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FIRST DEPARTMENT

CORPORATION LAW, CONTRACT LAW, DEBTOR-CREDITOR.

BUYER NOT OBLIGATED, UNDER THE TERMS OF THE ASSET PURCHASE AGREEMENT, TO PAY FINANCIAL ADVISOR HIRED BY SELLER. "DE FACTO MERGER" DOCTRINE DID NOT APPLY — NO "CONTINUITY OF OWNERSHIP."

The First Department, in a full-fledged opinion by Justice Friedman, over a full-fledged dissenting opinion by Justice Manzanet-Daniels, determined that the buyer of a business (TBA Buyer) did not assume the seller's (TBA Seller's) obligation to pay a financial advisor (Fidus) hired by TBA Seller to find a buyer and facilitate a sale. The opinion focused on the precise language of the asset purchase agreement (APA) and held that any monies owed by TBA Seller to Fidus were excluded, by the terms of the APA, from the assets and liabilities TBA Buyer purchased. Much of the opinion addresses the arguments made by the dissent. With respect to the dissent's argument that TBA Buyer assumed TBA Seller's obligation to pay Fidus under the "de facto merger" doctrine, the majority wrote: "[U]nder New York law, continuity of ownership is the touchstone of the [de facto merger] concept and thus a necessary predicate to a finding of de facto merger ... . The purpose of requiring continuity of ownership is to identify situations where the shareholders of a seller corporation retain some ownership interest in their assets after cleansing those assets of liability ... . Stated otherwise, [t]he fact that the seller's owners retain their interest in the supposedly sold assets (through their ownership interest in the purchaser) is the substance which makes the transaction inequitable ... . By contrast, where a buyer pays a bona fide, arms-length price for the assets, there is no unfairness to creditors in . . . limiting recovery to the proceeds of the sale — cash or other consideration roughly equal to the value of the purchased assets would take the place of the purchased assets as a resource for satisfying the seller's debts ... . Thus, allowing creditors to collect against the purchasers of insolvent debtors' assets would give the creditors a windfall by increasing the funds available compared to what would have been available if no sale had taken place ... . In this case, there is no continuity of ownership between TBA Seller and TBA Buyer because, as the record establishes (and Fidus does not dispute), none of TBA Seller's owners acquired a direct or indirect interest in TBA Buyer (and thus in the transferred assets) as a result of the asset purchase transaction ...". [internal quotation marks omitted] **Matter of TBA Global, LLC v Fidus Partners, LLC, 2015 NY Slip Op 06698, 1st Dept 9-1-15**

PERSONAL INJURY.

PASSENGER IN RECREATIONAL GO-KART ASSUMED RISK OF INJURY CAUSED BY BEING "BUMPED" BY OTHER GO-KARTS.

Plaintiff, a passenger in an electric, recreational go-kart, assumed the risk of injury alleged to have been caused by the go-kart being "bumped" by other go-karts. The court noted that (1) the written waiver of liability signed by the plaintiff was void as against public policy, and (2) the go-kart operator had a written policy prohibiting intentional "bumping," but held that the common-law assumption of risk doctrine nevertheless applied: "[The 'assumption of risk'] doctrine applies to certain types of athletic or recreational activities, where a plaintiff who freely accepts a known risk commensurately negates any duty on the part of the defendant to safeguard him or her from the risk ... . While participants are not deemed to have assumed risks resulting from the reckless or intentional conduct of others, or risks that are concealed or unreasonably enhanced ..., the concept of a known risk includes apparent or reasonably foreseeable risks inherent in the activity ... . The activity in which plaintiff engaged is a type to which the assumption of risk doctrine is appropriately applied. In riding the go-cart, the plaintiff . . . assumed the risks inherent in the activity... . Those risks included the risk that the go-cart would bump into objects ... . Of course, the apparent or reasonably foreseeable risks inherent in go-karting also include the risk that vehicles racing around the track may intentionally or unintentionally collide with or bump into other go-karts. It is that inherent risk which negates any duty on the part of the defendant to safeguard [plaintiff] from the risk ...". [internal quotation marks omitted] **Garnett v Strike Holdings LLC, 2015 NY Slip Op 06694, 1st Dept 9-1-15**

SECOND DEPARTMENT

CIVIL PROCEDURE.

