March/April 2010
Issue 55

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THE MORE THINGS CHANGE …

Effective January 1, 2010, Finkelstein Newman Ferrara LLP became Newman Ferrara LLP.

After 55 years of distinguished service to the New York real estate community, Daniel Finkelstein, our former partner, has opted to "semi-retire," but will continue Of Counsel to the firm.

Upon completing his studies at New York University and at Brooklyn Law School, Dan began his legal career in 1955 as Senior Real Estate Manager for the Board of Estimate of the City of New York, and worked as the Assistant Chief Enforcement Attorney for the Temporary State Housing Rent Commission. He later became a founding partner of Finkelstein, Borah, Schwartz, Altschuler & Goldstein P.C., which was one of New York City's largest landlord-tenant law firms.

In addition to being a respected litigator, Dan has also left his mark in academia as a teacher and writer. He is co-author of the critically acclaimed three-volume West treatise *Landlord and Tenant Practice in New York*, and serves as an Adjunct Professor of Law at New York Law School. Dan enjoys the time he spends with his students and is admired by all who have had the opportunity to study with him.

As he enters this next phase of his illustrious career, Dan remains a man of many hats -- an accomplished trial lawyer, a gracious volunteer, beloved teacher, and authoritative writer. His contributions continue to permeate throughout our great city and state. And no matter what title he may hold, Dan is, and always will be, the "Dean" of landlord-tenant lawyers.

OK FOR O'SHEA

Elizabeth O'Shea and her son appealed a Richmond County Civil Court decision which awarded possession of an apartment to her ex-husband, Frank Cudar.

Frank was the unit's original rent-controlled tenant. Elizabeth moved in after the couple married and together they lived for some 35 years -- until a criminal court later directed that Frank steer clear of Elizabeth.

Interestingly, within the context of their divorce case, no one was awarded exclusive possession of the apartment or its contents.

Having come into the unit as Frank's spouse, Elizabeth was found to be entitled to "possession, use and occupancy of the premises." According to the Appellate Term, Second Department, that meant Elizabeth became a rent-controlled tenant in her own right and had an equal entitlement to possession despite the couple's divorce. Since Frank wasn't able to use a summary proceeding to get her out of the unit, the AT2 dismissed the case.

Elizabeth sure knocked that one out of the park!

WE GET LETTERS

I truly enjoy reading your firm's newsletter. Each issue is informative and cheekily humorous. The articles have inspired legislation. Last year, I drafted a bill after reading about the tenant-landlord case involving Bianca Jagger. A summary of *Utkan v. Szuwala* ("Tenant Gets Burned") led me to ask my bill drafter to create a bill that will require landlords either to furnish radiator covers or reimburse tenants who purchase such covers when a child under age 12 years resides in the home. They will have to provide a notice similar to the annual NYC window guards notice.

Keep writing the Newsletter. I'm a fan!

Michael Benjamin
Member of NYS Assembly

I receive your firm's newsletter and I look forward to receiving and reading it. I read each article with much interest. However, I was very disappointed in the reporting in one of your articles entitled "Escrow-A-No-No" because I believe you were biased in the reporting.

In almost all of your articles you identify the plaintiffs and the defendants. However, in this article, you failed to identify the attorney in question but rather you only gave the initials. Especially since the attorney's license was suspended by the Appellate Division, First Department, to practice law, I strongly believe that the attorney should have been identified. In not identifying the attorney, I believe that you have done a great disservice to the public. I dealt with an attorney who did similar and other unscrupulous things just like B.S. but by the time I found out what he was doing, it was too late and until this day I feel guilty that I did not protect my customers. Therefore, it goes without saying that sharks always protect their own. I have to stick to my beliefs that there is no fairness in this world.

Thank you.
Carmen Lee Shue
Lee Shue Real Estate, Inc.
The "Carmen Lee Shue Real Estate Show"

NFLLP responds:

Ms. Shue,

As you have correctly observed, we deliberately omitted the name of the attorney whose license was suspended. As in a criminal case, where a defendant is presumed innocent until proven guilty, a suspension does not necessarily mean that the attorney will lose his license (or be found guilty of the charges). It is entirely possible that the charges against this particular attorney will be dropped or not found to be sustainable.

As a result, since the case was still in its preliminary stages, we didn't think it would be fair to identify the individual by name. (Besides, we thought using the initials "B.S." would make the article more entertaining.)

Our thanks to you, and to Assembly Member Benjamin, for your support of our publication.

