NY CLS CPLR R 4401

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Consolidated Laws Service **>**

Civil Practice Law And Rules (Arts. 1 — 100) **>**

Article 44 Trial Motions (§§ 4401 — 4406)

R 4401. Motion for judgment during trial

Any party may move for judgment with respect to a cause of action or issue upon the ground that the moving party is entitled to judgment as a matter of law, after the close of the evidence presented by an opposing party with respect to such cause of action or issue, or at any time on the basis of admissions. Grounds for the motion shall be specified. The motion does not waive the right to trial by jury or to present further evidence even where it is made by all parties.

History

Formerly § 4401, add, L 1962, ch 308; amd, L 1962, ch 315, § 1, eff Sept 1, 1963.

Annotations

Notes

Prior Law:

Earlier statutes and rules: CPA §§ 457–a, 476; RCP 166; CCP §§ 539 (part), 1185; Code Proc § 169.

Advisory Committee Notes:

This rule is a restatement of former law with no substantial change. It consolidates in one motion for judgment during the course of the trial the motion to dismiss a complaint under CPA § 482, the motion for a directed verdict at the close of a claimant's evidence and at the close of all the evidence under § 457-a, and the motion for judgment on a party's admissions which was permitted by § 476.

The phrase "on the basis of admissions" would include dismissal of a complaint on the basis of counsel's opening statements; although this practice is recognized, there is no specific reference to it in the present statute. See 6 Carmody-Wait, Cyclopedia of New York Practice 694–95 (1953).

Since a defendant's motion to direct a verdict duplicates in function and consequences a motion to dismiss on the merits, this rule creates a single motion. One result of this simplification is to remove the confusion created by various sections of the CPA and RCP. For example, some referred only to a motion for dismissal of a complaint but were equally applicable to the identical motion to direct a verdict for the defendant. See, e.g., RCP 166(2). RCP 166(2) is omitted since the court has power to deny the motion upon terms without it. See also CPLR rule 4403. For provisions similar to RCP 166(2), see CPLR rules 3211 and 3212.

Use of the words "or issue" permits a motion after the close of the evidence on an issue separately tried by a jury demanded as of right. Where all the issues are tried at once and a party indicates that he has no further evidence on an issue, although he has not yet rested, a motion with respect to that issue may be made which might be dispositive of all or a part of the case. Compare CPA § 476 which permitted judgment "as to part of a cause of action" at "any stage of an action or appeal" if warranted by the pleadings or admissions.

Although the right to present evidence after denial of a motion for directed verdict is consistently recognized, the provision of the third sentence of this rule—derived from the first sentence of CPA § 457-a(2)—was retained because of the historical antecedents of the motion for judgment. The predecessor of the motion for directed verdict, the demurrer to the evidence, effected a

waiver of the right to present evidence to the jury. See Smith, The Power of the Judge to Direct a Verdict, 24 Colum L Rev 111, 113 (1924); 6 Carmody-Wait, op cit supra at 709–10.

No standards for granting the motion are included in this rule. In New York, attempts to delineate by statute the court's power to direct a verdict have confused rather than clarified the problem. An excellent history and analysis is contained in 15 NY Jud Council Rep 270–284 (1949). The report points out that the intention in passing the original version of § 457-a was to expand the court's power to direct a verdict. Nevertheless, the section had been limited by judicial construction and the Judicial Council proposed an amendment to conform the statute to the rule set forth in the cases, which was enacted. Laws 1949, c. 604.

This rule, however, omits the Judicial Council's provision which was formerly contained in subd 1 of § 457-a: "The court may direct a verdict when it would be required to set aside a contrary verdict for legal insufficiency." Rather than formulating criteria for the direction of a verdict, that subdivision merely stated that the standard for directing a verdict was the same as for judgment notwithstanding the verdict. Since no standard was set for the granting of the latter motion and it was a renewal of the former (see CPA § 457-a(3)), the statement gave no guidance on when the court should decide the case and when it should leave it to the jury. Omission of the former provision is intended to clearly indicate that the standards for directing a verdict must be sought in case law. Cf. Fed RCP 50(b); CPLR rule 3212(a) (summary judgment).

The difficulty of formulating a standard has been aptly stated by Mr. Justice Rutledge in Galloway v United States, 319 US 372, 395 (1943): "Nor is the matter greatly aided by substituting one general formula for another. It hardly affords help to insist upon 'substantial evidence' rather than 'some evidence' or 'any evidence' or vice versa. The matter is essentially one to be worked out in particular circumstances and for particular types of cases. Whatever may be the general formulation, the essential requirement is that mere speculation be not allowed to do duty for probative facts, after making due allowance for all reasonably possible inferences favoring the party whose case is attacked."

Blum v Fresh Grown Preserve Corp. 292 NY 241, 54 NE2d 809 (1944), the leading New York case, has approved direction of a verdict where “by no rational process could the trier of the facts base a finding in favor of the defendant upon the evidence . . . presented.” Id. at 245, 54 NE2d at 811. The Court of Appeals pointed out that the “sufficiency of evidence ‘reasonably to satisfy a jury’ cannot be mechanically measured. It is ‘incredible as matter of law’ only where no reasonable man could accept it and base an inference upon it. That depends upon considerations which vary in accordance with the circumstances of the particular case.” Id. at 246, 54 NE2d at 811. Previously, in McDonald v Metropolitan St. Ry. Co. 167 NY 66, 70, 60 NE 282, 283 (1901), it had declared: “So long as a question of fact exists, it is for the jury and not for the court. If the evidence is insufficient, or if that which has been introduced is conclusively answered, so that, as a matter of law, no question of credibility or issue of fact remains, then the question being one of law, it is the duty of the court to determine it.”

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I. Under CPLR

A. In General

1. Generally

In any case where the right of trial by jury exists and the evidence presents an actual issue of fact, the court may not properly direct a verdict. Cohen v Hallmark Cards, Inc., 45 N.Y.2d 493, 410 N.Y.S.2d 282, 382 N.E.2d 1145, 1978 N.Y. LEXIS 2280 (N.Y. 1978).

No appeal lies from an order denying a motion to dismiss. Aesman v Fox, 26 A.D.2d 739, 272 N.Y.S.2d 94, 1966 N.Y. App. Div. LEXIS 3553 (N.Y. App. Div. 3d Dep't 1966).

Since complaint in action to reform and rescind a contract was dismissed by trial term for want of establishing a prima facie case, the Supreme Court, Appellate Division reviewed the evidence in light most favorable to plaintiff on its appeal. Sullivan's of Liberty, Inc. v Burroughs Corp., 57 A.D.2d 664, 393 N.Y.S.2d 626, 1977 N.Y. App. Div. LEXIS 11692 (N.Y. App. Div. 3d Dep't 1977), app. denied, 43 N.Y.2d 644, 1978 N.Y. LEXIS 2520 (N.Y. 1978).

The granting of plaintiff’s motion for a directed verdict after defendants both vigorously urged denial of the motion, arguing the existence of issues of fact requiring jury determination, was error where the record did not reflect any admissions by defendants sufficient to constitute the statutory grounds for a directed verdict; absent admissions of liability, a motion for a directed verdict made at the close of plaintiff’s case and prior to the commencement of defendant’s case should be denied. Gavigan v John Di Giulio, Inc., 84 A.D.2d 857, 444 N.Y.S.2d 727, 1981 N.Y. App. Div. LEXIS 16102 (N.Y. App. Div. 3d Dep't 1981).

In an Article 78 proceeding against a city, in which petitioner sought to recover possession of an automobile from the city’s police property clerk, the trial court erred in granting the city’s motion to dismiss at the conclusion of petitioner’s evidence on the asserted ground that petitioner had failed to establish a prima facie case by proving that the police department had taken the automobile, where the city had, in connection with a prior appeal based on the city’s claim that petitioner was not a lawful claimant to the automobile, submitted papers that admitted their

possession of the vehicle, so that petitioner was no longer required to prove such element as part of her prima facie case. Battle v New York, 98 A.D.2d 689, 469 N.Y.S.2d 765, 1983 N.Y. App. Div. LEXIS 20987 (N.Y. App. Div. 1st Dep't 1983).

While it is improper for a trial judge to enter the jury room and converse with the jurors in the absence of the parties' counsel, a new trial is not warranted unless prejudice to either party's case has resulted therefrom. Silverman v New Rochelle Hospital, 98 A.D.2d 774, 469 N.Y.S.2d 488, 1983 N.Y. App. Div. LEXIS 21098 (N.Y. App. Div. 2d Dep't 1983).

Motion to dismiss made immediately after plaintiff's opening statement was properly granted where plaintiff's counsel conceded that he could not make out prima facie case within parameters of complaint without proposed amendments which plaintiff was properly denied leave to make. Alexander v Seligman, 131 A.D.2d 528, 516 N.Y.S.2d 260, 1987 N.Y. App. Div. LEXIS 47987 (N.Y. App. Div. 2d Dep't 1987).

Previous denial of defendants' motions for summary judgment did not require, as consequence, that defendants' motion for judgment as matter of law be denied at trial. Country-Wide Leasing Corp. v Subaru of America, Inc., 133 A.D.2d 735, 520 N.Y.S.2d 24, 1987 N.Y. App. Div. LEXIS 51778 (N.Y. App. Div. 2d Dep't 1987), app. denied, 70 N.Y.2d 615, 526 N.Y.S.2d 436, 521 N.E.2d 443, 1988 N.Y. LEXIS 697 (N.Y. 1988).

Dismissals after plaintiff's opening statement are not favored. Patterson v Serota, 135 A.D.2d 521, 521 N.Y.S.2d 750, 1987 N.Y. App. Div. LEXIS 52477 (N.Y. App. Div. 2d Dep't 1987).

Court should not have dismissed civil action at close of evidence on ground that plaintiffs had not proven themselves to be real parties in interest where defendants did not interpose that defense either on motion or in their pleadings; defense was waived, not having been raised at trial. Advanced Magnification Instruments, Ltd. v Minuteman Optical Corp., 135 A.D.2d 889, 522 N.Y.S.2d 287, 1987 N.Y. App. Div. LEXIS 52818 (N.Y. App. Div. 3d Dep't 1987).

In medical malpractice action against hospital and surgeon arising from gall bladder surgery and postoperative care given in intensive care unit, plaintiff was entitled to new trial on cause of

action against surgeon for improper postoperative care where (1) court had improperly dismissed similar cause of action against hospital at conclusion of plaintiff's case, and (2) surgeon defended on basis that hospital staff was principally responsible for postoperative care; court's improper dismissal of cause of action against hospital undoubtedly influenced jury's consideration of cause of action against surgeon, and interests of justice required new trial of cause of action against both defendants. Gruntz v Deepdale General Hosp., 163 A.D.2d 564, 558 N.Y.S.2d 623, 1990 N.Y. App. Div. LEXIS 8957 (N.Y. App. Div. 2d Dep't 1990).

After trial court had dismissed medical malpractice action against certain particular defendants on grounds of failure to establish prima facie case, court should have granted plaintiff's motion to reopen issue of causation so that further testimony could be introduced where (1) court had persistently interjected into questioning and testimony of plaintiff's experts, thus hampering her ability to establish her case, (2) plaintiff's medical expert was still in courthouse at time court ordered action dismissed, and (3) no prejudice would have accrued to defendants by recalling expert. Harding v Noble Taxi Corp., 182 A.D.2d 365, 582 N.Y.S.2d 1003, 1992 N.Y. App. Div. LEXIS 5295 (N.Y. App. Div. 1st Dep't 1992).

Defendant's motion for directed verdict was premature, even though plaintiff indicated that she was resting "at this point" following her testimony, where it was clear that she intended to put on testimony of her expert, who was late in appearing. DeWall v Owl Homes, 213 A.D.2d 977, 624 N.Y.S.2d 482, 1995 N.Y. App. Div. LEXIS 3757 (N.Y. App. Div. 4th Dep't 1995).

It was error for court to dismiss medical malpractice action at close of plaintiffs' case on ground that testimony of plaintiffs' expert could not be considered by jury, where defendant did not object to admissibility of expert's testimony until after that testimony was completed and plaintiffs had rested; since objection was untimely, expert's testimony was presumed to have been unobjectionable, and alleged error was waived. Koplick v Lieberman, 270 A.D.2d 460, 704 N.Y.S.2d 657, 2000 N.Y. App. Div. LEXIS 3197 (N.Y. App. Div. 2d Dep't 2000).

Motion to dismiss complaint during trial was not based on corporate plaintiff's alleged lack of legal capacity to sue, which would be waived if not raised in answer or by pre-answer motion,

but rather challenged sufficiency of complaint as failing to state cause of action, which may be raised at any time, where defendants claimed that plaintiff had no right to relief because it did not “exist” when conduct complained of occurred and was not injured thereby. Rainbow Hospitality Mgmt., Inc. v Mesch Eng'r, P.C., 270 A.D.2d 906, 705 N.Y.S.2d 765, 2000 N.Y. App. Div. LEXIS 3592 (N.Y. App. Div. 4th Dep't 2000).

Defendants, subcontractor and general contractor, were improperly granted judgment as matter of law dismissing plaintiffs’ common-law negligence and CLS Labor § 200 causes of action where plaintiffs showed prima facie that subcontractor was negligent in leaving piece of pipe, upon which injured plaintiff tripped and fell, on floor in doorway, that subcontractor created allegedly dangerous condition, and that general contractor had authority to control activity bringing about injury to enable it to avoid or correct unsafe condition. Smith v Hercules Constr. Corp., 274 A.D.2d 467, 711 N.Y.S.2d 453, 2000 N.Y. App. Div. LEXIS 8172 (N.Y. App. Div. 2d Dep't 2000).

It was an abuse of discretion to grant an employer’s N.Y. C.P.L.R. 4401 motion and to preclude the testimony of an employee’s expert to the extent of limiting the expert’s testimony to the issues set forth in a prior affidavit as: (1) the employee’s failure to formally serve a N.Y. C.P.L.R. 3101(d) notice prior to the trial was not willful, and (2) an employer was not prejudiced by the employee’s delay given that the employee had apprised the employer of the subject matter and substance of the testimony of the employee’s expert several months before the trial through service of the employee’s bill of particulars, which alleged that the employer’s cooling tower deviated from specific industry standards, and through the affidavit submitted by the employee’s expert in opposition to the employer’s motion for summary judgment. Saldivar v I.J. White Corp., 46 A.D.3d 660, 847 N.Y.S.2d 224, 2007 N.Y. App. Div. LEXIS 12609 (N.Y. App. Div. 2d Dep't 2007).

In a medical malpractice case, the trial court did not err in denying plaintiffs’ motion to limit defendants, a hospital and a physician, to representation by one attorney or to limit the participation of the hospital’s counsel, as defendants were entitled to counsel of their own

choosing, and plaintiffs' theories of liability against them differed. Lasher v Albany Mem. Hosp., 161 A.D.3d 1326, 77 N.Y.S.3d 544, 2018 N.Y. App. Div. LEXIS 3350 (N.Y. App. Div. 3d Dep't 2018).

Trial court has the right to reserve decision on motion for judgment. 622 West 113th Street Corp. v Chemical Bank New York Trust Co., 52 Misc. 2d 444, 276 N.Y.S.2d 85, 1966 N.Y. Misc. LEXIS 1200 (N.Y. Civ. Ct. 1966).

In breach of contract action, where court granted defendant's motion for judgment under CLS CPLR § 4401 and taxed costs against plaintiff in sum of $300, plaintiff was incorrect in casting judgment as being money judgment for less than $6,000; as judgment of dismissal, rather than one for money damages, defendant was entitled to ordinary costs scheduled in CLS UCCA § 1901(a). Selby Mktg. Assocs. v Als, Inc., 169 Misc. 2d 1043, 647 N.Y.S.2d 927, 1996 N.Y. Misc. LEXIS 356 (N.Y. City Ct. 1996).

Although a trial court had denied a management company's pretrial motion to dismiss a store owner's cause of action for fraud, pursuant to N.Y. C.P.L.R. 3211(7), such a determination was directed at the sufficiency of the pleadings; accordingly, a directed verdict pursuant to N.Y. C.P.L.R. 4401 at the close of the evidence which dismissed that claim was not precluded. Wagner Trading Co. v Tony Walker Retail Mgmt. Co., 307 A.D.2d 701, 764 N.Y.S.2d 156, 2003 N.Y. App. Div. LEXIS 7847 (N.Y. App. Div. 4th Dep't 2003).

Trial court properly granted a seller's motion pursuant to N.Y. C.P.L.R. 4401 to dismiss a company's tortious interference claim; the company failed to show that the seller used improper means or acted for the sole purpose of inflicting intentional harm to the company. S. Fourth St. Props. v Muschel, 1 A.D.3d 347, 766 N.Y.S.2d 851, 2003 N.Y. App. Div. LEXIS 11484 (N.Y. App. Div. 2d Dep't 2003).

Dismissal of a complaint was proper insofar as asserted against a common carrier because the carrier's duty to the plaintiffs, as exiting passengers, was to stop at a place where the passengers could safely disembark and leave the area. Since there was no evidence the carrier

was aware of, or reasonably should have been aware of, any dangerous condition in the roadway, plaintiffs could not make a prima facie case against the carrier and dismissal of the complaint, on oral application and immediately after opening statements, was proper. Cuellar v City of New York, 5 A.D.3d 530, 772 N.Y.S.2d 872, 2004 N.Y. App. Div. LEXIS 2702 (N.Y. App. Div. 2d Dep't 2004).

2. Standard for granting motion

On defendant’s motion to dismiss made at close of plaintiff’s case, test was whether there was any rational basis on which jury could have found for plaintiffs, and plaintiffs were entitled to every reasonable inference which could reasonably be drawn from evidence submitted by them. Rhabb v New York City Housing Authority, 41 N.Y.2d 200, 391 N.Y.S.2d 540, 359 N.E.2d 1335, 1976 N.Y. LEXIS 3145 (N.Y. 1976).

Even though plaintiff’s case may be dubious, a verdict may not be directed, since the standard is not whether a verdict on his behalf would be set aside as contrary to the weight of the credible evidence, but whether the jury could find for him by any rational process. Prince v New York, 21 A.D.2d 668, 250 N.Y.S.2d 107, 1964 N.Y. App. Div. LEXIS 3688 (N.Y. App. Div. 1st Dep't 1964).

Where movant’s credibility is in issue, the direction of a verdict in his favor is unwarranted. Lakin v Motor Vehicle Acci. Indemnification Corp., 23 A.D.2d 488, 255 N.Y.S.2d 678, 1965 N.Y. App. Div. LEXIS 4988 (N.Y. App. Div. 1st Dep't 1965).

Where both sides moved for a directed verdict as provided in CPLR Rule 4401, direction of a verdict for defendant solely on weight of evidence grounds was error when plaintiffs had clearly presented a prima facie case. Squillante v Los Cab Corp., 23 A.D.2d 656, 257 N.Y.S.2d 605, 1965 N.Y. App. Div. LEXIS 4571 (N.Y. App. Div. 1st Dep't 1965).

The weight of the evidence is not a valid basis for withdrawing a case from a jury upon a motion made pursuant to CPLR 4401; thus, where plaintiff presented proof from which a jury might find that injuries in question resulted from defendant’s furnishing plaintiff with a contact lens which

was defective or improperly fitted, the case should have been submitted to the jury. Wessel v Krop, 30 A.D.2d 764, 291 N.Y.S.2d 986, 1968 N.Y. App. Div. LEXIS 3688 (N.Y. App. Div. 4th Dep't 1968).

In action to recover damages for personal injuries, trial court's direction of a verdict in favor of defendant was error, since plaintiff's version of the incident was corroborated by an independent witness and was not incredible as a matter of law, thus presenting a question of fact which was within the sole province of the jury to determine. Del Cerro v New York, 46 A.D.2d 898, 361 N.Y.S.2d 707, 1974 N.Y. App. Div. LEXIS 3338 (N.Y. App. Div. 2d Dep't 1974).

Motion for directed verdict may be granted only when trial court, accepting as true evidence of nonmoving party and all inferences reasonably drawn therefrom, determines that by no rational process could trier of facts base finding in favor of party moved against upon evidence presented. Weir v Slate, 51 A.D.2d 665, 378 N.Y.S.2d 181, 1976 N.Y. App. Div. LEXIS 11018 (N.Y. App. Div. 4th Dep't 1976).

In deciding motion for dismissal at close of plaintiff's proof, trial court must take view of evidence most favorable to nonmoving party. Bradshaw v Paduano, 55 A.D.2d 828, 390 N.Y.S.2d 308, 1976 N.Y. App. Div. LEXIS 15640 (N.Y. App. Div. 4th Dep't 1976).

Motion under rule authorizing motion for judgment during trial should not be granted where facts are in dispute or where different inferences might reasonably be drawn from undisputed facts, or where issue depends upon credibility of witnesses; court cannot properly undertake to weigh evidence but must take view most favorable to nonmoving party, and test is whether court could find that by no rational process could trier of facts base finding in favor of nonmoving party upon evidence presented. Cox v Don's Welding Service, Inc., 58 A.D.2d 1013, 397 N.Y.S.2d 272, 1977 N.Y. App. Div. LEXIS 13233 (N.Y. App. Div. 4th Dep't 1977).

Although dismissal of complaint at end of plaintiff's opening statement is generally disfavored, it is permitted in cases where (1) complaint does not state cause of action, (2) cause of action is conclusively defeated by admitted defense, or (3) counsel by admissions or statements of fact

has subverted plaintiff's cause of action. McLoughlin v Holy Cross High School, 135 A.D.2d 513, 521 N.Y.S.2d 744, 1987 N.Y. App. Div. LEXIS 52472 (N.Y. App. Div. 2d Dep't 1987).

On defendant's motion to dismiss complaint at close of plaintiff's evidence for failure to present prima facie case, plaintiff is entitled to benefits of most favorable inferences which can be drawn from evidence; it is only when there is complete lack of evidence that defendant is entitled to dismissal of complaint. Ferlito v Great South Bay Associates, 140 A.D.2d 408, 528 N.Y.S.2d 111, 1988 N.Y. App. Div. LEXIS 4988 (N.Y. App. Div. 2d Dep't 1988).

Standards governing pretrial motions to dismiss pleading for insufficiency or for summary judgment are quite different from those applied on motion for judgment as matter of law at conclusion of plaintiff's case; in latter instance, test is whether, accepting as true evidence of nonmoving party, there is no rational basis by which trier of fact could find in favor of nonmoving party. Murphy v Herfort, 140 A.D.2d 415, 528 N.Y.S.2d 117, 1988 N.Y. App. Div. LEXIS 4931 (N.Y. App. Div. 2d Dep't), app. denied, 73 N.Y.2d 701, 535 N.Y.S.2d 595, 532 N.E.2d 101 (N.Y. 1988).

Dismissal of cause of action at close of evidence is proper only when there are no disputed issues of fact and non-movant has failed to make out prima facie case, so that by no rational process could jury find in non-movant's favor. Winslow v Freeman, 257 A.D.2d 698, 684 N.Y.S.2d 299, 1999 N.Y. App. Div. LEXIS 76 (N.Y. App. Div. 3d Dep't 1999).

In determining motion under CLS CPLR § 4401, trial court must decide whether plaintiff has presented prima facie case, and motion should be granted if no rational jury could find for plaintiff based on evidence presented. Krakofsky v Fox-Rizzi, 273 A.D.2d 277, 709 N.Y.S.2d 856, 2000 N.Y. App. Div. LEXIS 6506 (N.Y. App. Div. 2d Dep't 2000).

In a worker's action under N.Y. Lab. Law § 240(1), it was error for the trial court to grant judgment as a matter of law in favor of an owner and against a subcontractor because the relative culpability between the subcontractor and the contractor presented fact questions, so granting the owner's motion as to indemnification against the subcontractor was premature.

Hernandez v Two E. End Ave. Apt. Corp., 303 A.D.2d 556, 757 N.Y.S.2d 65, 2003 N.Y. App. Div. LEXIS 2641 (N.Y. App. Div. 2d Dep't 2003).

Trial court properly granted an insurance company's motion for a directed verdict in a claim brought pursuant to a homeowners' policy where the homeowners failed to establish that the collapse of their roof was a covered loss. Fernandes v Allstate Ins. Co., 305 A.D.2d 1065, 758 N.Y.S.2d 729, 2003 N.Y. App. Div. LEXIS 4824 (N.Y. App. Div. 4th Dep't 2003).

Trial court erred in granting judgment as a matter of law to the worker on the issue of liability regarding her personal injury claim against the machine owner, as the motion did not meet the test of only being properly granted where the evidence presented showed that there was no rational process by which the trier of fact could base a finding in favor of the nonmoving party, in this case, the machine owner; indeed, a jury should have been allowed to consider whether an alleged defect in the subject machine that caused the worker's accident resulted from alterations of which the machine owner was unaware and whether the worker was comparatively at fault. Rios v Johnson V.B.C., 17 A.D.3d 654, 795 N.Y.S.2d 62, 2005 N.Y. App. Div. LEXIS 4396 (N.Y. App. Div. 2d Dep't 2005).

Although landlocked property owners failed to preserve for review the issue of the impropriety of the trial court's sua sponte charge to the jury in adjacent landowners' quiet title action, by request or exception pursuant to N.Y. C.P.L.R. 4110-b, the sua sponte jury charge caused jury confusion and an inconsistent verdict, such that it was fundamental error that necessitated a new trial pursuant to N.Y. C.P.L.R. 4404(a). Ciarelli v Lynch, 22 A.D.3d 987, 803 N.Y.S.2d 236, 2005 N.Y. App. Div. LEXIS 11390 (N.Y. App. Div. 3d Dep't 2005).

3. Inferences

On motion by defendant for a directed verdict, the facts adduced at trial must be considered in the light most favorable to plaintiff. Prince v New York, 21 A.D.2d 668, 250 N.Y.S.2d 107, 1964 N.Y. App. Div. LEXIS 3688 (N.Y. App. Div. 1st Dep't 1964).

On motion to dismiss made at close of all the evidence plaintiff is entitled to the benefit of every favorable inference which can be drawn from the evidence submitted by him. Tripi v Stillwell, 22 A.D.2d 759, 253 N.Y.S.2d 689, 1964 N.Y. App. Div. LEXIS 2913 (N.Y. App. Div. 4th Dep't 1964).

In reviewing a judgment of non-suit granted at close of plaintiff's evidence, plaintiff must be afforded the benefit of every reasonable inference to be drawn from the facts proved. Segal v Barnett, 24 A.D.2d 809, 263 N.Y.S.2d 789, 1965 N.Y. App. Div. LEXIS 3118 (N.Y. App. Div. 3d Dep't 1965).

Where judgment has been granted to defendant as a matter of law, appellate court must examine the evidence in light most favorable to plaintiff to determine whether case should have been submitted to jury. Braunstein v Robinson, 47 A.D.2d 700, 364 N.Y.S.2d 605, 1975 N.Y. App. Div. LEXIS 8936 (N.Y. App. Div. 3d Dep't 1975).

To be entitled to judgment as a matter of law, the defendant has the burden of showing that plaintiff failed to make out a prima facie case and in the face of such a motion plaintiff's evidence is accepted as true and plaintiff is entitled to the benefits of the most favorable inferences which can reasonably be drawn from such evidence. Nicholas v Reason, 84 A.D.2d 915, 447 N.Y.S.2d 55, 1981 N.Y. App. Div. LEXIS 16178 (N.Y. App. Div. 4th Dep't 1981).

In a negligence action to recover damages for personal injuries, the trial court erred in dismissing the action at the close of the plaintiff's case where applying the rule that upon a defendant's motion to dismiss at the close of the plaintiff's case, the plaintiff was entitled to the most favorable inferences which may be drawn from the evidence and taking particular note of the written statement made by defendant's manager five days after the accident, the plaintiff established a prima facie case on the issue of defendant's awareness of the condition that caused plaintiff to fall. McArdle v M & M Farms of New City, Inc., 90 A.D.2d 538, 455 N.Y.S.2d 107, 1982 N.Y. App. Div. LEXIS 18591 (N.Y. App. Div. 2d Dep't 1982), app. dismissed, 58 N.Y.2d 972, 1983 N.Y. LEXIS 4162 (N.Y. 1983).

In action to quiet title by adverse possession to strip of land between plaintiff's deed line and concrete retaining wall which they had previously assumed marked their common boundary with defendants' land, lack of evidence as to whether plaintiffs' predecessors or defendants' predecessors constructed wall did not support defendants' motion for dismissal at close of plaintiffs' case since (1) plaintiffs, having established open and continuous use for more than 10 years, were entitled to presumption that such use was hostile, and burden then shifted to defendants to show that use was permissive, and (2) inference that plaintiffs' predecessors constructed wall could be drawn from fact that their property was 3 to 4 feet higher than defendants' property, hence need for retaining wall. Fatone v Vona, 287 A.D.2d 854, 731 N.Y.S.2d 521, 2001 N.Y. App. Div. LEXIS 9750 (N.Y. App. Div. 3d Dep't 2001).

4. Admissions

Motion for a directed verdict made by the plaintiff after the close of the plaintiff's case and prior to any opportunity for the defendant to present any evidence, should be denied unless it could be properly granted on the basis of admissions by the defendant. Horn v Ketchum, 30 A.D.2d 624, 290 N.Y.S.2d 677, 1968 N.Y. App. Div. LEXIS 3879 (N.Y. App. Div. 3d Dep't 1968).

In an action for personal injuries plaintiff sustained at a construction site where he was employed, the trial court erred in granting plaintiff's motion for a directed verdict against a general contractor and in granting the general contractor's motion for a directed verdict against a third-party defendant-subcontractor, where neither the general contractor nor the subcontractor waived the issue of the prematurity of plaintiff's motion that was made prior to any presentation of evidence by defendants, and where the record did not reflect any admissions of liability by defendants. Gavigan v John Di Giulio, Inc., 84 A.D.2d 857, 444 N.Y.S.2d 727, 1981 N.Y. App. Div. LEXIS 16102 (N.Y. App. Div. 3d Dep't 1981).

In products liability action against automobile dealer and automobile manufacturer, in which jury ultimately found that vehicle was not defective and that vehicle was not manufactured negligently or serviced or repaired negligently, court erred in granting judgment during trial

against dealer on basis of its admission in its answer that vehicle was negligently manufactured since (1) admission was, by itself, insufficient to establish liability under any theory, and (2) dealer specifically denied that alleged negligence of manufacturer caused injuries to plaintiffs. Hulme v Patchogue Motors, Inc., 168 A.D.2d 425, 562 N.Y.S.2d 549, 1990 N.Y. App. Div. LEXIS 15025 (N.Y. App. Div. 2d Dep't 1990).

Admissions to be considered on motion for judgment should be formally intended to be part of pleadings or to avoid a question arising from pleadings, and not in conclusive evidentiary admissions that might be met by contradictory evidence resulting in an issue of fact. Martin Fireproofing Corp. v Maryland Casualty Co., 45 Misc. 2d 354, 257 N.Y.S.2d 100, 1965 N.Y. Misc. LEXIS 2227 (N.Y. Sup. Ct. 1965), aff'd, 26 A.D.2d 910, 275 N.Y.S.2d 375, 1966 N.Y. App. Div. LEXIS 6446 (N.Y. App. Div. 4th Dep't 1966).

Motion for judgment on admissions should be granted during trial when counsel deliberately and intentionally states or admits some fact that in any view of the case is fatal to the action. Martin Fireproofing Corp. v Maryland Casualty Co., 45 Misc. 2d 354, 257 N.Y.S.2d 100, 1965 N.Y. Misc. LEXIS 2227 (N.Y. Sup. Ct. 1965), aff'd, 26 A.D.2d 910, 275 N.Y.S.2d 375, 1966 N.Y. App. Div. LEXIS 6446 (N.Y. App. Div. 4th Dep't 1966).

In the injured parties’ action seeking to hold the out-of-possession landlords liable for the injuries caused by the tenants’ horse, the landlords were properly granted judgment as a matter of law pursuant to N.Y. C.P.L.R. 4401; the injured parties could not hold the landlords strictly liable due to the injured parties’ failure to show that the horse ever exhibited any vicious propensities. Young v Tirrell, 1 A.D.3d 509, 767 N.Y.S.2d 121, 2003 N.Y. App. Div. LEXIS 12086 (N.Y. App. Div. 2d Dep't 2003).

In the injured parties’ action seeking to hold the out-of-possession landlords liable for the injuries caused by the tenants’ horse, the landlords were properly granted judgment as a matter of law pursuant to N.Y. C.P.L.R. 4401; the injured parties’ claims seeking to impute alleged causative mistreatment of the horse to the landlords were without merit, as any failure to care for the horse was attributable to the tenants on the farm who owned the horse and not to the landlords, and

the injured parties did not establish any actionable negligence attributable to the landlords. Young v Tirrell, 1 A.D.3d 509, 767 N.Y.S.2d 121, 2003 N.Y. App. Div. LEXIS 12086 (N.Y. App. Div. 2d Dep't 2003).

Admission by a worker's counsel during opening statement that the worker had removed his eye gear just prior to the accident, and, after he did so, he was struck in the eye by flying debris from a saw, absolved the owner of liability under N.Y. Lab. Law § 241(6) and N.Y. Comp. Codes R. & Regs. tit. 12, § 23-1.8(a), and thus the trial court properly dismissed this claim against the owner; however, the complaint, as amplified by the workers' bill of particulars, stated viable N.Y. Lab. Law § 200 and common-law negligence claims against the owner and stated viable causes of action against the manufacturer sounding in strict products liability and breach of the warranty of fitness for a particular use. Nothing in the workers' opening statement precluded the possibility of recovery pursuant to those theories and the trial court erred in dismissing those causes of action. Beshay v Eberhart L.P. # 1, 69 A.D.3d 779, 893 N.Y.S.2d 242, 2010 N.Y. App. Div. LEXIS 443 (N.Y. App. Div. 2d Dep't 2010).

5. Waiver of jury trial

Even though both parties in an action to recover for room, board, and care rendered to a decedent moved for a directed verdict, their conduct did not waive the right to a trial by jury of the factual issues presented. Application of La Manna, 23 A.D.2d 957, 259 N.Y.S.2d 987, 1965 N.Y. App. Div. LEXIS 4214 (N.Y. App. Div. 4th Dep't 1965).

The parties by moving for a directed verdict did not waive the right to jury trial of issues of fact. McLean v Buffalo Bills Football Club, Inc., 32 A.D.2d 881, 301 N.Y.S.2d 872, 1969 N.Y. App. Div. LEXIS 3581 (N.Y. App. Div. 4th Dep't 1969).

In an action for personal injuries plaintiff sustained at a construction site where he was employed, the trial court erred in granting plaintiff's motion for a directed verdict against a general contractor and in granting the general contractor's motion for a directed verdict against a third-party defendant-subcontractor, where neither the general contractor nor the subcontractor

waived the issue of the prematurity of plaintiff's motion that was made prior to any presentation of evidence by defendants, and where the record did not reflect any admissions of liability by defendants. Gavigan v John Di Giulio, Inc., 84 A.D.2d 857, 444 N.Y.S.2d 727, 1981 N.Y. App. Div. LEXIS 16102 (N.Y. App. Div. 3d Dep't 1981).

6. Failure to make motion

Plaintiff conceded that question was one for jury where he failed to move for directed verdict as to whether he had sustained "serious injury" under No-Fault Insurance Law, and therefore Appellate Division exceeded its power of review when it determined that plaintiff had sustained "permanent loss of use of a body function" as matter of law. Miller v Miller, 68 N.Y.2d 871, 508 N.Y.S.2d 418, 501 N.E.2d 26, 1986 N.Y. LEXIS 20551 (N.Y. 1986).

By failing to move for a directed verdict defendant in effect concedes that the issues presented are for the jury. Galusha v Schur, 21 A.D.2d 32, 247 N.Y.S.2d 988, 1964 N.Y. App. Div. LEXIS 4133 (N.Y. App. Div. 3d Dep't), app. denied, 14 N.Y.2d 485, 1964 N.Y. LEXIS 1761 (N.Y. 1964).

In an action to recover a real-estate broker's commission, judgment in favor of defendant on dismissal of the complaint at the close of the plaintiff-broker's case at a non-jury trial would be reversed where the complaint had been dismissed on the ground that plaintiff had failed to make out a prima facie case of employment by defendant as defendant's broker, and where the trial court had resolved issues of credibility of the witnesses against the plaintiff, inasmuch as the trial court, on a motion to dismiss under CPLR § 4401, should not undertake to weigh the evidence, but should take the view of it most favorable to the nonmoving party. Crowley v Brown, 91 A.D.2d 601, 456 N.Y.S.2d 432, 1982 N.Y. App. Div. LEXIS 19444 (N.Y. App. Div. 2d Dep't 1982).

Trial court erred in granting non-suit "with prejudice" at close of plaintiffs' case where no dismissal motion had been made by any defendant; involuntary dismissal of action must await motion for such relief. Blunt v Northern Oneida County Landfill, 145 A.D.2d 913, 536 N.Y.S.2d 295, 1988 N.Y. App. Div. LEXIS 13922 (N.Y. App. Div. 4th Dep't 1988).

Trial court erred in granting, sua sponte, judgment as matter of law to defendants in false imprisonment action before close of plaintiff's case, after only 2 of plaintiff's witnesses had testified, and in absence of properly-grounded motion by defendant, even though plaintiff's absence had delayed proceedings; dismissal would have been inappropriate even if proper procedures were followed, since reasonable people could have differed on question of whether plaintiff's arrest was justified in circumstances. Canteen v White Plains, 165 A.D.2d 856, 560 N.Y.S.2d 320, 1990 N.Y. App. Div. LEXIS 11522 (N.Y. App. Div. 2d Dep't 1990).

It was unpreserved for appellate review whether plaintiff was entitled to judgment as matter of law on issue of liability where she failed to move for directed verdict under CLS CPLR § 4401 on issue of negligence at close of evidence, thereby implicitly conceding that issue was for trier of fact. Hurley v Cavitolo, 239 A.D.2d 559, 658 N.Y.S.2d 90, 1997 N.Y. App. Div. LEXIS 5676 (N.Y. App. Div. 2d Dep't 1997).

Plaintiffs in personal injury action implicitly conceded that factual issue existed by failing to move for directed verdict at conclusion of case. Weledniger v Smithtown Prof'l Owners Co., 255 A.D.2d 377, 679 N.Y.S.2d 668, 1998 N.Y. App. Div. LEXIS 11819 (N.Y. App. Div. 2d Dep't 1998).

In claim against city transit authority on behalf of passenger who died in fall from moving subway train while trying to change cars, if, as authority claimed in its post-trial motion for summary judgment, plaintiff offered no evidence that guard chains on subway cars were misplaced and defective, authority should have moved for directed verdict at close of plaintiff's case. Barksdale v New York City Transit Auth., 273 A.D.2d 43, 709 N.Y.S.2d 531, 2000 N.Y. App. Div. LEXIS 6379 (N.Y. App. Div. 1st Dep't 2000).

Agency's challenge to the legal sufficiency of the evidence in a verdict for a seller in the agency's claim for a real estate commission was not preserved for appellate review because the agency failed to move for judgment as a matter of law at the close of the evidence. Zere Real Estate Servs., Inc. v Adamag Realty Corp., 60 A.D.3d 758, 875 N.Y.S.2d 162, 2009 N.Y. App. Div. LEXIS 1830 (N.Y. App. Div. 2d Dep't 2009).

As to a motion for directed verdict in favor of one of the defendants in a personal injury action arising out of an automobile collision, since no motion for a directed verdict in her favor was made, either at the close of the plaintiff's case, her husband's case, or when all proofs were closed and before submission to the jury, this motion was denied. Britt v Perry, 64 Misc. 2d 655, 315 N.Y.S.2d 357, 1970 N.Y. Misc. LEXIS 1201 (N.Y. Sup. Ct. 1970).

In a personal injury action which a lessee's employee filed against a landlord who rented space in a building to the employee's employer, and a company that managed the building, the landlord and property manager's failure to move for judgment on the issue of negligence at the close of the evidence failed to preserve the landlord and property manager's contention that they were entitled to judgment as a matter of law on the issue of proximate cause, and also implicitly conceded that the issue was for the trier of fact. Sanford v Jonathan Woodner Co., 304 A.D.2d 813, 758 N.Y.S.2d 399, 2003 N.Y. App. Div. LEXIS 4582 (N.Y. App. Div. 2d Dep't 2003).

Even assuming for the moment that the transit authority's challenges to the sufficiency of the evidence had been waived by its failure to move under N.Y. C.P.L.R. 4401 for a directed verdict at the close of plaintiff's case, the transit authority's weight-of-the-evidence arguments were properly before the appellate court. Williams v Hooper, 78 A.D.3d 420, 911 N.Y.S.2d 13, 2010 N.Y. App. Div. LEXIS 8080 (N.Y. App. Div. 1st Dep't 2010), sub. op., vacated, recalled, 82 A.D.3d 448, 919 N.Y.S.2d 121, 2011 N.Y. App. Div. LEXIS 1656 (N.Y. App. Div. 1st Dep't 2011).

7. Movants

The trial court erred in granting summary judgment where all the principals were dead and none of the papers submitted in support of the motion had been offered by a party; the rule is clear that a court may not weigh the credibility of the affiants on such a motion unless it clearly appears that the issues are not genuine but feigned. In re Ramm's Estate, 37 A.D.2d 828, 325 N.Y.S.2d 269, 1971 N.Y. App. Div. LEXIS 3202 (N.Y. App. Div. 1st Dep't 1971).

If a third party defendant produces evidence sufficient to defeat plaintiff's complaint, the court must make its judgment on the basis of all the evidence before it, even though that evidence is

to the benefit of the original and less astute defendant. 622 West 113th Street Corp. v Chemical Bank New York Trust Co., 52 Misc. 2d 444, 276 N.Y.S.2d 85, 1966 N.Y. Misc. LEXIS 1200 (N.Y. Civ. Ct. 1966).

B. Particular Proceedings

i. In General

8. Generally

In wrongful death action arising out of homicide committed at social event held on defendant's premises, sufficient evidence as to assailant's boisterous conduct during the evening, defendant's sale of alcoholic beverages to him, and defendant's failure to take action to control his unruliness were presented to create a jury question. Bartkowiak v St. Adalbert's Roman Catholic Church Soc., 40 A.D.2d 306, 340 N.Y.S.2d 137, 1973 N.Y. App. Div. LEXIS 5289 (N.Y. App. Div. 4th Dep't 1973).

Trial court properly entered judgment as matter of law in favor of defendant in civil case where plaintiffs refused to proceed with trial, and rested without having established prima facie case after court issued ruling which plaintiffs' attorney considered adverse to his clients, and under these circumstances it was immaterial whether ruling by which plaintiffs claimed to be aggrieved was correct. Brenner v Sewall, 124 A.D.2d 620, 507 N.Y.S.2d 882, 1986 N.Y. App. Div. LEXIS 61930 (N.Y. App. Div. 2d Dep't 1986).

Trial court improperly dismissed complaint for damages sustained to automobile, even though at trial to determine amount of damages plaintiff was precluded from offering expert testimony based on his failure to comply with defendant's CLS CPLR § 3101(d) discovery demands, since qualified lay witnesses would be permitted to present their opinions as to value of property, owner of property could testify to its value regardless of special knowledge, and it might have

been possible for plaintiff to prove case through documentary evidence. Tulin v Bostic, 152 A.D.2d 887, 544 N.Y.S.2d 88, 1989 N.Y. App. Div. LEXIS 10262 (N.Y. App. Div. 3d Dep't 1989).

Plaintiff failed to establish prima facie case for violation of CLS Labor § 240 at trial of wrongful death action arising from incident in which engineer fell to his death while making measurement regarding replacement of bridge, since evidence established that measurement was made in response to request by Coast Guard, which was concerned that construction would impair navigability of waterway; while taking of measurement was precipitated by construction project, relationship between defendants and engineer did not make engineer “so employed” within meaning of § 240, and defendants were not responsible for provision of safety equipment. Groger v Morrison-Knudsen Co., 184 A.D.2d 620, 584 N.Y.S.2d 904, 1992 N.Y. App. Div. LEXIS 8077 (N.Y. App. Div. 2d Dep't 1992), app. denied, 86 N.Y.2d 706, 632 N.Y.S.2d 499, 656 N.E.2d 598, 1995 N.Y. LEXIS 3431 (N.Y. 1995).

Directed verdict for plaintiff was not precluded by fact that another justice of Supreme Court, in denying plaintiff’s motion for summary judgment, had previously found triable issue of fact as to whether defendant complied with parties’ agreement where denial of motion for summary judgment is not necessarily res judicata or law of case as to whether there is issue of fact that will be proved at trial. Wyo. County Bank v Ackerman, 286 A.D.2d 884, 730 N.Y.S.2d 898, 2001 N.Y. App. Div. LEXIS 9085 (N.Y. App. Div. 4th Dep't 2001).

Since affirmative findings on questions of control over the work site and negligence could preclude a general contractor from contractual indemnification under N.Y. Gen.Oblig. Law § 5-322.1, the trial court erred in granting the contractor’s motion for a directed verdict. Parelli v Talbot Store, 308 A.D.2d 569, 765 N.Y.S.2d 372, 2003 N.Y. App. Div. LEXIS 9902 (N.Y. App. Div. 2d Dep't 2003).

9. Assault, generally

Action against city for personal injuries to hospital employees, inflicted by inmate who had escaped from custody while in hospital for treatment, was properly dismissed at close of

plaintiffs' case where no evidence had been adduced indicating that employees relied to their detriment on any representation that city had undertaken duty to protect them, and where alleged negligence consisted of method used to restrain inmate, which involved discretionary decision for which city could not be held liable. Smith v New York, 122 A.D.2d 133, 504 N.Y.S.2d 696, 1986 N.Y. App. Div. LEXIS 59188 (N.Y. App. Div. 2d Dep't 1986).

In hotel patron's action for injuries sustained in attack by hotel security personnel, trial court properly refused to submit patron's cause of action in negligence to jury where only permissible inference to be drawn from proof was that hotel employees' offensive touching of patron, if it occurred at all, was intentional and not inadvertent, and thus any right to recover was on basis of intentional tort of assault and battery rather than negligence; once intentional offensive contact has been established, actor is liable for assault and not negligence, even when physical injuries may have been inflicted inadvertently. Mazzaferro v Albany Motel Enterprises, Inc., 127 A.D.2d 374, 515 N.Y.S.2d 631, 1987 N.Y. App. Div. LEXIS 42567 (N.Y. App. Div. 3d Dep't 1987).

Usher employed by movie theater made out prima facie case of negligence against security agency hired by theater, for injuries he sustained when attacked by theater patrons, based on testimony that (1) agency was hired to furnish security at theater, including crowd control and crime prevention, (2) there was no guard near usher when he was assaulted while trying to prevent people from sneaking into movie, contrary to theater owner's instructions, and (3) security agency failed to adequately train its guards in proper security techniques and procedures, and failed to properly supervise or place guards at theater; although usher's injuries were caused by third parties, jury could reasonably have found that attack should have been foreseen by security agency and was proximately caused by agency's original, wrongful acts. Cruz v Madison Detective Bureau, Inc., 137 A.D.2d 86, 528 N.Y.S.2d 372, 1988 N.Y. App. Div. LEXIS 5008 (N.Y. App. Div. 1st Dep't 1988).

Court properly dismissed, at close of plaintiff's case, action alleging that 3 defendants had assaulted plaintiff where evidence showed that plaintiff himself did not know how his injuries

occurred, and 2 defendants, called as plaintiff's witnesses, testified unequivocally that they did not see what had happened and that plaintiff was behind all defendants when he fell to ground. Donohue v Losito, 141 A.D.2d 691, 529 N.Y.S.2d 813, 1988 N.Y. App. Div. LEXIS 6971 (N.Y. App. Div. 2d Dep't), app. denied, 72 N.Y.2d 810, 534 N.Y.S.2d 938, 531 N.E.2d 658, 1988 N.Y. LEXIS 2940 (N.Y. 1988).

Defendant in negligence action was entitled to dismissal of complaint at end of plaintiff's proof, for failure to establish prima facie case, where evidence showed that, after mutual name calling and several minutes of pushing and shoving, defendant swung his fist and hit plaintiff in face; since defendant's actions were intentional, they could not form basis for negligence action. Cummins v Schouten, 160 A.D.2d 1165, 554 N.Y.S.2d 369, 1990 N.Y. App. Div. LEXIS 4564 (N.Y. App. Div. 3d Dep't 1990).

In action against Manhattan and Bronx Surface Transit Operating Authority (MABSTOA) by bus passenger who was stabbed by another passenger, alleging bus driver's failure to exercise reasonable care, complaint was properly dismissed at close of plaintiff's case since third party's unexpected criminal act constituted superseding and intervening cause, relieving MABSTOA of liability as matter of law. Also, as to allegation of bus driver's failure to call police, complaint was properly dismissed at close of plaintiff's case in absence of special relationship which would create duty on part of MABSTOA to provide police protection. Falcone v Manhattan & Bronx Surface Transit Operating Authority, 166 A.D.2d 271, 564 N.Y.S.2d 114, 1990 N.Y. App. Div. LEXIS 11921 (N.Y. App. Div. 1st Dep't 1990).

Court properly dismissed action for battery brought against bar and grill and its owner where testimony of witness, who was working as bartender at bar, indicated that he and his brothers, who were also bartenders, acted solely for personal ends during altercation with plaintiff, rather than in furtherance of or as incident to bar's business. Savarese v New York Housing Authority, 172 A.D.2d 506, 567 N.Y.S.2d 855, 1991 N.Y. App. Div. LEXIS 4413 (N.Y. App. Div. 2d Dep't 1991).

In action by apartment occupant for injuries sustained in sexual assault by intruder who apparently gained access to apartment via fire escape, landlords, who were alleged to have been negligent in allowing ladder at bottom of fire escape to hang too close to ground, thereby affording intruder easy access to fire escape, were entitled to dismissal of action since plaintiff offered no proof that they had notice of prior criminal activity on premises. Gleason v 75-10 Boulevard Owners' Corp., 193 A.D.2d 715, 597 N.Y.S.2d 742, 1993 N.Y. App. Div. LEXIS 4932 (N.Y. App. Div. 2d Dep't 1993).

Complaint alleging violation of CLS Gen Oblig § 11-101 was properly dismissed for failure to establish prima facie case where plaintiff was unable to identify person who allegedly struck him at defendants' establishment, since he was thus unable to offer proof that unknown patron was either underage or intoxicated, that defendants knowingly caused patron to become intoxicated, or that defendants knew or had reason to believe that patron was underage. Furio v Palm Beach Club, 204 A.D.2d 1053, 613 N.Y.S.2d 314, 1994 N.Y. App. Div. LEXIS 6910 (N.Y. App. Div. 4th Dep't 1994).

Tenant failed to establish prima facie case in action alleging that landlord's wife negligently allowed her husband to assault tenant where there was no evidence that she was present during assault, or that she knew or should reasonably have foreseen that assault would occur. Barraza v Sambade, 212 A.D.2d 655, 622 N.Y.S.2d 964, 1995 N.Y. App. Div. LEXIS 1718 (N.Y. App. Div. 2d Dep't 1995).

Dismissal at close of evidence was improper where plaintiff's testimony, if credited, established prima facie case of battery, and defendant testified that he struck plaintiff in self-defense. Winslow v Freeman, 257 A.D.2d 698, 684 N.Y.S.2d 299, 1999 N.Y. App. Div. LEXIS 76 (N.Y. App. Div. 3d Dep't 1999).

Court erred in granting defendants' motion to dismiss action under CLS CPLR § 4401 where defendants' failure to light courtyard, in violation of CLS Mult D § 26(7-a) and NYC Admin Code § 27-739, was prima facie evidence of their negligence, and plaintiff submitted sufficient evidence of prior criminal conduct at building from which jury could have determined that assault

by unknown persons that burglarized plaintiff's first-floor apartment was foreseeable. Guadagno v Terrace Tenants Corp., 262 A.D.2d 355, 691 N.Y.S.2d 146, 1999 N.Y. App. Div. LEXIS 6348 (N.Y. App. Div. 2d Dep't 1999).

10. —Animals involved

In a personal injury action by a woman who received a dog bite while helping defendant attempt to mate her German Shepherds, the trial court erred by granting defendant's motion to dismiss at the close of plaintiff's case, where evidence established that the dog was trained to protect defendant in response to the command, "watch him" by grabbing the arm of the person posing a threat, and plaintiff testified that defendant said "watch it" immediately prior to the attack; the jury rationally could have concluded that the defendant's dog, in view of its training, respond to the words "watch it" by biting the plaintiff. Becker v Pryschlak, 94 A.D.2d 753, 462 N.Y.S.2d 692, 1983 N.Y. App. Div. LEXIS 18208 (N.Y. App. Div. 2d Dep't 1983).

Defendants in dog bite case were not entitled to dismissal for failure to establish prima facie case where dog's vicious propensities and defendant's knowledge thereof were shown by facts that defendants regularly kept dog chained to stake in their backyard, dog would growl and pull at chain whenever anyone entered yard, one defendant had warned neighbor to stay away from dog because it would bite, and attack on infant plaintiff was severe and unprovoked. Moriano v Schmidt, 133 A.D.2d 72, 518 N.Y.S.2d 416, 1987 N.Y. App. Div. LEXIS 49597 (N.Y. App. Div. 2d Dep't 1987).

In action to recover for personal injuries sustained when plaintiff was kicked by defendant's horse while placing hay in stall, court erred in dismissing complaint at close of plaintiff's direct case where (1) groom employed by defendant testified that he had reported to defendant about incident during which he thought horse was about to kick and cautioned defendant to be careful when in close proximity to horse's posterior, and (2) there was nothing in groom's testimony to establish that warning was given because he knew he was dealing was inexperienced horse owner; testimony was sufficient to create jury question with respect to whether horse had pre-

existing vicious propensity and whether defendant had prior knowledge thereof. Zboray v Fessler, 154 A.D.2d 367, 545 N.Y.S.2d 844, 1989 N.Y. App. Div. LEXIS 12265 (N.Y. App. Div. 2d Dep't 1989).

Store owner and operator did not breach its duty to maintain store in reasonably safe condition so as to prevent occurrence of foreseeable injuries, where customer was knocked down by dog that was running through store after escaping from its owner's residence 2,000 feet away. There was no basis for imposing liability on friend of dog owner for injuries to store customer who was knocked down by dog as it ran through store, where friend had chased dog 2,000 feet after noticing that dog owner's sons were having difficulty controlling dog. Store customer who was knocked down by dog that was running through store 2,000 feet from dog owner's residence was entitled to have jury consider whether dog owner violated town ordinance and, if so, whether violation was proximate cause of accident, where ordinance provided: "Any person owning, possessing or harboring any dog in Town of Huntington shall be responsible for restraining and keeping said dog on his property, and it is hereby declared unlawful for said dog to run at large or to stray upon any private property, public highway, street, sidewalk or other public area in Town of Huntington." Lisi v MRP Holdings, 238 A.D.2d 316, 656 N.Y.S.2d 293, 1997 N.Y. App. Div. LEXIS 3397 (N.Y. App. Div. 2d Dep't 1997).

Trial court erred in granting judgment as a matter of law in favor of the defendants on the plaintiffs' personal injury action. The plaintiffs made out a prima facie case by presenting evidence which raised a fact issue as to whether the defendants had constructive notice of the wet floor, based on the plaintiffs' testimony concerning the condition of the passageway floor, the building superintendent's testimony about previous accumulations of rainwater resulting from open windows, and the failure of the doorman to comply with the building rule requiring the closure of basement windows during the rainstorm. Fielding v Rachlin Mgmt. Corp., 309 A.D.2d 894, 766 N.Y.S.2d 381, 2003 N.Y. App. Div. LEXIS 11072 (N.Y. App. Div. 2d Dep't 2003).

Trial court properly denied a county's motions for judgment as a matter of law, N.Y. C.P.L.R. 4401, and to set aside a verdict, N.Y. C.P.L.R. 4404; in light of the evidence presented, the jury

could have found in favor of the injured party, and the damages awarded did not deviate materially from reasonable compensation pursuant to N.Y. C.P.L.R. 5501(c). Patterson v Nassau Cmty. College, 308 A.D.2d 519, 764 N.Y.S.2d 841, 2003 N.Y. App. Div. LEXIS 9669 (N.Y. App. Div. 2d Dep't 2003).

11. —At school

Court did not err in dismissing action against state arising from assault on university student on ground that she failed to prove that assault occurred in her dormitory room, where she first reported that she was assaulted outside gym but later stated that she was assaulted in dorm room, and her roommate was in and out of dorm room on night assault allegedly occurred but observed no sign of struggle. Zobro v State, 130 A.D.2d 912, 516 N.Y.S.2d 322, 1987 N.Y. App. Div. LEXIS 46899 (N.Y. App. Div. 3d Dep't 1987).

In action on behalf of eighth-grade student who was injured while trying to break up fight between 2 classmates, action against participant in fight was properly dismissed at close of plaintiff's evidence for failure to make out prima facie case since such altercation did not rise to level of perilous situation which invited rescue in absence of testimony from which it could be inferred that participants were at risk of serious injury or that it was reasonable to believe they were at risk, and thus "danger invites rescue" doctrine was inapplicable to establish actionable negligence. Ha-Sidi v South Country Cent. School Dist., 148 A.D.2d 580, 539 N.Y.S.2d 47, 1989 N.Y. App. Div. LEXIS 3895 (N.Y. App. Div. 2d Dep't 1989).

Defendant school district was properly granted dismissal of complaint at close of plaintiff's case in action for injuries sustained in fight between plaintiff student and another student where fight occurred while students were being individually escorted to school building after teachers had broken up earlier fight between them, and injury occurred when plaintiff kicked at third party defendant and third party defendant twisted plaintiff's leg; it was intervening act of plaintiff that caused injury and not negligent supervision by teachers. Borelli v Board of Educ. of Highland

School Dist., 156 A.D.2d 903, 550 N.Y.S.2d 120, 1989 N.Y. App. Div. LEXIS 16401 (N.Y. App. Div. 3d Dep't 1989).

In action by school employee who was assaulted by emotionally handicapped student who had been brought to his office to calm down after engaging in violent behavior with another student, city defendants were properly granted judgment as matter of law where plaintiff alleged that school's failure to remove student from his office prior to assault constituted breach of duty on defendants' part, as plaintiff failed to prove that defendants owed him special duty on which he justifiably relied to his detriment. Verra v City of New York, 217 A.D.2d 577, 629 N.Y.S.2d 84, 1995 N.Y. App. Div. LEXIS 7726 (N.Y. App. Div. 2d Dep't), app. denied, 86 N.Y.2d 710, 635 N.Y.S.2d 947, 659 N.E.2d 770, 1995 N.Y. LEXIS 4406 (N.Y. 1995).

In action against school for sexual assault of 5-year-old kindergarten student, who was sent to bathroom alone and unsupervised where he was assaulted by older student, court properly denied motions to dismiss complaint made by school at close of evidence and following jury's verdict in favor of plaintiffs; jury could reasonably conclude that danger of assault was foreseeable and preventable, although school had no actual or constructive notice of similar incidents or prior dangerous conduct by alleged assailant, given school's written security guidelines concerning young children, coupled with principal's testimony, indicating awareness of risks to unescorted students in corridors and bathrooms. Garcia v City of New York, 222 A.D.2d 192, 646 N.Y.S.2d 508, 1996 N.Y. App. Div. LEXIS 8412 (N.Y. App. Div. 1st Dep't 1996), app. denied, 89 N.Y.2d 808, 655 N.Y.S.2d 888, 678 N.E.2d 501, 1997 N.Y. LEXIS 175 (N.Y. 1997).

In action by infant plaintiff who was injured when fellow elementary school student slashed him in his face with razor during altercation just outside school building after school was dismissed, school defendants were properly granted judgment as matter of law at close of plaintiffs' case, where plaintiffs' proof did not establish that infant plaintiff was within school's custody and control at time of altercation and that defendants therefore owed him duty of adequate supervision. Winter v Board of Educ., 270 A.D.2d 343, 704 N.Y.S.2d 142, 2000 N.Y. App. Div.

LEXIS 2688 (N.Y. App. Div. 2d Dep't), app. denied, 95 N.Y.2d 755, 711 N.Y.S.2d 833, 733 N.E.2d 1102, 2000 N.Y. LEXIS 1416 (N.Y. 2000).

Trial court properly granted a directed verdict to defendants in an action arising from the belated arrival of an ambulance; a decedent's wife failed to establish a special relationship running from a city to the wife or the decedent. Baez v City of New York, 309 A.D.2d 679, 765 N.Y.S.2d 875, 2003 N.Y. App. Div. LEXIS 11189 (N.Y. App. Div. 1st Dep't 2003).

Trial court erred by granting two separate motions for judgment as a matter of law because a continuance should have been granted to secure the attendance of a police officer; the trial court was not required to gain the consent of the opposing party before aiding in the enforcement of a subpoena. Papoutsis v NOV Trans. Corp., 309 A.D.2d 841, 766 N.Y.S.2d 52, 2003 N.Y. App. Div. LEXIS 10895 (N.Y. App. Div. 2d Dep't 2003).

12. —Police involved

Court properly denied New York City Transit Authority's motion to dismiss common-law negligence action at close of plaintiff's case, and at close of evidence, where plaintiff's testimony—that he had been shot in back by transit authority police officer after he had fled down flight of stairs and was some distance away from robbery scene—was corroborated by evidence that blood was found only at bottom of stairs, by expert testimony that plaintiff could not have run down stairs after bullet had severed his spinal cord, and by other officer's testimony that plaintiff did not lunge at officer who fired shots, as latter contended. McCummings v New York City Transit Auth., 81 N.Y.2d 923, 597 N.Y.S.2d 653, 613 N.E.2d 559, 1993 N.Y. LEXIS 661 (N.Y.), cert. denied, 510 U.S. 991, 114 S. Ct. 548, 126 L. Ed. 2d 450, 1993 U.S. LEXIS 7337 (U.S. 1993).

In an action to recover damages for assault and battery by a city police officer, plaintiff's judgment of $155,000 in compensatory damages for injuries to his cervical and lumbar spine would be reversed and a new trial ordered on the issue of damages only, where the court erroneously permitted the introduction of evidence by plaintiff's expert witness regarding the

permanency of plaintiff's injuries, where defendants were prejudiced by that error, in that they had not been apprised by plaintiff's bill of particulars that plaintiff intended to prove permanency, where defendants thus were hampered in the preparation of a defense, and where it was probable that the verdict was affected by the erroneously admitted evidence. Fricker v New York, 97 A.D.2d 832, 468 N.Y.S.2d 718, 1983 N.Y. App. Div. LEXIS 20624 (N.Y. App. Div. 2d Dep't 1983).

Action for assault brought against 2 police officers was properly dismissed for failure to prove prima facie case where plaintiff could not identify assailants and offered no direct evidence that injuries resulted form assault; moreover, proof showed that other officers were present at scene and it would have been improper to permit jury to speculate that either of 2 defendant officers committed alleged assault. Santos v New York, 130 A.D.2d 476, 515 N.Y.S.2d 58, 1987 N.Y. App. Div. LEXIS 46451 (N.Y. App. Div. 2d Dep't), app. denied, 70 N.Y.2d 609, 522 N.Y.S.2d 109, 516 N.E.2d 1222, 1987 N.Y. LEXIS 19317 (N.Y. 1987).

Police officer, who was injured when attacked by defendants' son while officer was responding to defendants' call for police assistance, failed to establish prima facie case on theory of defendants' negligent supervision of son where officer offered no evidence that defendants had ability or opportunity to control their son's conduct, and in fact defendants' call to police had been made because they were unable to control their son. Police officer established prima facie case on theory that defendants, in calling for police assistance, negligently misrepresented their son's condition and failed to warn officer of son's vicious propensities, with result that officer failed to prepare himself for possible attack by son and was unable to guard against injuries he suffered in such attack, where officer's evidence created questions of fact as to (1) whether defendants had duty to warn him, (2) whether defendants had opportunity to warn him, (3) whether he relied on defendants' misrepresentation, (4) whether such reliance was reasonable, and (5) whether defendants' misrepresentation proximately caused his injuries. Dawes v Ballard, 133 A.D.2d 662, 520 N.Y.S.2d 11, 1987 N.Y. App. Div. LEXIS 51703 (N.Y. App. Div. 2d Dep't

1987), dismissed, 163 A.D.2d 508, 558 N.Y.S.2d 181, 1990 N.Y. App. Div. LEXIS 8770 (N.Y. App. Div. 2d Dep't 1990).

In action for false imprisonment, assault, and negligent infliction of emotional distress, court erred in dismissing complaint, at close of proof, on ground that, in absence of medical proof, causal relationship of emotional injuries suffered by plaintiff and her infant daughter had not been established, since jury could find, even without medical testimony, that proximate cause of emotional injuries was conduct of plain clothes police officers in forcibly entering plaintiff's second-floor apartment, screaming and swearing at plaintiff and her daughter, holding gun to plaintiff's head, and confining them against their will. Allinger v City of Utica, 226 A.D.2d 1118, 641 N.Y.S.2d 959, 1996 N.Y. App. Div. LEXIS 5625 (N.Y. App. Div. 4th Dep't 1996).

Plaintiff established prima facie case that village police officer, acting within scope of his employment, inflicted injury on him where witnesses testified that they definitely saw one of 3 officers strike plaintiff in head, even though none of witnesses, including plaintiff, could identify which officer actually struck plaintiff; thus, it was error for court to dismiss action against village under doctrine of respondeat superior. Merritt v Village of Mamaroneck, 233 A.D.2d 303, 649 N.Y.S.2d 475, 1996 N.Y. App. Div. LEXIS 11605 (N.Y. App. Div. 2d Dep't 1996).

City police officer's personal injury action against city was properly dismissed at close of evidence, even though officer claimed that his injuries from accidental shooting by fellow officer resulted from fellow officer's having finger on trigger of his weapon, which allegedly was improper use of deadly force in violation of Police Department Patrol Guide Procedure 104-1, where Procedure 104-1 contained no such prohibition, and thus injuries could not have resulted from violation of either government pronouncement imposing clear legal duties or well developed body of law and regulation mandating performance or nonperformance of specific acts. Stea v City of New York, 240 A.D.2d 725, 660 N.Y.S.2d 997, 1997 N.Y. App. Div. LEXIS 7077 (N.Y. App. Div. 2d Dep't), app. denied, 90 N.Y.2d 812, 666 N.Y.S.2d 100, 688 N.E.2d 1383, 1997 N.Y. LEXIS 3660 (N.Y. 1997).

Court improperly dismissed demand for punitive damages in assault action where 60-year-old plaintiff testified, inter alia, that he was thrown to ground by police officers, that he was held down by one officer with foot to his throat, that he was kicked while being held down, that his shirt was torn off, that he was shackled to wall where he remained, naked from waist up, for 40 minutes, and that he was taunted by one officer. Freeman v Port Auth., 243 A.D.2d 409, 663 N.Y.S.2d 557, 1997 N.Y. App. Div. LEXIS 10858 (N.Y. App. Div. 1st Dep't 1997).

13. Breach of contract, generally

In a breach-of-contract action by a corporation that was engaged in the purchase and sale of frozen yogurt, alleging damages as the result of the melting of yogurt after the power company disconnected electrical power to the corporation's warehouse for nonpayment of bills, the power company's motion to dismiss, that was made at the close of the evidence, was properly granted where the corporation's account was historically delinquent, where the power company was entitled to discontinue service after sending both delinquency and disconnect notices, and where the corporation proved neither causation, nor the actual value of the goods lost, inasmuch as it failed to show that the power company was the only source of power, that the power energized the freezers, or that the freezers were otherwise properly operating, and that the discontinuance of service caused the yogurt to spoil, and inasmuch as the corporation failed to establish the condition of the yogurt prior to the discontinuance of service, or on the date of purchase, and, further, failed to show either replacement cost or market value. Fultonville Frozen Foods, Inc. v Niagara Mohawk Power Corp., 91 A.D.2d 732, 457 N.Y.S.2d 978, 1982 N.Y. App. Div. LEXIS 19618 (N.Y. App. Div. 3d Dep't 1982).

In an action upon an alleged contract, plaintiff's complaint was properly dismissed at the close of plaintiff's case, where the evidence was insufficient to prove a legally enforceable agreement, but instead showed that plaintiff was simply being offered the opportunity to apply and be considered for defendants' training program and that that commitment had been carried out.

Wright v Ford Motor Co., 111 A.D.2d 810, 490 N.Y.S.2d 556, 1985 N.Y. App. Div. LEXIS 50055 (N.Y. App. Div. 2d Dep't 1985).

Motions for judgment as matter of law and for judgment notwithstanding verdict, based on plaintiff's failure to prove damages with exactitude in breach of contract action, were properly denied where it was apparent that jury applied experience and common sense to facts proved and awarded damages reasonably calculated to be result of breach. Jetson Air Center, Inc. v Green Drake Leasing Co., 128 A.D.2d 677, 513 N.Y.S.2d 176, 1987 N.Y. App. Div. LEXIS 44368 (N.Y. App. Div. 2d Dep't 1987).

Operators of program to protect interests of low-income energy consumers were entitled to dismissal of legal services organization's breach of contract complaint at close of organization's proof where (1) operators' agent, who allegedly had authority to contract, was unavailable to testify, (2) there was no showing that operators caused organization to rely on agent's "apparent authority," (3) organization never inquired about scope of agent's authority, and (4) even assuming that authority existed, there was no evidence of offer and acceptance. Breach of contract cause of action is properly dismissed under CLS CPLR § 4401 when there is no proof of terms of any agreement between parties. Court also properly dismissed, at close of plaintiff's proof, quantum meruit action brought by legal services organization against operators of grant program to protect interests of low-income energy consumers where organization offered no proof concerning its alleged rendition of services or operator's acceptance thereof. Legal Aid Soc. v Economic Opportunity Com., Inc., 132 A.D.2d 113, 521 N.Y.S.2d 833, 1987 N.Y. App. Div. LEXIS 49553 (N.Y. App. Div. 3d Dep't 1987).

Jury question existed as to whether plaintiffs waived their claim for interest on late payments under service contract where defendant proved that although he almost regularly paid late over course of 2-year period, plaintiffs never assessed, demanded or asserted their right to interest on past-due accounts; thus, court erred in directing verdict for plaintiffs. Hess v Zoological Soc. of Buffalo, Inc., 134 A.D.2d 824, 521 N.Y.S.2d 903, 1987 N.Y. App. Div. LEXIS 50975 (N.Y. App. Div. 4th Dep't 1987).

Defendant corporation was entitled to dismissal of cause of action for breach of contract at close of plaintiff's case since it was not party to contract and there was no evidence to contradict its contention that its only role in transaction was acting as agent for disclosed principal, nor was there any showing that its corporate form should be disregarded to prevent fraud or achieve equity in absence of proof that it was mere alter ego for its officers and principals, who were also members of partnerships that formed disclosed principal. Aces Mechanical Corp. v Cohen Bros. Realty & Constr. Corp., 136 A.D.2d 503, 523 N.Y.S.2d 824, 1988 N.Y. App. Div. LEXIS 535 (N.Y. App. Div. 1st Dep't), modified, 531 N.Y.S.2d 218, 1988 N.Y. App. Div. LEXIS 8530 (N.Y. App. Div. 1st Dep't 1988).

Defendants were entitled to dismissal of breach of contract complaint after non-jury trial where plaintiff had contracted with one defendant to purchase natural gas and with second defendant (first defendant's owner) to supply anhydrous ammonia made from natural gas at planned facility, plaintiff failed to construct facility, and thus it breached contract when it could not accept delivery of natural gas by certain date and it could not supply ammonia to second defendant; subsequent notice sent by plaintiff to first defendant seeking delivery of natural gas failed to cure plaintiff's breach given fact that plaintiff never responded to first defendant's inquiry as to whether plaintiff planned to resell natural gas for use in interstate commerce in violation of their contract. New York Anhydrous Ammonia Dev. Corp. v Ciba-Geigy Corp., 150 A.D.2d 658, 541 N.Y.S.2d 530, 1989 N.Y. App. Div. LEXIS 7105 (N.Y. App. Div. 2d Dep't 1989).

Prospective purchaser's cause of action for breach of contract was properly dismissed at close of defendants' case due to lack of sufficient evidence of formation of contract, as defendant's signing of document could not be interpreted as completed execution of contract where all parties knew and understood that document would not ripen into contract unless co-owner also signed it and consented thereto. Malik v Ingber, 217 A.D.2d 535, 629 N.Y.S.2d 76, 1995 N.Y. App. Div. LEXIS 7560 (N.Y. App. Div. 2d Dep't 1995).

Court properly granted defendant's motion to dismiss at close of plaintiff's case in breach of contract action as to provisions requiring surviving shareholder to purchase shares of deceased

shareholder where there was no evidence, inter alia, that defendant had failed to purchase shares owned by plaintiff's decedent at time of his death. Simon v Siegel, 224 A.D.2d 315, 637 N.Y.S.2d 734, 1996 N.Y. App. Div. LEXIS 1322 (N.Y. App. Div. 1st Dep't 1996).

Court should have dismissed breach of contract action where no evidence was presented by plaintiff to prove its costs of providing goods and services in question, and only evidence admitted at trial on issue of damages were introduced by defendant's witnesses as to expense it incurred to obtain goods and services in question from another party. G & A Moving & Storage Co. v Computer Assocs. Int'l, 233 A.D.2d 479, 650 N.Y.S.2d 982, 1996 N.Y. App. Div. LEXIS 12652 (N.Y. App. Div. 2d Dep't 1996).

In action to recover payments allegedly due under window installation contract wherein defendant school board counterclaimed for breach of contract, alleging substantial premature deterioration of windows, and judgment in plaintiff's favor was reversed on appeal based on post-verdict evidence that plaintiff's principal had bribed board official to interpret contract as not requiring "back puttying," which was key issue at first trial, court should have dismissed punitive damages claim asserted by board at second trial when, at close of evidence, it dismissed all of board's counterclaims as time-barred. Prote Contr. Co. v Board of Educ., 276 A.D.2d 309, 714 N.Y.S.2d 36, 2000 N.Y. App. Div. LEXIS 10502 (N.Y. App. Div. 1st Dep't 2000).

Trial court properly denied an employer's motion for judgment based on an allegation that the contract it was being sued on only entitled its employee to relief yet only the employee's company sought relief as the parties' contract entitled the company to relief, and the employee incorporated by reference in the complaint the claims asserted by his company. A.S.L. Enters. v Venus Labs., Inc., 298 A.D.2d 337, 751 N.Y.S.2d 206, 2002 N.Y. App. Div. LEXIS 9368 (N.Y. App. Div. 2d Dep't 2002).

Orders denying plaintiff's motion for continuance and granting defendants' motion for judgment in their favor as a matter of law made at the close of plaintiff's breach of contract case was error because plaintiff's request for a continuance was to procure the testimony of a witness made indispensable by the failure of one defendant to appear at trial, was not made for delay, and

would not have prejudiced defendants. Noble Thread Corp. v Noble Group Corp., 46 A.D.3d 778, 847 N.Y.S.2d 668, 2007 N.Y. App. Div. LEXIS 12865 (N.Y. App. Div. 2d Dep't 2007).

Denial of borrowers' N.Y. C.P.L.R. 4401 motion for judgment as a matter of law in a lender's breach of contract action was proper because, at trial, the lender testified that he loaned the borrowers $50,000, which was to repaid with interest measured by a percentage of the profits of the borrowers' restaurant, but that repayment was not made; the verdict in favor of the lender was based on a fair interpretation of the evidence. Alameldin v Kings Castle Caterers, Inc., 53 A.D.3d 514, 861 N.Y.S.2d 759, 2008 N.Y. App. Div. LEXIS 6068 (N.Y. App. Div. 2d Dep't 2008).

Construction company's suit to recover money owed under a construction contract was properly dismissed under N.Y. C.P.L.R. 4401 as it was undisputed that the company was unlicensed at the time that the work was performed; thus, it could not maintain an action against property owners as Westchester County, N.Y., Administrative Code Article XVI, § 863.13 required a company to be licensed in order to maintain an action arising out of the company's engagement in the home improvement business. Racwel Constr., LLC v Manfredi, 61 A.D.3d 731, 878 N.Y.S.2d 369, 2009 N.Y. App. Div. LEXIS 2889 (N.Y. App. Div. 2d Dep't 2009).

Order granting a buyer's motion for judgment as a matter of law dismissing a breach of contract complaint was error because there was a rational basis to find that the seller performed under the parties' consulting and marketing agreements before the buyer's breach of these agreements, and that the buyer breached the relevant agreements; the seller presented evidence that the buyer breached the asset purchase agreement when it failed to pay the entire amount due and failed to make the monthly payments under a lease, evidence that the buyer breached the marketing and consulting agreements when it ceased making required payments thereunder, as well as when it terminated the marketing agreement because of the seller's alleged violation of a restrictive covenant, evidence of the damages it sustained, and evidence that the buyer stopped making the required payments under the consulting and marketing agreements. The seller also submitted sufficient evidence showing that the buyer breached a performance incentive provision when it failed to meet with one of the seller's representatives

and establish a formula for the incentive payment. PAS Tech. Servs., Inc. v Middle Vil. Healthcare Mgt., LLC, 92 A.D.3d 742, 939 N.Y.S.2d 85, 2012 N.Y. App. Div. LEXIS 1196 (N.Y. App. Div. 2d Dep't 2012).

Trial court properly entered judgment as a matter of law dismissing a seller’s claim against a buyer for expenses and health care premiums, as the seller failed to establish, prima facie, its entitlement to those damages. PAS Tech. Servs., Inc. v Middle Vil. Healthcare Mgt., LLC, 92 A.D.3d 742, 939 N.Y.S.2d 85, 2012 N.Y. App. Div. LEXIS 1196 (N.Y. App. Div. 2d Dep't 2012).

Trial court properly entered a trial order of dismissal because the Dead Man's Statute precluded a grantor from testifying about his discussions with the decedent about transferring certain real property to the decedent, with whom he had been cohabitating for approximately a decade, the grantor received legal advice before making the transfer, the grantor failed to establish that decedent made an express or implied promise to maintain his children as beneficiaries of her estate, the grantor did not rely on it in making the transfer even if there was a promise, and equity and good conscience permitted the decedent's estate to retain the gifts that the grantor gave her even after she ended their relationship. Klugman v Laforest, 138 A.D.3d 1185, 29 N.Y.S.3d 625, 2016 N.Y. App. Div. LEXIS 2569 (N.Y. App. Div. 3d Dep't 2016).

Owner of construction project was not entitled to dismissal, at close of evidence, of prime contractor’s cause of action for delay damages sustained by subcontractor where (1) course of conduct between prime contractor and subcontractor established existence of valid “liquidating agreement” permitting “pass through” cause of action whereby subcontractor was not required to first bring suit against prime contractor and prime contractor was not required to actually pay out damages before suing owner, and (2) proof established that owner’s actions injured subcontractor; prime contractor sustained actual damages based on its liability to compensate subcontractor. Barry, Bette & Led Duke, Inc. v State, 169 Misc. 2d 594, 645 N.Y.S.2d 713, 1996 N.Y. Misc. LEXIS 213 (N.Y. Ct. Cl. 1996), rev'd, dismissed, 240 A.D.2d 54, 669 N.Y.S.2d 741, 1998 N.Y. App. Div. LEXIS 2485 (N.Y. App. Div. 3d Dep't 1998).

Trial court erred in denying a property owner's motion for a directed verdict pursuant to N.Y. C.P.L.R. 4401 as to a contractor's implied contract cause of action based upon the contractor's failure to produce a written contract executed by both parties, because N.Y. Gen. Bus. Law § 771 required that all home improvement contracts be in writing and signed by both parties. Precision Founds. v Ives, 4 A.D.3d 589, 772 N.Y.S.2d 116, 2004 N.Y. App. Div. LEXIS 1073 (N.Y. App. Div. 3d Dep't 2004).

Although a contractor's claims were barred before it even knew that litigation might ensue, because the contractor did not file a notice of claim for more than three months after the work was substantially completed, as required by N.Y. Pub. Auth. Law § 1744(2), the trial court properly granted a school authority's N.Y. C.P.L.R. 4401 motion for judgment as a matter of law and dismissed the contractor's breach of contract complaint. C.S.A. Contr. Corp. v N.Y. City Sch. Constr. Auth., 10 A.D.3d 589, 781 N.Y.S.2d 659, 2004 N.Y. App. Div. LEXIS 10609 (N.Y. App. Div. 2d Dep't 2004), aff'd, 5 N.Y.3d 189, 800 N.Y.S.2d 123, 833 N.E.2d 266, 2005 N.Y. LEXIS 1569 (N.Y. 2005).

Where buyers of a first of two corporations sued the officers, directors, and shareholders of the second corporation alleging eight causes of action stemming from an alleged breach of a transportation agreement between the parties, but failed to show both sufficient evidence of a breach and that it was damaged by the apparent misunderstandings between the parties, the officers, directors, and shareholders of the second corporation were properly granted a directed verdict at the close of the buyers' case; further, the evidence failed to prove that the second' corporation's conduct rose to the level of culpability to support a punitive damages award. Fellion v Darling, 14 A.D.3d 904, 789 N.Y.S.2d 541, 2005 N.Y. App. Div. LEXIS 460 (N.Y. App. Div. 3d Dep't 2005).

14. —Real property contract

In an action for breach of a contract to convey realty, the trial court properly granted defendant's motion, at the close of plaintiff's case, to dismiss the complaint as a matter of law, where the

contract specifically stated that the conveyance was contingent upon plaintiff's receipt of an on premises liquor license, plaintiff's application for which had been denied, and where plaintiff had also failed to comply with another condition precedent to the contract that required him to obtain a written commitment for guaranteed financing of the existing mortgage prior to the agreed upon closing date, and to forward such written commitment to defendant. Wood v Laughlin, 103 A.D.2d 881, 477 N.Y.S.2d 905, 1984 N.Y. App. Div. LEXIS 19547 (N.Y. App. Div. 3d Dep't 1984).

Buyer's action for specific performance of contract for sale of real property was properly dismissed for failure to establish prima facie case since he failed to establish that he was ready, willing, and able to perform his obligations under contract where he did not attend rescheduled closing and it was established at trial that he did not have necessary funds to consummate purchase on that date; while original contract did not make time of essence and was not contingent on buyer's ability to obtain mortgage financing, sellers' letter fixing new closing date (after buyer was unable to close on original proposed date) made time of essence by advising buyer that failure to close on new date would result in default. Zev v Merman, 134 A.D.2d 555, 521 N.Y.S.2d 455, 1987 N.Y. App. Div. LEXIS 50763 (N.Y. App. Div. 2d Dep't 1987), aff'd, 73 N.Y.2d 781, 536 N.Y.S.2d 739, 533 N.E.2d 669, 1988 N.Y. LEXIS 3372 (N.Y. 1988).

Real estate brokers were not entitled to commission in connection with their client's sale of his residence, although they initially brought buyer to see residence, since there was no evidence that brokers initiated any negotiations, discussed any details on which parties to sale would have had to agree to consummate sale, or otherwise actively participated in ultimate sale; thus, trial court should have dismissed brokers' complaint for failure to present prima facie case. Gabrielli v Cornazzani, 135 A.D.2d 340, 525 N.Y.S.2d 71, 1988 N.Y. App. Div. LEXIS 1747 (N.Y. App. Div. 3d Dep't 1988).

In buyer's action for specific performance of real estate sales contract, seller was entitled to dismissal of complaint at close of buyer's case where proof showed that writing was intended by parties to be evidence only of buyer's payment of deposit, which was returned to him, and that

parties anticipated further negotiations regarding purchase of property. Papp v Gentile, 149 A.D.2d 493, 539 N.Y.S.2d 801, 1989 N.Y. App. Div. LEXIS 4631 (N.Y. App. Div. 2d Dep't 1989).

Client failed to make out prima facie case of fraud, self-dealing and conspiracy against broker and his partner where broker, with whom client had listed his real property for sale, fully disclosed his intention to purchase premises for his own account, and paid price which was both fair and reasonable; broker's undisclosed purchase of unrelated, contiguous parcel in which client had no interest did not constitute breach of broker's fiduciary duty. Yellot v Poritzky, 170 A.D.2d 676, 567 N.Y.S.2d 91, 1991 N.Y. App. Div. LEXIS 3164 (N.Y. App. Div. 2d Dep't 1991).

Court properly granted purchasers' motion for judgment during trial at close of broker's proof in action for commission on sale of apartment where (1) broker did not allege that she was procuring cause of sale, and instead alleged that purchasers deprived her of opportunity to earn commission by terminating their agreement in bad faith, (2) at most, broker provided financial information and showed complex to purchasers in 1978 and again provided financial information in 1979, (2) agreement between broker and purchasers was terminated in 1979, (3) no negotiations were going on at time agreement was terminated, and (4) complex was not sold until 1980. Gross v Valenti, 202 A.D.2d 971, 612 N.Y.S.2d 703, 1994 N.Y. App. Div. LEXIS 3324 (N.Y. App. Div. 4th Dep't 1994).

Evidence established prima facie case for breach of contract and breach of express warranty as to defendants' counterclaim and cause of action in their third-party complaint where (1) rider to parties' contract of sale contained guarantee against defects in newly constructed house for one year, and further provided that guarantee was to survive delivery of deed, (2) defects were not discoverable at time of closing, but were subsequently discovered by defendants within one year of closing, and (3) there was evidence by expert with regard to cost of repairing several defects. H.R. Jay Realty v Gross, 204 A.D.2d 274, 611 N.Y.S.2d 578, 1994 N.Y. App. Div. LEXIS 4616 (N.Y. App. Div. 2d Dep't 1994).

In action by prospective purchaser against construction company for breach of real estate sales contract requiring company to obtain mortgage commitment within 45 days, court improperly

granted company's motion for judgment as matter of law, at close of company's case, on ground that purchaser waived 45-day deadline by not meeting with mortgage broker until 41 days after execution of contract, where purchaser's only obligation was not to frustrate ability of construction company to obtain mortgage, there was no evidence that he intentionally delayed meeting with mortgage broker, and company never obtained firm mortgage commitment. Greenberg v Tekhomes, Inc., 209 A.D.2d 469, 619 N.Y.S.2d 60, 1994 N.Y. App. Div. LEXIS 11238 (N.Y. App. Div. 2d Dep't 1994), app. denied, 85 N.Y.2d 805, 627 N.Y.S.2d 322, 650 N.E.2d 1324, 1995 N.Y. LEXIS 1364 (N.Y. 1995).

In breach of contract action brought against defendants, who were hired as consultants to evaluate extent of toxic contamination on plaintiff's property, court erred in granting defendants' CLS CPLR § 4401 motion on basis of release executed between plaintiff and third party, from whom plaintiff had purchased chemicals and equipment, since release pertained solely to plaintiff's claims against third party, and was not intended to dispose of claims arising in entirely different context of remediation of toxic condition at plaintiff's property. B.B. & S. Treated Lumber Co. v Groundwater Tech., 256 A.D.2d 430, 681 N.Y.S.2d 608, 1998 N.Y. App. Div. LEXIS 13536 (N.Y. App. Div. 2d Dep't 1998), app. dismissed, 93 N.Y.2d 958, 694 N.Y.S.2d 634, 716 N.E.2d 699, 1999 N.Y. LEXIS 1354 (N.Y. 1999).

Judgment as a matter of law was properly granted to a purchaser in her breach of contract action against a seller, because the purchaser made a prima facie showing that the seller failed to close within the time appointed in the contract. The judgment was modified, however, because the appellate court determined that the award of attorney's fees was excessive as well as found that the award of costs was not authorized by the contract. Hand v Field, 15 A.D.3d 542, 790 N.Y.S.2d 681, 2005 N.Y. App. Div. LEXIS 1862 (N.Y. App. Div. 2d Dep't 2005).

15. Commercial transactions, generally

The trial court incorrectly directed a verdict in favor of defendant in an action for repayment of a loan where plaintiff's testimony, if believed, established the essentials of her cause of action,

and where the record disclosed contradictory evidence, so that the credibility of plaintiff and defendant should have been referred to and decided by a jury. Le May v Frankel, 80 A.D.2d 665, 436 N.Y.S.2d 398, 1981 N.Y. App. Div. LEXIS 10367 (N.Y. App. Div. 3d Dep't 1981).

Trial court erred in granting judgment for creditor at close of evidence where dispute existed as to whether debtor had acknowledged debt and thus extended limitations period, since issue of authenticity of debtor's signature on disputed acknowledgments presented jury question based on comparison of signatures and on testimony of debtor's bookkeeper that signatures were not genuine. Woll v Raffa, 124 A.D.2d 726, 508 N.Y.S.2d 474, 1986 N.Y. App. Div. LEXIS 62031 (N.Y. App. Div. 2d Dep't 1986).

In action seeking to trace proceeds from unauthorized sale of secured goods into hands of debtors' law firm, court properly granted judgment as matter of law to firm, which received proceeds in ordinary course of debtors' business and in exchange for legal services rendered, since CLS UCC § 9-306, with certain exceptions, allows secured party to trace proceeds from unauthorized sale of collateral only insofar as they remain in debtor's hands. Lake Ontario Production Credit Asso. v Partnership of Grove, 138 A.D.2d 930, 526 N.Y.S.2d 985, 1988 N.Y. App. Div. LEXIS 2789 (N.Y. App. Div. 4th Dep't 1988).

In action to recover balance allegedly due for goods sold and delivered, plaintiff's claim for $9,484.62 was properly dismissed for failure to make out prima facie case where only evidence proffered by plaintiff at trial was 4 checks with face amounts totaling $8,563.62 which had been returned for insufficient funds, defendant's president testified that he believed that all 4 checks were subsequently replaced, check in same amount as one dishonored check was introduced in evidence, plaintiff's regional manager did not know how figure of $9,484.62 was arrived at or for what each of 4 checks was in payment, and plaintiff did not produce invoices or other business records; plaintiff also failed to establish prima facie case of account stated since it failed to show that there was any account between parties and that specified balance was due. United Consol. Industries v Mendel's Auto Parts, Inc., 150 A.D.2d 768, 542 N.Y.S.2d 214, 1989 N.Y. App. Div. LEXIS 7288 (N.Y. App. Div. 2d Dep't 1989).

In action alleging illegal enforcement of warehouseman's lien, it was error for court to direct verdict against defendant warehouseman and its trucking carrier at conclusion of trial on basis that they willfully violated CLS UCC § 7-210 with regard to notice and conduct of auction, while dismissing case against law firm hired by them to conduct lien sale on ground that it was negligent but "something more than negligence" was required to hold it liable, as (1) warehouseman and trucking defendants were entitled to assume that law firm and its designated auctioneer would exercise their expertise in bring about valid foreclosure of lien, and (2) to dismiss case against erring parties and leave diligent client fully liable as matter of law was unsupported in record and repugnant to common sense. Shimamoto v S&F Warehouses, Inc., 257 A.D.2d 334, 693 N.Y.S.2d 110, 1999 N.Y. App. Div. LEXIS 7452 (N.Y. App. Div. 1st Dep't 1999), app. denied, 1999 N.Y. App. Div. LEXIS 9193 (N.Y. App. Div. 1st Dep't Sept. 9, 1999), app. dismissed, app. denied, 94 N.Y.2d 837, 703 N.Y.S.2d 68, 724 N.E.2d 763, 1999 N.Y. LEXIS 3877 (N.Y. 1999).

Court properly granted defendants' motion because plaintiff lacked standing to bring the second and third causes of action since they arose under the Transaction Documents (as defined in the indenture) but did not seek repayment of the notes; hence, section 5.4 of the indenture (the no-action clause), rather than section 5.9 (the exception to the no-action clause) applied. Highland Crusader Offshore Partners, L.P. v Celtic Pharma Phinco B.V., 205 A.D.3d 520, 169 N.Y.S.3d 256, 2022 N.Y. App. Div. LEXIS 3131 (N.Y. App. Div. 1st Dep't 2022).

16. —Banks; banking

Where the defendant bank debited a depositor's account the amount of a previously credited welfare check upon notice by the Department of Welfare that the endorsement of the check was a forgery 6 months after the initial deposit and long after final settlement of the item, the bank did so at its own peril. However, final settlement did not preclude the bank from pursuing its remedy by way of plenary suit to hold the depositor on its endorsement and warranties, and in such a suit in which the forgery was conclusively proved by the third party defendant, the

Department of Welfare, the bank was entitled to the benefit of that evidence and to dismissal of the complaint without prejudice to an institution by the plaintiff of a new action based upon negligence in discovering the forgery. 622 West 113th Street Corp. v Chemical Bank New York Trust Co., 52 Misc. 2d 444, 276 N.Y.S.2d 85, 1966 N.Y. Misc. LEXIS 1200 (N.Y. Civ. Ct. 1966).

In an action to collect a line-of-credit loan, a bank had to prove the loan's execution and the debtor's default, and, while the bank proved the loan's existence, it did not make a prima facie showing of the debtor's default, as it introduced no monthly billing statements or other evidence of the history of advances and payments on the loan, and a demand letter and pay-off statement, showing a balance due, were, alone, insufficient, as the bank did not explain how it arrived at the amount alleged to be due, so the debtor was properly granted judgment as a matter of law at the close of the bank's case. Fleet Nat'l Bank v Cove Car Care Ctr., Inc., 8 A.D.3d 225, 777 N.Y.S.2d 660, 2004 N.Y. App. Div. LEXIS 7448 (N.Y. App. Div. 2d Dep't 2004).

17. Divorce and family matters, generally

Infant defendant's motion under this rule was improperly granted where jury question was raised whether coaching services rendered by plaintiff to infant defendant were necessaries for which plaintiff was entitled to compensation on basis of quantum meruit. Siegel v Hodges, 24 A.D.2d 456, 260 N.Y.S.2d 405, 1965 N.Y. App. Div. LEXIS 4029 (N.Y. App. Div. 2d Dep't 1965).

County department of social services made out prima facie case of paternity, and adequately rebutted presumption of legitimacy sufficient to withstand CLS CPLR § 4401 motion to dismiss, where (1) mother testified that she had sexual intercourse solely with putative father during critical months, that she did not have intercourse with her husband following their physical separation 4 months earlier, and that putative father had admitted after child's birth that he was father, (2) putative father's surname was used as part of child's given name, and (3) results of 2 HLA tests indicated 98.4 percent and 97.5 percent probability that putative father was biological father. Wayne County Dep't of Social Services v Titcomb, 124 A.D.2d 989, 509 N.Y.S.2d 229, 1986 N.Y. App. Div. LEXIS 62309 (N.Y. App. Div. 4th Dep't 1986).

In divorce action, wife made out prima facie case of adultery sufficient to defeat husband's motion to dismiss where (1) wife placed into evidence petition and order of Family Court in separate filiation proceeding brought against husband which determined that husband was father of child by another woman, and (2) husband admitted at examination before trial that he was paying support for said child. Supreme Court erred in dismissing wife's complaint for divorce at conclusion of her case where court apparently believed that husband had established defense of recrimination under CLS Dom Rel § 171 and thus did not pass upon sufficiency of wife's proof in that regard, since such finding was based primarily upon husband's testimony which should have been disregarded pursuant to CLS CPLR § 4502; wife's denial of many of allegations testified to by husband raised issues of fact that could only be determined at close of all proof. Also, wife established prima facie case for divorce upon grounds of cruel and inhuman treatment sufficient to withstand motion to dismiss at close of her case in chief where her proof established course of adulterous conduct by husband which extended into 5 year period immediately preceding commencement of divorce action. Marrow v Marrow, 124 A.D.2d 1000, 508 N.Y.S.2d 789, 1986 N.Y. App. Div. LEXIS 62326 (N.Y. App. Div. 4th Dep't 1986).

Husband was not entitled to dismissal of divorce action at close of wife's evidence where court had erroneously denied her motion to conform pleadings to proof and excluded certain evidence as outside scope of pleadings; had court granted wife's motion, grounds for exclusion of evidence would have disappeared and wife's case would have been strengthened. O'Sullivan v O'Sullivan, 126 A.D.2d 784, 510 N.Y.S.2d 288, 1987 N.Y. App. Div. LEXIS 41940 (N.Y. App. Div. 3d Dep't), app. dismissed, 69 N.Y.2d 984, 516 N.Y.S.2d 1027, 509 N.E.2d 362, 1987 N.Y. LEXIS 16761 (N.Y. 1987).

