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DID AD2 GET THE POINT?

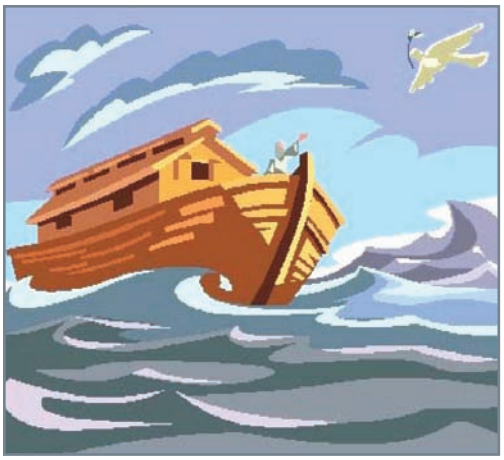
On October 11, 2005, Kenyon Alphonso purchased a home from Chaim Parnes for $600,000, and, in exchange for a $480,000 loan, gave Encore Credit Corp. a mortgage on the property. Several weeks later, on November 7, 2005, Alphonso sold the property to Point Holding Alpha, LLC for only $20,000 and the latter company recorded its deed on November 10, 2007. Some eleven days after that, on November 21, 2005, Alphonso's deed and mortgage with Encore were filed.

In June 2006, Encore assigned its mortgage to HSBC which filed a foreclosure case with the Kings County Supreme Court. In response to Point's claim that its interests superceded HSBC's, the Kings County Supreme Court found Point hadn't acquired the property as a "bona fide purchaser." On appeal, the Appellate Division, Second Department, was of the view that, at the time Point acquired the property, a title search would have revealed Alphonso wasn't the record owner (Parnes was). And the fact it paid only $20,000 for property which appraised for $600,000, didn't really help Point's position either.

Last, but not least, even though Point claimed it took the property subject to a mortgage, there was no evidence the company ever made any payments on that debt.

Which way do fingers point now?

KYPRIANIDES'S ARK



Because Stephen Kyprianides kept 15 dogs, 16 cats, 30 pigeons, and an iguana "in crowded and unsanitary conditions inside his home," the Warwick Valley Humane Society took possession of the animals.

Kyprianides later sued for intentional and negligent infliction of emotional distress when he learned the Society had euthanized some of his creatures.

After the Orange County Supreme Court dismissed his case, Kyprianides appealed to the Appellate Division, Second Department, which affirmed the outcome. The AD2 noted that the Society's conduct didn't rise to a level which supported an emotional distress claim, particularly since the supposed trauma was based on the loss of animals -- a theory which New York law doesn't currently recognize.

Now isn't that inhumane?

MIX-UP FORECLOSED!

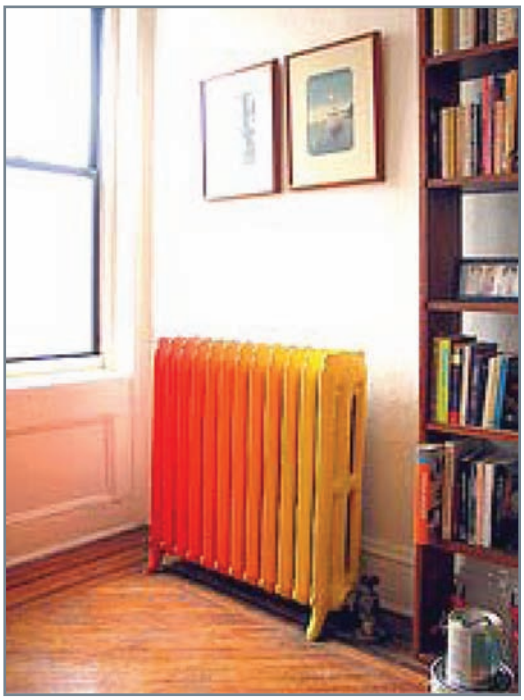
In *Lasalle Bank N.A. v. Ahearn*, when Timothy Ahern received an $180,000 mortgage from Fremont Investment & Loan to purchase a home, the loan documents identified Mortgage Electronic Registration Systems, Inc. as the mortgagee of record -- meaning the latter had the right to foreclose in the event of a payment default. Yet, when Ahern later failed to honor his debts, Lasalle Bank claimed to be the holder of the mortgage and filed for foreclosure.

