CasePrepPlus

June 7, 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*

# COURT OF APPEALS

## CRIMINAL LAW, APPEALS.

WHETHER THE POLICE ENTRY INTO DEFENDANT'S HOME WAS JUSTIFIED BY EXIGENT CIRCUMSTANCES IS A MIXED QUESTION OF LAW AND FACT AND IS THEREFORE NOT REVIEWABLE BY THE COURT OF APPEALS.

The Court of Appeals, over an extensive dissent by Judge Rivera, determined whether entry into defendant's home was justified by exigent circumstances is a mixed question of facts and law that cannot be addressed by the Court of Appeals: "The order of the Appellate Division should be affirmed. The conclusion that the warrantless entry by police into defendant's home was justified by exigent circumstances is a mixed question of law and fact. Where, as here, there is support in the record for the Appellate Division's conclusion, the issue is beyond our further review ... . 'The rule applies 'where the facts are disputed . . . or where reasonable minds may differ as to the inference to be drawn [from the established facts]'... . The dissent's conclusion to the contrary is based on a narrative derived from the suppression hearing record that unduly emphasizes the testimony and resulting inferences that are favorable to defendant.'...

RIVERA, J. (dissenting):

As a matter of law, there is no record evidence to support the trial court's ruling that exigent circumstances justified the warrantless entry into defendant's home ... . Therefore, the Appellate Division should be reversed and a new trial ordered. I dissent." ***People v. Sivertson*, 2017 N.Y. Slip Op. 04320, CtApp 6-1-17**

# FIRST DEPARTMENT

## ATTORNEYS, APPEALS.

PLAINTIFF'S COUNSEL REPEATEDLY MADE A DEMONSTRABLY FALSE ALLEGATION AGAINST DEFENDANT LAW FIRM THROUGHOUT THE PROCEEDINGS IN THIS LEGAL MALPRACTICE ACTION, INCLUDING ON APPEAL, WARRANTING SANCTIONS.

The First Department, in a full-fledged opinion by Justice Tom, determined defendant law firm was entitled to sanctions for the frivolous conduct of plaintiff's counsel. Plaintiff's counsel had repeatedly, including on appeal, made the false allegation that defendant law firm had withdrawn two causes of action which would have been successful. The two causes of action had, in fact, been timely brought by defendant law firm, but were subsequently withdrawn by successor counsel: "... [D]espite it having been apparent from the record that successor counsel was the one who withdrew the conversion and breach of contract claims in the federal action and not defendants, and despite being alerted to this fact by the record of this case and Supreme Court on multiple occasions, counsel persists in repeating a materially false claim to this Court. There can be no good faith basis for the repetition of this materially false claim on appeal, and we find that counsel's behavior would satisfy any of the criteria necessary to deem conduct frivolous. In fact, the only fair conclusion is that the prosecution of this appeal and knowing pursuit of a materially false and meritless claim was meant to delay or prolong the litigation or to harass respondents. * * * The appropriate remedy for maintaining a frivolous appeal is the award of sanctions in the amount of the reasonable expenses and costs including attorneys' fees incurred in defending the appeal ... ". ***Boye v. Rubin & Bailin, LLP*, 2017 N.Y. Slip Op. 04239, 1st Dept 5-30-17**

## CRIMINAL LAW.

WHERE THE CRITERIA ARE MET SENTENCING AS A PREDICATE FELON IS MANDATORY, DEFENDANT SHOULD HAVE BEEN SO SENTENCED BUT WAS NOT, PEOPLE'S MOTION TO SET ASIDE THE ILLEGAL SENTENCE PROPERLY BROUGHT AND GRANTED.

The First Department noted that the People's motion to set aside defendant's sentence based upon an illegal sentence was properly brought and granted. Where the criteria are met, sentencing a defendant as a predicate felon is mandatory. Defendant should have been so sentenced but was not: "Where a defendant is in fact a predicate offender, sentencing the defendant as a nonpredicate results in an illegal sentence. The provisions of CPL 400.15, governing second violent felony offender adjudications, are mandatory, and neither the People nor a court may ignore or waive a defendant's predicate sta-

tus ... . The claim that defendant describes as a collateral estoppel argument is without merit. The defective resentencing of defendant as a nonpredicate had no collateral estoppel effect with regard to the People's timely CPL 440.40 motion, which was a permissible alternative to an appeal. 'When the People seek to challenge a sentence as illegal, they may appeal . . ., or, within one year of the judgment, they may make a motion to set aside the sentence' ... . The very purpose of a (defendant's) CPL 440.20 motion or a (People's) 440.40 motion is to correct a substantively illegal sentence without the necessity of an appeal; obviously, the court deciding such a motion is not bound by a sentencing court's express or implied finding that the challenged sentence was legal." ***People v. Heisler*, 2017 N.Y. Slip Op. 04220, 1st Dept 5-30-17**

## CRIMINAL LAW.

IN A TRESPASS INVESTIGATION, DETAINING DEFENDANT AND RETAINING HIS ID TO CHECK WHETHER HAD, AS HE CLAIMED, VISITED HIS GIRLFRIEND AT A SPECIFIED APARTMENT IN THE COMPLEX WAS NOT A SEIZURE.
The First Department, over an extensive dissent, determined detaining defendant while the police, after taking the defendant's ID, checked to see if defendant's girlfriend lived in an apartment, was not a seizure. Defendant had been seen (by the police) making quick trips in and out of an apartment complex. To determine if defendant was trespassing, the police went to the apartment where defendant said his girlfriend lived. The occupant of the apartment was shown defendant's ID and denied knowing him. The police then had probable cause to arrest defendant for criminal trespass: "This Court has repeatedly held that in a trespass situation, a police officer may conduct a brief investigation to ascertain whether a defendant's explanation was credible, and this does not rise to a level three forcible detention or seizure ... . In determining the lawfulness of police encounters, New York has long followed the four-level test illustrated in People v. De Bour (40 NY2d 210, 223 [1976]). To determine a seizure under De Bour, '[t]he test is whether a reasonable person would have believed, under the circumstances, that the officer's conduct was a significant limitation on his or her freedom' .... The dissent cannot point to any New York State case applying the De Bour standard to support the broad proposition that a seizure occurs whenever an officer retains a person's identification. Although the dissent cites to several federal and out-of-state cases, those cases present different factual scenarios compared to the circumstances here, and are not controlling." ***People v. Hill*, 2017 N.Y. Slip Op. 04236, 1st Dept 5-30-17**

## CRIMINAL LAW, APPEALS.

THE ABSENCE FROM THE JURY CHARGE OF AN ESSENTIAL ELEMENT OF ATTEMPTED ROBBERY FIRST DEGREE (ACTUAL POSSESSION OF A DANGEROUS INSTRUMENT) REQUIRED REVERSAL IN THE INTERESTS OF JUSTICE.
The First Department reversed defendant's attempted robbery conviction, despite the lack of preservation of the error, because the jury charge did not make it clear that defendant must possess a dangerous instrument. The store clerk testified defendant had a knife and threatened him with it. However the exchange where the knife was allegedly brandished was not captured on the imperfect video and no knife was subsequently found by the police: "Defendant does not dispute that he failed to preserve his objection to the jury charge on attempted robbery. Accordingly, he asks us to exercise our interests-of-justice jurisdiction to reach the issue. There is precedent for exercising such jurisdiction in cases where a jury instruction was 'manifestly incorrect' ... . Defendant urges us to follow that precedent, arguing that the jury charge misstated the elements of the crime of first degree robbery. Defendant is correct in this regard. On its face, Penal Law § 160.15(3), under which defendant was charged, would appear to require conviction even if a person threatened to use a dangerous instrument that he did not in fact possess. However, the requirement for actual possession is an essential element that has been judicially engrafted onto the statute …". ***People v. Saigo*, 2017 N.Y. Slip Op. 04237, 1st Dept 5-30-17**