Plaintiff seeking damages for physical and mental abuse, allegedly suffered as result of defendant foster care agency's negligent supervision of his placement in foster homes, was not entitled to directed verdict based on admission of caseworker that she did not inform Department of Social Services of plaintiff's allegations of physical abuse in foster home, since caseworker also testified that plaintiff admitted to having fabricated allegation, and thus no case

of suspected child abuse existed to be reported. Ivan John M. v Catholic Home Bureau, 182 A.D.2d 421, 582 N.Y.S.2d 154, 1992 N.Y. App. Div. LEXIS 5602 (N.Y. App. Div. 1st Dep't 1992).

Court properly granted husband's motion, made at close of wife's proof, to dismiss action for divorce on ground of cruel and inhuman treatment where parties had been married for 18 years, there was no evidence of any physical violence or any vulgar or obscene language by husband, and there was no medical proof to show that his conduct adversely affected her physical or mental health. Donley v Donley, 233 A.D.2d 930, 649 N.Y.S.2d 750, 1996 N.Y. App. Div. LEXIS 13453 (N.Y. App. Div. 4th Dep't 1996).

Court erred in dismissing husband's counterclaim for divorce on ground of constructive abandonment for failure to prove prima facie case where he testified that for period of over one year his wife continuously and unjustifiably refused to engage in sexual relations with him, despite repeated requests made by him through that period, and even though he was unable to specify particular dates, he testified that refusals occurred some 100 times. Gonzalez v Gonzalez, 262 A.D.2d 281, 691 N.Y.S.2d 122, 1999 N.Y. App. Div. LEXIS 5894 (N.Y. App. Div. 2d Dep't 1999).

In action seeking divorce on ground of cruel and inhuman treatment, court improperly granted defendant's motion to dismiss complaint at close of plaintiff's proof where evidence showed that misconduct consisted of verbal and mental abuse that was long-standing and culminated in false accusations of adultery, and plaintiff testified to specific physical ailments arising from defendant's abuse and further testified that she was "seeing a counselor for emotionally battered women." Vaiana v Vaiana, 272 A.D.2d 916, 706 N.Y.S.2d 812, 2000 N.Y. App. Div. LEXIS 5135 (N.Y. App. Div. 4th Dep't 2000).

Where plaintiff wife sought a divorce on the ground of cruel and inhuman treatment, the trial court improperly granted the wife's motion pursuant to N.Y. C.P.L.R. 4401 for judgment as a matter of law at the close of the evidence, as the wife failed to establish facts to satisfy, as a matter of law, the degree of proof of cruel and inhuman treatment under N.Y. Dom. Rel. Law §

170(1) that was required for a marriage of such long duration (30 years). Davey v Davey, 293 A.D.2d 444, 739 N.Y.S.2d 629, 2002 N.Y. App. Div. LEXIS 3554 (N.Y. App. Div. 2d Dep't 2002).

Husband’s N.Y. C.P.L.R. 4401 motion should have been denied and the wife’s expert witness should not have been precluded because at least a portion of the husband’s interest in the property at issue was presumptively marital under N.Y. Comp. Codes R. & Regs. tit. 22, § 202.16(h), and the wife demonstrated good cause for a delay in filing and providing the husband a copy of her expert witness report under § 202.16(g) and N.Y. C.P.L.R. 3101(d). Kosturek v Kosturek, 107 A.D.3d 762, 968 N.Y.S.2d 97, 2013 N.Y. App. Div. LEXIS 4223 (N.Y. App. Div. 2d Dep't 2013).

Trial court erred in granting the wife’s N.Y. C.P.L.R. 4401 motion for judgment as a matter of law dismissing the wife’s attorney’s claim for attorney’s fee; although the attorney’s retaining lien had been extinguished when the attorney surrendered the wife’s legal file, the trial court retained jurisdiction pursuant to N.Y. Jud. Law § 475 to determine the attorney’s entitlement to a fee. Callaghan v Callaghan, 13 A.D.3d 406, 785 N.Y.S.2d 704, 2004 N.Y. App. Div. LEXIS 15255 (N.Y. App. Div. 2d Dep't 2004).

Respondent birth mother was not entitled to dismissal under N.Y. C.P.L.R. § 4401 of a family offense petition on the basis that that no cognizable claim had been made under N.Y. Fam. Ct. Act art. 8 because the conduct alleged fell within harassment in the second degree under N.Y. Penal Law § 240.26 and stalking in the fourth degree under N.Y. Penal Law § 120.45(1); it made no difference that the minor child, who had been adopted, was unaware that she was being followed and photographed as respondent should reasonably have known that such conduct was likely to cause the child a reasonable fear for her safety. Matter of K.J. v K.K., 873 N.Y.S.2d 867, 23 Misc. 3d 754, 241 N.Y.L.J. 29, 2009 N.Y. Misc. LEXIS 204 (N.Y. Fam. Ct. 2009).

18. —Child custody

Family Court erred in granting father’s CLS CPLR § 4401 motion to dismiss mother’s petition at close of her evidence at trial in which she sought initial determination of custody of her 3

children, since full and complete hearing is required to determine, in best interests of children, which parent should have custody. Evans v Evans, 127 A.D.2d 998, 513 N.Y.S.2d 63, 1987 N.Y. App. Div. LEXIS 43501 (N.Y. App. Div. 4th Dep't 1987).

Family Court properly granted petitioner's motion under CLS CPLR § 4401 for judgment as matter of law at close of petitioner's case, terminating visitation between mother and her child, even though motion was granted without any proof from opposing parties, since none of their witnesses were ready to testify, and mother's counsel asked court for adjournment to have further evaluations done, which request was denied because it was not made before hearing; since mother had no evidence to present, case was completed when court denied her application for adjournment. Oswald v Oswald, 224 A.D.2d 697, 639 N.Y.S.2d 76, 1996 N.Y. App. Div. LEXIS 1828 (N.Y. App. Div. 2d Dep't 1996).

19. Employment, generally

Court properly granted employer's motion under CLS CPLR § 4401 for judgment dismissing employee's age discrimination complaint where employee failed to rebut employer's evidence that alleged discriminatory action was taken for legitimate business reasons as part of valid corporate reorganization plan. Keith v Carrier International Corp., 132 A.D.2d 926, 518 N.Y.S.2d 261, 1987 N.Y. App. Div. LEXIS 49377 (N.Y. App. Div. 4th Dep't), app. denied, 70 N.Y.2d 613, 524 N.Y.S.2d 431, 519 N.E.2d 342, 1987 N.Y. LEXIS 19901 (N.Y. 1987).

It was error to dismiss, at close of evidence, optical company's actions against 2 former employees who allegedly took confidential information to use in their newly-formed business and induced salesman employed by company to obtain confidential information for them, since actionable claims were made out for unfair competition based on (1) fact that company had gone to great expense and effort to create customer information that was not easily obtainable elsewhere, (2) evidence from which jury could have concluded that defendants took master list of customers, list of accounts receivable, and 150 customer information cards from company, (3) testimony by persons engaged in same marketing endeavor that those items contained valuable

confidential information, and (4) evidence that salesman employed by company was required to bring current customer list as condition of joining defendant's sales department. Advanced Magnification Instruments, Ltd. v Minuteman Optical Corp., 135 A.D.2d 889, 522 N.Y.S.2d 287, 1987 N.Y. App. Div. LEXIS 52818 (N.Y. App. Div. 3d Dep't 1987).

Prior affirmance of denial of defendant's motion for summary judgment dismissing complaint in action for breach of employment contract did not mandate that defendant's motion for directed verdict be denied, since denial of summary judgment, determining nothing more than existence of factual issues requiring trial, is given no preclusive effect, and hence did not prevent directed verdict in favor of defendant after presentation of all evidence when plaintiff failed to establish essential element of detrimental reliance. DiCocco v Capital Area Community Health Plan, Inc., 159 A.D.2d 119, 559 N.Y.S.2d 395, 1990 N.Y. App. Div. LEXIS 8607 (N.Y. App. Div. 3d Dep't 1990), app. denied, 77 N.Y.2d 802, 566 N.Y.S.2d 587, 567 N.E.2d 981, 1991 N.Y. LEXIS 57 (N.Y. 1991).

Court erred in directing verdict for plaintiff on his claim for incentive compensation from his former employer where (1) plaintiff was director of division and was eligible for incentive compensation under plan which paid percentage of division's revenue, ½ at end of calendar year to which sum applied and ½ in 4 equal installments over next calendar year, (2) defendant's policy was that ½ paid in installments was contingent on continued employment, and (3) plaintiff left defendant after receiving one installment; issue of fact existed as to whether incentive compensation was bonus that was subject to forfeiture or post-employment commissions that were not subject to forfeiture. Weiner v Diebold Group, Inc., 173 A.D.2d 166, 568 N.Y.S.2d 959, 1991 N.Y. App. Div. LEXIS 5326 (N.Y. App. Div. 1st Dep't 1991).

In action by former town employees for compensation for unused vacation time, court erred in dismissing action at close of plaintiffs' case where (1) plaintiffs presented evidence that they were often unable to take vacation time and were assured by town supervisor that they could accumulate unused time and defer vacations or receive compensation at later date, (2) after plaintiffs' positions were transferred to village, they were informed that they could not carry over

unused vacation time, and (3) plaintiffs made claims for compensation from town, and town rejected claims. Gendalia v Gioffre, 191 A.D.2d 476, 594 N.Y.S.2d 322, 1993 N.Y. App. Div. LEXIS 2093 (N.Y. App. Div. 2d Dep't 1993).

Action to recover payment for legal services was properly dismissed under CLS CPLR § 4401 where only agreement that allegedly existed between parties was contingency agreement and underlying lawsuit, in which plaintiff represented defendant, was dismissed. Fowler v Parks, 222 A.D.2d 239, 635 N.Y.S.2d 579, 1995 N.Y. App. Div. LEXIS 12718 (N.Y. App. Div. 1st Dep't 1995), app. denied, 87 N.Y.2d 809, 642 N.Y.S.2d 858, 665 N.E.2d 660, 1996 N.Y. LEXIS 380 (N.Y. 1996).

Court erred in granting defendant directed verdict on ground that it was not liable under doctrine of respondeat superior for acts of its employee, even though defendant’s president denied that employee was specifically authorized to conduct transactions to wholesale plaintiff’s used vehicles at auction, since he admitted that employee was authorized to conduct those types of transactions without specific permission and, in fact, had bought and sold some 300 used cars while employed by defendant. Sports Car Ctr., Ltd. v Bombard, 249 A.D.2d 988, 672 N.Y.S.2d 201, 1998 N.Y. App. Div. LEXIS 5155 (N.Y. App. Div. 4th Dep't 1998).

In action by anesthesiologists against hospital’s interim director of anesthesiology for breach of contract, accounting, restitution for unjust enrichment, and imposition of constructive trust, defendant’s motion for summary judgment was untimely, and his motion for directed verdict was properly denied, where CLS Gen Oblig § 5-701 is no bar to joint venture agreement and even though plaintiffs’ request for accounting was equitable in nature, where crux of their complaint was that defendant breached agreement with them, which involved factual issues appropriate for jury resolution. Cobblah v Katende, 275 A.D.2d 637, 713 N.Y.S.2d 723, 2000 N.Y. App. Div. LEXIS 9282 (N.Y. App. Div. 1st Dep't 2000).

While a worker’s causes of action for common law negligence and violations of N.Y. Lab. Law §§ 200 and 241(6) were properly dismissed as insufficient, the trial court erred in granting a directed verdict under N.Y. C.P.L.R. 4401 on the worker’s N.Y. Lab. Law § 240(1) cause of

action before the defendants' case was commenced, and in failing to set aside the jury awards for past economic damages. Griffin v Clinton Green S., LLC, 98 A.D.3d 41, 948 N.Y.S.2d 8, 2012 N.Y. App. Div. LEXIS 4734 (N.Y. App. Div. 1st Dep't 2012).

Trial court properly denied defendant's motion pursuant to N.Y. C.P.L.R. 4401 for judgment as a matter of law on the issue of liability on the N.Y. Lab. Law § 200 and common-law negligence causes of action insofar as asserted against it. Viewing the evidence in the light most favorable to plaintiff, a rational process existed by which the jury could find that defendant exercised supervisory control over plaintiff's work. Hernandez v Pappco Holding Co., Ltd., 136 A.D.3d 981, 26 N.Y.S.3d 312, 2016 N.Y. App. Div. LEXIS 1287 (N.Y. App. Div. 2d Dep't 2016).

Trial court erred in granting defendants' motion for a directed verdict with respect to plaintiff's cause of action under the New York Human Rights Law alleging discrimination based on military status where, based on testimony that plaintiff was not promoted because there was a question after his military service about his mental stability, the jury could have rationally inferred that defendants refused to promote him in part because they perceived that combat veterans, such as plaintiff, develop dangerous and disqualifying mental health issues as a result of their military service. Hubbard v New York State off. of Mental Health, 192 A.D.3d 1586, 145 N.Y.S.3d 711, 2021 N.Y. App. Div. LEXIS 1700 (N.Y. App. Div. 4th Dep't 2021).

There was sufficient evidence—drafting history and chronology, cross-referencing of agreements, integral nature of undertakings for stage and video performance, relationships among producing parties and entities, and background assumptions furnished by Equity rules—for jury, as properly instructed, to find that 2 producers were personally liable to leading actor on "pay or play" guarantee where first producer affixed his signature to at least one of several interlocking agreements and second producer was bound because first acted in her authority, as permitted by agreement. This Is Me v Taylor, 157 F.3d 139, 1998 U.S. App. LEXIS 24416 (2d Cir. N.Y. 1998).

20. —Injury at work

Defendant city's motion to dismiss at close of evidence was improperly granted and new trial would be ordered in action by firefighter for personal injuries sustained while fighting 2-alarm fire involving firefighter's engine company and marine unit where (1) firefighter was injured when marine unit situated on opposite side of burning building used "demolition stream" of water which cut through building and injured firefighter, (2) firefighter claimed that water cannon was improperly used without waiting for acknowledgment by engine company that it had evacuated area, and (3) firefighter's expert testified that obligation to receive acknowledgment of evacuation was immutable rule and not subject to discretion; question of fact had been presented for resolution by trier of fact and dismissal of complaint was erroneous. Vyse v New York, 144 A.D.2d 452, 534 N.Y.S.2d 12, 1988 N.Y. App. Div. LEXIS 11809 (N.Y. App. Div. 2d Dep't 1988).

Machinist mover, who was injured in fall through opening in roof of building under construction, was not entitled to directed verdict on liability in action against building owner and general contractor under CLS Labor § 240(1) where (1) he testified that opening in roof was surrounded by low concrete parapet, but that it was not covered by protective planking, that there was no safety net underneath it and that he had not been furnished with safety lines, but (2) defendants' witnesses testified that 42 inch high metal barricade or railing had been erected around opening, that barricade had been repaired or replaced on at least 2 occasions as result of having been knocked down and that barricade was in place and undamaged 2 or 3 days before accident. Petterson v Museum Tower Corp., 151 A.D.2d 403, 543 N.Y.S.2d 435, 1989 N.Y. App. Div. LEXIS 8837 (N.Y. App. Div. 1st Dep't 1989).

Court properly granted plaintiff's motion under CLS CPLR § 4401 for judgment as matter of law, since owner's failure to provide guardrails or another safety device which would have prevented plaintiff's fall from mobile platform which was attached to forklift constituted failure to provide proper protection required by CLS Labor § 240(1) as matter of law. Boice v Jegarmont Realty Corp., 204 A.D.2d 674, 612 N.Y.S.2d 431, 1994 N.Y. App. Div. LEXIS 5738 (N.Y. App. Div. 2d Dep't 1994).

Court properly denied general contractor's motion for directed verdict against plaintiff's employer (subcontractor) for common-law indemnification in action under CLS Labor § 240(1) where fact question existed as to whether general contractor's liability could be based on its own negligence in supervising work site or whether its liability was purely statutory. Severino v Schuyler Meadows Club, 225 A.D.2d 954, 639 N.Y.S.2d 869, 1996 N.Y. App. Div. LEXIS 2784 (N.Y. App. Div. 3d Dep't 1996).

Court properly dismissed complaint at close of plaintiff's evidence in action under CLS Labor § 241(6), even though he testified that he stepped in depression on sand walkway and twisted his back while carrying 90-pound wall panel, where evidence was insufficient to show violation of specific provisions of Industrial Code (12 NYCRR § 1.0 et seq.). Court also properly dismissed complaint at close of plaintiff's evidence in action under CLS Labor § 200 where he failed to show that defendants had actual or constructive notice of condition that allegedly caused his injuries. Sobelman v Norstar Bank, 226 A.D.2d 444, 641 N.Y.S.2d 39, 1996 N.Y. App. Div. LEXIS 3602 (N.Y. App. Div. 2d Dep't 1996).

Plaintiff was not entitled to directed verdict in CLS Labor § 240(1) action where evidence presented fact question as to whether scaffold's failure to support plaintiff resulted from his own conduct in having untied lines that secured it to coping stones and then putting his foot on unsecured scaffold; as such, this was not situation where scaffold collapsed for no apparent reason, giving rise to presumption that scaffold did not provide proper protection. Tweedy v Roman Catholic Church of Our Lady of Victory, 232 A.D.2d 630, 648 N.Y.S.2d 685, 1996 N.Y. App. Div. LEXIS 11324 (N.Y. App. Div. 2d Dep't 1996), app. denied, 90 N.Y.2d 810, 664 N.Y.S.2d 271, 686 N.E.2d 1366, 1997 N.Y. LEXIS 3122 (N.Y. 1997).

In action by building employee against building owner for personal injuries sustained on job, court properly granted defendant's motion under CLS CPLR § 4401 to dismiss complaint as barred by Workers' Compensation Law where evidence showed that plaintiff was hired by prior building owner and remained defendant's employee under express terms of defendant's agreement with management company claimed by plaintiff to be his employer, defendant issued

plaintiff's W-2 statement, plaintiff listed defendant as his employer on mortgage application, and plaintiff's evidence failed to show, prima facie, that his daily activities were supervised by employee of management company. Sorrentino v Ronbet Co., 244 A.D.2d 262, 664 N.Y.S.2d 290, 1997 N.Y. App. Div. LEXIS 11695 (N.Y. App. Div. 1st Dep't 1997).

Court erred in dismissing complaint on ground that plaintiff's attempt at removing his hand truck from pavement depression was intervening and superseding cause of injury since fact finder could have concluded that causal chain stemming from defendants' alleged negligence in excavation work remained unbroken and that plaintiff's actions were reasonably foreseeable consequence of subject hazard. Griffith v Southbridge Towers, 248 A.D.2d 162, 670 N.Y.S.2d 22, 1998 N.Y. App. Div. LEXIS 2380 (N.Y. App. Div. 1st Dep't 1998).

In action for injury when load of lumber fell on plaintiff's hand as he operated forklift, forklift manufacturer's motion to have jury verdict set aside and complaint against it dismissed was properly granted, because plaintiff failed to show any causal connection between his injury and allegedly defective design of retaining pin in forklift, where (1) plaintiff did not use either retaining pin or carriage bolt to lock forks into place, even though he knew that with such safety mechanism, forks could and did move, and (2) although plaintiff claimed that because retaining pin was removable, it was foreseeable that forklift would be operated without it, forklift was not purposefully manufactured to allow its use without retaining pin, which was removable in order to allow adjustment of forks. Klein v Hyster Co., 255 A.D.2d 425, 680 N.Y.S.2d 583, 1998 N.Y. App. Div. LEXIS 12377 (N.Y. App. Div. 2d Dep't 1998).

In action by plaintiff who was injured while trying to store 2,100-pound machine on industrial storage system designed by defendant, alleging that defendant was negligent in specifying "number 2 grade" lumber for wooden hangers because such lumber was not satisfactory due to presence of knots that weakened its structural integrity, court erred in denying defendant's motion for directed verdict and order setting aside verdict in plaintiff's favor, where no evidence was adduced at trial that use of number 2 grade lumber violated generally accepted industry standards or State Building Code, defendant's expert testified that number 2 grade lumber was

most common type of wood used in construction industry and was acceptable for hanging loads notwithstanding presence of knots, and plaintiff's expert did not state that defendant's specification of such lumber deviated from acceptable industry standards. Columbus v Smith & Mahoney P.C., 259 A.D.2d 857, 686 N.Y.S.2d 235, 1999 N.Y. App. Div. LEXIS 2342 (N.Y. App. Div. 3d Dep't 1999).

Evidence supported both prima facie case of negligence and jury verdict finding point-of-departure warehouse owner 45 percent liable for truck driver's injuries in manually moving tightly packed 300-pound boxes in preparation for unloading where both plaintiff and another driver had complained to owner's warehouse manager about manner in which boxes were packed by use of forklift with basiloid attachment not possessed by receiving warehouse, expert testified that owner's practices fell below industry standard for loading once it had learned that receiving warehouse was using clamp truck without basiloid attachment, and driver claimed that owner should have rearranged boxes inside trailer to provide room for clamp truck to maneuver and unload boxes without need for manual help from drivers. Evidence also supported both prima facie case of negligence and jury verdict finding receiving warehouse owner 55 percent liable for truck driver's injuries where owner's employees had received, and transmitted to supervisors, complaints by plaintiff and other drivers about its failure to use proper equipment to unload such boxes, owner's employee testified that his superiors responded that owner was not going to buy basiloid attachment used in loading boxes at point-of-departure warehouse, expert testified that owner's practices fell below industry standards in allowing driver to participate in unloading process and in failing to supply proper unloading equipment, and another expert testified that driver would not have been injured if owner had used basiloid equipment. Gleason v Holman Contract Warehousing Inc., 263 A.D.2d 913, 694 N.Y.S.2d 230, 1999 N.Y. App. Div. LEXIS 8454 (N.Y. App. Div. 3d Dep't 1999).

Trial court erred in directing verdict against defendants as to CLS Labor § 240(1) liability where (1) plaintiff testified that he fell 3 feet through gap in scaffold platform, but key defense witness testified that he saw plaintiff fall on platform itself, which would not be actionable, (2) there was

testimony that scaffold construction crews at facility never left gaps in scaffold platforms, and (3) given plaintiff's testimony that immediately before he fell he was walking backward, installing banding material without looking behind him, jury could have concluded that he was injured by tripping on platform or stepping off side of properly erected scaffold platform. Holt v Welding Servs., 264 A.D.2d 562, 694 N.Y.S.2d 638, 1999 N.Y. App. Div. LEXIS 8935 (N.Y. App. Div. 1st Dep't 1999), app. dismissed, 94 N.Y.2d 899, 707 N.Y.S.2d 143, 728 N.E.2d 339, 2000 N.Y. LEXIS 150 (N.Y. 2000).

Asbestos removers were entitled to directed verdict on issue of defendants' liability under CLS Labor § 240(1) where they fell to cement floor from scaffold that moved when air conditioning duct fell on scaffold from ceiling, scaffold lacked guardrail, scaffold's wheels were not locked, object falling from ceiling was not extraordinary event given nature of work, and thus it did not avail defendants to argue that removers' negligence was sole cause of dislodgment of duct. Vasquez v Chase Manhattan Bank, N.A., 266 A.D.2d 3, 697 N.Y.S.2d 611, 1999 N.Y. App. Div. LEXIS 11176 (N.Y. App. Div. 1st Dep't 1999).

Third-party defendant in personal injury action was not estopped from denying existence of stipulation adding amount of its Workers' Compensation Law lien to damages awarded by jury, absent evidence of any written stipulation or stipulation in open court. Kowalski v Fisher 40th & 3rd Co., 266 A.D.2d 514, 698 N.Y.S.2d 716, 1999 N.Y. App. Div. LEXIS 12221 (N.Y. App. Div. 2d Dep't 1999).

In action by plaintiff who, while engaged in excavation of concrete floor and removal of hardpan underneath floor to level of 4 feet, fell anywhere from as little as 3 inches to as much as 3 ½ feet from top of rock which he was jack-hammering into excavated area surrounding rock, court erred in directing verdict in plaintiff's favor at close of proof on issue of liability under CLS Labor § 240(1) where witnesses' accounts materially conflicted in their estimation of height of exposed rock on which plaintiff was standing and, hence, extent of his fall. Amo v Little Rapids Corp., 268 A.D.2d 712, 701 N.Y.S.2d 517, 2000 N.Y. App. Div. LEXIS 379 (N.Y. App. Div. 3d Dep't),

modified, 275 A.D.2d 565, 713 N.Y.S.2d 295, 2000 N.Y. App. Div. LEXIS 8792 (N.Y. App. Div. 3d Dep't 2000).

Triable issue of fact existed as to violation of CLS Labor § 240(1), and thus worker was not entitled to either directed verdict or new trial, even though he testified that he was injured while trying to carry 96-pound bag of grout up ladder to roof of defendant's plant, that bag caught on clamp on ladder and tore open, that grout began to pour out, pulling him backwards and sideways and twisting ladder, causing leg of ladder to lift up, that he grabbed ladder and twisted his back in attempt to keep from falling, and that ladder was placed against building at about 70-degree angle without being secured in any way, where, in prior inconsistent statement, he admitted that as he climbed ladder he felt "a sudden sharp pain in [his] left side and low back area," as result of which he dropped bag of grout, and that "[t]he ladder did not slip. The ladder was in good shape. It was the weight of the bag that brought on the pain and nothing else." Even crediting worker's testimony that as he was trying to carry 96-pound bag of grout up ladder to roof of defendant's plant, bag caught on clamp on ladder and tore open, causing ladder to twist and lift off ground on one side, triable issue of fact existed as to whether defendant's failure to properly secure ladder was proximate cause of worker's injury, and thus worker was not entitled to either directed verdict or new trial in action under CLS Labor § 240(1), where worker testified that although he had injured his groin while prying open crate 2 days before ladder accident, his back pain resulted solely from July 16 incident with twisting ladder, but other evidence indicated that worker injured his back on July 14 while prying open crate. Cross v Finch Pruyn & Co., 281 A.D.2d 836, 722 N.Y.S.2d 312, 2001 N.Y. App. Div. LEXIS 2959 (N.Y. App. Div. 3d Dep't 2001).

Where defendant, owner of premises where plaintiff was injured, was also president of corporation that employed plaintiff, Workers' Compensation Law was plaintiff's exclusive remedy, and thus defendant was entitled to directed verdict in plaintiff's personal injury action. Falzon v Brown, 282 A.D.2d 498, 723 N.Y.S.2d 859, 2001 N.Y. App. Div. LEXIS 3541 (N.Y. App. Div. 2d Dep't 2001).

In absence of testimony that plaintiff had been working in confined space or with toxic metals when he was injured by inhaling fumes from burning metal, he was not involved in class of operations that would have required defendants to provide him with air line respirator under 12 NYCRR 12-2.8, and thus defendants were entitled to directed verdict in plaintiff's action under CLS Labor § 241(6). Samuels v Jam. Hosp. Corp., 282 A.D.2d 516, 723 N.Y.S.2d 207, 2001 N.Y. App. Div. LEXIS 3566 (N.Y. App. Div. 2d Dep't 2001).

In action by construction company employees who were injured when scaffold collapsed at site of home improvement project, court properly declined to submit to jury plaintiffs' CLS Labor §§ 240(1) and 241(6) claims against defendant home improvement company even if it was primarily responsible for erection of scaffold, as it was neither owner nor general contractor and there was no basis on which jury could conclude that it stepped "into the shoes" of plaintiffs' employer so as to become statutory agent of either owner or general contractor, where it worked with plaintiffs' employer on ad hoc basis with no specific contract, plaintiffs' employer had ultimate supervisory control over all facets of work being done, there was no proof that defendant had authority to supervise injured plaintiffs' work at time of accident or that it contracted for maintenance of scaffolding throughout progress of work, and it was not even present on day of accident. Morris v Pepe, 283 A.D.2d 558, 725 N.Y.S.2d 71, 2001 N.Y. App. Div. LEXIS 5304 (N.Y. App. Div. 2d Dep't 2001).

In plaintiff worker's personal injury suit, the trial court erred in dismissing defendant/third-party plaintiff corporation's third-party common-law indemnification complaint against third-party defendant employer and in granting the employer's N.Y. C.P.L.R. 4401 motion for judgment as a matter of law in the employer's favor, as there was a rational basis upon which the jury could have found that the worker was supervised and controlled by the employer on the date of the accident. Pugliese v Paneorama Italian Bakery Corp., 289 A.D.2d 553, 735 N.Y.S.2d 797, 2001 N.Y. App. Div. LEXIS 13012 (N.Y. App. Div. 2d Dep't 2001).

Action under CLS Labor § 241(6) and 12 NYCRR § 23-3.3(c) (mandating continuing inspections during hand demolition operations) was dismissed at close of plaintiff's case, where plaintiff's

employer was specifically instructed not to undertake demolition work that resulted in injury, and proof was undisputed that another contractor had been retained to perform such work after plaintiff's employer completed its part of job. Zuniga v Stam Realty, 169 Misc. 2d 1004, 647 N.Y.S.2d 426, 1996 N.Y. Misc. LEXIS 324 (N.Y. Sup. Ct. 1996), app. dismissed, aff'd, 245 A.D.2d 561, 666 N.Y.S.2d 515, 1997 N.Y. App. Div. LEXIS 13393 (N.Y. App. Div. 2d Dep't 1997).

Trial court erred granting defendants' motion for judgment as a matter of law pursuant to N.Y. C.P.L.R. 4401 in a personal injury action; trial court erred in excluding a police report which allegedly contained the co-worker's admission to throwing a lighted cigarette at the injured party based on the injured party's failure to provide a copy to defendants, N.Y. C.P.L.R. 4518, as the injured party did not possess the report, and the error could not be considered harmless pursuant to N.Y. C.P.L.R. 2002. Gatz v Layburn, 9 A.D.3d 348, 780 N.Y.S.2d 157, 2004 N.Y. App. Div. LEXIS 9370 (N.Y. App. Div. 2d Dep't 2004).

21. — —Fall

Construction supervisor, who was injured when his foot became entangled in electrical wiring in darkened stairway on premises, causing him to fall, was not entitled to directed verdict on issue of liability in action against owner of premises where there was evidence that he was examining "punch list" while walking to determine what work was left to be done; although CLS Labor § 241 imposes non-delegable duty on owners and contractors to provide safe area to perform work, plaintiff's comparative negligence would remain as defense. McLean v Wical Realty Corp., 182 A.D.2d 554, 582 N.Y.S.2d 423, 1992 N.Y. App. Div. LEXIS 6265 (N.Y. App. Div. 1st Dep't 1992).

Building owner was entitled to directed verdict on its third-party complaint against plaintiff's employer based on implied indemnity in action for injuries sustained when plaintiff fell from ladder where there was no suggestion that owner exercised control over placement of ladder, nor any suggestion that owner had authority to supervise or control repairs. Plaintiff was also entitled to directed verdict on issue of liability against building owner in action under CLS Labor

§ 240 for injuries sustained when plaintiff was standing on second or third step of 6-foot ladder and fell backward and was hit in face by debris from ceiling tile; since provision of ladder and its placement under tile to be removed did not prevent plaintiff's fall, owner's duty to provide device to enable plaintiff to work safely at elevation, even fairly small elevation, was not adequately met. Guillory v Nautilus Real Estate, 208 A.D.2d 336, 624 N.Y.S.2d 110, 1995 N.Y. App. Div. LEXIS 2760 (N.Y. App. Div. 1st Dep't), app. dismissed, app. denied, 86 N.Y.2d 881, 635 N.Y.S.2d 943, 659 N.E.2d 766, 1995 N.Y. LEXIS 4483 (N.Y. 1995), app. dismissed, app. denied, 86 N.Y.2d 881, 635 N.Y.S.2d 943, 659 N.E.2d 766, 1995 N.Y. LEXIS 4484 (N.Y. 1995).

Building owner and its managing agent were entitled to directed verdict on their cause of action for common-law indemnification against employer of injured plaintiff in underlying action where plaintiff's testimony clearly proved that employer controlled and supervised pump removal work during which plaintiff was injured. Skow v Jones, Lang & Wooton Corp., 240 A.D.2d 194, 657 N.Y.S.2d 709, 1997 N.Y. App. Div. LEXIS 5978 (N.Y. App. Div. 1st Dep't 1997), app. denied, 94 N.Y.2d 758, 704 N.Y.S.2d 532, 725 N.E.2d 1094, 1999 N.Y. LEXIS 4043 (N.Y. 1999).

Court properly directed liability verdict on plaintiff's CLS Labor § 240 (1) action where evidence showed that plaintiff was painting ceiling of renovated second floor when he fell into large, unprotected hole, that, on prior occasions, ropes or planks had been utilized to prevent workers from falling through hole down to floor below, and that for some unknown reason, those precautions were not taken on date of plaintiff's accident. Also, court properly dismissed general contractor's third-party complaint against painting subcontractor in action brought under CLS Labor § 240 (1) by subcontractor's employee, even though there was delegation of painting work to subcontractor, since there was no evidence that subcontractor controlled work areas or had authority to insist that safety precautions be taken as to injured employee's work, and both general contractor's and subcontractor's employees were involved in placing and removing planks from hole above staircase into which injured employee fell. Serpe v Eyris Prods., 243 A.D.2d 375, 663 N.Y.S.2d 542, 1997 N.Y. App. Div. LEXIS 10776 (N.Y. App. Div. 1st Dep't 1997).

Employer that required its employees to park in designated area, with result that they could reach its store by walking either along road or on grassy median that separated road from parking lot, was not entitled to directed verdict or order setting aside verdict for employee who tripped and fell while walking to store on median, even though employee could not identify precisely what caused her to fall, where she felt her foot catch on something, and there were several roots and thick stalks covered with grass in area of fall. Charvala v Kelly & Dutch Real Estate, Inc., 273 A.D.2d 936, 709 N.Y.S.2d 785, 2000 N.Y. App. Div. LEXIS 6709 (N.Y. App. Div. 4th Dep't 2000).

Owners of property on which boiler repair contractor's employee was injured were entitled to common-law indemnification from contractor for their purely statutory liability under CLS Labor §§ 240(1) and 241(6) where contractor, not owners, controlled work site and work in which employee was engaged at time of his fall into pit of scalding water. Parris v Shared Equities Co., 281 A.D.2d 174, 721 N.Y.S.2d 634, 2001 N.Y. App. Div. LEXIS 2205 (N.Y. App. Div. 1st Dep't 2001).

Owner was entitled to judgment as a matter of law on the claim filed by the foreman after the foreman slipped and fell on an exterior stairway, because it was undisputed that the stairway was attached and secured to the exterior of the building and was not the type of elevation hazard contemplated by N.Y. Lab. Law § 240(1). Gallagher v Andron Constr. Corp., 21 A.D.3d 988, 801 N.Y.S.2d 373, 2005 N.Y. App. Div. LEXIS 9199 (N.Y. App. Div. 2d Dep't 2005).

Trial court properly granted judgment as a matter of law pursuant to N.Y. C.P.L.R. 4401 to plaintiffs on the issue of defendants' liability under N.Y. Lab. Law § 240(1), because metal decking through which a worker fell was a safety device within the meaning of N.Y. Lab. Law § 240(1), and the worker's conduct was not the sole proximate cause of his injuries, as the worker neither engaged in unforeseeable, reckless activities nor misused a safety device that was provided to him. Beharry v Public Stor., Inc., 36 A.D.3d 574, 828 N.Y.S.2d 458, 2007 N.Y. App. Div. LEXIS 166 (N.Y. App. Div. 2d Dep't 2007).

Plaintiff carpenter who, while attempting to observe pitched floor in defendant's store, took side-step without looking and began to pivot his foot at same time that defendant's employee stepped on his foot, causing him to fall and hurt his ankle, could not rely on doctrine of res ipsa loquitur to support his negligence cause of action; thus, dismissal was warranted at close of plaintiff's case for failure to make out prima facie case. Peralta v La Placita Dominica Mkt. Corp., 170 Misc. 2d 340, 656 N.Y.S.2d 81, 1996 N.Y. Misc. LEXIS 365 (N.Y. Sup. Ct. 1996).

Trial court properly granted a motion for judgment as to liability in favor of the decedent's representatives where the decedent, a painter, fell to his death while painting a fire escape when a railing on the fire escape broke; the evidence that the decedent's fall was caused by the collapse of the safety device upon which he was working established a prima facie case of liability, as the fire escape being used as the functional equivalent of a scaffold to protect the decedent from elevation-related risks and therefore constituted a safety device within the meaning of N.Y. Lab. Law § 240(1). De Jara v 44-14 Newtown Rd. Apt. Corp., 307 A.D.2d 948, 763 N.Y.S.2d 654, 2003 N.Y. App. Div. LEXIS 8681 (N.Y. App. Div. 2d Dep't 2003).

Drywall installer could not recover against a premises owner under N.Y. Lab. Law § 240(1) when the installer fell from a scaffold because the installer supplied the scaffold, with which three planks were to be used as the scaffold's flooring, and unilaterally elected to use only one of the planks, even though the other two planks were readily available, creating a gap through which he fell, so his actions were the sole proximate cause of his injuries and he could show no statutory violation by the owner, entitling the premises owner to judgment as a matter of law under N.Y. C.P.L.R. 4401. Plass v Solotoff, 5 A.D.3d 365, 773 N.Y.S.2d 84, 2004 N.Y. App. Div. LEXIS 2137 (N.Y. App. Div. 2d Dep't), app. denied, 2 N.Y.3d 705, 780 N.Y.S.2d 310, 812 N.E.2d 1260, 2004 N.Y. LEXIS 962 (N.Y. 2004).

Worker and his wife were entitled to judgment as a matter of law on the issue of the building owner's liability when the worker fell 15 feet from a ladder while he was installing a sign on the building. Vasquez v Skyline Constr. & Restoration Corp., 8 A.D.3d 473, 779 N.Y.S.2d 113, 2004

N.Y. App. Div. LEXIS 8500 (N.Y. App. Div. 2d Dep't), app. denied, 3 N.Y.3d 611, 786 N.Y.S.2d 814, 820 N.E.2d 293, 2004 N.Y. LEXIS 3511 (N.Y. 2004).

Shape of a room which a worker was painting required him to use an A-frame ladder in a closed position while he painted the ceiling, and the trial court erred when it granted defendants' motion for judgment as a matter of law on the worker's claim under N.Y. Lab. Law § 241(6), and subsequently entered judgment confirming a jury's verdict that a corporation and other defendants were not liable to the worker under N.Y. Lab. Law § 240(1), in the worker's action seeking damages for injuries he sustained when he fell. Sztachanski v Morse Diesel Int'l, Inc., 9 A.D.3d 457, 780 N.Y.S.2d 367, 2004 N.Y. App. Div. LEXIS 10009 (N.Y. App. Div. 2d Dep't 2004).

22. —Termination of employment

Court properly dismissed employee's action alleging that he was terminated for purpose of interfering with his right to obtain stock under his stock option agreement with employer's president and sole shareholder where it was undisputed that employment, stock option and shareholders' agreements were negotiated in same transaction, and thus constituted single contract between employee, employer and employer's president and sole shareholder, since party to contract cannot be held liable for intentional interference with that contract. Bradford v Weber, 138 A.D.2d 860, 525 N.Y.S.2d 968, 1988 N.Y. App. Div. LEXIS 3191 (N.Y. App. Div. 3d Dep't 1988).

It was error to dismiss firefighter's action against owner of building under CLS Gen Mun § 205-a for injuries firefighter sustained when plastic flowerpot hanging from skylight fell on him as he was exiting burning building, since (1) local fire prevention code prohibited "obstructions to or on...stairs, halls, passageways, doors or windows, liable to interfere with" fire department operations, (2) flowerpot was made entirely of plastic including plastic straps which melt in very high temperatures, (3) pot was hanging directly over stairs, (4) one firefighter testified that he had bumped into hanging object which felt like pot in same area just prior to accident, and (5)

large plastic flowerpot was found in vicinity where firefighter was struck; such evidence was sufficient to establish prima facie showing of code violation, which warranted submitting cause of action to jury. Cotter v Spear, 139 A.D.2d 555, 527 N.Y.S.2d 55, 1988 N.Y. App. Div. LEXIS 3856 (N.Y. App. Div. 2d Dep't 1988).

In action for breach of written severance pay policy, employer was entitled to dismissal of complaint at close of employee's case, even if employer provided severance pay as regular practice, where employee's alleged reliance on availability of severance pay was supported only by evidence that he continued employment after institution of severance pay policy. Gallagher v Ashland Oil, Inc., 183 A.D.2d 1033, 583 N.Y.S.2d 624, 1992 N.Y. App. Div. LEXIS 6890 (N.Y. App. Div. 3d Dep't), app. denied, 80 N.Y.2d 758, 589 N.Y.S.2d 309, 602 N.E.2d 1125, 1992 N.Y. LEXIS 3385 (N.Y. 1992).

Employer was entitled to directed verdict dismissing former employee's age discrimination action where (1) there was conflicting evidence as to whether employee, who was tailor in men's clothing store, was laid off or resigned to open his own business, (2) tailoring business was cyclical, (3) before union was voted out, layoffs were made during slow periods on basis of seniority, (4) after union was voted out, employees were given opportunity to avoid layoffs by taking one day off per week, (5) although employees voted for that plan, which affected all employees equally, plaintiff expressed his dissatisfaction with it, and (5) fact that newly hired tailor earned much less than plaintiff earned did not prove discrimination in light of evidence that new tailor was hired to fill in while plaintiff was on vacation and to replace another tailor who had health problems. Orlando v Rubersi Sales, Inc., 255 A.D.2d 802, 680 N.Y.S.2d 310, 1998 N.Y. App. Div. LEXIS 12499 (N.Y. App. Div. 3d Dep't 1998).

In Article 78 proceeding alleging bad faith-termination of petitioner's public employment in violation of CLS Civ S § 75-b, defendants were not entitled to directed verdict, and new trial would be granted, even though petitioner was provisional at-will employee, where he presented evidence that termination was related to his report to Community Service Board that his superior

had acted improperly toward him and 2 other employees. Sisson v Lech, 266 A.D.2d 858, 697 N.Y.S.2d 805, 1999 N.Y. App. Div. LEXIS 11823 (N.Y. App. Div. 4th Dep't 1999).

23. Estates; estate administration

Directed verdict for administrator in action to compel beneficiary to deliver certain money back to estate was proper where no evidence was offered to show that beneficiary acted pursuant to decedent's directions when, using power of attorney, she withdrew funds from decedent's original bank accounts, deposited them in new accounts, and then withdrew funds soon after decedent's death; additionally, assertion that accounts were meant as inter vivos gifts lacked merit since decedent intended equal division of estate and was not even aware of new accounts. In re Estate of Burns, 126 A.D.2d 809, 510 N.Y.S.2d 732, 1987 N.Y. App. Div. LEXIS 41953 (N.Y. App. Div. 3d Dep't 1987).

In contested probate proceeding, court erred in removing question of undue influence by proponent from consideration of jury since jury could have found that confidential relationship existed between testatrix, woman of advanced years, and proponent, who drafted her will, in which he was named sole beneficiary, especially where evidence showed that proponent had control over all of testatrix' assets and was managing her financial affairs; although proponent had offered explanation as to why testatrix had executed will in his sole favor, such testimony merely created fact question for jury as to whether proffered explanation was adequate. In re Bach, 133 A.D.2d 455, 519 N.Y.S.2d 670, 1987 N.Y. App. Div. LEXIS 49925 (N.Y. App. Div. 2d Dep't 1987).

In probate proceeding, proponents were entitled to judgment during trial based on facts that (1) decedent executed will in attorney's office in presence of 3 subscribing witnesses, (2) entire execution of will was tape-recorded, which affirmatively demonstrated decedent's testamentary capacity, and (3) no evidence of fraud was adduced at trial. In re Estate of Scher, 137 A.D.2d 605, 524 N.Y.S.2d 494, 1988 N.Y. App. Div. LEXIS 1044 (N.Y. App. Div. 2d Dep't 1988).

Surrogate’s Court properly directed verdict as close of proponent’s evidence and dismissed petition for probate where (1) proponent offered document for probate that was missing bottom portion of page which would have contained decedent’s signature and signatures of attesting witnesses, (2) proponent conceded that he had no evidence as to how signature was removed or where signature was, and (3) proponent failed to adduce any evidence to rebut presumption of revocation created by cut and mutilated condition of will. Muller v Corini (In re Estate of Muller), 204 A.D.2d 551, 611 N.Y.S.2d 311, 1994 N.Y. App. Div. LEXIS 5237 (N.Y. App. Div. 2d Dep't 1994).

Plaintiff, administrator of estate of decedent who died as result of gunshot wound to head, established prima facie case of intentional tort against estate of decedent who died as result of self-inflicted gunshot wound to head where both bodies were discovered in bedroom of house damaged by fire, and sheriff’s department senior investigator concluded that defendants’ decedent shot plaintiff’s decedent and then shot himself; thus, court improperly granted defendants’ motion to dismiss complaint at close of plaintiff’s proof. Staples v Sisson, 274 A.D.2d 779, 711 N.Y.S.2d 550, 2000 N.Y. App. Div. LEXIS 8077 (N.Y. App. Div. 3d Dep't 2000).

Surrogate’s court improperly directed a verdict pursuant to N.Y. C.P.L.R. 4401 in favor of a decedent’s estate executor in a proceeding by the decedent’s son involving proceeds held in an investment account by the decedent and the executor, as there was not necessarily a joint account with a right of survivorship in the executor under N.Y. Banking Law § 675 where only the decedent had possession of the checks in the account, distribution of the proceeds therein only to the executor was against the clear intent of the decedent’s will distribution plan, and it was not clear that the account was opened as a joint account rather than as a matter of convenience. Matter of Corcoran, 63 A.D.3d 93, 877 N.Y.S.2d 522, 2009 N.Y. App. Div. LEXIS 3313 (N.Y. App. Div. 3d Dep't 2009).

Surrogate’s court improperly directed a verdict pursuant to N.Y. C.P.L.R. 4401 in favor of a decedent’s estate executor in a proceeding by the decedent’s son, as a bank account that was held by the decedent and the executor was not within the presumption of a joint account with

survivorship rights under N.Y. Banking Law § 675 because the signature card on the account had no specific language as to survivorship. Matter of Corcoran, 63 A.D.3d 93, 877 N.Y.S.2d 522, 2009 N.Y. App. Div. LEXIS 3313 (N.Y. App. Div. 3d Dep't 2009).

24. False arrest; false imprisonment

City arresting authorities were entitled to directed verdict dismissing action for false arrest since arrest warrant was based on felony complaint and on supporting depositions of 2 witnesses who positively identified plaintiff as perpetrator. In action for false imprisonment, county could not be held liable for district attorney's failure to seek plaintiff's release or dismissal of charges because of court's failure to promptly hold preliminary hearing since (1) delay was result of court order without involvement of district attorney's office, (2) applicable statute (CLS CPL § 180.80) placed burden on criminal defendant to move for release and did not provide for dismissal of charges, (3) plaintiff's attorney failed to either request release or dismissal on record, and (4) plaintiff consented to 3-week delay in conducting preliminary hearing; thus, county was entitled to directed verdict dismissing claim. Romeo v County of Oneida, 135 A.D.2d 1099, 523 N.Y.S.2d 318, 1987 N.Y. App. Div. LEXIS 52957 (N.Y. App. Div. 4th Dep't 1987).

Court did not err when it directed verdicts dismissing plaintiff's causes of action for false arrest, false imprisonment, and malicious prosecution where eyewitness had identified plaintiff as man he saw fleeing robbery scene, since police officers' reliance on witness' identification of plaintiff was reasonable as matter of law, and thus defendant city met its burden of establishing probable cause for arrest. Stratton v City of Albany, 204 A.D.2d 924, 612 N.Y.S.2d 286, 1994 N.Y. App. Div. LEXIS 5615 (N.Y. App. Div. 3d Dep't 1994).

In action stemming from warrantless arrest of plaintiff by city police officers, court did not err when it directed verdict dismissing plaintiff's cause of action against city sounding in negligent investigation, since police were under no obligation to investigate plaintiff's claimed alibi or develop every lead that may have yielded evidence beneficial to him. Stratton v City of Albany,

204 A.D.2d 924, 612 N.Y.S.2d 286, 1994 N.Y. App. Div. LEXIS 5615 (N.Y. App. Div. 3d Dep't 1994).

In action for false imprisonment, assault, and negligent infliction of emotional distress, court erred in dismissing complaint, at close of proof, on ground that, in absence of medical proof, causal relationship of emotional injuries suffered by plaintiff and her infant daughter had not been established, since jury could find, even without medical testimony, that proximate cause of emotional injuries was conduct of plain clothes police officers in forcibly entering plaintiff's second-floor apartment, screaming and swearing at plaintiff and her daughter, holding gun to plaintiff's head, and confining them against their will. Allinger v City of Utica, 226 A.D.2d 1118, 641 N.Y.S.2d 959, 1996 N.Y. App. Div. LEXIS 5625 (N.Y. App. Div. 4th Dep't 1996).

Dismissal of action for false arrest and malicious prosecution was properly based on undisputed evidence that arresting officers were unaware that plaintiff was employed at premises and had objectively valid basis for believing him to be trespasser, thereby providing them with probable cause to arrest when he entered restricted area without exhibiting his identification and did not immediately respond to officers' command to stop. Freeman v Port Auth., 243 A.D.2d 409, 663 N.Y.S.2d 557, 1997 N.Y. App. Div. LEXIS 10858 (N.Y. App. Div. 1st Dep't 1997).

City and its police department were entitled to judgment at close of evidence on plaintiff's cause of action for false arrest, even though plaintiff was arrested for receiving package that police thought contained heroin but did not contain any illegal substances, where arrest was made on probable cause based on credible information supplied by United States Customs, which had performed chemical tests on unopened package indicating presence of heroin. Tayibat Akande v City of New York, 275 A.D.2d 671, 713 N.Y.S.2d 341, 2000 N.Y. App. Div. LEXIS 10028 (N.Y. App. Div. 1st Dep't 2000).

Plaintiff's false arrest claim was improperly dismissed pursuant to defendants' N.Y. C.P.L.R. 4401 motion because it could not be said that there was no rational process by which the trier of fact could have found for plaintiff. Gagliano v County of Nassau, 31 A.D.3d 375, 817 N.Y.S.2d 651, 2006 N.Y. App. Div. LEXIS 8709 (N.Y. App. Div. 2d Dep't 2006).

Court would grant state's trial motion to dismiss claim for unjust conviction and imprisonment, even though claimant established damages for pecuniary and non-pecuniary loss at $240,000, where claimant had already received $450,000 settlement in prior federal action arising from same conviction and imprisonment based on violations of his civil rights and pendent state claims of negligence and malicious prosecution, and he failed to show that portion of settlement covering unjust conviction and subsequent imprisonment damages was less than $240,000 found by Court of Claims; unrecompensed damages are essential element of claim under CLS Ct C Act § 8-b inasmuch as it would be pointless to enter judgment for no damages, so that dismissal of claim would be appropriate. Carter v State, 139 Misc. 2d 423, 528 N.Y.S.2d 292, 1988 N.Y. Misc. LEXIS 172 (N.Y. Ct. Cl. 1988), aff'd, 154 A.D.2d 642, 546 N.Y.S.2d 648, 1989 N.Y. App. Div. LEXIS 13762 (N.Y. App. Div. 2d Dep't 1989).

Officers had probable cause to arrest, and thus court would grant state's motion to dismiss at conclusion of false arrest trial, where abused 2-month-old child had been found dead at cabin shared by plaintiff and child's mother, autopsy concluded that child had starved to death, officers knew that plaintiff had been living with child's mother since before child's birth and had taken some financial responsibility in caring for child, and plaintiff had refused to answer any of officers' questions; although charges of second degree manslaughter and endangering welfare of child were later dismissed as to plaintiff, he had been arrested for crime of criminally negligent homicide, which does not require that perpetrator be aware of risk of his actions. Myers v State, 175 Misc. 2d 90, 667 N.Y.S.2d 1010, 1997 N.Y. Misc. LEXIS 605 (N.Y. Ct. Cl. 1997).

Where a jury returned a verdict in favor of plaintiff on false arrest and malicious prosecution claims, the trial court properly denied defendant's motions under N.Y. C.P.L.R. 4401 and 4404, as there had been no probable cause to arrest him for leaving the scene of an accident without reporting, and defendant played an active role in the prosecution by encouraging the police to act. Mesiti v Wegman, 307 A.D.2d 339, 763 N.Y.S.2d 67, 2003 N.Y. App. Div. LEXIS 8371 (N.Y. App. Div. 2d Dep't 2003).

25. Fraud

Cause of action sounding in fraudulent misrepresentation was properly dismissed at close of plaintiff's evidence, despite allegation that automobile distributor breached oral agreement approving plaintiff as dealer, where promises relied on by plaintiff were expressions of future expectations rather than statements of existing fact. Country-Wide Leasing Corp. v Subaru of America, Inc., 133 A.D.2d 735, 520 N.Y.S.2d 24, 1987 N.Y. App. Div. LEXIS 51778 (N.Y. App. Div. 2d Dep't 1987), app. denied, 70 N.Y.2d 615, 526 N.Y.S.2d 436, 521 N.E.2d 443, 1988 N.Y. LEXIS 697 (N.Y. 1988).

Architect was entitled to directed verdict on school district's cause of action for fraud arising from faulty installation of roof on school building where there was far from clear and convincing evidence that architect had anything but genuine belief that remedial measures ordered for roof were sufficient. Board of Education v Sargent, Webster, Crenshaw & Folley, 146 A.D.2d 190, 539 N.Y.S.2d 814, 1989 N.Y. App. Div. LEXIS 4391 (N.Y. App. Div. 3d Dep't), app. denied, 75 N.Y.2d 702, 551 N.Y.S.2d 906, 551 N.E.2d 107, 1989 N.Y. LEXIS 4430 (N.Y. 1989).

In action by church for conspiracy to defraud brought against automobile dealership, inter alia, arising out of purchase by member of church of automobile and its later repossession, court properly dismissed action at close of church's case where (1) membership of church consisted primarily of pastor's family and included pastor's son-in-law, (2) church authorized son-in-law to purchase automobile for it, and (3) son-in-law executed purchase order in name of church, later had his name added to purchase order and had automobile titled in his name; church failed to show any intent to deceive on part of dealership, any false representations by dealership, that church was deceived by any representations of dealership or that there was any conspiracy by dealership. Ministry of Christ Church v Mallia, 148 A.D.2d 784, 538 N.Y.S.2d 367, 1989 N.Y. App. Div. LEXIS 2138 (N.Y. App. Div. 3d Dep't 1989).

Plaintiffs, who purchased cooperative apartment but never resided there nor furnished, decorated or attempted repairs thereto until unit was under contract to be sold, failed to establish prima facie case of fraud against apartment corporation based on alleged defects,

various leaks which damaged floors and walls, and discrepancies between actual construction and representations in offering plan, since any misrepresentations were made by sponsor, not parent corporation, and plaintiffs reaped substantial profit from resale. Halkedis v Two East End Ave. Apartment Corp., 161 A.D.2d 281, 555 N.Y.S.2d 54, 1990 N.Y. App. Div. LEXIS 5080 (N.Y. App. Div. 1st Dep't), app. denied, 76 N.Y.2d 711, 563 N.Y.S.2d 767, 565 N.E.2d 516, 1990 N.Y. LEXIS 3439 (N.Y. 1990).

In action by various diamond dealers against bank, in which it was alleged that plaintiffs were induced to offer credit to corporation based on bank's representation that corporation's account was "satisfactory" (i.e., recommended for normal business), bank was entitled to judgment during trial on cause of action for fraud since there was no specific intent to defraud where requests for information were made by inquiring banks, as agents for plaintiffs, without identifying either person making request or purpose of request. Belgo Asian Diamond Cy. v European American Bank & Trust Co., 168 A.D.2d 345, 562 N.Y.S.2d 668, 1990 N.Y. App. Div. LEXIS 15475 (N.Y. App. Div. 1st Dep't 1990).

Client failed to make out prima facie case of fraud, self-dealing and conspiracy against broker and his partner where broker, with whom client had listed his real property for sale, fully disclosed his intention to purchase premises for his own account, and paid price which was both fair and reasonable; broker's undisclosed purchase of unrelated, contiguous parcel in which client had no interest did not constitute breach of broker's fiduciary duty. Yellot v Poritzky, 170 A.D.2d 676, 567 N.Y.S.2d 91, 1991 N.Y. App. Div. LEXIS 3164 (N.Y. App. Div. 2d Dep't 1991).

Court properly granted defense motion to dismiss complaint at close of plaintiff's case on ground that plaintiff failed to establish fraud in connection with its purchase of commercial real property where, despite having means and ability to call on assistance of legal counsel, accountants, and real estate experts, it took no action at all to acquaint itself with prevailing rental rates for commercial property or availability of tenants. P. Chimento Co. v Banco Popular, 208 A.D.2d 385, 617 N.Y.S.2d 157, 1994 N.Y. App. Div. LEXIS 9414 (N.Y. App. Div. 1st Dep't 1994).

Court erred in directing verdict against Superintendent of Insurance, as liquidator, on 2 causes of action for fraud where (1) superintendent sufficiently showed that defendant (accounting firm) knowingly or recklessly made material misrepresentations constituting fraud, and aided and abetted fraud by providing services that helped in commission of fraud, and (2) evidence was clear that, except for such misrepresentations as to solvency of subject insurance corporations, Department of Insurance would not have entered into settlement agreement with them. Curiale v Peat, Marwick, Mitchell & Co., 214 A.D.2d 16, 630 N.Y.S.2d 996, 1995 N.Y. App. Div. LEXIS 8864 (N.Y. App. Div. 1st Dep't 1995).

In action seeking declaration that insurance policy was void due to insureds' false and fraudulent statements as to cause of fire, court properly granted insureds' motion for directed verdict given thinness of insurer's proof on issue of motive, along with its failure to produce any evidence showing that either of insureds, or anyone who might have been acting on their behalf or at their direction, had opportunity to set fire, or was seen on or near premises on day it occurred. And re insureds' false and fraudulent statements as to amount of loss sustained, judgment directing verdict in favor of insureds would be severed and new trial granted where insurer was unduly hampered in its attempts to tender relevant and probative evidence, and proof insurer was allowed to introduce could have justified finding that insureds knowingly misrepresented condition of property prior to fire or damage they incurred. Chenango Mut. Ins. Co. v Charles, 235 A.D.2d 667, 652 N.Y.S.2d 134, 1997 N.Y. App. Div. LEXIS 99 (N.Y. App. Div. 3d Dep't 1997).

Plaintiff owners of shares of preferred stock in subsequently defunct corporation were entitled to directed verdict in their action for fraudulent conveyance, under CLS Dr & Cr § 273, against one of corporation's 3 officers and directors where (1) after closing of preferred stock offering, defendant paid himself over $92,000 from corporation's account at time when corporation was insolvent, (2) most of that payment was to buy back stock that defendant had received from corporation, (3) that stock was not sold or transferred and was worth substantially less than amount that defendant received for it, (4) defendant knew, when he accepted corporation's

checks, that there would be almost no money left to operate corporation and that plaintiffs would lose their investment, and (5) thus, conveyance was not made in good faith or for fair consideration. Smith v Kanter, 273 A.D.2d 793, 709 N.Y.S.2d 760, 2000 N.Y. App. Div. LEXIS 6809 (N.Y. App. Div. 4th Dep't), app. denied, 95 N.Y.2d 764, 716 N.Y.S.2d 39, 739 N.E.2d 295, 2000 N.Y. LEXIS 2845 (N.Y. 2000).

Tortfeasor’s motions for judgment as a matter of law and to set aside the jury verdict on a cause of action to recover damages for fraud were properly denied as a rational basis existed for the jury’s finding that the tortfeasor committed fraud. Maisano v Beckoff, 2 A.D.3d 412, 767 N.Y.S.2d 790, 2003 N.Y. App. Div. LEXIS 12943 (N.Y. App. Div. 2d Dep't 2003).

Dismissal of three of a representative’s causes of action in a case alleging breach of fiduciary duty, fraud, and conversion relating to the sale of a vehicle was error because there was a rational basis upon which the jury could have concluded that an automobile dealer committed a breach of a fiduciary duty, fraud, and/or conversion and that the representative was damaged thereby; on the evidence presented, an award of damages would not have necessarily been merely speculative, possible, or imaginary, but, rather, the jury could have rationally awarded damages in an amount representing the best approximation possible through the exercise of good judgment and common sense. Recovery was not to have been denied merely because the quantum of damages was uncertain or difficult to ascertain. Shoecraft v BBS Automotive Group, Inc., 48 A.D.3d 786, 853 N.Y.S.2d 125, 2008 N.Y. App. Div. LEXIS 1744 (N.Y. App. Div. 2d Dep't 2008).

Plaintiff, which obtained liability insurance for its business through defendant insurance broker at excessive cost and with unwanted exclusion, allegedly due to defendant’s fraudulent misrepresentations and negligence, was not entitled to directed verdict against defendant on issue of damages in action seeking indemnification for cost of settling action by insurer against plaintiff for nonpayment of premiums, since there were questions of fact for jury as to whether settlement price exceeded price plaintiff would have had to pay another carrier for coverage it received for period during which it did not pay premiums, and whether plaintiff had passed on

cost of coverage by charging its customers amounts in excess of cost later paid by it. Trans World Maintenance Services, Inc. v Accident Prevention Brokerage Corp., 148 Misc. 2d 518, 560 N.Y.S.2d 914, 1989 N.Y. Misc. LEXIS 889 (N.Y. Sup. Ct. 1989), aff'd, 169 A.D.2d 519, 564 N.Y.S.2d 375, 1991 N.Y. App. Div. LEXIS 384 (N.Y. App. Div. 1st Dep't 1991).

Since the contractors did not rebut the statutory presumption of N.Y. Lien Law § 75(4) that they had divested trust funds, and because a jury could reasonably conclude that the plumber was fraudulently induced to refrain from filing a timely action, the trial court properly granted judgment in favor of the plumber under N.Y. C.P.L.R. § 4401. Medco Plumbing, Inc. v Sparrow Constr. Corp., 22 A.D.3d 647, 802 N.Y.S.2d 730, 2005 N.Y. App. Div. LEXIS 11124 (N.Y. App. Div. 2d Dep't 2005).

26. Landlord and tenant matters

Limousine company that leased 45 square feet of space in airport terminal to provide counter space for its representatives and telephone for its customers made out prima facie case of wrongful eviction by airport where airport manager admitted disconnecting lessee’s telephone and removing its sign after dispute over limousine company’s failure to pay rent in timely fashion, since any default in rental payments had been cured within 10 days of written notification by airport, as lease permitted, and thus there was no basis for eviction. Long Island Airports Limousine Service Corp. v Northwest Airlines, 124 A.D.2d 711, 508 N.Y.S.2d 223, 1986 N.Y. App. Div. LEXIS 62018 (N.Y. App. Div. 2d Dep't 1986).

Derivative cause of action asserted by mother against city, for loss of services resulting from burn injuries to child allegedly due to excessively hot water in city-owned building, was properly dismissed at close of plaintiffs’ case where mother voluntarily absented herself from entire trial. Daughtery v New York, 137 A.D.2d 441, 524 N.Y.S.2d 703, 1988 N.Y. App. Div. LEXIS 1651 (N.Y. App. Div. 1st Dep't 1988).

It was error to dismiss, for failure to make out prima facie case, action against city for burns sustained by infant plaintiff in city-owned building when water faucet broke and he was sprayed

with excessively hot water since (1) jury could conclude that city had constructive notice of defective condition based on evidence that water in building had been excessively hot for many months, that boiler and pipes were in substantial disrepair, and that extensive work had been performed on plumbing system at city's request, (2) city's duty to maintain premises in safe condition, under CLS Mult D § 78, was not negated by provision in lease for tenants' association to assume management of building in view of city's retention of ultimate control, (3) defective faucet was not independent intervening event which was solely responsible for plaintiff's injuries, and (4) issue of whether plaintiff's burns were proximately caused by spraying hot water or by child abuse, as city contended, was fact issue for jury to decide. Daughtery v New York, 137 A.D.2d 441, 524 N.Y.S.2d 703, 1988 N.Y. App. Div. LEXIS 1651 (N.Y. App. Div. 1st Dep't 1988).

Landlord was entitled to judgment as matter of law at close of plaintiff's evidence in action for personal injuries to tenant's employee when step collapsed while he was ascending interior stairway, where tenant had expressly covenanted in lease to make all interior repairs, tenant had in fact made repairs (including replacement of step after it was broken), and thus tenant would be deemed to have been in exclusive possession of that portion of premises where accident occurred; moreover, landlord's right of reentry as reserved in lease did not impose liability for any dangerous condition that subsequently arose, and thus could not be relied on by tenant to establish landlord's control. Gelardo v ASMA Realty Corp., 137 A.D.2d 787, 525 N.Y.S.2d 334, 1988 N.Y. App. Div. LEXIS 1970 (N.Y. App. Div. 2d Dep't 1988).

Landlord was not entitled to dismissal of action for trespass where tenant's evidence showed (1) that landlord took down signs for tenant's business, changed door locks, and removed tenant's property, (2) landlord requested that tenant remove her property, and signs were posted on premises to that effect, and (3) landlord stated that he wanted to rent to third party. Stay v Horvath, 177 A.D.2d 897, 576 N.Y.S.2d 908, 1991 N.Y. App. Div. LEXIS 15067 (N.Y. App. Div. 3d Dep't 1991).

Tenant's negligence claim should not have been dismissed on ground that landlord's failure to repair broken window pane in apartment building's front door prior to burglary was insufficient as

matter of law to constitute negligence in security; it was fact question whether landlord was negligent in failing to repair door which had been broken in landlord’s presence. Barcher v Radovich, 183 A.D.2d 689, 583 N.Y.S.2d 276, 1992 N.Y. App. Div. LEXIS 6532 (N.Y. App. Div. 2d Dep't 1992).

In action by apartment occupant for injuries sustained in sexual assault by intruder who apparently gained access to apartment via fire escape, landlords, who were alleged to have been negligent in allowing ladder at bottom of fire escape to hang too close to ground, thereby affording intruder easy access to fire escape, were entitled to dismissal of action since plaintiff offered no proof that they had notice of prior criminal activity on premises. Gleason v 75-10 Boulevard Owners' Corp., 193 A.D.2d 715, 597 N.Y.S.2d 742, 1993 N.Y. App. Div. LEXIS 4932 (N.Y. App. Div. 2d Dep't 1993).

In action for breach of covenant of quiet enjoyment based on repeated water system failures at lessee’s restaurant, court erred in granting lessor’s motion to dismiss at close of lessee’s proof where (1) lessee’s expert testified that cause of occasional lack of water to leased premises was clogged pipe that carried water from pond to reservoir well near building, and (2) lessee’s president testified that, on all but one occasion, lack of water interfered with restaurant operation, and that on final occasion he discarded some $1,000 worth of food and closed restaurant permanently; such testimony presented prima facie case that lessor’s wrongful act in failing to supply water to leased premises substantially and materially deprived lessee of beneficial use and enjoyment of premises. In action for constructive eviction based on repeated water system failures at lessee’s restaurant, court properly granted lessor’s motion to dismiss at close of lessee’s proof where (1) lessee’s president acknowledged that he did not close business because of problems with septic system, (2) despite evidence of problems with water quality, lease obligated lessee to maintain water supply equipment inside building and to pay costs of water purification, and (3) water quality problems could have been resolved by minor modifications to equipment. Hidden Ponds v Hresent, 209 A.D.2d 1025, 621 N.Y.S.2d 961, 1994 N.Y. App. Div. LEXIS 12065 (N.Y. App. Div. 4th Dep't 1994).

Tenant failed to establish prima facie case in action alleging that landlord's wife negligently allowed her husband to assault tenant where there was no evidence that she was present during assault, or that she knew or should reasonably have foreseen that assault would occur. Barraza v Sambade, 212 A.D.2d 655, 622 N.Y.S.2d 964, 1995 N.Y. App. Div. LEXIS 1718 (N.Y. App. Div. 2d Dep't 1995).

Action against landlord based on unjust enrichment should have been dismissed where plaintiff contracted only with tenant, and there was no proof that landlord assumed obligation to pay for goods and services provided by plaintiff. Amana Elevation Corp. v Ydrohoos-Aquarius, Inc., 244 A.D.2d 371, 664 N.Y.S.2d 88, 1997 N.Y. App. Div. LEXIS 11300 (N.Y. App. Div. 2d Dep't 1997), app. denied, 91 N.Y.2d 806, 668 N.Y.S.2d 561, 691 N.E.2d 633, 1998 N.Y. LEXIS 111 (N.Y. 1998).

Court erred in granting defendants' motion to dismiss action under CLS CPLR § 4401 where defendants' failure to light courtyard, in violation of CLS Mult D § 26(7-a) and NYC Admin Code § 27-739, was prima facie evidence of their negligence, and plaintiff submitted sufficient evidence of prior criminal conduct at building from which jury could have determined that assault by unknown persons that burglarized plaintiff's first-floor apartment was foreseeable. Guadagno v Terrace Tenants Corp., 262 A.D.2d 355, 691 N.Y.S.2d 146, 1999 N.Y. App. Div. LEXIS 6348 (N.Y. App. Div. 2d Dep't 1999).

In action to enforce personal guarantee of obligations under lease, court erred in dismissing complaint on ground that lease and employment contract were illegal in that they called for defendant to operate restaurant by availing himself of plaintiff's liquor license, where, inter alia, defendant's failure to promptly apply for liquor license, as required by contract, perpetuated claimed illegality, defendant continued to operate restaurant throughout relevant period and derived financial benefits therefrom, and nature of plaintiff's action was not to enforce lease agreement against lessee but to enforce defendant's personal guarantee, which was given to induce plaintiff's contract with lessee. Specialty Restaurants Corp. v Barry, 262 A.D.2d 926, 692 N.Y.S.2d 512, 1999 N.Y. App. Div. LEXIS 7506 (N.Y. App. Div. 3d Dep't 1999).

Out-of-possession landlord was entitled to judgment under CLS CPLR § 4401 dismissing during trial action for slip and fall on staircase by commercial tenant’s employee where employee failed to prove that landlord violated any specific statutory provision, and expert testimony attempting to prove that landlord violated NYC Admin Code § 27-375 was unavailing because that provision applies only to interior stairs, and subject staircase did not meet definition of interior stairs in NYC Admin Code § 27-232. Walker v 127 W. 22nd St. Assocs., 281 A.D.2d 539, 722 N.Y.S.2d 250, 2001 N.Y. App. Div. LEXIS 2644 (N.Y. App. Div. 2d Dep't 2001).

Trial court properly denied a landlord's motion for judgment as a matter of law on the issue of liability in a tenant's personal injury action because the landlord had notice of the dangerous condition—a loose hot water knob in the bathtub—that caused the tenant's accident where the tenant and her daughter had repeatedly complained to the building superintendent about the knob, but the issue was never resolved. Floyd v 1710 Realty, LLC, 145 A.D.3d 961, 44 N.Y.S.3d 474, 2016 N.Y. App. Div. LEXIS 8690 (N.Y. App. Div. 2d Dep't 2016).

Trial court should not have dismissed landlord’s holdover petition on ground that registration statement for interim multiple dwelling was not on file at time proceeding was commenced where (1) landlord presented proof, months before conclusion of trial, that premises were properly registered with Loft Board (albeit after service of petition), and (2) both parties conceded building’s status as interim multiple dwelling. However, court should have dismissed landlord’s holdover petition on merits where landlord purported to exercise option to cancel parties’ 1982 lease pursuant to buy-out provision contained in parties’ original 1980 lease, since (1) 1980 buy-out provision was unenforceable under CLS Mult D § 286(12), which nullified buy-out agreements made prior to effective date of Article 7-C (June 21, 1982), and (2) parties’ subsequent renewal of lease prolonged original lease, but did not constitute new buy-out agreement. Jocar Realty Co. v Rukavina, 137 Misc. 2d 1045, 526 N.Y.S.2d 49, 1987 N.Y. Misc. LEXIS 2760 (N.Y. App. Term 1987).

Trial court erred in granting those branches of a landlord’s motion, pursuant to N.Y. C.P.L.R. 4401, which were for judgment as a matter of law on the landlord’s claim for rental arrears and

dismissal of the tenant’s breach of the warrant of habitability counterclaim, as there was sufficient evidence in the record to permit a rational factfinder to conclude that the warranty of habitability was breached. Therefore, the matter was remitted to the trial court for a new trial to determine whether the landlord breached the warranty of habitability, and, if so, the amount by which the landlord’s rental arrears should be abated. Witherbee Court Assocs. v Greene, 7 A.D.3d 699, 777 N.Y.S.2d 200, 2004 N.Y. App. Div. LEXIS 7003 (N.Y. App. Div. 2d Dep't 2004).

Tenants were entitled to a directed verdict in the landlord’s holdover proceeding because, while the landlord alleged that they committed a nuisance by undisputedly causing two serious water leaks and attached unreasonable conditions to access, the tenants did not engage in acts proscribed by the COVID-19 Emergency Eviction and Foreclosure Prevention Act of 2020, L. 2020, ch. 381, since they were the only occupants of the building that wanted water services restored to their home, and any denial of access to their apartment did not infringe on the use or enjoyment of any other tenant or occupant of the building. Schwesinger v Perlis, 71 Misc. 3d 576, 143 N.Y.S.3d 830, 2021 N.Y. Misc. LEXIS 740 (N.Y. Civ. Ct. 2021).

27. Libel and slander

Granting of motion to dismiss at close of plaintiff’s evidence was erroneous in slander action where defendant had referred to plaintiff in presence of others as a prostitute in that there was sufficient evidence to raise question of fact requiring jury determination. Segal v Barnett, 24 A.D.2d 809, 263 N.Y.S.2d 789, 1965 N.Y. App. Div. LEXIS 3118 (N.Y. App. Div. 3d Dep't 1965).

Trial court properly granted motion by defendant hospital official to dismiss plaintiff anesthesiologist’s defamation case at conclusion of plaintiff’s evidence where there was no showing that defendant doubted truth of statements he made about plaintiff to hospital committee during committee’s proceedings leading up to plaintiff’s suspension, or that defendant was motivated by desire to injure plaintiff. Murphy v Herfort, 140 A.D.2d 415, 528 N.Y.S.2d 117, 1988 N.Y. App. Div. LEXIS 4931 (N.Y. App. Div. 2d Dep't), app. denied, 73 N.Y.2d 701, 535 N.Y.S.2d 595, 532 N.E.2d 101 (N.Y. 1988).

Plaintiff failed to make out prima facie case of libel based on statement made by complaining witness at union arbitration hearing after plaintiff's employer had produced witness to establish reason for plaintiff's dismissal, for in demanding arbitration hearing, wherein plaintiff was found to have been discharged for good cause, plaintiff thereby consented to publication of statements made during course thereof. Oviedo v Rudin Management Co., 140 A.D.2d 680, 529 N.Y.S.2d 105, 1988 N.Y. App. Div. LEXIS 6102 (N.Y. App. Div. 2d Dep't 1988).

Court properly dismissed actions for nuisance and trespass, which arose from construction work performed by defendants in or near lake bed adjoining parties' properties, where there was no evidence from which it could be inferred that defendants intended to intrude on plaintiffs' property, or that they intended to cause, or knew that their actions were substantially likely to cause, discharge of mud and silt into water adjacent to plaintiffs' property. Farrell v Stram, 228 A.D.2d 880, 644 N.Y.S.2d 395, 1996 N.Y. App. Div. LEXIS 7257 (N.Y. App. Div. 3d Dep't 1996).

Court properly granted defendant's motion to dismiss at close of plaintiff's proof in defamation action alleging that defendant's letter injured plaintiff's professional reputation as engineer by charging him with "serious crimes" of harassment, trespass, and injuring Department of Environmental Conservation (DEC) employee, even if defendant's characterizations of plaintiff's acts were entirely baseless, since those accusations constituted imputation of unlawful behavior amounting to no more than minor offenses which were not actionable without proof of damages, and defendant's erroneous statement that it was plaintiff who "allegedly injured a DEC employee" fell short of being reasonably susceptible to connotation of criminality. Clemente v Impastato, 274 A.D.2d 771, 711 N.Y.S.2d 71, 2000 N.Y. App. Div. LEXIS 8055 (N.Y. App. Div. 3d Dep't 2000).

Directed verdict, pursuant to N.Y. C.P.L.R. 4401, was properly granted dismissing campground owners' defamation suit because proof of special damages was required because allegations made in a report that the owners violated town ordinances or environmental laws did not constitute defamation per se, in that they simply imputed unlawful behavior to the owners amounting to only minor offenses. The owners failed to prove any damage to the campground

and failed to submit medical proof linking the depression suffered by one of the owners to the report. Sharratt v Hickey, 20 A.D.3d 734, 799 N.Y.S.2d 299, 2005 N.Y. App. Div. LEXIS 7776 (N.Y. App. Div. 3d Dep't 2005).

Motion to dismiss complaint was granted in teacher's action for libel against student's parent who wrote letter to be placed in personal file of teacher describing alleged mistreatment of student where letter was found false but privileged. Segall v Piazza, 46 Misc. 2d 700, 260 N.Y.S.2d 543, 1965 N.Y. Misc. LEXIS 1770 (N.Y. Sup. Ct. 1965).

In action to recover $1,500 for business libel arising from newspaper food critic's defamatory listing of incorrect ingredients of reviewed restaurant dish, restaurant failed to prove monetary damages based on alleged loss of one regular customer, in absence of records or competent proof as to past business of particular customer or other customers, or accountant's testimony as to decline in income or profits; therefore, dismissal was proper at close of plaintiff's case. Terillo v New York Newsday, 137 Misc. 2d 65, 519 N.Y.S.2d 914, 1987 N.Y. Misc. LEXIS 2566 (N.Y. Civ. Ct. 1987).

Trial court erred in denying a business associate's motion for judgment as a matter of law pursuant to N.Y. C.P.L.R. 4401 in an attorney's defamation action; the statements relied on by the attorney were made outside of the relevant one-year statute of limitations, N.Y. C.P.L.R. 215(3). Frederick v Fried, 10 A.D.3d 444, 780 N.Y.S.2d 908, 2004 N.Y. App. Div. LEXIS 10369 (N.Y. App. Div. 2d Dep't 2004).

28. Malicious prosecution

Defendant was not entitled to dismissal of malicious prosecution action on ground that Supreme Court had found probable cause to justify plaintiff's arrest and had therefore dismissed plaintiff's false arrest claim, since finding of probable cause to arrest does not entail finding of probable cause to support bringing of charge; critical issue concerned what defendant knew and reasonably believed when he made sworn statement, not what police reasonably believed in

reliance thereon. Heller v Ingber, 134 A.D.2d 733, 521 N.Y.S.2d 554, 1987 N.Y. App. Div. LEXIS 50919 (N.Y. App. Div. 3d Dep't 1987).

Court should have dismissed plaintiff's claims for false imprisonment and malicious prosecution where, given plaintiff's own trial testimony confirming truth of admissions he made to polygraph examiner that he had stolen cash from his employer, there was probable cause for his arrest as matter of law. Weingarten v Halfpenny Auto Parts, Inc., 138 A.D.2d 373, 525 N.Y.S.2d 657, 1988 N.Y. App. Div. LEXIS 2161 (N.Y. App. Div. 2d Dep't 1988).

Court properly dismissed cause of action for malicious prosecution where criminal action was terminated by withdrawal of charges, and plaintiff failed to establish either that court passed on merits of charge or that proceeding was terminated at instance of defendant under circumstance that fairly implied plaintiff's innocence. Stay v Horvath, 177 A.D.2d 897, 576 N.Y.S.2d 908, 1991 N.Y. App. Div. LEXIS 15067 (N.Y. App. Div. 3d Dep't 1991).

Court did not err when it directed verdicts dismissing plaintiff's causes of action for false arrest, false imprisonment, and malicious prosecution where eyewitness had identified plaintiff as man he saw fleeing robbery scene, since police officers' reliance on witness' identification of plaintiff was reasonable as matter of law, and thus defendant city met its burden of establishing probable cause for arrest. Stratton v City of Albany, 204 A.D.2d 924, 612 N.Y.S.2d 286, 1994 N.Y. App. Div. LEXIS 5615 (N.Y. App. Div. 3d Dep't 1994).

Defendant was not entitled to dismissal of malicious prosecution action at close of plaintiff's case where defendant had initiated underlying criminal proceeding charging plaintiff with harassment based on plaintiff's alleged shoving of defendant and making of threats, plaintiff was found not guilty after trial, she testified that she never came closer than 18 to 20 feet of defendant and that she made no threatening gestures or verbal threats, and thus plaintiff established malice, in that defendant lacked probable cause to bring underlying charge. Krisanda v Miller, 205 A.D.2d 1029, 614 N.Y.S.2d 73, 1994 N.Y. App. Div. LEXIS 7061 (N.Y. App. Div. 3d Dep't 1994).

Dismissal of action for false arrest and malicious prosecution was properly based on undisputed evidence that arresting officers were unaware that plaintiff was employed at premises and had objectively valid basis for believing him to be trespasser, thereby providing them with probable cause to arrest when he entered restricted area without exhibiting his identification and did not immediately respond to officers' command to stop. Freeman v Port Auth., 243 A.D.2d 409, 663 N.Y.S.2d 557, 1997 N.Y. App. Div. LEXIS 10858 (N.Y. App. Div. 1st Dep't 1997).

Plaintiff's malicious prosecution claim was properly dismissed pursuant to defendants' N.Y. C.P.L.R. 4401 motion because a judicial determination made after the probable cause hearing in the underlying criminal proceeding that the police had probable cause to arrest plaintiff barred his action to recover damages for malicious prosecution. Gagliano v County of Nassau, 31 A.D.3d 375, 817 N.Y.S.2d 651, 2006 N.Y. App. Div. LEXIS 8709 (N.Y. App. Div. 2d Dep't 2006).

Court would grant state's trial motion to dismiss claim for unjust conviction and imprisonment, even though claimant established damages for pecuniary and non-pecuniary loss at $240,000, where claimant had already received $450,000 settlement in prior federal action arising from same conviction and imprisonment based on violations of his civil rights and pendent state claims of negligence and malicious prosecution, and he failed to show that portion of settlement covering unjust conviction and subsequent imprisonment damages was less than $240,000 found by Court of Claims; unrecompensed damages are essential element of claim under CLS Ct C Act § 8-b inasmuch as it would be pointless to enter judgment for no damages, so that dismissal of claim would be appropriate. Carter v State, 139 Misc. 2d 423, 528 N.Y.S.2d 292, 1988 N.Y. Misc. LEXIS 172 (N.Y. Ct. Cl. 1988), aff'd, 154 A.D.2d 642, 546 N.Y.S.2d 648, 1989 N.Y. App. Div. LEXIS 13762 (N.Y. App. Div. 2d Dep't 1989).

29. Malpractice, generally

In an action against architects for negligence or breach of contract in designing an irreversible heat pump system, the trial court erred in dismissing the complaint during the trial for insufficiency of evidence, where the testimony of plaintiff's expert that the system was not

designed in accordance with proper engineering standards because it did not include a heat recovery unit along with other testimony established a prima facie case for the jury's resolution, notwithstanding that on cross-examination plaintiff's expert labeled the omission of the heat recovery system as a "judgment call" rather than a "design error," for it was for the jury to decide whether the architect's conduct in designing the system was improper. Board of Education v Hueber, 90 A.D.2d 685, 456 N.Y.S.2d 283, 1982 N.Y. App. Div. LEXIS 18772 (N.Y. App. Div. 4th Dep't 1982).

In order to establish prima facie case of medical malpractice, expert testimony is required to establish proximate cause unless causal relationship is readily apparent to trier of fact; accordingly, in medical malpractice action to recover damages for personal injuries, order granting defendant's motion for judgment as matter of law made at conclusion of presentation of evidence by plaintiff is affirmed, since it is not readily apparent that alleged damages were caused by alleged malpractice of defendant. Weiss v Zuckerman, 114 A.D.2d 895, 495 N.Y.S.2d 69, 1985 N.Y. App. Div. LEXIS 53924 (N.Y. App. Div. 2d Dep't 1985).

Doctor was not entitled to dismissal of malpractice action on ground that plaintiff did not establish prima facie case in that he failed to call medical expert and relied instead upon defendant doctor's own testimony to establish liability; defendant himself served as plaintiff's expert when he testified as to warnings he gave regarding plaintiff's medical condition, and when plaintiff testified that defendant never gave such warnings, question of fact was presented for jury to decide. Braun v Ahmed, 127 A.D.2d 418, 515 N.Y.S.2d 473, 1987 N.Y. App. Div. LEXIS 42572 (N.Y. App. Div. 2d Dep't 1987).

Seller of real property established prima facie case of malicious prosecution on part of prospective buyers where buyers failed to appear at closing, seller declared default and retained down payment, and buyers commenced actions and filed 2 notices of pendency which prevented seller from contracting with second purchaser for price substantially higher than price at which property was ultimately sold; prospective buyers acted without probable cause, despite their desire to conduct test borings in basement and contract's clause requiring that seller would

“cooperate prior to closing in the filing of any alteration plans,” since contract was silent as to test borings, and buyers knew that seller would not permit them to conduct such tests for fear of irreparable damage. Jackson v Kessner, 225 A.D.2d 403, 640 N.Y.S.2d 4, 1996 N.Y. App. Div. LEXIS 2704 (N.Y. App. Div. 1st Dep't 1996).

Trial court erred in granting a dentist's oral application for judgment as a matter of law dismissing a patient's dental malpractice complaint before she had an opportunity to present her case because, although the patient advised the trial court, prior to the commencement of trial, that she had not procured an expert witness to testify on her behalf, the patient did not necessarily need an expert witness to prove her case, and her assertion that she did not have such a witness was not fatal to her cause of action where it was not the type of “admission” contemplated by the statute. Harris v Hershkowitz, 50 Misc. 3d 59, 23 N.Y.S.3d 798, 2015 N.Y. Misc. LEXIS 3549 (N.Y. App. Term 2015).

30. —Legal malpractice

In a legal malpractice action arising from defendants’ allegedly negligent representation of plaintiff in a prior personal injury action, defendants’ motion pursuant to CPLR § 4401 for judgment as a matter of law was properly granted where plaintiff had failed to establish a prima facie case of legal malpractice and the acts and omissions of trial counsel, if any, were matters of professional judgment and therefore insufficient to support an action for malpractice. Fidler v Sullivan, 93 A.D.2d 964, 463 N.Y.S.2d 279, 1983 N.Y. App. Div. LEXIS 17865 (N.Y. App. Div. 3d Dep't 1983).

Court improperly granted legal malpractice defendant’s motion for trial order of dismissal at close of plaintiff’s case where there was sufficient evidence showing probability of success in underlying action. Ford v Mizio, 274 A.D.2d 329, 710 N.Y.S.2d 367, 2000 N.Y. App. Div. LEXIS 7758 (N.Y. App. Div. 1st Dep't 2000).

In legal malpractice action against attorneys whose sole defense was that personal injury lawsuit, which they failed to timely commence, would have failed in any event because plaintiff

did not sustain “serious injury” and there was no causal connection between automobile accident and plaintiff’s claimed injury of posttraumatic stress disorder (PTSD), court erred in dismissing complaint after both sides rested based on absence of expert testimony concerning diagnostic testing, and by finding that plaintiff’s proof of PTSD was solely subjective, where both plaintiff’s treating psychiatrist and psychiatrist retained by defendants diagnosed plaintiff as suffering from PTSD, both testified as to 4 elements that must exist to support this diagnosis, and neither testified to existence of diagnostic tests to objectively demonstrate PTSD or need to rely on such tests to diagnose plaintiff’s condition. Chapman v Capoccia, 283 A.D.2d 798, 725 N.Y.S.2d 430, 2001 N.Y. App. Div. LEXIS 5175 (N.Y. App. Div. 3d Dep't 2001).

Defendants were entitled to judgment as a matter of law pursuant to N.Y. C.P.L.R. 4401 as to plaintiffs’ legal malpractice and fraud action, because plaintiffs failed to demonstrate that, but for defendants’ alleged negligence in failing to inform them of a settlement offer, they would have accepted a settlement in the underlying action. Bauza v Livington, 40 A.D.3d 791, 836 N.Y.S.2d 645, 2007 N.Y. App. Div. LEXIS 6197 (N.Y. App. Div. 2d Dep't 2007).

31. —Medical malpractice, generally

Court of Appeals of New York reversed its prior decision, held that, even in the absence of an independent injury, expectant mothers can recover damages for emotional distress when they experience a miscarriage or stillbirth caused by malpractice, and reversed a judgment entered by the Supreme Court of New York, Appellate Division, Second Department, which affirmed the trial court’s judgment dismissing an action by a mother who sought damages after her child was stillborn. Broadnax v Gonzalez, 2 N.Y.3d 148, 777 N.Y.S.2d 416, 809 N.E.2d 645, 2004 N.Y. LEXIS 603 (N.Y. 2004).

In a medical malpractice action in which the record reflected that an expert’s testimony sufficiently established the elements of malpractice against two defendant doctors, the granting of a motion for judgment as a matter of law was error since the court may grant such a motion only if there is no rational process by which the jury could find for the plaintiff as against the

moving defendants. Nicholas v Reason, 84 A.D.2d 915, 447 N.Y.S.2d 55, 1981 N.Y. App. Div. LEXIS 16178 (N.Y. App. Div. 4th Dep't 1981).

Court erred in dismissing plaintiff's prima facie medical malpractice case against allergist without submitting it to jury where (1) allergist testified that he relied on records of another allergist, concurred with diagnosis that plaintiff (who actually had tumor) suffered only from allergy, and administered allergy therapy, (2) plaintiff's expert testified that diagnosis and treatment of allergies without first taking sinus x-rays constituted malpractice, and (3) testimony established that failure to diagnose tumor promptly was proximate cause of plaintiff's loss of sight. Weinstein v Daman, 132 A.D.2d 547, 517 N.Y.S.2d 278, 1987 N.Y. App. Div. LEXIS 49076 (N.Y. App. Div. 2d Dep't 1987), app. dismissed, 70 N.Y.2d 872, 523 N.Y.S.2d 498, 518 N.E.2d 8, 1987 N.Y. LEXIS 19085 (N.Y. 1987), app. dismissed, 70 N.Y.2d 951, 524 N.Y.S.2d 678, 519 N.E.2d 624, 1988 N.Y. LEXIS 23 (N.Y. 1988).

Plaintiff made out prima facie medical malpractice case against optometrist, so that court should not have dismissed case before it went to jury, by examining defendant optometrist as expert witness, by eliciting statement that it would be deviation from accepted standards for optometrist to fail to refer person with plaintiff's condition (chronic stuffed-up nose and blurry vision) to ophthalmologist immediately, and by establishing that no immediate referral was made. Weinstein v Daman, 132 A.D.2d 547, 517 N.Y.S.2d 278, 1987 N.Y. App. Div. LEXIS 49076 (N.Y. App. Div. 2d Dep't 1987), app. dismissed, 70 N.Y.2d 872, 523 N.Y.S.2d 498, 518 N.E.2d 8, 1987 N.Y. LEXIS 19085 (N.Y. 1987), app. dismissed, 70 N.Y.2d 951, 524 N.Y.S.2d 678, 519 N.E.2d 624, 1988 N.Y. LEXIS 23 (N.Y. 1988).

Denial of plaintiff's motion for directed verdict against physician in medical malpractice action was not incorrect or prejudicial to co-defendant radiologist to whom physician had referred patient, even though physician admitted, based on hindsight, that his less than urgent advice to patient concerning severity of her condition (based on radiologist's examination) was departure from standard medical practice, where physician maintained that he considered his conduct appropriate at time, and thus jury could have found that his reliance on radiologist's expertise

was reasonable. Riley v Wieman, 137 A.D.2d 309, 528 N.Y.S.2d 925, 1988 N.Y. App. Div. LEXIS 6074 (N.Y. App. Div. 3d Dep't 1988).

In malpractice action against psychiatrist for prescribing drug which rendered plaintiff legally blind, court erred in granting plaintiff's motion for judgment as matter of law on issue of liability based on negligence, notwithstanding that psychiatrist admitted that he was unaware of all side effects of prescribed drug, since he did consistently state that he recognized that drug could cause pigmentary retinopathy (plaintiff's affliction), and defendant's expert testified that defendant followed good and accepted medical practice; despite defendant's admission, his expert's testimony was sufficient basis from which jury could conclude that defendant did not depart from accepted psychiatric standards in treating plaintiff. Court also erred in directing verdict for plaintiff on issue of liability based on lack of informed consent where there was sufficient proof to raise fact issue, given that (1) plaintiff was already taking drug when she came under psychiatrist's care, (2) psychiatrist stated that he declined to advise plaintiff of drug's more severe side effects due to plaintiff's history of emotional problems and her suicidal state, (3) psychiatrist testified that soon thereafter he did inform plaintiff of possibility that drug could impair her vision, and (4) psychiatrist's expert testified that good medical practice did not warrant immediate disclosure of side effects; while psychiatrist's position was controverted by plaintiff, such conflict was for jury's resolution. Dooley v Skodnek, 138 A.D.2d 102, 529 N.Y.S.2d 569, 1988 N.Y. App. Div. LEXIS 7055 (N.Y. App. Div. 2d Dep't 1988).

Defendant physician was not entitled to judgment as matter of law at conclusion of plaintiffs' case in action for medical malpractice in which it was alleged that physician's acts and omissions led to infant's development of cerebral palsy since plaintiffs established prima facie case against physician where plaintiffs' experts testified that infant suffered from sepsis, which should have been tested for and treated at earlier date, and that her subsequent cerebral palsy could have been avoided if there had been no delay. Colozzo v Lovece, 144 A.D.2d 617, 534 N.Y.S.2d 701, 1988 N.Y. App. Div. LEXIS 12372 (N.Y. App. Div. 2d Dep't 1988).

In malpractice action alleging that physician’s negligence in failing to X-ray or probe puncture wound was proximate cause of plaintiff’s having to undergo surgery and suffer unnecessary pain and debilitation, court properly granted physician’s motion for judgment at trial for failure to establish prima facie case where (1) plaintiff’s expert witness testified that X rays and probing were proper procedures for plaintiff’s injury but admitted that microscopic particles which created need for surgery could not have been detected by either procedure, and (2) although other procedures were mentioned by plaintiff’s expert witness that might have detected or removed microscopic particles, there was no testimony that failure to perform them was departure from standard medical practice, nor were these procedures mentioned in plaintiff’s complaint. Tonetti v Peekskill Community Hosp., 148 A.D.2d 525, 538 N.Y.S.2d 860, 1989 N.Y. App. Div. LEXIS 2777 (N.Y. App. Div. 2d Dep't 1989).

In medical malpractice action, defendant physician was not entitled to judgment as matter of law under CLS CPLR § 4401, dismissing action alleging that decedent was prematurely discharged from hospital after hernia surgery and that such action, together with failure to diagnose lung cancer condition, resulted in diminishment of decedent’s life and his early demise, since evidence was sufficient to support conclusion that cancer spread very rapidly and 2-week delay in diagnosis could have led to early death. But, defendant physician was entitled to judgment as matter of law under CLS CPLR § 4401, dismissing action alleging failure to test and diagnose decedent’s lung condition, which was grounded on allegedly unnecessary nature of hernia surgery and claim that surgery caused decedent needless suffering before his death due to lung cancer, since there was no evidence that hernia operation was made unnecessary by presence of lung cancer or that operation hastened death. Hughes v New York Hospital-Cornell Medical Ctr., 195 A.D.2d 442, 600 N.Y.S.2d 145, 1993 N.Y. App. Div. LEXIS 7013 (N.Y. App. Div. 2d Dep't 1993).

In medical malpractice action, which was dismissed on ground that injuries claimed in plaintiff’s bill of particulars were identical to those alleged in bill of particulars served in another action brought by plaintiff against city for his original injuries, which had been settled, court should have

permitted plaintiff to amend his bill of particulars to more specifically allege precise nature of exacerbation injuries for which he held instant defendants responsible since (1) it was clear from complaint and bills of particulars that plaintiff was charging instant defendants with exacerbation of his leg fractures by their negligent post-accident treatment of him, and (2) at no point prior to trial nor at trial itself did defendants complain that they were unaware of essential elements of plaintiff's claim. Fick v LaGuardia Medical Group, P. C., 208 A.D.2d 800, 618 N.Y.S.2d 72, 1994 N.Y. App. Div. LEXIS 10056 (N.Y. App. Div. 2d Dep't 1994).

