CasePrepPlus

August 16, 2017

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

Editor: **Bruce Freeman**

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

# FIRST DEPARTMENT

## FAMILY LAW.

FAMILY COURT HAD THE POWER TO RETROACTIVELY DISMISS A NEGLECT PETITION AND IMPOSE A SUSPENDED JUDGMENT AFTER MOTHER DEMONSTRATED THE ABILITY TO CARE FOR HER CHILDREN.

The Second Department, in a full-fledged opinion by Justice Renwick, in a matter of first impression, determined that Family Court had the power to retroactively impose a suspended judgment and dismiss a neglect petition. Mother had consented to a neglect finding but subsequently turned her life around and demonstrated the ability to care for her four children: "This Family Court Act article 10 child neglect proceeding raises an issue of apparent first impression for this Court: whether the Family Court properly granted respondent mother a suspended judgment, 'retroactively,' in order to vacate a neglect finding and dismiss a neglect proceeding. Initially, the mother consented to a neglect finding and the Family Court's dispositional order released the children to the mother, under the supervision of petitioner, Administration for Children Services (ACS), for 12 months. At the end of this period, upon satisfactorily completing the terms of the dispositional order, the mother made a postdisposition motion to modify the dispositional order. The court granted a suspended judgment, retroactively, due to the mother's compliance with the conditions of the dispositional order, and vacated the neglect finding, as consistent with the children's best interest. [W]e find not only that the Family Court Act permits such a retroactive remedy, but that the remedy served the children's best interest under the circumstances of this case." ***Matter of Leenasia C. (Lamarriea C.--Maxie B.)*, 2017 N.Y. Slip Op. 06050, First Dept 8-8-17**

## FAMILY LAW, EVIDENCE.

CHILD ABUSE ALLEGATIONS SUPPORTED BY A PREPONDERANCE OF THE EVIDENCE, NO NEED TO DEMONSTRATE WHICH OF THE TWO RESPONDENTS ABUSED THE CHILD.

The First Department determined the child abuse allegations against mother and grandmother (respondents) were supported by a preponderance of the evidence. It was not necessary to prove which of them abused the child (Syriah): "The evidence submitted on petitioner's direct case supports the court's finding that respondents abused Syriah by showing that, while she was in their care, Syriah suffered an injury that would not ordinarily occur absent an act or omission of the person responsible for her care ... . '[Petitioner] was not required to establish whether the mother or the [grandmother] actually inflicted the injuries, or whether they did so together'... . A preponderance of the evidence supports the court's conclusion that Syriah's injuries were inflicted and not accidentally caused. She suffered a traumatic brain injury, which resulted in anoxic ischemic encephalopathy and subdural hematoma, from which she died. Doctor Cahill, a pediatrician qualified as an expert in child abuse pediatrics, opined to a reasonable degree of medical certainty that Syriah's injuries were the result of a shaking event. Among other things, Syriah had no skull fracture, and, as one expert testified, without a skull fracture, the most likely explanation for subdural hemorrhage and anoxic change is vigorous shaking. Respondents failed to demonstrate that Syriah's injuries 'could reasonably have occurred accidentally' so as to rebut petitioner's prima facie showing of abuse ... . The testimony of petitioner's experts ruled out the possibility that the injuries were caused, as respondents contend, by a short fall from a mattress to the floor. Indeed, respondents' own experts testified that it would be 'unusual' and 'extremely rare' for a child to suffer the injuries that Syriah suffered from a short fall." ***Matter of Syriah J. (Esther J.)*, 2017 N.Y. Slip Op. 06048, First Dept 8-8-17**

## PERSONAL INJURY, EVIDENCE.

PLAINTIFF WAS UNABLE TO RAISE A QUESTION OF FACT WHETHER THE RAMP FROM WHICH HE FELL WAS NEGLIGENTLY DESIGNED OR MAINTAINED, NO APPLICABLE BUILDING OR SAFETY CODES.

The First Department determined defendants' motion for summary judgment in this slip and fall case should have been granted. Plaintiff alleged that he fell off the edge of a service ramp in an area where trucks were unloaded. The plaintiff was unable to raise a question of fact about whether the ramp was negligently designed or maintained. There were no building code or other safety code provisions which were violated, or even applicable: "Defendants' expert report stated that the Building Code applicable to the premises, which was enacted in 1968 ... , was silent concerning the components of a loading dock, delivery truck parking, material loading and unloading, and in regard to an access ramp between the truck parking

floor and the top of the loading dock. As a result, the expert concluded, the ramp did not violate the Building Code. The expert also concluded that because the service ramp was not part of the required egress from the loading dock area, those parts of the Building Code applicable to 'Means of Egress' did not apply. Based on his conclusion that the Building Code did not contain sections specifically applicable to the instant facts, defendants' expert reviewed the standards promulgated by OSHA. He concluded, however, that no section of OSHA applied to the instant facts. He also found that National Fire Protection Agency 'Life Safety Code' did not apply to the instant facts. Defendants' expert opined that the portion of the curb of the ramp where plaintiff was alleged to have tripped was not a foreseeable pedestrian path, since it runs parallel, not across the path of pedestrians walking up and down the ramp. He noted that the use of bright yellow paint to alert pedestrians to the presence of walkway conditions was proper and in compliance with the American Society for Testing and Materials. Overall, defendants' expert concluded that plaintiff had not cited to any valid authority in support of his contention that the ramp caused the accident, and established that the ramp did not violate any standards referenced by plaintiff's expert in his expert exchange. In opposition, plaintiff failed to raise a triable issue of fact as to any negligence on the part of defendant ...". ***Schmidt v. One N.Y. Plaza Co. LLC*, 2017 N.Y. Slip Op. 06047, First Dept 8-8-17**

# SECOND DEPARTMENT

## ADMINISTRATIVE LAW, EVIDENCE.

PROCEEDING UNDER REVIEW WAS NOT QUASI-JUDICIAL, SUBSTANTIAL EVIDENCE STANDARD DID NOT APPLY.

