December 16, 2015

CasePrepPlus

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

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FIRST DEPARTMENT

CIVIL PROCEDURE.

PLAINTIFF, WHO SOLD GOODS TO NEW JERSEY COMPANIES FOR WHICH IT WAS NOT FULLY PAID, FAILED TO DEMONSTRATE NEW YORK JURISDICTION; FACTS PLED DID NOT DEMONSTRATE LONG-ARM JURISDICTION; SITUS OF THE INJURY WAS NEW JERSEY, NOT NEW YORK.

The First Department determined plaintiff did not demonstrate New York jurisdiction under the long arm statute (CPLR 302(a)(1) or under the statute imposing jurisdiction based on an out-of-state tort causing injury in New York (CPLR 302(a)(3)(ii)). Plaintiff allegedly sold goods to two New Jersey companies for which plaintiff was not fully paid. The assets of the two New Jersey companies were allegedly sold to a European company. Plaintiff alleged the transfer to the European company was a fraudulent conveyance. In finding both jurisdictional arguments lacking, the court wrote: "[T]he purchase and sale transaction, whereby this in-state plaintiff shipped goods to the out-of-state defendants, who then failed to fully pay for the goods, is '[t]he classic instance in which personal jurisdiction is found not to exist' ... . Plaintiff has offered nothing but conclusory assertions to support long-arm jurisdiction under CPLR 302(a)(1). * * * The court also properly rejected plaintiff's assertion of jurisdiction under CPLR 302(a)(3)(ii), for an alleged tort committed without the state causing injury within the state. As to the tort committed without the state, plaintiff points to the alleged fraudulent conveyance ... . This fails, however, because the 'the situs of the injury is the location of the original event which caused the injury, not the location where the resultant damages are subsequently felt' ... . Thus, this alleged tortious act did not cause injury within New York, but in New Jersey. Plaintiff has also offered nothing but conclusory allegations that any defendant 'derives substantial revenue from interstate or international commerce,' as required for jurisdiction under CPLR 302(a)(3)(ii)." **Cotia (USA) Ltd. v Lynn Steel Corp., 2015 NY Slip Op 09169, 1st Dept 12-10-15**

CRIMINAL LAW, EVIDENCE.

INADMISSIBLE TESTIMONIAL HEARSAY, PROSECUTORIAL MISCONDUCT, AND JUDGE'S ACTIONS TO COERCE THE JURY TO REACH A VERDICT DEPRIVED DEFENDANT OF A FAIR TRIAL.

The First Department reversed defendant's conviction, finding several distinct flaws which deprived defendant of a fair trial. Testimonial hearsay which served to bolster the complainant's identification of the defendant was improperly admitted. The prosecutor improperly referred to stricken testimony in summation. And the judge effectively coerced the jury into reaching a verdict. With respect to the coerced verdict, the court wrote: "The jury returned two notes, on the second and fourth day of deliberations, announcing that the jury was deadlocked; the second note emphatically listed different types of evidence the jury had considered. The court's *Allen* charges in response to both notes were mostly appropriate but presented the prospect of protracted deliberations by improperly stating that the jury had only deliberated for a very short time when it had actually deliberated for days ... . The court initially informed the jury that its hours on one day would be extended to 7:00 p.m., before reversing that decision and merely extending the hours to 5:00 p.m., and then it extended the hours to 6:00 p.m. on the next day, a Friday. The court improperly described those changes as a 'tremendous accommodation' that was 'loathed' by the system ... . The court further indicated that the jury would likely continue deliberating into the next week although jurors had been told during jury selection that the case would be over by the aforementioned Friday, raising concerns for one juror who was going to start a new job the following Monday and another juror who was solely responsible for his child's care in the first three days of the next week ... . * * * The totality of the circumstances supports an inference that the jury was improperly coerced into returning a compromise verdict." **People v DeJesus, 2015 NY Slip Op 08959, 1st Dept 12-8-15**

EMPLOYMENT LAW, MUNICIPAL LAW.

