CasePrepPlus

October 2, 2020

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

SECOND DEPARTMENT

CIVIL PROCEDURE, CONDOMINIUMS, REAL PROPERTY LAW.

A CAUSE OF ACTION MAY BE DISMISSED PURSUANT TO CPLR 3211(a)(4) BECAUSE IT SEEKS THE SAME RELIEF AS A PENDING ACTION INVOLVING THE SAME PARTIES.

The Second Department, reversing Supreme Court, determined a cause of action should have been dismissed pursuant CPLR 3211(a)(4) because it involved the same parties and sought the same relief as a pending action. The actions involved common charges for condominiums: "Pursuant to CPLR 3211(a)(4), a party may move to dismiss a cause of action on the ground that 'there is another action pending between the same parties for the same cause of action in a court of any state or the United States.' 'It is not necessary that the precise legal theories presented in the first action also be presented in the second action as long as the relief . . . is the same or substantially the same' ... . 'The critical element is that both suits arise out of the same subject matter or series of alleged wrongs' ... . We disagree with the Supreme Court's exercise of its discretion in denying that branch of [the] cross motion which was for relief pursuant to CPLR 3211(a)(4). The ... [actions] arise out of the same events, and involve overlapping questions of law, namely, the authority of the Board to charge ... the increased common charges and assessments. The business judgment rule does not shield a condominium board's acts of 'bad faith and self-dealing' ... . [T]he resolution of [the] causes of action against the Board, which include, among other things, a request for a judgment declaring that the Board's common charge increases were not valid, may moot the instant action to foreclose upon the common charge liens ... . Further, absent relief under CPLR 3211(a)(4), [there would be] duplicative litigation and the prospect of inconsistent results." ***Board of Mgrs. of the 1835 E. 14th St. Condominium v. Singer*, 2020 N.Y. Slip Op. 05026, Second Dept 9-23-20**

CIVIL PROCEDURE, CONTRACT LAW, CONDOMINIUMS.

MOTION TO DISMISS THE BREACH OF CONTRACT ACTION BASED ON DOCUMENTARY EVIDENCE PURSUANT TO CPLR 3211(a)(1) SHOULD HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined the defendant condominium-board-of-managers' motion to dismiss plaintiff condominium-owner's complaint based on documentary evidence should have been granted: "The plaintiff commenced this action against the defendant Board of Managers ... (hereinafter the Board) ... challenging the Board's allocation of common expenses, after the Condominium's first year of operation, in accordance with the first-year budget set forth in the Condominium offering plan. The plaintiff alleged that this method of allocating common expenses following the Condominium's first year was a breach of the Board's contractual duties and resulted in an overassessment of common charges to the plaintiff. * * * As to the breach of contract cause of action, '[t]o succeed on a motion to dismiss based upon documentary evidence pursuant to CPLR 3211(a)(1), the documentary evidence must utterly refute the plaintiff's factual allegations, conclusively establishing a defense as a matter of law' ... . Here, the Condominium offering plan, declaration, and bylaws (hereinafter collectively the governing documents) utterly refuted the plaintiff's factual allegations and conclusively established a defense as a matter of law to the breach of contract cause of action. In particular, the plaintiff admitted in the amended complaint that the common charges assessed to its unit since the inception of its ownership have been in accordance with the allocations set forth in 'Schedule B — First Year's Budget,' contained in the offering plan. The plaintiff's allegation that the Board was obligated to reallocate the common expenses after the first year of the Condominium's operation, based upon an assessment of the commercial unit owners' actual use of and benefit from the services and other items covered by the common expenses, is refuted by the governing documents. Those documents do not provide for an assessment of actual use and benefits, but rather, specify that, on at least a yearly basis, the Board will 'allocate and assess [the] Common Charges amongst the Unit Owners in accordance with allocations set forth in the First Year's Budget.' " ***189 Schermerhorn Owners Co., LLC v. Board of Mgrs. of the Be@Schermerhorn Condominium*, 2020 N.Y. Slip Op. 05021, Second Dept 9-23-20**

CIVIL PROCEDURE, JUDGES.

AFTER CONVERTING THE ARTICLE 78 PETITION TO A COMPLAINT THE JUDGE SHOULD NOT HAVE TREATED THE MOTION TO DISMISS AS A SUMMARY JUDGMENT MOTION WITHOUT NOTIFYING THE PARTIES.

