NEW YORK APPELLATE DIGEST, LLC

Weekly Newsletter
2-1-21 – 2-5-21

An Organized Compilation of the Summaries of Selected Decisions Released the Week of 2-1-21 – 2-5-21 by the First, Second, Third and Fourth Departments. The Entries in the Table of Contents Link to the Summaries Which Link to the Decisions on the Official New York Courts Website. Click on "Table of Contents" in the Header on Any Page to Return There.

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SETTLEMENT CONFESSIONS OF JUDGMENT WERE VALID AND SHOULD NOT HAVE BEEN VACATED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the settlement confessions of judgment were valid and should not have been vacated. The Second Department noted that vacating a judgment entered by filing a confession of judgment requires bringing a plenary action, which the defendants did not do. But, because Supreme Court reached the merits, the Second Department reversed on the merits:

"Generally, a person seeking to vacate a judgment entered upon the filing of an affidavit of confession of judgment must commence a separate plenary action for that relief"… . Here, as acknowledged by the Supreme Court in its order, the grounds for vacatur relied upon by the defendants do not fall within an exception to the general rule. Accordingly, the court should have denied the defendants' motion for failure to commence a plenary action … . However, the court did address the merits of the defendants' motion, and in the interest of judicial economy, we also consider the merits.

"Construction of an unambiguous contract is a matter of law, and the intention of the parties may be gathered from the four corners of the instrument and should be enforced according to its terms" … . Here, contrary to the Supreme Court's determination, there is no language in the merchant agreements limiting the plaintiff's authority to file the settlement confessions of judgment. Moreover, the settlement agreement and settlement confessions of judgment clearly and unambiguously permitted the plaintiff to file the settlement confessions of judgment in the event the defendants breached the terms of the settlement agreement. Ace Funding Source, LLC v Myka Cellars, Inc., 2021 NY Slip Op 00538, Second Dept 2-3-21

Practice Point: As a general rule, vacation of a judgment entered upon filing an affidavit of confession of judgment requires a separate plenary action.

CIVIL PROCEDURE, NEGLIGENCE.

AFTER TWICE ADMITTING OWNERSHIP OF THE AREA OF PLAINTIFF'S SLIP AND FALL, DEFENDANTS SHOULD NOT HAVE BEEN ALLOWED TO AMEND THEIR ANSWER TO DENY OWNERSHIP AFTER THE STATUTE OF LIMITATIONS HAD RUN (FIRST DEPT).

The First Department, reversing Supreme Court, determined defendants, after twice acknowledging ownership of the area of plaintiff's slip and fall, should not have been allowed to amend their answer to deny ownership after the statute of limitations had run:

[Defendants] may not amend their answer in this manner after the statute of limitations has expired; the amendment would be too prejudicial to plaintiff … . Jackson v 170 W. End Ave. Owners Corp., 2021 NY Slip Op 00625, First Dept 2-4-21

CIVIL PROCEDURE.

COMPREHENSIVE DISCUSSION OF THE PROCEDURES AND CRITERIA FOR THE ISSUANCE AND QUASHING OF SUBPOENAS IN THIS FRAUD ACTION STEMMING FROM HIGH CREDITWORTHINESS RATINGS GIVEN TO RESIDENTIAL MORTGAGE-BACKED SECURITIES (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined plaintiff bank's motion to quash defendant's subpoena of a nonparty former employee of plaintiff should not have been granted. The decision provides an extensive discussion of the procedures and criteria for subpoenas and motions to quash, and refused to apply the standing requirement for governmental agency investigative subpoenas. . Plaintiff bank had invested in residential mortgage-backed securities (RMBS) to which defendant had given high creditworthiness ratings. The action sounded in fraud:

… [W]e reject defendant's contention that plaintiff was not entitled to seek to quash the nonparty subpoena. CPLR 2304, which authorizes a motion to quash a subpoena, provides as relevant here that, "[i]f the subpoena is not returnable in a court, a request to withdraw or modify the subpoena shall first be made to the person who issued it and a motion to quash . . . may thereafter be made in the supreme court." …

… [P]laintiff, in moving to quash the nonparty subpoena, failed to meet its burden of establishing "either that the discovery sought is 'utterly irrelevant' to the action[s] or that the 'futility of the process to uncover anything legitimate is inevitable or obvious' " … . …

… [P]laintiff has not shown that the nonparty's testimony would be utterly irrelevant or that it was inevitable or obvious that taking the nonparty's deposition would be futile to uncovering anything legitimate … . …

… [P]laintiff's own submissions suggest that the nonparty has at least some knowledge of plaintiff's underwriting practices with respect to the non-prime loans at issue here … . M&T Bank Corp. v Moody's Invs. Servs., Inc., 2021 NY Slip Op 00706, Fourth Dept 2-5-21

Practice Point: To quash a nonparty subpoena the moving party must demonstrate that the nonparty's testimony would be utterly irrelevant or futile.

CIVIL PROCEDURE.

IT IS REVERSIBLE ERROR TO ENTERTAIN A MOTION FOR A DIRECTED VERDICT BEFORE THE OPPONENT HAS PRESENTED EVIDENCE AND CLOSED HIS OR HER CASE (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined that the motion for a directed verdict should not have been granted because defendant had not yet presented any evidence:

"[I]t is reversible error to grant a motion for a directed verdict prior to the close of the party's case against whom a directed verdict is sought" … . "By its express language, [CPLR 4401] authorizes the grant of a motion for a directed verdict only if the opponent of the motion has presented evidence and closes his or her case. The

requirement that each party await the conclusion of the other's case before moving for judgment [under CPLR 4401] is designed to afford all of them a day in court . . . Accordingly, the timing of a motion prescribed by CPLR 4401 must be strictly enforced and the grant of a dismissal [pursuant to CPLR 4401] prior to the close of the opposing party's case will be reversed as premature, even if the ultimate success of the opposing party in the action is improbable" … . Here, it is undisputed that plaintiff's motion was granted before defendant had an opportunity to present any evidence. Thus, it was error for the court to entertain plaintiff's motion … . Veley v Manchester, 2021 NY Slip Op 00760, Fourth Dept 2-5-21

Practice Point: A court cannot entertain a motion for a directed verdict before the conclusion of the opposing party's case.

CIVIL PROCEDURE.

PLAINTIFF IN THIS TAX LIEN FORECLOSURE ACTION DID NOT DEMONSTRATE DEFENDANT WAS PROPERLY SERVED WITH THE NOTICE TO REDEEM; THEREFORE PLAINTIFF WAS NOT ENTITLED TO ATTORNEY'S FEES FROM THE DEFENDANT (SECOND DEPT).

The Second Department determined plaintiff was not entitled to attorney's fees in this tax lien foreclosure action because plaintiff did not demonstrate defendant was properly served with the notice to redeem:

Pursuant to Nassau County Administrative Code § 5-51.0(c), prior to the commencement of this action, the plaintiff was required to serve the defendant with a notice to redeem "by personal service, as defined in the Civil Practice Law and Rules of the State of New York" (see Nassau County Administrative Code § 5-51.0[a]). Here, the plaintiff purportedly served the defendant with the notice to redeem by "nail and mail" service (see CPLR 308[4]). However, contrary to the plaintiff's contention, this service was ineffective, as the plaintiff failed to exercise the requisite due diligence in first attempting to serve the defendant pursuant to CPLR 308(1) or (2) … .

Where, as here, a plaintiff fails to properly serve the notice to redeem prior to commencing a foreclosure action, the plaintiff is precluded from recovering attorney's fees from the person to whom the notice was required to be sent, provided that the person "offers to pay the penalties allowed by law at any time before final judgment is entered" (Nassau County Administrative Code § 5-51.0[f]). Here, the defendant offered to pay the penalties allowed by law in a letter … , nearly one month prior to entry of the final judgment … . DBW TL Holdco 2014, LLC v Kirk, 2021 NY Slip Op 00543, Second Dept 2-3-21

CIVIL PROCEDURE.

RATHER THAN DISMISSING THE COMPLAINT, SUPREME COURT SHOULD HAVE ORDERED THE NECESSARY PARTIES SUMMONED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the motion to dismiss should not have been granted on the ground plaintiffs failed to join necessary parties. The court should have ordered the parties summoned:

Necessary parties are those "who ought to be parties if complete relief is to be accorded between the persons who are parties to the action or who might be inequitably affected by a judgment in the action" (CPLR 1001[a] …). Here, the Supreme Court correctly determined that the Limited Partnership and the third limited partner, Ai Ying Zheng, are necessary parties to this action … . …

… [A]s the Limited Partnership and Ai Ying Zheng are subject to the jurisdiction of the Supreme Court, the court should have "order[ed][them] summoned," rather than granting the motion to dismiss the complaint for failure to join necessary parties (CPLR 1001[b]…). Ji Juan Lin v Bo Jin Zhu, 2021 NY Slip Op 00550, Second Dept 2-3-21

Practice Point: If a necessary party was not joined and the court has jurisdiction over the party, the court must not dismiss the complaint but rather must order the party summoned pursuant to CPLR 1001 [b].

CIVIL PROCEDURE.

