August 17, 2018

CasePrepPlus

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

Editor: Bruce Freeman

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

FIRST DEPARTMENT

FAMILY LAW, ATTORNEYS.

CHILD'S ATTORNEY HAD STANDING TO OBJECT TO THE SUPPORT MAGISTRATE'S CHILD SUPPORT RULINGS, AN ADOPTIVE SUBSIDY IS A RESOURCE OF THE ADOPTED CHILD AND SHOULD BE PAID TO THE ADOPTIVE MOTHER ON THE CHILD'S BEHALF UNTIL THE CHILD TURNS 21, EVEN THOUGH MOTHER NO LONGER CARES FOR THE CHILD.

The First Department, in a full-fledged opinion by Justice Gesmer, reversing Family Court, determined (1) the adopted child's attorney had standing to object to the child support rulings, and (2) the child had the right to receive the adoption subsidy until 21. Mother had consented to the child being cared for by a guardian and thereafter mother voluntarily discontinued the adoptive subsidy. Family Court had found the court could not force mother to receive the subsidy. The First Department determined the subsidy is the child's resource and mother is to receive the subsidy on the child's behalf: "Although the mother argues that Family Court Act § 439(e) restricts the filing of objections to a 'party or parties,' we find that her reading is too narrow. That section does not prohibit children's attorneys, where appointed, from filing or rebutting objections to a Support Magistrate's order for three reasons. First, the statute is focused on the time frame for filing and not on the identity of the filers. It appears that the words 'party' and 'parties' are used in the general sense of persons or entities who have been served with a copy of the support order, rather than the strict sense of petitioner and respondent. Second, children's attorneys are expected to participate fully in proceedings in which they are appointed. We base this conclusion on the broad language of section 249 authorizing appointment of attorneys for children in any type of proceeding, the legislative finding that children's attorneys can be 'indispensable to a practical realization of due process of law'... , and the obligation of attorneys for children to zealously advocate for their clients and generally adhere to the ethical requirements applicable to all attorneys ... . * * * Family Court erred in determining that a deviation based on the subsidy would be improper because it would 'force' the mother to take steps to undo the subsidy's suspension. Awarding child support in the amount of the subsidy is not unlike awarding support based on a parent's historic earning potential, which similarly requires the parent to do what the court has determined he or she is capable of doing based on past performance. Family Court further erred in failing to properly consider the 10 factors set forth in FCA § 413(1)(f) to determine whether the mother's basic child support obligation is unjust or inappropriate. In particular, Family Court should have considered the first three statutory factors — the financial resources of the child, the physical and emotional health of the child and his special needs and aptitudes, and the standard of living the child would have enjoyed had he continued to reside with his mother — and the 10th factor: '[a]ny other factors the court determines are relevant in each case.' Considering these factors, we find that awarding child support in at least the amount of the subsidy for so long as the mother is eligible to receive it on the child's behalf is an appropriate deviation from the basic child support obligation ...". ***Matter of Barbara T. v. Acquinetta M.*, 2018 N.Y. Slip Op. 05736, First Dept 8-9-18**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT ON HIS LABOR LAW §§ 240(1) AND 241(6) CAUSES OF ACTION SHOULD HAVE BEEN GRANTED, PLAINTIFF FELL OFF THE BACK OF A FLATBED TRUCK AS STEEL BEAMS WERE BEING HOISTED FROM THE TRUCK.

The First Department, reversing Supreme Court, determined that plaintiff's motion for summary judgment on his Labor Law §§ 240(1) and 241(6) causes of action should have been granted. Plaintiff fell off a flatbed truck as steel beams were being hoisted from the truck: "Plaintiff established that the accident was proximately caused by defendants' failure to provide safety devices necessary to ensure protection from the gravity-related risks posed by the work he was engaged in, in violation of Labor Law § 240(1) ... . Here, plaintiff fell off a flatbed truck after a load of steel beams, without tag lines, was hoisted above him by a crane, and began to swing towards him ... . The risk of the hoisted load of beams with no tag lines triggered the protections set forth in Labor Law § 240(1) ... . Based on the same evidence, plaintiff also established his Labor Law § 241(6) claim insofar as the swinging beams lacked tag lines, a violation of 12 NYCRR 23-8.2(c)(3), which requires tag lines or certain other restraints to be used to avoid hazards posed by swinging loads hoisted by mobile cranes." ***Flores v. Metropolitan Transp. Auth.*, 2018 N.Y. Slip Op. 05734, First Dept 8-9-18**

LANDLORD-TENANT, MUNICIPAL LAW, ADMINISTRATIVE LAW.

OWNER PROPERLY FOUND RESPONSIBLE FOR REFUNDING OVERCHARGES COLLECTED BY THE PRIME TENANT WHICH HAD CREATED AN ILLUSORY TENANCY TO CIRCUMVENT THE NYC RENT STABILIZATION LAW.

