Queens BAR BULLETIN

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September 2023 | Volume 91, No. 1

Congratulations to Justice Lourdes Ventura and Justice Laurence Love

Governor Kathy Hochul announced the appointment of ten judges to the Appellate Division throughout New York State on Friday, July 28. We congratulate Justice Lourdes M. Ventura, Justice Laurence L. Love and Justice Carl Landicino on their appointments to the Appellate Division, Second Department.

Lourdes M. Ventura currently serves as an Associate Justice on the Appellate Term of the Supreme Court for the 2nd, 11th, and 13th Judicial Districts. She was previously elected Justice of the Supreme Court in the Eleventh Judicial District and Judge of the Civil Court of the City of New York in Queens County prior to that. Before beginning her service on the bench, Justice Ventura was a partner at the law firm of Ahmuty, Demers & McManus and was a former Assistant Attorney General for the Civil Rights Bureau of the New York State Attorney General's Office. Justice Ventura currently serves as co-chair the Equal Justice in the Courts Committee for the Civil Term of the Supreme Court, Queens County and a member of the New York Pattern Jury Instructions (Civil) Committee. Justice Ventura is currently serving as President of the Latino Judges Association, is a board member of the Supreme Court Judges Association of the City of New York as well as the Judges and Lawyers Breast Cancer Alert. Justice Ventura is a former member of the Queens County Bar Association Board of Managers.

Laurence L. Love was elected Justice of the Supreme Court in the Eleventh Judicial District in 2019. He currently serves as the New York citywide co-coordinator judge for Child Victims Act cases. Previously, he was elected to the Queens Civil court in 2012 and served as Acting Supreme Court Justice from 2016 to 2018. Prior to his election to the bench, Justice Love maintained his own law practice with a focus on personal injury law based in Queens and served as Legal Counsel to then Assemblywoman Audrey I. Pheffer, current Queens County Clerk and Commissioner of Jurors. Justice Love is a member of the board of the Brandeis Association.

Carl Landicino was elected Justice of the Supreme Court in the Second Judicial District in 2011. Justice Landicino attended the University of Rochester and St. John's University School of Law, and was admitted to the New York State Bar in 1991. Prior to his election, Justice Landicino was a partner at Borchert,

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The Docket

Being the official notice of the meetings and programs listed below. Due to unforeseen events, please note that dates listed in this schedule are subject to change. More information and changes will be made available to members via written notice and brochures. Questions? Please call 718-291-4500.

CLE Seminar & Event listings

SEPTEMBER 2023

Monday, September 4	L*abor Day – Office Closed*
Wednesday, September 6	Academy of Law Committee Mtg – 1:00 pm
Monday, September 11	Golf & Tennis Outing at Garden City Country Club
Wednesday, September 13	**CLE:** Real Estate
Thursday, September 28	EVENT: Young Lawyers Committee Happy Hour at Austin's Ale House – 6:00 pm

OCTOBER 2023

Monday, October 9	*Columbus Day – Office Closed*
Tuesday, October 10	**CLE:** ABC's of Guardianship – Pt 1 – 1:00 pm
Tuesday, October 17	**CLE:** ABC's of Guardianship – Pt 2 – 1:00 pm
Tuesday, October 24	**CLE:** ABC's of Guardianship – Pt 3 – 1:00 pm
Wednesday, October 25	**CLE:** Recent Significant Developments & Decisions from Our Highest NYS Appellate Courts – 5:30 pm
Tuesday, October 31	**CLE:** ABC's of Guardianship – Pt 4 – 1:00 pm

NOVEMBER 2023

Wednesday, November 1	**CLE:** Elder Law - MHL Article 83
Tuesday, November 7	*Election Day – Office Closed*
Friday, November 10	*Veteran's Day – Office Closed*
Thursday, November 16	CLE: Surrogate's Court Committee – 1:00 pm
Thursday, November 16	EVENT: Friendsgiving Fundraiser 6:30 pm
Thursday, November 23	*Thanksgiving Day – Office Closed*
Friday, November 24	*Thanksgiving Holiday – Office Closed*

DECEMBER 2023

Wednesday, December 13	EVENT: Holiday Party at Jericho Terrace, Mineola, NY – 5:30 pm
Monday, December 25	*Christmas Day – Office Closed*
Tuesday, December 26-29	*Christmas Weeky – Office Closed*

JANUARY 2024

Monday, January 1	*New Year's Day – Office Closed*
Monday, January 15	*Martin Luther King, Jr. Day – Office Closed*

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New Members

William E. Acevedo-Hernandez
Ammar N. Chatha
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Jaylene Gomez
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Serafina Russo
Rory M. Shectman
Anthony J. Simon
Gurpal Singh
Kenneth L. St. Bernard
William Vamvouris
John J. Whelan

Necrology

Richard W. Bryan
Hon. Dennis Lebwohl
Francis Valentino
Hon. Maurice Harbater

Editor's Note

An Appreciation: The Jeep Renegade and the Biden Bipartisan Infrastructure Law of 2021

By Paul E. Kerson

I bought a Jeep Renegade this past month from Hazel Boudiaf, my sales representative at Bill Volz Chrysler Jeep of Cortlandt Manor, NY. It is the tough, rugged, General Purpose (GP or Jeep when the letters are pronounced) symbol of American ingenuity that liberated Europe in World War II. "General Purpose" meant that the Jeep was used as an ambulance, battle tank, makeshift hospital operating room, delivery truck and troop transport, often all at the same time.

The Jeep manufacturing plant was owned by Willys-Overland Motors (1940-1953), Kaiser-Jeep (1953-1970), American Motors (1970-1987) and today Stellantis-NV, a 50/50 partnership of Fiat Chrysler Automobiles (FCA) and France's PSA Group.

Stellantis NV is the fourth largest automaker in the world.

The Jeep Renegade is today made in Italy, Brazil and China but its brand headquarters are still in Toledo, Ohio, where it all began 83 years ago and where other Jeep models are still produced.

Toledo, Ohio is the home of one member of a group of the most famous drivers and passengers of all Jeeps – the fictional Corporal Max Klinger who utilized the original Jeeps with his fellow fictional Korean War M*A*S*H legends, Captain Benjamin Franklin Pierce, Captain B.J. Hunnicutt, Colonel Sherman T. Potter, Major Margaret Houlihan, Major Charles Emerson Winchester, Father Francis Mulcahy, Major Frank Burns and Corporal Walter "Radar" O'Reilly.

M*A*S*H meant Mobile Army Surgical Hospital. It was one of the most popular and long-running television shows in American History. The original Jeep was one of its stars.

After World War II, President (and former World War II General) Dwight Eisenhower presided over the greatest construction project in World History – the United States Interstate Highway System, designed to get civilian and military Jeep and other drivers and passengers to every corner of the vast United States at safe and record speeds.

In New York, President Eisenhower's achiev-ement was echoed by Bob Moses, Chair of the Triborough Bridge and Tunnel Authority (TBTA), among other titles, who built the expanded Bridge and Tunnel New York – the Throgs Neck Bridge, Whitestone Bridge, Queens Midtown Tunnel, Triborough (Robert F. Kennedy) Bridge, Brooklyn Battery (Hugh L. Carey) Tunnel and Verrazzano Bridge for military and civilian Jeep and other drivers and passengers to navigate the nation's largest and most crowded City, now expanded to all of Long Island, New Jersey, Connecticut, and Westchester and Rockland Counties and much of Upstate New York.

