CasePrepPlus

July 27, 2016

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

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FIRST DEPARTMENT

CIVIL PROCEDURE.

ISSUE WHICH WAS NOT RAISED IN THE PRIOR FEDERAL ACTION BUT WHICH CONSTITUTED A COMPULSORY COUNTERCLAIM UNDER FEDERAL LAW BARRED IN SUBSEQUENT STATE ACTION UNDER DOCTRINE OF RES JUDICATA.

The First Department determined the doctrine of res judicata prohibited litigation in state court of an issue which was not raised but which constituted a compulsory counterclaim in the prior federal action: "[T]he Court of Appeals has provided clear guidance on this issue in *Gargiulo v Oppenheim* (63 NY2d 843, 845 [1984]), stating in dicta, 'For purposes of the disposition of this appeal we assume, without deciding, that under the procedural compulsory counterclaim rule in the Federal Courts (FRCP rule 13[a] [in 28 USC, Appendix]) claim and issue preclusion would extend to bar the later assertion in the present State court action of a contention which could have been raised by way of a counterclaim' ... . [W]e conclude that the later assertion in a state court action of a contention that constituted a compulsory counterclaim (FRCP rule 13[a]) in a prior federal action between the same parties is barred under the doctrine of res judicata ...". ***Paramount Pictures Corp. v. Allianz Risk Transfer AG*, 2016 N.Y. Slip Op. 05618, 1st Dept 7-21-16**

CRIMINAL LAW, EVIDENCE.

ACTUAL INNOCENCE IS A GROUND FOR VACATION OF A CONVICTION PURSUANT TO CPL § 440.10; PROOF HERE INSUFFICIENT TO WARRANT A HEARING; HEARING REQUIRED ON WHETHER PROSECUTOR WITHHELD *BRADY* MATERIAL.

The First Department, in an extensive opinion by Justice Mazzarelli, determined defendant was entitled to a hearing on his motion to vacate his conviction. Defendant had sufficiently alleged the prosecutor may have withheld information which could have been used to impeach the testimony of an important witness in this murder case (*Brady* material). In addition, the First Department held that "actual innocence" can be raised as a ground for vacation of a conviction pursuant to Criminal Procedure Law § 440.10. Although the First Department found the defendant did not present sufficient evidence of actual innocence to warrant a hearing, the "actual innocence" discussion is the most significant part of the opinion: "We agree with the Second Department [*People v Hamilton*, 115 AD3d 12] that CPL 440.10(1)(h) embraces a claim of actual innocence. If depriving a defendant of an opportunity to prove that he or she has not committed a crime for which he or she has been convicted is not a 'violation of a right . . . under the constitution of this state or of the United States,' then that section of the statute is virtually hollow. Both constitutions guarantee liberty through their due process clauses, and a wrongful conviction represents the ultimate deprivation of liberty. Notably, the People do not contest the applicability, in theory, of *Hamilton* to this case. Nevertheless, defendant did not clear the threshold set by the *Hamilton* court as necessary to gain a hearing on an actual innocence claim, because he did not present 'a sufficient showing of possible merit to warrant a fuller exploration by the court ...". ***People v. Jimenez*, 2016 N.Y. Slip Op. 05620, 1st Dept 7-21-16**

MUNICIPAL LAW, EMPLOYMENT LAW.

NO NOTICE OF CLAIM REQUIRED FOR RETALIATORY TERMINATION CLAIM PURSUANT TO CIVIL SERVICES LAW § 75-b.

The First Department, reversing Supreme Court, determined (1) a retaliatory termination claim pursuant to Civil Services Law § 75-b seeking only monetary damages is not subject to the notice of claim requirement of General Municipal Law §§ 50-e and 50-i; and (2), even if a notice of claim were required, the notice was adequate despite the failure to specifically mention a violation Civil Services Law § 75-b: "[W]e now find that a notice of claim is not required for a Civil Service Law § 75-b claim. As with the Human Rights Law claims that were the subject of Margerum, Civil Service Law § 75-b claims are not tort actions under 50-e and are not personal injury, wrongful death, or damage to personal property claims under 50-i, and there is no reason to encumber the filing of a retaliatory termination claim. * * * Even if [a notice of claim] was required, the notice of claim filed by plaintiff was sufficient to allow the City to investigate his Civil Service Law § 75-b claim, even though it did not cite the section." ***Castro v. City of New York*, 2016 N.Y. Slip Op. 05615, 1st Dept 7-21-16**

MUNICIPAL LAW, LANDLORD-TENANT.

