

OPENING STATEMENT

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It was thought that the Court of Appeals' 2002 decision in *Espinal v. Melville Snow Contractors* would end, or at least curtail, the issues surrounding an independent contractor's duty to third-parties. However, the various interpretations of *Espinal* have actually fueled the controversy further. Thus, the duty of an independent contractor to third-parties is the subject of our lead article.

The Duty Of An Independent Contractor To Third Parties

By: Stefanie R. Cardarelli

In recent years, the question of whether an independent contractor owes a duty to a third party who is injured has been a hot topic of debate. Historically, there was no specific standard employed by New York courts to determine whether an independent contractor owed a duty to an injured plaintiff.

However, in June 2002, the Court of Appeals decided *Espinal v. Melville Snow Contractors, Inc.*, 98 N.Y.2d 136 (2002), which analyzed whether an independent contractor owes a duty of care to an injured plaintiff. There, the Court of Appeals identified three factors to be considered in evaluating an independent contractor's duty: (1) whether the contracting party, in failing to exercise reasonable care in the performance of its duties, "launches a force of harm", (2) whether the plaintiff detrimentally relied upon on the continued performance of the contractor's duties; and (3) whether the contracting party had entirely displaced the owner's duty to safely maintain the premises. Therefore, if an independent contractor establishes that it did not create the condition complained of, plaintiff did not detrimentally rely on its' services, and the contract did not make it exclusively liable, liability shifts to the landowner. The landowner will then be required to prove that it did not cause or create the condition complained of or have actual or constructive notice of it.

Espinal involved a plaintiff who was injured when she slipped and fell on ice in the parking lot owned by her employer. She eventually sued the snow removal contractor who, in turn, moved for summary judgment, arguing that the plaintiff was not a third-party beneficiary of the contract between it and the owner of the property. When applying the three factors to the facts of that case,

the Court of Appeals held that the snow removal contractor was entitled to summary judgment, finding that the snow removal contract was not the type of "comprehensive and exclusive property maintenance obligation" which could provide a basis for liability. *Id.* at 141.

In evaluating the first factor, the Court of Appeals concluded that it was not intended to make the defendant answerable to anyone who might be harmed as a result of its breach since "[l]iability would be unduly and indeed indefinitely extended by this enlargement of the zone of duty." [citing *H.R. Moch Co. v. Rensselaer Water Co.*, 247 N.Y. 160 (1928)].

Turning to the second factor, the Court of Appeals relied on its prior decision in *Eaves-Brooks Costume Co. v. Y.B.H. Realty Corp.*, 76 N.Y.2d 220 (1990), in which a commercial tenant sought to recover for property damages against sprinkler system contractors who had been hired to inspect and maintain the sprinkler system. The Court noted that "tort liability may arise where performance of contractual obligations has induced detrimental reliance on continued performance" and the defendant's failure to perform those obligations "positively or actively works an injury upon the plaintiff." *Espinal* at 140. In evaluating this factor, the Court in *Espinal* found that plaintiff did not show that she detrimentally relied on the snow removal contractor's continued performance of its contractual obligations. *Id.* at 141.

With regard to the third factor, the Court looked to its decision in *Palka v. Servicemaster Management Services Corporation*, 83 N.Y.2d 579 (1994), where it addressed the issue of whether a maintenance company under contract to provide preventive maintenance services to a hospital assumed a duty of care to the plaintiff. The plaintiff in *Palka* was a nurse who was injured when a wall-mounted fan fell on her.

In *Palka*, the Court of Appeals found that the contract was so “comprehensive and exclusive” so as to entirely displace the hospital in carrying out its maintenance duties so that the contractor became “the sole privatized provider for a safe and clean hospital premises.” *Palka* at 588-9. In *Espinal*, the Court of Appeals held that the contract for snow removal was not the same “comprehensive and exclusive” property maintenance obligation contemplated in *Palka*, since it did not entirely absolve the landowner of its duty to maintain the premises safely. *Espinal* at 141.

While the facts in *Espinal* addressed the duty of a snow removal contractor, subsequent decisions have made it clear that its holding is not limited to snow removal contractors. See, for example: *Giustizia v. Radazo*, 297 A.D.2d 331 (2d Dep’t 2002) [involving a marine service contractor]; *Regatta Condominium Assoc., v. Village of Mamaroneck*, 303 A.D.2d 739 (2d Dep’t 2003) [involving a condominium’s “Owner’s Representative [on a construction project]”; and, *Church v. Callanan Industries, Inc.*, 99 N.Y.2d 104 (2002) [involving a highway guardrail contractor].

