CasePrepPlus

January 10, 2018

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

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FIRST DEPARTMENT

APPEALS, FAMILY LAW.

ALTHOUGH THE FINDING MOTHER WAS MENTALLY ILL WAS NOT APPEALABLE AS OF RIGHT, BECAUSE OF THE STIGMA THE COURT DEEMED THE NOTICE OF APPEAL TO BE A REQUEST FOR LEAVE TO APPEAL AND HEARD THE APPEAL.

The First Department noted that a finding mother is mentally ill within the meaning of the Social Services Law is not, as a nondispositional order, appealable as of right. However, because of the stigma attached to the finding, the court deemed the notice of appeal to be a request for leave to appeal and granted it. The mental illness finding was affirmed: "Although this nondispositional order is not appealable as of right (see Family Ct Act § 1112[a]), the finding that the mother is mentally ill within the meaning of Social Services Law § 384-b constitutes a permanent and significant stigma that might impact her status in future proceedings … . Accordingly, the Court, on its own motion, deems the notice of appeal to be a request for leave to appeal, and hereby grants leave to appeal ...". ***Matter of Chad Nasir S. (Charity Simone S.)*, 2018 N.Y. Slip Op. 00026, First Dept 1-2-18**

ATTORNEYS, APPEALS, FAMILY LAW.

PLAINTIFF AND HIS ATTORNEY EACH SANCTIONED $5000 FOR FRIVOLOUS ACTION AND APPEAL.

The First Department imposed $5000 sanctions (each) upon plaintiff and his attorney in this matrimonial matter. The underlying action attacking a stipulation (which had already been appealed) and the appeal were deemed frivolous: "We grant defendant's request that we impose sanctions upon plaintiff and his counsel (22 NYCRR 130-1.1[a]). The action below, and the appeal before us now, both of which counsel prosecuted, are plainly without merit (22 NYCRR 130-1.1[c][1]). Moreover, this appeal constitutes plaintiff's third unsuccessful challenge in this Court to the stipulation of settlement, which the parties entered into in 2012 ... . In our 2016 decision and order, which affirmed, inter alia, an award of counsel fees to defendant, we held that the award was proper based in part on plaintiff's 'multiple, unsuccessful attempts to void or rescind the support provisions contained in the stipulation' ... . Where a matrimonial litigant engages in a 'relentless campaign to prolong th[e] litigation,' sanctions in this Court are appropriate ...". ***Sonkin v. Sonkin*, 2018 N.Y. Slip Op. 00011, First Dept 1-2-18**

CRIMINAL LAW, ATTORNEYS.

DEFENDANT'S CONVICTION UPHELD DESPITE INVALID WAIVER OF THE RIGHT TO COUNSEL.

The First Department, in a full-fledged opinion by Justice Webber, determined defendant's waiver of his right to counsel was invalid, but deemed the error harmless and upheld his conviction. The defendant repeatedly represented himself at court appearances, repeatedly allowed counsel to represent him, and repeatedly refused to continue and left the courtroom. The trial was ultimately conducted in his absence. The First Department held that the failure to make sure defendant was aware that he faced a maximum of 15 years in prison rendered the waiver of counsel invalid. However, the suppression motion was deemed to have no chance of success and the trial evidence was deemed overwhelming: "The 'normal remedy for a violation of the right to counsel at a suppression hearing is a new suppression hearing, with a new trial to follow if, after the new hearing, the evidence is suppressed' ... . However, a new hearing would serve no purpose, and need not be ordered, where it is clear beyond a reasonable doubt that the result at a new trial would be the same even if the defendant prevailed at the suppression hearing. ... Even assuming counsel would some how be successful in arguing for the suppression of statements and property recovered, the evidence of defendant's guilt was overwhelming. Defendant was caught red-handed. ... Similarly, even assuming counsel would have been able to secure a more favorable Sandoval ruling, and defendant would have testified on his own behalf, the evidence overwhelmingly proved defendant knowingly and unlawfully entered the ... apartment with the intent to take property." ***People v. Rodriguez*, 2018 N.Y. Slip Op. 00040, First Dept 1-2-18**

CRIMINAL LAW, SEX OFFENDER REGISTRATION ACT (SORA).

