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FIRST DEPARTMENT

CONDOMINIUMS.

FAILURE TO PAY CONDOMINIUM COMMON CHARGES WAS A PROPER BASIS FOR EJECTION FROM THE CONDOMINIUM.

The First Department, in a full-fledged opinion by Justice Tom, determined defendant condominium owner was properly ejected from the condominium for failure to pay the common charges: "... [T]he Condominium Act and the applicable by-laws for the subject condominium authorize a lien for unpaid common charges and permit a lien foreclosure action and an action for the appointment of a receiver where appropriate (see Real Property Law §§ 339-z, 339-aa). Further, the order appointing the receiver in this matter authorized the receiver to take certain actions, including ejectment of defendant from the property ... . * * * Ejectment of defendant from the unit was not unconstitutional, since he failed to comply with the court's prior order directing him to pay the 'reasonable fair market rent' of $6,500 per month for his use and occupancy of the unit. Contrary to defendant's contentions, he was properly required to pay rent on the unit, regardless of the fact that he was the unit's owner, since both Real Property Law § 339-aa and section 5.9 of the bylaws provide that in a lien foreclosure action, 'the Unit Owner shall be required to pay a reasonable rental for the use of said Unit Owner's Unit.' It is inconsequential and irrelevant to this action that defendant defeated plaintiff's motion for summary judgment in the 2011 action. Nor does ejectment under these circumstances deprive defendant of his 'real property ownership/occupancy rights without due process of law.' " ***Heywood Condominium v. Wozencraft*, 2017 N.Y. Slip Op. 00257, 1st Dept 1-12-17**

DEFAMATION, PRIVILEGE.

PROCEEDINGS BEFORE THE FOOD AND DRUG ADMINISTRATION ARE QUASI-JUDICIAL IN NATURE, STATEMENTS PROTECTED BY ABSOLUTE PRIVILEGE.

The First Department, in a full-fledged opinion by Justice Saxe, over a dissenting opinion, reversing Supreme Court, determined proceedings before the FDA (US Food and Drug Administration) are quasi-judicial in nature and statements made during the proceedings are therefore protected by absolute, not qualified, privilege. The defamation cause of action should have been dismissed: "The statements that form the basis of the defamation claim at issue here were made to a U.S. Food and Drug Administration (FDA) investigator in the course of an investigation. ... Given both the nature of an FDA investigation into the propriety of the hospital's research protocols and the importance of the unimpeded flow of thoughts and information in this investigative context, as a matter of law and public policy, statements to such an investigator must be protected by an absolute privilege, not merely a qualified privilege. ***Stega v. New York Downtown Hosp.*, 2017 N.Y. Slip Op. 00139, 1st Dept 1-10-17**

EMPLOYMENT LAW.

PLAINTIFF'S DISCRIMINATION SUIT SHOULD NOT HAVE BEEN DISMISSED, QUESTIONS OF FACT ABOUT WHETHER ACCOMMODATIONS FOR DISABLING ANXIETY SHOULD HAVE BEEN MADE.

The First Department, reversing Supreme Court, determined plaintiff's employment discrimination suit should go forward. Questions of fact had been raised about whether plaintiff's employer was made sufficiently aware of plaintiff's disabling anxiety and whether reasonable accommodations should have been made pursuant to the Administrative Code (NYC): "Under these circumstances, issues of fact exist as to whether, based on plaintiff's disclosures, defendant reasonably 'should have known' that plaintiff was suffering from a disabling anxiety condition (Administrative Code of City of NY § 8-107[15][a]...). Issues of fact likewise exist as to whether defendant should have entered into a good faith interactive dialogue with plaintiff, inquiring into the nature of her disabling condition and exploring what sorts of accommodations might reasonably be required, and whether reasonable accommodations would have enabled her to perform the 'essential requisites of [her] job' (Administrative Code § 8-107[15][b]), without causing defendant 'undue hardship in the conduct of . . . [its] business' (id. § 8-102[18]...). Issues of fact also exist as to whether plaintiff's alleged disabling anxiety condition caused the poor performance (i.e., absenteeism and unresponsiveness) that defendant pointed to as the reason for her termination ... , and, if so, whether plaintiff could have performed the essential requisites of her job with reasonable accommodation (see Administrative Code §§ 8-107[15][b]; 8-102[18])." ***Chernov v. Securities Training Corp.*, 2017 N.Y. Slip Op. 00126, 1st Dept 1-10-17**

FAMILY LAW, ATTORNEYS.

