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NEWMAN FERRARA LLP

May/June 2012
Issue 68

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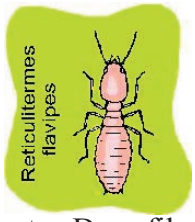
TOWER OF ERROR?



Douglas Dean didn't move into his new home because it was infested with termites, and "major renovations" had been required to rectify the problem.

When his insurer, Tower Insurance Company, denied a reimbursement claim--because he never took possession of the property--Dean filed suit and the New York County Supreme Court ended up siding with the company.

Since it was unclear whether Dean had to live in the space for coverage to apply, and whether the guy had misrepresented his intentions about living in the home, the Appellate Division, First Department, reversed and reinstated the case, so that those questions could be resolved at a formal hearing or trial.

That certainly would have bugged me.

THE SCARLET LETTER

In 2006, Madeline Acosta started a part-time clerical position with the Cooke Center for Learning and Development, which had a contract with the New York City Department of Education (DOE) to provide pre-school education.

Three months into her employment, when her supervisor insisted that Acosta undergo a background check, the DOE denied clearance because Acosta had been convicted of first-degree robbery some thirteen years earlier.

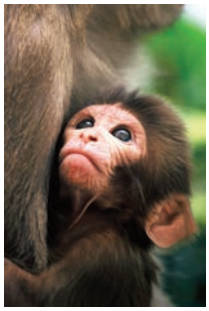
When the Cooke Center ended her employment, she sued the Center and DOE.

After the New York County Supreme Court dismissed her case, the Appellate Division, First Department, reversed on the grounds that the DOE had acted "arbitrarily and capriciously." On further appeal, while the New York State Court of Appeals agreed there had been some agency-related misconduct, it opted to let the Center out of the case.

As a general rule, it's unlawful for a private or public employer to deny an employment application on the grounds the applicant was previously convicted of a crime. While the DOE purportedly relied on an exception, there were a number of factors that needed to be considered before that exclusion applied.

Although it didn't have to offer a reason, DOE was required to consider all documentation submitted in support of the lady's application. And since the evidence showed that Acosta submitted a personal statement, letters of reference and other documents which demonstrated that--in the ten years since she completed her prison sentence--she had earned a bachelor's degree, volunteered with an organization that helped inmates develop skills for reintegration into society, started a family of her own, worked at two separate law firms, and remained a productive, law-abiding member of society, our state's highest court thought DOE's review was nothing more than a "pro forma denial."

Talk about judging someone.



MONKEY SUIT?

Nine-year-old Isaiah Smith's mother sued the City of New York after he fell off some monkey bars at a local park (his second monkey-bar related injury).

When the New York County Supreme Court threw the case out because the youngster had "assumed the risks" of engaging in the activity, the Smiths appealed to the Appellate Division, First Department, which thought that the City needed to establish that its "negligent supervision" wasn't the accident's cause.

Although his prior injury might have made him aware of the risks involved, the AD1 was unwilling to conclude that the kid fully appreciated the consequences of his actions.

Was there no monkeying with that?

AN EPIPHANY

As they were painting the walls of the RC Church of Epiphany, Manuel Jimenez and other workers fell after their scaffold shifted.

When they later filed suit, the Kings County Supreme Court found the church liable for violating New York State's labor laws.

Because the guys showed that the church didn't provide them with appropriate safety equipment, and that that omission was the sole cause of their injuries, the Appellate Division, Second Department, agreed that the church was legally responsible for what had unfolded.

Someone could sure use a miracle.

SOMETHING AMISS

After the Richmond County Supreme Court found him liable for "fraud and unjust enrichment," and directed that he pay $450,000 to Block 6222 Construction Corp., Mouhebat Sobhani appealed.

But because he didn't present all of the papers that had been considered by the trial judge, the Appellate Division, Second Department, wasn't able to issue an "informed decision on the merits," and dismissed the appeal.

That was unappealing.

HOW LIBERAL ARE WE?

Injured while working on an East Rochester school building, Clarence F. Riordan hired the firm of Cellino & Barnes to file a negligence case on his behalf. Because the lawyers supposedly didn't timely serve the school district with notice of the claim, Riordan's case was dismissed and a malpractice suit ensued.

