CasePrepPlus

April 7, 2023

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, CIVIL RIGHTS LAW.

WHERE A STATUTE, HERE CIVIL RIGHTS LAW § 40-B, PRESCRIBES A MONETARY REMEDY, AN INJUNCTION IS NOT AVAILABLE.

The First Department, reversing Supreme Court, determined plaintiffs' request for a preliminary injunction in this Civil Rights Law § 40-b action should not have been granted because the remedy is statutory. Civil Rights Law § 40-b prohibits an entertainment venue from denying entry to a person who has a ticket: "[I]t was improper for the motion court to issue a preliminary injunction. As Civil Rights Law § 41 prescribes a monetary remedy for violations of Civil Rights Law § 40-b, plaintiffs are limited to that remedy (*see Woollcott v Shubert* , 169 App Div 194, 197 [1st Dept 1915] ['The general rule is that where a statute creates a right and prescribes a remedy for its violation that remedy is exclusive and neither an action for damages nor for an injunction can be maintained'] ...). Even if injunctive relief were available, the existence of a statutory damages remedy would undermine plaintiffs' claims of irreparable harm ...". ***Hutcher v. Madison Sq. Garden Entertainment Corp.*, 2023 N.Y. Slip Op. 01646, First Dept 3-28-23**

CIVIL PROCEDURE, CONTRACT LAW.

FOR PURPOSES OF DETERMINING THE CORRECT JURISDICTION FOR STATUTE-OF-LIMITATIONS PURPOSES, THE ACCRUAL OF A BREACH OF CONTRACT ACTION ALLEGING PURELY ECONOMIC INJURY IS USUALLY IN THE "PLACE OF INJURY," WHICH IS USUALLY WHERE THE PLAINTIFF RESIDES.

The First Department, in a decision to complex to fairly summarize here, noted that breach of contract actions alleging purely economic injury the claims accrue in the "place of injury," usually plaintiff's residence: "... Supreme Court should not have found that the claims accrued in New York and were timely under New York's six-year statute of limitations. In contract cases involving a purely economic injury, accrual is determined by the 'place of injury,' which usually is determined by applying the 'plaintiff-residence' rule; this rule asks where the plaintiff resides and where it feels the economic impact of the loss ...". ***MLRN LLC v. U.S. Bank, N.A.*, 2023 N.Y. Slip Op. 01748, First Dept 3-30-23**

CIVIL PROCEDURE, FRAUD.

HERE THERE WAS A QUESTION OF FACT ABOUT WHEN THE PLAINTIFFS BECAME AWARE OF THE ALLEGED FRAUD; THEREFORE THE COMPLAINT SHOULD NOT HAVE BEEN DISMISSED AS TIME-BARRED.

The First Department, reversing Supreme Court, determined there was a question of fact concerning when the plaintiffs became aware of the alleged fraud. Therefore the complaint should not have been dismissed as time-barred: "Fraud claims must be commenced within 'the greater of six years from the date the cause of action accrued or two years from the time the plaintiff . . . discovered the fraud, or could with reasonable diligence have discovered it' (CPLR 213[8]). * * * Assuming, arguendo, that defendants met their prima facie burden on the motion, an issue of fact exists as to whether plaintiffs were on inquiry notice of the fraud more than two years before they commenced the action ...". ***Murray v. Stone*, 2023 N.Y. Slip Op. 01749, First Dept 3-30-23**

CIVIL PROCEDURE, JUDGES, APPEALS.

WHEN A JUDGE MAKES A WRONG RULING WHICH CANNOT BE APPEALED BECAUSE IT WAS NOT PROMPTED BY A MOTION, A MOTION TO SET ASIDE THE ORDER PURSUANT TO CPLR 5015 IS AN APPROPRIATE REMEDY; THE DENIAL OF THE MOTION TO SET ASIDE CAN BE APPEALED, AS WAS SUCCESSFULLY DONE HERE.

The First Department, reversing Supreme Court, determined Supreme Court should not have dismissed the complaint pursuant to CPLR 3216 because no motion to dismiss had been made and plaintiff was not given any warning or an opportunity to respond. The court noted that when a judge makes a wrong ruling, here the dismissal of the complaint, the proper procedure is a motion to set aside, the order pursuant to CPLR 5015. The motion to set aside should have been granted: "A trial court has inherent power, as well as statutory power under CPLR 5015, to set aside an order on appropriate grounds ... . 'Vacating the dismissal order is consistent with the public policy of this State to dispose of cases on their merits and upholds the principle that a trial court's power to dismiss an action sua sponte should be used sparingly and only in extraordinary circumstances' ... . There were no extraordinary circumstances warranting the complaint's dismissal." ***Wohnberger v. Lucani*, 2023 N.Y. Slip Op. 01758, First Dept 3-30-23**

CRIMINAL LAW.

