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FIRST DEPARTMENT

CIVIL PROCEDURE, EVIDENCE.

MOVING PARTY CANNOT RELY ON GAPS IN OPPOSING PARTY'S PROOF IN MOTIONS AND CROSS-MOTIONS FOR SUMMARY JUDGMENT; WITNESS-CREDIBILITY SHOULD NOT BE TAKEN INTO ACCOUNT AT THE SUMMARY JUDGMENT STAGE.

The First Department, over a partial dissent, reversing (modifying) Supreme Court, determined neither plaintiff nor defendant was entitled to summary judgment in this contract dispute. Defendant, KLT, represented a concert artist, Akon, who cancelled a performance, allegedly due to illness. The question was whether, under the terms of the contract, plaintiff was entitled to its money back. KLT moved for summary judgment, arguing that the "force majeure" clause applied and plaintiff was not entitled to relief. Plaintiff cross-moved for summary judgment alleging breach of contract. The court found that KLT's proof of Akon's illness was insufficient and summary judgment was properly denied for that reason. The court went on to find Supreme Court should not have granted plaintiff's cross-motion because plaintiff did not demonstrate illness was not the reason for the cancellation of the concert. The decision presents another example of how appellate courts analyze summary judgment motions. Plaintiff could not rely on the gaps in KLT's proof of illness. Rather plaintiff was required to affirmatively prove illness was not the reason for the cancellation. The court further noted that witness-credibility cannot be taken into account at the summary judgment stage (the dissent argued Akon's testimony about illness was not to be believed). ***Belgium v. Mateo Prods., Inc.*, 2016 N.Y. Slip Op. 02730, 1st Dept, 4-12-16**

CIVIL PROCEDURE, EVIDENCE.

DESTRUCTION (SPOLIATION) OF EVIDENCE WARRANTED STRIKING THE PLEADINGS.

The First Department determined defendant's pleadings were properly struck because defendant destroyed emails relevant to plaintiff's defamation action: "Defendant undertook an affirmative course of action resulting in destruction of relevant emails, though she represented otherwise during sworn testimony. As the documents received from third-party recipients confirm, the files defendant destroyed are highly relevant and tend to substantiate plaintiffs' claims. Evidence of defendant's willful and prejudicial destruction of evidence warrants the sanction of striking her pleadings ... . Where a party disposes of evidence without moving for a protective order, a negative inference may be drawn that the destruction was willful … . Willfulness may also be inferred from a party's repeated failure to comply with discovery directives ... . It should also be noted that this Court has upheld the striking of pleadings where the destruction of critical evidence occurs through ordinary negligence ...". ***Chan v. Cheung*, 2016 N.Y. Slip Op. 02731, 1st Dept 4-12-16**

MALICIOUS PROSECUTION, CIVIL PROCEDURE, MUNICIPAL LAW.

TRIAL COURT SHOULD NOT HAVE SET ASIDE VERDICT IN MALICIOUS PROSECUTION ACTION.

The First Department, in a full-fledged opinion by Justice Kapnick, reversing Supreme Court, reinstated plaintiff's malicious prosecution, 42 U.S.C. § 1983, punitive damages and attorney fees claims. The claims had been dismissed pursuant to defendants' motion to set aside the $4 million jury verdict. Plaintiff had been injured during an arrest which took place just outside plaintiff's residence after he was approached by two police officers, ostensibly for his holding an open can of beer. Plaintiff was ultimately charged only with disorderly conduct which was dismissed at trial at the close of the People's case. The opinion includes an in-depth discussion of the elements of malicious prosecution, including the distinct "lack of probable cause to arrest" and "malice" elements. The court noted that the trial court improperly substituted its own factual judgments for the jury's. ***Cardoza v. City of New York*, 2016 N.Y. Slip Op. 02766, 1st Dept 4-12-16**

PERSONAL INJURY.

