CasePrepPlus

May 1, 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

FAMILY LAW, CONSTITUTIONAL LAW, APPEALS.

FATHER WAS DENIED DUE PROCESS WHEN THE COURT TOOK SIX MONTHS TO HOLD A POST-DISPOSITIONAL HEARING AFTER A FAILED TRIAL DISCHARGE OF THE CHILDREN TO FATHER; THE CHILDREN WERE FINALLY RETURNED TO FATHER AND THE APPEAL WAS CONSIDERED AS AN EXCEPTION TO THE MOOTNESS DOCTRINE.

The First Department, in a full-fledged opinion by Justice Singh, determined that father was entitled to an expedited post-dispositional hearing after the children were removed from the father's custody based upon a failed trial discharge. The children were eventually returned to father, but the hearing took six months and the children were not returned to father until eight months after the decision was issued. The First Department ruled on the appeal as an exception to the mootness doctrine, finding that this situation was likely to recur. The court held that father was entitled to an "expedited hearing" after the children were removed under due process principles: "We find that a parent's private interest in having custody of his or her children, the children's private interest in residing with their parent, and the undisputed harm to these interests are factors that merit equal consideration. On this record, ACS [Administration for Children's Services] fails to establish that the lengthy delay was related to its interest in protecting the children. Rather, the hearing was prolonged over six months because of the court's and attorneys' scheduling conflicts. There is no indication that the completion of the hearing was caused by difficult legal issues, or by the need to obtain elusive evidence, or by some other factor related to an accurate assessment of the best interest of the children ... . Even though this is a post-dispositional matter, the father is entitled to the strict due process safeguards afforded in neglect proceedings. 'The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State' ... . This rationale equally applies to the primacy of a parent's fundamental liberty interest, and the importance of procedural due process in protecting that interest, particularly when a parent and child are physically separated ... . Accordingly, we find that a parent is entitled to a prompt hearing on the agency's determination to remove the children from his or her physical custody through a failed trial discharge." ***Matter of F.W. (Monroe W.)*, 2020 N.Y. Slip Op. 02385, First Dept 4-23-20**

LEGAL MALPRACTICE, ATTORNEYS.

DEFENDANTS-ATTORNEYS' MOTION TO DISMISS THE LEGAL MALPRACTICE ACTION BASED UPON UNDENIABLE DOCUMENTARY EVIDENCE, AS WELL AS OTHER GROUNDS, SHOULD HAVE BEEN GRANTED.

The First Department, reversing Supreme Court, determined defendants-attorneys' motion to dismiss the legal malpractice complaint based upon documentary evidence should have been granted. The plaintiffs-insurers' alleged the defendants negligently advised them to disclaim insurance coverage: "... [P]laintiffs allege that they sustained damages when they relied on defendants' negligent advice that they could disclaim coverage of their insured in an underlying malpractice action. In support of their motion to dismiss, defendants properly relied on documentary evidence, including the challenged disclaimer letter and the relevant policy, since their authenticity is undisputed and their contents are 'essentially undeniable' (... CPLR 3211[a][1]). The disclaimer letter sets forth an analysis of plaintiffs' right to refuse coverage to their insured on two independent bases. Plaintiffs' failure to allege with specificity or argue that one of the two bases for defendants' advice was incorrect, requires dismissal of this legal malpractice action. Aside from this, defendants' alleged malpractice concerning other issues is subject to the attorney-judgment rule ... . Since plaintiffs failed to show that the issues were elementary or subject to settled authority, defendants could not be liable for malpractice based on their prediction of how a court would interpret the policy ... . Further, plaintiffs' failure to explain how it was that any alleged error by defendants prejudiced their defense in the subsequent coverage action also mandates dismissal of the malpractice claim ...". ***Lloyd's Syndicate 2987 v. Furman Kornfeld & Brennan, LLP*, 2020 N.Y. Slip Op. 02365, First Dept 4-23-20**

PERSONAL INJURY, MUNICIPAL LAW.

