

Labor Law Update

Claar -v- Consolidated Edison Company of New York, (New York Law Journal August 13, 2002) addresses a Labor Law issue which has apparently not yet been interpreted by the First or Second Departments. In Claar, the plaintiff's decedent was mortally injured while painting a Con Edison van pursuant to an agreement between Con Edison and a company called Vilsmeier. The painting was done at a premises owned by Con Edison. Additionally, Con Edison supplied a ladder for the work and also supervised the painting. The ladder provided by Con Edison did not attach to the truck in any way and was also apparently missing one of its rubber feet. While the plaintiff was on the ladder, it apparently slid down the side of the truck causing him to fall and fracture his skull. He died two weeks later as a result of cardiac arrest, allegedly as a result of this accident.

Following the completion of discovery, the plaintiff moved for summary judgment under Labor Law section 240(1). Justice DeGrasse of the Supreme Court, New York County held that it was clear that the plaintiff was engaged in an activity (painting) covered by 240(1). The court was then called upon to decide whether the Con Edison truck was a "structure" within the meaning of the statute. The Court, finding no precedent in its own department, turned to cases in the Third and Fourth Departments, and found that both Departments had held that a truck was a "structure" within the meaning of section 240(1).

Given the fact that this was a case of first impression in the First Department, the fact that it is a wrongful death case, and the fact that there is a deep pocket defendant, an appeal is expected.

Mold Claims

We recently received our first request to defend a mold claim. While this is a new field to our office, it is not to many members of the plaintiffs' bar, who believe that "mold is gold." A brief survey of recent cases confirms this. For example, the New York Daily News recently reported a case where a landlord paid \$1.8 million in settlement for alleged physical injuries due to mold. With all indications being that this is a rapidly growing expanding area of litigation, we felt it would be helpful to do a general article on mold in an effort to assist insurer's in defending these claims and to provide some background to the bar as a whole in area the will likely be reading more about in the near future.

While most people are familiar with molds, if only because everyone has seen what happens to bread after a few days, it does not hurt to look at what exactly we are dealing with. Molds are living organisms that occur everywhere, both indoors and outdoors. They produce tiny spores to reproduce which waft continually through the air. When the spores land on a damp spot indoors, they may begin growing and digesting whatever they are growing on, be it wood, paper, carpet, or, of course, food.

While it would seem that that should be easy to control, pictures of mold infested homes show how quickly mold can cover entire walls when there is enough moisture available. As mold is made by nature, permitting its growth is negligence. In an apartment building, that negligence can be attributed to the landlord.

With regard to the health effects of mold, plaintiffs' attorneys like to use the phrase "toxic mold", in an effort to play up the danger posed by mold. That however, overstates the case, as mold is no where near as dangerous as other "toxic" substances like asbestos or lead. Molds can trigger asthma episodes in sensitive individuals with asthma and allergies in sensitive

individuals. It can also trigger dizziness and headaches. It should be noted that there are different types of molds, known as Stachybotrys, Aspergillus and Penicillium, which are allegedly more dangerous and allegedly cause more severe effects. It should also be pointed out that given the fact that mold is everywhere, most people have developed a tolerance for it. Children and those with a compromised immune system are much more at risk.

In addition to the personal injury aspect of mold claims, a third party claim by a tenant against a landlord will also likely contain a property damage component, for damage caused to furniture, etc.

So what is an insurer to do when faced with a claim for personal injury and/or property damage as a result of exposure to mold? A prompt response is essential. If the potential plaintiffs are still living in the contaminated premises, immediate steps must be taken to abate the mold to mitigate any potential health problems. Additionally, if damage or destruction of property is being claimed, the insurer should have the damaged property appraised immediately. Additionally, an inspection must be done to determine the cause of the mold. Certain causes of mold, i.e. inadequate design or faulty construction of the premises, present the opportunity for a contribution claim against the negligent party.

Surveillance Tapes

In our April issue we discussed the issue of whether a defendant is required to furnish copies of surveillance tapes prior to a further deposition regarding that plaintiff's daily activities. In that issue, we discussed Tran v. New Rochelle Hospital Medical Center, N.Y.S.2d (1st Dep't 2002) in which the First Department decided that the tape need not be exchanged until the conclusion of the deposition. That decision put the First Department in direct conflict with the Third and Fourth Departments which have both held that the tape must be turned over before the

deposition.

To date, the Second Department has not weighed in on this issue, however the lower courts have been forced to address the issue in several recent cases. In both Wallace v. Equitable Life Assurance Society, (New York Law Journal July 9, 2002) and Melton v. City of Yonkers, (New York Law Journal September 23 2002), the court followed Tran and ordered that the deposition take place before the exchange of the tape. The reasoning given was the same as in Tran, i.e. preventing the plaintiff from tailoring his or her testimony.

Presumably, the Second Department will eventually weigh in on this, however, given the split in the Departments, this is an issue which will likely be taken up by the Legislature or the Court of Appeals.

