CasePrepPlus

August 5, 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

EMPLOYMENT LAW, LABOR LAW, CIVIL RIGHTS.

WHISTLEBLOWER STATUTE (LABOR LAW 740) ADDRESSES RETALIATION FOR REPORTING ABUSE BUT DOES NOT BAR CLAIMS STEMMING FROM THE ABUSE WHICH WAS REPORTED.

A cause of action pursuant to Labor Law 740, the whistleblower statute, did not bar the underlying sexual harassment and negligence claims reported by the whistleblowers. Labor Law 740 prohibits retaliation for blowing the whistle, which is distinct from claims arising from the misconduct which was reported (sexual harassment here). **Lee v Woori Bank, 2015 NY Slip Op 06299, 1st Dept 7-28-15**

PERSONAL INJURY, LABOR LAW, CIVIL PROCEDURE, EVIDENCE.

USE OF PARTIALLY OPEN A-FRAME LADDER WAS NOT MISUSE OF A SAFETY DEVICE, PLAINTIFF'S DIRECTED VERDICT PROPER, FAILURE TO TURN OVER ALL MEDICAL RECORDS REQUIRED NEW TRIAL ON DAMAGES.

The court, after a jury trial, properly directed a verdict in favor of the plaintiff on the Labor Law 240(1) cause of action. Plaintiff was using an A-frame ladder while welding a tank. It was not possible to open the ladder completely unless the ladder was perpendicular to the tank. Because using the ladder in a perpendicular position would have forced plaintiff to twist his body to weld, plaintiff placed the ladder against the tank in a partially open position. The ladder "shook" and plaintiff fell off it. The First Department held that, under those facts, the way plaintiff used the ladder did not constitute misuse of a safety device and, because Labor Law 240(1) was violated, plaintiff's action could not constitute the sole proximate cause of the injury. A new trial was required, however, because the medical records supplied to the defendants pursuant to a subpoena were much less voluminous than the medical records brought to trial by the plaintiff's medical expert, thereby depriving the defendants of the ability to fully cross-examine the expert. **Noor v City of New York, 2015 NY Slip Op 06295, 1st Dept 7-28-15**

PERSONAL INJURY, WORKERS' COMPENSATION LAW.

PETITION SEEKING JUDICIAL APPROVAL OF SETTLEMENT OF THIRD-PARTY TORT ACTION EIGHT YEARS AFTER SETTLEMENT SHOULD HAVE BEEN GRANTED.

The Court of Claims abused its discretion when it denied claimant's late petition to approve a settlement of a third-party tort action *nunc pro tunc*. The carrier had been aware of the settlement for eight years and had continued to pay benefits to the claimant throughout, the carrier would suffer no prejudice from the approval, and the amount of the settlement was fair and reasonable: "The Court of Claims erroneously denied claimant's request for the application for a nunc pro tunc order. A judicial order may be obtained nunc pro tunc approving a previously agreed-upon settlement, even in cases where the approval is sought more than three months after the date of the settlement, provided that the petitioner can establish that (1) the amount of the settlement is reasonable, (2) the delay in applying for a judicial order of approval was not caused by the petitioner's fault or neglect, and (3) the carrier was not prejudiced by the delay...". [internal quotation marks omitted] **Amacio v State of New York, 2015 NY Slip Op 06298, 1st Dept 7-28-15**

SECOND DEPARTMENT

ADMINISTRATIVE LAW, LANDLORD-TENANT.

AGENCY'S FAILURE TO FOLLOW ITS OWN REGULATIONS RENDERS DETERMINATION ARBITRARY AND CAPRICIOUS.

The Second Department, over a partial dissent, in a rent-overcharge proceeding, affirmed Supreme Court's review of the propriety of rent regulated by the NYC Rent Stabilization Code. The court explained the extent of the courts' review powers of the administrative rulings, noting that the Deputy Commissioner's failure to calculate the appropriate rent in the manner dictated by the controlling regulations rendered that particular aspect of the Commissioner's ruling arbitrary and capricious: "In determining that the [landlord was] entitled to a rental increase of $204.01 per month pursuant to Rent Sta-

bilization Code (9 NYCRR) § 2522.4(a)(1), the Deputy Commissioner deviated from the statutory calculations set forth in Rent Stabilization Code (9 NYCRR) § 2522.4(a)(4). Accordingly, the determination to recalculate the legal regulated rent to be $1,200 per month, by including a rental increase of $204.01 per month, was arbitrary and capricious and did not have a rational basis in the record ...". **Matter of Velasquez v New York State Div. of Hous. & Community Renewal, 2015 NY Slip Op 06353, 2nd Dept 7-29-15**

ARBITRATION, INSURANCE LAW.

ARBITRATOR HAD THE POWER TO MAKE THRESHOLD DETERMINATION THAT RESPONDENT INSURER WAS NOT A MOTOR VEHICLE INSURER SUBJECT TO THE MANDATORY ARBITRATION PROVISION OF THE NO-FAULT INSURANCE LAW.

The arbitrator had the power to determine whether the respondent insurance company, American Bankers Ins. Co., was a motor vehicle insurer subject to the mandatory arbitration provision of No-Fault Insurance Law. The Second Department affirmed the arbitrator's determination that American Bankers Ins. Co. was not a motor vehicle insurer (and therefore was not subject to mandatory arbitration). The taxi insured by petitioner was involved in a collision with a horse. The rider was seriously injured and petitioner insurer paid out about $60,000 in no-fault benefits. The petitioner insurer then sought to recover the no-fault benefits from American Bankers Ins. Co., which insured the stable where the horse was kept. The Second Department (in a full-fledged opinion not fully summarized here) explained the powers of an arbitrator in this context and explained why the arbitrator's conclusion (that the matter was not subject to mandatory arbitration under the Insurance Law) was rational. **Matter of Fiduciary Ins. Co. v American Bankers Ins. Co. of Fla., 2015 NY Slip Op 06343, 2nd Dept 7-29-15**

CIVIL PROCEDURE.