ABUSE OF DISCRETION TO DENY PLAINTIFFS' MOTION TO EXTEND TIME FOR FILING A NOTE OF ISSUE.

In finding Supreme Court abused its discretion in denying plaintiffs' motion to extend the 90-day period for filing a note of issue, the Second Department explained the analytical criteria: "Once the plaintiffs were in receipt of the 90-day notice, they were required to serve and file a timely note of issue, or move before the default date to either vacate the 90-day notice or extend the 90-day period pursuant to CPLR 2004 ... . Here, there is no dispute that the plaintiffs timely moved, inter alia, to extend the 90-day period. However, notwithstanding the plaintiff's timely motion, the Supreme Court directed the dismissal of the complaint pursuant to CPLR 3216. This was an improvident exercise of discretion. The determination as to whether to vacate a 90-day notice and grant an extension of time to file a note of issue lies within the court's discretion, and this determination may be guided by the length of the delay in prosecuting the action, the reason for the delay, the prejudice to the defendants, and whether the moving party was in default before seeking the extension ... . The Court of Appeals has observed that CPLR 3216 is extremely forgiving ..., in that it never requires, but merely authorizes, the Supreme Court to dismiss a plaintiff's action based on the plaintiff's unreasonable neglect to proceed ...". [internal quotation marks omitted] **Amos v Southampton Hosp., 2015 NY Slip Op 06700, 2nd Dept 9-2-15**

CIVIL PROCEDURE, MUNICIPAL LAW.

CAUSES OF ACTION SEEKING MONETARY DAMAGES WERE NOT INCIDENTAL TO THE ARTICLE 78 CAUSES OF ACTION AND, THEREFORE, WERE NOT SUBJECT TO THE FOUR-MONTH STATUTE OF LIMITATIONS.

Certain causes of action in plaintiffs' complaint should not have been dismissed because they were not incidental to the Article 78 causes of action which were time-barred. Plaintiffs brought a hybrid proceeding (1) to annul a town resolution assessing taxes to pay for the town's demolition of some of plaintiffs' property which was deemed unsafe and (2) seeking damages for destruction of property and interruption of plaintiffs' business. The Second Department explained the criteria for determining whether causes of action seeking monetary damages should be deemed incidental to the Article 78 causes of action (and therefore subject to the four-month statute of limitations): "Pursuant to CPLR 7806, where a CPLR article 78 petitioner seeks damages as well as the annulment of a governmental determination, [a]ny restitution or damages granted to the petitioner must be incidental to the primary relief sought by the petitioner, and must be such as he [or she] might otherwise recover on the same set of facts in a separate action or proceeding suable in the supreme court against the same body or officer in its or his official capacity (CPLR 7806). [W]here the thrust of the lawsuit is the review of an adverse . . . agency determination, with the monetary relief incidental, [the] Supreme Court may entertain the entire case under CPLR article 78 ... . Whether the essential nature of the claim is to recover money, or whether the monetary relief is incidental to the primary claim, is dependent upon the facts and issues presented in a particular case ... . Contrary to the Supreme Court's determination, the claims asserted in the first, second, and eighth causes of action were not incidental to the plaintiffs' CPLR article 78 challenges to the Resolution and the special tax assessment ... . Therefore, these causes of action were not asserted in connection with the CPLR article 78 portion of this hybrid action/proceeding, and were not barred by the four-month statute of limitations applicable to CPLR article 78 proceedings ...". [internal quotation marks omitted] **Hertzel v Town of Putnam Val., 2015 NY Slip Op 06708, 2nd Dept 9-2-15**

CIVIL RIGHTS LAW.

PLAINTIFFS RAISED A QUESTION OF FACT WHETHER "SLAPP" SUIT HAS A SUBSTANTIAL BASIS IN FACT AND LAW.

