CasePrepPlus

March 6, 2020

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, BANKING LAW, FRAUD.

ALTHOUGH MOVING MONEY THROUGH A NEW YORK BANK IS ENOUGH TO CONFER PERSONAL JURISDICTION ON OUT-OF-STATE PARTIES, SUPREME COURT CORRECTLY HELD IT WAS NOT ENOUGH TO MAKE NEW YORK A CONVENIENT FORUM.

The First Department determined that, although using a New York bank for an allegedly fraudulent transaction is sufficient to acquire personal jurisdiction over out-of-state parties, it does not necessarily follow that New York is a convenient forum. Supreme Court properly found New York was not a convenient forum in these actions involving individuals and corporations in Saudi Arabia and the United Arab Emirates, as well as a Swiss bank: "... [T]he court properly considered the following matters, among others: (1) none of the parties to either action is a New York citizen or resident or (if an entity) is formed under New York law or has its principal place of business in New York; ... (2) the alleged conduct at issue primarily occurred in the UAE, Saudi Arabia and Switzerland, with the sole New York connection being the fleeting presence of the bribery funds at a nonparty New York correspondent bank while en route from the UAE to Switzerland; (3) the bulk of the relevant documentary evidence is located in the UAE, Saudi Arabia, Switzerland and BVI, and most witnesses are located outside New York and beyond New York's subpoena power; (4) there is a likelihood that foreign substantive law will govern; (5) there are alternative fora available (Switzerland and the UAE) with greater connection to the subject matter; and (6) in the Pictet [bank] action, Switzerland has an interest in regulating the conduct of a bank operating within its borders ... . As Supreme Court correctly recognized ... '[o]ur state's interest in the integrity of its banks . . . is not significantly threatened every time one foreign national, effecting what is alleged to be a fraudulent transaction, moves dollars through a bank in New York. . . . New York's interest in its banking system is not a trump to be played whenever a party to such a transaction seeks to use our courts for a lawsuit with little or no apparent contact with New York' (Mashreqbank PSC v. Ahmed Hamad Al Gosaibi & Bros. Co., 23 NY3d 129 , 137 [2014] ...). In accordance with Mashreqbank, this Court has declined to disturb the motion court's discretionary determination that New York is not a convenient forum in cases where the sole connection to New York was the passage of wired funds through a correspondent bank in the state ...". ***Al Rushaid Parker Drilling Ltd. v. Byrne Modular Bldgs. L.L.C.*, 2020 N.Y. Slip Op. 01277, First Dept 2-25-20**

CRIMINAL LAW.

THE RECORD DID NOT DEMONSTRATE A SELECTED UNSWORN JUROR COULD NOT RENDER AN IMPARTIAL VERDICT BECAUSE OF AN OUT-OF-TOWN MEETING ON THE DAY BEFORE THE TRIAL WAS LIKELY TO CONCLUDE, THE PEOPLE'S FOR CAUSE CHALLENGE SHOULD NOT HAVE BEEN GRANTED, NEW TRIAL ORDERED.

The First Department, reversing defendant's conviction, determined the judge should not have granted the People's for cause challenge to a selected by unsworn juror. Although the juror had an important out-of-town meeting on the day before the trial was to conclude, the record did not demonstrate the juror could not render an impartial verdict on that ground: "The record did not justify the court's discharge for cause of a selected but unsworn juror. Both defendant and the People initially declined to challenge the juror peremptorily or for cause. However, the prosecutor challenged the juror for cause, over defense objection, after the court, concerned about an important out-of-town meeting that the prospective juror was scheduled to attend on a day before the anticipated conclusion of the trial, announced that it would grant such a challenge. Although subsequent questioning demonstrated that rescheduling the meeting would be inconvenient for the juror, it did not establish that the juror, who never directly asked to be excused for hardship or otherwise, had 'a state of mind that [was] likely to preclude him from rendering an impartial verdict based on the evidence adduced at the trial' ... . By way of contrast, in People v. Williams (44 AD3d 326, 326 [1st Dept 2007], lv denied 9 NY3d 1010]), we found that the selected but unsworn juror at issue was unfit for service because her scheduling conflict involving a funeral 'would make it difficult for her to focus on the trial.' Here, the juror's responses did not establish a sufficient basis to sustain a challenge for cause, which was the only issue presented to and ruled upon by the court." ***People v. Manning*, 2020 N.Y. Slip Op. 01308, First Dept 2-25-20**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

PLAINTIFF WAS ENGAGED IN REPAIR WORK WHEN A PERMANENT LADDER IN AN ELEVATOR SHAFT ALLEGEDLY VIBRATED CAUSING HIM TO FALL; EVEN IF A HARNESS WERE AVAILABLE, COMPARATIVE NEGLIGENCE IS NOT A DEFENSE TO A LABOR LAW § 240(1) ACTION; DEFENDANTS' MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED.

The First Department, reversing Supreme Court, determined plaintiff's Labor Law § 240(1) cause of action should not have been dismissed. Plaintiff was engaged in a long-term project to repair elevator cables which were striking objects in the elevator shaft. While using a ladder that was permanently affixed in the shaft when it allegedly vibrated causing him to fall: "... [W]hile an unsecured ladder that moves or shifts constitutes a prima facie violation of Labor Law § 240(1) ... , the ladder from which plaintiff fell was secured to the structure, and, other than allegedly vibrating, it did not move, shift or sway. Under the circumstances, an issue of fact exists whether the secured, permanently affixed ladder that allegedly vibrated provided proper protection for plaintiff. The record demonstrates, contrary to defendants' contention, that at the time of his accident plaintiff was performing not routine maintenance but repair work, which falls within the protective ambit of Labor Law § 240(1) ... . Defendants failed to establish that plaintiff was the sole proximate cause of his accident, as they submitted no evidence that plaintiff knew that he was supposed to use a harness for climbing ladders or that he disregarded 'specific instructions' to do so ... . Further, to the extent the ladder failed to provide proper protection, plaintiff's failure to use a harness amounts at most to comparative negligence, which is not a defense to a Labor Law § 240(1) claim ...". ***Kehoe v. 61 Broadway Owner LLC*, 2020 N.Y. Slip Op. 01391, First Dept 2-27-20**

LEGAL MALPRACTICE, NEGLIGENCE, ATTORNEYS, EVIDENCE.