CAUSE OF ACTION AGAINST AN UNINCORPORATED ASSOCIATION (UNION) MUST ALLEGE EVERY MEMBER RATIFIED THE CONDUCT COMPLAINED OF.

In affirming the dismissal of a cause of action against unions brought by a probationary teacher who had been terminated, the Second Department noted that a suit against an unincorporated association must allege that the conduct complained of was ratified by every member of the association: "The Supreme Court ... properly granted the union defendants' cross motion pursuant to CPLR 3211(a) to dismiss the amended complaint insofar as asserted against them. Because the union defendants were unincorporated associations, and because the amended complaint failed to allege that the conduct complained of on the part of the union defendants was authorized or ratified by every one of their respective members, the amended complaint failed to state a cause of action against the union defendants ...". **Sweeny v Millbrook Cent. Sch. Dist., 2015 NY Slip Op 06331, 2nd Dept 7-29-15**

CIVIL PROCEDURE, CONTRACT LAW, INTENTIONAL TORTS.

MOTION TO DISMISS FOR FAILURE TO STATE CAUSES OF ACTION STEMMING FROM ALLEGED BREACH OF A JOINT VENTURE AGREEMENT, FLAWS IN EACH DISMISSED CAUSE OF ACTION DESCRIBED.

In an action stemming from the alleged breach of a joint venture agreement, the Second Department, in the context of a motion to dismiss for failure to state a cause of action, went through each cause of action and, where dismissal was appropriate, noted the pleading failure. The joint venture cause of action did not allege a mutual promise to share the losses. The constructive trust cause of action did not allege a confidential or fiduciary relationship. The fraud allegations were not collateral to the terms of the alleged joint venture and no out-of-pocket losses were alleged. The tortious interference with contract cause of action did not allege the intentional procurement of a breach of the joint venture agreement. The accounting cause of action did not allege that a demand for an accounting was made. The Second Department noted that the motion to amend the complaint to cure some of the defects should have been granted. The court succinctly described the criteria for determining a motion to dismiss for failure to state a cause of action where documentary evidence supporting the motion is submitted. **Mawere v Landau, 2015 NY Slip Op 06317, 2nd Dept 7-29-15**

CIVIL PROCEDURE.

DEPOSITION BY REMOTE ELECTRONIC MEANS AND USE OF VIDEO TRANSCRIPTION OF DEPOSITION IN LIEU OF TESTIMONY AT TRIAL SHOULD HAVE BEEN ALLOWED.

Supreme Court abused its discretion when it denied plaintiff's requests to conduct a deposition by remote electronic means and to present a video transcription of the deposition at trial in lieu of testifying. Plaintiff returned to China before depositions were complete and subsequent applications for a visa were denied: "The Supreme Court improvidently exercised its discretion in denying that branch of the plaintiff's cross motion which was pursuant to CPLR 3103(a) for a protective order directing that his deposition be conducted by remote electronic means. Generally, when a party to the action is to be deposed, the deposition should take place within the county . . . where the action is pending ... . An exception to this rule is where a party demonstrates that examination in that county would cause undue hardship ... . Here, in light of the evidence that the plaintiff's applications for a visa to return to the United States had been denied, and the evidence establishing that

he presently was ineligible to be admitted to the United States, the plaintiff demonstrated that traveling from China to the United States for his deposition or independent medical examination would cause undue hardship ... . Further, the Supreme Court erred in, in effect, denying that branch of the plaintiff's amended cross motion which was pursuant to CPLR 3117(a)(3) for leave to employ a video transcription of his deposition testimony at trial in lieu of appearing at trial to give testimony. The plaintiff met the criteria set forth in CPLR 3117(a)(3)(ii), (iv), and (v) ...".[internal quotation marks omitted] **Feng Wang v A & W Travel, Inc., 2015 NY Slip Op 06312, 2nd Dept 7-29-15**

CIVIL PROCEDURE, FORECLOSURE.

HEARING REQUIRED TO DETERMINE WHETHER PLAINTIFF BANK NEGOTIATED IN GOOD FAITH DURING SETTLEMENT CONFERENCE (TO FIND A WAY TO AVOID FORECLOSURE).

Defendant homeowner raised questions of fact whether plaintiff bank negotiated in good faith in a settlement conference pursuant to CPLR 3408 (designed to find a way to avoid foreclosure). The determinative motions heard by Supreme Court, therefore, were premature. The matter was sent back for a hearing on the "good faith" question: "CPLR 3408 requires the parties to a residential foreclosure action to attend settlement conferences at an early stage of the litigation, at which they must negotiate in good faith to reach a mutually agreeable resolution, including a loan modification, if possible (CPLR 3408[f]). During settlement conferences, [m]otions shall be held in abeyance (22 NYCRR 202.12-a[c][7])." [internal quotation marks omitted] **Onewest Bank, FSB v Colace, 2015 NY Slip Op 06321, 2nd Dept 7-29-15**

CONTRACT LAW.

CRITERIA FOR AN INTENDED THIRD-PARTY BENEFICIARY EXPLAINED.

The documents submitted by defendant power companies did not utterly refute plaintiff school district's allegation that it was an intended (not "incidental") third-party beneficiary of a Power Supply Agreement (PSA) in which the defendants agreed not to bring any further tax certiorari proceedings to challenge property tax assessments. The school district brought the breach of contract action when the defendants started a tax certiorari proceeding. Defendants' motion to dismiss based upon documentary evidence was properly denied. The court explained the criteria for a third-party beneficiary of a contract: "A non-party [to a contract] may sue for breach of contract only if it is an intended, and not a mere incidental, beneficiary ... . However, the identity of a third-party beneficiary need not be set forth in the contract or, for that matter, even be known as of the time of its execution... . A party asserting rights as a third-party beneficiary must establish (1) the existence of a valid and binding contract between other parties, (2) that the contract was intended for [its] benefit and (3) that the benefit to [it] is sufficiently immediate, rather than incidental, to indicate the assumption by the contracting parties of a duty to compensate [it] if the benefit is lost ... . In determining third-party beneficiary status it is permissible for the court to look at the surrounding circumstances as well as the agreement, and the obligation to perform to the third party beneficiary need not be expressly stated in the contract...". [internal quotation marks omitted] **Board of Educ. of Northport-E. Northport Union Free Sch. Dist. v Long Is. Power Auth., 2015 NY Slip Op 06304, 2nd Dept 7-29-15**

CRIMINAL LAW.

