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CasePrepPlus

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FIRST DEPARTMENT

CONTRACT LAW.

ALTHOUGH BREACH OF CONTRACT CAUSES OF ACTION WERE PRECLUDED BY THE STATUTE OF FRAUDS, RELATED PROMISSORY ESTOPPEL AND UNJUST ENRICHMENT CAUSES OF ACTION SHOULD HAVE SURVIVED MOTION TO DISMISS.

The First Department, in a full-fledged opinion by Justice Richter, reversing (modifying) Supreme Court, determined that, although the breach of contract allegations were precluded by the statute of frauds, the related causes of action for promissory estoppel and unjust enrichment should not have been dismissed. Plaintiff, Peter, and defendant, Lisa, were both named as beneficiaries in their mother, Madeline's, will. However, when Peter was in the midst of divorce proceedings, Madeline made Lisa the sole beneficiary because she did not want Peter's wife to claim any assets in her estate should she die before the divorce was final. Lisa orally agreed to split the estate upon Madeline's death in return for Peter's promise to pay Madeline's estate taxes. Peter paid the estate taxes and Lisa reneged on the deal: "Although the breach of contract causes of action cannot stand, the complaint sufficiently states a claim under the doctrine of promissory estoppel. The elements of a promissory estoppel claim are: (i) a sufficiently clear and unambiguous promise; (ii) reasonable reliance on the promise; and (iii) injury caused by the reliance ... . If a contract is barred by the statute of frauds, a promissory estoppel claim is viable in the limited set of circumstances where unconscionable injury results from the reliance placed on the alleged promise ... . * * * Here, the complaint's allegations show that Lisa was enriched at Peter's expense because Peter paid the estate taxes and insurance premiums, despite Lisa's being the sole beneficiary of the will, and that it would be against equity and good conscience to allow Lisa to retain that windfall. This theory of unjust enrichment is not precluded by the statute of frauds because it is not an attempt to enforce the oral contract but instead seeks to recover the amount by which Lisa was enriched at Peter's expense ...". **Castellotti v Free, 2016 NY Slip Op 01625, 1st Dept 3-8-16**

CORPORATION LAW.

PLAINTIFF MINORITY SHAREHOLDER ALLOWED TO REPLEAD DIRECT CLAIMS UNDER CAYMAN ISLANDS LAW AGAINST THE CORPORATION STEMMING FROM DISPROPORTIONATE PAYMENT OF DIVIDENDS AND BREACH OF FIDUCIARY DUTY BETWEEN DIRECTORS AND PLAINTIFF.

The First Department, in a full-fledged opinion by Justice Andrias, over a two-justice dissenting opinion, determined two causes of action which improperly alleged both direct and derivative claims by a shareholder against the corporation were properly dismissed but could be repled to make direct claims under Cayman Islands law. The dissent argued leave to replead was not warranted by the facts alleged: "Plaintiff should be given an opportunity to replead to remedy the pleading deficiencies ... . Although a challenge to a decision to pay dividends would generally be derivative, plaintiff asserts, inter alia, that his claim is direct because the disproportionate payment of dividends is discriminatory and directly harmed him as a minority shareholder. Thus, rather than corporate mismanagement, plaintiff asserts unequal treatment in the form of an intentional, premeditated plan to pay the Investors huge windfall dividends while freezing out minority shareholders in order to induce them to sell their shares to the Investors at a steep discount. * * * ... [P]laintiff should [also] be given leave to replead to separate his direct claim of being induced by the Directors to part with his common shares . . . for less than their true value from his derivative claim alleging harm to the company . . . , and to set forth facts to establish the special circumstances necessary under Cayman Islands law to create a fiduciary duty between the Directors and plaintiff as a minority shareholder." **Davis v Scottish Re Group Ltd., 2016 NY Slip Op 01756, 1st Dept 3-10-16**

CRIMINAL LAW

CONNECTICUT SEXUAL ASSAULT STATUTE IS BROADER IN ITS REACH THAN NEW YORK COUNTERPARTS AND THEREFORE CANNOT SERVE AS A PREDICATE FELONY IN NEW YORK.

