CasePrepPlus

April 19, 2017

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

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FIRST DEPARTMENT

CIVIL PROCEDURE, AGENCY.

PLAINTIFFS' CONCLUSORY ALLEGATIONS OF AN AGENCY RELATIONSHIP INSUFFICIENT TO DEMONSTRATE A BASIS FOR LONG-ARM JURISDICTION, MOTION TO DISMISS PROPERLY GRANTED.

The First Department, over a dissent, determined plaintiffs did not demonstrate defendants were subject to long-arm jurisdiction in New York. The dissent argued jurisdiction was obtained through the activities of defendants' New York agents. The majority held that the conclusory allegations concerning the purported agency relationship were insufficient to survive the motion to dismiss: "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. 02876, 1st Dept 4-13-17**

CIVIL PROCEDURE, AGENCY, PERSONAL INJURY.

EVIDENCE DEFENDANT HOTEL HELD ITSELF OUT AS THE PROPERTY OWNER ON ITS WEBSITE RAISED THE POSSIBILITY OF LIABILITY IN THIS SLIP AND FALL CASE AS THE APPARENT AGENT OF THE OWNER, SUMMARY JUDGMENT PROPERLY DENIED AS PREMATURE.

The First Department determined plaintiffs raised sufficient questions about whether defendant Starwood was an apparent or ostensible agent of the property owner, Sheraton, to justify further discovery and denial of defendant's summary judgment motion as premature. Plaintiff was injured in a slip and fall on a hotel walkway alleged to be defective. Plaintiff sued Starwood. Starwood moved for summary judgment arguing the hotel was owned by Sheraton and the walkway maintenance was under the exclusive control of an independent contractor, ZLC. Plaintiffs demonstrated there was evidence Starwood held itself out as the owner of the property on its website: "Starwood demonstrated that it did not own or control the hotel, and that, under the terms of the license agreement with Sheraton, ZLC was an independent contractor and was responsible for the day-to-day operations of the hotel. Under these circumstances, even if Starwood were a party to the license (or franchise) agreement, the mere existence of a franchise relationship would not provide a basis for the imposition of vicarious liability against Starwood for the negligence of the franchisee, ZLC ... . However, in opposition, plaintiff submitted evidence that Starwood's reservations website holds the hotel out to the public as a Starwood property, and that plaintiff relied on the representations on Starwood's website in choosing to book a room at the hotel. This evidence of public representations and reliance may support a finding of apparent or ostensible agency, which may serve as a basis for imposing vicarious liability against Starwood ... . Although the license agreement required ZLC to disclose that it was an "independent legal entity operating under license" from Sheraton and to place 'notices of independent ownership' on the premises, Starwood did not provide any evidence that ZLC complied with those requirements." ***Stern v. Starwood Hotels & Resorts Worldwide, Inc.*, 2017 N.Y. Slip Op. 02882, 1st Dept 4-13-17**

CRIMINAL LAW.

IDENTITY THEFT STATUTE AMBIGUOUS, THE ASSUMPTION OF THE VICTIM'S IDENTITY IS AN ESSENTIAL ELEMENT OF THE OFFENSE, HERE DEFENDANT USED HER OWN NAME, CONVICTION REVERSED.

The First Department, in a full-fledged opinion by Justice Acosta, determined defendant's conviction of identity theft first degree must be vacated. Defendant tried to cash a check which was not actually from the bank identified on the face of the check. The People argued defendant was assuming the identity of the bank, which is a "person" under the law. The First Department, disagreeing with the Fourth Department, found that the identity theft statute was ambiguous and the rule of lenity required the statute be interpreted to require proof of the assumption of the victim's identity as an element of the offense: "... [T]he People failed to prove beyond a reasonable doubt that defendant assumed the identity of another person. The People argue that defendant assumed the identity of H & R Block Bank when she attempted to cash a check that con-

tained the bank's personal identifying information (the company's name, address, account number, and routing number). However, the People did not demonstrate that the result of defendant's use of that information was that she assumed the bank's identity. To be sure, defendant presented a check containing the personal identifying information of H & R Block. However, the check was made payable to defendant, in her real name. Defendant presented her own identification establishing her identity as Blondine Destin, and signed her own name on the back of the check when the bank teller asked her to endorse it. None of the TD Bank employees were under the impression that defendant was anyone other than herself ... . Thus ... the evidence was legally insufficient to establish that defendant committed identity theft, because she did not assume the identity of the victim ...". ***People v. Destin*, 2017 N.Y. Slip Op. 02767, 1st Dept, 4-11-17**

CRIMINAL LAW.

STATUTE PROHIBITING CRIMINAL POSSESSION OF A WEAPON AS AN ACT OF TERRORISM NOT PREEMPTED BY FEDERAL LAW AND NOT UNCONSTITUTIONAL.

