CasePrepPlus

August 14, 2020

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

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FIRST DEPARTMENT

ADMINISTRATIVE LAW, VEHICLE AND TRAFFIC LAW.

REVOCATION OF PETITIONER'S DRIVER'S LICENSE, BASED UPON A 1995 DEFAULT CONVICTION OF WHICH PETITIONER WAS APPARENTLY UNAWARE, WAS ARBITRARY AND CAPRICIOUS.

The First Department, in a full-fledged opinion by Justice Manzanet-Daniels, determined the revocation of defendant's driver's license based upon a 24-year-old default conviction, which involved an error made by the Department of Motor Vehicles in 1994 (misspelling petitioner's name), was arbitrary and capricious: "Petitioner was issued four summonses in October of 1994 for driving violations including driving without insurance. When entering the violations into the DMV database, a DMV employee entered petitioner's surname as 'Sanders,' rather than 'Sonders,' which DMV acknowledges was a 'possible data-entry error.' Petitioner claims to the best of his knowledge and memory never to have been issued the summonses in question. A default judgment was entered against petitioner as a result of his failure to contest the tickets. The conviction for driving without insurance carried a mandatory penalty of a one-year license revocation (see Vehicle and Traffic Law § 318[3][a]-[b]). On or about August 6, 2019, petitioner renewed his New York State driver's license in person at the DMV. At that time, he obtained a copy of his driving record abstract, which indicated that his license status was 'valid.' Thereafter, petitioner received suspension notices, dated August 7, 2019, stating that his license had been suspended on February 3, 1995; and a revocation order dated August 7, 2019 stating that owing to the February 3, 1995 conviction his license would be revoked for one year in accordance with section 318 of the Vehicle and Traffic Law. Petitioner claims that this is the first notice he received of the summonses. Petitioner paid the outstanding fines and in September 2019 commenced an article 78 proceeding challenging the license revocation. Supreme Court denied the petition and dismissed the proceeding. This appeal followed. ... 'A license to operate an automobile is of tremendous value to the individual and may not be taken away except by due process.' No such due process was afforded to petitioner, who never received notice of the conviction and was led to believe for over 20 years that his license was in order." ***Matter of Sonders v. New York State Dept. of Motor Vehs. Traffic Violations Bur.*, 2020 N.Y. Slip Op. 04443, First Dept 8-6-20**

PARTNERSHIP LAW, CONTRACT LAW.

THE DETAILED STATUTORY SCHEME OF THE REVISED LIMITED PARTNERSHIP ACT (RLPA) PRECLUDED ENFORCEMENT OF THE UNSIGNED PURPORTED AMENDMENT TO THE PARTNERSHIP AGREEMENT.

The First Department determined the 1999 partnership agreement controlled and the purported 2004 amendment to the agreement, which was not executed, could not be enforced. The decision is too detailed to fairly summarize here. Suffice to say that the detailed statutory scheme of the Revised Limited Partnership Act (RLPA) precluded ignoring the Statute of Frauds with respect to the unexecuted amendment: "By design, the RLPA sets forth a clear separation between general and limited partners. This separation is more defined than the division between managers and members in limited liability corporations. With few exceptions, the RLPA provides that a general partner has the liabilities of a partner in a non-limited partnership. In exchange for a more passive position, the limited partners are generally sheltered from personal liability to third parties who transact business with the limited partnership (see generally, Bruce A. Rich, Practice Commentaries, McKinney's Cons. Laws of NY, Book 38, Revised Limited Partnership Act, at 317, 334-336). The RLPA's default requirements of partner consent to substantive changes to a limited partnership agreement helps protect the passive limited partners from actions taken by general partners that might adversely affect the limited partners' interests. That default protection would be undermined if we were to engraft on to the RLPA the equitable exceptions applicable to the Statute of Frauds. Accordingly, we decline to do so." ***A&F Hamilton Hgts. Cluster, Inc. v. Urban Green Mgt., Inc.*, 2020 N.Y. Slip Op. 04440, First Dept 8-6-20**

TOXIC TORTS, NEGLIGENCE, EVIDENCE.

