Queens BAR BULLETIN

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May 2020 | Volume 87, No. 8

Allen E. Kaye

Presidential Proclamation

AILA and American Immigration Council Summary of the April 22, 2020 Proclamation Suspending Entry of Immigrants Who Present Risk to the U.S. Labor Market During the Economic Recovery Following the COVID-19 Outbreak.

Joseph DeFelice

The proclamation becomes effective on Thursday, April 23, 2020 at 11:59 PM (ET), and suspends the entry of any individual seeking to enter the U.S. as an immigrant who:

- Is outside the United States on the effective date of the proclamation;
- Does not have a valid immigrant visa on the effective date; and
- Does not have a valid official travel document (such as a transportation letter, boarding foil, or advance parole document) on the effective date, or issued on any date thereafter that permits travel to the United States to seek entry or admission.

The following categories are exempted from the proclamation:

1. Lawful permanent residents (LPR);
2. Individuals and their spouses or children seeking to enter the U.S. on an immigrant visa as a physician, nurse, or other healthcare professional to perform work essential to combatting, recovering from, or otherwise alleviating the effects of the COVID-19 outbreak (as determined by the Secretaries of State and Department of Homeland Security (DHS), or their respective designees);
3. Individuals applying for a visa to enter the U.S. pursuant to the EB-5 immigrant investor visa program;
4. Spouses of U.S. citizens;
5. Children of U.S. citizens under the age of 21 and prospective adoptees seeking to enter on an IR-4 or IH-4 visa;
6. Individuals who would further important U.S. law enforcement objectives (as determined by the Secretaries of DHS and State based on the recommendation of the Attorney General (AG), or their respective designees);
7. Members of the U.S. Armed Forces and their spouses and children;
8. Individuals and their spouses or children eligible for Special Immigrant Visas as an Afghan or Iraqi translator/interpreter or U.S. Government Employee (SI or SQ classification); and
9. Individuals whose entry would be in the national interest (as determined by the Secretaries of State and DHS, or their respective designees). Discretion. It is within the discretion of the consular officer to determine if an individual is within one of the exempted categories outlined above. Nonimmigrant visa holders are not included in the proclamation. However, the proclamation requires that within 30 days of the effective date, the Secretaries of Labor and DHS, in consultation with the Secretary of State, shall review nonimmigrant programs and recommend to the President other appropriate measures to stimulate the U.S. economy and ensure "the prioritization, hiring and employment" of U.S. workers. Asylum seekers are not included in the ban. The proclamation states that it does not limit the ability of individuals to apply for asylum, refugee status, withholding of removal or protection under the Convention Against Torture. Prioritized Removal. Individuals who circumvent the application of this proclamation through fraud, willful misrepresentation or illegal entry will be prioritized for removal. Expiration. The proclamation expires

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The Docket

Being the official notice of the meetings and programs listed below, which, unless otherwise noted, will be held at the Bar Association Building, 90-35 148th Street, Jamaica, NY. Due to unforeseen events, please note that dates listed in this schedule are subject to change. More information and changes will be made available to members via written notice and brochures. Questions? Please call 718-291-4500.

CLE Seminar & Event listings

MAY 2020

Monday, May 25	Memorial Day - Office Closed
Wednesday, May 27	LGBTQ+ CommitteeZoom Meeting 1:00 – 1:30 pm https://us04web.zoom.us/j/72849873218, Meeting ID: 728 4987 3218

JULY 2020

Friday, July 3	Observation of Independence Day – Office Closed

SEPTEMBER 2020

Monday, September 7	Labor Day – Office Closed
Monday, September 14	Golf & Tennis Outing at the Garden City Country Club

UPCOMING SEMINARS

CPLR & Evidence Update
LGBTQ+ and Immigration CLE
Meet the New Supervising Judge, Civil Court, Queens County
Virtual Happy Hour – Part 2

New Members

Jason Barbara
Wendy Chiapaikeo
Gerard A. Geisweller
Ilana Leiser
Milene Mansouri
Daniel A. Passer
Nicole M. Teta

Necrology

Albert F. Pennisi

Queens Bar Bulletin

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Lawyers Assistance Committee

The Queens County Bar Association (QCBA) provides free confidential assistance to attorneys, judges, law students and their families struggling with alcohol and substance abuse, depression, stress, burnout, career concerns and other issues that affect quality of life, personally and/or professionally.

QCBA Lawyers Assistance Committee (LAC) offers consultation, assessment, counseling, intervention, education, referral and peer support.

All communication with QCBA LAC staff and volunteers are completely confidential. Confidentiality is privileged and assured under Section 499 of the Judiciary law as amended by the Chapter 327 of the laws of 1993.

If you or someone you know is having a problem, we can help. To learn more, contact QCBA LAC for a confidential conversation.

LAWYERS ASSISTANCE COMMITTEE
CONFIDENTIAL HELPLINE
718-307-7828

President's Message

Dear Members,

I extend warm greetings to each and everyone of you. My term as president of the Association is now coming to a close; this is the last President's Message that I am writing for the Queens County Bar Bulletin. It has been my honor to serve as the president of the Queens County Bar Association for the past year and a half. Thank you to all of our sponsors who provide valuable funding to the Association and make it possible for our programs to happen. Thank you to the Queens Daily Eagle for covering the Association's events, and for publishing our monthly Bar Bulletin. Thank you to our Bar Bulletin editor Paul Kerson; without you the Bar Bulletin would not happen. Thank you to our Executive Director Arthur Terranova, to our staff Janice Ruiz and Sasha Khan, to our Executive Committee members, to our Board of Managers, to our Academy of Law Dean Gary Miret, to all of the Committee Chairs, Co-Chairs, Vice-Chairs and committee members, to our Student Ambassadors, to all of the judges who participate and volunteer their time, sharing their wisdom and knowledge. Thank you to our interns, to all of the volunteers who mentor and help our young lawyers and law students; and a special thank you to all of the volunteers who helped with law school tablings this past summer and fall. Thank you to Mark Weliky and the Queens Volunteer Law Project. All of you have worked so hard this year and your contributions and work deserve recognition and acknowledgement. It is all of you working together that make this Association possible. Congratulations to my successor Clifford Welden on his incoming presidency; I wish him all the best and much success in his new role.

It has been a remarkable past year and a half in the history of the Association; we have had some important "firsts" during this time. This past summer, the Association held its first ever Summer Soiree that brought young lawyers, law students, lawyers and judges together on a beautiful summer evening; it was well-received and well-attended. This past fall the Association held a CLE in conjunction with the South Asian Indo-Carribean Bar Association of Queens, "An Evening of Guardianship" at the Association's building; the Honorable Judges Peter Kelly, Bernice Siegel and Karen Gopee presented in the forum. The Lawyers Assistance Committee held a CLE to support and provide information and resources to the caretakers of people who have Alzheimers and Dementia, a special thanks to the First National Bank of Long Island for sponsoring this event. The Association participated in a wonderful Chinese New Year celebration thanks to the Diversity and Inclusion Committee. On April 6, the Board of Managers held its first ever virtual board meeting via Zoom, and on April 23, the Association held its first ever Virtual Zoom Happy Hour sponsored by the Young Lawyers, Law School Liaison, and Bar Panels Committee. Also, thanks to many volunteers, we have expanded our outreach to the law schools; the Association's Student Ambassador program is growing; and membership to the Young Lawyers Committee has significantly increased.

A few notable anniversaries occurred during the year of 2019: the 50th Anniversary of the 1969 Stonewall riots in June, 2019, and 400th Anniversary of African American Heritage in the United States, solemnizing when the first enslaved Africans arrived to the English colonies in the United States in August, 2019. The Association participated in two separate events to commemorate these two occasions, thanks to the efforts of the LGBT Committee, and to the efforts of the Diversity and Inclusion Committee.

