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OVER EASY?

Chang Yang gave Myung and Jae Chon an $84,082.14 downpayment to buy their egg-delivery business.

When that deal faltered, Yang was forced to sue for the return of his money.

After the Richmond County Civil Court found in Yang's favor, the Chons appealed, and the Appellate Term, Second Department, was compelled to reverse on technical grounds.

Apparently, parts of the taped trial record were "virtually incomprehensible." Because the transcriber couldn't understand what the witnesses were saying, or who was speaking, there were over 600 omissions in the transcript. (Moreover, an "unknown amount of testimony" was lost when the court changed the tapes.)

Since the AT2 wasn't able to decide the appeal based on the record presented, a new trial was ordered and the use of a court reporter--rather than a recording of the testimony--was recommended.

So, you see: One can scramble eggs ... but not a transcript.

FRESHLY SQUEEZED?

Clotilde Crespo accused a T-Mobile subsidiary of tapping into her electricity and sued for the value of the stolen service.

When the New York County Civil Court denied a dismissal request, the utility appealed.

Since T-Mobile wasn't a tenant of Clotilde's building, nor performed any work therein, the Appellate Term, First Department, thought the company wasn't liable for its subsidiary's alleged misconduct. (It didn't help Clotilde's case that she lacked any evidence that T-Mobile "intentionally assumed or exercised control" over her juice.)

Think that'll stick together?

TENANCY EXTINGUISHED

Elisa R.'s landlord filed a "nuisance" eviction proceeding against her because she allegedly allowed gas to leak from her stove and had caused a fire in her apartment.

After the New York County Civil Court found the misconduct serious enough to warrant her removal from the building, Elisa appealed.

Because her "repeated" actions jeopardized the health and safety of the building's occupants and staff, the Appellate Term, First Department, thought Elisa had to go.

Goodness gracious.

SHARE MOMENTS...

Robert Goldhaber wanted his kids to stay overnight every Tuesday and Thursday.

When the Suffolk County Family Court gave him that additional time, the kids' mom appealed and the Appellate Division, Second Department, modified the schedule to provide for overnight stays on Tuesdays and Thursdays of every other week.

While increased visits were in the children's best interests, affording the father every Tuesday and Thursday, when he already had the kids on Friday through Mondays, would have given him custody for most of the week. That, according to the AD2, was beyond the lower court's discretion, since the mother had been granted sole custody.

Share life!

BURR...

Paul Burr wanted to stop paying child support for his young daughter because she was "emancipated"--"economically independent"--and refused to have contact with him.

After the Putnam County Family Court denied his request, Burr appealed to the Appellate Division, Second Department.

Since there was no evidence the kid had ended the relationship with her father--or that she had a job, entered the military service, or got married--the AD2 agreed that no adjustment was warranted.

Wasn't that chilling?

DESERTED ISLAND?

Back in October 2000, Island Auto Seat Cover Company entered into a commercial lease with Vito and Estelle Minunni, for a ten-year term which was to expire on October 31, 2010.

While their agreement also provided that Island, the tenant, could purchase the property for $350,000, that option had to be exercised at least 6 months before the lease expired, and, the transaction had to close within 90 days of the initial notice to purchase.

On March 25, 2008, Island notified the Minunnis (via certified mail) that the company was going to buy the building for cash. When the Minunnis resisted, Island sued in the Richmond County Supreme Court to compel the sale. That request was denied, whereupon Island appealed to the Appellate Division, Second Department.

Since a party seeking to compel the sale of real property must show it was "ready, able, and willing" to perform its contractual obligations, and it was unclear whether Island was financially able to purchase the property for the agreed-upon price, the AD2 shared the lower court's view that a full-blown trial on the merits was required.

Did Island take a back seat?

GOING BED BUGGY

Thought to be a pest of the past after DDT (dichlorodiphenyltrichloroethane) all but wiped them out after World War II, bedbugs are back ... with a vengeance.

In 2009, New York City recorded over 11,000 bedbug complaints, up from a mere 2 in 2002, and 16 in 2003.

These creepy creatures are infesting our city quite indiscriminately. You'll find them almost everywhere--movie theaters, office towers, clothing stores, and swanky hotels.

There are a few theories about this resurgence. Some blame the affordability of international travel and the increase in immigration from developing countries, while others point to the environmental-protection movement's crusade which led to the ban of bedbug eradicating pesticides, like DDT. Whatever theory you choose, these critters have certainly caught our attention.