ALTHOUGH THE DAMAGES WERE DEEMED EXCESSIVE, PLAINTIFFS' MULTI-MILLION DOLLAR VERDICT IN THIS ASBESTOS MESOTHELIOMA ACTION WAS SUPPORTED BY THE EXPERT EVIDENCE OF CAUSATION.

The First Department, although finding some of the damage amounts excessive, determined, over a dissent, the plaintiffs' multi-million-dollar verdict in this asbestos exposure case was supported by the evidence. The case hinged on expert ev-

idence that the extent of the exposure was sufficient to cause the resulting illness. The dissent argued the expert evidence did not meet the criteria imposed by the Court of Appeals: "In this asbestos case, Marlena Robaey [(]plaintiff), who died after the trial of this action, testified that, working with her husband and co-plaintiff, she had been regularly exposed to visible dust from scraping and grinding engine gaskets over a period of years, from cleaning the family garage after each gasket change, and from taking her and her husband's dusty clothes into their laundry room to clean. [Defendant] Federal-Mogul's corporate representatives, as well as the various experts called by defendants at trial, testified that the gaskets contained anywhere from 50% to 85% asbestos, and plaintiffs' experts testified that dust from these products, if visible, necessarily exceeded current permissible levels and contained sufficient levels of asbestos to cause plaintiff's peritoneal mesothelioma. * * * ... [T]he experts did not merely testify as to only an increased risk. Dr. Schwartz testified that the visible dust from the gaskets at issue, which were conceded by defendants' expert to contain between 50% and 85% asbestos, 80% being 'standard,' necessarily contained several thousand times the "safe" amount of asbestos, and thus was causative of plaintiff's disease ... . **From the dissent:** It should be borne in mind that the decedent's relevant alleged exposure to asbestos from Fel-Pro products was restricted to helping her husband remove gaskets from his cars "once or twice . . . in a month" over a period of 12 year. It should also be remembered that only about half of the gaskets involved were [defendant's] products, that not all of the [defendant's] gaskets contained asbestos, and that any asbestos that the gaskets did contain was of the less hazardous chrysotile variety." ***Matter of New York City Asbestos Litig. v. Air & Liquid Sys. Corp.*, 2020 N.Y. Slip Op. 04437, First Dept 8-5-20**

SECOND DEPARTMENT

ATTORNEYS, CONTRACT LAW, EVIDENCE.

PLAINTIFF BANK'S ATTORNEY'S FEES IN THIS BREACH OF CONTRACT ACTION SHOULD NOT HAVE BEEN AWARDED ABSENT PROOF OF THE ATTORNEY'S EXPERIENCE AND ABILITIES AND THE NATURE OF THE SERVICES RENDERED.

The Second Department, reversing (modifying) Supreme Court, determined the court should not have awarded attorney's fees to plaintiff bank in this breach of contract/guaranty action because the attorney's experience and abilities and the nature of the services were not spelled out: "… [T]he Supreme Court should not have awarded the bank attorneys' fees, costs, and disbursements based solely on the affirmation of legal services provided by the bank's attorney. 'An award of an attorney's fee pursuant to a contractual provision may only be enforced to the extent that the amount is reasonable and warranted for the services actually rendered' ... . 'In determining reasonable compensation for an attorney, the court must consider such factors as the time, effort, and .skill required; the difficulty of the questions presented; counsel's experience, ability, and reputation; the fee customarily charged in the locality; and the contingency or certainty of compensation' ... . 'While a hearing is not required in all circumstances, the court must possess sufficient information upon which to make an informed assessment of the reasonable value of the legal services rendered' ... . 'There must be a sufficient affidavit of services, detailing the hours reasonably expended . . . and the prevailing hourly rate for similar legal work in the community' ... . Here, the affirmation of services rendered submitted by the bank's counsel 'did not set forth counsel's experience, ability, and reputation, and failed to detail the prevailing hourly rate for similar legal work in the community' ...". ***Sterling Natl. Bank v. Alan B. Brill, P.C.*, 2020 N.Y. Slip Op. 04418, Second Dept 8-5-20**

CONTRACT LAW.

