

OPENING STATEMENT

INSIDE THIS ISSUE

Opening Statement	1
New York City Law Shifts Sidewalk Accident Liability to Landowners	1
Illegal Aliens Are Not Prohibited from Suing in New York's Courts for Personal Injuries	2
Landlords' Liability for Negligent Security	3
Recent Case Developments	3
AGFJ Developments	4
Public Education Service	4

A change in one provision of a Statute can have a broad impact upon the economic interests of those who live or do business within the affected jurisdiction. A seemingly minor change to the introduction to one section of the New York City Administrative Code which will go into effect shortly is likely have great impact upon residents of New York, property owners and their insurers. Soon, New York City property owners, rather than the City, will be financially responsible for the accidents resulting from the condition of the sidewalks adjacent to their premises. It is expected that this change will have a tremendous impact upon landowners, their insurers and upon New York City's Court dockets (which are likely to see a huge increase in litigation concerning attempts to shift liability from landlords to tenants and/or contractors who have made repairs). The change in New York City's Administrative Code and its potential impact upon landowners, tenants, and their insurers is the subject of our lead article.

NEW YORK CITY LAW SHIFTS SIDEWALK ACCIDENT LIABILITY TO LANDOWNERS

By: CARMEN A. NICOLAOU

In the past, insurers felt secure covering New York City landowners since, generally, their potential liability would be limited to claims arising within the boundaries of premises and would not extend to the public sidewalks around the property. Although the landowner's potential liability arose out of the entire premises, including the abutting property, insurers were aware that landowners had no duty, with the exception of a few circumstances, to plaintiffs who were injured as a result of a defective or negligently maintained sidewalk. However, this has changed for New York City property owners and insurers

owner for failure to repair." [Emphasis added]. See also: *Cahill v. Foodland Deli of L.I., Inc.* 270 A.D.2d 445, 705 N.Y.S.2d 299 (2d Dep't 2000); [An owner of land abutting a public way does not, solely by reason of being an abutting owner, owe a duty to keep the public way in a safe condition.] *Lowenthal v. Theodore H. Heidrich Realty Corp* 304 A.D.2d 725, 759 N.Y.S.2d 497 (2d Dep't 2003). [No evidence that [the landowner] created the alleged defect, voluntarily but negligently made repairs to the sidewalk before the accident, caused the condition to occur because of some special use, or violated a statute or ordinance which imposes liability on the abutting entity for failure to repair].

The Administrative Code of the City of New York §19-152 requires an owner of real property to repair and maintain an abutting sidewalk at his or her own expense. However, irrespective of the Administrative Code, courts in New York would only attach a duty to pedestrians to the landowner under limited circumstances. For example, in *Loforese v. Cadillac Fairview Shopping Centers* 235 A.D.2d 399, 399 (2d Dep't 1997) the Court succinctly re-stated the rule as follows: [a]n owner of land abutting a public sidewalk does not, solely by reason of being an abutting owner, owe a duty to keep the sidewalk in a safe condition." The Court further declared that "[l]iability may only be imposed on the abutting landowner where the landowner either (a) created the defective condition, (b) voluntarily but negligently made repairs, (c) created the defect through special use, or (d) violated a statute or ordinance which expressly imposes liability on the abutting land-

New York City, which has been bombarded with defective sidewalk cases, has now changed the law and, in all likelihood, the litigation landscape, by legislative fiat. On July 11, 2003 the New York City Council unanimously passed "Intro 193". This legislation shifts sidewalk accident liability to landowners. The new law (titled Intro No. 193), which was signed by Mayor Michael Bloomberg, will come into effect in September 14, 2003 and amend the Administrative Code of the City of New York by adding section 7-210. This section will apply to any accident occurring on or after the effective date. Furthermore, subsection (b) excludes one to three family homes from liability. However, the exclusion from liability is contingent upon the owner occupying, in whole or in part, the residential property and that the property is utilized exclusively for residential purposes.

This change in the law, which is expected to save the City of New York tens, if not hundreds, of millions in litigation costs, is also strongly

AGF&J

115 Broadway
11th Floor
New York, New York 10006
Phone: 212 422-1200
Fax: 212 968-7573

www.agfjlaw.com

supported by plaintiff attorneys. Until now, plaintiffs not only had to file a Notice of Claim with the City within 90 days, and commence action within one year, but they also had to establish that the City had actual notice of the defect in question. Meeting this burden generally entailed obtaining a Big Apple map that identifies the defects that existed on the date of the accident. Plaintiffs often find it difficult to meet this burden in that the Big Apple map may not have information pertaining to the defect. Furthermore, plaintiffs often fail to meet the 90 day Notice requirement due to their failure to timely seek counsel. In such cases, plaintiffs were left with no choice but to commence a direct claim against the abutting landowner in hopes that the landowner had caused the defect. The majority of the times, however, the owner had not created or caused the defect and thus, the actions were dismissed. In addition, plaintiffs' attorneys support this measure because it will enable them to place the action on the trial calendar in a shorter period of time.