FACT THAT OBJECT OVER WHICH PLAINTIFF TRIPPED AND FELL WAS OPEN AND OBVIOUS DID NOT RELIEVE DEFENDANT OF LIABILITY AS A MATTER OF LAW.

The First Department determined the fact that the object over which plaintiff tripped and fell was "open and obvious" did not relieve defendant of liability as a matter of law. Plaintiff tripped over a wheeled cart which had been in an aisle of defendant's discount store. A question of fact remained whether defendant maintained the store in a reasonably safe condition.

That plaintiff saw the cart was relevant to plaintiff's comparative negligence: "Although plaintiff admitted that she saw the pulley bag before she tripped, so that it was an 'open and obvious' condition, defendant failed to demonstrate that it fulfilled its broad obligation to maintain the store in a reasonably safe condition ... . An issue of fact exists as to whether the placement of the pulley bag with its protruding metal stand, along with the other merchandise cluttering the store's aisles, was an inherently dangerous condition that presented a tripping hazard ... . That plaintiff saw the bag before tripping does not require dismissal of the complaint, but is relevant to the issue of her comparative negligence ..." ***Johnson-Glover v. Fu Jun Hao Inc.*, 2016 N.Y. Slip Op. 02748, 1st Dept 4-12-16**

PERSONAL INJURY.

PLAINTIFF ASSUMED THE RISK OF INJURY CAUSED BY AN OPEN AND OBVIOUS DEFECT IN AN OUTSIDE BASKETBALL COURT.

The First Department determined plaintiff assumed the risk of injury caused by an open and obvious defect in an outdoor basketball court: "[P]laintiff, an experienced basketball player, voluntarily chose to play basketball on an outdoor court that had an open and obvious defect on its surface ... . The crack and/or hole in the basketball court's surface that allegedly caused plaintiff's injury was one of the risks he assumed when he decided to play basketball on the court, which was located in a public park owned and maintained by defendants ... . The photographs of the defect and plaintiff's testimony that nothing was blocking the defect before he stepped on it demonstrate that the defect was open and obvious ...". ***Wallace v. City of New York*, 2016 N.Y. Slip Op. 02763, 1st Dept 4-12-16**

PERSONAL INJURY, WRONGFUL DEATH, EVIDENCE.

EVIDENCE SUFFICIENT TO DEMONSTRATE BUS DRIVER SHOULD HAVE SEEN DECEDENT.

The First Department, over an extensive two-justice dissent, determined there was sufficient evidence to support the jury's conclusion the defendant bus driver was negligent. Plaintiff's decedent was crushed by the bus as the bus pulled out of a bus stop. The driver never saw the decedent. The majority held that the location of the body indicated the decedent should have been seen by the bus driver. The dissent argued the evidence of negligence on the driver's part was speculative and the complaint should have been dismissed. The majority wrote: "Decedent . . . was found dead under one of defendant Transit Authority's buses. While the bus driver had no explanation for how her body came to be there, plaintiffs' evidence, including DNA evidence matching samples recovered from the bus, was sufficient to support the jury's finding that the bus driver was negligent in operating the bus. The evidence showed facts and conditions from which negligence and causation could 'be reasonably inferred' ... . In particular, plaintiffs showed that decedent's body had been crushed by the bus at such an angle that the bus driver, pulling out of the bus stop, should have, with the proper use of his senses, seen decedent ...". ***Oates v. New York City Tr. Auth.*, 2016 N.Y. Slip Op. 02729, 1st Dept 4-12-16**

WORKERS' COMPENSATION LAW, STATUTES.

AMENDMENT TO WORKERS' COMPENSATION LAW WHICH IMPOSED LIABILITY UPON INSURERS FOR REOPENED CASES PREVIOUSLY COVERED BY THE SPECIAL FUND IS UNCONSTITUTIONAL.