For the past several months, we have found ourselves in the midst of the Covid-19 coronavirus global pandemic. It has been a challenging time; many people I know are currently, or were hospitalized, or have lost family members or friends to this virus. Also, a number of other people have passed away during this time for reasons not Covid-related. I extend sincere and heart-felt condolences to all of you who have lost family members, loved ones and friends. I send my deepest sympathy to all of you; may you be comforted in the time of your mourning and loss.

At the time of this writing, [April 24, 2020], less than one month since last month's president message, there now have been 190,872 deaths in the world from the Covid-19 coronavirus; of these 50,372 occurred in the United States; of these 15,740 occurred in New York State; of these 11,267 occurred in New York City (Coronavirus Covid-19 Google News); of these 4,057 occurred in Queens County ["Brooklyn May Now Be Deadliest County in U.S. for COVID-19, Overtaking Queens" NBC News, April 23, 2020 https://www.nbcnewyork.com/news/coronavirus/brooklyn-may-now-be-deadliest-county-in-u-s-for-covid-19-overtaking-queens/2388142/].

I have often written and spoken about the importance of unity among attorneys in order to foster and promote a more just legal system to better serve the community. With the Covid-19 coronavirus global pandemic, I feel that this is an opportunity for us as a society to become empowered and benefit from working together.

The call for unity is being echoed among many leaders in governments around the world during this time. In particular, New York State's own Governor Andrew Cuomo during his daily press briefings has repeatedly called for and stressed the importance of unity. Two of his quotes go straight to the point: "If there ever was a moment for unity this, my friends, this is the moment.," (March 30, 2020 Press Briefing) and "Realize the timeframe we're expecting, make peace with it and find a way to help each other through this situation because it's hard for everyone. And the goal for me - socially distanced but spiritually connected. How do you achieve socially distanced but spiritually connected?" (March 23, 2020 Press Briefing).

Unifying and becoming spiritually connected will create a sense of togetherness and solidarity that will empower us and enable us to work together collectively as a community, both on the local level and more expansively on a global level in order to eradicate this global pandemic. In doing our part to spiritually connect to the community while we have been socially distanced, the Queens County Bar Association has been posting different words of hope and encouragement under the picture of the Unisphere on its FaceBook page and on its website. The Unisphere was conceived and constructed as the theme symbol of the 1964-1965 New York World's Fair held at Flushing Meadow Corona Park, Queens, NY. The theme of the World's Fair was "Peace Through Understanding" and the Unisphere represented the theme of global interdependence. The Unisphere was dedicated to "Man's Achievements on a Shrinking Globe in an Expanding Universe." Now more than ever, global interdependence will be key for the literal preservation and to ensure safety of humankind.

The Queens County Bar Association extends heartfelt support to each and everyone of you. May you all have strength, courage, fortitude, peace and spiritual connection now, and always.

KIND REGARDS,
MARIE-ELEANA FIRST

Editor's Note

The Coronavirus Challenge to Our Courts and Law Offices

The best plan for re-starting our local and national economy comes from Dr. David A. Kessler, the former U.S. Food and Drug Administration (FDA) Commissioner and now a Professor of Epidemiology at the University of California, San Francisco. In addition to a Harvard University medical degree, Dr. Kessler has a law degree from the University of Chicago Law School. He served as FDA Commissioner in both Republican and Democratic administrations.

In the April 20, 2020 edition of The New York Times, Dr. Kessler wrote the leading article on this subject, "We Need a New Social Contract for the Coronavirus".

Even after the current "shelter in place" directions are lifted by our Governor, the coronavirus contagion remains a great public health danger. High rates of reinfection of the population of our county, city, state and nation remain a distinct possibility, even a likelihood, if we do not have a careful, intelligent plan.

Dr. Kessler recommends the following course of conduct: Everyone in society must cut his or her face-to-face contacts with other people by two-thirds. That is, try to have only one contact for every three contacts each of us had before the corornavirus pandemic nearly overwhelmed us in March.

This plan should significantly reduce the rate of contagion and must be followed until an anti-coronavirus vaccine is invented, perfected and distributed, a process that could take many months or even years.

Our court system is one of the prime sources of coronavirus contagion. In retrospect, our courts should have been closed two weeks earlier than they were. We must always recall in sadness that Justice Noach Dear and Justice Johnnie Lee Baynes of the Kings County Supreme Court in Brooklyn died from the coronavirus last month, probably having been exposed in the courthouse. Justice Baynes had been assigned to the Queens County Civil Court earlier in his career.

Applying Dr. Kessler's teaching and in memory of Justice Baynes and Justice Dear, I propose the following application of Dr. Kessler's plan as adapted for our Queens County, New York City and State Courts and Law Offices:

1. I previously thought that automation and computerization of courts and law offices was a truly bad idea because it took the humanity out of our common mission to put more justice in the world. Face-to-face meetings of litigants, lawyers and court personnel were essential to a just solution.

2. This attitude must change 180 degrees. Now, in the face of a global health threat in the world's most global city and state, we must automate and computerize our courthouses and law offices as much as we possibly can.

3. This means the adoption of TRUE IAS. The highly modified Individual Assignment System (IAS) must stop. Each judge and justice must be given complete control over his or her own caseload, and empowered to determine which cases must be called and which cases can wait.

4. No more calendar calls on Motions, Trials, Preliminary Conferences or Compliance Conferences. Each Chambers must arrange telephone, Facetime, Skype or Zoom conferences when the IAS Justice determines that such a conference is necessary.

5. Hearings, Trials and Oral Arguments of Motions and Appeals that must go forward are to be done on Facetime, Skype, Zoom or telephone conference call.

6. The big objection to TRUE IAS over the years has been the Unspoken Secret: Some judges and justices can't handle the volume. THE SOLUTION: Law students from St. John's and CUNY Law Schools must be recruited into every Judicial Chambers.

7. These law students can review files, help judges and justices determine priorities, and set up telephone, Facetime, Skype or Zoom oral arguments, settlement conferences, hearings and trials. They will undoubtedly learn far more practical law doing this than in a classroom.

8. These law students should be given academic credit for this internship of several hours per week. To get us through this time until a coronavirus vaccine is available, these students must be told that this internship in a Queens County Judge or Justice's Chambers is a recommended pubic service. If not enough Queens County law students volunteer, the word should go out on Westlaw and in the New York Law Journal that we are looking for law students regionally and nationally to perform this vital judicial function in the American county among the hardest hit by the coronavirus.

9. The same TRUE IAS plan must apply to the Surrogate's Court, Civil Court, Family Court and Criminal Court. Corrections must be directed to produce prisoners via Facetime, Skype or Zoom for court appearances and attorney conferences. Attorney-prisoner conferences are to be strictly confidential with no Corrections, Police, Court personnel or District Attorney's staff listening in. Law students should be setting up the telephonic and electronic calendar every day for the next day.

10. Electronic filing must be reopened and used. Courts without electronic filing must allow e-mail filing. "Working copies" must be mailed in US Mail to each Chambers. Law Students named above should be assembling each file in each Chambers and making the files available to the Law Secretary and Judge or Justice for reading and deciding. By sitting in on these deliberations, law students will gain a tremendous amount of practical legal knowledge.

11. The Appellate Division and Appellate Term must hold all Oral Arguments by telephone, Facetime, Skype or Zoom. Law students named above must set each day's electronic appointments with no wasted calendar call.

