Andres v North 10 Project LLC
2019 NY Slip Op 31672(U)
May 31, 2019
Supreme Court, Kings County
Docket Number: 504409/13
Judge: Carolyn E. Wade
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At an IAS Term, Part 84 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 31st day of May, 2019.

PRESENT:

HON. CAROLYN E. WADE,

Justice.

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MIECZYSLAW ANDRES,

Plaintiff,

-against-

TNDHE NORTH 10 PROJECT LLC, AJ INTERNATIONAL CONSTRUCTION 1, INC., HSD CONSTRUCTION, LLC, ATWEEK INC., and JAHMAL SABAHA CONSULTING,

Defendants.

---X

HSD CONSTRUCTION LLC AND THE NORTH 10 PROJECT LLC,

Third-Party Plaintiffs,

-against-

M.R. ELECTRICAL SERVICE LLC,

Third-Party Defendant.

---X

DECISION and ORDER

Index No. 504409/13

Motion Sequence Nos. 11-12

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The following e-filed papers read herein:	NYSCEF No.:
Notice of Motion/Cross Motion, Affirmation (Affidavit), and Exhibits Annexed	177-195, 199
Affirmation (Affidavit) in Opposition and Exhibits Annexed	198
Reply Affidavit (Affirmation)	201-202

Upon the foregoing papers, plaintiff Mieczyslaw Andres (plaintiff) moves, pursuant to CPLR 3212, for an order granting him summary judgment on the issue of liability under

Labor Law § 240 (1). Defendants, The North 10 Project LLC (North 10) and HSD Construction LLC (HSD) jointly cross-move for an order, also pursuant to CPLR 3212, granting them summary judgment, dismissing plaintiff's Labor Law §§ 241 and 200 causes of action as well as plaintiff's common-law negligence cause of action.

Factual Background

On March 17, 2013, North 10 owned the real property known as 137-139 North 10th Street, Brooklyn, New York (Premises). HSD was serving as the general contractor for certain demolition and renovation work being performed on/at the Premises (Demolition and Renovation Project) and acting as North 10's agent as well as managing the Premises. On or about March 1, 2013, HSD contracted with M.R. Electrical Service, LLC (MR Electrical) to perform certain electrical work relating to the Demolition and Renovation Project. Specifically, MR Electrical was retained to "install meters and riser, light and waterproof outlets, temporary construction lights and outlets on each floor, outlets in each room as per code, GFCI (i.e., ground fault circuit interrupter) plugs in kitchens and vanities as per code and P.L.P. wiring and installation" (defendants' exhibit A, affidavit of Movzesh Rutner [Mr. Rutner] at ¶ 2). MR Electrical's work on the Demolition and Renovation Project also required it to remove electrical boxes from the Premises' basement (Basement).

On March 17, 2013, plaintiff, an MR Electrical employee, was directed by Mr. Rutner, owner and principal of MR Electrical, to remove an electrical box at the Premises. Upon arriving there at 9:00 a.m., plaintiff equipped himself with a hard hat, and, with a fellow MR Electrical employee (coworker), transported two (2) ladders (six feet and eight feet in height),

pry bars, and basic tools, which included a screwdriver and pliers, from their work van to the Basement (*see* plaintiff's exhibit F, Andres tr at 240, lines 14-25 through 241, line 18; at tr 249, lines 21-25 through 250, line 11). No other equipment was used by or furnished to plaintiff. The electrical box which plaintiff removed was affixed to the Basement wall, two to three feet above the ground with a pipe running along the right side of it (*id.* at 257, lines 24-25 through 258 at line 3; at tr 265, lines 7-19). The electrical box had dimensions of approximately eight feet in height, four feet in width, and a depth of two to three feet (*id.* at 257, lines 14-23).

