CasePrepPlus

December 7, 2016

An advance sheet service summarizing recent and significant New York appellate cases

Editor: **Bruce Freeman**

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FIRST DEPARTMENT

EMPLOYMENT LAW, CONTRACT LAW.

COUNTERCLAIMS ALLEGING ENTITLEMENT TO A NONDISCRETIONARY BONUS PRECLUDED BY TERMS OF EMPLOYEE HANDBOOK.

The First Department, over an extensive dissent, determined the terms of the employee handbook, signed by the plaintiff, precluded counterclaims alleging an oral promise to pay an annual bonus: "The operative employee handbook stating, inter alia, that bonuses were paid at the sole discretion of plaintiff, and the acknowledgment of the handbook's terms signed by defendant, conclusively refute the counterclaims based on the alleged oral promise to pay an annual nondiscretionary bonus ... . Nor was the discretionary bonus policy modified by the alleged oral agreement. As defendant's acknowledgment makes clear, "[N]o supervisor, manager or other representative of [plaintiff] has the authority to make any verbal promises, commitments, or statements of any kind regarding the Company's policies, procedures, or any other issues that are legally binding on the Company." The quasi-contractual counterclaims based on the alleged agreement are likewise precluded by the discretionary bonus policy ... . ***Newmark & Co. Real Estate, Inc. v. Frischer*, 2016 N.Y. Slip Op. 08100, 1st Dept 12-1-16**

FAMILY LAW.

CUSTODY AWARD REVERSED, FACTORS ERRONEOUSLY RELIED UPON BY FAMILY COURT EXPLAINED IN DETAIL.

The First Department, reversing Family Court, determined mother, not father, should be awarded sole legal custody of the child: "The Family Court Judge presiding over the trial of this complex and long-running custody matter was clearly concerned with the child's best interests and wrestled with concerns about the mother's history of mental health issues, and the effect on the child of a 'temporary' award of custody to the father, issued years prior to assignment of the case to the trial judge. However, a thorough review of the record does not provide a sound and substantial basis for the award of custody to the father, and requires an award of custody to the mother. * * * In its award of custody to the father, the Family Court erred in several respects. … [I]t gave substantial weight to the fact that the father had temporary custody of the child for four years and nine months. This fact should not have been a basis, without more, for a final custody award. * * * … [T]he Family Court gave excessive weight to the parties' financial circumstances, noting that their finances favored the father because the father works, and the mother is unemployed and receives Supplemental Security Income (SSI). * * * … Family Court's concern about the mother's mental health history is understandable, but its conclusions disregard crucial evidence and its determination is not in the child's best interests. In March 2015, when the trial was completed, the mother was in remission, had not been hospitalized since November 2010, and, in the five years since then, had been compliant with treatment by her psychiatrist and therapist. * * * … [The child's] close relationship to her siblings, all of whom reside with her mother, also weighs in favor of awarding custody to the mother, since 'the stability and companionship to be gained from keeping the children together is an important factor for the court to consider" in making a custody determination ..., because "[y]oung brothers and sisters need each other's strengths and association in their everyday and often common experiences, and to separate them, unnecessarily, is likely to be traumatic and harmful' ...". ***Matter of Michael B. (Lillian B.)*, 2016 N.Y. Slip Op. 08101, 1st Dept 12-1-16**

FAMILY LAW, SOCIAL SERVICES LAW.

THE FINDING THAT PETITIONER'S CHILD WAS IN IMMINENT DANGER OF ABUSE, BASED SOLELY UPON A SHOPLIFTING INCIDENT, WAS NOT SUPPORTED BY THE EVIDENCE, PETITIONER'S NAME SHOULD NOT BE ON A LIST WHICH WILL MAKE IT DIFFICULT TO CONTINUE HER CAREER IN CHILD CARE.

The First Department, over a two-justice dissent, determined the administrative law judge's (ALJ's) finding that petitioner's (mother's) child was in imminent danger of harm was not supported by the evidence. Petitioner was caught shoplifting (wearing clothes under her clothes). At the time her five-year-old son was with her, and he too was wearing clothes under his clothes. The shoplifting charges were reduced to a violation and the record was sealed. Petitioner had no other contact with the criminal justice system. The child was deemed well cared for and happy. The issue was whether the petitioner's name should be maintained on a list ("indicated" child abuse) which will make it difficult for her to continue her career in

child care: "... [T]he ALJ's determination that petitioner's actions were reasonably related to a position in childcare, the field of study petitioner is pursuing, was not rational. The legal standards for determining whether a child is maltreated ... are repeated in the Guidelines. The ALJ failed to set forth his consideration of the relevant Guidelines for making such a determination, many of which, as the motion court pointed out, weighed in petitioner's favor, including factors 2 (the seriousness and extent of any injury to child), 3 (harmful effect on the child of the subject's actions or inactions), 5 (time since most recent incident of maltreatment), 6 (number of indicated incidents of abuse or maltreatment), 8(a) (whether the acts have been repeated), and 10 (whether reported behavior involved serious injury to, or death of, a child)." ***Matter of Natasha W. v. New York State Off. of Children & Family Servs.*, 2016 N.Y. Slip Op. 08099, 1st Dept 12-1-16**

INSURANCE LAW, SECURTIES, FRAUD.

MISREPRESENTATION CAUSE OF ACTION AGAINST BEAR STEARNS RE: COLLATERALIZED DEBT OBLIGATIONS AND RESIDENTIAL MORTGAGE-BACKED SECURITIES SHOULD NOT HAVE BEEN DISMISSED WITH PREJUDICE.