PRO SE PETITIONER SHOULD HAVE BEEN INFORMED OF HIS RIGHT TO COUNSEL IN THIS ORDER OF PROTECTION PROCEEDING.

The First Department, reversing Family Court, determined Family Court should have informed pro se petitioner of his right to counsel in this order of protection proceeding: "Family Court committed reversible error when, during a brief hearing in this article 8 proceeding, it failed to advise the pro se petitioner that he had a right to the assistance of counsel of his own choosing, a right to an adjournment to confer with counsel, and a right to have counsel assigned if he was financially unable to obtain representation (Family Ct Act § 262[a][ii]...). Moreover, Family Court did not possess sufficient relevant information to allow it to make an informed determination as to whether the parties are or have been in an 'intimate relationship' within the meaning of Family Court Act § 812(1)(e) ... . Further evidence is needed regarding the frequency of petitioner and respondent's interactions ...". ***Matter of Gustavo D. v. Michael D.*, 2017 N.Y. Slip Op. 00246, 1st Dept 1-12-17**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

DEFENDANT CON EDISION EXERCISED SUFFICIENT CONTROL OVER THE MANNER OF PLAINTIFF'S WORK TO SUPPORT THE LABOR LAW 200 VERDICT, MOTION TO SET ASIDE THE VERDICT SHOULD NOT HAVE BEEN GRANTED.

The First Department, reversing Supreme Court, over an extensive dissent, determined defendant Con Edison's motion to set aside the verdict in this asbestos-injury case should not have been granted. Con Edison was deemed to have sufficient control over the manner of plaintiff's work (applying concrete mixed with asbestos) to support the Labor Law 200 cause of action: "The evidence at trial demonstrated that Con Edison had the 'authority to control the activity bringing about the injury' ... . '[A]n implicit precondition to this duty is that the party to be charged with that obligation have the authority to control the activity bringing about the injury to enable it to avoid or correct an unsafe condition' ... . * * * Con Edison had the ability to prevent the hazard ultimately causing the plaintiff's injury, namely, the application of asbestos-containing materials. Indeed, Con Edison's specifications affirmatively required the use of hazardous asbestos-containing insulation materials, and Con Edison monitored work for compliance with those specifications." ***Matter of New York Asbestos Litig.*, 2017 N.Y. Slip Op. 00098, 1st Dept 1-10-17**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

LADDER SHIFTED, PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT ON HIS LABOR LAW 240(1) CAUSE OF ACTION SHOULD HAVE BEEN GRANTED.

The First Department, reversing Supreme Court, determined plaintiff should have been granted summary judgment on his Labor Law 240(1) cause of action. Plaintiff fell when a wooden ladder which was part of the structure of the building (for access to the attic) shifted when he attempted to step onto it: "Plaintiff's testimony that the ladder shifted as he descended, thus causing his fall, established a prima facie violation of Labor Law § 240(1) ... . The affidavit submitted by defendant averring that plaintiff had told his employer that he fell when attempting to descend the ladder using one hand as he carried tools or equipment in the other and missed a rung with his free hand, failed to refute plaintiff's testimony that the ladder shifted and failed to create triable issues of fact that plaintiff's actions were the sole proximate cause of the accident. Plaintiff also denies making the statement. Further, we reject defendant's contention that issues of fact exist as to whether plaintiff may be the sole proximate cause of the accident for failing to use the ladder, safety harness and rope provided by his employer. While the vice-president of plaintiff's employer stated in an affidavit that safety harnesses and other safety devices were available to plaintiff, the affidavit was vague as to what other unspecified safety devices were available, to what plaintiff should have attached the harness, or whether there were any available anchorage points ... . Defendant further fails to explain how a rope that was used to hoist materials to the attic area where plaintiff was working could be used as a safety device, and plaintiff's decision to use the ladder already in place cannot be the sole proximate cause of his accident where he was never instructed not to use it ...". ***Garcia v. Church of St. Joseph of the Holy Family of the City of N.Y.*, 2017 N.Y. Slip Op. 00239, 1st Dept 1-12-17**

LABOR LAW-CONSTRUCTION LAW, EVIDENCE, PERSONAL INJURY.