FOR CAUSE CHALLENGES TO JURORS WHO SAID ONLY THEY WOULD "TRY" TO BE FAIR SHOULD HAVE BEEN GRANTED.

Supreme Court should have granted three "for cause" challenges to jurors. All three jurors expressed doubts about their ability to be fair based upon personal experiences. All three said only that they would "try" to be fair: "At no point did the prospective jurors unequivocally state that their prior states of mind would not influence their verdict, and that they would render an impartial verdict based solely on the evidence. Under the circumstances, the Supreme Court should have granted the defense's challenges for cause to all three prospective jurors ...". **People v Alvarez, 2015 NY Slip Op 06354, 2nd Dept 7-29-15**

CRIMINAL LAW, CRIMINAL PROCEDURE LAW, APPEALS.

PETITION TO UNSEAL THE GRAND JURY RECORDS CONCERNING THE DEATH OF ERIC GARNER AT THE HANDS OF THE POLICE PROPERLY DENIED.

The Second Department, in an extensive, detailed decision (not fully summarized here), determined that the grand jury proceedings concerning the death of Eric Garner, who was unarmed, at the hands of the police should not be unsealed (the police were not indicted). As a threshold issue, the court found that New York City's Public Advocate, pursuant to the terms of the City Charter, did not have the capacity to bring the petition. However, the other petitioners, the Legal Aid Society, the New York Civil Liberties Union, and the local branch of the NAACP, did have standing to bring the petition. In response to the District Attorney's argument that the underlying order denying the petition to unseal the records was not appealable, the Second Department explained that the order was civil, not criminal, in nature (and therefore appealable). In essence, the court held that petitioners had not demonstrated the requisite "compelling and particularized" need for disclosure and the public interest in preserving grand jury secrecy outweighed the public interest in disclosure. The court explained the gener-

al analytical criteria as follows: "The decision as to whether to permit disclosure is committed to the trial court's discretion ... . However, without the initial showing of a compelling and particularized need, the question of discretion need not be reached, for then there simply would be no policies to balance ... . A party seeking disclosure will not satisfy the compelling and particularized need threshold simply by asserting, or even showing, that a public interest is involved. The party must, by a factual presentation, demonstrate why, and to what extent, the party requires the minutes of a particular grand jury proceeding to advance the actions or measures taken, or proposed (e.g. legal action, administrative inquiry or legislative investigation), to insure that the public interest has been, or will be, served...". [internal quotation marks omitted] **Matter of James v Donovan, 2015 NY Slip Op 06348, 2nd Dept 7-29-15**

CRIMINAL LAW, EVIDENCE.

DEFENDANT SHOULD NOT HAVE BEEN CROSS-EXAMINED ABOUT PRIOR POSSESSION OF GUNS UNDER SANDOVAL—-NO RELEVANCE TO CREDIBILITY.

Although the error was deemed harmless, the Second Department noted that defendant's prior conduct of possessing guns should not have been ruled a topic of proper cross-examination of the defendant. Gun possession has no relationship to credibility, which is the sole concern under Sandoval: "We agree with the defendant that the Supreme Court improvidently exercised its discretion in determining, after a Sandoval hearing (see People v Sandoval, 34 NY2d 371), that the People could inquire about the defendant's prior conduct of possessing guns. Whereas [c]ommission of perjury or other crimes or acts of individual dishonesty, or untrustworthiness . . . will usually have a very material relevance, whenever committed (id. at 377), the fact that the defendant had possessed guns on a prior occasion had little bearing on his credibility ...". **People v Anderson, 2015 NY Slip Op 06355, 2nd Dept 7-29-15**

CRIMINAL LAW.

SEX OFFENDER REGISTRATION ACT (SORA), MARIJUANA CONVICTIONS NOT SUFFICIENT FOR ASSESSING POINTS FOR ABUSE OF DRUGS.

Points for drug abuse should not have been assessed against defendant based solely on "marijuana" convictions: "... [T]he hearing court erred in assessing points under risk factor 11 (Drug or Alcohol Abuse) based solely on the fact that the defendant's criminal history includes convictions for the possession and sale of marijuana. Under risk factor 11, possession or sale of marijuana does not, in itself, amount to drug abuse ... . Since the People presented no evidence that the defendant had ever used, much less abused, drugs or alcohol, the evidence offered by the People was insufficient to satisfy their burden of proving, by clear and convincing evidence, that the defendant had a substance abuse history or was abusing drugs and or alcohol at the time of the offense..". [internal quotation marks omitted] **People v Velazquez, 2015 NY Slip Op 06323, 2nd Dept 7-29-15**

CRIMINAL LAW.

POLICE OFFICER'S OBSERVATIONS FILTERED THROUGH HIS EXPERIENCE JUSTIFIED STOP AND FRISK.

The Second Department, over a dissent, determined that the street stop of the defendant was justified by reasonable suspicion. Here the officer said he made eye contact with the defendant, saw an outline of a rectangular object under defendant's clothes and the defendant's movements were consistent with adjusting a weapon under the waistband. The majority held that was enough, because the officer could rely on his experience to interpret the defendant's movements. The dissent argued that making eye contact, seeing the outline of a rectangular object, and the defendant's adjusting his waistband were not enough to justify the stop. **People v Fletcher, 2015 NY Slip Op 06366, 2nd Dept 7-29-15**

CRIMINAL LAW, VEHICLE AND TRAFFIC LAW, DRIVING WHILE INTOXICATED, EVIDENCE.

PORTABLE BREATH TEST (PBT) RESULT SHOULD NOT HAVE BEEN ADMITTED AT TRIAL.

