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CasePrepPlus

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FIRST DEPARTMENT

ZONING, LAND USE.

THE NYC BOARD OF STANDARDS AND APPEALS (BSA) PROPERLY APPROVED THE CONSTRUCTION OF A BUILDING IN THE SPECIAL LINCOLN SQUARE DISTRICT ON A SPLIT-LOT, I.E., A LOT THAT STRADDLES TWO ZONING DISTRICTS, EACH WITH ITS OWN LIMITATIONS ON USE.

The First Department, in a full-fledged opinion by Justice Oing, reversing Supreme Court, determined the NYC Board of Standards and Appeals (BSA) properly approved the construction of a building in the Special Lincoln Square District. The project is on a zoning lot that straddles to zoning districts, each with its own limitations on uses, a so-called split-lot: "This Court has held that a split lot is treated as a single lot when assessing compliance with a zoning requirement that applies equally to both zoning districts of the split lot and that the split-lot provision is applied on a 'regulation-by-regulation basis' ... . ZR § 82-34, the relevant bulk distribution regulation, provides that '[w]ithin the Special District, at least 60 percent of the total floor area permitted on a zoning lot' must be below a height of 150 feet from curb level. There is no dispute that the project complied with ZR § 82-34. Practically speaking, this provision directly regulates the distribution of a building's floor area and indirectly regulates height by restricting much of a zoning lot's floor area to the part of a building below a cutoff. Every square foot that needs to be below the 150-foot ceiling to comply with ZR § 82-34 reduces the number of square feet that could be above it. ,,, As noted by BSA, 'the Special District's bulk-distribution regulations do operate to reduce the height of buildings in the Special District — only not to the extent [petitioner] wish[es]' ... . BSA held that this regulation applies to both ... zoning districts because it is located in a 'Special District.' ... ZR § 82-34's imposition of the bulk distribution regulation within the Special Lincoln Square District creates ... commonality ... so as to override the split-lot provision's prohibition against transfer of floor area between the two zoning districts, and permits the two zoning districts to be treated as one. Under these circumstances, we find that BSA's determination to apply ZR § 82-34 to the project's zoning lot was rational." ***City Club of N.Y. v. New York City Bd. of Stds. & Appeals*, 2021 NY Slip Op 04533, First Dept 7-22-21**

SECOND DEPARTMENT

CIVIL PROCEDURE, ATTORNEYS, FORECLOSURE.

A STAY OF THE FORECLOSURE PROCEEDINGS WAS TRIGGERED BY THE SUSPENSION OF DEFENDANT'S ATTORNEY; BUT THE APPEARANCE OF NEW COUNSEL FOR THE DEFENDANT TO OPPOSE PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT WAIVED THE PROTECTION OF THE STAY.

The Second Department, in a full-fledged opinion by Justice Dillon, determined the defendant in this foreclosure action waived any stay of proceedings under CPLR 321(c) triggered by her attorney's suspension: "CPLR 321(c) ... provides any adversary party with a mechanism for lifting a stay—by serving a notice upon the nonrepresented party to obtain a new attorney. Thus there are ... two ways in which a CPLR 321(c) stay may be lifted. One way is if the party that lost its counsel retains new counsel at its own initiative, or otherwise communicates an intention to proceed pro se ... . The second way is by means of the above-described notice procedure ... . [T]he plaintiff moved ... for summary judgment ... and for an order of reference ... at a time when no event allowing for the lifting of the CPLR 321(c) stay had yet occurred. No new attorney had yet appeared on behalf of the defendant, and there is no indication that the defendant had elected to proceed pro se ... . Moreover, the plaintiff moved for summary judgment without having served a CPLR 321(c) notice demanding the appointment of new counsel and without abiding by the statutorily mandated 30-day waiting period that follows the notice. Nevertheless, the defendant's new counsel formally appeared in the action six days after the plaintiff's summary judgment motion was filed, submitted papers in opposition to that motion, and cross-moved to dismiss the complaint insofar as asserted against the defendant, all within the original or adjusted briefing schedule. ... The appearance and activities of the defendant's new counsel operated, in effect, as a waiver of the protections otherwise afforded to the defendant by CPLR 321(c) ...". ***Wells Fargo Bank, N.A. v. Kurian*, 2021 NY Slip Op 04509, Second Dept 7-31-21**

CIVIL PROCEDURE, INSURANCE LAW.

SUPREME COURT HAD THE AUTHORITY UNDER CPLR 3001 TO ISSUE A DECLARATORY JUDGMENT ON THE PROPER RATE FOR POST-JUDGMENT INTEREST; ANOTHER COURT'S PRIOR DISCUSSION OF THE PROPER INTEREST RATE WAS MERELY ADVISORY (I.E. NOT ON THE MERITS) AND THEREFORE WAS NOT SUBJECT TO THE DOCTRINES OF RES JUDICATA, COLLATERAL ESTOPPEL OR LAW OF THE CASE.

The Second Department, in a full-fledged opinion by Justice Dillon, over an extensive dissent, determined (1) Supreme Court had the power to issue a declaratory judgment in this hybrid proceeding seeking a declaratory judgment on the rate of post-judgment interest; and (2) Supreme Court correctly found that dicta in a prior ruling about the proper post-judgment interest rate (i.e., that the rate should be 9% per year under the CPLR, not 2% per month under the Insurance Law) was merely "advisory" and therefore was not controlling under the doctrines of collateral estoppel, res judicata, or law of the case. Supreme Court's finding that the Insurance Law interest rate applied was affirmed. Using that rate the original 2001 judgment of $8,842.49 had apparently grown to $229,981.66 as of 2015: "CPLR 3001 uniquely vests the Supreme Court with authority to render declaratory judgments to the exclusion of other courts of the state. ... [T]o the extent [respondent] wished to obtain a declaratory judgment governing the rate of interest on its judgment, ... with appellate remedies correctly foreclosed, the Supreme Court was the only court where it could seek redress on that issue. * * * ... [T]he Appellate Term's expression in its decision and order dated August 18, 2017, regarding the applicable rate of interest was not determined on the merits, but was instead merely advisory. * * * ... [Appellant] was unable to establish that there was a determination on the merits in any prior proceeding about the proper rate of interest applicable to the judgment, as to preclude the Supreme Court from considering the issue de novo ...". ***Matter of B.Z. Chiropractic, P.C. v. Allstate Ins. Co.*, 2021 NY Slip Op 04484, Second Dept 7-21-21**

CRIMINAL LAW.

STATUTORY AMENDMENTS REPEALING MANDATORY SURCHARGES AND CRIME VICTIM ASSISTANCE FEES FOR YOUTHFUL OFFENDERS WERE REMEDIAL IN NATURE AND THEREFORE SHOULD BE APPLIED RETROACTIVELY.

The Second Department, modifying Supreme Court, determined the statutory amendments which went into effect while the appeal was pending were remedial and therefore should be applied retroactively. The amendments repealed the imposition of mandatory surcharges and crime victim assistance fees for youthful offenders: "Permitting juveniles whose direct appeals were pending when the amendments were enacted to benefit from them would further the legislative purpose of removing unreasonable financial burdens placed on juveniles and enhancing their chances for successful rehabilitation and reintegration. ... [P]rospective application would undermine the legislative goals by continuing the recognized inequity created by imposition of the surcharges and fees and leaving youth at risk for future 'devastating' consequences should they be unable to pay. Indeed, the Legislature conveyed 'a sense of urgency' in correcting these problems by providing that the amendments would take effect immediately ... . [R]etroactive application of the amendments would not result in unfairness or impair substantive rights ... . The subject surcharges and fees, which are 'nonpunitive,' were enacted strictly as a revenue raising measure ...". ***People v. Dyshawn B.*, 2021 NY Slip Op 04487, Second Dept 7-21-21**

CRIMINAL LAW, EVIDENCE.

IT WAS REVERSIBLE ERROR TO ADMIT AN INAUDIBLE RECORDING AND TO PROVIDE THE JURY WITH A PURPORTED TRANSCRIPT OF THE RECORDING.