## CRIMINAL LAW, EVIDENCE.

REFERENCES TO DEFENDANT'S PRIOR COMMISSION OF A VIOLENT CRIME AND IMPRISONMENT WERE INTERTWINED WITH THE DEFENSE EVIDENCE OF DEFENDANT'S LACK OF RESPONSIBILITY DUE TO MENTAL ILLNESS, THE PROBATIVE VALUE OUTWEIGHED THE PREJUDICIAL EFFECT.
The First Department, over a two-justice dissent, determined the prosecutor's mention of the details of a prior violent crime of which defendant was convicted, evidence the defendant had been in prison, ineffective redaction of references to the prior crime in the medical records, restrictions on the defense expert's testimony concerning the expert's reasons for doubting defendant committed the prior crime, and defense counsel's mention of the prior crime in voir dire, did not warrant reversal. Defendant was convicted of robbing a women of $40 at knife point. Defendant claimed he was not responsible by reason of mental illness. There was evidence he suffered from schizophrenia and he claimed voices told him to commit robbery to get money to buy cigarettes: "The court properly exercised its discretion in admitting evidence that defendant had been released from prison a few months before the robbery, and denying counsel's request to redact that information from defendant's medical records. In support of the defense of lack of criminal responsibility by reason of mental disease or defect, the defense psychiatric expert testified that defendant had been stable throughout his years in custody, when he received proper treatment for his schizophrenia. However, after he was released, he no longer received treatment, he became unstable, he began hearing voices, and he committed the robbery a few months later. Evidence of defendant's confinement in prison was 'inextricably interwoven' with the expert's testimony and conclusion ... . The court minimized the possible

prejudice by excluding evidence of defendant's underlying conviction and only admitted references to his imprisonment. ***People v. Sanabria*, 2017 N.Y. Slip Op. 04359, 1st Dept 6-1-17**

## FRAUD.

A CAUSE OF ACTION FOR AIDING AND ABETTING A FRAUDULENT CONVEYANCE CANNOT BE BROUGHT AGAINST A PROFESSIONAL WHO WORKED ON THE CONVEYANCE BUT GAINED NOTHING FROM IT.

The First Department noted that a cause of action for aiding and abetting a fraudulent conveyance cannot be brought against a professional (Swetnick) who worked on the conveyance but gained nothing from it: "On appeal, plaintiff concedes that it seeks to hold Swetnick liable for aiding and abetting a fraudulent conveyance, not for aiding and abetting fraud generally. The cause of action for aiding and abetting a fraudulent conveyance also should have been dismissed, because there is no cause of action for aiding and abetting a fraudulent conveyance against a person, such as Swetnick in this case, who is alleged merely to have assisted in effecting the transfer, in a professional capacity, and who is not alleged to have been a transferee of the assets or to have benefited from the transaction ... . Since the substantive claim against Swetnick fails as a matter of law, the ... cause of action, for attorney's fees pursuant to Debtor and Creditor Law § 276-a, must also be dismissed as against him." ***BBCN Bank v. 12th Ave. Rest. Group Inc.*, 2017 N.Y. Slip Op. 04229, 1st Dept 5-30-17**

## FRAUD, CIVIL PROCEDURE.

FACTS ALLEGED IN THE COMPLAINT INDICATE PLAINTIFFS HAD A DUTY TO INQUIRE INTO THE POSSIBLE FRAUD IN 2008, MORE THAN SIX YEARS BEFORE THE ACTION WAS BROUGHT, FRAUD-BASED CAUSES OF ACTION PROPERLY DISMISSED AS TIME-BARRED.

The First Department, in a full-fledged opinion by Justice Feinman, determined plaintiffs' multi-million dollar fraud-based action against Barclays Bank was time-barred because the facts alleged in the complaint demonstrated plaintiffs had sufficient knowledge to require an inquiry into the possible fraud in 2008, more than six years before the action was brought. The facts are too complex to fairly summarize here: "This appeal arises out of an alleged scheme to defraud a Saudi Arabian residential real estate developer out of hundreds of millions of dollars owed to it by the Saudi government. Its resolution requires us to construe New York's date of discovery rule for purposes of ascertaining when the statute of limitations was triggered with respect to plaintiffs' fraud-based claims. Ultimately, the result we reach today embraces the well-settled rule established in New York long ago: '[W]here the circumstances are such as to suggest to a person of ordinary intelligence the probability that he [or she] has been defrauded, a duty of inquiry arises, and if he [or she] . . . shuts his [or her] eyes to the facts which call for investigation, knowledge of the fraud will be imputed to him [or her]' ... . * * * ... [B]y at least 2008, plaintiffs were fully aware that Barclays and the Saudi government had settled [the relevant] claims, and that they would receive no money. By 2009, it became public knowledge that Barclays obtained a Saudi banking license. Yet, the last inquiry plaintiffs alleged to have made to Barclays was in 2008, and plaintiffs fail to allege any investigation they undertook in the years leading up to this action. Plaintiffs' own allegations, which we must accept as true on a motion to dismiss, establish that plaintiffs were apprised of facts from which fraud could have been reasonably inferred by at least 2008. Accordingly, by at least 2008, New York law imposed on plaintiffs a duty to inquire, and plaintiffs' subsequent failure to pursue a reasonable investigation triggered the running of the statute of limitations at that time ...". ***MBI Intl. Holdings Inc. v. Barclays Bank PLC*, 2017 N.Y. Slip Op. 04381, 1st Dept 6-1-17**

## LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

TAKING MEASUREMENTS IN PREPARATION FOR ROOF WORK IS AN ACTIVITY COVERED UNDER LABOR LAW § 240(1), PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT BASED UPON HIS FALL FROM A BROKEN LADDER WAS PROPERLY GRANTED.

The First Department determined plaintiff was properly awarded summary judgment on his Labor Law § 240(1) cause of action. The ladder plaintiff was using to take measurements in preparation for work broke. Taking measurements is an activity covered by the Labor Law: "The motion court correctly determined that plaintiffs were entitled to partial summary judgment against defendant owners on the issue of section 240(1) liability because the ladder that plaintiff ... was using to take measurements in preparation for work to be performed on the roof of defendant owners' building broke, causing him to fall to the ground ... . Contrary to defendant owners' contention, the work that plaintiff was engaged in was a protected activity within the meaning of Labor Law § 240(1) ... " ***Ortiz-Cruz v. Evers*, 2017 N.Y. Slip Op. 04228, 1st Dept 5-30-17**

## PERSONAL INJURY.

SIDEWALK DEFECT WAS TRIVIAL AS A MATTER OF LAW, SLIP AND FALL ACTION SHOULD HAVE BEEN DISMISSED.