The Second Department determined defendant's DWI conviction must be reversed because evidence of the result of the portable breath test (PBT), which is generally inadmissible as unreliable, was allowed in evidence. The defendant had subsequently agreed to the chemical breath test, which can be admissible evidence at trial, but his breaths were so shallow during repeated attempts to administer the test that no results were obtained. The result of the PBT (which showed the presence of alcohol) was deemed admissible, not as proof of intoxication, but as evidence of defendant's state of mind when the chemical breath test was administered (the People's position was that defendant deliberately sabotaged the chemical test with shallow breaths). Although the PBT was ostensibly not admitted as proof of intoxication, the Second Department determined the jury would have taken it as such and, therefore, the probative value of the test result was outweighed by its prejudicial effect. **People v Palencia, 2015 NY Slip Op 06373, 2nd Dept 7-29-15**

DEBTOR-CREDITOR, MORTGAGES.

SEPARATION OF MORTGAGE FROM THE DEBT.

The Second Department rejected plaintiff's argument that the naming of an entity other than the lender as the mortgagee rendered the mortgage null and void: "…[T]he mortgage defined the plaintiff as the "Borrower," Webster Bank N.A. as the "Lender," and "MERS" as Mortgage Electronic Registration Systems, Inc., "a separate corporation that is acting solely as a nominee for Lender and Lender's successors and assigns" and "FOR PURPOSES OF RECORDING THIS MORTGAGE, MERS IS THE MORTGAGEE OF RECORD." ... The plaintiff erroneously contends that the naming of MERS as the mortgagee, even though Webster was the payee designated on the note, constituted a violation of the clear prohibition against separating the collateral from the debt and, as such, the mortgage instrument was rendered null and void ... . …[T]he mortgage instrument itself was [not] rendered null or void, but rather, … the enforceable interest which was intended to be transferred by the assignment of the mortgage alone was ineffective, as no interest is acquired by it ...". [internal quotations omitted] **Ruiz v Mortgage Elec. Registration Sys., Inc., 2015 NY Slip Op 06325, 2nd Dept 7-29-15**

EDUCATION-SCHOOL LAW, CONTRACT LAW.

NOTICE OF CLAIM REQUIRED BY EDUCATION LAW UNTIMELY (NOT FILED WITHIN THREE MONTHS OF ACCRUAL OF BREACH OF CONTRACT CLAIM).

In finding plaintiff's breach of contract action against defendant school district was time-barred, the Second Department noted the Education Law, as a condition precedent, requires the filing of a notice of claim within three months of the accrual of the cause of action: "Education Law § 3813(1) requires a party to serve a notice of claim upon a school district within three months after the accrual of such claim as a condition precedent to the commencement of an action ... . Claims arising out of a breach of contract accrue when payment for the amount claimed was denied (Education Law § 3813[1]). A denial of payment is only deemed to occur upon an explicit refusal to pay or when a party should have viewed its claim as having been constructively rejected ... . Here, in support of that branch of the defendants' cross motion which was for summary judgment dismissing the complaint, the defendants demonstrated, prima facie, that the plaintiff failed to serve a notice of claim within three months of ... the date when the defendants explicitly refused payment to the plaintiff. In opposition, the plaintiff failed to raise a triable issue of fact ...". [internal quotation marks omitted] **School Aid Specialists, LLC v Board of Educ. of Warwick Val. Cent. Sch. Dist., 2015 NY Slip Op 06328, 2nd Dept 7-29-15**

EVIDENCE.

CRITERIA FOR AN EXCEPTION TO THE BEST EVIDENCE RULE NOT MET.

The criteria for an exception to the "best evidence rule" for the admission of a copy of a joint development agreement, the terms of which were in dispute, were not met. A new trial was ordered. The court explained the rule: "The best evidence rule requires the production of an original writing where its contents are in dispute and are sought to be proven ... . The rule serves mainly to protect against fraud, perjury and inaccuracies ... which derive from faulty memory ... . Under an exception to the rule, secondary evidence of the contents of an unproduced original may be admitted upon threshold factual findings by the trial court that the proponent of the substitute has sufficiently explained the unavailability of the primary evidence, and has not procured its loss or destruction in bad faith ... . The proponent of the secondary evidence has the heavy burden of establishing, preliminarily to the court's satisfaction, that it is a reliable and accurate portrayal of the original. Thus, as a threshold matter, the trial court must be satisfied that the proffered evidence is authentic and correctly reflects the contents of the original before ruling on its admissibility ... . Here, the plaintiff failed to adequately explain the unavailability of the primary evidence, i.e., the original executed joint development agreement ...". [internal quotation marks omitted] **Stathis v Estate of Karas, 2015 NY Slip Op 06330, 2nd Dept 7-29-15**

MENTAL HYGIENE LAW, GUARDIANSHIP.

INSUFFICIENT EVIDENCE OF INCAPACITY.

There was insufficient evidence to support the finding that the allegedly incapacitated person (AIP) was in fact incapacitated: "Here, the petitioner failed to demonstrate, by clear and convincing evidence, that the AIP is incapacitated (see Mental Hygiene Law § 81.02[b]...). The testimony presented by the petitioner at the hearing failed to show that the AIP was unable to provide for his personal needs and that he was unable to adequately understand and appreciate the nature and consequences of any such inability ... . The Supreme Court's conclusion that the AIP 'suffers from dementia' was not supported by the record. The petitioner's medical expert testified that the AIP had not 'evidenced . . . dementia' and was 'capable of impressive cognitive functioning' ...". **Matter of Edward S. (Georgis-Corey), 2015 NY Slip Op 06351, 2nd Dept 7-29-15**

MENTAL HYGIENE LAW, CONSTITUTIONAL LAW.

WAIVER OF JURY TRIAL IN ARTICLE 10 SEX-OFFENDER CIVIL COMMITMENT PROCEEDING REQUIRES AN ON-THE-RECORD COLLOQUY AFTER CONSULTATION WITH COUNSEL.