PLAINTIFF ALLEGED THE FAILURE OF DEFENDANT ATTORNEYS TO PROPERLY PREPARE THE EYEWITNESS TO THE ACCIDENT RESULTED IN THE WITNESS'S INCONSISTENT TESTIMONY AT TRIAL AND A DEFENSE VERDICT; ARGUING THAT THERE WOULD HAVE BEEN A PLAINTIFF'S VERDICT ABSENT THE ATTORNEYS' MALPRACTICE IS TOO SPECULATIVE TO SUPPORT A LEGAL MALPRACTICE ACTION.

The First Department, reversing Supreme Court, determent defendant attorneys' motion for summary judgment in this legal malpractice action should have been granted. Plaintiff was allegedly struck by a garbage truck and seriously injured. Plaintiff could not describe the truck and plaintiff's case depended upon the testimony of an eyewitness, Arenas. Arenas's descriptions of the truck were not consistent and there was a defense verdict. Plaintiff alleged defendant attorneys failed to properly prepare Arenas for his deposition, which resulted in Arenas's inconsistent testimony at trial: " '[M]ere speculation of a loss resulting from an attorney's alleged omissions . . . is insufficient to sustain a claim' for legal malpractice' ... . Plaintiff's assertion that, had Arenas been better prepared, the jury would have returned a favorable verdict is pure speculation ... . Defendants met their burden of showing that plaintiff cannot establish causation, in that plaintiff cannot prove that it would have prevailed in the underlying action 'but for' defendant's alleged negligence in preparing Arenas for his deposition ... . Although there are issues of fact regarding whether defendants may have departed from the applicable standard of care, any claim that the jury would have reached a different result in the personal injury action is wholly speculative. First, it is wholly speculative that Arenas would have testified to a different description of the truck either at his deposition or at trial had he been shown the investigative reports. Although the investigative reports were read to him line by line at his deposition, his description of the truck did not change and he adhered to his belief, that the front of the truck he saw strike and run over plaintiff was bullnosed. Even if Arenas's statement in support of plaintiff's motion in this case is accurate, that he would have testified differently had he been differently prepared, this, at best, creates an issue of fact about what he would have said at trial. It does not eliminate speculation about what the jury's verdict would have been, given that Arenas's description of the truck otherwise lacked detail, and the absence of any additional proof identifying defendants' truck and driver as being involved in underlying accident." ***Caso v. Miranda Sambursky Slone Sklarin Verveniotis LLP*, 2020 N.Y. Slip Op. 01384, First Dept 2-27-20**

REAL PROPERTY TAX LAW (RPTL), CONSTITUTIONAL LAW, CIVIL PROCEDURE.

PLAINTIFF DID NOT SUFFICIENTLY ALLEGE THAT NEW YORK'S PROPERTY TAX SYSTEM DISCRIMINATES AGAINST PROPERTY OWNERS IN "MAJORITY-MINORITY" NEIGHBORHOODS; COMPLAINT SHOULD HAVE BEEN DISMISSED IN ITS ENTIRETY.

The First Department, in a comprehensive opinion by Justice Kern, reversing (modifying) Supreme Court, determined the complaint alleging the New York property tax system is unconstitutional should have been dismissed in its entirety for failure to state a cause of action. The opinion is too detailed to fairly summarize here. With respect to the allegations the property tax system discriminates against property owners in "majority-minority" neighborhoods, the court wrote: "... [P]laintiff does not adequately allege a causal connection between the property tax system and any racial disparities in the availability of housing. Plaintiff has failed to allege sufficient concrete facts or produce statistical evidence showing that the application of the property tax system, as opposed to other factors, causes financial barriers that inhibit the ability of minority residents to own homes. Additionally, plaintiff does not allege sufficient concrete facts or produce statistical evidence showing how

the current property tax system contributes to higher rates of foreclosure or discourages the production of rental units in majority-minority communities. ... [P]laintiff has failed to meet its burden 'to allege facts at the pleading stage or produce statistical evidence demonstrating a causal connection' between the property tax system and the continued segregation of New York City neighborhoods sufficient to 'make out a prima facie case of disparate impact' ... . [P]laintiff argues that the terms and conditions of all home, condominium and cooperative sales and apartment rentals include the transfer of an illegal tax burden that make purchasing or renting a dwelling more expensive in affected communities. The portion of the FHA [Fair Housing Act] upon which plaintiff relies makes it unlawful to 'discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling . . . because of race, color, religion, sex, familial status, or national origin' ... . However, in the context of taxation, defendants are not involved in the terms and conditions of the sale or rental of property ...". ***Tax Equity Now NY LLC v. City of New York*, 2020 N.Y. Slip Op. 01401, First Dept 2-27-20**

SECOND DEPARTMENT

CIVIL PROCEDURE, JUDGES, FORECLOSURE.

SUPREME COURT SHOULD NOT HAVE, SUA SPONTE, DISMISSED THE COMPLAINT IN THIS FORECLOSURE ACTION, THEREBY DEPRIVING PLAINTIFF OF AN OPPORTUNITY TO BE HEARD.

