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An Organized Compilation of the Summaries of Selected Decisions (Mostly Reversals and Decisions with Dissents) Released by Our New York State Appellate Courts the Week of January 3 – 7, 2022, and Posted on the New York Appellate Digest Website on Monday January 6, 2022. 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. Right Click on the Citations to Keep Your Place in the Reporter.

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APPEALS, CIVIL PROCEDURE, JUDGES.

IN THIS ARTICLE 78 PROCEEDING, NO APPEAL LIES FROM A JUDGE'S DECLINING TO SIGN AN ORDER TO SHOW CAUSE; THE ONLY REMEDY IS A MOTION TO VACATE THE FINAL JUDGMENT (FIRST DEPT).

The First Department, in this Article 78 proceeding, noted that no appeal lies from a judge's declining to sign an order to show cause. The only remedy is a motion to vacate the final judgment:

No appeal lies from an order declining to sign an order to show cause, since it is an ex parte order that does not decide a motion made on notice (see CPLR 5701[a][2] …).

No party requests that we consider relief under CPLR 5704(a). In any event, we note that Supreme Court providently exercised its discretion in declining to sign plaintiffs' proposed order to show cause … . Plaintiffs sought to bring on a motion to renew an order that denied the petition and dismissed the proceeding, thus terminating the special proceeding. Renewal is not available under such circumstances … . Instead, an application to vacate a final judgment must be brought pursuant to CPLR 5015 … . This principle applies specifically in the context of a challenge to "a judgment dismissing a CPLR article 78 petition" … . Matter of Alliance to End Chickens as Kaporos v New York City Police Dept., 2022 NY Slip Op 00041, First Dept 1-6-22

Practice Point: Here, in the context of an Article 78 proceeding, the judge's refusal to sign an order to show cause was not directly appealable. A motion to vacate the final judgment may have preserved the issue for appeal (my interpretation of the ruling).

APPEALS, CRIMINAL LAW, EVIDENCE.

CRIMINAL SALE OF A CONTROLLED SUBSTANCE FIRST DEGREE AND THE RELATED CONSPIRACY CONVICTIONS WERE AGAINST THE WEIGHT OF THE EVIDENCE (THIRD DEPT).

The Third Department determined the criminal sale of a controlled substance first degree and the related conspiracy convictions were against the weight of the evidence:

In a weight of the evidence review, we first determine whether, based on all of the credible evidence, a different finding would have been unreasonable, and, if not, we then "weigh the relative probative force of the conflicting testimony and the relative strength of the conflicting inferences that may be drawn from the testimony" to determine if the verdict is supported by the weight of the evidence … . . . * * *

Although the jury may have been able to infer from the intercepted communications that defendant sold cocaine to Henry on October 28, 2017, the evidence failed to satisfy the two ounce or more weight element of criminal sale of a controlled substance in the first degree … . Under these circumstances, the evidence falls short of establishing the elements of criminal sale of a controlled substance in the first degree when viewed in a neutral light … . As defendant's conspiracy conviction is premised upon the criminal sale in the first degree charge, it too must fall based upon a review of the weight of the evidence … . People v Adams, 2022 NY Slip Op 00076, Third Dept 1-6-22

Practice Point: A "weight-of-the-evidence" review by an appellate court does not require preservation (unlike a "legally-sufficient-evidence" review) and will be

successful if conflicting evidence at trial throws doubt on an essential element of an offense.

APPEALS, FORECLOSURE, CIVIL PROCEDURE, JUDGES.

ALTHOUGH THE MOTION TO DISMISS THE FORECLOSURE ACTION AS ABANDONED PURSUANT TO CPLR 3215 WAS DENIED ON A GROUND NOT RAISED BY THE PARTIES, THE ORDER WAS SELF-PRESERVED AND APPEALABLE; THE PRESENTATION OF AN ORDER OF REFERENCE WITHIN ONE YEAR OF DEFENDANT'S DEFAULT PRECLUDES A FINDING THAT THE ACTION WAS ABANDONED PURSUANT TO CPLR 3215, DESPITE THE MOTION COURT'S REJECTION OF THE ORDER AS INCOMPLETE (SECOND DEPT).

