majority has nothing to say about it and does not even mention the Attorney General's effort to oppose Langone's motion on the basis of unpleaded theories of liability.

249 A.D.2d 531
Supreme Court, Appellate Division, Second Department, New York.

Lister R. RICHARDSON, Individually and as Administrator of the Estate of Marie T. Richardson, Deceased, et al., Appellants,
v.
DAVID SCHWAGER ASSOCIATES, INC., Defendant,
Wilbur F. Breslin, etc., et al., Respondents.
(And a Third–Party Action.)

April 27, 1998.

Synopsis

Customer sued car wash operator and owner/lessor of premises for injuries sustained in slip and fall. The Supreme Court, Nassau County, Murphy, J., granted owner/lessor's motion for summary judgment. Customer appealed. The Supreme Court, Appellate Division held that: (1) owner/lessor had nondelegable duty to provide public with reasonably safe premises, and (2) genuine issues of fact existed as to whether owner/lessor breached that duty and whether dangerous condition was created by owner/lessor's initial construction or design of premises.

Reversed, and complaint reinstated.

Attorneys and Law Firms

****115** Albert S. Dranoff, Long Beach, for appellants.

Ted M. Tobias, Melville (Leslie McHugh, of counsel), for respondents.

Before O'BRIEN, J.P., and SANTUCCI, KRAUSMAN and FLORIO, JJ.

Opinion

MEMORANDUM BY THE COURT.

***531** In an action to recover damages for personal injuries, etc., the plaintiffs appeal from an order of the Supreme Court, Nassau County (Murphy, J.), dated March 10, 1997, which granted the motion of the defendants Wilbur F. Breslin, David V. King, and E.A.S.A. d/b/a King Way Associates for summary judgment dismissing the complaint insofar as asserted against them.

ORDERED that the order is reversed, on the law, with costs, the respondents' motion is denied, and the complaint is reinstated insofar as asserted against them.

The plaintiff's decedent, Marie Richardson, was allegedly injured when she slipped in a puddle of soapy water at a car wash operated by the defendant David Schwager Associates, Inc. (hereinafter Schwager). Schwager subleased the premises from the defendants Wilbur Breslin, David King, and E.A.S.A. d/b/a King Way Associates (hereinafter collectively referred to as King Way). King Way moved for summary judgment on the ground that it was an out-of-possession lessor and had no knowledge of the alleged defective condition. In opposition to King Way's motion, the plaintiff presented expert evidence that the car wash was defectively designed, *inter alia,* in that there was no drainage system for soapy water which accumulated in the area designated for owners to pick up their cars. The deposition testimony of a King Way representative established that King Way hired the contractor who built the car wash and that it approved all of the plans and specifications prior to construction.

We conclude that the Supreme Court erred in granting King Way's motion. The evidence established that King Way subleased the premises to Schwager with knowledge that members of the public would be invited onto the premises. King Way therefore had a nondelegable duty to provide the public with a reasonably safe premises and a safe means of ***532** ingress and egress (*see, June v. Zikakis Chevrolet,* 199 A.D.2d 907, 908–909, 606 N.Y.S.2d 390; *Thomassen v. J & K Diner,* 152 A.D.2d 421, 424–425, 549 N.Y.S.2d 416). Moreover, where, as here, the claim is that the initial construction or design of the premises was defective, the plaintiff need not establish that King Way had notice of the condition, since the dangerous condition was allegedly created by King Way or its agent, the contractor (see, *Thomassen v. J & K Diner, supra; June v. Zikakis Chevrolet, supra*). Accordingly, there are issues of fact as to King Way's liability which preclude summary judgment.

All Citations

249 A.D.2d 531, 672 N.Y.S.2d 114, 1998 N.Y. Slip Op. 03923

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140 A.D.3d 1051
Supreme Court, Appellate Division, Second Department, New York.

SE DAE YANG, etc., et al., appellants,
v.
NEW YORK CITY HEALTH AND HOSPITALS CORPORATION, respondent.

June 22, 2016.

Synopsis
Background: Patient brought action against hospital alleging medical malpractice and wrongful death. The Supreme Court, Queens County, Kerrigan, J., 2015 WL 4992390, dismissed. Patient appealed.

The Supreme Court, Appellate Division, held that patient's notice to hospital of its claim was sufficient with regard to wrongful death claim.

Reversed.

Attorneys and Law Firms

****351** Sim & Record, LLP, Bayside, N.Y. (Sang J. Sim of counsel), for appellants.

Zachary W. Carter, Corporation Counsel, New York, N.Y. (Fay Ng and Victoria Scalzo of counsel), for respondent.

REINALDO E. RIVERA, J.P., SHERI S. ROMAN, JOSEPH J. MALTESE, and COLLEEN D. DUFFY, JJ.

Opinion

***1051** In an action, inter alia, to recover damages for medical malpractice and wrongful death, etc., the plaintiffs appeal, as limited by their brief, from so much of an order of the Supreme Court, Queens County (Kerrigan, J.), entered July 16, 2015, as granted that branch of the defendant's motion which was pursuant to CPLR 3211(a)(7) to dismiss the cause of action alleging wrongful death on the ground that the plaintiffs failed to serve an adequate notice of claim pursuant to General Municipal Law § 50–e.

ORDERED that the order is reversed insofar as appealed from, on the law, with costs, and that branch of the defendant's motion which was pursuant to CPLR 3211(a)(7) to dismiss the ***1052** cause of action alleging wrongful death on the ground that the plaintiffs failed to serve an adequate notice of claim pursuant to General Municipal Law § 50–e is denied.

A timely and sufficient notice of claim is a condition precedent to asserting a tort claim against a municipality or public benefit corporation (*see* General Municipal Law § 50–e[1][a]; *Brown v. City of New York,* 95 N.Y.2d 389, 393, 718 N.Y.S.2d 4, 740 N.E.2d 1078). With respect to most torts, service of the notice of claim must be made within 90 days after the claim arises, but "in wrongful death actions, the [90] days shall run from the appointment of a representative of the decedent's estate" (General Municipal Law § 50–e[1][a]).

General Municipal Law § 50–e(2) sets forth the criteria for the contents of a notice of claim. In pertinent part, the statute requires that the claimant state the nature of the claim and the time when, the place where, and the manner in which it arose (*see* General Municipal Law § 50–e[2]). The purpose of providing this information in a timely manner is so that the defendant can conduct a proper investigation and assess the merits of the claim while the information is still readily available (*see O'Brien v. City of Syracuse,* 54 N.Y.2d 353, 359, 445 N.Y.S.2d 687, 429 N.E.2d 1158; *Steins v. Incorporated Vil. of Garden City,* 127 A.D.3d 957, 959, 7 N.Y.S.3d 419; *DeLeonibus v. Scognamillo,* 183 A.D.2d 697, 698, 583 N.Y.S.2d 285).

"The Legislature did not intend that the claimant have the additional burden of pleading causes of action and legal theories, proper for the pleadings, in the notice of claim ... ****352** General Municipal Law § 50–e was not meant as a sword to cut down honest claims, but merely as a shield to protect municipalities against spurious ones" (*DeLeonibus v. Scognamillo,* 183 A.D.2d 697, 698, 583 N.Y.S.2d 285, citing *Schwartz v. City of New York,* 250 N.Y. 332, 333, 165 N.E. 517; *see generally Baker v. Town of Niskayuna,* 69 A.D.3d 1016, 1017–1018, 891 N.Y.S.2d 749). Accordingly, a claimant need not state "a precise cause of action in haec verba in a notice of claim" (*DeLeonibus v. Scognamillo,* 183 A.D.2d at 698, 583 N.Y.S.2d 285; *see Steins v. Incorporated Vil. of Garden City,* 127 A.D.3d at 959, 7 N.Y.S.3d 419; *Bartley v. County of Orange,* 111 A.D.3d 772, 774, 975 N.Y.S.2d

170).

Contrary to the Supreme Court's determination, the plaintiffs' notice of claim adequately apprised the defendant that the claimant would seek to impose liability under a wrongful death theory of recovery (*cf. Steins v. Incorporated Vil. of Garden City,* 127 A.D.3d at 959, 7 N.Y.S.3d 419; *Crew v. Town of Beekman,* 105 A.D.3d 799, 800, 962 N.Y.S.2d 677; *see generally Bartley v. County of Orange,* 111 A.D.3d at 774, 975 N.Y.S.2d 170; *Miller v. City of New York,* 89 A.D.3d 612, 933 N.Y.S.2d 36; *Baker v. Town of Niskayuna,* 69 A.D.3d at 1017–1018, 891 N.Y.S.2d 749). Accordingly, the Supreme Court should have denied that branch of ***1053** the defendant's motion which was pursuant to CPLR 3211(a)(7) to dismiss the cause of action alleging wrongful death on the ground that the plaintiffs failed to serve an adequate notice of claim pursuant to General Municipal Law § 50–e.

All Citations

140 A.D.3d 1051, 35 N.Y.S.3d 350, 2016 N.Y. Slip Op. 04929

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272 A.D.2d 603
Supreme Court, Appellate Division,
Second Department, New York.

Selma SHERYLL, respondent,
v.
L & J HAIRSTYLISTS OF PLAINVIEW, LTD., d/b/a Raves Salon, appellant.

May 30, 2000.

Attorneys and Law Firms

Baxter & Smith, P.C., Jericho, N.Y. (Anne V. Malone of counsel), for appellant.

****430** Bondi & Iovino, Mineola, N.Y. (Leslie L. Camins and Anthony F. Iovino of counsel), for respondent.

Opinion

***604** In an action to recover damages for personal injuries, the defendant appeals from an order of the Supreme Court, Nassau County (Davis, J.), dated August 2, 1999, which denied its motion for summary judgment dismissing the complaint.

ORDERED that the order is affirmed, with costs.

Contrary to the defendant's contentions, the Supreme Court properly denied its motion for summary judgment. Viewing the evidence in a light most favorable to the plaintiff as the party opposing summary judgment (*see, Rockowitz v. City of New York,* 255 A.D.2d 434, 680 N.Y.S.2d 864; *Rosen Furs, Inc. v. Sigma Plumbing & Heating Corp.,* 249 A.D.2d 276, 670 N.Y.S.2d 596), and giving her the benefit of every favorable inference (*see, Sofair v. Levin–Epstein,* 231 A.D.2d 706, 647 N.Y.S.2d 990), the plaintiff established the existence of issues of fact concerning the manner in which the accident occurred, and whether an employee of the defendant negligently contributed thereto.

RITTER, J.P., SANTUCCI, S. MILLER and GOLDSTEIN, JJ., concur.

All Citations

272 A.D.2d 603, 709 N.Y.S.2d 429 (Mem), 2000 N.Y. Slip Op. 05355

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295 A.D.2d 271
Supreme Court, Appellate Division,
First Department, New York.

Sarit SHMUELI, Plaintiff–Appellant,
v.
NEW YORK CITY POLICE DEPARTMENT, Defendant,
New York County District Attorney Robert M. Morgenthau, etc.,
Defendant–Respondent.

June 27, 2002.

Attorneys and Law Firms

Andrew M. Moskowitz, for Plaintiff-Appellant.

Michael S. Morgan, for Defendant-Respondent.

Opinion

Order, Supreme Court, New York County (Joan Madden, J.), entered on or about January 18, 2001, which granted defendant District Attorney Robert M. Morgenthau's motion to dismiss the complaint as against him, for failure to state a cause of action, unanimously affirmed, without costs.

Plaintiff's State law claim against District Attorney Morgenthau for negligent hiring, supervision and training was properly dismissed, since plaintiff's General Municipal Law § 50–e notice failed to assert such a claim or allege any facts from which defendant could have gleaned plaintiff's intention to raise such a claim (*see, Urena v. City of New York,* 221 A.D.2d 429, 633 N.Y.S.2d 391; *Brown v. New York City Tr. Auth.,* 172 A.D.2d 178, 180, 568 N.Y.S.2d 54; *St. John v. Town of Marlborough,* 163 A.D.2d 761, 763, 558 N.Y.S.2d 332).

