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Inside this issue

CONTRACTUALLY INFIRM

St. Lawrence Factory Stores wanted to build a shopping center and sought to purchase about 12 acres of land from the Ogdensburg Bridge and Port Authority (OBPA).

When OBPA backed out of the deal, Factory Stores sued for "lost profits" (based on what it would have made had the shopping center been built), "the benefits of the bargain" (the difference between the property's contract price and its fair market value), together with "reliance damages" (the money the company spent procuring financing and finding tenants for the property).

After the St. Lawrence County Supreme Court granted a pre-trial request to dismiss the reliance and lost-profits claims, and rejected the "benefits of bargain" theory after a trial, the parties appealed and the Appellate Division, Third Department, concurred with the outcome.

When the dispute reached the New York State Court of Appeals, it was of the view state law had long adopted the principle of "reliance" -- as set forth in the Restatement (Second) of Contracts § 349 -- and that a party can recover sums spent in anticipation of a contract's performance.

Since dismissal of the reliance claim was wrongful, our state's highest court sent the case back for "further proceedings."

Who'll get martyred next?

DEATH-DEFYING DEAL

Gene Altman wanted to buy a co-op unit from Kenneth and Diane Kaplan.

Soon after placing a $230,000 deposit in escrow, Altman suffered a stroke and died.

Although the estate representative asked for the return of the proceeds, the Kaplans thought the contract was binding on Altman's heirs and refused the refund request.

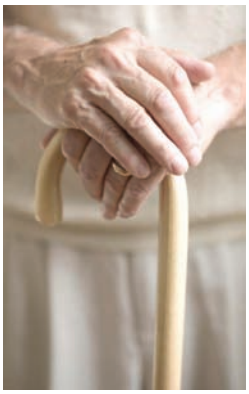
When litigation ensued, the New York County Supreme Court found the contract enforceable and dismissed the case.

On appeal, the Appellate Division, First Department, rejected the argument that Altman's death justified nonperformance, particularly since the parties' agreement addressed that particular contingency.

Because the estate representative had been obligated to seek the cooperative's approval, that failure to do so -- coupled with the contract's repudiation -- entitled the Kaplans to keep the $230,000 downpayment as liquidated damages.

That's some parting gift.

A CANE MUTINY



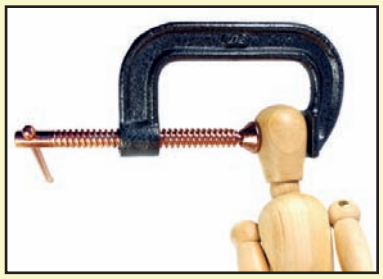
Diane Marks was convicted of robbery in the third degree and grand larceny in the fourth degree, and sentenced by the New York County Supreme Court to six months in jail, and 5 years' probation, for allegedly stealing a walking cane.

Although Marks claimed that she never intended to steal the item (because she was intoxicated), the Appellate Division, First Department, thought the evidence suggested otherwise.

Apparently, witnesses testified that Marks didn't reek of alcohol, that she walked normally, that she claimed to be the owner of the item, fended off witnesses when they tried to retrieve it, and, ran and hid from officers when they arrived at the scene.

The AD1 also summarily discredited Marks's argument that she lacked a "rational motive" for taking the item.

The poor lady got a good caning.



A PERFECT TEN?

After four and a half hours, a Kings County Supreme Court jury found Everton Simms guilty of two counts of first-degree robbery. When the jurors were later polled, "Juror 10" advised the court that, although she felt pressured, she voted to find Simms guilty.

When Simms later moved to set aside the outcome, a Kings County Criminal Court judge -- believing that he lacked the authority to grant the requested relief -- denied the request. On appeal, the Appellate Division, Second Department, reversed and ordered a new trial.

When the case reached our state's highest court, it cited to §310.80 of New York State's Criminal Procedure Law, which provides that if a juror declines to accept a verdict, deliberations must resume.

