Burvid v Ambulatory Surgery Ctr. of Western N.Y.
2021 NY Slip Op 33236(U)
February 18, 2021
Supreme Court, Erie County
Docket Number: Index No. 804524/2017
Judge: Timothy J. Walker
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STATE OF NEW YORK
SUPREME COURT : COUNTY OF ERIE

ANTHONY BURVID,

Plaintiff,

DECISION AND ORDER
Index No.: 804524/2017

vs.

AMBULATORY SURGERY CENTER OF WESTERN NEW YORK,

Defendant.

BEFORE: **HON. TIMOTHY J. WALKER, J.C.C., A.J.S.C.**
Presiding Justice

APPEARANCES: **CELLINO LAW LLP**
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Attorneys for Plaintiff

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Attorneys for Defendant

WALKER, J.

Defendant, Ambulatory Surgery Center of Western New York (the "Center"), has applied, pursuant to CPLR §3212, for an order granting summary judgment in its favor and dismissing the Complaint in its entirety, on the merits and with prejudice.

BACKGROUND

This action arises out of an alleged fall from an operating room table/chair, known as a "surgi-chair,"[1] at the Center's premises (the "Incident").

The Surgi-Chairs

Surgi-chairs used at the Center were manufactured by either Steris Corporation, or Hausted.

At the time of the Incident, the Center used five (5) surgi-chairs, but it has been unable to identify the exact surgi-chair that Mr. Burvid alleges was involved in the Incident, because the Center uses them interchangeably in its various operating rooms. Accordingly, it is unknown whether the surgi-chair involved in the Incident was manufactured by Steris or Hausted.

Surgi-chairs are mobile surgical platforms typically used for same day medical procedures, such as eye surgeries. Surgi-chairs may be converted from a chair position to a recline (supine[2]) position, offering a single platform from pre-op to post-op (*see* https://hausted.com/chairs/).

The platform, upon which the patient either sits, or lies (depending on whether the surgi-chair is in the chair or supine position), is typically padded, includes railings on each side, as well as a headrest at the head of the chair, a footrest at the foot of the chair, and a strap to secure the patient to the chair (which is located in the approximate area of the patient's torso).

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[1] The surgi-chairs used at the Center were variously referred to as a "surgi-chair", "eye cart", "eye bed", "table" and a "cataract table" during the deposition testimony of the witnesses deposed in this matter. To avoid confusion, the Court shall refer to them as "surgi- chairs."

[2] The term "supine" is not defined in Black's Law Dictionary; it is defined by Merriam-Webster's Online Dictionary as, "lying on the back or with the face upward."

The surgi-chairs are also secured to a column, which leads to a base that includes four (4) caster wheels that may be locked into place. The base is wider than the column, but shorter than the platform, such that the head and foot areas of the platform extend beyond the base.

Surgi-chairs may be electrically lowered from a chair position to a bed position via a control box, known as a hand pendant, which is tethered to the surgi-chair.

Daniel Delcampo provided deposition testimony in this action, as a non-party witness (*see* Delcampo Transcript at NYSCEF Doc No. 52). On August 27, 2020, Mr. Delcampo testified that: he was employed by GF Health Products, Inc., as a territory manager; he had been so employed since October 25, 2010; his job duties included selling surgi-chairs and providing related customer support; his territory included Western New York; and that, in May 2017 and March 2020, he sold surgi-chairs manufactured by Hausted to the Center (*Id*., at pp. 12-14).

Mr. Delcampo also testified that, while he did not sell surgi-chairs manufactured by Steris, and was not familiar with their construction, they "do operate in a similar fashion as - as most surgi-chairs in that the back articulates, the leg section articulates, and the whole chair goes up and down" (*Id*., at p. 33). He similarly testified that, in 2016 (prior to the Incident), he visited the Center with a new surgi-chair manufactured by Hausted, because the Center wanted to confirm that the new Hausted chair was similar to its existing chairs - which it was (*Id*., at pp. 32-33).