The First Department determined the statute prohibiting criminal possession of a weapon (a pipe bomb) as an act of terrorism was not preempted by federal law and was not unconstitutional: "Defendant has not met his burden of showing a 'clear and unambiguous' congressional intent to preempt state legislation in the field of counterterrorism ... . The statute is not expressly preempted by 18 USC § 2338, which states that federal district courts have exclusive jurisdiction over actions brought under 18 USC part I, chapter 113B. Although Penal Law § 490.25(1) uses language substantially identical to the federal definition of 'domestic terrorism' (18 USC § 2331[5]), the Penal Law provision is a separate statute limited to the commission of enumerated state offenses. Defendant also fails to establish implied federal preemption of state counterterrorism laws. Since a local community will typically be the most directly affected by a terrorist attack there ... , the 'federal interest' in counterterrorism is not 'so dominant' as to 'preclude' local enforcement of state laws against attempts to commit terrorist attacks ... . Moreover, Congress has not enacted 'a framework of regulation so pervasive' as to leave 'no room for the States to supplement it' ... . This is evident from the strong federal policy of cooperating with state and local governments to combat terrorism ... . The statute is not unconstitutionally vague in proscribing the 'intent to intimidate or coerce a civilian population' ... , … We also reject defendant's challenges to the statute under the Free Speech Clause of the First Amendment and article I, § 8 of the New York Constitution. * * * Moreover, defendant's argument that the statute is overbroad in chilling political speech is unavailing, since any overbreadth is not 'substantial . . . in relation to the statute's plainly legitimate sweep' ... of prohibiting criminal conduct perpetrated with an intent commonly associated with terrorism ...". ***People v. Pimentel*, 2017 N.Y. Slip Op. 02891, 1st Dept 4-13-17**

CRIMINAL LAW, SEX OFFENDER REGISTRATION ACT (SORA).

DEFENDANT, WHO WAS CONVICTED IN VIRGINIA OF THE MURDER OF A 15-YEAR-OLD WITH NO SEXUAL COMPONENT, AND WHO WAS REQUIRED TO REGISTER AS A SEX OFFENDER IN VIRGINIA, NEED NOT REGISTER AS A SEX OFFENDER IN NEW YORK.

The First Department, in a full-fledged opinion by Justice Andrias, determined requiring defendant to register as a sex offender in New York based upon the murder of a 15-year-old in Virginia violated defendant's right to substantive due process. Defendant shot and killed his 15-year-old half sister when he was 19. There was no sexual component to the crime. Upon his release from prison after 25 years, defendant, under Virginia law, was required to register as a sex offender (based on the age of the victim). New York has no similar registration requirement. When defendant relocated to New York he was assessed a level three sex offender in a SORA proceeding: "...[T]he connection between defendant's crime and the legislative purpose behind SORA is too attenuated to support finding a legitimate governmental interest in applying Correction Law § 168-a(2)(d)(ii) to defendant. The record does not establish a correlation between the murder of a victim under 15 years of age and the propensity to commit sexual offenses. Thus, the legislative purpose of protecting the public from sex offenders is not served by requiring defendant to register as a sex offender in New York pursuant to section 168-a(2)(d)(ii) solely because he is obligated to do so under a broader Virginia statute, which designates the murder of a person under the age of 15, without a sexual component, as an offense subject to registration in a registry that encompasses both sex crimes and crimes against minors." ***People v. Diaz*, 2017 N.Y. Slip Op. 02915, 1st Dept 4-13-17**

INSURANCE LAW, CONTRACT LAW.

ISSUE OF FACT ABOUT MEANING OF AN EXCLUSION IN A FLOOD INSURANCE POLICY.

The First Department determined there was a question of fact about the meaning of an exclusion in a flood insurance policy. The policy excluded coverage for property in (FEMA) Flood Zone A. The plaintiff's property was located in (FEMA) Flood Zone AE: "When it comes to exclusions from coverage, the exclusion 'must be specific and clear in order to be enforced' ... and ambiguities in exclusions are to be construed 'most strongly' against the insurer ... . As this Court has recognized, there are circumstances where extrinsic evidence may be admitted prior to an exclusion being strictly construed against an insurer ... , and '[w]here [] ambiguous words are to be construed in the light of extrinsic evidence or the surrounding circumstances, the meaning of such words may become a question of fact for the jury' ... . Here, the language of FEMA's

flood zone regulations raises an issue of fact rendering the insurance policy's exclusion of flood coverage ambiguous ...". ***Heartland Brewery, Inc. v. Nova Cas. Co.*, 2017 N.Y. Slip Op. 02908, 1st Dept 4-13-17**

INTENTIONAL TORTS, EMPLOYMENT LAW.

BAR NOT LIABLE FOR ASSAULT BY SECURITY GUARD WHO WAS AN INDEPENDENT CONTRACTOR, NOT AN EMPLOYEE.

The First Department determined defendant bar (BR Guest's) was not vicariously liable for an assault on plaintiff by a security guard (DiPaola), who was an independent contractor: "The record establishes that DiPaola, a security guard, was an independent contractor when the incident occurred ... . The evidence shows that DiPaola was not on BR Guest's payroll, did not receive health insurance or other fringe benefits, and that BR Guest contracted for his services as a security guard from defendant Presidium, LLC ... . The record reveals nothing more than general supervisory control, which cannot form the basis for imposing liability against BR Guest or Hanson, who was the vice president of BR Guest Inc., for plaintiff's injuries sustained as a result of DiPaola's assault ... . The fact that BR Guest decided the number of security guards needed on a particular night and where on the premises the guards should be posted at any given time, and gave them instructions relating to the manner in which they performed their work does not render the security guards working at the premises special employees ...". ***McLaughlan v. BR Guest, Inc.*, 2017 N.Y. Slip Op. 02906, 1st Dept 4-13-17**

LABOR LAW-CONSTRUCTION LAW, CIVIL PROCEDURE, PERSONAL INJURY.

