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CasePrepPlus

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Editor:
Robert S. Rosborough IV

Summarizing recent significant New York appellate cases

Here's what has been happening in New York's appellate courts over the past week.

FIRST DEPARTMENT

TORTS

***Kanayama v Kesy, LLC*, 2023 NY Slip Op 04720 (1st Dept Sept. 26, 2023)**

Issue: **May a failure to act establish the necessary intent to maintain claims for nuisance and trespass?**

Facts: The owners of a fifth-floor condo sued their upstairs neighbors on the sixth floor, which operated a spa in their condo, because the shower, washing machine, and toilet rooms in the sixth-floor condo caused leaks down into the fifth-floor unit, and the defendants didn't do anything about it until the trial court granted a TRO. The trial court denied the sixth-floor unit owner's motion for summary judgment, which argued that it didn't have the necessary intent to support claims for nuisance and trespass.

Holding: The First Department affirmed, holding that "[t]he intent element of nuisance may be established by a failure to act on a defendant's part." Here, the sixth-floor unit owner was notified of and allowed the leaks to continue for years without taking any action to correct them, which was sufficient to raise a triable issue of fact on intent. Similarly, the Court held, "the intent element of trespass is satisfied where defendants' alleged acts are such as will to a substantial certainty result in the entry of foreign matter into the plaintiff's property." A triable issue also existed on that element, the Court held, because both sides' experts agreed that the leaks came from the sixth floor and there was evidence to show that the plumbing alterations were the cause and the unit owner's inaction caused the leaks to continue.

ARBITRATION

***Mejia v Linares*, 2023 NY Slip Op 04822 (1st Dept Sept. 28, 2023)**

Issue: **Are Uber's 2016 and 2021 terms of use enforceable as a binding agreement to arbitrate disputes?**

Facts: After being sued by the plaintiff, Uber served a notice of intention to arbitrate. The plaintiff moved to stay arbitration, and Uber cross-moved to compel arbitration. The trial court granted the plaintiff's motion, and denied Uber's cross motion.

Holding: The First Department clarified that its prior holding in ***Castro v Jem Leasing, LLC* (214 AD3d 475 [1st Dept Mar. 14, 2023])** did not reject Uber's 2016 terms of use as unenforceable as a matter of law. In *Castro*, Uber merely failed its burden of proof to establish that the 2016 terms created an enforceable arbitration agreement. In contrast, here Uber satisfied the burden to show it had an enforceable arbitration agreement with the plaintiff under the 2016 terms, and thus the matter should have been sent to arbitration. The plaintiff's further argument that Uber's 2021 terms and conditions were unconscionable had to be decided by the arbitrators because the plaintiff conceded that the 2021 terms created a binding arbitration agreement and the 2021 terms' delegation provision left that question for the arbitrators to decide.

SECOND DEPARTMENT

TORTS

***Harris v Miranda*, 2023 NY Slip Op 04756 (2d Dept Sept. 27, 2023)**

Issue: **How much noise is too much to cause a private nuisance?**

Facts: A property owner sued his neighbor after the neighbor allegedly held three noisy parties over the course of three years, alleging a claim for private nuisance. The property owner moved for summary judgment, and the trial court not only denied the motion, but also searched the record and granted the defendants summary judgment dismissing the complaint.

Holding: The Second Department affirmed, holding that "[n]ot every annoyance will constitute a nuisance. Nuisance imports a continuous invasion of rights—a pattern of continuity or recurrence of objectionable conduct." The property owner's proof of three noisy parties over three years simply wasn't enough to show the pattern of continuing invasion required to sustain a private nuisance claim. Party on!

CONTRACTS, CIVIL PROCEDURE

***Prete v Tamares Dev. 1, LLC*, 2023 NY Slip Op 04783 (2d Dept Sept. 27, 2023)**

Issue: Can the inability to understand the English language defeat an otherwise signed and valid release of claims?

Facts: After a construction project on an adjacent property damaged the plaintiff's property, the plaintiff executed a release of claims with the defendant in exchange for $15,000. The plaintiff thereafter sued the defendant anyway. The defendant moved to dismiss the claim based on the signed release, but the trial court denied the motion.

