CasePrepPlus

August 3, 2016

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

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FIRST DEPARTMENT

MUNICIPAL LAW, PERSONAL INJURY.

PETITIONER SHOULD HAVE BEEN ALLOWED TO FILE A LATE NOTICE OF CLAIM IN RESPONSE TO THE CITY'S RAISING AN AFFIRMATIVE DEFENSE IN A RELATED FEDERAL ACTION.

The First Department, over an extensive two-justice dissent, determined the petitioner's motion for leave to file a late notice of claim against the city should have been granted. Petitioner was using a bicycle provided by New York City's Citi Bike program when he struck a wheel stop and flipped over, injuring his head. In a federal diversity action stemming from the same incident, the city asserted an affirmative defense based upon petitioner's failure to wear a helmet. Petitioner, in the federal action, was allowed thereafter to assert a negligence claim against the city based upon the city's failure to rent helmets. Petitioner, in the state action, then sought both to amend the notice of claim and to file a late notice of claim to reflect the helmet allegation, as well as a negligent design allegation (re: placement of the wheel stop). The motion to amend was rejected by the First Department but the motion to file a late notice (General Municipal Law § 50-3(5)) was granted: "Here, to the extent that the allegations concerning the design of the station differ between the original notice of claim and the proposed amended notice of claim, the City unquestionably had actual notice of the claims in the latter document, based on the original notice of claim. Further, it was not prejudiced by petitioner's amplification of the claims in the proposed amended notice, since the alleged defect was not transitory in nature ... . * * * … [P]etitioners had no reason to make a claim concerning the lack of helmets until the City raised the issue. * * * … [T]he City cannot claim to be prejudiced where it chose to inject a mitigation defense into the federal action, and petitioners are merely trying to ensure that their notice of claim supports their effort to rebut that defense ...". **Matter of Corwin v. *City of New York*, 2016 N.Y. Slip Op. 05663, 1st Dept 7-28-16**

SECOND DEPARTMENT

APPEALS, CONTRACT LAW.

REVIEW CRITERIA FOR A SMALL CLAIMS RULING EXPLAINED; SMALL CLAIMS FINDING THAT A CONTRACT WAS UNENFORCEABLE AS UNCONSCIONABLE UPHELD.

Reversing the Appellate Term, the Second Department explained the review criteria for a Small Claims Court (District Court) ruling. The Second Department upheld the Small Claims determination that a contract was unenforceable as unconscionable: "An appeal from a small claims judgment is permitted 'on the sole ground that substantial justice has not been done between the parties according to the rules and principles of substantive law' (Uniform Dist Ct Act § 1807). 'Accordingly, a small claims judgment may not be overturned simply because the determination appealed from involves an arguable point on which an appellate court may differ; the deviation from substantive law must be readily apparent and the court's determination clearly erroneous' ... . Here, the District Court's determination that the subject contract was unenforceable according to its literal terms because it was unconscionable was not clearly erroneous ...". ***Tranquility Salon & Day Spa, Inc. v. Caira*, 2016 N.Y. Slip Op. 05637, 2nd Dept 7-27-16**

CIVIL PROCEDURE.

PROPER VENUE FOR CONSOLIDATED ACTIONS STARTED IN DIFFERENT COUNTIES IS THE COUNTY WHERE THE FIRST ACTION WAS STARTED.

The Second Department determined the proper venue for consolidated actions which had been started in different counties was the county in which the first action was started: "[I]n the absence of special circumstances, where the actions have been commenced in different counties, venue should be placed in the county having jurisdiction over the action commenced first ... . Since venue properly lies in Richmond County with respect to this action, the first of the three subject actions to be commenced, venue of the action commenced in the Supreme Court, Kings County, and venue of the action commenced in the Civil Court, Queens County, should have been transferred to Richmond County." ***Oboku v. New York City Tr. Auth.*, 2016 N.Y. Slip Op. 05635, 2nd Dept 7-27-16**

CIVIL PROCEDURE, PERSONAL INJURY.

