CasePrepPlus

September 6, 2017

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

Editor: **Bruce Freeman**

NEW YORK STATE BAR ASSOCIATION
Serving the legal profession and the community since 1876

COURT OF APPEALS

ELECTION LAW, CIVIL PROCEDURE.

PETITION TO ADD MAYOR DE BLASIO AS A CANDIDATE PROPERLY DENIED, THE WORKING FAMILIES PARTY'S EXECUTIVE BOARD WAS A NECESSARY PARTY.

The Court of Appeals determined the the Working Families Party's petition to add NYC Mayor Bill deBlasio as a mayoral candidate in a primary election was properly denied for failure to name the party's Executive Board as a necessary party: "Necessary parties are those 'who ought to be parties if complete relief is to be accorded between the persons who are parties to the action or who might be inequitably affected by a judgment in the action' (CPLR 1001[a]). Appellants rely on Matter of O'Brien v. Seneca County Bd. of Elections (22 AD3d 1036, 1036 [4th Dept 2005]) and Matter of Seaman v. Bird (176 AD2d 1061, 1062 [3d Dept 1991]), to argue that, because complete relief could be obtained from the Board of Elections, the Executive Board of the Working Families Party is not a necessary party. Their reliance is misplaced. Here, where petitioners assert that the Executive Board's certificate of authorization was invalid under Election Law § 6-120, the Executive Board of the Working Families Party was a necessary party because a judgment on this issue could inequitably affect its interests. To the extent that there are other decisions to the contrary, they should not be followed." ***Matter of Morgan v. de Blasio*, 2017 N.Y. Slip Op. 06399, CtApp 8-31-17**

FIRST DEPARTMENT

CIVIL PROCEDURE, CONTRACT LAW, CORPORATION LAW.

FURTHER DISCOVERY NECESSARY TO DETERMINE RELATIONSHIP BETWEEN SIGNATORIES AND NON-SIGNATORIES TO A CONTRACT WITH A FORUM SELECTION CLAUSE, IF THE RELATIONSHIP IS CLOSE ENOUGH, NON-SIGNATORIES WILL BE COVERED BY THE CLAUSE.

The First Department, in a full-fledged opinion by Justice Kapnick, determined further jurisdictional discovery was required before certain causes of action could be dismissed on jurisdictional grounds. If the relationship with signatories of a contract with a forum selection clause is close enough, non-signatories will be covered by the clause. Discovery was necessary to determine how close the relationship was. The opinion is too detailed and complex to fully summarize here. The crux of the action is the alleged failure of the corporations to pay interest due on notes held by shareholders: " 'Under New York law, a signatory to a contract may invoke a forum selection clause against a non-signatory if the non-signatory is closely related' to one of the signatories such that enforcement of the forum selection clause is foreseeable by virtue of the relationship between the signatory and the party sought to be bound' ... . If the nonsignatory party has an ownership interest or a direct or indirect controlling interest in the signing party ... , or, the entities or individuals consulted with each other regarding decisions and were intimately involved in the decision-making process... , then, a finding of personal jurisdiction based on a forum selection clause may be proper, as it achieves the 'rationale behind binding closely related entities to the forum selection clause [which] is to promote stable and dependable trade relations.' ... . Here, plaintiffs allege that the individual defendants, by virtue of their senior management positions, power and decision-making authority, and B & B, as the parent company of BTEL and as a principal shareholder of 39.6% of BTEL's stock, had actual knowledge at the time of the offering that BTEL was insolvent and would be incapable of meeting its obligations under the notes; that they authorized, participated in, and promoted the offering; and that they caused the offering memoranda to be distributed into the marketplace. This is enough, at this stage, to permit jurisdictional discovery as to the nature of B & B's and the individual defendants' actual knowledge and role in the offering of the notes, and their responsibilities connected thereto, because this information, which may result in a determination that the nonsignatories are indeed 'closely related' to the signing parties, is a fact that cannot be presently known to plaintiffs, but rather, is within the exclusive control of defendants ....". ***Universal Inv. Advisory SA v. Bakrie Telecom PTE, Ltd.*, 2017 N.Y. Slip Op. 06344, First Dept 8-29-17**

CONTRACT LAW, EMPLOYMENT LAW.

