CasePrepPlus

June 8, 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

CIVIL PROCEDURE.

PLAINTIFF MADE A SUFFICIENT START DEMONSTRATING NEW YORK HAS JURISDICTION OVER THE DEFENDANTS TO WARRANT JURISDICTIONAL DISCLOSURE AND A HEARING.

The First Department, reversing Supreme Court, determined plaintiff had made a sufficient showing that New York may have jurisdiction over the defendants to warrant jurisdictional disclosure: "... [P]laintiff made a 'sufficient start' in establishing that New York courts have jurisdiction over defendants to warrant jurisdictional disclosure and a hearing ... . On his motion to renew, plaintiff submitted sufficient evidence to warrant a finding of jurisdiction on the papers alone (... CPLR 2221[e], [f]). The evidence shows that plaintiff was hired by defendants, a corporation and two individuals, all residents of Louisiana, after an in-person meeting in New York and that defendants engaged in extensive communications with him by telephone, email, in-person meetings, and document exchanges for two years while he was in New York representing them in various matters." ***Mischel v. Safe Haven Enters., LLC*, 2018 N.Y. Slip Op. 03902, First Dept 5-31-18**

CRIMINAL LAW, APPEALS.

PEOPLE CONCEDED ROBBERY THIRD SHOULD HAVE BEEN SUBMITTED TO THE JURY AS A LESSER INCLUDED OFFENSE, NO NEED FOR A NEW TRIAL, CONVICTION REDUCED.

The First Department, reversing (modifying) defendant's conviction of robbery second, determined Supreme Court should have submitted robbery third to the jury as a lesser included offense. But because the People agreed that the conviction could be reduced to robbery third a new trial was not necessary: "There was a reasonable view of the evidence supporting defendant's request for submission of third-degree robbery as a lesser included offense, and we have considered and rejected the People's argument that the issue is unpreserved. The appropriate remedy for this type of error would normally be a new trial. However, the People's concession that, if we reach this error, the conviction should be reduced to third-degree robbery renders a new trial unnecessary because the modification provides defendant with a greater remedy than he would have received had the trial court submitted that charge to the jury ...". ***People v. Cabassa*, 2018 N.Y. Slip Op. 03810, First Dept 5-29-18**

CRIMINAL LAW, ATTORNEYS.

COURT DID NOT CONDUCT SEARCHING INQUIRY INTO DEFENDANT'S REQUEST TO PROCEED PRO SE, CONVICTION REVERSED.

The First Department, reversing defendant's conviction, determined that the court's inquiry into defendant's request to proceed pro se was inadequate: "The knowing, voluntary, and intelligent waiver of the right to counsel by a defendant who seeks to proceed pro se requires a 'searching inquiry' in which the court must communicate to the defendant both the 'risks inherent in proceeding pro se' and 'the singular importance of the lawyer in the adversarial system of adjudication' ... . Neither a defendant's expression of a strong desire to proceed pro se, nor elicitation of information demonstrating the defendant might be relatively capable of doing so, is a substitute for the two above-cited essential components of a searching inquiry, which were all but completely absent here. The relevant portion of the trial court's colloquy with defendant on this subject was essentially limited to warning him that self-representation was a 'big mistake' and that the court had seen many pro se defendants convicted after trial. Even when the record is viewed as a whole, the required inquiry does not appear. Defendant had made several requests for self-representation before a calendar court. However, in each instance the court denied the request on the basis of its initial inquiry about defendant's understanding of the charges, without reaching the stage of the required pro se inquiry at issue on appeal." ***People v. Herbin*, 2018 N.Y. Slip Op. 03811, First Dept 5-29-18**

EMPLOYMENT LAW, LABOR LAW, PRIVILEGE, CIVIL PROCEDURE.

PLAINTIFF IN THIS WHISTLEBLOWER ACTION ENTITLED TO DISCOVER MEDICAL RECORDS WHICH ARE PROTECTED UNDER THE HEALTH INSURANCE PORTABILITY AND ACCOUNTABILITY ACT AND THE PUBLIC HEALTH LAW.

