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FIRST DEPARTMENT

CONTRACT LAW.

CERTAIN ASPECTS OF PLAINTIFF'S QUANTUM MERUIT AND UNJUST ENRICHMENT CAUSES OF ACTION PROPERLY SURVIVED A MOTION TO DISMISS, OTHER ASPECTS WERE BARRED BY THE STATUTE OF FRAUDS.

The First Department, in a full-fledged opinion by Justice Renwick, with extensive analysis of the "negotiation or consummation of a business opportunity" aspect of the statute of frauds (General Obligations Law 5-701(a)(10)), determined certain aspects of plaintiff's unjust enrichment and quantum meruit causes of actions properly survived defendants' motion to dismiss. Plaintiff alleged he supplied information and know-how which led to defendants' creation and operation of a highly successful website which facilitates finding and renting apartments. The aspects of plaintiff's causes of action which stemmed from "negotiating or consummating the business opportunity" were barred by the statute of frauds. But the aspects related to plaintiff's assistance in the success of the on-going business were not barred by the statute of frauds. The opinion includes a detailed discussion of the limits of the "writing" requirement for any agreement to "negotiate or consummate a business opportunity:" "In the present case, the amended complaint contains allegations that, if accepted by the trier of fact, demonstrate that plaintiff's role consisted of more than functioning as an intermediary that assisted in the negotiation or consummation of the business opportunity. Rather, [plaintiff] allegedly rendered a wide variety of services, which presumably took place after the company came to fruition, making these services related to a purpose other than 'assisting in the negotiation or consummation' of a business opportunity, so as to escape the strictures of General Obligations Law 5-701(a)(10)." ***Dorfman v. Reffkin*, 2016 N.Y. Slip Op. 06116, 1st Dept 9-21-16**

MEDICAID.

OFFICE OF MEDICAID INSPECTOR GENERAL COULD NOT SEEK REIMBURSEMENT OF OVERPAYMENTS IN AN AMOUNT HIGHER THAN SPECIFICALLY INDICATED IN ITS WRITTEN NOTICE.

The First Department, over a two-justice dissent, determined the language of the written notice to petitioner from the Office of the Medicaid Inspector General (OMIG) did not allow the OMIG to seek the higher of two estimated overpayment reimbursement amounts. The terms of the final audit report (FAR) required a lower payment if the findings were not challenged, and a higher payment if the findings were challenged at a hearing. Petitioner did not request a hearing to challenge the findings, but did not make payment arrangements within the time allowed. The OMIG then notified petitioner it would withhold future reimbursement to pay off what was owed. Although the written notice of the withholding stated the lower amount would be withheld, petitioner was informed orally the higher amount would be withheld. ***West Midtown Mgt. Group, Inc. v. State of New York*, 2016 N.Y. Slip Op. 06111, 1st Dept 9-21-16**

INSURANCE LAW, CONTRACT LAW, EMPLOYMENT LAW.

QUESTION OF FACT WHETHER THE TERM "INSURANCE" IN A NONCOMPETE AGREEMENT ENCOMPASSES SURETY BONDS.

The First Department, over an extensive dissent, determined the word "insurance" in a noncompete agreement was susceptible of two meanings, thereby precluding summary judgment. Defendant signed a noncompete agreement which prohibited the "brokering or placement of insurance." After plaintiff started a new job during the time-period covered by the noncompete agreement with his previous employer, he brokered two "surety bonds" for two companies which had been clients of his former employer. Plaintiff argued the term "insurance" encompassed "surety bonds." Defendants argued the term "insurance" did not encompass "surety bonds:" "... [T]he evidence produced by each side does not show that the interpretation urged by each is inevitable; rather, it shows that the language of the letter agreement is 'on its face . . . reasonably susceptible of more than one interpretation' ... . Accordingly, the motion court properly denied the motions for summary judgment." ***Frenkel Benefits, LLC v. Mallory*, 2016 N.Y. Slip Op. 06109, 1st Dept 9-21-16**

PERSONAL INJURY.