NEW YORK LAW APPLIED WHERE BOTH PLAINTIFF AND HIS EMPLOYER ARE CANADIAN, PLAINTIFF, WHO WAS SHOCKED BY ELECTRIC WIRES ON THE FLOOR, ENTITLED TO SUMMARY JUDGMENT ON HIS LABOR LAW § 241(6) CAUSE OF ACTION.

The First Department determined New York law applied here where plaintiff and plaintiff's employer, Nygard, a third-party defendant, are Canadian and further held plaintiff was entitled to summary judgment on his Labor Law § 241(6) cause of action. Plaintiff was shocked by electric wires which were on the floor of the workplace: "To the extent, if any, Manitoba law, unlike New York law, might prohibit the third-party claims asserted by defendants (both domiciled in New York) against Manitoba-domiciliary Nygard, plaintiff's employer, the availability of a third-party claim against plaintiff's employer is governed by the law of the place of injury — here, New York — 'where the local law of each litigant's domicile favors that party, and the action is pending in one of those jurisdictions' ... . The application of New York law on this issue is appropriate because this state, where the accident occurred, 'is the place with which both [defendants and Nygard] have voluntarily associated themselves' ... , and 'comports with the reasonable expectations of [these] parties in conducting their business affairs' ... . Plaintiff was engaged in 'construction' work at the time of the incident (Labor Law § 241[6]), and Owner's attempt to isolate the activities in which plaintiff was involved at the moment of the incident ignores the general context of the work ... . Further, the record established a violation of 12 NYCRR 23-1.13(b)(4), which requires that workers who may come into contact with an electric power circuit be protected against electric shock 'by de-energizing the circuit and grounding it or by guarding such circuit by effective insulation or other means.' " ***O'Leary v. S&A Elec. Contr. Corp.*, 2017 N.Y. Slip Op. 02888, 1st Dept 4-13-17**

REAL PROPERTY ACTIONS AND PROCEEDINGS LAW.

PETITIONER, WHO WAS GRANTED A LICENSE TO ENTER RESPONDENT'S PROPERTY UNDER RPAPL 881 TO MAKE REPAIRS ON PETITIONER'S PROPERTY (OTHERWISE NOT ACCESSIBLE), WAS REQUIRED TO PAY RESPONDENT A LICENSE FEE.

The First Department determined petitioner was entitled to a license to enter another's property to make repairs on petitioner's property (which was otherwise not accessible) but the respondent property owner was entitled to a license fee: "RPAPL 881 provides: 'When an owner or lessee seeks to make improvements or repairs to real property so situated that such improvements or repairs cannot be made by the owner or lessee without entering the premises of an adjoining owner or his lessee, and permission so to enter has been refused, the owner or lessee seeking to make such improvements or repairs may commence a special proceeding for a license so to enter pursuant to article four of the civil practice law and rules. The petition and affidavits, if any, shall state the facts making such entry necessary and the date or dates on which entry is sought. Such license shall be granted by the court in an appropriate case upon such terms as justice requires. The licensee shall be liable to the adjoining owner or his lessee for actual damages occurring as a result of the entry.' 'Although the determination of whether to award a license fee is discretionary, in that RPAPL 881 provides that a license shall be granted by the court in an appropriate case upon such terms as justice requires,' the grant of licenses pursuant to RPAPL 881 often warrants the award of contemporaneous license fees'... . This is because 'the respondent to an 881 petition has not sought out the intrusion and does not derive any benefit from it . . . . Equity requires that the owner compelled to grant access should not have to bear any costs resulting from the access' ...". ***Matter of Van Dorn Holdings, LLC v. 152 W. 58th Owners Corp.*, 2017 N.Y. Slip Op. 02905, 1st Dept 4-13-17**

SECOND DEPARTMENT

CIVIL PROCEDURE.

FAILURE TO COMPLY WITH DISCOVERY DEMANDS WARRANTED STRIKING THE ANSWER.

The Second Department determined the defendants repeated failure to comply with discovery demands warranted striking defendants' answer: "The nature and degree of the sanction to be imposed on a motion pursuant to CPLR 3126 is within the broad discretion of the motion court ... . The striking of a pleading may be appropriate where there is a clear showing that the failure to comply with discovery demands or court-ordered discovery is willful and contumacious ... . The willful and contumacious character of a party's conduct can be inferred from the party's repeated failure to comply with discovery demands or orders without a reasonable excuse ... . Here, the defendants' willful and contumacious conduct can be inferred from their repeated failures, without an adequate excuse, to comply with discovery demands and the Supreme Court's discovery orders ... . Accordingly, the court providently exercised its discretion in granting the plaintiffs' motion pursuant to CPLR 3126 to strike the defendants' answer and for leave to enter a default judgment against the defendants." ***Mears v. Long*, 2017 N.Y. Slip Op. 02782, 2nd Dept 4-12-17**

CIVIL PROCEDURE, BANKING LAW, DEBTOR-CREDITOR LAW.

NOT CLEAR WHETHER $1740 EXEMPTION FROM A JUDGMENT CREDITOR'S RESTRAINT OF FUNDS HELD BY A BANK APPLIES TO ALL ACCOUNTS IN THE AGGREGATE OR TO EACH ACCOUNT, BANK'S MOTION TO DISMISS THE COMPLAINT ALLEGING EACH ACCOUNT MUST BE CONSIDERED SEPARATELY PROPERLY DENIED.

