CasePrepPlus

February 1, 2017

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

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FIRST DEPARTMENT

ATTORNEYS, LEGAL MALPRACTICE.

PLAINTIFF, WHICH ULTIMATELY WON THE PATENT INFRINGEMENT SUIT, ALLEGED MALPRACTICE IN THE BRINGING OF CERTAIN MOTIONS; HAD THE MOTIONS WON, IT WAS ALLEGED, $10 MILLION IN LEGAL FEES WOULD HAVE BEEN AVOIDED; THE MALPRACTICE ACTION WAS PROPERLY DISMISSED.

The First Department determined the legal malpractice action by plaintiff (Brookwood) against defendant law firm (A & B) was properly dismissed. The law firm defended plaintiff in a patent infringement action which eventually won (with new lawyers). Plaintiff incurred legal fees of $10 million. In this malpractice action, plaintiff alleged its legal fees would have been much lower had the law firm won certain motions early on in the case: "A focal point of this appeal is Brookwood's claim that A & B, in the patent action, negligently litigated defenses that were available to Brookwood pursuant to 28 USC § 1498. 28 USC § 1498 provides that when a patent is infringed for the benefit of the United States government, the patent holder's remedy is against the United States in the United States Court of Federal Claims. Brookwood alleges that had A & B not been negligent, the motions that A & B eventually brought based on 28 USC § 1498 would have been granted and Brookwood would have avoided the approximately $10 million it expended on defending itself at trial and on appeal. * * * Decisions regarding the evidentiary support for a motion or the legal theory of a case are commonly strategic decisions and a client's disagreement with its attorney's strategy does not support a malpractice claim, even if the strategy had its flaws." ***Brookwood Cos., Inc. v. Alston & Bird LLP*, 2017 N.Y. Slip Op. 00535, 1st Dept 1-26-17**

CIVIL PROCEDURE.

PLAINTIFF DID NOT SUFFICIENTLY DEMONSTRATE DEFENDANT'S AGENTS TRANSACTED BUSINESS IN NEW YORK, NEW YORK DID NOT HAVE LONG-ARM JURISDICTION.

The First Department, over a substantial partial dissent, determined plaintiff did not demonstrate the transaction of business in New York by agents of the defendant. Therefore, New York could not exercise long-arm jurisdiction over the defendant and defendant's motion to dismiss was properly granted: "Pursuant to CPLR 302(a)(1) a New York court may exercise personal jurisdiction over a nondomiciliary if the nondomiciliary has purposefully transacted business within the state and there is 'a substantial relationship between the transaction and the claim asserted' ... . 'Purposeful activities are volitional acts by which the non-domiciliary avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws' ... . 'More than limited contacts are required for purposeful activities sufficient to establish that the non-domiciliary transacted business in New York' ... . * * * To establish that a defendant acted through an agent, a plaintiff must 'convince the court that [the New York actors] engaged in purposeful activities in this State in relation to [the] transaction for the benefit of and with the knowledge and consent of [the defendant] and that [the defendant] exercised some control over [the New York actors]' ... . '[T]]o make a prima facie showing of control, a plaintiff's allegations must sufficiently detail the defendant's conduct so as to persuade a court that the defendant was a primary actor' in the specific matter in question; control cannot be shown based merely upon a defendant's title or position within the corporation, or upon conclusory allegations that the defendant controls the corporation' ...". ***Coast to Coast Energy, Inc. v. Gasarch*, 2017 N.Y. Slip Op. 00532, 1st Dept 1-26-17**

CIVIL PROCEDURE, EDUCATION-SCHOOL LAW.

NO JUSTICIABLE CONTROVERY BETWEEN LAW SCHOOL AND AN ALLEGED DIPLOMA MILL, DECLARATORY JUDGMENT ACTION PROPERLY DISMISSED.