WHERE LIABILITY IS CONCEDED BY STIPULATION, PREJUDGMENT INTEREST RUNS FROM THE SUBSEQUENT DAMAGES VERDICT.

The Second Department, in a full-fledged opinion by Justice Balkin, determined, where liability is conceded by stipulation, prejudgment interest runs from the date of the subsequent damages verdict, not the date of the stipulation. Here, the damages trial was held 2 1/2 years after the stipulation was entered. Had liability been determined by "verdict, report or decision," interest would have run from the liability determination: "When the determinations of liability and damages are made together, the computation of prejudgment interest under CPLR 5002 is straightforward ... . When, however, the determinations of liability and damages are bifurcated, the general rule is that prejudgment interest under CPLR 5002 runs from the date of the 'verdict, report or decision' as to liability, rather than from the date of the 'verdict, report or decision' as to damages ... . * * * Stipulations are different. They are not adjudications made by a third party, but voluntary agreements, or contracts, by which the opposing parties themselves chart their own course in a way that makes sense for them... . * * * Clearly, the Legislature did not expressly include stipulations in CPLR 5002. Had the Legislature wished to include stipulations, it easily could have done so, as it has in other statutes...". ***Mahoney v. Brockbank*, 2016 N.Y. Slip Op. 05630, 2nd Dept 7-27-16**

CRIMINAL LAW.

RELIANCE ON A JURISDICTIONAL THEORY AT TRIAL WHICH DIFFERED FROM THE JURISDICTION CRITERIA ALLEGED IN THE INDICTMENT DEPRIVED DEFENDANT OF FAIR NOTICE OF THE CHARGES AGAINST HIM, NEW TRIAL ORDERED.

The Second Department, reversing defendant's conspiracy conviction, determined the difference between the jurisdictional criteria alleged in the indictment and the jurisdictional theory relied on at trial deprived defendant of fair notice of the charges against him: "Proof at trial that varies from an indictment may compromise the defendant's right to fair notice of the charges and his or her right to have those charges determined by the grand jury ... . Here, the indictment alleged jurisdiction in Kings County on the basis of overt acts committed in Kings County. However, the proof at trial did not support that theory and, as charged to the jury, jurisdiction in Kings County was based on conduct which had, or was likely to have, a particular effect upon Kings County pursuant to CPL 20.40(2)(c). As the evidence presented at trial varied from the indictment, and, contrary to the People's contention, the defendant did not have fair notice of the jurisdictional theory presented to the jury, the judgment convicting the defendant of conspiracy in the second degree must be reversed and the matter remitted to the Supreme Court, Kings County, for a new trial ...". ***People v. Wilson*, 2016 N.Y. Slip Op. 05660, 2nd Dept 7-27-16**

FAMILY LAW, APPEALS.

CRITERIA FOR REVIEW OF A CUSTODY DETERMINATION CONCISELY EXPLAINED.

The Second Department, upholding Family Court's custody determination, offered a concise description of the analytical criteria: "There is 'no prima facie right to the custody of the child in either parent' ... . The essential consideration in making an award of custody is the best interests of the children . . . , which are determined by a review of the totality of the circumstances ... . In making a determination as to what custody arrangement is in the children's best interests, the court should consider the quality of the home environment and the parental guidance the custodial parent provides for the children, the ability of each parent to provide for the children's emotional and intellectual development, the financial status and ability of each parent to provide for the children, the relative fitness of the respective parents, and the effect an award of custody to one parent might have on the children's relationship with the other parent ... . The court should also consider the children's wishes, weighed in light of their ages and maturity ... . 'As a custody determination depends to a great extent upon an assessment of the character and credibility of the parties and witnesses, the findings of the Family Court will not be disturbed unless they lack a sound and substantial basis in the record' ...". ***Matter of Schultheis v. Schultheis*, 2016 N.Y. Slip Op. 05648, 2nd Dept 7-27-16**

MUNICIPAL LAW, PERSONAL INJURY.

