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CasePrepPlus

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SECOND DEPARTMENT

ARBITRATION, MUNICIPAL LAW, EMPLOYMENT LAW.

CRITERIA FOR ARBITRABILITY OF DISPUTE INVOLVING PUBLIC EMPLOYEES SUCCINCTLY EXPLAINED.
Reversing Supreme Court, the Second Department determined the dispute about compensation for police officers during Hurricane Sandy was arbitrable under the terms of the Collective Bargaining Agreement (CBA). The court explained the relevant analytical criteria: "Public policy in New York favors arbitral resolution of public sector labor disputes ... . However, a dispute between a public sector employer and employee is only arbitrable if it satisfies a two-prong test ... . Initially, the court must determine whether there is any statutory, constitutional, or public policy prohibition against arbitrating the grievance ... . If there is no prohibition against the arbitration, the court must determine whether the parties agreed to arbitrate the particular dispute by examining their collective bargaining agreement ... . In analyzing whether the parties in fact agreed to arbitrate the particular dispute, a court is merely to determine whether there is a reasonable relationship between the subject matter of the dispute and the general subject matter of the CBA ... . Here, the relevant arbitration provisions of the CBA are broad, as they provide for arbitration of any grievance, defined as any claimed violation, misinterpretation or inequitable application of this Agreement, which remains unresolved following completion of step three of the grievance procedure. Moreover, there is a reasonable relationship between the subject matter of the dispute, which involves compensation over a specific time period, and the general subject matter of the CBA ... . Contrary to the Village's contention, whether the evidence supports the grievance is a question for the arbitrator, and not the courts, to decide ... . Moreover, the Village's contention that arbitration of the grievance was precluded because the PBA failed to comply with a condition precedent is without merit. The threshold determination of whether a condition precedent to arbitration exists and whether it has been complied with, is for the court to determine ... . By contrast, [q]uestions concerning compliance with a contractual step-by-step grievance process have been recognized as matters of procedural arbitrability to be resolved by the arbitrators, particularly in the absence of a very narrow arbitration clause or a provision expressly making compliance with the time limitations a condition precedent to arbitration ...". [internal quotation marks omitted] **Matter of Incorporated Vil. of Floral Park v Floral Park Police Benevolent Assn., 2015 NY Slip Op 07026, 2nd Dept 9-30-15**

BANKING LAW, UCC.

QUESTION OF FACT WHETHER WITHDRAWAL WAS AUTHORIZED, DESPITE ABSENCE OF SIGNATURE.
The Second Department, over a dissent, determined the bank had raised a question of fact about whether a $50,000 withdrawal, where the withdrawal slip was not signed, was authorized. The assistant branch manager submitted an affidavit stating that he received authorization by phone from the account holder. The court explained the relevant analytical criteria: "Generally, an unauthorized signature—defined as a signature made without authority, including a forgery (see UCC 1-201[41])—is ineffective to pass title or authorize a drawee bank to pay ... . The UCC imposes strict liability on a bank that charges against a customer's account any item not properly payable, such as a check bearing a forgery of the customer's signature (see UCC 4-401[2][a]; UCC 4-104[1][g], [j]...). A bank, however, avoids such liability if it demonstrates that the customer's negligence substantially contributed to the forgery and that the bank acted in good faith and in accordance with reasonable commercial standards (see UCC 3-406 ...)." **Proactive Dealer Servs., Inc. v TD Bank, 2015 NY Slip Op 07016, 2nd Dept 9-30-15**

CIVIL PROCEDURE.

