June 3, 2015

CasePrepPlus

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

ADMINISTRATIVE LAW. REVIEW POWERS RE: AGENCY-DETERMINATIONS. APPEALS.

The First Department reversed Supreme Court's denial of a motion to dismiss a petition to annul an agency-determination. The underlying proceedings involved two nurses accused of submitting false time sheets. In seeking a hearing allowed by the collective bargaining agreement, the union, on behalf of the nurses, requested certain documents relevant to the allegations from the New York City Human Resources Administration (HRA). HRA refused to turn over the documents, arguing that such "discovery" is not allowed in disciplinary actions (by the relevant regulations). The Board (of Collective Bargaining) ultimately ruled that some, but not all, of the requested documents (those kept in the regular course of business) should be turned over. HRA filed an Article 78 petition seeking to annul the Board's determination. Supreme Court denied the union's motion to dismiss the petition. The First Department held the petition should have been dismissed. In reviewing an agency determination, the court looks only at whether the determination is rationally based. Here the Board's determination was based upon its own precedents and related jurisprudence. Therefore, the determination must stand. A court cannot substitute its own judgment for that of the agency. **Matter of City of New York v New York State Nurses Assn., 2015 NY Slip Op 04437, 1st Dept 5-26-15**

CRIMINAL LAW. EVIDENCE. WEIGHT OF THE EVIDENCE. DNA. APPEALS.

The First Department, over a dissent, determined that defendant's conviction of criminal possession of a weapon was against the weight of the evidence. The medical examiner testified there was a mixture of DNA from at least three persons found on the weapon and defendant "could" have been a contributor to that mixture. "In other words, the medical examiner could not rule out the reasonable possibility that another unrelated individual could match the DNA profile." The court explained its role in a "weight of the evidence," as opposed to a "legal insufficienc ," analysis: "On this appeal, defendant does not ask us to reverse his convictions of criminal possession of a weapon in the second and third degrees on the ground that the trial evidence was legally insufficient to support such convictions. Instead, defendant argues that his convictions should be reversed because the jury's verdict was against the weight of the evidence. An appellate court weighing the evidence must, like the trier of fact below, weigh the relative probative force of conflicting testimony and the relative strength of conflicting inferences that may be drawn from the testimony ... . If based on all the credible evidence a different finding would not have been unreasonable and if the trier of fact has failed to give the evidence the weight it should be accorded, the appellate court may set aside the verdict ... . When an appellate court performs weight of the evidence review, it sits, in effect, as a 'thirteenth juror' ... ". [internal quotations omitted] **People v Graham, 2015 NY Slip Op 04401, 1st Dept 5-26-15**

ENVIRONMENTAL LAW. CITY ENVIRONMENTal QUALITY REVIEW (CEQR). FINAL ENVIRONMENTAL IMPACT STATEMENT (FEIS). MUNICIPAL LAW.

The city (NYC) took the requisite "hard look" at a development project and provided a "reasoned elaboration" of the basis for its approval of the project. Although the City Environmental Quality Review (CEQR) requires that the Final Environment Impact Statement (FEIS) include an analysis of a "No Action" alternative (an analysis based on the assumption the project will not be constructed), the CEQR does not require the FEIS to consider the petitioners' preferred alternative development scenario. **Matter of Residents for Reasonable Dev. v City of New York, 2015 NY Slip Op 04560, 1st Dept 5-28-15**

SECOND DEPARTMENT

CIVIL PROCEDURE. DISCOVERY. PROTECTIVE ORDER. PRIVILEGE RE: MATERIAL PREPARED IN ANTICIPATION OF LITIGATION.

