CasePrepPlus

July 29, 2015

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

Editor: **Bruce Freeman**

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

FIRST DEPARTMENT

CONTRACT LAW. APPEALS. PURELY LEGAL QUESTION OF CONTRACT INTERPRETATION CAN BE RAISED FOR THE FIRST TIME ON APPEAL.

Defendants were entitled to summary judgment dismissing the breach of contract complaint. Defendants owned an improved parcel of land next to a parcel owned by plaintiff. Plaintiff purchased a portion of defendants' parcel and the parties entered an agreement which included a promise by the defendants that they would not object to any construction on plaintiff's parcel, which was interpreted by the court to mean defendants agreed to provide their consent if it was necessary to the construction. Upon an examination of the facts, the court concluded plaintiff did not demonstrate he needed the defendants' consent to anything related to the construction, and therefore the contract provision requiring defendants to consent was never triggered. The aspect of the case which is worth noting is the court's determination that a purely legal question of contract interpretation was involved and that the purely legal question could be raised for the first time on appeal. The court explained that "where the intention of the parties may be gathered from the four corners of the instrument, interpretation of the contract is a question of law and no trial is necessary to determine the legal effect of the contract...". **Dreisinger v Teglasi, 2015 NY Slip Op 06197, 1st Dept 7-21-15**

CRIMINAL LAW. SEARCH WARRANTS. NONDISLOSURE ORDER. QUASH, MOTION TO. FACEBOOK. SUBPOENAS. APPEALS.

There was no statutory or constitutional authority for Facebook's motion to quash 381 search warrants which sought all the data from the targets' Facebook accounts and prohibited disclosure of the warrants to the targets. There is no authority allowing a pre-execution challenge to a search warrant. Facebook's argument that their motion was analogous to a motion to quash a subpoena, the denial of which can be appealed, was rejected. Facebook's argument that the bulk warrants were akin to subpoenas issued to Internet Service Providers, which can be challenged under the Federal Stored Communications Act (SCA), was rejected (after a full analysis). **381 Search Warrants Directed to Facebook, Inc. v New York County Dist. Attorney's Off., 2015 NY Slip Op 06201, 1st Dept 7-21-15**

CRIMINAL LAW. INEFFECTIVE ASSISTANCE OF COUNSEL. DEFENSE COUNSEL'S EXPLAINING THE REASONS FOR HIS ACTIONS DID NOT REFLECT A POSITION ADVERSE TO HIS CLIENT'S.

In affirming defendant's conviction by guilty plea, the First Department determined that defense counsel, in responding to allegations about his performance made by the defendant, did not take a position adverse to his client's. Rather, counsel merely explained the reasons for his actions and did not voice any opinion about the validity of defendant's pro se motions. Therefore the defendant was not entitled to withdraw his plea on that ground. **People v Maxwell, 2015 NY Slip Op 06199, 1st Dept 7-21-15**

ZONING. REGULATION OF ADULT BUSINESSES. FIRST AMENDMENT.

The First Department upheld Supreme Court's determination that the 2001 amendments to New York City's adult use zoning regulations, re: adult eating and drinking establishments and adult video and book stores, constituted a violation of the First Amendment precluding enforcement of the amendments. In an attempt to change the character of the adult businesses the city had enacted a "60-40" rule requiring that 60% of each business be devoted to "non-adult" products and/or activities. The City later amended the regulations, removing the "60-40" rule, and re-writing the criteria so that a business could be deemed to focus on sexually explicit entertainment irrespective of the amount of space or inventory devoted to "adult" activities and materials. It was those amendments which were challenged. The controversy boiled down to a factual one: Is the City able to demonstrate that the adult-businesses' response to the "60-40" rule was a "sham response" such that the character of the businesses, and the consequent negative effects on the surrounding community, had not been altered? If the City could so demonstrate, the recent amendments would constitute a justified restriction of speech, if not, the amendments result in an unjustified restriction of speech. The First Department determined the City failed to demonstrate the response to the "60-40" rule was a "sham response" and that the businesses remained unaltered in character by the rule. **For The People Theaters of N.Y. Inc. v City of New York, 2015 NY Slip Op 06200, 1st Dept 7-21-15**

SECOND DEPARTMENT

ADMINISTRATIVE LAW. PLANNING BOARD. SUBDIVISION APPLICATION. COURT'S REVIEW POWERS.

