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CasePrepPlus

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COURT OF APPEALS

ELECTION LAW.

STATE SENATE CANDIDATE, WHO REGISTERED TO VOTE IN WASHINGTON, D.C. IN 2014, DID NOT MEET NEW YORK'S FIVE-YEAR CONTINUOUS RESIDENCY REQUIREMENT, THIRD DEPARTMENT REVERSED.

The Court of Appeals, reversing the Third Department, determined the fact that petitioner (Glickman), a candidate for the state senate, had registered to vote in Washington, D.C. in 2014 precluded him, as a matter of law, from establishing the required five-year continuous residency in New York: "... [W]e conclude that Glickman lacked the requisite intent to establish residency for the five years required by our Constitution. A person is permitted to have more than one residence, but is not permitted to have more than one electoral residence. Under the Washington, D.C. law, a 'qualified elector' is defined, in part, as one who attests that he or she '[h]as maintained a residence in the District for at least 30 days preceding the next election and does not claim voting residence or right to vote in any state or territory' (DC Code §§ 1-1001.02 [2] [C]; 1-1001.07 [a] [2]). Thus, when Glickman registered to vote in Washington, D.C., he was required to attest that Washington, D.C. was his sole electoral residence and that he did not maintain voting residence in any other state. These factors clearly demonstrate that Glickman broke the chain of New York electoral residency which did not recommence until he registered to vote in New York in 2015. Thus, he cannot claim New York residency for the past five years as required by the State Constitution, and Supreme Court properly invalidated the designating petitions on that basis." ***Matter of Glickman v. Laffin*, 2016 N.Y. Slip Op. 05842, CtApp 8-23-16**

FIRST DEPARTMENT

CRIMINAL LAW.

TRIAL JUDGE PRESSURED DEFENDANT INTO PROVIDING A DNA SAMPLE AFTER DEFENSE COUNSEL HAD BEEN RELIEVED, DEFENDANT WAS DEPRIVED OF HIS RIGHT TO COUNSEL AT A CRITICAL STAGE, GUILTY PLEAS VACATED AND INDICTMENT DISMISSED.

The First Department, in a full-fledged opinion by Justice Manzanet-Daniels, over a two-justice dissenting opinion, determined defendant was deprived of his right to counsel when, after his attorney had been relieved, the judge pressured defendant into providing a DNA sample. The People's request for a DNA sample came long after the discovery deadline had passed. The defendant ultimately pled guilty to manslaughter and burglary. The First Department vacated the guilty pleas and dismissed the indictment: "The court rejected defendant's repeated pleas for a lawyer, pressured him into submitting to the DNA test, and incorrectly advised him that he had no argument against the prosecutor's untimely discovery. The denial of defendant's repeated entreaties to consult with a lawyer during this critical stage of the proceedings violated his Sixth Amendment rights. The deprivation of his Sixth Amendment rights is of constitutional dimension and is not subject to a harmless error analysis ... . The appropriate remedy under the circumstances is to vacate both pleas, and to dismiss the indictment ...". ***People v. Smith*, 2016 N.Y. Slip Op. 05902, 1st Dept 8-25-16**

MUNICIPAL LAW, APPEALS, IMMUNITY.

WAIVER OF SOVEREIGN IMMUNITY ARGUMENT COULD BE CONSIDERED ON APPEAL EVEN THOUGH NOT RAISED BELOW, CRITERIA EXPLAINED.

The First Department determined the Port Authority of N.Y. & N.J. did not waive sovereign immunity, despite several contract provisions requiring several steps to resolve disputes prior to resorting to suit. Because the notice of claim and the subsequent filing of a complaint were not timely pursuant to Unconsolidated Law 7107, the complaint was properly dismissed. The court noted that, although the waiver of sovereignty argument was not raised below, the appellate court could consider the argument (which was rejected). With respect to the powers of the appellate court in this context, the court explained: "... [W]here a party does not allege new facts, but merely raises a legal argument that appeared upon the face of the record, we are free to consider the argument "[s]o long as the issue is determinative and the record on appeal is sufficient to permit our review" ... . The waiver argument presents this very circumstance, and therefore, we consider [the] waiver argument on this appeal." ***W&W Steel, LLC v. Port Auth. of N.Y. & N.J.*, 2016 N.Y. Slip Op. 05900, 1st Dept 8-25-16**

PERSONAL INJURY.

