March 19, 2021

CasePrepPlus

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

Editor: **Bruce Freeman**

NEW YORK STATE BAR ASSOCIATION
Serving the legal profession and the community since 1876

FIRST DEPARTMENT

CIVIL PROCEDURE, EVIDENCE.

DEFENDANTS DID NOT PRESENT SUFFICIENT EVIDENCE IN SUPPORT OF THEIR MOTION TO CHANGE VENUE.
The First Department reversing Supreme Court, determined defendants did not present sufficient evidence in support of their motion to change venue. The plaintiffs alleged the defendants, who were hired to paint newly-constructed residential property, did substandard work. Suit was brought in the county of plaintiffs' residence and business, New York County. The defendants sought to change the venue to Suffolk County where the property is located and defendants reside: "Where venue has properly been designated by the plaintiff based on the residence of either party, a defendant seeking a change of venue under CPLR 510(3) must make a detailed evidentiary showing that the nonparty witnesses will, in fact, be inconvenienced absent such relief. The affidavit of the moving party under CPLR 510(3) must (1) contain the names, addresses, and occupations of witnesses expected to be called; (2) disclose the facts upon which such witnesses are expected to testify, in order that the court may determine whether such witnesses are material and necessary; (3) demonstrate that such witnesses are willing to testify; and (4) show that the witnesses would be inconvenienced absent a change in venue ... ... [D]efendants neglected to show with sufficient particularity the facts upon which nonparty McAulife is expected to testify. ... Defendants did not submit an affidavit from McAulife, relying instead on counsel's affirmation wherein he states that McAulife was 'familiar with the work performed by defendants at 10 Two Trees Lane,' and 'familiar with defendants in their business capacity.' Without further detail about when, where, and under what circumstances McAulife had occasion to become 'familiar with the work,' defendants' burden has not been met ... . Defendants also fail to set forth McAulife's name, address, and occupation, or how he would be inconvenienced absent a change in venue. The fact that the case involves work on a property located in Suffolk County does not justify an inversion of the burden of proof or relieve the moving party of its burden of establishing that the convenience of the nonparty witnesses would be served by a discretionary change of venue ...". ***10 Two Trees Lane LLC v. Mahone*, 2021 N.Y. Slip Op. 01371, First Dept 3-9-21**

CIVIL PROCEDURE, MUNICIPAL LAW, ATTORNEYS, MONEY HAD AND RECEIVED.

ALTHOUGH THIS NON-TORT ACTION AGAINST THE NYC DISTRICT ATTORNEY DID NOT TRIGGER THE NOTICE OF CLAIM REQUIREMENT OF THE GENERAL MUNICIPAL LAW, IT DID TRIGGER THE NOTICE OF CLAIM REQUIREMENT OF THE COUNTY LAW.
The First Department determined County Law 52, not General Municipal Law (GML) 50, applied to a "money had and received" lawsuit against the district attorney of New York County. Although the district attorney is considered a city employee for purposes the General Municipal Law, the district attorney is elected by the citizens of New York County and is subject to the provisions of the County Law. The General Municipal Law notice of claim requirement applies only to tort actions. However, the County Law notice of claim requirement applies to this action for money had and received. No notice of claim was filed: "Defendant falls back on the position that, even if no notice of claim was required under GML section 50-k, one was required under County Law section 52. ... Although this section also refers to GML sections 50-e and 50-i, the Court of Appeals has expressly held that it applies to non-tort claims ... . Further, County Law section 52 applies to county employees ... . Nevertheless, plaintiffs assert that in arguing for application of the County Law, the District Attorney is trying to have it both ways, since he claims to be a city employee for purposes of the General Municipal Law, but a county employee for purposes of the County Law. It is true that New York City law considers the District Attorney to be a city employee ... . However, this is no reason not to apply County Law section 52, since there is no county-level government organization in the City of New York that could be considered the District Attorney's employer for administrative purposes such as paying his or her salary. Moreover, the District Attorney is elected by the voters of New York County, not New York City. Finally, this Court has cited County Law section 52 in holding that a notice of claim is required before filing an action against the office of a District Attorney in the City of New York ...". ***Slemish Corp. S.A. v. Morgenthau*, 2021 N.Y. Slip Op. 01370, First Dept 3-9-21**

DEFAMATION, CRIMINAL LAW, IMMUNITY.

