KIP

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Issue 67

Inside this issue

SO LONG, FAREWELL, AUF WIEDERSEHEN, GOODBYE ...

While Brent Jacoby was on parole, an officer found a Sai--a three-pronged, non-deadly martial-arts weapon--in a drawer in Jacoby's apartment.

Although he claimed the item belonged to his ex-girlfriend, Jacoby admitted to knowing about the weapon and conceded that he had made no effort to return or remove it from the premises.

After an Administrative Law Judge concluded that the Sai was a "weapon," and recommended that Jacoby be imprisoned for 18 months, an administrative appeal with the Oneida County Supreme Court was filed, and the case was transferred to the Appellate Division, Fourth Department.

Even though he didn't own the thing, because Jacoby was in possession of an item "readily capable of causing physical injury," the ALJ's sentencing recommendation was confirmed.

Sai-o-nara!

INSANE IN DA MEMBRANE

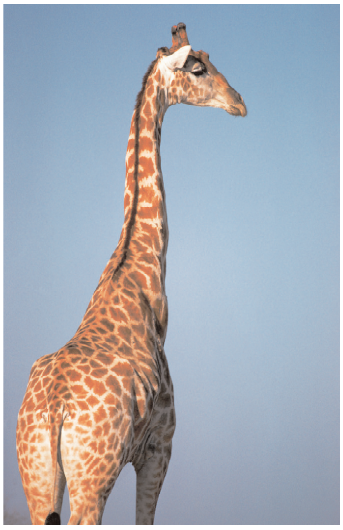
Jill Williams was seriously injured on a Manhattan street when a crazed guy threw a large glass bottle at her. After she recovered from two surgeries to correct multiple leg fractures, Williams filed suit, claiming that the State of New York had been negligent in its supervision of her mentally ill assailant. (The guy had been "voluntarily" committed to a state psychiatric institution--Manhattan Psychiatric Center--from which he "eloped" some two years prior to the encounter with Williams.)

When the Court of Claims dismissed her case, Jill appealed.

Because the State was aware of its patient's extensive history of violence against women, and of his eight prior "elopements" over the course of a 29-month period, the Appellate Division, First Department, thought there was a duty to prevent the man from harming others, and that negligence had made his escape and eventual misconduct possible.

Apparently, hospital employees failed to adhere to the Center's rules and, in effect, facilitated their patient's escape. Even though two years had passed since the escape occurred, the AD1 thought the State still remained liable, and reinstated the lawsuit.

How loco was that?



OH BABYLON, LOST BABYLON

As he was approaching his boat, Carlo Giarraffa stepped into a dirt-covered sinkhole and was injured. When he later filed suit, the Town of Babylon claimed that because it hadn't received any prior written notice of the problem, it was free of any liability.

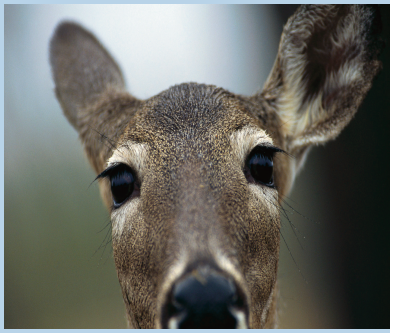
While the Town Supervisor had received a letter describing an "erosion problem," Babylon thought that that correspondence didn't satisfy the written-notice requirement imposed by local law.

Apparently, to be effective, the written notice had to be delivered to the Town Clerk, or the Commissioner of the Department of Public Works.

But since that notice requirement applied only to boardwalks or sidewalks, and not to the area where Giarraffa fell, both the Suffolk County Supreme Court and the Appellate Division, Second Department, agreed that the case could continue.

Did they stick their necks out there?

DEPARTMENT OF INDISCRETION?



Isabel Rivera filed a personal-injury suit, claiming the N.Y.C. Department of Education (DOE) failed to remove a disruptive student from her class and didn't provide her with proper protection.

When the Bronx County Supreme Court denied DOE's motion to dismiss the action, the agency appealed.

Absent a "special duty," the Appellate Division, First Department, thought there could be no liability for DOE's discretionary actions and decisions, particularly since Rivera was never told that the student would be removed or that she would be given security.

There was no DOE there for her.

WE GET LETTERS

I truly enjoy reading your publication "Knowledge is Power." I would love if I could receive any and all back issues. It's a pleasant break in the day, and I particularly love reading the newsletter while I commute on the bus.

