

OPENING STATEMENT

In our last edition of Cases & Points, the issue of lost wage recovery by illegal aliens was examined in light of the most recent case law. (See Volume V, Issue 3, Summer, 2003 "Illegal Aliens Are Not Prohibited From Suing In New York's Courts For Personal Injuries".) However, based upon the recent United States Supreme Court decision in *Hoffman Plastic*, the Court has reconsidered its holding and reversed itself. This issue which will, undoubtedly, soon be addressed by New York's Appellate courts shortly is the subject of our lead article.

THE UNSETTLED ISSUE OF ILLEGAL ALIENS' RIGHT TO RECOVER LOST WAGES IN BODILY INJURY LAWSUITS

By: Joseph A. Fitapelli

In the last edition of *Cases & Points*, the issue of lost wage recovery by undocumented aliens was examined under existing New York case law. Based upon the case law existing at that time, it appeared that an undocumented immigrant was not barred from recovering lost wages, although the plaintiff's status as an illegal could be presented to the jury when calculating lost earnings. Now, less than six months later, recent developments reveal that the court's treatment of this issue has changed. In fact, the same court that once held that an illegal alien could be awarded lost wages by a jury, has now held that an undocumented alien cannot recover lost wages, as a matter of law

In the past, New York Courts have permitted the recovery of lost wages for undocumented illegal aliens (see e.g. Public Adm'r of Bronx County v. Equitable Life Assur. Socy., 192 A.D.2d 325, 595 N.Y.S.2d 478 [1st Dept.1993]; *334 Collins v. New York City Health & Hosps. Corp., 201 A.D.2d 447, 607 N.Y.S.2d 387, [2nd Dept.1994]). However, recent developments in the wake of the Supreme Court's decision and holding in Hoffman Plastic Compounds, Inc. v. NLRB, demonstrate that a determination of the applicability of this decision by the Appellate Divisions is necessary. 535 U.S. 137, 122 S.Ct. 1275, 152 L.Ed.2d 271 (2002)

In Hoffman, the United States Supreme Court ruled that the National Labor Relations Board could not award back pay to an illegal alien who had used false documentation to obtain his job. The Court held that to award back pay to such an illegal alien would trivialize the immigration laws and condone and encourage violations of the law

When rendering its decision, the Court relied upon the Immigration Reform and Control Act of 1986 (IRCA), which mandates that employers verify the identity and eligibility of all new hires by examining specified documents before they begin work. (See Immigration and Nationality Act, § 274A, as amended, 8 U.S.C.A. § 1324a.) Further, the Court found that under this Act, it is impossible for an undocumented alien to obtain employment in the United States without some party directly contravening explicit congressional policies.

With respect to recognition of Hoffman in New York, in Cano v. Mallory Management, decided in April, 2003, the Supreme Court, Richmond County, held that while the plaintiff's undocumented alien status *may be* presented to the jury when calculating lost wages, the jury was not precluded from awarding plaintiff damages for lost wages. However, in its opinion, the Court only briefly dealt with Hoffman, and in its opinion expressed an aversion to denying lost wages to illegal aliens, in bodily injury actions.

In a recent decision (issued on October 1, 2003), this issue was again addressed by the Supreme Court, Richmond County. In Majlinger v. Cassino Contracting Corp., defendants Cassino and Veterans Property moved for partial summary judgment dismissing plaintiff's claims for lost earnings, since he could not establish that he was eligible for employment in the United States. The Court held that the IRCA barred an undocumented alien's claims in negligence and under labor law for wages lost due to injuries sustained in fall from scaffold. (766 N.Y.S.2d 332) The Court reasoned that plaintiff was not entitled to recover lost wages because, by statute, he had no lawful right to be employed and reinstated in his job. (Immigration and Nationality Act § 274A as amended 8 U.S.C.A.

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§ 274A, McKinney's Labor Law §§ 200, 241, 241, subd. 6.)

Moreover, the Court in Majlinger held that the interpretation afforded to the IRCA by the United States Supreme Court in Hoffman required the conclusion that plaintiff should not be permitted to recover for lost wages, as a matter of law, given his inability to prove he is legally authorized to work in this country. Finally, the Court held that it would be consistent with Hoffman to reserve lost wages awards only to those workers who have demonstrated a right to be lawfully employed and reinstated in their jobs.

