CasePrepPlus

August 19, 2015

An advance sheet service summarizing recent and significant New York appellate cases

Editor: **Bruce Freeman**

NEW YORK STATE BAR ASSOCIATION
Serving the legal profession and the community since 1876

FIRST DEPARTMENT

CIVIL PROCEDURE, DEBTOR-CREDITOR, BANKING LAW.

"SEPARATE ENTITY RULE" DID NOT PROHIBIT NEW YORK COURTS FROM ENFORCING COMPLIANCE WITH AN INFORMATION SUBPOENA SERVED ON THE NEW YORK BRANCH OF A FOREIGN BANK.

Defendant international bank, Mega (based in Taiwan with branches in 14 countries), was required to comply with an information subpoena issued to its New York branch. The essence of the action is the collection of a $39 million judgment. It was alleged that Mega was aiding the judgment debtor in preventing collection. Because the information requested was available to Mega through electronic searches conducted from the New York branch, and because Mega had consented to the necessary regulatory oversight in return for permission to operate in New York, Mega was directed to comply with the information subpoena. The court explained: "The issue is whether the separate entity rule bars New York courts from compelling Mega's New York branch to produce information pertaining to Mega's foreign branches. The separate entity rule is that each branch of a bank is a separate entity, in no way concerned with accounts maintained by depositors in other branches or at the home office ... . The continuing validity of this arcane rule was recently upheld by the Court of Appeals ..., solely with respect to restraining notices and turnover orders affecting assets located in foreign branch accounts * * *. ... [T]he rule does not bar the court's exercise of jurisdiction over Mega to compel a full response to the information subpoena. Moreover, public policy interests and innovations in technology support such an exercise of jurisdiction. ... [B]road post-judgment discovery in aid of execution is the norm in federal and New York state courts ..., and New York law entitles judgment creditors to discover all matters relevant to the satisfaction of a judgment ... . * * * The information requested by the Information Subpoena can be found via electronic searches performed in [the bank's] New York office, and [is] within this jurisdiction ... " (internal quotations omitted). **Matter of B&M Kingstone, LLC v Mega Intl. Commercial Bank Co., Ltd., 2015 NY Slip Op 06482, 1st Dept 8-11-15**

INSURANCE LAW, CONTRACT LAW, PERSONAL INJURY.

"ADDITIONAL INSUREDS" ENDORSEMENT DID NOT HAVE A "NEGLIGENCE TRIGGER" — EVEN THOUGH THE INSURED WAS NOT NEGLIGENT, THE "ADDITIONAL INSUREDS" WERE ENTITLED TO COVERAGE UNDER THE POLICY.

The "additional insureds" endorsement in plaintiff-insurer's policy did not have a "negligence trigger." Therefore, even though it was demonstrated that the company insured under plaintiff-insurer's policy was not negligent, the endorsement covered the "additional insureds" because there was a causal relationship between the insured's acts and the underlying injury to a worker. The insured company, Breaking Solutions, was hired by the New York City Transit Authority (NYCTA) and the Metropolitan Transit Authority (MTA) to break up concrete for a subway construction project. Plaintiff-insurer, Burlington Insurance Co., insured Breaking Solutions. The NYCTA and MTA were additional insureds under the policy. It was NYCTA's responsibility to identify the location of electric cables and to shut off the power in the areas where Breaking Solutions was working. NYCTA failed to identify and shut off the power to a cable which was struck by Breaking Solutions' excavation equipment resulting in an explosion. The plaintiff in the underlying personal injury action, an NYCTA employee, was injured by the explosion. The issue came down to the language of the "additional insureds" endorsement which referred only to injuries "caused" by the acts or omissions of the insured. Even though the probable intent of the drafters of the policy was to cover only "negligent" acts or omissions by the insured which "caused" the injury, the language of the endorsement could only be enforced as written. Because the worker's injuries were "caused" by the (non-negligent) acts of the insured, the additional insureds (NYCTA and MTA) were covered under the terms of the policy. **Burlington Ins. Co. v NYC Tr. Auth., 2015 NY Slip Op 06481, 1st Dept 8-11-15**

SECOND DEPARTMENT

CIVIL PROCEDURE. DEBTOR-CREDITOR.

