CasePrepPlus

February 8, 2017

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

Editor: **Bruce Freeman**

NEW YORK STATE BAR ASSOCIATION
Serving the legal profession and the community since 1876

FIRST DEPARTMENT

APPEALS.

ORDER DISMISSING COMPLAINT, ENTERED BY THE CLERK AT THE DIRECTION OF THE APPELLATE COURT AFTER REVERSAL, DOES NOT BRING UP TRIAL INTERLOCUTORY RULINGS FOR APPEAL.

The First Department rejected the plaintiff's attempt to appeal evidentiary rulings made by the trial court. Plaintiff had successfully moved to set aside the defense verdict in this personal injury case. The First Department reversed and directed the clerk to enter a judgment dismissing the complaint. The plaintiff then appealed that order, raising trial evidentiary issues. The First Department held that the order appealed from was not the order of the trial court, therefore the interlocutory evidentiary rulings could not be raised: "Although an appeal from a final order or judgment of Supreme Court brings up for review, inter alia, certain evidentiary rulings made at trial (CPLR 5501[a][3] ...), once this Court decides the issues raised on appeal and directs the Clerk of the court from which the appeal originated to enter judgment, such judgment finally disposes of all the issues in the action (CPLR 5701[a][1]...). The judgment that the Clerk entered ... was entered in accordance with and pursuant to an order of this Court (the Appellate Division) which 'dispose[d] of all the issues in the action' (CPLR 5701[a][1]). Stated differently, the ... judgment is not a judgment of the trial court bringing up interlocutory issues for review ... . Plaintiff did not move to set aside the verdict based upon erroneous evidentiary rulings. Although as plaintiff correctly argues, there is no interlocutory appeal as of right from an evidentiary ruling during trial (see CPLR 5701[a]...), plaintiff had the opportunity to raise legal arguments regarding the evidentiary rulings made by the trial court in support of her motion to set aside the jury's verdict. These issues could have also been raised to support her position in the prior appeal." ***Powell v. City of New York*, 2017 N.Y. Slip Op. 00576, 1st Dept 1-31-17**

CONTRACT LAW, REAL PROPERTY LAW.

HEATING AGREEMENT WAS A COVENANT WHICH RUNS WITH THE LAND, ORAL WAIVER MAY BE VALID DESPITE WRITING REQUIREMENT IN THE COVENANT.

The First Department determined there was a question of fact whether plaintiff building owner waived a heating agreement, which was a covenant running with the land. The covenant obligated defendant to provide heat to plaintiff's building as long as both buildings existed. The fact that the covenant required any waiver to be in writing was not dispositive. Oral waivers may be valid: "The motion court correctly concluded that the obligation undertaken by the previous owners of a building, currently owned by defendant, to provide steam heat to adjacent buildings, including one owned by plaintiff, as reflected in a written agreement between the previous owners of defendant's building and the previous owners of the adjacent buildings (Heating Agreement), which was recorded in the Office of the City Register of the City of New York, is a covenant running with the land. Accordingly, it is binding on defendant so long as both buildings are in existence ... . * * * In this case, the agreement provides that 'in the event the owner of any of said parcels [including plaintiff] shall elect to terminate and cancel this agreement with respect to said parcel, which election shall be made by written notice to the owner of Parcel I [currently, defendant], then this agreement shall end and terminate with respect to any such parcel as of . . . the date when notice of election to cancel is given.' Plaintiff's contention that this language precludes its waiver of the covenant by any means other than a writing is misplaced. '[A] contracting party may orally waive enforcement of a contract term notwithstanding a provision to the contrary in the agreement. Such waiver may be evinced by words or conduct, including partial performance' ... . Here, the record reflects that a representative of plaintiff orally advised a member of defendant's coop board that plaintiff would install its own boiler to provide heat to its own building independently." ***Condor Funding, LLC v. 176 Broadway Owners Corp.*, 2017 N.Y. Slip Op. 00719, 1st Dept 2-2-17**

CORPORATION LAW.

NONMONETARY SETTLEMENT OF A SHAREHOLDERS' CLASS ACTION SUIT APPROVED, NEW ANALYTICAL CRITERIA ANNOUNCED.

The First Department, in a full-fledged opinion by Justice Kahn, with a concurring opinion, reversing Supreme Court, determined a nonmonetary settlement of a shareholders' class action suit should have been approved. The matter was sent back to determine appropriate attorneys' fees. The opinion is too comprehensive to fairly summarize here. The court revisited the

factors to be considered in analyzing nonmonetary settlements, adding two new factors to those announced in *Woodrow v. Colt Industries* in 1990. This action involved the propriety of the purchase of Verizon Wireless by Verizon Communications: "The rise of nonmonetary class action settlements began in the 1980s and continued into the 1990s, when complaints of corporate misconduct in the context of mergers and acquisitions prompted calls for corporate governance reforms. Often, the perceived need for reform led to the commencement of litigation as a means to address the misfeasance, which would result in settlements with provisions for corporate governance reform or other forms of equitable relief, such as additional disclosures to shareholders in proxy statements, and would be accompanied by an award of reasonable attorneys' fees to shareholders' counsel. * * * ... [W]e now refine our *Colt* standard of review to add to the five established factors to be used by courts to ensure appropriate evaluation of proposed nonmonetary settlements of class action suits these two additional criteria: whether the proposed settlement is in the best interests of the putative settlement class as a whole, and whether the settlement is in the best interest of the corporation." ***Gordon v. Verizon Communications, Inc.*, 2017 N.Y. Slip Op. 00742, 1st Dept 2-2-17**

CRIMINAL LAW.

A MOVING CAR IS A PLACE WHERE THE VICTIM IS NOT LIKELY TO BE FOUND WITHIN THE MEANING OF THE KIDNAPPING STATUTE, UNDER THE FACTS, UNLAWFUL IMPRISONMENT WAS NOT A LESSER INCLUDED OFFENSE.

The First Department, in a full-fledged opinion by Justice Saxe, determined defendants were properly convicted of kidnapping and, under the facts, unlawful imprisonment was not a lesser included offense. The defendants taped the victim's wrists behind his back, taped his arms to his body, and then transported the victim by car from New York to Philadelphia, where the victim was released at night in a deserted area: "We reject defendants' argument that a car on a public thoroughfare may not, as a matter of law, be considered 'a place where [the victim] is not likely to be found' [within the meaning of the kidnapping statute] (Penal Law § 135.00 [2]). ... Defendants suggest that a car may only be treated as a place where the victim is 'not likely to be found' if (1) the defendant used or threatened to use a weapon to put or keep the victim in the vehicle, (2) the defendant used the vehicle to take the victim to a secluded place, or (3) the victim was not visible to the public within the car. However, neither Penal Law § 135.00(2) nor any case law imposes such requirements of proof. ... Unlawful imprisonment does not qualify here as a lesser included offense of the kidnapping charge, because there was no reasonable view of the evidence that defendants unlawfully imprisoned [the victim] but did not kidnap him." ***People v. Grohoske*, 2017 N.Y. Slip Op. 00617, 1st Dept 1-31-17**

FAMILY LAW.

REQUEST FOR DNA PATERNITY TEST PROPERLY DENIED, NOT IN THE CHILD'S BEST INTEREST.

