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COURT OF APPEALS

MUNICIPAL LAW, PERSONAL INJURY.

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT IN PLAINTIFF FIREFIGHTER'S GENERAL MUNICIPAL LAW § 205-a ACTION SHOULD NOT HAVE BEEN GRANTED.

The Court of Appeals, in a brief memorandum decision with no discussion of the facts, determined the defendant's motion for summary judgment in this General Municipal Law § 205-a action by a firefighter should not have been granted: "With respect to the General Municipal Law § 205-a cause of action, defendant's submissions of a certificate of occupancy and an expert affidavit that did not sufficiently respond to plaintiffs' General Municipal Law § 205-a claim were insufficient, without more, to meet its prima facie burden as the party moving for summary judgment (see Powers v. 31 E 31 LLC, 24 NY3d 84, 93 [2014])." ***Viselli v. Riverbay Corp.*, 2018 N.Y. Slip Op. 05968, CtApp 9-6-18**

WORKERS' COMPENSATION.

APPELLATE DIVISION REVERSED, WORKERS' COMPENSATION BOARD'S FINDING THAT CLAIMANT HAS A PERMANENT PARTIAL DISABILITY WITH A 75% LOSS OF WAGE-EARNING CAPACITY REINSTATED.

The Court of Appeals, in a brief memorandum decision with no discussion of the facts, reversed the Appellate Division and reinstated the decision of the Workers' Compensation Board which found claimant has a permanent partial disability with a 75% loss of wage-earning capacity. ***Matter of Wohlfeil v. Sharel Ventures, LLC*, 2018 N.Y. Slip Op. 05967, CtApp 9-6-18**

FIRST DEPARTMENT

CRIMINAL LAW, APPEALS.

POST-JUDGMENT MOTION TO VACATE A SENTENCE IMPOSED UNDER AN INCORRECT PREDICATE-FELONY-DESIGNATION THAT WAS LESS SEVERE THAN THE SENTENCE REQUIRED BY THE CORRECT PREDICATE-FELONY DESIGNATION PROPERLY DENIED.

The First Department determined defendant could not, in a post-judgment motion, contest a predicate-felony-based sentence that resulted in a less severe sentence than the correct predicate-felony-designation would have required. Courts have previously held appeals on this ground could not be brought. The First Department applied the same logic to defendant's post-judgment motion to vacate his sentence pursuant to Criminal Procedure Law § 440.20: "... 21 years later, defendant claims that he was unlawfully sentenced as a second felony offender, when he should have been sentenced as a second violent felony offender. His argument is that the court erred in his favor by imposing a lesser predicate felony adjudication than the one required by his prior record. It is apparent that defendant seeks a resentencing in order to 'to upset sequentiality for purposes of determining whether the conviction . . . can serve as a predicate for multiple felony offender status' ... . As defendant was not 'adversely affected' by any perceived error by the court in sentencing him, and, indeed, benefitted from the imposition of a less serious predicate status, defendant's CPL 440.20 claim must be rejected without consideration of the merits of his argument that the court erred when it pronounced sentence.(CPL 470.15[1] ...). ... [C]ourts [have relied] upon CPL 470.15(1) to deny direct appeals from sentences that were equal to or shorter than the sentence the defendant would have received if the alleged error in sentence had not occurred. We hold today that CPL 470.15(1) equally bars appeals from motions which challenge such alleged sentencing errors. To do otherwise would lead to the anomalous result that a defendant could achieve a result by motion which could not be obtained on a direct appeal." ***People v. McNeil*, 2018 N.Y. Slip Op. 05970, First Dept 9-6-18**

Similar issues and result in ***People v. Francis*, 2018 N.Y. Slip Op. 05971, First Dept 9-6-18**

CRIMINAL LAW, CIVIL PROCEDURE, APPEALS, CONSTITUTIONAL LAW, EVIDENCE.

