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COURT OF APPEALS

CIVIL PROCEDURE.

ARTICLE 78 PROCEEDING AGAINST A SURROGATE'S COURT JUDGE MUST BE COMMENCED IN SUPREME COURT, NOT THE APPELLATE DIVISION.

The Court of Appeals, in a full-fledged opinion by Judge Garcia, determined that, pursuant to the controlling statute, CPLR 506 (b)(1), an Article 78 proceeding against a Surrogate's Court judge must be commenced in Supreme Court, not the Appellate Division. Under the statute, only actions against Supreme and County Court judges must be commenced in the Appellate Division. The fact that the subject judge served as both a County Court and Surrogate's Court judge was of no consequence: "Venue for an article 78 proceeding against a multi-bench judge is determined by the capacity in which that judge was serving when the action that is challenged was taken. Respondent in this case was a Surrogate's Court Judge, acting as such in probating the will at issue, and the proceeding should have been brought in Supreme Court." ***Matter of Tonawanda Seneca Nation v. Noonan*, 2016 N.Y. Slip Op. 04974, CtApp 6-23-16**

CRIMINAL LAW, APPEALS.

AFFIDAVIT OF ERRORS MUST BE FILED AS A PREREQUISITE FOR TAKING AN APPEAL FROM A CONVICTION IN A LOCAL COURT WHERE THERE WAS NO STENOGRAPHER; TRANSCRIPT OF ELECTRONIC RECORDING IS NOT A SUBSTITUTE FOR AN AFFIDAVIT OF ERRORS.

The Court of Appeals, in a full-fledged opinion by Judge DiFiore, determined the filing of an affidavit of errors is a jurisdictional prerequisite to appealing from a conviction in a local court where there was no court stenographer. In both cases before the Court of Appeals, a transcript of an electronic recording of the local court proceedings was filed in lieu of an affidavit of errors. The transcript of an electronic recording, the Court of Appeals held, is not a substitute for an affidavit of errors. However, an unambiguous transcript of an electronic recording can be submitted by the defendant along with the affidavit of errors, or by the court in its return, responding to the affidavit of errors: "CPL 460.10 is 'free from ambiguity and express[es] plainly, clearly and distinctly the legislative intent' . . . , that, where the underlying proceedings are not recorded by a court stenographer, a defendant must file an affidavit of errors. Thus, defendants' failure to do so is a jurisdictional defect requiring dismissal. The 2008 order of the Chief Administrative Judge of the State of New York requiring the mechanical recording of proceedings in town and village justice courts — issued no doubt to enhance the record on appeal — cannot amend or supplement the legislative scheme setting forth the requirements for taking an appeal. That is a job for the legislature. An electronic recording that fully captures the proceedings and is later transcribed may be incorporated in an affidavit of errors, or in the court's return, and filed as a proposed record on appeal ... . However, the filing of a record on appeal is distinct from the taking of the appeal, and a transcript will not fulfill the jurisdictional requirement of the filing of the affidavit of errors." ***People v. Smith*, 2016 N.Y. Slip Op. 04973, CtApp 6-23-16**

CRIMINAL LAW, EVIDENCE.

DARDEN HEARING NOT NECESSARY WHERE POLICE OBSERVATIONS SUFFICIENT TO PROVIDE PROBABLE CAUSE FOR THE SEARCH OF DEFENDANT'S APARTMENT.

The Court of Appeals, in a full-fledged opinion by Judge Stein, held that a *Darden* hearing was not necessary to demonstrate the source of information provided to the police was in fact a reliable confidential informant (CI) (as opposed to an illegal wiretap, for example). Based upon a tip from the CI, the police arranged two controlled buys of drugs from the defendant by the CI. The transactions were recorded but not actually observed by the police. Based on the two controlled buys, a search warrant for defendant's apartment was issued and a significant quantity of cocaine was seized. Defendant was charged with what was found in the search, not the controlled buys. The Court of Appeals held that the observations of the police provided probable cause for the search, without any need to refer to the information provided by the CI: "Here, evidence was presented concerning two controlled drug buys. The People did not establish that the police directly observed that drugs or money were exchanged between defendant and the CI in either transaction ... . However, such a showing was unnecessary because the People were not attempting to establish probable cause to arrest defendant for his participation in those drug buys. Instead, the People sought only to establish probable cause to search defendant's apartment for drug

activity. The proof concerning the two controlled buys — independent of the CI's statements — was sufficient to establish probable cause for that purpose." ***People v. Crooks*, 2016 N.Y. Slip Op. 04975, CtApp 6-23-16**

FIRST DEPARTMENT

ATTORNEYS.