REPORTING AN ALLEGED SEXUAL ASSAULT TO THE POLICE DOES NOT EVINCE MALICE SUFFICIENT TO OVERCOME THE QUALIFIED IMMUNITY ASSOCIATED WITH MAKING THE REPORT; THE DEFAMATION ACTION SHOULD HAVE BEEN DISMISSED.

The First Department, reversing Supreme Court, in a full-fledged opinion by Justice Manzanet-Daniels, determined the defamation action based upon defendant's filing a sexual assault complaint with the police was protected by qualified immunity and the nature of the complaint did not evince the malice required to overcome the qualified immunity. The sexual assault trial ended in a hung jury and defendant agreed to an adjournment in contemplation of dismissal as the disposition of her charges against plaintiff. Plaintiff was formerly an assistant district attorney and defendant was a reporter for the Daily News: "The doctrine of qualified immunity shields individuals who, like defendant, act 'in the discharge of some public or private duty, legal or moral, or in the conduct of [her] own affairs, in a matter where h[er] interest is concerned' ... . To overcome the qualified privilege protecting defendant's statements to the police, plaintiff was required to sufficiently allege that she published the statements with actual malice, i.e., that defendant 'acted out of personal spite or ill will, with reckless disregard for the statement's truth or falsity, or with a high degree belief that [her] statements were probably false' ... . * * * Plaintiff's allegations fall short of alleging actual malice sufficient to overcome the qualified privilege attaching to defendant's statements to the police. Even as alleged in the complaint, the statements are a straightforward rendition of the incident that defendant claims occurred during a car ride with plaintiff. There was nothing excessive or 'vituperative' in the character of the reported statements that would support an inference of actual malice ... . Indeed, it is difficult to see how defendant could have been more succinct or restrained in her description of the events while accomplishing her purpose: to report to the police that she had been the victim of sexual assault." ***Sagaille v. Carrega*, 2021 N.Y. Slip Op. 01369, First Dept 3-9-21**

ZONING, LAND USE, MUNICIPAL LAW, ADMINISTRATIVE LAW.

TWO ZONING VIOLATION SUMMONSES ADDRESSING THE SAME USE OF THE PROPERTY WERE NOT DUPLICATIVE; THEREFORE THE NYC DEPARTMENT OF BUILDINGS' FAILURE TO APPEAL THE DISMISSAL OF THE FIRST SUMMONS DID NOT PRECLUDE THE SECOND.

The First Department, in a full-fledged opinion by Justice Oing, determined that two actions brought by the NYC Department of Buildings (DOB) seeking the removal of four large industrial shipping containers from petitioner's auto-repair-shop premises were not duplicative. Therefore the DOB's failure to appeal the dismissal of the first summons did not preclude the second summons. The second summons was dismissed by the hearing officer but was reinstated by the OATH [NYC Office of Trials and Hearings] Appeals Unit. The First Department upheld the reversal by the Appeals Unit. [The decision covers several substantive issues not summarized here]: "Petitioners argue primarily that although the summonses cite to two different provisions of the law — a Zoning Resolution violation and a certificate of occupancy violation pursuant to Administrative Code § 28-118.3.2 — the same proof and arguments were presented at the hearings for both summonses, namely, the certificate of occupancy, photographs depicting storage of the shipping containers on the property, the argument that the shipping containers would be transformed into trucks, and the counterargument that the storage was not a permitted use. They contend that this analysis is sufficient to demonstrate the duplicative nature of the summonses. The argument is unavailing. * * * Here ... the same body of evidence is used to prove two different violations, a violation of the Zoning Resolution, which covers the permitted uses and businesses within a specific area, and a violation of the certificate of occupancy, which applies specifically to the property, and describes the legal occupancy and use of that property. Moreover, the remedy for the two summonses is not the same. The first summons demanded that petitioners discontinue the illegal use, while the second summons provided for alternative remedies — discontinue illegal use or amend the certificate of occupancy. Accordingly, the OATH Appeals Unit's finding that the second summons was not duplicative of the first summons was not arbitrary and capricious." ***Matter of Karakash v. Del Valle*, 2021 N.Y. Slip Op. 01484, First Dept 3-11-21**

SECOND DEPARTMENT

CIVIL PROCEDURE.

THE REFEREE DID NOT COMPLY WITH THE ORDER OF REFERENCE; SUPREME COURT'S RULINGS BASED UPON THE REFEREE'S ORDER WERE THEREFORE INVALID.

