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CasePrepPlus

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COURT OF APPEALS

CRIMINAL LAW, APPEALS.

DEFENDANT CHARGED WITH A FELONY AND FACING A POTENTIAL LIFE SENTENCE CANNOT WAIVE INDICTMENT AND PLEAD TO A SUPERIOR COURT INFORMATION; JURISDICTIONAL ISSUE PROPERLY CONSIDERED ON APPEAL DESPITE GUILTY PLEA AND FAILURE TO RAISE THE ISSUE BELOW.

The Court of Appeal, reversing defendant's conviction by guilty plea, determined that the NYS Constitution and Criminal Procedure Law § 195.10[1] prohibited defendant's waiver of indictment because defendant was charged with an A felony with a potential life sentence. The defendant was charged with second degree murder, waived indictment and pled to a superior court information charging first degree manslaughter. The court noted that this jurisdictional issue could be considered on appeal despite the guilty plea and the failure to raise the issue below: "The New York State Constitution provides that '[n]o person shall be held to answer for a capital or otherwise infamous crime . . . unless on indictment of a grand jury' (NY Const, art. 1 § 6). The Constitution contains a limited exception to this jurisdictional requirement: 'a person held for the action of a grand jury upon a charge for such an offense, other than one punishable by death or life imprisonment, with the consent of the district attorney, may waive indictment by a grand jury and consent to be prosecuted on an information filed by the district attorney' (id.). In addition, Criminal Procedure Law § 195.10 provides that a defendant may waive indictment by grand jury when, among other conditions, 'the defendant is not charged with a class A felony punishable by death or life imprisonment' (CPL 195.10 [1]). Accordingly, under both the Constitution and Criminal Procedure Law, a defendant who is held for the action of the grand jury on a class A felony punishable by life imprisonment may not waive indictment by the grand jury and agree to be prosecuted for a lesser included offense in order to facilitate a plea bargain on the homicide offense ...". ***People v. Monforte*, 2019 N.Y. Slip Op. 06451, CtApp 9-5-19**

FIRST DEPARTMENT

BANKING LAW, UNIFORM COMMERCIAL CODE (UCC), FRAUD.

BANK NOT LIABLE FOR PAYMENT RE: FRAUDULENT CHECKS SIGNED BY PLAINTIFF BUT ALTERED BY PLAINTIFF'S BOOKKEEPER TO PAY OFF HER CREDIT CARD BILLS.

The First Department determined defendant bank (Citibank) and Citi Credit were not liable for cashing checks which were signed by plaintiff but which were altered by plaintiff's bookkeeper to pay off her credit card bills. Plaintiff was notified of the fraud by Citibank: "Citibank's actual knowledge of the fraud in February 2016 is, at this pleading stage, enough to sustain the claim of commercial bad faith that would render Citibank ineligible for the protection of UCC 3-405(1)(c) ... , i.e., the 'fictitious payee' or 'padded payroll' defense ... . UCC 3-405(1)(c) bars plaintiffs' claims against Citi Credit. Nowhere in any of their papers — either the complaint or Dr. Weiser's opposition affidavit — do plaintiffs allege other than conclusorily that Citi Credit, like Citibank a subsidiary of defendant Citigroup, Inc., had actual knowledge of the fraud. ... Although plaintiffs' claims against Citibank are not barred by UCC 3-405(1)(c), they are barred by plaintiffs' failure to satisfy a condition precedent to suit created by UCC 4-406(4) and Citibank's checking account rules and regulations as set forth in its CitiBusiness Client Manual ... . Plaintiffs failed, as required by the manual, to 'notify us [Citibank] in writing within 30 days after we send or make available to you [plaintiffs] your account statement and accompanying items of any errors, discrepancies, or unauthorized transactions.' " ***Weiser v. Citigroup, Inc.*, 2019 N.Y. Slip Op. 06440, First Dept 9-3-19**

INSURANCE LAW, ARBITRATION, PERSONAL INJURY.

THE INSURED DID NOT SHOW UP FOR THE SCHEDULED INDEPENDENT MEDICAL EXAMS IN THIS NO-FAULT POLICY CASE, ARBITRATOR'S AWARD IRRATIONALLY IGNORED THE CONTROLLING LAW.

The First Department, reversing the arbitrator, granted the insurer's petition to vacate the arbitration award in this no-fault policy case: "The master arbitrator's award was arbitrary because it irrationally ignored the controlling law that the no-fault policy issued by petitioner was void ab initio due to respondent's assignor's failure to attend duly scheduled independent medical exams ...". **Matter of Global Liberty Ins. Co. of N.Y. v. Top Q. Inc., 2019 N.Y. Slip Op. 06445, First Dept 9-3-19**

PERSONAL INJURY, EVIDENCE.