RECOVERY OF ATTORNEY FEES UNDER QUANTUM MERUIT THEORY IN ABSENCE OF A RETAINER AGREEMENT PROPER; PROVISION IN AGREEMENT FOR RECOVERY OF ATTORNEY FEES FOR COLLECTION OF FEES FROM THE CLIENT VOID BECAUSE THERE WAS NO RECIPROCAL PROVISION SHOULD THE CLIENT PREVAIL.

The First Department determined plaintiff attorney was entitled to recover fees under quantum meruit theory despite absence of a retainer agreement (for some, but not all, of the work). The court further determined that a provision of the retainer agreement, which allowed plaintiff to seek attorney fees for recovery of fees from the client, was void because there was no reciprocal provision should the client prevail. ***Ferst v. Abraham*, 2016 N.Y. Slip Op. 05034, 1st Dept 6-23-16**

CRIMINAL LAW, EVIDENCE, APPEALS.

EVIDENCE OF PHYSICAL INJURY INSUFFICIENT FOR SECOND-DEGREE ROBBERY; ISSUE PRESERVED DESPITE GENERAL MOTION FOR TRIAL ORDER OF DISMISSAL.

The First Department, in a full-fledged opinion by Justice Manzanet-Daniels, over a two-justice dissent, determined the evidence of "physical injury" was insufficient to support a second-degree robbery conviction. The issue was deemed preserved for appeal, despite only a general motion for a trial order of dismissal, because the court addressed the issue in other contexts. The dissent argued the issue was not preserved and the evidence of physical injury was sufficient: "Although defendant made only a general motion for a trial order of dismissal at the close of the People's case, the issue was clearly raised. The People in opposing the motion argued that the jury could infer 'substantial pain and physical impairment based on the markings on [complainant's] face.' While denying the motion, the court noted that there was a reasonable view of the evidence that defendant committed third-degree robbery (which does not have a physical injury element) as opposed to second-degree robbery — a factor that influenced the court's decision to grant the People's motion to charge the lesser included offense of robbery in the third degree. In reviewing the photos the court noted that there was 'redness' to the complainant, stating, 'Whether that's physical injury or not, I don't know.' The issue was revisited when the court ruled on defendant's posttrial 330.30 motion. * * * The photographs in evidence depict only slight redness on the complainant's neck and hands. They do not show cuts, abrasions, lacerations, or anything of the kind. The victim did not seek medical treatment. There are no medical records. Further, inasmuch as the victim in this case did not testify, there is no evidence concerning even his subjective experience of pain. Without any testimony from the complainant or medical records substantiating same, it is impossible to know if he was in significant pain, or whether the pain to his jaw was slight or trivial ...". ***People v. Rios*, 2016 N.Y. Slip Op. 04891, 1st Dept 6-21-16**

CRIMINAL LAW, EVIDENCE, APPEALS.

ARGUMENT THAT DNA EXPERT RELIED ON DATA GATHERED BY NONTESTIFYING ANALYSTS, THEREBY VIOLATING DEFENDANT'S RIGHT OF CONFRONTATION, NOT PRESERVED FOR APPELLATE REVIEW.

