CasePrepPlus

December 14, 2016

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

CONTRACT LAW, INSURANCE LAW.

"WRITTEN AGREEMENT" REQUIREMENT IN POLICY DID NOT MEAN AN "EXECUTED AGREEMENT."

The First Department determined the "written agreement" requirement in an insurance policy did not mean a "signed agreement." Here a purchase order required that the owner's property manager, Newmark, be named as an additional insured. The purchase order did not have signature lines and was not signed. The court held the unsigned purchase order was a "written agreement" within the meaning of the policy language: "Defendant contends that Newmark and the owner are not additional insureds because the purchase order/agreement was unsigned. However, defendant's policy merely requires a 'written' contract, not a 'signed' one. By contrast, in *Cusumano v. Extell Rock, LLC* (86 AD3d 448 [1st Dept 2011]), the policy said, 'The following are also an insured when you ... have agreed, in writing, in a contract or agreement that another person or organization be added as an additional insured on your policy, provided the injury or damage occurs subsequent to the execution of the contract or agreement' ... . As the motion court in *Cusumano* found, the insurer analogous to defendant in the case at bar 'expressly included the word executed' in[] its Policy, thereby requiring that any agreement by Regions to add a person/organization as an additional insured be memorialized in a signed contract ... . * * * Under the circumstances, the court did not err by finding that the unsigned purchase order constituted a written contract for purposes of the additional insured endorsement ...". ***Zurich Am. Ins. Co. v. Endurance Am. Speciality Ins. Co.*, 2016 N.Y. Slip Op. 08313, 1st Dept 12-8-16**

CRIMINAL LAW, ATTORNEYS.

DEFENDANT ENTITLED TO A HEARING ON HIS MOTION TO VACATE HIS CONVICTION, HE ADEQUATELY ALLEGED DEFENSE COUNSEL GAVE HIM WRONG INFORMATION ABOUT THE DEPORTATION CONSEQUENCES OF A GUILTY PLEA VERSUS A CONVICTION AFTER TRIAL.

The First Department determined defendant was entitled to hearing on his motion to vacate the judgment of conviction. Defendant alleged he was erroneously told he would not be deported if he pled guilty to a drug sale, but could be deported if convicted after trial: "This case presents factual issues requiring a hearing into whether defendant was deprived of effective assistance of counsel under *People v. McDonald* (1 NY3d 109 [2003]) by way of erroneous and prejudicial immigration advice. Defendant alleges that his attorney erroneously advised him that if he pleaded guilty to a drug sale count with a sentence of probation, he would not be subject to deportation, but if he refused the plea offer, proceeded to trial and lost, he would go to prison and then be deported. Defendant's claim is corroborated, to some extent, by statements made to present counsel by the attorney who represented defendant at the time of the plea ... . The standard 'no other promises' disclaimer in defendant's plea allocution does not, as a matter of law, defeat his claim of erroneous legal advice. This case warrants a hearing at which defendant may establish the advice he actually received regarding the deportation consequences of his plea. ... This case also warrants a hearing on the prejudice prong of defendant's claim. Defendant made a sufficient showing to raise an issue of fact as to whether he could have rationally rejected the plea offer under all the circumstances of the case, including the serious consequences of deportation and his incentive to remain in the United States ... . Further, defendant sufficiently alleges that if immigration consequences had been factored into the plea bargaining process, counsel might have been able to negotiate a different plea agreement that would not have resulted in automatic deportation." ***People v. Santos*, 2016 N.Y. Slip Op. 08169, 1st Dept 12-6-16**

CRIMINAL LAW.

FOR CAUSE CHALLENGE TO JUROR SHOULD HAVE BEEN GRANTED, TRIAL JUDGE DID NOT MAKE A SUFFICIENT INQUIRY WHEN THE JUROR EXPRESSED DOUBT SHE COULD BE FAIR.

The First Department, over a two-justice dissent, determined defense counsel's "for cause" challenge to a juror (Ms. J) should have been granted. Two of the juror's siblings had been the victims of serious crimes. Although the juror, at one point, indicated she could be fair, she subsequently expressed doubt and the trial judge did not make any further inquiry at that point: "While it is true that the trial judge in this case asked Ms. J. on October 5, 2011 whether the crimes suffered by her siblings would affect her ability to be fair, the judge did not repeat this inquiry the next day when Ms. J. repeated her belief

that her siblings' experience might affect her ability to be fair. Defense counsel's general inquiry into whether Ms. J. would have difficulty returning a not guilty verdict if she had a reasonable doubt was insufficient to elicit an unequivocal assurance of her impartiality, as this questioning failed to confront the very issue she had raised: that her siblings' experiences would affect her, thus making it less likely that she might have any reasonable doubt. Just as defense counsel's venire-wide inquiry in Arnold did not directly address a prospective juror's personal bias, in this case, defense counsel's general inquiry about reasonable doubt did not directly address the concerns of bias raised by Ms. J. on October 6, 2011. ...[W]e [also] find that the totality of Ms. J.'s responses did not indicate that she could set aside what happened to her brother and sister." ***People v. Small*, 2016 N.Y. Slip Op. 08293, 1st Dept 12-8-16**

CRIMINAL LAW, ATTORNEYS.

THE DECISION TO CALL OR NOT CALL A WITNESS IS ENTIRELY THE PROVINCE OF DEFENSE COUNSEL, WHETHER OR NOT THE DEFENDANT AGREES.

The First Department determined defendant was not deprived of his right to call his codefendant as a witness. Although he strongly expressed his wish to do so, defense counsel properly exercised professional judgment in deciding against calling the witness: " 'If defense counsel solely defers to a defendant, without exercising his or her professional judgment, on a decision that is for the attorney, not the accused, to make because it is not fundamental, the defendant is deprived of the expert judgment of counsel to which the Sixth Amendment entitles him or her' ... . Whether to call a witness is a strategic decision to be made by defense counsel ... . Moreover, counsel had a sound reason for not calling the codefendant, who, in his plea allocution, had implicated defendant in the drug sale. To the extent defendant is claiming ineffective assistance of counsel, that claim is likewise without merit ...". ***People v. Sheard*, 2016 N.Y. Slip Op. 08186, 1st Dept 12-6-16**

CRIMINAL LAW, EVIDENCE, CIVIL PROCEDURE.

