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FIRST DEPARTMENT

ATTORNEYS, FRAUD, JUDICIARY LAW.

PLENARY ACTION UNDER JUDICIARY LAW § 487 ALLEGING ATTORNEYS ENGAGED IN DECEITFUL AND COLLUSIVE CONDUCT DURING A PRIOR CONTRACT ACTION PROPERLY SURVIVED MOTION TO DISMISS.
The First Department determined plaintiff (Melcher) properly brought a plenary action for fraud and deceit against a law firm pursuant to Judiciary Law § 487. Plaintiff alleged the attorneys engaged in deceitful and collusive conduct in a prior contract action (the Apollo action) which had been settled. Plaintiff alleged the party-defendant in the prior contract action forged an amendment to the contract and then deliberately damaged the original instrument to obfuscate the forgery. The court rejected "claim-splitting" and "collateral estoppel" arguments because the precise issues raised in the Judiciary Law § 487 complaint were not addressed in the prior Apollo action: "[W]e find that under the circumstances presented, it was proper for Melcher to assert a Judiciary Law § 487 claim in a separate action, rather than seeking leave to assert a claim against the attorney defendants in the Apollo action. Judiciary Law § 487(1) provides, among other things, that an attorney who is 'guilty of any deceit or collusion, or consents to any deceit or collusion, with intent to deceive the court or any party . . . forfeits to the party injured treble damages, to be recovered in a civil action.' A plaintiff may bring an action to recover damages for attorney deceit regardless of whether the attorney's deceit was successful ... . Further, the plaintiff in a section 487 case may recover the legal expenses incurred as a proximate result of a material misrepresentation in a prior action ...". **Melcher v Greenberg Traurig LLP, 2016 NY Slip Op 00274, 1st Dept. 1-19-16**

CIVIL PROCEDURE, CONVERSION.

LONG-ARM JURISDICTION DID NOT REACH AN AUDITING FIRM IN THE UK AND CONVERSION CAUSES OF ACTION FAILED BECAUSE THE CONVERTED FUNDS WERE NOT IDENTIFIABLE AFTER THEY HAD BEEN INVESTED.
In affirming Supreme Court's dismissal of several complaints stemming from the defendants' alleged involvement with investments managed by Bernard Madoff, the First Department determined New York jurisdiction did not extend to a firm in the UK (KPMG UK) which allegedly negligently audited Madoff Securities, and further determined conversion causes of action failed because the funds allegedly converted were not sufficiently identifiable after they had been invested: "The motion court correctly found that New York lacks personal jurisdiction over KPMG UK pursuant to CPLR 302(a)(3)(ii). While plaintiffs allege that KPMG UK committed a tort outside the state (negligently auditing nonparty Madoff Securities International, Ltd. [MSIL] in the United Kingdom), and their causes of action arise out of that tort, KPMG UK's act did not cause injury to a person or property within the state. '[T]he situs of commercial injury is where the original critical events associated with the action or dispute took place, not where any financial loss or damages occurred'... . * * * Where, as here, a plaintiff alleges that a defendant converted money, the money 'must be specifically identifiable and be subject to an obligation to be returned or to be otherwise treated in a particular manner' ... . [Plaintiff] sent her money to Beacon Associates, which sent it to Madoff, who deposited it at JPMorgan. Even if, arguendo, [plaintiff's] money was specifically identifiable when she sent it to Beacon Associates, there is no indication that Beacon Associates segregated it when it sent investors' money to Madoff. By the time Madoff deposited investors' money at JPMorgan, [plaintiff's] investments would not have been specifically identifiable." **McBride v KPMG Intl., 2016 NY Slip Op 00306, 1st Dept 1-19-16**

CRIMINAL LAW.