These bridges are lighted at night and seem to wrap the City, the Nation and the Interstate Highway System in glittering, dazzling, shimmering, sparkling jewelry. They connect the region to the world at Kennedy Airport off Interstate 678 and LaGuardia Airport off Interstate 278.

Today's Jeep has equipment Radar O'Reilly would never have been able to acquire in all of the United States Army's Korean War supply depots: wireless cellphone hookup, Global Positioning System (GPS) navigation, Google information about anything and everything right in the Jeep as it travels, music of every description through Spotify over the Jeep's AM-FM radio, air conditioning, power steering and power brakes to name just a few.

Using decades of legislative skill, President Joe Biden has arranged to repair President Eisenhower's Interstate Highway System, Bob Moses' Bridges and Tunnels and all of the rest of the nation's roads, bridges, tunnels and trains.

The Biden Bipartisan Infrastructure Law of 2021 covers 32,000 projects in 4500 communities totaling $1 trillion in Federal Government investment in our country.

Today's Jeep is symbolic of everything our nation has built and stands for these last 83 years (one-third of its existence): international trade and the sharing of manufacturing wealth around the planet, technological skill and advancement, movement of goods and people around the country and around the world to enrich everyone like iron-infused blood flowing through the veins and arteries of an interconnected humanity.

Just look at your local section of the Interstate Highway, and know our country has achieved something no other nation has achieved throughout the course of history – true freedom for everyone, to travel and trade and spread wealth and knowledge all around the planet Earth in the Jeep that led the way on the roads President Eisenhower built and President Biden repaired.

Francisco DeFelice Medal of Honor

In photo, left to right: Neil DeFelice, Joe DeFelice, and Italian Deputy Consul General Cesare Bieller

Joseph F. DeFelice, Past President of the Queens County Bar Association, and his brother Neil DeFelice recently accepted a posthumous Medal of Honor for their father, Francisco, from Cesare Bieller, the Deputy Consul General of Italy. Francisco DeFelice is one of only five New Yorkers to ever receive this honor in recognition for his service during World War II. He was serving in the Italian army in Greece in 1943 when the Italians surrendered. Rather than fight for the German army, he was taken at gunpoint and imprisoned in a German prison camp. Eight decades later, this act was recognized as an act of passive resistance and the Medal of Honor was awarded.

Congratulations to Justice Lourdes Ventura and Justice Laurence Love

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Genovesi, LaSpina & Landicino, P.C., where he practiced law as a transactional attorney and litigator. He began his career as an attorney with the New York City Department of Housing Preservation and Development. Justice Landicino is an officer of the Supreme Court Justices Association of the City of New York, past President of the Columbian Lawyers Association of Brooklyn and the Nathan Sobel American Inn of Court of Brooklyn.

We offer our most heartfelt congratulations and best wishes to all three as they assume their new roles.

President's Message

What A Summer It Was!

By Michael D. Abneri

Hi Everyone.

It is a privilege to write my first message in our *Queens Bar Bulletin* as the current president of the Queens County Bar Association (QCBA). I have spent the last 20 years of my career practicing exclusively in Queens County, primarily as a trial lawyer in the civil parts of the Supreme Court and the Civil Court. I have known some of our members for many years, and I want to thank those of you who came to our annual installation dinner in May. I also know many of the judges and their staffs in Queens County who work hard to administer justice. Some of the current judges have in the past served as members of our Board of Managers. Like everyone else they were on the forefront of adapting and rolling out the newer technology of Microsoft Teams meetings in lieu of "in person" appearances where necessary and appropriate.

Our Supreme Court Committee on the civil matters side has met with Administrative Judge Grays multiple times over the past few years to address various issues. I expect that we will have an opportunity to update our members in September as to recent developments. The backlog of Civil Supreme trials continues to shrink. As of August 2023, the court was calendaring cases in TSP with Notes of Issue filed in October of 2022 for November 2023 appearances. Certainly, more resources need to be devoted where possible to continuing this trend so the citizens of Queens County can get quicker access to justice when they are involved in the court system. This is true for all types of cases in Queens County and perhaps the entire metropolitan area. We encourage OCA to continue their efforts to restore staff that have either retired, transferred or, sadly, passed away during the pandemic.

Several events have happened since our last publication in May. The most significant for us is that our "home" has now moved to 88-14 Sutphin Blvd. After over 63 years at our prior location, the age of the building and financial considerations led us to moving. While we will miss our old "home", we look forward to working in our new space which, although smaller, will still serve its important purposes of supporting the members of this Bar Association and our continued mission on behalf of the lawyers and their clients in Queens County. We expect to have several welcoming events this fall, and I suggest you stop by, take a look, and say hello to our staff. A big thank you to our Executive Director Jonathan Riegel, Sasha Khan and Janice Ruiz for their efforts in making this move possible and as always, getting the job done.

I would also thank Paul Kerson, a past president of QCBA who continues to edit our *Queens Bar Bulletin* and solicit articles from various members of the legal community.

Among other things that have happened since our last publication was the adoption of new bylaws. After approximately two years of work on rewriting our bylaws, led by past presidents Richard Gutierrez, Joseph Carolla III and Frank Bruno, Jr., we held a general membership meeting in early June and the new bylaws were passed. Please feel free to read these on our website.

Also in June, the Young Lawyers committee hosted a happy hour at the Austin Ale House cosponsored by the New York State Bar Association and the Queens County Woman's Bar Association. It was a great time with an excellent turnout. We are going to have another one on September 28th, 2023, at the Austin Ale House at 5:30 PM, and I encourage everybody to attend. It is a chance to network and mingle among your fellow members of the Queen's County Bar Association.

I want to thank Justice Donna-Marie Golia, Administrative Judge for Queens County Supreme Court, Criminal Term, for hosting a Pride Month event in late June, sponsored by the QCBA and organized by our own LGBTQ committee co-chair Michael Goldman. And thank you to Matthew Skinner, Executive Director of the Richard C. Failla LGBTQ Commission, for his update.

Another exciting event that occurred over the summer, spearheaded by the Queens County Woman's Bar Association, its president and member of QCBA, Elizabeth Newton, was a "family and friends' barbecue" at St. John's University on August 13th, 2023. With attendance of over 100 adults and children and with special activities for children, it offered an opportunity for members with children, in a casual setting, to attend. The event brought together a diverse group of people, as it was co-sponsored by the Catholic Lawyers Association, the Latino Lawyers of Association of Queens County, the Brandeis Association and the QCBA. I hope we can do this again next year.

I hope there is an opportunity to develop and expand our relations with the other bar associations in Queens County for involvement in more joint events and possibly combined joint CLE programs where appropriate.

We were also very proud to see, after the announcement in late April, that Honorable Joseph Zayas, a QCBA member, former Judge in Queens County, former Administrative Judge of the Supreme Court, Criminal Term, and former Associate Justice of the Appellate Division, Second Department, has taken over as the Chief Administrative Judge of the State of New York, leading the Office of Court Administration. We wish him the very best in this challenging job in the post-pandemic era to continue to the restore the courts as best as possible to a pre-pandemic state; but incorporating some of the beneficial and positive advances in technology and procedures that were instituted during the pandemic. I look forward to seeing him at our many events that we will have over the course of the year.

I also want to congratulate Justice Lourdes Ventura and Justice Laurence Love, two elected Supreme Court judges from Queens County, on their recent elevation by Governor Hochul as Associate Justices of the Appellate Division, Second Department. Justice Ventura has been a very active member of the association and is a former member of the QCBA Board of Managers. Justice Love has also been a long-term member and "a regular" in Queens County for many years prior to joining the bench. They join the other two Associate Justices from Queens in the Second Department, Justice Valerie Braithwaite Nelson and Justice Janice A. Taylor. We are now back to having four judges from Queens County, which we advocated for in early June and we thank the Governor for making these appointments.

Finally, congratulations Judge Maureen McHugh-Heitner and Judge Nicole McGregor-Mundy on their recent appointments to the New York State Court of Claims. Both are sitting in the Supreme Court, Civil Term as Acting Supreme Court Justices.

One of the great things about membership in the QCBA is the ability to join most of our committees by your choice. They are listed in our the QCBA directory and on our website at **www.QCBA.org**. You can find out what our committees are, and I encourage you to contact our staff to join these committees. Future QCBA leadership frequently comes from membership on these committees. Certainly, if you have any questions, please feel free to contact me **President@qcba.org**

Lastly, I would like to thank Adam Orlow, the immediate past president for his stewardship of the QCBA over the past year during his term. I also congratulate the current QCBA Executive Board members, President-Elect Zenith Taylor, Vice President Kristen Dubowski-Barba, Treasurer Joshua Katz and Secretary Joel Serrano, and I look forward to working with you the rest of our Board of Managers to tackle the challenges that we will face this year.

For those members celebrating Rosh Hashanah and Yom Kippur, may you have a happy New Year and an easy fast.

Best wishes,

Michael D. Abneri

Eulogy Given At Hon. Maurice Harbater's Funeral On May 15, 2023

BY HON. RICHARD LATIN

It's hard to say goodbye to the Honorable Maurice Harbater, a dear friend, a mentor and a man who treated me like a son. He and Marilyn always made me feel like family.

Maurice encouraged me to be active in the legal community. He persuaded me to teach at Queens College, serve as a small claims judge and helped me grow as an attorney and later as a judge. He attended both of my judicial installations first as a Civil Court judge and then as a Supreme Court judge. It was not easy for him to attend because he was in a wheelchair and needed an aide. But he knew I loved seeing him at my induction.

He hired me in 1986 when he was elected as a civil court Judge. It was my first job in the court system. Although I served seven judges, you never forget your first. He served with distinction for many years but he knew that he wanted to retire when his term was up. He wanted to enjoy retirement with his childhood sweetheart, his wife Marilyn, and he never considered certification. They traveled the world and truly enjoyed retirement. Maurice was fortunate to have 29 years of retirement. He was also a member of Bar for over 73 years. How many people can say that?

Maurice was a kind and caring soul – he put the rock in rachmones.

There are so many Harbater stories to share. It's hard to know where to begin.

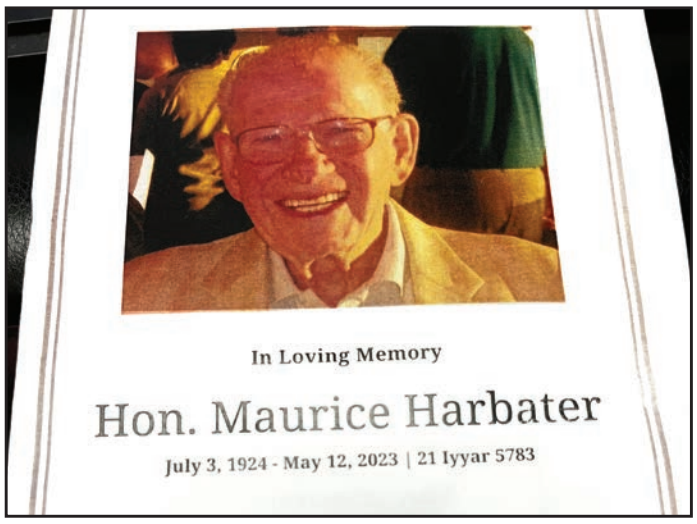
Maurice was one of the first housing court judges. He was appointed when the Housing Court was first created. He was particularly proud of the fact that he got the job without political sponsorship or organizational affiliation except for the Boy Scouts of America. Although I did not work with him when he served in the Housing Court, he shared many stories with me. In one case involving roach infestation, the landlord's attorney asked the tenant why the photo he offered into evidence only had a few roaches. The tenant replied that when he turned on the lights, the roaches would not stand still to pose. My favorite was the hoarder who thanked him for making him clean up all the clutter in her apartment or face eviction. The hoarder cleared out the apartment and was allowed to stay. Afterwards the tenant approached Judge Harbater and told him that she wanted to thank him. The Judge asked "why are you thanking me I made you throw out all your stuff?" To his surprise she told him that thanks to him she found her piano during the cleanup.

That being said, he couldn't wait to get out of the Housing Court and become a Civil Court judge. With the help of his devoted wife and his leader Morty Povman, he was elected to Civil Court in 1985.

I know that getting elected to Civil Court helped him keep his sanity. Whenever he drove past Creedmoor Hospital in Queens, he would recite how many years, months, days, and hours he served as Housing Court judge. Then he would say, looking at Creedmoor, "You didn't get me" followed by a Bronx cheer.

I can speak from personal knowledge about my eight years serving with him in the court system. His first assignment was in the Criminal Court in the Bronx. So began an odyssey that brought us back and forth between Civil and Criminal courts. We worked nights shifts and lobster shifts. Because we worked crazy hours we also ate at weird hours, we never knew what meal we were eating. Since his days frequently revolved around his meal it drove him crazy.

One night in arraignments, he made me aware of his sense of humor. He asked the defendant if he wanted to make a statement. The defendant replied, "Yes. Shove it up your butt." Judge Harbater turned to him and said, "Application denied." Then, seconds, later, he recalled the decision and said "On second thought decision reserved – I really don't want to be reversed on this decision."



Judge Harbater loved to walk and loved to hike. One day, when we were working at the Long Island City Court House, he called me at work and said he walked from Forest Hills and was at the Citicorp Building. I said so you are across the street. He said no I am at the other Citicorp in Manhattan. It is going to take me awhile to walk back to Long Island City I must still walk back over the Queensborough Bridge.

Our first chambers in Long Island City was so small I was knocked off my chair whenever someone opened the door. His sage advice was be like the palm tree not the oak tree. In high winds, the oak tree can be broken and uprooted but a palm tree sways and bends with the breezes and winds.

Maurice was philosophical. He told me that every situation should be evaluated with a balance between the pluses and the minuses. As long as there were more pluses you were okay. He prayed that G-d would raise him up as slowly as G-d wanted but not let him fall back down. But just in case he told me to be nice to the people on your way up because they would be the same people you meet on the way down. When he performed a wedding ceremony, including the vow renewal for my parent's 50th wedding anniversary, he would ask the couple to remember the two "c" s – communication and compromise.