HOUSING AUTHORITY VIOLATED ITS OWN RULES AND EFFECTIVELY PREVENTED PETITIONER FROM MEETING THE PREREQUISITES FOR A HEARING ON HER REMAINING FAMILY MEMBER GRIEVANCE.

The First Department, over an extensive dissent, determined the New York City Housing Authority (NYCHA) effectively made it impossible for the petitioner to meet the prerequisites for a hearing (paying use and occupancy arrears) on her "remaining family member" grievance. The case was therefore remitted for a hearing on the grievance: "The NYCHA Management Manual requires that a remaining family member grievant must remain current in use and occupancy to pursue the grievance (NYCHA Management Manual, ch 1, subd XII[D][2][b]). This Court has upheld that requirement (*Matter of Garcia v Franco*, 248 AD2d 263, 265 [1st Dept 1998], *lv denied* 92 NY2d 813 [1998]). However, in this case, NYCHA's application of that rule to petitioner, and its resulting dismissal of her remaining family member grievance, was arbitrary and capricious. NYCHA failed and refused to recalculate use and occupancy based on petitioner's income, notwithstanding that the NYCHA Management Manual requires that it do so, during the pendency of a remaining family member grievance, in order for it to determine use and occupancy as the lower of the tenant of record's rent or the rent rate based on the income of the remaining occupant (Manual, at ch 1, subd XII[D][2][b])[FN1]. NYCHA also failed and refused to provide petitioner with information and documents necessary for her to apply for funds to pay the arrears in use and occupancy. As a result, it was impossible for petitioner to meet the condition precedent to a hearing." ***Matter of Figueroa v. New York City Hous. Auth.*, 2016 N.Y. Slip Op. 05619, 1st Dept 7-21-16**

SECOND DEPARTMENT

CONTRACT LAW.

BOTH BREACH OF CONTRACT AND QUANTUM MERUIT WERE PLED, QUANTUM MERUIT CAUSE OF ACTION SHOULD HAVE GONE TO THE JURY.

The Second Department, reversing Supreme Court, determined plaintiff's quantum meruit cause of action should have gone to the jury. A new trial was ordered. Although the complaint was deemed inartfully drafted, the Second Department found that the quantum meruit cause of action was pled and evidence presented at trial supported it. The court explained when both a breach of contract cause of action and a quantum meruit cause of action may be validly pled: "Where the existence of a contract is in dispute, the plaintiff may allege a cause of action to recover in quantum meruit as an alternative to a cause of action alleging breach of contract ... . '[A] quasi-contractual obligation is one imposed by law where there has been no agreement or expression of assent, by word or act, on the part of either party involved. The law creates it, regardless of the intention of the parties, to assure a just and equitable result' ... . To be entitled to recover damages under the theory of quantum meruit, a plaintiff must establish: '(1) the performance of services in good faith, (2) the acceptance of services by the person or persons to whom they are rendered, (3) the expectation of compensation therefor, and (4) the reasonable value of the services rendered' ...". ***Thompson v. Horowitz*, 2016 N.Y. Slip Op. 05561, 2nd Dept 7-20-16**

DEBTOR-CREDITOR, CIVIL PROCEDURE, LIMITED LIABILITY COMPANY LAW.

MEMBERSHIP IN LIMITED LIABILITY COMPANY CAN BE REACHED BY A JUDGMENT CREDITOR; CHARGING ORDER, RATHER THAN ASSIGNMENT OF THE MEMBERSHIP INTEREST TO THE CREDITOR, IS AN APPROPRIATE REMEDY.