Plaintiff's remaining State law claims against District Attorney Morgenthau, seeking to hold him vicariously accountable for the acts or omissions of his subordinates, were also properly dismissed, ***872** since claims premised on vicarious liability do not lie against the head of a county agency (*see,* County Law §§ 54, 941; *Barr v. County of Albany,* 50 N.Y.2d 247, 257, 428 N.Y.S.2d 665, 406 N.E.2d 481).

Plaintiff's claim against District Attorney Morgenthau predicated on 42 USC § 1983 was also properly dismissed, since plaintiff has failed to allege direct participation by him in the alleged wrongful acts, a failure by him to remedy a wrong after discovering it, a policy or custom in the District Attorney's Office which encouraged or permitted the alleged wrongful acts, or gross negligence in District Attorney Morgenthau's supervision of his subordinates (*see, McKeon v. Daley,* 101 F.Supp.2d 79, 91, *affd.* 2001 WL 533662, 2001 U.S. App LEXIS 10503 [2d Cir.]).

WILLIAMS, P.J., NARDELLI, SAXE, SULLIVAN and FRIEDMAN, JJ., concur.

All Citations

295 A.D.2d 271, 743 N.Y.S.2d 871 (Mem), 2002 N.Y. Slip Op. 05378

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64 N.Y.2d 851
Court of Appeals of New York.

Muriel WINEGRAD et al., Appellants,
v.
NEW YORK UNIVERSITY MEDICAL CENTER, Defendant,
and
Joseph Jacobs et al., Respondents.

Feb. 12, 1985.

Synopsis
Action was brought to recover damages for medical malpractice. The Supreme Court, Special Term, New York County, Leonard Cohen, J., denied defendants' motion for summary judgment, and defendants appealed. The Supreme Court, Appellate Division, 104 A.D.2d 748, 480 N.Y.S.2d 472, reversed and dismissed the complaint, and plaintiffs appealed. The Court of Appeals held that in medical malpractice action in which the plaintiffs described certain injuries purportedly caused by negligence of defendants and in which one defendant acknowledged that at least in some part the alleged injury actually occurred, defendants' conclusory assertions that they did not deviate from good and accepted medical practices, with no factual relationship with the alleged injury, did not establish absence of genuine issue of material fact as to their liability so as to warrant granting of summary judgment in their favor.

Reversed and remitted.

Attorneys and Law Firms

***852 ***317 **643** Abraham A. Salm, New York City, for appellants.

Martin Wendel, Rahway, N.J., for respondents.

OPINION OF THE COURT

MEMORANDUM.

The order of the Appellate Division, 104 A.D.2d 748, 480 N.Y.S.2d 472, should be reversed, with costs, the individual defendants' cross motion for summary judgment denied, and the case remitted to the Appellate Division for consideration of issues not reached on the appeal to that court.

In this action to recover damages for medical malpractice, plaintiffs in a verified complaint and bill of particulars alleged that defendant Jacobs failed to check Mrs. Winegrad's medical history before undertaking to perform surgery on the tissues surrounding her eyes, and allowed administration of anesthesia without checking this history; that during the course of this minor surgery she went into shock and developed cardiac arrhythmia; that defendants Ross and Pasternack treated her and administered drugs for a blood clot and heart condition which were unnecessary and actually were incompatible with her condition; and that defendant Jacobs wrongfully left the surgery incomplete after representing to her that it had been completed.

In response to plaintiffs' motion to direct that defendants' answers be stricken on account of their failure to appear for depositions, defendants sought summary judgment, tendering in support of their cross motion only the brief affidavit of each asserting that the pertinent medical records had been reviewed. Each affidavit further contained the following identical paragraph: "I now state with a reasonable degree of medical certainty that I did not deviate from good and accepted medical practices in my treatment of plaintiff, nor did anything I do [*sic*] or allegedly failed to do proximately cause the plaintiff's alleged injuries. Therefore, I should not have been named as a defendant in the above-entitled action." Defendant Jacobs, in addition, acknowledged that he had attempted to perform a blepharoplasty on plaintiff, which was not completed since she developed cardiac arrhythmia. In opposition to the cross motion, plaintiffs submitted only their counsel's affidavit complaining of defendants' failure to appear for depositions. Special Term granted ***853** plaintiffs' requested relief and denied the cross motion for summary judgment; the Appellate Division reversed and dismissed the complaint.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case (*see,* *****318** *Zuckerman v. City of New York,* 49 N.Y.2d 557, 562, 427 N.Y.S.2d 595, 404 N.E.2d 718; *Sillman v. Twentieth*

Century-Fox Film Corp., 3 N.Y.2d 395, 404, 165 N.Y.S.2d 498, 144 N.E.2d 387). Failure to make such showing requires denial of the motion, regardless of the sufficiency of the ****644** opposing papers (*Matter of Redemption Church of Christ v. Williams,* 84 A.D.2d 648, 649, 444 N.Y.S.2d 305; *Greenberg v. Manlon Realty,* 43 A.D.2d 968, 969, 352 N.Y.S.2d 494).

In the appeal before us, plaintiffs have in verified pleadings described certain injuries purportedly caused by the negligence of defendants, and defendant Jacobs has acknowledged that at least in some part the alleged injury actually occurred. On this record, the bare conclusory assertions echoed by all three defendants that they did not deviate from good and accepted medical practices, with no factual relationship to the alleged injury, do not establish that the cause of action has no merit so as to entitle defendants to summary judgment (CPLR 3212[b]; *cf. Neuman v. Greenstein,* 99 A.D.2d 1018, 473 N.Y.S.2d 806, and *Pan v. Coburn,* 95 A.D.2d 670, 463 N.Y.S.2d 223). Defendants' cross motion for summary judgment should therefore have been denied.

WACHTLER, C.J., and JASEN, SIMONS, KAYE and ALEXANDER, JJ., concur in memorandum.

MEYER, J., taking no part.

On review of submissions pursuant to section 500.4 of the Rules of the Court of Appeals (22 NYCRR 500.4), order reversed, etc.

All Citations

64 N.Y.2d 851, 476 N.E.2d 642, 487 N.Y.S.2d 316

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Proposed Legislation

McKinney's General Municipal Law § 50-e

§ 50-e. Notice of claim

Effective: February 14, 2019
Currentness

1. When service required; time for service; upon whom service required.

(a) In any case founded upon tort where a notice of claim is required by law as a condition precedent to the commencement of an action or special proceeding against a public corporation, as defined in the general construction law, or any officer, appointee or employee thereof, the notice of claim shall comply with and be served in accordance with the provisions of this section within ninety days after the claim arises; except that in wrongful death actions, the ninety days shall run from the appointment of a representative of the decedent's estate.

(b) Service of the notice of claim upon an officer, appointee or employee of a public corporation shall not be a condition precedent to the commencement of an action or special proceeding against such person. If an action or special proceeding is commenced against such person, but not against the public corporation, service of the notice of claim upon the public corporation shall be required only if the corporation has a statutory obligation to indemnify such person under this chapter or any other provision of law.

2. Form of notice; contents. The notice shall be in writing, sworn to by or on behalf of the claimant, and shall set forth: (1) the name and post-office address of each claimant, and of his attorney, if any; (2) the nature of the claim; (3) the time when, the place where and the manner in which the claim arose; and (4) the items of damage or injuries claimed to have been sustained so far as then practicable but a notice with respect to a claim against a municipal corporation other than a city with a population of one million or more persons shall not state the amount of damages to which the claimant deems himself entitled, provided, however, that the municipal corporation, other than a city with a population of one million or more persons, may at any time request a supplemental claim setting forth the total damages to which the claimant deems himself entitled. A supplemental claim shall be provided by the claimant within fifteen days of the request. In the event the supplemental demand is not served within fifteen days, the court, on motion, may order that it be provided by the claimant.

3. How served; when service by mail complete; defect in manner of service; return of notice improperly served.

(a) The notice shall be served on the public corporation against which the claim is made by delivering a copy thereof personally, or by registered or certified mail, to the person designated by law as one to whom a summons in an action in the supreme court

issued against such corporation may be delivered, or to an attorney regularly engaged in representing such public corporation or, in a city with a population of over one million, by electronic means in a form and manner prescribed by such city.

(b) Service by registered or certified mail shall be complete upon deposit of the notice of claim, enclosed in a postpaid properly addressed wrapper, in a post office or official depository under the exclusive care and custody of the United States post office department within the state.

(c) If the notice is served within the period specified by this section, but in a manner not in compliance with the provisions of this subdivision, the service shall be valid if the public corporation against which the claim is made demands that the claimant or any other person interested in the claim be examined in regard to it, or if the notice is actually received by a proper person within the time specified by this section, and the public corporation fail to return the notice, specifying the defect in the manner of service, within thirty days after the notice is received.

(d) If the notice is served within the period specified by this section and is returned for the reason and within the time provided in this subdivision, the claimant may serve a new notice in a manner complying with the provisions of this subdivision within ten days after the returned notice is received. If a new notice is so served within that period, it shall be deemed timely served.

(e) If the notice is served by electronic means, as defined in paragraph two of subdivision (f) of rule twenty-one hundred three of the civil practice law and rules, it shall contain the information required under the provisions of subdivision two of this section. In addition, such notice shall contain the following declaration: "I certify that all information contained in this notice is true and correct to the best of my knowledge and belief. I understand that the willful making of any false statement of material fact herein will subject me to criminal penalties and civil liabilities." Service of the notice shall be complete upon successful transmission of the notice as indicated by an electronic receipt provided by such city, which shall transmit an electronic receipt number to the claimant forthwith.

(f) Service of a notice of claim on the secretary of state as agent of any public corporation, as defined in subdivision one of section sixty-six of the general construction law, whatsoever created or existing by virtue of the laws of the state of New York upon whom service of a notice of claim is required as a condition precedent to being sued, may be made by personally delivering to and leaving with the secretary of state or a deputy, or with any person authorized by the secretary of state to receive such service, at the office of the department of state in the city of Albany, duplicate copies of such notice of claim together with the statutory fee, which fee shall be a taxable disbursement but only in the amount equal to the portion of the fee collected by the public corporation in accordance with subdivision four of this section. Service on such public corporation shall be complete when the secretary of state is so served. Within ten days after receiving a notice of claim, the secretary of state shall either: (1) send one of such copies by certified mail, return receipt requested, to such public corporation, at the post office address on file in the department of state, specified for the purpose; or (2) electronically transmit a copy to such public corporation at the electronic address on file with the department of state specified for that purpose; or (3) transmit a copy to such public corporation by any other such means or procedure established by the secretary of state, provided that such other means or procedure of transmittal must be verifiable.

4. Requirements of section exclusive except as to conditions precedent to liability for certain defects or snow or ice. No other or further notice, no other or further service, filing or delivery of the notice of claim, and no notice of intention to commence an action or special proceeding, shall be required as a condition to the commencement of an action or special proceeding for the enforcement of the claim; provided, however, that nothing herein contained shall be deemed to dispense with the requirement of notice of the defective, unsafe, dangerous or obstructed condition of any street, highway, bridge, culvert, sidewalk or crosswalk, or of the existence of snow or ice thereon, where such notice now is, or hereafter may be, required by law, as a condition

precedent to liability for damages or injuries to person or property alleged to have been caused by such condition, and the failure or negligence to repair or remove the same after the receipt of such notice.

