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FIRST DEPARTMENT

CIVIL PROCEDURE, CONTRACT LAW.

SIX-MONTH CONTRACTUAL STATUTE OF LIMITATIONS EXPIRED BEFORE THE CLAIM ACCRUED AND WILL NOT BE ENFORCED TO PRECLUDE PAYMENT ON THE CLAIM.

The First Department, in a full-fledged opinion by Justice Mazzarelli, reversing Supreme Court, determined that plaintiff's suit for payment on a contract was not precluded by the six-month statute of limitations in the contract. Plaintiff AWI contracted with defendant Whitestone to provide security at construction sites. Both Whitestone and AWI were named in a prevailing wage class action commenced by AWI workers. Whitestone, pursuant to a contractual provision, refused to pay AWI until the wage action was resolved. The case was not resolved within the six-month limitations period: "[AWI argues] on appeal that the contractual limitations provision is unenforceable because it enables the scenario where, even though a claim has not accrued by the time six months have passed since the last time physical work was performed, it is still time-barred. AWI is essentially arguing that, in light of Whitestone's stated position that payment was not due to AWI until such time as the Wage Action was resolved, it should not have been subjected to the 'catch-22' of having to file a lawsuit to toll the statute of limitations where the claim was not yet ripe for adjudication. AWI analogizes to Executive Plaza, LLC v. Peerless Ins. Co. (22 NY3d 511 [2014]). In that case, the defendant insurer issued a fire policy to the plaintiff insured which required the plaintiff to commence suit under the policy within two years of a fire. The policy further required the plaintiff, if seeking to recover replacement cost, to forbear on making any such claim until the property had actually been replaced. When the plaintiff's property burned down, it diligently acted to replace the property, but it recognized that the process would take more than two years. In an effort to protect its rights, it commenced an action on the two-year anniversary of the fire. The defendant successfully moved to dismiss the action as premature. When the replacement was complete, the plaintiff commenced a new action. The defendant removed the action to federal district court and moved to dismiss on statute of limitations grounds. After the court granted the motion, the Second Circuit certified a question to the Court of Appeals asking whether the limitations period was enforceable. The Court of Appeals held that it was not. While recognizing the inherent reasonableness of contractually truncated statutes of limitations, the Court held that '[a] limitation period' that expires before suit can be brought is not really a limitation period at all, but simply a nullification of the claim' ... . * * * .. [W]we find that, under the circumstances, the limitations period cannot serve to bar AWI's claim ...". ***AWI Sec. & Investigators, Inc. v. Whitestone Constr. Corp.*, 2018 N.Y. Slip Op. 05907, First Dept 8-23-18**

LABOR LAW-CONSTRUCTION LAW, EVIDENCE, CIVIL PROCEDURE.

AFFIDAVIT FROM AN EYEWITNESS TO THE ACCIDENT SUBMITTED WITH THE REPLY PAPERS WAS PROPERLY CONSIDERED AS IT DID NOT CONFLICT THE WITNESS'S OTHER AFFIDAVIT OR THE WITNESS'S PRIOR UNSWORN STATEMENT, PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT ON HIS LABOR LAW § 240(1) CAUSE OF ACTION PROPERLY GRANTED.

The First Department determined plaintiff was entitled to summary judgment on his Labor Law § 240(1) cause of action. Plaintiff alleged his thumb was crushed when attempting to lift a roof cutting machine over a parapet at the edge of the roof in order to drop the machine to insulation material ten feet below. Three affidavits from an eyewitness (Vera) were submitted, including an affidavit submitted with the reply. The defendant argued conflicts in the affidavits created a question of fact. But the court saw no conflicts: "The motion court properly accepted Veras's second, clarifying affidavit in plaintiff's submission on reply. The second affidavit merely amplified the factual recitation set forth in Veras's initial affidavit, which had been procured and drafted by the defense and omitted the pertinent detail that the workers were actually in the process of lowering the machine from the roof, and not engaged in pushing it across the flat roof, when the accident occurred. Veras's second affidavit was a proper response to defendant's submission, and did not contradict the statement in his first affidavit ... Nor could Veras's second affidavit be rejected as raising a feigned issue of fact ... , especially since it comported with all of the other eyewitness testimony in the case, as well as with Veras's own early unsworn statement, and explained the ambiguity arising from the omission of additional details in his first affidavit. We have recognized the distinction in Labor Law § 240(1) cases between contradictory evidence and evidence that is subject to explanation in granting partial summary judgment on liability to a plaintiff... . Here, Veras's three statements, when taken together and along with those of the three

other eyewitnesses and that of plaintiff, provided a detailed and consistent recounting of the accident as having occurred during the lowering of the machine." ***Cuevas v. Baruti Constr. Corp.*, 2018 N.Y. Slip Op. 05905, Second Dept 8-23-18**

REAL PROPERTY LAW, CORPORATION LAW, MUNICIPAL LAW, CIVIL PROCEDURE, ENVIRONMENTAL LAW, LAND USE.