The First Department, in a full-fledged opinion by Justice Richter, determined (1) plaintiff's misrepresentation cause of action was properly dismissed because of a lack of specificity in the allegations, (2) the cause of action should not have been dismissed with prejudice, (3) and the specificity provided in the appellate briefs may support an amended complaint. Plaintiff, a stock insurance company, alleged it was induced to insure collateralized debt obligations (CDOs) by misrepresentations made by Bear Stearns: "[P]laintiff CIFG Assurance North America, Inc., a stock insurance company, alleges that Bear Stearns & Co. Inc., a predecessor of defendant J.P. Morgan Securities LLC, made material misrepresentations that induced CIFG to provide financial guaranty insurance in connection with two collateralized debt obligations (CDOs). According to CIFG, Bear Stearns had on its books a large number of high-risk residential mortgage-backed securities (RMBSs), and embarked on a scheme to rid itself of these toxic assets by offloading them into the two CDOs, and marketing the CDOs' securities to investors. * * * ... [T]he claim should not have been dismissed with prejudice, but rather, CIFG should be given the opportunity to replead. A request for leave to amend a complaint should be 'freely given, and denied only if there is prejudice or surprise resulting directly from the delay, or if the proposed amendment is palpably improper or insufficient as a matter of law' ...". ***CIFG Assur. N. Am., Inc. v. J.P. Morgan Sec. LLC*, 2016 N.Y. Slip Op. 08029, 1st Dept 11-29-16**

PERSONAL INJURY, LABOR LAW-CONSTRUCTION LAW.

SCAFFOLD DID NOT HAVE A SAFETY RAILING, PLAINTIFF ENTITLED TO SUMMARY JUDGMENT ON 240(1) CAUSE OF ACTION.

The First Department determined plaintiff was properly awarded summary judgment in this Labor Law 240(1) action. Plaintiff fell from a scaffold which did not have safety railings. Any comparative negligence on plaintiff's part (not locking the wheels) was irrelevant: "Plaintiff made a prima facie showing of entitlement to judgment as a matter of law on the Labor Law § 240(1) claim by presenting undisputed evidence that he 'fell off a scaffold without guardrails that would have prevented his fall' ... . Plaintiff's alleged 'failure to use the locking wheel devices and his movement of the scaffold while standing on it' were at most comparative negligence, which is not a defense to a Labor Law § 240(1) claim ...". ***Celaj v. Cornell*, 2016 N.Y. Slip Op. 07996, 1st Dept 11-29-16**

PERSONAL INJURY, LABOR LAW-CONSTRUCTION LAW.

PLAINTIFF ENTITLED TO SUMMARY JUDGMENT ON LABOR LAW 240 (1) CAUSE OF ACTION, LADDER KICKED OUT FROM UNDER HIM.

The First Department, reversing Supreme Court, determined plaintiff was entitled to summary judgment on his Labor Law 240(1) cause of action. There was evidence the ladder kicked out from under plaintiff. There was no need to show the ladder was defective. It was enough the ladder was not secured: "Plaintiff established his entitlement to partial summary judgment on his Labor Law § 240(1) claim through witnesses' testimony that the ladder from which he was descending suddenly kicked out to the left, resulting in his fall ... . Contrary to the motion court's finding, plaintiff was not required to demonstrate that the ladder was defective in order to satisfy his prima facie burden ... . In opposition, defendants failed to raise a triable issue of fact as to whether plaintiff was the sole proximate cause of the accident. Plaintiff was not responsible for setting up the ladder, and there was no testimony establishing the existence of any other readily available, adequate safety devices at the work site ... . Furthermore, given the undisputed testimony that the ladder kicked out because it was unsecured, the testimony that plaintiff unsafely descended from the ladder by carrying pipe fittings in his arms established, at most, 'contributory negligence, a defense inapplicable to a Labor Law § 240(1) claim' ...". ***Fletcher v. Brookfield Props.*, 2016 N.Y. Slip Op. 08105, 1st Dept 12-1-16**

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

FALL FROM SCAFFOLD WITH NO SIDE RAILS ENTITLED PLAINTIFF TO SUMMARY JUDGMENT, HEARSAY ALONE WILL NOT DEFEAT SUMMARY JUDGMENT MOTION, UNSIGNED DEPOSITION TRANSCRIPT PROPERLY CONSIDERED.

The First Department determined plaintiff was entitled to summary judgment on his Labor Law 240(1) cause of action. Plaintiff fell from a Baker's scaffold that had no side rails. Although hearsay can be submitted in opposition to a summary judgment motion, the motion will not be defeated by hearsay alone (the case here). The court noted that the plaintiff's unsigned deposition transcript was properly considered because it was certified by the reporter, its accuracy was not challenged by the defendant, and plaintiff adopted it as accurate by submitting it: "Plaintiff was entitled to summary judgment on his Labor Law § 240(1) claim where he fell from a six-foot-high Baker's scaffold, which he was directed to use in order to plaster a ceiling. The record shows that the scaffold 'had no side rails, and no other protective device was provided to protect him from falling off the sides' ... . [T]he statement in the affidavit of [defendant's] owner that a subcontractor had assured him that the subcontractor had instructed all his employees to use the lifeline, belt and harness is insufficient raise a triable issue of fact as to whether plaintiff may be the sole proximate cause for disregarding such an instruction ... . While hearsay may be considered in opposition to defeat a summary judgment motion if it is not the only evidence upon which opposition to the motion is predicated, because it was the only evidence establishing that plaintiff disregarded an instruction to use the safety devices, it is insufficient to defeat plaintiff's motion ...". ***Chong v. 457 W. 22nd St. Tenants Corp.*, 2016 N.Y. Slip Op. 07997, 1st Dept 11-29-16**

SECOND DEPARTMENT

CIVIL PROCEDURE.

MOTION TO AMEND ANSWER TO ASSERT STATUTE OF LIMITATIONS DEFENSE, MADE SIX YEARS AFTER INITIAL ANSWER WAS SERVED, SHOULD HAVE BEEN DENIED.