DOCK DISPUTE

Julie Schafler Dale owned a piece of property which included a body of water called Lower Lake Nimham. According to their deeds, her neighbors Andy Chisholm and others had the right to use the lake for swimming, bathing, ice skating, and other outdoor activities -- except power boating.

When her neighbors constructed a dock on the lake, Dale sued and alleged trespass. The defendants countered that nothing prevented them from building a dock.

After the Putnam County Supreme Court denied the parties' requests for relief, they appealed to the Appellate Division, Second Department.

Since Dale established the lake wasn't a navigable body of water, and her neighbors weren't "riparian owners," the AD2 didn't think the defendants' actions were legally permissible.

In other words, the neighbors' claims didn't hold water.

ANTENNA DILEMMA

Max di Fabio sued members of his condominium board and Omnipoint Communications to stop the erection of a cell phone antenna on the building's roof.

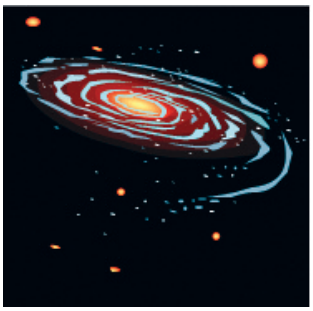
Because he failed to establish an entitlement to relief, the Westchester County Supreme Court denied Fabio's request and granted the board's cross-motion to dismiss the case.

On appeal, the Appellate Division, Second Department, noted that Fabio brought the wrong kind of case against the board and agreed that the litigation had been properly dismissed. (Fabio was permitted to bring the right kind of suit -- a derivative action -- if he so desired.)

The AD2 also thought that an injunction would have been improper because Fabio didn't show he would suffer "irreparable harm." (In other words, he needed to establish that any alleged misconduct wasn't "compensable by money damages.")

Did someone dial that one in?

THE SKY WAS FALLING



While standing on a Brooklyn street corner, Annette Saunders was hit by an air-conditioning unit which fell from a window of a building owned by 551 Galaxy Realty Corp.

After the Kings County Supreme Court refused to dismiss the case, Galaxy appealed to the Appellate Division, Second Department.

Since the owner couldn't show why the accident occurred, and that it wasn't negligent, the AD2 directed that the matter proceed to trial.

Was that Galaxy out of this world?

A SHAKESPEAREAN TRAGEDY?

William Romeo supposedly lent money to Angela Saitta so that the latter could pay off her debts.

When only a part of the loan was repaid, Romeo sued alleging Angela still owed him $1,016.

Angela contended she had fully satisfied her loan -- by way of money orders totaling $900, together with three cash payments made by a friend.

After the Dutchess County City Court limited his recovery to $116.03, Romeo appealed to the Appellate Term, Second Department, which deferred to the lower court's credibility findings.

At least that Romeo didn't die in the end.

PROBLEM PIZZA

In *8109 Pizzeria of New York, Inc. v. Polo Pizza One Corp.*, Polo agreed to buy a pizzeria for $228,000, gave a $30,000 downpayment, and promised to pay the balance by way of monthly installments.

When Polo defaulted on its payments, 8109 called for the acceleration of the remaining monies due, as per the terms of the parties' agreement.

When the Queens County Supreme Court denied 8109's request for relief, the company appealed to the Appellate Division, Second Department.

Although Polo argued it had expended significant sums of money repairing the establishment, the AD2 thought that had nothing to do with the entity's obligations under the contract and that Polo had an "independent" obligation to pay the purchase price.

While the precise amounts due weren't clear, the AD2 still felt 8109 was entitled to a finding that Polo was liable for its contract breach.

That *ain't* amore!

OPEN BUT NOT SO OBVIOUS

Vanessa Lawson was walking along a pedestrian walkway, under scaffolding attached to River Bay Corp.'s building, when she tripped over a concrete block. River Bay argued that the condition was an "open and obvious" hazard and that Vanessa's negligence case needed to be dismissed.

After the New York County Supreme Court denied River Bay's request, an appeal to the Appellate Division, First Department, followed.

While an "open and obvious" condition might have negated the entity's duty to warn of the hazard, it didn't eliminate the owner's obligation to ensure pedestrian safety.

Since there were unresolved questions as to whether the impediment comprised an "unreasonably dangerous condition" which required the landlord's attention, the AD1 directed that the case continue.

Looks like River Bay tripped up there.

FIRE AND ICE

Officer Paul A. Stymiloski was on patrol and radioed for assistance when he found a parked car ablaze.

After trying to extinguish the flames, Stymiloski and another man pushed the vehicle away from a nearby building.