The Second Department, reversing Supreme Court, determined plaintiff bank's motion to vacate the default in this foreclosure action should have been granted. Supreme Court had, sua sponte, dismissed the complaint without affording plaintiff an opportunity to be heard: "Following the plaintiff's failure to move for an order of reference ... , the Court Attorney Referee found ... that the plaintiff failed to show good cause for its failure to move for the order of reference as directed and recommended that the action be dismissed. ... Supreme Court directed dismissal of the action. 'A court's power to dismiss a complaint, sua sponte, is to be used sparingly and only when extraordinary circumstances exist to warrant dismissal' ... . As no such extraordinary circumstances were present in this case, we disagree with the Supreme Court's determination to sua sponte direct dismissal of the complaint, without affording the plaintiff notice and opportunity to be heard ... , which 'amounted to a denial of the plaintiff's due process rights' ... Accordingly, the Supreme Court should have granted those branches of the plaintiff's motion which were to vacate the October 4, 2016, order and to restore the action to active status ...". ***Deutsche Bank Natl. Trust Co. v. Winslow*, 2020 N.Y. Slip Op. 01325, Second Dept 2-26-20**

CIVIL PROCEDURE, JUDGES, FORECLOSURE.

MOTION TO DISCONTINUE STATE FORECLOSURE ACTION WHILE FORECLOSURE WAS PURSUED IN FEDERAL COURT SHOULD HAVE BEEN GRANTED WITHOUT PREJUDICE BECAUSE THERE WAS NO SHOWING OF PREJUDICE ON THE PART OF DEFENDANT.

The Second Department, reversing Supreme Court, determined plaintiff's motion to discontinue the foreclosure action should not have been granted with prejudice because there was no showing of prejudice on the part of the defendant (Jach): "... [T]he plaintiff commenced this action ... seeking to foreclose the subject mortgage. After interposing an answer, in which he alleged lack of standing as an affirmative defense, Jach moved for summary judgment dismissing the complaint insofar as asserted against him, and the plaintiff cross-moved, inter alia, for summary judgment on the complaint. The Supreme Court referred the action to a referee to hear and report on the issue of standing. After conducting a hearing, the referee issued a report finding, in effect, that the plaintiff had failed to establish its standing for purposes of its cross motion for summary judgment on the complaint. ... [W]ith this action still pending and the referee's report not yet confirmed, the plaintiff commenced an action in federal court seeking to foreclose the subject mortgage. Subsequently, ... the plaintiff moved before the Supreme Court, among other things, for leave to discontinue the action without prejudice, which Jach opposed. In the order appealed from, the Supreme Court, inter alia, in effect, upon granting that branch of the plaintiff's motion which was for leave to discontinue the action, did so with prejudice. The plaintiff appeals. The Supreme Court, in granting that branch of the plaintiff's motion which was for leave to discontinue the action, should have done so without prejudice. Pursuant to CPLR 3217(b), 'an action shall not be discontinued by a party asserting a claim except upon order of the court and upon terms and conditions, as the court deems proper.' As a general rule, 'a plaintiff should be permitted to discontinue an action without prejudice unless the defendant would be prejudiced thereby' ... . Here, there was no evidence that Jach would be prejudiced by a discontinuance ... ". ***Onewest Bank, FSB v. Jach*, 2020 N.Y. Slip Op. 01357, Second Dept 2-26-20**

CIVIL PROCEDURE, LABOR LAW-CONSTRUCTION LAW, EVIDENCE.

QUESTIONS OF FACT WHETHER WALKING ON THE REBAR GRID WAS INHERENT IN THE JOB AND WHETHER THE GRID WAS A DANGEROUS CONDITION PRECLUDED A DIRECTED VERDICT IN THIS LABOR LAW § 200 ACTION; NEW TRIAL ORDERED.

The Second Department, reversing Supreme Court, determined questions of fact for the jury precluded the directed verdict (CPLR 4401) for the defendants in this Labor Law § 200 action. Plaintiff was working as a surveyor at a construction site. He was walking across a rebar grid when one of his legs fell through. There were questions of fact whether walking on the rebar

grid was an inherent part of his job and whether the grid was a dangerous condition. Plaintiff's motion to set aside the directed verdict (CPLR 4404) should have been granted: "Labor Law § 200 is a codification of the common-law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work ... . The duty, however, is subject to recognized exceptions ... . It does not extend to hazards which are part of or inherent in the very work which the contractor is to perform, or where the contractor is engaged for the specific purpose of repairing the defect ... . Here, in directing a verdict in favor of the defendants on the issue of liability, the Supreme Court improperly decided the factual questions of whether traversing an uncovered rebar grid was an inherent risk in the injured plaintiff's work as a surveyor, and whether the uncovered rebar grid was a dangerous condition under the circumstances presented. The record demonstrates that the plaintiffs' evidence made out a prima facie case, and that disputed factual issues existed which should have been resolved by the jury. Since the court failed to draw 'every favorable inference' in favor of the plaintiffs and because the court resolved disputed issues of fact ... , the matter must be remitted to the Supreme Court, Queens County, for a new trial on the issue of liability." ***Vitale v. Astoria Energy II, LLC*, 2020 N.Y. Slip Op. 01381, Second Dept 2-26-20**

CIVIL PROCEDURE, LIMITED LIABILITY COMPANY LAW.

