KNOWLEDGE IS POWER

Sponsored by

NEWMAN FERRARA LLP

January/February 2011
Issue 60

Inside this issue

WHERE'S THE PLUS?

404 6th Avenue Realty Corp was sued after it denied a request by its tenant--Beauty Plus Stores--to sublease space to a cell-phone business.

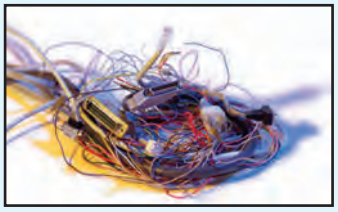
Since the lease permitted "beauty supplies and related sales," and because cell phones have a "fashion component," the tenant claimed the items fit within the governing restriction.

After the New York County Supreme Court granted the landlord's dismissal request, Beauty Plus appealed to the Appellate Division, First Department, which reiterated that a landlord has a legal right to control the manner in which a property is utilized.

Since it didn't think cell phones were "beauty products," the AD1 upheld the landlord's refusal to agree to the deal.

Now that was ugly!

CROSSED WIRES



In the event of a fire, 425 Park Avenue Co. was contractually obligated to repair its own space.

When that tenant later suffered damage, its landlord interfered with the restoration effort by insisting that the telecommunications system be upgraded. (The owner believed that the work was required to get the space "in first class order, repair and condition.")

After the New York County Supreme Court granted relief in the tenant's favor, the owner appealed.

Because the lease didn't obligate the tenant to do the work in question, the Appellate Division, First Department, agreed with the outcome.

Where was the disconnect?

NO CHEESEBURGER FOR YOU!

Haralambos Kaliontzakis and George Papadakos operated a restaurant on a property which had been owned by George's father-in-law.

In 1986, the property was sold to George.

Years later, Haralambos claimed that he had paid half the purchase price and, in a case filed with the Queens County Supreme Court, produced a photocopy of a document which showed that in 2002 George acknowledged Haralambos as a 50% owner of the parcel.

When his case was dismissed, Haralambos appealed. But in the absence of evidence establishing an intention to split ownership back in 1986, the Appellate Division, Second Department, agreed it all belonged to George.

Did he take that to go?

HANDS OFF!

G. White was convicted of sexual abuse in the third degree after he allegedly engaged in inappropriate behavior while riding the NYC subway.

On appeal, White claimed that the outcome wasn't supported by legally sufficient evidence, and that the victim's silence constituted a form of acquiesence to his conduct.

Even though the victim didn't verbally object to the contact, the Appellate Term, Second Department, thought her departure from the immediate area, as soon as the train reached the next station, signalled her disapproval.

We ain't touching that.

LOOK WHAT HE WHIPPED UP

Noho Star, a NY restaurant, fired its chef after it learned that the guy had agreed to testify against the establishment in a discrimination case brought by another employee.

When the chef filed a retaliatory discharge claim with the New York State Division of Human Rights, he was awarded back pay and damages for "emotional distress."

On review--pursuant to CPLR Article 78--the Appellate Division, First Department, agreed that the termination was retaliatory in nature.

Since there was no documented history of misbehavior, and in view of the fact he had received a promotion for job-related performance just a few weeks before he was terminated, the AD1 found Noho's arguments a bit overcooked.

U.B.S.

After UBS Securities sued Highland Capital Management to recoup certain investment losses, the New York County Supreme Court denied Highland's dismissal request and an appeal followed.

Since Highland never represented that the investment would be profitable, the Appellate Division, First Department, could find no basis for liability.

And in the absence of a contractual breach, the appellate court thought the case's dismissal was warranted.

U. B. Sorry, too.

PHANTOM PICKPOCKET?

After he allegedly pick-pocketed a wallet, E. Harris was found guilty of grand larceny in the fourth degree by a New York County Supreme Court jury, and was sentenced to 15 years to life as a "persistent felony offender."

On appeal to the Appellate Division, First Department, Harris argued that he should have been charged with petit larceny.

Although Harris claimed the wallet had been discarded by the owner, the appellate court refused to accept his version of the facts--particularly since he was seen fleeing from the scene "immediately after the theft."

The poor guy never had a ghost of a chance!

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

FAR FROM STERLING

Sterling National Bank had a lease which required it to restore its space to a "rentable condition" at its tenancy's conclusion.

When it later feuded with Fashion Associates (the landlord) over the work that needed to be done, the parties asked a New York County Supreme Court referee to decide the dispute. And after the bank was ordered to fork over $197,773.48 in damages, an appeal followed.