The First Department, in a full-fledged opinion by Justice Saxe, reversing Supreme Court, determined an amendment to the Workers' Compensation Law which made insurers liable for reopened cases no longer covered by the special fund (which has been eliminated) was unconstitutional. Although the insurers can adjust their premiums to cover future reopened cases no longer covered by the fund, the insurers cannot be compensated for reopened cases from prior to October 1, 2013, when premiums were lower because any reopened cases were the sole responsibility of the fund. The amendment therefore violated the Contract and Takings Clauses: "Plaintiffs . . . established that the amendment, as applied retroactively, violates the Contract Clause of the US Constitution because it retroactively impairs an existing contractual obligation to provide insurance coverage '[w]here *** the insurer does not have the right to terminate the policy or change the premium rate' ... . Defendants failed to show that the impairment is 'reasonable and necessary to serve' 'a significant and legitimate public purpose *** such as the remedying of a broad and general social or economic problem' ... . Indeed, the legislation's stated purpose of preventing a windfall to insurance carriers was based upon the erroneous premise that premiums already cover this new liability. Retroactive application would also constitute a regulatory taking in violation of the Takings Clause ...". ***American Economy Ins. Co. v. State of New York*, 2016 N.Y. Slip Op. 02924, 1st Dept 4-14-16**

SECOND DEPARTMENT

BAILMENT, CONTRACT LAW.

DEFENDANTS LIABLE UNDER A GRATUITOUS BAILMENT THEORY FOR DESTROYED GOODS; PROPER WAY TO CALCULATE DAMAGES FOR THE DESTROYED GOODS UNDER A CONTRACT THEORY EXPLAINED.

The Second Department determined the verdict in this bailment/contract action should not have been set aside as a matter of law under a gratuitous bailment theory, but was properly set aside because the damages amount was not supported by

the evidence. A new trial was ordered on damages only. The plaintiff is a horse breeder and defendants were storing frozen semen from plaintiff's stallion free of charge. Somehow the semen thawed and was therefore destroyed. The Second Department held the defendants were liable under a gratuitous bailment theory because the failure to return the stored goods is evidence of gross negligence. The court went on to find that the market value of the portion of the stored semen which was not under contract for sale had not been proven. ***Reed v. Cornell Univ.*, 2016 N.Y. Slip Op. 02797, 2nd Dept 4-13-16**

CRIMINAL LAW.

TRIAL JUDGE'S FAILURE TO WARN DEFENDANT OF THE CONSEQUENCES OF DISRUPTIVE BEHAVIOR BEFORE REMOVING DEFENDANT FROM THE COURTROOM WAS REVERSIBLE ERROR.

The Second Department reversed defendant's conviction because the trial judge did not first warn defendant about the consequences of disruptive behavior before removing defendant from the courtroom: "CPL 260.20 provides, in relevant part, 'that a defendant who conducts himself in so disorderly and disruptive a manner that his trial cannot be carried on with him in the courtroom may be removed from the courtroom if, after he has been warned by the court that he will be removed if he continues such conduct, he continues to engage in such conduct.' In the present case, the trial court erred in removing the defendant from the courtroom without first warning him that he would be removed if he continued his disruptive behavior ... . Contrary to the People's contention, the court's statement to the court officer that, 'If he speaks again, officer, do what you need to do,' did not constitute a sufficient warning. This statement was not directed to the defendant, and failed to adequately inform him of the 'potential consequences which might result from his continued disruptive behavior' ... . Furthermore, while the defendant's conduct was clearly disruptive, it was not violent in nature, and did not 'create[ ] an emergency necessitating his immediate removal' where 'the court had no practical opportunity to issue a verbal warning that [the] defendant would be removed if he continued to engage in such conduct' ...". ***People v. Burton*, 2016 N.Y. Slip Op. 02847, 2nd Dept 4-13-16**

CRIMINAL LAW, APPEALS.

DEFENSE WAIVED ANY OBJECTION TO A PROHIBITED CONVERSATION BETWEEN A COURT OFFICER AND JURORS BY ASKING THAT DELIBERATIONS CONTINUE DESPITE THE CONVERSATION; THE CONVERSATION DID NOT CONSTITUTE A MODE OF PROCEEDINGS ERROR.