PROOF REQUIREMENTS FOR RACIAL DISCRIMINATION UNDER THE NEW YORK CITY HUMAN RIGHTS LAW EXPLAINED; PLAINTIFF'S ACTION SHOULD HAVE BEEN DISMISSED.

The First Department, in a full-fledged opinion by Justice Acosta, determined plaintiff, who had brought a racial-discrimination action under the New York City Human Rights Law, was unable to show that the employer's reasons for terminating her were pretextual. The court held that the phrase "a leopard does not change its spots" and the term "tirade," used in ref-

erence to plaintiff's behavior, did not have discriminatory meanings. With respect to the proof requirements under the NYC Human Rights Law ("City HRL"), the court explained: "How the City HRL's distinctive substantive definitions, standards, and frameworks interact with existing standards for summary judgment has been the subject of some confusion ... . As with any other civil case, a discrimination plaintiff must produce enough evidence to preclude the moving defendant from being able to prove that (1) no issues of material fact have been placed in dispute by competent evidence, and (2) a reasonable jury (resolving all inferences that can reasonably be drawn in favor of the non-moving party) could not find for the plaintiff on any set of facts under any theory of the case. But recognizing that the general evidentiary standard remains the same in discrimination cases does not permit a court to apply the standard in a manner that ignores the distinctiveness of City HRL causes of action. All the general standard does, in other words, is provide the template that says, 'Defendant must prove that no reasonable jury can conclude X.' The 'X' depends on the cause of action. Thus, the only substantive requirement in a City HRL case where the plaintiff goes the 'pretext' route is for the plaintiff to produce some evidence to suggest that at least one reason is 'false, misleading, or incomplete.' A plaintiff who satisfies this requirement may well have produced less evidence than would be required under the state and federal laws. But he or she will have produced enough evidence to preclude the defendant from proving that no reasonable jury could conclude that any of the defendant's reasons was pretextual. In other words, the general evidentiary standard comfortably co-exists with the distinctive substantive framework that must be applied to City HRL claims." **Cadet-Legros v New York Univ. Hosp. Ctr., 2015 NY Slip Op 08984, 1st Dept 12-6-15**

PERSONAL INJURY.

RARE CASE WHERE DEFENDANT SUBMITTED SUFFICIENT EVIDENCE TO DEMONSTRATE SNOW REMOVAL EFFORTS DID NOT CREATE OR EXACERBATE A DANGEROUS CONDITION; DEFENDANT'S MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED.

The First Department, reversing Supreme Court, determined defendant (Sailsman) was entitled to summary judgment in a slip and fall case. Defendant demonstrated that his snow removal efforts did not create or exacerbate a dangerous condition. [This case is noteworthy because the vast majority of defendants' motions for summary judgment in similar cases are denied for failure to present the necessary evidence.]: "Sailsman made a prima facie showing that his property is a two-family home in which he resides, not subject to liability pursuant to Administrative Code of City of NY § 7-210 (b), and that his voluntary snow removal efforts did not create or exacerbate the alleged hazardous condition on the sidewalk ... . Sailsman testified that the day before the accident, he removed the snow and ice from the sidewalk and applied enough salt to completely melt the ice, and provided a neighbor's affidavit confirming that the sidewalk was clear and safe to walk on, as well as photographs taken shortly after the accident." **Montiel v Sailsman, 2015 NY Slip Op 08968, 1st Dept 12-8-15**

PERSONAL INJURY, LANDLORD-TENANT.

DEFENDANT DID NOT ESTABLISH IT WAS AN OUT-OF-POSSESSION LANDLORD; MANAGEMENT AGREEMENT INCLUDED THE RIGHT TO INSPECT THE PROPERTY AND AN AGREEMENT TO INDEMNIFY TENANT FOR CLAIMS ARISING FROM TENANT'S NEGLIGENCE.

The First Department determined defendant did not demonstrate it was an out-of-possession landlord and defendant was therefore properly held liable for plaintiff's slip and fall. Plaintiff worked for nonparty tenant Sunrise Senior Living Management, Inc. (SSLM) with which defendant had a property management agreement. Although the agreement required SSLM to maintain the facility, defendant had access to the facility for inspection and agreed to indemnify SSLM for claims arising from SSLM's negligence: "Defendant failed to establish that it was an out-of-possession landowner with limited liability to third persons injured on the property ... . Its management agreement with SSLM gave SSLM 'complete and full control and discretion in the operation ... of the Facility' and required SSLM to 'maintain the Facility ... in conformity with applicable Legal Requirements.' However, defendant had 'access to the Facility at any and all reasonable times for the purpose of inspection,' had access to SSLM's books and records, and was required to fund operating shortfalls, and SSLM was required to report to defendant regularly and to maintain bank accounts in approved financial institutions 'as agent for [defendant].' Significantly, the management agreement requires defendant to indemnify SSLM for claims arising out of SSLM's own negligence in the performance of its duties. This agreement to indemnify is analogous to the procurement of insurance, which constitutes evidence of ownership and control ... . It evidences defendant's intent to be responsible for any accidents on the property. But for the fortuity of plaintiff's being an employee who was barred from suing his employer, defendant would be responsible, through the indemnification provision, for his injuries." **Waring v Sunrise Yonkers SL, LLC, 2015 NY Slip Op 09174, 1st Dept 12-10-15**

USURY.

NOTE WITH 12% INTEREST RATE FOR LESS THAN A YEAR WAS USURIOUS.

The First Department determined a note was void as usurious. Although the face of the note indicated the interest rate was 12%, the duration of the note was less than a year. The actual interest was a usurious 36%: "It is true that the stated rate on the four-month note is 12%. However, it does not say 12% per annum. Where, as here, the loan is for less than a year, the

interest rate is annualized ... , and thus, the annual rate on the note is 36%, well above the criminal usury rate of 25%. It is also true that the note says, 'in no event shall the rate of interest payable hereunder exceed the maximum interest permitted to be charged by applicable law and any interest paid in excess of the permitted rate shall be credited to principal and any balance refunded to' defendant. However, that does not make the subject note nonusurious ... . Furthermore, even if defendant drafted the note, that 'does not relieve the lender from a defense of usury' …". **Bakhash v Winston, 2015 NY Slip Op 08966, 1st Dept 12-8-15**

SECOND DEPARTMENT

CONTRACT LAW, EVIDENCE.

"BEST EVIDENCE RULE" CRITERIA EXPLAINED; NOT MET HERE.

The Second Department determined defendant did not meet the requirements of the best evidence rule and defendant's summary judgment motion should not have been granted. Defendant argued that plaintiff's breach of contract action was time-barred because a pricing offer/customer agreement included a shortened statute of limitations (one year). However, defendant produced only unsigned documents together with an employee's (Muscillo's) affidavit saying the original signed document was likely lost. The Second Department explained why that evidence was not sufficient under the best evidence 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 best evidence 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 ... . Loss may be established upon a showing of a diligent search in the location where the document was last known to have been kept, and through the testimony of the person who last had custody of the original. Indeed, the more important the document to the resolution of the ultimate issue in the case, the stricter becomes the requirement of the evidentiary foundation establishing loss for the admission of secondary evidence ... . Here, given the significance of the lost original Pricing Offer to the issue of whether the action was time-barred, Muscillo's conclusory averments were insufficient to explain its unavailability ... . The defendant did not submit an affidavit from the person who last had custody of the original 2010 Pricing Offer, or from a person with personal knowledge of the search for it. Even if the defendant's submissions were sufficient to establish the unavailability of the original Pricing Offer, Muscillo's affidavit was insufficient secondary evidence that an original signed agreement ever existed." [internal quotation marks omitted] **Amica Mut. Ins. Co. v Kingston Oil Supply Corp., 2015 NY Slip Op 09059, 2nd Dept 12-9-15**

CRIMINAL LAW.

JUSTIFICATION DEFENSE JURY INSTRUCTION SHOULD HAVE BEEN GIVEN, CONVICTION REVERSED.