STATEMENT BY UNIDENTIFIED BYSTANDER, AUDIBLE ON THE 911 CALL, ADMISSIBLE, EVIDENTIARY RULINGS ARE NOT SUBJECT TO THE LAW OF THE CASE DOCTRINE.

The First Department determined that a statement by an unidentified bystander, audible on the 911 call, was properly admitted as an excited utterance. The court noted that another judge, who became ill, had ruled the statement inadmissible. Because it was an evidentiary ruling, it was not subject to the law of the case doctrine: "The court providently admitted, as an excited utterance, the statement of an unidentified bystander, audible on the 911 call made by one of the victims, that implicated defendant. All of the circumstances—most significantly that the statement was made immediately after the shooting—established a strong likelihood that the declarant observed the shooting ... . Although a contrary ruling on the excited utterance issue had been made by a previous judge, who presided over part of jury selection but was unable to continue because of illness, this circumstance did not foreclose the successor judge's ruling by operation of the law of the case doctrine. The ruling was evidentiary and did not fall within the ambit of that doctrine (see *People v. Evans* , 94 NY2d 499 [2000]). Defendant does not dispute that this was the type of ruling that, under *Evans* , may be revisited by a successor judge in a retrial. We see no reason to apply a different rule where there are successive judges in the same trial ...". ***People v. Cummings*, 2016 N.Y. Slip Op. 08298, 1st Dept 12-8-16**

EDUCATION-SCHOOL LAW.

TERMINATION SHOCKS THE CONSCIENCE, TEACHER SUGGESTED STUDENTS' ANSWERS ON A STANDARDIZED TEST MIGHT BE WRONG.

The First Department, over a dissent, determined a teacher's assisting several students on a standardized test did not warrant termination: "While petitioner's behavior in suggesting to several students that some of their answers might be wrong demonstrated a lapse in judgment, petitioner did not provide the students with the correct answers and there is no evidence that the incident was anything but a one-time mistake ... . Prior to her termination in October 2014, petitioner, a tenured teacher who had worked for respondent since 2003, had an unblemished record and, as the OSI investigator testified, was considered to be a good teacher ... . Moreover, the record is devoid of evidence that would suggest petitioner could not remedy her behavior." ***Matter of Bolt v. New York City Dept. of Educ.*, 2016 N.Y. Slip Op. 08158, 1st Dept 12-6-16**

LEGAL MALPRACTICE, CONTRACT LAW, CIVIL PROCEDURE.

EQUITABLE ESTOPPEL DOCTRINE ADEQUATELY PLED, LAW FIRM MAY BE PROHIBITED FROM ARGUING THE ASSIGNMENT IT DREW UP FOR PLAINTIFF DID NOT ASSIGN PLAINTIFF THE RIGHT TO BRING A MALPRACTICE ACTION AGAINST IT.

The First Department, reversing Supreme Court, determined plaintiff had adequately pled that the defendant law firm was equitably estopped from arguing an assignment, which was drawn up by the law firm, did not assign to plaintiff the right to bring a malpractice action against the law firm. The law firm had missed a deadline. Although the assignment could not be interpreted to include the malpractice claim, the equitable estoppel doctrine could be applied to prohibit the law firm from arguing the issue: "The motion court correctly found that the subject assignment, which merely transferred the assignor's 'entire right, title and interest in and to the [call] option contained in Paragraph 8 of' another contract, did not explicitly

assign tort claims ... . The assignment is not ambiguous; even if it were (and if we therefore considered parol evidence), an unexpressed understanding does not suffice ... . However, accepting plaintiff's affidavit in opposition to defendants' motion as true, we find that plaintiff sufficiently pleaded that defendants should be equitably estopped from arguing that the assignment did not assign tort claims. Contrary to defendants' contention, estoppel can be based on silence as well as conduct ... . Under these circumstances, where defendants drafted the assignment at a time when it represented ... plaintiff, and that interpreting the assignment to exclude tort claims would mean that neither the assignor nor plaintiff, the assignee, would be able to sue defendants for malpractice for failing to exercise the call option in a timely manner, we find that the 'special circumstances' exception to the privity requirement applies ...". ***Deep Woods Holdings LLC v. Pryor Cashman LLP*, 2016 N.Y. Slip Op. 08156, 1st Dept 12-6-16**

MEDICAL MALPRACTICE.

JURY ONLY CONSIDERED THE TREATMENT OF PLAINTIFF'S LEG AFTER IT HAD BEEN INJURED BY A DRIVER, THE DRIVER WAS PROPERLY NOT INCLUDED IN THE MALPRACTICE VERDICT SHEET.

The First Department, over a dissent, determined the driver who caused the injury to plaintiff's leg was properly excluded from the verdict sheet in this medical malpractice action. Only the treatment of the leg injury (amputation) was before the jury, not the original injury: "[T]he court [did not] err in denying defendants' request to place the driver of the vehicle that struck plaintiff, who settled prior to institution of the instant action, on the verdict sheet. Defendants are subsequent tortfeasors, and the jury was correctly charged that its award was to be limited to the exacerbation of the original injury caused by malpractice ... . Defendants' argument that plaintiff's original injury and subsequent amputation were indivisible is without merit, in that the experts testified as to what the condition of the leg would have been if it had been saved ... . Defendants' arguments concerning General Obligations Law § 15-108 are academic, given that the court reduced the judgment based upon the settlement received by the settling driver." ***Marin v. New York City Health & Hosps. Corp.*, 2016 N.Y. Slip Op. 08294, 1st Dept 12-8-16**

SECOND DEPARTMENT

CIVIL PROCEDURE.