Appellants were not entitled to a protective order precluding discovery of documents pursuant to CPLR 3103. The appellants argued the documents were privileged because they were prepared in anticipation of litigation. However, the conclusory attorney affidavit offered in support of the protective order did not meet the appellants' burden to demonstrate the

specific documents sought were "prepared solely in anticipation of litigation or trial ... ". **Ligoure v City of New York, 2015 NY Slip Op 04456, 2nd Dept 5-27-15**

CIVIL PROCEDURE. JOINDER OF LEGAL AND EQUITABLE CLAIMS. WAIVER OF RIGHT TO DEMAND JURY TRIAL. APPEALS. APPENDIX METHOD.

The Second Department noted that the deliberate joinder of claims for legal and equitable relief arising from the same transaction constitutes a waiver of the right to demand a jury trial. In addition, the Second Department dismissed the aspect of the appeal for which the relevant portions of the record were omitted from the appendix. With respect to the appendix method, the Second Department wrote: "An appellant who perfects an appeal by using the appendix method must file an appendix that contains all the relevant portions of the record in order to enable the court to render an informed decision on the merits of the appeal ... . The appendix shall contain those portions of the record necessary to permit the court to fully consider the issues which will be raised by the appellant and the respondent (22 NYCRR 670.10-b[c][1]; see CPLR 5528[a][5]). Here, the plaintiff omitted material excerpts from the transcripts of trial testimony and critical exhibits she relies on in seeking review of the dismissal of her disability discrimination cause of action. These omissions inhibit this Court's ability to render an informed decision on the merits of the appeal ... . Accordingly, the appeal from so much of the judgment …, in effect, dismissing the second cause of action must be dismissed." [internal quotations omitted] **Zutrau v ICE Sys., Inc., 2015 NY Slip Op 04479, 2nd Dept 5-17-15**

CIVIL PROCEDURE. MOTION TO DISMISS FOR FAILURE TO STATE A CAUSE OF ACTION.

Plaintiff's complaint should not have been dismissed in its entirety because the documentary evidence submitted in support of the motion to dismiss for failure to state a cause of action (CPLR 3211(a)(7)) did not demonstrate the facts alleged (which could support defendants' direct liability for negligent maintenance of a taxi cab) "were not facts at all." Plaintiff was injured when his motorcycle struck a tire which had come off defendants' taxi cab. Although the information in the affidavit submitted by a defendant was sufficient to warrant the dismissal of causes of action which relied on piercing the corporate veil, the information did not demonstrate defendants could not be directly liable for negligent maintenance of the cab. The related causes of action should not have been dismissed. The Second Department explained the analytical criteria to be applied when documentary evidence is submitted in support of a motion to dismiss for failure to state a cause of action: "In considering a motion to dismiss pursuant to CPLR 3211(a)(7), the court should accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory ... . Where evidentiary material is submitted and considered on a motion pursuant to CPLR 3211(a)(7), and the motion is not converted into one for summary judgment, the question becomes whether the plaintiff has a cause of action, not whether the plaintiff has stated one, and unless it has been shown that a material fact claimed by the plaintiff to be one is not a fact at all, and unless it can be said that no significant dispute exists regarding it, dismissal should not eventuate ... ". [internal quotations omitted] **Rathje v Tomitz, 2015 NY Slip Op 04467, 2nd Dept, 5-27-15**

CRIMINAL LAW. BATSON DOCTRINE.

The Second Department reversed defendant's conviction because Supreme Court improperly applied the Batson doctrine and denied defense counsel's peremptory challenges to two jurors. The prosecutor raised a "reverse-Batson" objection to defense peremptory challenges alleging the defense was excluding "Asian persons." Defense counsel offered race-neutral reasons for the peremptory challenges, the principal reason being that the potential jurors had been crime victims. Supreme Court found the proffered race-neutral reasons were pretextual. The Second Department determined they were not. **People v Grant, 2015 NY Slip Op 04505, 2nd Dept 5-17-15**

CRIMINAL LAW. MIRANDA WARNINGS. "PREAMBLE" TO MIRANDA WARNINGS. SUPPRESSION OF STATEMENT.