The Second Department determined the defense waived objection to a court officer's conversation with three jurors during deliberations. Defense counsel asked that the jurors be questioned about their ability to continue and, after the questioning, asked that the jury continue to deliberate. The Second Department further held the communication by the court officer did not constitute a mode of proceedings error which need not be preserved. The decision includes a clear explanation of the types of issues which can be raised in a Criminal Procedure Law § 330.30 (CPL) motion to set aside the verdict and the distinction between waiver and preservation: "Except when authorized by the court or when performing administerial duties with respect to the jurors, court officers may not communicate with jurors or permit any other person to do so (*see* CPL 310.10[1]...). In considering a motion to set aside a verdict pursuant to CPL 330.30(1), however, a trial court may only consider questions of law, not fact ... . Moreover, a trial court may only consider claims of legal error under CPL 330.30(1) where those claims are preserved for appellate review ... . Waiver and preservation are separate concepts . . . , although they are often 'inextricably intertwined' ... . Waiver connotes the intentional relinquishment or abandonment of a known right ... . Where a defendant assents at trial to a court's decision, agrees with the court's determination, or requests that the court take the actions the court ultimately took, the defendant cannot, after the fact, claim the action constituted error ...". ***People v. Armstrong*, 2016 N.Y. Slip Op. 02843, 2nd Dept 4-13-16**

FAMILY LAW.

AWARDING WIFE A DISTRIBUTIVE SHARE OF HUSBAND'S MEDICAL PRACTICE AND DETERMINING HUSBAND'S MAINTENANCE OBLIGATION BASED UPON INCOME FROM THE PRACTICE DID NOT CONSTITUTE DOUBLE-COUNTING.

The Second Department, reversing Supreme Court, determined that distributing part of the value of defendant-husband's medical practice to the wife, and figuring the amount of maintenance defendant was to pay based upon his income from the medical practice, did not constitute double counting: "[T]he defendant's medical practices, which employ other individuals including several doctors, and his interest in an ambulatory surgical center, are not intangible assets which are 'totally indistinguishable' from the income stream upon which his maintenance obligation was based . . . , and the valuation method used by the plaintiff's expert to determine the fair market value of these assets does not change their essential nature. Accordingly, the Supreme Court erred in concluding that it had no discretion to award the plaintiff any distributive share of the value of these assets because the parties considered the defendant's entire 2010 income in reaching a stipulation as to his maintenance obligation." ***Palydowycz v. Palydowycz*, 2016 N.Y. Slip Op. 02793, 2nd Dept 4-13-16**

FAMILY LAW, IMMIGRATION LAW.

FAMILY COURT SHOULD HAVE GRANTED MOTHER'S APPLICATION FOR FINDINGS ALLOWING HER CHILDREN TO APPLY FOR SPECIAL IMMIGRANT JUVENILE STATUS.

The Second Department, reversing Family Court, determined Family Court should have made the requisite declaration and findings allowing mother's children to apply for special immigrant juvenile status (SIJS): "[T]he record supports the Family Court's findings that the children are under the age of 21 and unmarried, and that the children are dependent upon a juvenile court or legally committed to an individual appointed by a state or juvenile court within the meaning of 8 USC § 1101(a)(27)(J)(i) ... . The court erred, however, with respect to its recital of the element of 'reunification.' The law does not require a finding that reunification with one or both of a child's parents is viable, but that reunification with one or both of the parents is not viable due to abuse, neglect, abandonment, or a similar basis found under state law (*see* 8 USC § 1101[a][27][J][i]...). We have the authority to make that finding, and upon our independent factual review of the record, we find that reunification of the children with their father is not a viable option due to abandonment ...". ***Matter of Marlene G. H. (Pedro H. P.)*, 2016 N.Y. Slip Op. 02817, 2nd Dept 4-13-16**

PERSONAL INJURY.

SIDEWALK RISE OF A LITTLE OVER AN INCH WAS A NON-ACTIONABLE TRIVIAL DEFECT.