The Second Department determined the defense request for a jury instruction on the justification defense should have been granted. There was evidence of a struggle for a knife and defendant feared for his life: "A person is justified in using deadly physical force against another if he or she reasonably believes such to be necessary to defend himself or herself or a third person from what he or she reasonably believes to be the use or imminent use of deadly physical force by such other person ... . 'A trial court must charge the jury with respect to the defense of justification whenever, viewing the record in the light most favorable to the defendant, there is any reasonable view of the evidence which would permit the jury to conclude that the defendant's conduct was justified' ... . A failure to give a justification charge under such circumstances constitutes reversible error ... . Here, the defendant requested a justification charge to the jury based, inter alia, upon his trial testimony that during his altercation with the decedent, there was a struggle for the Swiss Army-style knife attached to his key chain that he then used to inflict the fatal wounds. The defendant also testified that he feared for his life during the altercation. Under these circumstances, considering the record in the light most favorable to the defendant, the Supreme Court erred in failing to provide the jury with the requested justification charge ...". **People v Austin, 2015 NY Slip Op 09112, 2nd Dept 12-9-15**

CRIMINAL LAW.

INSUFFICIENT EVIDENCE DEFENDANT COMMITTED BURGLARY; DEFENDANT, THROUGH AN UNLOCKED DOOR, ENTERED A VESTIBULE THAT WAS NOT RESTRICTED TO USE BY TENANTS.

The Second Department reversed defendant's burglary conviction because of insufficient evidence defendant entered the victim's dwelling. Defendant entered a vestibule through an unlocked door and there was no indication the area was restricted to use by tenants only: "To be guilty of burglary in the first degree, a person must, among other things, knowingly enter or remain unlawfully in a dwelling (see Penal Law § 140.30). Here, while the evidence at trial showed that the defendant entered the vestibule of the victim's apartment building through an outer door that did not lock, there was no indicia that access to the building or vestibule was restricted to tenants. Thus, the weight of the evidence does not warrant

a finding that the defendant knowingly entered the victim's dwelling ...". **People v Huggins, 2015 NY Slip Op 09119, 2nd Dept 12-9-15**

FAMILY LAW, IMMIGRATION LAW.

MOTHER'S MOTION FOR FINDINGS ALLOWING HER CHILD TO PETITION FOR SPECIAL IMMIGRANT JUVENILE STATUS SHOULD HAVE BEEN GRANTED.

Reversing Family Court, the Second Department determined mother's motion for findings allowing her child to petition for special immigrant juvenile status (SIJS) should have been granted: "[W]e declare that the child has been legally committed to, or placed under the custody of, an individual appointed by a state or juvenile court, and we find that the child is unmarried and under 21 years of age, that reunification with one of his parents is not viable due to parental abandonment, and that it would not be in his best interests to return to El Salvador ...". **Matter of Tommy E. H. (Anonymous) v Silvia C. (Anonymous), 2015 NY Slip Op 09104, 2nd Dept 12-9-15**

FREEDOM OF INFORMATION LAW (FOIL).

REQUEST FOR STATEMENTS MADE BY WITNESSES WHO DID NOT TESTIFY AT TRIAL (BECAUSE PETITIONER PLED GUILTY) SHOULD HAVE BEEN DENIED; NON-TESTIFYING WITNESS STATEMENTS ARE CONFIDENTIAL; REQUEST FOR GRAND JURY MINUTES SHOULD HAVE BEEN DENIED; ALTHOUGH THE PUBLIC INTEREST IS INVOLVED, PETITIONER DID NOT MAKE THE REQUISITE FACTUAL SHOWING OF A PARTICULARIZED NEED FOR DISCLOSURE.