THE REAL ESTATE BOARD OF NEW YORK, WHOSE MEMBERS OWN HOTELS, HAD STANDING TO CONTEST A LOCAL LAW PLACING A TWO-YEAR MORATORIUM ON THE CONVERSION OF HOTELS TO RESIDENTIAL UNITS, THE BOARD DID NOT HAVE STANDING TO CHALLENGE THE LAW UNDER THE STATE ENVIRONMENTAL QUALITY REVIEW ACT, HOWEVER, BECAUSE IT DID NOT ALLEGE ENVIRONMENTAL HARM AND DID NOT ALLEGE HARM SEPARATE AND APART FROM INJURY TO THE GENERAL PUBLIC.

The First Department, in a full-fledged opinion by Justice Moulton, over a partial dissent, reversing Supreme Court, determined that the Real Estate Board of New York (REBNY) had standing to challenge a Local Law which placed a two-year moratorium on the conversion of hotels to condominiums or other residential uses. The court further determined that the REBNY did not have standing to challenge the statute under the State Environmental Quality Review Act (SEQRA). The REBNY alleged that 29 of its members owned hotels subject to the law: "Owners of real property who are subjected to a new zoning classification or other use restriction are 'presumptively affected by the change' and 'therefore technically have standing' to assert claims ... . Accepted as true for purposes of these CPLR 3211 motions, REBNY's assertion that its member hotel owners are currently negatively affected by the moratorium is sufficient to establish standing in the plenary action and in the article 78 proceeding under ULURP [the City Charter's Uniform Land Use Review Process] ... . * * * REBNY's claimed environmental harm is nothing more than economic harm (i.e., the reduction in property values, the loss of business opportunities and the added expense of applying for a waiver under Local Law 50). REBNY's own filings reflect that the organization's constitution mentions the environment only once, and only insofar as the environment relates to economic impact. The affidavit by REBNY's president does not salvage REBNY's standing argument. The president claims that 'SEQRA is a concern' for all REBNY members in 'proximity' to the hotels due to potential impacts on traffic, noise, air quality, waste disposal and demand for public services. This argument ... fails to establish injury separate and apart from injury to the general public ...". ***Matter of Real Estate Bd. of N.Y., Inc. v. City of New York*, 2018 N.Y. Slip Op. 05906, Second Dept 8-23-18**

SECOND DEPARTMENT

CIVIL PROCEDURE.

ALTHOUGH SUPREME COURT PROPERLY DEEMED SERVICE COMPLETE DESPITE LATE FILING OF THE AFFIDAVIT OF SERVICE, DEFENDANT'S MOTION TO VACATE THE DEFAULT JUDGMENT SHOULD NOT HAVE BEEN DENIED, RATHER DEFENDANT SHOULD HAVE BEEN GIVEN EXTRA TIME TO FILE AN ANSWER.

The Second Department, reversing Supreme Court, determined Supreme Court properly deemed service complete despite the late filing of the affidavit of service, but further determined Supreme Court should not have denied defendant's motion to vacate the default judgment. Rather service should have been deemed complete when the court ruled on it and defendant should have been given 30 days from that point to file an answer: "Here, the affidavit of service was not filed within 20 days of either the mailing or affixing; thus, service was never completed … . Since service was never completed, the defendant's time to answer the complaint had not yet started to run and, therefore, she could not be in default ... . However, the 'failure to file proof of service is a procedural irregularity, not a jurisdictional defect, that may be cured by motion or sua sponte by the court in its discretion pursuant to CPLR 2004'... . Thus, we agree with the Supreme Court's determination to deem the affidavit of service timely filed, sua sponte, pursuant to CPLR 2004. In granting this relief, however, the court must do so upon such terms as may be just, and only where a substantial right of a party is not prejudiced (see CPLR 2001 ...). The court may not make such relief retroactive, to the prejudice of the defendant, by placing the defendant in default as of a date prior to the order... , 'nor may a court give effect to a default judgment that, prior to the curing of the irregularity, was a nullity requiring vacatur' ... . Rather, the defendant must be afforded an additional 30 days to appear and answer after service upon her of a copy of the decision and order ...". ***First Fed. Sav. & Loan Assn. of Charleston v. Tezzi*, 2018 N.Y. Slip Op. 05826, Second Dept 8-22-18**

CIVIL PROCEDURE, CONTRACT LAW, REAL ESTATE, FRAUD.

REAL ESTATE CONTRACT LIMITING REMEDIES CONSTITUTED DOCUMENTARY EVIDENCE SUFFICIENT TO WARRANT DISMISSAL OF CAUSES OF ACTION FOR SPECIFIC PERFORMANCE AND REFORMATION OF THE PURCHASE CONTRACT, PLEADING REQUIREMENTS FOR FRAUDULENT MISREPRESENTATION EXPLAINED.

The Second Department, modifying Supreme Court, determined defendant's motion to dismiss causes of action for specific performance and reformation of a real estate purchase contract should have been granted. However the motion to dismiss the fraudulent misrepresentation cause of action was properly denied. The Second Department determined the limitation of remedies in the real estate contract constituted documentary evidence justifying dismissal pursuant to CPLR 3211(a)(1).

