NEW YORK COURT OF APPEALS ROUNDUP

STANDARD FOR RELIEF FROM CONDITIONAL ORDERS OF PRECLUSION

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The Court of Appeals recently addressed the enforcement of conditional orders of preclusion for failure to timely provide an adequate bill of particulars or other discovery, and the showing required to obtain relief from such an order, including the specific showing needed in medical malpractice actions. While the Court required strict adherence to the requirements for relief from a conditional order, in another case it was more flexible in applying the requirement of giving notice to a municipality in order to hold it liable. This month we discuss the decisions in those cases, as well as the Court's application of the assumption of the risk doctrine to the game of golf.

Conditional Orders

In one of its last decisions of 2010, *Gibbs v. St. Barnabas Hospital*, the Court explained that a 25-year-old precedent is to be strictly enforced. The Court had established in *Fiore v. Galang*, 64 NY2d 999 (1985), aff'g 105 AD2d 970 (3d Dept. 1984), that a party may only be granted relief from a conditional order of preclusion if he demonstrates both a reasonable excuse for failure to provide requested discovery and the existence of a meritorious claim or defense. Those requirements remain in full force today, making it an error of law to relieve a party from a conditional order of preclusion absent such a demonstration. Further, as it did in Fiore, the Court held in Gibbs that if the action is for medical malpractice, in order to establish that he has a meritorious claim, a plaintiff must submit 'expert medical opinion evidence.'

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Judge Victoria A. Graffeo's opinion for the Court expressed dismay at the conduct of plaintiff's counsel in repeatedly flouting discovery deadlines, and even court orders. One of the defendants, Fausto Vinces, served a demand for bill of particulars and other discovery. Plaintiff failed to furnish a bill of particulars within the time provided by the CPLR.

After his three letters to plaintiff on the subject went unanswered, Dr. Vinces filed a motion to compel and for imposition of a sanction of either dismissal of the complaint or preclusion of evidence of his alleged negligence. Only then did plaintiff furnish a bill of particulars, approximately a year after the demand for one had been made.

Dr. Vinces withdrew his motion at that time. At a subsequent preliminary conference, however, he raised issues with the bill of particulars. The court agreed that the response was 'unsatisfactory,' and directed plaintiff to serve a supplemental bill of particulars within 30 days. After that deadline came and went without compliance by plaintiff, Dr. Vinces again moved for sanctions.

Plaintiff was given one more chance when the court entered an order precluding him from introducing evidence of Dr. Vinces' negligence if he did not serve a supplemental bill within 45 days. After that deadline came and went, Dr. Vinces moved for enforcement of the conditional order and for summary judgment. Plaintiff finally served a supplemental bill, 30 days after the second judicial deadline. At no time did plaintiff seek an extension of the CPLR or court-imposed deadlines.

In opposing Dr. Vinces' motion, plaintiff attempted to satisfy the first prong of Fiore, a 'reasonable excuse' for his failure to meet the deadline of the conditional order of preclusion, by submitting an affidavit explaining the untimely response was a result of 'inadvertent law office failure' resulting from failure to diary the court's deadline. As to the second prong of Fiore, to demonstrate that his claim was meritorious, plaintiff pointed out that Dr. Vinces did not suggest the claim against him was not meritorious.

Rather than enforce its prior conditional order, the court sanctioned plaintiff by directing him to pay $500 in costs. The Appellate Division, First Department, affirmed (4-1). Stating that a drastic sanction that disposes of an action is inappropriate without a clear showing that the failure to comply with a discovery obligation was 'willful, contumacious, or the result of bad faith, ' the Appellate Division held that the Supreme Court's decision not to enforce its own conditional order was not an abuse of discretion.

The Court of Appeals disagreed. Simply stated, a court must enforce a conditional order of preclusion if the party failing to provide required discovery does not satisfy both prongs of Fiore. [1] The Court found it unnecessary to decide whether the law office failure excuse was 'reasonable,' because the plaintiff's effort to satisfy the second prong was so clearly insufficient. A party must make an affirmative showing that his claim or defense has merit. In the medical malpractice context, nothing short of an expert affidavit will do.

Lastly, the Court rejected plaintiff's argument that an order of preclusion would not be authorized by the CPLR because the Supreme Court had not made a finding that counsel's conduct was willful. Willfulness is a requirement of both CPLR 3042(d) (conditional orders of preclusion for failure to timely provide an adequate bill of particulars) and the CPLR 3126 provision for imposing sanctions for failure to disclose information that ought to have been disclosed, which is referenced in CPLR 3042(c) (failure to timely or fully comply with a demand for a bill of particulars). The majority relied upon the fact that CPLR 3126 authorizes the imposition of sanctions for failure to obey a court order, regardless of whether the failure was willful.

Judge Carmen Beauchamp Ciparick's dissent pointed out that the Supreme Court had, in fact, made a finding that plaintiff's conduct was 'dilatory but not intentioned.' Judge Ciparick argued that Fiore did not alter that the CPLR 'makes willfulness a prerequisite for preclusion.'

Notice Requirement

Whether the legislative requirement that a municipality has written notice of a hazard that causes injury has been met is generally a straightforward matter. But there are distinctions that may turn the issue into a jury question. Such a distinction is shown in *San Marco v. Village/Town of Mount Kisco*, another 4-3 decision by the Court.