Omnicor Biomedical Services, Inc. ("Omnicor") provides preventive maintenance services to the Center, which includes semi-annual inspections of the surgi-chairs as well as equipment repairs, as needed. Omnicor's president, James Bogett, has averred by way of affidavit that all five (5) of the Center's surgi-chairs passed the semi-annual preventative maintenance inspections performed in September 2016, approximately four (4) months prior to the Incident (*see* NYSCEF Doc. No. 16, ¶6, and inspection reports at NYSCEF Doc. No. 30; *see also*, NYSCEF Doc. No. 15, ¶¶6-10).

The Center's Version of the Incident

On the morning of January 18, 2017, Mr. Burvid arrived at the Center for a scheduled left eye cataract extraction and intraocular lens implant surgery, to be performed by his private attending eye surgeon, Dr. Albert Schlisserman (NYSCEF Doc. No.18, p. 8). Nurse Karen Lintner transported Mr. Burvid into the operating room from the pre-operative area, via wheelchair. Scrub technician Nancy Hutter and CRNA[3] Nancy Becht were already present in the operating room when Ms. Lintner entered the room with Mr. Burvid. At that time, the surgi-chair was in the supine position (NYSCEF Doc. No. 25, pp. 9-11; NYSCEF Doc. No. 28, pp. 6-11).

Ms. Lintner locked the wheelchair wheels, and directed Mr. Burvid to stand up from the wheelchair and sit down in the "middle" of the surgi-chair. She then instructed him to lie down, with his head facing the head of the surgi-chair (NYSCEF Doc. No. 25, pp.15, 18). Ms. Lintner assisted Mr. Burvid out of the wheelchair and, at the time Mr. Burvid sat on the surgi-chair, the chair remained in the supine position, and the railing on the side where Mr. Burvid was directed to sit was in the down position (*Id.*, at p. 16). The wheels of the surgi-chair were also locked (*Id.*, at p. 18).

As Mr. Burvid positioned himself on the surgi-chair, its top portion, where his head rested and, while Mr. Burvid was in the process of lying backwards, the surgi-chair "went back

[3] "CRNA" is an acronym for "certified registered nurse assistant"

rather quickly, forcefully, and the bed had tipped" (*Id*., at p. 19). At such time, Mr. Burvid had not yet been strapped down; he was in the process of lying down (*Id*.).

Ms. Lintner testified further that, a patient, such as Mr. Burvid, could have sat down in a seated position in a surgi-chair and then be re-positioned to a supine position, via the pendant. However, she did not believe there was any reason to do so in connection with Mr. Burvid's medical procedure (*Id*., at pp. 20-21).

At the time Ms. Lintner transported Mr. Burvid into the operating room, Ms. Hutter was preparing what is known as a "phaco machine," which is the instrument used to remove cataracts (NYSCEF Doc. No. 26, p. 33), and the the surgi-chair was in a supine (not chair) position (*Id*., at p. 37).

Ms. Hutter was not facing Mr. Burvid as he stood up from the wheelchair and proceeded to sit upon the surgi-chair, because she was focused on setting up the phaco machine. She heard Ms. Lintner tell Mr. Burvid to "be careful," and she then turned to see the surgi-chair "in a supine - or a teeter-totter position," with the head of the surgi-chair tilted backward toward the floor and his feet pointing toward the ceiling" (*Id*., at pp. 35, 39, 43). The top (head) part of the surgi-chair did not collapse. Rather, the entire platform portion of the surgi-chair shifted in a teeter-totter motion (*Id*., at p. 41). When the surgi-chair teeter-tottered, the wheels at its base were locked, but Ms. Hutter cannot recall whether any of the wheels left the floor (*Id*., at p. 40).

According to Ms. Hutter, when she witnessed the surgi-chair teeter-totter, Mr. Burvid had completed the process of placing himself onto the surgi-chair, was lying down on its padded platform, and was strapped down (*Id*., at p. 41).

The handwritten note in the Center's medical records describes the Incident, as follows: "Pt. moved self to OR table. Head of bed tipped to floor (slowly)" (NYSCEF Doc. No. 18, p. 16).

Ms. Hutter and Ms. Becht immediately joined Ms. Lintner at the side of the surgi-chair, and within seconds returned it to its horizontal position (*Id*., at p. 43). Dr. Schlisserman, who was in the room but not facing the surgi-chair at the time, heard the conversation among the operating room staff. When he turned to see what was happening, the surgi-chair had already been returned to its normal horizontal position with Mr. Burvid still on it (NYSCEF Doc. No. 27, pp. 17-18).