The First Department, reversing Supreme Court, determined defendant should not have been sentenced as a second felony offender based on a Connecticut conviction for sexual assault. The court found the Connecticut statute was broader than its New York counterparts in both the "threat of harm," and "accomplice liability" elements. Therefore the violation of the Connecticut statute could not serve as a predicate felony in New York. "The New York statutes prohibit various sexual acts

by forcible compulsion, which is defined (among other things) as the use of a threat 'which places a person in fear of immediate death or physical injury [to someone] or in fear that [someone] will immediately be kidnapped' (Penal Law § 130.00[8] ...). In contrast, CGSA § 53a-70(a)(1) does not contain any requirement that a threat issued to compel sexual intercourse must threaten immediate harm. Accordingly, the Connecticut statute is necessarily broader than its New York counterparts, and may not serve as a predicate offense ... . In addition, since CGSA § 53a-70(a)(1) is a general intent statute . . . , 'the prosecution need not establish that the accused intended the precise harm or precise result which resulted from his acts' ... . Accordingly, a conviction under the statute is warranted even if a rape committed by a person other than the defendant is the unintended result of the defendant's use or threatened use of force ... . In contrast, New York law requires that in order to establish accessorial liability the People must establish that a defendant, acting with the mental culpability required for the commission of the crime at issue, either solicited, requested, commanded, importuned, or intentionally aided another in committing the crime (Penal Law § 20.00). Accordingly, the Connecticut statute is broader than its New York counterparts in this regard as well." **People v Davis, 2016 NY Slip Op 01623, 1st Dept 3-8-16**

CRIMINAL LAW, APPEALS.

SIGNED, WRITTEN WAIVER OF APPEAL DID NOT REMEDY THE INADEQUATE ORAL COLLOQUY.

The First Department determined defendant's waiver of appeal was invalid because the oral colloquy was insufficient. The signed written waiver did not fix the inadequate colloquy: "[T]he Court never advised defendant of the consequences of the appeal waiver, or spoke to defendant to ensure he understood the rights he was forfeiting by signing the waiver ... . Although defendant signed a written waiver, this 'was no substitute for an on-the-record explanation of the nature of the right to appeal' ... . Furthermore, the written waiver says that defendant was 'advised by the Court of the nature of the rights being waived,' but that never occurred. Rather, the court told defense counsel to explain the waiver of appeal to defendant, and following an off-the-record conference between defendant and his counsel, counsel indicated defendant had signed the waiver. Counsel's confirmation that he told defendant about the waiver cannot substitute for the court conducting its own inquiry." **People v Harris, 2016 NY Slip Op 01741, 1st Dept 3-10-16**

CRIMINAL LAW, EVIDENCE.

RIGHT TO CONFRONT WITNESSES VIOLATED BY INTRODUCTION OF GRAND JURY TESTIMONY AS PAST RECOLLECTION RECORDED; ERROR WAS HARMLESS HOWEVER.

Although the error was deemed harmless, the First Department determined defendant's right to confront the witness against him was violated. The witness's grand jury testimony was read to the jury as past recollection recorded. However, because the witness asserted his Fifth Amendment right to avoid self-incrimination, the truth of the grand jury testimony could not be tested by cross-examination. The First Department explained the relevant law: "Provided that a proper foundation is laid, grand jury testimony may be admitted as past recollection recorded, and its admission does not violate the Confrontation Clause where the witness testifies at trial and is subject to cross-examination . . . , because 'when the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements' ... . However, this may not apply when a witness appears at trial but invokes the Fifth Amendment ... . Not every instance in which a witness invokes the privilege against self-incrimination will give rise to a Confrontation Clause violation; rather, 'the Sixth Amendment is violated only when assertion of the privilege undermines the defendant's opportunity to test the truth of the witness' direct testimony' ... . Here, the witness asserted his Fifth Amendment rights and refused to answer questions that had a direct bearing on testing the truth of his grand jury testimony. Thus, the witness's extensive assertion of his Fifth Amendment rights regarding the material facts 'undermine[d] the process to such a degree that meaningful cross-examination within the intent of the [Confrontation Clause] no longer exist[ed]' ...". **People v Rahman, 2016 NY Slip Op 01750, 1st Dept 3-10-16**

MALICIOUS PROSECUTION, MUNICIPAL LAW.