The First Department determined defendant's claim his right of confrontation was violated by the testimony of the DNA expert was not preserved for review. Defendant argued the DNA expert relied on data gathered by analysts who did not testify: "Defendant's claim that his right of confrontation was violated by the testimony of a DNA expert who prepared reports documenting the match between defendant's DNA and DNA found at the crime scenes, and referred to data gathered by nontestifying analysts, is unpreserved and we decline to review it in the interest of justice. When, at the outset of the analyst's testimony, the court inquired whether there was a Confrontation Clause issue, defense counsel remained silent, and he did not object to any DNA evidence on constitutional or other grounds, or request that the People call any other analysts. Although counsel cross-examined the witness about the fact that he did not perform all the steps in the DNA analysis, this was for the purpose of undermining the jury's confidence in the DNA evidence, and it did not raise any legal issue for determination by the court ... . We decline to decide whether, by way of 'independent analysis' or otherwise, this witness possessed the 'requisite personal knowledge' to satisfy the requirements of *People v John* (NY3d, 2016 N.Y. Slip Op. 03208, *27-28 [2016]). ***People v. Daly*, 2016 N.Y. Slip Op. 05048, 1st Dept 6-23-16**

LANDLORD-TENANT, REAL PROPERTY ACTIONS AND PROCEEDINGS LAW.

TENANT ENTITLED TO TREBLE DAMAGES BECAUSE LANDLORD WRONGFULLY ATTEMPTED TO EJECT TENANT FROM THE LEASED PREMISES.

The First Department determined plaintiff tenant was entitled to treble damages for the landlord's attempt to unlawfully eject plaintiff from the leased premises: "Real Property Actions and Proceedings Law § 853 . . . provides: 'If a person is disseized, ejected, or put out of real property in a forcible or unlawful manner, or, after he has been put out, is held and kept out

by force or by putting him in fear of personal violence or by unlawful means, he is entitled to recover treble damages in an action therefor against the wrong-doer.' 'RPAPL § 853 and its predecessor . . . were enacted to discourage undue intimidation and violence in the ejection of persons from real property by providing for treble damages under certain circumstances' ... . The statute was amended in 1981 to include the references to 'unlawful manner' and 'unlawful means' . . . and was 'intended to remedy such actions as removing the tenant's possessions while he or she is out, or by . . . changing the door lock ...'. * * * Here, defendants did not dispute plaintiff's allegations that after executing a lease extension, which defendants wanted to rescind, he returned home and found defendants in the process of changing the dead bolt lock on his front door, despite the fact that they had not commenced legal proceedings to evict him and did not have permission to enter the apartment. Plaintiff also alleged, and provided an affidavit supporting his claim, that all of his personal effects, clothing, valuable jewelry, electronics and other possessions were removed from the apartment, and his demands for the location and return of his property were refused by defendants for at least a month." ***Hood v. Koziej*, 2016 N.Y. Slip Op. 04889, 1st Dept 6-21-16**

MUNICIPAL LAW, CRIMINAL LAW, HUMAN RIGHTS LAW.

NYC LOCAL LAW PROHIBITING BIASED-BASED PROFILING ("STOP AND FRISK") NOT PREEMPTED BY STATE CRIMINAL PROCEDURE LAW.

The First Department, in a full-fledged, extensive opinion by Justice Acosta, determined New York City Local Law 71, which prohibits bias-based profiling (i.e., "stop and frisk") was not preempted by the Criminal Procedure Law (CPL). The plaintiff police unions argued the Criminal Procedure Law preempted the local law because: (1) the state legislature intended that the Criminal Procedure Law assume full responsibility for regulating police actions (field preemption); and (2) the local law conflicted with the Criminal Procedure Law (conflict preemption). Both arguments were rejected by the First Department: "In short, the CPL and Local Law 71 involve 'independent realm[s] of governance' ... . The CPL, a state criminal procedure statute, does not evince the Legislature's 'unmistakable desire' to preclude localities from addressing the discriminatory conduct of law enforcement officers and providing civil remedies to persons subjected to such conduct ... . Therefore, Local Law 71 is not invalid under the doctrine of field preemption. * * * ... [W]e reject plaintiffs' argument that Local Law 71 conflicts with the CPL. Local Law 71 essentially prohibits discrimination by law enforcement, which it terms 'bias-based profiling,' defined as a law enforcement act 'that relies on [an individual's protected status] as the determinative factor in initiating law enforcement action against an individual, rather than an individual's behavior or other information or circumstances that links a person or persons to suspected unlawful activity.' Nowhere in the CPL is there language specifically permitting police officers to engage in such discriminatory conduct. Nor does the case law interpreting the CPL permit police officers to discriminate in this way." ***Patrolmen's Benevolent Assn. of the City of New York, Inc. v. City of New York*, 2016 N.Y. Slip Op. 05057, 1st Dept 6-23-16**

PERSONAL INJURY.

