SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

**JANUARY 25, 2011**

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Sweeny, J.P., Moskowitz, Renwick, DeGrasse, Román, JJ.

3877 Victoria Kremen, Index 101739/06
Plaintiff-Respondent,

Boris Kremen,
Plaintiff,

-against-

Benedict P. Morelli & Associates, P.C., etc.,
Defendant-Appellant,

Benedict P. Morelli, Esq., et al.,
Defendants.

_____

Morelli Ratner PC, New York (Arthur L. Salmon of counsel), for appellant.

Victoria Kremen, respondent pro se.

_____

Order, Supreme Court, New York County (Emily Jane Goodman, J.), entered January 26, 2010, which, sua sponte, directed defendant law firm to pay $6,000 to the Lawyers' Fund for Client Protection, pursuant to 22 NYCRR 130-1.1, for engaging in frivolous motion practice, unanimously reversed, on the facts, without costs, and the order vacated,.

The parties have been to this court before. First, we dismissed as untimely a medical malpractice action in which

defendant law firm represented plaintiffs (*Kremen v Brower*, 16 AD3d 156 [2005], *lv denied* 5 NY3d 705 [2005]). Then, we dismissed this action in which plaintiffs sued defendants for legal malpractice arising out of the medical malpractice action as against the Morelli Ratner defendants (54 AD3d 596 [2008]).

After we dismissed plaintiffs' legal malpractice claim, defendant law firm moved in the motion court to restore its counterclaims for reimbursement of litigation expenses. Defendant had advanced these funds to plaintiff in the medical malpractice action. Defendant reasoned that because neither we nor the motion court had addressed these counterclaims, it was error for the motion court to mark the entire case "disposed." In an order dated February 29, 2009 and entered August 3, 2009, the motion court denied defendant's motion because defendant had not submitted any evidence that plaintiffs had agreed to be personally liable for the expenses.

By motion dated August 24, 2009, defendant moved to renew and reargue its prior motion. For the first time, defendant appended plaintiffs' retainer agreement to its motion papers. Defendant claimed it was interposing the retainer in response to the motion court's finding that defendant had submitted no evidence to support the contention that plaintiffs had agreed to be liable for expenses. The retainer stated that it was

> "understood by [plaintiff] that all expenses, costs and disbursements incurred in the prosecution of this action by my attorneys, will be reimbursed as a lien against the total gross recovery of the action.
>
> "The retention of other attorneys in place of [defendant] carries with it the obligation to immediately repay [defendant] all disbursements incurred or advanced by [defendant] and the right at the option of [defendant] to have a fixed percentage of the ultimate recovery immediately determined as the fee of [defendant]."

Defendant argued that the terms of the retainer agreement required plaintiffs to repay all disbursements when plaintiffs used a different law firm to appeal the dismissal of the medical malpractice action.

In an order entered October 8, 2009, the motion court denied defendant's motion to renew and reargue. It rejected defendant's argument that plaintiffs had replaced defendant with another firm, because, although another firm took the appeal, defendant was never replaced in the underlying medical malpractice action. Finding defendant's argument "nonsensical and frivolous," the motion court also declared its intention to impose sanctions. The court gave defendants the opportunity to submit a memorandum in opposition, of which defendant availed itself. On January 25, 2010, the motion court found that defendant had violated Uniform Rules for Trial Courts (22NYCRR) § 130-1.1, and imposed a sanction of $6,000 payable to the Lawyers' Fund for Client

Protection of the State of New York. Defendant appealed only from the January 25, 2010 order imposing sanctions. We now reverse.

While a sua sponte order is not appealable as of right (*Unanue v Rennert*, 39 AD3d 289 [2007]), in the interest of judicial economy, we nostra sponte deem defendant's notice of appeal a motion for leave to appeal, and grant leave (*see* CPLR 5701[c]; *Winn v Tvedt*, 67 AD3d 569 [2009]).

22 NYCRR § 130-1.1(c)(1) provides that conduct is frivolous if "it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law . . ." Defendant made a somewhat colorable argument that it was entitled to recover its disbursements. Moreover, although defendant's failure to submit its retainer agreement on the initial motion is certainly not commendable, we do not see anything in the record to suggest that defendant intentionally concealed the agreement. Accordingly,

sanctions in connection with the motion to renew or reargue were not warranted (*see W.J. Nolan & Co. v Daly*, 170 AD2d 320, 321 [1991]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JANUARY 25, 2011

CLERK

Saxe, J.P., Moskowitz, Richter, Manzanet-Daniels, Román, JJ.