THE DUE PROCESS PRONG OF LONG-ARM JURISDICTION WAS NOT DEMONSTRATED WITH RESPECT THE GERMAN MANUFACTURER; IN ADDITION THE FAILURE TO WARN CAUSE OF ACTION WAS PREEMPTED BY THE FEDERAL MEDICAL DEVICE AMENDMENTS TO THE FDA REGULATIONS (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined the due process prong of long-arm jurisdiction was not satisfied and the failure to warn allegation was preempted by Federal Drug Administration (FDA) regulations under the Medical Device Amendments (MDA). The medical device was not described in the decision but it apparently involves treatment of the eye:

Plaintiff has not shown a regular flow of Morcher's [the German manufacturer's] goods into New York, advertising directed at New York, the delivery of Morcher's goods into the stream of commerce with the expectation of purchase in New York, or any other facts that may arguably have established jurisdiction … . …

It is undisputed that the device in question is a class III medical device with respect to which the federal government has established requirements. Thus, we must determine whether plaintiff's "common-law claims are based upon New York requirements with respect to the device that are 'different from, or in addition to,' the federal ones, and that relate to safety and effectiveness" … . If so, those claims are preempted by the MDA … . If, on the other hand, the common-law claims provide a damages remedy and are premised on a violation of the regulations of the Food and Drug Administration (FDA), they " 'parallel,' rather than add to, federal requirements" and are not preempted … . … Plaintiff … fails to identify any federal statute or regulation that requires defendants to provide warnings to consumers or their physicians … . Barone v Bausch & Lomb, Inc., 2021 NY Slip Op 00745, Fourth Dept 2-5-21

Practice Point: The due process prong of long-arm jurisdiction requires a showing of a regular flow of the party's goods into New York, advertising directed at New

York, or the delivery of goods in the stream of commerce with the expectation of purchase in New York.

CIVIL PROCEDURE.

THE JUDGMENT LIEN WAS NOT DOCKETED UNDER THE SELLER'S SURNAME; THEREFORE THE BUYER'S ACTION FOR A JUDGMENT QUIETING TITLE WAS PROPERLY GRANTED (SECOND DEPT).

The Second Department determined plaintiff-buyer was entitled to judgment on his quiet title cause of action and to a declaration that the property is not subject to the defendant's judgment lien. The judgment was not docketed under the seller's surname:

… [T]he plaintiff demonstrated, prima facie, his entitlement to judgment as a matter of law on the cause of action to quiet title and for a declaration that the real property at issue is not subject to the defendant's judgment lien. In support of his motion, the plaintiff submitted, among other things, the deposition transcript of a supervisor of the Docket Department of the Kings County Clerk's Office (hereinafter the supervisor). The supervisor testified at her deposition that the judgment at issue was not docketed under "Paul"—the surname of the title owner of the property. Thus, no valid lien against the property was created (see CPLR 5018[c][1] …). Moreover, there is no dispute that the plaintiff had no actual or constructive notice of a judgment lien on the property … .

In opposition, the defendant failed to raise a triable issue of fact. Any alleged defects in the docketing procedure employed by the Kings County Clerk's Office are not attributable to a bona fide purchaser of the property … . Charles v Berman, 2021 NY Slip Op 00542, Second Dept 2-3-21

Practice Point: Where a judgment is not docketed under the correct surname there is no valid lien on the judgment debtor's property and a buyer of the property is a bona fide purchaser.

CONTEMPT.

THE CONTEMPT FINDING AND THE $535,000 FINE WERE BASED ON AN ORDER WHICH SUPREME COURT DID NOT HAVE THE JURISDICTION TO ISSUE (FOURTH DEPT).

The Fourth Department, reversing (modifying) Supreme Court, determined the contempt finding and the imposition of a $535,000 fine could not be enforced because it was based on an order which Supreme Court did not have jurisdiction to issue:

… [A]fter the entry of the order on appeal, this Court modified the prior order upon an appeal by defendant … . Defendant had transferred title to the … property to her children while reserving a life interest for herself, and she transferred title to … property to an LLC of which she was the sole owner, but later gifted that LLC to her children … . We stated in our decision that Supreme Court … equitably distributed the … properties "by directing defendant to prepare and execute deeds listing plaintiff as a one-half owner of those properties" … . We held that "[t]he court, however, lacked jurisdiction to do so inasmuch as the children and the LLC were not named as parties to this action" … . We therefore conclude in this appeal that the directive in the prior order requiring defendant to sign those deeds cannot be a basis for a finding of contempt, and we therefore modify the order by vacating the finding of contempt and the imposition of a fine upon that contempt. Jolley v Lando, 2021 NY Slip Op 00679, Fourth Dept 2-5-21

CRIMINAL LAW, ATTORNEYS.

DEFENDANT AND HIS SON WERE REPRESENTED BY THE SAME ATTORNEY; DEFENDANT ALLEGEDLY PLED GUILTY TO ATTEMPTED ASSAULT BECAUSE HE WAS TOLD HIS SON WOULD DO JAIL TIME IF DEFENDANT DID NOT ENTER THE PLEA; BECAUSE OF THE ATTORNEY'S CONFLICT OF INTEREST, DEFENDANT'S MOTION TO WITHDRAW HIS PLEA SHOULD HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing County Court, determined defendant's motion to withdraw his guilty plea should have been granted. Defendant was called to the scene of his son's (Nicholas's) arrest for DWI. Defendant was charged with assaulting one of the officer's at the scene. Both defendant and his son were represented by attorney Ozman. Although defendant maintained he did not assault the officer, but rather was assaulted by the officer as he was frantically trying to find his son, defendant allegedly agreed to plead guilty to attempted assault in order to ensure a good plea deal for his son. Because defendant maintained his innocence in his interview with probation, however, the judge did not abide by the plea agreement and sentenced defendant to incarceration. Prior to sentencing, defendant had hired a new attorney and moved to withdraw his plea:

… [T]he record as a whole demonstrates that the defendant's plea of guilty was motivated, at least in part, by coercive circumstances. The defendant averred, inter alia, that Ozman urged him to plead guilty despite his protestations of innocence because it was "very likely" that Nicholas would otherwise "face 'jail time.'" The record also reflects that the favorable terms of Nicholas' plea offer were conditioned upon the defendant entering a plea of guilty as part of the same plea agreement … . Moreover, the defendant demonstrated a significant possibility of a conflict of interest arising from Ozman's joint representation of the defendant and Nicholas. The defendant's maintenance of his innocence was at odds with Ozman obtaining a favorable plea offer for Nicholas as part of the "package deal," which also required the defendant to enter a plea of guilty … . Thus, the record suggests that the defendant's plea of guilty was induced by consideration other than his desire to obtain more favorable sentencing for himself, and that the defendant was deprived

of representation that was "singlemindedly devoted to his best interests as required by both the Constitution of the United States and the New York State Constitution" … . People v Wentland, 2021 NY Slip Op 00578, Second Dept 2-3-21

Practice Point: Where a father is encouraged to plead guilty to ensure his son will not be sentenced to jail, and both are represented by the same attorney, the father was deprived of his right to counsel.

CRIMINAL LAW, SEXUAL OFFENDER REGISTRATION ACT (SORA).

THE SEXUAL ASSAULT REFORM ACT (SARA), WHICH REQUIRES THAT CERTAIN SEX OFFENDERS RESIDE IN SARA-COMPLIANT HOUSING (AWAY FROM SCHOOL GROUNDS) UPON RELEASE FROM PRISON DOES NOT APPLY TO SEX OFFENDERS WHO HAVE BEEN ADJUDICATED YOUTHFUL OFFENDERS (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, in a full-fledged opinion by Justice Bannister, determined the conditions imposed by the Sexual Assault Reform Act (SARA) requiring certain sex offenders live in SARA-compliant housing upon release (away from school grounds) does not apply to those sex offenders who are adjudicated youthful offenders:

A "sex offender," as defined in the Correction Law, "includes any person who is convicted of any of the [enumerated offenses]" … . A "sex offense" is defined as "a conviction of or a conviction of an attempt to commit [an enumerated crime]" … Additionally, the school grounds mandatory condition as set forth in Penal Law § 65.10 (4-a) (a) expressly applies only to those persons convicted of the enumerated offenses.

When a sentencing court adjudicates a defendant a youthful offender, however, the conviction is "deemed vacated and replaced by a youthful offender finding" … . CPL 720.35 (1) states that a youthful offender adjudication "is not a judgment of conviction for a crime or any other offense," which is in keeping with the "legislative desire not to stigmatize youths [adjudicated youthful offenders] . . . with criminal records triggered by hasty or thoughtless acts" … . Thus, by definition, a youthful

offender is not a convicted sex offender and does not fall within the category of persons intended to be restricted under SARA. People ex rel. Suarez v Superintendent, Livingston Corr. Facility, 2021 NY Slip Op 00705, Fourth Dept 2-5-21

Practice Point: A sex offender who has been adjudicated a youthful offender cannot be compelled to live in Sexual Assault Reform Act (SARA) compliant housing (away from school grounds) upon release from prison.

CRIMINAL LAW.

A NEW TRIAL IS REQUIRED BECAUSE THE JUDGE DID NOT RESPOND TO A NOTE FROM THE JURY (SECOND DEPT).

The Second Department, reversing defendant's conviction, determined the judge committed a mode of proceedings error by not responding to a note from the jury:

… [A] new trial is required based upon the Supreme Court's failure to comply with CPL 310.30, in accordance with the procedures set forth in People v O'Rama (78 NY2d 270, 279). CPL 310.30 "imposes two responsibilities on trial courts upon receipt of a substantive note from a deliberating jury: the court must provide counsel with meaningful notice of the content of the note, and the court must provide a meaningful response to the jury" … . Where a trial court fails to fulfill its responsibility to provide meaningful notice of the content of the note, "a mode of proceedings error occurs, and reversal is . . . required even in the absence of an objection" … .

Here, the jury submitted a note requesting to view a specific portion of surveillance video taken from the victim's building. The Supreme Court failed to notify the parties regarding the existence of the note, failed to read the contents of the note into the record, and failed to respond to the note. People v Everett, 2021 NY Slip Op 00575, Second Dept 2-3-21

CRIMINAL LAW.