The Second Department determined the Bank of America's (BOA's) motion to dismiss a CPLR Article 52 proceeding contesting BOA's application of the Exempt Income Protection Act (EIPA) was properly denied. The EIPA exempts $1740 in a bank account from restraint by judgment creditors. BOA aggregated the amount in all of the plaintiffs' accounts, sent the plaintiffs $1740 and froze the rest. The plaintiffs argued the accounts should not be aggregated, rather the $1740 exemption should be applied to each account separately. The court deemed the statutory language ambiguous (the word "account," singular, was used). The Second Department noted that Supreme Court's conversion of the action to the correct format, a CPLR Article 52 special proceeding, was proper: "... [W]e find that CPLR 5222(i) is ambiguous as to whether it applies to an "amount" on deposit at a bank or to each "account" maintained at a bank. Turning to the legislative history of the EIPA, the bill jacket indicates that the stated legislative purpose was to create a procedure for the execution of money judgments on bank accounts containing exempt funds to ensure that debtors can keep access to exempt funds ... . The legislative history, as reflected in the bill jacket, particularly in a letter in support of the bill written by the bill's Assembly sponsor, Helene Weinstein, indicates that the statute applies to each account. Accordingly, BOA failed to establish its entitlement to dismissal of the cause of action alleging violations of the EIPA, and that branch of its motion pursuant to CPLR 3211(a) was properly denied." ***Jackson v. Bank of Am., N.A.*, 2017 N.Y. Slip Op. 02780, 2nd Dept 4-12-17**

CONTRACT LAW, LANDLORD-TENANT.

LIQUIDATED DAMAGES PROVISION IN THIS LEASE AGREEMENT WAS AN UNENFORCEABLE PENALTY.

The Second Department, reversing Supreme Court, determined the liquidated damages portion of a lease agreement was unenforceable. Here the complaint alleged that defendant did not vacate the leased premises on time and sought holdover damages: " '[W]hether a clause represents an enforceable liquidation of damages or an unenforceable penalty is a question of law, giving due consideration to the nature of the contract and the circumstances' ... . An enforceable liquidated damages clause is 'an estimate . . . of the extent of the injury that would be sustained as a result of breach of the agreement,' thereby embodying 'the principle of just compensation for loss' ... . Here, the defendant demonstrated, prima facie, that the amended agreement imposed an unenforceable penalty, and the plaintiff failed to raise a triable issue of fact in opposition. The damages section of the amended agreement provided the plaintiff with a remedy for the whole extent of any injury that would be sustained as a result of a holdover, 'in addition to' the sum of $5,000 per day in liquidated damages. The liquidated damages clause therefore is not 'an estimate . . . of the extent of the injury that would be sustained' ... , but rather an unenforceable penalty ...". ***555 W. John St., LLC v. Westbury Jeep Chrysler Dodge, Inc.*, 2017 N.Y. Slip Op. 02769, 2nd Dept 4-12-17**

EDUCATION-SCHOOL LAW, PERSONAL INJURY.

SCHOOL OWED NO DUTY OF CARE TO STUDENT STRUCK BY A CAR AFTER LEAVING THE SCHOOL WITH PERMISSION.

The Second Department determined defendant school did not owe a duty of care to a student who was struck by a car one block from the school after leaving the school with permission: "A school's duty to supervise the students in its charge arises from its physical custody and control over them ... . 'When that custody ceases because the child has passed out of the orbit of its authority in such a way that the parent is perfectly free to reassume control over the child's protection, the school's

custodial duty also ceases'... . 'Generally, a school cannot be held liable for injuries that occur off school property and beyond the orbit of its authority' ... . Here, the defendants established their prima facie entitlement to judgment as a matter of law by demonstrating that the infant plaintiff had left school grounds with the permission of his mother and, thus, was no longer in the defendants' custody or under their control and was outside the orbit of their authority ... . The defendants also demonstrated, prima facie, that the infant plaintiff was not released into a foreseeably hazardous setting that the defendants had a hand in creating ...". ***Donofrio v. Rockville Ctr. Union Free Sch. Dist.*, 2017 N.Y. Slip Op. 02774, 2nd Dept 4-12-17**

FAMILY LAW.

NEGLECT FINDING REVERSED, CRITERIA EXPLAINED.

The Second Department, reversing Family Court, determined the neglect finding was not supported by the evidence. The child was removed from the hospital shortly after mother gave birth: "The Administration for Children's Services (hereinafter ACS) filed a child neglect petition four days after the mother gave birth to the subject child in a Brooklyn hospital. During the initial days in the hospital, the child was placed in the room with the mother, where she took appropriate care of him. However, when the hospital personnel discovered that the mother only had income from public assistance and that she and the baby would not be accepted back into the home where the maternal grandmother was staying, they called ACS, which undertook an emergency removal of the child. It is undisputed that no ACS worker provided the mother with housing information, including emergency housing information, or provided any supplies for the child. After a fact-finding hearing, the Family Court found that the mother neglected the child. * * * 'At a fact-finding hearing in a neglect proceeding pursuant to Family Court Act article 10, a petitioner has the burden of proving by a preponderance of the evidence that the subject child was neglected'... . A neglected child is one 'whose physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired as a result of the failure of his parent . . . to exercise a minimum degree of care . . . in supplying the child with adequate food, clothing, shelter or education . . . though financially able to do so or offered financial or other reasonable means to do so'... . Actual or imminent danger of impairment is a 'prerequisite to a finding of neglect [which] ensures that the Family Court, in deciding whether to authorize state intervention, will focus on serious harm or potential harm to the child, not just on what might be deemed undesirable parental behavior'... . 'Imminent danger . . . must be near or impending, not merely possible'... . Here, ACS failed to demonstrate, by a preponderance of the evidence, that the mother did not supply the child with adequate food, clothing, and shelter although financially able to do so or offered financial or other reasonable means to do so ...". ***Matter of Zachariah W. v. Dominique W.*, 2017 N.Y. Slip Op. 02801, 2nd Dept 4-12-17**

MENTAL HYGIENE LAW, ATTORNEYS.

