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Schiff v. Intersystem S&S Corp.

Supreme Court of New York, Appellate Division, First Department

March 5, 2026, Decided; March 5, 2026, Entered

Index No. 155656/19, Appeal No. 6014, Case No. 2025-04188

Reporter
2026 N.Y. App. Div. LEXIS 1375 *; 2026 NY Slip Op 01294 **; 247 A.D.3d 439; 2026 LX 184368; 2026 WL 615837

[1]** Joseph Schiff, Plaintiff-Appellant-Respondent, v Intersystem S&S Corp., et al., Defendants-Respondents-Appellants, Intersystem Installation Corp. et al., Defendants.

Prior History: *Schiff v. Intersystem S&S Corp., 2025 N.Y. Misc. LEXIS 1891 (Mar. 31, 2025)*

Core Terms

summary judgment, cross-claim, breach of contract, customer, procure, issue of liability, issue of fact, indemnification, common-law, scaffold, sidewalk, entitlement to summary judgment, additional insured, prima facie burden, domestic partner, plaintiff's case, fail to raise, opposing-party, cross-motion, spoliate, excited, facie, gap

Case Summary

Overview
Key Legal Holdings

- Plaintiff's statements to his domestic partner and police officer that he fell on Intersystem's scaffolding were inadmissible hearsay where the statements were not made contemporaneously with the fall nor while plaintiff was still under stress of excitement from the incident.
- An Intersystem supervisor's statement to plaintiff's partner that plaintiff tripped over scaffolding materials Intersystem left on the sidewalk was admissible as an opposing-party statement where the supervisor made the statement while working within his scope of employment.
- Plaintiff was entitled to summary judgment on liability against Intersystem where the supervisor's admissible statement combined with observations of blood on plaintiff and scaffolding materials on the sidewalk provided sufficient evidence to infer causation and establish that Intersystem launched an instrument of harm by failing to exercise reasonable care.

Material Facts

- Plaintiff fell on scaffolding materials on the sidewalk.
- Intersystem supervisor told plaintiff's partner that plaintiff tripped over scaffolding materials Intersystem left on sidewalk.
- Plaintiff's partner observed blood on both plaintiff and scaffolding materials at scene.
- Contract required Intersystem to name 'the Customer' as additional insured.
- Evidence established Apple Bank was 'the Customer' under the contract.

Controlling Law

- *CPLR 4549*(opposing-party statements).
- People v Deverow and People v Johnson (hearsay exceptions).
- Haibi v 790 Riverside Dr. Owners (summary

judgment causation standard).

- Espinal v Melville Snow Contrs. (launching instrument of harm).
- Contract law principles regarding breach and insurance procurement obligations.

Court Rationale

The court found the supervisor's statement admissible as an opposing-party statement made within scope of employment, and this evidence combined with physical observations at the scene provided sufficient proof of causation to establish Intersystem's liability. Apple Bank failed to prove when the area was last inspected, precluding summary judgment in its favor, but succeeded on its insurance breach claim because Intersystem failed to produce required insurance naming Apple Bank as additional insured.

Outcome
Procedural Outcome

Order modified to grant plaintiff's cross-motion for summary judgment on liability against Intersystem and Apple Bank's motion for summary judgment on its insurance breach cross-claim against Intersystem. All other aspects of the lower court's order were affirmed. No costs awarded.

LexisNexis® Headnotes

Civil Procedure > Judgments > Summary Judgment > Burdens of Proof

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Movant Persuasion & Proof

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Nonmovant Persuasion & Proof

HN1 **Summary Judgment, Burdens of Proof**

A defendant cannot show entitlement to summary judgment merely by pointing to perceived gaps in plaintiff's case.

Headnotes/Summary

Headnotes

Evidence — Hearsay Evidence — Excited Utterance or Present Sense Impression — Opposing Party Statement — Negligence — Maintenance of Premises — Trip and Fall over Scaffolding Left on Sidewalk — Contracts — Breach or Performance of Contract — Failure to Procure Insurance — Requirement to Add Additional Insured

Counsel: **[*1]** German Rubenstein LLP, New York (Joel M. Rubenstein of counsel), for appellant-respondent.

Wilson Elser Moskowitz Edelman & Dicker LLP, White Plains (Nicholas R. Napoli, III of counsel), for Intersystem S&S Corps., respondent-appellant.

London Fischer LLP, New York (***Brian A. Kalman*** of counsel), for The Apple Bank Building Condominium, respondent-appellant.

Judges: Before: Moulton, J.P., Pitt-Burke, O'Neill Levy, Michael, Chan, JJ.

Opinion

Order, Supreme Court, New York County (Paul A. Goetz, J.), entered March 31, 2025, which, to the extent appealed from as limited by the briefs, denied defendant Intersystem S&S Corp.'s motion for summary judgment dismissing the complaint as against it and dismissing the cross-claims of defendant The Apple Bank Building Condominium as against it for common-law indemnification and contribution and for breach of contract for failure to procure insurance; denied so much of plaintiff's cross-motion as sought summary judgment on the issue of liability as against Intersystem and spoliation sanctions against Intersystem; and denied so much of Apple Bank's motion as sought summary judgment dismissing the complaint as against it and on its cross-claims against Intersystem for common-law **[*2]** indemnification and breach of contract for failure to procure insurance, unanimously modified, on the law, to grant so much of plaintiff's cross-motion as sought summary judgment on the issue of liability as against Intersystem, and so much of Apple Bank's motion as sought summary judgment on its cross-claim against Intersystem for breach of contract for failure to procure insurance, and otherwise affirmed,

without costs.