The requirements for sufficiently pleading a cause of action for fraudulent misrepresentation were explained as well: " 'To succeed on a motion to dismiss based upon documentary evidence pursuant to CPLR 3211(a)(1), the documentary evidence must utterly refute the plaintiff's factual allegations, conclusively establishing a defense as a matter of law' ... . 'An unambiguous contract provision may qualify as documentary evidence under CPLR 3211(a)(1)' ... . Here, the parties' contract, which limited the plaintiff's remedies in the event that the defendants were unable to clear defects in title, established a complete defense as a matter of law to the first and third causes of action, seeking specific performance and reformation of the contract based upon mutual mistake, respectively ... . Where a cause of action is based on a misrepresentation or fraud, 'the circumstances constituting the wrong shall be stated in detail' (CPLR 3016[b]). Here, the complaint sufficiently stated a cause of action to recover damages for fraudulent misrepresentation by alleging that the defendants misrepresented that they owned 42-55 27th Street and had the right to convey it, that they made this representation despite knowing that it was false, and that the plaintiff reasonably relied upon the representation to his detriment." ***Hiu Ian Cheng v. Salguero*, 2018 N.Y. Slip Op. 05831, Second Dept 8-22-18**

CIVIL PROCEDURE, FORECLOSURE.

CONDITIONAL ORDER DID NOT MEET THE NOTICE REQUIREMENTS OF CPLR 3216, FORECLOSURE ACTION SHOULD NOT HAVE BEEN ADMINISTRATIVELY DISMISSED.

The Second Department, reversing Supreme Court, determined that the conditional order requiring that a note of issue or motion be filed by plaintiff bank within ninety days did not meet the requirements of a notice pursuant to CPLR 3216. Therefore the administrative dismissal of the foreclosure action was invalid: " 'CPLR 3216 permits a court, on its own initiative, to dismiss an action for want of prosecution where certain conditions precedent have been complied with' ... . As relevant here, an action cannot be dismissed pursuant to CPLR 3216(a) 'unless a written demand is served upon the party against whom such relief is sought' in accordance with the statutory requirements, along with a statement that the default by the party upon whom such notice is served in complying with such demand within said ninety day period will serve as a basis for a motion by the party serving said demand for dismissal as against him for unreasonably neglecting to proceed' ... . While a conditional order of dismissal may have 'the same effect as a valid 90-day notice pursuant to CPLR 3216' ... , the conditional order here 'was defective in that it failed to state that the plaintiff's failure to comply with the notice will serve as a basis for a motion' by the court to dismiss the action for failure to prosecute' ... . Moreover, the conditional order failed to satisfy the notice requirement on the additional ground that there was 'no indication that the plaintiff's counsel was present at the status conference at which the court issued the conditional order of dismissal,' nor was there 'evidence that the order was ever properly served upon the plaintiff' ... . In the absence of proper notice, 'the court was without power to dismiss the action for the plaintiff's failure to comply with the conditional order of dismissal' ... . Lastly, the Supreme Court erred in administratively dismissing the action without further notice to the parties and without benefit of further judicial review ...". ***Deutsche Bank Natl. Trust Co. v. Bastelli*, 2018 N.Y. Slip Op. 05822, Second Dept 8-22-18**

CIVIL PROCEDURE, FORECLOSURE.

JUDGE SHOULD NOT HAVE REFUSED TO SIGN A PROPOSED ORDER TO SHOW CAUSE FOR DEFENDANTS' MOTION TO VACATE A DEFAULT JUDGMENT IN THIS FORECLOSURE ACTION.

The Second Department, reversing Supreme Court, determined the order to show cause was proper and the judge should not have refused to sign it. The defendants in this foreclosure action properly sought an order to show cause in their action to vacate the default judgment: "The defendants Jacob Hirsch and Blime Hirsch (hereinafter together the Hirsches) defaulted by failing to appear in this action to foreclose a mortgage on real property they owned. A judgment of foreclosure and sale dated December 12, 2014, was entered in favor of the plaintiff and against, among others, the Hirches. On December 3, 2015, the Hirsches presented a proposed order to show cause to the Supreme Court, seeking to vacate the judgment pursuant to CPLR 5015(a)(1), (3), and (4), to dismiss the complaint insofar as asserted against them pursuant to CPLR 3211(a)(8), to disqualify the plaintiff's counsel based upon an alleged conflict of interest, and to cancel the notice of pendency. The proposed order to show cause also sought a temporary restraining order staying the foreclosure sale of the property scheduled for later that day, December 3, 2015, at 2:30 p.m., pending the hearing and determination of their proposed motion. After oral argument, the court declined to sign the proposed order to show cause, with a handwritten notation that the Hirsches failed to demonstrate a meritorious defense to the action and that the Hirsches failed to submit proof of misconduct by the plaintiff's attorney. ... 'The court in a proper case may grant an order to show cause, to be served in lieu of a notice of motion, at a time and in a manner specified therein' (CPLR 2214[d]). Whether the circumstances constitute a 'proper case' for the use of an order to show cause instead of a notice of motion is a matter within the discretion of the court to which the proposed order is presented ... . Here, under the particular circumstances of this case, this was a proper case for the use of an order to show cause, and the Supreme Court improvidently exercised its discretion in declining to sign the proposed order to show cause ...". ***Gluck v. Hirsch*, 2018 N.Y. Slip Op. 05828, Second Dept 8-22-18**

CIVIL PROCEDURE, LEGAL MALPRACTICE, ATTORNEYS, EVIDENCE.