CERTIFICATION AS A SEX OFFENDER OCCURS UPON CONVICTION AND IS NOT REVIEWABLE IN A SORA RISK ASSESSMENT PROCEEDING.

The First Department determined whether defendant should have been adjudicated a sex offender was not reviewable in a SORA risk assessment proceeding. Defendant was convicted of unlawful surveillance for making cell phone videos under women's dresses on the subway. Pursuant to the statute, unlawful surveillance is a sex offense, However the defendant can make a motion asking the court to find registration as a sex offender too harsh under the particular circumstances: "We agree with the People that the statute does not give a SORA court the power to determine a motion under Correction Law § 168-a(2)(e). While we find it significant that the provision assigns the duty of ruling on the motion to 'the trial court' — notably the only time that phrase is used in SORA's numerous sections — we do not consider the use of the phrase to be a sufficient basis for our interpretation, because it is arguably malleable enough not to be limited to the court that actually presided over the defendant's trial. However, Correction Law § 168-d(1)(a), describing the 'duties of the court,' provides a more definite indication of statutory intent, by way of language that clearly contemplates that certification as a sex offender occurs 'upon conviction' and after consideration of any motion pursuant to Correction Law § 168-a(2)(e). Nothing else in the statutory scheme contradicts this understanding." ***People v. Lema*, 2018 N.Y. Slip Op. 00005, First Dept 1-2-18**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

EXPERT EVIDENCE THAT A SAFETY DEVICE WAS NOT NECESSARY IN THIS FALLING OBJECTS CASE DID NOT CREATE A QUESTION OF FACT, PLAINTIFF ENTITLED TO SUMMARY JUDGMENT ON THE LABOR LAW § 240(1) CAUSE OF ACTION.

The First Department determined plaintiff was entitled to summary judgment in this falling objects case. Plaintiff was making an opening in a concrete wall when cinderblocks above the opening fell on him. The court held that the cinderblocks should have been secured and no safety device had been employed. Expert evidence that no safety device was needed did not create a question of fact: "... [T]he testimony and expert opinion that a safety device was neither necessary nor customary 'is insufficient to establish the absence of a Labor Law § 240 (1) violation' ... . O'Brien v. Port Auth. of N.Y. & N.J. (29 NY3d 27 [2017]) is not to the contrary. Unlike in O'Brien, the experts here do not differ as to whether a safety device that was provided was adequate, but rather differ as to whether a safety device was required at all ... . In light of the uncontroverted fact that no safety devices were provided, it would be error to submit to the jury for their resolution the conflicting expert opinion as to what safety devices, if any, should have been employed ...". ***Gonzalez v. Paramount Group, Inc.*, 2018 N.Y. Slip Op. 00029, First Dept 1-2-18**

PERSONAL INJURY.

EVIDENCE BUILDING OWNER HAD KNOWLEDGE OF THE ELEVATOR MISLEVELING, EVIDENCE THE ELEVATOR MAY NOT HAVE BEEN PROPERLY MAINTAINED, AND THE APPLICABILITY OF RES IPSA LOQUITUR REQUIRED DENIAL OF DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT IN THIS SLIP AND FALL CASE.

The First Department determined there were questions of fact precluding defendants' motions for summary judgment in this elevator misleveling slip and fall case. There was evidence the building owner had notice of the problem and evidence the elevator company (Fujitec) may not have properly maintained the elevator. The doctrine of res ipsa loquitur was also applicable: "The record contained ample evidence from which a jury could find that the owner had actual notice of a recurring, misleveling problem with the elevator, based on prior similar incidents shown in the building's logbook and based on service records of Fujitec, which had contracted to maintain the elevator ... . Fujitec's servicing of the elevator in response to those prior complaints raises an issue of fact as to notice ... . [T]here is an issue of fact as to whether the owner's liability, if any, is vicarious... . Due to the adverse inference charge the court previously granted against the owner, a jury might find that the owner had actual notice of the misleveling defect on the day of the accident, before plaintiff's injury. In addition, given the adverse inference charge, a jury could find that the owner was negligent in either failing to timely notify Fujitec of the misleveling defect, or in failing to remove the elevator from service. Such negligence would bar the owner from obtaining common-law indemnification from Fujitec ... . [T]he doctrine of res ipsa loquitur precludes summary judgment... . 'The misleveling of an elevator does not ordinarily occur in the absence of negligence' ... . Further, the misleveling was apparently caused by an instrumentality within Fujitec's exclusive control and was not due to any voluntary action on plaintiff's part. The application of res ipsa loquitur is not 'overcome by [Fujitec's] evidence that the elevator was regularly inspected and maintained'... . Given the applicability of res ipsa loquitur, plaintiff was not required to identify a malfunction or defect in the elevator ...". ***Dzidowska v. Related Cos., LP*, 2018 N.Y. Slip Op. 00074, First Dept 1-4-18**

