Patrick J. Fogarty

Farrell v. Lewarn, 1999-08566, SUPREME COURT OF NEW YORK, APPELLATE DIVISION, SECOND DEPARTMENT, 275 A.D.2d 760; 714 N.Y.S.2d 232; 2000 N.Y. App. Div. LEXIS 9418, June 9, 2000, Argued, September 25, 2000, Decided.

Purcell & Ingrao, P.C., Mineola, N.Y. (Patrick J. Purcell and Anthony Marino of counsel), for appellant. Fogarty & Fogarty, P.C., Mineola, N.Y. (Patrick J. Fogarty of counsel), for respondents.

Margolis v. Greyhound, [NO NUMBER IN ORIGINAL], Civil Court of the City of New York, Bronx County, 71 Misc. 2d 277; 335 N.Y.S.2d 899; 1972 N.Y. Misc. LEXIS 1654, August 8, 1972

OVERVIEW: Judgment was granted for the passenger in a nominal amount on her action for the loss of a suitcase as the bus line negligently failed to store the passenger's suitcase in the baggage room and offered nor explanation for the loss.

Sidney K. Margolis, plaintiff in person, and for Helen Margolis, plaintiff. Mellen, Donnelly & Fogarty (Patrick J. Fogarty, Jr., of counsel), for defendants.

Margolis v. Greyhound Eastern Greyhound Lines, [NO NUMBER IN ORIGINAL], Supreme Court of New York, Appellate Term, First Department, 95 Misc. 2d 799; 408 N.Y.S.2d 766; 1978 N.Y. Misc. LEXIS 2508, June 12, 1978

Sidney K. Margolis, appellant pro se, and for Helen Margolis, appellant. Crowe, McCoy, Agoglia, Fogarty & Zweibel (Patrick J. Fogarty and Scott Fairgrieve of counsel), for respondents.

Herron v. Long Beach Hous. Auth., 2000-04943, SUPREME COURT OF NEW YORK, APPELLATE DIVISION, SECOND DEPARTMENT, 284 A.D.2d 499; 727 N.Y.S.2d 889; 2001 N.Y. App. Div. LEXIS 6764, June 1, 2001, Argued, June 25, 2001, Decided

Fogarty & Fogarty, P.C., Mineola, N.Y. (Patrick J. Fogarty of counsel), for appellant. Marcus & Katz, Garden City, N.Y. (Lawrence K. Katz of counsel), for respondent.

Fields v. Armada Vehicle Rental Co., 93-04335, SUPREME COURT OF NEW YORK, APPELLATE DIVISION, SECOND DEPARTMENT, 215 A.D.2d 433; 627 N.Y.S.2d 397; 1995 N.Y. App. Div. LEXIS 4832, March 28, 1995,
Argued, May 8, 1995, Decided

OVERVIEW: The accident victim submitted sufficient testimonial and documentary evidence that she sustained a herniated disk and a resulting significant limitation of the use of body function or system to establish a prima facie case of serious injury.

Fogarty & Fogarty, P.C., Mineola, N.Y. (Patrick J. Fogarty and Bob Giard of counsel), for appellant. Salzman, Ingber & Winer, New York, N.Y. (Pollack, Pollak, Isaac & DeCicco [Norman E. Forwley and Brian J. Isaac] of counsel), for respondent.

Garrett Duffy

Supreme Court, Appellate Division, Second Department, New York.
Brian THOMAS, etc., et al., appellants,
v.
HEMPSTEAD UNION FREE SCHOOL DISTRICT, respondent.
Nov. 25, 2008.

N.Y.A.D. 2 Dept.,2008.
Thomas v. Hempstead Union Free School Dist.
56 A.D.3d 759, 868 N.Y.S.2d 142, 238 Ed. Law Rep. 866, 2008 N.Y. Slip Op. 09383

Background: Action was brought against school district to recover damages sustained by seventh grade student who was allegedly injured when the broken leg of chair on which he was sitting came down on his finger. The Supreme Court, Nassau County, Mahon J., granted school district's motion for summary judgment. Plaintiffs appealed.

Holding: The Supreme Court, Appellate Division, held that fact issue existed as to whether school district could be charged with constructive notice of condition of chair.
Reversed.

Triable issue of fact existed as to whether the school district had actual knowledge of a recurrent dangerous condition with respect to the condition of the chairs in the classroom of a seventh grade student and, therefore, whether it could be charged with constructive notice of each specific recurrence of that condition, precluding summary judgment in action brought to recover damages for personal injuries sustained by seventh grade student who was allegedly injured when the broken leg of chair on which he was sitting came down on his finger.
Fogarty, Felicione & Duffy, P.C., Mineola, N.Y. (**Garrett Duffy** of counsel), for appellants.

Congdon, Flaherty, O'Callaghan, Reid, Donlon, Travis & Fishlinger, Uniondale, N.Y. (Gregory A. Cascino of counsel), for respondent.

ROBERT A. SPOLZINO, J.P., JOSEPH COVELLO, DANIEL D. ANGIOLILLO, and CHERYL E. CHAMBERS, JJ.

Camlica v. Hansson, 2005-00092, 2006-02897, (Index No. 3075/03), SUPREME COURT OF NEW YORK, APPELLATE DIVISION, SECOND DEPARTMENT, 2007 NY Slip Op 4247; 40 A.D.3d 796; 837 N.Y.S.2d 179; 2007 N.Y. App. Div. LEXIS 6199, May 15, 2007, Decided,

OVERVIEW: Judgment was affirmed as modified as summary judgment for general contractor was proper because the contractor made a prima facie showing that plaintiff's accident was not proximately caused by a violation of Labor Law § 240(1), and the evidence plaintiffs submitted in opposition failed to raise a triable issue of fact.