The First Department, reversing Supreme Court, determined the alleged sidewalk defect in this slip and fall case was trivial and not actionable as a matter of law: "Defendant established entitlement to judgment as a matter of law by demonstrating that the defect in the sidewalk that allegedly caused plaintiff to trip and fall was trivial, and that there were no surround-

ing circumstances that magnified the dangers it posed ... . Defendant submitted photographs and measurements, which showed that the height differential between the expansion joint and the sidewalk flags was less than half an inch. The photographs did not depict any jagged edges or any rough, irregular surface, and the expansion joint was not difficult to see or pass over safely on foot, given plaintiff's testimony that the accident occurred on a sunny day and she was the only person traversing the pathway. Plaintiff's testimony that the defect was two-to-four inches high was speculative, since she did not measure the defect ...". ***McCullough v. Riverbay Corp.*, 2017 N.Y. Slip Op. 04231, 1st Dept 5-30-17**

### PERSONAL INJURY, MUNICIPAL LAW.

AMENDMENT OF NOTICE OF CLAIM TO ALLEGE A DIFFERENT THEORY (CREATION OF THE DEFECT) IN THIS SLIP AND FALL CASE PROPERLY DENIED.

The First Department determined plaintiff's motion to amend the notice of claim in this slip and fall case was properly denied. The original notice of claim and the complaint alleged the protruding manhole cover over which plaintiff tripped was the result of improper maintenance. The proposed amendment sought to allege the defendant city created the dangerous condition: "The allegations of negligent maintenance in the notice of claim did not provide notice of plaintiff's new theory of affirmative negligence ... . Thus, General Municipal Law § 50-e(6), which 'authorizes the correction of good faith, nonprejudicial, technical defects or omissions, not substantive changes in the theory of liability' ... , does not apply. Further, General Municipal Law § 50-e(5) does not authorize amendment of the notice of claim to assert a new theory of liability where, as here, the limitations period has expired ... . Even assuming that the 'special use' theory is not a new theory of liability, leave to amend to add it would be futile, since the City's ownership of the manhole cover does not constitute a 'special use' of the sidewalk ...". ***Aleksandrova v. City of New York*, 2017 N.Y. Slip Op. 04379, 1st Dept 6-1-17**

### MUNICIPAL LAW, PERSONAL INJURY.

PLAINTIFF DID NOT ALLEGE THE CITY HAD WRITTEN NOTICE OF THE SIGN POST STUMP OVER WHICH SHE TRIPPED AND FELL, THE FALL OCCURRED WITHIN THE 15-DAY GRACE PERIOD FOR THE NOTICE THE CITY DID RECEIVE, COMPLAINT PROPERLY DISMISSED.

The First Department determined plaintiff's action against the city in this slip and fall case was properly dismissed. Plaintiff did not allege the city had prior written notice of the sign post stump in the sidewalk, and the 15-day grace period for the notice which the city did receive had not expired at the time of plaintiff's fall: "Plaintiff alleges that, as she was exiting a bus, she tripped and fell over the stump of a pole sign protruding about three to four inches from the sidewalk near the bus stop. The City met its prima facie burden by showing that plaintiff did not plead that the City received prior written notice of the sidewalk defect as required by Administrative Code of City of NY § 7-201(c)(2) ... . The City also submitted evidence showing the absence of prior written notice; that the sign was in good condition two years before the accident; that the City received a citizen complaint through 311 less than 15 days before plaintiff's accident; and that it repaired the condition a few days after her accident. The complaint received before the accident, even if it were in writing, could not constitute prior written notice for purposes of the statute, since it was received within the 15-day grace period provided by the statute for the City to make repairs after receiving notice ... . ... Plaintiff failed to demonstrate either that she pled prior written notice or that the 311 complaint received by the City within the 15-day grace period constitutes such notice. Plaintiff's contention that the City affirmatively created the condition by removing the sign from the sleeve is unsupported by any evidence." ***Brown v. City of New York*, 2017 N.Y. Slip Op. 04221, 1st Dept 5-30-17**

## SECOND DEPARTMENT

### ADMINISTRATIVE LAW, EMPLOYMENT LAW, CIVIL PROCEDURE.

SUPREME COURT SHOULD NOT HAVE RELIED ON AN AUTHORIZATION LETTER WHICH WAS NOT IN THE RECORD TO FIND THAT THE ADMINISTRATIVE LAW JUDGE WAS AUTHORIZED TO CONDUCT THE DISCIPLINARY PROCEEDING WHICH RESULTED IN THE TERMINATION OF A CORRECTIONS OFFICER.

The Second Department noted that the administrative law judge (ALJ) in this action which resulted in the termination of petitioner's employment as a corrections officer must be authorized to conduct the disciplinary proceedings by the commissioner of corrections. The petitioner contested his termination on the ground the ALJ was not so authorized. Supreme Court relied upon a letter of authorization which was not in the record. The Second Department held that was error and remitted the matter to allow the respondent to submit an authorization letter: "Civil Service Law § 75, which governs the procedure applicable to the subject disciplinary proceeding, provides that '[t]he hearing upon such charges shall be held by the officer or body having the power to remove the person against whom such charges are preferred, or by a deputy or other person designated by such officer or body in writing for that purpose' (Civil Service Law § 75[2]). In the absence of a written designation, the removing body or hearing officer has no jurisdiction to recommend the discipline of an employee and any

disposition flowing from such a proceeding will be void ... . This jurisdictional defect is not waived by a petitioner's failure to object at a disciplinary hearing ...". ***Matter of Lindo v. Ponte*, 2017 N.Y. Slip Op. 04282, 2nd Dept 5-31-17**

## CIVIL PROCEDURE.

DEFENDANT DID NOT DEMONSTRATE AN ADEQUATE EXCUSE FOR FAILURE TO ANSWER THE COMPLAINT, CRITERIA EXPLAINED, MOTION FOR LEAVE TO FILE A DEFAULT JUDGMENT SHOULD HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined plaintiffs' motion for leave to file a default judgment should have been granted and defendant's cross-motion to compel the acceptance of a late answer should have been denied: "To defeat the plaintiffs' facially adequate CPLR 3215 motion and be relieved of its default in answering the complaint, the defendant had to show either that it did not default, or that it had a reasonable excuse for its default and a potentially meritorious defense to the action ... . In order to compel the plaintiffs to accept service of its untimely answer, the defendant also had to provide a reasonable excuse for the delay in answering and demonstrate a potentially meritorious defense to the action (see CPLR 3012[d]... . '[S]uccessful opposition to a CPLR 3215 motion for leave to enter a default judgment requires the same showing as an affirmative motion for leave to extend the time to answer' ... . The Supreme Court improvidently exercised its discretion in granting the defendant's cross motion to compel the acceptance of its late answer, as the defendant did not offer a reasonable excuse for its failure to serve a timely answer in this action. The defendant, through an affidavit of its paralegal manager in its Massachusetts office, acknowledged that it received the complaint as of November 3, 2015, but blamed its failure to answer on a clerical error in its Mitchel Field, New York, office, which resulted in the complaint never being assigned to a claims handler. The affidavit of the defendant's paralegal manager failed to provide any details surrounding the bare claim that a clerical error, which purportedly occurred in an office in which she did not work, caused the failure of the defendant to timely answer ... . Moreover, the paralegal manager did not address why the defendant did not take any action upon being served with the plaintiffs' initial motion for leave to enter a default judgment against it or the resulting court order ... . Since the defendant failed to provide a reasonable excuse for its failure to timely serve an answer, it is unnecessary to consider whether it demonstrated the existence of a potentially meritorious defense ...". ***Clarke v. Liberty Mut. Fire Ins. Co.*, 2017 N.Y. Slip Op. 04250, 2nd Dept 5-31-17**

## CIVIL PROCEDURE, EDUCATION-SCHOOL LAW, INTENTIONAL TORTS, EVIDENCE.

PRE-ACTION DISCLOSURE OF THE IDENTITY OF THE PERSON OR PERSONS WHO DISTRIBUTED AN INTIMATE PHOTO OF A PORTION OF A HIGH SCHOOL STUDENT'S BODY PROPERLY GRANTED, THE FACTS SUPPORTED A CAUSE OF ACTION FOR INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS.

