CasePrepPlus

May 22, 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

CONSUMER LAW, ARBITRATION.

ARBITRATOR'S AWARD OF $63,000 UNDER THE LEMON LAW BASED UPON NOISES FROM THE VEHICLE WAS NOT SUPPORTED BY ADEQUATE EVIDENCE.

The First Department, reversing Supreme Court, determined the arbitration award in this Lemon Law case was not supported by adequate evidence. Respondent Leonidou leased a BMW and brought an action under the Lemon Law (General Obligations Law § 198-a) alleging noises impaired the value of the vehicle. The arbitrator awarded Leonidou nearly $63,000: "The Lemon Law applies to defects in car parts and workmanship that are expressly warrantied from defect by the manufacturer/dealer (see General Business Law § 198-a[b][1]). Under the statute, when a manufacturer is unable to correct a defect or condition that 'substantially impairs' the value of the motor vehicle after a reasonable number of attempts, the manufacturer, at the option of the consumer, is required either to (1) replace the motor vehicle with a comparable motor vehicle or (2) accept return of the vehicle and refund the full purchase price to the consumer (General Business Law § 198-a[c][1]). It is undisputed that Leonidou was offered a replacement vehicle by BMW and the dealership in accordance with General Business Law § 198-a (c)(1). Leonidou exercised his option not to replace his vehicle. Leonidou failed to present any evidence to show a defect in materials or workmanship that was covered by an express warranty ... . Leonidou acknowledged that the noise issues did not affect the car's safety or operation. He admitted that other drivers he knew, driving the same vehicle type, experienced similar noises, and BMW's witnesses, who testified to their technical experience in repairing such vehicles, attested that the noises at issue were inherent in the SUV design due to its, inter alia, stiffer suspension for off-road conditions. There was no basis in this record to find that the noises otherwise substantially impaired the value of the vehicle to Leonidou ...". ***Matter of BMW of N. Am., LLC v. Leonidou*, 2020 N.Y. Slip Op. 02858, First Dept 5-14-20**

CRIMINAL LAW, ATTORNEYS, IMMIGRATION LAW.

DEFENDANT SUFFICIENTLY DEMONSTRATED A PLEA WHICH WOULD NOT RESULT IN MANDATORY DEPORTATION COULD HAVE BEEN WORKED OUT; THE MOTION TO VACATE HIS CONVICTION ON INEFFECTIVE ASSISTANCE OF COUNSEL GROUNDS SHOULD NOT HAVE BEEN DENIED WITHOUT A HEARING.

The First Department, reversing Supreme Court, determined defendant's motion to set aside his conviction based upon ineffective assistance of counsel should not have been denied without a hearing. The defendant presented sufficient evidence that defense counsel could have negotiated a plea which would not result in mandatory deportation: "Where the basis of a claim for ineffective counsel is counsel's failure to attempt to negotiate an immigration friendly plea, defendant has to show that there is a reasonable probability that the People would have made such an offer ... . If the likelihood that the People would have made such an offer is speculative, then the motion may be denied without a hearing ... . Here, however, defendant's motion shows that there was a reasonable possibility that his plea counsel could have secured a plea deal with less severe immigration consequences. ... Defendant has adequately alleged that there was a reasonable possibility that the People would have offered defendant such a plea, despite the fact that the drug possession charge is a lesser-included offense to the drug sale charge. First, the People agreed to a sentence of one year in prison and one year of post-release supervision in order to cover defendant's drug offenses. This suggests that there was a reasonable possibility that the People would have agreed to a different, immigration-favorable disposition resulting in the same aggregate prison time ... . Second, both offenses subject defendant to equally enhanced sentences if he were to be convicted of another felony within 10 years ... . Third, if the People had only been willing to offer the lesser-included offense together with a longer sentence, defendant might well have been willing to agree to that. ... Finally, there is no evidence that the People specifically sought a conviction on the drug sales offense in order to secure a harsher immigration consequence for defendant ... .[D]efendant demonstrated a reasonable possibility that he would have rejected his plea had he known that he could have obtained a sentence that had less harsh immigration consequences ...". ***People v. George*, 2020 N.Y. Slip Op. 02852, First Dept 5-14-20**

ELECTION LAW.

BELATED FILING OF COVER SHEETS, UNDER THE UNIQUE COVID-19-RELATED CIRCUMSTANCES IN NEW YORK CITY, WAS NOT A FATAL DEFECT (DISAGREEING WITH THE SECOND DEPARTMENT).

The First Department, reversing Supreme Court, disagreeing with the Second Department, determined that, given the unique Covid-19-related circumstances in New York City, the belated filing of designating-petition cover sheets was not a fatal defect: "This election law proceeding involves the belated filing of cover sheets where the delay in filing is attributable to illness or quarantine because of the current COVID-19 pandemic. We hold that under the unique circumstances existing in New York City during the past few months, and the specific health challenges alleged here, the belated filing of these specific documents is not a fatal defect. In so holding, we note that no challenge has been presented to the number of signatures in the designating petitions and no claim of fraud has been alleged. Indeed, there is no evidence of specific actual prejudice presented. Although respondent Board of Elections contends that a cover sheet is necessary for administrative convenience, that cannot outweigh the right to ballot access in the current unique circumstances." ***Matter of Mejia v. Board of Elections in the City of N.Y.*, 2020 N.Y. Slip Op. 02902, First Dept 5-14-20**

Similar issue and result in ***Matter of Mujumder v. Board of Elections in the City of N.Y.*, 2020 N.Y. Slip Op. 02903, First Dept 5-14-20**

ELECTION LAW.

ALTHOUGH RESPONDENT VOTED IN CONNECTICUT WHILE IN COLLEGE THERE, NEW YORK REMAINED HIS ELECTORAL RESIDENCY; THEREFORE RESPONDENT WAS ELIGIBLE TO RUN FOR STATE SENATE IN NEW YORK.