NO SPECIAL RELATIONSHIP WITH PLAINTIFF'S DECEDENT, CITY IMMUNE FROM SUIT.

The Second Department determined city emergency response personnel did not enter into a special relationship with plaintiff's decedent based upon the 911 operator's assurance an ambulance was on its way. There was some confusion about where plaintiff's decedent was located which resulted is some delay in the arrival of help: "Here, the defendant demonstrated its prima facie entitlement to judgment as a matter of law dismissing the complaint by establishing that no special relationship existed between it and the decedent ... . The defendant demonstrated, prima facie, that the firefighters did not assume an affirmative duty to act on the decedent's behalf, and, in opposition, the plaintiffs failed to raise a triable issue of fact ... . Moreover, even assuming that the 911 operator's assurance that an ambulance was on its way constituted an assumption by the defendant of an affirmative duty to act on behalf of the decedent, the defendant demonstrated, prima

facie, that the decedent and the plaintiffs did not rely to their detriment on that assurance. In opposition, the plaintiffs failed to raise a triable issue of fact. The record does not show that the plaintiffs were lulled by any assurance made by the 911 operator into a false sense of security that caused them 'to forego other available avenues of protection' ...". ***Holloway v. City of New York*, 2016 N.Y. Slip Op. 05627, 2nd Dept 7-27-16**

PERSONAL INJURY, MEDICAL MALPRACTICE.

ERROR IN JUDGMENT JURY CHARGE SHOULD NOT HAVE BEEN GIVEN, NEW TRIAL REQUIRED.

The Second Department, reversing the defense verdict, determined the trial court should not have given the jury the "error in judgment" charge in this medical malpractice action. Plaintiff alleged defendant negligently diagnosed a lump as benign without any further diagnostic tests. The "error in judgment" theory does not apply in that circumstance: "Supreme Court erred in giving an 'error in judgment' charge (PJI 2:150 ¶ 5) over the plaintiff's objection. 'That charge is appropriate only in a narrow category of medical malpractice cases in which there is evidence that defendant physician considered and chose among several medically acceptable treatment alternatives' ... . Contrary to the defendant's contention, this case does not present a choice between one of two or more medically acceptable alternative treatments or techniques ... . Rather, the defendant testified that he diagnosed the decedent, in January of 2002, with a benign condition 'that was not urgent,' and he neither suspected cancer nor considered the option of sending the decedent for further diagnostic testing. Thus, the case presented the jury with the straightforward question of whether the defendant deviated from the applicable standard of care in diagnosing the decedent with a benign condition in January of 2002, and the 'error in judgment' charge was not warranted ...". ***Lacqua v. Silich*, 2016 N.Y. Slip Op. 05628, 2nd Dept 7-27-16**

PERSONAL INJURY, LABOR LAW.

SAFETY CONSULTANT DID NOT EXERCISE SUFFICIENT CONTROL OVER WORKSITE TO BE LIABLE UNDER LABOR LAW **§§ 240(1), 241(6) OR 200;** CRITERIA EXPLAINED.

The Second Department determined a work site "safety consultant" (PSS) did not exercise sufficient supervisory control to be held liable under the Labor Law. Plaintiff was injured when he fell through a plywood-covered hole in a ramp. The decision includes detailed recitations of the black letter law requirements for Labor Law §§ 240(1), 241(6) and 200 causes of action: "PSS submitted evidence demonstrating that its role at the work site was only one of general supervision, and that it did not have the authority to control the work performed or the safety precautions taken by the general contractor and the plaintiff's employer, which is insufficient to impose liability on a safety consultant under the Labor Law ... . 'To be held liable under Labor Law § 200 for injuries arising from the manner in which work is performed, a defendant must have authority to exercise supervision and control over the work' ... . 'A defendant has the authority to supervise or control the work for purposes of Labor Law § 200 when that defendant bears the responsibility for the manner in which the work is performed' ... . '[T]he right to generally supervise the work, stop the contractor's work if a safety violation is noted, or to ensure compliance with safety regulations and contract specifications is insufficient to impose liability under Labor Law § 200 or for common-law negligence' ... . Where a plaintiff's injuries arise not from the manner in which the work was performed, but from a dangerous condition on the premises, a contractor may be liable under Labor Law § 200 'only if it had control over the work site and either created the dangerous condition or had actual or constructive notice of it' ... . Moreover, an entity is not deemed to be an agent of an owner or contractor for purposes of Labor Law § 200 if it 'lacked sufficient control over the premises and the activity that brought about the injury'...". ***Marquez v. L & M Dev. Partners, Inc.*, 2016 N.Y. Slip Op. 05631, 2nd Dept 7-27-16**