ABSENCE OF ANY MENTION OF DEFENDANT DISCARDING A WEAPON IN THE PAPERWORK RELATING TO DEFENDANT'S ARREST, AND THE DIFFERING VERSIONS OF EVENTS PRIOR TO DEFENDANT'S ARREST, RAISED A QUESTION OF FACT WHETHER THERE WAS PROBABLE CAUSE TO ARREST DEFENDANT FOR POSSESSION OF A WEAPON.

The First Department, over an extensive dissent, determined questions of fact precluded summary judgment in favor of the defendants (city and police) in an action alleging, inter alia, malicious prosecution. Defendant was accused of possession of a weapon and spent 247 days in jail before being acquitted at trial. The accusation was based on the testimony of one of the police officers at the scene who said he saw defendant drop the weapon on a pile of garbage bags (where the weapon was apparently recovered). No other officer at the scene saw defendant with a weapon. And there was no mention of defendant discarding the weapon in any of the paperwork relating to defendant's arrest: "The elements of a claim for malicious prosecution are (1) the commencement or continuation of a criminal proceeding by the defendant against the plaintiff; (2) the termination of the proceeding in favor of the plaintiff; (3) the absence of probable cause for the criminal proceeding; and (4) actual malice ... . A jury may infer that a defendant acted with actual malice from the fact that there was no probable cause

to arrest the plaintiff ... . As noted, there are numerous factual questions concerning whether the police had the requisite probable cause to arrest plaintiff and initiate criminal proceedings. The omissions in the police paperwork and the various versions of events raise questions as to the credibility of the police account of what transpired. Further, the presumption of probable cause attaching upon an accused's arraignment or indictment may be overcome by evidence that 'the police witnesses have not made a complete and full statement of facts either to the Grand Jury or to the District Attorney, that they have misrepresented or falsified evidence, that they have withheld evidence or [that they have] otherwise acted in bad faith' ...". **Mendez v City of New York, 2016 NY Slip Op 01586, 1st Dept 3-8-16**

SECOND DEPARTMENT

CRIMINAL LAW.

FOURTH DEGREE ATTEMPTED CRIMINAL POSSESSION OF A CONTROLLED SUBSTANCE IS NOT A LESSER-INCLUDED OFFENSE OF FOURTH DEGREE CRIMINAL POSSESSION OF A CONTROLLED SUBSTANCE; SUPERIOR COURT INFORMATION JURISDICTIONALLY DEFECTIVE.

The Second Department reversed defendant's conviction (by guilty plea) because the Superior Court Information (SCI) to which defendant pled did not allege a lesser-included offense of an offense charged in the original felony complaint. Attempted criminal possession of a controlled substance in the fourth degree is not a lesser-included offense of criminal possession of a controlled substance in the fourth degree: "The single count in the SCI was not an 'offense for which the defendant [had been] held for action of a grand jury' (CPL 195.20), in that it was not an offense charged in the felony complaint or a lesser-included offense of an offense charged in the felony complaint ... . Attempted criminal possession of a controlled substance in the fourth degree under Penal Law §§ 110.00 and 220.09(1) is not a lesser-included offense of criminal possession of a controlled substance in the fourth degree under Penal Law § 220.09(3), because the former offense contains the element 'narcotic drug' (Penal Law § 220.00[7]) that is not an element of the latter offense and, therefore, it is possible to commit the greater offense 'without concomitantly committing, by the same conduct,' the lesser offense (CPL 1.20[37]...). Thus, the SCI upon which the defendant's plea was based did not 'include at least one offense that was contained in the felony complaint' or a lesser-included offense of an offense charged in the felony complaint . . . , and the SCI was jurisdictionally defective ... . This defect survives the defendant's failure to raise this claim in the County Court, his plea of guilty, and his waiver of the right to appeal ...". **People v Chacko, 2016 NY Slip Op 01689, 2nd Dept 3-9-16**

DEFAMATION, CIVIL PROCEDURE.

COMMUNICATION BETWEEN SPOUSES DOES NOT CONSTITUTE PUBLICATION IN A DEFAMATION ACTION; MOTION TO SET ASIDE PLAINTIFF'S VERDICT SHOULD HAVE BEEN GRANTED.