The Second Department determined a debtor's membership in a limited liability company can be reached by a judgment creditor. The court further determined that a remedy other than the assignment of the membership interest to the creditor was properly fashioned by Supreme Court: "In considering the remedies available to a judgment creditor such as the petitioner under CPLR article 52, the Supreme Court was not limited to considering the petitioner's request for an order assigning to him [the debtor's] membership interest in the LLC. CPLR 5240, which was relied upon by the Supreme Court, provides, in pertinent part, that a court 'may at any time, on its own initiative or the motion of any interested person, and upon such notice as it may require, make an order denying, limiting, conditioning, regulating, extending or modifying the use of any enforcement procedure' ... . This section grants the Supreme Court broad discretionary power to alter the use of procedures set forth in CPLR article 52 ... . Limited Liability Company Law § 607 expressly provides that, on an application by a judgment creditor of a member of an LLC, 'the court may charge' the debtor's membership interest 'with payment of the unsatisfied amount of the judgment with interest,' and '[t]o the extent so charged, the judgment creditor has only the rights of an assignee of the membership interest.' Thus, CPLR 5240 and Limited Liability Company Law § 607 give the court discretion, in an appropriate case, to issue a charging order instead of, inter alia, an order assigning or turning over the judgment debtor's membership interest in an LLC to the judgment creditor ...". ***Matter of Sirotkin v. Jordan, LLC*, 2016 N.Y. Slip Op. 05576, 2nd Dept 7-20-16**

EDUCATION-SCHOOL LAW.

STATUTE ALLOWING PROPERTY OWNERS TO CHOOSE SCHOOL DISTRICTS DOES NOT APPLY TO CONDOMINIUMS WHICH LIE ON THE BORDER BETWEEN TWO DISTRICTS.

The Second Department, affirming Supreme Court's grant of a motion to set aside plaintiffs' verdict, determined the statute which allows a property owner to select a school district when the boundary between school districts passes through the owner's property does not apply to condominiums. The case turned on the interpretation of the statute, which referred only to boundaries passing through single-family residences: "[T]he plain language of Education Law § 3203(1)(b) and its legislative history demonstrate that the statute is applicable only where property is improved by one single family dwelling unit, and not multiple single family dwelling units, and where the school district boundary line intersects property that the dwelling unit is located on. The Supreme Court properly determined that the subject 28-unit condominium complex is not 'an owner-occupied single family dwelling unit' located on property intersected by a boundary line within the meaning of Education Law § 3203(1)(b). Therefore, the court properly granted those branches of the school defendants' motion which were to set aside the jury verdict in favor of the plaintiffs ...". ***Palm v. Tuckahoe Union Free School Dist.*, 2016 N.Y. Slip Op. 05558. 2nd Dept 7-20-16**

EMINENT DOMAIN, MUNICIPAL LAW.

CLAIM FOR A DE FACTO TAKING ACCRUES WHEN THE TAKING IS FIRST APPARENT, NOT WHEN IT IS FIRST DISCOVERED BY THE CLAIMANT.

The Second Department determined the structures built by the city, which caused water to accumulate on claimant's land, were apparent when constructed in 2005. The fact that the structures were not discovered by the claimant until 2011 was not relevant. Therefore the claim for a de facto taking expired in 2008 and was time-barred: "A de facto taking claim is governed by the three-year statute of limitations applicable to claims to recover damages for injury to property set forth in CPLR 214(4) ... . Such a claim accrues at the time of the taking or, at the latest, when the taking becomes apparent, regardless of the time of discovery ... . Here, the record established that the headwall and overflow outlet were readily visible when the alleged taking occurred in September 2005. Accordingly, the Supreme Court properly determined that the claimant's time to bring any claim for damages for the alleged de facto taking expired in September 2008 ...". ***Matter of South Richmond Bluebelt, Phase 3. 594 Assoc., Inc. (City of New York)*, 2016 N.Y. Slip Op. 05577, 2nd Dept 7-20-16**

FAMILY LAW.

FAMILY COURT DID NOT HAVE THE POWER TO ORDER THE FINGERPRINTING OF PETITIONER IN A GUARDIANSHIP PROCEEDING.

The Second Department, reversing Family Court, determined the guardianship petition should not have been denied solely because the petitioner did not comply with the order requiring the fingerprinting of petitioner as part of a criminal background check. Family Court did not have the authority to require fingerprinting: "Contrary to the Family Court's determination, there is no express statutory fingerprinting requirement in a proceeding such as this pursuant to Family Court Act § 661(a) for '[g]uardianship of the person of a minor or infant' ... . Consequently, it was improper for the Family Court to dismiss the petition based solely on the petitioner's failure to comply with a directive to obtain fingerprinting ...". ***Matter of Silvia N. P. L. v. Jorge M. N. P.*, 2016 N.Y. Slip Op. 05567, 2nd Dept 7-20-16**

FAMILY LAW, EVIDENCE, CRIMINAL LAW, APPEALS.

