KNOWLEDGE IS POWER

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NEWMAN FERRARA LLP

November/December 2010
Issue 59

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NO KEEPING TAILLIE?

After Eugene and Kevin Taillie filed suit, claiming they adversely possessed a portion of Rochester Gas and Electric Corporation's property, the Wayne County Supreme Court granted the utility's request to dismiss the case.

Since RGEC showed that the Taillies' use wasn't "hostile" and hadn't lasted for the requisite 10-year time frame, the Appellate Division, Fourth Department, agreed that the case needed to end.

(Apparently, the Taillies had entered the land with RGEC's consent, which had never been rescinded.)

You try revoking that.

MADE TO BE BROKEN?

Upon signing a contract of sale for undeveloped real estate, All Island Properties deposited $5,000 with Dolores Haraden's attorney. Their agreement provided that All Island could back out of the deal if approvals to build a home on the lot couldn't be secured.

Of course, All Island wasn't able to get the permits, cancelled the contract, and demanded the return of its downpayment. After her attorney rebuffed that request, Dolores filed a small claims case with the Suffolk County District Court alleging that she'd been damaged in the amount of $5,000.

When her claim was dismissed, Dolores appealed to the Appellate Term, Second Department, which was of the view that she hadn't adequately established an entitlement to relief.

Did someone get a Haraden?

BUISTED!

Melvin Ickes owned property in Rhinebeck, and his deed contained a right-of-way for vehicular passage over a neighbor's parcel. When Ickes hired a paving company to repair the road, including a portion which extended onto Christian Buist's property, the latter supposedly tried to disrupt the work.

Ickes then filed suit and got an order from the Dutchess County Supreme Court stopping Buist from interfering with the road's use.

Since Ickes wasn't trying to expand the driveway, and had a "right to maintain it in a reasonable condition," the Appellate Division, Second Department, saw the paving as necessary for the easement's "exercise and enjoyment."

Now that wasn't very Christian.

21 REASONS NOT TO PAY TAX

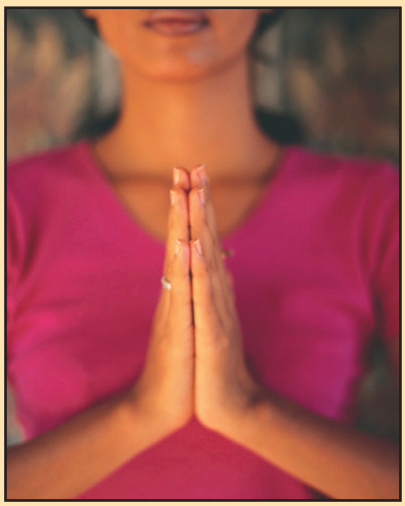
When the iconic 21 Club was zonked for some $72,053.66 in back taxes on audio-visual equipment rentals offered to its catering customers, the restaurant argued the transactions were re-rentals which were exempt from tax.

After the New York State Tax Appeals Tribunal upheld the assessment, 21 appealed to the Appellate Division, Third Department, which deferred to the Tribunal's "expertise" and accepted its "rational" determination that the restaurant's transactions were taxable.

Roses are red, violets are blue ...

Guess what 21? Your taxes are due!

ASK AND YE SHALL RECEIVE?



In 1999, Shameeka Spearman took out a mortgage with HomeSide Lending.

In 2003, HomeSide assigned the loan to Aurora Loan Services and when the latter tried to foreclose, the Kings County Supreme Court was asked to dismiss the case on the grounds that another foreclosure proceeding had been filed by HomeSide in 2000 (and was still pending).

After that request was denied, an appeal followed.

Since a New York State law--Real Property Actions and Proceedings Law §1301(1)--prohibits the filing of a second lawsuit unless court permission is first secured, the Appellate Division, Second Department, thought the 2003 case couldn't continue. (Apparently, the governing procedure hadn't been followed.)

Ye have not, because ye ask not.

IN THE PINK?

Greens at Half Hollow was sued for failing to honor the terms of an offering plan and contract of sale, which had required the use of certain insulation (above and beyond that necessary for a certificate of occupancy).

Because the Suffolk County District Court, and the Appellate Term, Second Department, thought the parties' agreement trumped what had been required by law, the buyer was awarded a money judgment in the amount of $3,075.

Was there no insulating against that?

DON'T BE TARDY FOR THE PARTY

Andre McMillon worked out a plea deal with the Livingston County Court that was conditioned upon his showing up on time for sentencing. When he arrived over an hour late for that appearance, the court imposed an "enhanced" sentence.

On appeal, the Appellate Division, Fourth Department, thought McMillon's history of tardiness, and failure to comply with a condition of his plea agreement, justified the outcome.

Never too late to learn.

