CasePrepPlus

May 24, 2017

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Editor: **Bruce Freeman**

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FIRST DEPARTMENT

CIVIL PROCEDURE, CORPORATION LAW, FRAUD.

CONSPIRACY JURISDICTION DISCUSSED IN THIS COMPLEX LITIGATION INVOLVING MANY INTER-RELATED INTERNATIONAL CORPORATIONS AND ALLEGATIONS OF FRAUD.

The First Department, in an issue-rich decision which is sparse on facts, determined several jurisdiction and choice of law issues in a complex lawsuit involving a great many inter-related international corporations and allegations of fraud. One of the many jurisdiction issues discussed is so-called "conspiracy jurisdiction;" a sample of that discussion follows: "The remaining possibility for obtaining jurisdiction over defendants-appellants is conspiracy jurisdiction ... . Defendants contend that the complaint does not allege an agreement by the Citco defendants to participate in a conspiracy to defraud Massachusetts Bay Transportation Authority Retirement Fund (MBTARF) and that MBTARF failed to identify an overt act. However, we find that the complaint contains factual allegations from which such an agreement can be inferred ... . It also alleges an overt act, namely, that alleged co-conspirators Mr. Fletcher and FAM took $7.1 million of MBTARF's investment in nonparty Fletcher Fixed Income Alpha Fund, Ltd. (Alpha) and used it in violation of Alpha's offering memorandum as partial repayment of Leveraged's loan to Citco Bank and SFT ... . Turning to the additional requirements for conspiracy jurisdiction ... , we must examine Leveraged's and Fletcher Income Arbitrage Fund Ltd. (Arbitrage)'s conspiracy claims with respect to personal jurisdiction. Leveraged and Arbitrage's conspiracy claims allege that Mr. Fletcher and FAM fraudulently transferred cash from plaintiff Fletcher International, Ltd. to Unternaehrer in the FIP Transaction. The transfer was made by instructing SFT to transfer money from FIP's account to Citco Bank's account at HSBC New York, for further credit to SFT, for further credit to Unternaehrer. Using a New York bank account for a fraudulent scheme constitutes a tort within New York ...". ***FIA Leveraged Fund Ltd. v. Grant Thornton LLP*, 2017 N.Y. Slip Op. 03887, 1st Dept 5-16-17**

CORPORATION LAW, SECURITIES, INSURANCE LAW.

QUESTION OF FACT WHETHER BANK OF AMERICA'S PURCHASE OF THE ASSETS OF COUNTRYWIDE WAS A DE FACTO MERGER ALLOWING THE INSURER OF RESIDENTIAL MORTGAGE-BACKED SECURITIES ISSUED BY COUNTRYWIDE TO SUE BANK OF AMERICA.

The First Department determined questions of fact precluded summary judgment in this action by Ambac, an insurer of residential mortgage-backed securities issued by defendant Countrywide, against defendants Countrywide and Bank of America (BAC). BAC purchased the assets of Countrywide. Ambac argued there was a de facto merger of Countrywide and Bank of America such that Countrywide shareholders became shareholders of BAC, allowing Ambac to sue BAC: " '[C]ontinuity of ownership is the touchstone of the [de facto merger] concept and thus a necessary predicate to a finding of a de facto merger' ... . Continuity of ownership 'exists where the shareholders of the predecessor corporation become direct or indirect shareholders of the successor corporation as the result of the successor's purchase of the predecessor's assets, as occurs in a stock-for-assets transaction' ... . 'Stated otherwise, continuity of ownership describes a situation where the parties to the transaction become owners together of what formerly belonged to each' ... . * * * We agree with BAC that there can be no continuity of ownership where the asset seller receives fair value consideration for its assets... . Although BAC maintains that it paid fair value for Countrywide's assets, Ambac points to evidence showing that large amounts of money Countrywide received in the asset sale were then cycled back to BAC and its subsidiaries. Thus, issues of fact exist as to whether the transactions were coordinated with the goal of combining BAC's and Countrywide's mortgage businesses while avoiding Countrywide's liabilities so as to benefit Countrywide's former shareholders at the expense of its creditors." ***Ambac Assur. Corp. v. Countrywide Home Loans, Inc.*, 2017 N.Y. Slip Op. 03886, 1st Dept 5-16-17**

CRIMINAL LAW, EVIDENCE.

TRIAL JUDGE IMPROPERLY LIMITED DISCOVERY OF *ROSARIO* MATERIAL AND IMPROPERLY COMMUNICATED WITH THE JURY OFF THE RECORD AND OUTSIDE THE PRESENCE OF DEFENDANT AND COUNSEL.