The First Department determined it was in the child's best interest to deny respondent's request for a DNA paternity test: "Family Court properly determined that it is in the child's best interest to equitably estop respondent from having a DNA test to establish paternity (see Family Ct Act § 532[a]). Clear and convincing evidence demonstrates that respondent held himself out as the father of the child and that the now 10-year-old child considers respondent to be his father ... . The child lived with respondent, his mother and siblings for about two years, calls respondent 'dad' and spends time with him on birthdays and holidays, including Father's Day. Respondent introduced the child to his family and friends as his son, and allowed the child to spend time and develop relationships with his family. Issues of credibility were for Family Court to resolve and its determination to credit the testimony of the mother and the child and to reject that of respondent is supported by the record ...". ***Matter of Commissioner of Social Servs. v. Dwayne W.*, 2017 N.Y. Slip Op. 00595, 1st Dept 1-31-17**

INSURANCE LAW.

EXCLUSION FOR INJURY DURING UNLOADING AN INSURED TRAILER APPLIED, EVEN THOUGH THE INJURY WAS CAUSED BY A DEFECT IN THE TRAILER.

The First Department determined an exclusion from plaintiff's "Truckers Policy" issued to Truck-Rite was unambiguous. The policy excluded coverage for injury arising out of loading and unloading trailers covered by the policy. Plaintiff was unloading a trailer when the trailer's lift gate collapsed. Despite the fact that the injury was caused by a defective part of the trailer, the injury was not covered by the policy: " 'Policy exclusions are subject to strict construction and must be read narrowly, and any ambiguities in the insurance policy are to be construed against the insurer. However, unambiguous provisions of insurance contracts will be given their plain and ordinary meaning' ... . * * * Here, the underlying plaintiff's accident occurred while he was unloading material from a shipping trailer, an activity clearly encompassed by the exclusion. The fact that his injury was allegedly caused by the defective nature of the trailer lift does not remove the injury from the policy exclusion. '[T]he focus of the inquiry is not on the precise cause of the accident but the general nature of the operation in the course of which the injury was sustained' ... . '[T]he phrase arising out of' . . . requires only that there be some causal relationship between the injury and the risk for which coverage is provided' ... . Such a causal relationship between the injury and exclusion clearly exists here and requires dismissal of the complaint." ***Country-Wide Ins. Co. v. Excelsior Ins. Co.*, 2017 N.Y. Slip Op. 00718, 1st Dept 2-2-17**

PERSONAL INJURY.

QUESTION OF FACT WHETHER OPTICAL CONFUSION OBSCURED A STEP, DEFENDANT'S SUMMARY JUDGMENT MOTION SHOULD NOT HAVE BEEN GRANTED.

The First Department, reversing Supreme Court, determined plaintiff had raised a question of fact in this slip and fall case. Plaintiff tripped on a step defendant claimed was open and obvious. Plaintiff raised a question of fact about optical confusion with photographs and an affidavit from an expert: "Plaintiff tripped and fell on a step on a walkway on defendant's premises while crossing the campus during her lunch break. Assuming that defendant established prima facie that the step was open and obvious and not inherently dangerous ... , plaintiff raised a triable issue of fact whether the condition was open and obvious by demonstrating through an expert's affidavit and photographs that the color and position of the step created optical confusion, i.e., 'the illusion of a flat surface, visually obscuring ... [the] step[]' ...". ***Buonchristiano v. Fordham Univ.*, 2017 N.Y. Slip Op. 00586, 1st Dept 1-31-17**

PERSONAL INJURY.

SPEED OF PLAINTIFF BICYCLIST RAISED A QUESTION OF FACT RE HIS COMPARATIVE NEGLIGENCE.

The First Department determined the allegation plaintiff bicyclist was going fast in the bike lane raised a question of fact about the plaintiff's comparative negligence. Plaintiff was injured when he stopped fast after defendant taxi driver turned into the bike lane: "Plaintiff, a cyclist, made a prima facie showing of his entitlement to partial summary judgment based on his evidence, including averments of a nonparty witness, that he was lawfully traveling in a designated bicycle lane, with a yield sign in his favor, when defendant taxi driver attempted to make a left turn and, in the process, crossed over the bicycle lane just moments before plaintiff arrived at the same spot, causing plaintiff to brake sharply and be pitched over his handlebars in order to avoid a collision with the taxi (see 34 RCNY 4-12[p][2]...). In opposition, defendant taxi driver's observations that plaintiff was riding his bicycle very fast raised factual issues as to plaintiff's potential comparative negligence ... . An accident may have more than one proximate cause ...". ***Bell v. Angah*, 2017 N.Y. Slip Op. 00613, 1st Dept 1-31-17**

PERSONAL INJURY.

CONFLICTING TESTIMONY RAISED QUESTION OF FACT ABOUT APPLICABILITY OF THE EMERGENCY DOCTRINE.

The First Department, reversing Supreme Court, determined summary judgment should not have been granted to the transit defendants in this bicycle-bus accident case. Plaintiff's decedent was riding her bicycle when a car door opened in front of her. She struck the door and fell over into the path of a bus, which ran over her. Summary judgment was granted to the transit defendants under the emergency doctrine. However, the First Department held that evidence the bus driver's vision to the side may have been blocked by standing passengers raised a question of fact about the applicability of the emergency doctrine: "Given the conflicting testimony in the record, including that there may have been passengers standing in front of the white line, which partially blocked the bus driver's view as he passed the red light, it was error for the motion court to have determined the reasonableness of the bus driver's response to the emergency situation presented, as a matter of law. This is an issue of fact that should be decided by a jury." ***Powers v. Kyong Kwan Min*, 2017 N.Y. Slip Op. 00716, 1st Dept 2-2-17**

SECOND DEPARTMENT

ANIMAL LAW.

DOG INJURED PLAINTIFF BY RUNNING AND JUMPING UP ON HER IN PLAY, COMPLAINT PROPERLY DISMISSED, DEFENDANTS DEMONSTRATED THE DOG DID NOT HAVE A PROPENSITY TO JUMP IN PLAY EXCEPT ON COMMAND.

The Second Department determined the complaint in this dog-injury case was properly dismissed. It was alleged the dog ran at plaintiff at full speed, jumped up on its hind legs, struck plaintiff in the chest and knocked her to the ground: "To recover in strict liability in tort for damages caused by a dog, the plaintiff must establish that the dog had vicious propensities and that the owner knew or should have known of the dog's vicious propensities … . 'Vicious propensities include the propensity to do any act that might endanger the safety of the persons and property of others in a given situation' ... . Indeed, '[a] known tendency to attack others, even in playfulness, as in the case of the overly friendly large dog with a propensity for enthusiastic jumping up on visitors, will be enough to make the defendant liable for damages resulting from such an act'... . The defendants' submissions, including the deposition testimony of the defendants and the plaintiffs, as well as the defendants' affidavits, demonstrated that prior to the subject incident, the dog was not aggressive, and did not growl or spontaneously jump on people in the fashion described by the injured plaintiff. The defendants did not restrain the dog to keep it away from guests in their home. Accordingly, the defendants established their prima facie entitlement to judgment as a matter of law ... . In opposition, the plaintiffs failed to raise a triable issue of fact. While the plaintiffs note that the defendants 'trained' their dog to jump up on them on command, the deposition testimony of the defendants made clear

that the dog only did so when prompted and only on immediate family members. They specifically testified that their dog had never jumped on an individual outside the immediate family. Such a jump on command is very different from the type of jump described by the injured plaintiff." ***Gammon v. Curley*, 2017 N.Y. Slip Op. 00630, 2nd Dept 2-1-17**

CRIMINAL LAW.

