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WHAT WAS PASCHAL'S THEORY?

In *Corbo v. West Side Travel*, Paschal Corbo sued West Side Travel for nonpayment of rent claiming he orally demanded the money from his tenant.

When West Side later failed to file an answer or appear in court in response to Corbo's nonpayment case, a final judgment was entered against the company and it was later evicted. Soon thereafter, West Side sought to be restored to the space alleging that it had been misnamed in Corbo's papers -- its actual name was West "Street" Travel. The tenant also claimed it owed no money to Corbo and never received any payment requests from him.

When the Richmond County Civil Court denied the tenant's motion, the company appealed to the Appellate Term, Second Department, which found no confusion "as to the party being sued" and the misidentification "de minimis." The AT2 also concluded Corbo wasn't required to give the tenant a written notice since the oral demand was a legally permissible alternative.

Finally, restoring the company to its space wouldn't have been appropriate, since it was a "month-to-month" tenant, whose occupancy was terminable at any time by either party, and Corbo had already "served a termination notice on tenant."

Now that's some West Side story!

AT2 GIVES PSYCHIC POWER

Mohinder Ramirez, a rent-stabilized tenant, was served with a notice to cure which alleged he was in violation of his lease for subletting the apartment without the owner's consent and allowing the occupants to use the unit for commercial purposes -- namely "psychic and palm readings."

The Queens County Civil Court allowed the landlord to withdraw that part of the notice which referred to the subletting, and allowed him to proceed on his commercial-use claim. After the Civil Court awarded the landlord $2800 and possession of the space, Ramirez appealed to the Appellate Term, Second Department.

The AT2 reversed and dismissed the case, finding it "elementary" that a predicate was unamendable after it was served. It also was of the opinion that it was unfair to allow the landlord to rely on a nonresidential use theory, as "illegal subletting" had been the dispute's original focus.

We're betting Ramirez predicted that outcome.

ISN'T THIS A GOVERNMENTAL FUNCTION?

In *Jericho Water Dist. v. One Call Users Council, Inc.*, Jericho Water District (JWD) filed suit against One Call Users Council, Inc. (OCUCI) seeking a judge to find JWD wasn't obligated to contribute to the "one-call" system.

Before an excavation or demolition may begin, contractors must contact OCUCI, which affords notice to all utility (and other service) providers of any work to be performed in the immediate area of the latter's easements or installations. The participants then map out exactly where "pipes, cables, wires, and the like" are situated in order to prevent someone from excavating in those areas. OCUCI is funded by its member operators who are statutorily required to join and pay the associated costs. However, since "municipalities" are exempt from remitting those fees, JWD claimed it wasn't required to pay the costs.

When the Nassau County Supreme Court disagreed, JWD appealed to the Appellate Division, Second Department, which reversed. On appeal, the New York State Court of Appeals again reversed, finding the exemption inapplicable because JWD didn't exercise "governmental functions." The outcome turned on the definition of the word "municipality." And since that term is narrowly defined, our state's highest court saw no reason to give it a broader application. *Drip!*

CAN'T SLIP ON STUFF THAT AIN'T THERE!

In *Perez v. Canale*, Enso Perez slipped on a walkway owned and managed by Amelia Canale and other defendants. While Perez alleged the cement walkway was covered with snow and ice, the defendants' expert established, at the time of Perez's fall, the temperature was "well above freezing" and it was thus "impossible" for there to have been any accumulated snow or ice.

When the Bronx County Supreme Court granted the defendants' request to dismiss the case, Perez appealed to the Appellate Division, First Department, which concurred with the outcome, particularly since Perez couldn't rebut the expert's analysis. (There were no issues which warranted the court's consideration.)

With that, Perez's case evaporated.

NIGHTMARE ON ELM STREET

In *1212 Ocean Ave. Hous. Dev. Corp. v. Brunatti*, Ocean Avenue Housing (OAH) filed suit against Deborah Brunatti alleging "nuisance, trespass, and negligence." Brunatti and OAH owned adjoining property which was separated by a "retaining wall." An elm tree, located on Brunatti's property, leaned against the wall and the tree's roots supposedly caused structural damage.

In 2004, when the Department of Buildings ordered OAH to fix the retaining wall, the corporation started a case against its neighbor to recover the repair costs. Brunatti contended that the roots weren't the cause of the problem and, because it failed to attempt a fix, OAH was precluded from seeking a recovery. When the Kings County Supreme Court denied her request to dismiss the case, Brunatti appealed to the Appellate Division, Second Department.