The First Department, over a concurrence, determined defendant was entitled to a new trial for two reasons: (1) the defendant should have been provided with *Rosario* material which tended to show the police may have confused defendant with another person arrested at the same time; and (2) the trial judge committed a mode of proceedings error by communicating

with the jury off the record and outside the presence of defendant and counsel. The concurrence argued the judge did not commit a mode of proceedings error: "Supreme Court improperly limited both defense counsel's discovery of Rosario material and his ability to cross-examine the police witnesses at trial. The Rosario material in question consisted of police documentation of the arrest of a third party. Supreme Court denied defendant's discovery request, rejecting his trial counsel's argument that defendant and the third party, both Hispanic males, had been contemporaneously arrested and separately charged with selling drugs to the same undercover officer at approximately the same time and location. In the absence of Supreme Court's discovery limitations, defense counsel might have reasonably established a motive to fabricate the evidence due to police confusion between defendant and the third party ... . Furthermore, as we have stated, where there is evidence raising the possibility of a 'police motive to fabricate,' cross-examination of police witnesses is 'highly relevant' ... . Thus, Supreme Court's errors deprived defendant of his right to present a defense ... . As there was 'a reasonable possibility that the non-disclosure materially contributed to the result of the trial' ... , Supreme Court's errors were not 'harmless beyond a reasonable doubt' ...". ***People v. Farez*, 2017 N.Y. Slip Op. 04041, 1st Dept 5-18-17**

CRIMINAL LAW, EVIDENCE.

ALTHOUGH THE EVIDENCE WAS FOUND AS A RESULT OF A SUPPRESSED STATEMENT, THE EVIDENCE WAS ADMISSIBLE UNDER THE INEVITABLE DISCOVERY DOCTRINE.

The First Department determined evidence discovered as a result of defendant's suppressed statement was admissible under the inevitable discovery doctrine: "The court properly denied the motion to suppress drugs recovered from defendant's person. While the record demonstrates that they were discovered as the result of a statement that was suppressed, they were nevertheless admissible pursuant to the doctrine of inevitable discovery. Because defendant would have been subjected to several thorough searches following his arrest, there was a 'very high degree of probability' that 'normal police procedures' would inevitably have led to the discovery of the drugs, even without the statement ... . In light of this determination ... 'we find it unnecessary to reach the issue of whether, given United States Supreme Court authority to the contrary (see *United States v. Patane*, 542 US 630 [2004]), physical evidence may be suppressed as fruit of a Miranda violation.' " ***People v. Jaquez*, 2017 N.Y. Slip Op. 04050, 1st Dept 5-18-17**

FRAUD, INSURANCE LAW, SECURITIES.

INSURANCE LAW § 3105 DOES NOT DISPENSE WITH THE COMMON-LAW PROOF REQUIREMENTS FOR FRAUDULENT INDUCEMENT IN THIS ACTION BY AN INSURER OF RESIDENTIAL MORTGAGE-BACKED SECURITIES.

The First Department, in a full-fledged opinion by Justice Richter, determined that plaintiff Ambac, which insured residential mortgage-backed securities issued by defendant Countrywide, was required to prove all the elements of common-law fraudulent inducement and Insurance Law § 3105 did not dispense with those proof requirements: "We agree with Countrywide that Ambac is required to prove all of the elements of its fraudulent inducement claim, including justifiable reliance and loss causation. The elements of a fraud cause of action are long-settled. To establish fraud, a plaintiff must show 'a misrepresentation or a material omission of fact which was false and known to be false by [the] defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury' ... . * * * There is no merit to Ambac's contention that Insurance Law § 3105 dispenses with the common-law requirement of proving justifiable reliance and loss causation. Nor can that statute be used affirmatively as a basis to recover monetary damages. Insurance Law § 3105 provides that a material misrepresentation 'shall avoid [a] contract of insurance' and 'defeat recovery thereunder' (Insurance Law § 3105[b][1]).* * * Cases applying Insurance Law § 3105 arise in the context of either a declaratory judgment action by an insurer seeking rescission of an insurance policy or an insurer asserting a defense to an insured's claim for payment under the policy ... . Here, Ambac seeks neither to rescind the policies, which are unconditional and irrevocable, nor to defeat a claim by an insured for payment. Instead, Ambac seeks to assert Insurance Law § 3105 as an affirmative claim seeking monetary damages. Under these circumstances, Insurance Law § 3105 is not applicable." ***Ambac Assur. Corp. v. Countrywide Home Loans, Inc.*, 2017 N.Y. Slip Op. 03919, 1st Dept 5-16-17**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

FAILURE TO TIE OFF LANYARD WAS NOT THE SOLE PROXIMATE CAUSE OF PLAINTIFF'S DECEDENT'S FALL, ABSENCE OF A GUARDRAIL ON THE SCAFFOLD REQUIRED SUMMARY JUDGMENT ON THE LABOR LAW § 240(1) CAUSE OF ACTION.

The First Department determined plaintiff's decedent was entitled to summary judgment on the Labor Law § 240 (1) cause of action. The scaffold from which decedent fell did not have an building-side guardrail. Therefore, decedent's failure to tie off a lanyard was not the sole proximate cause of the fall: "The motion court correctly granted plaintiff summary judgment on her Labor Law § 240(1) claim against Columbia (the building owner) and Bovis (the construction manager). It is uncontested that the scaffolding lacked a guardrail on the side adjacent to the window opening through which decedent fell... . Given this violation of the Labor Law, decedent's alleged failure to tie his lanyard to the scaffold is not the sole proximate cause of his fall...". ***Wilk v. Columbia Univ.*, 2017 N.Y. Slip Op. 03892, 1st Dept 5-16-17**

PERSONAL INJURY, EVIDENCE.