SUMMARY JUDGMENT IN FAVOR OF PLAINTIFF ON HIS LABOR LAW 240(1) CAUSE OF ACTION SHOULD HAVE BEEN GRANTED, UNCERTIFIED DOCUMENTS IN OPPOSITION SHOULD NOT HAVE BEEN CONSIDERED.

The First Department, reversing Supreme Court, determined plaintiff was entitled to summary judgment on his Labor Law 240(1) cause of action. Plaintiff alleged he fell from an unsecured ladder while attempting to move to a baker's scaffold. Unverified documents contesting plaintiff's allegations were not sufficient to defeat summary judgment: "Plaintiff made a prima facie showing of entitlement to judgment as a matter of law on the issue of liability under Labor Law § 240(1), through his affidavit stating that he was not provided with any safety equipment that could have protected him while performing his work alone on the ladder and scaffold ... . Once it is determined that the owner or contractor failed to provide the necessary safety devices required to give a worker 'proper protection,' absolute liability is inescapable under Labor

Law § 240(1) ... . Thus, in opposition, defendants were required to produce evidentiary proof in admissible form sufficient to establish the existence of a material issue of fact to preclude summary judgment ... . * * * Records without proper certification may be considered in opposition to a motion for summary judgment, but only when they are not the sole basis for the court's determination ... . Here, the unverified documents and unsworn statement are the only evidence to challenge details of plaintiff's version of the accident and therefore should not be considered." ***Erkan v. McDonald's Corp.*, 2017 N.Y. Slip Op. 00099, 1st Dept 1-10-17**

LABOR LAW-CONSTRUCTION LAW, EVIDENCE, PERSONAL INJURY.

QUESTION OF FACT WHETHER SITE SAFETY CONSULTANT EXERCISED SUFFICIENT CONTROL OVER PLAINTIFF'S WORK TO BE LIABLE UNDER LABOR LAW 200.

The First Department determined there was a question of fact whether defendant site safety consultant exercised sufficient supervisory control to support the Labor Law 200 cause of action: "The motion court properly found a material question of fact as to whether ELI, the site safety consultant employed by plaintiff['s] ... employer, had supervisory control and authority over the work being done when plaintiff was injured, and can be held liable for plaintiff's injuries under the Labor Law as an agent of the owner or general contractor. ... ELI's principal testified that the responsibility of a site safety consultant was to consult with and make recommendations to the foreman, project manager or superintendent should he or she observe a potentially unsafe condition. However, the agreement under which ELI performed its services for plaintiff's employer ... provided that the site safety consultant, in addition to making inspections of the work place to ascertain a safe operating environment, was to '[t]ake necessary and timely corrective actions to eliminate all unsafe acts and/or conditions,' and '[p]erform all related tasks necessary to achieve the highest degree of safety.' " ***Oliveri v. City of New York*, 2017 N.Y. Slip Op. 00237, 1st Dept 1-12-17**

PERSONAL INJURY, EVIDENCE.

DEFENDANTS DEMONSTRATED THEY DID NOT HAVE CONSTRUCTIVE NOTICE OF WET CONDITION WHERE PLAINTIFF FELL, CAUSE OF ACTION BASED ON ABSENCE OF A HANDRAIL SHOULD NOT HAVE BEEN DISMISSED.