Plaintiff's post-accident statements to his domestic partner and to the responding police officer, that he fell on Intersystem's scaffolding on the sidewalk, were not admissible under the exceptions to the rule against hearsay as excited utterances or present sense impressions. The statements were not contemporaneous with the incident (*see* People v Deverow, 38 NY3d 157, 165-166, 171 N.Y.S.3d 29, 190 N.E.3d 1161 [2022]), nor were they made while plaintiff was still under the stress of excitement after his fall (*see* People v Johnson, 1 NY3d 302, 306-307, 804 N.E.2d 402, 772 N.Y.S.2d 238 [2003]).

However, the testimony by plaintiff's domestic partner as to what an Intersystem supervisor told her after the accident — namely, that plaintiff had tripped over scaffolding materials that Intersystem had left on the sidewalk — was admissible as an opposing-party statement, as the supervisor made the statement while working within **[*3]** the scope of his employment by Intersystem (CPLR 4549).

Supreme Court should have granted summary judgment to plaintiff on the issue of liability as against Intersystem. The opposing-party statement, coupled with plaintiff's partner's observations at the scene of blood on both plaintiff and scaffolding materials on the sidewalk, "provide[d] sufficient facts and circumstances from which causation may be reasonably inferred" without resorting to speculation (Haibi v 790 Riverside Dr. Owners, Inc., 156 AD3d 144, 147, 64 N.Y.S.3d 22 [1st Dept 2017]). This evidence not only raised issues of fact precluding summary judgment dismissing the complaint as against Intersystem, but also established prima facie that Intersystem, in failing to exercise reasonable care in conducting its work, "launche[d] a force or instrument of harm" (Espinal v Melville Snow Contrs., 98 NY2d 136, 140, 773 N.E.2d 485, 746 N.Y.S.2d 120 [2002] [internal quotation marks omitted]). In opposition, Intersystem failed to raise an issue of fact.

In light of our determination on Intersystem's liability, the parties' arguments regarding whether Intersystem should have been sanctioned for alleged spoliation of evidence are rendered academic.

Supreme Court correctly denied Apple Bank's motion to the extent it sought summary judgment dismissing the complaint as against it. Apple Bank failed to establish its prima **[*4]** facie entitlement to judgment as a matter of law, as it submitted no evidence of when the area in question was last cleaned or inspected before plaintiff fell (*see* Vargas v Riverbay Corp., 157 AD3d 642, 642, 67 N.Y.S.3d 467 [1st Dept 2018]; Ricci v A.O. Smith Water Prods. Co., 143 AD3d 516, 516, 38 N.Y.S.3d 797 [1st Dept 2016]). Although Apple Bank submitted an affidavit addressing the issue in its reply, this evidence could not be considered in support of its prima facie burden (*see e.g.* Coon v WFP Tower B Co. L.P., 220 AD3d 407, 409, 197 N.Y.S.3d 31 [1st Dept 2023]). Further, Apple Bank ***HN1*** cannot show entitlement to summary judgment merely by pointing to perceived gaps in plaintiff's case (*see* Pullman v Silverman, 28 NY3d 1060, 1062, 43 N.Y.S.3d 793, 66 N.E.3d 663 [2016]; *Vargas, 157 AD3d at 642*).

Given the issues of fact as to its liability, Supreme Court also properly denied Apple Bank's motion to the extent it sought summary judgment on its cross-claim for common-law indemnification against Intersystem (*see* Correia v. Professional Data Mgmt., Inc., 259 A.D.2d 60, 65, 693 N.Y.S.2d 596 [1st Dept 1999]). We do not reach Intersystem's argument that Apple Bank's cross-claims against it should be dismissed, as Intersystem's request for that relief was expressly conditioned on the complaint's dismissal as against it (*see* Pander v. GuildNet, Inc., 245 A.D.3d 521, 2026 NY Slip Op 00201, *1 [1st Dept 2026]).

However, Supreme Court should have addressed the merits of Apple Bank's request for summary judgment on its newly added cross-claim against Intersystem for breach of contract for failure to procure insurance. The **[*5]** proposed amended pleading containing the cross-claim contained no demand for an answer, and was therefore deemed denied (*see* CPLR 3011). Accordingly, there was no need for Intersystem to join issue on the cross-claim before Apple Bank could seek summary judgment on it.

On the merits, Apple Bank should have been awarded summary judgment on that cross-claim, as it sustained its prima facie burden by submitting the relevant contract requiring Intersystem to name "the Customer" as an additional insured (*see* Benedetto v Hyatt Corp., 203 AD3d 505, 506, 165 N.Y.S.3d 45 [1st Dept 2022]). Although the contract does not define "the Customer," the documentary and testimonial evidence that Apple Bank submitted in support of its motion — including the deposition testimony of Intersystem's principal indicating that "the Customer" referred to Apple Bank — established that Apple Bank was "the Customer" within the meaning of the contract. Intersystem did not submit any insurance policy naming Apple Bank as an additional insured and, thus, failed to raise an issue of

fact in opposition (*see id.*).

THIS CONSTITUTES THE DECISION AND ORDER OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: March 5, 2026

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