The First Department, in a full-fledged opinion by Justice Singh, determined that the NYC Department of Housing and Community Renewal (DHCR) had the authority to sua sponte vacate a nonfinal order under the Rent Stabilization Code and DHCR correctly found that petitioner 333 East 49th Partnership, LP (the owner) was responsible for refunding the overcharge collected by the prime tenant, on the ground that the prime tenant created an illusory tenancy. The opinion is complex and comprehensive and cannot be fairly summarized here: "Section 2529.9 of the Rent Stabilization Code * * * authorizes DHCR to reopen, sua sponte, a proceeding at any time upon a finding of irregularity of vital matters, fraud or illegality, upon notice to the parties ... . * * * The rent stabilization laws [RSL] are designed 'to prevent exactions of unjust, unreasonable and oppressive rents and rental agreements and to forestall profiteering, speculation and other disruptive practices ...' . The Rent Stabilization Code expressly provides that the legal regulated rents and other requirements 'shall not be evaded, either directly or indirectly, in connection with the renting or leasing or the transfer of a lease for housing accommodations' ... . An illusory tenancy exists when the prime tenant rents an apartment for the sole purpose of re-leasing it, at a profit, or otherwise subverts the protections of the RSL ... . DHCR's finding that the owner may be held accountable for the overcharge is not irrational or arbitrary and capricious. DHCR is not restricted, as the owner argues, to only take into account whether the owner overcharged the subtenant and actually collected rent in excess of the lawful stabilized rent. Rather, DHCR may consider that the owner 'derived substantial benefits from the scheme and was aware of the nature of [the prime tenant's] activities' ... . * * * Rent Stabilization Code 2526.1(a)(1) imposes treble damages upon owners who 'have collected any rent . . . in excess of the legal regulated rent' ... . However, as noted above, RSL 26-511(c)(12)(e) merely states that 'where a tenant violates the provisions of subparagraph (a)' with regard to overcharging a subtenant, 'the subtenant shall be entitled to damages of three times the overcharge' ... . DHCR's interpretation of these statutes to impose treble damages upon the owner, under these circumstances, is rational and thus, entitled to deference ... ". ***Matter of 333 E. 49th Partnership, LP v. New York State Div. of Hous. & Community Renewal*, 2018 N.Y. Slip Op. 05735, First Dept 8-9-18**

PERSONAL INJURY, EVIDENCE.

DEFENDANT DEMONSTRATED THE ABSENCE OF ACTUAL OR CONSTRUCTIVE NOTICE OF THE ALLEGEDLY SLIPPERY CONDITION IN THIS SLIP AND FALL CASE.

The Second Department determined defendant demonstrated the absence of actual or constructive notice of the allegedly slippery condition on the staircase in this slip and fall case: "Defendant established its entitlement to judgment as a matter of law by establishing that it did not have actual or constructive notice of the urine on the staircase that allegedly caused plaintiff to fall. Defendant submitted, inter alia, the affidavit of its caretaker, who averred that it was his practice to inspect the staircase at issue twice each day, in the morning and at around 3:30 p.m., and to mop up any urine or other wet or slippery condition that he observed. He also stated that it was his practice to complete a checklist with regard to his morning inspection, and he attached and identified a copy of the checklist that he had completed as to the morning inspection on July 2, 2012, the day before plaintiff's fall. In addition, he specifically stated that no one had complained to him about urine in a stairwell between his afternoon inspection on July 2 and the time his shift ended... . Plaintiff's opposition failed to raise a triable issue of fact. The evidence she submitted failed to demonstrate a recurring dangerous condition routinely left unaddressed by defendant, as opposed to a mere general awareness of such a condition, for which defendant is not liable ...". ***Canteen v. New York City Hous. Auth.*, 2018 N.Y. Slip Op. 05733, First Dept 8-9-18**

SECOND DEPARTMENT

ATTORNEYS, TRUSTS AND ESTATES.

ATTORNEYS FOR THE EXECUTOR OF THE ESTATE IN A REMOVAL PROCEEDING SHOULD NOT HAVE BEEN DISQUALIFIED BASED UPON THEIR PRIOR REPRESENTATION OF DECEDENT'S WIFE FOR HER ESTATE PLANNING.

The Second Department, reversing Surrogate's Court, determined the law firm representing the executor and trustee of the estate in a removal proceeding should not have been disqualified based upon the firm's prior representation of the decedent's wife, Sandra, for Sandra's estate planning: " 'A party seeking disqualification of it[s] adversary's counsel based on counsel's purported prior representation of that party must establish (1) the existence of a prior attorney-client relationship between the moving party and opposing counsel, (2) that the matters involved in both representations are substantially related, and (3) that the interests of the present client and former client are materially adverse' ... . 'When the moving party is able to demonstrate each of these factors, an irrebuttable presumption of disqualification follows'... . 'A party's entitlement to be represented in ongoing litigation by counsel of his or her own choosing is a valued right which should not be abridged absent a clear showing that disqualification is warranted'... . Here, although the law firm had a prior attorney-client relationship with Sandra in connection with her own estate planning, which may have been intertwined somewhat with that of

the decedent, the record does not reveal that the law firm's prior representation of Sandra is substantially related or materially adverse to the removal proceedings. In the removal proceedings, Sandra's estate is not being administered or litigated, and there is nothing to suggest that any confidences with Sandra might be breached by the law firm's representation of the appellant in his capacity as executor and trustee of the decedent's estate ...". ***Matter of Kopet*, 2018 N.Y. Slip Op. 05678, Second Dept 8-8-18**

CIVIL PROCEDURE, CONTRACT LAW.