12. Law offices have already been revolutionized by Governor Cuomo's Executive Orders Nos. 202.7 and 202.14 allowing notarization and will witnessing by Facetime, Skype or Zoom. These Orders must be extended beyond their current May 7, 2020 expiration date. We must allow our clients to visit us in this way for these purposes and all other purposes. We must allow our secretaries, paralegals, clerks and legal assistants to work remotely. We must master Voice Memo, which allows us to dictate remotely. We must conduct all depositions on Facetime, Skype or Zoom exclusively. The requirement that a signer of a document personally appear before a notary dates from the Roman Empire. This means that Governor Cuomo's Executive Orders this past month swept aside more than 2000 years of history on this point.

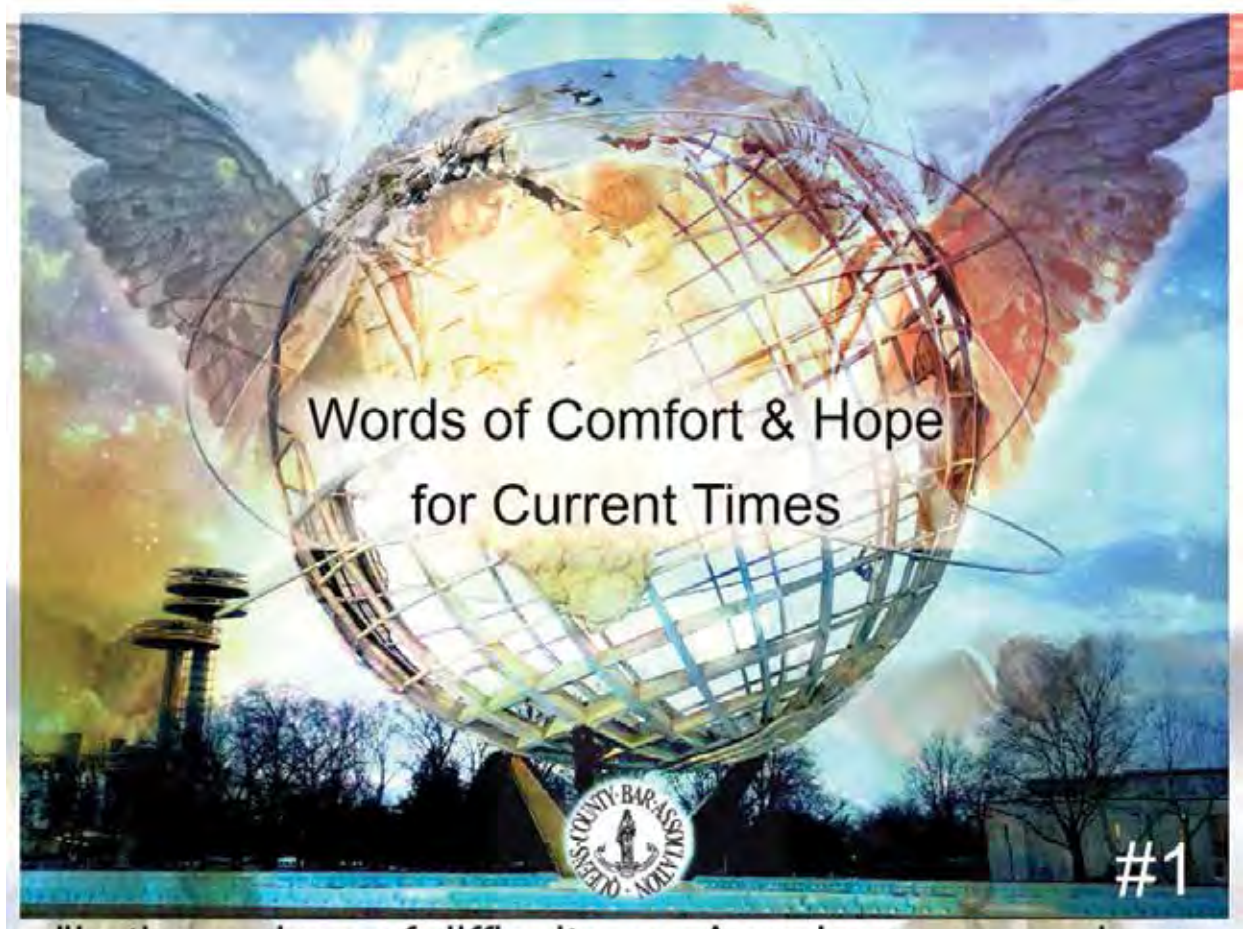
13. Courtrooms must be repurposed as follows: Judges, Justices, Law Secretaries, Court Clerks, clerical staff and law students can meet together seated six feet apart to administer justice electronically until such time as the anti-coronavirus vaccine is available. Everyone else is allowed in only by telephone, Facetime, Skype or Zoom, not in person.

14. This plan should cost exactly ZERO. It will actually save time and money because no one will be rushing through traffic by car, bus or train to get to the courthouse in person. Virtually everyone has an iPhone, iPad or laptop. All this technology is already in everyone's possession. And for those pro se litigants who do not, our law student interns must be instructed to reach out to them by P.O.T. – Plain Old Telephone.

If steps 1 through 14 are truly followed, we will continue to administer justice in the world's most diverse and hardest hit county and we will continue to do it without fear or favor, and we will save lives, especially including the lives of our dedicated Court personnel and ourselves. We do this in Memory of Justice Baynes and Justice Dear, and with a special thank you to Dr. Kessler, who showed us the way forward.

"Justice, justice you shall pursue." Deuteronomy 16:20. This was the goal in ancient times. Through war, pestilence and famine, it remains just as true today as it ever did. More now than ever in our lifetimes, justice depends on us to adapt quickly to a changed world.

BY PAUL E. KERSON, ESQ
EDITOR



Dear Readers,

I extend warm greetings to each and every one of you during this unprecedented and unsettling time. The community of Queens is facing incredible challenges as the Covid-19 coronavirus is infecting many residents; at present Queens accounts for 32% of the Covid-19 cases in all of New York City. In just a matter of days the socio-economic-political landscape of Queens has completely changed; the virus is spreading like wildfire, and Governor Cuomo has implemented the executive order New York on PAUSE, a 10-point policy to assure uniform safety for everyone in the state of New York. Measures are being implemented day by day on the local, state and federal levels in an attempt to stop the virus from infecting more people. At this challenging time, the Queens County Bar Association extends heart-felt support to each and everyone of you. We stand with you, both the legal community, and the general public of Queens County.

During his March 23, 2020 press conference Governor Cuomo poignantly stated, "Realize the timeframe we're expecting, make peace with it and find a way to help each other through this situation because it's hard for everyone. And the goal for me - socially distanced but spiritually connected. How do you achieve socially distanced but spiritually connected?"

Becoming spiritually connected will create a sense of togetherness and solidarity that will empower us and enable us to work together collectively as a community, both on the local level and more expansively on a global level.

In doing our part to spiritually connect to this community while we are socially distanced, the Queens County Bar Association will be providing words of hope and encouragement under this Unisphere. The picture that you see is that of the Unisphere. The Unisphere was conceived and constructed as the theme symbol of the 1964-1965 New York World's Fair held at Flushing Meadow Corona Park, Queens, NY. The theme of the World's Fair was "Peace Through Understanding" and the Unisphere represented the theme of global interdependence. The Unisphere was dedicated to "Man's Achievements on a Shrinking Globe in an Expanding Universe." Now, during this global pandemic, as the Covid-19 coronavirus races across the world, it is more important than ever for the world to unite and work together in order to stop its destruction and to find a cure or vaccine for it. By uniting and working together, humanity will be able to get the world through this challenging time.

Please check in with us on the Queens County Bar Association Facebook page for words of comfort and support right here underneath the picture of the Unisphere.

May you all have strength, courage, fortitude, peace and spiritual connection during this challenging time.