The First Department, reversing Supreme Court, over a dissent, determined New York, not Connecticut, was respondent's (Koffman's) electoral residency. Therefore respondent was eligible to run for the State Senate in New York. Respondent had attended college in Connecticut and registered to vote a there during college: "Petitioner submitted proof that respondent had registered to vote and had voted in Connecticut from 2015 to 2018 instead of voting by absentee ballot in New York. In opposition to the summary judgment motion, respondent presented his affidavit and documentary evidence which demonstrated, among other things, that he was born and raised in New York; that he used his New York home as his permanent address; maintained his New York driver's license; paid New York taxes; completed New York jury service while he was a student at Yale; lived in New York when school was not in session; returned to New York to live and work after graduation, and always considered himself a New York resident. * * * Under the circumstances here, where there was ample proof that Koffman was a New York resident and that Koffman's presence in Connecticut as a college student was temporary, together with the fact that he was not required under Connecticut law to renounce any voter registration in another state ... , petitioner fell short of meeting his burden by clear and convincing evidence that respondent does not meet the residency requirement of the NY Constitution." ***Matter of Quart v. Kaufman*. 2020 N.Y. Slip Op. 02904, First Dept 5-14-20**

INSURANCE LAW, CONTRACT LAW, BANKRUPTCY, CORPORATION LAW.

THE BANKRUPTCY EXCEPTION TO THE INSURED VS INSURED EXCLUSION IN THE DIRECTORS AND OFFICERS LIABILITY POLICY APPLIED TO THE CREDITOR TRUST WHICH WAS SET UP TO PURSUE THE BANKRUPTCY ESTATE'S LEGAL CLAIMS ON BEHALF OF UNSECURED CREDITORS; THE CREDIT TRUST SUED THE DIRECTORS AND OFFICERS OF THE INSURED ALLEGING BREACH OF FIDUCIARY DUTY.

The First Department, in a full-fledged opinion by Justice Renwick, in a matter of first impression, determined that the bankruptcy exception to the insured vs. insured exclusion of a Directors and Officers (D & O) liability insurance policy applied to a Creditor Trust. The Creditor Trust was formed pursuant to a Chapter 11 bankruptcy reorganization plan for the insured, RCS Capital Corporation (RCAP), to pursue the bankruptcy estate's legal claims on behalf of unsecured creditors of the insured: "... [T]he Creditor Trust sued RCAP's directors and officers alleging they had breached their fiduciary duties to the company. The directors and officers sought coverage under RCAP's D & O liability policy with Westchester (the insurer). Westchester commenced this action in response, seeking a declaratory judgment that it has no coverage obligations. This appeal raises an issue of apparent first impression of whether a D & O liability policy's bankruptcy exception, which allows claims asserted by the 'bankruptcy trustee' or 'comparable authority,' applies to claims raised by a Creditor Trust, as a post-confirmation litigation trust, to restore D & O coverage removed by the insured vs. insured exclusion. For the reasons that follow, we find that the bankruptcy exception, to the insured vs. insured exclusion, applies to restore coverage. Specifically, we interpret the broad language 'comparable authority' to encompass a Creditor Trust that functions as a post-confirmation litigation trust, given that such a Creditor Trust is an authority comparable to a 'bankruptcy trustee' or other bankruptcy-related or 'comparable authority' listed in the bankruptcy exception." ***Westchester Fire Ins. Co. v. Schorsch*, 2020 N.Y. Slip Op. 02895, First Dept 5-14-20**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

LABOR LAW § 200 AND NEGLIGENCE CAUSES OF ACTION SHOULD NOT HAVE BEEN DISMISSED; THE ACCIDENT WAS RELATED TO MATERIAL ON THE FLOOR WHICH CAUSED THE WHEELS OF A CART PLAINTIFF WAS PUSHING TO GET STUCK; DEFENDANT DID NOT DEMONSTRATE WHEN THE FLOOR WAS LAST INSPECTED OR CLEANED.

The First Department, reversing Supreme Court, determined the Labor Law § 200 and common law negligence causes of action should not have been dismissed. Plaintiff was pushing a cart when the wheels got stuck. When a coworker kept pulling the cart plaintiff hand was pinned and the tip of his index finger was severed. Plaintiff alleged there were steel rods (which were integral to the work) and garbage on the floor: "A defendant will be found to have 'failed to establish that they lacked constructive notice of the dangerous condition that caused plaintiff's injury, [if] they submitted no evidence of the cleaning schedule for the work site or when the site had last been inspected before the accident' ... . Here, plaintiff alleges that there was 'garbage' as well as rods on the floor that impeded the cart's movement. Bravo's [the builder's] contract explicitly required it to look for dangerous and hazardous conditions on a daily basis, and to keep the workplace safe. However, since Bravo submitted no evidence as to its inspection and cleaning schedule of the worksite, this claim must be reinstated. It is not relevant whether the rods on which the cart got stuck were an open and obvious condition that plaintiff could have seen, since that issue raises a question of plaintiff's comparative negligence and does not bear on defendant's own liability ...". ***Spencer v. Term Fulton Realty Corp.*, 2020 N.Y. Slip Op. 02855, First Dept 5-14-20**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

QUESTION OF FACT WHETHER PLAINTIFF WAS TOLD TO PAINT ONLY WHERE HE COULD REACH WITHOUT THE LADDER IN THIS LADDER-FALL CASE.

The First Department, reversing Supreme Court, determined there was evidence plaintiff was told only to paint areas he could reach without the ladder. Plaintiff fell from the ladder: "Plaintiff was injured when he fell from a ladder while painting an apartment in a building owned by defendant. The testimony of plaintiff's employer, that he had specifically instructed plaintiff only to paint areas he could reach and not to use the ladder, raises triable issues as to whether plaintiff's duties were expressly limited to work that did not expose him to an elevation-related hazard within the purview of Labor Law § 240(1) ...". ***Orellana v. Mo-Hak Assoc., LLC*, 2020 N.Y. Slip Op. 02867, First Dept 5-14-20**

PERSONAL INJURY, VEHICLE AND TRAFFIC LAW.

PLAINTIFF BICYCLIST WAS ENTITLED TO SUMMARY JUDGMENT IN THIS TRUCK-BICYCLE COLLISION CASE; THE TRUCK DRIVER BREACHED HIS DUTY TO SEE WHAT SHOULD BE SEEN.