The First Department determined there was no 'justiciable controversy" between Touro College (law school) and Novus University (law school). The declaratory judgment action was therefore properly dismissed. Touro, after admitting a Novus graduate into its LLM program, was sued by the Novus graduate when Touro refused to grant the LLM degree upon his successful completion of the program. The Novus graduate had misrepresented Novus as a foreign law school. Touro had successfully defended the lawsuit brought by the Novus graduate: "Touro, an institute of higher education, accredited by the American Bar Association (ABA), alleges that it and similarly-situated institutions have been harmed by Novus in that individuals who have received degrees from Novus, an online, non-ABA accredited law school, have applied to Masters

of Law programs at law schools, including Touro, while falsely representing that Novus was a foreign institution. Touro maintains that there is a justiciable controversy between Touro and Novus warranting declaratory relief (CPLR 3001), since Touro was forced to defend against 'meritless' litigation instituted by a Novus graduate who was denied a Touro LLM, after he was admitted to the program based on such a misrepresentation ... . Touro's allegations fail to identify any present controversy or disputed jural relationship between the parties to this action that would be resolved by issuance of the requested declaration." ***Touro Coll. v. Novus Univ. Corp.*, 2017 N.Y. Slip Op. 00546, 1st Dept 1-26-17**

CRIMINAL LAW.

FORMER GOLDMAN SACHS EMPLOYEE'S CONVICTION FOR UNLAWFUL USE OF SCIENTIFIC MATERIAL (COPYING PROPRIETARY COMPUTER SOURCE CODE) SHOULD NOT HAVE BEEN SET ASIDE, VERDICT REINSTATED.

The First Department, in a full-fledged opinion by Justice Richter, determined defendant's conviction for unlawful use of secret scientific information should not have been set aside: "Defendant was formerly employed by Goldman Sachs as a computer programmer. Prior to leaving Goldman to work for a potential competitor, defendant made a digital copy of Goldman's proprietary computer source code by uploading and saving it to a hard drive of a server located outside the Goldman network. After surreptitiously uploading the source code, defendant transferred copies of it to several of his personal computing devices, and subsequently shared it with his new employer. As a result, defendant was charged with unlawful use of secret scientific material (Penal Law § 165.07). After a jury convicted defendant of this crime, the trial court set aside the verdict. In this appeal, we are asked to decide whether defendant's actions constitute legally sufficient evidence to establish that he made a 'tangible reproduction or representation' of the source code, and did so with the 'intent to appropriate . . . [its] use,' within the meaning of the unlawful use statute. We conclude that, viewed in the light most favorable to the People, the evidence was legally sufficient as to both of these elements. Accordingly, we reverse the trial court's decision, reinstate the jury's verdict and remand the matter for sentencing." ***People v. Aleynikov*, 2017 N.Y. Slip Op. 00449m 1st Dept 1-24-17**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

LABOR LAW 240 (1) AND 241 (6) CAUSES OF ACTION SHOULD NOT HAVE BEEN DISMISSED, LIGHTING BAR FELL ON PLAINTIFF WHEN HE WAS DISMANTLING AN EXHIBITION BOOTH.

The First Department, reversing Supreme Court, determined defendant's motion for summary judgment on plaintiff's Labor Law 240(1) and 241(6) claims should not have been granted. Plaintiff was dismantling an exhibition booth when a lighting bar fell on him: "Since [plaintiff's] specific task at the moment the accident occurred was ancillary to and part of the larger demolition job of dismantling the booths, in which he was to participate, plaintiff was engaged in an activity within the purview of Labor Law §§ 240(1) and 241(6) ... . The lighting bar was an object that required securing to prevent it from becoming dislodged or falling during the work ... . Further, in view of the weight of the lighting bar, we cannot conclude as a matter of law that the distance it fell was de minimis ... . Nor did defendants demonstrate that any securing device would have defeated the task of removing the lighting bar .. . 12 NYCRR 23-1.8(c)(1), which mandates approved safety hats for persons 'required to work or pass within any area where there is a danger of being struck by falling objects or materials,' is sufficiently concrete to give rise to Labor Law § 241(6) liability ...". ***Rutkowski v. New York Convention Ctr. Dev. Corp.*, 2017 N.Y. Slip Op. 00555, 1st Dept 1-26-17**

MENTAL HYGIENE LAW.