Knowledge Is Power Initiative Ltd. (KIP) is a not-for-profit entity formed for educational purposes within the meaning of Section 501 (c) (3) of the Internal Revenue Code.

KIP's goal is to cultivate, develop and advance citizens' awareness of their rights and obligations under the law. This hard-copy newsletter, which is distributed free of charge, is just one way KIP realizes its mission.

Ultimately, by utilizing legal information as an empowerment tool, we hope our readers will develop a greater appreciation for the legal system's role and function.

AN UNSUCCESSFUL SUCCESSION CLAIM

After Margaret Healey, the rent-stabilized tenant-of-record of an apartment owned by 72A Realty Associates, moved to Los Angeles, her roommate claimed an entitlement to remain.

When the landlord later filed a holdover proceeding, the New York County Civil Court refused to grant relief in the owner's favor.

On appeal, the Appellate Term, First Department, thought that Healy's roommate couldn't stay because that occupant hadn't shown she lived with the tenant-of-record, for a two-year period, as required by law (Rent Stabilization Code [9NYCRR] §2523.5[b][1]).

Time didn't Healy that.

SOME CUSTODY BATTLE

After pleading guilty to a felony, J.W. Hardy was ordered to return to court several months later for sentencing.

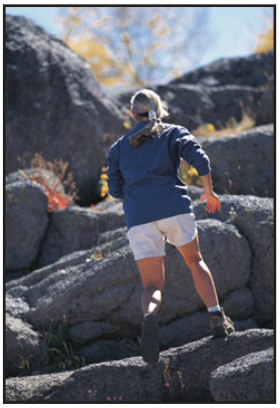
While still handcuffed, Hardy was supposedly told by deputies to remain seated in the hallway. But as the officers processed his paperwork, Hardy unilaterally decided to leave the courthouse, and was captured some twenty minutes later.

When he was found guilty of escape in the second degree, Hardy challenged the conviction. After the Appellate Division, Fourth Department, agreed with the outcome, Hardy appealed to our state's highest court.

Because New York's Penal Law--§205.10(2)--provides that a person is guilty of escape when that individual has been charged with a felony and flees from "official restraint or control," the New York State Court of Appeals allowed the conviction to stand. (Hardy's departure was found to be unauthorized.)

Was there no escape?

... AS A ROCK



765 Amsterdam Ave, LLC, wanted to evict Leon Maynard from a rent-stabilized apartment, because he supposedly didn't have a right to occupy the space after the tenant-of-record had died.

In the context of a holdover proceeding, the parties entered into an agreement which allowed Leon to remain in possession of the unit for a limited time. Of course, right before he was supposed to leave, Leon asked the New York County Civil Court to vacate the underlying arrangement on the grounds of "duress."

When his request was denied, Leon appealed to the Appellate Term, First Department, which was reluctant to "cast aside" the agreement.

In the absence of exceptional circumstances, which hadn't been shown, and since Leon received a "substantial benefit" for agreeing to the deal, the AT1 did him no solid ... and allowed the eviction to proceed.

Later Maynard!

FENCED IN

Dwayne Fuller was running to catch a bus when he tripped over a tree well and fell into a tree.

He later sued PSS/WSF Housing Company claiming that a construction fence, which had been erected in the area, had made the sidewalk unreasonably unsafe and caused his injury.

After the Bronx County Supreme Court dismissed his case, Fuller appealed to the Appellate Division, First Department.

Because he hadn't shown how the fence posed a hazard or made the sidewalk unsafe, the AD1 thought the accident was largely due to the guy's inattentiveness.

There was no fence-sitting there.

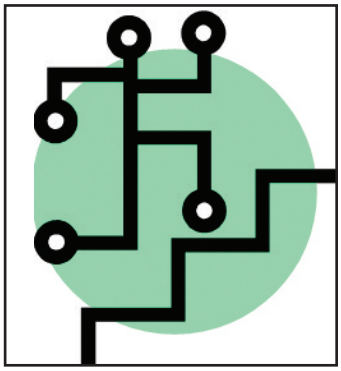
MY COUSIN FREDDIE?

After he was convicted of speeding by the Justice Court of the Town of Ramapo (Rockland County), Fred Shonfeld filed an appeal.

Because the Justice Court failed to inform Shonfeld of his right to counsel, the Appellate Term, Second Department, thought the guy might have been misled as to what would happen in his case.

Since the case should have adjourned, to allow Fred to get an attorney, the conviction was vacated and the matter sent back for a new trial.

I'm finished with this guy.



THANK YOU FOR BEING A FRIEND

Brandon Williams, and another man, supposedly attacked someone on the fifth floor of an apartment building.

When two officers heard the shots, they entered the structure and encountered Williams and his pal running down the stairs. While his companion managed to escape, Williams was detained for about 15 minutes and was eventually fingered as the shooter.