The Second Department determined the "substantial evidence" standard did not apply to review of the Unified Court System's finding that the court assistant (petitioner) was not asked to do out-of-title work. The "arbitrary and capricious" standard was the proper one: "Contrary to the petitioner's contention, 'a substantial evidence' question is presented only where a quasi-judicial evidentiary hearing has been held'... . The fact that the petitioner had the 'right to be heard . . . and to present facts in support of [his] position' at a grievance meeting ...did not render the grievance meeting 'a quasi-judicial proceeding involving the cross-examination of witnesses and the making of a record within the meaning of CPLR 7803(4)'... . Since the administrative determination in this case was made after a grievance meeting, as opposed to a quasi-judicial evidentiary hearing, the court properly concluded that the relevant standard of review was whether the 'determination was made in violation of lawful procedure, was affected by an error of law, or was arbitrary and capricious or an abuse of discretion' ... .The petitioner further contends that the Deputy Director's determination was arbitrary and capricious. 'An action is arbitrary and capricious when it is taken without sound basis in reason or regard to the facts' ... . 'In applying the arbitrary and capricious' standard, a court inquires whether the determination under review had a rational basis' ...". ***Matter of Manning v. New York State-Unified Ct. Sys.*, 2017 N.Y. Slip Op. 06077, Second Dept 8-9-17**

## ARBITRATION, EMPLOYMENT LAW, MUNICIPAL LAW.

UNION'S CLAIM MEDICAL TREATMENT FOR LINE OF DUTY INJURIES WAS BEING UNDULY DELAYED OR DENIED WAS ARBITRABLE; WHETHER THE UNDERLYING GRIEVANCE WAS TIMELY BROUGHT MUST BE DETERMINED BY THE ARBITRATOR, NOT THE COURT.

The Second Department determined that the city's petition to permanently stay arbitration was properly dismissed. The court described the criteria for determining whether a matter is arbitrable pursuant to a collective bargaining agreement (CBA). The court further held that whether the underlying grievance was timely brought must be determined by the arbitrator because the CBA was silent on the issue. The city firefighters (Local 628) sought arbitration of whether medical treatment for line of duty injuries (General Municipal Law § 207-a) was being unduly delayed or denied: " 'In analyzing whether the parties in fact agreed to arbitrate the particular dispute, a court is merely to determine whether there is a reasonable relationship between the subject matter of the dispute and the general subject matter of the CBA' ... . Here, the relevant arbitration provisions of the CBA are broad, as they provide for arbitration of any grievance 'involving the interpretation or application of any provision of this Agreement,' which remains unresolved following completion of step two of the grievance procedure. Moreover, there is a reasonable relationship between the subject matter of the dispute, which involves the processing of General Municipal Law § 207-a benefits to firefighters injured in the line of duty, and Appendix C of the CBA which sets forth the procedures regulating 'the application for, and the award of, benefits under section 207-a of the General Municipal Law' ... . The City's contention that arbitration was precluded because Local 628's grievance was not timely pursuant to step one of the grievance procedure is without merit. The 'threshold determination of whether a condition precedent to arbitration exists and whether it has been complied with, is for the court to determine' ... . By contrast, '[q]uestions concerning compliance with a contractual step-by-step grievance process have been recognized as matters of procedural arbitrability to be resolved by the arbitrators, particularly in the absence of a very narrow arbitration clause or a provision expressly making compliance with the time limitations a condition precedent to arbitration' ...". ***Matter of City of Yonkers v. Yonkers Fire Fighters, Local 628, IAFF, AFL-CIO*, 2017 N.Y. Slip Op. 06073, Second Dept 8-9-17**

## ATTORNEYS.

JUDICIARY LAW § 487 ACTION AGAINST ATTORNEYS, ALLEGING AN INTENTION TO DECEIVE THE COURT IN A DIVORCE PROCEEDING, PROPERLY DISMISSED.

The Second Department determined the suit against plaintiff's divorce attorneys alleging a violation of Judiciary Law § 487 was properly dismissed, both because of the failure to prove an intent to deceive the court, and the failure to prove pecuniary damage: "Judiciary Law § 487(1) provides that '[a]n attorney or counselor who . . . [i]s guilty of any deceit or collusion, or consents to any deceit or collusion, with intent to deceive the court or any party . . . [i]s guilty of a misdemeanor, and in addition to the punishment prescribed therefor by the penal law, he [or she] forfeits to the party injured treble damages, to be recovered in a civil action.' 'A violation of Judiciary Law § 487 requires an intent to deceive' ... Here, the evidence adduced at trial, including the testimony of [plaintiff's attorney], supports the trial court's determination that [the attorney] did not act with the requisite 'intent to deceive the court or any party' in applying for the receivership ... . In any event, to succeed on a cause of action to recover damages under Judiciary Law § 487, the plaintiff must demonstrate that he or she 'suffered . . . damages which were proximately caused by the deceit allegedly perpetrated on him [or her] or on the court' ... . The evidence adduced at trial also supports the trial court's conclusion that the plaintiff failed to establish that she suffered pecuniary damages as a result of the alleged deceit." ***Dupree v. Voorhees*, 2017 N.Y. Slip Op. 06062, Second Dept 8-9-17**

## CIVIL PROCEDURE, LIMITED LIABILITY COMPANY LAW.

REQUIREMENTS FOR SERVICE ON AN UNAUTHORIZED FOREIGN LIMITED LIABILITY COMPANY NOT MET, DEFAULT JUDGMENT PROPERLY DENIED.