The Second Department, reversing Supreme Court, determined the judge, after converting the article 78 petition to a complaint, should not have, sua sponte, dismissed the complaint with notifying the parties: "... [T]he Supreme Court denied the Comptroller's motion to dismiss, and, pursuant to CPLR 103(c), converted the article 78 petition into a complaint asserting a declaratory judgment cause of action. Upon reaching the merits of the plaintiff's complaint, the court sua sponte denied the plaintiff declaratory relief and directed dismissal of the complaint. ... Upon converting the article 78 petition into a complaint, the Supreme Court erred in reaching the merits of the complaint, and directing its dismissal. Having converted the petition to a complaint, the court could only reach the merits by giving the parties adequate notice that it was going to treat the defendant's pre-answer motion to dismiss as one for summary judgment (see CPLR 3211[c] ...). The defendant had not served an answer to either the petition or the complaint, and therefore, any motion for summary judgment would have been premature (see CPLR 3212[a]). Moreover, the record does not establish that the parties deliberately charted a summary judgment course ... . Under these circumstances, the court's determination on the merits of the complaint was premature." ***Matter of Gorelick v. Suffolk County Comptroller's Off.*, 2020 N.Y. Slip Op. 05048, Second Dept 9-23-20**

CIVIL PROCEDURE, MUNICIPAL LAW, ZONING, LAND USE.

INSTEAD OF DISMISSING THE PETITION FOR FAILURE TO INCLUDE A NECESSARY PARTY, SUPREME COURT SHOULD HAVE ORDERED THE PARTY SUMMONED PURSUANT TO CPLR 1001(b).

The Second Department, reversing Supreme Court, determined the petition seeking review of the village planning board's decision re: petitioner's application for approval of a subdivision should not have been dismissed. Because the planning board's decision affected another landowner (160 South Ocean, LLC) Supreme Court dismissed the petition for failure to include a necessary party. The Second Department held Supreme Court should have ordered the party summoned pursuant to CPLR 1001(b): "160 South Ocean, LLC, is a necessary party to this proceeding (see CPLR 1001[a]) subject to the jurisdiction of the court, and therefore, the Supreme Court should have 'order[ed] [it] summoned,' rather than denying the petition and dismissing the proceeding for failure to join a necessary ... party (CPLR 1001[b] ...). Accordingly, we reinstate the petition and remit the matter to the Supreme Court, Suffolk County, for further proceedings, including a determination on the merits of the respondents' motion, inter alia, to dismiss the petition ...". ***Matter of Mulford Bay, LLC v. Rocco*, 2020 N.Y. Slip Op. 05050, Second Dept 9-23-30**

CONSTITUTIONAL LAW, FAMILY LAW.

ORDER PROHIBITING DEFENDANT HUSBAND FROM DISPARAGING PLAINTIFF WIFE TO THIRD PARTIES WAS AN UNCONSTITUTIONAL PRIOR RESTRAINT OF SPEECH; ORDER SHOULD BE MODIFIED TO PROHIBIT DISPARAGING PLAINTIFF TO PLAINTIFF'S PATIENTS.

The Second Department, reversing (modifying) Supreme Court, determined the order issued in this divorce proceeding prohibiting defendant husband from discussing, demeaning or disparaging plaintiff wife to third parties was an unconstitutional prior restraint of speech. Plaintiff, a psychologist, wanted to prohibit defendant from talking to her patients. The Second Department held the order should be modified to limit the prohibition disparaging plaintiff to plaintiff's patients: "The defendant correctly contends that the portion of the order granting that branch of the plaintiff's motion which was for an order directing the defendant not to discuss, demean, or disparage the plaintiff to any third parties, including but not limited to the plaintiff's patients, was an unconstitutional prior restraint on speech. A prior restraint on speech is a law, regulation or judicial order that suppresses speech on the basis of the speech's content and in advance of its actual expression ... . Any imposition of prior restraint, whatever the form, bears a 'heavy presumption against its constitutional validity, and a party seeking to obtain such a restraint bears a correspondingly heavy burden of demonstrating justification for its imposition' ... . An injunctive order issued in the area of First Amendment rights must be couched in the narrowest terms that will accomplish the pin-pointed objective permitted by constitutional mandate and the essential needs of the public order ... . The order must be tailored as precisely as possible to the exact needs of the case ... . Here, the Supreme Court's prior restraint on speech was overbroad, and not tailored as precisely as possible to the exact needs of this case. The plaintiff, a psychologist, was concerned about damage to her professional reputation due to the defendant's allegedly demeaning statements to her patients. The court's objective can be achieved by modifying the order to provide only that the defendant shall not discuss, demean, or disparage the plaintiff to her patients ...". ***Karantinidis v. Karantinidis*, 2020 N.Y. Slip Op. 05039, Second Dept 9-23-20**

CRIMINAL LAW, ATTORNEYS, APPEALS, EVIDENCE.

BECAUSE THE TRIAL JUDGE OMITTED A PORTION OF THE BURGLARY JURY INSTRUCTIONS AND THE PEOPLE DID NOT OBJECT, THE PEOPLE ARE HELD TO THE PROOF REQUIRED BY THE INCOMPLETE INSTRUCTIONS; THE BURGLARY CONVICTION WAS THEREFORE AGAINST THE WEIGHT OF THE EVIDENCE; DEFENSE COUNSEL'S FAILURE TO MAKE A SPEEDY TRIAL MOTION DID NOT CONSTITUTE INEFFECTIVE ASSISTANCE BECAUSE THE ISSUE WAS NOT CLEAR-CUT AND DISPOSITIVE.