The state and federal constitutions mandated an on-the-record waiver of the right to a jury trial in an Article 10 sex-offender civil commitment proceeding. Here, the respondent sent a letter to the judge explaining his reasons for wanting a non-jury trial. The letter was deemed insufficient to establish a knowing waiver. "We hold that in order to accomplish a valid waiver

of the right to a jury trial in an article 10 proceeding under Mental Hygiene Law § 10.07(b), and in accordance with due process, there must be an on-the-record colloquy, in order to ensure that the respondent understands the nature of the right, and that the respondent's decision is knowing and voluntary after having had sufficient opportunity to consult with counsel ... . * * * We note, however, that a written waiver such as is mandated by CPL 320.10 in criminal proceedings is not required in order to satisfy the requirements of Mental Hygiene Law article 10 or due process ...". **Matter of State of New York v Ted B., 2015 NY Slip Op 06352, 2nd Dept 7-29-15**

PERSONAL INJURY.

PEDESTRIAN STRUCK BY CAR FROM BEHIND NOT COMPARATIVELY NEGLIGENT AS A MATTER OF LAW.
Plaintiff pedestrian, who was struck from behind by defendant's car, was free from comparative negligence as a matter of law and entitled to summary judgment. Plaintiff was properly crossing a street and had almost reached the other side when defendant, who was making a left turn into the street plaintiff was crossing, struck plaintiff from behind. Because plaintiff could not have seen defendant's car before she was struck, there was no possibility she was comparatively negligent. **Castiglione v Kruse, 2015 NY Slip Op 06306, 2nd Dept 7-29-15**

PERSONAL INJURY, MUNICIPAL LAW, CONTRACT LAW.

CITY IMMUNE FROM SUIT BY PLAINTIFF ASSAULTED AT CITY HOMELESS SHELTER, PRIVATE SECURITY COMPANY NOT IMMUNE, PLAINTIFF WAS THIRD-PARTY BENEFICIARY OF SECURITY CONTRACT.
The city and the Department of Homeless Services (DHS) were immune from suit by plaintiff, who was assaulted in a city homeless shelter. The city's obligation to provide security is a governmental function for which it cannot be held liable absent a special relationship with the plaintiff (not the case here). However, the private security company, FJC was not immune from suit. Plaintiff was a third-party beneficiary of the contract between DHS and FJC. FJC was not entitled to summary judgment because it failed to demonstrate it was not negligent and the attack was not foreseeable. **Clark v City of New York, 2015 NY Slip Op 06307, 2nd Dept 7-29-15**

PERSONAL INJURY.

LIABILITY TO PLAINTIFF ASSAULTED BY AN INTOXICATED BAR PATRON (DRAM SHOP ACT) EXPLAINED.
The defendant bar was not entitled to summary judgment dismissing the complaint. Plaintiff alleged she was assaulted by an intoxicated patron. The court explained the proof requirements under the Dram Shop Act (General Obligations Law 11-101): "... [W]here a plaintiff alleges that he or she was assaulted by an intoxicated individual, to establish prima facie entitlement to judgment as a matter of law dismissing a complaint alleging a violation of the Dram Shop Act, a defendant is required to establish either that it did not serve alcohol to [the plaintiff's assailant] while he [or she] was visibly intoxicated or that its sale of alcohol to him [or her] had no reasonable or practical connection to the assault"... . Here, the defendants failed to establish their prima facie entitlement to judgment as a matter of law." [internal quotation marks omitted] **Covert v Wisla Corp., 2015 NY Slip Op 06308, 2nd Dept 7-29-15**

PERSONAL INJURY, MUNICIPAL LAW.

VILLAGE IMMUNE FROM SUIT ALLEGING NEGLIGENCE OF AMBULANCE PERSONNEL.
The village was entitled to summary judgment in an action alleging negligence on the part of ambulance personnel responding to a 911 call. The ambulance service is a governmental function for which the city cannot be held liable absent a special relationship with plaintiff (not the case here). The court explained the relevant law: "When a municipality provides ambulance service by emergency medical technicians in response to a 911 call for assistance, it performs a governmental function and cannot be held liable unless it owed a special duty' to the injured party ... . Such a special duty can arise, as relevant here, where the government entity voluntarily assumed a duty to the plaintiff beyond what was owed to the public generally, or, in other words, where the municipality voluntarily assumed a special relationship with the plaintiffs ... . A municipality will be held to have voluntarily assumed a duty or special relationship with the plaintiffs where there is: (1) an assumption by the municipality, through promises or actions, of an affirmative duty to act on behalf of the party who was injured; (2) knowledge on the part of the municipality's agents that inaction could lead to harm; (3) some form of direct contact between the municipality's agents and the injured party; and (4) that party's justifiable reliance on the municipality's affirmative undertaking ...". [internal quotation marks omitted] **Earle v Village of Lindenhurst, 2015 NY Slip Op 06311, 2nd Dept 7-29-15**

PERSONAL INJURY, WRONGFUL DEATH, CIVIL PROCEDURE.

ISSUES: (1) COLLATERAL ESTOPPEL BASED UPON CRIMINAL CONVICTION FOR STABBING PLAINTIFF'S DECEDENT, (2) BAR'S LIABILITY FOR ASSAULT BY PATRON, (3) UNSIGNED DEPOSITION TRANSCRIPTS NOT A VALID BASIS FOR DENIAL OF MOTIONS.

Plaintiff's decedent's estate was entitled to summary judgment against the defendant, Taylor, who stabbed plaintiff's decedent outside a bar both had just left. Taylor had pled guilty to manslaughter and waived the justification defense. Taylor was therefore collaterally estopped from relitigating the issue in the civil proceeding. Questions of fact about the foreseeability and proximate cause of the stabbing, as well as the adequacy of security at the bar, precluded summary judgment re: liability of the bar defendants. The Second Department noted that Supreme Court should have overlooked the fact that the depositions submitted in motion practice were unsigned (a basis for Supreme Court's denial of requested relief). No party raised the "unsigned deposition" issue and it amounted to only a minor irregularity. **Hartman v Milbel Enters., Inc., 2015 NY Slip Op 06314, 2nd Dept 7-29-15**

PERSONAL INJURY, MUNICIPAL LAW.

CITY DID NOT DEMONSTRATE ENTITLEMENT TO QUALIFIED IMMUNITY FOR PLANNING DECISIONS RE: THE SAFETY OF PLAYGROUND EQUIPMENT.

