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NEWMAN FERRARA LLP

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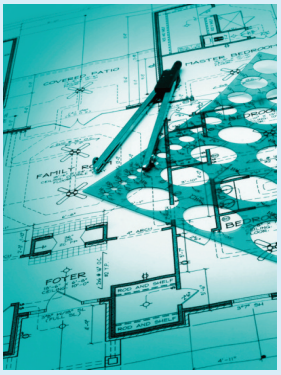
Inside this issue

UPPER EAST SIDE TRASH

Adam Clayton Powell IV sued to stop the City of New York from rebuilding a waste-management facility on the Upper East Side because state approval of the project hadn't been secured.

Back in 2004, when it announced plans to reopen an old garbage-packaging site, the City needed to use a pedestrian thoroughfare and some storage space below the neighboring Asphalt Green Sports Center. Because the Sports Center was on private land, and since the City only needed state approval if a public park was going to be repurposed, the New York County Supreme Court incinerated Adam Clayton Powell's claim. And on appeal, the Appellate Division, First Department, agreed that state approval was unnecessary since parkland wasn't involved.

Was there no discarding that?



PANTS ON FIRE!

Because he supposedly submitted "misleading photographs" and "falsely" certified to the Department of Buildings (DOB) that certain objections had been addressed, architect Robert Scarano was barred from filing any papers with that agency.

On administrative review--pursuant to CPLR Article 78--Scarano claimed his constitutional rights had been violated.

When the case reached the Appellate Division, First Department, it didn't think a right to make submissions to the DOB was a "constitutionally protected interest," and further concluded that the architect had been given proper notice of the hearing and ample opportunity to defend himself against the charges presented.

What's the plan now?

SWEET LITTLE LIES

After he was convicted of two counts of first degree perjury, Shamon L. Bedell claimed a Monroe County Court judge shouldn't have taken the case because that same jurist had heard Shamon utter the prevarications. Arguing that the judge was somehow biased, and that the right to a fair trial had been compromised, Shamon appealed.

Since the "contradicting statements" were made on the record, and the judge didn't need to testify as a witness, the Appellate Division, Fourth Department, affirmed the conviction. (Nor did it think that Shamon had been forced to lie.)

Shamon him.

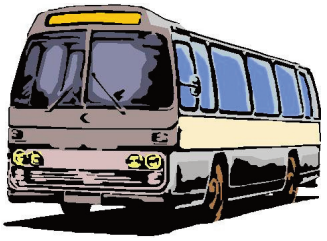
NO MOTHER THERESA?

Although Theresa Devito alleged she sustained "serious injuries" in a car crash, the Bronx County Supreme Court dismissed her case after a jury found that the accident wasn't the real cause of the lady's injuries.

On appeal, the Appellate Division, First Department, thought that the evidence had been fairly interpreted, particularly since there were inconsistencies which would have allowed the jury to find against the woman.

Peace begins with a smile.

HELL IN A BUCKET



After his bus crashed, Jeffrey Garcia was sued by Kenneth Negron and other passengers.

While Garcia claimed that the incident was unavoidable (because he had been hit by another vehicle which had experienced mechanical difficulties), and that he wasn't liable for the emergency that arose, both the Bronx County Supreme Court and the Appellate Division, First Department, disagreed.

Since there was conflicting testimony about the events which led up to the accident, the judges thought that the case needed to proceed to trial.

He ain't gonna enjoy that ride.

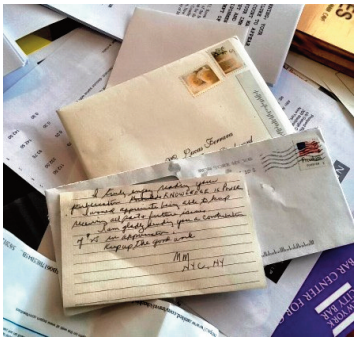
BEESWAX!

As he was removing gutters from James O'Connor's house, Ronald Dougherty was attacked by a swarm of bees, fell off a ladder, and was injured. When he later filed a personal-injury case, the Suffolk County Supreme Court sided with the homeowner and dismissed the suit.