The Second Department, in a full-fledged opinion by Justice Dillon, over a concurrence and an extensive two-justice dissent, determined; (1) the dismissal of the foreclosure complaint as abandoned pursuant to CPLR 3215 was appealable, even though it was dismissed, sua sponte, on a ground not raised by the parties; and (2) the fact that the plaintiff submitted an order, albeit an order which was rejected for incompleteness, within one year of defendant's default rendered the dismissal pursuant to CPLR 3215 unavailable as a remedy:

The [motion] court employed CPLR 3215(c) reasoning, never argued by the parties, to decide a CPLR 3215(c) motion, just as in Rosenblatt [119 AD3d 45], the court employed reasoning under CPLR 3212, which was never argued by the parties, to decide a CPLR 3212 summary judgment motion. Under the authority of either Rosenblatt or Tirado [175 AD3d 153], the analysis and reasoning of the court, in the order appealed from, although sua sponte, self-preserved the issues for appellate review because it was pursuant to the same CPLR section within which the plaintiff's motion was based and was dispositive to the action. * * *

… [T]he plaintiff presented a proposed ex parte order of reference within the one-year statutory period. The fact that the Supreme Court rejected the order of reference as defective is beside the point, as the mere presentment of it established

the plaintiff's intent to proceed toward the entry of judgment and not to abandon the action … . Citibank, N.A. v Kerszko, 2022 NY Slip Op 00032, Second Dept 1-5-22

Practice Point: Here the denial of the motion to dismiss the foreclosure action as abandoned was appealable, even though the denial was on a ground not raised by the parties. The order was deemed "self-preserving."

ATTORNEYS, PRIVILEGE, CIVIL RIGHTS LAW, DEFAMATION.

THE PRIVILEGE AFFORDED ATTORNEYS UNDER THE CIVIL RIGHTS LAW RE: ALLEGEDLY DEFAMATORY CLAIMS INCLUDED IN A COMPLAINT (WITH ONE EXCEPTION NOT APPLICABLE HERE) IS ABSOLUTE, EVEN IN THE FACE OF ALLEGATIONS OF MALICE AND BAD FAITH (FIRST DEPT).

The First Department determined the allegedly defamatory claims included in a complaint against plaintiff were absolutely privileged with respect to the attorneys who drafted the complaint:

… [T]here is no evidence to support a claim that defendant attorneys acted with malice against plaintiff, either in the commencement of this case or in the preparation of the papers as well as any dissemination of the papers, which are for public consumption to a reporter. … [T]here are no … issues of fact as to whether defendant attorneys instituted and sought to publicize a "sham" action containing defamatory allegations against plaintiff for the sole or primary purpose of disseminating those defamatory allegations while cloaking them in the privilege that attends certain statements made in connection with proceedings before a court (see Williams v Williams, 23 NY2d 592, 599 [1969]). …

In the absence of alleged facts supporting the Williams exception, the privilege under Civil Rights Law § 74 is absolute and applies even where the plaintiff alleges malice or bad faith … . Weeden v Lukezic, 2022 NY Slip Op 00026, First Dept 1-4-22

Practice Point: With one exception not relevant to this case (a "sham" action), the contents of complaints drafted by attorneys are protected from defamation actions by absolute privilege, even in the face of allegations of malice or bad faith.

CONDOMINIUMS, ASSOCIATIONS.

THE CONDOMINIUM BOARD OF MANAGERS PROPERLY APPLIED THE BUSINESS JUDGMENT RULE WHEN IT AUTHORIZED CONSTRUCTION WHICH NARROWED PLAINTIFF'S BOAT SLIP; THE DISSENT ARGUED THE BOARD FAILED TO SHOW THAT IT ACTED IN ACCORDANCE WITH THE CONDOMINIUM BYLAWS, WHICH IS REQUIRED BY THE BUSINESS JUDGMENT RULE (SECOND DEPT).

The Second Department, over a dissent, determined the defendant condominium board of managers properly applied the business judgment rule when it authorized construction which narrowed the boat slip assigned to plaintiff when she purchased the condominium:

"Under the business judgment rule, the court's inquiry is limited to whether the board acted within the scope of its authority under the bylaws (a necessary threshold inquiry) and whether the action was taken in good faith to further a legitimate interest of the condominium. Absent a showing of fraud, self-dealing or unconscionability, the court's inquiry is so limited and it will not inquire as to the wisdom or soundness of the business decision" … .