THE RAPE FIRST AND CRIMINAL SEXUAL ACT FIRST CONVICTIONS WERE VACATED AS INCLUSORY CONCURRENT COUNTS OF TWO PREDATORY SEXUAL ASSAULT COUNTS.

The First Department vacated the convictions of rape first and criminal sexual act first as inclusory concurrent counts of two of the predatory sexual assault counts. ***People v. Heyward*, 2023 N.Y. Slip Op. 01651, First Dept 3-28-23**

PRIVILEGE. CONTRACT LAW. TRADEMARKS, ATTORNEYS.

DEFENDANT'S OFFER TO PROVIDE FALSE TESTIMONY IN A SEPARATE ACTION IS NOT PROTECTED BY THE LITIGATION PRIVILEGE IN THIS RELATED ACTION ALLEGING DEFENDANT BREACHED A CONFIDENTIALITY AND NONDISPARAGEMENT AGREEMENT.

The First Department, reversing Supreme Court, in a full-fledged opinion by Justice Rodriguez, determined defendant's motion to dismiss the complaint for failure to state a cause of action should not have been granted. The complaint alleged breach of a confidentiality and nondisparagement agreement (TRB Agreement) which stemmed from a trademark infringement and unfair competition action brought by nonparty Reebok: "[D]efendant and his attorneys allegedly caused anonymous phone calls to be made to Reebok's counsel stating that defendant possessed information that TRB [plaintiff] 'intended to copy Reebok from the get-go.' Defendant's attorneys also notified Reebok's counsel that defendant would comply with a subpoena issued to him. Reebok listed defendant as a witness before trial and detailed defendant's expected testimony, including allegedly false testimony that TRB intended to create a 'knockoff' brand infringing on Reebok's marks. The description of expected testimony also made clear that defendant had breached the TRB Agreement by disclosing information concerning TRB's operations and information concerning the Reebok litigation … The main issue presented on this appeal is whether plaintiffs' complaint alleges conduct upon which invocation of the absolute litigation privilege would constitute abuse of the privilege such that its protections should not apply or be withdrawn. Examination of the applicable law, particularly with respect to plaintiffs' proposed exception to the privilege, demonstrates that the course of conduct alleged implicates a limited exception analogous to that applied in *Posner v Lewis* (18 NY3d 566 [2012]) to another absolute privilege. Accordingly, where a party engages in an extortion attempt by threatening to provide false testimony in a separate action if their demands are not accepted, and, following rejection, affirmatively reaches out to the extortion target's adversaries in the separate litigation, indeed offering to provide false testimony in that action, the absolute litigation privilege will not bar the action." ***TRB Acquisitions LLC v. Yedid*, 2023 N.Y. Slip Op. 01654, First Dept 3-28-23**

SECOND DEPARTMENT

CIVIL PROCEDURE.

THE COVID EXECUTIVE ORDERS TOLLING THE STATUTES OF LIMITATIONS APPLY TO THE TIME FOR ANSWERING A MOTION FOR SUMMARY JUDGMENT IN LIEU OF COMPLAINT.

The Second Department, reversing Supreme Court, determined the COVID executive orders tolling the statute of limitations applied to the time to oppose a motion for summary judgment in lieu of complaint: "In *Brash v Richards*, this Court determined that Executive Order 202.8 and the subsequent executive orders acted to toll those specific time limits contained in the CPLR and listed in the executive orders ... . Executive Order 202.8 and the subsequent executive orders 'appear to apply to the service of the notice of appearance' ... , but 'do[ ] not expressly apply to toll the defendant's time to serve an answer' ... . However, given the hybrid nature of the 'motion-action' under CPLR 3213, in which the filing of answering papers is akin to the service of a notice of appearance or an answer ... , combined with the desire to preserve the status quo for litigants during the COVID-19 pandemic ... , under Executive Order 202.8 and the subsequent executive orders, neither defendant was required to appear and file answering papers ...". ***Blue Lagoon, LLC v. Reisman*, 2023 N.Y. Slip Op. 01657, Second Dept 3-29-23**

CIVIL PROCEDURE.