DENIAL OF A REPORTER'S MOTION TO QUASH A SUBPOENA FOR EVIDENCE OF HER JAILHOUSE INTERVIEW OF THE DEFENDANT IN A CRIMINAL PROCEEDING IS NOT APPEALABLE.

The First Department, upon remittitur from the Court of Appeals, held that the denial of a reporter's motion to quash a subpoena for evidence of her jailhouse interview of the defendant is not appealable: " '[N]o appeal lies from an order arising out of a criminal proceeding absent specific statutory authorization' (Matter of People v. Juarez , _NY3d_, 2018 N.Y. Slip Op. 04684 [2018]), quoting People v. Santos , 64 NY2d 702, 704 [1984]). As pertinent to the issue in this case, "an order determining a motion to quash a subpoena . . . issued in the course of prosecution of a criminal action, arises out of a criminal proceeding for which no direct appellate review is authorized" (id.; see CPL art 450)." ***People v. Juarez*, 2018 N.Y. Slip Op. 05969, First Dept 9-6-18**

HUMAN RIGHTS LAW, EMPLOYMENT LAW, ADMINISTRATIVE LAW.

NYC HUMAN RIGHTS LAW PROTECTS AGAINST TERMINATION BASED UPON AN EMPLOYEE'S MARRIAGE TO A PARTICULAR PERSON WHO HAD LEFT TO WORK FOR A COMPETITOR, THERE WAS NO NEED TO ALLEGE THAT THE EMPLOYER WAS BIASED AGAINST MARRIED COUPLES GENERALLY.

The First Department, in a full-fledged opinion by Justice Acosta, in a matter of first impression, determined that terminating a person the employer (Fidessa) believed was married to another employee who had left to work for a competing employer stated a cause of action for discrimination based upon marital status under the New York City Human Rights Law: "The City HRL states, in relevant part: 'It shall be an unlawful discriminatory practice: (a) For an employer or an employee or agent thereof, because of the actual or perceived . . . marital status . . .(2) To refuse to hire or employ or to bar or to discharge from employment such person or (3) To discriminate against such person in compensation or in terms, conditions or privileges of employment' ... . From the complaint it appears that Fidessa treated plaintiff and his partner differently from [a] similarly situated couple based on its perception that they were married to one another and the members of the other couple were not. Thus, the question is whether discrimination based on 'marital status' encompasses discrimination based on marital status in relation to a person relevant to Fidessa. In other words, is an employer prohibited from discharging an employee because of the employee's marriage to a particular person. For the purposes of this analysis, the fact that defendant was not alleged to be 'biased against' married couples in all circumstances is of no moment: the factor in terminating plaintiff's employment was plaintiff's marital status in relation to the employee who left the company. Thus, plaintiff's termination was based on his marital status." ***Morse v. Fidessa Corp.*, 2018 N.Y. Slip Op. 05975, First Dept 9-6-18**

LABOR LAW-CONSTRUCTION LAW.

PLAINTIFF'S LADDER WAS PLACED ON A MUDDY WATERY SURFACE IN A TUNNEL AND IT SLIPPED OUT FROM UNDER HIM, PLAINTIFFS' SUMMARY JUDGMENT MOTION ON THE LABOR LAW § 240(1) CAUSE OF ACTION SHOULD HAVE BEEN GRANTED.

The First Department determined plaintiff was entitled to summary judgment on his Labor Law § 240(1) cause of action. Plaintiff was using a ladder on a muddy, watery surface in a tunnel when it slipped out from under him: "... [P]laintiffs were entitled to summary judgment on the issue of liability on the § 240(1) claim as against the MTA. The record establishes that the ladder that was provided to plaintiff failed to provide proper protection for him to perform the elevation-related task of re-positioning the stadium light, and MTA's opposition failed to raise a triable issue of fact ... . Contrary to the contention that an issue of fact exists as to whether a platform was available to secure the ladder to, there is nothing in the record to support that. In fact the engineer merely testified that there "may or may not have been" platforms available to tie the ladder to." ***Gordon v. City of New York*, 2018 N.Y. