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Continuing Legal Education Series

Taking and Defending Depositions – Tools for Women and Young Attorneys

June 1, 2024
11:30 am - 12:30 pm

Presenters: Leslie G. Abele, Esq,
Davika Kapoor, Esq.

Taking and Defending Depositions – Tools for Women and Young Attorneys

Saturday, June 1, 2024

11:30 a.m. to 12:30 p.m.

Presenters: Devika Kapoor, Esq. and Leslie G. Abele, Esq.

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Program Description

Depositions are crucial in litigation as they allow counsel to obtain key information which sets the tone for future case handling. They bind the witnesses to their story, provide support for summary judgment, and facilitate settlement negotiations. Given their significance, it is especially important that the deposition process is not frustrated by difficult adversaries and/or attorney misconduct. This presentation provides a toolbox, which includes New York State rules, case law, practice tips and strategies, for women and young litigators, who are often the target of adverse conduct during depositions. The goal of the presentation is to inspire, educate and encourage more women and young litigators to feel confident taking and defending depositions.

Agenda

I. Scope of a Deposition (15 minutes)
II. Pre-Deposition Preparation (15 minutes)
III. During the Deposition (15 minutes)
IV. Post-Deposition Remedies (15 minutes)

Introduction

We have come a long way in this profession, and instances of misconduct are fortunately becoming less prevalent.

Depositions can sometimes be the venue for obstructive or adverse conduct because they often take place in a private office, outside the view of a Judge or Court Referee. The rules discussed in this presentation apply to all lawyers. However, women, minorities, and young or inexperienced lawyers are sometimes more likely to be the target of obstructive conduct.

Although it is impossible to address every inappropriate question or comment which may arise at a deposition within this forum, we hope to address some examples of obstructive or adverse conduct to help prepare and encourage litigators who are faced with these challenges.

I. SCOPE OF A DEPOSITION

A. "The scope of examination on deposition is broader than what may be admissible on trial." [1] "Unless a question is clearly violative of a witness's constitutional rights, or of some privilege recognized in law, or is palpably irrelevant, questions at an examination before trial should be freely permitted and answered, since all objections other than those as to form are preserved for the trial and may be raised at that time." [2]

B. CPLR § 3101(a): Scope of Disclosure: There shall be full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof. CPLR § 3101.

1. Examples:

a. The Fourth Department ruled that defendants were entitled to production of, or access to plaintiff's cell phone, because defendant satisfied threshold requirement demonstrating that request for disclosure was reasonably calculated to yield information that as material and necessary to issues involved in the action. Tousant v. Aragona, 208 A.D.3d 1044 (4th Dept. 2022).

C. Examples of Obstructive, Disparaging, Derogatory, or Adverse comments:

1. *"are you the court reporter?"; "what she is trying to ask is…"; "what she means is…"; "you're not my mother."; "call my mother"; "learn to ask a proper question"; "that's childish"; "are we done yet?"; "how much longer?"; "move on counsel…"; "only answer if you understand…" ; "objection, you can answer if you recall"*[3]*; "that question is confusing."; "why don't you ask these questions properly?"; "call the judge if you are upset"; "don't explain… it's a yes or no question."; "where are you going with this line of questioning?"; "what is the point of this question?"*
2. *"Objection. If you understand the question you can answer."; "only answer, If you recall"* – Courts have characterized statements and objections of this type as "suggestive" or "coaching", and have found them to be improper. [4]
3. Note: Do not get into a lengthy or heated argument with opposing counsel. A recent New York County Supreme Court decision teaches that the deposition is not the place to recite all rules applicable to deposition conduct or make hollow threats to call the Court. It also teaches that the rules apply to <u>all</u> counsel involved, not just the targeted attorney– <u>we can offer the case site it requested</u>.

D. Why are these comments problematic?

1. They can intimidate the attorney, throw the attorney off their train of thought, reduce morale, or intentionally/unintentionally antagonize the targeted attorney.
2. They may prevent an attorney from conducting a thorough deposition.
3. Interrupt the flow of deposition.
4. The conduct may affect the deponent's perspective of the questioning attorney, which may in turn result in the deponent becoming hostile, evasive, or uncooperative.
5. Certain impermissible or unnecessary comments may be suggestive and coach the deponent to answering in a way he/she feels his/her attorney instructed her to before the deposition.

E. You cannot prevent an attorney from being obstructive, but you can prepare yourself for what to do when you are faced with an issue.

F. If we are equipped to handle these issues in practice, civilly and professionally, this will help promote the advancement of women and young attorneys.

II. PRE-DEPOSITION PREPARATION

A. Know the Rules: The rules applicable to the manner in which depositions are to be conducted are addressed in the following rules:

1. New York State Uniform Rules for the Conduct of Depositions

a. 22 N.Y.C.R.R. § 221.1 - Objections at Depositions: Lawyers may only interpose "succinct" objections which would otherwise be waived if not asserted during the deposition.

> **(a)** ***Objections in general.*** No objections shall be made at a deposition except those which, pursuant to subdivision (b), (c) or (d) of Rule 3115 of the Civil Practice Law and Rules, would be waived if not interposed, and except in compliance with subdivision (e) of such rule. All objections made at a deposition shall be noted by the officer before whom the deposition is taken, and the answer shall be given, and the deposition shall proceed subject to the objections and to the right of a person to apply for appropriate relief pursuant to article 31 of the CPLR.
>
> **(b)** ***Speaking objections restricted.*** Every objection raised during a deposition shall be stated succinctly and framed so as not to suggest an answer to the deponent and, at the request of the questioning attorney, shall include a clear statement as to any defect in form or other basis of error or irregularity. Except to the extent permitted by CPLR Rule 3115 or by this rule, during the course of the examination persons in attendance shall not make statements or comments that interfere with the questioning.[5]

i. Example: The Westchester County Supreme Court held, "the proper procedure during the course of an examination before trial is to permit the witness to answer all questions posed, subject to objections pursuant to CPLR 3115 Sections (b), (c), and (d), unless a question is clearly violative of the witness's constitutional rights or

some privilege recognized in law, or is palpably irrelevant." See J.R. v. V.M., 81 Misc. 3d 1230 (A) (Westchester Cty., Sup. Ct. January 16, 2024). Only objections to form and the technical aspects of the deposition are waived if not timely raised at the deposition. Id.; CPLR §3115.

b. 22 N.Y.C.R.R. § 221.2 Refusal to answer when objection is made:

A deponent shall answer all questions at a deposition, except:
(a) to preserve a privilege or right of confidentiality;
(b) to enforce a limitation set forth in an order of a court; or
(c) when the question is plainly improper and would, if answered, cause significant prejudice to any person. An attorney shall not direct a deponent not to answer except as provided in CPLR Rule 3115 or this subdivision. Any refusal to answer or direction not to answer shall be accompanied by a succinct and clear statement of the basis therefor. If the deponent does not answer a question, the examining party shall have the right to complete the remainder of the deposition.

c. 222 N.Y.C.R.R. § 221.3 - Communication with the Deponent

An attorney shall not interrupt the deposition for the purpose of communicating with the deponent unless all parties consent or the communication is made for the purpose of determining whether the question should not be answered on the grounds set forth in section 221.2 of these rules and, in such event, the reason for the communication shall be stated for the record succinctly and clearly.

2. CPLR § 3115: Objections to qualification of person taking deposition; competency; questions and answers.

a) Objection when deposition offered in evidence. Subject to the other provisions of this rule, objection may be made at the trial or hearing to receiving in evidence any deposition or part thereof for any reason which would require the exclusion of the

evidence if the witness were then present and testifying.

(b) Errors which might be obviated if made known promptly. Errors and irregularities occurring at the oral examination in the manner of taking the deposition, in the form of the questions or answers, in the oath or affirmation, or in the conduct of persons, and errors of any kind which might be obviated or removed if objection were promptly presented, are waived unless reasonable objection thereto is made at the taking of the deposition.

(c) Disqualification of person taking deposition. Objection to the taking of a deposition because of disqualification of the person by whom it is to be taken is waived unless made before the taking of the deposition begins or as soon thereafter as the disqualification becomes known or could be discovered with reasonable diligence.

(d) Competency of witnesses or admissibility of testimony. Objections to the competency of a witness or to the admissibility of testimony are not waived by failure to make them before or during the taking of the deposition, unless the ground of the objection is one which might have been obviated or removed if objection had been made at that time.

(e) Form of written questions. Objections to the form of written questions are waived unless served in writing upon the party propounding the questions within the time allowed for serving succeeding questions or within three days after service.[6]

3. CPLR § 3113: Conduct of the Examination

a. CPLR § 3113(c): Examination and cross-examination of deponents shall proceed as permitted in the trial of actions in open court, except that a nonparty deponent's counsel may participate in the deposition and make objections on behalf of his or her client in the same manner as counsel for a party. When the deposition of a party is taken at the instance of an adverse party, the deponent may be cross-examined by his or her own attorney. Cross-examination need not be limited to the subject matter of the examination in chief.

i. This section prohibits the participation of the attorney for a nonparty witness during the deposition of his or her client.[7]

However, that the nonparty has the right to seek a protective order (see CPLR § 3103[a]), if necessary.

4. **CPLR § 3116(a) – Send Notice to Sign and Return Transcript**

5. **22 N.Y.C.R.R. § 202.20-b Limitations on Depositions:** (a) Unless otherwise stipulated to by the parties or ordered by the court: (1) the number of depositions taken by plaintiffs, or by defendants, or by third-party defendants, shall be limited to 10; and (2) depositions shall be limited to 7 hours per deponent.

   a. "7-Hour Rule" – Especially in cases involving multiple parties, before the deposition, confer with all counsel regarding how much time each party will need to question the deponent.
   b. **Subsection (f)** permits an application to alter the time limitations, upon a showing of good cause for the same. It is important to review the Part Rules for the Judge assigned to your case, and determine how such a request can be made.

6. **CPLR § 3126: Penalties for refusal to comply with order or to disclose**
7. **CPLR § 3124: Failure to Disclose; Motion to Compel Disclosure**

B. Meet and Confer

1. **Pick up the Phone!**
   a. Introduce yourself and learn about opposing counsel.

   b. Memorialize all telephone calls in writing, either by e-mail or formal letter.

   c. 22 N.Y.C.R.R. § 202.7(c) Affirmation of Good Faith and 22 N.Y.C.R.R. § 202.20-f- Disclosure Disputes:

   (a) To the maximum extent possible, discovery disputes should be resolved through informal procedures, such as conferences, as opposed to motion practice.

   (b) Absent exigent circumstances, prior to contacting the court regarding a disclosure dispute, counsel must first consult with one another in a good faith effort to resolve all disputes about disclosure. Such consultation must take place by an in-person or telephonic conference. In the event that a discovery dispute cannot be resolved other than through motion practice, each such discovery motion shall be

> supported by an affidavit or affirmation from counsel attesting to counsel having conducted an in-person or telephonic conference, setting forth the date and time of such conference, persons participating, and the length of time of the conference. The unreasonable failure or refusal of counsel to participate in a conference requested by another party may relieve the requesting party of the obligation to comply with this paragraph and may be addressed by the imposition of sanctions pursuant to Part 130. If the moving party was unable to conduct a conference due to the unreasonable failure or refusal of an adverse party to participate, then such moving party shall, in an affidavit or affirmation, detail the efforts made by the moving party to obtain such a conference and set forth the responses received.
>
> (c) The failure of counsel to comply with this rule may result in the denial of a discovery motion, without prejudice to renewal once the provisions of this rule have been complied with, or in such motion being held in abeyance until the informal resolution procedures of the court are conducted.

