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Editor: **Bruce Freeman**

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COURT OF APPEALS

ELECTION LAW, CIVIL PROCEDURE.

NAILING AND MAILING THE PETITION TO INVALIDATE A DESIGNATING PETITION WAS TIMELY.

The Court of Appeals, affirming the Fourth Department, determined that service by "nailing and mailing" the petition to invalidate a designating petition was timely. The petition was "nailed" on the day before the last possible day for service and was "mailed" on the last possible day for service: "We agree with the courts below that this proceeding was properly commenced in a timely manner. Here, there is no dispute that petitioner complied with the terms of the order to show cause by nailing the papers to the door of [respondent's] residence on July 22, 2015 and mailing the papers to that residence by express mail on July 23. [Respondent] maintains that mailing on the last day of the statutory period was jurisdictionally defective since delivery inevitably would occur outside of the statutory period. However, where the instrument of notice has been delivered by another prescribed method within the statutory period, we have rejected such contentions concerning mailing ...". **Matter of Anglett v Morreale, 2015 NY Slip Op 06647, CtApp 8-26-15**

FIRST DEPARTMENT

CIVIL PROCEDURE.

CASE SHOULD NOT HAVE BEEN DISMISSED ON FORUM NON CONVENIENS GROUNDS---ANALYTICAL CRITERIA EXPLAINED.

Supreme Court should not have dismissed plaintiff's action on "forum non conveniens" grounds. The action concerned a lease and guaranty for property located in Georgia, but the property itself was not part of the dispute. Both parties were authorized to do business in New York, plaintiff's principal place of business was in New York, the lease was executed in New York and the guaranty was executed in New Jersey. The fact that Georgia law was to be applied (by the terms of the contract) did not control. The court explained the analytical criteria: "Generally, unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed ... . The burden rests upon the defendant challenging the forum to demonstrate relevant . . . factors which militate against accepting the litigation and the court, after considering and balancing the various competing factors, must determine in the exercise of its sound discretion whether to retain jurisdiction or not ... . Among the factors to be considered are the burden on the New York courts, the potential hardship to the defendant, and the unavailability of an alternative forum …. The court may also consider the residency of the parties and where the transaction out of which the case arose occurred ... . No one factor is controlling . . . [t]he great advantage of the rule of forum non conveniens is its flexibility based upon the facts and circumstances of each case ... . Here, there is a substantial nexus to New York." [internal quotation marks omitted] **Thor Gallery at S. DeKalb, LLC v Reliance Mediaworks (USA) Inc., 2015 NY Slip Op 06644, 1st Dept 8-25-15**

EMPLOYMENT LAW, CONTRACT LAW.

"AT WILL" EMPLOYEE STATED A CAUSE OF ACTION ALLEGING DEFENDANTS FRAUDULENTLY INDUCED HIM TO TAKE THE "AT WILL" JOB.

The First Department, in a full-fledged opinion by Justice Acosta, determined plaintiff had stated a cause of action for fraud in the inducement in connection with plaintiff's acceptance of "at will" employment with defendants. The complaint alleged that defendants induced plaintiff to leave his well-compensated position with J P Morgan by falsely indicating plaintiff was being hired because of defendants' heavy work load. The complaint further alleged that defendants did not have much work and plaintiff was hired solely to provide defendants with his business contacts. After turning over his business contacts, plaintiff alleged, defendants terminated him, claiming there was not enough work to support his position. The First Department reasoned that plaintiff was not seeking damages for wrongful termination, which is not available for an "at will" employee, but rather was seeking damages for defendants' fraudulently inducing him to give up his lucrative employment with J P Morgan in order to take the "at will" employment. The court further noted that the "general" merger clause in the "at will" employment contract did not preclude the action and the action concerned statements of material

existing fact, not (nonactionable) statements of future expectations. **Laduzinski v Alvarez & Marsal Taxand LLC, 2015 NY Slip Op 06646, 1st Dept 8-25-15**

LABOR LAW, PERSONAL INJURY.