The Second Department determined defendants' oral motion to set aside the verdict in a defamation case should have been granted. Plaintiff alleged statements made by defendants (husband and wife) caused specified pecuniary loss. Because the defendants are spouses, communication between them did not constitute publication. The plaintiff was unable to demonstrate that any statements made to third parties caused special harm: "[W]e conclude that there was no valid line of reasoning and permissible inferences which could have led the jury to find that the plaintiff established his cause of action alleging defamation. 'The elements of a cause of action [to recover damages] for defamation are a false statement, published without privilege or authorization to a third party, constituting fault as judged by, at a minimum, a negligence standard, and it must either cause special harm or constitute defamation per se' ... . Here, because it is undisputed that the defendants are spouses, the communications between the defendants do not constitute publication ... . [T]o the extent that the plaintiff's defamation claim alleged that [defendants] communicated the [statement] to third parties, the plaintiff failed to prove that he suffered special harm, i.e., the loss of something having economic or pecuniary value, as a result of those statements ...". **Gaccione v Scarpinato, 2016 NY Slip Op 01640, 2nd Dept 3-9-16**

ENVIRONMENTAL LAW, LAND USE.

PETITIONER ORGANIZATION DID NOT HAVE STANDING TO CHALLENGE CONSTRUCTION OF ASPHALT PLANT NEAR A STATE PARK.

The Second Department, affirming Supreme Court, determined the petitioner did not have standing to challenge the construction of a temporary asphalt plant near a state forest. The conclusory allegations of pollution of the park by a member of petitioner-organization were not enough: " '[I]n land use matters . . . the plaintiff, for standing purposes, must show that it would suffer direct harm, injury that is in some way different from that of the public at large' ... . Whether an organization or association has standing involves the application of the three-pronged test set forth in *Society of Plastics Indus. v County of Suffolk* (77 NY2d at 775). As pertinent to this appeal, the first prong of that test requires that the organization or association demonstrate that 'one or more of its members would have standing to sue' as an individual (*id.*). An individual has standing where he or she 'would suffer direct harm, injury that is in some way different from that of the public at large' (*id.* at 774) and 'the in-fact injury of which [he or she] complains . . . falls within the "zone of interests," or concerns, sought to

be promoted or protected by the statutory provision under which the agency has acted' (*id*. at 773, ...). Here, the petitioner submitted an affidavit from one of its members asserting that he frequently used the area of Stewart State Forest that was closest to the temporary asphalt plant. However, his allegations that the operation of the plant polluted the natural resources of the forest were conclusory and speculative, and therefore, insufficient to establish standing ...". **Matter of Stewart Park & Reserve Coalition, Inc. v Town of New Windsor Zoning Bd. of Appeals, 2016 NY Slip Op 01685, 2nd Dept 3-9-16**

FAMILY LAW, CIVIL CONTEMPT.

MOTHER FAILED TO FIRST USE LESS DRASTIC CHILD-SUPPORT ENFORCEMENT MECHANISMS, MOTION TO HOLD FATHER IN CIVIL CONTEMPT PROPERLY DENIED.

The Third Department determined mother's motion to hold father in civil contempt for alleged failure to pay child support and related expenses was properly denied. Mother did not first attempt to enforce the relevant provisions of the stipulation with a less drastic mechanism: "In matrimonial actions, Domestic Relations Law § 245 grants the court authority to punish a party for civil contempt pursuant to Judiciary Law § 756 where the party defaults 'in paying any sum of money' required by a judgment or order, 'and it appears presumptively, to the satisfaction of the court, that payment cannot be enforced' pursuant to the enforcement mechanisms provided in Domestic Relations Law §§ 243 and 244 and CPLR 5241 and 5242. 'A civil contempt motion in a [matrimonial] action should be denied where the movant fails to make a showing pursuant to section 245 that resort to other, less drastic enforcement mechanisms had been exhausted or would be ineffectual' ... . Here, the mother did not attempt to utilize any less drastic enforcement mechanism before moving to hold the father in contempt, and failed to demonstrate that resort to a less drastic enforcement mechanism would be ineffectual. Contrary to the mother's contention, the fact that the child care, medical care, and extracurricular activity expenses she sought payment of were not for a sum certain did not prevent her from seeking to fix any arrears due for those expenses and enforcing the father's payment obligations through less drastic means." **Rhodes v Rhodes, 2016 NY Slip Op 01657, 2nd Dept 3-9-16**

FAMILY LAW, SPECIAL IMMIGRANT JUVENILE STATUS.