DEFENDANT LIMITED LIABILITY COMPANY FAILED TO FILE ITS CURRENT ADDRESS WITH THE SECRETARY OF STATE SINCE 2011; DEFENDANT'S MOTION TO VACATE THE DEFAULT JUDGMENT ALLEGING IT WAS NOT SERVED WITH THE SUMMONS AND COMPLAINT SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined defendant limited liability company's motion to vacate a default judgment pursuant to CPLR 317 should not have been granted. Defendant had not filed its current address with the Secretary of State since 2011: "Pursuant to CPLR 317, a defaulting defendant who was served with a summons other than by personal delivery may be permitted to defend the action upon a finding by the court that the defendant did not personally receive notice of the summons in time to defend and has a potentially meritorious defense ... . Here, the defendant was not entitled to vacatur of its default pursuant to CPLR 317. The record reflects that, since September 2011, the defendant had not filed, with the Secretary of State, the required biennial form that would have apprised the Secretary of State of its current address (see Limited Liability Company Law § 301[e]), thus raising an inference that the defendant deliberately attempted to avoid notice of actions commenced against it ... . 'In contrast to a motion pursuant to CPLR 317, on a motion pursuant to CPLR 5015(a)(1), the movant is required to establish a reasonable excuse for his or her default' ... . Under the circumstances of this case, the defendant's failure to keep the Secretary of State apprised of its current address over a significant period of time did not constitute a reasonable excuse ...". ***Bookman v. 816 Belmont Realty, LLC*, 2020 N.Y. Slip Op. 01318, Second Dept 2-26-20**

CIVIL PROCEDURE, MEDICAL MALPRACTICE, NEGLIGENCE, EMPLOYMENT LAW.

PLAINTIFF PROPERLY ALLOWED TO AMEND THE MEDICAL MALPRACTICE COMPLAINT AFTER THE STATUTE OF LIMITATIONS HAD RUN TO ADD A TREATING DOCTOR EMPLOYED BY A NAMED DEFENDANT PURSUANT TO THE RELATION-BACK DOCTRINE.

The Second Department determined the relation-back doctrine allowed the amendment of the complaint (CPLR 1003) in this medical malpractice, wrongful death action to add a doctor, Abergel, who treated plaintiff's decedent and was employed by the defendant professional corporation (P.C.): "The causes of action arose out of the same conduct, to wit, the alleged negligence by [defendant] Purow and Abergel in the course of treating the decedent for her ulcerative colitis at the P.C.'s office, which they each did within the scope of their employment with the P.C. ... The vicarious liability of the P.C. allows for a finding of unity of interest with Abergel, 'regardless of whether the actual wrongdoer or the person or entity sought to be charged vicariously was served first' ... . [T]he plaintiff satisfied the third prong of the test, which focuses, inter alia, on 'whether the defendant could have reasonably concluded that the failure to sue within the limitations period meant that there was no intent to sue that person at all and that the matter has been laid to rest as far as he [or she] is concerned' ... . The decedent's medical records from the P.C. included several notes signed by Abergel, and clearly and repeatedly referenced Abergel as a physician who treated the decedent as part of the care rendered to the decedent by the P.C. * * * In addition, the plaintiff demonstrated that the failure to originally name Abergel as a defendant was the result of a mistake, and there was no need to show that such mistake was excusable ...". ***Petruzzi v. Purow*, 2020 N.Y. Slip Op. 01372, Second Dept 2-26-20**

CRIMINAL LAW, CONSTITUTIONAL LAW, APPEALS.

THE WAIVER OF APPEAL WAS NOT KNOWINGLY, VOLUNTARILY AND INTELLIGENTLY MADE.

The Second Department determined defendant's waiver of appeal was not knowingly, voluntarily and intelligently made. Executing a written waiver does not fix a deficient colloquy: "A defendant should ... ' receive an explanation of the nature of the right to appeal, which essentially advises that this right entails the opportunity to argue, before a higher court, any issues pertaining to the defendant's conviction and sentence and to have that higher court decide whether the conviction or sentence should be set aside based upon any of those issues . . . [and] that appellate counsel will be appointed in the event that he or she were indigent' ... . [T]he Criminal Jury Instructions & Model Colloquies, available online through the New

York State Unified Court System's website, include a model colloquy for the waiver of the right to appeal ... . While the use of the model colloquy is not mandatory, its use may nevertheless 'substantially reduce the difficulties' ... , provided that the trial judges retain and use flexibility to undertake individualized inquiries as appropriate. Here, the record does not establish that the defendant knowingly, voluntarily, and intelligently waived his right to appeal ... . The County Court's terse colloquy during the plea allocution failed to sufficiently advise the defendant of the nature of his right to appeal and the consequences of waiving that right ... . Although the defendant executed a written appeal waiver form, a written waiver is not a complete substitute for an on-the-record explanation of the nature of the right to appeal ... . Moreover, the defendant was not informed of the maximum sentence that could be imposed if he failed to comply with the conditions of his plea agreement ... . Thus, the purported appeal waiver does not preclude appellate review of the defendant's contention that the enhanced sentence was excessive." ***People v. Slade*, 2020 N.Y. Slip Op. 01366, Second Dept 2-26-20**

CRIMINAL LAW, CONSTITUTIONAL LAW, EVIDENCE.

28-YEAR PRE-INDICTMENT DELAY IN THIS MURDER CASE DID NOT VIOLATE DEFENDANT'S RIGHT TO DUE PROCESS; DNA PROFILE STEMMING FROM DEFENDANT'S 2008 ARREST MATCHED BLOOD EVIDENCE FROM THE 1984 MURDER.

The Second Department, in a full-fledged opinion by Justice Chambers, determined the 28 year pre-indictment delay in this murder case did not violate defendant's due process rights. Defendant was arrested in 2008 and his DNA profile was obtained. He had been a suspect in the 1984 murder and the blood evidence from the murder was linked to the defendant: "... [T]he preindictment delay of more than 28 years was undoubtedly extraordinary, a fact that weighs in favor of the defendant ... . However, under the circumstances presented, the People met their burden of demonstrating good cause for the delay ... . The record of the Singer hearing supports the hearing court's determination that the People acted in good faith in deferring commencement of the prosecution until after they were able to match the defendant's DNA profile with the one found on some of the blood-stained items recovered from the crime scene. While the defendant correctly points out that DNA testing of the crime scene evidence could have been performed years earlier, there is nothing to suggest that such tests would have yielded any meaningful information, as the defendant's own DNA profile was not available to investigators for comparative purposes until it was entered into CODIS in March of 2008. Nor are we persuaded by the defendant's contention that the People could have sought a court order compelling the defendant to produce a DNA sample for analysis before 2008 ... . Considering that the outcome of such a proceeding, under the particular facts of this case, would be very difficult to predict ... , we are loath to saddle the People with an affirmative duty to embark upon a course that could ultimately prove unsuccessful, and possibly jeopardize an ongoing investigation." ***People v. Innab*, 2020 N.Y. Slip Op. 01363, Second Dept 2-26-20**

CRIMINAL LAW, EVIDENCE.

