LAW OFFICES OF JONATHAN M. COOPER

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INSIDE THIS ISSUE

Free New Book on New York Breach of Contract Available for Download

As you can see at page 3 of this newsletter, "When You Don't Have a Written Agreement – How You Can ***Still*** Recover Your Losses" to my publisher is now available for download at my website.

In the next few weeks, I hope to publish my next book on breach of employment agreements.

As always, I've made these books available to my readership free of charge. All I ask in return is that you let me know what you think of the books; I really appreciate the feedback!

When Attorneys Go (Way) Too Far

Recently, I attended a non-party deposition in a commercial litigation matter arising out of a dispute over who is the rightful owner of a particular property in New York. As is often the case, the attorney conducting the deposition was less than thrilled at the answers given by the witness.

So, first he tried to refresh the witness's recollection. Then he tried to trick the witness by suggesting answers to the questions that he knew were false. And then he proceeded to remind the witness – at least 3 times – about the penalties for perjury, and suggested that incarceration was a foreseeable possibility.

While I didn't care for his tactics – particularly the latter two – what came next was inexcusable.

He flat-out charged the witness with disgracing his religion by failing to give "better" answers to the questions.

This attorney has made it to my (extremely short) list of people that I don't communicate with unless it is in writing. And it is attorneys who practice in this fashion that has led to the "sterling" reputation that has made us the butt of so many lawyer jokes.

When NY Employers Condition Receipt of Post-Employment Benefits on a Non-Compete

As you may be aware, it has become increasingly common for employers to condition their employees' receipt of post-employment benefits upon the employees' agreement to abide by a strict non-compete clause. So here's the question (which, unfortunately, occurs altogether too frequently): what if the non-compete is unreasonably and unduly restrictive (i.e., prevents you from using your acquired knowledge and expertise to earn a living), and your job has become intolerable to the point you want to quit?

Unfortunately, for purposes of evaluating the enforceability of a non-compete, or non-competition agreement, the difference between

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We strongly encourage the readers of our monthly newsletter to provide feedback about issues they would like to see addressed in our future publications.

To do so, please contact us through our website, www.JonathanCooperLaw.com or via e-mail at jmcooper@jmcooperlaw.com

"In its bizarre decision … the Court held that the plaintiff who was working in a trench for the water company was a trespasser to whom the State owed no duty."

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When NY Courts Reach Absurd Results: Worker Injured in Collapsed Trench Deemed a "Trespasser"

It is deeply disturbing when you see a decision coming out of New York's highest court that clearly ignores reality. Yet that is exactly what happened in the construction site accident case of Morton v. State.

In this case, the plaintiff descended into a trench that was dug in the middle of a New York State roadway in order to fix a broken water main, at which point an inadequately shored side wall collapsed, injuring the plaintiff. Although there was apparently no dispute that the failure to shore up the side wall constituted a violation of the construction worker safety statute, NY Labor Law § 241(6), the State contended that it could not be held liable for the plaintiff's personal injuries because it had no connection with the worker, and could not be deemed an "owner" under the statute.

In its bizarre decision agreeing with the State, the Court held that since the water company (for whom the plaintiff worked) did not obtain the required highway work permit, "claimant was a trespasser to whom the State owed no duty under Labor Law § 241(6)."

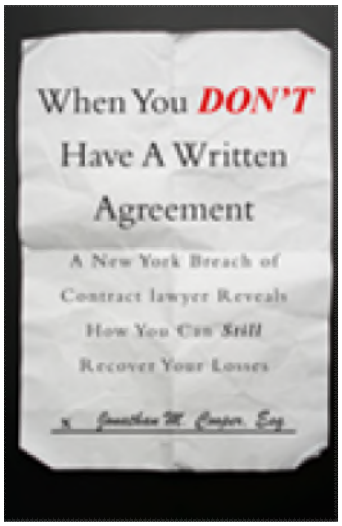
To quote John McEnroe: "You cannot be serious!"