SEX OFFENDERS HAVE A RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL IN MENTAL HYGIENE LAW ARTICLE 10 PROCEEDINGS.

The Second Department determined a respondent in a Mental Hygiene Law article 10 proceeding (re: civil commitment of sex offenders) has a right to effective assistance of counsel (not usually the case in a civil proceeding). Respondent's writ of error coram nobis, alleging ineffective assistance, however, was denied on the merits: "Generally, in the context of civil litigation, an attorney's errors or omissions are binding on the client and a claim of ineffective assistance of counsel will not be entertained in the absence of extraordinary circumstances ... . However, a respondent in a Mental Hygiene Law article 10 proceeding has a statutory right to counsel ... and, as in proceedings pursuant to the Sex Offender Registration Act (Correction Law art 6-C) and certain Family Court proceedings, the consequences of an unfavorable determination in these particular civil proceedings are uniquely severe ... . Indeed, a respondent in a Mental Hygiene Law article 10 proceeding 'arguably faces an even more severe threat to his or her liberty than that faced by a criminal defendant. When successfully litigated by the State, such a proceeding can result in civil confinement, after a respondent is released from prison, which is involuntary and indefinite, and can last the remainder of a respondent's life' ... . Further, a respondent's statutory right to counsel in a Mental Hygiene Law article 10 proceeding would be eviscerated if counsel were ineffective... . Thus, a claim of ineffective assistance of counsel may be raised in a Mental Hygiene Law article 10 proceeding ...". ***Matter of State of New York v. Wayne J.*, 2017 N.Y. Slip Op. 02798, 2nd Dept 4-12-17**

MUNICIPAL LAW, NEGLIGENCE.

APPLICATION TO FILE LATE NOTICE OF CLAIM SHOULD HAVE BEEN GRANTED DESPITE LACK OF ADEQUATE EXCUSE.

The Second Department determined petitioner's application for leave to file a late notice of claim should have been granted, despite the lack of an adequate excuse. The respondent city's employees were involved in the accident and the police report alerted the city to a potential lawsuit: "Here, the City of New York acquired actual knowledge of the essential facts constituting the claim within 90 days of the accident, since its employees were directly involved in the accident, and the police accident report gave reasonable notice from which it could be inferred that a potentially actionable wrong had been committed by the City and that the petitioner was injured as a result thereof ... . Furthermore, the City received a late notice

of claim 22 days after the expiration of the 90-day period, which it accepted, and informed the petitioner that it would do its best to investigate and, if possible, settle the claim ... . Moreover, the petitioner made an initial showing that the City was not substantially prejudiced, since the City acquired timely, actual knowledge of the essential facts constituting the claim through the police accident report and became aware of the negligence claim less than one month after the expiration of the 90-day period ...". ***Matter of Cruz v. City of New York*, 2017 N.Y. Slip Op. 02789, 2nd Dept 4-12-17**

PERSONAL INJURY, MEDICAL MALPRACTICE.

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT IN THIS PODIATRIC MALPRACTICE CASE SHOULD NOT HAVE BEEN GRANTED, REQUIREMENTS FOR A LACK OF INFORMED CONSENT CAUSE OF ACTION EXPLAINED.
The Second Department, reversing Supreme Court, determined summary judgment should not have been awarded to defendant podiatrist in this malpractice action. The defendant's expert did not address the precise claims of malpractice made in the pleadings and did not demonstrate plaintiffs gave informed consent to the procedure. On the issue of informed consent, the court wrote: "To succeed on a cause of action to recover damages for podiatric malpractice based on lack of informed consent, a plaintiff must demonstrate (1) the failure of the podiatric practitioner providing the professional treatment or diagnosis to disclose to the patient the alternatives thereto and the reasonably foreseeable risks and benefits involved that a reasonable podiatric practitioner under similar circumstances would have disclosed, in a manner permitting the patient to make a knowledgeable evaluation, and (2) that a reasonably prudent person in the patient's position would not have undergone the treatment or diagnosis if he or she had been fully informed, and (3) that the lack of informed consent is a proximate cause of the injury or condition for which recovery is sought ... . Here, the plaintiffs' deposition testimony indicates that they were not fully advised of the risks, benefits, and alternatives to the surgical procedure. Further, the generic consent form signed by the infant plaintiff's mother did not establish the defendants' prima facie entitlement to judgment as a matter of law since it did not disclose the risks specific to the surgical procedure performed, and the defendants' expert failed to aver that the consent form complied with the prevailing standard for such disclosures applicable to reasonable podiatrists performing the same kind of surgery …". ***Parrilla v. Saphire*, 2017 N.Y. Slip Op. 02803, 2nd Dept 4-12-17**

PRODUCTS LIABILITY.

