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FIRST DEPARTMENT

CRIMINAL LAW, EVIDENCE.

A JUROR WHO WAS A RETIRED DETECTIVE ACTED AS AN UNSWORN EXPERT WITNESS IN THE DELIBERATIONS; "MOLINEUX" EVIDENCE DEFENDANT LOOKED AT PORNOGRAPHY BEFORE ALLEGEDLY COMMITTING THE SEX-RELATED OFFENSES SHOULD NOT HAVE BEEN ADMITTED.

The First Department, reversing defendant's sex abuse and burglary convictions, determined: (1) a juror who was a retired detective acted as an unsworn expert witness in the deliberations; and (2) evidence defendant looked at pornography before allegedly committing the crimes was not necessary to prove identity and any probative value was outweighed by the prejudicial effect: "... [A] juror who was a retired detective opined on the feasibility of DNA and fingerprint extraction, the likelihood that tests were conducted and evidence was suppressed regarding a set of keys that were in evidence, and the probability that defendant was lying based on his speech patterns and body language. These opinions, which were communicated to and apparently influenced the jury, were within the scope of the juror's specialized expertise and were explicitly offered on the basis thereof, and at least some of these opinions concerned material issues, including defendant's credibility and whether he entered the victim's apartment by mistake ... . [E]vidence that defendant accessed a pornography website on the phone shortly before committing the charged offense should have been excluded at trial as improper propensity evidence. This evidence was not admissible to establish defendant's intent in sexually abusing the victim, which could be readily inferred from the charged conduct itself ... . While it may have been admissible to establish defendant's intent in entering the victim's apartment, its probative value was outweighed by its prejudice ...". ***People v. Alvarez*, 2021 N.Y. Slip Op. 00092, First Dept 1-7-21**

HUMAN RIGHTS LAW, EMPLOYMENT LAW.

PLAINTIFF POLICE OFFICER RAISED QUESTIONS OF FACT IN THIS EMPLOYMENT DISCRIMINATION CASE ALLEGING AN ANTI-GAY HOSTILE WORK ENVIRONMENT.

The First Department, reversing Supreme Court, determined plaintiff police officer's employment discrimination complaint should not have been dismissed. Plaintiff is a gay man and the complaint alleged actionable discrimination claims under the New York State and New York City Human Rights Law (HRL): "... [P]laintiff was ... exposed to two sergeants who quickly surmised, based on [plaintiff's] responses to their constant homophobic slurs directed at civilians and gay officers, that plaintiff was gay. Other officers joined in, condoned and encouraged by the sergeants, and plaintiff thereafter endured over a year of homophobic derision, harassment, and verbal abuse. The foregoing establishes a claim for employment discrimination, via hostile work environment, under the State and City HRLs ... . [P]laintiff was repeatedly required to enter a holding cell, by himself, with prisoners still inside, while plaintiff carried metal and wooden cleaning implements. This was potentially dangerous, as plaintiff could have been overwhelmed and attacked by the prisoners. ... Plaintiff was also required to go on foot patrol alone during the midnight shift in dangerous areas at the 77th Precinct; other officers patrolled with partners." ***Doe v. New York City Police Dept.*, 2021 N.Y. Slip Op. 00009, First Dept 1-5-21**

INSURANCE LAW, CONTRACT LAW.

AN ANSWER TO AN AMBIGUOUS QUESTION ON AN APPLICATION FOR INSURANCE COVERAGE IS NOT A MATERIAL MISREPRESENTATION; THEREFORE THE ANSWER DID NOT VOID THE POLICY WHICH REMAINS IN FULL FORCE AND EFFECT.