NO EVIDENTIARY BASIS FOR CONSTRUCTIVE POSSESSION JURY INSTRUCTION, NEW TRIAL ORDERED.
The Second Department determined defendant was entitled to a new trial on the criminal possession of a weapon counts. The People requested a jury instruction for constructive possession and the instruction was given. The evidence at trial did not provide a basis for the instruction: "After the gunpoint robbery of the supermarket, committed by a single perpetrator, the defendant was arrested when he was found hiding in an attic of a nearby house. Shortly thereafter, police officers recovered a gun from the attic. The People sought to prove at trial, among other things, that the defendant was the individual who committed the robbery with the gun recovered from the attic. In the bill of particulars and throughout the trial, the People's theory on the counts of criminal possession of a weapon in the second degree was that the defendant possessed the subject gun in the supermarket. Even at the charge conference, at which the People requested a charge of constructive possession, the People maintained that the basis of those counts was the defendant's possession of the gun in the supermarket. Since there was no evidence from which the jury could conclude that the defendant constructively possessed the gun in the supermarket, that charge should not have been given ...". ***People v. Golden*, 2017 N.Y. Slip Op. 00661, 2nd Dept 2-1-17**

CRIMINAL LAW.

MOTION FOR DNA TESTING OF CERTAIN TRIAL EVIDENCE SHOULD NOT HAVE BEEN DENIED.
The Second Department determined Supreme Court should have granted defendant's motion for DNA testing of some, but not all, of the evidence admitted at his trial: "Here, the defendant established that if forensic DNA testing had been conducted on two blood samples, a bloody sweater, and fingernail scrapings of the decedent, if any, recovered by the police from the crime scene, and if the results of such testing had been admitted at trial, there exists a reasonable probability that the verdict would have been more favorable to him ... . However, with respect to the defendant's request for forensic DNA testing of hair and fibers, the defendant failed to demonstrate that there is a reasonable probability that the verdict would have been more favorable to him had DNA testing results of those items been admitted into evidence ... . In opposition to the motion, the People failed to come forward with evidence demonstrating the existence or nonexistence of the materials sought, and whether such materials are available for testing. '[T]he defendant does not bear the burden of showing that the specified DNA evidence exists and is available in suitable quantities to make testing feasible. To the contrary, it is the People, as the gatekeeper of the evidence, who must show what evidence exists and whether the evidence is available for testing' ... . '[A] conclusory assertion that the evidence no longer exists is legally insufficient' ...". ***People v. Robinson*, 2017 N.Y. Slip Op. 00665, 2nd Dept 2-1-17**

FAMILY LAW.

MOTHER'S PETITION FOR MODIFICATION OF CUSTODY SHOULD NOT HAVE BEEN DENIED WITHOUT A HEARING.
The Second Department, reversing Family Court, determined mother's modification of custody petition should not have been denied without a hearing: "Here, the mother established her entitlement to a hearing on the basis of changed circumstances. Specifically, the mother made a sufficient evidentiary showing in support of her allegations that the father sexually abused the oldest child and that, as a result of the ensuing litigation, the mother's relationship with the father had deteriorated to the point that they could no longer communicate, and the oldest child was no longer visiting with the father ... . Moreover, the 'narrow exception' to the general requirement that a hearing be held is inapplicable in this case ... . The dismissal of the article 10 [alleging sexual abuse of the oldest child by father] proceeding pursuant to an adjournment in contemplation of dismissal was not a dismissal on the merits and it did not resolve the allegations of sexual abuse ... . Indeed, no evidentiary hearing was held in the article 10 proceeding, and the Family Court never made any findings of fact in that proceeding regarding the allegations of sexual abuse. In sum, the court should not have dismissed the mother's modification petition without a hearing ...". ***Matter of Chess v. Lichtman*, 2017 N.Y. Slip Op. 00644, 2nd Dept 2-1-17**

INSURANCE LAW, EMPLOYMENT LAW.

COVERAGE FOR CLAIMS ALLEGING PAYMENT OF INADEQUATE WAGES AND RETALIATION FOR BRINGING SUIT PRECLUDED BY EXCLUSION FOR EMPLOYMENT-RELATED WRONGFUL ACTS.
The Second Department, reversing Supreme Court, determined defendant insurer (FIC) was not obligated to defend plaintiff in a suit alleging the payment of inadequate wages in violation of the Faire Labor Standards Act and retaliation for bringing suit. The policy excluded coverage for employment-related wrongful acts. "Employment-related" was not defined: "In context, the plain and ordinary meaning of the 'employment-related Wrongful Act' exclusion unambiguously encompasses claims regarding violations of wage laws and retaliation for complaints about violations of wage laws. The

payment of wages has such an established connection to the 'act of employing' or 'the state of being employed' that a contrary conclusion would be unreasonable. Put otherwise, no reasonable average insured giving the relevant terms their 'plain and ordinary meaning' would conclude that complaints regarding violations of law as to payment of wages were not 'employment-related' ... . In short, it is clear from the language of the exclusion that ... the policy did not insure against the clearly 'employment-related' claims raised in the underlying action." ***Hansard v. Federal Ins. Co.*, 2017 N.Y. Slip Op. 00633, 2nd Dept 2-1-17**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

DEFENDANT DID NOT EXERCISE SUFFICIENT CONTROL OVER PLAINTIFF'S WORK TO BE LIABLE UNDER LABOR LAW 200.

The Second Department determined the masonry contractor, Citnalta, did not exercise sufficient control over plaintiff's work to be liable under Labor Law 200. Plaintiff, who worked for a subcontractor, was injured when a masonry saw jammed: "Here, Citnalta established its prima facie entitlement to judgment as a matter of law by demonstrating that the subject accident was caused by the means and methods of the plaintiff's work, that the plaintiff's work was directed and controlled by his employer, and that it had no authority to exercise supervisory control over his work ... . The plaintiff's evidence of Citnalta's general supervision of the project and overall compliance with safety standards was insufficient to raise a triable issue of fact in opposition ... . Further, contrary to the plaintiff's contention, he failed to raise a triable issue of fact as to whether his injuries arose from a dangerous or defective premises condition ...". ***Messina v. City of New York*, 2017 N.Y. Slip Op. 00640, 2nd Dept 2-1-17**

MUNICIPAL LAW.

ALTHOUGH THE ADMINISTRATIVE INTERPRETATION OF THE GENERAL MUNICIPAL LAW WAS WRONG, THE RULING WAS CORRECT; THE ARRESTING OFFICER WHO LEARNED THE SUSPECT COULD NOT HAVE COMMITTED THE CRIME, BUT SAID NOTHING, WAS NOT ENTITLED TO INDEMNIFICATION FOR COSTS OF DEFENDING THE RELATED CIVIL RIGHTS SUIT.

The Second Department determined Supreme Court properly dismissed a police officer's article 78 proceeding seeking reimbursement of the cost of defending a civil rights lawsuit. During the civil rights suit, the officer admitted doing nothing when he learned the plaintiff could not have committed the crime for which he was arrested. The officer argued the applicable provision of the General Municipal Law was ambiguous and, read correctly, required the county to indemnify him. Although the Second Department found that the provision was in fact ambiguous and had not been interpreted correctly by the Nassau County Police Officer Indemnification Board, the Board had correctly held the statute did not allow indemnification of the officer: "The statute vests the [Nassau County Police Officer Indemnification] Board with the discretion to determine the issues of proper discharge of duties and scope of employment, limited only by judicial review of whether a denial of defense and indemnification is arbitrary and capricious ... . Here, the Board's determination that the petitioner was not acting within the scope of his employment was arbitrary and capricious ... . However, its determination that the petitioner's failure to notify anyone that an incarcerated arrestee could not possibly have committed the robbery for which he was charged was not 'committed while in the proper discharge of his duties' was supported by the facts and was not arbitrary and capricious (General Municipal Law § 50-l...). A court 'may not substitute its judgment for that of the agency responsible for making the determination, but must ascertain only whether there is a rational basis for the decision or whether it is arbitrary and capricious' ... . Accordingly, the Supreme Court properly denied the petition and dismissed the proceeding." ***Matter of Lemma v. Nassau County Police Officer Indem. Bd.*, 2017 N.Y. Slip Op. 00649, 2nd Dept 2-1-17**

MUNICIPAL LAW, PERSONAL INJURY.