APPROPRIATE STATUTES OF LIMITATIONS AND ACCRUAL DATES FOR "BREACH OF FIDUCIARY DUTY," "CIVIL RICO," AND "DECLARATORY JUDGMENT" CAUSES OF ACTION EXPLAINED.
The Second Department described the analytical criteria for determining the statutes of limitations and accrual dates for (1) breach of fiduciary duty claims where allegations of fraud are essential; (2) civil RICO claims; (3) and declaratory judgment actions seeking a constructive trust. With respect to the "breach of fiduciary duty" cause of action, the court wrote: "New York law does not provide a single statute of limitations for breach of fiduciary duty claims. Rather, the choice of the applicable limitations period depends on the substantive remedy that the plaintiff seeks. Where the remedy sought is purely monetary in nature, courts construe the suit as alleging injury to property within the meaning of CPLR 214(4), which has

a three-year limitations period. Where, however, the relief sought is equitable in nature, the six-year limitations period of CPLR 213(1) applies ... . [W]here an allegation of fraud is essential to a breach of fiduciary duty claim, courts have applied a six-year statute of limitations under CPLR 213(8) ... . An exception to this rule . . . is that courts will not apply the fraud Statute of Limitations if the fraud allegation is only incidental to the claim asserted; otherwise, fraud would be used as a means to litigate stale claims ... . Thus, where an allegation of fraud is not essential to the cause of action pleaded except as an answer to an anticipated defense of Statute of Limitations, courts look for the reality, and the essence of the action and not its mere name ... . CPLR 213(8) provides, in part, the time within which the action must be commenced shall be the greater of six years from the date the cause of action accrued or two years from the time the plaintiff or the person under whom the plaintiff claims discovered the fraud, or could with reasonable diligence have discovered it. The discovery accrual rule also applies to fraud-based breach of fiduciary duty claims. An inquiry as to the time that a plaintiff could, with reasonable diligence, have discovered the fraud turns upon whether a person of ordinary intelligence possessed knowledge of facts from which the fraud could be reasonably inferred ... ". [internal quotation marks omitted] **DiRaimondo v Calhoun, 2015 NY Slip Op 07002, 2nd Dept 9-30-15**

CONTRACT LAW.

ZONING CHANGE PROHIBITING SUBDIVISION WAS FORESEEABLE, DEVELOPER NOT ENTITLED TO RESCIND CONTRACT FOR LAND PURCHASE ON "IMPOSSIBILITY" GROUNDS.

Plaintiff-developer's (RW's) complaint seeking rescission of a contract for the purchase of land was properly denied and the cross-motion to dismiss the complaint was properly granted. RW argued that the zoning changes enacted by the town, which prohibited the subdivision plan contemplated by the contract, was not foreseeable. The court found that defendants had demonstrated the zoning change was, in fact, foreseeable and rescission was therefore not an available remedy: "[T]he law of impossibility provides that performance of a contract will be excused if such performance is rendered impossible by intervening governmental activities, but only if those activities are unforeseeable ... . Contrary to RW's contention, a party seeking to rescind a contract must show that the intervening act was unforeseeable, even if the intervening act consisted of the actions of a governmental entity or the passage of new legislation ... . Here, RW did not show that it was unforeseeable that a change in the Town's Zoning Code would render it impossible to subdivide the property as initially planned, and did not raise a triable issue of fact in opposition to [defendants'] showing that such a change was foreseeable ...". [internal quotation marks omitted] **RW Holdings, LLC v Mayer, 2015 NY Slip Op 07020, 2nd Dept 9-30-15**

CRIMINAL LAW.

ORNAMENTS HANGING FROM REAR-VIEW MIRROR JUSTIFIED VEHICLE STOP.