PLAINTIFF WAS NOT ENTITLED TO PREJUDGMENT INTEREST IN THIS BREACH OF CONTRACT ACTION BECAUSE PLAINTIFF FAILED TO DEMONSTRATE WHEN THE DAMAGES WERE INCURRED.

In a breach of contract action too complex to fairly summarize here, the Second Department determined plaintiff was not entitled to prejudgment interest pursuant to CPLR 5001 (a) because plaintiff did not demonstrate when the damages were incurred: "We agree with the Supreme Court's determination that the plaintiff was not entitled to prejudgment interest. CPLR 5001(a) provides that interest shall be recovered upon a sum awarded for a breach of contract. CPLR 5001 further mandates that '[i]nterest shall be computed from the earliest ascertainable date the cause of action existed' (CPLR 5001[b]). 'Where such damages were incurred at various times, interest shall be computed upon each item from the date it was incurred or upon all of the damages from a single reasonable intermediate date' (CPLR 5001[b]...). CPLR 5001 further provides that '[t]he date from which interest is to be computed shall be specified in the verdict, report or decision' (CPLR 5001[c]). With limited exception, '[i]f a jury is discharged without specifying the date, the court upon motion shall fix the date' (id.). The party seeking prejudgment interest bears the burden of demonstrating the date from which interest should be computed... . Here, the plaintiff failed to demonstrate when the damages were incurred. Under the particular circumstances of this case, the Supreme Court's determination that the damages were not incurred until the jury rendered its verdict was warranted ...". ***Kachkovskiy v. Khlebopros*, 2018 N.Y. Slip Op. 05671, Second Dept 8-8-18**

CIVIL PROCEDURE, JUDGES, FORECLOSURE.

JUDGE SHOULD NOT HAVE, SUA SPONTE, RAISED THE STATUTE OF LIMITATIONS DEFENSE, IF THE DEFENSE IS NOT RAISED IN THE PLEADINGS IT IS WAIVED, JUDGE CANNOT TAKE JUDICIAL NOTICE OF IT.

The Second Department, reversing Supreme Court, determined the judge should not have, sua sponte, raised the statute of limitations defense in this foreclosure action: "Supreme Court erred in sua sponte raising the affirmative defense of the statute of limitations and directing the dismissal of the complaint on that ground. The statute of limitations is an affirmative defense which is waived by a party unless it is raised either in a responsive pleading, or by motion prior to the submission of a responsive pleading (see CPLR 3211[e]...). 'A court may not take judicial notice,' sua sponte, of the applicability of a statute of limitations if that defense has not been raised' ... . Here, the defendant neither answered the complaint nor submitted a pre-answer motion which raised the statute of limitations defense." ***352 Legion Funding Assoc. v. 348 Riverdale, LLC*, 2018 N.Y. Slip Op. 05662, Second Dept 8-8-18**

CRIMINAL LAW.

COURT SHOULD HAVE INQUIRED FURTHER WHEN DEFENDANT INDICATED IN HIS PLEA COLLOQUY THAT HE ACTED IN SELF-DEFENSE, CONVICTION BY GUILTY PLEA REVERSED.

The Second Department, reversing defendant's conviction by guilty plea, determined that the court should have inquired further when defendant indicated in the plea colloquy that he acted in self-defense: "The defendant pleaded guilty to assault in the second degree and assault in the third degree. During the plea proceeding, however, he insisted that the complainant had pulled a gun on him, and that he had attacked the complainant in self-defense. The County Court did not ask the defendant any questions about a possible justification defense. When a 'defendant's recitation of the facts underlying the crime pleaded to clearly casts significant doubt upon the defendant's guilt or otherwise calls into question the voluntariness of the plea,' the court has a duty to inquire further in order to make sure that the defendant understands the nature of the charge and that the plea has been intelligently entered... . This includes situations where the defendant's allocution suggests the existence of a possible defense ... . Where the court failed in its duty to inquire further, a defendant may raise a claim regarding the validity of the plea even without having moved to withdraw the plea ... . In this case, as the defendant contends and the People correctly concede, the County Court's failure to inquire into the validity of the plea after the defendant's allocution raised the possibility of a justification defense requires reversal of the judgment of conviction ...". ***People v. Williams*, 2018 N.Y. Slip Op. 05711, Second Dept 8-8-18**

CRIMINAL LAW, EVIDENCE.

EVIDENCE DEFENDANT HAD PREVIOUSLY BEEN CONVICTED OF STEALING A CAR SHOULD NOT HAVE BEEN ADMITTED TO SHOW KNOWLEDGE AND INTENT IN THIS CAR THEFT CASE, KNOWLEDGE AND INTENT CAN BE INFERRED FROM THE ACT, ERROR HARMLESS HOWEVER.

