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IN THIS ISSUE

*Summaries of Selected Appellate Decisions and Opinions from January 2013 through November 2016 Which Describe When a Defendant, Who Is a Party to a Contract, May Be Sued In Tort by a Non-Contracting Third Party Based Upon the Defendant's Performance of the Contract.

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CONTRACT-BASED TORT LIABILITY

The case summaries here, collected over the past (nearly) four years, identify proof problems which appear again and again at the appellate level. This pamphlet addresses when a defendant, who is a party to a contract, may be sued in tort by a non-contracting third party based upon the defendant's performance of the contract. A good example is a slip and fall case where the plaintiff sues the snow-removal contractor in tort founded on the snow-removal contract with the property owner.

The situations which allow a plaintiff to sue in tort based upon a defendant's performance of a contract with another, the so-called "Espinal" exceptions, were defined by the Court of Appeals in Espinal v Melville Snow Contrs., 98 NY2d 136.

The black letter law is as follows: "A contractual obligation, standing alone, generally will not give rise to tort liability in favor of a third party (see Espinal v Melville Snow Contrs., 98 NY2d 136, 138). However, there are three exceptions to that general rule: '(1) where the contracting party, in failing to exercise reasonable care in the performance of his [or her] duties, launches a force or instrument of harm, (2) where the plaintiff detrimentally relies on the continued performance of the contracting party's duties, and (3) where the contracting party has entirely displaced the other party's duty to maintain the premises safely'."

The case summaries collected here are varied enough to flesh out the kinds of "Espinal" issues routinely presented at the appellate level. The cases often go up on appeal after a summary judgment motion.

It is most important to plead any applicable "Espinal" exception. If an exception is not pled, the defendant need only show the plaintiff was not a party to the contract to win.

If an "Espinal" exception is pled, admissible proof of its substance and applicability are absolutely required to defeat a motion for summary judgment.

FROM THE EDITOR

This is the 9th Practice Pamphlet---a compilation of the summaries of New York State appellate decisions addressing contract-based tort liability which were posted on the website www.newyorkappellatedigest.com between January 2013 and November 2016.

To link to the summarized cases in a new tab, hold down the control key (ctrl) and click on the case name.

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Bruce Freeman **585 645-8902**
newyorkappellatedigest@gmail.com
www.NewYorKAppellateDigest.com

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Summary Judgment Issue---Defendant Need Only Address the "Espinal" Liability Theories Alleged in Complaint

Defendant, In Its Summary Judgment Motion, Properly Addressed Only the Theory of "Tort Liability Arising from Contract" Which Was Alleged in the Pleadings

The Second Department determined defendant was entitled to summary judgment in an action based upon the allegation defendant had "launched an instrument of harm," thereby imposing liability in tort arising from a contract. Defendant demonstrated it did not launch an instrument of harm and plaintiff failed to raise a question of fact in response. The court explained the applicable law, noting that defendant need only address the specific theory of contract-based liability which was raised in the pleadings:

"Generally, a contractual obligation, standing alone, will not give rise to tort liability in favor of a third party" ... . The Court of Appeals has recognized three exceptions to this general rule: (1) where the contracting party, in failing to exercise reasonable care in the performance of its duties, launches a force or instrument of harm, (2) where the plaintiff detrimentally relies on the continued performance of the contracting party's duties, and (3) where the contracting party has entirely displaced the other party's duty to maintain the premises safely ... . Here, the only exception alleged in the pleadings with respect to the defendant Wiley Engineering, P.C. (hereinafter Wiley), was that Wiley launched a force or instrument of harm ... . Therefore, in moving for summary judgment dismissing the complaint and all cross claims insofar as asserted against it, Wiley was only required to address this exception by demonstrating, prima facie, that it did not launch a force or instrument of harm creating or exacerbating any allegedly dangerous condition ... . Here, Wiley met its prima facie burden and, in opposition, the plaintiff failed to raise a triable issue of fact. **Reece v J.D. Posillico, Inc., 2015 NY Slip Op 06580, 2nd Dept 8-19-15**

In a Case Consolidated with the Case Summarized Immediately Above, Defendant Was Entitled to Summary Judgment After Demonstrating None of the Three Theories of "Tort Liability Arising from Contract" Applied---Because the Facts Are Not Discussed, It Is Not Clear Why All Three Potential Theories Were Addressed in this Action

In a case which was consolidated with the case summarized immediately above, the Second Department determined the defendant, J.D. Posillica, Inc., was entitled to summary judgment dismissing the complaint because it had demonstrated that none of the three theories of "tort liability arising from a contract" applied. It is not clear from the decision whether the defendant was required, by the nature of the pleadings, to address all three theories in order to be entitled to summary judgment:

"Generally, a contractual obligation, standing alone, will not give rise to tort liability in favor of a third party" ... . The Court of Appeals has recognized three exceptions to this general rule: (1) where the contracting party, in failing to exercise reasonable care in the performance of its duties, launches a force or instrument of harm, (2) where the plaintiff

detrimentally relies on the continued performance of the contracting party's duties, and (3) where the contracting party has entirely displaced the other party's duty to maintain the premises safely ... . Here, the defendant J.D. Posillico, Inc. ... , met its initial burden of establishing its entitlement to judgment as a matter of law dismissing the complaint and all cross claims insofar as asserted against it by demonstrating, prima facie, that none of the exceptions were applicable as against it in this case... . **Reece v J.D. Posillico, Inc., 2015 NY Slip Op 06581, 2nd Dept 8-19-15**

Snow-Removal Company Not Liable To Plaintiff Because Plaintiff Was Not A Party To The Snow-Removal Contract; No Need For Defendant To Address Espinal Exceptions In Its Summary Judgment Motion If The Exceptions Are Not Pled By The Plaintiff

The Second Department determined defendant snow-removal company, Brickman, was entitled to summary judgment dismissing the complaint in this slip and fall case. Because the plaintiff was not a party to the snow-removal contract with the owner of the property, Brickman owed no duty to plaintiff. The court noted that, because the plaintiff did not allege the applicability of any of the "Espinal" exceptions to the general rule against tort liability arising from a contract, the defendant was not obligated to address those exceptions in its summary judgment motion:

A contractual obligation, standing alone, generally will not give rise to tort liability in favor of a third party (see Espinal v Melville Snow Contrs., 98 NY2d 136, 138). However, there are three exceptions to that general rule: "(1) where the contracting party, in failing to exercise reasonable care in the performance of his [or her] duties, launches a force or instrument of harm, (2) where the plaintiff detrimentally relies on the continued performance of the contracting party's duties, and (3) where the contracting party has entirely displaced the other party's duty to maintain the premises safely" ... .

Brickman made a prima facie showing of its entitlement to judgment as a matter of law dismissing the complaint insofar as asserted against it by submitting evidence that the plaintiff was not a party to its snow removal agreement, and that it thus owed her no duty of care ... . Inasmuch as the plaintiff did not allege facts in the complaint or bill of particulars that would establish the possible applicability of any of the Espinal exceptions ... , Brickman was not required to affirmatively demonstrate that these exceptions did not apply in order to establish its prima facie entitlement to judgment as a matter of law ... .

Once Brickman made its prima facie showing, the burden shifted to the plaintiff to come forward with proof sufficient to raise a triable issue of fact as to the applicability of one or more of the Espinal exceptions ... . In opposition to Brickman's prima facie showing, the plaintiff failed to raise a triable issue of fact as to whether Brickman launched a force or instrument of harm, whether she detrimentally relied on the continued performance of Brickman's duties, or whether Brickman entirely displaced the owner's duty to maintain the premises in a safe condition ... . **Bryan v CLK-HP 225 Rabro, LLC, 2016 NY Slip Op 01280, 2nd Dept 2-24-16**

Defendant, Which Installed Christmas Displays At A Mall, Did Not Owe A Duty To Plaintiff Stemming From Its Contract With The Mall; Since Plaintiff Alleged Only One Espinal Exception To Support Liability Stemming From The Contract, Defendant Need Only Address That One Exception In Its Motion For Summary Judgment

The Second Department, reversing Supreme Court, determined defendant American Christmas did not owe a duty to plaintiff in this trip and fall case. American Christmas contracted with a shopping mall to install Christmas displays. After the installation contract was completed, plaintiff allegedly tripped over electrical wires taped to the floor. There was evidence American Christmas put up stanchions to prevent people from crossing over the cords. Plaintiff alleged American Christmas was liable in tort arising from the contract with the mall because it launched an instrument of harm. The court noted that because plaintiff only alleged one of the three possible criteria for liability to third persons arising from a contract, the defendant was only required to address that single theory in its motion for summary judgment:

Here, American Christmas demonstrated its prima facie entitlement to judgment as a matter of law by offering proof that the plaintiff was not a party to its holiday display contracts with the Mall Owner, and that it thus owed no duty of care to the

plaintiff. American Christmas also established, prima facie, that the one Espinal exception alleged by the plaintiff that would give rise to a duty of care does not apply in this case (see Espinal v Melville Snow Contrs., 98 NY2d at 141-142). ...

Inasmuch as the plaintiff did not allege facts that would establish the possible applicability of the second or third [Espinal] exception, American Christmas was not required to affirmatively demonstrate that these exceptions did not apply in order to establish its prima facie entitlement to judgment as a matter of law ... . **Parrinello v Walt Whitman Mall, LLC, 2016 NY Slip Op 03481, 2nd Dept 3-4-16**

In the Absence of Allegations in the Pleadings Supporting an "Espinal" Exception to the Rule that Tort Liability to Third Persons Does Not Arise from a Contract, No Question of Fact Was Raised About a Duty Owed by the Defendant to the Plaintiff

The Second Department determined the complaint in a slip and fall case was properly dismissed. There apparently was a contract between the defendant cleaning services company, One-A, and plaintiff's employer. Plaintiff slipped and fell on a wet floor. The court explained the Espinal criteria for tort liability to third parties arising from a contract and then found that, because plaintiff was not a party to the cleaning-services contract, the cleaning-services company did not owe her a duty of care:

Generally, a contractual obligation, standing alone, will not give rise to tort liability in favor of a third party ... . Nonetheless, the Court of Appeals has recognized three exceptions to this general rule: (1) where the contracting party, in failing to exercise reasonable care in the performance of his or her duties, launches a force or instrument of harm; (2) where the plaintiff detrimentally relies on the continued performance of the contracting party's duties; and (3) where the contracting party has entirely displaced another party's duty to maintain the premises safely ... . As part of its prima facie showing, a contracting defendant is only required to negate the applicability of those Espinal exceptions that were expressly pleaded by the plaintiff or expressly set forth in the plaintiff's bill of particulars ... . Here, given the allegations in the complaint and the plaintiff's bill of particulars, One-A established its prima facie entitlement to judgment as a matter of law simply by offering sufficient proof that the plaintiff was not a party to its contract to clean the floor of the premises, and that it thus owed her no duty of care ... . In opposition, the plaintiff failed to raise a triable issue of fact ... . **Glover v John Tyler Eters Inc, 2014 NY Slip Op 08809, 2nd Dept 12-17-14**

Vicarious Liability Stemming from Contract

City Was "United in Interest" with Non-Profit Corporation Which Maintained Central Park Pursuant to a Contract with the City---Therefore Plaintiff, Who Was Allegedly Injured by a Truck Owned by the Non-Profit Corporation, Could Amend His Complaint to Include the Non-Profit Corporation After the Statute of Limitations Had Run---However the Extent to Which the City Was "United in Interest" Was Dictated by the Terms of the Contract

The First Department determined that the Conservancy, a non-profit corporation which maintains Central Park under a contract with the City of New York, was "united in interest" with the City. Therefore, plaintiff, who allegedly had been injured by a maintenance truck owned by the Conservancy, could amend his complaint to include the Conservancy, even though the statute of limitations had run. The 'unity of interest" was defined by the terms of the contract. Because the contract did not call for the City to indemnify the Conservancy for gross negligence, the complaint against the Conservancy could not include the gross negligence claim:

... [P]laintiff relied on the 2006 Central Park Agreement, a contract between the City and the Conservancy, a nonprofit organization, in which they acknowledged that they had formed an effective "public/private partnership." Under the Agreement, the Conservancy is required to provide specified maintenance services in Central Park to the "reasonable satisfaction" of the City, and the City is broadly required to indemnify the Conservancy "from and against any and all liabilities . . . arising from all services performed and activities conducted by [the Conservancy] pursuant to this agreement in Central Park." The City's indemnification obligation, among other things, expressly excludes claims arising from gross

negligence or intentional acts of the Conservancy or its agents or volunteers. As a result of the Agreement, the Conservancy acts, in effect, as an independent contractor fulfilling the City's nondelegable obligation to maintain the City parks in reasonably safe condition ... .