Interestingly, the Ulster County Supreme Court denied Lasalle's request for relief because the financial institution "lacked standing" -- it couldn't show it had an interest in the property when the action was filed.

On appeal, the Appellate Division, Third Department, found that Lasalle, as an assignee, didn't have the ability to foreclose because a "complete assignment" hadn't been in effect at the time the case was filed. (Apparently, the underlying paperwork hadn't been completed or delivered to the bank.)

In other words, LaSalle was foreclosed from seeking foreclosure.

TENANT GETS BURNED



In *Utkan v. Szuwala*, Deniz Efe Utkan sued her landlord for her child's burn injuries.

Utkan alleged that, prior to the incident, she notified the owner -- Jenina Szuwala -- of a dangerous condition, and had requested that the apartment's radiators be covered.

Szuwala argued she wasn't responsible for protecting the tenant's kids from a radiator related injury, and asked for the case's dismissal. Utkan countered that the exposed radiator violated a state law -- known as the "warranty of habitability" -- which is intended to ensure that residential units are fit for human habitation and free of conditions which would threaten life, health, or safety.

When the Kings County Supreme Court denied Szuwala's dismissal request, she appealed to the Appellate Division, Second Department.

The AD2 was of the view that neither state law nor the governing lease shifted the duty to the building owner to protect children from exposed radiators. (That meant the responsibility to safeguard the youngster from this particular hazard remained with the parent.)

Isn't anyone going to get fired up over this?

PRESERVING PROPERTY TAKINGS

In Matter of *Aspen Cr. Estates, Ltd. v. Town of Brookhaven*, Aspen Creek Estates, Ltd. (ACE) sued the Town of Brookhaven claiming a property's "taking" -- or condemnation -- was wrongful and violated the Constitution.

After a public hearing and vote by the Town Board, Brookhaven sought to acquire local farmland, which included a 500-acre parcel belonging to ACE, in the interest of promoting, fostering and encouraging the agricultural industry.

Relying on the United States Supreme Court's decision in *Kelo v. New London*, ACE argued that, in order to be constitutionally permissible, any taking of private property had to be part of a pre-existing preservation plan.

Since the acquisition served a legitimate public purpose, neither the Appellate Division, Second Department, nor the New York State Court of Appeals, took to the private-property owner's takings arguments.

The Town certainly ACEd that.

NO ILLEGAL PARKING

In Matter of *Jacobsen v. Town of Bedford Zoning Board of Appeals*, Alfred Jacobsen challenged a decision by the Town of Bedford's Zoning Board which allowed GHP Bedford to use a part of its property as a commercial parking lot.

GHP'S property -- situated in a Neighborhood Business zoning district, as well as a Residence Two-Acre zoning district -- had been improved to include two commercial parking lots. Lot A was found on the portion designated for commercial use, while Lot B was located in the residentially zoned area.

Jacobsen challenged Lot B's use, claiming the Town's zoning ordinance (adopted in 1983) prohibited nonresidential parking in the area.

Because the lot's conversion to commercial use occurred before the ordinance's adoption, the Town sided with GHP. When the Westchester County Supreme Court dismissed his administrative proceeding challenging the outcome, Jacobsen then went to the Appellate Division, Second Department.

According to the AD2, the test to be applied was whether the Board's decision was "rational, not illegal, or an abuse of discretion." Since no irregularity could be discerned, the AD2 affirmed the outcome.

Guess Jacobsen had to park it right there.

PAYMENT OPTIONAL?

After a piece of property was purchased at a foreclosure sale, LKE Family Ltd. Partnership entered into an agreement which gave it an option to acquire the parcel. When the owners later refused to sell, LKE sued for "specific performance" -- to force the sale.

After the Suffolk County Supreme Court dismissed LKE's case, an appeal to the Appellate Division, Second Department, followed. Since LKE failed to make rent payments -- a "condition precedent" to the property's purchase -- the AD2 thought the dispute's dismissal was appropriate.