While the tenant argued it had been released from its restoration obligations, the Appellate Division, First Department, thought that release applied to a different property. It also didn't find the term "rentable condition" ambiguous, as the tenant had argued. (It was of the view that the bank needed to provide the landlord with "the barest, but legal, necessities essential for letting the space.")

Someone was clearly into Fashion.

ARTICLES OF DISORGANIZATION

Lena Hausman's Last Will and Testament provided that the rental income from property owned by an LLC would go to certain heirs. But because she signed the deed transferring the property two weeks before the entity's articles of organization had been filed with the New York Department of State, Lena's grandchildren challenged the legality of the conveyance.

Arguing that the transfer was valid, Lena's estate representative asked the Kings County Surrogate's Court to decide the controversy.

Although the Surrogate concluded that a valid "de facto" company existed, that determination was reversed by the Appellate Division, Second Department.

On review, our state's highest court--the New York State Court of Appeals--thought Hausman's failure to file the articles before the property was transferred rendered the transaction void. (The mere drafting of the document wasn't enough to satisfy the governing legal requirements.)

Is this now a dead issue?

FORCED TO FACE FACTS

Robert Thomas had the right to buy certain real property from Rogers Auto Collision.

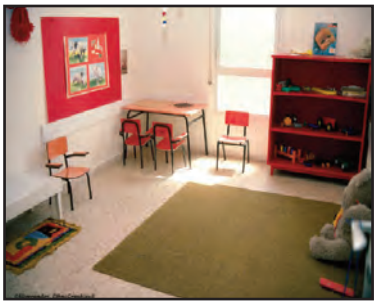
When RAC wouldn't honor the deal, Thomas was forced to sue and, after a trial, the Kings County Supreme Court ended up ordering that the sale take place.

During the course of the hearing, Thomas forgot to establish that he had the financial wherewithal to purchase the parcel. But when RAC asked for the case's dismissal, on the grounds the guy hadn't shown he was "ready, willing, and able" to close on the purchase, the court responded by reopening the case and allowing Thomas to present his proof.

Finding no error, the Appellate Division, Second Department, affirmed on appeal.

Thomas sure RACked that up.

NO CHILD LEFT BEHIND?



In an emergency, day-care teacher C.C. was entrusted with ensuring that her young charges were evacuated to the facility's gymnasium. Yet during the course of a fire, C.C. left a kid behind. Upon realizing the error, she returned to the room to retrieve the youngster.

Since her actions violated her employer's safety policy, C.C. was fired for "misconduct," which prevented her from collecting unemployment-insurance benefits.

On appeal, the Appellate Division, Third Department, refused to coddle C.C. and agreed that what happened was either "detrimental to the employer's interest or a violation of a reasonable work condition."

Think she was into Pink Floyd?

NO SEEING GREEN

After getting out of a rowboat, Susan Fox tripped on some algae which covered the Central Park Boathouse's dock.

When she later filed suit, Fox claimed the algae had created an "unreasonably dangerous condition" which the Boathouse should have abated. But the New York County Supreme Court disagreed.

On appeal, Fox also had trouble convincing the Appellate Division, First Department, to see it her way.

Since it's natural for algae to thrive in a lake's vicinity, and because she should have spotted the growth (since it extended some 150 feet), the AD1 thought the condition was an "inherent risk" of engaging in the activity.

Was Susan out-Foxed?

SOUR GRAPES?

Glenn Farrell was injured at a Waldbaum's supermarket after he slipped and fell on some grapes which were on the produce-aisle floor. (Farrell supposedly saw two employees stocking the fruit shortly before the accident occurred.)

When Waldbaum's asked for the case's dismissal, on the grounds the company neither created nor knew about the condition, the Queens County Supreme Court denied that request.

Although the store had conducted some general inspections, because there was no evidence the aisle had been cleaned or inspected prior to Farrell's fall, the Appellate Division, Second Department, thought that the case needed to proceed to trial.

Now that wasn't very fruitful.

SNOOZE, YOU LOSE

Solo Realty owned two properties on Fire Island. During the course of their marriage, Frank and Susan Lobacz each owned a 1/4 interest in the company, while the other half was owned by the Sobels.

In 1990, when Frank and Susan separated, Susan borrowed $87,000 from her ex and agreed to repay the debt upon the sale of the Fire Island properties, the sale of the marital residence, or Susan's 55th birthday--whichever first occurred.

On August 1, 2001, Solo Realty was dissolved, and one of the Fire Island properties was sold to the Sobels, the other being conveyed to Frank. Six years and fifteen days later, on August 16, 2007, Frank sued Susan in Suffolk County Supreme Court alleging breach of contract for not repaying the monies that had been loaned to her.