LABOR LAW 240(1) CONCERNS ONLY WHETHER PROPER SAFETY EQUIPMENT WAS PROVIDED---COMPARATIVE NEGLIGENCE IS NOT RELEVANT.
Plaintiff was entitled to summary judgment under Labor Law 240(1) for injury incurred while using the top half of an extension ladder which did not have rubber feet. The court noted that contributory or comparative negligence is not a defense to a Labor Law 240(1) cause of action: "Plaintiff presented evidence establishing that defendants did not provide proper protection within the meaning of Labor Law § 240(1). The record indicates that plaintiff only saw the extension ladder in the area where he was working. There was no scaffolding available to plaintiff. Plaintiff was not wearing a safety harness, and there was no appropriate anchor point to tie off the ladder. We reject defendants' assertion that plaintiff's conduct was the sole proximate cause of his injuries. Plaintiff's knowing use of half of the extension ladder without proper rubber footings goes to his culpable conduct and comparative negligence. Comparative negligence is not a defense to a claim based on Labor Law § 240(1), where, as here, defendants failed to provide adequate safety devices ... . Further, defendants failed to show that plaintiff refused to use the safety devices that were provided to him." [internal quotation marks omitted] **Stankey v Tishman Constr. Corp. of N.Y., 2015 NY Slip Op 06643, 1st Dept 8-25-15**

LABOR LAW, PERSONAL INJURY.

PLAINTIFF ENTITLED TO SUMMARY JUDGMENT RE: FALL FROM NON-DEFECTIVE LADDER AFTER CO-WORKER WHO WAS STABILIZING THE LADDER WAS CALLED AWAY---COMPARATIVE NEGLIGENCE NOT RELEVANT.
The First Department, over a dissent, determined plaintiff's motion for summary judgment for the Labor Law 240(1) cause of action should have been granted. Plaintiff fell from a non-defective ladder when he lost his balance while attempting to use a drill to install a metal stud. A co-worker, who had been stabilizing the ladder, had been called away five minutes before plaintiff fell. Plaintiff alleged no one else was around who could have stabilized the ladder. The court noted that plaintiff's alleged comparative negligence was not relevant. The only relevant consideration was whether plaintiff was provided with adequate protection, an issue not addressed by defendants. **Caceres v Standard Realty Assoc., Inc., 2015 NY Slip Op 06645, 1st Dept 8-25-15**

SECOND DEPARTMENT

CIVIL PROCEDURE.

DOCTRINE OF COMITY PRECLUDED NEW YORK ACTION ATTACKING BERMUDA JUDGMENT.
Supreme Court, under the doctrine of comity, properly dismissed the complaint attacking a foreign country judgment. Plaintiff had appeared in the Bermuda case and made no showing of fraud or a public policy violation: "Generally, the courts of this State will accord recognition to the judgments rendered in a foreign country under the doctrine of comity, which is the equivalent of full faith and credit given by courts to judgments of our sister States ... . Absent some showing of fraud in the procurement of the foreign country judgment or that recognition of the judgment would do violence to a strong public policy of New York State, a party who properly appeared in the action is precluded from attacking the validity of the foreign country judgment in a collateral proceeding commenced in a New York court ...". [internal quotation marks omitted] **Basile v CAI Master Allocation Fund, Ltd., 2015 NY Slip Op 06650, 2nd Dept 8-26-15**

CIVIL PROCEDURE.

LIMITED LIABILITY COMPANY AND CORPORATION NOT "UNITED IN INTEREST" SUCH THAT "RELATION-BACK" DOCTRINE APPLIED.
Plaintiffs were not entitled to amend the complaint to add a party after the statute of limitations had passed pursuant to the "relation-back" doctrine. Although the president of the party to be added, Madjek, Inc., was a member of Madjek, LLC, (a named defendant), that relationship alone was not enough to demonstrate Madjek, LLC, and Madjek, Inc. were "united in interest" such that one would be vicariously liable for the acts of the other. The court explained the "relation-back" and "united in interest" criteria: "To establish the applicability of the relation-back doctrine, a plaintiff is required to prove that: (1) both claims arose out of the same conduct, transaction, or occurrence; (2) the new defendant is united in interest with the original defendant, and by reason of that relationship can be charged with notice of the commencement of the action such that it will not be prejudiced in maintaining its defense on the merits; and (3) the new defendant knew or should have known that, but for a mistake by the plaintiffs as to the identity of the proper parties, the action would have been brought against it as well (see CPLR 203[b] ...). Once a defendant has demonstrated that the statute of limitations has expired, the burden is on the plaintiff to establish the applicability of the relation-back doctrine ... . … Defendants are not united in interest if there is a possibility that the new party could have a different defense than the original party ... . Here, the only

