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CasePrepPlus

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COURT OF APPEALS

AGRICULTURE AND MARKETS LAW. ANIMAL LAW. CRIMINAL LAW. MISTREATMENT OF DOG.

The proof of the emaciated condition of defendant's dog supported the defendant's conviction for a violation of Agriculture and Markets Law 353, which prohibits depriving an animal of necessary sustenance. On appeal, the defendant argued the trial court erred in refusing to instruct the jury that a conviction required proof of a mens rea, i.e., that defendant knowingly deprived or neglected the dog. The Court of Appeals did not address the defendant's argument, finding that the proof of the dog's condition alone supported the conviction. **People v Basile, 2015 NY Slip Op 05623, CtApp 7-1-15**

CONTRACT LAW. ASSIGNMENT OF NOTES. ASSIGNMENT OF RIGHT TO BRING TORT ACTION. FRAUD.

The assignment of a note, which was silent about whether the assignment included the right to bring a tort action, did not include such a right. Therefore the Second Circuit's certified question whether the assignee of the note had standing to sue Morgan Stanley for fraud was answered in the negative. The case arose out of the collapse in value of sub-prime residential mortgage-backed securities. The court explained the relevant New York law: "To be sure, fraud claims are freely assignable in New York ... . It has long been held, however, that the right to assert a fraud claim related to a contract or note does not automatically transfer with the respective contract or note ... . Thus, where an assignment of fraud or other tort claims is intended in conjunction with the conveyance of a contract or note, there must be some language — although no specific words are required — that evinces that intent and effectuates the transfer of such rights ... . Without a valid assignment, 'only the . . . assignor may rescind or sue for damages for fraud and deceit' because 'the representations were made to it and it alone had the right to rely upon them' ...". **Commonwealth of Pa. Pub. Sch. Employees' Retirement Sys. v Morgan Stanley & Co., Inc., 2015 NY Slip Op 05591, CtApp 6-30-15**

CRIMINAL LAW/CRIMINAL PROCEDURE LAW. 710.30 NOTICE OF INTENT TO INTRODUCE OUT-OF-COURT IDENTIFICATION.

The People were required to provide the pre-trial statutory notice of the intent to introduce evidence of an out-of-court identification of the defendant by the officer who viewed the underlying controlled drug purchase (by an undercover officer) from across the street. The error was deemed harmless however. Noting that the identification at issue was not so free from the risk of undue suggestiveness as to render the identification merely "confirmatory," the court offered a clear explanation of the reasons for the statutory pre-trial notice requirement: "The notice statute was a legislative response to the problem of suggestive and misleading pretrial identification procedures ... . In enacting the notice requirement, the Legislature attempt[ed] to deal effectively with the reality that not all police-arranged identifications are free from unconstitutional taint ... . The purpose of the notice requirement is two-fold: it provides the defense with an opportunity, prior to trial, to investigate the circumstances of the [evidence procured by the state] and prepare the defense accordingly and permits an orderly hearing and determination of the issue of the fact . . . thereby preventing the interruption of trial to challenge initially the admission into evidence of the [identification] ... . Thus, the statute contemplates pretrial resolution of the admissibility of identification testimony where it is alleged that an improper procedure occurred ...". [internal quotation marks omitted] **People v Pacquette, 2015 NY Slip Op 05595, CtApp 6-30-15**

CRIMINAL LAW. ENTERPRISE CORRUPTION. JURY INSTRUCTIONS. INEFFECTIVE ASSISTANCE OF COUNSEL.

The Court of Appeals affirmed the defendants' enterprise corruption convictions. The enterprise here involved a doctor and a chiropractor (the defendants), medical clinics, faked accidents, faked injuries, kickbacks to lawyers, fraudulent insurance claims, etc. The court explained that there is no requirement that the People prove the enterprise would continue in the absence of a key participant to demonstrate the "continuity" element of the enterprise, i.e., that the "structure [of the enterprise is] distinct from the predicate illicit pattern." In addition, the majority determined an acknowledged jury-instruction error (using "and" instead of "or") was unpreserved, and rejected an ineffective assistance argument which was based on the failure to object to the erroneous jury charge. In rejecting the ineffective assistance argument, the majority noted that

whether the jury-instruction error was reversible was a close question. If the error had been clearly reversible, the majority explained, the ineffective assistance argument would have prevailed. The dissent argued that the jury-instruction error was preserved and constituted reversible error. The jury-instruction and ineffective assistance discussions, like the enterprise corruption discussion, are extensive and substantive. **People v Keschner, 2015 NY Slip Op 05596, CtApp 6-30-15**

CRIMINAL LAW. FELONY MURDER. BURGLARY.