Conclusion

A maintenance contract or agreement, by itself, does not create a duty on the part of an independent contractor. Rather, for liability to attach or injuries sustained by a third-party, the plaintiff must show that: 1) the contractor created or exacerbated a dangerous condition; 2) the plaintiff relied on the services of the contractor; or 3) the contract in question entirely displaced the owner of its responsibilities.

Recent Court Decisions Regarding an Independent Contractor’s Duty to Third Parties

By: Allison Leff

The cases discussed below are post-*Espinal* Appellate Division decisions interpreting the factors delineated by the Court to consider in determining whether an independent contractor owes a duty to a third party:

- *Hopper v. Regional Scaffolding* 2004 WL 1463024 (1st Dep’t 2004). The plaintiff sought damages for injuries sustained at a construction site while operating a hoist. The defendant, Regional Scaffolding, installed and maintained hoists (pursuant to a contract with the project supervisor).

The Court found that the alleged conduct by the contracting party did rise to the level of one or more of the specific exceptions to the general rule, outlined in *Espinal*, so as to give rise to a duty to the plaintiff because the maintenance contract’s terms and the undisputed deposition testimony demonstrated that Regional bore an exclusive duty to keep the hoist in good repair. Regional had complete and unfettered authority to undertake all repairs and the contract also required defendant to periodically inspect the hoist and make necessary repairs.

- *Alvarez v. First National Supermarkets Inc., d/b/a Edwards Super Food Stores*, 2004 WL 2341263; 783 N.Y.S.2d 62 (2nd Dep’t 2004). A patron brought an action against the defendant supermarket to recover damages for personal injuries sustained in an accident involving an automatic door.

The Appellate Division found that the plaintiff failed to submit evidence that the defendant, Airlock Door Controls, assumed a duty to exercise reasonable care to prevent foreseeable harm to the plaintiff by virtue of his maintenance contract with the defendant. Accordingly, the plaintiff failed to establish that any of the three factors in *Espinal, supra*, were present.

- *Timmins v. Tishman Construction Corporation* 9 A.D.3d 62, 777 N.Y.S.2d

458 (1st Dep’t 2004). The plaintiff, a deckhand at a ferry terminal, sued for bodily injuries allegedly sustained while he was pushing open a rolling gate. At the time of the accident, the ferry terminal was undergoing substantial renovation. The plaintiff sued the construction manager, demolition contractor and gate installation subcontractor.

The First Department, reversed the lower court’s decision and held that defendants owed no duty to non-contracting third parties. The Court found that there was no claim that the second exception outlined in *Espinal*, detrimental reliance, applied to this accident. Furthermore, in regard to the third exception outlined in *Espinal*, the defendants did not entirely displace the obligation of the City of New York, as landowner, to inspect and maintain the area where the gate was located. The Court opined that the Department of Transportation, in providing ferry service to tens of thousands of passengers on a daily basis at all times, maintained operational contact and management over the ferry terminal where the gate was located. Also, the plaintiff failed to cite any provision in the relevant contracts that imposed any obligation approaching the “comprehensive and exclusive” duty of inspection and maintenance required to hold a third party liable in tort.

- *Kimball Malone v. City of New York*, 7 A.D.3d 675, 777 N.Y.S.2d 513 (2nd Dep’t 2004). Plaintiff allegedly slipped and fell on gravel and sand while ascending a flight of stairs in the building where she was employed. At the time of the incident, there were ongoing renovations throughout the building. The injured plaintiff commenced an action against the contractor who performed the renovations in the building.

The Second Department, reversing the lower court’s decision, found the plaintiff’s contention that the contractor created the dangerous condition too speculative to raise a triable issue of fact. Additionally, the plaintiff did not put forth any evidence that the contractor assumed a duty of care toward the injured plaintiff when it contracted to provide construction management services.

- *Davilmar v. City of New York*, 7 A.D.3d 559, 775 N.Y.S.2d 880 (2nd Dep’t 2004). Plaintiff sued Welsbach Electric Corp., hired by the defendant City of New York to maintain traffic signals, alleging negligent repair of a traffic signal. Welsbach last repaired the traffic signal only eight hours before the accident, and a total of six repair calls were made with respect to the subject traffic signal in that given month.