4095 The People of the State of New York, Respondents. Ind. 4927N/07

-against-

Victor Mendez,
Defendant-Appellant.

_____

Robert S. Dean, Center for Appellate Litigation, New York (Carl S. Kaplan of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Matthew T. Murphy of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Arlene D. Goldberg, J.), rendered March 23, 2009, convicting defendant, after a jury trial, of criminal sale of a controlled substance in the third degree, and sentencing him, as a second felony drug offender, to a term of 4 years, unanimously affirmed.

Defendant's challenges to the prosecutor's summation are unpreserved and we decline to review them in the interest of justice. As an alternative holding, we find no basis for reversal. The challenged comments were responsive to defense counsel's summation and did not exceed the bounds of proper rhetorical comment (*see People v Overlee*, 236 AD2d 133 [1997], *lv denied* 91 NY2d 976 [1992]; *People v D'Alessandro*, 184 AD2d 114, 118-119 [1992], *lv denied* 81 NY2d 884 [1993]). In making arguments on issues of credibility, the prosecutor did not vouch

for witnesses or shift the burden of proof. To the extent that anything in the summation could be viewed as improper, the court took suitable curative actions that were sufficient to prevent any prejudice.

We perceive no basis for reducing the sentence.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JANUARY 25, 2011

CLERK

Saxe, J.P., Moskowitz, Richter, Manzanet-Daniels, Román, JJ.

4096 Luis Alvarez, et al., Index 110583/08
Plaintiffs-Appellants,

-against-

1407 Broadway Real Estate LLC, et al.,
Defendants-Respondents

_____

Tomkiel & Tomkiel, PC, Scarsdale (Matthew Tomkiel of counsel), for appellants.

Mintzer, Sarowitz, Zeris, Ledva & Meyers, LLP, New York (Kevin L. Kelly of counsel), for respondents.

_____

Order, Supreme Court, New York County (Paul G. Feinman, J.), entered April 8, 2010, which, to the extent appealed from as limited by the briefs, denied plaintiffs' motion for summary judgment on the issue of liability under Labor Law § 240(1), unanimously reversed, on the law, without costs, and the motion granted.

Plaintiff Luis Alvarez testified that a scaffold tipped over as he was climbing onto it. In opposition to this prima facie showing that a violation of Labor Law § 240(1) occurred and that it was a proximate cause of plaintiff's injuries (*see Romanczuk v Metropolitan Ins. & Annuity Co.*, 72 AD3d 592 [2010]), defendants failed to raise an inference in support of their contention that the injured plaintiff's conduct was the sole proximate cause of

the accident (*see Torres v Monroe Coll.*, 12 AD3d 261 [2004]; *Garcia v 1122 E. 180st St. Corp.*, 250 AD2d 550 [1998]). Their expert witness conceded that plaintiff's failure to lock the scaffold wheels before climbing onto the scaffold did not cause the scaffold to tip over. In any event, contributory negligence is not a defense to liability under Labor Law § 240(1) (*see Crespo v Triad, Inc.*, 294 AD2d 145, 147 [2002]). While defendants' expert opined that plaintiff should have used a nearby A-frame ladder, rather than the ladder rungs of the scaffold, to gain access to the scaffold platform, defendants failed to submit any evidence that plaintiff knew or should have known that he was expected to use a ladder to climb onto the scaffold and "chose for no good reason not to do so" (*see Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 39-40 [2004]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JANUARY 25, 2011

CLERK

Saxe, J.P., Moskowitz, Richter, Manzanet-Daniels, Román, JJ.

4097 In re Julian O.,

A Person Alleged to be
a Juvenile Delinquent,
Appellant.

- - - - -

Presentment Agency

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Tamara A. Steckler, The Legal Aid Society, New York (Selene D'Alessio of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Larry A. Sonnenshein of counsel), for presentment agency.

_____

Order of disposition, Family Court, Bronx County (Nancy M. Bannon, J.), entered on or about July 20, 2010, which adjudicated appellant a juvenile delinquent upon his admission that he committed an act that, if committed by an adult, would constitute the crime of grand larceny in the fourth degree, and placed him on probation for 12 months, unanimously reversed, as an exercise of discretion in the interest of justice, without costs, the finding of juvenile delinquency and term of probation vacated, and the matter remanded with the direction to order an adjournment in contemplation of dismissal pursuant to Family Court Act § 315.3(1).