After entering the Basement, plaintiff and the coworker examined the electrical box for approximately 30 minutes (*id.* at 261, lines 23-25 through 262, line 3). Soon thereafter, plaintiff and the coworker began efforts to remove the electrical box. Eventually, after several unsuccessful attempts to remove it, the coworker mounted the eight-foot ladder and stood on a ledge behind the electrical box to attempt removing it with a pry bar (*id.* at 275, lines 16-23). After several additional unsuccessful attempts to remove the electrical box from his vantage point, the coworker indicated that plaintiff should attempt removing the electrical box from the Basement's floor. Plaintiff then removed the pipe running along the right side of the electrical box, which resulted in the electrical box falling from the wall and striking plaintiff (*id.* at 282, lines 13-14; at 296, lines 18-22).

Procedural History

Plaintiff thereafter commenced this action by filing a summons and complaint, and North 10 and HSD subsequently answered with various affirmative defenses and cross

claims. On January 6, 2014, North 10 and HSD filed a third-party summons and complaint, seeking, among other relief, common-law indemnification against third-party defendant M.R. However, that third-party action was discontinued on October 7, 2014.

A note of issue was eventually filed on January 22, 2018, and, on February 7, 2018, North 10 and HSD jointly moved for an order, in part, seeking to vacate that note of issue and to concurrently extend the time to move for summary judgment (February Motion). By order of Justice Ellen M. Spodek (March 2, 2019 Order), the parties' time to move for summary judgment was extended to June 4, 2018, but the note of issue was not vacated. Plaintiff filed the instant summary judgment motion on the issue of liability under Labor Law § 240 (1) on June 4, 2018, and North 10 and HSD jointly cross-moved, on October 9, 2018, for summary judgment seeking dismissal of plaintiff's Labor Law §§ 241 and 200 causes of action and his common-law negligence cause of action.

The Parties' Positions

In support of his motion, plaintiff proffers, among other submissions, his deposition testimony. Plaintiff attests that he was directed by his employer, Mr. Rutner, to "finish" the work in the Basement (*see* plaintiff's exhibit F, Andres tr at 223, lines 12-25 through 224, lines 1-11). Plaintiff further attests that he understood this direction to mean that he was to remove "just one [electrical box]" (*id.* at 225, lines 2-8). Plaintiff also attests that he requested to be provided ropes and lines to safely remove the electrical box (*id.* at 224, lines 15-20).

Additionally, plaintiff proffers the deposition testimony of Mr. Joseph Witriol, representative of the owner of North 10 and defendant HSD (plaintiff's exhibit G, Witriol tr at 8, lines 20-24 and 14, lines 8-12). Mr. Witriol avers that North 10 was the owner of the Premises on March 17, 2013 and that HSD was the general contractor for the Demolition and Renovation Project (*id.* at 14, lines 13-18 and 15, line 25 through 16, lines 1-5). Mr. Witriol further averred that neither North 10 or HSD provided any safety devices for the Demolition and Renovation Project (*id.* at 47, lines 15-25 through 48, line 1-2).

Finally, plaintiff also proffers the expert affidavit of Mr. Joseph C. Cannizzo, P.E. Mr. Cannizzo attests that he is a licensed professional engineer with a bachelor's degree in civil engineering and has 24 years' experience in the construction industry. Mr. Cannizzo further attests that the lack of certain safety devices caused the electrical box to fall from its affixed place on the wall, resulting in plaintiff's injuries (aff of Cannizzo at 7, ¶ 23).

Plaintiff contends that it is undisputed that he was engaged in activity protected under Labor Law §240 (1), that he was not furnished with necessary safety devices, that he was injured as a result of a height-related risk (i.e., the electrical box falling), and that the lack of necessary safety devices, as enumerated in Labor Law § 240 (1), proximately caused his injuries. Hence, plaintiff maintains that he is entitled to judgment as a matter of law on the liability issue of his Labor Law §240 (1) claim.