The plaintiff in San Marco slipped at 8:15 a.m. on a Saturday morning on some black ice in a public parking lot owned by the Village/Town of Mount Kisco and was seriously injured. The village had last salted the lot for ice conditions at 4:45 a.m. the day before. Because work crews were not employed by the village to monitor the parking lot on Saturdays or Sundays, the lot had not been treated between very early Friday morning and the time of the accident.

Plaintiff sued the village for damages, claiming that the black ice on which she slipped had been created by the melting and freezing of snow that the village had plowed into a pile near the car parking places, and that the village failed to remedy the dangerous

condition it had created.

The village moved for summary judgment on the basis of provisions of the Village Law and the Code of Mount Kisco arguing that, in the absence of prior written notice (and the absence of notice was established), it could not be liable. Plaintiff opposed the motion, arguing, inter alia, that because the village had created the black ice hazard through its snow removal procedures, the affirmative negligence exception should apply.

The motion court agreed with plaintiff and denied the motion, finding triable issues of fact concerning whether the village's snow removal operation had caused or worsened the icy condition that resulted in plaintiff's fall. The Appellate Division, Second Department, unanimously reversed on the ground that, to invoke the affirmative negligence exception, a plaintiff must show that a municipality's negligence immediately resulted in the dangerous condition. The Appellate Division concluded that plaintiffs failed to present such proof.

The Court granted leave to appeal and reversed in an opinion by Chief Judge Jonathan Lippman. It held that the 'immediacy requirement' for 'pothole' cases, i.e., that lack of prior notice is excused when a municipality's affirmative conduct immediately results in a dangerous condition, should not be extended to negligent snow removal.

At the same time, the Court reaffirmed the 'general underlying purpose' of written notice statutes. The majority explained that the immediacy requirement was intended to protect municipalities from facing liability for road construction or repair because of the difficulty of establishing, after the passage of time, whether the work had been performed negligently. It found that prior written notice statutes were not intended to exempt a municipality from liability as 'a matter of law' where its negligence in maintaining a parking lot caused the foreseeable development of black ice as temperatures shift.

The Court cited various New York cases supportive of its position. It also specifically stated that its decision did not create any 'new burden' on municipalities to remove all snow off-premises to avoid liability or to render municipalities insurers of pedestrians.

Judge Robert S. Smith wrote a strong dissent, arguing that the majority opinion undermines the basic purpose of the written notice requirement in municipal legislation, which purpose exists even when the municipality is negligent.

Golfers Beware

Is failure to call 'Fore' before taking a golf swing reckless conduct, or merely negligent? The answer to that question (that it is negligent) determined the result in *Anand v. Kapoor*.

The parties to the action were part of a golf threesome. After taking their shots, the players separated and each walked toward his or her respective ball. Defendant had hit his ball into the rough. When he found the ball, defendant took another shot but 'shanked' it, and hit the plaintiff (who had proceeded down the fairway), causing serious injury. Plaintiff brought a personal injury action based upon defendant's alleged failure to call 'Fore' before hitting his ball out of the rough. Defendant testified at deposition that he had yelled 'Fore,' although neither of the other players heard him.

Despite this factual dispute, the Supreme Court resolved the motion on summary judgment in defendant's favor for two reasons. First, although a golf professional testified that it is universally recognized that a golfer must not take a shot until he has ascertained that no other player is in a position to be struck by even an errant ball, the court concluded that defendant had no duty to give warning because plaintiff was not in the intended line of flight of defendant's ball. In addition, the Supreme Court concluded, being struck by an errant ball is an inherent risk of golf that plaintiff assumed when he participated in the game.

The Appellate Division, Second Department (3-1) affirmed, agreeing with both of the lower court's conclusions. It is interesting to read the majority and dissenting opinions because, among other reasons, they review a surprising number of decisions within and outside of New York that discuss the intricacies of golf etiquette. The Appellate Division granted leave to appeal.

The Court of Appeals dispensed with the case in a brief memorandum opinion that did not venture into the weeds of golf rules. The Court affirmed the grant of summary judgment, addressing only the assumption of the risk doctrine. Its opinion stated that a person engaging in sports or recreational activity consents to the risks that arise out of the nature of the sport, although he does not assume the risk of reckless or intentional conduct, or of concealed or unreasonably increased risks.

The Court held that defendant was not liable due to the fact he neither acted recklessly nor unreasonably increased the risks inherent in the sport of golf because 'being hit without warning by a shanked' shot while one searches for one's own ball [ ] reflects a commonly appreciated golf risk,' citing *Rinaldo v. McGovern*, 78 NY2d 729, 733 (1991).

Footnotes:

1. The Court of Appeals left open the possibility that a court may avoid imposing the sanction of its conditional order of preclusion by vacating the order upon reconsideration, acknowledging that a court is entitled to reconsider its orders. It declined plaintiff's invitation to assume that was what had occurred below, however, the record being devoid of anything to support such an assumption. Going forward, in opposing a motion to enforce a conditional order, counsel may wish to consider joining with its opposition to a motion for enforcement of a conditional order of preclusion a motion for reconsideration of the order.