From the dissent:

Under the business judgment rule, a necessary threshold inquiry is whether the board acted within the scope of its authority under the bylaws and whether the action was taken in good faith to further a legitimate interest of the condominium … . Here, as set forth below, the Board failed to show, prima facie, that it satisfied this first prong—that it acted pursuant to the bylaws. Katz v Board of Mgrs. of Stirling Cove Condominium Assn., 2022 NY Slip Op 00033, Second Dept 1-5-22

Practice Point: Here the condominium board of managers acted within the scope of its authority under the business judgment rule when it narrowed the plaintiff-condominium-owner's boat slip after hurricane damage.

CONTRACT LAW, UNIFORM COMMERCIAL CODE.

DEFENDANT PROPERLY REJECTED THE MACHINES AS NONCONFORMING GOODS, PLAINTIFF DID NOT CURE THE NONCONFORMITY, AND DEFENDANT WAS ENTITLED TO CONSEQUENTIAL DAMAGES AND LOST PROFITS (SECOND DEPT).

The Second Department determined Supreme Court properly found that defendant had rejected the machines as nonconforming goods, plaintiff did not cure the nonconformity, and defendant was properly awarded consequential damages and lost profits:

… [T]he Supreme Court found … the defendant[] demonstrated that the plaintiff had breached express and implied warranties by showing that the machines which were delivered to [defendant] Expansion did not conform to the descriptions set forth in the invoice. The court determined that Expansion was entitled to damages in the principal sum of $53,298.75 for breach of express and implied warranties, representing the amount of lease payments it made on the machines, as well as damages in the principal sum of $2,852,430 for lost profits resulting from that breach. …

… [T]he evidence established that Expansion rejected the machines with particularity as required by UCC 2-605. …

… [W]hile Expansion's rejection triggered the plaintiff's right pursuant to UCC 2-A-513 to cure the alleged nonconformity, the … determination that the plaintiff failed to do so was warranted by the facts. …

… [T]he determination that, at the time the parties entered into the contract, damages for lost profits were within the contemplation of the parties is warranted by the facts. It was foreseeable that a breach on the part of the plaintiff with respect

to delivering functioning machines would result in Expansion being unable to manufacture sufficient ammunition to fill existing orders, or to accept new orders, culminating in lost profits … . Mil-Spec Indus. Corp. v Expansion Indus., LLC, 2022 NY Slip Op 00035, Second Dept 1-5-22

Practice Point: Here, the sale of nonconforming machines used by the buyer to manufacture goods warranted the award of nearly $3 million in lost profits.

CONTRACT LAW.

BECAUSE PLAINTIFF ALLEGED THE ORAL CONTRACT WAS ENFORCEABLE EVEN IF THE TRIGGERING EVENT OCCURRED AFTER A YEAR, THE CONTRACT WAS WITHIN THE STATUTE OF FRAUDS AND THEREFORE MUST IN BE WRITING (FIRST DEPT).

The First Department determined the oral contract was within the statute of frauds because it was not susceptible of performance within one year. Plaintiff alleged he was entitled to 50% of the placement fee received by defendant for job candidates he referred to defendant, even if placement was made after a year:

The alleged oral agreement upon which plaintiff sues is within the statute of frauds, since plaintiff contends that when he refers a job candidate to defendant, he is entitled to 50% of the fee defendants receive for placing the candidate, even when the candidate is placed more than a year after plaintiff's referral (General Obligations Law § 5-701[a][1] …). As a result, because plaintiff has fully executed the contract while defendant's obligation continues past a one-year period, the contract is not, by its terms, susceptible of performance within one year, and therefore must be in writing to be enforceable … . Although oral agreements that violate the statute of frauds are enforceable where the party to be charged admits having entered into the contract, defendant never admitted that it agreed to pay plaintiff a fee on placements occurring more than a year after a referral … . Birnbaum v Goldenberg Consulting Group, Inc., 2022 NY Slip Op 00042, First Dept 1-6-22

Practice Point: An oral contract which may or may not be performed within one year is not enforceable.