The Second Department noted that evidence of a prior conviction of criminal possession of stolen property (a car) should not have been admitted as Molineux evidence to show knowledge and intent in this prosecution for the same genre of offense. Knowledge and intent can be inferred from possession of the car, which was taken by force. There error was deemed harmless however: "The Supreme Court should not have admitted, over objection, evidence of the defendant's 2009 conviction for criminal possession of stolen property, including the underlying fact that the stolen property was a motor vehicle, to demonstrate knowledge and intent to steal the vehicle ... . Here, the defendant's knowledge and intent could easily be inferred from his possession of the subject vehicle, which was procured by force. 'Generally, [e]vidence of prior criminal acts to prove intent will often be unnecessary, and therefore should be precluded even though marginally relevant, where intent may be easily inferred from the commission of the act itself' ... . However, as there was overwhelming evidence of the defendant's guilt, which included his statements to law enforcement authorities and the fact that he and his companion assumed possession of the vehicle, and no significant probability that the error contributed to the defendant's conviction, the error was harmless ...". ***People v. Sands*, 2018 N.Y. Slip Op. 05701, Second Dept 8-8-18**

CRIMINAL LAW, EVIDENCE, APPEALS.

CONVICTION OF ENDANGERING THE WELFARE OF A CHILD SHOULD NOT HAVE BEEN SET ASIDE BASED UPON THE ACQUITTALS ON THE REMAINING 27 COUNTS OF CRIMINAL SEXUAL ACT, COURT CANNOT CONSIDER DEFENDANT'S ALTERNATIVE ARGUMENT FOR AFFIRMANCE ON AN APPEAL BROUGHT BY THE PEOPLE.

The Second Department, reversing Supreme Court, determined defendant's conviction of endangering the welfare of a child should not have been set aside based upon his acquittal on all 27 counts of criminal sexual act involving a 10-year-old child. Because the appeal was brought by the People, the court was statutorily prohibited from considering defendant's argument that the indictment was jurisdictionally defective: "The Court of Appeals has held that a factual inconsistency in the verdict does not render 'the record evidence legally insufficient to support the conviction' ... . 'Where a jury verdict is not repugnant, it is imprudent to speculate concerning the factual determinations that underlay the verdict because what might appear to be an irrational verdict may actually constitute a jury's permissible exercise of mercy or leniency' ... . Thus, in this case, the acquittals of the criminal sexual act and sexual abuse counts did not render the evidence legally insufficient to support the conviction of endangering the welfare of a child ... . Although the Court of Appeals has noted that reviewing courts may consider jury acquittals 'in some instances on legal issues such as the sufficiency of the evidence or errors in the admissibility of evidence' ... , such consideration is appropriate to the extent that the acquittal provides information about the basis of, or the theory underlying, the jury's finding of guilt on another count ... . With this understanding of the basis or theory of the conviction on that other count, the court may then determine whether there was legally sufficient evidence to support that conviction ... . That determination is based on an independent review of the evidence presented at trial, and is not controlled by the jury's acquittal on the other charge ...". ***People v. Sturges*, 2018 N.Y. Slip Op. 05703, Second Dept 8-8-18**

EMPLOYMENT LAW, CONTRACT LAW.

COVENANT NOT TO COMPETE WHICH EFFECTIVELY PRECLUDED DEFENDANT SURGEON FROM PRACTICING MEDICINE IN METROPOLITAN NEW YORK WAS INVALIDATED, ARGUMENT FOR PARTIAL ENFORCEMENT REJECTED, CRITERIA EXPLAINED.

The Second Department determined a covenant not to compete which prohibited defendant surgeon from practicing within a ten-mile radius of his former employer was unreasonable and was properly invalidated. The argument that the covenant should be partially enforced was rejected as well: " 'Agreements restricting an individual's right to work or compete are not favored and thus are strictly construed' ... '[A] restrictive covenant will only be subject to specific enforcement to the extent that it is reasonable in time and area, necessary to protect the employer's legitimate interests, not harmful to the general public and not unreasonably burdensome to the employee' ... . The determination of whether a restrictive covenant is reasonable involves the application of a three-pronged test. 'A restraint is reasonable only if it: (1) is no greater than is required for the protection of the legitimate interest of the employer, (2) does not impose undue hardship on the employee, and (3) is not injurious to the public' ... . The 'violation of any prong renders the covenant invalid' ... . 'With agreements not to compete between professionals . . . [courts] have given greater weight to the interests of the employer in restricting competition within a confined geographical area' … . That said, 'the application of the test of reasonableness of employee restrictive covenants focuses on the particular facts and circumstances giving context to the agreement' … . 'The rationale for the differential application of the common-law rule of reasonableness . . . was that professionals are deemed to provide unique or extraordinary' services ... . Here, the defendants made a prima facie showing that the provision of the covenant prohibiting Andrade for a period of two years from practicing surgery of any kind, within a 10-mile radius of all of the plaintiff's offices

and affiliated hospitals, even those at which he had never worked, was geographically unreasonable, because it effectively barred him from performing surgery, his chosen field of medicine, in the New York metropolitan area ... . Contrary to the plaintiff's contention, the Supreme Court did not err in declining to modify the covenant rather than invalidating it. The determination of whether an overly broad restrictive covenant should be enforced to the extent necessary to protect an employer's legitimate interest involves 'a case specific analysis, focusing on the conduct of the employer in imposing the terms of the agreement' ... . Partial enforcement may be justified if an employer demonstrates, in addition to having a legitimate business interest, 'an absence of overreaching, coercive use of dominant bargaining power, or other anti-competitive misconduct' ... . 'Factors weighing against partial enforcement are the imposition of the covenant in connection with hiring or continued employment—as opposed to, for example, imposition in connection with a promotion to a position of responsibility and trust—the existence of coercion or a general plan of the employer to forestall competition, and the employer's knowledge that the covenant was overly broad'...". ***Long Is. Minimally Invasive Surgery, P.C. v. St. John's Episcopal Hosp.*, 2018 N.Y. Slip Op. 05674, Second Dept 8-8-18**

INSURANCE LAW, CONTRACT LAW.