Defendant's suppression motion should have been granted because the "preamble" read to him before he waived his right to remain silent neutralized the effect of the Miranda warnings. "Before the defendant was read his Miranda rights, the detective investigator said to him (1) 'if you agree to speak with us, you may, if you wish, explain what you did and what occurred at that date, time, and place,' (2) '[i]f . . . you have an alibi . . . and you want to tell us where you were, we will ask that you please give us as much information as you can, including the names of any people you were with,' and (3) '[i]f you agree to speak to us and your version of the events of that day differs from what we have heard, you may, if you so choose, tell us your story.' Thus, a clear implication was conveyed to the defendant that he ought to speak to the detective investigator and the assistant district attorney present at the interview in order to set forth his version of events so that they could be investigated. As such, the preamble here ... rendered the subsequent Miranda warnings inadequate and ineffective in advising the defendant of his rights ...". **People v Rivera, 2015 NY Slip Op 04517, 2nd Dept 5-27-15**

CRIMINAL LAW. SEX OFFENDER REGISTRATION ACT (SORA). JUVENILE DELINQUENCY ADJUDICATIONS. UPWARD DEPARTURE.

Defendant's juvenile delinquency adjudication should not have been considered in determining the defendant's risk level. The court explained the proper procedure for considering an upward departure: "[T]he County Court upwardly departed without following the required three analytical steps of determining, first, whether an aggravating factor exists as a matter of law, second, whether the People have adduced clear and convincing evidence of the facts in support of that aggravating factor, and third, whether, in the court's discretion, the totality of the circumstances warrant the upward departure to avoid an under-assessment of the defendant's dangerousness and risk of sexual recidivism ...". **People v Ruland, 2015 NY Slip Op 04464, 2nd Dept 5-27-15**

CRIMINAL LAW. SEX OFFENDER REGISTRATION ACT (SORA). UPWARD DEPARTURE.

County Court properly departed (upward) from the presumptive risk level based upon a felony conviction which pre-dated the sexual offenses considered in the risk assessment. The Second Department explained in some detail the criteria for an upward departure: "A court is permitted to depart from the presumptive risk level if 'special circumstances' warrant departure (Sex Offender Registration Act: Risk Assessment Guidelines and Commentary at 4 [2006]). An upward departure is permitted only if the court concludes 'that there exists an aggravating . . . factor of a kind, or to a degree, that is otherwise not adequately taken into account by the guidelines' (id. at 4 ...). In determining whether an upward departure is permissible and, if permissible, appropriate, a SORA court must engage in a multi-step inquiry. First, the court must determine whether the People have articulated, as a matter of law, a legitimate aggravating factor. Next, the court must determine whether the People have established, by clear and convincing evidence, the facts supporting the existence of that aggravating factor in the case before it. Upon the People's satisfaction of these two requirements, an upward departure becomes discretionary. If, upon examining all of circumstances relevant to the offender's risk of reoffense and danger to the community, the court concludes that the presumptive risk level would result in an underassessment of the risk or danger of reoffense, it may upwardly depart ... ". **People v Williams, 2015 NY Slip Op 04465, 2nd Dept 5-27-15**

ENVIRONMENTAL LAW. EMINENT DOMAIN PROCEDURE LAW (EDPL). STATE ENVIRONMENTAL QUALITY REVIEW ACT (SEQRA). MUNICIPAL LAW. TOWN LAW.

The town board did not complete the required review under the State Environmental Quality Review Act (SEQRA) in connection with an Eminent Domain Procedure Law (EDPL) 207 proceeding to condemn certain land for drainage and storm water management improvements (drainage plan). Even though the drainage plan is part of a much larger revitalization plan, the town board considered only the drainage plan in its SEQRA review, a limited review which can be done only if certain SEQRA requirements are met. The matter was remitted to the town board for compliance with the relevant provisions of SEQRA. **Matter of J. Owens Bldg. Co., Inc. v Town of Clarkstown, 2015 NY Slip Op 04487, 2nd Dept 5-27-15**

FAMILY LAW. VISITATION BY GRANDPARENTS. STANDING.

