CasePrepPlus

January 31, 2018

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

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FIRST DEPARTMENT

ATTORNEYS, CONTRACT LAW.

PLAINTIFF'S ACTION FOR BREACH OF CONTRACT, ALLEGING DEFENDANT-ATTORNEYS FAILED TO RETURN THE BALANCE OF THE FEE PAID AT THE CONCLUSION OF THE CASE, PROPERLY SURVIVED A MOTION TO DISMISS.

The First Department determined defendant-attorneys' motion to dismiss the breach of contract cause of action, alleging the failure to return the balance of fees paid, was properly denied. Plaintiff alleged there was an oral agreement to return any few balance remaining when the action was resolved. Defendants did not provide plaintiff with an accounting of the hour spent on the case: "Defendants moved to dismiss, arguing that the breach of contract claim was not adequately pleaded and that plaintiff's claim is barred by the 'voluntary payment doctrine.' The voluntary payment doctrine 'bars recovery of payments voluntarily made with full knowledge of the facts, and in the absence of fraud or mistake of material fact or law' ... . In the context of an attorney-client relationship, the attorney bears the burden of showing that the parties' fee agreement was fair, reasonable, and fully known and understood by plaintiff ... . Plaintiff has sufficiently alleged a claim for breach of contract based on defendants' failure to return the unearned balance of his retainer, pursuant to the parties' oral agreement ... . While defendants assert that plaintiff voluntarily made payments to compensate them for their services, they have not established that plaintiff had full knowledge of the relevant facts, such as the number of hours spent by defendants in connection with their representation of him ... . Nor did they submit any evidence to show that the amount of plaintiff's payments was fair and reasonably related to the value of services rendered ...". ***Dubrow v. Herman & Beinin*, 2018 N.Y. Slip Op. 00478, First Dept 1-25-18**

CIVIL PROCEDURE.

PLAINTIFF MADE A SUFFICIENT SHOWING OF PERSONAL JURISDICTION OVER A NEW JERSEY RADIATION TREATMENT CLINIC TO BE ENTITLED TO DISCOVERY.

The First Department determined plaintiff had sufficiently demonstrated personal jurisdiction over a New Jersey radiation therapy clinic (PPM) to be entitled to disclosure under both CPLR 301 (general jurisdiction) and 302 (specific jurisdiction): "Plaintiff made a 'sufficient start' in establishing that New York courts have jurisdiction over PPM under CPLR 301 and 302(a)(1) to be entitled to disclosure pursuant to CPLR 3211(d) ... . With regard to general jurisdiction, codified in CPLR 301, it is not clear whether PPM's 'affiliations with the State [New York] are so continuous and systematic as to render [it] essentially at home in the [] State' ... . However, the record contains a State filing in which PPM identified itself as having a principal place of business in Manhattan — 'tangible evidence' upon which to question PPM's claims to the contrary ... . With regard to specific jurisdiction (CPLR 302[a][1]), the record shows that PPM's activities in New York were 'purposeful and [that] there is a substantial relationship between the transaction and the claim asserted' ... . PPM chose and marketed its Somerset, New Jersey, location to target New York residents, touting its proximity to New York in advertising, entered into an agreement with a consortium of New York City hospitals for the referral of cancer patients for treatment at its facility, and provided the consortium's doctors with privileges at its facility. In contrast to Paterno v. Laser Spine Inst. (24 NY3d 370 [2014]), a medical malpractice action in which the plaintiff argued that New York courts had jurisdiction over a Florida-based facility and its doctors based on an advertisement and communications, in this case, plaintiff did not seek out PPM. She says that she was directed to PPM by her New York doctor, defendant Raj Shrivastava, as part of a referral fee agreement, that Dr. Shrivastava thereafter co-managed her care, and that PPM billed her directly for Dr. Shrivastava's services." ***Robins v. Procure Treatment Ctrs., Inc.*, 2018 N.Y. Slip Op. 00464, First Dept 1-25-18**

CONTRACT LAW, CIVIL PROCEDURE.

LIMITED LIABILITY PROVISION PRECLUDED RECOVERY FOR BREACH OF CONTRACT FOR ANY AMOUNT OVER THE LIMITATION, ALTHOUGH THE LIMITATION OF LIABILITY WAS AN AFFIRMATIVE DEFENSE, IT WAS PROPERLY CONSIDERED ON A MOTION TO DISMISS.

The First Department determined the limitation of liability provision precluded recovery for breach of contract for any amount over the limitation. The contract was an exclusive licensing agreement (ELA) for a securities trading system (ATS).

The First Department noted that it was proper to consider the limitation of liability, an affirmative defense, on a motion to dismiss: "It was not error for Supreme Court to rule on the enforceabilty of the liability limitation provision, although it is an affirmative defense, on a motion to dismiss. In the ordinary course of deciding motions, courts consider whether documentary evidence establishes an asserted defense, in this case a defense concerning the limitation of liability provisions in the parties' contracts ... . New York courts routinely enforce such liability-limitation provisions, especially when negotiated by sophisticated parties. The Court of Appeals has recognized that '[a] limitation on liability provision . . . represents the parties' Agreement on the allocation of the risk of economic loss in the event that the contemplated transaction is not fully executed, which the courts should honor.* * * [The parties] may later regret their assumption of the risks of non-performance in this manner, but the courts let them lie on the bed they made'... . However, such clauses are unenforceable when, '[i]n contravention of acceptable notions of morality, the misconduct for which it would grant immunity smacks of intentional wrongdoing. This can be explicit, as when it is fraudulent, malicious or prompted by the sinister intention of one acting in bad faith. Or, when, as in gross negligence, it betokens a reckless indifference to the rights of others, it may be implicit' ...". ***Electron Trading, LLC v. Morgan Stanley & Co. LLC*, 2018 N.Y. Slip Op. 00380, First Dept 1-15-18**

CRIMINAL LAW.

POLICE OFFICER'S EXPECTATION THAT DEFENDANT WOULD BE ARRESTED DID NOT HAVE ANY BEARING ON WHETHER DEFENDANT WAS IN CUSTODY, MOTION TO SUPPRESS STATEMENT PROPERLY DENIED.

