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FIRST DEPARTMENT

CRIMINAL LAW.

DEFENDANT'S ACTIONS UPON SEEING THE POLICE IN A HOUSING AUTHORITY BUILDING FREQUENTED BY TRESPASSERS JUSTIFIED INITIAL QUESTIONING; REMAND OF PRIOR CONVICTION FOR YOUTHFUL OFFENDER DETERMINATION DID NOT ALTER DATE OF THAT CONVICTION FOR PREDICATE-FELONY PURPOSES.

The First Department, over a two-justice dissent, determined: (1) the police were justified in following and questioning defendant who "retreated" into an elevator of a New York City Housing Authority (NYCHA) building upon seeing the police; (2) the defendant's refusal to tell the police whether he lived in the building and a bulge in defendant's clothing justified pulling up defendant's sleeve, which revealed the tip of a machete; (3) the show up identification by a recent robbery victim was proper; (4) and remanding a prior conviction for a youthful offender determination did not affect use of the prior conviction as a predicate felony in the current proceeding. The depth of the discussion of these issues cannot be fairly summarized here. The fact that the NYCHA building was a high crime area and was frequented by trespassers was deemed to justify the initial approach by the police to determine if defendant lived in the building. ***People v. Perez*, 2016 N.Y. Slip Op. 05730, 1st Dept 8-4-16**

FAMILY LAW.

PRELIMINARY CONFERENCE (PC) ORDER SETTING TEMPORARY MAINTENANCE WHICH DEVIATED FROM THE PRESUMPTIVE AMOUNT INVALID; UPWARD MODIFICATION PROPER.

The First Department, in a full-fledged opinion by Justice Acosta, affirming Supreme Court, determined a preliminary conference (PC) order directing temporary maintenance of $250 per week was invalid, and an upward modification of the temporary maintenance to $7,500 per month was proper. The PC ($250 per week) deviated from the presumptive award of temporary maintenance, did not specify the reasons for the deviation, and did not include the amount of temporary maintenance which would have been in accordance with Domestic Relations Law § 236: "Because the temporary maintenance terms in the PC order deviated from the presumptive award of temporary maintenance without providing the statutorily required recitals, the terms are unenforceable ... . Moreover, because the remaining terms of the PC order are intertwined with the temporary maintenance terms, the entire order is invalid ...". ***Anonymous v. Anonymous*, 2016 N.Y. Slip Op. 05736, 1st Dept 8-4-16**

PERSONAL INJURY.

QUESTIONS OF FACT WHETHER ZIP LINE WAS DEFECTIVE AND WHETHER PLAINTIFF KNEW OR SHOULD HAVE KNOWN OF THE RISKS OF USING THE ZIP LINE.

The First Department, reversing Supreme Court, over an extensive dissent, determined questions of fact about whether a zip line was negligently constructed and whether the risks of using the zip line were obvious precluded summary judgment in favor of defendant. Defendant (Skoler) designed and built the zip line with plaintiff's assistance. Plaintiff alleged the braking system did not work when he used the zip line and he was injured when he struck the end-point tree and fell off the seat onto a boulder: "Plaintiff concedes that, had he merely lost his grip and fallen off the seat while riding the zip line, he would be barred from recovery because that is an inherent risk of zip-lining. However, his claim is not that he fell victim to such a common hazard. Rather, it is that the zip line was negligently constructed by defendant and that he had no way of knowing that. A person cannot be said to have assumed the risk of being injured by faulty equipment when he was unaware that the equipment was faulty ... . The record is replete with facts that prevent us from determining, as a matter of law, that any risk encountered by plaintiff was inherent in zip-lining and not enhanced by Skoler's negligence, or that it was, or should have been, obvious to plaintiff. Even in granting the motion, the motion court conceded that there was evidence that the brake malfunctioned. Indeed, plaintiff testified that he failed to slow down as Skoler had done only moments before, even though his ride was not otherwise any different from Skoler's. Thus, we can assume for purposes of this motion that the brake failed ...". ***Zelkowitz v. Country Group, Inc.*, 2016 N.Y. Slip Op. 05732, 1st Dept 8-4-16**

SECOND DEPARTMENT

CIVIL PROCEDURE, PERSONAL INJURY, LABOR LAW-CONSTRUCTION LAW.

ALTHOUGH PLAINTIFF MADE OUT A PRIMA FACIE CASE ON HIS LABOR LAW CAUSES OF ACTION, THE MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN DISMISSED AS PREMATURE; PLAINTIFF NOT YET DEPOSED.