fact that the plaintiffs established in support of their contention that the Madjek defendants were united in interest was that the president of Madjek, Inc., was a member of Madjek, LLC. This fact, standing alone, is insufficient to establish that the Madjek defendants are vicariously liable for the acts of each other and, thus, is insufficient to establish that the Madjek defendants are united in interest ...". **Montalvo v Madjek, Inc., 2015 NY Slip Op 06661, 2nd Dept 8-26-15**

CONTRACT LAW, EVIDENCE, DAMAGES.

RECOVERY FOR CONSTRUCTION WORK UNDER DOCTRINE OF QUANTUM MERUIT WAS PROPER---PROOF OF DAMAGES WAS SUFFICIENT.

Defendants, who did construction work without a written contract, were entitled to recover under the doctrine of quantum meruit. The court noted that proof of damages may be based solely on oral testimony as long as the witness has knowledge of the actual costs: "The elements of a cause of action sounding in quantum merit are: (1) the performance of services in good faith, (2) the acceptance of services by the person to whom they are rendered, (3) the expectation of compensation therefor, and (4) the reasonable value of the services rendered ... . Here, the trial court properly determined that the ... defendants performed services in good faith, that the plaintiff accepted those services, and that the … defendants expected to be compensated therefor. The court also properly determined that the ... defendants provided sufficient evidence of the reasonable value of their services. The unsigned agreement furnished evidence of such value ... . In addition, the ... defendants presented proposals that they submitted to the plaintiff for payment in connection with additional work that they performed, invoices and proof of payments to subcontractors, and invoices and proof of payments to suppliers of materials and equipment. The fair and reasonable value of the ... defendants' services may be properly based on evidence concerning the amount that they billed the plaintiff for such services, and the amounts that subcontractors billed them for their services and for costs of supplies and equipment ...". **Johnson v Robertson, 2015 NY Slip Op 06658, 2nd Dept 8-26-15**

CRIMINAL LAW.

COUNTY COURT SHOULD NOT HAVE DISMSSED THE INDICTMENT ON A GROUND NOT RAISED BY THE DEFENDANT WITHOUT GIVING THE PEOPLE THE OPPORTUNITY TO ADDRESS THE ISSUE.

After reviewing the grand jury testimony, County Court dismissed the indictment on a ground (the complainant's lack of testimonial capacity) not raised in defendant's omnibus motion. The Second Department reversed because the People had not been given the opportunity to address the issue: "The County Court erred in dismissing the indictment based upon a specific defect in the grand jury proceedings not raised by the defendant, without affording the People notice of the specific defect and an opportunity to respond. A motion to dismiss an indictment pursuant to CPL 210.20 must be made in writing and upon reasonable notice to the People (see CPL 210.45[1]). Moreover, orderly procedures require that the People be given the opportunity to address any alleged defects prior to dismissal of an indictment...". [internal quotation marks omitted] **People v Coleman, 2015 NY Slip Op 06676, 2nd Dept 8-26-15**

CRIMINAL LAW, EVIDENCE.

EVIDENCE OF PHOTO-ARRAY IDENTIFICATION PROPERLY ALLOWED TO COUNTER INFERENCE LINE-UP WAS SUGGESTIVE (DEFENDANT RESTRAINED IN LINE-UP).

The identification of the defendant in a photo-array was properly allowed in evidence because the defendant was restrained in the line-up, which could give rise to an inference the line-up was suggestive: "Under the circumstances of this case, the Supreme Court properly allowed the admission of evidence concerning the pretrial photographic identification of the defendant made by one of the two complainants. The evidence elicited at a suppression hearing established that the defendant had to be restrained during the lineup at which the complainants identified him due to his uncooperative behavior. Since the restraint of the defendant during the lineup could give rise to an inference that the lineup was suggestive, and the line-up identification made by the complainants was therefore unreliable, the People were properly permitted to counter this inference by introducing evidence of the prior photographic identification...". **People v Adamson, 2015 NY Slip Op 06672, 2nd Dept 8-26-15**

CRIMINAL LAW, EVIDENCE.

