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FIRST DEPARTMENT

CIVIL PROCEDURE.

SUPREME COURT ERRED WHEN IT RULED PLAINTIFF HAD "DEFAULTED" ON ITS SUMMARY JUDGMENT MOTION BY FAILING TO APPEAR FOR ORAL ARGUMENT.

The First Department affirmed the denial of plaintiff's summary judgment on the merits in a breach of contract action. However, the First Department noted that the alternative ground for Supreme Court's ruling, i.e., that plaintiff had "defaulted" on its motion by failing to appear for oral argument, was not appropriate: "We find ... that Supreme Court erred in finding that plaintiff had 'default[ed]' on this motion. We fail to perceive the conduct that constituted plaintiff's default. It was plaintiff who submitted the motion for summary judgment. Typically, a motion for summary judgment can be readily decided on the papers unless oral argument is mandated by the motion court as 'necessary.' Nothing in the record before us suggests that the parties were on notice that oral argument was indispensable for resolution of plaintiff's motion. Indeed, when Supreme Court ultimately rendered its decision on the record, counsel for both parties were present. Under the circumstances, Supreme Court abused its discretion as a matter of law by disposing of the motion on the procedural ground sua sponte imposed by the court." **All State Flooring Distribs., L.P. v MD Floors, LLC, 2015 NY Slip Op 06751, 1st Dept 9-8-15**

LABOR LAW, PERSONAL INJURY.

PLAINTIFF ENTITLED TO SUMMARY JUDGMENT ON LABOR LAW 240(1) CAUSE OF ACTION — PLAINTIFF SLIPPED AND FELL ON TEMPORARY STAIRCASE WET FROM RAIN.

The First Department, over an extensive dissent, determined plaintiff was entitled to summary judgment on his Labor Law 240(1) cause of action based upon his fall from a temporary staircase which was wet from rain. The dissent argued that there was a question of fact whether a safer temporary staircase could have been provided, and, therefore, summary judgment in plaintiff's favor was not appropriate. The majority wrote: "The fact that the affidavits of plaintiff's and defendant's experts conflict as to the adequacy and safety of the temporary stairs does not preclude summary judgment in plaintiff's favor. A plaintiff is entitled to partial summary judgment on a section 240(1) claim where, as here, stairs prove inadequate to shield him against harm resulting from the force of gravity, and his injuries are at least in part attributable to the defendants' failure to take mandated safety measures to protect him against an elevation-related risk ... . Plaintiff›s expert opined, inter alia, that the stairs showed obvious signs of longstanding use, wear and tear; therefore, a decrease in anti-slip properties was to be expected. Given that it is undisputed that the staircase, a safety device, malfunctioned or was inadequate to protect plaintiff against the risk of falling, plaintiff is entitled to summary judgment, whatever the weather conditions might have been." **OBrien v Port Auth. of N.Y. & N.J., 2015 NY Slip Op 06749, 1st Dept 9-8-15**

LABOR LAW, PERSONAL INJURY, DAMAGES, CIVIL PROCEDURE.

ERROR TO CHARGE JURY ON COMPARATIVE NEGLIGENCE, INADEQUATE AWARDS FOR PAIN AND SUFFERING AND LOSS OF CONSORTIUM.

The First Department determined the jury should not have been charged on comparative negligence in this Labor Law 241(6) action. Plaintiff's decedent was injured when he tripped and fell over construction debris. Because defendant was obligated to keep the area clear of debris, and because there was no clear path plaintiff's decedent could use, the comparative negligence jury instruction was not warranted. The First Department further determined that the award for pain of suffering ($100,000) was inadequate and the failure to award any damages for loss of consortium was against the weight of the evidence and rendered the verdict inconsistent. Pursuant to plaintiff's motion to set aside the verdict, a new trial was ordered unless defendant agreed to a $400,000 award for pain and suffering and a $50,000 award for loss of consortium. **Kutza v Bovis Lend Lease LMB, Inc., 2015 NY Slip Op 06753, 1st Dept 9-8-15**

PERSONAL INJURY, EDUCATION-SCHOOL LAW.

SCHOOL'S KNOWLEDGE OF BULLYING DID NOT CONSTITUTE NOTICE THAT A STUDENT WOULD ACT VIOLENTLY AGAINST INFANT-PLAINTIFF.