The Second Department, over a dissent, determined the police officer had probable/reasonable cause to believe defendant had committed a traffic infraction. Therefore, the vehicle stop and the subsequent search of the vehicle (which turned up a weapon) were proper. There was an ornamental sandal and necklace hanging from the rear-view mirror. The officer had reasonable cause to believe the sandal and necklace obstructed the driver's view in violation of Vehicle and Traffic Law 375(30): "Under the Fourth Amendment to the United States Constitution and article I, § 12, of the New York State Constitution, a police officer may stop a vehicle when the officer has probable cause to believe that the driver of the vehicle has committed a traffic infraction ... . In this case, the credible evidence adduced at the suppression hearing established that the police had probable cause to stop the Altima. The officer who stopped the Altima testified that when he stopped his patrol car behind the Altima, he saw an ornamental sandal on a string and a necklace hanging from the Altima's rearview mirror. The officer further testified that the sandal was four to five inches long and '[p]ossibly about [two] inches in width,' and that it was hanging about four to five inches beneath the rearview mirror. Contrary to the defendant's contention and to our colleague's dissent, this testimony demonstrated that the officer had reasonable cause to believe that the sandal was hung 'in such a manner as to obstruct or interfere with the view of the operator through the windshield' (Vehicle and Traffic Law § 375[30]...). Accordingly, the officer's stop of the Altima was not improper .. . Probable cause does not require certainty, and the officer's testimony about the size and location of the ornaments was sufficient to establish probable cause." **People v Bookman, 2015 NY Slip Op 07037, 2nd Dept 9-30-15**

CRIMINAL LAW.

[HARMLESS] ERROR TO DENY DEFENSE A HEARING TO DETERMINE ADMISSIBILITY OF TESTIMONY OF PRIVATE INVESTIGATOR ABOUT WHAT COULD BE SEEN FROM A CERTAIN VANTAGE POINT (CALLING INTO QUESTION TESTIMONY IDENTIFYING THE DEFENDANT).

The Second Department, over a vehement and detailed dissent, affirmed defendant's assault and attempted murder convictions. The majority and dissent agreed that defendant should have been allowed to present the testimony of a private investigator about what could be seen from a certain vantage point (calling into question testimony identifying defendant), but disagreed about whether the error was harmless. The dissent explained the defendant's right to present a defense: *[FROM THE DISSENT]:* "The People correctly concede that it was error by the court to preclude the defense counsel from calling his private investigator as a witness. A defendant's right to call witnesses in his or her behalf is a constitutional right essential

to due process of law ... . In the absence of bad faith, the general rule is that where the defendant seeks to call a witness, the witness should be sworn and asked questions, to permit the court, upon proper objection, to rule upon the admissibility of the evidence offered ... . Here, the defense counsel's request for a hearing on the admissibility of the witness's testimony was improperly denied on the ground that opinion testimony from lay witnesses is inadmissible. However, there is no categorical proscription against the admission of opinions from lay witnesses ... . Further, the proposed testimony about the ability to see a point from another stated vantage point constituted testimony as to the facts—and would not necessarily include opinions ... . Since the defendant had a constitutional right to put forth a defense, contrary to the conclusion of my colleagues, the error cannot be deemed harmless ...". **People v Smith, 2015 NY Slip Op 07043, 2nd Dept 9-30-15**

ENVIRONMENTAL LAW, ADMINISTRATIVE LAW, MUNICIPAL LAW.

TOWN BOARD'S "ADVERSE EFFECTS" FINDINGS ANNULLED AS INCONSISTENT WITH FINAL ENVIRONMENTAL IMPACT STATEMENT (FEIS).

Supreme Court properly annulled the town board's findings that a project would have adverse environmental effects because the board's findings were not consistent with the Final Environmental Impact Statement (FEIS). The court explained the board's obligations and the courts' review powers in this context: "While an agency's ultimate conclusion is within the discretion of the agency, it must be based upon factual evidence in the record and not generalized, speculative community objections ... . While an EIS (Environmental Impact Statement) does not require a public agency to act in any particular manner, it constitutes evidence which must be considered by the public agency along with other evidence which may be presented to such agency ... . Here, the Supreme Court properly annulled the Board's findings statement as unsupported by the evidence. The Board was required to render its conclusions regarding the sufficiency of mitigation measures, the propriety of permit approvals, and a balancing of considerations, based on the evidence contained in the environmental review. The Board's conclusions in the findings statement were based, at least in part, on factual findings which were contradicted by the scientific and technical analyses included in the FEIS and not otherwise supported by empirical evidence in the record ... . The findings statement also failed to give sufficient consideration to the various alternative plans reviewed in the FEIS ...". [internal quotation marks omitted] **Matter of Falcon Group Ltd. Liab. Co. v Town/Village of Harrison Planning Bd., 2015 NY Slip Op 07025, 2nd Dept 9-30-15**

FORECLOSURE, CIVIL PROCEDURE.