The Second Department, reversing defendant's conviction, determined it was reversible error to admit in evidence an inaudible tape recording and to provide the jury with a purported transcript of the recording: " 'Whether a tape recording should be admitted into evidence is within the discretion of the trial court after weighing the probative value of the evidence against the potential for prejudice' ... . 'An audiotape recording should be excluded from evidence if it is so inaudible and indistinct that a jury must speculate as to its contents' ... . 'Even where tape recordings are inaudible in part, so long as the conversations can be generally understood by the jury, such infirmities go to the weight of the evidence and not to its admissibility' ... . '[I]n order to constitute competent proof, a tape should be at least sufficiently audible so that independent third parties can listen to it and produce a reasonable transcript' ... . Supreme Court improvidently exercised its discretion in admitting the subject recording into evidence ... . The first approximately 25 minutes of the conversation between the defendant and the complainant on the subject recording is almost completely inaudible, as all that can be heard are the background noises of a restaurant ... . Further, some of the remaining portions of the subject recording were 'so inaudible and indistinct' ... that the jury would have had to speculate as to their contents ... . The error was compounded when the jury was given what purported to be a transcript of portions of the largely inaudible recording ...". ***People v. Melendez*, 2021 NY Slip Op 04497, Second Dept 7-21-21**

CRIMINAL LAW, EVIDENCE.

IN A COMPREHENSIVE OPINION WITH DETAILED DISCUSSIONS OF THE FELLOW OFFICER RULE, THE STOP OF A VEHICLE BASED ON AN OBSERVED TRAFFIC VIOLATION, THE AUTOMOBILE EXCEPTION TO THE WARRANT REQUIREMENT, AND THE VALIDITY OF AN INVENTORY SEARCH, COUNTY COURT'S DENIAL OF THE MOTION TO SUPPRESS THE COCAINE FOUND IN THE VEHICLE IS REVERSED OVER TWO CONCURRENCES AND A TWO-JUSTICE DISSENT.

The Second Department, in an extensive, comprehensive opinion by Justice Miller, over two concurrences and a two-justice dissent, reversing defendant's conviction, determined the warrantless search of the vehicle in which cocaine was found was not demonstrated to be valid under the fellow officer rule, was not demonstrated to be valid pursuant to the automobile exception, and was not demonstrated to be based on a valid inventory search. In a nutshell, the claimed exceptions to the warrant requirement were rejected because they were not supported by the evidence at the suppression hearing. The detailed factual and legal analyses cannot be fairly summarized here. The opinion should be consulted on the issues addressed, including the propriety of the stop of the vehicle, because of the extraordinary depth of the discussions. County Court's denial of suppression was based on the following findings. All except the reason for the stop (an observed traffic violation) were rejected on appeal: "The [county] court first concluded that the State Troopers had probable cause to stop the vehicle by virtue of 'the fellow-officer rule.' ... [T]he [county] court cited to testimony that law enforcement officials had intercepted approximately 89,000 communications, and that some of these communications indicated that there would be a quantity of narcotics in the vehicle on the night in question. ... [T]he [county] court credited the testimony of one of the State Troopers who testified that he observed the subject vehicle exceed the maximum speed limit and fail to maintain its lane. ... [T]he [county] court concluded that the intercepted communications and the application of the fellow officer rule provided a lawful basis for the search of the vehicle at the outset of the traffic stop. The [county court] concluded that the State Troopers were authorized to search the subject vehicle under the 'automobile exception' to the Fourth Amendment. In this regard, the court noted that one of the State Troopers had reportedly detected the odor of marihuana when he initially approached the vehicle after it was pulled over. Finally, the County Court determined, as a third alternative ground, that the cocaine was properly recovered pursuant to a valid inventory search." ***People v. Mortel*, 2021 NY Slip Op 04498, Second Dept 7-21-21**

CRIMINAL LAW, SEX OFFENDER REGISTRATION ACT (SORA), APPEALS.