Guess who no likey that?

A LITTLE THING GOT IN THE WAY

In the *Matter of Lester v. New York State Office of Parks, Recreation & Historic Preservation*, 57-year-old Roy Lester filed suit against the New York State Office of Parks, Recreation & Historic Preservation alleging age discrimination.

Lester claimed Parks had perpetrated the misconduct because he refused to wear the required "Speedo" swimwear when he tried to requalify as a seasonal lifeguard.

Some two months after the State Division of Human Rights (DHR) ruled against him, Lester sought judicial review of the agency's determination. When the Nassau County Supreme Court dismissed the challenge as untimely, Lester appealed to the Appellate Division, Second Department.

If judicial review of a DHR decision is sought, a case must be brought within 60 days after service of that determination. Although Lester claimed his time was extended by a state statute -- CPLR 2103 -- the AD2 thought that law applied to deadlines in a "pending action," rather than an administrative proceeding.

Think the Court of Appeals will want to look into that?

NO RECOVERY FOR THIS GROUP

In *Group 88, Inc. v. AGA Capital NY, Inc.*, Group 88 went to a licensed mortgage broker -- AGA Capital -- for assistance with financing the purchase of nine cooperative apartments.

Apparently, after its loan request was rejected by one lender, AGA was able to secure financing from another entity on different terms, and the transaction closed. Group 88 later sued, alleging AGA breached certain oral representations as to the deal's terms.

After the Kings County Supreme Court dismissed the case, the Appellate Division, Second Department, agreed that AGA was free of liability since none of the transaction's particulars had been guaranteed.

Now how will Group 88 Capitalize that?

LOFTY EXPECTATIONS?

In *South Eleventh St. Tenants Assn. v. Dov Land, LLC*, a bunch of loft tenants were looking for rent-stabilized status.

Even though they were occupants of illegally converted apartments, the tenants asked the Kings County Supreme Court to afford them regulatory protection. When that request was denied, an appeal to the Appellate Division, Second Department, followed.

The AD2 found that a statute (the Emergency Tenant Protection Act of 1974) protected tenants of illegally converted units when "the owner acquiesced in the unlawful conversion, undertaken at the expense of the occupants, the premises were otherwise eligible for residential use ... and the owner ... actually sought to legalize the residential use."

Because the tenants' evidence suggested that their situation fell into that "rare" exception, the AD2 reversed the dismissal and sent the matter back for a formal hearing.

How high do you think this case will go?

AN ELECTRIFYING EASEMENT

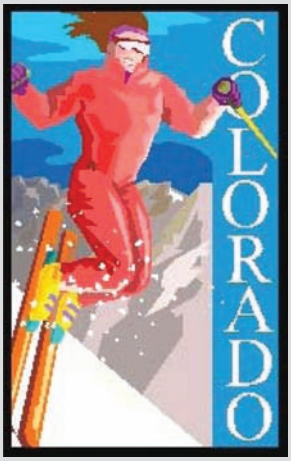
In *Jordan v. Vogel*, Allan Jordan had an easement which allowed him to use the water from a neighbor's pond to generate electricity.

After Michael Wallace and John Vogel purchased the property, Jordan alleged his new neighbors interfered with his rights. Apparently, the easement's location, which was described as being "100 feet in width around the perimeter of said pond," was in dispute.

While Wallace argued the easement was measured from the "water's edge," Jordan claimed it started from the top of the pond bank.

After the Delaware County Supreme Court found in Wallace's favor, and dismissed the case, Jordan appealed to the Appellate Division, Third Department, which thought there was a triable issue as to the easement's location (and whether it was situated on Wallace's property). According to the AD3, since the use of the word "perimeter" was ambiguous, and could be interpreted in different ways, the issue needed to await a formal hearing or trial.

That must have generated a few sparks!



A COLORADO STATE OF MIND

When the Department of Housing Preservation and Development (HPD) issued a Certificate of Eviction authorizing Lolita Santiago's eviction from her apartment, an Article 78 proceeding challenging that determination was filed.