When the Kings County Supreme Court found the arresting officers' conduct improper, and granted relief in Williams's favor, an appeal to the Appellate Division, Second Department, followed.

Because they are allowed to detain a suspect if there is a reasonable belief a crime has been committed, the AD2 thought the cops acted appropriately given that Williams was attempting to exit the building at 3:35 in the morning, shortly after the gunshots were fired, and his friend fled when confronted by police.

Was no one there for Williams?

IF YOU CAN'T TAKE THE HEAT ...

Aurelio Carrazana sued his landlord, Stratford Five Realty, after he was injured in a fire.

Carrazana claimed he had complained of a kitchen-stove gas leak to the building's superintendent (who supposedly failed to address the problem).

Even though Stratford showed that Carrazana was a smoker, never complained of a gas problem, that the fire caused more damage to the bedroom than the kitchen, and that matches were found among the bedroom debris, the Bronx County Supreme Court denied the owner's dismissal request.

On appeal, the Appellate Division, First Department, didn't think the owner's evidence trumped that of Carrazana's--particularly since expert testimony couldn't rule out the possibility that a kitchen gas leak had caused the blaze.

Did someone run out of gas?

TRAUMATIC TENANCY

M. Beato informed his building's super that some unsavory characters were loitering, and probably selling drugs, in the lobby. After he was later attacked in that area, Beato filed suit against the property owner, Cosmopolitan Associates.

When a Queens County Supreme Court jury found in Beato's favor, and awarded him $1.5 million in past pain and suffering, $3.5 million for future pain and suffering, $250,000 in past expenses, and $1.5 million in future medical expenses, Cosmopolitan asked the judge to set aside the verdict. Although that request resulted in a substantial reduction of those sums, an appeal to the Appellate Division, Second Department, still followed.

While a landlord has a duty to protect tenants if there has been a prior occurrence of criminal activity which has made the risk of harm foreseeable, because this tenant's complaints weren't enough to make the attack predictable, the AD2 vacated the award in its entirety.

Beato sure took a beating.

MOVIN' ON UP!

For years, Carl Van Curen had two mobile homes on his property.

After he got a permit to replace one of those "trailers," the Town cited him for violating a law which limited the number of mobile homes an owner could have.

When litigation ensued, the Justice Court of the Town of Broadalbin found in Van Curen's favor, as did the Fulton County Court.

While The Town Code prohibited two or more mobile homes, since Van Curen's units were in place before the law's enactment, and complied with all safety and aesthetic standards, the Appellate Division, Third Department, thought the restriction didn't apply. (The fact that he had the appropriate building permit--as required by local law--further supported the righteousness of his position.)

Didn't that make the guy upwardly mobile?

LOW INCOME, HIGH VALUE?

Warrensburg Commons (WC) owned a 24-unit apartment complex leased to "low-income individuals."

In 2006, the Town Assessor of Warrensburg initially valued the complex at $689,000, but after meeting with the building's manager, reduced the value to $250,000. Interestingly, the Board of Assessment Review rejected that agreement and set the property's value back at $689,000 for the next two years.

When a lawsuit was filed with the Warren County Supreme Court, WC argued that the complex should have been valued based on "actual income" rather than "market rents." The Town Assessor countered that the owner forfeited its right to contest the valuation because WC hadn't timely filed the required documentation.

After the Warren County Supreme Court denied the Town Assessor's request to dismiss the case, an appeal to the Appellate Division, Third Department, followed.

Since the law (upon which the Town Assessor relied) didn't have a forfeiture provision, the AD3 refused to infer or apply one, and was of the opinion the town needed to look to the Legislature if a stricter penalty was desired.

Bet they were glad they flushed that one out.

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NEW YORK'S HIGHEST?

Anthony C. was fired from his position as a New York City Police Department detective when a drug test allegedly revealed he was using marijuana.

The guy argued that the results came out positive because he had inadvertently ingested contaminated food and had inhaled second-hand smoke. He also claimed that the report's use violated his constitutional rights because the test hadn't been authorized by his union.

After he filed a special proceeding--pursuant to CPLR Article 78--with the New York County Supreme Court, his case was transferred to the Appellate Division, First Department.

That court found Anthony's termination justified, particulary in light of NYPD's evidence that the inadvertent ingestion of marijuana wouldn't have caused the levels found in his system. His constitutional argument was also rejected because officials were permitted to use any drug-testing method, even though the precise procedure hadn't been identified in the collective bargaining agreement.

Could the AD1 have gotten more blunt?

WEED WHACKER?

Samuel Jackson was pulled over because he failed to signal prior to turning.

Apparently, as an officer approached, marijuana smoke was detected emanating from the interior of Jackson's vehicle. And when the cop looked inside, she saw a joint in Jackson's hand.