DEFENDANT WAS ENTITLED TO A DOWNWARD DEPARTURE FROM LEVEL TWO TO LEVEL ONE IN THIS STATUTORY RAPE CASE; ALTHOUGH NOT PRESERVED BY A REQUEST FOR A DOWNWARD DEPARTURE, THE APPEAL WAS CONSIDERED IN THE INTEREST OF JUSTICE.

The Second Department, reversing County Court, determined defendant was entitled to a downward departure in this statutory-rape SORA risk level proceeding. The issue was not preserved because defendant did not request a downward departure but the appeal was considered in the interest of justice: " 'In cases of statutory rape, the Board has long recognized that strict application of the Guidelines may in some instances result in overassessment of the offender's risk to public safety' ... . The Guidelines provide that a downward departure may be appropriate where '(i) the victim's lack of consent is due only to inability to consent by virtue of age and (ii) scoring 25 points [for risk factor 2, sexual contact with the victim,] results in an over-assessment of the offender's risk to public safety' ... . Since the defendant did not request a downward departure from his presumptive risk level in the County Court, his contentions on appeal regarding a downward departure are unpreserved for appellate review ... . However, under the circumstances of this case, we address those contentions in the interest of justice ... . Considering all of the circumstances presented here, including that the subject offense is the only sex-related crime in the defendant's history, and that the defendant accepted responsibility for his crime, the assessment of 25 points under risk factor 2 resulted in an overassessment of the defendant's risk to public safety ... . Accordingly, a downward departure is warranted, and the defendant should be designated a level one sex offender." ***People v. Maldonado-Escobar*, 2021 NY Slip Op 04502, Second Dept 7-2-21**

FORECLOSURE, CIVIL PROCEDURE, EVIDENCE.

THE BUSINESS RECORDS REFERRED TO IN THE SUPPORTING AFFIDAVIT WERE NOT ATTACHED; THE BANK'S MOTION FOR A DEFAULT JUDGMENT IN THIS FORECLOSURE ACTION SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined the bank's motion for a default judgment in this foreclosure action should not have been granted. The business records referred in the affidavit of the banks servicing agent were not attached: " 'Where, as here, a foreclosure complaint is not verified, CPLR 3215(f) states, among other things, that upon any application for a judgment by default, proof of the facts constituting the claim, the default, and the amount due are to be set forth in an affidavit made by the party' ... . Here, in support of its motion, the plaintiff submitted an affidavit of merit executed by a 'Document Execution Specialist' who was employed by the plaintiff's servicing agent ... . The affiant asserted that she had personal knowledge of the merits of the plaintiff's cause of action based upon her review of various business records. However, as the defendants correctly contend, since the plaintiff failed to attach the business records upon which the affiant relied in her affidavit, her factual assertions based upon those records constituted inadmissible hearsay, and her

affidavit was insufficient to demonstrate 'proof of the facts constituting the claim' ...". ***Deutsche Bank Natl. Trust Co. v. Hossain*, 2021 NY Slip Op 04480, Second Dept 7-21-21**

PERSONAL INJURY, EVIDENCE.

THE CLIMATOLOGICAL DATA SUBMITTED BY DEFENDANT IN THIS ICE AND SNOW SLIP AND FALL CASE WAS NOT AUTHENTICATED; BECAUSE DEFENDANT DID NOT DEMONSTRATE THERE WAS A STORM IN PROGRESS AT THE TIME OF THE FALL, DEFENDANT'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined defendant's motion for summary judgment in this ice and snow slip and fall case should not have been granted. The climatological data presented to show there was a storm in progress at the time of the fall was not authenticated, related to a different county, and conflicted with plaintiff's testimony at the § 50-h hearing: "... [T]he defendant failed to meet its initial burden as the movant. Contrary to the defendant's contention, the three pages of climatological data that it submitted in support of its motion should have been authenticated because these pages themselves did not indicate that the data contained therein was 'taken under the direction of the United States weather bureau' (CPLR 4528). In any event, the climatological data was gathered from a neighboring county, and it was inconsistent with the plaintiff's testimony at a General Municipal Law § 50-h hearing that light snow fell about [*2]six hours prior to the accident. Under the circumstances, the defendant failed to establish, prima facie, that a storm was in progress at the time of the accident or that it did not have a reasonable opportunity after the cessation of the storm to remedy the alleged slippery condition ...". ***Beaton v. City of New York*, 2021 NY Slip Op 04477, Second Dept 7-21-21**

PERSONAL INJURY, LIMITED LIABILITY COMPANY LAW, CORPORATION LAW.