MISLEVELED ELEVATOR TRIGGERS RES IPSA LOQUITUR DOCTRINE.
The First Department determined the doctrine of res ipsa loquitur required the submission of this elevator-misleveling case to a jury. Plaintiff alleged she was injured removing a cart from the elevator: "The misleveling of an elevator does not ordinarily occur in the absence of negligence, and the misleveling of the elevator in this case was caused by an instrumentality or agency within the defendants' exclusive control and was not due to any voluntary action on plaintiff's part. Accordingly, the evidence is sufficient to warrant submission of the case against the defendants to a jury on a theory of res ipsa loquitur ...". ***Rojas v. New York El. & Elec. Corp.*, 2017 N.Y. Slip Op. 04043, 1st Dept 5-18-17**

PERSONAL INJURY, LANDLORD-TENANT.

TENANT ASSAULTED BY INTRUDER, QUESTIONS OF FACT ABOUT FORESEEABILITY, ADEQUACY OF SAFETY PRECAUTIONS, AND PROXIMATE CAUSE REQUIRED REVERSAL OF GRANT OF SUMMARY JUDGMENT TO DEFENDANTS.
The First Department, reversing Supreme Court, determined there were questions of fact precluding summary judgment in favor of the defendants in this action stemming from the assault of plaintiff-tenant by an intruder. The intruder entered the building by "piggy-backing" on an entering tenant. There was evidence this particular intruder had entered the building the same way on other occasions when he had harassed and assaulted women: "Given the existence of an issue of fact as to foreseeability, an issue of fact also exists whether defendants discharged their common-law duty to take minimal precautions to protect the tenants from the foreseeable harm... . In particular, in view of the previous incidents, issues of fact exist whether the security measures in place adequately protected female tenants from the risks posed and whether reasonable measures should have included, among others, warnings to tenants about the perpetrator, advising security staff of the perpetrator's prior arrest in the complex, providing security staff and tenants with the perpetrator's photograph, real-time monitoring of surveillance videos, or increasing the presence of lobby attendants, who were absent on the day of the assault. In other words, under the unique circumstances of this case, an issue is raised as to whether defendants, who had notice of this repeat intruder, took minimal security steps with respect to preventing his ability to easily access the interior of their buildings and attempt to sexually assault female tenants ... . Finally, an issue of fact exists whether any negligence on defendants' part was a proximate cause of the assault ... . The record shows that the perpetrator was able to gain entry into plaintiff's building not as a guest but as an intruder; given defendants' awareness of the practice of 'piggy backing' in general and 'piggy backing' by this perpetrator specifically, the tenant's act of permitting the perpetrator to enter the building by 'piggy backing' does not, as a matter of law, amount to a superseding intervening act that breaks the chain of causation between any deficient security and the assault on plaintiff ...". ***Gonzalez v. Riverbay Corp.*, 2017 N.Y. Slip Op. 04042, 1st Dept 5-18-17**

SECOND DEPARTMENT

CIVIL PROCEDURE, DEBTOR-CREDITOR.

CAUSE OF ACTION BASED UPON A LOAN PAYABLE UPON DEMAND ACCRUES WHEN THE LOAN IS MADE.
The Second Department determined plaintiff's causes of action based upon loans repayable on demand accrued when the loan was made, rendering them time-barred, despite the provision that payment became due three months after a demand for payment: "Here, the parties' agreement ... provided that the sums loaned to the defendants were repayable on demand. Accordingly, the plaintiff possessed a legal right to demand payment at the time that each loan was advanced to the defendants, and the statute of limitations began to run at each of those respective times ... . Contrary to the plaintiff's contention, the three-month period for repayment following a demand did not constitute a condition that had to be fulfilled before the right to final payment arose... . Accordingly, the Supreme Court properly granted that branch of the defendants' motion which was pursuant to CPLR 3211(a)(5) to dismiss as time-barred so much of the first cause of action as was predicated upon loans that allegedly were made more than six years prior to the commencement of the action." ***Elia v. Perla*, 2017 N.Y. Slip Op. 03930, 2nd Dept 5-17-17**

CIVIL PROCEDURE, EVIDENCE, DEBTOR-CREDITOR.

REQUIREMENTS OF BUSINESS RECORDS EXCEPTION TO THE HEARSAY RULE NOT MET, PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT SEEKING PAYMENT ON A NOTE SHOULD NOT HAVE BEEN GRANTED.
The Second Department, reversing Supreme Court, determined plaintiff, seeking payment of a note, did not submit proof of the payment history of the note in admissible form (requirements of the business records exception to the hearsay rule not met). Therefore plaintiff's motion for summary judgment should not have been granted: "... [T]he plaintiff failed to demonstrate the admissibility of the records relied upon by its account officer under the business records exception to the hearsay rule (see CPLR 4518[a]), and thus, failed to establish a default in payment under the note. 'A proper foundation for the admission of a business record must be provided by someone with personal knowledge of the maker's business prac-

tices and procedures' ... . Here, the plaintiff's account officer did not allege that she was personally familiar with HSBC's record keeping practices and procedures, and thus failed to lay a proper foundation for the admission of records concerning the payment history under the note ... . Inasmuch as the plaintiff's motion was based on evidence that was not in admissible form, the plaintiff failed to establish its prima facie entitlement to judgment as a matter of law ...". ***Cadlerock Joint Venture, L.P. v. Trombley*, 2017 N.Y. Slip Op. 03927, 2nd Dept 5-17-17**

FAMILY LAW.