2. **The Deposition Notice**
   - **a.** Does Plaintiff's deposition notice include a demand for video-taped deposition? If so, Cross-Notice for Video Deposition. Evaluate whether there is a reason to object to the Video-Taped Deposition.
   - **b. 22 N.Y.C.R.R. § 202.15: Videotape Recording of Civil Depositions.- (see attached)**[8]
     - i. See Sample Notice of Videotape Deposition attached.
   - **c. CPLR § 3106: Priority of Depositions** (see attached)– In the Order they were noticed - "Under CPLR 3106(a), as a general rule, in the absence of special circumstances, priority of [deposition] examination belongs to the defendant if a notice is served within the time to answer; otherwise, priority belongs to the party who first serves a notice of examination." See Serio v Rhulen, 29 A.D.3d 1195, 1196 (3d Dept. 2006)
3. **CPLR § 3110: Location of Depositions** (see attached)

4. **Request for a Virtual Deposition – CPLR § 3113(d):** The parties may stipulate that a deposition be taken by remote or electronic means.
    a. "The CPLR contemplates that depositions will be held in person and remote depositions may be held upon stipulation of the parties (CPLR 3113 [d]). Notwithstanding the provisions of CPLR 3113, there is no bright-line rule that precludes a court from requiring the parties to conduct remote depositions over the objection of one party. The court may at any time on its own initiative, or on motion of any party make a protective order denying, limiting, conditioning or regulating the use of any disclosure device" (CPLR 3103 [a]). When a court is called upon to determine whether remote depositions shall be held in lieu of in-person depositions, the standard to be applied is whether a party demonstrates that conducting his or her deposition in-person would cause undue hardship." V.M. v M.M., 74 Misc. 3d 1205(A) (Sup Ct 2022); see Yu Hui Chen v Chen Li Zhi, 81 A.D.3d 818, 818 (2d Dept 2011).

5. **"7-Hour Rule": 22 N.Y.C.R.R. § 202.20-b Limitations on Depositions**

C. **Study –** Carefully review all pleadings and bill of particulars and prepare an outline for your deposition to help keep yourself on Track. This does not have to be a script.

1. Yes, many times, Bill of Particulars are boilerplate, BUT read each line very carefully. The allegations will help you structure your outline for your deposition.

2. **New York Pattern Jury Instructions (PJI)**
    a. Study the PJI applicable to the claims and defenses in your case. This will help you outline the key questions to ask.

D. **Discovery and Exhibits:** Make sure you have received and exchanged all documents or photographs/video you need and intend on showing before your deposition. (For Virtual Depositions, discuss screen share with all counsel before the deposition)

1. **CPLR § 3101(i):** In addition to any other matter which may be subject to disclosure, there shall be full disclosure of any films, photographs, video tapes or audio tapes, including transcripts or memoranda thereof, involving a person referred to in paragraph one of subdivision (a) of this section. There shall be disclosure of all portions of such material, including outtakes, rather than only those portions a party intends to use. The provisions of this subdivision shall not apply to materials compiled for law enforcement purposes which are exempt from disclosure under section eighty-seven of the public officer's law. CPLR § 3101.

2. **Historical Street View Imagery provided by Google** [9]

a. Example: In Ryabaya v. City of New York, the Second Department held that the Supreme Court properly took judicial notice of the Google Maps images from August 2013, which showed that a defect indicated on the Big Apple map from 2004 had been remedied by August 2013. Ryabaya v City of New York, 220 AD3d 903, 904 (2d Dept 2023).

b. **CPLR § 4532-b**: An image, map, location, distance, calculation, or other information taken from a web mapping service, a global satellite imaging site, or an internet mapping tool, is admissible in evidence if such image, map, location, distance, calculation, or other information indicates the date such material was created and subject to a challenge that the image, map, location, distance, calculation, or other information taken from a web mapping service, a global satellite imaging site, or an internet mapping tool does not fairly and accurately portray that which it is being offered to prove. A party intending to offer such image or information in evidence at a trial or hearing shall, at least thirty days before the trial or hearing, give notice of such intent, providing a copy or specifying the internet address at which such image or information may be inspected. No later than ten days before the trial or hearing, or later for good cause shown, a party upon whom such notice is served may object to the request to admit into evidence such image or information, stating the grounds for the objection. Unless objection is made pursuant to this subdivision, the court shall take judicial notice and admit into evidence such image, map, location, distance, calculation or other information. CPLR § 4532-b.

3. Relevant Medical Records

a. Disclosure of all medical records which are "material and necessary to the defense pursuant to CPLR § 3101(a), inasmuch as they may contain information reasonably calculated to lead to relevant evidence". [10]

b. Pre-Accident, related injuries: Make efforts to obtain all pre-accident, medical records which are material and necessary to the defense before the deposition.

i. Example Questions: Mr. Smith, my review of your medical records indicated you were involved in a trip and fall accident on or around March 15, 2020, can you please tell me where this occurred?; What part of your body did you injure?...

ii. "A plaintiff who commences a personal injury action has waived the physician-patient privilege to the extent that his physical or mental condition is affirmatively placed in controversy."

Zbigniewicz v Sebzda, 58 Misc. 3d 1217(A) (Erie County, Sup. Ct. 2018) [11]; Bozek v. Derkatz, 55 A.D.3d 1311, 1312 (4th Dept. 2008); see also, Wachtman v. Trocaire College, 143 A.D.2d 527, 528 (4th Dept. 1988) ("Waiver almost invariably occurs in personal injury actions since the proof in such cases includes the nature and extent of a plaintiff's injuries").

4. Prior Litigation History
5. Prior deposition testimony

E. Know your Judge

1. Read the Part Rules – https://www.nycourts.gov/
   a. Example:https://ww2.nycourts.gov/courts/11jd/supreme/civilterm/civil_partrules.shtml

III. DURING THE DEPOSITION

A. Virtual Depositions – The same rules apply.

1. Memorialize the Environment on the Record
2. The deponent and her counsel must be visible on screen.
3. Make sure everyone present is in view of their own computers/tablets cameras.
4. Find out what documents, records, photographs the Deponent has in front of them or on their screen. Note it for the record. Request that all phones be turned off and any documents be put away.
5. If Deponent and his/her counsel are in the same room, both must be in view.
6. Ask the deponent if he/she is alone in the room. No one else should be present.
7. Derivative Claim of Spouse – is spouse allowed to be there? Need to show unusual circumstance to compel necessity of exclusion of the plaintiffs at each other's depositions. CPLR 3113(c) establishes a party's right to be present at an examination before trial. Powell v Cox, 26 Misc 3d 1240(A) (Sup Ct 2010); *see,* Lunney v. Graham, 91 A.D.2d 592 (1st Dept. 1982); Perez v. Time Moving & Storage, 28 A.D.3d 326 (1st Dept. 2006).

B. Marking an Exhibit on Zoom

1. If you use a different platform, make sure you know how to exhibits can be marked beforehand. A lot of times the court reporting company will have someone available to answer your questions.
2. https://support.zoom.com/hc/en/article?id=zm_kb&sysparm_article=KB0067931
3. Make sure deponent can view her marking and confirm whether the marking "fairly and accurately" depicts the location of the fall.
4. If Exhibits were pre-marked before a deposition, ask the deponent who made the marking, when it was made, whether it was made under anyone's direction, the basis for the marking, and what the marking represents.

C. A Request to "Go off the Record" Must be on Consent – if the parties do not consent to go off the Record, the Court reporter must continue to transcribe.

1. Example: "Let's go off the record". → First, this must be a request. Second, all parties must consent. If not, stay on the record.
2. Memorialize: "Let the Record reflect, Counsel has requested to go off the record, without consent. We are still on the record."
3. Artfully memorialize lengthy breaks or interruptions – "We're back from a 15 minute break"; "we are reconvening after Plaintiff had an opportunity to communicate with his attorney"… Make sure the record reflects how long breaks were and memorialize everything that is happening in the room.
4. Often times, counsel will consciously or subconsciously assist their client in answering the question – this could take the form of a tap on the shoulder (which could suggest the deponent to stop talking).
5. Verbalize all the physical gestures on the record.
6. Example: "Mr. Smith, I know your attorney is here, but your attorney cannot assist you in answering questions. Please refrain from consulting your attorney to answer questions."

D. Objections During Depositions

1. **Form**
2. **Privilege**
3. **"Palpably Improper"**

    a. Palpably improper questions include those that seek legal conclusions or are otherwise related to a party's understanding of his or her legal contentions, and Courts have refused to compel further deposition of the Deponent based upon these grounds.[12]

        i. Example: In a Labor Law matter, ladder fall, Plaintiff was found to have properly refused to answer the question whether defendant supplied "any defective, unsafe or improper devices or materials which caused [plaintiff's] fall" or whether the work area appeared "to be unreasonably dangerous". The Fourth Department Appellate Division in Mayer held that these questions seek legal and factual conclusions, and were seeking the Plaintiff to draw inferences from the facts. Mayer v Hoang, 83 AD3d 1516, 1518 (4th Dept 2011). However, in this same case, the Appellate Division affirmed the lower court's granting defendant's motion seeking to require plaintiff to answer the question whether "he ever made a claim for bodily injury following a motor vehicle accident in June of 2007". Id. Plaintiff alleged, as a result of the ladder fall, he injured his back, hip, groin, pelvis, and elbow, areas that are commonly injured in motor vehicle accidents, and thus the question was reasonably calculated to lead to evidence that is "material and necessary" to the defense of the action. Id.; CPLR § 3101(a).

        ii. Example: J.R. v V.M., 81 Misc 3d 1230(A) [Sup Ct 2024] "there are no precise parameters for what constitutes 'plainly improper or 'palpably improper" questioning causing 'significant prejudice'." Id. The Courts have established certain boundaries such as:

            1) Questions seeking a conclusion of fact or law or an argumentative matter are not permitted at an examination before trial.
            2) Questions largely related to a party's understanding of his or her ultimate legal contentions are palpably improper
            3) A party witness may not be compelled to answer questions seeking legal or factual conclusions or questions asking the witness to draw inferences from the facts. Id.

iii. Reptile Tactics

i. Lay witnesses cannot answer questions that are not fact-based on their personal knowledge – object to questions that seek to establish safety rules and whether defendant failed to comply with safety rules
ii. Note the objection on the record. The line of questioning could be used on prospective motion in limine.
iii. Ex: Do you think the safety rules were followed? He's not answering that on the grounds that the question is palpably improper, he is here as a fact witness, not expert witness.

4. **What's Not Included:**

a. Speaking objections

b. "Relevance"

c. "Hearsay" – hearsay objections cannot be asserted at a deposition and are not waived if not interposed during a deposition.[13]

d. "misleading"

e. "asked and answered"

f. "speculation"

E. Competency Questions

1. Example: Ask competency questions in your introduction. "Good morning Ms. Smith, before we begin, I would like to ask you a few preliminary questions. …Ms. Smith, have you taken any drugs or alcohol in the last 24 hours which will affect your ability to testify today?"

F. Don't Let Obstructive Conduct Prevent you from Asking Questions About All the Material and Necessary Facts

1. Constructive Notice: Color, size, shape, dimensions, and any other distinguishing facts of the alleged hazardous condition.