The Second Department, reversing Supreme Court, determined the county's motion to amend its answer to assert a statute of limitations defense, six years after the initial answer was served, should have been denied: "The County waived a defense based on the statute of limitations by not raising that defense in its answer ... . Nevertheless, defenses waived under CPLR 3211(e) can be interposed in an answer amended by leave of the court pursuant to CPLR 3025(b) ... . 'In the absence of prejudice or surprise resulting directly from the delay in seeking leave, such applications are to be freely granted unless the proposed amendment is palpably insufficient or patently devoid of merit' ... . 'A determination whether to grant such leave is within the Supreme Court's broad discretion, and the exercise of that discretion will not be lightly disturbed' ... . ' In exercising its discretion, the court should consider how long the party seeking the amendment was aware of the facts upon which the motion was predicated [and] whether a reasonable excuse for the delay was offered' ... . ' [W]here the application for leave to amend is made long after the action has been certified for trial, judicial discretion in allowing such amendments should be discrete, circumspect, prudent and cautious' ... . We agree with the plaintiffs that the Supreme Court improvidently exercised its discretion in granting the County's motion for leave to amend its answer to assert the statute of limitations as a defense and for summary judgment dismissing the complaint as time-barred ... . The County's motion was not made until approximately six years after service of its answer, after the parties had completed discovery, and after the note of issue had been filed. Under these circumstances, the plaintiffs have suffered significant prejudice from the County's delay in asserting the statute of limitations as a defense ...". ***Civil Serv. Empls. Assn. v. County of Nassau*, 2016 N.Y. Slip Op. 08038, 2nd Dept 11-30-16**

CIVIL PROCEDURE, CRIMINAL LAW.

CIVIL MATTER PROPERLY STAYED UNTIL RELATED CRIMINAL MATTER RESOLVED, DISCRETIONARY CRITERIA EXPLAINED.

The Second Department determined Supreme Court properly stayed a civil matter after the defendant was indicted in a related criminal matter and indicated he would invoke his Fifth Amendment right to remain silent if the civil matter went forward: "A motion pursuant to CPLR 2201 to stay a civil action pending resolution of a related criminal action is directed to the sound discretion of the trial court ... . 'Factors to consider include avoiding the risk of inconsistent adjudications, [duplication] of proof and potential waste of judicial resources. A compelling factor is a situation where a defendant will invoke his or her constitutional right against self incrimination' ... . 'Although the pendency of a criminal proceeding does not give rise to an absolute right under the United States or New York State Constitutions to a stay of a related civil proceeding . . . there is no question but that the court may exercise its discretion to stay proceedings in a civil action until a related criminal dispute is resolved' ... . Here, this action and the criminal proceeding against Samuel arise from the same facts. While a stay may cause inconvenience and delay to the plaintiffs, the failure to grant the stay would cause Samuel to 'suffer the severe prejudice of being deprived of a defense' ... . Moreover, a prior determination in the criminal proceeding could have

collateral estoppel effect in this action, thereby simplifying the issues ...". ***Mook v. Homesafe Am., Inc.*, 2016 N.Y. Slip Op. 08054, 2nd Dept 11-30-16**

CIVIL PROCEDURE, EMPLOYMENT LAW, CONTRACT LAW.

CRITERIA FOR A MOTION TO DISMISS NOT MET, SUPREME COURT SHOULD NOT HAVE DISMISSED BY MAKING A FINDING IN A MATTER PENDING BEFORE THE COMPTROLLER.

In an action stemming from the withholding of payment to plaintiff subcontractor, the Second Department determined the breach of contract cause of action should not have been dismissed, but noted that a conversion action cannot be based upon a breach of contract, and an unjust enrichment cause of action cannot coexist with a breach of contract cause of action. Supreme Court had dismissed the breach of contract cause of action, finding the defendant had a legal right to withhold payment under Labor Law 220 because complaints had been lodged for failure to pay the prevailing wage for this school construction project. But since the Comptroller had not yet ruled on the Labor Law 220 complaints, Supreme Court should not have based its dismissal on them by making its own finding: "The Supreme Court erred in dismissing the third-party cause of action alleging breach of contract on the ground that the third-party defendants had a legal right to withhold payment pursuant to Labor Law §§ 220 and 220-b. Based upon the record before us, there is no indication that the Comptroller has rendered a final determination regarding the alleged Labor Law § 220 violation. As such, the court, in effect, determined the prevailing wage issue, which is within the exclusive province of the Comptroller, prior to a determination by the Comptroller ... . Thus, the evidentiary material submitted by the third-party defendants, which demonstrated that payment … under the subject contracts was withheld pending the Comptroller's determination, failed to establish that any fact alleged in support of the third-party breach of contract cause of action was undisputedly not a fact, and failed to conclusively establish a defense as a matter of law to that cause of action." ***Gym Door Repairs, Inc. v. Astoria Gen. Contr. Corp.*, 2016 N.Y. Slip Op. 08047, 2nd Dept 11-30-16**

CRIMINAL LAW, ATTORNEYS.

DEFENSE COUNSEL INEFFECTIVE FOR FAILURE TO MOVE TO SEVER AT TRIAL AFTER AN ANTAGONISTIC DEFENSE WAS PURSUED BY THE CO-DEFENDANT.