Since her experts' reports -- which purportedly showed the tree's roots didn't damage the wall -- weren't in proper form, they couldn't be considered by the court. Nor could she show that a fix by OAH was "practicable" given that the "roots rested entirely on her property." Interestingly, Brunatti was successful in getting OAH's trespass claims dismissed for that same reason. "Since the tree roots rested entirely upon the Brunatti's property, there was no intentional intrusion or entry ... which could constitute trespass." ***OOOAH!!***

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STREETCAR NAMED "CONSTITUTIONALLY DEFICIENT"

In *Sidun v. Wayne County Treasurer*, Stella Sidun filed suit alleging her due process rights were violated when the County Treasurer of Wayne County (Michigan) "wrongfully deprived" Stella of her property.

Helen Krist owned a two-family dwelling on a parcel of land located in Hamtramck, Michigan. In 1979, by way of a quitclaim deed, Krist conveyed the property to herself and Stella Sidun -- her daughter -- as joint tenants with right of survivorship. The deed noted that Krist's primary residence was located in Warren, Michigan while Sidun's was in Birmingham, Michigan.

In 1998, after Krist developed Alzheimer's, she moved into her daughter's Birmingham home and, while the utility bills were forwarded to her daughter's place, Hamtramck's property tax officials weren't notified of the address change. Several months later, the Warren residence was sold.

From 1999 to 2003, the county treasurer mailed the Hamtramck tax bills to Krist's old Warren address and, of course, were not paid. When the treasurer sent two notices of delinquency by first class and certified mail to the Warren address they were returned as "undeliverable." Once the property went into foreclosure, the treasurer sent notices of the hearing date by certified mail to Krist's old address. And again, those notices were returned as undeliverable.

Because of those failed attempts, the treasurer opted to post the foreclosure notice on Krist's Hamtramck property and also published the information in a local newspaper, but failed to send a copy of the information directly to Sidun's Birmingham residence as listed on the deed.

When Sidun later filed suit, a trial court found her due process rights hadn't been violated and the Michigan Court of Appeals agreed. On appeal to that state's highest court, the Michigan Supreme Court vacated the judgment and sent the matter back to the Court of Appeals for reconsideration. After the Court of Appeals came to the same conclusion, the Michigan Supreme Court reversed.

Relying on Mullane v. Central Hanover Bank & Trust Co. and Jones v. Flowers, Michigan's Supreme Court concluded that, in order to satisfy constitutional requirements, the notice method utilized had to be "reasonably certain to inform those affected." Because two addresses were listed on the deed -- and a reasonable inference could have been drawn that Sidun was reachable at that other address -- the treasurer erred by limiting the direction of notices to the Warren property. The court felt the processes and procedures utilized weren't "reasonably calculated" to succeed.

The Supreme Court also found the posting and publishing insufficient. While they might have been reasonable follow-up methods under different circumstances, because the treasurer had Sidun's name and address prior to foreclosure, the procedures utilized in this instance were inferior to mailing the notices directly to Sidun's Birmingham residence and thus violative of her due process rights.

HEY STELLA!

ALL IN THE FAMILY?

In *25 W. 68th St. LLC v. Whitman*, 25 brought a holdover case against Brook Whitman who lived in the rent-controlled apartment with his grand-uncle for more than two years prior to the latter's death. Thereafter, Brook stayed in the unit claiming to be a "non-traditional family member" entitled to succeed to his grand-uncle's tenancy.

When the New York City Civil Court sided with Brook, the landlord appealed to the Appellate Term, First Department. The AT1 found Brook was entitled to remain in the unit since he and his grand-uncle shared an "emotional and financial commitment and interdependence." The two held joint bank accounts, credit cards, shared household expenses, and "engaged in social activities and recreational activities and attended family functions together." Brook also accompanied his grand-uncle to medical appointments, "attended to him during hospitalizations," and was the beneficiary of half of his grand-uncle's estate.

"Guys like us, we had it made … Those were the days."

HOW RAMBUNCTIOUS WERE THEY?

In *405 E. 56th St., LLC v. Morano*, the New York County Civil Court awarded the landlord a possessory judgment against David and Kathleen Morano after finding Kathleen had "committed a nuisance by engaging ... in a 'course of conduct' and pattern of 'out of control' behavior" over a number of years.