QUESTION WHETHER LOAN AT ISSUE WAS A "HOME LOAN" REQUIRING A SETTLEMENT CONFERENCE, HEARING ORDERED.

A hearing was required to determine whether the loan at issue was a "home loan" such that a settlement conference pursuant to CPLR 3408 was required. The court explained the analytical factors: "CPLR 3408 does not apply to every residential foreclosure action ... . CPLR 3408 only mandates a settlement conference in a residential foreclosure action involving a 'home loan' as that term is defined by RPAPL 1304, and when the defendant is a resident of the property subject to foreclosure (see CPLR 3408...). RPAPL 1304(5)(a)(i)–(iv) defines a qualifying home loan as one in which, inter alia, the borrower is a natural person; the borrower incurs the debt primarily for personal, family, or household purposes; and the loan is secured by a mortgage on real property in this state used or occupied, or intended to be used or occupied wholly or partly, as the home or [the] residence of one or more persons and which is or will be occupied by the borrower as the borrower's principal dwelling ... . Here, the conflicting affidavits submitted by the parties reveal a sharp factual dispute, inter alia, as to whether the subject loan was made for the defendant's personal, family, or household use, and whether the mortgaged premises was to be occupied as the defendant's principal dwelling." [internal quotation marks omitted] **Richlew Real Estate Venture v Grant, 2015 NY Slip Op 07018, 2nd Dept 9-30-15**

FRAUD, CIVIL PROCEDURE.

PLEADING REQUIREMENTS FOR "FRAUD" AND "AIDING AND ABETTING FRAUD" CAUSES OF ACTION SUCCINCTLY DESCRIBED.

The Second Department, in affirming the denial of a motion to dismiss "fraud" and "aiding and abetting fraud" causes of action, explained the elements which must be alleged in the complaint: "To state a cause of action sounding in fraud, a plaintiff must allege that '(1) the defendant made a representation or a material omission of fact which was false and the defendant knew to be false, (2) the misrepresentation was made for the purpose of inducing the plaintiff to rely upon it, (3) there was justifiable reliance on the misrepresentation or material omission, and (4) injury' ... . To plead a cause of action to recover damages for aiding and abetting fraud, the complaint 'must allege the existence of [the] underlying fraud, knowledge of the fraud by the aider and abettor, and substantial assistance by the aider and abettor in the achievement of the fraud'. Moreover, pursuant to CPLR 3016(b), where a cause of action is based upon fraud or aiding and abetting fraud, the 'circumstances constituting the wrong' must be 'stated in detail.' " **Caravello v One Mgt. Group, LLC, 2015 NY Slip Op 07000, 2nd Dept 9-30-15**

MEDICAID, ADMINSTRATIVE LAW.

SUBSTANTIAL EVIDENCE DID NOT SUPPORT DEPARTMENT OF HEALTH'S FINDING THAT PROPERTY TRANSFERS RENDERED PETITIONER INELIGIBLE FOR MEDICAID BENEFITS.

The Second Department annulled the Department of Health's (DOH's) finding that petitioner was ineligible for Medicaid benefits based on transfers of property made well before she exhibited signs of dementia. The court explained: "Here, the evidence at the fair hearing showed that the latest of the subject transfers was made approximately two years before the petitioner started to exhibit signs of dementia. At the time of the transfers and in the years preceding her need for nursing home care, the petitioner was in good health and living independently. She was driving, cooking, exercising, and paying her own bills. The transfers themselves constituted gifts to her relatives, and the petitioner still had more than $250,000, not including Social Security benefits, following the transfers. Under these circumstances, the petitioner met her burden of rebutting the presumption that the subject transfers were motivated by the anticipation of a future need to qualify for medical assistance ...". **Matter of Sandoval v Shah, 2015 NY Slip Op 07034, 2nd Dept 9-30-15**

FOURTH DEPARTMENT

ADMINISTRATIVE LAW, MUNICIPAL LAW.

COURTS' LIMITED REVIEW POWERS RE: ADMINISTRATIVE RULINGS CLEARLY ILLUSTRATED.

The Fourth Department, in a dispute about whether fiber optic cables were taxable by the city and the school district under the Real Property Tax Law, determined Supreme Court was powerless to rule on the matter on grounds not used by the administrative agencies which initially heard it. The Fourth Department succinctly explained the relevant review powers: "We agree with petitioners that the court erred in dismissing the petition on grounds different from those on which respondents relied in denying the applications. It is well settled that [a] reviewing court, in dealing with a determination . . . which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency. If those grounds are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis ... . Thus, the court was without power to uphold the administrative determinations on a different basis, no matter how sound that basis may be. Contrary to petitioners' further contention, however, we may not grant the ultimate affirmative relief requested in the petition, i.e., removal of the subject properties from the tax rolls and a refund of the taxes paid. The Court of Appeals has noted that courts regularly defer to the governmental agency charged with the responsibility for administration of [a] statute in those cases where interpretation or application involves knowledge and understanding of underlying operational practices or entails an evaluation of factual data and inferences to be drawn therefrom, and the agency's interpretation is not irrational or unreasonable ... . We conclude that this case involves a question concerning the specific application of a broad statutory term, . . . and therefore is one in which the agency which administers the statute must determine it initially ... , because in such a situation, the reviewing court's function is limited ...". [internal quotation marks omitted] **Matter of Level 3 Communications, LLC v Erie County, 2015 NY Slip Op 07104, 4th Dept 10-2-15**

CRIMINAL LAW.

ABSENCE OF CORROBORATION OF CONFESSION TO ATTEMPTED ROBBERY REQUIRED DISMISSAL OF ATTEMPTED ROBBERY COUNT, DISMISSAL OF THE FIRST DEGREE MURDER AND FELONY MURDER COUNTS (BOTH OF WHICH WERE BASED UPON THE ATTEMPTED ROBBERY) WAS NOT REQUIRED, THE DEATH ITSELF PROVIDED THE REQUISITE CORROBORATION.

The Fourth Department, in a detailed decision addressing several substantive issues not summarized here, found there was no proof of the attempted robbery count except defendant's confession. The absence of corroboration required reversal of the attempted robbery count. However, with respect to the first degree murder and felony murder counts (for which attempted robbery was the underlying felony) the death itself provided sufficient corroboration: "A person may not be convicted of any offense solely upon evidence of a confession or admission made by him [or her] without additional proof that the offense charged has been committed (CPL 60.50...). With respect to the counts of murder in the first degree and felony murder, it is well settled that CPL 60.50 does not require corroboration of defendant's confession to the underlying predicate felony to sustain a conviction of murder in the first degree or felony murder, when the charge is based on a murder committed in the course of and in furtherance of one of many enumerated felonies ... . The effect of the confession corroboration statute is to require proof of the corpus delicti ... . With felony murder and murder in the first degree, the corpus delicti is a death resulting from someone's criminality, i.e., a death that did not occur by suicide, disease or accident ... . The fact that the victim was found dead as the result of a gunshot wound is sufficient corroboration ... . The same analysis does not apply to the underlying felony itself. Where, as here, there is no corroboration of a defendant's confession with respect to the underlying felony, that count of the indictment charging the defendant with the underlying felony must be dismissed ...". [internal quotation marks omitted] **People v Harper, 2015 NY Slip Op 07064, 4th Dept 10-2-15**

CRIMINAL LAW.

GUN FOUND WEDGED UNDER A ROCK AFTER AN ILLEGAL POLICE PURSUIT WAS NOT "ABANDONED," SUPPRESSION OF GUN WAS PROPER.