Apparently, back in 2004, Santiago purchased a Colorado condo, and voting records showed that state as her place of residence.

In November 2005, about a year before the HPD proceeding, Santiago spent less than the required 183 days of the calendar year in New York. In fact, she admitted she hadn't stayed overnight in her apartment since January 2002, and was unable to produce a 2004 NYC Resident Income Tax return.

When the case got transferred to the Appellate Division, First Department, that court was of the view Santiago's Manhattan apartment wasn't her "primary residence," and confirmed the outcome. (It refused to excuse her absence from the apartment for medical reasons as it saw that evidence as "unavailing.")

No rocky mountain high for that Colorado resident.

HOW INCREDIBLE IS THIS?

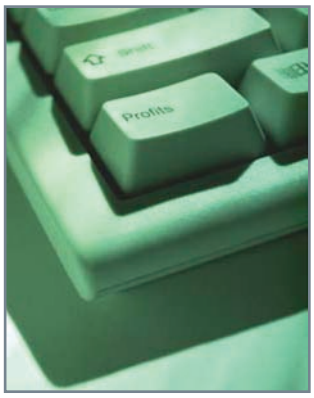
Louis Ferrigno was driving on Vanderbilt Parkway when a tree located on Suffolk County property fell and crushed his van.

At the trial of his personal-injury suit, an expert arborist testified that about five years prior to the incident, the tree began to exhibit "staghorn" effect -- an indication that the tree was dead.

Given the effect's visible nature and the length of time that the tree had been dead, a Suffolk County Supreme Court jury decided that there was adequate notice of the danger posed to motorists, and awarded Ferrigno over $2.5 million in damages.

On appeal, the Appellate Division, Second Department, agreed with the jury's findings as to liability, but saw the damage award as "excessive" and knocked Ferrigno's recovery down to $750,000.

Ferrigno must have turned green when he got that.



FAMILY FEUD: CONTRACT STYLE

In *Harrison v. Harrison, Jeffrey Harrison* had a couple of claims against his brother, Kevin. The first was "breach of contract," while his second was for the imposition of a "constructive trust" based on Jeffrey's alleged entitlement to 25% of profits from Global Telecom, Inc., of which Kevin was a 48% shareholder.

The brothers supposedly had an oral agreement whereby Jeffrey was to receive 25% of the profits from a designated account, plus 25% of the profits from any other account he brought to the company. After the Steuben County Supreme Court granted Kevin's request to dismiss the contract-breach claim, and denied Jeffrey's request to impose a constructive trust, both brothers appealed to the Appellate Division, Fourth Department, which reversed the outcome -- finding for Jeffrey on the breach claim, and for Kevin on the constructive-trust theory.

Since the AD4 was of the view that the purported oral agreement was enforceable, the breach claim was allowed to survive. But in order to establish an entitlement to a constructive trust, two elements needed to have been shown: a transfer in reliance of a promise, and, an unjust enrichment. Since Kevin didn't satisfy that standard, the AD4 was of the view he couldn't get that relief.

Brotherly love ain't what it used to be.

BRIDGEWORK TO NOWHERE?

In *Cava v. Fox*, Michael Cava sued for dental malpractice, claiming that as a result of Dr. Fox's bad drilling, another dentist had to replace Cava's bridgework and fill a cavity.

Cava wanted a refund from Fox, and further sought to recover the monies paid to the second dentist for the reparative work. Fox claimed that Cava wasn't charged for the services he performed, and denied that his treatment necessitated the subsequent work.

After the Suffolk County District Court, Sixth District, dismissed the case, Cava went to the Appellate Term, Second Department, which ended up affirming the outcome. Since Cava failed to produce expert testimony establishing a deviation from the "requisite standard of dental practice" during his treatment, Fox couldn't be found responsible for dental malpractice.

The doctor's assurances the bridgework would permanently remain in place, "without more," also didn't trigger liability.

Is there water under that bridge?

WHAT'S UP, DOCK?