After the surgi-chair was righted, Dr. Schlisserman examined Mr. Burvid and found no injuries. He asked Mr. Burvid if he still wished to proceed with the surgery. Mr. Burvid responded that he was perfectly fine and wanted to go forward with the surgery. Dr. Schlisserman performed the cataract surgery with Mr. Burvid remaining on the surgi-chair, without incident or complication (*Id*., at pp. 18-19). The procedure was completed by 12:30 p.m. Mr. Burvid was transported to the post-operative area where he expressed no complaints, and he was discharged from the Center at approximately 12:51 p.m. (NYSCEF Doc. No. 18, pp. 3, 19, 36).

According to all of the Center's representatives, the Incident was limited to a momentary tilting (or teeter-totering) of the surgi-chair, without Mr. Burvid falling from it.

<u>Mr. Burvid's Version of the Incident</u>

Mr. Burvid's version of the Incident is vastly different.

Mr. Burvid alleges that, prior to entering the operating room, he was given medication to relax him (NYSCEF Doc. No. 40, p.38). He was then brought into the operating room in a wheelchair by a nurse who then directed him,

> to sit on the table, chair, whatever you want to call it and then swing my legs around. And when I swung my legs around is when the back half of the table collapsed (*Id.*, at p. 40).

Mr. Burvid does not recall anyone assisting him out of the wheelchair (*Id.*, at p. 41). He could not recall precisely whether the entire surgi-chair tilted, but described its top portion (head) as having "folded" in a downward motion (*Id.*, at p. 43).

Mr. Burvid further testified at his deposition that,

> [the nurse] told me to sit on the chair and swing my legs up and lay back. And when I did, the top half collapsed and I did a somersault off the table, kicked equipment everywhere (*Id.*, at p. 42).

Mr. Burvid claims his legs came up over his head, causing him to fall off the surgi-chair and that the back of his head and neck struck the floor first. He claims to have fallen off the surgi-chair; that he did not slide off it (*Id.*, at pp. 44-45). With respect to having knocked over equipment, he "heard metal clanging" (*Id.*, at p. 45). Mr. Burvid claims that in response to his fall, Dr. Schlisserman stated: "too bad I didn't stick the landing" (*Id.*).

The nurses responded to Mr. Burvid's fall by "[s]crambling . . . to come to [his] aid, trying to pick up the equipment that fell and straighten out the light and get [Mr. Burvid] back in the chair, table . . . " (*Id.*, at p. 46).

When Dr. Schlisserman and one of the nurses asked Mr. Burvid whether he was "okay," he responded "I don't know" (Id., at p. 47). He was then directed back onto the surgi-chair, and Dr. Schlisserman proceeded with the medical procedure (*Id.*). Mr. Burvid was in pain immediately following the Incident, but at his deposition he was unable to quantify the level of pain on a scale of one (1) to ten (10), because he believes he was in shock (*Id.*, at p. 48).

Mr. Burvid alleges various physical injuries as a result of the Incident.

STANDARD OF REVIEW

It is well settled that the party seeking summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law (*Ferluck AJ v. Goldman Sachs & Co.,* 12 NY3d 316, 320 [2009]). This requires sufficient evidence to shift the burden to the opposing party to produce evidentiary proof sufficient to establish the existence of genuine issues of material fact (*Id* at 320). "Mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" to defeat summary judgment (*Gilbert Frank Corp. v. Fed. Ins. Co.*, 70 NY2d 966, 967 [1988] [citation omitted]).

Moreover, factual issues raised by the opposing party must be genuine, as opposed to speculative (*Trahwen LLC v. Ming 99 Cent City #7, Inc.*, 106 AD3d 1467, 1468 [4th Dept 2013]).

DISCUSSION

Premises Liability

Mr. Burvid has alleged a single cause of action in his Complaint - negligence, based upon a theory of premises liability (NYSCEF Doc. No. 1, ¶¶ 7-12).

Negligence, however, may not be presumed from the mere happening of an accident. Rather, it is incumbent on Mr. Burvid to show by competent evidence that the injuries he attributes to the Incident were caused by reason of some breach of a duty on the part of the Center (*Smart v. Zambito*, 85 AD3d 1721 [4th Dept 2011]).