GENERAL PRAYER FOR RELIEF WILL NOT JUSTIFY RELIEF DRAMATICALLY DIFFERENT FROM THAT REQUESTED IN THE MOTION, REPLY PAPERS CANNOT BE USED TO ADVANCE NEW ARGUMENTS.

In the context of a foreclosure proceeding, the Second Department, reversing Supreme Court, explained that a general prayer for relief cannot justify relief dramatically different from that requested in the motion, and reply papers cannot be used to raise new arguments: "The court may grant relief that is warranted pursuant to a general prayer for relief contained in a notice of motion if the relief granted is not too dramatically unlike the relief sought, the proof offered supports it, and there is no prejudice to any party ... . Here, [defendant's] application to vacate the final judgment of foreclosure and sale, as well as the related relief awarded, sua sponte, by the Supreme Court, was 'dramatically unlike' the relief sought in Ivette's motion, which only sought to stay the impending foreclosure sale based on her pending contempt motion in the matrimonial action. The function of reply papers is to address arguments made in opposition to the position taken by the movant and not to permit the movant to introduce new arguments in support of, or new grounds or evidence for, the motion ... . Here, [defendant's] reply papers included new arguments in support of the motion, new grounds and evidence for the motion, and expressly requested relief that was dramatically unlike the relief sought in her original motion. Accordingly, those contentions, and the grounds and evidence in support of them, were not properly before the Supreme Court. Similarly, the court erred in, sua sponte, awarding related relief not requested by the parties ...". ***USAA Fed. Sav. Bank v. Calvin*, 2016 N.Y. Slip Op. 08223, 2nd Dept 12-7-16**

CRIMINAL LAW.

GUILTY PLEA INDUCED BY AN UNFULFILLED PROMISE VACATED.

The Second Department vacated defendant's conviction because the guilty plea was induced by an unfulfilled promise: "In June 2013, the defendant pleaded guilty to attempted assault in the second degree and assault in the third degree. Pursuant to the plea agreement, the defendant was advised that if he failed to complete a Mental Health Court program, the court would sentence him to a term of imprisonment on his plea of guilty to attempted assault in the second degree, and that his plea of guilty to assault in the third degree would be vacated. The defendant did not successfully complete the program. At sentencing, however, instead of vacating the defendant's plea of guilty to assault in the third degree, the County Court sentenced the defendant to a term of imprisonment upon that plea, to run concurrently with the term of imprisonment imposed on his conviction of attempted assault in the second degree. '[A] guilty plea induced by an unfulfilled promise either must be vacated or the promise honored'...". ***People v. Rohan*, 2016 N.Y. Slip Op. 08251, 2nd Dept 12-7-16**

CRIMINAL LAW, EVIDENCE, SEX OFFENDER REGISTRATION ACT (SORA)

GRAND JURY TESTIMONY IS PROPERLY CONSIDERED IN A SORA RISK-LEVEL PROCEEDING.

The Second Department determined the SORA court properly considered grand jury testimony in assessing the risk level: "The defendant argues that the People's disclosure of grand jury minutes in this case violated CPL 190.25(4), citing *Matter of District Attorney of Suffolk County* (58 NY2d 436, 444, 446), which ruled that grand jury minutes cannot be disclosed in a civil proceeding without a demonstration of a 'compelling and particularized need' and that it is 'impossible' to make a case without the grand jury minutes. However, this argument has been uniformly rejected by the courts ... . Correction Law § 168-n(3) states that the court in a SORA proceeding 'shall review any victim's statement,' which includes a victim's testimony before the grand jury ... . Grand jury testimony constitutes reliable hearsay that is sufficient for SORA purposes ... . Where grand jury testimony is 'undermined by other more compelling evidence,' it need not be credited unless corroborated by other evidence ... . However, in this case, no conflicting evidence was submitted." ***People v. Harmon*, 2016 N.Y. Slip Op. 08210, 2nd Dept 12-7-16**

CRIMINAL LAW, EVIDENCE, SEX OFFENDER REGISTRATION ACT (SORA).

PEOPLE DID NOT DEMONSTRATE DEFENDANT WAS AWARE OF THE VICTIM'S AGE, FACTOR 7 SHOULD NOT HAVE BEEN APPLIED TO THE RISK ASSESSMENT.

The Second Department, reversing Supreme Court, determined the People did not demonstrate the defendant was aware of the victim's age when establishing the relationship for sexual purposes. The victim indicated she was 18 in her online profile: "... [I]n enacting SORA, the Legislature expressly stated that it was especially concerned with 'predatory acts': '[t]he legislature finds that the danger of recidivism posed by sex offenders, especially those sexually violent offenders who commit predatory acts characterized by repetitive and compulsive behavior, and . . . the protection of the public from these offenders, is of paramount concern or interest to the government' ... . This language convinces us that 'for the primary purpose of victimization,' as used in risk factor 7 and relevant to this case, requires proof that the defendant knew when establishing or promoting the relationship for sexual purposes that the victim was underage. In cases where the SORA offense is a crime because of the victim's age, risk factor 7 does not apply to offenders who may have established the relationship for sexual purposes, but without having reason to know the victim's age at that time ...". ***People v. Jordan*, 2016 N.Y. Slip Op. 08212, 2nd Dept 12-7-16**

FAMILY LAW.

ALTHOUGH THE DEBT WAS INCURRED DURING MARRIAGE, WIFE WAS NOT RESPONSIBLE FOR THE PORTION OF THE DEBT USED SOLELY TO FURTHER HUSBAND'S BUSINESS.