The Second Department, reversing Supreme Court, determined the referee did not comply with the order of reference and the referee's order exceeded the scope of authority given by the order of reference. Therefore the grant of summary judgment, which was based on the referee's order, was reversed: "A referee derives his or her authority from an order of reference by the court ... , and the scope of the authority is defined by the order of reference (see CPLR 4311 ...). A referee who attempts to determine matters not referred to him or her by the order of reference acts beyond and in excess of his or her jurisdiction ... . Here, the order of reference directed the Referee to hear and determine the issue of the preliminary in-

junction. The Referee's order, however, did not render a determination on the issue of the preliminary injunction." ***Brighton Leasing Corp. v. Brighton Realty Corp*., 2021 N.Y. Slip Op. 01384 Second Dept 3-10-21**

CIVIL PROCEDURE, DEBTOR-CREDITOR.

THE MOTION FOR AN ORDER OF ATTACHMENT SHOULD NOT HAVE BEEN GRANTED; CRITERIA EXPLAINED.

The Second Department, reversing Supreme Court, determined the motion for an order of attachment should not have been granted: " 'In order to be granted an order of attachment under CPLR 6201(3), a plaintiff must demonstrate that the defendant has concealed or is about to conceal property in one or more of several enumerated ways, and has acted or will act with the intent to defraud creditors, or to frustrate the enforcement of a judgment that might be rendered in favor of the plaintiff' ... . 'Affidavits containing allegations raising a mere suspicion of an intent to defraud are insufficient. It must appear that such fraudulent intent really existed in the defendant's mind' ... . The 'mere removal, assignment or other disposition of property is not grounds for attachment' ...". ***Cyngiel v. Krigsman*, 2021 N.Y. Slip Op. 01391, Second Dept 3-10-21**

CIVIL PROCEDURE, FORECLOSURE.

THE BANK'S FAILURE TO REJECT THE LATE ANSWER WITHIN 15 DAYS WAIVED THE LATE SERVICE AND DEFAULT.

The Second Department, reversing Supreme Court, determined the bank waived its objection to a late answer by not timely rejecting it within 15 days. Therefore the default was also waived: "The defendant failed to timely appear or answer the complaint. ... On April 30, 2018, the defendant served an answer with counterclaims. Seventeen days later, on May 17, 2018, the plaintiff served a notice of rejection in which it rejected the answer as untimely. ... Pursuant to CPLR 2101(f), '[t]he party on whom a paper is served shall be deemed to have waived objection to any defect in form unless, within fifteen days after the receipt thereof, the party on whom the paper is served returns the paper to the party serving it with a statement of particular objections' ... . Here, the plaintiff's undisputed failure to reject the defendant's answer within the fifteen-day statutory time frame constituted a waiver of the late service and the default ...". ***U.S. Bank N.A. v. Lopez*, 2021 N.Y. Slip Op. 01440, Second Dept 3-10-21**

CIVIL PROCEDURE, REAL PROPERTY LAW, COOPERATIVES.

THE CRITERIA FOR APPOINTMENT OF A TEMPORARY RECEIVER IN THIS PARTITION AND SALE ACTION WERE NOT MET.

The Second Department, reversing Supreme Court, determined that the evidence did not support the appointment of a temporary receiver of a residential building and cooperative apartment that were the subjects of a partition and sale action: "CPLR 6401(a) permits the court, upon a motion by a person with an 'apparent interest' in property, to appoint a temporary receiver of that property where 'there is danger' that it will be 'materially injured or destroyed.' However, the appointment of a temporary receiver 'is an extreme remedy resulting in the taking and withholding of possession of property from a party without an adjudication on the merits' ... .Therefore, a motion seeking such an appointment should be granted only where the moving party has made a 'clear and convincing' evidentiary showing of 'irreparable loss or waste to the subject property and that a temporary receiver is needed to protect their interests' ... . Here, the plaintiff failed to make the requisite showing. In particular, the plaintiff's speculative and conclusory allegations that the defendants failed to repair and maintain the subject properties and commingled income derived from the subject properties with their personal income were insufficient to demonstrate that there was a danger of irreparable loss or material injury to the subject properties warranting the appointment of a temporary receiver ... . Similarly, without more, the defendants' failure to maintain adequate records does not demonstrate that the plaintiff's interest in the subject properties is in imminent danger of irreparable loss or waste ...". ***Cyngiel v. Krigsman*, 2021 N.Y. Slip Op. 01390, Second Dept 3-10-21**

CIVIL PROCEDURE, ZONING, LAND USE, JUDGES.