EVEN THOUGH THE BREACH OF CONTRACT ACTION WAS TIME-BARRED, THE EXISTENCE OF A VALID CONTRACT PRECLUDED AN ACTION IN QUANTUM MERUIT OR QUASI CONTRACT.

The Second Department, reversing Supreme Court, determined defendant's motion to dismiss the breach of contract cause of action should have been granted because it was time-barred. In addition, the quantum meruit cause of action should have been dismissed because a valid contract precludes recovery in quasi contract: "The defendants established, prima facie, that this action was not commenced within the limitations period set forth in the contract for breach of contract claims ... . In opposition, the plaintiff failed to raise a question of fact as to whether the statute of limitations was tolled or otherwise inapplicable, or whether the action was actually commenced within the period propounded by the defendants. ... [T]o the extent that the complaint seeks recovery in quantum meruit, it should have been dismissed since 'the existence of a valid contract governing the subject matter generally precludes recovery in quasi contract for events arising out of the same subject matter' ...". **D. Gangi Contr. Corp. v. City of New York, 2020 N.Y. Slip Op. 04378, Second Dept 8-5-20**

CRIMINAL LAW.

THE JUDGE DID NOT PRONOUNCE THE LENGTH OF THE TERM OF PROBATION, SENTENCE VACATED AND MATTER REMITTED.

The Second Department, vacating defendant's sentence, determined the judge's failure to pronounce the term of probation required remittal: "CPL 380.20 requires that courts 'must pronounce sentence in every case where a conviction is entered.'

'When the sentencing court fails to orally pronounce a component of the sentence, the sentence must be vacated and the matter remitted for resentencing in compliance with the statutory scheme' ... . Here, although the parties do not dispute that, as part of the negotiated disposition, the defendant was promised a term of probation of three years, the sentence must be vacated and the matter must be remitted to the Supreme Court, Kings County, for resentencing because the court failed to pronounce the length of the probation term ...". ***People v. Childs*, 2020 N.Y. Slip Op. 04404, Second Dept 8-5-20**

CRIMINAL LAW.

DEFENDANT SHOULD HAVE BEEN ALLOWED TO MAKE A PERSONAL STATEMENT BEFORE RESENTENCING, RESENTENCE REVERSED.

The Second Department, reversing defendant's resentence, determined defendant should have been allowed to make a sentence before the sentence was pronounced: "At that proceeding, the defendant requested an opportunity to address the court. The court denied the defendant's request. The defendant appeals, and we reverse. A defendant is entitled 'to make a statement personally in his or her own behalf, and before pronouncing sentence the court must ask the defendant whether he or she wishes to make such a statement' (CPL 380.50 [1]). '[T]he provisions of CPL 380.50 apply to occasions of resentencing as well as to those of initial sentencing' ... . Here, the defendant was denied that opportunity. Accordingly, we remit the matter ... for resentencing to give the defendant an opportunity to make a statement in his behalf ...". ***People v. Taylor*, 2020 N.Y. Slip Op. 04413, Second Dept 8-5-20**

CRIMINAL LAW, JUDGES.

BY ENTERING A PLEA AGREEMENT WITH A TESTIFYING CODEFENDANT, THE TRIAL JUDGE ABANDONED THE ROLE OF A NEUTRAL ARBITER AND DEPRIVED DEFENDANT OF A FAIR TRIAL.

The Second Department, reversing defendant's conviction and ordering a new trial before a different judge, determined defendant was deprived of a fair trial by the judge's entering a plea agreement with a testifying codefendant: "The defendant ... contends that he was deprived of his due process right to a fair trial by the County Court's act of entering into a plea agreement with the testifying codefendant. The court's agreement with the codefendant was made in conjunction with a cooperation agreement reached between the codefendant and the People. The codefendant had been charged with, inter alia, murder in the second degree. The People had promised to recommend a determinate sentence of imprisonment between two and seven years in exchange for the codefendant's guilty plea to the reduced charge of attempted robbery in the second degree. However, the court promised the codefendant a sentence of only probation in exchange for her testimony against the defendant. Although the defendant failed to preserve this issue for appellate review (see CPL 470.05[2]), we nevertheless reach it in the exercise of our interest of justice jurisdiction. We agree with the defendant that, under the circumstances here, the County Court committed reversible error when it 'negotiated and entered into a [plea] agreement with a codefendant requiring that individual to testify against defendant in exchange for a more favorable sentence' ... . By doing so, 'the trial court abandoned the role of a neutral arbiter and assumed the function of an interested party, thereby creating a specter of bias that requires reversal' ...". ***People v. Greenspan*, 2020 N.Y. Slip Op. 04408, Second Dept 8-5-20**

FORECLOSURE, CIVIL PROCEDURE.

FORECLOSURE ACTION ON THE ENTIRE DEBT TIME-BARRED; QUESTION OF FACT WHETHER THE DEBT WAS DE-ACCELERATED; IF SO, ONLY THOSE INSTALLMENT PAYMENTS DUE WITHIN SIX YEARS OF THE START OF THE FORECLOSURE ACTION ARE RECOVERABLE.

The Second Department, reversing (modifying) Supreme Court, determined the foreclosure action on the entire debt was time-barred, but there was a question of fact whether the debt was de-accelerated such that the installment payments due during the six years prior to the commencement of the action were recoverable by the plaintiff bank (Chase): "... [T]he defendants demonstrated that the six-year statute of limitations (see CPLR 213[4]) began to run on July 7, 2009, when Chase accelerated the mortgage debt and commenced the prior foreclosure action ... . Since the plaintiff did not commence the instant foreclosure action until more than six years later, on January 28, 2016, the defendants sustained their initial burden of demonstrating, prima facie, that the action was untimely ... . [T]he plaintiff tendered evidence that, in May 2015, it sent letters to each of the defendants that purported to de-accelerate the entire debt ... . However, such evidence is sufficient only to raise a question of fact as to whether those causes of action that sought unpaid installments which accrued within the six-year period of limitations preceding the commencement of this action (see CPLR 213[4] ...) are barred by the statute of limitations due to this alleged de-acceleration by the plaintiff. Since the plaintiff failed to tender any evidence to rebut the defendants' showing that the statute of limitations bars the causes of action relating to unpaid mortgage installments which accrued on or before January 27, 2010, the Supreme Court should have granted that branch of the defendants' motion which was to dismiss those causes of action." ***U.S. Bank Trust, N.A. v. Miele*, 2020 N.Y. Slip Op. 04422, Second Dept 8-5-20**

FORECLOSURE, EVIDENCE.

REFEREE'S FINDINGS WERE BASED UPON HEARSAY PROVIDED BY THE BANK IN THIS FORECLOSURE ACTION; THE REFEREE'S REPORT SHOULD NOT HAVE BEEN CONFIRMED.

The Second Department, reversing Supreme Court, determined the referee's report in this foreclosure action should not have been confirmed. The report was based upon hearsay provided by the bank and therefore the referee's findings were not supported by the record: "The Supreme Court should have denied the plaintiff's motion, in effect, to confirm the referee's report and for leave to enter a judgment of foreclosure and sale. In support of its motion, the plaintiff relied upon the affidavit of a representative of its loan servicer, who attested, based upon his review of the servicer's books and records, to the amount due under the mortgage loan. However, the plaintiff's affiant failed to annex or otherwise produce the subject business records. Under the circumstances, the affidavit relied upon by the plaintiff constituted inadmissible hearsay and lacked probative value, and the referee's findings with respect to the total amount due upon the mortgage were not substantially supported by the record ...". ***Bank of N.Y. Mellon v. Fontana*, 2020 N.Y. Slip Op. 04375, Second Dept 8-5-20**

FORECLOSURE, EVIDENCE, CIVIL PROCEDURE.

DEFENDANT'S MOTION TO RENEW HIS OPPOSITION TO THE BANK'S MOTION FOR SUMMARY JUDGMENT IN THIS FORECLOSURE ACTION SHOULD HAVE BEEN GRANTED; THE BANK HAD ORIGINALLY ALLEGED IT POSSESSED THE NOTE AND THEREFORE HAD STANDING TO FORECLOSE; SUBSEQUENTLY THE BANK SUBMITTED A LOST NOTE AFFIDAVIT IN SUPPORT OF ITS MOTION TO CONFIRM THE REFEREE'S REPORT.