The Second Department, over an extensive dissent, reversing Supreme Court, determined that petitioner's request for disclosure of statements made by non-testifying witnesses and the grand jury minutes should not have been granted. In 1988, petitioner pled guilty to several sex offenses. Therefore, none of the witnesses who gave statements in connection the petitioner's criminal case testified. The Second Department held the statements remained confidential. With respect to the grand jury minutes, the court noted that the public interest was involved, but was not enough to justify disclosure because petitioner did not make a factual showing of a particularized need for disclosure: "[T]he statements of nontestifying witnesses are confidential and not disclosable under FOIL ... . Thus, the documents sought by the petitioner, which contain statements of nontestifying witnesses, are not disclosable under FOIL. [A] ... party seeking disclosure [of grand jury minutes] will not satisfy the compelling and particularized need threshold simply by asserting, or even showing, that a public interest is involved. Rather, [t]he 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 Friedman v Rice, 2015 NY Slip Op 09103, 2nd Dept 12-9-15**

PERSONAL INJURY.

DEFENDANT DID NOT DEMONSTRATE PLAINTIFF DID NOT KNOW THE CAUSE OF HER FALL AND DID NOT DEMONSTRATE A LACK OF CONSTRUCTIVE NOTICE OF THE DANGEROUS CONDITION; DEFENDANT'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED.

The Second Department determined defendant's motion for summary judgment in a slip and fall case should not have been granted. Plaintiff's testimony she "felt" liquid on the floor was sufficient evidence plaintiff was aware of the cause of her fall. And defendant failed to demonstrate a lack of constructive notice of the dangerous condition: "Although the defendant presented evidence that it neither created, nor had actual notice of, the alleged condition, it failed to demonstrate that it did not have constructive notice of the alleged condition, as the defendant failed to tender any evidence establishing when the subject area was last inspected and cleaned prior to the accident ...". **Korn v Parkside Harbors Apts., 2015 NY Slip Op 09071, 2nd Dept 12-9-15**

PERSONAL INJURY.

CHAIN ACROSS DRIVEWAY WAS NOT "OPEN AND OBVIOUS" AS A MATTER OF LAW; DEFENDANT'S SUMMARY JUDGMENT MOTION SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined a chain hanging across a driveway from two yellow posts was not "open and obvious" as a matter of law. Plaintiff allegedly tripped over the chain on a dark and rainy night. Defendant's motion for summary judgment, therefore, should not have been granted: "While a possessor of real property has a duty to maintain that property in a reasonably safe condition ... , there is no duty to protect or warn against an open and obvious condition which, as a matter of law, is not inherently dangerous ... . The issue of whether a dangerous condition is open and obvious is fact-specific, and usually a question of fact for a jury ... . 'Whether a hazard is open and obvious cannot be divorced from the surrounding circumstances' ... . 'A condition that is ordinarily apparent to a person making reasonable use of his or her senses may be rendered a trap for the unwary where the condition is obscured or the plaintiff is distracted' ... . Here, contrary to the Supreme Court's determination, the defendant failed to establish, prima facie, that the chain was

open and obvious, i.e., readily observable by those employing the reasonable use of their senses, given the conditions at the time of the accident ...". **Lazic v Trump Vil. Section 3, Inc., 2015 NY Slip Op 09075, 2nd Dept 12-9-15**

PERSONAL INJURY.

FACT THAT PLAINTIFF, A PASSENGER IN THE LEAD VEHICLE, WAS NOT AT FAULT IN THE REAR-END COLLISION DOES NOT LEAD TO THE AUTOMATIC CONCLUSION THE DRIVER OF THE REAR VEHICLE WAS AT FAULT; HERE THE DRIVER OF THE REAR VEHICLE RAISED A QUESTION OF FACT WHETHER THE ACCIDENT WAS CAUSED BY OIL ON THE ROADWAY; SUMMARY JUDGMENT FINDING THE REAR DRIVER AT FAULT SHOULD NOT HAVE BEEN GRANTED.