Since the house was a single-family dwelling, and O'Connor didn't control Dougherty's work, the Appellate Division, Second Department, thought New York State's labor laws didn't apply. It also didn't think much of Dougherty's common-law negligence claim either, because the owner neither created nor was aware of any dangerous condition.

And that's the buzz.

WE GET LETTERS



Thank you so much for sending me Knowledge is Power.

I congratulate you for your great work and look forward to every issue of your excellent and attractive newsletter. *Paul Emile Noel, Brooklyn, NY*

I truly enjoy reading Knowledge is Power. I would appreciate receiving all past and future issues and am gladly sending you a contribution in appreciation. Keep up the good work. *MM, N.Y.C., NY*

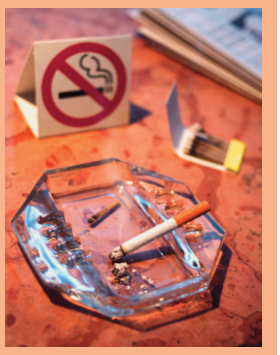
Thank you for Knowledge is Power. I enjoy reading your publication and learning about the law. Thanks again! *Isabel McNulty, Jackson Heights, NY*

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 this information as an empowerment tool, we hope our readers will develop a greater appreciation for the legal system's role and function.

WANNA LIGHT?

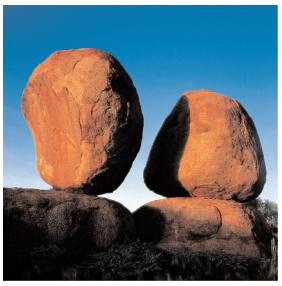


Christian and Britt Ewen, the owners of a Manhattan condominium unit, sued their neighbors for private nuisance and negligence, because the latter engaged in "excessive smoking" which caused secondhand smoke to waft into the Ewens's home.

When the New York County Civil Court refused to dismiss the case, an appeal was filed.

While the Appellate Term, First Department, acknowledged the dangers and annoyances associated with secondhand smoke, since there was no applicable law or condominium rule prohibiting the activity, it thought that the lawsuit couldn't continue--particularly since the Ewens's neighbors had no duty to refrain from smoking in their own apartment and were under no legal obligation to prevent the spread of the odor to neighboring units.

Did they finally meet their match?



ETCHED IN STONE?

When Cold Stone Creamery's subtenant failed to pay rent, Weaver Street Properties, the building's owner, filed suit against its tenant.

And after the Westchester County Supreme Court limited Weaver's recovery to 12 months of base rent, the landlord appealed.

Since the parties' contract "unambiguously" capped Cold Stone's liability, the Appellate Division, Second Department, agreed that Weaver couldn't recover more rent. But it did find that the tenant was contractually obligated to pay the owner's legal fees.

Did Cold Stone get creamed?

AND THE SURVEY SAYS ...

When Scott Hartman purchased his home, a survey showed that he owned a certain strip of land. So he built a driveway, installed a drainage system, driveway lights, and even planted some "foliage and shrubbery."

Twenty years later, a survey prepared at a neighbor's request showed that same bit of land belonged to Dorian Goldman.

When Hartman asked the Westchester County Supreme Court to declare him the rightful owner of the disputed parcel, that court declined.

And while the Appellate Division, Second Department, agreed that some of the improvements weren't enough to vest Hartman with ownership under New York's adverse-possession law, it thought the drainage-system installation might have triggered an entitlement which warranted further examination at a formal hearing or trial.

Did they straddle the fence there?

UNDRESSED?

Alla Landa sued Organic Cleaners, after her evening dress was damaged.

When the Nassau County District Court awarded the lady $1,456.21, an appeal to the Appellate Term, Second Department, followed.

Since she provided evidence of the dress's original purchase price, age, and condition, the AT2 affirmed, but on condition that she surrender the item.

They sure stripped that down.

JUMPER!

It was 17-year old Nicholas Caliandro's first time operating an all-terrain vehicle ("ATV"), when he lost control and hit Christopher Mikelinich.

After the Dutchess County Supreme Court dismissed the personal-injury case filed against the kid, Mikelinich appealed.

Even though he allowed the youngster to use the ATV, and then put himself in harm's way by jumping in front of the vehicle to prevent a collision with a camper, the Appellate Division, Second Department, thought that Mikelinich could still maintain his suit, especially since any recovery he received would be reduced by the extent of his own negligence.