THERE ARE QUESTIONS OF FACT WHETHER DEFENDANTS WERE NOTIFIED THAT THE ELEVATOR DOORS CLOSED TOO FAST AND WHETHER REPAIRS TO THE DOOR COULD BE RELATED TO THE CLOSING VELOCITY; PLAINTIFF ALLEGED HIS THUMB WAS CAUGHT IN THE CLOSING DOOR; DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED.

The First Department, reversing Supreme Court, determined summary judgment should not have been granted to the defendant's in this elevator accident case. Plaintiff alleged the elevator door closed too fast and his thumb was caught in the closing door. Plaintiff alleged he had complained to the building superintendent, a building maintenance employee and the management company about the door closing too fast. Both parties submitted affidavits from experts: "The superintendent-in-training on the date of the accident testified that he did not receive any complaints regarding problems with the elevator door. The field mechanic for [the elevator service company] testified that he did not complete any repair work with respect to the door opening and closing too quickly. He did, however, replace the elevator shoe which is a necessary component for the elevator door to be able to close ... . Plaintiff ... testified that prior to his accident he had complained to the then superintendent, another building maintenance employee, and the management company numerous times regarding the velocity with which the elevator door closed. Plaintiff testified further that during one of his conversations with the management company regarding the elevator door, he was told that management would send a service company out to address the issue. Additionally, plaintiff testified that approximately two months before his accident, he witnessed a friend get hit in the shoulder by the fast closing elevator door, and that plaintiff and his mother reported this incident to the then superintendent and the management company. The parties also presented conflicting expert affidavits regarding the potential causes of the alleged elevator door malfunction, including the purpose of the elevator shoe, and the relevance of the velocity with which the door closed as it pertained to the cause of plaintiff's injury, which only further precludes a grant of summary judgment ... . ***Mable v. 384 E. Assoc., LLC*, 2019 N.Y. Slip Op. 06442, First Dept 9-3-19**

PERSONAL INJURY, EVIDENCE.

PLAINTIFF DID NOT DEMONSTRATE DEFENDANTS' JANITORIAL SCHEDULE WAS MANIFESTLY UNREASONABLE IN THIS SLIP AND FALL CASE, WHICH PRECLUDES DEFENDANTS' LIABILITY; PLAINTIFF'S TESTIMONY DEMONSTRATED DEFENDANTS DID NOT HAVE ACTUAL OR CONSTRUCTIVE KNOWLEDGE OF THE ALLEGED WET CONDITION; DEFENDANTS' MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED.

The First Department, reversing Supreme Court, determined defendants' motion for summary judgment should have been granted in this slip and fall case. Defendants' presented evidence of the janitorial schedule for a particular day which was deemed sufficient to preclude liability because plaintiff did not demonstrate the schedule was manifestly unreasonable. And plaintiff's testimony the defendants did not have actual or constructive notice of the alleged wet condition on the stairs: "Defendants' superintendent offered testimony as to the janitorial schedule to be followed on a particular day. An established reasonable cleaning routine precludes the imposition of liability ... . Where, as here, the incident occurs outside of the scheduled cleaning routine, plaintiff's failure to raise a factual issue that such routine was manifestly unreasonable so as to require altering it warrants dismissal of the complaint ... . Furthermore, plaintiff testified that there was no wet condition on the stairs when he left the building, that upon his return a short while later he observed an alleged wet condition on the stairs, that he did not notify anyone of such condition, and that as a result of this condition he slipped and fell on the stairs as he was leaving the building a second time. Plaintiff's testimony demonstrates that defendants did not have actual notice of the purported wet condition, or constructive notice given that the condition did not exist for a sufficient length of time prior to the accident to permit defendants' employees to discover and remedy it ...". ***Thomas v. Sere Hous. Dev. Fund Corp.*, 2019 N.Y. Slip Op. 06443, First Dept 9-3-19**

REAL PROPERTY LAW, REAL ESTATE.

ALTHOUGH THE EASEMENT WAS NOT RECORDED IN PLAINTIFF'S DIRECT CHAIN OF TITLE, IT WAS INDEXED UNDER A BLOCK AND LOT NUMBER SYSTEM, THEREFORE PLAINTIFF HAD CONSTRUCTIVE NOTICE OF THE EASEMENT AND WAS NOT A BONA FIDE PURCHASER.