The Second Department determined a sidewalk rise of slightly more than an inch was a non-actionable trivial defect: "Here, the owners and the lessees submitted . . . evidence to establish that the defect at issue was, at most, a rise of slightly more than one inch in a portion of the sidewalk and that neither the alleged defect nor the surrounding circumstances increased the risk to her ... . [Plaintiff] testified at her deposition that she had traversed the sidewalk on numerous previous occasions without incident before the incident at issue. She testified that it was a sunny day and there were no crowds, construction, or other obstructions to block her view of the sidewalk as she traversed it. Thus, through her testimony, the owners and the lessees established that the alleged defect was not only small in size, but was also in a well-illuminated location that [plaintiff] had previously traversed on numerous occasions and that nothing in the area obstructed her view of the location and the alleged defect." ***Chee v. DiPaolo*, 2016 N.Y. Slip Op. 02777, 2nd Dept 4-13-16**

PERSONAL INJURY.

DEPRESSED DRAIN NEAR CONDOMINIUM ENTRANCE WAS A NON-ACTIONABLE TRIVIAL DEFECT.

The Second Department determined that a depressed drain near the entrance to a condominium was a non-actionable trivial defect: " 'Generally, whether a dangerous or defective condition exists depends on the particular facts of each case, and is properly a question of fact for the jury unless the defect is trivial as a matter of law' ... . '[I]njuries resulting from trivial defects, not constituting a trap or nuisance, over which a pedestrian might merely stumble, stub his or her toes, or trip are not actionable' ... . In determining whether a defect is trivial, the court must examine all of the facts presented, including the 'width, depth, elevation, irregularity and appearance of the defect along with the time, place, and circumstance of the injury' ... . '[T]here is no minimal dimension test or per se rule that a defect must be of a certain minimum height or depth in order to be actionable' ... . '[G]ranting summary judgment to a defendant based exclusively on the dimension[s] of the . . . defect is unacceptable' ... . Thus, 'a holding of triviality [is] to be based on all the specific facts and circumstances of the case, not size alone' ...". ***Maldonado v. 2121 Shore Condominium*, 2016 N.Y. Slip Op. 02780, 2nd Dept 4-13-16**

PERSONAL INJURY.

FACT THAT PLAINTIFF WAS RIDING HIS BICYCLE THE WRONG WAY ON A ONE-WAY STREET WHEN HE WAS STRUCK DID NOT ENTITLE DEFENDANT TO SUMMARY JUDGMENT; THERE CAN BE MORE THAN ONE PROXIMATE CAUSE OF AN ACCIDENT.

The Second Department, reversing Supreme Court, determined plaintiff's complaint should not have been dismissed. Plaintiff was injured when he was struck by a forklift as he was riding his bicycle the wrong way on a one-way street. Although plaintiff was negligent, the defendant failed to affirmatively demonstrate the forklift operator was free from negligence: "While the plaintiff was negligent in traveling the wrong way on a one-way street (*see* Vehicle and Traffic Law §§ 1127[a]; 1231, 1234[a]), there can be more than one proximate cause of an accident ... . A defendant moving for summary judgment has the burden of establishing freedom from fault in the happening of the accident ... . Thus, the fact that the plaintiff was riding his bicycle in the wrong direction on a one-way street would not preclude a finding that negligence by the defendant's employee contributed to the accident ... . Here, the defendant failed to meet its prima facie burden of establishing the forklift operator's freedom from fault in the happening of this accident as a matter of law ... . The papers the defendant submitted in support of its motion demonstrated the existence of triable issues of fact as to whether the forklift operator failed to exercise due care before proceeding from the driveway onto the street (*see* Vehicle and Traffic Law §§ 1143, 1146[a]; 1173...). ***Nunez v. Olympic Fence & Railing Co., Inc.*, 2016 N.Y. Slip Op. 02791, 2nd Dept 4-13-16**

PERSONAL INJURY, MEDICAL MALPRACTICE, EVIDENCE.