The New York State Court of Appeals (COA) was of the view the trial judge was obligated to resolve any uncertainties that existed, particularly if any purported "duress" occurred during the group's discussions.

Since the ambiguity which arose in this case hadn't been appropriately addressed, the COA concluded that a new trial was warranted.

Talk about peer pressure.

DEFYING GRAVITY

After he allegedly misappropriated an electronic translator, Nelson Miranda was found guilty of grand larceny in the fourth degree and sentenced to a term of 2 to 4 years.

Miranda claimed to have found the device on the floor and sought a lesser charge. When the New York County Supreme Court declined that request, Miranda appealed.

Because two officers saw Miranda remove the object, and since there was no evidence the victim's backpack was unzipped or turned upside down, the Appellate Division, First Department deferred to the "law of gravity" and concluded that the item had been comfortably situated until Miranda purportedly purloined it.

That's a backpack rap!

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.

BY CONCEALED, DID YOU MEAN OBVIOUS?

After buying two buildings from Mocal Enterprises, Inc., for $92 million dollars, 1225 Realty Owner LLC sued the seller on "fraudulent concealment" grounds -- claiming Mocal failed to disclose the existence of certain lease agreements.

When the New York County Supreme Court dismissed the case, 1225 appealed.

Since a revised rent roll had been provided more than a month before the contract was signed, and a schedule was also attached to the contract of sale, the Appellate Division, First Department, could discern no misconduct, particularly since both sides were "sophisticated business entities, represented by counsel."

Reading is so fundamental.

CASE CLOGGED

After a toilet overflowed and flooded a clothing store, the insurer sued the building's fifth-floor tenant to recover the monies paid on the claim.

When its case was dismissed, the insurance company appealed to the Appellate Division, First Department.

Since there was no evidence that the fifth floor tenant had exclusive control over the bathroom in question, the AD1 was of the view liability couldn't be established. (Apparently, the area was accessed by the building's porter, real-estate agents, and, the fifth floor tenant's contractors.)

And even if the mishap had been caused by the independent contractors (who had been hired to renovate the fifth floor tenant's space), there was no responsibility for their misconduct. ("'[A]n employer who hires an independent contractor is not liable for the independent contractor's negligent acts.'")

That insurer sure got soaked.

A GIFT FROM THE BEYOND

After Richard Baum died, his widow and two children decided to sell his apartment and split the proceeds. But when Valerie Greenly -- Richard's widow -- found a letter (supposedly written by the deceased) making her a co-owner of the unit, Baum's son sought a court order declaring the document invalid.

After the New York County Surrogate's Court concluded that the apartment hadn't been gifted to her, Greenly appealed.

Since it was unclear whether Richard had signed the letter, why it had taken Greenly over a decade to produce the document, and why no one had been previously told about the transfer -- including the bank which held the mortgage to the unit -- the Appellate Division, First Department, thought that Greenly failed to present "clear and convincing evidence" that a gift had been made.

Think she mourned that loss?

TOO DRUNK TO DRIVE?

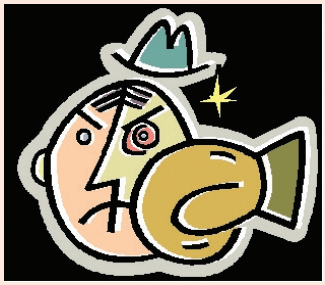
C. Rich had been charged with driving while intoxicated and sought to suppress the introduction of incriminating evidence at her trial because she believed the arresting officer lacked a legal basis -- or "probable cause" -- for the arrest.

When the Orange County Justice Court granted Rich's request, prosecutors filed an appeal with the Appellate Term, Second Department.

The AT2 thought there was sufficient support for the stop and her restraint because Rich had supposedly exhibited slurred speech, reeked of alcohol, and was trying to drive her car with its front right wheel nearly detached from its axle. (Rich also failed several sobriety tests and admitted to consuming several beers earlier in the day.)

