

---

22. 574 N.Y.S.2d at 345.

23. 170 A.D.2d 351, 566 N.Y.S.2d 52 (1<sup>st</sup> Dept. 1991).

24. 566 N.Y.S.2d at 33.

25. 126 A.D.2d 590, 511 N.Y.S.2d 31, 32 (2<sup>nd</sup> Dept. 1987).

26. 259 N.Y.S.2d 423, 687 N.Y.S.2d 885, 885-86 (2<sup>nd</sup> Dept. 1998).

---

8. *See Regula v. Ford Motor Credit Titling Trust*, 280 A.D.2d 843, 720 N.Y.S.2d 609, 611 (3<sup>rd</sup> Dept. 2001) (ABehr opposed the motions with nothing other than his own deposition testimony and affidavit stating that, as he traveled eastbound on Mariaville Road, he saw the driver's side of Regula's vehicle traveling toward him in his eastbound travel lane and that the point of impact of the vehicles was in his own lane of traffic. In view of Behr's original statement that he had no recollection of the accident, his current inability to recall any of the other events leading up to the collision and the fact that his statement is completely self-serving, directly contradicted by all of the physical evidence at the accident scene and unsupported by any expert opinion, we conclude that he has 'only raised a feigned factual issue which will not serve to defeat the motions for summary judgment.'"), *Andrews v. Porreca*, 227 A.D.2d 940, 643 N.Y.S.2d 250, 250 (4<sup>th</sup> Dept. 1996) ("The assertion of plaintiff in an opposing affidavit that she recalls having seen the electrical tape over the top portion of the outlet for about three months before the accident is a 'feigned attempt to avoid the consequences of her earlier testimonial admission' and is insufficient to defeat defendants' motion.").

9. 285 A.D.2d 402, 728 N.Y.S.2d 33 (1<sup>st</sup> Dept. 2001), leave den., \_\_\_ N.Y.2d \_\_\_ (February 14, 2002).

10. 67 N.Y.2d 836, 501 N.Y.S.2d 646 (1986).

11. 728 N.Y.S.2d at 34.

12. *See* note 9, *supra*.

13. 268 A.D.2d 318, 701 N.Y.S.2d 403 (1<sup>st</sup> Dept. 2000).

14. 701 N.Y.S.2d at 405.

15. 249 A.D.2d 28, 670 N.Y.S.2d 495 (1<sup>st</sup> Dept. 1998).

16. 670 N.Y.S.2d at 496.

17. 264 A.D.2d 797, 695 N.Y.S.2d 396, 398 (2<sup>nd</sup> Dept. 1999).

18. *See* note 9, *supra*.

19. 272 A.D.2d 145, 708 N.Y.S.2d 372 (1<sup>st</sup> Dept. 2000).

20. 708 N.Y.S.2d at 374.

21. 176 A.D.2d 226, 574 N.Y.S.2d 344 (1<sup>st</sup> Dept. 1998).

- 
1. See Zuckerman v. City of New York, 49 N.Y.2d 557, 427 N.Y.S.2d 595, 597-98 (1980); Friends of Animals v. Associated Fur Manufacturers, 46 N.Y.2d 1065, 416 N.Y.S.2d 790, 791-92 (1979).
  2. 305 N.Y. 288, 113 N.E.2d 424, 432 (1953).
  3. 22 N.Y.2d 439, 293 N.Y.S.2d 93, 94 (1968).
  4. 275 A.D.2d 282, 712 N.Y.S.2d 535, 537 (1<sup>st</sup> Dept. 2000).
  5. See also Joe v. Orbit Industries, Ltd., 269 A.D.2d 121, 703 N.Y.S.2d 14, 16 (1<sup>st</sup> Dept. 2000) (AThe mother's affidavit in opposition attesting to having seen the dog at the garage premises contradicts her deposition, in which she testified that she had only seen the dog tied up in the vacant lot. Her self-serving affidavit opposing the motion cannot be relied upon to contradict her prior testimony, and, thus, is insufficient to raise a genuine, as opposed to feigned, issue of fact as to Orbit's ownership or control of the dog.≡); Kistoo v. City of New York, 195 A.D.2d 403, 600 N.Y.S.2d 693, 694 (1<sup>st</sup> Dept. 1993) (AHere, the IAS court improperly relied on plaintiff's self-serving affidavit, which directly contradicted her prior deposition testimony that she did not see her assailant enter the building.≡); American Realty Co. v. 64B Venture, 176 A.D.2d 226, 574 N.Y.S.2d 344, 345 (1<sup>st</sup> Dept. 1991) ("Where, as here, issues were >not genuine, but feigned=, it was not improper to resolve questions of credibility on a motion for summary judgment.").
  6. 736 N.Y.S.2d 401, 402 (2<sup>nd</sup> Dept. 2002).
  7. See also Nieves v. Iss Cleaning Services Group, Inc., 284 A.D.2d 441, 726 N.Y.S.2d 456, 457 (2<sup>nd</sup> Dept. 2001) ("These contradictory statements raised a feigned factual issue designed to avoid the consequences of her earlier admission."); Oza v. Sinatra, 176 A.D.2d 926, 575 N.Y.S.2d 540, 542 (2<sup>nd</sup> Dept. 1991) ("Nevertheless, if the issue claimed to exist is not genuine, but feigned, and there is really nothing to be resolved at the trial, 'the case should be summarily decided, and an unfounded reluctance to employ the remedy will only serve to swell the Trial Calendar and thus deny to other litigants the right to have their claims promptly adjudicated.'"); Prunty v. Keltie's Bum Steer, 163 A.D.2d 595, 559 N.Y.S.2d 354, 355 (2<sup>nd</sup> Dept. 1990) ("Absent prejudice to the other side, the court has the inherent power to permit changes to a deposition transcript after it has been signed. However, on a motion for summary judgment, the court must determine whether the factual issues presented are genuine or unsubstantiated. If the issue claimed to exist is not genuine, but is feigned and there is nothing to be tried, then summary judgment should be granted.").