In upholding the Planning Board's denial of petitioner's subdivision application, the Second Department explained the court's review criteria in this context: "The court will substitute its judgment for that of a planning board only when the determination was affected by an error of law, or was arbitrary and capricious or an abuse of discretion, or was irrational (... see CPLR 7803[3]...). When reviewing a planning board's determination, courts consider substantial evidence only to determine whether the record contains sufficient evidence to support the rationality of the Board's determination...". [internal quotation marks omitted] The Second Department went on to look at the evidence, which, although conflicting in some aspects, included support for the rationality of the Planning Board's ruling. **Matter of Ostojic v Gee, 2015 NY Slip Op 06244, 2nd Dept 7-22-15**

CIVIL PROCEDURE. DECLARATORY JUDGMENTS. PRE-ANSWER MOTIONS TO DISMISS.

The Second Department explained how pre-answer motions to dismiss are handled in the context of an action for a declaratory judgment: "Generally speaking, [a] motion to dismiss a declaratory judgment action prior to the service of an answer presents for consideration only the issue of whether a cause of action for declaratory relief is set forth, not the question of whether the plaintiff is entitled to a favorable declaration ... . As such, where a cause of action is sufficient to invoke the court's power to render a declaratory judgment ... as to the rights and other legal relations of the parties to a justiciable controversy (CPLR 3001; see CPLR 3017[b]), a motion to dismiss that cause of action should be denied ... . Upon a motion to dismiss for failure to state a cause of action, a court may reach the merits of a properly pleaded cause of action for a declaratory judgment where no questions of fact are presented [by the controversy] ... . Under such circumstances, the motion to dismiss the cause of action for failure to state a cause of action "should be taken as a motion for a declaration in the defendant's favor and treated accordingly ...". [internal quotation marks omitted] **North Oyster Bay Baymen's Assn. v Town of Oyster Bay, 2015 NY Slip Op 06225, 2nd Dept 7-22-15**

CIVIL PROCEDURE. MOTION TO DISMISS FOR FAILURE TO STATE A CAUSE OF ACTION —DOCUMENTARY EVIDENCE SUBMITTED BY THE PLAINTIFF.

The motion to dismiss for failure to state a cause of action should not have been granted with respect to one of the defendants, and the motion to amend the complaint should have been granted. The court explained the proper way to handle a motion to dismiss for failure to state a cause of action when the plaintiff submits an affidavit in opposition, as well as the criteria for a motion to amend the complaint. With respect to the motion to dismiss, the court wrote: "In considering a motion to dismiss pursuant to CPLR 3211(a)(7), the court should accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory ... . Whether the complaint will later survive a motion for summary judgment, or whether the plaintiff will ultimately be able to prove [his or her] claims, of course, plays no part in the determination of a prediscovery CPLR 3211 motion to dismiss ... . Unless the motion is converted into one for summary judgment pursuant to CPLR 3211(c), affidavits may be received for a limited purpose only, usually to remedy defects in the complaint, and such affidavits are not to be examined for the purpose of determining whether there is evidentiary support for the pleading ... . [A] court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint …". [internal quotation marks omitted] **Tirpack v 125 N. 10, LLC, 2015 NY Slip Op 06236, 2nd Dept 7-22-15**

COLLATERAL, PRESERVATION OF. UNIFORM COMMERCIAL CODE (UCC).

In an action alleging the failure to preserve collateral which secured a promissory note, the Second Department determined summary judgment on the underlying promissory note should not have been granted because plaintiffs raised a question of fact about the commercial reasonableness of the handling of the collateral: "Under both the common law and the Uniform Commercial Code, a secured party has a duty to exercise reasonable care in the custody and preservation of collateral in its possession. The obligation remains the same regardless of whether the secured party came into possession of the property before or after the debtor's default ... . After default, a secured party may sell, lease, license or otherwise dispose of any or all of the collateral in its present condition or following any commercially reasonable preparation or processing (UCC 9-610[a]). Every aspect of a disposition of collateral, including the method, manner, time, place, and other terms, must be commercially reasonable (UCC 9-610[b]). A secured party that disposes of collateral under section 9-610 is required to send to, among others, the debtor and any secondary obligor, notification of disposition (see UCC 9-611[b], [c])." [internal quotation marks omitted] **Nugent v Hubbard, 2015 NY Slip Op 06226, 2nd Dept 7-22-15**

CONTRACT LAW. INDEMNIFICATION AGREEMENT. NEGLIGENCE. PERSONAL INJURY. INSURANCE LAW. GENERAL OBLIGATIONS LAW.