When I receive my income tax check I will be sure to make a contribution. Thank you.

Adrienne McGahee, New York, New York

- - - - - *Editor's response* - - - - -

Adrienne!

On behalf of all of us at KIP, please accept our sincerest thanks for your kind words of encouragement and financial support. We hope our readers are inspired by your graciousness and generosity. (We certainly were.)

Generous contributors, like you, help further our mission to educate the public on the legal system's role and function.

Per your request, a busload of back issues are on their way. Enjoy!

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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.

Disclaimer:
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ALWAYS USE PROTECTION

In response to a notice of violation and stop-work order it received from the Department of Buildings, Pavarini McGovern LLC entered into an agreement to pay Herbert Moskowitz, an adjacent landowner, $400 for each day certain "protection" remained in place on Moskowitz's property after May 24, 2008.

Because Pavarini failed to remove that protection, and stopped paying the $400 fee, Moskowitz sued and the New York County Supreme Court awarded him $62,000.

When Pavarini challenged that outcome on appeal, the Appellate Division, First Department, didn't view the fee as an "unenforceable penalty," nor was it convinced that the charge was "plainly or grossly disproportionate" to the benefit Pavarini received in connection with its multi-million-dollar construction project.

Would a pregnant pause now be appropriate?

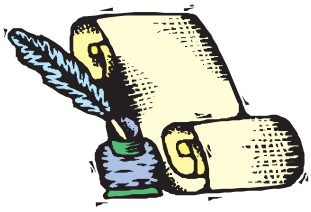
FEES SHOPPING

After he did some legal work for Ivette De La Cruz, attorney Neil Hirschfeld was supposedly directed by the New York County Surrogate's Court to make his request for compensation in that forum. Inexplicably, the lawyer went to the New York County Civil Court to have the fee claim adjudicated.

When the Civil Court found in Hirschfeld's favor, De La Cruz appealed.

Since the Surrogate's Court has the power to assess and award attorneys' fees, and was in the "best position" to do so in this instance, the Appellate Term, First Department, reversed because it wanted to discourage "forum shopping." (The AT1 indicated that the attorney was free to reapply for his fees in that other court.)

Was there no surrogate for that?



EMANCIPATION PROCLAMATION

Albert Stabile III wanted to stop his child-support payments because he wasn't getting along with his kids.

When the Suffolk County Family Court denied his request, Stabile argued on appeal that his children were "constructively emancipated." While New York parents usually have to support their kids until the latter reach twenty-one years of age, "constructive emancipation" occurs when the young ones are able to work, and refuse all contact with the "non-custodial parent."

Here, Stabile didn't meet the governing statutory standard because he was supposedly the one who had caused the relationship to sour.

How un-Stabile.

GARBAGE!

Although Aalba Auto Salvage (AAS) was the highest bidder, and had been selected by the New York City Department of Sanitation (DOS) to remove vehicles in Queens and Bronx counties, DOS later concluded that AAS wasn't a "responsible contractor," and refused to close a deal with the company. When AAS asked the Queens County Supreme Court to reverse that determination, the court responded by throwing the case out.

Because AAS skipped a necessary step, and failed to file an administrative appeal before filing its court case, the Appellate Division, Second Department, agreed that the lawsuit was unsalvageable.

That sure was cleansing.

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CHIP OFF THE OLD ...

Believing she was a victim of discrimination, Mildred Block filed a claim against her employer with the New York City Commission on Human Rights.

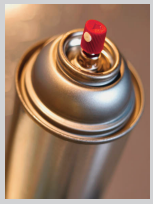
When both the Commission and the New York County Supreme Court concluded that she hadn't demonstrated an entitlement to relief, Block appealed to the Appellate Division, First Department.

Block based her claim on her employer's decision to change her assignment from a "portable beer stand" at Shea Stadium to a stationary one--where the young lady earned fewer tips.

Because that reassignment wasn't seen as "materially adverse," and since she received the same salary--and her employment remained subject to the same terms and conditions--the poor lady struck out.

Once more around the Block?

PAINTING THE TOWN ...



When a Nassau County District Court jury found Peter Suarez guilty of criminal mischief in the fourth degree for spray-painting on his neighbor's wall, he appealed to the Appellate Term, Second Department. In addition to damaging another person's property without permission, prosecutors had to show that Peter caused some diminution in value or other "loss."

