CasePrepPlus

January 3, 2018

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

## ARBITRATION, EMPLOYMENT LAW, LABOR LAW.

PLAINTIFF ENTITLED TO CONSIDERATION WHETHER ENFORCING THE AGREEMENT TO ARBITRATE THIS EMPLOYMENT DISPUTE WOULD, BECAUSE OF THE COSTS INVOLVED, EFFECTIVELY PRECLUDE PLAINTIFF FROM PURSUING HIS CLAIM.

The First Department, reversing Supreme Court, determined plaintiff was entitled to consideration whether compliance with the agreement to arbitrate would, because of the costs involved, effectively prohibit plaintiff from pursing his claim alleging untimely payment of wages: "... [T]he court erred in failing to address plaintiff's contention that, because of his financial circumstances, requiring him to arbitrate, and to do so in Florida, would preclude him from pursuing his claims (Matter of Brady v. Williams Capital Group, L.P., 14 NY3d 459 [2010]). Acknowledging the 'strong state policy favoring arbitration [] and the equally strong policy requiring the invalidation of such agreements when they contain terms that could preclude a litigant from vindicating his/her statutory rights in the arbitral forum' ... , the Court of Appeals in Brady held, as here relevant, that, 'in this context, the issue of a litigant's financial ability [to arbitrate] is to be resolved on a case-by-case basis and that the inquiry should at minimum consider the following questions: (1) whether the litigant can pay the arbitration fees and costs; (2) what is the expected cost differential between arbitration and litigation in court; and (3) whether the cost differential is so substantial as to deter the bringing of claims in the arbitral forum. Although a full hearing is not required in all situations, there should be a written record of the findings pertaining to a litigant's financial ability' ... . Applying the foregoing standard, we hold that plaintiff has made a preliminary showing that the fee sharing and venue provisions in the arbitration agreement have the effect of precluding him from pursuing his statutory wage claim in arbitration ... . ... While Brady did not expressly address this issue, by extension of its logic, the risk of plaintiff having to pay defendant's attorneys' fees, if it prevails, may be taken into account in considering whether the total costs associated with arbitration preclude plaintiff from pursuing his claim in the arbitral forum." ***Adams v. Kent Sec. of N.Y., Inc.*, 2017 N.Y. Slip Op. 09274, First Dept 12-28-17**

## LABOR LAW-CONSTRUCTION LAW.

PRESENCE OF LOOSE GRANULES WHICH CAUSED PLAINTIFF TO SLIP TO HIS KNEES VIOLATED INDUSTRIAL CODE, PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT ON HIS LABOR LAW § 241(6) CAUSE OF ACTION SHOULD HAVE BEEN GRANTED.

The First Department, reversing (modifying) Supreme Court, determined plaintiff was entitled to summary judgment on his Labor Law § 241(6) cause of action because the presence of loose material on a roof which cause plaintiff to slip to his knees violated an industrial code provision: "The record demonstrates that the loose granules on the roof surface that caused plaintiff to slip were not integral to the structure or the work ... , but were an accumulation of debris from which § 23-1.7(e)(2) requires work areas to be kept free ... .. Thus, plaintiff is entitled to summary judgment as to liability on the Labor Law § 241(6) cause of action insofar as it is predicated upon § 23-1.7(e)(2)." ***Lester v. JD Carlisle Dev. Corp.*, 2017 N.Y. Slip Op. 09259, First Dept 12-28-17**

## CRIMINAL LAW, ATTORNEYS.

DEFENDANT'S PRO SE MOTION TO VACATE HIS CONVICTION SHOULD NOT HAVE BEEN DENIED WITHOUT A HEARING BASED UPON THE ABSENCE OF AN ATTORNEY AFFIDAVIT, DEFENDANT ALLEGED HIS ATTORNEY DID NOT ACCURATELY INFORM HIM OF THE DEPORTATION CONSEQUENCES OF THE GUILTY PLEA AND THE FACTS CORROBORATED THE ALLEGATION.

The First Department, in a full-fledged opinion by Justice Gesmer, determined defendant's motion to vacate his conviction (by guilty plea) should not have been denied without a hearing. The pro se papers were deemed sufficient to raise the issues of ineffective assistance (failure to accurately inform defendant of the deportation consequences of the plea) and prejudice should defendant be deported after he had successfully sought asylum. The court found that the absence of an attorney affidavit from the motion to vacate papers was explained and should have been excused. Although defendant pled to endangering the welfare of a child, his attorney allowed an allocution on the elements of sexual abuse in the first degree: "Here, the absence of an affidavit by defendant's counsel does not support the summary denial of defendant's motion for three

reasons. First, defendant's allegations are corroborated by other parts of the record ... . They are corroborated by defendant's application to naturalize, postplea, which exposed him to detection by Immigration and Customs Enforcement (ICE), since he certainly would not have made the application if he had known that he was in any danger of deportation. In addition, counsel's failure to object to the court's unnecessary allocution on the elements of sexual abuse in the first degree ... suggests that counsel may not have accurately understood the consequences of the plea. Second, where, as here, defendant's application is adverse and hostile to his trial attorney, '[r]equir[ing] the defendant to secure an affidavit, or explain his failure to do so, is wasteful and unnecessary' ... . Third, in any event, defendant explained the absence of an affidavit by his counsel ...". ***People v. Mebuin*, 2017 N.Y. Slip Op. 09276, First Dept 12-28-17**

### PERSONAL INJURY.

STEP WAS OPEN AND OBVIOUS AND THEREFORE WAS NOT ACTIONABLE IN THIS SLIP AND FALL CASE.