Court erred in submitting psychiatric malpractice action to jury where plaintiffs failed to establish that decision to release injured plaintiff from hospital was something less than professional medical determination; plaintiffs' theory of liability was that injured plaintiff was released with insufficient level of medication in her system, but all expert witnesses agreed that it was not practice to monitor actual level of medication and that sole way to determine whether medication was effective was through clinical examination, which occurred daily before plaintiff was discharged. Vera v Beth Isr. Medical Hosp., 214 A.D.2d 384, 625 N.Y.S.2d 499, 1995 N.Y. App. Div. LEXIS 4219 (N.Y. App. Div. 1st Dep't, reh'g denied, 1995 N.Y. App. Div. LEXIS 8615 (N.Y. App. Div. 1st Dep't Aug. 3, 1995), app. denied, 87 N.Y.2d 802, 638 N.Y.S.2d 425, 661 N.E.2d 999, 1995 N.Y. LEXIS 5004 (N.Y. 1995), app. denied, 1995 N.Y. LEXIS 5005 (N.Y. Nov. 30, 1995).

Court properly dismissed medical malpractice complaint at close of plaintiffs' case where wrongdoing complained of was essentially akin to misdiagnosis, plaintiffs relied on doctrine of res ipsa loquitur to establish prima facie case, and there was no expert testimony as to whether defendants' diagnostic methods and treatment procedures were consistent with contemporary professional standards of care. Delaney v Champlain Valley Physicians Hosp. Med. Ctr., 232 A.D.2d 840, 648 N.Y.S.2d 761, 1996 N.Y. App. Div. LEXIS 10490 (N.Y. App. Div. 3d Dep't 1996).

Court improperly granted medical malpractice defendant's motion for directed verdict on ground that testimony of plaintiff's expert failed to show proximate cause where expert was asked "What

specific injury . . . to [plaintiff] did [defendant's] actions then lead to in falling below a proper standard of care by [defendant]," to which he replied "Further wound tissue death," whereupon he was asked "Could some of this tissue have been saved by proper follow-up instructions or by following a proper standard of care by [defendant]," to which he stated, "That's really beyond my area of expertise"; answer to first question established causation, and answer to second question simply addressed extent of plaintiff's injury. Colburn v Blum, 233 A.D.2d 888, 666 N.Y.S.2d 360, 1996 N.Y. App. Div. LEXIS 13377 (N.Y. App. Div. 4th Dep't 1996).

In medical malpractice action arising from defendant's performance of myelogram on plaintiff, court correctly took judicial notice of mathematical miscalculation made by plaintiff's expert concerning dosage of radiographic dye injected into plaintiff's spine, but incorrectly struck expert's testimony in its entirety based on that single miscalculation, and improperly granted defense motion for judgment as matter of law on ground that plaintiffs failed to establish prima facie case, where expert had testified as to numerous acts of defendant which, in his opinion, deviated from accepted medical practice, only one of which related to dosage. Feger v Goldberg, 250 A.D.2d 727, 673 N.Y.S.2d 194, 1998 N.Y. App. Div. LEXIS 5798 (N.Y. App. Div. 2d Dep't), app. denied, 92 N.Y.2d 807, 678 N.Y.S.2d 593, 700 N.E.2d 1229, 1998 N.Y. LEXIS 2793 (N.Y. 1998).

Court properly granted medical malpractice defendant's motion for judgment as matter of law, even though there was sufficient evidence to support conclusion that defendant departed from good and accepted medical practice and failing to send cyst fluid for analysis and failing to follow up after plaintiff failed to keep several appointments, where there was no expert testimony causally linking defendant's negligence with any delay in diagnoses of her breast cancer or with any injury that was separate and apart from underlying cancer. Lyons v McCauley, 252 A.D.2d 516, 675 N.Y.S.2d 375, 1998 N.Y. App. Div. LEXIS 8244 (N.Y. App. Div. 2d Dep't), app. denied, 92 N.Y.2d 814, 681 N.Y.S.2d 475, 704 N.E.2d 228, 1998 N.Y. LEXIS 3994 (N.Y. 1998).

Court properly dismissed medical malpractice action at close of plaintiff's case where evidence, including testimony of plaintiff's medical expert, failed to show either that defendants' treatment

of plaintiff deviated from accepted medical practice or that any such departure was substantial factor in causing decedent’s pain and suffering or later death. Corsack v Brody, 255 A.D.2d 222, 679 N.Y.S.2d 822, 1998 N.Y. App. Div. LEXIS 12458 (N.Y. App. Div. 1st Dep't 1998).

Court properly dismissed complaint at close of plaintiff’s proof in action alleging that defendants were negligent in performance of their evaluation to determine whether plaintiff was capable of returning to work and performing her normal job duties without risk of injury where plaintiffs failed to present prima facie proof of standards of care in physical therapy/work assessment field or any deviation from those standards by defendants, work assessment and conditioning center and licensed physical therapist specializing in industrial rehabilitation. Kirker v Nicolla, 256 A.D.2d 865, 681 N.Y.S.2d 689, 1998 N.Y. App. Div. LEXIS 13530 (N.Y. App. Div. 3d Dep't 1998).

Medical malpractice case was properly dismissed on motion made during jury selection, whether under CLS CPLR § 3212(a) or CLS CPLR § 4401, where plaintiff’s counsel conceded that expert’s deposition was his sole expert testimony, and deposition contained no testimony of causal connection between alleged negligence and injury. Giambona v Stein, 265 A.D.2d 775, 697 N.Y.S.2d 399, 1999 N.Y. App. Div. LEXIS 10910 (N.Y. App. Div. 3d Dep't 1999).

Medical malpractice action was properly dismissed at close of plaintiffs’ case where testimony of plaintiff’s treating cardiologist was insufficient to show that defendant deviated from accepted standard of care by failing to diagnose that she was suffering from pericardial effusion when he treated her at emergency room. Perrone v Grover, 272 A.D.2d 312, 707 N.Y.S.2d 196, 2000 N.Y. App. Div. LEXIS 4871 (N.Y. App. Div. 2d Dep't 2000).

Dismissal under CLS CPLR § 4401 was properly granted where plaintiff failed to adduce expert medical testimony to support action based on lack of informed consent. Antoine v Gulmi, 275 A.D.2d 294, 713 N.Y.S.2d 121, 2000 N.Y. App. Div. LEXIS 8713 (N.Y. App. Div. 2d Dep't), app. denied, 95 N.Y.2d 768, 721 N.Y.S.2d 605, 744 N.E.2d 141, 2000 N.Y. LEXIS 3546 (N.Y. 2000).

In medical malpractice action alleging that defendant’s failure to diagnose infection of plaintiff’s surgical wound fell below accepted podiatric standards, court erred in granting plaintiff’s motion for directed verdict based on defendant’s failure to take adequate medical history, as it was rational for jury to credit defendant’s testimony that wound showed no signs of infection but rather opened because of overuse, where defendant and plaintiff were social acquaintances and, as such, he was aware of her level of activity. Levin v Carbone, 277 A.D.2d 951, 715 N.Y.S.2d 557, 2000 N.Y. App. Div. LEXIS 11514 (N.Y. App. Div. 4th Dep't 2000).

Court properly granted medical malpractice defendant’s motion under CLS CPLR § 4401 where plaintiffs’ experts admitted that there was no way of knowing when injury occurred to infant plaintiff, and that it could have occurred before defendant’s treatment. Healy v Spector, 287 A.D.2d 541, 731 N.Y.S.2d 740, 2001 N.Y. App. Div. LEXIS 9561 (N.Y. App. Div. 2d Dep't 2001).

Trial court erred in granting a doctor’s N.Y. C.P.L.R. 4401 for judgment as a matter of law as to plaintiff’s medical malpractice action, as plaintiff established a prima facie case of causation based on expert testimony which indicated that the doctor’s failure to order endoscopic testing lowered plaintiff’s chance of surviving gastric cancer. Borawski v Huang, 34 A.D.3d 409, 824 N.Y.S.2d 362, 2006 N.Y. App. Div. LEXIS 13407 (N.Y. App. Div. 2d Dep't 2006).

Judgment as a matter of law was properly granted under N.Y. C.P.L.R. 4401 with respect to a claim that defendant negligently performed a patient’s colonoscopy because plaintiffs’ expert presented no evidence as to the applicable standard of care and plaintiffs, thus, failed to establish a prima facie case of medical malpractice. Harper v Findling, 38 A.D.3d 601, 832 N.Y.S.2d 266, 2007 N.Y. App. Div. LEXIS 2893 (N.Y. App. Div. 2d Dep't 2007).

Because the physicians deviated from accepted practice in assessing, treating, and caring for a patient’s acute perforated diverticulum, and because the future pain and suffering award did not deviate materially from what would be considered reasonable compensation under N.Y. C.P.L.R. 5501(c), the trial court properly denied the physicians’ N.Y. C.P.L.R. 4401, 4404 motions. Salmeri v Beth Isr. Med. Center-Kings Highway Div., 39 A.D.3d 841, 834 N.Y.S.2d 314, 2007 N.Y. App. Div. LEXIS 5175 (N.Y. App. Div. 2d Dep't 2007).

Because it was not shown that an expert's opinion would be reliable, the expert was unqualified to testify about the growth rate of a decedent's tumor; therefore, since the plaintiff was unable to present a prima facie case of medical malpractice, the defendants were entitled to judgments as a matter of law under N.Y. C.P.L.R. 4401. de Hernandez v Lutheran Med. Ctr., 46 A.D.3d 517, 850 N.Y.S.2d 460, 2007 N.Y. App. Div. LEXIS 12352 (N.Y. App. Div. 2d Dep't 2007).

In a medical malpractice action, a professional corporation was entitled to judgment as a matter of law under N.Y. C.P.L.R. § 4401 because the patient's expert failed to establish a departure from accepted medical practice in the treatment of the patient's fractured left leg for compartment syndrome as no necrotic tissue was found two days after the patient's fasciotomy; thus, the patient could only have been experiencing compartment syndrome for a few hours prior to medical intervention. Nichols v Stamer, 49 A.D.3d 832, 854 N.Y.S.2d 220, 2008 N.Y. App. Div. LEXIS 2806 (N.Y. App. Div. 2d Dep't 2008).

Because rational jurors could conclude that the radiologists departed from good and accepted standards of medical practice, the trial court correctly denied that their N.Y. C.P.L.R. 4401 motion for judgment as a matter of law. Eliopoulos v Healthcheck, Inc., 51 A.D.3d 622, 857 N.Y.S.2d 686, 2008 N.Y. App. Div. LEXIS 4052 (N.Y. App. Div. 2d Dep't 2008).

Upon a renewed motion under N.Y. C.P.L.R. 4401, a consulting cardiologist and a doctor who inserted a catheter into a woman who died after giving birth to her fourth child by cesarean section were granted a judgment as a matter of law absolving them from liability as they did not contribute to the woman's death in any manner. The appellate court agreed with the consulting cardiologist that there was no rational basis to support a jury finding that he departed from good and accepted practice by failing to take steps, beyond the normal scope of his role as a consultant and his specialization, to resolve the suspected post-surgical bleed, and there was no rational process the jury could have found liability against the doctor who inserted the catheter since expert opinion established it did not cause nor contribute to her death. Elias v Bash, 54 A.D.3d 354, 863 N.Y.S.2d 73, 2008 N.Y. App. Div. LEXIS 6438 (N.Y. App. Div. 2d Dep't), app. denied, 11 N.Y.3d 711, 872 N.Y.S.2d 73, 900 N.E.2d 556, 2008 N.Y. LEXIS 3451 (N.Y. 2008).

Because a patient presented sufficient evidence that a doctor's failure to administer Gram's stain and amniotic glucose tests deviated from accepted medical practice, and that the deviation was a substantial factor in causing her child to develop cerebral palsy, the trial court erred in granting the doctor's oral N.Y. C.P.L.R. 4401 application for judgment as a matter of law. Alicea v Ligouri, 54 A.D.3d 784, 864 N.Y.S.2d 462, 2008 N.Y. App. Div. LEXIS 6835 (N.Y. App. Div. 2d Dep't 2008).

Directed verdict pursuant to N.Y. C.P.L.R. 4401 in favor of physicians was proper in a claim against the physicians asserting that they failed to adequately "collaborate" with a nurse concerning a decedent's care within the meaning of N.Y. Educ. Law § 6902(3)(a) because the plaintiff conceded that there was no expert testimony that the physicians deviated from any accepted standard of care or that any such deviation was a substantial factor in causing the death of the decedent. Hytko v Hennessey, 62 A.D.3d 1081, 879 N.Y.S.2d 595, 2009 N.Y. App. Div. LEXIS 3545 (N.Y. App. Div. 3d Dep't 2009).

Order granting a doctor's motion to dismiss after the jury returned a verdict in favor of a patient in a medical malpractice case was error because the evidence at trial was sufficient for the jury to infer that the doctor's conduct in failing to recommend that surgery be performed on the patient within 24 hours diminished his chance for a better outcome or increased his injuries. Dockery v Sprecher, 68 A.D.3d 1043, 891 N.Y.S.2d 465, 2009 N.Y. App. Div. LEXIS 9422 (N.Y. App. Div. 2d Dep't 2009), app. denied, 17 N.Y.3d 704, 929 N.Y.S.2d 95, 952 N.E.2d 1090, 2011 N.Y. LEXIS 1720 (N.Y. 2011).

Order granting a radiologist's N.Y. C.P.L.R. 4401 motion to dismiss at the close of a patient's medical malpractice case was proper because the radiologist was not the patient's treating physician; his role was to interpret an MRI film and document his findings, but he did not assume a general duty of care to independently diagnose the patient's medical condition. Further, the record contained no evidence that the radiologist's misreading of a CAT scan or the alleged delay in performing the MRI was a substantial factor in causing the patient's injuries. Dockery v Sprecher, 68 A.D.3d 1043, 891 N.Y.S.2d 465, 2009 N.Y. App. Div. LEXIS 9422 (N.Y.

App. Div. 2d Dep't 2009), app. denied, 17 N.Y.3d 704, 929 N.Y.S.2d 95, 952 N.E.2d 1090, 2011 N.Y. LEXIS 1720 (N.Y. 2011).

Because the evidence presented at trial was sufficient to have allowed a jury to infer that the decedent would have had a better outcome if the physician had referred the decedent to a hospital emergency room, the trial court erred in granting the physician's N.Y. C.P.L.R. 4401 motion for a judgment as a matter of law. Goldberg v Horowitz, 73 A.D.3d 691, 901 N.Y.S.2d 95, 2010 N.Y. App. Div. LEXIS 3763 (N.Y. App. Div. 2d Dep't 2010).

Assignee's motion for a directed verdict setting aside the jury's finding in favor of a professional corporation was proper in the assignee's suit seeking indemnification under a claim assigned by a hospital because the proof was deficient with respect to whether the hospital's nursing staff's negligence was proximate cause of the assignee's injuries; the professional corporation failed to present expert testimony establishing proximate cause. Caruso v Northeast Emergency Med. Assoc., P.C., 85 A.D.3d 1502, 926 N.Y.S.2d 702, 2011 N.Y. App. Div. LEXIS 5468 (N.Y. App. Div. 3d Dep't), app. dismissed, 18 N.Y.3d 856, 938 N.Y.S.2d 863, 962 N.E.2d 288, 2011 N.Y. LEXIS 3987 (N.Y. 2011).

Trial court erred in granting the motions for judgment as a matter of law filed by a hospital and a doctor and in limiting the doctor's damages in a patient's medical malpractice action because the motions for judgment as a matter of law were made before the close of the patient's case and were not based upon admissions by the patient, and a fair reading of the bills of particulars set forth a claim for damages. Fuchs v Long Beach Med. Ctr., 199 A.D.3d 762, 157 N.Y.S.3d 499, 2021 N.Y. App. Div. LEXIS 6211 (N.Y. App. Div. 2d Dep't 2021).

In medical malpractice action, where expert testified in CLS CPLR Art 16 apportionment proceeding that nonparty radiologist negligently read and reported results of plaintiff's MRI, defendant doctor was entitled to directed verdict on issue of liability against radiologist where no contrary evidence was introduced, there was no issue as to expert's credibility, and there were no disputed facts regarding radiologist's negligence or any other inference possible. Rodi v Landau, 170 Misc. 2d 180, 650 N.Y.S.2d 514, 1996 N.Y. Misc. LEXIS 419 (N.Y. Sup. Ct. 1996).

To establish a prima facie case of liability in a medical malpractice action, the plaintiff must prove that the defendant physician departed from good and accepted standards of medical practice and that the departure was the proximate cause of the injury or damage; a motion to dismiss a medical malpractice wrongful death complaint was affirmed where the decedent's representative failed to prove that the alleged failure to treat the decedent's liver disease was a cause of her death. Biggs v Mary Immaculate Hosp., 303 A.D.2d 702, 758 N.Y.S.2d 83, 2003 N.Y. App. Div. LEXIS 3385 (N.Y. App. Div. 2d Dep't), app. denied, 100 N.Y.2d 506, 763 N.Y.S.2d 812, 795 N.E.2d 38, 2003 N.Y. LEXIS 1702 (N.Y. 2003).

Trial court erred in granting the two doctors' motions for directed verdict at the close of all of the evidence after they were sued by decedent's husband for medical malpractice, as the testimony of the husband's expert would have permitted a rational jury to conclude that the two doctors breached the applicable standard of care by not ordering a second biopsy when the first one was inconclusive and that the breach lessened decedent's chances of survival; however, the trial court did not err in granting the four healthcare providers' motion for judgment as a matter of law because the evidence presented at trial did not provide a basis for also holding them liable. Hanley v St. Charles Hosp. & Rehab. Ctr., 307 A.D.2d 274, 763 N.Y.S.2d 322, 2003 N.Y. App. Div. LEXIS 8228 (N.Y. App. Div. 2d Dep't 2003).

Judgment as a matter of law in favor of a podiatrist was reversed on a patient's malpractice claim arising from the podiatrist's treatment of a burn on the patient's leg, where the patient's proffered expert was qualified; while podiatrists were only licensed to treat below the ankle, the patient's expert, a podiatrist, had experience in diagnosing and treating many burns both above and below ankle, so he was qualified to offer expert testimony in malpractice action relating to burn treatment. Steinbuch v Stern, 2 A.D.3d 709, 770 N.Y.S.2d 106, 2003 N.Y. App. Div. LEXIS 13821 (N.Y. App. Div. 2d Dep't 2003).

Where the trial court, after precluding the patient from introducing certain hospital records in the medical malpractice case, thereby preventing the patient from being able to present a prima facie case, granted defendants' N.Y. C.P.L.R. 4401 motion to dismiss, the trial court erred in

precluding the records and in granting the motion; the medical records at issue were germane to the diagnosis and treatment of the patient and were, therefore, admissible under N.Y. C.P.L.R. 4518. Rodriguez v Piccone, 5 A.D.3d 757, 774 N.Y.S.2d 185, 2004 N.Y. App. Div. LEXIS 3571 (N.Y. App. Div. 2d Dep't 2004).

Trial court erred in striking a hospital and doctor's respective answers and granting the injured persons' motion for a directed verdict on liability as a sanction since there was no showing that the discovery default was deliberate or contumacious; rather, the trial court should have considered giving an adverse inference charge to the jury in regard to the evidence spoliation. Wetzler v Sisters of Charity Hosp., 17 A.D.3d 1088, 794 N.Y.S.2d 540, 2005 N.Y. App. Div. LEXIS 4579 (N.Y. App. Div. 4th Dep't), amended, 20 A.D.3d 944, 797 N.Y.S.2d 327, 2005 N.Y. App. Div. LEXIS 7465 (N.Y. App. Div. 4th Dep't 2005).

In a medical malpractice case, it was error to grant a physician's motion, under N.Y. C.P.L.R. 4401, to dismiss, at the close of the patient's case, because the patient presented a prima facie case on the issue of whether the physician adequately conveyed the reasonably foreseeable risks of a vaginal birth after a cesarean section (VBAC) to the patient to permit her to make an informed decision and whether a reasonably prudent person would have elected to attempt a VBAC had she been fully informed. Cicione v Meyer, 33 A.D.3d 646, 823 N.Y.S.2d 173, 2006 N.Y. App. Div. LEXIS 12258 (N.Y. App. Div. 2d Dep't 2006).

32. — —Dental malpractice

Dental malpractice action was subject to dismissal where plaintiff's expert testified as to each aspect of dentist's treatment of plaintiff with which he disagreed but failed to expressly state his opinion that these faults constituted deviation from requisite standard of care; opinion, as ultimate fact, may not be inferred. Where dentist sought dismissal under CLS CPLR § 4401 based on lack of expert opinion that he breached requisite standard of care, it was abuse of discretion to deny plaintiff's cross-motion to reopen case to present additional proof where record indicated that court may have interrupted plaintiff's expert as he began to answer critical

question; reopening case would not have prejudiced dentist because plaintiff's expert was in courtroom and could have testified immediately. Salzman v Alan S. Rosell, D.D.S., P. C., 129 A.D.2d 833, 513 N.Y.S.2d 846, 1987 N.Y. App. Div. LEXIS 45534 (N.Y. App. Div. 3d Dep't 1987).

Cause of action to recover damages for dental malpractice was properly dismissed at close of plaintiff's case for failure to establish prima facie case, even though plaintiff's expert testified that angle of drilling by defendant into bone below roots of plaintiff's tooth caused entrance into mandibular canal and severed nerve fibers, resulting in numbness to left side of plaintiff's face, where expert did not state that such conduct constituted deviation from requisite standard of care. Sohn v Sand, 180 A.D.2d 789, 580 N.Y.S.2d 458, 1992 N.Y. App. Div. LEXIS 2856 (N.Y. App. Div. 2d Dep't 1992).

Dental malpractice action was properly dismissed at close of plaintiff's case where expert witness (not specialist in treatment of temporo-mandibular joint (TMJ) problems) established only that defendants were not successful in alleviating plaintiff's symptoms of pain, not that pain was due to TMJ syndrome, that defendants breached standard of care for treatment of TMJ, or that breach of standard, or installation of devices in plaintiff's mouth, was proximate cause of her injuries. Dentist is not guarantor of correct diagnosis or successful treatment, nor is he or she liable for mere error in judgment if he or she has considered patient's best interest after careful evaluation. Matosic v Gelb, 232 A.D.2d 221, 647 N.Y.S.2d 781, 1996 N.Y. App. Div. LEXIS 10024 (N.Y. App. Div. 1st Dep't 1996).

Court should have granted dental malpractice defendant's motion for directed verdict where, of some 11 health-care professionals that treated plaintiff at some point, she only summoned dentist, longtime friend of her husband, who conceded that periodontal disease could not be diagnosed simply from indication of bone loss on X-ray, he lacked any knowledge that defendant had failed to probe plaintiff for periodontal pockets but that plaintiff's deposition statement was consistent with fact that defendant had regularly performed such probing, and bleeding of gums, which plaintiff denied having while she was being treated by defendant, was

common portent of periodontal disease. Elkins v Ferencz, 253 A.D.2d 601, 677 N.Y.S.2d 342, 1998 N.Y. App. Div. LEXIS 9333 (N.Y. App. Div. 1st Dep't 1998), rev'd, 93 N.Y.2d 938, 693 N.Y.S.2d 502, 715 N.E.2d 504, 1999 N.Y. LEXIS 2855 (N.Y. 1999).

Court erred in dismissing dental malpractice complaint at close of evidence based on plaintiff's failure to present expert testimony expressly stating that defendant's act of placing titanium fixtures into inferior alveolar nerve canal of mandibular bone constituted "departure from the requisite standard of oral surgery," where inference of departure from requisite standard of care was fairly supported by evidence and defendant, called to testify during plaintiff's case-in-chief, agreed that inferior alveolar nerve must be avoided during dental implant surgery. Knutson v Sand, 282 A.D.2d 42, 725 N.Y.S.2d 350, 2001 N.Y. App. Div. LEXIS 5322 (N.Y. App. Div. 2d Dep't 2001).

Because, inter alia, a dentist failed to perform neurosensory mapping to determine the status of the nerve after surgery, and failed to refer the patient to a nerve specialist, the trial court erred in granting the dentist's N.Y. C.P.L.R. 4401 motion for judgment as a matter of law. Bunea v Cahaly, 37 A.D.3d 389, 829 N.Y.S.2d 638, 2007 N.Y. App. Div. LEXIS 1500 (N.Y. App. Div. 2d Dep't 2007).

Trial court properly denied the motion to dismiss filed by the dentist and other defendants in the dental malpractice action at the close of the patient's case; granting the patient every favorable inference from the evidence, there was a rational basis upon which a jury could have found for the patient as required under N.Y. C.P.L.R. 4401. Cicalese v Myles A. Carter, D.D.S., P.C., 8 A.D.3d 523, 778 N.Y.S.2d 721, 2004 N.Y. App. Div. LEXIS 8703 (N.Y. App. Div. 2d Dep't 2004).

33. — —Drugs and medicines

Court properly refused to dismiss that portion of medical malpractice complaint alleging that defendants administered addictive pain killer while plaintiff was hospitalized for broken knee, despite their knowledge that he had previously been addicted to narcotics, and that he became re-addicted to narcotics and driven to pass bad checks to obtain drug money, resulting in his

conviction of grand larceny, since intervening criminality will not defeat liability as matter of law where criminal conduct is itself foreseeable result of alleged negligence. But, court properly dismissed that portion of medical malpractice complaint alleging that as result of defendants' administration of addictive pain killer while plaintiff was hospitalized for broken knee, he became re-addicted to narcotics and contracted AIDS from using shared needle to inject intravenous drugs, since expansion of concept of proximate cause to hold health care professional responsible for externally caused disease that may at some future time be contracted by patient would be improper regardless of foreseeability. Levitt v Lenox Hill Hosp., 184 A.D.2d 427, 585 N.Y.S.2d 401, 1992 N.Y. App. Div. LEXIS 8595 (N.Y. App. Div. 1st Dep't 1992).

Court properly granted medical malpractice defendant's motion for judgment as matter of law at close of plaintiff's case where plaintiff presented no expert testimony to show that defendant departed from accepted standard of care in prescribing medication "Coumadin" to reduce plaintiff's risk of suffering stroke. Berger v Becker, 272 A.D.2d 565, 709 N.Y.S.2d 418, 2000 N.Y. App. Div. LEXIS 6030 (N.Y. App. Div. 2d Dep't 2000).

34. — —Hospital as defendant

In malpractice action against doctors and hospital where complaint was dismissed on defendants' motion at the close of entire case, it was error to dismiss action against doctors where fact issues were presented whether operation was unauthorized because of failure to inform plaintiff of the true nature thereof, and whether defendants made an inadequate preoperative examination and diagnosis and retrial of all issues de novo would be ordered. Scott v Kaye, 24 A.D.2d 890, 264 N.Y.S.2d 752, 1965 N.Y. App. Div. LEXIS 2976 (N.Y. App. Div. 2d Dep't 1965).

In medical malpractice action against hospital alleging that its nurses' failure to properly monitor intravenous (IV) process caused infant to suffer severe chemical burn to his foot when fluid from IV connection infiltrated into surrounding tissue, hospital was entitled to judgment as matter of law since nurses had conformed to accepted medical practice by checking IV every half hour

between 8:30 a.m. when IV was started and 12:30 p.m. when infiltration was discovered; and despite fact that no entries regarding monitoring of IV were noted in chart until 12:00 noon, which might indicate that nurses did not in fact monitor IV as frequently as they said they did, 12:00 noon entry stated that IV was infusing well so that nurses' failure to monitor IV prior to that time could not be proximate cause of infant's injury. Goldstein v Hauptman, 131 A.D.2d 724, 516 N.Y.S.2d 783, 1987 N.Y. App. Div. LEXIS 48182 (N.Y. App. Div. 2d Dep't 1987), app. denied, 71 N.Y.2d 801, 527 N.Y.S.2d 767, 522 N.E.2d 1065, 1988 N.Y. LEXIS 1170 (N.Y. 1988).

Hospital was entitled to dismissal of malpractice complaint against it for failure to establish prima facie case where plaintiff alleged that he was injured by delay in surgery on his right leg since (1) doctrine of res ipsa loquitur did not apply because event which occurred was not kind which could ordinarily be said not to occur in absence of negligence, and (2) delay in performing surgery could not be said to be departure from accepted standards of medical care in absence of expert medical testimony. Jones v Society of New York Hosp., 155 A.D.2d 338, 547 N.Y.S.2d 309, 1989 N.Y. App. Div. LEXIS 14330 (N.Y. App. Div. 1st Dep't 1989), app. denied, 75 N.Y.2d 709, 555 N.Y.S.2d 692, 554 N.E.2d 1280, 1990 N.Y. LEXIS 717 (N.Y. 1990).

In medical malpractice action against hospital and surgeon arising from gall bladder surgery and postoperative care given in intensive care unit, court improperly granted motion of hospital, made at conclusion of plaintiff's case, for dismissal for failure to make out prima facie case where (1) expert testified that patient's condition called for careful monitoring by intensive care unit staff and attending physicians and that actions taken by attending physicians were improper, and (2) hospital failed to provide nurses' daily flow charts in which detailed notations of postoperative care were recorded. Gruntz v Deepdale General Hosp., 163 A.D.2d 564, 558 N.Y.S.2d 623, 1990 N.Y. App. Div. LEXIS 8957 (N.Y. App. Div. 2d Dep't 1990).

In medical malpractice action arising from incident in which plaintiff injured his leg in basketball game and was thereafter treated by hospital emergency room physician and, on next day, by orthopedist and surgeon, orthopedist and surgeon were entitled to dismissal of complaint at close of plaintiff's case since logical inferences to be drawn from testimony were that plaintiff's

injuries, which resulted in permanent foot drop, were result of plaintiff's failure to seek immediate medical attention and misdiagnosis by hospital emergency room physician. Nicolosi v Brookhaven Memorial Hosp., 168 A.D.2d 488, 562 N.Y.S.2d 729, 1990 N.Y. App. Div. LEXIS 15334 (N.Y. App. Div. 2d Dep't 1990).

In action against hospital for injuries sustained when plaintiff fell after he got out bed and exited his hospital room, hospital was entitled to dismissal of complaint at close of plaintiff's case where (1) plaintiff alleged that side rails on his bed should have been left in upright position so that he could not get out of bed, (2) physical activity order of plaintiff's physician called for progressive ambulation, which was least restrictive order that could have been given and permitted him to walk in hall unassisted, and (3) plaintiff was unable to relate actual cause of his fall. Georgetti v United Hosp. Medical Ctr., 204 A.D.2d 271, 611 N.Y.S.2d 583, 1994 N.Y. App. Div. LEXIS 4563 (N.Y. App. Div. 2d Dep't 1994).

Court properly granted hospital's motion for judgment as matter of law at close of evidence in action, inter alia, for wrongful death premised on allegation that decedent's death resulted from acute myocardial infarction which hospital failed to diagnose, even assuming that decedent did die from heart attack and that hospital committed malpractice in not admitting him, where there was no proof that, had decedent been hospitalized when he visited hospital emergency room, heart attack would have been prevented or risk of such attack lessened. Physician and hospital were entitled to judgment as matter of law at close of evidence in action, inter alia, for conscious pain and suffering where there was no indication that decedent was in pain from time he was seen by physician until time of his death as result of alleged heart attack, proof showed that medications decedent received at hospital alleviated his pain, and there was no proof that he was in pain thereafter. Naughton v Arden Hill Hosp., 215 A.D.2d 810, 625 N.Y.S.2d 746, 1995 N.Y. App. Div. LEXIS 4806 (N.Y. App. Div. 3d Dep't 1995).

Plaintiff failed to establish prima facie case of malpractice by hospital staff for failing to keep her in bed during 24 hours after surgery where she admitted that she knew of surgeon's instructions that she remain in bed during that time period, and that she nevertheless arose from bed herself

to use lavatory, and her expert testified that in his opinion premature ambulation of plaintiff was not proximate cause of her disfigurement. Romano v Frederick Marks, M.D., P.C., 231 A.D.2d 563, 647 N.Y.S.2d 272, 1996 N.Y. App. Div. LEXIS 9235 (N.Y. App. Div. 2d Dep't 1996).

It was error to grant medical malpractice defendants' motion for judgment as matter of law at close of plaintiff's case where there was expert medical opinion evidence that defendants' initial failure to diagnose her injury and properly treat it led to exacerbation of her injuries and prolonged hospital stay. D'Abbraccio v New Rochelle Hosp. Medical Ctr., 233 A.D.2d 539, 654 N.Y.S.2d 383, 1996 N.Y. App. Div. LEXIS 13174 (N.Y. App. Div. 2d Dep't 1996).

Court properly dismissed malpractice case against hospital at close of plaintiff's case, since evidence established that defendant physician did not act as employee or agent of hospital where plaintiff acknowledged that he was referred directly to defendant physician by his treating physician, that he met with defendant physician at his private office, that defendant physician performed surgery himself, attended by 2 orthopedic residents, and that defendant physician continued to treat plaintiff in his private office following plaintiff's discharge from hospital. Steiner v Brookdale Hosp. Med. Ctr., 241 A.D.2d 516, 663 N.Y.S.2d 981, 1997 N.Y. App. Div. LEXIS 7792 (N.Y. App. Div. 2d Dep't), app. denied, 91 N.Y.2d 801, 666 N.Y.S.2d 563, 689 N.E.2d 533, 1997 N.Y. LEXIS 4106 (N.Y. 1997).

In medical malpractice action alleging, inter alia, that nursing staff of defendant hospital negligently completed X-ray requisition slips, thereby contributing to anesthesiologist's failure to remove guide wire after inserting central line catheter into chest of plaintiff's decedent, court properly directed verdict in favor of hospital at close of plaintiff's proof where plaintiff adduced testimony of board-certified anesthesiologist that X-ray requisition slip prepared by nurses should have noted that central line procedure had been performed, but he admitted on cross examination that his opinion had to do with how he would prefer X-ray requisition slips to be prepared, and he conceded that he was not qualified to render opinion as to whether nurses in question deviated from accepted nursing practice. As to anesthesiologist's failure to remove guide wire after inserting central line catheter into chest of plaintiff's decedent, court did not err

in directing verdict in favor of defendant hospital at close of plaintiff's proof based on lack of evidence that its nursing staff deviated from accepted nursing practice, on ground that it could nevertheless be deemed liable on res ipsa loquitur theory, as anesthesiologist conceded that he inserted guide wire and inadvertently left it in decedent's chest and, accordingly, any deviation from accepted standards was his, not hospital's. Marion Dolan v Jaeger, 285 A.D.2d 844, 727 N.Y.S.2d 784, 2001 N.Y. App. Div. LEXIS 7509 (N.Y. App. Div. 3d Dep't 2001).

Dismissal at the close of evidence of a crossclaim by a doctor against a hospital in vicarious liability was proper since the doctor was plaintiffs' private attending physician and not a hospital employee. Therefore, no rational jury could have found that the hospital was vicariously liable for the doctor's medical malpractice in connection with the infant plaintiff's birth. Quezada v O'Reilly-Green, 24 A.D.3d 744, 806 N.Y.S.2d 707, 2005 N.Y. App. Div. LEXIS 14781 (N.Y. App. Div. 2d Dep't 2005), app. denied, 7 N.Y.3d 703, 819 N.Y.S.2d 870, 853 N.E.2d 241, 2006 N.Y. LEXIS 1487 (N.Y. 2006).

35. — —Surgery

A judgment at the close of all evidence dismissing a medical malpractice complaint against a physician would be reversed and a new trial granted where the introduction of the unanimous recommendation of the medical malpractice panel that the defendant physician was liable for malpractice, when considered with all of the evidence including the testimony of plaintiffs' expert, provided sufficient basis for a jury determination as whether defendant's alleged failure to utilize proper testing procedures resulted in a neglient preoperative diagnosis of a surgical condition and unnecessary surgery, and, as to plaintiff's cause of action for lack of informed consent, plaintiff's testimony and that of her expert was sufficient to satisfy the statutory requirements of Pub Health Law § 2805-d and thus raised a factual issue for jury determination. Lipsius v White, 91 A.D.2d 271, 458 N.Y.S.2d 928, 1983 N.Y. App. Div. LEXIS 16125 (N.Y. App. Div. 2d Dep't 1983).

In a medical malpractice action, the trial court erred in granting a doctor's motion at the close of plaintiff's case to dismiss the complaint against him for failure to establish a prima facie case, where a medical malpractice panel had made a unanimous recommendation of liability against the doctor, where the panel's findings were admitted into evidence, where the testimony of a doctor member of the panel established that the defendant doctor's surgical procedure was the proximate cause of plaintiff's injury, and where, even though defendants contested the panel doctor's assumptions, it was for the jury to decide the correctness of conflict expert medical testimony. Short v Rapping, 91 A.D.2d 1018, 457 N.Y.S.2d 892, 1983 N.Y. App. Div. LEXIS 16334 (N.Y. App. Div. 2d Dep't 1983).

In a medical malpractice action based on defendant's removal of excessive erectile tissue from plaintiff's penis, during an operation, the trial court properly granted a directed verdict to plaintiff on the issue of defendant's liability where both parties' experts agreed that removal of the amount of tissue the doctor stated he removed was negligent, and that plaintiff's impotency was a result of such negligence. Van Syckle v Powers, 106 A.D.2d 711, 483 N.Y.S.2d 756, 1984 N.Y. App. Div. LEXIS 21658 (N.Y. App. Div. 3d Dep't 1984), app. denied, 64 N.Y.2d 609, 489 N.Y.S.2d 1025, 1985 N.Y. LEXIS 18840 (N.Y. 1985).

Court should have granted defendant's motion to dismiss malpractice complaint for failure to present prima facie case where (1) testimony of physician who treated plaintiff after he was treated by defendant physician failed to establish with requisite degree of medical certainty that plaintiff was suffering from appendicitis when he was admitted to hospital under defendant's care (as plaintiff claimed) or that surgery was preferable to conservative course of treatment taken by defendant, and that defendant's treatment departed from accepted standards of medical practice, and (2) there was no evidence that defendant's failure to diagnose plaintiff's condition as appendicitis or his failure to perform surgery proximately caused plaintiff's injuries. Gross v Friedman, 138 A.D.2d 571, 526 N.Y.S.2d 152, 1988 N.Y. App. Div. LEXIS 3203 (N.Y. App. Div. 2d Dep't), aff'd, 73 N.Y.2d 721, 535 N.Y.S.2d 586, 532 N.E.2d 92, 1988 N.Y. LEXIS 3324 (N.Y. 1988).

Court properly dismissed malpractice action at close of plaintiff's evidence for failure to establish prima facie case where one physician testified that defendant deviated from accepted medical practice by failing to use protective contact lens on plaintiff's eye during surgery but no medical testimony was submitted as to proximate cause, hospital records did not show that plaintiff suffered abrasion injury prior to her discharge, and medical malpractice panel reached no conclusion as to causal relationship between deviation and injury; unanimous recommendation of liability by medical malpractice panel was insufficient basis for jury finding of liability. Guillari v Gormley, 142 A.D.2d 927, 530 N.Y.S.2d 353, 1988 N.Y. App. Div. LEXIS 14943 (N.Y. App. Div. 4th Dep't 1988).

In medical malpractice action against hospital and surgeon arising from gall bladder surgery and postoperative care given in intensive care unit, court improperly granted motion of hospital, made at conclusion of plaintiff's case, for dismissal for failure to make out prima facie case where (1) expert testified that patient's condition called for careful monitoring by intensive care unit staff and attending physicians and that actions taken by attending physicians were improper, and (2) hospital failed to provide nurses' daily flow charts in which detailed notations of postoperative care were recorded. Gruntz v Deepdale General Hosp., 163 A.D.2d 564, 558 N.Y.S.2d 623, 1990 N.Y. App. Div. LEXIS 8957 (N.Y. App. Div. 2d Dep't 1990).

In medical malpractice action arising from incident in which plaintiff injured his leg in basketball game and was thereafter treated by hospital emergency room physician and, on next day, by orthopedist and surgeon, orthopedist and surgeon were entitled to dismissal of complaint at close of plaintiff's case since logical inferences to be drawn from testimony were that plaintiff's injuries, which resulted in permanent foot drop, were result of plaintiff's failure to seek immediate medical attention and misdiagnosis by hospital emergency room physician. Nicolosi v Brookhaven Memorial Hosp., 168 A.D.2d 488, 562 N.Y.S.2d 729, 1990 N.Y. App. Div. LEXIS 15334 (N.Y. App. Div. 2d Dep't 1990).

Plaintiff failed to establish prima facie case of malpractice by hospital staff for failing to keep her in bed during 24 hours after surgery where she admitted that she knew of surgeon's instructions

that she remain in bed during that time period, and that she nevertheless arose from bed herself to use lavatory, and her expert testified that in his opinion premature ambulation of plaintiff was not proximate cause of her disfigurement. Romano v Frederick Marks, M.D., P.C., 231 A.D.2d 563, 647 N.Y.S.2d 272, 1996 N.Y. App. Div. LEXIS 9235 (N.Y. App. Div. 2d Dep't 1996).

Court properly dismissed malpractice case against hospital at close of plaintiff's case, since evidence established that defendant physician did not act as employee or agent of hospital where plaintiff acknowledged that he was referred directly to defendant physician by his treating physician, that he met with defendant physician at his private office, that defendant physician performed surgery himself, attended by 2 orthopedic residents, and that defendant physician continued to treat plaintiff in his private office following plaintiff's discharge from hospital. Steiner v Brookdale Hosp. Med. Ctr., 241 A.D.2d 516, 663 N.Y.S.2d 981, 1997 N.Y. App. Div. LEXIS 7792 (N.Y. App. Div. 2d Dep't), app. denied, 91 N.Y.2d 801, 666 N.Y.S.2d 563, 689 N.E.2d 533, 1997 N.Y. LEXIS 4106 (N.Y. 1997).

Court properly reserved decision on surgeon's motion for judgment at close of plaintiff's evidence, but plaintiff was prejudiced when court permitted surgeon's attorney to participate in summations with knowledge that court would grant motion notwithstanding verdict should jury attribute liability to surgeon, since surgeon's attorney was thereby able to argue with defendants that absent defendants who settled with plaintiff were wholly responsible for her son's injuries. Maldonado v Cotter, 256 A.D.2d 1073, 685 N.Y.S.2d 339, 1998 N.Y. App. Div. LEXIS 14162 (N.Y. App. Div. 4th Dep't 1998).

Medical malpractice defendant was not entitled to directed verdict where he testified that proper independent medical examination included taking patient's history, conducting physical examination, and reviewing diagnostic studies, and plaintiff testified that entire examination lasted 3 minutes and 22 seconds, that no medical history was taken nor meaningful physical examination performed, and that defendant's report to insurance company resulted in denial of benefits for plaintiff's shoulder surgery. Finnegan v Brothman, 270 A.D.2d 808, 705 N.Y.S.2d 145, 2000 N.Y. App. Div. LEXIS 3673 (N.Y. App. Div. 4th Dep't 2000).

Medical malpractice plaintiff presented sufficient evidence of negligence to preclude dismissal of complaint at close of evidence where her experts testified that her nerve injury could have been caused by improperly tight strap or compression device used by defendants during surgery, although defendants' experts disagreed, and plaintiff's testimony as to marks on her thighs contradicted nurse's assertion that padding had been used under straps. Lo Presti v Hospital for Joint Diseases, 275 A.D.2d 201, 712 N.Y.S.2d 110, 2000 N.Y. App. Div. LEXIS 8384 (N.Y. App. Div. 1st Dep't 2000).

Court erred in dismissing dental malpractice complaint at close of evidence based on plaintiff's failure to present expert testimony expressly stating that defendant's act of placing titanium fixtures into inferior alveolar nerve canal of mandibular bone constituted "departure from the requisite standard of oral surgery," where inference of departure from requisite standard of care was fairly supported by evidence and defendant, called to testify during plaintiff's case-in-chief, agreed that inferior alveolar nerve must be avoided during dental implant surgery. Knutson v Sand, 282 A.D.2d 42, 725 N.Y.S.2d 350, 2001 N.Y. App. Div. LEXIS 5322 (N.Y. App. Div. 2d Dep't 2001).

In action by plaintiff who sustained third-degree burn on her thigh during orthoscopic surgery on her knee, court erred in dismissing complaint at close of plaintiff's case on ground that res ipsa loquitur was not established, where plaintiff's injury was type that ordinarily would not occur in absence of negligence, any potential cause of burn was within exclusive control of defendants, and plaintiff was unconscious at moment of injury and thus could not have contributed to its cause. Babits v Vassar Bros. Hosp., 287 A.D.2d 670, 732 N.Y.S.2d 46, 2001 N.Y. App. Div. LEXIS 10046 (N.Y. App. Div. 2d Dep't 2001).

Because a surgeon performed a surgical procedure that departed from the applicable standards of medical care, and because the surgeon did not inform the patient of any alternative to the surgery, the trial court erred in granting the surgeon's N.Y. C.P.L.R. § 4401 motion to dismiss the patient's action to recover damages for medical malpractice and lack of informed consent.

Velez v Goldenberg, 29 A.D.3d 780, 815 N.Y.S.2d 205, 2006 N.Y. App. Div. LEXIS 6533 (N.Y. App. Div. 2d Dep't 2006).

In a medical malpractice action, the lower court erred in granting defendants' motions to dismiss the complaint pursuant to N.Y. C.P.L.R. 4401 because while the patient's expert surgeon and treating surgeon concededly did not produce medical literature that documented a prior case study in which cardiac catheterization through the groin was the cause of the aortic thrombosis that led to an acute spinal cord infarct and paralysis, they each laid a foundation for their theories on causation with generally accepted medical principles of vascular medicine and blood supply that were not novel, nor were they even challenged, and the fact that there was no textual authority directly on point with respect to the onset of the events that resulted in the patient's paralysis was relevant only to the weight to be given the testimony and did not preclude its admissibility; because the conclusions of the patient's expert surgeon and treating surgeon were based on accepted scientific principles involving medicine and the vascular system and were not based solely upon the experts' own unsupported beliefs, the lower court erred in determining that their testimony with respect to causation was inadmissible under Frye based solely upon the fact that there was no medical literature linking a cardiac catheterization in the groin to an aortic thrombosis with a delayed spinal infarct and paralysis. DieJoia v Gacioch, 42 A.D.3d 977, 839 N.Y.S.2d 904, 2007 N.Y. App. Div. LEXIS 8534 (N.Y. App. Div. 4th Dep't 2007).

In a medical malpractice action, a doctor was not entitled to a motion for judgment as a matter of law under N.Y. C.P.L.R. § 4401 at the close of the patient's case because expert testimony was proffered on the patient's behalf that the doctor departed from good and accepted medical practice during a hernia surgery by mishandling the patient's ilioinguinal nerve and causing damage to that nerve. Bryan v Staten Is. Univ. Hosp., 54 A.D.3d 793, 864 N.Y.S.2d 466, 2008 N.Y. App. Div. LEXIS 6785 (N.Y. App. Div. 2d Dep't 2008).

Trial court properly dismissed an administrator's claim for pain and suffering at the close of the administrators' medical malpractice case; the administrator failed to come forward with sufficient evidence of awareness on the decedent's part to make out a prima facie case with respect to

conscious pain and suffering, and the trial court properly declined to submit that claim to the jury. Johnson v Jacobowitz, 65 A.D.3d 610, 884 N.Y.S.2d 158, 2009 N.Y. App. Div. LEXIS 6101 (N.Y. App. Div. 2d Dep't 2009), app. denied, 14 N.Y.3d 710, 903 N.Y.S.2d 768, 929 N.E.2d 1003, 2010 N.Y. LEXIS 1057 (N.Y. 2010).

Trial court properly dismissed a patient’s medical malpractice complaint at the close of the patient’s case because the patient submitted no expert testimony and limited her proof of causation to the testimony of the doctor, who testified that a fragment of wire was intentionally left inside the patient’s thorax after it became separated from the tissue to which it was attached during the procedure; where the theory of liability necessarily involved matters of medical science requiring professional skill and knowledge, it had to be supported by expert testimony that there was a deviation from the standard of care, and since the patient failed to establish the applicable standard of care or the doctor’s breach, the patient failed to make out a prima facie case. The patient did not submit sufficient evidence to submit the case to the jury under the theory of res ipsa loquitur. James v Wormuth, 93 A.D.3d 1290, 941 N.Y.S.2d 388, 2012 N.Y. App. Div. LEXIS 2219 (N.Y. App. Div. 4th Dep't 2012), aff'd, 21 N.Y.3d 540, 974 N.Y.S.2d 308, 997 N.E.2d 133, 2013 N.Y. LEXIS 1726 (N.Y. 2013).

Supreme Court properly granted defendants' motion for a directed verdict based upon the patient's failure to establish a prima facie case of medical malpractice because the patient submitted no competent medical evidence that the surgeon deviated from the accepted standard of care. Peluso v C.R. Bard, Inc., 124 A.D.3d 1027, 1 N.Y.S.3d 500, 2015 N.Y. App. Div. LEXIS 397 (N.Y. App. Div. 3d Dep't 2015).

Supreme court properly denied plaintiffs’ motion for a directed verdict as the jury could have rationally concluded that defendant had reasonably advised plaintiff of a total thyroidectomy without presenting alternatives and informed her of the relevant risks to said procedure. Fitzpatrick v Tvetenstrand, 228 A.D.3d 7, 209 N.Y.S.3d 204, 2024 N.Y. App. Div. LEXIS 1997 (N.Y. App. Div. 3d Dep't 2024).

36. Motor vehicles, generally

Trial court in one-vehicle accident case erred in granting passenger's motion for directed verdict at close of defendant driver's proof in which he admitted he had fallen asleep at wheel since, on evidence presented at trial, rational jury could have found that although driver had warning that he was tired, he did not have warning that he was likely to fall asleep, and thus question of fact existed as to driver's negligence in heeding warning of impending sleep. Reynolds v Morford, 124 A.D.2d 978, 508 N.Y.S.2d 813, 1986 N.Y. App. Div. LEXIS 62291 (N.Y. App. Div. 4th Dep't 1986).

Contractor was entitled to dismissal of negligence action brought by county inspector for injuries sustained when driver, after having been stopped by contractor's flagman at road construction site, accelerated his car into wrong lane, contrary to flagman's instructions, and struck inspector; although inspector sought to establish that contractor was negligent in providing for traffic control at site, supervening act of driver broke any such causal nexus and thereby undermined inspector's prima facie case. Mannion v Lizza Industries, Inc., 127 A.D.2d 567, 511 N.Y.S.2d 366, 1987 N.Y. App. Div. LEXIS 43038 (N.Y. App. Div. 2d Dep't 1987).

In action arising from automobile accident in shopping mall parking lot which occurred during storm, court did not err in granting mall owners judgment as matter of law, even though there was evidence that owners had failed to follow self-imposed policy of sanding and salting parking lot and its entrance roads as soon as they found that ground was becoming slippery, since there is no basis for proposition that party may be held liable for failing to follow policy which it has adopted voluntarily, and without legal obligation, especially where there is no showing of detrimental reliance on defendant following that policy. Newsome v Cservak, 130 A.D.2d 637, 515 N.Y.S.2d 564, 1987 N.Y. App. Div. LEXIS 46651 (N.Y. App. Div. 2d Dep't 1987).

In action against employer for injuries sustained in car accident caused by employee who was driving home from office Christmas party in intoxicated condition, cause of action founded on principles of common-law negligence was properly dismissed at close of plaintiff's case since, under such circumstances, employer's duty extended to general public only while its employees

were on its premises. Joly v Northway Motor Car Corp., 132 A.D.2d 790, 517 N.Y.S.2d 595, 1987 N.Y. App. Div. LEXIS 49296 (N.Y. App. Div. 3d Dep't 1987).

In action for injuries sustained when plaintiff's car was struck by steel beam being transported by hauling subcontractor to his home, general contractor and its superintendent were entitled to dismissal at close of evidence where (1) there was no evidence that general contractor's employees were negligent in securing original load for purpose of transport to storage lot, (2) there was no evidence that persons who performed original loading knew that beam in question would not be unloaded at storage lot with remaining items, and (3) it was not foreseeable that subcontractor would fail to adequately resecure beam when it was only item left on trailer; moreover, proof was insufficient to even infer that accident was traceable to negligence of general contractor's employees since neither plaintiff, subcontractor, nor truck driver could identify which end of beam came loose, and there was no testimony that any support chain had broken or any other evidence as to how accident occurred. La Manna v Colucci, 138 A.D.2d 901, 526 N.Y.S.2d 643, 1988 N.Y. App. Div. LEXIS 3381 (N.Y. App. Div. 3d Dep't 1988), aff'd, 73 N.Y.2d 898, 539 N.Y.S.2d 291, 536 N.E.2d 620, 1989 N.Y. LEXIS 106 (N.Y. 1989).

Court properly dismissed cause of action for loss of use of automobile where plaintiff did not introduce any competent expert testimony nor any documentation to support her statement as to actual rental value of substitute vehicle, nor any proof that rental period was reasonable. Roundtree v Singh, 143 A.D.2d 995, 533 N.Y.S.2d 609, 1988 N.Y. App. Div. LEXIS 10493 (N.Y. App. Div. 2d Dep't 1988).

City was not entitled to judgment as matter of law at close of plaintiff's case in action for injuries sustained when plaintiff was struck by vehicle that had skidded on patch of ice in roadway where evidence established that icy condition persisted for 11 days subsequent to city's final snow removal operation, which presented fact question as to whether city adequately cleared streets in first instance and should have conducted further operations to remedy condition, and where plaintiff established prima facie case of negligence against city by demonstrating that city conducted "snow scattering" operation in area in question, that such procedure was performed

one week before accident when temperature was only 30 degrees, that such action represented departure from good practice, and that circumstances were therefore ripe for creation of hazardous condition. Gonzalez v New York, 148 A.D.2d 668, 539 N.Y.S.2d 418, 1989 N.Y. App. Div. LEXIS 4229 (N.Y. App. Div. 2d Dep't 1989), app. denied, 74 N.Y.2d 608, 545 N.Y.S.2d 104, 543 N.E.2d 747, 1989 N.Y. LEXIS 1021 (N.Y. 1989), disapproved, Love v State, 78 N.Y.2d 540, 577 N.Y.S.2d 359, 583 N.E.2d 1296, 1991 N.Y. LEXIS 4921 (N.Y. 1991).

In action arising from automobile accident, it was error to dismiss complaint at completion of plaintiff’s opening statement since plaintiff’s counsel, who stated that there were no eyewitnesses to accident owing to amnesia of both drivers, was denied opportunity to expand his statement by way of attempted offer of proof; although lack of eyewitness would make plaintiff’s case more difficult to prove, that disclosure did not amount to admission that was “ruinous” to success of case or otherwise bespeak irreparable inability to proceed. De Vito v Katsch, 157 A.D.2d 413, 556 N.Y.S.2d 649, 1990 N.Y. App. Div. LEXIS 6720 (N.Y. App. Div. 2d Dep't 1990).

In action by plaintiff who was injured when car in which she was passenger veered off city road into drainage swale and struck tree after driver swerved to avoid striking animal that had darted in front of car, city was entitled to judgment as matter of law based on plaintiff’s failure to prove prima facie case of negligence, where it was undisputed that drainage swale was not meant for vehicular travel and that car was directed into swale by driver, not by any defect in road; municipality has no duty to maintain unimproved land adjacent to road if vehicular traffic on such land is neither contemplated nor foreseeable. Stiuso v City of New York, 210 A.D.2d 470, 621 N.Y.S.2d 96, 1994 N.Y. App. Div. LEXIS 13200 (N.Y. App. Div. 2d Dep't 1994), rev'd, 87 N.Y.2d 889, 639 N.Y.S.2d 1009, 663 N.E.2d 321, 1995 N.Y. LEXIS 4761 (N.Y. 1995).

In action for injuries sustained by plaintiff who was hit by truck operated by individual defendant, who had been hired to repossess plaintiff’s car, court should have directed verdict in favor of defendant financing corporation pursuant to CLS CPLR § 4401 due to lack of evidence to support finding that plaintiff’s injuries were proximately caused by financing company’s

negligence in deciding to repossess car, or by its negligence in engaging independent contractor who hired individual defendant to carry out repossession, either on theory of negligent hiring or negligent instruction and supervision. Toscarelli v Purdy, 217 A.D.2d 815, 629 N.Y.S.2d 833, 1995 N.Y. App. Div. LEXIS 8062 (N.Y. App. Div. 3d Dep't 1995).

Verdict awarding $15,000 for past pain and suffering and $20,000 for future pain and suffering was inadequate where 38-year-old plaintiff suffered comminuted fracture of her distal tibia, requiring 2 painful surgeries and possible third, and she could no longer engage in bulk of athletic activities she enjoyed prior to injury; thus, new trial would be ordered unless defendants consented to increase in damages to $50,000 and $100,000, respectively. Semel v Klein, 233 A.D.2d 492, 650 N.Y.S.2d 304, 1996 N.Y. App. Div. LEXIS 12664 (N.Y. App. Div. 2d Dep't 1996).

Court properly granted defendants' CLS CPLR § 4401 motion for judgment as matter of law where all objective tests on plaintiff were normal and, on physical examination, both her physician and defendants' expert found plaintiff to be consistently within normal limits, and although she testified to some transitory discomfort on job, she continued to work full-time and did not show that her daily life or ordinary activities were at all disrupted by her back injuries, or that she was able to function only with pain. Crawford v Simmons, 239 A.D.2d 312, 657 N.Y.S.2d 993, 1997 N.Y. App. Div. LEXIS 4575 (N.Y. App. Div. 2d Dep't 1997).

Court properly granted city's motion, made at conclusion of plaintiff's opening statement, to dismiss complaint where activity alleged to have caused plaintiff's harm, driving of car at speed of 5 miles per hour on park roadway, was not ultra-hazardous, and there was no special relationship between plaintiff and city. Tewari v City of New York, 249 A.D.2d 175, 671 N.Y.S.2d 256, 1998 N.Y. App. Div. LEXIS 4437 (N.Y. App. Div. 1st Dep't 1998).

Automobile accident defendants were entitled to directed verdict at close of plaintiff's case for plaintiff's failure to establish "serious injury" pursuant to CLS Ins § 5102(d) where plaintiff's orthopedic surgeon, who had performed spinal fusion, testified that he relied on plaintiff's subjective expressions of pain in concluding that accident aggravated plaintiff's preexisting

spondylolisthesis, but admitted on cross-examination that he had been unaware of severity of plaintiff's pain before accident, and that revelations of plaintiff's prior complaints and treatment would cause him to "think this all through all over again." Crandall v Sledziewski, 260 A.D.2d 754, 687 N.Y.S.2d 812, 1999 N.Y. App. Div. LEXIS 3680 (N.Y. App. Div. 3d Dep't), app. denied, 93 N.Y.2d 811, 695 N.Y.S.2d 540, 717 N.E.2d 699, 1999 N.Y. LEXIS 1898 (N.Y. 1999).

Court properly granted plaintiff's motion for judgment as matter of law where his testimony was sole evidence on issue of liability, and he testified that vehicle he was operating collided with vehicle operated by defendant when, while plaintiff was making left turn, defendant attempted to pass him on left, entering oncoming lane of traffic. Pasquerella v Pisani, 269 A.D.2d 436, 702 N.Y.S.2d 922, 2000 N.Y. App. Div. LEXIS 1377 (N.Y. App. Div. 2d Dep't 2000).

Plaintiff failed to establish prima facie case of res ipsa loquitur, and thus court properly granted defendant's motion for judgment as matter of law where plaintiff failed to show either that accident, in which live electric cable snapped off utility pole and fell on car in which plaintiff was passenger, was kind which ordinarily does not occur in absence of someone's negligence, or that defendant, gas and electric corporation, had exclusive control of wire. Guarracino v Cent. Hudson Gas & Elec. Corp., 274 A.D.2d 551, 712 N.Y.S.2d 389, 2000 N.Y. App. Div. LEXIS 8332 (N.Y. App. Div. 2d Dep't 2000), app. dismissed, 96 N.Y.2d 727, 722 N.Y.S.2d 789, 745 N.E.2d 1012, 2001 N.Y. LEXIS 45 (N.Y. 2001).

Jury in personal injury action could not, by any rational process, have found in favor of plaintiff where his medical expert never testified that his injuries were proximately caused by automobile accident at issue, and thus defendants were entitled to judgment as matter of law. Baptiste v Feliciano, 275 A.D.2d 385, 712 N.Y.S.2d 872, 2000 N.Y. App. Div. LEXIS 8848 (N.Y. App. Div. 2d Dep't 2000).

Court properly dismissed action at close of evidence where X rays revealed no fractures or abnormalities, neurological exam revealed that plaintiff's neurocirculatory status was intact, orthopedist found no bruising, swelling, deformity, or limitation of either flexion or range of motion in plaintiff's foot, diagnosis of plantar fasciitis was made simply by application of localized

pressure from doctor’s thumb, applied to base of foot, which elicited expressions of discomfort from plaintiff, and on all occasions, plaintiff’s doctor found, at most, either tenderness or slight tenderness on application of pressure. Conahan v Sanford, 284 A.D.2d 749, 727 N.Y.S.2d 710, 2001 N.Y. App. Div. LEXIS 6645 (N.Y. App. Div. 3d Dep't 2001).

Order granting plaintiff’s motion for judgment as a matter of law on the issues of causation and serious injury in a traffic accident personal injury claim was error because the jury could have rationally found for the nonmovants on those issues and the trial court erred in precluding the testimony of a biomechanical engineering expert offered by the corporation and the driver to testify regarding whether the force of the impact in the subject accident could have caused a serious injury or exacerbated a preexisting injury to plaintiff’s cervical spine. Plate v Palisade Film Delivery Corp., 39 A.D.3d 835, 835 N.Y.S.2d 324, 2007 N.Y. App. Div. LEXIS 5240 (N.Y. App. Div. 2d Dep't 2007).

In an action to recover damages for personal injuries, because plaintiff acknowledged at the inquest on the issue of damages that he missed only one day of work as a result of the accident and thereafter returned to his usual duties, he failed to establish a prima facie case that he sustained a medically-determined injury or impairment of a nonpermanent nature which prevented him from performing substantially all of the material acts which constituted his usual and customary daily activities for not less than 90 days during the 180 days immediately following the occurrence of the injury as required by N.Y. Ins. Law § 5102(d), and thus, defendant’s motion pursuant to N.Y. C.P.L.R. 4401 for judgment as a matter of law should have been granted. Amato v Fast Repair Inc., 42 A.D.3d 477, 840 N.Y.S.2d 394, 2007 N.Y. App. Div. LEXIS 8548 (N.Y. App. Div. 2d Dep't 2007).

Judgment as a matter of law for the owner of a vehicle involved in an accident was error in plaintiff’s personal injury suit because the owner admitted in its answer that it had leased the vehicle to the driver, and was identified as the owner on the certificate of title; the owner thus made a formal judicial admission that it was listed as owner on vehicle’s certificate of title. A certificate of title was prima facie evidence of ownership pursuant to Vehicle and Traffic Law §

2108(c), and there was no evidence to rebut that presumption. Zegarowicz v Ripatti, 67 A.D.3d 672, 888 N.Y.S.2d 554, 2009 N.Y. App. Div. LEXIS 7846 (N.Y. App. Div. 2d Dep't 2009), recalled, vacated, sub. op., 77 A.D.3d 650, 911 N.Y.S.2d 69, 2010 N.Y. App. Div. LEXIS 7267 (N.Y. App. Div. 2d Dep't 2010).

Order granting an owner's N.Y. C.P.L.R. 4401 motion for judgment as a matter of law was error because the owner admitted that it had leased the vehicle involved in the underlying accident to the driver, and was identified as the owner on the certificate of title; under Vehicle and Traffic Law § 2108(c), a certificate of title was prima facie evidence of ownership and New York law made vehicle lessors, their assignees, and their agents vicariously liable as "owners" under the Vehicle and Traffic Law in an action, such as this one, which was commenced prior to the effective date of the Graves Amendment, 49 U.S.C.S. § 30106. Zegarowicz v Ripatti, 77 A.D.3d 650, 911 N.Y.S.2d 69, 2010 N.Y. App. Div. LEXIS 7267 (N.Y. App. Div. 2d Dep't 2010).

Trial court properly denied the plaintiff's motions for judgment as a matter of law, to set aside a jury verdict, and for additur because the jury could properly conclude that the plaintiff sustained only mild bursitis to her left shoulder as a result of an automobile accident, and not a torn labrum requiring surgery, that the loss of range of motion in the plaintiff's left shoulder was insignificant, it was a fair interpretation of the evidence for the jury to credit the testimony of the defendant's experts over that of the plaintiff's expert, and the jury's damage award did not deviate materially from what would be reasonable compensation. Iovino v Kaplan, 145 A.D.3d 974, 44 N.Y.S.3d 498, 2016 N.Y. App. Div. LEXIS 8706 (N.Y. App. Div. 2d Dep't 2016).

Trial court properly denied a transit authority's motion for judgment as a matter of law because the heel of a passenger's shoe got caught in a hole in the step as was getting off a bus, the step had a round, jagged, and dirty hole in it, and the passenger presented evidence suggesting that the bus maintenance records for the 10 days preceding the accident were missing. Barrett v New York City Tr. Auth., 176 A.D.3d 909, 111 N.Y.S.3d 615, 2019 N.Y. App. Div. LEXIS 7418 (N.Y. App. Div. 2d Dep't 2019), app. denied, 35 N.Y.3d 914, 153 N.E.3d 448, 130 N.Y.S.3d 3, 2020 N.Y. LEXIS 1975 (N.Y. 2020).

Public policy will not permit the real owner of an automobile to escape the consequences of his own negligence and recover property damages to his vehicle by taking refuge behind a rebuttable presumption of title in the registered owner, his wife, and it was implicit in the jury's verdict that they found the husband was the real owner of the vehicle he was operating at the time of the collision and that he was negligent and therefore the motion to set aside the verdict as inconsistent as it relates to claim for property damage was denied. Britt v Perry, 64 Misc. 2d 655, 315 N.Y.S.2d 357, 1970 N.Y. Misc. LEXIS 1201 (N.Y. Sup. Ct. 1970).

Plaintiff's property damage complaints would be dismissed for failure to plead and prove compliance with the advance written notice provisions of a city ordinance, which apply whenever a plaintiff seeks to recover in a civil suit for personal injury or property damage caused by defective street and sidewalk conditions, or to plead and prove relevant construction in the area of the incident, by photographic or other evidence, expert testimony, a city-issued permit, contract, or other documentation sufficient to put the municipality on notice of the construction, where testimony at trial merely indicated that the areas where the motor vehicles sustained damage appeared to be under construction. Aetna Life & Casualty v New York, 116 Misc. 2d 838, 456 N.Y.S.2d 647, 1982 N.Y. Misc. LEXIS 3968 (N.Y. Civ. Ct. 1982).

37. —Bicycle

Lessor of gas station premises, whereon plaintiff was injured when struck by boy's bicycle, was properly granted a directed verdict on the issue of liability, as the evidence was insufficient to warrant a finding that the lessor knew or should have known that neighborhood children used the station as a shortcut, as plaintiff's injury was the result of a momentary dangerous condition which the lessor could not be expected to discover upon an inspection of the station pursuant to the lease terms, and as there was no indication that the lessor either controlled or had the right to control the conduct of third parties while on the station property. Ouimet v Humble Oil & Refining Co., 55 A.D.2d 855, 55 A.D.2d 856, 390 N.Y.S.2d 497, 1976 N.Y. App. Div. LEXIS

15675 (N.Y. App. Div. 4th Dep't 1976), app. denied, 41 N.Y.2d 802, 1977 N.Y. LEXIS 3002 (N.Y. 1977).

In personal injury action involving northbound bicycle operated by plaintiff and left-turning southbound automobile driven by defendant, plaintiff was entitled to judgment as matter of law in regard to liability where defendant admitted that he did not see bicycle approaching from opposite direction and there was no evidence of any negligence on part of plaintiff. Burns v Mastroianni, 173 A.D.2d 754, 570 N.Y.S.2d 629, 1991 N.Y. App. Div. LEXIS 8106 (N.Y. App. Div. 2d Dep't 1991).

Court erred in granting electric utility's motion, made at close of plaintiff's case, to dismiss action arising from incident in which plaintiff was thrown from his bicycle after its handlebars became entangled in telephone wire which was hanging from utility pole owned by lighting company, where there were fact questions as to whether utility assumed duty to repair wire and whether it had sufficient notice of dangerous condition, given fact that field supervisor for utility testified at deposition that he went by pole every day and that it was part of his crew's duty to see that poles were maintained in safe manner, and plaintiff's mother testified that she saw hanging wire 2 days before incident. Singer v Long Island Lighting Co., 211 A.D.2d 779, 621 N.Y.S.2d 673, 1995 N.Y. App. Div. LEXIS 706 (N.Y. App. Div. 2d Dep't 1995).

City was entitled to judgment at close of case presented by bicyclist who fell over raised section of trench in parking lane of parkway where there was no evidence that dangerous condition existed when repair at site was completed, 8 to 10 years earlier, or that city created condition, and plaintiff's expert merely speculated that work might have been performed by city. Carbo v City of New York, 275 A.D.2d 439, 713 N.Y.S.2d 74, 2000 N.Y. App. Div. LEXIS 8936 (N.Y. App. Div. 2d Dep't 2000).

Motion filed under CPLR 4401 for judgment as a matter of law should have been granted to a driver and others in a cyclist's personal injury action arising out of a collision between their car and his bicycle because there was no rational basis for the jury to find them liable; they had the right of way under Vehicle and Traffic Law §§ 1231, 1172(a), 1142(a) and were entitled to

assume that the cyclist would obey the traffic laws, and the cyclist negligently crossed a roadway although he had a stop sign and, as he admitted, could not see past a bend in the road. Aiello v City of New York, 32 A.D.3d 361, 820 N.Y.S.2d 579, 2006 N.Y. App. Div. LEXIS 10482 (N.Y. App. Div. 1st Dep't 2006).

38. —Bus; mini-bus

New York City Transit Authority was entitled to dismissal of action at close of plaintiff's case where evidence demonstrated that he was on sidewalk at curb in middle of block when, without turning his head to look for traffic, he stepped off curb and almost instantly collided with side of bus traveling at 10 to 15 miles per hour. Splain v New York City Transit Authority, 180 A.D.2d 454, 579 N.Y.S.2d 380, 1992 N.Y. App. Div. LEXIS 1311 (N.Y. App. Div. 1st Dep't), app. denied, 80 N.Y.2d 759, 589 N.Y.S.2d 309, 602 N.E.2d 1125, 1992 N.Y. LEXIS 3419 (N.Y. 1992).

In action by plaintiff who was injured when top of hotel minibus in which he was riding collided with overpass, court properly directed verdict on issue of liability against hotel and driver of minibus, as there was no valid line of reasoning that could support finding that driver was not negligent or that plaintiff's actions contributed to accident, where driver (who testified that he was distracted by unidentified passenger who was urging him to hurry) ignored posted warning signs concerning 7-foot height clearance and drove 8-foot-high minibus on alternate drop-off roadway where he had been instructed not to travel. Adams v Romero, 227 A.D.2d 292, 642 N.Y.S.2d 673, 1996 N.Y. App. Div. LEXIS 5768 (N.Y. App. Div. 1st Dep't 1996).

Court properly dismissed personal injury complaint after defense rested where plaintiff did not deny that "friend" pushed her into back of moving bus, and there was no evidence that bus driver was negligent in any respect. Dennis v Wood, 231 A.D.2d 487, 647 N.Y.S.2d 102, 1996 N.Y. App. Div. LEXIS 8816 (N.Y. App. Div. 2d Dep't 1996), app. denied, 89 N.Y.2d 809, 655 N.Y.S.2d 888, 678 N.E.2d 501, 1997 N.Y. LEXIS 209 (N.Y. 1997).

In a personal injury action, city transit authority's N.Y. C.P.L.R. § 4401 motion to dismiss for failure to establish a prima facie case should have been granted because a photograph of the

area where a bus passenger disembarked and allegedly sprained her ankle on uneven pavement did not show a foreseeable hazard and the bus driver could not have seen it from his vantage point. Lovato v New York City Tr. Auth., 50 A.D.3d 969, 855 N.Y.S.2d 685, 2008 N.Y. App. Div. LEXIS 3507 (N.Y. App. Div. 2d Dep't 2008).

Trial court properly granted a corporation's N.Y. C.P.L.R. 4401 motion to dismiss at the close of plaintiff's case a personal injury complaint for failure to establish a prima facie case of negligence; plaintiff presented no evidence that a policy requiring the lowering of a bus for elderly passengers was reflective of an industry standard or a generally-accepted safety practice. Carlino v Triboro Coach Corp., 22 A.D.3d 624, 803 N.Y.S.2d 105, 2005 N.Y. App. Div. LEXIS 11081 (N.Y. App. Div. 2d Dep't 2005).

39. —Collisions, generally

In action arising from motor vehicle accident in which defendant's vehicle struck rear of plaintiff's vehicle, court properly denied plaintiffs' motions for directed verdict and to set aside verdict as against weight of evidence where jury could have credited defendant's testimony that plaintiff came to sudden stop after being cut off by third vehicle. Kienzle v McLoughlin, 202 A.D.2d 299, 610 N.Y.S.2d 771, 1994 N.Y. App. Div. LEXIS 2531 (N.Y. App. Div. 1st Dep't 1994).

Plaintiffs were entitled to judgment under CLS CPLR § 4401 where plaintiff motorist stopped her vehicle to avoid collision with vehicle in front of her, defendants' vehicle collided with rear of plaintiff's stopped vehicle, and defendants did not rebut resulting inference of their negligence. Pares v La Prade, 266 A.D.2d 852, 697 N.Y.S.2d 413, 1999 N.Y. App. Div. LEXIS 11704 (N.Y. App. Div. 4th Dep't 1999).

In personal injury action, an interlocutory judgment entered in favor of a driver and against defendants, a county, the county police department, and a police officer, on the issue of liability for a car accident between the driver and a second driver was reversed, and defendants' application pursuant to N.Y. C.P.L.R. 4401 for judgment as a matter of law was granted because in view of the evidence that the driver was able to come to a complete stop without hitting the

officer's vehicle which had stopped in front of the driver, the officer was not a proximate cause of the collision between the driver's vehicle and the second driver's vehicle, which had struck the driver in the rear. Tutrani v County of Suffolk, 42 A.D.3d 496, 840 N.Y.S.2d 809, 2007 N.Y. App. Div. LEXIS 8570 (N.Y. App. Div. 2d Dep't 2007), rev'd, 10 N.Y.3d 906, 861 N.Y.S.2d 610, 891 N.E.2d 726, 2008 N.Y. LEXIS 1489 (N.Y. 2008).

Trial court erred in denying plaintiffs' motion pursuant to N.Y. C.P.L.R. 4401 for judgment as a matter of law in a personal injury action; a rear-end collision with a stopped vehicle established a prima facie case of negligence on the part of the operator of the moving vehicle, and a city which owned the vehicle and the driver failed to offer evidence sufficient to rebut the inference of negligence created by the unexplained rear-end collision, as no reasonable view of the evidence supported a contention that the appearance of a pedestrian at the curb in or near the crosswalk was a sudden and unforeseen emergency. Hart v Town of North Castle, 305 A.D.2d 543, 759 N.Y.S.2d 185, 2003 N.Y. App. Div. LEXIS 5656 (N.Y. App. Div. 2d Dep't 2003).

Trial court's grant of judgment as a matter of law to defendant driver and defendant car owner was reversed because there was evidence presented by plaintiffs that created a factual issue about whether the driver's conduct caused the accident at issue. Silverio v Betancourt, 5 A.D.3d 468, 772 N.Y.S.2d 572, 2004 N.Y. App. Div. LEXIS 2462 (N.Y. App. Div. 2d Dep't 2004).

First driver and the passenger in the second driver's vehicle (passenger) was entitled to judgment as a matter of law against the second driver, the lessee of the second vehicle, and the motor company that owned the vehicle, and the trial court properly dismissed the complaint and all cross claims against the first driver because (1) the second driver proceeded into the moving lanes of traffic at an angle without ascertaining what traffic was behind her, in violation of N.Y. Veh. & Traf. Law § 1128(a); (2) the first driver had the right-of-way and was entitled to anticipate that the second driver would obey traffic laws which required her to yield; (3) the second driver's allegation that the first driver contributed to the emergency situation by traveling at an excessive rate of speed was speculation; (4) there was no evidence that the first driver was guilty of an error in judgment or had any time to take evasive action; and (5) there was no competent

evidence of negligence on the part of the first driver or the passenger. Jacino v Sugerman, 10 A.D.3d 593, 781 N.Y.S.2d 663, 2004 N.Y. App. Div. LEXIS 10590 (N.Y. App. Div. 2d Dep't 2004).

Judgment as a matter of law was erroneously granted to a plaintiff in her personal injury/negligence suit against a defendant, who had rear-ended the plaintiff's vehicle where a radiologist for the defendant testified that the plaintiff's herniated disc condition was degenerative, and not a result of the vehicular collision. The defendant was granted a new trial on the issue of damages. Ocasio v Zorbas, 14 A.D.3d 499, 789 N.Y.S.2d 166, 2005 N.Y. App. Div. LEXIS 163 (N.Y. App. Div. 2d Dep't 2005).

Corporation's motion to dismiss the driver's case at the close of the driver's evidence presented at trial, pursuant to N.Y. C.P.L.R. 4401, and the corporation's subsequent post-verdict motion under N.Y. C.P.L.R. 4404 were properly denied because there was sufficient evidence to support the jury's conclusion that the driver's injuries, including a disc herniation and limitation of motion, were caused when the driver was rear-ended by a bus that was owned by the corporation. Tapia v Dattco, Inc., 32 A.D.3d 842, 821 N.Y.S.2d 124, 2006 N.Y. App. Div. LEXIS 10629 (N.Y. App. Div. 2d Dep't 2006).

40. — —Brake failure

In action for personal injuries against used car dealer, allegedly caused by failure of brakes on car recently purchased, it was error to direct verdict for defendant at close of plaintiff's evidence where there were sufficient questions of fact raised to warrant submission of the issue of liability to the jury in view of this section and § 375 of the Vehicle and Traffic Law. Gluck v Royal Motors, Inc., 24 A.D.2d 442, 260 N.Y.S.2d 882, 1965 N.Y. App. Div. LEXIS 3740 (N.Y. App. Div. 1st Dep't 1965).

It was error to direct verdict against defendants, owner and driver of vehicle which struck plaintiffs, despite driver's conflicting testimony at his deposition and trial as to whether his foot was on brake, since he steadfastly maintained that acceleration was sudden and inexplicable,

and where driver’s explanation of unexpected brake failure addressed events occurring after he struck plaintiff. Jackson v Young, 226 A.D.2d 230, 641 N.Y.S.2d 29, 1996 N.Y. App. Div. LEXIS 3952 (N.Y. App. Div. 1st Dep't 1996), reh'g denied, 1996 N.Y. App. Div. LEXIS 6478 (N.Y. App. Div. 1st Dep't May 30, 1996), app. denied, 88 N.Y.2d 814, 651 N.Y.S.2d 15, 673 N.E.2d 1242, 1996 N.Y. LEXIS 3179 (N.Y. 1996).

41. — —Chain reaction; 3 or more motor vehicles

In an action for personal injuries arising from a collision involving three vehicles, in which plaintiff’s vehicle collided head-on with defendant’s truck and subsequently was struck by a second defendant’s vehicle, the complaint was properly dismissed where there was no evidence of negligence on the part of the truck driver, and, although the evidence raised an issue of fact as to whether the driver of the vehicle which subsequently struck plaintiff was driving at an excessive speed, there was no evidence that such conduct was a proximate cause of the accident. McCloud v Marcantonio, 106 A.D.2d 493, 483 N.Y.S.2d 31, 1984 N.Y. App. Div. LEXIS 21525 (N.Y. App. Div. 2d Dep't 1984).

In action for injuries sustained by cab driver when he stopped to pick up passenger and was struck in rear by vehicle owned and operated by defendants, which had been struck in rear by another vehicle, court properly dismissed complaint against defendants at conclusion of trial, since it was undisputed that defendant driver had stopped his vehicle in time and only struck plaintiff because of other driver’s inability to stop. Pasek v Playtime Kiddiewear, Inc., 179 A.D.2d 412, 577 N.Y.S.2d 854, 1992 N.Y. App. Div. LEXIS 157 (N.Y. App. Div. 1st Dep't 1992).

Court erred in denying defendant’s motion after close of evidence for judgment in his favor as matter of law, and thus judgment entered on jury verdict finding him 5 percent at fault in happening of accident would be reversed where uncontroverted evidence showed that he was in eastbound left-turn lane when vehicle driven by co-defendant crossed over from westbound roadway, hit center concrete divider, and then struck his vehicle, which was pushed into adjacent eastbound left lane, where it was struck second time by plaintiff’s vehicle. Calzareth v

Yip, 248 A.D.2d 661, 670 N.Y.S.2d 583, 1998 N.Y. App. Div. LEXIS 3494 (N.Y. App. Div. 2d Dep't 1998).

In action arising from 3-car collision, court should have granted motion to dismiss under CLS CPLR § 4401 brought by defendants, owner and operator of second vehicle, where it was undisputed that defendant operator safely came to full stop behind plaintiff's vehicle, and that his van was then struck in rear by third vehicle, and operator of third vehicle admitted that he looked away from traffic in front of him for about 3 seconds to see if there was space for him to move into another lane, and that when he turned his attention back to road in front of him, defendants' van had already stopped. Higgins v Ridgewood Sav. Bank, 262 A.D.2d 357, 691 N.Y.S.2d 175, 1999 N.Y. App. Div. LEXIS 6378 (N.Y. App. Div. 2d Dep't 1999).

Court erred in granting plaintiff's motion for judgment on liability, despite her testimony that defendant's vehicle struck her stopped vehicle from rear, where jury might reasonably have found that collision resulted not from defendant's negligence but from that of plaintiff colliding with rear of vehicle ahead of hers. Castellani v Bagdasarian, 262 A.D.2d 932, 692 N.Y.S.2d 560, 1999 N.Y. App. Div. LEXIS 7081 (N.Y. App. Div. 4th Dep't 1999).

Supreme court properly granted a driver's motion for a directed verdict on the accident victim's personal injury claim because the driver's violation of N.Y. Veh. & Traf. Law § 1120(a), which the victim's evidence showed was caused by the driver's vehicle being hit from behind and forced into the victim's oncoming traffic lane, did not constitute negligence per se; and, furthermore, the driver's failure to wear a seatbelt, in violation of N.Y. Veh. & Traf. Law § 1229-c, was not an act of negligence per se that caused the accident. Baker v Joyal, 4 A.D.3d 596, 771 N.Y.S.2d 269, 2004 N.Y. App. Div. LEXIS 1114 (N.Y. App. Div. 3d Dep't), app. denied, 2 N.Y.3d 706, 781 N.Y.S.2d 287, 814 N.E.2d 459, 2004 N.Y. LEXIS 1053 (N.Y. 2004).

42. — —Emergency vehicles

Court erred in dismissing, at close of evidence, negligence action brought by driver injured when his automobile collided with police truck parked behind unattended vehicle which ran out of gas

in high-speed lane of expressway, since questions of fact existed as to whether disabled vehicle owner's entry onto expressway while knowingly low on gas and his subsequent stop due to lack of fuel in violation of city traffic regulation constituted proximate cause of accident, and whether responding police officer took adequate measures to warn passing motorists and to remove vehicle from roadway. Anderson v Muniz, 125 A.D.2d 281, 508 N.Y.S.2d 567, 1986 N.Y. App. Div. LEXIS 62543 (N.Y. App. Div. 2d Dep't 1986).

Court erred in granting defendant's motion to dismiss at close of evidence on ground that plaintiff had failed to establish prima facie case in wrongful death action where it was alleged that defendant deputy sheriff caused decedent to lose control during high-speed chase by shining high-powered spotlight into rear window of his vehicle since evidence revealed there to be differing views as to when deputy turned on spotlight, how long he kept it on, and how close his car was to decedent's vehicle prior to crash. Spano v County of Onondaga, 135 A.D.2d 1091, 523 N.Y.S.2d 310, 1987 N.Y. App. Div. LEXIS 52950 (N.Y. App. Div. 4th Dep't 1987), app. dismissed, 71 N.Y.2d 994, 529 N.Y.S.2d 278, 524 N.E.2d 879, 1988 N.Y. LEXIS 1860 (N.Y. 1988).

Action against volunteer ambulance squad for injuries allegedly sustained by plaintiff while he was being transported from site of accident to hospital emergency room was properly dismissed at close of plaintiff's case, since no reasonable view of evidence would support conclusion that ambulance squad or its employees were grossly negligent, and thus they were immune from liability for medical services rendered to plaintiff. Kapinos v Alvarado, 143 A.D.2d 332, 532 N.Y.S.2d 416, 1988 N.Y. App. Div. LEXIS 9183 (N.Y. App. Div. 2d Dep't 1988).

In action arising from police officer's operation of authorized emergency vehicle while responding to report of 5 men fighting, police defendants were properly granted trial order of dismissal at close of proof as evidence that police vehicle struck plaintiff's decedent, who was attempting to cross street on bicycle, when police officer looked down momentarily to turn on emergency equipment, was insufficient to establish that officer acted in reckless disregard of known and obvious risk that was so great as to make it highly probable that harm would follow.

Szczerbiak v Pilat, 229 A.D.2d 977, 645 N.Y.S.2d 256, 1996 N.Y. App. Div. LEXIS 9022 (N.Y. App. Div. 4th Dep't 1996), aff'd, 90 N.Y.2d 553, 664 N.Y.S.2d 252, 686 N.E.2d 1346, 1997 N.Y. LEXIS 3221 (N.Y. 1997).

In action arising from collision between 2 police cars, both of which were responding to police radio call, defendants were not entitled to judgment as matter of law at close of evidence on issue of defendant officer’s recklessness, where defendant, whose marked car was behind plaintiff’s unmarked car, attempted to cut plaintiff off as they turned left on wet road in fog with no emergency signals in use, colliding with enough force to push plaintiff’s car 20 to 30 feet. McCarthy v City of New York, 250 A.D.2d 654, 673 N.Y.S.2d 160, 1998 N.Y. App. Div. LEXIS 5509 (N.Y. App. Div. 2d Dep't 1998).

In action arising from collision between police car engaged in emergency operation and car driven by plaintiff, it was error to grant defendants’ motion for judgment as matter of law at close of plaintiff’s case, where evidence indicated that police officer, after hearing on his radio that fellow officer and ambulance had been dispatched to medical emergency at nearby location, drove at high rate of speed down center turning lane of main thoroughfare heavily congested with traffic, without engaging emergency siren or attempting to decelerate when he approached red light. Gordon v County of Nassau, 261 A.D.2d 359, 689 N.Y.S.2d 192, 1999 N.Y. App. Div. LEXIS 4505 (N.Y. App. Div. 2d Dep't 1999).

Court improperly dismissed complaint at completion of evidence on ground that theory of “danger invites rescue” was inapplicable where plaintiff came upon damaged, smoking automobile facing wrong way in left lane of high-speed highway, car had no lifetime, visibility was poor and roadway was slick and not well lit, plaintiff placed his car, with its headlights and hazard lights on, between disabled car and oncoming traffic, he attempted to render aid to car’s driver and remove him, and other drivers, from harm’s way, plaintiff was then summoned by police officer and was subsequently injured when another car “slammed” into police car, and plaintiff’s testimony indicated that entire sequence of events took 5 minutes or less; under circumstances, court improperly found that accidents were so attenuated as to break causal

connection between disabled car’s driver’s alleged negligence and plaintiff’s injuries. Villoch v Lindgren, 269 A.D.2d 271, 703 N.Y.S.2d 131, 2000 N.Y. App. Div. LEXIS 2021 (N.Y. App. Div. 1st Dep't 2000).

In personal injury action arising from collision between car and fire truck driven by volunteer firefighter, defendant volunteer fire department was not entitled CLS CPLR § 4401 dismissal on ground that firefighter had been granted summary judgment due to lack of proof that he acted with reckless disregard for safety of others and only claim against fire department was based on vicarious liability for his conduct, as immunity granted to volunteer firefighters by CLS Gen Mun § 205-b does not extend to volunteer fire departments, which remain liable for negligence of volunteer firefighters while operating department vehicles in discharge of their duties. Tobacco v North Babylon Volunteer Fire Dep't, 182 Misc. 2d 480, 696 N.Y.S.2d 340, 1999 N.Y. Misc. LEXIS 403 (N.Y. Sup. Ct. 1999), app. dismissed, 276 A.D.2d 551, 714 N.Y.S.2d 450, 2000 N.Y. App. Div. LEXIS 10154 (N.Y. App. Div. 2d Dep't 2000).

43. — —Intersection collisions

In a personal injury action which resulted from an intersectional accident after a driver passed a stationary city sanitation truck on the right, which sanitation truck purportedly obstructed the driver’s vision, the trial court, before submitting the case to the jury, erred in granting defendant-City’s motion for a directed verdict on the ground that as a matter of law the accident was not proximately caused by the negligence of the City, since the decision by the defendant driver to pass the sanitation truck on the right was not as a matter of law an unforeseeable occurrence which freed the City from liability; in light of the apportionment rule among joint tortfeasors (CPLR 1401-1404) and the adoption of the rule of comparative negligence (CPLR 1411), the responsibilities of defendants to the plaintiff as well as to themselves are best determined by the same jury at one time. Monell v New York, 84 A.D.2d 717, 444 N.Y.S.2d 70, 1981 N.Y. App. Div. LEXIS 15876 (N.Y. App. Div. 1st Dep't 1981).

In action for personal injuries sustained by passenger in motor vehicle accident which occurred when vehicle failed to stop at stop sign and collided with another vehicle in intersection, court properly dismissed, after liability phase of bifurcated jury trial, third-party complaint alleging that city was negligent in failing to remove overhanging foliage that allegedly obscured stop sign, where photographs taken 2 hours after accident supported police officer's testimony that stop sign was visible from about 3 car lengths away, that stop sign was fully visible from 1 ½ car lengths away, and that painted "STOP" in roadway was clearly visible from more than 3 car lengths away. Owner and driver of northbound vehicle was entitled to dismissal of complaint after liability phase of bifurcated jury trial where (1) northbound vehicle collided with westbound vehicle, in which plaintiff was passenger, while traveling through intersection at which westbound vehicle failed to stop at stop sign, and (2) driver of northbound vehicle testified that she knew that westbound traffic had stop sign, saw westbound vehicle, and saw it slow as it approached intersection, proceeded into intersection, and was struck by westbound vehicle when it failed to stop; driver of northbound vehicle, while having duty to proceed with caution, had right to assume that westbound vehicle would stop at intersection. Safran v Amato, 155 A.D.2d 653, 548 N.Y.S.2d 244, 1989 N.Y. App. Div. LEXIS 15131 (N.Y. App. Div. 2d Dep't 1989).

Court erred in dismissing complaints for legal insufficiency at close of evidence in action arising out of intersection accident in which 2 vehicles collided when one of them made left-hand turn into path of other where fact issue was raised as to whether non-turning vehicle, as operator testified, had green light in its favor and whether other vehicle, as its operator testified, had green turning arrow in its favor; moreover, if green arrow was in turning vehicle's favor, there was also question as to whether its operator, given limited visibility and hazardous roadway conditions, exercised reasonable care in making turn. Shepperson v Salas, 216 A.D.2d 199, 628 N.Y.S.2d 663, 1995 N.Y. App. Div. LEXIS 6987 (N.Y. App. Div. 1st Dep't 1995).

Defendant was properly granted directed verdict in action for injuries sustained when her eastbound vehicle collided with plaintiff's vehicle as plaintiff proceeded into intersection heading

north after stopping at 2-way stop sign, since there was no condition shown that would have required defendant to reduce her speed as she approached intersection, there was no evidence that defendant had any opportunity to avoid collision, and defendant's uncontroverted testimony stated that she never saw plaintiff before accident and had no time to apply her brakes or to turn her steering wheel. Anastasio v Scheer, 239 A.D.2d 823, 658 N.Y.S.2d 467, 1997 N.Y. App. Div. LEXIS 5552 (N.Y. App. Div. 3d Dep't 1997).

In a personal injury action arising from a collision, the trial court properly denied defendants' motion pursuant to N.Y. C.P.L.R. 4401 for judgment as a matter of law at the close of evidence, as there was a rational process by which the jury could find for the subject bus passengers. A police van operator acknowledged at trial that the operator had increased speed as the operator approached the subject intersection and that, although the operator's view was partially obstructed, the operator proceeded into the subject intersection without stopping or activating the operator's siren. Lynch v City of New York, 38 A.D.3d 721, 833 N.Y.S.2d 141, 2007 N.Y. App. Div. LEXIS 3814 (N.Y. App. Div. 2d Dep't 2007).

Where the alleged tortfeasor, who was attempting to turn left at an intersection, struck the oncoming vehicle driven by the injured party, the trial court erred in granting the injured party's motion for judgment as a matter of law under N.Y. C.P.L.R. 4401 with regard to liability, as the testimony of an eyewitness stated that the injured party increased the injured party's speed when the light at the intersection turned yellow. Sauer v Diaz, 300 A.D.2d 1136, 753 N.Y.S.2d 631, 2002 N.Y. App. Div. LEXIS 13208 (N.Y. App. Div. 4th Dep't 2002).

Trial court erred by finding that a motorist who pled guilty to violating N.Y. Veh. & Traf. Law § 1101 was negligent as a matter of law and directing a jury to find that the motorist was negligent, and the appellate court reversed the jury's verdict in favor of a cyclist who struck the motorist's vehicle while it was proceeding through an intersection, and ordered a new trial on the issue of liability. Kelley v Kronenberg, 2 A.D.3d 1406, 770 N.Y.S.2d 217, 2003 N.Y. App. Div. LEXIS 14401 (N.Y. App. Div. 4th Dep't 2003).

Trial court erred in denying an injured party's motion to set aside a jury verdict as a driver testified that he nosed into the intersection without a clear view of the oncoming traffic and there was no valid line of reasoning or permissible inferences that could have led a rational jury to conclude that the driver's violation of N.Y. Veh. & Traf. Law §§ 1142(a) or 1172(a) was not a substantial factor in causing the accident; as the injured party did not move for a directed verdict at the close of the evidence, the matter was remitted to the trial court for a new trial. Garrett v Manaser, 8 A.D.3d 616, 779 N.Y.S.2d 565, 2004 N.Y. App. Div. LEXIS 9255 (N.Y. App. Div. 2d Dep't 2004).

44. —Highway construction, including medians and road dividers

State was entitled to dismissal after trial of action brought by motorist for alleged highway design defects, consisting of state's failure to provide flared end on highway median guide rail with result that speeding, out-of-control vehicle traveling in opposite direction climbed rail, became airborn, and landed on top of her car; state had no liability since it had had discretion to omit flared end, such design was in accordance with good engineering practice at time of rail's construction, accident history and state's tests gave no notice that such event was foreseeable, and highly excessive speed of other car would have rendered any state negligence of no effect. Epstein v State, 124 A.D.2d 544, 507 N.Y.S.2d 689, 1986 N.Y. App. Div. LEXIS 61868 (N.Y. App. Div. 2d Dep't 1986).

Court properly dismissed action alleging that state's negligence in construction and maintenance of highway was contributing proximate cause of injuries sustained by claimants after their car swerved off road to avoid collision with oncoming car, hitting telephone pole and headwall of culvert, since sole proximate cause of accident was unidentified car which crossed center line, coming into claimants' lane; claimants failed to prove that traveling lane or shoulder of highway was defective, or to show that 7-foot buffer zone from edge of traveling lane to telephone pole and headwall was unreasonably narrow or otherwise proximately caused their injuries, and absence of edge markings between shoulders and traveling lane was immaterial. Bradley v

State, 132 A.D.2d 816, 517 N.Y.S.2d 818, 1987 N.Y. App. Div. LEXIS 49313 (N.Y. App. Div. 3d Dep't 1987).