The court improvidently exercised its discretion when it imposed a juvenile delinquency adjudication with a term of probation, because this was not "the least restrictive available

alternative" (Family Ct Act § 352.2[2][a]). Instead, a supervised ACD would adequately serve the needs of appellant and society (*see e.g. Matter of Jeffrey C.*, 47 AD3d 433 [2008], *lv denied* 10 NY3d 707 [2008]; *Matter of Justin Charles H*, 9 AD3d 316 [2004]). The underlying offense did not involve injuries or weapons. This was appellant's first offense, and he had no history of behavioral problems. He was generally doing well at school, and had a very favorable report from a work-study program in which he participated. Appellant had been removed from his mother at a young age, and he spent many years in difficult foster care situations before being returned to his home. However, under all the circumstances, appellant's troubled family background did not warrant a finding of juvenile delinquency, particularly since he had made significant progress in overcoming the effects of that background.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JANUARY 25, 2011

CLERK

Saxe, J.P., Moskowitz, Richter, Manzanet-Daniels, Román, JJ.

4099 The People of the State of New York, ex rel. Al Rosa, etc., Petitioner-Appellant, Index 400840/10

-against-

Warden, Edgecombe Correctional Facility, et al., Respondents-Respondents.

_____

Richard M. Greenberg, Office of the Appellate Defender, New York (Anastasia Heeger of counsel), for appellant.

Andrew M. Cuomo, Attorney General, New York (Patrick J. Walsh of counsel), for respondents.

_____

Order, Supreme Court, New York County (A. Kirke Bartley, J.), entered on or about May 7, 2010, which, upon converting the petition for a writ of habeas corpus to a CPLR article 78 proceeding, denied petitioner's application to terminate his criminal sentence pursuant to Executive Law § 259-j(3-a), unanimously reversed, on the law, without costs, the petition granted, and petitioner is directed to be released from parole supervision in accordance herewith.

Petitioner was convicted in 2000 of criminal sale of a controlled substance in the third degree (*see* Penal Law § 220.39), and was sentenced, as a second felony offender, to a term of 5½ to 11 years. Petitioner was presumptively released on September 21, 2004, and it is undisputed that from that date to

January 22, 2008, his release was uninterrupted.

Since petitioner had more than two years of unrevoked presumptive release, his sentence must be terminated because the 2008 amendment to Executive Law § 259-j(3-a) clarified that presumptive releasees were always among the original intended beneficiaries of the law.

According to the legislative history, the 2008 amendment was necessary to correct a "drafting oversight" in the original legislation which "unintentionally neglected to include" certain offenders who, like petitioner, were presumptively released to parole supervision (Senate Mem in Support, 2008 McKinney's Session Laws of NY, at 2159). Moreover, the legislation states that the 2008 amendment "shall take effect immediately and apply to persons sentenced to an indeterminate sentence prior to, on and after the effective date."

We conclude that the Legislature, by enacting the amendment to Executive Law § 259-j(3-a), intended to extend the benefits of the statute to presumptive releasees retroactively to February 12, 2005, the original effective date of the statute (*see Matter of Gleason [Michael Vee, Ltd.]*, 96 NY2d 117 [2001] ["remedial legislation should be given retroactive effect in order to effectuate its beneficial purpose"]). Accordingly, petitioner is entitled to have his sentence terminated because as required by

Executive Law § 259-j(3-a), he had completed over two years of uninterrupted presumptive release from the statute's effective date prior to having it revoked on January 22, 2008 (*see People ex rel. Forshey v John*, 75 AD3d 1100 [2010]); *cf. People ex rel. Murphy v Ewald*, 77 AD3d 778 [2010]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JANUARY 25, 2011

CLERK

Saxe, J.P., Moskowitz, Richter, Manzanet-Daniels, Román, JJ.

4101 The People of the State of New York, Ind. 720/04
Respondent, 4336/04

-against-

Louis Estela,
Defendant-Appellant.

_____

Robert S. Dean, Center for Appellate Litigation, New York (Jan Hoth of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Allen J. Vickey of counsel), for respondent.

_____

Order, Supreme Court, New York County (Rena K. Uviller, J.), entered on or about March 24, 2010, which denied defendant's CPL 440.46 motion for resentencing, unanimously affirmed.

The court considered the appropriate factors and properly exercised its discretion in denying resentencing. Given defendant's extensive criminal record, the serious infraction he committed while incarcerated and his history of absconding, the court properly concluded that substantial justice dictated denial of the motion (*see e.g. People v Hidalgo*, 47 AD3d 455 [2008]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JANUARY 25, 2011

CLERK

Saxe, J.P., Moskowitz, Richter, Manzanet-Daniels, Román, JJ.