The First Department, partially reversing Supreme Court, determined defendants demonstrated they did not have constructive notice of a wet condition where plaintiff fell, but the cause of action based on the absence of a handrail should not have been dismissed: "Defendants established their prima facie entitlement to summary judgment by demonstrating that it had rained shortly before or at the time of plaintiff's accident and continued shortly afterward, that they did not have constructive notice of the wet condition, as defendants' porter averred that he had inspected the stairs 15 minutes prior to plaintiff's fall and did not observe any wet condition, and they had no complaints of wetness prior to plaintiff's fall. Moreover, defendants had a doormat in the vestibule to permit people to wipe their feet as they entered ... . In opposition, plaintiff did not submit any evidence as to the time elapsed between the cessation of the rain and his accident, and thus failed to raise an issue of fact as to whether defendants had a reasonable amount of time to remedy the wet condition ... . The court, however, improperly dismissed plaintiff's claim that defendants failed to install handrails on the subject staircase. The stairs which led to the door providing egress from the building to the outside were interior stairs requiring handrails (Administrative Code §§ 27-232, 27-375 ...). Plaintiff raised an issue of fact as to whether the absence of handrails was a proximate cause of his fall by submitting his expert's affidavit stating that the absence of handrails was a dangerous departure from accepted standards and the applicable building code ...". ***Lee v. Alma Realty Corp.*, 2017 N.Y. Slip Op. 00101, 1jst Dept 1-10-17**

PERSONAL INJURY.

QUESTION OF FACT WHETHER SIDEWALK LOW-LYING TRIPPING HAZARD NARROWED THE PASSABLE AREA AND WAS VISIBLE AT NIGHT.

The First Department, reversing Supreme Court, determined there were triable issues of fact whether a sidewalk defect narrowed the passable area and whether the defect was visible at night: "... [T]he owner and property manager of the premises that abutted a sidewalk where plaintiff Alison Stolzman tripped, established prima facie entitlement to summary judgement based on the testimony and photographic evidence indicating the alleged hazard was open and obvious and not inherently dangerous ... . However, there remain triable issues as to whether the alleged low-lying tripping condition dangerously narrowed the passable area of the sidewalk and was adequately visible at night ...". ***Stolzman v. City of New York*, 2017 N.Y. Slip Op. 00247, 1st Dept 1-12-17**

PERSONAL INJURY.

OPEN AND OBVIOUS CONDITION ELIMINATES DUTY TO WARN BUT NOT DUTY TO KEEP PREMISES SAFE.

The First Department determined defendant's motion for summary judgment was properly denied. Defendant (Schindler) failed to secure a seven-foot wooden panel which apparently fell and injured plaintiff. The court noted that the open and obvious nature of the panel eliminated the duty to warn but not the duty to make the premises safe: "Schindler's arguments that the wooden panel that its workers leaned against the wall was open and obvious, that plaintiff failed to use her senses

to observe it, and that any barricades or warnings would not have prevented the accident, are unpreserved as they were not presented to the motion court ... . In any event, we would find such arguments unavailing because even if a hazard is open and obvious, that merely eliminates the duty to warn, but not the duty to maintain the premises in a reasonably safe condition ... . Here, it is undisputed that Schindler's employees failed to secure the seven-foot tall wooden panel that they leaned against the wall or create a perimeter around it to prevent others from entering the area." ***Polini v. Schindler El. Corp.*, 2017 N.Y. Slip Op. 00254, 1st Dept 1-12-17**

SECOND DEPARTMENT

CRIMINAL LAW, APPEALS.

WAIVER OF A-1 FELONY INDICTMENT INVALID, DESPITE GUILTY PLEA, WAIVER OF APPEAL AND FAILURE TO PRESERVE THE ERROR.

The Second Department determined the waiver of indictment, which included an A-1 felony, was invalid. The guilty plea, the waiver of the right to appeal and/or the failure to preserve the error did not preclude appeal of the issue: "CPL 195.10 provides, in relevant part, that '[a] defendant may waive indictment and consent to be prosecuted by superior court information when . . . the defendant is not charged with a class A felony punishable by death or life imprisonment.' Thus, the Court of Appeals has held: '[W]hen an accused is held for Grand Jury action upon a felony complaint that charges a class A felony . . . a waiver of indictment with respect to that felony complaint is unauthorized' ... . Here, the felony complaint charged the defendant with criminal possession of a controlled substance in the first degree. That crime is a class A-I felony (see Penal Law § 220.21), which is punishable by an indeterminate sentence with a mandatory maximum term of life imprisonment (see Penal Law § 70.00[2][a]). Accordingly, the defendant could not waive indictment and agree to be prosecuted by superior court information ...". ***People v. Janelle*, 2017 N.Y. Slip Op. 00188, 2nd Dept 1-11-17**

CRIMINAL LAW, ATTORNEYS.