TRUCK RENTAL COMPANY, PURSUANT TO THE GRAVES AMENDMENT, DEMONSTRATED IT WAS NOT LIABLE FOR THE DEATH CAUSED BY ITS TRUCK, TRUCK PROPERLY MAINTAINED.

The First Department held that defendant truck-rental company (Penske) demonstrated it was entitled to summary judgment under the Graves Amendment in this vehicle-accident case: "Penske established its entitlement to summary judgment under the Graves Amendment (*see* 49 USC § 30106[a]) by showing that the accident in which a truck owned by it struck and killed plaintiff's decedent was not caused by any negligent maintenance on its part ... . Penske submitted evidence that it regularly maintained the truck, including the brakes, that it had inspected the brakes two months before the accident and found no defect, and that there was no report or other evidence of any brake failure before the accident. In opposition, plaintiff failed to raise a triable issue of fact as to whether the brakes were negligently maintained." ***Reifsnyder v. Penske Truck Leasing Corp.*, 2016 N.Y. Slip Op. 05022, 1st Dept 6-23-16**

PERSONAL INJURY.

FAILURE TO SHOW WHEN SLIP AND FALL AREA WAS LAST INSPECTED OR CLEANED PRECLUDED SUMMARY JUDGMENT.

The First Department determined defendant's failure to demonstrate when the area of the slip and fall was last inspected or cleaned precluded summary judgment in defendant's favor: "Plaintiff alleges that as he was returning to a show at defendant August Wilson Theater after having gone outside during intermission, he slipped on a wet staircase, causing him to sustain injuries. The evidence submitted by defendant was insufficient to establish prima facie that it lacked constructive notice of the alleged water hazard. Although defendant described its general cleaning routines at the theater, it failed to offer specific evidence as to its activities on the day of the accident, including evidence indicating the last time the staircase was inspected or maintained before plaintiff fell ...". ***Sada v. August Wilson Theater*, 2016 N.Y. Slip Op. 05024, 1st Dept 6-23-16**

PERSONAL INJURY, EVIDENCE.

DEFENDANT'S RELIANCE ON A POLICE REPORT IN SUMMARY JUDGMENT PROCEEDINGS WAIVED ANY OBJECTION TO DEFENDANT'S ADMISSION INCLUDED IN THE REPORT ON HEARSAY OR AUTHENTICATION GROUNDS.
The First Department, in this car-accident case, noted that defendant waived any objection to an admission included in the police report because the defendant relied on the report. Therefore, summary judgment in favor of plaintiff on liability was proper: "Plaintiff made a prima facie showing of his entitlement to judgment as a matter of law on the issue of liability. He submitted evidence showing that defendant driver made an illegal U-turn, in violation of Vehicle and Traffic Law § 1163(a), and collided with plaintiff's car within seconds and before plaintiff had any opportunity to avoid the collision ... . Defendant driver's admission in the police accident report that he had made an illegal U-turn and had collided with plaintiff's car is admissible, since defendants also relied upon the report and waived any hearsay or authentication objection ...". ***Cruz v. Skeritt*, 2016 N.Y. Slip Op. 04883, 1st Dept 6-21-16**

PERSONAL INJURY, EVIDENCE.