The First Department determined plaintiff in this whistleblower action was entitled to discover medical records protected by the Health Insurance Portability and Accountability Act (HIPAA) and the Public Health Law (PHL). Plaintiff alleged he was fired, in violation Labor Law 740, in retaliation for complaining that defendant's employees procured organs without performing tests and from people who still showed signs of life: "The records concerning these four individuals are material and necessary to plaintiff's claim (see CPLR 3101[a]). To prevail on a claim for retaliatory termination in violation of Labor Law § 740(2), plaintiff must prove that he was fired because he objected to or threatened to disclose a practice that was in violation of a law or regulation ... . The subject medical records will allegedly show that defendant pressured doctors to declare people dead in violation of regulations regarding the making of such determinations ... . [B]ecause the subject disclosure would be made in the course of a judicial proceeding and pursuant to a qualified protective order, it is authorized under HIPAA ... . PHL § 4351(8) renders defendant's documents subject to the protections of the physician-patient privilege set forth at CPLR 4504. This privilege is personal to the patient and is not terminated by death ... . It has not been expressly or implicitly waived in this case by the donors' next of kin ... . However, plaintiff demonstrated that the information in the medical records is material and necessary to his claim and that 'the circumstances warrant overcoming the privilege and permitting discovery of the records with all identifying patient information appropriately redacted to protect patient confidentiality' ... . Allowing disclosure under these circumstances is consistent with the public policy underlying the whistleblower statute, i.e., to encourage employees to report hazards to supervisors and the public ...". ***McMahon v. New York Organ Donor Network*, 2018 N.Y. Slip Op. 03820, First Dept 5-29-18**

FAMILY LAW, ATTORNEYS.

COURT SHOULD HAVE TAKEN INTO CONSIDERATION THE FUTURE EARNING CAPACITY OF THE PARTIES IN CONNECTION WITH MOTHER'S MOTION FOR ATTORNEY'S FEES, MOTHER ENTITLED TO A HEARING.

The First Department, reversing Family Court, determined mother was entitled to a hearing on her motion for attorney's fees in this divorce action (mother sought $174,000). Family Court had dismissed mother's motion. The First Department held that Family Court should have looked at the future earning capacity of the parties rather than their earning capacity at the time of the decision: "The purpose of awarding counsel fees is to further the objectives of 'litigational parity' and prevent a more affluent spouse from considerably wearing down the opposition ... . In its dismissal of the mother's motion for counsel fees, the court unduly relied upon the financial circumstances of the parties at the time it rendered its decision rather than weighing the historical and future earning capacities of both parties ... . Here, although the father was unemployed at the time the court's decision was rendered, and the mother had secured employment, the father earned considerably more than the mother during the course of their relationship and has significantly more expected earning capacity than the mother. Indeed, the financial and tax documents in the record support such a conclusion. The father, however, is entitled to a hearing so that the relative financial positions of the parties and the value and extent of the counsel fees requested can be examined ...". ***Matter of Brookelyn M. v. Christopher M.*, 2018 N.Y. Slip Op. 03801, First Dept 5-29-18**

LABOR LAW-CONSTRUCTION LAW.

PLAINTIFF LOST HIS BALANCE CARRYING A PIPE ON A RAMP, INCIDENT NOT COVERED BY LABOR LAW § 240(1).

The First Department, reversing (modifying) Supreme Court, determined plaintiff's Labor Law § 240(1) cause of action should have been dismissed. Plaintiff, while carrying a heavy pipe on a ramp, lost his balance and was struck by the pipe: "Plaintiff's testimony established that he was not exposed to the type of elevation-related hazard contemplated by the statute. The height differential of 6 to 10 inches mediated by the ramp did not constitute a physically significant elevation differential covered by the statute ... . Also, as the ramp was serving as a passageway, as opposed to the 'functional equivalent' of a safety device enumerated under the statute, it did not fall within the purview of the statute ... . Further, the impetus for the pipe's descent was plaintiff's loss of balance, rather than the direct consequence of the force of gravity ...". ***Jackson v. Hunter Roberts Constr. Group, LLC*, 2018 N.Y. Slip Op. 03805, First Dept 5-29-18**

LANDLORD-TENANT, PERSONAL INJURY.

OUT-OF-POSSESSION LANDLORD WITH RIGHT OF ENTRY TO INSPECT OR REPAIR DID NOT HAVE A DUTY TO REPAIR THE DEFECT AT ISSUE, DEFECT WAS NOT STRUCTURAL AND DID NOT VIOLATE A STATUTORY SAFETY PROVISION.

The First Department determined repair of the type of defect at issue was not the responsibility of the out-of-possession landlord: "Plaintiff seeks damages for injuries he sustained when one of the cellar doors he had opened to take garbage up to the sidewalk from the restaurant where he was employed snapped back and struck him on the back of the head. ... Although defendant Foreign Development Service, Ltd. was an out-of-possession landlord with the right to reenter the leased

premises to inspect or repair, the alleged defect in the cellar doors, i.e., rusty hinges and no device, such as a bar, to hold the doors open, was not a structural defect contrary to a specific statutory safety provision ...". ***Cuthbert v. Foreign Dev. Serv., Ltd.*, 2018 N.Y. Slip Op. 03812, First Dept 5-29-18**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

QUESTION OF FACT WHETHER DEFENDANT, WHICH COULD STOP WORK FOR UNSAFE PRACTICES, WAS A STATUTORY AGENT OF THE OWNER OR CONSTRUCTION MANAGER FOR PURPOSES OF LIABILITY UNDER LABOR LAW §§ 240(1) AND 241(6).