Judge Harbater loved to eat. I always knew not to disturb him during the "most important part of the day" – mealtime. He bragged that the Harbater refrigerator was always full and food would fall out when it was opened. His favorite food was a hot dog. Whenever he went to Pastrami King in Queens, he was given a hot dog as soon as he walked in the door. He ordered all the jury lunches from Pastrami King. He kept them in business for years. In fact, his retirement party was catered by Pastrami King. But what he really loved about his retirement party was that my wife's father, Richard Swarbrick, had the University Glee Club of New York perform at the party. Maurice couldn't stop talking about it.

This eulogy would not be complete without recognizing how much he loved his family. He was completely devoted to his wife Marilyn, his high school sweetheart. For many decades, the two of them could be seen walking down Queens Boulevard. Always hand in hand. During the war when he was stationed in Guam, he sent secret coded letters to Marilyn. They always ended in 143. A secret code the Army never broke. 143 was code for a one letter word, a four letter word and a three letter word. It was code for "I Love You."

Their marriage and partnership was blessed with two sons – David and Stephen. He always talked about his sons. He made time every week to talk to them by phone. He knew exactly when they would be calling. He couldn't be disturbed when expecting these very important calls. He was so proud of their accomplishments. His son David is one of the world's foremost mathematicians. He would often joke that David would have won the Nobel Prize except for a small technicality. There is no Nobel prize for math because Nobel's wife ran off with a mathematician. He was also very proud of other son Stephen who he joked wasn't that smart since he was only a rocket scientist.

When Marilyn called to tell me he had died, I remembered something he often told me. He said that the only way he was leaving his wonderful, rent stabilized Forest Hills apartment was horizontally. Which in fact he did. I also know how he loved to walk around his gardens. Gardens was his code word for cemetery. I am so glad his final resting place is literally a place he loved.

Special thanks to Judge Latin's wife Eileen Swarbrick and his intern Joseph Salama for their contributions to this article.

Introduction to the Federal and New York State Wage and Hour Laws

BY CLIFFORD TUCKER, ESQ.,

The Fair Labor Standards Act (FLSA) and New York Labor Law (NYLL) are important labor laws that establish the minimum standards for wages, working hours, overtime pay, and other labor practices. The FLSA is a federal law that applies throughout the United States and the NYLL is a state law that applies in the state of New York. Although the two laws share some similarities, there are several practical differences between them. Counsel can help employees recover damages and help employers avoid litigation by understanding the requirements.

The identification of the employers to be named as defendants is a critical first step for plaintiffs. The FLSA and NYLL define terms like "employee" and "employer" broadly, covering some parties who might not qualify as such under traditional agency law principles. *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 326 (1992). "Employer" is defined similarly in the FLSA and NYLL, and "employee" is defined nearly identically. *Hart v. Rick's Cabaret Int'l, Inc.*, 967 F. Supp. 2d 901, 922 (S.D.N.Y. 2013) (*citing* 29 U.S.C. § 203; N.Y. Lab. Law § 190). To identify "employers," courts are directed to the "economic reality" rather than "technical concepts" and usually consider four nonexclusive and overlapping factors: (1) the power to hire and fire employees, (2) supervision and control over employee work schedules or conditions of employment, (3) determination of the rate and method of payment, and (4) maintenance of employment records. *Irizarry v. Catsimatidis*, 722 F.3d 99, 104 (2d Cir. 2013). Employer-defendants can include owners, principals, and managers in their individual capacity, and an individual may simultaneously have multiple "employers" for the purposes of the FLSA and NYLL. *Martin v. Sprint United Mgmt. Co.*, 273 F. Supp. 3d 404, 421 (S.D.N.Y. 2017).

Jurisdiction is another important consideration wage and hour cases. The FLSA covers employees who are either "engaged in commerce" (individual coverage) or "employed in an enterprise engaged in commerce" (enterprise coverage). 29 U.S.C. § 206; 29 U.S.C. § 207. For individual coverage, a substantial part of the employee's work must relate to interstate commerce, such as communicating regularly with out-of-state customers, using the telephone and mail to engage in interstate communication, or regularly traveling across state lines while working. 29 C.F.R. § 779.103; *Bowrin v. Cath. Guardian Soc.*, 417 F. Supp. 2d 449 (S.D.N.Y. 2006). For enterprise coverage, the employer must have a gross volume of sales or business done of at least $500,000 and engage in interstate commerce. 29 U.S.C. § 203. Virtually every enterprise in the nation that does the required dollar volume of business is covered by the FLSA. *Archie v. Grand Cent. P'ship, Inc.*, 997 F. Supp. 504, 530 (S.D.N.Y. 1998). If an employee is covered by the FLSA, they may bring both federal and state claims in one federal action. 28 U.S.C. § 1331; 28 U.S.C. § 1367.

Counsel must identify all violations of the FLSA, NYLL, and wage orders. Wage orders are the regulations that set wage rates and labor standards for specific industries in New York. Employers must comply with these orders, which have the force of law. 12 NYCRR § 141 (building services), § 146 (hospitality, i.e., restaurants and hotels), and § 142 (miscellaneous). Where an employee is subject to both state and federal wage laws, the employee is entitled to the greatest benefit available. See *Ni v. Bat-Yam Food Servs. Inc.*, 2016 WL 369681, at *1 (S.D.N.Y. Jan. 27, 2016).

The FLSA has a two-year statute of limitations, which can be extended to three years if the employer's conduct was willful. 29 U.S.C. § 255. Conversely, the NYLL has a more generous six-year statute of limitations. N.Y. Lab. Law § 663. Most wage violations are not one-time events like a car crash. Wage violations often happen over an extended period—every day or week the employee is not paid lawfully—so it is essential to file claims promptly to cover as much of the employment period as possible.

The NYLL sets the minimum wage rate for New York State, which is higher than the FLSA. The FLSA minimum wage is $7.25 per hour. Conversely, as of December 31, 2022, the minimum wage for most employees in New York State is $15.00 per hour, although there are exceptions for certain industries, jobs, and regions.

The NYLL and FLSA require employers to pay overtime at a rate of one and one-half times the regular rate of pay for any hours worked over 40 in a workweek. 29 U.S.C. § 207; 12 NYCRR § 141-1.4, 142-2.2, 146-1.4. In certain industries and jobs, New York also requires employers to pay employees an additional hour of pay for any day when the first shift starts and last shift ends over 10 hours apart, i.e., "spread of hours." 12 NYCRR § 142-2.4, 146-1.6.

Under the FLSA and NYLL, employers must keep accurate records of their employees' hours worked, wages earned, and other labor-related data. 29 U.S.C. § 211; 12 NYCRR § 141-2.1, 142-2.6, 142-3.6, 146-2.1. Failure to do so may allow employees to prove violations through testimony of estimated work hours and wages based on recollection alone. *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687–88 (1946); *Kuebel v. Black & Decker Inc.*, 643 F.3d 352, 362 (2d Cir. 2011). The burden then shifts to the employer. Under the FLSA, the employer must then prove the precise amount of work performed or show the unreasonableness of the inference from the employee's testimony. Id. Under the NYLL, the employer without payroll records must bear a more stringent burden of proving that the employee received all wages, benefits, and supplements. N.Y. Lab. Law § 196-a; *Gamero v. Koodo Sushi Corp.*, 272 F. Supp. 3d 481, 498 (S.D.N.Y. 2017), aff'd, 752 F. App'x 33 (2d Cir. 2018).