CRIMINAL LAW, JURORS.

THE JUROR'S SIMULATION OF THE STABBING IN THE JURY ROOM DID NOT CONSTITUTE JUROR MISCONDUCT (FIRST DEPT).

The First Department determined a juror's use of a piece of cardboard to simulate a stabbing motion with a knife (during deliberations) did not constitute juror misconduct:

… [T]he juror … used a piece of cardboard to simulate a knife and briefly made a stabbing motion in an effort to demonstrate or reenact the crime at issue. Based on the evidence adduced at the hearing, this conduct likewise did not constitute "improper conduct" within the meaning of CPL 330.30(2). "It is well recognized that jurors may conduct a jury room crime reenactment or demonstration provided it involves no more that the jurors' application of everyday experiences, perceptions and common sense to the evidence" … . In light of the trial evidence and the nature of the demonstration, the juror did not become an unsworn witness, or introduce new facts into the deliberations … . Given the location, simplicity, and brief duration of the demonstration … , as well as the hearing testimony of the jurors who testified that the demonstration had no effect on their deliberations … , the demonstration did not prejudice a substantial right of defendant …. **People v Hubbard, 2022 NY Slip Op 00017, First Dept 1-4-22**

Practice Point: A juror's simulation of the stabbing during deliberations was not "juror misconduct."

CRIMINAL LAW, JUDGES.

THE MAJORITY CONCLUDED THE INTERVENTION BY THE TRIAL JUDGE DID NOT DEPRIVE DEFENDANT OF A FAIR TRIAL; STRONG TW0-JUSTICE DISSENT (SECOND DEPT).

The Second Department, over an extensive two-justice dissent, affirmed defendant's murder conviction. The majority noted that some of the trial judge's remarks would have been better left unsaid, but held the judge did not intervene excessively. The dissent disagreed:

… [W]hile many of the Supreme Court's interventions were proper attempts to clarify testimony and facilitate the progress of the trial, we agree with our dissenting colleagues that other remarks would better have been left unsaid. Nevertheless, when the record is viewed as a whole, the court's conduct, to the extent it was improper, did not prevent the jury from arriving at an impartial verdict on the merits … . * * *

From the dissent:

Viewing the record as a whole, the Supreme Court's conduct, taken together with, inter alia, its disparate treatment of the two experts … , its efforts to point out inconsistencies in the testimony of the defendant's wife … , and its assistance in eliciting testimony from the People's witnesses … , "demonstrated apparent bias in favor of the People" … . This improper interference deprived the defendant of a fair trial, and thus, a new trial is warranted before a different Justice … . People v Martinez, 2022 NY Slip Op 00037, Second Dept 1-5-22

Practice Point: This decision, because of the detailed two-justice dissent, gives some insight into how much intervention by a judge in a criminal trial will be tolerated.

CRIMINAL LAW, SEX OFFENDER REGISTRATION ACT (SORA).

THE UNLAWFUL SURVEILLANCE CONVICTION DID NOT INVOLVE "SEXUAL CONTACT" AS DEFINED BY THE PENAL LAW; THEREFORE THE 20 POINT ASSESSMENT FOR "SEXUAL CONTACT" WAS ERROR (THIRD DEPT).

The Third Department, reversing (modifying) County Court, determined the risk factors requiring "sexual contact" and a "prior felony or sex crime" were not supported:

County Court erred in assessing points under risk factors 4 and 10. The assessment of points under risk factor 4 is warranted where a defendant has engaged in "either (i) two or more acts of sexual contact, at least one of which is an act of sexual intercourse, oral sexual conduct, anal sexual conduct, or aggravated sexual contact, which acts are separated in time by at least 24 hours, or (ii) three or more acts of sexual contact over a period of at least two weeks" … . For purposes of risk classification, the Penal Law definition of terms is used … . The record does not reflect that defendant's crimes of conviction, for unlawful surveillance in the second degree … , involved any form of sexual contact … . In the absence of any record evidence that defendant engaged in sexual contact with any victim, 20 points should not have been assessed under risk factor 4 … . Likewise, the record lacks any evidence that defendant had a "prior felony or sex crime" within three years of the unlawful surveillance sex offenses and, thus, the court erred in assessing 10 points under risk factor 10 … . People v Wassilie, 2022 NY Slip Op 00103, Third Dept 1-6-22

Practice Point: The crime of which the sex offender was accused, unlawful surveillance, did not involve "sexual contact" as defined by the Penal Law. Therefore the 20 point risk-assessment for "sexual contact" was error.