CORE TERMS: causes of action, common-law, summary judgment, modified, notice of appeal, issue of fact, disbursements, proximate

... P.C., Mineola, N.Y. (Garrett Duffy of counsel), for General Contractor.

Sheehan v. J.J. Stevens & Co., 2006-01717, (Index No. 878/03) , SUPREME COURT OF NEW YORK, APPELLATE DIVISION, SECOND DEPARTMENT, 2007 NY Slip Op 3122; 39 A.D.3d 622; 833 N.Y.S.2d 237; 2007 N.Y. App. Div. LEXIS 4546, April 10, 2007, Decided , SUPREME COURT OF NEW YORK, APPELLATE DIVISION, SECOND DEPARTMENT

2007 NY Slip Op 3122; 39 A.D.3d 622; 833 N.Y.S.2d 237; 2007 N.Y. App. Div. LEXIS 4546

April 10, 2007, Decided

COUNSEL: Sullivan Papain Block McGrath & Cannavo, P.C., New York, N.Y. (Stephen C. Glasser and Stephanie Hatzakos of counsel), for appellants.

Fogarty, Felicione & Duffy P.C., Mineola, N.Y. (Garrett Duffy of counsel), for respondent.

JUDGES: REINALDO E. RIVERA, J.P., MARK C. DILLON, DANIEL D. ANGIOLILLO, THOMAS A. DICKERSON, JJ. RIVERA, J.P., DILLON, ANGIOLILLO and DICKERSON, JJ., concur.

OPINION
DECISION & ORDER

In an action to recover damages for personal injuries, etc., the plaintiffs appeal from an order of the Supreme Court, Suffolk County (Doyle, J.), entered January 25, 2006, which granted the defendant's motion for summary judgment dismissing the complaint.

ORDERED that the order is affirmed, with costs.

A defendant property owner who moves for summary judgment in a premises liability case has the initial burden of establishing, prima facie, that it neither created the defective condition nor had actual or constructive notice of the condition for a sufficient length of time to discover and remedy it (see Solomon v Loszynski, 21 AD3d 366, 800 N.Y.S.2d 46; McKeon v Town of Oyster Bay, 292 A.D.2d 574, 739 N.Y.S.2d 739; Abrams v Powerhouse Gym Merrick, 284 A.D.2d 487, 727 N.Y.S.2d 135). Only after the defendant has satisfied this threshold burden will the court examine the sufficiency of the plaintiff's opposition (see Joachim v 1824 Church Ave., Inc., 12 AD3d 409, 784 N.Y.S.2d 157). Here, the defendant established its entitlement to judgment as a matter of law by submitting evidence sufficient to demonstrate that it neither created nor had actual or constructive notice of the alleged defective condition, [**623] namely, the gap between the cushion seat and the frame of the chair which caused the plaintiff Lauraine Sheehan to sustain injuries. In opposition, the plaintiffs failed to submit evidence sufficient to raise a triable issue of fact (see Romano v Stanley, 90 N.Y.2d 444, 452, 684 N.E.2d 19, 661 N.Y.S.2d 589; Martinez v Roberts Consol. Indus., 299 A.D.2d 399, 749 N.Y.S.2d 279; cf. Currado v Waldbaum, Inc., 303 A.D.2d 442, 443, 755 N.Y.S.2d 892; Dawson v National Amusements, 259 A.D.2d 329, 687 N.Y.S.2d 19; [*2] Albergo v Deer Park Meat Farms, 138 A.D.2d 656, 526 N.Y.S.2d 580).

RIVERA, J.P., DILLON, ANGIOLILLO and DICKERSON, JJ., concur.

Mejia v. Levenbaum, 8369, Index 21633/99 , SUPREME COURT OF NEW YORK, APPELLATE DIVISION, FIRST DEPARTMENT , 2006 NY Slip Op 4952; 30 A.D.3d 262; 818 N.Y.S.2d 22; 2006 N.Y. App. Div. LEXIS 8135, June 20, 2006, Decided, June 20, 2006, Entered,.

OVERVIEW: Because a worker was engaged a "general clean out" of what had formerly been a restaurant and the work being performed was not construction, excavation, or demolition work within the meaning of Labor Law §§ 200, 240, 241(6), the landlord and a lessee were entitled to summary judgment on the worker's statutory and common law negligence claims.

Camacho Mauro Mulholland, LLP, New York (Kathleen Mulholland of counsel), for Andrew R. Levenbaum, appellant. Fogarty, Felicione & Duffy, P.C., Mineola (Garrett Duffy of counsel), for Tam Restaurants, Inc. and Plum Third Street Corp., appellants. Gorayeb & Associates, P.C., New York (John M. Shaw of counsel), for respondent.

Wilson v. John DeAngelis, M.D., P.C., No. 3919E, Supreme Court of New York, Appellate Division, Second Department, 161 A.D.2d 709; 555 N.Y.S.2d 846; 1990 N.Y. App. Div. LEXIS 6429, May 1, 1990, Submitted, May 21, 1990

Bonomo, Darwin, Geismar & Johnson, Manhasset, New York (Clifford J. Geismar of counsel), for appellant. Malachy J. Duffy, P.C., Garden City, New York (Garrett Duffy of counsel), for respondents.

