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CasePrepPlus

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FIRST DEPARTMENT

ARBITRATION, CONTRACT LAW.

NONSIGNATORY THAT RECEIVED A DIRECT BENEFIT FROM AN AGREEMENT WITH AN ARBITRATION PROVISION IS SUBJECT TO ARBITRATION.

The First Department determined defendant, Gordon, was entitled to compel arbitration with an entity that was not a party to the document with the arbitration provision. Plaintiff, BGC Notes, loaned $700,000 to Gordon as part of an employment arrangement with another related entity, BGC Financial. The employment agreement contained the arbitration clause and the note for the loan required resolution of any disputes in the courts. Although BGC Notes was not a party to the employment agreement, it was deemed to receive a direct benefit from the employment agreement. Therefore, BGC Notes was subject to the arbitration clause in the agreement: "Although BGC Notes was not a signatory to the employment agreement, which is the document actually containing the arbitration provision, BGC Notes nonetheless received a 'direct benefit' directly traceable to the employment agreement ... . Specifically, section 3(d) of the employment agreement provides that BGC Financial would 'cause' BGC Notes to make a loan to Gordon by way of the very note that BGC Notes sues upon in this action, and BGC Notes received all the benefits that an entity ordinarily receives upon the giving of a loan ... . Thus, BGC Notes derived benefits from the employment agreement, and BGC Notes' contention that section 3(d) conferred a benefit only to Gordon, and at most an 'indirect' benefit to BGC Notes itself, belies the terms of the employment agreement ...". ***BGC Notes, LLC v. Gordon*, 2016 N.Y. Slip Op. 05775, 1st Dept 8-11-16**

CIVIL PROCEDURE, CONTRACT LAW, SECURITIES.

CONTRACT PROVISION WHICH PURPORTED TO EXTEND THE ACCRUAL OF BREACH OF CONTRACT CAUSES OF ACTION STEMMING FROM SALE OF RESIDENTIAL MORTGAGE-BACKED SECURITIES DEEMED UNENFORCEABLE AS AGAINST PUBLIC POLICY; ACTION TIME-BARRED.

The First Department, in a full-fledged opinion by Justice Acosta, determined breach of contract causes of action stemming from contracts for the sale of defective residential mortgage-backed securities were time-barred. The court rejected as against public policy contractual provisions which purported to extend the accrual of the causes of action: "In this appeal, we must decide whether the statute of limitations bars a breach of contract action that was brought more than six years after the seller made allegedly false representations and warranties as to loans underlying residential mortgage-backed securities (RMBS). We find that dismissal of the action is mandated by the Court of Appeals' decision in *ACE Sec. Corp., Home Equity Loan Trust, Series 2006-SL2 v DB Structured Prods., Inc.* (25 NY3d 581 [2015]), which sets forth a clear rule that a breach of contract claim in an RMBS put-back action accrues on the date the allegedly false representations and warranties were made. Notwithstanding the parties' sophistication and their assent to a contract provision specifying a set of conditions that would have delayed the cause of action's accrual, we find that the accrual provision is unenforceable as against public policy, because it is tantamount to extending the statute of limitations based on an imprecise 'discovery' rule, which the Court of Appeals has consistently rejected in the commercial sphere ... . Moreover, the accrual provision does not compel defendant to undertake a promised future performance, separate from its obligations to cure or repurchase defective loans, so as to trigger the statute of limitations anew; nor does it contemplate a substantive condition precedent to defendant's performance that would delay accrual of the breach of contract claim ...". ***Deutsche Bank Natl. Trust Co. v. Flagstar Capital Mkts. Corp.*, 2016 N.Y. Slip Op. 05780, 1st Dept 8-11-16**

CONTRACT LAW.

DOCTRINE OF INDEFINITENESS IMPROPERLY APPLIED TO ORAL CONTRACT; BOTH QUANTUM MERUIT AND BREACH OF CONTRACT PROPERLY PLED WHERE DEFENDANTS DENY EXISTENCE OF CONTRACT.