RADIOLOGIST WAS NOT QUALIFIED TO EXPRESS AN OPINION ON THE PROXIMATE CAUSE OF THE DEFORMITY WHICH WAS ALLEGED TO HAVE RESULTED FROM A FAILURE TO DIAGNOSE A FRACTURE.

The Second Department, reversing Supreme Court, determined the defendants in a medical malpractice action were entitled to summary judgment dismissing the complaint as against them. The complaint alleged defendant radiologist failed to diagnose a fractured finger, which was the proximate cause of a deformity. In opposition to defendants' motion for summary judgment, the plaintiff offered an affidavit from a radiologist, Dr. Tantleff, who was qualified to evaluate the alleged failed diagnosis, but was not qualified to find the failed diagnosis was the proximate cause of the deformity (an orthopedic matter). Therefore the defendants were entitled to summary judgment: "Here, Dr. Tantleff's opinion as to proximate cause was related to the specialty of orthopedics, but Dr. Tantleff failed to state any basis on which he could be found competent to opine in that area. Therefore he was not qualified to render an opinion that Fong's failure to diagnose the plaintiff's nondisplaced fracture proximately caused the alleged orthopedic injuries ... . Moreover, his assertion was speculative, as he cited to no record evidence to support his opinion that the plaintiff's alleged injuries were due to the undiagnosed fracture ...". ***Martinez v. Quintana*, 2016 N.Y. Slip Op. 02782, 2nd Dept 4-13-16**

PERSONAL INJURY, MUNICIPAL LAW, GOVERNMENTAL IMMUNITY.

THE CITY (NYC) HAD ENTERED A SPECIAL RELATIONSHIP WITH DEFENDANT PROPERTY OWNERS CONCERNING THE REPAIR OF A DEFECTIVE SIDEWALK, DEFENDANTS WERE ENTITLED TO CONTRIBUTION FROM THE CITY IN THIS SLIP AND FALL CASE.

The Second Department determined defendant property owners, the Bilellos, were entitled to contribution from the city (NYC), based upon a special relationship with the city, in a sidewalk slip and fall case. Tree roots had raised the sidewalk in front of the Bilellos property. The city issued a notice of violation to the Bilellos and the Bilellos were told by the city not to touch the sidewalk until a plan for repair was developed by the city. The Department of Forestry never got in touch with the Bilellos and plaintiff tripped and fell over the defect 11 months after the Bilellos' last communication from the city: "Here, it is undisputed that the City did not owe a direct duty of care to the plaintiff, because the 2003 enactment of Administrative Code of City New York 7-210 shifted liability for injuries arising from sidewalk defects from the City to the abutting property owner ... . However, if the City owed an independent, special duty to the Bilellos, it may be held liable 'for the portion of the damage attributable to [its] negligence, despite the fact that the duty violated was not one owing directly to the injured person' ... . 'Such a duty is found when a special relationship exists between the municipality and an individual or class of persons warranting the imposition of a duty to use reasonable care for those persons' benefit' ... . To establish the existence of a special relationship based on a municipality's voluntary assumption of a duty, the party asserting the relationship has a heavy burden to prove the following elements: (1) an assumption by the municipality, through promises or actions, of an affirmative duty to act on behalf of the party; (2) knowledge on the part of the municipality's agents that inaction could lead to harm; (3) some form of direct contact between the municipality's agents and the party; and (4) the party's justifiable reliance on the municipality's affirmative undertaking ...". ***Stanciu v. Bilello*, 2016 N.Y. Slip Op. 02802, 2nd Dept 4-13-16**

ZONING, LAND USE.

EXTENSIONS OF NONCONFORMING USE SHOULD NOT HAVE BEEN ALLOWED.

