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High Court Takes Up Civil Rights Issues

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Recently, the United States Supreme Court spent two days of oral arguments on historic civil rights issues regarding same-sex marriage and benefits for same-sex couples.

The focus of the first oral argument was California's same-sex marriage ban of four years, which is known as Proposition 8. The lawsuit brought against Proposition 8 was filed by a gay couple, Jeff Zarrillo and Paul Katami, who want to marry and raise a family; and a lesbian couple, Kris Perry and Sandy Stier, who are parents of four sons. Thus far, the case has won in both federal courts prior to reaching the Supreme Court. The district court said the law violated the equal protection clause of the Constitution because same sex couples were not as good as couples of the opposite sex. By comparison, the appeals court ruled more narrowly that voters could not take away a right previously granted to a state's gays and lesbians.

Currently, nine states allow same sex marriage and 38 states have banned it.

The focus of the second oral argument was a challenge to the federal Defense of Marriage Act (DOMA), which denies benefits to legally married same-sex couples. The issue was whether it was constitutional for the U.S. government to refuse to recognize same-sex marriages recognized by the states.

The plaintiff, Edie Windsor, filed suit against the federal government after the IRS cited DOMA in not refunding $363,000 in federal estate taxes she paid following the death of her partner of over 40 years, Thea Spyer. These individuals were married in Canada in 2007 and they resided in New York. Windsor would have been eligible for an estate tax exemption had her spouse been a man.

DOMA defines marriage as a legal union between one man and one woman. Both the U.S. District Court and the U.S. District Court of Appeals for the 2nd Circuit declared DOMA unconstitutional.

The holding of the Supreme Court in these cases could be limited to these cases, be far reaching or be decided based on lack of standing. A decision in both cases is expected by June.◆

NY Cases

Vargas v Peter Scalamandre & Sons, Inc.

2013 NY Slip Op 02326

Decided on April 4, 2013

Editor's Note: The following is the opinion of the New York Supreme Court, Appellate Division, First Department in the captioned case.

Order, Supreme Court, Bronx County (Norma Ruiz, J.), entered July 1, 2011, which, to the extent appealed from as limited by the briefs, denied the motion of Rad & D'Aprile Construction Corp. (Rad) for summary judgment dismissing the Labor Law § 241(6) and common law negligence claims against it, unanimously reversed, on the law, without costs, and the motion granted. Order, same court and Justice, entered July 30, 2012, which, to the extent appealed from as limited by the briefs, denied the motions for summary judgment of defendant Peter Scalamandre & Sons, Inc. (Scalamandre), defendants Interstate Industrial Corp. and Interstate Industrial, Inc. (Interstate) and defendant Ferrara Bros. Building Materials Corp. (Ferrara), unanimously modified, on the law, to grant Interstate summary judgment dismissing the complaint and all cross claims against it, and otherwise affirmed, without costs. The Clerk is directed to enter judgment dismissing the complaint and all cross claims as against defendants Rad and Interstate.

Labor Law § 241(6) does not automatically apply to all subcontractors on a site or in the "chain of command" (*Russin v Louis N. Picciano & Son*, 54 NY2d 311, 317-318 [1981]; Nascimento v Bridgehampton Constr. Corp., 86 AD3d 189, 192-193 [1st Dept 2011]). Rather, for liability under the statute to attach to a defendant, a plaintiff must show that the defendant exercised control, either over the plaintiff, the specific work area involved or the work that gave rise to the injury (*see Nascimento*, 86 AD3d 193).

Here, while there is evidence connecting defendant concrete supplier Ferrara and concrete contractor Scalamandre to the particular pile of material over which plaintiff fell, there is insufficient evidence connecting bricklayer Rad and concrete contractor Interstate to that pile. Plaintiff's supervisor testified that the pile that caused plaintiff to fall had been caused earlier that day by a Ferrara truck driver washing out his truck onto the ground after delivering a load of concrete to Scalamandre. This supervisor claims to have alerted Scalamandre's supervisor of the condition, who told him he would get to it when he had a chance. Thus, Ferrara and Scalamandre's motions seeking dismissal of plaintiff's Labor Law § 241(6) claims against them were properly denied, since questions of fact exist as to whether those defendants exercised control over the work that gave rise to the injury, the disposal of excess concrete in the course of their operations.