Peterson v. Treeco Plainview, Ltd., 2003-08358, (Index No. 12736/01) , SUPREME COURT OF NEW YORK, APPELLATE DIVISION, SECOND DEPARTMENT , 9 A.D.3d 402; 780 N.Y.S.2d 166; 2004 N.Y. App. Div. LEXIS

9686, June 10, 2004, Argued, July 12, 2004, Decided

Fogarty & Fogarty, P.C., Mineola, N.Y. (Garrett Duffy of counsel), for appellant. Torino & Bernstein, P.C., Mineola, N.Y. (Christine M. Capitolo of counsel), for respondent Food Parade, Inc., d/b/a Shoprite.

Serrell v. Connetquot Cent. High Sch. Dist., 2000-04572, SUPREME COURT OF NEW YORK, APPELLATE DIVISION, SECOND DEPARTMENT, 280 A.D.2d 663; 721 N.Y.S.2d 107; 2001 N.Y. App. Div. LEXIS 1863, January 23, 2001, Argued, February 26, 2001, Decided, Subsequent appeal at Serrell v. Connetquot Cent. Sch. Dist., 2005 N.Y. App. Div. LEXIS 7316 (N.Y. App. Div. 2d Dep't, June 27, 2005)
OVERVIEW: Defendant was entitled to summary judgment in plaintiff's personal injury action, because plaintiff failed to raise a triable issue of fact that defendant had and breached a duty to promulgate sports rules concerning head injuries.

Fogarty & Fogarty, P.C., Mineola, N.Y. (Garrett Duffy of counsel), for appellant. Rappaport, Glass, Greene & Levine, LLP, Melville, N.Y. (Matthew J. Zullo and James Forde of counsel), for respondents.

Schiavone v. 382 McDonald Corp., 97-04800, SUPREME COURT OF NEW YORK, APPELLATE DIVISION, SECOND DEPARTMENT, 251 A.D.2d 486; 674 N.Y.S.2d 425; 1998 N.Y. App. Div. LEXIS 6912, April 17, 1998, Argued, June 15, 1998, Decided

OVERVIEW: Summary judgment was proper for employer/lessee supermarket because it did not have notice of defective condition on its property and summary judgment was improper for injured employee because lessor was not liable without obligation or control.

Fogarty & Fogarty, P.C., Mineola, N.Y. (Garrett Duffy of counsel), for third-party defendant-appellant-respondent. Stanley J. Kaufman, Brooklyn, N.Y. (Brian J. Isaac of counsel), for respondents-appellants. Dwyer & Ryan, P.C.,

Connie Desena, Appellant, v. 85 Livingston Tenants Corp. et al., Respondents.

2003-06531, (Index No. 15937/99)

SUPREME COURT OF NEW YORK, APPELLATE DIVISION, SECOND DEPARTMENT

11 A.D.3d 506; 782 N.Y.S.2d 846; 2004 N.Y. App. Div. LEXIS 11982

September 24, 2004, Submitted
October 12, 2004, Decided

CORE TERMS: repair, sidewalk, defective condition, special use, failure to maintain, prima facie, negligently, ordinance, landowner, abutting

HEADNOTES

Negligence--Sidewalks.--Complaint dismissed--defendants established that they did not create defective condition complained of, voluntarily but negligently make repairs, create defect through special use, or violate statute or ordinance which expressly imposed liability on abutting landowner for failure to maintain and repair sidewalk in question.

COUNSEL: Charles Berkman (Ephrem Wertenteil, New York, N.Y., of counsel), for appellant.

Thomas D. Hughes, New York, N.Y. (Richard C. Rubenstein of counsel), for respondents, 85 Livingston Tenants Corp. and WPG Management.

Fogarty & Fogarty, P.C., Mineola, N.Y. (Garrett Duffy of counsel), for respondent, Gold's Gym.

JUDGES: FRED T. SANTUCCI, J.P., DANIEL F. LUCIANO, ROBERT W. SCHMIDT, REINALDO E. RIVERA, JJ. SANTUCCI, J.P., LUCIANO, SCHMIDT and RIVERA, JJ., concur.

OPINION

In an action to recover damages for personal injuries, the plaintiff appeals, as limited by her brief, from so much of an order of the Supreme Court, Kings County (Belen, J.), dated May 20, 2003, as, upon granting her motion for leave to renew and reargue the separate motions of the defendant Gold's Gym, and 85 Livingston Tenants Corp. and WPG Management, for summary judgment dismissing the complaint insofar as asserted against them, respectively, adhered to the prior determination dated May 6, 2002, granting the respective motions.

Ordered that the order is affirmed insofar as appealed from, with one bill of costs to the respondents appearing separately and filing separate briefs.

The defendants established their prima facie entitlement to judgment as a matter of law on their respective motions for summary judgment by tendering sufficient evidence that they did not create the defective condition complained of, voluntarily but negligently make repairs, create the defect through special use, or violate a statute or ordinance which expressly imposes liability on the abutting landowner for failure to maintain and repair the sidewalk in question (see Hausser v Giunta, 88 N.Y.2d 449, 669 N.E.2d 470, 646 N.Y.S.2d 490 [1996]; Devine v City of New York, 300 A.D.2d 532, 533, 751 N.Y.S.2d 605 [2002]). In opposition to that prima facie showing, the plaintiff failed to raise a triable issue of fact (see Alvarez v Prospect Hosp., 68 N.Y.2d 320, 501 N.E.2d 572, 508 N.Y.S.2d 923 [1986]; Zuckerman v City of New York, 49 N.Y.2d 557, 404 N.E.2d 718, 427 N.Y.S.2d 595 [1980]). Santucci, J.P., Luciano, Schmidt and Rivera, JJ., concur.