CONCLUSORY EXPERT AFFIDAVIT ALLEGING INADEQUATE SALTING INSUFFICIENT TO DEFEAT DEFENDANT'S MOTION FOR SUMMARY JUDGMENT IN THIS SLIP AND FALL CASE.
The First Department noted that plaintiff's expert's affidavit alleging inadequate salting of the ice and snow where plaintiff fell was conclusory and therefore insufficient to defeat defendant's motion for summary judgment: "Defendant established its entitlement to judgment as a matter of law, in this action where plaintiff alleges that she was injured when she slipped and fell on ice on a sidewalk abutting defendant's property. Defendant submitted evidence, including an affidavit from the property's caretaker, showing that it made efforts to clear the sidewalks of snow within a reasonable amount of time after the snowfall had ended ... . In opposition, plaintiff failed to raise a triable issue of fact. Plaintiff failed to offer a basis from which it could be reasonably inferred that defendant's snow-removal efforts 'created or heightened' the alleged haz-ardous condition ... . Plaintiff submitted an expert affidavit from a meteorologist, who concluded that ice could only have been present due to an inadequate salting of the snow that caused the snow to melt, but did not prevent it from refreezing. However, the expert did not explain how the application of salt lowers the freezing temperature for water; what amount of salt would have been sufficient, given the temperature that day, to keep melted snow from refreezing; or the basis for his statement that defendant applied too little salt. Accordingly, plaintiff's arguments as to the origination of the allegedly dangerous condition are speculative and conclusory, and insufficient to defeat the motion ...". ***Rivas v. New York City Hous. Auth.*, 2016 N.Y. Slip Op. 05033, 1st Dept 6-23-16**

PERSONAL INJURY, LABOR-LAW CONSTRUCTION LAW.

PROOF PLAINTIFF FELL WHEN LADDER WOBBLED SUFFICIENT FOR SUMMARY JUDGMENT ON THE LABOR LAW § 240(1) CAUSE OF ACTION.
The First Department held that proof plaintiff fell after the ladder wobbled was sufficient to support summary judgment on the Labor Law § 240(1) cause of action. Proof the ladder was defective is not necessary: " 'Liability under Labor Law § 240(1) depends on whether the injured worker's task creates an elevation-related risk of the kind that safety devices listed in section 240(1) protect against' ... . '[T]he single decisive question is whether plaintiff's injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential' ... . Under this section of the Labor Law, a plaintiff's comparative fault is not a defense ... . 'Where a ladder is offered as a work-site safety device, it must be sufficient to provide proper protection. It is well settled that [the] failure to properly secure a ladder, to ensure that it remain[s] steady and erect while being used, constitutes a violation of Labor Law § 240(1)' ...". ***Hill v. City of New York*, 2016 N.Y. Slip Op. 05019, 1st Dept 6-23-16**

SECOND DEPARTMENT

CIVIL PROCEDURE.

COUNTERCLAIM ARISING OUT OF THE SAME TRANSACTION AS THAT ASSERTED BY THE PLAINTIFF IN THE COMPLAINT IS VALID EVEN THOUGH THE COUNTERCLAIM WOULD BE TIME-BARRED IF BROUGHT AS AN INDEPENDENT ACTION, RECOVERY ON THE COUNTERCLAIM AVAILABLE ONLY UP TO THE AMOUNT DEMANDED BY PLAINTIFF (RECOUPMENT).
The Second Department noted that defendant's legal malpractice counterclaim was viable, although it would have been time-barred as an independent action. The counterclaim is valid up to the amount demanded by plaintiff: "Under CPLR 203(d), claims and defenses that arise out of the same transaction as a claim asserted in the complaint are not barred by the statute of limitations, even though an independent action by the defendant might have been time-barred at the time the action was commenced. This provision allows a defendant to assert an otherwise untimely claim which arose out of the same transactions alleged in the complaint, but only as a shield for recoupment purposes, and does not permit the defendant to

obtain affirmative relief ... . The defendant's counterclaim alleging legal malpractice relates to the plaintiff's performance under the same retainer agreement pursuant to which the plaintiff would recover, and therefore this counterclaim falls within the permissive ambit of CPLR 203(d) ... . However, the counterclaim is permitted only to the extent that it seeks to offset any award of legal fees to the plaintiff and not to the extent that it seeks affirmative relief." ***Balanoff v. Doscher*, 2016 N.Y. Slip Op. 04896, 2nd Dept 6-22-16**

CIVIL PROCEDURE, RELIGION.

SUPREME COURT LACKED SUBJECT MATTER JURISDICTION; CASE WOULD HAVE REQUIRED APPLICATION OF RELIGIOUS PRINCIPLES.

