NEW YORK APPELLATE DIGEST, LLC

Weekly Newsletter
September 27 – October 1, 2021

An Organized Compilation of the Summaries of Selected Decisions Released the Week of September 27 – October 1, 2021, and Posted on the New York Appellate Digest Website on Monday, October 4, 2021. The Entries in the Tables 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. Right Click on the Citations to Keep Your Place in the Newsletter.

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ADMINISTRATIVE LAW, EVIDENCE, WOMEN-OWNED BUSINESSES.

THE DIRECTOR OF THE DIVISION OF MINORITY AND WOMEN'S BUSINESS DEVELOPMENT ERRONEOUSLY IGNORED THE EVIDENCE PRESENTED AT THE HEARING BEFORE AN ADMINSTRATIVE LAW JUDGE WHICH DEMONSTRATED PETITIONER MET THE CRITERIA FOR A WOMEN-OWNED BUSINESS ENTERPRISE (WBE) (THIRD DEPT).

The Third Department, annulling the determination of the Division of Minority and Women's Business Development of the Department of Economic Development (the Division), found the petitioner had demonstrated it met the criteria for certification as a woman-owned business enterprise (WBE). In its contrary ruling, the Division erroneously ignored the evidence presented at the hearing before the Administrative Law Judge (ALJ) which had ruled in favor of the petitioner:

Petitioner contends that the determination should be annulled because the Director refused to consider the testimonial evidence introduced at the administrative hearing in assessing the regulatory factors, and we agree. … [F]ollowing a determination denying an application for certification as a WBE, the applicant is, upon written request, entitled to an administrative hearing before an independent hearing officer … . The hearing officer must thereafter conduct the hearing based upon the information included in the request for a hearing as it relates to the information that was provided by the applicant with its certification application, and each party must be accorded a full opportunity to present evidence, including calling witnesses and cross-examining other parties and their witnesses … . The hearing officer may also "request additional information and take other actions necessary to make an informed decision" … , which ultimately must be based upon his or her "consideration of the record as a whole or such portion thereof as may be cited by any party to the proceeding and as supported by and in accordance with substantial evidence" … .

The proof adduced at the administrative hearing was highly relevant to the issue of whether petitioner met the criteria for WBE certification. Matter of Scherzi Sys., LLC v White, 2021 NY Slip Op 05143, Third Dept 9-30-21

APPEALS, ATTORNEYS, FAMILY LAW.

A FRIVOLOUS APPEAL IN THIS DIVORCE PROCEEDING WARRANTED SANCTIONS AGAINST APPELLANT'S ATTORNEY (FOURTH DEPT).

The Fourth Department, determined sanctions against plaintiff's attorney for bringing a frivolous appeal were in order in this divorce proceeding:

… [W]e consider defendant's request for costs, attorney's fees, and sanctions pursuant to 22 NYCRR 130-1.1. We grant defendant's request in part and award costs in the form of reimbursement by plaintiff's attorney, Angelo T. Calleri, for actual expenses reasonably incurred and reasonable attorney's fees resulting from the frivolous conduct of Calleri in prosecuting this appeal … and we remit the matter to Supreme Court to determine such amount … . "[C]onduct is frivolous if: (1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law; (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or (3) it asserts material factual statements that are false" … . We conclude that Calleri's appellate brief is replete with arguments that qualify as frivolous under the first paragraph of subdivision (c). Indeed, plaintiff's frivolous request that we impose sanctions against defendant by itself qualifies as frivolous conduct … . Marshall v Marshall, 2021 NY Slip Op 05194, Fourth Dept 10-1-21

CIVIL PROCEDURE, JUDGMENT AS A MATTER OF LAW.

THE MOTION FOR A JUDGMENT AS A MATTER OF LAW (CPLR 4401) FINDING THE NYC HOUSING AUTHORITY LIABLE FOR A BEDBUG INFESTATION SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the motion for a judgment as a matter law (CPLR 4401), finding the NYC Housing Authority

(NYCHA) liable for a bedbug infestation of plaintiffs' apartments, should not have been granted:

A motion pursuant to CPLR 4401 should not be granted unless, affording the party opposing the motion every inference which may properly be drawn from the facts presented, and viewing the evidence in the light most favorable to the nonmovant, there is no rational process by which the jury could find for the nonmovant against the moving party … . A court considering a motion for a directed verdict "must not 'engage in a weighing of the evidence,' nor may it direct a verdict where 'the facts are in dispute, or where different inferences may be drawn or the credibility of witnesses is in question'" … .

… [T]he evidence adduced at trial, viewed in the light most favorable to NYCHA, did not establish that there is no rational process by which the jury could find in favor of NYCHA … . The evidence included the plaintiffs' testimony, as well as the parties' competing expert testimony regarding the appropriate protocols for the treatment of a bedbug infestation and competing conclusions by the expert witnesses as to whether NYCHA's bedbug eradication efforts were appropriate. Although a landlord's violation of a municipal ordinance, including, as relevant here, Administrative Code of the City of New York §§ 27-2017 and 27-2018, may constitute some evidence of negligence for the jury to take into account, it does not constitute negligence per se … . Aponte v New York City Hous. Auth., 2021 NY Slip Op 05114, Second Dept 9-29-21

CONTRACT LAW.

THE CONTRACT WAS AMBIGUOUS CONCERNING WHETHER PLAINTIFF OR DEFENDANT WAS RESPONSIBLE FOR PAYING PROPERTY TAXES; THEREFORE THE DEFENDANT'S COUNTERCLAIM, WHICH WAS BASED UPON AN INTERPRETATION OF THE CONTRACT, SHOULD NOT HAVE BEEN DISMISSED (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined the defendant's third counterclaim seeking reimbursement for property taxes should not have been

dismissed because the terms of the related contract were ambiguous. As part of a purchase agreement which never closed, the defendant was allowed to remain in the property in return for paying the property tax for six months. If the defendant remained in the property after six months defendant was to pay $800/month rent. Defendant remained in the property after six months but no one paid the taxes. Eventually defendant paid the accumulated property tax to avoid a tax auction:

Inasmuch as "a contract generally incorporates the state of the law in existence at the time of its formation" ,,, , defendant, as the titled owner, would have been responsible for the property taxes, absent a contractual provision to the contrary. Here, however, the contract was not truly silent on the issue of property taxes. It specifically provided that defendant would pay property taxes in one situation but then failed to address who would pay the property taxes in another situation … . Based on the maxim expressio unius est exclusio alterius, which applies to contracts as well as statutes … , "[w]here a [document] describes the particular situations in which it is to apply, an irrefutable inference must be drawn that what is omitted or not included was intended to be omitted and excluded" … . Inasmuch as the determination of the intent of the parties depends on a choice among reasonable inferences, we conclude that resolution of the third counterclaim should be left to a trier of fact. Dunn Auto Parts, Inc. v Wells, 2021 NY Slip Op 05185, Fourth Dept 10-1-21

CRIMINAL LAW, APPEALS, YOUTHFUL OFFENDERS.