... for appellant. Thomas D. Hughes, New York, N.Y. (Richard C. Rubenstein of counsel), for respondents, 85 Livingston Tenants Corp. and WPG Management. Fogarty & Fogarty, P.C., Mineola, N.Y. (Garrett Duffy of counsel), for respondent, Gold's Gym.

Other Decisions of Interest

Onlythe Westlaw citation is currentlyavailable.

United States District Court,
S.D. New York.
Ilya MANYK, Plaintiff
v.
WESTERN UNION COMPANY FINANCIAL CO. and Ukranian Financial Group, Defendants.
No. 07 Civ. 6260(GEL).

May27, 2009.

AlexanderJ. Segal, Grinberg & Segal, P.L.L.C, New York, NY, for plaintiff.

Garrett Duffy, Fogarty, Felicione & Duffy, P.C., Mineola, NY, for defendant Western Union Financial Co. Inc.

OPINION AND ORDER

GERARD E. LYNCH, District Judge.

*1 Plaintiff IlyaManyk,acitizenof Australiaandaresident ofOdessa,Ukraine,bringsthispersonalinjuryactionagainst WesternUnionCompanyFinancial Co.("WesternUnion") andUkranianFinancial Group("UFG"),allegingthathewas assaulted byanother individual when he went to collect a moneytransfer at a UFG outlet in the Ukraine. UFG has not appeared in this action or responded to the complaint. Following an extension of discovery, Western Union moves for summaryjudgment, on the basis that plaintiff has not adduced anyevidence that theassailant wasanemployee or agent ofWesternUnion.Also pendingisplaintiff'smotionto reopendiscovery.For thereasonsset forthbelow,themotionfor summaryjudgment will be granted and the motion to reopen discoverywill be denied.

BACKGROUND

The following facts are either uncontested or taken in the light most favorable to the plaintiff. On July22, 2004, Ilya Manyk went to UFG's office at 10 Deribasovska Street in Odessa, Ukraine, to collect a money transfer sent through Western Union Financial Services, Inc. (Deposition of Ilya Manyk, dated July2, 2008 ("Manyk Dep."), 15:19-19:10.) UFG rented a small portion of the premises to exchange currencies and provide moneytransfer services. (Affidavit of Garrett Duffy,datedDecember 4,2008 ("DuffyAff"),Ex.E ¶ 2.) Thepremiseswas otherwise occupied byabranchof SocCom Bank, which is not a partyto this action. (*Id.*)

When Manyk went to the UFG window to request the money that he believed had been transferred to him, a UFG employee, Olga Olexiyivna Pysarenko *née* Illinskaya, told Manyk that the proceeds from the transfer had alreadybeen collected.(DuffyAff.Ex.F¶2;ManykDep.38:16-20.)Manykallegesthat Pysarenko thencalledhima"crook"andtold him to leave. (Manyk Dep. 39:2-16.) Manyk called the police, who subsequently summoned the manager of the UFG branch,Olexander StanislavovychChehovsky.(ManykDep.405-45:15;DuffyAff.Ex.F ¶ 3.) WhenChehovskyarrived, he reiterated that UFG could not paythe money transferred to Manyk because the available records indicated that the proceeds from the transfer had already been collected at the Aval Bank. (Duffy Aff. Ex. E ¶ 4; Manyk Dep. 45:8-18, 47:13-23.) Chehovskysuggestedthat Manykcontact thesender to clarifythetransactiondetails.(DuffyAff. Ex. E ¶ 4.)

The police then escorted Manyk to the Aval Bank branch at Sadovaya Street. (Manyk Dep. 49:3-7.) At Aval Bank, the police were toldthat themoneytransfer had not been paid. (PL's Opp. at 2.) Manyk eventuallylearned from the sender, OlenaAnatoliyivnaYashnik,that theclerkprocessingthemoneytransferinKievhadmadeamistakeandthat thetransfer had been annulled. (Manyk Dep. 51:13-17.)

Yashnik sent Manyk a new moneytransfer and onJuly23,2004,Manykreturnedto UFG'swindowat 10 Deribasovska Streetto collect thefunds.(ManykEep.53:8-18.) ManykagainspokewithPysarenko (ManykDep.67:9-24),whocould not or wouldnot executethetransaction.(DuffyAff.Ex. F ¶ 5; Manyk Dep. 67:11-24.) Manyk requested to speakwith the UFG manager and then headed toward the door in order to phone the police. (Manyk Dep. 68:17-21, 69:5-12.)

*2 Manykallegesthat,ashewasleaving,Pysarenkoinstructedanunnamedyoungman-aco-worker-"to throwthiscrook out of the bank." (Manyk Dep. 56:5-9, 71:2-3.) Anassailant thengrabbedManykfrom behind, twisted his hand, turned his back to the door, kicked him in the stomach, threw him out and threatened to "break [his] head" if Manyk returned. (Manyk Dep. 78:10-20, 83:15-17.) When Manyk was thrown out of the building, he hit the railing and landed on the ground. (Manyk Dep. 81:17-20.)

Manyk's brother-in-law, YevgeniyShashkov, waswaitingoutsideandsawManykthrownout of the bank. (Manyk Dep. 115:10-15.) After Shashkov helped Manyk up, they took a taxi to the Aval bank at Sadovaya Street where Manyk successfullyretrieved his funds. (Manyk Dep. 120:3-25.)

