KNOWLEDGE IS POWER

Sponsored by

NEWMAN FERRARA LLP

September/October 2011
Issue 64

Inside this issue

NO LEGGETT TO STAND ON

When a tenant was unable to get back into his own apartment, police were dispatched to the scene and encountered Corey Leggett (the tenant's friend) refusing to open the door. (Leggett also reportedly used threatening and profane language, demanded to see a search warrant, and asked for drugs.)

After they heard Leggett moving appliances, officers forced open the entrance and found the man in possession of three guns, and ammunition.

Because he thought the officers' conduct was a constitutionally violative "search and seizure," Leggett wanted to prevent prosecutors from using the evidence retrieved from the apartment at his criminal trial. And in response to the Westchester County Court's denial of that request, Leggett pled guilty to criminal possession of a weapon in the second degree, and four counts of criminal possession of a weapon in the third degree, and subsequently filed an appeal.

Since it was "reasonable" to believe that an "emergency" existed, and that Leggett's safety, and that of others, was at risk, the Appellate Division, Second Department, thought the cops had acted appropriately. (It also upheld the guy's sentence because it wasn't "excessive" and Leggett had understood the ramifications of his plea.)

What was Leggett trying to pull?

AWE-SOME

Awe Olunkunle settled a nonpayment case with his landlord, and agreed to relocate from a two-bedroom to a one-bedroom apartment, and that the rent for the "subject premises" would be $215 or 30% of the tenant's income, whichever was higher.

When it came time to move, the parties couldn't agree on the rent for the smaller unit. The landlord claimed that the term "subject premises" referred to the two-bedroom apartment, while Awe argued that that term referred to the smaller space.

When the New York Civil Court denied Awe's request to "reform" the agreement to comport with his understanding of its terms, he appealed.

While "reformation" is available when a party wants to add terms to an agreement that were "inadvertently omitted," or to remove wording that was "inadvertently supplied," the Appellate Term, First Department, thought the tenant was really asking the court to resolve an ambiguity, and that a hearing was needed to determine what the term "subject premises" referenced.

Will Awe be in for a shock?

Looking for 3 free CLE credits? *Check out page 4.*

NOT IN LIKE FLYNN?

Mark Flynn sued his landlord, and the building's managing agent, after he was attacked by his ex-girlfriend's companion. (Flynn claimed that security personnel had negligently allowed the perpetrators to enter the building unannounced.)

When the New York County Supreme Court denied a dismissal request, the owner appealed.

But since Flynn's injuries weren't foreseeable, and no "reasonable" security measures could have prevented what happened, the Appellate Division, First Department, thought the case needed to end.

Apparently, the ex-girlfriend was a regular visitor to the building, and there had been no indication that she should be denied entry or that "any foul play was in the offing."

Drats!

FAST AND FURIOUS

Joseph Woodward filed suit after he was involved in an accident with one of Associated Ambulance Service's vehicles.

Because a patient was being transported, the ambulance driver was shielded from liability unless "reckless disregard"--or unreasonable behavior--could be shown.

Since the emergency lights and siren had been activated, and the driver had reduced speed and looked both ways before entering the intersection, both the Kings County Supreme Court and the Appellate Division, Second Department, were of the view that immunity applied and that the case had to be dismissed.

That had to be a pain in the AAS.

WHO'S THE BULLY, NOW?

While a jury was deciding the outcome of a medical malpractice case brought against the City of New York, a juror advised the trial judge of some "heated" discussions that were taking place behind the scenes.

Although the New York County Supreme Court Justice asked the jurors to be "civil," and directed that deliberations continue, the next day, Juror #3 expressed discomfort with the continued "threats" and "intimidation."

When #3 was excused, and replaced with an alternate, the City objected and took the position that the judge should have asked others whether they were being harassed. (The City also argued that the misbehaving juror should have been excused.)

After the plaintiff was awarded an $8 million recovery, the Appellate Division, First Department, thought the City's right to a fair trial had been compromised and that the juror's substitution--after deliberations had commenced and over defense counsel's objection--denied the City the right to a fair trial.

The City wasn't about to take a beating.

Editorial Board:
Executive Editor: Lucas A. Ferrara, Esq.
Managing Editor: Helen Frassetti

Contributors
Jonathan H. Newman, Esq.
Lucas A. Ferrara, Esq.
Glenn H. Spiegel, Esq.
Jarred I. Kassenoff, Esq.
Daniel Finkelstein, Esq.
Robert C. Epstein, Esq.
Jon B. Felice, Esq.