The Second Department determined the Limited Liability Company Law requirements for a default judgment against an unauthorized foreign limited liability company were not met: "A plaintiff seeking leave to enter a default judgment must file proof of proper service of the summons and the complaint, the defendant's default, and the facts constituting the claim (see CPLR 3215[f] ...). The plaintiff averred that it served the defendant, a foreign limited liability company not authorized to conduct business in New York, pursuant to Limited Liability Company Law § 304. As relevant to the plaintiff's contentions, that statute requires three things. First, service upon the unauthorized foreign limited liability company may be made by personal delivery of the summons and complaint, with the appropriate fee, to the Secretary of State ... . Second, in order for the personal delivery to the Secretary of State to be 'sufficient,' the plaintiff must also give the defendant direct notice of its delivery of the process to the Secretary of State, along with a copy of the process. The direct notice may be sent to the defendant by registered mail, return receipt requested, to the defendant's last known address ... . Third, after process has been delivered to the Secretary of State and direct notice of that service has been sent to the defendant, the plaintiff must file proof of service with the clerk of the court. That proof of service must be in the form of an 'affidavit of compliance.' The affidavit of compliance must be filed with the return receipt within 30 days after the plaintiff has received the return receipt from the post office. Service of process shall be complete 10 days after the affidavit of compliance has been filed with the clerk with a copy of the summons and complaint ... . Strict compliance with Limited Liability Company Law § 304 is required, including as to the filing of an 'affidavit of compliance' ... . Where the plaintiff has failed to demonstrate strict compliance, the plaintiff will not be entitled to a default judgment ... . Here, the plaintiff failed to submit an affidavit of compliance with the return receipt within 30 days after it received the return receipt from the post office. Accordingly, the plaintiff's unopposed motion for leave to enter a default judgment was properly denied ... ". ***Global Liberty Ins. Co. v. Surgery Ctr. of Oradell, LLC*, 2017 N.Y. Slip Op. 06065, Second Dept 8-9-17**

## CIVIL PROCEDURE, SECURITIES, COOPERATIVES.

DECLARATORY JUDGMENT ACTION SEEKING A DETERMINATION OF THE OWNERSHIP OF A STOCK CERTIFICATE REPRESENTING SHARES IN A COOPERATIVE APARTMENT IS GOVERNED BY A THREE-YEAR STATUTE OF LIMITATIONS, THE STOCK CERTIFICATE IS PERSONAL NOT REAL PROPERTY.

The Second Department noted that the declaratory judgment action which sought a determination of the ownership of a stock certificate representing shares in a cooperative apartment was governed by the three-year statute of limitation. The stock certificate was personal property, not real estate: "The defendants established that the action was barred by the three-year statute of limitations for recovery of a chattel (see CPLR 214[3]). 'In order to determine the Statute of Limitations applicable to a particular declaratory judgment action, the court must examine the substance of that action to identify the relationship out of which the claim arises and the relief sought' ... . 'If the court determines that the underlying dispute can be or could have been resolved through a form of action or proceeding for which a specific limitation period is statutorily provided, that limitation period governs the declaratory judgment action' ... . Here, the plaintiff seeks to recover a stock certificate representing shares in a cooperative apartment corporation. An action to recover a stock certificate is governed by the three-year statute of limitations for recovery of a chattel ... . 'Shares of stock issued in connection with cooperative apartments are personal property, not real property' ...". ***Loscalzo v. 507-509 President St. Tenants Assn. Hous. Dev. Fund Corp.*, 2017 N.Y. Slip Op. 06070, Second Dept 8-9-17**

## CIVIL PROCEDURE, TRUSTS AND ESTATES, ATTORNEYS.

DECEASED PLAINTIFF'S LAWSUIT DISMISSED FOR FAILURE TO TIMELY SUBSTITUTE A REPRESENTATIVE OF PLAINTIFF'S ESTATE.

The Second Department determined the causes of action brought by plaintiff's decedent were properly dismissed because counsel did not timely substitute a representative for the deceased plaintiff: " 'CPLR 1021 requires a motion for substitution to be made within a reasonable time'... . 'The determination of reasonableness requires consideration of several factors, including the diligence of the party seeking substitution, the prejudice to the other parties, and whether the party to be substituted has shown that the action or the defense has potential merit' ... . Here, the plaintiff's counsel failed to demonstrate that he made any diligent efforts to substitute a representative for the deceased plaintiff. Additionally, the plaintiff's counsel did not demonstrate a reasonable excuse for failing to seek a substitution. Further, the plaintiff's counsel failed to submit an affidavit of merit, and did not rebut the contention of [defendants] that they were prejudiced in their ability to defend the case." ***Howlader v. Lucky Star Grocery, Inc.*, 2017 N.Y. Slip Op. 06067, Second Dept 8-9-17**