ABSENT A REQUEST FROM A PARTY, SUPREME COURT SHOULD NOT HAVE SUMMARILY DISMISSED THE DECLARATORY JUDGMENT ASPECT OF THIS HYBRID ARTICLE 78/DECLARATORY JUDGMENT ACTION.

The Second Department, reversing (modifying) Supreme Court, determined the court should not have summarily dismissed the declaratory judgment aspect of this hybrid declaratory judgment/Article 78 action. The Second Department found that Supreme Court had properly affirmed the denial of a special use permit for a dog kennel, but the Second Department reinstated the request for a declaratory judgment on the constitutionality of a related local law: "... [T]he Supreme Court should not have summarily dismissed the cause of action for a judgment declaring that Town of Lewisboro Code § 220-23(D)(7) is unconstitutional. 'In a hybrid proceeding and action, separate procedural rules apply to those causes of action which are asserted pursuant to CPLR article 78, on the one hand, and those to recover damages and for declaratory relief, on the other hand' ... . 'The Supreme Court may not employ the summary procedure applicable to a CPLR article 78 cause of action to dispose of causes of action to recover damages or seeking a declaratory judgment' ... . 'Thus, where no party makes a request for a summary determination of the causes of action which seek to recover damages or declaratory

relief, it is error for the Supreme Court to summarily dispose of those causes of action' ... . Here, since no party made such a request, the court erred in summarily disposing of the cause of action for a judgment declaring that Town of Lewisboro Code § 220-23(D)(7) is unconstitutional." ***Matter of Muller v. Zoning Bd. of Appeals Town of Lewisboro*, 2021 N.Y. Slip Op. 01416, Second Dept 3-10-21**

CRIMINAL LAW.

DEFENDANT'S MOTION TO WITHDRAW HIS PLEA, AND THE CIRCUMSTANCES SURROUNDING HIS ACCEPTANCE OF THE PLEA OFFER, RAISED THE POSSIBILITY THAT DEFENDANT ACCEPTED THE PLEA OFFER TO MAKE SURE HIS BAIL WOULD NOT BE INCREASED; DEFENDANT WAS WORRIED ABOUT BEING ABLE TO FIND CARE FOR HIS THREE-YEAR-OLD SON; BAIL SHOULD NOT BE A CONSIDERATION IN PLEA NEGOTIATIONS; THE MOTION TO WITHDRAW THE PLEA SHOULD NOT HAVE BEEN DENIED WITHOUT A HEARING.

The Second Department, reversing County Court, determined it was an abuse of discretion to deny defendant's motion to withdraw his plea without holding a hearing. The matter was remitted for a hearing. The defendant was given a "last chance" to accept a plea offer just before the suppression hearing began. Defense counsel asked about bail at that time and then defendant met with defense counsel before deciding to take the plea offer. In his motion to withdraw the plea, defendant alleged that, based upon his discussion with defense counsel, he thought his bail would be substantially increased if he didn't take the plea offer and was concerned about taking care of his three-year-old son. He had brought his son to court because he couldn't find a babysitter: "Bail status 'has no legitimate connection to the mutuality of advantage underlying plea bargaining because it does not relate either to the more lenient sentence for which the defendant is negotiating or to the waiver of trial and the certainty of conviction the prosecution is seeking' ... . Accordingly, '[t]he prospect of an immediate change in bail status, therefore, is an inappropriate consideration in plea negotiations' ... . Here, the plea bargaining process and the defendant's affidavit raise a legitimate question as to the voluntariness of the defendant's plea and, therefore, the defendant's motion should not have been denied without a hearing ... . The County Court's response to defense counsel's questions regarding bail, which included a statement that this was the defendant's 'last chance' to accept the offer, raise a legitimate question as to whether the defendant understood that the court's purportedly forthcoming bail decision was contingent on acceptance of the offer. Notably, after the defendant accepted the plea, the court never brought up the issue of changing the defendant's bail status, effectively continuing his release on cash bail without any changes ...". ***People v. Swain*, 2021 N.Y. Slip Op. 01430, Second Dept 3-10-21**

FAMILY LAW, JUDGES.

THE JUDGE SHOULD NOT HAVE DELEGATED THE COURT'S AUTHORITY TO DETERMINE MOTHER'S PARENTAL ACCESS; THE JUDGE LEFT IT TO MOTHER AND HER CHILD TO DETERMINE MOTHER'S PARENTAL ACCESS .