©Knowledge Is Power Initiative Ltd.

Barry Gottlieb
Glenn Berezanskiy
Jesse D. Schomer
Ricardo M. Vera
Maxwell K. Breed
Richard W. Sutton
Mona L. Lao

Student Editors
Christian Turak
Antoniya Kaneva
Matthew Vahidi
Jon Linder
Kevin Peterson
Emily Wolfe

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.

Disclaimer:
This publication is designed to provide accurate information on the subject matters addressed. It is distributed with the understanding that the publication is not intended to render legal or other professional advice. If such expert assistance is required, readers are encouraged to consult with an attorney to secure a formal opinion. Neither the publisher nor its contributors are responsible for any damages resulting from any error, inaccuracy, or omission contained herein.

HU'S ON FIRST?

After his month-to-month tenancy was terminated, East Broadway Mall started a holdover proceeding against Tin Tian Hu.

When his dismissal request was denied by the New York County Civil Court, Hu appealed to the Appellate Term, First Department.

Since the pleadings failed to identify the City as the owner of the building, and the Mall's lease with the municipality was never introduced into evidence, the AT1 thought the errors in the case were "fatal."

(Because the parties' occupancy agreement was "subject to and subordinate to" the City's lease, the appellate court believed that those omissions deprived Hu of certain defenses, and prevented the lower court from "properly" deciding the dispute.)

Hu's Mall was it?

STAY RIGHT WHERE YOU ARE

Although Jose Fajardo claimed to be the building's true owner, when a holdover proceeding was filed against him, a Queens County Housing Court judge advised Fajardo that he needed to get an injunction from the Queens County Supreme Court if he didn't want to get evicted.

Fajardo failed to heed the judge's admonition, didn't return to Housing Court on the next scheduled hearing date, and a default judgment was entered against him.

On appeal, the Appellate Term, Second Department, thought Fajardo's "constructive ownership" claim should have been heard by the Housing Court.

Because the "clear import" of the judge's instructions was that if the guy didn't get a stay he would lose the case, the AT2 found that guidance to be prejudicial, and vacated the default.

How constructive was that?

ADMISSION IMPOSSIBLE

After defeating her landlord's holdover proceeding, Shira Kalish wanted to recover her legal fees. But when the tenant presented a copy--but no original--of the 1943 lease, suggesting that she was entitled to collect such fees, the landlord questioned the document's authenticity and admissibility.

In response, Kalish argued that because the owner's pleadings referenced the 1943 agreement, that "admission" reinforced the tenant's entitlement to the fees. (Alternatively, Kalish asked that her version of the document be deemed an authentic copy of her lease.) When the Civil Court denied her request, and directed that the parties proceed with a hearing, Kalish appealed.

While the contents of a pleading may be used against a party, the allegations must be verified by someone with "personal" knowledge of the facts. Here, the Appellate Term, First Department, noted that the representations in dispute had been sworn to by the landlord's attorney--who attested to the accuracy of what had been pled "upon information and belief." (The AT1 also thought the Civil Court was in the best position to decide whether or not the document was authentic and admissible.)

What you know, can kill you.

This publication is made possible by a generous grant from:

NEWMAN FERRARA LLP

1250 Broadway, 27th Floor • New York, NY 10001
Tel: 212-619-5400 • Fax: 212-619-3090
www.nfllp.com

MAKING SENSE OF NONSENSE:
A LOOK AT SOME UNUSUAL REAL-ESTATE CASES

This class examines some of New York's most controversial real-estate decisions.

The presenters--established litigators and practitioners in the real-estate arena--will look at existing precedent and examine the procedural and substantive hurdles posed by those decisions.

3 CLE Hours: Areas of Professional Practice

This course has been approved for both newly admitted and experienced attorneys.

Wednesday, November 2, 2011

6-9PM

This free CLE program is sponsored by:

NEWMAN FERRARA LLP

1250 Broadway, 27th Floor • New York, NY 10001
Tel: 212-619-5400 • Fax: 212-619-3090

For additional information, or to reserve your seat,
please call Glenn H. Spiegel, Esq. at (212) 619-5400.