All the fruits of an illegal pursuit and arrest of the defendant were properly suppressed. Defendant crossed a street, causing a car to stop abruptly to avoid hitting him. The police pursued defendant, intending to arrest him for disorderly conduct. The police noticed defendant was carrying a bulky object held in his shirt. After capturing the defendant, the police found a gun wedged under a rock. The People conceded that the pursuit of defendant was unlawful because his crossing the street did not constitute disorderly conduct. The only question on appeal was whether the gun was abandoned, and therefore not subject to suppression. The court explained the relevant test for abandoned property in this context: "It is well established that property seized as a result of an unlawful pursuit must be suppressed, unless that property was abandoned ... . Property which has in fact been abandoned is outside the protection of the constitutional provisions . . . There is a presumption against the waiver of constitutional rights . . . [and, thus,] [t]he proof supporting abandonment should reasonably beget the exclusive inference of . . . throwing away ... . The test to be applied is whether defendant's action . . . was spontaneous and precipitated by the illegality or whether it was a calculated act not provoked by the unlawful police activity and was thus attenuated from it ... . Here, the court properly concluded that defendant's action was spontaneous and precipitated by the unlawful pursuit by the police ... . The court thus properly determined that the People failed to establish that defendant had abandoned the gun and, consequently, properly suppressed the gun." [internal quotation marks omitted] **People v Mueses, 2015 NY Slip Op 07088, 4th Dept 10-2-15**

CRIMINAL LAW.

PAT-DOWN SEARCH PURSUANT TO A STOP FOR A TRAFFIC INFRACTION UNLAWFUL, INJURY TO OFFICER DURING UNLAWFUL SEARCH WILL NOT SUPPORT ASSAULT CONVICTION (WHICH REQUIRES THE OFFICER BE INJURED PERFORMING A LAWFUL DUTY).

The pat-down search of defendant after he was stopped for walking in the street was unlawful. Therefore the assault charge stemming from injury to the police officer during the unlawful search was not supported by legally sufficient evidence. The officer was not performing a "lawful duty" at the time of the injury (a required element of the assault charge): "A person is guilty of assault in the second degree under Penal Law § 120.05 (3) when, [w]ith intent to prevent . . . a police officer . . . from performing a lawful duty . . . , he or she causes physical injury to such . . . police officer … . Here, a police officer stopped defendant for walking in the middle of a roadway in violation of Vehicle and Traffic Law § 1156 (a), and the suppression court found that the search of defendant's person by another officer was not lawful ... . We have previously held that even the more limited pat-down search of a traffic offender is not authorized unless, when the [person or] vehicle is stopped, there are reasonable grounds for suspecting that the officer is in danger or there is probable cause for believing that the offender is guilty of a crime rather than merely a simple traffic infraction (*People v Everett*, 82 AD3d 1666, 1666, ...). Here, as in *Everett*, the search of defendant was unauthorized, and the officer was injured only after he attempted to perform the unlawful search … . Viewing the evidence in the light most favorable to the People ..., we thus conclude that the evidence is legally insufficient to establish that the officer was injured while undertaking a lawful duty ...". [internal quotation marks omitted] **People v Richardson, 2015 NY Slip Op 07069, 4th Dept 10-2-15**

CRIMINAL LAW, EVIDENCE.

DEFENDANT'S NODDING IN AGREEMENT WITH A STATEMENT MADE BY A NONTESTIFYING CODEFENDANT PROPERLY ADMITTED AS AN ADOPTIVE ADMISSION.

