

SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION,
FOURTH JUDICIAL DEPARTMENT

Danielle W. v. Jentsch & Co., Inc.

2023 NY Slip Op 03570 (App. Div. 2023) · No. 104 CA 22-00442 · Decided June 30, 2023

SUMMARY

The New York Appellate Division, Fourth Department, affirmed summary judgment dismissing a personal-injury action arising from a child’s fall on a sidewalk. The court held that the plaintiff’s failure to respond to a notice to admit constituted a conclusive judicial admission identifying a different area of the sidewalk as the accident location, and the plaintiff had abandoned or failed to preserve arguments concerning that area. The court also held that the plaintiff was not aggrieved by dismissal of the third-party claims against the contractors.

CASE DETAILS

COURT	Supreme Court of the State of New York, Appellate Division, Fourth Judicial Department
WRITING FOR THE COURT	Peradotto, J.P.; Lindley, J.; Bannister, J.; Montour, J.; Ogden, J.
JURISDICTION	New York
DECIDED	June 30, 2023
DOCKET	104 CA 22-00442
DISPOSITION	affirmed
PROCEDURAL POSTURE	Plaintiff appealed from an order and judgment granting South Park’s motion for summary judgment dismissing the complaint and cross-claims against it, and granting JEG’s and Kimil’s motions for summary judgment dismissing the third-party complaint. The Appellate Division affirmed.
STANDARD OF REVIEW	The court reviewed the grant of summary judgment and related questions of abandonment and aggrievement; no separate standard-of-review formulation was stated.
PRECEDENTIAL VALUE	published opinion
PARTIES	Danielle W., as parent and natural guardian of Dominic M. v. Jentsch & Co., Inc., 290 South Park LLC, Jim’s Electric & General Contracting, Inc., Kimil Construction, Inc.

TOPICS

premises liability personal injury summary judgment evidence appellate procedure

PRACTICE AREAS

torts premises liability personal injury evidence civil procedure

QUESTIONS PRESENTED

1. Whether plaintiff's failure to respond to a notice to admit conclusively established the location of the alleged fall.
2. Whether plaintiff could rely on the excavated sidewalk area as the alleged dangerous condition after failing to respond to the notice to admit.
3. Whether plaintiff abandoned her challenge to South Park's summary judgment by failing to address the effect of the judicial admission in her main appellate brief.
4. Whether plaintiff could challenge summary judgment dismissing the third-party complaint against JEG and Kimil when she was not aggrieved by those portions of the order and judgment.

HOLDINGS

1. An admission obtained through a notice to admit is a formal judicial admission and is conclusive in the action when the responding party neither objects, seeks to amend or withdraw the admission, nor provides an adequate explanation for the failure to respond.
2. Because plaintiff's judicial admission identified a different sidewalk area as the location of the fall, and she failed to address the alleged dangerous condition in that area, she abandoned any contention that South Park's summary judgment was erroneous and could not prevail based on the excavated area.
3. Plaintiff could not challenge the dismissal of the third-party complaint against JEG and Kimil because she was not aggrieved by those portions of the order and judgment.

KEY QUOTATIONS

*“an admission obtained through a notice to admit is deemed a formal judicial admission and is conclusive for that action” (*2)*

*“we conclude that her admission is 'conclusive of the facts admitted in the action'” (*2)*

FACTUAL BACKGROUND

Plaintiff's son fell on a sidewalk adjacent to property owned by Jentsch and leased to South Park while South Park was purchasing and renovating the property. Kimil, a plumbing subcontractor hired by JEG, excavated one section of sidewalk for a proposed water-line tie-in and later had that section backfilled with crusher run because permits had not been obtained. During discovery, Kimil served a notice to admit accompanied by photographs, including a photograph in which the son circled the alleged fall area; plaintiff did not object or respond, and the circled area was separate from the excavated area where JEG and Kimil had worked.

PROCEDURAL HISTORY

Plaintiff commenced a personal-injury action based on her son's fall on a sidewalk adjacent to property owned by Jentsch and leased to South Park. South Park commenced a third-party action against JEG and Kimil. Supreme Court, Erie County, granted the summary-judgment motions, except that it denied as moot JEG's request for common-law or contractual indemnification from Kimil. Plaintiff appealed, and the Appellate Division unanimously affirmed.

DISPOSITION

affirmed

CASES CITED

- Groeger v. Col-Les Orthopedic Assoc., 136 A.D.2d 952, 952 (4th Dep't 1988)
- Carothers v. United Tech., 177 A.D.2d 995, 995 (4th Dep't 1991)
- People v. Brown, 98 N.Y.2d 226, 232 n.2 (2002)
- Williams v. Kublick, 42 A.D.3d 872, 872-873 (4th Dep't 2007)
- Cornell v. County of Monroe, 158 A.D.3d 1151, 1153 (4th Dep't 2018)
- Riner v. Texaco, Inc., 222 A.D.2d 571, 571-572 (2d Dep't 1995)
- Kimso Apts., LLC v. Gandhi, 24 N.Y.3d 403, 412 (2014)
- Ciesinski v. Town of Aurora, 202 A.D.2d 984, 984 (4th Dep't 1994)
- Brooks v. City of Buffalo, 209 A.D.3d 1270, 1272 (4th Dep't 2022)
- Murnane Bldg. Contrs., LLC v. Cameron Hill Constr., LLC, 159 A.D.3d 1602, 1605 (4th Dep't 2018)
- Levine v. City of New York, 101 A.D.3d 419, 420 (1st Dep't 2012)
- Bartek v. Murphy, 266 A.D.2d 865, 866 (4th Dep't 1999), lv. denied, 95 N.Y.2d 756 (2000)
- Chaitovitz v. Lewis, 222 A.D.2d 392, 393 (2d Dep't 1995)
- Sartori v. Gregoire, 259 A.D.2d 1004, 1004 (4th Dep't 1999)