The Second Department, reversing the conviction, determined the defense attorney's failure to move to sever the defendant's trial from the co-defendant's and request a missing witness charge constituted ineffective assistance. The need for severance became apparent during the trial when counsel for the co-defendant pursued a defense antagonistic to that of the defendant. The court noted the motion for severance can be made any time before the end of the trial when the defendant could not previously have been aware of the basis for it: "Where a defendant claims prejudice as a result of a joint trial because his defense is antagonistic to that of a codefendant, 'severance is not required solely because of hostility between the parties, differences in their trial strategies or inconsistencies in their defenses' ... . However, 'severance 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' ... . Thus, severance should be granted where the defenses are not only antagonistic, but also mutually exclusive and irreconcilable ... . Although a severance motion must generally be made before the commencement of trial ... , CPL 255.20(3) permits a pretrial motion to be made and decided 'at any time before the end of trial' when 'the defendant could not, with due diligence, have been previously aware' of the basis for the motion. CPL 255.20(3) further provides that the court may, 'in the interest of justice, and for good cause shown,' entertain and dispose of a pretrial motion 'at any time before sentence.' " ***People v. Davydov*, 2016 N.Y. Slip Op. 08090, 2nd Dept 11-30-16**

FORECLOSURE, ATTORNEYS, EVIDENCE.

RULES OF THE CHIEF ADMINISTRATIVE JUDGE CONCERNING THE CONTENTS OF AFFIDAVITS SUBMITTED BY BANK ATTORNEYS IN FORECLOSURE ACTIONS DID NOT EXCEED RULEMAKING POWERS AND MUST BE FOLLOWED.

The Second Department, reversing Supreme Court, determined that the rules promulgated by the Chief Administrative Judge, concerning the affidavits submitted by bank attorneys in foreclosure actions, did not exceed the rule-making powers of the Chief Administrative Judge and must be complied with in actions commenced before August 30, 2013 (when a new CPLR statute went into effect): "Contrary to the Supreme Court's determination, the Chief Administrative Judge was not acting ultra vires in issuing Administrative Orders 548/10 and 431/11 (hereinafter together the Administrative Orders), but pursuant to authority delegated by the Legislature to adopt rules and orders regulating practice in the courts after consulting with the administrative board ... . Moreover, the attorney affirmation itself is not substantive ... and, thus, is within the authority of the Chief Administrative Judge to promulgate rules of procedure. In addition, that the Legislature manifested a clear intent to apply the certificate of merit requirement of CPLR 3012-b only to those actions commenced on or after August 30, 2013, does not manifest an intent by the Legislature to relieve a plaintiff's counsel of the affirmation requirement in actions commenced prior to August 30, 2013." ***Bank of N.Y. Mellon v. Izmirligil*, 2016 N.Y. Slip Op. 08033, 2nd Dept 11-30-16**

HUMAN RIGHTS LAW, COOPERATIVES.

ALTHOUGH COMPLAINANT DID NOT DEMONSTRATE SHE WAS DISCRIMINATED AGAINST BY THE COOPERATIVE BASED UPON A DISABILITY, COMPLAINANT DID DEMONSTRATE THE COOPERATIVE IMPROPERLY RETALIATED AGAINST HER AFTER SHE FILED THE DISCRIMINATION COMPLAINT WITH THE NYS DIVISION OF HUMAN RIGHTS.

Although the complainant, a shareholder in a cooperative, did not demonstrate she was discriminated against when the cooperative and the board (petitioners) refused to allow her to keep a dog in her apartment, the Second Department determined she did demonstrate petitioners retaliated against her for bringing her complaint to the New York State Division of Human Rights (SDHR). Complainant alleged she was disabled and the dog helped her cope with her disabilities: "... [T]he complainant failed to present medical or psychological evidence sufficient to demonstrate that the dog was actually necessary in order for her to enjoy the apartment. Notably, the complainant had resided in the apartment for more than 20 years without the dog. ... [T]he complainant established that she participated in the protected activity of filing an SDHR discrimination complaint against the petitioners, the petitioners were aware of this action, and there was a causal connection between the protected activity and the petitioners' retaliatory conduct, which included taking away the complainant's designated parking space for a nine-day period, refusing to accept her maintenance checks, filing eviction proceedings against her, falsely informing her that the SDHR had ruled in the petitioners' favor, and directing her to immediately remove her dog from her apartment ...". ***Matter of Delkap Mgt., Inc. v. New York State Div. of Human Rights*, 2016 N.Y. Slip Op. 08073, 2nd Dept 11-30-16**

INSURANCE LAW, CONTRACT LAW.

EVEN IF THE MISREPRESENTATION THE HOME WAS TO BE OWNER-OCCUPIED WAS INNOCENTLY MADE, RESCISSION OF THE FIRE INSURANCE POLICY WAS JUSTIFIED.

The Second Department determined defendant insurer properly rescinded the plaintiffs' fire insurance policy based upon the plaintiffs' misrepresentation the residence would be owner-occupied. The court noted that a misrepresentation can be innocently made and still trigger rescission. The court also found that the broker had no obligation to make sure the insurance application was properly filled out by the plaintiffs: "Here, [the insurer] established its prima facie entitlement to judgment as a matter of law by submitting evidence demonstrating that the plaintiffs' application for insurance contained a misrepresentation regarding whether the premises would be owner occupied and that it would not have issued the subject policy if the application had disclosed that the subject premises would not be owner occupied ... . In opposition, the plaintiffs failed to raise a triable issue of fact. The plaintiffs admit that, at the time the application was completed, they did not intend to occupy the premises. Thus, contrary to the plaintiffs' contentions, although the application was completed prior to closing and prior to the inception of the policy, the representation therein that the premises was an owner-occupied primary residence established, in effect, a material misrepresentation of a then existing fact that the premises would be owner occupied, which was sufficient for rescission under Insurance Law § 3105 ...". ***Joseph v. Interboro Ins. Co.*, 2016 N.Y. Slip Op. 08050, 2nd Dept 11-30-16**

PERSONAL INJURY, LABOR LAW-CONSTRUCTION LAW.

