NEWMAN FERRARA LLP

The Real Estate Litigation Leaders

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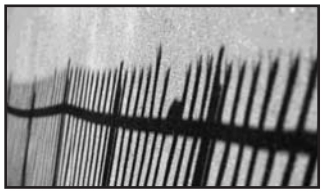
OUT OF BOUNDS



De Paulis Holding Corp. (DPHC) owned two Staten Island lots -- numbered 17 and 74 -- and when it sold one of the lots to the Russo's, the deed's metes and bounds description was inaccurate and ended up including the second parcel.

When that property was later purchased by Albert Vitale that conveyance also suffered from the same error. After DPHC sued to correct the mistake, the Richmond County Supreme Court denied Vitale's request to dismiss the case.

On appeal, the Appellate Division, Second Department, thought that the mishap rendered the deed "ambiguous," which, in turn, allowed the parties to introduce evidence as to their actual intentions.

And, since a trial was needed to resolve the dispute, the AD2 agreed that dismissal of the case wasn't appropriate.

Was that a measured response?

LET THE SUN SHINE IN!

In *Kiam v. Park & 66th Corp.*, Victor Kiam sued to prevent his co-op -- the Park & 66th Corporation -- from interfering with his "sun room," which he had built on his apartment's terrace some three decades ago.

Since his proprietary lease gave Kiam "exclusive use" of the area next to his penthouse unit, the New York County Supreme Court determined that he had a right to enclose the space and construct a sun roof.

On appeal, the Appellate Division, First Department, concurred. Apparently, the cooperative's Board had approved the sun room's construction and, after 35 years, had "waived" or relinquished its right to challenge Kiam's conduct.

Looks like that co-op got eclipsed.

ASHES TO ASHES, DOLLARS TO DUST

After James Bensen's dog died, he decided to have his pet's remains cremated.

When the animal's ashes weren't returned to him, Benson sued Isabella Wojsz, the cremation service provider.

After the Queens County Civil Court awarded $250 -- the cost of the service -- Bensen appealed to the Appellate Term, Second Department, claiming that the sentimental value of the animal's ashes should have been considered.

Unwilling to recognize Bensen's dogged devotion to his pet, the AT2 left the outcome undisturbed.

The AT2 sure put that one to rest.

NON-DESIGNING WOMAN

June Ricca sued Samhal Interiors to recover money paid for some design work.

While the parties' written agreement separated the project into two components, a completion date wasn't specified. (It did provide that the $5,000 retainer fee wasn't refundable, unless Samhal failed to complete the work.)

During the course of a non-jury trial, Samhal showed it spent quite a bit of time on the project and gave the court an abstract of the services performed. The company also established that Ricca didn't make design decisions -- which impeded the company's efforts.

Ricca, on the other hand, thought the project had taken too long and wanted to terminate the contract without losing her retainer fee.

After the District Court awarded her a refund of $2,037.50, the Appellate Term, Second Department, reversed on appeal. The AT2 found that Samhal hadn't breached the agreement and that Ricca's indecisiveness was the cause of the delay.

How would you have dressed that up?

CONSUMING BEERS

After picking up a 12-pack of beer at a Quickway store, Earl Beers got into his car swerved into oncoming traffic, sped off, and killed himself and the driver of another vehicle.

When a suit was filed against Beers and Quickway, Quickway's store clerk claimed that Beers didn't look intoxicated at the time of the sale. (A toxicologist agreed that Beers wouldn't have appeared drunk when the transaction occurred.)

The other driver's estate representative established that the clerk had informed police that the alcohol was sold to a person who had "beer-breath" and slurred his words. (The clerk later denied making those statements.) When Quickway asked for the case's dismissal, the Delaware County Supreme Court thought that the store clerk's contradictory statements warranted a formal hearing or trial. On appeal, the Appellate Division, Third Department, reversed.

The police report couldn't be considered because the clerk's statements hadn't been "sworn or notarized," were later repudiated, and, no one else saw Beers in the store. The AD3 also objected to the lack of any expert evidence as to Beers's blood alcohol content at the time of the sale.

That clearly went flat.

LOST IN SPACE

Jeanette Vera was injured when she tripped and fell during a dance class at the Dance Space Center.