The Second Department determined Supreme Court properly granted the petition for pre-action disclosure of the identity of the person or persons who widely distributed an intimate photo of a portion of a high school student's (the potential plaintiff's) body and identified the student depicted in the photo. The purpose of the disclosure was to identify potential defendants. The facts were sufficient to support an action for intentional infliction of emotional distress: " 'Before an action is commenced, disclosure to aid in bringing an action, to preserve information or to aid in arbitration, may be obtained, but only by court order' (CPLR 3102[c]...). '[D]isclosure to aid in bringing an action' (CPLR 3102 [c]) authorizes discovery to allow a plaintiff to frame a complaint and to obtain the identity of the prospective defendants'... .. However, pre-action disclosure 'may not be used to determine whether the plaintiff has a cause of action' ... . This limitation is 'designed to prevent the initiation of troublesome and expensive procedures, based upon a mere suspicion, which may annoy and intrude upon an innocent party' ... . 'Where, however, the facts alleged state a cause of action, the protection of a party's affairs is no longer the primary consideration and an examination to determine the identities of the parties and what form or forms the action should take is appropriate' ... . Accordingly, '[a] petition for pre-action discovery limited to obtaining the identity of prospective defendants should be granted where the petitioner has alleged facts fairly indicating that he or she has some cause of action' ...". ***Matter of Leff v. Our Lady of Mercy Academy*, 2017 N.Y. Slip Op. 04280, 2nd Dept 5-31-17**

## CIVIL PROCEDURE, FORECLOSURE.

NOTICE OF APPEARANCE FILED BY AN ATTORNEY WAIVES ANY DEFENSE BASED UPON LACK OF PERSONAL JURISDICTION, DEFENSE OF LACK OF STANDING IN THIS FORECLOSURE ACTION SHOULD NOT HAVE BEEN RAISED BY SUPREME COURT SUA SPONTE.

The Second Department, reversing Supreme Court, determined defendant's motion to dismiss based upon a lack of personal jurisdiction in this foreclosure action should have been denied. Defendant had appeared by an attorney (notice of appearance) and thereby waived any "lack of personal jurisdiction" argument. The Second Department further noted that Supreme Court should not have raised the defendant's lack of standing sua sponte: "... [T]he defendant waived any claim that the Supreme Court lacked jurisdiction over her. Pursuant to CPLR 320(a), '[t]he defendant appears by serving an answer or a notice of appearance, or by making a motion which has the effect of extending the time to answer.' Subject to certain exceptions not applicable here (see CPLR 320[c]), 'an appearance of the defendant is equivalent to personal service of the summons upon him, unless an objection to jurisdiction under [CPLR 3211(a)(8)] is asserted by motion or in the answer

as provided in [CPLR 3211]' (CPLR 320[b]). 'By statute, a party may appear in an action by attorney (CPLR 321), and such an appearance constitutes an appearance by the party for purposes of conferring jurisdiction' ... . Here, the defendant's attorney appeared in the action on her behalf by filing a notice of appearance ... , and neither the defendant nor her attorney moved to dismiss the complaint on the ground of lack of personal jurisdiction at that time or asserted lack of personal jurisdiction in a responsive pleading ... . Accordingly, the defendant waived any claim that the Supreme Court lacked personal jurisdiction over her in this action ... . To the extent that prior decisions of this Court could be interpreted to require a different result ... , they should no longer be followed." ***American Home Mtge. Servicing, Inc. v. Arklis*, 2017 N.Y. Slip Op. 04242, 2nd Dept 5-31-17**

## CIVIL PROCEDURE, FRAUD, INTENTIONAL TORTS.

PLAINTIFF, INTER ALIA, ALLEGED THE FLORIDA DEFENDANT IN THIS FRAUD-BASED ACTION DEPOSITED RELEVANT FUNDS IN A NEW YORK LAW FIRM ESCROW ACCOUNT AND CONVERTED THOSE FUNDS, DEFENDANT'S MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined the motion to dismiss the fraud-based complaint for lack of personal jurisdiction over defendant, whose domicile was Florida, should not have been granted. Relevant funds were deposited in the escrow account for defendant's New York law firm and those funds were alleged to have been converted in New York: "... [T]he plaintiffs made a prima facie showing that the defendant, a Florida domiciliary, transacted business in New York and that the plaintiffs' claims arose from those transactions so as to establish that jurisdiction was proper under CPLR 302(a)(1)... . Accepting the plaintiffs' allegations as true and construing the allegations in the light most favorable to the plaintiffs, they demonstrated prima facie that the defendant purposefully availed himself 'of the privilege of conducting activities' in New York, 'thus invoking the benefits and protections of its laws' ... . Contrary to the defendant's contention, his alleged contacts with New York amounted to more than mere communications ... . The defendant allegedly utilized Sommer & Schneider's New York escrow account to further the alleged fraudulent investment scheme by directing the plaintiffs to deposit the funds for investment deals into the escrow account, by acting as the agent for the purported investment deals, and by using and allowing Joel to use the investment money deposited in the escrow account for personal expenses ... . As to the second prong of the CPLR 302(a)(1) analysis, the plaintiffs' allegations demonstrated prima facie that the defendant's activities in New York had an articulable nexus or substantial relationship to the plaintiffs' claims ... . The plaintiffs' claims against the defendant of fraud, conversion, breach of fiduciary duty, and unjust enrichment turned entirely on the defendant's use of the New York escrow account to facilitate his fraudulent investment scheme ... . The plaintiffs also made a prima facie showing that the defendant committed tortious acts within New York, as the defendant is alleged to have converted funds held in New York ...". ***Nick v. Schneider*, 2017 N.Y. Slip Op. 04285, 2nd Dept 5-30-17**

## CRIMINAL LAW, ATTORNEYS.

DEFENDANT COULD HAVE PLED GUILTY TO AN OFFENSE THAT DID NOT REQUIRE DEPORTATION, MOTION TO VACATE CONVICTION PROPERLY GRANTED.

The Second Department determined defendant's motion to vacate his conviction based upon ineffective assistance of counsel was properly granted. The hearing demonstrated defendant could have pled to an offense that would not result in mandatory deportation: "... [D]efendant established that he was denied the effective assistance of counsel because his counsel failed to attempt to negotiate a plea to a crime that would not have constituted an aggravated felony under federal law, and therefore would not have subjected him to mandatory deportation. The record establishes that the People were willing to accept a plea to a crime pursuant to Penal Law § 220.16(12) that would not have subjected the defendant to mandatory deportation and that defense counsel did not make such a request because he was not aware that a plea pursuant to Penal Law § 220.16(12) would not have subjected the defendant to mandatory deportation ... . Moreover, defense counsel testified at a hearing on the motion to vacate the judgment of conviction that, had he known that a plea pursuant to Penal Law § 220.16(1) would have subjected the defendant to mandatory deportation, he would have attempted to negotiate a plea under Penal Law § 220.16(12) and would have advised the defendant not to take the plea that he ultimately took. This evidence supports the court's finding that the defendant was not afforded meaningful representation as guaranteed by the New York Constitution ... " ***People v. Guzman*, 2017 N.Y. Slip Op. 04291, 2nd Dept 5-31-17**

## CRIMINAL LAW, EVIDENCE.

SCHOOL CUSTODIAN'S STATEMENT TO A TEACHER THAT ON THE DAY HE IS FIRED HE WILL COME IN AND 'COLUMBINE THIS SHIT' DID NOT CONSTITUTE SUFFICIENT EVIDENCE OF A TERRORISTIC THREAT WITHIN THE MEANING OF THE PENAL LAW, DISMISSAL OF THE INDICTMENT AFTER A READING OF THE GRAND JURY MINUTES WAS PROPER.