ALTHOUGH PLAINTIFF WAS ON A LADDER WHEN INJURED, THE INJURY WAS NOT CAUSED BY GRAVITY, LABOR LAW 240(1) CAUSE OF ACTION PROPERLY DISMISSED, DEFENDANT DID NOT HAVE SUFFICIENT CONTROL OVER THE INJURY-PRODUCING WORK TO BE LIABLE UNDER LABOR LAW 200.

The Second Department determined plaintiff's Labor Law 240(1) and 200 causes of action were properly dismissed. Plaintiff was on a ladder bolting an elevated steel beam when a forklift struck another (connected) beam pinning plaintiff's arm between the beam he was working on and the wall. The injury was deemed unrelated to the force of gravity. In addition the court found that defendant did not exercise sufficient control over the injury-producing work to be liable under Labor Law 200. However, certain Labor Law 241(6) causes of action, alleging the injury was linked to violations of the industrial code, should not have been dismissed: "Labor Law § 240(1) 'was designed to provide exceptional protection for workers against the special hazards which stem from a work site that is either elevated or positioned below the level where materials are hoisted or secured' ... . Its purpose is 'to protect construction workers not from routine workplace risks, but from the pronounced risks arising from construction work site elevation differentials'... . Merely because 'a worker is injured while working above ground does not ipso facto mean that the injury resulted from an elevation-related risk contemplated by Section 240(1) of the Labor Law' ... . * * * To be held liable under Labor Law § 200 for injuries arising from the manner in which work is performed, a defendant must have the authority to exercise supervision and control over the work ... . 'A defendant has the authority to supervise or control the work for purposes of Labor Law § 200 when that defendant bears the responsibility for the manner in which the work is performed' ... . ' [T]he right to generally supervise the work, stop the contractor's work if a safety violation is noted, or to ensure compliance with safety regulations and contract specifications is

insufficient to impose liability under Labor Law § 200 or for common-law negligence'...". ***Guallpa v. Canarsie Plaza, LLC*, 2016 N.Y. Slip Op. 08046, 2nd Dept 11-30-16**

PERSONAL INJURY, LABOR LAW-CONSTRUCTION LAW

FALLING PLYWOOD NOT ACTIONABLE UNDER LABOR LAW 240(1), PLYWOOD WAS NOT BEING HOISTED AND WAS NOT REQUIRED TO BE SECURED, LABOR LAW 246(1) CAUSE OF ACTION PROPERLY SURVIVED.

The Second Department determined plaintiff's Labor Law 240(1) cause of action, based upon injury caused by a falling piece of plywood, was properly dismissed because the plywood was not being hoisted and did not need to be secured. Plaintiff's 241(6) cause of action was properly allowed to proceed: "... [T]he Supreme Court correctly determined that the defendants established their prima facie entitlement to judgment as a matter of law dismissing the cause of action alleging violations of Labor Law § 240(1) by submitting the deposition transcript of [defendant's] superintendent, which demonstrated that the plywood that fell was not being hoisted or secured and did not require securing for the purposes of the undertaking at the time it fell ... . * * * As to the Labor Law § 241(6) cause of action, which was predicated upon a violation of 12 NYCRR 23-1.7(a)(1), the Supreme Court ... correctly determined that ... the defendants established their prima facie entitlement to judgment as a matter of law based upon the plaintiff's supervisor's affidavit, in which he averred that the area where the plaintiff was working was not normally exposed to falling material or objects (see 12 NYCRR 23-1.7[a][1]...). In opposition, the plaintiff raised a triable issue of fact by submitting the plaintiff's supervisor's deposition testimony, in which he testified, in contradiction to his affidavit, that it was known that objects were 'always' falling at the plaintiff's worksite, and that objects fell 'sometimes' and 'once in a while' ...". ***Millette v. Tishman Constr. Corp.*, 2016 N.Y. Slip Op. 08053, 2nd Dept 11-30-16**

REAL ESTATE, CONTRACT LAW, APPEALS.

BUYER NOT ENTITLED TO RETURN OF DEPOSIT, BUYER DID NOT COMPLY WITH THE MORTGAGE CONTINGENCY PROVISIONS OF THE PURCHASE AGREEMENT AND DID NOT ACT IN GOOD FAITH, APPELLATE COURT SEARCHED THE RECORD AND AWARDED SUMMARY JUDGMENT TO SELLERS.

The Second Department, reversing Supreme Court, searched the record and awarded summary judgment to the defendants-sellers in this action to recover the deposit for a home purchase. The court found the buyer did not comply with the mortgage contingency provisions of the purchase agreement and misled the sellers, not informing them of the rejection of his mortgage applications: "... [T]he Supreme Court erred in determining that the buyer had made a prima facie showing of entitlement to judgment as a matter of law. The correspondence submitted by the buyer on renewal demonstrated, among other things, that the seller agreed to the buyer's initial request to extend the commitment date but refused to consider his request for a second extension of the commitment date until the buyer provided copies of his loan applications and declinations. Additionally, this new evidence demonstrated that when the buyer sought an extension of the commitment date, he did not advise the seller of the fact that he had already been rejected by more than one lender. Contrary to the buyer's contention, the evidence demonstrated that the buyer failed to comply with several provisions of the mortgage contingency clause in the contract ... , and acted in bad faith in obtaining an extension of the commitment date by misleading the seller about the fact that multiple lenders rejected his mortgage loan applications based on his "delinquent credit obligations" and the lenders' inability to verify his income." ***Kweku v. Thomas*, 2016 N.Y. Slip Op. 08051, 2nd Dept 11-30-16**

THIRD DEPARTMENT

CIVIL PROCEDURE.

MOTION TO COMPEL COMPLIANCE WITH NON-JUDICIAL SUBPOENAS PROPERLY GRANTED, ANY OBJECTIONS WOULD HAVE TO AWAIT THE ACTUAL QUESTIONING AT THE HEARING.