PERSONAL INJURY.

DEFENDANT DETOXIFICATION FACILITY NOT ENTITLED TO SUMMARY JUDGMENT IN ACTION BASED UPON THE DEATH OF A MAN WHO WAS TREATED, LEFT AND WAS FOUND DEAD A MONTH LATER, DEFENDANTS POINTED TO GAPS IN PLAINTIFF'S PROOF OF CAUSATION BUT DID NOT AFFIRMATIVELY DEMONSTRATE THE ABSENCE OF CAUSATION.

The First Department determined defendant detoxification facility was not entitled to summary judgment on the negligence and wrongful death causes of action brought on behalf of decedent, DeJesus, who had been treated at the facility, left and was found dead a month later. The defendants pointed to the plaintiff's inability to prove causation as grounds for summary judgment. However, it was the defendants' burden to affirmatively demonstrate the absence of causation, which they did not do. (Another example of the strict analytical criteria used by the appellate courts for review of summary judgment motions.) The court also held the Public Health Law cause of action should have been dismissed because the detoxification facility was not a nursing home and therefore was not subject to the Public Health Law: "Defendants, however, failed to submit affirmative evidence establishing that their alleged negligence did not, as a matter of law, proximately cause DeJesus's death. The fact that DeJesus's body was discovered a month after he disappeared is not sufficient, in itself, to warrant summary judgment in defendants' favor. Although defendants submitted DeJesus's death certificate, that document states only that the manner and cause of death were undetermined, and does not definitively rule out the requisite causal connection. Further, the autopsy report submitted with defendants' motion papers is incomplete, and does not identify the cause of death. Because defendants merely pointed to perceived gaps in plaintiff's proof, they are not entitled to summary judgment on the negligence and wrongful death claims ...". ***Hairston v. Liberty Behavioral Mgt. Corp.*, 2018 N.Y. Slip Op. 00004, First Dept 1-2-18**

PERSONAL INJURY.

EXPERT EVIDENCE AND TESTIMONY ABOUT THE COLOR OF THE ICE RAISED ISSUES OF FACT ABOUT THE EXISTENCE OF A HAZARDOUS CONDITION AND NOTICE IN THIS SLIP AND FALL CASE.

The First Department determined plaintiff raised a question of fact in this sidewalk slip and fall case. Defendant presented evidence the sidewalk was clear. Plaintiff presented climatological expert evidence as well as evidence the ice was brown and dirty, indicating it had been there long enough to be noticed: "... [P]laintiff raised triable issues of fact as to whether a hazardous icy condition existed and whether defendant had notice of that condition. Plaintiff's climatological expert opined, after reviewing relevant climatological reports, that snow had ceased falling two days before plaintiff's accident, but snow and ice would have remained on the ground in untreated areas on the morning of his accident, thus giving defendant sufficient time to discover and remedy the hazardous ice condition ... . Plaintiff also testified that before he fell he saw ice covering part of the sidewalk. He described the ice that he saw after his fall as '[b]rownish' and 'dirty,' thereby raising issues as to whether the icy condition had been on the sidewalk long enough to clear it before the accident ... .Furthermore, contrary to defendant's contentions, plaintiff identified the cause of his fall, since he testified that he saw ice on the ground when he looked sideways, when he fell, face down, onto it ...". ***Jones v. New York City Hous. Auth.*, 2018 N.Y. Slip Op. 00027, First Dept 1-2-18**

PERSONAL INJURY, CIVIL PROCEDURE.

IN THIS SLIP AND FALL CASE, THE REQUESTED DISCOVERY ABOUT THE DESIGN OF THE REAR STAIRS OF A BUS WAS BURDENSOME, REPRESENTATIVES OF DEFENDANTS ALLOWED TO BE PRESENT WHEN BUS INSPECTED BY PLAINTIFF.

The First Department, modifying Supreme Court, limited the amount of discovery about the rear stairs of the bus where plaintiff fell and allowed representatives of defendants to be present when the bus was inspected and photographed by plaintiff: "... [D]iscovery [is limited] to documents concerning the rear stairs of the bus on which plaintiff fell, and the absence of warning signs and handrails in the rear of the bus, for a period of five years preceding the date of the accident, and records relating to any modifications or changes to the interior stairs, handrails, or warning signs in the rear of the bus from the day of the accident to the day of the inspection, and the production of the bus for inspection and photographing by plaintiff in the presence of defendants' representatives ... . Predecessor models of the bus on which plaintiff fell and buses with front-facing rear seating are not relevant to whether the bus on which plaintiff fell was defectively designed (CPLR 3101[a]...). Similarly, while material concerning the rear stairs, handrails, and warning signs in the rear of the subject bus, i.e., the alleged dangerous conditions, is relevant, material concerning other sections of the bus or other defects is not relevant. The production of 15 years' worth of records is burdensome ...". ***Curran v. New York City Tr. Auth.*, 2018 N.Y. Slip Op. 00038, First Dept 1-2-18**

PERSONAL INJURY, CONTRACT LAW.

IN THIS SLIP AND FALL CASE, QUESTIONS OF FACT WHETHER BUS COMPANY LIABLE FOR FAILURE TO PROVIDE A SAFE PLACE FOR PASSENGERS TO DISEMBARK AND FAILURE TO NOTIFY PORT AUTHORITY OF NEED FOR REPAIR.

The First Department determined there was a question of fact whether defendant bus company (Hudson) was liable for plaintiff's fall. She stepped in a hole in the sidewalk as she got off the bus. The court noted a duty to provide a safe place to get off the bus and a contractual duty to notify Port Authority of needed repairs: "Issues of fact exist as to whether Hudson breached its duty as a common carrier to provide plaintiff with a safe place to disembark ... . The record shows that 15 or 20 passengers exited the bus before plaintiff. As she alighted, she stepped into a hole on the sidewalk and fell. The bus driver corroborated this testimony, stating that the hole was on the sidewalk, '[w]ithin one step' of where plaintiff disembarked. The bus driver further admitted that the hole caused plaintiff to fall. Additionally, plaintiff testified that, upon seeing where she fell, the bus driver exclaimed, '[Y]ou fell in that hole, they're supposed to fix that hole.' Under the circumstances, where plaintiff stepped into a hole immediately upon alighting from the bus, the fact that a number of passengers safely descended before she did does not entitled Hudson to summary judgment ... . Issues of fact as to, among other things, whether Hudson breached its contractual duty to notify Port Authority of any needed repairs at the gate where the accident occurred compel denial of summary judgment on Port Authority's contractual indemnification claim." ***Bruno v. Port Auth. of N.Y. & N.J.*, 2018 N.Y. Slip Op. 00069, First Dept 1-4-18**

PERSONAL INJURY, CONTRACT LAW.

QUESTIONS OF FACT WHETHER THE OWNER OF A DOMESTIC VIOLENCE SHELTER AND THE SECURITY COMPANY HIRED BY THE SHELTER WERE LIABLE FOR THE SHOOTING OF A CHILD JUST OUTSIDE THE GATE OF THE SHELTER, THE CHILD WAS AN INTENDED BENEFICIARY OF THE CONTRACT BETWEEN THE SHELTER AND THE SECURITY COMPANY.

