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CasePrepPlus

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FIRST DEPARTMENT

CONTRACT LAW.

DOCTRINE OF DEFINITENESS WAS PROPERLY NOT APPLIED; DOLLAR-AMOUNT OF THE FEE AT ISSUE COULD BE DETERMINED BY INDUSTRY PRACTICE.

The First Department, in a full-fledged opinion by Justice Manzanet-Daniels, determined the "doctrine of definiteness" should not be applied to an agreement in which the specific dollar-amount of a fee for financial advisory services, called a transaction fee, was not spelled out. The contract stated only that the transaction fee would be "consistent with investment banking industry practice for transactions of comparable complexity, level of analysis and size." Because the fee was ultimately determined by a method accepted in the investment banking industry, the fee was not rendered unenforceable by the "doctrine of definiteness:" "The doctrine of definiteness 'assures that courts will not impose contractual obligations when the parties did not intend to conclude a binding agreement' ... . It is to be sparingly used, as a 'last resort,' and only when an agreement 'cannot be rendered reasonably certain by reference to an extrinsic standard that makes its meaning clear' ... . The Court of Appeals has cautioned that if applied with too 'heavy [a] hand,' the doctrine may negate the reasonable expectations of the parties in entering into the contract ... . The 'Transaction Fee' provision explicitly references the type of 'commercial practice, or trade usage' New York courts routinely rely upon to render a price term sufficiently definite ... . The fee [is] enforceable inasmuch as it may be ascertained from public price indices and industry practice ... . Where, as here, the record demonstrates that sophisticated parties intended to be bound by an agreement, the doctrine of definiteness should not be used to defeat the bargain of the parties ...". ***Cowen & Co., LLC v. Fiserv, Inc.*, 2016 N.Y. Slip Op. 03840, 1st Dept 5-17-16**

CONTRACT LAW, EMPLOYMENT LAW.

QUESTION OF FACT WHETHER PLAINTIFF EMPLOYEE WAS TERMINATED (NOT A VIOLATION OF THE AT-WILL CONTRACT) OR WHETHER DEFENDANT EMPLOYER VIOLATED THE NO ORAL MODIFICATION CLAUSE.

The First Department, over an extensive two-justice dissent, reversing (modifying) Supreme Court, determined plaintiff employee should not have been granted summary judgment against defendant employer in this action alleging breach of an employment contract. Although the contract was deemed to have created an at-will employment arrangement, Supreme Court held that the "no oral modification" clause was violated when defendant employer modified plaintiff's duties without a written agreement signed by the plaintiff. The First Department found that there was a question of fact whether plaintiff was terminated (not prohibited by the contract), or whether the contract was modified without a written agreement (prohibited by the contract): " '[A]bsent an agreement establishing a fixed duration, an employment relationship is presumed to be a hiring at will, terminable at any time by either party' … . The presumption can be rebutted by evidence of a limitation on the employer's right to discharge the employee at will ... . The inclusion of the no oral modification clause in the employment agreement does not, in and of itself, suffice to rebut the at-will presumption. While the clause precluded the modification of 'any provision' of the agreement without a writing signed by the party against whom enforcement was sought, there is no express provision in the agreement that precluded defendant from terminating plaintiff without cause. However, as Supreme Court found, the no oral modification clause is an enforceable contract term even if the employment was at will ... . * * * Nevertheless, while the court correctly found that the no oral modification clause was enforceable and barred defendant from unilaterally altering the terms of plaintiff's employment agreement without a writing, issues of fact exist that preclude the granting of summary judgment in plaintiff's favor. These include whether or not defendant terminated plaintiff's employment or merely modified it when it removed plaintiff as president ...". ***Gootee v. Global Credit Servs., LLC*, 2016 N.Y. Slip Op. 03984, 1st Dept 5-19-16**

CRIMINAL LAW, EVIDENCE.

DENIAL, WITHOUT A HEARING, OF DEFENSE MOTION TO PRESENT EXPERT TESTIMONY ON THE SCIENCE OF FALSE CONFESSIONS WAS AN ABUSE OF DISCRETION.

The First Department, in a full-fledged opinion by Justice Kapnick, over an extensive two-justice dissent, determined, under the facts, the trial court abused its discretion when it denied, without a hearing, defendant's motion to present expert opin-

ion evidence concerning the science of false confessions: "First, there is no dispute that Dr. Drob concluded that defendant exhibited traits such as, 'borderline intellectual functioning, cognitive, social and emotional immaturity, severe deficits in reality testing and deficits in the capacity to understand the actions and intentions of others, deficits in his capacity to cope with interpersonal stress, anxiety, depression, dependency, passivity and a desire to please others, and a concomitant tendency to rely on others for direction and support.' There can also be no dispute that these particular mental conditions and personality traits are ones that research studies have linked to false confessions, and that the Court of Appeals has recognized this link (*Bedessie*, 19 NY3d at 159 ...). Second, certain conditions of the interrogation suggest that defendant could have been induced to confess falsely to the crimes at issue. The defense urges that the detectives' interrogation employed a variety of techniques that scientific research has shown to be highly correlated with eliciting false confessions. ... Finally, this is a case . . . that turns on the accuracy of defendant's confessions." ***People v. Evans*, 2016 N.Y. Slip Op. 03988, 1st Dept 5-19-16**

PERSONAL INJURY, LABOR-CONSTRUCTION LAW.