The Second Department, over a long and detailed dissent, determined defendant, Petrucci, was entitled to summary judgment on the question whether the action against her constituted a SLAPP suit under the Civil Rights Law, but was not entitled to summary judgment on the merits. SLAPP stands for "strategic lawsuit against public participation." The statute, Civil Rights Law 76-a(1), seeks to prohibit lawsuits brought against citizens who are critical of public bodies. Although finding that the plaintiffs' suit is properly characterized as a SLAPP suit, the majority further determined the plaintiffs had raised questions of fact about whether their action "has a substantial basis in fact and law." Plaintiffs have leases with the Port Authority. Plaintiffs alleged that Petrucci falsely reported to the Port Authority's Office of Inspector General that plaintiffs had underreported their revenues and therefore were paying less rent than was owed. The court wrote: "Petrucci demonstrated her prima facie entitlement to judgment as a matter of law determining that this action is a SLAPP suit, and the plaintiffs failed to raise a triable issue of fact in opposition. Accordingly, this action is properly characterized as a SLAPP suit ... . However, Petrucci was not entitled to summary judgment dismissing those causes of action specifically asserted against her in the complaint, or on her counterclaim pursuant to Civil Rights Law § 70-a. While we share the dissent's concern for safeguarding the rights of citizens to comment on matters of public concern, and we acknowledge that Civil Rights Law § 76-a was enacted to provide special protection for defendants in actions arising from the exercise of their rights of public petition and participation by deterring SLAPP actions ..., we conclude that the plaintiffs sustained

their statutory burdens in opposition to the motion by demonstrating that the action has a substantial basis in fact and law (CPLR 3212[h]...)". [internal quotation marks omitted] **International Shoppes, Inc. v At the Airport, LLC, 2015 NY Slip Op 06710, 2nd Dept 9-2-15**

CONTRACT LAW.

PLAINTIFF COULD NOT SHOW, AS A MATTER OF LAW, ITS INTERPRETATION OF THE CONTRACT WAS THE ONLY REASONABLE ONE — SUMMARY JUDGMENT DENIED.

Plaintiff sued under a brokerage agreement alleging entitlement to a fee in connection with the sale of defendant's property. By the terms of the agreement, no fee was owed if the property was sold to "a private party identified as James Walker." Ultimately the property was sold to "James Walker," but defendant alleged the buyer was not James Walker but was merely using the name as a pseudonym to protect his privacy. The Second Department determined plaintiff was not entitled to summary judgment because it could not be found as a matter of law that plaintiff's interpretation of the contract was the only reasonable interpretation. The court explained the relevant analytical criteria: "The threshold question of whether a contract is unambiguous, and the subsequent construction and interpretation of an unambiguous contract, are issues of law within the province of the court ... . [W]hen interpreting a contract, the court should arrive at a construction which will give fair meaning to all of the language employed by the parties to reach a practical interpretation of the expressions of the parties so that their reasonable expectations will be realized ... . Extrinsic and parol evidence of the parties' intent may not be admitted to create ambiguity in a contract that is unambiguous on its face, but such evidence may be considered where a contract is determined to be ambiguous ... . * * * ... [Here it] cannot be determined as a matter of law that the plaintiff's interpretation ... was the only reasonable interpretation ...". [internal quotation marks omitted] **NRT N.Y., LLC v Harding, 2015 NY Slip Op 06719, 2nd Dept 9-2-15**

CRIMINAL LAW, EVIDENCE.

DEFENDANT SHOULD HAVE BEEN ALLOWED TO SUBMIT EXPERT EVIDENCE RE: FALSE CONFESSIONS — NEW TRIAL ORDERED.

The Second Department addressed several significant issues in a lengthy decision ordering a new trial in a murder case (which will be the defendant's fifth trial in the matter). Although the defendant's girlfriend had testified against the defendant in prior proceedings, she feigned a loss of memory and refused to testify in the most recent trial. County Court properly held that the girlfriend was "unavailable" within the meaning of Criminal Procedure Law 670.10, thereby allowing her prior testimony to be read into evidence. County Court should not, however, have allowed the People to amend the bill of particulars which, in response to defendant's alibi evidence presented in prior trials, extended the time period in which the crimes were alleged to have occurred. The focus of the decision, and the reason for reversal, was County Court's error in excluding defendant's expert testimony about false confessions. The confession was the principal evidence in the People's case and was the product of seven hours of interrogation, only 75 minutes of which was videotaped. The Second Department addressed the "false confession" issue in depth: "Upon our consideration of the submissions and opinions of both experts, we find that the defendant made a thorough proffer that he was more likely to be coerced into giving a false confession than other individuals. His proffer clearly indicated that he was intellectually impaired, highly compliant, and suffered from a diagnosable psychiatric disorder, and also that the techniques used during the interrogation were likely to elicit a false confession from him … . Moreover, in light of the foregoing, the fact that no one had videotaped the nearly six hours of the interrogation that had been conducted before the confession was made raises significant concerns." [internal quotation marks omitted] **People v Days, 2015 NY Slip Op 06731, 2nd Dept 9-2-15**

PERSONAL INJURY, CIVIL PROCEDURE.