The Second Department determined defendant's statement to a teacher that on the day he was fired from his school custodian job he would "Columbine this shit" was not legally sufficient evidence of a "terrorist threat" within the meaning of the Penal Law. The indictment was properly dismissed upon reading the grand jury minutes: "According to the grand jury

minutes, the defendant, who was a custodian at a school for more than a decade, was eating a sandwich in the school's faculty break room when a teacher entered the room and asked how he was doing after the first week of school. The defendant allegedly told the teacher that another teacher was on his 'shit list,' and that 'people better stay out of [his] way.' When the teacher told him, among other things, that he should 'try to relax a little bit' and that 'we all have to like work together here,' the defendant allegedly got out of his chair and told the teacher that she 'better be absent the day they fire me because I am going to come in here and Columbine this shit.' He then mimed shooting a gun while imitating gun noises. Based upon his statements, the defendant was charged in an indictment with making a terroristic threat (Penal Law § 490.20), a class D felony. * * * Contrary to the People's contentions, the Supreme Court properly granted that branch of the defendant's omnibus motion which was to dismiss the indictment since the People failed to present legally sufficient evidence that the defendant's comment caused a reasonable expectation or fear of the imminent commission of a specified offense ... . The teacher testified that she did not believe that the defendant's threat of a school shooting was imminent and, therefore, she waited to report the defendant's comment. Moreover, the defendant's alleged threat was expressly conditioned by the phrase, 'the day they fire me.' The People did not present any evidence that the defendant was about to be terminated from his job, or had any reason to believe that he was going to be terminated." ***People v. Hulsen*, 2017 N.Y. Slip Op. 04294, 2nd Dept 5-31-17**

## CRIMINAL LAW, EVIDENCE.

DEFENDANT'S DRIVING WHILE INTOXICATED AT HIGH SPEEDS AND IGNORING TRAFFIC LIGHTS, RESULTING IN AN INTERSECTION COLLISION WHICH KILLED THE OTHER DRIVER, SUPPORTED THE DEPRAVED INDIFFERENCE MURDER CONVICTION.

The Second Department, over a partial dissent, determined the evidence supported defendant's conviction for depraved indifference murder in this driving-while-intoxicated/vehicular-homicide case. Defendant, who was intoxicated and high on marijuana, drove at high speeds through residential neighborhoods, ignoring traffic lights at intersections. A collision an an intersection split the victim's (Whether's) car in two and killed him instantly. The dissent argued the high evidence-threshold for depraved indifference murder was not met: "Here, the evidence proved beyond a reasonable doubt that the defendant recklessly engaged in conduct which created a grave risk of death to another person. First, the defendant was knowingly driving with a revoked driver license. Second, the defendant was driving while intoxicated with a BAC of approximately 0.25%, and high on marijuana. Third, the defendant engaged in a high-speed chase with the police for approximately two miles. Fourth, during this chase, the defendant sped through narrow streets of a residential neighborhood, traveling at speeds of more than double the legal limit. The defendant also ran through numerous stop signs and red traffic lights, without slowing down. The evidence further demonstrated that prior to the crash, the defendant sped eastbound down Pine Street, a residential street with stop signs and traffic lights, reaching a speed of over 80 miles per hour. Perhaps most significantly, the compelling circumstantial evidence demonstrated that as the defendant approached a red traffic light at the intersection of Guy Lombardo Avenue, he narrowly missed another vehicle that crossed the intersection, and seconds later, without slowing down, he ran the red light and crashed into Whethers' vehicle with such force that he split the vehicle in two, instantly killing Whethers. The direct and circumstantial evidence proved that the defendant deliberately drove his vehicle into this intersection with an utter disregard for the value of human life, and thus was legally sufficient to support the determination that the defendant acted with depraved indifference ...". ***People v. Williams*, 2017 N.Y. Slip Op. 04302, 2nd Dept 5-31-17**

## INSURANCE LAW.

REQUIREMENT THAT COVERAGE CANNOT BE DENIED UNLESS THE GROUND FOR THE DENIAL IS SPECIFIED IN THE DISCLAIMER LETTER APPLIES ONLY TO DEATH AND BODILY INJURY CLAIMS, THE INSURER'S MOTION FOR SUMMARY JUDGMENT BASED ON A VANDALISM EXCLUSION IN THIS PROPERTY DAMAGE CASE SHOULD HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined defendant insurer's motion for summary judgment should have been granted. The policy contained an exclusion for fire caused by vandalism if the property had been vacant for 90 days. Plaintiffs acknowledged the property had been vacant for six months at the time of the fire, which was deemed to have been deliberately set. Supreme Court denied the motion pursuant to Insurance Law 3420 (d) which provides that coverage cannot be denied unless the ground for the denial is specified in the disclaimer letter. However, the Second Department noted that Insurance Law 3420 (d) only applies to death and bodily injury claims, not property damage claims: "Contrary to the Supreme Court's determination, Insurance Law § 3420(d) expressly applies only to claims involving death and bodily injury, and has no application to claims for property damage such as the one in the present case ... . Moreover, the defendant is not precluded from invoking the vandalism exclusion under the common-law principles of waiver or estoppel ..., since the plaintiffs have adduced no evidence that the defendant intentionally relinquished its right to rely on that exclusion or lulled the plaintiffs into sleeping on their rights and thereby prejudiced them by its conduct ... ". ***Swanson v. Allstate Ins. Co.*, 2017 N.Y. Slip Op. 04311, 2nd Dept 5-31-17**

## INSURANCE LAW, LANDLORD-TENANT.

ALTHOUGH THE BUILDING OWNER WAS AN ADDITIONAL INSURED ON THE LESSEE'S POLICY, THE INSURER HAD NO DUTY TO DEFEND AN ACTION STEMMING FROM A SLIP AND FALL IN THE BUILDING PARKING LOT, THE LEASE DID NOT CALL FOR MAINTENANCE OF THE PARKING LOT BY THE LESSEE.

The Second Department determined the insurer of a lessee had no duty to defend an action by plaintiff who slipped and fell in the parking lot of the building. The lease included no obligation to maintain the parking lot. Although the building owner was an additional insured on the lessee's policy, the injury was not the result of a bargained-for risk: "An insurer's duty to defend is 'exceedingly broad'... . An additional insured is entitled to the same coverage as if it were a named insured ... . 'If any of the claims against an insured arguably arise from covered events, the insurer is required to defend the entire action' ... . The phrase 'arising out of' requires 'only that there be some causal relationship between the injury and the risk for which coverage is provided' ... . '[A]n insurer does not wish to be liable for losses arising from risks associated with a premises for which the insurer has not evaluated the risk and received a premium' ... . Moreover, '[u]nambiguous provisions of an insurance contract must be given their plain and ordinary meaning' ... . The interpretation of policy language is a question of law for the courts ... . Here, [the insurer] established its prima facie entitlement to judgment as a matter of law. The additional insured endorsement unambiguously provided that [the building owner] was an additional insured for liability 'arising out of' the 'ownership, maintenance or use' of the 'premises leased' to [lessee]. [The lessee] leased only a portion of the building from [the owner], not the parking lot where the accident occurred, and it had no duty to maintain the parking lot. As such, there was no causal relationship between the injury and the risk for which coverage was provided, and [plaintiff's] injury was not a bargained-for risk ...". ***Atlantic Ave. Sixteen AD, Inc. v. Valley Forge Ins. Co.*, 2017 N.Y. Slip Op. 04243, 2nd Dept 5-31-17**

## LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

PLAINTIFF FELL FROM AN UNSECURED A-FRAME LADDER THAT SHIFTED FOR NO APPARENT REASON, SUMMARY JUDGMENT ON HIS LABOR LAW § 240(1) CAUSE OF ACTION PROPERLY GRANTED.