But when she later sued claiming that rubber mats, which covered an uneven floor, caused her fall, the Bronx County Supreme Court dismissed her case. And, on appeal, the Appellate Division, First Department, concurred with that result.

Apparently, the Space Center was an "out-of-possession owner" who didn't have a responsibility to make repairs. In addition, Jeanette failed to show the Space Center had any actual or constructive notice of the floor's unevenness or that the condition violated law.

Did that make Jeanette a Space cadette?

A NOT-SO-SECRET BOARD MEETING

Randa Bishop, owner of a commercial unit, sued her condominium's board after it interfered with the alteration of her space.

Bishop claimed that the board withdrew its approval of the work during a "secret meeting" held at the behest of a board member whose outdoor terrace would have been impacted by the renovations. Bishop also argued the Department of Buildings twice rejected the board's attempts to revoke her construction plans.

Since Bishop had the right to renovate her space without board approval, as long as that activity didn't create a "'nuisance' or interfere with another resident's peaceful possession or proper use of the property," the New York Supreme Court thought her punitive-damages claim should be permitted to survive.

On appeal, the Appellate Division, First Department, agreed that if the board "intentionally and willfully" disregarded the unit owner's rights, a judge (or jury) could conclude that punitive damages were warranted in the case.

In other words, the AD1 gave that Bishop its blessing.

HOLY COW!

Security guard Ziograin Correa was seated behind home plate, at a Yankee Stadium baseball game, when a foul ball hit and broke his hand.

Correa claimed that the ball bypassed the safety net because a "window" had been created for an ESPN camera and an electrician, employed by PEM Electrical Corp., failed to seal all the gaps.

After the Bombers were sued in the Bronx County Supreme Court, and their request to dismiss the case was denied, the team appealed to the Appellate Division, First Department.

The appellate court thought the denial was appropriate given that the Yankees hadn't established that they used enough caution (or "reasonable care") to protect fans and others who were situated behind home plate.

Also, because the stadium is a "place of public assembly," the team couldn't delegate its responsibilities to an independent contractor, like PEM's electrician.

Interestingly, Correa wasn't found to have assumed the risks typically associated with attending a sporting activity since he was subjected to an "enhanced risk of injury" and had been directed by his employer to sit behind home plate.

Smell a Phillies' fan?

NOT A MUPPET SHOW

James Henderson pled guilty to attempted burglary in the second degree and was sentenced to a term of 12 years to life.

When Henderson later sought to withdraw his plea, the New York County Supreme Court denied his request. On appeal, the Appellate Division, First Department, concurred with the outcome because the guy's guilty plea was "knowingly, intelligently and voluntarily entered."

Not only did the record refute his argument that he couldn't hear the court's questions (due to a hearing problem), but Henderson also signed a document which waived his right to appeal.

Think he got that?

WHAT DID YOU SAY TO MOMMA?

Andrew Langer owed Judith Solomon $200,000 and claimed to have satisfied that debt by working out a deal with Solomon's mom (who was a former business acquaintance).

When Judith later filed suit in the New York County Supreme Court seeking to recover the proceeds and was awarded a $200,000 judgment, Andrew appealed to the Appellate Division, First Department.

Since the promissory note's terms specifically required that payments be made to Judith, and since she hadn't authorized her mom to act on her behalf, the AD1 refused to consider any oral arrangement that was purportedly reached.

Now that's Solomonic!

A HOT FLASH?

Stephen B. Flash, a Tompkins County high school student, supposedly punched another kid in the face and fractured the latter's jaw.

Soon after that incident, officers found Flash in a car carrying "prepackaged bags of cocaine and drug-selling paraphernalia," and holding over $1,700 in cash.

Two different Family Courts chimed in on the matter. The Tompkins County Family Court found the first incident equivalent to third degree assault, while the Seneca County Family Court found the second incident akin to third degree criminal possession of a controlled substance. Flash was later adjudicated a juvenile delinquent and placed in a special residence until July 2008.

While Flash claimed the evidence didn't support the outcome, the Appellate Division, Third Department, was of the view there was "ample evidence" of his misconduct. (Since the victim was walking away when the assault occurred, the AD3 didn't buy a "self-defense" argument. And, since he was found with "1.4 grams of crack cocaine, a hand-held digital weighing scale and glassine envelopes," the AD3 upheld the possession charge.)

Was that a Flash-attack?

HOT POCKET?