5. Application for leave to serve a late notice.

Upon application, the court, in its discretion, may extend the time to serve a notice of claim specified in paragraph (a) of subdivision one of this section, whether such service was made upon a public corporation or the secretary of state. The extension shall not exceed the time limited for the commencement of an action by the claimant against the public corporation. In determining whether to grant the extension, the court shall consider, in particular, whether the public corporation or its attorney or its insurance carrier acquired actual knowledge of the essential facts constituting the claim within the time specified in subdivision one of this section or within a reasonable time thereafter. The court shall also consider all other relevant facts and circumstances, including: whether the claimant was an infant, or mentally or physically incapacitated, or died before the time limited for service of the notice of claim; whether the claimant failed to serve a timely notice of claim by reason of his justifiable reliance upon settlement representations made by an authorized representative of the public corporation or its insurance carrier; whether the claimant in serving a notice of claim made an excusable error concerning the identity of the public corporation against which the claim should be asserted; if service of the notice of claim is attempted by electronic means pursuant to paragraph (e) of subdivision three of this section, whether the delay in serving the notice of claim was based upon the failure of the computer system of the city or the claimant or the attorney representing the claimant; that such claimant or attorney, as the case may be, submitted evidence or proof as is reasonable showing that (i) the submission of the claim was attempted to be electronically made in a timely manner and would have been completed but for the failure of the computer system utilized by the sender or recipient, and (ii) that upon becoming aware of both the failure of such system and the failure of the city to receive such submission, the claimant or attorney had insufficient time to make such claim within the permitted time period in a manner as otherwise prescribed by law; and whether the delay in serving the notice of claim substantially prejudiced the public corporation in maintaining its defense on the merits.

An application for leave to serve a late notice shall not be denied on the ground that it was made after commencement of an action against the public corporation.

6. Mistake, omission, irregularity or defect. At any time after the service of a notice of claim and at any stage of an action or special proceeding to which the provisions of this section are applicable, a mistake, omission, irregularity or defect made in good faith in the notice of claim required to be served by this section, not pertaining to the manner or time of service thereof, may be corrected, supplied or disregarded, as the case may be, in the discretion of the court, provided it shall appear that the other party was not prejudiced thereby.

7. Applications under this section. All applications under this section shall be made to the supreme court or to the county court: (a) in a county where the action may properly be brought for trial, (b) if an action to enforce the claim has been commenced, in the county where the action is pending, or (c) in the event that there is no motion term available in any of the counties specified in clause (a) or (b) hereof, in any adjoining county. Where the application is for leave to serve a late notice of claim, it shall be accompanied by a copy of the proposed notice of claim.

8. Inapplicability of section. (a) This section shall not apply to claims arising under the provisions of the workers' compensation law, the volunteer firefighters' benefit law, or the volunteer ambulance workers' benefit law or to claims against public corporations by their own infant wards.

(b) This section shall not apply to any claim made for physical, psychological, or other injury or condition suffered as a result of conduct which would constitute a sexual offense as defined in article one hundred thirty of the penal law committed against

a child less than eighteen years of age, incest as defined in section 255.27, 255.26 or 255.25 of the penal law committed against a child less than eighteen years of age, or the use of a child in a sexual performance as defined in section 263.05 of the penal law committed against a child less than eighteen years of age.

Credits

(Added L.1945, c. 694, § 1. Amended L.1950, c. 481, § 1; L.1951, c. 393, § 1; L.1956, c. 415, §§ 1, 2; L.1957, c. 383, § 1; L.1959, c. 814, § 1; L.1963, c. 660, § 2; L.1966, c. 732, § 1; L.1967, c. 252, § 1; L.1976, c. 745, § 2; L.1978, c. 531, § 1; L.1980, c. 686, § 1; L.1981, c. 738, § 1; L.1983, c. 62, § 1; L.1988, c. 24, § 12; L.2010, c. 12, §§ 1, 2, eff. Sept. 19, 2010; L.2012, c. 500, § 4, eff. July 15, 2013; L.2012, c. 500, § 5, eff. June 15, 2013; L.2013, c. 24, § 2, eff. July 15, 2013; L.2019, c. 11, § 5, eff. Feb. 14, 2019.)

McKinney's General Municipal Law § 50-e, NY GEN MUN § 50-e
Current through L.2022, chapters 1 to 202. Some statute sections may be more current, see credits for details.

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McKinney's Consolidated Laws of New York Annotated
Civil Practice Law and Rules (Refs & Annos)
Chapter Eight. Of the Consolidated Laws
Article 21. Papers

McKinney's CPLR Rule 2101

Rule 2101. Form of papers

Effective: January 1, 2012

Currentness

(a) Quality, size and legibility. Each paper served or filed shall be durable, white and, except for summonses, subpoenas, notices of appearance, notes of issue, orders of protection, temporary orders of protection and exhibits, shall be eleven by eight and one-half inches in size. The writing shall be legible and in black ink. Beneath each signature shall be printed the name signed. The letters in the summons shall be in clear type of no less than twelve-point in size. Each other printed or typed paper served or filed, except an exhibit, shall be in clear type of no less than ten-point in size.

(b) Language. Each paper served or filed shall be in the English language which, where practicable, shall be of ordinary usage. Where an affidavit or exhibit annexed to a paper served or filed is in a foreign language, it shall be accompanied by an English translation and an affidavit by the translator stating his qualifications and that the translation is accurate.

(c) Caption. Each paper served or filed shall begin with a caption setting forth the name of the court, the venue, the title of the action, the nature of the paper and the index number of the action if one has been assigned. In a summons, a complaint or a judgment the title shall include the names of all parties, but in all other papers it shall be sufficient to state the name of the first named party on each side with an appropriate indication of any omissions.

(d) Indorsement by attorney. Each paper served or filed shall be indorsed with the name, address and telephone number of the attorney for the party serving or filing the paper, or if the party does not appear by attorney, with the name, address and telephone number of the party.

(e) Copies. Except where otherwise specifically prescribed, copies, rather than originals, of all papers, including orders, affidavits and exhibits may be served or filed. Where it is required that the original be served or filed and the original is lost or withheld, the court may authorize a copy to be served or filed.

(f) Defects in form; waiver. A defect in the form of a paper, if a substantial right of a party is not prejudiced, shall be disregarded by the court, and leave to correct shall be freely given. The party on whom a paper is served shall be deemed to have waived objection to any defect in form unless, within fifteen days after the receipt thereof, the party on whom the paper

is served returns the paper to the party serving it with a statement of particular objections.

(g) Service by electronic means. Each paper served or filed by electronic means, as defined in subdivision (f) of rule twenty-one hundred three, shall be capable of being reproduced by the receiver so as to comply with the provisions of subdivisions (a) through (d) of this rule.

Credits

(L.1962, c. 308. Amended L.1964, c. 388, § 6; L.1965, c. 773, § 6; Jud.Conf.1973 Proposal No. 2; Jud.Conf.1974 Proposal No. 1; L.1994, c. 100, § 2; L.1996, c. 131, § 1; L.1999, c. 367, § 2, eff. July 27, 1999; L.2011, c. 473, § 2, eff. Jan. 1, 2012.)

Editors' Notes

SUPPLEMENTARY PRACTICE COMMENTARIES

by Thomas F. Gleason

2021

CPLR § 2101 Notice of Default on Stipulation of Settlement requires the caption--Letter notice held insufficient

In *Citibank, N.A. v. Wilson* (71 Misc.3d 1214(A) [N.Y. City Civ. Ct. 2021]), the plaintiff commenced an action seeking judgment against the defendant for an unpaid credit card bill in the amount of $2,583.00. The defendant appeared *pro se*, filing an answer asserting no defenses but stating a willingness to enter a payment plan. A court conference resulted in a stipulation confirmed by order of the Court, providing for a schedule of payments and other terms, including that on default the plaintiff would mail written notice of the impending default judgment to the defendant at the address set forth in the stipulation.

The plaintiff thereafter moved for a default judgment, including in the motion papers the notice of default which had been submitted to the defendant in letter form. Citing CPLR 2101(c), the Court held the notice of default to be defective because it was a "... paper served on defendant pursuant to this action" and did not include the caption. The Court reasoned that the purported notice was not clear on its face--it did not specifically refer to the action, and did not advise the defendant that upon a failure to cure the default the plaintiff would move for a judgment pursuant to the stipulation. Noting that the default notice was a paper served on a party, and that such service was required by the stipulation, the court denied the motion for a default judgment without prejudice to renew upon service of a properly captioned notice of default.

CPLR § 2101(f) Expiration of 15-day time limit waives objection to late service of answer--expanding the waiver beyond "form" of the paper

U.S. Bank N.A. et al. v. Lopez (192 A.D.3d 849 [2d Dept. 2021]) was a foreclosure action in which the defendant served a late answer. The plaintiff did not promptly reject the answer as untimely but did move for a default judgment and reference.

CPLR 2201(f) speaks to the forgiveness of a "defect in form" of a paper and provides that a party will waive such defects unless they return the defective paper to the sender within 15 days of receipt with a statement of "particular objections." In *U.S. Bank* the "defect" was untimeliness, rather than a problem with the form of the paper, but nevertheless the failure to act within the 15-day limit waived any objection to late service and the default. Accordingly, the Second Department held on appeal that the motion for a default judgment and a reference should have been denied by the Supreme Court.

CPLR § 2101(c) Anonymous name captions

Doe v. Doe (189 A.D.3d 406 [1st Dept. 2020]) was a case in which both the plaintiff and the defendant sought to proceed anonymously. The Supreme Court had granted the defendant relief on three orders: (a) removing the defendant's name from the proposed caption; (b) directing the defendant be listed in the caption as "John Doe"; and (c) sealing the record. The Appellate Division, First Department unanimously reversed, stating that the "default rule" is "openness and disclosure" of all aspects of court proceedings, including party identity. Although there is a statutory exception allowing for the identity of a victim of sex abuse to be confidential (*see*, Civil Rights Law § 50-b), the Court emphasizes that this exception does not protect the identity of the alleged perpetrator of a sexual offense. This statute does not by omission prevent a defendant from proceeding pseudonymously, however, because the court refers to a separate common law exception that would empower a court to shield a defendant's identity from public disclosure in a proper case. If such relief is requested, the Court will use its discretion to balance the party's legitimate and demonstrated privacy interests; the public interest in open trials and proceedings; and the potential prejudice granting anonymity would cause to other parties.

The discretionary exception to open proceedings was not applicable to this defendant, and on the question of the plaintiff's right to proceed anonymously, the court noted that that issue was not properly preserved in the record. On the sealing of the record, the court held that allowing the plaintiff to proceed pseudonymously was sufficient protection of any privacy interests and that the additional step of sealing the record was not warranted. Thus, *Doe v. Doe* exemplifies the measured and interest-based approach that the courts apply to limit pseudonym captions and preserve court openness.

CPLR § 2101(c) No right to pseudonym caption shown by malpractice plaintiff

In *F.L. v. Doe* (70 Misc.3d 962 [Sup. Ct. New York Cty. 2020]) the plaintiff moved for permission to proceed under pseudonymous initials in a malpractice action against her former divorce attorneys. The defendant responded by arguing that the plaintiff had failed to show any privacy interest sufficient for such relief, and in reply the plaintiff for the first time claimed that naming her in the caption would cause embarrassment to her daughter.

The case involved plaintiff's single claim of legal malpractice, alleging that the defendants negligently represented her in her divorce action by the use of a particular forensic accountant expert report. The Court held that the plaintiff had failed to explain how litigation of that claim would cause her or her daughter public humiliation or embarrassment, which, in any event would be insufficient grounds to allow plaintiff to proceed anonymously (*citing*, *Anonymous v. Lerner*, 124 A.D.3d 487, 487, 998 N.Y.S.2d 619, 619 [1st Dept. 2015]). Noting that the plaintiff's daughter and her daughter's friends were likely already aware of the matrimonial dispute, there was no showing of any substantial privacy interest outweighing the presumption in favor of open judicial proceedings.

2020

CPLR 2101 Affidavits of non-English Speakers.

This year's reminders of the dangers of relying on affidavits by persons not fluent in English again show that the consequences of noncompliance with CPLR 2101(b) range from benign to serious. In *Hong Qin Jiang v. Li Wan Wu* (179 A.D.3d 1035 [2nd Dept. 2019]), the plaintiff in a shareholders' derivative action submitted a noncompliant (and therefore) inadmissible affidavit in the defense of a motion for summary judgment. The result was not fatal because the defendant failed to meet their prima facie burden as movant. Phew!

In *CBU Associates, Inc. v. Forray* (65 Misc.3d 132 [A]) one of the tenants in a holdover proceeding sought to avoid judgment granting the landlord possession of a rent controlled apartment, by submitting an affidavit in the French language to establish entitlement to succession rights from the previous tenant. The affidavit was not accompanied by the translator's attestation required by CPLR 2101(b) and therefore was held to be "facially defective and inadmissible." However, the tenants had apparently also engaged in a persistent and systematic pattern of deception to conceal their occupancy status, thus exposing them to a waiver of the succession rights, but this issue was not decided by the court due to the inadmissible affidavit and the respondents' failure to defend the landlord's claim as a matter of law.

Finally, on the inconsequential error front, in *Uy v. Hussein, et al.* (186 A.D.3d 1567, 2020 WL 5648396) the controversy involved a non-English speaking Uber driver who allegedly struck a pedestrian while on duty for Uber. Uber sought dismissal of the complaint on the submission of an affidavit in English (the driver's native language was Bengali). The noncompliance with CPLR 2101(b) came to light because that driver had submitted an affidavit on a different motion that had properly been translated from Bengali. Although the latter affidavit was inadmissible, the misstep proved inconsequential because even an admissible sworn statement that the driver was not on duty at the time of the incident would not have eliminated all questions of fact in the personal injury case.

The above cases demonstrate that noncompliance with CPLR 2101(b) continues to be a problem in New York Courts, and fortunately that many such mistakes are not fatal. On the other hand, *People v. Ramos* (178 A.D.3d 1408 [4th Dept. 2019]) is a case in which the mistake was highly consequential.

People v. Ramos involved a determination by the New York Board of Examiners of Sex Offenders that a defendant was a Level 1 Sex Offender, based on an apparent felony sex offense conviction in Puerto Rico. The defendant argued on appeal that the board, in making its determination, had improperly relied upon official documents relating to the offense that were not accompanied by an English language translation that complied with CPLR 2101(b). The Appellate Division noted that the defendant actually objected on this point during the hearing before the Board, but no additional documents were included in the record to correct the error. As a result, the felony offense in Puerto Rico was not proved, and there was no legal basis for a Level 1 sex offender determination in New York. The defendant's risk level determination and sex offender registration requirements were unanimously vacated.

CPLR 2101 (c) Inclusion of Parties' Actual Names in the Caption--Restrictions on Anonymous Pleadings.

The prognostication of last year's commentary that the Child Victims Act (CVA) would result in many applications by sexual abuse victims to litigate anonymously (with a pseudonym caption) proved to be correct.

HCVAWCR-Doe v. Roman Catholic Archdiocese of New York (68 Misc.3d 1215 [A]) is one of many such cases, so many that distinguishable but anonymous party names now are being created with apparently random alphabet letters derived from a formula prescribed by the court.

In *HCVAWCR-Doe*, the Court noted that it "regularly grants worthy applications" by plaintiffs to sue anonymously, but lamented that the court had been "flooded with scores of pseudonym applications, many with no affidavit of plaintiff, or bare bones, boilerplate affidavits without facts specific to the plaintiff. These inadequate applications are compounded by a troubling expectation among the attorneys bringing them, that their applications should be granted."

However, as Justice Ruderman held in *Doe v. Roman Catholic Archdiocese of New York* (64 Misc.3d 1220 [A]) cited in last year's commentary, approvals of anonymous captions may not be approved *pro forma*. Rather, the court "should exercise its discretion sparingly and then, only when unusual circumstances necessitate it." (*Citing Applehead Pictures LLC v. Perelman*, 80 A.D.3d 181, 192 [1st Dept. 2010]).

Increasingly, it appears that many defendants who are aware of the plaintiff's true identity and who can obtain particulars of the alleged incidents, do not object to pseudonymous pleading, but this still requires the court to consider the public interest in open court proceedings. Therefore, Justice Wood cautions in *HCVAWCR* that granting such applications, even when unopposed, is not a mere "ministerial function." Nevertheless, the court granted the application after referencing another decision, to be discussed subsequently in this commentary, *Doe v. MacFarland*.

GCVAWCG-Doe v. Roman Catholic Archdiocese of New York (2020 WL 5083559), also noted the huge volume of pseudonym applications, and the Court's obligation to consider each application on its merits and exercise its deliberative and discretionary function. The Court will not grant permission to proceed under a pseudonym "indiscriminately to all CVA applications in a wholesale fashion ...." Each plaintiff must bring forth individual facts warranting the protection of anonymity and it is "... axiomatic that the court should recite those facts in its decision." To be granted anonymity, a plaintiff must present the merits of their claim and their specific reasons for seeking anonymity. The minimal threshold requires "plausible and actual, not speculative harm, and unique personal reasons that the plaintiff should not disclose his or her identity to the public." This need not include "the horrendous details of the alleged sexual abuse for the application, but it does require some real facts about the plaintiff's current circumstances."

Finally, the most extensive treatment since last year's commentary concerning pseudonym party applications is the above noted *Doe v. MacFarland*, which is the suit against a former guidance counselor and a school district. (66 Misc.3d 604 [2019]). *MacFarland* also details the impact of the Child Victims Act, which permitted claims arising from alleged sexual abuse to be brought decades after the events complained. The court cited "the almost inevitable onslaught of lawyers advertising for clients to prosecute such claims. Many of those advertisements suggest, if not overtly state, that plaintiffs have a nearly absolute right to proceed in these cases without revealing their identity." The court explained that counsel bringing these actions and applications to proceed anonymously often fail to even submit an affidavit or other showing of the necessity for anonymity. Such unsupported applications will be denied, as was the case in the first application in the *MacFarland* matter. However, with leave to resubmit on the point, the plaintiff in *MacFarland* did provide an affidavit that ultimately was successful. In thoroughly reviewing this application, as well as the important public policy implications of anonymous proceedings (including the due process rights of defendants), Justice Paul I. Marks thoroughly considers all of the relevant factors in an opinion well worth reading. Justice Marks cites a Second Circuit opinion outlining fifteen (15) factors applied in the weighing of the plaintiff's interest, in proceeding under a pseudonym, against the public interest in disclosure and any prejudice to defendant. (*Sealed Plaintiff v. Sealed*

Defendant, 537 F.3d 185, 189 [2nd Cir 2008]). The fifteen (15) points of consideration are extensive, including a final open-ended invitation to consider "... any other relevant factors that the court should consider in a specific case."

2019

CPLR § 2101 Affidavits of Non-English Speakers

For our yearly reminder that the failure to comply with CPLR § 2101(b) regarding submission of proof by persons not fluent in English, we see a criminal court accusatory instrument dismissed in *People v. Ramos* (64 Misc.3d 1240(A) [2019]). In *Ramos*, the defendant was charged with a Class A Misdemeanor based upon a criminal information supported by an affidavit of the Assistant District Attorney that a language translator was used to aid the complainant. The Assistant District Attorney did not submit an affidavit that he was fluent in the Spanish language, nor could he state that the translation was accurate.

Holding that CPLR 2101 applies in criminal proceedings, the Court found that the supporting deposition for a criminal information submitted to the Court without a certificate of translation meeting the requirements of CPLR 2101 is deficient. The delay attributable to the faulty submission ultimately was charged to the people and caused a dismissal of the criminal complaint on speedy trial grounds. (*See also, People v. Brooks*, 63 Misc.3d 158(A); *People v. Allen*, 63 Misc.3d 159(A)).

CPLR § 2101(c) Inclusion of Parties' Actual Names in the Caption--Restrictions on Anonymous Pleadings

Doe v. Roman Catholic Archdiocese of New York (64 Misc.3d 1220(A) [2019]) may be the first of a number of cases in which sexual abuse victims seek to proceed under a pseudonym caption. This case was a special proceeding brought by a petitioner who alleged he was sexually molested by a priest when he was approximately 13 years old. This claim was revived by the Child Victims Act, enacted in February 2019 (L. 2019, ch. 11) which extended the statute of limitations for a civil causes of action and opened a one year window to sue in cases for which the limitations period has run. The one-year period began on August 14, 2019.

Petitioner's application in *Doe v. Roman Catholic Archdioceses* sought permission of the Court to proceed as John Doe in the caption. The petitioner claimed that his children lived in the community and would be exposed to potential embarrassment, as a result of the publication of his of allegations against the church. The respondents successfully argued that they had the right to know the petitioner's identity, and that it would be impossible to defend against anonymous allegations.

The Court noted trial courts should not approve anonymous caption applications on a *pro-forma* basis, but should exercise discretion sparingly to allow such captions only in "unusual circumstances." (*Citing Applehead Pictures LLC v. Perelman*, 80 A.D.3d 181, 192 [1st Dept. 2010]). The analysis involves the balancing of the plaintiff's privacy interests against the presumption in favor of open trials and against any prejudice to the defendant. CPLR 2101 expressly requires that the caption of a summons and complaint include the name of all parties, which in almost all cases will be the true name and not a pseudonym.

The petitioner did not meet the "unusual circumstances" standard in *Doe, supra*, because the respondents argued prejudice as a result of the need to connect the petitioner's identity with the alleged sex abuse incidents. The cases unsuccessfully relied on by the petitioner in support of proceeding pseudonymously "... involve situations where defendants knew the plaintiff's true identity and/or plaintiff had consented to his or her legal name for

discovery purposes." This language leaves open the possibility of a pseudonym being used in a caption, provided the defendants receive notice of the plaintiff's actual identity, but in the absence of such disclosure a pseudonym caption appears unlikely to be allowed.

CPLR § 2101(f) Forgiveness of Defects in Form and Waiver

CPLR 2101(f) continues to perform its ameliorative function, and allowed acceptance of an allegedly defective affidavit in *Status General Development, Inc. v. 501 Broadway Partners, LLC* (163 A.D.3d 740 [2d Dept. 2018]). This was an appeal in which the Second Department held that the Supreme Court erred in denying a defendant's unopposed motion, on the ground that a supporting affidavit was not properly signed. The fact that the signature and jurat were contained on a page separate from the rest of the affidavit did not render the affidavit inadmissible, according to the Second Department. The court noted that "if anything, the separate signature page amounted to an irregularity that the court should have disregarded, as doing so did not prejudice the plaintiff" (*citing* CPLR 2001 and *Rosenblatt v. St. George Health and Racquetball Association, LLC*, 119 A.D.3d 45, 55-56). (The irregularity also was deemed waived because the opposing party failed to raise the issue after the service of the defendant's motion papers.)

Despite the forgiveness on offer in this case, it does point to the better practice of not including the jurat and signature for an affidavit on a completely separate page, because it allows the argument--unsuccessfully in this case--that the signature was not attached to the actual affidavit contents.

2018

§ 2101 Affidavits of Non-English Speakers

This may become an every-year update. Once again, it is worth reminding the bar that affidavits by persons not fluent in English will not be admissible unless the requirements of CPLR 2101(b) are met. If the affiant is not a fluent English speaker, do not submit an affidavit in English. Instead, the proper procedure is to draft an application in the language of the witness, together with an English translation and an affidavit by a translator stating his or her qualifications, and that the translation is accurate.