Defendant's felony murder conviction was affirmed. There was evidence the defendant entered the victim's apartment intending to assault, not kill, the victim. Therefore the defendant's causing the death of the victim in the course of the burglary constituted felony murder. The question whether entering the apartment with the intent to kill, and thereafter killing the victim, would also constitute felony murder remains unanswered. The court rejected defendant's argument that the felony murder statute requires the death be caused in order to advance the underlying felony, finding the statute requires only a logical nexus between a murder and a felony. **People v Henderson, 2015 NY Slip Op 05592, CtApp 6-30-15**

CRIMINAL LAW. PROSECUTORIAL MISCONDUCT. INEFFECTIVE ASSISTANCE OF COUNSEL. DNA. EVIDENCE.

Defendant was not afforded effective assistance of counsel. In her summation, the prosecutor mischaracterized the strength and meaning of the DNA evidence. Defense counsel had effectively, through cross-examination, called into question the strength and meaning of the DNA evidence. But defense counsel did not object to the prosecutor's unsubstantiated claims in her summation. The court concluded the failure to object could not be justified as a viable defense strategy and required reversal. **People v Wright, 2015 NY Slip Op 05621, CtApp 7-1-15**

GENERAL OBLIGATIONS LAW. STATUTE OF FRAUDS. CONTRACT LAW. QUANTUM MERUIT. UNJUST ENRICHMENT.

In the context of a pre-answer motion to dismiss, the statute of frauds did not bar the causes of action which stemmed from plaintiff's advising defendants *whether to negotiate* a business opportunity, as opposed to the causes of action stemming from plaintiff's advising defendants in the *actual negotiation* of a business opportunity (which were barred by the statute of frauds): "Here we are specifically concerned with General Obligations Law § 5-701 (a) (10), which appl[ies] to a contract implied in fact or in law to pay reasonable compensation and which provides that [e]very agreement, promise or undertaking is void, unless it or some note or memorandum thereof be in writing, and subscribed by the party to be charged therewith, or by his lawful agent, if such agreement, promise or undertaking . . . [i]s a contract to pay compensation for services rendered in . . . negotiating the purchase . . . of any real estate or interest therein, or of a business opportunity, business, its good will, inventory, fixtures or an interest therein ... . * * * ... [T]he allegations with respect [some of the projects] could be construed as seeking recovery for work performed so as to inform defendants whether to partake in certain business opportunities, that is, *whether to negotiate*. To the extent the causes of action are based on such allegations, they are not barred by the statute of frauds." [emphasis added and internal quotation marks omitted] **JF Capital Advisors, LLC v Lightstone Group, LLC, 2015 NY Slip Op 05622, CtApp 7-1-15**

INSURANCE LAW. UNINSURED/UNDERINSURED MOTORIST COVERAGE. POLICE VEHICLES.

A police vehicle is not a "motor vehicle" within the meaning of the Insurance Law. Therefore a police officer, who was injured in a police vehicle driven by another police officer, could not recover under the police-officer-driver's uninsured/underinsured motorist coverage in the driver's personal insurance policy: "Insurance Law §§ 3420 (e) and 3420 (f) (1) do not directly define motor vehicle in so many words, but Insurance Law § 3420 (e) does refer to a motor vehicle or a vehicle as defined in [VTL 388 (2)]. VTL 388 is the sole provision of VTL article 11, which governs civil liability for negligence in the operation of vehicles. VTL 388 (2) states, As used in this section, vehicle means a motor vehicle, as defined in [VTL 125], except fire and police vehicles, and certain other vehicles not relevant here (see VTL 388 [2])." [internal quotation marks omitted] **Matter of State Farm Mut. Auto. Ins. Co. v Fitzgerald, 2015 NY Slip Op 05626, CtApp 7-1-15**

MUNICIPAL LAW. IMPLIED DEDICATION AS PUBLIC PARKLAND. PUBLIC TRUST DOCTRINE. ENVIRONMENTAL LAW.

Certain city-owned parcels of land, which had been used as public parklands, had not been impliedly dedicated as public parklands. Therefore the parcels were not under the protection of the public trust doctrine and could be sold by the city without the approval of the state legislature. **Matter of Glick v Harvey, 2015 NY Slip Op 05593, CtApp 6-30-15**

PREEMPTION. ATTORNEYS. MUNICIPAL LAW. NEW YORK CITY LOCAL LAW. ADMINISTRATIVE CODE OF THE CITY OF NEW YORK. JUDICIARY LAW. REGULATION OF DEBT COLLECTION.