The City is vicariously liable for the Conservancy's negligence in the course of providing maintenance in Central Park by virtue of the contractual indemnification provision, and the parties are thus united in interest ... . Further, since the City has a nondelegable duty to maintain Central Park, it is vicariously liable for negligence committed by the contractor in the course of fulfilling that duty ... . However, the City is correct that its interests are not united with those of the Conservancy with respect to the proposed gross negligence claim, and leave to assert that claim against the Conservancy is therefore denied. **Brunero v City of New York Dept of Parks & Recreation, 2014 NY Slip Op 07444, 1st Dept 10-30-14**

Christmas Decoration Installer

Defendant, Which Installed Christmas Displays At A Mall, Did Not Owe A Duty To Plaintiff Stemming From Its Contract With The Mall; Since Plaintiff Alleged Only One Espinal Exception To Support Liability Stemming From The Contract, Defendant Need Only Address That One Exception In Its Motion For Summary Judgment

The Second Department, reversing Supreme Court, determined defendant American Christmas did not owe a duty to plaintiff in this trip and fall case. American Christmas contracted with a shopping mall to install Christmas displays. After the installation contract was completed, plaintiff allegedly tripped over electrical wires taped to the floor. There was evidence American Christmas put up stanchions to prevent people from crossing over the cords. Plaintiff alleged American Christmas was liable in tort arising from the contract with the mall because it launched an instrument of harm. The court noted that because plaintiff only alleged one of the three possible criteria for liability to third persons arising from a contract, the defendant was only required to address that single theory in its motion for summary judgment:

Here, American Christmas demonstrated its prima facie entitlement to judgment as a matter of law by offering proof that the plaintiff was not a party to its holiday display contracts with the Mall Owner, and that it thus owed no duty of care to the plaintiff. American Christmas also established, prima facie, that the one Espinal exception alleged by the plaintiff that would give rise to a duty of care does not apply in this case (see Espinal v Melville Snow Contrs., 98 NY2d at 141-142). ...

Inasmuch as the plaintiff did not allege facts that would establish the possible applicability of the second or third [Espinal] exception, American Christmas was not required to affirmatively demonstrate that these exceptions did not apply in order to establish its prima facie entitlement to judgment as a matter of law ... . **Parrinello v Walt Whitman Mall, LLC, 2016 NY Slip Op 03481, 2nd Dept 3-4-16**

Cleaning Contractor

Water Tracked In from Sidewalk Cleaning Raised Question of Fact About Creation of a Dangerous Condition in a Slip and Fall Case---Open and Obvious Condition Relieves Owner of Duty to Warn But Not Duty to Keep Premises Safe

The First Department determined there were questions of fact about whether the independent contractor which cleaned the sidewalks adjacent to defendants' office building created the dangerous condition. The sidewalks were cleaned by hosing them down. It was alleged that water tracked in from the sidewalks created a slippery condition, causing plaintiff's fall. The court noted that an open and obvious condition relieves the owner of a duty to warn, but does not the duty to maintain the premises in a reasonably safe condition:

In this case a jury could reasonably conclude that the defendants created a dangerous condition in the course of cleaning the sidewalk by hosing down the perimeter of the building without taking precautions to keep water from being tracked

onto the marble lobby floor. Slippery conditions created by defendants in the course of cleaning a premises can give rise to liability ... . Tracked-in water that creates a slippery floor can be a dangerous condition ... . While reasonable care does not require an owner to completely cover a lobby floor with mats to prevent injury from tracked-in water ..., it may require the placement of at least some mats ... . Since there is evidence supporting a conclusion that there were no mats on the floor near the entrance, there is an issue for the jury concerning whether the defendants exercised reasonable care, including whether they took reasonable precautions against foreseeable risks of an accident while cleaning the sidewalk during a busy work morning.

Defendants' contention that the water on the sidewalk was open and obvious does not warrant summary judgment dismissing the complaint. An open and obvious condition relieves the owner of a duty to warn about the danger, but not of the duty to maintain the premises in a reasonably safe condition ... . **DiVetri v ABM Janitorial Serv Inc, 2014 NY Slip Op 05494, 1st Dept 7-24-14**

In the Absence of Allegations in the Pleadings Supporting an "Espinal" Exception to the Rule that Tort Liability to Third Persons Does Not Arise from a Contract, No Question of Fact Was Raised About a Duty Owed by the Defendant to the Plaintiff

The Second Department determined the complaint in a slip and fall case was properly dismissed. There apparently was a contract between the defendant cleaning services company, One-A, and plaintiff's employer. Plaintiff slipped and fell on a wet floor. The court explained the Espinal criteria for tort liability to third parties arising from a contract and then found that, because plaintiff was not a party to the cleaning-services contract, the cleaning-services company did not owe her a duty of care:

Generally, a contractual obligation, standing alone, will not give rise to tort liability in favor of a third party ... . Nonetheless, the Court of Appeals has recognized three exceptions to this general rule: (1) where the contracting party, in failing to exercise reasonable care in the performance of his or her duties, launches a force or instrument of harm; (2) where the plaintiff detrimentally relies on the continued performance of the contracting party's duties; and (3) where the contracting party has entirely displaced another party's duty to maintain the premises safely ... . As part of its prima facie showing, a contracting defendant is only required to negate the applicability of those Espinal exceptions that were expressly pleaded by the plaintiff or expressly set forth in the plaintiff's bill of particulars ... . Here, given the allegations in the complaint and the plaintiff's bill of particulars, One-A established its prima facie entitlement to judgment as a matter of law simply by offering sufficient proof that the plaintiff was not a party to its contract to clean the floor of the premises, and that it thus owed her no duty of care ... . In opposition, the plaintiff failed to raise a triable issue of fact ... . **Glover v John Tyler Eters Inc, 2014 NY Slip Op 08809, 2nd Dept 12-17-14**

Construction Contractor

Contract Between Employer and Contractor Did Not Create a Duty Owed to Employee/Instrument of Harm Doctrine Not Applicable

Plaintiff was standing on a barrel performing work for his employer. In reaching for a tool he grabbed onto some bricks on a column. The bricks came loose and plaintiff lost his balance and fell. Plaintiff sued the parties responsible for installing the bricks six years before (pursuant to a contract with the employer). In affirming summary judgment to the defendants, the Fourth Department wrote:

Here, defendants established as a matter of law that they did not owe any duty to plaintiff, and plaintiff failed to raise a triable issue of fact. Although defendants had contractual obligations with respect to the construction of the project for plaintiff's employer, as a general rule "a contractual obligation, standing alone, will . . . not give rise to tort liability in favor of a third party," i.e., a person who is not a party to the contract …. There is an exception to that general rule, however, "where the contracting party, in failing to exercise reasonable care in the performance of [its] duties, 'launche[s] a force or

instrument of harm' " …, thereby "creat[ing] an unreasonable risk of harm to others, or increas[ing] that risk" …. Contrary to plaintiff's contention, the instrument of harm doctrine does not apply to the facts of this case, and thus there was no duty of care running from defendants to plaintiff based on that doctrine …. **Spaulding v Loomis Masonry, Inc. et al, CA 12-01395, 32, 4th Dept, 4-26-13**

Question of Fact Raised About Whether Contract for the Installation of Marble Staircase Landings Gave Rise to Tort Liability to Third Party (Plaintiff) Stemming from the Collapse of a Landing

The Second Department determined a question of fact had been raised about whether a contract for the installation of marble staircase landings (by defendant Suli) gave rise to tort liability for injury to plaintiff resulting from the collapse of the landing:

Ordinarily, the breach of a contractual obligation is not sufficient in and of itself to impose tort liability upon the promisor to noncontracting parties ... . However, a party who enters into a contract to render services may be said to have assumed a duty of care and, thus, would be potentially liable in tort to third persons when the contracting party, in failing to exercise reasonable care in the performance of its duties, launches an instrument of harm or creates or exacerbates a hazardous condition ... . Here, Suli demonstrated its prima facie entitlement to judgment as a matter of law by presenting evidence that it properly installed the marble slab, that it never received any complaints about the work prior to the accident, and that no defects in the marble were observed prior to the accident. However, in opposition, the plaintiff and the building defendants raised a triable issue of fact as to whether Suli created the hazardous condition that caused the accident through the affidavit of an experienced marble setter and installer. That expert explained that marble could weaken over time due to stress fractures, and opined that Suli should have supported the marble slab with an additional "angle iron" in the center of the slab, and that Suli's failure to do so was a substantial contributing factor in the happening of the accident ... . **Torres v 63 Perry Realty LLC, 2014 NY Slip Op 08830, 2nd Dept 12-17-14**

Contractor Which Repaired Exterior Stairs Did Not Owe A Duty Of Care To Plaintiff In This Slip And Fall Case

The Second Department determined a slip and fall complaint against a contractor which repaired exterior stairs was properly dismissed. The court explained the three theories under which a contract can result in a duty of care owed to a third party and the requirements of a defendant-contractor's motion for summary judgment in this context:

"Generally, a contractual obligation, standing alone, will not give rise to tort liability in favor of a third party" ... . However, there are three exceptions to that general rule: "(1) where the contracting party, in failing to exercise reasonable care in the performance of his [or her] duties, launches a force or instrument of harm, (2) where the plaintiff detrimentally relies on the continued performance of the contracting party's duties, and (3) where the contracting party has entirely displaced the other party's duty to maintain the premises safely" ... . " As part of its prima facie showing, a contracting defendant is only required to negate the applicability of those Espinal exceptions that were expressly pleaded by the plaintiff or expressly set forth in the plaintiff's bill of particulars'" ... .