## CONTRACT LAW, CIVIL PROCEDURE, EVIDENCE.

IN THE FACE OF A COMPLETE WRITTEN AGREEMENT, EVIDENCE OF A RELATED ORAL AGREEMENT SHOULD NOT HAVE BEEN CONSIDERED, DEFENDANT'S MOTION TO DISMISS FOUNDED UPON DOCUMENTARY EVIDENCE (THE WRITTEN AGREEMENT) SHOULD HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined the written consulting (retainer) agreement was complete and evidence of an oral agreement to form a joint venture should not have been considered. Defendant's motion to dismiss founded on documentary evidence (the written retainer agreement), therefore, should have been granted. Plaintiff had alleged defendant breached the oral agreement: " 'To succeed on a motion to dismiss pursuant to CPLR 3211(a)(1), the documentary evidence that forms the basis of the defense must be such that it resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim'... . A written agreement that is complete, clear, and unambiguous on its face must be enforced to give effect to the meaning of its terms and the reasonable expectations of the parties, and the court should determine the intent of the parties from within the four corners of the contract without looking to extrinsic evidence to create ambiguities ... . The parol evidence rule generally operates to preclude evidence of a prior or contemporaneous communication during negotiations of an agreement that contradicts, varies, or explains a written agreement which is clear and unambiguous in its terms and expresses the parties' entire agreement and intentions ... . Where, as here, there is no merger clause, the court must examine the surrounding circumstances and the writing itself to determine whether the agreement constitutes a complete, integrated instrument ... . Here, both a reading of the written retainer agreement and a consideration of the surrounding circumstances lead to the conclusion that the written retainer agreement is a complete written instrument, and, thus, evidence of what may have been agreed orally between the parties prior to the execution of this integrated written instrument cannot be received to vary the terms of the writing ...". ***Hoeg Corp. v. Peebles Corp.*, 2017 N.Y. Slip Op. 06066, Second Dept 8-9-17**

## CRIMINAL LAW.

IN SENTENCING DEFENDANT, SUPREME COURT ERRONEOUSLY CONSIDERED A CRIME OF WHICH DEFENDANT WAS ACQUITTED; PEOPLE DID NOT DEMONSTRATE UNDERLYING FACTS OF THE ASSAULT AND ROBBERY CONVICTIONS WERE DIFFERENT, SENTENCES MUST RUN CONCURRENTLY.

The Second Department determined the sentencing court erroneously considered a crime of which defendant was acquitted in sentencing. The Second Department further noted that the People did not demonstrate that the assault and robbery convictions were based upon different underlying facts, therefore the sentences must run concurrently: "Certain remarks made by the sentencing court demonstrate that it improperly considered a crime of which the defendant was acquitted as a basis for sentencing. Accordingly, the matter must be remitted ... for resentencing ... . Further, since the People failed to establish that the acts underlying the conviction of assault in the first degree were separate and distinct from the acts underlying the conviction of attempted robbery in the first degree, the sentences imposed on remittal are to run concurrently ...". ***People v. Newman*, 2017 N.Y. Slip Op. 06086, Second Dept 8-9-17**

## CRIMINAL LAW, EVIDENCE.

ADMISSION OF A CHART SHOWING THE STRUCTURE AND MEMBERSHIP OF A GANG WAS (HARMLESS) ERROR.

Although the facts of the case were not spelled out, the Second Department determined the introduction of a chart showing the structure and membership of a gang was (harmless) error: "We agree with the defendant that under the circumstances here, it was improper to admit into evidence a summary chart depicting the gang hierarchy and membership of the gang, which identified the gang's members by name and their associated arrest photos ... . Nevertheless, the error was harmless, as the proof of the defendant's guilt of arson in the first degree and conspiracy in the second degree was overwhelming, and

there is no significant probability that, but for the error, the verdict would have been less adverse ...". ***People v. Burkette*, 2017 N.Y. Slip Op. 06082, Second Dept 8-9-17**

## CRIMINAL LAW, EVIDENCE.

(HARMLESS) ERROR TO ALLOW DETECTIVE TO TESTIFY AS AN EXPERT ABOUT THE STRUCTURE OF THE GANG AND THE RELATIONSHIPS AMONG SPECIFIC MEMBERS, (HARMLESS) ERROR TO ALLOW IN EVIDENCE A CHART DESCRIBING THE STRUCTURE AND MEMBERSHIP OF THE GANG.

The Second Department determined it was (harmless) error to allow a detective to testify as an expert about the structure of the gang and the relationships among specific gang members. It was also (harmless) error to admit a chart describing the structure and membership of the gang: "The defendant correctly contends that the Supreme Court erred by, in effect, permitting the investigating detective in the case to testify as an expert not only regarding the general hierarchy of the gang to which the defendant belonged, but also as to the relationships between specific gang members, which he knew only as a result of his own participation in the investigation. Allowing the detective, who was intimately involved in the investigation into the gang-related arson, to testify as an expert created a danger that he would end up testifying beyond any cognizable field of expertise as an apparently omniscient expositor of the facts of the case, thereby usurping the fact-finding role of the jury ... . It was also improper, under the circumstances here, to admit into evidence a summary chart depicting the gang hierarchy and membership of the gang, which identified the gang's members by name and their associated arrest photos ...". ***People v. Vazquez*, 2017 N.Y. Slip Op. 06092, Second Dept 8-9-17**

## FAMILY LAW.

CHILD WAS ENTITLED TO A FINDING THAT REUNIFICATION WITH HIS MOTHER IN EL SALVADOR WAS NOT VIABLE DUE TO PARENTAL NEGLECT.

The Second Department, reversing Family Court, over a dissent, determined the child was entitled to a finding that reunification with his mother in El Salvador would not be viable in this special juvenile immigrant status proceeding: "... [W]here, as here, the Family Court's credibility determination is not supported by the record, this Court is free to make its own credibility assessments and overturn the determination of the hearing court ... . Based upon our independent factual review, we conclude that the record supports a finding that reunification of the child with his mother is not a viable option based upon parental neglect. The record reflects that the mother failed to meet the educational needs of the child... . The child testified that, although he was prevented from attending school by gang members who beat him while walking to school, the mother did not arrange for transportation, which was within her financial means, but instead, told him to stay home. Additionally, the child was expelled from one school due to excessive tardiness, and he failed the seventh grade ... . Further, the mother did not provide adequate supervision, often leaving the then eight-year-old child home alone at night in the neighborhood where he had encountered the gang violence ... . ... Since the record is sufficient for this Court to make its own findings of fact and conclusions of law, we find that reunification of the child with one or both of his parents is not viable due to parental neglect ...". ***Matter of Dennis X.G.D.V.*, 2017 N.Y. Slip Op. 06080, Second Dept 8-9-17**

## INSURANCE LAW, PERSONAL INJURY.

PLAINTIFF, AFTER A SUBSTANTIAL VERDICT IN A TRAFFIC ACCIDENT CASE, WAS ASSIGNED DEFENDANT'S RIGHT TO SUE DEFENDANT'S INSURER ALLEGING A BAD FAITH FAILURE TO SETTLE, THE INSURER'S MOTION TO DISMISS WAS PROPERLY DENIED.