In conclusion, given the volume of ongoing construction projects in New York, and the ethnic diversity found within the State, the issue of recovery of lost wages by illegal aliens is an unavoidable question associated with litigating Labor Law claims. As lost earnings claims within this realm can be substantial, new developments in this area must be closely followed by defense counsel. It should be noted that, realizing its decision was contradictory to prior caselaw, the Court in Majlinger concluded with a plea for guidance by the Appellate Courts. Consequently, a review of this issue by the Appellate Division can be expected in the near future.

Vicariously Liable Automobile Owners May Contest Liability Where a Default Judgment Is Entered Against the Driver

By: Marc Zanoni

It is not uncommon for insurers to be presented with the conundrum of how to defend an automobile liability bodily injury actions against the named insured owner and his uncooperative driver. This problem is magnified in the case of taxi or livery cabs where the driver is often unable to be located. In these situations, it is not uncommon for the insurer to learn of an action against the driver from the plaintiff's attorney only after a default judgment has been taken, rather than from the driver, himself. The entry of a default judgment against the driver prevents him from later contesting liability.

Where the driver would not be entitled to coverage under the named insured's policy (e.g.: as a result of his late notice, lack of cooperation, etc.), the question of whether the default judgment against the driver also estops the owner from contesting liability becomes crucial to plaintiffs and insurers, alike.

While it would seem unjust to transfer the negative effects of a default to an appearing party, until recently, the only case law suggested that, in fact, a vehicle owner was vicariously liable for the default of the driver. In Ha v. Y.W. Smith Corp., 714 N.Y.S.2d 873 (Kings County Sup. Ct. 2000), while defendant truck company interposed an answer, no answer was interposed on behalf of the truck driver. The court granted plaintiff's motion for summary judgment against the truck company based upon Vehicle and Traffic Law §388. Although the court was admittedly "troubled" by the result, the court held that he statute, coupled with the procedural posture of the case, "provided no alternative."

However, in August 2003 the Appellate Division, Second Department, addressed the issue directly in Balanta v. Stanlaine Taxi Corp., 307

company did not interpose an answer on behalf of the driver and the plaintiff obtained a default judgment against the driver. When the defendant moved for summary judgment pursuant to Insurance Law §5102(d), plaintiff cross-moved for summary judgment based upon Vehicle & Traffic Law §388. The court noted the incongruous decision in Ha, but squarely held that "the granting of a default judgment against Singh [the driver] does not preclude Stanlaine [the owner] from contesting the issue of Singh's negligence."

As a practical matter, an insurer and counsel will want to obtain the driver's cooperation, and in such cases, will most likely appear on his behalf, in any event. However, the Balanta case eases the risks of a default judgment where, as sometime occurs, it is not possible to vacate the default judgment against the driver. So long as the insured owner appears in the action, there would appear to be no limitations on the defense of the action.

• RECENT CASE DEVELOPMENTS

New York's Labor Law is one of the most fertile grounds for litigation. The following significant decisions are among the most significant of Labor Law cases decided by New York's Appellate Courts since our last edition of *Cases & Points*:

- Section 240(1) - Ladders

The Appellate Division, First Department, recently ruled in Meade v. Rock-McGraw, Inc., 307 A.D.2d 156, 760 N.Y.S.2d 39 (1st Dept., 2003) that a plaintiff's fall from a ladder does not necessarily give rise to a Labor Law violation where the ladder is inadequately secured due to plaintiff's improper use of it.

In Meade, the plaintiff fell from a ladder which slid out from under him while he was replacing ceiling tiles in a small hallway closet in a building under renovation. The plaintiff determined that a six-foot ladder was too big for the job and located a five-foot wooden A-frame ladder. However, the plaintiff determined that the five-foot ladder was also too big, so he placed the ladder in its closed position at a slight angle. The plaintiff denied that the ladder had been placed in uneven ground. He described the ladder as being in good working order, but testified that there was no rubber on the footing. Plaintiff's foreman stated that the plaintiff could have done the job safely with the six-foot ladder in an opened position, and that the plaintiff should have known that using the ladder in a closed position was improper.

The plaintiff moved for summary judgment on his Labor Law Section 240(1) claim arguing that the defendants breached their duty to insure that the ladder was placed so as to give him proper protection. The plaintiff argued that the ladder lacked footings, the floor was slippery and that the ladder was not secured by another worker. The plaintiff also claimed that the defendants failed to furnish him with any safety devices and that he was required to use improper equipment. The plaintiff submitted an affidavit from an expert who opined that a small platform or three-foot stool would have been the appropriate device.