In opposition, North 10 and HSD proffer Mr. Rutner's affidavit, which avers that plaintiff was not directed to remove the electrical box which fell on him, that MR Electrical maintains ropes, pulleys and/or cables at MR Electrical's principal place of business and that

plaintiff never requested being furnished with such safety equipment.[1] Additionally, North 10 and HSD contend that the court must reject plaintiff's proffered expert affidavit as plaintiff's counsel failed to disclose, pursuant to CPLR 3101 (d) (1) (i), Mr. Cannizzo as an expert witness.[2] Finally, North 10 and HSD assert that there are various factual issues precluding plaintiff from being entitled to judgment as a matter of law. Primarily, North 10 and HSD maintain that Mr. Rutner's affidavit creates a factual question as to whether safety devices were available to plaintiff at the Premises and whether plaintiff should be deemed a recalcitrant worker.[3]

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[1] The court notes that both plaintiff's and North 10 and HSD's papers focus much on whether plaintiff ever requested certain safety devices from and/or were provided certain safety devices by MR Electrical, his employer. First, it is irrelevant whether plaintiff ever made a formal or informal request for any safety device, as the plain language of the statute provides that "all contractors and owners and their agents . . . *shall* furnish or erect, or cause to be furnished or erected . . . devices . . . as to give proper protection to a person" (Labor Law § 240 [1] [emphasis added]). Second, the enactment of Labor Law 240 (1) places "ultimate responsibility for safety practices at building construction jobs where such responsibility actually belongs, *on the owner and general contractor*" (*Mingo v Lebedowicz*, 57 AD3d 491, 492-493 [2d Dept 2008] [internal citation and quotation marks omitted] [emphasis added]).

[2] The court notes that North 10 and HSD's papers incorrectly identify plaintiff's expert as "Mr. Sukowski" (affirmation of North 10 and HSD's counsel, ¶ 3) and "Mr. Cannizaro" (*id.* at ¶ 6).

[3] First, the court notes that Mr. Rutner's affidavit is silent as to whether safety devices as enumerated in Labor Law § 240 (1) were furnished to plaintiff. Mr. Rutner's affidavit merely states that safety devices were available to plaintiff at MR Electrical's principal place of business. Second, the court notes that the recalcitrant worker doctrine requires a defendant show "that the injured worker *refused* to use the safety devices *that were provided* by the owner or employer" (*Gordon v Eastern Ry. Supply*, 82 NY2d 555, 563 [1993] [emphasis added]). Mr. Rutner's affidavit, including his assertion that plaintiff was not directed to remove *the* electrical box fails to present requisite facts to apply the recalcitrant worker doctrine. Further, North 10 and HSD's opposition papers fail to articulate any arguments or present any authority supporting the theory that plaintiff was injured while engaged in an activity outside the scope of his work (*see generally* CPLR 2214 [c]).

In support of their cross motion, North 10 and HSD proffer their attorney's affirmation, which "respectfully refer[s]" to plaintiff's "Exhibits 'A' through 'D'" (affirmation of North 10 and HSD's counsel, ¶ 2). Relying on these papers, North 10 and HSD assert that plaintiff's Labor Law §§ 241, 200 and common-law negligence claims should be dismissed in their entirety. North 10 and HSD maintain that despite the untimeliness of their cross motion, the court should still consider the relief sought as the cross motion "involves identical causes of action and issues as Plaintiff's pending motion" (*id.* at ¶ 9).

North 10 and HSD then assert plaintiff's Labor Law § 241 (6) claim must be dismissed as none of plaintiff's allegations pursuant to Labor Law § 241 (6) are "based upon violations of applicable, concrete specifications of the Industrial Code" (*id.* at ¶ 19). North 10 and HSD also assert that plaintiff's Labor Law § 200 and common-law negligence claims must be dismissed as North 10 and HSD did not supervise "the activity bringing about the injury" or have "actual or constructive notice of a dangerous condition" (*id.* at ¶¶ 26, 28).

In opposition, plaintiff asserts that North 10 and HSD's cross motion must be denied as untimely. Plaintiff argues that North 10 and HSD failed to demonstrate good cause for the delay in making their cross motion and that the it does not present nearly identical issues as his motion. Plaintiff notes his motion seeks summary judgment exclusively on his Labor Law § 240 (1) claim, and the cross motion seeks summary judgment dismissing plaintiff's Labor Law §§ 241, 200 and common-law negligence causes of action.