FOR CAUSE FORFEITURE TERM OF DEFERRED COMPENSATION AGREEMENT NOT ELIMINATED BY A SUBSEQUENT FORM EXTENDING THE DUE DATE OF THE DEFERRED COMPENSATION.

The First Department determined defendant-employees' motion for summary judgment were properly denied. Defendants were subject to deferred compensation agreements (DCA's) which called for the "for cause" forfeiture of the deferred compensation. Here it was alleged the defendants violated a non-solicitation, non-competition clause and therefore forfeited the deferred compensation. The defendants argued a subsequent document, an "election form" which extended the date on which the deferred compensation was due and payable, and which did not include a "for cause" forfeiture provision, should control. The courts disagreed: "... [T]he Election Forms, by their express language, provide that any deferral of payment of deferred compensation is to be made 'in accordance with the terms of the Deferred Compensation Agreement . . . .' The DCAs, as noted, clearly provide in paragraph 4 that deferred compensation is forfeited if the employee is terminated for cause, including violation of non-solicitation or noncompetition covenants. There is no mention in the Election Forms of any intent to override this provision. Additionally, paragraph 5 of the DCAs specifically provides that their terms 'may not be altered, modified, or amended except by written instrument signed by the parties hereto.' At a minimum, it is commercially reasonable to view the Election Forms, on their face, to be informal human resources administrative forms. In any case, they are not 'written instrument[s] signed by the parties [to the DCAs],' as they lack any signature of plaintiffs, as required by paragraph 5 in order to amend the DCAs." ***Perella Weinberg Partners LLC v. Kramer*,2017 N.Y. Slip Op. 06341, First Dept 8-29-17**

CONTRACT LAW, TOXIC TORTS, PERSONAL INJURY.

ALTHOUGH THE ASBESTOS LIABILITY RELEASE SIGNED BY PLAINTIFF'S DECEDENT IN 1997 MENTIONED MESOTHELIOMA, THE LANGUAGE OF THE RELEASE WAS DEEMED TO BE BOILERPLATE WHICH DID NOT PRECLUDE THE INSTANT SUIT ALLEGING DEATH FROM MESOTHELIOMA.

The First Department, over an extensive dissent, determined a release plaintiff's decedent (South) agreed to in 1997 did not preclude the instant suit. South alleged he had been exposed to asbestos, made by Texaco, on board ships during his long career in the Merchant Marine. South died of mesothelioma. The 1997 release mentioned mesothelioma as a possible result of asbestos exposure but the First Department determined it was not clear South knew he was suffering from mesothelioma at the time he signed the release (in return for $1750.00). The case was analyzed under federal admiralty law (Jones Act): "... [W]e find that the release does not pass muster. To tease out the true intent South had when he signed the release, it is necessary to consider the context in which he did so. The 1997 complaint, while making generalized allegations that South had been exposed to asbestos, is exceedingly vague as to whether he had actually contracted an asbestos-related disease. To be sure, it mentions a 'devastating pulmonary disease Plaintiff now suffers' and an exhaustive grab-bag of asbestos-related diseases, from asbestosis to mesothelioma to brain cancer. However, it is impossible to twtwconclude from the complaint that South had actually received a diagnosis. Indeed, the 'meager' consideration he received for resolving the claim suggests that he had not been diagnosed with an asbestos-related disease, much less one even approaching the severity of the mesothelioma that the complaint specifically alleges he had. The complaint leaves open that possibility, to the extent it seeks relief for fear of an asbestos-related disease and not for the disease itself. Accordingly, the risk of contracting an actual asbestos-related disease remained hypothetical to South, and we decline to read the release as if South understood the implications of such a disease but chose nonetheless to release Texaco from claims arising from it. Further, if South had not received a definitive diagnosis at the time the 1997 complaint was filed, then the release, to the extent it warns him of the possibility of 'a new and different diagnosis from the diagnosis as of the date of this Release,' does not reflect the actual circumstances known to him, since the words 'new' and 'different' suggest that South had already been diagnosed with a disease when he executed the release. Rather, the lack of an actual diagnosis reveals the language in the release as mere boilerplate, and not the result of an agreement the parameters of which had been specifically negotiated and understood by South." ***Matter of New York City Asbestos Litig.*, 2017 N.Y. Slip Op. 06343 First Dept 8-29-17**

MEDICAL MALPRACTICE, PERSONAL INJURY, CIVIL PROCEDURE.

DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN DISMISSED FOR FAILURE TO MEET 60-DAY DEADLINE IMPOSED BY A LOCAL COURT RULE, QUESTION OF FACT WHETHER THE CONTINUOUS TREATMENT DOCTRINE TOLLED THE STATUTE OF LIMITATIONS, LACK OF INFORMED CONSENT DOES NOT APPLY TO FAILURE TO DIAGNOSE.

The First Department, reversing Supreme Court, over an extensive dissent, determined Supreme Court should not have dismissed defendants' motions for summary judgment in this medical malpractice. The motions were dismissed on procedural grounds because they were filed and served a few days after the 60-day deadline imposed by the local court rules. The courts had been closed when the papers were supposed to be filed due to a storm. The Second Department went on to determine the merits. Plaintiff had experienced headaches over a period of years and had sought treatment for them. Eventually a benign brain tumor was discovered. In removing the tumor plaintiff was rendered legally blind. The malpractice

action alleged a negligent failure to diagnose the tumor, and lack of informed consent. The court held that the continuing treatment doctrine tolled the statute of limitations even though the treatment was for headaches, not the tumor, because the presence of the tumor had not been diagnosed. The court went on to find that the informed consent cause of action was not viable because the alleged malpractice was a failure to diagnose, not the negligent performance of a surgical procedure: "... [T]he record presents issues of fact as to continuous treatment. As is well established, 'the continuous treatment doctrine tolls the Statute of Limitations for a medical malpractice action when the course of treatment which includes the wrongful acts or omissions has run continuously and is related to the same original condition or complaint' ... . In addition, '[w]here the malpractice claim is based on an alleged failure to properly diagnose a condition, the continuous treatment doctrine may apply as long as the symptoms being treated indicate the presence of that condition' ... . * * * ... [T]he informed consent claim lacks merit. As we have held, '[a] failure to diagnose cannot be the basis of a cause of action for lack of informed consent unless associated with a diagnostic procedure that involve[s] invasion or disruption of the integrity of the body' ...". ***Lewis v. Rutkovsky*, 2017 N.Y. Slip Op. 06342, First Dept 8-29-17**

SECOND DEPARTMENT

CIVIL PROCEDURE.

MOTION TO EXTEND TIME FOR SERVICE SHOULD HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined plaintiffs' motion to extend the time for service of the summons and complaint should have been granted. The action had been timely commenced but the statute of limitations had expired when the defect in service was discovered: "The denial of the plaintiffs' renewed motion pursuant to CPLR 306-b to extend the time to serve the defendants with the summons and complaint was an improvident exercise of discretion ... . While the action was timely commenced, the statute of limitations had expired when the plaintiffs first moved for relief, the timely service of process was subsequently found to have been defective, and the defendants had actual notice of the action within 120 days of commencement of the action... . Furthermore, the plaintiffs demonstrated a potentially meritorious cause of action, and there was no prejudice to the defendants attributable to the delay in service ...". ***Singh v. Trahan*, 2017 N.Y. Slip Op. 06395, Second Dept 8-30-17**

CIVIL PROCEDURE, ATTORNEYS.

WINNING A MOTION TO DISMISS DOES NOT TRIGGER THE AWARD OF ATTORNEY'S FEES UNDER CPLR 3220.