COUNTY CLERK WAS NOT AUTHORIZED TO ENTER JUDGMENT—THE UNDERLYING STIPULATION REQUIRED NOTICE PRIOR TO ENTRY OF JUDGMENT AND EXTRINSIC EVIDENCE WAS NECESSARY TO CALCULATE THE AMOUNT.

The Second Department vacated a clerk's judgment which had been entered based upon defendant's alleged violation of a stipulation requiring monthly installments to pay off a judgment. The stipulation allowed the entry of judgment only "upon ten (10) days notice" and extrinsic evidence was necessary to calculate the amount of the judgment. **HSBC Bank USA, N.A. v Wielgus, 2015 NY Slip Op 06494, 2nd Dept 8-12-15**

CIVIL PROCEDURE, PERSONAL INJURY, APPEALS.

DEFENSE VERDICT (FINDING THAT DEFENDANT WAS NEGLIGENT BUT THE NEGLIGENCE WAS NOT THE PROXIMATE CAUSE OF THE INJURY) WAS AGAINST THE WEIGHT OF THE EVIDENCE.

The defense verdict in a personal injury action was against the weight of the evidence, requiring a new trial. Of the three defendants, the jury found only one, Port Authority, negligent with respect to a door which came off its hinges, injuring the plaintiff. Because the only reasonable view of the evidence was that a defendant's negligence was the proximate cause of the injury, finding that the Port Authority was negligent, but that the negligence was not the proximate cause of plaintiff's injuries, was against the weight of the evidence. The court noted plaintiff's argument that the verdict was inconsistent as a matter of law was not preserved for appeal because objections to a verdict on the ground of inconsistency must be made before the jury is discharged. With respect to the "weight of the evidence" analysis, the court explained: "A jury verdict should not be set aside as contrary to the weight of the evidence unless the jury could not have reached the verdict by any fair interpretation of the evidence ... . Whether a jury verdict should be set aside as contrary to the weight of the evidence does not involve a question of law, but rather requires a discretionary balancing of many factors ... . Where the only reasonable view of the evidence presented at trial was that a defendant's negligence was a proximate cause of the plaintiff's injuries, a verdict finding that the defendant's negligence was not a proximate cause of the plaintiff's injuries must be set aside as contrary to the weight of the evidence ... . Here, in light of the jury's finding that neither [of the other two defendants] was negligent, the jury's determination that the Port Authority was negligent but that its negligence was not a substantial factor in causing the subject accident was not supported by a fair interpretation of the evidence ..." (internal quotations omitted). **Ahmed v Port Auth. of N.Y. & N.J., 2015 NY Slip Op 06485, 2nd Dept 8-12-15**

CRIMINAL LAW.

ODOR OF MARIHUANA PROVIDED PROBABLE CAUSE TO SEARCH DEFENDANT'S PERSON AND CAR.

The Second Department determined the odor of marihuana coming from inside defendant's car provided the police with probable cause to search defendant's car and person: "[T]he police had probable cause to search the defendant's vehicle and his person. An officer testified at the suppression hearing that he detected the odor of marihuana emanating from inside the vehicle through the open front windows. He further testified that he had been trained in the detection of marihuana and had made hundreds of drug arrests. Contrary to the defendant's contention, [t]he odor of marihuana emanating from a vehicle, when detected by an officer qualified by training and experience to recognize it, is sufficient to constitute probable cause to search a vehicle and its occupants ... " (internal quotations omitted). **People v McLaren, 2015 NY Slip Op 06522, 2nd Dept 8-12-15**

CRIMINAL LAW. EVIDENCE.