Family Court properly dismissed the grandparents' petition for visitation with the grandchildren without a hearing. Family Court properly determined the grandparents did not have standing to bring the petition because no triable issues of fact were raised in the submitted papers. The standing question is determined by applying equitable principles re: the nature of the grandparents' relationship with the children and the nature and basis of the parents' objection to visitation. **Matter of Moskowitz v Moskowitz, 2015 NY Slip Op 04490, 2nd Dept 5-27-15**

INSURANCE LAW. CONTRACT LAW. AMBIGUITY RESOLVED AGAINST INSURER.

Reversing Supreme Court, the Second Department determined the ambiguity in the supplemental underinsured motorist (SUM) endorsement about whether a snowmobile was a covered "motor vehicle" should have been resolved against the insurer. "We find that the policy, when read as a whole, is ambiguous as to whether the term 'motor vehicle' in the SUM endorsement refers to the snowmobile, the only vehicle covered by the policy. Contrary to State Farm's contention and the Supreme Court's determination, this ambiguity must be resolved 'against the insurer and in favor of coverage' ... , without reference to the definition of 'motor vehicle' set forth in the Vehicle and Traffic Law." **Matter of State Farm Mut. Auto. Ins. Co. v Jones, 2015 NY Slip Op 04493, 2nd Dept 5-27-15**

LABOR LAW. WHISTLEBLOWER STATUTE. CIVIL PROCEDURE.

Plaintiff's Labor Law 740 cause of action should have survived a motion to dismiss for failure to state a cause of action. "A cause of action based upon Labor Law § 740, commonly known as the 'whistleblower statute,' is available to an employee who 'discloses, or threatens to disclose to a supervisor or to a public body an activity, policy or practice of the employer that is in violation of law, rule or regulation which violation creates and presents a substantial and specific danger to the public health or safety' ... ". To survive a dismissal motion, the particular law, rule or regulation which was purportedly

violated need not be specified in the complaint. **Ulysse v AAR Aircraft Component Servs., 2015 NY Slip Op 04474, 2nd Dept 5-27-15**

MUNICIPAL LAW. COUNTY LAW. NASSAU COUNTY CHARTER. MUNICIPAL CONTRACTS. CONTRACTS.

A lease and a lease amendment were invalid and unenforceable, even though the documents had been approved by the Nassau County Legislature. The Nassau County Charter required that any contract entered into by the county be executed by the County Executive. The County Executive signed the lease, but not the lease amendment (which was integral to the final agreement). Execution of the lease amendment was not a "purely ministerial act" because the lease required that any modifications be in writing **County of Nassau v Grand Baldwin Assoc., L.P., 2015 NY Slip Op 04445, 2nd Dept 5-27-15**

NEGLIGENCE. PERSONAL INJURY. DAMAGES. PUNITIVE DAMAGES. DRIVING WHILE INTOXICATED. "WANTON AND RECKLESS" CONDUCT.

The award of punitive damages by the jury was supported by clear and convincing evidence. Defendant was intoxicated at the time of the vehicle accident. The fact that defendant was driving while intoxicated would not, standing alone, warrant punitive damages. However, other factors, including defendant's high blood-alcohol level and his "incoherence" at the time of the accident evinced the requisite "wanton and reckless" conduct. **Chiara v Dernago, 2015 NY Slip Op 04444, 2nd Dept 5-27-15**

RELEASES. CONTRACT LAW. FRAUD.

Plaintiff raised a triable issue of fact concerning whether plaintiff was fraudulently induced to sign a release re: a potential personal-injury action. The release was signed three days after the accident when the plaintiff was still on pain medication and it was alleged the insurance adjuster told her the offered funds were for plaintiff's "inconvenience" and not to compensate for her injuries. The court explained relevant law. **Powell v Adler, 2015 NY Slip Op 04466, 2nd Dept 5-27-15**

USURY. GENERAL OBLIGATIONS LAW. LIMITED LIABILITY COMPANY LAW. CRIMINAL LAW.