The Second Department determined summary judgment in this Labor Law §§ 240(1) and 241(6) action should not have been awarded to plaintiff. Although plaintiff had made out a prima facie case against defendant YAM, the motion was premature in that plaintiff had not yet been deposed: "[T]he plaintiff made a prima facie showing that YAM failed to provide him with adequate safety devices, as required by Labor Law § 240(1), and that this violation of the statute was a proximate cause of the accident ... . The plaintiff also made a prima facie showing that he was injured while he was engaged in an activity covered under Labor Law § 241(6), that there was a violation of an applicable provision of the Industrial Code, and that the violation was a proximate cause of the accident ... . Nonetheless, the plaintiff's motion for summary judgment on the issue of liability on the causes of action alleging violations of Labor Law §§ 240(1) and 241(6) insofar as asserted against YAM was premature since there has been almost no discovery in the case and the plaintiff has not been deposed. In the absence of such discovery, YAM's ability to defend is impaired, since it is limited to the plaintiff's own unchallenged account of the accident, set forth in the affidavit he submitted in support of his motion for summary judgment, and YAM has not had an opportunity to explore potential defenses ...". ***Churaman v. C&B Elec., Plumbing & Heating, Inc.*, 2016 N.Y. Slip Op. 05703, 2nd Dept 8-3-16**

CONTRACT LAW, FRAUD.

AGREEMENT TO AGREE UNENFORCEABLE UNDER BREACH OF CONTRACT, BREACH OF COVENANT OF GOOD FAITH, PROMISSORY ESTOPPEL AND FRAUD THEORIES.

The Second Department, reversing Supreme Court, determined that the letter of intent constituted merely "an agreement to agree" which could not support breach of contract, breach of the covenant of good faith and fair dealing, promissory estoppel or fraud causes of action: "The letter of intent provided that parties 'shall negotiate to arrive at mutually acceptable Definitive Agreements' regarding the potential joint venture and loan. The letter of intent further provided that the parties 'each reserve the right to withdraw from further negotiations at any time if, in the sole judgment of either or both, it is in either Party's best interest to do so, without further liability or obligation to the other.' * * * The Supreme Court should have granted the defendants' motion pursuant to CPLR 3211(a) to dismiss the complaint, as documentary evidence, in the form of the letter of intent, utterly refuted the plaintiff's factual allegations, thereby conclusively establishing a defense as a matter of law ... . '[I]t is rightfully well settled in the common law of contracts in this State that a mere agreement to agree, in which a material term is left for future negotiations, is unenforceable' ... . Here, the letter of intent demonstrated that the plaintiff's allegations of breach of contract related to a mere agreement to agree ... . Further, causes of action sounding in promissory estoppel and fraud require reasonable reliance on an alleged promise or misrepresentation ... . Here, in light of the language of the letter of intent, any reliance on the defendants' alleged promises and representations would, as a matter of law, have been unreasonable ... . Finally, the language of the letter of intent utterly refuted the plaintiff's allegations regarding an alleged breach of the covenant of good faith and fair dealing ...". ***New York Military Academy v. NewOpen Group*, 2016 N.Y. Slip Op. 05706, 2nd Dept 8-3-16**

FAMILY LAW.

MOTHER, WHO DEFAULTED, ENTITLED TO DISPOSITIONAL HEARING IN PROCEEDINGS TO TERMINATE HER PARENTAL RIGHTS BASED UPON MENTAL ILLNESS AND PERMANENT NEGLECT.

The Second Department determined mother's motion to vacate the dispositional portions of the orders terminating her parental rights based upon mental illness and permanent neglect should have been granted. Mother defaulted, but moved to vacate both the fact-finding and dispositional aspects of the orders: "Family Court improvidently exercised its discretion in denying that branch of the mother's motion which was to vacate the dispositional portions of the orders of fact-finding and disposition. Although, in the context of a proceeding pursuant to Social Services Law § 384-b to terminate parental rights based on mental illness, a separate dispositional hearing is not necessarily required in every case . . . , the circumstances of this case were not such that a separate dispositional hearing was unwarranted ... . Furthermore, in the case of permanent neglect, the Family Court may not dispense with a dispositional hearing in the absence of the consent of the parties ... . Consequently, the mother was entitled to vacatur of the dispositional portions of the orders of fact-finding and disposition in the interest of justice ...". ***Matter of Isabella R.W. (Jessica W.)*, 2016 N.Y. Slip Op. 05715, 2nd Dept 8-3-16**

FAMILY LAW.

GRANDMOTHER ENTITLED TO HEARING ON WHETHER SHE HAS STANDING TO PETITION FOR VISITATION.