The First Department determined defendant was not in custody at the time he made statements, despite the presence of several police officers and one officer's expectation that defendant would be arrested. Therefore defendant's motion to suppress the statements was properly denied: "Although several officers were present, they did not have their guns drawn, did not handcuff or restrain defendant in any way, and did not otherwise create a coercive or police-dominated atmosphere ... . A reasonable innocent person in defendant's position would not have thought that he was in custody ... , but rather 'that the police were still in the process of gathering information about the alleged incident prior to taking any action' ... . The officer's expectation that defendant would be arrested, based on the victim's complaint, was not conveyed to defendant. 'A policeman's unarticulated plan has no bearing on the question whether a suspect was in custody' at a particular time; the only relevant inquiry is how a reasonable man in the suspect's position would have understood his situation ...". ***People v. Clarke*, 2018 N.Y. Slip Op. 00472, First Dept 1-25-18**

EMPLOYMENT LAW, HUMAN RIGHTS LAW.

PLAINTIFF'S SEXUAL ORIENTATION DISCRIMINATION AND RETALIATION CAUSES OF ACTION AGAINST THE NYPD SHOULD NOT HAVE BEEN DISMISSED, ALTHOUGH PLAINTIFF HAD ROUTINELY PASSED PSYCHOLOGICAL EXAMS IN THE PAST, THE NYPD FOUND HIM PSYCHOLOGICALLY UNFIT.

The First Department, reversing Supreme Court, determined the sexual-orientation-based employment discrimination and retaliation causes of action (pursuant to the NYS and NYC Human Rights Law) should not have been dismissed. Plaintiff had once worked as an NYPD police officer and subsequently for several other law enforcement entitles, and had always passed the psychological tests. Plaintiff's application to work once again for the NYPD was denied, based on a finding plaintiff was psychologically unfit. Plaintiff had, in 2007, brought a discrimination action against the NYPD and that prior action was cited by the NYPD as evidence of plaintiff's inability to deal with stress (which supported the retaliation cause of action): "The parties do not dispute that plaintiff has sufficiently pleaded the first three elements of discrimination, to wit, plaintiff is part of a protected class due to his sexual orientation, he was qualified for the position of police officer, having previously served for seven years before voluntarily resigning, and he was treated adversely by having a psychological hold placed on his application and then being found to have failed the evaluation. ... Plaintiff alleged that he had passed six prior law enforcement psychological evaluations, in New York, California, Arizona, and Missouri, before defendants deemed him psychologically unfit for a position with the NYPD, and that in finding others psychologically fit defendants had given preferential treatment to similarly situated heterosexual applicants. Plaintiff further alleged that he was the only applicant whose application had been placed on a psychological review for over 15 months. ... [Plaintiff] submitted the psychological report of his independent clinical psychologist demonstrating his fitness to serve. ... The foregoing, taken together, and affording plaintiff the benefit of every favorable inference, establishes prima facie that defendants discriminated against plaintiff on account of his sexual orientation in finding him psychologically unfit to serve." ***Harrington v. City of New York*, 2018 N.Y. Slip Op. 00381, First Dept 1-23-18**

INSURANCE LAW.

INSURER OF A BUS OBLIGATED TO DEFEND AND INDEMNIFY THE BUS COMPANY IN AN ACTION BROUGHT BY A PASSENGER WHO FELL ATTEMPTING TO PICK UP HER LUGGAGE OUTSIDE THE BUS.

The First Department, reversing Supreme Court, determined the insurer of a Peter Pan bus was obligated to defend and indemnify the bus company in an action brought by a passenger who fell attempting to pick up her luggage outside the bus: "The insurance policy issued by defendant to Peter Pan provides coverage for damages owed because of, inter alia, 'bodily injury' ... caused by an accident' and resulting from the ownership, maintenance or use of a covered auto.' Regardless of

whether the plaintiff in the underlying action, having arrived at her destination on a Peter Pan bus and seen the driver unloading the passengers' luggage, tripped over a suitcase while approaching her own suitcase or tripped on the curb while looking for her suitcase, her accident resulted from Peter Pan's use of the bus, a covered auto, and defendant is obligated to defend and indemnify Peter Pan in the underlying action ...". ***Peter Pan Bus Lines, Inc. v. Hanover Ins. Co.*, 2018 N.Y. Slip Op. 00467, First Dept 1-25-18**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

QUESTION OF FACT WHETHER PLAINTIFF WAS COMPARATIVELY NEGLIGENT IN THIS LABOR LAW § 241(6) ACTION, PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED.

The First Department, modifying Supreme Court, determined plaintiff's motion for summary judgment in this Labor Law § 241 (6) action should not have been granted because there was a question of fact about plaintiff's comparative negligence: "Plaintiff's testimony that he slipped on water on the floor of the stairwell where he was working establishes prima facie a violation of Labor Law § 241(6) predicated on Industrial Code § 23-1.7(d) ('Slipping hazards'). In opposition, defendant, relying solely on speculative hearsay testimony (by another employee), failed to raise an issue of fact as to the way the accident occurred ... . While the record demonstrates defendant's liability as a matter of law, an issue of fact exists as to negligence on plaintiff's part ... , which could result in an apportionment of liability ... . Plaintiff testified that, as he entered the stairwell, he was looking up to determine the location of the box through which he was to run cable, and that, while carrying a ladder in one hand, he attempted to descend the staircase without looking at the stairs or the landing in front of him." ***Luciano v. New York City Hous. Auth.*, 2018 N.Y. Slip Op. 00473, First Dept 1-25-18**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

PLAINTIFF PROPERLY AWARDED SUMMARY JUDGMENT IN THIS LABOR LAW § 240(1) ACTION, HEAVY TRANSFORMER SHIFTED DOWNWARD STRIKING PLAINTIFF, NO SAFETY DEVICES PROVIDED.