The Second Department determined Supreme Court properly granted defendants' motion to dismiss for lack of subject matter jurisdiction because the defamation action would have required the court to apply religious principles: "The plaintiff's claims cannot be decided solely upon the application of neutral principles of law, without reference to religious principles ... . In particular, the courts would be involved in determining the proper interpretation and understanding of the Hebrew word 'mizuyaf,' the authenticity requirements for documents being submitted on an application to a Jewish religious tribunal for permission to remarry, and the validity of the documents submitted in the context of a Jewish religious divorce dispute. Thus, the court would be impermissibly entangled in the application of religious customs, laws, and procedures ...". ***Hafif v. Rabbinical Council of Syrian & Near E. Jewish Communities in Am.*, 2016 N.Y. Slip Op. 04909, 2nd Dept 6-22-16**

CRIMINAL LAW, EVIDENCE.

PEOPLE DID NOT DEMONSTRATE DEFENDANT UNDERSTOOD HIS *MIRANDA* RIGHTS, STATEMENT SHOULD HAVE BEEN SUPPRESSED.

The Second Department, reversing Supreme Court, determined the People did not demonstrate defendant understood the *Miranda* warnings and his statement, therefore, should have been suppressed. Defendant's limited understanding of English, his IQ and his limited ability to read were important factors in the "totality of the circumstances" review: "[T]he totality of the circumstances surrounding the interrogation establish that the defendant did not voluntarily, knowingly, and intelligently waive his *Miranda* rights. At the suppression hearing, the defendant presented the testimony of a forensic psychologist who examined him . . . , performed psychological tests, tested the defendant's understanding of the *Miranda* warnings, and reviewed the defendant's educational and psychological history. The defendant's expert testified that the defendant gave his history, reporting that he had emigrated as a child from Haiti, that English was not his first language, and that he had been placed in special education in this country. The psychologist testified that the defendant's IQ score was 53, and characterized him as being mildly mentally retarded or having borderline intellectual functioning. Tests further revealed that the defendant's score on a reading test was at the kindergarten level." ***People v. Cleverin*, 2016 N.Y. Slip Op. 04955, 2nd Dept 6-22-16**

EMPLOYMENT LAW, PUBLIC HEALTH LAW.

PLAINTIFF PHARMACIST ADEQUATELY PLED RETALIATION THEORY UNDER LABOR LAW § 741 (WHISTLEBLOWER STATUTE), CRITERIA EXPLAINED.

The Second Department, reversing Supreme Court, determined plaintiff, a pharmacist, had adequately pled a cause of action pursuant to Labor Law § 741 alleging her employer retaliated against her for complaining about hazardous and unsanitary conditions at the pharmacy. The relevant pleading criteria were explained: "Labor Law § 741(2) provides that 'no employer shall take retaliatory action against any employee because the employee . . . discloses or threatens to disclose to a supervisor, or to a public body an activity, policy or practice of the employer or agent that the employee, in good faith, reasonably believes constitutes improper quality of patient care' (Labor Law § 741[2][a]). The statute defines 'employee' as 'any person who performs health care services for and under the control and direction of any public or private employer which provides health care services for wages or other remuneration' (Labor Law § 741[1][a]). Here, the plaintiff sufficiently pleaded that she was an 'employee' as defined by Labor Law § 741 by alleging that she was responsible for 'compounding medications, compounding chemotherapy and consulting with physicians, nurses and patients' ... . Moreover, 'for pleading purposes [for a Labor Law § 741 cause of action], the complaint need not specify the actual law, rule or regulation violated, although it must identify the particular activities, policies or practices in which the employer allegedly engaged, so that the complaint provides the employer with notice of the alleged complained-of conduct' ... . Here, the plaintiff sufficiently identified the activities, policies, and practices in which the defendant allegedly engaged and which may have presented 'a substantial and specific danger to public health or safety or a significant threat to the health of a specific patient' ...". ***Von Maack v. Wyckoff Hgts. Med. Ctr.*, 2016 N.Y. Slip Op. 04932, 2nd Dept 6-22-16**

PERSONAL INJURY.

NO DUTY OF CARE OWED TO PLAINTIFF WHO ACTED AS A VOLUNTEER WHEN HE CLIMBED A LADDER.