The lessor of a shopping center, Montauk Properties, under the terms of its lease with a supermarket, Gambar Food, was entitled to indemnification re: plaintiff's slip and fall on a sidewalk in front of the supermarket. Although the terms of the lease exempted the lessor from liability for its own negligence, which is a violation of General Obligations Law (GOL) 5-321, GOL 5-231 does not apply to

a commercial lease negotiated at arm's length between sophisticated parties with an insurance procurement requirement. **Campisi v Gambar Food Corp., 2015 NY Slip Op 06205, 2nd Dept 7-22-15**

CONTRACT LAW. VOLUNTARY PAYMENT DOCTRINE.

The "voluntary payment doctrine" precluded recovery against the defendant. Plaintiff had an agreement with a consignee that plaintiff's liability associated with the export of fine art would be limited to $40,000. Plaintiff hired defendant to transport the fine art to the consignee, but the art was seized by customs because the documentation was incomplete. The plaintiff, despite the $40,000 liability cap, voluntarily compensated the consignee for its loss (around $240,000). Then plaintiff sued defendant for the $240,000. Because the plaintiff made that payment voluntarily, the "voluntary payment doctrine" required dismissal of the complaint: "[T]he voluntary payment doctrine ... bars recovery of payments voluntarily made with full knowledge of the facts, and in the absence of fraud or mistake of material fact or law ... . Here, the defendant established its prima facie entitlement to judgment as a matter of law through the submission of, among other things, a copy of the contract between the plaintiff and the consignee, which included the limitation of liability provision that capped the plaintiff's liability to the consignee at $40,000. This demonstrated, prima facie, that the plaintiff's payment to the consignee of anything more than $40,000 was voluntary ... . Further, the defendant demonstrated, prima fac[i]e, that the plaintiff recovered the full $40,000 for which it was liable to the consignee from its insurance company." **Hedley's, Inc. v Airwaves Global Logistics, LLC, 2015 NY Slip Op 06215, 2nd Dept 7-22-15**

CRIMINAL LAW. JUROR CHALLENGES. BATSON CHALLENGE. REVERSE BATSON CHALLENGE.

The prosecutor's proffered reason for challenging an Hispanic juror was pretextual and a new trial was required. Two Hispanic jurors were challenged by the prosecutor. The prosecutor's reason for challenging one of them was the juror's alleged inability to understand questions. The Second Department determined there was no support for that reason in the record. **People v Fabregas, 2015 NY Slip Op 06253, 2nd Dept 7-22-15**

CRIMINAL LAW. SENTENCING. UNDOCUMENTED ALIENS. DUE PROCESS. EQUAL PROTECTION.

In a case of first impression, the Second Department determined that a defendant's status as an undocumented alien cannot constitute the sole reason for a sentence of incarceration as opposed to probation. County Court reasoned that as soon as a sentence of probation was imposed upon an undocumented alien, the defendant would be in violation of probation by virtue of his/her undocumented status. Therefore, County Court concluded a sentence of probation was not available to any undocumented alien. The Second Department disagreed, holding that a defendant's status as an undocumented alien can be considered in determining the appropriate sentence, but it cannot be the sole ground for imposing a sentence of incarceration. To pre-determine that an undocumented alien is not eligible for probation violates due process and equal protection, constitutional rights which are afforded undocumented aliens. **People v Cesar, 2015 NY Slip Op 06252, 2nd Dept 7-22-15**

FAMILY LAW. FAMILY COURT ACT. FAMILY OFFENSE. SUBJECT MATTER JURISDICTION. ORDER OF PROTECTION.