In *Welenc v. Board of Directors of Polish and Slavic Federal Credit Union*, (160 A.D.3d 683, 74 N.Y.S.3d 294 [2d Dept. 2018]), a petition containing Polish and English text was signed and submitted to a credit union board by more than 2,000 members of the credit union. The petition demanded that the Board call and hold a special meeting of the membership, to vote on whether to remove certain individuals from the Board and the Board's supervisory committee. The Board declined to hold the meeting, after determining the petition invalid due to claimed discrepancies between paragraphs written in Polish and English.

The credit union members then sued to compel the Board to hold the special meeting, and the Board sought summary judgment dismissing the complaint, based on the asserted translation discrepancies. This motion was denied and the members won the case, because the Board failed to follow the mandate of CPLR 2101(b) and submit the required affidavit. (The paragraphs written in Polish were not submitted to the Court by the Board with the required English translation, and the affidavit of a translator stating their qualifications and that the translation from Polish was accurate).

2017

A case decided shortly after the submission by the author of the 2016 Commentary update once again demonstrated the serious risk of failing to comply with the foreign language requirements of CPLR 2101 (b).

1650 Realty Associates LLC v. Sasoun, (52 Misc.3d 139(A), [2016] N.Y. Slip Op. 51131(U)), involved a landlord-tenant holdover proceeding in which the tenant had failed to sign a renewal lease for a rent-stabilized apartment.

The defendant's answer was written in English and "verified." The verification also was in English, and included a statement that the answer had been read and translated for the tenant. Any lawyer with any sense of how to prove things should have seen the problem, even without CPLR 2101--there was no proof under oath that the signature verified anything that the signer understood, including the oath required by CPLR 3020.

In response to the landlord's summary judgment motion, the tenant compounded the error by submitting affidavits by himself and his wife, neither of whom spoke English fluently. Both affidavits were written in English and stated that the affidavit was translated for the deponent. Neither was accompanied the translator's affidavit that CPLR 2101(b) so plainly requires. The proper procedure is to use an affidavit in the deponent's language, with an English translation and translator's affidavit, stating the translator's qualifications and the translation is accurate. The affidavits in *Sasoun* were facially defective and inadmissible--resulting in the loss of the apartment and a lot of money for tenants who apparently qualified for rent stabilization. The landlord's motion for summary judgment was granted and the judgment awarded the landlord not only possession of the premises, but also rent arrears of $49,354.55.

Riu, Qin Chen Juan v. 213 West 28 LLC, (149 A.D.3d 539 [1st Dept. 2017]), was another landlord tenant dispute, this time involving an alleged default. Apparently the tenant failed to comply with a lease with requirement for insurance coverage, after which the landlord sought to invoke default remedies. As is somewhat common in real estate disputes over whether there has been a lease default, the tenant sought a "Yellowstone Injunction" to maintain the *status quo* pending judicial determination of whether the default actually occurred (*see First National Stores, Inc. v. Yellowstone Shopping Center, Inc.*, 21 N.Y.2d 630 [1968]).

In support of the motion, the non-English speaking tenant submitted an affidavit without the translator's affidavit required by CPLR 2102(b). Thus, the tenant provided "no factual support for the motion" and the denial of the requested injunction was affirmed.

Copies under CPLR 2101(e)

Global Liberty Ins. Co. v. Gorum, (143 A.D.3d 768 [2016]), involved a default judgment taken by a no-fault insurance carrier. On its CPLR 3215 motion to enter a default judgment, the insurer was required to prove service of the summons and complaint; the facts constituting the claim; and the default. There was no issue regarding proof of service or the default, but with respect to the facts constituting the claim, the plaintiff submitted a copy of an expert affirmation. Citing 2101(e), the Appellate Division, Second Department considered the copy and found that it did demonstrate facts supporting the claim against the defendant.

2016

CPLR 2101(b) Language

Two cases decided in 2016 show that the failure to comply with the simple foreign language requirements of

CPLR 2101(b) is particularly dangerous on motions for summary judgment.

In *Peralta-Santos v. 350 West 49th Street Corp.* (139 A.D.3d 536 [2016]), the plaintiff claimed that he had been injured when he fell down stairs in defendants building, after becoming dizzy. The defendant moved for summary judgment, submitting a transcript of the plaintiff's deposition testimony. The plaintiff had testified (apparently in addition to the fact that he neither spoke nor understood English) that he had not discovered what caused him to fall.

The plaintiff opposed the defendant's motion with his affidavit claiming that that he slipped and fell on restaurant menus strewn on defendant's stairs. This affidavit was not accompanied by a translator's affidavit under CPLR 2106, but the Supreme Court nevertheless denied the defendant's motion, holding that the cause of the fall was a question of fact.

The First Department reversed, holding that the plaintiff's affidavit was inadmissible, and that the plaintiff had failed to raise a triable issue of fact in opposition to the defendant's motion (the attempted rewriting of history by plaintiff and "feigned issues of fact" also were problems). The case is interesting because it appears that it was the deposition testimony that triggered the rejection of an affidavit that failed to comply with CPLR 2106. The plaintiff's lack of English fluency might not have been clear on the face of his affidavit, but it apparently was evident from other proof in the motion papers.

In *Saavedra v. 64 Annfield Court Corp.* (137 A.D.3d 771 [2016]), the Supreme Court granted summary judgment dismissing a cause of action based upon an alleged violation of Labor Law § 240. The defendant had moved for summary judgment, claiming that the plaintiff's conduct ". was the sole proximate cause of the accident that caused his alleged injuries ." (the plaintiff had erected a makeshift structure that collapsed and caused the plaintiff to fall approximately 8 to 10 feet). In opposition to the defendant's motion, the plaintiff submitted an affidavit translated from Spanish into English--however, the affidavit was not submitted with a translator's affidavit and qualifications of the translator. Even though the translation was supplied by a translation company, the failure to follow the statutory requirements (the translator's affidavit stating her qualifications and that the translation is accurate) rendered the affidavit inadmissible, and the defendant was successful on the summary judgment motion.

2015

C2101 Redaction of Confidential Personal Information from Court Papers

Although not mentioned in CPLR 2101, a new Uniform Rule requires omission or redaction of confidential personal information in filed court papers. *See*, 22 N.Y.C.R.R. § 202.5(e). The rule contains similar redaction requirements as the federal rule (see, F.R.C.P. 5.2) and applies to both paper and electronically filed cases.

The confidential personal information to be redacted is listed in four categories--taxpayer identification numbers (except for the last 4 digits); the date of a person's birth (except for the year); the full name of a minor (although initials may be used); and a financial account number (again except for the last 4 digits).

If a party in good faith believes that a full statement of this confidential personal information must be submitted, they can apply for leave of court and file such information in unabbreviated form with certain restrictions. There also is a provision allowing for the inclusion of confidential personal information in certain consumer credit cases, if the defendant appears and denies responsibility for the identified account. The redaction policy is not intended to affect standards for the sealing of court papers under Uniform Rule 216.1, which still limits sealing

to “good cause” situations.

CPLR 2101(b) Language

CPLR 2101(b) contains the straight-forward requirement that an affidavit or exhibit filed in a foreign language must be accompanied by an English translation and an affidavit by the translator. The translator’s affidavit must state the translator’s qualifications and that the translation is accurate. The legislative intent of these requirements is twofold--to insure that a signature on a written sworn statement is done with an understanding of the content, and that the sworn content is presented to the court in English. The failure to attain these minimal standards will render the foreign language document useless.

In *Raza v. Gunik*, 129 A.D.3d 700, 12 N.Y.S.3d 116 (June 3, 2015), a personal injury plaintiff was granted summary judgment on liability, after the rejection of a defense affidavit. The defendant “stated” in the affidavit that the affidavit had been translated from English to Russian for the witness. On its face, such an affidavit is defective, as there is no sworn attestation that the signer understood this assertion or anything else in the document. The affidavit was not accompanied by a translator’s affidavit. False swearing is an intent crime, so a sworn statement must be created in a language the signing witness understands in order to ensure the witness faces the perjury risk for false swearing. *See*, Penal Law § 210.00(5); see CPLR 2309. If the witness is not fluent in English, the translation method must be used.

Davidson XQ, LLC v. Watson, et al., 47 Misc.3d 1222(A), 16 N.Y.S.3d 791, shows that failure to translate foreign language exhibits into English will render them ineffectual. *Davidson* involved a defendant attorney who suffered a default judgment which she thereafter sought to set aside pursuant to CPLR 5015. The attorney claimed that she had not been properly served with process, and submitted an affidavit stating that although she previously maintained a law office in Manhattan, she had moved to Israel where she had allegedly resided at the time of service. In support of this assertion, the attorney submitted as exhibits two unidentified forms of Israeli identification, but these documents were in Hebrew and not submitted with the translation affidavit as required by CPLR 2101(b). The Court held that the defendant failed to provide sufficient facts to rebut the statements in the process server’s affidavit of service.

The failure to follow the requirements of CPLR 2101(b) can have severe consequences in matrimonial proceedings. In *Heydt-Benjamin v. Heydt-Benjamin*, 127 A.D.3d 814, 6 N.Y.S.3d 582, a defendant’s application for equitable distribution of the plaintiff’s pension was rejected. The defendant failed to prove the existence of a pension through a document written in German, but not accompanied by the requisite translator’s attestations under CPLR 2101(b). The Supreme Court rejected the application and the Appellate Division affirmed.

However, in *Ortiz v. Food Machinery of America, Inc.*, 125 A.D.3d 507, 5 N.Y.S.3d 8 (1st Dept.), the Appellate Division declined to reverse an order of the Supreme Court granting a motion to dismiss for lack of personal jurisdiction. The argument advanced in support of reversal was that the Supreme Court erred in considering an affidavit by an Italian citizen, submitted in English, but accompanied by an Italian translation (apparently the translation was added for the benefit of the Italian notary). Counsel for the witness represented to the Court that the witness spoke English and communicated with counsel in English in the drafting of the affidavit. In this unusual circumstance, the affidavit was considered by the Court.

In the Matter of the Appointment of a Guardian S.A.B.G., a Minor, 47 Misc.3d 812, 5 N.Y.S.3d 813, the court rejected an affidavit submitted with an unsworn statement by a translator that she is “proficient in both English and Spanish.” The court found this assertion to be ambiguous and insufficient to state the required

"qualifications" under CPLR 2101(b). The court referenced "professional" qualifications and "declined to conjecture" on the translator's level of proficiency, or how such "alleged proficiency" was earned. This case suggests the safe course is to use of translators with some court experience or other significant qualifications.

Pyke v. Bachan, 123 A.D.3d 994, 999 N.Y.S.2d 508 (2d Dept. 2014) demonstrates the importance of raising non-compliance with the translator formalities prior to an appeal. In *Pyke*, the Appellate Division rejected the argument on appeal that two affidavits were inadmissible because they did not comply with 2101(b) because the objection was not raised below, thus indicating CPLR 2101(b) objections may be waivable.

CPLR 2101(c) Failure to Include a "Party" in the Initial Caption

In *Gullas v. AGDH Jackson Heights, LLC*, 44 Misc.3d 62, 991 N.Y.S.2d 826, the Supreme Court Appellate Term, Second Department, dismissed a purported appeal by the wife of Paul Gullas. Mr. Gullas was an owner of shares of a residential cooperative unit who had commenced an action to recover for damages to the unit due to the defendants' alleged negligence. It appears that Mr. Gullas' wife, Cecilia Gullas, was added to the caption at some point during the litigation, but she was not formally added as a party by stipulation or order. The caption on the summons did not include Cecilia Gullas as a plaintiff, which turned out to be fatal to her "appeal."

The Appellate Term held that the caption of a summons must include the names of all the parties, and that Ms. Gullas was not aggrieved by the dismissal orders she sought to appeal, because she was not a party. The "purported" appeal was dismissed.