TRIAL JUDGE PROPERLY REFUSED TO INSTRUCT THE JURY ON THE *SCARANGELLA* DEFENSE WHICH PLACES THE RESPONSIBILITY FOR EMPLOYING A SAFETY DEVICE ON THE BUYER RATHER THAN THE MANUFACTURER.
The Second Department, in a full-fledged opinion by Justice Leventhal, determined that the defendant manufacturer of a Bobcat skid loader was not entitled to a jury instruction on the so-called *Scarangella* defense in this products liability case. Plaintiff's decedent was killed by a small tree which entered the open cab of the Bobcat. The Bobcat was rented without a door on the cab. A door was available as a safety device. The *Scarangella* defense, in limited circumstances, places the ultimate decision whether to employ an available safety device on the buyer rather than the manufacturer. In *Scarangella* the safety device was a back-up alarm for school buses. The purchaser of the buses opted not to have the alarms installed. Only the buyer's employees operated the buses and all were aware of the blind spot behind the buses: "The circumstances of this case demonstrate that the Supreme Court properly determined that the Scarangella exception is inapplicable. When the loader was sold to Taylor, the Bobcat defendants knew that Taylor would rent it out to consumers for their personal use. In other words, the Bobcat defendants knew that Taylor would be renting the loader to persons over whom Taylor had no control, and who might lack any experience operating heavy equipment. This is in sharp contrast to Scarangella, where the individuals at risk from the absence of back-up alarm equipment were almost exclusively the buyer's employees, and it was readily inferable that these employees were fully aware of a bus driver's blind spot in backing up a bus and the resultant hazard, and could be expected to exercise special care whenever positioned in proximity to the rear of any bus that was idling or moving in reverse in the yard. Where, as here, the buyer is purchasing the product for use not by its employees but by the general public, over whom the buyer will exercise no control once the product is rented, it would be inappropriate to apply an exception to liability that is premised on the buyer being in a superior position to make the risk-utility assessment." ***Fasolas v. Bobcat of N.Y., Inc.*, 2017 N.Y. Slip Op. 02777, 2nd Dept 4-12-17**

PROPERTY DAMAGE, CONTRACT LAW, CORPORATION LAW, MUNICIPAL LAW.

DIFFERENCES BETWEEN CONTRIBUTION AND INDEMNIFICATION EXPLAINED, PERSONAL TORT LIABILITY OF CORPORATE OFFICERS NOTED.
The Second Department, in a lawsuit stemming from the flooding of plaintiffs' land, explained the differences between contribution and indemnification and noted that corporate officers may be personally liable for torts committed in their performance of corporate duties: "The plaintiffs commenced this action against the Village of East Hills after they experienced flooding on their property from rainwater. The plaintiffs asserted causes of action sounding in tort, alleging that the flooding resulted from the development of land near their property, which was authorized by the Village. The Village commenced a third-party action seeking indemnification and contribution against A to Z Transit Contracting Corp., the project manager that constructed the plaintiffs' home, as well as its principal, David Ferdinand, architect Carl Majowka, who prepared plans for the construction of the plaintiffs' home, and Scott Anderson, the principal of Scott Anderson Design, Inc.,

which performed landscaping work for the plaintiffs' home. * * * '[C]ontribution arises automatically when certain factors are present and [does] not requir[e] any kind of agreement between or among the wrongdoers' ... . 'Indemnity, on the other hand, arises out of a contract which may be express or may be implied in law "to prevent a result which is regarded as unjust or unsatisfactory' ... . 'Further, '[w]here one is held liable solely on account of the negligence of another, indemnification, not contribution, principles apply to shift the entire liability to the one who was negligent.' . . . 'Conversely, where a party is held liable at least partially because of its own negligence, contribution against other culpable tort-feasors is the only available remedy'... . 'Whether indemnity or contribution applies depends not upon the parties' designation but upon a careful analysis of the theory of recovery against each tort-feasor' * * * Although '[c]orporate officers may not be held personally liable on contracts of their corporations, provided they did not purport to bind themselves individually under such contracts' ... , 'corporate officers may be held personally liable for torts committed in the performance of their corporate duties' ...". ***Eisman v. Village of E. Hills*, 2017 N.Y. Slip Op. 02775, 2nd Dept 4-12-17**

REAL PROPERTY, FORECLOSURE.

REAL PROPERTY ACTIONS AND PROCEEDINGS LAW (RPAPL) 1501 WAS THE PROPER BASIS FOR THE ACTION SEEKING TO SET ASIDE THE DEED AND MORTGAGES WHICH WERE THE BASES FOR THE BANK'S JUDGMENT OF FORECLOSURE.

The Second Department, reversing Supreme Court, determined plaintiff should have been granted summary judgment in the Real Property Actions and Proceedings Law (RPAPL) 1501 action to set aside the deed and mortgages which were the bases for foreclosure by defendant Wells Fargo bank. Plaintiff demonstrated the initial deed was a forgery. Wells Fargo argued the proper procedure required that plaintiff move to vacate the judgment of foreclosure: "RPAPL 1501(1) provides that any person who 'claims an estate or interest in real property' may 'maintain an action against any other person . . . to compel the determination of any claim adverse to that of the plaintiff which the defendant makes, or which it appears from the public records, . . . the defendant might make.' A deed based on forgery or obtained by false pretenses is void ab initio, and a mortgage based on such a deed is likewise invalid ... . Contrary to Wells Fargo's contention, the plaintiff, who, like the decedent, was not a defendant in the foreclosure action... , properly commenced the instant action ... . Wells Fargo otherwise failed to carry its prima facie burden on its motion by demonstrating the absence of a triable issue of fact as to whether the subject deed was valid ... . Accordingly, the Supreme Court erred in granting Wells Fargo's motion ...". ***Deramo v. Laffey*, 2017 N.Y. Slip Op. 02772, 2nd Dept 4-12-17**

WORKERS' COMPENSATION LAW. EMPLOYMENT LAW, PERSONAL INJURY.

