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CasePrepPlus

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FIRST DEPARTMENT

DEFAMATION

PLAINTIFFS DID NOT RAISE A QUESTION OF FACT WHETHER ALLEGED DEFAMATORY REMARK WAS "OF AND CONCERNING" THEM.

The First Department, in a full-fledged opinion by Justice Tom, over a two-justice partial dissent, determined that the defamation claims were properly dismissed. The plaintiffs provided management services to a club, Cheetah's, but did not own or run the club (plaintiffs provided food services and booked dancers). The club was raided by federal authorities and arrests were made based upon allegations of illegal "trafficking" of women who performed as exotic dancers at the club. A news report about the raid characterized the club as "run by the mafia." The defamation claims were deemed properly dismissed because the relevant remarks were directed to "Cheetah's," and were not, therefore, "of and concerning" the plaintiffs by "innuendo." The dissenters argued plaintiffs had raised a question of fact whether the "run by the mafia" statement was "of and concerning" them. **Three Amigos SJL Rest., Inc. v CBS News Inc., 2015 NY Slip Op 06409, 1st Dept 8-4-15**

PERSONAL INJURY, MUNICIPAL LAW, EVIDENCE, ATTORNEYS

NEW TRIAL ON APPORTIONMENT OF DAMAGES REQUIRED, JURY'S APPORTIONMENT WAS AGAINST THE WEIGHT OF THE EVIDENCE, TWO-JUSTICE DISSENT ARGUED COUNSEL'S INFLAMMATORY REMARKS IN SUMMATION WARRANTED NEW TRIAL.

The First Department, in a full-fledged opinion by Justice Manzanet-Daniels, over a two-justice dissenting opinion, determined the weight of the evidence did not support a 65%/35% apportionment of damages to the city (65%) and the contractor (35%) who set up lane closures for highway repair work. Plaintiff was severely injured in an accident which the jury found was the result of the failure to adequately warn drivers of upcoming lane closures. Because the lane closures were the responsibility of the contractor, the majority determined the 65%/35% damages apportionment was not supported by the weight of the evidence and sent the matter back for a new trial on the apportionment of liability. Much of the opinion, including the entirety of the dissenting opinion, focused on the propriety of remarks made by plaintiffs' counsel during summation (vouching for his own credibility, attacking the credibility of defense witnesses, etc.). The dissenters argued the inflammatory remarks warranted a new trial. **Gregware v City of New York, 2015 NY Slip Op 06408, 1st Dept 8-4-15**

REAL ESTATE, CONTRACT LAW

NO BONA FIDE RETRACTION OF REPUDIATION OF PURCHASE CONTRACT.

The defendants, who had entered an agreement to purchase plaintiffs' condominium, were not justified in repudiating the agreement based upon ongoing "firestopping" work in the condominium-building, and, even if the agreement had been effectively repudiated, the purported retraction of the repudiation was not "bona fide." Therefore, the plaintiffs-sellers were entitled to keep the purchasers' $365,000 downpayment based upon purchasers' failure to close. The issue on appeal came down to whether the plaintiffs-sellers breached a paragraph of the agreement which required them to clear the unit of any code violations of which the plaintiffs had been notified in writing by the condominium board of managers. The majority (there was an extensive dissenting opinion) determined no such notice had been given to the plaintiffs-sellers and the defendants were aware of the firestopping work (the basis of defendants' code-violation allegation) when the contract was entered. The majority further determined the defendants' purported retraction of the repudiation was not "bona fide" because it was conditioned on proof of the completion of the firestopping work, thereby imposing a condition not contemplated by the contract. **Beinstein v Navani, 2015 NY Slip Op 06403, 1st Dept 8-4-15**

SECOND DEPARTMENT

PERSONAL INJURY, INSURANCE LAW

FIREFIGHTER INJURED REMOVING INJURED DRIVER FROM CAR — "DANGER INVITES RESCUE" DOCTRINE RAISED QUESTION OF FACT WHETHER FIREFIGHTER'S INJURY WAS PROXIMATELY CAUSED BY INJURED DRIVER'S NEGLIGENT OPERATION.