CPLR 2101(f) Defects in Form

In *Francis v. Midtown Express, LLC*, 124 A.D.3d 493, 998 N.Y.S.2d 303 (1st Dept. 2015), the Appellate Division reversed an order granting the defendant's motion to change venue. The plaintiff designated venue in the county of the defendant's residence, but the summons had incorrectly stated that venue was based on the plaintiff's residence. Citing CPLR 2101(f) and noting that venue based on the defendant's residence would be proper, the Appellate Division held that such a technical mistake should have been disregarded by the court below. The moving defendant had made no showing of prejudice, nor any basis for a discretionary change of venue.

C2101(f)

In *Grskovic v. Holmes* (111A.D.3d 234, 972 N.Y.S.2d 650 [2d Dept. 2013]), the Second Department found some pretty serious e-filing mistakes to be correctable "glitches," and used CPLR 2001 to forgive them *nunc pro tunc*. The case also is discussed in the commentary to CPLR 2102, which addresses filing of papers.

The holding in *Grskovic* may portend further liberality under CPLR 2101 (f), which also allows "freely given" dispensation from practitioner errors. The *Grskovic* opinion is relevant to both CPLR 2001 and CPLR 2101(f) because of their similar leniency mission, and also because the court drew a distinction between the showing necessary for "correction" as compared to "disregarding of errors."

There is a slight difference in language between CPLR 2001 and CPLR 2101(f): CPLR 2001 states that "corrections" may be allowed "upon such terms as may be just," while a "mistake, omission, defect or irregularity" shall be "disregarded" if a "substantial right of a party is not prejudiced" and any applicable fees are

paid. CPLR 2101(f) provides that "a defect in the form of a paper, if a substantial right of a party is not prejudiced, shall be disregarded by the court, and leave to correct shall be freely given." The CPLR 2101(f) language does not indicate that disregarding and correcting errors are subject to different standards, but *Grskovic* suggests this is possible.

The court in *Grskovic* found that--"a 'correction' of a mistake appears to be subject to a broader degree of judicial discretion without necessary regard to prejudice, whereas a complete 'disregarding' of a mistake must not prejudice an opposing party." (*Grskovic*, 111 A.D.3d at 243). "Prejudice" within the meaning of CPLR 2001 and 2101 could be deemed to relate to the practical impact of the mistake on the defendant, and since CPLR 304-b allows service to be delayed up to 120 days after filing, it could be argued that there was really no prejudice in the *Grskovic* case, because the defendant need not receive immediate notice of the filing in any event.

It would seem that the absence of real prejudice as a standard is the operative analysis in the application of both CPLR 2001 and 2101(f), so that the "disregarding" and "correcting" both may be given their fullest ameliorative effect. We may hope that in the absence of actual substantive harm to a non-mistaken party, courts will continue to diminish the import of all non-substantive technicalities and procedural missteps.

C2101:2. Language.

It appears that the requirement in CPLR 2101(b) that foreign language affidavits or exhibits be accompanied by an English translation (together with the translators qualifications), still occasionally is not followed. In an unreported case in Kings County (*Levy v. Bomgarten*, 2014 NY Slip.Op. 50549 [Sup.Ct. Kings Co., April 4, 2014]), a personal injury plaintiff made the mistake of submitting an English affidavit that a translator had helped prepare.

The defendant had sought dismissal of plaintiff's Labor Law § 241 claim pursuant to a residential owner exemption, and the plaintiff opposed the exemption, claiming that the subject property also was used for commercial purposes. The affidavit submitted on the point stated that "I had a translator present with me who translated all of my attorney's words for me from English to Hebrew and I responded to my attorney in Hebrew, which was translated to English." This affidavit was rejected as "facially defective and inadmissible" by the Court, because it did not comply with CPLR 2101(b). Presumably, that quoted sentence in English was not understood by the deponent.

The affidavit was not accompanied by a translator's affidavit, and the creation of an affidavit with the help of a translator clearly is *not* sufficient for admissibility. For non-English-speaking witnesses (and for those of less than full fluency in English), the appropriate practice under CPLR 2101(b) is to obtain an affidavit in the foreign language, so it is clear that the deponent understands and attests that the signed text is true. The foreign language affidavit then is translated by a qualified translator, who confirms under oath their translating qualifications and that the translation is accurate.

The plaintiff in *Levy v. Bomgarten* similarly failed to generate admissible testimony in a deposition transcript. The transcript also was inadmissible because it did not contain the requisite certification and swearing by the translator. Instead, a statement was made at the outset of the deposition that a translator was present and performing a translation for the witness. This was not only insufficient, it actually made the inadmissibility clear.

In *Rosenberg v. Piller* (116 A.D.3d 1023, 985 N.Y.S.2d 250 [2d Dept. 2014]), the Appellate Division, Second Department appears to have allowed a waiver of an objection to a translated document after a party's failure to

object to it. The plaintiff and defendant in *Rosenberg* jointly owned several corporations, and signed an agreement written in Hebrew naming arbitrators to resolve their disagreements. One of the arbitrators later withdrew from the arbitration proceeding, and the remaining arbitrator rendered an award.

The Plaintiff commenced an action against the defendant, who moved to dismiss based upon the arbitration award. In support of the motion to dismiss, the defendant submitted an English translation of the arbitration agreement, and the plaintiff did not object to the translation. Instead, the plaintiff argued that the arbitrator improperly declined to allow the plaintiff's attorney to participate in the arbitration hearing.

The Supreme Court denied the defendant's motion to dismiss based on the arbitration award and held that the plaintiff was denied the right to counsel in the arbitration. The court also determined that the written agreement to submit the controversy to arbitration was valid and should be enforced. The plaintiff then moved to renew, arguing that the previously submitted English translation of the agreement to arbitrate was not accurate. The motion to renew was denied.

The Second Department affirmed the lower court holding that the parties had agreed to arbitrate, noting that no excuse had been given for failing to object to the translation on the original motion. In addition, the new translation submitted on the motion to renew was not in admissible form, because plaintiff failed to submit an affidavit by the translator attesting to qualifications and that the translation was adequate. (*Rosenberg*, 116 A.D.3d 1023, 985 N.Y.S.2d 250). The lessons of *Rosenberg* are first that a waiver may be possible, so check translations for accuracy at the first opportunity, and second, admissibility of translated evidence may be destroyed by failing to include the requisite translator's affidavit.

2013

C:2101:2 Language

CPLR 2101(b) requires that papers served or filed be in the English language, but some witnesses don't have the ability to make an affidavit in English. The proper procedure in that case is to submit an affidavit in the foreign language, accompanied by an English translation. The English translation must be authenticated with an affidavit by the translator, stating his or her qualifications and that the translation is accurate. This procedure was *not* followed in *Reynoso v. Bovis Lend Lease, LMB, Inc.* (39 Misc. 3d 1224(A), Sup. Ct. Kings Co.), an unreported case involving a work place injury.

The plaintiff in that case submitted an "affidavit" in English by a co-worker, but the co-worker's lack of English fluency was apparent from the content of the document, which included the following: "[t]his statement has been read and translated to [him] from English to Spanish and it is true to the best of [his] knowledge." Such use of a spoken translation for an affidavit in English clearly is not compliant with CPLR 2101(b)--there is no signed and sworn statement that the witness can read and understand, and therefore no real threat of perjury for a false statement. A further problem is that such an affidavit would not include the translated material in the record.

CPLR 2101(b) requires the affidavit of accuracy of the translation, but the inclusion of the translated language text also allows adverse parties to object to the accuracy of a translation. The affidavit in *Reynoso* failed to comply with CPLR 2101(b), and was rejected by the Court as proof on a motion for summary judgment. (*Reynoso v. Bovis Lend Lease, LMB, Inc.*, 39 Misc. 3d 1224(A), Sup. Ct. Kings Co.).

A different result ensued in *M.B.S. Moda, Inc. v. Fuzzi S. P. A.* (38 Misc. 3d 1208(A), Sup. Ct. N.Y. Co.), where

the defendant moved to dismiss the complaint, on among other grounds, a contractual forum-selection clause written in Italian. The dispute arose out of an agent/sales agreement between an Italian defendant and the plaintiff, who was the defendant's agent and sales representative in New York. The agency agreement provided (in Italian) that all controversies arising out of the contract must be submitted to the exclusive jurisdiction of the courts in Rimini, Italy. The defendant moved to dismiss, supporting the motion by an affirmation by the defendant's attorney, who translated the forum selection clause from Italian to English. This procedure was held in compliance with 2101(b), because defendant's attorney affirmed that she was fluent in both Italian and English, and that the translation of the contract was accurate.

C:2101:6 Defects in form; waiver

CPLR 2101(f) allows defects in the form of papers to be disregarded by the court or waived in order to promote dispositions of matters on the merits. It is the companion provision to CPLR 2001, which generally applies to forgiveness of any mistake, defect or irregularity at any stage of an action. As Professor Vincent C. Alexander notes, such liberality is "essential in an enlightened system of civil procedure" because form should not be elevated over substance. (Alexander, Practice Commentary to CPLR 2001).

PRACTICE COMMENTARIES

by Thomas F. Gleason

C:2101:1 Quality, size and legibility of paper.

Subdivision (a) of CPLR 2101 provides the technical requirements for papers served or filed in a civil action. Except for the summons, subpoenas and some other papers customarily transmitted on half-size paper, the rule is that papers must be 11 x 8 ½ inches, on white paper with black ink for the type. (A literal interpretation would mean even signatures in black, not blue or other colored ink). The name of the signor shall be printed beneath each signature on papers.

The size of the type must be no less than 12 point size for the summons, and no less than 10 points for all other papers, excluding exhibits. The purpose of the requirement is to ensure easy readability, which interestingly is sometimes less related to point size than the "x-height," a term referenced in CPLR 105(t) and General Construction Law § 62.

X-height is the height of lowercase letters "exclusive of ascenders or descenders" such as the mast and tail of an "h" and "g." The type size requirement is met if the lowercase letter is a minimum of 45% of the specified point size. The common fonts in word processing programs meet this standard, and the requirement serves to inhibit the deliberate selection of less readable fonts.

A "point" is an actual unit of measure, but few practitioners have the patience (or the eyesight) to actually convert points to inches using a ruler, relying instead on their word processor to automatically adjust the font as necessary. In a (very) modest tilt toward adoption of the metric system, the Legislature defines a "point" in CPLR 105(t) and General Construction Law § 62 as .351 millimeter, which is about $^{1}/_{72}$ of an inch.

The practitioner should also be aware of court rules that may bear on the subject of font size and other requirements for papers, particularly with respect to appellate briefs. The Uniform Civil Rules for the Supreme Court and County Court § 202.5(a) (and parallel rules for other civil courts) contain significant additional requirements for papers.

Papers must be at least double spaced (except for quotations) and margins must be at least 1 inch. Single side printing is the norm, except where papers are fastened "book style" on the side, in which case double sided copying is permitted.

CPLR 2101 requires the "writing" be "legible and in black ink," which admits the possibility of handwritten papers, except apparently respecting the summons, which must be "in clear type," and as noted above at least 12 point size. The provision requiring 12 point type for the summons was added in 1995 based upon the recommendation of the Office of Court Administration Advisory Committee on Civil Practice. (See, N.Y. Advisory Committee on Civ. Prac., 1993 Report, reprinted in 2 McKinney's 1993 N.Y. Session Laws pp. 2935, 2941). The objective was to avoid small or obscured type on a jurisdiction acquiring document that would not be reasonably legible.

It is a good idea to be particularly vigilant respecting compliance with the type size requirement on the summons, because it is tendered when personal jurisdiction is acquired. CPLR 2101(a) and the legislative memorandum preceding the 1995 amendment did not indicate the sanction, if any, to apply for serving a non-compliant summons, but it would appear that CPLR 2101(f), which permits defects in form to be ignored if a substantial right is not prejudiced, should govern the issue, so long as the failure is not extreme.