The Second Department, reversing the burglary conviction as against the weight of the evidence, determined the People were held to the proof required by the jury instructions to which the People did not object. The portion of the instructions which explained that entry into a private area of a building after entering the building through a public area constitutes unlawful entry. Because the defendant entered the building through a public entrance, the People did not prove unlawful entry as charged to the jury. The Second Department also held that defense counsel's failure to make a speedy trial motion did not constitute ineffective assistance because it was not clear the motion would succeed: "While the failure to make a meritorious speedy trial motion can constitute ineffective assistance of counsel ... , the speedy trial violation must have been 'clear-cut and dispositive' ... . In other words, the motion must not only be meritorious ... , it generally must not require resolution of novel issues, or resolution of whether debatable exclusions of time are applicable ... . Here, the issue cannot be fairly characterized as 'clear-cut and dispositive' so as to render defense counsel ineffective for failing to make such a motion ... . * * * The testimony at trial was unequivocal that the defendant and two cohorts entered the subject premises, a self-storage facility, during business hours, using the entrance designated for use by the public. The defendant's entry into the premises was therefore lawful ... . While the defendant's subsequent act of entering a nonpublic area of the premises could constitute an unlawful entry (see Penal Law § 140.00[5] ...), in light of the Supreme Court's charge omitting that portion of the instruction elaborating upon license and privilege as it applies to nonpublic areas within public places, and asking the jury whether the defendant unlawfully entered the premises generally, it was factually insufficient to prove that the defendant's entry was unlawful." ***People v. McKinnon*, 2020 N.Y. Slip Op. 05056, Second Dept 9-23-30**

FORECLOSURE, CIVIL PROCEDURE, CONTRACT LAW, EVIDENCE.

EVIDENCE SUBMITTED IN PLAINTIFF BANK'S REPLY PAPERS PROPERLY CONSIDERED; THE BANK'S PROOF OF COMPLIANCE WITH THE NOTICE REQUIREMENTS OF THE MORTGAGE AGREEMENT WAS INSUFFICIENT; THE BANK'S MOTION FOR SUMMARY JUDGMENT IN THIS FORECLOSURE ACTION SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined plaintiff bank's reply papers were properly considered but plaintiff did not submit sufficient proof that a condition precedent in the mortgage agreement, re: notice of default, was complied with: "... [T]he Supreme Court providently exercised its discretion in considering the affidavit of the plaintiff's employee Jeremiah Herberg, which was submitted with the plaintiff's papers in opposition to the defendant's cross motion and in further support of its motion ... . Although '[a] party moving for summary judgment generally cannot meet its prima facie burden by submitting evidence for the first time in reply . . . , there are exceptions to the general rule, including . . . when the other party is given an opportunity to respond to the reply papers' ... . Here, the defendant had the opportunity to address the Herberg affidavit in her reply papers in further support of her own cross motion. However, the plaintiff failed to establish, prima facie, that it complied with the condition precedent contained in section 22 of the mortgage agreement regarding the notice of default. The plaintiff's submissions did not establish that the notice was sent by first class mail or actually delivered to the notice address, as required by the terms of the mortgage agreement ... . Furthermore, Herberg's affidavit failed to lay a proper foundation for the admission of records concerning the plaintiff's mailing of the notices of default (see CPLR 4518[a] ...)." ***Wells Fargo Bank, N.A. v. McKenzie*, 2020 N.Y. Slip Op. 05086, Second Dept 9-23-20**

FORECLOSURE, CIVIL PROCEDURE, JUDGES.

JUDGE'S SUA SPONTE DISMISSAL OF THE FORECLOSURE COMPLAINT WAS NOT WARRANTED; NO EXTRA ORDINARY CIRCUMSTANCES.

The Second Department, reversing Supreme Court, determined plaintiff bank's motion to vacate the sua sponte dismissal of the foreclosure complaint should have been granted: "... [I]n a status conference order ... , the Court Attorney Referee ... directed the plaintiff to file an application seeking an order of reference by the date of the final status conference. Following the final status conference ... , the Court Attorney Referee ... determined that the plaintiff failed to show good cause for its failure to move for an order of reference as directed, and recommended that the action be dismissed. ... [T]he Supreme Court directed dismissal of the complaint. ... " 'A court's power to dismiss a complaint, sua sponte, is to be used sparingly and only when extraordinary circumstances exist to warrant dismissal' ... . Here, the Supreme Court was not presented with any extraordinary circumstances warranting a sua sponte dismissal of the complaint ... . Indeed, at the time the plaintiff was directed to file an application for an order of reference, an order of reference, as well as a judgment of foreclosure and sale, had already been issued." ***Bank of N.Y. v. Ramirez*, 2020 N.Y. Slip Op. 05024, Second Dept 9-23-20**

FORECLOSURE, EVIDENCE.