The First Department, over a dissent, affirmed the denial of summary judgment to plaintiff on his Labor Law §§ 240(1) and 241(6) causes of action. The court discussed the concept of a "statutory agent" of an owner or general contractor: "Labor Law §§ 240(1) and 241(6) impose absolute liability on 'contractors and owners and their agents' for worker injuries on construction sites... . CRSG, as site safety consultant, was neither an owner nor general contractor on the project. Thus, whether CRSG is subject to the Labor Law is dependent on whether it was an 'agent' of the owners or [construction manager] at the site. To hold a defendant liable under the Labor Law as a 'statutory agent' of either the owner or the general contractor, it must be shown that the defendant had the 'authority to supervise and control' the injury-producing work ... . The determinative factor is whether the defendant had the right to exercise control over the work, not whether it actually exercised that right ... . Where the owner or general contractor delegates to a third party the duty to conform to the requirements of the Labor Law, that third party becomes the statutory agent ... . The authority of DeSimone, as an employee of CRSG, to stop work in the event of unsafe practices raises an issue of fact as to whether CRSG is a 'statutory agent' for purposes of the Labor Law ...". ***Santos v. Condo 124 LLC*, 2018 N.Y. Slip Op. 03799, First Dept 5-29-18**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

PLAINTIFF ENTITLED TO SUMMARY JUDGMENT ON HIS LABOR LAW § 240(1) CAUSE OF ACTION, PLAINTIFF FELL THROUGH AN OPENING COVERED BY A PIECE OF PARTICLE BOARD.

The First Department, reversing (modifying) Supreme Court, determined plaintiff's motion for summary judgment on his Labor Law § 240(1) cause of action should have been granted. Plaintiff fell through an opening covered by a piece of particle board: "There is no issue of fact as to whether it was foreseeable that the particle board covering an escape hatch on top of the elevator car where plaintiff was required to work would collapse when traversed by him ... . It is not dispositive that the escape hatch covering was not intended to serve as a safety device protecting workers from elevation-related risks. Rather, since plaintiff's work exposed him to such risks, he was required to be provided with adequate safety devices in compliance with Labor Law § 240(1) ...". ***Giancola v. Yale Club of N.Y. City*, 2018 N.Y. Slip Op. 03901, First Dept 5-31-18**

LABOR LAW-CONSTRUCTION LAW, CIVIL PROCEDURE, PERSONAL INJURY.

PLAINTIFF ENTITLED TO SUMMARY JUDGMENT ON HIS LABOR LAW § 240(1) CAUSE OF ACTION, UNTIMELY CROSS MOTION CAN BE CONSIDERED ONLY TO THE EXTENT THE ISSUES RAISED ARE THE SAME AS THE ISSUES RAISED IN PLAINTIFF'S SUMMARY JUDGMENT MOTION.

The First Department determined plaintiff was entitled to summary judgment on his Labor Law § 240(1) cause of action. Plaintiff was standing on a scaffold when a masonry stone fell on the scaffold and the planks collapsed. The court noted that defendants' untimely cross motion for summary judgment was properly considered only to the extent the issues were identical to the issues raised in plaintiff's motion for summary judgment: "This Court may consider the merits of defendants' untimely cross motion for summary judgment dismissing the complaint to the extent it sought dismissal of the Labor Law § 240(1) claim, because it is based on the same issues raised in plaintiff's motion ... However, the remainder of the motion, seeking dismissal of Labor Law § 241(6), Labor Law § 200 and common law negligence claims cannot be considered because it does not address issues nearly identical to those raised in the timely motion and defendants did not demonstrate good cause for the delay ... . Plaintiff is entitled to summary judgment as to liability on his Labor Law § 240(1) claim. He established, prima facie, that he was engaged in an activity falling within the statute, and that defendants failed to provide him proper safety equipment, either in the form of a scaffold that could withstand the force of a falling masonry stone ... , or any other appropriate safety device. Plaintiff further demonstrated that defendants' failure to provide an appropriate safety device was the proximate cause of the accident, and defendants have failed to raise an issue of fact." ***Jarama v. 902 Liberty Ave. Hous. Dev. Fund Corp.*, 2018 N.Y. Slip Op. 03897, First Dept 5-31-18**

PERSONAL INJURY.

UNDER PENNSYLVANIA LAW PLAINTIFF ASSUMED THE RISK OF INJURY ON A TRAMPOLINE WITH MULTIPLE JUMPERS.