THE PEOPLE'S STATEMENTS OF READINESS FOR TRIAL WERE DEEMED ILLUSORY; CASE DISMISSED ON SPEEDY TRIAL GROUNDS.
The First Department, over an extensive dissent, determined the People's two statements of readiness (for trial) were illusory. The defendant's case should have been dismissed on speedy trial grounds: "First, the People provided no explanation why, after filing and serving the certificate of readiness on August 30, 2011, shortly after defendant's arraignment on August 25, 2011, they answered not ready at the next court date on September 7, 2011 ... . Nothing in the record, express or inferred, explains their change in status from ready to not ready. As the People 'gave no explanation for the change in circumstances between the initial statement of readiness and the subsequent admission that the People were not ready to proceed,' and the

statement of readiness thus 'did not accurately reflect the People's position,' the People should have been charged with the entire period, a total of 70 days ... . The People argue that the court did not ask for any reason, but the burden rests on the People to clarify, on the record, the basis for the adjournment ... . Second, after the People answered not ready on January 31, 2012, because the prosecutor was on trial in another case, the matter was adjourned to March 20, 2012. On February 7, 2012, the People filed and served a certificate of readiness. At the next court date, March 20, 2012, however, they again answered not ready because the prosecutor was on trial in another case. The court properly deemed the entire period chargeable to the People, 'notwithstanding' the February 7, 2012 certificate of readiness, but should have also charged subsequent adjournments to the People." **People v Rodriguez, 2016 NY Slip Op 00423, 1st Dept 1-21-16**

FRAUD, DAMAGES, CONTRACT LAW, EMPLOYMENT LAW.

PLAINTIFF'S INABILITY TO SHOW ACTUAL OUT-OF-POCKET LOSS REQUIRED DISMISSAL OF THE FRAUDULENT-INDUCEMENT CAUSE OF ACTION.

The First Department, over a two-justice dissent, determined the complaint alleging fraudulent inducement was properly dismissed for failure to allege out-of-pocket damages. Plaintiff was hired as an at-will employee to develop a ramen cuisine for defendant restaurant chain (Chipotle). Plaintiff subsequently learned defendant had entered an agreement with another chef to develop ramen cuisine, the deal had fallen apart and it would probably end in litigation. Plaintiff alleged that had he known about the undisclosed agreement with another chef he would not have entered the agreement with Chipotle. Although it was anticipated at the outset plaintiff would work for defendant for three years, and thereafter be entitled to certain specified additional compensation, plaintiff was an at-will employee and had been compensated for the work he completed before he was terminated. Therefore, the First Department held, plaintiff could not demonstrate the out-of-pocket loss required for a "fraudulent inducement" cause of action: "When a claim sounds in fraud, the measure of damages is governed by the 'out-of-pocket' rule, which states that the measure of damages is 'indemnity for the actual pecuniary loss sustained as the direct result of the wrong' ... . In other words, damages are calculated to compensate plaintiffs for what they lost because of the fraud, not for what they might have gained in the absence of fraud ... . Additionally, plaintiff's claim that he would have received better remuneration had he partnered with a different entity is inherently speculative and would require any factfinder to engage in conjecture ...". **Connaughton v Chipotle Mexican Grill, Inc., 2016 NY Slip Op 00273, 1st Dept 1-19-16**

PERSONAL INJURY, MEDICAL MALPRACTICE, CIVIL PROCEDURE.

JURY CONFUSION, STEMMING FROM THE WORDING OF THE SPECIAL VERDICT SHEET, MANDATED A NEW TRIAL.

The First Department, in three, two-justice concurring opinions, determined that plaintiff's motion to set aside the jury verdict should have been granted on "jury confusion" grounds. Plaintiff had a kidney removed for his father's transplant procedure. A "knot pusher device" was left inside plaintiff, and he underwent a second surgery to remove it. The jury, based on the special verdict sheet, indicated leaving the "knot pusher device" inside plaintiff was not the proximate cause of his injury, but the jury sent out a note stating the plaintiff should be awarded $50,000 for having to undergo the second procedure: "An examination of the record reveals that the special verdict sheet was 'unclear and confusing' . . . , because it did not provide for an award of damages caused by the need to undergo a second surgery. The confusing and ambiguous wording of the verdict sheet caused the jurors to experience substantial confusion in reaching their verdict ... . While '[t]he ambiguity had been brought to the attention of the trial Justice before the jury was discharged and could have been corrected or at least clarified at that time' . . . , the court did not do so and a new trial . . . is required to prevent a miscarriage of justice." **Srikishun v Edye, 2016 NY Slip Op 00315, 1st Dept 1-19-16**

SECOND DEPARTMENT

PERSONAL INJURY, LABOR LAW.