WHERE THE COMPLAINT ALLEGED ONLY THAT PLAINTIFF'S FALL WAS CAUSED BY A DEFECTIVE DRIVEWAY AND THE COMPLAINT AGAINST THE RENOVATOR OF THE DRIVEWAY WAS DISMISSED, THERE WAS NO VIABLE THEORY UNDER WHICH THE PROPERTY OWNERS COULD BE HELD LIABLE.

Supreme Court should have granted defendant property owners' motion for a judgment as a matter of law after the close of proof. Plaintiff, who tripped over the lip on defendants' driveway, alleged the driveway was defective. After proof was closed, Supreme Court dismissed the complaint against the company which renovated the driveway, but denied the property owners' motion to dismiss. Because plaintiff's only theory was that the driveway was defective, and the property owners could only be liable for a hazardous condition caused by a failure to properly maintain the property, the complaint against the property owners should have been dismissed as well: "Dismissal of an action insofar as asserted against a contractor who performs work on premises does not mandate dismissal of the action insofar as asserted against the owner of the premises, since the owner has a duty to maintain the premises in a reasonably safe condition ... . Here, however, the plaintiff's theory of liability was that the driveway was defective. ... [T]here was no evidence that the lip of the driveway was in a hazardous condition. Therefore, it was inconsistent to direct the dismissal of the complaint insofar as asserted against [contractor] while denying such relief to the appellants as homeowners, since no viable alternative theory of liability was asserted against the appellants ...". **Cioffi v Klein, 2015 NY Slip Op 06704, 2nd Dept 9-2-15**

PERSONAL INJURY, MUNICIPAL LAW.

PHONE CALL, EVEN IF REDUCED TO WRITING, DOES NOT SATISFY CITY'S "WRITTEN NOTICE OF A DEFECT" REQUIREMENT.

The requirement that the city be notified in writing of a defect (here, a raised portion of a sidewalk) before liability for failing to repair will attach was not met. A phone call from the abutting property owner to the municipality, even if the communication is reduced to writing, is not sufficient. The court further held that the "open request" generated by the abutting property owner's "311" call did not constitute the city's "written acknowledgment" of a defective condition (an alternative to the "written notice" requirement): "The City demonstrated its prima facie entitlement to judgment as a matter of law dismissing the complaint insofar as asserted against it by submitting evidence showing that no written notice of any defect was received with regard to the subject sidewalk ... . In opposition, the plaintiff failed to raise a triable issue of fact. Contrary to the plaintiff's contention, neither [the abutting property owner's] "311" call nor the records generated by the City's Department of Parks and Recreation (hereinafter the DPR) from that call provided the City with prior written notice of the sidewalk defect. A verbal or telephonic communication to a municipal body, even if reduced to writing, cannot satisfy the prior written notice requirement ... . Nor did the "open request" generated from that "311" call, which was received by the DPR clerk on the computer system, constitute a "written acknowledgment" by the City of a defective condition ...". **Tortorici v City of New York, 2015 NY Slip Op 06721, 2nd Dept 9-2-15**

THIRD DEPARTMENT

UNEMPLOYMENT INSURANCE.

CLAIMANT, WHO WORKED FROM HER HOME PURSUANT TO A CONSULTING AGREEMENT, WAS AN EMPLOYEE, NOT AN INDEPENDENT CONTRACTOR.