In *Kuiters v. Kukulka*, Richard and Mary Kuiters -- and several other parties -- alleged that David and Lizabeth Kukulka interfered with an easement, which allowed "ingress and egress." Among other things, the Kuiters claimed: interference with the easement's use, a local zoning ordinance had been violated, and fraud.

When the Herkimer County Supreme Court denied the Kukulkas's request to dismiss the case, they appealed to the Appellate Division, Fourth Department. Because the Kukulkas failed to prove that they hadn't unreasonably interfered with the Kuiters' easement, the AD4 thought that part of the case needed to continue. However, since the Town of Webb granted the Kukulkas a variance to construct a dock, no violation of the local zoning ordinance could be established.

And, finally, because no alleged misrepresentations were made to the Kuiters, a "fraud" claim couldn't be maintained.

Did the AD4 knock the wind out of someone's sails?

LIMO SERVICE GETS HACKED

In *Cassis Family Ltd. Partnership v. Elsayed*, Cassis Family Limited Partnership filed a summary holdover proceeding against Adel and Erika Elsayed to recover possession of a residential apartment.

Cassis claimed the Elsayeds violated their lease and perpetrated a "nuisance" by running a limousine business out of their unit and parking their vehicles in a neighboring lot. (The Elsayeds' lease only permitted residential use of the apartment.)

When the tenants asked for the case's dismissal (based on a defective notice to cure), the Westchester County Justice Court denied that request and ultimately found that the Elsayeds had breached a substantial obligation of their tenancy. As a result, the landlord was awarded possession of the space, together with a money judgment in the amount of $668.06.

On appeal, the Appellate Term, Second Department, thought that the Elsayeds had substantially violated their lease when they continued to use their apartment for commercial purposes after the cure period expired. It also didn't help their cause that documents filed with Westchester County reinforced that the tenants were operating a business out of their home.

No free rides there!

TENANT EVADES DEFAULT

In *Natixis North America, Inc. v. Solow Bldg. Co. II, L.L.C.*, when the New York County Supreme Court found Natixis wasn't in default of its lease, the landlord took its case to the Appellate Division, First Department.

The AD1 was of the view the tenant hadn't breached its lease by allowing "unaffiliated entities" use of the premises or by failing to remove refrigerant (as mandated by the Federal Clean Air Act).

And while an injunction had issued, preventing the landlord from interfering with the tenant's renovations, a challenge to that relief was seen as "academic," as Natixis had already completed its work.

Did that earn a failing grade?

CASE DROWNS

In *Saffore v. Fasinro*, Sherin Saffore sued Abdulakeem Fasinro, her daughter's landlord, for injuries suffered when Saffore slipped in her kid's kitchen.

Fasinro testified at a deposition that the only water-related problem he knew of was a toilet leak, which was immediately fixed. He claimed not to have received any other complaints prior to the alleged incident, and that he had uncovered no leaks during his yearly inspection. He also didn't observe any water when he was told about the accident a week after it occurred. However, Saffore insisted that her daughter continuously complained about the unit's water leaks.

After the Bronx County Supreme Court dismissed the case, the Appellate Division, First Department, also refused to find the landlord liable for Saffore's injuries.

The AD1 was of the view there was no evidence of any leak related complaints before the fall. (Without an affidavit or the daughter's deposition testimony buttressing the notice-related assertion, Saffore's case couldn't stand.)

Seems like the case sprung a leak of its own.

TAG!

Despite six or more "heavy" floods and "constant small leaks" -- supposedly caused by a washing machine and a toilet which had been removed from its base -- Wendy Rivera reportedly refused to allow her landlord access to her apartment.

To complicate things just a bit, her son and his friends were also supposedly responsible for the graffiti which appeared throughout the building.

Yet, the Queens County Civil Court refused to evict the tenant on "nuisance" grounds.

On appeal, the Appellate Term, Second Department, found that the cited behavior interfered with other tenants' use and enjoyment of their homes.

While not every annoyance constitutes a nuisance, when examined as a whole, it was clear to the AT2 that the recurrent flooding, the graffiti, and "excessive noise" which emanated from the unit, comprised the kind of conduct which warranted Rivera's removal from the building.

The AT2 sure left its mark there.

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