The Second Department, reversing Supreme Court, determined defendant's motion to renew his opposition to the bank's motion for summary judgment should have been granted in this foreclosure action. In support of its summary judgment motion the bank alleged it had standing based upon possession of the note. However, in support of the bank's subsequent motion to confirm the referee's report the bank submitted a lost note affidavit: "A motion for leave to renew 'shall be based upon new facts not offered on the prior motion that would change the prior determination' (CPLR 2221[e][2]), and 'shall contain reasonable justification for the failure to present such facts on the prior motion' (CPLR 2221[e][3]). Here, in support of his cross motion for leave to renew, the borrower had a reasonable justification for his failure to present the new facts in opposition to the original motion, since the plaintiff had previously—and unequivocally—represented that the original note was in Investors' possession, and only later disclosed that the original note had in fact been lost, without providing any further details as to when the search for the note occurred, who conducted the search, and when the note was lost ... . Under these circumstances, the Supreme Court should have granted the borrower's cross motion for leave to renew and, upon renewal, denied those branches of the plaintiff's motion which were for summary judgment on the complaint insofar as asserted against the borrower, to strike his answer and counterclaims, and for an order of reference, based on unresolved issues of fact regarding the plaintiff's standing ...". ***CitiMortgage, Inc. v. Barbery*, 2020 N.Y. Slip Op. 04377, Second Dept 8-5-20**

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

ALTHOUGH PLAINTIFF BANK DID NOT DEMONSTRATE THE RPAPL 1304 NOTICE WAS MAILED TO DEFENDANT IN THIS FORECLOSURE ACTION, DEFENDANT'S DENIAL OF RECEIPT OF THE NOTICE WAS NOT SUFFICIENT TO WARRANT SUMMARY JUDGMENT IN FAVOR OF DEFENDANT.

The Second Department, reversing (modifying) Supreme Court, determined defendant's cross motion for summary judgment in this foreclosure action should not have been granted. Supreme Court properly found that the bank did not provide sufficient proof that the Real Property Actions and Proceedings Law (RPAPL) 1304 notice was mailed to defendant. But defendant's mere denial of receipt of the notice was not enough to warrant summary judgment in defendant's favor: "The plaintiff failed to establish, prima facie, that it mailed the RPAPL 1304 notice, because 'the plaintiff failed to provide proof of the actual mailing, or proof of a standard office mailing procedure designed to ensure that items are properly addressed and mailed, sworn to by an individual with personal knowledge of that procedure' ... . We disagree, however, with the Supreme Court's determination to grant [defendant] Parker's cross motion for summary judgment dismissing the complaint insofar as asserted against her. Parker offered only a mere denial of receipt of the RPAPL 1304 notice in support of her cross motion, and such a mere denial is insufficient to establish entitlement to such relief ...". ***Bank of N.Y. Mellon v. Parker*, 2020 N.Y. Slip Op. 04376, Second Dept 8-5-20**

LANDLORD-TENANT, MUNICIPAL LAW, ADMINISTRATIVE LAW.

ALTHOUGH THE TENANT HAD VIOLATED CERTAIN PROVISIONS OF THE LEASE, THE EVICTION PENALTY SHOCKED THE CONSCIENCE AS A MATTER OF LAW.

The Second Department, reversing (modifying) Supreme Court, over a dissent, determined the housing authority's (THA's) eviction of petitioner was too severe a penalty for her alleged sporadic failure to make timely rent payments, her alleged failure to allow an exterminator to enter the apartment, and her single allegedly "rude and loud" phone conversation with