PLAINTIFF PROPERLY OPTED TO SUE EMPLOYER FOR WORKPLACE INJURY, EMPLOYER DID NOT CARRY WORKERS' COMPENSATION INSURANCE.

The Second Department determined plaintiff's personal injury action against his employer (Montalvo) should not have been dismissed. The employer did not have Workers' Compensation insurance and plaintiff properly opted to sue: "Generally, 'Workers' Compensation benefits are [t]he sole and exclusive remedy of an employee against his employer for injuries in the course of employment' ... . 'This precludes suits against an employer for injuries in the course of employment' ... . Here, however, the plaintiff properly elected his remedy of pursuing this action against Montalvo under Workers' Compensation Law §§ 11 and 50, since Montalvo did not carry Workers' Compensation coverage at the time of the accident ... , a fact conceded by Montalvo's counsel in a statement that constituted a judicial admission ... . Accordingly, the trial court should not have granted Montalvo's trial motion pursuant to CPLR 3211(a)(7)." ***Rosario v. Montalvo & Son Auto Repair Ctr., Ltd.*, 2017 N.Y. Slip Op. 02837, 2nd Dept 4-12-17**

ZONING.

BECAUSE THE ZONING BOARD DID NOT ADDRESS THE MERITS OF AN APPLICATION FOR A VARIANCE, SUPREME COURT COULD NOT ADDRESS THE MERITS.

The Second Department, remitting the matter to the zoning board of appeals, noted that Supreme Court should not have considered the merits of petitioners' application for renewal of a variance because the board did not address the merits. The board denied the application under the doctrine of res judicata which the parties agreed was not applicable: "The Supreme Court improperly, in effect, denied the petition and dismissed the proceeding after reviewing the merits of the subject portion of the petitioners' application. In considering the petitioners' request to renew the use variance allowing the subject property to be used as a two-family dwelling without the condition that the subject property be owner-occupied, the Board did not reach the merits of that portion of the application. Instead, the Board relied upon the doctrine of res judicata to deny the petitioners' request for renewal of the use variance without an owner-occupied condition and stated that, as a result, it was not engaging in an analysis of the merits of imposing an owner-occupied condition, which had been rendered academic. On appeal, the parties do not challenge the court's determination that the Board's reliance upon the doctrine of res judicata was improper. However, upon concluding that the Board improperly invoked the doctrine of res judicata, the Supreme Court should not have then analyzed the merits of the subject portion of the petitioners' application. 'Judicial review of an administrative determination is limited to the grounds invoked by the agency in making its decision' ... . 'If the

grounds relied upon by the agency are inadequate or improper, a reviewing court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis' ...". ***Matter of Rodriguez v. Weiss*, 2017 N.Y. Slip Op. 02794, 2nd Dept 4-12-17**

THIRD DEPARTMENT

CRIMINAL LAW, APPEALS.

COUNTY COURT DID NOT HAVE AUTHORITY TO ALLOW AMENDMENT OF CONSPIRACY COUNT BY ADDING AN OVERT ACT, ISSUE HEARD ON APPEAL DESPITE LACK OF PRESERVATION AND FAILURE TO RAISE ON APPEAL.

The Third Department determined County Count did not have the authority two amend a defective conspiracy count by allowing the People to add an overt act. The court entertained the issue even though it was not preserved and it was not raised on appeal. The Third Department had made the same ruling in the codefendant's (Placido's) appeal: "In connection with Placido's appeal, this Court has held that count 2 of the indictment was jurisdictionally defective and that County Court lacked the authority to grant the People's motion to amend that count ...). In light of the fact that count 2 of the indictment was identical in respect to Placido and defendant, it necessarily follows that this Court's holding in *People v. Placido* ... applies with equal force to defendant. Accordingly, notwithstanding the fact that defendant did not raise this issue before County Court and does not raise it on appeal, we exercise our interest of justice jurisdiction and reverse defendant's conviction for conspiracy in the fourth degree." ***People v. Deleon*, 2017 N.Y. Slip Op. 02848, 3rd Dept 4-13-17**

ENVIRONMENTAL LAW.

PETITIONER LACKED STANDING TO CONTEST BAN ON FRACKING.