INNOCENCE LOST

Alex Rivera was charged with eleven criminal counts in connection with a home break-in.

During the course of deliberations, the jurors informed the trial judge that they had found Rivera "not guilty" on six counts, but were deadlocked on the remaining five.

Over the defendant's objections, the judge refused to accept the partial verdict and ordered the jurors to deliberate on all counts, including those they had already decided. And the next day, the jury returned with a complete verdict, finding Rivera guilty on 10 of the 11 counts.

Although Rivera argued that the judge's actions were wrongful, the Appellate Division, Second Department, didn't agree. When the dispute reached our state's highest court, that tribunal thought the trial judge had two options when he was presented with a partial verdict: he could have allowed the jury to deliver the partial verdict, and permitted them to resume deliberations on the remaining counts, or ordered them to continue deliberations on all counts.

By rejecting the partial verdict, the Court of Appeals thought the trial judge was "signaling" to the jury that the outcome was wrong, conduct seen as "coercive" and depriving Rivera of his right to a fair trial.

Too many wrong mistakes.

WE GET LETTERS

Dear Editor:

I read your newsletter for the first time, word-for-word, cover-to-cover.

While I usually skim the publication, this time I carefully read the first page, and went on and on…until I laughed myself to sleep! (I'm not kidding.) At age 96, I have trouble sleeping and, after I started reading, I couldn't stop. Funny as all hell!

I have no idea how many people work on this thing, but it's fantastic. I love every bit of it!

Marie M. Runyon, New York, NY

P.S. Could you please send me some back issues? I need to get some more sleep!

Editor's Response:

Thanks for your note (and for making us smile). A supply of our back issues are on their way. Sweet dreams!

Ms. Runyon is a political activist and former New York State Assemblymember, most recently known for her work with the "New York Granny Peace Brigade."

NO BICKERING, PICKERING

When Yolanda Pickering sued her former landlords to get back her security deposit, they countersued, claiming she owed them three months' rent.

Because the building contained an illegal apartment, the Richmond County Civil Court awarded Pickering a refund. But since this dispute involved a single-family home, and a rent-forfeiture penalty only applies when an apartment's in a "multiple dwelling," the Appellate Term, Second Department, reversed.

According to the AT2, the owners were entitled to back rent and could keep Pickering's security money as an offset.

Was there no arguing with that?

HOW TO--

Ennismore Apartments filed a holdover proceeding to have Allan Gruet evicted because he continued to live in a stabilized apartment after the death of the tenant-of-record. Although Gruet asserted a succession entitlement, the landlord learned that Gruet also claimed, in a different case, that he primarily lived in another building.

After the New York County Civil Court found in Gruet's favor, the landlord appealed.

Since the settlement in that other case was "so-ordered" by a judge and a final judgment was issued, and because he couldn't argue that he maintained a primary residence at two different regulated apartments at the same time, the Appellate Term, First Department, reversed and ordered that the guy be evicted.

How to--not to--succeed.

FALSE SENSE OF SECURITY?

Because he supposedly failed to give enough notice that he wasn't going to renew his lease, Peter Schlesinger's landlord wouldn't return a $4,300 security deposit.

After a nonjury trial, the Nassau County District Court awarded the tenant a $3,746.46 refund--with the landlord getting $553.54 for unpaid electric and water bills, together with fees for carpet cleaning, replacing the "bathroom/kitchen tile," and re-keying the locks.

On appeal, the Appellate Term, Second Department, thought that Peter was only required to give notice if he wanted to stay in the space after his lease expired. Because that wasn't the case, no forfeiture of the security deposit was warranted. While the AT2 upheld some of the offsets--like the electric, water and lock-replacement charges--since the landlord didn't have receipts for the rest of his claimed damages, his recovery was reduced from $553.54 to $373.54.

Peter sure secured a victory there.

IT TAKES TWO, BABY

Kristin Johansen asked the Suffolk County District Court to rescind a money judgment that was entered against her in a nonpayment case on the grounds she wasn't liable for the sums sought.

When Kristin's request was granted, the landlord appealed. But because she never had a lease with the building's owner or ever paid rent, and her status was only that of a mere "licensee," the Appellate Term, Second Department, agreed that Kristin wasn't responsible for the payments.

Two can make that wish come true, yeah.

WE WANT YOUR MONEY!

