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The Myth of the Expert Affidavit

By [David A. Glazer](#)
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The defense attorney spends hours crafting and drafting a motion for summary judgment. All the deposition transcripts have been reviewed; the bill of particulars has been thoroughly taken apart, piece by piece. The motion has been filed. Then, the plaintiff's attorney serves the opposition papers. Seemingly out of nowhere, a theory that you thought was discredited by your motion has been re-asserted with the backing of an expert affidavit. Instead of a dismissal, the lower court denies the motion on the basis of a question of fact because of a so-called battle of experts.

The battle of the experts should not be an automatic question of fact. The Court of Appeals and the appellate divisions have granted dismissal in several cases despite the existence of an expert by the plaintiff. Evidentiary standards do apply in summary judgment motions and an expert affidavit can be dissected and dismissed by using the rules of evidence. The courts have recently thrown out expert affidavits that have not complied with basic evidentiary stands.

Court of Appeals

On June 9, 2005, the Court of Appeals, in [Buchholz v. Trump 767 Fifth Avenue, LLC](#),¹ upheld a First Department decision that reversed the lower-court finding of a question of fact based upon an expert affidavit. The First Department had held that the plaintiff's expert's affidavit was conclusory and unsupported and that it is the role of the motion court, not the jury, to decide whether an expert's allegation of a judicial violation is accurate. The Court of Appeals further noted that the plaintiff's expert asserted that the building failed to abide by good and accepted engineering practices, but did not cite any authority, treatise, standard, building code or article to support the allegations.

The obvious importance of *Buchholz* is that to defeat a motion for summary judgment, the expert affidavit must be specific and cannot merely rely on the educational qualifications of the expert to create a question of fact. A defense attorney can exploit this law by using it against experts who make general allegations without backing them up. Additionally, *Buchholz* requires the court to determine the applicability of a code or statute. The Court affirmed the First Department's decision reversing the denial of summary judgment and granted summary judgment, finding that the building code violation cited by plaintiff's expert was not applicable. As the movant, a defense counsel now has Court of Appeals support for an argument that codes cited by a plaintiff that do not apply to the facts of the case at hand, should not serve to defeat summary judgment.

The Second Department

The Second Department has repeatedly ruled in favor of the defendant when the plaintiff's expert made

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unsubstantiated and conclusory allegations.² In all of these cases, the court granted summary judgment to the defendant despite the proffer of an expert affidavit from the plaintiff. In each of these recent decisions, the Appellate Division held that the expert affidavit submitted by the plaintiff was insufficient as a matter of law to create a question of fact.

Perhaps the strongest of these cases for a defendant is *Kasner*. In *Kasner*, the Second Department held that the affidavit of plaintiff's expert was insufficient in part because he did not visit the site, have any background in the supermarket industry or cite a violation of any industry standard. This case highlights another important key point of attack: the expert's qualifications. While the plaintiff's expert failed to support his allegations, the key from the defense perspective is the industry standard. It is often easier for the defendant to obtain an expert with industry experience.

The First Department

The First Department has issued two decisions since July that granted summary judgment despite an expert affidavit on behalf of the plaintiff.³ In both cases, the Appellate Division held that the expert affidavit failed to create a question of fact because the affidavit failed to adequately support the expert's allegations of negligence.

In *Torres*, a loading dock became wet due to snow being brought in by a delivery truck driven by the plaintiff. The plaintiff later slipped and fell on the wet loading dock. There was no dispute that the defendant was an out-of-possession landlord. While plaintiff's expert tried to create a question of fact by asserting various defects in the loading dock, none of these assertions were supported by any engineering protocols and there were no violations of the Building Code cited. The First Department specifically stated that an engineer cannot rely solely upon his status as an engineer to show negligent design or construction.

The Supreme Court

It appears that these decisions have begun to have an effect on the Supreme Court level with the recent decision by Justice Louis B. York.⁴ In *Higgins*, the plaintiff sued an out-of-possession landlord and the tenant for personal injuries. The out-of-possession landlord filed a motion for summary judgment and the plaintiff responded by retaining an expert, who alleged a structural defect in the relevant steps and violations of the general maintenance provisions of the City of New York Building Code. Justice York ruled that the general maintenance provisions were insufficient as a matter of law to create a question of fact and he granted the summary judgment motion.

Affidavit Requirements

The courts have been very clear in stating that in order for an expert affidavit to defeat a motion for summary judgment, the affidavit must be specific to the fact pattern of the case and be supported by identifiable standards. The courts will consider a specific judicial violation if it is applicable to the case, an industry standard if the standard is supported by an identifiable treatise or publication, or an industry specific protocol. The qualifications of the expert must also be applicable. An engineer, who puts forward an industry specific protocol, must demonstrate an industry-specific background. The expert must also explain the methodology which supports the claim.

Conclusion

This line of cases will make it harder for a plaintiff to cobble together an expert affidavit in opposition to a well-drafted summary judgment motion in an effort to create a question of fact. From the defense perspective, these cases not only improve the chances of a successful summary judgment motion, but will also force the plaintiff's expert to be specific in the allegations and minimize the possibility of surprise at the time of trial. In essence, the courts have shown a willingness to consider an attack upon the qualifications of plaintiff's expert on a motion for summary judgment and require more than not just any "expert" affidavit to defeat a well-drafted and meritorious motion for summary judgment.

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Endnotes:

1. 5 NY3d 1 (2005)
2. *Lezama v. 34-15 Parsons Blvd, LLC*, 16 AD3d 560 (2nd Dept., 2005) (door closed quickly); *Palermo v.*

Roman Catholic Diocese of Brooklyn, N.Y., 799 NYS2d 248 (1st Dept., 2005) (slip and fall on wet tiles); Kasner v. Pathmark Stores, Inc., 18 AD3d 440 (2nd Dept., 2005) (entrance mat allegedly caused trip and fall); Ali v. National Railroad Passenger Corp., 18 AD3d 483 (2nd Dept., 2005) (trip and fall on the handle of a cart).

3. Machado v. Clinton Housing Development Co., 798 NYS2d 56 (1st Dept 2005) (sink valve exploded); Torres v. West Street Realty Co., 2005 N.Y. Slip Op. 06563 (1st Dept 2005) (slip and fall on wet loading dock).

4. Higgins v. D & S Plaza Inc., 8 Misc3d 1028(A) (N.Y.Sup. Ct., Aug. 18, 2005).

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