In action for injuries sustained when vehicle became “hung-up” on raised divider at entrance to shopping plaza, accelerated out-of-control when driver attempted to dislodge it, and crashed through window of bank, injuring plaintiff, alleging failure to erect and maintain proper island divider and barrier between sidewalk and parking area, court properly dismissed action against managing agent of plaza, contractor who built it, and lessee of supermarket in which bank was situated since, at close of plaintiff’s case, only plaza owner and site engineers who designed shopping plaza had been shown to have any responsibility for maintenance or erection of island divider and barrier. Also, shopping plaza owner and design engineers were entitled to dismissal, since proof revealed that divider was originally raised 8 inches above pavement and that one year prior to accident state resurfaced road at front of plaza so that outer edge of divider was flush with pavement; 17 NYCRR § 125.1 imposes duty on state to alter private entrances when it resurfaces highways, and thus plaintiff failed to show that defendants breached any duty with respect to divider. Also, shopping plaza owner and design engineers were entitled to dismissal of cause of action alleging that they should have erected barrier or barricade between sidewalk and parking area to prevent vehicles from invading stores in action for injuries suffered by bank employee where vehicle crashed through bank window at 30 to 50 miles per hour, since there was no competent evidence to show that barricade would have prevented accident, and thus plaintiff failed to prove that absence of barricade was proximate cause of injuries. And finally, court properly dismissed action against managing agent of plaza, contractor who built it, and lessee of supermarket in which bank was situated since, at close of plaintiff’s case, only plaza owner and site engineers who designed shopping plaza had been shown to have any responsibility for maintenance or erection of island divider and barrier. Jackson v Corgan & Balestiere, P. C., 132 A.D.2d 960, 518 N.Y.S.2d 530, 1987 N.Y. App. Div. LEXIS 49419 (N.Y. App. Div. 4th Dep't), app. denied, 70 N.Y.2d 611, 523 N.Y.S.2d 495, 518 N.E.2d 7, 1987 N.Y. LEXIS 19011 (N.Y. 1987).

City was entitled to dismissal at close of plaintiffs' case in action alleging that city negligently failed to install raised concrete median at section of roadway where accident occurred since (1) city's original decision not to install median was reasonably based on fact that roadway was below legal grade and might have to be changed, (2) problem identification report ordered by city, although recommending that raised median be installed, ranked accident location as 14th out of 23 areas of concern and did not include that location on list of 165 dangerous sites, (3) city had improved area in question by installing traffic light and changing configuration of painted median, and (4) installation of raised median would have involved widening of roadway and major reconstruction requiring financial resources in excess of current budget. Longo v Tafaro, 137 A.D.2d 661, 524 N.Y.S.2d 754, 1988 N.Y. App. Div. LEXIS 1832 (N.Y. App. Div. 2d Dep't), app. dismissed in part, app. denied, 72 N.Y.2d 884, 532 N.Y.S.2d 366, 528 N.E.2d 518, 1988 N.Y. LEXIS 3983 (N.Y. 1988).

In action to recover for injuries sustained by plaintiff when his automobile struck gate, which was used to close exit ramp at defendant's premises, complaint was properly dismissed at close of plaintiff's case for failure to establish prima facie case where (1) plaintiff was unable to recall how accident had occurred, and could not testify at trial with regard thereto, (2) plaintiff testified that he did not see any part of gate or anything else protruding into roadway prior to accident, and (3) plaintiff testified that he did not remain at scene to try to ascertain what had happened, and that he believed he drove directly to hospital. Calandriello v New York Racing Ass'n, 203 A.D.2d 503, 611 N.Y.S.2d 247, 1994 N.Y. App. Div. LEXIS 4288 (N.Y. App. Div. 2d Dep't 1994).

Defendants, lessor and lessee of premises operated as service station, were properly granted judgment as matter of law where plaintiff failed to show that curb cut for ingress and egress of motor vehicles to and from defendants' premises was specially constructed for benefit unrelated to general public use, or that defendants made special use of or derived benefit from curb cut. Lobel v Rodco Petroleum Corp., 233 A.D.2d 369, 649 N.Y.S.2d 939, 1996 N.Y. App. Div. LEXIS 11618 (N.Y. App. Div. 2d Dep't 1996), app. denied, 92 N.Y.2d 813, 680 N.Y.S.2d 906, 703 N.E.2d 764, 1998 N.Y. LEXIS 3688 (N.Y. 1998).

Court erred in granting New York City's motion for directed verdict dismissing action alleging that it was negligent in failing to replace concrete median barrier at accident site with safer, commonly used barrier, even though parkway was part of state arterial highway system, since city shared joint responsibility with state for safety of parkway (CLS High Art XII-B), city had long-standing knowledge that barriers were unsafe and alternatives of varying costs existed that reduced or eliminated risk of crossover accidents, and city failed to show that its failure to act as to barriers was excusable due to funding priorities. Gregorio v City of New York, 246 A.D.2d 275, 677 N.Y.S.2d 119, 1998 N.Y. App. Div. LEXIS 8975 (N.Y. App. Div. 1st Dep't 1998), app. dismissed, 93 N.Y.2d 917, 691 N.Y.S.2d 380, 713 N.E.2d 414, 1999 N.Y. LEXIS 1232 (N.Y. 1999).

Because a motorcyclist presented legally sufficient evidence to support a finding of liability on the part of a village based on its alleged negligent resurfacing of a side street, the village was not entitled to judgment as a matter of law under N.Y. C.P.L.R. 4401. Crawford v Village of Millbrook, 61 A.D.3d 918, 878 N.Y.S.2d 149, 2009 N.Y. App. Div. LEXIS 3378 (N.Y. App. Div. 2d Dep't 2009).

45. —Motorbike; motorcycle

Owner of motorbike was not entitled to dismissal of complaint at close of all evidence in action for damages by 14-year-old girl, injured in fall from bike, after it had been loaned to her by owner's 13-year-old son, since jury could reasonably have determined that bike was dangerous instrumentality and that owner, despite his instructions to his son concerning use of bike, should have foreseen that his son might loan bike to other children to ride in street, and that bike had thus been negligently entrusted to son. Paladino v Isasi, 123 A.D.2d 379, 506 N.Y.S.2d 457, 1986 N.Y. App. Div. LEXIS 60150 (N.Y. App. Div. 2d Dep't 1986).

Negligence action by motorcycle operator and passenger was properly dismissed at conclusion of plaintiffs' case where evidence showed (1) that plaintiffs and defendant were involved in verbal altercation at zoo, (2) that defendant left zoo in his automobile shortly before plaintiffs left

on motorcycle and that defendant waited to see in which direction plaintiffs would go, (3) that plaintiffs purposely chose unfamiliar alternate route to avoid additional altercation, but that defendant nevertheless followed them, and (4) that motorcycle failed to negotiate curve and drove off road at time that motorcycle was being driven at no more than speed limit, and gap between motorcycle and defendant's automobile was increasing; defendant was not "pursuing" motorcycle and was, at most, following at distance. Bixby v Eddy, 167 A.D.2d 51, 571 N.Y.S.2d 339, 1991 N.Y. App. Div. LEXIS 7823 (N.Y. App. Div. 3d Dep't 1991).

46. —Passenger injured

Court properly granted plaintiff's motion to strike defense of comparative negligence, even though plaintiff had consumed 2 to 3 drinks during approximately 5-hour period before accident, since there was no testimony as to what effect consumption had or could have had on plaintiff's driving ability, there was eyewitness testimony that he was observing speed limit at time of accident, and even assuming that he was negligent, there was no evidence to show that his negligence was substantial cause of accident. Court also properly granted motion to strike defense of comparative negligence where there was no evidence that plaintiffs, passengers in defendant's car, knew or should have known of any impairment of his ability to drive. Grcic v New York, 139 A.D.2d 621, 527 N.Y.S.2d 263, 1988 N.Y. App. Div. LEXIS 4226 (N.Y. App. Div. 2d Dep't 1988).

In action to recover for injuries sustained by automobile passenger arising out of accident in which car hit utility pole after failing to negotiate sharp curve, court properly dismissed complaints against county and utilities at close of plaintiffs' case since plaintiffs failed to establish that defendants' negligence, if any, proximately caused accident where driver of vehicle and sole eye-witness testified only that he saw unexpected curve and lost control, that he was not familiar with road and did not know how fast he was traveling, that he was not using high beams although there was no other traffic on road, and that he did not see curve warning sign and 25-mile-per-hour advisory speed control sign on approach to curve. Wang v County of

Rockland, 179 A.D.2d 977, 579 N.Y.S.2d 465, 1992 N.Y. App. Div. LEXIS 897 (N.Y. App. Div. 3d Dep't), app. denied, 80 N.Y.2d 753, 587 N.Y.S.2d 905, 600 N.E.2d 632, 1992 N.Y. LEXIS 1782 (N.Y. 1992).

Passenger who was injured while exiting from rear passenger side of taxi owned and operated by defendants, when passing car struck open door of taxi, established prima facie case that defendants were negligent based on evidence that taxi driver violated CLS Veh & Tr § 1202(a)(1)(a) by double parking on left side of one-say street to allow her to exit. Passenger also established prima facie case that defendant was negligent in view of evidence from which jury could have concluded that plaintiff opened door of taxi 3 seconds before it was struck by defendant's car and that defendant, who testified that she was traveling at only 5 to 10 miles per hour, could have stopped her car before hitting door of taxi; whether causal connection between defendant's actions and plaintiff's injuries was severed by plaintiff's negligence in exiting taxi on side available to moving traffic when it was not safe to do so (CLS Veh & Tr § 1214) was question for jury. Ferguson v Gassman, 229 A.D.2d 464, 645 N.Y.S.2d 331, 1996 N.Y. App. Div. LEXIS 7778 (N.Y. App. Div. 2d Dep't 1996).

Jury verdict for driver and owner of a van in a passenger's personal injury case was proper because the driver maintained that the accident was caused by the unexpected presence of an oily condition on the street, and the jury's decision to credit the driver's testimony and the defense expert over that of the passenger's expert was entitled to deference; based on this, the passenger's argument that the trial court improperly denied her motion for a directed verdict on the issue of liability failed, and in any event, the motion was premature as it was made prior to the presentation of the defense case. Sullivan v Goksan, 49 A.D.3d 344, 854 N.Y.S.2d 305, 2008 N.Y. App. Div. LEXIS 2067 (N.Y. App. Div. 1st Dep't 2008).

In a case in which the testimony of plaintiff, a passenger in defendant one's car, and defendant one was in conflict and in which defendant two, a second driver, was not allowed to testify, the trial court erred in granting defendant's two's motion for judgment as a matter of law at the end

of the trial. Bzezi v Eldib, 112 A.D.3d 772, 977 N.Y.S.2d 354, 2013 N.Y. App. Div. LEXIS 8336 (N.Y. App. Div. 2d Dep't 2013).

47. —Pedestrian injured

Since, in negligence action brought by pedestrian who was struck by car, plaintiff testified that the automobile which hit him was dark in color, whereas defendant testified that her car was light blue faded almost white and was parked in front of her house on the date of the accident, there was a substantial question of fact for the jury as to whether the car which struck plaintiff was owned by defendant, precluding the direction of a verdict in plaintiff's favor. Rodriguez v Robert, 47 A.D.2d 548, 363 N.Y.S.2d 94, 1975 N.Y. App. Div. LEXIS 8617 (N.Y. App. Div. 2d Dep't 1975).

Court erred in directing verdict for defendant in action for wrongful death of 16-year-old boy arising out of accident which occurred when defendant driver (adult) gave decedent ride to job interview and knowingly dropped him off in rain storm on opposite side of 4-lane high-speed highway at point not governed by traffic control device, and decedent was killed while crossing highway; trial judge did not address issue of decedent's infancy and jury should have been permitted to determine whether defendant, adult resident in decedent's home, who had assumed control over him, acted negligently. Ross v Ching, 146 A.D.2d 55, 539 N.Y.S.2d 181, 1989 N.Y. App. Div. LEXIS 2498 (N.Y. App. Div. 4th Dep't 1989).

New York City Transit Authority was entitled to dismissal of action at close of plaintiff's case where evidence demonstrated that he was on sidewalk at curb in middle of block when, without turning his head to look for traffic, he stepped off curb and almost instantly collided with side of bus traveling at 10 to 15 miles per hour. Splain v New York City Transit Authority, 180 A.D.2d 454, 579 N.Y.S.2d 380, 1992 N.Y. App. Div. LEXIS 1311 (N.Y. App. Div. 1st Dep't), app. denied, 80 N.Y.2d 759, 589 N.Y.S.2d 309, 602 N.E.2d 1125, 1992 N.Y. LEXIS 3419 (N.Y. 1992).

Defendant was not entitled to judgment as matter of law at close of trial where plaintiff presented evidence that (1) while she and defendant were walking across street arm-in-arm, defendant

guided her out of crosswalk and into lane of moving traffic, (2) she relied on him when crossing street, and (3) consequently she was hit by automobile; evidence was sufficient to establish that defendant assumed duty of aiding plaintiff, and to raise question of fact as to whether defendant had exercised reasonable care. Gordon v Muchnick, 180 A.D.2d 715, 579 N.Y.S.2d 745, 1992 N.Y. App. Div. LEXIS 2644 (N.Y. App. Div. 2d Dep't 1992).

Court should have granted town's motion under CLS CPLR § 4401 for judgment as matter of law at close of plaintiff's case in action for wrongful death of plaintiff's decedent, his wife, who was struck and killed by motor vehicle while walking home after voting at town hall, where town had designated hall as polling place as required by CLS Elec § 4-104(1), decedent lived near hall, and she and her husband had chosen to walk same route to polling place for 37 years. Renwick v Hogerheide, 218 A.D.2d 645, 630 N.Y.S.2d 364, 1995 N.Y. App. Div. LEXIS 8308 (N.Y. App. Div. 2d Dep't), app. denied, 87 N.Y.2d 803, 639 N.Y.S.2d 310, 662 N.E.2d 791, 1995 N.Y. LEXIS 4911 (N.Y. 1995).

Despite minor inconsistencies, plaintiff's unrefuted testimony that he waited until light flashed "Walk" and then entered crosswalk when he was hit by defendant's taxi entitled him to directed verdict on liability issue, there being no valid line of reasoning or permissible inferences from which jury could conclude that defendants were not negligent or that plaintiff's negligence contributed to accident. Razzaque v Krakow Taxi, 238 A.D.2d 161, 656 N.Y.S.2d 208, 1997 N.Y. App. Div. LEXIS 3192 (N.Y. App. Div. 1st Dep't 1997).

Action arising from hit-and-run accident was improperly dismissed at close of evidence, as proof was sufficient to establish prima facie case of negligence where (1) day of accident was clear and, while there were no eyewitnesses to actual impact and infant plaintiff did not testify due to her alleged injuries, witness testified that he heard "a thump" and screaming, saw plaintiff slide 20 feet along street, and saw black vehicle swerve twice to avoid hitting group of people and plaintiff (who was lying on ground) before it sped away, and (2) description and license plate number given to police matched vehicle leased by defendant corporation and usually driven by

individual defendant. Cain v Amaro, 287 A.D.2d 676, 731 N.Y.S.2d 766, 2001 N.Y. App. Div. LEXIS 10122 (N.Y. App. Div. 2d Dep't 2001).

In a personal injury action arising from an automobile-pedestrian collision, where it was alleged that a town did not properly maintain a stop sign at the intersection where the collision occurred, the town was entitled to judgment as a matter of law because the evidence showed a motorist who ran the stop sign was the sole proximate cause of the collision, as the stop sign was clearly visible. Mendez v Town of Islip, 307 A.D.2d 917, 762 N.Y.S.2d 901, 2003 N.Y. App. Div. LEXIS 8557 (N.Y. App. Div. 2d Dep't), app. denied, 1 N.Y.3d 504, 775 N.Y.S.2d 780, 807 N.E.2d 893, 2003 N.Y. LEXIS 4106 (N.Y. 2003).

48. —Taxi, cab, livery and the like

In action for injuries sustained by cab driver when he stopped to pick up passenger and was struck in rear by vehicle owned and operated by defendants, which had been struck in rear by another vehicle, court properly dismissed complaint against defendants at conclusion of trial, since it was undisputed that defendant driver had stopped his vehicle in time and only struck plaintiff because of other driver’s inability to stop. Pasek v Playtime Kiddiewear, Inc., 179 A.D.2d 412, 577 N.Y.S.2d 854, 1992 N.Y. App. Div. LEXIS 157 (N.Y. App. Div. 1st Dep't 1992).

Passenger who was injured while exiting from rear passenger side of taxi owned and operated by defendants, when passing car struck open door of taxi, established prima facie case that defendants were negligent based on evidence that taxi driver violated CLS Veh & Tr § 1202(a)(1)(a) by double parking on left side of one-say street to allow her to exit. Passenger also established prima facie case that defendant was negligent in view of evidence from which jury could have concluded that plaintiff opened door of taxi 3 seconds before it was struck by defendant’s car and that defendant, who testified that she was traveling at only 5 to 10 miles per hour, could have stopped her car before hitting door of taxi; whether causal connection between defendant’s actions and plaintiff’s injuries was severed by plaintiff’s negligence in exiting taxi on side available to moving traffic when it was not safe to do so (CLS Veh & Tr § 1214) was

question for jury. Ferguson v Gassman, 229 A.D.2d 464, 645 N.Y.S.2d 331, 1996 N.Y. App. Div. LEXIS 7778 (N.Y. App. Div. 2d Dep't 1996).

Despite minor inconsistencies, plaintiff's unrefuted testimony that he waited until light flashed "Walk" and then entered crosswalk when he was hit by defendant's taxi entitled him to directed verdict on liability issue, there being no valid line of reasoning or permissible inferences from which jury could conclude that defendants were not negligent or that plaintiff's negligence contributed to accident. Razzaque v Krakow Taxi, 238 A.D.2d 161, 656 N.Y.S.2d 208, 1997 N.Y. App. Div. LEXIS 3192 (N.Y. App. Div. 1st Dep't 1997).

49. —Traffic control device

In wrongful death action arising from motor vehicle accident, court properly dismissed complaint and cross claim against city at close of evidence at jury trial, where evidence established merely that city had considered desirability of installation of traffic control device, but had made no determination; city's failure to make such determination was clothed in qualified immunity. Harford v City of New York, 194 A.D.2d 519, 598 N.Y.S.2d 309, 1993 N.Y. App. Div. LEXIS 5442 (N.Y. App. Div. 2d Dep't 1993).

City was not negligent in failing place skip lines on highway before intersection where plaintiff presented no proof that such markings were required under New York Manual of Uniform Traffic Control Devices, and plaintiff's expert testified that (1) sole applicable reference in manual was provision "that any roadway with pavement sixteen feet or wider may be marked to indicate lane use" and (2) such markings are intended to prevent vehicles from wandering from lane to lane. Even if city should have placed skip lines on highway before intersection, plaintiff failed to prove that such failure was proximate cause of traffic accident where (1) plaintiff's expert merely speculated that skip lines would have alerted plaintiff to fact that highway had 4 lanes at intersection, (2) defendant motorist's statement that if he had known that highway had 4 lanes at intersection, he would have been "more cautious" before turning in front of plaintiff's oncoming vehicle was self-serving, and (3) at most, failure to mark intersection merely furnished condition

or occasion for occurrence of accident rather than one of its causes. Long v Cleary, 273 A.D.2d 799, 709 N.Y.S.2d 741, 2000 N.Y. App. Div. LEXIS 6815 (N.Y. App. Div. 4th Dep't), app. denied, 95 N.Y.2d 763, 715 N.Y.S.2d 216, 738 N.E.2d 364, 2000 N.Y. LEXIS 3758 (N.Y. 2000).

50. —Train

In personal injury action arising out of car-train collision at railroad crossing, court did not err in ruling as matter of law that defendant railroad could not have proximately caused accident, even if it did not comply with statutory or common law duties to provide adequate warning devices at crossing, since plaintiff was intimately familiar with crossing, having made at least 36 regular trips through it under conditions similar to those existing on day of accident. Vasquez by Vega v Conrail, 180 A.D.2d 247, 584 N.Y.S.2d 345, 1992 N.Y. App. Div. LEXIS 7958 (N.Y. App. Div. 3d Dep't), app. denied, 80 N.Y.2d 762, 592 N.Y.S.2d 671, 607 N.E.2d 818, 1992 N.Y. LEXIS 3958 (N.Y. 1992), app. denied, 80 N.Y.2d 762, 592 N.Y.S.2d 671, 607 N.E.2d 818 (N.Y. 1992).

51. —Truck

In action against town arising out of single-vehicle accident which occurred when truck left highway on curve and crashed into wooded area, court properly refused to direct verdict in favor of town on its assertion that its conduct did not proximately cause accident, even though plaintiff driver stated that he was familiar with road and had driven that stretch of road about 20 to 25 times, since record contained evidence which could support finding that town’s failure to utilize warning signs and guide rails on curve was proximate cause of accident. Ramundo v Guilderland, 142 A.D.2d 50, 534 N.Y.S.2d 543, 1988 N.Y. App. Div. LEXIS 10980 (N.Y. App. Div. 3d Dep't 1988).

Defendants, owner and operator of transfer station, were properly granted judgment at close of plaintiff’s case where evidence showed that accident, whereby plaintiff was struck by truck, occurred as result of truck driver’s failure to control his vehicle and that premises merely furnished condition or occasion for accident, rather than one of its causes. Bonsera v Universal

Recycling Servs. Corp., 269 A.D.2d 483, 703 N.Y.S.2d 729, 2000 N.Y. App. Div. LEXIS 2001 (N.Y. App. Div. 2d Dep't), app. denied, 95 N.Y.2d 757, 713 N.Y.S.2d 1, 734 N.E.2d 1212, 2000 N.Y. LEXIS 1773 (N.Y. 2000).

Trial court properly denied the motion of a corporation and its employee pursuant to N.Y. C.P.L.R. 4401 for judgment as a matter of law on the issue of liability, and properly awarded judgment as a matter of law in favor of a pedestrian and against the corporation and the employee; the pedestrian demonstrated that the employee was negligent in parking and securing a truck being used in a boiler removal job, which truck then struck the pedestrian after being left unattended, and the corporation and the employee failed to raise a triable issue of fact in this regard. Schiffer v Sunrise Removal, Inc., 62 A.D.3d 776, 879 N.Y.S.2d 518, 2009 N.Y. App. Div. LEXIS 3970 (N.Y. App. Div. 2d Dep't 2009).

52. —Van

Court properly dismissed wrongful death action alleging that defendant was negligent in overloading van which decedent was operating at time of accident where plaintiff, as result of preclusion order, could not show that van was overloaded or that such condition was proximate cause of accident. Keane v Samuel Tile Corp., 221 A.D.2d 418, 633 N.Y.S.2d 573, 1995 N.Y. App. Div. LEXIS 11997 (N.Y. App. Div. 2d Dep't 1995), app. denied, 88 N.Y.2d 805, 646 N.Y.S.2d 985, 670 N.E.2d 226, 1996 N.Y. LEXIS 1699 (N.Y. 1996).

Court properly granted defendants' motions at close of plaintiff's case dismissing complaint where plaintiff failed to prove prima facie case as to claimed defects in van he was driving when accident occurred; while existence of defect could be inferred from proof that van did not perform as intended, such inference did not arise due to plaintiff's failure to exclude all other causes of accident not attributable to defendants. Rosa v GMC, 226 A.D.2d 213, 640 N.Y.S.2d 548, 1996 N.Y. App. Div. LEXIS 3882 (N.Y. App. Div. 1st Dep't 1996).

In action arising from 3-car collision, court should have granted motion to dismiss under CLS CPLR § 4401 brought by defendants, owner and operator of second vehicle, where it was

undisputed that defendant operator safely came to full stop behind plaintiff's vehicle, and that his van was then struck in rear by third vehicle, and operator of third vehicle admitted that he looked away from traffic in front of him for about 3 seconds to see if there was space for him to move into another lane, and that when he turned his attention back to road in front of him, defendants' van had already stopped. Higgins v Ridgewood Sav. Bank, 262 A.D.2d 357, 691 N.Y.S.2d 175, 1999 N.Y. App. Div. LEXIS 6378 (N.Y. App. Div. 2d Dep't 1999).

53. Negligence, generally

Where questions of fact were presented which required the determination of jury it was error to dismiss a cause of action for personal injuries at the close of all proof pursuant to this section. Dowell v Remmer, 22 A.D.2d 192, 254 N.Y.S.2d 457, 1964 N.Y. App. Div. LEXIS 2591 (N.Y. App. Div. 4th Dep't 1964).

In personal injury action, court erred in granting judgment to defendant based on plaintiff's failure to establish prima facie case of damages, and thus plaintiff would be granted new trial on issue of damages, since continuance requested by plaintiff's attorney should have been granted in view of established merit of liability phase of plaintiff's claim, diligence exercised by his attorney, and importance of testimony in issue. Sutter v Nelson, 126 A.D.2d 634, 511 N.Y.S.2d 71, 1987 N.Y. App. Div. LEXIS 41765 (N.Y. App. Div. 2d Dep't 1987).

Motion by plaintiff for judgment as matter of law on liability was properly granted in action to recover damages for personal injuries sustained when plaintiff was struck in back by large container being transported on jack by employee of defendant where (1) employee claimed that plaintiff saw him approach, moved out of way, and then somehow moved back into path of jack, but acknowledged that he never saw plaintiff move, and (2) plaintiff and several other witnesses testified that he never saw employee approach and never moved out of way; evidence contrary to defendant's negligence was based upon conjecture and speculation which was no substitute for proof. Grillias v D'Arrigo Bros. Co., 144 A.D.2d 638, 535 N.Y.S.2d 60, 1988 N.Y. App. Div. LEXIS 12405 (N.Y. App. Div. 2d Dep't 1988).

At conclusion of plaintiff's case in action to recover for personal injuries, court erred in dismissing complaint for failure to make out prima facie case, and in denying plaintiff's motion to reopen in order to introduce testimony from defendant's examination before trial which would cure deficiency; motion should have been granted in absence of showing of prejudice to defendant, and fact that defendant would be deprived of victory by permission to reopen, and that case would therefore be adjudicated on merits, did not constitute prejudice sufficient to deprive plaintiff of his day in court. Lagana v French, 145 A.D.2d 541, 536 N.Y.S.2d 95, 1988 N.Y. App. Div. LEXIS 13614 (N.Y. App. Div. 2d Dep't 1988).

Defendants, building owner and management agent, should have been granted directed verdict on their action for contractual indemnification against third-party defendant, maintenance company, where contract between managing agent and maintenance company obligated latter to indemnify owner and agent for any and all liability incurred by them as result of company's negligent acts. Kotopoulos v Nathan Hale Gardens, 235 A.D.2d 276, 652 N.Y.S.2d 283, 1997 N.Y. App. Div. LEXIS 294 (N.Y. App. Div. 1st Dep't 1997).

Court properly dismissed action against city where it was undisputed that city did not receive prior written notice of street condition which allegedly caused plaintiff's injuries, there was no showing that city affirmatively created alleged defect, and there was no evidence that city inspected or was performing work on subject area shortly before accident. Seymour v City of New York, 235 A.D.2d 470, 652 N.Y.S.2d 1009, 1997 N.Y. App. Div. LEXIS 403 (N.Y. App. Div. 2d Dep't), app. denied, 90 N.Y.2d 809, 664 N.Y.S.2d 271, 686 N.E.2d 1366, 1997 N.Y. LEXIS 3136 (N.Y. 1997).

Dismissal of complaint at completion of plaintiff's opening statement was proper where plaintiff's counsel, in that statement, admitted that there had been no compliance with "Pothole Law" in NYC Admin Code § 7-201(c)(2) and failed to propose that he would prove at trial that exception to prior written notice requirement existed in case. Sewell v City of New York, 238 A.D.2d 331, 656 N.Y.S.2d 916, 1997 N.Y. App. Div. LEXIS 3400 (N.Y. App. Div. 2d Dep't 1997).

Res ipsa loquitur doctrine did not apply, and thus defendant in personal injury action was entitled to judgment under CLS CPLR § 4401 at close of plaintiffs' case, where plaintiffs did not prove that subject event was of kind that ordinarily does not occur in absence of someone's negligence and that it was not caused by any voluntary action or contribution of injured plaintiff. Pena v Seacrest Constr. Corp., 275 A.D.2d 737, 713 N.Y.S.2d 494, 2000 N.Y. App. Div. LEXIS 9272 (N.Y. App. Div. 2d Dep't 2000), app. denied, 96 N.Y.2d 703, 722 N.Y.S.2d 795, 745 N.E.2d 1017, 2001 N.Y. LEXIS 67 (N.Y. 2001).

In a personal injury action, the trial court erred in granting a racquet club's motion pursuant to N.Y. C.P.L.R. 4401 for judgment as a matter of law, because the jury could have rationally determined that the club's manager, under the circumstances, voluntarily assumed a duty of care toward an employee of a college who was injured while changing light bulbs at a tennis court leased by the club by assisting the employee, and was negligent. Petrescu v College Racquet Club, Inc., 40 A.D.3d 947, 838 N.Y.S.2d 574, 2007 N.Y. App. Div. LEXIS 6434 (N.Y. App. Div. 2d Dep't 2007).

Order granting an N.Y. C.P.L.R. 4401 motion made by an education department and a city for judgment as a matter of law was error in a student's claim arising out of her sexual assault by another pupil in a stairwell of a high school because, taking into account improperly precluded evidence, the student's evidence was sufficient to make out a prima facie negligent supervision case; the evidence, which consisted of, inter alia, the alleged attacker's school records, as well as records of prior assaults at the school, including a rape in a stairwell, was probative with respect to whether the alleged attack on the student was foreseeable. Moreover, evidence that an education department school aide assigned to patrol the third-floor hallway and an abutting stairwell where the attack allegedly took place never patrolled that stairwell, and that a school safety agent who was absent on the day in question was not replaced, was probative with respect to the claim of inadequate supervision. Doe v Department of Educ. of City of New York, 54 A.D.3d 352, 862 N.Y.S.2d 598, 2008 N.Y. App. Div. LEXIS 6440 (N.Y. App. Div. 2d Dep't 2008).

Personal representative of a deceased resident of a residential care facility was entitled to a new trial under N.Y. C.P.L.R. § 4401 on a negligence cause of action, which was not submitted for jury determination, because such a claim was separate and distinct from a claim against the facility for deprivation of rights under N.Y. Pub. Health Law § 2801-d. Sullivan v Our Lady of Consolation Geriatric Care Ctr., 60 A.D.3d 663, 875 N.Y.S.2d 116, 2009 N.Y. App. Div. LEXIS 1597 (N.Y. App. Div. 2d Dep't 2009).

Damages award for future pain and suffering was reversed, where such deviated materially from what was reasonable compensation to the extent indicated, under N.Y. C.P.L.R. 5501(c), unless the injured party agreed to a reduction of said award. Venancio v Clifton Wholesale Florist, Inc., 1 A.D.3d 505, 767 N.Y.S.2d 249, 2003 N.Y. App. Div. LEXIS 12091 (N.Y. App. Div. 2d Dep't 2003).

Damages award against city that deviated materially from reasonable compensation was remanded, under N.Y. C.P.L.R. § 5501(c) in the exercise of appellate discretion, and after the trial court had denied the city’s motions under N.Y. C.P.L.R. § 4401 judgment as a matter of law, and under N.Y. C.P.L.R. § 4404 for new trial, on that issue only, unless city and couple agreed, within 30 days, to specified lower amount for past and future pain and suffering. Seifert v City of New York, 7 A.D.3d 779, 776 N.Y.S.2d 872, 2004 N.Y. App. Div. LEXIS 7303 (N.Y. App. Div. 2d Dep't 2004).

Trial court erred in granting a passenger’s N.Y. C.P.L.R. 4404 motion to set aside a jury verdict in favor of a transit authority based on a deprivation of the passenger’s right to a fair trial because defense counsel’s remarks on summation did not amount to an argument based on facts not in the record, was not an interjection of counsel’s own view of the facts, and constituted a fair comment on the evidence. Selzer v New York City Tr. Auth., 100 A.D.3d 157, 952 N.Y.S.2d 26, 2012 N.Y. App. Div. LEXIS 6618 (N.Y. App. Div. 1st Dep't 2012).

Motion filed by a department of education and a board of education to set aside the verdict on the issue of liability and for judgment as a matter of law dismissing an assistant principal’s action to recover for injuries she sustained when she attempted to stop a fight between students had to

be granted because there was no rational process by which the jury could have found the principal justifiably relied upon assurances of increased security the principal made six weeks earlier. Morgan-Word v New York City Dept. of Educ., 161 A.D.3d 1065, 77 N.Y.S.3d 709, 2018 N.Y. App. Div. LEXIS 3630 (N.Y. App. Div. 2d Dep't 2018).

In plaintiff's action for personal injuries allegedly sustained when she tripped and fell while walking on a sidewalk, the Supreme Court should have granted defendant's motion for judgment as a matter of law, as the Supreme Court providently exercised its discretion in determining plaintiff's expert witness possessed the requisite knowledge and experience to render a reliable opinion with regard to the effects of improper backfilling on the stability of any dependent structures. Ippolito v Consolidated Edison of N.Y., Inc., 177 A.D.3d 715, 113 N.Y.S.3d 717, 2019 N.Y. App. Div. LEXIS 8219 (N.Y. App. Div. 2d Dep't 2019).

54. —Explosives; fireworks

Plaintiff, who allegedly sustained ear injury from fireworks explosion in front of defendants' business, was not entitled to directed verdict on ground that defendants admittedly possessed fireworks without permit in violation of CLS Penal § 405.00, since fact issue existed as to whether defendants' failure to obtain permit was proximate cause of injury. Azzue v Galore Realty, Inc., 172 A.D.2d 467, 568 N.Y.S.2d 955, 1991 N.Y. App. Div. LEXIS 5185 (N.Y. App. Div. 1st Dep't), app. denied, 78 N.Y.2d 856, 574 N.Y.S.2d 937, 580 N.E.2d 409, 1991 N.Y. LEXIS 3934 (N.Y. 1991).

55. —Premises liability, generally

In an action commenced by a house painter against defendant homeowners for negligence and failure to provide a safe place to work as required by Labor Law § 200, in which the house painter was held to be a business invitee, the trial court erred in granting defendants' motion pursuant to CPLR § 4401 dismissing plaintiff's complaint since, in considering such a motion the trial court must take the view of the evidence most favorable to the nonmoving party, and under

that standard it was error holding that defendants were not negligent or violative of the statute for plaintiff's injuries sustained when he struck his head on a low overhead door while fleeing a swarm of bees disturbed by defendant's spraying. Harris v Cool, 85 A.D.2d 921, 446 N.Y.S.2d 774, 1981 N.Y. App. Div. LEXIS 16766 (N.Y. App. Div. 4th Dep't 1981).

It was error to dismiss, for failure to make out prima facie case, action against city for burns sustained by infant plaintiff in city-owned building when water faucet broke and he was sprayed with excessively hot water since (1) jury could conclude that city had constructive notice of defective condition based on evidence that water in building had been excessively hot for many months, that boiler and pipes were in substantial disrepair, and that extensive work had been performed on plumbing system at city's request, (2) city's duty to maintain premises in safe condition, under CLS Mult D § 78, was not negated by provision in lease for tenants' association to assume management of building in view of city's retention of ultimate control, (3) defective faucet was not independent intervening event which was solely responsible for plaintiff's injuries, and (4) issue of whether plaintiff's burns were proximately caused by spraying hot water or by child abuse, as city contended, was fact issue for jury to decide. Daughtery v New York, 137 A.D.2d 441, 524 N.Y.S.2d 703, 1988 N.Y. App. Div. LEXIS 1651 (N.Y. App. Div. 1st Dep't 1988).

Court properly dismissed negligence action at close of homeowners' case where guest sought recovery on theory of res ipsa loquitur for injuries sustained when owners' porch collapsed, guest's expert testified that most likely cause of injury was defective design and construction of porch, owners had purchased home after porch was built, and thus there was no basis to conclude that owners had exercised exclusive control for purposes of res ipsa loquitur. Crosby v Stone, 137 A.D.2d 785, 525 N.Y.S.2d 332, 1988 N.Y. App. Div. LEXIS 2002 (N.Y. App. Div. 2d Dep't), app. denied, 72 N.Y.2d 807, 533 N.Y.S.2d 56, 529 N.E.2d 424, 1988 N.Y. LEXIS 2544 (N.Y. 1988).

In action by homeowner to recover for respiratory injuries sustained while installing paneling which was treated with urea formaldehyde, defendants were entitled to dismissal of negligence cause of action at end of plaintiff's case, even if defendants owed and breached duty to warn of

presence of urea formaldehyde, since homeowner failed to establish that absence of warning proximately caused his injuries where (1) homeowner did not present proof that he was allergic to urea formaldehyde or that paneling contained dangerous amount of such chemical, if it contained any at all, (2) homeowner smoked 2 packs of cigarettes per day for 20 years prior to time he worked on paneling, (3) homeowner was allergic to feather pillows, mold and spores, and had history of frequent colds, coughing, mucous and wheezing, and (4) homeowner suffered no respiratory problems while removing paneling from his home. Schimmenti v Ply Gem Industries, Inc., 156 A.D.2d 658, 549 N.Y.S.2d 152, 1989 N.Y. App. Div. LEXIS 16445 (N.Y. App. Div. 2d Dep't 1989).

In action for damages sustained when drop ceiling in store collapsed and portion of concrete deck of parking garage above store fell into store, res ipsa loquitur did not justify direction of verdict for plaintiff; just as doctrine permits plaintiff to go to jury in absence of direct proof of fault, it also permits defendant to go to jury in absence of direct proof of no fault. And, plaintiff was not entitled to directed verdict on basis that use of second floor as parking garage violated building’s certificate of occupancy, since obvious question of fact existed as to whether such use was proximate cause of occurrence. Shinshine Corp. v Kinney System, Inc., 173 A.D.2d 293, 569 N.Y.S.2d 686, 1991 N.Y. App. Div. LEXIS 7181 (N.Y. App. Div. 1st Dep't 1991).

It was error to grant judgment as matter of law dismissing action against school officials and city for injuries sustained by infant plaintiff while attending school, when another student closed classroom door on his hand, where plaintiffs provided evidence that teacher reprimanded group of students for “playing” with door at rear of classroom, that shortly thereafter teacher left room, and that after teacher left, someone slammed door on infant plaintiff’s hand; such evidence created fact issue as to whether intervening act was foreseeable. Dennis by Dennis v City of New York, 205 A.D.2d 577, 613 N.Y.S.2d 243, 1994 N.Y. App. Div. LEXIS 6173 (N.Y. App. Div. 2d Dep't 1994).

In action by plaintiff who allegedly was injured in defendants’ store, when heavy mirrored wall panel with shelves fell on her, court erred in dismissing action at close of plaintiff’s case, as

elements necessary for submitting case to jury on theory of res ipsa loquitur were established, although defendants were not only ones in control of panel; public did not have such unfettered access to wall panel as to render defendants' control insufficient, and while public might have touched shelving, that would not explain collapse of entire panel. Bonventre v August Max, 229 A.D.2d 557, 645 N.Y.S.2d 867, 1996 N.Y. App. Div. LEXIS 8266 (N.Y. App. Div. 2d Dep't 1996).

Court properly dismissed personal injury action against school district at close of plaintiffs' case where there was no proof that window that broke and injured student was in violation of 8 NYCRR 155.3 or was not in compliance with regulations existing when school was built, that school authorities were required to replace glass that did not comply with new regulations, that glass as installed was unsafe, or that there was history of prior similar accidents or breakage. Bradley v Smithtown Cent. Sch. Dist., 265 A.D.2d 283, 696 N.Y.S.2d 65, 1999 N.Y. App. Div. LEXIS 9678 (N.Y. App. Div. 2d Dep't 1999).

In a laundry worker's personal injury action, a property owner should have been granted a N.Y. C.P.L.R. § 4401 motion to dismiss the complaint for failure to establish a prima facie case at the close of the worker's case because the complaint alleged premises liability but the worker's proof at trial indicated that he was instructed to jump into a bin to compress laundry by his supervisors, who were employees of the owner. Diaz v White Plains Coat & Apron Co., Inc., 47 A.D.3d 670, 850 N.Y.S.2d 507, 2008 N.Y. App. Div. LEXIS 204 (N.Y. App. Div. 2d Dep't), app. denied, 11 N.Y.3d 706, 868 N.Y.S.2d 598, 897 N.E.2d 1082, 2008 N.Y. LEXIS 3236 (N.Y. 2008).

Directed verdict pursuant to N.Y. C.P.L.R. 4401 was properly entered for the landlords in a tenant's personal injury/premises liability action because they had no contractual or assumed duty to repair or maintain the tenant's apartment or attic, and they did not create or have notice (actual or constructive) of the hole in the attic through which the tenant fell. Patrick v Grimaldi, 100 A.D.3d 1320, 954 N.Y.S.2d 698, 2012 N.Y. App. Div. LEXIS 8153 (N.Y. App. Div. 3d Dep't 2012).

Trial court erred in denying the owners' motion for judgment as a matter of law on the issue of liability and in denying their motion for a new trial because an injured deliveryman's theory of liability was that the owners' driveway was defective, there was no evidence that the lip of the driveway was in a hazardous condition, and it was inconsistent to direct the dismissal of the complaint insofar as asserted against the contractor while denying such relief to the owners where no viable alternative theory of liability was asserted against the owners. Cioffi v Klein, 131 A.D.3d 914, 15 N.Y.S.3d 845, 2015 N.Y. App. Div. LEXIS 6592 (N.Y. App. Div. 2d Dep't 2015), app. denied, 27 N.Y.3d 901, 51 N.E.3d 563, 32 N.Y.S.3d 52, 2016 N.Y. LEXIS 440 (N.Y. 2016).

Supreme court properly determined that there was no rational process by which the jury could find in favor of a subcontractor’s employee on the cause of action against a transit authority and a general contractor alleging a violation of Labor Law § 240(1) because there was no evidence that falling objects were being hoisted, that the falling objects required securing, or that the objects fell due to the absence or inadequacy of a safety device. Bianchi v New York City Tr. Auth., 192 A.D.3d 745, 144 N.Y.S.3d 101, 2021 N.Y. App. Div. LEXIS 1497 (N.Y. App. Div. 2d Dep't 2021).

Supreme court properly granted the motion for judgment as a matter of law filed by a transit authority and a general contractor dismissing an action of a subcontractor’s employee alleging violations of Labor Law § 200 because no evidence was presented that the transit authority created the dangerous condition or had actual or constructive notice of it; in addition, there was no evidence that the general contractor had control over the work site. Bianchi v New York City Tr. Auth., 192 A.D.3d 745, 144 N.Y.S.3d 101, 2021 N.Y. App. Div. LEXIS 1497 (N.Y. App. Div. 2d Dep't 2021).

In action arising from “peeping tom” incident that occurred in shower facility at state park, court denied motion to dismiss claim for emotional distress at close of evidence as (1) symptoms of nightmares, strong and continuing concerns regarding privacy and security, and inability to engage in normal sexual relations with her husband, were not unexpected or aberrational results of shock and fright suffered by claimant when she saw eye peering through peephole, and (2)

expert medical evidence was not required to establish causation because it is common knowledge that fright can have serious mental and physical consequences. Topor v State, 176 Misc. 2d 177, 671 N.Y.S.2d 584, 1997 N.Y. Misc. LEXIS 697 (N.Y. Ct. Cl. 1997).

Trial court properly denied an injured party's motion for a directed verdict pursuant to N.Y. C.P.L.R. 4401 (2003) based on res ipsa loquitur in a personal injury action against building owners, because res ipsa loquitur was a rule of evidence that permitted, but did not require, a jury to draw the conclusion from the occurrence of an unusual event that it happened through a defendant's fault, and a plaintiff was entitled to a directed verdict on liability where the prima facie proof was so convincing that the inference of negligence arising therefrom was inescapable and unrebutted, and that could not be said of the proof herein, as there were issues of fact as to whether the building owners' actions led to the accident which caused the injuries. Morgan v Solomon, 305 A.D.2d 982, 758 N.Y.S.2d 458, 2003 N.Y. App. Div. LEXIS 4729 (N.Y. App. Div. 4th Dep't 2003).

Supreme court erred in denying the employer's motion, under N.Y. C.P.L.R. 4401, to dismiss the property owner's third-party complaint against the employer for indemnification and contribution, as the injured worker, who sued the owner for personal injury suffered on the owner's property, did not suffer a grave injury under N.Y. Workers' Compensation Law § 11. Rubeis v Aqua Club, Inc., 305 A.D.2d 656, 761 N.Y.S.2d 659, 2003 N.Y. App. Div. LEXIS 5976 (N.Y. App. Div. 2d Dep't 2003), rev'd, 3 N.Y.3d 408, 788 N.Y.S.2d 292, 821 N.E.2d 530, 2004 N.Y. LEXIS 3568 (N.Y. 2004).

It was error for the lower court to deny the motion for judgment as a matter of law filed by the owners and managers of an apartment building because the tenants had not offered proof that the criminal conduct that had occurred in the building was reasonably predictable based upon a prior occurrence of the same or similar criminal activity at a location that was sufficiently proximate to the subject location. Johnson v City of New York, 7 A.D.3d 577, 777 N.Y.S.2d 135, 2004 N.Y. App. Div. LEXIS 6924 (N.Y. App. Div. 2d Dep't), app. denied, 4 N.Y.3d 702, 790 N.Y.S.2d 648, 824 N.E.2d 49, 2004 N.Y. LEXIS 3879 (N.Y. 2004).

56. — —Elevator; escalator

Plaintiff's testimony that he suffered ruptured spleen and 5 broken ribs when elevator fell 9 stories and abruptly stopped just below lobby floor landing, throwing him to floor and against wall, was sufficient to support application of doctrine of res ipsa loquitur; thus, it was error to dismiss complaint for failure to prove prima facie case. Williams v Swissotel New York, Inc., 152 A.D.2d 457, 542 N.Y.S.2d 651, 1989 N.Y. App. Div. LEXIS 9358 (N.Y. App. Div. 1st Dep't 1989).

In action to recover for personal injuries sustained when ceiling tile in elevator fell on plaintiff's foot, elevator maintenance company was entitled to directed verdict since it was responsible only for maintenance of operating equipment and not for interior of elevator cab. Lorenz v 575 Fifth Ave. Assocs., 187 A.D.2d 274, 589 N.Y.S.2d 432, 1992 N.Y. App. Div. LEXIS 12674 (N.Y. App. Div. 1st Dep't 1992).

Because a passenger who was injured on a freight elevator presented evidence that the elevator operator's use of a freight elevator to transport passengers departed from the generally accepted custom in the elevator industry, the supreme court erred in granting the operator's N.Y. C.P.L.R. 4401 motion for a directed verdict dismissing the passenger's personal injury action. The case was remitted for a new trial as to the operator's liability. Guaman v Industry City Mgt., 40 A.D.3d 698, 835 N.Y.S.2d 680, 2007 N.Y. App. Div. LEXIS 5906 (N.Y. App. Div. 2d Dep't 2007).

Where there was inconclusive and sharply disputed evidence concerning the cause of the accident, it was error for a trial court to rely on res ipsa loquitur to direct a verdict, pursuant to N.Y. C.P.L.R. 4401, against an elevator maintenance company rather than submitting to the jury the issues of fact surrounding the applicability of the doctrine, and because the trial court had an insufficient factual basis upon which to conclude that the company was negligent as a matter of law, it followed that the court also erred in directing a verdict in favor of the building owner and against the company on the issue of common-law indemnification. Martinez v Mullarkey, 41 A.D.3d 666, 839 N.Y.S.2d 148, 2007 N.Y. App. Div. LEXIS 7699 (N.Y. App. Div. 2d Dep't 2007).

Residential hotel was entitled to directed verdict on tenant's counterclaim alleging that hotel violated CLS Gen Bus § 206 by charging tenant $22 per day when posted rate in each room was $20, since statute requires only that hotel post statement of charges "in a public and conspicuous place and manner in the office or public room, and in the public parlor," and tenant failed to prove whether rates were posted in required public places or whether rates charged exceeded posted rates. YMCA of Greater New York McBurney Branch v Plotkin, 136 Misc. 2d 950, 519 N.Y.S.2d 518, 1987 N.Y. Misc. LEXIS 2553 (N.Y. Civ. Ct. 1987).

Trial court erred in granting plaintiffs' applications pursuant to CPLR 4404 to set aside a jury verdict in favor of the defendants in a personal injury action as against the weight of the evidence, and pursuant to CPLR 4401 for judgment as a matter of law on the issue of liability; although an infant plaintiff was injured due to an alleged defect within an escalator, based on the evidence adduced at trial, the jury rationally found that defendants were not negligent in their maintenance and operation of the escalator, and there was also no proof of any actual or constructive notice regarding the allegedly unsafe condition. Georgas v Mays Dep't Stores, Inc., 299 A.D.2d 314, 749 N.Y.S.2d 151, 2002 N.Y. App. Div. LEXIS 10482 (N.Y. App. Div. 2d Dep't 2002).

57. — —Hotel; motel

In hotel patron's action for injuries sustained in attack by hotel security personnel, trial court properly refused to submit patron's cause of action in negligence to jury where only permissible inference to be drawn from proof was that hotel employees' offensive touching of patron, if it occurred at all, was intentional and not inadvertent, and thus any right to recover was on basis of intentional tort of assault and battery rather than negligence; once intentional offensive contact has been established, actor is liable for assault and not negligence, even when physical injuries may have been inflicted inadvertently. Mazzaferro v Albany Motel Enterprises, Inc., 127 A.D.2d 374, 515 N.Y.S.2d 631, 1987 N.Y. App. Div. LEXIS 42567 (N.Y. App. Div. 3d Dep't 1987).

In action in which only 2 mutually exclusive theories of liability were presented(namely, that either negligence of defendant and third-party plaintiff was proximate cause of accident, or negligence of hotel and/or plaintiff was proximate cause of accident), third-party complaint against hotel was properly dismissed, since hotel was not defendant in main action, and there was no evidence to support apportionment of damages between defendants in main action and hotel; even if jury concluded that proximate cause of accident was negligence of hotel, complaint would have to be dismissed against defendant and third-party plaintiff and, in turn, against third-party defendants (including hotel). Herrera v V.B. Haulage Corp., 205 A.D.2d 409, 613 N.Y.S.2d 883, 1994 N.Y. App. Div. LEXIS 6501 (N.Y. App. Div. 1st Dep't 1994).

In personal injury action by passenger in car driven by third-party defendant which was hit by defendant's truck, which had fishtailed on ice and crossed into oncoming lane, third-party defendant was properly granted directed verdict on issue of liability where she testified that she was proceeding at 30-35 miles per hour because traffic had slowed considerably and that she had no time to avoid accident after she saw truck coming toward her, and truck driver failed to introduce any evidence to show that she could have avoided accident by moving her car out of path of his truck or that she was traveling at unreasonable rate of speed. Baker v Shepard, 276 A.D.2d 873, 715 N.Y.S.2d 83, 2000 N.Y. App. Div. LEXIS 10475 (N.Y. App. Div. 3d Dep't 2000).

58. — —Ladder involved

In action by plaintiff who fell from ladder while running cable through ceiling at defendant's premises, court erred in directing verdict in favor of plaintiff's employer on defendant's third-party common-law indemnification claim, on ground that defendant had disposed of ladder involved in accident, where question of fact existed as to whether plaintiff's employer properly supervised and controlled work of its employee. Weininger v Hagedorn & Co., 91 N.Y.2d 958, 672 N.Y.S.2d 840, 695 N.E.2d 709, 1998 N.Y. LEXIS 1017 (N.Y. 1998).

In action by bus driver who was hit by school bus being operated in reverse in school bus parking yard, verdict was properly directed in favor of defendant bus manufacturer at close of

plaintiff's case with respect to claim that bus was defectively designed because it did not incorporate, as standard equipment, optional back-up alarm that would automatically sound when driver shifted it into reverse gear, where plaintiff's employer, having owned and operated school buses for decades and being aware that bus driver has blind spot when bus is operated in reverse, was highly knowledgeable consumer in better position than manufacturer to make risk-utility assessment, and it knew that back-up alarm was available but chose not to purchase it. Scarangella v Thomas Built Buses, Inc., 93 N.Y.2d 655, 695 N.Y.S.2d 520, 717 N.E.2d 679, 1999 N.Y. LEXIS 1432 (N.Y. 1999).

Court erred in granting plaintiff judgment as matter of law on issue of liability in action for violation of CLS Labor § 240 where there was conflicting evidence as to whether ladder base was resting on wooden platform or on ground next to platform. Ampolini v Long Island Lighting Co., 186 A.D.2d 772, 589 N.Y.S.2d 76, 1992 N.Y. App. Div. LEXIS 12281 (N.Y. App. Div. 2d Dep't 1992).

Building owner was entitled to directed verdict on its third-party complaint against plaintiff's employer based on implied indemnity in action for injuries sustained when plaintiff fell from ladder where there was no suggestion that owner exercised control over placement of ladder, nor any suggestion that owner had authority to supervise or control repairs. Plaintiff was also entitled to directed verdict on issue of liability against building owner in action under CLS Labor § 240 for injuries sustained when plaintiff was standing on second or third step of 6-foot ladder and fell backward and was hit in face by debris from ceiling tile; since provision of ladder and its placement under tile to be removed did not prevent plaintiff's fall, owner's duty to provide device to enable plaintiff to work safely at elevation, even fairly small elevation, was not adequately met. Guillory v Nautilus Real Estate, 208 A.D.2d 336, 624 N.Y.S.2d 110, 1995 N.Y. App. Div. LEXIS 2760 (N.Y. App. Div. 1st Dep't), app. dismissed, app. denied, 86 N.Y.2d 881, 635 N.Y.S.2d 943, 659 N.E.2d 766, 1995 N.Y. LEXIS 4483 (N.Y. 1995), app. dismissed, app. denied, 86 N.Y.2d 881, 635 N.Y.S.2d 943, 659 N.E.2d 766, 1995 N.Y. LEXIS 4484 (N.Y. 1995).

Court properly granted plaintiff's motion for directed verdict in action under CLS Labor § 240(1) where evidence showed that he fell from ladder while installing angle irons used to help support cement floor over building basement, that he borrowed ladder and stopped on first rung to stabilize it on dirt floor, and that there was no place on wall to tie off top of ladder; while there may have been fact question as to what caused ladder to fall, there was no question that angle iron was elevated above plaintiff's head and that it fell and struck his leg. Severino v Schuyler Meadows Club, 225 A.D.2d 954, 639 N.Y.S.2d 869, 1996 N.Y. App. Div. LEXIS 2784 (N.Y. App. Div. 3d Dep't 1996).

Slipping of ladder on which plaintiff was standing was insufficient, in and of itself, to show that owners of ladder were negligent in furnishing unsafe or inadequate ladder, absent some competent evidence, such as expert testimony establishing causation. Howerter v Dugan, 232 A.D.2d 524, 649 N.Y.S.2d 32, 1996 N.Y. App. Div. LEXIS 10434 (N.Y. App. Div. 2d Dep't 1996).

Where personal injury plaintiffs, who commenced an action to recover for injuries and death suffered as a result of an attempted rescue from a burning building, alleged that the distributor of fire apparatus equipment was liable for negligently failing to warn of the load limit on a rescue ladder and for defective design thereof, the trial court properly dismissed the complaint against it because there was no prima facie showing that such company actually distributed the apparatus used in the particular accident. Santana v Seagrave Fire Apparatus Corp., 305 A.D.2d 395, 759 N.Y.S.2d 509, 2003 N.Y. App. Div. LEXIS 5142 (N.Y. App. Div. 2d Dep't), app. denied, 1 N.Y.3d 502, 775 N.Y.S.2d 239, 807 N.E.2d 289, 2003 N.Y. LEXIS 3960 (N.Y. 2003).

59. —Products liability, generally

In personal injury action arising from explosion of glass soda bottle, it was error to dismiss complaint at end of plaintiffs' opening statement on ground that plaintiff's counsel stated in his opening remarks that negligence occurred in "either handling, usage or storage" of bottle, whereas complaint alleged that negligence occurred in "handling, storage and usage"; complaint set forth valid cause of action based on defendants' alleged negligence in placing soda bottle in

sun, and counsel's use of disjunctive form did not warrant dismissal. Seminara v Iadanza, 131 A.D.2d 457, 515 N.Y.S.2d 878, 1987 N.Y. App. Div. LEXIS 47914 (N.Y. App. Div. 2d Dep't 1987).

In action to recover for injuries sustained by child who fell from diving board and landed on concrete deck, against owner of premises and distributor who supplied diving apparatus to owner, court properly dismissed negligence and products liability claims at close of plaintiffs' case despite evidence that diving stand was negligently constructed because its handrails were too low, since record was devoid of evidence that defendants' negligence was substantial cause of events which produced child's injury where (1) child had no memory of events from time she readied herself to dive until she woke up in hospital, and (2) no one actually saw child dive. Fleming v Kings Ridge Recreation Park, Inc., 138 A.D.2d 451, 525 N.Y.S.2d 866, 1988 N.Y. App. Div. LEXIS 2818 (N.Y. App. Div. 2d Dep't 1988).

Defendant retailer of frozen food product, and codefendant manufacturer and packager, were entitled to judgment, as matter of law, at close of plaintiff's personal injury case since (1) plaintiff cut her hand while attempting to separate pieces of frozen food product with knife, (2) it was not shown that injury resulted from any negligence or breach of warranty by defendants, and (3) there was no evidence to sustain claim based on strict liability. Kerner v Waldbaum's Supermarkets, Inc., 149 A.D.2d 411, 539 N.Y.S.2d 763, 1989 N.Y. App. Div. LEXIS 4401 (N.Y. App. Div. 2d Dep't 1989), app. denied, 75 N.Y.2d 710, 556 N.Y.S.2d 532, 555 N.E.2d 929, 1990 N.Y. LEXIS 996 (N.Y. 1990).

In action by homeowner to recover for respiratory injuries sustained while installing paneling which was treated with urea formaldehyde, defendants were entitled to dismissal of cause of action based on implied warranty at end of plaintiff's case since plaintiff failed to demonstrate that paneling was defective or unfit for purpose for which it was intended. Also, defendants were entitled to dismissal of cause of action based on express warranty at end of plaintiff's case since plaintiff failed to establish that there was affirmation of fact by seller on which he relied in purchase where (1) homeowner had written to manufacturer of paneling and had received

response which stated that paneling was made without toxic chemicals, but (2) homeowner's letter and manufacturer's response were both written after homeowner had purchased paneling, and therefore response could not have affected homeowner's decision to purchase. Schimmenti v Ply Gem Industries, Inc., 156 A.D.2d 658, 549 N.Y.S.2d 152, 1989 N.Y. App. Div. LEXIS 16445 (N.Y. App. Div. 2d Dep't 1989).

In personal injury action arising from wheel falling off new bicycle, court properly dismissed, at close of defendants' case, causes of action sounding in breach of implied warranty of fitness (CLS UCC § 2-315) and breach of warranty of merchantability (CLS UCC § 2-314) where plaintiffs presented no evidence either (1) that accident was caused by design defect in bicycle, or (2) that plaintiffs advised seller that bicycle was to be used for particular purpose and relied on seller's skill and judgment to provide suitable goods. Crump v Times Square Stores, 157 A.D.2d 768, 550 N.Y.S.2d 373, 1990 N.Y. App. Div. LEXIS 666 (N.Y. App. Div. 2d Dep't 1990).

Products liability action was properly dismissed at close of plaintiffs' proof where there was no testimony as to whether screws referred to by plaintiffs' expert were missing from chair in question at time of accident, and expert's testimony as to cause of accident was speculative and without support. Reyes v Kimball, 269 A.D.2d 156, 701 N.Y.S.2d 433, 2000 N.Y. App. Div. LEXIS 1030 (N.Y. App. Div. 1st Dep't 2000).

N.Y. C.P.L.R. 4401 motion to dismiss for failure to make a prima facie case filed by a manufacturer and a seller of a treadmill (defendants) was properly denied in a minor's personal injury action as the minor demonstrated improper design of the treadmill and, thus, defendants were liable under a theory of strict products liability regardless of privity, foreseeability, or the exercise of due care. Wheeler v Sears Roebuck & Co., 37 A.D.3d 710, 831 N.Y.S.2d 427, 2007 N.Y. App. Div. LEXIS 2127 (N.Y. App. Div. 2d Dep't 2007).

60. — —Automobile "lemon laws"

Seller and warrantor of automobile were entitled to dismissal for failure to prove prima facie case in action brought by purchaser for violation of Lemon Law (CLS Gen Bus § 198-a), since remedy

thereunder runs only against manufacturer and, in any event, purchaser had not shown that there had been 4 or more attempts to repair same defect or that his car had been out of service for 30 or more days as required by statute. Also, seller and warrantor of automobile sold in January 1984 were entitled to dismissal for failure to prove prima facie case in action brought by purchaser under revocation of acceptance provision of CLS UCC § 2-608, notwithstanding that purchaser made adequate showing that defect causing car to stall substantially impaired its value to him, for if stalling incident which occurred in February 1984 were related to defect which led to similar incidents on May 16th and 18th, after which purchaser demanded replacement vehicle, his notice of revocation had not been made within reasonable time; alternatively, if later incidents arose from separate and different defect, then there was no adequate proof that such defect, evidencing itself some 4 months and 3,000 miles later, existed at time of purchase. Sepulveda v American Motors Sales Corp., 137 Misc. 2d 543, 521 N.Y.S.2d 387, 1987 N.Y. Misc. LEXIS 2619 (N.Y. Civ. Ct. 1987).

Court erred in granting defense motion to dismiss strict products liability action at close of plaintiff's case because issue of fact was presented for jury's determination where plaintiff and her passenger both testified that air bag deployed several seconds after initial impact and then did not function properly, while defendant's expert testified that it was "impossible" for air bag to deploy that way. McEneaney v Haywood, 179 Misc. 2d 1035, 687 N.Y.S.2d 547, 1999 N.Y. Misc. LEXIS 110 (N.Y. App. Term 1999).

61. — —Tools and machinery

In action for injuries sustained by plaintiff when crane failed and she was struck on head by concrete pieces dislodged from building near construction site, court erred in dismissing claims against owner of crane at close of plaintiff's case where failure of replacement parts of crane was deemed to be primary cause of accident, and there was evidence that owner had knowledge of defect in replacement parts based on metallurgical test report and inspection by employee who noticed what he considered to be defects; rational trier of fact could have

concluded that owner should not have used replacement parts, or was negligent in foregoing its own testing of those parts. Also, court erred in dismissing claims against operator of crane and his employer at close of plaintiff's case, since question of fact was presented as to whether operator of crane could have prevented crane from falling; jury could have concluded that operator was negligent in abandoning controls of crane, rather than using emergency stop button, when crane malfunctioned. Camillo v Olympia & York Properties Co., 157 A.D.2d 34, 554 N.Y.S.2d 532, 1990 N.Y. App. Div. LEXIS 4875 (N.Y. App. Div. 1st Dep't 1990).

In products liability action to recover for injuries caused by failure to equip front-loading commercial washing machine with solenoid interlock mechanism which would prevent drum from continuing to spin while door was open, repairer of machine was entitled to directed verdict dismissing cause of action alleging that it was negligent in failing to have recommended to purchaser that machine be retrofitted with interlock device, since repairmen are not held accountable in strict products liability when they repair already marketed product. Martinez v Gouverneur Gardens Housing Corp., 184 A.D.2d 264, 585 N.Y.S.2d 23, 1992 N.Y. App. Div. LEXIS 7840 (N.Y. App. Div. 1st Dep't), app. denied, 80 N.Y.2d 759, 591 N.Y.S.2d 137, 605 N.E.2d 873, 1992 N.Y. LEXIS 3459 (N.Y. 1992).

In action by plaintiff who was injured when conventional stone grinding wheel from which he had removed safety guard fractured while he was working with it, court properly granted defense motion to dismiss complaint at conclusion of plaintiff's case on ground that there was no duty to warn under circumstances, where trial evidence indicated that plaintiff, who was experienced lathe operator, purposefully adapted wheel for his own experimental purposes, knowing of potential dangers in doing so. Mangano v United Finishing Serv., Corp., 261 A.D.2d 589, 690 N.Y.S.2d 680, 1999 N.Y. App. Div. LEXIS 5664 (N.Y. App. Div. 2d Dep't 1999).

Defendant's trial motion to dismiss claims of design defect should have been granted where plaintiffs presented no evidence as to defect in design of blade guard for table saw, and although plaintiffs' expert opined that saw was improperly designed because set screw that tightened rip fence into position was too small and could loosen during saw operation, thereby

causing rip fence to move, there was no proof that rip fence or set screw were loose before plaintiff commenced cutting operations or that either became loose during its operation. Conn v Sears Roebuck & Co., 262 A.D.2d 954, 692 N.Y.S.2d 543, 1999 N.Y. App. Div. LEXIS 7117 (N.Y. App. Div. 4th Dep't), app. denied, 94 N.Y.2d 755, 701 N.Y.S.2d 711, 723 N.E.2d 566, 1999 N.Y. LEXIS 3918 (N.Y. 1999).

Manufacturer of excavation trencher in which plaintiff's hand was caught was not strictly liable, even though plaintiff's expert mechanical engineer testified that trencher should have been designed safer by adding dead-man switch, absent evidence that it was possible in 1990 to design and manufacture particular subject trencher with such switch, that manufacturer could have spread cost of such design change, or that trencher's lock-out lever or tension control device was defective. And, manufacturer of excavation trencher in which plaintiff's hand was caught was not liable on theory of failure to warn where (1) it placed on trencher specific warnings against activity that resulted in plaintiff's injuries—placing hands near trencher without first shutting off engine—and (2) although plaintiff claimed that there was danger that trencher's chain could start by itself due to defect in lock-out lever and that manufacturer did not warn of that danger, there was no evidence that such defect existed or that it caused plaintiff's injuries. Court, which granted defendants' motions for directed verdict at close of plaintiff's proof, properly excluded plaintiff's testimony regarding his thought process immediately before accident where ample evidence existed that he knew before accident how to operate trencher and that it was inherently dangerous if it were not properly stopped before clearing of obstruction. Schriber v Melroe Co., 273 A.D.2d 650, 710 N.Y.S.2d 416, 2000 N.Y. App. Div. LEXIS 7230 (N.Y. App. Div. 3d Dep't 2000).

Rental company was not negligent with respect to mechanical engineer whose hand was caught in excavation trencher that he rented for research comparison purposes where he had extensive background in development of power tools, he was warned by rental company's employees on 2 separate occasions of obvious risks and dangers of placing his hands near trencher without first shutting off engine, and there was no evidence that lock-out lever was not working properly.

Schriber v Melroe Co., 273 A.D.2d 650, 710 N.Y.S.2d 416, 2000 N.Y. App. Div. LEXIS 7230 (N.Y. App. Div. 3d Dep't 2000).

62. —Slip and fall, generally

Trial court properly denied a motion filed by a city and its department of transportation for a judgment as a matter of law because, while there was no evidence that the city had received prior written notice of the condition that allegedly caused a pedestrian's trip and fall injuries or that they made special use of a roadway, evidence was adduced at the trial that the street defect resulted from their affirmative act of creating a hole, and thereafter, failing to complete the restoration of the street. Guss v City of New York, 147 A.D.3d 731, 46 N.Y.S.3d 652, 2017 N.Y. App. Div. LEXIS 635 (N.Y. App. Div. 2d Dep't 2017).

In action by plaintiff who slipped on ice located on path leading to entrance of building owned by defendant, defendant was entitled to directed verdict since plaintiff failed to establish prima facie case of negligence inasmuch as there was no evidence that defendant had been notified of icy condition, no evidence was introduced as to origin of icy patch on which plaintiff allegedly fell and whether defendant had sufficient time to remedy dangerous condition, testimony that it had snowed one week prior to accident was insufficient to establish notice because no evidence was introduced that ice on which plaintiff allegedly fell resulted from that particular snow accumulation, and jury’s conclusion that defendant had constructive notice was based on pure speculation. Simmons v Metropolitan Life Ins. Co., 84 N.Y.2d 972, 622 N.Y.S.2d 496, 646 N.E.2d 798, 1994 N.Y. LEXIS 4125 (N.Y. 1994).

There is no “minimal dimension test” or per se rule that defect must be of certain minimum height or depth in order to be actionable; however, court properly granted county’s motion for judgment as matter of law at close of evidence, dismissing action by plaintiff who stumbled and fell over cement slab that was elevated “at an angle a little over a ½ -inch above the surrounding paving slabs.” Trincere v County of Suffolk, 90 N.Y.2d 976, 665 N.Y.S.2d 615, 688 N.E.2d 489, 1997 N.Y. LEXIS 3211 (N.Y. 1997).

Where defendant allegedly undertook to care for senile woman, it was error to dismiss the complaint at the end of plaintiffs' case in action to recover for injury sustained when senile woman slipped on ice on defendant's premises, since whether defendants undertook duty to care for plaintiff and whether they were negligent were questions for jury. Thibault v Franzese, 24 A.D.2d 903, 264 N.Y.S.2d 783, 1965 N.Y. App. Div. LEXIS 2932 (N.Y. App. Div. 2d Dep't 1965).

Plaintiff in a personal injury action made out a prima facie case of negligence, and the issue of negligence should therefore have been left for determination by the jury and the complaint not been dismissed at the close of evidence, where the evidence showed that the plaintiff, a housepainter, had fallen when an air conditioner on which he had leaned had fallen out of its window, where defendant admitted to having supervised the installation of the air conditioner, and where there was evidence that the air conditioner had been inadequately supported. Fernandez v Brander, 84 A.D.2d 546, 443 N.Y.S.2d 180, 1981 N.Y. App. Div. LEXIS 15605 (N.Y. App. Div. 2d Dep't 1981).

In mail carrier's action against homeowner for injuries allegedly suffered when he tripped over leaf-obscured garden hose in homeowner's driveway, complaint was properly dismissed at close of all evidence where mail carrier testified that he never saw what, if anything, hose was connected to, did not know who owned hose, and did know if he tripped over full length of hose or small section, whereas homeowner admitted he owned a hose which was connected to faucet in garage, but testified that it could not have been at place where fall occurred, and where there was no evidence that homeowner had actual or constructive notice of alleged dangerous condition. Condy v Alpren, 123 A.D.2d 737, 507 N.Y.S.2d 208, 1986 N.Y. App. Div. LEXIS 60879 (N.Y. App. Div. 2d Dep't 1986).

Guest of occupier of residential property was entitled to judgment as matter of law on issue of liability for occupier's failure properly to cover large backyard sewer trap, into which guest stepped as he pushed child on swing that had been hung by occupier, where guest presented testimonial and photographic evidence that cover consisted only of rotted plywood, and occupier

offered only incredible and contradictory assertions that he had placed construction planks or kitchen tabletop, or both, over hole; while trial court was justified in setting aside jury's verdict in favor of occupier as against weight of evidence, court should have taken additional step of directing judgment in guest's favor once occupier accepted photographs of rotten plywood as being accurate portrayals of trap on day after accident. Annunziata v Colasanti, 126 A.D.2d 75, 512 N.Y.S.2d 381, 1987 N.Y. App. Div. LEXIS 41126 (N.Y. App. Div. 1st Dep't 1987).

In personal injury action, defendant was entitled to judgment as matter of law at close of trial evidence where plaintiff presented no evidence that defendant had actual or constructive notice of any dangerous condition on his roof which could have caused plaintiff to fall, or that defendant or his employees had created any dangerous condition. Lander v Nacri, 130 A.D.2d 628, 515 N.Y.S.2d 555, 1987 N.Y. App. Div. LEXIS 46642 (N.Y. App. Div. 2d Dep't 1987).

Trial court erroneously determined, at close of plaintiff's personal injury case, that transit authority was entitled to judgment as matter of law, and thus new trial would be granted, where testimony of engineer was sufficient to establish prima facie case that authority's failure to design railing at elevated subway station in such manner as to preclude persons from sitting on it constituted breach of duty to provide and maintain safe and adequate stairways in its stations; despite authority's contention that plaintiff's fall was caused by his own negligence in sitting on railing, or by his contact with unknown third person, neither situation, if proven, was so extraordinary and unforeseeable as to constitute, as matter of law, intervening cause. Also, actual notice of alleged defect was established for purposes of prima facie case since defect was one created by defendant transit authority. Cruz v New York City Transit Auth., 136 A.D.2d 196, 526 N.Y.S.2d 827, 1988 N.Y. App. Div. LEXIS 3211 (N.Y. App. Div. 2d Dep't 1988).

Court erred in dismissing action for injuries sustained by tennis player, who slipped and fell on "Har-tru" surface of defendant's tennis court while moving to his left to attempt backhand, where (1) player established that mossy condition and leaves existed on court in area of his fall, as demonstrated by green stains on his shorts shortly after fall, (2) witness testified that he observed skid marks in mossy area of player's fall, (3) player's expert opined that tennis court in

question had not been properly maintained, and (4) although there was some evidence to indicate that “Har-tru” surface was constructed so as to provide players with “great deal of slide,” and player was unaware of exact cause of his fall, there was sufficient circumstantial evidence from which jury could reasonably infer that moss and leaves on court proximately caused fall. Secof v Greens Condominium, 158 A.D.2d 591, 551 N.Y.S.2d 563, 1990 N.Y. App. Div. LEXIS 1955 (N.Y. App. Div. 2d Dep't 1990).

Court improvidently dismissed complaint against ambulance company at close of plaintiff’s direct case where (1) plaintiff alleged that decedent, who suffered from cancer and was in very fragile condition, sustained displaced leg fracture when she was thrown from wheelchair while being transported by company employees from her apartment to ambulance for trip to see her doctor, (2) there was evidence that decedent had fallen on day before incident and/or one week prior to incident, (3) decedent’s sister testified that decedent had walked short distance to bathroom on date of incident, and (4) physician testified that non-displaced fracture could have occurred in prior fall, but that decedent would not have been able to walk at all on non-displaced fracture, as such activity would have caused immediate displacement; jury could have found that fall from wheelchair either was proximate cause of fracture or caused displacement of prior fracture. Vera v Knolls Ambulance Service, Inc., 160 A.D.2d 494, 554 N.Y.S.2d 158, 1990 N.Y. App. Div. LEXIS 4572 (N.Y. App. Div. 1st Dep't 1990).

In action by patron of defendant beauty parlor for injuries sustained in fall from ramp which did not have handrails, it was error to grant defendant’s motion for judgment as matter of law at close of plaintiff’s case since reasonable jury could clearly have concluded that, regardless of reason why plaintiff lost her balance, lack of handrails was proximate cause of injuries and constituted unreasonably dangerous condition. Portilla v Rodriguez, 179 A.D.2d 631, 578 N.Y.S.2d 241, 1992 N.Y. App. Div. LEXIS 233 (N.Y. App. Div. 2d Dep't 1992).

Court properly dismissed slip-and-fall case for failure to prove prima facie case where plaintiffs failed to show that defendants created condition which caused accident, or that defendants had

actual or constructive notice of condition. Gaeta v City of New York, 213 A.D.2d 509, 624 N.Y.S.2d 47, 1995 N.Y. App. Div. LEXIS 2903 (N.Y. App. Div. 2d Dep't 1995).

Court properly dismissed complaint at close of plaintiff's case in action for injuries allegedly sustained when he slipped on ice patch on grass near driveway of defendants' vacation home where his own testimony made it clear that no obvious dangerous condition existed that would have put defendants on notice, despite his reference to weather reports indicating that there was thaw earlier in week before accident that might have led to creation of icy condition when temperatures fell again before defendants' arrival that weekend, causing water to refreeze and create slippery icy condition. Gernard v Agosti, 228 A.D.2d 994, 644 N.Y.S.2d 599, 1996 N.Y. App. Div. LEXIS 7449 (N.Y. App. Div. 3d Dep't 1996).

Defendant was not entitled to directed verdict in action for injuries sustained when truck driver (plaintiff) slipped into gap between end of his truck and defendant's loading dock where there was testimony that had "dock lock" (safety device designed to reduce gap between tractor-trailer and loading dock) been functional, there would have been only 3-inch gap between tractor-trailer and dock, and even if plaintiff's failure to notice gap was sole cause of accident, there was rational basis on which jury could have found that had dock lock been functional or activated on plaintiff's arrival, his injuries could have been prevented. Rivers v Garden Way, 231 A.D.2d 50, 660 N.Y.S.2d 893, 1997 N.Y. App. Div. LEXIS 8094 (N.Y. App. Div. 3d Dep't 1997).

Court properly directed liability verdict on plaintiff's CLS Labor § 240 (1) action where evidence showed that plaintiff was painting ceiling of renovated second floor when he fell into large, unprotected hole, that, on prior occasions, ropes or planks had been utilized to prevent workers from falling through hole down to floor below, and that for some unknown reason, those precautions were not taken on date of plaintiff's accident. Also, court properly dismissed general contractor's third-party complaint against painting subcontractor in action brought under CLS Labor § 240 (1) by subcontractor's employee, even though there was delegation of painting work to subcontractor, since there was no evidence that subcontractor controlled work areas or had authority to insist that safety precautions be taken as to injured employee's work, and both

general contractor's and subcontractor's employees were involved in placing and removing planks from hole above staircase into which injured employee fell. Serpe v Eyris Prods., 243 A.D.2d 375, 663 N.Y.S.2d 542, 1997 N.Y. App. Div. LEXIS 10776 (N.Y. App. Div. 1st Dep't 1997).

Court improperly dismissed personal injury action where, inter alia, testimony of plaintiff and housekeeper showed that floor was hard, smooth, shiny, and slippery, and that throw rug did not have appropriate backing to prevent it from moving when stepped on, and there was evidence that plaintiff had seen defendant homeowner slip on rug "(m)any times," and that plaintiff had informed homeowners of dangerous condition before accident. Napolitano v Dhingra, 249 A.D.2d 523, 672 N.Y.S.2d 369, 1998 N.Y. App. Div. LEXIS 4589 (N.Y. App. Div. 2d Dep't 1998).

Court properly granted motion to dismiss complaint at close of plaintiff's case where plaintiff herself testified that area of snow and ice where she fell had not been shoveled, sanded, or salted, and she similarly stated that photograph of area indicated that it had not been shoveled. Faiz v City of New York, 254 A.D.2d 322, 678 N.Y.S.2d 647, 1998 N.Y. App. Div. LEXIS 10773 (N.Y. App. Div. 2d Dep't 1998).

Mere fact that floor has been rendered slippery by application of wax or polish is not enough for dangerous condition, absent proof that wax or polish was negligently applied. Court of Claims properly granted state's motion for judgment under CLS CPLR § 4401 in action for slip and fall on terrazzo floor of state building, even though floor was highly polished, where absence of evidence that wax or polish was negligently applied left no rational process by which court could rule in favor of claimants. Malossi v State, 255 A.D.2d 807, 680 N.Y.S.2d 305, 1998 N.Y. App. Div. LEXIS 12501 (N.Y. App. Div. 3d Dep't 1998).

Complaint against city, premised on existence of duty to post warning signs or erect additional barriers to protect visitors in Fort Tryon Park, was properly dismissed prior to close of plaintiff's evidence, where plaintiff's own evidence showed that cliff from which 2 ½ -year-old plaintiff fell, while under supervision of his grandparents, was open and obvious natural feature of landscape. Tushaj v City of New York, 258 A.D.2d 283, 685 N.Y.S.2d 64, 1999 N.Y. App. Div.

LEXIS 889 (N.Y. App. Div. 1st Dep't), app. denied, 93 N.Y.2d 818, 697 N.Y.S.2d 566, 719 N.E.2d 927, 1999 N.Y. LEXIS 2975 (N.Y. 1999).

It was error to grant defendant's motion for judgment as matter of law where defendant, who cared for infant plaintiff and several other children in her home, testified, as witness called by plaintiffs, that she was aware that older children were running in living room and might potentially harm each other, thus creating fact issue as to whether it was foreseeable that infant plaintiff's older brother would fall on her, causing injury. Singh v Persaud, 269 A.D.2d 381, 702 N.Y.S.2d 628, 2000 N.Y. App. Div. LEXIS 1209 (N.Y. App. Div. 2d Dep't 2000).

Boat owner was entitled to judgment at close of case presented by plaintiff who had slipped on puddle of water, since small puddle on exterior deck of 28-foot boat was not dangerous condition but was open, obvious and inherent in activity of pleasure boating, and plaintiff failed to show that boat owner created condition or had actual or constructive notice of it. Korothy v Corwin, 275 A.D.2d 301, 712 N.Y.S.2d 569, 2000 N.Y. App. Div. LEXIS 8592 (N.Y. App. Div. 2d Dep't 2000).

Directed verdicts on claims based on common law negligence and N.Y. Lab. Law § 200 should not have been entered in favor of a construction manager, a general contractor, and a supplier of concrete at a construction site where there was plenty of evidence that the supplier created a dangerous condition at the work site over which the general contractor had control, and where there was a likelihood that the injured worker, had the trial court not made excessively intrusive rulings regarding evidence, might also have shown that the construction exercised the requisite control as well. Pickering v Lehrer, McGovern, Bovis, Inc., 25 A.D.3d 677, 811 N.Y.S.2d 696, 2006 N.Y. App. Div. LEXIS 734 (N.Y. App. Div. 2d Dep't 2006).

Trial court erred in granting judgment as a matter of law to plaintiffs in a personal injury action against a club; representatives of a club testified that lights in the area where the fall occurred was working on the night of the fall, and therefore there was a rational process by which the jury could have found that the club was not negligent. Sousie v Lansingburgh Boys & Girls Club,

Inc., 306 A.D.2d 614, 759 N.Y.S.2d 606, 2003 N.Y. App. Div. LEXIS 6333 (N.Y. App. Div. 3d Dep't 2003).

Because a trial court assumed the role of “advocate” and because there were questions of fact regarding whether a housing authority had notice of a dangerous condition, pursuant to N.Y. C.P.L.R. § 4401, the trial court erred in granting judgment as a matter of law to the housing authority; the court’s actions deprived the invitee of a fair trial. Butler v New York City Hous. Auth., 26 A.D.3d 352, 810 N.Y.S.2d 209, 2006 N.Y. App. Div. LEXIS 1913 (N.Y. App. Div. 2d Dep't 2006).

Defendant’s motion for judgment under N.Y. C.P.L.R. 4401 was properly granted in a skater’s action alleging injury at an ice rink because skater testified that she did not know what caused traffic cone to fall and that it fell immediately before she tripped over it; defendant did not have actual or constructive notice of the fallen cone and did not cause or create the allegedly dangerous condition. Gafner v Chelsea Piers, L.P., 27 A.D.3d 353, 812 N.Y.S.2d 490, 2006 N.Y. App. Div. LEXIS 3594 (N.Y. App. Div. 1st Dep't 2006), app. denied, 8 N.Y.3d 802, 830 N.Y.S.2d 698, 862 N.E.2d 790, 2007 N.Y. LEXIS 78 (N.Y. 2007).

Trial court erred in granting a transit authority’s motion for a judgment as a matter of law under N.Y. C.P.L.R. 4401 in a personal injury action asserted by a plaintiff on behalf of her decedent who slipped and fell on a manhole cover that was owned by the authority, as she established a prima facie case based on the defective nature of the manhole cover; although there was no notice to the authority, a question for the jury was created as to whether the special use doctrine applied. Posner v New York City Tr. Auth., 27 A.D.3d 542, 813 N.Y.S.2d 106, 2006 N.Y. App. Div. LEXIS 2889 (N.Y. App. Div. 2d Dep't 2006).

In a personal injury action arising from a slip and fall accident, the trial court properly directed a verdict in favor of two corporations; the record was devoid of any evidence of actual notice of the wet condition to the corporations and the lapse of a reasonable time for them to correct the condition or warn about its existence. Further, the record was lacking in any evidence from

which constructive notice could be inferred. Hale v Wilmorite, Inc., 35 A.D.3d 1251, 827 N.Y.S.2d 387, 2006 N.Y. App. Div. LEXIS 15449 (N.Y. App. Div. 4th Dep't 2006).

Plaintiff carpenter who, while attempting to observe pitched floor in defendant's store, took side-step without looking and began to pivot his foot at same time that defendant's employee stepped on his foot, causing him to fall and hurt his ankle, could not rely on doctrine of res ipsa loquitur to support his negligence cause of action; thus, dismissal was warranted at close of plaintiff's case for failure to make out prima facie case. Peralta v La Placita Dominica Mkt. Corp., 170 Misc. 2d 340, 656 N.Y.S.2d 81, 1996 N.Y. Misc. LEXIS 365 (N.Y. Sup. Ct. 1996).

Unpublished decision: Plaintiffs' oral motion, for a judgment as a matter of law pursuant to N.Y. C.P.L.R. 4401, was denied as moot: (1) plaintiff filed his motion at the close of the evidence in his pain and suffering suit, which was brought against a geriatric care facility after a patient fell and suffered a broken leg; (2) the court had reserved ruling on the motion pending deliberation by the jury on plaintiff's claims; and (3) the motion became academic after the court determined that it should grant plaintiff's N.Y. C.P.L.R. 4404(a) motion to set aside the jury's verdict and that a new trial should be held as to several of plaintiff's claims. Sullivan v Our Lady of Consolation Geriatic Care Ctr., 236 N.Y.L.J. 119, 2006 N.Y. Misc. LEXIS 3890 (N.Y. Sup. Ct. Dec. 15, 2006), aff'd in part, modified, 60 A.D.3d 663, 875 N.Y.S.2d 116, 2009 N.Y. App. Div. LEXIS 1597 (N.Y. App. Div. 2d Dep't 2009).

63. — —Parking lot

Trial court erred in dismissing complaint at close of plaintiff's evidence in action by pedestrian for injuries suffered in fall over broken portion of curb in shopping center owned by defendant where plaintiff's evidence included photographs of curb taken 2 to 3 weeks following accident, and jury could have inferred from irregularity, width, depth, and appearance of defect shown in photographs that condition came into being over such length of time that knowledge of it should have been acquired by defendant. Ferlito v Great South Bay Associates, 140 A.D.2d 408, 528 N.Y.S.2d 111, 1988 N.Y. App. Div. LEXIS 4988 (N.Y. App. Div. 2d Dep't 1988).

Snow plower was improperly denied judgment as matter of law in action by patron who slipped and fell on ice in parking lot, despite evidence that earlier in day plower had removed snow out of lot pursuant to oral agreement with shopping center tenant, since there was no evidence that plower either breached his agreement or improperly performed snow-plowing operations. Weinberg v Shinconic Court, 193 A.D.2d 673, 598 N.Y.S.2d 969, 1993 N.Y. App. Div. LEXIS 4717 (N.Y. App. Div. 2d Dep't 1993).

In action to recover for injuries sustained when plaintiff slipped and fell on naturally accumulated snow and ice in parking lot allegedly plowed by defendant village, court properly granted judgment to defendant at close of evidence, since plaintiff failed to submit any evidence that condition of lot was made more hazardous by defendant’s plowing. Oley v Village of Massapequa Park, 198 A.D.2d 272, 604 N.Y.S.2d 818, 1993 N.Y. App. Div. LEXIS 10395 (N.Y. App. Div. 2d Dep't 1993).

Court properly denied defendants’ motion for directed verdict, despite their contention that chain over which plaintiff tripped constituted open and obvious danger, since 20-foot chain was strung by defendants across pathway from their day care center to parking lot, and there was no opening provided through which to walk. Crawford v Marcello, 247 A.D.2d 907, 668 N.Y.S.2d 852, 1998 N.Y. App. Div. LEXIS 1245 (N.Y. App. Div. 4th Dep't 1998).

Complaint was properly dismissed at close of plaintiff’s case where there was no testimony that defendant landlord was contractually obligated to make repairs or maintain parking lot where plaintiff was injured, nor was their evidence from which it could have been rationally inferred that defendant reserved right to re-enter premises for purposes of inspection and maintenance or repair, or that complained of defect involved significant structural or design defect violating specific statutory safety provision. Rosado v Neubert Realty Corp., 254 A.D.2d 209, 679 N.Y.S.2d 134, 1998 N.Y. App. Div. LEXIS 11344 (N.Y. App. Div. 1st Dep't 1998).

Court erred in granting third-party defendant’s motion for directed verdict and dismissing complaint where third-party defendant, snow removal contractor, admitted that if parking lot were not properly sanded and salted, more dangerous icy condition could develop after plowing

than would have existed had parking lot been left untouched, and weather during 2 days that elapsed between plowing and plaintiff's accident had been clear; under circumstances, it would not have been unreasonable for jury to infer that ice on which plaintiff slipped was residue of third-defendant's snow removal efforts 2 days earlier and that, had third-party defendant performed its duties with due care, ice would not have been present. Figueroa v Lazarus Burman Assocs., 269 A.D.2d 215, 703 N.Y.S.2d 113, 2000 N.Y. App. Div. LEXIS 1523 (N.Y. App. Div. 1st Dep't 2000).

Employer that required its employees to park in designated area, with result that they could reach its store by walking either along road or on grassy median that separated road from parking lot, was not entitled to directed verdict or order setting aside verdict for employee who tripped and fell while walking to store on median, even though employee could not identify precisely what caused her to fall, where she felt her foot catch on something, and there were several roots and thick stalks covered with grass in area of fall. Charvala v Kelly & Dutch Real Estate, Inc., 273 A.D.2d 936, 709 N.Y.S.2d 785, 2000 N.Y. App. Div. LEXIS 6709 (N.Y. App. Div. 4th Dep't 2000).

Trial court erroneously denied the county's motion for judgment as a matter of law since there was no evidence concerning how long a defect that allegedly caused the invitee's accident in the county's parking garage had existed prior to the time the invitee tripped and fell such that the county could be charged with constructive notice of the defect. Daniely v County of Westchester, 297 A.D.2d 654, 747 N.Y.S.2d 239, 2002 N.Y. App. Div. LEXIS 8396 (N.Y. App. Div. 2d Dep't 2002), app. denied, 100 N.Y.2d 501, 760 N.Y.S.2d 764, 790 N.E.2d 1193, 2003 N.Y. LEXIS 933 (N.Y. 2003).

Plaintiff, who fell in parking lot adjacent to restaurant, established prima facie case by demonstrating that defendants' use of parking lot created fact issue as to whether such use constituted "special use" of parking lot sufficient to impose duty of care where (1) individual defendants operated restaurant on property owned by separate corporation, principals of which were defendants, and no lease existed for property, and (2) parking lot adjoined building

housing restaurant, was used by defendants' customers, and serviced only restaurant. Marsico v Brennan, 162 Misc. 2d 666, 618 N.Y.S.2d 487, 1994 N.Y. Misc. LEXIS 478 (N.Y. Sup. Ct. 1994).

64. — —School

In action by plaintiff who lost his balance and fell while descending from bleachers at defendants' athletic field after it began to rain, plaintiff was improperly granted directed verdict on liability on ground that defendants' violation of NYC Admin Code § 27-531 (dealing with protective guards on bleachers) constituted negligence per se, as § 27-531 is not similar to any state statute and, given administrative code's "local law" designation, defendants' violation constituted only some evidence of negligence. Elliott v City of New York, 95 N.Y.2d 730, 724 N.Y.S.2d 397, 747 N.E.2d 760, 2001 N.Y. LEXIS 574 (N.Y. 2001).

Town board of education was entitled to dismissal at close of plaintiff's case in negligence action for injuries sustained when she fell while descending allegedly defective or dangerous aluminum risers placed in city convention center to permit access to bleacher seating at high school graduation ceremony, since evidence established that board was merely lessee and had no control over premises or aluminum risers, and thus had no duty to warn plaintiff. But, City was not entitled to dismissal at close of plaintiff's case, where testimony and opinion of "human factors consultant" regarding necessity of visual cue of existence of step and lack thereof on risers, combined with plaintiff's testimony that "had the marker [on the riser edge] been there, I would have known I wasn't stepping far enough" was sufficient to establish prima facie case. Elmlinger v Board of Education, 132 A.D.2d 923, 518 N.Y.S.2d 257, 1987 N.Y. App. Div. LEXIS 49375 (N.Y. App. Div. 4th Dep't 1987).

Teacher failed to establish prima facie case of negligence against educational officials (defendants) for injuries she allegedly sustained when she slipped and fell in second-floor school corridor as result of "watery" or "gluey and sticky" liquid left by defendants on stairway landing where (1) after teacher had allegedly stepped into liquid on landing, between third and

second floors, she continued to walk down 13 steps to second floor, without mishap, then walked through double doors leading to second-floor corridor, made right turn and walked approximately another 10 feet before she fell, (2) no proof was presented that any foreign substance allegedly on stairway landing was on teacher's shoes or corridor floor when she sustained injury, and (3) witness stated that teacher seemed to slip several times in shoes that she was wearing, between third and fourth floors, before she had allegedly stepped into foreign substance on landing. McCarther v Board of Educ., 161 A.D.2d 278, 554 N.Y.S.2d 912, 1990 N.Y. App. Div. LEXIS 5075 (N.Y. App. Div. 1st Dep't 1990).

Plaintiff failed to make out prima facie case of negligence against board of education for injuries sustained when she slipped and fell on spilled coffee outside her office where (1) there was no evidence that anyone observed coffee being spilled, and (2) although plaintiff testified that coffee had some dried areas and chemist testified to experiments he conducted to determine length of time it would take coffee to partially dry, chemist conceded that temperature and humidity of room would affect test results and that he had no information regarding temperature and humidity that existed in hallway at time of spill. Shildkrout v Board of Educ., 173 A.D.2d 603, 570 N.Y.S.2d 183, 1991 N.Y. App. Div. LEXIS 7665 (N.Y. App. Div. 2d Dep't), app. denied, 78 N.Y.2d 858, 575 N.Y.S.2d 454, 580 N.E.2d 1057, 1991 N.Y. LEXIS 4085 (N.Y. 1991).

65. — —Sidewalk, walkway and the like

Court properly granted New York City's motion for directed verdict and dismissed action for injuries allegedly sustained in February 1988 when plaintiff tripped on defect in sidewalk where, in attempt to comply with statutory condition precedent of prior written notice, plaintiff filed map, prepared by corporation and filed with Department of Transportation, with New York City dated June 5, 1986 depicting defect that purportedly caused her fall, but city produced successor map, dated November 4, 1987, that did not show any defect in area of plaintiff's accident; it was of no legal consequence that city did not present any records documenting repair in area in question since plaintiff failed to satisfy condition precedent necessary to proceed with action. Katz v City

of New York, 87 N.Y.2d 241, 638 N.Y.S.2d 593, 661 N.E.2d 1374, 1995 N.Y. LEXIS 4764 (N.Y. 1995).

Injured police officers' claims against New York City under CLS Gen Mun § 205-e were properly dismissed at close of plaintiffs' case where plaintiffs relied solely on New York City Charter § 2904 and NYC Admin Code § 19-152, which concern adjacent landowner's duty to repair defective sidewalks or flagstones and procedures that city may use to enforce that duty; to extent that cited provisions authorized city to act, authority was couched in permissive rather than mandatory terms. St. Jacques v City of New York, 88 N.Y.2d 920, 646 N.Y.S.2d 787, 669 N.E.2d 1109, 1996 N.Y. LEXIS 1173 (N.Y. 1996).

A direction for defendant at close of plaintiff's case was held justified where plaintiff, alleging that she had fallen on a public sidewalk, gave conflicting versions of the place of accident as to whether she had fallen on the sidewalk or in the parking lot, so that any verdict in her favor would have been based on pure speculation. Ransome v Bull Markets, Inc., 22 A.D.2d 719, 253 N.Y.S.2d 179, 1964 N.Y. App. Div. LEXIS 3057 (N.Y. App. Div. 3d Dep't 1964).

The trial court in a personal injury action properly denied defendant hospital's motion for a directed verdict where a special use by defendant of the sidewalk where the plaintiff had fallen was established in the record, and incidental to such special use was defendant's responsibility to keep the sidewalk in a reasonably safe condition, The question of plaintiff's contributory negligence was properly submitted to the jury since the evidence relating to that issue was subject to varying inferences. Cole v Albany, 80 A.D.2d 656, 436 N.Y.S.2d 413, 1981 N.Y. App. Div. LEXIS 10361 (N.Y. App. Div. 3d Dep't 1981).

In a negligence action to recover damages for personal injuries sustained when plaintiff fell on a patch of ice on the sidewalk in front of defendant's store, judgment for defendant would be reversed where the court had improperly dismissed the complaint at the close of plaintiff's case in that it would not have been "utterly irrational" for the jury to have found defendant liable. Tolley v Dogleg Realty Co., 89 A.D.2d 602, 452 N.Y.S.2d 465, 1982 N.Y. App. Div. LEXIS 17689 (N.Y. App. Div. 2d Dep't 1982).

In a personal injury action against an ice cream store to recover for injuries sustained when plaintiff tripped on a coaming between the sidewalk and the entrance to the store, the trial court erred in directing a verdict for defendant, where the fact that plaintiff had commenced a separate suit against the city did not justify the court's conclusion that as a matter of law plaintiff had fallen on the sidewalk, which was not under defendant's control, where plaintiff was entitled to every favorable inference that could reasonably be drawn from the evidence and was entitled to assert inconsistent causes of action in separate lawsuits, where it would not have been utterly irrational for the jury to have found that the dangerous condition existed on defendant's property, and where plaintiff adequately raised the issue of whether defendant met the reasonable person standard of care for property owners. Pontiatowski v Baskin-Robbins, 91 A.D.2d 1035, 458 N.Y.S.2d 629, 1983 N.Y. App. Div. LEXIS 16360 (N.Y. App. Div. 2d Dep't 1983).