The Second Department determined Supreme Court properly allocated payment of a home equity line of credit (HELOC) incurred during marriage, taking into account a portion of the debt was used solely to further defendant-husband's business: "The Supreme Court providently exercised its discretion in directing the defendant to pay two-thirds of the balance of a home equity line of credit (hereinafter the HELOC) or $198,667, and that the plaintiff was to be responsible for one-third of the balance of the HELOC or $99,330. In general, '[e]xpenses incurred prior to the commencement of a divorce action constitute marital debt and should be equally shared by the parties' ... . However, a financial obligation incurred by one party in pursuit of his or her separate interests should remain that party's separate liability ... . Under the circumstances of this case, inasmuch as the evidence established that the HELOC debt was incurred for the dual purpose of improving the marital residence and paying bills as well as funding the defendant's separate business interest in which the plaintiff had no share, the defendant failed to show that the HELOC debt as to the defendant's separate business interest should be shared equally." ***Horn v. Horn*, 2016 N.Y. Slip Op. 08198, 2nd Dept 12-7-16**

FAMILY LAW.

GENETIC MARKER TESTING SHOULD NOT BE ORDERED BEFORE RESOLUTION OF WHETHER THE DOCTRINE OF EQUITABLE ESTOPPEL APPLIES TO PRECLUDE DENIAL OF PATERNITY.

The Second Department determined Family Court erred by ordering genetic marker testing before resolving the issue of equitable estoppel: "Family Court Act § 532 provides that, in a proceeding to establish paternity, 'on the court's own motion or the motion of any party, [the court] shall order the mother, her child and the alleged father to submit to one or more genetic marker or DNA tests' (Family Ct Act § 532[a]...). However, '[n]o paternity test shall be ordered upon a written finding by the court that it is not in the best interests of the child on the basis of, inter alia, equitable estoppel' ... . 'Where a party to a paternity proceeding raises an issue of equitable estoppel, that issue must be resolved before any biological testing is ordered' ...". ***Matter of Tralisa R. v. Max S.*, 2016 N.Y. Slip Op. 08236, 2nd Dept 12-7-16**

FORECLOSURE, CIVIL PROCEDURE.

MOTION TO VACATE DEFAULT DID NOT WAIVE RIGHT TO MOVE TO DISMISS THE FORECLOSURE ACTION AS ABANDONED.

The Second Department, reversing Supreme Court, determined the defendant's right to make a motion to dismiss the foreclosure cause of action as abandoned was not waived by defendant's motion to vacate the default and file a late answer: "Contrary to the plaintiff's contention, the defendant did not waive the right to seek dismissal of the complaint pursuant to CPLR 3215(c) by moving to vacate her default and for leave to serve a late answer. 'The mere fact that the legislative intent underlying CPLR 3215(c) was to prevent the plaintiffs from unreasonably delaying the determination of an action, does not foreclose the possibility that a defendant may waive the right to seek a dismissal pursuant to the section by his or her conduct' ... . A defendant may waive the right to seek a dismissal pursuant to CPLR 3215(c) by serving an answer or taking 'any other steps which may be viewed as a formal or informal appearance' ... . However, a motion pursuant to CPLR 3012(d) for leave to serve an untimely answer does not constitute either a formal (see CPLR 320) or informal appearance ...". ***HSBC Bank USA, N.A. v. Grella*, 2016 N.Y. Slip Op. 08199, 2nd Dept 12-7-16**

FRAUD, CIVIL PROCEDURE.

SPECIFICITY REQUIRED FOR A FRAUD CAUSE OF ACTION IS TEMPERED WHEN THE DETAILS ARE EXCLUSIVELY WITHIN THE KNOWLEDGE OF THE DEFENDANT.

The Second Department, in affirming the denial of a motion to dismiss a cause of action for fraud, noted that the specificity required for a fraud complaint is tempered when the details are exclusively within the knowledge of the defendant: "A plaintiff asserting a cause of action alleging fraud is required to plead with particularity (see CPLR 3016[b]...). When, however, the operative facts are 'peculiarly within the knowledge of the party' alleged to have committed the fraud, it may be impossible at the early stages of the proceeding for the plaintiff to detail all the circumstances constituting the fraud ... . Thus, as the Court of Appeals has held, the pleading requirement of CPLR 3016(b) 'should not be so strictly interpreted as to prevent an otherwise valid cause of action in situations where it may be impossible to state in detail the circumstances constituting a fraud' ... . Instead, the pleading requirement will be deemed to have been met 'when the facts are sufficient to permit a reasonable inference of the alleged conduct' ...". ***Bibbo v. Arvanitakis*, 2016 N.Y. Slip Op. 08194, 2nd Dept 12-7-16**

INTENTIONAL TORTS.

NO CONSPIRACY TO COMMIT A TORT CAUSE OF ACTION IN NEW YORK.

In affirming the dismissal of a complaint, the Second Department explained the law re: conspiracy to commit a tort: "Under New York law, conspiracy to commit a tort is not a separately cognizable cause of action from the underlying tort ... . A cause of action alleging conspiracy to commit a tort stands or falls with the underlying tort ... . Here, since the court properly granted dismissal of the causes of action alleging defamation and misappropriation of confidential information, the court also properly granted dismissal of the causes of action alleging conspiracy to commit those torts ...". ***Arvanitakis v. Lester*, 2016 N.Y. Slip Op. 08191, 2nd Dept 12-7-16**

MENTAL HYGIENE LAW, EVIDENCE.

PRISON SEX OFFENDER TREATMENT RECORDS PROPERLY TURNED OVER TO THE ATTORNEY GENERAL AND PROPERLY USED BY THE STATE'S PSYCHIATRIC EXPERTS.