The Second Department, in a full-fledged opinion by Justice Dillon, reversing Supreme Court, determined the driver of a vehicle which struck the rear of a stopped vehicle (in which plaintiff was a passenger) raised a question of fact about whether the accident was unavoidable because of oil on the roadway. The Second Department took the time to explain, in detail, what the proof burdens are in the context of a rear-end collision. Here, the fact that the plaintiff-passenger was not at fault should not have given rise to the automatic conclusion the driver of the rear vehicle was at fault. In addition to the allegation oil on the road made it impossible to stop, there was a question whether the driver of the lead vehicle was comparatively at fault for stopping in the roadway to let off passengers: "We take this opportunity to caution that trial courts must be careful to avoid concluding, in rear-end accident cases, that just because a plaintiff is a passenger in the lead vehicle, the liability of the rear vehicle is automatically established. It is not. A plaintiff moving for summary judgment on the issue of liability must meet the twofold burden of establishing that he or she was free from comparative fault and was, instead, an innocent passenger, and, separately, that the operator of the rear vehicle was at fault. If the plaintiff fails to demonstrate, prima facie, that the operator of the offending vehicle was at fault, or if triable issues of fact are raised by the defendants in opposition, as here, summary judgment on the issue of liability must be denied, even if the moving plaintiff was an innocent passenger ...". **Phillip v D&D Carting Co., Inc., 2015 NY Slip Op 09084, 2nd Dept 12-9-15**

PERSONAL INJURY.

QUESTION OF FACT WHETHER WHEEL STOP IN PARKING LOT WAS AN OPEN AND OBVIOUS CONDITION.

The Second Department determined a question of fact had been raised whether a wheel stop in a parking area was an open and obvious condition. A photograph demonstrated the wheel stop was partially obstructing a walkway: "Here, the defendants submitted the expert affidavit of a forensic engineer who determined that 'the parking lot was a safe walking surface and adequately illuminated at night,' and that the wheel stop on which the injured plaintiff tripped 'was an open and obvious condition' located 'within a designated parking space' and not a pedestrian walkway. However, the photographs upon which the defendants' expert partially relies depict the wheel stop as extending directly in front of, and thus partially obstructing, a designated pedestrian walkway. Thus, the defendants failed to satisfy their initial burden of showing that they neither created the hazardous condition nor had actual or constructive notice of its existence for a sufficient length of time to discover and remedy it ...". **Rivera v Queens Ballpark Co., LLC, 2015 NY Slip Op 09087, 2nd Dept 12-9-15**

PERSONAL INJURY.

LACROSSE PLAYER JOGGING AROUND LACROSSE FIELD ASSUMED THE RISK OF BEING STRUCK BY A LACROSSE BALL.

The Second Department, noting that even bystanders assume the risk of being struck by a ball, determined a lacrosse player who was jogging around the lacrosse field while other players were throwing balls assumed the risk of being struck by a ball: "Pursuant to the doctrine of primary assumption of risk, a participant in a sport or recreational activity consents to those commonly appreciated risks which are inherent in and arise out of the nature of the sport generally and flow from such participation ... . This doctrine also applies to spectators or bystanders who place themselves in close proximity to a playing field ... . Here, the defendants established, prima facie, that by entering the fenced-off field where players were warming up for lacrosse practice, and jogging around the perimeter of the field where lacrosse balls were being thrown between the players and into the net, the injured plaintiff assumed the risk of being struck by a lacrosse ball ...". **Spiteri v Bisson, 2015 NY Slip Op 09089, 2nd Dept 12-9-15**

PERSONAL INJURY, EDUCATION-SCHOOL LAW.

ASSUMPTION OF RISK DEFENSE DID NOT APPLY TO STUDENT-ATHLETE'S PARTICIPATION IN UNSUPERVISED "HORSEPLAY;" SCHOOL'S SUMMARY JUDGMENT MOTION SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined defendant school district's motion for summary judgment should not have been granted. Plaintiff student was injured when, during an unsupervised period of time prior to the beginning of football practice, a blocking sled was being misused to catapult players into the air. Plaintiff fractured both wrists. The Second Department held there was a question of fact re: the negligent supervision cause of action, and further held that the assumption of risk defense did not apply to the "horseplay" which resulted in plaintiff's injury. With regard