It is well settled that a plaintiff asserting a claim for premises liability "must establish the existence of a defective condition and that the defendant either created or had actual or constructive notice of the defect" (*Ingram v. Costco Wholesale Corp*., 117 AD3d 685, 685 [2d Dept 2014]; *see also, Mills v. Niagara Frontier Transp. Auth*., 163 AD3d 1435 [4th Dept 2018]).

The Center contends that, because there is no admissible evidence in the record that it either created or had notice of a defect in the surgi-chair involved in the Incident, Mr. Burvid's claim rests on whether the Center had constructive notice of any defect.

In order to impute constructive notice upon a property owner, the alleged "defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit defendant's employees to discover and remedy it" (*Gordon v American Museum of Natural History*, 67 NY2d 836 [1986]). Where the defect is latent and would not be discoverable upon a reasonable inspection, constructive notice may not be imputed (*Spindell v Town of Hempstead*, 92 AD3d 669 [2d Dept. 2012]). Accordingly, where a defendant submits proof that it did not create or have notice (actual or constructive) of the alleged dangerous condition or defect claimed to have been a proximate cause of a plaintiff's injury, the defendant has made a *prima facie* showing of entitlement to judgment as a matter of law (*Taggart v Fandel*, 148 AD3d 1521 [4th Dept 2017], *rearg denied*, 151 AD3d 1782 [4th Dept. 2017], *lv to appeal denied*, 30 NY3d 903 [2017]).

The Complaint does not identify an alleged defect in the surgi-chair, nor does the record establish that an alleged defect was visible and apparent, a requisite element of a claim of constructive notice (*Gordon, supra*). Rather, the admissible evidence shows that: (i) all five (5) of the Center's surgi-chairs passed the semi-annual preventative maintenance inspections performed in September 2016, approximately four (4) months prior to the Incident and, (ii) none of the (many) Center's representatives who were deposed recalled a problem with a surgi-chair.

Under these circumstances, the Center has met its burden as to summary judment (*Quinn v Holiday Health & Fitness Centers of New York, Inc.*, 15 AD3d 857 [4th Dept. 2005]).

In addition, given the absence of any evidence that the Center had constructive notice of a dangerous or defective condition, it cannot be held liable for failure to warn or to remedy the (unknown) defect and has met its burden on this issue as well (*Taggart v Fandel*, 148 AD3d 1521 [4th Dept. 2017]).

Launching an Instrument of Harm

Mr. Burvid has also alleged that the Center "launched an instrument of harm," causing him injury (Complaint, at NYSCEF Doc. No. 1, ¶7). However, this theory of liability is inapplicable to this action, because it is premised upon a claim for injuries sustained by a plaintiff arising from the negligent performance of a contract between two other parties (*Espinal v Melville Snow Contrs.,* 98 NY2d 136, 141 [2002]); *Ketch v Ridge Overhead Door, Inc.*, 173 AD3d 1627 [4th Dept. 2019] *leave to appeal den'd*, 35 NY3d 901 [2020]). Mr. Burvid has not alleged that the Center negligently performed duties under a contract, or that it exacerbated a dangerous or defective condition relative to the surgi-chair or made it less safe.

In light of the foregoing, the burden shifted to Mr. Burvid to submit evidentiary proof sufficient to establish the existence of genuine issues of material fact (*Ferluck*, 12 NY3d at 320).

Witness Credibility

In determining a motion for summary judgment, the Court's role is "not to determine credibility, but whether there exists a factual issue, or if arguably there is a genuine issue of fact" (*S.J.*

Capelin Assoc.,Inc. v. Globe Mfg. Corp., 34 NY2d 338, 341 [1974]). Credibility issues are properly to be determined by the trier of fact at trial (*Knepka v. Tallman*, 278 AD2d 811 [4th Dept 2000]).

Mr. Burvid aptly submits that questions of fact and issues of credibility abound in this action, particularly regarding the facts and circumstances of the Incident. On the one hand, the Center contends that the Incident was limited to a momentary titling of the surgi-chair, and that Mr. Burvid never fell from it. On the other hand, Mr. Burvid alleges that the surgi-chair tipped or outright collapsed, causing him to strike the floor and knock over various medical equipment.