PERSONAL, INJURY, LABOR LAW, REAL PROPERTY LAW.

CONDOMINIUM BOARD OF MANAGERS, NOT INDIVIDUAL CONDOMINIUM OWNERS, IS LIABLE FOR INJURY IN A COMMON AREA.

The First Department, in a full-fledged opinion by Justice Friedman, over a full-fledged dissenting opinion by Justice Gische, determined the board of managers of a condominium was liable under the Labor Law for plaintiff's elevation-related injury in a common area (the boiler room), not the sponsor which still owned several unsold condominium units: "While defendant 41 West 72 LLC acquired the building in question by a deed recorded in January 2001, several months later, in August 2001, 41 West 72 LLC made the building subject to the Condominium Act (Real Property Law, article 9-B) by executing and filing a declaration of condominium pursuant to Real Property Law § 339-f … . The declaration defines the common elements of the condominium (Real Property Law § 339-e[2]) to include the building's boiler room. As a common element of the condominium, the boiler room was, at the time of plaintiff's accident, owned collectively by all of the owners of the building's 130 units ... . However, the conversion of the building to a condominium placed its common elements 'solely under the control of the [condominium's] board of managers' pursuant to the Condominium Act, which 'recogni[zes] that the board exercises exclusive control over the common elements' ...". ***Jerdonek v. 41 W. 72 LLC*, 2016 N.Y. Slip Op. 05666, 1st Dept 7-28-16**

THIRD DEPARTMENT

CRIMINAL LAW.

OKLAHOMA FIREARM STATUTE DOES NOT HAVE AN OPERABILITY ELEMENT AND CANNOT THEREFORE SERVE AS A PREDICATE FELONY IN NEW YORK.

The Third Department determined the Oklahoma statute prohibiting possession of a firearm could not be used as a predicate felony in New York. The Oklahoma statute does not have an operability element. In New York, operability is a required element: "County Court erred in sentencing defendant as a second felony offender, as the elements of his predicate Oklahoma felony were not 'equivalent to those of a New York felony' ... . As relevant here, the inquiry regarding equivalency is 'limited to a comparison of the crimes' elements as they are respectively defined in the foreign and New York penal statutes' ... . Defendant was previously convicted under an Oklahoma statute prohibiting possession of a firearm by a felon; however, operability is not a required element of the Oklahoma statute ... . In New York '[o]perability is a required element of the crime of criminal possession of a handgun, rifle or shotgun' ... . Thus, as the comparable New York statute requires an element that the Oklahoma crime does not, defendant's Oklahoma conviction cannot support a finding that he was a second felony offender ...". ***People v. Gibson*, 2016 N.Y. Slip Op. 05668, 3rd Dept 7-28-16**

CRIMINAL LAW.

PROTECTIVE SWEEP WHICH UNCOVERED METH LAB NOT JUSTIFIED; MIRANDIZED STATEMENTS NOT SUFFICIENTLY ATTENUATED FROM IMPROPER QUESTIONING; SUPPRESSION SHOULD HAVE BEEN GRANTED.