The First Department, over a dissent, determined the defendant New York City public school was entitled to summary judgment dismissing infant-plaintiff's "negligent supervision" complaint. Infant-plaintiff had been taunted and bullied by a fellow student, referred to in the decision as WEM. Infant-plaintiff was injured when WEM pushed him into a bookcase. Although infant-plaintiff's teacher had been notified of WEM's bullying on the day of the incident, and the school administration had been notified infant-plaintiff was being taunted and bullied by (unidentified) students, the majority concluded the school was not on notice that WEM would act violently toward infant-plaintiff, and, even if the school had been so notified, the sudden incident could not have been prevented by supervision. **Emmanuel B. v City of New York, 2015 NY Slip Op 06750, 1st Dept 9-8-15**

SEPULCHER, RIGHT OF, MUNICIPAL LAW.

PLAINTIFFS ENTITLED TO DAMAGES RE: CITY'S FAILURE TO TIMELY NOTIFY PLAINTIFFS OF THE DEATH OF A FAMILY MEMBER.

The First Department, in a full-fledged opinion by Justice Tom, affirmed Supreme Court's rulings re: allegations that (1) the City of New York failed to timely notify plaintiffs of the death of a family member (a 36-hour delay in violation of the right of sepulcher) and (2) the City negligently performed an autopsy, which violated the family's religious beliefs. The First Department determined plaintiffs were entitled to summary judgment on the "failure to timely notify" causes of action, and the City was entitled to summary judgment dismissing the "negligent performance of an autopsy" cause of action (by statute, in the absence of receipt of an objection on religious grounds, the City has the authority to conduct an autopsy without first seeking consent from the family). With respect to the "failure to timely notify" causes of action, the court wrote: "The first cause of action alleges that as a result of the failure to receive timely notification of the death of [their family member], plaintiffs sustained emotional injury. The second cause of action specifies that mental anguish resulted from defendants' interference with the family's right to the immediate possession of decedent's body. Thus, these causes of action can be read to advance a claim for violation of the common-law right of sepulcher. * * * As this Court stated: '[F]or a right of sepulcher claim to accrue (1) there must be interference with the next of kin's immediate possession of decedent's body and (2) the interference has caused mental anguish, which is generally presumed. Interference can arise either by unauthorized autopsy or by disposing of the remains inadvertently or, as in this case, by failure to notify the next of kin of the death' … . The City states no compelling reason to depart from clear precedent to bar a cause of action for loss of sepulcher in this instance ...". **Rugova v City of New York, 2015 NY Slip Op 06754, 1st Dept 9-8-15**

FOURTH DEPARTMENT

ELECTION LAW.

USE OF AN ADDRESS TO WHICH THE RESPONDENT WAS IN THE PROCESS OF MOVING DID NOT CONSTITUTE A FALSE STATEMENT WITHIN THE MEANING OF THE ELECTION LAW.

In an action seeking to invalidate a nominating petition, the Fourth Department determined the respondent (a candidate for Common Council Member in Utica) did not provide a false address when she witnessed signatures on her nominating petition. Respondent was in the process of moving to the address used on the petition. Although she had spent time at the new address, the certificate of occupancy for the property had not yet been issued and she, therefore, could not yet formally reside there. The Fourth Department explained the law relevant to the use of an address where one intends to reside: "The determination of an individual's residence is dependent upon an individual's expressed intent and conduct ..., and we conclude that the record establishes that respondent's conduct reflects her intent that the address is her residence …, despite her inability to move in for reasons beyond her control. Thus, the witness statement using that address does not, under the circumstances of this case, constitute a material false statement (§ 6-132 [2]), and there is no indication of fraud ... . Where an alleged impropriety does not involve the substantive requirements of witness eligibility[,] [i.e., that respondent is a duly qualified voter of the state and an enrolled voter of the same political party as the voters qualified to sign the petition] and there is no implication of fraud, resort to strict construction should be avoided if it would lead to injustice in the electoral process or the public perception of it ... . We therefore conclude, contrary to petitioner's contention, that strict construction of Election Law § 6-132 (2) is not necessary with respect to respondent's specification of the address on the witness statement." [internal quotation marks omitted] **Matter of Vescera v Karp, 2015 NY Slip Op 06755, 4th Dept 9-8-15**

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