Now that's Rich.

MET LIFE RUMBLE



After Sandy LoFaso punched an off-duty cop in the face, the security officers employed by Metropolitan Life Insurance Company broke up the fight and summoned the police. (LoFaso was arrested for assault.)

LoFaso and his wife later sued the New York City Police Department, Met Life, and the off-duty cop for false arrest, malicious prosecution, defamation, intentional infliction of emotional distress, and loss of consortium.

When the New York County Supreme Court let Met Life (and its security division and officers) out of the case, an appeal to the Appellate Department, First Department, followed. The AD1 thought that dismissal of the false arrest and malicious prosecution claims was appropriate given there was a legal basis, or "probable cause" for LoFaso's arrest. And, since the defamation claim was based on an unpublished memo prepared by Met Life personnel, the appellate court also didn't think that legal theory could survive attack.

Because "emotional distress" requires "utterly intolerable" acts which exceed "all possible bounds of decency," that claim was also stricken. And, finally, since none of the other theories survived, the loss of consortium claim also fell flat.

Did the LoFasos lose face?

NOW BEHAVE

Tamara Covington, a passenger in a taxicab driven by Sanjeev Kumar, was injured when Kumar failed to yield the right away to a car driven by Jarrett McCalla.

After Covington filed suit in the Bronx County Supreme Court against Kumar, McCalla, and the owners of the respective vehicles, a jury found McCalla and Thomas (the car's owner) 100% at fault for the accident. When the trial court denied their request to set aside the verdict, McCalla and Thomas appealed.

Because the outcome was "inexplicable," and contrary to the "weight of the evidence," the Appellate Division, First Department, set aside the jury's verdict and sent the case back for a new trial on damages -- unless the parties agreed to apportion liability as follows: 60% McCalla and Thomas, 40% Kumar and Lal (the cab's owner).

That was a hack job.

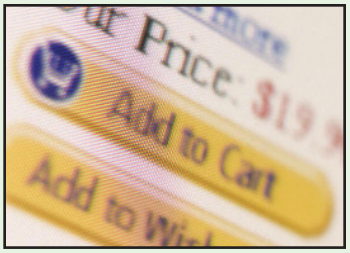
NOT FUNNY

Leonard Simmons filed a personal injury case against the New York City Transit Authority (NYCTA).

After the Bronx County Supreme Court awarded relief in Simmons's favor, NYCTA filed an appeal. But, since he failed to show he had suffered a "serious" injury, the Appellate Division, First Department, reversed and dismissed the case. (Simmons's limited ability to play pool and lift heavy objects wasn't enough to support an award in his favor.)

Wayyy!

"IT'S STRICTLY BUSINESS"



When the City of New York's Business Integrity Commission (BIC) refused to renew Canal Carting's trade-waste business license, the company challenged the agency's determination.

On administrative appeal, the New York County Supreme Court vacated the agency's decision, finding that BIC had acted "arbitrarily and capriciously."

Since BIC can refuse to issue a license to any applicant that "lacks good character, honesty and integrity," and Canal Carting supposedly had a history of illegal dumping and failed to honor its financial obligations, the Appellate Division, First Department, reversed and confirmed the license's non-renewal. (The appellate court rejected the argument that the legal basis upon which BIC relied only applied to companies with organized crime ties.)

Would you take that personal?

ON THE BOTTOM RUNG?

Richard Hauptner was sitting on his deck when a 30-foot ladder from an adjoining construction site fell and knocked him unconscious.

Hauptner later sued the developer, the owner, the general contractor, and subcontractor, for negligence, the defendants alleged "comparative negligence."

Because a safety inspection had been conducted a month before the accident, the defendants were on notice the ladder hadn't been properly secured. Their failure to address that problem was a breach of a duty of care as far as the Appellate Division, First Department, was concerned.