Here, the plaintiff alleged facts in his complaint and bills of particulars in support of his assertion that the defendants created or exacerbated the alleged dangerous conditions and, thus, launched a force or instrument of harm. Therefore, in support of their motion for summary judgment dismissing the complaint insofar as asserted against them, the defendants were required to establish, prima facie, that they did not create or exacerbate the alleged dangerous conditions ... . The defendants met this burden and established their prima facie entitlement to judgment as a matter of law by demonstrating that they neither created nor exacerbated the dangerous conditions that allegedly caused the plaintiff to sustain injuries. The parties' deposition testimony established, prima facie, that the defendants did not leave the subject step or the handrail in a condition more dangerous than they had found them ... . **Barone v Nickerson, 2016 NY Slip Op 05107, 2nd Dept 6-29-16**

Plaintiff Raised A Question Of Fact Whether Defendant Contractor Created An Unreasonable Risk Of Harm When Installing A Floor And Therefore Owed A Duty To Plaintff, However The Defect Was Trivial As A Matter Of Law

The Fourth Department, reversing Supreme Court, determined plaintiff had raised an issue of fact whether defendant contractor owed a duty to plaintiff because its flooring work created an unreasonable risk of harm to others. However Supreme Court erred in not finding the defect trivial as a matter of law:

Here, the record establishes that the bullnose tile was slightly less than one-half of an inch in height and was not the same color as the tile floor. * * * ..."[T]he test established by the case law in New York is not whether a defect is capable of catching a pedestrian's shoe. ... [T]he relevant questions are whether the defect was difficult for a pedestrian to see or to identify as a hazard or difficult to pass over safely on foot in light of the surrounding circumstances" ... . Upon our review of the photos of the alleged defect and in view of the less than ½-inch height of the bullnose tile and the circumstances surrounding decedent's accident ... , we conclude that, although an accident occurred that is "traceable to the defect, there is no liability" because the alleged defect " is so slight that no careful or prudent [person] would reasonably anticipate any danger from its existence' " under the circumstances present here ... . **Stein v Sarkisian Bros., Inc., 2016 NY Slip Op 07501, 4th Dept 11-10-16**

Where the Complaint Alleged Only that the Driveway Was Defective and the Complaint Against the Company Which Renovated the Driveway Was Dismissed, the Complaint Against the Property Owners Should Have Been Dismissed As Well--There Was No Viable Theory for Liability on the Part of the Property Owners

The Second Department determined Supreme Court should have granted defendant property owners' motion for a judgment as a matter of law after the close of proof. Plaintiff, who tripped over the lip on defendants' driveway, alleged the driveway was defective. After proof was closed, Supreme Court dismissed the complaint against the company which renovated the driveway, but denied the property owners' motion to dismiss. Because plaintiff's only theory was that the driveway was defective, and the property owners could only be liable for a hazardous condition caused by a failure to properly maintain the property, the complaint against the property owners should have been dismissed as well:

Dismissal of an action insofar as asserted against a contractor who performs work on premises does not mandate dismissal of the action insofar as asserted against the owner of the premises, since the owner has a duty to maintain the premises in a reasonably safe condition ... . Here, however, the plaintiff's theory of liability was that the driveway was defective. ...[T]here was no evidence that the lip of the driveway was in a hazardous condition. Therefore, it was inconsistent to direct the dismissal of the complaint insofar as asserted against [contractor] while denying such relief to the appellants as homeowners, since no viable alternative theory of liability was asserted against the appellants ... . **Cioffi v Klein, 2015 NY Slip Op 06704, 2nd Dept 9-2-15**

Contractor May Be Liable to Noncontracting Third Party If Area Made Less Safe by Contractor's Work

The Fourth Department reinstated a claim for contribution by the owner of a parking lot (Piedmont) against the contractor (Bach) hired to raze structures and fill in all holes. Plaintiff was injured when his foot fell through a hole into a hidden vault below:

We conclude that Bach met its initial burden on its motion with respect to the claim for contribution by establishing its entitlement to judgment as a matter of law dismissing that claim … . Specifically, Bach established as a matter of law "that the injured plaintiff was not a party to [the] contract . . . and that it thus owed no duty of care to the injured plaintiff" … . In opposition, however, Piedmont raised triable issues of fact to defeat that part of the motion. Although plaintiff was a noncontracting third party with respect to the construction contract between Bach and Piedmont, Bach may still be liable

if, “in failing to exercise reasonable care in the performance of its duties, [it] ‘launche[d] a force or instrument of harm’ ” … , or otherwise made the area “less safe than before the construction project began” … . Here, there are issues of fact whether Bach negligently filled in the vault only partially, and concealed its existence, thereby creating a force or instrument of harm or otherwise making the area less safe than before the demolition project began … . **Paro v Piedmont Land and Cattle, LLC…, 1189, 4th Dept 11-15-13**

Electrical Contractor

No Legal Duty Owed Independent of Contract—Negligence Cause of Action Dismissed

In the context of the dismissal of a tort action against Ferguson Electric Service Company after a building fire, the Fourth Department explained when a contractual relationship can give rise to an action in tort:

“It is a well-established principle that a simple breach of contract is not to be considered a tort unless a legal duty independent of the contract itself has been violated . . . This legal duty must spring from circumstances extraneous to, and not constituting elements of, the contract, although it may be connected with and dependent upon the contract” … . Plaintiffs cannot maintain their tort cause of action because Ferguson … owed no legal duty that is independent of the contract … . Moreover, “a contractual obligation, standing alone, will generally not give rise to tort liability in favor of a third party…”… . **Niagara Foods, Inc…v Ferguson Electric Service Company, Inc…, 1044, 4th Dept 11-15-13**

Electricity Supplier

Electricity-Supplier (Con Edison) Did Not Owe a Duty of Care to a Shareholder in an Apartment Cooperative Who Fell in a Common Area During a Power Outage/Plaintiff's Lack of Knowledge of the Cause of His Fall Was Fatal to the Lawsuit

The Second Department determined the electricity-supplier, Con Edison, did not owe a duty of care to plaintiff, a shareholder in an apartment cooperative, who fell in a common area of the building during a power outage. In addition, the plaintiff's lack of knowledge re: the cause of his fall was fatal to the lawsuit:

The Court of Appeals has held that an electricity-supplying utility "is not answerable to the tenant of an apartment building injured in a common area as a result of [the utility's] negligent failure to provide electric service as required by its agreement with the building owner" (Strauss v Belle Realty Co., 65 NY2d 399, 405; see Milliken & Co. v Consolidated Edison Co. of N.Y., 84 NY2d 469). Contrary to the plaintiffs' contention, the injured plaintiff's status as a shareholder in the cooperative corporation that owned the building did not make him a party to the contract with Con Edison, such that Con Edison owed him a duty of care... . * * *

"[A] plaintiff's inability to identify the cause of the fall is fatal to the cause of action, because a finding that the defendant's negligence, if any, proximately caused the plaintiff's injuries would be based on speculation" ... . Here, the injured plaintiff testified at his deposition that he did not know why he fell, did not know whether he tripped or slipped, and had no memory of the fall. When he was asked if he knew why he fell, the injured plaintiff testified: "That's speculation. I don't know." In addition, the building defendants submitted the deposition testimony of two witnesses who stated that the injured plaintiff appeared to be intoxicated at the time of the accident. Thus, the building defendants demonstrated that it was just as likely that the accident was caused by some factor other than poor lighting conditions in the stairwell, such as a misstep, a loss of balance, or intoxication, and thus "any determination by the trier of fact as to causation would be based upon sheer

conjecture" ... . **O'Connor v Metro Mgt. Dev., Inc., 2015 NY Slip Op 05921, 2nd Dept 7-8-15**

Elevator Repair

Company Hired on On-Call Basis for Elevator Repair Not Liable for Allegedly Faulty Elevator Door Interlock Where Last Repair Made 13 Months Before Accident

Plaintiff's decedent fell down an elevator shaft, allegedly due to the condition of a door interlock. The First Department determined the wrongful death complaint against New York Elevator and Electrical Corporation (NYE) should have been dismissed because the company was retained only on an on-call basis for repairs and there was no evidence NYE was negligent when it inspected the elevator 13 months before the accident:

The amended complaint should have been dismissed as against defendant/third-party plaintiff NYE in its entirety. NYE did not have an exclusive agreement with Broadway to maintain or service the freight elevator…. It was merely retained on an on-call basis to make specific repairs and inspections and, therefore, did not have a duty to inspect or repair unrelated defects…. Indeed, NYE may only be held liable if it failed to exercise reasonable care in making any requested repairs or inspections…. **Casey v New York El & Elec Corp, 2013 NY Slip Op 04745, 1st Dept 6-25-13**

Existence of Elevator Maintenance Contract Did Not Rule Out Duty of Care to Elevator User

The Second Department determined plaintiff had stated a cause of action in negligence against a company with a contract to maintain an elevator. The elevator escape door and debris fell on plaintiff. The court explained that the existence of a contract did not rule out that the company owed a duty of care to the plaintiff:

" Because a finding of negligence must be based on the breach of a duty, a threshold question in tort cases is whether the alleged tortfeasor owed a duty of care to the injured party'" … . "[A] contractual obligation, standing alone, will generally not give rise to tort liability in favor of a third party" … Exceptions to this general rule exist "(1) where the contracting party, in failing to exercise reasonable care in the performance of [its] duties, launch[e]s a force or instrument of harm; (2) where the plaintiff detrimentally relies on the continued performance of the contracting party's duties[;] and (3) where the contracting party has entirely displaced the other party's duty to maintain the premises safely" … .

Here, [defendant] failed to meet its prima facie burden of demonstrating that no questions of fact existed as whether it failed to exercise reasonable care while repairing the subject elevator and whether it thereby launched a force or instrument of harm that caused the accident… . **Dautaj v Alliance El Co, 2013 NY Slip Op 06657, 2nd Dept 10-16-13**

Question of Fact Whether Elevator Company Had Constructive Notice of "Misleveling Condition"/Question of Fact About Applicability of Res Ipsa Loquitur Doctrine

The First Department determined questions of fact had been raised about whether an elevator company, which exclusively maintained and repaired the elevator, had constructive notice of the "misleveling condition." In addition there was a question of fact about the applicability of the res ipsa loquitur doctrine:

An elevator company that agrees to maintain an elevator may be liable to a passenger for failure to correct conditions of which it has knowledge or failure to use reasonable care to discover and correct a condition which it ought to have found

... .

Plaintiffs raised a triable issue of fact as to whether defendants had constructive notice of the misleveling condition or with reasonable care could have discovered and corrected the condition, by submitting the affidavit of their expert, who reviewed defendants' repair tickets and concluded that they revealed conditions related to the elevator's leveling function. * * *

Issues of fact exist as to whether the doctrine of res ipsa loquitur applies here. The expert testimony conflicts as to whether the misleveling of the elevator would not ordinarily occur in the absence of negligence. It is, however, undisputed that defendants were exclusively responsible for maintenance and repair of the elevator, and the record is devoid of any evidence that plaintiff contributed to its misleveling... . **McLaughlin v Thyssen Dover El Co, 2014 NY Slip Op 03440, 1st Dept 5-13-14**

Elevator Company Which Agrees to Keep Elevator in a Safe Operating Condition May Be Liable to Injured Passenger

The Second Department reversed Supreme Court finding an elevator company which agreed to maintain an elevator in a safe condition may be liable to an injured passenger:

"An elevator company which agrees to maintain an elevator in safe operating condition may be liable to a passenger for failure to correct conditions of which it has knowledge or failure to use reasonable care to discover and correct a condition which it ought to have found" ... . Here, the defendant submitted maintenance records for the subject elevator, including work tickets for a period of approximately one year preceding the plaintiff's accident and a "callout report," which indicated that approximately six months before the accident, the defendant was called to repair the alarm bell. The defendant also submitted the plaintiff's deposition transcript, wherein he testified that, prior to his accident, there were times when the alarm bell and strobe light did not activate and that two other individuals had been struck on the head by the gate prior to his accident. Thus, the defendant's submissions failed to establish, prima facie, that it did not have actual or constructive notice concerning the defective operation of the elevator's gate, alarm bell, and strobe light ... . Since the defendant failed to establish its prima facie entitlement to judgment as a matter of law, its motion should have been denied regardless of the sufficiency of the plaintiff's opposition papers ... . **Papapietro v Knoe Inc, 2014 NY Slip Op 08817, 2nd Dept 12-17-14**

Contractual-Indemnification Cross Claim by Building Owners Against the Elevator Maintenance Company Should Not Have Been Dismissed---Relevant Criteria Explained

The Second Department determined the building owners failed to demonstrate they did not have constructive notice of the defect in the elevator door which caused plaintiff's injury. The denial of the owners' motion for summary judgment was therefore proper. Supreme Court erred, however, when it denied defendants' motion for summary judgment on the owners' contractual-indemnification cross claim. The contract with the elevator maintenance company, Dunwell, provided the company would indemnify the building owners for damages that did not arise solely and directly out of the owners' negligence. Dunwell failed to raise a question of fact about whether the owners had actual knowledge of the defect and whether the injury arose "solely and directly" from the owners' negligence. With regard to indemnification, the court wrote:

A party's right to contractual indemnification depends upon the specific language of the relevant contract ... . The promise to indemnify should not be found unless it can be clearly implied from the language and purpose of the entire agreement and the surrounding circumstances ... . Under the full-service elevator maintenance contract at issue here, Dunwell assumed responsibility for the maintenance, repair, inspection, and servicing of the elevators, including the electrical systems or devices that operated the opening and closing of the elevator doors. Dunwell also agreed to indemnify the building defendants for any claim arising out of the performance of its work, regardless of whether it was negligent in its performance, unless the claim arose "solely and directly out of" the building defendants' negligence. **Goodlow v 724 Fifth Ave. Realty, LLC, 2015 NY Slip Op 03501, 1st Dept 4-29-15**

Although the Elevator Maintenance Company May Have Been Negligent, Under "Espinal," the Company Did Not Owe a Duty of Care to the Plaintiff---There Was No Evidence the Maintenance Company "Launched an Instrument of Harm," the Only Available Theory of Liability (Re: Plaintiff) Which Could Have Arisen from the Maintenance Contract

The First Department, in a full-fledged opinion by Justice Saxe, determined an elevator maintenance company (The Elevator Man) did not owe a duty of care to the plaintiff who was injured when the elevator free-fell three stories in September 2010. The maintenance contract with the elevator maintenance company had been cancelled for non-payment, but the company had subsequently agreed to do, and had done, emergency repairs when called to do so. Although there was evidence the elevator maintenance company was negligent re: repairs done in early 2010, applying the "Espinal" criteria, the First Department held there was no evidence the maintenance company "launched an instrument of harm," the only available theory of liability:

If the issue were limited to whether The Elevator Man was negligent, a question of fact would preclude summary judgment. However, the issue is not that simple.