The First Department determined plaintiff was entitled to summary judgment in this Labor Law § 240(1) action. Plaintiff was on a ladder working on a heavy suspended transformer when it shifted and struck him. Plaintiff demonstrated he was not provided with any adequate safety devices, and defendants did not demonstrate adequate safety devices were available: "Plaintiff established prima facie his entitlement to the protections of Labor Law § 240(1) by submitting evidence that he was injured when a corner of an electrical transformer weighing hundreds of pounds and suspended from a ceiling shifted downward and struck him on the head as he was standing on a ladder working on it and that he had not been provided with any safety devices adequate to his task... . In opposition, defendants failed to raise an issue of fact as to their contention that plaintiff was the sole proximate cause of the accident. Plaintiff's coworker testified that there were no readily available safety devices to assist him and plaintiff in their task... . While plaintiff's foreman testified that he had given specific instructions to his workers about using wooden delivery pallets to prop up the transformer at the corner being worked on, he conceded that he did not know whether plaintiff was standing near enough to him to have heard these instructions ... . In any event, defendants submitted no evidence that this improvised method was a suitable safety device ...". ***Gericitano v. Brookfield Props. OLP Co. LLC*, 2018 N.Y. Slip Op. 00480, First Dept 1-25-18**

LANDLORD-TENANT.

LANDLORD BROUGHT EJECTMENT CAUSE OF ACTION AGAINST RENT REGULATED TENANT FOR RENTING TO AIRBNB CUSTOMERS, THE EJECTMENT CAUSE OF ACTION SHOULD NOT HAVE BEEN DISMISSED.

The First Department, modifying Supreme Court, determined there was no basis to dismiss the ejectment cause of action which was based upon the rent-regulated tenant's renting to Airbnb customers: "Plaintiff seeks to eject defendants based on their having illegally sublet rooms in their loft through the Airbnb website to numerous individuals, over a period of about two years, resulting in profits well in excess of the legal regulated rent. It is well settled that, when regulated tenants rent space on a short-term basis to transient individuals at rates higher than allowed by applicable regulations, that conduct is 'in the nature of subletting rather than taking in roommates, and constitute[s] profiteering and commercialization of the premises,' which is an 'incurable violation'... . Defendants do not dispute that tenants regulated pursuant to the Loft Law also are subject to eviction for profiteering ... . Since the alleged conduct is incurable, no notice to cure is required ... . As for the adequacy of the predicate notice of termination, plaintiff served a notice under the terms of the expired lease, which carried over into the statutory tenancy and governed the amount of notice required when the tenant violates a substantial obligation of his tenancy or is alleged to have engaged in illegal conduct ...". ***Aurora Assoc. LLC v. Hennen*, 2018 N.Y. Slip Op. 00465, First Dept 1-25-18**

LANDLORD-TENANT.

UNDER THE MULTIPLE DWELLING LAW, LESSEE WAS NOT ENTITLED TO RENT FROM THE SUBTENANTS FOR THE PERIOD DURING WHICH THERE WAS NO CERTIFICATE OF OCCUPANCY.

The First Department, reversing Supreme Court, determined that the subtenants (respondents), pursuant to the Multiple Dwelling Law, could not collect rent from the lessee (petitioner) for the period during which there was no certificate of occupancy: "Petitioner was the net lessee of the third floor of a six-story building, a de facto multiple dwelling; the net lease provided, inter alia, that there was no permanent certificate of occupancy for either the building or the demised premises. In April 2013, petitioner brought this proceeding alleging that respondents, its subtenants, had failed to pay residential use and occupancy since January 2013. Affording the relevant statutory language its natural and ordinary meaning ... , we conclude that the proceeding must be dismissed because petitioner was not entitled to collect rent from respondents. For purposes of the Multiple Dwelling Law, an 'owner' is broadly defined to include a 'lessee' ... . Respondents' unit constituted a 'dwelling' under the Multiple Dwelling Law ['any building or structure or portion thereof which is occupied in whole or in part as the home, residence or sleeping place of one or more human beings' (Multiple Dwelling Law 4[4]). The owner of a 'dwelling or structure ... occupied in whole or in part for human habitation in violation of [§ 301]' may not recover rent for the period during which there is no certificate of occupancy for 'such premises' (Multiple Dwelling Law § 302[1][b]). Nor may the owner maintain an action or special proceeding for possession of the premises for nonpayment of 'such rent' (id.). Thus, petitioner, as owner of respondents' dwelling, was precluded from charging respondents rent or other remuneration while the building lacked a certificate of occupancy for residential use ...". ***Matter of 49 Bleecker, Inc. v. Gathien*, 2018 N.Y. Slip Op. 00476, First Dept 1-25-18**

MUNICIPAL LAW, PERSONAL INJURY.

QUESTION OF FACT WHETHER CITY CREATED THE ROADWAY SINKHOLE BY INADEQUATE REPAIR, COMPLAINT SHOULD NOT HAVE BEEN DISMISSED IN THIS TRAFFIC ACCIDENT CASE.

The First Department, reversing Supreme Court, determined plaintiffs had raised a question of fact whether the city created the dangerous condition, a sinkhole in the roadway, which caused plaintiffs injuries after a wheel on their police car went into the hole: "... [P]laintiffs have met their burden of showing that there are triable issues of fact as to whether the City's affirmative negligence created the defect ... . Specifically, plaintiff's testimony and affidavit demonstrate that the City attempted to repair the sinkhole on August 27, 2011. Moreover, the City has conceded based on the CAR report that it worked to fill the sinkhole on August 27, 2011 (eleven days prior to the accident) and August 28, 2011 (ten days prior to the accident). The affidavit of plaintiffs' expert raises the issues of whether the City's affirmative repair of the sinkhole negligently created a defective condition causing the repair to fail immediately after it was made. There is nothing in the record here to indicate that the dangerous condition in question developed over time ...". ***Bania v. City of New York*, 2018 N.Y. Slip Op. 00470, First Dept 1-25-18**

PERSONAL INJURY.

TOW TRUCK DEFENDANTS FURNISHED THE CONDITION FOR THE REAR-END COLLISION BUT THE TOW TRUCK WAS NOT THE PROXIMATE CAUSE, TOW TRUCK DEFENDANTS MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED.