FATHER'S MOTION TO VACATE THE DEFAULT DISMISSAL OF HIS VISITATION PETITION SHOULD HAVE BEEN GRANTED, LIBERAL POLICY IN FAVOR OF VACATING DEFAULT NOTED.

The Second Department, reversing Family Court, determined father's motion to vacate the default dismissal of his visitation petition should have been granted. The court noted the liberal policy in favor of vacating defaults in this context: "In custody proceedings pursuant to Family Court Act article 6, this Court has adopted a liberal policy in favor of vacating defaults... . Under the circumstances presented here, and in light of the policy favoring resolution on the merits in child custody proceedings, the father demonstrated a reasonable excuse for his failure to appear on March 1, 2016 ... . The father's absence was not willful. Notably, the father had never missed any prior scheduled Family Court appearances and had been compliant with all of the court's directives. Moreover, there was no indication that a final determination of the petitions pending before the court would occur on the March 1, 2016, date. Finally, the father filed his motion to vacate within two months of the default. Under the totality of these circumstances, the court improvidently exercised its discretion in denying the father's motion to vacate the March 2016 orders on the ground that his excuse for his absence was not reasonable ...". ***Matter of Lemon v. Faison*, 2017 N.Y. Slip Op. 03953, 2nd Dept 5-17-17**

FAMILY LAW, CRIMINAL LAW.

FATHER SHOULD NOT HAVE BEEN DEEMED TO HAVE DERIVATIVELY NEGLECTED ALL HIS CHILDREN BASED SOLELY ON HIS GUILTY PLEA TO ENDANGERING THE WELFARE OF ONE OF HIS CHILDREN.

The Second Department, reversing Family Court, determined, in the absence of a fact-finding proceeding, father should not have been deemed to have derivatively neglected his children based solely upon his guilty plea to endangering the welfare of one of his children: " 'A criminal conviction may be given collateral estoppel effect in a Family Court proceeding where (1) the identical issue has been resolved, and (2) the defendant in the criminal action had a full and fair opportunity to litigate the issue of his or her criminal conduct' ... . Family Court Act § 1012(f)(i) defines a neglected child as one 'whose physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired as a result of the failure of his parent or other person legally responsible for his care to exercise a minimum degree of care' ... by, inter alia, 'unreasonably inflicting or allowing to be inflicted harm, or a substantial risk thereof.' Here, since the father's conviction for endangering the welfare of a child was based upon the same acts alleged to constitute neglect, the father's conviction established, prima facie, that Blima M. was a neglected child ... . However, the Family Court erred in granting that branch of ACS's [Administration for Children's Services'] motion which was for summary judgment determining that the father derivatively neglected Hersh M., Jacob M., Aron M., Moshe M., and Dina M. While proof of the neglect of one child shall be admissible evidence on the issue of the neglect of any other child of, or the legal responsibility of, the respondent ... , a finding of abuse or neglect as to one sibling does not mandate a finding of derivative abuse or neglect as to the other siblings ...". ***Matter of Blima M. (Samuel M.)*, 2017 N.Y. Slip Op. 03954, 2nd Dept 5-17-17**

FORECLOSURE, REAL PROPERTY ACTIONS AND PROCEEDINGS LAW, EVIDENCE.

NOTICE REQUIREMENTS OF REAL PROPERTY ACTIONS AND PROCEEDINGS LAW NOT DEMONSTRATED, PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT IN THE FORECLOSURE ACTION SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined plaintiff in this foreclosure action did not demonstrate it met the notice requirements of the Real Property Actions and Proceedings Law (RPAPL): "... [P]laintiff submitted an affidavit of its vice president, who averred that he had reviewed the business records, maintained in the regular course of business by the plaintiff, relating to [the] loan. Based upon his review, he averred that the RPAPL 1304 notice was 'sent in accordance with New York RPAPL 1304' on January 10, 2011. This unsubstantiated and conclusory statement was insufficient to establish that the required RPAPL 1304 notice was mailed ... by registered or certified mail and also by first-class mail... . Further, since the plaintiff was not an assignee of the mortgage at the time the notice allegedly was served, the basis of the vice president's knowledge is unclear ... . Moreover, [defendant] raised a triable issue of fact with respect to whether the RPAPL 1303 notice was in the proper form ...". ***Central Mtge. Co. v. Abraham*, 2017 N.Y. Slip Op. 03929, 2nd Dept 5-17-17**

FORECLOSURE, REAL PROPERTY ACTIONS AND PROCEEDINGS LAW, EVIDENCE.

NOTICE REQUIREMENTS OF REAL PROPERTY ACTIONS AND PROCEEDINGS LAW NOT DEMONSTRATED, PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT IN THE FORECLOSURE ACTION SHOULD NOT HAVE BEEN GRANTED.