DEFENDANT TOOK THE GUN FROM THE VICTIM AND KILLED THE VICTIM IN SELF DEFENSE; THE DEFENDANT'S BRIEF, TEMPORARY POSSESSION OF THE WEAPON AFTER THE SHOOTING DID NOT CONSTITUTE CRIMINAL POSSESSION OF A WEAPON SECOND DEGREE (SECOND DEPT).

The Second Department, reversing defendant's possession of a weapon conviction, over a dissent, determined the temporary possession of the gun did not meet the criteria for criminal possession of a weapon second degree. The gun belonged to the victim. During a struggle with the defendant the gun fell to the ground. Both the defendant and the victim dove for the gun. The defendant retrieved it and shot the victim. The defendant held on to the gun very briefly and then disposed of it. The defendant was acquitted of murder:

As reflected by the fact that the jury acquitted the defendant of the murder charge, based upon the defense of justification, the defendant initially took possession of the gun with a valid legal excuse … , and there is no evidence that the defendant retained the gun beyond opportunities to hand it over to the authorities … . The cases cited by our dissenting colleague are clearly distinguishable, involving situations where a defendant retained possession of a gun until it was found by the police … , retained access to the gun after hiding it in a secure location … , acted furtively when confronted by police with a weapon on his person … , or disposed of the weapon during hot pursuit by the police … .

Indeed, our dissenting colleague acknowledges that turning the gun over to authorities is not an element of temporary and lawful possession … . Here, the defendant retained the gun for a brief period while he looked for his brother, and, not finding him, unloaded the gun and disposed of it in the trash. At trial, when he was asked about his intention, the defendant responded, "[m]y intention this is not my gun. Why hold it." The evidence indicated that the defendant retained the gun for a sufficient time to dispose of it. The fact that he disposed of the gun without turning it into the authorities did not convert his temporary and lawful possession of the gun into illegal possession … . People v Rose, 2021 NY Slip Op 00577, Second Dept 2-3-21

Practice Point: Where the defendant disarms the attacker, uses the gun to shoot the attacker in self-defense and briefly hangs on to the weapon long enough to dispose of it, the possession of the weapon is temporary and lawful.

CRIMINAL LAW.

DEFENDANT WAS ENTITLED TO A HEARING ON HIS MOTION TO VACATE HIS CONVICTION ON THE GROUND THAT DEFENSE COUNSEL WAS INEFFECTIVE FOR FAILING TO MAKE AN ADEQUATE SPEEDY TRIAL MOTION (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined defendant's motion to vacate his conviction on ineffective assistance grounds should not have been denied without a hearing. The motion alleged defense counsel was ineffective for failing to make an adequate speedy trial motion. The Fourth Department found there was a question of fact about whether 88 days should have been excluded from the speedy trial calculation because the defendant was evading arrest:

… [T]he People contended that the speedy trial motion would have been denied even if properly pleaded because defendant was attempting to avoid apprehension and thus the 88 days preceding the People's first statement of readiness were excludable pursuant to CPL 30.30 (4) (c) (i). In denying the CPL 440.10 motion without a hearing, the court concluded that the trial court had ruled that the 88 days between the commencement of the action and the People's initial statement of readiness "was not chargeable to the People[] because defendant evaded arrest." We note, however, that the only evidence in the record supporting the conclusion that defendant was evading arrest was the prosecutor's statement at defendant's arraignment on the indictment that she understood that defendant had "fled the area" and was heading to the New York City area, an assertion that was based solely on the supposition of an unnamed member of the police department's central investigation division. We thus conclude that defendant's submissions "support[] his contention that he was denied effective assistance of counsel . . . and raise[] a factual issue that requires a hearing" … and that "[t]he People submitted nothing in opposition to the motion that would require or indeed allow the court to deny the motion without a hearing" … . People v Reed, 2021 NY Slip Op 00758, Fourth Dept 2-5-21

CRIMINAL LAW.

DEFENDANT WAS NOT INFORMED OF THE DIRECT CONSEQUENCES OF HIS GUILTY PLEA PRIOR TO ENTERING THE PLEA; THEREFORE THE PLEA WAS VACATED (FOURTH DEPT).

The Fourth Department, vacating defendant's guilty plea, determined defendant was not provided with sufficient information about the direct consequences of his guilty prior to entering the plea:

… Supreme Court failed to inform [defendant] that a fine would be imposed and failed to advise him that, following his indeterminate term of imprisonment, he would be subject to a mandatory three-year period of conditional discharge, during which he would be required to install and maintain an ignition interlock device in his vehicle … . …

"The direct consequences of a plea—those whose omission from a plea colloquy makes the plea per se invalid—are essentially the core components of a defendant's sentence: a term of probation or imprisonment, a term of postrelease supervision, a fine"… , and the failure to advise a defendant at the time of his or her guilty plea of a direct consequence of that plea "requires that [the] plea be vacated" … . Here, defendant was advised of the fine and mandatory conditional discharge for the first time immediately prior to sentencing, when the prosecutor stated that defendant would be required to pay "all mandatory fines [and] surcharges" and that the period of incarceration "would be followed by a conditional discharge for the ignition interlock to be enforced." We note that preservation of defendant's contention was not required under the circumstances of this case inasmuch as "defendant did not have sufficient knowledge of the terms of the plea at the plea allocution and, when later advised, did not have sufficient opportunity to move to withdraw [his] plea" … . People v Tung Nguyen, 2021 NY Slip Op 00724, Fourth Dept 2-5-21

CRIMINAL LAW.

FOR CAUSE CHALLENGES TO TWO JURORS SHOULD HAVE BEEN GRANTED (FOURTH DEPT).

The Fourth Department, reversing defendant's conviction, determined the for cause challenges to two jurors should have been granted. Both jurors said they would have difficulty considering each crime separately when the crimes occurred close in time. The judge did not elicit any responses from the two jurors after they expressed their concerns:

… [D]efense counsel questioned each juror as to whether he or she would have trouble separating the proof in the case or understanding that the prosecution had to prove each individual incident beyond a reasonable doubt, as well as whether they could set aside any preconceived notions and consider each incident individually. Two prospective jurors indicated that they were not sure if they could consider each incident separately. Specifically, one prospective juror stated, "I don't know if I could," while a second prospective juror stated, "I'm not sure. Like I'm not sure who said it, like the timeframe like if it was one after another, another day, day, day, I don't know if I can separate it. But if it's like once, you know, a year or three years later this—maybe I would be able to separate it then." …

In response, the court explained to the entire panel that defendant "is presumed to be innocent of each and every one of those [allegations], and the fact that there was something on one day, something on another day, you're going to decide each and every one of those on its own merits." The court also specifically asked the panel if they understood that they had "to decide each one of the cases on their—each one of the charges on their own merit." The prospective jurors remained silent. People v Padilla, 2021 NY Slip Op 00732, Fourth Dept 2-5-21

CRIMINAL LAW.

THE GRAND LARCENY TOOK PLACE IN NEW JERSEY AND IS NOT A "RESULT OFFENSE;" THEREFORE NEW YORK DID NOT HAVE TERRITORIAL JURISDICTION (SECOND DEPT).

The Second Department, reversing County Court, determined the grand larceny indictment should have been dismissed because New York did not have territorial jurisdiction. The grand larceny took place in New Jersey and is not a "result offense:"

Where New York's territorial jurisdiction over an offense is in dispute, the People bear the burden of establishing jurisdiction under CPL 20.20 beyond a reasonable doubt … . Here, the People did not dispute the defendant's claim that none of the elements of the alleged offense occurred in New York, and did not seek to establish, for instance, that the complainant's bank account was located in New York … . Rather, the People argued only that territorial jurisdiction was properly based on CPL 20.20(2)(a) because grand larceny was a "result offense" and the alleged "result" occurred in New York, and the County Court denied the defendant's jurisdictional challenge on this narrow ground.

"When a specific consequence, such as the death of the victim in a homicide case, is an element of an offense, the occurrence of such consequence constitutes the 'result' of such offense. An offense of which a result is an element is a 'result offense'" (CPL 20.10[3]). The elements of larceny are (1) intent to deprive another of property or to appropriate the same to himself or herself or to a third person, and (2) the wrongful taking, obtaining or withholding of such property … . Contrary to the People's contention, since no "specific consequence" is an element of grand larceny in the fourth degree, it follows that larceny in the fourth degree is not a "result offense" within the meaning of CPL 20.10(3) … . People v Cousar, 2021 NY Slip Op 00573, Second Dept 4-3-21

Practice Point: Grand Larceny is not a "result offense." Homicide, in contrast, is a result offense such that the death of the victim in New York would confer jurisdiction. Because all the elements of grand larceny were committed in New Jersey, New York did not have jurisdiction.

CRIMINAL LAW.

THE JUDGE DID NOT MAKE THE REQUIRED INQUIRY TO ENSURE DEFENDANT'S WAIVER OF HIS RIGHT TO COUNSEL FOR THE SORA HEARING WAS KNOWING, INTELLIGENT AND VOLUNTARY; THE NOTICE OF THE SORA HEARING PROVIDED TO DEFENDANT WAS INADEQUATE (FOURTH DEPT).

The Fourth Department, reversing County Court, determined the judge did not conduct the required inquiry to ensure defendant's waiver of his right to counsel for the SORA hearing was knowing, intelligent and voluntary. The Fourth Department also noted that notice of the SORA hearing provided to the defendant was inadequate:

…[D]efendant's purported waiver of the right to counsel is invalid. "It is well settled that defendants have a statutory right to counsel in SORA proceedings" … . In order for a defendant to validly waive his right to counsel, "the court must undertake a 'searching inquiry . . . aimed at [e]nsuring that the defendant [is] aware of the dangers and disadvantages of proceeding without counsel' " … . Such an inquiry ensures that the defendant's waiver is " 'made competently, intelligently and voluntarily' " … .