"Because a finding of negligence must be based on the breach of a duty, a threshold question in tort cases is whether the alleged tortfeasor owed a duty of care to the injured party" (Espinal v Melville Snow Contrs., 98 NY2d 136, 138 [2002]).

Where a contractor has entered into a contract to render services, it may only be held to have assumed a duty of care to nonparties to the contract in three situations:

> "(1) where the contracting party, in failing to exercise reasonable care in the performance of his duties, launches a force or instrument of harm'; (2) where the plaintiff detrimentally relies on the continued performance of the contracting party's duties and (3) where the contracting party has entirely displaced the other party's duty to maintain the premises safely" (Espinal, 98 NY2d at 140 [internal citations omitted]).

To the extent plaintiff relies on the inspection performed by The Elevator Man on January 14, 2010 in which it gave the elevator a "Satisfactory" rating, despite a "Cease Use" violation that had been issued on November 1, 2009, The Elevator Man was subject to the maintenance contract then in effect. To the extent plaintiff argues that The Elevator Man was negligent in the work it performed on May 26, 2010, any duty The Elevator Man had toward him could not be based on the terminated 2009 maintenance agreement; nevertheless, The Elevator Man continued to be subject to a more limited contract with the manager of the parking facility, in which it agreed to respond to emergency calls, upon payment of an agreed fee.

We find the rule set forth in Espinal to apply here. It is conceded that of the three possibilities listed in Espinal, only the first could provide a basis for liability to plaintiff: "where the contracting party, in failing to exercise reasonable care in the performance of his duties, launches a force or instrument of harm'" (id. at 140). However, even accepting for purposes of this analysis that The Elevator Man negligently inspected the elevator on January 14, 2010 and negligently failed to correctly assess the condition of the elevator and necessary repair on May 26, 2010, it cannot be said to have launched a force or instrument of harm. That is, in failing to correctly inspect or repair the elevator, it did not create or exacerbate an unsafe condition. **Medinas v MILT Holdings LLC, 2015 NY Slip Op 06044, 1st Dept 7-9-15**

Elevator Maintenance Company Under Contract With Nursing Home May Be Liable In Tort To Third Party Injured By Elevator Malfunction

The Second Department determined the company (Mainco) under contract with the Bronx Center (a nursing home) to maintain an elevator could be liable to plaintiff, who was injured when the elevator fell. The court explained the analytical criteria for liability in tort to third parties stemming from a contract:

> Mainco failed to demonstrate its prima facie entitlement to judgment as a matter of law dismissing the complaint

insofar as asserted against it on the ground that it did not have a duty to the plaintiff. " An elevator company which agrees to maintain an elevator in safe operating condition may be liable to a passenger for failure to correct conditions of which it has knowledge or failure to use reasonable care to discover and correct a condition which it ought to have found'" ... . Further, "a party who enters into a contract to render services may be said to have assumed a duty of care—and thus be potentially liable in tort—to third persons . . . where the contracting party has entirely displaced the other party's duty" of safe maintenance ... .

Here, the maintenance agreement between Mainco and Bronx Center required Mainco to periodically "inspect" the elevator and to "perform the New York City Local Law #10 mandated annual inspection." The evidence demonstrated that, if there were any problems with the elevator, Bronx Center called Mainco, and Mainco inspected the elevator to determine and report on the cause of the problem. The evidence further indicated that if the cause of the problem was not a repair covered by the maintenance contract, Mainco issued a repair proposal, and would perform the repair upon acceptance of its proposal. Under these circumstances, Mainco failed to demonstrate as a matter of law that it did not assume a duty to the plaintiff and that the plaintiff's claims did not fall within the scope of that duty. **Fajardo v Mainco El. & Elec. Corp., 2016 NY Slip Op 06678, 2nd Dept 10-12-16**

Engineer

Condominium Owners Stated a Cause of Action Based Upon Third-Party-Beneficiary Status Re: a Contract Between the Village and an Engineer Hired to Inspect the Condominiums/The Contract Cause of Action Precluded the Professional Malpractice Cause of Action

The Second Department determined that a cause of action based upon the theory that condominium owners were third-party beneficiaries of a contract between a village and an engineer hired to inspect the condominiums should not have been dismissed. It was alleged that the engineer approved the buildings (leading to the issuance of certificates of occupancy by the village) despite defects, including the absence of firewalls. Because a contract-based theory had been properly alleged, the related professional malpractice cause of action, sounding in negligence, should have been dismissed:

In determining third-party beneficiary status it is permissible for the court to look at the surrounding circumstances as well as the agreement . . . Moreover, it is well settled that the obligation to perform to the third party beneficiary need not be expressly stated in the contract" … . Here, the plaintiffs submitted an affidavit from the Village Attorney attesting that the Village engaged the defendant to perform the subject inspections for the benefit of the purchasers of the subject condominiums … . Moreover, "the identity of a third-party beneficiary need not be set forth in the contract or, for that matter, even be known as of the time of its execution" … .

The plaintiffs asserted in the complaint that the defendant "negligently performed inspection services relative to the homes in [Encore I] and [Encore II]," in that, inter alia, the defendant "fail[ed] to detect the existence of defects in the homes and appurtenant common areas." "[M]erely alleging that a party breached a contract because it failed to act with due care will not transform a strict breach of contract claim into a negligence claim" … . This is because "[o]bligations that flow exclusively from a contract must be enforced as contractual duties under a theory of contract law" … . "[A] court enforcing a contractual obligation will ordinarily impose a contractual duty only on the promisor in favor of the promisee and any intended third-party beneficiaries" … . "Thus where a party is merely seeking to enforce its bargain, a tort claim will not lie'" .. . Taking into account the applicable factors, including "the nature of the injury, the manner in which the injury occurred and the resulting harm" … , it is clear that the plaintiffs, as third-party beneficiaries, are seeking enforcement of the defendant's promise to properly inspect the construction of the subject homes. Thus, the only claim the plaintiffs have alleged against the defendant is one sounding in contract, and they have failed to state a cause of action sounding in tort. Accordingly, the Supreme Court properly directed dismissal of the second cause of action pursuant to CPLR 3211(a)(7). **Encore Lake Grove Homeowners Assn Inc v Cashin Assoc PC, 2013 NY Slip Op 07932, 2nd Dept 11-27-13**

Food Service Contractor

Questions of Fact About Defendant's Actual or Constructive Notice of Liquid on Floor---Question of Fact Whether Contract Food Service Launched and Instrument of Harm Such that the Food Service Contract Gave Rise to Tort Liability to Plaintiff

The First Department determined summary judgment should not have been granted to the defendants in a slip and fall case. The complaint alleged that there was liquid on the floor of a women's homeless shelter operated by defendant Camba. The complaint further alleged that plaintiff frequently observed liquid on the floor after defendant food service, Whitson's, delivered prepared food. Plaintiff also alleged she had complained about the condition to Camba's maintenance staff. The First Department found the affidavit of Camba's employee did not demonstrate the absence of actual or constructive notice (no evidence of the cleaning schedule was presented). The First Department also found there was a question of fact whether Whitson's launched an instrument of harm, which would support tort liability for plaintiff's fall arising from Whitson's food service contract with Camba:

Camba failed to make a prima facie showing that it lacked constructive notice of the liquid on the floor. Although Camba's employee testified that she completed her inspection of the building about an hour before the accident, and that it was her usual custom and practice to pass by the area where plaintiff claims she fell, she could not recall whether she inspected the accident location itself that afternoon when she made her rounds ... . Her affidavit stating that she did not observe a slippery substance or liquid on the hallway floor during her daily rounds did not satisfy Camba's burden of showing it had no actual or constructive notice of the dangerous condition alleged and that it did not exist for a sufficient length of time prior to the accident to permit Camba employees to discover and remedy it ... . Camba also failed to present evidence regarding the shelter's cleaning schedule, and Camba's employee lacked personal knowledge regarding the shelter's maintenance ... .

Even if Camba had met its initial burden, the record shows that there exists a question of fact as to whether it had notice of a recurring condition. Plaintiff's testimony that she frequently would see liquid leaking from Whitson's Food's delivery crates at the accident location, and that she complained to Camba's maintenance staff about the liquid, is sufficient to raise a triable issue of fact as to a recurring condition ... .

Whitson's Food, which had a contract with Camba to provide cooked meals for the shelter, failed to make a prima facie showing that it did not launch a force or instrument of harm by dropping liquid on the floor when it delivered food to the shelter on the day of the accident ... . The deposition testimony from an employee of Whitson's Food was insufficient to show that Whitson's Food did not cause or create the liquid condition, since he lacked personal knowledge as to whether the floor was clean after Whitson's Food delivered the food ... . **Jackson v Whitson's Food Corp., 2015 NY Slip Op 05889, 1st Dept 7-7-15**

Highway Contractor

Apportionment of Damages Between the City and the Contractor Who Negligently Set Up Lane Closures for Its Highway Work Was Not Supported by the Weight of the Evidence---New Trial for Apportionment of Damages Ordered/Two-Justice Dissenting Opinion Argued that Plaintiffs' Counsel's Vouching for His Own Credibility and Attacking the Credibility of Defense Witnesses In Summation Warranted a New Trial

The First Department, in a full-fledged opinion by Justice Manzanet-Daniels, over a two-justice dissenting opinion, determined the weight of the evidence did not support a 65%/35% apportionment of damages to the city (65%) and the contractor (35%) who set up lane closures for highway repair work. Plaintiff was severely injured in an accident which the jury found was the result of the failure to adequately warn drivers of upcoming lane closures. Because the lane closures were the responsibility of the contractor, the majority determined the 65%/35% damages apportionment was not supported the weight of the evidence and sent the matter back for a new trial on the apportionment of liability. Much of the opinion, including the entirety of the dissenting opinion, focused on the propriety of remarks made by plaintiffs' counsel during summation (vouching for his own credibility, attacking the credibility of defense witnesses, etc.):

It is well settled that trial counsel is afforded wide latitude in presenting arguments to a jury in summation ... . During summation, an attorney "remains within the broad bounds of rhetorical comment in pointing out the insufficiency and contradictory nature of a plaintiff's proofs without depriving the plaintiff of a fair trial" ... . However, an attorney may not "bolster his case . . . by repeated accusations that the witnesses for the other side are liars" .... .