The First Department, reversing Supreme Court, determined the single eight inch step which allegedly caused plaintiff to fall was open and obvious and, therefore, not actionable: "Defendants established prima facie entitlement to summary judgment based on evidence that the single 8" step onto the furniture display platform in defendants' showroom — on which plaintiff wife tripped — was an illuminated, open and obvious condition which was readily observable by reasonable use of one's senses ... . Plaintiff wife, together with her family, had navigated the single step onto the furniture display platforms earlier that shopping day, and also during an uneventful visit to the same showroom just a few weeks prior to the date of her accident. There was no evidence to indicate that the single step, in its design, placement and maintenance, was inherently dangerous, and the defendants' use of warning signs to give notice of the step's presence did not, standing alone, render the steps unsafe. Plaintiffs have not presented any proof that negligence on the part of defendants in the design, construction or maintenance of the subject step contributed to her fall, or that alleged showroom distractions support grounds to find liability on defendants' part under the circumstances presented ...". ***Faber v. Place Furniture, Inc.*, 2017 N.Y. Slip Op. 09265, First Dept 12-28-17**

## SECOND DEPARTMENT

### CIVIL PROCEDURE, ENVIRONMENTAL LAW, ADMINISTRATIVE LAW.

DECLARATORY JUDGMENT ACTION ALLEGING VIOLATION OF BUILDING HEIGHT RESTRICTIONS WAS UNTIMELY BECAUSE THE ACTION SHOULD HAVE BEEN BROUGHT AS AN ARTICLE 78 PROCEEDING.

The Second Department determined plaintiffs' declaratory judgment action should have been brought as an Article 78 proceeding and was properly dismissed as untimely. That action concerned alleged violations height restrictions on new construction which had been the subject of a final environmental impact statement (FEIS): "An action for a declaratory judgment is generally governed by a six-year statute of limitations (see CPLR 213[1]). However, where a declaratory judgment action involves claims that could have been made in another proceeding for which a specific limitation period is provided, the action is subject to the shorter limitations period ... . Where an action could have been brought pursuant to CPLR article 78, the four-month statute of limitations applicable to such proceedings applies ... A proceeding pursuant to CPLR article 78 may be brought to review a determination of a public body or officer which is 'final and binding upon the petitioner' … . There are two requirements for fixing the time when agency action is final and binding upon the petitioner: 'First, the agency must have reached a definitive position on the issue that inflicts actual, concrete injury and second, the injury inflicted may not be prevented or significantly ameliorated by further administrative action or by steps available to the complaining party' ... . A determination is final and the statute of limitations begins to run when the agency's 'definitive position on the issue [becomes] readily ascertainable' to the complaining party ... , so that the petitioner knew or should have known that it was aggrieved... . Here, the Supreme Court properly determined that this action could have been brought as a proceeding pursuant to CPLR article 78 ...". ***Save The View Now v. Brooklyn Bridge Park Corp.*, 2017 N.Y. Slip Op. 09189, Second Dept 12-27-17**

### CIVIL PROCEDURE, EVIDENCE.

ALTHOUGH PLAINTIFF BEARS THE BURDEN OF PROOF AT TRIAL, A DEFENDANT BRINGING A MOTION FOR SUMMARY JUDGMENT BEARS THE BURDEN OF PROOF, GAPS IN DEFENDANT'S PROOF REQUIRE DENIAL OF THE MOTION WITHOUT CONSIDERING THE OPPOSING PAPERS.

The Second Department determined defendants' motion for summary judgment was properly denied in this fraudulent conveyance action. The court offered a particularly clear description of how summary judgment motions are analyzed by the appellate courts. Although plaintiff bears the burden of proof at trial, a defendant bringing a motion for summary judgment bears the burden of proof. Gaps in a defendant's proof require that the motion be denied, without considering the plaintiff's opposing papers. Therefore a defendant cannot point to gaps in the plaintiff's proof as a ground for summary judgment in favor of defendant: "It is the movant's burden on a motion for summary judgment to 'make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of

any material issues of fact'... . Only if the movant succeeds in meeting its burden will the burden shift to the opponent to demonstrate through evidence in admissible form that there exists a triable issue of fact. While the ultimate burden of proof at trial will be borne by the plaintiff, a defendant seeking summary judgment bears the initial burden of demonstrating its entitlement to judgment as a matter of law by submitting evidentiary proof in admissible form ... . On a summary judgment motion by a defendant, the defendant does not meet its initial burden by merely pointing to gaps in the plaintiff's case; rather, it must affirmatively demonstrate the merit of its claim or defense...". ***Vumbico v. Estate of Rose H. Wiltse*, 2017 N.Y. Slip Op. 09194, Second Dept 12-27-17**

## CIVIL PROCEDURE, EVIDENCE, FORECLOSURE.

IN MOVING FOR SUMMARY JUDGMENT PLAINTIFF COULD NOT MAKE OUT A PRIMA FACIE CASE WITH EVIDENCE SUBMITTED FOR THE FIRST TIME IN REPLY PAPERS, PLAINTIFF'S SUMMARY JUDGMENT MOTION SHOULD HAVE BEEN DENIED.