Here, County Court failed to conduct the necessary searching inquiry and, instead, relied upon defendant's notation on the form notice he received about his SORA classification proceeding that he did "not wish to have counsel appointed." …

… [T]he form notice provided to [defendant] about his SORA classification contained numerous deficiencies. The notice did not fully describe the SORA hearing or the consequences that would follow if defendant failed to appear … . It also appears that the court failed to provide defendant with a "copy of the recommendation received from the [Board of Examiners of Sex Offenders] and any statement of the reasons for the recommendation" … . In providing the requisite notice to defendants pursuant to section 168-n (3), courts should be tracking the language used in that statute instead of giving a shortened summary. People v Huntley, 2021 NY Slip Op 00688, Fourth Dept 2-5-21

CRIMINAL LAW.

WHETHER THE HOUSE FIRE WAS DELIBERATELY SET WAS NOT RELEVANT TO THE ESSENTIAL ELEMENTS OF THE INSURANCE-FRAUD OFFENSES STEMMING FROM OVERSTATING THE VALUE OF DESTROYED ITEMS AND MAKING CLAIMS FOR ITEMS DEFENDANT DID NOT OWN OR POSSESS; THEREFORE THE PROBATIVE VALUE OF THE ARSON INVESTIGATOR'S TESTIMONY OUTWEIGHED ITS PROBATIVE EFFECT; ALTHOUGH THE ERRORS WERE NOT PRESERVED, THE APPEAL WAS CONSIDERED IN THE INTEREST OF JUSTICE (FOURTH DEPT).

The Fourth Department, reversing defendant's conviction, determined the arson investigator's testimony the fire had been deliberately set was irrelevant to the insurance-fraud offenses and was sufficiently prejudicial to require a new trial. The defendant was charged with making false insurance claims for objects alleged to be lost in the house fire:

… [T]he investigator's conclusion was highly prejudicial because it allowed the jury to speculate that defendant burned the house down with all of her possessions inside of it in order to collect the insurance money, which, if true, would be conclusive of her alleged intent to defraud. That prejudice was compounded by the limiting instructions that the court provided to the jury after opening statements. Inasmuch as the court had concluded prior to trial that the evidence in question was relevant and admissible for the purpose of completing the narrative of events, the court appropriately instructed the jury that the evidence would be received only for that limited purpose and, consistent with defendant's request, also instructed the jury that she had not been charged with arson. However, the court further instructed the jury that, "every time you hear the word arson, . . . you should be thinking about not tying the arson to [defendant]." We conclude that the further instruction, if anything, had the effect of linking defendant to the arson in the minds of the jurors. Moreover, the prejudice to defendant was also compounded by the court's failure to issue appropriate limiting instructions when the evidence in question was admitted and during the final charge to the jury … . Although defendant failed to preserve any challenge to the content or timing of the limiting instructions … we exercise our

power to review in the interest of justice her contentions in those respects … . People v Murray, 021 NY Slip Op 00722, Fourth Dept 2-5-21

Practice Point: The defendant was charged with insurance fraud, i.e., overstating the value of items lost in the fire and putting in claims for items she did not own or possess. The jury should not have heard evidence that the fire was deliberately set. Evidence of arson was not necessary to prove the elements of the insurance fraud offenses and was highly prejudicial.

EMPLOYMENT LAW, ARBITRATION, CONTRACT LAW, HUMAN RIGHTS LAW.

UNDER THE TERMS OF THE COLLECTIVE BARGAINING AGREEMENT PLAINTIFF MUST ARBITRATE HIS RACIAL DISCRIMINATION CLAIMS; AFTER THE UNION REFUSED TO ARBITRATE THE CLAIMS PLAINTIFF BROUGHT THE INSTANT HUMAN RIGHTS LAW CAUSES OF ACTION; THE COMPLAINT WAS STAYED PENDING ARBITRATION (SECOND DEPT).

The Second Department, in a comprehensive opinion by Justice Christopher, determined plaintiff's racial discrimination claims were subject to mandatory arbitration under the controlling collective bargaining agreement (CBA). The union had declined to pursue the arbitration of the discrimination claims and plaintiff then commenced the instant action pursuant to the NYS and NYC Human Rights Law. The opinion is to detailed to fairly summarize here. The plaintiff's complaint was stayed pending arbitration:

"[A]rbitration must be preferred unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute" … . An agreement to arbitrate must be "clear, explicit and unequivocal" … . "Arbitration is a matter of contract, and arbitration clauses, which are subject to ordinary principles of contract interpretation, must be enforced according to their terms" … . * * *

… [I]n order for the plaintiff to be required to arbitrate his employment discrimination claims, the CBA must "clearly and unmistakably" waive the

plaintiff's right to proceed in a judicial forum … . Here, the mandatory arbitration clause "clearly and unmistakably" waives the plaintiff's right to proceed in a judicial forum. It explicitly references the employment discrimination statutes that the plaintiff has alleged were violated, and states that "[a]ll such claims shall be subject to the grievance and arbitration procedure . . . as the sole and exclusive remedy for violations." * * *

The Supreme Court's determination to grant that branch of the defendants' motion which was, in effect, pursuant to CPLR 3211(a) to dismiss the complaint was improper. "An agreement to arbitrate is not a defense to an action," and "[t]hus, it may not be the basis for a motion to dismiss" … . However, upon granting that branch of the defendants' motion which was to compel arbitration pursuant to CPLR 7503(a), the court should have stayed the action …, the order granting a motion to compel "shall operate to stay a pending . . . action." Wilson v PBM, LLC, 2021 NY Slip Op 00593, Second Dept 2-3-21

EMPLOYMENT LAW.

HUMAN RIGHTS LAW CLAIMS DID NOT ALLEGE DISCRIMINATION; INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS DOES NOT APPLY TO TERMINATION OF AT WILL EMPLOYMENT; WORKERS' COMPENSATION IS THE EXCLUSIVE REMEDY FOR NEGLIGENCE ACTIONS AGAINST AN EMPLOYER; PUNITIVE DAMAGES NOT AVAILABLE FOR THE EMPLOYMENT DISCRIMINATION OR BREACH OF CONTRACT CAUSES OF ACTION (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined that several of plaintiff's causes of action, as well as claims for punitive damages, should have been dismissed. Plaintiff's lawsuit stemmed from alleged wrongful conduct in terminating the plaintiff's employment and evicting him from a work-provided apartment:

… [P]laintiff alleges that he engaged in "protected activity" when his attorney sent a letter to one or more defendants about an altercation between plaintiff and a neighbor. We agree with defendants that … sending the letter did not constitute

"protected activity" because the letter did not suggest, much less allege, that anyone had engaged in "unlawful discrimination," i.e., conduct prohibited by the [Human Rights Law]. …

… [I]t is well established that "[t]ort causes of action alleging intentional infliction of emotional distress . . . 'cannot be allowed in circumvention of the unavailability of a tort claim for wrongful discharge or the contract rule against liability for discharge of an at-will employee' " … . …

With respect to the fifth and eighth causes of action (negligent infliction of emotional distress and negligent hiring, training, and supervision, respectively), it is well established that workers' compensation benefits are the "exclusive remedy for . . . injuries allegedly caused by the negligence of [a person's] employer and fellow employee" … . …

Punitive damages are not available for the employment discrimination claims in the complaint … . … [T]he breach of contract claim … does not qualify for punitive damages because plaintiff does not allege that [the] alleged breach of contract was " 'aimed at the public generally' " … . Miller v National Prop. Mgt. Assoc., Inc., 2021 NY Slip Op 00729, Fourth Dept 2-5-21

Practice Point: A cause of action for intentional infliction of emotional distress can not be based on the termination of at will employment.

FAMILY LAW, CIVIL PROCEDURE.

A PLENARY ACTION WAS REQUIRED TO SET ASIDE THE STIPULATION OF SETTLEMENT WHICH WAS INCORPORATED BUT NOT MERGED INTO THE JUDGMENT OF DIVORCE (SECOND DEPT).

The Second Department, reversing Supreme Court, determined Supreme Court did not have the authority to declare certain portions of the stipulation of settlement invalid. A plenary action was necessary:

… [A] plenary action was required to seek to set aside the stipulation of settlement, which was incorporated but not merged into the judgment of divorce … . There are

exceptions to this general rule, such as where reformation of a separation agreement is sought to conform the agreement with the intent of the parties … , or where the matrimonial action is still pending and was not terminated with entry of a judgment … , or in certain circumstances where enforcement of child support is sought … . None of these exceptions are applicable here.

In view of the foregoing, those branches of the plaintiff's cross motion which were to vacate the provisions of the stipulation of settlement concerning equitable distribution and maintenance should have been denied. Jagassar v Deonarine, 2021 NY Slip Op 00549, Second Dept 2-3-21

Practice Point: A plenary action is necessary to vacate a stipulation of settlement incorporated but not merged into the judgment of divorce.

FAMILY LAW, TRUSTS AND ESTATES.

THE ESTATE OF A PARTY TO A SEPARATION AGREEMENT MAY SEEK A DOWNWARD MODIFICATION OF THE AGREED MAINTENANCE PAYMENTS; THE DISSENT ARGUED ONLY THE PARTY, NOT THE ESTATE OF THE PARTY, CAN SEEK A DOWNWARD MODIFICATION AND THE MATTER SHOULD BE HANDLED IN PROBATE (FOURTH DEPT).