Questions of fact precluded summary judgment in favor of the city in a suit stemming from a playground injury. The complaint alleged the design of the playground equipment was unsafe. The city claimed qualified immunity for liability arising from planning decisions. But the city failed to demonstrate that it undertook a study which addressed the issue at the heart of the case. **Moskovitz v City of New York, 2015 NY Slip Op 06318, 2nd Dept 7-29-15**

PERSONAL INJURY, MUNICIPAL LAW.

WRITTEN NOTICE REQUIREMENT RE: DEFECT CAUSING SLIP AND FALL.

The city's failure to install a concrete pad for a bus stop was not the kind of "affirmative negligence" for which prior written notice of a defect is not required: "Prior written notice of a defect is a condition precedent which a plaintiff is required to plead and prove to maintain an action against the City ... . The two recognized exceptions to the prior written notice requirement are where the defect or hazard results from an affirmative act of negligence by the municipality, or a special use by the municipality that conferred a special benefit from it ... . Only when one of these exceptions applies is the written notice requirement obviated ... . The plaintiff's contention that the City failed to install a concrete bus pad, resulting in the formation of a physical defect in the roadway which caused her to fall, does not amount to an affirmative act of negligence. Thus, the plaintiff's claim requires prior written notice pursuant to Administrative Code of the City of New York § 7-201(c) ...". [internal quotation marks omitted] **Rodriguez v City of New York, 2015 NY Slip Op 06324, 2nd Dept 7-29-15**

TAX LAW, REAL PROPERTY TAX LAW, MUNICIPAL LAW.

VILLAGE DID NOT HAVE AUTHORITY TO SELL LAND DEDICATED TO PUBLIC USE (PUBLIC ROADS) TO SATISFY TAX LIENS.

The Second Department determined the village did not have the authority under the Real Property Tax Law (RPTL) to sell land dedicated to public use (dedicated public streets) to satisfy property tax liens: "... [W]hile RPTL 995 allows a municipality to consent to the sale of property to satisfy a tax lien, not all property owned by a municipality is freely alienable. As relevant here, a municipality holds the fee of dedicated public streets in trust for the public ..., and may not convey such a fee unless there is specific legislative authorization permitting it, or the parcel's use as a dedicated public street has been discontinued... . RPTL 995 did not provide the Village with that specific authorization. The statute only authorizes petitions to collect "validly levied or charged" taxes (RPTL 995). Since the Legislature limited the application of the statute in that way, it did not contemplate that municipally owned property held for public use, which is exempted from taxation by RPTL 406(1), would be subject to an enforcement proceeding under RPTL 995, or that such property would be sold by a municipality at public auction in reliance on section 995, in satisfaction of a claim for such taxes (see McKinney's Cons Laws of NY, Book 1, Statutes § 222). Contrary to the Village's contention, Village Law § 1-102 likewise did not provide the specific authorization necessary for the Village to sell a dedicated public road." **Matter of AJM Capital II, LLC v Incorporated Vil. of Muttontown, 2015 NY Slip Op 06335, 2nd Dept 7-29-15**

ZONING, ADMINISTRATIVE LAW.

COURTS' REVIEW POWERS RE: ZONING BOARD'S GRANT OF AREA VARIANCES EXPLAINED.

In affirming the zoning board's grant of area variances to "34 Cove" (re: construction of a tennis court), the Second Department explained the court's limited review powers and noted that the board applied the appropriate balancing test and considered all the statutory factors. That is as far as a reviewing court can go: "Here, the Zoning Board engaged in the required balancing test and considered the relevant statutory factors ... . While we agree with the petitioner that the proposed variances were substantial ..., and that the alleged difficulty was self-created ..., there was no evidence that the granting of the variance would produce an undesirable change in the character of the neighborhood, have an adverse effect on physical and environmental conditions, or otherwise result in a detriment to the health, safety, and welfare of the neighborhood or community ... . Moreover, the Zoning Board rationally concluded that the benefit sought by 34 Cove, namely, to maximize its use of the proposed tennis court, could not be achieved by the alternative site proposed by the petitioner ...". **Matter of Borrok v Town of Southampton, 2015 NY Slip Op 06340, 2nd Dept 7-29-15**

THIRD DEPARTMENT

APPEALS, CIVIL PROCEDURE.

ONLY DOCUMENTS RELEVANT TO ORDER/JUDGMENT APPEALED FROM SHOULD BE IN RECORD ON APPEAL.
The Third Department affirmed Supreme Court's denial of plaintiff's motion to settle the record (on appeal) by adding documents (which were deemed not relevant to the appeal). The court described the required contents of the record: "Consistent with the provisions of CPLR 5526, the record on appeal from a final judgment shall consist of a notice of appeal, the judgment roll, the transcript or a statement in lieu of a transcript if there was a trial or hearing, any exhibits in the court of original instance, any other reviewable order and any opinion in the case ... . The judgment roll, in turn, shall contain, among other things, the summons, pleadings, admissions, each judgment and each order involving the merits or necessarily affecting the final judgment (CPLR 5017 [b]...). As a result, [d]ocuments or information that were not before [the trial court] cannot be considered by this Court on appeal .. . Here, Supreme Court expressly found that the five documents at issue were neither considered in conjunction with nor relevant to the issues that gave rise to its ... order and judgment...". [internal quotation marks omitted] **Xiaoling Shirley He v Xiaokang Xu, 2015 NY Slip Op 06385, 3rd Dept 7-30-15**

CIVIL PROCEDURE, CONTRACT LAW.