PLAINTIFF SOCIAL WORKER WAS MENACED BY A TENANT IN CITY HOUSING WIELDING A KNIFE AND SUED THE CITY; THE CITY WAS ACTING IN A GOVERNMENTAL CAPACITY; THERE WAS NO SPECIAL DUTY OWED TO PLAINTIFF BY THE CITY; THE ATTACK WAS NOT FORESEEABLE; SECURITY WAS ADEQUATE; THE COMPLAINT WAS PROPERLY DISMISSED.

The First Department determined plaintiff social worker's suit against the city based on a tenant's menacing her with a knife was properly dismissed. The incident happened at city housing for mentally ill and homeless persons: "The court correctly concluded that the City defendants were acting in a governmental capacity when they provided funding for the facility and its services. A party seeking to impose liability on a municipality acting in a governmental capacity must establish the existence of a special duty to plaintiff, which is more than the duty owed to the public generally ... . Here, plaintiff presented no evidence that would provide a basis for finding that a special duty was owed to her by the City defendants. Regarding defendants owner and managing agent of the premises, a landowner must act as a reasonable person in maintaining the property in a reasonably safe condition in view of all the circumstances, including the likelihood of injury to others, the seriousness of the injury and the burden of avoiding the risk ... . The owner and managing agent demonstrated that the incident was not reasonably foreseeable in that the tenant was a resident in the facility for nine years and had no record of violent behavior or threats of violence to others ... . Plaintiff asserts that the tenant was an unsuitable tenant for the facility because of his mental illness and prior criminal conduct. However, the tenant's criminal conduct took place 15 years before the incident. Plaintiff argues that the facility lacked adequate security given its 'high risk' population. However, surveillance cameras controlling building access and functioning locks on office doors, which were present here, have been found to be sufficient to satisfy the 'minimal precautions' standard ... . Furthermore, since the incident was over in less than a minute and security personnel were alerted and responded, additional security could not have prevented the incident ...". ***Musano v. City of New York*, 2020 N.Y. Slip Op. 02368, First Dept 4-23-20**

PERSONAL INJURY, MUNICIPAL LAW.

THE CITY'S AND THE ABUTTING PROPERTY OWNER'S MOTIONS FOR SUMMARY JUDGMENT IN THIS SIDEWALK SLIP-AND-FALL CASE SHOULD NOT HAVE BEEN GRANTED; THE CITY DID NOT SHOW THAT IT DID NOT CREATE THE DEFECT; THE ABUTTING PROPERTY OWNER HAS A NONDELEGABLE DUTY TO KEEP THE SIDEWALK SAFE.

The First Department, reversing Supreme Court, determined the city's and the abutting property owner's motions for summary judgment in this sidewalk slip-and-fall case should not have been granted. The defect was a mound of concrete with a piece of metal in the sidewalk. Although the city demonstrated it did not have written notice of the defect, the city did not demonstrate it did not create the defect. And the abutting property owner had a nondelegable duty to keep the sidewalk in a safe condition. ***O'Connor v. Tishman Constr. Corp.*, 2020 N.Y. Slip Op. 02383, First Dept 4-23-20**

THIRD DEPARTMENT

CRIMINAL LAW, EVIDENCE.

REVERSIBLE ERROR TO ADMIT INTO EVIDENCE A VIDEO OF THE INTERROGATION OF DEFENDANT SHOWING HIM REMAINING SILENT WHILE THE POLICE RECOUNTED THE CASE AGAINST HIM.