EMAILS AND LETTERS WERE NOT DOCUMENTARY EVIDENCE, MOTION TO DISMISS LEGAL MALPRACTICE ACTION PURSUANT TO CPLR 3211 (a)(1) SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined defendant attorneys were not entitled to dismissal of the legal malpractice action based on documentary evidence: "A motion pursuant to CPLR 3211(a)(1) to dismiss the complaint on the ground that the action is barred by documentary evidence 'may be appropriately granted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law' ... . 'In order for evidence to qualify as documentary,' it must be unambiguous, authentic, and undeniable' ... . '[J]udicial records, as well as documents reflecting out-of-court transactions such as mortgages, deeds, contracts, and any other papers, the contents of which are essentially undeniable, would qualify as documentary evidence in the proper case; ... . 'Conversely, letters, emails, and affidavits fail to meet the requirements for documentary evidence' ... . Here, the emails and letters submitted in support of the defendant's motion were not documentary evidence within the meaning of CPLR 3211(a)(1). To the extent that the other evidence submitted was documentary, that evidence did not conclusively establish the absence of an attorney-client relationship between the plaintiffs and the defendant with respect to the liens and their extensions." ***First Choice Plumbing Corp. v. Miller Law Offs., PLLC*, 2018 N.Y. Slip Op. 05825, Second Dept 8-22-18**

CRIMINAL LAW, ATTORNEYS.

PROSECUTOR'S REPEATED USE OF THE TERM 'STATUTORY RAPE' TO GIVE THE JURY THE MISIMPRESSION THE VICTIM OF THE SHOOTING IN THIS MANSLAUGHTER CASE HAD NOT BEEN CHARGED WITH A VIOLENT RAPE DEPRIVED DEFENDANT OF A FAIR TRIAL BECAUSE DEFENDANT WAS RELYING ON THE JUSTIFICATION DEFENSE.

The Second Department, reversing defendant's manslaughter conviction, determined the prosecutor's repeated use of the term "statutory rape" to describe the charge against the victim deprived the defendant of a fair trial. The defendant raised the justification defense. Defendant had been working with the police to capture the victim, who had confessed to the defendant he was wanted for rape. Defendant shot the victim when he was attempting to turn the victim over to the police. By using the term "statutory rape," the jury was given the mistaken impression that the rape was not a violent offense: "The County Court correctly determined that the use of the term 'statutory rape' when describing the victim's alleged criminal conduct was not proper as such a colloquial term may have been misinterpreted by some jurors to mean that the sexual contact between the victim and his alleged victim was consensual, but illegal solely because of the age difference between them. Indeed, the People had initially contended to the County Court that the crime for which the victim was charged, rape in the second degree... , was not a 'violent' crime. Here, because the defendant's defense was based on justification, the County Court was properly concerned that use of the term 'statutory rape' by the prosecutor may have been interpreted by jurors to imply that the victim was not violent, and thus properly instructed the potential jurors that the victim was a fugitive charged with rape in the second degree. However, the court's failure to issue curative instructions to the entire jury pool, including those already sworn and seated, was error and deprived the defendant of his fundamental right to a fair trial ...". ***People v. Carlson*, 2018 N.Y. Slip Op. 05859, Second Dept 8-22-18**

CRIMINAL LAW EVIDENCE.

ANONYMOUS PHONE CALL DESCRIBING 'A MAN WITH A GUN' AND DESCRIBING THE MAN'S CAR, INCLUDING THE LICENSE PLATE NUMBER, DID NOT PROVIDE THE POLICE WITH REASONABLE SUSPICION SUFFICIENT TO JUSTIFY STOPPING THE CAR, APPROACHING WITH GUNS DRAWN, AND FRISKING THE DEFENDANT, MOTION TO SUPPRESS SHOULD HAVE GRANTED, CRIMINAL POSSESSION OF A WEAPON CONVICTIONS REVERSED.