After that court dismissed the case as "time barred," an appeal followed.

Since New York law requires that a contract dispute be brought within six years from a breach's occurrence, and because Susan's time to repay the loan started to run once the Fire Island properties were transferred, the Appellate Division, Second Department, agreed that Frank was precluded from seeking relief.

Was that a sleeper?

IT CAN HAPPEN TO YOU ...

In February 2007, after he had agreed to sell his property to Jonathan Carnike, Robert Youngs signed another contract to sell the same piece of land to the Town of Chemung.

Believing Youngs was in breach, Carnike filed suit with Chemung County Supreme Court and asked for specific performance--an order compelling Youngs to sell the property to him. (In December of 2007, Carnike also filed a document known as a "notice of pendency" against the property.)

Even though the Town was aware of the lawsuit, it still went ahead with the purchase and accepted a warranty deed from Youngs. Of course, as luck would have it, the Chemung County Supreme Court ruled in Carnike's favor and awarded him a bargain and sale deed to the same parcel. And when the Town's request to intervene in that case was denied, an appeal followed.

When parties who aren't named in a lawsuit wish to be heard by a court, that request has to be made while the dispute is still pending. Since the Town sought relief months after Carnike's case had ended, the Appellate Division, Third Department, thought the intervention request hadn't been timely made and was properly denied.

Was the Town too Youngs at heart?

IT'S A LITTLE CHILLY

Santorini Equities wanted to evict Francisco Picarra because the landlord thought the guy didn't really live in his rent-stabilized unit. (Apparently, the owner believed the tenant resided in the apartment less than 180 days in a year.)

After the New York County Civil Court found in Santorini's favor, Picarra appealed to the Appellate Term, First Department, which agreed with the outcome.

When the case reached the Appellate Division, First Department, that court was of the view Picarra hadn't received a proper preliminary notice. The Rent Stabilization Code--§§ 2524.2(c)(2) and 2524.4(c)--requires a landlord to advise a regulated tenant that a lease will not be renewed no less than 90 and not more than 150 days prior to the agreement's expiration date. Since Santorini failed to inform Picarra of its intentions within that statutory "window period," the AD1 thought the outcome had to be reversed and the proceeding dismissed.

Did the AD1 properly frame the issue?

ROOFTOPS?

Caesar Bellamy and his three canine companions lived in public housing administered by the New York City Housing Authority (NYCHA).

When Caesar took his leashless dogs to the roof, where three police officers were conducting a routine patrol, one of the pooches attacked and injured a cop.

After Caesar's tenancy was terminated, he commenced an administrative proceeding--pursuant to CPLR Article 78--which got the case before the Appellate Division, Second Department.

Since it thought NYCHA's determination had "substantial" evidentiary support, and didn't think the penalty of eviction was "disproportionate to the offense," the AD2 allowed the termination of Bellamy's tenancy to stand.

Scream your heart out!

VISIT OUR VIDEO VAULT

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

Watch our panel of experienced practitioners 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 City Council Member James Sanders, Jr.

PLEA PRESSURE?

Before J. Fisher pled guilty to burglary and attempted rape (both in the first degree), he was supposedly told by a New York County Supreme Court judge that he would receive the "maximum sentence" and would be a "very old man" by the time he got out of jail if convicted and sentenced after trial.

On appeal, Fisher sought to have his plea rescinded because of "undue coercion" by the trial judge.

Interestingly, because the Appellate Division, First Department, thought that the threats were "impermissibly coercive," and compromised Fisher's right to a fair trial, his plea was vacated and the case was sent back for further proceedings.

Was the AD1 baited by Fisher?

OH, BEHAVE!

In an "objectionable conduct" holdover case, St. Margaret's House entered into an agreement which allowed a tenant to remain in possession of his residential space provided that he wouldn't "verbally or physically assault" or "stalk or harass" any person in or around the building, and that he would socialize with others in a "peaceable manner."

If he violated those terms within a two-year period, St. Margaret's could seek his immediate eviction.

When the tenant physically attacked a visitor, and verbally abused at least three people, the New York County Civil Court granted St. Margaret's request to have the man forcibly removed from the premises and, on appeal, the Appellate Term, First Department, affirmed.

Did the AT1 just punch that one out?

JUROR JUGGLING

Rosalyn Troutman sued 957 Nassau Road LLC after her relative slipped on a patch of ice and died.

During the course of the trial, a juror revealed that she knew one of the witnesses who was going to testify for the defense. (The two people lived in the same neighborhood and often greeted each other.)

Although the juror indicated she could be fair and impartial, the Nassau County Supreme Court granted defense counsel's request to have her replaced. And after the jury found in 957's favor, Rosalyn appealed.