The Second Department determined the extension of a nonconforming use by the construction of decks, a gazebo, awning and detached shed should not have been permitted by the board of zoning appeals (BZA): "[T]he Surf Club's erection of the decks, the awning, the gazebo, and the detached shed on its premises, and the completion of certain alterations to its clubhouse, constituted an impermissible extension of that nonconforming use, not a mere increase in volume or intensity of the same nonconforming use ... . As such, the BZA's determination to grant the Surf Club's application for an extension of nonconforming use violated Code of Town of Brookhaven § 85-883(A)(2), which prohibits the extension of nonconforming uses. Accordingly, the portion of the BZA's determination which granted the Surf Club's application for an extension of nonconforming use was arbitrary and capricious and should have been annulled by the Supreme Court." ***Matter of Martinos v. Board of Zoning Appeals of Town of Brookhaven*, 2016 N.Y. Slip Op. 02828, 2nd Dept 4-13-16**

THIRD DEPARTMENT

ARBITRATION, GENERAL BUSINESS LAW, CONTRACT LAW.

CONSTRUCTION CONTRACT PROVISION MAKING LITIGATION THE SOLE METHOD FOR RESOLVING A DISPUTE RENDERED VOID BY GENERAL BUSINESS LAW.

The Third Department determined the General Business Law rendered void a provision in a construction subcontract mandating litigation as the sole method for resolving a dispute: "General Business Law § 757 (3) . . . unambiguously voids and renders unenforceable any contractual provision that makes expedited arbitration unavailable to one or both parties. ... [T]

he obvious function of section 6.2 of the subcontract is to establish litigation as the sole legal option for the resolution of disputes under the subcontract, which, in turn, denies both parties the opportunity to arbitrate such claims. Inasmuch as General Business Law § 757 (3) clearly operates to void and render unenforceable the subcontract's dispute resolution provision, we find that Supreme Court properly denied petitioner's application to stay arbitration." ***Matter of Capital Siding & Constr., LLC (Alltek Energy Sys., Inc.)*, 2016 N.Y. Slip Op. 02878, 3rd Dept 4-14-16**

BANKRUPTCY.

APPELLANT COULD NOT PURSUE COUNTERCLAIMS AND CROSS-CLAIMS WHICH WERE NOT LISTED AS ASSETS IN APPELLANT'S BANKRUPTCY PETITION; THE CAUSES OF ACTION REMAIN VESTED IN THE BANKRUPTCY ESTATE.

The Third Department determined appellant was precluded from raising counterclaims and cross-claims in a matter which was stayed when appellant filed for bankruptcy. The causes of action were not listed as assets and therefore became the property of the bankruptcy estate: "It is fundamental that, '[u]pon the filing of a voluntary bankruptcy petition, all property which a debtor owns . . . , including a cause of action, vests in the bankruptcy estate' ... . Such a cause of action 'can only revert to the debtor to be pursued in his or her individual capacity if the claim is 'dealt with' in the bankruptcy, which necessitates it being listed as an asset [in the schedule of assets] and either abandoned by the bankruptcy trustee or administered by the bankruptcy court for the benefit of the creditors' ... . Accordingly, 'a debtor's failure to list a legal claim as an asset in his or her bankruptcy proceeding causes the claim to remain the property of the bankruptcy estate and precludes the debtor from pursuing the claim on his or her own behalf' ...". ***Central Natl. Bank, Canajoharie v. Scotty's Auto Sales, Inc.*, 2016 N.Y. Slip Op. 02876, 3rd Dept 4-14-16**

CIVIL PROCEDURE, EVIDENCE, CONTRACT LAW.

MOTION TO AMEND PLEADINGS BASED ON TRIAL EVIDENCE OF MUTUAL MISTAKE PROPERLY GRANTED, CRITERIA EXPLAINED.