Kathleen was "confrontational and verbally abusive" to neighbors and building employees, and allowed her three "rambunctious dogs" to pester other building occupants. (Police were called to intervene on at least two occasions.)

On appeal, the Appellate Term, First Department, found the tenant's behavior "placed an intolerable burden" on the building's other residents.

A lone dissenter -- Justice William J. Davis -- was of the view that Kathleen's conduct, while "rude, annoying, and bothersome," was a "reality of everyday urban life" which needed to be "tolerated." He didn't believe the tenant's activities "substantially threatened the health, safety and comfort" of her neighbors. As "aggressive and belligerent" as she was, Justice Davis didn't believe 63-year-old Kathleen and disabled 61-year-old David should forfeit their 28-year stabilized tenancy.

Is this an instance of barks with a bite?

LEASHLESS IN DOUGLASTON

In *Petrone v. Fernandez*, Melanie Petrone -- a mail carrier -- was working her route when she saw a rottweiller named "Kai" positioned on Fernandez's lawn only feet away from her.

Since the animal was unleashed, Petrone retreated. When she noticed Kai was starting to chase her, Petrone also began to run, jumping through the window of her vehicle and injuring her finger.

James McCloy, Kai's custodian, alleged the dog was asleep on the front lawn, that Petrone ran away from the house yelling and screaming, but the animal remained stationary the entire time.

McCloy claimed Kai couldn't pursue Petrone because the animal suffered from a severe arthritic condition, and, both Fernandez and McCloy testified Kai never "exhibited vicious propensities."

After Petrone filed a negligence suit against the two men for "failing to guard [Petrone] from the dog's known vicious propensities" and for violating the New York City leash laws, the Queens County Supreme Court dismissed the case.

On appeal, the Appellate Division, Second Department, modified the outcome. After reviewing the Court of Appeals's decision in *Bard v. Jankhe* -- which established strict liability "for harm caused by an animal, where it is established that the owner knew or should have known of the animal's vicious propensities and harm is caused as a result of those propensities" -- the AD2 used Petrone's case as a platform to highlight an appellate discord.

While the First and Second Departments have recognized "common-law liability independent of an animal's vicious propensities," the Third and Fourth Departments "generally have not ... absent evidence of the animal's vicious propensities."

Since *Bard v. Jankhe* wasn't a leash-law case, but a dispute dealing with a "bull in a barn of a dairy farm," the AD2 didn't believe our state's highest court had addressed the "question of whether negligence involving the violation of a leash law can result in liability."

Relying on its own precedent, which recognized dog owners' liability for leash law violations, the AD2 concluded the Supreme Court erred in dismissing Petrone's case since questions of fact remained as to Kai's behavior on the afternoon in question. (The AD2 agreed Fernandez sufficiently established he wasn't Kai's owner, wasn't home at the time Petrone was injured, and that he owed no duty to Petrone.)

We're thinking the Court of Appeals will muzzle this case.

JARRED KASSENOFF RETURNS!

We are proud to announce Jarred I. Kassenoff has rejoined Finkelstein Newman Ferrara LLP as a partner.

Before returning to FNFLLP, Jarred was a member of the Commercial Litigation Practice Group at Cozen O'Connor.

For the past decade, Jarred has concentrated his practice in the areas of complex commercial real-estate disputes, insolvency issues and zoning and tax matters. He has represented Fortune 500 corporations, real-estate management companies, property owners, landlords and tenants in all aspects of their use, management and operation of commercial real estate.

He has published articles in such prominent publications as the *New York State Bar Association Journal* and the *New York Law Journal*.

Jarred earned his law degree from the Benjamin N. Cardozo School of Law, where he was editor of the *Journal of International and Comparative Law*, and his undergraduate degree from The Pennsylvania State University.

Welcome back, JIK. (We missed ya!)

WHO PETS AN ANGRY DOG?

In *Dykeman v. Heht*, Crysta Dykeman and her parents were guests in Raymond Heht's home when, within 30 to 45 minutes after their arrival, Heht's dog bit Crysta in the face, severing part of her eyelid and tear duct and cutting her lips. According to Crysta's mother, the dog had "barked, snarled, growled, and bared its teeth at them" on a prior visit to Heht's home, but was subdued without incident.

Crysta and her mother filed suit against Heht to recover damages for personal injuries and claimed strict liability. After Heht's request to dismiss the case was denied by the Dutchess County Supreme Court, an appeal to the Appellate Division, Second Department, followed.