According to state law, a substitution is appropriate when a juror dies, becomes ill, or is "unable to perform his [or her] duty." Since there was no reason to believe that the lady was biased, the Appellate Division, Second Department, was of the view that reversible error had occurred and sent the case back for a new trial.

You try tossing that around.

THIS LAND IS YOUR LAND ...

The Krims and the Benjamins owned adjacent properties and, since the 1950's, shared a dock and pier which was on the Benjamins' property.

In 1998, Jean Benjamin gave Mathilde Krim a "right-of-way" over a 22-foot strip of land situated on the Benjamins' lot.

In 2005, the Benjamins sold their home to Rafael Sassouni who sued the Krims claiming that the "right-of-way" didn't allow his neighbors to use the dock and pier.

Both the Nassau County Supreme Court and the Appellate Division, Second Department, thought the disputed easement gave the Krims the right to enter and exit the property "for any purpose, including access to and use of the pier and dock."

"This land was made for you and me."

TALK ABOUT BEING DISGRUNTLED

After Daniel Farash hired Ashforth Warburg Associates to sell his cooperative apartment, one of the company's sales agents reportedly suffered an "emotional breakdown" and trashed the place during the course of an "open house."

When Farash later sought to be compensated for the damage caused by Ashforth's agent, the New York County Civil Court dismissed the case.

Since Ashforth wasn't aware of its agent's destructive tendencies, the Appellate Term, First Department, agreed that the company wasn't liable for what happened, particularly since the guy's conduct was an "obvious departure" from his usual duties.

That would have made me mad.

NOW THIS IS AN OVERCHARGE!

Banco National (whose interests were transferred to Citibank and then to Citicorp North America) had a 16-year lease with the then building owner, Longstreet (whose interests were transferred to 767 Fifth Avenue and then to Fifth Avenue 58/59 Acquisition).

The tenants alleged that, beginning back in 1993, the owners miscalculated the rent and overcharged them about $564,531.

When the tenants' suit to recover that money was dismissed by the New York County Supreme Court, they appealed to the Appellate Division, First Department.

Interestingly, there was little sympathy for the tenants' position. Because they were "highly sophisticated entities" which had paid the monies over nine years, without protest, the AD1 concluded that the tenants' claim was barred by the doctrine of "voluntary payment."

Guess who went through withdrawals?

RACKET RUCKUS

Andres Morales and Thomas Galeazzi each owned 50% of Depot Road Tennis Club--which operated on a six-acre property.

Galeazzi later bought two adjoining parcels, one in 1990 and another in 2003, and neither Morales nor the Club was involved in those purchases.

When a deal was later struck with a developer to sell the Club, along with the 1990 and 2003 plots, Morales sued claiming Galeazzi had wrongfully taken advantage of corporate opportunities.

After a Suffolk County Supreme Court judge found Morales and the Club shared an interest in the 2003 purchase, the Appellate Division, Second Department, reversed.

Since there had been "no tangible expectation of purchasing the 2003 property," and no duty had been breached, the AD2 didn't think there was a bona fide claim to that additional land.

Double fault?

COME ON, BABY...

Frank and Allison Maloney lost their home in a fire, after their four-year-old kid found a beer-bottle-shaped lighter in Allison's purse and accidently set their living room ablaze.

Because the losses exceeded the amount recoverable under their insurance policy, Nationwide--their insurance carrier--and the Maloneys sued the lighter's manufacturer in the Dutchess County Supreme Court claiming "strict products liability."

When the lighter-maker's dismissal request was denied, it appealed.

Since meeting minimum federal-safety requirements didn't relieve the manufacturer of liability, the Appellate Division, Second Department, thought that unresolved product-design questions warranted a trial.

They sure lit a fire under that.

KNOWLEDGE IS POWER

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

We've got a resolution for you.

www.nyreblog.com

NEVER A BORROWER ...

Garry Britton lent his friend, Joseph DiPrima, over $30,000 to renovate three homes. The deal was that Joe would pay back the money and give Garry a 10% share of the profits from any sales. When that didn't happen, Garry took Joe to court.

Even though their agreement wasn't in writing, the Monroe County Supreme Court awarded Garry the sums requested, with interest thereon.

On appeal before the Appellate Division, Fourth Department, Joe argued that the parties had entered into the deal in their "corporate capacities" and that the lawsuit shouldn't have been brought against him personally.

Finding no error, the AD4 deferred to the trial court's determination. It also saw no problem with the lower court's award of interest, because a state law--CPLR § 5001(a)--authorized that relief.

... Or a lender be. For loan oft loseth both itself and friend.