UNDULY SUGGESTIVE LINE-UP REQUIRED NEW TRIAL.

The Second Department ordered a new trial because the hearing court erroneously concluded the line-up was not unduly suggestive. The defendant was the only person in the line-up wearing a red shirt (which was a prominent part of the description of the assailant by the complainant). A new trial was necessary because the People did not have the opportunity to demonstrate whether there was an independent source for the complainant's identification: "The hearing court erred in concluding that the pretrial identification procedure, a lineup, was not unduly suggestive. The defendant was conspicuously displayed in that lineup. He was the only lineup participant dressed in a red shirt, the item of clothing which figured prominently in the description of the assailant's clothing that the complainant gave to the police. Thus, at the lineup, the defendant's red shirt improperly drew attention to his person ... . The hearing court's erroneous determination effectively

precluded the People from proffering evidence as to whether there was an independent source for the complainant's in-court identification. Since the People did not have an opportunity to establish the existence of an independent source, if any, a new trial is required, to be preceded by an independent source hearing ...". **People v Pena, 2015 NY Slip Op 06681, 2nd Dept 8-26-15**

FALSE ARREST, FALSE IMPRISONMENT, CRIMINAL LAW.

FALSE ARREST AND FALSE IMPRISONMENT CAUSES OF ACTION PROPERLY DISMISSED---CITY DEMONSTRATED POLICE HAD PROBABLE CAUSE TO ARREST.

Plaintiff's complaint alleging false arrest and false imprisonment was properly dismissed. The city demonstrated the police had probable cause to arrest the plaintiff based upon allegations made by an identified complainant. Although accused of a shooting by the alleged victim, plaintiff was never indicted. Discrepancies in statements made by the alleged victim of the shooting did not negate the existence of probable cause to arrest: "To prevail on a cause of action alleging false arrest or false imprisonment, a plaintiff must prove (1) intentional confinement by the defendant, (2) of which the plaintiff was aware, (3) to which the plaintiff did not consent, and (4) which was not otherwise privileged ... . Where, as here, an arrest is made without a warrant, [t]he existence of probable cause serves as a legal justification for the arrest and an affirmative defense to the claim ... . Probable cause does not require proof sufficient to warrant a conviction beyond a reasonable doubt but merely information sufficient to support a reasonable belief that an offense has been or is being committed ..." . [internal quotations marks omitted] **Nolasco v City of New York, 2015 NY Slip Op 06663, 2nd Dept 8-26-15**

FORECLOSURE, CIVIL PROCEDURE.

"LACK OF STANDING" DEFENSE WAIVED, "LACK OF STANDING" NOT A JURISDICTIONAL DEFECT, SUA SPONTE DISMISSALL FOR "LACK OF STANDING" NOT WARRANTED.

In reversing Supreme Court's denial of plaintiff-bank's unopposed motions in a foreclosure action, the Second Department noted that defendant homeowner had waived the "lack of standing" defense by not asserting it in her answer, and, in any event, "lack of standing" is not a jurisdictional defense for which the court's sua sponte dismissal of the complaint was warranted: "The Supreme Court abused its discretion in, sua sponte, directing the dismissal of the complaint for the plaintiff's lack of standing. A court's power to dismiss a complaint, sua sponte, is to be used sparingly and only when extraordinary circumstances exist to warrant dismissal ... . Here, the court was not presented with extraordinary circumstances warranting sua sponte dismissal of the complaint. [The homeowner] had waived the defense of lack of standing by failing to assert it in her amended answer … . … Furthermore, a party's lack of standing does not constitute a jurisdictional defect and does not warrant a sua sponte dismissal of the complaint by the court ...". **Mortgage Elec. Registration Sys., Inc. v Holmes, 2015 NY Slip Op 06662, 2nd Dept 8-26-15**

LABOR LAW, PERSONAL INJURY.