OnJuly27,2004,ManykfiledacomplaintwiththepoliceattheOdessaPrimorskyDistrictDepartmentofInternalAffairs emphasizingtheverbal abusehesufferedat the handsof Pysarenko andanunnamedSocComBankmanager.(Segal Aff. Ex.E.) Inthat complaint, Manyk said the "floodof [verbal] abuses...endedwhenIwasgrabbedbyayoung manandwas thrown out into the street." (Segal Aff. Ex. E ¶ 6.)

Manyk claims he was seriously injured in the assault. Slightly less then a month after the incident, Manyk called a psychiatric hotline for help and on August 16, 2004, he met with a psychiatrist. (Manyk Dep. 124:15-22.) Later that

month,Manykwasadmittedto apsychiatricclinicwhereheremaineduntil December.(ManykDep.129:2-11.) In2005, Manyk complained of pain in his right kidneyand the clinic found blood in his urine. (Manyk Dep. 143:3-9.)

DISCUSSION

I. *Summary Judgment*

Summaryjudgment isappropriatewherethe"pleadings,thediscoveryanddisclosurematerialsonfile,andanyaffidavits show that there isno genuine issue as to anymaterial fact and the movant is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). In deciding a motion for summaryjudgment, the court must resolve all ambiguities and construe all facts in the nonmovant's favor. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). Nevertheless, the nonmoving party cannot defeat a motion for summary judgment by relying solely on "conclusory allegations or unsubstantiated speculation." *Scotto v. Almenas*, 143 F.3d 105, 114 (2d Cir.1998). Instead, the nonmovant must "by affidavits or as otherwise provided ... set out specific facts showing a genuine issue for trial," Fed.R.Civ.P. 56(e)(2), andcomeforwardwith"evidenceonwhichthejurycouldreasonablyfindforthenonmovant."*Pocchia v.NYNEXCorp.*, 81 F.3d275,277(2dCir.1996),quoting*Anderson,*477 U.S.at 252.If thenonmovant'sevidence"ismerelycolorable, or is not significantlyprobative, summaryjudgment maybe granted." *Anderson,* 477 U.S. at 249-50.

II. *Vicarious Liability*

Thethresholdissueraisedbythismotioniswhether plaintiff'sassailantis,asplaintiffalleges,a"WesternUnionworker." (Manyk Dep. 55:21-22.) On the present record, there is not a triable issue of material fact whether plaintiff's assailant worked for, or was the agent of, Western Union. Accordingly, there is no basis for imputing liabilityfor the assault to Western Union.[FN1]

> FN1.Plaintiff also bringsaclaimagainst WesternUnionfordefamation,butplaintiff hasnot opposedWestern Union'smotionforsummaryjudgmentonthisclaim.Accordinglytheclaimisabandoned.*See*Lipton v.County of Orange, 315 F.Supp.2d 434, 446 (S.D.N .Y.2004) ("This Court may, and generally will, deem a claim abandoned when a plaintiff fails to respond to a defendant's arguments that the claim should be dismissed.") (internal citations omitted); *see also* Barlow v. Connecticut, 319 F.Supp.2d 250, 266-67 (D.Conn.2004) (findingthatcourtsmaydeemabandonedanyclaimsnot fullybriefedinamotionfor summaryjudgment). Even if plaintiff had responded to Western Union's motion, however, the defamation claim would be dismissed on the merits because, for reasons that are substantially similar to those explained below, Western Union is not vicariouslyliable for Pysarenko's alleged statement that plaintiff was a "crook."

*3 Therecordisreplete with evidence that the assailant was not an employee of WesternUnion.Themanager of UFG's 10 Deribasovska Street branch, Olexander Chehovsky, avers that Western Union did not own, lease, operateor control the premises andthat no employeesor representativesof Western Union were employed at the branch on July22 or 23, 2004,thedaysplaintiff visitedtheUFGbranch.(DuffyAff.Ex.E ¶¶ 3,6.) Thisevidenceisundisputed.Plaintiff,indeed, does not argue that the assailant was an employee of Western Union. Rather, plaintiff relieson the fact that Pysarenko, who wastheonlyUFGemployeeondutythedayof plaintiff'sassault,wasan*agent* of WesternUnion,andthereforeher actions,and/orthoseofherpurported"co-worker,"canserveto imputeliabilityfortheassaultto WesternUnion.Plaintiff acknowledgesthat hehasno other reasonto pursueWesternUnionotherthanhisrecollectionthatPysarenko toldamanthat Pysarenko allegedlyidentified as her co-worker-"to throw[Manyk] out."(ManykDep.56:5-9,59:7-60:3,71:2-3.)

ButevenifPysarenkomadetheremark-whichPysarenkodeniesandis,at best,inconclusiveastotheidentityoraffiliation of Manyk'sultimateassailant-it wouldbeinsufficient to establishthat *Western Union* is liable for plaintiff'sinjury.The controlling issue is the scope of the relationship between Western Union and UFG-specifically, whether the agency relationshipbetweenthetwo companies permits imputing the general torts of the agent,UFG,to theprincipal,Western Union. It does not.