THE 2012 SENTENCE IMPOSED WITHOUT CONSIDERING WHETHER DEFENDANT SHOULD BE AFFORDED YOUTHFUL OFFENDER STATUS WAS NOT ILLEGAL OR UNAUTHORIZED UNDER THE LAW IN EFFECT AT THE TIME; THEREFORE A MOTION TO VACATE THE SENTENCE ON THAT GROUND IS NOT AVAILABLE (THIRD DEPT).

The Third Department, reversing Supreme Court, in a full-fledged opinion by Justice Aarons, determined the defendant's motion to vacate his 2012 conviction because the sentencing court did not consider whether he should be afforded youthful offender status should not have been granted. At the time the law was changed to require consideration of youthful offender status the defendant's case was not on

appeal and the law-change was not made retroactive such that it could be considered in a collateral proceeding (motion to vacate):

… [T]his appeal does not concern the legality of the sentence imposed after a determination had been made whether a defendant should or should not be accorded youthful offender status or, indeed, the legality of any aspect of defendant's 2012 sentence. Rather, the appeal centers on the failure to determine, in 2012, whether defendant should have been given youthful offender status — a finding that ultimately goes to the judgment of conviction. Accordingly, … CPL 440.20 — a statute that empowers a court to set aside an unauthorized, illegal or invalid sentence — does not authorize the relief granted by Supreme Court … . …

… [I]n limiting the application of the new interpretation of CPL 720.20 (1) to "cases still on direct review," the Court of Appeals expressly indicated that it was not available to permit "collateral attacks on sentences that have already become final" (People v Rudolph, 21 NY3d at 502). Thus, as a result of the Rudolph decision, convicted defendants gained the right to argue on direct appeal their entitlement to a resentencing at which the court will make a youthful offender determination. The Rudolph decision, however, did not authorize that relief in a collateral proceeding pursuant to CPL 440.20. In foreclosing retroactive application of the new rule announced in Rudolph to collateral proceedings, the Court of Appeals necessarily rejected the view that sentences imposed under its prior precedent were illegal, unauthorized or invalid. People v Vanderhorst, 2021 NY Slip Op 05141, Third Dept 9-30-21

CRIMINAL LAW, APPEALS.

SUPREME COURT MUST RULE ON DEFENDANT'S MOTION FOR A TRIAL ORDER OF DISMISSAL BEFORE THE APPELLATE COURT CAN CONSIDER THE ISSUE, MATTER REMITTED FOR A RULING; THE SENTENCE IN THIS DWI CASE WAS ILLEGAL (FOURTH DEPT).

The Fourth Department, remitting the case to Supreme Court, determined the trial court must rule on the motion for a trial order of dismissal before the appeal of that

issue can be considered. The Fourth Department noted that the sentence imposed in this DWI case was illegal:

… [W]e may not address defendant's contention because, "in accordance with People v Concepcion (17 NY3d 192, 197-198 [2011]) and People v LaFontaine (92 NY2d 470, 474 [1998] …), we cannot deem the court's failure to rule on the . . . motion as a denial thereof" … . We therefore hold the case, reserve decision, and remit the matter to Supreme Court for a ruling on defendant's motion … . …

… [W]e note … that the sentence is illegal insofar as the court directed that defendant serve a term of five years of probation, with an ignition interlock device for a period thereof, consecutive to the indeterminate term of imprisonment of 1 to 3 years on his conviction for violating Vehicle and Traffic Law § 1192 (4-a) … . People v Capitano, 2021 NY Slip Op 05225, Fourth Dept 10-1-21

CRIMINAL LAW, APPELAS.

DEFENDANT SHOULD HAVE BEEN ALLOWED TO WITHDRAW HIS GUILITY PLEA; THE WAIVER OF APPEAL DID NOT PRECLUDE AN APPEAL ALLEGING THE GUILTY PLEA WAS INVALID (SECOND DEPT).

The Second Department, reversing County Court, over a dissent, determined defendant should have been allowed to withdraw his guilty plea. The court noted that the defendant's waiver of appeal did not preclude an appeal alleging the guilty plea was not valid:

… [T]he defendant secured new counsel and made a written motion to withdraw his plea a little more than four months after he pleaded guilty. The County Court denied the defendant's motion, without a hearing or any further inquiry into the defendant's claims. At the subsequent sentencing proceeding, the defendant again asserted his innocence and again asked the court to permit him to withdraw his plea based on his attorneys' failure to provide meaningful representation. The defendant's application to withdraw his plea at the sentencing proceeding was based on his statements to the court and his prior evidentiary submissions, which tended to substantiate his

contention that he had not understood the concept of constructive possession or the nature of the People's evidence at the time that he pleaded guilty. These submissions were sufficient to cast doubt on his guilt and the validity of his plea … . The People did not allege any prejudice that would have resulted had the court permitted the defendant to withdraw his plea of guilty at that time … . People v Gerald, 2021 NY Slip Op 05130, Second Dept 9-29-21

CRIMINAL LAW, DISCOVERY, SEARCHES BY SECURITY GUARDS.

DEFENDANT WAS ENTITLED TO A HEARING TO DETERMINE WHETHER THE SECURITY GUARD WHO RECOVERED STOLEN PROPERTY FROM HIM WAS LICENSED TO EXERCISE POLICE POWERS OR WAS ACTING AS AN AGENT OF THE POLICE (FIRST DEPT).

The First Department, in a full-fledged opinion by Justice Renwick, determined defendant was entitled to a hearing on whether the store security guard who detained him was licensed to exercise police powers or was acting as an agent of the police. Although the defendant had already pled guilty and was sentenced, the information available to the defendant did not identify the person who detained him and, therefore, defendant could hot have subpoenaed employment records to ascertain the security guard's employment status:

Under People v Mendoza (82 NY2d 415, 425, 433—434 [1993]), defendant is entitled to a hearing on the purely factual issue of whether or not the security guard involved in his detention was licensed to exercise police powers, or acting as an agent of the police. * * *

… [T]he felony complaint provided no information regarding defendant's arrest, and the VDF simply indicated that the arrest took place on "May 27, 2027," at "9:04 PM," "Inside Bergdorf Goodman at 754 Fifth Avenue." The individual who allegedly recovered the stolen material from defendant's handbag was neither identified by name nor as an employee of Bergdorf.