EVIDENCE OF UNCHARGED CRIMES COMMITTED BY DEFENDANT'S BROTHER SHOULD NOT HAVE BEEN ADMITTED — CONVICTION REVERSED.

Defendant's murder conviction was reversed because evidence of a shooting committed by defendant's twin brother should not have been admitted. This highly prejudicial evidence had no bearing on defendant's culpability: "Evidence of uncharged crimes or crimes committed by a person other than the defendant is generally inadmissible because it is highly prejudicial with little probative value ... . Here, the evidence of the unrelated shooting was admitted in response to evidence introduced by the defense to show that the defendant and his uncharged accomplices exhibited a calm demeanor shortly after the shooting at the garage and that such a demeanor was inconsistent with the People's contention that they had been recently involved in a violent crime. The People argued that evidence of the unrelated shooting was relevant to this case on the ground that it showed that the defendant's identical twin brother had similarly exhibited a calm demeanor after he shot an individual at a bar on a prior occasion. Evidence that the defendant's identical twin brother had perpetrated a separate shooting less than two months prior to the shooting in this case was highly prejudicial to the defendant and had no bearing whatsoever on the defendant's culpability for the crimes charged ... . This evidence served no purpose other than to raise an

inference of guilt by association ... " (internal quotations omitted). **People v Grigoroff, 2015 NY Slip Op 06517, 2nd Dept 8-12-15**

REAL PROPERTY, CORPORATIONS.

ALTHOUGH THE ARTICLES OF INCORPORATION HAD NOT BEEN FILED AT THE TIME OF THE TRANSFER, PLAINTIFF LIMITED LIABILITY COMPANY MAY HAVE LEGITIMATELY TAKEN TITLE TO REAL PROPERTY UNDER THE "DE FACTO CORPORATION DOCTRINE."

The defense motion to dismiss based upon documentary evidence was properly denied. Plaintiff limited liability company was able to demonstrate that it may be entitled to a declaration that it was the fee simple owner of property under the "de facto corporation doctrine." When plaintiff limited liability company took title, the company was not yet "in legal existence" because all the necessary documents had not been filed. Under the "de facto corporation doctrine" the limited liability company could be deemed to have taken title if (1) a law existed under which it might be organized, (2) there was an attempt to organize, and (3) there was an exercise of corporate powers thereafter. **Lehlev Betar, LLC v Soto Dev. Group, Inc., 2015 NY Slip Op 06496, 2nd Dept 8-12-15**

REAL PROPERTY, ZONING.

PETITIONER SUFFICIENTLY ALLEGED THE INVALIDITY OF THE TOWN'S RESTRICTIVE COVENANT REQUIRING PETITIONER TO SELL RATHER THAN LEASE CONDOMINIUMS.

Petitioner had stated causes of action contesting the validity and enforceability of the town's restrictive covenant requiring that condominiums built by petitioner be sold rather than leased. Petitioner had sufficiently alleged (1) the restrictive covenant was invalid because it regulated the person who owned the land (petitioner) rather than the use of the land, (2) the restrictive covenant was not enforceable because its purpose could not be accomplished, and (3) the restrictive covenant amounted to an unconstitutional taking. **Blue Is. Dev., LLC v Town of Hempstead, 2015 NY Slip Op 06488, 2nd Dept 8-12-15**

THIRD DEPARTMENT

EMPLOYMENT LAW. HUMAN RIGHTS LAW. EXECUTIVE LAW.

COMMISSIONER OF HUMAN RIGHTS' DETERMINATION RESPONDENT WAS SUBJECTED TO SEXUAL HARASSMENT AFFIRMED.