The Second Department determined plaintiff's motion for summary judgment was properly granted in this Labor Law § 240(1) action based upon the allegation an unsecured A-frame ladder shifted for no apparent reason cause plaintiff to fall from it: "Labor Law § 240(1) imposes upon owners and general contractors, and their agents, a nondelegable duty to provide safety devices necessary to protect workers from risks inherent in elevated work sites... . 'To prevail on a Labor Law § 240(1) cause of action, a plaintiff must establish that the statute was violated and that the violation was a proximate cause of his or her injuries' ... . Here, the plaintiffs made a prima facie showing of their entitlement to judgment as a matter of law on the issue of liability on the cause of action alleging a violation of Labor Law § 240(1). According to [plaintiff's] deposition testimony, he was standing on an unsecured A-frame ladder when the ladder shifted for no apparent reason, causing him to fall ... . In opposition, [defendant] failed to raise a triable issue of fact as to whether Alvarez's own actions were the sole proximate cause of the accident ...". ***Alvarez v. Vingsan L.P.*, 2017 N.Y. Slip Op. 04241, 2nd Dept 5-31-17**

## LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

PLAINTIFF SLIPPED ON ROSIN PAPER WHICH WAS PLACED ON THE STEPS AS AN INTEGRAL PART OF THE WORK, LABOR LAW §§ 240(1) AND 241(6) CAUSES OF ACTION PROPERLY DISMISSED.

The Second Department determined plaintiff's Labor Law causes of action were properly dismissed. Plaintiff slipped and fell on rosin paper on a step. Use of rosin paper was an integral part of the work. The court determined the Labor Law § 240(1) cause of action was properly dismissed because the accident was not caused by the operation of gravity within the meaning of the statute and the Labor Law 241 § (6) cause of action was properly dismissed because the rosin paper was not a foreign substance: "In support of that branch of their motion which was for summary judgment dismissing the cause of action alleging a violation of Labor Law § 240(1), the defendants established their prima facie entitlement to judgment as a matter of law by demonstrating that the plaintiff's injuries were not the direct consequence of the application of the force of gravity to an object or person ... and, thus, fell outside the ambit of Labor Law § 240(1). ... The defendants also established their prima facie entitlement to judgment as a matter of law dismissing the Labor Law § 241(6) cause of action, premised upon a violation of 12 NYCRR 23-1.7(d), by establishing that the protective rosin paper upon which the plaintiff slipped was an integral part of the tile work ... .As such, the rosin paper does not constitute a 'foreign substance' within the meaning of 12 NYCRR 23-1.7(d) ...". ***Lopez v. Edge 11211, LLC*, 2017 N.Y. Slip Op. 04262, 2nd Dept 5-31-17**

## MUNICIPAL LAW, PERSONAL INJURY, TRUSTS AND ESTATES, CIVIL PROCEDURE.

MOTION TO RENEW PETITION FOR LEAVE TO FILE A LATE NOTICE OF CLAIM IN THIS WRONGFUL DEATH ACTION SHOULD HAVE BEEN GRANTED, LEAVE TO FILE A LATE NOTICE OF CLAIM SHOULD HAVE BEEN GRANTED.

The Second Department, reversing (modifying) Supreme Court, determined petitioner's motion to renew the petition for leave to file a late notice of claim was erroneously deemed a motion to reargue (by Supreme Court) and was erroneously denied. Leave to file a late notice of claim should have been granted. The wrongful death action was brought on behalf of

a county worker who was killed when he fell off the back of a dump truck after the truck allegedly struck a bump in the road. The Second Department noted: (1) the 90-day period for filing a notice of claim runs from the appointment of the administrator of decedent's estate; (2) the motion presented new evidence which was not previously available and was therefore a motion to renew, not reargue; (3) the county had notice of the facts of the action within the 90-day period; (4) the county did not demonstrate prejudice related to the delay in filing the notice of claim (even though the road defect had been repaired): "The County acquired actual knowledge of the essential facts constituting the claim before a representative of the estate was appointed. The [police department] conducted an investigation, took photographs of, inter alia, the subject roadway condition, obtained a statement from the driver of the truck, and prepared a case report that detailed the nature and the alleged cause of the accident. In addition, ... … The County … had recognized the need for repairs of the roadway before the petitioner was appointed as administrator, and it issued work orders to repair the roadway only a few days after the petitioner was appointed. Thus, any prejudice resulting from the changed condition of the road was not caused by the petitioner's delay in serving a notice of claim ... . In any event, the County took photographs of the defect and inspected the location after the accident ... . The County also failed to make a showing that any of the witnesses are unavailable. Thus, the County failed to respond to the petitioner's initial showing as to lack of prejudice with a particularized showing that the petitioner's delay in serving a notice of claim will prejudice it in its defense on the merits ... " ***Matter of Kerner v. County of Nassau*, 2017 N.Y. Slip Op. 04277, 2nd Dept 5-31-17**

## PERSONAL INJURY.

DEFENDANT, WHO COLLIDED WITH PLAINTIFF AFTER PLAINTIFF CROSSED INTO DEFENDANT'S ONCOMING LANE OF TRAFFIC, WAS ENTITLED TO SUMMARY JUDGMENT, SUPREME COURT REVERSED.

The Second Department, reversing Supreme Court, determined defendant Daley's motion for summary judgment in this traffic accident case should have been granted. Plaintiff collided with defendant Bernstein's car which caused plaintiff's car to enter Daley's oncoming lane of traffic: " 'A defendant moving for summary judgment in a negligence action has the burden of establishing, prima facie, that he or she was not at fault in the happening of the subject accident'... There can be more than one proximate cause of an accident ... , and '[g]enerally, it is for the trier of fact to determine the issue of proximate cause' ... . 'However, the issue of proximate cause may be decided as a matter of law where only one conclusion may be drawn from the established facts' ... . In support of his motion, Daley submitted evidence showing that the plaintiff's vehicle and Bernstein's vehicle collided in the plaintiff's lane of travel in the subject intersection, which caused the plaintiff to lose control of his vehicle and cross over into Daley's lane of travel, i.e., the opposite oncoming lane of traffic, and thereby caused the collision with Daley's vehicle. While a driver who has the right-of-way has a duty to exercise reasonable care to avoid a collision ... , a driver such as Daley who has the right-of-way and only seconds to react to a vehicle which has failed to yield, is not negligent for failing to avoid the collision ... . The evidence submitted on Daley's motion established that his actions were not a proximate cause of that collision ... . Contrary to the contentions of the plaintiff and Bernstein, there was no evidence submitted on Daley's motion tending to show that Daley operated his vehicle improperly or engaged in conduct which helped bring about the collision between his vehicle and the plaintiff's vehicle, or the previous collision between the plaintiff's vehicle and Bernstein's vehicle ... . Thus, Daley established his prima facie entitlement to judgment as a matter of law by demonstrating that he was not at fault in the happening of the subject accident." ***Victor v. Daley*, 2017 N.Y. Slip Op. 04315, 2nd Dept 5-31-17**

## PERSONAL INJURY, EMPLOYMENT LAW, CIVIL PROCEDURE.

CAUSE OF ACTION SEEKING PUNITIVE DAMAGES FOR NEGLIGENT HIRING, RETENTION AND SUPERVISION NOT PRECLUDED BY DOCTRINE OF RESPONDEAT SUPERIOR.