PLAINTIFF'S MOTION TO AMEND ITS REPLY TO A COUNTERCLAIM TO ADD THE STATUTE OF LIMITATIONS DEFENSE SHOULD HAVE BEEN GRANTED; THE PROPOSED AMENDMENT WAS NOT PALPABLY IMPROPER AND DEFENDANT SHOWED THERE WAS NOT PREJUDICE BY NOT OPPOSING THE MOTION TO AMEND.

The Second Department, reversing Supreme Court, determined plaintiff's motion to amend a reply to a counterclaim to add the statute-of-limitations affirmative defense should have been granted, noting that mere lateness is not an adequate ground for denial of a motion to amend. The court also noted that defendant's failure to oppose the motion demonstrated a lack of prejudice: " 'In the absence of prejudice or surprise resulting directly from the delay in seeking leave, applications to amend or supplement a pleading 'are to be freely granted unless the proposed amendment is palpably insufficient or patently devoid of merit' (... see CPLR 3025[b]). 'The burden of demonstrating prejudice or surprise, or that a proposed amendment is palpably insufficient or patently devoid of merit, falls upon the party opposing the motion' ... . 'The determination to permit or deny amendment is committed to the sound discretion of the trial court' ... . Here, the record reflects that the proposed amendment was neither palpably insufficient nor patently devoid of merit. Moreover, while the plaintiff's motion pursuant to CPLR 3025(b) was made more than eight months after its original verified reply, '[m]ere lateness is not a barrier to the amendment. It must be lateness coupled with significant prejudice to the other side, the very elements of the laches doctrine' ... . In this case, having failed to oppose the motion, [defendant] failed to satisfy its burden of demonstrating any prejudice or surprise." ***Toiny, LLC v. Rahim*, 2023 N.Y. Slip Op. 01702, Second Dept 3-29-23**

CIVIL PROCEDURE, ENVIRONMENTAL LAW, MUNICIPAL LAW.

THE COURT'S INQUIRY ON MOTIONS TO DISMISS AN ARTICLE 78 PETITION, A COMPLAINT, AND/OR A REQUEST FOR A DECLARATORY JUDGMENT SHOULD RARELY GO BEYOND WHETHER, ASSUMING THE TRUTH OF THE ALLEGATIONS, A CAUSE OF ACTION HAS BEEN STATED.

The Second Department, reversing Supreme Court, noted that the inquiry on motions to dismiss should rarely go beyond determining whether a cause of action has been stated. The action here alleged violations of the Sewage Pollution Right to Know Act (ECL § 17-0825-a): " 'On a motion pursuant to CPLR 7804(f) to dismiss a petition, only the petition is to be considered, all of its allegations are to be deemed true, and the petitioner is to be accorded the benefit of every possible inference' ... . On a motion pursuant to CPLR 3211(a)(7), '[c]ourts may consider extrinsic evidence outside of the pleading's four corners to help determine whether the pleading party has a cause of action, as distinguished from whether the pleading simply states a cause of action' ... . However, affidavits submitted by a movant 'will almost never warrant dismissal under CPLR 3211 unless they establish conclusively that [petitioner] has no [claim or] cause of action' ... . The petition/complaint also states a viable cause of action for declaratory relief. A motion to dismiss the complaint in an action for a declaratory judgment ' "presents for consideration only the issue of whether a cause of action for declaratory relief is set forth, not the question of whether the plaintiff is entitled to a favorable declaration" ' …". ***Matter of Riverkeeper, Inc. v. New York City Dept. of Envtl. Protection*, 2023 N.Y. Slip Op. 01679, Second Dept 3-29-23**

CIVIL PROCEDURE, JUDGES, ATTORNEYS.

PRECLUSION OF EVIDENCE AS A DISCOVERY SANCTION WAS NOT WARRANTED; THERE WAS NO EVIDENCE OF WILLFUL OR CONTUMACIOUS CONDUCT AND THE SANCTIONED PARTY WAS NOT GIVEN AN OPPORTUNITY TO EXPLAIN THE FAILURE TO COMPLY WITH DISCOVERY ORDERS.