This information could not have helped defendant further investigate whether the security guard was a private or state actor status. People v Sneed, 2021 NY Slip Op 05095, First Dept 9-28-21

CRIMINAL LAW, EVIDENCE.

THE JURY SHOULD NOT HAVE BEEN ALLOWED TO CONSIDER A THEORY OF DEPRAVED INDIFFERENCE MURDER WHICH WAS NOT ALLEGED IN THE BILL OF PARTICULARS (FOURTH DEPT).

The Fourth Department, reversing defendant's murder conviction and ordering a new trial, determined the jury instructions allowed the jury to consider a theory of prosecution that was not alleged in the bill of particulars. The defendant was charged with hitting and shaking the child victim, but the jury was allowed to consider defendant's alleged inaction after the alleged assault:

"A defendant has a right to be tried only for the crimes charged in the indictment" … . " 'Where the prosecution is limited by the indictment or bill of particulars to a certain theory or theories, the court must hold the prosecution to such narrower theory or theories' " … . We agree with defendant that the People's theory of depraved indifference, as outlined in the bill of particulars, was limited to defendant's assaultive conduct, i.e., his infliction of head injuries by shaking or hitting the child, and that the court's instruction allowed the jury to consider, in addition to the specifically delineated assaultive conduct, defendant's "inaction" after the assault ended. … [D]efendant objected during the charge conference to a modification of the depraved indifference charge. The charge, as modified, allowed the jury to … consider "the defendant's later inaction as a factor when considering the brutal, prolonged and ultimately fatal course of conduct," and defendant objected on the ground that such proof was outside the scope of the bill of particulars. People v Faison, 2021 NY Slip Op 05184, Fourth Dept 10-1-21

CRIMINAL LAW, EVIDENCE.

THE PEOPLE PROPERLY RELIED ON HEARSAY TO DEMONSTRATE PROBABLE CAUSE AT THE SUPPRESSION HEARING; THE DEFENDANT DID NOT PRESENT ANY EVIDENCE TO CALL THE RELIABILITY OF THE HEARSAY INTO QUESTION (FIRST DEPT).

The First Department explained the People's burden of proof when relying on hearsay evidence at a suppression hearing. Here the transit officers who witnessed defendant commit "farebeating" (providing probable cause) were not called to testify. The hearsay was deemed admissible under Aguilar-Spinelli and the defendant did not call the accuracy or reliability of the hearsay into question by cross-examination or the presentation of evidence:

Defendant's main argument on appeal is that the People failed to meet their burden of coming forward with evidence demonstrating probable cause with respect to the underlying theft of services arrest — which created the circumstances for the testifying officer's discovery of defendant — because they did not present any testimony from the Transit Bureau officers who had firsthand knowledge of the farebeating offense. …

Probable cause may properly be established based on hearsay testimony … , such as the officer's testimony about what he was told by the transit officers, so long as, under the Aguilar-Spinelli test, the People establish that there was "some basis" of knowledge for the underlying statement and that it was "reliable"… . The "some basis" requirement is satisfied where, as here, the information is based on personal knowledge … .

Although the People will fail to meet their burden at a suppression hearing where they rely exclusively on hearsay evidence and "the defense challenges the sufficiency of the evidence, whether by cross-examining the People's witness or putting on a defense case" … , that is not the situation here, because defendant did not present any evidence, identify anything in the People's case, or elicit any statements on cross-examination that undercut the veracity of the transit officers' account of a farebeating, as relayed by the testifying officer … . The unsupported

assertion in defendant's moving papers that he was seized without reason was not sufficient to necessitate calling the transit officers as witnesses. People v Gerard, 2021 NY Slip Op 05089, First Dept 9-28-21

CRIMINAL LAW, JUDGES.

THE TRIAL JUDGE SHOULD NOT HAVE NEGOTIATED A PLEA DEAL WITH A CO-DEFENDANT REQUIRING TESTIMONY AGAINST THE DEFENDANT IN EXCHANGE FOR A MORE FAVORABLE SENTENCE; NEW TRIAL BEFORE A DIFFERENT JUDGE ORDERED (F0URTH DEPT).

The Fourth Department, reversing defendant's conviction and ordering a new trial, determined the trial judge assumed the function of an interested party when he negotiated and entered into a plea agreement with a co-defendant requiring the co-defendant to testify against the defendant in exchange for a more favorable sentence:

… [T]he court committed reversible error when it "negotiated and entered into a [plea] agreement with a codefendant[,] requiring that individual to testify against defendant in exchange for a more favorable sentence" … . We conclude that, "by assuming the function of an interested party and deviating from its own role as a neutral arbiter, the trial court denied defendant his due process right to '[a] fair trial in a fair tribunal' " … . We therefore reverse the judgment and grant a new trial before a different justice … . People v Johnson, 2021 NY Slip Op 05217, Fourth Dept 10-1-21

CRIMINAL LAW, JUSTIFICATION DEFENSE.

ALTHOUGH THE COMPLAINANT WAS USING ONLY HIS FISTS FIGHTING THE MUCH SMALLER DEFENDANT, THE DEFENDANT WAS ENTITLED TO THE DEADLY-FORCE-JUSTIFICATION-DEFENSE JURY INSTRUCTION (SECOND DEPT).