### Conclusion

It is true that an issue of fact will result in the denial of a motion for summary judgment, but careful attention must be paid to determine whether the purported issue of fact is "genuine" or "feigned." The Courts seem to have divided the feigned issue of fact doctrine into two distinct scenarios: (i) when a party attempts to overcome his own deposition testimony by tendering his or a witness' contradictory affidavit, or (ii) when a party asserts a patently false claim. If your issue of fact fits into either scenario, make that motion for summary judgment.

After plaintiffs commenced an action for specific performance against the seller, the seller offered plaintiffs another opportunity to close, but plaintiffs once again failed to appear. The seller then moved for summary judgment and plaintiffs opposed the motion by claiming that the seller had breached a clause of the contract that required the seller to cooperate prior to closing in the filing of alteration plans. The seller responded by tendering documentary evidence establishing that it had executed alteration plans prepared by plaintiffs. When the plaintiffs appealed the grant of defendants' motion, the First Department stated "In this posture, Supreme Court was fully justified in concluding plaintiffs had raised only feigned issues, not any genuine factual issues warranting a trial."<sup>24</sup>

The Second Department has also held that documentary evidence will trump a feigned issue of fact. In Assing v. United Rubber Supply Co., Inc.<sup>25</sup> the Court stated:

If the issue claimed to exist is not genuine, but feigned and therefore there is nothing to be resolved at trial, 'the case should be summarily decided, and an unfounded reluctance to employ the remedy will only serve to swell the Trial Calendar and thus deny to other litigants the right to have their claims promptly adjudicated.' The record in this case discloses an absence of a genuine issue of fact with regard to the plaintiffs' contention that United manufactured, supplied or distributed an allegedly defective hose which caused the injuries of the plaintiffs George Assing and Ruthven Collette... United has, however, conclusively vitiated the probity of the plaintiffs' submission by uncontroverted documentary evidence indicating that the label was from a shipment of hose which had been ordered by the employer of the plaintiffs George Assing and Ruthven Collette in March 1977, more than 14 months after the accident. The plaintiffs offered no meaningful rebuttal to this evidence.

Similarly, in Fisch v. Aiken<sup>26</sup>, the Second Department stated "Here, the appellant's affidavit merely presents a feigned factual issue designed to avoid the consequences of the petitioner's documentary evidence."

next to plaintiff when he fell, there was no water on the steps at that time, and he had never seen water on those particular steps at any time. Notwithstanding that the plaintiff did not tender an affidavit that contradicted his deposition testimony, the First Department nonetheless applied the feigned issue of fact doctrine. The Court held:

The credibility of the parties is not a proper consideration for the court weighing the sufficiency of the pleadings, and the plaintiff's statements in opposition to the motion are accepted as true 'unless the facts sworn to are patently untrue'. Where, as here, documentary evidence conclusively establishes that an issue of fact is 'not genuine, but feigned', it is appropriate to summarily resolve the matter.<sup>20</sup>

Documentary evidence also trumped a plaintiff's feigned issue of fact in American Realty Co. v. 64B Venture.<sup>21</sup> In American Realty Co., plaintiff commenced a declaratory judgment action to determine whether it had properly exercised its option to renew a lease. When the evidence established that the plaintiff assigned its right to exercise the renewal option, plaintiff responded by submitting a statement by its limited partner that the landlord had not consented to the assignment and by claiming that a provision requiring consent of the landlord was deleted from the assignment agreement. The defendant countered with documentary evidence consisting of a separate agreement, dated the same day as the assignment agreement, establishing that the landlord had consented to the assignment. Despite the seemingly dueling affidavits of the parties, the First Department affirmed the trial court's grant of the defendant's summary judgment motion, reasoning "Where, as here, issues were 'not genuine, but feigned', it was not improper to resolve questions of credibility on a motion for summary judgment."<sup>22</sup>

A plaintiff's specious claim was again defeated by documentary evidence in Kessner v. Izsak.<sup>23</sup> In Kessner, plaintiffs agreed to purchase a parcel of land but failed to appear for closing.

there for a few months.'