PROTECTIVE ORDER DELAYING DISCOVERY UNTIL 45 DAYS BEFORE TRIAL GRANTED BY THE APPELLATE COURT.

The Second Department, reversing Supreme Court, granted the People's application for a protective order delaying release of discovery until 45 days before trial: "Pursuant to CPL 245.70(6), a party who has unsuccessfully sought, or opposed the granting of, a protective order relating to the name, address, contact information, or statements of a person may obtain expedited review by an individual justice of the intermediate appellate court to which an appeal from a judgment of conviction would be taken. Where, as here, 'the issue involves balancing the defendant's interest in obtaining information for defense purposes against concerns for witness safety and protection, the question is appropriately framed as whether the determination made by the trial court was a provident exercise of discretion' ... . Applying the factors set forth in CPL 245.70(4), including concerns for witness safety and protection, I conclude that the Supreme Court improvidently exercised its discretion in directing immediate disclosure of the subject materials to counsel for the defendant and his investigator. Under the particular facts and circumstances of this case, the Supreme Court should have delayed disclosure of the subject materials to counsel for the defendant and his investigator until 45 days before trial." ***People v. Brown*, 2020 N.Y. Slip Op. 01439, Second Dept 2-28-20**

CRIMINAL LAW, EVIDENCE.

REVOLVER FOUND BY A PASSERBY SEVEN BLOCKS FROM THE CRIME SCENE SHOULD NOT HAVE BEEN ADMITTED IN EVIDENCE; ERROR DEEMED HARMLESS HOWEVER.

The Second Department determined a revolver found by a passerby seven blocks from the scene of the crime should not have been admitted in evidence. The error was harmless however: "Supreme Court should not have admitted into evidence a revolver that was recovered by the police from underneath a vehicle five to seven blocks away from the scene of the crime and approximately seven hours after the shooting. The revolver was discovered by a passerby, who notified the police. 'When real evidence is purported to be the actual object associated with a crime, the proof of accuracy has two elements. The offering party must establish, first, that the evidence is identical to that involved in the crime; and, second, that it has not

been tampered with' ... . At trial, the only eyewitness at the scene of the shooting who observed the defendant armed with a firearm testified that the defendant was armed with a '[s]ilver, long barrel' revolver. Contrary to the court's determination, although that testimony was somewhat consistent with the defendant's description of his revolver, it was insufficient to provide reasonable assurances that the revolver that was admitted into evidence was the same revolver used by the defendant during the shooting ... . No forensic evidence was recovered from the subject revolver linking it to the defendant, and more significantly, the eyewitness was never asked, either by the police after the revolver was recovered or by the prosecution at trial, to identify the revolver as the 'actual object' used by the defendant during the shooting ... . Further, there was no evidence in the record to support the court's independent observation that the revolver that was admitted into evidence was 'very uncommon' and a 'very, very unique gun.' " ***People v. Deverow*, 2020 N.Y. Slip Op. 01359, Second Dept 2-26-20**

CRIMINAL LAW, EVIDENCE.

ANONYMOUS 911 CALL WAS NOT ADMISSIBLE AS AN EXCITED UTTERANCE OR AS A PRESENT SENSE IMPRESSION; CONVICTION REVERSED.

The Second Department, reversing defendant's conviction, determined the recording of the 911 call was not admissible as an excited utterance or as a present sense impression: "... [T]he People did not present sufficient facts from which it could be inferred that the anonymous caller personally observed the incident ... . The anonymous caller merely stated to the 911 operator that '[s]omebody just got shot on East 19th and Albemarle' and that it 'was a guy with crutches. He started to shoot.' Nothing in these brief, conclusory statements, which were made at least five minutes after the shooting occurred, suggested that the caller was reporting something that he saw, as opposed to something he was told ... . Moreover, although there was testimony that the call was made from a payphone located in the vicinity of the shooting, the People did not demonstrate that the payphone was situated outdoors or in a place where the actual site of the shooting would be visible. Accordingly, the statement did not qualify as an 'excited utterance' ... . For similar reasons, the declarations of the 911 caller were not admissible under the 'present sense impression' exception to the hearsay rule. ' Present sense impression' declarations . . . are descriptions of events made by a person who is perceiving the event as it is unfolding' ... . Here, as just explained, the People failed to demonstrate that the anonymous caller was describing events that he actually perceived." ***People v. Thelismond*, 2020 N.Y. Slip Op. 01368, Second Dept 2-26-20**

FAMILY LAW, EVIDENCE.

EXPERT WITNESSES CORROBORATED THE CHILD'S OUT-OF-COURT STATEMENTS IN THIS CHILD SEXUAL ABUSE CASE; THE PETITION, DISMISSED BY FAMILY COURT, REINSTATED AND A FINDING OF ABUSE MADE BY THE APPELLATE COURT.