The Second Department, reversing Family Court, determined the judge should not not have left it to mother and her child to determine when mother will have parental access. The child lives with stepmother who is married to father. Father, who is incarcerated, did not want mother to have parental access: " 'A court may not delegate its authority to determine parental access to either a parent or a child' ... . 'While a child's views are to be considered in determining custody or parental access, they are not determinative' ... . Moreover, '[a]n access provision which is conditioned on the desires of [a] child[ ] tends to defeat the right of parental access' ... . Here, the order appealed from directed that the mother was only entitled to parental access with the child as often as she and the child agree. That provision effectively conditions the mother's parental access on the child's wishes and leaves the determination as to whether there should be any parental access at all to the child. Moreover, the Family Court's directive as to parental access creates the potential for influence upon the child, since the stepmother, with whom he lives, is married to the father, who is opposed to the mother having any parental access with the child. Thus, the court's directive as to parental access must be set aside ...". ***Matter of Clezidor v. Lexune*, 2021 N.Y. Slip Op. 01409, Second Dept 3-10-21**

FORECLOSURE, CIVIL PROCEDURE, REAL PROPERTY ACTIONS AND PROCEEDINGS LAW (RPAPL), TRUSTS AND ESTATES.

IN THIS FORECLOSURE ACTION, THE JUDGE SHOULD HAVE FIRST DETERMINED WHETHER ANY DISTRIBUTEES OF THE DECEASED MORTGAGORS WERE NECESSARY PARTIES [RPAPL 1311 (1)] AND, IF SO, SUMMON THEM PURSUANT TO CPLR 1001 [b]; THE MOTION TO DISMISS FOR FAILURE TO JOIN NECESSARY PARTIES SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined there were questions of fact whether any distributees of the deceased mortgagors were necessary parties in this foreclosure action. The motion to dismiss for failure to join necessary parties should not have been granted. The court should have determined whether joinder of any parties was required and then summon them pursuant to CPLR 1001 [b]: "Pursuant to RPAPL 1311(1), 'necessary defendants' in a mortgage foreclosure action include, among others, '[e]very person having an estate or interest in possession, or otherwise, in the property as tenant in fee, for life, by the curtesy, or for years, and every person entitled to the reversion, remainder, or inheritance of

the real property, or of any interest therein or undivided share thereof, after the determination of a particular estate therein.' 'In certain circumstances, the estate of the mortgagor is not a necessary party to a mortgage foreclosure action' ... . In particular, 'where a mortgagor/property owner dies intestate and the mortgagee does not seek a deficiency judgment, generally a foreclosure action may be commenced directly against the distributees,' in whom title to the real property automatically vests ... . Here, the plaintiff did not seek a deficiency judgment. However, questions of fact existed, which should have been resolved by the Supreme Court, as to whether any distributees of the deceased mortgagors, other than the defendants herein, retained an interest in the property such that they were necessary parties to the foreclosure action. Further, to the extent that there were such necessary parties to the action, dismissal of the complaint was not the proper remedy; rather, the property remedy in such instance is to direct the joinder of those parties (see CPLR 1001[b] ...". ***NRZ Pass-Through Trust IV v. Tarantola*, 2021 N.Y. Slip Op. 01423, Second Dept 3-10-21**

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

THE BORROWER'S APPLICATION FOR A LOAN MODIFICATION DID NOT RELIEVE THE BANK OF THE RPAPL 1304 NOTICE REQUIREMENTS IN THIS FORECLOSURE ACTION; THE BANK DID NOT PROVIDE SUFFICIENT PROOF OF THE MAILING OF THE NOTICE.