Action against town for personal injuries was properly dismissed on ground that town had not been given written notice of defect as required by CLS Town § 65-a where (1) evidence showed that pedestrian's fall was caused by hole in grass area that was part of town-owned sidewalk, which constituted physical defect in sidewalk and thus made § 65-a applicable to case, and (2) plaintiff failed to establish exemption from requirements of § 65-a by proving that town created hole or engaged in affirmative tortious conduct. Gallo v Hempstead, 124 A.D.2d 700, 508 N.Y.S.2d 212, 1986 N.Y. App. Div. LEXIS 62007 (N.Y. App. Div. 2d Dep't 1986).

In action by pedestrian injured in fall on ice-covered sidewalk who testified that sidewalk was completely covered with bumpy, uneven ice one to 2 inches thick, court erred in granting city's motion to dismiss at close of evidence since jury could have inferred that ice had existed for period of at least 7 days prior to accident in view of prevailing weather conditions, and would not have been speculating in finding that ice had not developed solely as result of 3-inch snowfall on day before accident or one-inch snowfall 2 days prior to incident. Candelier v New York, 129 A.D.2d 145, 517 N.Y.S.2d 486, 1987 N.Y. App. Div. LEXIS 43953 (N.Y. App. Div. 1st Dep't 1987).

In action for injuries sustained when plaintiff fell into 3-inch-deep hole in street where water valve cover belonging to water district had not been raised to grade after street resurfacing, court properly granted motion for judgment in favor of water district at close of plaintiff's case where no evidence was presented tending to show that district had received actual or constructive notice of defective condition at time sufficiently in advance of accident to permit it to take corrective action; while homeowner testified that she had complained about depression to man who read her water meter, she had no idea when she made complaint, and because there was no evidence that district had any duty to inspect valve cover and no showing that condition was so patently defective that district employees would have been put on notice of potential danger, constructive notice was not established. Also, court properly granted motion for judgment in favor of paving company at close of all evidence where company's work was accepted by town and there was no evidence of contractual duty on part of company to raise water valve covers to grade level. Gurriell v Huntington, 129 A.D.2d 768, 514 N.Y.S.2d 761, 1987 N.Y. App. Div. LEXIS 45464 (N.Y. App. Div. 2d Dep't 1987).

In action for injuries sustained when plaintiff slipped and fell on icy patch on sidewalk in front of defendant's store, it was error to direct verdict for defendant where it could reasonably be inferred that ice was residue of defendant's snow removal efforts, and question of whether defendant's employees had shoveled snow into piles at curbside, thereby creating more hazardous condition than would have obtained absent such effort, was fact issue for jury. Glick v New York, 139 A.D.2d 402, 526 N.Y.S.2d 464, 1988 N.Y. App. Div. LEXIS 3439 (N.Y. App. Div. 1st Dep't 1988).

In action for injuries sustained when plaintiff fell on icy patch outside her apartment, it was error to dismiss, at close of evidence, cross-claim brought by apartment owners against apartment management company to recover all or part of any judgment which plaintiff might recover against owners where (1) management contract obligated company to remove snow and ice on building's walkways Monday through Friday, (2) several witnesses testified that building's walkways during week prior to accident had not been cleared of accumulated snow and ice, and

(3) meteorological consultant testified to conditions that would have caused accumulated snow and ice to thaw, then refreeze under newly fallen snow on morning of accident; evidence indicated that company failed to fulfill its obligations, possibly precipitating plaintiff's fall, thus creating issues for jury. Ledda v Minkin, 149 A.D.2d 471, 539 N.Y.S.2d 966, 1989 N.Y. App. Div. LEXIS 4616 (N.Y. App. Div. 2d Dep't 1989).

It was error to dismiss complaint for failure to present prima facie case in action for injuries sustained when plaintiff was forced to walk around parked truck blocking sidewalk and slipped on patch of ice on roadway since there was evidence that other drivers of such delivery trucks angled their cabs while parked so as not to obstruct sidewalk, that driver here could have done so as well, and that truck was parked for over 2 hours while it was being unloaded by driver alone; long-standing common law and statutory privilege of property owner to block adjoining sidewalk to unload goods does not grant absolute right to obstruct sidewalk in derogation of rights of pedestrians, and thus it was for jury to determine whether obstruction of sidewalk was necessary and reasonable. Fleischer v White Rose Food Corp., 152 A.D.2d 489, 543 N.Y.S.2d 456, 1989 N.Y. App. Div. LEXIS 10299 (N.Y. App. Div. 1st Dep't 1989).

Property owners were not entitled to judgment at close of plaintiff's case in action for injuries sustained in fall on public sidewalk where evidence, including that of expert, could have led rational jury to conclude that it was owners who negligently repaired sidewalk in front of their residence on which plaintiff was injured. Xenakis v Vorilas, 166 A.D.2d 586, 560 N.Y.S.2d 872, 1990 N.Y. App. Div. LEXIS 12704 (N.Y. App. Div. 2d Dep't 1990).

In action by plaintiff who was injured when she fell on sidewalk at point where cement portion ended and dirt portion commenced, it was error to grant city's request to dismiss complaint at close of evidence for failure to establish prima facie case that defect existed which city failed to repair, where notices sent by city to owner of abutting premises prior to accident, indicating that violation existed and directing owner to "install sidewalk where necessary," established that city had actual notice of condition complained of. Shiebler v City of New York, 208 A.D.2d 709, 617 N.Y.S.2d 497, 1994 N.Y. App. Div. LEXIS 9964 (N.Y. App. Div. 2d Dep't 1994).

Court properly dismissed complaint as matter of law where evidence at close of plaintiff's direct case failed to show that defendants, landowner and tenant of premises adjacent to public sidewalk on which plaintiff fell, came within any exception to general rule of non-liability to pedestrian injured by defect in public sidewalk. Strauss v Tam Tam Inc., 231 A.D.2d 564, 647 N.Y.S.2d 110, 1996 N.Y. App. Div. LEXIS 9246 (N.Y. App. Div. 2d Dep't 1996).

Issue of fact existed as to whether owner of premises abutting private street had constructive notice of "messy" condition of street due to repaving project, and whether city and county had created condition, and thus owner, city and county were not entitled to judgment as matter of law at close of plaintiff's case, where plaintiff deliveryman testified that he fell due to such condition, and that he had noticed condition several days before accident. Around the Clock Delicatessen v Larkin, 232 A.D.2d 514, 648 N.Y.S.2d 678, 1996 N.Y. App. Div. LEXIS 10447 (N.Y. App. Div. 2d Dep't 1996).

Court should have granted defendant city's motion for judgment as matter of law made at close of evidence where evidence did not show that city created defect through affirmative negligence, or that city made special use of sidewalk, any notice to city provided by inspection of plumbing inspector, whether actual or constructive, was insufficient as matter of law to overcome requirement of prior written notice, and it was undisputed that city never received prior written notice. Passaro v City of Newburgh, 272 A.D.2d 385, 707 N.Y.S.2d 224, 2000 N.Y. App. Div. LEXIS 5053 (N.Y. App. Div. 2d Dep't 2000).

Defendant, New York City, should have been granted summary judgment where plaintiffs conceded at trial that defendant did not have prior written notice of defect as required by NYC Admin Code § 7-201, plaintiffs failed to show when defect arose or when walkway was constructed, and there was no evidence that defect arose when walkway was constructed, or that walkway, when constructed, did not comply with established engineering practices. Arias v City of New York, 284 A.D.2d 354, 725 N.Y.S.2d 394, 2001 N.Y. App. Div. LEXIS 6047 (N.Y. App. Div. 2d Dep't 2001).

It was proper to deny defendant city's motion for judgment as matter of law, even though city argued that it had not received prior written notice of actual defect that caused plaintiff's accident, where plaintiff, although having testified that she fell as result of hole in sidewalk, also described defect as "big crack about a yard long," with deeper hole in center; whether such defect was same "extended section of uneven sidewalk" of which city received prior written notice as described in "pothole map" was fact issue for jury's resolution. Patane v City of New York, 284 A.D.2d 513, 727 N.Y.S.2d 114, 2001 N.Y. App. Div. LEXIS 6801 (N.Y. App. Div. 2d Dep't 2001).

Because the evidence, including photographic exhibits of the site of the location, was sufficient to establish that a depression in a sidewalk was created by the negligence of a transit authority and its contractor, the trial court properly denied their N.Y. C.P.L.R. 4401 motion for judgment as a matter of law in a pedestrian's personal injury action. Antigua v City of New York, 52 A.D.3d 751, 860 N.Y.S.2d 626, 2008 N.Y. App. Div. LEXIS 5745 (N.Y. App. Div. 2d Dep't 2008).

Because the photographic exhibits, and the time, place, and circumstances of an accident, provided a valid line of reasoning and permissible inferences that the sidewalk defect that caused a pedestrian to trip and fall was not trivial in nature, the city was properly found 75% at fault and its N.Y. C.P.L.R. 4401, 4404(a) motions for judgment as a matter of law and to set aside the verdict were properly denied. Felix-Cortes v City of New York, 54 A.D.3d 358, 863 N.Y.S.2d 72, 2008 N.Y. App. Div. LEXIS 6434 (N.Y. App. Div. 2d Dep't 2008).

Trial court's denial of a transit authority's motion pursuant to N.Y. C.P.L.R. 4401 for judgment as a matter of law was proper in plaintiff's slip and fall case because, inter alia, according to deposition testimony of a deceased eyewitness, the ice on which plaintiff fell was present when he arrived at the scene about 15 to 30 minutes before plaintiff's accident, it extended from the subway to the curb, and it was 5 to 10 feet wide; this witness also testified that the source of the ice was a leaking standpipe near the subway wall. Properly authenticated photos taken reasonably close to the time of the accident revealed an ice patch of significant size. Villaurel v City of New York, 59 A.D.3d 709, 873 N.Y.S.2d 740, 2009 N.Y. App. Div. LEXIS 1420 (N.Y.

App. Div. 2d Dep't), app. denied, 13 N.Y.3d 704, 886 N.Y.S.2d 366, 915 N.E.2d 291, 2009 N.Y. LEXIS 3392 (N.Y. 2009).

Trial court properly denied a city's motion pursuant to N.Y. C.P.L.R. 4401 for judgment as a matter of law insofar as asserted against it at the close of evidence on the issue of liability as to an injured party's personal injury action arising from a trip and fall accident on a sidewalk owned by the city; viewing the evidence in the light most favorable to the injured, and giving the injured party the benefit of every favorable inference, there was a rational process by which the jury could have found both that the city had notice of the defect and that the defect was actionable. Viviani v City of Yonkers, 303 A.D.2d 493, 757 N.Y.S.2d 306, 2003 N.Y. App. Div. LEXIS 2346 (N.Y. App. Div. 2d Dep't 2003).

Trial court properly granted judgment as a matter of law pursuant to N.Y. C.P.L.R. 4401 to a property owner in a personal injury action; there was no rational process by which a trier of fact could have found that the property owner created or exacerbated the icy condition on a public sidewalk which caused the injured party's fall. Friedman v Stauber, 18 A.D.3d 606, 795 N.Y.S.2d 612, 2005 N.Y. App. Div. LEXIS 5308 (N.Y. App. Div. 2d Dep't 2005).

66. — —Stairs; steps

In an action to recover damages for personal injuries and the wrongful death of an elderly woman who fell down a stairway in the building in which she resided, the trial court in dismissing the complaint on the merits erroneously held that the evidence was insufficient as a matter of law to establish that the defective condition of the stairway caused the fall, even though the single witness to the event had not observed the start of the fall and thus was unable to identify the exact step from which the decedent fell, where the evidence showed that at least ten of the nineteen steps in the stairway were defective, and where the law did not require proof of causation to an unreasonable degree of certitude. Vitanza v Growth Realties, Inc., 91 A.D.2d 917, 457 N.Y.S.2d 544, 1983 N.Y. App. Div. LEXIS 16195 (N.Y. App. Div. 1st Dep't 1983).

Landlord was entitled to judgment as matter of law at close of plaintiff's evidence in action for personal injuries to tenant's employee when step collapsed while he was ascending interior stairway, where tenant had expressly covenanted in lease to make all interior repairs, tenant had in fact made repairs (including replacement of step after it was broken), and thus tenant would be deemed to have been in exclusive possession of that portion of premises where accident occurred; moreover, landlord's right of reentry as reserved in lease did not impose liability for any dangerous condition that subsequently arose, and thus could not be relied on by tenant to establish landlord's control. Gelardo v ASMA Realty Corp., 137 A.D.2d 787, 525 N.Y.S.2d 334, 1988 N.Y. App. Div. LEXIS 1970 (N.Y. App. Div. 2d Dep't 1988).

In action for injuries sustained by plaintiff when he slipped on debris allegedly left on staircase of his employer's premises by employees of defendant construction company, court erred in dismissing complaint against construction company at close of evidence on grounds that defendant had no duty to protect plaintiff from risk of harm on stairway, and had no notice of debris, since triable issue existed as to whether defendant's employees, acting within scope of their employment, created dangerous condition on stairway; if it were shown that defendant's employees created dangerous condition on stairway, notice would not have to be established as part of plaintiffs' case. Keyes v James A. Jennings Co., 150 A.D.2d 758, 542 N.Y.S.2d 209, 1989 N.Y. App. Div. LEXIS 7245 (N.Y. App. Div. 2d Dep't 1989).

Owners of office building were not entitled to judgment n.o.v. following jury verdict in favor of personal injury plaintiff, who worked in building, for damages resulting from slip and fall on indoor stairwell of building, where evidence was legally sufficient to permit trier of fact to infer that stairway was controlled by owners and invariably became littered with debris toward end of each week, that owners negligently failed to avoid creation of such dangerous condition despite actual knowledge of condition, and that such negligence was cause of plaintiff's fall and injuries; where stairwell could have been swept clean on daily basis, plaintiff was not required to prove owners' knowledge of existence of exact item of debris which caused plaintiff to fall. Weisenthal

v Pickman, 153 A.D.2d 849, 545 N.Y.S.2d 369, 1989 N.Y. App. Div. LEXIS 11569 (N.Y. App. Div. 2d Dep't 1989).

Construction supervisor, who was injured when his foot became entangled in electrical wiring in darkened stairway on premises, causing him to fall, was not entitled to directed verdict on issue of liability in action against owner of premises where there was evidence that he was examining “punch list” while walking to determine what work was left to be done; although CLS Labor § 241 imposes non-delegable duty on owners and contractors to provide safe area to perform work, plaintiff’s comparative negligence would remain as defense. McLean v Wical Realty Corp., 182 A.D.2d 554, 582 N.Y.S.2d 423, 1992 N.Y. App. Div. LEXIS 6265 (N.Y. App. Div. 1st Dep't 1992).

Motion to dismiss personal injury complaint, made at close of testimony, should have been granted where plaintiff who tripped over baseball bat on steps outside of defendants’ premises failed to make prima facie showing that defendants created condition or had actual or constructive notice of it. Palumno v Cipriano, 265 A.D.2d 538, 696 N.Y.S.2d 891, 1999 N.Y. App. Div. LEXIS 10810 (N.Y. App. Div. 2d Dep't 1999).

Out-of-possession landlord was entitled to judgment under CLS CPLR § 4401 dismissing during trial action for slip and fall on staircase by commercial tenant’s employee where employee failed to prove that landlord violated any specific statutory provision, and expert testimony attempting to prove that landlord violated NYC Admin Code § 27-375 was unavailing because that provision applies only to interior stairs, and subject staircase did not meet definition of interior stairs in NYC Admin Code § 27-232. Walker v 127 W. 22nd St. Assocs., 281 A.D.2d 539, 722 N.Y.S.2d 250, 2001 N.Y. App. Div. LEXIS 2644 (N.Y. App. Div. 2d Dep't 2001).

In a slip and fall personal injury action, a trial court erred in granting owners’ motion for judgment as a matter of law, pursuant to N.Y. C.P.L.R. 4401, where plaintiffs, an injured party and others, made out a prima facie case by presenting evidence that the owners had constructive notice of the alleged hazardous condition and thus could have been held liable because (1) the injured party was walking down a staircase when the injured party slipped and fell on water, (2) according to the injured party, the entire staircase connecting the first floor and the basement of

the premises owned by the owners and managed by the manager was covered with water, and (3) the injured party also alleged that when the injured party traversed the same staircase earlier on the day of the accident and on the previous day, it was in the same condition. Bracco v Puntillo Ltd. P'ship, 19 A.D.3d 624, 798 N.Y.S.2d 504, 2005 N.Y. App. Div. LEXIS 7282 (N.Y. App. Div. 2d Dep't 2005).

In a slip and fall personal injury action concerning a staircase, a trial court properly granted a manager's motion for judgment as a matter of law, pursuant to N.Y. C.P.L.R. 4401, where (1) the action should have been dismissed on the ground that the manager owed no duty to an injured party, (2) the service contract between the manager and the owners was not comprehensive and exclusive, and the manager did not entirely displace the owners' duty to maintain the premises in a reasonably safe condition by virtue of its limited maintenance agreement with the owners, and (3) the evidence did not establish that the manager launched an instrument of harm or that the injured party detrimentally relied on the manager's continued performance of its duties. Bracco v Puntillo Ltd. P'ship, 19 A.D.3d 624, 798 N.Y.S.2d 504, 2005 N.Y. App. Div. LEXIS 7282 (N.Y. App. Div. 2d Dep't 2005).

Where a trial court precluded an expert from testifying to "human factors" in relation to an alleged dangerous condition, precluded the expert from testifying to city building code requirements governing riser height in support of his opinion that the height of a particular riser was dangerous, and limited an injured teacher from laying a foundation for the proposed expert testimony during voir dire, the trial court abused its discretion and erred in dismissing the teacher's personal injury complaint. Wichy v City of New York, 304 A.D.2d 755, 758 N.Y.S.2d 385, 2003 N.Y. App. Div. LEXIS 4284 (N.Y. App. Div. 2d Dep't 2003).

Motion of an apartment owner and an apartment manager under N.Y. C.P.L.R. 4401 for judgment as a matter of law was improperly granted in a tenant's slip and fall suit. Evidence that six inches of snow fell on the day before the tenant slipped on wet stairs in the apartment building, that the snowfall ended 11 hours before accident, that the pavement outside was wet, and that defendants were aware that the stairs might be wet, as shown by the placement of a

floor mat in the lobby of the building, was sufficient to create a jury question on the issue of constructive notice. Kormusis v Jeffrey Gardens Apt. Corp., 31 A.D.3d 392, 817 N.Y.S.2d 655, 2006 N.Y. App. Div. LEXIS 8688 (N.Y. App. Div. 2d Dep't 2006).

67. — —Store, including supermarket

In action arising from plaintiff's slip and fall on leaf on floor of defendant's supermarket, court should have granted defense motion to dismiss complaint at close of plaintiffs' case, as any finding that leaf had been on floor for sufficient time for defendant's employees to discover and remedy it was mere speculation where, inter alia, leaf was not described by plaintiff as dirty but only as "all mushed up" by her skid, there was no proof regarding when leaf fell to floor, and proof established that area had been checked by defendant's employees 3 hours before plaintiff's fall and was clean and dry immediately after her fall. Kennedy v Wegmans Food Mkts., 90 N.Y.2d 923, 664 N.Y.S.2d 259, 686 N.E.2d 1353, 1997 N.Y. LEXIS 3713 (N.Y. 1997).

In action for injuries sustained when plaintiff slipped and fell on icy patch on sidewalk in front of defendant's store, it was error to direct verdict for defendant where it could reasonably be inferred that ice was residue of defendant's snow removal efforts, and question of whether defendant's employees had shoveled snow into piles at curbside, thereby creating more hazardous condition than would have obtained absent such effort, was fact issue for jury. Glick v New York, 139 A.D.2d 402, 526 N.Y.S.2d 464, 1988 N.Y. App. Div. LEXIS 3439 (N.Y. App. Div. 1st Dep't 1988).

Action by grocery store security guard, to recover for injuries sustained when he slipped on corn silk as he was walking down produce aisle, was properly dismissed at close of plaintiff's case where evidence established that floor was swept on day of accident and that store had policy that all employees had to immediately pick up any item they saw on floor, there was no testimony that debris was observed on floor by anyone prior to accident, and store's general manager testified that he had walked down aisle ½ -hour before accident without seeing

anything on floor. Johnson v Grand Union Co., 158 A.D.2d 517, 551 N.Y.S.2d 281, 1990 N.Y. App. Div. LEXIS 1780 (N.Y. App. Div. 2d Dep't 1990).

Plaintiff's conduct was neither reckless nor unforeseeable, and court properly submitted case to jury in action for injuries sustained when plaintiff entered store, walked down aisle directly ahead of entrance, found aisle blocked by workers and ladder, and instead of turning around and gaining access to rest of store by walking down other aisle, she walked across empty wooden platform 5 inches high, which was normally used to display merchandise, whereupon her heel hit edge of platform and she fell on her hands and knees. Massio v Pergament Distributors, Inc., 183 A.D.2d 755, 583 N.Y.S.2d 496, 1992 N.Y. App. Div. LEXIS 6816 (N.Y. App. Div. 2d Dep't 1992).

Court erred in granting store owner's motion to dismiss complaint at close of evidence in action for injuries sustained when plaintiff fell over raised display platform where there was evidence (1) that clothes racks were positioned closely together and around platform without discernible aisles, (2) that view of platform was obstructed by shopping cart half-full of merchandise, (3) that presence of platform was not as clearly discernible from rear as it was from front, and (4) that at best, store owner attempted to warn of platform by placing "wet floor" signs in front of it; because there was evidence to suggest that cart was placed near platform by store owner's employees, plaintiffs' failure to establish defendant's notice of its presence was not fatal to case. Thornhill v Toys "R" Us NYTEX, Inc., 183 A.D.2d 1071, 583 N.Y.S.2d 644, 1992 N.Y. App. Div. LEXIS 7171 (N.Y. App. Div. 3d Dep't 1992).

Supermarket was not entitled to directed verdict in action by plaintiff who testified that he tripped over wooden pallet in aisle, causing him to fall and hit his head, where there was testimony that pallet had merchandise on it, but was not full, and that about 2 inches around base of pallet was exposed. Grizzanto v Golub Corp., 188 A.D.2d 1015, 592 N.Y.S.2d 163, 1992 N.Y. App. Div. LEXIS 14847 (N.Y. App. Div. 4th Dep't 1992).

In action against supermarket by plaintiff who was injured while standing at end of checkout counter when he caught his foot in approximately 3-inch "toe space" gap between bagger stand

and floor, court properly submitted supermarket's third party claim to jury since proof was sufficient to establish prima facie case of strict products liability based on defective design of bagger stand where (1) it was undisputed that third party defendant designed, manufactured and sold bagger stand, which was received and installed by supermarket without any alteration or modification, and (2) plaintiff's expert testified that "toe space" design depicted in photographs, which was proximate cause of plaintiff's injury, constituted hazard which could have been easily remedied by increasing height of "toe space" or installing kickplate. De Matteo v Big V Supermarkets, 204 A.D.2d 932, 611 N.Y.S.2d 970, 1994 N.Y. App. Div. LEXIS 5648 (N.Y. App. Div. 3d Dep't 1994).

Court properly dismissed complaint at close of plaintiffs' case in action for injuries sustained in fall allegedly caused by piece of gum or candy that was stuck on floor of store where there was no evidence that defendants had actual or constructive notice of allegedly dangerous condition. Graziano v J.C. Penney Co., 205 A.D.2d 664, 614 N.Y.S.2d 300, 1994 N.Y. App. Div. LEXIS 6468 (N.Y. App. Div. 2d Dep't 1994).

Court erred in denying defendant's motion for directed verdict at close of plaintiff's case where plaintiff failed to prove that water on floor where she fell was apparent and existed for sufficient length of time prior to fall to allow defendant's employees to discover and remedy defect, and even though plaintiff showed that defendant had general awareness that water was present in front area of store when weather was inclement, she failed to prove that defendant had actual knowledge of recurring condition. Hammer v KMart Corp., 267 A.D.2d 1100, 700 N.Y.S.2d 345, 1999 N.Y. App. Div. LEXIS 13929 (N.Y. App. Div. 4th Dep't 1999), app. denied, 2000 N.Y. App. Div. LEXIS 14184 (N.Y. App. Div. 4th Dep't Mar. 29, 2000), app. denied, 95 N.Y.2d 757, 713 N.Y.S.2d 1, 734 N.E.2d 1212, 2000 N.Y. LEXIS 1764 (N.Y. 2000).

Defendant was entitled to directed verdict where injured plaintiff's testimony established that she slipped on ice patch that was neither visible nor apparent, negating defendant's constructive notice, and plaintiff also failed to present evidence that defendant had actual notice of ice patch or had caused it to form. Altro v Wal-Mart Stores, Inc., 282 A.D.2d 487, 723 N.Y.S.2d 213, 2001

N.Y. App. Div. LEXIS 3529 (N.Y. App. Div. 2d Dep't 2001), app. denied, 97 N.Y.2d 612, 742 N.Y.S.2d 604, 769 N.E.2d 351, 2002 N.Y. LEXIS 498 (N.Y. 2002).

68. Real property, damage to

Court properly dismissed claims alleging that state's negligent bridge design caused flooding of claimants' property or contributed to its severity since proof showed that (1) bridge was designed after thorough study of site and design alternatives, (2) bridge met state's standard for bridge design and was sufficent to accommodate 50-year flood, (3) state's design was equal or superior to alternatives proposed by claimant's expert, and (4) rainfall and debris accumulation during storm in question constituted unanticipated and unprecedented contingency, 100- to 500-year event, which no reasonable bridge design could accommodate. Ball v State, 134 A.D.2d 827, 523 N.Y.S.2d 3, 1987 N.Y. App. Div. LEXIS 50978 (N.Y. App. Div. 4th Dep't 1987).

Neither electric utility company nor town (as owner of electrical distribution equipment) was required to install safety fuse on customer's service line in order to fulfill their duty of reasonable care, as matter of law, and thus dismissal of customer's insurer's complaint was properly granted at close of insurer's case, even though insurer's witnesses testified that safety fuse would have alleviated potential for fire in distribution box that damaged customer's property, where box was owned and controlled by customer, there was no statute, code, rule or regulation which either mandated or recommended installation of safety fuses, and insurer failed to show that fuses were installed in other localities. Capital Mut. Ins. Co. v Niagara Mohawk Power Corp., 137 A.D.2d 877, 524 N.Y.S.2d 561, 1988 N.Y. App. Div. LEXIS 822 (N.Y. App. Div. 3d Dep't), app. denied, 71 N.Y.2d 806, 530 N.Y.S.2d 109, 525 N.E.2d 754, 1988 N.Y. LEXIS 1022 (N.Y. 1988).

Court properly dismissed, at close of plaintiff's case, negligence action to recover for property damage caused by fire where proof showed that fire was caused by intervening criminal act of arson, which was not natural, reasonably foreseeable consequence of any negligence by

defendant. East Ramapo Cent. School Dist. v Orangetown-Monsey Hebrew School, 141 A.D.2d 693, 529 N.Y.S.2d 576, 1988 N.Y. App. Div. LEXIS 7053 (N.Y. App. Div. 2d Dep't 1988).

In action by owners of waterfront property against marina, court properly dismissed causes of action for nuisance and violation of littoral rights where marina introduced evidence that its operations were reasonable and complied with all applicable statutes and regulations, and presented witnesses that refuted property owners' allegations concerning specific instances of harassment or objectionable practices at marina. Zalay v Huletts Island View Marina & Yacht Club, Inc., 148 A.D.2d 772, 538 N.Y.S.2d 352, 1989 N.Y. App. Div. LEXIS 2074 (N.Y. App. Div. 3d Dep't 1989).

In retailer's action for property damage caused by electrical fire due to explosion of circuit breaker in utility room of shopping mall, court did not err in dismissing action against defendant mall owner at close of evidence where testimony established that even diligent inspection by defendant would not have disclosed particular malfunction which occurred. Flah's, Inc. v Richard Rosette Electric, Inc., 155 A.D.2d 772, 547 N.Y.S.2d 935, 1989 N.Y. App. Div. LEXIS 14217 (N.Y. App. Div. 3d Dep't 1989).

Owners of cooperative apartment failed to establish prima facie case of violation of CLS Mult D § 78, despite evidence that leaking water damaged unit, since proof that sums were expended to replace cabinets, windows and flooring was not specific as to amount claimed for each item, nor did plaintiffs establish that work done was reasonably necessary to repair premises, as opposed to enhancing unit with better and more expensive materials in connection with its forthcoming sale. Halkedis v Two East End Ave. Apartment Corp., 161 A.D.2d 281, 555 N.Y.S.2d 54, 1990 N.Y. App. Div. LEXIS 5080 (N.Y. App. Div. 1st Dep't), app. denied, 76 N.Y.2d 711, 563 N.Y.S.2d 767, 565 N.E.2d 516, 1990 N.Y. LEXIS 3439 (N.Y. 1990).

In action for damages arising out of alleged contamination of plaintiff's well from pile of salt on defendant's property, it was error to dismiss complaint on ground that plaintiff failed to establish that salt in defendant's pile was of same variety as that found in plaintiff's well, where plaintiff's experts testified that defendant's method of storing salt allowed it to dissolve into soil, that there

were no other sources of salt to contaminate plaintiff's well, and that general flow of subterranean waters was from salt pile to plaintiff's well, and plaintiff testified that her water was salty. Flick v Town of Steuben, 199 A.D.2d 970, 605 N.Y.S.2d 602, 1993 N.Y. App. Div. LEXIS 12549 (N.Y. App. Div. 4th Dep't 1993).

Seller of real property established prima facie case of malicious prosecution on part of prospective buyers where buyers failed to appear at closing, seller declared default and retained down payment, and buyers commenced actions and filed 2 notices of pendency which prevented seller from contracting with second purchaser for price substantially higher than price at which property was ultimately sold; prospective buyers acted without probable cause, despite their desire to conduct test borings in basement and contract's clause requiring that seller would "cooperate prior to closing in the filing of any alteration plans," since contract was silent as to test borings, and buyers knew that seller would not permit them to conduct such tests for fear of irreparable damage. Jackson v Kessner, 225 A.D.2d 403, 640 N.Y.S.2d 4, 1996 N.Y. App. Div. LEXIS 2704 (N.Y. App. Div. 1st Dep't 1996).

County Court erred in reversing City Court's judgment on ground that plaintiffs failed to present expert testimony on issue of whether defendants, as professional engineers, had exercised appropriate skill and care required for structural inspection where instant case did not involve latent defect, discoverable only by professional analysis or testing, plaintiffs presented evidence that roof leak was patent defect, discoverable by observing that which was readily observable, and jury did not need either specialized knowledge or expert opinion to determine whether defendants breached their duty to exercise reasonable care when they reported roof in excellent condition despite existence of readily observable indications of substantial leak. Kohl v Green, 235 A.D.2d 671, 651 N.Y.S.2d 744, 1997 N.Y. App. Div. LEXIS 115 (N.Y. App. Div. 3d Dep't), app. dismissed, 89 N.Y.2d 1025, 657 N.Y.S.2d 595, 679 N.E.2d 1075, 1997 N.Y. LEXIS 494 (N.Y. 1997).

Court improperly granted plaintiff's motion for directed verdict on her title claim where deed description was ambiguous, and evidence as to parties' actual intent was equivocal.

Wintemberg v Kowal, 235 A.D.2d 999, 653 N.Y.S.2d 178, 1997 N.Y. App. Div. LEXIS 760 (N.Y. App. Div. 3d Dep't 1997).

Court erred in dismissing plaintiffs' cancerphobia actions where they established prima facie case by presenting evidence from various experts that each plaintiff had been exposed to carcinogens emanating from town's landfill and that, to reasonable degree of medical certainty, plaintiffs had "likelihood" of contracting cancer as result of their exposure to contaminants from landfill; further, court erred in striking testimony of plaintiffs' experts as to emotional harm to plaintiffs and need for future medical monitoring. Dangler v Town of Whitestown, 241 A.D.2d 290, 672 N.Y.S.2d 188, 1998 N.Y. App. Div. LEXIS 4966 (N.Y. App. Div. 4th Dep't 1998).

Court erred in granting town's motion for directed verdict, striking claimants' appraisal, and dismissing condemnation proceeding at close of claimants' case; there is constitutional mandate on court to give just and fair compensation for any property taken. Town of Cheektowaga v Starlite Builders, 247 A.D.2d 933, 668 N.Y.S.2d 973, 1998 N.Y. App. Div. LEXIS 1316 (N.Y. App. Div. 4th Dep't 1998).

Restrictive covenant contained in deed and stating "THAT the land herein granted and conveyed shall be used for residential purposes only and that no building or structure of any kind whatsoever shall be erected thereon, except the buildings now erected upon the premises may be restored, or replaced with similar buildings," was valid where plaintiff, who sought declaration that covenant was unenforceable, failed to prove that covenant was of no substantial benefit to defendants, that it was onerous to her property, or that its purpose was incapable of being accomplished because of changed conditions. Hoffman v Lang, 251 A.D.2d 292, 674 N.Y.S.2d 385, 1998 N.Y. App. Div. LEXIS 6313 (N.Y. App. Div. 2d Dep't 1998), app. denied, 92 N.Y.2d 819, 685 N.Y.S.2d 421, 708 N.E.2d 178, 1999 N.Y. LEXIS 2053 (N.Y. 1999).

In action for judgment declaring ownership of property by adverse possession, defendant was not entitled to judgment at close of plaintiff's case where plaintiff made requisite showing that her possession was hostile and under claim of right, actual, open, notorious, exclusive, and continuous for statutory period; she was not required to show enmity or specific acts of hostility.

Greenberg v Sutter, 257 A.D.2d 646, 684 N.Y.S.2d 571, 1999 N.Y. App. Div. LEXIS 604 (N.Y. App. Div. 2d Dep't 1999).

Defendants, who leased commercial space in their building to plaintiff, should have been granted judgment at close of plaintiff's case where fire department's report attributed cause of fire which damaged plaintiff's inventory to malfunction in defendants' oil furnace, located in basement of building beneath plaintiff's store, and there was no evidence that defendants received notice prior to fire of defective condition in furnace. Keizer v D'Agostino, 272 A.D.2d 447, 708 N.Y.S.2d 335, 2000 N.Y. App. Div. LEXIS 5553 (N.Y. App. Div. 2d Dep't 2000).

In action to quiet title by adverse possession to strip of land between plaintiffs' deed line and retaining wall, court erred in dismissing complaint at close of plaintiffs' case on ground that parties were mutually mistaken as to true location of their common boundary line, since possession of land either inadvertently or by mistake may form basis for claim of adverse possession, and hostility would be presumed if use was open, notorious and continuous for full 10-year statutory period. Fatone v Vona, 287 A.D.2d 854, 731 N.Y.S.2d 521, 2001 N.Y. App. Div. LEXIS 9750 (N.Y. App. Div. 3d Dep't 2001).

Motion for dismissal filed by the city on the property owners' claim that a city map showing a widening of their street precluded the owners from selling their home was granted, without prejudice, because the owners had not offered evidence of any attempts to sell their home that had not been successful because of the city's conduct. Royal v City of New York, 822 N.Y.S.2d 427, 13 Misc. 3d 1095, 236 N.Y.L.J. 70, 2006 N.Y. Misc. LEXIS 2915 (N.Y. Sup. Ct. 2006).

69. —Flooding

Defendants were entitled to dismissal of complaint at close of plaintiffs' case in action allegedly arising out of past and continued damage to undeveloped area at rear of plaintiffs' adjoining property from flow and collection of surface water caused when large quantity of fill was added to defendant's land, which reversed relative elevation of 2 properties, since there was no evidence that defendants used pipes, drains or any other artificial means to divert water onto

plaintiffs' land, and defendants' reason for adding fill to their land was good faith effort to stop water from accumulating on their property and to eliminate dandelions and mosquitoes. Archambault v Knost, 132 A.D.2d 909, 518 N.Y.S.2d 243, 1987 N.Y. App. Div. LEXIS 49366 (N.Y. App. Div. 3d Dep't 1987).

Contractor was entitled to dismissal of negligence claim in which owner of adjoining building alleged that construction of parking lot caused rainfall to collect in its basement, despite owner's attempt at trial to prove that parking lot's gravel bed had created "bathtub effect" which caused water problem, where owner offered no evidence that water which collected in gravel actually seeped into basement. Dismissal of complaint as to contractor at close of plaintiff's evidence did not prejudice building wrecker in defending itself against plaintiff's claim that wrecker and contractor had negligently constructed parking lot (which caused rainwater to seep into plaintiff's basement) where wrecker was permitted to introduce evidence that contractor had negligently created "bathtub effect" when it installed lot's gravel bed. Div-Com, Inc. v F.J. Zeronda, Inc., 136 A.D.2d 844, 523 N.Y.S.2d 687, 1988 N.Y. App. Div. LEXIS 456 (N.Y. App. Div. 3d Dep't 1988).

In consolidated actions against city by public benefit nonprofit organization which supplied water on wholesale basis to village and other entities to recover costs incurred in repeatedly repairing and eventually relocating water transmission main which it alleged was damaged by city's negligence and trespass, city was entitled to dismissal of complaints at close of evidence since plaintiff failed to establish identity of person or entity who filled in land above water main. Westchester Joint Water Works v Yonkers, 155 A.D.2d 534, 547 N.Y.S.2d 392, 1989 N.Y. App. Div. LEXIS 14283 (N.Y. App. Div. 2d Dep't 1989).

In action against city for damage to plaintiff's property, allegedly caused by flooding when natural waterway used as part of municipal drainage system overflowed its banks on 2 separate occasions, city was entitled to judgment as matter of law at close of plaintiff's case where there was insufficient proof that debris causing first flood accumulated because of any negligence by city, and there was no evidence of any negligence by city that contributed to collapse of dam

which caused second flood. Walter Legge Co. v City of Peekskill, 210 A.D.2d 317, 619 N.Y.S.2d 771, 1994 N.Y. App. Div. LEXIS 12601 (N.Y. App. Div. 2d Dep't 1994).

Trial court properly granted a directed verdict to a city, pursuant to N.Y. C.P.L.R. 4401, and dismissed a church's negligence action, arising from the church's allegations that the city failed to find the source of contaminated sewage water that had leaked into its basement, and had failed to eradicate the problem, as the church did not meet its burdens of proof to show that the city committed negligence; the church had refused to allow the city to enter its premises in order to seal a stone structure that was acting as a conduit for the water to come into the basement from a sewer line, and after the action was commenced, the church did allow the city to seal the structure, which immediately cured the problem. Holy Temple First Church of God in Christ v City of Hudson, 17 A.D.3d 947, 794 N.Y.S.2d 465, 2005 N.Y. App. Div. LEXIS 4485 (N.Y. App. Div. 3d Dep't 2005).

70. —Trespass

Landlord was not entitled to dismissal of action for trespass where tenant's evidence showed (1) that landlord took down signs for tenant's business, changed door locks, and removed tenant's property, (2) landlord requested that tenant remove her property, and signs were posted on premises to that effect, and (3) landlord stated that he wanted to rent to third party. Stay v Horvath, 177 A.D.2d 897, 576 N.Y.S.2d 908, 1991 N.Y. App. Div. LEXIS 15067 (N.Y. App. Div. 3d Dep't 1991).

Trespass claim against railroad corporation arising from presence of railroad ties on plaintiff's property was properly dismissed at close of plaintiff's case where there was uncontradicted proof that codefendant purchased railroad ties pursuant to track removal contract prior to placing ties on plaintiff's property, and that railroad corporation had no involvement in placement of ties on plaintiff's property. River Valley Assoc. v Conrail, 182 A.D.2d 974, 581 N.Y.S.2d 935, 1992 N.Y. App. Div. LEXIS 5735 (N.Y. App. Div. 3d Dep't 1992).

Actionable trespass occurred where defendant installed catch basins along road and directed water so collected onto plaintiff's property. Dellaportas v County of Putnam, 240 A.D.2d 358, 658 N.Y.S.2d 116, 1997 N.Y. App. Div. LEXIS 5795 (N.Y. App. Div. 2d Dep't 1997).

Defendant club was entitled to dismissal of complaint during trial under CLS CPLR § 4401 where plaintiff city failed to meet its prima facie burden of proving that it owned property in question, and such ownership is essential element of both common-law trespass and violation of CLS RPAPL § 861. City of New York v Paerdegat Boat & Racquet Club, Inc., 281 A.D.2d 506, 721 N.Y.S.2d 800, 2001 N.Y. App. Div. LEXIS 2618 (N.Y. App. Div. 2d Dep't), app. denied, 97 N.Y.2d 603, 735 N.Y.S.2d 492, 760 N.E.2d 1288, 2001 N.Y. LEXIS 3337 (N.Y. 2001).

Trial court properly denied defendants' motion for judgment as a matter of law with regard to a volunteer fire association's claims for trespass and private nuisance because the evidence supported the conclusion that defendants performed work outside of the boundaries of a municipal right-of-way, causing damage to, and depriving the association of the use and enjoyment of its property. Volunteer Fire Assn. of Tappan, Inc. v County of Rockland, 101 A.D.3d 853, 956 N.Y.S.2d 102, 2012 N.Y. App. Div. LEXIS 8450 (N.Y. App. Div. 2d Dep't 2012).

71. Sports and games, generally

In action for injuries sustained during basketball game, court properly granted defense motion for non-suit at close of plaintiff's case where plaintiff assumed risk of injury by playing basketball on gymnasium floor simultaneously used by others for practice. Speigel v Jewish Community Center, 24 A.D.2d 926, 264 N.Y.S.2d 771, 1965 N.Y. App. Div. LEXIS 2935 (N.Y. App. Div. 3d Dep't 1965).

In action against county for injuries to child resulting from accident at county park which occurred while child, who was sliding down hill on "saucer," was struck by 3 boys sliding on large inner tube, it was error for court to dismiss complaint at close of plaintiffs' case on ground that they failed to establish inadequate supervision because they failed to show "notice and knowledge of ultra-hazardous activity," since (1) county maintained hills for sliding, invited public

participation, and provided supervision, and thus had duty to furnish adequate supervision, (2) jury could have found that adequate supervision would have prevented accident, and (3) evidence indicated that park supervisor realized danger if several children were to slide down together on one inner tube, that 3 boys had descended hill on one inner tube at least once before, and that supervisor was normally stationed at top of hill to see that sliders did not go down at same time. Noeller v County of Erie, 145 A.D.2d 919, 535 N.Y.S.2d 854, 1988 N.Y. App. Div. LEXIS 13935 (N.Y. App. Div. 4th Dep't 1988).

No rational basis existed for jury to find that school district was negligent in supervision of student injured while sledding on hill located on school premises during his scheduled recess period, and thus court properly granted district's motion to dismiss complaint at close of evidence, where (1) student was 17 years old, (2) he was properly using sled made for that purpose on hill without dangerous condition, (3) although commonly done, there had been no reports of prior injuries on hill, (4) sledding was forbidden during school hours to prevent classroom distractions, but there was no prohibition against sledding on hill after school hours, and (5) student made 5 or 6 more runs after being instructed to stop by teacher whose class was being distracted. Gattyan v Scarsdale Union Free School Dist., 152 A.D.2d 650, 543 N.Y.S.2d 732, 1989 N.Y. App. Div. LEXIS 10302 (N.Y. App. Div. 2d Dep't 1989).

Court erred in granting city's motion at close of plaintiffs' case dismissing action against city for failure to provide cushioned surface beneath park playground slide where evidence was presented regarding existence of city specification calling for 1 ½ inches of padding under playground and whether city complied with that standard. Rosario v New York, 157 A.D.2d 467, 549 N.Y.S.2d 661, 1990 N.Y. App. Div. LEXIS 70 (N.Y. App. Div. 1st Dep't 1990).

Court erred in dismissing action for injuries sustained by tennis player, who slipped and fell on "Har-tru" surface of defendant's tennis court while moving to his left to attempt backhand, where (1) player established that mossy condition and leaves existed on court in area of his fall, as demonstrated by green stains on his shorts shortly after fall, (2) witness testified that he observed skid marks in mossy area of player's fall, (3) player's expert opined that tennis court in

question had not been properly maintained, and (4) although there was some evidence to indicate that “Har-tru” surface was constructed so as to provide players with “great deal of slide,” and player was unaware of exact cause of his fall, there was sufficient circumstantial evidence from which jury could reasonably infer that moss and leaves on court proximately caused fall. Secof v Greens Condominium, 158 A.D.2d 591, 551 N.Y.S.2d 563, 1990 N.Y. App. Div. LEXIS 1955 (N.Y. App. Div. 2d Dep't 1990).

In action for injuries sustained when plaintiff dove into pool, court properly dismissed complaint at close of plaintiff’s case since there was no duty to warn plaintiff of obvious dangers of diving into pool given that cursory visual inspection would have revealed that pool was above ground and only 4 feet deep. Von Bartheld v Marathon Org., Inc., 190 A.D.2d 667, 593 N.Y.S.2d 290, 1993 N.Y. App. Div. LEXIS 854 (N.Y. App. Div. 2d Dep't), app. denied, 81 N.Y.2d 711, 600 N.Y.S.2d 442, 616 N.E.2d 1104, 1993 N.Y. LEXIS 1816 (N.Y. 1993).

Court erred in dismissing complaint against owner and operator of playground where court improperly precluded expert testimony as to duty of using and benefit to be gained by use of resilient material around base of slide; owner need not have been negligent in causing child to fall from slide to have been found negligent in failing to conform to its duty to make playground safe for its intended users, and expert testimony sought to address such issue, which was of technical nature and relevant to owner’s negligence. Reale v Herco, Inc., 231 A.D.2d 619, 647 N.Y.S.2d 533, 1996 N.Y. App. Div. LEXIS 9440 (N.Y. App. Div. 2d Dep't 1996).

Court erred in directing verdict in favor of contractor, which built catch basin during prior summer as part of renovation of city golf course, in action for injuries sustained when plaintiff collided with catch basin during run down hill on toboggan where there was conflicting evidence as to whether contractor conformed to contract specifications to seed and plant grass to prevent erosion gullies from forming. English v City of Albany, 235 A.D.2d 977, 652 N.Y.S.2d 873, 1997 N.Y. App. Div. LEXIS 740 (N.Y. App. Div. 3d Dep't 1997).

Plaintiff, who was injured when he tripped over cement mound while playing basketball at night on unlit city court, assumed all risks inherent in such activity, including his inability to detect what

would otherwise be open and obvious condition; thus, court should granted city's motion for judgment as matter of law at close of evidence. Welch v Board of Educ., 272 A.D.2d 469, 707 N.Y.S.2d 506, 2000 N.Y. App. Div. LEXIS 5562 (N.Y. App. Div. 2d Dep't 2000).

Supreme court erred in denying plaintiff's motion for a directed verdict, N.Y. C.P.L.R. 4401, at the close of the evidence on the ground that plaintiff assumed the risk of a collision with another skier. A participant in a sport would not be deemed to have assumed the risks of reckless or intentional conduct, but such conduct was defined as the conscious or intentional doing of an act of an unreasonable character in disregard of a known or obvious risk so great as to make it highly probable that harm would follow, and done with conscious indifference to the outcome; viewing the evidence presented in a light most favorable to plaintiff, there was no rational process by which the jury could have found that the collision was caused by conduct on the part of defendant that fell within that definition. De Angelis v Protopopescu, 37 A.D.3d 1178, 829 N.Y.S.2d 790, 2007 N.Y. App. Div. LEXIS 1174 (N.Y. App. Div. 4th Dep't 2007).

Appeals court concluded that, viewing the evidence in the light most favorable to the plaintiffs (whose child was injured in a playground "jungle gym" fall after being pushed by another child), there was simply no valid line of reasoning and permissible inferences which could possibly lead rational people to the conclusion that the board's supervision was inadequate or that the board's conduct was the proximate cause of the happening of the accident. Francisquini v N.Y. City Bd. of Educ., 305 A.D.2d 455, 759 N.Y.S.2d 535, 2003 N.Y. App. Div. LEXIS 5380 (N.Y. App. Div. 2d Dep't 2003).

72. —At school; school-sponsored

Testimony of student's expert and orthopedic surgeon that shoulder pads serve to decrease potential for shoulder injuries was sufficient to allow jury to conclude that private school's failure to so equip student during intramural tackle football game held at school was proximate cause of student's dislocated shoulder; although neither witness could confirm that shoulder pads would have prevented injury, likelihood of injury was greater because of lack of protective gear.

Locilento v John A. Coleman Catholic High School, 134 A.D.2d 39, 523 N.Y.S.2d 198, 1987 N.Y. App. Div. LEXIS 50863 (N.Y. App. Div. 3d Dep't 1987).

School district was entitled to dismissal of negligence action at close of plaintiff's evidence where plaintiff, who was student injured in game of girls' flag football, testified that, when player on opposing team reached across to plaintiff's left side to grab her flag, 2 players collided and plaintiff flipped over opposing player; there was no rational basis on which jury could find that school district was negligent in supervising or instructing players given fact that game of flag football does not involve physical contact between players. Buckvar v Syosset Cent. School Dist., 148 A.D.2d 409, 538 N.Y.S.2d 563, 1989 N.Y. App. Div. LEXIS 2446 (N.Y. App. Div. 2d Dep't 1989).

Action against board of education for injuries sustained by student, who was allegedly compelled to perform gymnastic exercise, was properly dismissed at close of plaintiffs' opening statement since (1) plaintiffs' notice of claim and bill of particulars did not sufficiently apprise board of assertion by plaintiffs' attorney that plaintiffs had cause of action sounding in negligent supervision, and (2) to permit negligent supervision cause of action would have required board to reorient its defense 5 ½ years after accident occurred. Also, properly dismissed at close of plaintiffs' opening statement for failure to establish prima facie case of negligence where (1) plaintiffs' attorney conceded that teacher who allegedly caused accident was qualified, (2) student had performed exercise at least once before, and thus there was no showing that teacher should have known or foreseen existence of special danger, and (3) plaintiffs had ample opportunity to correct or expand on contents of their opening statement before dismissal was granted. Fuller by Fuller v New York City Bd. of Educ., 206 A.D.2d 452, 614 N.Y.S.2d 557, 1994 N.Y. App. Div. LEXIS 7480 (N.Y. App. Div. 2d Dep't 1994), app. denied, 89 N.Y.2d 810, 656 N.Y.S.2d 738, 678 N.E.2d 1354, 1997 N.Y. LEXIS 262 (N.Y. 1997).

Court properly dismissed complaint in action for injuries sustained when plaintiff was hit in eye by baseball while pitching batting practice for high school baseball team where he acknowledged that he was aware of risks involved in playing baseball, he was member of his

college baseball team, and it was undisputed that he was playing with team voluntarily. Esposito v Carmel Cent. Sch. Dist., 226 A.D.2d 421, 640 N.Y.S.2d 606, 1996 N.Y. App. Div. LEXIS 3545 (N.Y. App. Div. 2d Dep't 1996).

Court properly dismissed complaint in action for injuries sustained when plaintiff was hit in eye by baseball while pitching batting practice for high school baseball team where he acknowledged that he was aware of risks involved in playing baseball, he was member of his college baseball team, and it was undisputed that he was playing with team voluntarily. Esposito v Carmel Cent. Sch. Dist., 226 A.D.2d 421, 640 N.Y.S.2d 606, 1996 N.Y. App. Div. LEXIS 3545 (N.Y. App. Div. 2d Dep't 1996).

Defendant’s motion for directed verdict was properly denied where plaintiffs offered evidence that defendants’ failure to provide and require ninth grader to where catcher’s mask during fast-pitch softball tryout session, which was inconsistent with standard athletic custom in schools throughout state, constituted breach of sound coaching practice which enhanced risk of injury normally associated with such activity. Zmitrowitz v Roman Catholic Diocese, 274 A.D.2d 613, 710 N.Y.S.2d 453, 2000 N.Y. App. Div. LEXIS 7600 (N.Y. App. Div. 3d Dep't 2000).

In a personal injury suit brought by a special education teacher against a board of education wherein the teacher was awarded damages in the amount of $512,465 as a result of incurring personal injuries when she attempted to protect one of her students from attack by another student with a history of aggressive and disruptive conduct, the trial court properly denied the board’s motion for judgment as a matter of law made at the close of the teacher’s case since the evidence established that the teacher justifiably relied on the local administrators’ reassurances that the violent student would be moved from her class promptly. Dinardo v City of New York, 57 A.D.3d 373, 871 N.Y.S.2d 15, 2008 N.Y. App. Div. LEXIS 9795 (N.Y. App. Div. 1st Dep't 2008), rev'd, 13 N.Y.3d 872, 893 N.Y.S.2d 818, 921 N.E.2d 585, 2009 N.Y. LEXIS 4144 (N.Y. 2009).

73. Other and miscellaneous

Operator of heating oil bulk storage plant established prima facie case in action to enjoin county from enforcing fire prevention ordinance, and thus Supreme Court erred in dismissing complaint at close of operator's direct case, where ordinance requiring surveillance of bulk storage plants distinguished between marine terminals and land terminals, and operator presented evidence that county's sole rationale for such distinction was its concern with substantially larger amounts of spillage possible during deliveries to plants, but ordinance required presence of watchman when no deliveries were taking place, thus offering no protection against evil which ordinance was allegedly enacted to guard against. Hawkins Cove Oil Supply Corp. v Nassau County, 127 A.D.2d 630, 511 N.Y.S.2d 656, 1987 N.Y. App. Div. LEXIS 43120 (N.Y. App. Div. 2d Dep't 1987).

Utility company was entitled to dismissal of negligence action at close of plaintiff's case, even though plaintiffs adduced sufficient proof to demonstrate that company breached duty to them to exercise reasonable care in maintenance of power lines, where there was no evidence that company's breach of duty was proximate cause of plaintiffs' alleged injuries. Covelli v Long Island Lighting Co., 133 A.D.2d 605, 519 N.Y.S.2d 634, 1987 N.Y. App. Div. LEXIS 51643 (N.Y. App. Div. 2d Dep't 1987), app. denied, 70 N.Y.2d 614, 524 N.Y.S.2d 676, 519 N.E.2d 622, 1988 N.Y. LEXIS 49 (N.Y. 1988).

Plaintiff's failure to establish prima facie case required dismissal of negligence complaint, even though he established that defendant owed him duty of care when both were cutting logs into firewood using chainsaws, where plaintiff was injured when his chain saw kicked back and he shielded his face from saw, and he failed to establish that defendant had breached his duty by causing saw to kick back. Olden v Bolton, 137 A.D.2d 878, 524 N.Y.S.2d 562, 1988 N.Y. App. Div. LEXIS 849 (N.Y. App. Div. 3d Dep't 1988).

Motion by defendant owner of apartment complex to dismiss action at close of all evidence should have been granted in suit brought by live-in superintendent for injuries she suffered when liquid shot out of plastic bottle she was handling in storage room, where superintendent did not have permission to be in storage room, owner was not shown to have knowledge of contents of

bottle, bottle was not produced as evidence, and unidentified third party had been seen handling bottle; danger to superintendent was not foreseeable and any negligence by owner or its managing agent was not proximate cause of accident. Wojcicki v Elbert Enterprises, 153 A.D.2d 481, 544 N.Y.S.2d 353, 1989 N.Y. App. Div. LEXIS 10610 (N.Y. App. Div. 1st Dep't 1989), aff'd, 75 N.Y.2d 955, 555 N.Y.S.2d 690, 554 N.E.2d 1278, 1990 N.Y. LEXIS 944 (N.Y. 1990).

In action for breach of thoroughbred racehorse syndicate agreement brought by syndicate's manager against syndicate shareholder, it was error to deny manager's motion to dismiss shareholder's counterclaim alleging that manager was negligent in failing to provide shareholder with documentation regarding recovery by shareholder of stud fee from third party, since shareholder offered no evidence at trial that third party's mare ever had live foal, which was necessary condition to recovery of fee. Gallagher's Stud, Inc. v Fishman, 156 A.D.2d 50, 553 N.Y.S.2d 561, 1990 N.Y. App. Div. LEXIS 3826 (N.Y. App. Div. 3d Dep't 1990).

Negligence complaint against railroad corporation and company that purchased railroad ties from railroad corporation, arising from presence of railroad ties on plaintiff's property, was improperly dismissed at close of plaintiff's case for failure to make out prima facie case, since plaintiff submitted evidence of railroad corporation's negligence in selling ties to party not having valid permit from Department of Environmental Conservation, and of codefendant company's negligence in method it employed to dispose of ties. River Valley Assoc. v Conrail, 182 A.D.2d 974, 581 N.Y.S.2d 935, 1992 N.Y. App. Div. LEXIS 5735 (N.Y. App. Div. 3d Dep't 1992).

Defendants, mother and father of plaintiff's ex-husband, were entitled to judgment as matter of law at close of plaintiff's case in action for negligent entrustment which arose when plaintiff lost 2 fingers while trying to remove grass catching bag from gas powered lawnmower, notwithstanding plaintiff's contention that defendants coerced her into mowing lawn as part of arrangement whereby she lived rent free in their home even though they knew that she did not know how to operate lawnmower, since lawnmower was not defective, and plaintiff had no peculiar characteristic or condition which rendered her use of lawnmower unreasonably

dangerous. Zara v Perzan, 185 A.D.2d 236, 586 N.Y.S.2d 139, 1992 N.Y. App. Div. LEXIS 8805 (N.Y. App. Div. 2d Dep't 1992).

Court erred in granting plaintiffs' motion for directed verdict on liability in action to recover damages from plaintiffs' ingestion of food cooked on grill that was mistakenly sprayed with oven degreaser instead of butter since there was question of fact for jury as to comparative negligence of plaintiffs where, while eating food, plaintiffs made several comments regarding funny taste of food but continued to eat food anyway. Klingle v Versatile Corp., 199 A.D.2d 881, 606 N.Y.S.2d 71, 1993 N.Y. App. Div. LEXIS 12459 (N.Y. App. Div. 3d Dep't 1993).

Court properly granted city's motion to dismiss complaint at conclusion of trial where there was no evidence that decedent was promised protection or that decedent requested protection from police upon learning of threat to her life; fact that decedent's employer called police about threat was insufficient absent evidence that employer received assurances from police and that those assurances were communicated to decedent who acted in reliance thereon. Greene v City of New York, 205 A.D.2d 584, 613 N.Y.S.2d 418, 1994 N.Y. App. Div. LEXIS 6180 (N.Y. App. Div. 2d Dep't), app. denied, 84 N.Y.2d 808, 621 N.Y.S.2d 517, 645 N.E.2d 1217, 1994 N.Y. LEXIS 3873 (N.Y. 1994).

Action for film royalties was properly dismissed at close of plaintiff's case where plaintiff failed to offer sufficient proof that any of films in question were specifically covered under trust agreement; court, in settling judgment, correctly dismissed claims without prejudice since disposition was based on lack of evidence which might become available in future. Raine v Viacom Int'l, 224 A.D.2d 362, 638 N.Y.S.2d 81, 1996 N.Y. App. Div. LEXIS 1483 (N.Y. App. Div. 1st Dep't 1996).

Actions for tortious interference with contract and intentional infliction of emotional distress were properly dismissed where plaintiff failed to submit sufficient evidence to show that means employed to terminate her were wrongful, or that defendants' conduct was so outrageous in character, and so extreme in degree, as to exceed all possible bounds of decency. Coclin v

Lane Press, 228 A.D.2d 359, 644 N.Y.S.2d 275, 1996 N.Y. App. Div. LEXIS 7337 (N.Y. App. Div. 1st Dep't 1996).

Court properly dismissed causes of action based on partnership theory where plaintiff's evidence that he and defendant had formed legal partnership was limited to his account of 2 brief conversations between parties, and 3 individuals with whom defendant had business relations at time in question testified that they were unaware of existence of any partnership agreement between plaintiff and defendant. Prince v O'Brien, 256 A.D.2d 208, 683 N.Y.S.2d 504, 1998 N.Y. App. Div. LEXIS 13686 (N.Y. App. Div. 1st Dep't 1998).

Defendant physician was not entitled to directed verdict on negligence cause of action where plaintiff testified that length of examination performed by defendant was 3 minutes and 22 seconds and that no medical history was taken nor meaningful physical examination performed, and jury could rationally find that medical report containing defendant's personal opinion that plaintiff's need for surgery was not related to his accident caused plaintiff to lose insurance benefits and incur damages. Finnegan v Brothman, 270 A.D.2d 808, 705 N.Y.S.2d 145, 2000 N.Y. App. Div. LEXIS 3673 (N.Y. App. Div. 4th Dep't 2000).

Plaintiff, who had been sent to roof with instructions only to check for leaks and to speak to day laborers plaintiff's employer had hired, was not acting outside scope of his employment simply because he threw chunks of ice off roof that he saw while carrying out those instructions where plaintiff's employer and building owners and managers all knew about ice removal project, which was top priority for all their employees, and plaintiff himself had spent 4 to 5 hours clearing ice from roof just 2 days before accident; thus, plaintiff was properly granted directed verdict in action under CLS Labor § 240(1). Calaway v Metro Roofing & Sheet Metal Works, Inc., 284 A.D.2d 285, 727 N.Y.S.2d 426, 2001 N.Y. App. Div. LEXIS 6687 (N.Y. App. Div. 1st Dep't 2001).

Trial court improperly set aside a jury's verdict against a contractor in an employee's suit against the contractor and a college to recover for injuries sustained on a work site, alleging that the contractor was negligent and violated N.Y. Lab. Law § 200, where the evidence showed that the contractor had actual notice of the dangerous condition and had control over the site where the

injury occurred, in that the evidence showed that the contractor had actual notice of the door's broken pane of glass, which caused the employee's injuries, more than a year before the accident. However, the trial court properly denied the college's motion to set aside the jury's verdict against it where the employee was injured as a result of the existence of a dangerous condition on the college's property, of which the college had actual or constructive notice, and thus, the college could be held liable under § 200 and common-law negligence regardless of whether it supervised the employee's work. Kerins v Vassar College, 15 A.D.3d 623, 790 N.Y.S.2d 697, 2005 N.Y. App. Div. LEXIS 2040 (N.Y. App. Div. 2d Dep't 2005).

Because the issue of an injured plaintiff's comparative fault should have been submitted to the jury, the trial court erred in granting the plaintiff's N.Y. C.P.L.R. 4401 motion for judgment as a matter of law on the issue of liability, and in finding that the plaintiff was not at fault in the happening of the accident; consequently, in the exercise of discretion under N.Y. C.P.L.R. 4404(a), a new trial on both liability and damages was granted. Sokolovsky v Mucip, Inc., 32 A.D.3d 1011, 821 N.Y.S.2d 463, 2006 N.Y. App. Div. LEXIS 11471 (N.Y. App. Div. 2d Dep't 2006).

Because a city, as the owner of the premises, could be held liable for injuries caused by a dangerous condition that it affirmatively created, its N.Y. C.P.L.R. 4401 motion for a judgment as a matter of law was properly denied; however, the award of $150,000 for the injured pedestrian's future medical expenses was excessive. Bleiberg v City of New York, 43 A.D.3d 969, 842 N.Y.S.2d 76, 2007 N.Y. App. Div. LEXIS 9853 (N.Y. App. Div. 2d Dep't 2007).

Pedestrian submitted a prima facie negligence case against a building's owner for N.Y. C.P.L.R. 4401 purposes as: (1) the pedestrian slipped in a puddle of water on the top floor of the owner's building, after which the pedestrian was wet, and there was a stain on the ceiling directly above the area where the water had pooled, (2) the pedestrian had observed a leak in the same location about a year earlier, (3) a coworker corroborated the presence of water on the floor, had observed a leak in the same area of the ceiling a few months earlier, and had advised the owner, (4) the owner was responsible for maintaining the roof of the building, and had received

a prior complaint about a leak in a different area of the roof approximately five months before the accident, and (5) nearly four inches of rain had fallen in the three days immediately preceding the accident. Robinson v 211-11 N., LLC, 46 A.D.3d 657, 847 N.Y.S.2d 599, 2007 N.Y. App. Div. LEXIS 12601 (N.Y. App. Div. 2d Dep't 2007).

In an action involving damages from a fire allegedly caused by a woodburning fireplace insert, a subrogee was not entitled to judgment as a matter of law under N.Y. C.P.L.R. § 4401 because no evidence was presented that the purchase contract for the fireplace insert included noncombustible material to be used as floor protection or that the seller agreed to extend the subrogors' hearth to fireproof the area. Preferred Mut. Ins. Co. v C. Rumbalski Chimney Sweep, 46 A.D.3d 866, 849 N.Y.S.2d 584, 2007 N.Y. App. Div. LEXIS 13339 (N.Y. App. Div. 2d Dep't 2007).

Sufficient evidence was not presented that departures by defendants, an employer and an employee, from the appropriate standard of care were a substantial factor in causing the decedent's death; thus, defendants were entitled to a N.Y. C.P.L.R. § 4401 motion for judgment as a matter of law on a wrongful death claim. Marus v Village Med., 51 A.D.3d 879, 858 N.Y.S.2d 735, 2008 N.Y. App. Div. LEXIS 4386 (N.Y. App. Div. 2d Dep't 2008), amended, 59 A.D.3d 1144, 2009 N.Y. App. Div. LEXIS 1305 (N.Y. App. Div. 2d Dep't 2009).

While the Administration for Children's Services presented a prima facie case of neglect under N.Y. Fam. Ct. Act § 1012(f)(i)(B), its motion for summary judgment should have been denied outright as untimely and procedurally improper under N.Y. C.P.L.R. 4401 irrespective of its merit, since the mother had not been given an opportunity to present a case at the fact-finding hearing. Matter of Giovanni S. (Jasmin A.), 98 A.D.3d 1054, 950 N.Y.S.2d 777, 2012 N.Y. App. Div. LEXIS 6156 (N.Y. App. Div. 2d Dep't 2012).

State was entitled to a judgment as a matter of law under N.Y. C.P.L.R. 4401 and defendant was properly committed on the issue of whether defendant was a "detained sex offender" under N.Y. Mental Hyg. Law § 10.03(g) because defendant's status as a sex offender was established by proof of defendant's conviction for first-degree sexual abuse under N.Y. Penal Law § 130.65,

which was, by definition, a “sex offense” under § 10.03(p)(1). Matter of State of New York v Geoffrey P., 100 A.D.3d 911, 954 N.Y.S.2d 601, 2012 N.Y. App. Div. LEXIS 7973 (N.Y. App. Div. 2d Dep't 2012), app. denied, 20 N.Y.3d 862, 965 N.Y.S.2d 81, 987 N.E.2d 642, 2013 N.Y. LEXIS 531 (N.Y. 2013).

Trial court properly denied the defendants' motion for judgment as a matter of law dismissing an arrestee's complaint for, inter alia, false arrest and malicious prosecution because the certificate of disposition was properly admitted as relevant to and probative of the arrestee's cause of action alleging false arrest inasmuch as that cause of action required proof that the confiner was not privileged, the evidence was admissible to refute the affirmative defense of legal justification for the arrest, the certificate of disposition was also relevant to and probative of the malicious prosecution cause of action. Gill v City of New York, 146 A.D.3d 939, 45 N.Y.S.3d 570, 2017 N.Y. App. Div. LEXIS 459 (N.Y. App. Div. 2d Dep't 2017).

Trial court erred in finding that a construction manager was at fault in the happening of an accident and in denying its motions for judgment as a matter of law and to set aside the verdict because the jury necessarily engaged in impermissible speculation where there was no rational process by which the jury could find that the manager was negligent, the owner failed to present any evidence that the use of ropes to lower a power washer was improper or that the use of other equipment could have prevented the accident, and there was no evidence that the injured workers were instructed by the manager to place the power washer on a parapet wall. Gonsalves v 35 W. 54 Gonsalves v 35 W. 54 Realty Corp., 147 A.D.3d 815, 47 N.Y.S.3d 367, 2017 N.Y. App. Div. LEXIS 961 (N.Y. App. Div. 2d Dep't 2017).

In a foreclosure action, the trial court did not err in granting plaintiff's motion, made at the close of evidence, for judgment as a matter of law because plaintiff established its standing by proof that it possessed the subject note, endorsed in blank, before it filed the lawsuit, and even considering the evidence in the light most favorable to defendant, it established that the mortgage was not satisfied and did not support defendant's theory of fraud in the factum, i.e., that he was induced to sign a deed that was entirely different than what he thought he was

signing. Countrywide Home Loans, Inc. v Gibson, 157 A.D.3d 853, 70 N.Y.S.3d 580, 2018 N.Y. App. Div. LEXIS 431 (N.Y. App. Div. 2d Dep't 2018).

Veteran failed to establish prima facie case of fraud against state based on his claim that veterans' counselor erroneously led him to believe that his application for disability benefits had been filed and rejected in 1968, and that in reliance thereon he had ceased further efforts to secure benefits until 1983, since there was no proof of scienter, and thus state's motion for dismissal at trial would be granted; counselor's failure to follow up on letter to veteran requesting that he submit certain documents, or to make further inquiry during veteran's visits, did not establish gross negligence from which scienter could be inferred, inasmuch as counselor dealt with 5,000 veterans annually. Di Maio v State, 135 Misc. 2d 1021, 517 N.Y.S.2d 675, 1987 N.Y. Misc. LEXIS 2352 (N.Y. Ct. Cl. 1987).

In action by claimant who allegedly contracted tuberculosis while incarcerated due to state's failure to correct unsanitary and poorly ventilated prison facilities, state was entitled to dismissal under CLS CPLR § 4401 where Department of Corrections had policy of mandatory tuberculosis screening for all persons under its care and custody which included protocols for dealing with inmates with positive tuberculosis test results, and claimant failed to submit evidence on which objective determination could be made that such protocols violated state constitution's prohibition against cruel and unusual punishment. De La Rosa v State, 173 Misc. 2d 1007, 662 N.Y.S.2d 921, 1997 N.Y. Misc. LEXIS 421 (N.Y. Ct. Cl. 1997).

Candidate's culpable knowledge that certain petition signatures were forgeries was insufficiently shown where the administrative record indicated that the candidate was distracted at the time the single invalid page was presented for the candidate's signature, and the candidate could reasonably have believed that the page was one already reviewed, that the candidate had simply forgotten to subscribe. McHugh v Comella, 307 A.D.2d 1069, 763 N.Y.S.2d 698, 2003 N.Y. App. Div. LEXIS 9015 (N.Y. App. Div. 3d Dep't), app. denied, 100 N.Y.2d 509, 766 N.Y.S.2d 162, 798 N.E.2d 346, 2003 N.Y. LEXIS 1805 (N.Y. 2003).

In a negligence suit against a transit authority, the authority was not entitled to judgment as matter of law on the basis of the “storm-in-progress” rule where, while the authority introduced into evidence certain climatological data indicating precipitation at certain locations at the time of the accident, a factual issue existed as to whether there was a storm in progress at the specific time and location of accident. Calix v N.Y. City Transit Auth., 14 A.D.3d 583, 789 N.Y.S.2d 219, 2005 N.Y. App. Div. LEXIS 530 (N.Y. App. Div. 2d Dep't 2005).

Trial court properly granted a board of assessment review’s motion for judgment at the close of a corporation’s proof seeking dismissal of the petitions for two tax years as the corporation failed to submit any evidence to support a claim other than a claim that its common areas had only a nominal value and a prior appellate opinion had held that the corporation could not introduce evidence that the value of the common areas was less than the corporation claimed before the board of assessment review. Matter of Radisson Community Assn., Inc. v Long, 28 A.D.3d 88, 809 N.Y.S.2d 323, 2006 N.Y. App. Div. LEXIS 1342 (N.Y. App. Div. 4th Dep't 2006).

Because there was no rational basis upon which the jury could have determined that the property was occupied by only one dwelling, the school district's motion for a directed verdict had to be granted since the homes did not fall within the statute. Because the property intersected by the boundary line was owned in common and was separate and distinct from the dwelling units, it was not encumbered by any dwellings and, even if it had been, it was encumbered not by one unit, but by 28. Palm v Tuckahoe Union Free Sch. Dist., 993 N.Y.S.2d 452, 46 Misc. 3d 358, 2014 N.Y. Misc. LEXIS 3467 (N.Y. Sup. Ct. 2014), aff'd, 141 A.D.3d 635, 36 N.Y.S.3d 178, 2016 N.Y. App. Div. LEXIS 5413 (N.Y. App. Div. 2d Dep't 2016).

ii. Insurance Matters

a. In General

74. Generally

Where insurance policy is ambiguous, and no extrinsic evidence is offered from which jury could conclude that policy should be interpreted in favor of insurer, direction of verdict in favor of insured is warranted. Tri Town Antlers Foundation, Inc. v Fireman's Fund Ins. Co., 76 N.Y.2d 841, 560 N.Y.S.2d 124, 559 N.E.2d 1283, 1990 N.Y. LEXIS 1983 (N.Y. 1990).

In an action to recover on a policy of robbery insurance, the directed verdict granted by the trial court in favor of defendant insurer would be reversed where the court had granted the insurer’s motion on the ground that, as a matter of law, the security guard who had been robbed at gunpoint while he was transporting cash and checks from plaintiff’s place of business to a local bank was not an employee of plaintiff, the insurance policy defined an employee as one who is compensated by the insured by salary, wages or commissions, subject to the insured’s right to govern and direct at all times the performance of his duties, and not a representative of a general character, and a question of fact was presented for resolution by the jury as to whether the security guard was an employee of the insured within the meaning of its policy with the insurer. Fortunoff Silver Sales, Inc. v Hartford Acci. & Indem. Co., 92 A.D.2d 880, 459 N.Y.S.2d 866, 1983 N.Y. App. Div. LEXIS 17267 (N.Y. App. Div. 2d Dep't 1983).

In an action to recover for losses under an insurance policy, the trial court’s dismissal order pursuant to CPLR § 4401 (entered after plaintiff was awarded a mistrial during presentation of defendant’s case) was premature and in error, where plaintiffs had reserved the right to reopen their case, and any inadequacies in plaintiffs’ proof could have been cured. Cass v Broome County Co-operative Ins. Co., 94 A.D.2d 822, 463 N.Y.S.2d 312, 1983 N.Y. App. Div. LEXIS 18296 (N.Y. App. Div. 3d Dep't 1983).

Insurance company was not entitled to dismissal of action to recover under automobile insurance policy where insured proffered documents showing that he was owner of automobile in question at time of accident and company failed to present evidence to rebut presumption of insured’s ownership. Contreras v Allstate Ins. Co., 125 A.D.2d 438, 509 N.Y.S.2d 566, 1986 N.Y. App. Div. LEXIS 62733 (N.Y. App. Div. 2d Dep't 1986).

Insured was not entitled to directed verdict in action to recover under homeowner's insurance policy merely because trial court, at close of evidence, dismissed insurer's affirmative defenses alleging lack of coverage based on fraud, since assertion of affirmative defense in answer preserves defendant's right to present evidence on issues raised therein but has no effect on plaintiff's burden of proof, and there were numerous issues presented to jury as to whether loss actually occurred. Palmier v United States Fidelity & Guaranty Co., 135 A.D.2d 1057, 523 N.Y.S.2d 192, 1987 N.Y. App. Div. LEXIS 52916 (N.Y. App. Div. 3d Dep't 1987).

Where insurance policy is ambiguous and no extrinsic evidence is offered from which jury could conclude that policy should be interpreted in favor of insurer, verdict in favor of insured should be directed as matter of law. Tri Town Antlers Foundation, Inc. v Fireman's Fund Ins. Co., 158 A.D.2d 908, 550 N.Y.S.2d 953, 1990 N.Y. App. Div. LEXIS 1401 (N.Y. App. Div. 4th Dep't), aff'd, 76 N.Y.2d 841, 560 N.Y.S.2d 124, 559 N.E.2d 1283, 1990 N.Y. LEXIS 1983 (N.Y. 1990).

It was error to direct verdict in favor of insured in action to recover for property damage under collision insurance provision of comprehensive automobile insurance policy where fact issues remained as to whether insured's reliance on reinstatement notice he received from insurer was reasonable and in good faith, and whether that notice was proximate cause of insured not seeking coverage elsewhere. Mooney v Nationwide Mut. Ins. Co., 172 A.D.2d 144, 577 N.Y.S.2d 506, 1991 N.Y. App. Div. LEXIS 16571 (N.Y. App. Div. 3d Dep't 1991).

Insureds were entitled to dismissal of complaint for failure to establish prima facie case that they owed any premium on policies issued to them where insurer failed to preserve most of policies' endorsements and certificates in support of its claims, and its resort to secondary source documentary evidence was unavailing. Royal Ins. Co. of Am. v Mercy Hosp., 204 A.D.2d 219, 612 N.Y.S.2d 137, 1994 N.Y. App. Div. LEXIS 5573 (N.Y. App. Div. 1st Dep't 1994), aff'd, Graubard Mollen Dannett & Horowitz v Moskovitz, 86 N.Y.2d 112, 629 N.Y.S.2d 1009, 653 N.E.2d 1179, 1995 N.Y. LEXIS 2238 (N.Y. 1995).

Court erred in directing verdict against Superintendent of Insurance, as liquidator, on 2 causes of action for fraud where (1) superintendent sufficiently showed that defendant (accounting firm)

knowingly or recklessly made material misrepresentations constituting fraud, and aided and abetted fraud by providing services that helped in commission of fraud, and (2) evidence was clear that, except for such misrepresentations as to solvency of subject insurance corporations, Department of Insurance would not have entered into settlement agreement with them. Curiale v Peat, Marwick, Mitchell & Co., 214 A.D.2d 16, 630 N.Y.S.2d 996, 1995 N.Y. App. Div. LEXIS 8864 (N.Y. App. Div. 1st Dep't 1995).

75. Fire insurance

Motion pursuant to CPLR § 4401 can be granted only if movant is entitled to it as matter of law; accordingly, in action to recover damages for breach of fire insurance policy, defendant's motion to dismiss complaint is denied since plaintiff presented enough evidence from expert witnesses to establish prima facie case as matter of law on question of damages. Gumbs v New York Property Ins. Underwriting Asso., 114 A.D.2d 933, 495 N.Y.S.2d 204, 1985 N.Y. App. Div. LEXIS 53976 (N.Y. App. Div. 2d Dep't 1985).

In action to recover damages under fire insurance policy, evidence was sufficient to establish insured's prima facie case that building was damaged beyond repair, including testimony of witness who stated that all that remained of building after fire was large pile of rubble standing approximately 3 feet high as well as certified copy of New York City Fire Department's report of fire which stated that building was lost due to spread of fire; thus, court erred in granting insurance company's motion to dismiss case at close of insured's proof. Kates Group v New York Property Ins. Underwriting Asso., 128 A.D.2d 838, 513 N.Y.S.2d 757, 1987 N.Y. App. Div. LEXIS 44526 (N.Y. App. Div. 2d Dep't 1987).

Insurance company was not entitled to directed verdict dismissing action to recover under homeowner's policy for fire loss, notwithstanding contention that homeowner failed to offer evidence of actual cash value of property at time immediately before fire or market value of property immediately after fire, since homeowner, in accordance with policy, established cost of

repairing damage to property. Bowles v Travelers Indem. Co., 149 A.D.2d 936, 540 N.Y.S.2d 69, 1989 N.Y. App. Div. LEXIS 5946 (N.Y. App. Div. 4th Dep't 1989).

Trial court properly directed verdict in favor of insured to recover under terms of fire insurance policy, even though co-insured joint owner allegedly set fire, where policy named and was intended to protect insured, and there was no showing that insured participated in alleged arson. Goldner v Kemper Ins. Co., 152 A.D.2d 936, 544 N.Y.S.2d 396, 1989 N.Y. App. Div. LEXIS 9800 (N.Y. App. Div. 4th Dep't 1989), app. denied, 75 N.Y.2d 704, 552 N.Y.S.2d 109, 551 N.E.2d 602, 1990 N.Y. LEXIS 99 (N.Y. 1990).

In action by homeowners to recover under fire insurance policy, insurance company was not entitled to dismissal at conclusion of plaintiffs' proof, on ground that proof of loss form was fraudulent because it failed to recite existing mortgage, where omitted mortgagee was carpenter who had worked on house and who was not listed as payee on insurance policy, and insurance company failed to articulate any prejudice resulting from omission; homeowners' oversight on matter could not be deemed material within meaning of CLS Ins § 3404(e). Also, insurance company was not entitled to dismissal on basis that proof of loss form was fraudulent in that it inaccurately indicated that homeowners resided at property at time of loss where, although homeowners had moved from property shortly before fire, there was evidence that move was accomplished to accommodate their work schedule and that they still considered property to be their home and returned there on weekends. Lilledahl v Insurance Co. of North America, 163 A.D.2d 696, 558 N.Y.S.2d 709, 1990 N.Y. App. Div. LEXIS 8398 (N.Y. App. Div. 3d Dep't 1990).

Court erred in dismissing insurer's affirmative defense alleging arson in action for breach of insurance contract where evidence amply supported finding that insured had financial motive for arson, and there was ample testimony that blaze was deliberately set. Ashline v Genesee Patrons Coop. Ins. Co., 224 A.D.2d 847, 638 N.Y.S.2d 217, 1996 N.Y. App. Div. LEXIS 1268 (N.Y. App. Div. 3d Dep't 1996).

In action seeking declaration that insurance policy was void due to insureds' false and fraudulent statements as to cause of fire, court properly granted insureds' motion for directed verdict given

thinness of insurer's proof on issue of motive, along with its failure to produce any evidence showing that either of insureds, or anyone who might have been acting on their behalf or at their direction, had opportunity to set fire, or was seen on or near premises on day it occurred. And re insureds' false and fraudulent statements as to amount of loss sustained, judgment directing verdict in favor of insureds would be severed and new trial granted where insurer was unduly hampered in its attempts to tender relevant and probative evidence, and proof insurer was allowed to introduce could have justified finding that insureds knowingly misrepresented condition of property prior to fire or damage they incurred. Chenango Mut. Ins. Co. v Charles, 235 A.D.2d 667, 652 N.Y.S.2d 134, 1997 N.Y. App. Div. LEXIS 99 (N.Y. App. Div. 3d Dep't 1997).

In insurer's subrogation action for property damage caused by fire, defense was not compromised by spoliation of evidence where toaster oven, which defendants claimed was alternative cause of fire, was not key piece of evidence that should have been preserved. State Farm Ins. Co. v Amana Refrigeration, Inc., 266 A.D.2d 372, 698 N.Y.S.2d 300, 1999 N.Y. App. Div. LEXIS 11544 (N.Y. App. Div. 2d Dep't 1999).

In action for breach of insurance contract, court improperly denied defendants' motion under CLS CPLR § 4401 based plaintiffs' failure to prove damages, even though plaintiffs offered evidence of cost to repair premises, where their witness also admitted that premises was not repaired, and that no repair costs were incurred, and plaintiffs presented no evidence as to pre- or post-fire value of premises; although defendants breached insurance contract provision that they would "determine the value of Covered Property in the event of loss or damage," such did not relieve plaintiffs of their burden of proving damages at trial. Alpha Auto Brokers, Ltd. v Cont'l Ins. Co., 286 A.D.2d 309, 728 N.Y.S.2d 769, 2001 N.Y. App. Div. LEXIS 7841 (N.Y. App. Div. 2d Dep't 2001).

76. Pemises insurance

Insurer offered ample proof to show that premises were destroyed under suspicious circumstances and that insured might have had motive to destroy his property, and thus insurer's affirmative defenses to action on policy should not have been dismissed, where, inter alia, insured had ostensibly gone to California on hastily arranged vacation to visit his mother (but insured admitted at trial that his mother told him before he left that she would not see him), there was no forced entry into house, neighbor observed 2 men enter and depart immediately before explosion, insured had contractual obligation to buy out his former live-in girlfriend's share of house within 9 months following time of fire, his adjusted gross income had declined substantially, and he had made numerous gambling trips. Phillips v State Farm Fire & Cas. Co., 225 A.D.2d 457, 640 N.Y.S.2d 24, 1996 N.Y. App. Div. LEXIS 2751 (N.Y. App. Div. 1st Dep't 1996).

In action on policy for loss of insured premises, insurer was barred from asserting policy language limiting replacement cost by its refusal letter repudiating policy. 438 Manhattan Ave., Inc. v Insurance Co. of Pa., 251 A.D.2d 71, 673 N.Y.S.2d 687, 1998 N.Y. App. Div. LEXIS 6502 (N.Y. App. Div. 1st Dep't 1998).

In action alleging that defendant insurance broker was negligent in procuring policy for plaintiffs which failed to cover their summer residence for damages caused by weight of accumulated ice and snow, defendant was entitled to directed verdict at close of plaintiffs' case as (1) plaintiffs did not request coverage for damage caused by weight of ice or snow and their generalized request that policy "cover them on everything" was insufficient, (2) evidence of defendant's deviation from purported industry standard of informing customers of advisability of obtaining "form two" coverage did not establish prima facie case of negligence, in absence of any showing of parties' "special relationship," and (3) plaintiffs received and reviewed subject policy prior to time of roof collapse, thereby giving them conclusive presumptive knowledge of policy's terms and limits, and defeating their action as matter of law. Catalanotto v Commercial Mut. Ins. Co., 285 A.D.2d 788, 729 N.Y.S.2d 199, 2001 N.Y. App. Div. LEXIS 7389 (N.Y. App. Div. 3d Dep't),

app. denied, 97 N.Y.2d 604, 736 N.Y.S.2d 308, 761 N.E.2d 1035, 2001 N.Y. LEXIS 3405 (N.Y. 2001).

Because a passenger failed to demonstrate that he sustained a “serious injury,” as such was defined in Insurance Law § 5102(d), and failed to present objective evidence to support a determination that he had a loss of his range of motion, the trial court erred in failing either to direct a verdict against him, or enter a judgment in favor of a trucking company notwithstanding the verdict. Parreno v Jumbo Trucking, Inc., 40 A.D.3d 520, 836 N.Y.S.2d 593, 2007 N.Y. App. Div. LEXIS 6490 (N.Y. App. Div. 1st Dep't 2007).

Because no rational jury could have found that a plaintiff sustained an injury under the “90/180 day” or “permanent consequential limitation” categories in N.Y. Ins. Law § 5102(d), the trial court erred in denying the defendant’s oral N.Y. C.P.L.R. 4401 motion for judgment as a matter of law. Hamilton v Rouse, 46 A.D.3d 514, 846 N.Y.S.2d 650, 2007 N.Y. App. Div. LEXIS 12360 (N.Y. App. Div. 2d Dep't 2007).

No rational jury could have concluded that plaintiff sustained a significant limitation of use of a body function or system from a traffic accident under N.Y. Ins. Law § 5102(d), and denial of defendant’s N.Y. C.P.L.R. 4401 motion for judgment as a matter of law was improper because plaintiff’s expert witness admittedly never recorded any range-of-motion findings, nor compared his findings to normal ranges of motion, but, rather, merely made the conclusory assertion that plaintiff suffered an approximately 30 percent limitation in various ranges of motion; further, neither plaintiff nor his expert established that the damages at issue arose from the subject accident rather than from a prior motor vehicle accident in which plaintiff sustained, inter alia, a fractured hip and herniated discs in his lumbar spine. Kilakos v Mascera, 53 A.D.3d 527, 862 N.Y.S.2d 529, 2008 N.Y. App. Div. LEXIS 6070 (N.Y. App. Div. 2d Dep't), app. denied, 11 N.Y.3d 707, 868 N.Y.S.2d 599, 897 N.E.2d 1083, 2008 N.Y. LEXIS 3269 (N.Y. 2008).

Supreme court properly denied a motion for a directed verdict filed by an injured husband and wife, on an issue of whether the wife suffered a “serious injury” as defined by N.Y. Ins. Law § 5102(d), where conflicting testimony was presented regarding the permanency and significance

of her injuries. Schmidt v Turner, 15 A.D.3d 835, 789 N.Y.S.2d 380, 2005 N.Y. App. Div. LEXIS 1143 (N.Y. App. Div. 4th Dep't 2005).

b. “Serious Injury” under Insurance Law § 5102(d)

77. Generally

In an action to recover damages for personal injuries resulting from an automobile accident in which one of the principal issues for jury determination was whether plaintiff had sustained “serious injury,” the trial court should not have directed a verdict in favor of plaintiff as a matter of law, but rather should have set the verdict aside and ordered a new trial, where the jury verdict finding that plaintiff had not “permanently lost the use of a body function” was against the weight of the evidence. Barker v Bice, 87 A.D.2d 908, 449 N.Y.S.2d 369, 1982 N.Y. App. Div. LEXIS 16432 (N.Y. App. Div. 3d Dep't 1982).

In action for injuries sustained in automobile accident, evidence was sufficient to submit claim of “serious injury” to jury where evidence at trial revealed that trauma of accident resulted in chondromalacia of plaintiff’s right knee, and plaintiff’s doctors testified that condition was permanent and that plaintiff was restricted from performing tasks that required her to bend her knee. Akin v Estate of Patti, 149 A.D.2d 964, 540 N.Y.S.2d 397, 1989 N.Y. App. Div. LEXIS 5996 (N.Y. App. Div. 4th Dep't 1989).

Defendants’ motion for dismissal of complaint—made following parties’ opening statements—was properly granted in motor vehicle accident case where plaintiff’s counsel in open court revealed contents of letter from plaintiff’s expert medical witness indicating that plaintiff did not sustain “serious injury” within meaning of CLS Ins §§ 5104(a) and 5102(d); statements of plaintiff’s counsel that expert might change his opinion at trial were highly speculative and insufficient to defeat motion, especially since expert reportedly said that he might not change his opinion at all. Henderson v Henderson, 172 A.D.2d 956, 568 N.Y.S.2d 664, 1991 N.Y. App. Div. LEXIS 4579 (N.Y. App. Div. 3d Dep't 1991).

Court properly dismissed complaint at close of defendant's case, prior to submission to jury, as plaintiffs failed to present prima facie case of "serious injury" under CLS Ins § 5102(d) where there was no definitive medical evidence that they suffered more than sprains or strains as result of car accident. Komar v Showers, 227 A.D.2d 135, 641 N.Y.S.2d 643, 1996 N.Y. App. Div. LEXIS 4743 (N.Y. App. Div. 1st Dep't 1996).

Supreme Court properly directed verdict for plaintiff that she sustained "significant disfigurement" where Appellate Division viewed photographs depicting plaintiff's scar at various times after accident, including time of trial, and agreed with Supreme Court that collision left plaintiff with facial scarring that reasonable person would regard as unattractive, objectionable, or subject of pity and scorn. Carson v De Lorenzo, 238 A.D.2d 790, 657 N.Y.S.2d 469, 1997 N.Y. App. Div. LEXIS 3944 (N.Y. App. Div. 3d Dep't), app. denied, 90 N.Y.2d 810, 666 N.Y.S.2d 99, 688 N.E.2d 1381, 1997 N.Y. LEXIS 3628 (N.Y. 1997).

Defendant was not entitled to summary judgment dismissing personal injury action on ground that plaintiff did not sustain "serious injury" under CLS Ins § 5102(d) where defendant's motion papers failed to show prima facie case that plaintiff's alleged hearing loss was not causally related to subject accident. Lubrano v Brown, 251 A.D.2d 383, 672 N.Y.S.2d 817, 1998 N.Y. App. Div. LEXIS 6627 (N.Y. App. Div. 2d Dep't 1998).

Reports prepared by 2 doctors, submitted by defendants to prove prima facie case that plaintiff had not sustained "serious injury" under CLS Ins § 5102(d), were competent evidence where they were affirmed to be true under penalty of perjury. Marin v Kakivelis, 251 A.D.2d 462, 674 N.Y.S.2d 709, 1998 N.Y. App. Div. LEXIS 6883 (N.Y. App. Div. 2d Dep't 1998).

In action based on alleged "serious injury" under CLS Ins § 5102(d), plaintiff was entitled to oppose defendants' motion for summary judgment by relying on same unsworn medical reports submitted in support of motion, even though those reports were not in admissible form. Pagels v P.V.S. Chems., 266 A.D.2d 819, 698 N.Y.S.2d 368, 1999 N.Y. App. Div. LEXIS 11825 (N.Y. App. Div. 4th Dep't 1999).

Court should have granted defendant's application for judgment as matter of law on issue of whether plaintiff had sustained "serious injury" where plaintiff testified that she missed only few days from her part-time job immediately following accident, and after leaving her part-time job at end of that summer, she began full-time job teaching elementary school while attending part-time master's program. Randazzo v Morris, 269 A.D.2d 513, 703 N.Y.S.2d 238, 2000 N.Y. App. Div. LEXIS 1974 (N.Y. App. Div. 2d Dep't 2000).

Court properly granted defendant's motion for directed verdict at close of plaintiff's proof on ground that plaintiff failed to establish prima facie case of "serious injury" under CLS Ins § 5102(d) where plaintiff's treating psychiatrist testified to objective medical findings of another physician, but he did not testify that those findings were related to motor vehicle accident approximately 2 years before those findings were made, and 2 physicians who testified that plaintiff's soft tissue injuries were caused by accident found no objective evidence to support plaintiff's subjective complaints of pain. Latiuk v Cona, 272 A.D.2d 988, 708 N.Y.S.2d 531, 2000 N.Y. App. Div. LEXIS 5132 (N.Y. App. Div. 4th Dep't 2000).

In action involving issue of whether plaintiff sustained "serious injury" under CLS Ins § 5102(d), unsworn report of plaintiff's orthopedic surgeon was properly before Supreme Court where report was submitted by defendants in support of their motion for summary judgment. Borino v Little, 273 A.D.2d 262, 709 N.Y.S.2d 575, 2000 N.Y. App. Div. LEXIS 6536 (N.Y. App. Div. 2d Dep't 2000), app. denied, 96 N.Y.2d 704, 723 N.Y.S.2d 131, 746 N.E.2d 186, 2001 N.Y. LEXIS 263 (N.Y. 2001).

Defendant failed to proved as matter of law that none of plaintiff's injuries was "serious" under CLS Ins § 5102(d) where defendant submitted contradictory proof as to whether plaintiff's cervical spine condition was caused by accident involving defendant's vehicle, prior accident, or degenerative disease. Julemis v Gates, 281 A.D.2d 396, 721 N.Y.S.2d 665, 2001 N.Y. App. Div. LEXIS 2104 (N.Y. App. Div. 2d Dep't 2001).

78. Triable issue of fact, generally

It was error to refuse defendant’s request to submit question of whether plaintiff sustained serious injury to jury as fact question, even accepting that plaintiff’s disk and cervical spine injuries were medically verified, where plaintiff’s testimony as to his physical limitations was unspecific and partially impeached, his own expert admitted that he placed no restriction on plaintiff’s activities, nor did he know of any, and testimony of defense experts strongly suggested that limitations in range of motion were not objectively verifiable and were supported only by plaintiff’s subjective expressions of pain. Noble v Ackerman, 252 A.D.2d 392, 675 N.Y.S.2d 86, 1998 N.Y. App. Div. LEXIS 8120 (N.Y. App. Div. 1st Dep't 1998).

Plaintiff raised triable issue of fact as to whether he sustained “serious injury” under CLS Ins § 5102(d) where his chiropractor stated that plaintiff suffered serious, permanent, and consequential disabling injury to his lumbosacral spine as result of his accident, he based his conclusions on several objective medical tests performed by him, including MRI, which revealed that plaintiff suffered from severe back pain and spasms from bulging disc and degenerative changes in facet joints of spine, and that injury would limit plaintiff’s ability for physical labor and recreation, including restricting him from lifting more than 25 pounds and from bending and working with arms overhead for prolonged period. Evans v Hahn, 255 A.D.2d 751, 680 N.Y.S.2d 734, 1998 N.Y. App. Div. LEXIS 11902 (N.Y. App. Div. 3d Dep't 1998).

Plaintiff raised triable issue of fact as to whether she suffered medically determined injury that prevented her from performing substantially all material acts of her usual and customary daily activities for not less than 90 days during 180 days after accident, under CLS Ins § 5102(d), where her medical proof of fibromyalgia and chronic pain syndrome was combined with evidence that injuries sustained in accident prevented her from resuming her employment, performing her household duties, and participating in recreational activities. Pagels v P.V.S. Chems., 266 A.D.2d 819, 698 N.Y.S.2d 368, 1999 N.Y. App. Div. LEXIS 11825 (N.Y. App. Div. 4th Dep't 1999).