The Second Department, reversing Supreme Court, explained an aspect of the rigid proof requirements for summary judgment. Here plaintiff bank moved for summary judgment in a foreclosure action. Defendant, in opposition, raised plaintiff's failure to demonstrate compliance with a condition precedent in the note. Plaintiff submitted reply papers with proof the condition precedent had been met. The Second Department determined the reply could not be considered and therefore the plaintiff had not made out a prima facie case in its papers: "As part of her affirmative defenses and counterclaim, the defendant asserted, inter alia, that the plaintiff l... failed to show that it complied with the condition precedent contained in paragraph 7, subsection C, of the note. * * * ... [T]he plaintiff failed to establish, prima facie, that it complied with the condition precedent contained in paragraph 7, subsection C, of the note... '[A] party moving for summary judgment cannot meet its prima facie burden by submitting evidence for the first time in reply, and generally, evidence submitted for the first time in reply papers should be disregarded by the court'... . Here, since the defendant raised the issue of compliance with paragraph 7, subsection C, of the note in her affirmative defenses and counterclaim, the plaintiff's submission for the first time of a copy of the requisite default notice with its reply to the defendant's opposition to the summary judgment motion was not sufficient to establish its prima facie compliance ... . Since the plaintiff failed to meet its prima facie burden on the motion, we need not consider the sufficiency of the defendant's opposition papers ...". ***Wells Fargo Bank, N.A. v. Osias*, 2017 N.Y. Slip Op. 09195, Second Dept 12-27-17**

## CRIMINAL LAW, MUNICIPAL LAW.

THE PARAMEDIC DEFENDANT WAS ACCUSED OF ASSAULTING WAS NOT A PEACE OFFICER AND THE JURY SHOULD NOT HAVE BEEN SO INSTRUCTED, THEREBY EFFECTIVELY NEGATING THE JUSTIFICATION DEFENSE.

The Second Department, reversing defendant's assault conviction, determined the jury should not have been instructed that the paramedic defendant was accused of assaulting was a peace officer (thereby negating the justification defense). The paramedic (Cohn) was a member of the NYC Fire Department, and was not authorized to arrest: "Penal Law § 35.27 provides that '[a] person may not use physical force to resist an arrest, whether authorized or unauthorized, which is being effected or attempted by a police officer or peace officer when it would reasonably appear that the latter is a police officer or peace officer.' CPL 2.10 sets forth the '[p]ersons designated as peace officers,' including, as relevant here, '[a]ll officers and members of the uniformed force of the New York city fire department as set forth and subject to the limitations contained in section 487a-15.0 of the administrative code of the city of New York' (CPL 2.10[28]). The relevant section of the New York City Administrative Code provides, with limited exceptions not applicable here, that '[i]n the performance of their duties, all officers and members of the uniformed force [of the FDNY] . . . shall have the powers and perform the duties of peace officers, but their power to make arrests and to serve process in criminal actions shall be restricted to cases arising under laws relating to fires and the extinguishment thereof, and to fire perils' ... . ... EMS personnel are not members of the uniformed force of the FDNY ... . Accordingly, Paramedic Cohn was not acting as a peace officer within the meaning of CPL 2.10(28) at the time that the defendant allegedly assaulted him, and the Supreme Court erred when it instructed the jury that Penal Law § 35.27 applied with respect to the charge of assault in the second degree related to Paramedic Cohn. Since the court's charge effectively removed from the jury's consideration the defendant's justification defense, under the circumstances, the defendant is entitled to a new trial on count one of the indictment charging her with assault in the second degree relating to Paramedic Cohn ...". ***People v. Thomas*, 2017 N.Y. Slip Op. 09178, Second Dept 12-27-17**

## CRIMINAL LAW, SEX OFFENDER REGISTRATION ACT (SORA).

DEFENDANT'S SUBMISSION OF RE-OFFENSE RISK ASSESSMENTS OTHER THAN NEW YORK'S RISK ASSESSMENT INSTRUMENT (RAI) DID NOT CONSTITUTE A MITIGATING FACTOR WARRANTING DOWNWARD DEPARTURE.

The Second Department, in a full-fledged opinion by Justice Eng, determined Supreme Court properly denied defendant's request for a downward departure in this Sex Offender Registration Act (SORA) risk assessment proceeding. Defendant submitted two psychological risk assessments, the Static-99R and the Vermont Assessment, in support of the request for downward departure: "To recognize a low or moderate-low score on the Static-99R and/or the Vermont Assessment as a mitigating factor would, in essence, permit SORA courts to rely on those instruments in lieu of the RAI [New York's Risk Assessment Instrument} promulgated by the

Board [of examiners of sex offenders] and designed to account for the specific factors prescribed by the Legislature. This would amount to a rejection of the RAI in favor of assessment instruments that serve the more limited function of attempting to measure risk of reoffense alone, in clear contravention of the legislative intent to require consideration of both risk of reoffense and the danger of harm posed by reoffense ... . ... Even were we to accept the proposition that the fact that a sex offender received a more favorable assessment on the Static-99R or Vermont Assessment could constitute an appropriate mitigating factor, we would find that the defendant failed to sustain his burden of proof in support of his request for a downward departure on this basis. ... Our conclusion that an offender's lower risk score on an alternate risk assessment instrument is not itself a mitigating factor that can support a downward departure does not necessarily mean that an offender cannot rely upon one or more of the individual risk factors included on such instruments to demonstrate that he or she is at a lower risk of reoffense or poses less of a danger to the community." ***People v. Curry*, 2017 N.Y. Slip Op. 09184, Second Dept 12-27-17**

## FAMILY LAW.

FAMILY COURT DID NOT HAVE THE AUTHORITY TO ORDER THE FINGERPRINTING OF MOTHER SEEKING TO BE APPOINTED GUARDIAN IN THIS SPECIAL IMMIGRANT JUVENILE STATUS PROCEEDING.