WATER ON LOCKER ROOM FLOOR WAS NOT NECESSARILY INCIDENTAL TO USE OF THE AREA, DEFENSE MOTION FOR SUMMARY JUDGMENT PROPERLY DENIED.

The First Department, over a two-justice dissent, determined defendant was not entitled to summary judgment in a slip and fall case. Plaintiff alleged he slipped on water in a locker room in the vicinity of a swimming pool and showers. The majority rejected the argument that water in the locker room was necessarily incidental to the use of the locker room (the dissent's argument): "[D]efendant cannot obtain summary judgment here by relying on the cases cited by the dissent, in which this Court dismissed personal injury claims arising out of slipping on water in gyms based on the reasoning that 'water was necessarily incidental to the use of the area' (*Noboa-Jaquez v. Town Sports Intl., LLC*, 138 AD3d 493 [1st Dept 2016]; *Dove v. Manhattan Plaza Health Club*, 113 AD3d 455 [1st Dept 2015], lv denied 24 NY3d 901 [2014]). In *Dove*, the plaintiff 'slipped and fell on water located on the tile floor around the indoor pool of defendants' health club,' prompting this Court to observe that 'the presence of such water was necessarily incidental' to the use of the pool' ... . In *Noboa-Jaquez*, the plaintiff slipped on the tiled floor in the area of the gym's showers, and this Court applied the same reasoning as in *Dove* to hold that '[t]he mere presence of water on a tiled floor adjacent to the gym's showers cannot impart liability, particularly since water was necessarily incidental to the use of the area' ... . Neither of those holdings stands for the broader proposition that any water on a tiled floor anywhere in a locker room must preclude a claim for negligence because water is 'necessarily incidental' to the entire locker room's intended use. From the evidence before us, it does not appear that plaintiff was in the shower area, and he had clearly left the pool area." ***Grossman v. TCR*, 2016 N.Y. Slip Op. 06114, 1st Dept 9-21-16**

SECOND DEPARTMENT

CIVIL PROCEDURE.

FRIVOLOUS CONDUCT WARRANTED AWARD OF ATTORNEY'S FEES, CRITERIA EXPLAINED.

The Second Department determined plaintiff's frivolous conduct (delaying discontinuance) warranted the award of attorney's fees to the respondent. The court explained the criteria for finding frivolous conduct: 'The court rule set forth in 22 NYCRR 130-1.1, which is intended to limit frivolous and harassing behavior, authorizes a court, in its discretion, to award a party in a civil action reasonable attorney's fees resulting from frivolous conduct' ... . Conduct is frivolous if, inter alia, it is 'completely without merit in law"'or 'undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another' (22 NYCRR 130-1.1[c][1], [2]...). 'In determining whether the conduct undertaken was frivolous, the court shall consider, among other issues the circumstances under which the conduct took place, including the time available for investigating the legal or factual basis of the conduct, and whether or not the conduct was continued when its lack of legal or factual basis was apparent, should have been apparent, or was brought to the attention of counsel or the party' (22 NYCRR 130-1.1[c])." ***Hutter v. Citibank, N.A.*, 2016 N.Y. Slip Op. 06062, 2nd Dept 9-21-16**

DEFAMATION, PRIVILEGE.

NEWS REPORTS CONNECTING PLAINTIFF TO AN ATTEMPTED RAPE ABSOLUTELY PRIVILEGED UNDER CIVIL RIGHTS LAW, REPORTS ACCURATELY REFLECTED INFORMATION PROVIDED BY THE POLICE.