When Riordan later sought to question two of the firm's attorneys before trial, Cellino & Barnes asked for a protective order and, after the Erie County Supreme Court granted that request (and stopped the firm's lawyers from being questioned), Riordan appealed.

In view of New York's liberal discovery rules, the Appellate Division, Fourth Department, reversed and allowed the questioning to proceed, because it thought that Riordan was entitled to get pertinent case-related facts from the firm's employees.

We ain't answering no questions about that.

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

COME FLY AWAY

In June 2002, Richmor Aviation leased a Gulfstream IV aircraft to Sportsflight Air, for the federal government's use. The parties' written agreement guaranteed 250 flight hours until November 2002, with the right to charter planes for 50 hours per month thereafter.

Richmor continued to provide a plane through 2005, and in 2006 submitted an invoice requesting payment for 1600 hours of flight time.

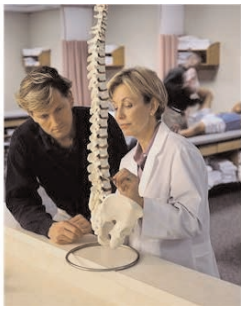
When Sportsflight rejected that invoice, Richmor sued, claiming there had been an oral agreement to extend the 50 hours of guaranteed flight time per month. Sportsflight countered that flights had been sold on an "as needed" basis by way of an independent agreement.

After the Columbia County Supreme Court found that the parties' contract had been extended, and awarded Richmor over $1 million in damages, Sportsflight appealed.

Since the two companies continued to perform pursuant to their original agreement, the Appellate Division, Third Department, thought the trial judge correctly concluded that the original deal's terms still applied. (Richmor referred to the flights in the same manner, and used the same plane--unless it was out for maintenance, in use, or the government requested a different aircraft. Sportsflight never chartered the plane to other clients without the government's permission, and continued to maintain an on-call ground crew.)

Interestingly, the AD3 disagreed with the lower court's damage calculation and reduced the total guaranteed flight time from 1600 to 1550 hours, and the total recovery from $1,119,650 to $874,650.

In other words, Sportsflight's arguments never took off.



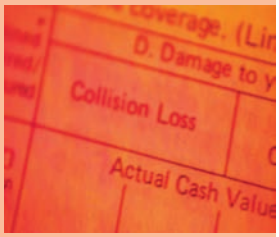
DOCTOR'S ORDERS

When she enrolled in D'Youville College's Doctor of Chiropractic program, Nicole M. Enzinna thought her degree would allow her to take the licensing exam wherever she wanted. After she graduated, Enzinna and other students learned that that wasn't the case, and sued the college for "false advertising," "false and deceptive business practices," and "negligent misrepresentation."

Although the college argued that the governing "statute of limitations"--the timeframe within which Enzinna had to bring the suit--had expired, the Erie County Supreme Court and the Appellate Division, Fourth Department, didn't think the clock began to run until the students learned of their inability to get a license. (Because the case had been timely filed, the litigation was permitted to continue.)

They showed some spine.

SOME POLICY



Arrested for driving without auto insurance, Sandra Martin sued her insurance broker--Parsons DiSalvo Agency--claiming the broker should have notified the Department of Motor Vehicles (DMV) that she had insurance in place. (When told that her policy had lapsed, Martin secured coverage, and the agent forwarded the premium to the insurance company.)

After the Westchester County Civil Court awarded the lady $449.40, DiSalvo appealed.

Because New York state law requires insurance companies--rather than brokers--to advise the DMV of policy-related changes, the Appellate Term, Second Department, thought that DiSalvo had done no wrong and ended up reversing and dismissing the case.

They brokered their way out of that.

THE GANG'S ALL HERE

Convicted of assault in the first and second degrees, gang assault in the first degree, and two counts of criminal possession of a weapon, Ariel Enriquez was sentenced to a ten-year prison term by the New York County Supreme Court.

Although he challenged the sufficiency of the evidence, the Appellate Division, First Department, thought the record established that Enriquez and his cohorts were engaged in a "joint activity"--particularly since a "variety of weapons" had been used to attack the victim, who happened to have been a rival gang member.

What the heck do we care?