The Second Department determined the proof of notice requirements of Real Property Actions and Proceedings Law (RPAPL) § 1304 was insufficient and the bank's motion for summary judgment in this foreclosure proceeding should not have been granted: "Here, the plaintiff failed to demonstrate, prima facie, its strict compliance with RPAPL § 1304 ... . In support of its motion, the plaintiff submitted the affidavit of Monica I. Montalvo Rivas, its vice president of loan documentation, stating that she had 'reviewed the 90 day pre-foreclosure notice sent to Borrower on October 31, 2013 to the last known address of Borrower, which is the residence that is [the] subject of the Mortgage, by first class mail and certified mail.' Annexed to Rivas's affidavit was a copy of the notice, along with a copy of a "Certified Mail Receipt" containing the defendant's address and a 'Certified Mail Number.' The receipt contained no language indicating that it was issued by the United States Postal Service. 'While mailing may be proved by documents meeting the requirements of the business exception records exception to the rule against hearsay,' here, Rivas did not aver that she was familiar with the plaintiff's mailing practices and procedures, and therefore did not establish proof of a standard office practice and procedure designed to ensure that items are properly addressed and mailed ... . In any event, the plaintiff failed to submit any proof substantiating Rivas's assertion that the notice was mailed to the defendant by first class mail." ***Wells Fargo Bank, N.A. v. Trupia*, 2017 N.Y. Slip Op. 03986, 2nd Dept 5-17-17**

PERSONAL INJURY.

PLAINTIFF, WHO HAD THE RIGHT OF WAY, DID NOT DEMONSTRATE FREEDOM FROM COMPARATIVE FAULT IN THIS BUS-CAR COLLISION CASE, SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court's grant of summary judgment to plaintiff driver, determined that, although plaintiff had the right of way, he did not demonstrate the absence of comparative fault in this car-bus collision case. A driver with the right of way still has the obligation to see what is there to be seen and to take evasive action: "Although the operator of a motor vehicle traveling with the right-of-way is entitled to anticipate that other drivers will obey the traffic laws requiring them to yield ... , the operator with the right-of-way also has an obligation to keep a proper lookout to see what can be seen through the reasonable use of his or her senses to avoid colliding with other vehicles ... . Since there can be more than one proximate cause of an accident, a plaintiff moving for summary judgment on the issue of liability has the burden of establishing, prima facie, not only that the defendant was negligent, but that the plaintiff was free from comparative fault ... . Here, Mark [plaintiff] failed to establish, prima facie, that he was not comparatively at fault in the happening of the accident. In support of his motion and cross motion, Mark submitted, inter alia, the deposition testimony of the parties, which raised triable issues of fact as to whether Mark failed to see what was there to be seen and failed to take evasive actions to avoid the collision between his vehicle and the bus... . Accordingly, the Supreme Court should have denied the motion and cross motion without regard to the sufficiency of the defendants' opposition papers ...". ***Mark v. New York City Tr. Auth.*, 2017 N.Y. Slip Op. 03940, 2nd Dept 5-17-17**

PERSONAL INJURY, CIVIL PROCEDURE, EVIDENCE.

MOTION TO RENEW PROPERLY USED TO CORRECT DEFECT IN INITIAL PAPERS (DEPOSITION TRANSCRIPTS UNSIGNED), PLAINTIFF RAISED A QUESTION OF FACT WHETHER DEFENDANT BAR SERVED DRIVER WHEN HE WAS VISIBLY INTOXICATED (DRAM SHOP ACT).

The Second Department, reversing Supreme Court, determined a question of fact had been raised whether defendant bar (Danu) served the driver of the car in which plaintiff was injured when the driver was visibly intoxicated (Dram Shop Act). The court noted that defendant's motion to renew its motion for summary judgment to correct a defect in the initial motion papers (the deposition transcripts were unsigned) was proper: "... [T]he plaintiff raised a triable issue of fact as to whether Danu's bartenders, who were not presented for deposition, served alcohol to the driver while he was visibly intoxicated. Proof of a high blood alcohol content does not, in and of itself, 'provide a sound basis for drawing inferences about a person's appearance or demeanor' ' ... . Nonetheless, '[p]roof of visible intoxication can be established by circumstantial evidence, including expert and eyewitness testimony'... . The plaintiff submitted a transcript of the driver's plea of guilty to aggravated driving while intoxicated and related crimes, which established that the driver recalled drinking 'a few' mixed drinks prior to the accident and that his blood alcohol content was over .18%. The plaintiff also relies on a police report indicating that, after the accident, the driver was 'observed to be intoxicated and placed under arrest.' Although Danu now argues that the police report is inadmissible, it submitted the report with its reply papers on the original motion. Thus, Danu waived any objection to its admissibility, and on appeal the plaintiff may rely upon the report in opposition to Danu's summary judgment motion ...". ***Trigoso v. Correa*, 2017 N.Y. Slip Op. 03983, 2nd Dept 5-17-17**

PERSONAL INJURY, CIVIL PROCEDURE, EVIDENCE.

PLAINTIFF'S MOTION TO SET ASIDE THE VERDICT AS AGAINST THE WEIGHT OF THE EVIDENCE SHOULD HAVE BEEN GRANTED.