2. Sole Proximate Cause: How many times did you traverse the area before the accident?; Did you see the condition the first time?; Did you see it the second time?; what if anything did you do to avoid it the first time?; did you take the same steps to avoid it before your accident?; did the condition change over the times you traversed the area?; How?; Describe in detail?

a. Sole proximate cause in the Labor Law § 240(1) context. See Verdugo v. Fox Bldg. Group, 218 A.D.3d 1179 (4th Dept. 2023) (attached)

3. Medical History: discussed above. Ask about every symptom plaintiff feels was a result of the alleged accident.

a. In Mayer, the Fourth Department Appellate Division affirmed the lower court's granting defendant's motion seeking to require plaintiff to answer the question whether "he ever made a claim for bodily injury following a motor vehicle accident in June of 2007". Mayer v Hoang, 83 AD3d 1516, 1518 (4th Dept 2011). Plaintiff alleged, as a result of the ladder fall, he injured his back, hip, groin, pelvis, and elbow, areas that are commonly injured in motor vehicle accidents, and thus the question was reasonably calculated to lead to evidence that is "material and necessary" to the defense of the action. Id.; CPLR § 3101(a).

4. Prior Criminal History: Can you ask the Question? What are the limits?
   a. Example: Cushion the question – I will start by asking you a few questions regarding your background….Current Meds, Education, Employment History, "have you ever been convicted of a crime?".

5. Don't be afraid to ask questions to which you feel you may receive an unfavorable response.

6. Providing a Social Security number "is reasonably calculated to lead to admissible evidence", and therefore satisfies the relevance standard in CPLR 3101(rea), even where plaintiff was not seeking lost earnings (*Pedraza*, 2016 WL 270825, at *9). A plaintiff's "Social Security number is useful, for example, in searching for his or her medical records and determining the amount of his or her Medicaid lien" (*Id.*). Moreover, in defending the action, Defendants are entitled to conduct an investigation into any of Zbigniewicz' prior claims or injuries, medical treatment, and criminal history, all of which implicates the use of his Social Security number. Zbigniewicz v Sebzda, 58 Misc 3d 1217(A) [Sup Ct 2018]

G. When every answer is "I don't recall", follow up with Questions, such as: "I want to be clear is it that you do not know the answer or you do not remember?", Q: "If you do not remember, is there anything, such as a document or photograph, which may help refresh your recollection?".

1. This will help rebut any effort to supplement or change this testimony on motion practice via a supplemental affidavit or at trial.

2. Legal argument: Plaintiff's affidavit contradicts her prior sworn testimony and creates only a feigned issue of fact, and is insufficient to defeat a properly supported motion for summary judgment. Amaya v. Denihan Ownership Co., LLC, 30 A.D.3d 327 (1st Dept. 2006). A party's affidavit that contradicts her own prior sworn testimony creates only a feigned issue of fact, and is insufficient to defeat a properly supported motion for summary judgment. Id.; Andrews v. Porreca, 227 A.D.2d 940 (4th Dept. 1996); Harty v. Lenci, 294 A.D.2d 296 (1st Dept. 2002); Phillips v. Bronx Lebanon Hosp., 268 A.D.2d 318, 320 (1st Dept. 2000).

H. Lay the Foundation

1. Lay the foundation for all exhibits you intend to produce at trial.

2. Business Records – "records kept in the normal course of business"

3. Photographs – "fair and accurate representation"

I. Do Not Feel Pressure to Enter into Stipulations on the Record. Be Careful. If you do, memorialize it in writing Post-Deposition –

1. Example: Absent a showing of sufficient grounds for vacatur, on-the-record oral stipulations are binding and strictly enforceable. (See Shoretz v Shoretz, 186 AD2d 370, 372 (1st Dept 1992). Despite being unsigned, the deposition transcripts submitted in support of the motion are admissible because certified by the reporter and plaintiff does not challenge its accuracy. Tsai Chung Chao v Chao, 161 AD3d 564, 564 (1st Dept 2018); accord Sass v TMT Restoration Consultants Ltd., 100 AD3d 443, 443 (1st Dept 2012); Bennett v Berger, 283 AD2d 374, 375 (1st Dept 2001). Plaintiff also implicitly ratified the stipulation by failing to make any formal objections to it in over five months. See Friedman v Garey, 8 AD3d 129, 129 (1st Dept 2004); Broadmass Assoc, v McDonald's Corp., 286 AD2d 409, 410 (2d Dept 2001).
2. Example: Finally, there are no sufficient grounds to invalidate the stipulation. The medical report to which plaintiff refers (Progress Note - Exhibit I) indicates that information regarding the back and neck injuries was available to plaintiff much sooner than he represents in his motion. The Progress Note shows that plaintiff's initial visit was on September 19, 2016, and that a follow-up took place on October 12, 2016 - over a year before the deposition in which plaintiff's lawyer waived the claim for the neck and back injuries. Plaintiff had plenty of time to assess these documents and evaluate whether the claim should be waived. Plaintiff has not moved to vacate the stipulation or established sufficient cause for the stipulation to be set aside. Plaintiff's motion for leave to amend his bill of particulars is denied. Morocho v The 740 Corp., 2018 N.Y. Slip Op. 32511[U], 5 (N.Y. Sup Ct, New York County 2018)

J. Cross-Examining of your own client

K. Remedies during the deposition (Note: Do not get into a lengthy debate on the record. If an argument gets heated, end it, especially because the witness is likely going to gather that his/her attorney does not want him/her to answer the question. If it seems the attorney continues to make speaking objections, pause the questioning, stay on the record, and call the Judge to have a ruling made on the record.)

1. **If possible, try moving forward, and do not let obstructions throw you off track**
2. **Meet and Confer** – attempt to resolve the issue, off the record, and outside the presence of the deponent. This way, if you cannot reach an agreement,

when you call the Judge or make a motion in the future, you can now include your good faith efforts in your affirmation or representations to the Court. Memorialize efforts on the record. (Example: Counsel, are you instructing your client not to answer? Counsel has instructed his client to not answer the question, we went off the record to confer on the issue, and there is no change in Counsel's position. I will mark this question for a ruling and reserve our right to move to compel a response.)

3. **Call the Judge requesting a ruling** (see sample on Power Point slide)
4. **"Mark it for a ruling"**
5. **End it.**
    a. If the obstructions get to a point where your client will now be prejudiced because of the obstruction and delay, adjourn the deposition and seek court intervention. Memorialize what occurred in writing.

IV. POST-DEPOSITION REMEDIAL OPTIONS

A. Post-Deposition Discovery Demands – Serve them right away.

1. Relevant Medical Records, psych records
2. The last known address and phone number for any fact witness (to the alleged incident and to the alleged damages)

B. Motion to Compel a Further Deposition and Compel Responses to Deposition Questions

1. Move to compel a further deposition and responsive testimony, requiring the deponent to answer questions which he/she previously refused to answer pursuant to CPLR § 3101(a), CPLR § 3124, CPLR § 3126, and 22 N.Y.C.R.R. § 221; see Mayer, 83 A.D.3d 1516. [14]

C. Motion to Preclude

1. **CPLR § 3103 (a): Protective Orders**

D. Request a Conference with your Judge

E. Serve a Notice for Videotaped and/or Supervised Deposition by a Referee (CPLR § 3104: Supervision of Disclosure)

1. Example: The decision to appoint a referee pursuant to CPLR § 3104 "is a matter within the discretion of the trial court and is especially appropriate where, a party may be hostile or otherwise frustrate discovery. See Laddcap Value Partners, LP v Lowenstein Sandler P.C., 18 Misc 3d 1130(A) [Sup Ct 2007]; Kogan v. Royal Indem. Co., 179 A.D.2d 399 (1st Dept. 1992).

F. Sanctions for Violations of 22 N.Y.C.R.R.§ 221

1. **Section 130-1.1 *et seq.*[15]**
2. We have made tremendous progress – these instances are fewer because of the progress we have made.
3. It is important for all lawyers to be prepared, thorough, and knowledgeable for depositions – to continue advancement for all attorneys !!

G. Rules of Professional Conduct

1. **Rule 8.4**
2. **Rule 3.3**
3. **Rule 3.4**

CONCLUSION

- Do not give up! Continue educating yourself on the law and stay up to date
- Stand up for yourself
- Consult your support network
- Surround yourself with positive energy and support
- Join your local Women's Bar Chapter and participate in as many events as you can. Network with one another.
- Mental health awareness: Take breaks, go for a walk, exercise, stay hydrated, eat healthy, and take deep breaths

[1] St. Cloux v Park S. Tenants Corp., 52 Misc 3d 1222(A) (Sup Ct 2016)

[2] Orner v Mount Sinai Hosp., 305 A.D.2d 307 (1st Dept 2003) (Holding, Evidentiary scope of an examination before trial is at least as broad as that applicable at the trial itself; consequently, when faced with objections at a deposition, the proper procedure is to permit the witness to answer all questions subject

to objections in accordance with rule governing objections during depositions); St. Cloux v Park S. Tenants Corp., 52 Misc 3d 1222(A) (Sup Ct 2016) quoting White v. Martins, 100 A.D.2d 805, 805, 474 N.Y.S.2d 733 (1st Dept 1984; Dibble v Consol. Rail Corp., 181 AD2d 1040, 1040 (4th Dept 1992) (The Fourth Department Appellate Division held that plaintiff was properly directed to respond to all questions he had previously refused to answer at the examination before trial. Plaintiff was also properly directed to identify everyone who treated him for any back or leg condition, and to provide defendant and third-party defendant with medical authorizations to allow them to obtain all medical records relating to any injuries or disease to various parts of his body, as plaintiff's bill of particulars contained claims of multiple trauma, contusions, and abrasions to his body and limbs. The Court held, any prior injuries to plaintiff's back and leg were relevant and material to trial preparation pursuant to CPLR § 3101(a)).

[3] Freidman v. Fayenson, 2013 WL 6392248 (Sup. Ct., New York Co. 2013), *aff'd sub nom*. Freidman v. Yakov, 138 A.D.3d 554, 30 N.Y.S.3d 58 (1st Dep't 2016) (The Court held that the deponent's attorney committed multiple violations of Uniform Rules 22.1.1 and 221.3, stating "Objection. If you understand the question you can answer.", "If you recall".)

[4] Id.; see also City of New York v. Coastal Oil NY, Inc., 2000 WL 97247, at * 2 (S.D.N.Y. Jan. 27, 2000) (finding objections which had the appearance of coaching the witness by continually reminding the witness by stating "if you know" or "if you remember" were improper).

[5] 22 N.Y.C.R.R. § 221.1

[6] CPLR § 3115

[7] Sciara v Surgical Assoc. of W. New York, P.C., 104 A.D.3d 1256, 1257 (4th Dept 2013)

[8] 22 N.Y.C.R.R. § 202.15 (see attached)

[9] See Nunez v. Salvation Army, 2020 WL 7075525 (Sup. Ct., Orange County September 1, 2020) (decision attached)

[10] See Milligan v. Bifulco, 153 A.D.3d 1624 (4th Dept. 2017) (Holding, that, based on the broad and all-encompassing allegations of physical injury, the records sought from plaintiff's health insurance carriers are " 'material and necessary' to the defense of this action (CPLR 3101 [a]), inasmuch as they may contain information 'reasonably calculated to lead to relevant evidence' "; see also Goetchius v. Spavento, 84 A.D.3d 1712, 1713 (4th Dept. 2011).