NO PROOF DEFENDANT WAS DEPRIVED OF HIS LIMITED RIGHT TO SPEAK TO COUNSEL BEFORE TAKING BLOOD-ALCOHOL TEST, SUPPRESSION SHOULD NOT HAVE BEEN GRANTED, APPLICABLE LAW EXPLAINED.

The Second Department determined defendant's motion to suppress the results of the blood-alcohol test and his statement should not have been granted. Although the police learned the name and phone number of defendant's counsel before the test was administered, there was no evidence of the source of that information and no evidence counsel "entered" the case such that defendant should have been allowed to talk to his attorney before taking the test. The Second Department offered a concise explanation of the applicable law: "In *People v. Gursey* (22 NY2d 224), the Court of Appeals held in this context that the police 'may not, without justification, prevent access between the criminal accused and his lawyer, available in person or by immediate telephone communication, if such access does not interfere unduly with the matter at hand' (id. at 227...). The police have no duty to warn a defendant of this limited right before asking the defendant to submit to a blood alcohol test ... . Violation of the limited right to consult with counsel will result in suppression of the test results ... . * * * '[A]n attorney enters' a criminal matter and triggers the indelible right to counsel when the attorney or a professional associate of the attorney notifies the police that the suspect is represented by counsel' (*People v. Grice*, 100 NY2d 318, 324). Notification given to the police by a third party, such as a member of the defendant's family, is not sufficient to establish counsel's entry into the case (see id. at 322 ...)." ***People v. Lucifero*, 2017 N.Y. Slip Op. 00190, 2nd Dept 1-11-17**

FAMILY LAW.

MOTHER'S MOTION TO RELOCATE WITH THE CHILDREN SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined mother's motion to relocate with the children should not have been granted. Father argued relocation would limit his involvement with the children to only weekends: "Here, the Supreme Court's determination that the plaintiff could relocate with the children was not supported by a sound and substantial basis in the record ... , as the plaintiff did not establish by a preponderance of the evidence that the proposed relocation would serve the children's best interests ... . The plaintiff's evidence that relocating would enhance her life and the children's lives economically was tenuous at best ... , and the court's finding that the plaintiff could become self-supporting and contribute to the children financially if she relocated was thus speculative and not supported by a sound and substantial basis in the record ... . Moreover, the relocation would negatively impact the quantity and quality of the children's future contact with the defendant, which weighs against granting relocation in this case ... . The defendant presented evidence of his involvement in the children's daily lives, school, and extracurricular activities. If the plaintiff was permitted to relocate with the children to East Hampton, the defendant would no longer be able to see the children midweek or remain involved in their many activities ... . Finally, the plaintiff did not establish by a preponderance of the evidence that her proposed relocation would enhance the children's lives emotionally or educationally ...". ***DeFilippis v. DeFilippis*, 2017 N.Y. Slip Op. 00147, 2nd Dept 1-11-17**

PERSONAL INJURY.

DEPARTMENT STORE'S MOTION FOR SUMMARY JUDGMENT IN THIS ESCALATOR SLIP AND FALL CASE SHOULD HAVE BEEN GRANTED, NO ACTUAL OR CONSTRUCTIVE NOTICE OF CONDITION.