The Second Department, reversing Supreme Court in this foreclosure action, determined (1) the bank was still required to provide the RPAPL 1304 notice despite the application for a loan modification, and (2) the proof of mailing the notice was insufficient. The court noted that proof of mailing submitted for the first time in reply cannot be considered as part of the bank's prima facie case: "When the instant action was commenced, RPAPL 1304(3) provided: 'The ninety day period specified in the notice[ ] contained in [RPAPL 1304(1)] shall not apply, or shall cease to apply, if the borrower has filed [an application for the adjustment of debts of the borrower or an order for relief from the payment of debts], or if the borrower no longer occupies the residence as the borrower's principal dwelling' ... . A loan modification was not an adjustment of debts within the meaning of the version of RPAPL 1304(3) then in effect and, in any event, a lender was relieved only from the requirement to provide notice within the 'ninety day period' (RPAPL 1304[3]), not from the requirement to provide the notice specified in RPAPL 1304(1) ... . US Bank failed to establish, prima facie, that it complied with RPAPL 1304. Although Ubinas stated in her affidavit that the RPAPL 1304 notices were mailed by certified and regular first-class mail, and attached copies of those notices, of an envelope addressed to the defendant bearing a certified mail 20-digit barcode, and of an envelope bearing a first-class mail postage stamp, US Bank failed to attach, as exhibits to the motion, any documents to prove that the mailing actually occurred. There is no copy of any United States Post Office document indicating that the notice was sent by registered or certified mail as required by the statute. Further, while Ubinas attested that she had personal knowledge of the record-making practices of Ocwen, and that the 90-day notice was sent in compliance with RPAPL 1304, she did not attest to knowledge of the mailing practices of the Law Offices of McCabe, Weisberg, and Conway, P.C., the entity that allegedly sent the notices to the defendant on behalf of Ocwen. On appeal, US Bank relies upon the signed certified mail return receipt submitted in reply. The moving party, however, cannot meet its prima facie burden by submitting evidence for the first time in reply ...". ***U.S. Bank N.A. v. Hammer*, 2021 N.Y. Slip Op. 01439, Second Dept 3-10-21**

FREEDOM OF INFORMATION LAW (FOIL).

THE PETITION SEEKING EMAILS AND RECIPIENT LISTS IN ELECTRONIC FORM FROM THE VILLAGE SHOULD NOT HAVE BEEN DISMISSED; THE VILLAGE DID NOT DEMONSTRATE THE REQUEST COULD NOT BE GRANTED WITH REASONABLE EFFORTS; PETITIONER WAS NOT ADVISED OF THE AVAILABILITY OF AN ADMINSTRATIVE APPEAL, THEREFORE THE APPEAL WAS NOT UNTIMELY.

The Second Department, reversing Supreme Court, determined the petition seeking emails and the related recipient lists in electronic form should not have been dismissed because the denial of the request did not indicate no one employed by the village had the expertise to provide the information in electronic form. In addition, the appeal of the denial of another similar request should not have been deemed untimely because the petitioner was never advised of the availability of an administrative appeal: "Guazzoni {the Village Trustee] stated that he lacked the technical sophistication to manually transfer the email addresses of each of his individual recipients onto an Excel spreadsheet in order to provide an electronically formatted response to the FOIL request. However, Guazzoni did not address whether any other employee of the Village could, with a reasonable degree of time and effort, create an Excel spreadsheet that would comply with the terms of the FOIL request. It cannot be said, therefore, that the amended petition fails to state a cause of action, as it presents a question of fact as to whether reasonable efforts by Village employees could be undertaken to provide an electronically formatted response ... . Public Officers Law § 89(3)(a) and (4)(a) requires that FOIL requests be granted or denied by an agency within five business days, and that any administrative appeal of a denial, as required for exhausting administrative remedies, be undertaken within 30 days of the denial. 21 NYCRR 1401.7(c) provides that a FOIL request is deemed denied if there is no response to the request within five business days. However, since there was no advisement to the petitioner of the availability of an administrative appeal as required by 21 NYCRR 1401.7(b), the Supreme Court erred in concluding that

the petitioner's administrative appeal, which was filed on July 13, 2017, was time barred ...". ***Matter of Madden v. Village of Tuxedo Park*, 2021 N.Y. Slip Op. 01415, Second Dept 3-10-21**

LABOR LAW-CONSTRUCTION LAW, EVIDENCE, PERSONAL INJURY.