The Second Department determined there was no basis for the dismissal of Rios's complaint alleging defendant insurer's (Tri State's) bad faith refusal to settle the underlying traffic-accident action for the policy limit of $100,000. Rios had collided with Weathers, who sued Rios. Weathers won a substantial verdict which was reduced by the Second Department. The Second Department ordered a new trial unless Weathers stipulated to the reduced award (which remained substantial and well above the policy limit). Weathers stipulated to most of the reduced award, but not the award for future physical therapy and medical costs. Rios then assigned his "bad faith" action against defendant insurer (Tri State) to Weathers. In moving to dismiss the Rios complaint, the insurer argued that because Weathers did not stipulate to all of the reduced award, his only remedy was a new trial: "Weathers, as assignee of Rios's rights, ... commenced this action alleging that Tri State acted in bad faith by refusing to settle this case before the trial for the policy limit of $100,000 and breached the implied covenant of good faith and fair dealing in handling the defense of the personal injury action on behalf of Rios. Tri State moved, in effect, pursuant to CPLR 3211(a) to dismiss the complaint insofar as asserted against it. Tri State argued that this Court's decision and order in the personal injury action did not permit Weathers, the personal injury plaintiff, to pick and choose which modified awards he would accept and which awards he would reject. Tri State contended that, because Weathers did not 'unconditionally accept' the reduced awards set forth in this Court's decision and order within 30 days, he 'has the right to a new trial, nothing else.' Tri State argued that the instant 'bad faith' action is premature 'because there is no jury verdict on damages at this stage,' and therefore, it cannot be said 'that Tri State acted in bad faith for refusing to settle [the personal injury] case.' … Under the particular circumstances of this case, Tri State has failed to establish any ground to dismiss the

complaint insofar as asserted against it. Although there are outstanding questions as to the total award of damages in the personal injury action, Tri State has failed to demonstrate why that prevents Weathers from maintaining an action against Tri State alleging bad faith refusal to settle and breach of the implied covenant of good faith and fair dealing ...". ***Weathers v. Tri State Consumer Ins. Co.*, 2017 N.Y. Slip Op. 06099, Second Dept 8-9-17**

## MUNICIPAL LAW.

FAILURE TO ANSWER SOME QUESTIONS AT THE § 50-H HEARING REQUIRED DISMISSAL OF THIS FALSE ARREST AND FALSE IMPRISONMENT ACTION.

The Second Department determined the plaintiff's false arrest and false imprisonment complaint was properly dismissed. Although plaintiff appeared at the General Municipal Law § 50-h hearing, he did not answer all of the questions posed by the defendant city's attorney and he did not invoke the Fifth Amendment. Because the § 50-h hearing is a condition precedent to the suit against the city, dismissal was required: "The purpose of the statutory notice of claim requirement is to afford the public corporation an adequate opportunity to conduct an investigation into the circumstances surrounding an alleged occurrence and to explore the merits of the claim while information is readily available ... . The oral examination of the claimant pursuant to General Municipal Law § 50-h serves to supplement the notice of claim and provides an investigatory tool to the public corporation, with a view toward settlement... . 'Compliance with a demand for a General Municipal Law § 50-h examination is a condition precedent to the commencement of an action against a municipal defendant, and the failure to so comply warrants dismissal of the action'... . Here, while the plaintiff appeared for the scheduled examination, he failed to answer many of the questions that were posed to him, and he never invoked his Fifth Amendment privilege against self-incrimination. Since he failed to assert his privilege at the time he was relying on it, he was unable to benefit from it ... . Even if the plaintiff had properly asserted his privilege, he was obligated to schedule a new General Municipal Law § 50-h examination after his criminal case ended, but he failed to do so ... . Instead, the plaintiff simply commenced an action in January 2016 without indicating the status of the criminal charges." ***Di Pompo v. City of Beacon Police Dept.*, 2017 N.Y. Slip Op. 06059, Second Dept 8-9-17**

## PERSONAL INJURY.

NO DUTY OF CARE OWED PLAINTIFF, DEFENDANTS DID NOT OWN, OCCUPY OR CONTROL THE STAIRCASE WHERE PLAINTIFF SLIPPED AND FELL.

The Second Department determined the defendants demonstrated they did not own, occupy or control the area where plaintiff slipped and fell. Therefore the defendants owed no duty of care to the plaintiff: " 'To establish a prima facie case of negligence, a plaintiff must establish the existence of a duty owed by a defendant to the plaintiff, a breach of that duty, and that such breach was a proximate cause of injury to the plaintiff' ... . Where there is no duty of care owed by the defendant to the plaintiff, there can be no breach, and thus, no liability can be imposed upon the defendant ... . Liability for a dangerous condition on property is generally predicated upon ownership, occupancy, control, or special use of the property... . The existence of one or more of these elements is sufficient to give rise to a duty of care... . Where none is present, '[generally] a party cannot be held liable for injuries caused by the allegedly defective condition' ... . Here, the defendants established, prima facie, that they did not owe a duty to the plaintiff by demonstrating that they did not own, occupy, or control the area where the subject accident occurred, and thus, that they did not have a duty to maintain the staircase on the date of the accident." ***Donatien v. Long Is. Coll. Hosp.*, 2017 N.Y. Slip Op. 06061, Second Dept 8-9-17**

## PERSONAL INJURY, EDUCATION-SCHOOL LAW.

QUESTION OF FACT WHETHER A STEEL PLATE NEAR THE SIDELINE OF A FOOTBALL FIELD UNREASONABLY INCREASED THE RISKS ASSOCIATED WITH PLAYING HIGH SCHOOL FOOTBALL.