That defendant Interstate received a delivery from Ferrara to a different area of the site does not connect them to the accident, and the fact that Rad may have left mortar to the accident, and the fact that Rad may have left mortar on the ground on past occasions is irrelevant since there is no evidence in the record that the pile of material over which plaintiff fell was left by Rad. That Rad or Interstate may have contributed to other accumulations of debris is irrelevant as those accumulations were not implicated in plaintiff's accident.

On the same facts, plaintiff's common law claims against Rad and Interstate, and his Labor Law § 200 claim against Interstate are dismissed. However, in that evidence was adduced that Ferrara created the pile (*see Hernandez v Argo Corp.*, 95 AD3d 782 [1st Dept 2012]), that Scalamandre was obligated by contract to clean the concrete wash down area during pour operations (*see Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 505 [1993]), and that Scalamandre was placed on actual notice that its vendor had created the pile, their motions to dismiss plaintiff's common law and Labor Law § 200 claims were properly denied (*see Murphy v Columbia Univ.*, 4 AD3d 200, 202 [1st Dept 2004]).◆

Burke v State Farm Fire & Cas. Co.

2013 NY Slip Op 02367
Decided on April 10, 2013

Editor's Note: The following is the opinion of the New York Supreme Court, Appellate Division, Second Department in the captioned case.

DECISION & ORDER

In an action to recover the proceeds of a rental dwelling insurance policy, the defendant appeals from an order of the Supreme Court, Suffolk County (Rebolini, J.), dated October 24, 2011, which denied its motion for summary judgment dismissing the complaint.

ORDERED that the order is reversed, on the law, with costs, and the defendant's motion for summary judgment dismissing the complaint is granted.

In November 2007, the plaintiffs sold certain real property to Irving Development Corp. (hereinafter Irving), and held a purchase money mortgage in the amount of $400,000. Irving secured a rental dwelling insurance policy from the defendant, State Farm Fire and Casualty Company. The policy named the plaintiffs as mortgagees, and was effective from November 2007 to November 2008. In January 2008, the property sustained water damage, of which the plaintiffs were not informed.

Irving then defaulted on the mortgage. In 2009, the plaintiffs commenced a foreclosure action against Irving. In 2010, Irving executed a deed in lieu of foreclosure transferring the property to Riviera Court Associates, Inc., which was owned by the plaintiffs. The plaintiffs executed a release in connection with the deed. The plaintiffs then discovered the damage to the property and filed a claim with the defendant. The defendant denied coverage on the ground, inter alia, that the plaintiffs did not have an insurable interest in the property. The plaintiffs commenced the instant action to recover proceeds of the subject policy.

The defendant moved for summary judgment dismissing the complaint, and the Supreme Court denied the motion.

Under the facts of this case, the delivery of the deed and the release resulted in full satisfaction of the mortgage debt that was owed to the plaintiffs. As a result of such full satisfaction of the mortgage debt, the plaintiffs mortgagees lacked any insurable interest in the property insured by the defendant (*see Moke Realty Corp. v Whitestone Sav. & Loan Assn.*, 82 Misc 2d 396, 397-398, *affd* 51 AD2d 1005, *affd* 41 NY2d 954; *Washington Mut. Bank, F.A. v Allstate Ins. Co.*, 48 AD3d 554). In the absence of any such insurable interest, the plaintiffs are not permitted to recover under the mortgagee loss payable clause contained in the policy issued by the defendant (*see Washington Mut. Bank, F.A. v. Allstate Ins. Co.*, 48 AD3d at 554; *Sportsmen's Park v New York Prop. Ins. Underwriting Assn.*, 97 AD2d 893, *affd* 63 NY2d 998; *Moke Realty Corp. v Whitestone Sav. & Loan Assn.*, 82 Misc 2d at 397-398). Accordingly, the Supreme Court erred in finding that the plaintiffs retained an insurable interest in the property, and should have granted the defendant's motion for summary judgment dismissing the complaint. MASTRO, J.P., RIVERA, CHAMBERS and MILLER, JJ., concur.◆

McGowan v Great N. Ins. Co.

2013 NY Slip Op 02226

Decided on April 3, 2013

Editor's Note: The following is the opinion of the New York Supreme Court, Appellate Division, Second Department in the captioned case.