In reply to North 10 and HSD's opposition to plaintiff's summary judgment motion, plaintiff asserts that he does not rely on Mr. Cannizzo's expert affidavit to establish his prima

facie entitlement to judgment as a matter of law, and, in any event, Mr. Cannizzo's name was exchanged as an expert witness before plaintiff's motion. Further, plaintiff argues that Mr. Rutner's affidavit should not be considered as Mr. Rutner was never disclosed as a fact witness, but, even if considered, it fails to raise a triable factual issue.[4]

Discussion

North 10 and HSD's Cross Motion

CPLR 3212 (a) provides that "[a]ny party may move for summary judgment in any action, after issue has been joined . . . the court may set a date after which no such motion may be made." When the court sets a date after which no motion may be made, such dates may be extended only where the party seeking an untimely motion establishes good cause for the delay (*Giordano v CSC Holdings, Inc.*, 29 AD3d 948, 948-949 [2d Dept 2006]; *see also Fiorino v North Shore Univ. Hosp. at Glen Cove*, 78 AD3d 1116, 1118 [2d Dept 2010]). The Court of Appeals defines "good cause shown" as "a satisfactory explanation for the untimeliness" (*Brill v City of New York*, 2 NY3d 648, 652 [2004]). Whether the deadline for filing a motion for summary judgment be imposed by court order or statute, such deadlines "are not options, they are requirements, to be taken seriously by the parties" (*Miceli v State*

[4] The court notes that plaintiff fails to proffer any discovery requests or discovery responses supporting his assertion that Mr. Rutner was never disclosed as a fact witness. Further, plaintiff's citations all focus on the narrow issue of parties failing to disclose a "notice witness" in "discovery responses" (*Muniz v New York City Hous. Auth.*, 38 AD3d 628, 628 [2d Dept 2007]; *see also Williams v ATA Hous. Corp.*, 19 AD3d 406, 407 [2d Dept 2005]; *see also Concetto v Pedalino*, 308 AD2d 470, 470-471 [2d Dept 2003]). Here though, plaintiff only states that "Mr. Rutner was never exchanged as a fact witness in this action," but is silent as to whether discovery demands were served relating to such witnesses or otherwise distinguishing Mr. Rutner's status as a fact witness as compared to a notice witness (*see* affirmation in opposition of plaintiff's counsel ¶ 12). Therefore, the court shall consider Mr. Rutner's affidavit.

Farm Mut. Auto. Ins. Co., 3 NY3d 725, 726 [2004]). Thus a party moving for summary judgment beyond a deadline imposed by the court must provide a satisfactory explanation for the untimeliness; "in the absence of such a good cause showing, the court has no discretion to entertain even a meritorious, nonprejudicial motion for summary judgment . . . the [motion] . . . must be denied . . ." (*see Thompson v Leben Home for Adults*, 17 AD3d 347, 348 [2d Dept 2005] [internal citation and quotation marks omitted]).

The Second Department has found that an untimely summary judgment cross motion made on nearly identical grounds as a timely summary judgment motion is a pro forma satisfactory explanation for the cross motion's untimeliness (*see Grande v Peteroy*, 39 AD3d 590, 591-592 [2d Dept 2007], citing *Bressingham v Jamaica Hosp. Med. Ctr.*, 17 AD3d 496, 497 [2d Dept 2005]; *Boehme v A.P.P.L.E., A Program Planned for Life Enrichment*, 298 AD2d 540 [2d Dept 2002]; *Miranda v Devlin*, 260 AD2d 451 [2d Dept 1999]). The Second Department explains that "[i]n such circumstances, the issues raised by the untimely motion or cross motion are already properly before the Court and thus, the nearly identical nature of the grounds may provide the requisite good cause to review the untimely motion or cross motion on the merits" (*id.*). However, where an untimely summary judgment cross motion seeks accelerated judgment on completely different causes of action than those sought by a timely summary judgment motion, the motions are not made on nearly identical grounds and, absent another satisfactory explanation for the untimeliness, the motion should be denied (*see Paredes v 1668 Realty Assoc., LLC*, 110 AD3d 700, 702 [2d Dept 2013] [wherein defendant cross-moved for summary judgment seeking dismissal of plaintiff's Labor Law § 200 and common-law negligence causes of action after the deadline to move for summary judgment

had expired, but plaintiff had timely moved for summary judgment on the issue of liability pursuant to Labor Law § 240 (1). The court denied defendant's cross motion as untimely, finding the motions were not on nearly identical issues]).