In *People v. McNeil*, Joseph McNeill allegedly confronted a woman with what appeared to be a gun and forced her to withdraw cash from a nearby ATM machine.

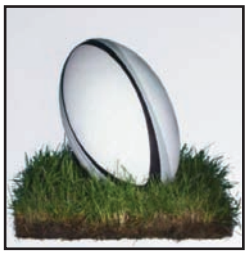
After he was convicted of second-degree robbery, the New York County Supreme Court sentenced him -- as a "persistent violent felony offender" -- to 18 years to life. On appeal to the Appellate Division, First Department, McNeill argued that the charge should have been reduced to third-degree robbery because he didn't take the victim's property with force. But, since the record established that McNeill gestured as if he had a gun in his pocket and threatened to shoot the victim if she didn't comply with his demands, the AD1 didn't agree.

The appellate court could also discern "no bad faith" or prejudice caused by prosecutors' belated use of arrest photographs -- which hadn't been previously located.

Nor was there was any error allowing an officer to recite a conversation he had had with a witness, who didn't testify, since that exchange was introduced "for the legitimate, nonhearsay purpose of completing the narrative of events and explaining police actions ...."

That sure was filled with good stuff.

AIN'T LIFE UNKIND?



Ruby Wilson tripped and fell on a subway stairway and later sued the New York City Transit Authority claiming negligence.

After her case was dismissed by the New York County Supreme Court, Wilson appealed to the Appellate Division, First Department, alleging that her injuries had been due to overcrowding.

Since that theory wasn't mentioned in Ruby's underlying papers -- i.e., the Notice of Claim -- her "speculation" as to why the accident had occurred couldn't be considered. (That she previously admitted not knowing the reason for her fall didn't help her none neither.)

Goodbye Ruby ....

DIRTY DOC?

After being treated at St. Vincent's Hospital for a sinus condition, Melanie Suarez got a doctor's note which she didn't read before submitting to her employer. (She later learned the note contained obscene language.)

When Melanie sued the doctor and the hospital for "intentional infliction of emotional distress," the New York County Supreme Court dismissed the case.

Since the doctor's conduct went beyond his "scope of employment," the Appellate Division, First Department, thought St. Vincent's was relieved of any liability in the case.

The appellate court was also unreceptive to Suarez's "intentional infliction of emotional distress" claim because the doctor's language -- while "extremely offensive and bizarre" -- didn't transcend "all possible bounds of decency" so as to be actionable.

Is that what you would have prescribed?

CONDITIONED CONTROL

In *Zellner v. Tarnell*, the Tarnells wanted to buy a home in Westchester County and gave the Zellners a downpayment.

When the sellers later sued the buyers for failing to comply with the terms of the contract of sale, the Westchester County Supreme Court granted the Zellners' request to keep the monies which had been paid, as "liquidated damages" for the breach.

On appeal, the Appellate Division, Second Department, thought that the parties' agreement only required the Tarnells to proceed with the deal if they got a binding mortgage commitment from a lender within a thirty day period.

Since the commitment they received was revocable "at any time," the AD2 let the buyers off the hook. (The appellate court was of the view the Tarnells hadn't procured a binding mortgage commitment within the governing timeframe and thus could withdraw from the purchase, scot free.)

See why guys are afraid to commit?

PISTOL WHIPPED?

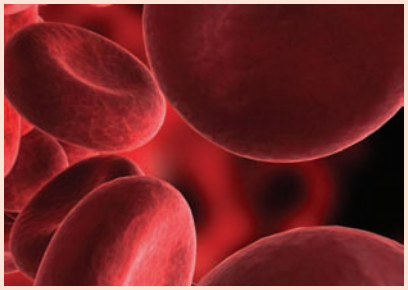
After he was caught trying to steal pistols from a police precinct's locker room, Elijah Cummings was tried in the New York County Supreme Court and convicted of second degree burglary and two counts of criminal possession of a weapon in the third degree (and sentenced "20 years to life" as a "persistent felony offender").

On appeal to the Appellate Division, First Department, Cummings sought reversal of the burglary conviction on the grounds that the station wasn't a "dwelling," and that errors had been made at his trial.

Citing his failure to challenge the prosecutor's evidence or case, and finding "no basis" for a reversal, the AD1 summarily cratered Cumming's contentions.