DECISION & ORDER

In an action, inter alia, to recover damages for breach of contract, the defendant Great Northern Insurance Company appeals from (1) a judgment of the Supreme Court, Nassau County (Winslow, J.), entered January 31, 2012, which, upon a jury verdict, is in favor of the plaintiffs and against it in the principal sum of $165,000, and (2) an order of the same court dated February 24, 2012, which, in effect, vacated an automatic stay of enforcement of the judgment pursuant to CPLR 5519(a)(2).

ORDERED that the judgment is affirmed; and it is further,

ORDERED that the appeal from the order dated February 24, 2012, is dismissed, as no appeal lies from an order which does not determine a motion made on notice, and we decline to grant leave to appeal (see CPLR 5701[a][2]), since the appeal is academic in light of our determination on the appeal from the judgment; and it is further,

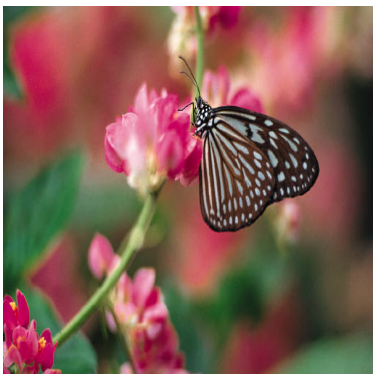
ORDERED that one bill of costs is awarded to the plaintiffs.

The plaintiffs are the owners of real property in East Norwich which is improved by a single-family home and a guest house. In January 2004 a pipe burst in the guest house. Thereafter, the plaintiffs filed a claim with their insurer, the defendant Great Northern Insurance Company (hereinafter Great Northern), which reimbursed them for the costs of repair. In December 2006 the plaintiffs learned that an odor emanating from the guest house, which they detected during the fall of 2006, was caused by mold. Thereafter, the plaintiffs filed a claim with Great Northern, but the claim was denied. In 2008, the plaintiffs commenced this action against Great Northern to recover under their homeowners' insurance policy for losses caused by mold contamination and for mold remediation expenses. The case proceeded to trial and the jury awarded the plaintiffs the principal sums of $20,000 for remediation and $145,000 for reconstruction. Contrary to Great Northern's contention, although the jury attributed the mold contamination to the pipe burst in 2004, the action is not time-barred. The limitations period contained in the policy providing that an action had to be commenced within two years "after the loss occurs" was ambiguous, as it lacked specificity as to the event insured against and did not include precise phrases such as "date of loss" or "after inception of the loss" (*cf. Roberts v New York Prop. Ins. Underwriting Assn.*, 253 AD2d 807; *Costello v Allstate Ins. Co.*, 230 AD2d 763). Thus, the rule of construction that ambiguities in contracts must be construed against the drafter applies here (*see Guardian Life Ins. Co. of Am. v Schaefer*, 70 NY2d 888, 890; *NIACC, LLC v Greenwich Ins. Co.*, 51 AD3d 883, 884). Accordingly, construing the policy's two-year limitations period against its drafter, Great Northern, the two-year period did not begin to run when the pipe burst in January 2004, but in 2007, when the plaintiffs' cause of action accrued, as it was at that time when all the facts necessary to the cause of action occurred, entitling the plaintiffs to seek relief in court (*see Zere Real Estate Servs., Inc. v Parr Gen. Contr Co., Inc.*, 102 AD3d 770).

Further, the conduct of the trial court did not deprive Great Northern of a fair trial (*see Rizzo v Kay*, 79 AD3d 1001).

Great Northern's remaining cotentions are without merit or need not be reached in light of our determination.

DILLON, J.P., BALKIN, DICKERSON and HINDS-RADIX, JJ., concur.◆



Reed v Sub-K Holdings, LLC

2013 NY Slip Op 02303

Decided on April 4, 2013

Editor's Note: The following is the opinion of the Supreme Court, Appellate Division, Third Department in the captioned case.

MEMORANDUM AND ORDER

Rose, J. P.

Appeal from an order of the Supreme Court (Ferradino, J.), entered March 13, 2012 in Saratoga County, which granted a motion by defendant Sub-K Holdings, LLC for summary judgment dismissing, among other things, the complaint against it.