COMPENSATION FOR A GUARDIAN UNDER THE MENTAL HYGIENE LAW IS NOT CALCULATED ACCORDING TO THE FORMULA IN THE SURROGATE'S COURT PROCEDURE ACT, GUARDIAN ENTITLED ONLY TO REASONABLE COMPENSATION.

The First Department determined Supreme Court properly set the compensation for a guardian (Goldstein) who served for about a month at $100,000, rejecting the guardian's request for about $700,000. The Mental Hygiene Law requires only "reasonable" compensation, and does not require use of the compensation formula set out in the Surrogate's Court Procedure Act (SPCA): "... [A]lthough the Mental Hygiene Law, as originally enacted, encouraged courts to consider a compensation plan similar to the guidelines set forth in the SCPA after the statute was amended in 2004, all references to the SCPA were eliminated. The Mental Hygiene Law does not provide any formula or guideline for the court to follow in setting compensation for an Article 81 guardian, nor does it refer to such compensation as a 'commission.' * * * ... [W]e reject Goldstein's argument that the court was required to find misfeasance or misconduct on his part in order to deny him a full commission calculated under the SCPA. Under the Mental Hygiene Law, Goldstein is entitled to no more than 'reasonable compensation' for his services, and there is no mathematical formula in the mental hygiene law that the motion court failed to apply or disregarded. A court may, and in this case did, with respect to Goldstein's services as temporary guardian, choose to compensate a guardian in quantum meruit, using an hourly rate ... . Whether using the hourly rate approved by the court of $350 per hour or using his usual hourly rate of $495, Goldstein was well compensated for his time ...". ***Matter of Goldstein v. Zabel*, 2017 N.Y. Slip Op. 00426, 1st Dept 1-24-17**

PERSONAL INJURY.

NO NOTICE OF ALLEGED SKIDDING AND SHAKING OF ESCALATOR, RES IPSA LOQUITUR NOT APPLICABLE.
The First Department determined the escalator-fall case against defendant Macy's and (apparently) defendant ThyssenKrupp (responsible for escalator maintenance) was properly dismissed. The defendants demonstrated they had no notice of a problem with the escalator (either before or after the accident). The doctrine of res ipsa loquitur did not apply because plaintiff did not show the alleged skidding and shaking of the escalator could only have resulted from defendants' negligence: "Macy's operations manager and ThyssenKrupp's elevator mechanic both testified that they did not receive any reports of the escalators shaking or stopping and starting before the date of plaintiff's accident; nor did anyone, including plaintiff, before her July 2009 accident, observe the escalators stop and start several times in succession ... . The fact that Macy's made service calls to ThyssenKrupp on January 15, 2009 and February 15, 2009, because the escalator from the basement to the main level was not running, does not raise an issue of fact as to notice, since there is no evidence that those calls were occasioned by the type of malfunctioning plaintiff describes ... . * * * Plaintiff claims that the escalator skidded and shook causing her to fall forward. The evidence in this record establishes that the elevator never operated in this manner either before or after the alleged accident. Plaintiff was able, after her fall, to ride the escalator up to the next level without any further escalator malfunction. Without more, this proof is insufficient to establish that the event is of a kind that ordinarily does not happen in the absence of negligence ... ." ***Torres-Martinez v. Macy's, Inc.*, 2017 N.Y. Slip Op. 00429, 1st Dept 1-24-17**

PERSONAL INJURY.