The First Department, reversing Supreme Court, determined plaintiff bicyclist was entitled to summary judgment in this traffic accident case based upon the video taken from inside defendants' truck (which collided with plaintiff): "The video footage taken from inside defendants' truck shows plaintiff bicycling on the right side of the lane in front of Ortiz [the truck driver] before being struck ... . Ortiz thus failed to exercise due care to avoid colliding with a bicyclist (Vehicle and Traffic Law § 1146[a]), and breached his duty 'to see what should be seen and to exercise reasonable care under the circumstances to avoid an accident' ... . Moreover, plaintiff was not required to demonstrate his own freedom from comparative negligence nor to show that defendants' negligence was the sole proximate cause of the accident to be entitled to summary judgment ...". ***Fernandez v. Ortiz*, 2020 N.Y. Slip Op. 02856, Second Dept 5-14-20**

SECOND DEPARTMENT

CIVIL PROCEDURE.

DEFENDANT'S EXCUSE WAS NOT REASONABLE; MOTION TO VACATE A DEFAULT JUDGMENT SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined defendant's motion to vacate a default judgment should not have been granted. The excuse was not reasonable: "A defendant seeking to vacate a default in answering a complaint must show both a reasonable excuse for the default and the existence of a potentially meritorious defense (see CPLR 5015[a][1] ...). Here, the defendant's proffered excuse that its president failed to open and review the contents of a package following its personal delivery upon him, and that the summons and verified complaint may inadvertently have been discarded thereafter, were insufficient to demonstrate a reasonable excuse for the default ...". ***Elderco, Inc. v. Kneski & Sons, Inc.*, 2020 N.Y. Slip Op. 02766, Second Dept 5-13-20**

CIVIL PROCEDURE, BANKRUPTCY, MEDICAL MALPRACTICE, PERSONAL INJURY.

ALTHOUGH THE PARTY TWICE FILED FOR BANKRUPTCY WITHOUT LISTING THE MEDICAL MALPRACTICE ACTION AS AN ASSET, THE BANKRUPTCY PROCEEDING WAS SUBSEQUENTLY REOPENED AND THE ACTION WAS ADDED AS AN ASSET; AT THAT POINT THE BANKRUPTCY TRUSTEE BECAME THE PLAINTIFF IN THE MEDICAL MALPRACTICE ACTION AND THE DOCTRINE OF JUDICIAL ESTOPPEL, BASED UPON THE PARTY'S INITIAL FAILURE TO LIST THE ACTION AS AN ASSET, DID NOT APPLY TO THE TRUSTEE.

The Second Department, reversing Supreme Court, determined the defendant's motion to dismiss the medical malpractice complaint on judicial estoppel grounds should not have been granted. Vormnadiryan commenced a medical malpractice action in 2006. In two bankruptcy proceedings in 2008 and 2016 the medical malpractice action was not listed as an asset by Vormnadiryan. In 2017 Vormnadiryan opened the 2008 bankruptcy action and the medical malpractice action was added as an asset, making the bankruptcy trustee the plaintiff in that action. The Second Department determined Vormandiryan's initial failure to list the malpractice action as an asset did not subject the bankruptcy trustee, as the plaintiff in the malpractice action, to the judicial estoppel doctrine: " 'The integrity of the bankruptcy system depends on full and honest disclosure by debtors of all of their assets. By failing to list causes of action on bankruptcy schedules of assets, the debtor represents that it has no such claims. Thus, the doctrine of judicial estoppel may bar a party from pursuing claims which were not listed in a previous bankruptcy proceeding' ... . 'Because the doctrine is primarily concerned with protecting the judicial process, relief is granted only when the risk of inconsistent results with its impact on judicial integrity is certain' ... . Here, the 2008 bankruptcy proceeding was reopened by the Bankruptcy Court so that the 2006 medical malpractice action could be identified as an asset of the bankruptcy estate. Therefore, judicial estoppel cannot be predicated on Vormnadiryan's failure to list the action as an asset when she originally filed the 2008 bankruptcy petition ... . Further, once a bankruptcy proceeding is commenced, all legal or equitable interests of the debtor become part of the bankruptcy estate, including any causes of action (see 11 USC § 541[a][1] ...). The trustee in bankruptcy, as representative of the estate, 'has capacity to sue and be sued' ... '. ***Pereira v. Meisenberg*, 2020 N.Y. Slip Op. 02815, Second Dept 5-13-20**

CIVIL PROCEDURE, EVIDENCE.

A DEFENSE WITNESS HELD OUT AS DISINTERESTED AND OBJECTIVE WAS IN FACT EMPLOYED BY THE DEFENDANTS; PLAINTIFFS' MOTION TO SET ASIDE THE VERDICT SHOULD HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined plaintiffs' motion to set aside the jury verdict in this personal injury case should have been granted. One of the issues in the trial was the identity of the party which left a pipe in a tunnel. Plaintiff alleged he was injured when he tripped over the pipe. Defendants presented a witness, Dudin, who testified the defendants were not responsible for leaving the pipe in the tunnel. Dudin was represented as a disinterested witness when, in fact, he was employed by the defendants: "Pursuant to CPLR 4404(a), a trial court may order a new trial 'in the interest of justice.' 'A motion pursuant to CPLR 4404 (a) to set aside a verdict and for a new trial in the interest of justice encompasses errors in the trial court's rulings on the admissibility of evidence, mistakes in the charge, misconduct, newly discovered evidence, and surprise' ... . In considering such a motion, '[t]he Trial Judge must decide whether substantial justice has been done, whether it is likely that the verdict has been affected and must look to his [or her] own common sense, experience and sense of fairness rather than to precedents in arriving at a decision' ... . Here, the record reveals that the defendants affirmatively represented to the jury that Dudin was a disinterested, objective witness, notwithstanding that he was employed by the defendants at the time of trial. During summation, the defendants' counsel stated that Dudin was 'with the construction manager,' and that he was 'not on [the defendants'] payroll,' but rather was a representative of the DEP [Department of Environmental Protection]. Additionally, the defendants' counsel stated that, 'you heard from Mr. Dudin, who is with the DEP now, this is not [the defendants'] stuff' in the tunnel. Counsel specifically referred to Dudin as 'an objective witness' who 'has no dealings with [the defendants],' and stated that he was 'there to help the [injured] plaintiff.' Under the circumstances, we find that the jury should have had the opportunity to consider Dudin's status as an employee of the defendants in assessing his credibility and in determining whether this relationship biased or influenced the witness's testimony ...". ***D'Amato v. WDF Dev., LLC*, 2020 N.Y. Slip Op. 02761, Second Dept 5-13-20**

ELECTION LAW.