The Second Department, reversing Family Court, determined the court did not have the authority to order mother to be fingerprinted in this special immigrant juvenile status (SIJS) proceeding: "... [T]he mother commenced this proceeding to be appointed guardian of the subject child for the purpose of obtaining an order declaring that the child is dependent on the Family Court and making specific findings so as to enable the child to petition the United States Citizenship and Immigration Services for special immigrant juvenile status (hereinafter SIJS) pursuant to 8 USC § 1101(a)(27)(J). Thereafter, the mother moved for the issuance of an order making the requisite declaration and specific findings so as to enable the child to petition for SIJS. The Family Court denied the motion without a hearing and dismissed the guardianship petition for 'failure to prosecute' based on the mother's failure to obtain fingerprinting. The mother appeals. Since there is no express statutory fingerprinting requirement in a proceeding such as this pursuant to Family Court Act § 661(a) for '[g]uardianship of the person of a minor or infant' ... , the Family Court erred in denying the mother's motion based on her failure to comply with the court's directive to obtain fingerprinting ... . Further, under the circumstances of this case, the court erred in dismissing the petition for 'failure to prosecute' based on the mother's failure to obtain fingerprinting ...". ***Matter of Fermina B. v. Rene P.*, 2017 N.Y. Slip Op. 09125, Second Dept 12-27-17**

## FAMILY LAW, EVIDENCE.

FATHER'S VISITATION RIGHTS SHOULD NOT HAVE BEEN INDEFINITELY SUSPENDED WITHOUT A HEARING, UNTESTED EVIDENCE PRESENTED AT CONFERENCES NOT SUFFICIENT.

The Second Department, reversing Family Court, determined father's visitation rights should not have been suspended indefinitely without a hearing. Family Court had relied on untested evidence presented at conferences: "Generally, where a facially sufficient petition has been filed, modification of a Family Ct Act article 6 custody and visitation order requires a full and comprehensive hearing at which a parent is to be afforded a full and fair opportunity to be heard ... . A decision regarding child custody and visitation should be based on admissible evidence ... . Here, the Family Court relied on information provided at the court conferences, and the hearsay statements and conclusions of mental health providers whose opinions and credibility were untested by either party ... . Under the circumstances of this case, the Family Court erred when it, without a hearing, in effect, denied the father's petition for increased visitation and indefinitely suspended his visitation with the child ...". ***Matter of Edmunds v. Fortune*, 2017 N.Y. Slip Op. 09126, Second Dept 12-27-17**

## PERSONAL INJURY.

BUS DRIVER WAS LIABLE AS A MATTER OF LAW, BUS CROSSED THE YELLOW LINE INTO PLAINTIFF'S ON-COMING LANE, NO EMERGENCY.

The Second Department, reversing Supreme Court, determined plaintiffs' summary judgment motion in this traffic accident case should have been granted. Defendant bus driver was aware of an upcoming sharp curve and was aware the road was slippery due to rain. The bus crossed into the on-coming lane, striking plaintiffs' vehicle. There was no question of fact about whether the bus driver had reacted to an emergency: " 'A driver is not required to anticipate that a vehicle traveling in the opposite direction will cross over into oncoming traffic' ... . 'Crossing a double yellow line into the opposing lane of traffic, in violation of Vehicle and Traffic Law § 1126 (a), constitutes negligence as a matter of law, unless justified by an emergency situation not of the driver's own making'... . Here, the plaintiffs established their prima facie entitlement to judgment as a matter of law by submitting evidence demonstrating that the defendant driver's negligence in crossing over the double yellow line and entering the opposite lane of traffic, in which the plaintiffs' vehicle had been traveling, was the sole proximate cause of the accident ... . In opposition, the defendants failed to raise a triable issue of fact. The defendant driver's deposition testimony indicated that she knew that there was a sharp curve in the road where she lost control of her vehicle and that rain, which had been falling for some time prior to the accident, had made the roadway slippery. Contrary

to the defendants' contention, the defendant driver merely speculated that there was oil on the ground. Thus, the defendants failed to raise a triable issue of fact as to whether the defendant driver was faced with an emergency situation not of her own making which contributed to the happening of the accident ...". ***Browne v. Logan Bus Co., Inc.*, 2017 N.Y. Slip Op. 09111, Second Dept 12-27-17**

## PERSONAL INJURY.

DEFENDANTS DID NOT HAVE NOTICE OF THE DEPRESSION OR HOLE PLAINTIFF STEPPED INTO, AREA WAS COVERED WITH GRASS AND APPEARED TO BE LEVEL, DEFENDANTS' MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined defendant-cemetery had demonstrated it did not have notice of the depression or hole plaintiff stepped in. The area was covered with grass and appeared to be level: "As alleged by the plaintiff, she was visiting the graves of her family members and was walking behind her father when she took a step near one of the headstones and her left foot began to sink into the ground. The spot where her foot sank into the ground was covered with grass, and it appeared to be level. According to the plaintiff, her father had stepped in the exact spot seconds before her accident without incident. The plaintiff, and her husband suing derivatively, commenced this action against the defendants, and the defendants moved for summary judgment dismissing the complaint. The Supreme Court denied the motion, and the defendants appeal. In a premises liability case, a defendant who moves for summary judgment has the initial burden of making a prima facie showing that it neither created the allegedly dangerous or defective condition nor had actual or constructive notice of its existence... . To constitute constructive notice, a dangerous condition 'must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit defendant's employees to discover and remedy it' ... . Here, the defendants established their prima facie entitlement to judgment as a matter of law by demonstrating that they did not create or have actual or constructive notice of the subject dangerous condition before the incident occurred ...". ***Carriero v. St. Charles/ Resurrection Cemetery*, 2017 N.Y. Slip Op. 09112, Second Dept 12-27-17**