4102 The People of the State of New York, Ind. 7991/02
Respondent,

-against-

Marcus Smith,
Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Ellen Dille of counsel), for appellant.

_____

Judgment, Supreme Court, New York County (Bonnie Wittner, J.), rendered on or about November 21, 2008, unanimously affirmed.

Application by appellant's counsel to withdraw as counsel is granted (*see Anders v California*, 386 US 738 [1967]; *People v Saunders*, 52 AD2d 833 [1976]). We have reviewed this record and agree with appellant's assigned counsel that there are no non-frivolous points which could be raised on this appeal.

Pursuant to Criminal Procedure Law § 460.20, defendant may apply for leave to appeal to the Court of Appeals by making application to the Chief Judge of that Court and by submitting such application to the Clerk of that Court or to a Justice of the Appellate Division of the Supreme Court of this Department on reasonable notice to the respondent within thirty (30) days after service of a copy of this order.

Denial of the application for permission to appeal by the judge or justice first applied to is final and no new application may thereafter be made to any other judge or justice.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JANUARY 25, 2011

CLERK

Saxe, J.P., Moskowitz, Richter, Manzanet-Daniels, Román, JJ.

4103 The People of the State of New York, Ind. 414/99
Respondent,

-against-

Akeem Taborn,
Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Adrienne M. Gantt of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Alan Gadlin of counsel), for respondent.

_____

Judgment of resentence, Supreme Court, New York County (Maxwell Wiley, J), rendered December 3, 2008, resentencing defendant to an aggregate term of 6 years with 5 years' postrelease supervision, unanimously reversed, on the law, the resentence vacated, and the original sentence without postrelease supervision reinstated.

As the People concede, defendant is entitled to relief under *People v Williams* (14 NY3d 198 [2010]), which invalidates the imposition of postrelease supervision upon resentencing of

defendants who have been released after completing their terms of imprisonment.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JANUARY 25, 2011

CLERK

Saxe, J.P., Moskowitz, Richter, Manzanet-Daniels, Román, JJ.

4105 Darrell Bridgers, et al., Index 114416/08
Plaintiffs-Appellants,

-against-

Christofer Wagner,
Defendant-Respondent.

_____

Darrell Bridgers, New York, appellant pro se and for Franca Ferrari-Bridgers, appellant.

Ahmuty, Demers & McManus, Albertson (Brendan T. Fitzpatrick of counsel), for respondent.

_____

Order, Supreme Court, New York County (Richard F. Braun, J.), entered December 7, 2009, which, insofar as appealed from, granted defendant's motion for summary judgment dismissing the causes of action for defamation, slander, libel, tortious interference with business relations and with contract, and intentional infliction of emotional distress, unanimously affirmed, without costs.

The defamation, libel, slander and intentional infliction of emotional distress claims are barred by the one-year statute of limitations (CPLR 215[3]). There is no basis to toll the limitations period. Defendant did nothing to actively mislead plaintiffs or prevent them from timely bringing this action (*see O'Hara v Bayliner*, 89 NY2d 636, 646 [1997], *cert denied* 522 US 822 [1997]). Moreover, defendant's e-mail to the board of

directors of the cooperative, stating that he believed that plaintiffs had made unapproved renovations to their apartment, was not defamatory (*see Ferguson v Sherman Sq. Realty Corp.*, 30 AD3d 288 [2006]), and his alleged conduct was not "extreme and outrageous," as required to establish intentional infliction of emotional distress (*see Howell v New York Post Co.*, 81 NY2d 115, 121 [1993]).

Plaintiffs' allegation that the cooperative board's minutes referring to the allegedly illegal work performed in their apartment discouraged a potential purchaser is insufficient to support their claim of tortious interference with contract or with prospective business relations (*see Lama Holding Co. v Smith Barney*, 88 NY2d 413, 424-425 [1996]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JANUARY 25, 2011

CLERK

Saxe, J.P., Moskowitz, Richter, Manzanet-Daniels, Román, JJ.

4106 The People of the State of New York, Ind. 2752/06
Respondent,

-against-

Victor Suazo Lopez,
Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Susan Epstein of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Karen Swiger of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Megan Tallmer, J.), rendered March 11, 2009, convicting defendant, after a jury trial, of burglary in the second degree, and sentencing him to a term of 15 years, unanimously affirmed.

The verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). The victim's identification testimony was corroborated by defendant's behavior after the crime and his incriminating statements to the police.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JANUARY 25, 2011

CLERK

Saxe, J.P., Moskowitz, Richter, Manzanet-Daniels, Román, JJ.

4107 SP & S Associates, LLC, Index 112860/09
Plaintiff-Respondent,

-against-

Insurance Company of Greater New York, etc.,
Defendant-Appellant.

_____

Thomas D. Hughes, New York (Richard Rubinstein of counsel), for appellant.

Rose & Rose, New York (Dean Dreiblatt of counsel), for respondent.

_____

Order, Supreme Court, New York County (Milton A. Tingling, J.), entered June 18, 2010, which denied defendant's motion to dismiss a declaratory judgment action seeking to hold defendant responsible for defending and indemnifying plaintiff insured in a personal injury action, unanimously reversed, on the law and the facts, without costs, and the motion granted to the extent that it is declared that defendant has no duty to defend or indemnify plaintiff in the underlying action.

The subject insurance policy's notice of claim condition precedent to coverage required the insured corporate plaintiff to notify defendant insurer of an occurrence which might result in a claim "as soon as practicable." The receipt of service of a personal injury summons with notice by the Secretary of State, as plaintiff's designated agent (Limited Liability Company Law §

301, § 303), constituted receipt by the plaintiff itself (*Cedeno v Wimbledon Bldg. Corp.*, 207 AD2d 297, 298 [1994], *lv dismissed* 84 NY2d 978 [1994]). The fact that plaintiff did not actually receive a copy of the summons with notice, due to its failure to keep its address current with the Secretary of State, does not excuse its noncompliance with the notice requirements of the policy. As plaintiff did not provide notice of the action to its insurer until receipt of a motion for default judgment some five-and-a-half months after service of process, defendant was entitled to disclaim coverage (*Briggs Ave. LLC v Insurance Corp. of Hannover*, 11 NY3d 377 [2008]; *26 Warren Corp. v Aetna Cas. & Sur. Co.* (253 AD2d 375, 376 [1998]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JANUARY 25, 2011

CLERK

Saxe, J.P., Moskowitz, Richter, Manzanet-Daniels, Román, JJ.

4108 The People of the State of New York, Respondent, SCI 2838/07 2372/06

-against-

Lawrence Andrews, Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Adrienne M. Gantt of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Maureen L. Grosdidier of counsel), for respondent.

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (John P. Collins, J.), rendered on or about September 13, 2007,

And said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon,

It is unanimously ordered that the judgment so appealed from be and the same is hereby affirmed.

ENTERED: JANUARY 25, 2011

CLERK

Counsel for appellant is referred to § 606.5, Rules of the Appellate Division, First Department.

Mazzarelli, J.P., Sweeny, Moskowitz, Manzanet-Daniels, Román, JJ.

2056 Ruairi Kelly, etc., et al., Index 110426/04
Plaintiffs-Appellants,

-against-

Metropolitan Insurance and
Annuity Company, et al.
Defendants-Respondents.

_____

Pollack, Pollack, Isaac & De Cicco, New York (Brian J. Isaac of counsel), for appellants.

White & McSpedon, P.C., New York (Tracey Lyn Jarzombek of counsel), for Metropolitan Insurance and Annuity Company and Rose Associates, Inc., respondents.

Marks O'Neill O'Brien & Courtney, P.C., Elmsford (James M. Skelly of counsel), for Yates Restoration Group, Ltd., respondent.

Rubin, Fiorella & Friedman LLP, New York (Paul Kovner of counsel), for Spring Scaffolding, Inc., respondent.

_____

Judgment, Supreme Court, New York County (Carol R. Edmead, J.), entered September 3, 2008, modified, on the facts and in the exercise of discretion, the jury verdict vacated, the complaint reinstated as against defendants Metropolitan, Yates and Spring, and the matter remanded for a new trial as to those defendants, and otherwise affirmed, without costs.

Opinion by Manzanet-Daniels, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Angela M. Mazzarelli, J.P.
John W. Sweeny, Jr.
Karla Moskowitz
Sallie Manzanet-Daniels
Nelson S. Román, JJ.