DOCTRINE OF RES IPSA LOQUITUR PRECLUDED SUMMARY JUDGMENT IN THIS ELEVATOR ACCIDENT CASE.
The First Department determined defendant's motion for summary judgment in this elevator accident case was properly denied. The doctrine of res ipsa loquitur applied: "The motion court properly concluded that the doctrine of res ipsa loquitur precludes the award of summary judgment in defendant's favor in this action where plaintiff was injured when the elevator in which he was riding came to a sudden and abrupt stop. Elevator malfunctions ordinarily do not occur in the absence of negligence ... , and defendant has failed to demonstrate as a matter of law that it lacked exclusive control over the subject elevator at the time of the accident. Defendant's argument that vandalism was the cause of the elevator's malfunction, lacks support in the record, and there is no evidence that plaintiff's actions played a role in the cause of the accident." ***Galante v. New York City Hous. Auth.*, 2017 N.Y. Slip Op. 00430, 1st Dept 1-24-17**

SECURITIES, CONTRACT LAW, EVIDENCE.

DEUTSCHE BANK BREACHED CREDIT DEFAULT SWAP AGREEMENTS.
The First Department, in a decision too detailed to fairly summarize here, determined the defendant Deutsche Bank breached credit default swap agreements with plaintiff Good Hill Master Fund. Good Hill was found to have acted in good faith and in a commercially reasonable manner in negotiating the price of the notes at issue. In addition Supreme Court did not abuse its discretion in prohibiting expert testimony offered by Deutsche Bank because interpretation of the contracts was within the ken of the trial judge: "We find no basis to disturb the court's determination that Deutsche Bank breached the credit default swap agreements at issue here ... . As the trial court found in awarding judgment in Good Hill's favor, Good Hill negotiated at arm's length with Bank of America to sell six tranches of notes the Bank had previously sold Good Hill at $.29 on the dollar, so that the Bank of America could unwind and terminate a securitization in the then-declining mortgage market. Bank of America's resulting writedown of the B6 notes would trigger a negative credit event under the swap agreements. As a result, Good Hill negotiated with Bank of America to forgive only 17% of the principal amount, resulting in a smaller payout to Deutsche Bank under the swap agreements, as opposed to forgiving principal of 71% across the board on all the tranches of notes based on the $.29 purchase price. Bank of America was free to accept or reject that 83% allocation and had rejected several prior proposals from Good Hill that would have resulted in no payment or an even smaller payment to Deutsche Bank." ***Good Hill Master Fund L.P. v. Deutsche Bank AG*, 2017 N.Y. Slip Op. 00428, 1st Dept 1-24-17**

SECOND DEPARTMENT

COURT OF CLAIMS, MUNICIPAL LAW, ENVIRONMENTAL LAW.

ACTION BY TOWN SEEKING REIMBURSEMENT OF LITIGATION COSTS PURSUANT TO A PROVISION OF THE ENVIRONMENTAL CONSERVATION LAW WAS PROPERLY AND TIMELY BROUGHT IN THE COURT OF CLAIMS.
The Second Department, reversing Supreme Court, determined the town's action pursuant to the Environmental Conservation Law seeking reimbursement for litigation costs incurred in defense of discrimination suits was properly and timely brought. Supreme Court had ruled the town should have brought an Article 78 action in Supreme Court: "In 1991, the New York State Legislature adopted article 44 of the Environmental Conservation Law (hereinafter the Greenway legislation), which created the Hudson River Valley Greenway (hereinafter the Greenway). The purpose of this article was to 'protect and enhance the special places of scenic, cultural and ecological importance' in the Hudson River Valley (ECL 44-0101). Among other things, the Greenway legislation created a regional planning council and gave communities within its range

the opportunity to enter into the 'Greenway Compact,' a voluntary regional compact among municipalities to facilitate cooperative planning (see ECL 44-0103[2], [4]; 44-0119). To encourage communities to participate in the compact, the State of New York agreed that participating communities (as defined by ECL 44-0103[10]) would be entitled to indemnification in actions arising from their participation in the compact (see ECL 44-0119[7]). In 1992, this provision was amended to limit the indemnification in actions alleging, among other things, unlawful discrimination. The amendment provided that communities would be entitled to reimbursement for all reasonable attorneys' fees and litigation expenses only if they prevailed in the underlying action." ***Town of Rhinebeck v. State of New York*, 2017 N.Y. Slip Op. 00502, 2nd Dept 1-25-17**

CRIMINAL LAW, EVIDENCE.