Although the City failed to object to the bulk of the challenged comments during summation, the City moved for an immediate mistrial based on comments impugning defense counsel, the reference to "Wang and his gang," and plaintiffs' counsel's allegedly vouching for his own credibility. We find that although some of the comments were highly inflammatory, they did not " create a climate of hostility that so obscured the issues as to have made the trial unfair'" ... . The jury had ample reason to question the testimony of Officer Pagano, lessening the danger that they were improperly influenced by plaintiff's counsel's remarks. **Gregware v City of New York, 2015 NY Slip Op 06408, 1st Dept 8-4-15**

Question Of Fact Whether Defendant-Contractor Launched An Instrument Of Harm And Whether There Was An Intervening, Superseding Cause Of The Injury, Criteria For Both Explained

The Third Department, reversing Supreme Court, determined defendant-contractor's motion for summary judgment should not have been granted. Defendant contracted with the NYS Department of Transportation (DOT) to do roadwork. Plaintiff alleged the roadwork caused the car in which he was a passenger to go airborne. The Third Department found that the alleged excessive speed attributed to the driver of the car was not unforeseeable as a matter of law. Therefore, there was a question of fact whether the speed was the superseding cause of the accident. The court explained the law re: tort liability to third persons arising from contract, and an intervening, superseding cause of injury:

... "[A] party who enters into a contract to render services may be said to have assumed a duty of care — and thus be potentially liable in tort — to third persons: (1) where the contracting party, in failing to exercise reasonable care in the performance of his [or her] duties, launches a force or instrument of harm; (2) where the plaintiff detrimentally relies on the continued performance of the contracting party's duties[;] and (3) where the contracting party has entirely displaced the other party's duty to maintain the premises safely" ... . "The general rule is that '[a] builder or contractor is justified in relying upon the plans and specifications which he [or she] has contracted to follow unless they are so apparently defective that an ordinary builder of ordinary prudence would be put upon notice that the work was dangerous and likely to cause injury'" * * *

... "[W]here the acts of a third person intervene between the defendant's conduct and the plaintiff's injury, the causal connection is not automatically severed. In such a case, liability turns upon whether the intervening act is a normal or foreseeable consequence of the situation created by the defendant's negligence. If the intervening act is extraordinary under the circumstances, not foreseeable in the normal course of events, or independent of or far removed from the defendant's conduct, it may well be a superseding act which breaks the causal nexus" ... . Whether an intervening act is a

superseding cause is generally a question of fact, but there are circumstances where it may be determined as a matter of law ... . **Dunham v Ketco, Inc., 2016 NY Slip Op 00082, 3rd Dept 1-7-16**

Mechanic

Complaint Did Not State a Cause of Action Against Mechanic Who Inspected Defendant's Car---Plaintiff Did Not Allege the Mechanic Created or Exacerbated Any Dangerous Condition---Therefore the Complaint Did Not Allege the Mechanic Owed Plaintiff a Duty of Care

The Fourth Department, reversing Supreme Court, determined plaintiff did not state a cause of action against the mechanic who inspected the defendant's (Golley's) car, with which plaintiff's motorcycle collided. Plaintiff alleged the mechanic negligently allowed Golley's car to pass inspection. However, the complaint did not demonstrate the mechanic owed a duty of care to plaintiff by creating or exacerbating any dangerous condition in Golley's car. The court explained the relevant law:

Here, plaintiff alleged with respect to defendant that he knowingly passed a vehicle for inspection that should not have passed, but he did not allege, either in the complaint or in opposition to the motion, that defendant created or exacerbated any dangerous condition relating to Golley's vehicle by inspecting it. Thus, even assuming, arguendo, that defendant did not conduct a proper inspection of Golley's vehicle, we conclude that plaintiff has failed to allege that defendant assumed a duty to plaintiff by "launch[ing] an instrument of harm since there is no reason to believe that the inspection made [Golley's] vehicle less safe than it was beforehand ... . **Murray v Golley, 2015 NY Slip Op 07395, 4th Dept 10-9-15**

Municipal Contractor

Condominium Owners Stated a Cause of Action Based Upon Third-Party-Beneficiary Status Re: a Contract Between the Village and an Engineer Hired to Inspect the Condominiums/The Contract Cause of Action Precluded the Professional Malpractice Cause of Action

The Second Department determined that a cause of action based upon the theory that condominium owners were third-party beneficiaries of a contract between a village and an engineer hired to inspect the condominiums should not have been dismissed. It was alleged that the engineer approved the buildings (leading to the issuance of certificates of occupancy by the village) despite defects, including the absence of firewalls. Because a contract-based theory had been properly alleged, the related professional malpractice cause of action, sounding in negligence, should have been dismissed:

In determining third-party beneficiary status it is permissible for the court to look at the surrounding circumstances as well as the agreement . . . Moreover, it is well settled that the obligation to perform to the third party beneficiary need not be expressly stated in the contract" … . Here, the plaintiffs submitted an affidavit from the Village Attorney attesting that the Village engaged the defendant to perform the subject inspections for the benefit of the purchasers of the subject condominiums … . Moreover, "the identity of a third-party beneficiary need not be set forth in the contract or, for that matter, even be known as of the time of its execution" … .

The plaintiffs asserted in the complaint that the defendant "negligently performed inspection services relative to the homes in [Encore I] and [Encore II]," in that, inter alia, the defendant "fail[ed] to detect the existence of defects in the homes and appurtenant common areas." "[M]erely alleging that a party breached a contract because it failed to act with due care will not transform a strict breach of contract claim into a negligence claim" … . This is because "[o]bligations that flow exclusively from a contract must be enforced as contractual duties under a theory of contract law" … . "[A] court enforcing a contractual obligation will ordinarily impose a contractual duty only on the promisor in favor of the promisee and any intended third-party beneficiaries" … . "Thus where a party is merely seeking to enforce its bargain, a tort claim will not lie'" .. . Taking into account the applicable factors, including "the nature of the injury, the manner in which the injury occurred and the resulting harm" … , it is clear that the plaintiffs, as third-party beneficiaries, are seeking enforcement of the defendant's promise to properly inspect the construction of the subject homes. Thus, the only claim the plaintiffs have alleged against the defendant is one sounding in contract, and they have failed to state a cause of action sounding in tort. Accordingly, the Supreme Court properly directed dismissal of the second cause of action pursuant to CPLR 3211(a)(7). **Encore Lake Grove Homeowners Assn Inc v Cashin Assoc PC, 2013 NY Slip Op 07932, 2nd Dept 11-27-13**

City Was "United in Interest" with Non-Profit Corporation Which Maintained Central Park Pursuant to a Contract with the City---Therefore Plaintiff, Who Was Allegedly Injured by a Truck Owned by the Non-Profit Corporation, Could Amend His Complaint to Include the Non-Profit Corporation After the Statute of Limitations Had Run---However the Extent to Which the City Was "United in Interest" Was Dictated by the Terms of the Contract

The First Department determined that the Conservancy, a non-profit corporation which maintains Central Park under a contract with the City of New York, was "united in interest" with the City. Therefore, plaintiff, who allegedly had been injured by a maintenance truck owned by the Conservancy, could amend his complaint to include the Conservancy, even though the statute of limitations had run. The 'unity of interest" was defined by the terms of the contract. Because the contract did not call for the City to indemnify the Conservancy for gross negligence, the complaint against the Conservancy could not include the gross negligence claim:

... [P]laintiff relied on the 2006 Central Park Agreement, a contract between the City and the Conservancy, a nonprofit organization, in which they acknowledged that they had formed an effective "public/private partnership." Under the Agreement, the Conservancy is required to provide specified maintenance services in Central Park to the "reasonable satisfaction" of the City, and the City is broadly required to indemnify the Conservancy "from and against any and all liabilities . . . arising from all services performed and activities conducted by [the Conservancy] pursuant to this agreement in Central Park." The City's indemnification obligation, among other things, expressly excludes claims arising from gross negligence or intentional acts of the Conservancy or its agents or volunteers. As a result of the Agreement, the Conservancy acts, in effect, as an independent contractor fulfilling the City's nondelegable obligation to maintain the City parks in reasonably safe condition ... .

The City is vicariously liable for the Conservancy's negligence in the course of providing maintenance in Central Park by virtue of the contractual indemnification provision, and the parties are thus united in interest ... . Further, since the City has a nondelegable duty to maintain Central Park, it is vicariously liable for negligence committed by the contractor in the course of fulfilling that duty ... . However, the City is correct that its interests are not united with those of the Conservancy with respect to the proposed gross negligence claim, and leave to assert that claim against the Conservancy is therefore denied. **Brunero v City of New York Dept of Parks & Recreation, 2014 NY Slip Op 07444, 1st Dept 10-30-14**

Security at Homeless Shelter Is a Governmental Function--City Immune from Suit by Plaintiff Who Was Assaulted at the Shelter/Private Security Company Not Immune/Plaintiff Was a Third-Party Beneficiary of the Contract Between the Department of Homeless Services and the Security Company/Security Company Did Not Demonstrate It Was Free from Negligence and the Assault Was Not Foreseeable

The Second Department determined the city and the Department of Homeless Services (DHS) were immune from suit by plaintiff, who was assaulted in a city homeless shelter. The city's obligation to provide security is a governmental function for which it cannot be held liable absent a special relationship with the plaintiff (not the case here). However, the private security company, FJC was not immune from suit. Plaintiff was a third-party beneficiary of the contract between DHS and FJC. FJC was not entitled to summary judgment because it failed to demonstrate it was not negligent and the attack was not foreseeable:

The plaintiff's theory of recovery was premised upon the alleged failure of the municipal defendants to provide an adequate and proper security force to prevent attacks by third parties at the homeless shelter where the subject incident occurred. Such a claim, however, implicates a governmental function, liability for the performance of which is barred absent the breach of a special duty owed to the injured party ... . Here, the municipal defendants demonstrated, prima facie, that they owed no special duty of care to the plaintiff, and the plaintiff failed to raise a triable issue of fact in opposition. Therefore, that branch of the municipal defendants' motion which was for summary judgment dismissing the complaint insofar as asserted against them was properly granted ... .

However, the Supreme Court erred in granting that branch of the motion of the defendant FJC Security Services, Inc. (hereinafter FJC), which was for summary judgment dismissing the complaint insofar as asserted against it. Contrary to its contention, FJC, a private, for-profit contractor of security services, is not entitled to governmental immunity ... . In addition, the plaintiff is a third-party beneficiary of the contract between FJC and DHS. The provisions of the contract between FJC and DHS unequivocally express an intent to confer a direct benefit on the homeless clients in residence at the City shelter, such as the plaintiff, to protect them from physical injury. Thus, in order to prevail on its motion for summary judgment, FJC was required to demonstrate, prima facie, that there were no triable issues of fact as to whether it was negligent in the performance of its duties, or that the assault on the plaintiff was not a reasonably foreseeable consequence of any breach of its duties ... . FJC failed to demonstrate either. **Clark v City of New York, 2015 NY Slip Op 06307, 2nd Dept 7-29-15**

Circumstantial Evidence Raised Question of Fact About Whether Respondent (a Software-Communications Contractor Working on a Subway Train) Was Responsible for the Placement of an Object Which Fell and Injured Plaintiff Train Operator

The Second Department determined summary judgment in favor of the respondent should not have been granted. Plaintiffs had raised a question of fact by producing circumstantial evidence that the respondent, not New York City Transit Authority (NYCTA) employees, were responsible for the placement of a "shoe paddle" in a subway car which fell and injured plaintiff, the driver of the subway train. The respondent contractor was working on the subway communications system. A “shoe paddle” had been used to prop open the subway doors. The court explained the criteria for circumstantial evidence in this context. (The nature of the respondent-contractor’s duty to plaintiff was not discussed. The placement of the shoe paddle would seem to constitute the “launch of an instrument of harm.”):

"To establish a prima facie case of negligence based wholly on circumstantial evidence, [i]t is enough that [the plaintiff] shows facts and conditions from which the negligence of the defendant and the causation of the accident by that negligence may be reasonably inferred'" ... . "The law does not require that plaintiff's proof positively exclude every other possible cause of the accident but defendant's negligence" ... . "Rather, [the plaintiff's] proof must render those other causes sufficiently remote' or technical' to enable the jury to reach its verdict based not upon speculation, but upon the logical inferences to be drawn from the evidence" ... . "A plaintiff need only prove that it was more likely or more reasonable that the alleged injury was caused by the defendant's negligence than by some other agency" ... .