The Second Department, in affirming the verdict requiring the civil confinement of appellant as a dangerous sex offender, determined the records of appellant's sex offender treatment in prison were properly released to the attorney general and properly used by the state's psychiatric experts: "Supreme Court did not err in permitting the petitioner's experts to testify regarding certain communications made by the appellant in the context of sex offender treatment he received in prison. The appellant correctly argues that the language of a limited waiver of confidentiality he signed before receiving sex offender treatment did not permit disclosure of his treatment records to the Attorney General for a trial under Mental Hygiene Law article 10. However, the appellant concedes that his sex offender treatment records were properly disclosed to the Attorney General and the Attorney General's experts pursuant to Mental Hygiene Law § 10.08(b) and (c). By granting the Attorney General access to a sex offender's relevant treatment records 'notwithstanding any other provision of law,' and by specifying that the psychiatric examiners chosen by the Attorney General be given access to such records, the Legislature expressed its intent that otherwise privileged sex offender treatment records could be used by these parties in the adversarial stage of an article 10 proceeding ...". ***Matter of State of New York v. Justin D.*, 2016 N.Y. Slip Op. 08241, 2nd Dept 12-7-16**

PERSONAL INJURY.

DEFENDANT ENTITLED TO SUMMARY JUDGMENT IN THIS SLIP AND FALL CASE UNDER THE STORM IN PROGRESS DOCTRINE.

The Second Department determined defendant, which owned property abutting a sidewalk, was entitled to summary judgment in this slip and fall case under the storm in progress doctrine. The court laid out all of the applicable law: " 'Under the so-called storm in progress rule, a property owner will not be held responsible for accidents occurring as a result of the accumulation of snow and ice on its premises until an adequate period of time has passed following the cessation of the storm to allow the owner an opportunity to ameliorate the hazards caused by the storm' ... . However, 'if the storm has passed and precipitation has tailed off to such an extent that there is no longer any appreciable accumulation, then the rationale for continued delay abates, and commonsense would dictate that the rule not be applied' ... . If a property owner has elected to clear a sidewalk during a storm in progress, the owner is required to act with reasonable care and may be liable if its efforts create a hazardous condition or exacerbate a natural hazard created by the storm ... . The mere failure of a defendant to remove all of the snow and ice, without more, does not establish that the defendant increased the risk of harm ...". ***Aronov v. St. Vincent's Hous. Dev. Fund Co., Inc.*, 2016 N.Y. Slip Op. 08190, 2nd Dept 12-7-16**

PERSONAL INJURY.

ABUTTING PROPERTY OWNER ENTITLED TO SUMMARY JUDGMENT IN THIS SIDEWALK SLIP AND FALL CASE.

The Second Department determined the abutting property owner was entitled to summary judgment in this sidewalk slip and fall case. No statute or ordinance imposed a duty to maintain the sidewalk on the property. And the property owner demonstrated it did not create the icy condition: "An abutting landowner will be liable to a pedestrian injured by a defect in a public sidewalk only when the owner either created the condition, or when a statute or ordinance places an obligation to maintain the sidewalk on the owner and expressly makes the owner liable for injuries caused by a breach of that duty ... . Here, the defendant demonstrated its prima facie entitlement to judgment as a matter of law ... , by establishing that no statute or ordinance imposed upon it tort liability for failure to maintain the adjoining sidewalk, and that it did not create the alleged icy condition." ***Escobar v. Lowe Props., LLC*, 2016 N.Y. Slip Op. 08197, 2nd Dept 12-7-16**

PERSONAL INJURY.

ALTHOUGH PLAINTIFF HAD THE RIGHT OF WAY AT THE TIME OF THE COLLISION, SUMMARY JUDGMENT WAS PROPERLY DENIED, PLAINTIFF DID NOT DEMONSTRATE FREEDOM FROM COMPARATIVE FAULT.

The Second Department determined plaintiff's motion for summary judgment in this traffic accident case was properly denied. Plaintiff did not demonstrate freedom from comparative fault. Plaintiff had the right-of-way at the time of the collision: "While an operator of a motor vehicle traveling with the right-of-way is entitled to anticipate that other drivers will obey the traffic laws requiring them to yield ... , the driver with the right-of-way nonetheless also has an obligation to keep a proper lookout and see what can be seen through the reasonable use of his or her senses to avoid colliding with other vehicles ... . There can be more than one proximate cause of a motor vehicle accident and, thus, 'a plaintiff moving for summary judgment on the issue of liability in an action alleging negligence must establish, prima facie, not only that the defendant was negligent but that the plaintiff was free from comparative fault' ... . The issue of comparative fault is generally a question for the trier of fact ... .Here, the plaintiff failed to establish her prima facie entitlement to judgment as a matter of law, as her submissions were insufficient to eliminate all triable issues of fact as to whether she contributed to the happening of the accident ...". ***Taylor v. Brat Auto Sales, Ltd.*, 2016 N.Y. Slip Op. 08220, 2nd Dept. 12-7-16**

PERSONAL INJURY, LABOR LAW-CONSTRUCTION LAW.

LABOR LAW CLAIMS PROPERLY DISMISSED, DEFENDANT WAS NOT AN AGENT OF THE OWNER OR CONTRACTOR, DID NOT CONTROL THE MANNER OF WORK, DID NOT CREATE THE DANGEROUS CONDITION, AND DID NOT HAVE NOTICE OF THE DANGEROUS CONDITION.

The Second Department determined plaintiff's Labor Law 240(1), 241(6) and 200 causes of action against Dynatec were properly dismissed. Dynatec demonstrated it was not an agent of the owner or contractor, did not control the manner of the work, did not create the dangerous condition, and did not have notice of the dangerous condition. Apparently plaintiff was injured twice, once falling from a ladder and a second time falling down stairs: "Here, Dynatec established its prima facie entitlement to judgment as a matter of law dismissing the Labor Law §§ 240(1) and 241(6) causes of action insofar as asserted against it by demonstrating that it lacked the authority to supervise or control the plaintiff's work ... . Specifically, Dynatec offered evidence indicating that its role at the worksite was to ensure compliance with design plans through weekly visits lasting no more than three hours. In opposition, the plaintiff failed to raise a triable issue of fact ... . Dynatec established its prima facie entitlement to judgment as a matter of law dismissing the common-law negligence and Labor Law § 200 causes of actions insofar as asserted against it by submitting evidence demonstrating that it did not control the methods or materials of the plaintiff's work, did not create the dangerous conditions that allegedly caused the accidents,

and did not have actual or constructive notice of the dangerous conditions ...". ***Vazquez v. Humboldt Seigle Lofts, LLC*, 2016 N.Y. Slip Op. 08225, 2nd Dept 12-7-16**

PERSONAL INJURY, LABOR LAW-CONSTRUCTION LAW, WORKERS' COMPENSATION LAW.