Interestingly, the appellate court was of the opinion that the dog's behavior "raised a question of fact as to whether Heht should have known of his dog's vicious propensities." A lone dissenter -- Justice Dillon -- was of the opinion case law required more than just growling and barking to establish an animal's "vicious propensities." Dillon also noted that Heht's dog hadn't previously exhibited aggressive behavior, and always responded to Heht's commands.

How viciously will the Court of Appeals respond to this case?

THIS POOCH WOULDN'T BE IGNORED

In *1725 York Venture v. Block*, 1725 York Venture started an eviction proceeding against Michael and Nomi Block for harboring a dog in their apartment without the owner's consent.

While the building was "pet-friendly," the Blocks' lease didn't allow them to have an animal living with them. When the owner sought to enforce that rule, the Blocks claimed 1725 had waived its right to enforce the prohibition since it didn't bring a case within 3 months of discovering the dog's presence.

After the New York County Civil Court found in the landlord's favor and awarded 1725 possession of the apartment, the Blocks appealed. Since the building's employees knew of the dog, the Appellate Term, First Department, found their knowledge applied to 1725. The AT1 believed "[a]bsentee landlords cannot avoid having 'imputed knowledge' of the presence of pets by 'turning a blind eye to [an] open and notorious fact.'"

That was ruff!

DOWN PAYMENT GETS RETURNED

In *Hoft v. Frenkel*, Joanne Hoft sued for breach of contract after Baila Frenkel cancelled an agreement to purchase Hoft's home. (Hoft believed she was entitled to keep the $54,500 down payment.)

The sale had been conditioned upon Baila's ability to secure a mortgage commitment within 30 days. Although her mortgage application was "provisionally" approved, when it was later denied, Baila's attorney informed Hoft the buyer wanted to cancel the deal according to the "mortgage contingency clause." After the Rockland County Supreme Court granted Baila's request for relief in her favor, Hoft appealed to the Appellate Division, Second Department. Baila established that she made a good-faith effort to obtain financing and was denied because she failed to meet certain qualifying criteria. According to the AD2, that entitled her to the lawsuit's dismissal and return of her contract deposit.

The AD2 bailed Baila out of that one.

VILLAGE PEOPLE HAVE A SAY

In *Matter of MLB, LLC v. Gary Schmidt*, MLB challenged the Village of Monticello Planning Board's denial of an application to subdivide an undeveloped parcel of land into three lots in order to construct homes on them. Neighboring owners opposed the development believing it would exacerbate the area's draining and flooding problems and the planning Board agreed.

After MLB filed a special proceeding -- pursuant to CPLR Article 78 -- seeking to overturn the Board's denial of the request, the Sullivan County Supreme Court dismissed the case and an appeal ensued. Although MLB argued the Board gave too much weight to its neighbors' concerns, the Appellate Division, Third Department, found the community's opposition was based on "personal experience and observations" which included reports by "downhill property owners" of street and basement flooding during heavy rains.

It took a village to stop things from going downhill.

OFFICES AIN'T FOR SLEEPING

In *Holdridge/BK St., Inc. v. Lamson*, Holdridge filed a nonpayment case against Richard Lamson, a commercial tenant. When the New York County Civil Court granted relief in the landlord's favor, and awarded a final judgment of possession and a money judgment in the amount of $28,853, the tenant appealed to the Appellate Term, First Department.

Since the tenant was unable to offer an acceptable excuse for his failure to pay the rent, and the lease provided the space was to be used for commercial purposes only, the AT1 noted "to the extent that any portion thereof was unlawfully used for living purposes, it afforded no basis for relief to [the tenants] in this proceeding."

Another reason not to nap at your desks, folks!

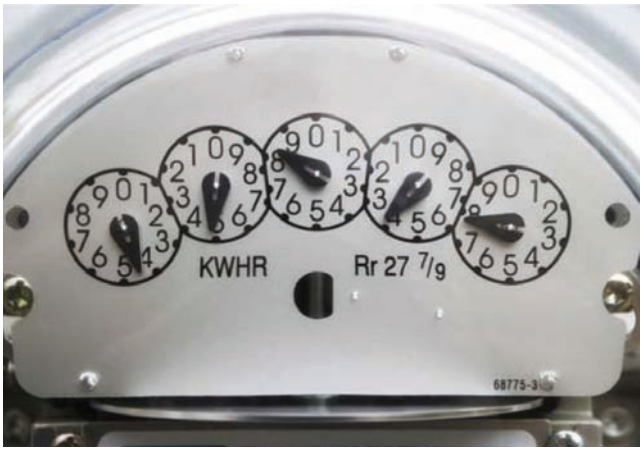
A PORTUGUESE RESTORATION?