Answering a certified question from the Second Circuit, the Court of Appeals determined that New York City's Local Law 15, which regulates debt-collection practices, including some debt-collection practices used by attorneys, was not preempted by the Judiciary Law. The Local Law only reaches attorneys who regularly engage in activities traditionally performed

by debt collectors. The court found no conflict between the Local Law and the Judiciary Law (no "conflict" preemption). And the court found that the Judiciary Law does not evince an intent to preempt the field of regulating nonlegal services performed by attorneys (no "field" preemption). **Eric M. Berman, P.C. v City of New York, 2015 NY Slip Op 05594, CtApp 6-30-15**

REAL PROPERTY TAX LAW. CHARITABLE PURPOSE-USE EXEMPTION.

Parking lots owned by "Greater Jamaica" were not entitled to a charitable exemption from real estate taxes. "Greater Jamaica" is an organization formed for the purpose of facilitating Jamaica's commercial development. It is exempt from federal income taxation pursuant to 26 U.S.C. 501(c)(3). The N.Y.C. Department of Finance (DOF) revoked Greater Jamaica's exemption from real estate taxes, which the DOF had previously granted. Supreme Court upheld the revocation. The Appellate Division reversed Supreme Court. And the Court of Appeals reversed the Appellate Division. The Court of Appeals noted that the criteria for a charitable exemption under the IRS code is different from the criteria under Real Property Tax Law 420-a (RPTL) and, although a court may consider the IRS exemption in a RPTL 420-a proceeding, the IRS exemption is not determinative. The Court of Appeals concluded the parking lots were primarily *used* to facilitate the commercial growth of Jamaica, which was not a charitable purpose under the RPTL. **Matter of Greater Jamaica Dev. Corp. v New York City Tax Commn., 2015 NY Slip Op 05620, CtApp 7-1-15**

TAX LAW. INCOME TAX. NON-RESIDENT INCOME TAX. INTANGIBLE PROPERTY. S CORPORATIONS. "DEEMED ASSET SALE." NEW YORK CONSTITUTIONAL LAW.

Non-resident plaintiffs, shareholders in an S corporation who sold their stock and treated the transaction as a "deemed asset sale," were properly assessed New York income taxes on the New York-source aspects of the sale pursuant to Tax Law 632. The court rejected the argument that the tax assessment violated Article 16, § 3, of the N.Y. Constitution. **Burton v New York State Dept. of Taxation & Fin., 2015 NY Slip Op 05624, CtApp 7-1-15**

TAX LAW. INCOME TAX. NON-RESIDENT INCOME TAX. INTANGIBLE PROPERTY. S CORPORATIONS. "DEEMED ASSET SALE." RETROACTIVE APPLICATION OF STATUTE.

In an action raising many of the same income-tax-law issues raised in *Burton v. New York State Dept. of Taxation & Fin.*, 2015 N.Y. Slip Op 05624, CtApp 7-1-15 (summarized herein), the Court of Appeals determined non-resident plaintiffs' due process rights were not violated by the retroactive application of Tax Law 632. The case concerned the taxation of installment payments re: a deemed asset sale of stock in an S corporation. The 2010 amendments of Tax Law 632 clarified that the installments will be treated as New York-source income and made the amendments retroactive for 3 1/2 years. The Court of Appeals held: (1) plaintiffs' interpretation of the prior law was not reasonable and therefore plaintiffs did not establish reliance on the prior law; (2) the length of the retroactive period was not excessive; and (3), the amendment (correcting an error and preventing revenue loss) served a valid public purpose. **Caprio v New York State Dept. of Taxation & Fin., 2015 NY Slip Op 05625, CtApp 7-1-15**

FIRST DEPARTMENT

CRIMINAL LAW. FORFEITURE. APPEALS.

A stipulation of forfeiture of a sum of money entered by the defendant was part of the judgment of conviction, and was therefore reviewable on appeal. The dissent argued that appeal should have been dismissed because the forfeiture was part of the sentence, not the judgment of conviction, and was therefore not reviewable. The forfeiture was ultimately affirmed on the merits. **People v Burgos, 2015 NY Slip Op 05600, 1st Dept 6-30-15**

CRIMINAL LAW. JUSTIFICATION DEFENSE. JURY INSTRUCTIONS. AMBIGUOUS VERDICT. INTEREST OF JUSTICE APPELLATE JURISDICTION. APPEALS.