The Second Department determined the media-defendant (WPIX) in a defamation action was entitled to absolute immunity under the Civil Rights Law. The action stemmed from news reports which included the plaintiff's photograph and stated the police were looking for the plaintiff in connection with an attempted rape. The final report stated that another had been arrested but plaintiff's photograph was included in that report as well: "... [T]he Supreme Court properly determined that the plaintiff's allegation that the subject news reports were published without privilege was not a fact at all, because WPIX's evidentiary submissions established that the news reports were absolutely privileged pursuant to Civil Rights Law § 74. That statute provides, in pertinent part, that '[a] civil action cannot be maintained . . . for the publication of a fair and true report of any judicial proceeding, legislative proceeding or other official proceeding' (Civil Rights Law § 74). Contrary to the plaintiff's contention, the police investigation of the attempted rape constituted an 'official proceeding' under the statute ... . Further, the subject news reports were substantially accurate reports of the information provided by the NYPD in its press releases ... . The privilege is not defeated by the NYPD's error in identifying the plaintiff by his photograph as the assailant. The statute 'was designed precisely to protect the publisher of a fair and true report from liability for just such an error and to relieve it of any duty to expose the error through its own investigation' ...". ***Rodriguez v. Daily News, L.P.*, 2016 N.Y. Slip Op. 06071, 2nd Dept 9-21-16**

EMINENT DOMAIN.

SUPREME COURT CORRECTLY DETERMINED THE HIGHEST AND BEST USE BASED ON THE ASSUMPTION THE PROPERTY WOULD HAVE BEEN REZONED, RAISING THE VALUE OF THE PROPERTY.

The Second Department determined Supreme Court properly valued the condemned property by assuming the property would have been rezoned, increasing its value: "Here, the Supreme Court properly determined that the claimant had es-

tablished that, in the absence of the project, there was a reasonable probability that the property would have been rezoned to C6-2A. ... The court's findings that many of the buildings in the immediate area had been converted to commercial and residential use, that New York City policy was to rezone underutilized industrial sites to allow for commercial or residential development, and that a zoning district with a FAR of 6 would be in scale to this portion of Atlantic Avenue were supported by the record. * * * Further, the Supreme Court properly accepted the highest and best use proposed by the claimant of a 12-story budget hotel ... . Contrary to ESDC's [Empire State Development Corporation's] contention, the ... lease on the property did not prohibit a finding of a different highest and best use than contemplated in the lease, since the property must be valued at 'its highest and best use on the date of the taking, regardless of whether the property is being put to such use at the time' ...". ***Matter of 730 Equity Corp. v. New York State Urban Dev. Corp.*, 2016 N.Y. Slip Op. 06086, 2nd Dept 9-21-16**

EMPLOYMENT LAW, CIVIL RIGHTS LAW, CIVIL PROCEDURE.

COURT SHOULD NOT CONSIDER DEFENSES TO AN ACTION ON A MOTION TO DISMISS, WHETHER THE ACTION WOULD SURVIVE A MOTION FOR SUMMARY JUDGMENT IS NOT BEFORE THE COURT.

The Second Department, reversing Supreme Court, determined plaintiff stated causes of action for sexual harassment and retaliatory firing. The Second Department noted that Supreme Court erred by relying on defenses to action, which are relevant only to a summary judgment motion, not a motion to dismiss. The Second Department further explained how a motion to dismiss is to be handled when (as here) documentary evidence is submitted in opposition: "The court erred in determining that the subject cause of action must be dismissed because the plaintiff failed to show that the behavior of her supervisor constituted more than a petty slight or trivial inconvenience. The plaintiff does not have this burden. Rather, a contention that the behavior was a petty slight or trivial inconvenience constitutes an affirmative defense ... , which should be raised in the defendants' answer, and does not lend itself to a pre-answer motion to dismiss ... . A motion to dismiss merely addresses the adequacy of the pleading, and does not reach the substantive merits of a party's cause of action. 'Therefore, whether the pleading will later survive a motion for summary judgment, or whether the party will ultimately prevail on the claims, is not relevant on a pre-discovery motion to dismiss' ... . * * * 'When evidentiary material is considered on a motion to dismiss a complaint pursuant to CPLR 3211(a)(7), and the motion has not been converted to one for summary judgment, the criterion is whether the plaintiff has a cause of action, not whether he or she has stated one, and, unless it has been shown that a material fact as claimed by the plaintiff to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it, dismissal should not eventuate' ..". ***Kaplan v. New York City Dept. of Health & Mental Hygiene*, 2016 N.Y. Slip Op. 06063, 2nd Dept 9-21-16**

FORECLOSURE, ATTORNEYS.

