CasePrepPlus

October 21, 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

COURT OF APPEALS.

CRIMINAL LAW.

FAILURE TO TURN OVER TO THE DEFENDANT GRAND JURY MINUTES USED BY THE JUDGE IN SORA RISK CALCULATION VIOLATED DUE PROCESS.

The failure to turn over to the defendant grand jury minutes used by the judge in the Sex Offender Registration Act (SORA) proceedings was a violation of due process. However, in light of the other evidence, the error was harmless. The Court of Appeals explained the application of due process protections to SORA proceedings: "It is well established that sex offenders are entitled to certain due process protections at their risk level classification proceedings (see ... *Doe v Pataki*, 3 F Supp 2d 456 [SD NY 1998]). *Doe*, for example, recognized that, although the due process protections required for a risk level classification proceeding are not as extensive as those required in a plenary criminal or civil trial . . . the consequences of registration and notification under the Act are sufficiently serious to warrant more than mere summary process (*Doe*, 3 F Supp 2d at 470 …). Accordingly, that court held that in order to satisfy due process concerns, the offender must be afforded prehearing discovery of the documentary evidence relating to his or her proposed risk level adjudication (*see* Doe, 3 F Supp 2d at 472). Likewise, we have observed that [t]he bedrock of due process is notice and opportunity to be heard ... . * * * In keeping with our precedent, the Correction Law requires that defendant is entitled to prehearing access to the documents relied upon by the Board in reaching a risk level recommendation (*see* Correction Law § 168-n [3]...). Although the statute may not expressly state that defendant is likewise entitled to any materials submitted by the District Attorney in meeting its burden of establishing the facts supporting a risk level determination by clear and convincing evidence, the same due process concerns are presented in that context. Moreover, broad disclosure is consistent with *Doe*'s recognition that an offender should be accorded discovery of all papers, documents and other material relating to his proposed level and manner of notification (3 F Supp 2d at 472)." [internal quotation marks omitted] **People v Baxin, 2015 NY Slip Op 07530, CtApp 10-15-14**

CRIMINAL LAW.

ALLEGATIONS DESCRIBING A "GRAVITY KNIFE" IN MISDEMEANOR COMPLAINT WERE SUFFICIENT.

The misdemeanor complaint sufficiently alleged the defendant possessed a "gravity knife:" "Defendant argues that an accusatory instrument alleging possession of a gravity knife must expressly state that the knife locks by means of a device. We disagree. By stating that a knife, once opened, 'locks automatically in place,' an accusatory instrument conveys to a defendant that his knife was observed (1) to lock in an open position, rather than merely having a bias towards remaining open, and (2) to lock by means of a built-in device, rather than manually. A mechanism that locks itself by means of such a device is naturally described as locking 'automatically.' Indeed, many New York cases have treated locking 'by means of a . . . device' (Penal Law § 265.00 [5]) as synonymous with 'automatically' locking for these purposes ... . Moreover, because of the use of the generic term 'device' in the statute, there can be no requirement that an arresting officer specify any particular kind of mechanism on the knife that causes it to lock in place." **People v Sans, 2015 NY Slip Op 07529, CtApp 10-15-15**

CRIMINAL LAW, EVIDENCE.

EVIDENCE OF A MURDER WHICH WAS NOT CONNECTED TO THE DEFENDANT PROPERLY ADMITTED TO EXPLAIN RELEVANT EVENTS, PROBATIVE VALUE OUTWEIGHED PREJUDICIAL EFFECT.

The Court of Appeals, in a full-fledged opinion by Judge Pigott, determined that evidence of a murder which was not connected to the defendant was properly admitted in defendant's witness-tampering prosecution. Defendant was awaiting trial on a murder charge. Three teenaged girls and a man named Bobby Gibson were eyewitnesses. Defendant allegedly developed relationships with the three girls and paid them money. The girls recanted their identifications of the defendant. Then, on the day before the trial, Bobby Gibson was shot and killed outside the apartment of one of the girls. The girls then went to the police and told the police why they had recanted. The girls were placed in protective custody. A man who was apparently not connected with the defendant confessed to killing Bobby Gibson. The Court of Appeals determined evidence of Bobby Gibson's death was properly admitted in the witness-tampering trial to explain the girls' actions. The trial judge gave the jury a limiting instruction emphasizing that there was no evidence connecting the defendant to the Gibson murder. **People v Harris, 2015 NY Slip Op 07528, CtApp 10-15-15**

FIRST DEPARTMENT

CONTRACT LAW, DAMAGES.