Exercising the court's "interest of justice" jurisdiction, the First Department determined defendant was entitled to a new trial because the jury instructions did not make clear that, if the jury found the defendant's actions justified (self-defense), acquittal on all counts was mandatory. The defendant was charged with attempted murder, attempted assault in the first degree, and assault second degree stemming from a stabbing. There was evidence defendant may have acted in self-defense. Therefore the jury was given the justification-defense instruction. The jury found the defendant not guilty of attempted murder, but guilty of the lesser two counts. If the not guilty verdict was based on the justification defense, then the defendant should have been acquitted of all charges. The jury instructions did not make the effect of finding the defendant's acts justified clear. Because it could not be discerned whether the jury acquitted the defendant of attempted murder based on the justification defense, the verdict was ambiguous and a new trial was required, notwithstanding that the error in the jury instructions was not preserved. **People v Velez, 2015 NY Slip Op 05619, 1st Dept 6-30-15**

LABOR LAW. PERSONAL INJURY. SUBCONTRACTORS. LABOR LAW 200. LABOR LAW 241(6).

Under Labor Law 200 (a codification of common law negligence), a subcontractor, as the statutory agent of the owner and general contractor, stands in the shoes of the owner and general contractor. Neither the owner, general contractor nor their statutory agent may be held liable under Labor Law 200 in the absence of evidence the owner, general contractor or their statutory agent actually created the dangerous condition or had actual or constructive notice of the dangerous condition. Here there was no evidence the defendant subcontractor created or was aware of a dangerous condition allegedly created by its subcontractors. A subcontractor who did not create and/or has no notice of the dangerous condition, however, can be vicariously liable for the acts and omissions of its subcontractors, as a statutory agent, under Labor Law 241 (6). **DeMaria v RBNB 20 Owner, LLC, 2015 NY Slip Op 05599, 1st Dept 6-30-15**

NEGLIGENCE. PERSONAL INJURY. CONSTRUCTIVE NOTICE.

The trial evidence was sufficient to support the jury's conclusion the defendant hospital had constructive notice of a worn rubber mat. The jury could reason that the wearing of the mat, resulting in a hole, occurred over a period of time and should have been noticed by the defendant. The fact that plaintiff's testimony was the only evidence of the claimed defect did not render the evidence insufficient. The motion to set aside the verdict was properly denied and the verdict was not against the weight of the evidence. **Cruz v Bronx Lebanon Hosp. Ctr., 2015 NY Slip Op 05601, 1st Dept 6-30-15**

PUBLIC TRUST DOCTRINE. MUNCIPAL LAW. PUBLIC PARKLANDS. STATUTORY INTERPRETATION. NYC ADMINISTRATIVE CODE. ENVIRONMENTAL LAW.

Provisions of the NYC Administrative Code could not be interpreted to allow the construction of a shopping mall in the area where Shea Stadium once stood. Rather the code provisions allowed only construction which was relevant to the stadium. Under the public trust doctrine only the uses of the dedicated parkland contemplated by the code provisions were authorized: "This dispute turns on whether the plain language of Administrative Code § 18-118 compels a narrow use of the parkland in question such that any additional construction on it must be directly related to a stadium, or whether any such construction on the parkland must only be related to one of the purposes delineated in § 18-118(b). The proper interpretation of the statute is critical in this case, because, under the public trust doctrine, dedicated park areas in New York are impressed with a public trust for the benefit of the people of the State, and their 'use for other than park purposes, either for a period of years or permanently, requires the direct and specific approval of the State Legislature, plainly conferred' ... . Stated differently, parkland may be alienated or leased for non-park purposes as long as authorized by the legislature ..., and the 'legislative authority required to enable a municipality to sell its public parks must be plain' ... . * * *... [T]he public trust doctrine is clear that any alienation of parkland must be explicitly authorized by the legislature. No reasonable reading of Administrative Code section 18-118 allows for the conclusion that the legislature in 1961 contemplated, much less gave permission for, a shopping mall, unrelated to the anticipated stadium, to be constructed in the Park. Further, it is simply not in our power to set the doctrine aside, no matter how worthy a proposed use of parkland may be. Here, while there is a legislative mandate for the use of the Park, that mandate does not encompass the use proposed by respondents." **Matter of Avella v City of New York, 2015 NY Slip Op 05790, 1st Dept 7-2-15**

SECOND DEPARTMENT

ANIMAL LAW. DOG BITE. STRICT LIABILITY.