WEIGHT OF THE EVIDENCE REVIEW RESULTED IN REVERSAL IN THIS JUVENILE DELINQUENCY PROCEEDING, TESTIMONY OF POLICE OFFICERS REJECTED.

The Second Department, reversing Family Court, determined the finding that appellant, had he been an adult, would have committed criminal possession of a weapon (and related offenses) was against the weight of the evidence. The Second Department clearly explained its role in a weight of the evidence review and essentially rejected the testimony of the arresting officers: "In conducting our weight of the evidence review, we have a responsibility to affirmatively review the record; independently assess all of the proof; substitute our own credibility determinations for those made by the Family Court in an appropriate case; determine whether the Family Court's determination was factually correct; and acquit the appellant if we are not convinced that the Family Court's adjudication of the appellant as a juvenile delinquent was proven beyond a reasonable doubt ... . * * * The reasonable inferences to be made from the officers' collective testimony were that at least two other individuals were with the appellant at the time of his arrest and, contrary to the initial testimony that the appellant was the only person observed in the area of the firearm, multiple individuals were in the vicinity of the firearm at the relevant time. In addition, when the appellant was brought to the precinct, he denied possessing the firearm and asked Officer Thomas to check to see if there were cameras in the area of the incident. Officer Thomas testified that at the end of his shift on the date in question, he returned to the scene and viewed surveillance video from a store in the area. However, he did not take notes or ask for a copy of the video, and he 'completely forgot to notify anybody' of his investigation or record it in

his memo book. At the time of the fact-finding hearing, he could not recall whether the video he viewed depicted the street at the relevant time." ***Matter of Trevor S.*, 2016 N.Y. Slip Op. 05574, 2nd Dept 7-20-16**

FREEDOM OF INFORMATION LAW (FOIL), MUNICIPAL LAW.

DISCLOSURE OF TOWN EMAIL LIST PROPERLY ORDERED.

The Second Department determined the town board did not articulate any valid reason for refusing to disclose an email list (gblist) consisting of the addresses of town residents who wished to be kept informed of news on matters of public concern: "Here, the Town parties did not articulate the applicability of any enumerated exemptions under Public Officers Law § 89(2)(b), nor did they show that the privacy interests at stake outweigh the public interest in disclosure of the information ... . The petitioner seeks 'to further the public discourse on matters of public importance and concern in the Town' by obtaining the names and email addresses of those persons who subscribe to the gblist — persons who have willingly divulged that information to the Town so that they may receive news and information, in electronic form, on matters of public concern in the Town. The Town parties did not articulate any privacy interest that would be at stake in the disclosure of the records. The Town parties' contention that disclosure of the requested email addresses would render the gblist subscribers more susceptible to phishing, spamming, and other email scams is speculative; the Town parties failed to show that disclosure of the information would make the gblist subscribers more susceptible to such acts than they ordinarily would be." ***Matter of Livson v. Town of Greenburgh*, 2016 N.Y. Slip Op. 05570, 2nd Dept 7-20-16**

PISTOL PERMITS.

FAILURE TO DISCLOSE DETAILS OF ARRESTS JUSTIFIED DENIAL OF PISTOL PERMIT.

The Second Department determined the petitioner's failure to disclose the details of his prior arrests justified denial of a pistol permit: "Penal Law § 400.00(1), which sets forth the eligibility requirements for obtaining a pistol license, requires, inter alia, that the applicant be at least 21 years of age, of good moral character with no prior convictions of a felony or serious offense, a person who has not had a license revoked or who is not under a suspension or ineligibility order, and a person 'concerning whom no good cause exists for the denial of the license' ... . 'A pistol licensing officer has broad discretion in ruling on permit applications and may deny an application for any good cause' ... . Contrary to the petitioner's contention, the licensing officer's determination that good cause existed to deny his application for a pistol license was not arbitrary and capricious. The petitioner failed to disclose all of the required details of his three prior arrests, thus hindering the licensing officer's ability to determine his moral fitness to possess a pistol." ***Matter of Praino v. Forman*, 2016 N.Y. Slip Op. 05572, 2nd Dept 7-20-16**

THIRD DEPARTMENT

CRIMINAL LAW, EVIDENCE.

