CasePrepPlus

September 16, 2022

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

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FIRST DEPARTMENT

CRIMINAL LAW.

THE JURY SHOULD HAVE BEEN INSTRUCTED DEFENDANT DID NOT HAVE A DUTY TO RETREAT FROM A SHARED BATHROOM USED ONLY BY THE DEFENDANT AND THE COMPLAINANT; ASSAULT CONVICTION REVERSED.

The First Department, reversing defendant's assault second conviction, over an extensive two-justice dissent, determined it was reversible error for the judge to refuse to instruct the jury that the defendant did not have a duty to retreat (re: the justification defense). There is no duty to retreat from one's own dwelling. Here the incident took place in a portion of the housing complex used only by the defendant and the complainant: "Defendant and the complainant lived in a housing complex where they each had a separate room that gave them access to a shared bathroom to which no one else had access. The court should have granted the defense's request for a jury instruction that defendant, who asserted a defense of justification, had no duty to retreat from the bathroom he shared with the complainant as a matter of law ... . [T]his bathroom, unlike a hallway bathroom, was accessible only from the respective rooms of defendant and the complainant. As a matter of law, the shared bathroom was a part of defendant's dwelling, notwithstanding that he shared it with the complainant, as opposed to a common area in the building. Therefore, under Penal Law § 35.15 (2) (a) (i), defendant had no duty to retreat before using deadly physical force to defend himself ... . [T]he court's inaccurate instruction that whether the incident took place in defendant's dwelling depended on the extent to which defendant exercised exclusive possession and control over the area in question could have led the jury to erroneously conclude that the bathroom was not part of defendant's dwelling because he shared it with the complainant and that therefore defendant had a duty to retreat." ***People v. Delisme*, 2022 N.Y. Slip Op. 05130, First Dept 9-6-22**

EMPLOYMENT LAW, CONTRACT LAW.

THE EMPLOYMENT CONTRACT MUST BE READ AS A WHOLE; THE PROVISION RELIED ON BY THE EMPLOYER TO AVOID PAYING DEFENDANT'S EARNED SALARY UPON TERMINATION APPLIED ONLY TO THOSE CURRENTLY EMPLOYED (ALLOWING PAYMENT TO BE DEFERRED WHEN AVAILABLE FUNDS ARE INSUFFICIENT); A DIFFERENT PROVISION REQUIRING PAYMENT IN CASH APPLIED TO TERMINATED EMPLOYEES.

The First Department, reversing Supreme Court, determined the employment contract between Drone and defendant obligated Drone to pay defendant the salary which remained unpaid upon defendant's termination. Drone unsuccessfully argued the provision of the contract which allowed cash payment of salaries to be deferred when there were insufficient funds applied only to persons who were employed, not to persons whose employment was terminated: "Drone claimed in opposition that it did not have to pay defendant his salary in cash, but had the option to pay defendant his wages in (worthless and unmarketable) Drone stock, relying on paragraph 3 in the employment agreement, governing compensation during the 'employment period,' which states, 'the Company may elect to . . . defer any cash payment until it has sufficient funds to do so.' Drone, however, ignores paragraph 5(b) of the employment agreement, applicable post-termination, which states that '[i]n the event that [defendant's] employment with the Company is terminated . . . the Company shall pay or grant [defendant] any earned but unpaid salary, bonus, and Options through [defendant's] final date of employment with the Company, and the Company shall have no further obligations to [defendant]' … . Read as a whole, the employment agreement makes clear that while payment of defendant's salary could be deferred for lack of funds while he remained in Drone's employ, 'all earned but unpaid salary' was payable to defendant, unconditionally, upon termination of employment ... . The finality of its language reflects an intent that the parties promptly settle up affairs within a reasonable time ...". ***Drone USA, Inc. v. Antonelos*, 2022 N.Y. Slip Op. 05129, First Dept 9-6-22**

INSURANCE LAW, CONTRACT LAW.

INSURANCE COVERAGE DEPENDED UPON WHETHER THE INJURED RESPONDENT RESIDED WITH HIS SON IN MAINE; RESPONDENT ALLEGED HE SPLIT HIS TIME BETWEEN RESIDING IN NEW YORK AND RESIDING WITH HIS SON; A PERSON MAY HAVE MORE THAN ONE RESIDENCE; A FRAMED-ISSUE HEARING WAS REQUIRED.

The First Department, reversing Supreme Court, determined a framed-issue hearing was required to determine whether respondent was entitled to coverage under the uninsured/underinsured motorist (SUM) provision of respondent's son's policy. Whether respondent is covered depends upon whether he resides with his son. Respondent alleged he splits his time between residing in New York and residing with his son in Maine: "The policy contained an uninsured/underinsured motorist endorsement (SUM coverage) which defined an insured as, among other things, '1. You or any family member.' The policy defined 'family member' as 'a person related to you by blood, marriage or adoption who is a resident of your household.' * * * The policy conditions the status of an insured relative on whether the relative resides with the named

insured. Residency is established by a degree of permanency and an intention to remain, and a person may have more than one residence ... . Here, both parties have proposed that it would be reasonable to hold a framed issue hearing, and Elliott [respondent] has raised sufficient facts to warrant one, including that he splits his time between Maine and New York, spends a portion of each year at 22 Huntress Street [Maine] where he keeps personal items and has a bedroom, furnishes the house and landscapes the yard jointly with Zachary [respondent's son], and holds the only mortgage on the property." ***Matter of Travelers Home & Mar. Ins. Co. v. Barowitz*, 2022 N.Y. Slip Op. 05131, First Dept 9-6-22**

THIRD DEPARTMENT

JUDGES, ATTORNEYS, FAMILY LAW.

THE FAMILY COURT JUDGE HAD REPRESENTED MOTHER IN A RELATED CUSTODY MATTER YEARS BEFORE FATHER BROUGHT A PETITION TO MODIFY CUSTODY; THE JUDGE WAS STATUTORILY DISQUALIFIED FROM THE CURRENT PROCEEDING.

The Third Department determined the Family Court judge in this custody proceeding should have recused himself because, as an attorney, he had represented the mother years before where custody was adjudicated. The judge did not remember representing mother, but disqualification was required by the applicable statute: " 'A judge shall not sit as such in, or take any part in the decision of, an action, claim, matter, motion or proceeding . . . in which he [or she] has been attorney or counsel' (Judiciary Law § 14; see Rules Governing Judicial Conduct [22 NYCRR] § 100.3 [E] [1] [b] [i]). 'This prohibition is absolute and establishes a bright-line disqualification rule' ... . Although neither the Judiciary Law nor the Rules Governing Judicial Conduct define 'an action, claim, matter, motion or proceeding' (Judiciary Law § 14), Black's Law Dictionary defines a 'claim' as '[t]he assertion of an existing right . . . to an equitable remedy, even if contingent or provisional' ... . [O]ur jurisprudence recognizes that, except in limited circumstances, a parent has an existing and ongoing right to custody of and/or visitation with his or her children ... , and it is undisputed that the November 2012 default order and the order on appeal both deal with the custodial arrangement between the same two parents regarding the same three children. Under these circumstances, where the two proceedings involve the same claim of custody, guardianship, or visitation for the same children, we find that Family Court was statutorily disqualified from the instant proceedings ...". ***Matter of John II. v. Kristen JJ.*, 2022 N.Y. Slip Op. 05132, Third Dept 9-8-22**

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