At least one case adopted this sensible approach. A summons was not deemed jurisdictionally defective since the type the plaintiff used was only "a bit less than 12 point," and the print was "very clear and completely readable." The court found the essential notice function of a summons had been fulfilled, and so the defect was in the class of a mere irregularity to be disregarded or freely corrected. (*United States Fidelity and Guaranty Co. v. King Van and Storage, Inc.*, 1995 WL 17959449 [N.Y.Sup.] [Trial Order]). The paucity of other case law on the subject seems to indicate that either there is general compliance, or courts are applying CPLR 2101(f) and forgiving such technicalities without written opinion.

CPLR 2101(a) specifically excludes exhibits from the point type requirement, because exhibits often are documents prepared outside of litigation, perhaps in the ordinary course of business.

However a new and frequently encountered issue is the production of exhibits derived from electronic documents such as emails. Usually a printout derived from the appropriate software is used, together with a description of the nature of the document and the manner of its production, in an affirmation or affidavit attaching the exhibit. However, it is not good practice in civil actions to attach to papers compact discs, tapes, "jump drives" or other electronic media, as they are not in compliance with CPLR 2101. Perhaps we may expect future measures to address electronic evidence on paper motions and other non-trial applications.

CPLR 2101:2 Language.

CPLR 2101(b) requires all papers served or filed to be in the English language, and in "ordinary usage." This means common vernacular and not obscure terminology or jargon, to the extent possible. Acronyms should be avoided, at least without first introduction of the term fully spelled out, in accordance with ordinary English usage. Foreign language expressions not in common English usage also should be avoided.

If a witness or party does not speak English, an affidavit may be submitted in a foreign language, but it must be accompanied by an attached English translation and another affidavit by the translator, specifically stating the qualifications of the translator and attesting that the translation is accurate. There are no stated minimum qualifications, but fluency in the foreign language and English ought to be the minimum attested qualification.

Of course, if the witness or party is not fluent in English, it is a very bad idea (to say the least), to submit an affidavit in English. Even if the affidavit is a true translation of what the witness would swear to in their native language, an affidavit signed by a witness who does not understand the contents in English may provide a pretty effective exhibit to the adversary. The deposition or cross-examination, in English, at which a witness cannot understand or confirm the contents of their own affidavit will not go well.

Polish American Immigration Relief Committee, Inc. v. Relax (1991, 172 A.D.2d 374, 568 N.Y.S.2d 754 [1st Dep't]), is an interesting application of the translation requirement rule. It was a libel action in which the defamatory statements were contained in an article written entirely in Polish. Instead of quoting the article in the complaint (stating the words complained of is a particularity-in-pleading requirement for libel or slander cases--see CPLR 3016[a]), the plaintiff attached the Polish article as an exhibit. This of course triggered the CPLR 2101(b) requirement that an English translation also accompany the complaint, with the requisite translator's affidavit.

National Puerto Rican Day Parade v. Casa Publications, Inc. (79 A.D.3d 592 [1st Dep't 2010]), was another libel case involving 19 allegedly defamatory news articles published in a Spanish language newspaper. The complaint stated in English the allegedly defamatory words, and attached the offending articles and two translator affidavits to the complaint. A motion to dismiss on grounds of non-compliance with CPLR 2101(b) was denied by the Supreme Court, and the Appellate Division affirmed. The Court rejected the defendant's assertion that the complaint was defective because the translators had not translated the entirety of each article into English; because the translators had not signed their affidavits contemporaneously with the complaint; and because the translators had not printed their names beneath the signature line.

These claimed defects were not grounds for dismissal, the Court reasoned, because allegedly defamatory words were translated by professional translators and an itemized list of their qualifications was unnecessary. The Court distinguished cases in which there was "a complete absence of any attested translator affidavits" and where a document was translated by a party's family member. (*See, National Puerto Rican Day Parade v. Casa Publications, Inc.*, *supra*; *Martinez v. 123-16 Liberty Ave. Realty Corp.*, 47 A.D.3d 901, 850 N.Y.S.2d 201 [2d Dep't 2008]; *Yoshida Print. Co. v. Aiba*, 240 A.D.2d 233, 659 N.Y.S.2d 7 [1997]).

Rosado v. Mercedes-Benz of North America (1984, 103 A.D.2d 395, 480 N.Y.S.2d 124 [2d Dep't]), holds that a party who produces preexisting foreign-language documents in response to a pretrial discovery demand does not have to translate them. This makes sense because CPLR 2101(b) only requires a translation for foreign-language document "served or filed" with the court.

C:2101:3 Caption.

CPLR 2101(c) requires the caption to state the parties, the court and venue, the title of the action, the nature of the paper and the index number once it has been assigned. The summons, complaint and a judgment must include the names of all the parties, because such documents when filed can have important legal effect on the parties named. For other papers it is sufficient to state the name of the first named party on each side, with the appropriate

indication that others are omitted (usually "et al."). Uniform Rule 202.5 also requires inclusion of the name of the assigned judge, if a judge has been assigned. The name usually is stated in the same area on the right of the caption where the paper is identified.

In cases of public importance or in cases expected to be important precedent, it can be a matter of strategy as to which party is selected as first party named. For example, some membership associations wish to be associated with particular claims, and others wish to preserve some sense of anonymity to the extent possible. In such cases it is a good idea to discuss the possible public effect of being first named with all the clients. For some clients notoriety is not a problem and even a benefit, but there also are many former parties to litigation whose names, now to their consternation, are associated with important cases or legal principles. This was due to the happenstance that their names were the first party in the caption.

Uniform Rule 202.5 also provides that the party filing the first paper in an action shall obtain from the county clerk the index number, which thereafter is to be stated on the first and cover page, on the right side of the caption on each paper. That party, usually the plaintiff, also is required to communicate in writing the index number "forthwith" to all other parties to the action, which usually will occur through service. CPLR 2101(c) also requires the inclusion of the county of venue, which will be done at the top of the caption, and a brief description of the nature of the paper to the right of the caption (such as "Verified Complaint"; "Affidavit in Support of ...." etc.).

In *Balogh v. The Civil Service Employees Association, Inc.* (30 Misc.3d 809), discussed in C:2101:5, the failure to designate the court in the caption on the summons was deemed a correctable defect, but the court had to distinguish some pre-commencement by filing cases that held such an omission jurisdictional. (*See, Tamburo v. P & C Food Mkts.*, 36 A.D.2d 1017).

There are provisions of law that allow parties to proceed by pseudonym (for example in the case of a party who alleges that they have been the victim of a sex offense. *See*, Civil Rights Law § 50-b), but cases in which pseudonyms are used are pretty rare. Courts have allowed this only on statutory entitlement or upon the balancing of the plaintiff's privacy interests against the presumption that all judicial proceedings in New York are open and public (on the presumption of openness of court proceedings and papers, *see generally*, *Westchester Rockland Newspapers v. Leggett*, 48 N.Y.2d 430 [1979] and citing cases; as well as Judiciary Law §§ 255 and 255-b). *Doe v. New York University*, 2004, (6 Misc.3d 866, 878-81, 786 N.Y.S.2d 892, 902-04 [Sup.Ct.N.Y.Co.]), held that anonymity is limited to "situation is 'compelling' involving 'highly sensitive matters.' " Thus, the use of a pseudonym presumably would be preceded by a sealed motion specifically articulating the facts and bases for the request for anonymity. (See the standard for sealing under Uniform Rule 216.1).

C:2101:4 Endorsement by attorney.

CPLR 2101(d) requires that papers be "endorsed" with the name, address and telephone number of the attorney for the party serving or filing the paper. If a party is appearing *pro se*, their name, address and telephone number must be endorsed in the place usually reserved for the attorney.

If an attorney does not wish to consent to service by fax, which is not recommended and is becoming less and less common in civil litigation, the fax number of the attorney's office should *not* be included in this endorsement. Fax communications can then be accepted on a limited consensual basis, but today cooperating attorneys who wish to facilitate electronic notice instead use email transmittal (on consent). As noted in the Commentary to CPLR 2103, email service presently is limited to the New York State Courts Electronic Filing System ("NYSCEF"; *see* www.nycourts.gov/efile) as described in CPLR 2103 and implemented in sections 202.5-b and 202.5-bb of the

Uniform Rules.

The endorsement requirement of CPLR 2101 is distinct from the signing of papers requirement provided in Subpart 130-1 of the Rules of the Chief Administrator. The signing requirement in that Rule is related to the possible award of monetary sanctions and costs for frivolous litigation. The requirement applies to attorneys and *pro se* parties, and states that the court "shall strike any unsigned paper if the omission of the signature is not corrected promptly after being called to the attention of the attorney or party." (*See*, 22 NYCRR § 130-1.1-a).

The signature serves as the certification by the attorney or *pro se* party "to the best of that person's knowledge, information and belief, formed after reasonable inquiry under the circumstances, [that] the presentation of the paper or contentions therein are not frivolous."

The federal analog of the rule against submitting frivolous papers is Rule 11 of the Federal Rules of Civil Procedure. In New York, "frivolous conduct" is defined in 130-1.1(c) as:

For purposes of this Part, conduct is frivolous if:

(1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law;

(2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or

(3) it asserts material factual statements that are false.

Frivolous conduct shall include the making of a frivolous motion for costs or sanctions under this section. In determining whether the conduct undertaken was frivolous, the court shall consider, among other issues, (1) the circumstances under which the conduct took place, including the time available for investigating the legal or factual basis of the conduct; and (2) whether or not the conduct was continued when its lack of legal or factual basis was apparent, should have been apparent, or was brought to the attention of counsel or the party.

In *Salt Aire Trading, LLC v. Sidley, Austin, Brown & Wood, LLP* (93 A.D.3d 452 [2012]), the signing requirement was not met when an action was commenced by filing a summons with notice, signed on behalf of the plaintiff by two lawyers from the state of Washington. The lawyers were not admitted to practice in New York state, and the problem for the unqualified signors went beyond having the paper stricken, because the First Department held that in signing the pleading, the out-of-state attorneys had acted in violation of Judiciary Law § 478, which makes it unlawful for a person to appear as an attorney in the state without having been licensed and having taken the constitutional oath.

The court in *Salt Aire* noted that the plaintiff had a right to represent himself, but he could not do so by an attorney-in-fact or other person not authorized to practice law. The Appellate Division held that this particular defect could *not* be waived by defendant, or by the application of CPLR 2101(f) (which permits defects or irregularity to be ignored if the substantial right of a party is not prejudiced). Instead the court struck the pleading without prejudice to a new filing. This seems a bit harsh, as the Rule calls for striking only if the signing defect is

not promptly corrected, but perhaps the Court intended a strong statement on the unauthorized practice by out-of-state attorneys.

However, there are other cases showing significant consequences for failure to meet the signing requirement, such as where the attorney allowed others in his office to sign his name. (*See*, *Matter of Shapiro*, 55 A.D.3d 291, and *Matter of Moroff*, 55 A.D.3d 200). In one case, the practice resulted in a six month suspension and in the other some 4,600 matters needed refilling. Professor Siegel has an excellent discussion of these cases in Siegel's Practice Review, 203:2-3. (*See also*, Siegel, New York Practice [5th Ed.] § 201, pp. 341-342).

C:2101:5 Copies.

CPLR 2101(e) provides that copies of documents generally are permitted to be served or filed, except when there is a specific requirement for the original to be served and filed. In most instances copies will suffice, however, practitioners should be alert for particular situations, such as with a bond or undertaking, where the original may be required. Often parties submit the original papers with ink signatures to the court and copies are served on the other parties. Many practitioners distinguish the original signed copies by different color backers, though no such color scheme or even the backer itself is required. After motions or other applications are decided, the originals usually are filed, however, this is not required by CPLR 2101(c).