The Third Department reversed defendant's conviction because a video of his interrogation, which showed him remaining silent while the police recounted the case against him, was admitted into evidence: " 'It is a well-established principle of state evidentiary law that evidence of a defendant's pretrial silence is generally inadmissible' ... . There are many reasons why an individual may choose not to speak to the police; however, there is a substantial risk that jurors might construe such silence as an admission and draw an unwarranted inference of guilt ... . Here, the admitted video consists of the police recounting their case against defendant, including reading his texts aloud and being met largely, if not completely, with silence. Defendant is shown slouching, with an ankle shackle securing him to the chair, and he is dressed in a hooded sweatshirt with oversized sweatpants worn in a manner so as to expose his underwear. His attitude appears to be dismissive and, at one point, he laughs in response to police questioning. Throughout the video, defendant makes no inculpatory statements. Both detectives who appear in the video were presumably available to testify and, in fact, one of them did testify. Allowing evidence of defendant's selective silence was highly prejudicial because there was a significant risk that the jurors deemed defendant's failure to answer the police officer's questions to be an admission of guilt ... . Given its highly prejudicial nature and that it contained little to no probative value, we agree with defendant that County Court erred in allowing the redacted video to be shown to the jury ... . This error was compounded by the People's use of the video during summation, wherein the prosecutor highlighted and commented upon defendant's silence during the police interrogation. In doing this, the People improperly shifted the burden to defendant ...". ***People v. Chapman*, 2020 N.Y. Slip Op. 02330, Third Dept 4-23-20**

CRIMINAL LAW, SEX OFFENDER REGISTRATION ACT (SORA).

ALTHOUGH PETITIONER WAS ADJUDICATED A LEVEL THREE SEX OFFENDER AFTER HIS RELEASE FROM PRISON ON A PRIOR RAPE CONVICTION, HE WAS NOT SUBJECT TO THE RESIDENCY REQUIREMENTS OF THE SEXUAL ASSAULT REFORM ACT AFTER HIS RELEASE FROM PRISON ON A SUBSEQUENT ROBBERY/BURGLARY CONVICTION.

The Third Department, reversing Supreme Court, determined petitioner, who was adjudicated a level three sex offender when released after a prior rape conviction, was not subject to the residential restrictions under the Sexual Assault Reform Act (Executive Law § 259-c (14)) upon release after his subsequent robbery/burglary convictions and incarceration: "In 2007, petitioner was convicted of robbery in the second degree and burglary in the third degree, resulting in a sentence of concurrent prison terms, the maximum of which was 13 years in prison, followed by five years of postrelease supervision. In 2017, petitioner reached the conditional release date of that sentence and the Board of Parole determined that, because he was a risk level three sex offender as a result of his 1989 conviction, he was subject to the provisions of the Sexual Assault Reform Act as set forth in Executive Law § 259-c (14) (L 2000, ch 1, as amended by L 2005, ch 544), which, as relevant here, prohibits him from residing within 1,000 feet of school grounds. Petitioner failed to offer any proposed residence that would permit him to comply with that condition, other than the New York City homeless shelter system, which the Department of Corrections and Community Supervision regarded as inappropriate. As such, petitioner was maintained in the custody of the Department of Corrections and Community Supervision. ... For the reasons stated in People ex rel. Negron v. Superintendent, Woodbourne Corr. Facility (170 AD3d 12 [2019]), we agree with petitioner and find that he is not subject to the conditions of Executive Law § 259-c (14) (see Matter of Cajigas v. Stanford, 169 AD3d 1168 [2019] ...". ***Matter of Green v. LaClair*, 2020 N.Y. Slip Op. 02338, Third Dept 4-23-20**

DISCIPLINARY HEARINGS (INMATES), EVIDENCE.

THE RECORD DID NOT INDICATE THE HEARING OFFICER ASSESSED THE RELIABILITY OF CONFIDENTIAL INFORMATION; MISBEHAVIOR DETERMINATION ANNULLED.