QUESTIONS OF FACT WHETHER DEFENDANT SUPERVISED AND DIRECTED PLAINTIFF'S WORK AND WHETHER PLAINTIFF WAS A SPECIAL EMPLOYEE UNDER THE WORKERS' COMPENSATION LAW, DEFENDANT'S MOTION TO DISMISS THE LABOR LAW 200 AND NEGLIGENCE CAUSES OF ACTION SHOULD HAVE BEEN DENIED.

With respect to one of the defendants (Irwin) the Second Department determined Supreme Court should have denied the defendant's motion for summary judgment on the Labor Law 200 and common-law negligence claims. Plaintiff injured his knee carrying a 200 pound, 30 foot beam. The defendant's own submission raised questions of fact about whether defendant supervised and directed plaintiff's work, and whether plaintiff was a "special employee" such that his only remedy was Workers' Compensation benefits: "The Supreme Court erred …in determining that Irwin was entitled to summary judgment dismissing the Labor Law § 200 and common-law negligence claims against it. The evidence submitted by Irwin in support of its summary judgment motion demonstrated that Irwin supervisors were present at the construction site every day supervising the work, and that these supervisors gave the plaintiff his daily work assignments. … … Whether a special employment relationship exists is generally an issue of fact ... , and requires consideration of many factors, the most of important of which is who directs and controls the manner, details, and ultimate result of the employee's work ... . Additionally, the employee must have had knowledge of, and consented to, the special employment relationship ... . … Irwin failed to submit evidence demonstrating that the plaintiff had knowledge of, and consented to, a special employment relationship ...". ***Zupan v. Irwin Contr., Inc.*, 2016 N.Y. Slip Op. 08229, 2nd Dept 12-7-16**

PERSONAL INJURY, MUNICIPAL LAW.

CAUSES OF ACTION AGAINST ABUTTING PROPERTY OWNERS AND COUNTY ALLEGING OBSTRUCTION OF SIGHT AT AN INTERSECTION SHOULD NOT HAVE BEEN DISMISSED.

The Second Department, reversing Supreme Court in this traffic accident case, determined the causes of action against abutting property owners (the Herlichs) and the county alleging obstruction of sight at an intersection should not have been dismissed: " 'A homeowner has no duty under the common law to prevent vegetation from creating a visual obstruction to users of a public roadway, but a duty to such users may be created by statute or ordinance' ... . '[W]here a specific regulatory provision . . . imposes upon property owners a duty to prevent vegetation from visually obstructing the roadway, proof of noncompliance with the regulatory provision may give rise to tort liability for any damages proximately caused thereby' ... . Here, the Herlich defendants failed to establish their prima facie entitlement to judgment as a matter of law, as they failed to demonstrate that the hedge on their property did not constitute a visual obstruction in violation of Code of the Town of Oyster Bay chapter 246 § 246-4.4.4, and Code of the Village of Massapequa Park chapter 298, article I, § ... . 'It has long been established that a governmental body, be it the State, a county or a municipality, is under a nondelegable duty to maintain its roads and highways in a reasonably safe condition, and that liability will flow for injuries resulting from a breach of the duty' ... . Here, the County, which concedes that the section of Park Boulevard where the accident occurred was within its jurisdiction, failed to demonstrate, prima facie, that Park Boulevard was maintained in a reasonably safe condition with unobstructed sight lines." ***Dutka v. Odierno*, 2016 N.Y. Slip Op. 08196, 2nd Dept 12-7-16**

REAL PROPERTY, REGULATORY TAKING.

PROHIBITING SEPTIC SYSTEMS WITHIN 300 FEET OF A LAKE WAS NOT AN UNCONSITUTIONAL REGULATORY TAKING OF CLAIMANT'S PROPERTY.

The Second Department determined the Court of Claims properly dismissed claimant's cause of action alleging a state watershed regulation prohibiting septic systems within 300 feet of a lake amounted to an unconstitutional taking of the property (because it could not be developed): "The Takings Clause of the Fifth Amendment to the United States Constitution, made applicable to the states through the Fourteenth Amendment ... , provides that private property shall not 'be taken for public use, without just compensation' (US Constitution Amendment V). The Takings Clause 'is designed not to limit the governmental interference with property rights per se, but rather to secure compensation in the event of otherwise proper interference amounting to a taking' ... . In addition to physical takings, the United States Supreme Court has recognized that 'government regulation of private property may, in some instances, be so onerous that its effect is tantamount to a direct appropriation or ouster— and that such regulatory takings' may be compensable under the Fifth Amendment' ... . The United States Supreme Court has 'generally eschewed' any set formula for identifying regulatory takings, choosing instead to engage in ' essentially ad hoc, factual inquiries' considering a number of factors ... . However, it has recognized two categories of regulatory action that will be deemed per se takings for Fifth Amendment purposes, without the need to engage in case-specific inquiries: (1) regulations that compel the property owner to suffer a permanent physical invasion of the property, and (2) regulations that completely deprive an owner of 'all economically beneficial us[e]' of the property ... . Here, in support of its motion for summary judgment, the claimant failed to establish, prima facie, that the subject property

has suffered a complete elimination of value as a result of the watershed regulations...". ***Monroe Equities, LLC v. State of New York*, 2016 N.Y. Slip Op. 08206, 2nd Dept 12-7-16**

ZONING.

ZONING BOARD'S DENIAL OF APPLICATION FOR SITE PLAN APPROVAL ANNULLED, BOARD'S DETERMINATION BASED SOLELY ON GENERALIZED COMMUNITY OPPOSITION.