The Second Department, reversing defendant's criminal possession of a weapon conviction, determined that defendant's motion to suppress the weapon, identification and statements should have been granted. The police stopped the defendant's car and approached with guns drawn on the basis of an anonymous phone call which described "a man with a gun" and described the car the man was driving, including the license plate number. The Second Department determined the anonymous call did not provide the officers with reasonable suspicion sufficient to justify stopping and frisking a suspect: " 'It is fundamental that in order to stop a vehicle the police must have a reasonable suspicion, based on objective evidence, that the occupants were involved in a felony or misdemeanor' ... . 'Reasonable suspicion has been defined as that quantum of knowledge sufficient to induce an ordinarily prudent and cautious [person] under the circumstances to believe criminal activity is at hand'... .. '[W]here an anonymous phone tip giving a general description and location of a man with a gun' is the sole predicate, it will generate only a belief that criminal activity is afoot,' and 'will not of itself constitute reasonable suspicion thereby warranting a stop and frisk of anyone who happens to fit that description'... . 'Unlike a tip from a known informant whose reputation can be assessed and who can be held responsible if her [or his] allegations turn out to be fabricated, an anonymous tip alone seldom demonstrates the informant's basis of knowledge or veracity' ... . However, 'there are situations in which an anonymous tip, suitably corroborated, exhibits sufficient indicia of reliability to provide reasonable suspicion to make the investigatory stop' ... . Further, reasonable suspicion 'requires that a tip be reliable in its assertion of

illegality, not just in its tendency to identify a determinate person' ... . Here, while the individual who reported a man with a gun ultimately disclosed his identity to Officer Travitt, his identity was unknown at the time the police stopped the vehicle and ordered the defendant out of the car at gunpoint ... . The police lacked reasonable suspicion to stop the vehicle based only on an anonymous tip of 'a man with a gun,' since the tip came from an individual 'who neither explained how he knew about the gun nor supplied any basis for believing he had inside information about [the defendant],' and the report '[did] not show that the tipster ha[d] knowledge of concealed criminal activity' ...". ***People v. Bailey*, 2018 N.Y. Slip Op. 05856, Second Dept 8-22-18**

ELECTION LAW.

POSSIBLE CONFUSION ABOUT WHICH MICHAEL YACUBICH AT THE SAME ADDRESS WAS THE "MIKE YACUBICH" SEEKING TO BE PLACED ON THE BALLOT FOR ASSEMBLY WAS NOT A PROPER GROUND FOR INVALIDATING THE DESIGNATING PETITION.

The Second Department, reversing Supreme Court , determined petitioner's designating petition for the nomination of the Republican Party as a candidate for the Assembly should not have been invalidated on the ground that there were two voters registered at petitioner's address with similar names (father and son). Father and son are named Michael Yacubich and petitioner sought to be placed on the ballot as Mike Yacubich: "The Board exceeded its authority when it invalidated the designating petition on the ground that it could not identify which registered voter was the candidate. As amplified by the testimony of one of the Commissioners, the Board perceived that the similarity between the two names was confusing. '[B]oards of election have no power to deal with questions of fact or with objections involving matters not appearing upon the face of the petition, and . . . such extrinsic matters, if any, are to be determined in court proceedings only' ... . '[T]he board's power to determine the validity of a [designating or] nominating petition extends only to ministerial examination and the board may not go behind a petition designating candidates for primary election' … . Candidates are permitted to run for office using a familiar name or nickname ... . Similar to objections raising allegations of fraud ... , the issue of whether a candidate's name is confusing because it is similar to another voter's name involves a matter extrinsic to the designating petition itself and, thus, is a matter for judicial consideration and not for the Board of Elections. Accordingly, the Board lacked the authority to rule on the objection based upon its perception that the petition was confusing because of the candidate's name, which should have been raised through a judicial proceeding to invalidate." ***Matter of Yacubich v. Suffolk County Bd. of Elections*, 2018 N.Y. Slip Op. 05912, Second Dept 8-24-18**

INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS, MUNICIPAL LAW.

AS A MATTER OF PUBLIC POLICY, AN ACTION ALLEGING INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS CANNOT BE BROUGHT AGAINST A MUNICIPALITY.

The Second Department, in an action for false arrest and related causes of action, all of which were dismissed, noted that an action for intentional infliction of emotional distress cannot, as a matter of public policy, be brought against a municipality: "... [W]e agree with the Supreme Court's determination granting that branch of the defendants' motion which was to dismiss the cause of action to recover damages for intentional infliction of emotional distress with respect to the City, as 'public policy bars claims sounding in intentional infliction of emotional distress against a governmental entity'... . Moreover, the defendants established their prima facie entitlement to judgment as a matter of law dismissing that cause of action insofar as asserted against [the arresting officer] by establishing that [the officer]i did not engage in extreme or outrageous conduct ...". ***Ball v. Miller*, 2018 N.Y. Slip Op. 05813, Second Dept 8-22-18**

LABOR LAW-CONSTRUCTION LAW, TRUSTS AND ESTATES, PERSONAL INJURY.

HOMEOWNER'S DAUGHTER, AS EXECUTRIX OF DECEDENT HOMEOWNER'S ESTATE, ENTITLED TO HOMEOWNER'S EXEMPTION FROM LIABILITY UNDER LABOR LAW §§ 240(1) AND 241(6), BUT DECEDENT'S SON, WHO GAVE WORK INSTRUCTIONS TO THE INJURED PLAINTIFF, WAS NOT ENTITLED TO THE HOMEOWNER'S EXEMPTION AND MAY BE LIABLE AS AN AGENT OF THE OWNER.