RELEASE ENTERED WITH THE INSURER OF THE OTHER CAR INVOLVED IN THE ACCIDENT PRECLUDED CLAIM FOR SUPPLEMENTARY UNDERINSURED MOTORIST (SUM) BENEFITS AGAINST INSURER OF THE CAR IN WHICH APPELLANT WAS A PASSENGER.

The Second Department determined a release entered after settlement with the insurer of the other car involved in the accident precluded appellant's attempt to claim supplementary underinsured motorist (SUM) benefits from the insurer of the car in which appellant was a passenger: " 'A release is a contract, and its construction is governed by contract law' ... . A valid general release will apply not only to known claims, but 'may encompass unknown claims, . . . if the parties so intend and the agreement is fairly and knowingly made' ... . 'Where a release is unambiguous, the intent of the parties must be ascertained from the plain language of the agreement' ... . Here, the general release, in clear and unambiguous terms, releases all claims and future claims the appellant had or may have against the petitioner by reason of the subject accident. The plain language of the release thus precludes the appellant's SUM claim against the petitioner." ***Matter of Travelers Home & Mar. Ins. Co. v. Fiumara*, 2018 N.Y. Slip Op. 05681, Second Dept 8-8-18**

PERSONAL INJURY.

INCREASED SUSCEPTIBILITY TO INJURY JURY INSTRUCTION DID NOT AFFECT THE VERDICT, NO DUTY TO MITIGATE DAMAGES BY LOSING WEIGHT, REQUEST FOR MITIGATION OF DAMAGES JURY INSTRUCTION PROPERLY DENIED.

The Second Department, in affirming a $1.8 million verdict in this car accident case, determined that the increased susceptibility to injury jury instruction did not affect the verdict so it didn't discuss the propriety of the instruction. The Second Department also determined that defendants were not entitled to a duty to mitigate instruction based upon plaintiff's failure to lose weight: "The increased susceptibility instruction given by the Supreme Court did not refer to any condition. The pattern jury instruction for aggravation of a preexisting injury provides that 'the plaintiff is entitled to recover for any (increased) disability or pain resulting from' the aggravation of a preexisting injury or condition where the aggravation was caused by the accident (PJI 2:282). This charge is somewhat similar to the increased susceptibility charge, which instructs the jury that '[t]he fact that the plaintiff may have a physical or mental condition that makes [him or her] more susceptible to injury than a normal healthy person does not relieve the defendant[s] of liability for all injuries sustained as a result of [their] negligence' (PJI 2:283). On the issue of aggravation of the preexisting back condition, the jury found in favor of the defendants, and therefore did not award any damages based upon an increased susceptibility to an aggravated back injury. Thus, under the circumstances of this case, the jury instructions did not affect the verdict. We … agree with the Supreme Court's determination to decline to instruct the jury with respect to the plaintiff's duty to mitigate damages by losing weight. 'A party seeking to avail itself of the affirmative defense of failure to mitigate damages must establish that the injured party failed to make diligent efforts to mitigate its damages, and the extent to which such efforts would have diminished those damages' ... . The defendants failed to meet that burden. The plaintiff's expert orthopedic surgeon testified that the plaintiff's decision whether to have bariatric surgery to facilitate weight loss was 'a personal decision.' The plaintiff's expert further testified that the plaintiff's obesity did not change the need for knee and hip replacements, as 'the dye [sic] was cast the minute that this injury occurred.' The trial evidence established that the plaintiff complied with medical directives for physical therapy in an effort to mitigate damages, and there was no evidence presented that his damages would have been less if he had more actively participated in physical therapy." [Note: the name of this case probably should be "Rivera v. Kolsky."] ***People v. Kolsky*, 2018 N.Y. Slip Op. 05713, Second Dept 8-8-18**

PERSONAL INJURY, EDUCATION-SCHOOL LAW, EVIDENCE.

NEGLIGENT MAINTENANCE OF THE PLAYGROUND CAUSE OF ACTION AGAINST THE SCHOOL DISTRICT SHOULD HAVE BEEN DISMISSED, ALLEGED VIOLATIONS OF AMERICAN SOCIETY OF TESTING MATERIAL AND CONSUMER PRODUCT SAFETY COMMISSION STANDARDS DO NOT RAISE A QUESTION OF FACT ABOUT NEGLIGENCE.