FORECLOSURE, CIVIL PROCEDURE.

ALTHOUGH THE BANK IN THIS FORECLOSURE ACTION INSPECTED THE VACANT PROPERTY AND MADE PERIODIC REPAIRS, IT WAS NOT A "MORTGAGEE IN POSSESSION" SUCH THAT THE STATUTE OF LIMITATIONS WAS TOLLED; IN ORDER TO BE DEEMED A "MORTGAGEE IN POSSESSION," THE MORTGAGOR MUST CONSENT TO THE BANK'S POSSESSION OF THE PROPERTY (SECOND DEPT).

The Second Department, reversing Supreme Court, over a dissent, determined the statute of limitations had run on defendant bank's foreclosure counterclaim. The bank argued that the statute of limitations had been tolled because it was a "mortgagee in possession," in that it kept tabs on the property and made repairs. The majority held that, in order to be a "mortgagee in possession," the mortgagor must consent to the possession. Such consent constitutes an acknowledgment of the debt. The mortgagor here did not consent to the mortgagee's possession of the property:

We disagree with our dissenting colleague that determining whether a mortgagee qualifies as a mortgagee in possession for purposes of tolling the statute of limitations requires "an analysis of the actions taken by the mortgagee to secure the property financially and physically." Rather, the determination only requires an analysis of whether the mortgagee took full possession of the property pursuant to an agreement with the mortgagor. Mardenborough v U.S. Bank N.A., 2022 NY Slip Op 00034, Second Dept 1-5-22

Practice Point: When a bank is deemed a "mortgagee in possession" of the property, the statute of limitations for a foreclosure action is tolled. However, the bank is not a "mortgagee in possession" unless the mortgagor consents to the bank's possession of the property. Merely inspecting the property and making repairs, absent the mortgagor's consent, is not enough.

FORECLOSURE, CIVIL PROCEDURE.

THE BANK WHICH COMMENCED THE 2006 FORECLOSURE HAD ALREADY ASSIGNED THE NOTE AND MORTGAGE AND DID NOT HAVE STANDING TO FORECLOSE; THEREFORE THE STATUTE OF LIMITATIONS DID NOT START RUNNING IN 2006; THE DISSENT DISAGREED (SECOND DEPT).

The Second Department, over an extensive dissent, determined that the bank (Option One) which commenced foreclosure proceedings in 2006 did not have standing to do so because it had already assigned the note and mortgage (to Residential). Therefore the six-year statute of limitations did not start to run in 2006. The dissent argued Option One, as the original lender, did in fact have standing. Much of the majority's decision was devoted to demonstrating the dissenting argument was not valid:

We disagree with our dissenting colleague's assertion that Option One, after its assignment of the note and mortgage to Residential, continued to have standing to commence and prosecute the 2006 action. Our dissenting colleague misreads the holding in Wilmington Sav. Fund Socy., FSB v Matamoro (200 AD3d 79, 90-91), wherein we held that there are three bases to establish standing in residential foreclosure actions. There is no dispute with regard to the second two bases for finding standing; to wit: a plaintiff's physical possession of the note prior to commencement of the foreclosure action with an allonge or endorsement in blank or to the plaintiff (second basis), or an assignment of the note to the plaintiff prior to the commencement of the foreclosure action (third basis). However, while the Matamoro Court described the first basis for standing as being "where the plaintiff is the original lender in direct privity with the defendant" … , the second part of the description explained that "[t]he direct privity is rarely seen in residential mortgage foreclosure litigations, given the nature of the home lending business where financial instruments are routinely sold, assigned, or 'bundled' from one institution to another between the time funds are initially dispersed by a lender and the commencement of a later foreclosure action" … . The Matamoro Court's holding and description of the nature of the market falls squarely into the facts of this case. Contrary to our dissenting colleague's rationale that the original lender retains the right to sue on a note that it has fully assigned, we have held that"'[a]n absolute assignment of a bond and mortgage transfers to the assignee all rights theretofore conferred upon the assignor-mortgagee to enforce the bond and

mortgage'" … . 21st Mtge. Corp. v Rudman, 2022 NY Slip Op 00031, Second Dept 1-5-22

Practice Point: Even the original lender does not have standing to foreclose if the note has been assigned prior to commencing the foreclosure proceedings.

LABOR LAW-CONSTRUCTION LAW.

THE DUCT ON THE FLOOR WAS AN INTEGRAL PART OF THE DEMOLITION WORK, THEREFORE LABOR LAW 241 (6) DID NOT APPLY; THE DEFENDANT DID NOT SUPERVISE OR CONTROL PLAINTIFF'S WORK, THEREFORE LABOR LAW 200 DID NOT APPLY (FIRST DEPT).

The First Department, reversing Supreme Court, determined the air duct which caused plaintiff's fall was part of the demolition work plaintiff's employer was hired to perform. Therefore Labor Law 241(6) was not applicable. In addition, Labor Law 200 did not apply to the defendant who did not supervise or control plaintiff's work:

Plaintiff fell after trying to climb over an air duct that was left on the floor as part of the demolition work his employer was subcontracted to perform. Accordingly, the air duct constituted an integral part of the work, and 12 NYCRR 23-1.7(e)(2) as a predicate for the Labor Law § 241(6) claim is inapplicable … . Contrary to plaintiff's contention, defendant properly raised its "integral part" argument in its moving papers.

Defendant cannot be held liable under Labor Law § 200, because the presence of the air duct on the floor was a condition created by the means and methods of the work performed by plaintiff or his employer, and the record demonstrates that defendant had only general supervisory authority over the construction site and did not control plaintiff's work … . Plaintiff testified that he received instructions only from his employer's foremen … . Mateo v Iannelli Constr. Co. Inc., 2022 NY Slip Op 00010, First Dept 1-4-22

Practice Point: Here, during demolition, plaintiff fell attempting to climb over a duct which had been taken down and placed on the floor. Because the duct was an "integral part" of the demolition work, the accident was not actionable under Labor Law 241(6).

LANDLORD-TENANT.

RECENT CHANGES TO THE STATUTES: (1) REQUIRING A LANDLORD TO MITIGATE DAMAGES WHEN A TENANT ABANDONS A RESIDENTIAL APARTMENT BEFORE THE END OF THE LEASE; AND (2), APPLYNG A SECURITY DEPOSIT TO REPAIRS, INTERPRETED AND APPLIED (FIRST DEPT).

The First Department, in a full-fledged opinion by Justice Gische, interpreted recent changes to Real Property Law 227-e and General Obligations law 7-108 regarding the landlord's duty to mitigate damages (when a tenant abandons an apartment before the end of the lease), and the landlord's use of a security deposit to make repairs:

Real Property Law § 227-e now clearly holds that the duty to mitigate damages applies to all residential leases in New York State. It also clarifies that the doctrine of mitigation of damages is not an affirmative defense to be asserted by a tenant, but rather the burden is on landlord to establish it took reasonable and customary actions to "render the injury as light as possible" … . * * *

Under General Obligations Law § 7-103(1), it is black letter law that money deposited or advanced by a tenant on a lease agreement "shall continue" to be tenant's money and "shall" be held in trust for the benefit of tenant until the lease is terminated and it is repaid or applied. The deposit is meant to cover the costs of repairing damages to the apartment. …

General Obligations Law § 7-108 (1-a)(d) also newly added, provides a requirement that landlord provide tenant with written notice of a right to have and be present at an inspection of the premises upon moving out. * * *

The penalty of [a landlord's] forfeiture [of the security deposit] is only mandated when landlord fails to provide an itemized statement of the repairs that it claims are required and justify retention of part or all of the security deposit … . 14 E. 4th St. Unit 509 LLC v Toporek, 2022 NY Slip Op 00002, First Dept 1-4-22

Practice Point: This opinion explains recent changes to Real Property Law 227-e and General Obligations law 7-108 regarding the landlord's duty to mitigate damages (when a tenant abandons an apartment before the end of the lease), and the landlord's use of a security deposit to make repairs.