Some time later, while responding to the fire chief's order to push the car back even further, Stymiloski slipped on ice that had formed and injured his left shoulder. When he later filed requests for benefits, he was denied accidental disability by the New York State Comptroller's office.

In response to his lawsuit challenging the denial, the Albany County Supreme Court transferred the case to the Appellate Division, Third Department, which upheld the Comptroller's determination.

Because his injuries occurred while he was performing his duty as a police officer, the AD3 was of the view no "accidental injury" had occurred.

That sure stymied Stymiloski.

BOW, WOW!

Valerie Groell sued her ex-husband after his dog bit their son in the face.

When her ex failed to appear, the Monroe County Supreme Court held a hearing and entered a default judgment against him in the amount of $60,000.

Since her son received over 40 stitches, and was permanently disfigured, Dawn appealed to the Appellate Division, Fourth Department, which increased the award to $150,000 -- $100,000 for past pain and suffering, and $50,000 for future pain and suffering.

The AD4 thought the lower number wasn't reasonable, since the bite had caused the child "excruciating" and chronic pain, and the kid had become "socially withdrawn" as a result of the scarring.

Guess who Groelled when he got that?

A DEAD ISSUE

Denise Petrillo, a funeral director, injured her back and left knee while at work and was out for a month before returning to "light duty." She later filed a claim for workers' compensation and was awarded benefits.

Two years later, Denise was terminated because of "downsizing." And, as a result of her permanent disability, opted to pursue training as a paralegal.

When her former employer -- Walter B. Cooke -- filed a request to suspend or reduce her disability payments, because she had voluntarily withdrawn from the workforce, a Workers' Compensation Administrative Law Judge sided with Cooke and ended payments.

On appeal, the Appellate Division, Third Department, agreed that Denise had opted not to work after earning her paralegal degree because she wanted to care for an elderly relative. (Denise was unable to prove that her inability to find employment stemmed from the injury.)

Will that die there?

GOOD DOGGIE?

Melanie Petrone was delivering mail when she noticed an unleashed rottweiler approaching her.

In order to avoid a confrontation with the animal, Petrone tried jumping through her vehicle's driver's side window and ended up jamming her right middle finger on the doorframe.

After the Queens County Supreme Court granted a request to dismiss Petrone's personal injury case, the Appellate Division, Third Department, reinstated the lawsuit because the animal's custodian had violated a local leash law.

On appeal to our state's highest court, the Court of Appeals didn't think the leash-law lapse justified the lawsuit's continuation, as "'negligence' is no longer a basis for imposing liability" when domestic animals cause injury or harm.

The Court of Appeals sure put a leash on that.

NOT FALLING FOR IT

Barbara Goldfischer sued A&P after allegedly tripping and falling on a bumpy rubber floor mat while shopping at one of the company's supermarkets.

After the New York County Supreme Court granted the store's dismissal request, Goldfischer appealed to the Appellate Division, First Department.

Because she didn't know what triggered her fall, and neither Goldfischer nor her husband saw any "bump" prior to the incident, the AD1 allowed the dismissal to stand. (The inability to pin down the accident's cause was "fatal" to the lady's case.)

There was no fisching for gold there.

NO, *HE* DID IT!

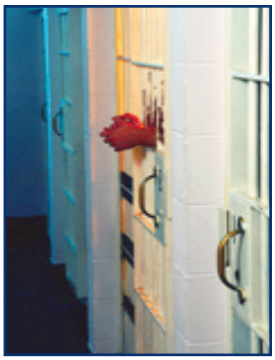
After allegedly robbing another man, Charles Dunnell was overtaken and held by his victim. But, when officers arrived, Dunnell claimed the man restraining him was the criminal.

When the New York County Supreme Court convicted Dunnell of grand larceny in the fourth degree, and sentenced him to 2 to 4 years as a second felony offender, he appealed to the Appellate Division, First Department.

While his assertions triggered credibility issues (which were resolvable at trial), the AD1 didn't think the legality of Dunnell's arrest was impacted in any meaningful way, particularly in view of the duo's behavior at the time the officers reported to the scene.

Who was victimized by that?

NO PRISON BREAK



Efrain Suarez, a prison inmate, sued the State of New York claiming prison personnel were negligent in failing to address problems with his bed and that their unwillingness to address the situation -- and to attend to his medical needs after his fall -- violated his "civil rights."

When the Court of Claims granted the State's dismissal request, Suarez appealed to the Appellate Division, Third Department, which affirmed the lower court's decision.

Apparently, Suarez was unable to show the State was responsible for his injuries. (Suarez couldn't show that he -- or someone else -- hadn't caused the mishap.)