The Second Department determined the negligent training a supervision cause of action against the school district was properly dismissed and the negligent maintenance of the premises cause of action should have been dismissed. Infant plaintiff fell from an apparatus on the school playground during recess: "The defendant also established its prima facie entitlement to judgment as a matter of law dismissing so much of the complaint as alleged negligent maintenance of its premises by submitting evidence which demonstrated that it adequately maintained the playground and that it did not create an unsafe or defective condition ... . In opposition, the plaintiff's expert opined, in part, that the ground cover beneath the apparatus from which the plaintiff fell was inherently dangerous as installed and/or maintained, because it did not meet American Society of Testing Material standards or standards established by the Consumer Product Safety Commission. These standards, however, are guidelines and not mandatory, and are insufficient to raise a triable issue of fact regarding negligent installation or maintenance ...". ***Boland v. North Bellmore Union Free Sch. Dist.*, 2018 N.Y. Slip Op. 05663, Second Dept 8-8-18**

REAL ESTATE, CONTRACT LAW.

REAL ESTATE BROKER ENTITLED TO COMMISSION, DEFENDANTS TERMINATED THE BROKER'S SERVICES IN BAD FAITH JUST BEFORE ENTERING THE LEASE AGREEMENT.

The Second Department determined plaintiff real estate broker was entitled to a commission on a lease entered by defendants (Budhu and RLRC) just after defendants terminated plaintiff's services, an action deemed to have been done in bad fact warranting recovery under an implied contract theory and in quantum meruit: "A real estate broker is entitled to recover a commission upon establishing that it (1) is duly licensed, (2) had a contract, express or implied, with the party to be charged with paying the commission, and (3) was the procuring cause of the transaction ... . There is no dispute that the plaintiff is a licensed brokerage firm. ... The plaintiff established that it had an implied contract to provide brokerage services for Budhu and RLRC. The plaintiff also established that it was the procuring cause of the transaction. In order to establish that it was the procuring cause of a transaction, a 'broker must establish that there was a direct and proximate link, as distinguished from one that is indirect and remote, between the bare introduction and the consummation' ... . While the plaintiff was not involved in the negotiations leading up to the completion of the deal between RLRC and Hillside, it established that it created an amicable atmosphere in which negotiations proceeded, and that it generated a chain of circumstances that proximately led to the transaction... . Even if the plaintiff were not the procuring cause of the transaction, it would still be entitled to recover a commission, as the evidence established that Budhu and RLRC terminated the plaintiff's activities in bad faith and as a mere last-minute device to escape the payment of the commission ... . Moreover, even assuming that there was no contract, express or implied, between the parties, the plaintiff would be entitled to recover for its services in quantum meruit in order to avoid the unjust enrichment of Budhu and RLRC ... . The plaintiff established that it performed services in good faith, that Budhu and RLRC accepted the services, that it expected to be compensated therefor, and the reasonable value of the services ...". ***Gluck & Co. Realtors, LLC v. Burger King Corp.*, 2018 N.Y. Slip Op. 05668, Second Dept 8-8-18**

REAL PROPERTY ACTIONS AND PROCEEDINGS LAW (RPAPL).

CRITERIA FOR AN EQUITABLE MORTGAGE EXPLAINED, CRITERIA FOR STANDING IN AN ACTION TO QUIET TITLE IS NOT THE SAME AS IN A FORECLOSURE ACTION.

The Second Department determined the causes of action concerning an equitable mortgage should not have been granted in this action to quiet title. The court noted that the criteria for standing in an action to quiet title is not the same as in a foreclosure action. The facts are too complicated to fairly summarize here: " 'New York law allows the imposition of an equitable lien if there is an express or implied agreement that there shall be a lien on specific property' ... . 'While [a] court will impose an equitable mortgage where the facts surrounding a transaction evidence that the parties intended that a specific piece of property is to be held or transferred to secure an obligation, it is necessary that an intention to create such a charge clearly appear from the language and the attendant circumstances' ... . Supreme Court improvidently exercised its discretion in denying that branch of the plaintiff's motion which was to substitute Fannie Mae as the plaintiff on the ground that Fannie Mae lacked standing. In reaching its conclusion, the court erroneously applied the standard used to establish standing in mortgage foreclosure actions. 'Standing to commence the foreclosure action is not properly raised in this action to quiet title' ... Since the plaintiff sufficiently established that Fannie Mae 'claims an estate or interest' in the subject property (see RPAPL 1501[1]), that branch of the plaintiff's motion which was to substitute Fannie Mae as the plaintiff should have been granted." ***JP Morgan Chase Bank, N.A. v. Bank of Am.*, 2018 N.Y. Slip Op. 05670, Second Dept 8-8-18**

ZONING.

BECAUSE THE DETERMINATION THAT THE PROPOSED CONSTRUCTION WAS ZONING COMPLIANT WAS NEVER FILED THE 30-DAY APPEAL PERIOD NEVER RAN, BECAUSE A NOTICED HEARING WAS NEVER HELD THE APPROVAL OF THE CONSTRUCTION WAS JURISDICTIONALLY DEFECTIVE.