ELEVATED PLATFORM NOT A DANGEROUS CONDITION AS A MATTER OF LAW.

The First Department affirmed summary judgment to the defendants in this slip and fall case. Plaintiff fell off an elevated platform. However the platform and steps were well-marked and well-lit and plaintiff testified she fell because she was not looking down. The defendants therefore demonstrated the platform did not constitute a dangerous condition as a matter of law: "... [P]laintiff alleges that she was injured when she fell off an elevated display platform in defendants' store. Defendants submitted evidence demonstrating that the platform and steps leading to the platform were not dangerous conditions as a matter of law through photographic evidence showing that the steps of the platform were clearly demarcated with thick black lines which contrasted with the light color of the floorboards. The evidence also showed that the steps were well lit and free of debris ... . Furthermore, plaintiff testified that she turned and stepped without looking down because she was seeking a sales associate and that the steps played no part in her fall ...". ***Pinkham v. West Elm*, 2016 N.Y. Slip Op. 05899, 1st Dept 8-25-16**

PERSONAL INJURY, EVIDENCE.

PLAINTIFF'S FAILURE TO TURN OVER A VIDEOTAPE OF THE EVENT AT WHICH PLAINTIFF WAS INJURED DID NOT WARRANT THE DISMISSAL OF THE COMPLAINT DURING THE JURY TRIAL.

The First Department, reversing Supreme Court's dismissal of the complaint during trial, determined the plaintiff's failure to turn over a videotape of the event during which plaintiff allegedly tripped on a cord and fell did not justify dismissing the complaint. On the third day of the trial plaintiff testified she had found a videotape of the event which had been misplaced. The videotape did not show the trip and fall, but allegedly did show the cord which caused the fall: "Under the particular circumstances of this case, the court abused its discretion in dismissing the complaint due to plaintiff's belated disclosure of a video. Although CPLR 3101(i) requires disclosure of 'any films, photographs, video tapes or audio tapes' of a party upon demand ... , there was insufficient evidence of willful or contumacious conduct on plaintiff's part, or prejudice to [defendant], to warrant the dismissal of her complaint in the midst of the jury trial ,,,, even if the dismissal was without prejudice. There was no court order directing plaintiff to produce the video, and [defendant's] discovery demands only requested that she produce photographs. Furthermore, plaintiff, who claimed to have misplaced the video, did not seek to introduce the edited video, which did not show her fall, into evidence at trial, and was willing to consent to its preclusion, the striking of her testimony concerning its existence, and a curative instruction, even though she believed the video to be favorable to her because it showed a cord across the floor and one of [defendant's] principals standing in the vicinity." ***Fox v. Grand Slam Banquet Hall*, 2016 N.Y. Slip Op. 05897, 1st Dept 8-25-16**

TRUSTS AND ESTATES, CIVIL PROCEDURE.

MORE THAN A YEAR'S DELAY IN PUBLIC ADMINISTRATOR'S SEEKING SUBSTITUTION FOR DECEASED IN A MEDICAL MALPRACTICE ACTION ADEQUATELY EXPLAINED.

The First Department, over a dissent, determined the Public Administrator's late motion (CPLR 1021) for substitution (for the deceased plaintiff) in a medical malpractice action was properly granted. There was a delay of more than one year after letters testamentary were issued before substitution was sought. The delay was essentially caused by law office failure. With respect to a reasonable excuse for the delay, the court wrote: "... [T]he record shows that there was a dispute between two of [the deceased's] children as to who would administer the estate, and that the Public Administrator's counsel was on maternity leave for five months. In addition, in this case, inadvertent errors in drafting the agreement to retain counsel accounted for some of the delay. Thus, ... there are circumstances present that 'adequately explain[] the delay in issue' ...". ***Public Adm'r, as Adm'r of the Estate of Ronald Simpson v. Levine*, 2016 N.Y. Slip Op. 05896, 1st Dept 8-25-16**

SECOND DEPARTMENT

CIVIL PROCEDURE.