The New York Wage Theft Prevention Act (WTPA) requires employers to provide employees with a notice, in both English and the employee's primary language, at the time of hiring. The notice should provide information on the rate and basis of pay, regular pay day, employer's name, address, phone number, and other relevant details. N.Y. Lab. Law § 195(1). Employers must also provide a pay stub with every payment of wages, listing dates of work, hours worked, employee and employer names, rates of pay, gross and net wages, and deductions, among other information. N.Y. Lab. Law § 195(3). Violations of the WTPA can result in up to $10,000 in damages and liability for attorney's fees and costs. N.Y. Lab. Law § 198.

Employers who violate minimum wage, overtime, and spread of hours requirements are liable for unpaid wages, attorney's fees, costs, interest, and 100% liquidated damages. 29 U.S.C. § 216; N.Y. Lab. Law § 198, 663; C.P.L.R. 5004. To avoid liquidated damages, an employer may present an affirmative defense that it acted in good faith and with reasonable grounds to believe its actions were not violations. 29 U.S.C. § 260; N.Y. Lab. Law § 198(1-a). However, the burden is difficult to meet, and double damages are the norm. *Barfield v. New York City Health & Hosps. Corp.*, 537 F.3d 132, 150 (2d Cir. 2008); *Reich v. S. New England Telecommunications Corp.*, 121 F.3d 58, 71 (2d Cir. 1997).

In conclusion, while the FLSA and NYLL share some similarities, there are practical differences between them. It is important to stay up to date on any changes to these laws as they can have a significant impact on employees' rights and remedies and employers' exposure to liability.

Clifford Tucker, Esq., is a trial attorney licensed in New York and New Jersey. He practices employment and personal injury law at the Law Office of Sacco & Fillas LLP. Mr. Tucker focuses on representing clients in matters related to minimum wage, overtime, spread-of-hours, the Wage Theft Protection Act, and retaliation under the federal Fair Labor Standards Act, New York Labor Law, and the implementing regulations of federal and state wage and hour laws. Additionally, he handles discrimination and harassment actions and provides representation for civil servants in administrative proceedings. Mr. Tucker serves clients from various industries, including hospitality, restaurants, construction, retail business, and civil service. His representation extends to the United States District Courts for the Southern and Eastern District of New York, the New York State Supreme Court, the New York State Division of Human Rights, the New York City Commission on Human Rights, the New York State Department of Labor, and administrative proceedings. Furthermore, Mr. Tucker has taught Continuing Legal Education classes on case preparation, investigation, negotiation, and discovery.

New York State Bar Association Report

BY BY DAVID LOUIS COHEN, ESQ.
Vice-President, 11th Judicial District
New York State Bar Association

The Spring Meeting of the House of Delegates of the NYS State Bar Association was held on June 10, 2023. Both myself and QCBA President Michael Abneri attended in person. Below please find a summary of the issues that were discussed and the Reports and Recommendations that were adopted by the House.

"The future of our profession and our ability to confront issues are dependent upon the willingness and ability of attorneys to step forward when we believe our vocation – or the rule of law – is under attack," observed Richard Lewis, as he begins his term as President, "We need to listen to each other and respect differences of opinion. We may not always agree, but we can increase our influence through a constructive and civil dialogue."

Though officially his term began on June 1, the June 10th Cooperstown meeting was President Lewis's first address to the House of Delegates. He was installed as President by Justice Elizabeth Garry, Supreme Court, Presiding Justice of the Third Department. In her brief remarks, she recognized President Lewis's commitment to the legal profession and added, "We know that New York State Bar Association has a long, rich history of extraordinary leadership which will continue today with the installation of Dick for the year ahead."

Following Justice Garry's remarks, President Lewis delivered remarks outlining his presidential initiatives and a call to action to all lawyers to join the Association in tackling the challenging issues facing the profession and our communities.

"We face enormous issues as a profession and as a society," President Lewis explained. "Our ability to move forward in addressing these challenges is largely dependent on our ability to listen to one." He announced five areas of focus during his bar year: Homelessness and the Law, Medical Aid in Dying, Anti-Semitic and Anti-Asian Hate, Law Practice and Law Rules and Civics. [On June 14, 2023, President Lewis announced the creation of a Task Force on Affirmative Action.]

"I understand the breadth of my agenda," stated President Lewis. "My aim this year is to bring forth our concerns to the governor, the Legislature and the Office of Court Administration so we can remove barriers interfering with the practice of law, protect vulnerable New Yorkers, and improve access to justice across the state."

In addition to the installation of President Lewis, the House of Delegates (HOD) received several reports. Action was required in the four following reports:

1. **Task Force on Mental Health and Trauma Informed Representation**

   MISSION: The task force will focus on the need for the Association to better serve individuals with mental health challenges and/or trauma histories, both adults and children, through trauma-informed practice, such as informing attorneys and the judiciary of available resources to assist in the representation of clients, by raising awareness of intersectional stigma and trauma and by recommending education on best practices in the representation of these clients.

   ACTION: HOD adopted the various recommendations for action to be taken by the Legislature, Office of Court Administration, law schools and the Association in furtherance of the mission.

2. **Task Force on Modernization of the Criminal Practice**

   MISSION: The Task Force shall seek to modernize the criminal law practice in the State of New York to improve safety, fairness, access to justice and efficiency in the administration of criminal justice. Action: HOD adopted the various legislative recommendations to make structural changes to the justice courts, sentencing, discovery, electronic filing and virtual appearances in furtherance of the mission.

3. **Report and recommendations of Committee on Membership**

   PURPOSE: The study of membership development and retention for the Association and the development of recommendations to increase membership and enhance retention of attorneys and law students. Action: HOD adopted a resolution to develop the concept of a subscription-based membership fee model. This model will improve the membership experience and bundle various Association benefits for one price (based on years of practice). The membership committee will work with the leaders across the Association to further develop the details of the model to be implemented in 2025.

4. **Report and recommendations of Committee on the New York State Constitution**

   MISSION: Serve as a resource for the State Bar on issues and matters relating to or affecting the State Constitution; make recommendations regarding potential constitutional amendments and promote initiatives designed to educate the legal community and public about the State Constitution. Action: The HOD adopted a recommendation to propose amendments to the NY Constitution to eliminate provisions that are no longer relevant.

Some other reports were informational and they included the Special Committee to Examine Selection of Judges for the Court of Appeals; the Task Force on the Post-Pandemic Future of the Profession; and the Working Group on Facial Recognition Technology. Those committees and Task Forces working on those reports, and others will return later in the bar year to report out and seek adoption of their recommendations.

Finally, the House of Delegates received a report from Carla Palumbo, New York Bar Foundation Chair. The Foundation supports entities across the state that provide legal services or activities to the neediest among us. She reported on the activities of the Foundation highlighting the new Family First fundraising campaign.

Should you have any questions or want any additional information please email me at **david@davidlouiscohenlaw.com**.

The next meeting of the House of Delegates in November 4, 2023 in the New York State Bar Association Bar Center in Albany.

My thanks to Taa Grays, Secretary of the New York State Bar Association for her drafting of the majority of this article.

Scaffold Law Update: A Synopsis Of Recent Cases By The Appellate Division, Second Department

BY HON. GEORGE M. HEYMANN

THE STATUTE

Labor Law §240(1), commonly referred to as the "Scaffold Law", reads in relevant part:

> "All contractors and owners and their agents ... [1] in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure [2] *shall* furnish or erect, or cause to be furnished or erected for the purpose of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and *other devices* which shall be so constructed, placed and operated as to give proper protection to a person so employed." (Emphasis added. The numbers in brackets [ ] were added by the author.)