The First Department, reversing Supreme Court, determined questions of fact precluded summary judgment in favor of defendants. Plaintiff alleged breach of an oral contract and quantum meruit (unjust enrichment) causes of action. Although there was no express agreement that plaintiff was entitled to payment for work done before termination, the doctrine of indefiniteness should not have been applied to dismiss the breach of contract claim. In addition, because defendants alleged there was no enforceable contract, plaintiff's quantum meruit cause of action should not have been dismissed. Plaintiff does

not have to elect a remedy (breach of contract or quantum meruit) in that circumstance. With regard to the breach of oral contract cause of action, the court wrote: "An oral agreement may be enforceable as long as the terms are clear and definite and the conduct of the parties evinces mutual assent 'sufficiently definite to assure that the parties are truly in agreement with respect to all material terms' ... . However, not all terms of a contract need be fixed with absolute certainty, and courts will not apply the doctrine of indefiniteness to 'defeat the reasonable expectations of the parties in entering into the contract' ... . Where 'there may exist an objective method for supplying the missing terms needed to calculate the alleged compensation owed plaintiff,' a claimed oral agreement is "not as a matter of law unenforceable for indefiniteness' ...". ***Kramer v. Greene*, 2016 N.Y. Slip Op. 05776, 1st Dept 8-11-16**

CONTRACT LAW, SECURITIES, NEGLIGENCE.

IN THIS ACTION STEMMING FROM DEFECTIVE RESIDENTIAL MORTGAGE-BACKED SECURITIES, MORGAN STANLEY'S ALLEGED FAILURE TO NOTIFY PLAINTIFF OF THE DISCOVERY OF DEFECTIVE SECURITIES IS AN INDEPENDENT BREACH OF CONTRACT; GROSS NEGLIGENCE CAUSE OF ACTION SHOULD NOT HAVE BEEN DISMISSED DESPITE SOLE REMEDY CONTRACTUAL PROVISION.

The First Department, reversing Supreme Court, in a full-fledged opinion by Justice Gische, in an action stemming from the sale of defective residential mortgage-backed securities, determined defendant's (Morgan Stanley's) alleged failure to notify plaintiff of the discovery of defective securities constituted an independent breach of contract claim. The First Department further determined, despite the purported "sole remedy" contractual provision, the cause of action for gross negligence was adequately pled and should not have been dismissed: "[U]nder similar RMBS agreements, a seller's failure to provide the trustee with notice of material breaches it discovers in the underlying loans states an independently breached contractual obligation, allowing a plaintiff to pursue separate damages ... . Where parties contractually agree to a limitation on liability, that provision is enforceable, even against claims of a party's own ordinary negligence ... . The purpose of provisions that limit liability or remedies available in the event of breach is to 'allocat[e] the risk of economic loss in the event that the contemplated transaction is not fully executed' ... . Courts will generally honor the remedies that the parties have contractually agreed to ... . There are exceptions to this rule of law, however, and as a matter of long standing public policy, a party may not insulate itself from damages caused by its 'grossly negligent conduct' ... . Used in this context, 'gross negligence' differs in kind, and not only degree, from claims of ordinary negligence. 'It is conduct that evinces a reckless disregard for the rights of others or smacks' of intentional wrongdoing' ...". ***Morgan Stanley Mtge. Loan Trust 2006-13ARX v. Morgan Stanley Mtge. Capital Holdings LLC*, 2016 N.Y. Slip Op. 05781, 1st Dept 8-11-16**

EMPLOYMENT LAW.

OSTENSIBLE NON EMPLOYER WAS NOT A JOINT EMPLOYER SUBJECT TO EMPLOYMENT DISCRIMINATION LIABILITY; CRITERIA FOR JOINT EMPLOYER STATUS EXPLAINED.