The Second Department determined the successful motion to dismiss a civil suit did not mandate the award of attorney's fees under the CPLR: "... '[U]nder the American Rule as applied to statutory entitlement to attorneys' fees, the [United States] Supreme Court has held that we follow a general practice of not awarding fees to a prevailing party absent explicit statutory authority'... . * * * The relevant phrase of CPLR 3220 stating that the claimant 'shall pay the expenses necessarily incurred by the party against whom the claim is asserted, for trying the issue of damages from the time of the offer' demonstrates the Legislature's intent that, where the claimant has not accepted the offer, the commencement of a trial is a condition precedent to imposing liability upon the claimant for the opposing party's expenses. This phrase also defines the recoverable expenses as those 'necessarily' expended 'for trying the issue of damages.' CPLR 3220 further provides that those expenses should be determined by the judge 'before whom the case is tried.' Accordingly, the plain language of CPLR 3220 does not explicitly authorize an award of attorney's fees and costs to a party … who merely prevailed in seeking dismissal of a cause of action alleging breach of contract. Even if CPLR 3220 could arguably support an implied right to the attorney's fees and costs ... , the public policy of the American Rule militates against adoption of that interpretation ...". ***Saul v. Cahan*, 2017 N.Y. Slip Op. 06391, Second Dept 8-30-17**

CRIMINAL LAW, ATTORNEYS.

PEOPLE WERE UNABLE TO DEMONSTRATE WITNESS'S REFUSAL TO TESTIFY WAS THE RESULT OF DEFENDANT'S THREATS, NEW TRIAL ORDERED; DEFENSE COUNSEL'S REQUEST TO BE RELIEVED REQUIRED FURTHER INQUIRY BY THE COURT.

The Second Department reversed defendant's conviction and ordered a new trial because the People did not demonstrate, at a *Sirois* hearing, that a witness's refusal to testify was the result of defendant's threats. The trial court had ruled the witness's grand jury testimony could be read to the jury. The Second Department also held the court should have inquired into the defense attorney's request to be relieved because the defendant had filed a grievance against him: "At the Sirois hearing, the People were required to 'demonstrate by clear and convincing evidence that the defendant, by violence, threats or chicanery, caused a witness's unavailability' ... . Here, although the People presented evidence that the witness was afraid to testify, they failed to meet their heavy burden of showing that her fear was caused by a threat made by the defendant ... . Under the circumstances of this case, this error cannot be considered harmless ... . Thus, the judgment must be reversed, and the matter remitted to the Supreme Court, Kings County, for a new trial ... . The Supreme Court also should not have denied defense counsel's request to be relieved without first having made at least some minimal inquiry in light of defense

counsel's statement that the defendant had filed a grievance against him ...". ***People v. Middleton*, 2017 N.Y. Slip Op. 06378, Second Dept 8-30-17**

CRIMINAL LAW.

CONFUSION ABOUT THE EFFECT OF FINDING THE DEFENDANT NOT GUILTY BY VIRTUE OF THE JUSTIFICATION DEFENSE REQUIRED A NEW TRIAL, IF THE JUSTIFICATION DEFENSE APPLIES TO A HIGHER COUNT THERE CAN BE NO FURTHER CONSIDERATION OF ANY LESSER COUNT.

The Second Department reversed defendant's conviction because instructions to the jury and the verdict sheet created confusion about the effect of finding the defendant not guilty of the most serious offense based on the justification defense. The instructions gave the impression the jurors could continue to consider a lesser offense after finding the justification defense required a not guilty verdict on more serious offense: " 'This Court has held that, in a case involving a claim of self-defense, it is error for the trial court not to instruct the jurors that, if they find the defendant not guilty of a greater charge on the basis of justification, they were not to consider any lesser counts' ... . Such failure constitutes reversible error ... . 'Our precedent in this regard is sound and ineluctable. The defense of justification does not operate to excuse a criminal act, nor does it negate a particular element of a crime. Rather, by recognizing the use of force to be privileged under certain circumstances, it renders such conduct entirely lawful' ... . [W]hen instructing the jury on the verdict sheet, the court did not instruct that, if the jury found the defendant not guilty of a greater charge on the basis of justification, it was not to consider any lesser count, and the verdict sheet was inconsistent with that principle ... . In particular, the verdict sheet, which made no reference to justification, instructed the jury that, if it found the defendant not guilty on count one or count two, the jury must 'deliberate next on' the following count. Similarly, in explaining the verdict sheet, the court instructed the jury, if the verdict on count one or count two was not guilty, to 'go on' and to 'deliberate' on the next count, without explaining that they should not deliberate on any lesser-included count if the jury found the defendant not guilty based upon the People's failure to disprove the defense of justification." ***People v. Braithwaite*, 2017 N.Y. Slip Op. 06369, Second Dept 8-30-17**

CRIMINAL LAW, EVIDENCE.

TRIAL COURT SHOULD NOT HAVE RULED DEFENDANT COULD BE CROSS-EXAMINED ABOUT A PRIOR SIMILAR STABBING OF THE SAME VICTIM IF THE DEFENDANT CHOSE TO TESTIFY, NEW TRIAL ORDERED.

The Second Department reversed the defendant's conviction finding that evidence of a prior similar stabbing of the same victim was too prejudicial to be admissible. The evidence of defendant's connection to the prior stabbing was weak. The victim refused to cooperate with the investigations into both stabbings. Therefore the trial court should not have ruled the defendant could be cross-examined about the prior stabbing if he chose to testify (he did not testify): "Although questioning concerning other crimes and past conduct is not automatically precluded simply because the crime or conduct inquired about is similar to the crime charged ... , 'cross-examination with respect to crimes or conduct similar to that of which the defendant is presently charged may be highly prejudicial, in view of the risk, despite the most clear and forceful limiting instructions to the contrary, that the evidence will be taken as some proof of the commission of the crime charged rather than be reserved solely to the issue of credibility' ... . Thus, 'a balance must be struck between the probative worth of evidence of prior specific criminal, vicious or immoral acts on the issue of the defendant's credibility on the one hand, and on the other the risk of unfair prejudice to the defendant, measured both by the impact of such evidence if it is admitted after his testimony and by the effect its probable introduction may have in discouraging him from taking the stand on his own behalf' ... . Under the circumstances presented here, most notably the unsubstantiated evidence connecting the defendant to the uncharged crime involving the identical victim, which occurred three months earlier, the probative value was far outweighed by the danger of undue prejudice. There was a strong likelihood that the uncharged crime would be viewed as evidence of propensity, rather than probative on the issue of credibility ...". ***People v. Ridenhour*, 2017 N.Y. Slip Op. 06383, Second Dept 8-30-17**

FORECLOSURE, CIVIL PROCEDURE, EVIDENCE.

DEFAULT JUDGMENT DISCHARGING THE MORTGAGE SHOULD HAVE BEEN GRANTED, THE SIX YEAR STATUTE OF LIMITATIONS FOR FORECLOSURE STARTED WHEN THE DEBT WAS ACCELERATED BY THE FORECLOSURE ACTION WHICH WAS ULTIMATELY DISMISSED.

The Second Department, reversing Supreme Court, determined plaintiff's motion for a default judgment discharging a mortgage after the statute of limitations on the foreclosure action had expired should have been granted. The court explained that the six year statute starts to run when the debt was accelerated by the foreclosure action that was ultimately dismissed. The plaintiff demonstrated that the dismissed foreclosure action was commenced by a party with standing: "... [W]ith respect to an action pursuant to RPAPL 1501(4), a person having an estate or an interest in real property subject to a mortgage can seek to cancel and discharge that encumbrance where the period allowed by the applicable statute of limitations for the commencement of an action to foreclose the mortgage had expired, provided that the mortgagee or its successor was not in possession of the subject real property at the time the action to cancel and discharged the mortgage was

commenced ... . An action to foreclose a mortgage has a six-year statute of limitations... . 'The law is well settled that, even if a mortgage is payable in installments, once a mortgage debt is accelerated, the entire amount is due and the Statute of Limitations begins to run on the entire debt'... . Here, the plaintiff submitted a copy of the summons and complaint filed in the mortgage foreclosure action commenced by the defendant's predecessor-in-interest and the order dismissing that action pursuant to CPLR 3216 which demonstrated that the mortgage was accelerated in 2008 more than six years before the commencement of this action and that there was no longer a pending mortgage foreclosure action ... . In addition, the summons and the complaint, along with the subject mortgage documents, submitted by the plaintiff on its motion, demonstrated that the defendant's predecessor-in-interest had standing to commence the mortgage foreclosure action .... Further, the plaintiff demonstrated that the applicable statute of limitations had expired even if the limitations period was calculated ... the date by which the Federal Deposit Insurance Corporation was appointed as receiver for the defendant's predecessor-in-interest ....". ***53 PL Realty, LLC v. US Bank N.A.*, 2017 N.Y. Slip Op. 06345, Second Dept 8-30-17**

PERSONAL INJURY, EVIDENCE.