[11] Zbigniewicz v Sebzda, 58 Misc 3d 1217(A) (Sup Ct 2018) - In Zbigniewicz, the plaintiff alleged various injuries, including sprain of the cervical spine, TBI, post-concussion syndrome,… accompanied by tearing, irritation, and injury to the discs, tendons, ligaments, muscles, blood vessels, cartilages, nerves, and soft tissues of said areas, and affected the blood supply of said areas, and were accompanied by pain and suffering; limitation of motion; causation, precipitation and activation of traumatically induced degenerative changes/arthritis in the appropriate areas above which are causally related to the ... [MVA] Id. The plaintiff expanded on these claims and added several additional injuries during his deposition, including migraine headaches, ringing in ears, hard to swallow, pain generating from neck to arms, numbness in fingers, stabbing in the lower back, pain in the middle of shoulder blades, loss of bladder,… "and might as well say depression because I'm totally depressed with the whole situation." Id. The Erie

County Supreme Court held that each question which plaintiff was instructed not to answer directly relates to plaintiff's claims, or is otherwise reasonably calculated to lead to discoverable evidence.

[12] Id.; Barber v BPS Venture, Inc., 31 A.D.3d 897 (3d Dept 2006) (The Court found that a review of the entire deposition transcript reveals that defense counsel freely permitted the witness to answer any and all fact-based questions relating to his knowledge of the condition of the premises on the day in question. The questions which counsel refused to permit the witness to answer largely related to his understanding of the parties' ultimate legal contentions and were thus palpably improper.); see Lobdell v. S. Buffalo Ry., 159 A.D.2d 958 (4th Dept. 1990) Palpably improper questions include those that seek legal conclusions or are otherwise related to a party's understanding of his or her legal contentions.

[13] Watson v Peschel, 188 AD3d 1693 (4th Dept 2020) (Plaintiff motorist's submission of driver's deposition transcript did not prevent application of the rule precluding the use of hearsay alone to defeat a summary judgment motion in summary judgment proceedings in plaintiff motorist's personal injury action arising out of motor vehicle collision; driver's deposition transcript contained inadmissible hearsay, plaintiff motorist's submission of transcript did not indicate that he was adopting driver's statements as not hearsay, and hearsay objections could not be asserted at a deposition and therefore were not waived if not interposed.); N.Y. CPLR § 3115; 22 N.Y.C.R.R. § 221.1

[14] Mayer v Hoang, 83 A.D.3d 1516, 1518 (4th Dept. 2011); Zbigniewicz v Sebzda, 58 Misc 3d 1217(A) [Sup Ct 2018] The court ordered that the parties' respective counsel shall confer and agree upon a date for the follow-up deposition and, thereafter, contact the Law Clerk to facilitate the scheduling of the deposition in the Court's jury deliberation room.

[15] Id.

22 NYCRR 202.15

Section 202.15. Videotape recording of civil depositions

Currentness

(a) *When permitted.* Depositions authorized under the provisions of the Civil Practice Law and Rules or other law may be taken, as permitted by section 3113(b) of the Civil Practice Law and Rules, by means of simultaneous audio and visual electronic recording, provided such recording is made in conformity with this section.

(b) *Other rules applicable.* Except as otherwise provided in this section, or where the nature of videotaped recording makes compliance impossible or unnecessary, all rules generally applicable to examinations before trial shall apply to videotaped recording of depositions.

(c) *Notice of taking deposition.* Every notice or subpoena for the taking of a videotaped deposition shall state that it is to be videotaped and the name and address of the videotape operator and of the operator's employer, if any. The operator may be an employee of the attorney taking the deposition. Where an application for an order to take a videotaped deposition is made, the application and order shall contain the same information.

(d) *Conduct of the examination.*

(1) The deposition shall begin by one of the attorneys or the operator stating on camera:

(i) the operator's name and address;

(ii) the name and address of the operator's employer;

(iii) the date, the time and place of the deposition; and

(iv) the party on whose behalf the deposition is being taken.

The officer before whom the deposition is taken shall be a person authorized by statute and shall identify himself or herself and swear the witness on camera. If the deposition requires the use of more than one tape, the end of each tape and the beginning of each succeeding tape shall be announced by the operator.

(2) Every videotaped deposition shall be timed by means of a time-date generator which shall permanently record hours, minutes and seconds. Each time the videotape is stopped and resumed, such times shall be orally announced on the tape.

(3) More than one camera may be used, either in sequence or simultaneously.

(4) At the conclusion of the deposition, a statement shall be made on camera that the recording is completed. As soon as practicable thereafter, the videotape shall be shown to the witness for examination, unless such showing and examination are waived by the witness and the parties.

(5) Technical data, such as recording speeds and other information needed to replay or copy the tape, shall be included on copies of the videotaped deposition.

(e) *Copies and transcription.* The parties may make audio copies of the deposition and thereafter may purchase additional audio and audio-visual copies. A party may arrange to have a stenographic transcription made of the deposition at his or her own expense.

(f) *Certification.* The officer before whom the videotape deposition is taken shall cause to be attached to the original videotape recording a certification that the witness was fully sworn or affirmed by the officer and that the videotape recording is a true record of the testimony given by the witness. If the witness has not waived the right to a showing and examination of the videotape deposition, the witness shall also sign the certification in accordance with the provisions of section 3116 of the Civil Practice Law and Rules.

(g) *Filing and objections.*

(1) If no objections have been made by any of the parties during the course of the deposition, the videotape deposition may be filed by the proponent with the clerk of the trial court and shall be filed upon the request of any party.

(2) If objections have been made by any of the parties during the course of the deposition, the videotape deposition, with the certification, shall be submitted to the court upon the request of any of the parties within 10 days after its recording, or within such other period as the parties may stipulate, or as soon thereafter as the objections may be heard by the court, for the purpose of obtaining rulings on the objections. An audio copy of the sound track may be submitted in lieu of the videotape for this purpose, as the court may prefer. The court may view such portions of the videotape recording as it deems pertinent to the objections made, or may listen to an audiotape recording. The court, in its discretion, may also require submission of a stenographic transcript of the portion of the deposition to which objection is made, and may read such transcript in lieu of reviewing the videotape or audio copy.

(3)

(i) The court shall rule on the objections prior to the date set for trial and shall return the recording to the proponent of the videotape with notice to the parties of its rulings and of its instructions as to editing. The editing shall reflect the rulings of the court and shall remove all references to the objections. The proponent, after causing the videotape to

be edited in accordance with the court's instructions, may cause both the original videotape recording and the deleted version of the recording, clearly identified, to be filed with the clerk of the trial court, and shall do so at the request of any party. Before such filing, the proponent shall permit the other party to view the edited videotape.

(ii) The court may, in respect to objectionable material, instead of ordering its deletion, permit such material to be clearly marked so that the audio recording may be suppressed by the operator during the objectionable portion when the videotape is presented at the trial. In such case the proponent may cause both the original videotape recording and a marked version of that recording, each clearly identified, to be filed with the clerk of the trial court, and shall do so at the request of any party.

(h) *Custody of tape.* When the tape is filed with the clerk of the court, the clerk shall give an appropriate receipt for the tape and shall provide secure and adequate facilities for the storage of videotape recordings.

(i) *Use at trial.* The use of videotape recordings of depositions at the trial shall be governed by the provisions of the Civil Practice Law and Rules and all other relevant statutes, court rules and decisional law relating to depositions and relating to the admissibility of evidence. The proponent of the videotaped deposition shall have the responsibility of providing whatever equipment and personnel may be necessary for presenting such videotape deposition.

(j) *Applicability to audio taping of depositions.* Except where clearly inapplicable because of the lack of a video portion, these rules are equally applicable to the taking of depositions by audio recording alone. However, in the case of the taking of a deposition upon notice by audio recording alone, any party, at least five days before the date noticed for taking the deposition, may apply to the court for an order establishing additional or alternate procedures for the taking of such audio deposition, and upon the making of the application, the deposition may be taken only in accordance with the court order.

(k) *Cost.* The cost of videotaping or audio recording shall be borne by the party who served the notice for the videotaped or audio recording of the deposition, and such cost shall be a taxable disbursement in the action unless the court in its discretion orders otherwise in the interest of justice.

(l) *Transcription for appeal.* On appeal, visual and audio depositions shall be transcribed in the same manner as other testimony and transcripts filed in the appellate court. The visual and audio depositions shall remain part of the original record in the case and shall be transmitted therewith. In lieu of the transcribed deposition and, on leave of the appellate court, a party may request a viewing of portions of the visual deposition by the appellate court but, in such case, a transcript of pertinent portions of the deposition shall be filed as required by the court.

Credits

Sec. filed Jan. 9, 1986 eff. Jan. 6, 1986.

Current with amendments included in the New York State Register, Volume XLVI, Issue 15, dated April 10, 2024. Some sections may be more current, see credits for details.

N.Y. Comp. Codes R. & Regs. tit. 22, § 202.15, 22 NY ADC 202.15

End of Document

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF _____
----------X
XXXXXXX,

Plaintiff,

-against-

XXXXXXXXXXXX

Defendants.
----------X

NOTICE OF VIDEOTAPED DEPOSITION

Index No. _____

PLEASE TAKE NOTICE that, pursuant to Article 31 of the Civil Practice Law and Rules, the testimony upon oral examination of Plaintiff _____, will be taken before a notary public who is not affiliated with any of the parties or their attorneys, on ___(DATE)___, or any further agreed upon date. This deposition will be videotape recorded by an employee of Veritext Legal Solutions, Pursuant to Section 202.15 of the Uniform Civil Rules for the Supreme Court.

The said deposition will involve all of the relevant facts and circumstances in connection with the incident referred to in the Complaint, including negligence, contributory negligence, liability and damages.

The said person to be examined is required to produce at such examination all books, records and documents put in issue by the pleadings herein and/or which will be or have been used to refresh the recollection of the witnesses herein including, but not limited to, any and all verification of lost wage claims, income tax returns where party is self-employed, medical bills, medical reports, hospital bills, hospital records and accident reports.

Dated: Syracuse, New York
June 2, 2024

FIRM

_____
Name
Client
Address

TO:

(All Parties)

McKinney's Consolidated Laws of New York Annotated
Civil Practice Law and Rules (Refs & Annos)
Chapter Eight. Of the Consolidated Laws
Article 31. Disclosure (Refs & Annos)

McKinney's CPLR Rule 3106

Rule 3106. Priority of depositions; witnesses; prisoners; designation of deponent

Currentness

(a) Normal priority. After an action is commenced, any party may take the testimony of any person by deposition upon oral or written questions. Leave of the court, granted on motion, shall be obtained if notice of the taking of the deposition of a party is served by the plaintiff before that party's time for serving a responsive pleading has expired.

(b) Witnesses. Where the person to be examined is not a party or a person who at the time of taking the deposition is an officer, director, member or employee of a party, he shall be served with a subpoena. Unless the court orders otherwise, on motion with or without notice, such subpoena shall be served at least twenty days before the examination. Where a motion for a protective order against such an examination is made, the witness shall be notified by the moving party that the examination is stayed.

(c) Prisoners. The deposition of a person confined under legal process may be taken only by leave of the court.

(d) Designation of deponent. A party desiring to take the deposition of a particular officer, director, member or employee of a person shall include in the notice or subpoena served upon such person the identity, description or title of such individual. Such person shall produce the individual so designated unless they shall have, no later than ten days prior to the scheduled deposition, notified the requesting party that another individual would instead be produced and the identity, description or title of such individual is specified. If timely notification has been so given, such other individual shall instead be produced.