The Third Department, annulling the misbehavior determination, found that record did not reflect that the hearing officer took the necessary steps to confirm the reliability of confidential information: "Although the Hearing Officer indicates that he relied upon and independently assessed confidential testimony, neither the hearing transcript nor the witness interview notice form reflects that any confidential testimony was taken during the hearing or that any confidential documents were reviewed. As to the relevant statement from the confidential informant, '[a] disciplinary determination may be based upon hearsay confidential information provided that it is sufficiently detailed and probative for the Hearing Officer to make an independent assessment of the informant's reliability' ... . Here, the author of the misbehavior report simply testified with regard to the confidential informant that he had received information from the confidential informant in the past and deemed the current information accurate. Other than this general and conclusory testimony, no further details regarding the basis for the information or the results of the author's investigation into the incident were provided. Moreover, evidence at the hearing contradicted the confidential information. Specifically, the inmate who petitioner allegedly sent to the visit room to pick up drugs had not, according to the visit room log, been to the visit room in over three weeks prior to the alleged incident. In view of the foregoing, neither the testimony or evidence at the hearing was sufficiently detailed or probative for the Hearing Officer to assess the reliability or credibility of the confidential informant." ***Matter of Brown v. Annucci*, 2020 N.Y. Slip Op. 02343, Third Dept 4-23-20**

UNEMPLOYMENT INSURANCE, EVIDENCE.

FINDING THAT CLAIMANT MADE A WILLFUL FALSE STATEMENT TO OBTAIN UNEMPLOYMENT INSURANCE BENEFITS WAS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE; ALTHOUGH CLAIMANT DENIED SHE WAS GUILTY OF CRIMINAL CHARGES RELATED TO HER FIRING, SHE PROVIDED THE COURT DOCUMENTS WHICH INDICATED SHE HAD PLED GUILTY.

The Third Department determined claimant should not have been found to have made a willful misrepresentation to obtain unemployment benefits. Claimant had been fired for allegedly hiding a coworker's wallet that she found in lunchroom. Although she denied being guilty of the charges arising out of the incident, she provided the Department of Labor with the court document stating she had pled guilty to criminal mischief and disorderly conduct: "The record establishes that claimant spoke, in Mandarin, to a representative from the Department of Labor and informed the representative about the incident that led to her separation from employment, including that she was arrested on the charge of grand larceny in the fourth degree. According to claimant's statement, she denied being guilty of the charges and, thereafter, readily provided the Department of Labor with a court document. That court document, however, reflects that claimant had already pleaded guilty to criminal mischief in the fourth degree and disorderly conduct and was required to perform five days of community service. Claimant's statement reflects a misunderstanding on her part, as she indicates that the court would not be determining her guilt until July 2018. Notwithstanding the inconsistent information provided by claimant and the court document provided to the Department of Labor, claimant did not withhold any information regarding the nature of the

conviction, and, in fact, provided the pertinent information with regard to her conviction. In view of this, claimant cannot be deemed to have made a knowing, intentional and deliberate false statement to obtain benefits ... . As such, the Board's finding that claimant made a willful false statement is not supported by substantial evidence ...". ***Matter of Hua Fan (Commissioner of Labor)*, 2020 N.Y. Slip Op. 02350, Third Dept 4-23-20**

FOURTH DEPARTMENT

CIVIL PROCEDURE, CONTRACT LAW, LANDLORD-TENANT.

PLAINTIFF LANDLORD HAD AN ADEQUATE REMEDY AT LAW FOR AN ALLEGED BREACH OF THE LEASE BY THE TENANT; PLAINTIFF'S ALLEGED LOSS OF GOODWILL WAS NOT APPLICABLE; THE BALANCE OF EQUITIES FAVORED THE TENANT; THE PRELIMINARY INJUNCTION WAS NOT WARRANTED.