OUT-OF-COURT SETTLEMENT AGREEMENT.
The writings (correspondence) which were intended to lead to a settlement agreement (re: real property taxes) did not create a binding agreement. Subsequent to the correspondence proposed stipulations had been circulated but were not executed. The Court explained the relevant analytical criteria: "... [A]n out-of-court settlement agreement is not binding upon a party unless it is in a writing subscribed by [that party] or [that party's] attorney (CPLR 2104). Writings between parties to an action or proceeding that discuss the possibility of settlement will be considered to constitute a binding agreement if "the settlement agreement was adequately described in [such] writings, namely, the agreement was clear, the product of mutual accord and contained all material terms" ... . Settlement-related writings may be deemed to have contained sufficiently detailed terms to give rise to a binding agreement when, for example, these writings explicitly incorporate the terms of other documents prepared in anticipation of settlement ... . In contrast, settlement-related writings will not be found to have created a binding agreement if they expressly anticipate a subsequent writing that is to officially memorialize the existence of a settlement agreement and set forth all of its material terms ...". [internal quotation marks omitted] **Matter of George W. & Dacie Clements Agric. Research Inst., Inc. v Green, 2015 NY Slip Op 06399, 3rd Dept 7-30-15**

CONTRACT LAW.

"NO DAMAGES FOR DELAY" AND "MANDATORY NOTICE" CLAUSES PRECLUDED SUIT.
The Third Department affirmed the dismissal of plaintiff's breach of contract complaint, finding that the exceptions to the enforceability of a "no damages for delay" clause did not apply, and the "mandatory notice" clause precluded suit for "extra work." Plaintiff was engaged by defendant to install heating, ventilation and air conditioning equipment. With regard to the "no damages for delay" clause, the court wrote: "As a general rule, contract clauses exculpating the contractee from liability to the contractor for damages resulting from delays in performance of the contract work are valid and enforceable ... . However, even where the contract contains such a clause, there are several recognized exceptions. As relevant here, a contractor may still recover for delays caused by the contractee's bad faith or its willful, malicious, or grossly negligent conduct ... . A defendant seeking summary judgment dismissing a claim for delay damages bears the initial burden of demonstrating prima facie that none of the exceptions to the 'damages for delay' clause are present ...". [internal quotation marks omitted] **Tougher Indus., Inc. v Dormitory Auth. of the State of N.Y., 2015 NY Slip Op 06388, 3rd Dept 7-30-15**

CRIMINAL LAW.

UNDER THE "BRIGHT LINE" RULE, FAILURE TO DIRECTLY ADDRESS A JUROR'S STATED BIAS REQUIRED REVERSAL.
Once the prospective juror (No. 383) expressed a bias based upon the age difference between the adult defendant and child complainant, the failure to gain the assurance from the juror that her prior state of mind will not influence her verdict and she will render an impartial verdict based solely on the evidence constituted reversible error. The fact that the juror assured the judge she would not vote to convict if she had a reasonable doubt and that she would follow the law as instructed was not enough to address the expressed age-related bias. A juror who has expressed a bias must, under the "bright line" rule, unambiguously assure the court she will put her bias aside. **People v Warrington, 2015 NY Slip Op 06380, 3rd Dept 7-30-15**

EDUCATION-SCHOOL LAW, ADMINISTRATIVE LAW.

TEACHER WHO NEVER CONSENTED TO AN "OUT OF AREA" ASSIGNMENT WAS ENTITLED TO SENIORITY IN HER TENURE AREA, DESPITE HER BEING ASSIGNED TO ANOTHER AREA.

Supreme Court correctly annulled the commissioner's determination terminating petitioner's employment on the ground that her position was properly eliminated because she had the least seniority. Although petitioner was in the English tenure area, she was assigned to teach computer classes, which she had taught for 11 years. The commissioner determined she had acquired no seniority because she had not taught in her tenure area. However, the relevant regulations require that a teacher consent to an "out of area" assignment. Because petitioner never consented to an "out of area" assignment, she was entitled to seniority in her English tenure area, despite the fact she was assigned to teach computer classes. The Third Department noted that the Commissioner's ruling constituted an artificial or forced construction of the applicable regulations. **Matter of Cronk v King, 2015 NY Slip Op 06396, 3rd Dept 7-30-15**

INSURANCE LAW.

PLAINTIFF NOT ENTITLED TO SUMMARY JUDGMENT DISMISSING INSURER'S "ARSON" AFFIRMATIVE DEFENSE.
Plaintiff was not entitled to summary judgment in its breach of contract action against the insurer. Plaintiff's restaurant was destroyed by fire. The insurer disclaimed coverage on the ground that the fire had been intentionally set. Plaintiff brought a summary judgment motion seeking the dismissal of the insurer's affirmative defense (arson) and judgment in its favor on liability. The court explained the relevant proof burdens re: the affirmative defense of arson at the summary judgment stage: "As the movant, plaintiff was required to initially demonstrate "the absence of genuine issues of material fact on every relevant issue raised by the pleadings, including any affirmative defenses" ... . Upon the affirmative defense of arson, if plaintiff, as the insured, met its initial burden, the burden would then shift to defendant, as the insurer. Although defendant's ultimate burden of proving the affirmative defense at trial would be by the standard of clear and convincing evidence ..., this strict standard is not applied at this juncture. Assuming that plaintiff met its initial burden to demonstrate that the fire was not intentionally set and that plaintiff had no motive to commit arson, to defeat the summary judgment motion defendant was merely required to demonstrate that plaintiff's premises may have been damaged by arson and that plaintiff may have had a motive to see the property destroyed by fire ... . Importantly, [e]vidence of motive and incendiary origin without more is sufficient to defeat an insured's motion for summary judgment in an action on its fire insurance policy... . Plaintiff failed to offer evidence to establish that the fire had not been intentionally set and, instead, merely challenged the validity of defendant's investigation, arguing that the evidence failed to affirmatively establish that the fire had been deliberately set." [internal quotation marks omitted] **Morley Maples, Inc. v Dryden Mut. Ins. Co., 2015 NY Slip Op 06395, 3rd Dept 7-30-15**

JUDGES (RECUSAL), CONTRACT LAW.