## PERSONAL INJURY.

PLAINTIFF ASSUMED THE RISK OF TRIPPING OVER BENCHES NEAR THE FIELD WHERE HE WAS PLAYING FOOTBALL, SUPREME COURT REVERSED.

The Second Department, reversing Supreme Court, determined the benches near the field where plaintiff was playing football were open and obvious and plaintiff had assumed the risk of tripping over them: "Under the doctrine of primary assumption of risk, '[i]f the risks of [a sporting] activity are fully comprehended or perfectly obvious to [a voluntary participant], he or she has consented to them and the [defendant] has discharged its duty of care by making the conditions as safe as they appear to be" ... . "Risks inherent in a sporting activity are those which are known, apparent, natural, or reasonably foreseeable consequences of the participation' ... . 'This includes risks associated with the construction of the playing surface and any open and obvious condition on it' ... 'If the risks are known by or perfectly obvious to the player, he or she has consented to them and the property owner has discharged its duty of care by making the conditions as safe as they appear to be' ... . Here, according to the infant plaintiff's deposition testimony, which the defendants submitted in support of their motion, there was nothing marking the area where the benches were located as the end zone, but if the ball was caught in the vicinity of the bench, the campers would consider that a touchdown. The infant plaintiff also testified that he flipped over one of the benches as he was running for a pass and that, prior to turning to catch the ball, he had run the full length of the field looking ahead toward the benches, which were situated alongside the volleyball courts. Consequently, the bench was open, obvious, clearly visible, and known to the infant plaintiff ... . Since the infant plaintiff, who had been playing football on this field for more than an hour when the accident occurred, was aware of that condition and voluntarily chose to play on the field, he assumed the risk of injury of colliding into one of the benches when attempting to score ...". ***E.B. v. Achim*, 2017 N.Y. Slip Op. 09115, Second Dept 12-27-17**

## PERSONAL INJURY.

QUESTION OF FACT WHETHER DEFENDANT'S EMPLOYEE SAW WHAT HE SHOULD HAVE SEEN BEFORE THE EMPLOYEE'S GARBAGE CART COLLIDED WITH PLAINTIFF'S SCOOTER AS PLAINTIFF BACKED OUT OF AN ELEVATOR.

The Second Department, reversing Supreme Court, determined questions of fact raised by the defendant housing authority's evidence precluded summary judgment. Plaintiff was injured when a custodian pushing a cart collided with plaintiff's scooter as plaintiff backed out of an elevator. The custodian's claim that he could see clearly in front of him raised a credibility issue: "Here the evidence the Housing Authority submitted in support of the motion was insufficient to establish its prima facie entitlement to judgment as a matter of law. The evidence did not eliminate any material issue of fact as to whether its employee was negligent in handling the garbage cart at the time of the incident. The employee testified at his deposition that he was told to watch for people in the hallways and to never fill the cart too high so as to block his vision at the front of the cart. He never loaded the cart higher than chest height, at the time of the accident there was nothing obstructing his

view, and he always looked in front of him when pushing the cart to make sure no one was in front of him. At the time of the incident he could see clearly in front of him, he was not walking fast, and he was cautiously pushing the cart with his usual force. The employee further testified at his deposition that he first saw the plaintiff only after he felt the impact of his cart striking the plaintiff, and he stopped to see what had occurred. It is undisputed that the plaintiff had been on his scooter backing out of the elevator before the impact, which raises a question as to the credibility of the employee's testimony that he could see clearly in front of him as he was pushing the cart, when he did not see or hear the elevator open or the plaintiff backing out of the elevator. Further, there is a question of fact as to whether the employee was negligent in failing to 'see what should be seen' ... . Since the Housing Authority failed to eliminate all questions of fact as to the happening of the accident, the Supreme Court should have denied its motion without regard to the sufficiency of the plaintiff's opposition papers ...". ***Richardson v. County of Nassau*, 2017 N.Y. Slip Op. 09187, Second Dept 12-27-17**

### PERSONAL INJURY, CIVIL PROCEDURE, CRIMINAL LAW.

ALTHOUGH THERE IS NO CAUSE OF ACTION FOR PUNITIVE DAMAGES IN NEW YORK, PUNITIVE DAMAGES WERE PROPERLY REQUESTED IN THE AD DAMNUM CLAUSE IN THIS DRUNK DRIVING ACCIDENT CASE.