The Second Department, reversing Family Court, determined that the child's prior out-of-court statements should have been admitted in this child sexual abuse proceeding. The expert witnesses corroborated the child's statements: " 'A child's prior out-of-court statements may provide the basis for a finding of abuse, provided that these hearsay statements are corroborated, so as to ensure their reliability' . 'Any other evidence tending to support the reliability of the previous statements . . . shall be sufficient corroboration' (Family Ct Act § 1046[a][vi]). 'The Family Court has considerable discretion in deciding whether a ... out-of-court statements alleging incidents of abuse have been reliably corroborated' ... . Although deference is to be given to the hearing court's determinations as to credibility ... , where that court's credibility determination is not supported by the record, 'this Court is free to make its own credibility assessments and overturn the determination of the hearing court' ... . Contrary to the Family Court's determination, the testimony of the petitioner's expert witnesses, including the validating expert witness ... , provided sufficient corroboration of the subject child's numerous and consistent out-of-court statements regarding the father's sexual abuse of her, and together with the testimony of the petitioner's caseworker, established by a preponderance of the evidence that the father sexually abused the child ... . Further, the court failed to give sufficient consideration to the inconsistent and evasive nature of the father's testimony ...". ***Matter of Tazya B. (Curtis B.)*, 2020 N.Y. Slip Op. 01341, Second Dept 2-26-20**

FORECLOSURE, CIVIL PROCEDURE, EVIDENCE.

PROOF OF POSSESSION OF THE NOTE WHEN THE ACTION WAS COMMENCED WAS HEARSAY; PLAINTIFF BANK DID NOT DEMONSTRATE STANDING TO FORECLOSE.

The Second Department, reversing Supreme Court, determined plaintiff bank did not demonstrate standing to bring the foreclosure action. The assertions that the note was in plaintiff's possession when the action was commenced were hearsay and were not supported by business records: "… [T]he plaintiff, to establish its standing to commence this mortgage foreclosure action, submitted an affirmation of Amber A. Jurek, a lawyer with Gross Polowy, LLC (hereinafter Gross Polowy), the plaintiff's counsel. Jurek stated that she was familiar with Gross Polowy's records and record-keeping practices. Jurek stated that on January 28, 2015, Gross Polowy received the plaintiff's file, which included the original endorsed note. Gross Polowy commenced this action on the plaintiff's behalf on February 26, 2015. According to Jurek, "[o]n that date, Gross Polowy, on behalf of Plaintiff, remained in physical possession of the collateral file, including the original endorsed Note dated March 20, 2012." The plaintiff also submitted the note, which bore an undated endorsement to the plaintiff. However,

Jurek did not set forth any facts based on her personal knowledge to support her statement that the note in the plaintiff's file was the original endorsed note. Further, the plaintiff failed to attach the business records upon which Jurek relied in her affirmation, and since Jurek did not state that she personally witnessed Gross Polowy receive the plaintiff's file, her statement is inadmissible hearsay ... . The plaintiff also submitted an affidavit of April H. Hatfield, vice president of loan documentation for the plaintiff. Hatfield stated that she was familiar with the plaintiff's records and record-keeping practices. Although Hatfield attached the records upon which she relied, she did not state that the plaintiff had possession of the endorsed note at the time the action was commenced. Rather, she relied on Jurek's affidavit for that fact. Accordingly, Hatfield's affidavit was also insufficient to establish the plaintiff's standing. Finally, the plaintiff did not attach a copy of the note to the complaint when commencing this action. Therefore, the plaintiff failed to establish, prima facie, that it had standing to commence this action ...". ***Wells Fargo Bank, N.A. v. Bakth*, 2020 N.Y. Slip Op. 01382, Second Dept 2-26-2**

FORECLOSURE, DEBTOR-CREDITOR, CIVIL PROCEDURE.

THE MORTGAGE-PAYMENT MODIFICATION AGREEMENT DID NOT CONSTITUTE AN ACKNOWLEDGMENT OF THE MORTGAGE DEBT WITHIN THE MEANING OF GENERAL OBLIGATIONS LAW 17-101; THEREFORE THE STATUTE OF LIMITATIONS DID NOT START ANEW; THE FORECLOSURE ACTION IS TIME-BARRED.

The Second Department, reversing Supreme Court, determined defendant's trial payments as a condition for entering a mortgage-payment modification agreement (the Plan) did not amount to an acknowledgment of the debt such that the statute of limitations would start running anew: " 'General Obligations Law § 17-101 effectively revives a time-barred claim when the debtor has signed a writing which validly acknowledges the debt' ... . 'The writing, in order to constitute an acknowledgment, must recognize an existing debt and must contain nothing inconsistent with an intention on the part of the debtor to pay it' ... . 'In order to demonstrate that the statute of limitations has been renewed by a partial payment, it must be shown that the payment was accompanied by circumstances amounting to an absolute and unqualified acknowledgment by the debtor of more being due, from which a promise may be inferred to pay the remainder' ... . * * * ... [T]he Plan did not constitute an 'unconditional and unqualified acknowledgment of [the] debt' sufficient to reset the statute of limitations ... . While the writing arguably acknowledged the existence of indebtedness, the defendant merely agreed to make three trial payments so as to receive a permanent modification offer. Any intention to repay the debt was conditioned on the parties reaching a permanent modification agreement, which condition did not occur. Under these circumstances, it cannot be said that the writing contained 'nothing inconsistent with an intention on the part of the debtor to pay' the debt ... . Indeed, the defendant represented in the Plan that he was unable to afford the mortgage payments." ***Nationstar Mtge., LLC v. Dorsin*, 2020 N.Y. Slip Op. 01354, Second Dept 2-26-20**

FORECLOSURE, REAL PROPERTY ACTIONS AND PROCEEDINGS LAW (RPAPL).