The Fourth Department, reversing Supreme Court, over a two-justice dissent, determined a preliminary injunction was not warranted in this dispute over a lease. Defendant store leased space in plaintiff mall. The lease provided the store could terminate the lease before the end of the term if its gross sales were below a threshold. The store sought to terminate the lease on that ground, but the mall alleged the store's gross sales did not fall below the threshold. The lease included a liquidated damages provision. The majority concluded the liquidated damages provision provided a remedy at law, the loss of goodwill was not applicable and the balance of the equities favored the store, not the mall. So the preliminary injunction should not have been granted: "... [T]he lease contains a liquidated damages provision that entitles plaintiff to certain money damages if defendants prematurely vacate the premises and cease operations. The lease also contains an integration clause stating that the lease is 'the entire and only agreement between the parties.' Thus, because the lease specifically provides that plaintiff is entitled to certain money damages in the event that defendants vacate the premises in breach of the agreement—the very injury that serves as the predicate for plaintiff's action—we conclude that plaintiff has an adequate remedy at law and, moreover, that plaintiff has not suffered irreparable harm because the liquidated damages clause was intended as the sole remedy for such a breach ... . We disagree with our dissenting colleagues that plaintiff established a likelihood of irreparable injury from the loss of goodwill that would occur if defendants were to cease operations by prematurely terminating the lease. The 'loss of goodwill and damage to customer relationships, unlike the loss of specific sales, is not easily quantified or remedied by money damages' ... and may warrant a finding of irreparable injury in cases such as those involving unfair competition tort claims ... , the proposed demolition or alteration of the premises ... , or the issuance of a Yellowstone injunction, in which it is a tenant, not the landlord, who seeks to enjoin the termination of a lease ... . No such scenario is implicated here and, moreover, as already noted, the specific injury complained of by plaintiff was accounted for by the terms of the lease agreement. ... [W]we conclude that the harm defendants will suffer if forced to keep their 6,000-square-foot store open against their will is greater than the injury plaintiff will suffer from the loss of one tenant in the mall, especially because plaintiff may still recoup its loss via the liquidated damages provision." ***Eastview Mall, LLC v. Grace Holmes, Inc.*, 2020 N.Y. Slip Op. 02447, Fourth Dept 4-24-20**

CRIMINAL LAW, EVIDENCE.

DEFENDANT WAS CONVICTED OF STABBING THE VICTIM AT A CROWDED PARTY BUT NO ONE SAW DEFENDANT WITH A KNIFE; DEFENSE REQUEST FOR THE CIRCUMSTANTIAL EVIDENCE JURY INSTRUCTION SHOULD HAVE BEEN GRANTED; CONVICTION REVERSED.

The Fourth Department, reversing defendant's murder conviction, determined that the defense request fot eh circumstantial evidence jury instruction should have been granted. It was alleged defendant stabbed the victim but no one saw the defendant with a knife: "The victim was stabbed five times at a crowded house party where there were multiple ongoing fights, and the evidence established that the victim was involved in physical altercations with at least two other partygoers. One of the wounds was almost five inches deep, meaning that the blade of the knife must have been at least five inches long. None of the witnesses who observed defendant fighting with the victim observed anything in defendant's hand during the altercation, and no blood was discovered in the room in which defendant and the victim engaged in their altercation. All of the evidence at trial required the jury to infer that defendant was the perpetrator who had the knife and that he used that knife to stab the victim. We thus conclude that a circumstantial evidence instruction was warranted ... . Contrary to the People's contention, this is not 'the exceptional case where the failure to give the circumstantial evidence charge was harmless error' ...". ***People v. Swem*, 2020 N.Y. Slip Op. 02435, Fourth Dept 4-24-20**

CRIMINAL LAW, EVIDENCE.

CPL § 330.30 MOTION ALLEGING JUROR MISCONDUCT DURING DELIBERATIONS, I.E. CONDUCTING A REENACTMENT, SHOULD NOT HAVE BEEN DENIED WITHOUT A HEARING.

The Fourth Department, reversing County Court, determined the Criminal Procedure Law § 330.30 motion alleging misconduct during jury deliberations should not have been denied without a hearing. The defendant was charged with menacing