The Second Department, reversing Supreme Court, determined that plaintiff's separate cause of action for punitive damages should have been dismissed. However, the demand for punitive damages in the ad damnum clause was proper. Plaintiff was a passenger in the car driven by defendant, who was drunk and lost control of the car: "The plaintiff erroneously denominated her request for punitive damages as a separate cause of action. 'New York does not recognize an independent cause of action for punitive damages'... . Accordingly, the Supreme Court erred in denying that branch of the defendant's motion which was pursuant to CPLR 3211(a)(7) to dismiss the separately pleaded sixth cause of action insofar as asserted against him. However, the plaintiff's request for punitive damages in the ad damnum clause of the complaint was proper. Whereas compensatory damages are intended to assure that the victim receives 'fair and just compensation commensurate with the injury sustained,' punitive damages are meant to 'punish the tortfeasor and to deter this wrongdoer and others similarly situated from indulging in the same conduct in the future' ... . With regard to the availability of punitive damages in personal injury cases involving drunk drivers, while this Court has held that '[e]vidence that a defendant was driving while intoxicated is insufficient by itself to justify the imposition of punitive damages'... , this Court has also held that 'driving while intoxicated may support an award for punitive damages where there is additional evidence that the defendant engaged in wanton and reckless' conduct evincing heedlessness and an utter disregard for the safety of others'... . Indeed, punitive damages were properly imposed where the driver was excessively drunk ... or was a repeat offender... . Accordingly, a request for punitive damages can be stated in a case arising from drinking and driving." ***Gershman v. Ahmad*, 2017 N.Y. Slip Op. 09117, Second Dept 12-27-17**

## THIRD DEPARTMENT

### ARBITRATION, CIVIL PROCEDURE.

THE AGREEMENT TO ARBITRATE WAS NOT A DEFENSE TO THE COMPLAINT, THE COMPLAINT SHOULD NOT HAVE BEEN DISMISSED, RATHER, THE ACTION SHOULD HAVE BEEN STAYED.

The Third Department, reversing Supreme Court, determined the action on the complaint should have been stayed, not dismissed, based upon the agreement to arbitrate. The Third Department further held that the complaint, augmented by affidavits, stated causes of action and should not have been dismissed: "Supreme Court improperly dismissed the action against [defendant], rather than staying the action. Initially, there is no dispute on this record that plaintiff and [defendant], in the settlement agreement, consented to arbitrate any and all disputes regarding, among other things, the subject property. However, under established law, '[a]n agreement to arbitrate is not a defense to an action' and, thus, 'may not be the basis for a motion to dismiss' ... . [Defendant's] cross motion to dismiss based upon CPLR 3211 (a) (1), premised upon the agreement to arbitrate, does not entitle him to dismissal of this action... . Rather, where, as here, there is a valid arbitration clause in an agreement and the party sued ... moves to compel arbitration, the court should stay the judicial action rather than dismiss it (see CPLR 7503 [a]...). By statute, the order granting [defendant's] motion to compel arbitration 'operate[s] to stay [the] pending or subsequent action' (CPLR 7503 [a]). ... We further find that Supreme Court improperly dismissed the complaint against the remaining defendants ... . Importantly, on the remaining defendants' pre-answer cross motions to dismiss the complaint pursuant to CPLR 3211, the court was bound to 'accept the facts as alleged in the complaint as true, accord plaintiff[] the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory' ... . The court was also authorized to 'consider affidavits submitted by plaintiff[] to remedy any defects in the complaint ...". ***Piller v. Tribeca Dev. Group LLC*, 2017 N.Y. Slip Op. 09209, Third Dept 12-28-17**

## CIVIL PROCEDURE.

COURT SHOULD NOT HAVE DISMISSED CAUSES OF ACTION FOR FAILURE TO NAME NECESSARY PARTIES, BECAUSE THE PARTIES WERE SUBJECT TO THE COURT'S JURISDICTION, THE COURT SHOULD HAVE ORDERED THE PARTIES JOINED.

The Third Department determined Supreme Court should not have dismissed causes of action for failure to name necessary parties, but rather should have ordered the parties joined: "Supreme Court erred, however, by determining that petitioners' failure to name Negron, Zell, Lowe, Robertson and Burkert as necessary parties required dismissal of the first three causes of action in the petition/complaint ... . CPLR 1001 (b) provides that where a party or parties who should be joined have 'not been made a party and [are] subject to the jurisdiction of the court, the court shall order [them] summoned' ... . Because Negron, Zell, Lowe, Robertson and Burkert are necessary parties and are subject to Supreme Court's jurisdiction insofar as they were employees of the City of Kingston Police Department at the time of commencement of this proceeding, the court should have ordered them joined... . Accordingly, we find that this matter must be remitted to Supreme Court to order Negron, Zell, Lowe, Robertson and Burkert to be joined as necessary parties ...". ***Matter of Farrell v. City of Kingston*, 2017 N.Y. Slip Op. 09214, Third Dept 12-28-17**

## CONTRACT LAW.

IN A DESIGN-BUILD TURNKEY PROJECT, A PROPERTY OWNER IS NOT A THIRD PARTY BENEFICIARY OF CONTRACTS ENTERED INTO BY THE TURNKEY BUILDER IN CHARGE OF THE PROJECT.