2056
Index 110426/04

_____x

Ruairi Kelly, etc., et al.,
Plaintiffs-Appellants,

-against-

Metropolitan Insurance and
Annuity Company, et al.,
Defendants-Respondents.
_____x

Plaintiffs appeal from a judgment of the Supreme Court, New York County (Carol R. Edmead, J.), entered September 3, 2008, dismissing the complaint as against defendant Rose Associates, Inc., after the close of plaintiffs' evidence, and as against defendants Metropolitan Insurance and Annuity Co., Yates Restoration Group, Ltd., and Spring Scaffolding, Inc., after a jury verdict in their favor.

Pollack, Pollack, Isaac & De Cicco, New York (Brian J. Isaac and Michael H. Zhu of counsel), for appellants.

White & McSpedon, P.C., New York (Tracey Lyn Jarzombek of counsel), for Metropolitan Insurance and Annuity Company and Rose Associates, Inc., respondents.

Marks O'Neill O'Brien & Courtney, P.C., Elmsford (James M. Skelly of counsel), for Yates Restoration Group, Ltd., respondent.

Rubin, Fiorella & Friedman LLP, New York (Paul Kovner of counsel), for Spring Scaffolding, Inc., respondent.

MANZANET-DANIELS, J.

While riding a bicycle on the grounds of Stuyvesant Town, where he lived with his family, the infant plaintiff struck the wooden base of one of the metal poles supporting a sidewalk shed that had been temporarily erected on the property. He was propelled from his bike, hit, and slid down the metal pole, landing on a sharp, rusty cross brace and uncapped bolt securing the structure. The infant plaintiff sustained debilitating injuries to his penis, including structural damage and loss of sensation, and had to undergo reconstructive plastic surgery to restore the normal function and appearance of his penis. At trial, the court dismissed the complaint as to defendant Rose Associates; after trial, the jury found for the three remaining defendants. Because the trial was tainted by error, we reverse, in the interest of justice, and order a new trial as to the three remaining defendants.[1]

On April 10, 2004, a Sunday, the infant plaintiff, then six years of age, went with his mother to one of the parks on the grounds of Stuyvesant Town, owned by defendant Metropolitan

[1]After the verdict was rendered, plaintiffs' counsel made an oral application to set aside the verdict as against the weight of the evidence. That request was summarily denied by the trial court. The court informed the parties that any further post-trial applications were "deemed denied," such that they could immediately appeal.

Insurance and Annuity Company and managed by defendant Rose Associates, Inc. The infant plaintiff saw another young boy riding a bicycle and convinced his mother that he, too, was ready to ride his bike without training wheels. The infant plaintiff's father removed the wheels and the child began riding the bike. At that time, construction was underway on the premises. Defendant Yates Restoration Group, Ltd. was in the process of restoring the brick work on several of the buildings, and defendant Spring Scaffolding, Inc. had erected a sidewalk shed to shield passers-by from falling debris. The shed was constructed in the standard manner with a horizontal bar and diagonal cross beams nailed to vertical supports that were in turn staked to the ground on wooden blocks. The testimony showed that the diagonal cross brace was rusty, sharp "like a knife," and not rounded on the end. The testimony also showed that the bolts used to secure the cross-braces were exposed and were not capped or taped. The evidence showed that no provision of the New York City Building Code mandated that the ends of cross braces or the exposed and protruding bolts on sidewalk sheds be capped or taped (although capping or taping of bolts is required by the School Construction Authority in the vicinity of schools). While it was agreed by all that the Code was silent on the subject of capping or taping, the expert evidence conflicted as to whether it was industry

practice to cap or tape the exposed ends of bolts and cross braces. Indeed, plaintiffs' case rested entirely on the premise that although the failure to cap or tape was not a Code violation, it was nonetheless negligent to fail to do so in this instance, citing industry practice and evidence that the shed was erected in close proximity to a children's park.

A reasonable view of the evidence, certainly, could support a verdict in plaintiffs' favor. However, the trial court effectively preempted the possibility of a plaintiffs' verdict by inappropriately interfering during the testimony of plaintiffs' expert witness.

The trial court interrupted plaintiffs' expert, commented several times that there was no Code violation, openly criticized and expressed dislike for the expert, and ultimately limited her testimony on the subject of defendants' negligence. The cumulative and unmistakable effect of this interference was to leave the jury with the impression that defendants could not be negligent in the absence of a Code violation. The trial court's treatment of plaintiffs' expert, who was critical to plaintiffs' case and without whom plaintiffs could not prevail, served to deprive plaintiffs of a fair trial.