The Second Department, in an action stemming from a traffic accident, determined the complaint stated a cause of action for negligent hiring, retention and supervision for which punitive damages were sought. The facts were not discussed, but the court explained when a cause of action for negligent hiring seeking punitive damages is not precluded by the doctrine of respondeat superior: "Here, accepting the facts as alleged in the complaint as true and according the plaintiff the benefit of every possible favorable inference, the complaint sufficiently stated a demand for punitive damages insofar as asserted against the defendant driver. At this stage of the litigation, it is premature to conclude that the allegations in the complaint are insufficient to support the allegation that the defendant driver acted so recklessly or wantonly as to warrant an award of punitive damages ... . ' 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' ... . However, 'such a claim is permitted when punitive damages are sought based upon facts evincing gross negligence in the hiring or retention of an employee' ...". ***Gipe v. DBT Xpress, LLC*, 2017 N.Y. Slip Op. 04258, 2nd Dept 5-31-17**

## PERSONAL INJURY, MUNICIPAL LAW.

EVEN THOUGH THE ALLEGEDLY DEFECTIVE SIDEWALK ABUTTED AN UNDEVELOPED LOT, DEFENDANT WAS ENTITLED TO THE SMALL-PROPERTY EXEMPTION FROM TORT LIABILITY.

The Second Department determined defendant was entitled to the small-property exemption for liability for sidewalk defects in this slip and fall case. Although the sidewalk where plaintiff fell abutted an undeveloped lot, defendant (Manley) demonstrated the lot was part of the residential premises: "In 2003, the New York City Council enacted the Sidewalk Law to shift tort liability for injuries resulting from defective sidewalks from the City to abutting property owners ... . This liability-shifting provision, however, does not apply to 'one-, two- or three-family residential real property that is (i) in whole or in part, owner occupied, and (ii) used exclusively for residential purposes' (Administrative Code of City of NY § 7-210[b]). The exemption was provided in recognition that it was inappropriate to expose 'small-property owners in residence, who have limited resources, to exclusive liability with respect to sidewalk maintenance and repair'... . Here, in support of her motion, Manley established her prima facie entitlement to the small-property owner exemption. Manley established, prima facie, that the lot abutting the sidewalk where the plaintiff allegedly was injured was part of her residential premises for all practical purposes and that her use of her property qualified in all other respects for the small-property owner exemption. As we have recognized, this exemption is concerned with the ownership and use of the relevant property, not its technical designation ... . Manley additionally established, prima facie, that she did not create the alleged sidewalk defect or make special use of the sidewalk and thus could not be held liable under common-law principles ...". ***Johnson v. Manley*, 2017 N.Y. Slip Op. 04259, 2nd Dept 5-31-17**

## TRUSTS AND ESTATES, REAL PROPERTY, CIVIL PROCEDURE, EVIDENCE.

PROPERTY OWNED AS TENANTS BY THE ENTIRETY PASSES FREE AND CLEAR TO THE SURVIVING SPOUSE, PURCHASE FROM THE SURVIVING SPOUSE PROVIDES CLEAR TITLE, HEARSAY ALONE WILL NOT DEFEAT SUMMARY JUDGMENT.

The Second Department determined plaintiffs had received title to real property free of any encumbrances. Plaintiffs had purchased the property from Edwin Ramsey. Ramsey and his wife. Bertha, had owned the property as tenants by the entirety. Upon the death of Bertha, Edwin owned the property free and clear. Defendant's argument that the Ramsey's had agreed to hold separate interests in the property was based upon hearsay, which, standing alone, will not defeat a summary judgment motion: " 'A disposition of real property to a husband and wife creates in them a tenancy by the entirety, unless expressly declared to be a joint tenancy or a tenancy in common' (EPTL 6-2.2[b]...). '[A] surviving tenant in a tenancy by the entirety receives the fee interest in its entirety, free and clear of any debts, claims, liens or other encumbrances as against the deceased spouse' ... . Here, the plaintiffs demonstrated, prima facie, that they were entitled to summary judgment. Their evidence, including Edwin and Bertha's 1968 marriage certificate and the 1972 deed, showed that Edwin and Bertha had a tenancy by the entirety in the property, as they were married at the time of the 1972 deed conveying the property to them and the deed did not 'expressly declare[ ] [there] to be a joint tenancy or a tenancy in common' (EPTL 6-2.2[b]). Thus, when Bertha died in 2012, Edwin, as the surviving spouse, 'receive[d] the fee interest in its entirety, free and clear of any debts, claims, liens or other encumbrances as against' Bertha ... . Edwin was thereafter free to convey the property to the plaintiffs, which he did." ***Cormack v. Burks*, 2017 N.Y. Slip Op. 04252, 2nd Dept 5-31-17**

## VEHICLE AND TRAFFIC LAW.

EVIDENCE THE SON WAS DRIVING HIS FATHER'S CAR WITHOUT HIS FATHER'S PERMISSION, THEREBY RELIEVING THE FATHER OF LIABILITY, WAS NOT SUFFICIENT TO WARRANT SUMMARY JUDGMENT IN THIS PROPERTY DAMAGE CASE.

The Second Department determined defendants father and son (Daniel) did not submit sufficient evidence that Daniel was driving his father's car without permission to warrant summary judgment. Daniel had driven the car through a person's house, causing nearly $190,000 in damage. The insurer sued defendants: "Vehicle and Traffic Law § 388(1) 'makes every owner of a vehicle liable for injuries resulting from negligence in the use or operation of such vehicle . . . by any person using or operating the same with the permission, express or implied, of such owner'... . Under this statute, there is a presumption that the operator of a vehicle operates it with the owner's permission ... . The presumption may be rebutted by substantial evidence that the owner did not give the operator consent ... . ... Under the circumstances of this case, the Supreme Court properly determined that the appellant failed to sufficiently rebut the strong presumption pursuant to Vehicle and Traffic Law § 388 that Daniel was operating the vehicle with his permission ... . Daniel had access to the appellant's residence. Further, the key to the vehicle was kept in a 'central location' inside a bin located in the kitchen of the appellant's residence. Additionally, on previous occasions, Daniel had been permitted by the appellant to drive other vehicles owned by the appellant. Accordingly, the Supreme Court properly concluded that the appellant failed to establish his prima facie entitlement to judgment as a matter of law and, as a result, we need not consider the sufficiency of the opposition papers ... ". ***State Farm Fire & Cas. Co. v. Sajewski*, 2017 N.Y. Slip Op. 04310, 2nd Dept 5-31-17**

# THIRD DEPARTMENT

## FAMILY LAW.

PROOF WAS SUFFICIENT TO DEMONSTRATE FATHER WOULD REMAIN MENTALLY ILL FOR THE FORESEEABLE FUTURE (DISSENT DISAGREES), PARENTAL RIGHTS PROPERLY TERMINATED.