Kind Regards, Marie-Eleana First, President Queens County Bar Association

Presidential Proclamation

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60 days from its effective date and may be continued as necessary. Within 50 days from the effective date, the Secretary of DHS shall, in consultation with the Secretaries of State and Labor, recommend whether the President should continue or modify the proclamation. Severability Clause. If any provision of the proclamation, or the application of any provision to any person or circumstance, is held to be invalid, the remainder of the proclamation shall not be affected.

Following is a Summary by Notable Attorney, Greg Siskind

The President signed a new proclamation banning the entry of a number of new classes of individuals citing the impact immigrants have on the labor market during a period of high unemployment and the need to preserve State Department resources so consular officers can service US citizens abroad. He also alleges that immigrants strain our health care system. The order is in effect for 60 days and he cites Sections 212(f) as the main authority. He also cites other sections of the US Code that don't really impact the scope of this order and because 212(f) is the main authority cited, it means the focus is on visas and people entering the US from abroad. Section 212(f) permits the President to bar the entry of immigrants and classes of immigrants he deems to be detrimental to the United States. Section 1. Suspension and Limitation on Entry. – The section broadly states that the entry into the US of aliens as "immigrants" is suspended. This means people seeking to come in as permanent residents and non-immigrant categories and other categories of entrants are not covered. Section 2. Scope of Suspension and Limitation on Entry. The suspension covers people if the following criteria are met: - They're outside the US on the effective date of the proclamation (11:59 pm tomorrow – 4/23). - They don't have an immigrant visa valid on the effective date. - They don't have an official travel document other than a visa. The following categories are exempt: - Any lawful permanent residents (green card holders) - People seeking to enter the US on an immigrant visa as a physician, nurse, or other healthcare professional, to perform medical research intended to combat the spread of COVID, or to perform work essential to combating recovering from or alleviating the effects of the COVID-19 outbreak, as determined by DOS or DHS. - EB-5 immigrant investors - Spouses of US citizens - Children under 21 of US citizens or prospective adoptees - People who further important US law enforcement objectives, as determined by DOS or DHS - Members of the US Armed Forces or their spouses and children - Special Immigrants (including Iraqi and Afghani translators and religious workers) - People whose entry would be in the national interest as determined by DOS or DHS. Potentially, this could include EB-2 national interest waiver recipients. Section 3. Implementation and Enforcement. The consular officer makes the determination if an individual is eligible for one of the exemptions in Section 2. DOS and DHS may set the procedures to carry this out. People circumventing this through fraud or willful misrepresentation shall be a priority for removal. This order doesn't impact people seeking asylum, refugee status, withholding of removal or protection under the Convention Against Torture. Section 4. Termination. The proclamation expires 60 days from tomorrow, but may be continued "as necessary". A recommendation on continuing must be provided by the Secretary of Homeland Security (in consultation with DOS and DOL) within 50 days. Section 5. Effective Date. 11:59 eastern daylight time on April 23, 2020. Section 6. Additional Measures. Within 30 days of the effective date, DOL and DHS, in consultation with DOS, shall review nonimmigrant programs and make recommendation to stimulate the US economy and ensure the prioritization, hiring, and employment of US workers. Section 7. Severability. If the courts throw out any part, it's the intention to continue on with the rest or the order. Section 8. General Provisions. Boilerplate language regarding complying with budget and other rules.

DHS Acting Secretary Announces Border Restrictions Extended for 30 Additional Days

DHS Acting Secretary Chad Wolf announced that the United States, Mexico, and Canada "have each agreed to extend restrictions on non-essential travel across their shared borders for 30 additional days."

Acting Secretary Chad Wolf Statement on Non-Essential Travel Release Date: April 20, 2020 "In close collaboration, the US, Mexico, and Canada have each agreed to extend restrictions on non-essential travel across their shared borders for 30 additional days. As President Trump stated last week, border control, travel restrictions and other limitations remain critical to slowing the spread and allowing the phased opening of the country."

AILA Urges Rational Response on COVID-19 and Immigration Policy; Condemns Divisive Presidential Tweet to Suspend Immigration

Washington, DC - The American Immigration Lawyers Association (AILA) has been closely following the latest tweet from President Trump announcing his plan to sign an order to "temporarily suspend immigration into the United States." To date, the White House has issued no further details as to the scope and breadth of the proposed Executive Order. AILA urges the White House and agencies to implement rational, policy-based measures that promote the public health and economic interests of our country during this national crisis rather than resort to distraction and political theater.

Marketa Lindt, AILA President, noted, "The latest announcement to suspend immigration is not a legitimate policy plan to respond to the current COVID-19 crisis. At this critical time, we need to focus our time and resources on policies that spur innovation and economic growth and that promote the health and safety of the American people. A rational immigration policy is a critical component of successfully addressing our nation's public health needs and spurring an economic recovery."

Ben Johnson, AILA Executive Director, added, "Unfortunately, the President's tweet is not a surprise. In the face of growing questions and criticism about his handling of the COVID-19 crisis, it was only a matter of time before President Trump resorted to distraction, blame, and fearmongering. The heroes of this crisis include the agriculture workers who have kept us fed, the healthcare workers saving lives, the scientists and researchers searching for a cure, the factory workers and truck drivers providing critical supplies. Regardless of where we were born, we all have an important role to play in building a better future. Now is the time for us to stand shoulder to shoulder and work toward the day that this crisis is behind us. Measures that isolate America won't make America stronger; fear and division can't take the place of unity and determination."

BY ALLEN E. KAYE
AND JOSEPH DEFELICE

Allen E. Kaye and Joseph DeFelice are Co-Chairs on the Immigration and Naturalization Committee on the Queens County Bar Association.

Defending Against The Strict Liability Of New York's "Scaffold Law"

[NYC Housing Court Judge (ret); Adjunct Professor of Law, Maurice A. Deane School of Law at Hofstra University; Certified Supreme Court Mediator; of Counsel, Finz & Finz, PC]

New York's "Scaffold Law", Labor Law §240(1), is a strict (absolute) liability statute created to protect workers in the field of construction where injuries, or, in some instances, death occur while performing one or more tasks that are elevation related.

Since its inception, the statute has generated substantial case law attempting to interpret and appropriately incorporate its intended purposes in those matters that come within its ambit.

In my article, Language and the Law (NYLJ, 4/7/20, p.6, col.4; Queens Bar Bulletin, April 2020, Vol. 87, No.7, p.6), I stated that "we [attorneys and judges] are often called upon to decipher the 'legislative intent' of a statute". This is especially so with respect to Labor Law §240(1). For decades, courts have often struggled with its application to the facts of each case, where the injured plaintiffs invariably seek summary judgment on the issue of liability. As the body of decisional law has shown, there are generally no black and white answers to the issues in question leaving the attorneys and the courts to draw conclusions by sifting through the grey matter with varying results. (See, Heymann, Scaffold Law: A Defining Moment, NYLJ, 6/1/18, p.4, col.4)

In a 2014 report written by the Construction Law Committee of the New York County Lawyers' Association on the Scaffold Law ["NYCLA Report"] it was stated that: "The interpretation of the Scaffold Law is so perplexing that the former Chief Justice [sic] of the Court of Appeals characterized one of her opinions as 'an attempt at the highly elusive goal of defining with precision the statutory terms' of the Scaffold Law. [Joblon v.Solow, 91 NY2d 457 (1988, Kaye, CJ)] Chief Justice [sic] Kaye is not alone in her opinion of the vagaries of the Scaffold Law. Indeed, Hon. George M. Heymann, a former New York City Civil Court Justice [sic], said the Scaffold Law 'has been and continues to be a statute that will yield differences of opinion between the courts at all levels regarding the nature of a worker's tasks that fall within the statute….' [Hon. George M. Heymann, New York's Scaffold Law and the Evolution of Elevation, New York State Bar Association Journal, Jan. 2013, at 20]" (NYCLA Report at 16)

NYCLA's extensive study on this subject concluded that New York State was an outlier among the remaining 49 states in the country by not adopting a defense of comparative negligence statute which would, in its opinion, provide "principles of equity and fairness" … to the adjudication of Scaffold Law claims". (NYCLA Report at 29)

In the intervening six years since the Report was published, the Legislature has not made any changes to the statute in this regard. This article takes no position in this debate, as its focus is to highlight two recent appellate cases, under the existing statute, where the injured plaintiffs were denied summary judgment for liability against the defendants as a direct result of their own conduct.