No point further dwelling on that.

TRANSFUSION CONFUSION



Pilar Lopez Apiado lost her job as a North Shore University Hospital lab technician after a post-operative patient was given a transfusion with blood from the hospital's general blood bank supply. (Apparently, the patient had deposited some of her own blood to be used for the procedure.)

Apiado later sued claiming she was fired because of her age and race.

When the Nassau County Supreme Court granted the hospital's request to dismiss the case, Apiado appealed to the Appellate Division, Second Department, which thought that the employer had shown that the technician was terminated for "legitimate, nondiscriminatory reasons."

Talk about bad blood!

PEAKS AND VALLEYS GIRLS

In 2004, after Stacy gave birth to her child, she experienced postpartum depression, and checked herself into a mental health facility. Stacy's mother, Bonnie, then filed a request with Ulster County Family Court to get custody of her grandkid.

Initially, Bonnie was given temporary custody while Stacy had "extensive weekly supervised visitation." Two months later, the court gave the grandmother full custody, with maternal visits at Bonnie's discretion.

In 2007, Stacy sought full custody, claiming that she had been denied access to her child. Although that accusation was withdrawn, Bonnie still opposed the visitation request. When Stacy tried again, the Family Court denied her application.

The Appellate Division, Third Department, was of the view that a biological parent has a superior right to custody over a nonparent, except under "extraordinary circumstances" -- which hadn't been demonstrated in this case. As a result, the dispute was sent back to the Family Court for further proceedings.

"What-ever."

IN THE OUT EXIT

James McGrantham was driving eastbound on Cropsey Avenue in Brooklyn and wanted to enter the westbound lane of the Belt Parkway, but mistakenly drove onto an exit ramp.

In an attempt to correct his error, McGrantham made an illegal u-turn across the highway and had almost completed the maneuver when a 20-year old motorcyclist crashed into McGrantham's driver's side door.

After the Queens County Supreme Court dismissed the criminally negligent homicide and reckless driving charges brought against McGrantham, the Appellate Division, Second Department, reversed. (The AD2 thought that McGrantham's conduct was "morally blameworthy," and "unreasonably endanger[ed] users of the public highway.")

On further review, the New York State Court of Appeals thought the decision to cross the 3-lane highway was "unwise" but didn't "rise to the level of moral blameworthiness" necessary for criminally negligent homicide. But, since his conduct was unreasonable and endangered others, the reckless driving charge was permitted to stand.

There's no turning back ... at least as far as that case is concerned.

CREDIT OR DEBIT?

Mujahid Muhammad was driving someone else's vehicle when officers pulled him over and found two forged credit cards in his proximity.

Even though he wasn't holding the cards, Muhammad was convicted of two counts of criminal possession of a forged instrument in the second degree.

After being sentenced to 3 to 6 years, Muhammad appealed to the Appellate Division, First Department, which agreed with the case's outcome.

In addition to finding no irregularities with the court's jury instructions, the AD1 thought the forged cards were close enough to Muhammad's person that the jury could reasonably infer that he knowingly possessed them.

Ironically, the AD1 gave Muhammad no credit there.

A THORNE IN THE SIDE?

David Thorne was injured when his hand and arm pierced a glass shower-door in an apartment owned by Cauldwell Terrace Construction Corp. (CTCC).

After the Queens County Supreme Court dismissed his negligence case, on the grounds CTCC didn't have notice of any defect, an appeal to the Appellate Division, Second Department, followed.

Although CTCC may not have known of a problem, since a local law governing glass shower-doors might have been violated, the AD2 reversed and reinstated the suit.

(While it was argued the law didn't apply to the building, that contention was rejected because CTCC supposedly failed to submit appropriate evidence in that regard.)

Was CTCC walking on broken glass?

A SCARRING EXPERIENCE

Joan Orphan incurred a 6.5 centimeter scar after undergoing surgery to remove a benign lump in her breast.

When she later sued her doctor and the hospital where the surgery was performed, Orphan claimed she hadn't been advised of the procedure's risks.

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

Since Orphan had signed a consent form which described the procedure and delineated its anticipated benefits and risks, she was unable to show that a reasonable person wouldn't have undergone the procedure (even if that individual had been warned of the possible scarring).

Was the poor lady Orphaned by the AD1?