The Fourth Department, over a dissent, determined that the estate of a party to a separation agreement that was merged but not incorporated into a judgment of divorce could seek a downward modification of the maintenance payments. The dissent argued only the party to the agreement, not the estate of the party, could seek a downward modification based on extreme hardship:

FROM THE DISSENT:

… [T]his Court recently held that plaintiff and defendant's decedent entered into a Separation and Property Settlement Agreement (settlement agreement), which was incorporated but not merged into a judgment of divorce, whereby decedent agreed to pay lifetime maintenance to plaintiff that continued even in the event of decedent's death … . * * *

Pursuant to the Domestic Relations Law, "[w]here . . . [a separation agreement] remains in force, no modification of an order or judgment incorporating the terms of said agreement shall be made as to maintenance without a showing of extreme hardship on either party" (§ 236 [B] [9] [b] [1] …). A modification of maintenance based on extreme hardship is thus, personal to the parties who contracted as to the amount of maintenance in the separation agreement and, as noted, a modification of that amount has only been awarded in situations involving personal hardships. In my view, an "estate" can never establish a personal hardship and thus, is never entitled to a downward modification of maintenance. While defendant in this case submitted evidence that the continued payment of the maintenance obligation would pose a hardship on the estate, such a hardship is not upon any party to the settlement agreement. Indeed, it is only a hardship upon the beneficiaries of decedent's estate who wish to maximize their inheritance. In my view, any difficulty in the estate's ability to pay the amount of lifetime maintenance agreed to by decedent is an issue that should be raised by the estate in the probate court when determining the reserve funds to be set aside to satisfy the maintenance obligation. Gardner v Zammit, 2021 NY Slip Op 00707, Fourth Dept 2-5-21

FAMILY LAW.

ONCE PETITIONER'S PATERNITY HAD BEEN ESTABLISHED BY GENETIC TESTING FAMILY COURT HAD THE AUTHORITY TO VACATE THE ACKNOWLEDGMENT OF PATERNITY (AOP) PREVIOUSLY EXECUTED BY MOTHER'S BOYFRIEND (FOURTH DEPT).

The Fourth Department, reversing (modifying) Family Court, determined that once petitioner had been established to be the father of the child by court-ordered genetic testing Family Court had the power to vacate mother's boyfriend's acknowledgment of paternity (AOP):

… [G]iven the continued existence of the AOP, we acknowledge respondents' concern that the order of filiation might have effectively created an impermissible three-parent arrangement for the subject child … . The court … had the power to vacate the AOP to address that concern … , and we conclude that the AOP should

be vacated in order to eliminate any question that petitioner is the child's only legal father. We therefore modify the order by granting petitioner's motion in its entirety and vacating the AOP. Matter of Ryan M. E. v Shelby S., 2021 NY Slip Op 00717, Fourth Dept 2-5-21

Practice Point: Family Court has the authority to vacate an acknowledgment of paternity after genetic testing confirms the identity of another as the father.

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

THERE WAS NO PROOF THE NOTICE REQUIRED BY RPAPL 1304 WAS MAILED TO THE PROPER ADDRESS (FIRST DEPT).

The First Department, reversing Supreme Court, determined the notice provisions of Real Property Actions and Proceedings Law (RPAPL) 1304 were not complied with and the bank's motion for summary judgment in this foreclosure action should not have been granted. There was no proof the notice was mailed to the right place:

Plaintiff failed to demonstrate its strict compliance with RPAPL 1304, a condition precedent to the commencement of a foreclosure action … . Although the statute requires that the notice be sent to "the property address and any other address of record," the affidavits submitted by plaintiff show that the notices were mailed neither to the mortgaged premises nor to defendant's residence. One of the addresses to which the notices were sent not only was never occupied by defendant but also specified a unit that did not exist at that street address. The other was sent to the correct high-rise apartment building of more than 400 units but was missing the unit number. Thus, plaintiff did not send defendant proper notice under RPAPL 1304 … . U.S. Bank N.A. v Moran, 2021 NY Slip Op 00645, First Dept 2-4-21

FORECLOSURE, TRUSTS AND ESTATES.

THE ESTATE OF THE HUSBAND WAS NOT A NECESSARY PARTY IN THIS FORECLOSURE ACTION; THE PROPERTY PASSED TO THE WIFE UPON THE HUSBAND'S DEATH (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the husband's (Thomas's) estate was not a necessary party in this foreclosure action because the property passed to the decedent's wife (Judy) upon Thomas's death:

… [T]he plaintiff's submission of the deed and Thomas's death certificate established prima facie that Thomas and Judy had held the subject property as a married couple, and that they remained married at the time of his death. Therefore, Thomas's death "result[ed] in the defeasance of the deceased spouse's coextensive interest in the property" … , and the surviving spouse automatically inherited his ownership interest in the property. Moreover, the plaintiff explicitly provided that it would not seek a deficiency judgment against Thomas's estate … . Based upon the foregoing, the plaintiff established that Thomas's estate was not a necessary party to foreclosure and the plaintiff was entitled to discontinue the action against Thomas, remove his name from the caption, and to vacate the stay which arose upon Thomas's death … . U.S. Bank N.A. v Auteri, 2021 NY Slip Op 00588, Second Dept 2-3-21

Practice Point: Upon the death of the husband, the property owned as husband and wife passed to the wife. The husband's estate is therefore not a necessary party in a foreclosure action.

FORECLOSURE.

ONLY THE HUSBAND TOOK OUT A MORTGAGE AND DEFENDANTS DENIED THE ALLEGATION IN THE COMPLAINT THAT THE WIFE'S INTEREST WAS SUBJECT TO AN EQUITABLE MORTGAGE; THEREFORE THE BANK'S MOTION FOR SUMMARY JUDGMENT IN THIS FORECLOSURE ACTION SHOULD NOT HAVE BEEN GRANTED; THE COURT NOTED THAT "NEITHER ADMITTED NOR DENIED" IN AN ANSWER TO A COMPLAINT IS DEEMED AN ADMISSION (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff bank did not demonstrate its foreclosure action could affect the wife's (Gloria's) interest in the property based on the husband's (David's) mortgage. It was not necessary for defendants to claim that Gloria's interest was not subject to an equitable mortgage as an affirmative defense. [Although not related to the equitable mortgage issue, the Second Department noted that "Neither Admitted nor Denied" in an answer to an allegation in a complaint should be deemed to admit the allegation (*see* CPLR 3018[a] …)]:

… [W]e disagree with the plaintiff's contention that the defendants, by not pleading it as an affirmative defense, waived their defense to the cause of action relating to the alleged equitable mortgage on Gloria Saff's interest in the subject property. "CPLR 3018, which governs responsive pleadings, draws a distinction between denials and affirmative defenses" … . "Denials generally relate to allegations setting forth the essential elements that must be proved in order to sustain the particular cause of action" and "[t]hus a mere denial of one or more elements of the cause of action will suffice to place them in issue" … . A defendant, however, must plead, as an affirmative defense, "all matters which, if not pleaded, would be likely to take the adverse party by surprise or would raise issues of fact not appearing on the face of a prior pleading" … . Here, the defendants, in their answer, denied the allegations in the complaint relating to the existence of an equitable mortgage on Gloria Saff's interest in the subject property. As the denials of an equitable mortgage were in response to allegations in the complaint, they would not take the plaintiff by surprise.
* * *

Where spouses own property as tenants by the entirety, a conveyance by one spouse, to which the other has not consented, cannot bind the entire fee … . The mortgage executed by David Saff did not encumber Gloria Saff's interest in the subject property, and the plaintiff failed to submit evidence demonstrating that it held an equitable mortgage on Gloria Saff's interest in the subject property. Thus, the Supreme Court should have denied those branches of the plaintiff's motion which were for summary judgment on the causes of action to foreclose the mortgage and for a judgment declaring that the plaintiff has an equitable mortgage against the interest of Gloria Saff in the subject property. U.S. Bank N.A. v Saff, 2021 NY Slip Op 00590, Second Dept 2-3-21

Practice Point: Where the property is owned as tenants by the entirety and only the husband takes out a mortgage secured by the property, the bank must present evidence the wife holds an equitable mortgage to be entitled to summary judgment in a foreclosure action.

FREEDOM OF INFORMATION LAW (FOIL).

NYC FIRE DEPARTMENT DOCUMENTS COULD HAVE BEEN REDACTED TO PROTECT PRIVACY AND WERE NOT INTER-AGENCY MATERIALS; THEREFORE THE FOIL REQUESTS FOR THESE DOCUMENTS SHOULD NOT HAVE BEEN DENIED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined certain FOIL requests for NYC Fire Department (FDNY) should have been granted:

… [T]he FDNY withheld the records identified in the petitioner's FOIL request numbers 4, 9, and 16, which sought records concerning requests for religious accommodations and the determinations made thereon, and accommodations from the FDNY dress requirements. The FDNY withheld those records on the grounds that releasing them would be an unwarranted invasion of personal privacy under Public Officers Law § 87(2)(b) and the records were inter-agency materials exempt by Public Officers Law § 87(2)(g). * * *

… [T]he FDNY failed to sustain its burden of proving that the personal privacy exemption applied to the records sought, since it failed to establish that the identifying details could not be redacted so as to not constitute an unwarranted invasion of personal privacy … . Its conclusory assertions that the records fall within the exemption were insufficient to meet its burden of proving that the statutory exemption applies … . The FDNY should have produced the requested records, redacting whatever portions are necessary to safeguard the identities of the individuals who sought the accommodation, and leaving nonidentifying information intact … .