The First Department determined defendant's motion for summary judgment in this Pennsylvania trampoline injury case was properly granted. Under Pennsylvania law, plaintiff assumed the risk of injury on the trampoline: "The record demonstrates conclusively that defendant cannot be held liable under Pennsylvania law for the injuries that plaintiff alleges she

sustained while a guest at his Pennsylvania home when another guest jumping on a trampoline lost control and fell on her. A property owner may be held liable to 'social guests,' as opposed to 'business visitors' ... , only if he 'knows or has reason to know of the [dangerous] condition and should realize that it involves an unreasonable risk of harm' and 'fails to exercise reasonable care to make the condition safe, or to warn the licensees of the condition and the risk involved,' and the guests 'do not know or have reason to know of the condition and the risk involved' ... . Plaintiff's deposition testimony and affidavit demonstrate that she understood the risks involved in using the trampoline, including the risks of using it with multiple jumpers." ***Ramos v. Hamelburg*, 2018 N.Y. Slip Op. 03913, First Dept 5-31-18**

PERSONAL INJURY, MUNICIPAL LAW.

CITY NOT LIABLE FOR SLIP AND FALL IN CROSSWALK DURING STORM, ALLEGED FAILURE TO COMPLY WITH SNOW REMOVAL PROTOCOLS AND FAILURE TO APPLY SALT BEFORE THE STORM ARE NOT GROUNDS FOR LIABILITY.

The First Department determined the city could not be held liable for a slip and fall in a crosswalk while a storm was in progress: "The certified expert report [plaintiff] submitted does not address how the City created or exacerbated the icy condition of the crosswalk and only states that it was created during the heavy snow falling when the accident happened ... . Plaintiff's claim that the City may be held liable for failing to adhere to its snow removal protocols is unpersuasive, because liability 'cannot be based on the violation of an internal rule imposing a higher standard of care than the law, at least where there is no showing of detrimental reliance by the plaintiff' ... . Nor can the City be held liable for failing to salt the roadway before the storm, because such alleged inaction does not constitute an affirmative act of negligence that caused, created or exacerbated the icy condition ...". ***Mimikos v. City of New York*, 2018 N.Y. Slip Op. 03813, First Dept 5-29-18**

PERSONAL INJURY, MUNICIPAL LAW, IMMUNITY.

PLAINTIFF'S DECEDENT WAS KILLED IN A MOTORCYCLE ACCIDENT DURING RECREATIONAL USE OF A CITY PARKING LOT, CITY NOT LIABLE PURSUANT TO THE GENERAL OBLIGATIONS LAW.

The First Department, reversing Supreme Court, determined the city could not be held liable for a "trespass activity" motorcycle accident in the parking lot at Yankee Stadium. Trespassers have used the parking for motorcycles, dirt bikes and all-terrain vehicles for recreation for years. Plaintiff's decedent was killed in a collision in the parking lot. Under the General Obligations Law the city could not be liable unless its conduct was willful or malicious: "The decedent, who trespassed onto a Yankee Stadium parking lot in the off season together with other trespassers who similarly rode motorcycles, dirt bikes and all-terrain vehicles, suffered fatal injuries in a collision with an all-terrain vehicle operated by defendant Pena. The record shows that the nature of the trespass activity involved was commonplace for the parking lot in question, for at least two years, and that drag racing would sometimes be involved. Plaintiff alleged that the City (as lot owner) and Kinney (as lessee) were negligent for not repairing and/or securing the lot's perimeter fence, and in not employing proper security or supervision to keep trespassers off the premises. Here, the subject property was physically conducive to the motorcycle activity taking place thereon, and was appropriate for public use in pursuing the activity as recreation (see General Obligations Law § 9-103). As such, the City is immune from liability for any ordinary negligence on its part that may have given rise to the cause of the decedent's accident, and plaintiff has not otherwise demonstrated that the City's challenged conduct was willful or malicious as might preclude the City's reliance on the defense afforded under General Obligations Law § 9-103 ... . Furthermore, although Kinney has not relied upon General Obligation Law § 9-103 as a potential defense to the action against it, the statute's defense is available to lessees as well as property owners ... . Inasmuch as the issue appears on the face of the record, involves no new facts and could not have been avoided if it were timely raised ...". ***Rodriguez v. City of New York*, 2018 N.Y. Slip Op. 03821, First Dept 5-29-18**

SECOND DEPARTMENT

CIVIL PROCEDURE.

DEFENDANT WHO HAD APPEARED IN THE ACTION BUT HAD SINCE MOVED TO SOUTH CAROLINA COULD BE COMPELLED TO APPEAR AT TRIAL BY A SUBPOENA MAILED TO HIS NEW YORK ATTORNEY.