Will he get run over, again?

SIS BOOM BAH!

Carin Lomonico was injured when one of her colleagues fell on her during a stunt cheerleading performance.

Carin blamed the incident on the school's failure to properly instruct or supervise the youngsters and to provide protective floor mats. While the school argued that Carin's claims weren't trial-worthy, the Nassau County Supreme Court didn't agree and refused to end the litigation.

But since she was familiar with the dangers associated with the maneuvers performed, and because she couldn't show she had been exposed to any hidden or "unreasonably increased" risks, the Appellate Division, Second Department, reversed, and dismissed Carin's case.

Can you hear that jeer?

IT'S ALL ABOUT THE BEER

Giacomo Lopez was carrying a six-pack in a Stop & Shop supermarket when the bottom of the packaging gave way and the bottles ended up on the floor. After he slipped and fell, Lopez sued the store, together with the companies that were responsible for delivering the beer--Manhattan Beer Distributors, LLC, and Manhattan Beer Distributors, Inc.

During the course of pre-trial questioning, a sales manager for the distributors explained that one of their employees was responsible for stocking the store's refrigerators, and was charged with checking the products' packaging. (The manager also indicated that wet cartons were supposed to be removed from the display case by that employee.)

When the Queens County Supreme Court denied their request to have the case thrown out, the distributors appealed. And because they couldn't prove that they didn't know about the packaging's condition, the Appellate Division, Second Department, agreed that the case needed to proceed to trial.

Bet that aled them.

FALL FOUL

Tawana Whittingham sued her landlord after she fell down a set of exterior stairs.

Although she claimed that her injury was the result of a step breaking off, the Kings County Civil Court ultimately decided to dismiss the case.

Because she testified that the area didn't appear to be in disrepair, and since the owner, Colin Andrew Clarke, wasn't aware of a defective condition, the Appellate Term, Second Department, didn't think he was liable for what had occurred.

That toppled Tawana.

A WOMAN FOR ALL SEASONS

While at work, a buckled mat caused Jacqueline Sainval to trip and fall.

When she later sued All Seasons Industrial Services (the mat supplier), and the Queens County Supreme Court refused to dismiss the case, an appeal followed.

Given that the evidence established that the mats were delivered in "excellent" condition, that there was no notice of any defects, and that the company wasn't responsible for their maintenance after they were delivered, the Appellate Division, Second Department, thought All Seasons wasn't responsible for what unfolded, and threw the case out.

She really went to the mat on that.

NEWMAN FERRARA LLP

We are pleased to announce the formation of our **Civil Rights Practice Group (CRPG)** led by a team of highly regarded civil rights specialists experienced in advocating for housing and property rights; employment rights; open government and voting rights; public safety and constitutional rights, consumer rights; and, community oriented development.

Professor Randolph M. McLaughlin, **CRPG Chair,** is a graduate of Columbia College and Harvard Law School. He has been a faculty member at Pace Law School since 1988 where he teaches civil procedure, labor law and New York practice. He is recognized as a leading civil rights and voting rights litigator. In 1997, he won the landmark case *Goosby v. Town of Hempstead,* 981 F. Supp. 751 (E.D.N.Y. 1997), *aff'd* 180 F.3d 476 (2d. Cir. 1999), *cert denied* 528 U.S. 1138 (2000).

Debra S. Cohen, CRPG Co-Chair, is a graduate of Vassar College and a cum laude graduate of Pace Law School where she has taught since 2005 as an adjunct professor of Civil Rights Law, Civil Rights Litigation and Interviewing, Counseling & Negotiation. She has represented a wide variety of clients alleging civil rights violations by police, schools, government officials and employers as well as groups and individuals seeking assistance with open-government and land-use issues.

Jeffrey M. Norton, a member of Newman Ferrara LLP, is an adjunct professor at Pace Law School where he teaches mass torts and class action litigation. In addition to shareholder, ERISA, and consumer litigation, he has litigated a number of civil rights, voting rights, and employment cases. Mr. Norton also chairs the firm's Class Action & Complex Litigation Practice Group.