The Second Department, reversing Supreme Court, determined the discover sanctions imposed by the judge on plaintiff were not warranted: "... Supreme Court improvidently exercised its discretion by imposing the drastic sanction of preclusion upon the plaintiff without affording the plaintiff adequate notice and an opportunity to be heard, including on facts relevant to whether the plaintiff's noncompliance was willful and contumacious. The defendant did not move for sanctions pursuant to CPLR 3126 due to the plaintiff's failure to comply with the interim order, nor did the court make its own motion or include language in the interim order warning that noncompliance would result in sanctions. The court also made its determination without oral argument, such that it is unclear what opportunity the plaintiff had to explain the circumstances of its noncompliance. ... ... [E]ven if the plaintiff had been provided with adequate due process, the Supreme Court still would have improvidently exercised its discretion by, inter alia, precluding the plaintiff from serving further demands and from introducing certain documents. The record contains no showing of 'a clear pattern of willfulness and contumacious conduct necessary to justify [such] sanctions' ... . There is no indication that the plaintiff 'repeated[ly] fail[ed] to comply with court-ordered discovery' or 'fail[ed] to comply with court-ordered discovery over an extended period of time' ... . Instead, this case involves a 'single incident of noncompliance' with a court order, which was insufficient to warrant a sanction as drastic as preclusion ... , especially given the policy of resolving cases on their merits and the fact that discovery was still ongoing at the time the court made its determination." ***Korsinsky & Klein, LLP v. FHS Consultants*, LLC, 2023 N.Y. Slip Op. 01667, Second Dept 3-29-23**

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

THE ARTICLE 78 PETITION SOUGHT RELIEF NOT AVAILABLE IN SUCH A PROCEEDING (REMOVAL OF A TERRACE CONSTRUCTED ABOVE PETITIONER'S RESIDENCE); THE APPELLATE COURT CONVERTED THE PETITION TO A COMPLAINT PURSUANT TO CPLR 103.

The Second Department determined the Article 78 petition seeking the removal of a terrace constructed above petitioner's property sought relief not available pursuant to Article 78 but converted the petition to a complaint pursuant to CPLR 103(c): "RPAPL 871(1) authorizes the owner of any legal estate in land to maintain an action for an injunction directing the removal of a structure encroaching on such land. ;Even where the facts which would justify the grant of [such] an extraordinary remedy are established, the court must still decide whether, in the exercise of a sound discretion, it should grant the remedy, and if granted, the terms and conditions which should be annexed to it' ... . Consequently, that branch of the petition which was to compel the respondents to remove the terrace did not seek the performance of a purely ministerial act which can be obtained in a CPLR article 78 proceeding ... . Pursuant to CPLR 103(c), however, a proceeding should not be dismissed 'solely because it is not brought in the proper form,' and this Court has the power to convert a proceeding into the proper form ... . Under the circumstances, we convert so much of the proceeding as sought to compel the respondents to remove the terrace into an action, deem that branch of the petition which was to compel the respondents to remove the terrace to be the complaint, and remit the matter to the Supreme Court, Queens County, for further proceedings on the complaint." ***Matter of Dicker v. Glen Oaks Vil. Owners, Inc.*, 2023 N.Y. Slip Op. 01673, Second Dept 3-29-23**

CONTRACT LAW EVIDENCE.

PLAINTIFF WAS ENTITLED TO SUMMARY JUDGMENT FINDING DEFENDANT BREACHED THE CONTRACT, BUT SUMMARY JUDGMENT ON THE AMOUNT OF DAMAGES SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing (modifying) Supreme Court, determined the defendant in this breach of contract action did not demonstrate the alleged cost of correcting defendant's defective work was fair and reasonable. Therefore summary judgment on the damages amount

should not have been granted: "To recover damages for breach of contract, a plaintiff must demonstrate 'the existence of a contract, the plaintiff's performance pursuant to the contract, the defendant's breach of its contractual obligations, and damages resulting from the breach' ... . Here, the plaintiff demonstrated its prima facie entitlement to judgment as a matter of law on the issue of liability on the breach of contract cause of action. The plaintiff submitted evidence demonstrating that the defendant breached the agreement by not following the specifications provided by NYSTA [New York State Transit Authority]. ... [T]he Supreme Court properly granted that branch of the plaintiff's motion which was for summary judgment on the issue of liability on the breach of contract cause of action. The Supreme Court erred, however, in granting that branch of the plaintiff's motion which was for summary judgment on the issue of damages on the breach of contract cause of action. 'In an action seeking damages for breach of a construction contract, the proper measure of damages is the fair and reasonable market price for correcting the defective installation' ... . Here, the plaintiff failed to establish, prima facie, that the costs it incurred in correcting the defective work were fair and reasonable ...". ***Ben Ciccone, Inc. v. Naber Elec. Corp.*, 2023 N.Y. Slip Op. 01656, Second Dept 3-29-23**

FAMILY LAW, CIVIL PROCEDURE, CRIMINAL LAW, JUDGES.