THE SOLE MEMBER OF THE LLC WHICH OWNED THE PROPERTY COULD NOT BE HELD LIABLE FOR THE DANGEROUS CONDITION SOLELY BY VIRTUE OF HIS MEMBER STATUS; HOWEVER THERE WAS A QUESTION OF FACT WHETHER THE LLC COULD BE LIABLE.

The Second Department, reversing (modifying) Supreme Court in this premises liability case, determined the sole member of the LLC (Romanoff) which owned the premises was not liable, but there was a question of fact whether the LLC had constructive knowledge of the defective railing which collapsed when plaintiff leaned on it: "... [T]he plaintiff failed to raise a triable issue of fact. Romanoff, as a member of the LLC, cannot be held liable for the company's obligations by virtue of that status alone ... , and the plaintiff failed to adduce evidence as to the existence of circumstances that would entitle him to pierce the corporate veil to impose personal liability on Romanoff ... . [T]he Romanoff defendants failed to establish, prima facie, that the LLC did not have constructive notice of the alleged hazardous condition ... . In support of their motion, the Romanoff defendants submitted ... evidence that the porch railing that collapsed had not been physically inspected in the eight months following the purchase of the premises. They also failed to demonstrate that the alleged dangerous condition of the porch railing was latent and not discoverable upon a reasonable inspection. ... [T]he Romanoff defendants relied upon the plaintiff's deposition testimony that, as he leaned onto the railing to shake dust out of a blanket, he felt the railing move as soon as he made contact with it, and it did not appear to be attached to anything." ***Hayden v. 334 Dune Rd., LLC*, 2021 NY Slip Op 04481, Second Dept 7-21-21**

PERSONAL INJURY, VEHICLE AND TRAFFIC LAW.

THE JURY SHOULD HAVE BEEN INSTRUCTED ON THE VEHICLE AND TRAFFIC LAW PROVISION WHICH REQUIRES SIGNALING FOR 100 FEET BEFORE MAKING A TURN, EVEN THOUGH THE TRUCK WHICH MADE THE TURN WAS STOPPED AT A TRAFFIC LIGHT; DEFENSE VERDICT IN THIS TRUCK-BICYCLE ACCIDENT CASE REVERSED.

The Second Department, in a full-fledged opinion by Justice Barros, overruling a City Court decision, reversing the jury verdict in this truck-bicycle traffic accident case, determined the jury should have been instructed on the Vehicle and Traffic Law provision requiring that a turn signal be activated for 100 feet before turning. The truck was at a stop light and plaintiff testified the truck's turn signal was not on when she pulled up to the stop light next to the truck. When she started riding straight through the intersection, the truck allegedly made a right turn and ran over her. The driver (Murphy) testified he put his signal on and then made the turn. The trial court instructed the jury on the Vehicle and Traffic Law provision which applies to parked cars and which does not have the "100-foot" signaling requirement. The Second Department found that the truck was not "parked" within the meaning of that provision: "Vehicle and Traffic Law § 1163(b) provides that '[a] signal of intention to turn right or left when required shall be given continuously during not less than the last one hundred feet traveled by the vehicle before turning.' Under Vehicle and Traffic § 1163(a), Murphy was required to signal his intention to turn right at the subject intersection. Thus, since a signal of intention to turn was required, the clear and unambiguous words used in Vehicle and Traffic Law § 1163(b) also required Murphy to give such signal 'continuously during not less than the last one hundred feet' that he traveled before making the turn. The provision makes no exception for vehicles that are stopped at a red traffic light ... . Vehicle and Traffic Law § 1163(d), which applies ... to vehicles moving from a parked