The Second Department determined a trial subpoena issued to a defendant in a medical malpractice action compelled defendant's attendance despite his having moved to South Carolina: "... [T]he plaintiffs mailed a subpoena to the office of the defendant's attorneys, located in Mineola, New York. The subpoena commanded the defendant to appear at the trial of this action to give testimony as part of the plaintiffs' direct case. The defendant moved to quash the subpoena, arguing that he was no longer subject to the jurisdiction of the court because he had moved from New York to South Carolina during the pendency of the action. The Supreme Court denied the motion, and the defendant appeals. A court of record generally has the power 'to issue a subpoena requiring the attendance of a person found in the state to testify in a cause pending in that court' (Judiciary Law § 2-b[1]). 'Where the attendance at trial of a party or person within the party's control can be

compelled by a trial subpoena, that subpoena may be served by delivery in accordance with [CPLR 2103(b)] to the party's attorney of record' (CPLR 2303-a). Here, the trial subpoena was properly served upon the defendant's attorneys pursuant to CPLR 2303-a and 2103(b)(2). Contrary to the defendant's contention, because he is a party to this action, over whom personal jurisdiction had been obtained, he is "found in the state" within the meaning of Judiciary Law § 2-b(1) ...". ***Chicoine v. Koch*, 2018 N.Y. Slip Op. 03825, Second Dept 5-30-18**

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

DENIAL OF A PETITION TO MODIFY A SEX OFFENDER REGISTRATION ACT (SORA) RISK ASSESSMENT IS APPEALABLE AS OF RIGHT, PETITION PROPERLY DENIED.

The Second Department, in a full-fledged opinion by Justice Rivera, considering a question of first impression, determined a defendant can appeal, as of right, the denial of a petition to modify a Sex Offender Registration Act (SORA) risk classification. The Second Department further held that the petition was properly denied, in large part because defendant, who was 71 years old and in poor health, did not participate in any sex offender treatment programs and did not accept responsibility for his sex offenses: " ... [N]othing in the language of Correction Law § 168-o(2) precludes this Court's exercise of its broad authority and jurisdiction to entertain and decide the instant appeal. In the context of SORA, we have long recognized the significant impact upon the defendant's liberty interest. Furthermore, we are cognizant of the ongoing responsibility and crucial importance in maintaining a balance between the procedural safeguards afforded to the defendant and the societal interests involved in protecting 'the public from sex offenders' ... . [W]e hold that a sex offender may appeal from an order denying a petition for a downward modification of his risk level." ***People v. Charles*, 2018 N.Y. Slip Op. 03864, Second Dept 5-30-18**

DEFAMATION.

STATEMENTS POSTED ON FACEBOOK CONCERNING PLAINTIFF'S UNAUTHORIZED PARTIAL DEMOLITION OF A LANDMARK BUILDING WERE DEEMED NON-ACTIONABLE OPINION AND HYPERBOLE.

The Second Department determined that defendant's Facebook posts were non-actionable opinion in this defamation action. Defendant, without obtaining the required certificate, had begun to demolish a building which had been designated a landmark. Defendant posted pictures of the building with comments that the demolition was a crime, that the plaintiff was a vampire, and that plaintiff, rather than gutting the building and maintaining the facade, intended to demolish the building and put up condominiums: "The defendant established that [the] statements, which referred to the plaintiff's actions in causing the demolition of the building as a 'crime' and referred to the plaintiff as a 'vampire,' constituted nonactionable opinion or rhetorical hyperbole ... . [T]he defendant asserted that the plaintiff had originally said that he would keep the building's historic facade and gut the interior to convert the building into apartments. The defendant further stated that the plaintiff's statement was 'a lie' and that '[a]ll along he planned a big condo and he removed part of the metal roof and punched holes in it and failed to repair it so the elements would get in and slowly but surely destroy the building. This is known as demolition by intentional neglect.' ... In distinguishing between statements of opinion and fact, the factors to be considered are: (1) whether the specific language at issue has a precise, readily understood meaning, (2) whether the statements are capable of being proven true or false, and (3) whether either the full context of the communication in which the statement appears or the broader social context and surrounding circumstances are such as to signal readers that what is stated is likely to be opinion, not fact... Even apparent statements of fact may assume the character of opinion when made in public debate where the audience may anticipate the use of rhetoric or hyperbole ... . The question is not whether there is an isolated assertion of fact; rather, it is necessary to consider the writing as a whole, including its tone and apparent purpose, as well as the overall context of the publication, to determine whether the reasonable reader would have believed that the challenged statements were conveying facts about the plaintiff ...". ***Stolatis v. Hernandez*, 2018 N.Y. Slip Op. 03868, Second Dept 5-30-18**

EDUCATION-SCHOOL LAW, MUNICIPAL LAW, EMPLOYMENT LAW, HUMAN RIGHTS LAW.