ACKNOWLEDGING RECEIPTS

When Balazs Botocska sued Alex & Juait Garanvolgyi for $17,200 in back rent and real-estate taxes, the tenants alleged that they had paid their landlord some $65,000 in cash -- more than enough to satisfy any arrears claimed to be due.

Apparently, whenever the Garanvolgyis paid their rent, the landlord would count the money in their presence and hand over a receipt.

Interestingly, on the date the $65,000 payment was made, the receipt omitted the amount the owner had been given.

After trial, the Suffolk County District Court gave considerable weight to the Garanvolgyis's testimony and found in their favor.

Since the trial judge was in a better position to "observe and evaluate the testimony" and assess the credibility of the witnesses, the Appellate Term, Second Department, deferred and left the outcome undisturbed.

There's no receipt for that.

RELAX, IT'S FEDEX

Twenty minutes after informing David Grais's attorney that a real-estate deal was dead, Loryn Kass received a fully executed contract of sale.

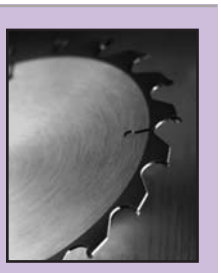
While Kass claimed that the contract was unenforceable because the offer had been timely withdrawn, Grais countered that the deal had been sealed when the papers were deposited with FedEx, rather than when they were actually received by Kass.

Since the parties' agreement provided it would be effective upon delivery, and Kass backed out before that occurred, the New York County Supreme Court found in Kass's favor.

On appeal, in the absence of any ambiguity as to the contract's terms, the Appellate Division, First Department, also delivered Kass a nice win.

(Absolutely, positively.)

POWER SAW MASSACRE



Jose Telmo Morocho was injured while working on a kitchen renovation project when his power saw recoiled and hit him in the face. He later sued Luigia Ricci - the owner of the home - and his employer, Santo Marino, who lived with Ricci's daughter.

After the Westchester County Supreme Court entered a default judgment against Marino, and dismissed the case as against Ricci, an appeal to the Appellate Division, First Department, followed.

Under N.Y. Labor Law -- Section 241(6) -- owners of one- and two-family homes, who don't direct or supervise the work performed on their property, aren't liable for injuries that may occur.

Since Ricci neither "directed nor controlled" Morocho's work, the appellate court was of the view the homeowner was free of any liability.

The AD1 sawed that one in half.

ARMED AND EVICTED

When a search of Doris Diaz's apartment revealed nine firearms and over four hundred rounds of ammunition (all of which allegedly belonged to Doris's boyfriend), the New York City Housing Authority (NYCHA) terminated her tenancy based on "nondesirability" and breach of NYCHA's rules and regulations.

After Doris filed an administrative proceeding with the New York County Supreme Court claiming NYCHA's decision wasn't supported by "substantial evidence," the case was transferred to the Appellate Division, First Department, which confirmed the outcome.

Despite her assertions that she didn't know the stuff was being stored in her unit, the AD1 thought there was enough evidence supporting the hearing officer's determination and which discredited Doris's claims. (She also supposedly breached her lease by allowing her boyfriend to live with her.)

Not in *THIS* house!

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A SPECULATIVE EVICTION?

London Terrace Gardens served a notice of termination on a rent-controlled tenant claiming the apartment was no longer the guy's primary residence.

Kenneth Heller supposedly lacked a "physical nexus" with the unit because he allegedly spent less than 183 days a year there.

Because the governing law -- NYC Rent and Eviction Regulations § 2204.3 -- requires notices in a nonprimary residence case to state the grounds for a tenant's eviction and the "facts necessary to establish the existence of such ground," the New York County Civil Court dismissed the proceeding due to the document's factual deficiency.

On appeal, the Appellate Term, First Department, thought the notice's lack of "case-specific facts" including the address where Heller was alleged to primarily reside, rendered the case fatally defective. ("To uphold the studiously vague termination notice here under review would, for all practical purposes, eviscerate the plain language of the governing notice regulation and undermine its salutary purpose to discourage baseless eviction claims founded upon speculation and surmise, rather than concrete facts.")

Nothing vague about that!

Would you like to attend one of our upcoming classes, and earn up to 8 CLE credits, for free?

For additional information, please contact Jarred I. Kassenoff at 212-619-5400 or jkassenoff@nfllp.com.