a THA employee. The dissenter argued eviction was an appropriate penalty: "Here, although the petitioner made late rental payments during the subject period, she did eventually pay all of the rent due, as well as the fees that had accrued on the account. Moreover, the record establishes that during the subject period, the amount of the petitioner's rent fluctuated monthly, with little advance notice, such that her December 2015 rent was nearly three times as much as her September 2015 rent. ... [T]he two isolated incidents concerning the exterminator and the offensive telephone conversation were not proportionate to the penalty of eviction. First, although the petitioner denied the exterminator entry to her apartment on March 14, 2016, the THA's evidence otherwise established that the petitioner was the one who had requested treatment for bedbugs, she fully complied with the first treatment, and over several years of biweekly extermination for other pests, she had never denied the exterminator entry ... . [T]he petitioner's single threat of violence occurred in a heated telephone conversation, immediately before the petitioner hung up in frustration and anger. The THA employee to whom the comment was directed testified at the hearing that she found the comment '[e]xtraordinary and extremely rude,' but she did not testify that she was frightened or that she understood the comment to be a genuine threat of violence. ... The penalty imposed is so grave in its impact on the petitioner that it is disproportionate to the misconduct, or the risk of harm to the THA or the public. Under the circumstances of this case, the penalty of termination of the petitioner's tenancy is so disproportionate to the offenses committed as to be shocking to the judicial conscience as a matter of law ...". ***Matter of Jacobs v. Tuckahoe Hous. Auth.*, 2020 N.Y. Slip Op. 04392, Second Dept 8-5-20**

PERSONAL INJURY, MUNICIPAL LAW.

THE APPLICATION FOR LEAVE TO FILE A LATE NOTICE OF CLAIM SHOULD NOT HAVE BEEN GRANTED; THERE WAS NO SHOWING THE CITY AND FIRE DEPARTMENT HAD TIMELY KNOWLEDGE OF A POTENTIAL NEGLIGENCE ACTION ARISING FROM A RESPONSE TO A 911 CALL.

The Second Department, reversing Supreme Court, determined the application for leave to file a late notice of claim should not have been granted. Plaintiff alleged the city and the fire department (the appellants) were negligent in the response to a 911 call made after petitioner's daughter was discovered drowning in a swimming pool. The petitioner did not demonstrate the appellants were timely made aware of a potential negligence action: "Contrary to the petitioner's contention, the appellants did not acquire actual knowledge of the essential facts constituting the claim within 90 days after the claim arose or a reasonable time thereafter by virtue of their possession of a portion of the relevant 911 call. The appellants demonstrated that 911 calls are initially answered by a representative of the New York Police Department (hereinafter NYPD) and are transferred to the FDNY's Emergency Medical Dispatch Center if, as here, the reported emergency is of a medical nature. The appellants showed that the NYPD portion of the call was deleted in the normal course of business after 180 days, while the FDNY portion was retained. The FDNY portion of the call and other communications maintained by the appellants revealed that the arrival on the scene of an Advanced Life Support ambulance was delayed because the ambulance was initially directed to an incorrect address, but did not reveal whether the appellants' employees or the 911 caller was the source of the error. Rather, it was the deleted NYPD portion of the call that would likely have contained that information. Furthermore, the petitioner's daughter's pulse and breathing were restored in the ambulance, and nothing in the records maintained by the appellants revealed the extensive injuries that the petitioner's daughter allegedly suffered. Thus, despite the appellants' knowledge of facts surrounding the response to the 911 call, there was little to suggest injury attributable to any negligence on their part ... . [E]ven assuming that the petitioner demonstrated an absence of prejudice, in response, the appellants made a particularized evidentiary showing that they would be substantially prejudiced by the more than one year delay in serving the notice of claim by showing that the NYPD portion of the call, which would likely have revealed the source of the erroneous residential address, had been deleted ... . The petitioner additionally failed to demonstrate a reasonable excuse for the failure to timely serve a notice of claim ...". ***Matter of Adbelghany v. City of New York*, 2020 N.Y. Slip Op. 04391, Second Dept 8-5-20**

PERSONAL INJURY, MUNICIPAL LAW.

WHERE THERE ARE TWO POSSIBLE CAUSES OF A DANGEROUS CONDITION AND THE TRIER OF FACT WOULD HAVE TO RESORT TO SPECULATION ABOUT WHETHER THE ALLEGED NEGLIGENCE OF THE DEFENDANT WAS THE PROXIMATE CAUSE, THE ACTION MUST BE DISMISSED.