WHERE EQUITABLE RELIEF DESCRIBED IN "SOLE REMEDY CLAUSE" IS IMPOSSIBLE, MONETARY DAMAGES ARE AVAILABLE.

The First Department, in a full-fledged opinion by Justice Sweeney, in a case addressing many specific-contract-provision issues not summarized here, determined that where the sole remedy clause of a contract allows only equitable relief, and that equitable relief is impossible, monetary damages may be available. The actions stem from the collapse of the residential mortgage-backed securities (RMBS) market. The complaints alleged the breach of several representations and warranties (concerning the underlying mortgages) in the mortgage loan purchase agreement (MLPA). The "sole remedy clause" in the agreement purported to limit relief to the defendant's repurchase of defective mortgages. However, repurchase of foreclosed or liquidated mortgages was impossible. In that situation, the First Department held, equity allows the imposition of monetary damages: "New York law has long held that contracting parties are generally free to limit their remedies. A limitation on liability provision in a contract represents the parties' agreement on the allocation of the risk of economic loss in the event that the contemplated transaction is not fully executed, which the courts should honor ... . Therefore, by the terms of the 'sole remedy' clause, the agreements limit plaintiffs to seeking an order of specific performance requiring defendant to repurchase the defective loans at the purchase price defined in those agreements, or to cure the defects in those loans. However, specific performance is an equitable remedy. In the RMBS context, most courts have repeatedly held that while a provision providing for equitable relief as the sole remedy will generally foreclose alternative relief, where the granting of equitable relief appears to be impossible or impracticable, equity may award damages in lieu of the desired equitable remedy ... . Such a rule makes sense, for to hold otherwise would create a perverse[] incentive for a sponsor to fill the trust with junk mortgages that would expeditiously default so that they could be released, charged off, or liquidated before a repurchase claim is made ...". [internal quotation marks omitted] **Nomura Home Equity Loan, Inc., Series 2006-FM2 v Nomura Credit & Capital, Inc., 2015 NY Slip Op 07458, 1st Dept 10-13-15**

CRIMINAL LAW.

CONVICTION BASED UPON PLEA WHERE DEFENDANT WAS NOT ADVISED OF THE PERIOD OF POSTRELEASE SUPERVISION IS UNCONSTITUTIONAL FOR PREDICATE FELONY PURPOSES, *CATU* APPLIED RETROACTIVELY.

A 2002 conviction based upon a (pre-*Catu*) plea during which the defendant was not advised of the period of postrelease supervision is unconstitutional for predicate felony purposes: "CPL 400.15(7)(b) provides: 'A previous conviction . . . which was obtained in violation of the rights of the defendant under the applicable provisions of the constitution of the United States must not be counted in determining whether the defendant has been subjected to a predicate felony conviction' ... . Because a conviction obtained in violation of *Catu* implicates rights under the federal Constitution as well as the state constitution (*see Catu*, 4 NY3d at 245 ...), the court properly granted defendant's CPL 440.20 motion and vacated his sentence as a second violent felony offender on the ground that his 2002 conviction could not be counted as a predicate felony under CPL 400.15(7)(b). The underlying conviction preceded the *Catu* decision. However, contrary to the People's contention, we find that the rule of law announced in *Catu* applies retroactively to pre-*Catu* convictions ...". **People v Smith, 2015 NY Slip Op 07565, 1st Dept 10-15-15**

LABOR LAW, PERSONAL INJURY.

QUESTION OF FACT WHETHER PLAINTIFF'S ACTIONS WERE SOLE PROXIMATE CAUSE OF HIS INJURY.

The First Department, reversing Supreme Court, in a full-fledged opinion by Justice Andrias, over an extensive two-justice dissent, determined there was a question of fact whether plaintiff's actions constituted the sole proximate cause of his injury in a Labor Law 240(1) action. Plaintiff stood on concrete blocks to work on a billboard, fell and was injured. Plaintiff had access to a cherry picker, ladders and safety harnesses but did not use them. Although plaintiff argued none of the safety devices were usable, the defendant raised a question of fact whether the safety devices could have been used: "Here, the record includes conflicting evidence regarding whether plaintiff was provided with adequate safety devices but failed to use them, which raises a triable issue of fact whether his conduct was the sole proximate cause of his injuries ... . Unlike cases where a plaintiff was injured when he used his discretion to choose one of several safety devices provided and that device proved inadequate, in this case plaintiff was supplied with four safety devices and chose not to use any of them, electing instead to go straight to the concrete blocks, whose intended purpose was to act as a counterweight, not as a platform. * * * [A]n issue exists as to whether safe alternative means of painting the billboard were available to plaintiff and whether his failure to use those means was the sole proximate cause of his accident ...". **Quinones v Olmstead Props., Inc., 2015 NY Slip Op 07571, 1st Dept 10-15-15**

SECOND DEPARTMENT

CIVIL PROCEDURE.