The First Department, reversing Supreme Court, determined that defendant's tow truck merely furnished the condition for the rear-end collision and was not the proximate cause. The tow truck driver was in the process of hooking up a car (a Jetta) to tow it off the expressway when the Jetta was struck from behind by an intoxicated driver (Ripoli) who had fallen asleep. Plaintiff was a passenger in the Jetta: "Defendants-appellants are entitled to summary judgment, because the tow truck driver's affirmative negligence, if any, did nothing more than furnish the condition or give rise to the occasion by which plaintiff's injury was made possible... . There is no allegation that their actions violated a traffic regulation and the record shows that the tow truck driver was in the process of securing the vehicle to tow it off the expressway when the accident happened. Plaintiff's assertion that the accident would not have occurred if the tow truck driver had placed additional flares or moved the ones that the police officers had placed, displayed cones or removed the Jetta from the location sooner is speculative and insufficient to raise an issue of fact, because it is undisputed that Ripoli fell asleep before his vehicle rear-ended the Jetta ...". ***McLean v. Ripoli*, 2018 N.Y. Slip Op. 00461, First Dept 1-25-18**

PERSONAL INJURY, LANDLORD-TENANT.

OUT OF POSSESSION LANDLORDS NOT LIABLE FOR SIDEWALK SLIP AND FALL.

The First Department, reversing Supreme Court, determined defendant out-of-possession landlords' motion for summary judgment should have been granted in this sidewalk slip and fall case: "Defendants cannot be held liable for injuries allegedly sustained by plaintiff when he slipped on snow and ice on the sidewalk adjacent to their property, because they were out-of-possession landlords with no contractual obligation to keep the sidewalks clear of snow and ice, and the pres-

ence of snow and ice does not constitute a significant structural or design defect ...". **Xiang Fu He v. Troon Mgt., Inc., 2018 N.Y. Slip Op. 00382, First Dept 1-23-18**

PERSONAL INJURY, VEHICLE AND TRAFFIC LAW.

PLAINTIFF PEDESTRIAN ENTITLED TO SUMMARY JUDGMENT IN THIS BUS-PEDESTRIAN ACCIDENT CASE, EVEN IF THE CROSSING LIGHT CHANGED WHILE PLAINTIFF WAS CROSSING HE WAS ENTITLED TO PROCEED.

The First Department, reversing Supreme Court, determined plaintiff's motion for summary judgment in this bus-pedestrian accident case should have been granted. The court noted that even if the cross signal changed while plaintiff was crossing, he was permitted to proceed once he started crossing: "Plaintiff established his entitlement to partial summary judgment through his testimony that he was crossing the intersection within the crosswalk and with the light in his favor, when defendants' bus struck him while making a left turn ... . The testimony of defendant bus driver does not contradict plaintiff's testimony that he was in the crosswalk, since the driver did not see plaintiff until the moment of impact. The driver's observation of a white crossing signal before commencing his turn also does not contradict plaintiff's testimony that he started crossing with the light in his favor. ... The court should not have considered the videotape footage defendants provided as defendants neither authenticated it nor even showed that it had any relevance to the accident at issue ... . It indicates, at most, that it was raining. Even if it showed, as defendants claim, that the pedestrian cross signal changed as plaintiff was crossing, that would not help defendants, as plaintiff was permitted to proceed across the avenue, once he started crossing with the signal in his favor (see Vehicle and Traffic Law § 1112 [b], [c]...)." ***Torres v. Werner Bus Lines, Inc.*, 2018 N.Y. Slip Op. 00483, First Dept 1-25-18**

REAL ESTATE, EVIDENCE.

PLAINTIFF ACTED AS A REAL ESTATE BROKER FOR BOTH BUYER AND SELLER, DUAL AGENCY WAS NOT DISCLOSED, PLAINTIFF NOT ENTITLED TO COMMISSION, STATEMENT IN COMPLAINT THAT PLAINTIFF WAS A BROKER WAS A JUDICIAL ADMISSION, PRECLUDING ANY CLAIM PLAINTIFF WAS MERELY A FINDER.

The First Department determined plaintiff Zaccaro was a real estate broker, not a finder, and was not entitled to a real estate commission because plaintiff acted as a broker for the buyer and the seller (impermissible dual agency without full disclosure): "Plaintiffs' argument that Zaccaro was merely a finder instead of a real estate broker is unavailing. The amended complaint, which was verified by Zaccaro's president, alleges that plaintiffs were [the buyer's] real estate brokers. This statement constitutes a formal judicial admission ... . Furthermore, a finder has no obligation to negotiate the real estate transaction in order to obtain its fee ... . Here, the amended complaint indicates that plaintiffs were obligated to negotiate the sale of the premises. In particular, the amended complaint alleges that [the buyer] authorized plaintiffs 'to act as the licensed real estate brokers ...'. ... Plaintiffs' contention that the seller was not injured by Zaccaro's dual agency is unavailing. Where, as here, the duty of undivided loyalty is breached, plaintiff broker forfeits its right to a commission, 'regardless of whether damages were incurred' ...". ***P. Zaccaro, Co., Inc. v. DHA Capital, LLC*, 2018 N.Y. Slip Op. 00458, First Dept 1-25-18**

SECOND DEPARTMENT

CIVIL PROCEDURE.

INITIAL ATTEMPT TO SERVE DEFENDANT WAS TIMELY BUT DEFECTIVE, EVEN THOUGH THE STATUTE OF LIMITATIONS HAD RUN, SUPREME COURT PROPERLY GRANTED PLAINTIFF AN EXTENSION OF TIME TO EFFECT SERVICE.

The Second Department determined Supreme Court properly allowed plaintiff to extend the time to serve the summons and complaint. The initial service was timely but defective. In the mean time, the statute of limitations had run: "Generally, service of a summons and complaint must be made within 120 days after the commencement of the action (see CPLR 306-b). If service is not made within the time provided, the court, upon motion, must dismiss the action without prejudice, or 'upon good cause shown or in the interest of justice, extend the time for service' ... . 'An extension of time for service is a matter within the court's discretion' ... . Here, while the action was timely commenced, the statute of limitations had expired when the plaintiff cross-moved for relief, the timely service of process was subsequently found to have been defective, and the defendant had actual notice of the action within 120 days of commencement of the action... . Moreover, there was no prejudice to the defendant attributable to the delay in service ...". ***Chan v. Zoubarev*, 2018 N.Y. Slip Op. 00402, Second Dept 1-24-18**

CIVIL PROCEDURE.

PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION PROPERLY DENIED, BUT COMPLAINT SHOULD NOT HAVE BEEN DISMISSED SUA SPONTE.

The Second Department, modifying Supreme Court, determined defendant's motion for a preliminary injunction was properly denied, but Supreme Court should not have dismissed the complaint sua sponte. The underlying action sought a

declaratory judgment that plaintiff was the owner of shares of stock allocated to a cooperative apartment. The plaintiff moved for a preliminary injunction in the pending holdover proceeding: "To obtain a preliminary injunction, the moving party must demonstrate (1) a likelihood of success on the merits, (2) irreparable injury absent a preliminary injunction, and (3) that the equities balance in his or her favor (see CPLR 6301...). "The decision to grant or deny a preliminary injunction lies within the sound discretion of the Supreme Court" ... . Here, the plaintiff did not sustain his burden of establishing a likelihood of success on the merits. However, inasmuch as there was neither notice to the parties by the Supreme Court nor an application by the defendant seeking dismissal, it was error for the court to, sua sponte, direct the dismissal of the complaint in this action ...". ***Gonzalez v. 231 Maujer St., HDFC*, 2018 N.Y. Slip Op. 00412, Second Dept 1-24-18**

CIVIL PROCEDURE, ATTORNEYS, PRIVILEGE.

THE DOCUMENTS SOUGHT IN DISCOVERY WERE PROTECTED BY THE COMMON INTEREST PRIVILEGE, AN EXCEPTION TO THE USUAL RULE RE: WAIVER OF ATTORNEY-CLIENT PRIVILEGE.

The Second Department determined Supreme Court properly denied the motion to compel discovery because the requested documents were protected by the common interest privilege (an exception to the usual rule re: waiver of the attorney-client privilege): "The common-interest privilege is an exception to the traditional rule that the presence of a third party waives the attorney-client privilege ... . To fall within that exception, the privileged communication must be for the purpose of furthering a legal, as opposed to a commercial, interest common to the client and the third party... . 'The legal interest that those parties have in common must be identical (or nearly identical), as opposed to merely similar' ... . Moreover, the communication must 'relate to litigation, either pending or anticipated, in order for the exception to apply' ...". ***Saint Annes Dev. Co. v. Russ*, 2018 N.Y. Slip Op. 00451, Second Dept 1-24-18**

CONTRACT LAW.

QUESTIONS OF FACT WHETHER PAYMENT WAS PURSUANT TO AN ORAL CONTRACT, THEREBY TAKING THE CONTRACT OUT OF THE STATUTE OF FRAUDS.

The Second Department, reversing Supreme Court, determined there was a question of fact whether a payment was made on an oral contract, thereby taking the contract out of the statute of frauds. The written contract (Assignment of Units) mentioned only a transfer of ownership of Emerson Associates. But there was a question of fact whether the payment was actually made pursuant to an oral contract to transfer ownership of Emerson Partners: "[Defendant] raised triable issues of fact as to whether [plaintiffs] orally agreed to transfer their ownership interests in Emerson Partners and whether ... such an agreement was not invalid under the statute of frauds because ... the payments of $230,000 ... constituted partial performance unequivocally referable to the oral agreement ... . [T]here was no evidence demonstrating that the alleged oral agreement had 'absolutely no possibility in fact and law' of being performed within a year ...". ***Meagher v. Doscher*, 2018 N.Y. Slip Op. 00420, Second Dept 1-24-18**

CRIMINAL LAW.

YOUTHFUL OFFENDER DETERMINATION MUST BE MADE IN EVERY CASE WHERE DEFENDANT IS ELIGIBLE, CARE REMITTED FOR THAT DETERMINATION.

The Second Department noted that the sentencing court did not make a youthful offender determination, which must be made in every case where a defendant is eligible. The matter was remitted for the determination: "CPL 720.20(1) requires a court to make a youthful offender determination in every case where the defendant is eligible, even where the defendant fails to request it ... . Here, as the People correctly concede, the record does not demonstrate that the Supreme Court made such a determination. Accordingly, we vacate the sentence imposed, and remit the matter to the Supreme Court, Kings County, for resentencing after making this determination ... . We express no opinion as to whether the court should afford youthful offender status to the defendant." ***People v. Keizer*, 2018 N.Y. Slip Op. 00438, Second Dept 1-24-18**

FORECLOSURE, CIVIL PROCEDURE.

THE DISMISSAL OF THE 2009 FORECLOSURE ACTION DID NOT CONSTITUTE A REVOCATION OF THE ACCELERATION OF THE DEBT, THE STATUTE OF LIMITATIONS TRIGGERED BY THE 2009 ACTION EXPIRED AND THE PROPERTY OWNER IS ENTITLED TO A DISCHARGE OF THE MORTGAGE.

The Second Department, reversing Supreme Court, determined that a 2009 foreclosure action accelerated the debt and therefore started the statute of limitations. The dismissal of the 2009 action did not revoke the election to accelerate. The current owner of the property was therefore entitled to a discharge of the mortgage: "The filing of the summons and complaint in the 2009 action was sufficient to accelerate the mortgage ... . Contrary to the Supreme Court's determination, although a lender may revoke its election to accelerate the mortgage, the dismissal of the prior foreclosure action did not constitute an affirmative act by the lender revoking its election to accelerate, and the record is barren of any affirmative act of revocation occurring during the six-year limitations period subsequent to the initiation of the 2009 action ...". ***MSMJ Realty, LLC v. DLJ Mtge. Capital, Inc.*, 2018 N.Y. Slip Op. 00422, Second Dept 1-24-18**

FORECLOSURE, CIVIL PROCEDURE.

MOTION TO VACATE A REFEREE'S DEED PROPERLY DENIED, A SALE PRICE LOWER THAN MARKET VALUE DOES NOT INVALIDATE THE SALE, PURPORTED EVIDENCE OF A CONSPIRACY AMONG THE BIDDERS WAS IMPROPERLY SUBMITTED FOR THE FIRST TIME IN REPLY PAPERS.

The Second Department determined the motion to vacate a referee's deed in foreclosure was properly denied. The appellant's alleged that price at which the property sold was too low and was the result of a conspiracy among the bidders. The court noted that foreclosed properties routinely sell below market value and the proof of the alleged conspiracy was improperly submitted in reply papers: "A court may exercise its inherent equitable power to ensure that a foreclosure sale conducted pursuant to a judgment of foreclosure "is not made the instrument of injustice" ... and, therefore, may set aside a foreclosure sale ' where fraud, collusion, mistake, or misconduct casts suspicion on the fairness of the sale'... . Absent such conduct, the mere inadequacy of price is an insufficient reason to set aside a sale unless the price is so inadequate as to shock the court's conscience ... . '[I]n most instances,' the fair market value of a mortgaged property 'will exceed the winning bid' on that property at a foreclosure sale ...". ***Northern Blvd Corona, LLC v. Northern Blvd Prop.*, LLC, 2018 N.Y. Slip Op. 00428, Second Dept 1-24-18**

FORECLOSURE, CIVIL PROCEDURE.

ALTHOUGH THE JUDGMENT OF FORECLOSURE MISTAKENLY ORDERED THE SALE OF MULTIPLE LOTS, WHICH WAS IMPOSSIBLE BECAUSE A SINGLE BUILDING SPANNED THE THREE LOTS, THE MOTION COURT PROPERLY DEEMED THE PROPERTY TO HAVE BEEN SOLD AS A SINGLE LOT, COURT HAS THE POWER TO CORRECT A MISTAKE, SUA SPONTE, WHERE THERE IS NO PREJUDICE.

The Second Department determined the motion court properly merged three lots into one after the foreclosure sale because the building on the property spanned all three lots. The appellants sought to vacate the referee's deed because the foreclosure judgment directed the sale "in multiple parcels or in bulk" which was impossible: "CPLR 2001 permits a court, at any stage of an action, to disregard a party's mistake, omission, defect, or irregularity if a substantial right of a party is not prejudiced... . In addition, CPLR 5019(a) gives trial courts the discretion to cure mistakes, defects, and irregularities that do not affect substantial rights of parties... . Here, the appellants failed to establish that a substantial right of theirs was prejudiced by the court's sua sponte, inter alia, deeming the property to have been sold as one lot ... ". ***Northern Blvd Corona, LLC v. Northern Blvd Prop., LLC*, 2018 N.Y. Slip Op. 00427, Second Dept 1-24-18**

FORECLOSURE, EVIDENCE.

BANK DID NOT DEMONSTRATE COMPLIANCE WITH THE NOTICE PROVISIONS OF RPAPL 1304 IN THIS FORECLOSURE PROCEEDING, BANK'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined the bank's (Wilmington's) motion for summary judgment should have been denied in this foreclosure proceeding. The bank's papers did not demonstrate compliance with the notice provisions of Real Property Actions and Proceedings Law (RPAPL) 1304: "Wilmington submitted an affidavit of the managing director of its loan servicer, who attested to the defendant's default in payment. While he attested to the mailing of a notice of default in accordance with the mortgage and a 90-day notice in accordance with RPAPL 1304, his affidavit did not contain a statement that he was familiar with JP Morgan's mailing practices and procedures, and therefore did not establish proof of a standard office practice and procedure designed to ensure that items are properly addressed and mailed ...". ***J.P. Morgan Mtge. Acquisition Corp v. Kagan*, 2018 N.Y. Slip Op. 00416, Second Dept 1-24-18**

FORECLOSURE, EVIDENCE, CIVIL PROCEDURE.

BANK'S MOTION FOR LEAVE TO ENTER A DEFAULT JUDGMENT WAS SUPPORTED BY DOCUMENTS VERIFIED OR AFFIRMED BY PERSONS WITHOUT FIRST-HAND KNOWLEDGE, MOTION WAS PROPERLY DENIED BUT COMPLAINT SHOULD NOT HAVE BEEN DISMISSED SUA SPONTE.

The Second Department determined the bank's motion for leave to enter a default judgment in this foreclosure proceeding was properly denied because the motion relied on documents verified and affirmed by counsel and an affidavit by a person with no first-hand knowledge of the facts asserted. The Second Department noted that the bank's motion to amend the caption, by substituting named parties for "John Does" should have been granted and the complaint should not have been dismissed sua sponte: "... [T]he plaintiff failed to submit the requisite proof of the facts constituting the claim ... 'While a verified complaint may be used as the affidavit of the facts constituting the claim, it must contain evidentiary facts from one with personal knowledge'... . ' [A] pleading verified by an attorney pursuant to CPLR 3020 (d) (3)[, and not by someone with personal knowledge of the facts,] is insufficient to establish its merits'... . On its motion, the plaintiff submitted the complaint, verified only by counsel, and an affirmation of counsel, with counsel having no personal knowledge of the facts. The plaintiff also submitted an affidavit of a representative of the loan servicer attesting to a default, but failing to address the relevant questions relating to the fact that the mortgagor did not own the subject property, whether the relevant documents

should be reformed, or whether an equitable lien or mortgage should be imposed." ***First Franklin Fin. Corp. v. Alfa*u, 2018 N.Y. Slip Op. 00409, Second Dept 1-24-18**

INSURANCE LAW, NEGLIGENCE.