FALL FROM LADDER WHILE SETTING UP AUDIOVISUAL EQUIPMENT NOT COVERED BY LABOR LAW § 240(1).
The First Department determined plaintiff's fall from a ladder while setting up audiovisual equipment was not covered by Labor Law § 240(1): "While the work that the injured plaintiff was doing immediately before his accident should not be viewed in isolation in determining whether he has a potentially viable claim under Labor Law § 240(1) . . . , the motion court correctly found that . . . his work was outside the scope of activity protected by that statute. Plaintiff, a lighting engineer, fell off a ladder while attempting to replace a gel that altered the color of one light on a temporary lighting stand secured to the floor by sandbags. The work performed by plaintiff and his employer entailed moving audiovisual, staging and lighting equipment into a hotel ballroom, assembling, setting up, and positioning the equipment as necessary for its use in an event, and removing it after the event ended. There is no evidence that any of this work 'altered' or caused a substantial, or indeed any, physical change to the building ...". ***Royce v. DIG EH Hotels, LLC*, 2016 N.Y. Slip Op. 03985, 1st Dept 5-19-16**

SECOND DEPARTMENT

CONTRACT LAW, LABOR-CONSTRUCTION LAW.

FAILURE TO STRICTLY COMPLY WITH CONDITION-PRECEDENT NOTICE PROVISIONS IN THE CONSTRUCTION CONTRACT PRECLUDED RECOVERY FOR DELAY DAMAGES.
The Second Department, reversing Supreme Court, determined plaintiff was not entitled to [construction] delay damages because plaintiff did not strictly comply with the delay-notice requirements spelled out in the contract as a condition precedent: " 'Where a construction contract contains a condition precedent-type notice provision setting forth the consequences of a failure to strictly comply, strict compliance will be required' ... . Express conditions precedent 'must be literally performed; substantial performance will not suffice,' and '[f]ailure to strictly comply with such provisions generally constitutes a waiver of a claim' ... . * * * The letters and emails relied upon by the Supreme Court and the plaintiff did not strictly comply with the contractual notice requirement, since they did not contain verified statements of the amount of delay damages allegedly sustained by the plaintiff and were unsupported by documentary evidence ...". ***Schindler El. Corp. v. Tully Constr. Co., Inc.*, 2016 N.Y. Slip Op. 03868, 2nd Dept 5-18-16**

CRIMINAL LAW.

SIDEWALK WAS NOT USED AS A DANGEROUS INSTRUMENT IN THIS ASSAULT CASE.
The Second Department determined, under the facts, the sidewalk was not "used" as a dangerous instrument by the defendant. The defendant punched the victim who then fell and struck his head on the sidewalk, suffering very serious injury. Although it is possible to intentionally or recklessly "use" a sidewalk as a dangerous instrument, here the sidewalk was not "used" by the defendant to cause injury within the meaning of the assault statute (Penal Law § 120.05(4)): "We agree with the People's interpretation of Penal Law § 120.05(4) that the reckless mens rea must be read to modify the phrase 'by means of . . . a dangerous instrument' (*see* Penal Law § 15.05[3]), and that the statute does not, as the Supreme Court held, require 'purposeful use' of the dangerous instrument (*see* Penal Law § 15.15[1] ...). However, we disagree with the People's contention that Penal Law § 120.05(4) does not require that the serious physical injury be recklessly caused by the use of a dangerous instrument. Such a reading of the statute ignores the definition of dangerous instrument, which expressly focuses on the circumstances in which the instrument is 'used' (Penal Law § 10.00[13]), and the use-oriented approach that has evolved directly from that definition ... . Moreover, a person can 'use' a dangerous instrument in a reckless manner ... . Therefore, a conviction under Penal Law § 120.05(4) requires legally sufficient evidence establishing that the defendant recklessly 'used' the dangerous instrument." ***People v. McElroy*, 2016 N.Y. Slip Op. 03897, 2nd Dept 5-18-16**

CRIMINAL LAW, EVIDENCE.