The Third Department, affirming Supreme Court, determined petitioner's motion pursuant to CPLR 2308 (b) to compel respondents to comply with non-judicial subpoenas was properly granted. Petitioner was charged by the State Liquor Authority (SLA) with improper conduct, i.e., shipping wine to customers in states that prohibit residents from receiving such shipments. Petitioner subpoenaed the SLA's general counsel and several others on the SLA staff. It was petitioner's position that shipping wine out of state had never before been deemed improper by the SLA. The court found the objections to the subpoenas, including an objection based upon attorney-client privilege, premature. Because the subpoenas sought only testimony, any objections would have to await the actual questioning at the hearing: "According to petitioner, the challenged subpoenas are intended to obtain information pertaining to, among other things, SLA's past and present policies regarding out-of-state shipping, the standards applicable to the charges of improper conduct against petitioner and evidence related to penalty mitigation. CPLR 2308 (b) provides that, upon a motion to compel a respondent to comply with a non-judicial subpoena, the court 'shall order compliance' if it determines that the subpoena was authorized. Here, it is undisputed that petitioner was authorized by SLA's regulations to issue the subpoenas (see 9 NYCRR 54.3 [h]; see also CPLR 2302 [a]). Respondents nevertheless contend that their motion to quash should have been granted based upon their claims that the information sought by the subpoenas is privileged, irrelevant, beyond the scope of the administrative hearing, cumulative

and burdensome. We affirm, finding no abuse of Supreme Court's discretion in the denial of respondents' cross motion ...". ***Matter of Empire Wine & Spirits LLC v. Colon*, 2016 N.Y. Slip Op. 08145, 3rd Dept 12-1-16**

CRIMINAL LAW, APPEALS.

MURDER CONVICTION REVERSED, AGAINST THE WEIGHT OF THE EVIDENCE.

The Third Department reversed defendant's murder conviction, finding it against the weight of the evidence. The victim, who died from blunt force trauma to the abdomen, was defendant's two-year-old son. The forensic evidence placed the time of the injury during a period when defendant was not home. Contradictions in witness testimony rendered it too weak to support the conviction. The Third Department went through the trial evidence in detail. The evidence cannot be fairly summarized here. ***People v. Taft*, 2016 N.Y. Slip Op. 08123, 3rd Dept 12-1-16**

DISCIPLINARY HEARINGS (INMATES).

PETITIONER WAS NOT ALLOWED TO PRESENT RELEVANT DOCUMENTARY EVIDENCE, DETERMINATION ANNULLED.

The Third Department annulled the determination because petitioner was not allowed to present relevant documentary evidence: "Initially, respondent concedes, and we agree, that substantial evidence does not support the finding that petitioner was guilty of violating facility correspondence procedures. Turning to the merits, petitioner asserts that he was improperly denied the right to present documentary evidence in support of his defense, an issue that, contrary to respondent's contention, we find preserved for our review. The record establishes that when petitioner informed the Hearing Officer that he had documentary evidence, albeit not with him at that time, that would support his defense of retaliation, the Hearing Officer adjourned the hearing without addressing the issue of the documentary evidence and, immediately upon recommencement of the hearing, rendered the determination of guilt. Because the documentary evidence was relevant to petitioner's exculpatory explanation regarding the content of the letter that formed the basis of the misbehavior report, as well as to his defense of retaliation, and because we cannot say that petitioner was not prejudiced by the omission of the documents, the determination must be annulled ...". ***Matter of Telesford v. Annucci*, 2016 N.Y. Slip Op. 08149, 3rd Dept 12-1-16**

EMPLOYMENT LAW, EDUCATION-SCHOOL LAW, CIVIL SERVICE LAW.

CLAIMANT WAS NOT A NECESSARY EMPLOYEE WITHIN THE MEANING OF THE CIVIL SERVICE LAW, NO OBLIGATION TO TRANSFER HER AFTER HER POSITION WAS ABOLISHED.

The Third Department, affirming Supreme Court, determined petitioner was not a "necessary employee" under the Civil Service Law. Therefore her position with the respondent school district was not obligated to transfer her when her position was abolished: "Mandamus to compel, sought by petitioner, is 'an extraordinary remedy that lies only to compel the performance of acts which are mandatory, not discretionary, and only when there is a clear legal right to the relief sought' ... . Civil Service Law § 70 (2) provides, in relevant part: 'Upon the transfer of a function . . . from one department or agency of the state to another department or agency of the state, . . . provision shall be made for the transfer of necessary officers and employees who are substantially engaged in the performance of the function to be transferred' ... . This language imposes a mandatory duty ... . Thus, the ultimate issue is whether petitioner has 'established a right to the relief sought which is 'so clear as not to admit of reasonable doubt or controversy' ... . An employee is eligible for a transfer pursuant to Civil Service Law § 70 (2) only if he or she is a 'necessary . . . employee[]' — i.e., if the agency or the department to which his or her duties are being transferred does not have sufficient staff at the time of the transfer to perform the duties being transferred ...". **Matter of Thornton v. Saugerties Cent. Sch. Dist., 2016 N.Y. Slip Op. 08139, 3rd Dept 12-1-16**

EMPLOYMENT LAW, MUNICIPAL LAW.

NOTICE OF CLAIM REQUIRED FOR WRONGFUL TERMINATION SUIT AGAINST A COUNTY, EVEN THOUGH A NOTICE OF CLAIM WOULD NOT BE REQUIRED FOR A SIMILAR SUIT AGAINST A CITY.