The Second Department, reversing Supreme Court, determined that the defendant department store's (Macy's) motion for summary judgment in this escalator slip and fall case should have been granted. Apparently plaintiff's purse strap caught on a broken or protruding piece of metal on the escalator. Macy's demonstrated it did not have actual or constructive notice of the condition: "Here, Macy's submitted evidence demonstrating, prima facie, that it did not create or have actual or constructive notice of the alleged defective and dangerous condition of the escalator —i.e., a broken and protruding piece of metal which caught the strap of the plaintiff's pocketbook and caused her to fall. Through the deposition testimony of its employees and a technician employed by [the escalator company] as well as escalator inspection logs, Macy's established that the escalator was regularly inspected and maintained, and that it had not received any prior complaints about the escalator before the accident ... . Among other things, a Macy's employee testified at a deposition that he inspected the escalator on the morning of the accident and that it was in working order ...". ***Isaacs v. Federated Dept. Stores, Inc.*, 2017 N.Y. Slip Op. 00156, 2nd Dept 1-11-17**

PERSONAL INJURY.

DEFECT NOT TRIVIAL AS A MATTER OF LAW, DEFENDANT'S MOTION FOR A JUDGMENT AS A MATTER OF LAW SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined defendant's motion for a judgment as a matter of law should not have been granted. The five-inch-long, three-inch-wide and two-inch-deep defect in the step which caused plaintiff to fall was not trivial as a matter of law: "Generally, the issue of whether a dangerous or defective condition exists depends on the facts of each case and is a question of fact for the jury ... . However, property owners may not be held liable for trivial defects which, considering 'all the specific facts and circumstances of the case, not size alone,' do not 'unreasonably imperil[ ]' the safety of a pedestrian ... . In other words, physically small defects are actionable 'when their surrounding circumstances or intrinsic characteristics make them difficult for a pedestrian to see or to identify as hazards or difficult to traverse safely on foot' ... . There is no 'minimal dimension test or per se rule' that the condition must be of a certain height or depth to be actionable ... . In determining whether a defect is trivial as a matter of law, the court must examine all of the facts presented, 'including the width, depth, elevation, irregularity and appearance of the defect along with the time, place and circumstance' of the injury ..." . ***Pitt v. New York City Tr. Auth.*, 2017 N.Y. Slip Op. 00203, 2nd Dept 1-11-17**

PERSONAL INJURY, EVIDENCE.

ALTHOUGH PLAINTIFF DRIVER HAD THE RIGHT OF WAY, HE DID NOT DEMONSTRATE FREEDOM FROM COMPARATIVE FAULT IN THIS INTERSECTION ACCIDENT, SUMMARY JUDGMENT PROPERLY DENIED, SUMMARY JUDGMENT SHOULD HAVE BEEN AWARDED TO PLAINTIFF'S PASSENGER, HOWEVER.

The Second Department determined the plaintiff driver of a car (Ahmed) was not entitled to summary judgment even though his passenger (Olga) was. Plaintiff driver did not demonstrate freedom from comparative fault in this intersection accident: " '[A] driver who has the right-of-way has a duty to exercise reasonable care to avoid a collision with another vehicle that allegedly failed to yield the right-of-way' ... . Olga's affidavit, submitted on behalf of both plaintiffs, failed to establish that Ahmad was free from comparative fault in the happening of the accident ... . Since Ahmad failed to meet his prima facie burden for summary judgment ... , that branch of the plaintiffs' motion which was for summary judgment on his behalf against ... was properly denied without regard to the sufficiency of the opposition papers ... " ***Al-Mamar v. Terrones*, 2017 N.Y. Slip Op. 00140, 2nd Dept 1-11-17**

PERSONAL INJURY, EVIDENCE.

DEFENDANT BUS DRIVER, WHO HAD THE RIGHT OF WAY, FAILED TO DEMONSTRATE FREEDOM FROM COMPARATIVE FAULT IN AN INTERSECTION ACCIDENT, SUMMARY JUDGMENT PROPERLY DENIED.

The Second Department determined defendant bus driver's motion for summary judgment in this intersection accident case was properly denied. Although the bus driver had the right of way, she did not demonstrate freedom from comparative fault: "At the time of the collision, the defendants' bus was in the process of making a left turn from Hillside Avenue onto Merrick Boulevard from a left turn only lane, and the plaintiff was going straight in the opposite direction on Hillside Avenue. ... A defendant moving for summary judgment in a negligence action has the burden of establishing, prima facie, that he or she was not at fault in the happening of the subject accident … . While an operator of a motor vehicle traveling with the right-of-way is entitled to assume that other drivers will obey the traffic laws requiring them to yield, the operator traveling with the right-of-way nevertheless has a duty to use reasonable care to avoid colliding with other vehicles … . Here, the defendants failed to eliminate all triable issues of fact, including whether Coleman contributed to the happening

of the accident by failing to observe the plaintiff's vehicle as he approached the intersection ...". ***Blair v. Coleman*, 2017 N.Y. Slip Op. 00143, 2nd Dept 1-11-17**

PERSONAL INJURY, MEDICAL MALPRACTICE, EVIDENCE.