As a result of Intro 193, commercial property owners, as well as home owners who do not fall within the exception, will now be held liable for a defective or negligently maintained abutting sidewalk. Issues as to contractual or common law indemnification, pursuant to lease provision, insurance coverage for landlords under their tenants' policies, antisubrogation and similar technical contract issues, which were not necessarily relevant in the past, may now play a central role in defending a sidewalk case. This is likely to also result in an increase of the number of declaratory judgment actions being commenced against insurers on indemnification and coverage issues.

Illegal Aliens Are Not Prohibited From Suing in New York's Courts for Personal Injuries

By: Gail J. McNally

In New York, the fact that a plaintiff is in the United States illegally does not prevent him from maintaining litigation against an alleged tortfeasor. This plaintiff may even be able to recover for past and future lost wages, despite the fact that he was working illegally in this country.

Recently, the U.S. Supreme Court ruled in Hoffman Plastics Compounds v. NLRB, 535 U.S. 137 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 Supreme Court held that to award back pay to such an illegal alien would trivialize the immigration laws, condone and encourage violations of the law. However, New York's Courts have refused to extend the Hoffman ruling to tort actions in the state.

In Cano v. Mallory Management and Con Edison, (decided April 10, 2003), the Supreme Court, Richmond County, (Justice Maltese) declined to dismiss the tort action of an illegal immigrant. Justice Maltese held that "it is contrary to the public policy of New York State that a person who claims to be injured as a result of tortious conduct may be barred from pursuing that claim in the courts of this state based upon the resident status of the claimant. Defendants can not negligently injure someone who is within

the state legally or not, and then not be held responsible to that injured person for the injuries sustained." 2003 N.Y. Misc. Lexis 562.

The fact that the plaintiff is an illegal alien and has used a false Social Security number to procure employment cannot, in and of itself, be used to rebut a claim for future lost wages. In Collins v. NYCHHC, 151 Misc. 2d 270 (S.Ct. Queens County, 1992) the Court held that the family of an illegal alien could not recover for lost wages in a wrongful death action inasmuch he was illegally employed. The Appellate Division reversed and held that the issue of plaintiff's status, length of time he might have continued to earn wages in the U.S. and the potential for deportation were all for the jury to consider in determining lost wages.

Defendants' ability to introduce the fact that the plaintiff has been using a false Social Security number, and is an illegal alien, is quite limited. It is well settled, under New York law, that neither the plaintiff's allegedly improper conduct in obtaining his employment nor his status as an illegal alien will be a bar to maintenance of a law suit for personal injuries. Mazur v. Rock-McGraw, 246 A.D.2d 515, 666 N.Y.S.2d 939 (2nd Dept. 1998). The length of time plaintiff might have continued to earn wages in the United States and the potential for his deportation will be issues that the jury could use to determine future lost wages.

In Klapa v. O & Y Liberty Plaza Company, 645 N.Y.S.2d 281, the plaintiff fell from a scaffold and sued the premises owner. Plaintiff was an illegal alien. The Court held that "(i)n New York, an illegal alien may sue to recover damages for future lost earnings resulting from tortious injury. (citations omitted). A defendant may rebut such a claim by presenting evidence that establishes a date of deportation or the inability of plaintiff to obtain future employment in the United States." The Court observed that the fact that the plaintiff is deportable, does not mean that deportation will actually occur. In this case the probative value of the fact that plaintiff was an illegal alien was "far outweighed" by the prejudicial impact presenting this fact to a jury would have.

Unequivocally, plaintiff's illegal alien status, in and of itself, will be deemed inadmissible, and cannot be used to prevent a plaintiff from recovering compensatory damages in a personal injury action. The issue of an improper Social Security number, or illegal alien status, can only be admitted as it relates to the issue of lost wages (Cano v. Mallory Management).

In essence, the defendants' use of plaintiff's status as an illegal alien and his illegal employment are of very limited value in litigation in the State of New York. In certain circumstances, the use of this information may even be detrimental to the defendant's position at trial, especially in venues where the jury panel is comprised of people from the same country or geographic region as the illegal alien – plaintiff. Thus, it would be a wise trial strategy to first assess the jury pool of a

particular case before deciding to go attempt to use the plaintiff's illegal immigrant status as a defense weapon.