Established to protect workers in the performance of elevation related jobs, the above strict liability statute contains two separate criteria - the first delineates the specific nature of the work to be performed and the second the type of protection required by the contractor, and his or her agents, to the worker(s) when the work is, in fact, being performed. This is a non-delegable duty by the contractor and blame cannot be shifted to the injured plaintiff, as there is no comparative negligence. The only defense is to prove that the plaintiff was recalcitrant in the performance of his or her job [the sole proximate cause of the injuries].

For a worker to successfully prosecute a case under this statute it is necessary that both elements be proven. If it cannot be shown that the task carried out by the worker was covered by the statute, the Scaffold Law is inapplicable. If, however, the task is among the enumerated items set forth therein, the plaintiff must then prove that the failure of the contractor to provide adequate protection during the time the work was performed was the proximate cause of the accident and resulting injury. Generally, at the outset of their case, plaintiffs move for summary judgment on the issue of liability, which, if successful, leaves the amount of damages as the only issue to be resolved.

KEY LEMENTS

As can be ascertained from the statute above and the litany of case law, the key elements that must be considered in every Labor Law §240(1) action, on a case by case basis, are the following: 1]was the job contemplated and performed by the injured worker specifically enumerated in the first section of the statute; 2] did the contractor(s) provide the proper safety equipment in order for the worker to perform the job properly without incident; 3] was the work performed subject to an elevation-related risk, or possible injury due to the force of gravity and 4] did the plaintiff perform his or her job as required so that there was no recalcitrance [such as the failure to follow instructions given by superiors or a failure to use proper safety equipment that was provided and available and there was no good reason not to do so]. Any recalcitrant conduct could be determined to be the "sole proximate cause" of the accident, which would enable the defendant(s) to succeed on a motion for summary judgment of dismissal, regardless of whether they contributed to the accident by not providing the proper equipment. Often, neither side is granted summary judgment if there are triable issues of fact that must be argued before a judge or jury.

RECENT CASES

1. *Cruz v 451 Lexington Realty, LLC* (2023 NY Slip Op 03905 [7/26/23]), is an example where a falling object was not sufficient to meet the criteria of Labor Law §240(1). Here, the plaintiff allegedly sustained injuries during his employment as a laborer tasked with clearing debris from the first floor of a building that was being demolished. The plaintiff alleged that his injuries occurred when ductwork attached to the first-floor ceiling became detached on one end and fell approximately a foot and ½, causing dirt and debris particles to fall into his left eye. At the time of the incident the plaintiff had removed his protective eyewear in the designated "safety zone" as he and other workers were walking towards the exit to take a break. The Supreme Court denied the plaintiff's motion for summary judgment and the Appellate Division ["AD"] affirmed.

   "In cases involving falling objects, the applicability of the statute does not 'depend upon whether the object has hit the worker' but rather 'whether the harm flows directly from the application of the force of gravity to the object' (citation omitted ["( )"]. However, '[t]he extraordinary protections of the Labor Law §240(1) extend only to a narrow class of special hazards and do 'not encompass *any and all* perils that may be connected in some tangential way with the effects of gravity'. ( ) In falling object cases, the plaintiff 'must demonstrate that at the time the object fell it either was being hoisted or secured, or required securing for the purposes of the undertaking'. ( ) (emphasis in original)"

   The AD held that the statute was not applicable in this case. "Accepting arguendo the plaintiff's contention that his injuries flowed directly from the application of the force of gravity upon the falling ductwork ( ), the court correctly determined that the ductwork, which was part of the pre-existing building structure and was not being actively worked on at the time of the incident, was not an object that required securing for the purposes of the undertaking ( ). Moreover, contrary to the plaintiff's contention, the nature and purpose of the work being performed at the time of the incident did not pose a significant risk that the ductwork would fall ( ). To the extent that the partially demolished condition of the building may have created a greater general risk of objects falling, this is not the sort of risk that the extraordinary protections of Labor Law §240(1) was designed to address ( )."

2. Is an injured worker protected under the statute while "performing duties ancillary to those [enumerated] acts"? In *Estrella v ZRHLE Holdings, LLC* (2023 NY Slip Op 03848 [7/19/23]) the AD "modified" and affirmed the trial court by substituting its order for dismissal of the action and granting plaintiff's motion for summary judgment on liability. During a renovation project, defendant hired a nonparty general contractor who employed the plaintiff. Prior to July 2016 the interior walls and subfloors of the first two floors of the subject premises had basically been removed and the basement was excavated to make it lower by four feet. On July 28th, the plaintiff was assigned the task of removing damaged carpeting and flooring from a property adjacent to the subject premises, which allegedly had flooded as a result of the renovations to the subject premises. When the plaintiff went inside the subject premises to get a tool, he fell through a temporary plywood floor which consisted of several pieces of plywood placed on top of beams.

   The AD noted that the statute should be liberally construed and that "[t]he intent of Labor Law §240(1) 'was to protect workers employed in the enumerated acts, even while performing duties ancillary to those acts. *** [T]he question whether a particular [activity] falls within 240(1) must be determined on a case by case basis, depending on the context of the work ( )'". The plaintiff established that "he was at the subject premises, which was a construction site, in order to perform duties ancillary to the construction work which was covered by Labor Law §240(1) ( ). Further, the plaintiff established that he was exposed to an elevation-related risk for which no safety devices were provided, and such failure was a proximate cause of his injuries ( )". The defendant failed to raise any triable issues of fact that the plaintiff was recalcitrant in any way and there was no evidence that anyone instructed the plaintiff that he was prohibited from entering the subject premises to obtain the tools he needed to work on the adjacent property.

3. In a straightforward case regarding Labor Law §240(1), *Correa v 455 Ocean Associates, LLC* (NY Slip Op 03677 [7/5/23]), the plaintiff was injured

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Scaffold Law Update: A Sysnopsis Of Recent Cases By The Appellate Division, Second Department

BY HON. GEORGE M. HEYMANN

CONTINUED FROM PAGE 4

while working on the roof of a building owned and managed by the defendants. Plaintiff alleged that he injured his wrist while carrying tar paper down an extension ladder to a lower level of the roof. As he was doing so, he dropped the roll and grabbed the ladder to prevent himself from falling. The Supreme Court granted plaintiff's motion for summary judgment and the AD affirmed.

"Here, the plaintiff established his prima facie entitlement to judgment as a matter of law. The plaintiff submitted, inter alia, his deposition testimony that, although there was a pulley on the work site to raise or lower heavy materials, he could not operate the pulley without a second person and his foreman instructed him to use the extension ladder, which was not an adequate device for lowering the rolls ( ). In opposition, the defendants failed to raise a triable issue of fact."

4. Notwithstanding the fact that a plaintiff can demonstrate that he is entitled to summary judgment on the issue of liability, where the defendants can raise a triable issue of fact to refute such evidence, neither side will be granted summary judgment because "credibility questions cannot be determined on a motion for summary judgment". In *Gamez v New Line Structures & Dev., LLC* (2023 NY Slip Op 03683 [7/5/23]), plaintiff was employed to do carpentry work on property allegedly owned by the defendants. While walking on a sixth floor working deck, during construction, plaintiff "observed numerous pieces of plywood. While he was walking, one of the pieces of plywood allegedly slid out from under his feet, and he fell through a hole which the plywood had been covering, landing on the deck below. According to [plaintiff], the plywood had not been nailed down or marked with the word 'hole'". The Supreme Court denied plaintiff's motion for summary judgment. The AD affirmed.