Claimant, who worked from her home pursuant to a consulting agreement with Source Interlink Media (SIM), was an employee entitled to unemployment insurance benefits: "Here, the consulting agreement indicates that SIM retained the services of claimant and set her hourly rate of pay. Further, claimant's wages were reported on an IRS 1099 tax form with SIM identified as the wage payer. Although claimant generally worked from home, she was required to work at [the] office every Friday from 9:00 a.m. to 5:00 p.m. On Fridays, she was provided a work space, computer, telephone and office supplies. If claimant was going to be late or absent, she was expected to inform an executive assistant at the office. She planned annual meetings, parties and boat shows and was reimbursed for her travel expenses. Her other duties included writing press releases, but she could not distribute the releases until her supervisor had reviewed and edited them. If claimant missed a deadline to complete an assignment, her supervisor could terminate the consulting agreement." **Matter of Morris (Commissioner of Labor), 2015 NY Slip Op 06741, 2nd Dept 9-2-15**

UNEMPLOYMENT INSURANCE.

FLIGHT CREW MEMBER DEEMED AN EMPLOYEE OF A SERVICE WHICH PROVIDES FLIGHT CREWS FOR CORPORATE CLIENTS.

Claimant, who worked for Stecher Aviation Services, which provides flight crews for corporate clients, was an employee, not an independent contractor: "Here, the record reflects that Stecher Aviation reviews and evaluates the resume of a prospective crew member and other required certifications in deciding whether to add the crew member to its database. Once accepted, the crew member must sign a contract that requires him or her to take instructions directly from the client, prohibits substituting a third party to fulfill the assignment and requires the submission of an invoice by a specified time in order to be paid for services and reimbursed for expenses. Although a crew member may reject an assignment and can work for competitors, Stecher Aviation reviews its database and selects the crew member whom it deems qualified to perform the services required by its client, and the work hours and location are determined by the needs of the client. The crew member does not negotiate the rate of pay, as such rate is already set between Stecher Aviation and the client's flight department. Stecher Aviation handles the billing for the services provided and, after deducting its commission, pays the crew member. Additionally, Stecher Aviation finds replacements for a crew member who cancels an assignment and fields complaints about a crew member's performance; crew members also are covered under Stecher Aviation's workers' compensation insurance policy. Finally, Stecher Aviation's sole business is providing crew members for its clients. **Matter of Stecher Aviation Servs., Inc. (Commissioner of Labor), 2015 NY Slip Op 06743, 2nd Dept 9-3-15**

UNEMPLOYMENT INSURANCE.

CLAIMANT WAS AN EMPLOYEE OF AN OUTFIT WHICH ADVERTISES FOR SECURITY GUARDS ON CRAIGSLIST.

Claimant was an employee of Precinct, which advertises for security guards on Craigslist: "Precinct places advertisements on Craigslist seeking security guards, although we note that claimant was referred to Precinct by another security guard. Precinct interviews applicants about their experience and verifies that the applicants are licensed as security guards in New

York. As to claimant, he was assigned by Precinct to a hotel. Precinct negotiated with the hotel in setting claimant's rate of pay. Precinct billed the hotel based upon the negotiated hourly rate and paid claimant after subtracting one third of claimant's pay as a commission. If claimant could not report to work on a certain day, he was required to inform Precinct, and claimant could not find his own replacement." **Matter of Lobban (Commissioner of Labor), 2015 NY Slip Op 06746, 2nd Dept 9-3-15**

UNEMPLOYMENT INSURANCE.

CLAIMANT, WHO WORKED PURSUANT TO A CONSULTING AGREEMENT, WAS NOT AN EMPLOYEE.

Claimant, who worked pursuant to a consulting agreement with two companies, was not an employee: "Tomen America Inc. was eliminated when Toyota negotiated to purchase assets of Tomen and acquire many of its employees. Claimant negotiated and drafted an agreement with both Tomen and Toyota whereby he served as a consultant for both companies, during set periods, to provide post-integration support in human resource matters with regard to the Tomen employees being assimilated by Toyota. As a consultant with Toyota, claimant worked three to five days a month and set his own schedule. He was not required to report to any supervisor, was not given any direction by anyone, did not submit his work for review, did not participate in regular human resource meetings and was issued an identification badge indicating that he was a contractor. Claimant submitted a monthly invoice for an agreed-upon payment, which, pursuant to the agreement drafted by claimant, withheld no taxes." **Matter of Farley (Commissioner of Labor), 2015 NY Slip Op 06747, 2nd Dept. 9-3-15**

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