DISCLOSURE OF SUBSTANCE OF DEFENSE EXPERT'S OPINION INADEQUATE, MOTION TO SET ASIDE DEFENSE VERDICT IN THIS MEDICAL MALPRACTICE CASE SHOULD HAVE BEEN GRANTED.

The Second Department determined Supreme Court should have granted plaintiffs' motion to set aside the verdict in this medical malpractice action. The defendants' notice of the expert opinion evidence to be presented at trial did not notify plaintiffs that the expert would testify plaintiff's stroke was caused by a piece of calcium, not a blood clot. Plaintiffs' malpractice theory was based entirely on the allegation a blood clot was the cause of the stroke. The court explained the notice requirements: "The Supreme Court improvidently exercised its discretion in denying that branch of the plaintiffs' motion which was pursuant to CPLR 4404(a) to set aside the verdict in favor of [defendants] and against the plaintiffs on the issue of liability. Pursuant to CPLR 3101(d)(1)(i), [defendants] were required to disclose 'in reasonable detail the subject matter on which each expert is expected to testify, the substance of the facts and opinions on which each expert is expected to testify, . . . and a summary of the grounds for each expert's opinion.' Here, [the] expert witness disclosure only revealed expert testimony that [plaintiff's] stroke was not caused by his atrial fibrillation or a blood clot, but did not inform the plaintiffs that the expert would testify that the stroke was caused by calcification. [Defendant] failed to demonstrate good cause for not disclosing the substance of his expert's causation theory until trial ... . The revelation of the defendants' causation theory at trial prejudiced the plaintiffs' ability to prepare for trial because they did not have adequate time to consult or retain an expert neuroradiologist ...". ***Rocco v. Ahmed*, 2017 N.Y. Slip Op. 00207, 2nd Dept 1-11-17**

THIRD DEPARTMENT

INSURANCE LAW.

HOMEOWNERS INSURANCE COMPANY HAD DUTY TO DEFEND IN AN ACTION STEMMING FROM A SHOOTING BY THE INSURED, SHOOTING MAY HAVE BEEN UNINTENTIONAL (RECKLESS).

The Third Department determined defendant insurer (homeowners policies) had a duty to defend plaintiff in an action brought by one Prindle, who was shot by plaintiff. The shooting could have been unintentional and therefore covered under the policy: "An insurance company's duty to defend 'is exceedingly broad and an insurer will be called upon to provide a defense whenever the allegations of the complaint suggest a reasonable possibility of coverage' ... . If the complaint's allegations bring the claim 'even potentially within the embrace of the policy, the insurer must defend its insured no matter how groundless, false or baseless the suit may be' ... . Here, Prindle's complaint alleged that plaintiff 'assault[ed] [Prindle] . . . by shooting [Prindle] in the abdomen' and that 'as a result of the assault,' Prindle sustained personal injuries. While Prindle's complaint also alleged that plaintiff was arrested and criminally charged with assault, there was no further specification as to this criminal charge raised against plaintiff ... . Inasmuch as an assault may derive from an individual's recklessness or criminal negligence (see Penal Law § 120.00 [2], [3]), a reasonable possibility exists that plaintiff's actions were not intentional, as defendant argues ... . Because the shooting can be reasonably interpreted as having stemmed from plaintiff's unintentional conduct, we conclude that defendant's duty to defend was triggered under the insurance policy ...". ***Guzy v. New York Cent. Mut. Fire Ins. Co.*, 2017 N.Y. Slip Op. 00233, 3rd Dept 1-12-17**

REAL PROPERTY TAX LAW, MUNICIPAL LAW, IMMUNITY, CIVIL RIGHTS (42 USC 1983).