However, the facts and circumstances surrounding the Incident have no bearing on the question of whether the Center had constructive notice of a defect in the surgi-chair. Accordingly, to extent the Court were to assume the truth of the facts of the Incident, as described by Mr. Burvid, such facts would not impute constructive notice of a defect to the Center, precluding a premises liability claim.

The Center's Use and Operation of the Chair

The parties disagree over the extent to which the surgi-chair tilted (or collapsed) and whether Mr. Burvid fell from the surgi-chair and struck the floor. It is indisputable, however, that Mr. Burvid entered the surgical room via a wheelchair and was instructed to stand from the wheelchair and place himself on the platform of the surgi-chair, while it was in the supine (horizontal) position, immediately prior to the Incident.

Mr. Burvid contends that the Incident would not have occurred in the event he was seated in the surgi-chair while the surgi-chair was in the "chair" position (as opposed to the supine position); he was then strapped into the chair; and the chair was then electronically adjusted to the supine position.

Representatives of the Center, including Dr. Schlisserman and Ms. Lintner, testified at their respective depositions that it would have been possible to have seated Mr. Burvid in the surgi-chair and strapped into place before then electronically re-positioning him and the surgi-chair into the supine position.

Dr. Schlisserman testified that while it would have been possible to do so, he "would never request that," as it "would probably extend the length of the operation . . . [b]ecause the electronics are not as quick as you would like it to be" (NYSCEF Doc. No. 27, pp. 21-23). However, Dr. Schlisserman further testified that the total time elapsed from electronically positioning the surgi-chair from the "chair" position to the supine position would amount to "a matter of a portion of a minute" (*Id*., at p. 23).

Ms. Lintner testified that a patient could be seated in the surgi-chair in the "chair" position and then electronically re-positioned into the supine position. In response to being asked why Mr. Burvid was not seated in the surgi-chair and then re-positioned electronically, Ms. Lintner testified, "[t]here was no reason to . . . [because] he was physically capable of sitting and then lying himself down" (NYSCEF Doc. No. 25, pp. 20-21).

<u>Warnings Contained in Manuals</u>

During discovery, the Center produced several operating manuals for a surgi-chair manufactured by Hausted, including, *inter alia*, a manual with a copyright date of 2012 (the "Manual") (NYSCEF Doc. No. 37).

The Center contends that the Manual (and similar manuals produced in discovery) should be disregarded as irrelevant and inapplicable to this action, because all of the surgi-chairs in use on the date of the Incident pre-dated the Manual (and all other manuals produced in discovery). However, Mr. Delcampo testified that when he visited the Center in 2016 in his capacity as a sales representative for GF Health Products, Inc., he confirmed that the Center's existing surgi-chairs (whether manufactured by Hausted or Steris) where similar to Hausted's 2016 model.

The several of the Center's representatives that were questioned about the Manual testified they never reviewed it. The question is begged: why not? It is reasonable to both assume and expect that the Center's doctors and staff would familiarize themselves with operating manuals for equipment used during surgery, such as a surgi-chair.

The Manual is brief and contains warnings including, *inter alia*,

> WARNING: When not in use, do not leave the chair in a reclined position;
>
> WARNING: At no time should the patient be permitted to enter or exit from the ends of the chair in partial or total recline position;
>
> WARNING: The chair has warning labels on both the head and foot end stating: Do not sit on end, as tipping may occur (NYSCEF Doc. No. 37, p.1-1).

Assuming, *arguendo*, that the Court disregarded the Manual (which it does not), one need not be well versed in physics to observe, and appreciate - merely from observing a photograph of a surgi-chair, that a surgi-chair might be capable of tipping in the event a person sat on it too close to either end. As previously stated, when the sugi-chair is in the supine position, only its middle section is supported by the column attached to the base, and its upper and lower sections extend beyond the base (*see* photograph of a Hausted surgi-chair in the "chair" position on the cover of the Manual at NYSCEF Doc. No. 37 and a rendering of it in the supine position at p. 3-1).

The Doctrine of *Res Ipsa Loquitur*

Mr. Burvid contends that the doctrine of *res ipsa loquitur* (the "Doctrine") applies to this action.