Family Court did not have subject matter jurisdiction pursuant to Family Court Act 812 and could not, therefore, issue an order of protection to a person, Kirton, who was not a party to a family offense proceeding. Family Court's jurisdiction in a family offense proceeding is limited to certain acts which occur "between spouses or former spouses, or between parent and child or between members of the same family or household (Family Ct Act § 812[1]...). [M]embers of the same family or household include, among others, persons who are not related by consanguinity or affinity and who are or have been in an intimate relationship regardless of whether such persons have lived together at any time..." [internal quotation marks omitted] Here the party to whom the order of protection was issued, Kirton, was not related in any way to, was not a member of the household of, and did not have an intimate relationship with the petitioner, Cambre (from whom Kirton was ordered to stay away). **Matter of Cambre v Kirton, 2015 NY Slip Op 06242, 2nd Dept 7-22-15**

CRIMINAL LAW. WEIGHT OF THE EVIDENCE REVIEW. APPEALS. JURORS, OUTSIDE INFLUENCE UPON. [EDITOR'S NOTE—NO DISCERNABLE DIFFERENCE BETWEEN WEIGHT OF THE EVIDENCE REVIEW AND SUFFICIENCY OF THE EVIDENCE REVIEW].

The Second Department, in applying its "weight of the evidence review," determined that the counts of the indictment stemming from an alleged burglary or attempted burglary were not supported by evidence the defendant entered the victim's house illegally. Therefore those counts were dismissed. The court explained how a "weight of the evidence" review is applied. [It seems to this writer that there no longer is a distinction between a "weight of the evidence" review, which need not be preserved by a motion to dismiss, and a "legally sufficient evidence" review, which must be preserved by a specific motion to dismiss.] The court also explained the criteria for determining whether there was undue outside influence on the jury (here alleged discussion of a newspaper article about the trial and defendant's reputation as a troublemaker). The "undue outside influence" argument was rejected. Concerning the "weight of the evidence" review, the court wrote: "In fulfilling our responsibility to conduct an independent review of the weight of the evidence (see CPL 470.15[5]...), we essentially

sit as the thirteenth juror and decide[ ] which facts were proven at trial ... . [W]eight of the evidence review is not limited to issues of credibility ... . Rather, in conducting its weight of the evidence review, a court must consider the elements of the crime, for even if the prosecution's witnesses were credible their testimony must prove the elements of the crime beyond a reasonable doubt ...". [internal quotation marks omitted] **People v Marsden, 2015 NY Slip Op 06260, 2nd Dept 7-22-15**

FAMILY LAW. NEGLECT. EVIDENCE. CORROBORATION CHILDREN'S OUT-OF-COURT STATEMENTS.

In affirming Family Court's neglect finding, the Second Department noted that the children's out-of-court statements, if sufficiently corroborated, will support a finding of neglect. Here the children's statements were cross-corroborated among them, and were corroborated by the testimony of a school nurse and caseworkers. **Matter of Hayden C. (Tafari C.), 2015 NY Slip Op 06241, 2nd Dept 7-22-15**

FREEDOM OF INFORMATION LAW (FOIL).

The respondent fire department did not demonstrate why any information other than residence addresses should be redacted from the requested documents. Providing the residence addresses would constitute an unwarranted invasion of privacy. Conclusory assertions by the fire department were not otherwise sufficient to meet the department's burden for demonstrating the applicability of a statutory exemption from disclosure: "Under FOIL, government records are presumptively open for public inspection and copying, unless they fall within an enumerated statutory exemption of Public Officers Law § 87(2) ... . The exemptions are to be narrowly construed so as to ensure maximum public access ..., and the burden rests on the agency to demonstrate that the requested material in fact qualifies for exemption (see Public Officers Law § 89[4][b]...). To meet that burden, the agency must articulate particularized and specific justification" for the nondisclosure at issue…". [internal quotation marks omitted] **Matter of Villalobos v New York City Fire Dept., 2015 NY Slip Op 06249, 2nd Dept 7-22-15**

NEGLIGENCE. PERSONAL INJURY. ASSUMPTION OF RISK. EDUCATION-SCHOOL LAW.

The defendant school district did not demonstrate, in its motion for summary judgment, that the softball coach's having infant plaintiff practice sliding on grass did not unreasonably increase the inherent risk of the activity. Therefore the school district's motion was properly denied without any consideration of the opposing papers. **Brown v Roosevelt Union Free School Dist., 2015 NY Slip Op 06204, 2nd Dept 7-22-15**

REAL ESTATE. BROKERAGE COMMISSION.

