

Structured Judgments

In New York State, the tort reform debate rages. There are currently a number of bills pending before the Legislature which seek to alter various aspects of the tort system. Article 50-A of the CPLR was enacted in the mid 1980s during another period of tort reform in an effort to prevent overcompensation. Unfortunately, the article has not always produced the results its sponsors intended and its application has proven difficult for the courts. Desiderio v. Ochs, 2003 N.Y. LEXIS 432 is the most recent example of the problems of Article 50-A.

Article 50-A altered the manner in which damages are computed, specifically, future damages. Under the statute, the first \$250,000 of future damages are paid in a lump sum. Any future damages in excess of \$250,000 are paid in installments, through an annuity which the CPLR requires the defendants to purchase.

Desiderio involved a child born with hydrocephalus who underwent surgery to revise a shunt that was used to treat the condition. The surgery failed, causing brain damage. The plaintiff, through his mother brought suit against New York Hospital and several of the doctors involved in the surgery. The jury awarded the plaintiff \$1.5 million for past pain and suffering and nearly \$80 million in future damages, which was reduced by the trial court to approximately \$50 million.

As required by the statute, the trial court applied a discount rate to the future damages over \$250,000, divided that total by the plaintiff's 55 year expected life span and then compounded that amount at the statutory rate of 4% for 55 years. These computation increased the amount of the award to almost \$140 million. The Hospital appealed, urging reversal of the harsh result of the strict application of Article 50-A. The First Department affirmed the trial court's decision and the defendants appealed to the Court of Appeals.

While in this case, the amount awarded under Article 50-A is greater than the amount awarded by the jury, the Court begins by noting that Article 50-A was originally enacted, in part, to save insurer's money. The rationale is that by structuring the judgment, the insurer can invest the balance of the award before the installments come due, thus reducing the overall cost. Additionally, the payout ceases upon the death of the plaintiff, which means there would be a savings for the insurer if the plaintiff did not live to full life expectancy.

In the instant case, while the working of the Article harmed the defendant, the Court held that such a result was not enough to disregard the specified statutory procedure. In a concurring opinion, Judge Rosenblatt noted that while such results were possible and not what the Legislature intended, the Court was bound to apply the law as written.

Labor Law Update

Last month we took a break from reviewing the courts continuing struggle to apply Labor Law section 240 to claims made by injured workers and discussed one of the few defenses to a 240 claim, the recalcitrant worker defense. This month we return to the application of the Labor Law to plaintiff's claims with the Court of Appeals decision in Panek v. County of Albany. 2003 N.Y. Lexis 318.

The plaintiff in Panek was an engineer technician employed by the Federal Aviation Authority at the Albany International Airport, which leased an air traffic control tower from defendant County of Albany Airport Authority (the "Authority"), which operated the facility for the County of Albany. As part of a renovation, a new control tower was built and placed in service. The Authority then issued a contract for the demolition of the old tower.

Prior to the actual demolition of the old tower, the FAA instructed the plaintiff to remove two air handlers from the old tower's cooling system. The air handlers weighed approximately

200 pounds and were affixed with bolts to an I-beam on the second floor ceiling of the tower. At the time of the accident, the plaintiff was using a stepladder owned by the FAA to loosen the bolts. The plaintiff had positioned a lift under the air handler so that the air handler would be released onto the lift once all the bolts were removed.

As the plaintiff was in the process of loosening a bolt, he fell from the ladder, and although he was able to grab a cable tray that was suspended from the ceiling, he ultimately fell to the ground and sustained injuries. The plaintiff brought suit against the County of Albany and the Authority alleging, among other things, violations of Labor Law section 240.

At the conclusion of discovery, the plaintiff moved for summary judgment on his 240 claim, arguing that he was involved in work incidental to the upcoming demolition or, alternatively, that the removal of the air handlers constituted an alteration of the tower, either of which activity would fall under the statute. The defendants cross-moved to dismiss the complaint. The defendants argued that the plaintiff's work was not encompassed by the Labor Law protections because removal of the air handlers was not part of the separately contracted future demolition and that the salvaging of the air handlers did not constitute an alteration of the building

The Supreme Court granted plaintiff's motion, holding that while the plaintiff was not engaged in demolition, he was engaged in an alteration activity and as such was covered by the statute. The Appellate Division reversed, holding that the plaintiff's work assignment did not constitute "altering", reasoning that the statute contemplated that the building would continue to be used after the completion of any of the enumerated activities.. Given the fact that the tower was going to be demolished, the plaintiff's activity could not be considered an "alteration", even if it resulted in a significant physical change to the building.

The Court of Appeals agreed with the lower courts that the plaintiff was not involved in demolition, but disagreed with the Appellate Division's interpretation of the word "altering" in the statute. The court held that "altering" within the meaning of the statute "requires making a *significant* physical change to the configuration or composition of the building or structure." In finding that the plaintiff was engaged in a significant physical change to the building, the Court pointed to the fact that the removal of two 200 pound air handlers required two days of preparatory labor, including the dismantling of electrical and plumbing components of the cooling system and required the use of a mechanical lift to support the weight of the air handlers. The fact that the plaintiff did the work on a building that was scheduled for demolition did not change the nature of the work.