Plaintiff, an employee of defendant Scotland Holdings, LLC (hereinafter the vendee), was sexually assaulted by Anthony Miller, a fellow employee, while they were both working at a sandwich shop. The assault occurred 10 days after the vendee purchased the shop premises and took over operations from defendant Sub-K Holdings, LLC (hereinafter the vendor). Plaintiff commenced this action alleging, among other things, that the vendor, who had previously employed Miller, should have been aware of Miller's history of sexually harassing female employees and should have either terminated his employment or warned the vendee against hiring him. After joinder of issue and some discovery, the vendor moved for summary judgment dismissing the complaint against it on the ground that it could not be held liable for Miller's conduct after it sold the premises and terminated his employment. Supreme Court granted the motion and plaintiff appeals.

Plaintiff expressly disavows seeking to hold the vendor liable based on its employment relationship with Miller. She argues instead that this is a premises liability case that involves the narrow exception allowing liability to be imposed on a previous owner "where a dangerous condition existed at the time of the conveyance and the new owner has not had a reasonable time to discover . . . and to remedy the condition" (Smith v Northern Lights Land Co., LLC, 80 AD3d 964, 965 [2011] [internal quotation marks and citations omitted]; *accord Young v Hanson*, 179 AD2d 978, 978-979 [1992]). According to plaintiff, the dangerous condition here was Miller's employment, and she contends that there are issues of fact as to whether the vendee had sufficient time to discover and remedy that condition. Even accepting that Miller's employment was a dangerous condition on the premises and that the vendor had notice of that condition, the evidence in the record establishes that the vendor terminated all of its employees at that location, including Miller, at the time the premises were conveyed. Further, there is uncontradicted evidence in the record that the vendor had no knowledge that the vendee would hire any of the vendor's former employees after the sale. Thus, there can be no causal connection between the vendor's prior employment of Miller and his subsequent assault of plaintiff while employed by the vendee. Put another way, the allegedly dangerous condition was remedied by the vendor at the time of the conveyance and, accordingly, the narrow exception on which plaintiff relies does not apply (*see generally Bittrolff v Ho's Dev. Corp.*, 77 NY2d 896, 898 [1991]; *Smith v Northern Lights Land Co., LLC*, 80 AD3d at 865; *Farragher v City of New York*, 26 AD2d 494, 496 [1966], *affd on op below* 21 NY2d 756 [1968]).

Lahtinen, Stein and Egan Jr., JJ., concur.

ORDERED that the order is affirmed, with costs.◆

Erie Ins. Co. of N.Y. v AE Design, Inc.

2013 NY Slip Op 01972

March 22, 2013

Editor's Note: The following is the opinion of the Supreme Court, Appellate Division, Fourth Department in the captioned case.

Appeal from an order of the Supreme Court, Chautauqua County (James H. Dillon, J.), entered December 21, 2011. The order granted the motion of defendant to dismiss the complaint.

It is hereby ordered that the order so appealed from is unanimously affirmed without costs.

Memorandum: Plaintiff's subrogor, Maplevale Farms, Inc. (Maplevale), hired defendant to provide engineering services in connection with the construction of an addition to Maplevale's warehouse in Clymer, New York. The addition was built pursuant to plans and specifications prepared by defendant. Following a heavy snowfall, the roof of the original warehouse collapsed, resulting in damage to the building and the inventory and property stored therein. Plaintiff, as subrogee of Maplevale, commenced this action asserting causes of action for malpractice and breach of contract, and seeking to recover sums necessary to cover the losses sustained as the result of the roof collapse.

Supreme Court properly granted defendant's motion to dismiss the complaint pursuant to CPLR 3211 (a) (1). According to the "Standard Terms and Conditions" of the agreement between Maplevale and defendant, "[a]ny litigation arising in any way from this Agreement shall be brought in the Courts of Common Pleas of Pennsylvania having jurisdiction." That forum selection clause is "prima facie valid and enforceable unless it is shown by the challenging party to be[, inter alia,] unreasonable, unjust, [or] in contravention of public policy' " (*KMK Safety Consulting, LLC v Jeffrey M. Brown Assoc., Inc.*, 72 AD3d 650, 651 [2010]; *see Brooke Group v JCH Syndicate 488*, 87 NY2d 530, 534 [1996]). Contrary to plaintiff's contention, the enforcement of the forum selection clause does not contravene New York public policy (*cf. Matter of Betlem*, 300 AD2d 1026, 1026-1027 [2002]).