FAMILY COURT SHOULD HAVE GRANTED MOTION FOR FINDINGS TO ENABLE CHILD TO PETITION FOR SPECIAL IMMIGRANT JUVENILE STATUS (SIJS).

The Second Department, reversing Family Court, determined mother's motion for an order making the findings to enable her child to petition for special immigrant juvenile status (SIJS) should have been granted: "Pursuant to 8 USC § 1101(a)(27)(J) . . . and 8 CFR 204.11, a 'special immigrant' is a resident alien who, inter alia, is under 21 years of age, unmarried, and dependent upon a juvenile court or legally committed to an individual appointed by a state or juvenile court. Additionally, for a juvenile to qualify for SIJS, a court must find that reunification of the juvenile with one or both of the juvenile's parents is not viable due to parental abuse, neglect, abandonment, or a similar basis found under state law . . . , and that it would not be in the juvenile's best interests to be returned to his or her native country or country of last habitual residence ... . Here, the child is under the age of 21 and unmarried, and has been 'legally committed to, or placed under the custody of . . . an individual . . . appointed by a State or juvenile court' within the meaning of 8 USC § 1101(a)(27)(J)(i) ... . Further, based upon our independent factual review, we find that the record supports the mother's contention that the child's reunification with her father is not viable due to abandonment . . . , and that it would not be in the best interests of the child to be returned to El Salvador ...". **Matter of Fatima J. A. J. (Ana A. J. S. — Carlos E. A. F.), 2016 NY Slip Op 01673, 2nd Dept 3-9-16**

FREEDOM OF INFORMATION LAW (FOIL), PUBLIC OFFICERS LAW.

REQUEST FOR THE NAME OF THE MOHEL WHO PERFORMED CIRCUMCISION ON AN INFANT WHO BECAME INFECTED WITH HERPES SIMPLEX VIRUS PROPERLY DENIED.

The Second Department determined a reporter's (Berger's) request to the NYC Department of Health for the name of a mohel who performed a circumcision on an infant who became infected with herpes simplex virus (HSV-1) was properly denied. A person's medical history is exempt from disclosure under the Public Officers Law. Revealing the mohel's name would reveal his medical condition: "As relevant here, Public Officers Law § 87(2)(b) expressly exempts from disclosure records that 'if disclosed would constitute an unwarranted invasion of personal privacy' under Public Officers Law § 89(2). Public Officers Law § 89(2)(b)(i) expressly includes 'medical . . . histories' within the ambit of 'unwarranted invasion of personal privacy' ... . In turn, the Court of Appeals has held that 'medical history' is 'information that one would reasonably expect to be included as a relevant and material part of a proper medical history' ...". **Matter of Berger v New York City Dept. of Health & Mental Hygiene, 2016 NY Slip Op 01667, 2nd Dept 3-9-16**

INSURANCE LAW, CONTRACT LAW.

PRINCIPLES OF CONTRACT INTERPRETATION APPLIED TO DETERMINE THE DEDUCTIBLE AMOUNT; SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED TO THE INSURER.

The Second Department, reversing Supreme Court, determined the defendant insurer's interpretation of the policy language was correct and plaintiff's damages claim was below the deductible. Plaintiff's facility was damaged during Hurri-

cane Sandy. The damage claim was approximately $2.3 million. The question on appeal was whether the policy language supported the insurer's position that the applicable deductible was 2% of the total value of the property, which amounted to more than $2.3 million. Or whether the policy language supported the insured's position that the deductible was 2% of the $2.5 million sublimit for flood damage. The court concluded the insured's interpretation was not viable because it rendered several other policy provisions superfluous: "In sum, there is only one reasonable interpretation of the relevant deductible provision of the policy. That interpretation supports [the insurer's] contention that the applicable deductible was $2,494,020, and that the claim submitted by [the insured] did not meet the deductible." **Castle Oil Corp. v ACE Am. Ins. Co., 2016 NY Slip Op 01632, 2nd Dept 3-9-16**

PERSONAL INJURY, EVIDENCE.

CRITERIA FOR SPOLIATION OF EVIDENCE NOT MET.