to assumption of the risk, the court wrote: "The doctrine of primary assumption of risk is most persuasively justified for its utility in facilitating 'free and vigorous participation in athletic activities' ... . By placing the risk of participation on the participants themselves, rather than on the sponsor, the doctrine encourages sponsorship, which leads to more opportunities to participate in sports or other recreational activities ... . The doctrine of primary assumption of risk is not applicable to the conduct at issue in this case. ... [T]he use of the blocking sled to catapult each other into the air is not the sort of 'socially valuable voluntary activity' that the doctrine seeks to encourage ... . Furthermore, the defendants did not establish that the commonly appreciated risks which are inherent in and arise out of the nature of football generally and flow from such participation on the football team included the risk of sustaining injury after being catapulted through the air by a blocking sled ...". **Duffy v Long Beach City Sch. Dist. 2015 NY Slip Op 09065, 2nd Dept 12-9-15**

PERSONAL INJURY, MUNICIPAL LAW.

CITY (NYC), NOT ABUTTING LANDOWNERS, RESPONSIBLE FOR MISSING SIDEWALK HYDRANT VALVE COVER PURSUANT TO RULES OF CITY OF NEW YORK DEPARTMENT OF TRANSPORTATION.

The Second Department determined that the city (NYC) was responsible for maintenance of grates or covers on sidewalks pursuant to the Rules of the City of New York Department of Transportation. Therefore plaintiff, who allegedly fell because a sidewalk hydrant valve cover was missing, could not sue the abutting landowners: "Section 7-210 of the Administrative Code of the City of New York imposes liability for injuries resulting from negligent sidewalk maintenance on the abutting property owners. However, Rules of City of New York Department of Transportation (34 RCNY) § 2-07(b) provides that owners of covers or gratings on a street are responsible for monitoring the condition of those covers and gratings and the area extending 12 inches outward from the perimeter of the hardware, and for ensuring that the hardware is flush with the surrounding street surface. 34 RCNY 2-01 includes a sidewalk within the definition of street ... . Accordingly, the City, and not the defendants, was responsible for maintaining the condition of the area where the plaintiff fell ... . [T]here is nothing in section 7-210 of the Administrative Code of the City of New York indicating that the City Council intended to supplant the provisions of 34 RCNY 2-07(b) and to allow a plaintiff to shift the statutory obligation of the owner of the cover or grating to the abutting property owner ...". [internal quotation marks omitted] **Torres v Sander's Furniture, Inc., 2015 NY Slip Op 09091 2nd Dept 12-9-15**

PERSONAL INJURY, PRODUCTS LIABILITY.

MANUFACTURER OF A TUBE SLIDE AND THE PROPERTY OWNER WHERE THE TUBE SLIDE WAS LOCATED ENTITLED TO SUMMARY JUDGMENT; INFANT PLAINTIFF FELL WHEN CLIMBING ON THE OUTSIDE OF THE TUBE SLIDE.

The Second Department determined both the manufacturer (Slip N Slide) of a tube slide (an enclosed plastic spiral tube) and the property owner (Philip Howard) where the tube slide was located were entitled to summary judgment. Infant plaintiff (10 years old) was injured when she fell while climbing on the outside of the tube slide. The Second Department determined the dangers of climbing on the outside of the tube were obvious and the tube slide was not inherently dangerous or defectively designed. In addition, the property owner demonstrated it did not create the hazardous condition or have constructive notice of it. **Moseley v Philip Howard Apts. Tenants Corp., 2015 NY Slip Op 09080, 2nd Dept 12-9-15**

WORKERS' COMPENSATION LAW (FEDERAL LONGSHORE AND HARBOR WORKERS' COMPENSATION ACT).

PLAINTIFF'S ACTION AGAINST ALTER EGO OF HIS EMPLOYER BARRED BY FEDERAL LONGSHORE AND HARBOR WORKERS' COMPENSATION ACT.