In *Santorini Equities v. Picarra*, Francisco Picarra and his daughters, Rachel and Sonya, claimed they shouldn't be evicted from their Manhattan rent-stabilized "310-square foot walk-up apartment."

Even though Francisco spent much of each year with his wife and family in Portugal, he still felt he had a right to keep his regulated unit because his daughters had returned to the U.S. and occupied the apartment while attending college. Since the premises weren't Francisco's "primary" residence, and the daughters couldn't establish a succession entitlement, the New York County Civil Court entered judgment for the landlord and ordered an eviction. Due to Francisco's failure to maintain an "ongoing, substantial, physical nexus" with the unit, the Appellate Term, First Department, affirmed.

Did that signal the fall of the House of Picarra?

THIS DISCONNECT COST MILLIONS



In *Neissel v. Rensselaer Polytechnic Institute*, Jordan Neissel sued Rensselaer Polytechnic Institute (RPI) for injuries suffered while repairing a tripped circuit breaker.

After three electricians hired by RPI investigated a non-campus power outage, but were unable to determine the cause, RPI retained High Voltage Electric Service, Inc., which determined the problem stemmed from a voltage feed "fault" located somewhere in the basement of RPI's Materials Research Center.

Neissel -- a "journeyman high voltage electrician" -- positioned himself in the basement where a High Voltage electrician had informed him it would be safe to work on cables contained within the metal cabinet. Unbeknownst to Neissel, RPI officials decided the Materials Research Center needed to be re-energized in order to preserve projects and experiments in the freezers, refrigerators, and incubators. Using an alternative voltage feed, power was restored to the building.

Those same officials later met Neissel in the basement to monitor the progress being made on the original voltage fault and watched as Neissel, (who thought that the equipment was still de-energized), reached in and "came into contact with the open blades and was shocked and severely burned."

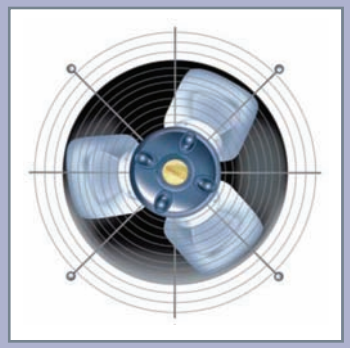
Neissel incurred extensive injuries, including third, fourth, and fifth degree burns on his arms, torso, and hand. He also sustained significant muscle loss -- resulting in a lack of strength -- nerve damage, and an inability to produce oil or regulate heat in areas where he sustained skin grafts. Neissel also suffered from "posttraumatic stress disorder, flashbacks, nightmares, social isolation and panic attacks."

After he filed suit with the Columbia County Supreme Court, alleging negligence on the part of RPI and High Voltage for failing to warn him the Research Center had been re-energized, the Supreme Court found in Neissel's favor and awarded him some $4 million in damages.

On appeal, the Appellate Division, Third Department, didn't buy RPI's argument that Neissel's failure to verify whether the equipment was still de-energized or his failure to wear protective clothing shifted responsibility for the accident. Instead, the AD3 found Neissel was harmed as a result of a "complete lack of coordination and breakdown in communication."

Who's got the power now?

LOOK HOW THIS CASE FANNED OUT



In *Lafleur v. MLB Industries Inc.*, Roderick Lafleur -- an employee of Alltek Energy Systems (Alltek) -- was injured while renovating a large exhaust hood in a grocery store.

Hannaford Bros., Inc. contracted with MLB Industries Inc. (MLB) to do the work, which then subcontracted the project out to Alltek. While an indemnification agreement between MLB and Alltek existed when an exhaust hood was originally installed, that agreement wasn't renewed until after Lafleur was injured installing the second hood.

Since New York's Workers Compensation Law requires indemnity agreements be in place before an accident occurs, the Rensselaer County Supreme Court granted Alltek's request to dismiss the case.

On appeal, the Appellate Division, Third Department, affirmed. Unless the parties specifically provide to the contrary, indemnification contracts aren't retroactive.

Don't know about you, but we're exhausted.

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