Welsbach moved for summary judgment on the grounds that a contractual obligation ordinarily will not give rise to tort liability and its conduct was not the proximate cause of the plaintiff’s accident.

The Appellate Division, reversing the lower court, denied summary judgment stating that a negligent repair of a traffic light may well fall within the first exception of *Espinal, supra*, launching a force or instrument of harm. Moreover, Welsbach failed to submit evidence of the “nature, extent and time of repair and maintenance work it performed.”

- *Edick v. Paul De Lima Company*, 6 A.D.3d 864, 775 N.Y.S.2d 385 (3rd Dep’t 2004). The plaintiff, a user of a coffee maker, commenced an action against the company which delivered the coffee and serviced the coffee maker, for personal injuries sustained when she received an electric shock while attempting to clean the coffee maker.

The Appellate Division, Third Department, ruled that tort liability for breach of contract will not be imposed merely because there is some safety aspect to the unfulfilled contractual obligation; instead, liability will attach only if defendant’s safety responsibilities are comprehensive. Further, there was no evidence that the injured plaintiff detrimentally. The company did not assume exclusive control over safety obligations

and exclusive under the contract. In this case, the company did not assume exclusive control over all safety obligations regarding the coffee maker and thus had no duty to the user.

- *Dennenbaum v. Rotterdam Square* 6 A.D.3d 1045, 776 N.Y.S.2d 136 (3rd Dep't 2004). A pedestrian who tripped and fell on a sidewalk outside a Mall sued the contractor that installed the sidewalk pursuant to a contract with the mall owner.

The Third Department, reversing the trial court, held that the contractor did not owe a duty of care to the plaintiff pedestrian, as the contractor did not "launch a force or instrument of harm" nor did the contractor negligently create or exacerbate a dangerous condition.

- *Vertsberger v. City of New York*, 7 A.D.3d 697, 776 N.Y.S.2d 836 (2nd Dep't 2004). Plaintiff was injured when he fell after his foot became lodged in iron rods protruding from a street light pole foundation, allegedly due to dangerous condition created during street light installation and relocation project performed by the defendant, Welsbach Electric Corp., pursuant to a contract with the City of New York.

The Second Department, affirming the lower court, dismissed the plaintiff's complaint against Welsbach finding that plaintiff had failed to establish that Welsbach created or exacerbated a hazardous condition so as to fall within an exception to the general rule that a party which enters into a contract or renders services, has not assumed a duty a care to third parties outside the contract.

- *Venuto v. RCS Electronic Equipment Corporation* 5 A.D.3d 672, 774 N.Y.S.2d 729, (2nd Dep't 2004). The plaintiff was allegedly injured when a forklift rolled and struck his wrist despite the fact that the emergency/parking brake had been engaged. The plaintiff commenced this action against RCS Electronic Equipment Corporation alleging that RCS was negligent in maintaining the forklift.

The Appellate Division, Second Department, reversing the lower court, stated that RCS had established its *prima facie* entitlement to judgment as a matter of law. The plaintiffs failed to raise a triable issue of fact that RCS negligently performed repairs, or had or undertook a duty to routinely inspect and maintain the forklift.

- *Curiale v. Sharrotts Woods, Inc.* 9 A.D.3d 473, 781 N.Y.S.2d 47 (2nd Dep't 2004). Plaintiff fell from a folding attic staircase while touring a model home constructed and owned by the defendants Sharrotts Woods, Inc. The staircase became partially unhinged and collapsed as the plaintiff was ascending it.

The Appellate Division, Second Department, affirmed the lower court's decision granting summary judgment to the third party defendant, Dan's Carpentry. The Court stated that the repair and maintenance of the staircase was entirely under the control of Sharrotts Woods. Dan's Carpentry established its entitlement to judgment as a matter of law by submitting evidentiary proof that it properly installed the prefabricated staircase with hardware supplied by Sharrotts Woods, and that it had no contractual duty to inspect and maintain the subject staircase.

- *Fernandez v. Otis Elevator Company* 772 N.Y.S.2d 14 (1st Dep't 2004). Plaintiff, a janitor, fell down an elevator shaft in a college dormitory. Following the accident, the plaintiff sued Otis Elevator Company.