The above cases make clear that, although a court may generally not weigh the credibility of the affiants on a motion for summary judgment, an exception exists where an issue of fact is not "genuine" but "feigned." In light of Perez<sup>18</sup>, this exception is now applicable not only to the situation where a party submits an affidavit that contradicts his sworn deposition testimony, but also where a party attempts to overcome his deposition testimony by tendering a contradictory affidavit from a witness.

#### *Documents Overcoming Feigned Issues*

All of us have been faced with the situation where a plaintiff's deposition testimony, although implausible or down-right false, seemingly creates an issue of fact. Many motions for summary judgment have not been made because it was thought that the motion would be summarily denied due to the existence of an issue of fact. But, the feigned issue of fact doctrine has permitted defendants to obtain summary judgment when defendants have tendered documentary evidence establishing the falsity of the plaintiff's testimony.

A recent example of the application of the feigned issue of fact doctrine to this scenario is Leo v. Mt. St. Michael Academy.<sup>19</sup> In Leo, the plaintiff slipped on a stairway and testified at deposition that the stairs were worn and water had accumulated from students tracking it in on their shoes because it was raining on the day of the accident. The defendant moved for summary judgment and relied on an affidavit of a meteorologist who summarized weather reports that established it was not raining on the day of the accident. In addition to the meteorologist's affidavit, the defendant relied on the deposition of a student who testified that he was standing

motion for summary judgment.<sup>11</sup>

The Perez<sup>12</sup> decision is a logical extension of the First Department's earlier decision in Phillips v. Bronx Lebanon Hospital.<sup>13</sup> In Phillips, the plaintiff and two eye witnesses submitted affidavits in opposition to the defendant's motion for summary judgment that contradicted the plaintiff's sworn deposition testimony. In reversing the trial court's denial of the defendant's motion, the First Department held:

While issues of fact and credibility may not ordinarily be determined on a motion for summary judgment, where, as here, the self-serving affidavits submitted by plaintiff in opposition clearly contradict plaintiff's own deposition testimony and can only be considered to have been tailored to avoid the consequences of her earlier testimony, they are insufficient to raise a triable issue of fact to defeat defendant's motion for summary judgment.<sup>14</sup>

The Phillips decision is consistent with the First Department's decision in Tse Chin Cheung v. G&M Hardware & Electric, Inc.<sup>15</sup> In Tse Chin Cheung, the First Department rejected the plaintiff's attempt to defeat summary judgment by submitting his affidavit as well as the affidavit of his brother. The First Department held that "the affidavits submitted by plaintiff and his brother in opposition to defendants' motion ... were properly rejected by the court as self-serving statements directly contradicting their earlier deposition testimony ..."<sup>16</sup>

The Second Department has also rejected self-serving affidavits tendered by both the plaintiff and witnesses. In Buziashvili v. Ryan,<sup>17</sup> the Second Department stated that "[t]he self-serving affidavits submitted by the plaintiff, his sister, and his cousin's wife that the plaintiff had lived at the Brooklyn apartment for over 1 1/2 years presented a feigned factual issue designed to avoid the consequences of the plaintiff's earlier admission that he had only lived

to include the situation where a plaintiff opposed a motion for summary judgment not by tendering his affidavit but, rather, by relying on a contradictory witness affidavit.

In Perez v. Bronx Park South Associates the plaintiff slipped and fell on the exterior steps of an apartment building. At deposition, plaintiff testified unequivocally that he did not observe any leaflets on the steps when he left the building in the morning or when he later returned for lunch. The plaintiff also conceded that the accident took place an hour and half after he entered the building for lunch. The defendant moved for summary judgment arguing that the plaintiff, like the plaintiff in Gordon v. American Museum of Natural History<sup>10</sup>, could not prove that the defendant had actual or constructive notice of the alleged hazardous condition. The plaintiff opposed the defendant's motion not by tendering his affidavit but, rather, by relying on an affidavit from a witness who alleged that she observed leaflets on the steps the night before and morning of the accident. Because the contradictory witness affidavit was clearly tailored to overcome the admissions made by the plaintiff at his deposition, the First Department applied the feigned issue of fact doctrine and affirmed the trial court's grant of the defendant's motion. The First Department reasoned:

In light of the foregoing, plaintiff's own deposition testimony makes it clear that none of the criteria necessary to sustain a cause of action against the landowner has been met. Plaintiff's submission of a one-page affidavit from his neighbor, an alleged eyewitness to the accident, which consists of nothing more than two relevant sentences of conclusory allegations tailored to overcome plaintiff's testimony, is insufficient to warrant the denial of defendant's motion. As we held in Phillips v. Bronx Lebanon Hospital, "[w]hile issues of fact and credibility may not ordinarily be determined on a motion for summary judgment, where, as here, the self-serving affidavits submitted by plaintiff in opposition clearly contradict plaintiff's own deposition testimony and can only be considered to have been tailored to avoid the consequences of her earlier testimony, they are insufficient to raise a triable issue of fact to defeat defendant's

the credibility of the affiants on a motion for summary judgment unless it clearly appears that the issues are not genuine, but feigned."

Every Department has applied the doctrine without hesitation in the situation where a plaintiff submits an affidavit that contradicts his sworn deposition testimony. In Pacheco v. Fifteen Twenty Seven Associates, L.P.<sup>4</sup>, the First Department held:

The statements in the hospital record offered in support of the cross motion are hearsay, contradicted by the meteorological data and no more reliable than their source, which is plaintiff himself. Plaintiff's affidavit in opposition merely reiterates that he has no recollection of the date of the accident. 'It is well established that on a motion for summary judgment, the court must determine whether the factual issues presented are genuine or unsubstantiated.' Where the asserted factual issue is merely feigned, summary judgment should be granted. Plaintiff's allegations as to the date of his injury 'are unsubstantiated by evidentiary facts and are thus insufficient to raise a triable issue of fact necessary to defeat a motion for summary judgment.'<sup>5</sup>

The Second Department recently applied the doctrine in Ilardi v. Inte-fac Corporation<sup>6</sup>, where the Court stated "The injured plaintiff's affidavit, which indicated that he slipped and fell as a result of defective lighting at the premises where the accident occurred, only raised a feigned factual issue which will not serve to defeat the defendants' motion for summary judgment."<sup>7</sup> The Third and Fourth Department have equally applied the doctrine.<sup>8</sup>

#### *Rejection of Witness Affidavits*

The above cases involved the situation where the plaintiff tendered an affidavit that contradicted his sworn deposition testimony. Rejection of such affidavits is easy to rationalize because it is obvious that the defendant's motion has alerted the plaintiff to fatal gaps in proof and the plaintiff (and counsel) is attempting to nullify the admissions made at deposition. The doctrine was recently extended by the First Department in Perez v. Bronx Park South Associates<sup>9</sup>

### *Summary Judgment and the Feigned Issue of Fact Doctrine*<sup>1</sup>

We are all familiar with the rule that the existence of a genuine issue of material fact precludes the award of summary judgment.<sup>1</sup> The rule's reference to a "genuine issue" might appear to be a matter of semantics. In practice, however, the term "genuine issue" has been treated by the Courts not as an innocuous term but, rather, a stringent requirement on the party opposing a motion for summary judgment. Parties 'typically the plaintiff' have attempted to circumvent this requirement by creating or fabricating an issue of fact by a variety of means. This is the "feigned issue of fact" doctrine. One of the most frequent occurrences of the doctrine is the situation where a party in opposition to a summary judgment motion submits an affidavit that contradicts his own sworn deposition testimony. The Appellate Divisions have consistently applied the doctrine in such situations, and have increasingly applied the doctrine to also reject an affidavit of a witness that contradicts the plaintiff's sworn testimony.

The Court of Appeals has long recognized the feigned issue of fact doctrine. In a pre-CPLR case, Rubin v. Irving Trust Co.<sup>2</sup>, the Court stated that "The ultimate question is whether plaintiff has shown the existence of a triable fact issue. If the issue claimed to exist is not 'genuine, but feigned, and there is in truth nothing to be tried' summary judgment is properly granted." Similarly, in Glick & Dolleck v. Tri-Pac Expert Corporation<sup>3</sup>, a post-CPLR case, the Court of Appeals stated "To grant summary judgment, it must clearly appear that no material and triable issue of fact is presented. This drastic remedy should not be granted where there is any doubt as to the existence of such issues, or where the issue is arguable. The court may not weigh

---

<sup>1</sup> Steven R. Kramer is a senior litigation associate with Harrington, Ocko & Monk, LLP's White Plains office and argued the Perez v. Bronx Park South Associates case discussed herein in the First Department.