Credits
(L.1962, c. 308. Amended L.1984, c. 294, § 4; L.1985, c. 327, § 1.)

Editors' Notes

SUPPLEMENTARY PRACTICE COMMENTARIES

by Professor Patrick M. Connors

2023

Subdivision (a)

C3106:1 Priority in Taking Depositions.
Court Denies Defendants' Motion Seeking to Preserve Priority in Deposing Nonparty

McKinney's Consolidated Laws of New York Annotated
Civil Practice Law and Rules (Refs & Annos)
Chapter Eight. Of the Consolidated Laws
Article 31. Disclosure (Refs & Annos)

McKinney's CPLR Rule 3110

Rule 3110. Where the deposition is to be taken within the state

Currentness

A deposition within the state on notice shall be taken:

1. when the person to be examined is a party or an officer, director, member or employee of a party, within the county in which he resides or has an office for the regular transaction of business in person or where the action is pending; or

2. when any other person to be examined is a resident, within the county in which he resides, is regularly employed or has an office for the regular transaction of business in person, or if he is not a resident, within the county in which he is served, is regularly employed or has an office for the regular transaction of business in person; or

3. when the party to be examined is a public corporation or any officer, agent or employee thereof, within the county in which the action is pending; the place of such examination shall be the office of any of the attorneys for such a public corporation or any officer, agent or authorized employee thereof unless the parties stipulate otherwise.

For the purpose of this rule New York city shall be considered one county.

Credits
(L.1962, c. 308. Amended L.1994, c. 603, § 1.)

Editors' Notes

SUPPLEMENTARY PRACTICE COMMENTARIES

by Professor Patrick M. Connors

2020

C3110:6 Change of Disclosure Venue.

Courts Order Parties to Conduct Video Depositions During COVID-19 Disaster Emergency

As we note in the main Practice Commentaries, when the appropriate showing is made, CPLR 3103 is available to change the appropriate venue of a deposition under CPLR 3110. During the COVID-19 Disaster Emergency, several courts have issued rulings requiring parties to appear for virtual depositions over objections. These decisions

2020 WL 7075525 (N.Y.Sup.) (Trial Order)
Supreme Court of New York.
Orange County

Aurea NUNEZ, Plaintiff,
v.
Salvation ARMY, Defendant.

No. EF004912-2017.
September 1, 2020.

Decision and Order

Sobo & Sobo, LLP, Office & P.O. Address, One Dolson Ave, Middletown, New York 10940, Attorney for the Plaintiff.

French & Casey, LLP, Office & P.O. Address, 29 Broadway, 27th Floor, New York, New York 10006, Attorney for Defendant Salvation Army.

Robert A. Onofry, Judge.

***1** To commence the statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

Motion Date: July 29, 2020, #2

The following papers numbered 1 to 10 were read and considered on a motion by the Defendant, pursuant to CPLR § 3212, for summary judgment dismissing the complaint.

Notice of Motion- Kapoor Affirmation- Exhibits A-Q- Gonzalez Affidavit- Fraser Affidavit-Fordham Affidavit- Memorandum of Law	1-7
Opposition- Del Duco Affirmation- Exhibit 1	8-9
Affirmation in Opposition- Stamatelatos	10

Upon the foregoing papers, it is hereby,

ORDERED, that the motion is granted.

Introduction

On February 10, 2016, the Plaintiff Aurea Nunez was allegedly injured when she tripped and fell on the sidewalk/entrance to a store operated by the Defendant Salvation Army located at 280 Route 211 East, in Middletown, New York. The Plaintiff alleges, *inter alia,* that there was a hole in the area that was subsequently repaired.

The Salvation Army moves for summary judgment dismissing the complaint.

The motion is granted.

Factual/Procedural Background

In order to provide a framework for the testimony, the Court provides the following general description of the area in question.

The area in question is comprised of a paved asphalt black top which abuts a raised concrete sidewalk/entranceway to the store. Along the curb side of the sidewalk/entranceway, there are several vertical silver metal poles implanted in the concrete. There is an opening in the poles and a curb cut in the section of the sidewalk/entranceway which leads to the door of the store. The concrete slopes up from the asphalt to the area immediately outside the door.

In her bill of particulars, the Plaintiff the alleges that "the accident occurred on the sidewalk/entrance area to the store entrance ramp at 237-245 Wickham Avenue, Middletown, NY 10940. While attempting to enter upon the entrance away of 'Salvation Army' between the silver poles, Plaintiff tripped and fell in a defect/hole/crumbling of the concrete approximately one to two feet to the left of the righter [sic?] entrance silver pole. Plaintiff was caused to trip and fall as a result of a defect in the sidewalk/entrance to the handicap ramp."

The Record

At an examination before trial, the Plaintiff testified, *inter alia,* as follows.

On the day of the accident, her son-in-law drove her to the Salvation Army to shop. Her daughter was also in the vehicle. She had been to the store before, as she shopped there regularly. She was wearing slip-on style shoes. When she opened the door to the vehicle, "there was a hole in there."

The Plaintiff was shown various photographs of the area in question. Concerning the same and the happening of the accident, the following colloquies occurred.

> Q. Does the image depicted in this photograph look the same as the premises of the Salvation Army did on the day of the accident?

A. Yes. The Salvation Army door.

Q. Does this photograph fairly and accurately depict the scene of the incident as it was on the day of the incident?

***2** A. It was kind of cloudy day, but it was not for me to fall.

Q. Is anything about the pavement as it is depicted in this photograph different from how it was the day of the accident?

A. Right here was where I fell (indicating). But they fixed this. It is not now painted yellow.

Q: Does this photograph show the area where you fell?

A. Well, I don't see the hole in here (indicating). They fixed this after I fell.

Q. On the day of the accident the area depicted in this photograph, was there a difference in height between the lighter colored sidewalk portion of the pavement and the darker colored parking lot portion of the pavement?

A. It was uneven. It was.

Q: Was it a uniform difference in height?

A. One side was higher than the other side. The other side was lower.

Q. Was there a portion of the sidewalk that was even with the parking lot?

A. It was even.

Q. Such that you could use a wheelchair to go from the parking lot to the sidewalk without having any bumps along the way?

A. A wheelchair can go through there now, but when I fell, that was very high. They fixed this (indicating).

Q. On the day of the accident was there any portion of the lighter colored sidewalk pavement that was not even with the parking lot?

A. Yes. It was not even.

Q. On the day of the accident was there any portion of the lighter colored sidewalk entrance pavement that was at the same level as the parking lot?

A. It was even, but this area was higher and the tube [1] was here (indicating). They have fixed this (indicating).

Q. Does this photograph in front of you, Defendant's Exhibit D, demonstrate the area where you fell?

A. Well, when I fell it was not there.

Q. What was not there?

A. It was a little bit up.

Q. What was a little bit up?

A. This was not there

Q. What was not there?

A. It was on the one side.

Q. What was not there?

A. There was a tube placed here (indicating). They made this like for wheelchairs. And they tried to pull this, and they could not. Excuse me. My son-in-law gave you guys a picture.

Where I fell, because my son-in-law took a picture and gave all the information.

Q. Let's return to Defendant's Exhibit C. Does this photograph depict the area where you fell?

A. Yes.

Q. Can you please point to the area where you fell?

A. Around here (indicating).

Q. Miss Nunez, did you fall on the asphalt or on the lighter colored sidewalk portion?

A. On the dark one.

Q. Were you the only person that got out of the car in front of the entrance?

A. Yes.

Q. Did you use the grab bar in the car to help you get out of the car?

A. Yes.

Q. Is this the bar that was on the door, or on top of the inside of the car?

A. From the door.

Q: Which foot did you step out of the car with first?

A. I got one foot first, and then the other one, and I hold myself from the door.

Q. Did you stand entirely upright before you fell?

A. Yes, I stand when I get out of the car. And when I went to do one step going to the store, that's when I fell.

Q. When you stood up after exiting the car, was your body faced towards the front of the store?

***3** A. Yes. I was going to step onto the higher level of the floor. That's when I fell because there was a hole there.

Q. When you stood up after getting out of the car, were your feet on the darker pavement as shown in Defendant's Exhibit D, or on the lighter pavement?

A. I stood up there (indicating). I closed the door and I went to walk. That's when I fell.

Q. When you stood up were your feet on the dark part of the pavement, as shown in this photograph in Defendant's Exhibit D, or on the lighter part of the sidewalk?

A. I did not notice.

Q. Just before you fell down where were you looking?

A. I was going -- I was watching straight ahead. I did not know that I was going to fall.

Q. After you stood up, which foot did you attempt to take a step with?

A. I did not go to the car.

Q. After you got out of the car and you stood up, you testified that you moved towards the front entrance of the store, which foot did you use with that first step?

A. I put the right one first, and then the left one, because the car was very close to it.

Q. The car was very close to what?

A. It was not close to it. Then I walked and I fell. So it means my fall has something to do with Salvation Army, because they did not fix that.

Q. What did they not fix, in your opinion?

A. Now you go there and you see everything fixed.

Q. What needed to be fixed at the time of the accident, in your opinion?

A. Well, the problem is I did not see it was even. Now in here you can put one foot up and then move the second foot next. But when I was going to step onto my first foot, then I went forwards.

Q. When you fell forwards, where was your right foot?

A. When I moved one foot, giving a step and then I moved the second one, that was when I fell. It was unlevel. It was high. If it would have been painted yellow or red, I would have noticed that. But it was high.

Q. While you were attempting to approach the front of the store, the front entrance of the store, did you have to step up onto the lighter colored pavement that is the sidewalk?

A. Well, I did not notice something like that. The only thing I noticed, I was walking towards the entrance of the store, and that's when I fell.

Q. When you fell down, did you fall completely to the pavement, or were you able to catch yourself from falling entirely?

A. I fell completely on the ground, and I hit my forehead. I fractured my hand and my knee. And I was laying on the ground and my daughter came and says, “Mom. Mom.”

Q. Did you come to a rest on the pavement?

A. Yes.

Q. When you came to rest on the pavement were you on the lighter colored sidewalk pavement, or on the darker colored parking lot asphalt?

A. The clear one.

Q. Where were your feet? Were your feet on the lighter colored sidewalk pavement, or the darker colored asphalt pavement?

A. The darker one.

Q. Did your shoes fall off?

A. One.

Q. Which one?

A. The left one.

Q. When you arrived in the car in front of the Salvation Army that day, was there an area of the sidewalk that was sloped so that there was not a height difference between the parking lot and the front entrance sidewalk?

A. Well, it was rising, and there was a little hole there. That's when I fell forwards. I don't remember.

***4** Q. Was it a very sudden change in height or a very gradual change in height?

A. I did not notice.

Q. Did you take a step up to get onto the lighter colored sidewalk?

A. Yes. And that's when I fell.

Q. Did your left foot come in contact with the sidewalk causing you to trip?

A. When I get one step in order to go to the store to the Salvation Army, that's when I fell. It was high, and I hit against the sidewalk.

Q. Did your right ankle roll when you took a step?

A. No.

Q. When you took a step did your left ankle roll?

A. I don't remember. I know that I fell. I did not notice.

Q. Did you stub your toe?

A.No.