Questions of fact about whether the dog exhibited vicious propensities prior to plaintiff's injury precluded summary judgment in a dog bite case. The court explained the relevant law, noting that no negligence cause of action for a dog bite exists in New York: :Aside from the limited exception ..., regarding a farm animal that strays from the place where it is kept ..., which is not at issue here, "New York does not recognize a common-law negligence cause of action to recover damages for injuries caused by a domestic animal" ... . Thus, [t]o recover upon a theory of strict liability in tort for a dog bite or attack, a plaintiff must prove that the dog had vicious propensities and that the owner of the dog . . . knew or should have known of such propensities ... . Vicious propensities include the propensity to do any act that might endanger the safety of the persons and property of others ... . Evidence tending to prove that a dog has vicious propensities includes a prior attack, the dog's tendency to growl, snap, or bare its teeth, the manner in which the dog was restrained, and a proclivity to act in a way that puts others at risk of harm ..." . [internal quotation marks omitted] **Ostrovsky v Stern, 2015 NY Slip Op 05654, 2nd Dept 7-1-15**

CHARTER SCHOOLS. CHARTER SCHOOL ACT.EDUCATION LAW. EDUCATION-SCHOOL LAW. ADMINISTRATIVE LAW.

Parents of children in public schools had standing to bring an Article 78 petition for a review of the SUNY Trustee's authorization for charter schools. The court determined the authorization was not arbitrary or capricious or an abuse of discretion, noting that there was no requirement of majority community support. **Matter of Williamsburg & Greenpoint Parents: Our Pub. Schools! v Board of Trustees, State Univ. of N.Y., 2015 NY Slip Op 05690, 2nd Dept 7-1-15**

CIVIL PROCEDURE. CLASS ACTIONS. MOTION TO INTERVENE. STATUTE OF LIMITATIONS. ENVIRONMENTAL LAW.

The motion to intervene by plaintiffs and 167 residents in a de-certified class action alleging environmental damage resulting from emissions from defendant's (BNL's) lab should have been granted. The action began as a class action suit which was dismissed without prejudice. Then, in accordance with CPLR 1013, the individuals in the class brought a motion to intervene accompanied by a complaint which was denied by Supreme Court. The Second Department held the motion to intervene should have been granted and further held that the statute of limitations had been tolled from the time the class action proceedings were commenced: "... [T]he causes of action of the proposed intervenors are all based upon common theories of liability and, thus, satisfy the requirement of CPLR 1013 that their causes of action involve common questions of law or fact. Contrary to the Supreme Court's conclusion, BNL would not be faced with a 'plethora of new claims.' Moreover, BNL did not demonstrate that intervention would substantially prejudice any party, or cause undue delay ...". **Osarczuk v Associated Univs., Inc., 2015 NY Slip Op 05653, 2nd Dept 7-1-15**

CONSTRUCTIVE TRUST. REAL PROPERTY. DEEDS.

A constructive trust was properly imposed on property for which the plaintiff provided one-third of the downpayment. Plaintiff Reynida Diaz was not included on the original deed with her two sisters because of her credit history. There was an agreement among the sisters that Reynida would be added to the deed at a later time. Defendant sister refused to add Reynida to the deed. The court explained the requirements for a constructive trust: "In general, the imposition of a constructive trust is appropriate in situations when property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest ... . The elements of a constructive trust are (1) a fiduciary or confidential relationship; (2) an express or implied promise; (3) a transfer in reliance on the promise; and (4) unjust enrichment ... . A party must establish the elements of a constructive trust by clear and convincing evidence ..." . [internal quotation marks omitted] **Diaz v Diaz, 2015 NY Slip Op 05635, 2nd Dept 7-1-15**

CRIMINAL LAW. CRIMINAL PROCEDURE LAW. JURY NOTE.

The trial judge's failure to follow the proper procedure for answering a note from the jury was reversible error. The jury sent out a note requesting a readback of alibi testimony. Just after that note was read to the jury and the parties for the first time, the trial judge read a second note which indicated the jury had reached a verdict. Without addressing the first note, the verdict was pronounced. Defense counsel was not alerted to the contents of the first note or the judge's intended response and was not given a chance to suggest a response before the jury was called in. a violation of CPL (Criminal Procedure Law 310.30). **People v Wiggs, 2015 NY Slip Op 05707, 2nd Dept 7-1-15**

CRIMINAL LAW. PAYTON RULE. WARRANTLESS ARREST.