Adding to the absurdity is that the water company specifically had added New York State as an additional insured on its policy governing the work that the claimant was in the middle of performing, a fact that the majority dismissed as having been done for "some unexplained reason."

Perhaps there is some small consolation to be had, though. There was a vigorous dissent that noted the inclusion of the State on the water company's insurance policy was certainly "not out of any charitable impulse" but because the water company knew that the state could theoretically be held liable for work that was being performed.

When You Don't Have a Written Agreement

by Jonathan M. Cooper



This new **FREE Book,** which explains some of the ways that you can still recover your losses – even when you don't have a written contract - is available to be downloaded directly from:

www.**JonathanCooperLaw.**com

When Employers Condition Severance on a Non-Compete

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voluntarily resigning and being fired is quite important under New York law. This is known in legalese as the "employee choice doctrine." (For additional information on this topic, please see "When NY Courts Will Uphold Non-Compete Clauses – No Matter How Unreasonable").

As a tacit exception to New York's rule that disfavors non-compete agreements, the employee choice doctrine is based on the notion that "if the employee is given the choice of preserving contract rights by refraining from competition or risking forfeiture of such rights by exercising a right to compete, there is no unreasonable restraint upon an employee's right to earn a living." Post v Merrill Lynch, Pierce, Fenner & Smith, Inc., 48 NY2d 84, 421 NYS2d 847, 397 NE2d 358.

"You don't have to actually be fired in order to be considered fired from a job under New York law."

But there is a way to defeat this exception.

In case you didn't already know it (and I suspect that's most people), you don't have to actually *be* fired in order to be *considered* fired from a job under New York law, and thereby effectively invalidate the non-compete agreement. But as you might suspect, the test to satisfy this doctrine, which in legalese is called "constructive termination" or "constructive discharge," is difficult to prove.

The test for constructive discharge was established by the Federal courts, and occurs "when the employer, rather than acting directly, deliberately makes an employee's working conditions so intolerable that the employee is forced into an involuntary resignation" (*Pena v. Brattleboro Retreat*, 702 F.2d 322, 325 [2d Cir.1983]. A claimant can prove that she was constructively discharged by establishing that the working conditions "[were] so difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign" (*Pena*, 702 F.2d at 325).

***COMMUNICATION POLICY**: As a general rule, Mr. Cooper does not accept unscheduled phone calls. This policy affords Mr. Cooper the ability to pay closer and more focused attention to each case, resulting in more efficient and effective representation for his clients. Moreover, it avoids the endless and needless game of phone tag played by most businesses and law firms. To schedule a phone call or in-person appointment with Mr. Cooper, please call his office at 516.791.5700.*

How Parents Can Be Held Negligent in New York for Their Kids' Dangerous Acts

When discussing the rules governing parental liability for childrens' acts, there is the general rule which states that a parent cannot be held responsible for damages caused by the child on account of that parent's failure to supervise properly the child (*Holodook v. Spencer*, 36 N.Y.2d 35, 51, 364 N.Y.S.2d 859, 324 N.E.2d 338).

There is an important, albeit limited, exception to this rule, however.

A parent may be held liable in negligence to a third party if the parent negligently entrusted a "dangerous instrument" to the child. And the reason for this exception is relatively straightforward: by giving this dangerous instrumentality to a child, the parent has placed others in harm's way, and in that fashion, has breached his or her duty to thereby breaching a duty owed to the third party to control the child's use of dangerous instruments to protect others from foreseeable harm, which in this case, is preventing the child (who may lack appropriate judgment) from the use of this dangerous instrumentality. (*Nolechek v. Gesuale*, 46 N.Y.2d 332, 338-339, 413 N.Y.S.2d 340, 385 N.E.2d 1268 [1978]; *see, also Rios v. Smith*, 95 N.Y.2d 647, 722 N.Y.S.2d 220, 744 N.E.2d 1156 [2001]).

Some examples where parents have been held liable under this rule of law include where under age children were allowed to play with air guns (in contravention of New York's Penal Code), and All-Terrain Vehicles (ATVs).

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