In a legal malpractice action, plaintiffs alleged their trial attorneys in the personal injury action failed to inform them about a $12 million settlement offer made shortly before the $3.7 million verdict. Defendants-attorneys alleged the plaintiffs were informed of the offer, which was provided in writing, and plaintiffs rejected it. During the deposition of plaintiff-wife (Mrs. Doviak), she was handed the written offer. The plaintiffs argued that handing the offer to Mrs. Doviak constituted spoliation of evidence, because the document could have been tested for fingerprints, and the absence of her fingerprints would have demonstrated she was never provided with the written offer during the trial. The Second Department determined the criteria for spoliation of evidence had not been met: "The plaintiffs failed to demonstrate that they requested that the offer document be tested for fingerprints, or that it be preserved for forensic testing prior to Mrs. Doviak's deposition, or otherwise informed the defendants of their desire to conduct fingerprint analysis. * * * …[T]he plaintiffs failed to demonstrate that, in handing the original document to Mrs. Doviak at her deposition, the defendants intentionally or negligently destroyed potential forensic evidence ... . In any event, the plaintiffs failed to demonstrate that, by failing to preserve the offer document for forensic testing, the defendants had fatally compromised the plaintiffs' ability to prove their claims ...". **Doviak v Finkelstein & Partners, LLP, 2016 NY Slip Op 01636, 2nd Dept 3-9-16**

PERSONAL INJURY, MUNICIPAL LAW.

QUESTION OF FACT WHETHER OFFICER DEMONSTRATED RECKLESS DISREGARD FOR THE SAFETY OF OTHERS IN HIGH-SPEED PURSUIT.

The Second Department determined the county's motion for summary judgment in an action stemming from a high-speed police pursuit was properly denied. Before the pursued car went through a red light and collided with plaintiff's decedent, there were several similar close calls as the pursuit proceeded through a residential neighborhood: " 'The manner in which a police officer operated his or her vehicle in responding to an emergency may form the basis of civil liability to an injured third party if the officer acted in reckless disregard for the safety of others' ... . 'The reckless disregard' standard requires proof that the officer intentionally committed an act of an unreasonable character in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow' ... . In this case, the County defendants, in moving for summary judgment, failed to establish, prima facie, that [the officer] did not act in reckless disregard for the safety of others in commencing, conducting, or failing to terminate the high-speed pursuit of [the] vehicle ... . Among other things, there are triable issues of fact as to what occurred just moments before the accident and as to whether [the officer] pursued [the vehicle] in a manner that prevented [the pursued driver] from stopping for fear of a collision with [the officer's] police vehicle. Furthermore, considering the testimony indicating that the pursuit was conducted at high speeds in a residential neighborhood, that [the pursued driver] disobeyed several traffic control devices, and that collisions with other cars at earlier intersections were narrowly avoided, there are triable issues of fact as to whether [the officer] should have terminated the pursuit." **Foster v Suffolk County Police Dept., 2016 NY Slip Op 01639, 2nd Dept 3-9-16**

PERSONAL INJURY, PHARMACIST MALPRACTICE.

PHARMACIST'S DUTY OF CARE CLEARLY ARTICULATED AFTER IN-DEPTH ANALYSIS; SUMMARY JUDGMENT DISMISSING THE NEGLIGENCE/WRONGFUL DEATH CAUSES OF ACTION AGAINST THE PHARMACIST AND PHARMACY SHOULD HAVE BEEN GRANTED.

The Second Department, in a full-fledged opinion by Justice Miller, reversing Supreme Court, determined defendant pharmacist and pharmacy (the CVS defendants) were entitled to summary judgment dismissing the negligence/wrongful death causes of action against them. Plaintiff's decedent was prescribed hydromorphone for pain (up to eight milligrams every three hours). The prescription was filled by defendant pharmacist. Shortly after returning home from the hospital and taking an eight milligram dosage of hydromorphone, plaintiff's decedent gasped for air and died. The autopsy identified the cause of death as acute hydromorphone intoxication. Noting that the duty of care owed to a patient by a pharmacist had not been clearly articulated, the Second Department issued a comprehensive opinion tracing the historical role of pharmacists and several analogous standards of care. The court concluded the pharmacist has a duty to accurately fill a doctor's prescription and need not inquire further unless there exists a clear-cut contraindication for use of the medication. No such