The Second Department determined there was a question of fact whether a steel plate (covering a pole vault pit) unreasonably increased the risk of injury for high school football players. Plaintiff was tackled and struck the steel plate, which was several feet from the sideline: " 'Pursuant to the doctrine of primary assumption of risk, a voluntary participant in a sporting or recreational activity consents to those commonly appreciated risks which are inherent in and arise out of the nature of the sport generally and flow from such participation'... . 'Participants are not deemed to have assumed the risks of reckless or intentional conduct, or concealed or unreasonably increased risks'... . Thus, '[a]n educational institution organizing a team sporting activity must exercise ordinary reasonable care to protect student athletes voluntarily participating in organized athletics from unassumed, concealed, or enhanced risks'...".

Here, the Supreme Court properly determined that the defendants failed to establish their prima facie entitlement to judgment as a matter of law. The defendants failed to eliminate a triable issue of fact as to whether the placement of the steel plate in the vicinity of the playing field unreasonably increased the risk of injury to the participants ...". ***Deserto v. Goshen Cent. Sch. Dist.*, 2017 N.Y. Slip Op. 06058, Second Dept 8-9-17**

## PERSONAL INJURY, LANDLORD-TENANT.

DEFENDANT COLLEGE DEMONSTRATED IT DID NOT CREATE OR HAVE NOTICE OF THE CONDITION WHICH INJURED PLAINTIFF, A PORTION OF A LIGHT FIXTURE IN PLAINTIFF'S ON-CAMPUS ROOM FELL ON HER.

The Second Department determined defendant's motion for summary judgment was properly granted. Plaintiff, a student living in defendant's on-campus housing, was injured when a globe from an overhead light fell on her. The defendant college demonstrated it did not created the dangerous condition and did not have actual or constructive notice of the condition: "The plaintiff was a student at the defendant, Long Island University, and resided at its on-campus housing facility in Brooklyn. During the evening of November 5, 2010, a glass globe fell from a ceiling lighting fixture in the plaintiff's room onto her head. The plaintiff subsequently commenced this action against the defendant to recover damages for personal injuries. Following discovery, the defendant moved for summary judgment dismissing the complaint. The Supreme Court granted the defendant's motion, and the plaintiff appeals. The defendant established its prima facie entitlement to judgment as a matter of law by demonstrating that it did not create the condition that allegedly caused the plaintiff's injuries or have actual or constructive notice of it ...". ***Williamson v. Long Is. Univ.*, 2017 N.Y. Slip Op. 06100, Second Dept 8-9-17**

## PERSONAL INJURY, MUNICIPAL LAW.

DEFENDANT ABUTTING PROPERTY OWNER FAILED TO ELIMINATE ALL TRIABLE ISSUES OF FACT RE WHETHER A GAP BETWEEN THE CURB AND THE SIDEWALK WAS ATTRIBUTABLE TO ITS NEGLIGENCE AND CONTRIBUTED TO PLAINTIFF'S SLIP AND FALL.

The Second Department determined a question of fact precluded defendant-abutting-property-owner's (51 Remsen's] motion for summary judgment in this sidewalk slip and fall case. The NYC Administrative Law imposed the burden of keeping the sidewalk safe on the abutting property owner, but the curb was excluded from the property owner's responsibility. Plaintiff testified there was a gap between the curb and the sidewalk: 'Administrative Code of the City of New York § 7-210(a) imposes a duty on 'the owner of real property abutting any sidewalk, including, but not limited to, the intersection quadrant for corner property, to maintain such sidewalk in a reasonably safe condition,' and provides that the owner of said real property 'shall be liable for any injury to property or personal injury, including death, proximately caused by the failure of such owner to maintain such sidewalk in a reasonably safe condition.' 'Sidewalk' is defined as 'that portion of a street between the curb lines, or the lateral lines of a roadway, and the adjacent property lines, but not including the curb, intended for the use of pedestrians' ... . Here, the Supreme Court properly denied the motion of 51 Remsen for summary judgment dismissing the complaint and all cross claims insofar as asserted against it.... 51 Remsen's expert opined that while the sidewalk was in good condition, set properly, and free of tripping defects, the curb was 'problematic' because it did not meet City Department of Transportation height regulations. The plaintiff, however, testified at his deposition that there was a '[l]ittle gap' between the curb and the sidewalk. Viewing the evidence in the light most favorable to the plaintiff as the nonmovant ..., 51 Remsen failed to eliminate all triable issues of fact regarding whether it had a duty to maintain the area of the plaintiff's fall, and whether the alleged dangerous sidewalk condition, i.e., an improper setback from the curb, was attributable to its negligence and contributed to the plaintiff's fall ...". ***Gelstein v. City of New York*, 2017 N.Y. Slip Op. 06064, Second Dept 8-9-17**

## PERSONAL INJURY, MUNICIPAL LAW.

MOTION TO DISMISS THIS SIDEWALK SLIP AND FALL ACTION PROPERLY DENIED, DEFENDANT DID NOT UTTERLY REFUTE THE ALLEGATION IT CREATED THE CONDITION OR THAT IT HAD NOT ASSUMED THE RESPONSIBILITY FOR MAINTAINING THE SIDEWALK BY THE TERMS OF ITS LEASE.