FALSE INFORMATION IN ATTORNEY AFFIDAVIT JUSTIFIED DENIAL OF MOTION FOR JUDGMENT OF FORECLOSURE BUT NOT DISMISSAL.

The Second Department determined false information in the attorney affidavit submitted by the plaintiff bank warranted denial of the motion for a judgment of foreclosure, but did not warrant dismissal of the complaint with prejudice and cancellation of the notice of pendency: "The Administrative Order requires the attorney to attest that the papers 'contain no false statements of fact or law' (Administrative Order 548/10). A plaintiff's failure to file the mandatory attorney affirmation in compliance with the Administrative Order warrants denial of a motion for a judgment of foreclosure and sale ... . Here, since the subject affirmation contained an apparently false statement of fact, the Supreme Court providently exercised its discretion in denying the motion for a judgment of foreclosure and sale without prejudice to renew (see CPLR 2001). However, the Supreme Court erred in, sua sponte, directing the dismissal of the complaint with prejudice and in directing the cancellation of the notice of pendency. 'A court's power to dismiss a complaint, sua sponte, is to be used sparingly and only when extraordinary circumstances exist to warrant dismissal' ... . Here, there were no extraordinary circumstances ... . ***Downey Sav. & Loan Assn., F.A. v. Trujillo*, 2016 N.Y. Slip Op. 06058, 2nd Dept 9-21-16**

INSURANCE LAW, CONTRACT LAW.

AMENDMENT TO STATUTE CHANGING THE LIMITATIONS PERIOD FOR ACTION ON A PAYMENT BOND DID NOT APPLY RETROACTIVELY, CRITERIA EXPLAINED.

The Second Department determined an action by a subcontractor seeking payment under a payment bond for environmental clean-up work was time-barred. Plaintiff subcontractor had submitted invoices to the contractor which were not paid. Whether the action on the payment bond was time-barred depended upon whether an amendment to State Finance Law 137 applied retroactively. The court found the amendment did not apply retroactively and explained the analytical criteria: " ' In determining whether statutory enactments should be given retroactive effect, there are two axioms of statutory interpretation' ... . ' Amendments are presumed to have prospective application unless the Legislature's preference for retroactivity is explicitly stated or clearly indicated. However, remedial legislation should be given retroactive effect in order to effectuate its beneficial purpose' ... . ' These axioms are helpful guideposts, but the reach of the statute ultimately becomes a matter of judgment made upon review of the legislative goal' ... . Here, the Legislature did not explicitly state or clearly

indicate … [the] amendment should be applied retroactively ... . Thus, 'we presume at the outset that the amendment was to have prospective application' ... . Additionally, the … amendment did not create a new right or a new class of individuals who could assert a cause of action under a payment bond. Instead, the amendment was simply intended to clarify the limitations period for bringing a payment bond claim. Given these circumstances, the amendment cannot be characterized as remedial, and need not be applied retroactively to achieve its purpose ...". ***Clean Earth of N. Jersey, Inc. v. Northcoast Maintenance Corp.*, 2016 N.Y. Slip Op. 06056, 2nd Dept 9-21-16**

LANDLORD-TENANT, REAL PROPERTY LAW.

CLOSURE OF TERRACE BREACHED THE IMPLIED WARRANTY OF HABITABILITY.

The Second Department, reversing (modifying) Supreme Court, determined plaintiff had made out a prima facie case for damages stemming from the defendant's breach of the implied warranty of habitability. Plaintiff held a proprietary lease in a cooperative. A storm damaged the terrace adjacent to the apartment. Plaintiff was entitled to damages for the period of time the terrace was closed: "The implied warranty of habitability, codified in the Real Property Law, provides that in every written lease for residential purposes, the landlord or lessor 'shall be deemed to covenant and warrant that the premises so leased or rented and all areas used in connection therewith in common with other tenants or residents are fit for human habitation and for the uses reasonably intended by the parties and that the occupants of such premises shall not be subjected to any conditions which would be dangerous, hazardous or detrimental to their life, health or safety' (Real Property Law § 235-b[1]). In *Solow v. Wellner* (86 NY2d 582, 587-588), the Court of Appeals clarified that Real Property Law § 235-b(1) includes three separate covenants: '(1) that the premises are fit for human habitation, (2) that the premises are fit for the uses reasonably intended by the parties, and (3) that the occupants will not be subjected to conditions that are dangerous, hazardous or detrimental to their life, health or safety' (*id*. at 587-588 [internal quotation marks omitted]). 'A breach of warranty may be said to have occurred where the premises have not met the reasonable expectations of the parties' … . Here, the plaintiff established that the water damage and subsequent closures of the terrace rendered it unfit for the uses reasonably intended by the parties ...". ***Goldhirsch v. St. George Tower & Grill Owners Corp.*, 2016 N.Y. Slip Op. 06060, 2nd Dept 9-21-16**