position, and which does not require a vehicle to signal its turn 100 feet before making it, is inapplicable. Murphy's truck was not parked within the meaning of 'park or parking' under Vehicle and Traffic Law § 129. Rather, it was stopped at a red light ... . To the extent that *People v Brandt* (60 Misc 3d 956, 961 [Poughkeepsie City Ct]) holds otherwise, we overrule it. The precise and specific duty established in Vehicle and Traffic Law § 1163(b) bore directly on the facts to which the parties testified, and, therefore, the Supreme Court erred in refusing to give that charge ... . The statute establishes a standard of care, the unexcused violation of which is negligence per se ...". ***Moore v. City of New York*, 2021 NY Slip Op 04483, Second Dept 7-21-21**

THIRD DEPARTMENT

UNEMPLOYMENT INSURANCE.

CLAIMANT, AN AGENT LICENSED TO SELL LIFE INSURANCE, ANNUITIES AND OTHER INVESTMENT PRODUCTS, WAS NOT AN EMPLOYEE OF THE BROKER-DEALER AND THEREFORE WAS NOT ENTITLED TO UNEMPLOYMENT INSURANCE BENEFITS.

The Third Department determined claimant broker-dealer was not an employee of AXA and therefore was not entitled to Unemployment Insurance benefits: "AXA Advisors LLC is a broker-dealer registered to sell life insurance policies and annuities, stocks, mutual funds and other investment products. Claimant began working for AXA under a three-year 'training allowance' agreement in 1993. After that agreement terminated in 1996, claimant entered into a new agreement as a licensed agent, and he continued working in that capacity until AXA terminated the agreement in 2015. * * * The record reflects that, under the 1996 agreement, claimant did not have a set work schedule or work location, he was not assigned a sales territory and did not have to turn in any reports. Claimant was not supervised, could work from home and could use his own computer. Claimant had to pay for the cost of his liability insurance and was not paid for any expenses. AXA required reimbursement from claimant for the cost of business cards and stationery and claimant had to pay for the use of AXA's clerical staff and office space. Claimant was responsible for developing his own client base and, although AXA would sometimes provide a sales lead, claimant testified that he did not have to pursue it. Claimant determined what products best suited his clients' needs and he could sell the products of AXA's competitors. AXA did provide claimant with promotional materials, and claimant was paid by commission, with the commission rate set by AXA or whichever company offered the product that he sold to the client." ***Matter of Lee (AXA Advisors LLC--Commissioner of Labor)*, 2021 NY Slip Op 04518, Third Dept 7-22-21**

WORKERS' COMPENSATION.

THE UNAVAILABILIITY OF PARKING FOR WORK REQUIRED THAT CLAIMANT CROSS A DANGEROUS ROAD TO GET TO HIS WORKPLACE; THE INJURIES SUFFERED WHEN CLAIMANT WAS STRUCK BY A VEHICLE WERE THEREFORE COMPENSABLE.

The Third Department determined the unavailability of parking for work created a special hazard. Therefore claimant's being struck by a vehicle while walking to his place of employment resulted in a compensable injury: "... [C]laimant, a food service worker at Montefiore-Nyack Hospital, sustained serious injuries when he was struck by a motor vehicle while walking towards the hospital entrance prior to the start of his work shift. * * * ... [T]he Board could reasonably determine that a special hazard existed due to the unavailability of parking along the eastern side of Route 9W, requiring claimant to, at a certain spot without a crosswalk, cross Route 9W — a dangerous public roadway — to access the loading dock entrance, which, significantly, was not used by the public and regularly used by claimant ... . Further, based upon the regular use of the loading dock entrance by claimant and other food service workers, combined with the close proximity of the accident to the loading dock area, there was a close association of the access route with the premises, as far as going and coming are concerned, permitting the conclusion that the accident happened as an incident and risk of employment." ***Matter of Cadme v. FOJP Serv. Corp.*, 2021 NY Slip Op 04525, Third Dept 7-22-21**

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