In finding that a prosecution witness was properly allowed to testify about a nontestifying codefendant's statement and defendant's nodding in agreement. The defendant's nodding was deemed an "adoptive admission:" "[Defendant's] rights to due process and a fair trial, and his right of confrontation were not violated when Supreme Court allowed a prosecution witness to testify that defendant nodded in agreement to a statement made by a nontestifying codefendant. Defendant's nonverbal response was admissible as an adoptive admission (... *People v Lourido*, 70 NY2d 428, 433), and the court properly instructed the jury in accordance with *Lourido* that the codefendant's statements were being admitted solely to establish defendant's 'reaction . . . to that statement . . . [and] not for the truth of the statement' made by the codefendant ...". **People v Nafi, 2015 NY Slip Op 07132, 4th Dept 10-2-15**

CRIMINAL LAW, EVIDENCE.

ABSENCE OF INFORMATION ABOUT THE SOURCE OF DOUBLE HEARSAY IN THE SEARCH WARRANT APPLICATION REQUIRED SUPPRESSION.

A search warrant application which was based upon double hearsay did not provide probable cause to search because the initial source of the information was inadequately described. There was no way to determine the reliability of the source or the basis of the source's knowledge (*Aguilar-Spinelli* test). An amended warrant which sought seizure of items in plain

sight during the search was rendered invalid by the defective initial warrant: "It is well settled that a search warrant may be issued only upon a showing of probable cause to believe that a crime has occurred, is occurring, or is about to occur ..., and there is sufficient evidence from which to form a reasonable belief that evidence of the crime may be found inside the location sought to be searched ... . It is equally well settled that, under New York law, [p]robable cause may be supplied, in whole or part, through hearsay information . . . New York's present law applies the *Aguilar-Spinelli* rule for evaluating secondhand information and holds that if probable cause is based on hearsay statements, the police must establish that the informant had some basis for the knowledge he [or she] transmitted to them and that he [or she] was reliable ... . Notably, where the information is based upon double hearsay, the foregoing requirements must be met with respect to each individual providing information ...". **People v Bartholomew, 2015 NY Slip Op 07112, 4th Dept 10-2-15**

CRIMINAL LAW, EVIDENCE.

WHERE ARREST WAS NOT AUTHORIZED, CONVICTION FOR RESISTING ARREST WAS AGAINST THE WEIGHT OF THE EVIDENCE.

The People conceded defendant's actions (apparently simply standing with a group) did not constitute disorderly conduct. Therefore, the Fourth Department determined defendant's arrest for disorderly conduct was unauthorized and his conviction of resisting arrest was against the weight of the evidence: "As the People correctly concede, the evidence fails to establish beyond a reasonable doubt that the arrest of defendant for disorderly conduct was authorized. The Court of Appeals has 'made clear that evidence of actual or threatened public harm (inconvenience, annoyance or alarm') is a necessary element of a valid disorderly conduct charge ..., and there is no evidence of such actual or threatened harm here. Inasmuch as it is not disorderly conduct . . . for a small group of people, even people of bad reputation, to stand peaceably on a street corner ..., the arrest of defendant for engaging in that conduct was not authorized. There being no probable cause that authorized defendant's arrest, [he] cannot be guilty of resisting arrest ... . Thus, we conclude that the jury failed to give the evidence the weight it should be accorded ...". **People v Howard, 2015 NY Slip Op 07100, 4th Dept 10-2-15**

DEBTOR-CREDITOR, CIVIL PROCEDURE.

PLEADING REQUIREMENTS FOR "GOODS SOLD AND DELIVERED" CAUSE OF ACTION SUCCINCTLY EXPLAINED.

In affirming Supreme Court's grant of summary judgment to plaintiff on its "goods sold and delivered" cause of action, the Fourth Department explained the pleading requirements: "[P]laintiff's complaint, with its attached invoices, satisfied the pleading requirements of CPLR 3016 (f) ... . The invoices provided the requisite degree of specificity inasmuch as they permitted defendant to respond in a meaningful way on an item-by-item basis ... . Each invoice set forth the date of the order, the specific items ordered and delivered, the quantity ordered and delivered, as well as the price per unit and the total price for the quantity ordered ... . Defendant was thus required to indicate specifically in its verified answer those items [it] dispute[d] and whether in respect of delivery or performance, reasonable value or agreed price (CPLR 3016 [f]). Defendant failed to do so and, therefore, Supreme Court properly granted that part of plaintiff's motion on the cause of action for goods sold and delivered ...". [internal quotation marks omitted] **Erie Materials, Inc. v Central City Roofing Co., Inc., 2015 NY Slip Op 07137, 4th Dept 10-2-15**

ENVIRONMENTAL LAW, CIVIL PROCEDURE.