Hauptner, on the other hand, wasn't "comparatively negligent" -- or somehow responsible for what occurred -- because there was no evidence he expected a ladder from the construction site to fall into his backyard.

They sure wrung that one out.

WHO STOLE THE COOKIES FROM THE COOKIE JAR?

In People v. Porto, William Porto's fingerprint was found on a cookie tin in an apartment that had been burglarized.

After a New York County Supreme Court jury found him guilty of burglary in the second degree, Porto was sentenced -- as a persistent violent felony offender -- to 16 years to life.

On appeal, the Appellate Division, First Department, thought that the verdict was based on legally sufficient evidence and refused to entertain the guy's explanation as to how his fingerprint ended up on container.

Porto was canned.

NOT INTO CLEVELAND

In October of 2006, Thomas Dufour's dog was seriously wounded by a "pit-lab" owned by David Brown (a neighbor's live-in boyfriend).

Some three months later, in January 2007, the same animal escaped from a fenced area and attacked Dufour and fatally wounded the guy's dog.

After Dufour sued Brown and Lisa Cleveland (the neighbor), the Rensselaer County Supreme Court dismissed the case brought against Lisa because she wasn't the dog's owner and the attack hadn't occurred on her property.

On appeal, the Appellate Division, Third Department, thought that the mere harboring of a dog with "vicious propensities" was enough to trigger liability for that animal's behavior.

Because Cleveland allowed Brown and his dog to live with her, and because she had witnessed the earlier (October 2006) attack, the AD3 didn't think the case's dismissal was justified.

That sure bites!

GUY GETS SLAMMED

David Schoneboom sued the B.B. King Blues Club & Grill after he was injured by a bunch of slam dancers.

When the New York Supreme Court granted B.B. King's dismissal request, Schoneboom went to the Appellate Division, First Department.

Apparently, Schoneboom had been watching the performance from a distance but had opted to move to a closer (and more perilous) position. Since he assumed the risk of getting injured, the AD1 thought his case couldn't survive the thrashing.

Was Schoneboom a pushover?

SLIDERS

Lisa Davis fell on the 10th floor landing of her apartment building's stairway.

While she didn't see what caused her fall, once she regrouped, she noted that her pants were wet and that there was a puddle of water on the lower landing.

When her negligence case brought against the building's owner was dismissed by the Queens County Supreme Court, Davis appealed.

Generally, in order to trigger liability for "a slip and fall," it must be shown that the owner had actual or constructive notice of a dangerous condition and failed to fix that problem within a reasonable time frame.

Since Davis couldn't definitively identify what caused the incident, the Appellate Division, Second Department thought the case was properly dismissed.

Wasn't that Ludacris?

SENIOR MOMENT?

Because Veena Sadhwani suffered brain trauma and couldn't testify at her personal-injury trial, her attorney read her deposition testimony into the record.

After a New York County Supreme Court jury found the New York City Transit Authority (NYCTA) liable, and awarded Veena $1.9 million in damages, NYCTA appealed to the Appellate Division, First Department.

The AD1 thought the jury properly found NYCTA responsible for the accident, and that the trial court hadn't abused its discretion by permitting the use of Veena's deposition in lieu of actual testimony.

Did we forget something?

CAMARA NEVER SAW THIS CUMMING

Early one September morning, while the light was in the traffic's favor, an allegedly intoxicated Alex Cumming attempted to cross West 76th Street and was hit by a taxicab driven by Sansoussy Camara.

After Cumming filed suit against Camara, and the vehicle's owner, in the New York County Supreme Court, a jury found in the defendants' favor.

On appeal, Cumming argued that the lower court had improperly charged the jury (on the driver's failure to "yield the right of way") and that the outcome was contrary to the evidence presented at trial.

Although it agreed that the jury charge was somewhat irregular, because the lower court's error was "harmless," and the jury based its determination on a "fair interpretation of the evidence," the Appellate Division, First Department, affirmed the outcome.