THE "SCAFFOLD LAW": LABOR LAW §240(1)

The first paragraph of section 240(1) of the Labor Law contains two distinct criteria, each of which comes into play when an injured worker seeks recovery under this statute. In relevant part, Labor Law §240(1) reads as follows:

All contractors and owners and their agents, ...[1] in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure [2] shall furnish or erect, or cause to be furnished or erected for the purpose of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed. (Numbers in [ ] added)

The first part of this provision sets forth and limits the specific type of job that a worker must be doing at the time of his or her injury. The second part pertains to the various devices necessary to protect the worker from injury while in the performance of his or her duties. The list is not exhaustive as the language includes "other [safety] devices" to provide "proper protection". It is this second component that establishes the strict liability upon the contractors and their agents and their responsibility is non-delegable.

Currently, only two defenses to this statute exist: [1] that the injured worker was "recalcitrant" in refusing to obey the instructions by his superiors regarding his or her use of the safety equipment provided or [2] the worker acted negligently in his or her performance of the assigned task. It should be noted, however, that such defenses would fail if the safety equipment provided was inadequate to protect the worker or the worker was not made aware of its availability, regardless of the worker's conduct.

SEMINAL CASES

Among the cases pertaining to this issue, there are three decisions that predominate: Blake v. Housing Services of NYC, 1 NY3d 280 (2003); Cahill v. Triborough Bridge and Tunnel Authority, 4 NY3d 35 (2004) and Gallagher v. New York Post, 14 NY3d 83 (2010).

Blake provides an historical background as to the development of the strict/absolute liability of contractors. It points out [as does the NYCLA Report] that the "statutory language never explicitly barred contributory negligence as a defense. However, the Court of Appeals, in 1948, determined that "to meet [the statute's] objective" the defense of contributory negligence would no longer "exonerate a defendant who has violated the statute and proximately caused a plaintiff's injury". (See, Koenig v. Patrick Construction Corp, 298 NY 313 [1948]; Zimmer v. Chemung County Performing Arts, 65 NY2d 513 [1985]; Stolt v. General Foods Corp, 81 NY2d 918 [1993])

Blake notes that "[t]he point of Labor Law §240(1) is to compel contractors and owners to comply with the law, not to penalize them when they have done so." (Emphasis added) Originally imposing an "absolute" duty on contractors, the term "strict liability" was first pronounced in 1990 and the two terms have been used "interchangeably" since. (See, Cannon v.Putnam, 76 NY2d 644 [1996])

Hence, if all the evidence conclusively demonstrates that the contractors provided proper safety equipment in all foreseeable circumstances and gave proper, unambiguous instructions as to its use regarding the nature of the work to be performed, then it may be justified to conclude that a plaintiff's injuries were solely the result of his or her choice to disobey instructions [recalcitrant] or to act in a negligent manner. As will be discussed below, workers often look for short-cuts to accomplish their job, which, in time, become the conventional custom and practice. Such conduct, unless directly or tacitly approved by a superior, would absolve the contractor of liability, but only if proper safety equipment was available to the worker and he was apprised of its availability.

In Blake, the plaintiff used his own ladder, which was designed to give him proper protection, but failed to lock the extension clips when he fell. As the plaintiff could not prove that the defendant violated the statute by failing to provide mandated safety protections, the "jury implicitly found the fault was entirely plaintiff's".

The Blake Court stated that the facts before it were similar to those in Weininger v. Hagedorn, 91 NY2d 958 (1998) where a "reasonable jury" could conclude that a plaintiff's actions were the "sole proximate cause" of his injuries, that liability under Labor Law §240(1) did not attach and its findings should not be disturbed. "Thus, if a statutory violation is a proximate cause of an injury, the plaintiff cannot be solely to blame for it. Conversely, if the plaintiff is solely to blame for the injury, it necessarily means that there has been no statutory violation."

In Cahill, the holding of Blake was reiterated and reinforced where the plaintiff chose not to use a safety line provided by the defendant contractor and was determined to be "recalcitrant", even where there was a lapse of time between when the instructions to use the equipment were given and the "disobedience" occurred. As the Court held, citing Blake, "[e]ven when a worker is not 'recalcitrant' there can be no liability under section 240(1) when there is no violation and the worker's actions (here, his negligence) are the 'sole proximate cause' of the accident"

Gallagher, however, reached a contrary result. Here, the plaintiff, an ironworker, was on the second floor of a building removing a section of metal decking in preparation for the installment of a new floor. He was using a two handled power saw to enlarge a hole previously made by other workers when the blade jammed thrusting him through the hole onto a temporary floor between the first and second levels sustaining injuries. He commenced an action under Labor Law §240(1) and moved for summary judgment on liability. At issue here was whether a "standing order" by the project manager to the project foreman that ironworkers should "have a harness on and be tied off" was conveyed to the workers. The Supreme Court initially denied the motion stating there were issues of fact as to whether the defendant provided adequate safety devices and whether or not plaintiff used them. Upon reargument, the court determined that there were no issues of fact but still denied the motion on the basis that a prior injury to plaintiff's hand may have impaired his ability to properly use the saw, thus becoming the sole proximate cause of his injuries. The Appellate Division affirmed, based on the trial court's initial determination that there were questions of fact as to whether the defendant provided adequate protections for the plaintiff's safety and he failed to utilize them. Two justices dissented.

The Court of Appeals reversed. Here, in contrast to Blake and Cahill, there was no evidence in the record that Gallagher knew where to find the safety devices that the defendant argued were readily available or that he was expected to use them. Therefore, the evidence did not raise a question of fact that Gallagher knew of the availability of the safety devices and unreasonably chose not to use them. The Court further held that

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The Practice Page
Service Of Process By CPLR 312-A

CPLR 312-a is the most recent addition to the various available methods for serving process, but since time flies, it is already past its 21st anniversary.

Everyone in the legal community agrees that service of process is a technical endeavor. Even process servers who make their living performing these tasks, and who are well versed in the statutory details, are not infallible. In the 1980s, there were well-founded concerns that the technicalities of the traditional methods for serving process were onerous, not to mention there being instances of "sewer service" where the process described in affidavits of service did not actually occur.

Personal service, which sounds straight-forward, involves technicalities such as whether the description of the person served in the affidavit of service matches that of the defendant. Service by suitable age and discretion spawns litigation over whether the person receiving the summons was in fact of a suitable age and/or discretion. The "nail and mail" method generates litigation over whether the process server exercised "due diligence" in first attempting service personally or by suitable age and discretion. Alternate methods of service that may be permitted upon application to the court, such as service by publication, unrealistically assumes that target defendants read the Legal Notices of newspapers. I've never done so. Have you?