LACK OF WRITTEN NOTICE OF AN ICY CONDITION PRECLUDED SUIT IN THIS SLIP AND FALL CASE.

The Second Department determined the county's written notice required precluded suit in this "slip and fall on ice" action: "Here, the County established its prima facie entitlement to judgment as a matter of law by submitting the affidavit of a County employee, which indicated that she had conducted a search of the relevant records covering a five-year period prior to the date of the accident, and found no written notice of any dangerous or defective conditions at the accident site ... . Contrary to the plaintiff's contention, the County could require prior written notice of the icy condition because the landing on the exterior steps of the building where the accident occurred provided the public with a general right of passage, and thus served the same functional purpose as a sidewalk, which is one of the locations specifically enumerated in General Municipal Law § 50-e(4) ...". ***Walker v. County of Nassau*, 2017 N.Y. Slip Op. 00683, 2nd Dept 2-1-17**

MUNICIPAL LAW, PROPERTY DAMAGE, IMMUNITY, CONTRACT LAW.

COUNTY NOT IMMUNE FROM SUIT ALLEGING NEGLIGENT MAINTENANCE OF DRAINAGE SYSTEM; INDEPENDENT CONTRACTOR MAY BE LIABLE FOR LAUNCHING AN INSTRUMENT OF HARM; FLOOD DAMAGE RESULTED FROM DREDGING OPERATION.

The Second Department determined the county was not entitled to summary judgment on governmental immunity grounds and an independent contractor for the county was not entitled to summary judgment because of the contractual relationship. Plaintiffs alleged the county and the contractor were negligent in dredging a pond resulting in flood damage. The county could be liable in ordinary negligence for maintenance of the drainage system (as opposed to design) and the subcontractor could be liable for launching an instrument of harm: "Although a governmental entity may be entitled to immunity from liability arising out of claims that it negligently designed a sewerage or storm drainage system ... , the immunity does not extend to claims that it negligently maintained the system ... . Here, even assuming the subject project fell within the ambit of a governmental function, the plaintiffs contend that the County was negligent, inter alia, in its maintenance of the pond and oversight of the dredging operations. * * * Generally, an independent contractor owes no tort duty of care to third parties ... . However, there are "three situations in which a party who enters into a contract to render services may be said to have assumed a duty of care—and thus be potentially liable in tort—to third persons ... where the contracting party, in failing to exercise reasonable care in the performance of his duties, launches a force or instrument of harm ...". ***Nachamie v. County of Nassau*, 2017 N.Y. Slip Op. 00657, 2nd Dept 2-1-17**

PERSONAL INJURY.

QUESTION OF FACT WHETHER PLAINTIFF TRIPPED OVER A SIDEWALK DEFECT OR A TREE WELL DEFECT, CITY'S SUMMARY JUDGMENT MOTION SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined the city (NYC) did not demonstrate there was no question of fact whether plaintiff tripped over a portion of the sidewalk (for which the city would not be liable) or a tree well (for which the city would be liable): "Administrative Code of the City of New York § 7-210, which became effective September 14, 2003, shifted tort liability for injuries arising from a defective sidewalk from the City to the abutting property owner, absent certain exceptions not relevant to this case ... . However, a tree well does not fall within the applicable Administrative Code definition of 'sidewalk' and, thus, 'section 7-210 does not impose civil liability on property owners for injuries that occur in city-owned tree wells' ...". ***Antonyuk v. Brightwater Towers Condo Homeowners' Assn., Inc.*, 2017 N.Y. Slip Op. 00619, 2nd Dept 2-1-17**

PERSONAL INJURY.

EVIDENCE OF GENERAL CLEANING PRACTICES NOT ENOUGH TO DEMONSTRATE LACK OF CONSTRUCTIVE NOTICE IN A SLIP AND FALL CASE.

The Second Department determined defendant's motion for summary judgment in this slip and fall case was properly denied. Defendant offered evidence only of its general cleaning practices rather than specific evidence when the area was lasted cleaned or inspected: "Here, the defendant failed to establish, prima facie, that it did not have constructive notice of the alleged hazardous condition that caused the plaintiff to fall. The deposition testimony of the defendant's caretaker, submitted in support of the motion, did not establish when the accident site was last inspected in relation to the plaintiff's fall. The caretaker merely testified about general cleaning practices, with no evidence regarding any specific cleaning or inspection of the area in question, which is insufficient to establish a lack of constructive notice ...". ***Jeremias v. Lake Forest Estates*, 2017 N.Y. Slip Op. 00635, 2nd Dept 2-1-17**

PERSONAL INJURY.

DEFENDANT MADE A SUDDEN LEFT TURN IN FRONT ACROSS PLAINTIFF'S RIGHT OF WAY, PLAINTIFF'S SUMMARY JUDGMENT MOTION SHOULD HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined plaintiff moped operator should have been granted summary judgment in this traffic accident case. Defendant made a sudden left turn crossing plaintiff's right of way: "The plaintiff established his entitlement to judgment as a matter of law by demonstrating, prima facie, that the defendant driver violated Vehicle and Traffic Law § 1141 when he suddenly made a left turn directly into the path of the moped operated by the plaintiff, who had no time to avoid the impact, when it was not reasonably safe to do so, and that this violation was the sole proximate cause of the accident ...". ***Mei-Hua Gao v. Makrinos*, 2017 N.Y. Slip Op. 00639, 2nd Dept 2-1-17**

PERSONAL INJURY, EDUCATION-SCHOOL LAW.

STUDENT INJURED HORSING AROUND IN GYM CLASS, SCHOOL'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED.

The Second Department determined summary judgment should not have been granted to the school in this negligent supervision case. Plaintiff was injured while horsing around during gym class: "At the beginning of gym class, prior to attendance being taken, the infant plaintiff ran toward a fellow classmate, placed his hands on his shoulders, and jumped over him. The classmate asked the infant plaintiff to do it again, and the infant plaintiff jumped over the classmate again, without incident. The classmate then asked the infant plaintiff to jump over him once again, and when the infant plaintiff attempted to do so, 'something popped' in his knee, which caused him to fall to the gym floor and allegedly sustain an injury. At the time of the incident, two teachers were nearby; however, neither saw the incident occur. The infant plaintiff stated

that about four to five minutes elapsed between the first and third time he jumped over his classmate. A teacher, however, stated that class began at 1:11 p.m., and that the incident occurred at approximately 1:20 p.m. * * * 'Schools are under a duty to adequately supervise the students in their charge and they will be held liable for foreseeable injuries proximately related to the absence of adequate supervision' ... . Contrary to the defendant's contention, it failed to establish, prima facie, that it adequately supervised the plaintiff or that, even if it had, the incident occurred in such a short span of time that it could not have been prevented by the most intense supervision ...". ***Cruz-Martinez v. Brentwood Union Free Sch. Dist.*, 2017 N.Y. Slip Op. 00626, 2nd Dept 2-1-17**

PERSONAL INJURY, EMPLOYMENT LAW.

WHERE AN EMPLOYEE ACTS WITHIN THE SCOPE OF EMPLOYMENT, ABSENT A VALID CLAIM FOR PUNITIVE DAMAGES, AN EMPLOYER CANNOT BE SUED FOR NEGLIGENT HIRING AND RETENTION.

The Second Department, reversing Supreme Court, determined the negligent hiring and retention cause of action against a nursing home (Sunrise Manor) alleging improper care of a resident should have been dismissed. When it is alleged an employee acted within the scope of employment, the respondeat superior theory applies and a negligent hiring and retention cause of action will not lie: "Supreme Court should have granted that branch of Sunrise Manor's motion which was for summary judgment dismissing the fourth cause of action, which was to recover damages for negligent hiring and retention, insofar as asserted against it. 'Generally, where an employee is acting within the scope of his or her employment, the employer is liable for the employee's negligence under a theory of respondeat superior and no claim may proceed against the employer for negligent hiring, retention, supervision or training' ... . Here, in opposition to Sunrise Manor's prima facie showing that its employees were acting within the scope of their employment, the plaintiff failed to raise a triable issue of fact. While an exception exists to the above general principle where the plaintiff seeks punitive damages from the employer 'based on alleged gross negligence in the hiring or retention of the employee' ... , here, that exception is inapplicable because the Supreme Court granted that branch of Sunrise Manor's motion which was for summary judgment dismissing the cause of action seeking punitive damages." ***Henry v. Sunrise Manor Ctr. for Nursing & Rehabilitation*, 2017 N.Y. Slip Op. 00634, 2nd Dept 2-1-17**

TRUSTS AND ESTATES.

BENEFICIARIES OF TRUST ENTITLED TO EXAMINE TRUSTEE ABOUT MATTERS RELATING TO ADMINISTRATION OF THE TRUST, BUT NOT APPOINTMENT OF THE TRUSTEE.

The Second Department determined the trust beneficiaries were entitled to examine the trustee about matters relating to administration of the trust but not matters related to his appointment as trustee: "SCPA 2211(2) provides, in pertinent part, that '[t]he fiduciary may be examined under oath by any party to the proceeding either before or after filing objections, if any, to the account, as to any matter relating to his or her administration of the estate.' The Surrogate's Court providently exercised its discretion in granting the trustee's motion for a protective order pursuant to CPLR 3103 vacating a notice of deposition served upon him by the trust's beneficiaries ... to the extent of vacating so much of the notice of deposition as sought to examine him as to 'the manner in which he and Donald J. Farinacci became or were nominated as successor trustees and Donald J. Farinacci renounced such appointment,' as those issues exceeded the scope of SCPA 2211(2) ... . However, under SCPA 2211(2), the trust beneficiaries were entitled to examine the trustee under oath 'as to any matter relating to his or her administration of the estate.' Accordingly, the court erred in vacating the entirety of the notice of deposition ...". ***Matter of Jane D. Ritter Revocable Living Trust*, 2017 N.Y. Slip Op. 00647, 2nd Dept 2-1-17**

FOURTH DEPARTMENT

ANIMAL LAW, MUNICIPAL LAW.

COUNTY'S MOTION FOR SUMMARY JUDGMENT IN THIS DOG BITE CASE SHOULD HAVE BEEN GRANTED; NO EVIDENCE SHELTER PERSONNEL WERE AWARE OF VICIOUS PROPENSITIES; HEALTH DEPARTMENT'S KNOWLEDGE THE DOG HAD BITTEN SOMEONE ELSE NOT IMPUTED TO SHELTER PERSONNEL; NEGLIGENCE CAUSE OF ACTION SHOULD HAVE BEEN DISMISSED.

The Fourth Department, reversing Supreme Court, determined the county's motion for summary judgment in this dog bite case should have been granted. Plaintiff was a volunteer who walked dogs held at the county animal shelter. She was bitten by one of the dogs. There was no showing the shelter personnel were aware of the dog's vicious propensities. The fact that the health department was aware the dog had bitten someone else in a prior incident was not imputed to the shelter personnel. The Fourth Department also held Supreme Court should not have denied the county's motion to dismiss the negligence cause of action. Negligence does not lie in dog bite cases: "Contrary to plaintiff's contention, the fact that shelter personnel may have been informed at the time of the dog's surrender that the dog had previously knocked over a child is insufficient to raise an issue of fact as to the dog's vicious propensities to bite. Although a tendency to knock a person over may reflect 'a proclivity to act in a way that puts others at risk of harm' … , plaintiff's injuries were not caused by the dog's knocking

her over, and the dog's proclivity to do so, even if established, did not 'result[] in the injury giving rise to the lawsuit'... . We conclude that, under the circumstances of this case, any knowledge of that incident obtained by ... [the] Health Department should not be imputed to the County or the shelter ... . 'A municipality often will have numerous employees assigned to separate and diverse agencies or departments'... , and the record demonstrates that there is no overlap in the respective scopes of authority of the Health Department and the shelter. We further conclude that the court erred in denying the County's motion with respect to plaintiff's negligence cause of action. '[C]ases involving injuries inflicted by domestic animals may only proceed under strict liability based on the owner's knowledge of the animal's vicious propensities, not on theories of common-law negligence' ...". ***Blake v. County of Wyo.*, 2017 N.Y. Slip Op. 00826, 4th Dept 2-3-17**

ATTORNEYS.

SUPREME COURT SHOULD NOT HAVE AWARDED ATTORNEY'S FEES AND COSTS TO PREVAILING DEFENDANTS, CRITERIA EXPLAINED.

The Fourth Department determined there was no basis for the award of attorney's fees and costs to the defendants in this deed/adverse possession action. After two appeals and a trial, the defendants prevailed: "We agree with plaintiff that Supreme Court improperly awarded counsel fees and litigation costs to defendants, and we therefore reverse. The general rule in New York is that litigants are required to absorb their own counsel fees and litigation costs unless there is a contractual or statutory basis for imposing them ... , and '[t]here is neither a contractual nor a statutory basis for the award of [counsel] fees to [defendants] in this case' ... . Furthermore, although a court may award counsel fees as a sanction for frivolous conduct pursuant to 22 NYCRR 130-1.1, it may do so 'only upon a written decision setting forth the conduct on which the award . . . is based, the reasons why the court found the conduct to be frivolous, and the reasons why the court found the amount awarded . . . to be appropriate' (22 NYCRR 130-1.2...). Here, defendants did not seek sanctions for frivolous conduct, and the court did not issue a written decision or make any finding that plaintiff or decedents engaged in such conduct. Furthermore, we conclude that the counterclaim seeking to recover counsel fees failed to state a cause of action inasmuch as defendants did not allege any proper basis upon which such fees would be recoverable. We therefore dismiss the counterclaims ...". ***Perry v. Edwards*, 2017 N.Y. Slip Op. 00862, 4th Dept 2-3-17**

CONSTITUTIONAL LAW (STATE), INDIAN LAW, CIVIL PROCEDURE.

TRANSFER OF LAND TO A TRUST PURSUANT TO THE ONEIDA SETTLEMENT AGREEMENT DID NOT CEDE THE STATE'S TAXATION AUTHORITY; MOTION TO DISMISS A DECLARATORY JUDGMENT ACTION WILL BE TREATED AS A MOTION FOR A DECLARATION IN DEFENDANT'S FAVOR.

The Fourth Department determined a citizen taxpayer's declaratory judgment action against the state, claiming that the transfer of land to a trust pursuant to the Oneida Settlement Agreement ceded the state's taxation authority, was properly rejected. The court noted that when a motion to dismiss a declaratory judgment action is made, the court will treat it as a motion for a declaration in the defendant's favor: "Plaintiff alleges that Section VI B (1-5) of the Agreement violates article XVI of the State Constitution, which prohibits the State from surrendering, suspending or contracting away its power of taxation. Section VI B (1-5) provides that the State will not oppose a future application by the Oneida Indian Nation (Nation) to transfer to the United States up to 12,366 acres of land to be held in trust pursuant to 25 USC § 5108 (formerly § 465). The land at issue was formerly part of the 300,000-acre reservation, which was established in the 1788 Treaty of Fort Schuyler (see City of Sherrill, N.Y. v. Oneida Indian Nation of N.Y., 544 US 197, 203), and which the Nation has reacquired through open-market transactions (see id. at 211). In 2008, the United States Secretary of the Interior accepted the transfer into trust of 13,004 acres of reacquired land owned by the Nation, over defendant's objection. We conclude that the court properly declared that Section VI B (1-5) does not violate the State constitutional provision prohibiting defendant from surrendering or contracting away its power of taxation. * * * To the extent that plaintiff contends that Executive Law § 11 and Indian Law § 16 violate article XVI of the State Constitution, we reject that contention." ***Kaplan v. State of New York*, 2017 N.Y. Slip Op. 00766, 4th Dept 2-3-17**

CONTRACT LAW, LIMITED LIABILITY COMPANY LAW.

NO DEMONSTRATION A PARTICULAR INTERPRETATION OF AN AMBIGUOUS CONTRACT WAS THE ONLY FAIR INTERPRETATION; THEREFORE MOTIONS FOR SUMMARY JUDGMENT WERE PROPERLY DENIED.

The Fourth Department, over a two-justice dissent, determined motions for summary judgment in this contract-interpretation case were properly denied. The contract at issue was an operating agreement for plaintiff limited liability company. Both the majority and the dissent found the contract language ambiguous. The majority concluded reference to extrinsic evidence was necessary, precluding summary judgment. The dissent argued plaintiffs had shown their interpretation was the only fair interpretation: " 'It is well settled that a contract must be read as a whole to give effect and meaning to every term . . . Indeed, [a] contract should be interpreted in a way [that] reconciles all [of] its provisions, if possible' ... . Therefore, '[e]ffect and meaning must be given to every term of the contract . . . , and reasonable effort must be made to harmonize all of its terms' ... . It is equally well settled that '[t]he interpretation of an unambiguous contractual provision is a function for the court . . . , and [t]he proper inquiry in determining whether a contract is ambiguous is whether the agreement on its face

is reasonably susceptible of more than one interpretation . . . To be entitled to summary judgment, the moving party has the burden of establishing that its construction of the [contract] is the only construction [that] can fairly be placed thereon' ... . Here, neither party established that its interpretation of the Agreement is the only reasonable interpretation thereof ... . Consequently, summary judgment is inappropriate at this juncture because a 'determination of the intent of the parties depends on the credibility of extrinsic evidence or on a choice among reasonable inferences to be drawn from extrinsic evidence' ...". ***Maven Tech., LLC v. Vasile*, 2017 N.Y. Slip Op. 00840, 4th Dept 2-3-17**

CRIMINAL LAW.

FOR CAUSE CHALLENGE TO JUROR SHOULD HAVE BEEN GRANTED, CONVICTION REVERSED.

The Fourth Department determined the denial of a for cause challenge to a juror required reversal: "Here, in response to the prosecutor's question regarding whether any member of the panel thought that he or she could not be fair and impartial due to the allegations of driving while intoxicated, prospective juror No. 13 indicated that, due to situations in her past, she did not see any reason why anyone would need to drink and drive, and she could not be fair and impartial. Upon follow-up questioning by the court, she assured the court that she could set those feelings aside. Later, however, in response to defense counsel's questions, prospective juror No. 13 indicated that she had wondered what defendant did wrong when she first walked into the courtroom, and that 'obviously' she felt that 'he must have done something wrong or he wouldn't have' been in court. The court asked follow-up questions, but cut off the prospective juror before she could reply to one such question, and the court's final substantive question failed to establish the prospective juror's state of mind. Consequently, the court abused its discretion in denying defendant's challenge for cause to prospective juror No. 13." ***People v. Betances*, 2017 N.Y. Slip Op. 00804, 4th Dept 2-3-17**

CRIMINAL LAW.

AT THE SUPPRESSION HEARING THE PEOPLE PRESENTED NO EVIDENCE OF THE LEGALITY OF THE VEHICLE STOP, CONSENT TO SEARCH THE CAR WAS THEREFORE DEEMED INVOLUNTARY AND THE SEIZED COCAINE SUPPRESSED.

The Fourth Department, reversing Supreme Court, determined the People did not come forward with proof demonstrating the legality of a vehicle stop. Defendant and the driver were the only persons in the car. A large amount of cocaine was seized from the back seat area. The driver purportedly consented to the search. However, because, at the suppression hearing, no proof of the legality of the stop was presented, the consent was deemed involuntary and the evidence suppressed: "We conclude that, '[b]ecause the People failed to present evidence at the suppression hearing establishing the legality of the police conduct, [the driver's] purported consent to the search of his vehicle was involuntary[,] and all evidence seized from the vehicle as a result of that consent should have been suppressed' ... . We therefore reverse the judgment, vacate the plea, grant defendant's omnibus motion insofar as it sought suppression of the cocaine found in the vehicle, and remit the matter to Supreme Court for further proceedings on the indictment." ***People v. Kendrick*, 2017 N.Y. Slip Op. 00870, 4th Dept 2-3-17**

CRIMINAL LAW, EVIDENCE.

ATTEMPTED FIRST DEGREE MURDER CONVICTIONS PRECLUDED BY FAILURE TO PROVE THE 38-YEAR-OLD DEFENDANT WAS MORE THAN 18 YEARS OLD, RECKLESS ENDANGERMENT FIRST DEGREE CONVICTION NOT SUPPORTED BY PROOF OF A GRAVE RISK OF DEATH.

The Fourth Department determined the failure to offer any proof the 38-year-old defendant was more than 18 years old precluded conviction of attempted first degree murder (defendant shot at police officers). The convictions were reduced to attempted second degree murder. The Fourth Department further determined the reckless endangerment first degree was not supported by sufficient evidence that the passenger in defendant's vehicle was exposed to a "grave risk of death" when defendant rammed a police vehicle. The conviction was reduced to reckless endangerment second degree. ***People v. VanGorden*, 2017 N.Y. Slip Op. 00877, 4th Dept 2-3-17**

FAMILY LAW.

UNDER CRITERIA RECENTLY ANNOUNCED BY THE COURT OF APPEALS, GRANDPARENTS HAD STANDING TO CONTEST MOTHER'S PETITION FOR CUSTODY.

The Fourth Department, reversing Family Court, determined, pursuant to the criteria recently announced by the Court of Appeals, the grandparents had standing to contest a custody petition by mother. The child, now six years old, had lived with the grandparents since birth and mother, who has a good relationship with the child, had never before sought custody: "Approximately six months after the court issued its order, the Court of Appeals reversed our decision in Suarez and clarified what constitutes extraordinary circumstances when the nonparent seeking custody is a grandparent of the child. In that context, extraordinary circumstances may be demonstrated by an 'extended disruption of custody, specifically: (1) a 24-month separation of the parent and child, which is identified as prolonged, (2) the parent's voluntary relinquishment of

care and control of the child during such period, and (3) the residence of the child in the grandparents' household' (Suarez, 26 NY3d at 448 ...) ". ***Matter of Orlowski v. Zwack*, 2017 N.Y. Slip Op. 00880, 4th Dept 2-3-17**

FAMILY LAW.

18% REDUCTION IN INCOME SUFFICIENT TO WARRANT RECALCULATION OF CHILD SUPPORT.
The Fourth Department, reversing Family Court, determined an 18% reduction in father's income was sufficient to warrant a recalculation of his child support: "... [T]he father cites his significantly reduced income from 2012 to 2013 as the requisite change in circumstances. We agree with the father that such income reduction—approximately 18%—constitutes a sufficient change in circumstances to warrant a recalculation of his child support obligation ...". ***Matter of Brink v. Brink*, 2017 N.Y. Slip Op. 00879, 4th Dept 2-3-17**

LABOR LAW-CONSTRUCTION LAW.

QUESTION OF FACT WHETHER LADDER WAS DEFECTIVE AND WHETHER ADDITIONAL SAFETY DEVICES WERE REQUIRED, SUMMARY JUDGMENT ON LABOR LAW 240(1) CAUSE OF ACTION PROPERLY DENIED.
The Fourth Department determined plaintiff's motion for summary judgment on his Labor Law 240 (1) cause of action was properly denied. Plaintiff was standing on a closed A-frame ladder when he felt an electric shock and fell: "At the time of the accident, plaintiff was using a 10-foot A-frame ladder to install flashing around a duct. The ladder was folded shut and leaning against the wall while plaintiff was using it. Just before the accident, he was using both hands to take a measurement above his head, while standing on 'the fourth or fifth rung' of the ladder, which was 'at least four feet off the floor.' As he extended his tape measure, he felt a strong electric shock to his left arm and he fell off the ladder. Contrary to plaintiff's contention, we conclude that the court properly denied the motion. '[T]here are questions of fact . . . whether . . . the ladder, which was not shown to be defective in any way, failed to provide proper protection, and whether . . . plaintiff should have been provided with additional safety devices' ...". ***Jones v. Nazareth Coll. of Rochester*, 2017 N.Y. Slip Op. 00825, 4th Dept 2-3-17**

MEDICAID, ADMINISTRATIVE LAW.

COUNTY'S INTERPRETATION OF REGULATION WAS RATIONAL AND COULD NOT, THEREFORE, BE DISTURBED BY THE COURT; TIME LIMITS APPLICABLE TO ADMINISTRATIVE DECISIONS ARE DISCRETIONARY.
The Fourth Department determined Supreme Court properly determined the respondent county had timely notified petitioner of the denial of petitioner's request for Medicaid overburden expenditures. If the denial had been deemed untimely, petitioner argued, the county would be required to pay. The court noted that the county's interpretation of the relevant time limits was rational and therefore could not be disturbed by a court. The court further noted that, even if the time limits had been exceeded, denial of the claim would still have been proper because the time limits are discretionary in this context: "It is well settled that 'the interpretation given to a regulation by the agency which promulgated it and is responsible for its administration is entitled to deference if that interpretation is not irrational or unreasonable' ... . * * * ... [I]t is well settled that, '[a]bsent an express limitation upon the power of a particular agency to act after the expiration of the relevant statutory period, the time limits within which an administrative agency must act generally are construed as discretionary' ... . As the Court of Appeals noted, ' [a] rule that rendered every administrative decision void unless it was determined in strict literal compliance with statutory [or regulatory] procedure would not only be impractical but would also fail to recognize the degree to which broader public concerns, not merely the interests of the parties, are affected by administrative proceedings' ...". ***Matter of County of Oneida v. Zucker*, 2017 N.Y. Slip Op. 00785, 4th Dept 2-3-16**

PERSONAL INJURY.

DEFENDANT CAR RENTAL COMPANY'S MOTION FOR SUMMARY JUDGMENT IN THIS NEGLIGENT ENTRUSTMENT CASE WAS PROPERLY DENIED; QUESTION OF FACT WHETHER COMPANY KNEW AN UNLICENSED DRIVER WOULD USE THE CAR.
The Fourth Department, over a two-justice dissent, determined defendant's motion for summary judgment in this negligent entrustment case was properly denied. Plaintiff alleged the defendant car rental company (BAR) knew or should have known that an unlicensed driver (Kirksey) would drive the car (which was rented to defendant Jones). The dissent argued that knowledge an unlicensed driver would use the car does not amount to knowledge the car would be driven by an incompetent driver: "The fact that Kirksey did not possess a driver's license is a factor to consider in determining whether BAR knew that Kirksey was incompetent to operate the vehicle ... . While we agree with the dissent that 'the absence or possession of a driver's license is not relevant to the issue of negligence' in the operation of a motor vehicle ... , this is a negligent entrustment cause of action, where the issue does not concern the manner in which the accident occurred. Rather, the issue is whether BAR should have entrusted the vehicle to Kirksey in the first instance." ***Graham v. Jones*, 2017 N.Y. Slip Op. 00835, 4th Dept 2-3-17**

PERSONAL INJURY.

SNOW REMOVAL CONTRACTOR DID NOT OWE A DUTY TO PLAINTIFF IN THIS SLIP AND FALL CASE; INSPECTION THREE HOURS BEFORE THE FALL DID NOT WARRANT DISMISSAL OF THE CAUSE OF ACTION ALLEGING CONSTRUCTIVE NOTICE.

The Fourth Department determined the complaint against the snow removal contractor (JB Landscaping) in this slip and fall case should have been dismissed. The fact that the property was inspected three hours before the incident did not warrant dismissal of the constructive notice cause of action against the property manager (Ciminelli) and the property owner (205 Park): "We conclude that the contract between JB Landscaping and Ciminelli was not so comprehensive and exclusive that it entirely displaced Ciminelli's and 205 Park's duty to maintain the premises safely, such that JB Landscaping assumed a duty to plaintiff. Although the contract in the case at bar delegated all of the snow and ice removal to JB Landscaping, along with responsibility for monitoring the property 24 hours per day, seven days per week, the contract also provided that 205 Park and the tenant of the property could request additional services from JB Landscaping, including snow and ice removal. In addition, the contract reserved Ciminelli's rights 'to determine the depth of snow at locations where JB Landscaping performs snowplowing' and to direct JB Landscaping to reposition or remove accumulated snow piles. The contract also required weekly submission of maintenance logs to Ciminelli and preapproval from Ciminelli to engage a subcontractor to assist with snow and ice removal. * * * The weather records ... recited ... that from 3:01 a.m. until 6:24 a.m. the short term forecasts called for falling temperatures, and that any wet or untreated pavement could result in patchy black ice. Plaintiff testified that she fell at 7:45 a.m. In our view, the inspection of the area approximately three hours before the plaintiff fell does not establish ' that the ice formed so close in time to the accident that [defendant(s)] could not reasonably have been expected to notice and remedy the condition' ...". ***Waters v. Ciminelli Dev. Co., Inc.*, 2017 N.Y. Slip Op. 00854, 4th Dept 2-3-17**

MUNICIPAL LAW, PERSONAL INJURY.

LEAVE TO FILE LATE NOTICE OF CLAIM PROPERLY GRANTED, NOTICE FILED PROMPTLY AFTER CLAIMANTS LEARNED THE WATER AUTHORITY CREATED THE DEFECT IN THE ROADWAY.