ALLEGATION PLAINTIFF WAS TOLD NOT TO WORK ON THE DAY HE FELL FROM A SCAFFOLD PRECLUDED SUMMARY JUDGMENT IN PLAINTIFF'S FAVOR; THE DEFINITION OF EMPLOYEE INCLUDES PERMISSION TO WORK.

The Second Department, reversing Supreme Court, determined defendants had raised a triable issue of fact about whether plaintiff had their permission to work when plaintiff fell from a scaffold. The definition of an employee under the Labor Law includes "permission to work." Here, the defendants alleged plaintiff was specifically told not to work until certain demolition work was done: "The Labor Law defines 'employee' as 'a mechanic, workingman or laborer working for another for hire' (Labor Law § 2[5]), and 'employed' as 'permitted or suffered to work' (Labor Law § 2[7]). 'To come within the special class for whose benefit absolute liability is imposed upon contractors, owners, and their agents to furnish safe equipment for employees under section 240 of the Labor Law, a plaintiff must demonstrate that he was both permitted or

suffered to work on a building or structure and that he was hired by someone, be it owner, contractor or their agent' ...". **Aslam v Neighborhood Partnership Hous. Dev. Fund Co., Inc., 2016 NY Slip Op 00316, 2nd Dept 1-20-16**

FAMILY LAW.

GOOD CAUSE FOR A FIVE-YEAR EXTENSION OF AN ORDER OF PROTECTION WAS DEMONSTRATED, CRITERIA EXPLAINED.

The Second Department, reversing Family Court, in a full-fledged opinion by Justice Chambers, determined petitioner had made a showing of "good cause" for the extension of an order of protection, and the court ordered a five-year extension. The court took the opportunity to define "good cause" in this context: "[I]n determining whether good cause has been established, courts should consider, but are not limited by, the following factors: the nature of the relationship between the parties, taking into account their former relationship, the circumstances leading up to the entry of the initial order of protection, and the state of the relationship at the time of the request for an extension; the frequency of interaction between the parties; any subsequent instances of domestic violence or violations of the existing order of protection; and whether the current circumstances are such that concern for the safety and well-being of the petitioner is reasonable ...". **Matter of Molloy v Molloy, 2016 NY Slip Op 00366, 2nd Dept 1-20-16**

FAMILY LAW, CIVIL PROCEDURE.

AGREEMENT, WHICH WAS PART OF A FOREIGN ISLAMIC DIVORCE DECREE, PROPERLY ENFORCED UNDER THE DOCTRINE OF COMITY.

The Second Department determined an agreement, called a mahr agreement, which was part of a foreign Islamic divorce decree, and which called for the payment to the wife of $250,000, was properly enforced by Supreme Court under the doctrine of comity: " 'Although not required to do so, the courts of this State generally 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 the courts to judgments of our sister States' ... . Comity should be extended to uphold the validity of a foreign divorce decree absent a showing of fraud in its procurement or that recognition of the judgment would do violence to a strong public policy of New York ... . Moreover, in extending comity to uphold the validity of a foreign divorce decree, New York courts will generally recognize all the provisions of such decrees, including any agreement which may have been incorporated therein, unless modification is required by reason of some compelling public policy ... . Here, the mahr agreement, although not acknowledged in accordance with Domestic Relations Law § 236(B)(3), was signed by the parties and two witnesses, as well as the Imam of the Islamic Cultural Center of New York. Under the circumstances presented, the Supreme Court properly recognized so much of the foreign judgment of divorce as incorporated the mahr agreement under the principles of comity, as no strong public policy of New York was violated thereby ...". **Badawi v Alesawy, 2016 NY Slip Op 00317, 2nd Dept 1-20-16**

FORECLOSURE, CIVIL PROCEDURE.