The Second Department, reversing (modifying) Supreme Court, determined plaintiff's motion to set aside the verdict as against the weight of the evidence should have been granted in this car-bus collision case. Plaintiff testified he had a green light. The bus driver (Puntarich) testified he had a green turn arrow. The jury found the bus driver negligent but his negligence was not the proximate cause of the accident. The Second Department noted that, because of the conflicting factual allegations, a motion to set aside the verdict as a matter of law could not be granted: " 'A jury finding that a party was negligent but that the negligence was not a proximate cause of the accident is inconsistent and against the weight of the evidence only when the issues are so inextricably interwoven as to make it logically impossible to find negligence without also finding proximate cause' ... . Under the circumstances of this case, the Supreme Court should have granted that branch of the plaintiff's motion which was to set aside the verdict as contrary to the weight of the evidence, as the finding that Puntarich's negligence was not a proximate cause of the accident did not rest upon a fair interpretation of the credible evidence ... . However, that branch of the plaintiff's motion which was to set aside the verdict and for judgment as a matter of law was properly denied, as issues of fact exist as to whether the plaintiff also was at fault in causing the accident ...". ***Mancini v. Metropolitan Suburban Bus Auth.*, 2017 N.Y. Slip Op. 03939, 2nd Dept 5-17-17**

TRUSTS AND ESTATES.

SURROGATE'S COURT SHOULD HAVE CARRIED OUT WHAT DECEDENT CLEARLY INTENDED, DESPITE THE DEFECT IN THE MEANS CHOSEN TO EFFECT HIS INTENT.

The Second Department, reversing Surrogate's Court, determined the intent of the decedent was clear from the will and trust documents and should be carried out. The will and trust documents indicated decedent wished the sole asset of his estate, an IRA, be distributed 1/3 to his wife and 2/3 to his daughter. Decedent intended that a living trust he had set up receive the IRA, which all parties agreed was not possible: "The wife ... contends that pursuant to the terms of the Will, no Testamentary Trust was created into which the IRA proceeds could be transferred, because the Living Trust was neither terminated nor ineffective at the time of the decedent's death. Such a constrained reading of the Will illustrates 'the aptness of Judge Learned Hand's wise and trenchant observation that courts should be wary of making a fortress out of the dictionary,' since there is no more likely way to misapprehend the meaning of language . . . than to read the words literally, forgetting the object which the document as a whole seeks to achieve' ... . The drafter of the Will testified at his deposition that the decedent not only specifically intended to place the IRA proceeds into the Living Trust, but that the IRA was, in fact, '[t]he only asset' intended to fund the Living Trust. It is undisputed, however, that the Living Trust could not receive the IRA. Under the circumstances, it is evident that the Living Trust was ineffective in carrying out the very purpose for which it was created. Therefore, under the alternative disposition and residuary provisions of article SECOND of the Will, the Testamentary Trust became available to receive the IRA proceeds (see EPTL 13-3.3[a][2]), and it follows that the decedent's beneficiary designation with respect to the IRA can, and must, be enforced as written, and the order appealed from must be reversed." ***Matter of Perlman*, 2017 N.Y. Slip Op. 03957, 2nd Dept 5-17-17**

TRUSTS AND ESTATES, CIVIL PROCEDURE.

PLAINTIFF DID NOT HAVE STANDING TO CONTEST PROPERTY TRANSFER TO HER BROTHER BY HER MOTHER BASED UPON AN ALLEGATION MOTHER LACKED MENTAL CAPACITY AT THE TIME OF THE TRANSFER, PLAINTIFF HAD ONLY A POTENTIAL, SPECULATIVE INTEREST IN HER MOTHER'S PROPERTY.

The Second Department, reversing Supreme Court, determined plaintiff did not have standing to bring an action against her brother based upon allegations her brother, who had a power of attorney for their mother, had been unjustly enriched by the transfer of mother's property to him: "The plaintiff, claiming that the mother lacked mental capacity at the time of the transfer, commenced this action against the defendant asserting causes of action to impose a constructive trust, to recover damages for unjust enrichment, for an accounting, and for 'appointment of [a] guardian ad litem' for the mother. The defendant moved, inter alia, for summary judgment dismissing the complaint, asserting, among other things, that the plaintiff lacked standing. The Supreme Court denied the motion. '[S]tanding requires an inquiry into whether the litigant has an interest in the claim at issue in the lawsuit that the law will recognize as a sufficient predicate for determining the issue at the litigant's request' ... . Thus, to demonstrate standing, a plaintiff must 'establish that he or she will actually be harmed by the challenged action, and that the injury is more than conjectural' ... . 'The rules governing standing help courts separate the tangible from the abstract or speculative injury' ... . Here, the defendant demonstrated his prima facie entitlement to judgment as a matter of law on the basis that the plaintiff lacked standing to commence this action. 'While [the] mother was alive, she had the absolute right to change her intentions regarding the distribution of her assets' ... . Accordingly, the plaintiff's interest in the subject real property and the mother's other assets was merely a 'potential, speculative interest,' insufficient to give rise to standing ...". ***Jacob v. Conway*, 2017 N.Y. Slip Op. 03936, 2nd Dept 5-17-17**

TRUSTS AND ESTATES, CONTRACT LAW.

AFTER FATHER'S DEATH, SON COULD NOT SEEK AN INJUNCTION AGAINST MOTHER AND SUE MOTHER FOR BREACH OF CONTRACT BASED UPON MOTHER AND FATHER'S AGREEMENT NOT TO MODIFY OR REVOKE THEIR WILLS WITHOUT THE MUTUAL CONSENT OF THE PARTIES.