RE-SERVICE AFTER EXPIRATION OF STATUTE OF LIMITATIONS PROPERLY ALLOWED.

The Second Department determined re-service of the summons and complaint after the statute of limitations had passed was properly allowed: "The Supreme Court providently exercised its discretion in granting that branch of the plaintiffs' cross motion which was pursuant to CPLR 306-b to extend the time to serve the defendant with the summons and complaint in the interest of justice ... . While the action was timely commenced, the statute of limitations had expired when the plaintiffs cross-moved for relief, the plaintiffs re-served the defendant within a reasonable time after learning that the timely service of process was being challenged by the defendant as defective, and the defendant had actual notice of the action within 120 days of its commencement ... . Furthermore, after re-serving the defendant, the plaintiffs cross-moved within a reasonable time for an extension of time to serve the defendant, and there was no identifiable prejudice to the defendant attributable to the delay in service ...". ***Rivera v. Rodriguez*, 2016 N.Y. Slip Op. 05855, 2nd Dept 8-24-16**

CONTRACT LAW.

DOCTRINE OF MUTUAL MISTAKE APPLIED TO REFORM NOTE AND MORTGAGE.

The Second Department determined the doctrine of mutual mistake applied and Supreme Court properly reformed the note and mortgage to correct the mistake: " 'A party seeking reformation of a contract by reason of mistake must establish, with clear and convincing evidence, that the contract was executed under mutual mistake or a unilateral mistake induced by the other party's fraudulent misrepresentation' ... . 'In a case of mutual mistake, the parties have reached an oral agreement and, unknown to either, the signed writing does not express that agreement' ... . 'Reformation is not granted for the purpose of alleviating a hard or oppressive bargain, but rather to restate the intended terms of an agreement when the writing that memorializes that agreement is at variance with the intent of both parties' ... . Here, the Supreme Court properly determined that the plaintiff established the existence of a mutual mistake by clear and convincing evidence ... . The parties' contract of sale clearly and unambiguously provided that the purchase price for the subject property was $550,000, which was to be paid, in part, by a $350,000 purchase money mortgage. Based upon the proof at trial, it was clear that the $206,065.79 balloon payment calculated by the plaintiff's attorney and mutually agreed upon by the parties was the product of an inadvertent error, as it was inconsistent with the parties' agreement that the mortgage was to be in the amount of $350,000. '[I]f, by the mistake of the scrivener or by any other inadvertence, [a] writing does not express the agreement actually made, it may be reformed by the court' ...". ***Gunther v. Vilceus*, 2016 N.Y. Slip Op. 05847, 2nd Dept 8-24-16**

CRIMINAL LAW.

JUDGE FAILED TO GIVE COUNSEL MEANINGFUL NOTICE OF THE CONTENTS OF A JURY NOTE, CONVICTION REVERSED.

The Second Department, reversing defendant's conviction, determined the trial judge's response to a jury note did not comply with Criminal Procedure Law 310.30. The note requested that the court "define clearly acting in concert:" "The jury's request to 'define clearly' was not a request for a 'mere ministerial readback' of the Supreme Court's charge ... . Meaningful notice of a jury's note 'means notice of the actual specific content of the jurors' request. Manifestly, counsel cannot participate effectively or adequately protect the defendant's rights if this specific information is not given' ... . The court's failure to provide counsel with meaningful notice of a substantive jury note was a mode of proceedings error ... , which requires reversal of the judgment and a new trial ...". ***People v. Gough*, 2016 N.Y. Slip Op. 05873, 2nd Dept 8-24-16**

FAMILY LAW, CONTRACT LAW.

MAINTENANCE PORTION OF POSTNUPTIAL AGREEMENT UNCONSCIONABLE.