A promissory note imposing an annual interest rate of more than 25% (60% here) was criminally usurious (Penal Law 190.40) and could not be saved by a provision purporting to reduce the interest rate to a non-usurious rate if the original rate were found to be usurious. Although a limited liability company (the defendant here) cannot assert the defense of civil usury, a limited liability company can assert the defense of criminal usury. In addition, the note was void under General Obligations Law 5-511 because the interest rate exceeded 16%. **Fred Schutzman Co. v Park Slope Advanced Med., PLLC, 2015 NY Slip Op 04447, 2nd Dept 5-27-15**

ZONING. ADMINISTRATIVE LAW. AREA VARIANCES. GENERAL CITY LAW. TOWN LAW.

The city zoning board properly denied the application for area variances. The court explained its role in reviewing the board's determination and the criteria applied to applications for area variances under the General City Law and the Town Law: "In determining whether to grant an application for an area variance, a zoning board must engage in a balancing test weighing 'the benefit to the applicant if the variance is granted . . . against the detriment to the health, safety and welfare of the neighborhood or community by such grant' (General City Law § 81-b[4][b];... see also Town Law § 267-b[3]). The zoning board must also consider: '(i) whether an undesirable change will be produced in the character of the neighborhood or a detriment to nearby properties will be created by the granting of the area variance; (ii) whether the benefit sought by the applicant can be achieved by some method feasible for the applicant to pursue, other than an area variance; (iii) whether the requested area variance is substantial; (iv) whether the proposed variance will have an adverse effect or impact on the physical or environmental conditions in the neighborhood or district; and (v) whether the alleged difficulty was self-created, which consideration shall be relevant to the decision of the board of appeals, but shall not necessarily preclude the granting of the area variance' (General City Law § 81-b[4][b]...)". **Matter of Goodman v City of Long Beach, 2015 NY Slip Op 04484, 2nd Dept 5-27-15**

ZONING. AREA VARIANCES. VILLAGE LAW.

The village zoning board properly denied petitioner's application for an area variance by considering all of the required factors enumerated in Village Law 7-712-b(3): "When determining whether to grant an application for an area variance, a Village zoning board of appeals, pursuant to Village Law § 7-712-b(3), must engage in a balancing test weighing the benefit to the applicant against the detriment to the health, safety, and welfare of the neighborhood or community if the variance is granted" ... . A Village board of zoning appeals must also consider "whether (1) an undesirable change will be produced in the character of the neighborhood, or a detriment to nearby properties will be created by the granting of the area variance, (2) the benefit sought by the applicant can be achieved by some other method, other than an area variance, feasible for the applicant to pursue, (3) the required area variance is substantial, (4) the proposed variance will have an adverse effect or

impact on the physical or environmental conditions in the neighborhood or district, and (5) the alleged difficulty was self created" ... . . **Matter of Affordable Homes of Long Is., LLC v Monteverde, 2015 NY Slip Op 04480, 2nd Dept 5-27-15**

THIRD DEPARTMENT

CORPORATION LAW. DISSOLVED CORPORATIONS.

The Third Department determined the sole officer of a corporation dissolved in 1997 was personally liable for the post-dissolution debts incurred for the purchase of fuel. The court explained the relevant law: "Business Corporation Law § 1005 (a) (1) provides, in relevant part, that, following dissolution, [t]he corporation shall carry on no business except for the purpose of winding up its affairs. Winding up, in turn, is defined as the performance of acts directed toward the liquidation of the corporation, including the collection and sale of corporate assets (...see Business Corporation Law § 1005 [a] [2]...). Notably, a dissolved corporation is precluded from engaging in new business ... and has no existence, either de jure or de facto, except for a limited de jure existence for the sole purpose of winding up its affairs ... . As a result, [a] person who purports to act on behalf of a dissolved corporation is personally responsible for the obligations incurred ... ". [internal quotations omitted] **Long Oil Heat, Inc. v Polsinelli, 2015 NY Slip Op 04542, 3rd Dept 5-28-15**

FREEDOM OF INFORMATION LAW (FOIL). CIVIL RIGHTS LAW. PUBLIC OFFICERS LAW.