EDUCATION LAW REQUIRES THAT PLAINTIFF FILE A NOTICE OF CLAIM AS A CONDITION PRECEDENT FOR AN ACTION AGAINST THE NYC DEPARTMENT OF EDUCATION ALLEGING A VIOLATION OF THE NYS HUMAN RIGHTS LAW.

The Second Department determined plaintiff was required, pursuant to the Education Law, to file a notice of claim in an action alleging a violation of the NYS Human Rights Law: "Contrary to the plaintiff's contention, since her complaint seeks both equitable relief and the recovery of damages, the filing of a notice of claim within three months after her claim arose was a condition precedent to the maintenance of this action against the defendants Department of Education of the City of New York (hereinafter Department of Education) and Chancellor Carmen Fariña (see Education Law 3813[1]...). In contrast to General Municipal Law §§ 50-e(1) and 50-i(1), Education Law § 3813(1) broadly requires the filing of a notice of claim as a condition precedent to an 'action . . . for any cause whatever,' which includes the plaintiff's causes of action pursuant to the New York State Human Rights Law (see Executive Law § 296). ... Further, the plaintiff was not excused from the notice

of claim requirement since her action does not seek to vindicate a public interest ... , and does not seek judicial enforcement of a legal right derived through enactment of positive law ... . The Supreme Court improperly determined that the plaintiff was required to serve a notice of claim upon the defendant City of New York ... . Nonetheless, since this action relates to the plaintiff's employment with the Department of Education, the plaintiff failed to state a cause of action against the City, which is a legal entity distinct from the Department of Education ...". ***Seifullah v. City of New York*, 2018 N.Y. Slip Op. 03867, Second Dept 5-30-18**

FAMILY LAW, IMMIGRATION LAW, CIVIL PROCEDURE.

FAMILY COURT DIVESTED OF SUBJECT MATTER JURISDICTION IN THIS GUARDIANSHIP PROCEEDING BECAUSE THE CHILD TURNED 21, MOTION FOR FINDINGS ALLOWING THE CHILD TO APPLY FOR SPECIAL IMMIGRANT JUVENILE STATUS (SIJS) RENDERED ACADEMIC.

The Second Department, dismissing the appeal as academic, determined Family Court was divested of subject matter jurisdiction in this guardianship proceeding because the child had turned 21. Mother had sought appointment as guardian in an effort to procure special immigrant juvenile status (SIJS) for the child: " 'Generally, courts are precluded from considering questions which, although once live, have become moot by passage of time or change in circumstances' ... . Where, as here, a child who consented to the appointment of a guardian after his or her 18th birthday turns 21, the term of appointment of the guardian 'expires on [the child's] twenty-first birthday' (SCPA 1707[2]). Consequently, once the child turns 21, the court 'is divested of subject matter jurisdiction, [and] cannot exercise such jurisdiction by virtue of an order nunc pro tunc' ... . Thus, the guardianship petition cannot be granted at this juncture. Furthermore, since guardianship status, which the Family Court can only grant to individuals under 21, is a condition precedent to a declaration allowing a child to seek SIJS, the petitioner's motion for the issuance of an order declaring that the child is dependent on the court and making the requisite specific findings so as to enable him to petition for SIJS has also been rendered academic ...". ***Matter of Vincenta E. V. v. Alexander R. G.*, 2018 N.Y. Slip Op. 03849, Second Dept 5-30-18**

INSURANCE LAW, ARBITRATION, CIVIL PROCEDURE.

ARBITRATOR'S RULING WAS IRRATIONAL AND VIOLATED CPLR 1209 IN THIS NO-FAULT INSURANCE ACTION, HEALTH CARE PROVIDER, AS AN ASSIGNEE, WAS ENTITLED TO ARBITRATE ITS CLAIM FOR CARE PROVIDED TO THE INJURED INFANT.

The Second Department determined the arbitrator's award was irrational and violated CPLR 1209 in this no-fault insurance action. The injured child and his mother had assigned their rights to payment for health care services to the petitioner, Fast Care. Contrary to the arbitrator's finding, arbitration was not sought by the injured child, which would have required a court order under CPLR 1209, but rather was sought by the assignee, Fast Care: "An arbitration award may be vacated if the court finds that the rights of a party were prejudiced by (1) corruption, fraud, or misconduct in procuring the award; (2) partiality of an arbitrator; (3) the arbitrator exceeding his or her power; or (4) the failure to follow the procedures of CPLR article 75 ... . In addition, an arbitration award may be vacated 'if it violates strong public policy, is irrational, or clearly exceeds a specifically enumerated limitation on the arbitrator's power'... . An arbitration award may also be vacated where it is in 'explicit conflict' with established laws and 'the strong and well-defined policy considerations' embodied therein'... . We agree with the Supreme Court that the arbitrator's award was irrational and in conflict with CPLR 1209, which applies 'only where an infant is a party' to an arbitration proceeding ... . The infant patient was not a party to the arbitration; rather, Fast Care, as the infant's assignee, was the party that brought the arbitration ...". ***Matter of Fast Care Med. Diagnostics, PLLC/PV v. Government Employees Ins. Co.*, 2018 N.Y. Slip Op. 03831, Second Dept 5-30-18**

PERSONAL INJURY.