ERRONEOUS SANDOVAL RULING REQUIRED REVERSAL.

The Second Department, reversing defendant's conviction, over a dissent, determined the Sandoval ruling erroneously allowed cross examination about a prior crime. The defendant chose not to testify and the proof was deemed far from overwhelming. During the prior crime (robbery) defendant held a knife to the victim's throat. In the rape trial at issue, it was alleged the defendant held a knife to the victim's throat: "While we recognize that, under Sandoval and its progeny, the mere similarity of crimes or conduct to the charge for which a defendant stands trial does not automatically preclude inquiry, here, under the particular facts and circumstances of this case, a proper balancing of the probative value of the defendant's prior conduct of placing a knife to the robbery complainant's neck, in connection with the issue of credibility, against the risk of unfair prejudice to the defendant, should have resulted in a ruling precluding the People's proposed line of questioning ... . Moreover, the error was not harmless ... . The proof of the defendant's guilt was far from overwhelming, and the defendant was the only available source of material testimony in support of his defense (see *People v. Sandoval*, 34 NY2d at 378). Inasmuch as the pretrial ruling affected the defendant's decision whether to testify and denied the jury potentially significant material evidence, the Supreme Court's Sandoval ruling cannot be considered harmless ...". ***People v. Calderon*, 2017 N.Y. Slip Op. 00479, 2nd Dept 1-25-17**

CRIMINAL LAW, EVIDENCE.

EVIDENCE BEFORE THE GRAND JURY WAS LEGALLY SUFFICIENT, CRITERIA EXPLAINED.

The Second Department, reversing Supreme Court, determined the evidence before the grand jury was legally sufficient to support the indictment (intimidating a victim or witness). The court explained the applicable standard of proof: " 'Courts assessing the sufficiency of the evidence before a grand jury must evaluate whether the evidence, viewed most favorably to the People, if unexplained and uncontradicted—and deferring all questions as to the weight or quality of the evidence—would warrant conviction' ... . 'Legally sufficient evidence' means competent evidence which, if accepted as true, would establish every element of an offense charged and the defendant's commission thereof' ... . ' In the context of a Grand Jury proceeding, legal sufficiency means prima facie proof of the crimes charged, not proof beyond a reasonable doubt' ... . 'The reviewing court's inquiry is limited to whether the facts, if proven, and the inferences that logically flow from those facts supply proof of every element of the charged crimes,' and whether the Grand Jury could rationally have drawn the guilty inference'. That other, innocent inferences could possibly be drawn from those facts is irrelevant to the sufficiency inquiry as long as the Grand Jury could rationally have drawn the guilty inference' ...". ***People v. Franov*, 2017 N.Y. Slip Op. 00482, 2nd Dept 1-25-17**

CRIMINAL LAW, EVIDENCE.

JURY-NOTE ERROR REQUIRED REVERSAL; ALL INDICTMENT COUNTS WERE TAINTED BY THE JURY-NOTE ERROR; UNSWORN VIDEOTAPED STATEMENT OF WITNESS PROPERLY ALLOWED BECAUSE DEFENDANT CAUSED THE WITNESS'S UNAVAILABILITY.