BANK DID NOT NEGOTIATE IN GOOD FAITH IN THE CPLR 3408 MANDATORY FORECLOSURE SETTLEMENT CONFERENCE, CERTAIN SANCTIONS PROPERLY IMPOSED.

The Second Department determined Supreme Court properly found the bank did not negotiate in a mortgage foreclosure settlement conference (CPLR 3408(f)) in good faith and properly imposed certain sanctions on the bank: "Pursuant to CPLR 3408(f), the parties at a mandatory foreclosure settlement conference are required to negotiate in good faith to reach a mutually agreeable resolution (*see* CPLR 3408[f]...). 'The purpose of the good faith requirement [in CPLR 3408] is to ensure that both plaintiff and defendant are prepared to participate in a meaningful effort at the settlement conference to reach resolution' ... . To conclude that a party failed to negotiate in good faith pursuant to CPLR 3408(f), a court must determine that 'the totality of the circumstances demonstrates that the party's conduct did not constitute a meaningful effort at reaching a resolution' ... . Here, contrary to the Bank's contention, the totality of the circumstances support the Supreme Court's conclusion that it failed to negotiate in good faith. The homeowner's submissions demonstrated that the Bank, among other things, engaged in dilatory conduct by 'making piecemeal document requests, providing contradictory information, and repeatedly requesting documents which had already been provided' ... . The Bank failed to offer any evidence in opposition to the homeowner's motion and did not controvert the homeowner's account of the mandatory settlement negotiations. Accordingly, under the circumstances, the Supreme Court properly concluded that the Bank violated CPLR 3408(f) by failing to negotiate in good faith ...". **LaSalle Bank, N.A. v Dono, 2016 NY Slip Op 00340, 2nd Dept 1-20-16**

PERSONAL INJURY.

GOLFER ASSUMED THE RISK OF SLIPPING ON A WET RAILROAD TIE WHICH LINED A PATH ON THE GOLF COURSE.

The Second Department, reversing Supreme Court, determined plaintiff golfer assumed the risk of slipping on a wet railroad tie which lined a path on the golf course: "Among the risks inherent in participating in a sport are the risks involved in the construction of the field, and any open and obvious conditions of the place where the sport is played ... . '[A]wareness of

risk is not to be determined in a vacuum. It is, rather, to be assessed against the background of the skill and experience of the particular plaintiff' ... . Moreover, '[i]t is not necessary to the application of assumption of risk that the injured plaintiff [had] foreseen the exact manner in which his or her injury occurred, so long as he or she is aware of the potential for injury of the mechanism from which the injury results' ... . While participants are not deemed to have assumed the risks of concealed or unreasonably increased risks . . . , if 'the risks are fully comprehended or obvious and the plaintiff has consented to them, the defendant has satisfied its only duty of care which is to make the conditions as safe as they appear to be' ...". **Bryant v Town of Brookhaven, 2016 NY Slip Op 00323, 2nd Dept 1-20-16**

PERSONAL INJURY, MEDICAL MALPRACTICE, CIVIL PROCEDURE.

THE ELEMENTS OF A LACK-OF-INFORMED-CONSENT CAUSE OF ACTION WERE NOT ACCURATELY STATED IN THE JURY INSTRUCTIONS AND VERDICT SHEET; MOTION TO SET ASIDE THE VERDICT SHOULD HAVE BEEN GRANTED.

The Second Department reversed Supreme Court, in the interest of justice, because the jury instructions and verdict sheet did not accurately state the elements of malpractice based upon a lack of informed consent. Plaintiff's motion to set aside the verdict should have been granted. The elements of a "lack of informed consent" cause of action were explained: "[L] ack of informed consent is a distinct cause of action requiring proof of facts not contemplated by an action based merely on allegations of negligence ... . To establish a cause of action to recover damages for malpractice based on lack of informed consent, a plaintiff must prove (1) that the person providing the professional treatment failed to disclose alternatives thereto and failed to inform the patient of reasonably foreseeable risks associated with the treatment, and the alternatives, that a reasonable medical practitioner would have disclosed in the same circumstances, (2) that a reasonably prudent patient in the same position would not have undergone the treatment if he or she had been fully informed, and (3) that the lack of informed consent is a proximate cause of the injury ... . The third element is construed to mean that the actual procedure performed for which there was no informed consent must have been a proximate cause of the injury ... . To state it in other terms, the causal connection between a doctor's failure to perform his [or her] duty to inform and a patient's right to recover exists only when it can be shown objectively that a reasonably prudent person would have decided against the procedures actually performed. Once that causal connection has been established, the cause of action in negligent malpractice for fail-ure to inform has been made out and a jury may properly proceed to consider plaintiff's damages ...". [internal quotation marks omitted] **Figueroa-Burgos v Bieniewicz, 2016 NY Slip Op 00329, 2nd Dept 1-20-16**

ZONING.

PLAINTIFFS HAD STANDING TO BRING A COMMON-LAW ACTION TO ENJOIN ZONING VIOLATIONS BY VIRTUE OF THE CLOSE PROXIMITY OF PLAINTIFFS' AND DEFENDANTS' PROPERTIES.

The Second Department determined plaintiffs had standing to bring a private common-law action to enjoin zoning violations by virtue of the proximity of plaintiffs' property to defendants' property: "To establish standing to maintain a private common-law action to enjoin zoning violations, a private plaintiff must establish that, due to the defendant's activities, he or she will sustain special damages that are different in kind and degree from the community generally and that the asserted interests fall within the zone of interest to be protected' by the statute or ordinance at issue ... . However, an allegation of close proximity may give rise to an inference of injury enabling a nearby property owner to maintain an action without proof of actual injury ... . Here, the record demonstrates that the plaintiffs' property was in close proximity to the defendants' property and that the plaintiffs' interests were within the zone of interest to be protected by the zoning ordinances alleged to be violated ... . Since the appellant failed to demonstrate that the plaintiffs lacked standing to maintain this action, the Supreme Court properly denied that branch of his motion which was to dismiss the complaint pursuant to CPLR 3211(a)(3)...". [internal quotation marks omitted] **Gershon v Cunningham, 2016 NY Slip Op 00332, 2nd Dept 1-20-16**

THIRD DEPARTMENT

CRIMINAL LAW, EVIDENCE.

WHERE A WITNESS STATES SHE DOES NOT RECALL MAKING A STATEMENT, IT IS NECESSARY TO CALL SOMEONE WHO HEARD THE WITNESS MAKE THE STATEMENT TO LAY A FOUNDATION FOR ITS ADMISSION AS A PRIOR INCONSISTENT STATEMENT.

The Third Department determined County Court properly denied defense counsel's request to enter the victim's statement in evidence as a prior inconsistent statement. The court explained that, where a witness states she does not recall making a statement, it is necessary to call a witness who was present when the statement was made to lay a proper foundation for admission. The court also noted that the statement was not so inconsistent with the witness' testimony as to warrant its use in cross-examination. With respect to the foundation for the evidence, the court wrote: "It is well established that a witness' prior inconsistent statements may be used to impeach his [or her] trial testimony [a]nd the test of inconsistency . . . is not

limited to outright contradictions between a witness' prior statements and his [or her] trial testimony ... . However, before a witness may be impeached with such a statement, a proper foundation must be laid . . . , and, [i]f the witness denies that the statement was made or does not remember making it, he or she may be impeached by the testimony of others who heard the statement ...". [internal quotation marks omitted] **People v Maxam, 2016 NY Slip Op 00391, 3rd Dept 1-21-16**

CRIMINAL LAW, EVIDENCE.

EVIDENCE OF AN UNRELATED DRUG SALE WAS NOT ADMISSIBLE TO SHOW DEFENDANT'S MOTIVE, CONVICTION REVERSED.