DEFENDANT RESTAURANT-BAR DEMONSTRATED ITS EMPLOYEE DID NOT KNOW THE DRIVER WAS UNDER 21, RESTAURANT-BAR ENTITLED TO SUMMARY JUDGMENT IN THIS DRAM SHOP ACT ACTION.

The Second Department determined the restaurant/bar's (Hacienda's) motion for summary judgment in this Dram Shop Act action was properly granted. Plaintiff, a passenger in a car driven by Behler, was injured when the driver struck a guardrail. The driver, who was under 21, had been served alcohol at Hacienda. General Obligations Law (GOL) § 11-101 (the Dram Shop Act) prohibits serving alcohol to persons under 21. The Second Department held there is a knowledge element of GOL § 11-101 and Hacienda demonstrated its employee did not know the driver was under 21: "In 1983, the Legislature supplemented the Dram Shop Act by adding General Obligation Law § 11-100, which applies to any provider unlawfully furnishing alcoholic beverages to or unlawfully assisting in procuring alcoholic beverages for minors. Pursuant to Alcoholic Beverage Control Law § 65(1), it is unlawful to furnish an alcoholic beverage to any 'person, actually or apparently, under the age of twenty-one years' ... . '[L]iability under General Obligations Law § 11-100 may be imposed only on a person who knowingly causes intoxication by furnishing alcohol to (or assisting in the procurement of alcohol for) persons known or reasonably believed to be underage. While [General Obligations Law §] 11-101 does not explicitly refer to knowledge, that same requirement must be inferred because the legislative history makes plain that section 11-100 was intended to parallel the Dram Shop Act' ... . Hacienda established through the submission of the deposition testimony of its bartender that it

did not have knowledge or reason to believe that the driver was under 21 years of age when it served alcoholic beverages to him." ***Ferber v. Olde Erie Brew Pub & Grill, LLC*, 2018 N.Y. Slip Op. 03827, Second Dept 5-30-18**

PERSONAL INJURY.

DRAINAGE GRATE NEAR SOCCER FIELD DEEMED OPEN AND OBVIOUS, PLAINTIFF SOCCER PLAYER ASSUMED THE RISK OF INJURY RESULTING FROM HIS CLEAT GETTING STUCK IN THE GRATE.

The Second Department determined plaintiff soccer player had assumed the risk of injury resulting from a cleat on his shoe getting stuck in a drainage grate near the soccer field. The drainage grate was deemed open and obvious: " 'Pursuant to the doctrine of primary assumption of risk, a voluntary participant in a sporting or recreational activity consents to those commonly appreciated risks which are inherent in and arise out of the nature of the sport generally and flow from such participation' ... . 'This principle extends to those risks associated with the construction of the playing field and any open and obvious condition thereon'... . Here, the defendants established their prima facie entitlement to judgment as a matter of law on the ground that the doctrine of primary assumption of risk barred the injured plaintiff's recovery. The evidence submitted by the defendants included, inter alia, the pretrial testimony of the infant plaintiff that his accident occurred when he ran onto the drainage grate only a few feet from the edge of the field while he was retrieving a ball that had traveled out of bounds during the game. He further conceded that in order to gain access to the field, he had to walk over the silver-colored drainage grate that surrounded the perimeter of the field. Moreover, the photographs submitted in support of the motion confirmed the open and obvious nature of the grate, and there was no evidence that the grate was concealed or defective in any manner." ***O'Toole v. Long Is. Jr. Soccer League, Inc.*, 2018 N.Y. Slip Op. 03853, Second Dept 5-30-18**

THIRD DEPARTMENT

CRIMINAL LAW.

PAROLE BOARD PROPERLY CONSIDERED PETITIONER'S YOUTH AT THE TIME HE COMMITTED SERIOUS CRIMES, PAROLE PROPERLY DENIED.