The Third Department explained the concept of a design-build "turnkey" project, noting that the property owner is generally not a third-party beneficiary of the contracts entered into by the entity in charge of the design-build "turnkey" project (here RBG): "It is undisputed that neither plaintiff entered into a contract with RZA nor RDI. Rather, RBG entered into contracts with each of those entities, as would be expected in a turnkey project. 'In turnkey or design-build construction projects, an owner contracts with one entity to both design and build the project and the turnkey builder is responsible for every phase of the construction from final design through subcontracting, construction, finishing, and testing. The design-builder generally cannot shift liability and is the single point of responsibility under a design-build contract, because' the design-builder is responsible for all phases of construction, including 'the responsibility for holding the contracts with its trade contractors' ... . Generally, a party may not assert a cause of action for breach of contract against a person or entity with whom it is not in privity ... . Without a contractual relationship and the resulting privity, plaintiffs could proceed against RZA or RDI only if plaintiffs were third-party beneficiaries of RBG's contract with those entities or had the functional equivalent of privity... . '[O]rdinarily, construction contracts are not construed as conferring third-party beneficiary enforcement rights' ...". ***Luckow v. RBG Design-Build, Inc.*, 2017 N.Y. Slip Op. 09221, Third Dept 12-28-17**

## CRIMINAL LAW, EVIDENCE.

PRIOR BURGLARY CONVICTION SHOULD NOT HAVE BEEN ALLOWED AS MOLINEUX AND SANDOVAL EVIDENCE IN THIS ROBBERY PROSECUTION, ERROR HARMLESS HOWEVER.

The Third Department determined a prior burglary should not have been allowed as Molineux and Sandoval evidence in this robbery prosecution. The error was deemed harmless however: " 'The Molineux rule requires that evidence of a defendant's prior bad acts or crimes be excluded unless it is probative of a material issue other than criminal propensity and its probative value outweighs the risk of prejudice to the defendant'... . Although defendant's intent was at issue, given his defense that he was an innocent bystander who had no knowledge that the codefendants planned to rob [the victim] when he drove them to her residence, the prior conviction was of limited probative value with respect to defendant's intent because the prior conviction arose from an incident that was not similar to the charged conduct. The prior burglary did not involve a robbery, but, rather, arose from an incident during which defendant entered the residence of another with the intent to assault an occupant. Moreover, [a co-defendant's] testimony, if believed, was sufficient to permit the jury to find that defendant had the requisite intent to the commit burglary and robbery. Accordingly, the evidence that defendant had committed a prior burglary would serve only to demonstrate that defendant had a propensity to commit burglary and, therefore, the court should have determined that the prior conviction was inadmissible as proof of defendant's intent ... . County Court also erred in its Sandoval ruling. Although the crime was not too remote to be relevant and the nature of the conviction was probative of defendant's credibility, allowing the prior crime to be identified as burglary improperly suggested that defendant had a propensity to commit one of the crimes with which he was charged ... ". ***People v. Williams*, 2017 N.Y. Slip Op. 09196, Third Dept 12-28-17**

## FAMILY LAW.

MOTHER, ALTHOUGH A FIT AND LOVING PARENT, WAS PROPERLY STRIPPED OF LEGAL CUSTODY, DISSENT DISAGREED.

The Third Department, over a two-justice partial dissent, determined mother was properly stripped of joint legal custody: "The evidence reveals the parties' inability to communicate effectively regarding the child. Notwithstanding their numer-

ous discussions, occurring both in court and out of court, the mother continued to undermine the father and to act contrary to his express wishes. The mother testified that she 'knew [the father] was not in agreement' with allowing the child's continued contact with the boy and that she did not make a 'joint decision[].' Nonetheless, she unilaterally decided to permit the child to have physical contact with the boy, and to attend the church where he served as her youth leader and his baseball game. She further acknowledged that a message that she had sent to the father 'threaten[ed] to file court papers if he didn't allow [the child] to do what she wanted on his time.' In sum, although the parties are able to communicate, there is scant evidence that the mother is willing to accept or act upon that communication; instead, after speaking with the father, she disregards his requests and opinion regarding essential parenting issues, and fails to acknowledge that it is important to do so. Upon this record, a sound and substantial basis supports the determination awarding the parents equal shared physical custody and the father sole legal custody, while directing him to 'solicit and reasonably consider' the mother's input regarding any major decisions ...". **From the Dissent:** "As the majority recognizes, the mother and the father were not on the same page regarding the issue of the child's relationship with the 15-year-old boy and the extent and manner in which she should be disciplined for her alleged transgressions. Nevertheless, this is not a situation where the parties' joint decision making has so broken down that joint legal custody is no longer feasible ... . Indeed, the record established that, despite their significantly different parenting styles, the parties had been successfully following the previous order, communicating in the best interests of the child for several years and operating 'in harmony' under the concept of '[my] house, [my] rules, [your] house, [your] rules' — a concept that was, notably, introduced by the father. ***Matter of Thompson v. Wood*, 2017 N.Y. Slip Op. 09219, Third Dept 12-28-17**

## FAMILY LAW, CRIMINAL LAW.

ADMISSION AND ALLOCUTION DID NOT MEET THE REQUIREMENTS OF THE FAMILY COURT ACT, JUVENILE DELINQUENCY PETITION DISMISSED.