The Second Department determined the defendant's (Queens Ballpark's) motion to dismiss this slip and fall action, based on documentary evidence, was properly denied. The documents did not conclusively establish that defendant did not create the condition which caused the sidewalk slip and fall, and did not establish that had not assumed the landowner's responsibility to maintain a safe sidewalk by the terms of the lease: "Pursuant to Administrative Code of the City of New York § 7-210(a), 'the owner of real property abutting any sidewalk' has a duty 'to maintain such sidewalk in a reasonably safe condition.' 'Notwithstanding any other provision of law, the owner of real property abutting any sidewalk[] . . . shall be liable for any injury to property or personal injury, including death, proximately caused by the failure of such owner to maintain such sidewalk in a reasonably safe condition' (id. § 7-210[b]). 'As a general rule, the provisions of a lease obligating a tenant to repair the sidewalk do not impose on the tenant a duty to a third party'... . 'However, where a lease agreement is so comprehensive and exclusive as to sidewalk maintenance as to entirely displace the landowner's duty to maintain the sidewalk, the tenant may be liable to a third party' ... . Here, the documentary evidence submitted by Queens Ballpark failed to utterly refute the plaintiff's factual allegations, thereby conclusively establishing a defense as a matter of law ... . Further, Queens Ballpark failed to establish conclusively that the plaintiff had no cause of action ... . In her complaint, the plaintiff alleged that Queens Ballpark created the alleged defect in the sidewalk, and that Queens Ballpark was liable pursuant to Administrative Code § 7-210 for failing to maintain the sidewalk in a reasonably safe manner. Queens Ballpark's evidence, namely, excerpts from its lease of the parking lot, photographs of the sidewalk, and an affidavit from the Executive Director

of Ballpark Operations for Queens Ballpark, did not address whether Queens Ballpark created the alleged defect, or whether Queens Ballpark had entirely displaced the landowner's duty to maintain the sidewalk such that Queens Ballpark could be held liable to the plaintiff under Administrative Code § 7-210 ...". ***Torres v. City of New York*, 2017 N.Y. Slip Op. 06096, Second Dept 8-9-17**

# THIRD DEPARTMENT

## ATTORNEYS.

MASSACHUSETTS ATTORNEYS' REQUEST FOR A WAIVER OF THE JUDICIARY LAW REQUIREMENT THAT THEY MAINTAIN A PHYSICAL OFFICE IN NEW YORK IN ORDER TO PRACTICE IN NEW YORK DENIED.

The Third Department denied the applications of two Massachusetts attorneys (Fee and Lawless) for a waiver of the Judiciary Law requirement that they maintain a physical office in New York in order to practice in New York. The Third Department, following the Second Department and disagreeing with the First, determined the legal work performed by the attorneys to date was not null and void: "Upon our review of Judiciary Law § 470, we find that it unambiguously provides, without exception, that a prerequisite for a nonresident attorney to practice law in this state is that he or she maintain a physical law office here. In our view, Fee's and Lawless' requests for a waiver of the clear mandate of Judiciary Law § 470 'finds no support in the wording of the provision and would require us to take the impermissible step of rewriting the statute' ... . In addition to holding that no statutory authority exists for granting the waivers, we also find that creating an avenue for nonresident attorneys to obtain a waiver of the law office requirement would amount to the type of rulemaking reserved for the Court of Appeals (see generally Judiciary Law § 53). Accordingly, Fee's and Lawless' applications are denied. Finally, we reject plaintiff's contention that all of the work performed by Fee and Lawless in this action should be declared void from the beginning. In reaching this conclusion, we adopt the Second Department's reasoning in Elm Mgt. Corp. v. Sprung (33 AD3d 753 [2006]) that 'the fact that a party has been represented by a person who was not authorized or admitted to practice law under the Judiciary Law . . . does not create a 'nullity' or render all prior proceedings void per se' ... , and we note our disagreement with the First Department's cases holding to the contrary ...". ***Stegemann v. Rensselaer County Sheriff's Off.*, 2017 N.Y. Slip Op. 06114, Third Dept 8-10-17**

## CRIMINAL LAW, ATTORNEYS.

FOR CAUSE CHALLENGE TO A SWORN JUROR, AN ATTORNEY, WHOSE FIRM REPRESENTED THE MURDER VICTIM'S PARENTS IN AN ACTION TO GAIN CUSTODY OF THE DEFENDANT'S AND VICTIM'S CHILD SHOULD HAVE BEEN GRANTED ON IMPLIED BIAS GROUNDS.

The Third Department, reversing defendant's conviction, over a dissent, determined that defendant's for cause challenge to a sworn juror should have been granted. Defendant was accused of killing his ex-wife, Powell. The juror was a partner in a law firm which represented Powell's parents in their action to gain custody of Powell's (and defendant's) child. "... [W]here the challenging party acquires new information that had not been previously available after a juror has already been sworn, the trial court may entertain a challenge made for cause made before the first trial witness is sworn ... . ... The governing law dictates that a juror should be discharged for cause where the juror is shown to have an implied bias; that is, if the juror shares a relationship with any person involved in the trial the nature of which is likely to preclude him or her from rendering an impartial verdict ... . ... It bears noting that the juror did not personally represent Powell's parents, and that the relationship shared by her firm and Powell's family was purely of a professional nature. Nonetheless, the law firm owed Powell's family a clear and paramount duty to represent their interests. As the juror recognized and stated in response to the court's inquiry, the conflicts that arise therefrom — under the particular circumstances presented here — are imputed to her by law ... . Further, the effect of the juror's involvement cannot be said to be remote, as the verdict reached by this jury would inevitably affect the custody proceedings; indeed, by direct application of statutory law, a guilty verdict in this criminal action necessarily precluded an award of custody or visitation to defendant in that matter ... . As a matter of well-established law, a juror's assurances of impartiality are inadequate to cure an implied bias ...". ***People v. Powell*, 2017 N.Y. Slip Op. 06104, Third Dept 8-10-17**

## UNEMPLOYMENT INSURANCE.

CLAIMANT, WHO WAS HIRED TO SHOW RENTAL PROPERTIES FOR A REAL ESTATE BROKER, WAS AN EMPLOYEE ENTITLED TO UNEMPLOYMENT INSURANCE BENEFITS.