In opposition, the defendants contended that the five-foot ladder which plaintiff used was a safety device that, had the plaintiff used it properly in the open position, would have provided the plaintiff with the necessary protection. The defendants further contended that plaintiff's misuse of the ladder was the sole proximate cause of his injuries.

The First Department affirmed the trial Court's decision denying plaintiff's motion for summary judgment. The court reasoned that the strict liability benefit of Labor Law Section 240(1) is not available to a worker whose own act in failing to properly use an otherwise adequate safety device is the sole proximate cause of his injury, and held that the defendants came forth with sufficient evidence to raise any issue of fact whether plaintiff's misuse of the ladder was the sole proximate cause of the accident.

- Grave Injury

In Rubeis v. Aqua Club, Inc., 305 A.D.2d 656, 761 N.Y.S.2d 659 (2nd Dept. 2003), plaintiff's brain injuries did not qualify as a "grave injury" as contemplated by Workers' Compensation Law Section 11.

The plaintiff in Rubeis sustained brain damage in a fall from a ladder. These injuries included softening of the brain, blindness in one eye, loss of sense of smell and an overall grave impact on plaintiff's brain function. Although there was evidence that the plaintiff could perform simple tasks, there was evidence that the plaintiff could never work again as an ironworker. There was further evidence that it was unlikely that the plaintiff would ever be gainfully employed with any degree of responsibility since he was unable to perform any task requiring accuracy because of his brain injuries. Despite these limitations, there was evidence that the plaintiff was able to carry up to 35 pounds for short periods and could work in a grocery store.

The issue of whether the plaintiff had sustained a grave injury was submitted to the jury over the objection of plaintiff's employer, who was the third-party defendant. The jury found that the plaintiff sustained a grave injury, and therefore, the third-party plaintiff was able to recover contribution from plaintiff's employer. The trial denied third-party defendant's motion to set aside the verdict.

The Second Department reversed the trial court's ruling and held that plaintiff's injuries, as a matter of law, did not qualify as a "grave injury" since plaintiff's brain injury did not result in a permanent total disability. The Court noted that the definition of grave injury as defined by Workers' Compensation Section 11 included "an acquired injury to the brain caused by an external physical force resulting in permanent total disability". While the Appellate Division conceded that there was evidence that the plaintiff sustained serious brain injuries resulting from external physical force, there was no evidence that the injury resulted in permanent total disability. In determining whether the brain injury resulted in permanent total disability, the Court held that the issue is whether the injury interferes with plaintiff's inability to engage in day-to-day functions rather than the em-

plaintiff was unable to perform day-to-day activities such as showering, dressing and feeding himself, the Court concluded that, despite the seriousness of plaintiff's brain injuries, the injuries did not qualify as a grave injury under the statute.

- Section 240(1) – Alteration of a Building

New York's highest court has recent addressed the issue of what constitutes an "alteration" as contemplated by Labor Law Section 240(1). Panek v. County of Albany, 99 N.Y.2d 452, 788 N.E.2d 616, 758 N.Y.S.2d 267 (2003)

The plaintiff in Panek was an engineer employed by the Federal Aviation Administration (FAA), which leased an air traffic control tower in Albany. As part of a major renovation project at the airport, a new air traffic control tower was built and completed in February 1999. The demolition of the old tower was scheduled to begin in April 1999.

In March 1999, the plaintiff was instructed to remove two air handlers from the old tower's cooling system. During the course of this work, the plaintiff was injured when he fell from a ladder. The plaintiff moved for summary judgment on his Labor Law Section 240(1) claim, arguing that the work he was performing was incidental to the upcoming demolition of the old tower or, alternatively, that the removal of the air handlers was an alteration of the tower thereby falling within the purview of the statute. The plaintiff further claimed that the ladder failed to provide him with proper protection since it was misplaced, unbalanced or inadequately secured. The defendants cross-moved for summary judgment to dismiss plaintiff's claims arguing that the statute did not afford protection to the plaintiff since the removal of the air handlers was not part of the demolition project since it had not yet taken place and that the removal of the air handlers did not constitute an alteration of the building.

The Court of Appeals agreed with the conclusions of the courts below that plaintiff's work did not fall within the category of demolition since the removal of the air handlers was to be completed prior to the commencement of the demolition work. However, the Court held that the plaintiff was engaged in a significant physical change to the building and, therefore, his work constituted an alteration. The Courts rejected the Appellate Division's holding that plaintiff's work did not constitute an alteration because the tower was ultimately scheduled for demolition and the statute contemplated continued use of the building after the alteration. The Court reasoned that the nature of the work at the time of the accident determines whether the activity falls within the purview of the statute. Thus, the Court determined the fact that plaintiff performed a substantial modification on a building ultimately scheduled for demolition was irrelevant since the plaintiff was performing an alteration to the building at the time of his accident.