The FDNY also failed to establish that the exemption for inter-agency materials applied, since the agency determinations sought were final on the accommodation requests and therefore not subject to the exemption … . Matter of Aron Law, PLLC v New York City Fire Dept., 2021 NY Slip Op 00556, Second Dept 2-3-21

LABOR LAW-CONSTRUCTION LAW.

PLAINTIFF APPARENTLY FELL FROM A WET, SLIPPERY WOODEN LADDER; HE WAS ENTITLED TO SUMMARY JUDGMENT ON HIS LABOR LAW 240(1) CAUSE ACTION; NO NEED TO SHOW THE LADDER WAS INHERENTLY DEFECTIVE (FIRST DEPT).

The First Department, reversing Supreme Court, determined plaintiff was entitled to summary judgment on his Labor Law 240(1) without showing the ladder from which he fell was inherently defective:

Plaintiff testified that he was injured when he fell while using a wet and slippery wooden ladder provided by defendants for him to move between the tenth and eleventh floors of the construction site to perform his work. This testimony established prima facie that plaintiff's work exposed him to an elevation-related risk against which defendants failed to provide him with proper protection, as required by Labor Law § 240(1) … . It is clear that the ladder was not adequate to prevent plaintiff from falling and there is no dispute that other than the ladder, no additional safety devices were provided … . Plaintiff was not required to show that the ladder

was inherently defective … . Millligan v Tutor Perini Corp., 2021 NY Slip Op 00630, First Dept 2-4-21

Practice Point: Plaintiff in this Labor Law 240(1) action fell from a wet, slippery wooden ladder used to move between the 10th and 11th floors of a building under construction. It was not necessary to demonstrate the ladder was defective. Plaintiff was entitled to summary judgment on his Labor Law 240(1) cause of action.

LABOR LAW-CONSTRUCTION LAW.

PLAINTIFF FELL FROM A SCAFFOLD WHICH DID NOT HAVE GUARDRAILS AND WAS ENTITLED TO SUMMARY JUDGMENT ON HIS LABOR LAW 240(1) CAUSE OF ACTION DESPITE DEFENDANTS' ARGUMENTS THAT PLAINTIFF DID NOT LOCK THE WHEELS ON THE SCAFFOLD AND PLAINTIFF MAY HAVE FAINTED OR STEPPED BACKWARDS OFF THE SCAFFOLD (FIRST DEPT).

The First Department, reversing Supreme Court, determined plaintiff was entitled to summary judgment on his Labor Law 240(1)cause of action. Plaintiff apparently fell from a scaffold which did not have guardrails. Defendants unsuccessfully argued plaintiff did not lock the wheels of the scaffold and therefore was the sole proximate cause of the accident:

… [D]efendants failed to raise an issue of fact as to whether plaintiff was the sole proximate cause of his accident. Given the scaffold's inadequacy to protect him from falling, plaintiff's alleged failure to lock the wheels of the scaffold could not be the sole proximate cause of his accident … . It would be at most comparative negligence, which is not a defense to a Labor Law § 240(1) claim … . Defendants' argument, raised for the first time on appeal, that plaintiff was the sole proximate cause because he was not wearing a safety harness is also unavailing … , as is their suggestion that plaintiff may have fainted and/or stepped backwards off the scaffold … . Ordonez v One City Block, LLC, 2021 NY Slip Op 00529, First Dept 2-2-21

Practice Point: Plaintiff who fell from a scaffold which had no guardrails was entitled to summary judgment on the Labor Law 240(1) cause of action despite defendants'

argument plaintiff did not lock the wheels of the scaffold and fainted or stepped backwards off the scaffold.

LABOR LAW-CONSTRUCTION LAW.

PLAINTIFF, A BUILDING MAINTENANCE WORKER, FELL FROM AN 8-FOOT UNSECURED LADDER WHEN ATTEMPTING TO REMOVE A BIRD'S NEST FROM A GUTTER; THE ACTIVITY WAS NOT ROUTINE CLEANING AND PLAINTIFF WAS ENTITLED TO SUMMARY JUDGMENT ON HIS LABOR LAW 240 (1) CAUSE OF ACTION; TWO-JUSTICE DISSENT (FOURTH DEPT).

The Fourth Department, over an extensive two-justice dissent, determined plaintiff, who maintained a mixed use building, was engaged in a "Labor Law 240 (1)" covered activity when he was attempting to remove a bird's nest from a gutter. Plaintiff fell from an 8-foot unsecured ladder when he was surprised by a bird flying out of the nest:

… [P]laintiff's work in removing the bird's nest from one of the building's gutters was not routine cleaning. Plaintiff had never before been given such a task during his time working on the premises. Indeed, the reason for removing the nest was, in part, to prevent the further accumulation of bird excrement under the nest. Plaintiff's supervisor characterized the task of removing the nest as nonroutine cleaning. In addition, removing the bird's nest from the gutter, which was located above the tenant's entry door, necessarily involved elevation-related risks that are not generally associated with typical household cleaning … . Although plaintiff's work did not necessitate the use of specialized equipment or expertise, nor was it performed in conjunction with any construction, renovation or repair project on the building … , those factors are not dispositive in light of the atypical nature of the work and its attendant elevation-related risks and, moreover, the fact that plaintiff's task involved the removal of extraneous materials that had formed in the gutter not due to its normal operation … . Healy v Est Downtown, LLC, 2021 NY Slip Op 00699, Fourth Dept 2-5-21

Practice Point: Plaintiff, who fell from an unsecured ladder attempting to remove a bird's nest from a gutter, was entitled to summary judgment on his Labor Law 240(1) cause of action. Plaintiff fell when he was surprised by a bird flying out of the nest. Removing the bird's nest was not routine cleaning and therefore was a covered activity.

LANDLORD-TENANT, MUNICIPAL LAW.

EVICTION WAS TOO SEVERE A PENALTY FOR PETITIONER'S MOMENTARY LOSS OF CONTROL DURING WHICH SHE STRUCK A NYC HOUSING AUTHORITY EMPLOYEE (FIRST DEPT).

The First Department, reversing Supreme Court, determined the NYC Housing Authority (NYCHA) should not have penalized petitioner for striking a NYCHA employee by evicting her:

The termination of the tenancy of petitioner, a now 64-year-old woman who has been a NYCHA tenant without incident for more than 40 years and will be evicted from her home along with her adult daughter because she suffered a momentary loss of control when she struck respondent's employee, whom she believed to be in a relationship with her former partner, is "so disproportionate to [her] offense, in the light of all the circumstances, as to be shocking to one's sense of fairness" … .

Given the facts presented as well as the lack of any evidence presented by NYCHA that petitioner's continued occupancy presents a concern to the safety of NYCHA employees or a risk to the other NYCHA tenants, this Court finds that a lesser penalty is warranted … . Matter of Bryant v Garcia, 2021 NY Slip Op 00521, First Dept 2-2-21

MENTAL HYGIENE LAW.

A COMPETENT ADULT MAY REVOKE A HEALTH CARE PROXY; HERE PETITIONER'S MOTHER REVOKED THE PROXY BY EXECUTING A DOCUMENT REVOKING ALL DOCUMENTS OF AUTHORITY IN FAVOR OF PETITIONER (FIRST DEPT).

The Second Department determined that a document executed by Angela M., Mark M.'s mother, revoking all documents of authority in favor of Mark M. included a health care proxy:

"A competent adult may revoke a health care proxy by notifying the agent or a health care provider orally or in writing or by any other act evidencing a specific intent to revoke the proxy" (Public Health Law § 2985[1][a]). Angelina M. revoked the health care proxy prior to her incapacitation by executing a written revocation expressly revoking "any and all" documents of authority "of every nature[,] type[,] and description" in favor of Mark M. Contrary to Mark M.'s contention, the revocation is not limited to powers of attorney related to Angelina M.'s interest in real properties and certain limited liability companies and reflects Angelina M.'s intent to revoke all documents of authority in his favor, including the health care proxy. Also contrary to Mark M.'s contention, the revocation is clear and unambiguous, and the Supreme Court properly declined to consider the affidavit of the attorney who drafted the revocation … . Matter of Angelina M. (Mark M.), 2021 NY Slip Op 00649, First Dept 2-4-21

NEGLIGENCE, COURT OF CLAIMS.

THE COURT OF CLAIMS PROPERLY DISMISSED THE CLAIM FINDING THAT CLAIMANT'S DECEDENT WOULD HAVE BEEN KILLED IN THE CAR ACCIDENT EVEN IF THE PROPER W BEAM AS OPPOSED TO THE IMPROPER BOX BEAM HAD BEEN ERECTED AS A BARRIER ACROSS THE CLOSED BRIDGE; TWO JUSTICE DISSENT ARGUED THE MAJORITY IMPROPERLY APPLIED A "BUT FOR" STANDARD OF CAUSATION (FOURTH DEPT).

The Fourth Department, over a two-justice dissent, determined the Court of Claims properly dismissed the claim on the ground that claimant's decedent would have been killed in the car crash even if the barrier the car struck was a proper W beam as opposed to an improper steel box beam. The beams were erected across a closed bridge and claimant's decedent was a passenger in the convertible which struck and passed under the box beams at both ends of the bridge. The dissenters argued that, upon remittal after a reversal in the first appeal, the Court of Claims was called upon to determine if the box beam was a dangerous condition which was a proximate cause in aggravating the injuries and did not do so. The dissenters noted that claimant's decedent's head injuries occurred when the car passed under the second box beam and he survived for 18 hours after the accident:

… [W]e remitted the matter to the Court of Claims to determine "whether the steel box beam was a substantial factor in aggravating decedent's injuries and causing his death" … . …

… [W]e conclude that a fair interpretation of the evidence supports the court's determination that the steel box beam was not a substantial factor in aggravating decedent's injuries and causing his death. Claimant's witnesses testified with respect to the type of barrier that defendants were required to use to block access to the bridge, i.e., a W-beam. Claimant also presented evidence that decedent's impact with a W-beam would have led to the same result, i.e., a fatality.