The Third Department determined plaintiff's wrongful termination suit against the county was properly dismissed for failure to file a notice of claim. The court noted that the notice of claim requirement for suits against cities is more narrow and applies only to tort cases. The notice of claim requirements for suits against counties are not limited to tort actions: "County Law § 52 (1) broadly provides that '[a]ny claim . . . against a county for damage [or] injury . . . and any other claim for damages arising at law or in equity, alleged to have been caused . . . by or because of any misfeasance, omission of duty, negligence or wrongful act on the part of the county, its officers, agents, servants or employees, must be made and served in compliance with [General Municipal Law § 50-e]' ... . Here, plaintiff's complaint sought damages for wrongful termination and, thus, pursuant to County Law § 52 (1), General Municipal Law § 50-e (1) (a) required service of a notice of claim within 90 days after the claim for retaliatory termination arose. It is undisputed that plaintiff failed to serve a notice of claim, entitling defendant to dismissal of the complaint ... . Plaintiff's reliance on appellate decisions involving complaints asserting a Civil Service Law § 75-b or similar claims against cities, in which the courts have ruled that the filing of a notice of claim is not required ... , is misplaced. The cases cited by plaintiff involve claims against cities to which the more narrow notice of claim provisions of General Municipal Law §§ 50-e and 50-i apply, limiting the requirement for notices of claim to 'tort'

claims (General Municipal Law § 50-e [1] [a]) or claims for 'personal injury, wrongful death or damage to real or personal property' (General Municipal Law § 50-i [1])." ***Sager v. County of Sullivan*, 2016 N.Y. Slip Op. 08152, 3rd Dept 12-1-16**

ENVIRONMENTAL LAW, NAVIGATION LAW, CORPORATION LAW.

PETITIONER OPERATED AN ONSHORE PETROLEUM STORAGE FACILITY WITHOUT A LICENSE IN VIOLATION OF THE NAVIGATION LAW, LICENSE FEES AND PENALTIES PROPERLY IMPOSED UPON PETITIONER'S SOLE SHAREHOLDER.

The Third Department affirmed the respondent commissioner of environmental conservation's determination petitioner had failed to obtain licenses and pay license fees for an onshore petroleum storage facility and failed to maintain an adequate secondary containment area for the storage tanks. The assessment of fees and penalties was upheld, as was piercing the corporate veil to impose the fees and penalties upon petitioner's sole shareholder personally: "The applicable standard of review is whether substantial evidence supports respondent's determination (see CPLR 7803 [4]...). Under this standard, 'it is the responsibility of the administrative agency to weigh the evidence and choose from among competing inferences therefrom and, so long as the inference drawn and the ultimate determination made are supported by substantial evidence, it is not for the court to substitute its judgment for that of the administrative agency' ... . Respondent is not bound by the ALJ's factual findings and is entitled to make his own findings ... . To that end, respondent's determination will not be disturbed so long as it is supported by substantial evidence ... . Under New York's Navigation Law, a person is prohibited from operating a major petroleum storage facility in the absence of a license (see Navigation Law § 174 [1] [a]; [9])." ***Matter of Supreme Energy, LLC v. Martens*, 2016 N.Y. Slip Op. 08143, 3rd Dept 12-1-16**

FAMILY LAW, CIVIL PROCEDURE.

UNDER THE FACTS, NO ABUSE OF DISCRETION IN FAILING TO AWARD PREJUDGMENT INTEREST ON A DISTRIBUTIVE AWARD THE WIFE FAILED TO PAY.

The Third Department determined Supreme Court did not abuse its discretion when it did not award prejudgment interest on a distributive award the wife had failed to pay. The matter came before Supreme Court when the husband moved to enforce the separation agreement: " 'There is no automatic entitlement to prejudgment interest, under CPLR 5001, in matrimonial litigation' ... . Rather, the decision to award prejudgment interest in a matrimonial action, as well as the rate and date from which it shall be computed, are matters within the sound discretion of the trial court ... . Here, the record reflects that, following the execution of the separation agreement, issues arose regarding the accuracy of certain deeds and transfer documents prepared by the husband relative to the parcels of real property that were to be conveyed pursuant to the agreement. Such issues had not been resolved at the time of the husband's motion to enforce the agreement, the wife claiming that certain inaccuracies still remained within the relevant documents. Although the wife's obligation to tender the distributive award by the date prescribed in the separation agreement was not contingent upon the execution of the deeds transferring the real property, the wife explained that she had been advised by her attorney to withhold payment of the distributive award — which she had placed in a separate interest-bearing bank account — until the deeds were finalized and signed so as to ensure a contemporaneous exchange ... . Under these circumstances, we cannot conclude that Supreme Court improvidently exercised its discretion in choosing to award the husband all interest actually earned on the distributive award rather than prejudgment interest pursuant to CPLR 5001." ***Fori v. Fori*, 2016 N.Y. Slip Op. 08135, 3rd Dept 12-1-16**

FREEDOM OF INFORMATION LAW (FOIL).

REQUEST FOR NAMES AND ADDRESSES OF RESIDENTS PARTICIPATING IN THE DEER MANAGEMENT PROGRAM, ALLOWING BOW AND ARROW HUNTING ON THEIR PROPERTY, SHOULD HAVE BEEN GRANTED.

The Third Department determined the request for the names and addresses of residents participating in the deer management program should have been granted by the village. The residents at issue allowed deer hunting (bow and arrow) on their property: "To justify the redaction of the names, addresses and other identifying information relating to participants in the deer management program, respondent asserts that disclosure of this information 'would constitute an unwarranted invasion of personal privacy' (Public Officers Law § 87 [2] [b]) or 'could endanger the li[ves] or safety' of the participants (Public Officers Law § 87 [2] [f]). Turning first to the personal privacy exemption, respondent failed to demonstrate that the redacted information fell into any of the categories of information that the Legislature has specifically determined would qualify as an unwarranted invasion of personal privacy if disclosed (see Public Officers Law § 89 [2] [b]). * * * Nor did respondent demonstrate that disclosure of the redacted information 'could endanger the li[ves] or safety' of the program's participants (Public Officers Law § 87 [2] [f]). While respondent was only required to demonstrate 'a possibility of endangerment' ... , respondent's submissions … fell short of such demonstration." ***Matter of Laveck v. Village Bd. of Trustees of the Vil. of Lansing*, 2016 N.Y. Slip Op. 08150, 3rd Dept 12-1-16**

RETIREMENT AND SOCIAL SECURITY LAW.