Q. Which foot came into contact with the uneven portion of the sidewalk?

A. The right one, the one where I fell with.

Q. Did it come into contact with a hole in the pavement?

A. Yes.

Q. Did it come into contact with the curb, such that the curb was several inches higher than the parking lot?

A. Yes.

Q. Did the hole cause you to fall?

A. Yes.

Q. Did the change in height cause you to fall?

A. Yes.

Q. Was the change in height because of the hole?

A. Yes, that's true.

Q. How deep was the hole?

A. That was like to drain water. It was pretty big, but I did not see it.

Q. Was there any metal in the area where you fell, on the ground?

A. There was cement and stones.

Q. What helps to drain the water?

A. Well, when it rains, maybe the water was going down there. It could be also that the construction people did not fix that hole.

Q. Approximately how big was the hole? Was it bigger than a piece of paper?

A. The hole, it had some cement on top. It was there. The front of my shoes got stuck in there. That's why I fell.

Q. Was it the front of your left shoe?

A. No. The right one,

Q. Did you notice that hole before you took a step there?

A. No.

Q. Was it the front of your right foot?

A. It's like you take a step, and then you fell.

A. I repeat to you once again. I get out of the car. I took one step, and the next step that I was going to take, that's when I fell. If the hole was not there, I was not going to fall.

Q. On the left side of the photograph does it appear to you that there is a change in height between the lighter colored portion and the darker colored pavement?

A. Because they fixed this when I fell (indicating). This was high (indicating).

Q. Does the left side of this photograph show the area where you fell?

A. Around here (indicating). This was high. They painted it yellow after I fell.

Q. Do you see any portion of the pavement that's painted yellow in this photograph?

A. Like a little line.

Q. Where is the little line?

A. I don't know if it's my eyes or not. I didn't see it. I'm sorry.

Q. Have you visited the Salvation Army after the accident?

A. No.

Q. Have you ever observed a yellow line on the pavement in front of the front entrance to the Salvation Army?

A. No.

Q. On the date of your accident the portion of the sidewalk that you traversed in order to enter, intending to enter the store, was it smooth like the left side of the picture?

A. No. When I fell, that was not smooth. That was high (indicating). It was not that lighter also.

Q. On the day of your accident was the change in height on the left side of this picture the same as the change in height on the right side?

***5** A. No. Because that's too high. This, after I fell, they fixed this. They lowered it.

Q. I'm going to call what is here on the right side of this picture, a curb, because there is a difference of a few inches between the dark pavement and the lighter pavement.

A. Yes.

Q. On the left side of this picture as it is in this picture where it appears that it slopes gently to be at the same level as the parking lot, I'm going to call that a ramp.

A. Can I tell you something?

Q. Please wait for my question.

A. The problem is I did not get to get into the store, and the door did not open also. I fell before getting into the store.

Q. On the day of the accident, the portion towards the left side of this picture, was it designed the same as the portion to the right, such that there was a curb between the parking lot and the front door?

A. Yes. There was a hole here where I fell (indicating). They fix it.

Q. The path that you intended to take on the day of the accident to get from the car to the front door of the store, did it take you over the ramp part?

A. No. I get off the car here (indicating). I just get two steps, and that's when I fell. But there were more tubes. Not only those two. Can you show me another one? I did not see that.

Q. On the day that you fell did your foot come into contact with a hole that was in the ramp portion of the sidewalk?

A. No. My foot got in the hole and I fell forwards, because the shoe did not -- it got stuck in the hole, because I fell.

Q. Was the hole in the lighter colored portion of the pavement?

A. This is wrong, because that did not happen either here or here (indicating). It was high like this, and the hole was right around there (indicating). That's when I fell.

Q. Was the hole in the darker colored pavement?

A. Well, I don't know. At that moment I was in shock. I did not notice the color. I wasn't dizzy when I fell. But when I fell, I got dizzy. But it was not my health that it happened to me, because my health was fine.

Q. Were you dizzy when you fell?

A. No, after I fell I did not feel well in order to see if it was darker or lighter.

Q. Did you fall over a curb like this curb that's on the right side of the photograph?

A. That is not accurate. They did not do it well. I fell, but this is not any signs in there.

Q. I'm trying to figure out exactly what the problem was, so I want to ask you a couple of more questions and we will try to get the details.

A. I know.

Q. Did you trip over an elevated curb like the curb that's depicted on the right side of this photograph?

A. No. It was not a trip. It was that I was going to step on something and I fell. Whoever fixed this, covered the hole because I fell there, and they don't want anyone else to fall there also, so they fixed it and they covered the hole that was there.

Q. When did you first notice the hole?

A. I didn't notice when I fell, but I say uh-oh, but I did not trip. I just fell.

Q. Did you fall because you stepped into a hole?

A. No. I walk, I was going to lift my leg up going to the store, and that's when I fell.

***6** Q. What was wrong with the pavement that made you fall?

A. Well, I have to answer, but what the problem is this picture is not accurate. If it would have been smooth like this (indicating), I would not have fall. I wouldn't fall if it was like this (indicating). But it seems like it was high and it was the hole that the construction people left there, and I fell.

Q. When did you notice that there was something wrong with the sidewalk?

A. I hit my head, my hand and my leg.

Q. But what was wrong with the pavement or the sidewalk specifically that caused you to fall?

A. Do you have another picture? Because this picture don't show anything. Do you have another?

Q. I'm going to show you one more photograph labeled Defendant's Exhibit F. Now, have you seen this photograph before today?

A. No.

Q. Do you recognize what's depicted in the photograph?

A. Well, it shows the entrance to the Salvation Army in this area, but this area was higher (indicating). And here (indicating) there was a tube, a pole. It was like this. It was there (indicating).

Q. Listen to my question carefully. Does this photograph depict the general area where you fell?

A. Yes.

Q. Again listen carefully. Does this photograph fairly and accurately depict the area where you fell as it was on the day of your accident?

A. Yes.

Q. Did the pavement as shown in this photograph differ from the way it was on the day of your accident.

A. Yes. I find this different because there was a tube here (indicating).

Q. On the day of your accident was the dark pavement the same as it is in this picture?

A. I say they are the same.

Q. Is the light colored portion of the pavement different than it was on the day of the accident?

A. Different. I was going to walk through here (indicating) in order to enter the building, and I fell.

Q. Had you walked that way previously into the Salvation Army before the day of the accident?

A. No.

Q. When you visited the Salvation Army prior to the day of accident, did you take a different path to enter?

A. What is your question?

Q. You testified that you shopped at the Salvation Army several times before the day of the accident?

A. I did not say that I was shopping or I was going to the Salvation Army because I cannot walk by myself.

Q. Had you ever noticed any problems with the pavement before the day of accident?

A. Well, there was a hole there, and everything was done bad.

Q. Did you notice that before the day of accident?

A. When I get out of the car, it was that I fell.

Q. On your previous trips to the Salvation Army before the day of the accident did you ever have any problems with the pavement?

A. Well, I did not notice anything before, but I was walking through there from here to here (indicating), but that day my son-in-law, he stopped the car right where I get out the car, and that's where I fell where the hole was.

Q. Prior to the day of the accident did anyone ever tell you that there were problems with the pavement in front of the Salvation Army?

A. No.

Q. Prior to the day of the accident did you ever complain to anyone about problems with the pavement in front of the Salvation Army?

***7** A. No.

The Salvation Army's Motion

In support of its motion, the Salvation Army submits an affirmation from counsel, Devika Kapoor.

Kapoor argues that the action must be dismissed because (1) there is no legally admissible evidence that the Salvation Army breached any duty to the Plaintiff or that it was negligent; (2) the area where the Plaintiff allegedly fell was not defective or hazardous and any purported defect, if found, would be trivial; (3) the Salvation Army did not create or have notice of the alleged defective condition; and (4) the Plaintiff was indisputably the sole proximate cause of her injuries and there is no evidence that the purported defect/hazard, which did not exist, was the proximate cause of the Plaintiffs injuries.

Kapoor notes that, at an examination before trial, Ruth Gonzalez, the manager of the store at issue, testified as follows.

Gonzalez's duties included opening and closing the store, training and hiring employees, and putting out merchandise, etc. She had been employed by the Salvation Army since 2014, and for approximately four years at the subject store. She was not aware of the Plaintiff having made any prior complaints about the store before the incident.

There was no construction or renovations to the store, including the outside of the area within the parking lot. She had reviewed Exhibits “A” through “F”, which were photographs taken of the store and its premises. When she started working at the store, the poles depicted near the entrance were in place. When she first began working at the store, the lighter colored cement portion outside of the store entrance was present. She was unaware of any repair work or cement being laid in the area immediately outside of the entrance. Nor had she seen anybody working immediately outside the entranceway area leading from the parking lot to the entranceway. She never saw anyone repaving or repainting the parking stripes or any other sort of work in this area.

Gonzalez witnessed the Plaintiff fall. The accident occurred between 10:00 a.m. and 11:30 a.m. in the area best depicted in Exhibits “B”, “D” and “F”. She observed the Plaintiff exit a minivan which was immediately by the curb area, which is a slope area from the entranceway for handicap access. The accident occurred near the curb. She was not aware of any renovation or construction work, etc., being done to that specific area before February 10, 2016, and no one had complained about the entrance area. She was not aware of anyone else falling at the store.

Gonzalez described the Plaintiff's fall as follows:

> When the doors opened and I greeted a person I seen her getting off. She was trying to get off of the vehicle. And what I noticed was when she was trying to get off the vehicle she had slip on shoes and she tripped on her own feet. And that's when she fell forward out of the vehicle. She wasn't off the vehicle yet.

She saw the Plaintiff exiting the vehicle sideways. Her right side was the first side to exit the vehicle. The Plaintiff began to fall as she was stepping out leading with her right leg. She was uncertain if the Plaintiff's right foot touched the pavement before the fall and did not recall whether the Plaintiff's left foot touched the ground. The Plaintiff fell sideways onto her right hand and onto her face.

***8** Gonzalez testified that no changes to the property were ever made, and that the property appeared the same in February 2016 as it appears in Defendant's Exhibits “A” through “F”. None of the poles located outside of the entrance have ever been removed, renovated or changed, and there had never been any repaving in the area.

As manager, she testified, she inspected the area of the Plaintiffs fall several times day. When she checked the area before the store opened, she did not observe any debris, snow or ice. The day was sunny but cold. She observed nothing in the area that would affect someone walking into the store from the pavement.

Finally, she testified, the Plaintiff “tripped with her own feet, with her own shoes.”

Kapoor notes that, at a examination before trial, non-party Taineesha King testified as follows.

King was an employee of the Salvation Army and had been employed there as a sales associate for seven years. She witnessed the accident. It happened “right outside of the front door”. She saw the Plaintiffs fall because she was stationed at a register near the front of the store.

Since she began working at the Salvation Army store approximately in 2012, there had never been any work done in front of the store. The area where the Plaintiff fell is where the blacktop driveway transitions to the concrete sidewalk. The area is flat.

King observed the Plaintiffs vehicle pull up and she saw the Plaintiff step out of the car and then proceed to fall. The Plaintiff tripped as she was exiting. However, there was nothing there for her to have tripped on, and nothing was broken on the sidewalk where she fell. Rather, the Plaintiff tripped over her own feet. King did not observe any issues with respect to the sidewalk or ground at the property after the accident, and did not notice any debris in the area where the Plaintiff fell. She also did not observe any physical defect or tripping hazard in the area of the Plaintiff's fall.

Kapoor notes that, at a examination before trial, non-party witness Brenda Diaz testified as follows.