FROM THE DISSENT:

… [T]he majority improperly elected to apply a "but for" standard of causation, rather than considering whether the negligence was a proximate cause of injury. In

our view, applying a "but for" causation standard "would relieve from liability a negligent actor if the same harm might have been sustained had the actor not been negligent; yet the law is clear that that fact may be considered in fixing damages but does not relieve from liability" … . Reames v State of New York, 2021 NY Slip Op 00712, Fourth Dept 2-5-21

NEGLIGENCE, EVIDENCE.

THE METEOROLOGICAL DATA WAS NOT SWORN TO; DEFENDANTS THEREFORE DID NOT DEMONSTRATE THERE WAS A STORM IN PROGRESS IN THIS SLIP AND FALL CASE (FIRST DEPT).

The First Department, reversing Supreme Court, determined defendant's motion for summary judgment in this slip and fall case should not have been granted. The defendants asserted the storm in progress defense, but the meteorological data was not in admissible form:

In this action where plaintiff alleges that he was injured after he fell on a snowy or icy condition on defendants' driveway, defendants failed to meet their prima facie burden of establishing entitlement to judgment as a matter of law. The meteorologists' reports relied upon by defendants were not in admissible form … . The reports contain no jurat, stamp of a notary public, or any other indication that the experts were actually sworn … .

In any event, contrary to defendants' contention, the testimony of the parties alone did not establish that the snowstorm was still in progress at the time of the accident, and was therefore insufficient to avail them of the storm in progress defense … . Morales v Gross, 2021 NY Slip Op 00632, First Dept 2-4-21

Practice Point: In a slip and fall case where it is alleged as a defense that a storm was in progress at the time of the fall, the meteorological data presented in support of a defendant's summary judgment motion must be sworn to or it is not in admissible form and will not be considered.

NEGLIGENCE, MUNICIPAL LAW, EMPLOYMENT LAW.

PLAINTIFF'S DECEDENT, A POLICE OFFICER SUFFERING FROM BIPOLAR DISORDER, COMMITTED SUICIDE; THE ESTATE BROUGHT A WRONGFUL DEATH ACTION AGAINST THE CITY; ALTHOUGH THE FACTS SUPPORTED AN EMPLOYMENT DISCRIMINATION CLAIM, THE COMPLAINT DID NOT ALLEGE HUMAN RIGHTS LAW CAUSES OF ACTION; THE COMPLAINT WAS PROPERLY DISMISSED (FIRST DEPT).

The First Department, in a full-fledged opinion by Justice Acosta. determined plaintiff's decedent (Benitez), a police officer who committed suicide, was disabled by bipolar disorder and was entitled to accommodation under the state and city Human Rights Law. However, because the estate brought a wrongful death action, and did not allege Human Rights Law discrimination causes of action, the complaint was properly dismissed:

… [P]laintiff conceded that this case "ha[d] been primarily brought on a claim of negligence," that it had not interposed separate statutory causes of action, and that "this [wa]s a negligence c[ase], not a c[ase] based on discriminatory practices." …

Inasmuch as plaintiff did not raise any Human Rights Law violations for failure to accommodate, we are constrained to affirm … . Supreme Court correctly concluded that defendants did not owe Benitez a duty to prevent him from committing suicide. A defendant owes such a duty where it is either "a facility such as a hospital or jail which is in actual physical custody of an individual" or "an institution or mental health professional with sufficient expertise to detect suicidal tendencies and with the control necessary to care for the person's well-being" … . Here, defendants had neither "actual physical custody" of the decedent nor "the control necessary to care for [his] well-being" before his suicide … . Furthermore, a defendant only breaches its duty to prevent a decedent's suicide when it "fails to take reasonable steps to prevent a reasonably foreseeable suicide … ," and there is no evidence in this case that the decedent's suicide was "reasonably foreseeable" … .

On appeal, plaintiff argues that the NYPD failed to accommodate Benitez under, among other statutes, the City Human Rights Law (City HRL). However, plaintiff improperly raises elements of disability discrimination in the context of a wrongful

death action. Benitez v City of New York, 2021 NY Slip Op 00617, First Dept 2-4-21

Practice Point: A municipality does not have a duty to prevent a police officer in psychological distress from committing suicide, so a wrongful death action brought on that theory will be dismissed. However, the municipality may have a duty to make appropriate accommodations under the Human Rights Law.

NEGLIGENCE, MUNICIPAL LAW.

RARE CASE IN WHICH A SPECIAL RELATIONSHIP BETWEEN THE PLAINTIFF AND THE CITY MAY RENDER THE CITY LIABLE FOR A DELAYED RESPONSE TO A 911 CALL; BECAUSE THE DELAY MAY NOT HAVE BEEN THE RESULT OF A DELIBERATE EXERCISE OF DISCRETION, THE DOCTRINE OF GOVERNMENTAL IMMUNITY MAY NOT APPLY (FIRST DEPT).

The First Department, reversing Supreme Court, determined plaintiff had sufficiently alleged the existence of a special relationship with the city and dismissal based on the doctrine of governmental function immunity was not appropriate. Plaintiff called 911 and was told the ambulance was on its way. Plaintiff had other options for assistance but relied on the 911 operator's statement. Apparently the ambulance response was delayed. Absent a special relationship a municipality may not be held liable for breach of a duty owed to the general public. Governmental immunity generally protects discretionary actions. Here the delayed response may not have been due to the deliberate exercise of discretion and therefore may not be protected by the immunity doctrine:

Plaintiff's allegations are sufficient to establish a special relationship between the City and the decedent that brings her claim within the exception to the general rule that a municipality may not be held liable to a person injured by the breach of a duty that it owes to the general public — such as the duty to provide ambulance service … . The allegation that the 911 operator told plaintiff that "we are on our way" is sufficient to establish defendants' assumption of an affirmative duty to act on the decedent's behalf … . Plaintiff sufficiently alleged justifiable reliance on the call

operator's statement through an affidavit submitted in opposition to defendants' motion in which she listed several additional actions she would have taken to secure help but for the operator's assurance … .

Dismissal is also not appropriate at this stage pursuant to the doctrine of governmental function immunity, which shields public entities from liability for "discretionary" actions taken during the performance of "governmental functions" … . It is undisputed that the provision of emergency care by FDNY EMTs constitutes a governmental function … . It is also clear that determinations of whether and when to dispatch an ambulance, the type of ambulance to dispatch and from where, and the route the ambulance should take are discretionary in nature … . However, it is not clear that the delay at issue here was due to an affirmative exercise of this discretion, rather than an unintentional failure to timely dispatch an ambulance … . Xenias v City of New York, 2021 NY Slip Op 00647, First Dept 2-4-21

Practice Point: The 911 operator's telling plaintiff the ambulance was on its way may have created a special relationship such that the municipality may be liable for a delayed response. Plaintiff allegedly had other options for assistance which were foregone. In addition, the delay may not have been the result of an intentional discretionary act, so the doctrine of governmental immunity may not apply.

NEGLIGENCE.

ALTHOUGH THE SIDEWALK DEFECT WAS SMALL, THE AREA WAS DARKENED BY SCAFFOLDING; DEFENDANTS' MOTION FOR SUMMARY JUDGMENT IN THIS SLIP AND FALL CASE SHOULD NOT HAVE BEEN GRANTED (FIRST DEPT).

The First Department, reversing Supreme Court, determined defendant's motion for summary judgment in this sidewalk slip and fall case should not have been granted. There was evidence the defect in the sidewalk, although small, may not have been visible because scaffolding covered the sidewalk. In addition, defendants' expert did not inspect the sidewalk until 3 1/2 years after the accident (after repairs had been made):

Defendants and the motion court relied extensively on the height differential between the sidewalk flags, applying a mechanistic disposition of a case based exclusively on the dimension of a sidewalk defect, which defendants' expert measured to be seven-sixteenths of an inch … .

Plaintiff presented evidence that the height differential was not the only factor that caused her to trip. First, plaintiff established that the sidewalk was covered by a scaffolding that darkened the sidewalk and made it harder to see a sidewalk defect … . Second, plaintiff established through her expert that the expansion joint between the sidewalk flags was recessed an inch below the surface, when it should have been filled in and flush with the surface (see New York City Department of Transportation Highway Rule § 2-09[f][4][v]). The recessed expansion joint, which was repaired by the time defendants' expert examined the sidewalk, added to the hazard …

Moreover, defendants' expert did not inspect the area where plaintiff fell until more than 3 ½ years after plaintiff's accident. Marks v 79th St. Tenants Corp., 2021 NY Slip Op 00629, First Detp 2-4-21

NEGLIGENCE.