The First Department, reversing Supreme Court, determined a question in the application for insurance coverage was ambiguous. Therefore the answer to the question was not a material misrepresentation and the policy remains in full force and effect: "A misrepresentation in an insurance application is material, voiding the policy ab initio, if, had the true facts been known, either the insurer would not have issued the policy or would have charged a higher premium ... . Even an innocent misrepresentation is sufficient to void the policy ... . However, 'an answer to an ambiguous question on an insurance application cannot be the basis for a claim of misrepresentation' in procuring insurance ... . Here, on defendants-respondents' insurance application submitted to plaintiff, Question 9, which asked 'Any uncorrected code violations?' is ambiguous. While the plain language asks whether there are 'any uncorrected fire code violations' and not uncorrected fire code notices

of violation, different witnesses provided five different understandings as to what the question was asking. In any event, this Court has used the term 'violation' to mean the issuance of a citation ... . Indeed, the question is not even posed as a complete sentence but a sentence fragment lacking a verb, which could have clarified the question." ***Starr Indem. & Liab. Co. v. Monte Carlo, LLC*, 2021 N.Y. Slip Op. 00044, First Dept 1-5-21**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

THE ACCIDENT WAS NOT THE TYPE OF GRAVITY-RELATED INCIDENT COVERED BY LABOR LAW § 240(1); BUT THERE WAS A QUESTION OF FACT WHETHER THE GENERAL CONTRACTOR WAS LIABLE PURSUANT TO LABOR LAW § 200.

The First Department, reversing Supreme Court, determined the Labor Law § 240(1) cause of action was properly dismissed but the Labor Law § 200 cause of action should not have been dismissed. Plaintiff was injured when a pipe rolled over his foot, not the type of gravity-related accident covered by Labor Law § 240(1). But the accident related to the means and methods of the work over which the defendant general contractor (Gilbane) may have exercised supervisory control: "Plaintiff was injured while employed by nonparty Titan Industrial Corporation (TIC) when a pipe rolled onto his foot. On the day of the accident, plaintiff's foreman instructed plaintiff and his two coworkers to insert some pipes under a concrete planter to relocate it. Plaintiff and his coworkers were pushing and pulling the planter from the sides, while the foreman was pushing it with a bobcat, when one of the pipes rolled over plaintiff's foot, causing an injury. ... The operation, according to plaintiff's foreman, was normally performed with two Bobcats, one pushing and one pulling the load; in this case, however, the operation was performed with only one Bobcat because the others were in use elsewhere on the site. Gilbane required that onsite Bobcat operators be licensed and kept track of all such operating engineers; in the event an unlicensed person were found to be operating a Bobcat contrary to instructions, the subcontractor would be notified by Gilbane and instructed to shut down the equipment. It is undisputed that the foreman who was operating the Bobcat involved in plaintiff's accident lacked the required license and, if [the onsite supervisor's] testimony is to be credited, should have been prohibited from doing so by Gilbane." ***Lemache v. MIP One Wall St. Acquisition, LLC*, 2021 N.Y. Slip Op. 00019, First Dept 1-5-21**

PERSONAL INJURY, EVIDENCE.

QUESTIONS OF FACT WHETHER DEFENDANT HAD CONSTRUCTIVE NOTICE OF THE RAISED SIDEWALK FLAG AND WHETHER THE DEFECT WAS TRIVIAL IN THIS SLIP AND FALL CASE.

The First Department, reversing Supreme Court, determined there were questions of fact about whether defendant had constructive notice of a raised sidewalk flag and whether the defect was trivial in this slip and fall case: "Although the property manager states that the premises were regularly inspected, and any condition observed would have been reported to him, reference to a generalized inspection practice 'is insufficient to satisfy defendant['s] burden of establishing that [he] lacked notice of the alleged condition of the sidewalk prior to the accident' ... . As a general rule, whether a defect is trivial depends on 'the facts presented, including the width, depth, elevation, irregularity and appearance of the defect along with the time, place and circumstance of the injury' ... . The relevant inquiry is whether the defect was 'difficult for a pedestrian to see or to identify as a hazard or difficult to pass over safely on foot in light of the surrounding circumstances' ... . Although defendant relies on photographs to prove his defense that the defect is trivial, summary judgment should not be granted where, as here, 'the dimensions of the alleged defect are unknown and the photographs and descriptions inconclusive' ...". ***Trinidad v. Catsimatidis*, 2021 N.Y. Slip Op. 00047, First Dept 1-5-21**

THIRD DEPARTMENT

CRIMINAL LAW, EVIDENCE.