Last year, New York State Assemblymember Linda Rosenthal spearheaded the passage of the Bed Bug Disclosure Act, which requires New York City landlords to inform prospective tenants, in writing, whether an apartment, or a residential building, has had a bedbug "infestation" within the last year. While it's certainly a good start, the legislation's got plenty of holes and leaves quite a few issues unaddressed.

> **§ 27-2018.1** Notice of bedbug infestation history. a. For housing accommodations subject to this code, an owner shall furnish to each tenant signing a vacancy lease, a notice in a form promulgated or approved by the state division of housing and community renewal that sets forth the property's bedbug infestation history for the previous year regarding the premises rented by the tenant and the building in which the premises are located.
>
> b. Upon written complaint, in a form promulgated or approved by the division of housing and community renewal, by the tenant that he or she was not furnished with a copy of the notice required pursuant to subdivision a of this section, the division of housing and community renewal shall order the owner to furnish the notice.

Notably, the new law only applies to new or prospective tenants; current tenants needn't be told that their neighbors have (or have had) a problem. It's also unclear whether the law applies to cooperatives or condominiums.

While tenants can check for bedbug sightings with online services, such as bedbugregistry.com, or with the New York City Department of Housing Preservation Development, because of the stigma these little pests represent, many cases are still going unreported or uninvestigated--leaving public records incomplete.

So, until the dust settles, try not to let that bug you.

A HARD DAY'S NIGHT

Suspected of driving while impaired, Howard Smith declined to take a sobriety test until he had an opportunity to speak with his attorney.

During Smith's trial, the prosecutor argued that Smith's insistence on consulting with counsel--who was unreachable--comprised a "persistent refusal to submit to a chemical test." After he was found guilty of "driving while ability impaired," Smith appealed.

Because the efforts to contact an attorney weren't successful, the Appellate Term, Second Department, thought the prosecutor was permitted to introduce evidence of Smith's refusal to cooperate. (It also thought the evidence established Smith's guilt beyond a reasonable doubt.)

Doubt he felt all right.

XX RATED?

Dr. Anthony Colantonio sued a coworker, Xenophon Xenophontos, and his employer, Mercy Medical Center, for defamation.

XX supposedly made some disparaging remarks which prompted hospital administrators to investigate whether disciplinary action should be taken against the doctor. At a meeting, a number of staff members allegedly made false accusations against Colantonio--in retaliation for past complaints he had made against them--and the doctor's hospital privileges were terminated.

After the Nassau County Supreme Court denied the defendants' request to dismiss the twenty causes of action filed against them, the Appellate Division, Second Department, allowed only four to survive.

The AD2 was of the view that XX's comments--that Colantonio was difficult to work with, "very unreasonable," and "not stable"--were matters of opinion that weren't actionable.

The remaining causes of action, based on the statements made at the meeting, were issues which the AD2 thought warranted examination at a formal hearing or trial. (There was uncertainty as to whether the observations were knowingly false and maliciously made.)

Lord, have Mercy!

STAGE PLIGHT?

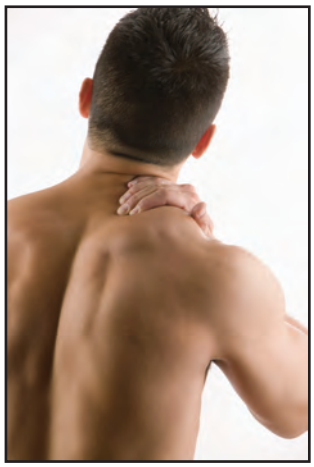
While working as a stagehand at Radio City Music Hall, Eugene Travers was injured when he was hit by a speaker which fell off a forklift.

After he sued the building's owner, the Nassau County Supreme Court dismissed the case.

Because his injuries didn't occur during the course of an "erection, demolition, repairing, altering, painting, cleaning or pointing of the building," the Appellate Division, Second Department, thought the state's Labor Law protections didn't apply and that the "out-of-possession landlord" wasn't liable for the guy's injuries.

Guess you can't fight Radio City Music Hall.

THIS CERTAINLY DEGENERATED



After Janice Seidenberg hit him with her car, Richard Semonian filed suit claiming he had sustained a serious injury.

When the Erie County Supreme Court awarded relief in Richard's favor, Janice appealed to the Appellate Division, Fourth Department, which didn't agree with the outcome.

The AD4 thought the record established that Richard suffered from a "degenerative disease," and questioned his sixteen-month delay in seeking medical treatment. (Of course, it didn't help the guy's case that during the relevant period he was employed, moonlighted as a security guard, and regularly exercised.)

Since he didn't suffer a "serious injury," as defined by state law, the AD4 dismissed the case.

That had to hurt.

LITTLE LIES?