33-HOUR DELAY IN ARRAIGNMENT, UNDER THE FACTS, DID NOT RENDER STATEMENT INVOLUNTARILY MADE.
The Second Department, in affirming defendant's conviction over a dissent, determined a 33-hour delay of arraignment did not, under the facts, render defendant's statement involuntarily made: "[T]he testimony at the suppression hearing demonstrated that approximately 29-33 hours passed between the defendant's arrest and his arraignment and that he provided statements after being in custody for approximately 25-28 hours. ... [T]his was not a typical armed robbery case, and . . . the delay in arraignment was satisfactorily explained. The NYPD coordinated with three other law enforcement agencies to investigate not only the attempted murder and two robbery charges, but also the extent to which the defendant used false identities and counterfeit money in various jurisdictions, before presenting these matters at arraignment, where a judge would be considering the likelihood that the defendant would return to court before setting bail. Notably, prior to obtaining a statement from the defendant, the lead detective traveled to the hospital where the victim was recovering, conducted a photo array identification procedure when the victim became available, and then traveled back to the station house. Under these circumstances, we conclude that the delay in arraigning the defendant was attributable to a thorough and necessary police investigation. Thus, his 'detention [was not] prolonged beyond a time reasonably necessary to accomplish the tasks required to bring [him] to arraignment' ... . Further, the record does not otherwise demonstrate that the police unnecessarily delayed the arraignment in order to obtain an involuntary confession ...". ***People v. Johnson*, 2016 N.Y. Slip Op. 03896, 2nd Dept 5-18-16**

INSURANCE LAW.

INSURER NOT OBLIGATED TO SATISFY JUDGMENT AGAINST ITS INSURED; INJURED PARTY FAILED TO TIMELY NOTIFY INSURER OF THE FIRE WHICH CAUSED THE DAMAGE.
The Second Department, reversing Supreme Court, determined plaintiff insurer was not required to satisfy the injured party's (Seville's) judgment against its insured because Seville did not timely notify plaintiff insurer of the fire which damaged Seville's property: " 'Insurance Law § 3420(a)(2) expressly permits an injured party to recover any unsatisfied judgment against an insured, directly from the insurer' ... . Insurance Law § 3420(a)(3) requires the injured party to demonstrate that he or she acted diligently in attempting to ascertain the identity of the insurer, and thereafter expeditiously notified the insurer ... . 'In determining the reasonableness of an injured party's notice, the notice required is measured less rigidly than that required of the insured[ ]' ... . 'The injured person's rights must be judged by the prospects for giving notice that were afforded him, not by those available to the insured' ... . 'What is reasonably possible for the insured may not be reasonably possible for the person he has injured. The passage of time does not of itself make delay unreasonable' ... . Here, the plaintiff made a prima facie showing that Seville failed to act diligently in attempting to ascertain the plaintiff's identity and in expeditiously notifying it. In opposition, Seville failed to raise a triable issue of fact ...". ***Mt. Hawley Ins. Co. v. Seville Electronics Trading Corp.*, 2016 N.Y. Slip Op. 03862, 2nd Dept 5-18-16**

MUNICIPAL LAW, IMMUNITY, CIVIL RIGHTS, PERSONAL INJURY.

DEFENSE MOTION TO SET ASIDE THE VERDICT SHOULD HAVE BEEN GRANTED; POLICE DID NOT USE EXCESSIVE FORCE AND WERE ENTITLED TO BOTH QUALIFIED AND GOVERNMENT FUNCTION IMMUNITY.
The Second Department determined defendants' motion to set aside the plaintiff's verdict, in a case alleging use of excessive force by police officers, should have been granted. Plaintiff, who was mentally ill, punched a police officer who approached him and ran up some stairs. When the police attempted to restrain him, he and the officers fell down the stairs. The Second Department held the facts did not support a finding of excessive force. The court further held the officers did not clearly violate plaintiff's statutory or constitutional rights and were therefore entitled to qualified immunity. In addition, the Second Department found the officers were performing a discretionary, not ministerial function, and were therefore entitled to government function immunity, requiring dismissal of the negligence cause of action. On the topic of qualified immunity, the Second Department wrote: " 'The doctrine of qualified immunity shields officials from civil liability so long as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known' ... . While the doctrine does not require 'a case directly on point, . . . existing precedent must have placed the statutory or constitutional question beyond debate' ... . The dispositive question is whether the violative nature of particular conduct is clearly established ... . 'This inquiry must be undertaken in light of the specific context of the case, not as a broad general proposition' ... . 'Such specificity is especially important in the Fourth Amendment context, where the Court has recognized that it is sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts' ... . 'This exacting standard gives government officials breathing room to make reasonable but mistaken judgments' by protect[ing] all but the plainly incompetent or those who knowingly violate the law' ...". ***Davila v. City of New York*, 2016 N.Y. Slip Op. 03846, 2nd Dept 5-18-16**

PARTNERSHIP LAW.