PLAINTIFF BANK DID NOT PRESENT SUFFICIENT EVIDENCE TO DEMONSTRATE IT TOOK ACTION TO ENTER A DEFAULT JUDGMENT IN THIS FORECLOSURE ACTION WITHIN ONE YEAR OF DEFENDANT'S DEFAULT; THE ACTION SHOULD HAVE BEEN DISMISSED AS ABANDONED PURSUANT TO CPLR 3215(c).

The Second Department, reversing Supreme Court, determined plaintiff bank did not present sufficient evidence that it commenced proceedings to enter a default judgment within one year of the default. Therefore the bank had abandoned the action: "... [T]he plaintiff ... relies upon two pages in the record. The first of those two pages is a 'CamScanner' copy of the face sheet of a proposed order of reference reflecting the caption of this action, a blank line over the words '(ORD OF REF) FEE PAID,' and a pagination of "Page 1 of 2." The page is devoid of markings that it was ever presented to any Justice of the Supreme Court as no name is written next to 'Hon.' above the caption, and no presentment date is reflected in the blank spaces at the upper right-hand corner of the document where the date and month of presentments are typically identified. There is nothing that indicates that this document was ever filed with the court. The second 'CamScanner' page relied upon by the plaintiff, delineated as 'Page 2 of 2,' reflects what appears to be either a 2010 or 2019 date stamp, in an unreadable month and date, at 12:07 p.m., with two looping lines that may or may not be a penned signature. The date stamp does not identify it as being placed upon the document by any particular person, entity, or court, and does not contain the word 'Filed.' Both of the pages relied upon by the plaintiff contain in their lower right-hand corners the notation 'Printed: 10/5/20,' without a full readable year. No other pages comprising the purported proposed order of reference were provided, though the first page, which ends in mid-sentence, is clearly not the entirety of the document. Since CPLR 3215(c) provides that courts 'shall' dismiss actions as abandoned where the plaintiff fails to take proceedings within one year after a default 'unless sufficient cause is shown,' the burden was upon the plaintiff to establish sufficient cause as to why the complaint should not be dismissed in this instance ... . Here, the burden was not met." ***HSBC Mtge. Corp. v. Hasan*, 2020 N.Y. Slip Op. 05036, Second Dept. 9-23-20**

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

PLAINTIFF BANK DID NOT DEMONSTRATE STRICT COMPLIANCE WITH THE NOTICE REQUIREMENTS OF RPAPL 1304 AND THEREFORE WAS NOT ENTITLED TO SUMMARY JUDGMENT IN THIS FORECLOSURE ACTION; DEFENDANT'S MERE DENIAL OF RECEIPT OF THE NOTICE DID NOT WARRANT SUMMARY JUDGMENT IN DEFENDANT'S FAVOR.

The Second Department, reversing Supreme Court, determined plaintiff bank did not demonstrate compliance with the RPAPL 1304 notice requirements and, therefore, the bank's motion for summary judgment in this foreclosure action should not have been granted. Defendant's denial of receipt of the RPAPL 1394 notice, however, was not enough to warrant summary judgment in favor of defendant: " 'Although not jurisdictional, proper service of RPAPL 1304 notice on the borrower or borrowers is a condition precedent to the commencement of a residential foreclosure action, and the plaintiff has the burden of establishing satisfaction of this condition' ... . [A]lthough the plaintiff submitted a copy of the 90-day notice purportedly sent to [defendant], the plaintiff failed to submit an affidavit of service or other proof of mailing by the post office establishing that the plaintiff properly sent the notice by registered or certified mail and first-class mail pursuant to RPAPL 1304 ... . Since the plaintiff failed to provide evidence of the actual mailing, or evidence of a standard office mailing procedure designed to ensure that items are properly addressed and mailed, sworn to by someone with personal knowledge of the procedure, the plaintiff failed to establish its strict compliance with RPAPL 1304 ...". ***TD Bank, N.A. v. Roberts*, 2020 N.Y. Slip Op. 05074, Second Dept 9-23-20**

INSURANCE LAW, CONTRACT LAW.

THE EXCESS INSURANCE CARRIER WAS NOT BARRED FROM RECOVERY OF THE AMOUNT IT CONTRIBUTED TO THE SETTLEMENT OF A PERSONAL INJURY ACTION BY THE VOLUNTARY PAYMENT DOCTRINE; THE EXCESS INSURANCE CARRIER'S BREACH-OF-THE-COVENANT-OF-GOOD-FAITH ACTION AGAINST THE PRIMARY CARRIER PROPERLY SURVIVED SUMMARY JUDGMENT.