The warrantless arrest of the defendant in the doorway of his apartment did not violate the "Payton" rule which prohibits warrantless arrests in the home: "Here, the hearing evidence demonstrated that the police entered the building the defendant lived in through the front door. Thereafter, they passed through a vestibule before climbing the stairs to the defendant's upstairs apartment. One of the officers knocked on the closed apartment door, the defendant opened it, and the officer effectuated the arrest in the doorway. The arresting officer did not go inside the defendant's apartment ..., or reach in to pull the defendant out ... . Since the defendant was arrested at the threshold of his apartment, after he 'voluntarily emerged [and thereby] surrendered the enhanced constitutional protection of the home' ..., his warrantless arrest did not violate Payton ...". **People v Garvin, 2015 NY Slip Op 05695, 2nd Dept 7-1-15**

CRIMINAL LAW. WARRANTLESS SEARCH. PAROLEES. PAROLE OFFICERS.

The warrantless search of a parolee's car by a detective who was exercising parole-warrant responsibilities was valid. The detective was aware of defendant's parole violations and the related warrant for defendant's arrest. The detective was also aware that defendant, as a parolee, had consented in writing the search of his person and property: "While a person on parole is not denied the Fourth Amendment right to be free from unreasonable searches and seizures, the status of a parolee is always relevant and may be critical in evaluating the reasonableness of a particular search or seizure. A search which would be unlawful if directed against an ordinary citizen may be proper if conducted against a parolee ... . The special circumstances and close supervision that come with being a parolee must be considered when determining if a search is reasonable ...". **People v McMillan, 2015 NY Slip Op 05702, 2nd Dept 7-1-15**

DECLARATORY JUDGMENT. STATUTE OF LIMITATIONS. MUNICIPAL LAW. TAX ASSESSMENTS-LIENS. VOID AB INITIO.

The declaratory judgment actions seeking a ruling on the validity of certain tax assessments/liens were not time-barred. Even where tax assessments are challenged as "void ab initio," the statute of limitations (six years here) applies: "An action

for a declaratory judgment is generally governed by a six-year limitations period (see CPLR 213[1]). Where a declaratory judgment action involves claims that are open to resolution through a form of proceeding for which a specific limitation period is statutorily provided, then that period limits the time for commencement of the declaratory judgment action... . The instant action could not have been brought pursuant to CPLR article 78 (see CPLR 7803), or as any other form of proceeding for which a specific limitations period is provided. Therefore, the six-year limitations period is applicable ..." . [internal quotation marks omitted] **Town of Hempstead v AJM Capital II, LLC, 2015 NY Slip Op 05663, 2nd Dept 7-1-15**

FAMILY LAW. FAMILY COURT ACT. FAMILY OFFENSE. ORDER OF PROTECTION.

In a family offense proceeding, the Second Department noted that Supreme Court did not make the finding of aggravating circumstances required for an order of protection which exceeds two years: "The Supreme Court ... failed to set forth any finding of aggravating circumstances "on the record and upon the order of protection," as is required to issue an order of protection with a duration exceeding two years (Family Ct Act § 842), and insufficient evidence was presented at the hearing to support any finding of aggravating circumstances (see Family Ct Act § 827[a][vii]...). Therefore, the duration of the order of protection may not exceed two years ..." . **Matter of Masciello v Masciello, 2015 NY Slip Op 05681, 2nd Dept 7-1-15**

FORECLOSURE. MORTGAGES. STANDING. NOTES. ASSIGMENT OF NOTES. BANKRUPTCY. IN REM PROCEEDINGS. IN PERSONAM PROCEEDINGS.

The assignee of a mortgage note discharged in bankruptcy had standing to bring a foreclosure action for the sale of the mortgaged property. The borrower, because of the discharge in bankruptcy, could not be held liable on the note in personam (no deficiency judgment was possible). But the bank could proceed against the property in rem seeking the proceeds of a foreclosure sale: "Under New York law, in order to have standing to commence a foreclosure action, a plaintiff generally must be the holder or assignee of the note which the mortgage secures. On this appeal, we are asked to consider whether a note discharged in bankruptcy can be subsequently assigned, with the mortgage passing incident thereto, so as to convey standing to the assignee. ... [W]e answer the question in the affirmative. * * * ... [A]n assignee of a mortgage takes it subject to the equities attending the original transaction ... . After assignment, a note remains subject to any defense, legal and equitable, that existed between the original parties ..." . **Deutsche Bank Trust Co. Ams. v Vitellas, 2015 NY Slip Op 05634, 2nd Dept 7-1-15**

FRAUD. UNJUST ENRICHMENT. FORECLOSURE. CIVIL PROCEDURE.