"Although 'comparative negligence is not a defense to absolute liability under the statute, 'where the plaintiff is the sole proximate cause of his or her own injuries, there can be no liability under Labor Law §240(1) ( ). A plaintiffs intentional or negligent conduct may be the sole proximate cause of the injuries where adequate safety devices are provided as required by the statute, 'but the worker either does not use or misuses them' ( )".

Here, the defendants raised a triable issue of fact as to whether the plaintiff was the sole proximate cause of his injuries. "Specifically, the defendants submitted deposition testimony and affidavits in which witnesses asserted that [the plaintiff] and a partner were the designated 'safety carpenters' on the site whose job it was to make the holes on the deck safe for all the workers, that there was a 'strict protocol' that pieces of plywood covering holes would to be nailed down and marked 'hole', and that the plywood over the hole through which [the plaintiff] fell, which was not secured or marked, was personally placed by [the plaintiff]." Defendants provided additional evidence that "an appropriate fall protection system was in place with tie off points".

5. Another case involving acts "ancillary" to the alteration of a structure is *Ramones v 425 County Road., LLC* (2023 NY Slip Op 03489 [6/28/23]). Plaintiff allegedly sustained injuries while loading equipment [scaffolds, poles, boards, and ladders] onto the roof of a truck owned by his employer CDI. The plaintiff, along with other employees of CDI were using the equipment for shingling the roof of defendant's building. Defendants "failed to demonstrate, as a matter of law, that plaintiff's activity in removing equipment from the work site and loading it onto the van was not performed as part of the larger renovation project that CDI had been hired to complete on the premises, including roofing and shingling work. The plaintiff's role in removing the equipment after it had been used by the plaintiff and his CDI colleagues was an act 'ancillary' to the alteration of the structure at the property and protected under Labor Law §240(1) ( ). The defendants also failed to adduce any evidence demonstrating that climbing on the roof of the van was not necessary to the task of securing the equipment on the roof, nor did they demonstrate that no safety device enumerated in Labor Law §240(1) would have prevented the plaintiff's fall". The AD "modified" the trial court's granting of defendant's motion for summary judgment by denying same and affirmed the denial of plaintiff's cross-motion for summary judgment holding that "[t]he plaintiff's submissions showed the existence of triable issues of fact as to whether his fall resulted from the lack of an adequate safety device".

6. In *Panfilow v 66 E. 83rd St. Owners Corp* (2023 NY Slip Op 03357 [6/21/23]), the AD reversed the Supreme Court's denial of plaintiff's motion for summary judgment. Here, plaintiff "established his prima facie entitlement to judgment as a matter of law by demonstrating that his injuries [from falling off a ladder at a construction site] were proximately caused by the defendants' failures as the owner and general contractor at the construction site, to satisfy their nondelegable duty to provide him with a safe and adequate ladder necessary for him to perform his elevation-related work at the site ( )."

7. *Acevedo v PSM Long Is. Corp* (2023 NY Slip Op 03322 [6/21/23]) involved injuries to the plaintiff when he fell off a ladder during the construction of a new house. Plaintiff worked for a subcontractor hired by the defendant to put siding on the house. "The plaintiff testified at his deposition that he was preparing to install siding on the exterior of the house while standing on the 15th rung of an extension ladder, which his employer had set up. While he was driving a nail with a hammer above a second-story window, the ladder tilted to one side, causing the plaintiff to lose his balance. In order to avoid falling to the ground, as he lost his balance, the plaintiff jumped down onto a plank, which was at a level approximately 3 feet below the ladder rung on which he had been standing, and was approximately 14 or 15 feet above the ground. The plaintiff testified that when emergency personnel straightened the ladder in order to rescue him from the plank, he noticed that one of the nails that should have prevented the ladder from tilting to the side was missing".

The Supreme Court denied plaintiff's motion for summary judgment. The AD "modified" the order by granting the plaintiff summary judgment and as so modified affirmed. The AD held that the plaintiff established his prima facie case that the statute was violated and that the proximate cause of his injuries resulted from the ladder tilting, causing him to lose his balance and jump onto the plank below. Defendants failed to raise any triable issues of fact or to demonstrate that plaintiff's actions were the sole proximate cause of his injuries.

8. "Labor Law §240(1) does 'not encompass any and all perils that may be connected in some tangential way with the effects of gravity. Rather, [it is] limited to such specific gravity-related accidents as falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured' ( )". "Whether a plaintiff is entitled to recovery under Labor Law §240(1) requires a determination of whether the injury sustained is the type of elevation-related hazard to which the statute applies ( )". In the case of *Castro v Wythe Gardens, LLC* (2023 NY Slip Op 03329 [6/21/23]), the plaintiff's injuries did not fall within the ambit of Labor Law §240(1) because they did not occur as a result of an elevation-related or gravity-related risk. Here, the plaintiff was injured "when he tripped after stepping into a gap between the top step of a staircase and the landing. Plaintiff's use of the stairwell as a passageway it did not come within the purview of the statute.

NOTE: On April 28, 2022, the Court of Appeals rendered three opinions regarding Labor Law §240(1). Those cases were previously discussed in my article *CHUTES AND LADDERS – RECENT CASES INVOLVING NEW YORK'S "SCAFFOLD LAW"* (*Queens Bar Bulletin*, May 2022).

Hon. George M. Heymann is NYC Housing Court Judge (ret); Of Counsel, Finz & Finz, PC; Certified Supreme Court Mediator and Member of the Committee on Character & Fitness, Appellate Division, Second Department, 2nd; 10th; 11th & 13th Judicial Districts.

The Practice Page

Law Clarified on Proximate Cause of Negligent Security

BY HON. MARK C. DILLON
Serves on the Appellate Division, Second Department

Judicial departments within the state differed on a salient point of law regarding proximate cause in negligent security cases. Recently, the Court of Appeals resolved these differences in *Scurry v. NYCHA and Estate of Murray v NYCHA*, __ NY3d __ , 2023 WL 3588692, jointly decided on May 23, 2023. Both cases were similar, as they involved mortal crimes in NYCHA buildings where there were alleged defective door locks permitting intruders' with criminal intent easy access into the premises. One was the death of a plaintiff's decedent by flammable immolation. The other was by a gang-related shooting. The stakes in these cases are understandably high. Negligent security cases against landowners are not uncommon, rendering the *Scurry/Murphy* holdings noteworthy for the bar.

As a general matter, property owners have a duty to take at least minimal precautions to protect tenants from foreseeable harm, including harm that may arise from the criminal conduct of third persons (*Burgos v Aqueduct Realty Corp.*, 92 NY2d 544, 548). Negligence includes the separate concepts of duty and foreseeability once a duty is found to exist, foreseeability determines the scope of the efforts that must reasonably be undertaken to fulfill the duty (*Maheshwari v City of New York*, 2 NY3d 288, 294). A tension naturally exists when criminal conduct occurs within a premises — it might arguably be an intervening cause severing the nexus between an occurrence and an injury, or alternatively, be criminal conduct that is foreseeable as to expose the landowner to potential liability (*Nallan v Helmsley-Spear, Inc.*, 50 NY2d 507, 520). Liability may exist where intervening acts are a natural and foreseeable consequence of circumstances created by the defendant, but not where the acts are not foreseeable (*Derdiarian v Felix Constr. Corp.*, 51 NY2d 308, 315).