BOOZE TALK

After he was convicted by a Bronx County Supreme Court jury of driving while under the influence of alcohol, and criminal mischief in the fourth degree, Daniel Peart was hit with three years of probation and a $500 fine.

He later asked the Appellate Division, First Department, to reverse, because he thought the verdict went against the weight of the evidence. (Peart argued that he didn't imbibe any alcohol until after his vehicle hit several parked cars.)

Although he didn't preserve his arguments for an appeal, the AD1 reviewed the record and found that the outcome was appropriate, given a witness's testimony that right after the collision, Peart appeared to be intoxicated, and because Peart supposedly admitted to the arresting officers that he had been drinking and driving.

That had to be sobering.

THE EPISTLE OF BARNABAS

While under supervision at St. Barnabas Hospital, Biber Kukic jumped from his hospital-room window and was injured.

When he later filed suit, Kukic alleged the hospital and its physicians had been negligent. But because they established Kukic's treatment complied with medically acceptable practices, the Bronx County Supreme Court dismissed the case.

Since the jump wasn't foreseeable, or caused by any treatment-related errors, the Appellate Division, First Department, affirmed. (It refused to accept the testimony offered by Kukic's expert because that analysis was seen as "speculative and wholly unsupported by the record.")

And so it is written.

VILLA'S THRILLA'

Guillermo Villa was assaulted at a rap concert and later sued Paradise Theater Productions, Inc. (the concert-venue owner), and Emmis Communications (the concert promoter), claiming there hadn't been enough security.

Both the New York County Supreme Court and the Appellate Division, First Department, agreed that the defendants weren't liable for what happened because reasonable security measures--like security guards, metal detectors, and a police presence--had all been in place.

That couldn't have been music to Villa's ears.

OH AMAYA!

Florencia Amaya was sued after her car, operated by a man she didn't know, was involved in a head-on collision. When she later asked that the case be dismissed, the Suffolk County Supreme Court denied her request.

Since Florencia had loaned the car to Ever Benitez, with the understanding that no one else be allowed to drive it, and because the driver didn't have Florencia's or Ever's consent to operate the vehicle, the Appellate Division, Second Department, reversed and let the lady out of the case.

Bet she won't Ever do that again.

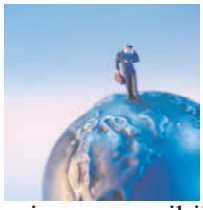
EQUUS

Aljosa Dobre and partners boarded their horses at a public stable and riding facility operated by Riverdale Riding Corporation, and their agreement provided that either party could terminate the arrangement at any time, for any reason, on as little as 30 days' notice.

On July 10, 2009, Riverdale notified Dobre that it was cancelling the boarding agreements, and that the animals had to be removed. On July 31, Riverdale sent another letter, which reiterated that the contracts had been cancelled, and that the failure to remove the horses would be deemed an "abandonment." In response, Dobre and his colleagues sued in Westchester County Supreme Court for injunctive relief, and for damages based on an "illegal eviction."

After the Westchester County Supreme Court granted Riverdale's dismissal request, the owners appealed to the Appellate Division, Second Department, which found no liability, since the boarding agreements had been properly terminated in "accordance with their terms."

Neigh!



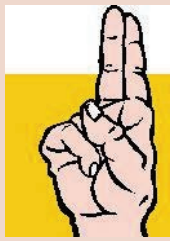
HE WASN'T GOING DOWN

Demoted from his position as the sole CFO of the NYU Hospitals Center, Richard Miller filed suit, claiming breach of contract. When its dismissal request was denied by the New York County Supreme Court, NYU appealed.

Since he was no longer part of the organization's "senior leadership team," and lost most of his prior responsibilities, the Appellate Division, First Department, thought the guy established a violation of the parties' agreement, and that the discharge of his wrongful-discharge claim would be wrongful.

Will he get back on top?

PROMISES, PROMISES



David Smith went to work for Multidyne, after he resigned from Meridian Technologies. In letters sent to Smith and Multidyne, Meridian claimed that its former employee had "exploited" the company's trade secrets and was in violation of a non-compete clause. After he was let go by Multidyne, Smith sued Meridian, but the Nassau County Supreme Court ended up dismissing the case.