The Second Department, reversing defendant's conviction, determined (1) there was no evidence the trial judge gave counsel notice and a chance to respond to a jury note, (2) the jury-note error affected all the counts of which defendant was convicted, and (3) the videotaped statement of an unsworn witness was properly admitted based upon proof the witness was unavailable due to defendant's intentional misconduct: "Here, the jury submitted a note stating, 'Please clarify 1st degree assault; 2nd degree assault; 2nd degree manslaughter [and] 2nd degree murder.' The Supreme Court did not read the contents of the note into the record at any point, and there is no record indication that the court communicated to the parties that a jury note had been received. Instead, after a recess for deliberations, the court merely stated 'let us revisit these counts,' and then it gave the charges for those offenses. The court's failure to provide counsel with meaningful notice of a substantive jury note was a mode of proceedings error ... , which requires reversal of the judgment and a new trial ... . When the error at issue relates to a mistake in the court's charge to the jury, the primary focus is on any effect the error 'might have had on the jury's ability to deliberate fairly on the non-tainted counts, although attention must of course be paid as well to the evidentiary relationship between the tainted counts and the non-tainted counts' ... . Reversal is required if 'there is a reasonable possibility' that the jury's decision to convict on the tainted counts influenced its guilty verdict on the remaining counts in a meaningful way' ... . In this case, given the evidentiary relationship between the tainted counts and

the weapon possession count, it cannot be said that there is no reasonable possibility that the jury's decision to convict on the other counts did not influence its guilty verdict on the weapon possession count ... . In a criminal case, the out-of-court statements of a witness may be admitted as direct evidence at trial where, inter alia, the witness is unavailable to testify and proof establishes that the witness's unavailability was procured by intentional misconduct on the part of the defendant ...". ***People v. Thomas*, 2017 N.Y. Slip Op. 00497, 2nd Dept 1-25-17**

EMPLOYMENT LAW, CIVIL PROCEDURE, APPEALS, CONTRACT LAW.

APPELLATE COURT NEED NOT REVIEW ISSUES NOT SUPPORTED BY DOCUMENTS IN THE APPENDIX; COUPLING DECLARATORY JUDGMENT WITH SPECIFIC PERFORMANCE WAIVED RIGHT TO JURY TRIAL; FAITHLESS SERVANT DOCTRINE FORFEITED PLAINTIFF'S RIGHT TO A STOCK OPTION.

The Second Department determined (1) certain issues in plaintiff's appeal could not be addressed because the necessary documents were not included in the appendix provided to the appellate court, (2) the faithless servant doctrine applied to plaintiff who, by his disloyalty, forfeited his contractual right to a stock option, and (3) the plaintiff waived his right to a jury trial in this declaratory judgment action: "This Court is not obligated to determine an issue where the appendix submitted to it is inadequate to permit review ... . * * * Where a plaintiff joins an equitable claim for specific performance to a legal claim for damages, the plaintiff waives the right to a jury trial ... . '[A] declaratory judgment action . . . can be legal or equitable in nature, and to determine whether a party is entitled to a jury trial, it is necessary to examine which of the traditional actions would most likely have been used to present the instant claim had the declaratory judgment action not been created' ... . Here, the Supreme Court correctly determined that the plaintiff's declaratory judgment cause of action was in the nature of a prayer for specific performance ... . Accordingly, the court correctly determined that the plaintiff had waived his right to a jury trial ... . * * * ... [T]he court properly applied the faithless servant doctrine and determined that, pursuant to that doctrine, the plaintiff forfeited the right to exercise the stock option ...". ***Trimarco v. Data Treasury Corp.*, 2017 N.Y. Slip Op. 00503, 2nd Dept 1-25-17**

MUNICIPAL LAW.

APPLICATION FOR LEAVE TO SERVE LATE NOTICES OF CLAIM SHOULD HAVE BEEN GRANTED, CRITERIA EXPLAINED.