That all said, the First Department has had a long line of cases distinguishing between "targeted" criminal acts against a particular victim within a premises, *versus* opportunistic crimes at a premises against random victims. If a crime is targeted against a specific person such as murder, the First Department held that the proximate cause between an occurrence and an injury is essentially broken by the intervening criminal event, on the theory that no amount of building security can foreseeably prevent a planned and targeted crime (*Estate of Murphy v NYCHA*, 193 AD3d 503 [1st Dep't. 2021]; see also *Roldan v. New York City Hous. Auth.*, 171 AD3d 418, 419; *Estate of Faughey v New 56-79 IG Assoc., L.P.*, 149 AD3d 418, 418; *Flynn v Esplanade Gardens, Inc.*, 76 AD3d 490, 492; *Cynthia B. v 3156 Hull Ave. Equities, Inc.*, 38 AD3d 360; *Flores v Dearborne Mgt., Inc.*, 24 AD3d 101, 101-02; *Buckeridge v Broadie*, 5 AD3d 298-300; *Cerda 2962 Decatur Ave. Owners Corp.*, 306 AD2d 169, 169-70; *Rivera v New York City Hous. Auth.*, 239 AD2d 114, 115; *Harris v New York City Hous. Auth.*, 211 AD2d 616, 616-17). Under many of those cases the defendant landlords were entitled to summary judgment. By contrast, where the criminal act was perpetrated in the First Department in a "random" manner, the causal nexus between the plaintiff's injury and the landowner's duty of care raised triable issues of fact about the adequacy of the building security (*Gonzalez v Riverbay Corp.*, 150 AD3d 535, 536 [sexual assault by perpetrator who entered building by "piggybacking" a tenant who entered at the door using a key]; *Gonzalez v 231 Ocean Assoc.*, 131 AD3d 871, 871-72 [random intruder in defendant's building]; *Foreman v B&L Props. Co.*, 261 AD2d 301 [random sexual assault in elevator with evidence of broken front door lock]).

The Second Department took an entirely different approach to the issue in *Scurry v NYSHA*, 193 AD3d 1 (2nd Dep't. 2021). The Second Department specifically rejected the distinction between "targeted" and "random" attacks at a premises for legally defining issues of foreseeability and the reasonable security measures that should be undertaken by landlords. This is particularly true, said the court, as there may be more than one proximate cause of an occurrence such as, in Scurry, the criminal intent of the perpetrator and the premises' broken door lock facilitating the crime. Therefore, in the Second Department, a landlord could not receive summary judgment in its favor by merely establishing that a crime at a premises was "targeted," but rather, had to prove prima facie that any alleged security deficiencies were not a proximate concurrent cause of the occurrence (*Scurry v NYCHA*, 193 AD3d at 10).

The Third and Fourth Departments do not appear to have directly addressed the dichotomy between "targeted" and "random" crimes, if any such dichotomy should even be recognized. The closest any Third Department case came to the issue was in *Haire v Bonelli*, 107 AD3d 1204 (2013). There, the plaintiff was a victim of a 2005 mass shooting by an individual at a shopping mall using a semiautomatic weapon. The Third Department held that such an event was not reasonably predictable or foreseeable. As such, the reasonableness of the shopping mall's security measures did not need to be reached given the difference between duty and foreseeability.

The Court of Appeals joined the appeals of Murphy from the First Department decided in 2021 with Scurry from the Second Department, also decided in 2021, for oral argument and a joint opinion. In a 6-0 opinion authored by Chief Judge Rowan Wilson (Judge Halligan not taking part), the Court of Appeals resolved the differences between the two departments in favor of the approach of the Second Department. The Court of Appeals held that the First Department's conclusion in Murphy, that the broken condition of the door lock at the premises would not have prevented a targeted attack, mistakes a factual determination for a legal one. In other words, the question of whether a targeted attacker's intent qualifies as a superseding cause of an occurrence is a matter of proximate cause and foreseeability that belongs to a trier of fact, rather than being a question of law for the court on summary judgment. This is now the law statewide.

For the record: There is no intramural competition between the judicial departments. The justices of each department render opinions that they each sincerely deem correct, and in the event of differences of opinion, genuflect to the ultimate determinations of the Court of Appeals that set forth statewide standards. The *Scurry/Murphy* opinion from the Court of Appeals is an example of how the statewide system "works" in practice, providing the bench and bar from Montauk to Buffalo with a uniform legal standard that will guide similar issues in the future. That role is clearly recognized by the Court of Appeals, as evidenced by that court's joinder of the Murphy and Scurry appeals and the publication of a joint opinion resolving the differences between the judicial departments on the issue presented. Well done.

Mark C. Dillon is a Justice of the Appellate Division, 2nd Department, an Adjunct Professor of New York Practice at Fordham Law School, and a contributing author of CPLR Practice Commentaries in McKinney's.

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QUEENS COUNTY BAR ASSOCIATION

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QUEENS COUNTY BAR ASSOCIATION

88-14 Sutphin Blvd – 3rd Floor, Jamaica, NY 11435 • Tel 718-291-4500 • www.QCBA.org • CLE@QCBA.ORG

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YOUNG LAWYERS COMMITTEE

Co-Chairs: **Sean C. Acosta, Esq. • Ben Margolin, Esq. • Eric Renfroe, Esq. • Sydney A. Spinner, Esq.**
Vice Chairs: **John Ryan • Katlyne Ryan, Esq.**

Join us for QCBA's Fall

HAPPY HOUR MIXER!

Thursday, September 28, 2023 • 5:30 pm – 7:30pm

Austin's Ale House
8270 Austin St, Kew Gardens, NY 11415
(Outdoor Patio – weather permitting)

$25.00 Per Person for Members of the Hosts and Sponsors
$35 at the door/ $50 non-members
WWW.QCBA.ORG

Please join us for a happy hour mixer with a 2-hour open bar & appetizers.

Help us kick off autumn and mingle with our partners at the Queens County Women's Bar Association and the New York State Bar Association.

Everyone is welcome and encouraged to attend.

Hosted by:

No refunds/credits if registration is not canceled by September 26, 2023.

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The QCBA Young Lawyers Committee Presents Its Fourth Annual

Thursday, November 16, 2023 • 6:30 PM - 8:30 PM
Location: One Station Plaza, 213-10 41st Avenue, Bayside, NY 11361

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We are thankful for our members and sponsors. Please join us in giving thanks, and giving back, as we kick off the holiday season at our fourth annual Friendsgiving fundraiser. All proceeds from this event will be donated to:

DANCINGDREAMS
Dance for Every Child

Located in Bayside, Queens, Dancing Dreams provides dance classes to children with medical and physical challenges by pairing them with a teenage "helper" to support them through the class as they focus on their abilities, not disabilities.
We will be joined by the Founder & Director, Joann Ferrara, PT.

Registration fee includes two-hour open bar and appetizers. Additional donations welcomed and appreciated!

$30 per person in advance • $40 per person at the door
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