The First Department determined defendant non employer was not a "joint employer" such that defendant could be liable for employment discrimination under the Human Rights Law. The court explained the "joint employer" criteria: "In determining whether an ostensible non employer is actually a 'joint employer' for purposes of employment discrimination claims under the State and City Human Rights Laws (HRLs), numerous Federal District Courts have applied the 'immediate control' test ... . Under the 'immediate control' formulation, a 'joint employer relationship may be found to exist where there is sufficient evidence that the defendant had immediate control over the other company's employees,' and particularly the defendant's control 'over the employee in setting the terms and conditions of the employee's work.' 'Relevant factors' in this exercise 'include commonality of hiring, firing, discipline, pay, insurance, records, and supervision.' Of these factors, 'the extent of the employer's right to control the means and manner of the worker's performance is the most important factor.' If such control is established, other factors 'are then of marginal importance ...". ***Brankov v. Hazzard*, 2016 N.Y. Slip Op. 05778, 1st Dept 8-11-16**

FRAUD, SECURITIES.

FRAUD ALLEGATIONS RELATED TO SALE OF DEFECTIVE RESIDENTIAL MORTGAGE-BACKED SECURITIES SUFFICIENT TO WITHSTAND MOTION TO DISMISS.

The First Department determined plaintiff had sufficiently alleged fraud and aiding and abetting fraud in connection with defendants' sale of defective residential mortgage-backed securities (RMBS): "Defendants argue that in order to establish justifiable reliance, plaintiffs were required to allege that they sought additional information from defendants about the truthfulness of the representations made in the offering documents or that they requested the loan files for the loans underlying the RMBS. The level of due diligence advocated by defendants requires a prospective purchaser to assume that the credit ratings assigned to the securities were fraudulent and to verify them through a detailed retracing of the steps undertaken by the underwriter and credit rating agency. We do not require this heightened due diligence standard to support justifiable reliance in a pleading concerning such sales of securities by prospectus ... . The element of scienter, that is, the requirement that the defendant knew of the falsity of the representation being made to the plaintiff, is, of course, the element most likely to be within the sole knowledge of the defendant and least amenable to direct proof ' ... . All that

is required to defeat a motion to dismiss a fraud claim for lack of scienter is 'a rational inference of actual knowledge' ... . The allegations that defendants were informed about defects in the loans they were securitizing because they obtained this information through their own due diligence are sufficient to plead scienter …". ***IKB Intl. S.A. v. Morgan Stanley*, 2016 N.Y. Slip Op. 05779, 1st Dept 8-11-16**

SECOND DEPARTMENT

ATTORNEYS, PRIVILEGE, CIVIL PROCEDURE, EVIDENCE.

CRITERIA FOR ATTORNEY WORK-PRODUCT PRIVILEGE, WILLFUL AND CONTUMACIOUS CONDUCT DURING DISCOVERY, AND SPOLIATION OF EVIDENCE CLEARLY EXPLAINED.

The Second Department determined: (1) information procured by an attorney's freedom of information law requests was not protected by work-product privilege; (2) defendants' conduct during discovery was not willful and contumacious; and (3) an adverse inference instruction was an appropriate sanction for spoliation of evidence. The Second Department offered detailed summaries of the criteria for work-product privilege, sanctions for conduct during discovery, and spoliation of evidence which are worth reading. With respect to attorney work-product privilege, the court wrote: "The CPLR exempts attorney work product from disclosure ... . However, 'the party asserting the privilege that material sought through discovery was prepared exclusively in anticipation of litigation or constitutes attorney work product bears the burden of demonstrating that the material it seeks to withhold is immune from discovery by identifying the particular material with respect to which the privilege is asserted and establishing with specificity that the material was prepared exclusively in anticipation of litigation' ... . Furthermore, '[n]ot every manifestation of a lawyer's labors enjoys the absolute immunity of work product. The exemption should be limited to those materials which are uniquely the product of a lawyer's learning and professional skills, such as materials which reflect his [or her] legal research, analysis, conclusions, legal theory or strategy' ... . Here, the plaintiffs contend that materials obtained by their attorney via requests pursuant to state and federal freedom of information laws are privileged attorney work product. However, this material cannot be characterized as being 'uniquely the product of [the plaintiffs' counsel's] learning and professional skills' or as reflecting his 'legal research, analysis, conclusions, legal theory or strategy' ...". ***Cioffi v. S.M. Foods, Inc.*, 2016 N.Y. Slip Op. 05741, 2nd Dept 8-10-16**

CRIMINAL LAW.