Here, the respondents established their prima facie entitlement to judgment as a matter of law by proffering the testimony of two of their employees denying that they placed the shoe paddle in the subject door. In opposition, the plaintiffs raised

a triable issue of fact by submitting the testimony from NYCTA employees, including the testimony of the cleaner of the subject train, that no NYCTA employee placed the shoe paddle in the door, and that the respondents were the only contractors present at the site during the relevant time period. The plaintiffs also submitted NYCTA records showing that as of 11:40 p.m., about three hours prior to the incident, all shoe paddles were in their holders and all doors were free and moving properly. Thus, the plaintiffs raised a triable issue of fact as to whether this circumstantial evidence gives rise to a rational inference that it was more likely or more reasonable that an employee of the respondents placed the shoe paddle in the subject door than an NYCTA employee ... . **Hernandez v Alstom Transp., Inc., 2015 NY Slip Op 05911, 2nd Dept 7-8-15**

Apportionment of Damages Between the City and the Contractor Who Negligently Set Up Lane Closures for Its Highway Work Was Not Supported by the Weight of the Evidence---New Trial for Apportionment of Damages Ordered/Two-Justice Dissenting Opinion Argued that Plaintiffs' Counsel's Vouching for His Own Credibility and Attacking the Credibility of Defense Witnesses In Summation Warranted a New Trial

The First Department, in a full-fledged opinion by Justice Manzanet-Daniels, over a two-justice dissenting opinion, determined the weight of the evidence did not support a 65%/35% apportionment of damages to the city (65%) and the contractor (35%) who set up lane closures for highway repair work. Plaintiff was severely injured in an accident which the jury found was the result of the failure to adequately warn drivers of upcoming lane closures. Because the lane closures were the responsibility of the contractor, the majority determined the 65%/35% damages apportionment was not supported the weight of the evidence and sent the matter back for a new trial on the apportionment of liability. Much of the opinion, including the entirety of the dissenting opinion, focused on the propriety of remarks made by plaintiffs' counsel during summation (vouching for his own credibility, attacking the credibility of defense witnesses, etc.):

It is well settled that trial counsel is afforded wide latitude in presenting arguments to a jury in summation ... . During summation, an attorney "remains within the broad bounds of rhetorical comment in pointing out the insufficiency and contradictory nature of a plaintiff's proofs without depriving the plaintiff of a fair trial" ... . However, an attorney may not "bolster his case . . . by repeated accusations that the witnesses for the other side are liars" .... .

Although the City failed to object to the bulk of the challenged comments during summation, the City moved for an immediate mistrial based on comments impugning defense counsel, the reference to "Wang and his gang," and plaintiffs' counsel's allegedly vouching for his own credibility. We find that although some of the comments were highly inflammatory, they did not " create a climate of hostility that so obscured the issues as to have made the trial unfair'" ... . The jury had ample reason to question the testimony of Officer Pagano, lessening the danger that they were improperly influenced by plaintiff's counsel's remarks. **Gregware v City of New York, 2015 NY Slip Op 06408, 1st Dept 8-4-15**

Question Of Fact Whether Defendant-Contractor Launched An Instrument Of Harm And Whether There Was An Intervening, Superseding Cause Of The Injury, Criteria For Both Explained

The Third Department, reversing Supreme Court, determined defendant-contractor's motion for summary judgment should not have been granted. Defendant contracted with the NYS Department of Transportation (DOT) to do roadwork. Plaintiff alleged the roadwork caused the car in which he was a passenger to go airborne. The Third Department found that the alleged excessive speed attributed to the driver of the car was not unforeseeable as a matter of law. Therefore, there was a question of fact whether the speed was the superseding cause of the accident. The court explained the law re: tort liability to third persons arising from contract, and an intervening, superseding cause of injury:

... "[A] party who enters into a contract to render services may be said to have assumed a duty of care — and thus be potentially liable in tort — to third persons: (1) where the contracting party, in failing to exercise reasonable care in the performance of his [or her] duties, launches a force or instrument of harm; (2) where the plaintiff detrimentally relies on the continued performance of the contracting party's duties[;] and (3) where the contracting party has entirely displaced the other party's duty to maintain the premises safely" ... . "The general rule is that '[a] builder or contractor is justified in

relying upon the plans and specifications which he [or she] has contracted to follow unless they are so apparently defective that an ordinary builder of ordinary prudence would be put upon notice that the work was dangerous and likely to cause injury'" * * *

... "[W]here the acts of a third person intervene between the defendant's conduct and the plaintiff's injury, the causal connection is not automatically severed. In such a case, liability turns upon whether the intervening act is a normal or foreseeable consequence of the situation created by the defendant's negligence. If the intervening act is extraordinary under the circumstances, not foreseeable in the normal course of events, or independent of or far removed from the defendant's conduct, it may well be a superseding act which breaks the causal nexus" ... . Whether an intervening act is a superseding cause is generally a question of fact, but there are circumstances where it may be determined as a matter of law ... . **Dunham v Ketco, Inc., 2016 NY Slip Op 00082, 3rd Dept 1-7-16**

Property Manager

Failure to Submit Management Agreement Required Dismissal of Property Managing Agent's Motion for Summary Judgment in a Slip and Fall Case---the Terms of the Agreement Determine the Agent's Liability

The Second Department determined that the property managing agent, in a slip and fall case, did not eliminate all triable issues of fact concerning liability for plaintiff's fall on black ice because it did not submit a copy of the managing agreement with its motion for summary judgment:

As a general rule, liability for a dangerous or defective condition on real property must be predicated upon ownership, occupancy, control, or special use of that property ... . A duty of care on the part of a managing agent may arise where there is a comprehensive and exclusive management agreement between the agent and the owner that displaces the owner's duty to safely maintain the premises ... . Here, in moving for summary judgment, the ... defendants failed to submit a copy of the written management agreement. Consequently, they failed to establish, prima facie, that the managing agent owed no duty of care to the plaintiff ... . **Calabro v Harbour at Blue Point Home Owners Assn Inc, 2014 NY Slip Op 05620, 2nd Dept 8-6-14**

Management Agreement Did Not Give Rise to Tort Liability for Slip and Fall

In determining the management agreement with a hospital did not give rise to tort liability for a slip and fall on the hospital premises, the Second Department explained the relevant law:

"Generally, a contractual obligation, standing alone, will not give rise to tort liability in favor of a third party" ... . However, there are three exceptions to this general rule: (1) where the contracting party, in failing to exercise reasonable care in the performance of its duties, launches a force or instrument of harm or creates or exacerbates a hazardous condition; (2) where the plaintiff detrimentally relies on the continued performance of the contracting party's duties; and (3) where the contracting party has entirely displaced the other party's duty to maintain the premises safely ... . "As part of its prima facie showing, a contracting defendant is only required to negate the applicability of those Espinal exceptions that were expressly pleaded by the plaintiff or expressly set forth in the plaintiff's bill of particulars" ... .

Here, the plaintiffs alleged that Sodexo [the building manager] maintained and controlled the premises. Sodexo established its prima facie entitlement to judgment as a matter of law by submitting evidence establishing that the plaintiffs were not parties to the management agreement and thus, it owed the injured plaintiff no duty of care ...; that the management agreement was not so comprehensive and exclusive as to displace the Hospital's duty to maintain the

premises safely ...; and that it did not create the allegedly hazardous condition ... . In opposition, the plaintiffs failed to raise a triable issue of fact. **Sperling v Wyckoff Hgts. Hosp., 2015 NY Slip Op 04840, 2nd Dept 6-10-15**

Question Of Fact Whether Property Manager Launched An Instrument Of Harm When A Minor Leak Was Repaired

The First Department, over an extensive dissent, determined the motion for summary judgment dismissing the negligence cause of action against defendant property manager was properly denied. Defendant contracted with the board of a cooperative to manage the property. Plaintiff alleged defendant's attempt to fix a minor leak caused water to damage his unit:

Regardless of which party had the burden of proof on the Espinal exception, the evidence submitted on the motion established that defendant attempted to fix the leak or leaks on several occasions and that the problem persisted and culminated in a flood of water "cascading" into plaintiff's apartment. Plaintiff testified that the leak began on March 8, 2010, and lasted a few days. The leak started again in May 2010, and reoccurred in August 2010 and December 2010, and finally, the "big finale" of water cascading into plaintiff's unit occurred in August 2011. Defendant attempted to fix the leaks on several occasions. Invoices dated March 10, April 13, September 28, and December 30, 2010 indicate that plumbing work was done in response to plaintiff's complaints about water leaks. The notations in these invoices do not definitively establish whether or not defendant's plumbers "launched a force or instrument of harm." Thus, contrary to the dissent's contention, the evidence raises an issue of fact as to whether defendant's attempts to fix the water leak exacerbated the condition that led to the more serious leak that occurred in August 2011. **Karydas v Ferrara-Ruurds, 2016 NY Slip Op 05941, 1st Dept 9-1-16**

Question of Fact Whether a Building Manager Owed a Duty to Plaintiff---Plaintiff, a Sidewalk Pedestrian, Was Struck by Window-Washing Equipment---The Window Washing Service Was an Independent Contractor Hired by the Building Manager---Question of Fact Raised Whether a Duty to the Plaintiff Ran from the Building Manager Because of the Inherently Dangerous Work the Independent Contractor Was Hired to Do and Because of the Nature of the Contract Between the Building Manager and the Building Owner---The Court Noted that the Property Owners Were Not Liable Because Ownership and Control of the Building on the Property Had Been Transferred (to the Building Owner)

The Second Department determined there was a question of fact whether a building manager (Milford) who hired a window washing service (Red Cap) could be liable for injury to a pedestrian (plaintiff) struck by a piece of window-washing equipment which fell. Although Red Cap was an independent contractor, plaintiff raised a question of fact about whether Milford owed a nondelegable duty to plaintiff because the work it hired Red Cap to do was inherently dangerous (in the absence of warning signs and pedestrian barriers) and whether the building management services contract between Milford and the building-owner (S & P) was sufficiently comprehensive and exclusive to create a duty running to plaintiff. The court noted that the property owners were not liable because ownership and control of the building (on the property) had been transferred (to the building-owner):

Milford established its prima facie entitlement to judgment as a matter of law by submitting proof that Red Cap was an independent contractor and, thus, it could not be held liable for Red Cap's negligent acts ..., and that, as S & P's contractual managing agent, it owed no duty to the plaintiff ... . However, in opposition, the plaintiff raised triable issues of fact as to whether Milford owed a nondelegable duty to the plaintiff because it knew or had reason to know that the work it hired Red Cap to perform was inherently dangerous to pedestrians in the absence of warning signs or barriers on the sidewalk below the window-washing apparatus ..., and whether the property management services agreement with S & P was sufficiently comprehensive and exclusive so as support a duty running to the plaintiff ... . **Baek v Red Cap Servs., Ltd., 2015 NY Slip Op 04794, 2nd Dept 6-10-15**

Real Estate Broker

Question of Fact Whether Real Estate Broker "Launched an Instrument of Harm" In an Apartment Being Shown to Plaintiff; Evidence of Custom Not Enough to Shift the Burden of Proof in Premises Liability Action