The Second Department determined Supreme Court properly granted summary judgment in favor of plaintiff property owners who sought to contest the approval of the construction of condominiums near their properties. Because the approval of the project was never filed within the meaning of the Village Code, the 30-day period for appeal never began to run and plaintiffs' action should not have been dismissed as untimely. In addition, because no duly noticed public hearing (as required by the Village Code) was held, the site plan approval was jurisdictionally defective: "... [T}he ZBA [zoning board of appeals] determined that the 30-day period set forth in Village Code § 300-23(A)(2) began to run in November 2012, when the Building Inspector forwarded [the] application to the Planning Board, an act that was not disclosed to the public. It is undisputed that any determination of the Building Inspector in November 2012 that [the] proposed use was zoning-compliant was not 'filed' anywhere at that time. Thus, we agree with the Supreme Court's conclusion that the ZBA's determination in this respect was contrary to the plain language of Village Code § 300-23(A)(2). Since this is a purely legal conclusion based on arguments raised in the motions to dismiss, and based on undisputed facts, contrary to the appellants' contentions, the conversion of their motions into motions for summary judgment was proper, and we agree with the court's determination granting summary judgment to the petitioners on this issue prior to the filing of an answer ... . We also agree with the Supreme Court's determination granting summary judgment to the petitioners on the second cause of action to the extent of declaring that the determination of the BOT dated December 18, 2013, granting site plan approval, was jurisdictionally defective and thus void in that no duly noticed public hearing was held thereon in accordance with Village Code § 300-28(G). Contrary to the appellants' contention, Village Code § 300-28(G)(1) plainly requires that public hearings be held on site plan applications. That section further provides that the applicant shall be required to send notices of the hearing to owners of properties within 200 feet of the subject property by certified mailing. Since no notice of a public hearing was given, the BOT acted without jurisdiction in granting site plan approval ...". ***Matter of Corrales v. Zoning Bd. of Appeals of the Vil. of Dobbs Ferry*, 2018 N.Y. Slip Op. 05676, Second Dept 8-8-18**

ZONING.

SUPREME COURT SHOULD NOT HAVE REVERSED THE ZONING BOARD OF APPEALS AND GRANTED THE PETITION FOR A VARIANCE TO CONSTRUCT AN IN-LAW APARTMENT, COURT'S LIMITED REVIEW POWERS EXPLAINED.

The Second Department, reversing Supreme Court, determined that the petition for a variance to allow construction of an in-law apartment should not have been granted: "To obtain a use variance, an applicant must demonstrate to the zoning board of appeals that 'applicable zoning regulations and restrictions have caused unnecessary hardship' (Village Law § 7-712-b[2][b]). This imposes a 'heavy burden' on the applicant ..., who is required to establish: '[F]or each and every permitted use under the zoning regulations for the particular district where the property is located, (1) the applicant cannot realize a reasonable return, provided that lack of return is substantial as demonstrated by competent financial evidence; (2) that the alleged hardship relating to the property in question is unique, and does not apply to a substantial portion of the district or neighborhood; (3) that the requested use variance, if granted, will not alter the essential character of the neighborhood; and (4) that the alleged hardship has not been self-created' (Village Law § 7-712-b[2][b]). 'Under a zoning ordinance which authorizes interpretation of its requirements by a board of appeals, such as Village of Patchogue Code § 93-47(B), specific application of a term of the ordinance to a particular property is governed by that body's interpretation, unless unreasonable or irrational . . . [J]udicial review is generally limited to ascertaining whether the action was illegal, arbitrary and capricious, or an abuse of discretion' ... The petitioner failed to make the requisite showing of 'unnecessary hardship' for a use variance ... . Additionally, there is no evidence that the ZBA [zoning board of appeals] failed to adhere to any prior precedent of granting use variance applications in similar situations ...". ***Matter of Gray v. Village of Patchogue*, 2018 N.Y. Slip Op. 05677, Second Dept 8-8-18**

THIRD DEPARTMENT

CRIMINAL LAW, APPEALS.

APPELLATE COURT EXERCISED ITS POWER TO REDUCE A SENTENCE EVEN THOUGH THE SENTENCING COURT DID NOT ABUSE ITS DISCRETION, NOTING EXTRAORDINARY CIRCUMSTANCES.

The Third Department exercised its power to reduce a sentence in the absence of an abuse of discretion by the sentencing judge. In the midst of difficult divorce proceedings defendant deposited a check made out to her and her husband. The evidence demonstrated the husband's signature was forged and defendant was convicted of criminal possession of a forged instrument. The Third Department did not explain the extraordinary circumstances but deemed the four-month sentence inappropriate and imposed a time-served sentence of 13 days: " 'Ordinarily, we refrain from exercising our power to modify

a sentence unless the sentencing court abused its discretion or extraordinary circumstances exist warranting such a modification' ... . In our view, the circumstances surrounding the commission of the crime and defendant herself are extraordinary and warrant the exercise of that power. Defendant has already served 13 days in jail and, as a matter of discretion in the interest of justice, we reduce the jail component of her sentence to time served ...". ***People v. Gretzinger*, 2018 N.Y. Slip Op. 05716, Third Dept 8-9-18**

CRIMINAL LAW, EVIDENCE, ATTORNEYS, APPEALS.

DEFENSE COUNSEL WAS INEFFECTIVE IN FAILING TO REQUEST A FRYE HEARING CONCERNING A COMPUTER PROGRAM USED TO INTERPRET MIXED DNA SAMPLES, APPEAL HELD IN ABEYANCE AND MATTER REMITTED FOR A HEARING.