MUNICIPAL LAW. ENVIRONMENTAL LAW.

SCRAP METAL SALES OPERATION WAS NOT A TRANSFER STATION WITHIN THE MEANING OF THE COUNTY SOLID WASTE LAW.

The Second Department, in a full-fledged opinion by Justice Cohen, determined a scrap metal seller was not operating a "transfer station" within the meaning of the Westchester County Solid Waste Law. Therefore, certain fines and license fees related to the operation of a transfer station should not have been imposed by the county. The Second Department noted that, in reviewing an Article 78 proceeding, as long as the underlying statute does not require expertise to interpret, the reviewing court has the power to determine the meaning of the controlling statute. Here the plain meaning of the statute would not support defining the scrap metal sales operation as a transfer station: "The petitioner, Universal Metal & Ore, Inc. (hereinafter Universal), is an international metal trading company founded in 1951, which maintains a facility in Mount Vernon. Essentially, Universal is in the business of purchasing scrap metal, and reselling it at a profit to other companies. The primary issue raised on appeal is whether Universal's Mount Vernon facility, where Universal accepts deliveries of scrap metal from independent dealers and stores it pending transport, may be considered a solid waste 'transfer station' under the Westchester County Solid Waste and Recyclables Collection Licensing Law (hereinafter the Solid Waste Law). ... [W]e conclude that Universal's facility is not a transfer station as defined by the Solid Waste Law, and that there was thus no rational basis for the Westchester County Solid Waste Commission's determination to fine Universal for operating a transfer station without a license." ***Matter of Universal Metal & Ore, Inc. v. Westchester County Solid Waste Commn.*, 2016 N.Y. Slip Op. 06091, 2nd Dept 9-21-16**

PERSONAL INJURY, EVIDENCE.

CONSCIOUS PAIN AND SUFFERING CAUSE OF ACTION SHOULD NOT HAVE BEEN DISMISSED, EXPERT OPINION EVIDENCE SHOULD NOT HAVE BEEN ACCORDED ANY PROBATIVE FORCE.

The Second Department, in this wrongful death case, determined the defendant's motion for summary judgment dismissing the cause of action for damages for conscious pain and suffering should not have been granted. The physician's (Yong-Myun Rho's) letter did not demonstrate relevant expertise and was conclusory and speculative: "The letter did not set forth what skill, training, knowledge, or experience Yong-Myun Rho had in the relevant areas of medicine so as to ensure the reliability of the opinion regarding the decedent's time of death and whether the decedent suffered conscious pain before her death. Further, the opinion of Yong-Myun Rho was conclusory and speculative and, thus, should have been accorded no probative force ... . Essentially, based on the 'findings' that the decedent had no vital sign when brought to the hospital, that there were open skull fractures showing the contused and lacerated brain tissue, and that the hospital certified the decedent's death as traumatic cardiac arrest, Yong-Myun Rho opined that the decedent died immediately after the collision

due to severe brain injury, and that she did not suffer any conscious pain before her death. Yong-Myun Rho added that the brain was the 'essential organ that feels the pain.' Yong-Myun Rho did not adequately explain how these findings led to the conclusion that the decedent died immediately after the collision and did not suffer conscious pain before her death." ***Mazella v. Hauser*, 2016 N.Y. Slip Op. 06066, 2nd Dept 9-21-16**

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