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The Civil Rights Practice Group

Jeffrey M. Norton, Debra S. Cohen, Prof. Randolph M. McLaughlin

Representative cases:

Employment Discrimination

Glover v. National Basketball Association – The firm represents Warren Glover, a former director of the NBA's security department and an NYPD veteran, in a suit alleging that he was fired in retaliation for reporting incidents of sexual harassment and complaints of discrimination by female employees.

Police Misconduct

Chamberlain v. City of White Plains – The firm represents the Estate of Kenneth Chamberlain, a sixty-eight year old Marine Corps veteran killed in his home by White Plains, New York, police officers who had responded to the accidental triggering of Mr. Chamberlain's medical alert device and refused to leave after he insisted he did not require assistance. After an hour long stand-off, which included racial and inflammatory taunts by police, officers broke down Mr. Chamberlain's door, fired tasers and bean bags, and then fatally shot him.

Marriage Equality

Roe v. Empire Blue Cross and Blue Shield – The firm represents the plaintiffs in a national class action in a case arising out of a Catholic hospital's exclusion of medical benefits for same-sex spouses. While New York and many other states now recognize same-sex marriage and domestic partnerships, some institutions and insurance plans continue to exclude these individuals from medical-benefits coverage on the basis of the Defense of Marriage Act ("DOMA"). The firm is challenging the constitutionality of DOMA.

Voting Rights

Favors v. Cuomo – The firm represents minority voters challenging the 2012 redistricting of the New York State Senate, Assembly and Congressional districts. After the State failed to timely adopt a plan to reapportion New York's Congressional districts, a three judge court implemented its own plan, which incorporated maps and proposals prepared by the firm. The suit also alleges that the State failed to create additional majority minority Assembly and Senate seats in Nassau County.

Fair Housing

Jones v. City of Yonkers – The firm represents minority homeowners in an affordable housing development in Yonkers, New York, in a suit filed under the Fair Housing Act of 1968. The suit alleges that the homeowners were steered to housing in a predominantly minority community and denied opportunities to reside in integrated communities. It is also alleged that the homes were poorly constructed and suffer from numerous defects.

NO WAY TO TREAT A LADY

When Teachers College's Faculty Advisory Committee (FAC) learned that Madonna Constantine had allegedly plagiarized and fabricated documents, she was given an opportunity to defend herself against the charges at a hearing. But because she wasn't able to convince the FAC that the work was hers alone, Madonna was let go, and the New York County Supreme Court later refused to overturn the College's decision to dismiss her.

Since the plagiarism charges were supported by ample evidence, and the school's inquiry complied with the institution's policies and procedures, the Appellate Division, First Department, declined to do a rewrite.

Copy that?

NO STEPPING ON HER

After his father passed away, William Kliamovich asked that he be declared the sole beneficiary of his father's life-insurance policy. And when the Rockland County Supreme Court granted that request, his stepmom appealed.

Even though William presented an undated Policy Change Request Form showing his entitlement to the proceeds, together with a 1996 letter from the insurance company acknowledging the modification, the Appellate Division, Second Department, thought those documents weren't enough to grant William's application (in advance of a formal hearing or trial), particularly in light of a 1998 Policy Change Request which designated the stepmom as the sole beneficiary.

Money knows no relatives.

HENNE PECKED?

When he was hired by Maya Assurance Company, William Henne was told he had a 12-month "probationary period." Terminated after only 9 months, Henne filed a contract-breach claim which the Nassau County Supreme Court threw out.

On appeal, the Appellate Division, Second Department, thought that Henne's employment agreement didn't preclude his early termination and that the case had been properly dismissed.

Goose eggs for that Henne?

A BIT TOO SPICY

Ana Lawson filed a civil suit against the City of New York claiming the police lacked a legal basis--or "probable cause"--to arrest and imprison her for drug possession.

Believing that the City was liable for its officers' misconduct, Lawson asked for relief in her favor, while the municipality requested that the case be thrown out. And after the Bronx County Supreme Court denied both requests, the parties appealed to the Appellate Division, First Department.

Even though there had been a warrantless arrest, since a reliable police informant had snitched on Lawson, drugs (and related paraphernalia) were found in an apartment where she was staying, and, she was later indicted for possession, the AD1 thought the officers' actions were justified and that there had been no misconduct.