Landlords' Liability for Negligent Security By: Elizabeth George

Under the New York State Real & Personal Property Law, a landlord has a duty to take "minimal" precautions to protect tenants from reasonably foreseeable criminal acts. The law does not require a landlord to provide the optimal or most advanced security system available, but only minimally *reasonable* security measures. To prove that the landlord failed to satisfy his duty, the plaintiff must establish a causal connection or proximate cause between the landlord's failure to provide adequate security and the tenant's injuries resulting from an assault. Burgos v. Aqueduct Realty Corp., 92 N.Y.2d 544, 550, 684 N.Y.S.2d 139 (1998).

In order to satisfy the burden of proving proximate cause in a case involving the security of premises wherein a tenant has been victimized in a criminal attack, the plaintiff must prove that the assailant was an intruder who gained access to the premises through a negligently maintained entrance. Price v. New York City Housing Authority, 92 N.Y.2d 553, 558, 684 N.Y.S.2d 143 (1998). New York Courts have consistently granted defendants' motions for summary judgment due to the plaintiff's failure to establish causation. In one such case, a plaintiff commenced an action alleging that he was assaulted as a result of the defendants' failure to repair the front door lock and intercom system. Latini v. Auburn Leasing Corp., 267 A.D.2d 358, 700 N.Y.S.2d 66 (2nd Dept. 1999). However, the Appellate Division, Second Department granted the defendant's motion for summary judgment as the plaintiff was unable to establish how the intruder gained entrance into the building. Id. Specifically, the Court held that even assuming the plaintiff could establish that the defendants had breached a duty, the defendants were entitled to summary judgment as "the record [was] devoid of any evidence establishing which of the five entrances the intruders used to gain access to the building." Id.

Yet another hurdle in establishing proximate cause in such cases is the *intervening act*, which, if present, serves to sever any liability the defendant may have. As a general rule, an intervening act is a superceding cause which breaks the causal connection between the defendant's alleged negligent act or failure to act and the plaintiff's resulting injuries. Such acts are considered *superceding* only if the act was not foreseeable in the normal course of events or if it is independent or far removed from the defendant's negligence. DeSousa v. Dayton T. Brown, Inc., 280 A.D.2d 447, 721 N.Y.S.2d 69 (2nd Dept. 2000). While a defendant is liable for all normal and foreseeable consequences of its acts, an intervening act will constitute a superceding cause and will serve to relieve a defendant of liability. Clark v. New York City Housing Authority, 277 A.D.2d 338, 717 N.Y.S.2d 216 (2nd Dept. 2000).

In negligent security cases involving assaults in apartments,

the act of opening an apartment door without ascertaining the identity of the person knocking is an intervening cause of an attack severing any liability of the landowner. See, Morgan v. New York City Police Department, 294 A.D.2d 416; 741 N.Y.S.2d 905 (2nd Dept. 2002). In Morgan, the plaintiff was assaulted and raped by her former boyfriend in her apartment. She subsequently commenced an action against the owner of the building and its general partner, alleging that they failed to provide adequate security. Id. The Supreme Court granted the defendants' summary judgment motion, which the Appellate Division later affirmed, stating that the plaintiff's act of unlocking and opening her apartment door at 4:00 a.m., without ascertaining the identity of the person knocking on the door, was an intervening cause of the attack, severing any liability of the defendants. Id.

In a more recent case in which the defendant/landlord was represented by AGF&J, the Supreme Court, Kings County (J. Martin) granted summary judgment to the owner/landlord. Beltran v. Osborne Towers HDFC. et. al., (decided April 11, 2003).

In Beltran, the plaintiff opened his apartment door to three masked assailants, one of whom was carrying an iron bar, without first looking through the peephole. In defendant's motion, AGF&J successfully argued that the plaintiff was unable to establish proximate cause as the defendants had, in fact, provided adequate security measures. To wit, the defendants furnished a security booth at the entrance to the building and had security personnel patrol the building and monitor the lobby and entrances of the building by closed circuit television. In further support of the motion, we argued that the plaintiff's act of opening the locked apartment door without first looking through the peephole and ascertaining the identity of the person knocking was an intervening cause of the incident. The defendants were represented by Steven DiSiervi of AGF&J. For more information on the Beltran case, contact Steven DiSiervi or email sdisiervi@agfjlaw.com.

In sum, under current New York law, a landlord need only provide minimal security measures to ensure the safety of his tenants. It is up to the aggrieved tenant to prove the causal link between the landlord's actions or, in some cases, inaction, and any resulting injuries. When an intervening act comes into the picture, the plaintiff's case becomes even more challenging.