The Second Department, in an extensive decision covering several marital/separate property and equitable distribution issues not summarized here, determined the maintenance portion of a 1988 postnuptial agreement was unconscionable and therefore unenforceable: "Here, the Supreme Court properly determined that the maintenance provision of the 1988 postnuptial agreement, which provided the plaintiff with only $50,000 in full satisfaction of all claims, would be unconscionable by the time a final judgment would be entered in this action. At the time that the parties executed the 1988 postnuptial agreement, the defendant owned, among other things, a jewelry business worth at least $3 million, and he was in contract to buy a shopping center. Thereafter, during more than 25 years of marriage, the defendant's jewelry business underwent tremendous growth while the plaintiff worked there, and the parties lived what can easily be described as a lavish lifestyle. Among other things, they owned numerous high-end automobiles and took numerous international vacations. For a time, they traveled regularly to the Bahamas on the defendant's yacht. Under all the circumstances, the court properly determined that the maintenance provision in the 1988 agreement was unconscionable and, thus, unenforceable ...". ***Maddaloni v. Maddaloni*, 2016 N.Y. Slip Op. 05851, 2nd Dept 8-24-16**

FAMILY LAW, EVIDENCE.

COURT MUST DETERMINE VALUE OF MARITAL PROPERTY, DESPITE PAUCITY OF SUBMITTED EVIDENCE, BEFORE DISTRIBUTING IT.

The Second Department determined the trial judge should have determined the value of the marital residence before awarding sole title to plaintiff: "We remit the matter for a new trial on the issue of equitable distribution of marital property. Although the parties came forward with a paucity of evidence regarding the value of the marital residence, the Supreme Court was nevertheless required to determine the value of the property before awarding sole title to the plaintiff. 'A determination must be made as to the net value of each asset before determining the distribution thereof' ... . In circumstances where proof of value is insufficient to make a determination, the court has discretion to, among other things, appoint a neutral appraiser and to direct that such appraiser be paid by one or both parties ... . Further, the court erred in failing to value and equitably distribute the defendant's investment in a rental property located in North Carolina and the parties' remaining interest in property located in Costa Rica." ***Van Dood v. Van Dood*, 2016 N.Y. Slip Op. 05858, 2nd Dept 8-24-16**

FORECLOSURE.

REFEREE'S ALLEGED VIOLATION OF A LOCAL COURT RULE DID NOT WARRANT SETTING ASIDE THE FORECLOSURE SALE.

The Second Department, reversing Supreme Court, determined the referee's alleged setting of an "upset price" which violated Kings County Supreme Court Civil Term Rules did not warrant setting aside the foreclosure sale: "RPAPL 231 provides, in relevant part, that a court, within one year after a foreclosure sale, 'may set the sale aside for failure to comply with the provisions of this section as to the notice, time or manner of such sale if a substantial right of a party was prejudiced by the defect' (RPAPL 231[6]). 'In the exercise of its equitable powers, a court has the discretion to set aside a foreclosure sale where there is evidence of fraud, collusion, mistake, or misconduct' ... . 'In order to provide a basis for setting aside a sale, the evidence of fraud, collusion, mistake, or misconduct must cast suspicion on the fairness of the sale ... . Furthermore, evidence of a unilateral mistake at the foreclosure sale, without more, does not provide a basis to invalidate a sale that was otherwise lawfully conducted ... , and belated and unsubstantiated claims are insufficient to establish the existence of fraud, collusion, mistake, or misconduct ... . Moreover, mere irregularities by a referee may be disregarded if they do not affect a substantial right of a party ...". ***Clinton Hill Holding 1, LLC v. Kathy & Tania, Inc.*, 2016 N.Y. Slip Op. 05844, 2nd Dept 8-24-16**

PERSONAL INJURY, EMPLOYMENT LAW.

QUESTION OF FACT WHETHER EMPLOYER VICARIOUSLY LIABLE FOR NEGLIGENCE OF AN INDEPENDENT CONTRACTOR.