The First Department, in a detailed opinion by Justice Friedman, determined a reasonable title search would have turned up an easement on the subject property. Therefore, plaintiff was not a bona fide purchaser of the empty lot (57 Crosby). The interesting opinion is too detailed to fairly summarize here. The following excerpt provides the flavor of the reasoning: "The question presented ... is whether plaintiff, when it purchased 57 Crosby in 2011, had constructive notice of the 1981 easement, notwithstanding that the indexing of the easement had not been changed by the City Register when 57 Crosby was subdivided from Lot 30 in 1984 and reassigned its previous designation of Lot 9. ... [T]he answer to the foregoing question does not turn on whether the 1981 easement would have been found in a search in 2011 of the direct chain of title to 57 Crosby. Almost 40 years ago, the Court of Appeals held that "the rule limiting constructive notice to recorded conveyances that are within the purchaser's direct chain of title" does not apply 'to instances in which the purchaser had access to a block

and lot' or tract indexing system,' such as the one in use in New York City ... . '[I]n counties using a block and lot' indexing system, a purchaser is charged with record notice of all matters indexed under the block and lot numbers corresponding to the purchaser's property, regardless of whether such information also appears in his or her direct chain of title' ... . Thus, although ... the 1981 easement was not recorded within plaintiff's direct chain of title, that circumstance has no bearing on the outcome of this appeal ...". ***Akasa Holdings, LLC v. 214 Lafayette House, LLC*, 2019 N.Y. Slip Op. 06447, First Dept 9-3-19**

FOURTH DEPARTMENT

ELECTION LAW.

SUPREME COURT PROPERLY VALIDATED 25 SIGNATURES ON THE DESIGNATING PETITION WHICH HAD BEEN INVALIDATED BY THE BOARD OF ELECTIONS, THEREBY ALLOWING THE DEMOCRATIC CANDIDATE FOR COUNTY EXECUTIVE TO RUN IN THE NOVEMBER ELECTIONS.

The Fourth Department determined Supreme Court properly validated signatures which had been declared invalid by the Oneida County Board of Elections, allowing the Democratic candidate for Oneida County Executive to run in the upcoming election: "The designating petition had been invalidated by respondent Board of Elections of County of Oneida (Board), which determined in response to objections filed by James Genovese (respondent) that the designating petition contained 22 fewer valid signatures than required. After a hearing, Supreme Court validated 25 signatures that had been invalidated by the Board and thus ordered that petitioner be declared a duly qualified candidate of the Democratic Party for County Executive. ... With respect to the merits, we reject respondent's contention that the court erred in validating the signatures at lines 2 through 4 and lines 6 and 7 of page 28 of the designating petition. Each of those signatures had listed by them the same street address, but no apartment numbers were included even though testimony at the hearing established that there are 'maybe 60 [to] 70' apartments at that address. We nonetheless conclude that the designating petition adequately set forth the 'residence address' of those signers within the meaning of Election Law § 6-130 'by indicating each signer's respective street address'... , and that an apartment number is not a required component of a residence address for purposes of section 6-130 ... . The signatures at line 8 of page 17 and line 8 of page 6 were properly validated based on the testimony of the signers identifying their signatures ... . The court validated the other three signatures by crediting the testimony of 'subscribing witnesses attesting to the identity of [the signers]' ... , i.e., testimony that the subscribing witnesses either personally knew the signer or required the signer to present identification before signing ... . Respondent also contends that the subscribing witness for page 90 of the designating petition engaged in fraud by attesting in his subscribing witness statement that the signer listed at line 8 signed her name in his presence, when in fact her son signed for her pursuant to a power of attorney. In view of the court's determination to credit the testimony of the subscribing witness, however, we conclude that the record fails to establish that the subscribing witness statement was false, i.e., that the listed signer did not sign the designating petition herself ...". ***Matter of Hennessy v. Board of Elections of County of Oneida*, 2019 N.Y. Slip Op. 06450, Fourth Dept 9-4-19**

MUNICIPAL LAW, EDUCATION-SCHOOL LAW, ELECTION LAW.

PROPOSED 2019 ELECTION REFERENDUM REGARDING PUBLIC EDUCATION OFFICIALS IN THE CITY OF ROCHESTER IS IMPERMISSIBLY ADVISORY AND WAS PROPERLY DECLARED VOID.

The Fourth Department determined the proposed 2019 referendum on amendments to City of Rochester Local Laws regarding the Board of Education, Commissioners and the salaries of School Board Members was impermissibly advisory: "Any local law that '[a]bolishes an elective office' or 'reduces the salary of an elective officer during his [or her] term of office' is subject to mandatory referendum (Municipal Home Rule Law § 23 [2] [e]), but an 'advisory' referendum—i.e., one that lacks legal effect or consequence—is not permitted in the absence of express constitutional or statutory authority for it ... . Contrary to respondents' contention, we conclude, for two independent reasons, that the referendum on the Local Law is impermissibly advisory and, thus, that the court properly declared the Local Law invalid and the referendum void. First, the language of section 5 of the Local Law, which conditions its effectiveness on subsequent action by the New York State Legislature, strips the referendum of any binding legal effect (...see ... Municipal Home Rule Law § 23 [1]). Second, as the court correctly noted, a local government may not legislate in areas 'where the State has evidenced its intent to occupy the field' ... , and it is well established that the State has preempted local action in the field of public education ...". ***Matter of Rochester City Sch. Dist. v. City of Rochester*, 2019 N.Y. Slip Op. 06449, Fourth Dept 9-4-19**

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