The Plaintiff is her mother. Diaz took nine (9) photographs of the area where her mother fell and her mother after the accident. The photographs were marked as Defendant's Exhibit K.

The photographs fairly and accurately depicted the way the Premises appeared on the date of accident on February 10, 2016. There were no changes made to the property since then.

Diaz had dropped her mother at the Salvation Army on many occasions. On the day in question, after the vehicle stopped in front of the store, she “heard the door slam and then [she] heard a boom, you know a couple of seconds, maybe, a boom.” Her mother had shut the door and proceeded to walk. The next time she saw her mother, she was on the ground. No one in the vehicle witnessed the fall, and she did not know what caused the fall.

Diaz testified that the Defendant's Exhibit B was a fair and accurate representation the area where her mother fell. The difference between the asphalt parking lot and the concrete area was a slight difference; either “just little” or “just a hair” difference. There were no holes in the sidewalk on the day of her mother's accident.

Kapoor notes that, an examination before trial, non- party witness Saul Diaz testified as follows.

The Plaintiff is his mother-in-law. He was present at the time of the accident, but he did not witness the accident. He saw his mother-in-law get out of the car and close the door. He did not see her walk away. He parked the vehicle and saw his mother-in-law “on the floor.” She was lying on the sidewalk on the blacktop. His mother-in-law screamed about ten seconds after she exited the vehicle.

***9** In further support of its motion, the Salvation Army submits an affirmation from Alistair Fraser.

Fraser avers that he is the Property Director for the Adult Rehabilitation Center (“ARC”) Command for the Eastern Territory of the Salvation Army. His duties and responsibilities include corporate oversight of all ARC properties in the Northeast, which includes over 300 thrift stores. He oversees the Salvation Army store at issue.

As Property Director, he has personal knowledge of the renovation and repair records kept in the normal course of the Salvation Army's non-profit business, and had reviewed the records relating to the subject store. In addition, he has personal knowledge of the property, as he visited it prior to the date of the purported accident. The property appeared the same on and around February 10, 2016, as it appears in the photographs appended as exhibits, and no changes were made to the property either before or after that date.

Further, he avers, he had not personally observed the defect alleged by the Plaintiff, and there was no record of any defect in the curb, sidewalk, or asphalt near the entrance of the property.

Further, there were never any repairs made nor were any additional poles near the entrance of the Salvation Army store that were removed or replaced in the area where the Plaintiff tripped and fell.

Finally, he avers, the sidewalk/ramp entrance at the Salvation Army store was never altered or repaired, and there are no reports of any holes at the entrance, curb, or sidewalk at the subject store. Nor had the Salvation Army received any complaints in general regarding any area in the sidewalk entrance of the subject premises, or specifically as to the defect alleged.

In further support of its motion, the Salvation Army submits an affidavit from a professional engineer, James Fordham.

Fordham performed a site inspection of the store at issue on March 6, 2020, and reviewed various materials in the action.

Initially, he notes, the area in question, as built, does not violate any applicable building or zoning code, or standard, etc.

Further, he avers, based on his inquiries, he can conclude the following to a reasonable degree of engineering certainty.

First, there is no evidence to conclude that a bollard was allegedly removed from the area, or that a hole was allegedly created by the removal of a bollard.

Second, at the time of the accident, there was sufficient illumination along all points of the Plaintiff's intended path of travel, affording her the opportunity to clearly observe the condition of the curb and concrete walkway area.

Third, the area where the Plaintiff fell was maintained in the condition it was originally constructed and in accordance with Chapter 359 of the Code of the City of Middletown.

Fourth, the minor spalling noted along the rear of the curb near the front curb ramp that was allegedly involved in the Plaintiffs accident was negligible, and did not constitute a trip hazard and violated no applicable code or standard.

Fifth, historical street view imagery provided by Google for the subject property dated November 2015 (4 months prior to the alleged accident), reveals that the configuration of the concrete walkway, curb ramps, and steel bollards along the front right portion of the building were identical to the conditions observed by during his March 6, 2020, site inspection. Otherwise, there was no evidence to conclude a bollard was removed from the area along the middle of the front curb ramp, or that a hole was allegedly created by the removal of a bollard.

***10** Sixth, and finally, he notes, the Plaintiff visited the property regularly without incident. Thus, he opined, the Plaintiffs choice of foot wear (slip-on shoes) and her lack of attentiveness could not be discounted as the sole cause of the accident.

In opposition to the motion, the Plaintiff submits her own affidavit.

Initially, the Plaintiff asserts, she "stand[s] by [her] testimony that [her] accident occurred when my foot became stuck in a hole that was allowed to remain near the curb of the sidewalk, near the entrance. This hole had been partially obscured by loose cement and stones which made the hole more difficult to observe in passing."

Further, she avers, she stood by her claim that the adjacent curb was not painted at the time of my accident. Had the curb been properly painted, she argues, she could have more easily observed the height differential between the curb and the bottom of the hole. Ultimately, she opines, the "unpainted curb and obscuring debris made it difficult to observe the hole."

In addition, the Plaintiff asserts, to the extent that her testimony as to the relevant facts was inconsistent at her examination before trial *(supra),* it was due to the fact that she was testifying with the help of a translator. Regardless, she argues, she believes that she had "adequately explained that the hole, which was obscured by cement debris and stones, was the cause of [her] fall, and further, that the failure to paint the curb hindered the discovery of this defect until after [her] fall."

The Plaintiff notes that the Salvation Army was relying on photographs purportedly taken of the scene of the accident. However, she avers, she stands by her testimony that the photographs "neither truly nor accurately reflect the scene of the accident as it was at the time of [her] fall."

All other issues, she argues, at best, raise issues of fact for the jury.

In reply, the Salvation Army submit an affirmation from counsel, Maria Stamatelatos.

Stamatelatos notes that the Plaintiff did not submit an affidavit from an engineer, nor from any other witnesses, including her own daughter or son-in-law, who were with her on the date of incident.

Moreover, she argues, although the Plaintiff argues that a defect did exist, and faults the Salvation Army for failing to produce any photographs of the alleged defect, ironically, the Plaintiff, who was with her daughter, son-in-law and husband at the time of the accident, and who was a frequent patron at the subject store, and who lives a few miles from the store, had not produced a single photograph depicting the alleged defect.

Otherwise, she notes, the Plaintiff merely argues that the photographs of the area in question do not reflect the conditions as they were on the date of accident.

In addition, Stamatelatos asserts, at her examination before trial, the Plaintiff identified a photograph marked as Defendant's Exhibit A as accurately depicting the area in question on the date of the accident, and the photograph does not show any hole in the area. Further, she notes, the Plaintiffs daughter and son-in-law both testified under oath that they did observe any holes in the area. In fact, she notes, the Plaintiffs daughter testified that she returned to the store in November 2016, which is only a few months after the alleged accident, and took photographs of the area of her mother's fall. Stamatelatos asserts that the photographs "clearly do not depict any holes in the subject area."

***11** Finally, she argues, the Plaintiff never established the exact location of her fall or the hole, and never described the actual size or depth of the hole.

Discussion/Legal Analysis

To hold a party liable for a dangerous and defective condition on a sidewalk, a plaintiff must demonstrate (1) that the defendant owned, controlled, occupied or made special use of the sidewalk; (2) that the sidewalk was in a dangerous and defective condition, and that the defendant had either actual or constructive notice of the same; and (3) that the dangerous and defective condition was a proximate cause of damages. *Shehata v. City of New York,* 128 A.D.3d 944 [2nd Dept 2015]; *Weinberg v. City of New York,* 43 A.D.3d 489 [2nd Dept 2004]; *Aversano v. City of New York,* 265 A.D.2d 437 [2nd Dept. 1999].

To provide constructive notice, the dangerous and defective condition must be visible and apparent, and must exist for a sufficient length of time before the accident to permit the defendant to discover and remedy it. *Shehata v. City of New York,* 128 A.D.3d 944 [2nd Dept 2015].

A plaintiffs inability to identify the cause of his or her fall is fatal to a negligence cause of action because, in such an instance, the trier of fact would be required to base a finding of proximate cause upon nothing more than speculation. *Louman v. Town of*

Greenburgh, 60 A.D.3d 915 [2nd Dept 2009]. Thus, a defendant may establish a prima facie entitlement to judgment as a matter of law by submitting evidence that the plaintiff cannot identify the cause of his or her fall. *Mallen v. Dekalb Corp.,* 181 A.D.3d 669 [2nd Dept. 2020]. Where it is just as likely that some other factor, such as a misstep or a loss of balance, could have caused a trip and fall accident, any determination by the trier of fact as to causation would be based upon sheer speculation. *Mallen v. Dekalb Corp.,* 181 A.D.3d 669 [2nd Dept. 2020][although the plaintiff testified at her deposition that three weeks after the accident she observed a "broken cracked sidewalk" in the area where she allegedly fell, she acknowledged at her deposition that, on the day of the accident, she did not look to see what caused her to fall]; *Dennis v. Lakhani,* 102 A.D.3d 651 [2nd Dept. 2013] [although the plaintiff testified that he found loose cement two days after the accident, he could identify this condition as the cause of his slip and fall]; *Douse v. City of New York,* 70 A.D.3d 764 [2nd Dept. 2010][although the plaintiff asserted that a "piece of metal sticking out of the concrete" caused her to fall, she first observed the same approximately one month after the alleged incident, when she returned to the scene with her attorney]; *Louman v. Town of Greenburgh,* 60 A.D.3d 915 [2nd Dept 2009][the plaintiff concluded that she tripped over a crack only after her daughter inspected the area where the accident occurred, on the day following the occurrence, and reported to her mother that she observed a crack at that location].

Finally, a defect may be too trivial to be actionable. A defendant seeking dismissal of a complaint on the basis that the alleged defect is trivial must make a prima facie showing that the defect is, under the circumstances, physically insignificant and that the characteristics of the defect, or the surrounding circumstances do not increase the risks it poses. *Hutchinson v. Sheridan Hill House Corp.,* 26 N.Y.3d 66; *Mejias v. City of New York,* 183 A.D.3d 886 [2nd Dept. 2020]. In determining whether a defect is trivial as a matter of law, the court must examine all of the facts presented, including the width, depth, elevation, irregularity and appearance of the defect along with the time, place and circumstance of the injury. *Mejias v. City of New York,* 183 A.D.3d 886 [2nd Dept. 2020].

***12** Here, it is noted, as a threshold issue, the sole defect alleged in the Plaintiffs bill of particulars is a hole in the area at issue. There is no allegation that she tripped due to any height differential between the asphalt and the concrete sidewalk/entranceway. Indeed, although some of the Plaintiff's testimony at her examination before trial appears to raise the issue of a height differential in the area, the Plaintiff makes clear in the affidavit submitted in opposition to the motion that she is not alleging that she tripped and fell due to such a height differential. The Court notes that none of the photographs appended as exhibits show an actionable height differential between the asphalt and concrete. Thus, the focus of the analysis will be on the alleged hole.

Initially, it is noted, the Salvation Army presented evidence from eye witnesses who testified that the Plaintiff did not trip in a hole, but rather on her own feet. However, the differing versions of the fall set forth in the record cannot be resolved as a matter of law. However, the case may nonetheless be resolved on summary judgment.

In support of its motion, the Salvation Army demonstrated, *prima facie,* that no hole currently exists in the area where the Plaintiff fell, and that no hole existed at the time of her trip and fall. This evidence includes testimony from three persons with personal knowledge of the facts, and photographs taken by the Plaintiff's daughter near the time of the accident.