A broker who had negotiated extensively on behalf of the purchaser, but was not named as a broker entitled to a commission in the operative contract (because the purchaser did not want to work with that broker any further), was entitled to a commission. The court explained the relevant law: "In order to recover a real estate brokerage commission, a broker must establish: (1) that it is duly licensed, (2) that it had a contract, express or implied, with the party to be charged with paying the commission, and (3) that it was the procuring cause of the transaction. To establish that a broker was the procuring cause of a transaction, the broker must establish that there was a direct and proximate link, as distinguished from one that is indirect and remote, between the bare introduction and the consummation...". [internal quotation marks omitted] **Sholom & Zuckerbrot Realty, LLC v Gallant, 2015 NY Slip Op 06231, 2nd Dept 7-22-15**

REAL PROPERTY. DEEDS. RESTRICTIVE COVENANTS. REVERSIONARY INTEREST. PUBLIC TRUST DOCTRINE. ENVIRONMENTAL LAW. STATE ENVIRONMENTAL QUALITY REVIEW ACT (SEQRA). MUNICIPAL LAW. VILLAGE LAW.

The Second Department upheld an agreement to remove restrictive covenants from a deed, allowing the village, to which the property had been conveyed, to retain the property free and clear from restrictions. The deed to the village from the Ortenbergs (husband and wife) included a covenant that the property would remain in its natural state for public purposes for the life of the village. If the village ceased maintaining the property in a natural state, or if the village ceased to exist, the property reverted to the Ortenbergs, their heirs and assigns. After Mrs. Ortenberg died, Mr. Orternberg entered an agreement with the village to remove the restrictive covenants. The petitioners, owners of contiguous land, brought an Article 78 petition arguing that the agreement violated the public trust doctrine which requires the approval of the New York State Legislature before the land held for public use could be converted to private use. The Second Department noted that the public trust doctrine does not apply to land conveyed for public use subject to a condition subsequent (the reversionary interest). The court also noted that the agreement was not subject to the State Environmental Quality Review Act (SEQRA). **Matter of Rappaport v Village of Saltaire, 2015 NY Slip Op 06246, 2nd Dept 7-22-15**

STRICT PRODUCTS LIABILITY. DOCTRINE OF ALTERNATIVE LIABILITY.

The Second Department determined the doctrine of alternative liability applied to a strict products liability case where it was not possible for the plaintiff to determine which of two defendants distributed the product. The doctrine places the burden on the defendants to demonstrate which of them distributed the product, and if that is not possible, the two defendants would be jointly and severally liable. **Silver v Sportsstuff, Inc., 2015 NY Slip Op 06232, 2nd Dept 7-22-15**

TRUSTS AND ESTATES. DIVORCE. ABANDONMENT OF AN ACTION. STIPULATION OF SETTLEMENT (DIVORCE). REVOCATION OF TESTAMENTARY DISPOSITION. FAMILY LAW. CONTRACT LAW.

Decedent and her husband had entered a stipulation of settlement and all matters related to their divorce had been settled at the time of decedent's death. Only the submission of the proposed judgment of divorce remained. The stipulation of settlement included the parties' agreement that they were no longer the beneficiaries of each other's wills. Decedent's husband sought letters testamentary and a share in the estate, arguing that, because the proposed judgment of divorce was not submitted by decedent, decedent had abandoned the divorce action. Surrogate's court agreed the divorce action had been abandoned and found there was a question of fact whether the stipulation of settlement was enforceable. The Second Department reversed, finding that the divorce action was not abandoned and the stipulation of settlement was enforceable. Decedent's husband, therefore, had no right to share in decedent's estate. **Matter of Rivera, 2015 NY Slip Op 06247, 2nd Dept 7-22-15**

WORKERS' COMPENSATION LAW. EMPLOYMENT LAW. CORPORATION LAW. ALTER EGO (CORPORATIONS).

Defendant's status as the "alter ego" of plaintiff's employer limited plaintiff's recovery for job-related injury to Workers' Compensation: "The protection against lawsuits brought by injured workers which is afforded to employers by Workers' Compensation Law §§ 11 and 29(6) also extends to entities which are alter egos of the entity which employs the plaintiff ... . A defendant moving for summary judgment based on the exclusivity defense of the Workers' Compensation Law under this theory must show, prima facie, that it was the alter ego of the plaintiff's employer ... . A defendant may establish itself as the alter ego of a plaintiff's employer by demonstrating that one of the entities controls the other or that the two operate as a single integrated entity ... . Here, the defendant demonstrated its prima facie entitlement to judgment as a matter of law by establishing that it was the alter ego of the plaintiff's employer, since the two companies operated as a single integrated entity ...". [internal quotation marks omitted] **Haines v Verazzano of Dutchess, LLC, 2015 NY Slip Op 06214, 2nd Dept 7-22-15**

THIRD DEPARTMENT

CONTRACT LAW. BREACH OF CONTRACT. PREVENTING A PARTY FROM CARRYING OUT THE AGREEMENT.