The Second Department determined the excess insurance carrier, MetLife, could maintain an action against the primary liability carrier, GEICO, for breach of the implied covenant of good faith and fair dealing, alleging bad faith. GEICO unsuccessfully argued the voluntary payment doctrine barred MetLife from recovering the amount it contributed to the settlement of the personal injury action stemming from an auto accident: " 'The voluntary payment doctrine bars recovery of payments voluntarily made with full knowledge of the facts, and in the absence of fraud or mistake of material fact or law' ... . However, the voluntary payment doctrine does not bar an excess insurance carrier, such as MetLife, that contributed to a settlement of an underlying action from seeking to recover its settlement contribution from a primary insurance carrier, such as GEICO, based on the primary carrier's alleged bad faith. Despite an excess insurance carrier's decision to contribute to a settlement, an excess insurance carrier may later maintain an action against a primary insurance carrier for breaching its duty of good faith in defending and settling claims over which it exercised exclusive control, provided that the excess insurance carrier reserved its rights against the primary insurance carrier at the time of the settlement ... . An insurer may be

held liable for breaching its duty of good faith ... , and a primary liability insurer owes an excess insurance carrier the same duty of good faith as the primary liability insurer owes its insureds ...". ***Metropolitan Prop. & Cas. Ins. Co. v. GEICO Gen. Ins. Co.*, 2020 N.Y. Slip Op. 05045, Second Dept 9-23-20**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

A COMPONENT OF A TOWER CRANE WAS BEING HOISTED WHEN IT SWUNG TO THE SIDE AND PINNED PLAINTIFF; PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT ON A LABOR LAW § 241(6) CAUSE OF ACTION SHOULD HAVE BEEN GRANTED.

The Second Department, reversing (modifying) Supreme Court, determined plaintiff was entitled to summary judgment on a Labor Law § 241(6) cause of action: "The injured plaintiff allegedly was injured in the process of hoisting a component of the tower crane for assembly when the load, which had been stationary for several minutes, suddenly moved, swung to the side, struck the injured plaintiff, and pinned him against a plumber's pipe. * * * ... [T]he plaintiffs were entitled to summary judgment on the issue of liability on so much of the Labor Law § 241(6) cause of action as was predicated upon a violation of 12 NYCRR 23-8.1(f)(2)(i). The plaintiffs established, prima facie, that the load suddenly moved and caused the injured plaintiff's injuries (see 12 NYCRR 23-8.1[f][2][i] ...). In opposition, the defendants failed to raise a triable issue of fact, as '[t]he fact that the plaintiff may have been the sole witness to the accident does not preclude the award of summary judgment in his favor' ... , and '[a]ny comparative negligence on the part of the plaintiff does not preclude liability founded upon a violation of Labor Law § 241(6)' ...". ***Wein v. East Side 11th & 28th, LLC*, 2020 N.Y. Slip Op. 05085, Second Dept 9-23-20**

MEDICAL MALPRACTICE, PERSONAL INJURY, EVIDENCE.

SUPREME COURT SHOULD NOT HAVE DISMISSED THIS DENTAL MALPRACTICE ACTION ON THE GROUND THE PLAINTIFFS' EXPERT WAS NOT QUALIFIED TO RENDER AN OPINION; ANY WEAKNESSES IN THE EXPERT'S AFFIDAVIT WENT TO ITS WEIGHT NOT ITS ADMISSIBILITY.

The Second Department, reversing Supreme Court, determined this dental malpractice action should not have been dismissed. The weaknesses in plaintiffs' expert's affidavit went to the weight of her opinion as evidence, not its admissibility: "The Supreme Court granted that branch of the motion, determining that the defendant demonstrated his prima facie entitlement to judgment as a matter of law dismissing the dental malpractice cause of action insofar as asserted against him, and that the expert affirmation submitted by the plaintiffs in opposition lacked probative value because the plaintiffs' expert was not qualified to render an opinion as to the applicable standard of care. ... [T]he affirmation of the plaintiffs' expert was sufficient to demonstrate his qualifications to render opinions as to the applicable standard of care and, under these circumstances, raised triable issues of fact as to whether the defendant deviated from that standard and whether any such deviation was a proximate cause of [plaintiff's] injuries ... . 'Any lack of skill or expertise that the plaintiff's expert may have had goes to the weight of his or her opinion as evidence, not its admissibility' ... . The parties' conflicting expert opinions raised questions of credibility for the trier of fact ...". ***Lesniak v. Huang*, 2020 N.Y. Slip Op. 05044, Second Dept 9-23-20**

MUNICIPAL LAW, CONSTITUTIONAL LAW, CIVIL PROCEDURE.

MOTION TO DISMISS A DECLARATORY JUDGMENT ACTION FOR FAILURE TO STATE A CAUSE OF ACTION SHOULD BE TREATED AS A MOTION FOR A DECLARATORY JUDGMENT IN DEFENDANT'S FAVOR; TWO CAUSES OF ACTION NOT INCLUDED IN THE NOTICE OF CLAIM PROPERLY DISMISSED ON THAT GROUND.