The Doctrine permits a jury to draw an inference of negligence from solely the happening of an accident (*Morejon v. Rais Constr. Corp.*, 7 NY3d 202 [2006]). A plaintiff seeking to apply the Doctrine must show that: (i) the accident is of a kind that normally does not occur in the absence of someone's negligence; (ii) the instrumentality that caused the injury is within the defendant's exclusive control; and (iii) the injury is not the result of any voluntary action by the plaintiff (*Kambat v. St. Francis Hosp*., 89 NY2d 489 [1997]); *Brink v. Anthony J. Costello & Son Development, LLC*, 66 AD3d 1451 [4th Dept 2009]). Upon establishing these elements, "a *prima facie* case of negligence exists, and plaintiff is entitled to have *res ipsa loquitur* charged to the jury" (*Kambat*, 89 NY2d at 494).

A plaintiff may raise the Doctrine in opposition to a defendant's summary judgment motion, without having previously alleged the Doctrine in his or her pleadings, because the Doctrine is not a separate theory of liability. Rather, it is an evidentiary rule that involves a "common sense application of the probative value of circumstantial evidence" (*Townsend v. New York City Hous. Auth.*, 187 AD3d 591 [1st Dept. 2020]; *see also, Iannota v. Tishman Speyer Props., Inc.,* 46 AD3d 297 [1st Dept. 2007]).

However, it is well within this Court's discretion to reject the Doctrine based on Mr. Burvid having delayed in asserting it for the first time in his opposition to the Center's motion for summary judgment (*Yousefi v. Rudeth Realty, LLC*, 61 AD3d 677, 678 [2d Dept 2009]; *Trevithick v Abbott Labs.,* 72 AD2d 840, 840-841 [3d Dept 1979]). While the Court has considered the Doctrine, it does not apply to this action.

Mr. Burvid is unable to satisfy the "exclusive control" element of the Doctrine. Omnicor provides maintenance services to the Center, which include inspection and repair of the surgi-chairs. In light of such services, the Center did not have exclusive control over the alleged instrumentality causing the harm, thus defeating the application of the Doctrine (*see Chambers v Tilden Towers Hous. Co.,* 177 AD3d 413 [1st Dept. 2019] [exclusivity element absent where building owner ceded responsibility for maintenance and repair to service contractor]).

Finally, the application of the Doctrine in a medical setting has been limited to the following scenarios: (i) where a foreign object is left in the body of the patient (*Kambat v. St. Francis Hosp.,* 89 NY2d 489 [1997]); (ii) where the patient, while anesthetized, experiences an unexplained injury in an area which is remote to the treatment site (*Schmidt v. Buffalo General Hosp.,* 278 AD2d 827 [4th Dept 2000]); or (iii) where the nature of the acts alleged, such as a beating of the patient by a psychiatrist, itself implicates improper treatment (*Pipers v. Rosenow*, 39 AD2d 240 [2d Dept 1972]). None of those circumstances are present in this matter.

In light of the foregoing, while the Center demonstrated entitlement to the relief requested in its original submission, Mr. Burvid submitted evidence, in admissible form, creating material issues of fact sufficient to defeat summary judgment. These questions include, *inter alia*, whether the Center was negligent for having failed to seat/strap Mr. Burvid in the surgi-chair prior to his medical procedure and then electronically re-position him and the surgi-chair to the supine position; whether the Center should have been aware of certain dangers associated with the operation of the surgi-chair, as reflected in the Manual (and similar manuals) and, if so, whether the failure to heed such warnings constituted negligence; and whether, in the event the Incident occurred as described by Mr. Burvid, Ms. Linter caused or contributed to it by, *inter alia*, not assisting Mr. Burvid onto the surgi-chair, instructing him to sit too close to one of the ends of the surgi-chair, failing to notice that he sat too close to one of the ends of the surgi-chair, and/or by failing to monitor Mr. Burvid as he got onto the surgi-chair.

Accordingly, it is hereby

ORDERED, that the Center's motion for summary judgment is denied in all respects.

This constitutes the Decision and Order of this Court. Submission of an order by the parties is not necessary. The delivery of a copy of this Decision and Order by this Court shall not constitute notice of entry.

Dated: February 18, 2021
Buffalo, New York

HON. TIMOTHY J. WALKER, JCC,
Acting Supreme Court Justice