The First Department determined defendant real estate broker's (Prudential/Leonhardt's) motion for summary judgment in a personal injury case should not have been granted. As an apartment was being shown by the real estate broker, plaintiff tripped and fell when her foot became tangled in a drapery cord which was on the floor. The broker (Leonhardt) submitted evidence in support of the motion for summary judgment stating that she did not remember whether she opened the drapes on the day in question, and further stating that her habit was to hang the cord up when she did open the drapes. The court held the broker's evidence was not sufficient to demonstrate, as a matter of law, that the broker did not "launch an instrument of harm," i.e., cause the cord to be on the floor. Therefore, the contract between the broker and the owner of the apartment could have given rise to a duty of care owed by the broker to the plaintiff:

We thus turn to the ... potential predicate for finding third-party tort liability, which rests on whether Prudential or Leonhardt launched an instrument of harm. Since they were the movants for summary judgment, Prudential and Leonhardt had the prima facie burden of demonstrating that there were no triable issues of fact and that they were entitled to judgment as a matter of law on the issue ... . Leonhardt's deposition testimony, and her affidavit in support of the motion, established that it was possible that she opened the drapes before the accident occurred, although she was not able to state with a reasonable degree of certainty that she did. If indeed she had opened the drapes, Leonhardt surmised, she would have wrapped the cord around the hook, because that is what she always did. However, evidence of a particular custom is insufficient to shift the burden in a premises liability case, because the defendant is required to proffer "specific evidence as to [her] activities on the day of the accident" ... . Here, since Leonhardt had no specific recollection concerning the opening of the drapes on the day of the accident, she and Prudential were unable to eliminate the possibility that they were responsible for the hazardous placement of the cord on the floor. Accordingly, they failed to meet their prima facie burden, and the court should have denied their motion for summary judgment. **Stimmel v Osherow, 2015 NY Slip Op 08340, 1st Dept 11-17-15**

Security Contractor

Security at Homeless Shelter Is a Governmental Function--City Immune from Suit by Plaintiff Who Was Assaulted at the Shelter/Private Security Company Not Immune/Plaintiff Was a Third-Party Beneficiary of the Contract Between the Department of Homeless Services and the Security Company/Security Company Did Not Demonstrate It Was Free from Negligence and the Assault Was Not Foreseeable

The Second Department determined the city and the Department of Homeless Services (DHS) were immune from suit by plaintiff, who was assaulted in a city homeless shelter. The city's obligation to provide security is a governmental function for which it cannot be held liable absent a special relationship with the plaintiff (not the case here). However, the private security company, FJC was not immune from suit. Plaintiff was a third-party beneficiary of the contract between DHS and FJC. FJC was not entitled to summary judgment because it failed to demonstrate it was not negligent and the attack was not foreseeable:

The plaintiff's theory of recovery was premised upon the alleged failure of the municipal defendants to provide an adequate and proper security force to prevent attacks by third parties at the homeless shelter where the subject incident occurred. Such a claim, however, implicates a governmental function, liability for the performance of which is barred

absent the breach of a special duty owed to the injured party ... . Here, the municipal defendants demonstrated, prima facie, that they owed no special duty of care to the plaintiff, and the plaintiff failed to raise a triable issue of fact in opposition. Therefore, that branch of the municipal defendants' motion which was for summary judgment dismissing the complaint insofar as asserted against them was properly granted ... .

However, the Supreme Court erred in granting that branch of the motion of the defendant FJC Security Services, Inc. (hereinafter FJC), which was for summary judgment dismissing the complaint insofar as asserted against it. Contrary to its contention, FJC, a private, for-profit contractor of security services, is not entitled to governmental immunity ... . In addition, the plaintiff is a third-party beneficiary of the contract between FJC and DHS. The provisions of the contract between FJC and DHS unequivocally express an intent to confer a direct benefit on the homeless clients in residence at the City shelter, such as the plaintiff, to protect them from physical injury. Thus, in order to prevail on its motion for summary judgment, FJC was required to demonstrate, prima facie, that there were no triable issues of fact as to whether it was negligent in the performance of its duties, or that the assault on the plaintiff was not a reasonably foreseeable consequence of any breach of its duties ... . FJC failed to demonstrate either. **Clark v City of New York, 2015 NY Slip Op 06307, 2nd Dept 7-29-15**

Sign Installer

No Liability to Third Party Stemming from Contract to Install a Sign

The Second Department determined the plaintiff's verdict in a slip and fall case was properly set aside. Plaintiff tripped on a sign that had fallen and was covered by snow. The evidence did not demonstrate the sign company (Everlast) "launched an instrument of harm" so as to trigger tort liability in favor of a third party arising from a contract. The analytical criteria were explained:

" [A] contractual obligation, standing alone, will generally not give rise to tort liability in favor of a third party'" ... . The Court of Appeals has recognized three exceptions to this rule ..., only one of which is pertinent to this case. Under that exception, a party who enters into a contract to render services may be liable in tort to a third party "where the contracting party, in failing to exercise reasonable care in the performance of his duties, launche[s] a force or instrument of harm'" ... .

Here, there was no rational process by which the jury could have found that Everlast launched a force or instrument of harm ... . In that respect, there was no direct evidence that Everlast was negligent in installing the sign seven months before the accident. Further, there was no rational process by which the jury could have found in favor of the plaintiff based upon circumstantial evidence, since the plaintiff failed, as a matter of law, to demonstrate that it was "more likely or more reasonable that the alleged injury was caused by the defendant's negligence than by some other agency" ... . **Robinson v Limoncelli, 2015 NY Slip Op 02745, 2nd Dept 4-1-15**

Snow Removal Contractor

Circumstances Under Which Contractor Can Be Held Liable for Slip on Snow and Ice

In this slip and fall case, the Second Department explained the circumstances under which a snow-and-ice-removal contractor can be held liable for injuries to third parties:

Generally, "a limited contractual obligation to provide snow removal services does not render the contractor liable in tort for the personal injuries of third parties" … . However, there are three recognized exceptions: "(1) where the contracting party, in failing to exercise reasonable care in the performance of his duties, launche[s] a force or instrument of harm; (2) where the plaintiff detrimentally relies on the continued performance of the contracting party's duties and (3) where the contracting party has entirely displaced the other party's duty to maintain the premises safely" … . **Santos v Deanco Servs, Inc, 2013 NY Slip Op 02065, 2012-02786, Inex No 5927/09, 2nd Dept 3-27-13**

Question of Fact Raised About Whether Snow-Removal Contractor Created or Exacerbated the Dangerous Condition

The Second Department affirmed the denial of summary judgment to a snow-removal contractor (SCS) in a slip and fall case. The plaintiff fell on a mound of snow between the street and a sidewalk. The court explained:

A contractor may be held liable for injuries to a third party where, in undertaking to render services, the contractor entirely displaces the duty of the property owner to maintain the premises in a safe condition, the injured party relies on the contractor's continued performance under the agreement, or the contractor negligently creates or exacerbates a dangerous condition … . SCS demonstrated its prima facie entitlement to judgment as a matter of law dismissing the amended complaint insofar as asserted against it … by demonstrating that the injured plaintiff was not a party to the snow and ice removal contract, and that it did not owe a duty to him … . In opposition, however, the plaintiffs raised a triable issue of fact as to whether SCS's alleged negligence created or exacerbated the hazard which was a proximate cause of the accident… . **LaGuarina v Metropolitan Trans Auth, 2013 NY slip Op 05800, 2nd Dept 9-11-13**

Summary Judgment Properly Granted to Snow-Removal Contractor---"Espinal" Exceptions Explained

In affirming the grant of summary judgment to defendant snow-removal contractor (Lemp) in a slip and fall case, the Second Department clearly explained the applicable law, including the "Espinal" exceptions to the rule a contractor is not liable to third parties:

As a general rule, a limited contractual obligation to provide snow removal services does not render the contractor liable in tort for the personal injuries of third parties … . However, in Espinal v Melville Snow Contrs. (98 NY2d 136, 140), the Court of Appeals recognized that exceptions to this rule apply (1) where the contracting party, in failing to exercise reasonable care in the performance of his or her duties, launches a force or instrument of harm, (2) where the plaintiff detrimentally relies on the continued performance of the contracting party's duties, and (3) where the contracting party has entirely displaced another party's duty to maintain the premises safely.

Contrary to the plaintiffs' contentions, the defendant Lemp Landscapers, Inc. (hereinafter Lemp), made a prima facie showing of its entitlement to judgment as a matter of law by offering proof that the injured plaintiff was not a party to its snow removal contract with the defendant Woodland Pond Condominium Association (hereinafter Woodland), and that it thus owed no duty of care to the injured plaintiff … . Since the plaintiffs did not allege facts in their complaint or bill of particulars which would establish the possible applicability of any of the Espinal exceptions, Lemp, in establishing its prima facie entitlement to judgment as a matter of law, was not required to affirmatively demonstrate that these exceptions

did not apply … .

In opposition to Lemp's prima facie showing, the plaintiffs offered no evidence to support their contentions that Lemp launched a force or instrument of harm by creating or exacerbating the icy condition that allegedly caused the plaintiff Ernest Rudloff's fall … . By merely plowing the snow in accordance with the contract and leaving some residual snow or ice on the plowed area, Lemp cannot be said to have created a dangerous condition and thereby launched a force or instrument of harm. Moreover, a claim that a contractor exacerbated an existing condition requires some showing that the contractor left the premises in a more dangerous condition than he or she found them … . Therefore, even if Lemp failed to sand or salt the roadway on which the injured plaintiff fell, the plaintiffs have offered nothing more than speculation that the failure to perform that duty rendered the property less safe than it was before Lemp started its work … . **Rudloff v Woodland Pond Condominium Assn, 2013 NY Slip Op 05812, 2nd Dept 9-11-13**

Snow Removal Contractor May Be Liable to Plaintiff in Slip and Fall Action/Question of Fact Whether Failure to Use Low-Temperature Salt Created a Dangerous Condition

The Third Department determined there was a question of fact whether a contractor hired to clear snow and ice created a dangerous condition by not using salt designed for low temperatures:

While a snow removal contractor is generally not liable to injured persons who were not parties to the contract …, plaintiffs argue the recognized exception that extends a duty to noncontracting third parties where the contractor fails to exercise reasonable care in the performance of duties such that he or she "'launche[s] a force or instrument of harm'" … .

In opposition to the motion for summary judgment, plaintiffs submitted affidavits from experts who opined that, among other things, [defendant's] application of plain, untreated rock salt to the parking lot on the morning in question was negligent because temperatures, which were below 20 degrees Fahrenheit, were too cold for plain rock salt to be effective. According to plaintiffs' experts, by using untreated salt instead of treated, low temperature salt, [defendant] caused snow shoveled from the sidewalk to the parking lot … to melt and then quickly refreeze, creating a layer of ice beneath the snow. There is no dispute that [defendant] had the option of using untreated or treated salt pursuant to the contract and that he had both kinds available. There was also evidence that [defendant] was aware that snow would be shoveled from the sidewalk onto the parking lot, and [a witness] testified that he had observed salt in the area where plaintiff fell. This evidence sufficiently raises a question of fact as to whether [defendant] "'negligently create[d] or exacerbate[d] a dangerous condition'" by using untreated salt, resulting in the formation of the ice on which plaintiff allegedly slipped… . **Belmonte v Guilderland Associates LLC…, 516830, 3rd Dept 12-12-13**

Property Owner and Snow Removal Contractor Should Have Been Awarded Summary Judgment in Snow/Ice Slip and Fall Case---Analytical Criteria Explained

The Second Department determined the defendant property owner and defendant snow-removal contractor should have been awarded summary judgment in a slip and fall case. The court outlined the criteria for both causes of action:

" A property owner will be held liable for a slip-and-fall accident involving snow and ice on its property only when it created the dangerous condition which caused the accident or had actual or constructive notice of its existence'" ... . Thus, to establish its prima facie entitlement to judgment as a matter of law, a property owner defendant moving for summary judgment is required to establish, prima facie, that it neither created nor had actual or constructive notice of the dangerous condition that allegedly caused the plaintiff to fall ... . Here, ... [the property owner] ... established its prima facie entitlement to judgment as a matter of law by submitting the transcripts of the deposition testimony of ... a maintenance supervisor, and ... the snow removal contractor, which established, prima facie, that [the property owner] did not have actual or constructive notice for a sufficient length of time to discover and remedy the ice condition which allegedly caused the plaintiff to fall... . * * *

"As a general rule, a limited contractual obligation to provide snow removal services does not render the contractor liable in tort for the personal injuries of third parties" ... . "However, in Espinal v Melville Snow Contrs. (98 NY2d 136, 140), the Court of Appeals recognized that exceptions to this rule apply (1) where the contracting party, in failing to exercise reasonable care in the performance of his or her duties, launches a force or instrument of harm, (2) where the plaintiff detrimentally relies on the continued performance of the contracting party's duties, or (3) where the contracting party has entirely displaced another party's duty to maintain the subject premises safely" ... .