The Second Department, over a strong dissent, reversing defendant's conviction, determined defendant's request for a deadly-force-justification-defense jury instruction should have been granted. The person with whom defendant was fighting, Gibson, was five inches taller and 66 pounds heavier than defendant. Gibson testified the defendant struck him with a hammer and a meat cleaver. Although Gibson was using only his fists during the fight, he eventually rendered defendant unconscious with a single punch. The medical evidence did not support Gibson's claim he had been struck with a hammer and a meat cleaver:

The jury acquitted the defendant of attempted murder in the second degree and criminal possession of a weapon in the third degree, and convicted him of assault in the second degree. …

… [B]ased on the differences in size and strength between Gibson and the defendant … , the complainant's own testimony that he held the defendant down and punched him in the face, the significant injuries suffered by the defendant, including a fractured ankle, Hall's [a roommate's] statement during the 911 call that "they're killing each other," and the significant factual questions presented regarding what weapons were used and by whom, a rational jury could have found that the defendant reasonably believed that deadly physical force was necessary to defend himself … against the use or imminent use of deadly physical force by Gibson … . … [B]ased on the evidence viewed in the light most favorable to the defendant, a rational jury could have determined that Gibson, not the defendant, was the first person to use or threaten the imminent use of deadly physical force … . Under these circumstances, the failure to charge the defense constituted reversible error … . * * *

… Supreme Court failed to view the evidence in the light most favorable to the defendant. The court credited Gibson's testimony despite evidence which …

significantly called into question the credibility of Gibson's story. … A criminal defendant has no burden to present evidence at trial to prove his innocence, including by showing that his conduct was justified and therefore lawful … . Instead, the burden to disprove justification falls on the People. People v Singh, 2021 NY Slip Op 05134, Second Dept 9-29-21

CRIMINAL LAW, SEX OFFENDER REGISTRATION ACT (SORA).

DEFENDANT IN THIS CHILD PORNOGRAPHY CASE DEMONSTRATED MITIGATING FACTORS WARRANTING A DOWNWARD DEPARTURE TO SORA RISK LEVEL ONE (FOURTH DEPT).

The Fourth Department determined defendant in this child pornography case established mitigating circumstances that warranted a downward departure of the risk level to level one:

We agree with defendant … that he established by a preponderance of the evidence that there are other mitigating factors that were "not otherwise adequately taken into account by the guidelines" … . Defendant established that he suffered from a rare, congenital disease that resulted in significant disfigurement and medical issues, requiring numerous surgeries throughout his life. Defendant was bullied as a child, primarily due to his disfigurement and, as a result, was socially isolated, having no significant peer relationships. Defendant has only one prior crime on his record, a misdemeanor for which he was referred to Mental Health Court, and, in the case at hand, the court sentenced him to probation pursuant to the People's recommendation, thus indicating that defendant does not pose a significant threat to the community. We also note that defendant will be under supervision by the Probation Department for 10 years.

As a result of the depression and related mental health issues that flowed from such a difficult childhood, defendant turned to alcohol and drugs, some of which had been properly prescribed to him following many of his surgeries. Defendant's use of child pornography generally occurred while he was under the influence of drugs. Inasmuch as defendant was sentenced to a 10-year term of probation, which would ensure that he continued to participate in all of his treatment programs, we conclude

that, in light of the totality of the circumstances, a downward departure to risk level one is warranted in the exercise of our discretion … . People v Morana, 2021 NY Slip Op 05188, Fourth Dept 10-1-21

FAMILY LAW, ATTORNEYS.

SUPREME COURT SHOULD HAVE CONDUCTED AN INQUIRY TO ENSURE DEFENDANT INTELLIGENTLY WAIVED HIS RIGHT TO COUNSEL AFTER HIS ATTORNEY WAS PERMITTED TO WITHDRAW; NEW TRIAL ORDERED (SECOND DEPT).

The Second Department, reversing Supreme Court in this divorce action, determined the court did not make sure defendant intelligently waived his right to counsel after his attorney was permitted to withdraw:

A divorce litigant has a statutory right to counsel for the custody portion of the litigation (see Family Ct Act § 262[a][iii], [v]; Judiciary Law § 35[8]). Here, the defendant's attorney was permitted to withdraw during the trial, and the defendant proceeded pro se. However, the Supreme Court did not determine whether the defendant was unequivocally, voluntarily, and intelligently waiving his right to counsel … and failed to inquire whether the defendant understood the risks and disadvantages of appearing pro se. … [W]e … remit the matter … for a new trial … . At that time, the court should conduct a more detailed inquiry to determine whether the defendant is eligible for assigned counsel. Brandel v Brandel, 2021 NY Slip Op 05116, Second Dept 9-29-21

FAMILY LAW, EVIDENCE.

THE 2ND DEPARTMENT, MAKING ITS OWN CREDIBILITY ASSESSMENTS, DETERMINED THE EVIDENCE SUFFICIENTLY DEMONSTRATED ABUSE; A FINDING OF NEGLECT BASED UPON EXCESSIVE CORPORAL PUNISHMENT WAS NOT SUPPORTED (SECOND DEPT).

The Second Department, reversing Family Court, making its own credibility assessments, determined there was sufficient evidence Amir abused Shyla. In addition, the Second Department determined the evidence did not demonstrate that mother neglected Amir by inflicting excessive corporal punishment:

Shyla described in detail at the fact-finding hearing the incidents of abuse by Bryan, which testimony sufficiently corroborated her out-of-court descriptions of the abuse … . Inconsistencies in Shyla's testimony as to peripheral details, such as timing and the presence of other individuals in the home at the time of the abuse, did not detract from Shyla's consistent and credible description of the core conduct constituting the abuse, particularly considering the child's age at the time of these events … . Further, Shyla's previous, out-of-court recantation of her allegations was sufficiently explained by the indirect threats she received from her own family members … . …

While the use of excessive corporal punishment constitutes neglect, "[p]arents have a right to use reasonable physical force against a child in order to maintain discipline or to promote the child's welfare" … . Here, ACS [Administration for Children's Services] offered evidence of a single instance in which the mother hit Amir's arm with a belt to discipline him after he was caught shoplifting, and failed to sufficiently demonstrate that marks observed on Amir were the result of being hit with the belt by the mother. Under the circumstances, ACS failed to establish that the mother's conduct rose to the level of neglect or that she exhibited a pattern of inflicting excessive corporal punishment on Amir … . Matter of Tarahji N. (Bryan N.–Divequa C.), 2021 NY Slip Op 05125, Second Dept 9-29-21

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

SENDING THE 90-DAY FORECLOSURE NOTICE TO TWO BORROWERS IN THE SAME ENVELOPE DOES NOT COMPLY WITH THE REQUIREMENTS OF RPAPL 1304, WHICH IS A CONDITION PRECEDENT TO A FORECLOSURE ACTION; BECAUSE THE NOTICE WAS NOT SENT TO EACH BORROWER IN A SEPARATE ENVELOPE THE FORECLOSURE ACTION WAS PROPERLY DISMISSED (SECOND DEPT).