Apparently, there was no proof that the wall's value or usefulness had been diminished as a result of Peter's conduct, or that there had been any resulting damage--like cleaning or replacement costs. (In fact, the owner didn't even testify that she disliked what Peter had done.) As a result, the AT2 reversed the conviction and dismissed the criminal case.

Is that the Peter principle?

GUN SHY?

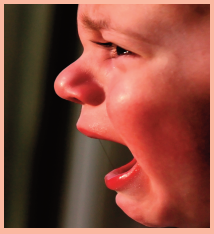
Tobias Boyland took an appeal to the Appellate Division, Fourth Department, after he was convicted of four counts of criminal possession of a weapon.

Boyland claimed that a rifle seized from a closet shouldn't have been allowed into evidence at his trial because it was found on the second floor of a two-story home, and the search warrant only authorized a search of the "lower floor" apartment.

Apparently, when officers arrived at the scene, they supposedly heard voices emanating from the upper floor, examined the area, and found the rifle. Since that "protective sweep" was based on the belief that there was an individual on the upper level who posed a danger, the AD4 upheld the officers' conduct and affirmed the conviction.

Were they gunning for that guy?

SON OF A GUN



In response to Jessika Lamparillo's charge that her husband left bullets and an unloaded gun on the kitchen table, allowed their five-year-old kid to play with the weapon, and later showed the youngster how to load it, the Suffolk County Family Court issued an "order of protection" against Michael Lamparillo based on "reckless endangerment."

When Michael challenged that order, the Appellate Division, Second Department, deferred to the trial court's credibility determinations and was of the view that Jessika's testimony sufficiently established the offense and supported the outcome.

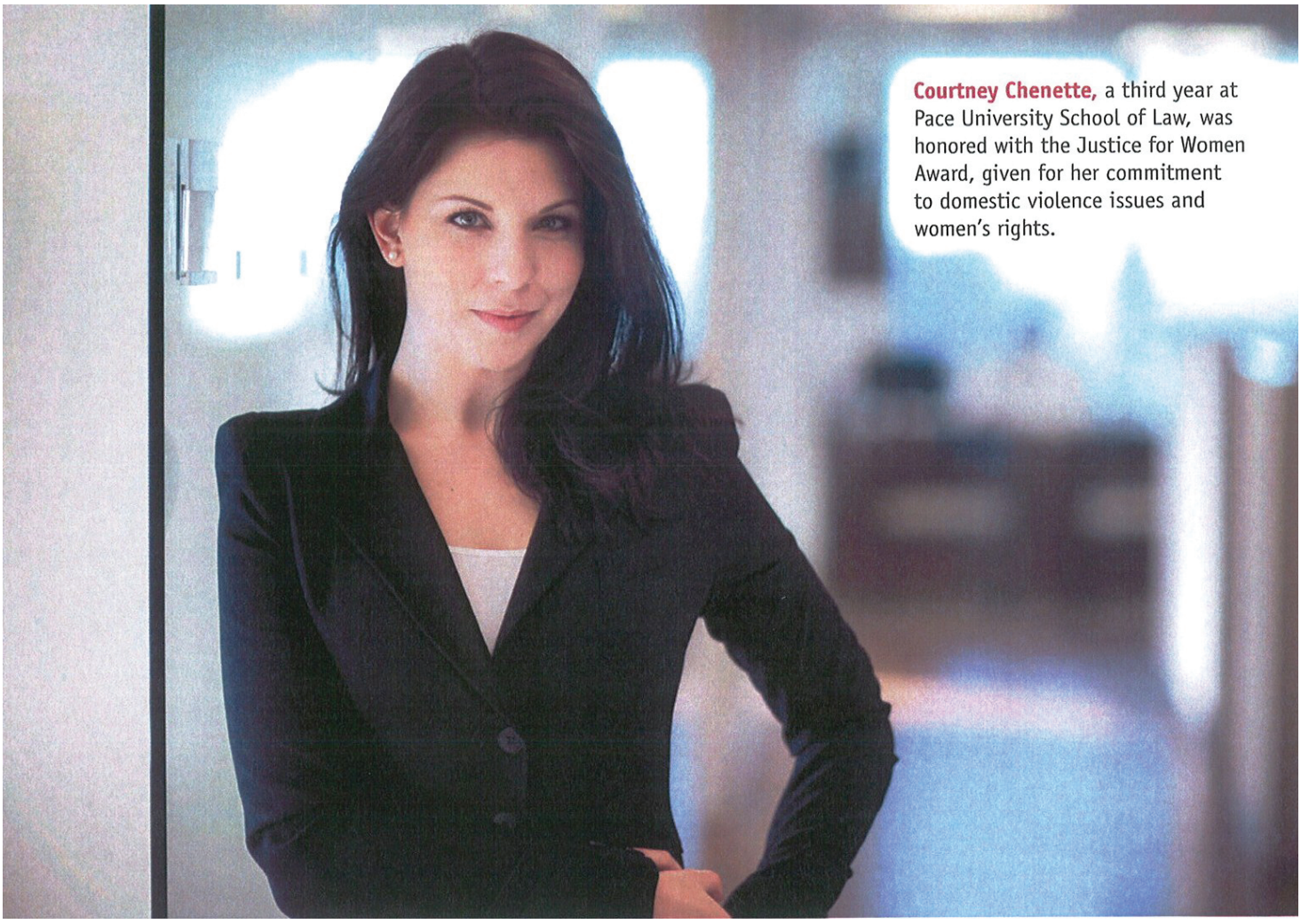
Did they jump the gun there?