Help further our educational mission by supporting our newsletter and video programming.

MAKE AN ONLINE CONTRIBUTION AT: www.kipny.com

Knowledge Is Power Initiative Ltd. is qualified as a charitable organization under Section 501(c)(3) of the Internal Revenue Code. Contributions are tax-deductible to the extent permitted by law. (Please consult your tax advisor for the federal, state, and local tax consequences of your contribution.)

A copy of our latest annual report may be obtained, upon request, from Knowledge Is Power Initiative Ltd., 1250 Broadway, 27th Fl., New York, New York 10001, or from the New York State Attorney General's Charities Bureau, Attn: FOIL Officer, 120 Broadway, New York, New York 10271.

ABANDON SHIP!

Laurence Apel was propelled across the deck of a barge which was transporting construction materials along the East River.

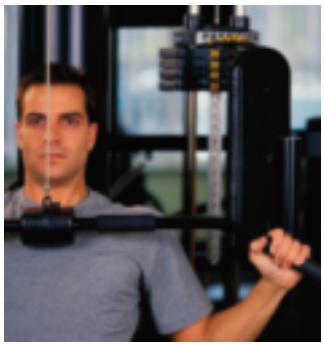
In order to move the vessel, a heavy eighty-foot-long anchor rod had to be lifted from the water by a crane, and a 125-pound steel pin placed in a hole to lock the anchor in place. Apel was inserting one of those steel pins when the crane prematurely released the anchor, causing the pin to pop up like a "seesaw," "snapping" the guy's arm and "hurling" him across the boat.

When he later sued, the New York County Supreme Court found the City of New York liable for the man's injuries.

Since no adequate safety measures were in place to guard against the unchecked descent of that "very heavy" anchor rod, the Appellate Division, First Department, agreed with the lower court's determination. (It also didn't think Apel was in any way responsible for what had happened.)

Damages aweigh!

DON'T PRESS YOUR LUCK



While he was attending a fitness class at the Rochester Institute of Technology (RIT), Matthew Capuano's trainer told him to "max out" on the horizontal leg press machine.

Unable to keep the weight up, Matthew suffered a serious back injury and later filed a personal-injury suit against the school.

Because he had "assumed the risk" of injury by using the machine, the New York Supreme Court granted RIT's dismissal request.

Since it wasn't clear Matt knew he risked harm, the Appellate Division, Fourth Department, sent the case back so that a jury could determine whether the trainer was responsible for what happened, and if the injury could have been prevented. (Apparently, the woman Matt was working with had no "formal" weight-training and wasn't in the room when the accident occurred.)

Now that was heavy.

AN EDUCATIONAL EXPERIENCE?

After NYC public school teacher Shelly Stuckhardt filed a personal-injury case against the NYC Department of Education in Queens County Civil Court, the DOE responded with a suit in Kings County Civil Court to recover $19,360.42 in salary overpayments.

When a Queens County judge denied Stuckhardt's request to consolidate the two cases and to transfer everything to Brooklyn, she appealed to the Appellate Term, Second Department.

Since it is up to the trial judge to decide whether or not a joint trial should be conducted, and because the two cases didn't involve a "common question of law or fact," the AT2 left the denial undisturbed--particularly in the absence of any proof the claims "overlapped."

Seems Shelly Stuckhardt's stuck.

CUT DIMOND

Cynthia Dimond hired Sherwood Allen Salvan to sue her former lawyer for malpractice after a judge dismissed her personal-injury case.

When her malpractice case also got dismissed, Dimond sued Salvan for malpractice, claiming he should have advanced a bunch of theories (rather than just the one he used).

After the New York County Supreme Court threw the case against Salvan out, Dimond appealed to the Appellate Division, First Department, which was of the view that an attorney's selection of a single course of action wasn't malpractice.

(The AD1 disregarded the testimony offered by Dimond's expert, since it's the court's role to decide whether an attorney has deviated from governing standards and practices.)

How would you appraise that?

THIS MUST HAVE BEEN A NAG

During the course of a date, Barbara Ann Stanislav was injured while horseback riding.

She later sued her boyfriend, William Papp, claiming he hadn't warned her of the activity's dangers and that he failed to "appreciate" her limited riding skills. He also supposedly ignored her request that the animals proceed at a slow pace.

After the New York County Supreme Court granted Papp's request to reign the case in (and dismiss), Stanislav appealed.