The Second Department, reversing the zoning board, determined that the denial of petitioner's application for site plan approval was improperly based solely on generalized community opposition. The village consultants and the negative State Environmental Quality Review Act (SEQRA) declaration did not support the board's determination: " 'Although scientific or other expert testimony is not required in every case to support a zoning board's determination, the board may not base its decision on generalized community objections' ... . In contrast, a zoning board's reliance upon specific, detailed testimony of neighbors based on personal knowledge does not render a variance determination the product of generalized and conclusory community opposition ... . Here, we agree with the petitioner that the record lacks sufficient evidence to support the rationality of the Board's determinations denying the petitioner's application for site plan approval … . The only evidence in the record concerning the traffic and safety issues cited by the Board in the determinations was the conclusory opposition of neighboring residents, which was not supported by any of the Village's consultants and was contradicted by the negative SEQRA declaration adopted by the Board ... . Under the circumstances, the Board's determinations were improperly based on generalized community opposition and should have been annulled ...". ***Matter of Ramapo Pinnacle Props., LLC v. Village of Airmont Planning Bd.*, 2016 N.Y. Slip Op. 08238, 2nd Dept 12-7-16**

THIRD DEPARTMENT

COURT OF CLAIMS, IMMUNITY.

STATE ENTITLED TO QUALIFIED IMMUNITY WITH RESPECT TO THE ABSENCE OF A GUIDE RAIL ALONG A HIGHWAY.

The Third Department affirmed the Court of Claim's determination that the absence of a guide rail was not the proximate cause of claimant's injuries, and the state was entitled to qualified immunity because it had reasonably concluded after a study that a guide rail was not necessary. Claimant was injured when the ambulance in which he was riding struck a stone wall near the roadway: "Defendant's duty to maintain roads in a reasonably safe condition includes the installation of guide rails when necessary ... . With respect to highway safety and design, defendant is 'accorded a qualified immunity from liability arising out of a highway planning decision' ... . 'Under this doctrine of qualified immunity, a governmental body may be held liable when its study of a traffic condition is plainly inadequate or there is no reasonable basis for its traffic plan' ...". ***Schroeder v. State of New York*, 2016 N.Y. Slip Op. 08263, 3rd Dept 12-8-16**

CRIMINAL LAW, EVIDENCE.

TAKING A WOMAN'S DOG FOR A WALK WAS A VIOLATION OF PROBATION, THE WOMAN HAD A MISDEMEANOR DWI CONVICTION, THEREFORE THE PROBATIONER ASSOCIATED WITH A CONVICTED CRIMINAL.

The Third Department, over a two-justice dissent, determined the probation violation petition gave sufficient notice of the charges and a woman (Nichols) who had been convicted of misdemeanor DWI was a "convicted criminal" within the meaning of a condition of probation (prohibiting association with convicted criminals). The court held that it was not necessary to prove petitioner knew of the DWI conviction. The probationer apparently went to the Nichol's apartment for the purpose of taking a dog for a walk. The dissent argued that simply taking a dog for a walk was not "contact" or "association" with a convicted criminal: "Special condition No. 17 required defendant to refrain from associating with 'convicted criminals' — as opposed to 'known criminals.' Accordingly, defendant cannot avoid a violation of the subject condition simply by claiming either that he did not know that a particular individual had been convicted of a crime or that he believed that said individual was guilty of only a traffic violation. ... With respect to the issue of whether defendant 'associate[d]' with Nichols within the meaning of special condition No. 17, the testimony at the hearing further demonstrated that, on approximately four occasions ... , defendant called either Nichols or her daughter and thereafter went to Nichols' apartment for the purpose of picking up and walking the dog that defendant and Nichols once shared. Notably, Nichols confirmed that she spoke with defendant, with whom she remained friends, on the telephone to make arrangements regarding the dog and testified that she personally exchanged the dog with defendant '[a]bout four times,' stating, 'I would hand him the dog and he would take the dog and go down the street.' " ***People v. Kislowski*, 2016 N.Y. Slip Op. 08261, 3rd Dept 12-8-16**

EDUCATION-SCHOOL LAW.

RESTRICTIONS ON PARTICIPATION IN HIGH SCHOOL SPORTS BY TRANSFER STUDENTS UPHELD.

The Third Department determined the rules promulgated by respondent NY Public High School Athletic Association concerning restrictions on the eligibility of transfer students to participate in school sports were valid: "... [I]t is settled that '[c]ourts should not interfere with the internal affairs, proceedings, rules and orders of a high school athletic association unless there is evidence of acts which are arbitrary, capricious or an abuse of discretion' ... . Such 'determination rests on whether the athletic association's actions have a sound basis in reason and a foundation in fact' ... . We find that petitioners have failed to demonstrate that the actions taken by respondent warrant our interference. The purpose of the transfer rule, which was promulgated by respondent pursuant to its constitution and by authority delegated to it through the regulations of the Commissioner of Education ... , is to deter athletic school-shopping and the recruitment of high school athletes by schools. By establishing an objective standard for eligibility that prohibits, with certain limited exceptions, immediate eligibility upon a transfer not accompanied by a parental change of residence, the transfer rule reasonably and rationally furthers these legitimate goals. Indeed, '[t]he absence of such a rule might reasonably invite strategically motivated transfers thinly disguised as transfers in the best (nonathletic) interest of the student' ...". ***Matter of Albany Academies v. New York State Pub. High Sch. Athletic Assn.*, 2016 N.Y. Slip Op. 08290, 3rd Dept 12-8-16**

MEDICAID.

TRANSFERS MADE WITHIN FIVE YEARS JUSTIFIED FIVE MONTH PERIOD OF INELIGIBILITY FOR MEDICAID BENEFITS.