JUDGE'S FAILURE TO RECUSE HIMSELF WAS AN ABUSE OF DISCRETION, PLAINTIFFS' FAILURE TO COMPLY WITH CONDITION PRECEDENT MANDATED SUMMARY JUDGMENT TO DEFENDANTS.
The Third Department determined the judge hearing a case concerning the construction of a casino and resort should have recused himself. The judge's wife was in the county legislature and had voiced support of defendants' position. In his decision granting summary judgment to the defendants, the judge stated to do otherwise would "violate public policy," an issue which was not properly part of the case before him. However, the Third Department went on to consider the merits of the case. Plaintiffs' failure to meet a condition precedent (concerning the financing of the project) by the specified date was an unambiguous breach of the contract, mandating summary judgment in favor of the defendants. With respect to the recusal, the court wrote: "Considering the irrelevancy of [the judge's] comments to the issues before the court and the parallels between them and the public comments of [his wife] in support of [defendants'] casino proposal, [the judge's] inclusion of such inherently legislative and policy considerations as a basis for his order displays a striking lack of sensitivity to the aroma of favoritism [that] such a favorable disposition could engender ... . Under the circumstances, it seems to us that [the judge] should have recognized that this was a situation in which his impartiality might reasonably be questioned (22 NYCRR 100.3 [E] [1]), and, therefore, we must conclude that his failure to recuse himself constituted a clear abuse of discretion ...". [internal quotation marks omitted] **Concord Assoc., L.P. v EPT Concord, LLC, 2015 NY Slip Op 06393, 3rd Dept 7-30-15**

LIEN LAW.

VERIFIED STATEMENT RE: FUNDS HELD IN TRUST FOR SUBCONTRACTORS WAS DEFICIENT, PLAINTIFF SUBCONTRACTOR ENTITLED TO SUMMARY JUDGMENT ON LIABILITY (RE: ITS MECHANIC'S LIEN).
The Third Department affirmed Supreme Court's grant of summary judgment to plaintiff subcontractor in plaintiff's action against the site contractor seeking payment for completed work. Plaintiff alleged it was underpaid for its work and filed a mechanic's lien. The general contractor withheld 1 1/2 times the amount of the lien from its payment to the site contractor. The plaintiff demanded a verified statement from the site contractor (showing the receipt and disbursement of funds held by the site contractor in trust for subcontractors) pursuant to Lien Law 76. The verified statement submitted by the site contractor indicated a multi-million dollar discrepancy between the amount it received and the amounts paid out. Because of the discrepancy, the site contractor was found to have used the funds it held in trust for subcontractors for purposes other than the trust. Plaintiff was therefore entitled to summary judgment on liability. **Anthony DeMarco & Sons Nursery, LLC v Maxim Constr. Serv. Corp., 2015 NY Slip Op 06394, 3rd Dept 7-30-15**

REAL ESTATE, CONTRACT LAW.

PURCHASE CONTRACT PROPERLY CONVERTED TO TIME-IS-OF-THE-ESSENCE CONTRACT.
In affirming the judgment awarded plaintiff in this breach of contract action, the Third Department noted that a "non time of the essence" real estate purchase contract can be converted to a "time of the essence" contract by giving the buyer clear, unequivocal notice and a reasonable time to perform, as was done by the seller here. **12 Baker Hill Rd., Inc. v Miranti, 2015 NY Slip Op 06400, 3rd Dept 7-30-15**

REAL PROPERTY, APPEALS.

DRIVEWAY MAINTENANCE AGREEMENT RUNS WITH THE LAND.
Small claims court properly determined an agreement to maintain a driveway on a right-of-way passing through the grantor's front parcel to the grantee's rear parcel ran with the land. The Third Department noted its review of small claims court rulings is confined to whether "substantial justice" was done according to the rules and principles of substantive law. Small claims court correctly held that the original parties to the property transfer intended the maintenance to run with the land and that the agreement "touches and concerns" the land. Therefore the defendant, the subsequent purchaser of the rear parcel, was bound by the maintenance agreement: "Appellate review of small claims is limited to determining whether 'substantial justice has not been done between the parties according to the rules and principles of substantive law' ... . Accordingly, this Court will overturn such a decision only if it is clearly erroneous ... . As relevant here, to establish that the 1982 agreement ran with the land and was binding on defendants, plaintiff was required to establish that (1) the grantor and grantee intended the [agreement] to run with the land, (2) there is privity of estate between the parties to the current dispute, and (3) the [agreement] touches and concerns the land ... . * * * ... [A]n agreement touches and concerns the land if it affects the legal relations — the advantages and the burdens — of the parties to the [agreement], as owners of particular parcels of land and not merely as members of the community in general...". [internal quotation marks omitted] **Pugliatti v Riccio, 2015 NY Slip Op 06398, 3rd Dept 7-30-15**

TAX LAW, REAL PROPERTY TAX.

PARENT CORPORATION NOT ENTITLED TO QUALIFIED EMPIRE ZONE ENTERPRISE (QEZE) TAX CREDITS BECAUSE A RELATED BUT SEPARATE BUSINESS ENTITY FAILED TO MAKE PAYMENTS REQUIRED BY ITS "PAYMENT IN LIEU OF TAXES" (PILOT) AGREEMENT.
With regard to a building in the City of Rochester, the Third Department determined petitioner (parent corporation) was not entitled to Qualified Empire Zone Enterprise (QEZE) tax credits because a related but separate limited partnership, Rochwil, did not make payments required by its "payment in lieu of taxes" (PILOT) agreement. "The primary issue presented in this proceeding is whether petitioner could claim a refund for unused QEZE real property tax credits that were reported by its subsidiary based on its partnership interest in Rochwil for PILOT payments that were not made. As the taxpayer seeking a tax credit, petitioner bears the burden of establishing that such credit is unambiguously set forth in the statute ... . To meet this burden, petitioner must show that its interpretation of the statute is not only plausible, but also that it is the only reasonable construction ... .* * * Contrary to petitioner's claim, the plain and unambiguous language of the statute provides that real property taxes imposed are distinct from PILOT payments made, and where, as here, a QEZE does not own the property but is instead subject to a PILOT agreement with the property owner, the PILOT payments must be made in order to qualify for the credit provided by Tax Law former § 15 ...". [internal quotation marks omitted] **Matter of Wilmorite, Inc. v Tax Appeals Trib. of the State of N.Y., 2015 NY Slip Op 06386, 3rd Dept 7-30-15**

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