New York law is well-settled that, where, as here, an agencyrelationship exists solelyfor a specific purpose-here, the

effectuation of moneytransfers-liabilitycannot attachto theprincipal for tortsunrelatedto the scope of the agency. *See McGarry v. Miller,* 550 N.Y.S.2d 896, 897 (1st Dep't 1990),citing*Greenev. Hellman,* 51 N.Y.2d 197 (1983). The signedagreementbetweenWesternUnionandUFGispellucidthat thepurposeandscopeof therelationshipbetweenthe parties is restricted to UFG's actions in offeringfor saleand redeeming moneytransfers.[FN2] (See DuffyAff. Ex. A¶ 1.) In a section entitled "Authority" the agreement expressly limits the extent to which the UFG acts within the scope of Western Union's authority. It states:

> FN2. Specifically, the agreement provides that
>
> [UFG] shall(a)receivefundsfromcustomersfor transfer to anyother locationintheworldat whichWestern Union's Money Transfer Service is available and (b) make payments to recipients of moneytransfers which havebeeninitiatedthroughWesternUnionor from anyother locationintheworldat whichWesternUnior's MoneyTransfer Service is available.
>
> (DuffyAff. Ex. A¶ 1.)

ThisAgreement shall not constituteor bedeemedto constituteapartnershipbetweentheparties.No employeeoragent of either partyshall bedeemedto be an employee or agent of the other for anypurpose whatever. Except for [UFG's] properoriginationandpayingoutofmoneytransfersinaccordancewiththeServiceRequirementsandthisAgreement, neither partyshall havetheauthorityto makeanyagreementorcommitmentorincuranyliabilityonbehalfoftheother, and neither partyshall be liable for anyacts,omissions,agreements,commitments,promisesor representations made bythe other, except as otherwise specificallyprovided herein.
*4 (DuffyAff. Ex. A¶ 21(H).)

Thisprovisionsquarelyforeclosesplaintiff'sargumentthatWesternUnionisliablefor Pysarenko'sstatementsor for the actionsofherpurported"co-worker."ItclearlystatesthatWesternUnioncannotbeheldresponsibleforplaintiff'sinjuries because-even if there were a colorableargument that theassailant wasanemployeeof UFGor that Pysarenko proposed that Manyk be "thrown out" of thebank[FN3]-anysuchtort wouldbeoutside the scope of the principalagent relationship. After full discovery, plaintiff offers no evidence of anyactions of either Western Union or UFG inconsistent with the limited agencyconferred bythe agreement, or indicative of a broader relationship than that defined there.

> FN3.Pysarenko claimsthat shehadnever seenthe youngmanwho interactedwithManykbeforeandhasnever seen him since. (DuffyAff. Ex. F ¶¶ 5, 6.) Pysarenko testifiesfurther that sheknewall of the UFG employees who hadanyresponsibilitiesrelatedtothe10DeribasovskaStreetbranchandassertsthattheyoung manshesaw interacting with Manyk was neither an employee nor affiliate of UFG. (Duffy Aff. Ex. F ¶ 7.) After full discovery,plaintiff hasbeenabletoproducenoevidenceapart fromthealleged"co-worker"remarkidentifying the man or tending to prove his employment byor affiliation with UFG.

This point is dispositive. Even drawing all justifiable inferences in plaintiff's favor, and assuming arguendo that UFG might beliablefor anyinjuriessufferedbyplaintiff,thereissimplyno evidence,giventhenatureandscopeof theagency relationship between UFG andWesternUnion,that liabilitycould attach to Western Union.[FN4] In sum, plaintiff has not "byaffidavits or as otherwise provided ... set out specific facts showing a genuine issue for trial." Fed.R.Civ.P. 56(e)(2).[FN5] Accordingly, summaryjudgment will be granted.

> FN4.Moreover,theonlyevidenceonwhichplaintiff reliesto establishtheidentityof hisassailant-Pysarenko's remark-wouldbeinadmissablehearsayagainstWesternUnionfor preciselythesamereasonthereisno liability in the first place: it is not a statement "by [Western Union's] agent or servant concerning a matter within the scopeof theagencyor employment."Fed.R.Evid.801(d)(2)(D): *see Pappas v.Middle Earth Condominium Ass'n,* 963 F.2d 534, 537 (2d Cir.1992).
>
> FN5.Plaintiff claimsto haveraisedother triableissues of fact, including that hisversionof eventscontradicts Pysarenko's version, and alleges that Chehovsky's affidavit is deficient becauseChehovskywas not physically

present on the dayof the incident andthereforelackspersonal knowledgeas to who was there on that day. (Pl. Opp.at9-10.) None of thesedisputeismaterial to whether WesternUnionisliablefortheactionsofplaintiff's assailant.

III. *Motion to Reopen Discovery*

Plaintiffmovestoreopendiscoveryona"failuretotrain"theory.Specifically,plaintiffseekstodiscoverwhetherWestern Unionmight havebeennegligent inthehiring,instructingor supervising[UFG] asanindependentcontractor."(Pl.Opp. at 19.)

The proper standard for assessing plaintiff's motion is provided by Rule 56(f), Fed.R.Civ.P. *See Miller v. Wolpoff & Abramson, L.L.P.*, 321 F.3d 292, 303-04 (2d Cir.2003). Rule 56(f) gives the court discretion to deny or defer an otherwise supported motion for summary judgment to allow for further discovery if the nonmoving party "shows by affidavit that, for specifiedreasons,it cannot present factsessential to justifyitsopposition"to themotionfor summary judgment. Partiesseekingto reopendiscoverymust detail (1) thespecificfactssought andhowtheyanticipateobtaining them, (2) "how those facts are reasonablyexpected to create a genuineissueof material fact,"(3) other efforts made to obtainthosefacts,and(4)"whythoseeffortswereunsuccessful."*Burlington CoatFactoryWarehouse,Corp.v.Esprit De Corp.*, 769 F.2d 919, 926 (2d Cir.1985).