PLAINTIFF BANK DID NOT COMPLY WITH RPAPL 1306; DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT IN THIS FORECLOSURE ACTION SHOULD HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined plaintiff bank's failure to comply with RPAPL 1306 required that defendant's cross-motion for summary judgment be granted: " 'RPAPL 1306 provides, in pertinent part, that within three business days of the mailing of the foreclosure notice pursuant to RPAPL 1304(1), every lender or assignee shall file' certain information with the superintendent of financial services, including at a minimum, the name, address, last known telephone number of the borrower, and the amount claimed as due and owing on the mortgage, and such other information as will enable the superintendent to ascertain the type of loan at issue' ... . 'Any complaint served in a proceeding initiated pursuant to [RPAPL article 13] shall contain, as a condition precedent to such proceeding, an affirmative allegation that at the time the proceeding is commenced, the plaintiff has complied with . . . this section' (RPAPL 1306[1]). Compliance with RPAPL 1306 is a condition precedent to the commencement of a foreclosure action RPAPL 1306(1) became effective on February 13, 2010 (see L 2009, ch 507, § 5), one month before this action was commenced. Contrary to the plaintiff's contention, it was not absolved from compliance with the statute by virtue of the fact that its RPAPL 1304 notices were purportedly mailed prior to the effective date of RPAPL 1306. ... [I]t is ... clear from the face of the complaint that it contains no 'affirmative allegation that at the time the proceeding [wa]s commenced, the plaintiff ha[d] complied with' RPAPL 1306 ...". ***Deutsche Bank Natl. Trust Co. v. Spanos*, 2020 N.Y. Slip Op. 01324, Second Dept 2-26-20**

MEDICAL MALPRACTICE, PERSONAL INJURY, EMPLOYMENT LAW, EVIDENCE.

HOSPITAL DID NOT DEMONSTRATE THE TREATING EMERGENCY PHYSICIAN WAS NOT AN EMPLOYEE AND DID NOT DEMONSTRATE THE EMERGENCY PHYSICIAN DID NOT DEPART FROM ACCEPTED STANDARDS OF MEDICAL CARE; THE HOSPITAL'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing (modifying) Supreme Court, determined the medical malpractice action against the hospital (Mercy) should not have been dismissed. The hospital failed to demonstrate the emergency physician (Hughes) was not an employee and failed to demonstrate the emergency physician did not depart from the accepted standards of care: "... [T]he Mercy defendants failed to establish, prima facie, that they could not be held vicariously liable for the alleged malpractice of Hughes on the ground that he was not an employee. The medical records submitted by the Mercy defendants

in support of the subject branches of the motion established that the plaintiff arrived at the hospital for treatment of her abdominal pain through the emergency department, and not as a patient of any particular physician ... . In addition, the affidavit of a registered nurse employed by the defendant Mercy Medical Center as a Director Risk Management/Privacy Officer contained no evidentiary basis to support her conclusory assertion that Hughes was not an employee of the hospital ... . The Mercy defendants also failed to establish, prima facie, that Hughes did not depart from accepted community standards of medical care in the treatment of the plaintiff, or that any departure by Hughes was not a proximate cause of the plaintiff's injuries ...". ***Pinnock v. Mercy Med. Ctr.*, 2020 N.Y. Slip Op. 01374, Second Dept 2-26-20**

PERSONAL INJURY.

PLAINTIFF WAS RIDING HER BICYCLE ON A SIDEWALK WHEN SHE COLLIDED WITH DEFENDANT'S VEHICLE AS DEFENDANT WAS ATTEMPTING TO PULL OUT OF A PARKING LOT; DEFENDANT'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined defendant's motion for summary judgment in this bicycle-vehicle collision case should not have been granted. Apparently plaintiff was riding on the sidewalk and collided with defendant's vehicle as it was attempting to pull out of a parking lot: "The plaintiff Jamie Heaney (hereinafter the plaintiff) alleges she was operating a bicycle on a sidewalk when she collided with the defendant's vehicle, which was attempting to exit from a parking lot ... . 'A defendant moving for summary judgment in a negligence action has the burden of establishing, prima facie, that he or she was not at fault in the happening of the subject accident' ... . 'There can be more than one proximate cause of an accident' ... , and the issue of proximate cause is generally one for the jury ... . Here, the defendant's vehicle had pulled out from a parking lot and came to a stop immediately prior to the impact. The defendant failed to establish, prima facie, that the presence of his vehicle on the sidewalk merely furnished the condition or occasion for the occurrence of the event but was not one of its causes ... ". ***Heaney v. Kahn*, 2020 N.Y. Slip Op. 01333, Second Dept 2-26-20**

THIRD DEPARTMENT

ARBITRATION, CONTRACT LAW, EMPLOYMENT LAW.

THE COLLECTIVE BARGAINING AGREEMENT DID NOT ALLOW THE AWARD OF BACK PAY TO AN EMPLOYEE WHO FACED DISCIPLINARY ACTION RELATING TO A CRIMINAL OFFENSE BUT WAS ULTIMATELY ACQUITTED AFTER TRIAL; THEREFORE THE ARBITRATOR EXCEEDED HIS AUTHORITY BY AWARDING BACK PAY.

The Third Department determined the arbitrator exceeded his authority in awarding back pay to a corrections officer (Spratley) who was terminated by the Department of Corrections and Community Services (DOCCS) after shooting someone while off-duty. The officer was found not guilty of the criminal offense but was subject to disciplinary action based upon the incident: "... Section 8.4 of the CBA [collective bargaining agreement] sets forth the procedures under which DOCCS may suspend an employee without pay prior to the service of a notice of discipline and the limited circumstances under which back pay is owed following that act. Spratley was suspended without pay pursuant to section 8.4 (a) (2), which, in relevant part, authorizes that step for 'an employee charged with the commission of a crime.' The same section provides that, where DOCCS fails to serve a notice of discipline within 30 days of the suspension or seven days after learning of a disposition of the criminal charges, 'whichever occurs first,' an award of back pay is called for. There is nothing to suggest, and the arbitrator did not find, that either of those conditions were satisfied. ... Section 8.4 (a) (5) provides another path for an award of back pay where the suspended employee does not face related disciplinary action and is 'not found guilty' of the pending criminal charges, but Spratley did face related disciplinary action. The CBA accordingly contains no provision for the 'retroactive' invalidation of the interim suspension and award of back pay under the circumstances presented, and the arbitrator, who was expressly barred by a term of the CBA from adding to, subtracting from or otherwise modifying its provisions, was powerless to add one ... . Thus, the arbitrator exceeded his authority in making an award of back pay, and Supreme Court should have granted respondents' cross motion to the extent of vacating that award." ***Matter of Spratley (New York State Dept. of Corr. & Community Supervision)*, 2020 N.Y. Slip Op. 01424, Third Dept 2-27-20**

CRIMINAL LAW, APPEALS.