During the direct testimony of plaintiffs' expert, the trial court sustained an objection to testimony that the Buildings

Department required capping or taping. The defense complained that the expert had, in reaction to the court's ruling, "mouthed words to the jury." Though the witness denied saying anything, the court observed that the jurors were "shaking their heads yes." The court thereupon ordered the jury out of the courtroom, and questioned the expert and the attorneys regarding what had transpired. The court told the attorneys that it would speak to the jurors "one by one," and warned them that if the expert had said something, "there is a problem with this witness testifying at all." The witness was excused and the court proceeded to interrogate the jurors one by one. The first juror indicated that a "gesture" had been made. The second juror indicated that it appeared the expert hadn't agreed with what the court had said. The court paused and asked whether plaintiffs' attorney wanted it to poll the entire jury. Plaintiffs' attorney demurred, saying "it is not really my issue, with all due respect," and that he was "not making that request." The court nonetheless continued to poll the jurors. The third juror said the expert had "just opened her mouth." The fourth juror said the expert's mouth "opened and closed, more in exasperation or a sigh." The fifth juror said the expert "gesticulated," "rais[ing] her shoulders" as if "surprised." The sixth juror said the expert made a "voiceless gesture." The final three

jurors polled saw nothing.

Defense counsel moved to strike the expert's testimony in its entirety based on her "interference" with the jury. The plaintiffs' attorney objected, stating that "[a]t best, what you have here is a witness who sighed after a judicial ruling," noting that dissatisfaction with the court's ruling in no way equated with testimony prejudicial to defendants. The court expressed its exasperation with plaintiffs' expert, stating,

> "That's more than disrespectful, it is challenging the ruling of the Court, notwithstanding the Court's ruling in front of the jury . . . This is an experienced testifier. For her to come in here and to nonverbally communicate to the jury that I don't know what I'm doing is not okay."

The court noted that it was not appropriate to "penalize the plaintiff," and stated that it was going to "write a curative up." The court then backtracked, ruling that while it would allow the expert's testimony to stand, it would preclude any further testimony by the expert, stating,

> "You know why? Anything beyond that she's colored it by acting like she's some expert beyond what she should be doing with respect to saying what the Court – opining on the Court's ruling."

The court rejected plaintiffs' counsel's plea that she reconsider the ruling, further stating,

> "[T]he jury has to understand that . . . this Court has determined that [] she did gesture, however you want to call it, was egregious and she has to be penalized for it. And the question is what's the penalty, and the penalty is other than the testimony that's relevant to this case her testimony is stricken. You have what you need which is you asked her a hypothetical opinion, you have her opinion, and she should now find her way out of here."

The court acknowledged that the argument that the brace and bolt should have been capped was a reasonable one, but stated "not through this witness any further."

Upon defense counsel's protests that they were unwilling to waive the right to cross-examination, the court again relented and allowed the witness to continue testifying. It prefaced the expert's further testimony with a curative instruction that neither the Building Code, nor "codification of the industry standard," required that the cross brace or bolt be taped or capped and further stated,

> "If the credibility of this Court and the Court's ruling and the integrity of the judicial system are to be maintained, a witness cannot challenge the Court's rulings with impunity. The Court has admonished this witness to refrain from demonstrating in any manner displeasure or objection [*sic*] with the Court's rulings. Do you understand?"

Plaintiffs' expert thereafter opined that protruding cross braces and bolts should be taped or capped "if it's within the

reach of the public or the workers," and that the sidewalk shed structure would have been "safer" had both the bolt and cross brace been capped and/or taped. However, her testimony concerning industry standard was diluted by repeated objections and colloquies that left the jury with the impression that there was no industry standard on the subject of capping or taping (in contradistinction to a Code violation), impermissibly conflating the concepts of industry standard and Code violation, a distinction essential to plaintiffs' case.

The court rightfully took umbrage with what it perceived as the expert's lack of respect for the court. But rather than issuing a simple curative instruction, as would have been appropriate under the circumstances, the court interrogated each of the jurors individually concerning the nature of the gesture or sigh made by the expert. This protracted episode left the jurors with the distinct and unmistakable impression that the court disapproved of plaintiffs' expert and credited none of her testimony. Indeed, shortly following this interrogation, the court threatened to preclude plaintiffs' expert from testifying further, leaving plaintiffs without expert testimony on the crucial issue of defendants' negligence.