Recent Case Developments

Products Liability – Reliance on Circumstantial Evidence to Prove that the Product Was Defective

In product liability cases, plaintiffs often rely on circumstantial evidence to establish that the product in question was the cause of the incident. When plaintiff does so, its proof must, as a matter of law, exclude all other possible causes for the loss. If it cannot do so, the defendant will be entitled to summary judgment.

In Speller v. Sears, Roebuck & Co., 100 N.Y.2d 38 (decided May 6, 2003), New York's Court of Appeals decided an appeal by the plaintiff from the Appellate Division's grant of summary judgment to the defendant. In Speller, the plaintiff opposed the motion by submitting depositions and affidavits from experts from which a jury could conclude that only a refrigerator could have caused the fire which resulted in the death of plaintiff's decedent. The depositions and affidavits also stated that the fire could not have been caused by grease on the top of the stove, as defendant contended. Thus, the Court reversed the grant of summary judgment and held that the cause of the fire was a question of fact which only a jury could decide.

In Speller, plaintiff contended that the fire had been caused by defective wiring in a refrigerator sold by the defendant. The wiring was destroyed in the fire, thus requiring plaintiff to rely on circumstantial evidence to prove the cause.

In writing for the unanimous Court, Judge Graffeo found that plaintiff had met its burden in existence of a question of fact by submission of the depositions and affidavits of its experts. Thus, she concluded, that the motion must be denied and the issue had to be decided by the jury.

Autoerotic Asphyxiation is Excluded as a Self-Inflicted Injury

The Second Circuit Court of Appeals (over a strenuous dissent by Judge Amalya Kearse) affirmed a grant of summary judgment to the insurer holding that, as a matter of law, death by asphyxiation during autoerotic stimulation was excluded from coverage under an accidental death policy.

In Critchlow v. First Unum Life Ins. Co. (decided 8/6/03) plaintiff's son died after placing a noose around his neck to accomplish autoerotic stimulation—the restriction of oxygen to the brain to enhance sexual pleasure. Plaintiff sued the insurer to recover under the son's employer's group accidental death and dismemberment policy. The district court granted defendant's motion for summary judgment and found that the death was the result of a self-inflicted injury. The Court of Appeals concluded the decedent's intentional act of constricting his trachea was an intentional self-inflicted injury and an injury that was excluded from the insurance policy. The court concluded that even though the decedent had engaged in this activity on prior occasions without adverse consequences, does not mean that the activity did not injure him. The court reasoned that even if the decedent did not intend to die, the injury was self-inflicted and intentional.

AGFJ DEVELOPMENTS

This Spring and Summer has been a busy time for AGF&J. We have successfully argued summary judgment motions and have obtained dismissals of actions against our clients in several cases involving a variety of issues:

Martinez v. Martinez, et al., Sup. Ct., Queens Co.- motion for summary judgment on the "serious injury" threshold granted – argued by Carmen A. Nicolaou (decided 7/15/03);

Schuberg v. B & B Auto Parts, Sup. Ct., Bronx -motion for summary judgment granted. Owner had no notice of dangerous condition of ice in parking lot – argued by Tina M. Fugazzi (decided 6/30/03);

Sadowski v. Washington Jefferson Hotel - summary judgment granted to third-party defendant/employer of plaintiff. Plaintiff did not suffer a "grave injury" under WCL § 11 – argued by Tina M. Fugazzi (decided 5/29/2003);

Smith v. Hertz, Sup. Ct., Kings Co., summary judgment granted on the serious injury threshold - argued by Joseph A. Fitapelli (decided 5/30/03).

Michael Gorelick has been consulted and quoted as an insurance coverage dispute expert in an article in the August 5, 2003 edition of New York Newsday concerning the insurance coverage dispute between the Diocese of Brooklyn and its insurer as to the number of occurrences (and number of deductibles which must be borne by the Diocese) in connection with claims of sexual abuse and misconduct asserted against a priest. The reporter consulted Michael after reading his article in the Spring 2002 edition of Cases and Points entitled "Liability Insurance Coverage Issues for Claims Involving Clerical Misconduct".

PUBLIC EDUCATION SERVICE

It is our policy to appear as speakers at seminars, business and professional meetings, as well as before industry groups. In addition, whenever possible we attempt to fulfill requests for articles from industry publications. We will also make presentations on a variety of legal issues to claim and risk management departments. For further information, please contact Michael Gorelick at (212) 422-1200.

AGF&J's *Cases and Points* is published as a service to our friends and clients. It is only a summary of, or commentary upon, case law and should not be relied upon as authoritative support. Also, the opinions expressed herein are ours, and do not necessarily reflect those of our clients.