The Second Department determined defendant's motion for a judgment as a matter of law should have been granted. The court held the plaintiff, a resident of defendant's building, acted as a volunteer when he ascended a ladder in the building to look for stray cats and then fell. Because plaintiff was a volunteer, he was owed no duty of care by the defendant: "Here, the Supreme Court should have granted the defendant's motion pursuant to CPLR 4401 for judgment as a matter of law on the issue of liability. Under the circumstances, viewing the evidence in the light most favorable to the plaintiff, the plaintiff was a volunteer and had no basis for recovery against the defendant ...". ***Barnes v. Sam Burt Houses, Inc.*, 2016 N.Y. Slip Op. 04897, 2nd Dept 6-22-16**

PERSONAL INJURY, LABOR LAW-CONSTRUCTION LAW.

HOMEOWNER EXERCISED CONTROL OVER PLAINTIFF'S WORK, NOT ENTITLED TO HOMEOWNER'S EXCEPTION TO LIABILITY UNDER LABOR LAW §§ 240(1) AND 241(6).

The Second Department determined defendant was not entitled to the homeowner's exception to liability under Labor Law §§ 240(1) and 241(6) and plaintiff, who fell from a makeshift ladder after feeling the ladder "jerk," was entitled to summary judgment on his Labor Law § 240(1) cause of action. Although the defendant (called the appellant in the decision) owned the single-family home where plaintiff fell, defendant exercised control over the work: " '[I]n order for a defendant to receive the protection of the homeowners' exemption, the defendant must satisfy two prongs required by the statutes. First, the defendant must show that the work was conducted at a dwelling that is a residence for only one or two families' ... . 'The second requirement . . . is that the defendants not direct or control the work' ... . ' The expressed and unambiguous language of both [Labor Law §§ 240(1) and 241(6)] focuses upon whether the defendants supervised the methods and manner of the work' ... . … [T]he appellant's control of the work site exceeded that of the ordinary homeowner, since he was involved in the construction, assembled and placed the ladder where it was, and instructed the workers to use it for access to the second floor ... . The appellant also performed some of the work at the site himself, coordinated the subcontractors, and was 8 to 10 feet away from the plaintiff's decedent at the time of the accident, performing work on the entrance door. Because of his involvement in and control of the work site, the appellant was not entitled to the homeowners' exception under Labor Law §§ 240(1) and 241(6) ...". ***Ramirez v. I.G.C. Wall Sys., Inc.*, 2016 N.Y. Slip Op. 04927, 2nd Dept 6-22-16**

PERSONAL INJURY, MEDICAL MALPRACTICE.

QUESTION OF FACT WHETHER HOSPITAL VICARIOUSLY LIABLE FOR ACTIONS OF NON-EMPLOYEE ANESTHESIOLOGIST UNDER DOCTRINE OF APPARENT AUTHORITY.

The Second Department determined there was a question of fact whether the defendant hospital, Hudson Valley Hospital Center (HVHC), was vicariously liable for the actions of an anesthesiologist who was not a hospital employee. The court explained the theory of apparent or ostensible authority: " 'In order to create . . . apparent agency, there must be words or conduct of the principal, communicated to a third party, which give rise to the appearance and belief that the agent possesses the authority to act on behalf of the principal. The third party must reasonably rely on the appearance of authority, based on some misleading words or conduct by the principal, not the agent. Moreover, the third party must accept the services of the agent in reliance upon the perceived relationship between the agent and the principal, and not in reliance on the agent's skill' ... . 'There are two elements to such a claim of apparent or ostensible agency. To establish the holding out element, the misleading words or conduct must be attributable to the principal. To establish the reliance element, the third party must accept the agent's services and submit to the agent's care in reliance on the belief that the agent was an employee of the principal' ... . In the context of a medical malpractice action against a hospital, the patient must have reasonably believed that the physicians treating him or her were provided by the hospital or acted on the hospital's behalf ...". ***Keesler v. Small*, 2016 N.Y. Slip Op. 04912, 2nd Dept 6-22-16**

PERSONAL INJURY, MUNICIPAL LAW.

NOTICE OF CLAIM SUFFICIENT TO ALERT DEFENDANT TO WRONGFUL DEATH THEORY, CRITERIA FOR AN ADEQUATE NOTICE OF CLAIM EXPLAINED.