Since he had executed an enforceable non-compete agreement, the Appellate Division, Second Department, thought that Meridian's letters didn't amount to a wrongful act for which Smith could recover damages.

"This is where those promises, promises end ...."

NOT IN THE INTEREST OF FULL DISCLOSURE

Unhappy with Sandals Resorts International's hiring policies, "jft3092@gmail.com" sent out an email which described the company as a predatory entity which accepted Jamaican tax subsidies, yet considered locals unworthy of upper-level positions.

In response, Sandals filed a lawsuit, asking the New York County Supreme Court for an order requiring Google to disclose "jft3092's" identity. When that request was denied, Sandals appealed.

In addition to the company's failing to show how it was harmed by that email, the Appellate Division, First Department, thought the content wasn't actionable because it contained "constitutionally protected opinion." (The writing wasn't seen as defamatory because the author provided a series of links which not only supported his view of the company's practices, but allowed the message's recipients to arrive at their own conclusions.)

That was no walk on the beach.

UPSTAIRS, DOWNSTAIRS

Dr. Pamela Lipkin sued her fellow cooperators, Richard and Liane Weintraub, after a renovation project went awry and damaged Lipkin's medical office.

While the New York County Supreme Court thought that only the construction team was responsible for what had happened, the Appellate Division, First Department, was of the view that the Weintraubs also owed a duty--reinforced by their propriety lease and an alteration agreement--to ensure that their contractors took "reasonable precautions" to avoid injury to people and property.

Do unto others ....

THE WONG WIFE

When Victoria Wong filed for divorce, her husband, Ricky, asserted that the parties had signed a prenuptial agreement.

After the New York County Supreme Court dismissed his claim, Ricky appealed.

But since he couldn't prove he ever received a fully executed version of the document, or produce a "true and accurate" copy, the Appellate Division, First Department, agreed that Ricky wasn't able to show that a binding and enforceable agreement existed.

Was that Wong?

SCAR-PACE

After 31 years of marriage, Mario Scarpace filed for divorce.

While the marital property was distributed to her satisfaction, Mrs. Scarpace wasn't happy with the Saratoga County Supreme Court's maintenance award of $200 per week, for six years.

On appeal, the Appellate Division, Third Department, found the dollar figure to be fair--given the lady's conservative lifestyle (prior to the divorce), her employment status, and the division of the marital assets. But in light of the couple's income disparities, and her "reduced earning potential," the AD3 thought a "nondurational" (lifetime) award was the way to go.

Who wouldn't have killed for that?

NOT A CARE IN THE WORLD

At just two years of age, Jaylin Jacob W. was hospitalized for cancer treatment, yet his mom, Malipeng W., only visited him about once a week and failed to attend discharge training--which resulted in the kid having to stay in the hospital for an extra three months.

Jamiar W., Jaylin's brother, was hospitalized for "excess fluid in the brain," which required surgery and follow-up treatments, but because Malipeng didn't schedule medical appointments, his health worsened.

After the Queens County Family Court found her guilty of neglect, Malipeng appealed, but the Appellate Division, Second Department, agreed that the lower court's findings had been established by a "preponderance of the evidence."

Mums the word?

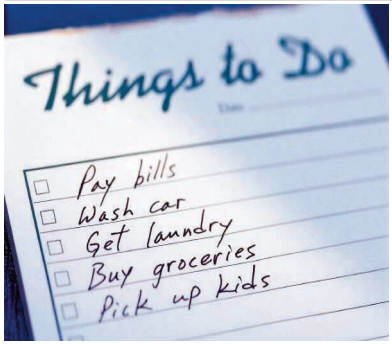
STEP IN TIME

New York City police officer Rosario Sebastiano sued the NYC Transit Authority after she fell down a subway station's stairs.

When a Bronx County Supreme Court jury found in Sebastiano's favor, the trial judge set aside the outcome and ordered a new trial, whereupon the parties appealed.

Because the station was built in 1915, well before enactment of the relevant building and maintenance codes, the Appellate Division, First Department, thought the case had to be dismissed. Although the station was under renovation at the time of the accident, the officer didn't show (to the court's satisfaction) that the work triggered, or was subject to, those laws.

"Never need a reason, never need a rhyme ...."



ON THE "TO-DO?"