The Third Department determined Supreme Court properly allowed the pleadings to be amended to conform to the evidence at trial. The trial evidence indicated the contract at issue was based upon mutual mistake rather than deliberate misrepresentation. The motion to amend the pleadings to allege mutual mistake was properly granted and the contract was properly rescinded on that ground: The burden was upon defendant, as the party opposing plaintiff's motion, to establish that it was 'hindered in the preparation of [its] case or . . . prevented from taking some measure in support of [its] position' ... . That burden cannot be met when the difference between the original pleading and the evidence results from 'proof admitted at the instance or with the acquiescence of [the opposing] party' ... . Here, the proof upon which plaintiff's motion was based was the testimony of defendant's president that she acted mistakenly in providing the wrong sales figures ... . Given this testimony, defendant cannot have been surprised or unduly prejudiced by plaintiff's assertion of the theory of mutual mistake; thus, leave to conform the pleadings to the proof was properly granted ...". ***Lakshmi Grocery & Gas, Inc. v. GRJH, Inc.*, 2016 N.Y. Slip Op. 02891, 3rd Dept 4-14-16**

FAMILY LAW, ATTORNEYS.

ATTORNEY WHO HAD PREVIOUSLY PROSECUTED MOTHER FOR ENDANGERING THE WELFARE OF A CHILD SHOULD NOT HAVE BEEN APPOINTED TO REPRESENT MOTHER'S CHILDREN IN A CUSTODY MATTER; IN THE ABSENCE OF EVIDENCE MOTHER WAS PREJUDICED BY CONFIDENTIAL INFORMATION MOTION TO VACATE CUSTODY STIPULATION ON CONFLICT OF INTEREST GROUNDS PROPERLY DENIED.

The Third Department determined Family Court should not have allowed an attorney who, as an assistant District Attorney, prosecuted mother for endangering the welfare of a child, to serve as the children's attorney in a custody matter. Mother moved to vacate the custody stipulation, in part based upon the attorney's (Bielicki's) conflict of interest. The fact that Bielicki should not have been appointed, in the absence of evidence of actual prejudice to mother from the use of confidential information, did not warrant vacation of the stipulation: "The mother . . . argues that Bielicki's representation of the children violated Rules of Professional Conduct (22 NYCRR 1200.0) rule 1.11 (c), which provides that 'a lawyer having information that the lawyer knows is confidential government information about a person, acquired when the lawyer was a public officer or employee, may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person.' The rule defines confidential governmental information as 'information that has been obtained under governmental authority and that, at the time this Rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose, and that is not otherwise available to the public' ... . * * * Bielicki's assignment as attorney for the children in this matter was contrary to the standards set forth in Rules of Professional Conduct (22 NYCRR 1200.0) rule 1.11 (c) — and, for that reason, Family Court . . . should not have permitted Bielicki to serve in that capacity — such error, without more, does not warrant vacatur of the stipulation and order." ***Matter of Tina X. v John X.*, 2016 N.Y. Slip Op. 02874, 3rd Dept 4-14-16**

UNEMPLOYMENT INSURANCE.

CO-WORKERS' EGREGIOUS AND LEWD BEHAVIOR, TOGETHER WITH THE EMPLOYER'S INADEQUATE RESPONSE, CONSTITUTED GOOD CAUSE FOR LEAVING EMPLOYMENT.

The Third Department determined that co-workers' egregious, lewd and harassing behavior, combined with the employer's inadequate response, provided good cause for claimant's leaving employment: " 'Whether a claimant has left employment for good cause so as to qualify for unemployment insurance benefits is a factual issue to be resolved by the Board and its determination will be upheld if supported by substantial evidence' ... . The Board was free to, and did, credit claimant's testimony that she did not feel safe or comfortable with continuing her employment after the egregious behavior of her coworker. The record evidence also reflects that claimant had previously reported harassment by another male coworker, who was reprimanded by the employer. In view of this pattern of sexual harassment and the employer's inadequate offer to transfer claimant to a nearby building — where she would still be forced to interact with the service center — substantial evidence supports the Board's determination that claimant left her employment for good cause ...". ***Matter of Labbate (Robert Green Auto & Truck, Inc.--Commissioner of Labor)*, 2016 N.Y. Slip Op. 02898, 3rd Dept 4-14-16**

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