The Second Department determined there was a question of fact whether the employer, Vertical, could be held vicariously liable for the actions of an independent contractor, On Guard. On Guard providing security for a parking lot owned by Vertical. Plaintiff was injured when struck by a remote-controlled toy car which was apparently being operated in the parking lot with a security guard's knowledge: " 'Generally, a party who retains an independent contractor, as distinguished from a mere employee or servant, is not liable for the independent contractor's negligent acts' ... . 'One of the exceptions to this general rule is the nondelegable duty exception, which is applicable where the party is under a duty to keep premises safe' ... . In such instances, the party 'is vicariously liable for the fault of the independent contractor because a legal duty is imposed on it which cannot be delegated' ... . Here, the evidence submitted by the moving defendants raised triable issues of fact regarding whether On Guard was negligent in performing its security duties, and whether the moving defendants were vicariously liable for On Guard's negligence based on their nondelegable duty to keep the premises safe...". ***Pesante v. Vertical Indus. Dev. Corp.*, 2016 N.Y. Slip Op. 05854, 2nd Dept 8-24-16**

REAL PROPERTY TAX LAW.

NON-PROFIT RETREAT ENTITLED TO REAL PROPERTY TAX EXEMPTION FOR ENTIRE PROPERTY, NOT JUST THE DEVELOPED PORTION.

The Second Department, reversing Supreme Court, determined the owner of a retreat (Greentree, a non-profit) was entitled to a real property tax exemption for the entirety of the property, not just the developed portion: "The term 'exclusively,' in the context of RPTL 420-a, 'is not to be read literally' ... , and 'has been broadly defined to connote principal or primary such that purposes and uses merely auxiliary or incidental to the main and exempt purpose and use will not defeat the exemption' ... . 'Thus, whether property is used 'exclusively' for purposes of section 420-a is dependent upon whether the 'primary use' of the property is in furtherance of permitted purposes' ... . Here, Greentree demonstrated that the entire property should be considered as a single unit and that it is used exclusively for tax exempt purposes. More specifically, Greentree offered proof that the undeveloped area is an integral part of the property, regardless of the frequency of use, because it served to preserve the character of the remaining property and, thus, is entitled to exemption ...". ***Matter of Greentree Found. v. Assessor & Bd. of Assessors of County of Nassau*, 2016 N.Y. Slip Op. 05861, 2nd Dept 8-24-16**

THIRD DEPARTMENT

CRIMINAL LAW, EVIDENCE.

CRIMINAL PROCEDURE LAW 440.30 (1-a) DOES NOT ALLOW A POST-TRIAL CHALLENGE TO DNA EVIDENCE ADMITTED AT TRIAL.

The Second Department determined Criminal Procedure Law 440.30 (1-a) did not authorize defendant to challenge, in a post-trial motion, DNA evidence which was introduced at trial. The statute deals only with post-trial DNA testing: "CPL 440.30 (1-a) (a) (1) provides that a defendant may bring a postconviction motion requesting forensic DNA testing of 'specified evidence.' The statute further provides that 'the court shall grant the application for forensic DNA testing of such evidence upon its determination that if a DNA test had been conducted on such evidence, and if the results had been admitted in the trial resulting in the judgment, there exists a reasonable probability that the verdict would have been more favorable

to the defendant' (CPL 440.30 [1-a] [a] [1]). As the Court of Appeals has recognized, CPL 440.30 (1-a) was enacted to establish a new procedure for defendants to secure DNA testing of specified evidence ... .. Defendant here has not requested DNA testing of any evidence, and instead seeks to have expert testimony adduced for the purpose of challenging the accuracy of scientific evidence that was actually presented at trial. Inasmuch as CPL 440.30 (1-a) does not address requests for expert testimony, the provision is inapplicable to defendant's request." ***People v. Ramos*, 2016 N.Y. Slip Op. 05885, 3rd Dept 8-25-16**

RETIREMENT AND SOCIAL SECURITY LAW.

HEARING OFFICER APPLIED THE WRONG REVIEW STANDARD, NEW HEARING ORDERED.