The complaint against defendant bank alleging unjust enrichment and fraud was properly dismissed for failure to state a cause of action. The action stemmed from a foreclosure sale. After the property had been sold, the judgment of foreclosure and sale was vacated because the bank did not properly serve process on one of the parties. The full amount paid for the property was refunded to the plaintiff. The plaintiff then sued for unjust enrichment claiming the bank collected bank fees and interest. Re: unjust enrichment: the complaint failed to allege the bank had been enriched at plaintiff's expense. And the plaintiff sued for fraud alleging the bank knew it had failed to properly serve one of the parties at the time it prosecuted the foreclosure action. Re: fraud: the complaint included only conclusory allegations of fraud without out the requisite supporting factual allegations. **GFRE, Inc. v U.S. Bank, N.A., 2015 NY Slip Op 05640, 2nd Dept 7-1-15**

INSURANCE LAW. STATUTORILY CREATED ENTITIES. CAPACITY TO SUE.

A nonprofit association created by statute (Insurance Law 2130), the Excess Line Association of New York (ELANY), did not have the capacity to sue based upon the defendants' alleged failure to comply with the Insurance Law. Only the Superintendent of Insurance can enforce the Insurance Law. Because the legislature did not provide ELANY with a statutory private right of action, the association did not have the capacity to bring the suit. **Excess Line Assn. of N.Y. (ELANY) v Waldorf & Assoc., 2015 NY Slip Op 05637, 2nd Dept 7-1-15**

NEGLIGENCE. PERSONAL INJURY. COMMON ELEMENTS. CONDOMINIUMS. BOARD OF MANAGERS.

Plaintiff slipped and fell in a vestibule, one of the common elements of a condominium. The common elements of a condominium are under the control of the board of managers, not the individual condominium owners. Therefore the condominium owners' motions for summary judgment were properly granted. **O'Toole v Vollmer, 2015 NY Slip Op 05655, 2nd Dept 7-1-15**

NEGLIGENCE. PERSONAL INJURY. DUTY OF CARE. TORT LIABILITY ARISING FROM CONTRACT. CONTRACT LAW.

Plaintiff alleged a traffic accident was the result of a malfunctioning traffic signal. The defendant county had entered a traffic-signal maintenance contract with defendant Welsbach. The Second Department determined that the contract between the county and Welsbach did not give rise to tort liability re: defendant Welsbach in favor of the plaintiff because the

contract was not such that it displaced the county's duty to maintain the traffic signal. The court explained the analytical criteria: "[A] contractual obligation, standing alone, will generally not give rise to tort liability in favor of a third party ... . Exceptions to this general rule exist (1) where the contracting party, in failing to exercise reasonable care in the performance of [its] duties, launche[s] a force or instrument of harm; (2) where the plaintiff detrimentally relies on the continued performance of the contracting party's duties[;] and (3) where the contracting party has entirely displaced the other party's duty to maintain the premises safely ... . Welsbach established, prima facie, that it did not owe the plaintiff a duty of care, since its limited maintenance contract with the County did not displace the County's duty to maintain the traffic signal at the subject intersection in a reasonably safe condition and it did not launch an instrument of harm ...". [internal quotation marks omitted] **Watt v County of Nassau, 2015 NY Slip Op 05668, 2nd Dept 7-1-15**

NEGLIGENCE. PERSONAL INJURY. OUT-OF-POSSESSION LANDLORD. LANDLORD-TENANT. LEASE.

There were questions of fact whether an out-of-possession landlord (Marphil Realty) was liable for a dangerous condition (resulting in a fire). The lease gave the landlord the right to reenter during usual business hours in order to inspect the premises and to make repairs and improvements. Therefore there was a question of fact whether the landlord had relinquished complete control over the property such that its duty to maintain the property in a reasonably safe condition was extinguished. **Yehia v Marphil Realty Corp., 2015 NY Slip Op 05670, 2nd Dept 7-1-15**

NEGLIGENCE. PERSONAL INJURY. REAR-END COLLISIONS.