Supreme Court properly held that defendants breached the contract. Plaintiff owned a business which produced and sold aggregate stone. Plaintiff entered a lease agreement with defendants which allowed plaintiff to remove stone from a quarry on defendants' property and required that defendants pay "rent" based upon the amount of stone removed. No stone was removed for some time. Defendants sent a letter indicating they would consider the lease null and void unless plaintiff started up the business within 90 days. The parties then entered discussions, some stone was removed and rent was paid. Thereafter, the defendants unilaterally declared the lease null and void, ordered plaintiff to remove its equipment, and prevented plaintiff from entering the property. Supreme Court found plaintiff had done enough to comply with defendants' initial demand that plaintiff start up its business and, therefore, defendants' actions, which prevented plaintiff from carrying out its agreement, constituted a material breach. The Third Department agreed. **Galusha & Sons, LLC v Champlain Stone, Ltd, 2015 NY Slip Op 06286, 3rd Dept 7-23-15**

CRIMINAL LAW. EVIDENCE. UNCHARGED CRIMES. PROSECUTORIAL MISCONDUCT.

The Third Department reversed defendant's conviction based upon several errors including the improper presentation of evidence of uncharged crimes attributed to the defendant and a police officer's vouching for the reliability and credibility of the confidential informant (CI), upon whose testimony the People's case depended. The jury heard evidence of defendant's participation in a drug offense identical to that for which he was on trial. Even though objection to the testimony was sustained and the testimony struck, no limiting instructions were given to the jury. Evidence of defendant's sitting at a table on which there were large amounts of heroin and crack cocaine was also improperly presented. Objection to that testimony was overruled. With respect to the police officer's vouching for the credibility and reliability of the CI, the defense objection to that testimony was sustained, but no curative instructions were given to the jury. **People v Nicholas, 2015 NY Slip Op 06269, 3rd Dept 7-23-15**

HIGHWAY DESIGN. HIGHWAY MAINTENANCE. QUALIFIED IMMUNITY. NEGLIGENCE. PERSONAL INJURY.

The maintenance and construction of a culvert, around which the road repeatedly washed out, was a highway design issue, for which the state was protected by qualified immunity, not a highway maintenance issue, for which a negligence standard applies. Claimant was injured when his vehicle went into a sinkhole near the culvert: "In order to successfully invoke the qualified immunity defense, defendant had the burden of demonstrating that its decision with regard to the replacement of the culvert "was the product of a deliberative decision-making process ... . Even with design planning issues, liability may exist where the municipality does not adequately analyze the condition or if there is no reasonable basis for its plan ... . If a remedial plan is developed, liability may result from a failure to effec-

tuate the plan within a reasonable period of time," but "a reasonable delay justified by design considerations [or] a legitimate claim of funding priorities would not be actionable ... . Based upon our review of the probative evidence, we agree with the Court of Claims that the replacement of the culvert presented a design and not a maintenance issue and that defendant was entitled to qualified immunity." [internal quotation marks omitted] **Evans v State of New York, 2015 NY Slip Op 06288, 3rd Dept 7-23-15**

REAL PROPERTY. REAL PROPERTY ACTIONS AND PROCEEDINGS LAW (RPAPL). COTENANCY. OUSTER. ADVERSE POSSESSION.

The motion to dismiss for failure to state a cause of action was properly granted. A cotenant who had resided at the property, maintained the property, and paid the taxes for over two decades, brought an action seeking exclusive ownership based upon ouster of defendant cotenant and/or adverse possession. Neither the complaint nor plaintiff's submissions established the statutory criteria for ouster or adverse possession (Real Property Actions and Proceedings Law [RPAPL] 541). There was no unequivocal expression by the possessory cotenant that the property was being adversely possessed, and the inclusion of the defendant cotenant's name on a property insurance policy belied adverse possession. The court noted that exclusive possession and payment of maintenance expenses by a cotenant, standing alone, do not establish adverse possession. **Lindine v Iasenza, 2015 NY Slip Op 06275, 3rd Dept 7-23-15**

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