Respondents were not entitled to summary judgment dismissing claim of “serious injury” under CLS Ins § 5102(d) where their expert concluded that plaintiff’s injuries were caused by subject

automobile accident, and same expert's conclusory assertion that limitation of motion in plaintiff's shoulder was "near normal" lacked any trace of factual support. Acevedo v Pena, 273 A.D.2d 260, 710 N.Y.S.2d 900, 2000 N.Y. App. Div. LEXIS 8214 (N.Y. App. Div. 2d Dep't 2000).

Plaintiffs did not sustain "serious injury" as triable issue of fact under CLS Ins § 5102(d) where defendants proved prima facie case through affidavits and incorporated reports of physician who examined plaintiffs and concluded that they had not sustained accident-related injury, and plaintiffs' medical evidence in opposition was insufficient to raise triable issue of fact. Sallusti v Jones, 273 A.D.2d 293, 710 N.Y.S.2d 547, 2000 N.Y. App. Div. LEXIS 6529 (N.Y. App. Div. 2d Dep't 2000).

Plaintiff failed to raise triable issue of fact as to whether his injuries prevented him from performing "substantially all" material acts of his usual and customary daily activities for at least 90 of first 180 days after accident, under CLS Ins §§ 5102(d), where plaintiff admitted in his bill of particulars that he missed only about 2 weeks of work as result of accident. Bucci v Kempinski, 273 A.D.2d 333, 709 N.Y.S.2d 595, 2000 N.Y. App. Div. LEXIS 7108 (N.Y. App. Div. 2d Dep't 2000).

Plaintiff's affidavit stating that she was unable to return to work was insufficient to create triable issue of fact as to her ability to perform substantially all of her daily activities for at least 90 of first 180 days after accident, under CLS Ins § 5102(d), absent competent evidence of medically determined injury producing alleged impairment of her activities. Welcome v Diab, 273 A.D.2d 377, 711 N.Y.S.2d 329, 2000 N.Y. App. Div. LEXIS 7071 (N.Y. App. Div. 2d Dep't 2000).

Defendants were not entitled to summary judgment dismissing personal injury action, on ground that plaintiff did not sustain "serious injury" under CLS Ins § 5102(d), where MRI report on plaintiff's lumbosacral spine showed disc herniations at L4-5 and L5-S1, and defendants failed to show that those herniations were not causally related to subject accident. Caulfield v Metten, 275 A.D.2d 758, 713 N.Y.S.2d 551, 2000 N.Y. App. Div. LEXIS 9366 (N.Y. App. Div. 2d Dep't 2000).

79. —Facial disfigurement

Plaintiff made out prima facie case that disfigurement of his face was "significant" where his physician testified that line-shaped scar under his right eye was "deeply discolored" and that 1/3-inch scar on his nose was somewhat "thickened," that scars had assumed their "permanent or definitive configuration," and that "no treatment . . . could accomplish any significant improvement in the appearance of these two lesions." Abdulai v Roy, 232 A.D.2d 229, 647 N.Y.S.2d 778, 1996 N.Y. App. Div. LEXIS 10025 (N.Y. App. Div. 1st Dep't 1996).

Plaintiff raised triable issue of fact as to whether her injuries were serious where report prepared by her treating orthopedist indicated decreased range of motion in plaintiff's neck, and report of her treating dentist revealed that plaintiff was limited in her ability to open her mouth. Mastromonica v Conklin, 246 A.D.2d 581, 667 N.Y.S.2d 281, 1998 N.Y. App. Div. LEXIS 403 (N.Y. App. Div. 2d Dep't 1998).

80. —Movement limitation

Although defendants made out prima facie case that plaintiff had not sustained "serious injury" under CLS Ins § 5102(d), doctor's medical affidavit presented by plaintiff raised triable issue of fact as to whether plaintiff met that statutory threshold where medical affidavit provided objective evidence of extent or degree of limitation of movement in plaintiff's cervical and lumbar spines. Carucci v Tzimopoulos, 238 A.D.2d 459, 657 N.Y.S.2d 921, 1997 N.Y. App. Div. LEXIS 4032 (N.Y. App. Div. 2d Dep't 1997).

Plaintiff proved prima facie case of "serious injury" under CLS Ins § 5102(d) where she presented affidavit of physician who concluded, from examining plaintiff and reviewing her medical records, that she had restricted motion of her lumbosacral spine of 35 to 40 degrees and that such limitation of movement was significant and permanent. Grullon v Chang Ok Chu, 240 A.D.2d 367, 657 N.Y.S.2d 776, 1997 N.Y. App. Div. LEXIS 5814 (N.Y. App. Div. 2d Dep't 1997).

Taxicab passenger raised triable issue of fact as to whether she suffered “serious injury” under CLS Ins § 5102(d) where her affirmations specified extent of her injury, and affidavit of her treating physician specifically indicated extent of her limitation, describing “permanent” spinal injury that prevented plaintiff from moving her neck “to the full range of what is normal.” Assiakoley v Irvin, 245 A.D.2d 8, 665 N.Y.S.2d 640, 1997 N.Y. App. Div. LEXIS 11996 (N.Y. App. Div. 1st Dep't 1997).

Woman struck by bus proved prima facie case of “serious injury” under CLS Ins § 5102(d) where her submissions included her doctor’s findings of range-of-motion limitations based on examination, X-ray, and detailed observations. Bitici v New York City Transit Auth., 245 A.D.2d 157, 666 N.Y.S.2d 188, 1997 N.Y. App. Div. LEXIS 13113 (N.Y. App. Div. 1st Dep't 1997).

Doctor’s findings regarding straight-leg raising tests that plaintiff underwent raised triable issue of fact as to whether she sustained “significant limitation of use of a body function or system” and thus as to whether she sustained “serious injury” under CLS Ins § 5102(d). O'Dol v Malley, 245 A.D.2d 436, 667 N.Y.S.2d 274, 1997 N.Y. App. Div. LEXIS 14143 (N.Y. App. Div. 2d Dep't 1997).

Plaintiff raised triable issue of fact as to whether she sustained “serious injury” under CLS Ins § 5102(d) where affidavit and supplemental report sworn to by her treating chiropractor provided objective evidence of extent or degree of limitation of use of her cervical spine. Jackson v Sorto, 245 A.D.2d 546, 666 N.Y.S.2d 727, 1997 N.Y. App. Div. LEXIS 13363 (N.Y. App. Div. 2d Dep't 1997).

Considering that plaintiff had burden of proving that she sustained “serious injury” under CLS Ins § 5102(d), and that jury was entitled to reject expert opinion as to permanency of her injuries in motor vehicle accident, plaintiff was not entitled to directed verdict on issue of serious injury, even though defendants produced no expert evidence, where testimony of plaintiff’s physicians concerning her limitations and permanence of her symptoms was sufficiently equivocal to allow varying inferences. Cooper-Fry v Kolket, 245 A.D.2d 846, 666 N.Y.S.2d 775, 1997 N.Y. App. Div. LEXIS 13195 (N.Y. App. Div. 3d Dep't 1997).

Plaintiff raised triable issue of fact as to whether, under CLS Ins § 5102(d), she suffered from medically determined nonpermanent injury that prevented her from performing substantially all material acts of her usual daily activities for at least 90 of 180 days immediately after her injury in September accident where her chiropractor, after initially treating her on September 23, diagnosed her as having “sustained whiplash syndrome/cervical sprain, cervical subluxation complex, lumbar sprain/strain and multiple contusions” and that she was totally disabled from her employment as nanny until about October 7, he reexamined her on October 10 and extended her disability until January 4, and plaintiff stated that during that period she could not perform any kind of lifting, head movement, or prolonged sitting or standing without pain and that her athletic and social activities were curtailed. Uhl v Sofia, 245 A.D.2d 988, 667 N.Y.S.2d 92, 1997 N.Y. App. Div. LEXIS 13726 (N.Y. App. Div. 3d Dep't 1997).

Plaintiff raised triable issue of fact as to whether she sustained “serious injury” under CLS Ins § 5102(d) where one treating physician diagnosed her as suffering from chronic and severe cervical, dorsal, and lumbosacral sprain with radiating pain, and intermittent paresthesias in her arms and legs, all directly and causally related to motor vehicle accident, treating physicians’ medical findings included trigger points and spasms in plaintiff’s back, and 2 treating physicians opined that her injuries rendered her permanently disabled from performing her profession as chambermaid and housekeeper. Denner v Mizgala, 245 A.D.2d 1069, 666 N.Y.S.2d 76, 1997 N.Y. App. Div. LEXIS 13839 (N.Y. App. Div. 4th Dep't 1997).

Triable issues of fact existed as to whether plaintiff sustained “serious injury” under CLS Ins § 5102(d) where report of chiropractor who examined her 5 years after accident stated that she suffered cervical and thoracic strain and sprain causally related to accident, which aggravated symptoms of preexisting cervical and thoracic spondylosis and left her with “mild partial disability,” and that no fundamental change in her condition could be expected, and defendant’s own proof showed that plaintiff suffered from chronic neck, shoulder, and back conditions that restricted her physical activities. Hawkins v Foshee, 245 A.D.2d 1091, 666 N.Y.S.2d 88, 1997 N.Y. App. Div. LEXIS 13878 (N.Y. App. Div. 4th Dep't 1997).

Pedestrian struck by motor vehicle raised triable issue of fact as to whether he sustained "significant limitation of use of a body function or system" under CLS Ins § 5102(d) where affidavit of his examining physician specified degree to which pedestrian's movement was restricted in his cervical and lumbosacral spine and stated that those restrictions would last indefinitely. Cenat v Cutler, 251 A.D.2d 362, 672 N.Y.S.2d 812, 1998 N.Y. App. Div. LEXIS 6592 (N.Y. App. Div. 2d Dep't 1998).

Defendant was not entitled to summary judgment in personal injury action where affidavit of plaintiff's chiropractor, which incorporated findings contained in chiropractor's medical report specifying degree of limitation in range of motion of plaintiff's cervical and lumbar spine, was based on identified objective testing, was in admissible form, and was sufficient to raise triable issue of fact as to whether plaintiff sustained serious injury under CLS Ins § 5102(d). Gonzalez v Niddrie, 251 A.D.2d 450, 673 N.Y.S.2d 330, 1998 N.Y. App. Div. LEXIS 6857 (N.Y. App. Div. 2d Dep't 1998).

Affidavit of plaintiff's treating chiropractor raised triable issue of fact as to whether plaintiff sustained "serious injury" under CLS Ins § 5102(d) where affidavit stated, inter alia, that plaintiff suffered from objectively measured, specifically quantified restrictions of motion of her cervical and lumbosacral spine. Pasutto v Hacker, 251 A.D.2d 478, 673 N.Y.S.2d 592, 1998 N.Y. App. Div. LEXIS 6889 (N.Y. App. Div. 2d Dep't 1998).

Doctor's affidavits, based on examinations of 2 injured plaintiffs, raised triable issue of fact as to whether they sustained "significant limitation of use of a body function or system" under CLS Ins § 5102(d) where affidavits indicated that first plaintiff experienced restriction of movement to 30-35 degrees in right and left rotation of his cervical spine and that second plaintiff experienced restriction of movement to 40 degrees in her lumbar spine. Yahya v Schwartz, 251 A.D.2d 498, 674 N.Y.S.2d 430, 1998 N.Y. App. Div. LEXIS 6845 (N.Y. App. Div. 2d Dep't 1998).

Medical evidence specifying degree of limitation in range of motion of plaintiff's lumbosacral spine causally related to his accident was sufficient to raise triable issue of fact as to whether plaintiff sustained "a significant limitation of use of a body function or system," and thus "serious

injury," under CLS Ins § 5102(d). Dahlman v Lowen, 251 A.D.2d 532, 673 N.Y.S.2d 924, 1998 N.Y. App. Div. LEXIS 7524 (N.Y. App. Div. 2d Dep't 1998).

Plaintiff raised triable issue of fact as to whether he sustained "serious injury" under CLS Ins § 5102(d) where (1) MRI disclosed large herniated disc and bulging disc, (2) EMG confirmed disc problem and indicated ridiculopathy, (3) neurologist opined that plaintiff had severe aggravated exacerbation of his spinal cord injuries, which were permanent, and that if history given by plaintiff were correct, those permanent and significant injuries were causally related to his automobile accident, and (4) although chiropractor initially reported that plaintiff had fully recovered, he later opined that relief had been temporary and that plaintiff had decreased range of motion in cervical and lumbar spine directly related to his accident. Boehm v Estate of Mack by Pfaff-Adams, 255 A.D.2d 749, 680 N.Y.S.2d 732, 1998 N.Y. App. Div. LEXIS 11914 (N.Y. App. Div. 3d Dep't 1998).

Plaintiffs raised triable issues of fact as to whether they sustained serious injuries under CLS Ins § 5102(d) where their doctor's affidavit quantified limitations of motion of cervical spine regions of both plaintiffs and set forth duration of those limitations. Lefkowitz v Salas, 266 A.D.2d 356, 698 N.Y.S.2d 329, 1999 N.Y. App. Div. LEXIS 11540 (N.Y. App. Div. 2d Dep't 1999).

Plaintiff raised triable issue of fact as to whether she sustained "serious injury" under CLS Ins § 5102(d), despite contrary affirmation of defendants' expert neurologist, where (1) plaintiff's medical expert asserted in his affirmation that plaintiff suffered from fibromyalgia and chronic pain syndrome as result of accident and that those conditions significantly limited use of her upper torso and might result in permanent consequential limitation of use of her spine and upper torso, (2) sworn report of independent physician who examined plaintiff concluded that she suffered from chronic pain syndrome and that her condition was likely result of accident, and (3) medical records submitted by defendants documented muscle spasms, trigger points, and restricted ranges of motion and muscular weakness in cervical and lumbar regions of spine continuing from date of accident. Pagels v P.V.S. Chems., 266 A.D.2d 819, 698 N.Y.S.2d 368, 1999 N.Y. App. Div. LEXIS 11825 (N.Y. App. Div. 4th Dep't 1999).

Plaintiff raised triable issue of fact as to whether she sustained “serious” injury under CLS Ins § 5102(d) where competent medical evidence indicated that she suffered significant and permanent injury to her lumbosacral spine and was unable to perform substantially all of her daily activities for at least 90 of 180 days following accident. Shulman v Papell, 273 A.D.2d 111, 710 N.Y.S.2d 527, 2000 N.Y. App. Div. LEXIS 6596 (N.Y. App. Div. 1st Dep't 2000).

Plaintiff raised triable issue of fact as to whether she sustained “serious injury” under CLS Ins § 5102(d) where she submitted doctor’s affirmation, based on recent examination, indicating degree to which plaintiff’s movement was restricted in her cervical spine and lumbar spine, noting that those restrictions had been objectively measured using range-of-motion test, and stating that restrictions were permanent. Vitale v Lev Express Cab Corp., 273 A.D.2d 225, 708 N.Y.S.2d 692, 2000 N.Y. App. Div. LEXIS 6288 (N.Y. App. Div. 2d Dep't 2000).

Plaintiff raised triable issue of fact as to whether she sustained “serious injury” under CLS Ins § 5102(d) where her treating chiropractor testified that plaintiff suffered from “vertebral subluxation complex” in her cervical spine as result of injuries sustained in accident, and those injuries allegedly resulted in permanent significant range-of-motion limitations, which were objectively measured using arthroidal protractor. Martin v Pietrzak, 273 A.D.2d 361, 709 N.Y.S.2d 591, 2000 N.Y. App. Div. LEXIS 7061 (N.Y. App. Div. 2d Dep't 2000).

Plaintiff raised triable issue of fact as to whether she sustained “serious injury” under CLS Ins § 5102(d) where orthopedic surgeon who treated her for 2 ½ years after traffic accident opined that, to reasonable degree of medical certainty, plaintiff had suffered permanent limitations including, inter alia, 20 to 30 percent loss of flexion, rotation, and extension in her neck, 20-degree loss of full elevation of right shoulder, permanent winging of right scapula with permanent nerve damage and palsy to long thoracic nerve, and 20 percent loss of use of right shoulder. Mangano v Sherman, 273 A.D.2d 836, 709 N.Y.S.2d 293, 2000 N.Y. App. Div. LEXIS 6713 (N.Y. App. Div. 4th Dep't 2000).

There was triable issue of fact as to whether plaintiff sustained “serious injury” under CLS Ins § 5102(d) where chiropractor who had treated plaintiff for over 3 years after car accident stated his

objective findings that range of motion in plaintiff's lumbar spine was extremely limited and that he measured significant restrictions in flexion and extension of plaintiff's lumbar spine 2 years after accident, and he opined to reasonable degree of medical certainty that those restrictions were permanent and that accident at issue was cause of plaintiff's injuries. Dixon v La Morticella, 286 A.D.2d 951, 730 N.Y.S.2d 389, 2001 N.Y. App. Div. LEXIS 9137 (N.Y. App. Div. 4th Dep't 2001).

81. —Psychological injury, including depression

In action arising from motor vehicle collision, plaintiff proved prima facie case of "serious injury" under CLS Ins § 5102(d), and he was entitled to have that issue submitted to jury for special finding, where (1) experts testified that he suffered from herniated discs between fourth and fifth, and fifth and sixth, cervical vertebrae, that one disc was surgically excised, and that he sustained bilateral carpal tunnel syndrome, which also required surgery, (2) doctor who examined plaintiff testified that plaintiff was extremely depressed, and (3) plaintiff testified that he suffered from pain in both arms and hands and in his lower back, shoulders, and neck. Porcano v Lehman, 255 A.D.2d 430, 680 N.Y.S.2d 590, 1998 N.Y. App. Div. LEXIS 12390 (N.Y. App. Div. 2d Dep't 1998).

Plaintiff established, prima facie, that his posttraumatic stress disorder (PTSD) was "serious injury" proximately caused by his 1987 automobile accident where (1) his treating psychiatrist and psychiatrist retained by defendants both diagnosed him as suffering from PTSD, (2) evidence established permanent loss of use of body function or system based on chronic nature of PTSD, and significant limitation of use of body function or system, providing medical foundation for his complaints of psychological trauma, and (3) fact that defendants' psychiatrist testified that his PTSD was only partially caused by 1987 accident merely raised issues of credibility and weight of evidence for jury to resolve. Chapman v Capoccia, 283 A.D.2d 798, 725 N.Y.S.2d 430, 2001 N.Y. App. Div. LEXIS 5175 (N.Y. App. Div. 3d Dep't 2001).

82. No triable issue of fact, generally

Plaintiff did not disprove defendants' prima facie case that she did not sustain "serious injury" as defined by CLS Ins § 5102(d) where sole competent evidence submitted by her in opposition to motion for summary judgment was doctor's affirmation, which failed to cite any objective tests performed on plaintiff to support his conclusion that she sustained significant functional impairment of her lower back, and doctor failed to indicate that claimed limitation of use of plaintiff's lumbar spine was more than minor. McDougal v Wytak, 238 A.D.2d 321, 656 N.Y.S.2d 932, 1997 N.Y. App. Div. LEXIS 3410 (N.Y. App. Div. 2d Dep't 1997).

Treating chiropractor's reference to soft tissue injury and conclusory description of duration of plaintiff's injury did not raise triable issue of fact as to whether she suffered "serious injury" under CLS Ins § 5102(d). Branca v Story, 245 A.D.2d 479, 666 N.Y.S.2d 480, 1997 N.Y. App. Div. LEXIS 13247 (N.Y. App. Div. 2d Dep't 1997).

Plaintiff's insignificant injuries, including mild cervical and lumbar strains, were insufficient to raise triable issue of fact as to whether he suffered "serious injury" under CLS Ins § 5102(d). Lebron v Camacho, 251 A.D.2d 295, 671 N.Y.S.2d 1025, 1998 N.Y. App. Div. LEXIS 6337 (N.Y. App. Div. 2d Dep't 1998).

Plaintiff failed to raise triable issue of fact as to whether he sustained "serious injury" under CLS Ins § 5102(d) where his affidavit consisted merely of subjective complaints of pain, and his examining physician's affidavit consisted of conclusory assertions founded only on plaintiff's subjective complaints of pain and was tailored to meet statutory requirements. Lopez v Zangrillo, 251 A.D.2d 382, 674 N.Y.S.2d 107, 1998 N.Y. App. Div. LEXIS 6589 (N.Y. App. Div. 2d Dep't 1998).

Plaintiff's deposition testimony that he was out of work for "at least six months while under active medical care" did not raise triable issue of fact as to whether he was prevented from performing "substantially all of the material acts which constitute his usual and customary activities for not less than [90] days during the [>;180] days immediately following the occurrence" under CLS Ins

§ 5102(d), absent physician's affidavit substantiating that his alleged impairment was attributable to "medically determined" injury. Sigona v New York City Transit Auth., 255 A.D.2d 231, 680 N.Y.S.2d 228, 1998 N.Y. App. Div. LEXIS 12471 (N.Y. App. Div. 1st Dep't 1998).

Affidavit of plaintiff's chiropractor indicating only that plaintiff sustained unquantified decrease in cervical and lumbar range of motion was insufficient to raise triable issue of fact as to whether plaintiff sustained "serious injury" under CLS Ins § 5102(d). Hores v Guralnick, 255 A.D.2d 292, 679 N.Y.S.2d 647, 1998 N.Y. App. Div. LEXIS 11589 (N.Y. App. Div. 2d Dep't 1998).

Plaintiff did not sustain "serious injury" as triable issue of fact under CLS Ins § 5102(d) where defendants proved prima facie case to that effect through affirmation and affirmed report of neurologist who examined plaintiff and concluded that plaintiff sustained no accident-related disability, and competent evidence submitted by plaintiff did not raise triable issue of fact. Gladding v Riccobono, 273 A.D.2d 272, 709 N.Y.S.2d 852, 2000 N.Y. App. Div. LEXIS 6519 (N.Y. App. Div. 2d Dep't 2000).

83. —Lapse of time since medical examination or treatment

Infant plaintiffs did not sustain serious injuries under CLS Ins § 5102(d) where affidavits of their physician (1) merely recited measurements of their alleged limitations of cervical and lumbar motion, which had been obtained 20 months earlier and less than 2 weeks after accident, and (2) failed to articulate any opinion as to permanency. Kim v Kim, 266 A.D.2d 190, 697 N.Y.S.2d 676, 1999 N.Y. App. Div. LEXIS 11102 (N.Y. App. Div. 2d Dep't 1999).

Plaintiff did not prove triable issue of fact as to "serious injury" under CLS Ins § 5102(d) where (1) chiropractor's report dated about 3 weeks after accident indicated no lumbar or cervical range-of-motion limitations for plaintiff as result of accident, and (2) although new report from same chiropractor after unexplained 21-month gap in treatment indicated significant limitations in plaintiff's range of motion as result of accident, second report was clearly tailored to meet statutory requirements. Kim v Budhu, 273 A.D.2d 204, 709 N.Y.S.2d 440, 2000 N.Y. App. Div. LEXIS 6299 (N.Y. App. Div. 2d Dep't 2000).

84. — —Lapse of several years

Automobile accident victim failed to rebut prima facie showing that she was not "seriously injured" under CLS Ins § 5102(d) where she submitted sworn medical reports relating to examinations made several years before date of defendant's motion for summary judgment. Bauer v Koch, 245 A.D.2d 537, 666 N.Y.S.2d 498, 1997 N.Y. App. Div. LEXIS 13364 (N.Y. App. Div. 2d Dep't 1997).

Plaintiff failed to prove prima facie case that she sustained "serious injury" under CLS Ins § 5102(d), even though she submitted affidavit by her examining chiropractor characterizing her injury as "permanent consequential limitation" in her cervical and lumbar regions, where affidavit was prepared more than 2 years after he last saw her, and it did not indicate that his opinion was based on any recent examination of her. Thomas v Roach, 246 A.D.2d 591, 667 N.Y.S.2d 296, 1998 N.Y. App. Div. LEXIS 413 (N.Y. App. Div. 2d Dep't 1998).

Plaintiff did not sustain "serious injury" under CLS Ins § 5102(d) where her chiropractor's affidavit was based on examinations of plaintiff performed at least 34 months earlier, and thus there was insufficient proof of triable issue of fact of duration of alleged impairment. Burnett v Miller, 255 A.D.2d 541, 680 N.Y.S.2d 866, 1998 N.Y. App. Div. LEXIS 12882 (N.Y. App. Div. 2d Dep't 1998).

Plaintiff failed to rebut defendants' prima facie showing that she did not suffer "serious injury" under CLS Ins § 5102(d) where her chiropractor's affidavit (1) failed to indicate that opinion expressed was based on recent medical examination rather than one conducted 2 years earlier, and (2) although it noted "loss of the lumbar range of motion," failed to specify extent or degree of that limitation. Kosto v Bonelli, 255 A.D.2d 557, 681 N.Y.S.2d 293, 1998 N.Y. App. Div. LEXIS 12857 (N.Y. App. Div. 2d Dep't 1998).

Plaintiff did not sustain "serious injury" under CLS Ins § 5102(d) where his doctor's affirmation failed to indicate that opinion expressed therein was based on recent medical examination

rather than doctor’s examination and treatment of plaintiff 11 years earlier. Alvarez v Ming Chao Wong, 266 A.D.2d 248, 699 N.Y.S.2d 420, 1999 N.Y. App. Div. LEXIS 11335 (N.Y. App. Div. 2d Dep't 1999).

Plaintiff did not prove triable issue of fact of “serious injury” under CLS Ins § 5102 (d) where his treating chiropractor did not indicate what, if any, objective medical tests were performed to support his conclusion that plaintiff suffered loss of cervical and thoracic motion. Funderburk v Gordon, 273 A.D.2d 196, 709 N.Y.S.2d 437, 2000 N.Y. App. Div. LEXIS 6257 (N.Y. App. Div. 2d Dep't 2000).

Plaintiff did not prove triable issue of fact as to “serious injury” under CLS Ins § 3102(d) where (1) defendants submitted affirmed report of orthopedist, who “found no evidence of any orthopedic disability,” and affirmed MRI report of radiologist, who characterized as “unremarkable” MRI exam of plaintiff’s cervical spine, (2) plaintiff submitted affirmed report of chiropractor, who had not treated him in 3 years and whose opinions were based on examinations at least 3 years old, and (3) although plaintiff also submitted MRI report indicating that he exhibited “slight posterior disc bulge” in cervical spine, there was no evidence causally relating bulge to accident. Bucci v Kempinski, 273 A.D.2d 333, 709 N.Y.S.2d 595, 2000 N.Y. App. Div. LEXIS 7108 (N.Y. App. Div. 2d Dep't 2000).

85. “Serious injury” claim sustained

Automobile accident victim was entitled to partial summary judgment on issue of whether he suffered “serious injury” under CLS Ins § 5102(d) where prima facie case was proved by physician’s affirmation that victim had suffered acute posttraumatic subluxation of cervical spine, necessitating surgical fusion that had left his head and neck “virtually frozen in the neutral position,” and prima facie showing was not refuted by affirmation of defendant’s attorney suggesting that surgery was necessitated by congenital abnormality. Mustello v Szczepanski, 245 A.D.2d 553, 667 N.Y.S.2d 63, 1997 N.Y. App. Div. LEXIS 13373 (N.Y. App. Div. 2d Dep't 1997).

Motorist sustained “serious injury” under CLS Ins § 5102(d) where (1) she complained of headaches, numbness in several fingers of her left hand, loss of grip strength in that hand, and decreased range of neck motion, (2) MRI scan, performed 2 months after accident, revealed that she had suffered herniated disc at C5-C6, causing distortion of her spinal cord and pressure on her sixth spinal nerve, (3) examining physician concluded that disc herniation and symptoms were caused by accident, and motorist was able to obtain relief from her debilitating symptoms only by undergoing spinal surgery. Hawkey v Jefferson Motors, 245 A.D.2d 785, 665 N.Y.S.2d 766, 1997 N.Y. App. Div. LEXIS 12955 (N.Y. App. Div. 3d Dep't 1997).

Jury’s finding that taxi cab passenger sustained “serious injury” under CLS Ins § 5102(d) was supported by evidence, including testimony of passenger, her dentist, and defendants’ examining oral surgeon, that (1) collision caused passenger’s face to strike plexiglass partition separating front and rear seats, causing lacerations to her face and to inside of her mouth, minor paresthesia affecting part of her chin and lower lip, trauma to 7 lower teeth, and internal derangement to her temporomandibular joint (TMJ), (2) passenger required 60 stitches and was left with minor scarring, and (3) she suffered episodes of open lockjaw, with pain in her TMJ, audible clicking, and limited ability to open her mouth and chew tough foods. Taxi cab passenger’s “serious injury” threshold under CLS Ins § 5102(d) was met by her permanent nerve loss in 7 teeth, which required series of root canal treatments and significant restorative dental work. In action in which plaintiff was found to have sustained “serious injury” under CLS Ins § 5102(d), jury was entitled to credit expert opinion of plaintiff’s treating dentist that plaintiff’s temporomandibular joint condition was permanent, even though dentist was not specialist is oral surgery. Mancusi v Miller Brewing Co., 251 A.D.2d 265, 675 N.Y.S.2d 56, 1998 N.Y. App. Div. LEXIS 7799 (N.Y. App. Div. 1st Dep't 1998), app. denied, 1998 N.Y. App. Div. LEXIS 10933 (N.Y. App. Div. 1st Dep't Oct. 1, 1998).

Jury reasonably could have concluded that plaintiff sustained “serious injury” under CLS Ins § 5102(d) where his medical experts testified that he suffered from 4 bulging discs in lumbosacral

spine and that those bulges impinged on his thecal sac. Maisonaves v Friedman, 255 A.D.2d 494, 680 N.Y.S.2d 619, 1998 N.Y. App. Div. LEXIS 12654 (N.Y. App. Div. 2d Dep't 1998).

Plaintiff sustained “serious injury” under CLS Ins § 5102(d) where his chiropractor averred that, on examination, he determined that plaintiff sustained partial permanent disability in his cervical spine and some loss of range of motion, and chiropractor quantified those limitations. Ventura v Moritz, 255 A.D.2d 506, 680 N.Y.S.2d 176, 1998 N.Y. App. Div. LEXIS 12661 (N.Y. App. Div. 2d Dep't 1998).

Plaintiff sustained “serious injury” under CLS Ins § 5102(d) where (1) he testified that, within a few days after accident, he began experiencing severe pain in his neck that radiated into his arms and hands and that, as result of numbness in his arms and fingers, he frequently dropped things and was unable to perform many daily activities, and (2) his treating neurologist testified that post-accident MRI showed herniated disc, that preaccident MRI did not, that herniated disc was consistent with plaintiff’s stated symptoms, and that he could conclude with reasonable degree of medical certainty that plaintiff sustained injury in collision that resulted in significant limitation of use of body function or system. Quinn v Licausi, 263 A.D.2d 820, 693 N.Y.S.2d 762, 1999 N.Y. App. Div. LEXIS 8296 (N.Y. App. Div. 3d Dep't 1999).

Plaintiff sustained “serious injury” under CLS Ins § 5102(d) where she testified that, as result of injury in motor vehicle accident, she continued to experience pain and tingling in her right arm and shoulder, that she was unable to lift or hold things with her right arm, and that cortisone shots, pain medication, and physical therapy were insufficient to totally alleviate her symptoms, (2) her doctor testified that he and 2 other physicians diagnosed her as having impingement syndrome and cervical myosascitis, that MRI revealed, inter alia, inflammation of bicep tendon and synovium, that plaintiff’s complaints correlated with his clinical findings and MRI, and that plaintiff’s injuries were permanent and causally related to accident, and (3) although orthopedic surgeon testified that there was nothing wrong with plaintiff and that she was faking pain, he admitted that it was not possible to fake inflammation. Rivera v Majuk, 263 A.D.2d 841, 695 N.Y.S.2d 158, 1999 N.Y. App. Div. LEXIS 8259 (N.Y. App. Div. 3d Dep't 1999).

Plaintiff sustained “serious injury” under CLS Ins § 5102(d) where report prepared by his radiologist stated that MRI taken of plaintiff’s lumbar spine 4 days after accident revealed “[d]esiccation...at the L5-S1 level” and “[b]ulging to the L5-S1 intervertebral disc,” and reports prepared by his treating orthopedist specified degree of limitation in range of motion of plaintiff’s lumbar and cervical spines and asserted that those injuries were “causally related” to his accident and were permanent. Dillon v Thomas, 266 A.D.2d 183, 697 N.Y.S.2d 336, 1999 N.Y. App. Div. LEXIS 11109 (N.Y. App. Div. 2d Dep't 1999).

Plaintiff sustained “serious injury” under CLS Ins § 5102(d) where (1) plaintiff testified that, 6 months after accident, she experienced severe pain and daily discomfort and could not perform her daily activities, (2) her board-certified neurologist opined that although plaintiff had preexisting back condition, she had suffered lumbosacral radiculopathy, muscle spasms, and cervical sprain in connection with car accident, which rendered her unable to substantially perform her normal activities for at least 90 of 180 days after accident, that plaintiff had sustained permanent injury to her cervical spine, and that preexisting injury to her lumbar spine was aggravated by collision, and (3) neurologist’s views were based on objective findings, including MRI and EMG results, as well as presence of muscle spasms and swelling. Stone v Hidle, 266 A.D.2d 705, 698 N.Y.S.2d 351, 1999 N.Y. App. Div. LEXIS 11843 (N.Y. App. Div. 3d Dep't 1999).

Plaintiff sustained “serious injury” under CLS Ins § 5102(d) where her chiropractor averred that he measured significant and permanent restrictions in the flexion, extension, and rotation of her cervical spine 11 months after accident. Rodriguez v Duggan, 266 A.D.2d 859, 697 N.Y.S.2d 803, 1999 N.Y. App. Div. LEXIS 11836 (N.Y. App. Div. 4th Dep't 1999).

Plaintiff sustained “serious injury” under CLS Ins § 5102(d) where medical report prepared by defendants’ medical expert was unsworn, and diagnoses of plaintiff’s examining physician were probative, even though they were not supported by objective tests, because they were based on his own physical examination of plaintiff. Choudhury v Hsien Chen, 273 A.D.2d 142, 710 N.Y.S.2d 895, 2000 N.Y. App. Div. LEXIS 7155 (N.Y. App. Div. 1st Dep't 2000).

Plaintiff sustained “serious injury” under CLS Ins § 5102(d) where MRI of her cervical spine and lower back showed posterior herniated disc at C4-5, and defendant failed to show that herniation was not causally related to subject accident. Chaplin v Taylor, 273 A.D.2d 188, 708 N.Y.S.2d 465, 2000 N.Y. App. Div. LEXIS 6278 (N.Y. App. Div. 2d Dep't 2000).

Plaintiff sustained “serious injury” under CLS Ins § 5102(d) where (1) no-fault verification form signed by his physician proved that he was disabled and thus unable to return to work or perform his usual and customary daily activities for at least 90 day immediately after accident, and (2) as to other categories of serious injury alleged, medical records indicated that he had permanent loss of use of body organ, member, function, or system, permanent consequential limitation of use of body organ or member, or significant limitation of use of body function or system. Gaeta v Kosek, 273 A.D.2d 801, 710 N.Y.S.2d 269, 2000 N.Y. App. Div. LEXIS 6936 (N.Y. App. Div. 4th Dep't 2000).

86. “Serious injury” claim not sustained, generally

Plaintiff did not sustain permanent “serious injury” under CLS Ins § 5102(d) where independent neurologist found “no objective evidence on examination of any permanent limitation of the use of [plaintiff’s] extremity or her neck or back,” and plaintiff’s sole medical proof in opposition to motion for summary judgment was her chiropractor’s nonspecific and conclusory affidavit stating, without substantive elaboration, that plaintiff “received a limitation in the use of her lumbar spine and cervical spine as well as her right elbow,” and chiropractor failed to identify tests used in diagnosing plaintiff, dates of his findings, locations of “trigger point tenderness” and muscle spasms, degree of motion limitation, or any treatment recommendations; his mere use of word “permanent” was insufficient to raise triable issue of fact. Uhl v Sofia, 245 A.D.2d 988, 667 N.Y.S.2d 92, 1997 N.Y. App. Div. LEXIS 13726 (N.Y. App. Div. 3d Dep't 1997).

Bare affirmation of plaintiff’s attorney, who showed no personal knowledge of plaintiff’s injuries, lacked evidentiary value and thus failed to overcome defendant’s prima facie showing, by reports of 2 doctors affirmed under penalties of perjury, that plaintiff did not sustain “serious

injury" under CLS Ins § 5102(d). Sloan v Schoen, 251 A.D.2d 319, 673 N.Y.S.2d 1017, 1998 N.Y. App. Div. LEXIS 6344 (N.Y. App. Div. 2d Dep't 1998).

Plaintiff did not suffer "serious injury" under CLS Ins § 5102(d) where there was no indication that medical diagnoses on which he relied were based on objective tests or merely his subjective complaints, no-fault insurer's doctor found that plaintiff sustained "mild partial disability," and none of plaintiff's reported symptoms was "significant limitation of a use of a body function." Sigona v New York City Transit Auth., 255 A.D.2d 231, 680 N.Y.S.2d 228, 1998 N.Y. App. Div. LEXIS 12471 (N.Y. App. Div. 1st Dep't 1998).

Defendant was entitled to summary judgment dismissing action for "serious injury" under CLS Ins § 5102(d) where defendant proved prima facie case of no such injury, and plaintiff's medical evidence indicated that he sustained, at most, "minor, mild or slight" limitation, which was insignificant under § 5102(d). Stipes v Kopf, 255 A.D.2d 502, 680 N.Y.S.2d 175, 1998 N.Y. App. Div. LEXIS 12647 (N.Y. App. Div. 2d Dep't 1998).

Jury verdict finding that plaintiff did not sustain "serious injury" under CLS Ins § 5102(d) was not against weight of evidence, even though her treating physician testified that, based on plaintiff's subjective complaints, she had sustained cervical, shoulder, and chest wall strain and possible posttraumatic carpel tunnel syndrome, where he acknowledged that MRI revealed neither disc herniation nor nerve root compression and that he conducted no tests for carpel tunnel syndrome, (2) plaintiff's chiropractor testified that although tests showed no neurological or reflex abormalities, plaintiff nevertheless sustained permanent partial disability to her cervical and upper thoracic spine, (3) defendant's expert testified that X-rays and MRI were normal, that examination revealed no abnormalities, that any strain was not permanent, and that there was no evidence of carpel tunnel syndrome, and (4) plaintiff returned to work 3 weeks after accident. Moxley v Givens, 255 A.D.2d 632, 679 N.Y.S.2d 472, 1998 N.Y. App. Div. LEXIS 11672 (N.Y. App. Div. 3d Dep't 1998).

Plaintiff's self-serving affidavit stating that she was unable to return to work and perform her domestic duties after accident was insufficient to create triable issue of fact as to her inability to

perform substantially all of her daily activities for not less than 90 of first 180 days after accident, under CLS Ins § 5102(d), absent physician's affidavit substantiating existence of medically determined injury that caused alleged limitation of plaintiff's activities. Jackson v New York City Transit Auth., 273 A.D.2d 200, 708 N.Y.S.2d 469, 2000 N.Y. App. Div. LEXIS 6245 (N.Y. App. Div. 2d Dep't 2000).

Plaintiff's averment that she was forced to curtail recreational and household activities was insufficient to show that she had sustained medically determined injury or impairment that prevented her from performing substantially all material acts of her normal daily activities for not less than 90 of first 180 days after accident, under CLS Ins § 5102(d). Lauretta v County of Suffolk, 273 A.D.2d 204, 708 N.Y.S.2d 468, 2000 N.Y. App. Div. LEXIS 6227 (N.Y. App. Div. 2d Dep't), app. denied, 95 N.Y.2d 770, 722 N.Y.S.2d 473, 745 N.E.2d 393, 2000 N.Y. LEXIS 3873 (N.Y. 2000).

Plaintiff did not sustain "serious injury" under CLS Ins § 5102(d) where medical evidence submitted by defendants proved prima facie case to that effect, plaintiff's affidavit consisted merely of subjective complaints of pain, and plaintiff admitted that she missed only about 2 weeks of work as result of accident. Marotta v Mastroianni, 273 A.D.2d 206, 708 N.Y.S.2d 466, 2000 N.Y. App. Div. LEXIS 6234 (N.Y. App. Div. 2d Dep't 2000).

Plaintiff did not sustain "serious injury" under CLS Ins § 5102(d), even though there was evidence that she suffered from herniated and bulging discs, where there was no objective evidence of extent, degree, or duration of alleged physical limitations resulting from her injuries. Nisnewitz v Renna, 273 A.D.2d 210, 709 N.Y.S.2d 435, 2000 N.Y. App. Div. LEXIS 6311 (N.Y. App. Div. 2d Dep't 2000), app. denied, 96 N.Y.2d 705, 723 N.Y.S.2d 132, 746 N.E.2d 187, 2001 N.Y. LEXIS 184 (N.Y. 2001).

Plaintiff did not sustain "serious injury" under CLS Ins § 5102(d) where (1) sworn reports of orthopedic surgeon and neurologist who examined plaintiff about 5 months after accident indicated that he had normal range of motion in his spine and knee and that his neck, back, and knee strains allegedly caused by accident were temporary, (2) although plaintiff's treating

physician stated that plaintiff suffered 30 percent restriction of motion of his knee and 20 percent restriction of his lumbar spine, physician did not describe objective tests that he performed to support those conclusions, and (3) treating physician's mere recitation of selected parts of 1995 MRI reports, without explanation of their significance, was insufficient to defeat evidence that plaintiff suffered only temporary muscle strains as result of accident. Watt v Eastern Investigative Bureau, Inc., 273 A.D.2d 226, 708 N.Y.S.2d 472, 2000 N.Y. App. Div. LEXIS 6302 (N.Y. App. Div. 2d Dep't 2000).

Plaintiff did not sustain "serious injury" under CLS Ins § 5102(d) where defendants proved prima facie case to that effect, and affidavit of plaintiff's physician consisted solely of conclusory assertions tailored to meet statutory requirements. Worley v Griffith, 273 A.D.2d 303, 709 N.Y.S.2d 846, 2000 N.Y. App. Div. LEXIS 6543 (N.Y. App. Div. 2d Dep't 2000).

Plaintiff did not sustain "serious injury" under CLS Ins § 5102(d) where (1) neurologist who examined him concluded that he "does not demonstrate an objective neurological disability," and (2) plaintiff's treating chiropractor's affidavit did not prove duration of alleged "significant limitation of use of a body function or system." Barbeito v Kesev Taxi, Inc., 281 A.D.2d 379, 721 N.Y.S.2d 279, 2001 N.Y. App. Div. LEXIS 2050 (N.Y. App. Div. 2d Dep't 2001).

Plaintiff did not sustain "serious injury" under CLS Ins § 5102(d) where (1) although disc bulge was initially diagnosed about one week after 1995 car accident, there was no evidence that it still existed, (2) plaintiff's chiropractor did not explain expert findings in MRI reports indicating that bulge was degenerative or congenital, and (3) chiropractor's finding of 2 percent loss of cervical rotation did not show significant limitation or permanent loss of use of body function or system. Monette v Keller, 281 A.D.2d 523, 721 N.Y.S.2d 839, 2001 N.Y. App. Div. LEXIS 2612 (N.Y. App. Div. 2d Dep't 2001).

In action involving issue of "serious injury" under CLS Ins § 5102(d), plaintiff, whose disc bulge allegedly resulted from car accident, did not raise triable issue of fact as to whether he was prevented from performing substantially all of his customary and usual activities for not less than 90 days during 180 days immediately after accident where (1) he stated that he was terminated

from his employment about 1 ½ months after accident because of time lost from work and that he did not obtain another job for almost one year after accident, and (2) he did not identify any other daily activity that he was unable to undertake as result of his injuries during period before or after termination. Monette v Keller, 281 A.D.2d 523, 721 N.Y.S.2d 839, 2001 N.Y. App. Div. LEXIS 2612 (N.Y. App. Div. 2d Dep't 2001).

Plaintiff did not sustain “serious injury” under CLS Ins § 5102(d) where (1) plaintiff did not submit any medical evidence indicating what treatment he received for his alleged injuries during 4 ½ -year period between accident and examination conducted by his expert, and (2) plaintiff’s expert neither stated nature of plaintiff’s alleged prior medical treatment nor delineated when that treatment was received. Yaraghi v Zeller, 286 A.D.2d 765, 730 N.Y.S.2d 517, 2001 N.Y. App. Div. LEXIS 8651 (N.Y. App. Div. 2d Dep't 2001).

87. —Causation not established

Defendants’ prima facie showing that plaintiff did not sustain “serious injury” under CLS Ins § 5102(d) was not overcome by doctor’s affidavit that did not causally relate plaintiff’s injuries to accident. O'Dol v Malley, 245 A.D.2d 436, 667 N.Y.S.2d 274, 1997 N.Y. App. Div. LEXIS 14143 (N.Y. App. Div. 2d Dep't 1997).

Plaintiff failed to show that he suffered “serious injury” under CLS Ins § 5102(d) in first accident where he was involved in second accident less than 90 days later, in which he also allegedly suffered serious injury, chiropractor who treated him for injuries from second accident did not treat him for injuries from first accident, and thus chiropractor’s affidavit did not prove that plaintiff’s injuries from first accident were causally related to his alleged inability to perform “substantially all of the material acts which constitute[d] [his] usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment.” Jeannot v Lawrence, 245 A.D.2d 547, 667 N.Y.S.2d 66, 1997 N.Y. App. Div. LEXIS 13362 (N.Y. App. Div. 2d Dep't 1997).

Defendants were entitled to summary judgment dismissing action for “serious injury” under CLS Ins § 5102(d), even though disc bulge might be such injury, where plaintiff failed to show that subject motor vehicle accident was proximate cause of disc bulge. Bocci v Turkowitz, 255 A.D.2d 476, 680 N.Y.S.2d 637, 1998 N.Y. App. Div. LEXIS 12655 (N.Y. App. Div. 2d Dep't 1998).

Defendants made prima facie showing that plaintiff did not suffer “serious injury” under CLS Ins § 5102(d) where, inter alia, (1) probative medical reports of orthopedist and neurologist, prepared after physical examinations of plaintiff, showed that although plaintiff suffered “lumbosacral sprain” and “soft tissue injuries” as result of accident, there was no evidence of “disability or any permanent type of injuries which could be linked causally” to accident, and (2) MRI showed preexistent levels of disc herniation and desiccation that were causally unrelated to accident. Kosto v Bonelli, 255 A.D.2d 557, 681 N.Y.S.2d 293, 1998 N.Y. App. Div. LEXIS 12857 (N.Y. App. Div. 2d Dep't 1998).

Plaintiff did not sustain “serious injury” under CLS Ins § 5102(d) where he missed only 14 days of work as result of accident, and his doctor’s affirmed report failed to indicate that plaintiff’s injuries were “serious” or causally related to accident. Lalli v Tamasi, 266 A.D.2d 266, 698 N.Y.S.2d 276, 1999 N.Y. App. Div. LEXIS 11334 (N.Y. App. Div. 2d Dep't 1999).

Plaintiff did not sustain “serious injury” under CLS Ins § 5102(d) where defendants submitted affirmed reports of neurologist and orthopedic surgeon stating that objective tests performed during their examination of plaintiff revealed that he had “normal range of motion,” plaintiff’s treating chiropractor did not explain objective tests that were performed to support his conclusion that plaintiff suffered restricted range of motion, chiropractor’s conclusions appeared to be based on plaintiff’s subjective complaints of pain, chiropractor never stated that plaintiff’s bulging disc was causally related to accident, and neither plaintiff nor chiropractor sufficiently explained almost 4-year gap between plaintiff’s last treatment and most recent examination. Villalta v Schechter, 273 A.D.2d 299, 710 N.Y.S.2d 87, 2000 N.Y. App. Div. LEXIS 6481 (N.Y. App. Div. 2d Dep't 2000).

Although disc herniation may be “serious injury” under CLS Ins § 5102(d), it was sheer speculation to conclude that May 1992 car accident was proximate cause of plaintiff’s herniated disc diagnosed in October 1996 doctor visits where there was no explanation for 4-year gap in treatment, and expert testimony for plaintiff proved only that she suffered herniated disc at some time before October 1996. Ekundayo v GHI Auto Leasing Corp., 273 A.D.2d 346, 709 N.Y.S.2d 603, 2000 N.Y. App. Div. LEXIS 7053 (N.Y. App. Div. 2d Dep't), app. denied, 95 N.Y.2d 765, 716 N.Y.S.2d 640, 739 N.E.2d 1145, 2000 N.Y. LEXIS 3782 (N.Y. 2000).

Plaintiff did not sustain “serious injury” under CLS Ins § 5102(d) where defendants submitted affirmation of orthopedist who concluded, from physical examination and objective medical tests, that plaintiff’s disc herniations were result of preexisting degenerative condition rather than accident, and plaintiff’s treating physician improperly relied on unsworn medical report of another physician and failed to set forth any objective medical basis for his conclusion that plaintiff’s disc herniations were caused or exacerbated by accident. Napoli v Cunningham, 273 A.D.2d 366, 710 N.Y.S.2d 919, 2000 N.Y. App. Div. LEXIS 7079 (N.Y. App. Div. 2d Dep't 2000).

Plaintiff did not sustain “serious injury” under CLS Ins § 5102(d) where (1) there was no objective medical basis for opinions of his experts that injury shown in May 1998 MRI was causally related to March 1992 accident, (2) those opinions were dependent solely on his representations of continuing pain and related problems since terminating treatment in April 1992, (3) as of that date, his attending physician reported that plaintiff “had full range of motion and complained of no pain,” (4) diagnostic tests performed in 1992 and 1993 revealed only preexisting degenerative arthritic condition of cervical spine and “mild C 7 radiculopathy,” and (5) plaintiff did not prove causal relationship between accident and that radiculopathy. Palivoda v Sluberski, 275 A.D.2d 1036, 713 N.Y.S.2d 378, 2000 N.Y. App. Div. LEXIS 9638 (N.Y. App. Div. 4th Dep't 2000).

Plaintiff did not sustain “serious injury” under CLS Ins § 5102(d) where (1) medical experts disagreed as to whether his herniated discs were caused by motor vehicle accident or preexisting degenerative condition temporarily aggravated by accident, (2) plaintiff’s expert did

not specify any resulting loss or limitation of motion, (3) plaintiff continued to play racquetball once or twice per week, although he could not compete with same frequency and intensity as before accident, (4) he continued to participate in Tai Chi, exercising regularly, although with some discomfort, (5) in his employment as teacher, he sat more often while giving lectures after accident, and (6) he was no longer taking prescription medication, although he was using ibuprofen for pain. Rose v Furgerson, 281 A.D.2d 857, 721 N.Y.S.2d 873, 2001 N.Y. App. Div. LEXIS 3047 (N.Y. App. Div. 3d Dep't), app. denied, 97 N.Y.2d 602, 735 N.Y.S.2d 491, 760 N.E.2d 1287, 2001 N.Y. LEXIS 3301 (N.Y. 2001).

Plaintiff did not sustain "serious injury" under CLS Ins § 5102(d) where (1) evidence of disc herniation alone is not sufficient proof, (2) 2 of 3 experts failed to provide objective evidence of extent or degree of the physical limitations resulting from herniation or its duration, (3) third expert, although quantifying limitations, did not draw any causal connection between herniation and car accident, (4) plaintiff's experts also failed to submit quantitative objective findings as to plaintiff's shoulder injury, and (5) experts did not explain 22-month hiatus between cessation of plaintiff's medical treatment after accident and physical examinations that they conducted, possibility that plaintiff's condition might have existed before accident, or possible significance of related injuries sustained by plaintiff in later car accident. Uber v Heffron, 286 A.D.2d 729, 730 N.Y.S.2d 174, 2001 N.Y. App. Div. LEXIS 8558 (N.Y. App. Div. 2d Dep't 2001).

88. —Evidence not competent

Defendant was entitled to summary judgment dismissing cause of action based on alleged "serious injury" under CLS Ins § 5102(d) where defendant made out prima facie case that plaintiff had not sustained serious injury, and sole medical evidence submitted by plaintiff in opposition—affirmed report prepared by plaintiff's treating chiropractor—was not competent evidence under CLS CPLR § 2106. Rameau v King, 245 A.D.2d 557, 666 N.Y.S.2d 513, 1997 N.Y. App. Div. LEXIS 13376 (N.Y. App. Div. 2d Dep't 1997).

Plaintiff did not sustain “serious injury” under CLS Ins § 5102(d), even though affidavit of her treating neurologist stated that, as result of accident, plaintiff sustained permanent disability and significant limitation of motion in her lumbar region caused by myofascial pain syndrome, where neurologist’s conclusions were based on plaintiff’s subjective complaints of pain and were unsupported by objective medical proof, and unsworn statements of that neurologist contained in unsworn report of defendant’s expert neurologist were not in admissible form. Stowell v Safee, 251 A.D.2d 1026, 674 N.Y.S.2d 228, 1998 N.Y. App. Div. LEXIS 7065 (N.Y. App. Div. 4th Dep't 1998).

Plaintiff did not sustain “serious injury” under CLS Ins § 5102(d) where his physician’s affidavit relied on unsworn reports and failed to provide objective evidence of extent, degree, and duration of “significant limitation of use of a body function or system.” Ahmed v Jaekyoo Yoo, 255 A.D.2d 345, 679 N.Y.S.2d 840, 1998 N.Y. App. Div. LEXIS 11816 (N.Y. App. Div. 2d Dep't 1998).

Plaintiff claiming “serious injury” under CLS Ins § 5102(d) did not show “permanent consequential limitation of use of a body organ or member” or “significant limitation of use of a body function or system” where her submitted documents were not in admissible form, and she failed to specify any degree of restriction of motion to the lumbosacral or cervical spine. Plaintiff’s self-serving affidavit stating that she was “incapacitated from work for about six months” was insufficient to show that she sustained medically determined injury or impairment of nonpermanent nature that prevented her from performing substantially all material acts of her usual and customary daily activities for period of not less than 90 days during 180-day period immediately after accident. Plaintiff did not support her claim of significant disfigurement, even though she averred that she sustained scar under her right eye resulting from laceration caused by accident, where scar was not described in terms of length, width, texture, or density. Estrella v Marano, 255 A.D.2d 358, 679 N.Y.S.2d 678, 1998 N.Y. App. Div. LEXIS 11827 (N.Y. App. Div. 2d Dep't 1998).

Plaintiff failed to rebut defendant's prima facie case that plaintiff did not sustain "serious injury" under CLS Ins § 5102(d) where unsworn progress report by plaintiff's chiropractor was inadmissible, and plaintiff's affidavit contradicted his deposition and consisted of merely conclusory assertions tailored to meet statutory requirements. Benanti v Bay Ridge Lincoln Mercury, Inc., 255 A.D.2d 475, 680 N.Y.S.2d 636, 1998 N.Y. App. Div. LEXIS 12671 (N.Y. App. Div. 2d Dep't 1998).

Defendant was entitled to summary judgment dismissing action for "serious injury" under CLS Ins § 5102(d) where plaintiff's subjective complaints of pain were insufficient to rebut defendant's prima facie case that plaintiff did not suffer serious injury, and plaintiff's magnetic resonance imaging report was not in admissible form. Soto v Fogg, 255 A.D.2d 502, 680 N.Y.S.2d 174, 1998 N.Y. App. Div. LEXIS 12648 (N.Y. App. Div. 2d Dep't 1998).

Plaintiff failed to prove as to whether his second accident resulted in "medically determined injury or impairment of a non-permanent nature" that prevented him from performing his usual daily activities for at least 90 of first 180 days after accident, under CLS Ins § 5102(d), where (1) his neurologist's affidavit did not refer to plaintiff's inability to perform his customary activities as result of either first or second accident, (2) neurologist's unsworn letters were inadmissible and indicated only that plaintiff was disabled as result of first accident, (3) plaintiff acknowledged that he lost no time from work as result of second accident and that he continued to work for another year, and (4) both plaintiff and his wife testified that degree to which his daily activities were limited did not change after second accident. Cody v Parker, 263 A.D.2d 866, 693 N.Y.S.2d 769, 1999 N.Y. App. Div. LEXIS 8281 (N.Y. App. Div. 3d Dep't 1999).

Plaintiff did not sustain "serious injury" under CLS Ins § 5102(d) where much of his evidence was not submitted in admissible form, and his subjective complaints of pain and his physician's affidavit, which was based on examination conducted almost 6 years earlier, were insufficient to raise triable issue of fact. Calcagno v New York City Transit Auth., 266 A.D.2d 421, 698 N.Y.S.2d 872, 1999 N.Y. App. Div. LEXIS 12019 (N.Y. App. Div. 2d Dep't 1999), recalled,

vacated, sub. op., 273 A.D.2d 334, 710 N.Y.S.2d 824, 2000 N.Y. App. Div. LEXIS 7025 (N.Y. App. Div. 2d Dep't 2000).

Plaintiff involved in 2 automobile accidents 3 years apart did not sustain “serious injury” under CLS Ins § 5102(d) in first accident where sole basis for orthopedist’s opinion that plaintiff’s disc herniation at C5-6 was causally related to first accident was notation in another orthopedist’s report stating that plaintiff “was experiencing paresthesias along the C6 root in her right hand,” that unsworn report was of questionable evidentiary value, and there was no objective basis for medical conclusion that plaintiff’s herniated disc and other injuries were causally related to first accident. Zupan v Hart, 266 A.D.2d 795, 699 N.Y.S.2d 155, 1999 N.Y. App. Div. LEXIS 12144 (N.Y. App. Div. 3d Dep't 1999).

Plaintiff did not sustain “serious” injury under CLS Ins § 5102(d), despite his self-serving allegation that he was out of work for about 4 months as result of accident, where his doctor’s affidavit did not indicate that doctor reviewed MRI films on which he relied or that he performed any objective tests that would support his conclusions, no sworn MRI report was attached to doctor’s affidavit, and thus doctor’s opinion lacked probative value. Sherlock v Smith, 273 A.D.2d 95, 709 N.Y.S.2d 176, 2000 N.Y. App. Div. LEXIS 6610 (N.Y. App. Div. 1st Dep't 2000).

Plaintiff did not sustain “serious injury” under CLS Ins § 3102(d) where much of plaintiff’s evidence was not submitted in admissible form, and remaining evidence consisted of his subjective complaints of pain and affirmation of physician based on examination conducted almost 6 years earlier. Calcagno v New York City Transit Auth., 273 A.D.2d 334, 710 N.Y.S.2d 824, 2000 N.Y. App. Div. LEXIS 7025 (N.Y. App. Div. 2d Dep't), aff'd, 95 N.Y.2d 875, 715 N.Y.S.2d 211, 738 N.E.2d 358, 2000 N.Y. LEXIS 3941 (N.Y. 2000).

Plaintiff did not sustain “serious injury” under CLS Ins § 5102(d) where defendants submitted affirmation of orthopedist who concluded, from physical examination and objective medical tests, that plaintiff’s disc herniations were result of preexisting degenerative condition rather than accident, and plaintiff’s treating physician improperly relied on unsworn medical report of another physician and failed to set forth any objective medical basis for his conclusion that

plaintiff's disc herniations were caused or exacerbated by accident. Napoli v Cunningham, 273 A.D.2d 366, 710 N.Y.S.2d 919, 2000 N.Y. App. Div. LEXIS 7079 (N.Y. App. Div. 2d Dep't 2000).

Plaintiffs did not sustain "serious injury" under CLS Ins § 5102(d) where affidavit of their treating chiropractor did not indicate what objective medical tests he performed to measure plaintiffs' restrictions of motion, and court correctly refused to consider unsworn medical records attached to that affidavit. Perovich v Liotta, 273 A.D.2d 367, 710 N.Y.S.2d 908, 2000 N.Y. App. Div. LEXIS 7139 (N.Y. App. Div. 2d Dep't 2000).

Plaintiff did not sustain "serious injury" under CLS Ins § 5102(d) where all but one of medical reports submitted in opposition to defendants' summary judgment motion were neither sworn nor affirmed to be true under penalty of perjury and thus were not competent evidence, and remaining medical report contained only conclusory allegations tailored to meet statutory requirements. Slavin v Associates Leasing, Inc., 273 A.D.2d 372, 710 N.Y.S.2d 916, 2000 N.Y. App. Div. LEXIS 7109 (N.Y. App. Div. 2d Dep't 2000).

Plaintiff did not sustain "serious injury" under CLS Ins § 5102(d) where written statements of her treating physician were not competent evidence under CLS CPLR § 2106. Douglas v Zhi Wei He, 275 A.D.2d 690, 713 N.Y.S.2d 287, 2000 N.Y. App. Div. LEXIS 9177 (N.Y. App. Div. 2d Dep't 2000).

Findings of limitations in plaintiffs' cervical movement were insufficient to prove that they sustained either permanent consequential limitation of use of body organ or member or significant limitation of use of body function or system under CLS Ins § 5102(d) where (1) restriction in cervical flexion purportedly diagnosed for first plaintiff, who claimed most extensive limitation of any plaintiff, did not raise triable issue of fact as to whether she suffered "serious injury," (2) diagnosis that second plaintiff suffered herniated disc was based on MRI report done by another doctor that was not submitted in plaintiffs' papers and thus was properly disregarded as unsupported by competent admissible evidence, and (3) additional diagnostic statements in treating chiropractor's reports were conclusory assertions tailored to meet statutory

requirements. Collins v Jost, 281 A.D.2d 175, 721 N.Y.S.2d 524, 2001 N.Y. App. Div. LEXIS 2242 (N.Y. App. Div. 1st Dep't 2001).

Plaintiff did not sustain “serious injury” under CLS Ins § 5102(d) where, inter alia, (1) defendants’ orthopedist found that plaintiff’s cervical and low back sprains had fully resolved, (2) plaintiff’s chiropractor did not specify degree of limitation or restriction caused by alleged spinal injuries, (3) plaintiff’s proof was based on examination performed over 2 years earlier and unsworn MRI report prepared nearly 5 years earlier by physician no longer treating plaintiff, and (4) although plaintiff’s psychiatrist indicated that plaintiff was suffering from depression since accident, psychiatrist did not address issue of whether plaintiff was unable to function in her usual manner. Gjelaj v Ludde, 281 A.D.2d 211, 721 N.Y.S.2d 643, 2001 N.Y. App. Div. LEXIS 2227 (N.Y. App. Div. 1st Dep't 2001).

Injury to plaintiff’s knee was not “serious injury” under CLS Ins § 5102(d), despite her subjective claims of pain, where (1) her doctor offered no opinion on seriousness or permanency of injury or how it affected plaintiff’s daily activities, (2) doctor’s affirmed medical report did not explain 3-year gap between it and his last examination of plaintiff and improperly relied on unsworn 3-year-old MRI report, and (3) plaintiff lost only 2 days of work, was not confined to bed, and was no longer receiving medical treatment for her knee. Graham v Shuttle Bay, Inc., 281 A.D.2d 372, 722 N.Y.S.2d 541, 2001 N.Y. App. Div. LEXIS 3218 (N.Y. App. Div. 1st Dep't 2001).

Plaintiff did not sustain “serious injury” under CLS Ins § 5102(d) where (1) affirmation of her physician did not state objective medical tests that he performed to determine that plaintiff suffered specifically quantified restrictions of motion in her back and neck, (2) same physician improperly relied on unsworn medical reports and test results of other physicians in reaching his conclusions, and (3) plaintiff did not show that she was prevented from performing substantially all material acts constituting her usual and customary daily activities for required period. Trent v Niewierowski, 281 A.D.2d 622, 722 N.Y.S.2d 68, 2001 N.Y. App. Div. LEXIS 3100 (N.Y. App. Div. 2d Dep't 2001).

Plaintiff did not sustain “serious injury” under CLS Ins § 5102(d) where (1) defendants submitted evidence that plaintiff was suffering from degenerative disc disease and associated degenerative disc bulge, which was not related to any trauma, (2) medical reports by orthopedist and neurologist, both of whom had examined plaintiff over 3 years after accident, indicated that plaintiff had suffered cervical and lumbar sprains, that range of motion in her cervical and lumbar spines was good, and that she was not suffering from orthopedic or neurological disability, and (3) affirmation of plaintiff’s treating chiropractor was not competent evidence. Holmes v Hanson, 286 A.D.2d 750, 730 N.Y.S.2d 528, 2001 N.Y. App. Div. LEXIS 8643 (N.Y. App. Div. 2d Dep't 2001).

89. —Evidence not sufficient

Plaintiff failed to prove that he sustained “serious injury” under CLS Ins § 5102(d) where (1) his chiropractor’s affidavit contained conclusory assertions that plaintiff was suffering from significant limitation and permanent consequential limitation, based on recent examination, without quantifying extent or degree to which plaintiff’s range of movement was limited, (2) although affidavit contained measurements of limitations of motion in plaintiff’s spine, measurements were based on physical examination conducted 4 years earlier, and (3) plaintiff failed to support allegation that his injuries prevented him from performing substantially all of his usual daily activities during at least 90 out of first 180 days after accident. Marin v Kakivelis, 251 A.D.2d 462, 674 N.Y.S.2d 709, 1998 N.Y. App. Div. LEXIS 6883 (N.Y. App. Div. 2d Dep't 1998).

Plaintiff failed to rebut defendant’s prima facie case that plaintiff did not sustain “serious injury” under CLS Ins § 5102(d) where unsworn progress report by plaintiff’s chiropractor was inadmissible, and plaintiff’s affidavit contradicted his deposition and consisted of merely conclusory assertions tailored to meet statutory requirements. Benanti v Bay Ridge Lincoln Mercury, Inc., 255 A.D.2d 475, 680 N.Y.S.2d 636, 1998 N.Y. App. Div. LEXIS 12671 (N.Y. App. Div. 2d Dep't 1998).

Jury verdict finding that plaintiff did not sustain “serious injury” under CLS Ins § 5102(d) was not against weight of evidence, even though he testified that his lower lip was numb in area of injury, which made it difficult for him to eat certain foods, prevented him from smiling, and caused him to drool, where (1) his treating physician testified that wound had healed well, that there was no muscular damage to his lip, and that he was able to smile, (2) photograph of him smiling was admitted into evidence, (3) he demonstrated smile to jury, and (4) jury thus properly found that he did not sustain significant disfigurement or permanent consequential limitation of body organ or member. Moxley v Givens, 255 A.D.2d 632, 679 N.Y.S.2d 472, 1998 N.Y. App. Div. LEXIS 11672 (N.Y. App. Div. 3d Dep't 1998).

Plaintiff did not sustain “serious” injury under CLS Ins § 5102(d), despite his self-serving allegation that he was out of work for about 4 months as result of accident, where his doctor’s affidavit did not indicate that doctor reviewed MRI films on which he relied or that he performed any objective tests that would support his conclusions, no sworn MRI report was attached to doctor’s affidavit, and thus doctor’s opinion lacked probative value. Sherlock v Smith, 273 A.D.2d 95, 709 N.Y.S.2d 176, 2000 N.Y. App. Div. LEXIS 6610 (N.Y. App. Div. 1st Dep't 2000).

Plaintiff did not sustain “serious injury” under CLS Ins § 5102(d) where he did not submit any medical testimony or records, and his entire case rested on his own vague and conclusory assertions of his inability, after accident, to perform unspecified activities due to subjective complaints of pain. Krakofsky v Fox-Rizzi, 273 A.D.2d 277, 709 N.Y.S.2d 856, 2000 N.Y. App. Div. LEXIS 6506 (N.Y. App. Div. 2d Dep't 2000).

Plaintiff did not sustain “serious injury” under CLS Ins § 5102(d) where (1) affidavit of her chiropractor did not explain how limitation of plaintiff’s range of motion, which was described as resolved a few months after accident, was found to exist nearly 4 years later, (2) although chiropractor’s most recent examination noted limitation of plaintiff’s cervical range of motion, he concluded that she had suffered 10 percent limitation of spinal range of motion, and there was no indication in report or affidavit that any tests for spinal range of motion were performed, and (3) objective findings regarding plaintiff’s cervical range of motion showed insignificant

limitations of 2, 4, and 2 percent. Duncan v New York City Transit Auth., 273 A.D.2d 437, 710 N.Y.S.2d 255, 2000 N.Y. App. Div. LEXIS 7368 (N.Y. App. Div. 2d Dep't 2000).

Injury to plaintiff's knee was not "serious injury" under CLS Ins § 5102(d), despite her subjective claims of pain, where (1) her doctor offered no opinion on seriousness or permanency of injury or how it affected plaintiff's daily activities, (2) doctor's affirmed medical report did not explain 3-year gap between it and his last examination of plaintiff and improperly relied on unsworn 3-year-old MRI report, and (3) plaintiff lost only 2 days of work, was not confined to bed, and was no longer receiving medical treatment for her knee. Graham v Shuttle Bay, Inc., 281 A.D.2d 372, 722 N.Y.S.2d 541, 2001 N.Y. App. Div. LEXIS 3218 (N.Y. App. Div. 1st Dep't 2001).

90. — —No objective medical proof

Plaintiff failed to rebut defendant's prima facie case that plaintiff did not sustain "serious injury" under CLS Ins § 5102(d) where affidavit of plaintiff's chiropractor did not indicate any objective basis on which he determined stated degrees of limitation of motion allegedly suffered by plaintiff, and affidavit was clearly tailored to meet statutory requirements. Lebenfeld v Toner, 251 A.D.2d 551, 673 N.Y.S.2d 929, 1998 N.Y. App. Div. LEXIS 7537 (N.Y. App. Div. 2d Dep't 1998).

Plaintiff who injured her neck in motor vehicle accident did not sustain "serious injury" under CLS Ins § 5102(d) where defendants submitted affidavit of orthopedic surgeon who examined plaintiff and opined that she merely sustained cervical sprain/strain and that there was no objective medical evidence of serious or permanent injury, and although affidavits of plaintiff's physician and chiropractor stated that she was unable to engage in substantially all of her customary daily activities for 90 of 180 days after accident, those affidavits were clearly tailored to meet statutory threshold and were dependent solely on information supplied by plaintiff, including her subjective complaints of pain and discomfort. Bennett v Reed, 263 A.D.2d 800, 693 N.Y.S.2d 738, 1999 N.Y. App. Div. LEXIS 8307 (N.Y. App. Div. 3d Dep't 1999).

Plaintiff did not sustain "serious injury" under CLS Ins § 5102(d) where, in opposition to defendants' prima facie showing of no such injury, affidavit of plaintiff's examining physician did

not provide any information concerning objective tests that he performed in arriving at his conclusions about alleged restriction of plaintiff's range of motion. Laincy v Tsou Chienchun, 266 A.D.2d 355, 697 N.Y.S.2d 533, 1999 N.Y. App. Div. LEXIS 11545 (N.Y. App. Div. 2d Dep't 1999).

Plaintiff did not sustain "serious injury" under CLS Ins § 5102(d) where (1) he did not submit any medical records, in admissible form, indicating treatment, if any, received for his alleged injuries in over 2 ½ years between accident and examination conducted by his expert, and (2) his expert did not set forth what objective tests she performed in arriving at her conclusions concerning alleged restrictions of his range of motion. Guevara v Conrad, 273 A.D.2d 198, 708 N.Y.S.2d 698, 2000 N.Y. App. Div. LEXIS 6237 (N.Y. App. Div. 2d Dep't 2000).

Plaintiff did not sustain "serious injury" under CLS Ins § 5102(d), even though his treating chiropractor averred that plaintiff had specifically quantified restrictions of motion in his cervical and lumbar spines, absent any indication that those measurements were based on objective medical tests. Harewood v Aiken, 273 A.D.2d 199, 710 N.Y.S.2d 82, 2000 N.Y. App. Div. LEXIS 6256 (N.Y. App. Div. 2d Dep't 2000).

Plaintiff did not sustain "serious injury" under CLS Ins § 5102(d), even though her treating physician properly relied on unsworn MRI report submitted by defendants, which showed that plaintiff suffered from bulging disc, where (1) physician did not provide any objective evidence of extent or degree of alleged physical limitations resulting from disc injury and its duration, and (2) physician's affirmation, which was dated over 6 ½ years after accident, did not provide any information concerning nature of plaintiff's medical treatment or any explanation for gap of over 6 years between plaintiff's prior and most recent visits to physician. Jackson v New York City Transit Auth., 273 A.D.2d 200, 708 N.Y.S.2d 469, 2000 N.Y. App. Div. LEXIS 6245 (N.Y. App. Div. 2d Dep't 2000).

Plaintiff did not sustain "serious injury" under CLS Ins § 5102(d) where neither of plaintiff's 2 physicians indicated that he had performed objective tests to verify plaintiff's subjective complaints of pain and quantify her alleged limitation of motion, and neither physician explained

gap of about 6 years between plaintiff's final medical treatment and their affidavits. Lauretta v County of Suffolk, 273 A.D.2d 204, 708 N.Y.S.2d 468, 2000 N.Y. App. Div. LEXIS 6227 (N.Y. App. Div. 2d Dep't), app. denied, 95 N.Y.2d 770, 722 N.Y.S.2d 473, 745 N.E.2d 393, 2000 N.Y. LEXIS 3873 (N.Y. 2000).

Plaintiff did not prove that he was prevented by his injuries from performing his usual and customary activities for not less than 90 of 180 days after accident, under CLS Ins § 5102(d), where (1) he merely averred that he was unable to work for 9 months after accident, (2) although his treating physician concurred in that statement, there was no objective evidence that injury prevented plaintiff from performing substantially all of his customary activities, and (3) treating physician's opinion was dependent on plaintiff's subjective complaints. Watt v Eastern Investigative Bureau, Inc., 273 A.D.2d 226, 708 N.Y.S.2d 472, 2000 N.Y. App. Div. LEXIS 6302 (N.Y. App. Div. 2d Dep't 2000).

Plaintiff did not sustain "serious injury" under CLS Ins § 5102(d) where defendants submitted affirmed reports of neurologist and orthopedic surgeon stating that objective tests performed during their examination of plaintiff revealed that he had "normal range of motion," plaintiff's treating chiropractor did not explain objective tests that were performed to support his conclusion that plaintiff suffered restricted range of motion, chiropractor's conclusions appeared to be based on plaintiff's subjective complaints of pain, chiropractor never stated that plaintiff's bulging disc was causally related to accident, and neither plaintiff nor chiropractor sufficiently explained almost 4-year gap between plaintiff's last treatment and most recent examination. Villalta v Schechter, 273 A.D.2d 299, 710 N.Y.S.2d 87, 2000 N.Y. App. Div. LEXIS 6481 (N.Y. App. Div. 2d Dep't 2000).

Plaintiff did not sustain "serious injury" under CLS Ins § 5102(d) where defendants submitted affirmation of orthopedist who concluded, from physical examination and objective medical tests, that plaintiff's disc herniations were result of preexisting degenerative condition rather than accident, and plaintiff's treating physician improperly relied on unsworn medical report of another physician and failed to set forth any objective medical basis for his conclusion that

plaintiff's disc herniations were caused or exacerbated by accident. Napoli v Cunningham, 273 A.D.2d 366, 710 N.Y.S.2d 919, 2000 N.Y. App. Div. LEXIS 7079 (N.Y. App. Div. 2d Dep't 2000).

Plaintiff did not sustain "serious injury" under CLS Ins § 5102(d), even though affirmations of her treating and examining physicians purported to quantify certain alleged restrictions in her range of motion, where those physicians did not support their conclusions with proof of objectively diagnosed injury, provide any information about nature of plaintiff's medical treatment, or explain over 4-year gap between date of accident and her later visits. Welcome v Diab, 273 A.D.2d 377, 711 N.Y.S.2d 329, 2000 N.Y. App. Div. LEXIS 7071 (N.Y. App. Div. 2d Dep't 2000).

Plaintiff did not sustain "serious injury" under CLS Ins § 5102(d) where orthopedic surgeon's examination of plaintiff revealed no objective signs to confirm any of plaintiff's subjective complaints, chiropractor failed to provide adequate explanation for 22-month lag between plaintiff's initial medical treatment and later visit and failed to state what objective tests he performed in arriving at his conclusions regarding alleged restrictions in plaintiff's range of motion, and plaintiff did not show that she suffered from medically determined injury that prevented her from performing substantially all of her customary and usual activities for at least 90 days during 180 days immediately after accident. Graves v Rui Liu, 273 A.D.2d 440, 710 N.Y.S.2d 113, 2000 N.Y. App. Div. LEXIS 7373 (N.Y. App. Div. 2d Dep't 2000).

Plaintiff did not sustain "serious injury" under CLS Ins § 5102(d) where plaintiff's doctor neither quantified any limitations of motion nor verified any limitation by objective medical findings, either at initial visit or 5 years later at most recent examination, and plaintiff did not show that she was prevented from performing substantially all of her customary and usual activities for at least 90 days during 180 days immediately after accident. Linares v Mompoint, 273 A.D.2d 446, 711 N.Y.S.2d 741, 2000 N.Y. App. Div. LEXIS 7378 (N.Y. App. Div. 2d Dep't 2000).

Plaintiff did not sustain "serious injury" under CLS Ins § 5102(d) where her sole medical evidence was physician's affidavit that stated neither (1) objective tests performed in reaching conclusions concerning restrictions in plaintiff's range of motion nor (2) treatment, if any, that

plaintiff received. McKie v Hughes, 273 A.D.2d 448, 712 N.Y.S.2d 365, 2000 N.Y. App. Div. LEXIS 7355 (N.Y. App. Div. 2d Dep't 2000).

Plaintiff did not sustain “serious injury” under CLS Ins § 5102(d) where her doctor failed to (1) state what objective tests, if any, were used to examine plaintiff, (2) specify degree of plaintiff’s limitation of motion, and (3) explain almost 2 ½ -year gap in treatment between accident and plaintiff’s most recent medical examination. Slasor v Elfaiz, 275 A.D.2d 771, 713 N.Y.S.2d 742, 2000 N.Y. App. Div. LEXIS 9435 (N.Y. App. Div. 2d Dep't 2000).

Plaintiff did not sustain “serious injury” under CLS Ins § 5102(d) where (1) there was no objective medical basis for opinions of his experts that injury shown in May 1998 MRI was causally related to March 1992 accident, (2) those opinions were dependent solely on his representations of continuing pain and related problems since terminating treatment in April 1992, (3) as of that date, his attending physician reported that plaintiff “had full range of motion and complained of no pain,” (4) diagnostic tests performed in 1992 and 1993 revealed only preexisting degenerative arthritic condition of cervical spine and “mild C 7 radiculopathy,” and (5) plaintiff did not prove causal relationship between accident and that radiculopathy. Palivoda v Sluberski, 275 A.D.2d 1036, 713 N.Y.S.2d 378, 2000 N.Y. App. Div. LEXIS 9638 (N.Y. App. Div. 4th Dep't 2000).

Plaintiff did not sustain “serious injury” under CLS Ins § 5102(d) where (1) affirmation of her physician did not state objective medical tests that he performed to determine that plaintiff suffered specifically quantified restrictions of motion in her back and neck, (2) same physician improperly relied on unsworn medical reports and test results of other physicians in reaching his conclusions, and (3) plaintiff did not show that she was prevented from performing substantially all material acts constituting her usual and customary daily activities for required period. Trent v Niewierowski, 281 A.D.2d 622, 722 N.Y.S.2d 68, 2001 N.Y. App. Div. LEXIS 3100 (N.Y. App. Div. 2d Dep't 2001).

Self-employed florist did not sustain “serious injury” under CLS Ins § 5102(d) where (1) he was examined in hospital emergency room immediately after motor vehicle accident and was

diagnosed with muscle strain of his neck and back, (2) he missed only 4 or 5 days of work and then worked part-time thereafter, (3) independent medical examination report affirmed lack of objective findings or ongoing disability, and (4) his own medical experts (orthopedist and chiropractor) described his permanent disability as “very mild” and “mild.” In action involving issue of “serious injury” under CLS Ins § 5102(d), self-employed florist who sustained muscle strain of his neck and back in motor vehicle accident did not prove that he was unable to perform substantially all of his usual daily activities for not less than 90 out of 180 days following accident where (1) his medical experts’ affidavits were deficient because they were clearly tailored to meet statutory threshold and ignored fact that he missed only 4 or 5 full work days, and (2) as activities restricted since accident, florist listed at his deposition only landscaping, which he estimated as 25 to 40 percent of his business, and riding friend’s jet ski and snow skiing, which he had done “at the maximum maybe two to three times.” Pantalone v Goodman, 281 A.D.2d 790, 722 N.Y.S.2d 291, 2001 N.Y. App. Div. LEXIS 2497 (N.Y. App. Div. 3d Dep't 2001).

Plaintiff did not sustain “serious injury” under CLS Ins § 5102(d) where (1) evidence of disc herniation alone is not sufficient proof, (2) 2 of 3 experts failed to provide objective evidence of extent or degree of the physical limitations resulting from herniation or its duration, (3) third expert, although quantifying limitations, did not draw any causal connection between herniation and car accident, (4) plaintiff’s experts also failed to submit quantitative objective findings as to plaintiff’s shoulder injury, and (5) experts did not explain 22-month hiatus between cessation of plaintiff’s medical treatment after accident and physical examinations that they conducted, possibility that plaintiff’s condition might have existed before accident, or possible significance of related injuries sustained by plaintiff in later car accident. Uber v Heffron, 286 A.D.2d 729, 730 N.Y.S.2d 174, 2001 N.Y. App. Div. LEXIS 8558 (N.Y. App. Div. 2d Dep't 2001).

Plaintiff did not sustain “serious injury” under CLS Ins § 5102(d) where (1) defendants’ medical evidence proved that plaintiff did not sustain serious loss of hearing as result of accident, (2) it could be inferred from plaintiff’s deposition that any orthopedic injuries that he sustained in

accident had long since been resolved, and (3) plaintiff's medical expert failed to specify objective tests used in arriving at her conclusions regarding alleged restrictions in plaintiff's range of motion. Thaler v Aspen Ready Mix Corp., 286 A.D.2d 763, 730 N.Y.S.2d 717, 2001 N.Y. App. Div. LEXIS 8698 (N.Y. App. Div. 2d Dep't 2001).

91. — —No quantified medical limitation

Affidavit of treating chiropractor for infant plaintiff was insufficient to show that she sustained "permanent consequential limitation of use of a body function or system" under CLS Ins § 5102(d) where he failed to quantify restriction of motion that she allegedly suffered. Jeannot v Lawrence, 245 A.D.2d 547, 667 N.Y.S.2d 66, 1997 N.Y. App. Div. LEXIS 13362 (N.Y. App. Div. 2d Dep't 1997).

Plaintiff failed to prove that she sustained "serious injury" under CLS Ins § 5102(d) where her treating physician's affidavits did not specify extent or degree of her alleged "significant limitation of use of a body function or system." Williams v Tillak, 251 A.D.2d 657, 675 N.Y.S.2d 555, 1998 N.Y. App. Div. LEXIS 7956 (N.Y. App. Div. 2d Dep't 1998).

Plaintiff did not sustain "serious injury" under CLS Ins § 5102(d), despite her subjective complaints of pain, where chiropractor's affidavit asserting that plaintiff had decreased range of motion in her spine as result of accident did not specify extent or degree of that decrease and thus did not raise triable issue of fact as to whether limitation of motion was "significant" or "consequential," and chiropractor's affidavit contained no objective findings to support his conclusory assertion that injury was permanent. Brehaut v Laveck, 266 A.D.2d 927, 697 N.Y.S.2d 418, 1999 N.Y. App. Div. LEXIS 11877 (N.Y. App. Div. 4th Dep't 1999).

Plaintiff did not sustain "serious injury" under CLS Ins § 5102(d) where neither of plaintiff's 2 physicians indicated that he had performed objective tests to verify plaintiff's subjective complaints of pain and quantify her alleged limitation of motion, and neither physician explained gap of about 6 years between plaintiff's final medical treatment and their affidavits. Lauretta v County of Suffolk, 273 A.D.2d 204, 708 N.Y.S.2d 468, 2000 N.Y. App. Div. LEXIS 6227 (N.Y.

App. Div. 2d Dep't), app. denied, 95 N.Y.2d 770, 722 N.Y.S.2d 473, 745 N.E.2d 393, 2000 N.Y. LEXIS 3873 (N.Y. 2000).

Plaintiff did not sustain “serious injury” under CLS Ins § 5102(d) where, inter alia, (1) defendants submitted reports of 2 orthopedic surgeons stating that plaintiff did not sustain any restrictions in range of motion due to accident and could resume her normal activities, (2) reports of plaintiff’s treating chiropractor and orthodontist were not based on recent examination of plaintiff and thus were insufficient, (3) those reports did not explain gap of over 3 ½ years in treatment immediately preceding submission of reports, (4) although plaintiff’s orthopedic surgeon stated that plaintiff suffered from “chronic cervical strain, chronic impingement syndrome, and myofascial pain syndrome” as result of accident, he did not quantify any restriction in plaintiff’s range of motion, and (5) surgeon’s report was not based on recent examination of plaintiff. Borino v Little, 273 A.D.2d 262, 709 N.Y.S.2d 575, 2000 N.Y. App. Div. LEXIS 6536 (N.Y. App. Div. 2d Dep't 2000), app. denied, 96 N.Y.2d 704, 723 N.Y.S.2d 131, 746 N.E.2d 186, 2001 N.Y. LEXIS 263 (N.Y. 2001).

Plaintiff did not sustain “serious injury” under CLS Ins § 5102(d) where, inter alia, (1) defendants’ orthopedist found that plaintiff’s cervical and low back sprains had fully resolved, (2) plaintiff’s chiropractor did not specify degree of limitation or restriction caused by alleged spinal injuries, (3) plaintiff’s proof was based on examination performed over 2 years earlier and unsworn MRI report prepared nearly 5 years earlier by physician no longer treating plaintiff, and (4) although plaintiff’s psychiatrist indicated that plaintiff was suffering from depression since accident, psychiatrist did not address issue of whether plaintiff was unable to function in her usual manner. Gjelaj v Ludde, 281 A.D.2d 211, 721 N.Y.S.2d 643, 2001 N.Y. App. Div. LEXIS 2227 (N.Y. App. Div. 1st Dep't 2001).

Plaintiff did not sustain “serious injury” under CLS Ins § 5102(d) where (1) affirmation of her physician did not state objective medical tests that he performed to determine that plaintiff suffered specifically quantified restrictions of motion in her back and neck, (2) same physician improperly relied on unsworn medical reports and test results of other physicians in reaching his

conclusions, and (3) plaintiff did not show that she was prevented from performing substantially all material acts constituting her usual and customary daily activities for required period. Trent v Niewierowski, 281 A.D.2d 622, 722 N.Y.S.2d 68, 2001 N.Y. App. Div. LEXIS 3100 (N.Y. App. Div. 2d Dep't 2001).

Plaintiff did not sustain "serious injury" under CLS Ins § 5102(d) where (1) medical experts disagreed as to whether his herniated discs were caused by motor vehicle accident or preexisting degenerative condition temporarily aggravated by accident, (2) plaintiff's expert did not specify any resulting loss or limitation of motion, (3) plaintiff continued to play racquetball once or twice per week, although he could not compete with same frequency and intensity as before accident, (4) he continued to participate in Tai Chi, exercising regularly, although with some discomfort, (5) in his employment as teacher, he sat more often while giving lectures after accident, and (6) he was no longer taking prescription medication, although he was using ibuprofen for pain. Rose v Furgerson, 281 A.D.2d 857, 721 N.Y.S.2d 873, 2001 N.Y. App. Div. LEXIS 3047 (N.Y. App. Div. 3d Dep't), app. denied, 97 N.Y.2d 602, 735 N.Y.S.2d 491, 760 N.E.2d 1287, 2001 N.Y. LEXIS 3301 (N.Y. 2001).

92. — —Subjective medical proof only

Plaintiff did not sustain "serious injury" under CLS Ins § 5102(d) where (1) affidavit of plaintiff's physician, based on examination over 4 years after accident, consisted of conclusory assertions tailored to meet statutory requirements, (2) plaintiff's affidavit consisted of merely subjective complaints of pain, and (3) scar on plaintiff's forehead, allegedly sustained in accident, was not significant disfigurement. Dyagi v Newburgh Auto Auction, Inc., 251 A.D.2d 619, 675 N.Y.S.2d 872, 1998 N.Y. App. Div. LEXIS 7921 (N.Y. App. Div. 2d Dep't 1998).

Plaintiff did not sustain "serious injury" under CLS Ins § 5102(d), even though affidavit of her treating neurologist stated that, as result of accident, plaintiff sustained permanent disability and significant limitation of motion in her lumbar region caused by myofascial pain syndrome, where neurologist's conclusions were based on plaintiff's subjective complaints of pain and were

unsupported by objective medical proof, and unsworn statements of that neurologist contained in unsworn report of defendant's expert neurologist were not in admissible form. Stowell v Safee, 251 A.D.2d 1026, 674 N.Y.S.2d 228, 1998 N.Y. App. Div. LEXIS 7065 (N.Y. App. Div. 4th Dep't 1998).

Defendant was entitled to summary judgment dismissing action for "serious injury" under CLS Ins § 5102(d) where plaintiff's subjective complaints of pain were insufficient to rebut defendant's prima facie case that plaintiff did not suffer serious injury, and plaintiff's magnetic resonance imaging report was not in admissible form. Soto v Fogg, 255 A.D.2d 502, 680 N.Y.S.2d 174, 1998 N.Y. App. Div. LEXIS 12648 (N.Y. App. Div. 2d Dep't 1998).

Plaintiffs did not sustain serious injuries under CLS Ins § 5102(d) where (1) orthopedist's finding that first plaintiff had sustained permanent loss or use of body organ, member, function, or system was improperly based on subjective complaints of pain, (2) although same orthopedist's conclusion that second plaintiff had sustained serious injury was based on MRI results, he did not indicate that he reviewed MRI films, and he did not attach copy of sworn MRI report to his affidavit, and (3) affidavit of physical therapist was of limited probative value in opposition to affirmed reports prepared by board-certified orthopedic surgeon submitted by defendants. Shay v Jerkins, 263 A.D.2d 475, 692 N.Y.S.2d 730, 1999 N.Y. App. Div. LEXIS 7879 (N.Y. App. Div. 2d Dep't 1999).

Plaintiff did not sustain "serious injury" under CLS Ins § 5102(d), despite his otolaryngologist's conclusion that he sustained "permanent loss, to a degree, of the function of his audiological system," where MRI audiologic evaluation results were negative, and diagnosis of tinnitus rested solely on plaintiff's subjective complaints of ringing in ear, which was not accompanied by hearing loss or any other manifestation of injury. Congdon v Preisman, 263 A.D.2d 808, 693 N.Y.S.2d 757, 1999 N.Y. App. Div. LEXIS 8301 (N.Y. App. Div. 3d Dep't 1999).

Plaintiff did not sustain "serious injury" under CLS Ins § 5102(d) where much of his evidence was not submitted in admissible form, and his subjective complaints of pain and his physician's affidavit, which was based on examination conducted almost 6 years earlier, were insufficient to

raise triable issue of fact. Calcagno v New York City Transit Auth., 266 A.D.2d 421, 698 N.Y.S.2d 872, 1999 N.Y. App. Div. LEXIS 12019 (N.Y. App. Div. 2d Dep't 1999), recalled, vacated, sub. op., 273 A.D.2d 334, 710 N.Y.S.2d 824, 2000 N.Y. App. Div. LEXIS 7025 (N.Y. App. Div. 2d Dep't 2000).

Plaintiff involved in 2 automobile accidents 3 years apart did not sustain "serious injury" under CLS Ins § 5102(d) in first accident where sole basis for orthopedist's opinion that plaintiff's disc herniation at C5-6 was causally related to first accident was notation in another orthopedist's report stating that plaintiff "was experiencing paresthesias along the C6 root in her right hand," that unsworn report was of questionable evidentiary value, and there was no objective basis for medical conclusion that plaintiff's herniated disc and other injuries were causally related to first accident. Zupan v Hart, 266 A.D.2d 795, 699 N.Y.S.2d 155, 1999 N.Y. App. Div. LEXIS 12144 (N.Y. App. Div. 3d Dep't 1999).

Plaintiff did not sustain "serious injury" under CLS Ins § 3102(d) where much of plaintiff's evidence was not submitted in admissible form, and remaining evidence consisted of his subjective complaints of pain and affirmation of physician based on examination conducted almost 6 years earlier. Calcagno v New York City Transit Auth., 273 A.D.2d 334, 710 N.Y.S.2d 824, 2000 N.Y. App. Div. LEXIS 7025 (N.Y. App. Div. 2d Dep't), aff'd, 95 N.Y.2d 875, 715 N.Y.S.2d 211, 738 N.E.2d 358, 2000 N.Y. LEXIS 3941 (N.Y. 2000).

Plaintiffs did not sustain "serious injury" under CLS Ins § 5102(d) where affidavit of their treating chiropractor did not indicate what objective medical tests he performed to measure plaintiffs' restrictions of motion, and court correctly refused to consider unsworn medical records attached to that affidavit. Perovich v Liotta, 273 A.D.2d 367, 710 N.Y.S.2d 908, 2000 N.Y. App. Div. LEXIS 7139 (N.Y. App. Div. 2d Dep't 2000).

Plaintiff did not sustain "serious injury" under CLS Ins § 5102(d), despite her subjective complaints of pain and disability, where (1) her chiropractor's affidavit referred to findings from his examination of her over one year earlier, in which only minimal limitations of movement were noted, and affidavit did not indicate that his opinion was based on more recent examination, (2)

plaintiff missed only one day of work because of accident, and (3) during summer after accident, she participated in various athletic activities, such as tennis and bicycling. Mohamed v Dhanasar, 273 A.D.2d 451, 711 N.Y.S.2d 733, 2000 N.Y. App. Div. LEXIS 7395 (N.Y. App. Div. 2d Dep't 2000).

II. Under Former Civil Practice Laws

A. Directed Verdict

i. In General

93. Generally

Until a jury has agreed upon a verdict upon the issues submitted to it, a directed verdict upon other issues remains merely a ruling made in the course of the trial and does not constitute a judicial determination of such issues. In re Mackenzie's Will, 272 N.Y. 403, 6 N.E.2d 73, 272 N.Y. (N.Y.S.) 403, 1936 N.Y. LEXIS 918 (N.Y. 1936).

Under CPA § 457a and § 1333 (now Real Prop Actions & Proc Law 404), the relator was entitled, as a matter of right, to have the jury render a verdict upon issues not submitted. People ex rel. Bean v Clausen, 74 A.D. 217, 77 N.Y.S. 521, 1902 N.Y. App. Div. LEXIS 1818 (N.Y. App. Div. 1902).

CPA § 457a defined the power of the court to determine when, on the basis of the evidence adduced, to direct a verdict, but did not purport to limit or extend the time or manner of directing a verdict. Kramer v United States Fidelity & Guaranty Co., 212 A.D. 644, 209 N.Y.S. 419, 1925 N.Y. App. Div. LEXIS 9523 (N.Y. App. Div. 1925).

Where it was stipulated that a different judge could take all action necessary in connection with reception of the verdict, he could not direct a verdict, but if the verdict was irregular and void he

could advise the jury to retire and reconsider it. Covaleski v Thomas, 229 A.D. 413, 242 N.Y.S. 174, 1930 N.Y. App. Div. LEXIS 10401 (N.Y. App. Div. 1930).

Where a party moves for a directed verdict, he waives his right to go to the jury and, absent further action, the court may pass upon all questions of law or fact, and the decision stands as would a verdict of a jury. Niagara Ferry & Transp. Co. v Eagle Star & British Dominion Ins. Co., 229 A.D. 433, 242 N.Y.S. 273, 1930 N.Y. App. Div. LEXIS 10410 (N.Y. App. Div.), aff'd, 254 N.Y. 626, 173 N.E. 895, 254 N.Y. (N.Y.S.) 626, 1930 N.Y. LEXIS 1238 (N.Y. 1930).

Where plaintiff fails to establish his cause of action by a fair preponderance of the evidence, it is error for trial court to direct judgment in favor of plaintiff solely on ground that defendant failed to establish his defense by a fair preponderance of evidence. Cohen v Gellers, 15 A.D.2d 954, 226 N.Y.S.2d 710, 1962 N.Y. App. Div. LEXIS 10798 (N.Y. App. Div. 2d Dep't 1962).

The test to be applied upon a motion for the direction of a verdict is whether there has been an actual defect of proof, and hence, as matter of law the party moved against was not entitled to recover. Dubin v Fashion Knitting Mills, 19 Misc. 2d 95, 194 N.Y.S.2d 320, 1959 N.Y. Misc. LEXIS 3401 (N.Y. App. Term 1959).

On motion for directed verdict court does not weigh evidence, but determines whether, viewing the evidence most favorably to the non-movant and the inferences reasonably drawn therefrom, a verdict might under the law be found against the non-movant. Dubin v Fashion Knitting Mills, 19 Misc. 2d 95, 194 N.Y.S.2d 320, 1959 N.Y. Misc. LEXIS 3401 (N.Y. App. Term 1959).