Jackson appealed his conviction of criminal possession of marijuana in the fifth degree, claiming he hadn't been in a "public place" and that the marijuana wasn't "open to public view."

The Appellate Term, Second Department, rejected his overly technical interpretation of the law and allowed the conviction to stand.

Basically, that guy was smoked out.

A WROTTEN RESULT

Juwanna Wrotten--a home health aid--was arrested for assault and two counts of robbery for allegedly attacking an 83 year-old man with a hammer and demanding his money.

After the incident, the victim moved to California, and because his physical condition and advanced age prevented him from travelling back to New York, the Bronx County Supreme Court allowed the senior to testify live via a two-way video hook-up from a California courthouse.

After Wrotten was convicted of assault in the second degree, the Appellate Division, First Department, vacated the outcome--because the lower court didn't have the authority to accept the televised testimony.

When the case made its way up to our state's highest court, the New York State Court of Appeals concluded that televised testimony didn't hinder Wrotten's rights under the United States or New York constitutions, but cautioned against the use of such a format unless there are "exceptional circumstances"--like those shown in this case.

And that's a wrap!

NO ROOM FOR ERROR?

Eleven year-old Christina Corrado fell off her bike while trying to clear two ramps set up on the edge of a sidewalk near Peter Vath's driveway. After her case against Vath was dismissed by the Suffolk County Supreme Court, she appealed to the Appellate Division, Second Department.

Since the accident's cause was based on "mere speculation," the AD2 thought the case had been properly dismissed.

Did the AD2 not mind the gap?

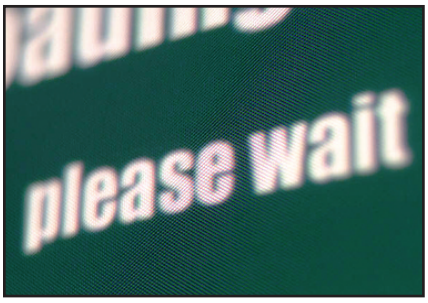
SO IT IS WRITTEN

Timothy Keefe sued New York Law School over his "legal writing" grade.

Apparently, the assignments for the class were based on material used in a different course. And, since he was a transfer student who hadn't attended that other class, he thought he had been "unfairly disadvantaged" and that the school should change his letter grade to a pass/fail. When the New York County Supreme Court granted NYLS's dismissal request, Keefe appealed.

The Appellate Division, First Department, thought the student wasn't entitled to a pass/fail option, particularly since the school's handbook provided that a letter grade would be issued (and Keefe had never been told otherwise).

It didn't help the kid's case that the institution had agreed to provide him with the materials covered in that other class. Because he didn't avail himself of that assistance, his arguments were written off.



PICK A NUMBER ...

Edward Bowie worked for St. Cabrini Home, Inc., and claimed that his employer owed him $16,107 in unpaid wages and overtime.

Although the Bronx County Civil Court found in Bowie's favor, it only awarded him $5,000, and failed to provide any rationale for its decision.

On appeal, the Appellate Term, First Department, asked the lower court to provide some clarification. But the response was only marginally informative.

While the trial court indicated that Bowie established his employer's liability, no support for that conclusion was offered. There was also no itemization or other attempt to explain how the $5,000 was calculated.

Due to the record's lack of clarity, the AT1 vacated the underlying judgment and sent the case back for a new trial.

Next!

IT'S ABOUT TIME

After pleading guilty to "speeding, riding a motorcycle between lanes, having a bent license plate, and failing to comply with a lawful order," Daniel Bonacorso claimed that his constitutional right to a speedy trial had been violated and that the charges against him should have been dismissed.

When the City Court of Rye denied his request, Bonacorso appealed to the Appellate Term, Second Department.

Although he had experienced a 21-month delay, as far as the AT2 was concerned, the mere passage of time wasn't enough to justify the case's dismissal, particularly in the absence of any prejudice. (Among other things Bonacorso needed to show that his defense had been "impaired by reason of the delay.")

That ride sure ran its course.

IT'S RAINING MEN ...

Paul and Kevin Johnson were injured when a ladder, which supported scaffolding on which they were standing, collapsed.

When they sued the manufacturer and distributor, the Johnsons had a slight problem--the ladder had been discarded after the incident. Because that critical piece of evidence went missing, the duo had to prove that there was no other cause for the collapse, other than a product-related defect.

After reviewing the parties' submissions, the Herkimer County Supreme Court concluded that "misuse" triggered the fall.

Because the defendants showed that the ladder's rated capacity had been exceeded, and that the accident had been caused by the excessive weight placed on the scaffolding, the Appellate Division, Fourth Department, agreed with the lower court's assessment of the case and allowed the dismissal to stand.

Hallelujah?

KNOWLEDGE IS POWER

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