The Second Department, reversing Supreme Court, determined the defendant New York City Housing Authority's (NYCHA's) summary judgment motion in this playground injury case should have been granted. Plaintiff alleged a water sprinkler, in which children could play, was too close to the monkey bars and infant plaintiff was injured falling from the wet monkey bars. However the plaintiff presented evidence that children who were wet from playing in the sprinkler had climbed the monkey bars before infant plaintiff slipped and fell. The Second Department held that finding the NYCHA negligent would have to be based upon speculation: "The infant plaintiff testified at a General Municipal Law § 50-h hearing and his deposition that the wind was pushing water from the sprinkler to the monkey bars. However, the infant plaintiff also testified at his deposition that, immediately before he went on the ladder to the monkey bars, two children who were wet from playing in the sprinkler climbed on the ladder. 'Where the facts proven show that there are several possible causes

of an injury, for one or more of which the defendant was not responsible, and it is just as reasonable and probable that the injury was the result of one cause as the other, plaintiff cannot have a recovery, since he [or she] has failed to prove that the negligence of the defendant caused the injury' ... . Given the wet children who preceded the infant plaintiff on the ladder, it would require impermissible speculation to conclude that the water on which the infant plaintiff slipped was caused by the proximity of the sprinkler to the monkey bars ... . The affidavit of the infant plaintiff to the effect that the ladder was wet before the wet children climbed on it 'presented what appears to be a feigned issue of fact, designed to avoid the consequences of [his] earlier deposition testimony' that he did not see that the ladder was wet before he climbed on it ...". ***Wilson v. New York City Hous. Auth.*, 2020 N.Y. Slip Op. 04427, Second Dept 8-5-20**

THIRD DEPARTMENT

ADMINISTRATIVE LAW, CIVIL PROCEDURE, UTILITIES.

DOCTRINE OF PRIMARY JURISDICTION PRECLUDED THIS CIVIL SUIT AGAINST OFFICERS OF THE UTILITY AFTER THE PUBLIC SERVICE COMMISSION DETERMINED PLAINTIFF'S ELECTRICITY HAD BEEN PROPERLY CUT OFF BY THE UTILITY BECAUSE PLAINTIFF HAD REPLACED THE METER.

The Third Department determined the doctrine of primary jurisdiction precluded plaintiff's lawsuit against former officers of the Central Hudson Gas & Electric Corporation. Plaintiff believed the digital encoder receiver transmitter (ERT) installed at his home by the utility to replace an analog meter emitted cancer-causing radiation. Plaintiff removed the ERT and replaced it with an analog meter. The utility considered the meter dangerous and cut off plaintiff's electricity. Plaintiff complained to the Public Service Commission (PSC) which supported the utilities' power cut-off and informed plaintiff of his appeal rights. Plaintiff did not appeal and started the instant civil suit: "... [W]e find that Supreme Court was correct in its interpretation of the doctrine of primary jurisdiction. Under the doctrine of primary jurisdiction, a court has the discretion to refrain from exercising jurisdiction over a matter where an administrative agency also has jurisdiction, and the determination of the issues involved, under a regulatory scheme, depends upon the specialized knowledge and experience of the agency ... . Here, the issues concern the particular meter used by Central Hudson, plaintiff's removal and replacement of same, the safety concerns caused by his actions and the validity of the disconnection of his service. These matters fall under the doctrine and, thus, were appropriate for PSC determination. We also agree with Supreme Court's assessment that the causes of action found in plaintiff's complaint amount to little more than a rebranding of his PSC claim and were properly dismissed ... . [W]e agree with Supreme Court's determination that review of a PSC ruling is limited to a CPLR article 78 proceeding. 'Supreme Court, in determining the motion for [summary judgment,] properly considered whether the . . . primary jurisdiction doctrine[] precluded the causes of action propounded by plaintiff[]' ... , and that, in order to review the original ruling, it was incumbent upon plaintiff to bring an article 78 proceeding ...". ***[Romine] v. Laurito*, 2020 N.Y. Slip Op. 04432, Third Dept 8-6-20**

CRIMINAL LAW, EVIDENCE.