RETIREMENT AND SOCIAL SECURITY LAW.

THE WIND BLOWING A DOOR SHUT ON PETITIONER POLICE OFFICER'S HAND DID NOT CONSTITUTE AN "ACCIDENT" WITHIN THE MEANING OF THE RETIREMENT AND SOCIAL SECURITY LAW (THIRD DEPT).

The Third Department, over a two-justice dissent, determined petitioner police officer's injury caused by wind slamming a door on her hand was not an "accident" entitling her to disability benefits:

… "[W]hen determining whether a precipitating event was unexpected, [the Comptroller] and courts may … consider whether the injured person had direct knowledge of the hazard prior to the incident or whether the hazard could have been reasonably anticipated so long as such a factual finding is based upon substantial evidence in the record" … . * * *

… [P]etitioner testified that, as she was walking from the bus to the booth to write her report, she observed that it was windy. Indeed, petitioner does not dispute that, on the day of the incident, it was cold and windy and that she was aware of the weather conditions. According to petitioner, the door to the booth weighed between 80 and 100 pounds and she was aware that the door would close on its own, as it did not have a closure arm attached to slow its closure. Petitioner further testified that, when she went to open the door to the booth, she felt resistance due to the wind blowing against it and she only opened the door enough for her to "squeeze" herself in. As petitioner entered the doorway, she felt a gust of wind

and, concerned that the door was going to hit her as it closed, she put her right hand out behind her for protection. The wind blew the door shut behind her, slamming her right hand in the doorjamb. … [S]ubstantial evidence supports the Comptroller's determination that petitioner could have reasonably anticipated that the wind would blow the door closed on her and, therefore, the incident did not constitute an accident within the meaning of the Retirement and Social Security Law … . Matter of Rizzo v DiNapoli, 2022 NY Slip Op 00095, Third Dept 1-6-22

Practice Point: The term "accident" in the context of the Retirement and Social Security Law has a very specific meaning. It does not encompass, for example, injury to a police officer from a foreseeable event, here the wind blowing a door shut on the officer's hand.

WORKERS' COMPENSATION.

CLAIMANT'S EXPERT PROVIDED SUFFICIENT EVIDENCE OF A CAUSAL RELATIONSHIP BETWEEN CLAIMANT FIREFIGHTER'S LUNG CANCER AND EXPOSURE TO TOXINS AT GROUND ZERO, WORKERS' COMPENSATION BOARD REVERSED (THIRD DEPT).

The Third Department, reversing the Workers' Compensation Board, determined the evidence supported a finding that claimant firefighter's lung cancer and death were caused by exposure to toxins at Ground Zero:

The Board found the opinion of Ploss [claimant's expert] to be incredible in part because he did not "cite to any studies or other evidence to sufficiently explain his opinion regarding causation." However, Ploss opined that "[i]t is well accepted that the numerous carcinogens contained in the debris of th[e] highly polluted area known as Ground Zero could cause numerous malignancies such as cancer of the lungs." As claimant asserts, the question of whether such studies supported the doctor's findings could have been raised at the hearing, but was not. Ploss further testified that the toxic exposure at Ground Zero that decedent experienced was intense and concentrated given his prolonged exposure and lack of respiratory protection and that such exposure would have resulted in damage to decedent's bronchial tree and lung tissue. In our view, the medical opinion of Ploss was

neither speculative nor a general expression of possibility and demonstrated that decedent's exposure at Ground Zero and the World Trade Center site was a contributing factor to his demise for purposes of causation. In view of the foregoing, the Board improperly rejected Ploss' uncontroverted medical opinion as to causation … . Matter of Murphy v New York State Cts., 2022 NY Slip Op 00087, Third Dept 1-6-22

Practice Point: In this World-Trade-Center workers' compensation case, the failure to present studies to support the claimant's expert's testimony that claimant's cancer was caused by toxins at Ground Zero did not warrant rejection of the expert's opinion. The issue could have been raised at the hearing, but wasn't.