Peter Voutsas intended to sue his former partners for fraud after their company was dissolved back in May 1996. But some three years later, when he filed for bankruptcy, Peter neglected to list that claim as an "asset."

When he finally got around to bringing a case, the New York County Supreme Court dismissed the litigation. And, on appeal, the Appellate Division, First Department, agreed that by not disclosing the dispute within the bankruptcy context, Peter had forfeited any right to file a lawsuit.

No scratching that off.

TRY NURSING THIS

When John Balzarini was admitted to a nursing home, the cost of his care exceeded his monthly income.

After the Suffolk County Department of Social Services (DSS) determined that all his money--which consisted of Social Security and a private pension--should go to the facility, John challenged the decision on the grounds that his wife, Francis, needed some of the funds to support herself.

While a law known as the Medicare Catastrophic Coverage Act provides that a non-institutionalized spouse may keep "necessary, but not excessive, income and assets," that formula can be modified in "exceptional circumstances."

Arguing that DSS's calculations exposed his spouse to "significant financial distress," John wanted to have her allowance increased. (Apparently, Francis's expenses, such as mortgage payments, real-property taxes, food, prescription drugs, and payment of credit-card debt--incurred before John was institutionalized--were nearly double her monthly income.)

On its review of the case--filed pursuant to CPLR Article 78--the Appellate Division, Second Department, found that Francis was entitled to an upward modification of her allowance because her monthly expenses were all "necessities of daily living." But because it didn't believe the term "exceptional circumstances" encompassed ordinary living expenses, the New York State Court of Appeals reversed. While the law seeks to prevent "financial disaster," our state's highest court was of the view that didn't mean an individual was entitled to maintain his/her lifestyle or standard of living.

Absent a demonstration of "hardship," our state's highest court reinstated the DDS's original calculations.

There's no taking it with you.

PLAYING HOOKEY

After a hearing, Mary Wallis's employment as a school bus driver came to an end due to her excessive absences. Even though she supposedly received several warnings over an 18-month period, Wallis ended up being out over 60% of the time.

On appeal, the woman claimed that the outcome should be annulled because she had missed work for legitimate reasons, such as a work-related injury.

Since there was "substantial evidence" that Wallis was "insubordinate," and that her absences had a "disruptive and burdensome effect" on her employer, the Appellate Division, Fourth Department, thought that she had been properly terminated. (Her physical incapacity didn't excuse her excessive absences.)

That would've made me sick.

WHERE WILL HE PARK IT?

Chris Mullusky--a New York City Department of Parks and Recreation employee--was fired for allegedly making anti-Semitic remarks to a Jewish co-worker.

When he challenged his termination by way of a special proceeding, brought pursuant to CPLR Article 78, the New York County Supreme Court referred the matter to the Appellate Division, First Department.

Because it deferred to the Administrative Law Judge's credibility determinations, and since the penalty didn't "shock" its "sense of fairness," the AD1 left the outcome undisturbed, particularly in light of Mullusky's "prior disciplinary history."

That wasn't in the park, that's for sure.

LET ME SEE YOUR HANDS

1133 Taconic, LLC, tried to recover real-estate taxes it paid while it was in "wrongful possession" of property owned by Lartrym Services.

When the Dutchess County Supreme Court dismissed the case which had been based on an "unjust enrichment" theory, Taconic appealed. But because the tenant had "unclean hands," the Appellate Division, Second Department, allowed the dismissal to stand.

They must have been real dirty.

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Cheeky

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LOW BLOW!

After he was shot in the urethra, Edwin Gomez sued William Morales, an off-duty cop.

While Gomez asserted that he heard Morales mumble "Russian roulette" before firing, no other evidence supported that claim. (And even if the shooting hadn't been intentional, the incident left Gomez in the hospital for five days, and the poor fellow was required to use a urine catheter for some three weeks.)

Finding it was an accident, a Bronx County Supreme Court jury awarded Gomez $1.5 million for his pain and suffering. But when the New York City Police Department asked that the jury's verdict be rescinded, the judge directed a new trial on the issue of damages, unless Gomez agreed to accept $700,000.

When the case got to the Appellate Division, First Department, it thought $700,000 was way too high, and that Edwin should consider accepting $500,000.

That must have pissed him off.