This prejudicial treatment of plaintiffs' expert is to be contrasted with the court's treatment of the defense expert, whom

the court accorded wide latitude. Notably, the court did not similarly chide the defense's expert when he transgressed courtroom protocol. Defendant's expert, during direct, inappropriately interjected that the infant plaintiff "[p]robably should have left the [training wheels] on to begin with," a gratuitous statement intended to undermine the court's ruling that in light of the infant's age, neither he nor his parents could be considered comparatively negligent. This statement, in direct contravention of the court's ruling, arguably tainted the jury, and, unlike plaintiffs' expert's "sigh" or gesticulation, was an unambiguous statement, uttered directly to and intended to prejudice the jury. Indeed, plaintiffs' counsel pointed out that, in contradistinction to plaintiffs' expert, the defense expert had "intentionally responded . . . having nothing to do with the question to insert his opinion about the happening of the accident in the first place." The court agreed that the actions of the expert were "egregious," but nonetheless denied the plaintiffs' motion to strike his testimony, issuing instead a simple curative instruction.

The prejudice was compounded by the failure of the trial court to give the charge requested by plaintiffs, i.e., that the absence of a building code violation is not tantamount to the absence of negligence. This left the jury with the distinct

impression that defendants' compliance with the building code was a defense to liability.

Indeed, it is black letter law that compliance with statutory or regulatory enactments does not preclude a finding that the defendant violated a common-law duty. "Irrespective of the absence of a statutory obligation, the landlord remains subject to the common law duty to take minimal precautions to protect tenants from foreseeable harm" (*Jacqueline S. v City of New York*, 81 NY2d 288, 293-94 [1993] [landlord's compliance with procedures set forth in Multiple Dwelling Law regarding installation of locks not dispositive as to liability]; *see also Feiner v Calvin Klein, Ltd.*, 157 AD2d 501 [1990] [compliance with federal flammability regulations did not absolve defendant of liability]; *Mercogliano v Sears, Roebuck & Co.*, 303 AD2d 566 [2003] [defendants failed to establish prima facie entitlement to summary judgment based on conclusion of their expert that product complied with and exceeded standards set forth in federal regulations]; *Duncan v Corbetta*, 178 AD2d 459 [1991] [error to preclude plaintiffs' expert from testifying that it was common practice to use pressure-treated lumber in the construction of stairways, even though that practice exceeded the minimum safety requirement for lumber under the applicable building code]).

Plaintiffs were further prejudiced by the fact that the

trial court, over counsel's objections, allowed the introduction of evidence relating to the infant plaintiff's parents' alleged negligent supervision in allowing the infant plaintiff to ride a bicycle on the pathway at Stuyvesant Town, contrary to the lease and to signs posted on the premises. The common law, now codified at section 3-111 of the General Obligations Law, expressly prohibits the imputation of a parent's contributory negligence to an infant plaintiff.[2] During summations, defense counsel was allowed, improperly, to comment on the father's failure to be "next to [plaintiff] when his son lost control," and on the mother's comments about how "even with his training wheels, [the sidewalk bridge] was not the place to ride your bike." The refusal to sustain an objection to the latter comment was error since the issue of parental supervision is irrelevant to this action brought in the name of the infant plaintiff. The jury verdict was tainted by the introduction of this irrelevant and highly prejudicial evidence. The jury may well have concluded that in spite of the existence of a dangerous condition, plaintiff's parents were at fault for allowing him to ride under the sidewalk shed. Absent clarifying instructions, it cannot be assumed that the jury's finding of no negligence was

[2]Further, the infant plaintiff was not a party to the lease and thus could not be bound by its terms.

not a product of the jury's consideration of these irrelevant and prejudicial issues.

Because these errors served cumulatively to deprive plaintiffs of a fair trial, we hereby modify the judgment as indicated, and order a new trial. We affirm the judgment in favor of Rose Associates, the managing agent, since the evidence failed to show that Rose assumed the owner's maintenance obligations or otherwise owed a duty to the infant plaintiff (*see Espinal v Melville Snow Contrs.*, 98 NY2d 136 [2002]).

Accordingly, the judgment of the Supreme Court, New York County (Carol R. Edmead, J.), entered September 3, 2008, dismissing the complaint as against defendant Rose Associates, Inc., after the close of plaintiffs' evidence, and as against defendants Metropolitan Insurance and Annuity Company, Yates Restoration Group, Ltd., and Spring Scaffolding, Inc., after a jury verdict in their favor, should be modified, on the facts and in the exercise of discretion, the jury verdict vacated, the complaint reinstated as against defendants Metropolitan, Yates

and Spring, and the matter remanded for a new trial as to those defendants, and otherwise affirmed, without costs.

All concur.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: January 25, 2011

CLERK