TESTIMONY OF DNA EXPERT, WHICH WAS BASED ON DATA COLLECTED BY NON-TESTIFYING WITNESSES, DID NOT VIOLATE DEFENDANT'S RIGHT OF CONFRONTATION; ILLEGAL STOP DID NOT REQUIRE SUPPRESSION OF STATEMENT, SUFFICIENT ATTENUATION.

The Third Department, in affirming defendant's conviction, determined the testimony of the DNA expert (Pasqualino) did not violate defendant's right of confrontation. Although the expert relied on data collected by non-testifying witnesses, the conclusions drawn from the data were entirely her own. In addition, the Third Department determined the concededly illegal stop of the defendant did not require suppression of his statement because the statement was sufficiently attenuated from the stop. An officer illegally stopped the defendant to tell him the police wanted to speak to him. The defendant then drove to the station where he was read his Miranda rights. With respect to the DNA evidence, the court wrote: "Pasqualino testified that she analyzed raw data compiled by the nontestifying lab technicians and that she did not rely on the opinions or interpretation of anyone else in forming her scientific conclusions linking defendant's DNA profile to the victim's rape kit, which conclusions were contained in the reports that she authored... . * * * There is no evidence in the record that any lab technician or analyst who participated in the preliminary processing and testing of this DNA evidence engaged in any data editing, analysis, comparisons or interpretations of the evidence or rendered any opinions regarding whether the data collected from the rape kit matched defendant's DNA profile; likewise, there is no proof that Pasqualino relied upon any such opinions or conclusions drawn by others ... . Further, the technicians' compilation of objective data was not accusatory and did not, without Pasqualino's expert analysis and testimony, link defendant to these crimes ... . Under these circumstances, defendant's right of confrontation was not violated when Pasqualino relied upon and made reference to data collected by nontestifying lab technicians ...". ***People v. Stahl*, 2016 N.Y. Slip Op. 05597, 3rd Dept 7-21-16**

DISCIPLINARY HEARINGS (INMATES).

AUTHORIZATION TO OPEN PETITIONER'S MAIL WAS INVALID.

The Third Department determined the authorization purporting to allow the opening of petitioner's mail was invalid: "Petitioner argues that his mail was opened in violation of established mail watch procedures. Specifically, petitioner contends that the 'express written authorization' that permitted facility personnel to open, inspect or read his outgoing correspondence (7 NYCRR 720.3 [3] [e]) failed to 'set forth the specific facts forming the basis for the action' (7 NYCRR 720.3 [e] [1]) and, as such, the subject authorization was invalid. Upon reviewing the document at issue, we agree. Accordingly, the determination of guilt must be annulled ...". ***Matter of Ramos v. Annucci*, 2016 N.Y. Slip Op. 05601, 3rd Dept 7-21-16**

FREEDOM OF INFORMATION LAW (FOIL), TAX LAW.

DOCUMENTS WHICH REFLECT INFORMATION IN TAX RETURNS ARE EXEMPT FROM DISCLOSURE UNDER THE TAX LAW.

The Third Department determined Supreme Court properly withheld from disclosure both tax returns and documents which reflect information included in tax returns: " 'The policy behind the [tax] secrecy provisions is twofold: to protect personal privacy interests in the information on a return, which may reveal information concerning a person's activities, associations and beliefs, and to encourage voluntary compliance with the tax laws by preventing use of return information to harm the reporting taxpayer' ... . As relevant here, the statute prohibits the disclosure of 'any particulars' by any person who 'is permitted to inspect' a return, receives 'any information contained in any [return]' or who 'in any manner may acquire knowledge of the contents of a [return]' (Tax Law § 211 [8] [a]). By its terms, therefore, the confidentially required by the statute necessarily extends to any document that reflects information included in a return. If we were to construe the statute to only protect the secrecy of the return, the purpose of the statute would not be served . . . , and we find, in particular, that Tax Law § 211 (8) (a) prohibits the Department from releasing an agreement made with another taxpayer (*see* Tax Law §§ 171 [18]; 210-A [11]). ... Contrary to petitioner's arguments, where, as here, a document is exempt from disclosure pursuant to state statute, it may not be subjected to redaction ...". ***Matter of Moody's Corp. & Subsidiaries v. New York State Dept. of Taxation & Fin.*, 2016 N.Y. Slip Op. 05612, 3rd Dept 7-21-16**

PERSONAL INJURY, INTENTIONAL TORT.