The Second Department, reversing Supreme Court, determined the city's (petitioner's) application to serve late notices of claim should have been granted. The court provided a clear explanation of the analytical criteria: "The key factors in determining whether to allow service of a late notice of claim are whether (1) the petitioner demonstrated a reasonable excuse for the failure to serve a timely notice of claim, (2) the municipality acquired actual notice of the essential facts of the claim within 90 days after the claim arose or a reasonable time thereafter, and (3) the delay would substantially prejudice the municipality in its defense ... . The presence or absence of any one of these factors is not necessarily determinative ... and the absence of a reasonable excuse is not necessarily fatal ... . 'However, whether the public corporation acquired timely actual knowledge of the essential facts constituting the claim is seen as a factor which should be accorded great weight' ... . Here, the County acquired timely actual knowledge of the essential facts constituting the claims ...". ***Matter of City of New York v. County of Nassau*, 2017 N.Y. Slip Op. 00465, 2ne Dept 1-25-17**

PERSONAL INJURY.

PLAINTIFF ENTITLED TO SUMMARY JUDGMENT IN THIS INTERSECTION ACCIDENT CASE, WHETHER DEFENDANT STOPPED BEFORE ENTERING PLAINTIFF'S RIGHT OF WAY WAS NOT DISPOSITIVE.

The Second Department determined plaintiff was entitled to summary judgment in this intersection accident case. The court noted that whether the defendant's truck (driven by Lindo) stopped at a stop sign before entering plaintiff's right of way was not dispositive. It was enough that the truck entered plaintiff's path, whether it had previously stopped or not: "Here, the plaintiff established his prima facie entitlement to judgment as a matter of law by demonstrating that Lindo, who was faced with a stop sign at the intersection, negligently drove the sanitation truck into the intersection without yielding the right-of-way to the plaintiff, and that this was the sole proximate cause of the accident ... . In opposition, the defendants failed to raise a triable issue of fact. The question of whether Lindo stopped at the stop sign is not dispositive, since the evidence established that he failed to yield even if he did stop ... . Moreover, the defendants failed to contest the plaintiff's deposition testimony that he was already in the intersection when he saw the sanitation truck one second prior to the impact, and therefore could not have avoided the accident ...". ***Fuertes v. City of New York*, 2017 N.Y. Slip Op. 00457, 2nd Dept 1-25-17**

PERSONAL INJURY.

DEFENDANT DID NOT DEMONSTRATE WHEN ALLEGEDLY DEFECTIVE STEP WAS LAST INSPECTED AND DID NOT DEMONSTRATE ANY DEFECT WAS LATENT, SUMMARY JUDGMENT PROPERLY DENIED.

The Second Department determined defendants' motion for summary judgment in this slip and fall case was properly denied. Plaintiff was injured when a concrete step broke and gave way. Defendants did not demonstrate when the area in question was last inspected and did not demonstrate the defect at issue was latent: "A defendant moving for summary judgment in a slip-and-fall case has the initial burden of establishing that it did not create the alleged dangerous or defective condition or have either actual or constructive notice of its existence for a sufficient length of time to discover and remedy it ... . A defendant has constructive notice of a defect when it is visible and apparent, and has existed for a sufficient length of time before the accident that it could have been discovered and corrected ... . 'To meet its initial burden on the issue of lack of constructive notice, a defendant is required to offer some evidence as to when the accident site was last cleaned or inspected prior to the plaintiff's fall' ... . 'When a defect is latent and would not be discoverable upon a reasonable inspection, constructive notice may not be imputed' ... . Here, in the absence of any evidence as to when the defendants last inspected the subject staircase before the accident, or that the condition of the step was a latent defect that could not have been discovered upon a reasonable inspection, the defendants failed to establish, prima facie, that they lacked constructive notice of the allegedly defective condition of the subject step ...". ***Gairy v. 3900 Harper Ave.*, LLC, 2017 N.Y. Slip Op. 00458, 2nd Dept 1-25-17**

THIRD DEPARTMENT

DISCIPLINARY HEARINGS (INMATES).

FAILURE TO INQUIRE INTO WITNESS'S REFUSAL TO TESTIFY REQUIRED A NEW HEARING.