INSURANCE BROKER DID NOT PRESENT SUFFICIENT EVIDENCE THE AMOUNT OF UNINSURED MOTORIST COVERED REQUESTED BY THE PLAINTIFF WAS PROCURED, BROKER'S MOTION FOR SUMMARY JUDGMENT IN THIS NEGLIGENCE ACTION SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined that the defendant insurance broker's motion for summary judgment should not have been granted. Plaintiff alleged, under a negligence theory, that the broker failed to procure sufficient uninsured motorist coverage. The papers submitted by the broker failed to demonstrate the amount of coverage requested was procured. Therefore the motion should have been denied without consideration of the opposing papers: "An insurance broker may be held liable under theories of breach of contract or negligence for failing to procure insurance upon a showing by the insured that the agent or broker failed to discharge the duties imposed by the agreement to obtain insurance, either by proof that it breached the agreement or because it failed to exercise due care in the transaction ... . Here, the defendants failed to establish their prima facie entitlement to judgment as a matter of law because they submitted insufficient evidence that they procured the amount of coverage that the plaintiff engaged them to procure ...". ***Giamundo v. Cleveland Dunn 2nd*, 2018 N.Y. Slip Op. 00411, Second Dept 1-24-18**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

HOMEOWNER'S EXEMPTION TO LABOR LAW § 241(6) APPLIED, NO EVIDENCE HOMEOWNERS SUPERVISED PLAINTIFF'S WORK, HOMEOWNERS' MOTION FOR SUMMARY JUDGMENT PROPERLY GRANTED.

The Second Department determined the homeowner's exemption from Labor Law § 241(6) applied and the complaint was properly dismissed. The fact that the homeowner had worked in the construction field and had excess insurance coverage did not raise a question of fact whether the homeowner supervised plaintiff's work: "Contrary to the plaintiff's contention, the Supreme Court properly found that the statutory exemption contained in Labor Law § 241(6) applied to the [defendants]. Labor Law § 241(6) exempts from liability 'owners of one and two-family dwellings who contract for but do not direct or control the work' ... . The phrase 'direct or control' is 'construed strictly and refers to the situation where the owner supervises the method and manner of the work' ... . Here, it is undisputed that the [defendants'] house was a one-family dwelling. Moreover, the [defendants] established, prima facie, that they did not direct or control the work ... . In opposition ... , the plaintiff failed to raise a triable issue of fact ... . Given the lack of evidence that the [defendants] supervised the method and manner of the work, the limited evidence that [the defendant husband] may have previously worked in the construction industry and that the [defendants] had excess insurance coverage does not create a triable issue of fact ...". ***Hicks v. Aibani*, 2018 N.Y. Slip Op. 00413, Second Dept 1-24-18**

MEDICAL MALPRACTICE, PERSONAL INJURY, CONTRACT LAW.

RELEASE WHICH PERTAINED TO MEDICAL CENTER AND ANY JOINT TORTFEASORS DID NOT PRECLUDE A MEDICAL MALPRACTICE ACTION AGAINST SURGEONS WHO WERE NOT EMPLOYEES OF THE MEDICAL CENTER, SUPREME COURT REVERSED.

The Second Department, reversing Supreme Court, determined that a release which related to a medical center and any joint tortfeasors did not preclude a medical malpractice action against doctors who were not employees of the medical center. The plaintiff had undergone surgery for a deviated septum. During the surgery plaintiff's teeth were damaged by the anesthesiologist, an employee of the medical center. The medical center settled with the plaintiff and plaintiff signed a release. The medical malpractice action against the surgeons was not related to the damaged teeth: "... [T]he release is unambiguously limited to tortfeasors jointly liable with the Medical Center. 'At common law the joint and several liability imposed on joint tort-feasors was indivisible, and any one of the joint tort-feasors was liable to the injured party for the entire damage'... . A hospital is not vicariously liable for the malpractice of independently retained doctors who are not employees of the hospital or are not held out as agents of the hospital ... . Here, the defendants do not contend that the defendant doctors were employees of the Medical Center, or that they held themselves out as agents of the Medical Center. As such, there would be no basis for joint liability with the Medical Center. Further, the injuries claimed in this action are different from those claimed against and settled with the Medical Center. The lost crown and broken teeth caused by the anesthesiologist, an employee of the Medical Center, are completely distinct from the damages claimed in this action." ***Hoffmann v. Horn*, 2018 N.Y. Slip Op. 00414, Second Dept 1-24-18**

PERSONAL INJURY, LANDLORD-TENANT.

OUT OF POSSESSION LANDLORD DID NOT DEMONSTRATE A LACK OF ACTUAL OR CONSTRUCTIVE KNOWLEDGE OF A LEAKING WATER HEATER IN THIS SLIP AND FALL CASE, LANDLORD'S MOTION FOR SUMMARY JUDGMENT PROPERLY DENIED.

The Second Department determined the defendant out of possession landlord's motion for summary judgment in this slip and fall case was properly denied. The lease imposed a duty to repair (here plaintiff slipped on water from a leaking water heater) and the landlord's papers did not demonstrate a lack of actual or constructive notice: "An out-of-possession landlord and its agent are not liable for injuries caused by dangerous conditions on leased premises in the absence of a statute imposing liability, a contractual provision placing the duty to repair on the landlord, or a course of conduct by the landlord giving rise to a duty ... . Here, the defendants failed to establish their prima facie entitlement to judgment as a matter of law dismissing the complaint. They submitted a copy of the lease, which established that Felice was required to remedy 'any defective condition in any plumbing, heating system or electrical lines located in the demised premises' following prompt notice by the tenant. The defendants' submissions, however, failed to eliminate all triable issues of fact, including whether they had actual or constructive notice of the allegedly defective hot water heater, thereby placing upon them the duty to repair it pursuant to the lease. Accordingly, the motion was properly denied, regardless of the sufficiency of the plaintiff's opposition papers ...". ***Irizarry v. Felice Realty Corp.*, 2018 N.Y. Slip Op. 00415, Second Dept 1-24-18**

REAL PROPERTY ACTIONS AND PROCEEDINGS LAW (RPAPL).

ALTHOUGH THE CLADDING AND DRIP EDGE PLAINTIFF INSTALLED ON A PARTY WALL WAS A TRESPASS, SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED ON THE DEFENDANT'S REQUEST FOR AN INJUNCTION DIRECTING THE REMOVAL OF THE CLADDING AND DRIP EDGE.