TAKING A LEAVE OF ABSENCE FROM A POSITION ON THE COUNTY BOARD OF ELECTIONS TO RUN FOR STATE SENATE IS NOT THE EQUIVALENT OF RESIGNING FROM THE BOARD OF ELECTIONS, WHICH IS REQUIRED BY THE ELECTION LAW; THE DESIGNATING PETITION SHOULD HAVE BEEN INVALIDATED.

The Second Department, reversing Supreme Court, determined the designating petition of LaLota should have been invalidated under the provisions of the Election Law. LoLota was a Commissioner of the Suffolk County Board of Elections. He took a "leave of absence" from that position to allow him to seek office as a State Senator. The Second Department held that taking a leave of absence was not the equivalent of resigning, which is required by the Election Law: "The purpose of the statute is readily apparent—to prevent the conflict of interest, and potential abuse of authority, that would arise if a person is simultaneously both a candidate for public office and an election commissioner charged with the responsibility for over-

seeing the casting and canvassing of votes for that office. The concern that the statute addresses would not be assuaged by an election commissioner simply stepping aside momentarily while reserving the right to act as commissioner at any time of his or her own choosing. Additionally, because the Deputy Commissioner is appointed by, and serves at the pleasure of, the Commissioner ... , LaLota's designation of his deputy to act for him during his leave of absence does not serve to ameliorate the conflict of interest concerns against which the statute seeks to guard." ***Matter of LaLota v. New York State Bd. of Elections*, 2020 N.Y. Slip Op. 02905, Second Dept 5-15-20**

ELECTION LAW, MUNICIPAL LAW.

THE GOVERNOR'S COVID-19-RELATED REDUCTION IN THE REQUIRED NUMBER OF DESIGNATING-PETITION SIGNATURES UNDER THE ELECTION LAW DOES NOT APPLY TO THE REQUIRED NUMBER OF DESIGNATING-PETITION SIGNATURES UNDER THE NEW YORK CITY CHARTER.

The Second Department, reversing Supreme Court, determined the governor's COVID-19-related reduction in the threshold number of designating-petition signatures required under the Election Law did not apply to the threshold number of signatures required by the New York City Charter: "There is no evidence that the Governor intended to alter the New York City Charter's threshold of 450 signatures as opposed to the Election Law statutory threshold of 900. Given that the Governor specifically referred to the Election Law threshold as providing the relevant baseline to reduce the number of signatures in Executive Order No. 202.2, to the extent that there may be any conflict by application of a different threshold baseline set forth in the New York City Charter, Executive Order (Cuomo) No. 202.3 (9 NYCRR 8.202.3) would warrant suspension of the contrary New York City Charter provision." ***Matter of Council v. Zapata*, 2020 N.Y. Slip Op. 02750, Second Dept 5-11-20**

FORECLOSURE, CIVIL PROCEDURE, REAL PROPERTY TAX, MUNICIPAL LAW.

BECAUSE THE HOLDER OF A FIRST MORTGAGE WAS A DEFENDANT IN THE TAX FORECLOSURE PROCEEDINGS, THE MORTGAGE HOLDER DID NOT NEED TO FILE ITS OWN FORECLOSURE ACTION TO ENFORCE ITS LIEN ON THE SURPLUS TAX-FORECLOSURE-SALE PROCEEDS.

The Second Department, in a full-fledged opinion by Justice Scheinkman, determined that HPD, the holder of a first mortgage on property which was the subject of a tax foreclosure, was entitled to the surplus funds from the tax foreclosure sale. The issue was whether HPD's action seeking the surplus was time-barred because it didn't enforce the lien on the surplus within six years of the tax foreclosure sale. The Second Department held no further action to enforce the lien was necessary because HPD was a defendant in the tax foreclosure proceedings: "... HPD's appearance in the tax lien foreclosure action put [the property owner] and anyone else interested in a potential surplus on notice of HPD's claims. To require HPD to commence a separate foreclosure action, when an action to foreclose the tax lien was already pending, would serve no useful purpose." ***NYCTL 1997-1 Trust v. Stell*, 2020 N.Y. Slip Op. 02802, Second Dept 5-13-20**

FORECLOSURE, EVIDENCE.

PROOF OF DEFENDANTS' DEFAULT IN THIS FORECLOSURE ACTION WAS NOT IN ADMISSIBLE FORM; PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined the bank's motion for summary judgment in this foreclosure action should not have been granted. The evidence of defendants' default was not in admissible form: "To establish its prima facie entitlement to summary judgment in a mortgage foreclosure action, a plaintiff must submit the mortgage, the unpaid note, and evidence of the mortgagor's default ... . A default is established by (1) an admission made in response to a notice to admit, (2) an affidavit from a person having personal knowledge of the facts, or (3) other evidence in admissible form ... . Here, Ostermann [plaintiff's vice president], in her affidavit, did not specifically state that she had personal knowledge of the default. Moreover, to the extent that her knowledge was based on her review of business records, she did not identify what records she relied on and she did not attach them to her affidavit. Thus, the plaintiff failed to submit evidence in admissible form to establish the defendants' default … . Since the plaintiff failed to establish, prima facie, that the defendants had defaulted on the subject note, the Supreme Court should have denied those branches of the plaintiff's motion which were for summary judgment on the complaint insofar as asserted against the defendants, to strike their answers, and for an order of reference ...". ***Deutsche Bank Natl. Trust Co. v. McGann*, 2020 N.Y. Slip Op. 02765, Second Dept 5-13-20**

HUMAN RIGHTS LAW, EMPLOYMENT LAW, MUNICIPAL LAW.

DIFFERENT STANDARDS OF PROOF OF EMPLOYMENT DISCRIMINATION UNDER THE NY CITY HUMAN RIGHTS LAW, AS OPPOSED TO THE NY STATE HUMAN RIGHTS LAW, EXPLAINED IN SOME DEPTH; PLAINTIFF'S CAUSE OF ACTION FOR GENDER DISCRIMINATION UNDER THE NY CITY HUMAN RIGHTS LAW ON A THEORY OF A HOSTILE WORK ENVIRONMENT REINSTATED.

The Second Department, in a comprehensive opinion by Justice Brathwaite Nelson, reversing (modifying) Supreme Court, determined plaintiff's cause of action for gender discrimination on a theory of a hostile work environment under the NY

City Human Rights Law should not have been dismissed. The Second Department held that the "materially adverse" change in employment conditions, which applies to the NY State Human Rights Law, does not apply to the NY City Human Rights Law. The standard under the NY City Human Rights Law is a showing that plaintiff was subject to an unfavorable change or treated less well than other employees on the basis of a protected characteristic. The Second Department took pains to explain the different standards of proof under the State and City Human Rights Laws: "... [U]nder the City Human Rights Law, in order to demonstrate liability, a plaintiff need not establish that she or he was subjected to a "materially adverse" change to terms and conditions of employment, but only that she or he was subject to an unfavorable change or treated less well than other employees on the basis of a protected characteristic ... . * * * The alleged comment by Denesopolis [plaintiff's boss], that he did not 'like women on this job because they have babies,' plainly expresses a view of the role of women in the workplace. Considering the totality of the circumstances, which include the plaintiff's testimony that Denesopolis expressed displeasure upon learning of her transfer to his unit as a pregnant woman, and then again at her second pregnancy, we cannot say that this is a 'truly insubstantial case' as a matter of law. In addition, while it might be inferred that the incidents in which Denesopolis publicly reprimanded the plaintiff and referred to her as an 'empty suit' and 'Sergeant do nothing' were related to deficiencies in her performance as a sergeant, on the defendants' motion for summary judgment, we must view the facts in the light most favorable to the plaintiff. A jury could agree with the plaintiff that the conduct was based upon her pregnancies and conclude that the plaintiff was subject to a workplace in which she was treated less well than others because of her gender. Accordingly, the cause of action alleging gender discrimination on a theory of a hostile work environment under the City Human Rights Law must be reinstated." ***Golston-Green v. City of New York*, 2020 N.Y. Slip Op. 02768, Second Dept 5-13-20**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

WIRES WHICH CAUSED PLAINTIFF TO TRIP AND FALL WERE INTEGRAL TO THE WORK BEING PERFORMED AND CANNOT THEREFORE BE CONSIDERED DEBRIS WITHIN THE MEANING OF THE INDUSTRIAL CODE; THE LABOR LAW § 241(6) CAUSE OF ACTION SHOULD HAVE BEEN DISMISSED.

The Second Department, reversing (modifying) Supreme Court, determined plaintiff's Labor Law § 241(6) cause of action should have been dismissed. Plaintiff fell when his foot became entangled in electrical wires hanging from the ceiling. The wires were integral to the work being performed. Therefore the Industrial Code provision prohibiting the accumulation of debris did not apply. However the common law negligence (dangerous condition) cause of action properly survived summary judgment: "To prevail on a cause of action alleging a violation of Labor Law § 241(6), a plaintiff 'must set forth a violation of a specific rule or regulation promulgated by the Commissioner of the Department of Labor' ... . Here, the plaintiff alleged a violation of 12 NYCRR 23-1.7(e)(2), which requires that '[t]he parts of floors, platforms and similar areas where persons work or pass shall be kept free from accumulations of dirt and debris and from scattered tools and materials and from sharp projections insofar as may be consistent with the work being performed.' However, 12 NYCRR 23-1.7(e)(2) is 'inapplicable [where] the material over which [a plaintiff] alleges he [or she] tripped was integral to the work being performed' ...". ***Martinez v. 281 Broadway Holdings, LLC*, 2020 N.Y. Slip Op. 02773, Second Dept 5-13-20**

MENTAL HYGIENE LAW, JUDGES.

JUDGE SHOULD NOT HAVE, SUA SPONTE, TERMINATED THE GUARDIANSHIP OF AN INCAPACITATED PERSON WITHOUT HOLDING A HEARING.

The Second Department, reversing Supreme Court, determined the judge should not have, sua sponte, terminated the guardianship of an incapacitated person (IP) without holding a hearing: "In April 2016, Fanny K. commenced this proceeding pursuant to Mental Hygiene Law article 81 seeking to be appointed as the guardian to manage Angeliki K.'s property located in Greece. After a hearing, the Supreme Court determined that Angeliki K. (hereinafter the IP) was incapacitated within the meaning of Mental Hygiene Law article 81 and appointed Fanny K. (hereinafter the guardian) as the guardian of her property. In September 2018, due to the IP's health problems and resultant inability to communicate in English, the IP was admitted to an assisted living and rehabilitation facility in Athens, Greece. In November 2018, the guardian moved for leave to change the IP's place of abode from New York to the assisted living and rehabilitation facility, with the IP continuing to maintain her permanent residence in New York. The court, without a hearing, denied the motion and, sua sponte, terminated the guardianship due to a lack of a continuing nexus between the guardianship and New York. The Supreme Court should not have, sua sponte, terminated the guardianship, without a hearing, as a guardianship may be terminated 'only on application of a guardian, the incapacitated person, or any other person entitled to commence a proceeding under Mental Hygiene Law article 81 with a hearing on notice' (... see Mental Hygiene Law §§ 81.36[b], [c] ...)." ***Matter of Angeliki K. (Fanny K.)*, 2020 N.Y. Slip Op. 02786, Second Dept 5-13-20**

PERSONAL INJURY, EVIDENCE.

DEFENDANTS DID NOT DEMONSTRATE, PRIMA FACIE, THE UNEVEN SEWER GRATE WAS A TRIVIAL DEFECT; THEREFORE THE BURDEN OF PROOF NEVER SHIFTED TO THE PLAINTIFF; DEFENDANTS' MOTION FOR SUMMARY JUDGMENT IN THIS SLIP AND FALL CASE SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined defendants' motion for summary judgment in this slip and fall case should not have been granted. Plaintiff allegedly tripped on an uneven sewer grate in a parking lot. The evidence did not demonstrate, prima facie, that the defect was trivial. Therefore the burden of proof on the summary judgment motion never shifted to plaintiff: " 'A defendant seeking dismissal of a complaint on the basis that the alleged defect is trivial must make a prima facie showing that the defect is, under the circumstances, physically insignificant and that the characteristics of the defect or the surrounding circumstances do not increase the risks it poses. Only then does the burden shift to the plaintiff to establish an issue of fact' ... . In determining whether a defect is trivial, the court must examine all of the facts presented, including the 'width, depth, elevation, irregularity and appearance of the defect along with the time, place and circumstance of the injury' ... . There is no 'minimal dimension test' or per se rule that the condition must be of a certain height or depth in order to be actionable ... . Physically small defects may be actionable 'when their surrounding circumstances or intrinsic characteristics make them difficult for a pedestrian to see or to identify as hazards or difficult to traverse safely on foot' ...". ***Bishop v. Pennsylvania Ave. Mgt., LLC*, 2020 N.Y. Slip Op. 02756, Second Dept 5-13-20**

PRODUCTS LIABILITY, PERSONAL INJURY, IMMUNITY.

MANUFACTURER AND SELLER OF THE PRODUCT WHICH ALLEGEDLY INJURED INFANT PLAINTIFF CANNOT SUE THE PARENTS FOR CONTRIBUTION ON A THEORY OF NEGLIGENT SUPERVISION OF THE INFANT.

The Second Department, reversing Supreme Court, determined the third-party complaint brought by the defendant manufacturer and seller of a humidifier against the parents of the injured child, alleging negligent supervision of the child, should have been dismissed: "In March 2014, the then-10-month-old infant plaintiff allegedly was injured when she knocked over a humidifier and hot water spilled onto her foot. The infant's father had placed the humidifier on the living room floor before leaving the apartment with the infant's five-year-old sibling. The infant's mother was in the living room when the accident occurred. In August 2014, this action to recover damages for the infant's injuries was commenced against the defendants, which allegedly manufactured and sold the humidifier. In December 2015, the defendants commenced a third-party action against the parents for contribution. ... There is no legally cognizable cause of action to recover damages for injuries suffered by a minor child against his or her parent for negligent supervision ... . Additionally, where a secondary right of contribution is dependent upon 'the parent's alleged failure to perform a duty owing to the plaintiff child, the absence of the primary cause of action defeats the . . . third-party complaint' ... . Although there is an exception when the parent's conduct implicates a duty owed to the public at large ... , the acts complained of in the third-party complaint were encompassed within the intrafamily immunity for negligent supervision ...". ***Martinez v. Kaz USA, Inc.*, 2020 N.Y. Slip Op. 02776, Second Dept 5-13-20**

THIRD DEPARTMENT

CIVIL PROCEDURE.

PLAINTIFF'S MOTION FOR A DEFAULT JUDGMENT SHOULD HAVE BEEN DENIED AND DEFENDANT'S CROSS MOTION TO RENEW SHOULD HAVE BEEN GRANTED, CRITERIA EXPLAINED; E-FILING WAS VOLUNTARY IN CHENANGO COUNTY SO FAILURE TO E-FILE WAS NOT A GROUND FOR REJECTION OF DEFENDANT'S MOTION PAPERS.

The Third Department, reversing Supreme Court, determined plaintiff's motion for a default judgment should have been denied and defendant's cross motion to renew should have been granted. The court noted that Chenango County is a consensual or voluntary e-filing county and defendant's hard copy filing should not have been rejected by the court (for failure to e-file): "... Supreme Court abused its discretion in granting plaintiff's motion for a default judgment. Although defendant's motion papers lacked specific details of the underlying circumstances for the delay, the delay herein was de minimis — one week — and should be excused ... . Defendant timely opposed the motion, offering a meritorious defense. There is no indication that the default was willful or that plaintiff was prejudiced as a result of the late answer. Moreover, defendant appeared in the action when he opposed plaintiff's motion for a preliminary injunction and temporary restraining order. Public policy favors the resolution of cases on the merits ... . Supreme Court confused the cross motion to renew with a motion to reargue and summarily denied it since it was not made within 30 days. This time period applies solely to motions to reargue (see CPLR 2221 [d] [3] ...)." ***Preferred Mut. Ins. Co. v. DiLorenzo*, 2020 N.Y. Slip Op. 02845, Third Dept 5-14-20**

CRIMINAL LAW.

REFERENCES TO DEVIATE BEHAVIOR AND USE OF FORCE IN PETITIONER-INMATE'S CRIME AND SENTENCE INFORMATION FORM AND HIS COMPAS RISK AND NEEDS ASSESSMENT INSTRUMENT NOT SUPPORTED BY THE SEXUAL OFFENSES COMMITTED; THE PETITION SEEKING CORRECTION OF THE DOCUMENTS SHOULD NOT HAVE BEEN DISMISSED.

The Third Department, reversing (modifying) Supreme Court, determined petitioner-inmate had raised legitimate issues about the contents of his Crime and Sentence Information (CSI) form and his COMPAS Risk and Needs Assessment Instrument requiring further proceedings in this Article 78 action. Specifically petitioner argued that references to "deviate" behavior and use of force in connection with sexual offenses were inaccurate: "... [W]ith respect to the CSI form, petitioner was not convicted of any crimes involving an element of 'deviate' behavior ... . Additionally, with regard to the challenged characterization in the COMPAS instrument indicating that petitioner committed a '[s]ex [o]ffense with [f]orce,' we note that petitioner was not convicted of a crime involving 'force' or 'forcible' contact ... . Accordingly, to the extent that the inclusion of such references in the CSI form and COMPAS instrument could be perceived as misleading and be potentially prejudicial to 'future deliberations concerning the petitioner's status' ... , we find that, at this stage of the proceeding, in the absence of a more developed record, petitioner has stated a potentially valid cause of action. Because respondent has yet to serve an answer in this matter, this matter must be remitted to Supreme Court for this purpose ...". ***Matter of Staropoli v. Botsford*, 2020 N.Y. Slip Op. 02840, Third Dept 5-14-20**

ELECTION LAW.