A firefighter may be entitled to coverage under his own insurance policy's supplementary uninsured/underinsured motorists (SUM) endorsement. Plaintiff-firefighter responded to a car accident and injured his shoulder removing the injured driver, Goodman, from his car. Plaintiff recovered the limit ($25,000) of the Goodman's policy and sought to recover under his own SUM endorsement. Reversing Supreme Court, the Second Department held it could not be determined as a matter of law that plaintiff's injury was not proximately caused by Goodman's negligent use of his car. Plaintiff had invoked the "danger invites rescue" doctrine in support of his argument that his shoulder injury was proximately caused by Goodman's negligence. **Matter of Encompass Indem. Co. v Rich, 2015 NY Slip Op 06432, 2nd Dept 8-5-15**

THIRD DEPARTMENT

ADMINISTRATIVE LAW, DRIVING WHILE INTOXICATED

DEPARTMENT OF MOTOR VEHICLES (DMV) DID NOT EXCEED ITS AUTHORITY IN PROMULGATING REGULATIONS RE: LIFETIME REVOCATION OF DRIVER'S LICENSE, FIVE-YEAR STAY OF RELICENSURE, AND SUBSEQUENT FIVE-YEAR IMPOSITION OF A RESTRICTED LICENSE/IGNITION INTERLOCK DEVICE UPON RELICENSURE.

The Third Department, in a full-fledged opinion by Justice Peters, over a two-justice dissent, determined that petitioner's challenges to Department of Motor Vehicles' (DMV'S) regulations re: (1) the lifetime revocation of a driver's license for alcohol-related convictions, (2) the five-year stay of relicensure for persons with three alcohol-related convictions, and (3) the subsequent five-year period with the imposition of a restricted license and installation of ignition interlock device upon relicensure, were properly dismissed as nonjusticiable (petitioner not yet affected by any of them). The court went on to determine the DMV, by promulgating these regulations, did not encroach upon the powers of the legislature. The dissenters argued that the some of the challenges were justiciable and the DMV in fact exceeded its powers by mandating a five-year stay of relicensure for anyone with three alcohol-related convictions within a 25-year lookback, as well as the subsequent five-year period allowing only a restricted license with the installation of an ignition interlock device. The court explained and applied the general principles for analyzing whether an agency has exceeded its powers. **Matter of Acevedo v New York State Dept. of Motor Vehs., 2015 NY Slip Op 06467, 3rd Dept 8-6-15**

PERSONAL INJURY, COURT OF CLAIMS

NOTICE OF INTENTION JURISDICTIONALLY DEFECTIVE, INADEQUATE DESCRIPTION OF LOCATION OF SLIP AND FALL.

Claimant's notice of intention was jurisdictionally defective because it did not adequately describe the location of plaintiff's alleged slip and fall on ice and snow: "Court of Claims Act § 11 (b) requires that a notice of intention to file a claim set forth, among other things, the time when and place where such claim arose ... . While absolute exactness is not necessary ... a claimant must provide a sufficiently detailed description of the particulars of the claim to enable [defendant] to investigate and promptly ascertain the existence and extent of [its] liability ... . Failure to abide by these pleading requirements constitutes a jurisdictional defect mandating dismissal of the claim, even though this may be a harsh result ... . Claimant's notice of intention states that he slipped and fell on unseen ice on a sidewalk 'on the campus of the State University of New York at Oneonta.' While we recognize that notices of intention are reviewed less strictly than claims ..., we nevertheless find that this generalized description of the location at which claimant fell was insufficient to permit defendant to investigate its liability ...". [internal quotation marks omitted] **Sommer v State of New York, 2015 NY Slip Op 06472, 3rd Dept 8-6-15**

FORECLOSURE, EVIDENCE

BANK'S POSSESSION OF NOTE (TO PROVE STANDING TO FORECLOSE) DEMONSTRATED UNDER BUSINESS RECORDS EXCEPTION TO HEARSAY RULE.

Plaintiff bank demonstrated it had standing to foreclose by sufficient proof it had possession of the underlying note at the time the foreclosure proceeding was commenced. Proof of possession of the note was by an affidavit invoking the business records exception to the hearsay rule. The court noted that evidence a document was filed does not qualify the documents as business records. Here, however, the affidavit included sufficient additional information to demonstrate the applicability of the exception: "While the mere filing of papers received from other entities, even if they are retained in the regular course of business, is insufficient to qualify the documents as business records ..., such records are nonetheless admissible if the recipient can establish personal knowledge of the maker's business practices and procedures, or that the records provided by the maker were incorporated into the recipient's own records or routinely relied upon the recipient in its business ... . To be admissible, these documents should carry the indicia of reliability ordinarily associated with business records ...". [internal quotation marks omitted] **Deutsche Bank Natl. Trust Co. v Monica, 2015 Slip Op 06453, 3rd Dept 8-6-15**

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