COLLAPSE OF ROTTEN FLOOR NOT FORESEEABLE. DEFECT WAS LATENT AND WAS NOT CAUSED BY OWNER.

Plaintiff's fall through a rotted portion of subfloor exposed when carpeting was removed was not foreseeable. Therefore the Labor Law 240(1) cause of action, the Labor Law 200 cause of action, and the common-law negligence cause of action against the owner of the property were properly dismissed: "In order for liability to be imposed under Labor Law § 240(1), there must be a foreseeable risk of injury from an elevation-related hazard . . . as [d]efendants are liable for all normal and foreseeable consequences of their acts ... . Thus, the collapse or partial collapse of a permanent floor may give rise to liability under Labor Law § 240(1) where circumstances are such that there is a foreseeable need for safety devices ... . Here, however, the plaintiffs failed to demonstrate that the partial collapse of a small section the basement subfloor and, in turn, the need for safety devices to protect the injured plaintiff from an elevation-related hazard, were foreseeable. … * * * When a defect is latent and would not be discoverable upon a reasonable inspection, constructive notice may not be imputed"... . Here, the defendant demonstrated its prima facie entitlement to judgment as a matter of law by establishing that it did not have actual or constructive notice of the defect in the subfloor, which was latent and not discoverable upon a reasonable inspection. The defendant further demonstrated that it did not create the defect." [internal quotation marks omitted] **Carrillo v Circle Manor Apts., 2015 NY Slip Op 06652, 2nd Dept 8-26-15**

PERSONAL INJURY, EDUCATION-SCHOOL LAW.

NEGLIGENT SUPERVISION CAUSE OF ACTION AGAINST SCHOOL SHOULD HAVE BEEN DISMISSED.

Reversing Supreme Court, the Second Department, over a strong dissent, determined the defendants' motions for summary judgment should have been granted. Plaintiff-student alleged he was injured when he tripped over another student's (Maher's) foot during a "speedball" game at school. Plaintiff-student provided conflicting statements about whether Maher had acted deliberately. With respect to the negligent supervision cause of action, the court wrote: "The School District's submissions, including an affidavit of a physical education expert, established its prima facie entitlement to judgment as a matter of law dismissing the complaint insofar as asserted against it ... . The evidence submitted by the School District demonstrates

that the incident occurred so quickly that it could not have been prevented by even the most intense supervision ... . In opposition, the plaintiffs failed to raise a triable issue of fact ... . While the plaintiffs emphasize that there is evidence in the record indicating that Maher had shoved another student in a gym class on an earlier date, this evidence was insufficiently specific to place the School District on notice of the conduct that led to the infant plaintiff's injuries ... . Finally, while the compulsory nature of the gym class activities precludes an assumption of risk defense, it is not an impediment to summary judgment, as it does not deprive the School District of its defense that the incident was sudden and unexpected ...". **Scavelli v Town of Carmel, 2015 NY Slip Op 06666, 2nd Dept 8-26-15**

PISTOL PERMITS, CRIMINAL LAW.

LICENSING OFFICER HAS BROAD DISCRETION RE: DENIAL OF APPLICATION FOR PISTOL PERMIT.

In upholding the denial of an application for a pistol permit, the Second Department explained the broad discretion afforded the licensing officer: "Penal Law § 400.00(1), which sets forth the eligibility requirements for obtaining a pistol license, requires, inter alia, that the applicant be at least 21 years of age, of good moral character with no prior convictions of a felony or serious offense, who has not had a license revoked or who is not under a suspension or ineligibility order, and a person concerning whom no good cause exists for the denial of the license" (Penal Law § 400.00[1][n]...). A pistol licensing officer has broad discretion in ruling on permit applications and may deny an application for any good cause(... see Penal Law § 400.00[1][n]...). Contrary to the petitioner's contention, the licensing officer's determination that good cause existed to deny the application was not arbitrary and capricious. The determination was rationally based, inter alia, on the petitioner's criminal history ... . Moreover, the licensing officer, by her own observation, found that the petitioner had issues with judgment, credibility, the ability to stay in control, and general moral fitness." [internal quotation marks omitted] **Matter of Lawtone-Bowles v Klein, 2015 NY Slip Op 06669, 2nd Dept 8-26-15**

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