FAILURE TO TIMELY FILE A CERTIFICATE OF ACCEPTANCE OF A DESIGNATION REQUIRED INVALIDATION OF THE DESIGNATING PETITION, NOTWITHSTANDING A REASONABLE EXPLANATION OF THE ONE-DAY-LATE MAILING DUE TO COVID-19.

The Third Department determined the COVID-19 crisis did not excuse the late filing of a certificate of acceptance of a designation. The designating petition was properly invalidated: "... [P]etitioner was required to file her certificate of acceptance of designation no later than March 24, 2020 (see Election Law § 6-158 [2]). Although petitioner completed the acceptance form on March 24, 2020, the record confirms, and petitioner does not dispute, that it was mailed on March 25, 2020. As the acceptance was not 'postmarked prior to midnight of the last day of filing,' her acceptance was untimely (Election Law § 1-106 [1]). Contrary to petitioner's contention and the dissent's characterization, the failure to abide by the prescribed timelines set forth in the Election Law for the filing of a certificate of acceptance is not a technical violation, but, by the plain statutory language, "a fatal defect" (Election Law § 1-106 [2] ...). ... Citing to the unprecedented circumstances created by the COVID-19 pandemic, petitioner also seeks equitable relief to have her acceptance deemed timely filed. We are sympathetic to the difficult situation that petitioner was placed in due to the pandemic and the shortened political calendar but, even assuming that she has articulated a reasonable explanation for her untimely filing of the certificate of acceptance, the equitable remedy that she seeks is unavailable." ***Matter of Hawatmeh v. New York State Bd. of Elections*, 2020 N.Y. Slip Op. 02907, Third Dept 5-15-20**

ELECTION LAW.

OBJECTIONS TO A DESIGNATING PETITION WERE NOT SERVED BY CERTIFIED OR REGISTERED MAIL AS REQUIRED BY THE ELECTION LAW AND WERE NOT TIMELY SERVED UNDER THE TERMS OF THE ELECTION LAW.

The Third Department determined service of objections to the Weinstock designating petition by express mail overnight was not the equivalent of service by registered or certified mail as required by the Election Law. The court also determined that the proceeding was not timely commenced: "Although petitioners argue that express mail overnight is the 'functional equivalent' of registered or certified mail, the provisions of 9 NYCRR 6204.1 (b), which are 'mandatory and may not be disregarded'... , as well as the service requirements set forth in Election Law § 6-154 (2), have long required strict and literal compliance ... . 'A petitioner raising a challenge under Election Law § 16-102 must commence the proceeding and complete service on all the necessary parties within the period prescribed by Election Law § 16-102 (2)' ... . In order to properly complete service, actual delivery must occur no later than the last day upon which the proceeding may be commenced ...—here, April 3, 2020. As evidenced by the proofs of delivery contained in the record on appeal, the order to show cause and the accompanying petition were delivered to Weinstock on April 4, 2020 and to the State Board on April 6, 2020. Inasmuch as service was not completed within the statutory period ending on April 3, 2020, Supreme Court properly found that this proceeding was not timely commenced ...". ***Matter of Sauberman v. Weinstock*, 2020 N.Y. Slip Op. 02906, Third Dept 5-15-20**

FAMILY LAW, CONSTITUTIONAL LAW.

ALTHOUGH MOTHER DID NOT APPEAR AT THE SCHEDULED CONFERENCE AND DID NOT HAVE A MERITORIOUS DEFENSE IN THIS NEGLECT PROCEEDING, SHE WAS NOT AWARE THAT FINDINGS OF FACT WOULD BE MADE IN HER ABSENCE; DEFAULT ORDER VACATED ON DUE PROCESS GROUNDS.

The Third Department, reversing Family Court, determined mother was deprived of her right to due process when findings of fact were made in her absence. Although mother did not appear at a scheduled conference, mother was not aware fact findings would be made: "A parent has a right 'to be present at every stage of" a Family Ct Act article 10 proceeding as a matter of due process, but that right "is not absolute' ... . Family Ct Act § 1042 provides that 'a court may proceed with a hearing . . . in a parent's absence, so long as the subject child is represented by counsel, and the absent parent may thereafter move to vacate the resulting order and schedule a rehearing' ... . Vacatur of that order would ordinarily be warranted if, upon motion, the parent demonstrated 'a meritorious defense to the petition, unless . . . [he or she] willfully refused to appear at the hearing' ... . If the parent demonstrates that the default itself resulted from a deprivation of his or her 'fundamental due process rights,' however, the default is a nullity and no showing of a meritorious defense is required ... . [A]lthough respondent was arguably on notice of the April 2018 conference, she did not receive notice that a potential fact-finding hearing might be conducted at it so as to satisfy due process ... . Indeed, despite the references in the order of fact-finding to an inquest, there is no dispute that Family Court departed from "the proper course" of conducting a hearing in respondent's absence by accepting the allegations in the petition as proven by virtue of respondent's default ... . It would offend due process to hold that respondent 'default[ed] in attending a hearing that she did not know was going to happen and did not, in fact, happen' ... . Thus, notwithstanding the failure of respondent to articulate a meritorious defense, Family Court abused its discretion in denying respondent's motion." ***Matter of Arra L. (Christine L.),* 2020 N.Y. Slip Op. 02829, Third Dept 5-14-20**

FORECLOSURE, EVIDENCE, CIVIL PROCEDURE.

VOLUNTARY DISCONTINUANCES OF PRIOR FORECLOSURE ACTIONS AND THE RELATED CORRESPONDENCE DID NOT UNAMBIGUOUSLY DE-ACCELERATE THE DEBT; THEREFORE THE FORECLOSURE ACTION IS TIME-BARRED; TWO-JUSTICE DISSENT ARGUED THE CORRESPONDENCE DE-ACCELERATED THE DEBT.