THE COMPLAINT IN THIS LABOR LAW § 200 ACTION ALLEGED INJURY CAUSED BY A DANGEROUS CONDITION AT THE WORK SITE; THE DEFENDANTS IGNORED THAT THEORY IN THEIR MOTION FOR A SUMMARY JUDGMENT AND FOCUSED ON AN INAPPLICABLE THEORY (THE MEANS AND MANNER OF WORK); THE MOTION SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined the defendants motion for summary judgment in this Labor Law § 200 action should not have been granted. There are two distinct theories which will support a Labor Law § 200 cause of action. If the injury stems from the means and manner of the work, the defendant must have supervisory authority over the way the work is done. If the injury stems from a dangerous condition, the defendant must have control over the work site and must have created or had notice of the dangerous condition. Here plaintiff alleged a door at the work site was not adequate secured and he was injured when wind blew the door shut. The door therefore was alleged to constitute a dangerous condition. In their motion papers, however, the defendants addressed only the means-and-manner-of-work theory: "... [T]he plaintiff's complaint and verified bill of particulars sounded almost entirely in premises liability, and alleged, inter alia, that the door was not properly constructed, placed, or secured, and that it lacked adequate securing devices. To establish their prima facie entitlement to judgment as a matter of law, the defendants were obligated to address the proof applicable to the plaintiff's dangerous condition theory of liability, or alternatively, to demonstrate, prima facie, that this case fell only within the ambit of the means and methods category of Labor Law § 200 cases ... . On their motion, the defendants summarily concluded that the case exclusively implied a means and methods theory of liability, and contended that they only had general supervisory authority over the work site, which would be insufficient to impose liability for common-law negligence and under Labor Law § 200 in a means and methods case ... . The defendants, however, failed to address premises liability and whether they either created the alleged dangerous condition or had actual or constructive notice of it ...". ***Rodriguez v. HY 38 Owner, LLC*, 2021 N.Y. Slip Op. 01436, Second Dept 3-10-21**

PERSONAL INJURY.

PLAINTIFF WAS KNOCKED DOWN WHEN MALL SHOPPERS PANICKED AND FLED BECAUSE A FALLING DISPLAY SOUNDED LIKE GUNSHOTS; QUESTIONS OF FACT CONCERNING THE FORESEEABILITY OF THE PANIC AND THE OPPORTUNITY TO CONTROL THE PANIC PRECLUDED SUMMARY JUDGMENT RE THE OWNERS AND SECURITY COMPANY.

The Second Department determined the owners of a shopping mall and the mall security company did not eliminate questions of fact about whether they owned a duty to prevent harm to plaintiff, who was knocked down when shoppers panicked. Apparently security personnel were struggling with a shoplifter when a display of perfume bottles was knocked over causing a crash which apparently sounded like gunshots: " 'Landowners, as a general rule, have a duty to exercise reasonable care to prevent harm to patrons on their property' ... . An owner's duty to control the conduct of persons on its premises arises when it has the opportunity to control such conduct, and is reasonably aware of the need for such control ... . The record demonstrates that the mall defendants and AlliedBarton [the security company] had trained employees to handle mall evacuations and active shooters, including a live drill with other employees assuming the role of panicked shoppers. Thus, the mall defendants did not eliminate all triable issues of fact as to whether it was foreseeable that a disturbance in the mall, like the one caused by the incident with Darby [the alleged shoplifter], could cause a dangerous panic. Furthermore, contrary to the mall defendants' contention, they failed to establish that they had no notice or opportunity to control the panic or the crowd before it reached [the] store [where plaintiff was shopping] and allegedly ultimately caused the plaintiff's injuries." ***Grogan v. Simon Prop. Group, Inc.*, 2021 N.Y. Slip Op. 01396, Second Dept 3-10-21**

PERSONAL INJURY, MUNICIPAL LAW.

THE CITY DID NOT HAVE WRITTEN NOTICE OF THE SIDEWALK/CURB DEFECT IN THIS SLIP AND FALL CASE BECAUSE THE DEFECT DID NOT APPEAR ON THE BIG APPLE MAP WHICH HAD BEEN SERVED ON THE CITY, DESPITE THE APPARENT EXISTENCE OF ANOTHER BIG APPLE MAP WHICH SHOWED THE DEFECT BUT WAS NOT SHOWN TO HAVE BEEN SERVED ON THE CITY.

The Second Department, reversing Supreme Court, determined the Big Apple map demonstrated the city did not have prior written notice of the sidewalk/curb defect where plaintiff allegedly slipped and fell, despite the apparent existence of another Big Apple map which showed the defect but was not shown to have been served on the city (NYC): "Maps prepared by Big Apple Pothole and Sidewalk Protection Committee, Inc. (hereinafter Big Apple), and filed with the Department of Transportation serve as prior written notice of defective conditions depicted thereon ... . Where a plaintiff relies on a Big Apple map, the map served on the City closest in time prior to the subject accident is controlling ... . Here, the City met its prima facie burden by proffering evidence that the most recent Big Apple map served on it did not show the defect and that it had not received any other prior written notice of the allegedly defective condition ... . Although the plaintiff produced a

competing Big Apple map which purportedly showed the defect, that map was not accompanied by any evidence showing when it had been served on the City." ***Abdullah v. City of New York*, 2021 N.Y. Slip Op. 01377, Second Dept 3-10-21**

THIRD DEPARTMENT

FORECLOSURE, CIVIL PROCEDURE.