The Second Department determined Supreme Court properly found that cladding and a drip edge plaintiff added to a party wall constituted a trespass. But Supreme Court should not have granted summary judgment on the issue whether defendant was entitled to an injunction directing plaintiffs to remove the cladding and drip edge: "... [T]he Supreme Court erred in granting summary judgment to the defendant on the issue of whether it was entitled to an injunction directing the plaintiffs to remove the cladding and drip edge. RPAPL 871(1) provides that an 'action may be maintained by the owner of any legal estate in land for an injunction directing the removal of a structure encroaching on such land. Nothing herein contained shall be construed as limiting the power of the court in such an action to award damages in an appropriate case in lieu of an injunction or to render such other judgment as the facts may justify.' In order to obtain injunctive relief pursuant to RPAPL 871(1), a party is 'required to demonstrate not only the existence of [an] encroachment, but that the benefit to be gained by compelling its removal would outweigh the harm that would result to [the encroaching party] from granting such relief' ... . Here, the defendant failed to demonstrate the absence of any triable issues of fact concerning whether the balance of equities weighed in its favor ...". ***Kimball v. Bay Ridge United Methodist Church*, 2018 N.Y. Slip Op. 00417, Second Dept 1-24-18**

THIRD DEPARTMENT

DISCIPLINARY HEARINGS (INMATES).

FINDING THAT PETITIONER POSSESSED A WEAPON FOUND IN A CUBE SHARED WITH OTHER INMATES NOT SUPPORTED BY SUBSTANTIAL EVIDENCE, DETERMINATION ANNULLED.

The Third Department determined the finding that petitioner possessed a weapon which was found in a cube shared with other inmates was not supported by substantial evidence: "Petitioner denied any knowledge of the weapon, and the record reflects that he shared the cube with other inmates. The cube was separated by a divider into two living areas, with petitioner and another inmate sharing one side and at least one other inmate housed on the other side. The correction officer who authorized the search, and was present when the weapon was found, testified that the weapon was discovered under the center of the divider. According to the officer, all the inmates housed in the cube had access to that area because the divider was movable and it could be easily lifted. The correction officer who discovered the weapon testified that it was located closer to the side of the divider where petitioner and another inmate were housed and that it would have been more difficult for inmates housed on the other side of the divider to place the weapon there. There is no evidence in the record to support a finding that petitioner possessed the weapon and, in our view, the evidence presented does not eliminate either the inmates housed on the other side of the divider or the inmate who shared petitioner's side from being responsible for possessing it. Further, under the circumstances presented here, 'we do not believe that a reasonable inference can be made that petitioner possessed this contraband simply because he had access to the area where the contraband was found and that it, to some extent, was under his control' ...". ***Matter of Carter v. Annucci*, 2018 N.Y. Slip Op. 00501, Third Dept 1-25-18**

DISCIPLINARY HEARINGS (INMATES).

HEARING OFFICER DID NOT MAKE AN ADEQUATE INQUIRY TO DETERMINE WHY AN INMATE WITNESS WHO HAD PREVIOUSLY AGREED TO TESTIFY LATER REFUSED, NEW HEARING ORDERED.

The Third Department determined petitioner was entitled to a new hearing because the hearing officer did not make an adequate inquiry into the reasons an inmate witness who had previously agreed to testify later refused: "Generally, we have held that, in situations where an inmate witness who had previously agreed to testify but later refuses without giving a reason, 'it is incumbent upon the Hearing Officer to conduct a personal inquiry unless a genuine reason for the refusal is apparent from the record and the Hearing Officer makes a sufficient inquiry into the facts surrounding the refusal to ascertain its authenticity' ... . While the personal inquiry by a hearing officer may be limited in situations where, as here, the requested witness is housed in a different correctional facility, the record does not reflect that the Hearing Officer made any attempt to personally interview the witness to confirm the reason for the refusal, to obtain a written refusal form from the witness containing such a reason or to call the correction officer who interviewed the witness to testify at the hearing. In our view, petitioner's regulatory right to call this witness was not adequately protected and that part of the determination finding petitioner guilty of assault, refusing to obey a direct order and possessing a weapon, as charged in the first misbehavior report, must be annulled and remitted for a new hearing on these charges ...". ***Matter of Radcliffe v. Annucci*, 2018 N.Y. Slip Op. 00505, Third Department 1-25-18**

FAMILY LAW.

CHILD BORN TO SAME-GENDER MARRIED COUPLE AFTER ARTIFICIAL INSEMINATION IS ENTITLED TO THE PRESUMPTION OF LEGITIMACY, DOCTRINE OF EQUITABLE ESTOPPEL REQUIRED DISMISSAL OF THE SPERM DONOR'S PATERNITY PETITION.

The Third Department, in a full-fledged opinion by Justice Mulvey, reversing Family Court, determined: (1) the presumption of legitimacy applies to a child born to a same-gender married couple after artificial insemination; (2) the presumption was not rebutted; (3) ordering a paternity test was not in the best interests of the child; and (4) the doctrine of equitable estoppel required the dismissal of the paternity petition. The mother inseminated herself with sperm with the consent of the donor. The parties had agreed the sperm donor waived any claims of paternity and any right to custody or visitation. The facts that the written agreement was destroyed and did not comply with the requirements of Domestic Relations Law 73 (formalities required for artificial insemination) did not preclude proof of legitimacy by other means. The opinion is comprehensive and too detailed to fairly summarize here: "While a workable rubric has not yet been developed to afford children the same protection regardless of the gender composition of their parents' marriage, and the Legislature has not addressed this dilemma, we believe that it must be true that a child born to a same-gender married couple is presumed to be their child and, further, that the presumption of parentage is not defeated solely with proof of the biological fact that, at present, a child cannot be the product of same-gender parents ... . If we were to conclude otherwise, children born to same-gender couples would be denied the benefit of this presumption without a compelling justification. * * * ... [I]nvocation of the doctrine of equitable estoppel is warranted here 'to protect the status interests of [the] child,' who was born to married parents and thereafter lived with them in a family unit ... . While the child, now over three years old, was an infant when the paternity proceeding was commenced, we nonetheless find that petitioner's representations in donating sperm combined with his delay in asserting parental rights compel against ordering a test. While young, the child's 'image of her family' — consisting of two mothers — would be devastated by an outsider, who merely donated sperm, belatedly asserting parental rights ...". ***Matter of Christopher YY. v. Jessica ZZ.*, 2018 N.Y. Slip Op. 00495, Third Dept 1-25-18**

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