The operative facts in this case replicate those in *Paredes*. The March 2, 2018 Order extended the time to move for summary judgment to June 4, 2018, and plaintiff then filed his motion seeking summary judgment on liability under Labor Law § 240 (1). Four months later, on October 9, 2018, North 10 and HSD filed the instant summary judgment cross motion seeking to dismiss plaintiff's Labor Law §§ 241, 200 and common-law negligence causes of action. However, North 10 and HSD fail to demonstrate any good cause for their untimeliness in moving for summary judgment.[5] Accordingly, North 10 and HSD's summary judgment cross motion is denied as untimely (*see Paredes,* 110 AD3d at 702).

Plaintiff's Summary Judgment Motion

The key task in addressing plaintiff's summary judgment motion is determining whether triable issues of fact exist or whether judgment can be granted to a party on the proof submitted as a matter of law (*see Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). The movant must initially make a prima facie showing of such entitlement, tendering sufficient evidence to demonstrate the absence of any material factual issue (*see Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]). Once the plaintiff sets forth a prima facie case, the burden shifts to the defendant to produce evidentiary proof in admissible form establishing the existence of a material factual issue (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

[5] To the extent North 10 and HSD seek to show good cause for their delay in filing the instant cross motion, those parties rely on the inapplicable principle herein that an untimely summary judgment cross motion made on nearly identical grounds as a timely summary judgment motion should be considered on its merits.

"Labor Law § 240 (1) imposes a nondelegable duty upon owners and general contractors to provide safety devices to protect workers from elevation-related risks" (*Salinas v 64 Jefferson Apartments, LLC*, 170 AD3d 1216, 1222 [2d Dept 2019] [internal quotation marks and citation omitted]; *see also Silvas v Bridgeview Invs., LLC*, 79 AD3d 727, 731 [2d Dept 2010]). Specifically, the statute provides that:

> "[a]ll contractors and owners and their agents . . . in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance 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" (Labor Law § 240 [1]).

"The extraordinary protections of Labor Law § 240 (1) extend only to a narrow class of special hazards, and do not encompass any and all perils that may be connected in some tangential way with the effects of gravity" (*Simmons v City of New York*, 165 AD3d 725, 726 [2d Dept 2018] [internal quotations marks and citations omitted]; *see also Nieves v Five Boro A.C. & Refrig. Corp.*, 93 NY2d 914, 915-916 [1999]; *see also Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]). "Liability under the statute . . . depends on whether the injured work's 'task creates an elevation-related risk of the kind that the safety devices listed in section 240 (1) protect against'" (*Niewojt v Nikko Constr. Corp.*, 139 AD3d 1024, 1027 [2d Dept 2016], quoting *Broggy v Rockefeller Group, Inc.*, 8 NY3d 675, 681 [2007]).

Elevation-related hazards subject to Labor Law § 240 (1) include falling objects, "where the falling of an object is related to a significant risk inherent in . . . the relative elevation . . . at which materials or loads must be positioned or secured" (*Narducci v*

Manhasset Bay Assoc., 96 NY2d 259, 267-268 [2001] [internal citation omitted]). "Labor Law § 240 (1) does not apply in situations in which a hoisting or securing device of the type enumerated in the statute would not be necessary or expected" (*Ruiz v Ford*, 160 AD3d 1001, 1003 [2d Dept 2018] [internal quotation marks and citations omitted]). Traditionally, a plaintiff was required to "show that the object fell, while being hoisted or secured, because of the absence or inadequacy of a safety device of the kind enumerated in the statute" (*Narducci*, 96 NY2d at 268). The Court of Appeals has expanded the falling object doctrine beyond instances where the object was being hoisted or secured (*see Quattrocchi v F.J. Sciame Constr. Corp.*, 11 NY3d 757, 758-759 [2008]). Since *Quattrocchi*, the Court of Appeals requires that the plaintiff shows, among the other requirements of Labor Law § 240 (1), that the object which fell was inadequately secured for the activity for which the object was being used (*id.* at 759).