Holding: The Second Department reversed and dismissed the complaint, holding that, generally, "a valid release constitutes a complete bar to an action on a claim which is the subject of the release." Since the defendant submitted the signed release that barred the plaintiff's claim, it was up to the plaintiff to demonstrate "whether there had been fraud, duress, or some other circumstance which would be sufficient to void the release." The plaintiff failed to do so, because the claim of illiteracy in the English language was not enough, on its own, to void the release where the plaintiff failed to take any steps to have the release translated or otherwise explained to him. As the Second Department held, "[a] person who does not understand the English language is not automatically excused from complying with the terms of a signed agreement, since such person must make a reasonable effort to have the agreement made clear to him or her."

THIRD DEPARTMENT

CRIMINAL LAW, APPEALS

***People v Potter*, 2023 NY Slip Op 04802 (3d Dept Sept. 28, 2023)**

***People v Lomack*, 2023 NY Slip Op 04801 (3d Dept Sept. 28, 2023)**

***People v Crannell*, 2023 NY Slip Op 04800 (3d Dept Sept. 28, 2023)**

Issue: Did the criminal defendant validly waive his right to appeal of the sentence imposed upon his guilty plea?

Facts: In three cases, similarly to many others that the Appellate Division has released recently, criminal defendants have appealed the sentences imposed by the trial court upon their guilty pleas.

Holding: In these three cases, in two of which the People conceded error, the Third Department held that the defendants' waivers of the right to appeal were ineffective because their written waivers of the right to appeal were overbroad and indicated that the waiver was a complete bar to a direct appeal as well as to collateral relief on certain nonwaivable issues in both state and federal courts. The trial courts' oral colloquies with the defendants did not cure the written waivers' mischaracterizations of what appellate rights were actually waived or demonstrate that the defendants understood the nature and consequences of the waiver of their appellate rights. Ultimately, however, the Third Department upheld each sentence on the merits as not unduly harsh or excessive.

FOURTH DEPARTMENT

FAMILY LAW, CIVIL PROCEDURE, APPEALS

***Matter of Reardon v Krause*, 2023 NY Slip Op 04880 (4th Dept Sept. 29, 2023)**

Issue: What is appealable from an order entered upon default, and when may a court enter a default for a party's failure to appear visually at a hearing?

Facts: In a Family Court Act article 6 custody proceeding, Family Court entered a custody order, upon the mother's default in appearing, granting the father sole custody of the child, with supervised visitation to the mother. The Family Court entered the default after the mother failed to appear by video at the virtual evidentiary hearing, but appeared instead by phone, and her attorney appeared by video.

Holding: The Fourth Department held that although a party's failure to appear does not automatically constitute a default, it can in certain circumstances, even where the party's attorney is present but "declines to participate in the hearing in the party's absence and instead elects to stand mute." Here, Family Court specifically advised the mother that she must appear visually at the evidentiary hearing through the Court's Microsoft Teams link and offered her the opportunity to appear from a computer at the courthouse, where her attorney would be, if necessary. On the date of the hearing, however, the mother did not appear visually through Teams, either from her own device or at the courthouse, but instead called in, saying that she had "technical difficulties" in accessing the video. She also repeatedly expressed her preference to appear by phone, but Family Court explained that it needed to be able to see the mother to be able to assess her credibility. The Court denied the mother's attorney's request for an adjournment, after which the attorney declined to participate in the mother's absence. Thus, the Fourth Department held, the "mother's failure to appear in the manner required constituted a default."

Although an order entered upon default is not appealable, and thus the entry of the default custody order was not before the Fourth Department on the mother's appeal, the Fourth Department noted that it could review only the denial of the request for an adjournment because the appeal from an order entered on default "brings up for review those matters which were the subject of contest before the

trial court." The denial of the adjournment, the Court held, was not an abuse of discretion, because "the mother had been adequately warned of the consequences of failing to appear visually at the virtual hearing and was afforded ample time to find access to a computer or other functional device that would permit her to participate via videoconference."

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