HELLO, NEWMAN!

Wells Fargo Bank was sued because it allegedly represented to Randall Newman that his property would be treated as a two-family, rather than a one-family, home for financing purposes.

But neither the New York County Supreme Court nor the Appellate Division, First Department, gave any credence to Newman's arguments, and they dismissed his case. Apparently, Newman's "fraudulent misrepresentation" claim was contradicted by the terms of his mortgage-commitment letter. And as for his "detrimental reliance" on the bank's inflated appraisal of his home, the AD1 thought such reports were "matters of opinion," and weren't legally actionable.

Damn!



Courtney Chenette, a third year at Pace University School of Law, was honored with the Justice for Women Award, given for her commitment to domestic violence issues and women's rights.

'I feel very empowered'

Courtney Chenette was a victim of sexual assault as a teenager. Now the Pace third year is providing support for others in need.

BY MICHELLE WEYENBERG

The national statistics are staggering. One in five students report being physically or sexually abused by a dating partner in a survey of ninth through 12th graders. Women ages 16 to 24 experience the highest per capita rate of intimate partner violence — triple the national average. Two in three teens do not tell anyone and tend to interpret the violence as "signifying love," studies report.

And everyone's experience is unique, says Courtney Chenette, a third year at **Pace University School of Law** in White Plains, N.Y., and an advocate for domestic violence, sexual assault and women's rights issues.

For Chenette, it was a traumatic experience of sexual assault as a teenager that motivated her to dedicate her life to advocating for young survivors of violence. Chenette found that she — like most survivors of sexual assault — lacked the resources needed to effectively navigate the legal system.

"Experiencing violence doesn't just represent one area of your life," she said. "It affected my education, my personal relationships with family and friends and the way I felt about myself. I found myself wanting to provide that support for others in need."

As an undergraduate student at Hollins University in Roanoke, Va., she became involved in direct client services for victims of sexual assault at a women's center. After working as a paralegal during college, she decided to take her advocacy to the next level — law school.

The law has given her the toolbox to help people affected by domestic violence and sexual assault, she said.

For the past two summers she interned at Day One, a nonprofit organization that provides legal services to young survivors of domestic violence in all five New York City boroughs. Day One's clients are all under the age of 24, and include many young mothers and minors under the age of 18. The organization primarily assists clients with orders of protection, but is also involved in all tangential family court work, including custody and child support cases, education law, and some criminal advocacy.

Chenette said Day One has a really high client volume, and part of the mission is

continued from page 5

to educate. Community outreach coordinators are involved in this to preempt violence as well as identify when a student might be having an issue with violence.

"Outreach and education is what is going to make communities safer for young people," she said. "It starts with a dialogue about self-respect. It doesn't just start when you are 18."

Last spring, Chenette also participated in the Family Court Legal Program externship through Pace's Women's Justice Center. The externship included coursework in Family Law and Children and the Law, and allowed her to work directly with clients under the supervision of Women's Justice Center attorneys at the Yonkers and White Plains Family Courts.