THE TRAFFIC STOP AND CANINE SEARCH WERE JUSTIFIED; THE DISSENT ARGUED THE CANINE SEARCH WAS NOT.

The Third Department, over a dissent, determined the traffic stop was valid and the extended detention for a canine search was justified. The dissent argued the canine search was not justified: "The trooper testified that it was fully dark at the time of the stop and that he and defendant had their vehicles' headlights on, as did other vehicles passing on the roadway. When the trooper turned off his headlights briefly to check the license plate light, he observed that it did not illuminate the plate. Thus, it was 'objectively reasonable' for the trooper to conclude that the requisite visibility did not exist and that a traffic violation had been committed ... . Additionally, the trooper was entitled to rely upon the investigator's previous observation that defendant was driving without a seatbelt — a separate traffic violation that also provided probable cause for the stop ... . [T]he trooper's observations of defendant engaging in behaviors commonly seen in outdoor drug transactions at a location known for such activity, his 'slow roll response' and furtive movements after the trooper initiated the stop and his evasive, inconsistent answers to the trooper's questions created a founded suspicion that criminal activity was afoot ... . Thus, the trooper properly extended the stop beyond its initial justification and conducted the canine search — which,

in any event, took place only nine minutes after the initial stop and, according to the trooper, was completed in less than a minute ...". ***People v. Blandford*, 2021 N.Y. Slip Op. 00058, Third Dept 1-7-21**

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

THE DEBT WAS ACCELERATED WHEN THE BANKRUPTCY STAY WAS LIFTED; THE FORECLOSURE ACTION WAS THEREFORE TIME-BARRED; DISAGREEING WITH THE 2ND DEPARTMENT, THE DEFENDANTS DID NOT NEED TO INTERPOSE A COUNTERCLAIM TO CANCEL THE MORTGAGE PURSUANT TO RPAPL 1501.

The Third Department, in a full-fledged opinion by Justice Clark, determined the debt was accelerated when the automatic bankruptcy stay was lifted. Therefore the foreclosure action was untimely and the mortgage was properly cancelled pursuant to RPAP 1501: "... [T]he mortgage was accelerated on December 8, 2011, the date on which the bankruptcy court issued the order lifting the automatic bankruptcy stay as to plaintiff's predecessor in interest and its assignees and/or successors in interest ... . By filing a proof of claim in the bankruptcy proceeding and shortly thereafter seeking affirmative relief from the automatic bankruptcy stay, plaintiff's predecessor in interest communicated a clear and unequivocal intent to accelerate the entire mortgage debt ... . Supreme Court did not err in discharging and canceling the mortgage. RPAPL 1501 (4) states, as relevant here, that, where the statute of limitations period for the commencement of a mortgage foreclosure action has expired, 'any person having an estate or interest in the real property subject to such encumbrance may maintain an action . . . to secure the cancellation and discharge of record of such encumbrance, and to adjudge the estate or interest of the plaintiff in such real property to be free therefrom' … . Contrary to the Second Department, we do not read RPAPL 1501 (4) as stating that the cancellation and discharge of a mortgage can only be obtained by commencing an action or interposing a counterclaim for such relief ... . [D]efendants did not interpose a counterclaim seeking to discharge and cancel the mortgage. However, defendants requested, in their answer, dismissal of the complaint and such 'other and further relief as [Supreme Court] deem[ed] just and equitable' and thereafter specifically requested in their cross motion that the mortgage be discharged and canceled." ***MTGLQ Invs., L.P. v. Wentworth*, 2021 N.Y. Slip Op. 00064, Third Dept 1-7-21**

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