IN THE FOURTH DEPARTMENT, UNLIKE IN THE SECOND DEPARTMENT, A MUNICIPALITY MOVING FOR SUMMARY JUDGMENT IN A SLIP AND FALL CASE NEED ONLY SHOW IT DID NOT HAVE WRITTEN NOTICE OF THE DANGEROUS CONDITION EVEN WHERE THE COMPLAINT ALLEGES THE MUNICIPALITY CREATED THE DANGEROUS CONDITION; HERE AN ONLINE COMPLAINT DID NOT SATISFY THE WRITTEN NOTICE REQUIREMENT; EVIDENCE A MUNICIPAL CONTRACTOR CREATED THE DANGEROUS CONDITION RAISED A QUESTION OF FACT ABOUT MUNICIPAL LIABILITY (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined: (1) disagreeing with the Second Department, a municipality moving for summary judgment in a slip and fall case need only show it did not receive written notice of the dangerous condition and need not affirmatively show it did not create the dangerous condition even if alleged in the complaint; (2) if the lack of written notice is demonstrated the burden

shifts to plaintiff to show the municipality created the condition; (3) the written notice requirement is not necessarily satisfied by an online (CityLine) complaint; and (4) plaintiff raised a question of fact whether a municipal contractor created the dangerous condition. Plaintiff was injured when his bicycle went into a pavement cutout concealed by a puddle:

… [D]efendant met its initial burden by submitting the affidavit of its commissioner of public works establishing that he did not receive prior written notice of the allegedly dangerous or defective condition in the street as required by its prior notification law … . As a result, the burden shifted to plaintiff to demonstrate the existence of a triable issue of fact as to the requisite written notice or, as relevant here, the applicability of the affirmative negligence exception … . …

… [As] CityLine complaints were simply received by complaint investigators and routed through a computer system to the appropriate department, and … such complaints were stored solely in the electronic file on the computer system, there is no indication in the record that such complaints were actually given to the commissioner of public works as required by the prior notification law … . …

… [T]here is circumstantial evidence that defendant created the defect through its contractor's actions and, thus, a triable issue of fact whether the affirmative negligence exception applies … . Horst v City of Syracuse, 2021 NY Slip Op 00708, Fourth Dept 2-5-21

Practice Point: In the 4th Department, unlike the 2nd Department, a municipality moving for summary judgment in a slip and fall case need only demonstrate it did not have written notice of the condition to make out a prima facie case, even if the complaint alleges the municipality created the dangerous condition. In the 2nd Department, if the complaint alleges the municipality created the condition, the municipality must present evidence it did not create the condition to make out a prima facie case. Here an online notification of the dangerous condition did not meet the written-notice requirement. However there was evidence the condition was created by a contractor hired by the municipality, which raised a question of fact about the municipality's liability.

NEGLIGENCE.

PLAINTIFF TRIPPED OVER A FOOTING FOR A TRAFFIC SIGNAL POLE WHICH HAD BEEN REMOVED; ALTHOUGH THE CITY APPROVED THE REMOVAL OF THE POLE IT PLAYED NO ROLE IN ITS REMOVAL; THEREFORE THE CITY DID NOT CREATE THE CONDITION AND THE LACK OF WRITTEN NOTICE RELIEVED THE CITY OF LIABILITY (THIRD DEPT).

The Third Department, reversing Supreme Court, determined, after a plaintiff's verdict at trial, the defendant city's motion for summary judgment should have been granted in this slip and fall case. Plaintiff tripped over the footing of a traffic signal pole (the pole had been removed). The city demonstrated it did not have written notice of the condition. Therefore the burden shifted to the plaintiff to show that the city created the condition. The city submitted documents showing that the removal of the pole was part of a private construction project over which the city exercised no control:

The City did not receive notice of the project's completion or when and by whom the traffic signals were removed. Trudeau [Chief Supervisor of the Traffic Engineering Division of the Albany Police Department] testified that the City did not oversee the development project because it was a private project, and he was not aware of when the traffic signals were removed or who removed them. We note that, contrary to Supreme Court's decision, the City's failure to inspect the sidewalk is an omission that does not constitute affirmative negligence that excuses compliance with the prior written notice requirement … . By failing to present any proof that the City received written notice of the defect or of an affirmative act taken by the City that immediately resulted in the defective condition of the sidewalk, plaintiffs failed to raise a material issue of fact as to the exception to the prior written notice requirement … . Vnuk v City of Albany, 2021 NY Slip Op 00600, Third Dept 2-4-21

Practice Pointer: Even though the city authorized the removal of the signal pole by a private party, it did not supervise its removal. After the pole was removed, the footing remained. Plaintiff tripped over the footing. Because the municipality did

not remove the pole, it was not liable because it was not provided with written notice of the hazard.

REAL PROPERTY ACTIONS AND PROCEEDINGS LAW.

HOMEOWNERS' ASSOCIATIONS IN THE HAMPTONS DEMONSTRATED OWNERSHIP OF THE BEACH TO THE HIGH WATER MARK; THE TOWNS THEREFORE COULD NOT ISSUE PERMITS ALLOWING VEHICLES ON THE BEACH (SECOND DEPT).

The Second Department, reversing Supreme Court in this action to quiet title pursuant to RPAPL Article 15,, determined the homeowners' associations demonstrated ownership of about 4000 feet of beach in the Hamptons on Long Island. Therefore the towns could not allow vehicles to park on the beach:

In an action pursuant to RPAPL article 15, the plaintiff bears the burden of demonstrating, inter alia, the boundaries of the subject property with "common certainty" (see RPAPL 1515[2] …). Here, contrary to the Supreme Court's determination, we find that Seaview, Dunes, Tides, and Whalers established their title claims by a preponderance of the evidence, and that Ocean established its title claim by a preponderance of the evidence with respect to the westernmost portion of its property. At trial, the plaintiffs produced a land title expert who testified to the homeowners associations' chains of title to their respective properties. Specifically, that expert testified, based on documentary evidence, that Seaview, Dunes, Tides, and Whalers owned fee simple title to their respective properties, extending to the mean high-water mark of the Atlantic Ocean. The expert also testified, in relevant part, that Ocean owned fee simple title extending to the mean high-water mark of the Atlantic Ocean, as to the westernmost 400 linear feet of its property. The plaintiffs produced all of the deeds in those respective chains of title, beginning with the Benson Deed, which is common to all of the homeowners associations' chains of title. Based on the foregoing evidence, the homeowners associations established, to the extent previously indicated, that they owned title in fee simple absolute to the disputed portion of their respective properties (see RPAPL 1515[2] …). Seaview at Amagansett, Ltd. v Trustees of Freeholders & Commonalty of Town of E. Hampton, 2021 NY Slip Op 00584, Second Dept 2-3-21

WORKER'S COMPENSATION.

THE BOARD DEPARTED FROM ITS PRECEDENT WITHOUT EXPLANATION, REVERSED AND REMITTED (THIRD DEPT).

The Third Department, reversing the Workers' Compensation Board, determined the Board departed from its precedent without explanation:

… [T]he Board did not follow its precedent in finding that, due to his failure to show labor market attachment, he had no compensable lost time from June 16, 2016 to January 26, 2017. The Board has previously held that findings regarding labor market attachment are limited to the period subsequent to the date when the issue was first raised by the workers' compensation carrier … . Although the record reflects that the Special Fund first raised labor market attachment during the January 26, 2017 hearing, the Board found no compensable time from June 1, 2016 to November 9, 2018 based upon a lack of proof of labor market attachment. "While the Board is free to alter a course previously set out in its decisions, it must set forth its reasons for doing so, and the Board's failure to do so renders its decision arbitrary and capricious" … Inasmuch as the Board did not explain its departure from prior precedent in finding that claimant was not entitled to awards from June 1, 2016 to January 26, 2017, that part of the decision must be reversed and the matter remitted for further proceedings … . Matter of Delk v Orange & Rockland, 2021 NY Slip Op 00604, Second Dept 2-4-21

Practice Point: When the Workers' Compensation Board issues a ruling which conflicts with its precedent, the departure from precedent must be explained in the ruling.

WORKERS' COMPENSATION.

CLAIMANT, A LIVE-IN HOME HEALTH ATTENDANT, WAS INJURED WHEN SHE FELL AFTER PICKING UP MEDICAL RECORDS FROM HER DOCTOR'S OFFICE; THE PURPOSE OF HER VISIT TO THE DOCTOR'S OFFICE WAS NOT PURELY PERSONAL; THEREFORE SHE WAS ENTITLED TO WORKERS' COMPENSATION BENEFITS (THIRD DEPT).

The Third Department, reversing the Workers' Compensation Board, determined that claimant, a 24-hour home health aide, was entitled to Workers' Compensation benefits even though she was injured when she fell after picking up records from her doctor's office:

… [I]t is undisputed that it was routine for claimant to escort her client on four- or five-hour walks on days where the client had no scheduled appointments, such as the day of the subject incident. According to claimant, while on such a walk on the day of the incident, she and her client elected to briefly stop at the subject doctor's office for multiple reasons — to collect medical paperwork pertaining to claimant's employment and to confirm whether the doctor accepted the client's insurance prior to scheduling her an appointment. * * *

… [T]here is not substantial evidence that claimant's actions represented a deviation from employment as conduct specifically prohibited by the employer … . Further, without regard to whether claimant prospectively inquired about the acceptance of her client's insurance, claimant's act of briefly stopping while on a routine walk with her client, regardless of where that stop took place, simply cannot be said to be purely personally or wholly unrelated to her work. Moreover, stopping at the subject doctor's office in order to collect the subject paperwork benefited the employer by allowing claimant to continue to provide round-the-clock care to her client, and to secure the documentation necessary to ensure that such care would not be interrupted in the future. We therefore find that, under the circumstances, claimant's activity was reasonable, sufficiently work related and, thus, not purely personal, such that the Board's decision to the contrary is not supported by substantial evidence … . Matter of Sharipova v BNV Home Care Agency, Inc., 2021 NY Slip Op 00605, Third Dept 2-4-21

Practice Point: Claimant was a 24-hour home care aide. She fell after picking up her medical records from her doctor's office. She was on a routine walk with her client when she stopped at the office. She was entitled to Workers' Compensation benefits.