The Third Department determined meth lab evidence and defendant's Mirandized statements should have been suppressed. The police were called to an apartment and heard the sounds of a physical altercation inside. The police opened the unlocked door and separated the two men who were fighting. Defendant then came out of the bathroom and was asked to sit down. The officers heard someone in the back bedroom which defendant rented. Defendant told the police his wife was in the back bedroom. The officers knocked on the locked bedroom door and defendant's wife said she had to get dressed. She then came out of the bedroom into the living room. One of the officers smelled a chemical odor in the back bedroom, went in, lifted up a shirt and found the meth lab equipment. The Third Department held that a protective sweep of the back bedroom was not justified (the concurrence disagreed). In addition, the Third Department determined the People did not demonstrate defendant's Mirandized statements were sufficiently attenuated from the improper questioning of the defendant at the apartment. ***People v. Harris*, 2016 N.Y. Slip Op. 05670, 3rd Dept 7-28-16**

DISCIPLINARY HEARINGS (INMATES).

HEARING OFFICER SHOULD HAVE INQUIRED FURTHER INTO INMATE'S REFUSAL TO TESTIFY IN PETITIONER'S HEARING, NEW HEARING ORDERED.

The Third Department determined petitioner was entitled to a new hearing. An inmate petitioner wished to call as a witness refused to testify, giving a reason which was on its face untrue. In that circumstance, the hearing officer was obligated to inquire further into the reason for the inmate's refusal: "During the disciplinary hearing, petitioner requested the testimony of the other inmate who was present in the room at the time of the incident. The Hearing Officer contacted that inmate, who refused to testify and executed a refusal form stating, 'I know nothing.' This statement, however, is belied by evidence in the record. According to the unusual incident report, the potential inmate witness informed correction officers that petitioner 'stabbed [the victim] with the weapon that was found in the garbage can.' Notably, the Hearing Officer specifically referenced the witness's account of the incident in his statement of the evidence that he relied on in making the determination of guilt. Inasmuch as evidence in the record 'casts doubt on the authenticity of the reason[] given' for the witness's refusal . . . , and there is nothing in the record indicating that the Hearing Officer made any further inquiry, we find that petitioner's right to call witnesses was violated ... . Insofar as the Hearing Officer articulated a good-faith reason for the denial of the witness, 'this amounts to a regulatory violation requiring that the matter be remitted for a new hearing' ...". ***Matter of Peterson v. Annucci*, 2016 N.Y. Slip Op. 05681, 3rd Dept 7-28-16**

UNEMPLOYMENT INSURANCE.

LICENSED CREATIVE ARTS THERAPIST WAS AN EMPLOYEE ENTITLED TO BENEFITS.

The Third Department determined that claimant, a licensed creative arts therapist, was an employee of CompassionNet, which provides home care to sick and terminally ill children: "[T]he record evidence demonstrates, that while claimant was not required to undergo any training, she submitted a résumé and went through an interview process that was several hours in duration. Upon being selected for placement on a panel of therapists, claimant signed an agreement identifying her as an independent contractor; however, that agreement required claimant to adhere to policies established by CompassionNet and prohibited her from employing or subcontracting another therapist in her place without the prior written consent of CompassionNet. A schedule attached to the agreement unilaterally established the fees that clients would be charged

for claimant's services and the amounts that she would be reimbursed for her travel expenses, including parking and tolls. Although claimant could decline a particular assignment, the agreement provided that, upon being assigned, a case manager would establish the visit frequency and the duration and time of day that claimant would provide her services, and required claimant to submit documentation to CompassionNet within 72 hours of providing services and invoices in a predetermined format at least monthly. To that end, claimant was paid for her services regardless of whether CompassionNet received payment from, or on behalf of, the client. While CompassionNet required claimant to maintain her own professional liability insurance, claimant explained that she was never self-employed as a creative arts therapist and that she did not provide her services for any other entity during the time period in question." ***Matter of Kliman (Genesee Region Home Care Assn., Inc. — Commissioner of Labor)*, 2016 N.Y. Slip Op. 05680, 3rd Dept 7-28-16**

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