The Second Department determined the motion to dismiss the declaratory judgment action should have been treated as a motion for a declaration in the defendant's favor. The action concerned fines imposed on plaintiff home-owner by NYC for the alleged failure to have the in-home elevator inspected once a year. Plaintiff alleged the relevant regulations were unconstitutional. Plaintiff also included causes of action for breach of contract and promissory estoppel. The contract and estoppel causes of action were dismissed because they were not included in plaintiff's notice of claim. The regulations were deemed constitutional. With regard to the declaratory judgment cause of action and the notice of claim, the court wrote: " 'A motion to dismiss a declaratory judgment action prior to the service of an answer 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' ... . '[W]here a cause of action is sufficient to invoke the court's power to 'render a declaratory judgment . . . as to the rights and other legal relations of the parties to a justiciable controversy' (CPLR 3001; see CPLR 3017[b]), a motion to dismiss that cause of action should be denied' ... . However, upon a motion to dismiss for failure to state a cause of action, a court may reach the merits of a properly pleaded cause of action for a declaratory judgment where 'no questions of fact are presented [by the controversy]' ... . Under such circumstances, the motion to dismiss the cause of action for failure to state a cause of action 'should be treated as one seeking a declaration in [the] defendant's favor and treated accordingly' ... . * * * A timely notice of claim is a condition precedent to maintaining an action against the City of New York (see Administrative Code § 7-201 ...). Here, the notice of claim attached to the complaint fails to include any allegations relating to the plaintiff's causes of action to recover damages for breach of contract and promissory estoppel ...". ***Neuman v. City of New York*, 2020 N.Y. Slip Op. 05052, Second Dept 9-23-30**

MUNICIPAL LAW, ENVIRONMENTAL LAW, CIVIL PROCEDURE.

THE STATE HAS NOT PREEMPTED A MUNICIPALITY'S ABILITY TO REGULATE THE PROCESSING OF WASTE; THEREFORE, EVEN THOUGH THE STATE HAD ISSUED A PERMIT ALLOWING THE PROCESSING OF 500 TONS OF WASTE PER DAY, THE VILLAGE'S ACTION FOR A PERMANENT INJUNCTION REDUCING THE ALLOWED AMOUNT OF WASTE SHOULD NOT HAVE BEEN DISMISSED.

The Second Department, reversing Supreme Court, determined the village's request for a preliminary injunction limiting the amount of waste that could be processed by defendant recycling company was properly denied, but the action seeking a permanent injunction should not have been dismissed. The Department of Environmental Conservation (DEC) had issued a temporary emergency permit allowing the defendant to process 1100 tons of waste per day and the defendant applied to make 1100 tons per day permanent. The village sought an injunction imposing the 2008 limit of 370 tons per day. While the preliminary injunction was pending, the DEC issued a permit imposing a daily waste limit of 500 tons per day, which obviated the need for the preliminary injunction. But, because the state has not preempted the ability of a municipality to regulate the amount of waste, the permanent injunction action should not have been dismissed: "... [T]he Supreme Court erred in determining, in effect, that it did not have the authority to issue declaratory or injunctive relief limiting the maximum amount of waste that could be processed at the facility in an amount less than that permitted by the DEC. Indeed, 'the State has not preempted local legislation of issues related to municipal solid waste management' ... . Thus, the DEC's issuance of the 2016 renewal permit did not per se preclude the court from considering the merits of the causes of action asserted in the Village's complaint. * * * ... [A]s a practical matter, the DEC's issuance of the [500 ton per day] permit largely obviated the need for an order preliminarily enjoining the defendants ... . However, the Supreme Court had an insufficient legal or factual basis, at this preliminary stage, to deny the Village's request for permanent injunctive relief precluding [defendant] from exceeding the 2008 limits. Indeed, if the Village is ultimately able to establish, at trial, that the defendants breached the terms of a prior agreement entered into between the Village and [defendant], or that the facility's operation in excess of the 2008 limits constitutes a nuisance, or that the facility is operating in violation of the Village's zoning code, then the Village may well be entitled to permanent injunctive relief as an appropriate remedy ...". ***Incorporated Vil. of Lindenhurst v. One World Recycling, LLC*, 2020 N.Y. Slip Op. 05037, Second Dept 9-23-20**

MUNICIPAL LAW, INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS.

AS A MATTER OF PUBLIC POLICY AN INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS CAUSE OF ACTION CANNOT BE BROUGHT AGAINST A GOVERNMENTAL ENTITY.

The Second Department, reversing Supreme Court, determined defendant city's motion for summary judgment in this false arrest and imprisonment, malicious prosecution, civil rights violation, negligent hiring and retention and intentional infliction of emotional distress action should have been granted, in large part because there was probable cause for defendant's arrest. The court noted that an intentional infliction of emotional distress cause of action cannot be brought against a municipality: "... [T]he defendants established their prima facie entitlement to judgment as a matter of law dismissing the cause of action to recover damages for intentional infliction of emotional distress, since '[i]t is well settled that public policy bars claims sounding in intentional infliction of emotional distress against a governmental entity' ...". ***Rapuzzi v. City of New York*, 2020 N.Y. Slip Op. 05067, Second Dept 9-23-30**

PERSONAL INJURY.