94. Constitutionality

Validity of CPA § 457a questioned by appellant but not passed upon by court. Greenpoint Nat'l Bank v Gilbert, 237 N.Y. 19, 142 N.E. 338, 237 N.Y. (N.Y.S.) 19, 1923 N.Y. LEXIS 679 (N.Y. 1923).

In re Bennett's Will, 207 A.D. 388, 202 N.Y.S. 201, 1923 N.Y. App. Div. LEXIS 5967 (N.Y. App. Div. 1923), aff'd, 238 N.Y. 583, 144 N.E. 901, 238 N.Y. (N.Y.S.) 583, 1924 N.Y. LEXIS 761 (N.Y. 1924).

Constitutionality upheld, see Noonan v Paine, 267 A.D. 1035, 49 N.Y.S.2d 89, 1944 N.Y. App. Div. LEXIS 6115 (N.Y. App. Div. 1944).

Where the trial court directed a verdict against a party and the testimony presented a perfectly fair question of fact for the jury, and nothing appeared in the record from which it could be fairly said that a verdict in favor of such party would have been against the weight of evidence, held that it was not necessary, in reversing the judgment, to determine the constitutionality of CPA § 457-a. Goldberg v Price, 205 N.Y.S. 391, 123 Misc. 532, 1924 N.Y. Misc. LEXIS 948 (N.Y. App. Term 1924).

95. Applicability

CPA § 457-a referred to Surrogate’s Courts as well as to the Supreme Court. In re Price's Will, 204 A.D. 252, 197 N.Y.S. 778, 1923 N.Y. App. Div. LEXIS 9451 (N.Y. App. Div.), aff'd, 236 N.Y. 656, 142 N.E. 323, 236 N.Y. (N.Y.S.) 656, 1923 N.Y. LEXIS 1116 (N.Y. 1923).

L 1949 ch 604 was held not retroactive so as to authorize appeal from order denying nonsuit. Holdren v Morris, 275 A.D. 996, 91 N.Y.S.2d 344, 1949 N.Y. App. Div. LEXIS 5386 (N.Y. App. Div. 1949).

CPA § 457-a did not apply to actions wherein the only issue was the amount of an unliquidated claim. Homes Leasing Corp. v Eisenstadt, 207 N.Y.S. 159, 124 Misc. 168, 1924 N.Y. Misc. LEXIS 1038 (N.Y. App. Term 1924).

96. Directed verdict where evidence is legally insufficient

Evidence is incredible as matter of law where no reasonable man can accept it and base inference thereon. Blum v Fresh Grown Preserve Corp., 292 N.Y. 241, 54 N.E.2d 809, 292 N.Y. (N.Y.S.) 241, 1944 N.Y. LEXIS 1379 (N.Y. 1944).

In an action against codefendants' respective owners of boats which collided, whereby plaintiff's intestate was killed, the captains of both boats testified their boats were going backward at the time, one or the other version must be untrue, and the court was not justified in dismissing the complaint as to either defendant on a special finding that neither defendant was guilty, but should have instructed the jury to render a general verdict, or should have directed verdict for the party entitled thereto. Carlin v New York Dock Co., 135 A.D. 876, 120 N.Y.S. 261, 1909 N.Y. App. Div. LEXIS 4087 (N.Y. App. Div. 1909), reh'g denied, 137 A.D. 71, 122 N.Y.S. 57, 1910 N.Y. App. Div. LEXIS 615 (N.Y. App. Div. 1910), app. dismissed, 200 N.Y. 598, 94 N.E. 1092, 200 N.Y. (N.Y.S.) 598, 1911 N.Y. LEXIS 1490 (N.Y. 1911).

Test in considering motion to direct verdict is whether trial court could find that by no rational process could trier of facts base finding in favor of party moved against upon evidence. Wearever Upholstery & Furniture Corp. v Home Ins. Co., 286 A.D. 93, 141 N.Y.S.2d 107, 1955 N.Y. App. Div. LEXIS 3982 (N.Y. App. Div. 1955).

Where contestant in probate proceeding was able to show motive and opportunity but unable to show any evidence of undue influence, and had evidence been submitted to jury and verdict returned in favor of contestant, it would have been necessary to set aside verdict, surrogate was authorized to direct verdict for proponent, as evidence insufficient to convince reasonable mind is no evidence at all. In re Will of Richards, 1 A.D.2d 502, 151 N.Y.S.2d 744, 1956 N.Y. App. Div. LEXIS 5416 (N.Y. App. Div. 3d Dep't 1956).

A trial court may direct a verdict when it would be required to set aside a contrary verdict for legal insufficiency of evidence. McDonald v Hatz, 3 A.D.2d 32, 157 N.Y.S.2d 809, 1956 N.Y. App. Div. LEXIS 3486 (N.Y. App. Div. 4th Dep't 1956).

The test to determine whether or not a trial court can direct a verdict is whether the trial court could find that by “no rational process could the trier of the facts base a finding in favor of the party moved against upon the evidence presented.” McDonald v Hatz, 3 A.D.2d 32, 157 N.Y.S.2d 809, 1956 N.Y. App. Div. LEXIS 3486 (N.Y. App. Div. 4th Dep't 1956).

In considering a motion to direct a verdict, the court cannot properly undertake to weigh the evidence. Its duty is to take that view of the evidence most favorable to the nonmoving party and from the evidence and inferences reasonably to be drawn therefrom determine whether or not under the law a verdict could be found for the moving party and the test is whether the trial court could find “that by no rational process could the trier of facts base a finding in favor of the party moved against upon the evidence presented.” Fuhrman v Davis, 7 A.D.2d 616, 178 N.Y.S.2d 677, 1958 N.Y. App. Div. LEXIS 4587 (N.Y. App. Div. 4th Dep't 1958).

CPA § 457-a was not applicable where the evidence of the party who sought a directed verdict was such as need not be accepted. Harris v Rabinowitz, 231 N.Y.S. 654, 133 Misc. 507, 1928 N.Y. Misc. LEXIS 1159 (N.Y. App. Term 1928).

The court may direct a verdict where a contrary verdict will be set aside, and the scintilla rule of “some” evidence, however slight, no longer applies. Baxter v Baxter, 11 Misc. 2d 69, 169 N.Y.S.2d 871, 1957 N.Y. Misc. LEXIS 2005 (N.Y. Sup. Ct. 1957).

Where verdict for plaintiff is incredible as a matter of law because no reasonable man could accept it and base an inference upon it, verdict set aside. Frankenheim v B. Altman & Co., 13 Misc. 2d 1079, 177 N.Y.S.2d 302, 1958 N.Y. Misc. LEXIS 3224 (N.Y. Sup. Ct. 1958), app. dismissed, 8 A.D.2d 809, 190 N.Y.S.2d 612, 1959 N.Y. App. Div. LEXIS 7790 (N.Y. App. Div. 1st Dep't 1959).

Although plaintiff’s testimony made out prima facie case, but weight of credible evidence from all facts and circumstances falls far short of sustaining burden of proof as matter of law, direction of verdict for defendant was required. Sagorsky v Malyon, 141 N.Y.S.2d 570, 1955 N.Y. Misc.

LEXIS 2690 (N.Y. Sup. Ct. 1955), aff'd, 2 A.D.2d 675, 153 N.Y.S.2d 560, 1956 N.Y. App. Div. LEXIS 4830 (N.Y. App. Div. 1st Dep't 1956).

Where court granted defendant's motion to set aside verdict for plaintiff, and defendant subsequently made timely motion for directed verdict in his favor and for dismissal of complaint, question is whether facts and inference construed in favor of plaintiff, accepting as true testimony of plaintiff's witness, would support verdict for plaintiff, and on such motion, "legal insufficiency of evidence" includes insufficient evidence to sustain burden of proof as well as prima facie evidence. Sagorsky v Malyon, 141 N.Y.S.2d 570, 1955 N.Y. Misc. LEXIS 2690 (N.Y. Sup. Ct. 1955), aff'd, 2 A.D.2d 675, 153 N.Y.S.2d 560, 1956 N.Y. App. Div. LEXIS 4830 (N.Y. App. Div. 1st Dep't 1956).

97. Motion by both parties

Plaintiff, by moving for a directed verdict, did not waive his right to have the jury determine issues of fact, notwithstanding that defendant had also moved for a directed verdict and neither party reserved his right to go to the jury. Kestler v Goffredi, 11 Misc. 2d 871, 172 N.Y.S.2d 629, 1958 N.Y. Misc. LEXIS 3908 (N.Y. App. Term 1958).

Defendant by moving for directed verdict did not waive its right to trial by jury, though plaintiff had also moved for directed verdict. Karlin v Stuyvesant Press Corp., 146 N.Y.S.2d 294, 1955 N.Y. Misc. LEXIS 3882 (N.Y. App. Term 1955).

98. Effect of failure to move for directed verdict

CPA § 457-a was not in question where defendant, by failing to move, at the close of the case, for a dismissal of the case or for a direction of the verdict, conceded or admitted that there was evidence justifying a submission of the case to the jury. Eno v Klein, 236 N.Y. 543, 142 N.E. 276, 236 N.Y. (N.Y.S.) 543, 1923 N.Y. LEXIS 967 (N.Y. 1923).

Where the plaintiff failed to move for a directed verdict at the close of all the evidence, plaintiff conceded that there was a question of fact to be passed upon by the jury and after the verdict was received the court could not direct judgment in favor of plaintiff under CPA § 457-a. Taylor v Creary, 5 A.D.2d 876, 171 N.Y.S.2d 560, 1958 N.Y. App. Div. LEXIS 6688 (N.Y. App. Div. 2d Dep't 1958).

Plaintiff by failing to move for directed verdict at end of entire case conceded that there were questions of fact for jury to determine. Laby v Gordon, 10 A.D.2d 988, 202 N.Y.S.2d 867, 1960 N.Y. App. Div. LEXIS 9725 (N.Y. App. Div. 2d Dep't 1960).

By failing to move for directed verdict plaintiff conceded that there were factual questions to be determined by jury, and where the verdict was not contrary to weight of the evidence, court erred in setting verdict aside and granting new trial. McManus v Edmunds, 11 A.D.2d 740, 204 N.Y.S.2d 801, 1960 N.Y. App. Div. LEXIS 9008 (N.Y. App. Div. 2d Dep't 1960) (verdict reinstated on appeal).

99. Motion to dismiss at end of entire case

A motion to dismiss at close of entire case is equivalent to a motion for a directed verdict, and is to be decided by a determination of whether the court would be required to set aside a contrary verdict for legal insufficiency of evidence. Weinrib v Krich, 17 Misc. 2d 868, 191 N.Y.S.2d 874, 1959 N.Y. Misc. LEXIS 3747 (N.Y. App. Term 1959).

Court had authority, having denied defendant’s motion to dismiss complaint at end of plaintiff’s and defendant’s case, thereafter to vacate its ruling and upon the entire case reserve decision with respect to defendant’s motion to dismiss complaint. Cutler v Brockington, 19 Misc. 2d 28, 187 N.Y.S.2d 108, 1959 N.Y. Misc. LEXIS 3803 (N.Y. Sup. Ct. 1959), aff'd, 10 A.D.2d 712, 199 N.Y.S.2d 171, 1960 N.Y. App. Div. LEXIS 11437 (N.Y. App. Div. 2d Dep't 1960).

A motion to dismiss at the close of entire case is equivalent to a motion for a directed verdict, and if there is any evidence in the record, direct or circumstantial, reasonably warranting an

inference of defendant’s liability, the motion must be denied and the case must be submitted to the jury. Chmela v Board of Education, 26 Misc. 2d 10, 207 N.Y.S.2d 401, 1960 N.Y. Misc. LEXIS 2476 (N.Y. Sup. Ct. 1960), aff'd, 17 A.D.2d 826, 233 N.Y.S.2d 56, 1962 N.Y. App. Div. LEXIS 7825 (N.Y. App. Div. 2d Dep't 1962).

ii. Propriety Of Directed Verdict In Particular Matters

100. Contracts generally

Judgment was directed to be entered in favor of defendants dismissing complaint where affidavits raised no issue of fact but clearly showed that agreement upon which action was brought was illegal. Margulies v Mittlemark, 2 A.D.2d 883, 156 N.Y.S.2d 353, 1956 N.Y. App. Div. LEXIS 3871 (N.Y. App. Div. 1st Dep't 1956), aff'd, 3 N.Y.2d 743, 163 N.Y.S.2d 976, 143 N.E.2d 521, 1957 N.Y. LEXIS 1050 (N.Y. 1957).

Where theory of anticipatory breach of contract is refuted by record and supported only by contradictory testimony of one witness, direction of verdict for defendant was proper. Rodorn Mfg. Corp. v Rudel Machinery Co., 144 N.Y.S.2d 354, 207 Misc. 1058, 1955 N.Y. Misc. LEXIS 3747 (N.Y. Sup. Ct. 1955).

101. —Agency and brokerage

In action to recover brokerage, wherein it was undisputed that the prospective buyer had funds available to consummate the purchase, it was error to dismiss for insufficiency of proof of financial ability, but question should have been submitted to jury. Weinrib v Krich, 17 Misc. 2d 868, 191 N.Y.S.2d 874, 1959 N.Y. Misc. LEXIS 3747 (N.Y. App. Term 1959).

Where there was no credible evidence supporting a jury finding that, although a decedent and a driver were negligent, neither person’s negligence was a proximate cause of an accident, a new

trial on the issue of liability was warranted. Lockhart v Adirondack Transit Lines, Inc., 305 A.D.2d 766, 759 N.Y.S.2d 567, 2003 N.Y. App. Div. LEXIS 5249 (N.Y. App. Div. 3d Dep't 2003).

102. Insurance

In action by insured on fire policy, disputed questions as to asserted defenses of fraud and false swearing, including consideration of credibility of plaintiff's witnesses, were for jury, barring directed verdict. Wearever Upholstery & Furniture Corp. v Home Ins. Co., 286 A.D. 93, 141 N.Y.S.2d 107, 1955 N.Y. App. Div. LEXIS 3982 (N.Y. App. Div. 1955).

In action for declaratory judgment that life policy was invalid because insured misstated that his health was good, cause of action was dismissed at close of all evidence for lack of any proof of fraud or falsity or misrepresentation. Bronx Sav. Bank v Weigandt, 141 N.Y.S.2d 629, 207 Misc. 820, 1955 N.Y. Misc. LEXIS 2709 (N.Y. Sup. Ct.), aff'd, 286 A.D. 748, 146 N.Y.S.2d 625, 1955 N.Y. App. Div. LEXIS 4134 (N.Y. App. Div. 1955).

In action on life insurance policy, defendant's motion for a directed verdict was denied where question of fact was presented as to whether insured had misrepresented a known heart condition. Ettman v Equitable Life Assurance Soc., 7 Misc. 2d 1023, 166 N.Y.S.2d 602, 1957 N.Y. Misc. LEXIS 2429 (N.Y. City Ct. 1957), aff'd, 9 Misc. 2d 960, 175 N.Y.S.2d 595, 1958 N.Y. Misc. LEXIS 4085 (N.Y. App. Term 1958).

In action on jeweler's liability policy excluding loss of articles from unattended automobile, where undisputed and uncontradicted testimony established that articles of jewelry were taken from automobile while unattended, direction of verdict for defendant was required. Sagorsky v Malyon, 141 N.Y.S.2d 570, 1955 N.Y. Misc. LEXIS 2690 (N.Y. Sup. Ct. 1955), aff'd, 2 A.D.2d 675, 153 N.Y.S.2d 560, 1956 N.Y. App. Div. LEXIS 4830 (N.Y. App. Div. 1st Dep't 1956).

103. Negligence

Judgment and order setting aside verdict and dismissing complaint on ground motorist who was familiar with railroad crossing was contributorily negligent when he failed to slacken his speed and increase his visibility reversed. Guido v Delaware, L. & W. R. Co., 5 A.D.2d 754, 168 N.Y.S.2d 517, 1957 N.Y. App. Div. LEXIS 3736 (N.Y. App. Div. 4th Dep't 1957), amended, 5 A.D.2d 803, 170 N.Y.S.2d 48, 1958 N.Y. App. Div. LEXIS 7265 (N.Y. App. Div. 4th Dep't 1958), aff'd, 4 N.Y.2d 981, 177 N.Y.S.2d 503, 152 N.E.2d 527, 1958 N.Y. LEXIS 915 (N.Y. 1958).

Verdict was directed for defendant city in action for injuries arising out of defect in sidewalk where plaintiff’s only evidence to show that city was chargeable with constructive notice was a photograph of defective condition. Valle v New York, 22 Misc. 2d 985, 198 N.Y.S.2d 731, 1960 N.Y. Misc. LEXIS 3568 (N.Y. Sup. Ct. 1960).

Where in negligence action defendant’s motion to dismiss for failure of proof of prima facie case was denied despite court’s predisposition to set aside any verdict for plaintiff and jury awarded verdict for plaintiff which was set aside, such denial was not prejudicial to plaintiff. Buccanon v New York City Transit Authority, 151 N.Y.S.2d 188 (N.Y. Sup. Ct. 1956), aff'd, 7 A.D.2d 853, 182 N.Y.S.2d 346, 1959 N.Y. App. Div. LEXIS 10341 (N.Y. App. Div. 2d Dep't 1959).

104. —Automobile or traffic accidents

Where issues of fact are presented which require new trial, order granting plaintiff’s motion in automobile negligence action for directed verdict in his favor was error. CASSARO v FRANCIS, 285 A.D. 1219, 285 A.D. 1220, 140 N.Y.S.2d 541, 1955 N.Y. App. Div. LEXIS 7218 (N.Y. App. Div. 4th Dep't 1955).

Where plaintiff driver left his automobile in right traffic lane of highway and was standing beside it in road when struck by defendant’s car, direction of verdict for plaintiff was error, since questions of negligence and contributory negligence and credibility were for jury. Evans v Jones, 286 A.D. 921, 141 N.Y.S.2d 857, 1955 N.Y. App. Div. LEXIS 4512 (N.Y. App. Div. 1955).

iii. Decisions Under Former Statute (CPA § 461)

105. Generally

On motion at general term for judgment on the verdict, it is the duty of the successful party to make a case, containing the pleadings and proceedings at the trial. Cobb v Cornish, 16 N.Y. 602, 16 N.Y. (N.Y.S.) 602, 15 How. Pr. 407, 1858 N.Y. LEXIS 19, 1858 N.Y. Misc. LEXIS 140 (N.Y. 1858).

A motion to set aside such a verdict cannot be entertained at general term, but should be made at special term. Purvis v Coleman & Stetson, 21 N.Y. 111, 21 N.Y. (N.Y.S.) 111, 1860 N.Y. LEXIS 71 (N.Y. 1860).

A new trial is to be ordered when a verdict subject to the opinion of the court is improperly directed. Purchase v Matteson, 25 N.Y. 211, 25 N.Y. (N.Y.S.) 211, 1862 N.Y. LEXIS 125 (N.Y. 1862).

Unless a statement of facts and the conclusions of law are prepared and filed with the judgment roll, the judgment of the general term upon a verdict subject to the opinion of the court cannot be reviewed in the court of appeals. Reinmiller v Skidmore, 59 N.Y. 661, 59 N.Y. (N.Y.S.) 661, 1875 N.Y. LEXIS 315 (N.Y. 1875).

No new trial can be ordered where a verdict is ordered subject to the opinion of the court at general term, for the whole case on its merits is before that court. Northampton Nat'l Bank v Kidder, 49 N.Y. Super. Ct. 338 (1883), aff'd, 106 N.Y. 221, 12 N.E. 577, 106 N.Y. (N.Y.S.) 221, 8 N.Y. St. 621, 1887 N.Y. LEXIS 877 (N.Y. 1887).

Court may direct general verdict subject to its opinion and thereafter set verdict aside. Christensen v Petterson, 239 A.D. 735, 268 N.Y.S. 139, 1933 N.Y. App. Div. LEXIS 8112 (N.Y. App. Div. 1933), app. dismissed, 264 N.Y. 671, 191 N.E. 619, 264 N.Y. (N.Y.S.) 671, 1934 N.Y. LEXIS 1708 (N.Y. 1934).

Surrogate’s Ct. Act § 316, made CPA § 457a applicable to a contested probate proceeding tried by a jury. In re Dorsey's Will, 157 N.Y.S. 662, 94 Misc. 566, 1916 N.Y. Misc. LEXIS 1235 (N.Y. Sur. Ct. 1916).

Semble, before the amendment of 1879, the court might direct the jury to find a general verdict pro forma for the plaintiff, reserving the case for further consideration on a motion for a new trial; and afterwards direct a verdict for the party entitled to it. Hall v Hall, 13 Hun 306 (N.Y.), aff'd, 81 N.Y. 130, 81 N.Y. (N.Y.S.) 130, 1880 N.Y. LEXIS 208 (N.Y. 1880).

Trial court in reserving decision on motions which presented question of sufficiency of evidence, and in taking the verdict of the jury subject to its opinion on that question, conformed to proper practice. Baltimore & Carolina Line, Inc. v Redman, 295 U.S. 654, 55 S. Ct. 890, 79 L. Ed. 1636, 1935 U.S. LEXIS 334 (U.S. 1935).

CPA ? 457a did not apply to a trial by the court without a jury. Mallory v Wood, 13 Super Ct (6 Duer) 657. See note on general subject, 13 Abb NC 382.

106. When verdict may be directed subject to opinion of court

It is improper to direct a verdict subject to the opinion of the court where there is a question as to the credibility of witnesses and conflicting testimony, and where there are exceptions in regard to the admissibility of testimony. Purchase v Matteson, 25 N.Y. 211, 25 N.Y. (N.Y.S.) 211, 1862 N.Y. LEXIS 125 (N.Y. 1862).

Where there is no conflicting evidence as to the material facts, or any doubtful inferences from those proved, and no exceptions have been taken, other than to the denial of a motion for a nonsuit, it is proper to direct a verdict subject to the opinion of the court. Poole v Kermit, 59 N.Y. 554, 59 N.Y. (N.Y.S.) 554, 1875 N.Y. LEXIS 296 (N.Y. 1875).

Where exceptions have been taken on the trial, it is erroneous to direct a verdict subject to the opinion of the court, and if the parties consent to such direction, the exceptions are abandoned. Byrnes v Cohoes, 67 N.Y. 204, 67 N.Y. (N.Y.S.) 204, 1876 N.Y. LEXIS 371 (N.Y. 1876).

To render it proper to direct a verdict subject to the opinion of the court, all the facts necessary to enable the court to render a final judgment must be conceded or established beyond controversy. Matson v Farm Bldgs. Ins. Co., 73 N.Y. 310, 73 N.Y. (N.Y.S.) 310, 1878 N.Y. LEXIS 615 (N.Y. 1878).

So also exceptions may be waived and verdict directed subject to the opinion of the court. Cowenhoven v Ball, 118 N.Y. 231, 23 N.E. 470, 118 N.Y. (N.Y.S.) 231, 1890 N.Y. LEXIS 961 (N.Y. 1890).

When the court, without submitting any specific question under CPA § 459 (Rule 4111(a), (c), 4112 herein) and without directing a jury to render a verdict subject to the opinion of the court directs judgment for the plaintiff and the jury is discharged, the court cannot direct a verdict for the defendant but is limited to granting a new trial. Wilson & Baillie Mfg. Co. v New York, 122 A.D. 621, 107 N.Y.S. 524, 1907 N.Y. App. Div. LEXIS 2516 (N.Y. App. Div. 1907).

A direction or a verdict subject to the opinion of the court at general term is proper only where, upon the trial, an uncontroverted state of facts is presented involving only questions of law and there are no exceptions on either side to the reception or rejection of evidence. Flandreau v Elsworth, 28 N.Y.S. 671, 8 Misc. 428, 1894 N.Y. Misc. LEXIS 484 (N.Y. Super. Ct. 1894).

Verdict taken subject to opinion of court. Tolmie v Fidelity & Casualty Co., 84 N.Y.S. 1020, 41 Misc. 451, 1903 N.Y. Misc. LEXIS 382 (N.Y. Sup. Ct. 1903), aff'd, 95 A.D. 352, 88 N.Y.S. 717, 1904 N.Y. App. Div. LEXIS 1990 (N.Y. App. Div. 1904).

107. Special verdict

Where there is a special verdict there having been a disputed question of fact, a verdict subject to the opinion of the court is irregular. Gilbert v Beach, 16 N.Y. 606, 16 N.Y. (N.Y.S.) 606, 1858 N.Y. LEXIS 20 (N.Y. 1858). See also, SACKETT v SPENCER, 29 Barb. 180, 1859 N.Y. App. Div. LEXIS 200 (N.Y. Sup. Ct. Mar. 7, 1859); GRISWOLD v DEXTER, 62 Barb. 648, 1862 N.Y. App. Div. LEXIS 270 (N.Y. Sup. Ct. Oct. 7, 1862); Clark v Dearborn, 13 Super Ct (6 Duer) 309;

Purvis v Coleman & Stetson, 14 Super Ct (1 Bosw) 321, affd Purvis v Coleman & Stetson, 21 N.Y. 111, 21 N.Y. (N.Y.S.) 111, 1860 N.Y. LEXIS 71 (N.Y. 1860).

108. Exceptions

Where an order for a verdict subject to the opinion of the court also directed exceptions to be heard in the first instance at general term, held, that the words “subject to the opinion of the court,” etc., were surplusage, and did not deprive the party of his exceptions. In such a case, findings of fact by the general term are unauthorized, but they do not vitiate the judgment. Durant v Abendroth, 69 N.Y. 148, 69 N.Y. (N.Y.S.) 148, 1877 N.Y. LEXIS 811 (N.Y. 1877).

Where a verdict is ordered subject to the opinion of the court without qualification, exceptions cannot be heard, and the only question is, which party is entitled to final judgment on the uncontroverted facts; no new trial can be granted, but final judgment must be directed for one party or the other without regard to which party had the verdict. Such a direction is improper where exceptions have been taken or where the facts are controverted. Durant v Abendroth, 69 N.Y. 148, 69 N.Y. (N.Y.S.) 148, 1877 N.Y. LEXIS 811 (N.Y. 1877).

The unsuccessful party may file a notice of exception within ten days after the service of a copy of the decision of the court. Elliot v Van Schaick, 26 A.D. 587, 50 N.Y.S. 432, 1898 N.Y. App. Div. LEXIS 455 (N.Y. App. Div. 1898).

Where the court, presiding at a jury trial, reserves its decision on a motion to dismiss the complaint, made by the defendant when the plaintiff rested, and the defendant does not renew such motion after all the proof is in or request the court to submit any question of fact to the jury, whereupon the court directs a verdict for the plaintiff, to which the defendant takes no exception, no authority exists authorizing the court to file a decision and the defendant to file an exception to such decision. Murray v New York, 60 A.D. 541, 69 N.Y.S. 959, 1901 N.Y. App. Div. LEXIS 741 (N.Y. App. Div. 1901).

109. Entry of judgment

A verdict subject to the opinion of the court suspends the entry of judgment until the decision at general term. Gilbert v Beach, 16 N.Y. 606, 16 N.Y. (N.Y.S.) 606, 1858 N.Y. LEXIS 20 (N.Y. 1858).

110. Motion by both parties

At the close of the testimony, the plaintiff and the defendant each asked the court to direct a verdict in his favor. The court holding that the plaintiff was entitled to the direction, the defendant asked to go to the jury on the question whether the debt was ever contracted, which was refused. Held, that the defendant was entitled to go to the jury. Koehler v Adler, 78 N.Y. 287, 78 N.Y. (N.Y.S.) 287, 1879 N.Y. LEXIS 909 (N.Y. 1879).

Where each party asks that a verdict be directed in its favor, without requesting the submission of any specific questions of fact, the right to go to the jury is waived and the verdict is one in form only; the finding is in reality by the court and the jury is merely its mouthpiece to announce the decision, and where there is evidence to support such finding, the judgment must be affirmed. Westervelt v Phelps, 171 N.Y. 212, 63 N.E. 962, 171 N.Y. (N.Y.S.) 212, 1902 N.Y. LEXIS 846 (N.Y. 1902).

The request by both parties for the direction of a verdict amounts to a submission of the whole case to the trial judge, and his decision in plaintiff’s favor upon the facts has the same effect as if the jury has found a verdict in the plaintiff’s favor after the case was submitted to it. Sigua Iron Co. v Brown, 171 N.Y. 488, 64 N.E. 194, 171 N.Y. (N.Y.S.) 488, 1902 N.Y. LEXIS 876 (N.Y. 1902).

The denial of motions made by counsel on both sides for the direction of a verdict and the submission of the case to the jury cannot be held to have prejudiced either party, provided the jury decided the case as the court ought to have decided it, nor in such case is the conduct of the court in charging or refusing to charge the jury material. National Revere Bank v National

Bank of Republic, 172 N.Y. 102, 64 N.E. 799, 172 N.Y. (N.Y.S.) 102, 1902 N.Y. LEXIS 656 (N.Y. 1902).

Although the court may find facts when both parties move for the direction of a verdict, the court may not find facts without evidence or contrary to the evidence. Heintz v Continental Casualty Co., 121 A.D. 75, 105 N.Y.S. 519, 1907 N.Y. App. Div. LEXIS 1711 (N.Y. App. Div. 1907).

Where both parties move for the direction of a verdict, and the court announces it will direct a verdict for one of them, there is yet no final decision, and either party may withdraw such motion and ask to go to the jury on specific questions, if such application is made before the verdict is actually rendered at the direction of the court; under such circumstances a party is not entitled to go to the jury on all questions of fact, but only those which he points out before the rendition of the verdict. Maxwell v Martin, 130 A.D. 80, 114 N.Y.S. 349, 1909 N.Y. App. Div. LEXIS 146 (N.Y. App. Div. 1909).

Where at the close of the evidence plaintiff moves for the direction of a verdict and the defendant renews a motion for a nonsuit, the facts may be determined by the trial judge, for the defendant’s motion is equivalent to a request for the direction of a verdict in his favor. Sheldon v George, 132 A.D. 470, 116 N.Y.S. 969, 1909 N.Y. App. Div. LEXIS 1523 (N.Y. App. Div. 1909).

Where both parties move for a directed verdict and verdict is directed for plaintiff, any conflicting inferences from the facts shown must be deemed determined in plaintiff’s favor, with the same force as the verdict of a jury. Island Trading Co. v Berg Bros., 209 A.D. 63, 204 N.Y.S. 523, 1924 N.Y. App. Div. LEXIS 8551 (N.Y. App. Div.), aff'd, 239 N.Y. 229, 146 N.E. 345, 239 N.Y. (N.Y.S.) 229, 1924 N.Y. LEXIS 502 (N.Y. 1924).

Both parties moved for directed verdict; plaintiff also asked to go to the jury on questions of negligence and damages; error to direct verdict for defendant before disposing of plaintiff’s motions; plaintiff’s exception saved the question for review. O'Brien v Tilden, 228 A.D. 502, 240 N.Y.S. 355, 1930 N.Y. App. Div. LEXIS 12204 (N.Y. App. Div. 1930).

Motion by both parties for a directed verdict determined in favor of the plaintiff the question as to whether the action was brought within the time prescribed. Hennessey v Knights of Columbus, 239 A.D. 409, 267 N.Y.S. 297, 1933 N.Y. App. Div. LEXIS 8055 (N.Y. App. Div. 1933), aff'd, 264 N.Y. 668, 191 N.E. 617, 264 N.Y. (N.Y.S.) 668, 1934 N.Y. LEXIS 1701 (N.Y. 1934).

Despite motion for a directed verdict by each party, an unsuccessful party may move to have issues of fact submitted to the jury at any time before the verdict of the jury is rendered. In re Jacobstein's Will, 253 A.D. 458, 2 N.Y.S.2d 721, 1938 N.Y. App. Div. LEXIS 8471 (N.Y. App. Div. 1938).

Motion for directed verdict, which is not granted, is not waiver of trial by jury, though all parties have moved for directed verdicts. McTiernan v Little Falls, 284 A.D. 79, 130 N.Y.S.2d 214, 1954 N.Y. App. Div. LEXIS 3347 (N.Y. App. Div. 1954).

Where upon the trial each party requests the direction of a verdict in his favor, the court is clothed with the functions of a jury in determining questions of fact. Dilcher v Nellany, 102 N.Y.S. 264, 52 Misc. 364, 1907 N.Y. Misc. LEXIS 27 (N.Y. Sup. Ct. 1907), app. dismissed, 109 N.Y.S. 1128 (N.Y. App. Div. 1908).

Where in an action at law each party moves for the direction of a verdict in its favor and neither asks to go to the jury, but the court denies the motions and submits to the jury the disputed questions of fact, the court is bound by the verdict to the same extent as by a verdict on any issues in an action at law. New York Produce Exchange Bank v Twelfth Ward Bank, 115 N.Y.S. 998, 62 Misc. 69, 1909 N.Y. Misc. LEXIS 489 (N.Y. Sup. Ct.), rev'd, 135 A.D. 52, 119 N.Y.S. 988, 1909 N.Y. App. Div. LEXIS 3908 (N.Y. App. Div. 1909).

111. Stipulation for verdict by absent jury

A directed verdict may, under stipulation, be deemed returned by an absent jury and duly recorded. Grundt v Shenk, 217 N.Y.S. 169, 127 Misc. 889, 1926 N.Y. Misc. LEXIS 1065 (N.Y.

Sup. Ct. 1926), rev'd, 222 A.D. 82, 225 N.Y.S. 317, 1927 N.Y. App. Div. LEXIS 7804 (N.Y. App. Div. 1927).

112. Withdrawal of motion

Motion for directed verdict is no bar to withdrawal of motion and moving for submission of questions of fact to the jury. MacIvor v Schwartzman, 226 A.D. 746, 233 N.Y.S. 601, 1929 N.Y. App. Div. LEXIS 9716 (N.Y. App. Div. 1929).

113. Decision on motion

A party is entitled to a specific decision on his motion for a directed verdict before he is called on to make a further motion that the issues be left to the jury for decision, and this right cannot be defeated by the action of the court in directing a verdict for the other party on the latter’s motion. Happel v Lehigh V. R. Co., 210 A.D. 461, 206 N.Y.S. 726, 1924 N.Y. App. Div. LEXIS 6756 (N.Y. App. Div. 1924).

114. Effect of failure to move for directed verdict

A party who fails to move for a directed verdict at the end of the case concedes there is a question of fact for the jury. Hirsch v Schwartz & Cohn, 256 N.Y. 7, 175 N.E. 353, 256 N.Y. (N.Y.S.) 7, 1931 N.Y. LEXIS 1018 (N.Y. 1931).

Where plaintiff did not move for directed verdict, he thereby conceded there was issue of fact for jury; court had no power, on its own motion, to direct verdict for plaintiff for $500. Billig v Don Allen Midtown Chevrolet, Inc., 110 N.Y.S.2d 162, 1951 N.Y. Misc. LEXIS 2777 (N.Y. App. Term 1951).

115. What constitutes direction

On motion for directed verdict by the plaintiff in an action to recover for alleged breach of contract by an automobile vendor to keep car insured, the court's refusal to submit to the jury any question but the value of the car was in effect a direction of the verdict. Posnick v Stedman, 219 A.D. 610, 220 N.Y.S. 251, 1927 N.Y. App. Div. LEXIS 10982 (N.Y. App. Div. 1927).

116. Propriety of direction of verdict, in general

It is error to dismiss the complaint or to direct the jury to render a verdict for either party, where there is conflict of evidence. Van Wyck v Allen, 69 N.Y. 61, 69 N.Y. (N.Y.S.) 61, 1877 N.Y. LEXIS 797 (N.Y. 1877).

The direction of a verdict in any case where the parties are entitled to a jury trial constitutes reversible error if a question of fact is presented by the evidence. Sundheimer v New York, 176 N.Y. 495, 68 N.E. 867, 176 N.Y. (N.Y.S.) 495, 1903 N.Y. LEXIS 829 (N.Y. 1903).

Trial court may direct verdict only when it would be required to set aside contrary verdict for insufficiency of evidence. Loewinthan v Le Vine, 299 N.Y. 372, 87 N.E.2d 303, 299 N.Y. (N.Y.S.) 372, 1949 N.Y. LEXIS 945 (N.Y. 1949).

In an action at law the court has no power against the objection of either party to discharge the jury, and in its absence to pass upon the questions involved. If the evidence conclusively establishes the right of either party to recover, the court should direct a verdict, but cannot properly dismiss the jury and decide the case itself. Gansberg v Sagemohl, 67 A.D. 554, 73 N.Y.S. 984, 1902 N.Y. App. Div. LEXIS 29 (N.Y. App. Div. 1902).

After the plaintiff had made a prima facie case and the defendants had rested thereon, it was error for the court to direct a verdict for the defendants. Wisner v De Forest, 220 A.D. 454, 221 N.Y.S. 653, 1927 N.Y. App. Div. LEXIS 9329 (N.Y. App. Div. 1927), aff'd, 247 N.Y. 526, 161 N.E. 168, 247 N.Y. (N.Y.S.) 526, 1928 N.Y. LEXIS 1112 (N.Y. 1928).

Where plaintiff amended to conform to the proof and defendant produced no evidence to meet the prima facie case pleaded and proved, directed verdict for plaintiff was affirmed. Kessler v

Ansonia, 227 A.D. 290, 237 N.Y.S. 537, 1929 N.Y. App. Div. LEXIS 6419 (N.Y. App. Div. 1929), aff'd, 253 N.Y. 453, 171 N.E. 704, 253 N.Y. (N.Y.S.) 453, 1930 N.Y. LEXIS 854 (N.Y. 1930).

Where jury affirmatively answered plaintiff's submitted questions, which were sustained by the evidence, it was error to direct general verdict for defendant. Wen Kroy Realty Co. v Public Nat'l Bank & Trust Co., 234 A.D. 461, 255 N.Y.S. 1, 1932 N.Y. App. Div. LEXIS 10464 (N.Y. App. Div.), aff'd, 260 N.Y. 84, 183 N.E. 73, 260 N.Y. (N.Y.S.) 84, 1932 N.Y. LEXIS 662 (N.Y. 1932).

A trial justice was without power or authority to direct a verdict for the defendant where the jury after deliberating for some time was returned to the court and the trial justice had previously denied a motion of the defendant to dismiss the complaint and had submitted the questions of fact to the jury. Amato v Brooklyn & Queens Transit Corp., 251 A.D. 728, 295 N.Y.S. 538, 1937 N.Y. App. Div. LEXIS 7256 (N.Y. App. Div. 1937).

Court was in error in directing verdict for plaintiff after appellant moved for direction of verdict, or in alternative that case be submitted to jury; request that court submit questions of fact to jury was aptly made before sealed verdict of jury was opened. Tremaine v McAllister Nav. Co., 257 A.D. 217, 13 N.Y.S.2d 43, 1939 N.Y. App. Div. LEXIS 7713 (N.Y. App. Div. 1939).

Belief of testimony was for jury, where there were material disputed questions of fact. Erskine v Froelich, 277 A.D. 1048, 100 N.Y.S.2d 621, 1950 N.Y. App. Div. LEXIS 4450 (N.Y. App. Div. 1950).

Where issues of fact are presented which require new trial, order granting plaintiff's motion in automobile negligence action for directed verdict in his favor was error. CASSARO v FRANCIS, 285 A.D. 1219, 285 A.D. 1220, 140 N.Y.S.2d 541, 1955 N.Y. App. Div. LEXIS 7218 (N.Y. App. Div. 4th Dep't 1955).

Test in considering motion to direct verdict is whether trial court could find that by no rational process could trier of facts base finding in favor of party moved against upon evidence. Wearever Upholstery & Furniture Corp. v Home Ins. Co., 286 A.D. 93, 141 N.Y.S.2d 107, 1955 N.Y. App. Div. LEXIS 3982 (N.Y. App. Div. 1955).

Though plaintiff's testimony as to the alleged fraudulent inducement of a release was uncontradicted since the release was in evidence and plaintiff was an interested party questions of fact were present which should have been submitted to the jury. Ferrainolo v Prudential Ins. Co., 15 A.D.2d 718, 223 N.Y.S.2d 261, 1962 N.Y. App. Div. LEXIS 12221 (N.Y. App. Div. 4th Dep't 1962).

The court must determine whether the plaintiff has a cause of action which cannot be controverted. Edward F. Dibble Seedgrower v Jones, 223 N.Y.S. 785, 130 Misc. 359, 1927 N.Y. Misc. LEXIS 1036 (N.Y. Sup. Ct. 1927).

It is error to direct a verdict in favor of defendant where plaintiff's evidence presented questions of fact and where the court cannot say that a verdict for the plaintiff would have been against the weight of evidence. Sokoloff v Wapnick, 266 N.Y.S. 805, 149 Misc. 535, 1933 N.Y. Misc. LEXIS 1346 (N.Y. App. Term 1933).

Trial court, after reservation of decision on plaintiff's motion for a directed verdict made at the conclusion of plaintiff's case, could properly direct judgment for plaintiff several months after the jury had disagreed and been discharged. Central Coal Co. v Louray Realty Corp., 281 N.Y.S. 438, 156 Misc. 206, 1935 N.Y. Misc. LEXIS 1315 (N.Y. App. Term 1935).

In summary proceeding to evict tenant, claiming as permissive holdover "until end of war," jury's verdict for tenant was held unreasonable and possession was awarded to landlord. Royce Haulage Corp. v Bronx Terminal Garage, Inc., 57 N.Y.S.2d 760, 185 Misc. 892, 1945 N.Y. Misc. LEXIS 2337 (N.Y. App. Term 1945).

After verdict for plaintiff on motion for directed verdict of no cause of action, crux is whether facts and inferences, favorable to plaintiff, will support plaintiff's verdict. Magnoli v John Hancock Mut. Life Ins. Co., 78 N.Y.S.2d 130, 192 Misc. 344, 1948 N.Y. Misc. LEXIS 2230 (N.Y. Mun. Ct. 1948).

Motion after verdict for plaintiff, relative to refusal to direct, was unauthorized renewal of same motion denied at trial. Appelt v Timpone, 88 N.Y.S.2d 43, 195 Misc. 68, 1949 N.Y. Misc. LEXIS

2035 (N.Y. Sup. Ct.), rev'd, 275 A.D. 1046, 91 N.Y.S.2d 869, 1949 N.Y. App. Div. LEXIS 5753 (N.Y. App. Div. 1949).

Jury disagreement, in death action submitted to jury, did not bar subsequent direction of verdict for defendant. Rosati v H. W. E., Inc., 81 N.Y.S.2d 412, 1948 N.Y. Misc. LEXIS 2802 (N.Y. Sup. Ct. 1948).

Although plaintiff's testimony made out prima facie case, but weight of credible evidence from all facts and circumstances falls far short of sustaining burden of proof as matter of law, direction of verdict for defendant was required. Sagorsky v Malyon, 141 N.Y.S.2d 570, 1955 N.Y. Misc. LEXIS 2690 (N.Y. Sup. Ct. 1955), aff'd, 2 A.D.2d 675, 153 N.Y.S.2d 560, 1956 N.Y. App. Div. LEXIS 4830 (N.Y. App. Div. 1st Dep't 1956).

117. —Pleading insufficient

In an action upon a check made by defendant payable to order of plaintiff, directed verdict for plaintiff was affirmed, defendant's answer being insufficient as a defense. Antillo Realty Co. v Porte, 249 N.Y. 542, 164 N.E. 576, 249 N.Y. (N.Y.S.) 542, 1928 N.Y. LEXIS 880 (N.Y. 1928).

118. —Evidence insufficient

It is error to submit to the jury a question as to which there is no evidence. Booth v Boston & A. R. Co., 67 N.Y. 593, 67 N.Y. (N.Y.S.) 593, 1876 N.Y. LEXIS 461 (N.Y. 1876).

Verdict on counterclaim erroneously directed because of lack of sufficient proof. United Artists Corp. v Phelps, 225 A.D. 605, 233 N.Y.S. 519, 1929 N.Y. App. Div. LEXIS 11708 (N.Y. App. Div. 1929).

Where record, including documentary proof, discloses that claim of plaintiff is palpably false, direction of verdict against him is proper. Gerber v Jarold Shops, Inc., 281 A.D. 1015, 121 N.Y.S.2d 141, 1953 N.Y. App. Div. LEXIS 4109 (N.Y. App. Div. 1953), app. dismissed, 306 N.Y.

829, 118 N.E.2d 830, 306 N.Y. (N.Y.S.) 829, 1954 N.Y. LEXIS 1159 (N.Y. 1954), aff'd, 307 N.Y. 694, 120 N.E.2d 861, 307 N.Y. (N.Y.S.) 694, 1954 N.Y. LEXIS 1436 (N.Y. 1954).

Though plaintiff's testimony as to the alleged fraudulent inducement of a release was uncontradicted since the release was in evidence and plaintiff was an interested party questions of fact were present which should have been submitted to the jury. Ferrainolo v Prudential Ins. Co., 15 A.D.2d 718, 223 N.Y.S.2d 261, 1962 N.Y. App. Div. LEXIS 12221 (N.Y. App. Div. 4th Dep't 1962).

Legal insufficiency is not restricted to lack of sufficient evidence to establish prima facie case but includes sufficient evidence to sustain burden of proof. Playtown Products, Inc. v Ideal Toy Corp., 113 N.Y.S.2d 102, 201 Misc. 911, 1952 N.Y. Misc. LEXIS 2748 (N.Y. Sup. Ct. 1952), aff'd, 286 A.D. 1084, 147 N.Y.S.2d 671, 1955 N.Y. App. Div. LEXIS 5239 (N.Y. App. Div. 1955).

Where plaintiff testified to fact which, if believed, would make out a prima facie case, but weight of credible testimony was against him, court may set aside jury verdict for plaintiff and direct verdict for defendant. Playtown Products, Inc. v Ideal Toy Corp., 113 N.Y.S.2d 102, 201 Misc. 911, 1952 N.Y. Misc. LEXIS 2748 (N.Y. Sup. Ct. 1952), aff'd, 286 A.D. 1084, 147 N.Y.S.2d 671, 1955 N.Y. App. Div. LEXIS 5239 (N.Y. App. Div. 1955).

119. Agency and brokerage

In action by an insurance company against an adjuster for negligence, the evidence was sufficient to raise a question for the jury. Globe & Rutgers Fire Ins. Co. v General Adjustment Bureau, 250 N.Y. 157, 164 N.E. 890, 250 N.Y. (N.Y.S.) 157, 1928 N.Y. LEXIS 996 (N.Y. 1928).

In action by agent to recover commissions under an alleged sales agency contract, directed verdict for defendant affirmed. R. J. Caldwell Co. v Connecticut Mills Co., 251 N.Y. 565, 168 N.E. 429, 251 N.Y. (N.Y.S.) 565, 1929 N.Y. LEXIS 821 (N.Y. 1929).

Judgment reversing judgment on directed verdict for defendant, an insurance broker, for damages for failure to see that plaintiff's insurance was effective after notice that it had become

so, affirmed. Joseph, Inc. v Alberti, Carleton & Co., 251 N.Y. 580, 168 N.E. 434, 251 N.Y. (N.Y.S.) 580, 1929 N.Y. LEXIS 838 (N.Y. 1929).

Where defendant's evidence established the execution of the contract executed by plaintiff's agent clothed with apparent authority to act, it was reversible error to dismiss defendant's counterclaim based upon breach of same and direct verdict for the plaintiff. Standard Oil Co. v Siraco, 226 A.D. 266, 235 N.Y.S. 1, 1929 N.Y. App. Div. LEXIS 8700 (N.Y. App. Div. 1929).

In broker's action for commissions it was error to direct verdict for defendants, it being for the jury to determine whether the plaintiff was the procuring cause of the transaction, or the efforts of a friend of defendants. Hamilton, Iselin & Co. v Jaretzki, 230 A.D. 102, 243 N.Y.S. 261, 1930 N.Y. App. Div. LEXIS 8554 (N.Y. App. Div. 1930).

The court directed a verdict for the defendant, against the demand of the plaintiff for a real estate brokerage commission on contract, upon the evidence showing there was never a meeting of minds between the parties. Smith v Herrman, 225 N.Y.S. 245, 130 Misc. 832, 1927 N.Y. Misc. LEXIS 1196 (N.Y. Sup. Ct. 1927).

120. Attorney and client

In action by client against former attorney for recovery of money advanced for costs and disbursements, under the contract of employment, verdict was properly directed for plaintiff, defendant's counterclaim raising no question of fact worthy of consideration. Stiles v Annabel, 226 A.D. 268, 235 N.Y.S. 508, 1929 N.Y. App. Div. LEXIS 8701 (N.Y. App. Div. 1929).

Verdict erroneously directed for defendant in action to recover for legal services since the jury might have drawn inferences favorable to plaintiff from the evidence. Lewin v Moody, 228 N.Y.S. 281, 131 Misc. 833, 1928 N.Y. Misc. LEXIS 803 (N.Y. App. Term 1928).

121. Bailments

No cause of action is proved for the loss of bailed goods when proof shows that another than plaintiff left the goods in defendant's warehouse and that he kept the key and control thereof. Armstrong v Sisti, 242 N.Y. 440, 152 N.E. 254, 242 N.Y. (N.Y.S.) 440, 1926 N.Y. LEXIS 1003 (N.Y. 1926).

Plaintiff's complaint should not have been dismissed when she showed the storage of trunks, failure to deliver, and no excuse therefor, as alleged. Dalton v Hamilton Hotel Operating Co., 242 N.Y. 481, 152 N.E. 268, 242 N.Y. (N.Y.S.) 481, 1926 N.Y. LEXIS 1007 (N.Y. 1926).

Acceptance by bailor of receipt for storage of fur coat worth $3477, limiting bailee's liability to $10, was not as matter of law binding on bailor, but presented jury question whether she consented to such limitation. Howard v Handler Bros. & Winell, Inc., 103 N.Y.S.2d 786, 200 Misc. 600, 1951 N.Y. Misc. LEXIS 1675 (N.Y. Sup. Ct.), aff'd, 279 A.D. 72, 107 N.Y.S.2d 749, 1951 N.Y. App. Div. LEXIS 2868 (N.Y. App. Div. 1951).

122. Bills and notes

Verdict for the plaintiff properly directed in action against indorser on promissory note. Bank of United States v Manheim, 264 N.Y. 45, 189 N.E. 776, 264 N.Y. (N.Y.S.) 45, 1934 N.Y. LEXIS 1391 (N.Y.), reh'g denied, 264 N.Y. 511, 191 N.E. 540, 264 N.Y. (N.Y.S.) 511, 1934 N.Y. LEXIS 1552 (N.Y. 1934).

Error to direct verdict for plaintiff, since alleged fraud in securing indorsement of note in suit, if established, would have been a complete defense. Wiesenthal v Krane, 226 A.D. 82, 234 N.Y.S. 392, 1929 N.Y. App. Div. LEXIS 8652 (N.Y. App. Div. 1929).

In action against accommodation indorser of a note, defense of extension of time of payment without consent of defendant, and the other defenses, were insufficient, and plaintiff's motion for directed verdict should have been granted. People's Nat'l Bank v Hewitt, 226 A.D. 412, 235 N.Y.S. 392, 1929 N.Y. App. Div. LEXIS 8736 (N.Y. App. Div. 1929), modified, 253 N.Y. 523, 171 N.E. 765, 253 N.Y. (N.Y.S.) 523, 1930 N.Y. LEXIS 880 (N.Y. 1930).

Directed verdict for plaintiff reversed because of false representations inducing the execution of the notes sued on. La Belle Heights v Stone, 227 A.D. 65, 237 N.Y.S. 51, 1929 N.Y. App. Div. LEXIS 6361 (N.Y. App. Div. 1929).

In action by depositor against a bank to recover payments made on forged indorsements, wherein defendant failed to sustain the burden of proof of its affirmative defenses that plaintiff was negligent in not discovering the forgeries, directed verdict for plaintiff was sustained. John G. Paton Co. v Guaranty Trust Co., 227 A.D. 545, 238 N.Y.S. 362, 1930 N.Y. App. Div. LEXIS 12070 (N.Y. App. Div.), aff'd, 254 N.Y. 621, 173 N.E. 893, 254 N.Y. (N.Y.S.) 621, 1930 N.Y. LEXIS 1233 (N.Y. 1930).

In an action to recover bank sums drawn out on checks bearing forgery of plaintiff’s signature, verdict was properly directed for plaintiff, since he exercised ordinary care and the bank was negligent. Takenaka v Bankers' Trust Co., 229 N.Y.S. 459, 132 Misc. 322, 1928 N.Y. Misc. LEXIS 891 (N.Y. City Ct. 1928), aff'd, 225 A.D. 860, 233 N.Y.S. 905, 1929 N.Y. App. Div. LEXIS 12391 (N.Y. App. Div. 1929).

123. Contracts generally

In an action to recover the reasonable value of goods sold and delivered to the defendant, wherein there were interposed as affirmative defenses breaches of warranty of sales by sample and rescission, and there was evidence sufficient to raise a question of fact as to the merchantability of the goods, it was error to direct a verdict for the plaintiff. Jacobson v E. T. Slattery Co., 218 A.D. 654, 219 N.Y.S. 331, 1926 N.Y. App. Div. LEXIS 5996 (N.Y. App. Div. 1926).

The court should not direct a verdict against a plaintiff seeking damages to the extent of what he could reasonably have made on a sale of cotton contracts on the exchange above what they were sold for by the defendants after his alleged failure to margin up, on evidence showing for plaintiff that such sale was contrary to the agreement between the parties. Evans v Hubbard, 220 A.D. 423, 221 N.Y.S. 642, 1927 N.Y. App. Div. LEXIS 9320 (N.Y. App. Div. 1927).

A verdict was wrongly directed for a defendant after the plaintiff had shown an agreement by defendant to hold gelatine imported and sold to him until the government could test it under the Food and Drugs Act and not to resell it for edible purposes, and that defendant knew the plaintiff was liable to the government on a bond for such resale but nevertheless resold it for edible purposes. George B. Ritchie & Co. v Paul Puttmann, Inc., 220 A.D. 676, 222 N.Y.S. 283, 1927 N.Y. App. Div. LEXIS 9391 (N.Y. App. Div. 1927), aff'd, 247 N.Y. 535, 161 N.E. 172, 247 N.Y. (N.Y.S.) 535, 1928 N.Y. LEXIS 1123 (N.Y. 1928).

In an action against an abstract company for error in failing to show a judgment against the owner of the property, directed verdict for plaintiff was error, since defendant was without any knowledge of obligation to the party to whom the property was transferred. Cole v Vincent, 229 A.D. 520, 242 N.Y.S. 644, 1930 N.Y. App. Div. LEXIS 10433 (N.Y. App. Div. 1930).

In an action for failure of a buyer to accept delivery, direction of a verdict, pursuant to a stipulation between the parties, in favor of the plaintiff is sustained by the evidence. J. B. Preston Co. v Funkhouser, 235 A.D. 200, 256 N.Y.S. 681, 1932 N.Y. App. Div. LEXIS 7921 (N.Y. App. Div. 1932), modified, 261 N.Y. 140, 184 N.E. 737, 261 N.Y. (N.Y.S.) 140, 1933 N.Y. LEXIS 1267 (N.Y. 1933).

Judgment directed for plaintiff in action by creditor to set aside conveyance in trust without consideration. Chase Nat'l Bank v United States Trust Co., 236 A.D. 500, 260 N.Y.S. 40, 1932 N.Y. App. Div. LEXIS 6015 (N.Y. App. Div. 1932), aff'd, 262 N.Y. 557, 188 N.E. 63, 262 N.Y. (N.Y.S.) 557, 1933 N.Y. LEXIS 1076 (N.Y. 1933).

In action for breach of radio contract, issues of fact held presented for jury’s consideration, which precluded direction of verdict for defendant at conclusion of entire case. Cole v Phillips H. Lord, Inc., 262 A.D. 116, 28 N.Y.S.2d 404, 1941 N.Y. App. Div. LEXIS 5307 (N.Y. App. Div. 1941).

In an action by a plumber for breach of a contract under which he agreed to do work and furnish materials, where, at the close of the case, it was evident the plaintiff had failed to sustain by

evidence the allegations of his complaint, the court should have dismissed the complaint; and it was error to direct a verdict for the defendant. Rothenberg v Rosenberg, 108 N.Y.S. 678, 57 Misc. 653, 1908 N.Y. Misc. LEXIS 247 (N.Y. App. Term 1908).

Where an architect was prevented, by law, from performing, in full, services contemplated by the contract, defendant being only partially at fault, verdict was directed for plaintiff on quantum meruit basis. Weiser v Stadium of Carnarsie, 244 N.Y.S. 61, 137 Misc. 881, 1930 N.Y. Misc. LEXIS 1424 (N.Y. Sup. Ct. 1930).

Verdict directed for defendant in action on employment contract. Nikulnikoff v Archbishop & Consistory of Russian Orthodox Greek Catholic Church, 255 N.Y.S. 653, 142 Misc. 894, 1932 N.Y. Misc. LEXIS 1394 (N.Y. Sup. Ct. 1932), aff'd, 238 A.D. 837, 263 N.Y.S. 935, 1933 N.Y. App. Div. LEXIS 10309 (N.Y. App. Div. 1933).

Where theory of anticipatory breach of contract is refuted by record and supported only by contradictory testimony of one witness, direction of verdict for defendant was proper. Rodorn Mfg. Corp. v Rudel Machinery Co., 144 N.Y.S.2d 354, 207 Misc. 1058, 1955 N.Y. Misc. LEXIS 3747 (N.Y. Sup. Ct. 1955).

124. Corporations

A verdict should not have been directed against defendant for checks collected by him, given him by plaintiff’s president as his personal pay for land bought of defendant, on the ground the latter knew of the president’s misuse of company checks; for reasonable inquiry would have shown plaintiff to be a merely nominal corporation and really only the president’s alter ego. B. Bressman, Inc. v Mosson, 215 N.Y.S. 766, 127 Misc. 282, 1926 N.Y. Misc. LEXIS 966 (N.Y. App. Term 1926).

125. Damages

In action against the sheriff for failure to put purchaser at foreclosure sale in possession of the property, it was error for the court to fix the amount of damages and direct verdict for the plaintiff, since the amount of damages was for the jury. Tubiola v Baker, 225 A.D. 420, 233 N.Y.S. 373, 1929 N.Y. App. Div. LEXIS 11655 (N.Y. App. Div. 1929).

In action for damages for breach of covenant in a lease not to rent nearby stores for a competing business, defendant’s motion for directed verdict for plaintiff for nominal damages admitted liability for damages, but left the question of amount open to review. Judgment on the verdict asked for was reversed because of exclusion of plaintiff’s evidence showing the difference in his daily receipts on days when his competitor was or was not open for business. Humphrey v Trustees of Columbia University, 228 A.D. 168, 239 N.Y.S. 461, 1930 N.Y. App. Div. LEXIS 12128 (N.Y. App. Div. 1930).

126. Divorce

In action for divorce proof held sufficient to submit question of the defendant’s adultery to the jury, and that it was error to direct verdict in favor of the defendant. Symington v Symington, 215 A.D. 553, 214 N.Y.S. 307, 1926 N.Y. App. Div. LEXIS 11007 (N.Y. App. Div. 1926).

127. False arrest

In an action for false arrest and imprisonment, question of probable cause was for the jury under the evidence. Rolnick v Borden's Farm Products Co., 214 A.D. 259, 212 N.Y.S. 189, 1925 N.Y. App. Div. LEXIS 10494 (N.Y. App. Div. 1925).

128. Fraud

In an action to recover on notes procured from the defendant for stock of much less value than the notes by apparently gross fraud amounting to theft, the court will not compel the defendant

to make good to wrongdoers the proceeds of such fraudulent scheme. Shoenbrun v Tubby, 222 A.D. 56, 225 N.Y.S. 290, 1927 N.Y. App. Div. LEXIS 7795 (N.Y. App. Div. 1927).

Motion to dismiss action for fraud granted there being no question of fact for submission to the jury, and evidence would not justify conclusion of fraud. Hoffman v Crittenden, 248 N.Y.S. 373, 139 Misc. 325, 1931 N.Y. Misc. LEXIS 1134 (N.Y. Sup. Ct. 1931), aff'd, 242 A.D. 671, 273 N.Y.S. 441, 1934 N.Y. App. Div. LEXIS 6664 (N.Y. App. Div. 1934).

129. Guaranty, indemnity, and suretyship contracts

In action to recover on indemnity insurance contract the amount paid in settlement of an action against plaintiff by an employee for personal injuries which defendant refused to defend, directed verdict for plaintiff was proper. 381 Park Ave. Corp. v Hartford Acci. & Indem. Co., 249 N.Y. 540, 164 N.E. 575, 249 N.Y. (N.Y.S.) 540, 1928 N.Y. LEXIS 877 (N.Y. 1928).

After a trial under a complaint against defendants as guarantors in which there is no proof of written guaranty as required by the Statute of Frauds, the court should dismiss the complaint or direct a verdict for defendants. Lumen Bearing Co. v Mosle, 221 A.D. 572, 224 N.Y.S. 457, 1927 N.Y. App. Div. LEXIS 6503 (N.Y. App. Div. 1927).

It was error to direct a verdict in an action on a bond given to secure performance of a building contract, since it was for the jury to decide the bona fides of the contract and the amount of damages, if any. Juell v New Amsterdam Casualty Co., 223 A.D. 612, 229 N.Y.S. 190, 1928 N.Y. App. Div. LEXIS 6279 (N.Y. App. Div. 1928).

A verdict was directed for the defendant in an action on the bond of executors of a will in which the complaint alleged the payment of a legacy to a corporation other than the one named in the will, upon it appearing that the corporation to whom the legacy was paid was the same as the one named in the will except for the legal change of name, and that the testatrix had not declared it necessary that the corporation should take under the name it bore in the will. Walsh v

Fidelity & Deposit Co., 227 N.Y.S. 96, 131 Misc. 138, 131 Misc. 158, 1928 N.Y. Misc. LEXIS 699 (N.Y. Sup. Ct. 1928).

Verdict properly directed for plaintiff on the ground that defendant was estopped to deny that his guaranty given a partnership was extended to a corporation formed to carry on the same business. New York American v Hub Advertising Agency, 240 N.Y.S. 367, 136 Misc. 596, 1930 N.Y. Misc. LEXIS 1064 (N.Y. City Ct. 1930).

In action on a guaranty, contract construed as continuing and defendant not released by giving new notes or extensions of time. Verdict directed for plaintiff. Bank of United States v Chemical Bank & Trust Co., 246 N.Y.S. 595, 140 Misc. 394, 1930 N.Y. Misc. LEXIS 1702 (N.Y. Sup. Ct. 1930).

Judgment directed for defendant in action on bond giving “Messenger Robbery Coverage.” Freiberger v United States Fidelity & Guaranty Co., 255 N.Y.S. 710, 143 Misc. 164, 1932 N.Y. Misc. LEXIS 1397 (N.Y. App. Term 1932).

130. Infancy

It was error to direct a verdict against an infant plaintiff where a prima facie case of infancy was established, defendant defaulted, and no testimony was offered in contradiction. Zauderer v Market St. Long Beach Realty Corp., 227 A.D. 626, 235 N.Y.S. 910, 1929 N.Y. App. Div. LEXIS 6666 (N.Y. App. Div. 1929).

131. Insurance

In action on insurance policy, directed verdict was sustained as against the contention that the statutory standard provisions of the state had not been complied with, since the contract was made in another state. Smith v Squire Co., 250 N.Y. 618, 166 N.E. 346, 250 N.Y. (N.Y.S.) 618, 1929 N.Y. LEXIS 1018 (N.Y. 1929).

In several actions seeking to recover from an insurer of an automobile owner against personal liability for negligence, it was a question for the jury whether insured, by his testimony, was attempting to aid the defendant, as the policy required him to do, or to aid plaintiffs, hence it was error to direct verdicts for plaintiffs. Seltzer v Indemnity Ins. Co., 252 N.Y. 330, 169 N.E. 403, 252 N.Y. (N.Y.S.) 330, 1929 N.Y. LEXIS 564 (N.Y. 1929).

In action on an indemnity policy verdict was improperly directed for plaintiff, since defendant's laches in disclaiming liability had not prejudiced plaintiff. Lavine v Indemnity Ins. Co., 260 N.Y. 399, 183 N.E. 897, 260 N.Y. (N.Y.S.) 399, 1933 N.Y. LEXIS 769 (N.Y. 1933).

In action on benefit certificate, order setting aside special verdict for plaintiff and directing general verdict for defendant on question of consultation by assured with a physician, reversed and judgment directed for plaintiff on special findings. Nowak v Brotherhood of American Yeomen, 226 A.D. 123, 234 N.Y.S. 426, 1929 N.Y. App. Div. LEXIS 8664 (N.Y. App. Div. 1929), aff'd, 252 N.Y. 465, 169 N.E. 647, 252 N.Y. (N.Y.S.) 465, 1930 N.Y. LEXIS 646 (N.Y. 1930).

In an action on an automobile maintenance insurance policy for injuries caused by insured carelessly dropping a lighted match into a can of kerosene with which he was cleaning the car, directed verdict for plaintiff was reversed because the open kerosene can was not the proximate cause of the accident. Steir v London Guarantee & Acci. Co., 227 A.D. 37, 237 N.Y.S. 40, 1929 N.Y. App. Div. LEXIS 6351 (N.Y. App. Div. 1929), aff'd, 254 N.Y. 576, 173 N.E. 873, 254 N.Y. (N.Y.S.) 576, 1930 N.Y. LEXIS 1179 (N.Y. 1930).

Judgment directed for plaintiff in action on policy of accident and health insurance. Collis v Massachusetts Bonding & Ins. Co., 236 A.D. 525, 260 N.Y.S. 241, 1932 N.Y. App. Div. LEXIS 6022 (N.Y. App. Div. 1932), aff'd, 264 N.Y. 447, 191 N.E. 507, 264 N.Y. (N.Y.S.) 447, 1934 N.Y. LEXIS 1483 (N.Y. 1934).

Where plaintiff expressly concedes, in action for indemnity by contractor's insurer against subcontractor for injury to employee of another subcontractor, that former had no obligation to plank over elevator shaft into which employee fell, direction of verdict for defendant was proper.

Pink v Kraus & Silverman, Inc., 262 A.D. 156, 28 N.Y.S.2d 340, 1941 N.Y. App. Div. LEXIS 5318 (N.Y. App. Div. 1941), aff'd, 291 N.Y. 786, 53 N.E.2d 366, 291 N.Y. (N.Y.S.) 786, 1944 N.Y. LEXIS 2036 (N.Y. 1944).

Where application for policy forbade modification of insurance contract except by specified officers, insurer was not estopped from asserting forfeiture of policy for failure to pay premium by oral promise of unspecified officer to waive insurer’s rights; verdict for plaintiff was properly set aside. Kiamie v Equitable Life Assurance Soc., 267 A.D. 87, 44 N.Y.S.2d 510, 1943 N.Y. App. Div. LEXIS 5972 (N.Y. App. Div. 1943), rev'd, 296 N.Y. 509, 68 N.E.2d 452, 296 N.Y. (N.Y.S.) 509, 1946 N.Y. LEXIS 1130 (N.Y. 1946).

In action on life policy excluding death by suicide acts and incidents which are as consistent with sanity as insanity will not authorize submission of question to jury. Strasberg v Equitable Life Assurance Soc., 281 A.D. 9, 117 N.Y.S.2d 236, 1952 N.Y. App. Div. LEXIS 3056 (N.Y. App. Div. 1952).

In action by insured on fire policy, disputed questions as to asserted defenses of fraud and false swearing, including consideration of credibility of plaintiff’s witnesses, were for jury, barring directed verdict. Wearever Upholstery & Furniture Corp. v Home Ins. Co., 286 A.D. 93, 141 N.Y.S.2d 107, 1955 N.Y. App. Div. LEXIS 3982 (N.Y. App. Div. 1955).

Verdict was wrongly directed for an insurance company on a clause of the policy exempting it from payment in case the insured had been “under the care” of a physician within a certain time prior to the application without so stating, on proof that a doctor had once told her to change to a hot drink and that she had “advised” with an unlicensed doctor. De Fazio v Metropolitan Life Ins. Co., 222 N.Y.S. 60, 129 Misc. 821, 1927 N.Y. Misc. LEXIS 780 (N.Y. App. Term 1927).

In action on a life insurance policy it was construed as having expired before death of insured for nonpayment of premiums, and verdict was directed for defendant. Pladwell v Travelers' Ins. Co., 234 N.Y.S. 287, 134 Misc. 205, 1929 N.Y. Misc. LEXIS 769 (N.Y. Sup. Ct. 1929).

In action on a life insurance policy, defendant failed to sustain its defense of fraudulent concealment as to treatment by a physician, after application and before delivery of the policy, and judgment on directed verdict for plaintiff was affirmed. Armand v Metropolitan Life Ins. Co., 235 N.Y.S. 726, 134 Misc. 357, 1929 N.Y. Misc. LEXIS 1160 (N.Y. App. Term), aff'd, 228 A.D. 625, 238 N.Y.S. 786, 1929 N.Y. App. Div. LEXIS 11266 (N.Y. App. Div. 1929).

Verdict directed for defendant in action on marine insurance policy covering “perils or dangers of the seas,” on ground it did not include theft of plaintiff’s tug while anchored at pier. Theft was not piracy since that must be committed on the high seas of which harbors are not a part. Britannia Shipping Corp. v Globe & Rutgers Fire Ins. Co., 244 N.Y.S. 720, 138 Misc. 38, 1930 N.Y. Misc. LEXIS 1553 (N.Y. Sup. Ct. 1930), aff'd, 232 A.D. 801, 249 N.Y.S. 908, 1931 N.Y. App. Div. LEXIS 15341 (N.Y. App. Div. 1931).

Verdict directed for defendant in action on an accident insurance policy where insured was killed by officers pursuing him for purposes of making arrest for felony. Piotrowski v Prudential Ins. Co., 252 N.Y.S. 313, 141 Misc. 172, 1931 N.Y. Misc. LEXIS 1639 (N.Y. Sup. Ct. 1931).

Policy of credit insurance construed in action thereon and verdict directed for plaintiff for part of his claim. Shawmut Coal & Coke Co. v American Credit-Indemnity Co., 254 N.Y.S. 818, 142 Misc. 799, 1932 N.Y. Misc. LEXIS 930 (N.Y. Sup. Ct. 1932). See also Shawmut Coal & Coke Co. v American Credit-Indemnity Co., 232 A.D. 29, 248 N.Y.S. 378, 1931 N.Y. App. Div. LEXIS 13720 (N.Y. App. Div. 1931).

In an action to recover the balance of the unearned premium on the cancellation of a policy of insurance, judgment is directed for the defendant on a counterclaim for the amount of the earned premium. Manhattan Wet Wash Laundry Co. v Guardian Casualty Co., 257 N.Y.S. 144, 143 Misc. 767, 1932 N.Y. Misc. LEXIS 1068 (N.Y. Sup. Ct. 1932), aff'd, 238 A.D. 780, 262 N.Y.S. 885, 1933 N.Y. App. Div. LEXIS 9882 (N.Y. App. Div. 1933).

In action for declaratory judgment that life policy was invalid because insured misstated that his health was good, cause of action was dismissed at close of all evidence for lack of any proof of

fraud or falsity or misrepresentation. Bronx Sav. Bank v Weigandt, 141 N.Y.S.2d 629, 207 Misc. 820, 1955 N.Y. Misc. LEXIS 2709 (N.Y. Sup. Ct.), aff'd, 286 A.D. 748, 146 N.Y.S.2d 625, 1955 N.Y. App. Div. LEXIS 4134 (N.Y. App. Div. 1955).

In action on jeweler's liability policy excluding loss of articles from unattended automobile, where undisputed and uncontradicted testimony established that articles of jewelry were taken from automobile while unattended, direction of verdict for defendant was required. Sagorsky v Malyon, 141 N.Y.S.2d 570, 1955 N.Y. Misc. LEXIS 2690 (N.Y. Sup. Ct. 1955), aff'd, 2 A.D.2d 675, 153 N.Y.S.2d 560, 1956 N.Y. App. Div. LEXIS 4830 (N.Y. App. Div. 1st Dep't 1956).

132. Judgment, action on

Verdict directed for plaintiff in an action on a foreign judgment. James Mills Orchards Corp. v Frank, 244 N.Y.S. 473, 137 Misc. 407, 1930 N.Y. Misc. LEXIS 1511 (N.Y. Sup. Ct. 1930).

133. Landlord and tenant

A verdict should be directed against a landlord in his action to recover accrued damages and rent because of a tenant's breach of the lease, on the theory the action was premature where lease term not yet terminated. Hermitage Co. v Levine, 248 N.Y. 333, 162 N.E. 97, 248 N.Y. (N.Y.S.) 333, 1928 N.Y. LEXIS 1268 (N.Y. 1928).

The court may not direct a verdict for plaintiff for $1,552.50 after the same party as defendant in an action brought by his opponent, then pending, had admitted by answer that $733.34 of said amount was justly due as rent; and judgment will be reduced to the difference between the two sums. Tekane Realty Co. v Edelo Realty Corp., 214 N.Y.S. 472, 126 Misc. 680, 1926 N.Y. Misc. LEXIS 646 (N.Y. App. Term 1926).

In summary proceeding to remove tenants from building to be demolished for erection of new building, verdict was properly directed for landlord despite claim that good faith of landlord should have been submitted to jury, where there was no evidence thereof. 1407 Broadway

Realty Corp. v Sheby, 76 N.Y.S.2d 655, 191 Misc. 104, 1948 N.Y. Misc. LEXIS 2097 (N.Y. App. Term), aff'd, 273 A.D. 1003, 79 N.Y.S.2d 881, 1948 N.Y. App. Div. LEXIS 5711 (N.Y. App. Div. 1948).

134. Libel

Where issue of actual malice should have been submitted to jury, it was error to direct verdict for defendant. Weniger v West India S.S. Co., 279 A.D. 561, 107 N.Y.S.2d 178, 1951 N.Y. App. Div. LEXIS 2983 (N.Y. App. Div. 1951).

In action for libel by publishing report that plaintiff had been guilty of misconduct in his business, verdict was directed for defendant since report was true and plaintiff had suffered no damages. Rodger v American Kennel Club, Inc., 245 N.Y.S. 662, 138 Misc. 310, 1930 N.Y. Misc. LEXIS 1637 (N.Y. Sup. Ct. 1930).

Motion to set aside directed verdict for plaintiff and for a new trial granted in action for libel, because of reception of incompetent evidence and because the question whether plaintiff or a person of the same name was libeled, was for the jury. Kehoe v New York Tribune, Inc., 247 N.Y.S. 695, 139 Misc. 420, 1931 N.Y. Misc. LEXIS 1069 (N.Y. Sup. Ct. 1931), aff'd, 235 A.D. 612, 255 N.Y.S. 839, 1932 N.Y. App. Div. LEXIS 8149 (N.Y. App. Div. 1932).

135. Licensor and licensee

Where the owner of an automobile had given his son permission to use same to go to a certain place and expressly stipulated that he should not go to another and the son disregarded directions and went to the latter place and injured plaintiff there, directed verdict for plaintiff was reversed. Vehicle and Traffic Law, § 59 construed. Chaika v Vandenberg, 252 N.Y. 101, 169 N.E. 103, 252 N.Y. (N.Y.S.) 101, 1929 N.Y. LEXIS 531 (N.Y. 1929).

136. Malpractice

Direction of verdict for defendant held improper in action against dentist for alleged malpractice for removal of impacted tooth. Herzell v Smith, 263 N.Y. 519, 189 N.E. 678, 263 N.Y. (N.Y.S.) 519, 1933 N.Y. LEXIS 818 (N.Y. 1933).

137. Master and servant

In action for assault whether the master was liable for the act of the servant was a question of fact, hence error to direct a verdict. Curran v Buckpitt, 225 A.D. 380, 233 N.Y.S. 249, 1929 N.Y. App. Div. LEXIS 11643 (N.Y. App. Div. 1929).

An action by an employee of defendant's lessee for damages for personal injury caused by a defective elevator which plaintiff was operating was governed by the provisions of the Labor Law, and judgment on a directed verdict for defendant was reversed. Urgo v Coles & Co., 226 A.D. 610, 235 N.Y.S. 431, 1929 N.Y. App. Div. LEXIS 8789 (N.Y. App. Div. 1929).

In action for recovery of commissions and damages for breach of contract of employment, directed verdict on first cause of action affirmed, cause separated and new trial ordered on second cause because correct rule for estimating damages was not followed. Palmer v New York Herald Co., 228 A.D. 176, 239 N.Y.S. 619, 1930 N.Y. App. Div. LEXIS 12132 (N.Y. App. Div.), aff'd, 255 N.Y. 572, 175 N.E. 318, 255 N.Y. (N.Y.S.) 572, 1930 N.Y. LEXIS 779 (N.Y. 1930).

In action for breach of employment contract, where main dispute as to justification for discharge involved credibility of witnesses, direction of verdict for defendant was improper. Ruthizer v William Bass Dress Corp., 264 A.D. 372, 35 N.Y.S.2d 473, 1942 N.Y. App. Div. LEXIS 4152 (N.Y. App. Div. 1942).

Damages for breach by workman of his employment contract being nominal and his pay stipulated, a directed verdict in his favor in his action for breach of employment is proper. Grosner v Gropper Knitting Mills, Inc., 213 N.Y.S. 433, 126 Misc. 370, 1926 N.Y. Misc. LEXIS 570 (N.Y. App. Term 1926).

In action by an employee of a subcontractor against the general contractor for injury suffered from a brick which fell down the elevator shaft, verdict was directed for defendant because of insufficiency of plaintiff's proof. Smith v Matthews Const. Co., 241 N.Y.S. 689, 137 Misc. 290, 1930 N.Y. Misc. LEXIS 1241 (N.Y. Sup. Ct. 1930).

In action by employees for overtime compensation under Fair Labor Standards Act, where evidence indicates that plaintiff and defendant are engaged in transporting goods in commerce, plaintiffs being drivers or helpers and defendant being private carriers, outside provisions of Fair Labor Standards Act, verdict was directed for defendant. McLough v Mallen, 137 N.Y.S.2d 523, 1954 N.Y. Misc. LEXIS 2567 (N.Y. Sup. Ct. 1954).

138. Money had and received

Judgment on directed verdict affirmed in favor of plaintiff for moneys had and received by agent or trustee of defendant. Sayer v Wynkoop, 248 N.Y. 54, 161 N.E. 417, 248 N.Y. (N.Y.S.) 54, 1928 N.Y. LEXIS 1222 (N.Y.), reh'g denied, 248 N.Y. 591, 162 N.E. 537, 248 N.Y. (N.Y.S.) 591, 1928 N.Y. LEXIS 1402 (N.Y. 1928).

139. Mortgages

In action by a trustee in bankruptcy of the mortgagor to recover the proceeds of sale by the mortgagee of the property mortgaged, verdict was directed in favor of the mortgagee, with a holding that he acted within the provisions of a valid mortgage. Sprague v Glynn, 238 N.Y.S. 696, 136 Misc. 163, 1930 N.Y. Misc. LEXIS 938 (N.Y. Sup. Ct. 1930).

140. Negligence

Absolute lack of evidence of defendant's negligence in an action against him for injury on slippery stairs warranted verdict in his favor. Rankin v ITTNER Realty Co., 242 N.Y. 339, 151 N.E. 641, 242 N.Y. (N.Y.S.) 339, 1926 N.Y. LEXIS 990 (N.Y. 1926).

Complaint for negligently placing meter box in such position that it fell on plaintiff, dismissed and judgment reversed because proof showed defendant had not so placed it but that it had been moved there by another defendant. Loktich v Bethlehem Engineering Corp., 242 N.Y. 436, 152 N.E. 253, 242 N.Y. (N.Y.S.) 436, 1926 N.Y. LEXIS 1002 (N.Y. 1926).

Judgment reversing judgment for defendant on directed verdict where plaintiff, a customer, slipped on ice on the sidewalk at defendant's door, affirmed. Venable v Consolidated Dry Goods Co., 251 N.Y. 585, 168 N.E. 436, 251 N.Y. (N.Y.S.) 585, 1929 N.Y. LEXIS 843 (N.Y. 1929).

See Sanders v Favorable Realty Corp., 290 N.Y. 591, 48 N.E.2d 171, 290 N.Y. (N.Y.S.) 591, 1943 N.Y. LEXIS 1264 (N.Y. 1943).

In an action for negligence verdict for defendant should not be directed because of contributory negligence of plaintiff where the evidence, viewed in the light of the most favorable inference for plaintiff, makes the question of negligence of both parties one for the jury. Griffin v United Traction Co., 212 A.D. 699, 209 N.Y.S. 569, 1925 N.Y. App. Div. LEXIS 9536 (N.Y. App. Div. 1925).

Directed verdict for defendant was error, under the rule that a contractor who is using a street for his own benefit is obligated to maintain it in a safe and secure condition until restored to its previous condition. Becker v Liscio, 223 A.D. 698, 229 N.Y.S. 361, 1928 N.Y. App. Div. LEXIS 6296 (N.Y. App. Div. 1928).

Testimony adduced on behalf of plaintiff required submission to the jury of the questions of defendant's negligence and contributory negligence of deceased, if any. Askelsen v Delaware, L. & W. R. Co., 224 A.D. 750, 230 N.Y.S. 797, 1928 N.Y. App. Div. LEXIS 10983 (N.Y. App. Div. 1928).

It was error to direct a verdict against a county clerk for negligently entering a judgment since it was a question of fact whether or not the negligence alleged was the proximate cause of the injury complained of. Cole v Vincent, 229 A.D. 520, 242 N.Y.S. 644, 1930 N.Y. App. Div. LEXIS 10433 (N.Y. App. Div. 1930).

Directed verdict for defendant reversed, the evidence showing that plaintiff fell into an open stairway in a partially dark storeroom, the protecting gate having been negligently left open. Kleiman v Feldstein, 234 A.D. 219, 254 N.Y.S. 649, 1932 N.Y. App. Div. LEXIS 10396 (N.Y. App. Div. 1932).

Where pleadings admit defendant's negligence, but there is no admission as to contributory negligence, it is error to direct judgment in favor of plaintiff and order case placed on trial calendar for assessment of damages. Potruch v Lehigh V. R. Co., 235 A.D. 22, 256 N.Y.S. 232, 1932 N.Y. App. Div. LEXIS 7872 (N.Y. App. Div. 1932).

Verdict erroneously directed in action for personal injuries arising from negligent operation of automobile. Connolly v Elston, 248 A.D. 211, 288 N.Y.S. 910, 1936 N.Y. App. Div. LEXIS 6116 (N.Y. App. Div. 1936).

Inconsistency and contradiction in testimony of plaintiff, suing for injuries on ice-skating rink negligently constructed, held not to justify direction of verdict for defendant. Welo v Union News Co., 263 A.D. 328, 32 N.Y.S.2d 943, 1942 N.Y. App. Div. LEXIS 6883 (N.Y. App. Div. 1942).

Where record in action for personal injury against city shows serious brain injury and medical testimony warrants finding of loss of memory caused by accident, question of allowing plaintiff additional time for giving statutory notice of claim was for jury. Hillborg v New York, 263 A.D. 668, 34 N.Y.S.2d 153, 1942 N.Y. App. Div. LEXIS 6977 (N.Y. App. Div. 1942).

In action against retailer and distributor for personal injuries from bottle bursting, issue of fact as to cause of bursting from defect, inherent in bottle or from blow struck against bottle, required submission to jury. Cummerford v Pepsi-Cola Co., 278 A.D. 658, 102 N.Y.S.2d 595, 1951 N.Y. App. Div. LEXIS 4253 (N.Y. App. Div. 1951).

Question as to sufficiency of proof of negligence, presented by defendant's motions to dismiss complaint and for directed verdict, survived court's charge. Gallagher v Citizens Water Works of Highlands, 278 A.D. 792, 104 N.Y.S.2d 195, 1951 N.Y. App. Div. LEXIS 4755 (N.Y. App. Div.

1951), aff'd, 303 N.Y. 805, 104 N.E.2d 363, 303 N.Y. (N.Y.S.) 805, 1952 N.Y. LEXIS 1296 (N.Y. 1952).

In action involving automobile collision at intersection, where plaintiff entered intersection without looking, and circumstances point as much to negligence of plaintiff as to its absence, nonsuit should be granted, though plaintiff had right of way. Davis v Rogers Fuel Corp., 284 A.D. 1024, 134 N.Y.S.2d 849, 1954 N.Y. App. Div. LEXIS 4405 (N.Y. App. Div. 1954).

Where plaintiff driver left his automobile in right traffic lane of highway and was standing beside it in road when struck by defendant’s car, direction of verdict for plaintiff was error, since questions of negligence and contributory negligence and credibility were for jury. Evans v Jones, 286 A.D. 921, 141 N.Y.S.2d 857, 1955 N.Y. App. Div. LEXIS 4512 (N.Y. App. Div. 1955).

A verdict will be directed in favor of the defendant on evidence showing that at the time plaintiff was injured by alleged negligent driving of one of defendant’s automobiles in which she was riding, the driver thereof was her husband who could not be made liable to her for a tort against her. Schubert v August Schubert Wagon Co., 222 N.Y.S. 115, 129 Misc. 578, 1927 N.Y. Misc. LEXIS 785 (N.Y. Sup. Ct. 1927), rev'd, 223 A.D. 502, 228 N.Y.S. 604, 1928 N.Y. App. Div. LEXIS 6251 (N.Y. App. Div. 1928).

Where plaintiff was injured by biting a nail which was imbedded and concealed in a loaf of bread, directed verdict against the manufacturer charged with negligence was proper. Cohen v Dugan Bros., Inc., 230 N.Y.S. 743, 132 Misc. 896, 1928 N.Y. Misc. LEXIS 1059 (N.Y. Sup. Ct. 1928), rev'd, 227 A.D. 714, 236 N.Y.S. 769, 1929 N.Y. App. Div. LEXIS 7543 (N.Y. App. Div. 1929).

Defendant’s motion for direction of verdict in its favor granted in action against it by proposed passenger for negligence. Huntington v Union R. Co., 258 N.Y.S. 676, 144 Misc. 341, 1932 N.Y. Misc. LEXIS 1489 (N.Y. City Ct. 1932).

Where there is no evidence to sustain jury's verdict, court may grant defendant's motion to direct verdict for plaintiff for admitted amount. Gales v Frank, 121 N.Y.S.2d 435, 203 Misc. 902, 1953 N.Y. Misc. LEXIS 1748 (N.Y. Sup. Ct. 1953).

Where the proofs in a negligence action made a plain case for submission to the jury of issues as to the negligence of the defendant and the contributory negligence of the plaintiff, it was error for the court to direct a verdict for defendant, notwithstanding CPA § 457-a. S. & F. Service, Inc. v Motor Haulage Co., 201 N.Y.S. 683, 1923 N.Y. Misc. LEXIS 1308 (N.Y. App. Term 1923).

In action arising from grade crossing collision between automobile and train, verdict for motorist was contrary to uncontradicted evidence that train bell was ringing as train approached crossing; defendant was denied directed verdict but verdict for plaintiff was set aside under CPA § 549 (§ 4404(a), (b) herein) and new trial granted. Murphy v Long Island R. Co., 32 N.Y.S.2d 345, 1941 N.Y. Misc. LEXIS 2537 (N.Y. Sup. Ct.), aff'd, 263 A.D. 840, 32 N.Y.S.2d 140, 1941 N.Y. App. Div. LEXIS 5212 (N.Y. App. Div. 1941).

In passenger's action for injuries while attempting to board elevated train, question whether space of 8 inches between platform and train created dangerous condition was for jury. Leto v New York, 112 N.Y.S.2d 751, 1952 N.Y. Misc. LEXIS 2689 (N.Y. City Ct. 1952).

141. Notice

A verdict should not be directed on evidence of interested witnesses affirming on one hand the sending of notice of the termination of a contract, and denying on the other hand the receiving thereof. Capital City Surety Co. v Lazarus, 221 A.D. 740, 225 N.Y.S. 270, 1927 N.Y. App. Div. LEXIS 6557 (N.Y. App. Div. 1927).

Defendant's motion for directed verdict erroneously denied, since notice of breach of warranty was unreasonably delayed and he was not liable. Brunella v Bracchi, 226 N.Y.S. 732, 226 N.Y.S. 738, 131 Misc. 301, 1928 N.Y. Misc. LEXIS 681 (N.Y. App. Term 1928).

142. Nuisances

Where snow accumulated behind a sign over defendant’s store door which melted and formed ice upon the sidewalk, upon which the plaintiff slipped and was injured, it was a question for the jury whether defendant had maintained a nuisance. Venable v Consolidated Dry Goods Co., 225 A.D. 202, 232 N.Y.S. 404, 1929 N.Y. App. Div. LEXIS 11599 (N.Y. App. Div.), aff'd, 251 N.Y. 585, 168 N.E. 436, 251 N.Y. (N.Y.S.) 585, 1929 N.Y. LEXIS 843 (N.Y. 1929).

143. Probate

This section authorizes the Surrogate, on motion by proponent in proceedings to probate a will, to direct a verdict for proponent and admit the will to probate, although the jury were unable to agree as to the sole issues submitted to them, namely, those of fraud and undue influence, where the evidence was such that a contrary verdict could have been set aside as against the weight of the evidence. In re Price's Will, 204 A.D. 252, 197 N.Y.S. 778, 1923 N.Y. App. Div. LEXIS 9451 (N.Y. App. Div.), aff'd, 236 N.Y. 656, 142 N.E. 323, 236 N.Y. (N.Y.S.) 656, 1923 N.Y. LEXIS 1116 (N.Y. 1923).

Probate of will was directed by surrogate after jury disagreed, where there was no evidence of testamentary incapacity. In re Horton's Will, 272 A.D. 646, 75 N.Y.S.2d 45, 1947 N.Y. App. Div. LEXIS 3367 (N.Y. App. Div. 1947), aff'd, 297 N.Y. 891, 79 N.E.2d 736, 297 N.Y. (N.Y.S.) 891, 1948 N.Y. LEXIS 990 (N.Y. 1948).

Where presumption of revocation from failure to produce counterparts of carbon copy of alleged will offered for probate was overcome by proponent, court improperly directed verdict for contestant. In re Mittelstaedt's Will, 280 A.D. 163, 112 N.Y.S.2d 166, 1952 N.Y. App. Div. LEXIS 3421 (N.Y. App. Div.), app. dismissed, 304 N.Y. 795, 109 N.E.2d 86, 304 N.Y. (N.Y.S.) 795, 1952 N.Y. LEXIS 987 (N.Y. 1952), app. dismissed, 304 N.Y. 876, 109 N.E.2d 886, 304 N.Y. (N.Y.S.) 876, 1952 N.Y. LEXIS 1041 (N.Y. 1952).

In an action to determine the validity of a will, the court may in a proper case direct a verdict. Hawke v Hawke, 31 N.Y.S. 968, 82 Hun 439 (1894), aff'd, 146 N.Y. 366, 41 N.E. 89, 146 N.Y. (N.Y.S.) 366, 1895 N.Y. LEXIS 680 (N.Y. 1895).

144. Real property

Directed verdict for plaintiff was proper where through default of defendant, vendee in a land contract, plaintiff stood to lose a determinable sum of money which must have been in contemplation of the parties. Tague Holding Corp. v Harris, 250 N.Y. 422, 165 N.E. 834, 250 N.Y. (N.Y.S.) 422, 1929 N.Y. LEXIS 896 (N.Y. 1929).

In an action to recover real property the court cannot direct a general verdict, but may direct judgment on a special verdict embracing a finding of all the necessary facts. Arcady Camps, Inc. v Berry, 207 A.D. 63, 202 N.Y.S. 398, 1923 N.Y. App. Div. LEXIS 5897 (N.Y. App. Div. 1923).

Judgment directed in favor of plaintiff for recovery of down payment on a contract for exchange of properties because defendant could not convey a marketable title. Scheckner v Broad Development Co., 230 N.Y.S. 537, 231 N.Y.S. 82, 132 Misc. 860, 1927 N.Y. Misc. LEXIS 1313 (N.Y. App. Term 1927).

Before consummation of conditional contract for sale of a farm and personalty thereon, fire destroyed latter; in action to foreclose the contract and for recovery of insurance, decree directed for defendant, rescinding the contract and refunding amount paid. Szatkus v Schaub, 252 N.Y.S. 350, 141 Misc. 177, 1931 N.Y. Misc. LEXIS 1642 (N.Y. Sup. Ct. 1931).

145. Replevin

In an action to replevy goods sold under a conditional contract, it is error to direct a verdict for the plaintiff when the buyer gives proof that his tender of payment was refused by the seller who insisted upon retaking the property; the direction of a verdict for the plaintiff is also erroneous where defendant tenders the balance due at the trial but refuses to pay costs as the plaintiff was

not justified in bringing replevin, and hence not entitled to costs. Kindelberger v Kunow, 122 A.D. 158, 106 N.Y.S. 597, 1907 N.Y. App. Div. LEXIS 2395 (N.Y. App. Div. 1907), aff'd, 195 N.Y. 517, 88 N.E. 1122, 195 N.Y. (N.Y.S.) 517, 1908 N.Y. LEXIS 1030 (N.Y. 1908).

Where articles sold by plaintiff under a conditional sale contract were affixed to land subsequently purchased by defendant at foreclosure sale, verdict in replevin was directed for defendant on the ground that plaintiff had failed to establish his case. G. Goldberg & Sons v Gilet Bldg. Corp., 237 N.Y.S. 258, 135 Misc. 158, 1929 N.Y. Misc. LEXIS 930 (N.Y. Sup. Ct. 1929).

146. Shipping

Where charter of vessel for excursion had no control over pier, it was not liable for injuries to excursionist on pier. Murrain v Wilson Line, Inc., 49 N.Y.S.2d 862, 1944 N.Y. Misc. LEXIS 2226 (N.Y. Sup. Ct. 1944), aff'd, 270 A.D. 372, 59 N.Y.S.2d 750, 1946 N.Y. App. Div. LEXIS 3691 (N.Y. App. Div. 1946).

B. Judgment On Pleadings Or Admission Of Part Of Cause

i. In General

147. Generally

Where an answer sets forth a statute as a bar, the issue as to the validity of the statute is raised without further pleading and is presented to the court upon a motion for judgment on the pleadings. Atkins v Hertz Drivurself Stations, Inc., 261 N.Y. 352, 185 N.E. 408, 261 N.Y. (N.Y.S.) 352, 1933 N.Y. LEXIS 1293 (N.Y. 1933), aff'd, 291 U.S. 641, 54 S. Ct. 437, 78 L. Ed. 1039, 1934 U.S. LEXIS 527 (U.S. 1934).

The purpose of CPA § 476 was to obviate the necessity of waiting until trial to make such motion, but the rules were the same as where the motion was made at trial, and the defendant was not entitled to judgment if the complaint entitled the plaintiff to any relief, legal or equitable, even though the judgment demanded was not the precise relief to which he was entitled; a defendant by moving for judgment under said section admits every material allegation of the complaint. Clark v Levy, 130 A.D. 389, 114 N.Y.S. 890, 1909 N.Y. App. Div. LEXIS 217 (N.Y. App. Div. 1909).

In a dissenting opinion the view was expressed that CPA § 476 was unconstitutional. In re Bennett's Will, 207 A.D. 388, 202 N.Y.S. 201, 1923 N.Y. App. Div. LEXIS 5967 (N.Y. App. Div. 1923), aff'd, 238 N.Y. 583, 144 N.E. 901, 238 N.Y. (N.Y.S.) 583, 1924 N.Y. LEXIS 761 (N.Y. 1924).

CPA § 476 applied exclusively to cases in which the cause of action survives. Thorne v Thorne, 210 A.D. 55, 205 N.Y.S. 284, 1924 N.Y. App. Div. LEXIS 6654 (N.Y. App. Div. 1924).

The purpose of CPA § 476 was to provide severance and judgment for a part of a claim which could not be contested in good faith, the action to proceed to trial on the contested part of the cause of action. Valentine v Perlman, 216 A.D. 548, 215 N.Y.S. 338, 1926 N.Y. App. Div. LEXIS 9267 (N.Y. App. Div. 1926).

CPA § 476 permitted the court to render judgment in favor of any party at any stage of an action, if warranted by the pleadings or the admissions of the party. Mack, Miller Candle Co. v Macmillan Co., 239 A.D. 738, 269 N.Y.S. 33, 1934 N.Y. App. Div. LEXIS 10931 (N.Y. App. Div.), aff'd, 266 N.Y. 489, 195 N.E. 167, 266 N.Y. (N.Y.S.) 489, 1934 N.Y. LEXIS 978 (N.Y. 1934).