The Third Department, reversing Supreme Court, over a two-justice dissent, determined the foreclosure action was time-barred. The initial foreclosure action was in 2010. That action was discontinued and the mortgage was subsequently assigned three times. After a second discontinuance, the third foreclosure action was commenced in 2017. The majority concluded that the discontinuances and related correspondence did not de-accelerate the debt, so the statute of limitations kept running from the initial action in 2010. The dissenters argued the debt had been de-accelerated by correspondence with the defendant: "... [T]he voluntary discontinuance of the first two actions, without more, did not constitute an affirmative revocation of the initial acceleration of the debt ... . That is particularly so because plaintiff's predecessors in interest moved to discontinue each action due to title concerns, without addressing the prospect of revoking the acceleration and resuming installment payments ... . * * * [The plaintiffs'] letters do not indicate a clear and unambiguous return to an installment payment plan and, for all practical purposes, do not actually evidence any real intent to de-accelerate the loan. In effect, 'plaintiff simply put defendant[s] on notice of its obligation to cure a . . . default and then promptly embarked on the notices required to initiate a [third] foreclosure action' ... . In our view, these notices do not constitute affirmative actions to de-accelerate the mortgage ...". ***U.S. Bank Natl. Assn. v. Creative Encounters LLC,* 2020 N.Y. Slip Op. 02844, Third Dept 5-14-20**

PERSONAL INJURY, EVIDENCE, CIVIL PROCEDURE, CRIMINAL LAW.

ALTHOUGH THE RAPE SHIELD LAW DOES NOT APPLY TO A CIVIL PROCEEDING, SUPREME COURT HAD THE AUTHORITY TO PROHIBIT THE QUESTIONING OF PLAINTIFF'S DAUGHTER ABOUT HER SEXUAL HISTORY TO PREVENT EMBARRASSMENT AND HARASSMENT IN THIS NEGLIGENT SUPERVISION CASE.

The Third Department upheld Supreme Court's protective order prohibiting plaintiff's child from being questioned about her sexual history. The complaint alleged the child was raped during a sleep over at defendants' home. The complaint alleged several theories of liability, including negligent supervision. Supreme Court held that the Rape Shield Law applied to this civil case. The Third Department disagreed, but held that the court had the authority to prohibit the testimony to protect the child from embarrassment: "... Supreme Court was required to balance plaintiff's concern that the child's sexual history is irrelevant, and that questions of this nature are nothing more than a form of intimidation and embarrassment, against defendants' argument that the child had a motive to fabricate the allegations of the assault because of a purported pregnancy. The record reveals that Supreme Court undertook a balancing of these concerns. We find that plaintiff met her burden of showing annoyance and embarrassment. The child's sexual history, sexual conduct and pregnancies are not relevant or material to the elements of the causes of action for negligence, battery, intentional infliction of emotional distress or loss of services ... . Moreover, it has been determined that there is limited value to testimony concerning the sexual past of a victim of a sexual assault; instead, it often serves only to harass the victim and confuse the jurors ...". ***Lisa I. v. Manikas,* 2020 N.Y. Slip Op. 02846, Third Dept 5-14-20**

REAL PROPERTY LAW, NUISANCE, APPEALS.

PUBLIC VERSUS PRIVATE NUISANCE EXPLAINED; BECAUSE DEFENDANTS SOLD THEIR PROPERTY, THE APPEAL RELATED TO THE INJUNCTION CAUSE OF ACTION WAS MOOT.

The Third Department determined plaintiffs' private nuisance cause of action should not have been dismissed, but the public nuisance cause of action was properly dismissed. The Third Department noted that, because defendants' property had been sold, the injunction aspect of the case was moot. The defendants had put in a parking area and a retaining wall which plaintiffs' alleged blocked their view of oncoming traffic making it dangerous for plaintiffs' to pull out from their driveway: "Plaintiffs' complaint alleges that defendants paved a significant area of their front yard and proceeded to park cars and trucks thereon, and, as a result, their view of oncoming traffic was significantly hindered when they used their driveway. As a consequence, they claimed that they suffered great anxiety, as they continually worried about being in a traffic accident. What plaintiffs can ultimately prove, or whether damages of this sort are recoverable, is not our concern when determining a motion to dismiss for failure to state a cause of action ... . Rather, 'the dispositive inquiry is whether plaintiffs have a cause of action and not whether one has been stated, i.e., whether the facts as alleged fit within any cognizable legal theory' ... . Here, after applying the strict standards of a pre-answer motion to dismiss, we conclude that Supreme Court erred in dismissing plaintiffs' cause of action for private nuisance. ... 'A public nuisance is actionable by a private person only if it is shown that the person suffered special injury beyond that suffered by the community at large' ... . Plaintiffs have not alleged that defendants interfered with the use of a public place or public rights. The complaint alleges that plaintiffs and the public (pedestrian, cyclist or motorist) are at risk of suffering a collision. '[W]here the claimed injury is common to the entire community, a private right of action is barred' ... . Moreover, we find without merit plaintiffs' claim that they suffer a special damage in that they will suffer liability as a result of any collision that might occur. Even were we to conclude that this claim is not completely speculative, the injury proposed by plaintiffs is not different in kind, but merely in degree, to that which may be suffered by the public as a whole. As such, it does not qualify as a "special injury" so as to allow plaintiffs to bring a public nuisance cause of action ...". ***Duffy v. Baldwin*, 2020 N.Y. Slip Op. 02836, Third Dept 5-14-20**

FOURTH DEPARTMENT

ELECTION LAW, FRAUD.

EVIDENCE OF ALLEGED FRAUD IN THE ACKNOWLEDGMENT OF SIGNATURES WAS NOT SUFFICIENT TO SUPPORT THE INVALIDATION OF THE DESIGNATING PETITION.

The Fourth Department, reversing Supreme Court. determined respondent's designating petition should not have been invalidated based on allegations of fraud in acknowledging signatures: "... [T]he court based its determination to invalidate the designating petition on the testimony of a single signatory, who stated that although respondent was the subscribing witness on the petition that she signed, her signature was actually witnessed by a younger man of a different race. While such evidence may warrant invalidation of a designating petition ... , cross-examination of the signatory—during which she acknowledged signing four City Court petitions, including one for an individual whose description was similar to that of respondent—called her testimony on direct examination into question. ... [W]e conclude that respondent's apparent failure to administer to one signatory 'an oath . . . calculated to awaken the conscience and impress the mind of the person taking it in accordance with his religious or ethical beliefs' ... did not, on its own, constitute evidence of fraud requiring invalidation of his designating petition ...". ***Matter of Monto v. Zeigler*, 2020 N.Y. Slip Op. 02753, Fourth Dept 5-14-20**

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