QUESTIONS OF FACT ABOUT DEFENDANT DRIVER'S COMPARATIVE NEGLIGENCE IN THIS BICYCLE-CAR COLLISION CASE, DEFENDANT'S SUMMARY JUDGMENT MOTION SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined defendant driver's (Kostadinov's) motion for summary judgment in this bicycle-car accident case should not have been granted. Kostadinov did not eliminate triable questions of fact about his comparative negligence: "Here, Kostadinov failed to demonstrate his prima facie entitlement to judgment as a matter of law, since the evidence submitted in support of his motion failed to establish that he was free from fault in the happening of the accident, or that the alleged negligence of the plaintiff and Karczewski were the sole proximate causes of the accident ... . Specifically, the deposition testimony of all of the parties, submitted by Kostadinov in support of his motion, revealed the existence of triable issues of fact as to the manner in which the accident occurred (see id. at 934) and as to whether the impact between the plaintiff's bicycle and Karczewski's vehicle was a foreseeable consequence of Kostadinov reversing his vehicle against the flow of traffic within the subject intersection given the traffic conditions existing at the time of the accident ... ". ***Searless v. Karczewski*, 2017 N.Y. Slip Op. 06393, Second Dept 8-30-17**

PERSONAL INJURY, LANDLORD-TENANT.

LANDLORD DEMONSTRATED THE BREAK-IN WAS NOT FORESEEABLE BECAUSE THERE HAD BEEN NO SIMILAR BREAK-INS IN THE VICINITY, PLAINTIFFS' SUIT STEMMING FROM INJURY DURING A ROBBERY SHOULD HAVE BEEN DISMISSED.

The Second Department, reversing Supreme Court, determined the landlord's motion for summary judgment should have been granted. Plaintiffs alleged they were injured during a robbery and the landlord failed to provide sufficient protection in the form of a lock on an interior door through which the robbers gained entry. The Second Department held the landlord had demonstrated the break-in was not foreseeable because there had been no other similar break-ins: " 'Landlords have a common-law duty to take minimal precautions to protect tenants from foreseeable harm, including foreseeable criminal conduct by a third person' ... . 'To establish that criminal acts were foreseeable, the criminal conduct at issue must be shown to be reasonably predictable based on the prior occurrence of the same or similar criminal activity at a location sufficiently proximate to the subject location' ... 'Without evidentiary proof of notice of prior criminal activity, the owner's duty reasonably to protect those using the premises from such activity never arises'... . Here, the defendants established their prima facie entitlement to judgment as a matter of law by demonstrating that they lacked notice of the prior occurrence of the same or similar criminal activity at a location sufficiently proximate to the subject premises ...". ***Golub v. Louris*, 2017 N.Y. Slip Op. 06353, Second Dept 8-30-17**

PERSONAL INJURY, MUNICIPAL LAW.

TOWN'S FAILURE TO REMOVE ICE AND SNOW IS NOT AN AFFIRMATIVE ACT OF NEGLIGENCE WHICH IS EXEMPT FROM THE WRITTEN NOTICE REQUIREMENT.

The Second Department determined the defendant town's motion for summary judgment in this ice and snow slip and fall case was properly granted. The court held that the failure to remove ice and snow is a passive in nature and is not an affirmative creation of a dangerous condition that is exempt from the written notice requirement: "Here, the Town established its prima facie entitlement to judgment as a matter of law by submitting evidence, including an affidavit from its Town Clerk, demonstrating that it did not receive prior written notice of the condition alleged, and that it did not create the alleged condition through an affirmative act of negligence. In opposition, the plaintiff failed to raise a triable issue of fact as to whether the Town created the alleged condition through an affirmative act of negligence. The plaintiff's reliance on San Marco v. Village/Town of Mount Kisco (16 NY3d 111) is misplaced. The Town's failure to remove any snow or ice from the area where the subject accident occurred was passive in nature and does not constitute an affirmative act of negligence excepting it from prior written notice requirements ...". ***Morreale v. Town of Smithtown*, 2017 N.Y. Slip Op. 06361, Second Dept 8-30-17**

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