Enter CPLR 312-a in 1989. The statute represented a well-intentioned effort to avoid the vicissitudes of serving process under the traditional methods, by instead using a new method that is simple, cheap, and verifiable. It has not been the panacea that was hoped, but is used by some attorneys to good effect. The idea behind CPLR 312-a is simple but afflicted by its own technicalities. The plaintiff's summons with notice, summons and complaint, or notice of petition and petition, is served upon the defendant by mail, properly addressed and posted. The mailing may be addressed to any location where the defendant is at, whether a residence, domicile, place of business, or other. The mailing is accompanied by two copies of a Statement of Service by Mail (the "Statement"), one of which is to be executed by the defendant and returned to the plaintiff's counsel, and the second copy kept by the defendant. CPLR 312-a provides a template of the language that is to be used in the Statement. Defendants are to execute the Statement within 30 days of its receipt. Service is deemed complete upon the defendant's execution of the Statement, and the Statement has the same force and effect as an affidavit of service. To facilitate matters, the plaintiff is required to include with service a properly-addressed, postage pre-paid return envelope. Service by this method is defective if two copies of a proper Statement are not provided, or if the service documents fail to include the required pre-addressed return envelope with its 55-cent stamp.

The problem with CPLR 312-a, beyond its simple technicalities, is that its success depends entirely upon the cooperation of the defendant. If the defendant fails or refuses to execute and return the Statement, the plaintiff must use another method of service from scratch, and hopefully has enough time left under the 120-day timeframe of CPLR 306-b to do so without need of a time extension. The only penalty for a defendant's non-compliance is to re-

CONTINUED ON PAGE 13

The Practice Page
Service Of Process By CPLR 312-A

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imburse the plaintiff for the reasonable expenses of service by another method. That expense may be minor compared to the overall costs of the litigation, or when damages are sought in the tens or hundreds of thousands of dollars, or millions. Defendants have little incentive to comply.

As litigators, you will do as you wish for serving process. CPLR 312-a represents a good concept, but has not worked out over its two decades quite as well as originally hoped.

. Shaw v Shaw, 97 AD2d 403, 404 (2nd Dept. 1983).
. Ismailov v Cohen, 26 AD3d 412, 413 (2nd Dept. 2006).
. Room Additions, Inc. v Howard, 124 Misc.2d 19 (Sup. Ct. Bronx Co. 1984).
. N.Y. CPLR 308(1).
. N.Y. CPLR 308(2); E.g., McSorley v Spear, 50 AD3d 652, 653-54.
. N.Y. CPLR 316.
. N.Y. CPLR 312-a(c).
. Komanicky v Contractor, 146 AD3d 1042 (3rd Dept. 2017).
. N.Y. CPLR 312-a(f).

BY HON. MARK C. DILLON
APPELLATE DIVISION, 2ND DEPT.

Book Reviews For The Pandemic

My colleague, Paul Kerson, Esq. (A former President of the QCBA) has asked me to write an article for the Bar Journal during the pandemic. With the Courts basically closed and our professional and personal lives disrupted, perhaps it is time to remind ourselves of the very foundations of our democracy.

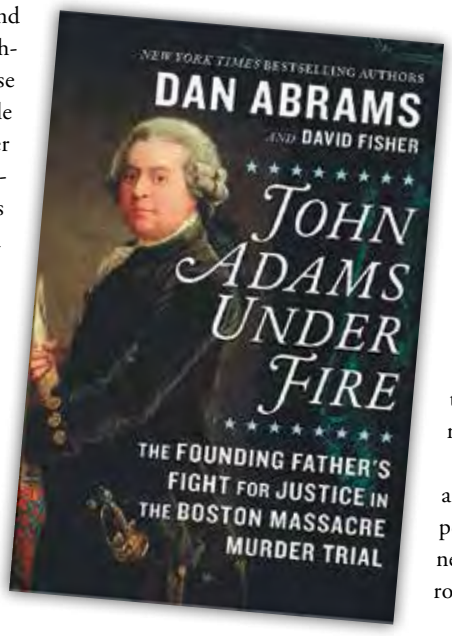
With this in mind I have been reading Dan Abrams' (and David Fisher' s) book

JOHN ADAMS UNDER FIRE: THE FOUNDING FATHER'S FIGHT FOR JUSTICE

Mr. Abrams is a lawyer and a well-known television pundit. His father is the prominent First Amendment lawyer Floyd Abrams.

This book reminds us that we as attorneys take the " good with the bad."

Here is John Adams, one of the great patriots of the revolutionary period. Yet he is called upon to defend the soldiers at the very heart of the so-called "Boston Massacre." How do we as lawyers brings ourselves to represent unpopular people, whether criminally or civilly.



John Adams (who became our Second President after Washington) answered those questions in his role as a leading member of the Bar of Massachusetts. Dan Abrams takes us (and I mean the lawyers) thru the origins of his (reluctant) representation and his trial tactics. He had two trial counsel, Josiah Quincy II (brother of one of the Prosecutors), and Robert Auchmuty (an experienced local lawyer and loyalist who Adams did not particularly like).

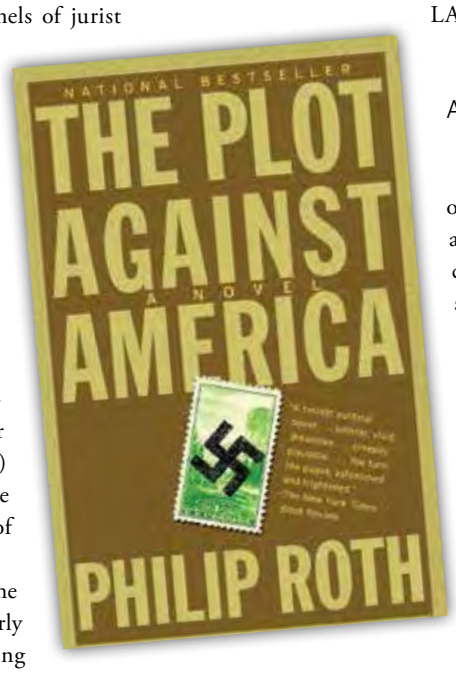
Abrams takes us thru the trial procedures of 1770 which were similar but certainly not the same as today. There was a 5-man panels of jurist clothed in red robes to signify the capital nature of the case. Witnesses could be called out of turn and often to immediately rebut certain direct testimony. The Boston Courthouse was new since at the time it was unusual to have a dedicated building for Court trials. It was only at that time that the concept of presumed innocence took hold and was applied at trials. Blackstone's Commentaries (by Sir William Blackstone 1723-1780) was the chief legal resource since it was written around the time of the trial.

Jurors were chosen from the community which was particularly difficult considering the revolutionary environment then existing in Boston. Witnesses were not sworn since it was the belief at that time that they would answer truthfully or answer to the almighty.

Adams and his fellow attorneys managed to secure an acquittal for Captain Preston and at least six or the eight soldiers he commanded (It was never established that he gave the order to fire). This was a remarkable achievement.

Dan Abrams has produced a remarkable book for everyone to read, but especially for our profession. We, as attorneys, owe a great deal to John Adams as a role model for members of the Bar.

Take some time to read and enjoy this book as well as the others written by Dan Abrams (and David Fisher) including: THEODORE ROO SEVELT FOR THE DEFENSE, and LINCOLN'S LAST TRIAL.



THE PLOT AGAINST AMERICA by Philip Roth (2004)

Here's another book to occupy your time. You may also be familiar with the recent HBO 6-episode miniseries based upon Philip Roth's fine work. While he did approve the show before he passed away, Roth' s actual book is superior and somewhat different from the program.

As you may know, the book takes place in America's 1930s with Franklin Roosevelt as President. Charles Lindbergh, perhaps the most famous person of his time, is the isolationist critic of the President. He is one of the leaders of the right-wing America First movement and a person who spent a great deal of time praising Hitler.

Lindbergh defeats Roosevelt in the 1940 election and leads the Country into an isolationist policy. As a result, the United States plunges into deep Antisemitism and a basic pro-German policy. More than this I will not reveal!