The Third Department, dismissing the juvenile delinquency petition, determined the juvenile's admission to endangering the welfare of a child did not meet the criteria required by the Family Court Act: "Family Court 'shall not consent to the entry of an admission unless it advises the respondent of his or her right to a fact-finding hearing and, further, ascertains through allocution of the respondent and his or her parent that the respondent committed the acts underlying the admission, is voluntarily waiving a fact-finding hearing and is aware of the possible specific dispositional orders' ... . Even though Family Court partially complied with Family Ct Act § 321.3, we agree with respondent that the allocution was insufficient overall ... . At the hearing, Family Court merely asked respondent whether he 'engaged in conduct that was likely to pose a risk of injury to a child.' Although Family Court specified the date and the location of the alleged crime, the court did not mention any other specific underlying fact forming the basis of the alleged crime... . As such, Family Court did not 'elicit a sufficient factual basis to support respondent's admission' ... . Furthermore, while Family Court advised respondent of his right to a hearing and his right to remain silent, the record does not indicate that respondent was advised of his right to present witnesses on his behalf, his right to confront witnesses and that the presentment agency had to prove beyond a reasonable doubt that he committed the alleged act, which if committed by an adult, would constitute a crime ... . Nor do we find that merely asking respondent's mother as to whether respondent's admission to the charge of endangering the welfare of the child was done with her approval constituted a sufficient allocution of respondent's parent as required by Family Ct § 321.3 (1) ...". ***Matter of Kameron Vv.*, 2017 N.Y. Slip Op. 09215, Third Dept 12-28-17**

## REAL PROPERTY.

EASEMENT WHICH ALLOWED ACCESS TO A GARAGE AND WOODSHED WAS EXTINGUISHED, GARAGE AND WOODSHED NO LONGER EXISTED AND HAD NOT EXISTED FOR 50 YEARS.

The Third Department determined an easement which originally allowed access to a garage and woodshed had been extinguished because the garage and woodshed longer existed, and had not existed for some 50 years: "An easement appurtenant, such as the one at issue on this appeal, is created through a written conveyance, subscribed by the grantors, that burdens the servient estate for the benefit of the dominant estate ... . An easement expressly created for, or limited to, a specific purpose may be extinguished by the abandonment of that purpose ... , which must be demonstrated through 'unequivocal' acts establishing that the owner of the dominant estate intended to "permanently relinquish all rights to the easement" ... . In determining the nature and extent of an express easement, the easement must be construed 'to give effect to the [conveyors'] intent, as manifested by the language of the grant' ...". ***Stone v. Donlon*, 2017 N.Y. Slip Op. 09225, Third Dept 12-28-17**

## UNEMPLOYMENT INSURANCE.

OFFICE LEASING BROKER WAS AN EMPLOYEE ENTITLED TO UNEMPLOYMENT INSURANCE BENEFITS.

The Third Department determined an office leasing broker was an employee of Kaufman Leasing Company LLC and was entitled to unemployment insurance benefits: "Here, the record establishes that claimant, a licensed real estate salesperson, submitted his resume and was interviewed twice before being hired as an office leasing broker and signing an independent contractor agreement. Kaufman provided claimant and those similarly situated an extensive training program that included assignment of a mentor and instruction by a third-party vendor hired by the Kaufman that took place either at

Kaufman's offices or the vendor's location. The training included instruction on best practices, basic leasing terminology, how to identify prospects, how to make cold calls and how to negotiate a transaction. Even after claimant successfully completed the training program within the probationary period, the services of the vendor were still available to him. Claimant was paid a draw during the probationary and training period, for which Kaufman did not seek reimbursement. Kaufman also provided claimant and those similarly situated an office with equipment and supplies — including desks, computers, Internet and multiple listing service — where claimant and those similarly situated were expected to report when the office opened at 8:30 a.m. or otherwise inform a supervisor of his or her whereabouts during the day. In addition, Kaufman issued claimant and those similarly situated a work email address, as well as business cards with the salesperson's name and Kaufman's name on them. Pursuant to the signed agreement, Kaufman reimbursed claimant and those similarly situated for certain professional expenses, set the commission rates, reserved the right to request monthly reports, required confidential final transaction reports, provided health insurance at Kaufman's expense, prohibited the performance of similar services outside the company and required that the services be performed to the best of the salesperson's abilities in a timely and productive manner." ***Matter of Slater (Kaufman Leasing Co. LLC--Commissioner. of Labor)*, 2017 N.Y. Slip Op. 09218, Third Dept 12-28-17**

## ZONING, ENVIRONMENTAL LAW.

TOWN BOARD'S DENIAL OF A SPECIAL USE PERMIT ALLOWING THE BLASTING AND REMOVAL OF ROCK WAS NOT ARBITRARY OR CAPRICIOUS DESPITE THE TOWN'S IMPROPER CONSIDERATION OF INFORMATION GATHERED OUTSIDE THE STATE ENVIRONMENTAL QUALITY REVIEW ACT PROCESS, THE TOWN'S RULING WAS SUPPORTED BY THE LOCAL LAW CRITERIA FOR ISSUANCE OF A SPECIAL USE PERMIT.

The Third Department determined the town board did not act arbitrarily or capriciously when it denied a quarry's (Troy Sand's) application for a special use permit allowing the blasting and removal of rock. The court based its ruling on the local law which describes the criteria for issuance of a special use permit. The fact that the town improperly relied on information outside that gathered during the State Environmental Quality Review Act (SEQRA) process did not change the fact that the local law was properly applied and justified the denial: " ' … [i]t was in no way irrational, on this record, to find that petitioners failed to carry their burden of showing that their contemplated use of the subject property conforms with the standards imposed'... . ... We recognize that the Town Board relied on environmental information that was outside of the SEQRA record and made factual findings with no basis in the final EIS in evaluating most of the standards it applied... However, inasmuch as the failure to meet even one applicable [local law] standard is a sufficient basis upon which to deny a special use permit application ... , we cannot say that the Town Board's determination was irrational ...". ***Matter of Troy Sand & Gravel Co., Inc. v. Fleming*, 2017 N.Y. Slip Op. 09222, Third Dept 12-28-17**

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