In *Rechler Equity B-1, LLC v. Akr Corporation* (98 A.D.3d 496 [2012]), the Second Department held that it was error for the Supreme Court to deny a motion for summary judgment because the plaintiff's affidavits had not been "originally signed." Citing CPLR 2101, the Appellate Division stated that copies may be "served or filed," so it was error for the lower court to decline to address photocopies of affidavits on the merits.

C:2101:6 Defects in form; waiver.

CPLR 2101(f) is a very important provision implementing the general policy of the CPLR, that it be liberally construed to secure the just, speedy and inexpensive determination of civil judicial proceedings. The CPLR provide that at any state of the action, including the filing of commencement papers, the court may permit a mistake or defect to be corrected or disregarded (*see*, CPLR 2001; CPLR 103).

Section 2101(f) provides that any defect in the form of the paper is to be "disregarded by the court" so long as a substantial right of a party is not prejudiced. In addition, "leave to correct shall be freely given," and a party in receipt of a paper that is defective in form is deemed to have waived objection to the defect, unless within 15 days after receipt the allegedly defective paper is returned with a statement of particular objections. In practice, of course, this rarely occurs, because courts are likely to permit a corrected paper to be served or filed despite the objection. But there are cases in which a party sought dismissal, claiming that a defect in a paper was more than one of form.

For example, in *Balogh v. The Civil Service Employees Association, Inc.*, discussed in C:2101:1 above, an employee brought an action for alleged violations of the Human Rights Law and negligence but failed to expressly designate the supreme court in her initial summons and complaint caption. The defendant requested and received an extension of time to answer and later claimed that the plaintiff's failure to name the court constituted a jurisdictional defect, supposedly rendering the action a nullity. By that time the statute of limitations had expired, though the plaintiff subsequently filed a corrective summons.

The court in *Balogh* (*supra*), held that the failure to designate the court in the caption on the summons was a correctable defect, but in doing so had to distinguish some pre-commencement by filing cases, which had held the failure to identify the court to be jurisdictional. The prior rule that a summons without a stated court in the caption was "radically defective," dated to the 1850s. In *Dix v. Palmer* (5 How. Pr. 233 [1851]), the court expressed the rationale that "a summons certainly should inform a party in what court he is sued." (*See, also Tamburo v. P & C Food Mkts.*, 36 A.D.2d 1017).

In *Balogh*, however, Justice Lynch sensibly held that such a notice function could be met under the CPLR 304 commencement by filing system, because the summons delivered to the defendant in that case had been stamped by the appropriate County Clerk with the index number. Thus, the summons as delivered provided sufficient notice of the court, and the defect was correctable under CPLR 2101(f). The court denied a motion to dismiss and granted the plaintiff leave to amend the summons. (*See also* Anderson v. Monticup, 124 A.D.2d 320, 508 N.Y.S.2d 102).

C:2101:7 Service by electronic means.

Subdivision (g) of CPLR 2101 provides the rule for papers served by electronic means (as defined in subdivision (f) of Rule 2103). Subdivision (g) was added by Chapter 367 of the Laws of 1999, which also changed CPLR 2103, dealing with service of papers, and CPLR 304 which provides for commencement of an action or special proceeding by filing with the clerk. The changes facilitated the limited pilot program for commencement of actions, service and filing of electronic papers over the Internet. The implementing provisions for the program in its present form (which is much broader) are in CPLR 2103(b)(7); 2103(f)(2), and in Uniform Rules 202.5-b and 202.5-bb.

The term "paper" is retained even in the electronic context, which may seem strange, but the term is so pervasive in the court system that the Legislature could find no appropriate substitute. An acceptable electronic paper must be "capable of being reproduced by the receiver" in the standard form described by the first four subdivisions of CPLR 2103, i.e., printed onto the usual 11 x 8 ½ paper. This occurs through use of the Adobe Portable Document Format ("PDF"). The Practice Commentary for CPLR 2103 contains further information on the electronic filing program.

LEGISLATIVE STUDIES AND REPORTS

Subd. (a) of this rule is based on rule 10 of the rules of civil practice. The Revisers included notices of appearances among the papers permitted to be on a short sheet and they state that the notice of appearance may, of course, be combined with the answer.

In this subdivision, the term "writing" includes all means for the inscription of words on paper, such as handwriting, typewriting, or the various methods of mechanical duplicating or printing.

New Jersey Rule 4:5-9 is the source for the last sentence of this subdivision, and the word "printed" is used to denote all types of writing other than cursive handwriting.

Subd. (b) first sentence, is taken from rule 10 of the rules of civil practice, while the second sentence has no counterpart in the civil practice act or the rules of civil practice.

The Second Report to the Legislature, discussing this subdivision, states that a general requirement of ordinary English usage

is made in lieu of the specific material on names of process, technical words, abbreviations and numbers.

Presumably an affidavit or exhibit annexed to a paper was not itself required to be indorsed by the attorney, if the paper is so indorsed, despite the wording of rule 11 of the rules of civil practice. The similar requirement of subd. (d) of this rule, as well as that of a caption in subd. (c) of this rule, would apply only to the paper to which the affidavit or exhibit is annexed. It is required by this subdivision, however, that the annexed affidavit or exhibit be translated if it is in a foreign language. This requirement, although new, achieves the same result reached under the English language requirement of rule 10 of the rules of civil practice. Hurwitz v. Hurwitz, 214 A.D. 823, 210 N.Y.S. 865 (2d Dep't 1925); Friedman v. Prescetti, 199 A.D. 385, 192 N.Y.S. 55 (1st Dep't 1922).

It is further said that a well-established principle of the common law followed in this state is the one that oral and written evidence submitted at a trial be in English. See 3 Wigmore, Evidence § 811 (3d ed. 1940); 5 Wigmore, Evidence § 1393. In the event that a witness at a trial does not adequately understand and speak English, the questions to him and his answers must be translated by a sworn interpreter. Some jurisdictions have adopted rules of evidence to this effect. See, e.g., Cal.Code Civil Proc. [former] § 1884 [now West's Ann.Evid.Code § 752]. Various New York laws provide for the appointment of permanent official interpreters to be attached to the courts and for the appointment of temporary interpreters where needed. McKinney's County Law § 218; Judiciary Law §§ 106, 172, [former] 199, 380, [former] 381 to 385, 386; [former] Code Crim.Proc. § 55; [former] Surr.Ct.Act § 24.

The only provision for translation in the case of papers served or filed is in § 359 of the civil practice act, which is limited in application to oaths or affidavits taken without the state or by a person serving with the armed forces. It requires such oaths or affidavits, in order to be filed or used in a court, to be accompanied by an English translation made by a person designated by a Supreme Court justice, county judge or surrogate, and signed, acknowledged and certified by such person under oath before the judge to be true and accurate.

The practice in New York has been, in instances not covered by § 359 of the civil practice act, for the party filing or serving the paper to provide his own translator. The English translation then accompanies the foreign language original together with an affidavit by the translator stating his qualifications and certifying the accuracy of the translation. Since the adverse party has access to the foreign language original, he has the opportunity to object to the accuracy of the translation. The court can decide any dispute and, if necessary, appoint a translator for this purpose. This procedure is much less cumbersome and time-consuming than the procedure provided for in § 359 and, at the same time, includes adequate safeguards against an inaccurate translation.

Subd. (c) of this rule is derived from § 255(1) of the civil practice act, rule 45 of the rules of civil practice, and rule 10(a) of the Federal Rules of Civil Procedure, 28 U.S.C.A.

The Second Report to the Legislature explaining the changes made by the Revisers states that subd. (c) of this rule requires captions on all papers served or filed as distinguished from § 255(1) of the civil practice act which provides for a caption on the complaint only. The specification by the plaintiff in a Supreme Court action of the county where trial is desired has been eliminated in favor of a simple statement of the venue, since it is unnecessary to recite both, because they are identical.

It is also said that the requirement that a paper be labeled is a convenience to the parties and the court, and with respect to pleadings, it is needed as a basis for such provisions as that of § 3011 requiring a reply to a counterclaim "denominated as such."

The provision that the caption include a file number is the practice in most courts by local rule with respect to papers to be

filed. This provision has been extended to include papers to be served. The final draft of this subdivision substituted "index number" for "file number" to clarify meaning.

The Revisers further comment that the last sentence of subd. (c) of this rule is a rewording of part of rule 10(a) of the Federal Rules of Civil Procedure, 28 U.S.C.A., and merely ratifies the practice which has developed in New York, in the absence of any statute or rule, relating to captions in papers other than complaints. In addition to the complaint, the summons and judgment are required to include the names of all parties. This sentence becomes necessary as a result of the inclusion of the first sentence, requiring a caption on all papers.

Subd. (d) of this rule consolidates rule 11 and part of rule 13 of the rules of civil practice. Indorsement is required rather than subscription, and it is said in the Second Report, that the latter need not be a handwritten signature, but may be typed or printed (Smith v. Kerr, 49 Hun. 29, 1 N.Y.S. 454 (Sup.Ct., Gen'l T.1888) and its functions seem entirely fulfilled by the former.

The Revisers omitted rule 16 of the rules of civil practice which permitted special rules for the indorsement to be placed on papers and for filing in each department. They remark that although trial courts have adopted local rules with respect to indorsements and filing of papers, most of the provisions of the local rules are similar to this subdivision. There is no strong reason why indorsements on papers should not be uniform throughout the state. On the other hand, some administrative problems are presented with filing systems that may differ with the volume of business and the facilities and staff available in each county. Specific authorization for flat-filing does not appear to be necessary. It is further noted that this subdivision is designed to achieve a uniformity among courts, counties and departments in details of form of papers, thus correcting a constant annoyance and unnecessarily complicated office procedure for the lawyer who practices in more than one court.

Subd. (e) of this rule is taken from rules 10 and 14 of the rules of civil practice. The comments of the Revisers in the Second Report state that no substantive change is intended, but the sources of this subdivision appear inconsistent. They therefore added the opening phrases of each sentence of this subdivision to clarify the provision. Copies, of course, must conform to the other requirements of this rule, so that the specific requirement of legibility for copies has been omitted. The enactment of this subdivision makes it possible to eliminate references to copies in many provisions of the civil practice act and the rules of civil practice.

Subd. (f) of this rule consolidates part of § 105 of the civil practice act and the first sentence of rule 12 of the rules of civil practice. The Revisers state that since this subdivision is cast in mandatory language, the provision of the last sentence of rule 10 of the rules of civil practice has not been carried forward into CPLR. Thus, while the court should disregard a non-prejudicial defect, it would allow the defect to be corrected in order that it may be efficiently filed and dealt with. No change in the practice is intended in this respect.

It is also said that subd. (f) of this rule places upon the party served the burden of objecting to defective papers which would result in prejudice. It would be incumbent, in such event, upon the party making the error in form to serve a new or amended paper. This waiver provision is derived from rule 12, which provides for objection within 24 hours--a period that appears unreasonably short and which has been extended to two days. The waiver of a party does not affect the eligibility of a paper for filing or submission to court; it merely prohibits such party from asserting prejudice to himself. For this reason, the final sentence of rule 12 of the rules of civil practice seems unnecessary and has been omitted.

Official Reports to Legislature for this rule:

1st Report Leg.Doc. (1957) No. 6(b), p. 61.

2nd Report Leg.Doc. (1958) No. 13, p. 171.

5th Report Leg.Doc. (1961) No. 15, p. 351.

6th Report Leg.Doc. (1962) No. 8, p. 198.

Notes of Decisions (104)

McKinney's CPLR Rule 2101, NY CPLR Rule 2101
Current through L.2022, chapters 1 to 202. Some statute sections may be more current, see credits for details.

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