ABSENT A STIPULATION BY THE PARTIES, FAMILY COURT SHOULD NOT HAVE WITHDRAWN THE FAMILY OFFENSE PETITION.

The Second Department, reversing Family Court, determined the family offense petition should not have been withdrawn by the judge because the parties did not stipulate to the withdrawal: "Where, as here, the matter has been submitted to the court, 'the court may not order an action discontinued except upon the stipulation of all parties appearing in the action' (CPLR 3217[b]). In this case, there was no stipulation from the parties. Thus, the court erred in directing that the petition was withdrawn ...". ***Matter of Johnson v. Lomax*, 2023 N.Y. Slip Op. 01675, Second Dept 3-29-23**

FAMILY LAW, EVIDENCE, JUDGES.

THE JUDGE SHOULD NOT HAVE DECIDED MOTHER'S CUSTODY PETITION WITHOUT A BEST INTERESTS HEARING.

The Second Department, reversing Supreme Court, determined a hearing was required in this custody proceeding: " 'Custody determinations . . . require a careful and comprehensive evaluation of the material facts and circumstances in order to permit the court to ascertain the optimal result for the child' ... . Accordingly, 'custody determinations should '[g]enerally' be made 'only after a full and plenary hearing and inquiry' ... . 'This general rule furthers the substantial interest, shared by the State, the children, and the parents, in ensuring that custody proceedings generate a just and enduring result that, above all else, serves the best interest of a child' ... . '[W]here . . . facts material to the best interest analysis, and the circumstances surrounding such facts, remain in dispute, a custody hearing is required' ... . Here, the Supreme Court erred in making a final custody determination without a hearing and without inquiring into the best interests of the parties' child ...". ***Matter of Bendter v. Elikwu*, 2023 N.Y. Slip Op. 01670, Second Dept 3-29-23**

FAMILY LAW, JUDGES.

FAMILY COURT DID NOT ARTICULATE ITS REASONS FOR DETERMINING CHILD SUPPORT BASED ON PARENTAL INCOME IN EXCESS OF THE STATUTORY CAP; THE ORIGINAL SUPPORT LEVEL BASED ON THE STATUTORY CAP REINSTATED.

The Second Department, reversing Supreme Court, determined father's objections to the level of mother's child support obligation should not have been granted. Family Court had more than doubled the support obligations based on the couple's income level, which was above the statutory cap. But Family Court did not sufficiently articulate the reasoning underlying the discretionary increase: "The Child Support Standards Act 'sets forth a formula for calculating child support by applying a designated statutory percentage, based upon the number of children to be supported, to combined parental income up to a particular ceiling' ... . 'Where . . . the combined parental income exceeds the statutory cap, in fixing the basic child support obligation on income over the cap, the court has the discretion to apply the factors set forth in Family Court Act § 413(1)(f), or to apply the statutory percentages, or to apply both' ... . 'However, the Family Court must articulate an explanation of the basis for its calculation of child support based on parental income in excess of the statutory cap' ... . 'This articulation should reflect 'a careful consideration of the stated basis for its exercise of discretion, the parties' circumstances, and its reasoning why there [should or] should not be a departure from the prescribed percentage' ... . Here, the Family Court did not set forth a sufficient basis for its determination to calculate child support based on combined parental income exceeding the statutory cap. Further, the record shows that based on certain factors, including the parties' disparity in income and the child's standard of living, the child support obligation should be calculated based only on combined parental income up to the statutory cap ...". ***Matter of Butta v. Realbuto*, 2023 N.Y. Slip Op. 01671, Second Dept 3-29-23**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

PLAINTIFF WAS NOT WEARING A HARD HAT AND WAS STRUCK IN THE HEAD BY DEBRIS DURING DEMOLITION WORK; PLAINTIFF ALLEGED THE FAILURE TO PROVIDE HEAD PROTECTION VIOLATED THE INDUSTRIAL CODE GIVING RISE TO A LABOR LAW § 241(6) CAUSE OF ACTION; DEFENDANTS DID NOT DEMONSTRATE THE JOB WAS NOT A HARD HAT JOB; THEREFORE DEFENDANTS' MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing (modifying) Supreme Court, determined the Labor Law § 241(6) cause of action should not have been dismissed. Plaintiff was struck in the head by falling debris. The Industrial Code regulation requiring a hard hat was not demonstrated to be