The First Department, in a full-fledged opinion by Justice Acosta, affirmed the denial of the defendants' motions for summary judgment in this third party assault case. The defendants are the owner-operators of a domestic violence shelter and the security company hired by the shelter. Plaintiff child, CB, was shot while CB and his father, Bobby B, were waiting for CB's mother to come down to the gate to accompany CB back to where she and CB were residing in the shelter. Bobby B had asked the guards to let the child in because Bobby B had been followed by several men. The child was not let in. The guards called CB's mother a couple of times telling her the child was waiting. One of the men who followed Bobby B approached with a gun and demanded Bobby B's jacket. In a struggle the gun discharged striking and paralyzing CB: "With respect to the common-law duty, landowners have 'a duty to exercise reasonable care in maintaining [their] . . . property in a reasonably safe condition under the circumstances'..., which includes taking minimal safety precautions to protect against reasonably foreseeable criminal acts of third persons ... . We reject defendants' contention that they had no common-law duty to CB because the shooting took place outside the building, i.e., because CB was on the street side of the gate. Plaintiffs raised issues of fact as to whether the security booth, gate, and recessed area that CB was standing in were part of the shelter property and not the public sidewalk. However, even if CB was not standing on shelter property, it cannot be said that under any circumstance [the owner] owed no duty to him. ... Although the contract [with defendant security company] clearly provides that CB is an intended third-party beneficiary, there are issues of fact as to the benefits that CB is entitled to under the contract. It should be noted, however, that allowing a child in danger to enter the shelter does not appear to be in derogation of any rules prohibiting unarmed guards from intervening in an altercation." ***CB v. Howard Sec.*, 2018 N.Y. Slip Op. 00087, First Dept 1-4-18**

REAL PROPERTY LAW.

ACTIONS FOR TRESPASS AND ENCROACHMENT ALLEGING DAMAGE TO A PARTY WALL PROPERLY SURVIVED SUMMARY JUDGMENT, RESTRICTIVE COVENANT IN 1869 DEED DID NOT BENEFIT ANYONE OTHER THAN THE ORIGINAL GRANTEE.

The First Department determined plaintiffs' causes of action for trespass and encroachment properly survived summary judgment and the cause of action for enforcement of a restrictive covenant was properly dismissed. The plaintiffs alleged that construction on defendants' building encroached on and damaged a party wall. The restrictive covenant was in an 1869 deed and did not indicate it was for the benefit of anyone other than the grantee: "The motion court correctly denied the motion insofar as it sought dismissal of the causes of action for encroachment and trespass. 'A party wall is for the common benefit of contiguous proprietors. Neither may subject it to a use whereby it ceases to be continuously available for enjoyment by the other. . . A wall may be carried by either owner beyond its height as first erected, provided only it is strong enough to bear the weight and strain' ... . It was defendants' burden, as movants, to offer evidence establishing their prima facie entitlement to summary judgment ... . This they have failed to do. Indeed, plaintiffs in opposition proffer evidence that the alterations to the party wall have undermined the structural integrity of their buildings. Plaintiffs' engineer opined that defendants failed to detail a flashing system and to adhere to industry standards, occasioning damage. He further opined

that it was impossible to ascertain whether the new masonry is properly tied to the old masonry so as to provide the requisite structural stability. The cause of action to enforce a restrictive covenant was correctly dismissed for lack of standing... The covenant was entered into in 1869 by the original owner of one lot that included both of the subject properties and his immediate neighbor, and it contains no explicit provision that it is for the benefit of anyone other than the grantee." ***Mastrobattista v. Borges*, 2018 N.Y. Slip Op. 00039, First Dept 1-2-18**

THIRD DEPARTMENT

CIVIL PROCEDURE, COURT OF CLAIMS.

BECAUSE IT WAS POSSIBLE THE STATE WOULD REFUSE TO INDEMNIFY DEFENDANT DOCTORS IN THIS MEDICAL MALPRACTICE ACTION BROUGHT BY A STATE PRISON INMATE, THE SIMILAR ACTION IN SUPREME COURT SHOULD NOT HAVE BEEN DISMISSED, BUT RATHER THE SUPREME COURT ACTION SHOULD BE STAYED PENDING THE OUTCOME IN THE COURT OF CLAIMS.