The Second Department, in a full-fledged opinion by Justice Wooten, over a strong dissent, determined RPAPL 1304 requires that the 90-day notice of foreclosure proceedings be sent to each borrower in separate envelopes. Here a single envelope with the RPAPL 1304 notice addressed to both borrowers did not comply with the statute and the foreclosure action was properly dismissed by Supreme Court:

… [W]hile 30-day notices of default were separately mailed to each of the defendants, the 90-day notice, which was sent via certified and first-class mail, was jointly addressed to the defendants. While the record reflects that "F. Yapkowitz" signed for and accepted delivery of the 90-day notice sent via certified mail, receipt of the notice is inconsequential. Even assuming, arguendo, that both of the defendants had signed for and accepted delivery of the 90-day notice, the plaintiff would not have demonstrated strict compliance with the requirements of RPAPL 1304 by mailing a notice jointly addressed to both of the borrowers in the same envelope. Since it is undisputed that the 90-day notice to each of the borrowers was sent in the same envelope, the plaintiff failed to establish its compliance with RPAPL 1304, a condition precedent to the commencement of the action. Wells Fargo Bank, N.A. v Yapkowitz, 2021 NY Slip Op 05139, Second Dept 9-29-21

INSURANCE LAW, DUTIES OF BROKERS.

ALTHOUGH THE BROKER MAY HAVE REQUESTED THAT PLAINTIFF BE ADDED TO THE INSURANCE POLICY, THE BROKER ALLEGEDLY DID NOT VERIFY THE COVERAGE WAS IN PLACE BEFORE ERRONEOUSLY REPRESENTING TO THE PLAINTIFF THAT IT WAS INSURED; THERE WAS A QUESTION OF FACT WHETHER THE BROKER BREACHED A COMMON-LAW OR CONTRACTUAL DUTY OWED TO PLAINTIFF (SECOND DEPT).

The Second Department determined there were triable issues of fact concerning whether defendant Ovation breached its common-law or contractual duty to procure insurance for plaintiff Concrete. Allegedly, Ovation had represented to Concrete that the insurance had been procured but did not verify that the coverage, to be provided by the insurer, was in place:

In general, "insurance brokers have a common-law duty to obtain requested coverage for their clients within a reasonable time or inform the client of the inability to do so" … . A claim of liability for a violation of this duty may sound in either contract or tort … . To state a claim based upon violation of the insurance broker's common-law duty, the client must demonstrate that the broker failed to discharge its duty either by breaching the agreement with the client by failing to obtain the requested coverage or by failing to exercise due care in obtaining insurance on the client's behalf … .

Here, the Ovation defendants failed to establish … that Ovation did not breach its common-law or contractual duty to Concrete. Even assuming [there was a request] that Concrete be added to the existing policy … the deposition testimony submitted by the Ovation defendants … demonstrated that Ovation agreed to obtain insurance for Concrete and then represented that it had done so without verifying this fact. … [T]he Ovation defendants failed to establish, … the absence of a triable issue of fact as to whether Ovation undertook a duty to Concrete which it then failed to discharge. Alpha/Omega Concrete Corp. v Ovation Risk Planners, Inc., 2021 NY Slip Op 05113, Second Dept 9-29-21

LABOR LAW-CONSTRUCTION LAW, CIVIL PROCEDURE.

SUPREME COURT PROPERLY ALLOWED THE AMENDMENT OF THE BILL OF PARTICULARS AFTER THE NOTE OF ISSUE HAD BEEN FILED; THE AMENDMENT ALLEGED ADDITIONAL VIOLATIONS OF THE INDUSTRIAL CODE IN THIS LABOR LAW 241(6) ACTION (SECOND DEPT).

The Second Department determined Supreme Court properly allowed the amendment of the bill of particulars after the note of issue had been filed in this Labor Law 231(6). The amendment alleged additional violations of the Industrial Code:

"[L]eave to amend the pleadings to identify a specific, applicable Industrial Code provision may properly be granted, even after the note of issue has been filed, where the plaintiff makes a showing of merit, and the amendment involves no new factual allegations, raises no new theories of liability, and causes no prejudice to the defendant"… . Here, the Supreme Court providently exercised its discretion in granting that branch of the plaintiff's cross motion which was to amend the bill of particulars to allege violations of additional Industrial Code sections. The plaintiff's amendment did not prejudice the defendants and did not involve new factual allegations or raise new theories of liability … . Palaguachi v Idlewild 228th St., LLC, 2021 NY Slip Op 05127, Second Dept 9-29-21

LABOR LAW-CONSTRUCTION LAW.

THE SCAFFOLD ON WHICH PLAINTIFF WAS STANDING FELL OVER WHEN HE ATTEMPTED TO MOVE IT WHILE STANDING ON IT; PLAINTIFF WAS ENTITLED TO SUMMARY JUDGMENT ON HIS LABOR LAW 240(1) AND 241(6) CAUSES OF ACTION (SECOND DEPT).

The Second Department determined plaintiff was entitled to summary judgment in this Labor Law 240(1) and 241(6) action. The scaffold fell over when plaintiff

attempted to move it while standing on it. There was evidence one of the wheels, which was attached with wire, became detached:

… [T]he plaintiff demonstrated that he was directed to work on a Baker scaffold in order to perform his task of installing tracks on the ceiling, that the scaffold he was using was the only scaffold available to him, that as he was working without assistance, he tried to move the scaffold while he was standing on it, and that after the scaffold toppled over he observed that one of its wheels was detached. The plaintiff also submitted the affidavit of his foreman … who averred … that there were no nuts and bolts securing the wheels to the scaffold, and that the wheels were kept in place with the use of wire. Shortly after the accident, [the foreman] also observed that one of the wheels of the scaffold had become detached from its frame.

… [The] defendants failed to present a plausible view of the evidence—enough to raise a fact question—that there was no statutory violation and that the plaintiff's own acts or omissions were the sole cause of the accident … . Masmalaj v New York City Economic Dev. Corp., 2021 NY Slip Op 05119, Second Dept 9-29-21

LANDLORD-TENANT, COVID.