ONCE A COURT SENTENCES A DEFENDANT TO SHOCK INCARCERATION, THE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION (DOCCS) DOES NOT HAVE THE AUTHORITY TO DETERMINE THE DEFENDANT IS NOT ELIGIBLE; APPEAL HEARD AS AN EXCEPTION TO THE MOOTNESS DOCTRINE.

The Third Department, in full-fledged opinion by Justice Reynolds Fitzgerald, determined the Department of Corrections and Community Supervision (DOCCS) did not have the authority to find the peititioner was not eligible for the shock incarceration based upon his drug-related prison disciplinary history. Although the appeal was moot because petitioner had completed the program, the appeal was heard as an exception to the mootness doctrine because the scenario is likely to recur: "Once an inmate has been judicially ordered into the program, DOCCS' participation under Penal Law § 60.04 (7) is expressly limited to its administration of the program, i.e., the completion, discipline and removal of an inmate from the program. If the Legislature intended DOCCS to have administrative discretion as to the eligibility criteria, it could have said

so. It is a canon of statutory interpretation that a court cannot by implication supply in a statute a provision that it is reasonable to suppose the Legislature intended to omit (see McKinney's Cons Laws of NY, Statutes § 74). The doctrine of expressio unius est exclusio alterius applies. The specification that DOCCS shall oversee completion, discipline and removal from the program implies in the strongest sense that the omission of DOCCS' administrative eligibility regulation was intentional and not inadvertent ... " ***Matter of Matzell v. Annucci*, 2020 N.Y. Slip Op. 01425. Third Dept 2-27-20**

UNEMPLOYMENT INSURANCE.

DRIVERS FOR A LIMOUSINE SERVICE WERE NOT ENTITLED TO UNEMPLOYMENT INSURANCE BENEFITS, UNEMPLOYMENT INSURANCE APPEAL BOARD REVERSED.

The Third Department, reversing the Unemployment Insurance Appeal Board, determined the drivers for the Park West limousine service were not employees entitled to receive unemployment insurance benefits: "A driver apparently had full flexibility in deciding how much and how often to work; drivers would log on to the mobile application at the time and in the geographic zone in which they wanted to work, without an apparent requirement or expectation as to frequency or duration in any given period. The dispatch system would match the driver with work once the driver decided when and where to work ... . The drivers determined the routes they wanted to take in transporting the passengers. Drivers had the freedom to utilize substitutes and to work for competitors while working for Park West, and they risked nonpayment of both fares and reimbursement of expenses in the event that the corporate client did not remit payment ... . A witness for Park West testified that it encouraged drivers to attend informational sessions to learn how the dispatch system and application operated, as well as to dress and act professionally, so that drivers could maximize their own profits and have success in their entrepreneurial activity, but there was no set dress code ... . Although Park West offered window signs to the drivers so that passengers could identify their rides, their use was not required. .. [T]he day-to- day activities of the drivers, including when and where they worked, were controlled by the decisions the drivers made themselves. The drivers had ultimate control over their vehicles and were solely responsible for maintenance and other related expenses in the ownership of their respective vehicles ... . The requirements that Park West imposed with respect to licensing, registration and safety were necessitated by laws governing the industry and the rules of the New York City Taxi and Limousine Commission ... . Although Park West acted as a liaison between drivers and clients when complaints arose, managing complaints from clients is not conclusive as to the type of employment relationship, as the 'requirement that the work be done properly is a condition just as readily required of an independent contractor as of an employee' ... . As such, we find that Park West's control over the drivers was, at most, incidental ...". ***Matter of Escoffery (Park W. Exec. Servs. Inc.--Commissioner of Labor)*, 2020 N.Y. Slip Op. 01422, Third Dept 2-27-20**

WORKERS' COMPENSATION LAW.

CLAIMANT IS ENTITLED TO SIMULTANEOUSLY RECEIVE AN AWARD FOR A SCHEDULE LOSS OF USE AND A PERMANENT PARTIAL DISABILITY CLASSIFICATION.

The Third Department, in a full-fledged opinion by Justice Garry, reversing the Workers' Compensation Board, determined claimant was entitled to simultaneously receive an award for a schedule loss of use (SLU) and a permanent partial disability classification: "... Workers' Compensation Law § 15 (3) permits a simultaneous SLU award and nonschedule classification for impairments that arise out of the same work-related accident where the claimant has returned to work at preinjury wages. * * * ... [W]hen a claimant who has sustained a permanent impairment to a member has returned to work at preinjury wages, it is mere speculation that an award will ever be made for nonschedule injuries arising from the same accident. Although the Board may be appropriately concerned about the possibility of double payment or recovery if and when a claimant experiences actual lost wages, this circumstance was provided for within Matter of Taher v. Yiota Taxi, Inc. (162 AD3d at 1290 n 2). Additionally, the withholding of an SLU award in favor of the 'virtual banking' of nonschedule cap weeks adds unnecessary complexity in the event that a claimant suffers a death that is unrelated to the established sites of injury ... . We further note that the Board's position strongly incentivizes injured claimants with schedule and nonschedule permanent impairments arising from the same work-related accident who are capable of returning to work at preinjury wages not to do so in order to collect a nonschedule award." ***Matter of Arias v. City of New York*, 2020 N.Y. Slip Op. 01429, Third Dept 2-27-20**

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