After Dr. Richard Marfuggi testified as an expert witness in three medical-malpractice cases brought against Dr. Robert Cattani, the latter responded by suing the former for knowingly giving false testimony.

When the New York County Supreme Court dismissed the case, Cattani appealed.

Because Cattani merely alleged that Marfuggi had committed perjury--without offering any other detail as to the testimony's purported falsity--the Appellate Division, First Department, affirmed the dismissal.

Oh, no, no you can't disguise ....

WHEEL OF FORTUNE?

Jacques Thys was expecting a bonus from his employer, Fortis Securities, LLC, but the $198,230.73 he received was less than anticipated.

Thys was supposedly told that Fortis would deposit the correct sum once $192,000 was returned. When the company failed to honor that promise, Thys later sued for "conversion," but the New York County Supreme Court decided to throw the case out.

Since the $192,000 was an "identifiable fund," which was returned to Fortis for a specific purpose--namely for the recalculation of the bonus--the Appellate Division, First Department, thought that a valid conversion claim had been stated and that the lawsuit should continue. (The fact that the money was voluntarily relinquished was of no consequence.)

Looks like he won a bonus round.

SOME MISSTEP

Because he injured his back while at work, Corrections Officer Richard Benedetto thought he was entitled to accidental-disability retirement benefits. But, at a hearing, it was determined that his fall wasn't encompassed by the state's Retirement and Social Security Law.

When he filed an administrative appeal with the Albany County Supreme Court, the matter was transferred--pursuant to CPLR Article 78--to the Appellate Division, Third Department.

Apparently, in a report made immediately after the accident, Benedetto noted that he lost his footing while walking down a flight of stairs. However, on his benefits application, Benedetto claimed to have slipped on ice while escorting an inmate to the prison's basement.

Interestingly, Benedetto couldn't identify the alleged inmate or explain how the ice formed on stairs inside the building.

Without enough evidence in his favor, the AD3 concluded that the accident occurred "in the ordinary course of his employment," and that the officer didn't qualify for the desired benefits.

Now, that's awkward.

THE MOLD AND THE BEAUTIFUL

Gabriel Cabral and her three children sued their landlord after they allegedly developed asthma from exposure to mold in their apartment.

When the Kings County Supreme Court denied the owner's dismissal request, an appeal followed.

Although a doctor opined that the children's asthma was inherited, the Appellate Division, Second Department, thought that conclusion wasn't supported by the record, since neither parent had a family history of the condition nor was the mother diagnosed with the disease until 2002--years after moving into the apartment.

The mould of their fortune remains in their own hands.

A HOLLYWOOD STUNT RIDER

While rafting down Splish Splash Water Park's "Hollywood Stunt Rider," Geovanny Nolasco dove into shallow water and hit his head on the pool's bottom.

After the Queens County Supreme Court dismissed his personal-injury case, Nolasco appealed.

Since there were "audio and visual warnings" about the water's shallowness and the guy had swimming and diving experience, and because it was a matter of "plain common sense" that diving into a shallow pool was dangerous, the Appellate Division, Second Department, thought Nolasco was lucky not to be swimming with the fishes.

That had to have made a big splash.

HEAD OVER HEELS?

Deborah Murphy sued the New York City Transit Authority (NYCTA) after she fell down a station's flight of stairs.

Even though an engineer thought the stairs' tread violated the New York State Building Code, Deborah's claim that the fall was due to NYCTA's negligence was viewed as "speculative" at best.

Because there was no evidence the condition in question actually caused Murphy's fall, or that it existed at the time of the accident (nearly 2½ years earlier), the Appellate Division, Second Department, thought the case had been properly dismissed.

Should she have pumped it up?

ESCROW, ANYONE?

The Grievance Committee for the Second, Eleventh and Thirteenth Judicial Districts wanted to have Russell Cheek removed from the roll of New York attorneys based on his disbarment by a neighboring state.

While practicing law in New Jersey, Cheek acted as the administrator of an estate, and was required to temporarily hold $7,000 in escrow.

He supposedly made the deposit on March 21, 1994 and was obligated to return the money on January 12, 1999, but didn't do so (despite repeated demands) until April 12, 2005.

While Cheek claimed he "removed" the $7,000 in 2001, and replaced the proceeds in 2004, the account statements showed otherwise. (And after Cheek allegedly failed to cooperate with an audit requested by New Jersey's disciplinary authorities, he was disbarred by that state in 2008.)

Because of the seriousness of the misconduct, the Appellate Division, Second Department, thought the guy should also be prohibited from practicing law in New York.

Was that too Cheeky?