DEFENDANT TENANT CLOSED ITS BUSINESS AND ABANDONED THE LEASED PROPERTY DUE TO THE COVID PANDEMIC; PLAINTIFF LANDLORD TOOK POSSESSION OF THE PROPERTY AND CHANGED THE LOCKS; DEFENDANT WAS ENTITLED TO DISCOVERY TO DETERMINE WHETHER DEFENDANT ACCEPTED SURRENDER OF THE PREMISES AND THE APPROPRIATE AMOUNT OF DAMAGES (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined defendant was entitled to discovery in this action on a commercial lease. Plaintiff closed its furniture business due to the COVID pandemic and abandoned the leased property. Defendant took possession of the property and changed the locks. Therefore questions remained concerning whether defendant accepted surrender of the property and whether the accelerated rent amounted to a penalty:

Generally, a tenant is relieved of its obligation to pay full rent due under a lease where it surrenders the premises before expiration of the term and the landlord accepts its surrender … . A surrender by operation of law may be inferred from the conduct of the parties where "the parties to a lease both do some act so inconsistent with the landlord-tenant relationship that it indicates their intent to deem their lease terminated" … . "Such a surrender and acceptance severs the relationship between the parties upon the creation of an estate inconsistent with the prior tenant's rights under the lease" … . Further, "conduct by the landlord which [falls] short of an actual reletting but which indicate[s] the landlord's intent to terminate the lease and use the premises for his [or her] own benefit" may evince an intent to accept a tenant's surrender of the premises … .

… [W]hile plaintiff had no duty to mitigate damages …, any actions it may have taken to offset the rent owed by defendants are relevant to determining the amount of damages … . Thus … the discovery sought by defendants is relevant to the issues presented in plaintiff's motion for summary judgment … . … [B]ecause plaintiff seeks accelerated rent constituting liquidated damages … , defendants should have been afforded an opportunity to obtain information regarding whether the undiscounted accelerated rent amount was disproportionate to plaintiffs's actual losses and thus an enforceable penalty … . University Sq. San Antonio, Tx. LLC v Mega Furniture Dezavala, LLC, 2021 NY Slip Op 05192, Fourth Dept 10-1-21

MEDICAL MALPRACTICE, NEGLIGENCE.

CLAIMS AGAINST DEFENDANT NURSING HOME SOUNDED IN MEDICAL MALPRACTICE AND IN NEGLIGENCE, REQUIRING ANALYSES USING DIFFERENT CRITERIA; SOME CAUSES OF ACTIONS SHOULD HAVE BEEN DISMISSED (FOURTH DEPT).

The Fourth Department, reversing (modifying) Supreme Court, determined some of plaintiff's causes of action alleging medical malpractice and negligence against defendant nursing home should have been dismissed. The complaint alleged plaintiff's decedent, a double amputee, was left unsupervised and fell from his bed. The Fourth Department noted the complaint alleged claims sounding in medical malpractice and in negligence:

… [T]he complaint … alleges several claims sounding in medical malpractice … [and]]he summary judgment standard for medical malpractice claims should apply to those claims. … [P]laintiff alleges that defendants failed to "provide proper services to the decedent[,] . . . provide . . . adequate . . . staff[ing,] . . . change and/or adjust the decedent's care plan . . . [, and] adequately formulate and/or promulgate a care plan in accordance with a comprehensive assessment[]," all of which sound in medical malpractice because they challenge defendants' assessment of the decedent's need for supervision … . * * * … [P]laintiff raised a triable issue of fact … by submitting the affidavit of her own expert, who opined that defendants deviated from the standard of care insofar as they did not amend the decedent's care plan to require greater supervision after he was noted to be experiencing confusion and delirium … . Plaintiff's expert did not, however, address the claims regarding inadequate staffing procedures and training, and those claims are accordingly deemed abandoned … .

… [P]laintiff's claims that defendants were negligent in failing to follow the care plan and to equip the decedent's wheelchair with a seatbelt sound in ordinary negligence inasmuch as they relate to defendants' general duty to safeguard the nursing home's residents, measured by "the capacity of [a resident] to provide for his or her own safety" … and "the [resident's] physical and mental ailments known to the [agency's] officials . . . and employees" … . … Defendants met [their] burden with respect to the claim alleging negligence in failing to equip the decedent's wheelchair with a seatbelt by submitting evidence that they formulated a plan of care that addressed the decedent's risk of falling, and that a restrictive lap belt was not used in their facility. Plaintiff failed to raise a triable issue of fact in opposition with respect to that claim inasmuch as plaintiff's expert failed to opine how a nonrestrictive lap belt would have prevented the subject accident … . Noga v Brothers of Mercy Nursing & Rehabilitation Ctr., 2021 NY Slip Op 05189, Fourth Dept 10-1-21

MEDICAL MALPRACTICE.

PLAINTIFF'S CLAIM FOR PUNITIVE DAMAGES IN THIS MEDICAL MALPRACTICE ACTION SHOULD HAVE BEEN DISMISSED (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined the claim for punitive damages in this medical malpractice action should have been dismissed because there was no evidence defendant doctor acted with malice or evil intent. Apparently, plaintiff alleged defendant's fallure to adequately treat a skin condition warranted punitive damages:

Defendant explained that he initiated conservative treatment because, given plaintiff's other conditions, it was appropriate to address plaintiff's abdominal skin condition by attempting to alleviate her inflammatory process before considering surgical intervention. Defendant's submissions established that, contrary to plaintiffs' allegations, he had indeed treated plaintiff's abdominal skin condition, albeit conservatively as he deemed appropriate under the circumstances, and that he had not abandoned plaintiff's treatment in that regard … . We conclude that, even viewing the evidence in the light most favorable to plaintiffs, defendant established that his conduct "did not manifest spite or malice, or a fraudulent or evil motive . . . , or such a conscious and deliberate disregard of the interests of others that the conduct may be called wilful or wanton" … . Gaines v Brydges, 2021 NY Slip Op 05193, Fourth Dept 10-1-21

MUNICIPAL LAW, EMPLOYMENT LAW.

THE 3RD DEPARTMENT ANNULLED THE DETERMINATION OF THE PUBLIC EMPLOYMENT RELATIONS BOARD (PERB) WHICH FOUND THAT THE FIREFIGHTERS DID NOT DEMONSTRATE THE CITY FAILED TO NEGOTIATE BEFORE UNILATERALLY IMPOSING A SALARY REDUCTION (THIRD DEPT).