On these criteria, plaintiff's request is wholly without merit. First, plaintiff has enjoyed ample opportunityto conduct discovery in this case and there is absolutely no reason, and plaintiff offers none, whyhe could not have pursued this theoryduring discovery. Indeed, the documents plaintiff admits heisseekingarewhollyrepetitive of the discoverythat has alreadytaken place.

Second, a Rule 56(f) request should be denied where additional discoverywill not uncover agenuine issue of material fact.*See,e.g.,TreborSportswearCo.,Inc.v.TheLtd.Stores,Inc.,*865 F.2d506,511-12 (2dCir.1989).Becausethere isnotriableissuethattheplaintiff'sassailant wasemployedby,oranagentof,WesternUnion,nothingthatplaintiffcould discover about Western Union's conduct with respect to thehiring,instructingor supervisingof UFGcouldberelevant to plaintiff's injuries. Moreover,as a matter of straightforward contract interpretation, the agreement between Western Union and UFG forecloses as a matter of law that Western Union could be liable to plaintiff on a"failure to train"theory. Accordingly, plaintiff's motion to reopen discovery is denied.

CONCLUSION

*5 For the foregoing reasons, plaintiff's motion to reopen discovery is denied and defendant's motion for summary judgment is granted. The clerk is respectfully directed to enter judgment dismissing the complaint and to close the case.

SO ORDERED.

S.D.N.Y.,2009.
Manyk v. Western Union Co. Financial
Co. Slip Copy, 2009 WL 1490827
(S.D.N.Y.)

Torres v. Performance Auto. Group, Inc., 2005-10442, 2006-01218, (Index No. 2957/04) , SUPREME COURT OF NEW YORK, APPELLATE DIVISION, SECOND DEPARTMENT, 2007 NY Slip Op 630; 36 A.D.3d 894; 829 N.Y.S.2d 181; 2007 N.Y. App. Div. LEXIS 957, January 30, 2007, Decided.

OVERVIEW: Summary judgment for defendants was reversed as defendants failed to show that plaintiff did not sustain serious injury under Insurance Law § 5102(d) since their motion papers did not adequately address plaintiff's claim that she went to work for about month after accident, and that she was out of work for five of first six months after accident.

CORE TERMS: individual capacity, serious injury, summary judgment, prima facie, subject accident, immediately following, post-accident, remitted ... P.C., Mineola, N.Y.

Newell v. Ford Motor Credit Co., 2005-11359, 2006-02480, (Index No. 4097/04) , SUPREME COURT OF NEW YORK, APPELLATE DIVISION, SECOND DEPARTMENT , 2007 NY Slip Op 282; 36 A.D.3d 675; 828 N.Y.S.2d 196; 2007 N.Y. App. Div. LEXIS 455, January 16, 2007, Decided ,

OVERVIEW: Because a plaintiff substantially complied with a towing company's notice of discovery and inspection, and because the plaintiff did not willfully or contumaciously failed to comply with the court's order, the trial court's drastic remedy of striking the complaint under CPLR 3126(3) was not warranted.

CORE TERMS: reargue, inspection, discovery, notice, complied, appeal lies

... P.C., Mineola, N.Y.

Karian v. G & L Realty, LLC, 8289, Index 101909/02 , SUPREME COURT OF NEW YORK, APPELLATE

DIVISION, FIRST DEPARTMENT , 2006 NY Slip Op 6204; 820 N.Y.S.2d 231; 2006 N.Y. App. Div. LEXIS 9964, August 10, 2006, Decided, August 10, 2006, Entered,

OVERVIEW: Since the record contained no evidence of any negligence by the elevator contractor, much less

evidence that any such negligence was a substantial factor in causing the injured person's accident, as the contractor was not servicing the elevator at the time, the contractor was entitled to summary judgment as to the personal injury

complaint.

Fogarty, Felicione & Duffy, P.C., Mineola, for appellant. Kahn, Gordon, Timko &

Rodriques, P.C., New York (Edward A. Lemmo of counsel), for respondent.

Cotter v. Summit Sec. Servs., 2004-01333 , SUPREME COURT OF NEW YORK, APPELLATE DIVISION,

SECOND DEPARTMENT , 14 A.D.3d 475; 788 N.Y.S.2d 153; 2005 N.Y. App. Div. LEXIS 193, December 7, 2004, Argued, January 10, 2005, Decided,

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OVERVIEW: Trial court erred in denying summary judgment to defendants in an action false arrest and other causes of action; defendants did not induce police action, but merely provided information to the police, who decided to arrest the injured party.

Fogarty & Fogarty, P.C., Mineola, N.Y. , for appellants. Ginsberg & Katsorhis, P.C.,

Flushing, N.Y. (Jeffrey P. Brodsky of counsel), for respondent.

White v. Jeffco W. Props., 2002-09716 , SUPREME COURT OF NEW YORK, APPELLATE DIVISION, SECOND DEPARTMENT , 304 A.D.2d 824; 759 N.Y.S.2d 138; 2003 N.Y. App. Div. LEXIS 4503, April 22, 2003, Argued, April 28, 2003, Decided

Fogarty & Fogarty, P.C., Mineola, N.Y. , for appellant. Benedict P. Morelli & Associates, P.C., New York, N.Y. (Arthur L. Salmon of counsel), for respondent.