The First Department, reversing the lower court, found that there was no evidence that Otis created or exacerbated any risk to the plaintiff by failing to adequately perform its obligations under its service contract. Otis submitted evidence showing that it complied with the terms of the contract, that it recommended modernization of

the elevator systems and it repeatedly advised the college that certain equipment needed to be replaced. Furthermore, the plaintiff made no claim that he was injured as a result of a reasonable reliance upon Otis's performance under the contract. Moreover, the terms and conditions of the limited service agreement established that the contract was not a comprehensive assumption of all the college's safety related obligations with respect to the elevator. .

- *Patterson v. New York City Transit Authority*, 5 A.D.2d 454, 773 N.Y.S.2d 417 (2nd Dept. 2004) Plaintiff slipped and fell on a patch of ice on the sidewalk beneath a bus shelter after exiting a bus. Plaintiff claimed that a drain pipe on the shelter diverted melting snow from the roof onto the adjacent sidewalk, causing ice to form. The City of New York's franchisee was to construct, operate and maintain the bus shelters. The contractor was hired to clean and maintain the shelter, including the removal of snow and ice from the shelters within 24 hours after the end of a snowfall. In holding that the lower Court erred in denying the contractor's motion summary judgment, the Appellate Division found that the contractor did not owe a duty of care to the plaintiff because the maintenance agreement was not a comprehensive and exclusive maintenance obligation, which displaced the duty of the franchisee to safely maintain the shelters.

Recent Court Decisions Regarding An Independent Contractor's Duty in Snow Removal Cases

By: Marisa Carpentiere

Subsequent to the decision in *Espinal*, New York Courts have continuously applied the three factors addressed by the Court of Appeals to determine whether an independent contractor owes a duty to a third party for snow and/or ice removal. The cases decided below are some of the recent decisions from the Appellate Divisions regarding an independent contractor's duty.

- *Prenderville v. International Service Systems, Inc.*, 10 A.D.2d 3d 334, 781 N.Y.S.2d 110, (1st Dept. 2004) Plaintiff slipped and fell on the surface of a curb cut on a street corner that was icy and slushy. A maintenance service contract required the contractor to remove snow from sidewalks, plaza park area, building entrances and approaches and street crosswalks adequate for pedestrian access, all as and when required. In holding that the Supreme Court erred in granting the contractor's summary judgment motion, the Appellate Division found that the contractor failed to establish entitlement, as a matter of law. Although a "contractual obligation, standing alone, will generally not give rise to tort liability in favor of a third party" an exception exists where a contractor who undertakes to perform services pursuant to a contract negligently creates or exacerbates a dangerous condition so as to have "launched a force or instrument of harm." The contractor failed to establish that it did not perform any snow removal operations with respect to the condition that caused the plaintiff's injury, or alternatively, that if they did perform such operations, those efforts did not create or exacerbate a dangerous condition.

- *Boddie v. New Plan Realty Trust*, 304 A.D.2d 693 (2d Dep't 2003). The Appellate Division, Second Department affirmed the lower court's decision granting summary judgment to a snow removal contractor, where a plaintiff slipped and fell on a patch of ice in front of the property owned by a defendant. In holding that summary judgment was proper, the Appellate Division ruled that "[a] limited contractual undertaking to provide snow removal services does not render the contractor liable in tort for the personal injuries of third parties. Further, there is no evidence that the injured plaintiff detrimentally relied on the contractor's performance, or that the action of contrac-

- *Baratta v. Home Depot USA, Inc.*, 303 A.D.2d 434 (2d Dep't 2003). An infant plaintiff was injured when his father slipped on ice causing the shopping cart he was seated in to tip over. The Appellate Division granted summary judgment in favor of the snow removal contractor holding that a limited contractual undertaking to provide snow removal services generally does not render a contractor liable in tort for personal injuries of third parties. Additionally, there was no evidence that the injured plaintiff detrimentally relied on the contractor's performance or that the contractor launched a force or instrument of harm.

- *Eldlisz v. Village of Kiryas Joel*, 302 A.D.2d 558 (2d Dep't 2003). The plaintiff commenced an action against the village and its snow removal service contractor, after slipping and falling on snow and ice on a sidewalk. The Appellate Division held that summary judgment was properly granted in favor of the contractor on the ground that it owed no duty to the injured plaintiff since the snow removal contract was not a comprehensive and exclusive property maintenance obligation intended to displace the village's duty, as landowner, to safely maintain the premises. In addition, the plaintiffs failed to establish that the contractor snow removal activities created or exacerbated a hazardous condition or that plaintiff detrimentally relied on the performance of its services. *Id.* at 559.