The Third Department determined claimant, who was hired to show rental properties by a real estate broker (Cantor), was an employee entitled to unemployment insurance benefits: "Here, there is evidence in the record that Cantor set the sales agent's rate of compensation, which included the right to draw on commissions and imposed restrictions on outside employment. Cantor determined claimant's work schedule and coached him on how to best show the properties — including having him show properties in a certain order and giving him tips on showcasing certain aesthetic features of a property — and critiqued his public speaking skills. Claimant was required to submit weekly statistical reports to Cantor on the real estate market in the neighborhoods to which he was assigned and inform Cantor if he was going to be late or miss any

work. Cantor also provided claimant with business cards and contacts for potential customers ...". ***Matter of Link (Cantor & Pecorella, Inc.--Commissioner of Labor)*, 2017 N.Y. Slip Op. 06118, Third Dept 8-10-17**

## WORKERS' COMPENSATION LAW.

CLAIMANT, DECEDENT'S HUSBAND, WAS ENTITLED TO WORKERS' COMPENSATION DEATH BENEFITS BASED UPON DECEDENT'S UNWITNESSED DEATH DUE TO CARDIAC ARREST.

The Third Department determined claimant, decedent's husband, was entitled to Workers' Compensation death benefits. Decedent was found on the floor after she had complained of job-related stress and chest pains. Decedent's death certificate indicated that she died from cardiac arrhythmia due to arteriosclerotic heart disease with obesity as a contributing factor: "Here, there is no dispute that claimant was entitled to the statutory presumption in that decedent suffered a cardiac arrest while working in her office and died shortly thereafter as a result, an event with no known witnesses ... . The carrier's cardiologist reviewed decedent's medical records and concluded that while it was not certain exactly what happened, decedent's cardiac arrest was most likely due to preexisting coronary artery disease and was not causally related, finding insufficient evidence that it was due to work-related stress ... . This evidence was sufficient to rebut the presumption of compensability, shifting the burden to claimant to demonstrate a causal relationship ... . Claimant presented the report and testimony of an internal medicine physician who reviewed decedent's medical records and concluded that she had underlying asymptomatic cardiac atherosclerotic disease, and that her work-related stress was a 'significant contributing factor' that caused her sudden cardiac death. He relied on the emergency department records and the fact that decedent had no known history of cardiac symptoms or treatment. While claimant's physician acknowledged that decedent had other cardiac risk factors, such as obesity and a daily smoking habit, decedent's 'work-related illness need not be the sole or even the most direct cause of death, provided that the claimant demonstrates that the compensable illness was a contributing factor in the decedent's demise'...". ***Matter of Lavigne v. Hannaford Bros. Co.*, 2017 N.Y. Slip Op. 06121, Third Dept 8-10-17**

## WORKERS' COMPENSATION LAW.

SUBSTANTIAL EVIDENCE SUPPORTED THE DETERMINATION THE UNWITNESSED ACCIDENT OCCURRED WHILE DECEDENT WAS PERFORMING WORK-RELATED DUTIES.

The Third Department determined the deceased worker's (claimant's husband's) statement to his wife indicating he fell from a ladder while doing his work on a subway car, coupled with a supervisor's testimony decedent left work early holding his stomach, constituted substantial evidence supporting the claim for death benefits. Although the accident was not witnessed, and no report of the incident was made, the statutory presumption that the accident was work-related was not applicable: "Workers' Compensation Law § 21 (1) provides a statutory presumption that 'an unwitnessed accident which occurred 'within the time and place limits' of employment arose out of that employment' ... . This presumption, however, 'cannot be used to establish that an accident occurred' ... and 'does not wholly relieve [a claimant] of the burden of demonstrating that the accident occurred in the course of, and arose out of, [his or] her employment' ... . Significantly, whether a claimant's injury resulted from an accident that arose out of and in the course of his or her employment is a factual issue for the Board to resolve, and its determination in this regard will not be disturbed if supported by substantial evidence ... . Although the Board applied the presumption set forth in Workers' Compensation Law § 21 (1), we conclude that it is inapplicable here given that the issue in dispute is whether decedent was performing his duties at work when he sustained the injuries that led to his death, which is dispositive of whether the injuries arose out of and in the course of his employment. ... Decedent's statement to claimant is the most direct evidence that he sustained his fatal injuries while performing his duties at work. Pursuant to Workers' Compensation Law § 118, '[d]eclarations of a deceased employee concerning the accident shall be received in evidence and shall, if corroborated by the circumstances or other evidence, be sufficient to establish the accident and the injury.' Under the circumstances presented here, we find that claimant's testimony, together with that of the supervisor who witnessed decedent holding his stomach, provided sufficient corroboration of decedent's statement ...". ***Matter of Silvestri v. New York City Tr. Auth.*, 2017 N.Y. Slip Op. 06123, Third Dept 8-9-17**

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