a police officer and whether the defendant heard the announcement that the people knocking on his door were deputy sheriffs was a critical issue. Defense counsel learned after the trial that the jurors had conducted a reenactment in the jury room to determine whether defendant heard the sheriffs: " … [I]n support of the motion, defendant submitted the affirmation of his attorney. Defendant's attorney alleged that, during post-verdict discussions with the jury, he learned that the jurors had attempted during their deliberations to determine whether defendant was aware that the people knocking at his door were sheriff's deputies by using the bathroom door in the deliberation room to reenact the moment when one of the deputies knocked on defendant's door and announced the deputies' presence. The court did not conduct a hearing and instead summarily denied the motion, ruling that, although the alleged jury reenactment constituted a conscious, contrived experiment that placed before the jury evidence not introduced at trial, the experiment was not directly material to any critical point at issue. That was error. As defendant correctly contends, whether he could hear the announcement by the deputy was directly material to a critical point at issue in the trial—indeed, to an element of menacing a police officer—i.e., whether defendant 'knew or reasonably should have known' that the people at his door were sheriff's deputies (Penal Law § 120.18 ...). We conclude under the circumstances of this case that a hearing is required to ascertain whether and in what manner the alleged reenactment occurred, and whether such conduct 'created a substantial risk of prejudice to the rights of the defendant by coloring the views of the . . . jur[y]' ...". ***People v. Newman*, 2020 N.Y. Slip Op. 02449, Fourth Dept 4-24-20**

CRIMINAL LAW, EVIDENCE.

ADMISSION OF A HEARSAY STATEMENT BY A BYSTANDER WHO TOLD A POLICE OFFICER DEFENDANT HAD RUN INTO A HOUSE WAS (HARMLESS) ERROR.

The Fourth Department determined it was (harmless) error to admit the hearsay statement attributed to a bystander who told a police officer the defendant had run into a house after a car chase: "Defendant contends that County Court erred in allowing inadmissible hearsay testimony when the police officer was allowed to testify at trial that the bystander told him that the fleeing suspect ran into the house. We agree. The statement of the bystander was inadmissible hearsay because it was admitted for the truth of the matters asserted therein ... . Indeed, the import of the bystander's statement was to confirm that the suspect had indeed fled into the house, and thereby confirm that someone inside the house, i.e., defendant, perpetrated the crime. Nevertheless, we conclude that the error was harmless because the evidence of defendant's guilt is overwhelming and there is no significant probability that defendant would have been acquitted but for the admission of the hearsay testimony ... . Defendant was identified by the victim and the other eyewitness as a perpetrator of the robbery, which had occurred in broad daylight, close in time to the show-up identification procedure. Those identifications of defendant were corroborated by testimony of the police officer, who observed the suspect flee from the stolen vehicle toward the house where defendant was apprehended. Moreover, the evidence strongly supported an inference that defendant was not in the house for innocent purposes because he did not live at that address and had tried to conceal his identification in an uninhabited part of the house." ***People v. Harrington*, 2020 N.Y. Slip Op. 02399, Fourth Dept 4-24-20**

CRIMINAL LAW, EVIDENCE, APPEALS.

HEARING REQUIRED TO DETERMINE THE AMOUNT OF RESTITUTION AND TO WHOM RESTITUTION SHOULD BE PAID; UNPRESERVED ERRORS CONSIDERED ON APPEAL IN THE INTEREST OF JUSTICE.

The Fourth Department determined the record did not include sufficient evidence to support the restitution order and remitted the matter for a hearing: "Defendant's contention in her main brief that the court erred in ordering her to pay restitution without a hearing is not preserved for our review inasmuch as defendant 'did not request a hearing to determine the [proper amount of restitution] or otherwise challenge the amount of the restitution order during the sentencing proceeding' ... . We nevertheless exercise our power to review that contention as a matter of discretion in the interest of justice ... . Moreover, even assuming, arguendo, that defendant's further challenge to the court's purported failure to direct restitution to an appropriate person or entity... required preservation under these circumstances ... , we likewise exercise our power to reach that unpreserved contention as a matter of discretion in the interest of justice ... . As the People correctly concede, the record does not contain sufficient evidence to establish the amount of restitution imposed, nor does it establish the recipient of the restitution ... . We therefore modify the judgment by vacating that part of the sentence ordering restitution, and we remit the matter to County Court for a hearing to determine restitution in compliance with Penal Law § 60.27." ***People v. Meyers*, 2020 N.Y. Slip Op. 02419, Fourth Dept 4-24-**20

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