The Second Department determined plaintiff-son's complaint seeking an injunction prohibiting his mother (defendant) from transferring any property mother inherited from father (Vitus) was properly dismissed. Mother and father, by contract, agreed not to modify or revoke their wills without the "mutual written consent of the parties." The court found there was no contractual impediment to mother's transferring (the inherited) property after father's death and plaintiff could not maintain a breach of contract action during defendant's lifetime: "Contrary to the plaintiff's contention, there is nothing in the unambiguous language of the agreement which prevents the defendant from making inter vivos gifts or transfers of assets she inherited from Vitus's residuary estate ... . Accordingly, the Supreme Court correctly, pursuant to CPLR 3211(a)(1), directed dismissal of the causes of action for injunctive relief and breach of contract to the extent that they are based on any past and future inter vivos transfers of any property inherited by the defendant from Vitus's residuary estate. Accepting the facts as alleged in the complaint as true, and according the plaintiff the benefit of every possible favorable inference (see CPLR 3211[a][7] ...), the Supreme Court correctly directed the dismissal of the complaint to the extent that it sought to enjoin the defendant from breaching the agreement by revoking or modifying her will or executing a new will. During the defendant's lifetime, the plaintiff is precluded from maintaining an action predicated upon a breach of the agreement as it relates to the defendant's promise not to revoke or modify her will or execute a new will ...". ***Tretter v. Tretter*, 2017 N.Y. Slip Op. 03982, 2nd Dept 5-17-17**

ZONING, ENVIRONMENTAL LAW, MUNICIPAL LAW.

WATER DISTRICT'S CONSTRUCTION OF A REPLACEMENT DRINKING WATER SUPPLY TANK WAS IMMUNE FROM COMPLIANCE WITH THE VILLAGE CODE AND DID NOT TRIGGER THE STATE ENVIRONMENTAL QUALITY REVIEW ACT.

The Second Department determined Supreme Court properly concluded the Water District's planned replacement of a drinking water supply tank was immune from the village code and did not trigger the State Environmental Quality Review Act (SEQRA): "In *Matter of County of Monroe (City of Rochester)* (72 NY2d 338), the Court of Appeals addressed the applicability of local zoning laws where a conflict exists between two governmental entities. The Court therein articulated 'a balancing of public interests' test which requires the consideration of various factors in order to determine whether an entity should be granted immunity from local zoning requirements … . These factors include 'the nature and scope of the instrumentality seeking immunity, the kind of function or land use involved, the extent of the public interest to be served thereby, the effect local land use regulation would have upon the enterprise concerned and the impact upon legitimate local interests' … . Here, the Village failed to set forth any basis for its contention that the application of the Monroe balancing test is in the exclusive province of the Village, or host entity. In fact, the Court of Appeals did not specify the entity initially responsible for evaluating the competing interests ... . Further, the Supreme Court properly employed the 'balancing of public interests' test and correctly determined that the proposed construction plan is immune from the Village's local laws ... . The Supreme Court also properly found, in effect, that the Water District's determination that the proposed construction plan was for a 'replacement, rehabilitation or reconstruction of a structure or facility, in kind' (6 NYCRR 617.5[c][2]) and, thus, was a Type II action under SEQRA that presumptively did not have a significant impact upon the environment and did not require the preparation and circulation of an environmental impact statement, was not irrational, arbitrary or capricious, affected by error of law, or an abuse of discretion ...". ***Incorporated Vil. of Munsey Park v. Manhasset-Lakeville Water Dist.*, 2017 N.Y. Slip Op. 03934, 2nd Dept 5-17-17**

THIRD DEPARTMENT

DISCIPLINARY HEARINGS (INMATES).

HEARING OFFICER'S REFUSAL WITHOUT EXPLANATION TO CALL A WITNESS TO THE INCIDENT REQUIRED ANNULMENT AND EXPUNGEMENT.

The Third Department, annulling the misbehavior determination, found the hearing officer's refusal without explanation to call a witness to the confrontation between petitioner and guards to be a constitutional violation: " 'An inmate has a right to call witnesses at a disciplinary hearing so long as the testimony is not immaterial or redundant and poses no threat to institutional safety or correctional goals'... . This report indicated that, without provocation, petitioner punched the officer conducting the frisk in the eye. Petitioner maintained that he did not assault either officer, that the officer conducting the frisk was the aggressor, grabbing petitioner's genitals during the frisk and punching him, and that both officers attacked him in retaliation for him filing a grievance against a fellow officer. The requested witness submitted a memorandum to his superior on the day of the incident stating that he observed the frisk, that petitioner turned off the wall and that a struggle ensued with the correction officer. According to the memorandum, the officer called for a response team and, by the time the

team arrived, both petitioner and the officer involved in the altercation were inside of petitioner's cell and out of his sight. Following the initial request for this witness at the hearing, the Hearing Officer stated that he would address the request later. Petitioner clearly requested testimony from this witness a second time and the Hearing Officer did not respond. The Hearing Officer subsequently closed the hearing without calling the witness and without providing a reason for not calling him." ***Matter of Reyes v. Keyser*, 2017 N.Y. Slip Op. 04007, 3rd Dept 5-18-17**

FAMILY LAW.

AUNT DID NOT HAVE STANDING TO SEEK VISITATION, AWARDING ADDITIONAL VISITATION TO GRANDPARENTS NOT SUPPORTED BY THE RECORD.