TOWN BOARD OF ASSESSMENT REVIEW IS A QUASI-JUDICIAL BODY IMMUNE FROM SUIT, 42 U.S.C. § 1983 CAUSES OF ACTION AGAINST TOWN ASSESSORS INDIVIDUALLY CAN GO FORWARD.

The Third Department, in a decision too detailed to be fairly summarized here, determined a town board of assessment review (BAR) is a quasi-judicial body and is therefore entitled to absolute immunity from suit. The Third Department further determined that causes of actions for civil rights violations (42 U.S.C. 1983) against two town assessors individually (stemming from allegedly discriminatory property tax assessments) can go forward: "Consistent with the provisions of RPTL 523, the Town was required to have a board of assessment review (see RPTL 523 [1] [a]), and its individual members, in turn, were required to attend mandated training (see RPTL 523 [1] [d]; [2]). Here, in accordance with its appointed duties, the BAR had a statutory obligation to 'fix the place or places for the hearing of complaints in relation to assessments' (RPTL 525 [1]) and, on the date required by law, to 'meet to hear complaints in relation to assessments' (RPTL 525 [2] [a]). Upon convening for the required hearing, the BAR could 'administer oaths, take testimony and hear proofs in regard to any complaint and the assessment to which it relates' and, further, could 'require the person whose real property is assessed, or his or her agent or representative, or any other person, to appear before [it] and be examined concerning such complaint, and to produce any papers relating to such assessment' (RPTL 525 [2] [a]). * * * ... [S]uffice it to say that [defendants town assessors'] proof ... fell short of establishing that the assessors valued plaintiff's property in a nondiscriminatory fashion and, therefore,

defendants failed to demonstrate their entitlement to summary judgment [on the violation of civil rights causes of action]." ***Corvetti v. Town of Lake Pleasant*, 2017 N.Y. Slip Op. 00227, 3rd Dept 1-12-17**

WORKERS' COMPENSATION LAW, FRAUD, CIVIL PROCEDURE.

CAUSES OF ACTION AGAINST ACCOUNTANTS STEMMING FROM A WORKERS' COMPENSATION TRUST FOUND TO BE $8 MILLION IN DEBT SURVIVED MOTIONS TO DISMISS, SIX YEAR STATUTE OF LIMITATIONS APPLIES TO INTENTIONAL (AS OPPOSED TO NEGLIGENT) CONDUCT.

The Third Department determined Supreme Court should not have dismissed the breach of fiduciary duty cause of action against defendant accountants (Fuller) stemming from a workers' compensation trust found to be more than $8 million in debt. The Second Department also found Supreme Court properly applied the six year statute of limitations to the allegedly intentional acts by the defendant accountants (designed to conceal the debt). The defendant accountants unsuccessfully argued the three-year (negligence/malpractice) statute of limitations should apply. Regarding the breach of fiduciary duty cause of action, the Second Department explained: "Although the duty owed by an accountant is generally not fiduciary in nature ... , a fiduciary relationship exists where the accountant is 'under a duty to act for or to give advice for the benefit of [the client] upon matters within the scope of the relation; ... . This inquiry is 'necessarily fact-specific' ... , and the dispositive factor is whether there is 'confidence on one side and resulting superiority and influence on the other' ... . Plaintiff alleged that Fuller held itself out to have the requisite skill and expertise to maintain the trust's financial records, provide auditing services and — importantly — provide advice to the trust regarding the trust's financial status. According to plaintiff, Fuller breached its fiduciary duty by knowingly and consistently concealing the trust's true financial condition and failing to properly advise the trust regarding its solvency, causing over $8 million in damages. Accepting these allegations as true and giving plaintiff the benefit of every favorable inference ... , we find that plaintiff's cause of action for breach of fiduciary duty is sufficiently stated to survive Fuller's motion to dismiss ...". ***New York State Workers' Compensation Bd. v. Fuller & LaFiura, CPAs, P.C.*, 2017 N.Y. Slip Op. 00225, 3rd Dept 1-12-17**

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