The Third Department confirmed the determination of the Department of Health that petitioner was ineligible for Medicaid coverage for a period of five months based upon transfers of property made during the five-year look-back period: " 'In reviewing a Medicaid eligibility determination rendered after a hearing, this Court must review the record, as a whole, to determine if the agency's decisions are supported by substantial evidence and are not affected by an error of law' ... . For purposes of determining Medicaid eligibility, 'any transfer of an asset by the individual or the individual's spouse for less than fair market value made within or after the look-back period shall render the individual ineligible for nursing facility services' for a period of time based on the amount transferred ... . Such a transfer will not result in a penalty period where the applicant has made a satisfactory showing that the individual intended to dispose of the assets at fair market value or the assets were transferred exclusively for a purpose other than to qualify for medical assistance ... . The burden is on the applicant to demonstrate his or her eligibility for Medicaid by rebutting the 'presumption that the transfer of funds was motivated, in part if not in whole, by . . . anticipation of a future need to qualify for medical assistance' ... . Substantial evidence is 'less than a preponderance of the evidence' and 'demands only that a given inference is reasonable and plausible, not necessarily the most probable' ... . * * * We cannot say that respondents erred in rejecting [the] proof as inadequate and note that the Department of Social Services duly credited petitioner for expenses in which receipts were provided." ***Matter of Krajewski v. Zucker*, 2016 N.Y. Slip Op. 08287, 3rd Dept 12-8-16**

REAL PROPERTY.

DEFENDANTS' ERRONEOUSLY-DESCRIBED EASEMENT PROPERLY RELOCATED BY PLAINTIFF.

The Third Department affirmed Supreme Court's determination that defendants had an easement over plaintiff's land and, because the description of the easement erroneously placed it on another's land, the easement was properly relocated by plaintiff: " '[I]n the absence of a claim for reformation, courts may as a matter of interpretation' transpose, reject or supply words in a contract or conveyance in order to effectuate the intent of the agreement if 'some absurdity has been identified or the contract would otherwise be unenforceable either in whole or in part' ... . Supreme Court did so here because the use of the metes and bounds description in the 1988 conveyance would have led to the absurd result of a right-of-way being granted over property that the grantor did not own, and preserved the stated intent of creating a right-of-way 'for the purpose of ingress and egress' by jettisoning the defective description ... . Defendants accordingly have a right-of-way over plaintiff's property but, inasmuch as it lacks a specific metes and bounds description or other expression to the contrary, plaintiff is free to unilaterally relocate it 'so long as the change does not frustrate the parties' intent or object in creating the right of way, does not increase the burden on the easement holder, and does not significantly lessen the utility of the right of way'...". ***Anzalone v. Costantino*, 2016 N.Y. Slip Op. 08277, 3rd Dept 12-8-16**

REAL PROPERTY TAX LAW, CIVIL PROCEDURE.

DEPOSITION OF TOWN ASSESSOR PROPERLY ALLOWED IN THIS SELECTIVE REASSESSMENT PROCEEDING.

The Third Department, affirming Supreme Court, determined the deposition of the town tax assessor was properly allowed in this proceeding challenging a tax assessment of a golf course as "selective reassessment:" " 'A property owner may challenge an assessment pursuant to RPTL article 7 on several grounds, including that the assessment is excessive, unequal or unlawful' ... . Furthermore, '[i]t is well settled that a system of selective reassessment that has no rational basis in law violates the equal protection provisions of the constitutions of the United States and the State of New York' ... . [D]iscovery in

a RPTL article 7 proceeding is governed by CPLR 408, pursuant to which trial courts have broad discretion in directing the disclosure of material and necessary information' ... . The trial court's decision to compel discovery is accorded deference on appeal and should not be disturbed absent an abuse of discretion as a matter of law ... . Additionally, to obtain discovery, a party must submit an affirmation showing 'a good faith effort to resolve the issues raised by the [discovery] motion' or indicating 'good cause' why no communications occurred between the parties in this regard (22 NYCRR 202.7 [a] [2]; [c]...)." ***Matter of City of Troy v. Assessor of The Town of Brunswick*, 2016 N.Y. Slip Op. 08280, 3rd Dept 12-8-16**

ZONING.

SUPREME COURT CANNOT SUBSTITUTE ITS OWN JUDGMENT FOR THAT OF THE ZONING BOARD, EVEN IN AFFIRMING THE BOARD'S DETERMINATION, CRITERIA FOR ALLOWING THE CONTINUATION OF A NONCONFORMING USE EXPLAINED.

The Third Department upheld the zoning board's (ZBA's) determination that the application for the nonconforming use of the property as a boarding house was properly denied. There was evidence that the initial nonconforming use was a nursing home, not a boarding house. The court noted that Supreme Court, which affirmed on different grounds, should not have substituted its own judgment for that of the board. The court further explained the criteria for allowing nonconforming use of property: "Supreme Court, apparently rejecting the ZBA's conclusion that the property was a nursing home at the time that the zoning law was enacted in 1963, independently determined that the property was used as a boarding house in 1963, but that its current use as a boarding house was nonetheless a nonconforming use because its 'ownership, occupancy and usage . . . [was] far removed from what it was in 1963.' This was improper. A reviewing court cannot, as the court did here, 'search the record for a rational basis to support [an administrative agency's] determination, substitute its judgment for that of the [agency] or affirm the underlying determination upon a ground not invoked . . . in the first instance' ... . In recognition of the 'undue financial hardship that immediate elimination of nonconforming uses would cause to property owners,' nonconforming uses that predate the enactment of a zoning ordinance are constitutionally protected and will grudgingly be permitted to continue notwithstanding the contrary law of the ordinance ... . However, '[t]he law . . . generally views nonconforming uses as detrimental to a zoning scheme, and the overriding public policy of zoning in New York State and elsewhere is aimed at their reasonable restriction and eventual elimination' ... . A preexisting nonconforming use is 'closely restricted' such that it cannot be restored after substantial damage or conversion to a different nonconforming use and may be deemed abandoned following substantial discontinuation ...". ***Matter of Tri-Serendipity, LLC v. City of Kingston*, 2016 N.Y. Slip Op. 08292, 3rd Dept 12-8-16**

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