STATE CLAIMS RE: ALLEGED RELEASE OF TOXINS DURING LOVE CANAL CLEAN-UP NOT PRECLUDED (PREEMPTED) BY FEDERAL CERCLA REMEDY.

State claims for negligence, abnormally dangerous activity, private nuisance and trespass were not precluded by a federal Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) remedy re: the Love Canal toxic contamination: "As the federal District Court explained, it is uniformly recognized that, in enacting CERCLA, Congress expressly disclaimed an intent to preempt state tort liability for damages caused by the release of hazardous substances ... . District Court therefore granted plaintiffs' motion seeking to remand the matter to Supreme Court, determining that plaintiffs seek relief only under common law theories of negligence, . . . private nuisance, and trespass ... , [and t]he claims . . . do not expressly challenge the effectiveness of the [CERCLA] remedy . . . Rather, plaintiffs seek only to be made whole for any harm proximately caused by defendants' conduct, whether in performance of operation, maintenance, and monitoring obligations with respect to the remedy, or during the [sewer project] ... * * * The doctrine of judicial estoppel prohibits a party who has assumed a position in one legal proceeding, and prevailed on that position, from assuming a contrary position in another proceeding because the party's interests have changed ... . Here, however, we conclude that plaintiffs' position was consistent in both the federal and state court matters inasmuch as they maintained that they did not challenge the CERCLA remedy, as the moving defendants alleged, but instead challenged defendants' performance of their respective obligations in executing the CERCLA remedy." [internal quotation marks omitted] **Abbo-Bradley v City of Niagara Falls, 2015 NY Slip Op 07145, 4th Dept 10-2-15**

INSURANCE LAW, CIVIL PROCEDURE, DAMAGES.

CONCLUSORY ALLEGATIONS OF BAD FAITH WILL NOT SURVIVE A MOTION TO DISMISS, PUNITIVE DAMAGES MUST BE CONNECTED TO SUBSTANTIVE CAUSE OF ACTION, LATE DISCLAIMER IN PROPERTY DAMAGE ACTION IS VALID ABSENT PREJUDICE.

Plaintiff's cause of action alleging bad faith on the part of the insurer should have been dismissed for failure to state a cause of action. Conclusory, as opposed to fact-based, allegations will not survive a motion to dismiss. A claim for punitive damages must be tied to a specific cause of action and cannot be based upon conclusory allegations. Even an unreasonable delay in disclaiming a property-damage claim is valid absent prejudice. The court explained: "[1] Our role is thus to determine only whether the facts as alleged fit within any cognizable legal theory . . . and the criterion is whether the proponent of the pleading has a cause of action, not whether he [or she] has stated one ... . Nevertheless, [w]hile it is axiomatic that a court must assume the truth of the complaint's allegations, such an assumption must fail where there are conclusory allegations lacking factual support ... . Indeed, a cause of action cannot be predicated solely on mere conclusory statements . . . unsupported by factual allegations ... . * * * [2] A demand or request for punitive damages is parasitic and possesses no viability absent its attachment to a substantive cause of action ... . [3] Where, as here, the underlying claim does not arise out of an accident involving bodily injury or death, the notice of disclaimer provisions set forth in Insurance Law § 3420 (d) are inapplicable and, [u]nder the common-law rule, delay in giving notice of disclaimer of coverage, even if unreasonable, will not estop the insurer to disclaim unless the insured has suffered prejudice from the delay ...". [internal quotation marks omitted]

Miller v Allstate Indem. Co., 2015 NY Slip Op 07134, 4th Dept 10-2-15

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