The Second Department, reversing Supreme Court, determined plaintiff's notice of claim was sufficient to alert defendant to the wrongful death theory in the pleadings. The court explained the criteria for an adequate notice of claim: "General Municipal Law § 50-e(2) sets forth the criteria for the contents of a notice of claim. In pertinent part, the statute requires that the claimant state the nature of the claim and the time when, the place where, and the manner in which it arose (*see* General Municipal Law § 50-e[2]). The purpose of providing this information in a timely manner is so that the defendant can conduct a proper investigation and assess the merits of the claim while the information is still readily available ... . 'The Legislature did not intend that the claimant have the additional burden of pleading causes of action and legal theories, proper for the pleadings, in the notice of claim . . . General Municipal Law § 50-e was not meant as a sword to cut down honest claims, but merely as a shield to protect municipalities against spurious one' ... . Accordingly, a claimant need not state 'a precise

cause of action in haec verba in a notice of claim' ... . Contrary to the Supreme Court's determination, the plaintiffs' notice of claim adequately apprised the defendant that the claimant would seek to impose liability under a wrongful death theory of recovery ...". ***Se Dae Yang v. New York City Health & Hosps. Corp.*, 2016 N.Y. Slip Op. 04929, 2nd Dept 6-22-16**

PERSONAL INJURY, WORKERS' COMPENSATION LAW.

QUESTION OF FACT WHETHER PLAINTIFF WAS A SPECIAL EMPLOYEE OF DEFENDANT, THEREBY PRECLUDING A NEGLIGENCE ACTION.

The Second Department determined defendant bus company, Bella Bus, was not entitled to summary judgment finding plaintiff was a special employee (of Bella Bus). Plaintiff was not, therefore, precluded from bringing a negligence suit against Bella Bus because she had recovered from her non-party employer under the Workers' Compensation Law. Plaintiff, a bus matron, was injured when the Bella Bus in which she was riding collided with another vehicle: "For purposes of the Workers' Compensation Law, a person may be deemed to have more than one employer — a general employer and a special employer ... . 'The receipt of Workers' Compensation benefits from a general employer precludes an employee from commencing a negligence action against a special employer' … . A special employee is 'one who is transferred for a limited time of whatever duration to the service of another' ... . The determination as to who properly qualifies as a 'special employee' of a particular employer is to be made on the basis of many factors, including whether that employer 'controls and directs the manner, details and ultimate result of the employee's work' ... . The documents submitted by the bus defendants in support of their motion did not establish that Bella Bus controlled and directed the manner and details of the plaintiff's work ... . Nor did the submissions show that the plaintiff's actual employer, Brooklyn Transportation, had permanently assigned her exclusively to Bella Bus on a full-time basis or that the plaintiff had been hired by Brooklyn Transportation solely to meet Bella Bus's specified employee needs ... . The affidavit submitted by the bus defendants also failed to identify any specific Bella Bus employee who supervised the plaintiff ...". ***Bostick v. Penske Truck Leasing Co., L.P.*, 2016 N.Y. Slip Op. 04899, 2nd Dept 6-22-16**

THIRD DEPARTMENT

CORPORATION LAW, LIMITED LIABILITY COMPANY LAW.

CRITERIA FOR DERIVATIVE VERSUS DIRECT CLAIM AGAINST A LIMITED LIABILITY COMPANY EXPLAINED.

In affirming the dismissal of causes of action alleging breach of a fiduciary duty, the Third Department explained the criteria used to decide whether a cause of action against a limited liability company is derivative or direct: "A derivative suit may be commenced by a member of a limited liability company on behalf of such limited liability company when recovery is sought for damages to the entity ... . A direct or individual claim may exist, however, if the 'plaintiff suffered the alleged harm individually, and he [or she] would receive the benefit of any recovery' ... . When considering the sufficiency of a complaint, '[t]he pertinent inquiry is whether the thrust of the plaintiff's action is to vindicate his [or her] personal rights as an individual and not as a stockholder on behalf of the corporation' ... . If the individual claim is 'confused' or 'embedded' within the derivative claim, then it must be dismissed ...". ***Maldonado v. DiBre*, 2016 N.Y. Slip Op. 04999, 3rd Dept 6-23-16**

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