The Second Department determined one of decedent homeowner's children, Nina, who was the executrix of decedent's estate, was entitled to dismissal of the Labor Law §§ 240(1) and 241(6) causes of action pursuant to the homeowner's exemption, but there was a question of fact whether decedent's son, Stephen, was liable as an agent of the owner. Plaintiff, who was hired to paint the interior of decedent's home, alleged Stephen instructed him to use a ladder to enter the house through a window. Plaintiff fell when the ladder slipped out from under him: "... [T]he defendants established the entitlement of Nina, as executrix of the decedent's estate, to the protection of the homeowner's exemption by submitting evidence that the decedent owned the one-family residence at which the work was being performed and that the decedent did not direct or control the work being done ... . Stephen did not own the subject residence and, therefore, was not entitled to the homeowner's exemption ... . .. [T]the defendants failed to demonstrate, prima facie, that liability for violations of Labor Law §§ 240(1) and 241(6) could not be imposed upon Stephen as an agent of the owner. 'A party is deemed to be an agent of an owner or general contractor under the Labor Law when it has supervisory control and authority over the work being

done where a plaintiff is injured'... . 'To impose . . . liability [under the Labor Law], the defendant must have the authority to control the activity bringing about the injury so as to enable it to avoid or correct the unsafe condition' ... . Here, a triable issue of fact exists as to whether Stephen had the authority to supervise and control the plaintiff's work. Stephen told the plaintiff which rooms to paint and, according to the plaintiff, directed him to use a ladder to access the house through a window." ***Diaz v. Trevisani*, 2018 N.Y. Slip Op. 05823, Second Dept 8-22-18**

PERSONAL INJURY, CONTRACT LAW.

DEFENDANT WHICH BUILT THE SWIMMING POOL, DEFENDANT WHICH INSTALLED THE POOL LINER, AND DEFENDANT OWNERS OF THE POOL, WERE NOT ENTITLED TO SUMMARY JUDGMENT IN THIS SWIMMING POOL INJURY CASE, PLAINTIFF WAS INJURED WHEN HE DOVE IN AND STRUCK HIS CHIN IN A SHALLOW AREA.

The Second Department determined defendants' motions for summary judgment in this swimming pool injury case was properly denied. Plaintiff was injured when he dove into the pool allegedly unaware of a shallow area near the deep area. The builder of the pool and the installer of the pool liner (the Bertolino defendants), as well as the owners of the pool (the Olsen defendants), were sued. The Bertolino defendants could be liable based upon their contracts with the owners because it was alleged the pool was negligently designed and constructed by them. There also was a question of fact whether the condition was readily observable (raising the duty to protect or warn on the part of the owners): "With respect to the Bertolino defendants, generally, a contractual obligation of a third party does not give rise to liability in tort to persons not a party to the contract... . An exception exists, however, where the contractor created a dangerous condition or increased the risk of harm to others in its undertaking ... . Here, the plaintiff's allegation that the Bertolino defendants negligently designed and constructed the subject pool by incorporating the allegedly dangerous condition falls within this exception ... . Moreover, the Bertolino defendants failed to establish, prima facie, that the alleged condition was not dangerous or that it did not unreasonably increase the risk of harm to those diving off the side of the pool, even though, as their expert opined, it was located outside the 'diving water envelope,' which the expert described as the 'area without constructed intrusions' ... . As to the Olsen defendants, '[t]he owner of a private residential swimming pool has a duty to maintain the pool in a reasonably safe condition in view of all the circumstances, including the likelihood of injury to others, the seriousness of the injury and the burden of avoiding the risk' ... . 'What accidents are reasonably foreseeable, and what preventive measures should reasonably be taken, are ordinarily questions of fact' ... . However, there is no duty to protect or warn of conditions that are not inherently dangerous and that are readily observable by the reasonable use of one's senses ... . Here, the Olsen defendants, who did not deny notice of the allegedly dangerous condition, failed to establish, prima facie, that the condition at issue was not inherently dangerous and that it was readily observable by the reasonable use of one's senses ...". ***Grosse v. Olsen*, 2018 N.Y. Slip Op. 05829, Second Dept 8-22-18**

PERSONAL INJURY, MUNICIPAL LAW.

CITY DEMONSTRATED IT DID NOT HAVE PRIOR WRITTEN NOTICE OF A POTHOLE WHICH PLAINTIFF BICYCLIST RAN OVER, DEFENDANTS' SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined plaintiff bicyclist's suit against the city stemming from injury after running over a pothole should have been dismissed. The defendants established the city did not have prior written notice of the condition: "... [T]he defendants established the City's prima facie entitlement to judgment as a matter of law by demonstrating through, inter alia, DOT records, that the City did not have prior written notice of the condition alleged as required by the Administrative Code ... and that the City did not affirmatively create the condition ... . In opposition, the plaintiff failed to raise a triable issue of fact as to whether the City received prior written notice of the alleged condition. Although the plaintiff relied upon a map submitted by the Big Apple Pothole and Sidewalk Protection Corporation which had a straight line, indicating '[r]aised or uneven portion of sidewalk,' in the area where the plaintiff's accident occurred, the map did not give the City prior written notice of the pothole condition alleged by the plaintiff ... . The plaintiff also failed to raise a triable issue of fact as to whether the City created the alleged condition through an affirmative act of negligence." ***Allen v. City of New York*, 2018 N.Y. Slip Op. 05811, Second Dept 8-22-18**

PERSONAL INJURY, MUNICIPAL LAW, CIVIL PROCEDURE, APPEALS.

ORDER FOLLOWING GRANT OF A MOTION TO REARGUE IS APPEALABLE, APPEAL HEARD EVEN THOUGH A PRIOR APPEAL OF THE ORIGINAL ORDER HAD BEEN ABANDONED INSTEAD OF WITHDRAWN, CITY DEMONSTRATED IT DID NOT HAVE WRITTEN NOTICE OF DEFECT IN BICYCLE LANE, NO SPECIAL USE EXCEPTION TO THE PRIOR WRITTEN NOTICE REQUIREMENT.

The Second Department determined Supreme Court had, in effect, granted plaintiff's motion for reargument of his opposition to the city's motion for summary judgment and therefore the related order was appealable. The Second Department further determined it would hear the appeal, even though plaintiff's prior appeal of the original order had been abandoned rather than withdrawn. Plaintiff, a bicyclist, alleged he had been injured by a defect in the bicycle lane. The city demonstrated it did not have prior written notice of the defect. The Second Department rejected plaintiff's argument that the "special use" exception to the prior written notice requirement applied because the city did not derive a special benefit from the

bicycle lanes unrelated to the public use: " 'Where, as here, a municipality has enacted a prior written notice law, it may not be subjected to liability for injuries caused by a dangerous roadway condition unless it has received prior written notice of the dangerous condition, or an exception to the prior written notice requirement applies' ... . 'Where the City establishes that it lacked prior written notice under [Administrative Code of City of NY § 7-201], the burden shifts to the plaintiff to demonstrate the applicability of one of two recognized exceptions to the rule—that the municipality affirmatively created the defect through an act of negligence or that a special use resulted in a special benefit to the locality'... . The special use exception is reserved for situations where a municipality derives a special benefit from the property unrelated to the public use ... . It is undisputed that the City demonstrated, prima facie, that it lacked prior written notice of the alleged defect. It is further undisputed that the record contains no evidence that the City created the condition that allegedly caused the plaintiff's accident. The plaintiff contends that this case falls within the special use exception because bicycle lanes provide a special benefit to the City by 'enhancing its status' and 'attracting residents and tourists.' However, the plaintiff failed to demonstrate that the implementation of bicycle lanes on City roadways bestowed a special benefit upon the City unrelated to the public use or that it constituted a special use of the roadways ...". ***Budoff v. City of New York*, 2018 N.Y. Slip Op. 05817, Second Dept 8-22-18**

THIRD DEPARTMENT

CRIMINAL LAW, EVIDENCE.

POSSESSION OF SEXUAL PERFORMANCE OF A CHILD CONVICTIONS REVERSED, PHOTOGRAPHS DID NOT MEET STATUTORY CRITERIA; ALTHOUGH THE MAJORITY AFFIRMED DEFENDANT'S CONVICTION IN THIS RAPE, CRIMINAL SEXUAL ACT, AND POSSESSION OF SEXUAL PERFORMANCE BY A CHILD PROSECUTION, THE DISSENT WOULD HAVE REVERSED BECAUSE THE PHOTOGRAPHIC EXHIBITS UPON WHICH THE PROSECUTION RELIED WERE NOT PROPERLY AUTHENTICATED.

The Third Department, over a dissent, affirmed defendant's conviction and long prison sentence for rape, criminal sexual act, possessing a sexual performance by a child and criminal solicitation. Three of the four possession of a sexual performance by a child were reversed because the "the lewd exhibition of the genitals" element was not present, only the victim's bare chest was depicted. The dissenting justice argued that the photographic exhibits were not supported by a proper foundation and should not have been admitted. With the photographs deemed inadmissible, the dissent would have reversed defendant's convictions: "**From the dissent:** The People's foundational questioning here, generously described by the majority as 'brief,' was wholly lacking in substance. Although the People asked appropriate witnesses, including the victim, to identify the subject matter of the photographs to which they had knowledge, little or no additional information was elicited. Fatally, the People did not elicit any testimony that could establish that any of the photographs fairly and accurately depict the subject matter identified therein ... . Specifically, with respect to the 16 photographic exhibits depicting the victim in various stages of undress, the People simply asked the victim whether each photograph 'look[ed] familiar.' Contrary to the assertions of the majority, the victim's general testimony identifying herself as the person depicted in those photographs was insufficient to properly authenticate them. Even if the victim's testimony demonstrated that the photographs admitted into evidence were a fair representation of the photographs that she took or were taken of her, as the majority contends, no one testified that the admitted photographs had not been altered or that they were true and accurate representations of the photographs actually recovered from defendant's cell phone and computer ... . There was simply no sworn testimony to refute the possibility that the photographs had been manipulated. Although not discussed by the majority in detail, the remaining 10 photographic exhibits allegedly depict a motel room, different areas in the victim's bedroom and defendant's home computers, vehicle and residence. These photographs were offered into evidence to corroborate the victim's testimony, to provide background information and/or to allow the jury to assess whether the photographs of the victim were taken in either the motel room or the victim's bedroom. As with the photographs of the victim, the People did not elicit any testimony whatsoever to establish that these photographs fairly and accurately represented the subject matter depicted therein, as required ...". ***People v. Pendell*, 2018 N.Y. Slip Op. 05899, Third Dept 8-23-18**

FOURTH DEPARTMENT

CORPORATION LAW.