contraindication was apparent here. The court described the pharmacist's duty as follows: "[W]e conclude that, when a pharmacist has demonstrated that he or she did not undertake to exercise any independent professional judgment in filling and dispensing prescription medication, that pharmacist cannot be held liable for negligence in the absence of evidence that he or she failed to fill the prescription precisely as directed by the prescribing physician or that the prescription was so clearly contraindicated that ordinary prudence required the pharmacist to take additional measures before dispensing the medication ...". **Abrams v Bute, 2016 NY Slip Op 01627, 2nd Dept 3-9-16**

REAL PROPERTY.

USE OF PLAINTIFF'S LAND WAS PERMISSIVE, NOT HOSTILE; EASEMENT BY PRESCRIPTION WAS NOT CREATED.
Affirming the judgment pursuant to Real Property Actions and Proceedings Law (RPAPL) article 15, the Second Department determined plaintiff (Colin Realty) demonstrated the use of its land by neighboring property owners over the years was permissive, not hostile. Therefore no easement by prescription had been created and plaintiff could properly prohibit defendants' use of the land: " 'An easement by prescription is generally demonstrated by proof of the adverse, open and notorious, continuous, and uninterrupted use of the subject property for the prescriptive period' ... . In general, 'where an easement has been shown by clear and convincing evidence to be open, notorious, continuous, and undisputed, it is presumed that the use was hostile, and the burden shifts to the opponent of the allegedly prescriptive easement to show that the use was permissive' ... . This presumption, however, does not arise 'when the parties' relationship was one of neighborly cooperation or accommodation' ... . Similarly, the presumption of hostility is inapplicable when the use by the claimant is not 'exclusive' ... . In this regard, 'exclusivity is not established where [a claimant's] use is in connection with the use of the owner and the general public'... . Here, while . . . it appears undisputed that the defendants' traversing of Colin Realty's lot was open, notorious, and continuous for the prescriptive period, the court properly determined that the presumption of hostility did not arise. Fred Colin, the manager of Colin Realty, testified that he permitted such use to [defendant] Fradler and the public at large as a matter of willing accord and neighborly accommodation. He further explained how he had, over the years, protected Colin Realty's ownership interest when others had abused the permission he afforded." **Colin Realty Co., LLC v Manhasset Pizza, LLC, 2016 NY Slip Op 01633, 2nd Dept 3-9-16**

THIRD DEPARTMENT

CONTRACT LAW, FRAUD, CIVIL PROCEDURE.

FRAUD CAUSE OF ACTION PROPERLY DISMISSED BECAUSE (1) IT WAS DUPLICATIVE OF THE BREACH OF CONTRACT CAUSE OF ACTION AND (2) PLAINTIFF, AS A SOPHISTICATED BUSINESS ENTITY, COULD NOT ARGUE IT RELIED ON ORAL REPRESENTATIONS WHICH CONTRADICTED THE WRITTEN CONTRACT; STRICT REQUIREMENTS FOR ATTACHMENT NOT MET.
The Third Department, affirming Supreme Court, determined plaintiff's fraud cause of action was properly dismissed because (1) it was duplicative of the breach of contract cause of action, and (2), plaintiff, a sophisticated business entity, could not be heard to rely upon alleged oral representations which contradicted the written contract. In addition, the Third Department determined the requirements for attachment pursuant to CPLR 6201(3) were not met by plaintiff. There was insufficient proof defendant was secreting assets in order to frustrate a potential judgment: "A cause of action for fraud does not exist where the alleged fraudulent act is premised upon a breach of a contractual obligation ... .* * * … [A] sophisticated business entity cannot justifiably rely on oral representations when it thereafter enters into a contract containing terms that directly contradict those oral representations ... . Accordingly, plaintiff's fraud cause of action is subject to dismissal, either as duplicative of the contract cause of action or, in the alternative, based on plaintiff's own allegations that it relied on oral representations that were contradicted by the terms of the contract that it thereafter entered into. **Northeast United Corp. v Lewis, 2016 NY Slip Op 01713, 3rd Dept 3-10-16**

UNEMPLOYMENT INSURANCE.