The Third Department determined defense counsel was ineffective in failing to request a Frye hearing concerning a computer program, the TrueAllele Caaswork system, used to interpret mixed DNA samples. The appeal was held in abeyance and the matter remitted for the hearing: "Defendant asserts that his trial counsel should have challenged, by way of a Frye hearing, the reliability of the TrueAllele Casework system, the proprietary 'computer program that use[d] mathematics and statistics to interpret' the electronic data generated from the DNA mixtures taken from the lavender gloves and determine the statistical probability of a match between defendant's DNA and that found on the inside of the gloves. A Frye hearing ascertains the reliability of 'novel scientific evidence' by determining 'whether the accepted techniques, when properly performed, generate results accepted as reliable within the scientific community generally'... . At the time of defendant's pretrial proceedings in 2014, there were no reported trial court or appellate court decisions in this state establishing that the reliability of the TrueAllele Casework system had been assessed through a Frye hearing or that any court in the state had otherwise accepted expert testimony regarding that proprietary computer program... . Given these circumstances, we do not find that it would have been futile for defense counsel to have requested a Frye hearing to challenge the reliability of the TrueAllele Casework system or that such an application would have had little or no likelihood of success ...". ***People v. Wilson*, 2018 N.Y. Slip Op. 05715, Third Dept 8-9-18**

EMPLOYMENT LAW, HUMAN RIGHTS LAW, MUNICIPAL LAW.

LOST PENSION BENEFITS AS DAMAGES IN THIS SEXUAL HARASSMENT CASE WERE PROPERLY CALCULATED USING THE TOTAL OFFSET METHOD.

The Third Department, in a matter of first impression, determined the damages award for loss of Seabury's pension benefits in this sexual harassment case was properly calculated using the "total offset" method: "We ... reject petitioner's contention that SDHR [State Division of Human Rights] erred by failing to reduce the damages awarded for loss of pension benefits to present value. Citing Stratton v. Department of Aging for City of New York (132 F3d 869, 882 [2d Cir 1997]), SDHR explained that it had not discounted the award to present value because it had not factored future salary increases into its award ... . Whether the Human Rights Law (see Executive Law art 15) requires that awards for future damages be discounted to present value is an issue of first impression in the appellate courts of New York. However, the Court of Appeals has noted that federal case law is instructive in the employment discrimination context... . We acknowledge that the award for Seabury's lost pension benefits can only be a 'rough approximation' of the amount necessary to restore her to the position that she would have occupied had she not been the victim of sexual harassment, because neither her lost income stream nor the effect of future price inflation can be predicted with complete confidence ... . One permissible method for approximating damages that arises from a loss of future income — known as the "total offset" method — is to neither consider future salary increases nor discount the damages to present value based on the presumption that future salary increases are offset by the discount rate used to calculate the present value of a damages award... . Thus, SDHR did not err by adopting the total offset method to determine the value of Seabury's lost pension benefits ...". ***Matter of Rensselaer County Sheriff's Dept. v. New York State Div. of Human Rights*, 2018 N.Y. Slip Op. 05719, Third Dept 8-9-18**

RETIREMENT AND SOCIAL SECURITY LAW.

EXTRA PAYMENTS MADE TO PORT AUTHORITY EMPLOYEES IN THE WAKE OF 9/11 IN ORDER TO RETAIN EMPLOYEES WHO COULD RETIRE SHOULD HAVE BEEN INCLUDED IN THE AVERAGE SALARY CALCULATION FOR RETIREMENT BENEFITS.

The Third Department, reversing the Retirement System's ruling, over a two-justice dissent, determined that extra payments (longevity allowance payments) made to Port Authority employees in the wake of 9/11, in an effort to retain employees who could retire, should be included in the average salary calculation for retirement benefits: "In our view, these payments are more appropriately characterized as payments genuinely made to delay petitioners' retirements, not to artificially inflate their final average salary in anticipation of retirement. We see the primary purpose of the memorandum agreement as twofold — to retain key employees following the September 11, 2001 terrorist attack and to adequately compensate petitioners for their dedication and commitment to remain in their vital positions... . This is certainly neither a lump-sum payment on the eve of retirement nor a disproportionate salary increase designed to artificially inflate a pension benefit that would be properly excluded from the computation of the final average salary ... . The statute squarely precludes 'any

additional compensation paid in anticipation of retirement' from an employee's salary base for purposes of computing the employee's retirement benefit (Retirement and Social Security Law § 431 [3]). In that regard, it is telling that both the Retirement System and the Hearing Officer, whose recommendation the Comptroller adopted, characterized the payments as having been made 'in anticipation of eventual retirement' (emphasis added). The term 'eventual' is not part of the statutory standard and actually reflects the Comptroller's own recognition that there was no actual retirement date anticipated in the memorandum agreement. Further, that temporal qualification is consistent with the Port Authority's key objective to further delay petitioners' retirements, not to artificially inflate an impending pension." ***Matter of Bohlen v. DiNapoli*, 2018 N.Y. Slip Op. 05720, Third Dept 8-9-18**

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