- *Raynor-Brown v. Garden City Plaza Assoc., et al.*, 305 A.D.2d 572, 759 N.Y.S.2d 397 (2nd Dept. 2003) Plaintiff was allegedly injured when she slipped and fell on ice at or near a curb and adjacent parking lot of certain premises owned by defendants, which contracted for the removal of snow and ice on the sidewalks of the premises. In holding that the trial court erred in denying the contractor's motion summary judgment, the Appellate Division found that, where a snow removal contract is not a comprehensive and exclusive property maintenance obligation intended to displace a landowner's duty to maintain the property, the contractor owes no duty of reasonable care to prevent foreseeable harm to an injured plaintiff. The exception to the rule is where the contractor's action has advanced to such a point as to have "launched a force or instrument of harm". *Id.*, at 399.

- *Scott v. Bergstol*, 2004 WL 2303414 (2nd Dept. 2004). Plaintiff allegedly slipped and fell on ice on a sidewalk that was located on property leased to the United States Postal Service, which had retained a contractor to perform snow removal services. In holding that that summary judgment was proper, the Appellate Division noted, as stated in *Boddie*, "[a] limited contractual undertaking to provide snow removal services does not render the contractor liable in tort for the personal injuries of third parties." Moreover, there was no evidence that the contractor launched a force or an instrument of harm. *Id.*, at 1.

- *Winograd v. Neiman Marcus Group*, 782 N.Y.S.2d 753, 2004 N.Y. Slip Op. 07164 (2nd Dept. 2004) Plaintiff allegedly slipped and fell on snow and ice in the loading dock area of a department store within a mall. The mall owner contracted for the removal of snow and ice from the common areas of the mall. Although the contract expressly provided that the contractor was not required to remove snow and ice from the loading dock, it did on January 3, 2001 at the mall owner's request. From said date until the date of plaintiff's accident, the contractor never returned to the loading dock area. Three days prior to the alleged accident, 5.5 inches of snow fell in the vicinity of the accident location. The Appellate Division upheld the lower court's granting of summary judgment in favor of the

entitlement to summary judgment by demonstrating that the injured plaintiff slipped and fell on ice that formed during the snow storm and that its snow removal efforts did not create the allegedly hazardous snow and ice condition.

AGFJ DEVELOPMENTS

- The Firm is pleased to announce that Amy N. Davidoff has joined us as an associate. Amy earned her B.A. Degree from Cornell University and her J.D. from New York Law School. Amy will handle cases in both the bodily injury defense and insurance coverage units.

- On October 20, 2004, Daniel J. Friedman presented a seminar at the International Underwriting Association in London. The seminar, entitled "How to Avoid Being Torpedoed by Your Own Claim File", was approved for continuing education credits. On November 9 and 10, Dan also presented a seminar entitled "Recognizing and Responding to Potential Fraudulent Losses" at the P.L.R.B. Regional Adjusters' Conference in Philadelphia. This seminar was also approved for continuing education credit. For more information on either seminar, contact Dan Friedman or e-mail him at dfriedman@agfjlaw.com.

- AGF&J recently won summary judgment for its client in an insurance coverage declaratory judgment action pending in the Federal Court.

In *U.S. Underwriters Ins. Co. v. Congregation Kollole*, an individual who was performing demolition work on a vacant premises owned by the insured, Congregation Kollole, claimed to have suffered serious injuries when a wall fell upon him during the demolition work. The insured worker sued the owner. Congregation Kollole was insured under a CGL policy issued by U.S. Underwriters which contained two separate exclusions relating to claims involving independent contractors: the first exclusion provided that the policy did not cover claims arising out of services performed for or on behalf of the insured by independent contractors; the second exclusion provided that the policy did not apply to claims for injuries to employees of the insured, or contractors, performing services for or on behalf of the insured.

The insurer disclaimed coverage and commenced a declaratory judgment action in the U.S. District Court, Eastern District of New York. Judge Trager agreed that both exclusions operated to preclude coverage, as a matter of law, and granted summary judgment to the insurer.

For more information, contact Michael Gorelick or e-mail him at mgorelick@agfjlaw.com.

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.

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