SHOP 'TIL YOU DROP?

After their kid was injured while riding an escalator, the Espinoza family sought to recover damages from Macy's and Mainco, the company responsible for maintaining the system.

After its dismissal request was denied, Mainco appealed.

Because there was no evidence that the company caused the defect, or that it knew of a problem and failed to fix it, the Appellate Division, First Department, thought Mainco was entitled to relief in its favor. (And since there was no evidence that Macy's was negligent, Mainco couldn't seek relief against the store, either.)

That's the magic of Macy's.

THANK HEAVEN FOR 7-ELEVEN?

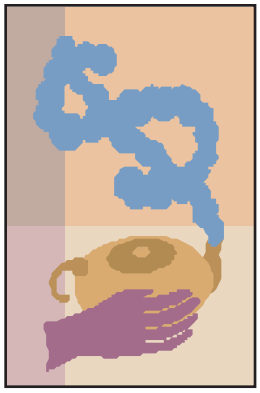
John and Susanne Aristides sued Phillip and Kathy Foster, the owners of a neighboring 7-Eleven, for the disruption caused by the store's patrons and delivery vehicles.

The Aristideses claimed that trucks blocked access to their home, and that customers loitered in the vicinity "creating noise and disturbances," at all hours.

After the Suffolk County Supreme Court declined to throw the case out, the Fosters appealed to the Appellate Division, Second Department, which also wasn't receptive to the store-owners' contentions.

In the AD2's view, the argument that the Fosters were being blamed for conduct of other local establishments was contradicted by the evidence--such as photographs--which showed cars and trucks blocking the entrance to the homeowners' property.

Bet they took a big gulp after they got that!



THIS JENEE AIN'T STAYING IN HER BOTTLE

Although Jenee McAlpine only owed $101 in back rent, her landlord filed a nonpayment proceeding seeking $950.

Because the owner failed to provide a "good-faith estimate of the arrears owed," the Queens County Civil Court dismissed the case.

Since the evidence established that the landlord had received and cashed checks sent by the Department of Social Services on McAlpine's behalf, the Appellate Term, Second Department, was of the view the landlord knew, or should have known, that the amount sought was incorrect.

There was no rubbing her the wrong way.

RUMPOLE OF THE BAILEY

After Marc Bailey leased a piece of property, he was allowed to build a well and septic system and was given an easement against the neighboring parcel for that purpose.

When the neighboring owner later tried to revoke its approval, and started its own construction, Bailey filed suit in Putnam County Supreme Court and was granted an order stopping the work. Of course, an appeal followed.

Since the neighboring owner's activity interfered with Bailey's rights, and because time and money had already been expended getting the necessary permits, the Appellate Division, Second Department, thought that injunctive relief had appropriately issued in this particular instance.

Did the AD2 bail out the ole Bailey?

NO SHOW!

West 95th LP filed a small claims case against Cecilia Gullas seeking $5,000 in unpaid rent.

After the matter was postponed, Cecilia failed to appear on the rescheduled date and the Kings County Civil Court awarded her former landlord a judgment for the sum sought.

She later made three attempts to have the judgment vacated but wasn't successful because (among other things) her papers failed to offer a "reasonable excuse" for her earlier non-appearance.

On appeal, the Appellate Term, Second Department, thought that what was a "reasonable excuse" was within the trial court's discretion and, in any event, because her papers didn't show why her former landlord wasn't entitled to the monies in question, the judgment had to be left undisturbed.

That must have broke Cecilia's heart.

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AGINA IS A CHOKING PAIN

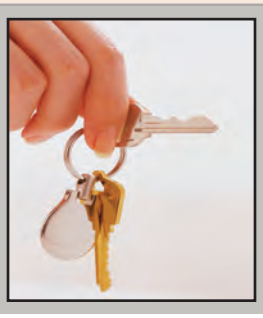
After a jury trial, A. Agina was found guilty of false imprisonment in the first degree, attempted assault in the first degree, and assault in the second degree, for beating his wife over a 12-hour period.

Although the evidence supported the conviction, the Appellate Division, Second Department, opted to reverse and grant Agina a new trial, because the Queens County Supreme Court had allowed the jury to hear testimony about the time the guy had assaulted his ex-wife.

Evidence of past bad acts is relevant when a perpetrator's identity is uncertain, and the behavior shows a pattern of conduct consistent with the crime charged.

Since there was no question who committed the act--because Agina's wife had testified that he beat her over an extended period of time--his former spouse's testimony was viewed as prejudicial because it deprived the guy of his right to a fair trial.

Can you beat that?



COME UNLOCK 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 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.