APPEAL, RATHER THAN A MOTION TO VACATE A DEFAULT JUDGMENT, IS THE PROPER REMEDY WHERE A PARTY APPEARS TO CONTEST MOTION TO ENTER A DEFAULT JUDGMENT.

The prohibition of an appeal from an order entered upon default does not apply when a party appears to contest a motion to enter a default judgment: "Although CPLR 5511 prohibits an appeal from an order entered upon default, that provision does not apply where, as here, a party appears and contests a motion for leave to enter a default judgment ... . Under the circumstances [of this case], the proper remedies were either an appeal from the default order, a timely motion for reargument or renewal, or an appeal from a judgment entered after the inquest on damages, which would bring up for review the default order ... . Thus, a motion to vacate the default order was procedurally improper and should not have been entertained ...". **Cole-Hatchard v Eggers, 2015 NY Slip Op 07466, 2nd Dept 10-14-15**

CIVIL PROCEDURE.

MANDAMUS TO COMPEL JUDGE TO DECIDE MOTIONS PROPER.

Mandamus was the proper vehicle to compel a judge to decide pending motions: "Mandamus will lie to compel the determination of a motion ... . Under the particular circumstances of this case, the petitioner demonstrated a clear legal right to the relief sought ... . Accordingly, the petition must be granted insofar as asserted against the respondent ..., and that respondent is directed to issue written orders within 30 days of this decision and judgment determining the four fully submitted motions pending in the underlying action ...". [internal quotation marks omitted] **Matter of Liang v Hart, 2015 NY Slip Op 07502, 2nd Dept 10-14-15**

CIVIL PROCEDURE, CONTRACT LAW.

CONTRACT AND PROMISSORY NOTE/PERSONAL GUARANTY NOT INTERTWINED, PLAINTIFF ENTITLED TO SUMMARY JUDGMENT IN LIEU OF COMPLAINT.

Reversing Supreme Court, the Second Department determined the contract for the sale of plaintiff's one-half share of a business to defendant was not intertwined with the promissory note and personal guaranty executed by the defendant in connection with the sale. Therefore plaintiff was entitled to summary judgment in lieu of a complaint based upon defendant's default: "The plaintiff made a prima facie showing of his entitlement to judgment as a matter of law by submitting the promissory note, which contained an unequivocal and unconditional obligation to pay, the personal guaranty, and proof of the defendants' failure to make payments on the note according to its terms ... . In opposition, the defendants failed to raise a triable issue of fact as to a bona fide defense ... . [T]he general rule is that the breach of a related contract cannot defeat a motion for summary judgment on an instrument for money only unless it can be shown that the contract and the instrument are intertwined and that the defenses alleged to exist create material issues of triable fact ... . Here, contrary to the Supreme Court's determination, the evidence submitted by the defendants failed to establish that the agreement and the promissory note were intertwined, such that any breach of the related agreement by the plaintiff may create a defense to payment on the note." [internal quotation marks omitted] **Chervinsky v Rezhets, 2015 NY Slip Op 07463, 2nd Dept 10-14-15**

CONTEMPT.

FAILIURE TO ADVISE APPELLANT OF RIGHT TO COUNSEL IN COMTEMPT PROCEEDINGS REQUIRED REVERSAL.

The Second Department reversed Supreme Court, which found appellant, Patricia Howlett, to be in civil and criminal contempt for the alleged failure to comply with a court order, because appellant was not informed of her right to counsel in the contempt proceedings: "The Supreme Court erred in holding Patricia Howlett in criminal and civil contempt. There is no evidence in the record which would establish that the court informed Howlett of her right to the assistance of counsel in connection with the contempt proceedings (see Judiciary Law § 770...). Howlett must be fully advised of her right to counsel, and her right to appointed counsel must be adequately explored, with counsel to be provided if appropriate ... . Accordingly, we must reverse the order dated January 7, 2015, and remit the matter to the Supreme Court, Suffolk County, for a new hearing and a new determination of the motion to hold Howlett in contempt." **Matter of Anthie B. (Howlett), 2015 NY Slip Op 07496, 2nd Dept 10-14-15**

CRIMINAL LAW, SEX OFFENDER REGISTRATION ACT (SORA).

UPWARD DEPARTURE FROM LEVEL ONE TO THREE NOT WARRANTED BY THE EVIDENCE.

The Second Department reversed the SORA court, finding that the People did not prove by clear and convincing evidence that an upward departure from the presumptive risk level was warranted. The upward departure was erroneously based upon defendant's psychiatric history, the place of the offense (a group home), a parole violation 10 years before the sex offense and two older bench warrants. The court explained the "upward departure" analytical criteria and reduced the defendant's risk level from three (the highest) to one (the lowest): "Once the presumptive risk level has been established at a risk

level hearing, the court is permitted to depart from it if special circumstances warrant a departure ... . An upward departure is permitted only if the court concludes, upon clear and convincing evidence, that there exists an aggravating . . . factor of a kind, or to a degree, that is otherwise not adequately taken into account by the [SORA] [G]uidelines ... . In determining whether an upward departure is permissible and, if permissible, appropriate, the court must engage in a three-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 presence of that 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 the 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 from that risk level ... . If, however, the People do not satisfy the first two requirements, the court does not have the discretion to depart from the presumptive risk level ...". [internal quotation marks omitted] **People v Manougian, 2015 NY Slip Op 07484, 2nd Dept 10-14-15**

CRIMINAL LAW, EVIDENCE.

TWO-HOUR INTERVAL DID NOT RETURN DEFENDANT TO STATUS OF ONE WHO WAS NOT UNDER INFLUENCE OF UNWARNED STATEMENT.

The two-hour interval between defendant's unwarned statement and a mirandized statement did not save the mirandized statement from suppression. During the unwarned statement defendant agreed to make a subsequent videotaped statement (which was mirandized). During the two hours between the unwarned statement and the videotaped statement the defendant was never returned to the status of one who was not under questioning. The error here (admitting the videotaped statement) was, however, deemed harmless. **People v Rodriguez, 2015 NY Slip Op 07520, 2nd Dept 10-14-15**

LABOR LAW, PERSONAL INJURY.

CRITERIA FOR LABOR LAW 200 AND COMMON LAW NEGLIGENCE CAUSES OF ACTION EXPLAINED.

The Second Department affirmed the grant of summary judgment to defendants on the Labor Law 200 and common law negligence causes of action. Plaintiff was working on a roof when a co-worker's water jug rolled down the roof, struck him and caused him to fall to the roof. The complaint alleged the injury arose from the manner in which the work was performed and from a dangerous condition. The court noted that, because the complaint alleged both theories of liability, the summary judgment motion must address both. The court explained the relevant analytical criteria: "Labor Law § 200 is a codification of the common-law duty of landowners and general contractors to provide workers with a reasonably safe place to work ... . To be held liable under Labor Law § 200 for injuries arising from the manner in which work is performed at a work site, an owner or manager of real property must have authority to exercise supervision and control over the work at the site ... . However, the right to generally supervise the work, stop the contractor's work if a safety violation is noted, or to ensure compliance with safety regulations and contract specifications is insufficient to impose liability under Labor Law § 200 or for common-law negligence ... . Where a plaintiff's injuries stem not from the manner in which the work was being performed, but, rather, from a dangerous condition on the premises, a [defendant] may be liable under Labor Law § 200 if it either created the dangerous condition that caused the accident or had actual or constructive notice of the dangerous condition ... . Where an accident is alleged to involve both a dangerous condition on the premises and the means and methods of the work, a defendant moving for summary judgment with respect to causes of action alleging a violation of Labor Law § 200 is obligated to address the proof applicable to both liability standards ... . * * * The defendants established, prima facie, both that they did not create or have actual or constructive notice of the allegedly dangerous condition which caused the injured plaintiff's accident, and that they did not have the authority to supervise or control the means and methods of the injured plaintiff's work ... . In opposition, the plaintiffs failed to raise a triable issue of fact." [internal quotation marks omitted] **Banscher v Actus Lend Lease, LLC, 2015 NY Slip Op 07461, 2nd Dept 10-14-15**

PERSONAL INJURY.

PROPERTY OWNER NOT LIABLE FOR TRACKED-IN RAIN.