Philip Roth has produced a book worthy of your attention. It contains various twists and turns which will keep you busy reading. Suffice it to say that it is different than the HBO miniseries. However, I frankly find it better!

To my friends and colleagues, I hope to see you all soon. Stay well.

STEPHEN DAVID FINK

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Lawrence K. Marks
Chief Administrative Judge

MEMORANDUM

April 30, 2020

TO: All Trial Court Justices and Judges

FROM: Lawrence K. Marks LM

SUBJECT: Additional Steps

Chief Judge DiFiore and I hope you and your families are doing well as we all continue to cope with the ongoing public health crisis.

As you know, and as the Chief Judge has updated you in her weekly video remarks, the Unified Court System has been increasingly active and productive since we transitioned to virtual court appearances over the past number of weeks. Beginning with cases involving essential and emergency matters, and then expanding to non-essential matters on April 13, trial judges have conferenced and heard a growing number of cases in recent weeks. We have sought to approach this expansion of judicial services in a deliberate and methodical fashion, to ensure that the volume of matters heard is appropriate in light of the challenges and limitations inherent in a transition to virtual court proceedings.

By any measure, this approach has been highly successful. Since April 13, our trial judges have conducted conferences or other court proceedings in over 25,000 cases. Fully one-third of those cases have been settled or otherwise disposed. In addition, judges are using this opportunity to address and resolve fully-submitted outstanding motions and other undecided matters. This is critically important, because if we can eliminate the current backlog of undecided matters, we will be in a far better position to absorb what promises to be a surge of new litigation once the court system returns to more normal operations.

We can all rightfully be proud of these achievements. And as we continue our successful transition to virtual court proceedings, we can again take further steps to increase access to justice and expand judicial services. We have identified these next steps following ongoing discussions with judges, bar association groups, legal services organizations and other stakeholders. Please note that these steps do not include the filing of new non-essential cases.

The following is a summary of these next steps, which take effect this Monday. 5/4

- Expanded motion practice. New motions, responsive papers to previously filed motions, and other applications (including post-judgment applications) may be filed electronically in pending cases, either (1) through our NYSCEF e-filing system in jurisdictions that have it; or (2) through a new electronic document delivery system that we have created for courts and jurisdictions where e-filing is unavailable. This new document delivery system enables lawyers and litigants to send documents to courts for filing and other purposes in a secure and efficient manner. Details concerning the new system are available on the court system's web site and from your Administrative Judge. Note that a requirement of the new document delivery system is that all filings require service by electronic means.

- Problem-solving courts. Problem-solving courts may conduct virtual court conferences with counsel, court staff, and service providers, via Skype for Business.

- ADR. Judges may resume referral of matters for alternative dispute resolution, including to neutrals on court-established panels, community dispute resolution centers, and ADR-dedicated court staff.

- Appeals. Notices of appeal may be filed electronically, either through NYSCEF or through the new document delivery system.

These are significant additional steps that will widen judicial work and responsibilities without rendering more difficult our continuing commitment to virtual court proceedings and the limitations inherent in those proceedings. Further details about these steps can be provided by your Administrative Judge. I remind you that administrative and technology staff remain available for assistance as you navigate this new virtual court model.

We will keep you apprised of future steps under consideration. Please be safe, and stay healthy!

cc: Hon. Janet DiFiore
Hon. George Silver
Hon. Vito Caruso
Administrative Judges

Defending Against The Strict Liability Of New York's "Scaffold Law"

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plaintiff's weakened grip on the saw from his prior injury would "at most have contributed towards his loss of balance, and could not as a matter of law have been the sole proximate cause of his fall".

RECENT APPELLATE CASES

Tukshaitov v. Young Mens' & Young Womens' Hebrew Assn.(YMWHA), 2020 NY Slip Op 01380 (App Div 2nd Dept) and Biaca-Neto v. Boston Rd II Hous. Dev. Fund Corp., 176 AD3d 1 (1st Dept, 2019) aff'd as modified, 2020 NY Slip Op 01116, both address the issue of whether the actions of the two plaintiffs were the sole proximate cause of their injuries. In Tukshaitov, the Appellate Division unanimously affirmed the trial court's determination that the plaintiff was the sole proximate cause of his accident. In Biaca-Neto, on the other hand, both the Appellate Division and the Court of Appeals were sharply divided in their decisions (3-2 and 4-3, respectively). The Court of Appeals ultimately concluded that there were issues of fact for a jury to decide and, thus, modified the Appellate Division's affirmance of the Supreme Court's dismissal of the action.

Tukshaitov was employed by an elevator company as a mechanical assistant and on the day of his accident was assigned to work on a modernization project in a building owned by the defendant, YMWHA. To get to the elevator machine room plaintiff and his co-workers took an elevator to the penthouse floor and then ascended a "special staircase" to access the machine room. They then removed a controller and generator from one elevator and, using the hoists they brought with them, lowered the equipment to the penthouse floor where they were then taken down to the ground floor on a different elevator. The machine room shaft, which connects to the penthouse, is a two-level rectangular opening which is opened by removing two metal sheets with attached metal handles. Once opened, the sheets must be set aside as there are no hinges to connect the doors to the shaft. The lower portion of the shaft is then accessible through a panel which is opened by sliding pistons to unlock it and then lowered by a rope where the panel remains attached to the shaft by hinges.

After the plaintiff assisted in loading the equipment into his company's van he returned with his supervisor and two others to the machine room to close up the shaft. One of the workers pulled the rope to close the hinged lower shaft access panel, and then the plaintiff hammered in the sliding piston locks to secure it. The plaintiff and his coworkers went on to perform different tasks, leaving the upper portion of the shaft open, with the metal doors still to be closed and secured. Thereafter, the plaintiff, without instruction or supervision, unilaterally decided to close the metal shaft doors by himself, by stepping into the shaft, standing on the hinged access panel, and pulling the first of the two doors into place. When the plaintiff started pulling the metal door toward him, the access panel swung open, and the plaintiff fell approximately 10 to 14 feet to the floor below, suffering injury.

The Appellate Division agreed with the Supreme Court's determination granting summary judgment dismissing the complaints as asserted against the defendants YMWHA and the contractor. With respect to the causes of action alleging violations of Labor Law §§ 240 (1), the defendants submitted, inter alia, the plaintiff's deposition testimony demonstrating, prima facie, that "it was the plaintiff's decision to climb into the shaft and stand on the access panel in an attempt to close the doors, while knowing that it was [his employer's] procedure to stand on the floor of the machine room with another coworker, and close the doors from above. He also knew that his supervisor would not have approved of him standing on the access panel. The defendants established, as a matter of law, that the plaintiff's actions were the sole proximate cause of his injuries (see Montgomery v Federal Express Corp., 4 NY3d 805 [2005]; Cahill v Triborough Bridge & Tunnel Auth., 4 NY3d 35 [2004]; Blake v Neighborhood Hous. Servs. of N.Y. City, 1 NY3d 280 [2003]; but cf. Cordeiro v TS Midtown Holdings, LLC, 87 AD3d 904 [2011]). In opposition, the plaintiff failed to raise a triable issue of fact". (Emphasis added)

The issue in Biaca-Neto is set forth in the opening paragraph of the Appellate Division's majority opinion: "The main focus of our appellate review addresses where to locate the boundaries of a defendant's responsibilities under Labor Law § 240 (1) when a worker is injured upon exiting a scaffold by an impermissible means when a safe mode of exit is readily available. The record evidence amply supports the motion court's conclusion that defendants cannot be held liable for plaintiff['s] injuries under the Scaffold Law."