The Third Department, reversing the Public Employment Relations Board (PERB), determined the city did not fulfill its obligation to negotiate a change in salary for its firefighters:

PERB acknowledged petitioners' claims that the City made a unilateral determination to end the past practice of paying night differential, check-in pay and holiday pay in calculating regular wages and benefits to current employees should they receive General Municipal Law § 207-a (2) benefits in the future, but rejected those contentions upon the ground that petitioners had only documented the City's intent to discontinue those payments with regard to retirees to whom it owed no duty to bargain. … The parties … orally stipulated at the hearing … that "those affected [by the City's unilateral change in benefits] are those in the unit as of the alleged unilateral change," necessarily referring to current employees who are members of the bargaining units rather than the retirees who are not … . The parties later reinforced that point by stipulating that the unilateral change was made "in a uniform[] fashion to all members of both bargaining units," again using language necessarily referring to current employees to whom the City owes a duty to bargain. In the absence of any indication that counsel lacked authority to enter into those unambiguous factual stipulations or that some cause sufficient to invalidate a contract existed for setting the stipulations aside, they are binding … . Thus, as the parties stipulated that the City's unilateral actions impacted current employees in the bargaining units, PERB's finding that the record was barren of proof on that point is not supported by substantial evidence, and it follows that PERB's determination must be annulled … . Matter of Uniformed Fire Officers Assn. of the City of Yonkers v New York State Pub. Empl. Relations Bd., 2021 NY Slip Op 05144, Third Dept 9-30-21

MUNICIPAL LAW, NEGLIGENCE.

A TOWN IS NOT LIABLE FOR THE NEGLIGENCE OF A VOLUNTEER FIREFIGHTER IN A "FIRE DISTRICT," BUT IS LIABLE FOR THE NEGLIGENCE OF A VOLUNTEER FIREFIGHTER IN A "FIRE PROTECTION DISTRICT" (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined the application for leave to file a late notice of claim against the town in this traffic accident case should not have been denied on the ground the town was not liable for an accident caused by a member of the fire company. Plaintiff alleged the defendant driver was acting within the scope of his duties as a firefighter at the time of the accident. The Fourth Department noted that a town is not liable for the negligence of a volunteer fireman in the employ of a "fire district," but is liable for the negligence of a member of a "fire protection district:"

A fire district is a "wholly independent political subdivision whose members, including its volunteer firemen, are employees of the district and not of the town" … . The "fire district rather than the town appoints its own members, furnishes fire and ambulance service and is liable for negligence on the part of its members, including their negligent operation of vehicles" … . Accordingly, a "town is not liable on the theory of respondent superior for the negligence of a volunteer fireman in the employ of a fire district" … .

In contrast, "a fire protection district is simply a geographic area, with no independent corporate status, for which the town board is responsible for providing for the furnishing of fire protection" … and, "[t]o that end, [a town board] may 'contract with any city, village, fire district or incorporated fire company . . . for the furnishing of fire protection' " … . "Members of the fire departments or companies established within a fire protection district 'are deemed officers, employees, or appointees of the town[,] and the town is liable for any negligence on the part of such members' " … . Matter of Froelich v South Wilson Volunteer Fire Co., 2021 NY Slip Op 05207, Fourth Dept 10-1-21

NEGLIGENCE, CONTRACT LAW, SLIP AND FALL.

THE "BUILDING" DEFENDANTS AND THE COMPANY WHICH INSTALLED AND MAINTAINED THE AIR CONDITIONING UNIT WHICH ALLEGEDLY LEAKED WATER ON THE FLOOR WERE NOT ENTITLED TO SUMMARY JUDGMENT IN THIS SLIP AND FALL CASE; THE LANDLORD DID NOT DEMONSTRATE IT WAS AN OUT-OF-POSSESSION LANDLORD; THE "BUILDING" DEFENDANTS DID NOT DEMONSTRATE THEY DID NOT HAVE ACTUAL OR CONSTRUCTIVE KNOWLEDGE OF THE CONDITION; AND THE COMPANY WHICH INSTALLED AND MAINTAINED THE AIR CONDITIONER DID NOT SHOW IT DID NOT LAUNCH AND INSTRUMENT OF HARM.

The Second Department, reversing Supreme Court, determined the summary judgment motions by several defendants in this slip and fall case should not have been granted in this slip and fall case. Plaintiff alleged she slipped on water dripping from and air conditioning unit in the break room. The landlord did not demonstrate it was an out-of-possession landlord. The defendants failed to show they did not have actual of constructive notice of the condition. Superior, the company which installed the air conditioner (HVAC system], did not show that it did not launch an instrument of harm:

An out-of-possession landlord and its agent may be liable for injuries occurring on its premises if it has "retained control over the premises and has a duty imposed by statute or assumed by contract or a course of conduct" to perform maintenance and repairs … . … [The defendants] failed to establish … that they were out-of-possession landlords, that they did not assume a duty by course of conduct to maintain the area of the building at issue, including the HVAC system, and that they relinquished control over the premises to such a degree so as to extinguish their duty to maintain the premises … . * * *

… Superior's submissions demonstrated that it entered into a contract with the … defendants' general contractor to install the HVAC system, that the installation was completed approximately eight months before the plaintiff's alleged slip and fall, and that, subsequently, it entered into a contract … to service and maintain at least

a part of that HVAC system, and this contract was in effect at the time of the accident. Superior failed to establish … that the source of the leak at issue was not the HVAC system. Superior also failed to eliminate all triable issues of fact as to whether it launched an instrument of harm by creating the alleged recurring condition through its negligent installation or maintenance of the HVAC system … . Taliana v Hines REIT Three Huntington Quadrangle, LLC, 2021 NY Slip Op 05138, Second Dept 9-29-21

RETIREMENT AND SOCIAL SECURITY LAW, SLIP AND FALL.

PETITIONER-POLICE-OFFICER'S SLIP AND FALL ON BLACK ICE WAS A COMPENSABLE ACCIDENT UNDER THE RETIREMENT AND SOCIAL SECURITY LAW BECAUSE THE METEOROLOGICAL CONDITIONS WERE SUCH THAT THE PRESENCE OF BLACK ICE COULD NOT HAVE BEEN ANTICIPATED (THIRD DEPT).

The Third Department, reversing (modifying) the hearing officer's ruling, determined the petitioner-police-officer's slip and fall on black ice was a compensable "accident" within the meaning of the Retirement and Social Security Law:

Petitioner testified that, while patrolling his assigned area on the evening in question, he observed a group of youths congregating in a local parking lot. Consistent with his patrol duties, petitioner pulled into what he described as the poorly illuminated parking lot with the intention of instructing the group to disperse. As petitioner exited his vehicle, he slipped on what he later described as black ice and sustained injuries. Petitioner testified that, although it was cold and blustery at the time of his fall, it was not raining or snowing, and he did not recall any precipitation occurring in the days prior to the incident. As petitioner was focused on "[o]bserving the scene," he also did not recall looking down at the surface of the parking lot prior to exiting his patrol vehicle. * * *

Absent some indication of meteorological conditions that would be amenable to the presence or formation of black ice, respondent's determination — that petitioner could have reasonably anticipated the slippery condition that he encountered at the

time of his fall — is not supported by substantial evidence … . Matter of Castellano v DiNapoli, 2021 NY Slip Op 05148, Third Dept 9-30-21

TRUSTS AND ESTATES, EVIDENCE.