She sure got herself into a pinch.

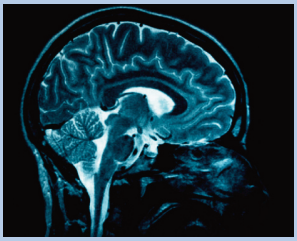
IN CASE OF EMERGENCY

After drinking from a plastic-wrapped glass bottle, Michael Mattern supposedly swallowed a few pieces of glass and later sued the manufacturers.

When the Nassau County Supreme Court granted a party's request to perform a test on the container, an appealed followed.

Since the bottle would be damaged by the analysis, the Appellate Division, Second Department, thought a strong showing of necessity was required to conduct the test, particularly since it hadn't been shown that less destructive methods weren't available.

Luckily, Michael didn't have a glass jaw.



A MIND ON DRUGS

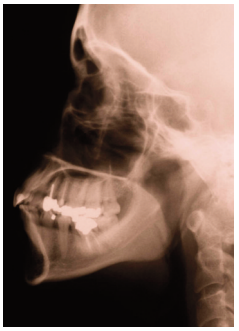
Efrain Lopez pleaded guilty to attempted burglary in the second degree and, because he was a "persistent violent felony offender," was sentenced to 12 years to life.

When Lopez later sought to rescind his plea, on the grounds he had been medicated and coerced into agreeing to the deal, the New York County Supreme Court concluded that the guy's decision was "knowing, intelligent and voluntary."

Because there was no indication in the record that medication affected Lopez's ability to appreciate the consequences of his decision, the AD1 allowed the sentence and conviction to stand.

Was he fried?

JAWBREAKER!

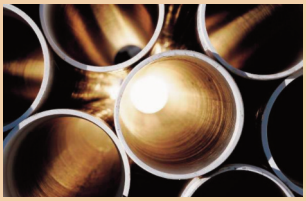


During the course of a robbery, Shaquille Davis repeatedly punched a 64-year old man and broke the guy's jaw--which then needed to be wired shut for eight weeks.

After the Genesee County Court denied Davis's request to be treated as a "youthful offender," he was convicted of attempted robbery in the first degree.

On appeal, the Appellate Division, Fourth Department, allowed the conviction and sentence to stand--particularly in light of the "brutal and senseless" nature of the crimes committed.

Now that's a gobstopper.



PIPING HOT

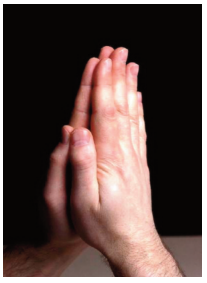
Because he supposedly absconded with 2,500 linear feet of copper piping, Louis Riley was found guilty of grand larceny in the second degree, and criminal possession of stolen property in the second degree, and was sentenced to 4 1/2 to 9 years in prison.

Riley later requested that he be resentenced because he thought the jury's verdict went against the weight of the evidence. And because the jury's valuation of the stolen property included the labor costs associated with the piping's re-installation, the Appellate Division, First Department, ended up siding with the guy.

Since it thought labor costs shouldn't have been considered, and the value of the stolen property was only about $250, the AD1 reduced the conviction to petit larceny and criminal possession of stolen property in the fifth degree, and gave Riley credit for time served.

That was no pipe dream.

LACKING GRACE?



Because Maria A. admitted her addiction to recreational marijuana to her daughters' caseworker, and her two eldest kids confirmed the drug use, the Richmond County Family Court found Maria guilty of neglect.

While she contended the evidence wasn't reliable, the Appellate Division, Second Department, thought otherwise--particularly in view of Maria's failure to testify at the Family Court hearing.

Pray for us sinners....

WAS THIS BY DESIGN?

Brennan Beer Gorman, an architecture firm, filed suit after its client, Cappelli Enterprises, refused to pay for commissioned blueprints.

Although no formal agreement had been signed, the architects asked for, and received, authorization to proceed with their work, but Cappelli repeatedly indicated that it would only be bound by a formal contract.

While the parties continued to work together over the ensuing months, Cappelli eventually backed out of the deal and refused to honor the architects' invoices.