In finding the grant of summary judgment to defendant was proper, the Second Department explained a property owner's liability for tracked-in rain water: "In a slip-and-fall case, a defendant moving for summary judgment has the burden of demonstrating, prima facie, that it did not create the alleged dangerous condition or have actual or constructive notice of its existence for a sufficient length of time to discover and remedy it ... . A general awareness that water might be tracked into a building when it rains is insufficient to impute, to a defendant, constructive notice of the particular dangerous condition ... . Moreover, a property owner is 'not required to cover all of its floors with mats, nor to continuously mop up all moisture resulting from tracked-in rain' ... . Here, the defendant established its prima facie entitlement to judgment as a matter of law by presenting evidence that it did not create or have actual or constructive notice of the alleged dangerous condition. In opposition, the plaintiff failed to raise a triable issue of fact. **Grib v New York City Hous. Auth., 2015 NY Slip Op 07472, 2nd Dept 10-14-15**

In support of similar findings in another case, the Second Department explained: "While a defendant [is] not required to cover all of its floors with mats, nor to continuously mop up all moisture resulting from tracked-in rain"..., a defendant may be held liable for an injury proximately caused by a dangerous condition created by water, snow, or ice tracked into a building if it either created the hazardous condition, or had actual or constructive notice of the condition and a reasonable time to undertake remedial action ... . Here, in support of their motion, the defendants submitted evidence sufficient to demonstrate, prima facie, that they did not create the alleged hazardous condition or have actual or constructive notice of it ... . In opposition, the plaintiff failed to raise a triable issue of fact. A general awareness that water might be tracked into a building when it rains is insufficient to impute to the defendants constructive notice of the particular dangerous condition...". [internal quotation marks omitted] **Murray v Banco Popular, 2015 NY Slip Op 07482, 2nd Dept 10-14-15**

PERSONAL INJURY.

OWNER OF RENTAL VEHICLE MAY BE LIABLE BASED UPON FAILURE TO MAINTAIN THE VEHICLE.

The Second Department, reversing Supreme Court, determined the Graves Amendment (which immunizes owners of rental vehicles from liability for the use of vehicles) did not apply where the complaint alleged a failure to maintain the vehicle. Because the defendant, PV Holding, did not demonstrate the alleged failure to maintain the vehicle did not result in the accident, the defendant's summary judgment motion should have been denied: "Pursuant to the Graves Amendment (49 USC § 30106), generally, the owner of a leased or rented motor vehicle cannot be held liable for personal injuries resulting from the use of such vehicle if: (1) the owner is engaged in the trade or business of renting or leasing motor vehicles, and (2) there is no negligence or criminal wrongdoing on the part of the owner (see 49 USC § 30106[a]...). The Graves Amendment does not apply where, as here, a plaintiff seeks to hold a vehicle owner liable for the alleged failure to maintain a rented vehicle ... . The PV defendants failed to establish, prima facie, PV Holding's entitlement to judgment as a matter of law. Although the PV defendants submitted evidence showing that PV Holding was engaged in the business of renting vehicles and that regular maintenance was performed on the subject vehicle, the PV defendants failed to submit any admissible evidence to demonstrate that the accident was not caused by the condition of the vehicle as a consequence of PV Holding's allegedly negligent failure to maintain it ...". **Olmann v Neil, 2015 NY Slip Op 07483, 2nd Dept 10-14-15**

TRUSTS AND ESTATES.

INSTRUCTIONS IN WILL RE: PAYMENT OF ESTATE TAXES PROPERLY FOLLOWED.

The instruction in the will that estate taxes be paid out of the residuary estate was properly followed: "All estate tax payments must be equitably apportioned among recipients of estate assets 'unless otherwise provided in the will or non-testamentary instrument' (EPTL 2-1.8[c]), and such a contrary direction must be clear and unambiguous ... . Although there is a strong policy favoring apportionment ..., that policy gives way where the clear and unambiguous wishes of the testator direct otherwise ... . Analysis begins with the general rules of will construction which provide that a court is to determine and effectuate the intent of the testator and that in doing so, it must construe his or her words according to their ordinary and natural meaning ... . Here, the second paragraph of the decedent's will directs that all estate taxes, 'in respect to any property required to be included in my gross estate for estate tax or like purposes by any such government, whether the property passes under this Will or otherwise, without contribution by any recipient of any such property,' were to be paid out of the residuary estate. The words clearly and unambiguously reflect the decedent's intent that his preresiduary and nontestamentary beneficiaries . . . are to take their property without liability for the payment of any estate taxes, regardless of whether the taxes are imposed on property and assets passing under the will or outside of the will ...". **Matter of Priedits, 2015 NY Slip Op 07508, 2nd Dept 10-14-15**

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