The Second Department, in a case related to the cases summarized immediately above and below, determined Family Court should not have dismissed grandmother's petition for visitation on standing grounds without first conducting a hearing:

"Where a grandparent seeks visitation pursuant to Domestic Relations Law § 72(1), the court must undertake a two-part inquiry ... . First, the court must determine whether the grandparent has standing to petition for visitation based on the death of a parent or equitable circumstances ... . Where the court concludes that the grandparent has established standing, the court must then determine whether visitation with the grandparent is in the best interests of the child ... . In determining whether equitable circumstances confer standing, the court must examine all relevant facts ... . '[A]n essential part of the inquiry is the nature and extent of the grandparent-grandchild relationship,' including whether the grandparent has a meaningful relationship with the child ... . Here, the grandmother's petition alleged the existence of a sufficient relationship with the child to confer standing upon her to seek visitation ... . Further, the information before the Family Court was insufficient to enable it to undertake a comprehensive independent review of the standing issue, without a hearing ...". ***Matter of Weiss v. Orange County Dept. of Social Servs.*, 2016 N.Y. Slip Op. 05716, 2nd Dept 8-3-16**

FAMILY LAW.

GRANDMOTHER ENTITLED TO HEARING ON HER PETITION FOR CUSTODY, HEARING SHOULD BE HELD IN DISPOSITIONAL PORTION OF PROCEEDINGS TO TERMINATE MOTHER'S PARENTAL RIGHTS.

The Second Department, in a case related to the two cases summarized immediately above, determined grandmother's petition for custody should not have been dismissed without a hearing. Mother's parental rights were terminated based upon mental illness and permanent neglect. The Second Department held that grandmother's petition for custody should be part of the dispositional hearing in the mother's parental rights proceedings: "A grandparent has standing to seek custody of a child pursuant to Family Court Act article 6 when the child is in foster care, and is generally entitled to a hearing ... . While the grandmother was not entitled to an immediate hearing on her custody petition prior to the determination made at the conclusion of the fact-finding hearing in the termination proceedings against the mother . . . , the proper procedural course would have been for the Family Court to consider her custody petition in the context of a dispositional hearing in the underlying termination proceedings, wherein the court would determine the best interests of the child ... . The grandmother did not testify at the fact-finding hearing or any of the permanency hearings held in relation to the termination proceedings against the mother, and was therefore never afforded the right to be heard on the issues ... . Accordingly, the Family Court erred in failing to resolve the custody petition before freeing the child for adoption ...". ***Matter of Weiss v. Weiss*, 2016 N.Y. Slip Op. 05717, 2nd Dept 8-3-16**

MEDICAL MALPRACTICE, PERSONAL INJURY.

DEFENDANTS DID NOT DEMONSTRATE SURGICAL CONSENT FORM COMPLIED WITH THE ACCEPTED STANDARD OF DISCLOSURE, SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined defendants did not submit sufficient evidence to warrant dismissal of the "lack of informed consent" cause of action. Plaintiff alleged the breast implants she received were not of the type and size she requested. The proof submitted by the defendants did not demonstrate the consent form at issue complied with the standard for disclosure in this context: "Although the defendants demonstrated that they cannot be held liable for lack of informed consent based upon the size of the implants used, the defendants failed to establish that they cannot be held liable for lack of informed consent based on the type of implants used. The consent forms signed by the plaintiff stated that she would be receiving 'gel' implants, but did not identify the particular brand or manufacturer of the implants. Although the defendants' expert averred that the operative report indicated that 'Palaia explained the risks, benefits and alternatives to [the plaintiff] prior to the procedure,' and noted that consent forms were signed, he failed to aver that 'the consent form complied with the prevailing standard for such disclosures applicable to reasonable practitioners performing the same kind of surgery' ...". ***Whitnum v. Plastic & Reconstructive Surgery, P.C.*, 2016 N.Y. Slip Op. 05710, 2nd Dept 8-3-16**

PERSONAL INJURY.

DEFENDANTS DID NOT DEMONSTRATE PLACEMENT OF A FLOWER POT NEAR THE BASKETBALL COURT DID NOT UNREASONABLY INCREASE THE INHERENT RISKS OF PLAYING BASKETBALL, SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined defendant failed to make out a prima facie case warranting summary judgment. Plaintiff was injured playing basketball on defendant's property when he fell on a flower pot which was near the post supporting the backboard. The evidence failed to eliminate a triable issue whether the placement of the flower pot unreasonably increased the inherent risks: "[D]efendants failed to establish, prima facie, that the doctrine of primary assumption of the risk barred the plaintiff's recovery. The evidence submitted by the defendants, including testimony as to the size and placement of the flowerpot in close proximity to the paved court, failed to eliminate a triable issue as to whether its placement unreasonably increased the inherent risks of the activity ... . Moreover, contrary to their contention, the defendants failed to establish, prima facie, that they did not create or have actual or constructive notice of the alleged condition ...". ***Simone v. Doscas*, 2016 N.Y. Slip Op. 05709, 2nd Dept 8-3-16**