Looks like the poor guy took another fall.

CAN YOU HEAR THE DRUMS, FERNANDO?

In *Matter of Fernando S. v. Fernando S.*, Fernando admitted to selling illegal narcotics and to possessing loaded firearms in the house in which he lived with his two kids.

After the Bronx County Family Court found the father guilty of "inadequate guardianship and supervision," custody of the children was transferred to the New York City Administration for Children's Services.

On appeal, the Appellate Division, First Department, thought the Family Court's determination was supported by the record and gave "great weight and deference" to the trial court's findings.

Would you do the same, my friend?

SOME STUNNER

While he was on trial for strangling a 14 year old girl, the Chautauqua County Court required Buchanan to wear a stun belt under his clothes.

Buchanan repeatedly objected to wearing the device because he found it uncomfortable, distracting, and noticeable to the jury. He also claimed that he had been deprived of his constitutional entitlement to a fair trial.

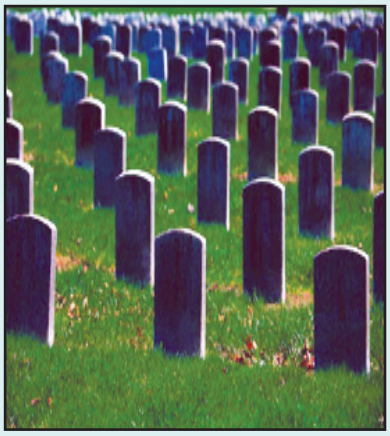
Although Buchanan wasn't disruptive while in the courtroom, the judge directed that belt be worn because it was the court's "blanket policy" and no medical reason for its removal had been given.

After Buchanan was convicted of second-degree murder, and sentenced to 25 years-to-life in prison, he appealed to the Appellate Division, Fourth Department, which affirmed the outcome. But when the case reached our state's highest court, although it dodged the constitutional issues raised, it found that "as a matter of New York law," a criminal defendant can't be compelled to wear a stun belt without an appropriate "inquiry" and "a specifically identified security reason."

Since the appropriate procedure wasn't followed in this case, the matter was sent back for a new trial.

Shocking?

SIX FEET UNDER?



Domestic partners David Fink and Carl Levine purchased three grave plots in a cemetery owned by the Jewish Center of the Hamptons (JCOH).

After Levine was buried in one of those plots, JCOH rejected Fink's grave-marker request but granted that of Levine's daughter, Caren Stanley.

In a suit filed with the Suffolk County Supreme Court, Fink sought a court order directing Bernard Grobart (former head of the JCOH) to remove Stanley's marker. When the lower court dismissed his case, Fink appealed to the Appellate Division, Second Department.

Since Grobart had resigned from JCOH back in 2006, the AD2 thought the case had been brought against the wrong party and had been properly dismissed.

Was that case DOA?

NO FETSCHING A MINT

Joseph Fetsch was the proud owner of a $20 gold "Double Eagle" coin minted in Philadelphia back in 1910. But when he sent the prized item along with 9 other coins to Miller's Mint, Ltd., his treasured piece was never returned and was supposedly replaced with a substitute.

After Fetsch filed suit, the Suffolk County District Court found in the Mint's favor and dismissed the case. On appeal, the Appellate Term, Second Department, agreed that Fetsch couldn't prove he'd given the coin to the company.

Talk about getting short changed.

YOU'RE NOT BEING THE BALL, LOUIS

Louis Teodoro sued the Longwood Central School District (LCSD) after he was injured while learning to play golf.

The youngsters were told not to step forward until the preceding student finished taking a swing and released the club. Louis was injured when he supposedly stepped forward prematurely and was hit in the face while another kid was taking a swing.

After the Suffolk County Supreme Court refused to dismiss the case, LCSD appealed to the Appellate Division, Second Department.

While schools can be held liable for foreseeable injuries when students aren't adequately supervised, since the evidence established that the school's gymnasium was appropriately staffed, the AD1 was of the view the case couldn't be maintained.

Par for the course?

TIMBER!

Manuel Morales sued Westchester Stone after he was hit by a tree limb while at work. Morales argued that the company violated New York State's Labor Law, which requires that workers at buildings undergoing construction or alterations be provided with adequate safeguards and protections.

After the Westchester County Supreme Court dismissed Morales's case, he appealed to the Appellate Division, Second Department.

The AD2 agreed that the tree's removal was outside the scope of the Labor Law since neither a building nor a structure was involved. It also thought Morales's contention -- that the tree's removal was necessary to complete a larger construction project -- wasn't sufficiently established.

Was Morales Stoned?

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