Since she was fully aware of the dangers associated with the sport, the Appellate Division, First Department, thought that the lady was beating a dead horse. (Papp's conduct wasn't seen as reckless or creating any "additional unanticipated risk.")

In other words, that Papp avoided a good schmear.

TAKEN FOR A RIDE

Although he was legally entitled to retrieve his motorcycle, every time John McGrath went to his ex-wife's house, she rebuffed his efforts--claiming the vehicle was blocked by other items stored in the garage.

When he eventually got the bike, and found it in a "rusty" and "inoperable" state, McGrath filed suit. And when the Suffolk County District Court found his "ex" wasn't liable for the deterioration, McGrath appealed.

Because the lady refused access, and failed to properly care for the bike while it was in her custody, the Appellate Term, Second Department, reversed. But, interestingly, even though the cycle was worth about $2,800, McGrath was only awarded $500.

V-rroom!

IM AT A LOSS

In 2006, "Cosmos," a Queens County jewelry store, asked Matthias Saechang Im to find the company an insurance policy that covered theft.

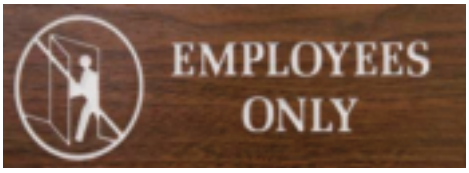
While he supposedly found a plan, it wasn't until the policy was renewed (in May 2007) that Im advised his client that the desired coverage wasn't included.

And although he later offered two different theft-insurance options, Cosmos neglected to sign up for either of them.

After the store was robbed, Im was sued for the loss. And when the New York County Supreme Court denied his request to dismiss the case, he appealed.

While Im had made some mistakes, because he wasn't responsible for the theft, or the client's inaction, the Appellate Division, First Department, reversed and threw the case out.

Was that a form of cosmic coverage?



ADP GETS WORKED UP

When Pedro Pena sued Automatic Data Processing (ADP) to recover damages for injuries suffered while at work, the company countered that Pena's status as a "special employee," prevented him from maintaining the case.

And when the Suffolk County Supreme Court denied ADP's dismissal request on that basis, the company appealed.

Under our state's Workers' Compensation Law, a person entitled to workers' compensation benefits usually can't sue his employer or "special employer."

Factors which determine whether someone is a "special" employee include who pays the wages, supervises and benefits from the work, and has the authority to fire the individual. Since there were questions as to whether Pena's work was supervised by ADP or Randstad, his general employer, the Appellate Division, Second Department, agreed that the case couldn't be dismissed.

Was that the ADP solution?

KNOWLEDGE IS POWER Knowledge INITIATIVE LTD

1250 Broadway, 27th Floor, New York, NY 10001
tel. 212-619-5400 • fax 212-619-3090

Fall for this.

www.nyreblog.com

DON'T GO CHASIN' WATERFALLS

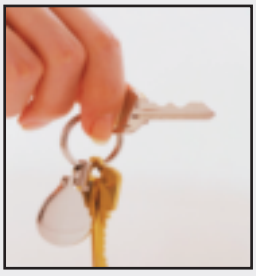
Thirteen-year-old Darlin Melendez was injured when he fell into the Bronx River from the top of a naturally occurring waterfall in Bronx River Park.

Apparently, the kid climbed over a four-foot-high pipe-rail fence that blocked access to the waterfall and, as he moved away from the edge, slipped into the water below.

When Melendez later filed a personal-injury case against the City of New York, a jury found in the kid's favor. And after the Bronx County Supreme Court granted the City's request to set aside the outcome, Melendez appealed.

The Appellate Division, First Department, was of the view the City had no duty to protect the youngster, since the danger of climbing out onto the wet ledge should have been readily apparent to him. Because a slippery ledge is an "open and obvious" natural feature, the AD1 thought the risks--and dangers--should have been anticipated.

Was there a fallback position?



COME UNLOCK OUR VAULT!

KIP'S new website--www.kipny.com--features a series of videos on an array of topics.

Watch our panel of experienced lawyers and local politicians discuss such issues as homelessness, gay rights, and the "Stuy Town" decision.

Special guests include: Assemblyman Micah Z. Kellner, Assemblyman David I. Weprin, and New York City Council Member James Sanders, Jr.