inapplicable by the defendant: "... Supreme Court should have denied those branches of the defendants' motions which were for summary judgment dismissing so much of the Labor Law § 241(6) cause of action as was predicated on a violation of 12 NYCRR 23-1.8(c)(1). 'In order to prevail on a Labor Law § 241(6) cause of action premised upon a violation of 12 NYCRR 23-1.8(c)(1), the plaintiff must establish that the job was a 'hard hat' job, and that the plaintiff's failure to wear a hard hat was a proximate cause of his [or her] injury' ... . Here, the defendants failed to establish, prima facie, that the demolition work associated with the house renovation was not a hard hat job, and that the plaintiff's lack of head protection did not play a role in the injuries he sustained when he was struck in the head by a piece of wood …". ***Reyes v. Sligo Constr. Corp.*, 2023 N.Y. Slip Op. 01699, Second Dept 3-29-23**

PERSONAL INJURY.

PLAINTIFF WAS INVOLVED IN A COLLISION WHICH PUSHED HIS CAR INTO DEFENDANT'S CAR WHICH WAS PARKED ALONG THE CURB IN VIOLATION OF PARKING REGULATIONS; THE LOCATION OF DEFENDANT'S CAR WAS NOT A PROXIMATE CAUSE OF THE ACCIDENT; DEFENDANT'S SUMMARY JUDGMENT MOTION SHOULD HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined defendant (Lopez) was entitled to summary judgment in this traffic accident case. Plaintiff was involved in a collision which pushed his car into defendant Lopez's car, which was parked along the curb. The fact that the Lopez car was parked in violation of parking regulations was not controlling: "Even assuming, as the plaintiff alleges, that Lopez's vehicle was parked in violation of applicable regulations, no triable issue of fact was raised as to whether the location of the parked vehicle was a proximate cause of the accident ... . Indeed, the plaintiff admitted in an affidavit that it was the impact of Wilson's vehicle striking his vehicle that caused his vehicle to come into contact with Lopez's vehicle." ***Reeves v. Wilson*, 2023 N.Y. Slip Op. 01698, Second Dept 3-29-23**

PERSONAL INJURY, JUDGES, CIVIL PROCEDURE.

IN AN INQUEST ON DAMAGES AFTER DEFENDANT DEFAULTED, THE JUDGE SHOULD NOT HAVE CONSIDERED LIABILITY ISSUES.

The Second Department, reversing Supreme Court, determined the judge should not have considered issues of liability in the inquest on damages after defendant's default: "After conducting the inquest, the court found ... that the plaintiff had failed to proffer credible evidence that the accident occurred or that she had sustained an injury that was caused by the defendants, and directed the dismissal of the complaint. ... By defaulting, the defendants admitted 'all traversable allegations in the complaint, including the basic allegation of liability' ... . As such, the sole issue to be determined at the inquest was the extent of the damages sustained by the plaintiff, and the Supreme Court should not have considered issues of liability ...". ***Youngja Lee v. Hong Kong Supermarket*, 2023 N.Y. Slip Op. 01668, Second Dept 3-29-23**

PERSONAL INJURY, VEHICLE AND TRAFFIC LAW.

ALTHOUGH PLAINTIFF PEDESTRIAN WAS STRUCK CROSSING THE STREET WHERE THERE WAS NO CROSSWALK, THERE WAS A QUESTION OF FACT WHETHER DEFENDANT DRIVER FAILED TO SEE WHAT SHE SHOULD HAVE SEEN.

The Second Department, reversing Supreme Court, determined defendant's summary judgment motion in this pedestrian-car accident case should not have been granted. Although plaintiff pedestrian violated the Vehicle and Traffic law by crossing the street where there was no crosswalk, plaintiff raised a question of fact about whether defendant-driver failed to see what she should have seen: "The defendant established her prima facie entitlement to judgment as a matter of law by submitting evidence that, under the circumstances of this case, the plaintiff's own conduct in crossing the roadway outside of a crosswalk was the sole proximate cause of the accident, and that the defendant was not at fault in the happening of the accident ... . However, in opposition, the plaintiff raised a triable issue of fact as to whether the defendant failed to exercise due care to avoid striking the plaintiff with her vehicle by failing to see that which, through the proper use of her senses, she should have seen (see Vehicle and Traffic Law § 1146[a] ...)." ***Davis v. Khalil*, 2023 N.Y. Slip Op. 01659, Second Dept 3-29-23**

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