MOTION TO DISMISS PUNITIVE DAMAGES CLAIM PROPERLY DENIED.

The Third Department determined the motion to dismiss the demand for punitive damages was properly denied. The action stemmed from a physical confrontation between plaintiff and defendant, an off-duty police officer: " 'Punitive damages may be awarded in an action to recover damages for assault' . . . , but 'are permitted only when a defendant purposefully causes, or is grossly indifferent to causing, injury and defendant's behavior cannot be said to be merely volitional' ... . Defendant's conduct, in other words, must reflect 'a high degree of moral culpability, . . . [be] so flagrant as to transcend mere carelessness, or . . . constitute[] willful or wanton negligence or recklessness' ... . * * * ... [The] proof permits the finding that defendant pursued plaintiff and angrily confronted him over his perceived deficiencies as a driver, then physically subdued plaintiff and falsely accused him of starting the confrontation to ensure that he would be detained by police. If true, this aggressive and dishonest behavior by an off-duty state trooper is precisely the type of "morally culpable" behavior that defendant and others should be deterred from engaging in ...". ***George v. Albert*, 2016 N.Y. Slip Op. 05613, 3rd Dept 7-21-16**

UNEMPLOYMENT INSURANCE.

OWNER OF SEASONAL BUSINESS WAS NOT TOTALLY UNEMPLOYED AND THEREFORE WAS NOT ENTITLED TO UNEMPLOYMENT INSURANCE BENEFITS.

The Third Department determined claimant, the owner of a seasonal charter fishing business, was not totally unemployed and thus was not entitled to unemployment insurance benefits: "It is well settled that a 'claimant who performs activities on behalf of an ongoing business may not be considered totally unemployed, even if such activities are minimal or the business is not profitable, if he or she stands to benefit financially from its continued operation' ... . Notably, this rule has been applied to seasonal businesses as well as those that operate throughout the year ... . Here, claimant performed a number of activities related to his fishing business after he filed his unemployment insurance claim. Specifically, he maintained a business website, communicated with prospective customers through email and by telephone, paid various business-related expenses, renewed insurance, placed an advertisement in a local circulation, leased a boat slip and prepared the boat for operation." ***Matter of Pasinski (Commissioner of Labor)*, 2016 N.Y. Slip Op. 05606, 3rd Dept 7-21-16**

ZONING.

USE OF SINGLE-FAMILY RESIDENCE FOR WEDDINGS, RECEPTIONS AND OTHER EVENTS VIOLATED THE ZONING ORDINANCE WHICH ALLOWED "ACCESSORY USE."

The Third Department determined the use of a single-family residence (called Highland Castle) for weddings, receptions and other events constituted a violation of the zoning ordinance, which allowed "accessory use" of residential property: "The ZBA [zoning board of appeals] found that, given the manner in which petitioner utilized and marketed Highlands Castle as a venue for weddings and other large social gatherings, the challenged use was neither subordinate nor customarily incidental to the primary single-family residential use of the property. On this record, we cannot say that such determination is either irrational or unreasonable. Petitioner insists that Highlands Castle is held out merely for residential rental use, yet the record belies such a claim. In offering Highlands Castle for rent, petitioner emphasized its availability for weddings, large parties and other social receptions. Notably, the property was marketed as available on a daily or even a 'half-day' basis and was advertised upon a pricing structure specific to the type of event that may be of interest to the consumer and, in some instances, to the number of individuals that will be attending. The marketing of Highlands Castle thus evinces a clear intent to target a rental audience that sought more than just residential use of the property and, indeed, no evidence was presented that Highlands Castle had ever been rented out for use as a single-family residence. To the contrary, the evidence shows that Highlands Castle was rented eight times over the course of a roughly two-year period for large-scale events — including three weddings and an American Bar Association function. Further, given that the property is advertised for rent on a year-round basis without restriction as to availability, nothing prevents its regular use as an event venue on a more frequent basis than that which has previously occurred." ***Matter of Lavender v. Zoning Bd. of Appeals of The Town of Bolton*, 2016 N.Y. Slip Op. 05599, 3rd Dept 7-21-16**

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