The Third Department annulled the determination and sent the matter back for a new hearing because the hearing officer applied the wrong legal standard. The matter concerned a police officer seeking accidental disability retirement benefits: "... [T]he Hearing Officer applied the incorrect legal standard in rendering her decision. Specifically, the Hearing Officer confined her analysis to whether the initial determination was supported by substantial evidence, rather than undertaking a 'redetermination' and exercising 'the same powers upon such hearing as upon the original application' ... . As this Court recently noted in *Matter of DeMaio v. DiNapoli* (137 AD3d 1545, 1545-1546 [2016]), such deficiency constitutes an error of law requiring annulment of the determination." ***Matter of Bodenmiller v. DiNapoli*, 2016 N.Y. Slip Op. 05894, 3rd Dept 8-25-16**

RETIREMENT AND SOCIAL SECURITY LAW.

POLICE OFFICER'S SLIP AND FALL DURING A BURGLARY INVESTIGATION NOT AN ACCIDENT.

The Third Department determined the police officer's slip and fall on a wet stair was not an accident entitling him to accidental disability retirement benefits: "Petitioner's search of the residence following the burglary was a part of his routine duties as a police officer. He acknowledged that it was lightly raining when he conducted the search and, although he did not see water pooling on the stairs, he believed that they were wet. He stated that he did not realize that the stairs were slippery until his foot slipped on the top stair. Notwithstanding this, petitioner could have reasonably anticipated the slippery condition of the stairs under the circumstances presented ...". ***Matter of Magistro v. DiNapoli*, 2016 N.Y. Slip Op. 05893, 3rd Dept 8-25-16**

UNEMPLOYMENT INSURANCE.

EXOTIC DANCERS WERE EMPLOYEES.

The Third Department determined exotic dancers were employees entitled to unemployment insurance benefits: "The record reflects that the club would evaluate prospective dancers and instruct those who were inexperienced to observe a more experienced dancer. If the club determined that a dancer was 'unappealing,' the dancer would not be permitted to continue to perform. Additionally, the dancers were required to present proof of legal age and citizenship or their services would not be engaged. The club charged patrons an admission fee and set the prices that the dancers would charge patrons for private one-on-one dances, with the club retaining a percentage thereof, and patrons would pay the club's bartender for the private dances. While the dancers could set their own schedules, the club would compile a nightly list of the dancers scheduled to perform and post it on its website. Finally, the club provided the stage, private dance rooms, lighting and sound equipment, while the dancers supplied their own costumes and music." ***Matter of Greystoke Indus. LLC (Commissioner of Labor)*, 2016 N.Y. Slip Op. 05890, 3rd Dept 8-25-16**

WORKERS' COMPENSATION LAW.

CLAIMANT DID NOT DEMONSTRATE SUFFICIENT ATTEMPTS TO RETURN TO WORK TO WARRANT BENEFITS; TOTAL INDUSTRIAL DISABILITY CLAIM SENT BACK, JUDGE AND BOARD FAILED TO DISCUSS THE RELEVANT FACTORS IN THE DENIAL OF THAT CLAIM.

The Third Department determined claimant, who was found to have a work-related permanent partial disability, did not demonstrate a sufficient attachment to the labor market to warrant benefits. Claimant's only attempt to go back to work was enrollment in an unfunded training program. The court sent the "total industrial disability" claim back because the Workers' Compensation Law Judge (WCLJ) and the Board did not cite any medical evidence in support of the denial of the "total industrial disability" claim: "Although the Board has found that a claimant remains attached to the labor market when it is shown that he or she is actively participating in a job location service or a Board-approved vocational rehabilitation ... , we find that the Board's determination here — that by relying solely on an unfunded training program, claimant was not actively participating in vocational rehabilitation and had voluntarily removed himself from the labor market — is supported by substantial evidence and will not be disturbed ... . * * * Here, the WCLJ found a lack of total industrial disability based solely upon claimant's failure to seek employment after his accident, with no discussion of the relevant factors relating to a total industrial disability." ***Matter of Walker v. Darcon Constr. Co.*, 2016 N.Y. Slip Op. 05888, 3rd Dept 8-25-16**

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