When Cappelli's request to dismiss the case was denied by the New York County Supreme Court, the company appealed. And because it found that Brennan Beer Gorman reasonably expected to be compensated for its work, the Appellate Division, First Department, was of the view that the architects were entitled to a formal hearing or trial.

Looks like this will get drawn out a bit further.

DON'T MAKE A HABIT OF IT

Because illegal drugs were found inside its tenant's apartment, and criminal charges had been filed, the landlord--Second Farms Neighborhood HDFC--started an eviction proceeding.

After trial, the Bronx County Civil Court dismissed the case, because it thought the HDFC hadn't established that the apartment had been used to "facilitate trade in drugs."

On appeal, the Appellate Term, First Department, agreed that neither the quantity of contraband discovered at the apartment, nor charges filed against the tenant, supported the conclusion that the apartment was a "focal point" for drug activity, or that illicit drug-use occurred there "customarily or habitually."

That facilitated the end of that.

LOW RENT?

On June 7, 2008, Edsheeka Woodson moved out of a place she had been renting on a month-to-month basis. When her landlord, Leo Smith, later filed a small claims case against her, the Queens County Civil Court threw the dispute out, because Leo couldn't prove that Edsheeka had caused any damage or that she owed any rent.

On appeal, the Appellate Term, Second Department, sided with the landlord and awarded him $1,040. Since Edsheeka didn't properly notify Smith of her intention to vacate--by returning the keys or otherwise indicating a surrender--she ended up being liable for the additional monies.

There was no leaving him.

TROUBLE...TROUBLE, TROUBLE....

When Bentoria Holdings' building was damaged by excavation work being performed in the area, its insurer--Travelers Indemnity Company--disclaimed coverage because of an "earth-movement exclusion." (Apparently, the policy excepted any loss attributable to "earthquakes, landslides, and mine subsidence," and from "'(e)arth sinking, ... rising or shifting,'" no matter how caused.)

When Bentoria filed suit, the Kings County Supreme Court refused to throw the case out, and Travelers appealed. While the policy excluded coverage for any damage resulting from "natural" or "manmade" earth movements, since the governing language wasn't as clear as it needed to be (and because such provisions are strictly and narrowly construed), the Appellate Division, Second Department, thought the case needed to proceed to trial. (Apparently, the policy made no reference to "excavations.")

Worry..., worry, worry....

YARD SALE!

Injured while snowboarding, Walter Bedder sued Windham Mountain Partners claiming the company's trail had been negligently constructed and maintained, which heightened the possibility of harm.

Since snowboarding is a risk-riddled sport, both the New York County Supreme Court and the Appellate Division, First Department, found that Bedder had agreed to subject himself to the inherent dangers when he decided to participate in the activity. (Because his expert's affidavit was "conclusory," it did little to support the lawsuit's survival.)

Bedder luck next time.

UNRELENTING?

After a New York County Supreme Court jury found him guilty of burglary in the first degree, unlawful imprisonment in the second degree, assault in the third degree, and menacing in the third degree, Terriel Smith was sentenced to a term of 15 years to life (because of his "persistent felony offender" status).

On appeal, Smith asked the Appellate Division, First Department, to overturn the verdict because he hadn't "knowingly and unlawfully" entered the building--necessary elements for a burglary conviction.

Since the building was locked, and a clearly visible "no trespassing" sign was posted, the AD1 thought that the jury could reasonably conclude that Smith's entry was unauthorized. (While he claimed to have been invited into the building by a resident, the appellate court thought the jurors were free to make their own credibility assessments and reject that explanation.)

He truly was persistent.

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MCCANN'S CAN

Heather McCann sued the Varick Group after she was injured at work. Apparently, a building security guard lifted the lady to see if she could pop a balloon by sitting on it.

Because the guard was an independent contractor, and the property owner's "degree of control" over him wasn't enough to establish an employer-employee relationship, both the New York County Supreme Court, and the Appellate Division, First Department, thought dismissal of the case was appropriate.

Notwithstanding the guard's status, because his actions were a "clear departure" from the scope of his employment, the courts saw that as yet another basis upon which dismissal could be premised. (The owner's failure to conduct a background check was of little consequence, as the guard's past "kidnapping" conviction bore no relationship to the acts which lead to the lady's injuries.)

McCann lost it in the end.

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