The Third Department, modifying Supreme Court, determined an state prison inmate's action in Supreme Court against doctors (Lieb and Angell) alleging medical malpractice should not have been dismissed as duplicating an action against the same doctors in the Court of Claims. It was possible the state would not indemnify the doctors who were not employees of the state and plaintiff would be left without recourse. The Supreme Court action should have been stayed, not dismissed: "The legal theory in the Court of Claims action is nearly identical to the Supreme Court action, and it is not disputed that the two actions arise out of the same set of facts. Moreover, Correction Law § 24-a provides that licensed physicians providing contractual medical care at the request of DOCCS are covered by the defense and indemnity provisions in Public Officers Law § 17, as long as the injury was not the result of intentional wrongdoing. As such, it appears that the dismissal of the Supreme Court action would not prejudice plaintiff's right to receive full recovery from all defendants, as intentional wrongdoing is not part of the Supreme Court action and any damages attendant to Lieb's or Angell's malpractice or negligence would be borne by the state in the Court of Claims action. However, while these defense and indemnity provisions appear to apply to Lieb and Angell, the record is not fully developed at this time to make such a definite determination. Indeed, despite currently defending Angell, the state has neither conceded nor admitted in any of its submissions or pleadings that it is statutorily bound by Correction Law § 24-a and Public Officers Law § 17 (3) (a) to indemnify Lieb and Angell." ***Rothschild v. Braselmann*, 2018 N.Y. Slip Op. 00054, Third Dept 1-4-18**

INSURANCE LAW.

ALTHOUGH THE UNINSURED DRIVER ACTED INTENTIONALLY, THE INJURY TO THE MAN WHO WAS TRYING TO STOP THE DRIVER FROM DRIVING WHILE INTOXICATED WAS THE RESULT OF AN ACCIDENT WITHIN THE MEANING OF THE UNINSURED MOTORIST POLICY.

The Third Department, reversing Supreme Court, determined respondent, Widdecombe, was injured in an accident within the meaning of the applicable uninsured motorist policy. Widdecombe was concerned because the driver, Germain, who had been drinking, should not drive. When Widdecombe attempted to take the keys, Germain drove off, dragging and injuring Widdecombe: "... [F]or purposes of an uninsured motorist endorsement, when an occurrence is — from the insured's perspective — 'unexpected, unusual and unforeseen,' it qualifies as an 'accident'... . ... '[T]he intentional assault of an innocent insured is an accident within the meaning of his or her own policy' ... . [W]hatever Germain's intent and criminal liability, this incident was an accident from Widdecombe's perspective. Contrary to petitioner's contention, Widdecombe's uncontroverted testimony established that the incident 'happened so fast' and, after he attempted to grab the keys, Germain said that 'he was going to cut [Widdecombe's] leg off' and, as Widdecombe tried to get his leg out of the car, Germain 'threw the car in drive' and 'screeched' away, dragging Widdecombe. ... [T]his event "was clearly an accident from the insured's point of view," since having his leg trapped and being dragged was sudden and 'unexpected, unusual and unforeseen' ...". ***Matter of Progressive Advanced Ins. Co. (Widdecombe)*, 2018 N.Y. Slip Op. 00061, Third Dept 1-4-18**

MUNICIPAL LAW, CIVIL PROCEDURE.

FACT THAT PRO SE NOTICE OF CLAIM WAS NOT VERIFIED PROPERLY OVERLOOKED, FACTS IN NOTICE SUFFICIENT TO NOTIFY CITY OF MALICIOUS PROSECUTION CLAIM.

The Third Department determined the fact that the pro se notice of claim was not verified was properly overlooked by Supreme Court and, although the notice did not explicitly describe a cause of action for malicious prosecution, the allegations were sufficient to put the municipality on notice that a malicious prosecution cause of action was contemplated. Only a malicious prosecution claim was timely (the false arrest and false imprisonment claims were untimely): "Plaintiff's notice of claim does not specifically refer to the fact that he was charged with harassment in the second degree or to the dismissal of those charges. Nonetheless, plaintiff's assertions that he was falsely arrested without legitimate cause, that no crime took place and that City employees acted maliciously provided sufficient notice to defendants that plaintiff potentially had a

claim for malicious prosecution. Although they protect different personal interests and are composed of different elements, claims for 'false arrest and malicious prosecution are kindred actions insofar as they often aim to provide recompense for illegal law enforcement activities' ... . Causes of action for false arrest and malicious prosecution are related closely enough that, in a trial of both, the court must instruct the jury not to make a duplicate award of damages... . Moreover, actual malice is an element of a cause of action for malicious prosecution, but not of a cause of action for false arrest ... . Thus, receipt of a notice of claim alleging that its agents acted maliciously in executing a false arrest when no crime had occurred provided the City with the opportunity to investigate all circumstances related to plaintiff's arrest, including whether he had been arrested pursuant to a warrant — which would have insulated defendants from liability for false arrest ... — and whether plaintiff's arrest had resulted in him being charged with, or prosecuted for, a crime." ***Hone v. City of Oneonta*, 2018 N.Y. Slip Op. 00055, Third Dept 1-4-18**