"Walking into court can be overwhelming for a law student," she said. "It's exponentially more overwhelming when you're entering the court system as a survivor of violence — especially when you're a young person."

Jennifer Cranstoun, an attorney with the Family Court Legal Program, supervised Chenette during her externship, and says this area of law is completely different from, say, tax law.

"When you're dealing with families in crisis, it's only natural that you would feel the effects," she said. "But the great thing about this type of work… it's very positive because you're helping to effect change and empower people. I think there are some people that are naturally cut out for this work."

And, she says, Chenette is one of them.

"She is extremely passionate and kind," Cranstoun said. "She's a good listener, but someone that can actively make someone feel better when they are in crisis."

Chenette was 2011's recipient of the Justice for Women Award, given annually to a current Pace law student who successfully completed the Center's Family Court Legal Program externship. Criteria include commitment to domestic violence issues and women's rights, public interest law, diversity, and scholarship. Sbe is also a Dean's Scholar and a Presidential Scholar.

Chenette said Pace Law School has been incredibly supportive of students who want to make social change.

Like Cranstoun, Chenette also considers Randolph McLaughlin, a Pace law professor and attorney, as another great mentor. She is currently a law clerk at his firm Newman Ferrara LLP.

"I've been fortunate to have several mentors in my law school career who have demonstrated how to turn a passion for social change into a successful and long-lived legal career," she said.

Chenette is keeping an open mind about career options after graduating, but said her ultimate goal is to do social justice work and make her community a better place.

For her, it has been incredibly motivating to know she can be that care, support and resource rhat she didn't have when she needed it. And it's still important for her to share her story.

"It doesn't just happen to certain kinds of people," she said. "Helping other women who experience violence has been both a challenge and a calling every step of the way. I feel very empowered to be in a place in my life where I can give back to that community."

WHO'S FOR HORTON?

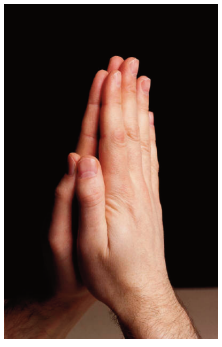
On April 27, 2011, the U.S. Supreme Court, in the case *AT&T Mobility v. Concepcion,* held that California law couldn't invalidate arbitration provisions in consumer contracts--even when those agreements effectively barred class actions by requiring claims to be arbitrated on an individual basis. After that decision, business groups throughout the country were eager to know whether the same theory would apply to employment agreements.

Hear this. In January of this year, the National Labor Relations Board, in the case of *In re D.R. Horton and Michael Cuda*, found that arbitration clauses which prohibit employees from pursuing class or collective actions violated federal law--Section 7 of the National Labor Relations Act.

While opponents question whether the NLRB's decision can be reconciled with that of our nation's highest court, class-action lawyers are touting *D.R. Horton* as a victory for employee rights … at least for now.

Watch out for that Beezlenut oil!

HOSANNA!



When's a teacher not a teacher? (When she's a minister.)

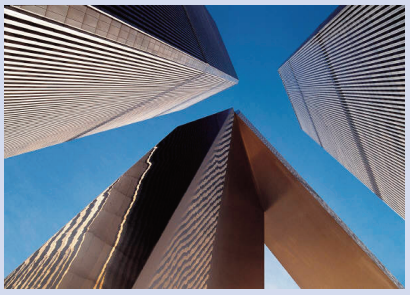
On January 11, 2012, in a decision penned by Chief Justice John G. Roberts, Jr., the United States Supreme Court examined whether the First Amendment's "ministerial exception" barred an employment-discrimination suit brought by a teacher.

Due to her physical condition, Cheryl Perich took a leave of absence from her duties with Hosanna-Tabor Evangelical Lutheran Church. When she later notified her employer of her ability to return to work, she was told that she had been replaced, and was fired after she threatened to sue.

Although she claimed her termination violated federal law, the United States Supreme Court thought the First Amendment trumped cases challenging the employment decisions made by a religious institution regarding one of its ministers, even if that minister was primarily employed as a teacher.

Anyone care to sing praise for that?

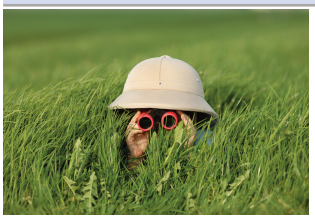
MUCH ADO ABOUT NOTHING?