Petitioner's request for evidence held by the district attorney's office was properly denied. The requested evidence consisted of chat logs and the contents of computers which identified the victims of sex offenses. Even if the identification could be redacted, the documents are categorically excluded from disclosure under the Civil Rights Law and Public Officers Law. **Matter of MacKenzie v Seiden, 2015 NY Slip Op 04537, 3rd Dept 5-28-15**

UNEMPLOYMENT INSURANCE LAW. ATTORNEYS. CONTRACT ATTORNEYS.

A "contract attorney" hired by an attorney for document-review in a class-action case was an employee entitled to unemployment insurance benefits, despite claimant's designation as an independent contractor in a written agreement. **Matter of Singhal (Commissioner of Labor), 2015 NY Slip Op 04550, 3rd Dept 5-28-15**

UNEMPLOYMENT INSURANCE LAW. ELECTION POLL WORKER. ELECTION LAW.

An election poll worker was not an employee entitled to unemployment insurance benefits. No duties were assigned to the worker that were not imposed by the relevant statutes (Election Law). **Matter of Chorekchan (New York City Bd. of Elections—Commissioner of Labor), 2015 NY Slip Op 04552, 3rd Dept 5-28-15**

UNEMPLOYMENT INSURANCE LAW. MUSIC TEACHERS (PRIVATE LESSONS).

The music teachers were employees of Encore Music, a service which connected students with teachers for a portion of the fees paid by the students. The court explained the analytical criteria for "professionals" whose work is not directly supervised or controlled: "[W]here the details of the work performed are difficult to control because of considerations such as professional . . . responsibilities, courts have applied the 'overall control' test, which requires that the employer exercise control over 'important aspects of the services performed" ..., a test which has been applied to musicians who do not easily lend themselves to direct supervision or control' ... . Further, 'an organization which screens the services of professionals, pays them at a set rate and then offers their services to clients exercises sufficient control to create an employment relationship' ... ". **Matter of Encore Music Lessons LLC (Commissioner of Labor), 2015 NY Slip Op 04553, 3rd Dept 5-28-15**

UNEMPLOYMENT INSURANCE LAW. SALES REPRESENTATIVE.

A cellular phone sales representative was an employee entitled to unemployment insurance benefits. Among other factors, the court noted: "The record establishes that Cellular Sales precluded sales representatives from selling competing products and its products outside of the 'territory' absent its prior written consent, suggested, and in certain instances required, that products be sold at a minimum price, set sales goals for the sales representatives to attain and provided a script that sales representatives were to '[s]tick to . . . on every customer opportunity' regarding a certain cellular phone. In addition, Cellular Sales specified a certain dress code and provided that any sales representative not meeting such dress code in its store would be 'address[ed]' by a leader. Cellular Sales also required sales representatives to, among other things, complete certain mandatory training that it paid for, to 'strictly comply' with its directives regarding use, disclosure and application of marketing information and to know and follow certain 'procedures for the market.' " **Matter of Pratt (Cellular Sales of N.Y., LLC—Commissioner of Labor), 2015 NY Slip Op 04549, 3rd Dept 5-28-15**

WORKERS' COMPENSATION LAW.

Open questions about whether the claimant was permanently disabled demonstrated that claimant's case was not truly closed in 2005. Therefore transfer of the claim to the Special Fund was not warranted. **Matter of Kettavong v Livingston County SNF, 2015 NY Slip Op 04556, 3rd Dept 5-28-15**

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