PERSONAL INJURY, CONTRACT LAW.

SNOW REMOVAL CONTRACTORS NOT LIABLE FOR PARKING LOT SLIP AND FALL, ESPINAL EXCEPTIONS DID NOT APPLY.

The Third Department determined the defendants who had contracted with the property owner/manager to remove snow from the parking lot where plaintiff slipped and fell on ice were not liable to plaintiff under an *Espinal* exception: "It is well-settled that a party that contracts with a property owner to provide snow and ice removal services cannot be liable to a third party who is injured on the property unless "(1) . . . the contracting party, in failing to exercise reasonable care in the performance of his [or her] duties launche[d] a force or instrument of harm; (2) . . . the plaintiff detrimentally relie[d] on the continued performance of the contracting party's duties; [or] (3) . . . the contracting party has entirely displaced the other party's duty to maintain the premises safely" (Espinal v. Melville Snow Contrs., 98 NY2d 136, 140 [2002] ...). ... [W]hile [the snow removal contractor] retained some independent authority, we cannot conclude that the agreement "displaced entirely" [the property owner's] duty to maintain the property ... . [The defendants' meteorologist's] affidavit fails to raise a material question of fact, inasmuch as the evidence demonstrates only that defendants may have failed to clear all of the ice and snow, a fact that does not constitute the affirmative creation of a dangerous condition ... ". ***Hutchings v. Garrison Lifestyle Pierce Hill, LLC*, 2018 N.Y. Slip Op. 00057, Third Dept 1-4-18**

ZONING, ENVIRONMENTAL LAW.

PROPERTY OWNER SUFFICIENTLY ALLEGED THE REZONING TO PRECLUDE DEVELOPMENT WAS ARBITRARY AND CAPRICIOUS AND CONSTITUTED REVERSE SPOT ZONING, THOSE CAUSES OF ACTION, ALTHOUGH THEY MAY NOT ULTIMATELY BE SUCCESSFUL, SHOULD NOT HAVE BEEN DISMISSED.

The Third Department, modifying Supreme Court, determined petitioner property owner had stated causes of action alleging the town's rezoning of the property was arbitrary and capricious and constituted reverse spot zoning. The property had been zoned for resort-type development but, after a State Environmental Quality Review Act (SEQRA) review by the town, the property was rezoned to preclude development. The regulatory taking cause of action was dismissed as not ripe because petitioner had not first sought compensation. The SEQRA review and negative declaration were deemed properly done (requisite hard look taken): "Petitioner asserts, as a result, that the Town Board's decision to rezone the subject property arbitrarily disregarded the comprehensive plan's finding that a planned resort community was appropriate for the subject property. The 2015 report proposed the rezoning in order to address changed conditions in keeping with the spirit of the comprehensive plan, and it is debatable whether petitioner can ultimately 'establish[] by competent evidence that the Town Board's decision to . . . change its zoning ordinance as it affects [the subject] property was arbitrary and unreasonable' ... . Nevertheless, accepting the allegations in the petition/complaint as true, and noting the absence of documentary proof conclusively establishing a defense to them ..., petitioner articulated a cognizable claim. Petitioner also alleges that the subject property was 'arbitrarily singled out for different, less favorable treatment than neighboring properties in a manner that was inconsistent with a well-considered land-use plan' so as to constitute discriminatory reverse spot zoning ... . In our view, the ... allegations are sufficient to state a cognizable claim for reverse spot zoning ...". ***Matter of Wir Assoc., LLC v. Town of Mamakating*, 2018 N.Y. Slip Op. 00059, Third Dept 1-4-18**

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