POST TRAUMATIC STRESS DISORDER SUFFERED BY A COURT OFFICER AFTER THE OFFICER RETURNED FIRE KILLING A SHOOTER AT THE COURTHOUSE WAS NOT THE RESULT OF A COMPENSABLE ACCIDENT.

The Third Department, over a dissent, determined the incident which led to petitioner's psychological injury was not an accident within the meaning of the Retirement and Social Security Law. Petitioner was therefore not entitled to accidental disability retirement benefits. Petitioner was on duty in the courthouse when a man fired a shotgun into the building. Petitioner returned fire, killing the shooter: "It is well settled that for purposes of the Retirement and Social Security Law, an accident is 'a sudden, fortuitous mischance, unexpected, out of the ordinary, and injurious in impact' ... . 'Significantly, it must result from an activity that is not undertaken in the performance of ordinary job duties and that is not an inherent risk of such job duties' ... , nor can it stem from hazards that may be reasonably anticipated ... . Petitioner bears the burden of establishing that the event producing the injury was an accident ... , and the Comptroller's determination will be upheld where it is supported by substantial evidence ... . There is no question that petitioner's heroic efforts saved many lives on the morning in question, and he is to be commended for his service in the protection of others. There is also no question, however, that — based upon a review of petitioner's job description and testimony — petitioner was injured during the course of executing the very duties that he had been assigned to perform and in the context of responding to a risk that was both reasonably foreseeable and, more to the point, inherent in the execution of his regular duties." ***Matter of Kowal v. DiNapoli*, 2016 N.Y. Slip Op. 08144, 3rd Dept 12-1-16**

UNEMPLOYMENT INSURANCE.

CLAIMANT ACCEPTED $10,000 AND AGREED TO RESIGN IN GRIEVANCE PROCEEDINGS, VOLUNTARY SEPARATION PRECLUDED UNEMPLOYMENT INSURANCE BENEFITS.

The Third Department, reversing the board, determined claimant's acceptance of $10,000 and his agreement to resign during the course of grievance proceedings constituted a voluntary separation from his employment. Claimant was therefore not entitled to unemployment insurance benefits: "... [C]laimant's resignation and acceptance of the $10,000 payment in settlement of outstanding grievances and other claims constitutes a voluntary separation from employment disqualifying him from receiving unemployment insurance benefits ... . There is no indication that claimant was forced to accept the settlement agreement or that he was subject to disciplinary action if he did not." ***Matter of Gill (Phoenix Energy Mgt. Inc. – Commissioner of Labor)*, 2016 N.Y. Slip Op. 08140, 3rd Dept 12-1-16**

WORKERS' COMPENSATION LAW.

FAILURE TO INFORM CARRIER OF LAWN CARE WORK WARRANTED RETURN OF BENEFITS PAID, BUT NOT A PERMANENT BAR ON FUTURE BENEFITS.

The Third Department upheld the board's determination that claimant knowingly failed to inform the carrier he was doing some lawn care work while collecting workers' compensation benefits. The omission was deemed a knowing false statement or misrepresentation warranting return of the benefits paid. However, the board's ruling claimant was permanently barred from seeking benefits was not warranted by the facts: "... [A]n omission of material information may constitute a knowing false statement or misrepresentation ... . We thus find that substantial evidence supports the Board's credibility determination that claimant's failure to fully describe and disclose his lawn mowing activities to the carrier and the carrier's consultant at the time of the medical examination constituted knowing false statements to obtain workers' compensation benefits in violation of Workers' Compensation Law § 114-a (1) ... . We reach a different conclusion as to the Board's determination permanently disqualifying claimant from receiving any future wage replacement benefits. The applicable standard is that the penalty imposed may not be disproportionate to the underlying misconduct ... . In cases where this very significant sanction has been approved, the underlying deception has been deemed 'egregious' or severe, or there was a lack of mitigating circumstances ... . Here, the Board provided no rationale supporting its determination that this onerous penalty was warranted, and we find inadequate support for such a finding upon review." ***Matter of Kodra v. Mondelez Intl., Inc.*, 2016 N.Y. Slip Op. 08136, 3rd Dept 12-1-16**

ZONING.

ZONING BOARD OF APPEALS' RULING THAT A NONCONFORMING USE HAD NOT BEEN DISCONTINUED OR ABANDONED SHOULD NOT HAVE BEEN REVERSED.

The Third Department, reversing Supreme Court, determined the zoning board of appeals' (ZBA's) ruling that a nonconforming use had not been discontinued or abandoned should be affirmed. The court explained the role of the reviewing court when the controversy is fact-based and does not involve the interpretation of a statute or ordinance: "It is well settled that unless the issue presented is one of pure legal interpretation, '[a] zoning board's interpretation of a local zoning ordinance is afforded deference and will only be disturbed if irrational or unreasonable' ... . Here, the issue of whether the preexisting nonconforming use was discontinued is largely a fact-based inquiry, rather than a purely legal interpretation of the zoning law. As such, the ZBA's determination is entitled to deference ...". ***Matter of Lumberjack Pass Amusements, LLC v. Town of Queensbury Zoning Bd. of Appeals*, 2016 N.Y. Slip Op. 08142, 3rd Dept 12-1-16**