WHEN DETERMINING THE VALUE OF A PARTNERSHIP SHARE UPON DISSOLUTION, A MINORITY DISCOUNT CAN PROPERLY BE APPLIED TO A PARTNER WHO WRONGFULLY DISSOLVED THE PARTNERSHIP AND WHO DID NOT EXERCISE CONTROL OVER THE PARTNERSHIP AS A GOING CONCERN.

The Second Department, in a full-fledged opinion by Justice Dickerson, determined a "minority discount" should be applied to the share of a partnership awarded to a partner who wrongfully dissolved the partnership. The minority discount is appropriate where the partner did not exercise control over the partnership as a going concern. The court noted that the prohibition of a minority discount for minority corporate shareholders did not apply to partnerships: "[T]his case does not involve a determination of the 'fair value' of a dissenting shareholder's shares pursuant to Business Corporation Law §§ 623 and 1118, but rather, involves the determination of the 'value' of the shares of a partner who has wrongfully caused the dissolution of a partnership pursuant to Partnership Law § 69(2)(c)(II). ... [A]pplying a minority discount in the context of valuing a partnership interest 'would not contravene the distinctly corporate statutory proscription (Business Corporation Law § 501[c]) against treating holders of the same class of stock differently, or undermine the remedial goal of the appraisal statutes to protect shareholders from being forced to sell at unfair values, or inevitably encourage oppressive majority conduct'...". ***Congel v. Malfitano*, 2016 N.Y. Slip Op. 03845, 2nd Dept 5-18-16**

ZONING, LAND-USE.

PETITIONERS DID NOT HAVE STANDING TO CONTEST APPROVAL OF CONSTRUCTION PROJECT, CLOSE PROXIMITY IS NOT ENOUGH.

The Second Department determined Supreme Court properly found the petitioners did not have standing to challenge the approval of a construction project by the zoning board. Although petitioners' property is in close proximity to the proposed project, the petitioners did not demonstrate any harm peculiar to them, as opposed to the community at large: "An allegation of close proximity may give rise to an inference of damage or injury that enables a nearby property owner to challenge a land use decision without proof of actual injury. However, this does not entitle the property owner to judicial review in every instance ... . Rather, in addition to establishing that the effect of the proposed change is different from that suffered by the public generally, the petitioner must establish that the interest asserted is arguably within the zone of interests the statute protects ... . Thus, 'even where petitioner's premises are physically close to the subject property, an ad hoc determination may be required as to whether a particular petitioner itself has a legally protectable interest so as to confer standing' ... . * * * The Supreme Court properly determined that the petitioners failed to establish standing on the basis of alleged traffic impacts, impacts arising from issues of compliance, or community character impacts, as the petitioners failed to establish any harm distinct from that of the community at large ...". ***Matter of CPD NY Energy Corp. v. Town of Poughkeepsie Planning Bd.*, 2016 N.Y. Slip Op. 03877, 2nd Dept 5-18-16**

THIRD DEPARTMENT

CIVIL PROCEDURE.

COURT OF CLAIMS LACKS JURISDICTION WHERE MONEY DAMAGES ARE MERELY INCIDENTAL TO THE CLAIM.

The Third Department determined a prisoner's lawsuit alleging false imprisonment based upon mistakes in sentencing was properly dismissed because the Court of Claims lacked jurisdiction: " 'While jurisdiction reposes in the Court of Claims where the essential nature of the claim against defendant is to recover money, it does not lie where monetary relief is incidental to the primary claim' ... . Here, we agree with the Court of Claims that it lacks subject matter jurisdiction on claimant's false imprisonment claim, inasmuch as his primary argument is that he is currently being confined unlawfully due to errors in resentencing and that any claim for related damages is incidental to this primary argument. Therefore, the claim for false imprisonment was properly dismissed for lack of jurisdiction." ***Jackson v. State of New York*, 2016 N.Y. Slip Op. 03938, 3rd Dept 5-19-16**

WORKERS' COMPENSATION LAW.

INJURY IN FALL IN EMPLOYER'S PARKING LOT AROSE FROM EMPLOYMENT.

The Third Department determined injury from a trip and fall in the employer's parking lot was covered under the Workers' Compensation Law: " 'To be compensable under the Workers' Compensation Law, an injury must have arisen both out of and in the course of a claimant's employment' ... . Moreover, '[w]hile on the employer's premises, going to or coming from work is generally considered an incident of the employment' ... . Here, the record reveals that claimant tripped and fell in the employer's parking lot as she was preparing to leave at the end of her shift. Thus, there is substantial evidence in the record to support the Board's determination that claimant's injury arose out of and in the course of her employment ...". ***Matter of Swartz v. Absolut Ctr. for Nursing & Rehab*, 2016 N.Y. Slip Op. 03937, 3rd Dept 5-19-16**