The Fourth Department determined Supreme Court properly granted claimants leave to file a late notice of claim against the water authority which allegedly created a depression in the roadway (the cause of the injury). Claimants had filed a timely notice of claim against the city and only later learned the water authority was the general contractor: "An '[e]rror concerning the identity of the governmental entity to be served' can constitute a reasonable excuse for the delay 'provided that a prompt application for relief is made after discovery of the error' ... . Here, claimants demonstrated a reasonable excuse for the delay inasmuch as they served a timely notice of claim upon the City, and then promptly applied for leave to serve a late notice of claim upon respondents after discovering respondents' alleged involvement in causing claimant's injuries ... . Furthermore, although respondents lacked actual knowledge of claimant's injuries, respondents have ' made no particularized or persuasive showing that the delay caused [them] substantial prejudice' ... . Indeed, we note that the Water Board was the general contractor for the construction project that allegedly created the defect in the roadway, and thus respondents' ability to investigate the facts underlying the claim is furthered by their possession of documents and other information related to the construction project." ***King v. Niagara Falls Water Auth.*, 2017 N.Y. Slip Op. 00855, 4th Dept 2-3-17**

PRODUCTS LIABILITY, TOXIC TORTS, PERSONAL INJURY.

ONLY FAILURE TO WARN CAUSES OF ACTION PREEMPTED BY FEDERAL LAW IN THIS PESTICIDE-INJURY LAWSUIT.

The Fourth Department determined only the failure to warn causes of action in this lawsuit against a pesticide manufacturer were preempted by federal law. Supreme Court should not have dismissed the negligence, defective design/manufacture and breach of warranty causes of action. The Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) preempted only those causes of action that could result in state labelling requirements: "The preemption provision of FIFRA provides that, '[i]n general[,] . . . a State may regulate the sale or use of any federally registered pesticide or device in the State, but only if and to the extent the regulation does not permit any sale or use prohibited by this subchapter' (7 USC § 136v [a]). On the other hand, FIFRA provides that, in the interest of '[u]niformity[,] . . . [s]uch State shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under this subchapter' ... . * * * ... [W]e conclude that the court erred in dismissing the third, fifth, and sixth causes of action of plaintiff's amended complaint, as well as those parts of the fourth cause of action that do not allege a failure to warn. Plaintiff's causes of action and claims alleging defendant's breach of warranty, ordinary negligence, and defective design and manufacture of its product, i.e., theories unrelated to labeling or packaging, are not preempted by FIFRA ...". ***Esposito v. Contec, Inc.*, 2017 N.Y. Slip Op. 00842, 4th Dept 2-3-17**

REAL PROPERTY TAX LAW, MUNICIPAL LAW.

PETITIONER DID NOT COME FORWARD WITH SUFFICIENT EVIDENCE TO OVERCOME THE PRESUMPTION THAT THE REAL PROPERTY TAX ASSESSMENT WAS VALID.

The Fourth Department determined the petitioner (city) did not overcome the presumption that the respondent's (town's) real property tax assessment was valid. The city owned a drinking water reservoir and dam area in the town. The city failed to produce an appraisal to challenge the town's assessment. Therefore, the town was not required to come forward with any proof to support the assessment: "It is the rule in an RPTL article 7 proceeding that the 'locality's tax assessment is presumptively valid,' but that '[the] petitioner may overcome that presumption by bringing forth substantial evidence that its property has been overvalued' ... . 'In the context of a proceeding to challenge a tax assessment, substantial evidence will often consist of a detailed, competent appraisal based on standard, accepted appraisal techniques and prepared by a qualified appraiser' ... . Until the presumption of the validity of the assessment is overcome, there is no obligation on the part of the assessor to come forward with proof of correctness of the assessment ... . Only if the petitioner rebuts the presumption of validity must the court then examine and 'weigh the entire record, including evidence of claimed deficiencies in the assessment, to determine whether petitioner has established by a preponderance of the evidence that its property has been overvalued' ... . Here, the record contains no competent appraisal evidence by which the court plausibly might have determined that the fair value of the parcel was, on each of the taxable dates in question, $11.45 million. Given that lack of proof of valuation, it must be concluded that petitioner failed to carry its evidentiary burden in challenging its tax assessment ...". ***Matter of City of Rome v. Board of Assessors*, 2017 N.Y. Slip Op. 00864, 4th Dept 2-3-17**

ZONING.

DETERMINATION ALLOWING USE OF RESIDENTIAL STREETS TO ACCESS A CLAY MINING OPERATION REVERSED, NO DEMONSTRATION PROPERTY WAS WORTHLESS UNDER EXISTING ZONING.

The Fourth Department, reversing the zoning board of appeals (ZBA) and Supreme Court, held that the ZBA's determination allowing respondent Seneca Meadows Inc (SMI) to use residential streets to access a clay mining operation was irrational and unreasonable. SMI did not demonstrate that no reasonable return may be obtained from the property under existing zoning: "SMI's proposed clay mine is located within its agriculturally zoned parcel, but it is bordered by its commercially and residentially zoned parcels that provide access to public roads. The Zoning Law of the Town of Waterloo prohibits commercial excavation operations in residential districts. Nevertheless, the ZBA upheld [the code enforcement officer's] determination that the access road can cross the residential district because the agricultural portion of the property is landlocked. ... The ZBA's and the court's reliance on our determination in *Matter of Passucci v. Town of W. Seneca* (151 AD2d 984) is misplaced. In that case, similar to this case, the commercially zoned portion of the petitioner's property was landlocked, and the only access was over the residentially zoned portion of the property (*id.* at 984). In that case, however, the Town's ordinance prohibited the petitioner from using the residential portion of his premises to access his commercial portion, and thus enforcing the zoning restriction would be unconstitutionally applied inasmuch as it "would prevent [the petitioner] from making any use of the property and would destroy its economic value" (*id.* ...). SMI has failed to carry its 'heavy burden of establishing that no reasonable return may be obtained from the property under the existing zoning' ...". ***Matter of Lemmon v. Seneca Meadows, Inc.*, 2017 N.Y. Slip Op. 00798, 4th Dept 2-3-17**

ZONING.

DENIAL OF VARIANCES FOR BILLBOARDS UPHELD, ANY HARDSHIP DEEMED SELF-CREATED.

The Fourth Department determined the ruling of the zoning board of appeals (ZBA) was properly upheld by Supreme Court. Petitioner-trust owns a landlocked undeveloped parcel. An offer to buy the parcel was contingent on the grant of variances allowing off-site billboards visible from the adjacent highway. The town code allows only on-site billboards. The ZBA denied the variances. "We reject petitioners' contention that the ZBA acted arbitrarily and capriciously in determining that they failed to establish the factors constituting unnecessary hardship required for the issuance of the use variances (see Town Law § 267-b [2] [b]). The court properly determined, upon review of the record as a whole, including the evidence submitted to the ZBA, the findings and conclusions articulated by the ZBA during the hearing, and its subsequent letter decision ... , that there is substantial evidence supporting the ZBA's determination that the hardship was self-created (see § 267-b [2] [b] [4]). * * * ... [T]he Trust possesses the same unused, oddly-shaped, difficult-to-develop property that [its predecessor] purchased, and although the purchase may now be viewed as a poor investment, courts are not responsible for 'guarantee[ing] the investments of careless land buyers' ... . Contrary to petitioners' contention, the court properly concluded that there is substantial evidence supporting the ZBA's determination that the billboards would have a negative and adverse effect upon the character of the neighborhood inasmuch as the relevant area could not aesthetically support additional signs ...". ***Matter of Expressview Dev., Inc. v. Town of Gates Zoning Bd. of Appeals*, 2017 N.Y. Slip Op. 00874, 4th Dept 2-3-17**

To view archived issues of CasePrepPlus,
visit www.nysba.org/caseprepplus.