The Third Department, reversing Family Court, determined: (1) the aunt did not have standing to seek visitation because there was a loving and responsible relationship between mother and child; and (2) awarding additional visitation to the grandparents was not supported by the record (no testimony taken from the grandparents): "Turning first to the merits of the aunt's petition seeking visitation ... , we find that Family Court erred in awarding visitation to the aunt inasmuch as the aunt does not have standing to seek such relief ... . While the aunt and the attorney for the child contend that extraordinary circumstances exists to confer standing upon the aunt, such rule does not apply to this case ... , especially where Family Court found that the mother was a 'loving and responsible parent.' We further note that although the mother originally consented to the aunt having minimal visitation with the child, she later changed her position and orally moved to dismiss the aunt's petition for visitation immediately prior to the commencement of trial ... . Accordingly, Family Court erred in granting the aunt visitation with the child over the mother's objections and the aunt's petition should have been dismissed ... . * * * ... [W]e conclude that Family Court's determination to award the grandparents increased visitation lacks a sound and substantial basis in the record. The increased visitation did not stem from the consideration of any documentary evidence or testimony but, instead, from Family Court's own familiarity with the parties based upon prior petitions. Such information, however, is not part of the record ...". ***Matter of Romasz v. Coombs*, 2017 N.Y. Slip Op. 04001, 3rd Dept 5-18-17**

UNEMPLOYMENT INSURANCE.

CLAIMANT, WHO WAS UNABLE TO WORK BECAUSE OF DOMESTIC ABUSE, WAS ENTITLED TO UNEMPLOYMENT INSURANCE BENEFITS.

The Third Department, reversing the Unemployment Insurance Appeal Board, determined claimant was willing and able to work, within the meaning of the Unemployment Insurance Law, when she took a leave of absence because of domestic abuse. Claimant alleged she was unable to leave her house and walk to work because her former boyfriend would harass her both as she walked to work and at work: "Here, the uncontroverted evidence is that claimant was ready, willing and able to work during the period in issue. Under the circumstances presented, we disagree with the Board that her leave of absence necessitated by the actions of a perpetrator of domestic abuse rendered her legally unavailable for work ... . To that end, and pursuant to Labor Law § 593 (1) (b) (i), the Legislature has provided that an employee may not be disqualified from receiving unemployment insurance benefits for separating from employment 'due to any compelling family reason,' which includes 'domestic violence . . . which causes the individual reasonably to believe that such individual's continued employment would jeopardize his or her safety or the safety of any member of his or her immediate family'... . The progenitor of Labor Law § 593 (1) (b) (i) was enacted ... in response to a New Jersey appeals court ruling that a woman who was forced to quit her job due to domestic violence was not entitled to collect unemployment benefits ... and was intended to ensure that victims of domestic violence 'may be eligible for [u]nemployment [i]nsurance' ... . When the provision was amended to its current form in 2009 ... , the legislative intent remained to ensure that 'individuals who are voluntarily separated from employment due to compelling family reasons are eligible for [unemployment insurance] benefits' ... . The Board credited claimant's uncontroverted account that she was the victim of domestic violence, stalking and harassment, as well as her testimony that she was willing and able to work during the period in issue but was prevented from leaving her home to get to work due to her justifiable fear of further violence by her former boyfriend ...". ***Matter of Derfert (Commissioner of Labor)*, 2017 N.Y. Slip Op. 04016, 3rd Dept 5-18-17**

WORKERS' COMPENSATION LAW.

CLAIMANT PROPERLY FOUND TO HAVE A 35% LOSS OF WAGE EARNING CAPACITY DESPITE HIS HAVING RETURNED TO WORK FULL-TIME.

The Third Department determined claimant was properly determined to have a 35% loss of wage earning capacity even though he had returned to work full-time. Because claimant had returned to work, he was not awarded any compensation. However, should his ability to work change, he would be entitled to up to 275 weeks of compensation. The court explained the different meanings of "wage earning capacity" and "loss of wage earning capacity": "The employer argues that, because claimant returned to work full time at his preaccident wages, claimant's wage-earning capacity at the time of classification was 100%; therefore, the employer's argument continues, the Board's finding that claimant sustained a 35% loss of wage-earning capacity was in error and unlawful. The employer's argument on this point ignores the fact that the terms 'wage-earning capacity' (see Workers' Compensation Law § 15 [5-a]) and 'loss of wage-earning capacity' (see Work-

ers' Compensation Law § 15 [3] [w]) 'are to be used for separate and distinct purposes' ... . As this Court recently reiterated, 'wage-earning capacity is used to determine a claimant's weekly rate of compensation,' whereas 'loss of wage-earning capacity . . . is used at the time of classification to set the maximum number of weeks over which a claimant with a permanent partial disability is entitled to receive benefits' … . 'Unlike wage-earning capacity, which can fluctuate based on a claimant's employment status, loss of wage-earning capacity [is] intended to remain fixed' ... . Contrary to the employer's assertion, '[t]he durational limits imposed by Workers' Compensation Law § 15 (3) (w) do not distinguish between claimants who are employed at the time of classification and those who are not' ...". ***Matter of De Ruggiero v. City of N.Y. Dept. of Citywide Admin. Servs.*, 2017 N.Y. Slip Op. 03999, 3rd Dept 5-18-17**

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