PAT-DOWN SEARCH AFTER VEHICLE STOP OK, CRITERIA EXPLAINED.

The Second Department, affirming the denial of defendant's suppression motion, explained the analytical criteria for a pat-down search of defendant's person after a vehicle stop: " 'In light of the heightened dangers faced by investigating police officers during traffic stops, a police officer may, as a precautionary measure and without particularized suspicion, direct the occupants of a lawfully stopped vehicle to step out of the car' ... . However, a police officer's questions regarding whether an individual has a weapon is a common-law inquiry which must be supported by founded suspicion ... . In addition, a pat-down search of a suspect's outer clothing is reasonable and constitutionally permissible when an officer observes facts and circumstances that give rise to a reasonable suspicion that a person is armed or poses a threat to his or her safety ... . Among the factors relevant to determining whether a pat-down search is justified are 'the substance and reliability of the report that brought the officers to the scene, the nature of the crime that the police are investigating, the suspect's behavior and the shape, size, and location of any bulges in the suspect's clothing' ... . Under the circumstances of this case, including, among other things, the time of night, the fact that the livery cab in which the defendant was a passenger was speeding, the neighborhood, the officer's observations of the defendant make what he interpreted as a furtive movement indicating that he was hiding something, the defendant's refusal to answer questions or look at the officer in comparison to the other passenger's animated responses, and the abnormal bulge in an unusual spot near the defendant's groin, the officer was justified in inquiring about the bulge and performing the minimally intrusive measure of touching the bulge to verify that it was, in fact, a gun and not, as the defendant stated, cash ...". ***People v. Graves*, 2016 N.Y. Slip Op. 05763, 2nd Dept 8-10-16**

CRIMINAL LAW, EVIDENCE.

JOINDER OF DEFENDANT AND CO-DEFENDANT FOR TRIAL WAS LAWFUL BUT, BECAUSE OF IRRECONCILABLE DEFENSES, JOINDER RESULTED IN DENIAL OF DEFENDANT'S RIGHT TO A FAIR TRIAL.

The Second Department, reversing defendant's conviction, determined defendant should not have been jointly tried with a co-defendant because of an irreconcilable conflict between his defense, and that of the co-defendant: "Where, as here, joinder is lawful, because the defendant and the codefendant were 'jointly charged with every offense alleged' in their separate indictments, and 'all the offenses charged [were] based upon the same criminal transaction' . . . , a defendant's motion for a separate trial is 'addressed to the discretion of the trial court, which may for good cause shown' order severance. Good cause under the statute includes, but is not limited to, a finding that a defendant will be unduly prejudiced by a joint trial' ... . '[A] strong public policy favors joinder, because it expedites the judicial process, reduces court congestion, and avoids the necessity of recalling witnesses' ... . However, 'compromise of a defendant's fundamental right to a fair trial free of undue

prejudice as the quid pro quo for the mere expeditious disposition of criminal cases will not be tolerated' ... . '[S]everance is compelled where the core of each defense is in irreconcilable conflict with the other and where there is a significant danger, as both defenses are portrayed to the trial court, that the conflict alone would lead the jury to infer defendant's guilt' ...". ***People v. Lessane*, 2016 N.Y. Slip Op. 05765, 2nd Dept 8-10-16**

FAMILY LAW.

IT WAS IN THE BEST INTERESTS OF SIBLINGS TO REMAIN TOGETHER, CUSTODY OF BOTH CHILDREN SHOULD HAVE BEEN AWARDED TO FATHER IN THIS MODIFICATION PROCEEDING.