The Panek Court further held that the uncontested evidence revealed that the plaintiff fell because the ladder gave way or collapsed beneath him. As such, the court determined that the defendants failed to create an issue of fact regarding proximate causation.

- Contractual Indemnification

The Appellate Division, First Department, in Pena v. Chateau Woodmere Corp., 304 A.D.2d 442, 759 N.Y.S.2d 451 (1st Dept., 2003) held that Workers' Compensation Law Section 11 does not prohibit an indemnification provision in a contract executed after plaintiff's accident from applying retroactively where there is evidence establishing that the agreement pertaining to the contractor's work was made as of a pre-accident date and that the parties intended that it apply as of that date.

The plaintiff in Pena was injured in a fall from a scaffold while employed by a waterproofing subcontractor retained to perform work at defendant's premises. Plaintiff commenced an action against the owner, who in turn, impleaded plaintiff's employer seeking contractual indemnification based on a contract executed after the date of plaintiff's accident.

Plaintiff's employer moved to dismiss the third-party complaint on the ground that the contract was not signed until one month after plaintiff's accident. The defendant owner opposed the motion, arguing that the contract expressly provided that the contract commenced on a date which was three days prior to plaintiff's accident.

The First Department found there was sufficient evidence establishing, as a matter of law, that the parties intended the contract to apply retroactively. The Court referred to specific language of the contract wherein it expressly stated that the contract was to commence on a date which differed from the date of execution. The Court also referred to certificates of insurance that plaintiff's employer provided to the owner prior plaintiff's accident which was required pursuant to the provisions of the contract as further persuasive evidence that the parties intended the contract to apply retroactively.

For more information on these or other Labor Law issues call Eileen Ventura or e-mail eventura@agfjlaw.com

• AGFJ DEVELOPMENTS

We are pleased to report that Joseph V. Aulicino has joined the firm as an associate. Joseph is a graduate of Cornell University and obtained his J.D. from Southwestern University School of Law in 1997.

AGF&J has been successful in obtaining the dismissal of several cases against its clients:

- In Ortiz v. Smith, a product liability action, AGFJ obtained summary judgment on behalf of our client, T.C. Dunham Varnish Corp. That case, handled by Steven DiSiervi, involved a claim by plaintiff, Ortiz, against a premises owner for serious burns suffered

loors. AGF&J's client was sued for defective manufacture of the floor sealing chemical. AGF&J moved for summary judgment on behalf of T. Dunham on product identification. Our motion for summary judgment dismissing the action was granted because the plaintiff could not establish, or even raise a question of fact, that the product had been manufactured by Dunham. For more information on this decision, call Steven DiSiervi or e-mail sdisiervi@agfjlaw.com.

- In Kotash v. A&J Restaurant & Bar, AGF&J was granted summary judgment dismissing the Complaint against its client, a tavern. Kotash was a liquor liability case in which plaintiff sought recovery for injuries which occurred when he was struck by a vehicle while he was standing outside the premises with one foot upon the sidewalk and the other foot on the street. Both the plaintiff and the driver of the vehicle had been patrons in the bar and were involved in a fight. In dismissing the Complaint, the Court agreed with AGF&J's contention that the injuries occurred in a location which was outside the scope of the bar's responsibility, as a matter of law. For more information, call Steven DiSiervi or email sdisiervi@agfjlaw.com.

- AGF&J also obtained a summary judgment for Lenco, Inc., a hammer manufacturer, who had been impleaded into a suit. In Murray v. TW Smith Corp., plaintiff, a mechanic's helper, was injured while using a ballpine hammer after removing his safety goggles. The hammer broke and a piece of it went into his right eye. At his deposition, plaintiff produced the hammer that supposedly was involved in the incident..

AGF&J moved for summary judgment on behalf of Lenco, based upon the affidavit of a professional engineer and the deposition of the parties. We established that the hammer produced by the plaintiff was not manufactured by Lenco. Plaintiff and third-party plaintiff failed to come forward with any proof in admissible form to raise a question of fact that the hammer involved in the incident was a Lenco hammer. Thus, the Court granted AGF&J's motion. For more information on this decision, telephone Tina Fugazzi or e-mail tfugazzi@agfjlaw.com

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