POLICE OFFICER WAS JUSTIFIED IN FOLLOWING DEFENDANT'S CAR AFTER OBSERVING A TRAFFIC VIOLATION, DIRECTING THE OCCUPANTS OF THE CAR TO RETURN TO THE CAR AFTER IT PULLED INTO A RESIDENTIAL DRIVEWAY, AND DETAINING THE DEFENDANT AND CONDUCTING A SEARCH ON THE PROPERTY AFTER THE HOMEOWNER SAID HE DID NOT KNOW THE OCCUPANTS OF THE CAR.

The Third Department determined the police office acted properly in following the defendant's car after observing a traffic violation, directing the occupants of the car to return to car after it pulled into a residential driveway, detaining the defendant when the homeowner said he did not know the defendant and the others, and arresting the defendant after a weapon was found after a search behind the house: "The officer observed a traffic infraction when the vehicle ran a stop sign ... and was accordingly justified in approaching the vehicle after he had caught up to it ... . Defendant suggests that the traffic infraction was a pretext for making the approach, but that contention is unpreserved for our review ... . As a result, although one might reasonably question why the officer, upon seeing a traffic violation of sufficient gravity to cause him to make a U-turn and follow the vehicle, did not put on his siren or emergency lights, and then approached the vehicle with more apparent interest in the passengers than the driver, the record was not developed on the possibility of an ulterior motive for the officer's actions. It follows that the record affords no basis for defendant's speculation as to the officer's motivations. We are, in any event, bound by controlling precedent that those speculative motivations would not render an otherwise proper approach invalid ... . The officer had discretion to 'control the scene in a way that maximize[d]' safety as the approach unfolded, could have directed defendant to exit the vehicle had he been in it and, in ... view of the heightened safety concerns stemming from defendant's refusal to return to the vehicle and brief disappearance behind the house, was free to direct that defendant sit on the hood of the vehicle upon his return ... . Shortly thereafter, the officer learned that the homeowner did not know anyone in the vehicle despite their claims and had watched defendant throw something away behind the house. The foregoing created a reasonable suspicion of criminal activity by defendant that warranted his detention, after which

the handgun was recovered and afforded probable cause for his arrest ...". ***People v. Price*, 2020 N.Y. Slip Op. 04430, Third Dept 8-6-20**

CRIMINAL LAW, EVIDENCE, APPEALS.

ALTHOUGH THE VICTIM'S FACIAL SCARS WERE SHOWN TO THE JURY NO DESCRIPTION OF THE SCARS APPEARS IN THE TRIAL RECORD AND NO PHOTOGRAPH OF THE SCARS WAS INTRODUCED; THEREFORE THE SERIOUS DISFIGUREMENT ELEMENT OF ASSAULT FIRST WAS NOT DEMONSTRATED AND THE ASSAULT FIRST CONVICTION WAS AGAINST THE WEIGHT OF THE EVIDENCE; CONVICTION REDUCED TO ATTEMPTED ASSAULT FIRST.

The Third Department, finding the assault first conviction to be against the weight of the evidence and reducing it to attempted assault first, determined the record of the evidence presented at trial did not support the serious disfigurement element in this knife attack case: "The testimonial, photographic and documentary evidence demonstrated that the victim sustained a laceration to his right cheek that was approximately four centimeters long, as well as a similarly sized laceration transversing the tip of his nose to his right nostril. Both lacerations were sutured by a plastic surgeon. Although the evidence clearly demonstrated the locations of the lacerations and their size prior to and immediately after suturing, the record is imprecise as to the extent and appearance of any resulting facial scars. The People did not introduce a photograph depicting the victim's nose and right cheek at the time of trial or any time after the sutures had been removed and the lacerations healed ... . Further, although the physician who treated the victim testified that the victim was expected to have facial scars and the victim did in fact display facial scars to the jury, the People failed to make a contemporaneous record of what the jury observed, so as to demonstrate the extent and appearance of those scars ... . Moreover, despite their prominent locations, there is no indication that the relatively small facial lacerations produced jagged, uneven or "unusually disturbing" scars ... . In the absence of a photograph depicting the victim's facial scars or an on-the-record description of the victim's scars at the time of trial, we cannot conclude that the record evidence supports a finding of serious disfigurement ...". ***People v. Harris*, 2020 N.Y. Slip Op. 04431, Third Dept 8-6-20**

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