The "Standard Terms and Conditions" also provide that "[t]he laws of the Commonwealth of Pennsylvania shall govern the validity of this Agreement, its interpretation and performance," and plaintiff contends that the enforcement of the "limitation of legal liability" provision of the agreement pursuant to Pennsylvania law violates General Obligations Law §§ 5-322.1 and 5-324 and would thus contravene New York public policy. That contention, however, concerns choice of law, not choice of forum, and it may properly be raised before a court in the forum chosen by the parties in Pennsylvania (*see Boss v American Express Advisors, Inc.*, 6 NY3d 242, 247 [2006]). "[O]bjections to a choice of law clause are not a warrant for failure to enforce a choice of forum clause" (*id.*).

We reject plaintiff's further contention that the forum selection clause does not apply to its allegations of negligence, and thus that the court erred in granting defendant's motion with respect to the malpractice cause of action. "[U]nder its broad and unequivocal terms, the applicability of the subject forum selection clause does not turn on the type or nature of the dispute between" Maplevale and defendant, and plaintiff "cannot circumvent application of the forum selection clause by pleading parallel and/or additional related noncontractual claims" (*Tourtellot v Harza Architects, Engrs. & Constr. Mgrs.*, 55 AD3d 1096, 1098 [2008]).

Finally, contrary to plaintiff's contention, the "Standard Terms and Conditions" were expressly incorporated into the agreement, and the failure of Maplevale's president to read or recall the forum selection provision does not render that provision unenforceable (*see KMK Safety Consulting, LLC*, 72 AD3d at 651). Present—Scudder, P.J., Fahey, Sconiers, Valentino and Martoche, JJ.◆

Pennsylvania Case Briefs

Hand v City of Philadelphia
Case No. 2068 EDA 2012 (PA Superior Ct., Mar. 4, 2013)

This appeal is brought by Stephen Hand, from the order of the Court of Common Pleas of Philadelphia County which sustained the preliminary objections of the City of Philadelphia and Erie Insurance Group, dismissing his complaint. The court affirmed the decision.

In 2007, Hand was an on duty city police officer , when he was struck by a private motor vehicle while operating a police car. Hand was seriously injured and incurred resultant medical expenses.

Erie issued an insurance policy with Personal Injury Protection (PIP) benefits and the City provided first party medical loss benefits and uninsured and underinsured motorist benefits. Hand did not receive benefits or lost wages. Hand's physicians demanded payment. Hand brought suit against the City and Erie.◆

Albert v Erie Insurance Exchange
Case No. 1780 EDA 2012 (PA Superior Ct., March 20, 2013)

This is an appeal from the order of the Court of Common Pleas of Philadelphia County which granted the preliminary objections of Erie Insurance Exchange, and dismissed Cathy L. Albert's second amended complaint. The court affirmed the decision.

Albert was covered by an insurance policy issued by Erie. Erie defended her in a suit from a 2007 motor vehicle accident. The benefits of the policy included paying insureds for costs they incurred to help Erie investigate and defend claims. Albert appeared at a deposition for which she lost $114.00 in wages plus travel expenses. Albert alleged she was not paid but in her second amended complaint, nowhere did she allege she made a claim to be reimbursed.◆

Bowman v Sunoco, Inc.
Case No. 27 EAP 2011(PA S.Ct., Apr. 25, 2013)

Sabrina Bowman appeals the Superior Court's order which affirmed the Court of Common Pleas of Philadelphia County that granted Sunoco's motion for judgment on the pleadings, and dismissed Bowman's negligence claim. The court affirmed the decision.

Bowman was employed as a security guard and signed a Workers' Compensation Disclaimer which waived her right to sue her employer's clients for damages related to a work injury. She was injured from a fall on snow or ice at one of Sunoco's refineries, for which she received Workers' Compensation benefits. She then brought suit, alleging a failure to maintain safe conditions. Bowman argued the disclaimer was void as against public policy and it waived a cause of action that was not accrued, but the disclaimer was upheld.◆

Case Notes Around The Country

- In **Chiquita Brands Int'l , Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.** ___ N.E. 2d ___ 2013 Ohio App. LEXIS 697 (Ohio C. App. Mar. 6, 2013), the Ohio Court of Appeals held that claims based on a policyholder's intentional conduct do not constitute an occurrence under liability policies, even when they are styled as negligence claims.◆

- In **Misiti, LLC v. Travelers Prop. Cas. Co of Am.,** 308 Conn. 146 (March 26, 2013), the Connecticut Supreme Court relieved the insurer of a the duty to defend a personal injury suit against an additional insured.◆

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