THE DEFAULT LETTER, WHICH INDICATED THE MORTGAGE DEBT WOULD BE ACCELERATED AT A SPECIFIC FUTURE DATE IF THE DEFAULT WERE NOT CURED, DID NOT ACCELERATE THE DEBT; THEREFORE THE STATUTE OF LIMITATIONS DID NOT START RUNNING AND THE FORECLOSURE ACTION WAS TIMELY.

The Third Department, reversing Supreme Court, determined the mortgage debt was not accelerated by a letter indicating the debt would be accelerated on a specific future date if the arears were not paid: "... [T]he issue is whether the May 2008 default letter was an acceleration event that triggered the statute of limitations. We hold that is was not. Thus, the second action, commenced in October 2014, was timely. To that end, the May 2008 letter provided that, if the default was not cured 'on or before June 10, 2008, the mortgage payments will be accelerated with the full amount remaining accelerated and becoming due and payable in full, and foreclosure proceedings will be initiated at that time.' Since this letter was "merely an expression of future intent that fell short of an actual acceleration,' which could 'be changed in the interim' ... , it did not accelerate the debt ... . '[T]he letter did not seek immediate payment of the entire, outstanding loan, but referred to acceleration only as a future event, indicating the debt was not accelerated at the time the letter was written' ... . Further, the May 2008 letter specifically discussed other non-acceleration options for defendant, including a repayment plan or loan modification, which plaintiff, as the holder of the note, should be able to do 'without running the risk of being deemed to have taken the drastic step of accelerating the loan' ... . Thus, the statute of limitations was not triggered until the debt was accelerated by the commencement of the first action in February 2009 ... , rendering the commencement of the second action, in October 2014, timely as it was within the six-year statute of limitations ...". ***GMAT Legal Tit. Trust 2014-1, Us Bank Natl. Assn. v. Wood*, 2021 N.Y. Slip Op. 01455, Third Dept 3-11-21**

JUDGES, ADMINISTRATIVE LAW, CONSTITUTIONAL LAW.

BUDGETARY CONCERNS RELATED TO THE COVID-19 PANDEMIC JUSTIFED THE DENIAL OF CERTIFICATION TO CONTINUE SERVING ON THE BENCH TO 46 SUPREME COURT JUSTICES WHO REACHED THE MANDATORY RETIREMENT AGE OF 70 IN 2020.

The Third Department, reversing Supreme Court, in a full-fledged opinion by Justice Lynch, over a partial dissent, determined the Administrative Board of the NYS Unified Court System did not act arbitrarily and capriciously when it denied certification to 46 of 49 Supreme Court Justices who reached the age of 70 in 2020. Retirement at age 70 is mandated by the NYS Constitution. But certification to continue serving on the bench can be granted by the Board. Here the Board based its decision to deny certification to 46 justices on budgetary concerns resulting from the COVID-19 pandemic: "The Board minutes explain that the Board 'declined to certify 46 of the 49 [Justices] applying for certification owing to current severe budgetary constraints occasioned by the coronavirus pandemic. Three [Justices], having specialized additional assignments[,] were certified.' The Board's certification of three applicants reflects both an individualized assessment and a recognition — 'at least impliedly' — that additional judicial services are necessary ... .'[W]hether the services of a particular Justice are 'necessary to expedite the business of the court' encompasses much more than a mechanical inquiry into the size of the courts' docket divided by the number of Justices' ... . Certainly, it should be recognized that the continued services of the petitioner Justices would advance the needs of the court in managing an expanding caseload. That positive contribution, however, is not the deciding factor, as the Board is charged with balancing the costs of certification with the overall needs of the court system ... . [T]he Board made the extremely difficult judgment call that certification would prove too costly under the economic dilemma presented. ... [C]ertification would significantly disrupt overall court operations given that the alternative savings mechanism would require more than 300 layoffs of nonjudicial personnel. Achieving the proper balance for the court system was for the Board to determine. ... In our view, the Board acted in accord with the governing standard and within the scope of its broad authority in basing its ultimate decision on the overall needs of the court system." ***Matter of Gesmer v. Administrative Bd. of the N.Y. State Unified Ct. Sys.*, 2021 N.Y. Slip Op. 01376, Third Dept 3-9-21**

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