The Third Department affirmed the State Division of Human Rights' (SDHR's) determination that respondent corrections officer had been subjected to sexual harassment (creating a hostile work environment) and was entitled to economic and noneconomic damages. The court noted that its review powers were "narrow" and were confined to whether the commissioner of Human Rights' rulings were rational in light of the evidence. The court further noted that the commissioner should not have offset the award based upon past and future workers' compensation benefits, and the commissioner should have considered respondent's loss of pension benefits. In explaining its review criteria, the court wrote: "When reviewing a determination made by the Commissioner in a matter such as this one, our purview is 'extremely narrow' and must focus not on whether we would have reached the same result as did the Commissioner, but instead on whether the Commissioner's determination was rational in light of the evidence presented ... . Such deference is due given SDHR's expertise in evaluating discrimination claims ... . A violation of Executive Law § 296 based on a hostile work environment must be supported by proof that the workplace [was so] permeated [by a] discriminatory atmosphere that it alter[ed] the conditions of the [complainant's] employment ... . Where, as here, there is a finding of a hostile work environment as a result of sexual harassment, the evidence in the record must establish the pertinent elements, including proof that the discriminatory conduct occurred due to the complainant's gender ..." (internal quotations omitted). **Matter of Rensselaer County Sheriff's Dept. v New York State Div. of Human Rights, 2015 NY Slip Op 06551, 3rd Dept 8-13-15**

MENTAL HYGIENE LAW, CRIMINAL LAW, EVIDENCE.

EVIDENCE (OVER AND ABOVE PROOF RESPONDENT SUFFERED FROM ANTISOCIAL PERSONALITY DISORDER) WAS SUFFICIENT TO DEMONSTRATE RESPONDENT WAS UNABLE TO CONTROL HIS SEXUAL BEHAVIOR (JUSTIFYING CONFINEMENT).

After the Court of Appeals determined that Antisocial Personality Disorder (ASPD) was not a sufficient ground for a finding of a "mental abnormality" justifying confinement of a sex offender pursuant to the Mental Hygiene Law, Supreme Court vacated its prior adjudication that respondent was a dangerous sex offender requiring confinement. The Third Department, in a full-fledged opinion by Justice Devine, over a two-justice dissent, reversed Supreme Court and reinstated the confinement. The majority concluded there was sufficient evidence of mental disorders (over and above ASPD) which rendered respondent unable to control his sexual behavior. The dissenters found the evidence insufficient. Both the majority

and the dissent went through the evidence in detail. **Matter of State of New York v Richard TT., 2015 NY Slip Op 06557, 3rd Dept 8-13-15**

PERSONAL INJURY, CIVIL PROCEDURE, EVIDENCE, DAMAGES.

WHERE THE STATE IS A POTENTIAL JOINT TORTFEASOR WHICH CAN ONLY BE SUED IN THE COURT OF CLAIMS, THE JURY IN THE SUPREME COURT TRIAL (WHERE THE OTHER POTENTIAL JOINT TORTFEASOR IS SUED) SHOULD BE ALLOWED TO HEAR EVIDENCE OF THE STATE'S LIABILITY AND, IF APPROPRIATE, TO APPORTION DAMAGES BETWEEN THE DEFENDANT AND THE STATE.

Plaintiffs (husband and wife) alleged that, while driving on a state highway, plaintiff-wife was injured when a branch overhanging the highway from a tree located on defendant's property fell and struck her vehicle. Plaintiffs sued the property owner in Supreme Court and also commenced an action in the Court of Claims seeking damages from the State on the ground that it failed to properly maintain the trees along the highway. Defendant moved in limine to have the jury apportion liability for plaintiff-wife's injuries between defendant and the State. The Third Department, in a case of first impression, in a full-fledged opinion by Justice McCarthy, over a partial dissent, determined that evidence of both parties' liability could be presented in the Supreme Court trial and the jury should, if appropriate, be allowed to apportion damages between the defendant and the state. **Artibee v Home Place Corp., 2015 NY Slip Op 06556, 3rd Dept 8-13-15**

To view archived issues of CasePrepPlus,
visit www.nysba.org/caseprepplus.