Here, the plaintiff alleged [the snow-removal contractor] created the dangerous condition that caused her to slip and fall and, thus, launched a force or instrument of harm. In support of its motion, [the contractor] established, prima facie, that it did not create the allegedly dangerous condition which caused the plaintiff's fall ... . In opposition ..., the plaintiff and [the property owner] failed to raise a triable issue of fact as to whether [the contractor] created or exacerbated the alleged hazardous condition ... . The affidavit of the plaintiff's expert as to the origin of the hazardous condition was speculative and conclusory and, thus, insufficient to defeat a motion for summary judgment ... . **Scott v Avalonbay Communities Inc, 2015 NY Slip Op -1438, 2nd Dept 2-18-15**

Snow-Removal Company Not Liable To Plaintiff Because Plaintiff Was Not A Party To The Snow-Removal Contract; No Need For Defendant To Address Espinal Exceptions In Its Summary Judgment Motion If The Exceptions Are Not Pled By The Plaintiff

The Second Department determined defendant snow-removal company, Brickman, was entitled to summary judgment dismissing the complaint in this slip and fall case. Because the plaintiff was not a party to the snow-removal contract with the owner of the property, Brickman owed no duty to plaintiff. The court noted that, because the plaintiff did not allege the applicability of any of the "Espinal" exceptions to the general rule against tort liability arising from a contract, the defendant was not obligated to address those exceptions in its summary judgment motion:

A contractual obligation, standing alone, generally will not give rise to tort liability in favor of a third party (see Espinal v Melville Snow Contrs., 98 NY2d 136, 138). However, there are three exceptions to that general rule: "(1) where the contracting party, in failing to exercise reasonable care in the performance of his [or her] duties, launches a force or instrument of harm, (2) where the plaintiff detrimentally relies on the continued performance of the contracting party's duties, and (3) where the contracting party has entirely displaced the other party's duty to maintain the premises safely" ... .

Brickman made a prima facie showing of its entitlement to judgment as a matter of law dismissing the complaint insofar as asserted against it by submitting evidence that the plaintiff was not a party to its snow removal agreement, and that it thus owed her no duty of care ... . Inasmuch as the plaintiff did not allege facts in the complaint or bill of particulars that would establish the possible applicability of any of the Espinal exceptions ... , Brickman was not required to affirmatively demonstrate that these exceptions did not apply in order to establish its prima facie entitlement to judgment as a matter of law ... .

Once Brickman made its prima facie showing, the burden shifted to the plaintiff to come forward with proof sufficient to raise a triable issue of fact as to the applicability of one or more of the Espinal exceptions ... . In opposition to Brickman's prima facie showing, the plaintiff failed to raise a triable issue of fact as to whether Brickman launched a force or instrument of harm, whether she detrimentally relied on the continued performance of Brickman's duties, or whether Brickman entirely displaced the owner's duty to maintain the premises in a safe condition ... . **Bryan v CLK-HP 225 Rabro, LLC, 2016 NY Slip Op 01280, 2nd Dept 2-24-16**

Question Of Fact Whether Snow-Removal Contractor Created The Ice Condition Where Plaintiff Fell

The Third Department, in this slip and fall case, determined Inland, the owner of the shopping mall where plaintiff fell on ice, raised a question of fact whether the snow removal contractor, Hayes Paving, created the dangerous condition (i.e.,

launched an instrument of harm) by piling ice near a building which subsequently melted and refroze:

... [W]e conclude that a question of fact exists as to whether Hayes Paving negligently created a dangerous condition by piling chunks of ice against the Staples store building which, thereafter, melted and refroze into the patch of ice upon which plaintiff allegedly slipped ... . Thus, Hayes Paving was not entitled to dismissal of Inland's third-party claim for contribution. **Hannigan v Staples, Inc., 2016 NY Slip Op 02506, 3rd Dept 3-31-16**

Snow Removal Contractor Not Liable For Slip And Fall On Ice, No Evidence Contractor Created Or Exacerbated Icy Condition; Failure To Apply Salt Not Enough

The Second Department, in a full-fledged opinion by Justice Dillon, resolving a question of first impression in the Second Department, determined a snow-removal contractor could not be held liable for plaintiff's slip and fall on ice without proof the icy condition was created or exacerbated by the contractor. Here, the contractor had plowed the snow on the same day as the slip and fall. Proof that the area was not salted was deemed insufficient:

We are called upon to determine, for the first time in this judicial department, whether a snow removal contractor may be found liable in a personal injury action under *Espinal v Melville Snow Contrs.* (98 NY2d 136) on the ground that the snow removal contractor's passive omissions constituted the launch of a force or instrument of harm, where there is no evidence that the passive conduct created or exacerbated a dangerous condition. We find that liability cannot be imposed under such circumstances. * * *

The trial record is devoid of any evidence regarding the cause, creation, or exacerbation of the icy condition. No evidence was presented as to when the ice first materialized or how long it had been present before the accident. There were no climatology records admitted into evidence regarding the nature of the recent storm, the air temperature prior, during, and after the storm, or potential snowmelt and refreeze. There was no evidence as to when the bullpen was plowed in relation to the time of the plaintiff's accident, and there was no expert testimony regarding the standard of care that may have been violated if, contractual language aside, no salt or sand/salt mixture were applied under the circumstances present. Moreover, there was no evidence that the icy condition at the bullpen worsened between when it arguably should have been salted and the time of the plaintiff's accident.

Absent at least some of the foregoing evidence, a determination that the failure to salt created or exacerbated the icy condition ... would be speculative. Indeed, a failure to apply salt would ordinarily neither create ice nor exacerbate an icy condition, as the absence of salt would merely prevent a pre-existing ice condition from *improving* ... . **Santos v Deanco Servs., Inc., 2016 NY Slip Op 05489, 2nd Dept 7-13-16**

Software/Communications Contractor

Circumstantial Evidence Raised Question of Fact About Whether Respondent (a Software-Communications Contractor Working on a Subway Train) Was Responsible for the Placement of an Object Which Fell and Injured Plaintiff Train Operator

The Second Department determined summary judgment in favor of the respondent should not have been granted. Plaintiffs had raised a question of fact by producing circumstantial evidence that the respondent, not New York City Transit Authority (NYCTA) employees, were responsible for the placement of a "shoe paddle" in a subway car which fell and injured plaintiff, the driver of the subway train. The respondent contractor was working on the subway

communications system. A “shoe paddle” had been used to prop open the subway doors. The court explained the criteria for circumstantial evidence in this context. (The nature of the respondent-contractor’s duty to plaintiff was not discussed. The placement of the shoe paddle would seem to constitute the “launch of an instrument of harm.”):

"To establish a prima facie case of negligence based wholly on circumstantial evidence, [i]t is enough that [the plaintiff] shows facts and conditions from which the negligence of the defendant and the causation of the accident by that negligence may be reasonably inferred'" ... . "The law does not require that plaintiff's proof positively exclude every other possible cause of the accident but defendant's negligence" ... . "Rather, [the plaintiff's] proof must render those other causes sufficiently remote' or technical' to enable the jury to reach its verdict based not upon speculation, but upon the logical inferences to be drawn from the evidence" ... . "A plaintiff need only prove that it was more likely or more reasonable that the alleged injury was caused by the defendant's negligence than by some other agency" ... .

Here, the respondents established their prima facie entitlement to judgment as a matter of law by proffering the testimony of two of their employees denying that they placed the shoe paddle in the subject door. In opposition, the plaintiffs raised a triable issue of fact by submitting the testimony from NYCTA employees, including the testimony of the cleaner of the subject train, that no NYCTA employee placed the shoe paddle in the door, and that the respondents were the only contractors present at the site during the relevant time period. The plaintiffs also submitted NYCTA records showing that as of 11:40 p.m., about three hours prior to the incident, all shoe paddles were in their holders and all doors were free and moving properly. Thus, the plaintiffs raised a triable issue of fact as to whether this circumstantial evidence gives rise to a rational inference that it was more likely or more reasonable that an employee of the respondents placed the shoe paddle in the subject door than an NYCTA employee ... . **Hernandez v Alstom Transp., Inc., 2015 NY Slip Op 05911, 2nd Dept 7-8-15**

Stove Installer

Contract-Based Duty Owed to Non-Party Explained

In this case a stove that was not secured to the wall with a bracket tipped over as children either stood or jumped on the oven door. One of the children was killed. One of the many issues in the case was whether the contractor who installed the stove without the bracket was liable to the surviving child. In upholding the denial of the contractor’s motion for summary judgment, the Third Department explained when a contractual relationship can give rise to tort liability to a third party:

Defendant contends that, since he performed work as a contractor for the rental agent, he owed no duty to the surviving child and, thus, his motion for summary judgment in this regard should have been granted. "[A] contractual obligation, standing alone, will generally not give rise to tort liability in favor of a third party" …. The three limited exceptions to this general rule include: "(1) where the contracting party, in failing to exercise reasonable care in the performance of his [or her] duties, launches a force or instrument of harm; (2) where the plaintiff detrimentally relies on the continued performance of the contracting party's duties[;] and (3) where the contracting party has entirely displaced the other party's duty to maintain the premises safely" …. Care must be taken in the application of the exceptions so that they do not "swallow up the general rule" …, and determining whether a duty exists is "a question of law for the courts" …. **Kelley…v Schneck…, 515645, 3rd Dept, 5-2-13**

Traffic Signal Installer

Company Which Contracted with County to Maintain Traffic Signals Did Not Owe a Duty to Plaintiff---Plaintiff Alleged a Malfunctioning Traffic Signal Caused an Accident in Which She Was Injured

Plaintiff alleged a traffic accident was the result of a malfunctioning traffic signal. The defendant county had entered a traffic-signal maintenance contract with defendant Welsbach. The Second Department determined that the contract between the county and Welsbach did not give rise to tort liability re: defendant Welsbach in favor of the plaintiff because the contract was not such that it displaced the county's duty to maintain the traffic signal. The court explained the analytical criteria:

> "[A] contractual obligation, standing alone, will generally not give rise to tort liability in favor of a third party" ... . Exceptions to this general rule exist "(1) where the contracting party, in failing to exercise reasonable care in the performance of [its] duties, launche[s] a force or instrument of harm; (2) where the plaintiff detrimentally relies on the continued performance of the contracting party's duties[;] and (3) where the contracting party has entirely displaced the other party's duty to maintain the premises safely" ... . Welsbach established, prima facie, that it did not owe the plaintiff a duty of care, since its limited maintenance contract with the County did not displace the County's duty to maintain the traffic signal at the subject intersection in a reasonably safe condition and it did not launch an instrument of harm ... . **Watt v County of Nassau, 2015 NY Slip Op 05668, 2nd Dept 7-1-15**