The Third Department, over a two-justice dissent, determined father was properly deemed mentally ill and his parental rights were properly terminated. The dissent argued that, although there was sufficient proof father was mentally ill, there was insufficient proof he would remain mentally ill for the foreseeable future: "In our view, Liotta's [petitioner's psychologist] comprehensive report and testimony was sufficient to establish that respondent is presently, and for the foreseeable future will remain, unable to provide proper and adequate care for the two children due to his mental illness (see Social Services Law § 384-b [4] [c]...). As Liotta explained, respondent's continuing lack of insight with regard to his mental illness, established during his interview and evident in the results of the psychological testing, was a concern and surprising in light of his treatment history, and that his 'denial, compartmentalization, and rationalization interfere' with his capacity to gain insight in the future. Liotta attributed these characteristics to respondent's personality disorder and, after identifying and detailing the positive factors and 'glimmers of hope' that suggested that respondent might be able to provide adequate care in the future, concluded that, based on respondent's history, he did not believe that treatment would be successful." ***Matter of Duane II. (Andrew II.)*, 2017 N.Y. Slip Op. 04331, 3rd Dept 6-1-17**

## UNEMPLOYMENT INSURANCE.

ALTHOUGH CLAIMANTS WERE TEMPORARY EMPLOYEES HIRED BECAUSE OF HURRICANE DAMAGE, THE EMERGENCY EXCEPTION TO UNEMPLOYMENT INSURANCE COVERAGE DID NOT APPLY, CLAIMANTS ENTITLED TO BENEFITS.

The Third Department determined claimants were entitled to unemployment insurance benefits. Claimants were hired on a temporary basis to address damage caused by a hurricane. The employer argued claimants were hired to address an emergency and therefore were not entitled to coverage. In rejecting the emergency exception, the court noted claimants were hired a year after the hurricane and performed routine maintenance: "For purposes of determining a claimant's eligibility for unemployment insurance benefits, Labor Law § 565 (2) (d) provides that "the term 'employment' does not include services rendered for a governmental entity by . . . a person serving on a temporary basis in case of fire, storm, snow, earthquake, flood or similar emergency' ... . 'Whether this exclusion applies presents a mixed question of law and fact, and the Board's determination in this regard will be upheld if it has a rational basis' ... . * * * The record evidence reflects that claimants, who were hired on a temporary basis using federal grant money received as a result of the damage caused by the hurricane, performed routine maintenance duties, including cutting grass, raking leaves, shoveling snow, driving trucks and cleaning municipal parking lots. In determining that the services performed by claimants were related to the hurricane clean-up efforts but 'not performed in case of an emergency,' the Board noted that claimants were hired almost a year after the hurricane and at a time when 'there was no need for immediate action.' " ***Matter of Clemons (Village of Freeport--Commissioner of Labor)*, 2017 N.Y. Slip Op. 04333, 3rd Dept 6-1-17**

## UNEMPLOYMENT INSURANCE.

EXOTIC DANCER WAS AN EMPLOYEE ENTITLED TO UNEMPLOYMENT INSURANCE BENEFITS.

The Third Department determined claimant, an exotic dancer, was an employee of a club (Jacaranda) entitled to unemployment insurance benefits: "Here, the record establishes that, before claimant was permitted to work in the club, she was required to attend an audition for Jacaranda to determine whether to hire her. While claimant provided the club with the dates on which she was available to perform, her proposed work schedule had to be approved by the club's managers. Claimant testified that, once her schedule was set, she was required to report to work by a particular time. Claimant was also required to sign in when she arrived at the club, and, according to claimant, she was expected to notify the club's managers when she could not come to work for her scheduled hours and was required to make up for any absences. Claimant testified that, while she provided her own costumes, each costume had to meet certain standards set by the club and be approved by the club's managers. Claimant was required to use the stage, private dance rooms, sound equipment and music provided by the club. Furthermore, claimant testified that the club charged patrons an admission fee, set the prices that she could charge patrons for private dances and retained a percentage of those private bookings. Claimant also testified that, besides performing dances, she was required to sell alcohol to patrons and attend weekly meetings conducted by the club's owners or managers. Lastly, claimant testified that she was prohibited from working for Jacaranda's competitors while performing services for Jacaranda." ***Matter of Commissiong (Jacaranda Club LLC--Commissioner of Labor)*, 2017 N.Y. Slip Op. 04337, 3rd Dept 6-1-17**

## WORKERS' COMPENSATION LAW.

CLAIMANT DID NOT REMOVE HIMSELF FROM EXPOSURE TO HARMFUL NOISE FOR THREE MONTHS PRIOR TO APPLYING FOR WORKERS' COMPENSATION FOR HEARING LOSS, CLAIM PROPERLY DENIED.

The Third Department determined claimant was properly denied benefits for hearing loss. To qualify, claimant was required to show he used effective ear protection for three months. Claimant used the same type of ear protection he was using when he experienced the hearing loss: "Claimant contends that he has been removed from the workplace noise for the requisite time period. Claimant testified that he was exposed to workplace noise beginning in 1977 and that he has always worn the earplugs or headphones provided by the employer for protection from the noise. The statute requires, however, as relevant here, that claimant be removed from exposure to the harmful noise by 'use of effective ear protection devices' (Workers' Compensation Law § 49-bb). In light of claimant's continued use of, for the three months in question, the same method of hearing protection against the workplace noise that he used while contracting occupational hearing loss, we conclude that substantial evidence supports the Board's decision that claimant has not established, for the purpose of an accurate appraisal of his hearing loss, that he has been removed from the noise for the requisite time period ... . We note that the statute requires claimant to use effective protection, but that it would be at the employer's expense (see Workers' Compensation Law § 49-bb). It does not appear, however, that claimant has availed himself of such protection, other than continuing to use the same devices he was wearing at the time that he contracted the hearing loss." ***Matter of Durkot v. Newsday*, 2017 N.Y. Slip Op. 04341, 3rd Dept 6-1-17**

## WORKER'S COMPENSATION LAW.

DIFFERENT PURPOSES OF THE TERMS LOSS OF WAGE-EARNING CAPACITY AND WAGE-EARNING CAPACITY EXPLAINED.

The Third Department again explained the different purposes for "loss of wage-earning capacity" and "wage earning capacity" in the benefits determination: "Claimant contends that, because he had returned to work at full wages, the Board erred in finding that he had a 10% loss of wage-earning capacity. We disagree. The loss of wage-earning capacity 'is used at the time of classification to set the maximum number of weeks over which a claimant with a permanent partial disability is entitled to receive benefits'... . In comparison, wage-earning capacity is used to determine a claimant's weekly rate of compensation (see Workers' Compensation Law § 15 [5-a]). As this Court has recently explained, wage-earning capacity and loss of wage-earning capacity 'are to be used for separate and distinct purposes' ... . While wage-earning capacity 'can fluctuate based on a claimant's employment status,' the loss of wage-earning capacity remains fixed after the time of classification... . In other words, 'the determination of a claimant's loss of wage-earning capacity is designed to establish duration of benefits, a finding which is unrelated to the traditional purpose of Workers' Compensation Law § 15 (5-a), which is to calculate the weekly benefit rate' ... . Accordingly, despite the fact that claimant was working at full wages, the Board was entitled to establish the loss of wage-earning capacity, which sets a fixed durational limit on potential benefits in the event that claimant incurs a subsequent reduction of wages as the result of his work-related injuries ...". ***Matter of Perez v. Bronx Lebanon Hosp. Ctr.*, 2017 N.Y. Slip Op. 04344, 3rd Dept 6-1-17**

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