Summary Judgment Practice

What type of evidence is sufficient to defeat a summary judgment motion? That is the question that split the First Department in a relatively routine slip and fall case. Grullon -v- City of New York, 2002 N.Y. App. Div. LEXIS 8178 (August 29, 2002) arose out of an incident which occurred on an outdoor stairway in the Bronx on February 10, 1997. The stairway on which the plaintiff fell leads from Tiebout Avenue to the building in which the plaintiff resided at 365 183rd Street, part of the Twin Parks West Development , a housing complex owned by defendant New York City Housing Authority (NYCHA). The plaintiff brought suit against the City of New York (City), the New York City Transit Authority (NYCTA) and NYCHA, alleging in the alternative that each owned, operated, managed and controlled the stairway. Each defendant essentially denied ownership in their answers. In March, 1999, NYCTA successfully moved for summary judgment on the ground that it did not own the stairway in question.

In February, 2001, NYCHA moved for summary judgment, arguing that it did not own

the stairway. In support of the motion, NYCHA submitted an affidavit from a professional land surveyor stating that based upon a survey he performed, that the stairway on which the plaintiff fell was not the property of NYCHA. NYCHA also submitted an affidavit from the manager of Twin Parks that based upon a review of photographs supplied by plaintiff's counsel that it was his understanding that the stairway on which the plaintiff fell was not part of the Twin Parks property.

In opposition, the plaintiff submitted two pages of the indenture by which the City granted NYCHA the property on which Twin Parks is situated, and a copy of an affidavit from an employee of NYCHA based on a review of NYCHA's internal records. The affidavit stated that the stairway was not owned by NYCTA and, without offering any factual basis, that the stairway was owned by NYCHA. Based upon that affidavit, the motion court ruled that there was an issue of fact and denied the motion.

There was no dispute that the evidence submitted by NYCHA was sufficient to entitle it to summary judgment, thereby shifting the burden to the plaintiff to come forward with sufficient evidence to raise an issue of fact. As such, the Appellate Division focused solely on the sufficiency of the plaintiff's proof.

The court immediately dismissed the indenture as it made no reference to any stairways and thus did not provide any evidence on the issue of ownership, one way or the other. The court went on to examine the affidavit from the NYCTA employee, and, although the affidavit was presumably sworn, the court held that it was inadmissible on the issue of ownership. The court also held that the assertion that the stairway was owned by NYCHA was wholly incompetent and without formation. The court felt that the affidavit was speculative and in rejecting it cited the oft quoted language that "mere conclusory assertions, devoid of evidentiary

facts, are insufficient to defeat a summary judgment motion, as is surmise, conjecture or speculation.”

The majority’s decision was met with a vigorous dissent. Part of the dissent is based on the practical argument that the plaintiff will be left in a precarious decision if NYCHA’s motion was granted. Since the City took no position on the motion, it would be free to argue at trial that it was not the owner of the stairway, and if successful, the plaintiff would be without recourse. While that is true, as the majority correctly points out, that is no reason to keep an innocent party in the case.

The real controversy in the case is over the affidavit from the NYCHA employee. As noted above, despite being in admissible form, the majority disregarded the affirmation, because they felt it was speculative. The dissent makes a compelling argument that the “assessment of the evidence offered by the respective parties is the province of the trier of fact” The dissent also cogently points out “any apparent discrepancy between the testimony of the evidence of record goes only to the weight of the evidence.” In short, the dissent argues that the majority rejected the affidavit not because it contained inadmissible evidence, but because the majority did not believe it. Although the exact wording of the affidavit is not contained in the decision, it does appear that the dissent has a valid argument.

Although not mentioned by the dissent, it is also worth noting that the majority accepted the affidavit from the NYCHA employee who testified about ownership based upon a review of photographs. It is not clear why that affidavit is any less speculative than the affidavit proffered by the plaintiff.

While this case may be limited to its facts, counsel should take care to state in any affidavit the precise factual basis for any statements in the affidavit to avoid having the entire

affidavit disregarded as being “speculative.”

Legislative Update

In our April issue, we discussed bills which were pending in both houses of the Legislature which would amend Insurance Law 3420(g) to require insurers to provide notice in every policy that spousal coverage is not included but that supplemental spousal liability coverage for a reasonable premium. Despite the strong opposition of the American Insurance Association, this bill was recently signed by Governor Pataki and is currently in effect.

As we previously discussed, the reason long given for the spousal exclusion was the fear of fraud. Specifically, insurer's worried that since they were members of the same household, the negligent spouse had an incentive to help the injured spouse. While that could be true, there was no similar exclusion for other family members. Additionally, while the negligent spouse would not be a direct defendant, they would typically end up being a third party defendant, a claim for which there would be insurance coverage. As such is is questionable whether the exclusion was preventing any fraud. That was also the view of the other 49 states, which had already abolished the spousal exclusion.