William Claudio challenged the denial of accidental-disability retirement benefits, by way of an administrative proceeding (filed pursuant to CPLR Article 78).

While he alleged that his disability was triggered by his recovery work at the World Trade Center after the tragic events of 9/11, the City of New York contended otherwise. And after the New York County Supreme Court denied his challenge, Claudio appealed.

As far as the Appellate Division, First Department, was concerned, the "credible evidence," including the analysis offered by "numerous health professionals," reinforced the conclusion that Claudio's condition wasn't attributable to his work at Ground Zero. *My soul doth tell me Hero is belied;*
And that shall Claudio know....



KNUCKLE HEADS

After undercover cops arrested Maurice Evans for smoking marijuana in plain view, his backpack was seized and was found to contain "11 bags of marijuana, a pair of brass knuckles, a nine-millimeter gun, and two magazines of ammunition."

Although he tried to prevent the contents of the backpack, and the statement he made to the officers, from being introduced into evidence at his trial, Evans ended up getting convicted by the New York Supreme Court of attempted possession of a weapon in the second degree, and sentenced to a 2-year term.

In the absence of a threat to an officer or the general public, or a need to protect evidence from being concealed or destroyed, the Appellate Division, First Department, thought that the police had overstepped their bounds and conducted an "unreasonable warrantless search"--particularly because while Evans was in custody, he wasn't "aggressive or hostile," and had fully cooperated with the authorities.

Was that unwarranted?

THE DAY THE MUSIC DIED?

When a rooftop bar opened up next door, 61 W. 62 Owners Corp.--a New York City co-operative--sued to stop the noise and other disturbances generated by the establishment and its patrons.

While the New York County Supreme Court dismissed the case because the New York City Department of Environmental Protection hadn't issued a noise violation, the Appellate Division, First Department, thought that didn't prevent the court from fashioning appropriate relief--particularly in light of the analysis offered by an acoustical expert.

When the case reached our state's highest court, the New York State Court of Appeals concurred with the AD1 and thought that the co-op wasn't precluded from seeking relief merely because a violation hadn't issued. Thus, it sent the case back to the AD1.

And because it was of the view that the co-op was entitled to an injunction, the AD1 directed the New York County Supreme Court to "fashion" an "appropriate provisional remedy."

The party's over....

SILENCE OF THE LAM

Wang Dong and others were sued after Shu Chi Lam was hit by a car and allegedly sustained injures to his head, neck and left knee.

When the New York County Supreme Court concluded he didn't have a case, Lam appealed to the Appellate Division, First Department.

The medical reports submitted by the defendants showed that Lam hadn't sustained a "permanent consequential limitation of use" or "significant limitation of use" of his head, neck or left knee. Although his doctor claimed there were some lingering injuries, that analysis was discredited since the physician couldn't establish that those conditions were tied to the accident.

No one was about to ding Dong.

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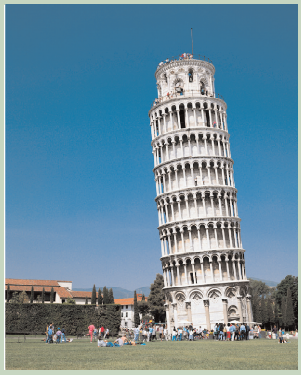
TARANTULS' TARANTELLA



After they sold their property to Igor and Nelly Cherkassky, Mark and Rosa Tarantul sued to recover $40,000, which had been held in escrow pending confirmation of a tax abatement.

The Cherkasskys counter-sued, claiming that they hadn't been sold a "newly constructed home," that they had been fraudulently induced to purchase the house, and that the structure's plumbing and electrical systems weren't in working order.

When the Kings County Supreme Court sided with the Tarantuls, and dismissed the buyers' claims, an appeal to the Appellate Division, Second Department, followed.

In addition to the fact that the contract of sale didn't call for a newly built residence, and that the Tarantuls had no obligation to ensure the plumbing and electrical systems worked beyond the closing date, the Cherkasskys had specifically disavowed reliance upon any oral representations made by the sellers and agreed to rely on the results of their own property inspection.

Since construction had been completed before the contract was signed, and the Cherkasskys had the opportunity to undertake an investigation, the AD2 thought their fraudulent-inducement counterclaim lacked merit.

That was some dance.

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