Plaintiff was injured while working on a vessel owned by a defendant when an employee of the New York Container Terminal, LLC (NYCT) lowered a container on him. NYCT's motion for summary judgment should have been granted. NYCT provided insurance coverage for payment of Federal Longshore and Harbor Workers' Compensation Act (LHWHA) benefits to plaintiff. And NYCT demonstrated it was the alter ego of plaintiff's employer: "The evidence demonstrated that any action against NYCT in relation to the plaintiff's accident was barred by the Federal Longshore and Harbor Workers' Compensation Act (hereinafter the LHWCA) because NYCT provided insurance coverage for the payment of LHWCA benefits to the plaintiff ... . Moreover, NYCT provided sufficient evidence that it was the alter ego of the plaintiff's employer ... . In opposition, the plaintiff failed to raise a triable issue of fact. '[O]nce an employer fulfills its obligations under the [LHWCA] by paying out benefits to the injured LHWCA employee, further tort-based contribution from the employer is foreclosed' ... . Therefore, [plaintiff's employer] cannot maintain contribution or contractual indemnification claims against NYCT ... and [plaintiff's employer's] proposed cross claims against NYCT would be palpably insufficient or patently devoid of merit ...". **Morales v Hapag-Lloyd AG. (America), 2015 NY Slip Op 09079, 2nd Dept 12-9-15**

THIRD DEPARTMENT

ADMINISTRATIVE LAW, DRIVER'S LICENSE.

COMMISSIONER OF MOTOR VEHICLES HAS THE POWER TO DENY RELICENSING TO DRIVER CONVICTED OF DWI WHO HAD TWO SIX-POINT SPEEDING TICKETS DURING THE LOOK-BACK PERIOD.

The Third Department, over a dissent, determined the Commissioner of Motor Vehicles, pursuant to the new DWI relicensing regulations, properly refused to relicense petitioner, who had been convicted of three alcohol-related offenses during a 10-year period, based upon two six-point speeding tickets during the look-back period. The question presented was whether two five-point speeding tickets could properly constitute a "serious driving offense" justifying a denial of relicensing. The majority concluded the relevant regulation was a valid exercise of the Commissioner's powers. The court noted that the Commissioner has the discretion to grant a license under unusual, extenuating and compelling circumstances, but petitioner did not make an application under that provision: "In the broadest sense, 15 NYCRR part 136 was promulgated to 'establish[] criteria to identify individual problem drivers,' that is, applicants for new licenses that 'ha[ve] had a series of convictions, incidents and/or accidents . . . which in the judgment of the [C]ommissioner . . . upon review of the applicant's entire driving history, establishes that the person would be an unusual and immediate risk upon the highways' (15 NYCRR 136.1 [a], [b] [1]). * * * As for petitioner's claim that her two six-point speeding violations during the 25-year look-back period are not serious enough to be expressly defined as a 'serious driving offense' (see 15 NYCRR [a] [2] [iii]), we defer to the Commissioner's determination, as it was made pursuant to her discretionary authority (see Vehicle and Traffic Law § 510 [5], [6]), and it was within the area of expertise of the agency she heads ...". **Matter of Matsen v New York State Dept. of Motor Vehs., 2015 NY Slip Op 09159, 3rd Dept 12-10-15**

CRIMINAL LAW.

FAILURE TO INFORM DEFENDANT OF THE PERIOD OF POSTRELEASE SUPERVISION AT THE TIME OF THE PLEA RENDERED THE PLEA INVALID.

The Third Department reversed defendant's conviction by guilty plea because the defendant was not informed of the period of postrelease supervision at the time of the plea. Defendant was told by the sentencing judge (at the time of the plea) if he violated interim probation (which was to lead to a felony probation) he would be sentenced to four years in prison. No mention was made of postrelease supervision. Defendant violated the terms of the interim probation and was sentenced to four years' incarceration plus two years of postrelease supervision: "[I]t is well settled that, for a defendant's plea to be knowingly, voluntarily and intelligently entered into, a court must advise him or her of the direct consequences of a plea prior to sentencing, including the existence and duration of any postrelease supervision requirement ... . Here, as the People concede, at the time of his plea, defendant was not properly made aware of the postrelease supervision component of his sentence. Accordingly, defendant's decision to plead guilty was not a knowing, voluntary and intelligent one and, therefore, the judgment of conviction must be reversed ...". **People v Binion, 2015 NY Slip Op 09142, 3rd Dept 12-10-15**

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