The Third Department determined the hearing officer's failure to inquire into a witness's reasons for refusing to testify required a new hearing: "Where, as here, an inmate initially agrees to testify and later refuses, '[i]t [is] incumbent upon the Hearing Officer . . . to conduct a personal inquiry unless a genuine reason for the refusal is apparent from the record and the Hearing Officer ma[kes] a sufficient inquiry into the facts surrounding the refusal to ascertain its authenticity' ... . Significantly, 'an inmate's refusal that is based upon a desire not to be involved is not adequate to excuse a personal inquiry by the Hearing Officer' ... . The Hearing Officer failed to conduct the requisite personal inquiry here, notwithstanding his offer to do so. Inasmuch as the inmate's testimony was potentially relevant to charges for which petitioner was found guilty ... , we find that petitioner was denied his regulatory right to call witnesses and that the matter must be remitted for a new hearing ...". ***Matter of Banks v. Annucci*, 2017 N.Y. Slip Op. 00529, 3rd Dept 1-26-17**

DISCIPLINARY HEARINGS (INMATES).

FLAWED EVIDENCE REQUIRED ANNULMENT OF SMUGGLING CHARGES.

The Third Department determined problems with the recording of a conversation and other evidentiary failures required annulment of the smuggling charges: "The tape-recorded conversation that was read into the record during the hearing is replete with inaudible portions rendering it impossible to ascertain if, in fact, petitioner was a participant in the smuggling plan ... . Moreover, the investigator who authored the misbehavior report did not identify the coded language allegedly used during the telephone conversation that led him to believe that petitioner was involved in such a plan ... . The confidential information considered by the Hearing Officer in camera — which only calls the accuracy of the conversation read into the record at the hearing into further doubt — does not remedy these deficiencies. Thus, the determination must be partially annulled." ***Matter of McGriff v. Venettozzi*, 2017 N.Y. Slip Op. 00530, 3rd Dept 1-26-17**

FAMILY LAW, APPEALS.

FAMILY COURT'S REFUSAL TO ACKNOWLEDGE THE THIRD DEPARTMENT'S REVERSAL OF THE TERMINATION OF MOTHER'S PARENTAL RIGHTS REQUIRED NEW HEARING IN FRONT OF A DIFFERENT JUDGE.

The Third Department, in a decision too detailed to fairly summarize here, determined Family Court's many mistakes, which have resulted in mother's inability to visit with her children for years, required a new hearing in front of a different judge. The Third Department had reversed the termination of mother's parental rights in 2013. Family Court, however, refused to reinstate her parental rights and mother has been fighting to be allowed supervised visitation ever since: "... [W]e must address Family Court's flawed understanding of the legal effect of our October 2013 order reversing the orders that terminated the mother's parental rights to the children. Inexplicably, Family Court incorrectly and repeatedly stated on the record that there was no declaration by this Court that the mother's parental rights or any prior orders were reinstated and that the mother was mistaken that her parental rights had been restored. It is fundamental that the reversal of an order upon appellate review restores the party who prevailed on appeal to the position that he or she enjoyed prior to entry of the order appealed from ... . Contrary to Family Court's statements, this Court's October 2013 order did reinstate the mother's parental rights and restored her to the position that she was in prior to the erroneous termination of her parental rights.

It appears from the record that, at such time, the mother had been afforded supervised visitation with the children once a week. Accordingly, upon the reinstatement of her parental rights, the mother was, at a minimum, entitled to the restoration of the visitation that she was afforded prior to the termination, unless it could be demonstrated by respondent that there were 'compelling reasons and substantial evidence that such visitation would be detrimental or harmful to the child[ren]'s welfare' ...". ***Matter of Angela F. v. St. Lawrence County Dept. of Social Servs.*, 2017 N.Y. Slip Op. 00513, 3rd Dept 1-26-17**. See also the related case: ***Matter of Angela F. v. Gail WW.*, 2017 N.Y. Slip Op. 00514, 3rd Dept 1-25-17**

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