While "[a]n object falling from a minuscule height is not the type of elevation-related injury that [Labor Law § 240 (1)] was intended to protect against" (*Schreiner v Cremosa Cheese Corp.*, 202 AD2d 657, 657-658 [2d Dept 2011]), the Court of Appeals has rejected the categorical exclusion from recovery pursuant to Labor Law § 240 (1), where the object that caused the plaintiff's injuries fell from the same level as the plaintiff (*see Wilinski v 334 East 92nd Hous. Dev. Fund Corp.*, 18 NY3d 1, 9-10 [2011]). In *Wilinksi*, the Court of Appeals focused on: 1) whether the object fell from a height that was minuscule or *de minimis*[6] and 2) "[w]hether plaintiff's injuries were proximately caused by the lack of a

[6] An alternative way of phrasing the inquiry is whether "risk [arose] from a physically significant elevation differential" between the falling object and the injured plaintiff (*Runner*, 13

safety device of the kind required by [Labor Law § 240 (1)]" (*Wilinski*, 18 NY3d at 11). Critical to the determination of whether the object fell from a *de minimis* height is "'the amount of force [the object] w[as] able to generate'" for the height from which it fell (*id.* at 10, quoting *Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 605 [2009]). Paramount to determining the amount of force the object was able to generate is a quantification of the weight of the object and the distance the object traveled (*see Eddy v John Hummel Custom Bldrs., Inc.*, 147 AD3d 16, 21-22 [2d Dept 2016], citing *Runner*, 13 NY3d at 602, 605; *Treile v Brooklyn Tillary, LLC*, 120 AD3d 1335 [2d Dept 2014]; *Rodriguez v Margaret Tietz Ctr. For Nursing Care*, 84 NY2d 841 [1994]).

Here, plaintiff failed to established his prima facie entitlement to judgment as a matter of law. Plaintiff's proffered evidence (principally, his deposition testimony, his affidavit, and Mr. Cannizzo's expert affidavit) does not establish that he sustained injuries as a result of the "narrow class of special hazards" protected by Labor Law § 240 (1) (*Simmons*, 165 AD3d at 726 [internal quotation marks and citation omitted]).[7] Mr. Cannizzo's expert affidavit fails to establish, as a matter of law, that the height from which the electrical box fell presented a risk arising "from a physically significant elevation differential" (*id.*), not merely a *de minimis* height differential (*Wilinski*, 18 NY3d at 10 [internal quotation marks and citation

NY3d at 603).

[7] North 10 and HSD's contention that the court must exclude plaintiff's expert affidavit is unfounded. CPLR 3212 (b) specifically states that "[w]here an expert affidavit is submitted in support of, or opposition to, a motion for summary judgment, the court shall not decline to consider the affidavit because an expert exchange pursuant to [CPLR 3101 (d) (1) (i)] was not furnished prior to the submission of the affidavit." Consequently, the court shall consider Mr. Cannizzo's expert affidavit (*see generally Rivers v Birnbaum*, 102 AD3d 26, 36-37 [2d Dept 2012]).

omitted]). Critically absent from Mr. Cannizzo's expert affidavit is any quantification of the electrical box's weight and an articulation of the force the electrical box generated given its weight and the distance traveled. Plaintiff thus failed to establish, as a matter of law, that the electrical box falling two to three feet belongs to the "narrow class of special hazards" protected by Labor Law § 240 (1) (*Simmons*, 165 AD3d at 726 [internal quotation marks and citation omitted]). Therefore, plaintiff's summary judgment motion warrants denial. Accordingly, it is

ORDERED that plaintiff's motion for an order granting him summary judgment against North 10 and HSD on the issue of liability under Labor Law § 240 (1) is denied; and it is further

ORDERED that North 10 and HSD's cross motion for an order, granting them summary judgment, dismissing plaintiff's Labor Law §§ 241 and 200, and common-law negligence causes of action, is denied.

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Hon. Carolyn E. Wade
Acting Supreme Court Justice