Bet the poor guy was punch-drunk when he got that.

MUSIC TO WHOSE EARS?

Tazewell Delaney and John Weston were supposed to be partners in a business related to music sales, but Weston allegedly stole the idea and started a competing company.

After Delaney filed suit which alleged breach of a joint venture agreement, misappropriation of ideas, and, unjust enrichment, Weston asked the New York County Supreme Court to dismiss the case. When that request was granted, an appeal to the Appellate Division, First Department, followed.

Because Delaney's idea wasn't original, and the parties' agreement lacked language which would have made their contract enforceable, the AD1 thought dismissal was appropriate. (It also couldn't find any "unjust enrichment," since Weston's company suffered net losses of approximately $1MM in its four years of existence.)

Sour notes all around.

UNSETTLED SCORE

After he was physically attacked by several of his fellow co-workers, James Wolfgeorge filed a personal-injury case against William Ambrister, Delta Funding Corporation, and others.

When the Bronx County Supreme Court denied the defendants' dismissal request, on the grounds that Wolfgeorge had settled the claim in exchange for a $1,500 payment, the group appealed.

Based on its review of the record, the Appellate Division, First Department, couldn't find any evidence which supported the defendants' position. Wolfgeorge's purported signature on a general release didn't match his signature on other documents, nor was there any proof the guy had received a payment.

Did someone cry Wolf?

WE DIDN'T START THE FIRE

After her kitchen caught fire, Donnell Holliman made a couple of attempts to quell the flames but eventually opted to leave the apartment with her family.

Donnell reportedly suffered injuries when she returned to the unit for a third try at extinguishing the inferno.

She later filed suit against the New York City Housing Authority (NYCHA) claiming that a defective smoke alarm --- which hadn't been activated by the fire -- triggered the agency's liability. When the New York County Supreme Court denied its dismissal request, NYCHA appealed.

Since Donnell was injured because she returned to the apartment without the appropriate means of extinguishing the flames, the Appellate Division, First Department, reversed and dismissed the case.

NYCHA smoked that one out.

THE BUTLERS DID IT

Mary J. Butler sued the City of Gloversville after her daughter, Rachel, fell off a playground slide onto unprotected ground and fractured her clavicle and femur.

Since protective ground covers are recommended by the U.S. Consumer Product Safety Commission's Handbook for Public Playground Safety, the American Society for Testing and Materials' Standard Consumer Safety Performance, and, because other playgrounds in the area had those covers in place, the Fulton County Supreme Court denied the City's request to dismiss the case.

On appeal, the Appellate Division, Third Department, was of the opinion that the absence of ground covering wasn't the cause of Rachel's injuries and ended the litigation.

But when the case reached our State's highest court, the New York State Court of Appeals thought that the City hadn't shown an entitlement to relief. Since there were unresolved questions as to whether the kid's injuries would have been as severe had there been some protective covering been in place, the case was reinstated and sent back for trial.

Those Butlers served that one up, real good.

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BAMISILE'S BACKSIDE BUMMER

After his arrest, Adebola Bamisile was subjected to a pat down. When the officer felt a hard object on Bamisile's backside, Bamisile was instructed to remove the item -- which ended up being a bag of cocaine -- from inside his pants.

At trial, Bamisile sought to suppress the introduction of the drugs, on the grounds the officer's examination was unlawful.

When the New York County Supreme Court denied that request, Bamisile appealed.

The Appellate Division, First Department, thought there was a difference between finding drugs hidden in an arrestee's rectum, or between his/her butt cheeks, and "junk" comfortably lodged in the "vicinity" of the buttocks.

Because the evidence established that the drugs had been placed in the "vicinity" of the guy's tush, the appellate court saw that placement as "comparable to an object in a back pocket" and affirmed the lower court's decision.

That was the end of that.

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