The Third Department, in a comprehensive decision, determined the parole board had properly considered petitioner's youth at the time of the commission of the crimes and had properly denied parole. Petitioner was a few weeks from his eighteenth birthday when he committed the crimes and was 44 years old at his 2016 appearance before the parole board: "... [R]eview of the record leads us to the conclusion that the Board did consider the necessary statutory factors, as well as petitioner's youth at the time of the crimes. Specifically, at the hearing, the Board explored the facts underlying petitioner's crimes in detail and his insight into his crimes, as well as his release plans, prior criminal record, educational and institutional achievements, lengthy prison disciplinary record, sentencing minutes, COMPAS Risk and Needs Assessment instrument and numerous letters of support. Also, the hearing transcript demonstrates that petitioner's youth at the time that he committed the crimes was adequately explored. * * * A thorough review of the Board's decision evinces that all necessary statutory factors, as well as petitioner's youth and its attendant characteristics, were considered. Although the Board assigned greater weight to the seriousness of petitioner's crimes, his history of violence, his failure to complete recommended programming and his lengthy prison disciplinary record, we find that the ultimate determination is rational and, therefore, we will not disturb it ...". ***Matter of Allen v. Stanford*, 2018 N.Y. Slip Op. 03888, Third Dept 5-31-18**

CRIMINAL LAW, SEX OFFENDER REGISTRATION ACT (SORA).

CORRECTION LAW DOES NOT REQUIRE SEX OFFENDER TO DISCLOSE HIS OR HER USE OF FACEBOOK, IT IS ENOUGH THAT THE SEX OFFENDER DISCLOSE EMAIL ADDRESSES AND SCREEN NAMES.

The Third Department, in a full-fledged opinion by Justice Pritzker, reversing defendant's conviction, determined the indictment charging defendant sex offender with a violation of the Correction Law for failing to disclose his use of Facebook was jurisdictionally defective. Disclosure of his Facebook use is not required by the Correction Law and, therefore, failure to disclose is not a crime. Defendant had complied with the requirements of Correction Law §§ 168-f (4) and 168-a (18) by disclosing his email address and screen names: "... [W]e conclude that the social media website or application — be it Facebook or any other social networking website or application — does not constitute a 'designation used for the purposes of chat, instant messaging, social networking or other similar [I]nternet communication' (Correction Law § 168-a [18]). An Internet identifier is not the social networking website or application itself; rather, it is how someone identifies himself or herself when accessing a social networking account, whether it be with an electronic mail address or some other name or title, such as a screen name or user name. Defendant's failure to disclose his use of Facebook is not a crime, rendering the indictment jurisdictionally defective ...". ***People v. Ellis*, 2018 N.Y. Slip Op. 03873, Third Dept 5-31-18**

WORKERS' COMPENSATION LAW.

CLAIMANT WAS ASSAULTED ON TRANSIT AUTHORITY PROPERTY WHILE WEARING HER TRANSIT AUTHORITY UNIFORM, ALTHOUGH SHE WAS COMMUTING TO WORK, HER COMMUTE HAD NOTHING TO DO WITH HER WORK, WORKERS' COMPENSATION BENEFITS PROPERLY DENIED.

The Third Department determined claimant, who worked for the NYC Transit Authority, was not entitled to Workers' Compensation benefits for injuries suffered in an assault on the way to work. Although she was wearing her uniform and was on Transit Authority property when she was assaulted, her commute to her work station was deemed to have no connection to her work for the Transit Authority: " 'An injury is only compensable under the Workers' Compensation Law if it arose out of and in the course of a worker's employment and, in general, injuries sustained in the course of travel to and from the place of employment do not come within the statute' ... . Injuries incurred while commuting to work are generally not covered because 'the risks inherent in traveling to and from work relate to the employment only in the most marginal sense' ... . There are recognized exceptions but, here, substantial evidence supports the Board's determination that claimant's injuries sustained while commuting are not compensable, as none of the relevant exceptions to this rule applies ... . According to claimant, the assault occurred almost an hour before the start of her shift, on her way to work, before signing in at her assigned station as required at the start of her shift. The employer neither encouraged nor benefitted from her commute route. Thus, at the time of the assault, claimant was not yet on duty or at her assigned station and was not performing any duties of her employment or undertaking an errand for the employer ... . Although claimant had opted to wear her work uniform on her commute, she was not required to do so, nor was she required to use public transportation to get to work. The employer provided a transportation pass, but there was no evidence that it was contractually bound to provide free transit, and the use of the pass did not make claimant's commute a part of her employment... . Rather, at the relevant time, claimant was a commuter using the subways like the general public and, while she was on property owned and operated by the employer, substantial evidence supports the Board's determination that this did not establish a [causal] connection between her employment and the assault ...". ***Matter of Rodriguez v. New York City Tr. Auth.*, 2018 N.Y. Slip Op. 03887, Third Dept 5-31-18**

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