PROMOTIONAL SALES MODEL WAS AN EMPLOYEE.
The Third Department determined claimant, a promotional sales model who distributed samples of products and free merchandise for the clients of Preston, was an employee of Preston entitled to unemployment insurance benefits: "Here, Preston directed potential promotional sales models to fill out an application and to provide references. Preston established the pay rates, paid claimant directly regardless of whether a client paid Preston and, at times, reimbursed claimant for certain travel or incidental expenses. Preston determined the time, date and location of the promotional events, as well as the particular products that claimant would be required to distribute at the events ... . Prior to a promotional event, Preston's managers instructed claimant to dress appropriately . . . and not to distribute products at the events that were not being promoted. The managers also explained what was expected of her at the event and informed her of what she should say at the events about the clients' products. If claimant could not report for a scheduled event or complete her shift, she was expected to contact a manager at Preston. Following an event, she was expected to fill out a Preston 'recap form' summarizing her time

spent at and information about the event, and she was required to submit the form to a manager at Preston. While claimant could and did work for other companies, she did not maintain her own business for promotional sales marketing. On occasion, Preston would contact its clients to review and critique claimant's work at the promotional events, and Preston directly handled clients' complaints ...". **Matter of Waggoneer (Preston Leasing Corp.—Commissioner of Labor), 2016 NY Slip Op 01707, 3rd Dept 3-10-16**

UNEMPLOYMENT INSURANCE.

CRISIS COUNSELOR WAS AN EMPLOYEE.

The Third Department determined a counselor (called a "specialist") who worked for Crisis Care Network (CCN), a provider of crisis intervention services to employers which have experienced tragedies, was an employee entitled to unemployment insurance benefits. CCN contracts with an employer's designated employee assistance program (EAP): "[A]fter contracting with an EAP, CCN recruits specialists from its self-created database and screens them to ensure that they have the qualifications required by the EAP. If a specialist has the proper qualifications, CCN offers that individual the assignment at a set hourly rate of pay. If accepted, as in claimant's case, the parties enter into a written agreement governing that particular assignment and CCN informs the specialist, based upon instructions from the EAP, of the date, time and location that the specialist is to report. While on assignment, the specialist must represent that he or she is from the EAP and is not permitted to solicit clients, although there is no prohibition against a specialist otherwise engaging in private practice or working for CCN's competitors. Except in very limited circumstances, CCN pays specialists within 45 days after services are rendered upon the submission of the proper paper work by the specialist regardless of whether it has yet been paid by the EAP, and CCN also provides reimbursement for travel expenses. CCN also provides voluntary training. If a specialist is unable to report to an assignment, he or she must notify CCN and cannot select a replacement. Furthermore, CCN provides specialists with informational handouts to be used on assignments, as well as professional guidelines that are based upon the expectations of the EAP, and the specialists must provide reports summarizing the counseling sessions per the requirements of the EAP." **Matter of Torres (Crisis Care Network, Inc.—Commissioner of Labor), 2016 NY Slip Op 01710, 3rd Dept 3-10-16**

UNEMPLOYMENT INSURANCE.

PART-TIME BOOKKEEPER WAS AN EMPLOYEE.

The Third Department determined claimant, a part-time bookkeeper for AIS, was an employee entitled to unemployment insurance benefits: "Here, claimant responded to a job advertisement placed by AIS, submitted a resume and was interviewed by AIS's office manager. She was hired at an agreed-upon hourly wage and performed her duties at AIS, where she shared an office with the clinical director and was provided with a computer, bookkeeping software, an email account and a key to the office. Although she was not required to work a set schedule, claimant testified that she was expected to work a total of 24 hours per week. She was also expected to notify AIS of the specific hours that she would be working each week and submit documentation detailing her hours, which had to be reviewed and approved by the clinical director in order to receive payment. She was paid by means of a biweekly paycheck, although payroll taxes were not deducted. In addition, she was required to attend staff meetings when they dealt with business-related matters, and she interacted with both AIS personnel as well as its outside certified public accountant regarding such matters. In our view, the foregoing illustrates that AIS retained sufficient control over claimant's work to be considered her employer ...". **Matter of Stewart (American Inst. for Stuttering—Commissioner of Labor), 2016 NY Slip Op 01720, 3rd Dept 3-10-16**

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