Russell v. Kraft, Inc., 2000-05456, SUPREME COURT OF NEW YORK, APPELLATE DIVISION, SECOND

DEPARTMENT, 284 A.D.2d 386; 726 N.Y.S.2d 290; 2001 N.Y. App. Div. LEXIS 6062, May 14, 2001, Argued, June 11, 2001, Decided

Fogarty & Fogarty, P.C., Mineola, N.Y. (Paul Felicione of counsel), for defendant third-party plaintiff-appellant. Jared Altman, Peekskill, N.Y., for plaintiff-respondent. Williamson & Williamson, P.C., New York, N.Y. (Joseph M. Glatstein of counsel), for ...

Harney v. Tombstone Pizza Corp., 1999-10925 , SUPREME COURT OF NEW YORK, APPELLATE DIVISION,

SECOND DEPARTMENT , 279 A.D.2d 609; 719 N.Y.S.2d 704; 2001 N.Y. App. Div. LEXIS 834, December 15,

2000, Argued, January 29, 2001, Decided

OVERVIEW: New York plaintiff could not withstand defendants' summary judgment motion when all he had to offer were conclusory statements of medical experts who had not examined him and his own self-serving statements.

Fogarty & Fogarty, P.C., Mineola, N.Y. , for appellants-respondents. O'Dwyer & Bernstien, LLP, New York, N.Y. (Gary Silverman of counsel), for respondents-appellants.

Allocca v. Shop Rite Hardware, 96-02250, SUPREME COURT OF NEW YORK, APPELLATE DIVISION,

SECOND DEPARTMENT, 237 A.D.2d 237; 655 N.Y.S.2d 386; 1997 N.Y. App. Div. LEXIS 2168, January 28, 1997, Argued, March 3, 1997, Decided

Fogarty & Fogarty, P.C., Mineola, N.Y. , for appellants Shop Rite Hardware, Inc., and Joseph Scarpantonio. Ryan, Perrone & Hartlein, P.C., Mineola, N.Y. (William T. Ryan and Robin Mary Heaney of

counsel), for appellant Anthony ...

Davis v. Federated Dep't Stores, 95-05720, SUPREME COURT OF NEW YORK, APPELLATE DIVISION,

SECOND DEPARTMENT, 227 A.D.2d 514; 642 N.Y.S.2d 707; 1996 N.Y. App. Div. LEXIS 5336, March 29, 1996, Submitted, May 20, 1996, Decided

OVERVIEW: Summary judgment was improperly granted in favor of a customer on the issue of a store's liability in

the customer's negligence action where the court could not conclude based on the record that the store was negligent as a matter of law.

Fogarty & Fogarty, P.C., Mineola, N.Y., for appellant. Fallon and Fallon, Sayville, N.Y. (James V. Fallon, Jr., of counsel), for respondents.

Bannon v. Auerbach, 4749/00 , SUPREME COURT OF NEW YORK, SUFFOLK COUNTY , 2004 NY Slip Op

24467; 6 Misc. 3d 219; 785 N.Y.S.2d 650; 2004 N.Y. Misc. LEXIS 2331, September 14, 2004, Decided,

OVERVIEW: Motion to strike complaint or to preclude plaintiffs from offering evidence was denied where actions of plaintiffs' expert which resulted in destruction of samples was not done in bad faith and the samples were not available due to biological nature.

Christian Aaron Pickney, Esq., Atty for the Plaintiff, Hempstead NY. Paul Felicione, Esq., Atty for the Defendants,

Mineola NY.

Grob v. Kings Realty Assocs., LLC, 2000-11112 , SUPREME COURT OF NEW YORK, APPELLATE

DIVISION, SECOND DEPARTMENT , 4 A.D.3d 394; 771 N.Y.S.2d 384; 2004 N.Y. App. Div. LEXIS 1320, January 6, 2004, Argued, February 9, 2004, Decided

OVERVIEW: A trial court properly granted summary judgment to property owners in a personal injury and wrongful death action because the testimony by plaintiffs' expert as to the cause of a decedent's fall down a staircase was purely speculative.

Basichas, LLC (Scott L. Sherman and Pollack, Pollack, Isaac & DeCicco, New York, N.Y. [Brian J. Isaac and Chris Crawford] of counsel), for appellants. Fogarty & Fogarty, P.C., Mineola, N.Y., for respondents.

Fusco v. Now & Zen, Inc., 2001-07247, SUPREME COURT OF NEW YORK, APPELLATE DIVISION,

SECOND DEPARTMENT, 294 A.D.2d 466; 742 N.Y.S.2d 650; 2002 N.Y. App. Div. LEXIS 5215, March 25, 2002, Argued, May 20, 2002, Decided

OVERVIEW: The trial court erred in granting an injured party's motion to strike defendants' affirmative defense based on a waiver of liability; conflicting claims of the parties presented issues of fact on whether a disputed statute was applicable.

Fogarty & Fogarty, P.C., Mineola, N.Y. , for appellants. Leav & Steinberg, LLP, New York, N.Y. (Elizabeth Mark Meyerson and Marshall D. Sweetbaum of counsel), for respondents.

Rosenblatt by Rosenblatt v. Abraham & Strauss, Inc., 92-07937, SUPREME COURT OF NEW YORK,

APPELLATE DIVISION, SECOND DEPARTMENT, 204 A.D.2d 525; 614 N.Y.S.2d 198; 1994 N.Y. App. Div.

LEXIS 5301, April 28, 1994, Argued, May 16, 1994, Decided

Lapping, Demaria & Schwarz, P.C., Hempstead, N.Y. (Susan W. Darlington of counsel), for appellants. George M.

Faber, Westbury, N.Y., for plaintiffs-respondents. Fogarty & Fogarty, P.C., Mineola, N.Y. , for defendants-respondents.