The Third Department reversed defendant's conviction in a drug-sale case because evidence of a prior unrelated drug sale was allowed to be introduced. There was no issue in the case to which the prior crime pertained. The evidence was not necessary to demonstrate defendant's motive. The prejudicial effect of the evidence, therefore, outweighed its probative value: "Evidence of prior bad acts or uncharged crimes may be admissible to show motive to commit a crime under one of the traditional *Molineux* exceptions — where the probative value exceeds its prejudicial effect ... . That said, 'there is usually no issue of motive in a drug sale case, as the seller's motivation is nearly always financial gain' ... . Moreover, 'evidence of similar uncharged crimes has probative value, but as a general rule it is excluded for policy reasons because it may induce the jury to base a finding of guilt on collateral matters or to convict a defendant because of his [or her] past' ... . The [evidence in question] is highly suggestive of an illicit drug transaction, and it is difficult to discern any relevant impact other than to show defendant's criminal propensity. As this case largely turned on [a witness'] credibility, we cannot characterize the error in admitting this evidence as harmless, notwithstanding County Court's curative instruction ...". **People v Magee, 2016 NY Slip Op 00399, 3rd Dept 1-21-16**

CRIMINAL LAW, MENTAL HYGIENE LAW.

SEX OFFENDER CAN NOT BE KEPT IN PRISON AFTER SERVING HIS MAXIMUM SENTENCE ON THE GROUND SUITABLE HOUSING HAD NOT YET BEEN FOUND.

The Third Department, in a full-fledged opinion by Justice Lynch, determined a sex offender could not be kept in prison after he had served his maximum sentence on the ground that suitable housing had not yet been found: "We have previously held that the Board has discretion to deny parole release to an inmate who has not secured an approved residence on his or her conditional release date ... . In contrast, we recently held that DOCCS does not have the authority to retain an inmate beyond the inmate's maximum expiration date in order to finalize the terms of PRS [post-release supervision], because it was conclusively bound by the sentence and commitment order ... . [W]e find that when a risk level III sex offender reaches his or her maximum expiration date, DOCCS must release the individual to either an approved residence or to an RTF [residential treatment facility]. Where an individual needs mental health treatment not otherwise available at an RTF, DOCCS must, prior to the release date, seek a court order authorizing continued hospitalization pursuant to Mental Hygiene Law article 9 or admission to a secure detention facility pursuant to Mental Hygiene Law article 10 (*see* Correction Law § 404)." **People ex rel. Green v Superintendent of Sullivan Corr. Facility, 2016 NY Slip Op 00417, 3rd Dept 1-21-16**

REAL PROPERTY.

THE INSTALLATION OF LIGHT FIXTURES ON A PARTY WALL EXCEEDED ANY EASEMENT THAT MIGHT ARISE FROM THE EXISTENCE OF A PARTY WALL.

A wall separating plaintiff's (NYCAR's) and defendant's property was located entirely on NYCAR's property. Defendant installed light fixtures on the wall for commercial purposes (an outdoor eating area for defendant's restaurant). The defendant also installed a door in the wall to act as an emergency exit for patrons of the restaurant. Defendant argued the wall was a party wall and the easement which accompanies a party wall allowed the installation of fixtures on the wall. The Third Department explained that the installation of fixtures on the wall exceeded any easement which might exist: "A party wall … may … 'belong[] entirely to one of the adjoining owners, but [be] subject to an easement or right in the other to have it maintained as a dividing wall between the two tenements' ... . Here, defendant's actions were beyond the scope of a party wall easement; the fixtures and utilities that defendant placed on the exposed eastern portion of the wall neither provided support to defendant's building nor contributed in any way to the maintenance of a dividing wall between the buildings. Instead, they were installed solely for defendant's 'mere convenience or advantage' in operating its restaurant ...". **Stamp v 301 Franklin St. Café, Inc., 2016 NY Slip Op 00410, 3rd Dept. 1-21-16**

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