DEFENDANT DRIVER DID NOT DEMONSTRATE HE KEPT A PROPER LOOKOUT IN THIS VEHICLE-BICYCLE COLLISION CASE; THE PLAINTIFF BICYCLIST STRUCK THE REAR DRIVER'S SIDE DOOR WHEN DEFENDANT TURNED LEFT INTO A CAR WASH; DEFENDANT'S SUMMARY JUDGMENT MOTION SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined defendant's motion for summary judgment in this vehicle-bicycle collision case should not have been granted: "The plaintiff commenced this action to recover damages for personal injuries he allegedly sustained when, while riding a bicycle, he came into contact with the rear driver's side of a motor vehicle that was operated by the defendant, as it was turning left into a car wash. ... An operator of a motor vehicle traveling with the right-of-way has an obligation to keep a proper lookout and see what can be seen through the reasonable use of his or her senses to avoid colliding with other vehicles ... . Since there can be more than one proximate cause of an accident, a defendant moving for summary judgment is required to make a prima facie showing that he or she is free from fault ... . Here, when questioned at his deposition, the defendant admitted that in the short period leading up to the accident, he could not recall where he was looking. The defendant further admitted that he did not see the plaintiff prior to impact and only realized there was an accident when he heard the impact to the rear driver's side of his vehicle. Accordingly, the defendant failed to demonstrate, prima facie, that he kept a proper lookout and that his alleged negligence did not contribute to the happening of the accident ...". ***Carias v. Grove*, 2020 N.Y. Slip Op. 05029, Second Dept 9-23-20**

PERSONAL INJURY, EMPLOYMENT LAW, UNEMPLOYMENT INSURANCE, LABOR LAW, CIVIL PROCEDURE, APPEALS, EVIDENCE.

DESPITE THE ALLEGATION THAT THE DRIVER HAD LOGGED OFF THE UBER APP PRIOR TO THE PEDESTRIAN-VEHICLE ACCIDENT, QUESTIONS OF FACT PRECLUDED SUMMARY JUDGMENT ON THE VICARIOUS LIABILITY THEORY; THE UNEMPLOYMENT INSURANCE APPEAL BOARD'S FINDING THAT THE DRIVER WAS EMPLOYED BY UBER WAS NOT ENTITLED TO PRECLUSIVE EFFECT; ISSUE NOT RAISED BELOW PROPERLY CONSIDERED ON APPEAL.

The Second Department, reversing (modifying) Supreme Court in this pedestrian-vehicle accident case, determined: (1) a ruling by the Unemployment Insurance Appeal Board finding that defendant driver was an employee of defendant Uber was not entitled collateral-estoppel effect pursuant to Labor Law § 623(2); (2) although the Labor Law § 623(2) argument was not raised below, it raised a question of law which could not have been avoided below and therefore was considered on appeal; (3) the claim that defendant driver had logged off the Uber app at the time of the accident did not warrant summary judgment in favor of Uber on the vicarious liability theory: "An action may be considered to be within the scope of employment, thus rendering an employer vicariously liable for the conduct, when 'the employee is engaged generally in the business of the employer, or if the act may be reasonably said to be necessary or incidental to such employment' ... . Whether an employee was acting within the scope of his or her employment is generally a question of fact for the jury ... . Here, contrary to Uber's contention, the averments [that the driver] had logged off of the Uber app 40 minutes before the accident were simply insufficient, without more, to eliminate all questions of fact as to whether Hussein was acting within the scope of his alleged employment with Uber at the time of the incident ...". ***Uy v. Hussein*, 2020 N.Y. Slip Op. 05080, Second Dept 9-23-30**

PERSONAL INJURY, EVIDENCE.

A PARTY'S ADMISSION IN AN UNCERTIFIED POLICE REPORT IS NO LONGER ADMISSIBLE IN THE 2ND DEPARTMENT AND DECISIONS TO THE CONTRARY SHOULD NO LONGER BE FOLLOWED.

The Second Department, in a full-fledged opinion by Justice Connolly, reversing Supreme Court, noting prior decisions to the contrary should no longer be followed, determined a party's hearsay admission in an uncertified police report is not admissible. Therefore, plaintiff's motion for summary judgment in this rear-end collision case should not have been granted: "At the first level of hearsay, the report itself must be admissible. A properly certified police accident report is admissible where 'the report is made based upon the officer's personal observations and while carrying out police duties' ... . CPLR 4518(c) provides that the foundation for the admissibility of, inter alia, the records of a department or bureau of a municipal corporation or of the state may be laid through a proper certification ... . CPLR 4518(c) 'is governed by the same standards as the general business record exception' ... . Thus, the certification must 'set forth' ... that the record 'was made in the regular course of any business and that it was the regular course of such business to make it, at the time of the act, transaction, occurrence or event, or within a reasonable time thereafter' (CPLR 4518[a]). * * * Although a line of cases from our Court held that an uncertified police report constitutes inadmissible hearsay ... , a separate line of cases anomalously espoused a carve-out to that rule, holding that a party's admission in an uncertified police report is admissible against that party. Although a party's admission is an exception to the hearsay rule ... , it is not logically consistent to hold that such admission may be received into evidence where the business record containing the purported admission is not itself in admissible form. Stated differently, a party's admission contained within a police accident report may not be bootstrapped into evidence if a proper foundation for the admissibility of the report itself has not been laid." ***Yassin v. Blackman*, 2020 N.Y. Slip Op. 05090, Second Dept 9-23-20**

PERSONAL INJURY, MUNICIPAL LAW.