Contractual Indemnification

In our March issue, we discussed the First Department's decision in Dutton v. Pankow Builders, Ltd., 745 N.Y.S.2d 520 (1st Dep't 2002), which appeared to create a claim for "partial indemnification" with regards to a claim for contractual indemnification against the plaintiff's employer in a construction accident case. We commented that Dutton appeared to ignore General Obligations Law section 5-322.1 and opened up a whole new area of liability. In Bush v. City of New York, (New York Law Journal, April 24, 2003), one of the first post-Dutton cases, Justice Renwick of the Supreme Court, Bronx County does not specifically follow Dutton, however, he does not specifically follow the pre-Dutton cases either.

Bush involves a fairly typical work site accident in which the plaintiff's employer ultimately ends up being a third party defendant. The third party plaintiff moved for summary judgment on its contractual indemnification claim against the plaintiff's employer, which cross moved to dismiss the contractual claim. While the decision quotes both contracts in full, it is

sufficient to note that the contracts in Bush and Dutton were similar in that they both required indemnification only “to the fullest extent permitted by law.”

By way of background, Dutton, involved a case where, at trial, the plaintiff’s employer was found 80% responsible for the happening of the accident, while the general contractor entitled to indemnification, was found 20% responsible. Before Dutton, it could have fairly been assumed that that result would have extinguished the contractual indemnification claim by working of GOL 5-322.1, prohibits a party from being indemnified for its own negligence. Dutton, however, permitted “partial indemnification”. In other words, although 20% responsible, the general contractor was still entitled to recover the 80% that was the employer’s share of fault. (While the court called it “partial indemnification”, it was really permitting contribution, which had been abolished by the Omnibus Workers’ Compensation Reform Act of 1996.)

Turning to Bush, the court discusses at some length, situations where contracts provide for indemnification, even for the indemnitee’s own negligence. The court cites the Court of Appeals decision in Itri Brick v. Aetna, 89 N.Y.2d 786 (1998) which held that such agreements were unenforceable. The court went on to note that Itri Brick did not discuss the effect of the savings clause, present in both Bush and Dutton, that provides for indemnification only “to the fullest extent permitted by law.” The court examined various cases from other jurisdictions, and ultimately concluded that the savings clause takes the contract out of the ambit of GOL 5-322.1, and permitted the indemnitee to get summary judgment on its contractual indemnification claim.

While the court specifically states that its holding is not inconsistent with Dutton, such does not appear to be true. While Dutton did not discuss the effect of the savings clause on the contractual indemnification claim, it appears to have decided that in cases where the indemnitee

is negligent, it can recover the proportional share from the indemnitor, regardless of the contractual language. Put another way, the court in Bush looked to find a way around the GOL based on the contractual language to permit indemnification. The court in Dutton appears to ignore the GOL and establish a right to contribution which had previously been abolished. Given these two cases, it appears that this is an area which will see a number of decisions in the near future.

Special Relationship

In Melby v. Duffy, 2003 N.Y. App. Div. LEXIS 3493, the Second Department addressed the proof necessary to successfully sue a governmental entity for failure to warn of a dangerous condition. Melby involved a plaintiff who was injured while operating his boat near Blue Point Cove in Patchogue Bay. While boating, the plaintiff's face hit a rope suspended approximately five feet above the water. The rope extended between two fish traps, known as pound traps, which were owned and maintained by defendant Duffy, a commercial fisherman. The bottom of the bay where the accident occurred was owned by the Town of Brookhaven.

The plaintiff brought suit against the Town of Brookhaven and the County of Suffolk which patrolled the site, alleging that they were negligent by "causing, allowing and permitting the incident to occur and in having actual and/or constructive notice of the dangerous and hazardous condition existing in Patchogue Bay." The plaintiff also alleged that the Town and County were negligent in failing to warn the plaintiff of the condition and in failing to remedy the condition. Ultimately, both government defendants moved for summary judgment.

It should be noted that there was no real issue as to whether the Town or County had notice of the condition, as defendant Duffy's traps had injured others previously, and in fact, the Town ultimately passed a law outlawing the types of traps used by Duffy. The court described

the plaintiff's claims against both the Town and the County as being based on the alleged breach of a governmental duty to warn of a hazardous condition created by a third party. The court further stated that such a duty falls within the governmental function of providing adequate police protection to the general public. In such situations, the governmental entity is immune from negligence claims, unless there is a "special relationship" between the plaintiff and the municipality.

The court then enumerated the elements of a "special relationship. They are:

- (1) an assumption by the municipality, through promises or actions, of an affirmative duty to act on behalf of the party who was injured;
- (2) knowledge on the part of the municipality's agents that inaction could lead to harm;
- (3) some form of direct contact between the municipality's agents and the injured party; and
- (4) that party's justifiable reliance on the municipality's affirmative undertaking.

Applying the facts to the law was relatively simple, and the court found that there was no direct contact between the Town or the County and the plaintiff before the accident, and no evidence of an assumption of an affirmative duty to the plaintiff. In the absence of any indication of a special relationship between the plaintiff and the Town or County, summary judgment was appropriate.