Plaintiffs, who were struck from the rear in a vehicle collision, were entitled to summary judgment. A "conclusory" allegation by the defendant that plaintiffs' vehicle caused the accident by stopping suddenly was not enough to defeat the motion. The court explained the relevant law: "When the driver of an automobile approaches another automobile from the rear, he or she is bound to maintain a reasonably safe rate of speed and control over his vehicle, and to exercise reasonable care to avoid colliding with the other vehicle ... . A rear-end collision with a stopped or stopping vehicle creates a prima facie case of negligence against the operator of the rear vehicle, thereby requiring that operator to rebut the inference of negligence by providing a nonnegligent explanation for the collision... .A nonnegligent explanation for a rear-end collision may include evidence of a sudden stop of the lead vehicle ... . However, vehicle stops which are foreseeable under the prevailing traffic conditions, even if sudden and frequent, must be anticipated by the driver who follows, since he or she is under a duty to maintain a safe distance between his or her car and the car ahead... . Moreover, "a] conclusory assertion by the operator of the following vehicle that the sudden stop of the vehicle caused the accident is insufficient, in and of itself, to provide a nonnegligent explanation ..." . [internal quotation marks omitted] **Brothers v Bartling, 2015 NY Slip Op 05630, 2nd Dept 7-1-15**

NEGLIGENCE. PERSONAL INJURY. SIDEWALK SNOW AND ICE. ABUTTING PROPERTY OWNERS.

Defendants, who leased the premises abutting a sidewalk in Brooklyn, were not entitled to summary judgment dismissing a "snow and ice" slip and fall complaint. The defendants demonstrated that there was no statute or ordinance imposing tort liability (on lessees). However the defendants failed to affirmatively demonstrate that their snow removal efforts did not make conditions more hazardous (another example of the need for a defendant bringing a summary judgment motion to address every possible theory of liability). **Forlenza v Miglio, 2015 NY Slip Op 05639, 2nd Dept 7-1-15**

REAL PROPERTY. DEED, TRANSFER OF. DEED, HELD IN ESCROW. ESCROW CONDITIONS. TRANSFER OF OWNERSHIP. NEGLIGENCE.

Appellant did not own the property on the day plaintiff slipped and fell. The "preclosing" on the sale of the property to appellant took place on the day of the accident. But the deed was held in escrow until the escrow conditions were met on the day following the accident. Therefore the property was not transferred to the appellant until the day after the accident. **Camac v 550 Realty Hgts., LLC, 2015 NY Slip Op 05631, 2nd Dept 7-1-15**

THIRD DEPARTMENT

CRIMINAL LAW. PRE-INDICTMENT DELAY.

In a child pornography case, the nearly five-year delay between when defendant's computer was seized and defendant questioned (2009) and the indictment (2013) required dismissal of the indictment. The case was not complex and no additional information beyond that gathered in 2009 was needed to indict. The People therefore did not demonstrate good cause for the extensive delay. **People v Montague, 2015 NY Slip Op 05721, 3rd Dept 7-2-15**

ZONING. LAND USE CODE. BUILDING CODE. PRIVATE RIGHT OF ACTION TO ENJOIN ZONING VIOLATIONS. STANDING. TOWN LAW.

Boathouses constructed without permits (required by the New York State Uniform Fire Prevention and Building Code [SBC] and the Village of Lake Placid/Town of North Elba Land Use Code [LUC]) must be completely dismantled and removed. The defendants were

aware from the start that proceeding with the building of the boathouses without permits would be at their own risk. The permits were ultimately denied. The opinion is extensive and much of it is devoted to explaining the litigation/appeal history and refuting defendants' arguments (not addressed here). With respect to the finding that the immediate neighbors had standing to bring an action to enjoin the asserted zoning violations re: one of the parcels (referred to as the "children's parcel"), the court wrote: "As a threshold matter, Supreme Court correctly concluded that the neighbors have standing to challenge the asserted zoning violations and to seek injunctive relief against the children. Although municipal officials indeed are tasked with enforcing zoning ordinances within their boundaries (see Town Law § 268 [2]), this 'does not prevent . . . private property owner[s] who suffer[] special damages from maintaining an action seeking to enjoin the continuance of the violation and obtain damages to vindicate [their] discrete, separate identifiable interest[s]' ... . To establish standing to maintain a private common-law action to enjoin zoning violations, a private plaintiff must establish that, due to the defendant's activities, he or she will sustain special damages that are ,different in kind and degree from the community generally, and that the asserted interests fall ,within the zone of interest to be protected, by the statute or ordinance at issue ...". **Town of N. Elba v Grimditch, 2015 NY Slip Op 05740, 3rd Dept 7-2-15**

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