A motion for judgment may be directed not only against a separate cause of action but also against a distinct and independent act or specification of wrongdoing which does not give rise to a remediable legal wrong or which cannot serve as a basis for defendants’ liability and which, if dismissed, will not prejudice or embarrass the fair trial of the remaining specifications or issues.

Melniker v American Title & Guaranty Co., 253 A.D. 570, 3 N.Y.S.2d 198, 1938 N.Y. App. Div. LEXIS 8497 (N.Y. App. Div. 1938).

Affidavit used on motion to dismiss for lack of prosecution could not be used on motion under former RCP 112. Dold v Niagara County, 270 A.D. 344, 59 N.Y.S.2d 426, 1946 N.Y. App. Div. LEXIS 3687 (N.Y. App. Div. 1946).

A motion for judgment on the pleadings, under CPA § 476 was to obviate the delay in waiting for a case to be reached on the calendar for trial. Ellenbogen v Slocum, 121 N.Y.S. 1110, 66 Misc. 611, 1910 N.Y. Misc. LEXIS 169 (N.Y. City Ct.), modified, 123 N.Y.S. 342 (N.Y. App. Term 1910).

The provisions of CPA § 476 were applible to interlocutory judgments as well as to final judgments. Furmans v Gough, 128 N.Y.S. 722, 70 Misc. 337, 1911 N.Y. Misc. LEXIS 90 (N.Y. Sup. Ct. 1911).

The provision of CPA § 476 was not applicable to a case where defendant admitted the claim of plaintiff but set up a counterclaim greater in amount. H. Koehler & Co. v Adams, 128 N.Y.S. 707, 71 Misc. 436, 1911 N.Y. Misc. LEXIS 252 (N.Y. App. Term 1911).

The rules governing the determination of a motion in the Special Term for judgment on the pleadings are the same as those applicable to a similar motion made at trial. Cunningham v Platt, 144 N.Y.S. 51, 82 Misc. 486, 1913 N.Y. Misc. LEXIS 1088 (N.Y. Sup. Ct. 1913); Oswego v People's Gas & Electric Co., 190 N.Y.S. 39, 116 Misc. 354, 1921 N.Y. Misc. LEXIS 1647 (N.Y. Sup. Ct. 1921).

A defendant was not precluded to move for judgment under CPA § 476 upon the ground that the complaint was insufficient by reason of the fact that he had filed an answer denying the averments thereof. Spielberg v Canada S.S. Lines, 162 N.Y.S. 610, 98 Misc. 304, 1917 N.Y. Misc. LEXIS 677 (N.Y. Sup. Ct. 1917).

A motion for partial judgment and separate trial of a counterclaim, supported by affidavits, could be said to be brought under CPA § 476. Little Falls Dairy Co. v Berghorn, 224 N.Y.S. 34, 130 Misc. 454, 1927 N.Y. Misc. LEXIS 1056 (N.Y. Sup. Ct. 1927).

CPA § 476 read in connection with former RCP 112 authorized judgment on the pleadings in favor of either party without regard to which party made the motion. Neither provision was mandatory but was addressed to the discretion of the court. Under the rule, nothing but the pleadings could be considered. Jongers v First Trust & Deposit Co., 263 N.Y.S. 619, 147 Misc. 260, 1932 N.Y. Misc. LEXIS 1305 (N.Y. Sup. Ct. 1932).

The court could grant judgment, pursuant to CPA § 476 and former RCP 112 without regard to which party made the motion. United States Trust Co. v Wenzell, 19 N.Y.S.2d 448, 173 Misc. 998, 1939 N.Y. Misc. LEXIS 2770 (N.Y. Sup. Ct. 1939), aff'd, 258 A.D. 1046, 18 N.Y.S.2d 1001, 1940 N.Y. App. Div. LEXIS 8797 (N.Y. App. Div. 1940).

It is better to give notice of an order severing the action, although it may be made ex parte. Shaw v Coleman (1886) 54 Super Ct (22 Jones & S) 3.

148. Courts

Appellate Division has no power to grant judgment, where appeal is from order which neither grants nor denies judgment, and where plaintiff does not admit that defendant is entitled to judgment. Skinner v Paramount Pictures, Inc., 294 N.Y. 474, 63 N.E.2d 64, 294 N.Y. (N.Y.S.) 474, 1945 N.Y. LEXIS 772 (N.Y. 1945).

Where effective judgment can be rendered by Court of Appeals sustaining part of complaint without fatal mutilation of entire pleading, it will do so. Kane v Walsh, 295 N.Y. 198, 66 N.E.2d 53, 295 N.Y. (N.Y.S.) 198, 1946 N.Y. LEXIS 842 (N.Y. 1946).

The provisions of CPA § 476, authorizing judgment upon the pleadings after issue joined applied to the municipal court of the City of New York. Maune v Unity Press, 139 A.D. 740, 124 N.Y.S. 504, 1910 N.Y. App. Div. LEXIS 2290 (N.Y. App. Div. 1910).

CPA § 476 applied to Surrogate's courts. In re Bennett's Will, 207 A.D. 388, 202 N.Y.S. 201, 1923 N.Y. App. Div. LEXIS 5967 (N.Y. App. Div. 1923), aff'd, 238 N.Y. 583, 144 N.E. 901, 238 N.Y. (N.Y.S.) 583, 1924 N.Y. LEXIS 761 (N.Y. 1924).

The municipal court of the city of New York had no power to strike out pleadings as frivolous or to give judgment on the pleadings under CPA § 476. Martin v Lefkowitz, 115 N.Y.S. 64, 62 Misc. 490, 1909 N.Y. Misc. LEXIS 579 (N.Y. App. Term 1909).

Federal court, see Tractor & Equipment Corp. v Chain Belt Co., 50 F. Supp. 1001, 1942 U.S. Dist. LEXIS 1916 (D.N.Y. 1942).

149. Time and term for motion

A motion for judgment on the pleadings can only be made when the cause is at issue, and hence such a motion is premature where the defendant has neither answered nor objected to the legal sufficiency of an amended complaint. Childs v Childs, 144 A.D. 167, 128 N.Y.S. 781, 1911 N.Y. App. Div. LEXIS 1651 (N.Y. App. Div. 1911).

A motion for judgment on the pleadings under CPA § 476 was properly made at the special term for motions and not at the special term for trials. Higgins v New York Dock Co., 132 N.Y.S. 590, 75 Misc. 227, 1912 N.Y. Misc. LEXIS 647 (N.Y. Sup. Ct. 1912).

The objection that plaintiff had no right to maintain the action could be presented on a motion under CPA § 476 in the Special Term. Oswego v People's Gas & Electric Co., 190 N.Y.S. 39, 116 Misc. 354, 1921 N.Y. Misc. LEXIS 1647 (N.Y. Sup. Ct. 1921).

A motion for dismissal if warranted by pleadings or admissions of party, may be made at any time during progress of the litigation. Pennsylvania Exchange Bank v Lasko, 4 Misc. 2d 1039, 159 N.Y.S.2d 429, 1957 N.Y. Misc. LEXIS 3595 (N.Y. Sup. Ct. 1957), rev'd, 4 A.D.2d 206, 163 N.Y.S.2d 864, 1957 N.Y. App. Div. LEXIS 4885 (N.Y. App. Div. 1st Dep't 1957), reh'g denied, 9 Misc. 2d 384, 170 N.Y.S.2d 612, 1958 N.Y. Misc. LEXIS 4073 (N.Y. Sup. Ct. 1958).

On a motion for judgment on pleadings, the court could decide whether the action was barred by the defense of the statute of limitations since CPA § 476 permitted a court to render judgment in favor of any party at any stage of an action if warranted by the pleading and the admissions of the party or parties. Rokita v Germaine, 12 Misc. 2d 84, 176 N.Y.S.2d 34, 1958 N.Y. Misc. LEXIS 3255 (N.Y. Sup. Ct. 1958), aff'd, 8 A.D.2d 620, 185 N.Y.S.2d 272, 1959 N.Y. App. Div. LEXIS 9333 (N.Y. App. Div. 2d Dep't 1959).

Motion under CPA § 476 was premature before answer. Greenberg v Refined Gas Stations, Inc., 85 N.Y.S.2d 721, 1948 N.Y. Misc. LEXIS 3849 (N.Y. Sup. Ct. 1948).

150. Amendment of pleading after notice of motion

Where it appears that plaintiff is not, in any event, entitled to maintain the action, the court will not be justified in permitting the service of an amended complaint. Oswego v People's Gas & Electric Co., 190 N.Y.S. 39, 116 Misc. 354, 1921 N.Y. Misc. LEXIS 1647 (N.Y. Sup. Ct. 1921).

Where answers of codefendants were stricken leave was given to serve amended answers. Strunin v Har Realty Co., 242 N.Y.S. 712, 137 Misc. 539, 1930 N.Y. Misc. LEXIS 1345 (N.Y. City Ct. 1930).

The provisions of CPA § 476 and former RCP 112 were not mandatory but were addressed to the discretion of the court. If, upon a motion for judgment upon the pleadings, the court sustained an objection, it had authority to permit the defective pleading to be amended with or without terms. Hamilton Park Builders Corp. v Rogers, 4 Misc. 2d 269, 156 N.Y.S.2d 891, 1956 N.Y. Misc. LEXIS 1571 (N.Y. Sup. Ct. 1956), overruled, Todd v Pearl Woods, Inc., 20 A.D.2d 911, 248 N.Y.S.2d 975, 1964 N.Y. App. Div. LEXIS 4040 (N.Y. App. Div. 2d Dep't 1964).

Where defendant, following plaintiff’s motion for judgment on the pleadings under CPA § 476, served an amended answer within the time limit set by CPA § 244 (§ 3025(a) herein), the amended answer superseded the notice of motion and the motion was not arguable. Dorries Saddlery Co. v Howe, 198 N.Y.S. 673, 1923 N.Y. Misc. LEXIS 841 (N.Y. Sup. Ct. 1923).

Where defendant’s amended answer, served after plaintiff’s notice of motion for judgment on the pleadings under CPA § 476 set up a counterclaim based upon breach of warranty, plaintiff’s motion for judgment, even if deemed addressed to the amended pleadings, could not be granted to the extent of dismissing the counterclaim. Dorries Saddlery Co. v Howe, 198 N.Y.S. 673, 1923 N.Y. Misc. LEXIS 841 (N.Y. Sup. Ct. 1923).

151. Stay of proceedings

Where there was summary judgment for such part of plaintiff’s claim as was not extinguished by a counterclaim, it was proper to restrain plaintiff from taking action to enforce the judgment until a hearing was had upon the issues raised by the counterclaim; defendant giving a bond covering the amount of the judgment. Dairymen's League Co-op. Ass'n v Egli, 228 A.D. 164, 239 N.Y.S. 152, 1930 N.Y. App. Div. LEXIS 12127 (N.Y. App. Div. 1930).

On motion for judgment on the pleadings in an action in the supreme court, to determine which of two wills was entitled to probate and to enforce rights under a contract to make a will, the question of jurisdiction having been raised, all proceedings were stayed until the question had been determined by the surrogate’s court. Schley v Donlin, 225 N.Y.S. 453, 131 Misc. 208, 1927 N.Y. Misc. LEXIS 1220 (N.Y. Sup. Ct. 1927).

ii. Pleadings And Other Matters Considered On Motion

152. Generally.

Motion for judgment on pleadings is made on pleadings and admissions only. Gracie Square Realty Corp. v Choice Realty Corp., 305 N.Y. 271, 113 N.E.2d 416, 305 N.Y. (N.Y.S.) 271, 1953 N.Y. LEXIS 815 (N.Y. 1953).

On motion for judgment under CPA § 476 nothing but the pleadings can be considered. Partenfelder v People, 157 A.D. 462, 142 N.Y.S. 915, 1913 N.Y. App. Div. LEXIS 6675 (N.Y.

App. Div. 1913), reh'g denied, 157 A.D. 933, 142 N.Y.S. 1133, 1913 N.Y. App. Div. LEXIS 7057 (N.Y. App. Div. 1913), aff'd, 211 N.Y. 355, 105 N.E. 675, 211 N.Y. (N.Y.S.) 355, 1914 N.Y. LEXIS 1051 (N.Y. 1914).

On defendant’s motion to dismiss complaint, only complaint and formal admissions of plaintiff may be considered, and every intendment and fair inference is in favor of pleading. Gould v United Traction Co., 282 A.D. 812, 122 N.Y.S.2d 662, 1953 N.Y. App. Div. LEXIS 5002 (N.Y. App. Div. 1953).

On a motion for judgment on the pleadings only a question of law will be determined. The motion is considered only on the basis of the pleadings, admissions of the parties, bills of particulars and written stipulations. Shapiro v Thompson, 6 A.D.2d 608, 180 N.Y.S.2d 528, 1958 N.Y. App. Div. LEXIS 3896 (N.Y. App. Div. 3d Dep't 1958), app. dismissed, 6 N.Y.2d 747, 186 N.Y.S.2d 279, 158 N.E.2d 851, 1959 N.Y. LEXIS 1477 (N.Y. 1959).

Motion hereunder must be heard on all of the pleadings. St. Regis Paper Co. v Hano, 252 N.Y.S. 174, 141 Misc. 75, 1931 N.Y. Misc. LEXIS 1605 (N.Y. Sup. Ct. 1931), aff'd, 235 A.D. 653, 255 N.Y.S. 845, 1932 N.Y. App. Div. LEXIS 8501 (N.Y. App. Div. 1932).

An admission that first action was deliberately abandoned contained in plaintiff’s affidavit in opposition to defendant’s motion to dismiss complaint on ground of another action pending between parties RCP 107, subd 3 (Rule 3211(a) herein) did not constitute an admission within the purview of CPA § 476. Cantor v Mahana Textiles, Inc., 17 Misc. 2d 809, 187 N.Y.S.2d 885, 1959 N.Y. Misc. LEXIS 3909 (N.Y. Sup. Ct. 1959).

Motion for judgment on pleadings is ordinarily addressed to discretion of court. Owens v Owens, 138 N.Y.S.2d 475, 1955 N.Y. Misc. LEXIS 2629 (N.Y. Sup. Ct. 1955), aff'd, 1 A.D.2d 844, 148 N.Y.S.2d 813, 1956 N.Y. App. Div. LEXIS 6336 (N.Y. App. Div. 2d Dep't 1956).

153. Complaint, answer, and reply

On plaintiff’s motion for judgment on pleadings, court has right to consider allegations of both complaint and answer. Gould v United Traction Co., 282 A.D. 812, 122 N.Y.S.2d 662, 1953 N.Y. App. Div. LEXIS 5002 (N.Y. App. Div. 1953).

On defendant’s motion for judgment on pleadings or, in alternative, for summary judgment, defendant is not entitled to benefit of any allegation of answer since such allegations are deemed denied; sole inquiry relates to sufficiency of complaint. In re Presender's Estate, 285 A.D. 109, 135 N.Y.S.2d 418, 1954 N.Y. App. Div. LEXIS 3290 (N.Y. App. Div. 1954), app. denied, 285 A.D. 806, 137 N.Y.S.2d 821, 1955 N.Y. App. Div. LEXIS 5636 (N.Y. App. Div. 1955).

The complaint must be read, on such a motion in the Special Term, as clarified and limited by the additional matter set up in the answer and admitted by the reply. Oswego v People's Gas & Electric Co., 190 N.Y.S. 39, 116 Misc. 354, 1921 N.Y. Misc. LEXIS 1647 (N.Y. Sup. Ct. 1921).

On motion to dismiss a complaint, its allegations alone will be considered. Meth v New York, 253 N.Y.S. 248, 142 Misc. 203, 1929 N.Y. Misc. LEXIS 1134 (N.Y. Sup. Ct. 1929).

Where motion to dismiss complaint is directed to complaint as whole and not to each cause of action contained therein, court may dismiss part of cause of action though it is not dismissible in its entirety, but court is not required to do so. Pansy v Massola, 140 N.Y.S.2d 417, 207 Misc. 908, 1955 N.Y. Misc. LEXIS 3146 (N.Y. Sup. Ct. 1955).

154. —Affirmative defenses and counterclaims

When defendant moves for judgment on pleadings, court ordinarily will pay no heed to defenses consisting of new matter, because such defenses are deemed to be controverted by plaintiff. Stevenson v News Syndicate Co., 302 N.Y. 81, 96 N.E.2d 187, 302 N.Y. (N.Y.S.) 81, 1950 N.Y. LEXIS 771 (N.Y. 1950), reh'g denied, 302 N.Y. 690, 98 N.E.2d 485, 302 N.Y. (N.Y.S.) 690, 1951 N.Y. LEXIS 854 (N.Y. 1951).

In action for specific performance, defendant's motion for judgment on pleadings was properly denied, despite defense of statute of frauds. Owens v Owens, 1 A.D.2d 844, 148 N.Y.S.2d 813, 1956 N.Y. App. Div. LEXIS 6336 (N.Y. App. Div. 2d Dep't 1956).

Affirmative defense, set up in answer, cannot be considered on motion directed to complaint. Rabinowitz v Cee Bee Oil Co., 92 N.Y.S.2d 455, 197 Misc. 600, 1949 N.Y. Misc. LEXIS 2841 (N.Y. City Ct. 1949).

Where defendants-vendors covenanted to cancel contract to convey realty and to retain deposit made thereunder, upon purchaser's failure to take title, they cannot, on occurrence of that contingency, invoke specific performance to compel compliance with agreement which they had elected to terminate, and counterclaim alleging such facts was dismissed. Dukas v Tolmach, 142 N.Y.S.2d 176, 1955 N.Y. Misc. LEXIS 2778 (N.Y. Sup. Ct. 1955).

155. Bill of Particulars

On motion for judgment on pleadings, question to be answered is whether pleadings and bill of particulars raise issues of fact. Gracie Square Realty Corp. v Choice Realty Corp., 305 N.Y. 271, 113 N.E.2d 416, 305 N.Y. (N.Y.S.) 271, 1953 N.Y. LEXIS 815 (N.Y. 1953).

On a motion by defendant for judgment under CPA § 476 the plaintiff's bill of particulars could be considered. Dineen v May, 149 A.D. 469, 134 N.Y.S. 7, 1912 N.Y. App. Div. LEXIS 6425 (N.Y. App. Div. 1912).

On motion hereunder the court may consider whatever might be properly considered on motion at the opening of the trial, including admissions in the bill of particulars, that being taken as part of the pleadings and the facts therein set up, taken as true. Rosenzweig v Schmitt, 232 A.D. 131, 249 N.Y.S. 266, 1931 N.Y. App. Div. LEXIS 13747 (N.Y. App. Div. 1931).

On notice of motion by defendant executors for judgment on the pleadings to dismiss the complaint, based on the pleadings, the demand for a bill of particulars and the bills of particulars furnished, defendants are not limited to the bare allegations of the complaint. Levin v Levin, 288

N.Y.S. 820, 159 Misc. 230, 1936 N.Y. Misc. LEXIS 1317 (N.Y. Sup. Ct. 1936), aff'd, 253 A.D. 758, 300 N.Y.S. 1042, 1937 N.Y. App. Div. LEXIS 5483 (N.Y. App. Div. 1937).

Plaintiff's bill of particulars held to show that plaintiff had furnished consideration for defendant's oral promises, barring motion for judgment on pleadings. Wilson v Gotham Instrument Co., 101 N.Y.S.2d 699, 198 Misc. 1009, 1950 N.Y. Misc. LEXIS 2322 (N.Y. Sup. Ct. 1950).

Where defendant moves for judgment on pleadings dismissing complaint as amplified by bill of particulars and where plaintiff cross-moves to amend such bill, court would, in considering motion for judgment on pleadings, consider respective demands and parties' bill of particulars as amended. Reinwald v Chemical Bank & Trust Co., 128 N.Y.S.2d 98, 205 Misc. 335, 1953 N.Y. Misc. LEXIS 2628 (N.Y. Sup. Ct. 1953), aff'd, 283 A.D. 966, 130 N.Y.S.2d 446, 1954 N.Y. App. Div. LEXIS 5938 (N.Y. App. Div. 1954).

Bill of particulars may be considered in determining legal sufficiency of complaint. Blaich & Stiegler, Inc. v Manhasset Park Co., 133 N.Y.S.2d 420, 206 Misc. 541, 1954 N.Y. Misc. LEXIS 2217 (N.Y. Sup. Ct. 1954).

Where alleged widow brings proceeding in Surrogate's Court to establish her right of inheritance to realty owned by decedent husband her admission in her bill of particulars that no marriage was solemnized as required by Domestic Relations L. § 13, establishes that she is not lawful surviving spouse and so has no standing to bring proceedings and motion for judgment on pleadings and admissions was granted. In re Rizzo's Estate, 154 N.Y.S.2d 691 (N.Y. Sur. Ct.), aff'd, 2 A.D.2d 993, 158 N.Y.S.2d 90, 1956 N.Y. App. Div. LEXIS 3391 (N.Y. App. Div. 2d Dep't 1956).

156. Superseded pleadings

On review of an order granting a motion for judgment on the pleadings, from which defendant appealed, the court will consider only the complaint and the second amended answer, although the plaintiff improperly read into the record the original and first amended answer in support of

the motion. Kenneth v Newgold, 183 A.D. 652, 170 N.Y.S. 803, 1918 N.Y. App. Div. LEXIS 5111 (N.Y. App. Div. 1918).

On motion to dismiss an amended complaint the original complaint may not be considered. Peoples' Bank of Hamburg v C. L. Gates, Inc., 232 A.D. 328, 250 N.Y.S. 452, 1931 N.Y. App. Div. LEXIS 13801 (N.Y. App. Div. 1931).

157. Summons

Upon a motion for judgment on the pleadings, facts appearing in the summons will not be taken into consideration. Pernisi v John Schmalz's Sons, Inc., 142 A.D. 53, 126 N.Y.S. 880, 1910 N.Y. App. Div. LEXIS 4190 (N.Y. App. Div. 1910), overruled, Sharrow v Inland Lines, Ltd., 214 N.Y. 101, 108 N.E. 217, 214 N.Y. (N.Y.S.) 101, 1915 N.Y. LEXIS 1217 (N.Y. 1915).

Upon a motion for judgment under CPA § 476 neither the summons nor an affidavit supporting such motion could be considered. Agresta v Federal Steam Nav. Co., 169 A.D. 467, 155 N.Y.S. 343, 1915 N.Y. App. Div. LEXIS 4957 (N.Y. App. Div. 1915).

158. Affidavits and evidence generally

A motion for judgment on the pleadings pursuant to CPA § 476 had to be determined solely on the pleadings and they could not in any way be aided by affidavits or testimony, and such motion was not denied with leave to renew after searching the pleadings by an application for particulars or after searching the conscience of the plaintiff by an examination before trial. Ship v Fridenberg, 132 A.D. 782, 117 N.Y.S. 599, 1909 N.Y. App. Div. LEXIS 1593 (N.Y. App. Div. 1909).

A motion for judgment on the pleadings under CPA § 476 had to be determined solely on the pleadings unaided by affidavit or other testimony. Standard Fashion Co. v Thompson, 137 A.D. 588, 122 N.Y.S. 300, 1910 N.Y. App. Div. LEXIS 738 (N.Y. App. Div. 1910).

CPA § 476 did not empower the court to determine issues of fact; affidavits or evidence could not be considered, and the practice was the same as upon a motion for judgment at the opening of a trial. Emanuel v Walter, 138 A.D. 818, 123 N.Y.S. 491, 1910 N.Y. App. Div. LEXIS 1638 (N.Y. App. Div. 1910).

It is not proper, on a motion under this section, to receive evidence of matters dehors the pleadings themselves. Fass v Armstrong, 170 A.D. 596, 156 N.Y.S. 806, 1915 N.Y. App. Div. LEXIS 6095 (N.Y. App. Div. 1915).

Affidavits did not need to be considered under CPA § 476, except, perhaps, for the purpose of establishing such admissions of a party as were contemplated by the statute. Lefler v Clark, 247 A.D. 402, 287 N.Y.S. 476, 1936 N.Y. App. Div. LEXIS 8277 (N.Y. App. Div. 1936).

Documentary evidence, attached to plaintiff’s affidavits but not to his complaint, showing plaintiff could not establish his alleged cause of action, cannot be considered. Gordon v New York Institute of Optics, Inc., 277 A.D. 1100, 101 N.Y.S.2d 192, 1950 N.Y. App. Div. LEXIS 4613 (N.Y. App. Div. 1950).

In determining sufficiency of complaint, court is not required to pretend ignorance of matters of common knowledge and public record; judicially noticed such matters may be considered as though embodied in complaint. Watertown v Watertown, 139 N.Y.S.2d 198, 207 Misc. 433, 1952 N.Y. Misc. LEXIS 3002 (N.Y. Sup. Ct. 1952).

Affidavit of plaintiff’s attorney may not be read in opposition to motion for judgment on pleadings except under very limited circumstances. Owens v Owens, 132 N.Y.S.2d 215, 205 Misc. 506, 1954 N.Y. Misc. LEXIS 3419 (N.Y. App. Term 1954).

On motion for judgment of dismissal the application must be considered on the pleadings alone unaided by extrinsic proof other than admissions of a party. Pennsylvania Exchange Bank v Lasko, 4 Misc. 2d 1039, 159 N.Y.S.2d 429, 1957 N.Y. Misc. LEXIS 3595 (N.Y. Sup. Ct. 1957), rev'd, 4 A.D.2d 206, 163 N.Y.S.2d 864, 1957 N.Y. App. Div. LEXIS 4885 (N.Y. App. Div. 1st

Dep't 1957), reh'g denied, 9 Misc. 2d 384, 170 N.Y.S.2d 612, 1958 N.Y. Misc. LEXIS 4073 (N.Y. Sup. Ct. 1958).

159. Admissions

“Admissions of a party or parties” refers to admissions made in the action, and intended to be treated as a part of a pleading or made to avoid some question arising on the pleadings. An admission out of court is not contemplated. Lloyd v R. S. M. Corp., 251 N.Y. 318, 167 N.E. 456, 251 N.Y. (N.Y.S.) 318, 1929 N.Y. LEXIS 723 (N.Y. 1929); Lefler v Clark, 247 A.D. 402, 287 N.Y.S. 476, 1936 N.Y. App. Div. LEXIS 8277 (N.Y. App. Div. 1936).

It could not be held that assumptions for the purpose of one suit had to be considered admissions in a second, within the strict requirements for a dismissal under CPA § 476. Brick v Cohn-Hall-Marx Co., 283 N.Y. 99, 27 N.E.2d 518, 283 N.Y. (N.Y.S.) 99, 1940 N.Y. LEXIS 918 (N.Y. 1940).

Admissions of party or parties refer to admissions made in action, and intended to be treated as part of pleading or made to avoid some question arising on pleadings; they do not relate to matters oral or written which might be competent as evidence at trial but which might be met by other evidence, thus depriving them of their conclusiveness and creating issue of fact with respect thereto. Gracie Square Realty Corp. v Choice Realty Corp., 305 N.Y. 271, 113 N.E.2d 416, 305 N.Y. (N.Y.S.) 271, 1953 N.Y. LEXIS 815 (N.Y. 1953).

Deposition was not pleading but was testimony to be used as evidence, and not as “admission of party” within CPA § 476 authorizing judgment on pleadings or admissions. Gracie Square Realty Corp. v Choice Realty Corp., 305 N.Y. 271, 113 N.E.2d 416, 305 N.Y. (N.Y.S.) 271, 1953 N.Y. LEXIS 815 (N.Y. 1953).

Plaintiff’s bill of particulars and the contract sued on included in moving papers as admissions under CPA § 476. Herx & Eddy, Inc. v Carlson, 210 A.D. 417, 206 N.Y.S. 179, 1924 N.Y. App. Div. LEXIS 6745 (N.Y. App. Div. 1924).

Under RCP 113, 114 (Rule 3212, 5012 herein) and CPA § 476, where defendant counterclaimed for part and admitted the balance of plaintiff's claim, summary judgment should have been for the amount admitted, leaving the balance to be determined upon trial of the issues raised by the counterclaim. Dairymen's League Co-op. Ass'n v Egli, 228 A.D. 164, 239 N.Y.S. 152, 1930 N.Y. App. Div. LEXIS 12127 (N.Y. App. Div. 1930).

Defendant's admissions were not sufficient to warrant total disregard of the allegations of the answer. Standard Oil Co. v Boyle, 231 A.D. 101, 246 N.Y.S. 142, 1930 N.Y. App. Div. LEXIS 7014 (N.Y. App. Div. 1930).

Admissions may be merely evidentiary and not conclusive. Islip v Daly, 277 A.D. 799, 97 N.Y.S.2d 855, 1950 N.Y. App. Div. LEXIS 3365 (N.Y. App. Div. 1950).

Statements in writing by the defendant in an action for conversion tending to show that the plaintiff was entitled to the property in suit and that defendant held the same without excuse were not "admissions of a party" within the meaning of CPA § 476. Kidder v Hesselman, 196 N.Y.S. 837, 119 Misc. 410, 1922 N.Y. Misc. LEXIS 1579 (N.Y. Sup. Ct. 1922).

Any specification intended to be treated as part of pleading, or made to avoid some question arising on pleadings, will be considered as admission by party. Wilson v Gotham Instrument Co., 101 N.Y.S.2d 699, 198 Misc. 1009, 1950 N.Y. Misc. LEXIS 2322 (N.Y. Sup. Ct. 1950).

Admissions by party under CPA § 322 (§ 3123 herein) were available upon motion for judgment on pleadings. Wilson v Gotham Instrument Co., 101 N.Y.S.2d 699, 198 Misc. 1009, 1950 N.Y. Misc. LEXIS 2322 (N.Y. Sup. Ct. 1950).

Admissions contained in affidavits or depositions were not admissions within meaning of CPA § 476, and so could not be used on motion for judgment on pleadings. Jenks v Lowe, 139 N.Y.S.2d 769, 207 Misc. 141, 1954 N.Y. Misc. LEXIS 3281 (N.Y. App. Term 1954).

New matter pleaded as a separate defense was admitted by plaintiff in his brief and judgment for defendant followed. Lidgerwood v Hale & Kilburn Corp., 47 F.2d 318, 1930 U.S. Dist. LEXIS 1643 (D.N.Y. 1930).

160. Stipulations

Failure of a defendant to protest during the year following the making of a settlement, of which he had been aware, did not operate as an estoppel or other admission under CPA § 476 or otherwise. Countryman v Breen, 241 A.D. 392, 271 N.Y.S. 744, 1934 N.Y. App. Div. LEXIS 8259 (N.Y. App. Div. 1934), aff'd, 268 N.Y. 643, 198 N.E. 536, 268 N.Y. (N.Y.S.) 643, 1935 N.Y. LEXIS 1114 (N.Y. 1935).

Oral agreement by defendant to pay plaintiff $7000 in settlement, and relied on by plaintiff to the extent of permitting necessary nonresident witnesses to leave the state, and allowing the case to be stricken from the calendar on announcement of defendant’s attorneys in open court that the case had been settled, was an “admission of a party” warranting judgment for plaintiff for $7000 under CPA § 476. Lee v Rudd, 198 N.Y.S. 628, 120 Misc. 407, 1923 N.Y. Misc. LEXIS 834 (N.Y. Sup. Ct. 1923).

Stipulation in writing by parties may be considered in determining motion for judgment on pleadings. Nelson v Fantino, 99 N.Y.S.2d 69, 198 Misc. 657, 1950 N.Y. Misc. LEXIS 1878 (N.Y. Sup. Ct.), rev'd, 277 A.D. 1058, 100 N.Y.S.2d 874, 1950 N.Y. App. Div. LEXIS 4489 (N.Y. App. Div. 1950).

On cross-motion by plaintiff and defendant for judgment on pleadings, it is proper for court to consider written stipulations entered into as to facts for purpose of supplementing pleadings. Arnstein v Price, 136 N.Y.S.2d 340, 206 Misc. 1013, 1954 N.Y. Misc. LEXIS 3129 (N.Y. Sup. Ct. 1954), modified, 285 A.D. 557, 139 N.Y.S.2d 471, 1955 N.Y. App. Div. LEXIS 5534 (N.Y. App. Div. 1955).

iii. Determination Of Motion

161. Generally

If the complaint entitled to any relief, either legal or equitable, defendant was not entitled to judgment on motion under CPA § 476, notwithstanding the judgment to which plaintiff was entitled was not that sought by his complaint. Gutta Percha & Rubber Mfg. Co. v Holman, 208 N.Y. 583, 101 N.E. 885, 208 N.Y. (N.Y.S.) 583, 1913 N.Y. LEXIS 1178 (N.Y. 1913).

Summary judgment was not proper where it was claimed that an oral settlement of the case had been made, and that the authority of defendant's agent to settle, had been repudiated. Lloyd v R. S. M. Corp., 251 N.Y. 318, 167 N.E. 456, 251 N.Y. (N.Y.S.) 318, 1929 N.Y. LEXIS 723 (N.Y. 1929).

Motion by plaintiff under CPA § 476 for order directing entry of judgment granted on refusal by defendant to pay sum agreed upon pursuant to settlement on ground that it had been deceived in making settlement by false representations of plaintiff before and after the trial. Donohue v Haven Transp., Inc., 265 N.Y. 656, 193 N.E. 431, 265 N.Y. (N.Y.S.) 656, 1934 N.Y. LEXIS 1243 (N.Y. 1934).

Ordinarily motion for judgment on pleadings is addressed to discretion of court, but parties may treat their cross motions as challenges to legal sufficiency of pleadings, and court of appeals will so consider them. Stevenson v News Syndicate Co., 302 N.Y. 81, 96 N.E.2d 187, 302 N.Y. (N.Y.S.) 81, 1950 N.Y. LEXIS 771 (N.Y. 1950), reh'g denied, 302 N.Y. 690, 98 N.E.2d 485, 302 N.Y. (N.Y.S.) 690, 1951 N.Y. LEXIS 854 (N.Y. 1951).

Although a complaint in equity will be dismissed on objection to its sufficiency if it fails to state an equitable cause of action, yet after answer it will not be dismissed on a motion for judgment on the pleadings if it states a legal cause of action, no matter what the prayer for relief. Perrin v Smith, 135 A.D. 127, 119 N.Y.S. 990, 1909 N.Y. App. Div. LEXIS 3924 (N.Y. App. Div. 1909).

On a motion by a defendant for judgment on the pleadings, the complaint will be searched as on objection to its sufficiency. McCarthy v Heiselman, 140 A.D. 240, 125 N.Y.S. 13, 1910 N.Y. App. Div. LEXIS 2908 (N.Y. App. Div. 1910).

Where an answer, liberally construed, shows a good defense to an action, the court will not grant plaintiff's motion for judgment on the pleadings. Metropolitan Printing Co. v O'Neill, 148 A.D. 885, 131 N.Y.S. 1009, 1911 N.Y. App. Div. LEXIS 5402 (N.Y. App. Div. 1911).

A plaintiff who moves for judgment on the pleadings necessarily submits his complaint to the scrutiny of the court; for, even if the answer does not state facts sufficient to constitute a defense, the plaintiff cannot obtain judgment unless his complaint states facts sufficient to constitute a cause of action. Equitable Life Assurance Soc. v Wilds, 184 A.D. 435, 171 N.Y.S. 505, 1918 N.Y. App. Div. LEXIS 6056 (N.Y. App. Div. 1918).

Under CPA § 476 an insufficient complaint could be dismissed and the issues joined by a reply to counterclaims proceed to trial. American Union Line, Inc. v Oriental Nav. Corp., 209 A.D. 260, 204 N.Y.S. 501, 1924 N.Y. App. Div. LEXIS 8603 (N.Y. App. Div.), rev'd, 239 N.Y. 220, 146 N.E. 342, 239 N.Y. (N.Y.S.) 220, 1924 N.Y. LEXIS 501 (N.Y. 1924).

Defendant was entitled to judgment on the pleadings, since plaintiff's reply set up no facts overcoming prior admissions. Strong v Strong, 231 A.D. 428, 247 N.Y.S. 773, 1931 N.Y. App. Div. LEXIS 16069 (N.Y. App. Div. 1931).

An oral agreement by defendant to pay plaintiff $7,000 in settlement of an action, made on the day prior to which the cause was calendared for trial, and relied upon by plaintiff to the extent of permitting necessary nonresident witnesses to leave the state and allowing the case to be stricken from the calendar when called, on the announcement of defendant's attorneys in open court that the case had been settled, was an "admission of a party" warranting entry of judgment for plaintiff for $7,000 under CPA § 476, despite RCP 4 (Rule 2104 herein), relative to the validity of oral agreements. Lee v Rudd, 198 N.Y.S. 628, 120 Misc. 407, 1923 N.Y. Misc. LEXIS 834 (N.Y. Sup. Ct. 1923).

Plaintiff's motion for judgment granted on the ground that defendant admitted the indebtedness and agreed to stipulate as to terms of payment during negotiations for settlement of the case in the presence of the judge. Gass v Arons, 227 N.Y.S. 282, 131 Misc. 502, 1928 N.Y. Misc. LEXIS 726 (N.Y. City Ct. 1928).

Motion to strike the answer as sham; the counterclaim as not interposable and interposed for delay; for judgment pursuant to CPA § 476 and RCP 113 (Rule 3212(a)–(f) herein) or in the alternative for judgment pursuant to RCP 114 (Rule 3212(e), 5012 herein), denied. Bauer v Phelps, 235 N.Y.S. 47, 134 Misc. 447, 1929 N.Y. Misc. LEXIS 829 (N.Y. Sup. Ct. 1929).

A defendant was not entitled to have judgment on motion under CPA § 476 where the complaint stated at least one good cause of action. Menzies v Tasker-Halsted Realty Co., 164 N.Y.S. 403 (N.Y. App. Term 1917).

On motion for judgment on the pleadings the pleadings are liberally construed. Rice v Miner, 202 N.Y.S. 256, 1923 N.Y. Misc. LEXIS 1374 (N.Y. App. Term 1923).

Motion for judgment on pleadings is ordinarily addressed to discretion of court. Owens v Owens, 138 N.Y.S.2d 475, 1955 N.Y. Misc. LEXIS 2629 (N.Y. Sup. Ct. 1955), aff'd, 1 A.D.2d 844, 148 N.Y.S.2d 813, 1956 N.Y. App. Div. LEXIS 6336 (N.Y. App. Div. 2d Dep't 1956).

162. Benefit of inferences; assumption of truth

On motion for judgment on the pleadings the court must assume that the allegations are true. De Wolf v Ford, 193 N.Y. 397, 86 N.E. 527, 193 N.Y. (N.Y.S.) 397, 1908 N.Y. LEXIS 659 (N.Y. 1908).

A defendant, by moving for judgment on the pleadings, admits every material allegation of the complaint. Felt v Germania Life Ins. Co., 149 A.D. 14, 133 N.Y.S. 519, 1912 N.Y. App. Div. LEXIS 6339 (N.Y. App. Div. 1912).

On a motion for judgment on the pleadings the court must assume the truth of the allegations in both pleadings. Smathers v Standard Oil Co., 199 A.D. 368, 191 N.Y.S. 843, 1922 N.Y. App. Div. LEXIS 8024 (N.Y. App. Div.), aff'd, 233 N.Y. 617, 135 N.E. 942, 233 N.Y. (N.Y.S.) 617, 1922 N.Y. LEXIS 1038 (N.Y. 1922).

On appeal from judgment for plaintiff on the pleadings the allegations of the answer will be deemed true. Hardie v International Milk Products Co., 201 A.D. 67, 193 N.Y.S. 690, 1922 N.Y. App. Div. LEXIS 6255 (N.Y. App. Div.), aff'd, 234 N.Y. 614, 138 N.E. 468, 234 N.Y. (N.Y.S.) 614, 1922 N.Y. LEXIS 812 (N.Y. 1922).

On a motion for judgment on the pleadings, not only must all the facts and allegations as pleaded in the defense and bill of particulars be considered and admitted and taken as true when attacked for insufficiency, but every legitimate inference to be drawn therefrom must be resolved in favor of the pleading. Hurwitz v Hurwitz, 216 A.D. 362, 215 N.Y.S. 184, 1926 N.Y. App. Div. LEXIS 9228 (N.Y. App. Div. 1926).

Upon a motion for judgment on the pleadings under § 476, the facts provable under the allegations of the complaint and supported by reasonable implication and fair intendment had to be accepted as true in determining whether they constituted a cause of action. Continental Sec. Co. v Belmont, 133 N.Y.S. 560, 75 Misc. 234, 1912 N.Y. Misc. LEXIS 649 (N.Y. Sup. Ct.), aff'd, 150 A.D. 298, 134 N.Y.S. 635, 1912 N.Y. App. Div. LEXIS 7109 (N.Y. App. Div. 1912).

On a motion by defendant in the Special Term, he admits every material fact set out in the complaint, and he is entitled to judgment if the complaint does not state facts sufficient to constitute a cause of action. Oswego v People's Gas & Electric Co., 190 N.Y.S. 39, 116 Misc. 354, 1921 N.Y. Misc. LEXIS 1647 (N.Y. Sup. Ct. 1921).

On a motion to dismiss the complaint on the ground that it does not set forth a cause of action, all the facts alleged and all necessary inferences arising therefrom are deemed admitted, but conclusions of law based upon allegations of facts are not admitted. Velsor v Freeman, 194 N.Y.S. 191, 118 Misc. 276, 1922 N.Y. Misc. LEXIS 1210 (N.Y. Sup. Ct. 1922).

On a motion to dismiss a complaint on the ground that it does not set forth a cause of action, it is not sufficient that the facts are imperfectly averred, or that the complaint lacks “definiteness and certainty,” but the motion will be denied unless, admitting all the facts alleged, it appears that no cause of action whatever is presented. Velsor v Freeman, 194 N.Y.S. 191, 118 Misc. 276, 1922 N.Y. Misc. LEXIS 1210 (N.Y. Sup. Ct. 1922).

The rule that in passing upon a motion for judgment on the pleadings, the court should assume the allegations of the complaint to be true, does not apply where a bar is set up as a defense and the facts constituting it are undisputed. Herder v Clifford, 230 N.Y.S. 464, 132 Misc. 666, 1928 N.Y. Misc. LEXIS 1011 (N.Y. Sup. Ct. 1928), app. dismissed, 225 A.D. 780, 232 N.Y.S. 56, 1928 N.Y. App. Div. LEXIS 9844 (N.Y. App. Div. 1928), modified, 227 A.D. 645, 234 N.Y.S. 811, 1929 N.Y. App. Div. LEXIS 6785 (N.Y. App. Div. 1929).

On motion to dismiss a complaint for insufficiency it is the only pleading to be considered; every material fact set out therein is admitted, and every legitimate inference to be drawn therefrom must be resolved in its favor. Sweet v Hollearn, 252 N.Y.S. 202, 141 Misc. 135, 1931 N.Y. Misc. LEXIS 1615 (N.Y. Sup. Ct. 1931).

Where the defense pleaded is apparently good on its face, though without actual support in fact, judgment hereunder cannot be rendered. Western Felt Works v Modern Carpet Cleaning & Storage Corp., 252 N.Y.S. 696, 141 Misc. 495, 1931 N.Y. Misc. LEXIS 1720 (N.Y. Mun. Ct. 1931).

Moving party admits the truth of all material allegations of fact in the pleading attacked, but not the pleader’s legal conclusions, nor his interpretation of statute. McCormick v Westchester Lighting Co., 252 N.Y.S. 849, 142 Misc. 27, 1931 N.Y. Misc. LEXIS 1740 (N.Y. Sup. Ct. 1931).

Plaintiff, on defendant’s motion, is entitled to the most favorable inferences which may be drawn from the complaint. Barr v Brooklyn Children's Aid Soc., 190 N.Y.S. 296, 1921 N.Y. Misc. LEXIS 1698 (N.Y. Sup. Ct. 1921).

On defendant’s motion for judgment on pleadings, factual allegations in complaint and bill of particulars are deemed admitted, and all favorable inferences must be drawn in plaintiff’s favor. Oscar Chandler & Co., Inc. v S. & E. Novelty Co., 118 N.Y.S.2d 797, 1952 N.Y. Misc. LEXIS 2216 (N.Y. App. Term 1952).

On motion by defendant allegations of complaint are deemed to be true. Kibbe v Rochester, 57 F.2d 542, 1932 U.S. Dist. LEXIS 1130 (D.N.Y. 1932).

163. Issues of fact as not determinable

Issues as to credibility of witnesses as defeating motion for summary judgment on notes, see Irving Trust Co. v Leff, 253 N.Y. 359, 171 N.E. 569, 253 N.Y. (N.Y.S.) 359, 1930 N.Y. LEXIS 840 (N.Y. 1930).

Court may consider anything on motion for judgment on the pleadings that might properly be considered on such a motion at the opening of the trial. Dineen v May, 149 A.D. 469, 134 N.Y.S. 7, 1912 N.Y. App. Div. LEXIS 6425 (N.Y. App. Div. 1912).

On a motion for judgment on the pleadings only the uncontroverted allegations of the pleadings can be considered. Dealy v Klapp, 199 A.D. 150, 191 N.Y.S. 457, 1921 N.Y. App. Div. LEXIS 6627 (N.Y. App. Div. 1921).

It is error to render a judgment on the pleadings when a triable issue of fact is presented. Panzica v Boasberg, 214 A.D. 752, 209 N.Y.S. 593, 1925 N.Y. App. Div. LEXIS 7377 (N.Y. App. Div. 1925).

CPA § 476 applied only where the answer, taken in its entirety, admitted that a part of plaintiff’s claim was just, and should have been enforced and collected without waiting the result of litigation. Dairymen's League Co-op. Ass'n v Egli, 228 A.D. 164, 239 N.Y.S. 152, 1930 N.Y. App. Div. LEXIS 12127 (N.Y. App. Div. 1930).

Amended answer with counterclaim was sham and did not prevent summary judgment for plaintiff. Nathan H. Gordon Corp. v Cosman, 232 A.D. 280, 249 N.Y.S. 544, 1931 N.Y. App. Div. LEXIS 13790 (N.Y. App. Div. 1931).

Motion for entry of judgment in favor of plaintiff after his death, under CPA § 476 and CPA § 478 (Rule 5016(d), § 5203(a)(4) herein) denied. Plaintiff was not entitled to enter judgment on alleged agreement of settlement. Merrill v Lehigh V. R. Co., 246 A.D. 541, 282 N.Y.S. 574, 1935 N.Y. App. Div. LEXIS 8991 (N.Y. App. Div. 1935).

Issues of fact raised by the pleadings could not be determined upon a motion under CPA § 476. Theobald v United States Rubber Co., 146 N.Y.S. 597, 83 Misc. 627, 1914 N.Y. Misc. LEXIS 1249 (N.Y. Sup. Ct. 1914).

Where situation calls for development of facts on trial, judgment on pleadings will be denied. Quinn v Metropolitan Life Ins. Co., 67 N.Y.S.2d 195, 187 Misc. 629, 1946 N.Y. Misc. LEXIS 3206 (N.Y. Sup. Ct. 1946).

Motions by all parties in tenants? action against landlord for judgment on the pleadings, in effect conceded that there were no fact questions in the way of granting a declaratory judgment. Tropp v Knickerbocker Village (1953) Tropp v Knickerbocker Village, 122 N.Y.S.2d 350, 205 Misc. 200, 1953 N.Y. Misc. LEXIS 1850 (N.Y. Sup. Ct. 1953), aff'd, 284 A.D. 935, 135 N.Y.S.2d 618, 1954 N.Y. App. Div. LEXIS 4117 (N.Y. App. Div. 1954).

Where complaint did not rest on a legally sufficient basis, it was appropriate to grant a motion to strike, or for judgment, “not only against a separate cause of action, but also against a distinct and independent act or specification of wrongdoing which does not give rise to a remedial legal wrong or which cannot serve as a basis for defendants’ liability and which, if dismissed, will not prejudice . . . the fair trial of the . . . issues.” Taller & Cooper, Inc. v Neptune Meter Co., 8 Misc. 2d 107, 166 N.Y.S.2d 693, 1957 N.Y. Misc. LEXIS 2444 (N.Y. Sup. Ct. 1957).

Issue of wilfulness of rent overcharge held to require denial of action for treble damages for same. Feigen v Domblatt, 91 N.Y.S.2d 682, 1949 N.Y. Misc. LEXIS 2693 (N.Y. Sup. Ct. 1949).

Triable issues, presented by pleadings, required denial of defendant's motion for judgment on pleadings. General Electric Co. v Masters, Inc., 122 N.Y.S.2d 15, 1952 N.Y. Misc. LEXIS 2305 (N.Y. Sup. Ct. 1952), aff'd, 281 A.D. 827, 118 N.Y.S.2d 927, 1953 N.Y. App. Div. LEXIS 3445 (N.Y. App. Div. 1953).

Motion for judgment on pleadings is made on pleadings and admissions only; where proof of particular facts and circumstances would affect ultimate determination, motion cannot be granted. Estate of Barber, 137 N.Y.S.2d 659, 1954 N.Y. Misc. LEXIS 2576 (N.Y. Sur. Ct. 1954), aff'd, 285 A.D. 874, 139 N.Y.S.2d 237, 1955 N.Y. App. Div. LEXIS 5932 (N.Y. App. Div. 1955).

Only question of law can be determined. Kibbe v Rochester, 57 F.2d 542, 1932 U.S. Dist. LEXIS 1130 (D.N.Y. 1932).

iv. Particular Actions And Proceedings

164. Agency and brokerage

Plaintiff, a broker, earned his commissions; purchaser did not complete the purchase; partial judgment for broker reversed on appeal and judgment ordered for whole amount. North Sea Dev., Inc. v Burnett, 228 A.D. 444, 239 N.Y.S. 634, 1930 N.Y. App. Div. LEXIS 12191 (N.Y. App. Div.), rev'd, 254 N.Y. 374, 173 N.E. 228, 254 N.Y. (N.Y.S.) 374, 1930 N.Y. LEXIS 1055 (N.Y. 1930).

165. Banks and banking

For summary judgment in action on contract indemnifying against loss on letters of credit, see Bank of New York & Trust Co. v Atterbury Bros., Inc., 226 A.D. 117, 234 N.Y.S. 442, 1929 N.Y. App. Div. LEXIS 8663 (N.Y. App. Div. 1929), aff'd, 253 N.Y. 569, 171 N.E. 786, 253 N.Y. (N.Y.S.) 569, 1930 N.Y. LEXIS 937 (N.Y. 1930).

Defendant overdrew his account with drawee bank, plaintiff, latter certified and later paid payee; bank given judgment on the pleadings, the transaction amounting to an advance or loan to defendant. Title Guarantee & Trust Co. v Emadee Realty Corp., 240 N.Y.S. 36, 136 Misc. 328, 1930 N.Y. Misc. LEXIS 1027 (N.Y. Sup. Ct. 1930).

166. Carriers

An action to recover a claim for alleged shortage of oil from leakage during transportation was dismissed, since the complaint was defective in failing to allege any breach of duty either by defendant, carrier or by defendant, seller under the contract. Best Foods, Inc. v Mitsubishi Shoji Kaisha, Ltd., 224 A.D. 24, 229 N.Y.S. 364, 1928 N.Y. App. Div. LEXIS 9915 (N.Y. App. Div. 1928).

Judgment on the pleadings will be rendered against a defendant who raises no issue by admitting that he did not pay the carrier’s charges and that he did accept the goods under a bill of lading requiring the payment of freight charges. Transmarine Corp. v Deleware & Hudson Co., 216 N.Y.S. 623, 127 Misc. 812, 1926 N.Y. Misc. LEXIS 1041 (N.Y. Sup. Ct. 1926).

167. Constitutionality of statute

Judgment for plaintiff, declaring unconstitutional so much of Education law, §§ 1352, 1354 as restricts ownership of pharmacies to licensed pharmacists. Pratter v Lascoff, 249 N.Y.S. 211, 140 Misc. 211, 1931 N.Y. Misc. LEXIS 1213 (N.Y. Sup. Ct. 1931), aff'd, 236 A.D. 713, 258 N.Y.S. 1002, 1932 N.Y. App. Div. LEXIS 6349 (N.Y. App. Div. 1932).

168. Contracts generally

Although it appears from the complaint as amplified by the bill of particulars that the contract sued upon rests in parol instead of being evidenced by a written agreement, the defendant is not excused thereby from his failure to plead the statute of frauds, and so defendant may not raise

the objection by moving for judgment on the pleadings under the present section. Harmon v Alfred Peats Co., 243 N.Y. 473, 154 N.E. 314, 243 N.Y. (N.Y.S.) 473, 1926 N.Y. LEXIS 774 (N.Y. 1926).

Motion for judgment in favor of the defendant under the present section denied in action to recover on contract between plaintiff and defendant's assignor for the manufacture, use and sale of a patented machine. Rahe Match Co. v World Match Corp., 213 A.D. 729, 211 N.Y.S. 425, 1925 N.Y. App. Div. LEXIS 8578 (N.Y. App. Div. 1925).

Motion for judgment in favor of plaintiff pursuant to CPA § 476 denied in action on contract. W. G. Cornell Co. v McKiever, 214 A.D. 738, 211 N.Y.S. 488, 1925 N.Y. App. Div. LEXIS 7218 (N.Y. App. Div. 1925).

Where plaintiff sued upon a quantum meruit, and the answer denied the allegations of the complaint and alleged that the work sued upon was done under an express contract for a specified compensation, an order that the action be severed and proceed as to the issue of whether the transaction between the parties was in contract or in quantum meruit, and the balance due plaintiff, if any, was not authorized, under CPA § 476 and RCP 114 (Rule 3212(e), 5012 herein), such answer not stating an admission, within the meaning of these provisions, but a defense which, if established, would completely dispose of plaintiff's cause of action. Nathan Lyons, Inc. v Sam S. & Lee Shubert, Inc., 197 N.Y.S. 253, 119 Misc. 694, 1922 N.Y. Misc. LEXIS 1625 (N.Y. App. Term 1922).

In an action involving purchase of corporate stock, another for rescission of the contract, and election of remedies, denials in the answer were sufficient to defeat motion for judgment on the pleadings. Hochreich v Amalgamated Laundries, Inc., 240 N.Y.S. 11, 136 Misc. 507, 1930 N.Y. Misc. LEXIS 1021 (N.Y. Sup. Ct. 1930).

In action for balance of commissions due under advertising contracts, defendant's admission of part of indebtedness claimed entitled plaintiff to immediate judgment for admitted part, and to

have action severed as to rest. Sheehan v Andrew Cone General Advertising Agency, Inc., 29 N.Y.S.2d 317, 176 Misc. 882, 1941 N.Y. Misc. LEXIS 2058 (N.Y. App. Term 1941).

Complaint by father, under former CPA § 61-a et seq., to recover sums of money spent by him in preparation for his daughter's marriage to defendant already married, was insufficient. Easley v Neal, 110 N.Y.S.2d 191, 202 Misc. 554, 1952 N.Y. Misc. LEXIS 2393 (N.Y. Sup. Ct. 1952).

Judgment for plaintiff in an action on a written contract was granted on the pleadings, pursuant to CPA § 476, where the answer of the defendant was no more than a denial of the construction placed upon the contract by the plaintiff, raising an issue of law for the court, its qualified denial of performance being contradicted by admissions of performance of all that plaintiff had been obliged to do under its construction of the instrument. Baird & Daniels Co. v Victory Sparkler & Specialty Co., 6 F.2d 27, 1924 U.S. Dist. LEXIS 1320 (D.N.Y. 1924), aff'd, Victory Sparker & Specialty Co. v Baird & Daniels Co., 6 F.2d 29, 1925 U.S. App. LEXIS 1954 (2d Cir. N.Y. 1925).

169. Contract for services

In action for breach of contract for services, motion to dismiss complaint, based on pleadings, plaintiff's particulars and admissions in examination before trial, was denied, question remained as to extent of plaintiff's commissions. A'Hearn v Servomechanisms, Inc., 281 A.D. 974, 120 N.Y.S.2d 292, 1953 N.Y. App. Div. LEXIS 3976 (N.Y. App. Div. 1953).

The defendants are not entitled to judgment on the pleadings which show that they took advantage of plaintiff's services and that he may submit proof of services rendered after their agreement, all of which should be determined on trial instead of on hearing of a motion. Levitas v Yarmel Realty Corp., 216 N.Y.S. 419, 127 Misc. 627, 1926 N.Y. Misc. LEXIS 1018 (N.Y. Mun. Ct. 1926).

Complaint that plaintiff employee was to be paid specified percentage of "gross profits" was sufficiently definite. Goddard v Holland Transp. Co., 84 N.Y.S.2d 410, 1948 N.Y. Misc. LEXIS

3591 (N.Y. Sup. Ct. 1948), aff'd, 277 A.D. 755, 97 N.Y.S.2d 372, 1950 N.Y. App. Div. LEXIS 3138 (N.Y. App. Div. 1950).

Plaintiff was denied judgment on pleadings in action to declare that restrictive covenant in employment contract was unenforceable as against public policy, where triable fact issues were raised. Herskovitz v Todd Co., Inc., 85 N.Y.S.2d 707, 1949 N.Y. Misc. LEXIS 1689 (N.Y. Sup. Ct. 1949).

170. Decedents' estates

In an action to set aside a conveyance by a decedent made prior to his death and to have ownership of the estate decreed to plaintiff, on a motion to dismiss the complaint as not setting forth a cause of action an allegation thereof that the deceased died intestate is a conclusion of law based upon a subsequent allegation of the invalidity of his will by reason of undue influence and is not deemed to be admitted on the motion, especially where the complaint alleges that he left a will. Velsor v Freeman, 194 N.Y.S. 191, 118 Misc. 276, 1922 N.Y. Misc. LEXIS 1210 (N.Y. Sup. Ct. 1922).

Complaint alleging performance by plaintiff, and limited performance by defendant's testatrix, of oral agreement to devise realty free and clear, was sufficient where it alleged the devise of the realty subject to a mortgage. Adsit v First Trust & Deposit Co., 7 Misc. 2d 651, 164 N.Y.S.2d 937, 1957 N.Y. Misc. LEXIS 2723 (N.Y. Sup. Ct. 1957), aff'd, 5 A.D.2d 1050, 174 N.Y.S.2d 227, 1958 N.Y. App. Div. LEXIS 6048 (N.Y. App. Div. 4th Dep't 1958).

171. Declaratory judgment

Construing NY Const Art 1 § 6, prior to its 1959 amendment, it was held that defendant officeholder was entitled to judgment on the pleadings dismissing complaint for declaratory judgment that he had forfeited his right to office by refusing to sign waiver of immunity demanded where he was not obligated to sign the waiver demanded as to previous offices held.

People v Moskal, 9 A.D.2d 369, 194 N.Y.S.2d 118, 1959 N.Y. App. Div. LEXIS 5402 (N.Y. App. Div. 4th Dep't 1959).

172. Duress

Duress by threatened exercise by creditor of legal right in action on renewal note held insufficient to defeat motion for judgment for plaintiff. Tarrytown Nat'l Bank & Trust Co. v Clark, 261 A.D. 937, 25 N.Y.S.2d 418, 1941 N.Y. App. Div. LEXIS 8167 (N.Y. App. Div. 1941).

173. Ejectment

A complaint for ejectment cannot stand in case the pleadings show that instead of plaintiffs' ancestor deeding the disputed land with a condition subsequent as alleged, it was deed in trust forever to defendants for the use of church purposes which might be effected otherwise as well as by building upon the land. Van De Bogert v Reformed Dutch Church, 220 N.Y.S. 50, 128 Misc. 603, 1926 N.Y. Misc. LEXIS 1109 (N.Y. Sup. Ct. 1926), aff'd, 219 A.D. 220, 220 N.Y.S. 58, 1927 N.Y. App. Div. LEXIS 10882 (N.Y. App. Div. 1927).

174. Equitable relief

Complaint in an action to set aside a conveyance by one since deceased and to have his estate decreed to be the property of plaintiff held to require the adjudication of the validity of his will and to state a cause of action cognizable in equity. Velsor v Freeman, 194 N.Y.S. 191, 118 Misc. 276, 1922 N.Y. Misc. LEXIS 1210 (N.Y. Sup. Ct. 1922).

Plaintiff's motion for judgment on the pleadings denied and complaint dismissed, where the relief sought was specific performance by defendant of a covenant for quiet enjoyment in lease of premises to plaintiff, thus, in effect, seeking equitable relief for an ordinary breach of contract, for which there was ample remedy at law. Blank v La Montagne-Chapman Co., 205 N.Y.S. 45, 123 Misc. 238, 1924 N.Y. Misc. LEXIS 903 (N.Y. Sup. Ct. 1924).

175. Foreign corporations

In action by a foreign corporation on a contract entered into here, complaint failed to allege its authorization to transact business in the state. Western Felt Works v Modern Carpet Cleaning & Storage Corp., 252 N.Y.S. 696, 141 Misc. 495, 1931 N.Y. Misc. LEXIS 1720 (N.Y. Mun. Ct. 1931).

176. Foreclosure

CPA § 476 and former RCP 112 justified the granting of an order of reference, judgment of foreclosure and sale in foreclosure proceedings. Wilkinson v Medbury, 228 N.Y.S. 666, 132 Misc. 58, 1928 N.Y. Misc. LEXIS 848 (N.Y. Sup. Ct. 1928).

177. Fraud and misrepresentation

Motion of defendant to dismiss complaint and to grant judgment in favor of the defendant denied in action by retail merchant for damages against manufacturer for putting on the market cans of salad oil containing less than quantity marked thereon. Abounader v Strohmeyer & Arpe Co., 217 A.D. 43, 215 N.Y.S. 702, 1926 N.Y. App. Div. LEXIS 7737 (N.Y. App. Div.), aff'd, 243 N.Y. 458, 154 N.E. 309, 243 N.Y. (N.Y.S.) 458, 1926 N.Y. LEXIS 772 (N.Y. 1926).

Where complaint mingled claims of violation of fiduciary’s duties and of fraud, motion for partial judgment dismissing part of complaint relating to former claim was granted with leave to amend to eliminate allegations of breach of trust or fiduciary duty. Tobias v Cellar, 267 A.D. 839, 46 N.Y.S.2d 117, 1944 N.Y. App. Div. LEXIS 5041 (N.Y. App. Div. 2d Dep't), superseded, 267 A.D. 839, 267 A.D. 884, 46 N.Y.S.2d 117, 1944 N.Y. App. Div. LEXIS 5041, 1944 N.Y. App. Div. LEXIS 5306 (N.Y. App. Div. 1944).

Complaint in action for damages for fraudulently inducing partner to sell his interest in partnership contract below real value held sufficient on motion for judgment on the pleadings.

Poss v Gottlieb, 193 N.Y.S. 418, 118 Misc. 318, 1922 N.Y. Misc. LEXIS 1105 (N.Y. App. Term 1922).

Judgment would have been rendered for defendants, in view of CPA § 476, on a complaint charging them as vendors with fraud in concealing the fact that a barn had been burned prior to the execution and delivery of deed to a farm contract to be sold to plaintiffs, where there was no allegation in the complaint of any special agreement, or of any special circumstances taking the case out of the general rule that such a loss fell on the vendee. Cammarata v Merkewitz, 198 N.Y.S. 825, 120 Misc. 503, 1923 N.Y. Misc. LEXIS 868 (N.Y. Sup. Ct. 1923).

178. Guaranty and indemnity

Where after defendant had served its amended answer in an action on two drafts, setting up denials of liability and certain defenses, its board of directors adopted a resolution calling upon its guarantor to perform its obligation to save it harmless from liability under such instruments, proof thereof, with other evidence establishing plaintiff’s right to maintain the action, held to entitle plaintiff to judgment on the pleadings under CPA § 476 and RCP 113 (Rule 3212(a)–(f) herein). Hongkong & Shanghai Banking Corp. v Lazard-Godchaux Co., 207 A.D. 174, 201 N.Y.S. 771, 1923 N.Y. App. Div. LEXIS 5927 (N.Y. App. Div. 1923), aff'd, 239 N.Y. 610, 147 N.E. 216, 239 N.Y. (N.Y.S.) 610, 1925 N.Y. LEXIS 1001 (N.Y. 1925).

In an action on a contract indemnifying plaintiff against loss through use of letters of credit, defenses urged were insufficient, and summary judgment for plaintiff was ordered. Bank of New York & Trust Co. v Atterbury Bros., Inc., 226 A.D. 117, 234 N.Y.S. 442, 1929 N.Y. App. Div. LEXIS 8663 (N.Y. App. Div. 1929), aff'd, 253 N.Y. 569, 171 N.E. 786, 253 N.Y. (N.Y.S.) 569, 1930 N.Y. LEXIS 937 (N.Y. 1930).

In action on a guaranty bond complaint was dismissed because it varied from the condition of the bond. Peoples' Bank of Hamburg v C. L. Gates, Inc., 232 A.D. 328, 250 N.Y.S. 452, 1931 N.Y. App. Div. LEXIS 13801 (N.Y. App. Div. 1931).

In action to enforce liability of guarantor, contract construed, complaint found sufficient, plaintiff's motion for summary judgment granted and defendant's crossmotion denied, defenses being insufficient. W. Irving Herskovits Fur Co. v Hollander, 246 N.Y.S. 588, 138 Misc. 456, 1930 N.Y. Misc. LEXIS 1701 (N.Y. Sup. Ct. 1930), aff'd, 232 A.D. 802, 249 N.Y.S. 908, 1931 N.Y. App. Div. LEXIS 15349 (N.Y. App. Div. 1931).

179. Insurance

Insurance company which has paid for damage to automobile in crossing accident is entitled to a judgment on the pleadings, in an action against the insured who has recovered or settled in full for the damages to person and property with the one causing the injury, for the amount of the insurance paid. Hamilton Fire Ins. Co. v Greger, 218 A.D. 536, 218 N.Y.S. 534, 1926 N.Y. App. Div. LEXIS 5973 (N.Y. App. Div. 1926), rev'd, 246 N.Y. 162, 158 N.E. 60, 246 N.Y. (N.Y.S.) 162, 1927 N.Y. LEXIS 858 (N.Y. 1927).

It is error to grant summary judgment for a beneficiary seeking recovery on a life insurance policy, on an answer setting up the defense of fraud on the part of an insured who died less than two years after issuance of the policy, which provided it should be incontestible after being in force two years after date of issuance. McKenna v Metropolitan Life Ins. Co., 220 A.D. 53, 220 N.Y.S. 568, 1927 N.Y. App. Div. LEXIS 9232 (N.Y. App. Div. 1927), app. dismissed, 247 N.Y. 527, 161 N.E. 169, 247 N.Y. (N.Y.S.) 527, 1928 N.Y. LEXIS 1114 (N.Y. 1928).

In action on policy of fire insurance containing mortgagee clause, defendant mortgagee was not entitled to order striking out reply of defendant insurance company, on which mortgagee had served a cross-answer demanding judgment for the amount of his interest as mortgagee and for summary judgment, where there was nothing in the reply or affidavit on mortgagee's motion in nature of admission justifying such judgment. Furshpin v Monticello Co-operative Fire Ins. Co., 249 A.D. 366, 293 N.Y.S. 150, 1937 N.Y. App. Div. LEXIS 9592 (N.Y. App. Div. 1937).

Complaint which alleged due performance of all of provisions of insurance policy was not insufficient because it failed to allege specifically the giving of prompt notice of the accident to

insurer. Balkan Demolition Co. v Yorkshire Ins. Co., 10 A.D.2d 706, 198 N.Y.S.2d 99, 1960 N.Y. App. Div. LEXIS 10896 (N.Y. App. Div. 1st Dep't 1960) (judgment on pleadings dismissing complaint reversed).

In policy holder's derivative action against insurance company for illegal investment in realty, complaint charging improvident twenty-year leasehold and purchase of realty for parking purposes was sufficient to allege improvidence. Garfield v Equitable Life Assurance Soc., 7 Misc. 2d 419, 164 N.Y.S.2d 823, 1957 N.Y. Misc. LEXIS 2981 (N.Y. Sup. Ct.), app. dismissed, 4 A.D.2d 861, 170 N.Y.S.2d 487 (N.Y. App. Div. 1st Dep't 1957).

Decision in action by United States against Russian insurance company held not res judicata in later action against successor superintendent of insurance of New York, since latter was not party to former action. United States v Pink, 315 U.S. 203, 62 S. Ct. 552, 86 L. Ed. 796, 1942 U.S. LEXIS 1060 (U.S. 1942), limited, Rupali Bank v Provident Nat'l Bank, 403 F. Supp. 1285, 1975 U.S. Dist. LEXIS 16092 (E.D. Pa. 1975).

In an action by owner of insured goods against insurance company and also against bank holding policy as collateral security for draft on consignee of goods, held proper practice for plaintiff to move for summary judgment against either or both defendants, and for the bank to move for dismissal as to it and for summary judgment in favor of plaintiff against the insurance company, if the pleadings warranted such relief. MacNamara & Wadbrook Trading Co. v Royal Ins. Co., 288 F. 985, 1923 U.S. Dist. LEXIS 1698 (D.N.Y. 1923).

Insurance carrier's action to recover of the negligent third party, under the Workmen's Compensation Law, was dismissed for failure to set forth the terms of the policy relating to subrogation upon which it relied. Liberty Mut. Ins. Co. v American Incinerator Co., 51 F.2d 739, 1931 U.S. Dist. LEXIS 1557 (D.N.Y. 1931).

180. Judgment note; foreign judgment

Judgment on the pleadings should have been entered upon a complaint showing a judgment obtained in the Province of Quebec, Canada, as the comity of state forbids other defenses than those which might have been offered in the foreign court. Cowans v Ticonderoga Pulp & Paper Co., 219 A.D. 120, 219 N.Y.S. 284, 1927 N.Y. App. Div. LEXIS 10862 (N.Y. App. Div.), app. dismissed, 245 N.Y. 573, 157 N.E. 862, 245 N.Y. (N.Y.S.) 573, 1927 N.Y. LEXIS 736 (N.Y. 1927), aff'd, 246 N.Y. 603, 159 N.E. 669, 246 N.Y. (N.Y.S.) 603, 1927 N.Y. LEXIS 991 (N.Y. 1927).

Judgment upon a judgment note is an act of the court, and until reversed or set aside has all the attributes of a judgment on verdict. Pierce v Bristol, 223 N.Y.S. 678, 130 Misc. 188, 1927 N.Y. Misc. LEXIS 1012 (N.Y. Sup. Ct. 1927).

A judgment on a judgment note rendered in a sister state must be given the same effect as though rendered here, whether or not our courts could have rendered the same or whether the rendition was in accord with the laws of that state. Pierce v Bristol, 223 N.Y.S. 678, 130 Misc. 188, 1927 N.Y. Misc. LEXIS 1012 (N.Y. Sup. Ct. 1927).

181. Landlord and tenant

Motion for judgment on the pleadings, granted, complaint not sustained by lease annexed. Bovin v Galitzka, 250 N.Y. 228, 165 N.E. 273, 250 N.Y. (N.Y.S.) 228, 1929 N.Y. LEXIS 868 (N.Y. 1929).

Motion for judgment on the pleadings denied in action to remove widow of tenant from premises held by the tenant at the time of his death as a statutory tenant under Emergency Rent Laws. Stern v Mautner, 214 A.D. 102, 211 N.Y.S. 223, 1925 N.Y. App. Div. LEXIS 10453 (N.Y. App. Div. 1925).

In an action upon promissory notes given to plaintiff by the defendant upon the assignment of a hotel lease, plaintiff’s motion for judgment on the pleadings granted where defendant’s only defense was a counterclaim for repairs made on the property which plaintiff had covenanted to

make, but the making of which had been in effect waived by the lessor. Fritz v Commonwealth Finance Corp., 204 N.Y.S. 857, 123 Misc. 280, 1924 N.Y. Misc. LEXIS 893 (N.Y. Sup. Ct. 1924), aff'd, 212 A.D. 867, 208 N.Y.S. 864, 1925 N.Y. App. Div. LEXIS 10219 (N.Y. App. Div. 1925).

A complaint against a landlord for permitting a leaky ceiling will not, because it fails to join as another tortfeasor the negligent tenant above plaintiff, be dismissed. Kaszovitz v Trustees of Sailors' Snug Harbor, 216 N.Y.S. 745, 127 Misc. 818, 1926 N.Y. Misc. LEXIS 1046 (N.Y. Mun. Ct. 1926).

Sufficiency of complaint based upon defendant’s default under a mining contract or lease of a mine. Estate Property Corp. v Hudson Coal Co., 230 N.Y.S. 372, 132 Misc. 590, 1928 N.Y. Misc. LEXIS 990 (N.Y. Sup. Ct. 1928), aff'd, 225 A.D. 798, 232 N.Y.S. 739, 1929 N.Y. App. Div. LEXIS 11839 (N.Y. App. Div. 1st Dep't 1929).

Judgment dismissing tenant’s complaint against landlord for injury caused by defective appliance, reversed, facts showing prima facie case. Boros v Jernomi Const. Corp., 249 N.Y.S. 414, 139 Misc. 837, 1931 N.Y. Misc. LEXIS 1234 (N.Y. App. Term 1931).

In action against the assignee of a lease to recover taxes imposed, lease construed and judgment for plaintiff affirmed. Big Four Realty Corp. v Belnord Garage, 252 N.Y.S. 742, 141 Misc. 472, 1931 N.Y. Misc. LEXIS 1727 (N.Y. App. Term 1931), aff'd, 235 A.D. 672, 255 N.Y.S. 906, 1932 N.Y. App. Div. LEXIS 8640 (N.Y. App. Div. 1932).

Where all parties to action by tenants against landlords for declaratory judgment had answered and each party moved for judgment on pleadings, they thus conceded that there existed no fact question, and issues presented were solely law questions. Tropp v Knickerbocker Village (1953) Tropp v Knickerbocker Village, 122 N.Y.S.2d 350, 205 Misc. 200, 1953 N.Y. Misc. LEXIS 1850 (N.Y. Sup. Ct. 1953), aff'd, 284 A.D. 935, 135 N.Y.S.2d 618, 1954 N.Y. App. Div. LEXIS 4117 (N.Y. App. Div. 1954).

Where defendant assigned his lease to plaintiff who sued for treble damages for rent overcharge, plaintiff was denied judgment on pleadings, leaving issue wilful overcharge for trial. Feigen v Domblatt, 91 N.Y.S.2d 682, 1949 N.Y. Misc. LEXIS 2693 (N.Y. Sup. Ct. 1949).

182. Libel and slander

In an action for libel defendant was not entitled to an order pursuant to CPA § 476 and former RCP 112, dismissing the complaint “upon the pleadings and upon the admissions of the plaintiff,” on the theory that the statements complained of were absolutely privileged, since they had been made by the defendant as an attorney in a printed brief on appeal in another action and were pertinent to the issue therein raised. Lefler v Clark, 247 A.D. 402, 287 N.Y.S. 476, 1936 N.Y. App. Div. LEXIS 8277 (N.Y. App. Div. 1936).

Complaint in action for libel held not subject to motion for judgment on pleadings, articles counted upon being libelous. Pignatelli v New York Tribune, Inc., 192 N.Y.S. 605, 117 Misc. 466, 1921 N.Y. Misc. LEXIS 1990 (N.Y. Sup. Ct. 1921).

On a motion by defendant in an action for libel, the complaint in which contains no allegations of special damage, the sufficiency of the complaint to constitute a cause of action must be determined by the character of the publication and whether it is actionable per se, or whether, under any reasonable construction, it will convey the meaning ascribed by the innuendo pleaded thereunder. Hills v Press Co., 202 N.Y.S. 678, 122 Misc. 212, 1924 N.Y. Misc. LEXIS 641 (N.Y. Sup. Ct. 1924), aff'd, 214 A.D. 752, 209 N.Y.S. 848, 1925 N.Y. App. Div. LEXIS 7376 (N.Y. App. Div. 1925).

Complaint in action for libel not alleging special damage held, on examination of publication, not to state cause of action. Hills v Press Co., 202 N.Y.S. 678, 122 Misc. 212, 1924 N.Y. Misc. LEXIS 641 (N.Y. Sup. Ct. 1924), aff'd, 214 A.D. 752, 209 N.Y.S. 848, 1925 N.Y. App. Div. LEXIS 7376 (N.Y. App. Div. 1925).

Allegations that defendants, without plaintiff's consent, altered his research paper by substituting the name of defendants' product for the name of the product plaintiff had researched so that it appeared that plaintiff endorsed defendants' product, stated a cause of action for invasion of plaintiff's right of privacy, but not for libel per se. Ravich v Kling, 17 Misc. 2d 683, 187 N.Y.S.2d 272, 1959 N.Y. Misc. LEXIS 3931 (N.Y. Sup. Ct. 1959).

183. Matrimonial matters

Under CPA § 476 in an action by a wife against her husband and paramour for a declaratory judgment declaring and establishing her rights as a wife, a judgment dismissing that part of the complaint which made claim for injunctive relief could be granted where the complaint contained no allegations which entitled the plaintiff to such relief, especially where the right to a declaratory judgment was established by the pleadings or by admissions made for the purpose of permitting the entry of appropriate judgment. Lowe v Lowe, 265 N.Y. 197, 192 N.E. 291, 265 N.Y. (N.Y.S.) 197, 1934 N.Y. LEXIS 1015 (N.Y. 1934).

Joinder of causes of action for separation and marriage annulment in same complaint did not admit existence of valid marriage. Prosswimmer v Prosswimmer, 50 N.Y.S.2d 46, 182 Misc. 807, 1944 N.Y. Misc. LEXIS 2263 (N.Y. Sup. Ct. 1944), limited, Bell v Yasgur, 104 N.Y.S.2d 467, 201 Misc. 171, 1951 N.Y. Misc. LEXIS 1759 (N.Y. Sup. Ct. 1951).

184. Mechanic's lien

In action to foreclose mechanic's lien, where no bona fide issue exists as to amount and validity of plaintiff's lien, but issues exist as to equities and priorities of other liens, plaintiff was granted summary judgment adjudging validity of his lien, with action to proceed as to other issues. Ivon R. Ford, Inc. v Sutherland, 142 N.Y.S.2d 797, 1955 N.Y. Misc. LEXIS 3544 (N.Y. Sup. Ct. 1955).

In action to foreclose mechanic's lien, where contract annexed to complaint barred filing of mechanic's lien, complaint was dismissed insofar as it seeks foreclosure but sustained insofar

as it seeks recovery of money damages. Bronxville-Yonkers Corp. v Bronxville Gardens Co-operative Apartments Corp., 142 N.Y.S.2d 893, 1955 N.Y. Misc. LEXIS 3576 (N.Y. Sup. Ct. 1955).

185. Negligence

In action for property damage to plaintiff's trailer due to negligence of defendant school bus driver, failure to serve notice of claim pursuant to General Mun L § 50-e barred maintenance of action, requiring judgment on pleadings. Van Tassell v Hill, 285 A.D. 584, 139 N.Y.S.2d 663, 1955 N.Y. App. Div. LEXIS 5542 (N.Y. App. Div. 1955).

186. Negotiable instruments

In action on a note wherein defendant, by counterclaim, claimed partial payment, partial judgment should have been given for so much of plaintiff's claim as was not controverted, the action severed and the motion to strike the counterclaim denied. Irving Trust Co. v Leff, 253 N.Y. 359, 171 N.E. 569, 253 N.Y. (N.Y.S.) 359, 1930 N.Y. LEXIS 840 (N.Y. 1930).

In an action on several notes the answer raised an issue as to the credibility of witnesses which should not have been determined on motion for summary judgment. Bernstein v Kritzer, 224 A.D. 387, 231 N.Y.S. 97, 1928 N.Y. App. Div. LEXIS 10016 (N.Y. App. Div. 1928).

Answer held properly stricken as sham and frivolous in action on a note and motion for summary judgment held properly granted. Donlin v Carlow, 200 N.Y.S. 339, 120 Misc. 698, 1923 N.Y. Misc. LEXIS 1093 (N.Y. Sup. Ct. 1923).

In an action by the payee against the maker and one who indorsed the notes, where the answer admits a certain amount to be due, judgment may be awarded against the maker; but where there is no allegation in the complaint that the indorsement was made to give credit therewith to the payee, the presumption is that the indorser intended to be liable thereon subsequent to the

payee; the judgment cannot be entered against him. Meise v Doscher, 23 N.Y.S. 49, 68 Hun 557 (1893).

187. Sales

Where the buyer admitted that it had used the greater portion of the pictures delivered and alleged no valid defense, the plaintiff, moving under § 476 was entitled to judgment for the contract price of the portion used, and the action should have been severed, and the plaintiff be permitted to continue the action as if it had originally been brought for the remainder of the claim if he so elected. Electro-Tint Engraving Co. v American Handkerchief Co., 130 A.D. 561, 115 N.Y.S. 34, 1909 N.Y. App. Div. LEXIS 257 (N.Y. App. Div. 1909).

Motion for judgment on the pleadings, dismissing complaint, granted in action by seller against buyer for damages for nonacceptance of goods, where complaint demonstrated that there had been no proper tender by plaintiff. Dery v Blate, 209 A.D. 467, 205 N.Y.S. 15, 1924 N.Y. App. Div. LEXIS 8657 (N.Y. App. Div.), aff'd, 239 N.Y. 203, 146 N.E. 204, 239 N.Y. (N.Y.S.) 203, 1924 N.Y. LEXIS 499 (N.Y. 1924).

In an action for the purchase price of an instalment of goods, the counterclaim of the buyer for damages for the failure to deliver other instalments does not entitle him to relief where he had breached the contract by failure to pay monthly for the goods shipped; and the plaintiff is entitled to summary judgment, there being no defense set up. Old Town Woolen Co. v Louis Fishman & Son, Inc., 218 A.D. 472, 218 N.Y.S. 497, 1926 N.Y. App. Div. LEXIS 5960 (N.Y. App. Div. 1926).

An answer is properly stricken as sham which only generally denies a complaint for goods sold, accompanied by a specific schedule, although the answer further claimed that a certain corporation was indebted to defendant and had some directors the same as plaintiff but did not plead another action pending or show any business connection between plaintiff and said concern. International Milk Co. v Cohen, 219 A.D. 308, 219 N.Y.S. 593, 1927 N.Y. App. Div. LEXIS 10905 (N.Y. App. Div.), app. dismissed, 245 N.Y. 564, 157 N.E. 858, 245 N.Y. (N.Y.S.) 564, 1927 N.Y. LEXIS 725 (N.Y. 1927).

Where the transaction involved sale of goods under a conditional sale contract, plaintiff was entitled to judgment, defense of usury not applicable. P. J. Tierney Sons, Inc. v Bajowski, 233 A.D. 766, 250 N.Y.S. 189, 1931 N.Y. App. Div. LEXIS 12492 (N.Y. App. Div. 1931), aff'd, 258 N.Y. 563, 180 N.E. 333, 258 N.Y. (N.Y.S.) 563, 1932 N.Y. LEXIS 1224 (N.Y. 1932).

An answer to a complaint for goods sold to defendant's wife will not be stricken on a showing of supporting affidavits that defendant gave plaintiff notice he would not be responsible for his wife's debts after her living separate and apart from him. Wm. H. Frear & Co. v Bailey, 214 N.Y.S. 675, 127 Misc. 79, 1926 N.Y. Misc. LEXIS 664 (N.Y. City Ct. 1926).

188. Stockholders

Motion to dismiss complaint of an individual stockholder, alleging mismanagement of affairs by pledgees of stock, was properly denied. Cutler v Fitch, 231 A.D. 8, 246 N.Y.S. 28, 1930 N.Y. App. Div. LEXIS 6986 (N.Y. App. Div. 1930).

Judgment granted for plaintiff on a motion under CPA § 476 in an action for guaranteed dividends pursuant to a stock certificate held by plaintiff. Peabody v Interborough Rapid Transit Co., 209 N.Y.S. 376, 124 Misc. 801, 1924 N.Y. Misc. LEXIS 1122 (N.Y. Sup. Ct. 1924), aff'd, 213 A.D. 857, 209 N.Y.S. 893, 1925 N.Y. App. Div. LEXIS 9112 (N.Y. App. Div. 1925).

Stockholder's derivative action against directors for wasting corporate assets; acts of wrongdoing charged to defendant directors were held to be distinct and independent acts, entitling defendant to have them struck out. Murphy v Somerville, 85 N.Y.S.2d 222, 1948 N.Y. Misc. LEXIS 3744 (N.Y. Sup. Ct. 1948).

In action by minority stockholder for accounting, where no facts are set forth as to claimed wrongs or why transactions were illegal, and all allegations of wrongdoing are conclusory, complaint was dismissed. Wohl v Miller, 145 N.Y.S.2d 84, 1955 N.Y. Misc. LEXIS 3284 (N.Y. Sup. Ct. 1955), modified, 5 A.D.2d 126, 169 N.Y.S.2d 233, 1957 N.Y. App. Div. LEXIS 3578 (N.Y. App. Div. 1st Dep't 1957).

189. Taxation

On a taxpayer's action to test a changed method of city elections the court held that its determination on the validity of all or any part of the law, whatever it might be, would be in the nature of a declaratory judgment. Bareham v Rochester, 221 A.D. 36, 222 N.Y.S. 141, 1927 N.Y. App. Div. LEXIS 6365 (N.Y. App. Div.), modified, 246 N.Y. 140, 158 N.E. 51, 246 N.Y. (N.Y.S.) 140, 1927 N.Y. LEXIS 855 (N.Y. 1927).

Certiorari to establish exemption from taxation of realty consisting of 110-room mansion house used as retreat of metaphysicians because used for charitable and educational purposes; respondent's motion under CPA § 476 granted. Application of Peace Haven, House of New Commandment, R. F. M. M. Retreat, Inc., 25 N.Y.S.2d 974, 175 Misc. 753, 1941 N.Y. Misc. LEXIS 1520 (N.Y. Sup. Ct. 1941).

Complaint to recover local utility tax payments finally held illegal held insufficient as not showing protested payments. Guzy Realty Co. v New York, 26 N.Y.S.2d 417, 175 Misc. 1070, 1941 N.Y. Misc. LEXIS 1575 (N.Y. Sup. Ct.), aff'd, 262 A.D. 1008, 30 N.Y.S.2d 846, 1941 N.Y. App. Div. LEXIS 7005 (N.Y. App. Div. 1941).

Declaratory judgment will not lie to determine issue of unequal tax levies and motion for judgment of dismissal will be granted. Cedzich v New York, 19 Misc. 2d 572, 190 N.Y.S.2d 167, 1959 N.Y. Misc. LEXIS 3274 (N.Y. Sup. Ct. 1959).

Where the assessor has jurisdiction, but uses illegal means in exercising it (making assessment without personal inspection), action for declaratory judgment to void assessment will not lie and motion for judgment dismissed will be granted. Cedzich v New York, 19 Misc. 2d 572, 190 N.Y.S.2d 167, 1959 N.Y. Misc. LEXIS 3274 (N.Y. Sup. Ct. 1959).

In action to recover sales tax from defendant, officer of corporate vendor, where sales tax returns were made while he was such officer, plaintiff's motion for judgment was granted, despite claim that local law imposing liability was invalid. New York v Bernstein, 90 N.Y.S.2d 759, 1949 N.Y. Misc. LEXIS 2480 (N.Y. Sup. Ct. 1949).

190. Trusts

Question of legal exercise of power of appointment by beneficiary under trust deed was issue of law, subject to motion for judgment on pleadings. United States Trust Co. v Wenzell, 19 N.Y.S.2d 448, 173 Misc. 998, 1939 N.Y. Misc. LEXIS 2770 (N.Y. Sup. Ct. 1939), aff'd, 258 A.D. 1046, 18 N.Y.S.2d 1001, 1940 N.Y. App. Div. LEXIS 8797 (N.Y. App. Div. 1940).

191. Vendor and purchaser

Where plaintiff contracted to purchase a large quantity of undeveloped land, the answer to the question whether the fact that defendant is unable to convey title to a small portion entitles the plaintiff to a lien for the down payment and deprives defendant of the right to specific performance, cannot be predicated upon the pleadings but must be determined upon evidence to be presented at the trial. Rifkin v Ed Zit Holding Corp., 254 N.Y. 352, 173 N.E. 219, 254 N.Y. (N.Y.S.) 352, 1930 N.Y. LEXIS 1049 (N.Y. 1930).

In an action to compel specific performance of a contract to purchase real estate, which provided for the payment of a certain sum as liquidated damages in case of a breach thereof, wherein the defendant’s affirmative defense was that it was the intent of the parties that the action for such damages should constitute the exclusive remedy, held that defendant was not confined to the contract, but was at liberty to introduce extraneous evidence to show the intent of the parties, and therefore plaintiff could not properly move for judgment on the pleadings. Dealy v Klapp, 199 A.D. 150, 191 N.Y.S. 457, 1921 N.Y. App. Div. LEXIS 6627 (N.Y. App. Div. 1921).

The court should grant a motion to dismiss a complaint which seeks recovery of a payment by a vendee on the ground that the deed tendered was defective in that the acknowledgment omitted the name of the grantor and thirty years before the property was transferred contrary to corporate powers, inasmuch as the acknowledgment was sufficient and the plea of ultra vires

cannot prevail if the contract has been executed. Fahey v Ottenheimer, 219 A.D. 668, 220 N.Y.S. 491, 1927 N.Y. App. Div. LEXIS 10998 (N.Y. App. Div. 1927).

Where defendant-vendors covenanted to cancel contract to convey realty and to retain deposit made thereunder, upon purchaser's failure to take title, they cannot, on occurrence of that contingency, invoke specific performance to compel compliance with agreement which they had elected to terminate, and counterclaim alleging such facts was dismissed. Dukas v Tolmach, 142 N.Y.S.2d 176, 1955 N.Y. Misc. LEXIS 2778 (N.Y. Sup. Ct. 1955).

Research References & Practice Aids

Cross References:

Motion for summary judgment, CLS CPLR Rule 3212.

General and special verdicts and written interrogatories, CLS CPLR Rule 4111.

Post-trial motion for judgment and new trial, CLS CPLR Rule 4404.

Effect of judgment dismissing claim, CLS CPLR Rule 5013.

Appeals to appellate division from supreme and county courts, CLS CPLR 5701.

Federal Aspects:

Form of motions in United States District Courts, USCS Court Rules, Federal Rules of Civil Procedure, Rule 7.

Motion for judgment as a matter of law in United States District Courts, USCS Court Rules, Federal Rules of Civil Procedure, Rule 50(a).

Jurisprudences:

44A NY Jur 2d Disclosure § 294. .

58A NY Jur 2d Evidence and Witnesses § 969. .

73 NY Jur 2d Judgments § 136. .

73A NY Jur 2d Judgments § 411. .

73A NY Jur 2d Jury § 55. .

76 NY Jur 2d Malpractice § 329. .

84 NY Jur 2d Pleading § 238. .

92 NY Jur 2d References §§ 30, 33.

105 NY Jur 2d Trial §§ 161., 278., 280., 281., 283.– 287., 292., 293., 302., 308., 610.

56 Am Jur 2d, Motions, Rules, and Orders §§ 1 et seq.

75A Am Jur 2d, Trial § 853.

23B Am Jur Pl & Pr Forms (Rev ed), Trial, Forms 95.– 98.

Law Reviews:

The New York Civil Practice Law and Rules: Trial. 27 Alb. L. Rev. 187.

The CPLR and the trial lawyer. 9 N.Y.L. Sch. L. Rev. 269.

Motion practice under the CPLR. 9 NY L Forum 317.

Treatises

Matthew Bender’s New York Civil Practice:

Weinstein, Korn & Miller, New York Civil Practice: CPLR Ch. 4401, Motion for Judgment During Trial.

2 Cox, Arenson, Medina, New York Civil Practice: SCPA ¶ 502.16, 503.01.

Matthew Bender’s New York CPLR Manual:

CPLR Manual § 23.02. Trials; general rules.

CPLR Manual § 23.06. Trial and post-trial motions.

CPLR Manual § 24.03. Effect of judgment dismissing claim.

CPLR Manual § 26.03. Appealability — Appellate Division.

CPLR Manual § 27.02. (Money Judgments) Applicable statutory provisions.

Matthew Bender’s New York Practice Guides:

1 New York Practice Guide: Probate and Estate Administration §§ 11.14, 11.17, 11.19, 11.23.

Matthew Bender’s New York AnswerGuides:

LexisNexis AnswerGuide New York Civil Litigation § 9.04. Seeking Motion In Limine.

LexisNexis AnswerGuide New York Civil Litigation § 9.26. Moving for Judgment During Trial (Directed Verdict).

Warren’s Weed New York Real Property:

Warren’s Weed: New York Real Property § 3.46.

Matthew Bender’s New York Evidence:

1 Bender's New York Evidence § 121.17. Res Ipsa Loquitur: Additional Illustrative Cases.

2 Bender's New York Evidence § 137.03. Qualifying Experts.

3 Bender's New York Evidence § 153.06. Categories of Admissions.

Annotations:

Direction of verdict in favor of one or more of several defendants after plaintiff has completed his evidence. 48 ALR2d 535.

Court's power, on motion for judgment on the pleadings, to enter judgment against movant. 48 ALR2d 1175.

Motion by each party for a directed verdict as waiving the submission of fact questions to the jury. 68 ALR2d 300.

What constitutes sufficiently serious personal injury, disability, impairment, or the like to justify recovery of damages outside of no-fault insurance coverage. 33 ALR4th 767.

Matthew Bender's New York Checklists:

Checklist for Submitting Pre-Trial Memorandum of Law, Marked Pleadings, and Other Papers to Court LexisNexis AnswerGuide New York Civil Litigation § 9.02.

Checklist for Making Trial and Post-Trial Motions LexisNexis AnswerGuide New York Civil Litigation § 9.25.

Checklist for Meeting Requirements for Judgment LexisNexis AnswerGuide New York Civil Litigation § 11.02.

Forms:

Bender's Forms for the Civil Practice Form No. CPLR 4401:1 et seq.

LexisNexis Forms FORM 75-CPLR 4401:1.—General Form of Order on Motion for Judgment During Trial.

LexisNexis Forms FORM 75-CPLR 4401:2.—General Form of Judgment on Motion for Judgment During Trial.

LexisNexis Forms FORM 380-21:101.—General Form of Order on Motion for Judgment During Trial.

LexisNexis Forms FORM 380-21:102.—General Form of Judgment on Motion for Judgment During Trial.

LexisNexis Forms FORM 380-21:201.—Order on Motion for Judgment at Close of Plaintiff's Case; Medical Malpractice Action Based Upon Lack of Informed Consent.

2 Medina's Bostwick Practice Manual (Matthew Bender), Forms 21:101 et seq .(trial motions).

Texts:

4 New York Trial Guide (Matthew Bender) §§ 80.01, 80.10.

Hierarchy Notes:

NY CLS CPLR, Art. 44

Forms

Forms

Form 1

Body of Order Directing Judgment Dismissing Complaint at Close of Plaintiff's Evidence

The above entitled action being regularly on the Calendar for trial and having been reached in its regular order for trial, and a jury having been impaneled, and the plaintiff having submitted his testimony and proof, and thereupon the defendant having moved for judgment with respect to the said cause of action upon the ground that the plaintiff has failed to prove the allegations of his complaint and has failed to prove any actionable negligence on the part of the defendant, _____, and the Court having entertained the motion, now, after hearing _____, attorney for the defendant in favor of said motion, and _____, attorney for the plaintiff in opposition thereto, it is, on motion of _____, attorney for the defendant,

Ordered, that the defendant's motion for judgment in his favor and that final judgment in favor of the defendant, and against the plaintiff, be entered herein.

Form 2

Body of Judgment Dismissing Complaint at Close of Plaintiff's Evidence

The above entitled action being regularly on the Calendar for trial at a Trial Term of this Court held in the City of _____, New York, commencing on the _____ day of _____, 20_____, and having been reached in its order and moved for trial on _____ _____, 20_____, and a jury having been impaneled, and the plaintiff having submitted his testimony and proofs, and the Court having at the close of the plaintiff's case granted the defendant's motion for judgment in his favor, and having ordered final judgment [upon the merits] to be entered accordingly, in favor of the defendant and against the plaintiff, and said order having been filed and entered and the defendant's costs having been taxed at the sum of $_____, it is, on motion of _____, attorney for the defendant,

Adjudged that the plaintiff's complaint be dismissed and judgment [upon the merits] granted in favor of the defendant herein and against the plaintiff herein; and it is further

Adjudged that the defendant, _____, recover of the plaintiff, _____, the sum of $_____, costs and disbursements, and have execution therefor.