OWNER OF OWNER-OCCUPIED TWO-FAMILY RESIDENCE IS EXEMPT FROM LIABILITY FOR A SIDEWALK SLIP AND FALL PURSUANT TO THE NYC ADMINISTRATIVE CODE AND WAS NOT LIABLE UNDER THE COMMON LAW; DEFENDANT'S SUMMARY JUDGMENT MOTION SHOULD HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court in this sidewalk slip and fall case, determined defendant property owner was exempt from liability under the administrative code and common law: " 'Administrative Code of the City of New York § 7-210, which became effective September 14, 2003, shifted tort liability for injuries arising from a defective sidewalk from the City to the abutting property owner, except for sidewalks abutting one-, two-, or three-family residential properties that are owner occupied and used exclusively for residential purposes' (... see Administrative Code of City of NY § 7-210[b]). Here, the defendants established, prima facie, that the subject property abutting the public sidewalk was a two-family, owner-occupied residence, and thus, that they are entitled to the exemption from liability for owner-occupied residential property ... . The defendants also established that they could not be held liable for the plaintiff's alleged injuries under common-law principles. 'Absent the liability imposed by statute or ordinance, an abutting landowner is not liable to a passerby on a public sidewalk for injuries resulting from defects in the sidewalk unless the landowner either created the defect or caused it to occur by special use' ... . The defendants established, prima facie, that they did not create the defective condition

that allegedly caused the plaintiff's fall or make a special use of that area of the sidewalk ...". ***Osipova v. London*, 2020 N.Y. Slip Op. 05053, Second Dept 9-23-30**

THIRD DEPARTMENT

DEFAMATION, PRIVILEGE.

THE STATEMENTS MADE ABOUT PLAINTIFF WERE PROTECTED BY QUALIFIED PRIVILEGE; PLAINTIFF WAS UNABLE TO SHOW THE STATEMENTS WERE MOTIVATED SOLELY BY MALICE; THE DEFAMATION ACTION WAS PROPERLY DISMISSED.

The Third Department determined plaintiff's defamation action was properly dismissed. Plaintiff was accused by a fellow library board member, Hoag, of misappropriating over $20,000 in library funds. A criminal investigation uncovered no wrongdoing and plaintiff brought the defamation suit. The defamatory statements were protected by a qualified privilege because Hoag had an interest in the subject matter and the statements were made to a person with a corresponding interest. Therefore the statements were actionable only if Hoag was motivated solely by malice. The court held the statements were made in good faith, despite evidence that Hoag disliked plaintiff: " 'Courts have long recognized that the public interest is served by shielding certain communications, though possibly defamatory, from litigation, rather than risk stifling them altogether' ... . Those communications include ones protected by the qualified privilege that attaches to a person's good faith communication 'upon a subject in which he or she has an interest, or a legal, moral or societal interest to speak, and . . . made to a person with a corresponding interest' ... . Defendants ... came forward with proof that Hoag made the communication in good faith, with Hoag and other Board members averring that their review of financial records, as well as plaintiff's refusal to provide requested documentation, caused them to believe that plaintiff had made numerous questionable, unauthorized and/or undocumented expenditures of library funds. ... Inasmuch as the proof reflects that the inquiry into library spending by Hoag and other Board members was at least part of what led Hoag to accuse plaintiff of misappropriating funds, 'even if [Hoag] disliked plaintiff or possessed some ill will towards her, plaintiff has failed to make an evidentiary showing that [Hoag was] motivated by malice alone in making the statement[]'...". ***Macumber v. South New Berlin Lib.*, 2020 N.Y. Slip Op. 05113, Third Dept 9-24-20**

DISCIPLINARY HEARINGS (INMATES).

MISBEHAVIOR CHARGES BASED UPON ITEMS ALLEGEDLY FOUND DURING A SEARCH OF PETITIONER'S CELL CONDUCTED WHEN THE PETITIONER WAS NOT PRESENT ANNULLED AND EXPUNGED.

The Third Department annulled the findings of guilt on possessing a weapon and possessing an altered item because defendant was not present during all of the search of his cell before the weapon was discovered: "... [W]ith respect to the charges of possessing a weapon and possessing an altered item, the Attorney General concedes, and we agree, that the findings of guilt as to those charges should be annulled and all references thereto expunged from petitioner's institutional record on the ground that petitioner was not present during all of the search of the cell before the weapon was discovered." ***Matter of Sylvester v. Annucci*, 2020 N.Y. Slip Op. 05109, Third Dept 9-24-20**

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