The Third Department determined petitioner lacked standing to challenge the statewide ban on fracking: "In 2010, then Governor David Paterson issued an executive order prohibiting respondent Department of Environmental Conservation (hereinafter DEC) from issuing permits for the use of high volume hydraulic fracturing (hereinafter HVHF) for the stimulation of oil and gas wells pending the completion of a supplemental generic environmental impact statement under the State Environmental Quality Review Act (see ECL art 8). That order was extended by Governor Andrew Cuomo in 2011 and remained in effect when petitioner, in December 2014, first wrote to respondent Commissioner of Environmental Conservation seeking permission to conduct HVHF on his properties in Allegany and Monroe Counties. ... We agree with Supreme Court that petitioner lacked standing to challenge the statewide prohibition on HVHF. 'Standing is a threshold determination, resting in part on policy considerations, that a person should be allowed access to the courts to adjudicate the merits of a particular dispute that satisfies the other justiciability criteria.' ... . In order to have standing in a land use matter, petitioner must demonstrate, among other things, that he 'would suffer direct harm, injury that is in some way different from that of the public at large' ... . At the time of commencement of this proceeding, petitioner had not applied for a permit nor offered any proof that he met any of the requirements to obtain a permit. He offered no proof of any plans to move forward with the process and conceded that any plans would necessarily involve commitments by oil and gas exploration companies, of which he had none. Petitioner's standing at the time of filing was no different than that of any landowner in the state; thus he lacked standing to challenge the determination ...". ***Matter of Morabito v. Martens*, 2017 N.Y. Slip Op. 02863, 3rd Dept 4-13-17**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

QUESTIONS OF FACT WHETHER HOMEOWNER'S EXEMPTION APPLIED (LABOR LAW § 240 (1)) AND WHETHER DEFENDANT CREATED THE DANGEROUS CONDITION (LABOR LAW § 200).

The Third Department determined there were questions of fact whether defendant intended to reside in the two-family home plaintiff was working on (thereby triggering the homeowner's exemption from Labor Law liability) and whether defendant created a dangerous condition by providing a ladder that was too short. Therefore defendant's motions for summary judgment on the Labor Law §§ 240 (1) and 200 causes of action were properly denied: Despite defendant's submissions indicating that he intended to use the house, at least in part, as his own residence, defendant also submitted the deposition of plaintiff, who testified that defendant had told him that he planned to rent both halves of the two-family home. Thus, defendant's submissions, when viewed in the light most favorable to the nonmoving party, failed to meet his prima facie burden of establishing his entitlement to the homeowner's exemption ... . Where, as here, the injured worker contends that the underlying 'accident arose not from the manner in which the work was performed, but rather from an allegedly dangerous condition at the work site, liability for a violation of Labor Law § 200 and common-law negligence will be imposed if the property owner created the condition or had actual or constructive notice of it, and failed to remedy the condition within a reasonable amount of time'... . According to plaintiff's deposition testimony, defendant created the dangerous condition that caused his fall and failed to remedy it despite plaintiff's complaints. More specifically, and according to plaintiff, defendant supplied plaintiff with a ladder that was too short for the fascia project that defendant had asked him to complete and, despite plaintiff voicing his concerns about the ladder, defendant told plaintiff that the project needed to be

completed before plaintiff left that day. Plaintiff further testified that defendant thereafter held the same ladder that plaintiff had indicated was too short while plaintiff climbed it and then reached to attempt the fascia work before falling." ***Vogler v. Perrault*, 2017 N.Y. Slip Op. 02857, 3rd Dept 4-13-17**

NEGLIGENCE, CONTRACT LAW.

CONTRACTOR OWED A DUTY OF CARE TO PLAINTIFF OVER AND ABOVE THE OBLIGATIONS IN THE CONTRACT BETWEEN THEM.

The Third Department determined defendant contractor owed a duty to plaintiff crane operator over and above any obligation running from a contract between them. The court further found there was a question of fact whether defendant was negligent in finding and setting up a staging area for the crane (the crane sank and fell into the pond): "In a case such as this one where the parties' relationship stems from a contract, a 'duty must spring from circumstances extraneous to, and not constituting elements of, the contract, although it may be connected with and dependent upon the contract' ... . 'In determining the scope of duty, courts examine, among other factors, whether the injury-producing occurrence is one that could have been anticipated' ... . Whether a duty exists in the first instance is a question of law for the courts ... . Here, neither the price quote nor the work order — the documents embodying the contractual relationship between plaintiff and defendant — contained terms regarding site safety or the placement of cranes at the site. The record nonetheless reveals that Daniel Morin, defendant's president, scouted an area by the pond where the dredging would take place in order to construct a 'staging area' that was to be used for daily activities and access for construction equipment." ***Southern Tier Crane Servs., Inc. v. Dakksco Pipeline Corp.*, 2017 N.Y. Slip Op. 02859, 3rd Dept 4-13-17**

ZONING.

TIE ZONING BOARD OF APPEALS VOTE IS NOT A DEFAULT DENIAL WHEN THE BOARD IS EXERCISING ITS ORIGINAL JURISDICTION.

The Third Department determined a 2-2 tie vote by the zoning board of appeals on a special use permit was not a default denial because the board was exercising its original, not appellate, jurisdiction. Therefore a subsequent 3-2 vote in favor of the permit (after a new member was appointed) was valid: "Supreme Court accurately set forth the 2002 legislative amendments to Town Law § 267-a, aptly observed the impact of those amendments in relation to *Matter of Tall Trees Constr. Corp. v. Zoning Bd. of Appeals of Town of Huntington* (97 NY2d 86 [2001]) and correctly determined that a tie vote of a zoning board of appeals only results in a default denial when, among other things, it is exercising its appellate jurisdiction ... . Inasmuch as it is undisputed that the ZBA was exercising its original jurisdiction here ... , we agree with Supreme Court that the September 2014 tie vote did not result in a default denial." ***Matter of Alper Rest. Inc. v. Town of Copake Zoning Bd. of Appeals*, 2017 N.Y. Slip Op. 02871, 3rd Dept 4-13-17**

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