Significantly, the Plaintiff does not dispute that no hole is currently present, or is shown in the photographs appended as exhibits. Rather, she argues that this is because the hole has been fixed. However, on the record presented, this testimony is insufficient to raise a triable issue of fact.

In support of its motion, the Salvation Army demonstrated, *prima facie,* by competent evidence in admissible form, from several witnesses, that the area in question had not changed, and had not been repaved or repaired since the accident. This includes the testimony of two employees of the store at the time of the accident (Gonzalez and King) and the testimony of the person in charge of, or knowledgeable about, such repairs (Fraser).

Further, the Court notes, none of the photographs of the area appended as exhibits show any apparent area where patching or repairing of a hole has occurred. Indeed, the Plaintiff does not argue that any of the photographs do show such patching or repair.

Further, the Plaintiff did not purport to have conducted a search of building permits, etc. for evidence of work or repairs performed in the area, or to have made inquiries of the Salvation Army concerning records, invoices, etc. concerning such work.

Moreover, the Plaintiff did not hire her own expert to conduct an inquiry into whether work had in fact been performed in the area in question, or whether there was any evidence of patching or repairing.

Given such, the Court finds the Plaintiff's otherwise conclusory assertion that she tripped and fell in a hole to be insufficient to raise a triable issue of fact.

Thus, the Salvation Army is granted summary judgment dismissing the complaint.

Accordingly, and for the reasons cited herein, it is hereby,

ORDERED, that the motion is granted, and the complaint, and all causes of action asserted therein, is dismissed

The foregoing constitutes the decision and order of the court.

Dated: September 1, 2020

Goshen, New York

ENTER

<<signature>>

HON. ROBERT A. ONOFRY, J.S.C.

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Footnotes

1 It appears that the vertical metal poles were referred to as “tubes” at the Plaintiff's examination before trial.

New York Official Reports

218 A.D.3d 1179, 193 N.Y.S.3d 524, 2023 N.Y. Slip Op. 03998

****1** Joel Verdugo, Appellant,

v

Fox Building Group, Inc., et al., Respondents.

Supreme Court, Appellate Division, Fourth Department, New York
22-00014, 286
July 28, 2023

CITE TITLE AS: Verdugo v Fox Bldg. Group, Inc.

HEADNOTES

Labor
Safe Place to Work
Commercial Construction Project—Elevation-Related Hazard—Fall while Installing Roof Trusses on Building—Sole Proximate Cause—Failure to Tie Lanyard off to Trusses That Had Already Been Nailed Down and Braced

Labor
Safe Place to Work
Commercial Construction Project—Elevation-Related Hazard—Statutory Agent—Lack of Authority or Control

Dolce Panepinto, P.C., Buffalo (Sean Cooney of counsel), for plaintiff-appellant.
Smith, Sovik, Kendrick & Sugnet, P.C., Syracuse (David M. Katz of counsel), for defendant-respondent Fox Building Group, Inc.
Burke, Scolamiero & Hurd, LLP, Albany (Steven V. DeBraccio of counsel), for defendant-respondent Hinsdale Road Group, LLC.
Goldberg Segalla LLP, Buffalo (Meghan M. Brown of counsel), for defendant-respondent CNY Boom Truck, LLC.
Smith, Dominelli & Guetti, LLC, Albany (Christopher A. Guetti of counsel), for defendant-respondent CBD Construction, LLC.

Appeal from an order of the Supreme Court, Onondaga County (Joseph E. Lamendola, J.), entered November 24, 2021. The order, among other things, denied plaintiff's motion for summary judgment and granted those parts of defendants' motions seeking summary judgment dismissing plaintiff's Labor Law § 240 (1) causes of action.

It is hereby ordered that the order so appealed from is unanimously modified on the law by denying those parts of defendants' motions seeking summary judgment dismissing the Labor Law § 240 (1) causes of action against defendants Hinsdale Road Group, LLC, CBD Construction, LLC, and Fox Building Group, Inc., and reinstating those causes of action against those defendants and as modified the order is affirmed without costs.

Memorandum: In this action pursuant to, inter alia, Labor Law § 240 (1), plaintiff seeks to recover damages for injuries he sustained when he fell while installing roof trusses on a building as part of a commercial construction project. On the day of the accident, the roof trusses were raised two at a time by a crane to plaintiff, a carpenter whose duties included securing the trusses to the frame of the building, approximately 13 to 14 feet above the ground, while wearing a body harness with a four-foot-long lanyard. Plaintiff was injured after the crane ***1180** cable became entangled with a truss, which was unsecured and upon which plaintiff was standing, causing the truss and plaintiff to fall to the ground. Plaintiff moved for summary judgment on, inter alia, the issue of certain defendants' liability under Labor Law § 240 (1), and defendants filed separate motions seeking, inter alia, summary judgment dismissing the complaints against them. As limited by his brief, plaintiff appeals from an order insofar as it denied plaintiff's motion with respect to the issue of three defendants' liability under Labor Law § 240 (1) and insofar as it granted defendants' motions with respect to the Labor Law § 240 (1) causes of action against four defendants.

****2** We agree with plaintiff that Supreme Court erred in granting those parts of defendants' motions with respect to the Labor Law § 240 (1) causes of action against defendants Hinsdale Road Group, LLC (Hinsdale), CBD Construction, LLC (CBD), Fox Building Group, Inc. (Fox), and CNY Boom Truck, LLC (CNY), on the ground that plaintiff was the sole proximate cause of his injuries because defendants failed to meet their initial burden on their motions to that extent. To establish a sole proximate cause defense, a defendant must demonstrate that the plaintiff "(1) had adequate safety devices available, (2) knew both that the safety devices were

available and that [they were] expected to use them, (3) chose for no good reason not to do so, and (4) would not have been injured had they not made that choice" (*Biaca-Neto v Boston Rd. II Hous. Dev. Fund Corp.*, 34 NY3d 1166, 1167-1168 [2020] [internal quotation marks omitted]; *see Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 40 [2004]). In evaluating such a defense, "[i]t is well settled that the failure to follow an instruction by an employer or owner to avoid unsafe practices does not constitute a refusal to use available, safe and appropriate equipment" (*Fazekas v Time Warner Cable, Inc.*, 132 AD3d 1401, 1403-1404 [4th Dept 2015]) and does not "render [a] plaintiff the sole proximate cause of [their] injuries" (*Schutt v Bookhagen*, 186 AD3d 1027, 1029 [4th Dept 2020], *appeal dismissed* 36 NY3d 939 [2020]; *see generally Salzer v Benderson Dev. Co., LLC*, 130 AD3d 1226, 1228 [3d Dept 2015]). Further, a "plaintiff's decision to employ one method of performing a necessary task, even if a safer method existed, constitute[s] nothing more than comparative fault that is not a defense under the statute" (*Szymkowiak v New York Power Auth.*, 203 AD3d 1618, 1619 [4th Dept 2022] [internal quotation marks omitted]).

In support of their motions, defendants submitted the deposition testimony of the project foreman and another carpenter ***1181** on the project, who testified that plaintiff was instructed on the correct way to use his harness and lanyard—i.e., by tying his lanyard off only to those trusses that had already been nailed down and braced—and that plaintiff had been corrected when he had previously used them improperly on a job. However, defendants also submitted the deposition testimony of plaintiff, who testified that he did not receive specific training on how to use the harness and lanyard or any instructions regarding the removal of the crane cable. Plaintiff further testified that he used his regular method of performing his work on the day of the accident, i.e., standing on and attaching his lanyard to the unsecured truss prior to bracing and nailing the truss to the structure. He explained that he proceeded in that manner because it was faster than attaching his lanyard only to trusses that had already been nailed to the frame and braced, he was able to more easily reach the trusses despite his short lanyard, and it was safe as long as the cable held the trusses in place. Furthermore, both the foreman and the crane operator testified at their depositions that they did not observe plaintiff using his lanyard incorrectly on the day of the accident. Plaintiff also testified at his deposition that another carpenter detached the crane cable from the truss and then gave the signal for the crane operator to raise the crane cable out of the way while plaintiff was attached or in the process of attaching his lanyard to the unsecured truss, which he believed remained connected to the crane cable. The foregoing evidence raises triable issues of fact whether an adequate safety device was readily available that plaintiff knew that he was expected to use "but for no good reason chose not to do so, causing an accident," and whether plaintiff would not have been injured had he not made that choice (*Gallagher v New York Post*, 14 NY3d 83, 88 [2010]; *see Martin v Niagara Falls Bridge Commn.*, 162 AD3d 1604, 1606 [4th Dept 2018]). We therefore modify the order by denying those parts of defendants' motions seeking summary judgment dismissing the Labor Law § 240 (1) causes of action against Hinsdale, CBD, and Fox and reinstating those causes of action against those defendants (*see generally Doe v Westfall Health Care Ctr.*, 303 AD2d 102, 114 [4th Dept 2002]; *Bald v Westfield Academy & Cent. School*, 298 AD2d 881, 882-883 [4th Dept 2002]).

CNY alternatively contends that the court did not err in granting its motion with respect to plaintiff's Labor Law § 240 (1) cause of action against it because it is not an owner or general contractor and, therefore, it is not liable. Initially, "[a]lthough the court did not address [that] issue[ ] in its decision, [CNY] properly raises [it] on appeal as [an] alternative ground [ ] ***1182** for affirmance" (*Arista Dev., LLC v Clearmind Holdings, LLC*, 207 AD3d 1127, 1129 [4th Dept 2022] [internal quotation marks omitted]; *see Melgar v Melgar*, 132 AD3d 1293, 1294 [4th Dept 2015]). Furthermore, we agree with CNY that the court should have granted its motion with respect to the Labor Law § 240 (1) cause of action against it on that ground. "[U]nless a defendant has supervisory control and authority over the work being done when the plaintiff is injured, there is no statutory agency conferring liability under the Labor Law" (*Walls v Turner Constr. Co.*, 4 NY3d 861, 864 [2005]; *see Knab v Robertson*, 155 AD3d 1565, 1565-1566 [4th Dept 2017]; *Krajnik v Forbes Homes, Inc.*, 120 AD3d 902, 903-904 [4th Dept 2014]). "[T]he ****3** determinative factor on the issue of control is not whether a [contractor] furnishes equipment but[, rather, is] whether [it] has control of the work being done and the authority to insist that proper safety practices be followed" (*Knab*, 155 AD3d at 1566 [internal quotation marks omitted]). Here, CNY, which was undisputedly not an owner or a general contractor, established as a matter of law that it had no control over plaintiff or the work he was

performing, and plaintiff failed to raise a triable issue of fact in opposition (*see id.*; *Kulaszewski v Clinton Disposal Servs.*, 272 AD2d 855, 856 [4th Dept 2000]).

Plaintiff further contends that the court erred in denying his motion for summary judgment with respect to liability on his Labor Law § 240 (1) causes of action against Hinsdale, CBD, and Fox. For the same reasons discussed above, we conclude that plaintiff failed to establish his entitlement to judgment as a matter of law in that respect inasmuch as there are triable issues of fact whether plaintiff was the sole proximate cause of the accident (*see generally Thomas v North Country Family Health Ctr., Inc.*, 208 AD3d 962, 963-964 [4th Dept 2022]). Present—Whalen, P.J., Peradotto, Bannister, Montour and Greenwood, JJ.