This case brings to the fore several questions to be considered: did the defendant employer provide adequate safety protection; was the plaintiff aware that it was available to him; was he given specific instructions as to the work to be performed and the use of such equipment; did he understand his tasks and the instructions to be followed; is his conduct excusable if he cuts corners because his fellow workers consistently do it, despite its prohibition by superiors; and, finally, could plaintiff, in his failed attempt to do what his co-worker did, meet his prima facie burden on the theory of "follow the leader"?

Plaintiff was working on the assembly of an exterior scaffold with a co-worker at the time of his accident. To reach the platform on the seventh-floor level they could either use a scaffold staircase or hoists to ascend and descend. That morning plaintiff used the staircase and wore a lifeline attached to a harness to protect him from falls. There was no evidence that the scaffold was improperly constructed or that necessary safety devices were unavailable. However, to enter the interior of the building, workers were required to descend using the scaffold staircase or hoists and then use the interior staircase to reach the different levels to perform interior work. There were also window cutouts for "safety control zones" only and workers were prohibited from entering the interior of the building from the scaffold via these cutouts without permission from the safety manager. The defense asserted that they were "unaware of workers using such a shortcut and that any worker who climbed through a window would have been removed from the job site".

On the day of the incident, the plaintiff and his co-worker, while on the scaffold, were directed to perform work on the other side of the building. Rather than descend the scaffold by the staircase or hoist to enter the building as previously instructed, the co-worker chose to push himself up through the window opening. The plaintiff, who could not reach the opening several feet above his head, unhooked his harness and while attempting to climb the scaffold, slipped, "popped" his shoulder, and fell back onto the platform of the scaffold.

Amidst the conflicting testimony and evidence at both the trial and appellate level, the Appellate Division, in a split decision, affirmed the Supreme Court's denial of plaintiff's motion for summary judgment and dismissal of the action.

The majority of the court determined that the plaintiff's conduct was the sole proximate cause of his injuries. In order to save a few minutes in relocating to another part of the building, the plaintiff, following his co-worker's lead, unhooked his safety harness and climbed on the scaffold frame to enter through the window opening which was prohibited. "Whether or not he did so knowledgeably or was simply following another worker is not a valid basis to attribute responsibility to the defendants." Plaintiff acted "on his own volition" and, according to the court, his actions were not protected by Labor Law §240(1) because he could not prove any defect in the required safety devices available to him.

A vigorous dissent asserted that there were triable issues of fact the resolution of which should be left to a jury. Other than the plaintiff, no one else witnessed his accident. At his deposition, the plaintiff testified "I decided to follow the experience of someone who was working there longer". The testimony of others demonstrated that while the supervisors were told that workers were prohibited from entering the building through the window cut-outs, no evidence was elicited that this prohibition was ever passed along to the workers. While the plaintiff himself gave conflicting statements about the incident, it should be for a jury to reconcile the differences during their deliberations and whether to accept any version as the truth.

In a memorandum decision, the Court of Appeals, agreeing with the dissent below, modified the Appellate Division's order by denying defendant's motion for summary judgment and dismissal of plaintiff's Labor Law §240(1) action. It concluded that there was a triable issue of fact as to the plaintiff's conduct being the sole proximate cause of his injuries (i.e.: whether he "unambiguously" knew that he was expected to utilize the safety equipment supplied).

Adhering to its prior holdings in Gallagher and Cahill, the Court highlighted the key factors set forth in Cahill, that "a jury could have found that plaintiff had adequate safety devices available; that he knew both that they were available and that he was expected to use them; that he chose for no good reason not to do so; and that had he not made that choice he would not have been injured." (Cahill v Triborough Bridge & Tunnel Auth., 4 NY3d 35, 40 [2004]). If such factual findings would lead to the conclusion that a defendant has no liability under Labor Law § 240 (1), then summary judgment should not be granted in plaintiff's favor. In this case, a triable issue of fact exists as to whether plaintiff knew he was expected to use the safety devices provided to him, despite the apparent accepted practice of entering the building through the window cut-outs from the scaffolding. "Indeed, as the Appellate Division dissent concluded, the Appellate Division majority (and the dissent here) 'ignore[] the evidence in the record that workers on this job site used the scaffold to go through window cut-outs to enter the interior of the building and that the scaffold was clearly inadequate for that purpose' (Citation omitted)."

The spirited dissent opined that the plaintiff's conduct, as a matter of law, was the sole proximate cause of his injuries because "for no good reason" he chose not to use the adequate safety devices available to him which he was expected to use. Instead, he "chose convenience over safety" and "[i]t is equally irrelevant that plaintiff was attempting the same unsafe 'maneuver' as his coworker [ ]. Reckless maneuvers are still reckless no matter how many times they are performed. Plaintiff cannot defeat summary judgment by simply pointing to a coworker who made the same misguided decision to disregard the various safety devices that defendants had provided."

CONCLUSION

As I noted at the outset, a great portion of cases in this area of law are anything but black and white and require a factual finding by a jury. The Biaca-Neto matter, which caused a great deal of debate among the judges in the appellate courts, is a prime example.

BY HON. GEORGE HEYMANN

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2019-2020

QUEENS COUNTY BAR ASSOCIATION

LAWYER REFFERAL SERVICE

APPLICATION & REGISTRATION FORM

90-35 148th St.,
Jamaica, NY 11435
T: 718-291-4500
F: 718-657-1789

Name: _____ DOB: _____
First *Middle* *Last*

Firm Name: _____ Practice consists of: ___Trial work ___Office work

Address: _____

Telephone number(s): _____ E-Mail: _____

Date of Admission to the NYS Bar _____ Admission to Other Jurisdictions _____

List two attorneys or judges (*none of whom are my present partners and associates*) who have knowledge of professional work and ability:

_____

Languages other than English that you speak fluently: _____ or Office offers translation: _____

I will accept cases in the area(s) checked below (limit to five). I consider myself competent in such areas. Please indicate any specialties or exclusions within area of law.

AREAS OF PRACTICE	SPECIALTIES	EXCLUSIONS
☐ Adoptions		
☐ Bankruptcy		
☐ Civil Rights		
☐ Civil Service		
☐ Commercial		
☐ Consumer Law		
☐ Elder/Guardianship Law		
☐ Criminal Law		
☐ Decedent's Estates, Wills & Trusts		
☐ Domestic Relations (Family Law)		
☐ Immigration & Naturalization		
☐ Insurance		
☐ Juvenile Delinquency Matters		
☐ Labor Relations & Unemployment Compensation		
☐ Landlord & Tenant		
☐ Libel & Slander		
☐ Malpractice		
☐ Negligence		
☐ Patent, Trademark, Copyright, Unfair Competition		
☐ Real Property		
☐ Taxation		
☐ Social Security Appeals (SSI, SSD)		
☐ Small Claims		
☐ Traffic Law		
☐ Worker's Compensation		

LAWYER REFERRAL SERVICE DUES PAYMENT

☐ Registration fee with one area law **$395.00** ☐ Additional area(s) of law (limit four) **$ 100.00/per area**

Amount $_____ ☐ Check ☐ MasterCard ☐ Visa ☐ AMEX ☐ Discover

Credit Card Number _____ Exp. Date _____/_____ CSC: _____

The undersigned hereby applies for registration on the panel of the Lawyer Referral Service of the Queens County Bar Association **and is also a member in good standing.** He/she certifies that he/she is familiar with its procedures and that he/she will abide by all rules which may be promulgated by the Association and agrees to be bound thereby.

Date of Application: Signature of Applicant

Big Apple Abstract Corp.

Lawrence M. Litwack, Esq.

Margaret T. Ling, Esq.

Senior Counsel

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A Division of Big Apple Abstract Corp.

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(1934 - 2019)

Marvin Simms
(1932 - 2019)

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A Division of Big Apple Abstract Corp.

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Counsel

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