IN THIS COMMON LAW DISSOLUTION ACTION, PLAINTIFF WAS ENTITLED TO PAYMENT BY THE CORPORATION OF HIS EXPENSES FOR DEFENDING AGAINST THE CORPORATION'S COUNTERCLAIMS, AND PLAINTIFF'S MOTION TO PROHIBIT THE DEFENDANTS FROM USING CORPORATE FUNDS TO DEFEND AGAINST THE COMMON LAW DISSOLUTION ACTION SHOULD HAVE BEEN GRANTED.

The Fourth Department, modifying Supreme Court, over a dissent, determined plaintiff, who owns shares in a closely held corporation and sued the corporation seeking common law dissolution, was entitled payment by the corporation of expenses associated with plaintiff's defense of counterclaims made by the corporation. In addition plaintiff's cross motion

to restrain the defendants from using the corporation's funds for defense of the common law dissolution action should have been granted: "The counterclaims are asserted against plaintiff 'by reason of the fact that he . . . was a director or officer of the [C]orporation,' and Business Corporation Law § 722 (a) provides that he may be indemnified by the Corporation for his 'reasonable expenses, including attorneys' fees actually and necessarily incurred as a result of such action or proceeding . . . if [he] acted, in good faith, for a purpose which he reasonably believed to be in . . . the best interests of the [C]orporation.' That is so even though the counterclaims are brought, in part, by the Corporation itself ... . Pursuant to section 724 (c), where, as here, 'indemnification is sought by judicial action, the court may allow a person such reasonable expenses, including attorneys' fees, during the pendency of the litigation as are necessary in connection with his [or her] defense therein, if the court shall find that the [person seeking indemnification] has by his [or her] pleadings or during the course of the litigation raised genuine issues of fact or law.' 'With respect to the advancement of fees, courts have consistently observed that the governing standard is not a stringent one' ... . All plaintiff was required to do was raise a genuine issue of fact or law ..., and we conclude that he has done so. We thus modify the order accordingly, and we remit the matter to Supreme Court for a determination of reasonable attorneys ' fees and litigation expenses that should be reimbursed to plaintiff, subject to repayment in the event defendants are successful on their counterclaims ... . Here, as in judicial dissolution proceedings, 'the corporation appears as a nominal party and the proceeding amounts to a dispute between the shareholders'... . We thus conclude that 'corporate funds may not be used in payment of counsel fees for the individual shareholders' regardless of the fact that this is a common-law dissolution proceeding ...". ***Feldmeier v. Feldmeier Equip., Inc.*, 2018 N.Y. Slip Op. 05893, Fourth Dept 8-22-18**

FAMILY LAW, EVIDENCE.

A SHOWING THAT MOTHER WAS ABUSED AND THE CHILD WITNESSED THE ABUSE IS NOT LEGALLY SUFFICIENT EVIDENCE THAT MOTHER NEGLECTED THE CHILD.

The Fourth Department, reversing Family Court, determined the Department of Children and Family Services (DCFS) did not present legally sufficient evidence of mother's neglect. The basis of the neglect allegation was mother's allowing the children to be exposed to domestic violence at the hands of her paramour: "In order to establish a prima facie case of neglect, DCFS was required, insofar as relevant here, to establish by a preponderance of the evidence that the subject children's 'physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired as a result of the failure of [their] parent or other person legally responsible for [their] care to exercise a minimum degree of care' ... . In the petition, DCFS alleged that the mother neglected the subject children by exposing them to domestic violence, i.e., by allowing her paramour into her house on several occasions in the presence of the subject children despite his history of violent actions toward her, during which she was again subjected to domestic violence. It is well settled that, in certain situations, '[t]he exposure of the child to domestic violence between the parents may form the basis for a finding of neglect'... . To establish neglect, however, 'there must be proof of actual (or imminent danger of) physical, emotional or mental impairment to the child' . . . In order for danger to be imminent,' it must be near or impending, not merely possible' . . . Further, there must be a causal connection between the basis for the neglect petition and the circumstances that allegedly produce the . . . imminent danger of impairment' ... . Thus, '[a] neglect determination may not be premised solely on a finding of domestic violence without any evidence that the physical, mental or emotional condition of the child was impaired or was in imminent danger of becoming impaired'... . 'When the sole allegation' is that the mother has been abused and the child has witnessed the abuse, such a showing has not been made' ...". ***Matter of Nevin H. (Stephanie H.)*, 2018 N.Y. Slip Op. 05891, Fourth Dept 8-22-18**

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