THE PROPONENT OF THE WILL DID NOT DEMONSTRATE DECEDENT KNEW THE NATURE AND EXTENT OF THE PROPERTY HE WAS DISPOSING AT THE TIME THE WILL WAS EXECUTED (SECOND DEPT).

The Second Department, over a strong dissent, determined that Alice, the decedent's sister, did not prove the decedent knew the nature and extent of the property he was disposing at the time the will was executed:

Alice testified that the decedent told her his total assets amounted to $200,000. The decedent then told the attorney who prepared the will that his total assets amounted to $1.5 million, when in fact, with the annuity, his assets, including nonprobate property consisting of an IRA in the amount of $258,299, are valued at more than $2.6 million. This amount does not include the CDs the decedent claimed were held in trust for his grandchildren, which are not listed on the inventory of assets filed with the Surrogate's Court. * * *

On the day he executed the will [December 15], the 83-year-old decedent, who had stage IV prostate cancer, had been a patient at WPH for two weeks, since December 1, 2014. He was admitted with a fever, generalized weakness, pneumonia, bilateral pleural effusion, and a 30-to-40-pound weight loss over the prior three to four months. During those two weeks, he had a choking incident on December 4, which caused respiratory and cardiac arrest and resulted in intubation and transfer to the ICU, and a second incident on December 13, two days prior to executing the will, during which he developed respiratory arrest, was transferred to the CCU, and was sedated with morphine. At times, during the day before he executed the will, as well as on the morning of the day of the execution, the decedent exhibited an inability to follow instructions, disorientation, confusion, inability to benefit from education, impulsive behavior, and a potential to injure himself. On both the day prior to the execution of the will and the day the will was executed, the decedent was intubated

and on a ventilator and unable to speak. The decedent was also sedated with lorazepam the day before the execution of the will. Matter of Falkowsky, 2021 NY Slip Op 05122, Second Dept 9-29-21

UNEMPLOYMENT INSURANCE, CONTRACT LAW.

THE PURCHASE OF A CHECK CASHING BUSINESS DID NOT TRANSFER THE UNEMPLOYMENT INSURANCE OBLIGATIONS OF THE SELLER TO THE PURCHASER; THE LABOR LAW 581 CRITERIA FOR THE TRANSFER OF UNEMPLOYMENT INSURANCE OBLIGATIONS WERE NOT MET (THIRD DEPT).

The Third Department, reversing the Unemployment Insurance Appeal Board, determined the unemployment insurance obligations of PTL Check Cashing Corp. were not transferred to PLS Check Cashiers of New York Inc. when PLS entered an asset purchase agreement with PTL in order to acquire PTL's license to operate at PTL's former location in the Bronx:

"Labor Law § 581 establishes an experience-rating system that allows for variations in the unemployment insurance contribution rates from the standard rate of qualified employers in certain situations" … . Under the statute, when a business is transferred either whole or in part from one employer to another, the transferee shall take over and continue the unemployment insurance experience account of the transferor … . A transfer, however, will not be deemed to have occurred if (1) the transferee has not assumed any of the transferor's obligations, (2) the transferee has not acquired any of the transferor's goodwill, (3) the transferee has not continued or resumed the transferor's business either in the same establishment or elsewhere, and (4) the transferee has not employed substantially the same employees as those of the transferor … . …

It is undisputed that PLS did not assume any of PTL's financial obligations and did not hire any of its employees. Moreover, while PLS operated from the same Bronx location, its business included a variety of financial services and was not limited to check cashing, which was PTL's sole business. Significantly, the ability to operate from the Bronx location was necessary in order for PLS to obtain a license from the

Department of Financial Services given the geographic limitations applicable to businesses that offer check cashing services. Although the asset purchase agreement listed other property included in the sale, PLS's president testified that the tangible assets were disposed of and the only asset that was of value was the opportunity to acquire the license to operate from the Bronx location. Notwithstanding the fact that goodwill was generally referenced as property included in the sale, PLS did not use PTL's brand, logo or phone number and had its own customer base, negating any expectation that it would be patronized by PTL's customers. In view of the foregoing, substantial evidence does not support the Board's finding that a transfer of business occurred under Labor Law § 581 (4) such that PLS acquired the unemployment insurance experience rating of PTL … . Matter of PLS Check Cashiers of N.Y. Inc. (Commissioner of Labor), 2021 NY Slip Op 05142, Third Dept 9-30-29

WORKERS' COMPENSATION, NEGLIGENCE, VEHICLE AND TRAFFIC LAW, EMPLOYMENT LAW.

DEFENDANT CAR DEALERSHIP OWNED THE CAR IN WHICH PLAINTIFF, ITS SALESMAN, WAS INJURED DURING A TEST DRIVE; THE DEALERSHIP, AS PLAINTIFF'S EMPLOYER, IS IMMUNE FROM SUIT UNDER THE WORKERS' COMPENSATION LAW AND IS NOT VICARIOUSLY LIABLE AS THE OWNER OF THE CAR UNDER THE VEHICLE AND TRAFFIC LAW (FOURTH DEPT).

The Fourth Department, reversing (modifying) Supreme Court, determined defendant Paddock Chevrolet was immune from suit by its employee in this traffic accident case. Plaintiff, a salesman for Paddock, was a passenger in a car owned by Paddock which was being test-driven at the time of the accident. The court noted that the Workers' Compensation Law protected Paddock from vicarious liability as the owner of the car pursuant to the Vehicle and Traffic Law:

Workers' Compensation Law § 11 provides that "[t]he liability of an employer prescribed by [section 10] shall be exclusive and in place of any other liability whatsoever, to such employee, . . . or any person otherwise entitled to recover damages, contribution or indemnity, at common law or otherwise, on account of

such injury or death or liability arising therefrom . . .” We thus agree with Paddock that plaintiff’s claims against it are barred.

Paddock correctly contends that New York has rejected the “dual capacity” doctrine … , rendering it irrelevant whether the amended complaint and cross claims asserted against Paddock were based on its status as plaintiff’s employer or its status as the owner of the vehicle who is vicariously liable for the negligence of a nonemployee driver under Vehicle and Traffic Law … . Mansour v Paddock Chevrolet, Inc., 2021 NY Slip Op 05190, Fourth Dept 10-1-21