The Second Department determined Family Court properly awarded custody of Jonathan to father, finding modification of custody was justified by changed circumstances. However, Family Court erred in failing to award father custody of Jonathan's sibling, Madison. It was deemed to be in Madison's best interests to continue living with Jonathan: "[T]he Supreme Court's determination that the evidence did not demonstrate a sufficient change in circumstances warranting modification of the custody provisions of the settlement agreement so as to award the father residential custody of the parties' child Madison is not supported by a sound and substantial basis in the record. It 'has long [been] recognized that it is often in the child's best interests to continue to live with his [or her] siblings' . . . , and 'the courts will not disrupt sibling relationships unless there is an overwhelming need to do so' ... . It is undisputed that Jonathan and Madison have a close relationship, and, based upon the recommendations of the children's therapist that they should not be separated, the position of the attorney for the children that they should remain with the same custodial parent, and evidence that the father demonstrated more of an ability and willingness to assure meaningful contact between the children and the mother, and to foster a healthier relationship between the children and the mother, than the mother would have fostered between the children and the father, the court should have awarded residential custody of Madison to the father ...". ***Cook v. Cook*, 2016 N.Y. Slip Op. 05743, 2nd Dept 8-10-16**

FAMILY LAW, IMMIGRATION LAW.

ALTHOUGH MOTHER WAS ENTITLED TO CUSTODY AS SOLE SURVIVING PARENT, HER PETITION FOR CUSTODY SHOULD NOT HAVE BEEN DISMISSED WITHOUT FINDINGS WHICH WOULD ENTITLE HER CHILDREN TO PETITION FOR SPECIAL IMMIGRANT JUVENILE STATUS.

The Second Department determined mother's custody petition should not have been dismissed. Although mother was presumptively entitled to custody as the sole surviving parent, she was seeking findings which would allow the children to apply for special immigrant juvenile status (SIJS): "SIJS is a form of immigration relief that affords undocumented children a pathway to lawful permanent residency and citizenship ... . * * * Here, although the mother was presumptively entitled to custody of the children as their surviving parent . . . , '[a] natural parent has standing to seek legal custody of his or her child' . . . , and '[u]nopposed petitions for custody brought by a natural parent have been granted' for SIJS purposes ... . Accordingly, the Family Court should not have dismissed the custody petition without conducting a hearing and considering the children's best interests. Instead, the court should have proceeded to conduct a hearing on the petition, which sought a custody order as well as an order making the requisite declaration and special findings so as to enable the children to petition for SIJS ...". ***Matter of Castellanos v. Recarte*, 2016 N.Y. Slip Op. 05755, 2nd Dept 8-10-16**

PERSONAL INJURY, LANDLORD-TENANT.

LEASE TERMS ALLOWED JURY TO BE INSTRUCTED ON TENANT'S POTENTIAL LIABILITY FOR A SIDEWALK SLIP AND FALL.

The Second Department determined the jury was properly instructed to consider a tenant's liability for a sidewalk slip and fall based upon the terms of the lease: "[T]he Supreme Court properly submitted the issue of the tenant's negligence to the jury. 'Administrative Code of the City of New York § 7-210 imposes a nondelegable duty on a property owner to maintain and repair the sidewalk abutting its property' ... . Generally, the 'provisions of a lease obligating a tenant to repair the sidewalk do not impose on the tenant a duty to a third party, such as the plaintiff' ... . However, where a lease agreement is 'so comprehensive and exclusive as to sidewalk maintenance as to entirely displace the landowner's duty to maintain the sidewalk,' the tenant may be liable to a third party ... . Here, the owner demonstrated that a rider to the subject lease requiring the tenant to, at its own cost and expense, keep and maintain the sidewalk 'in thorough repair and good order,' was so comprehensive and exclusive as to entirely displace the owner's duty to maintain the sidewalk ...". ***Paperman v. 2281 86th St. Corp.*, 2016 N.Y. Slip Op. 05747, 2nd Dept 8-10-16**

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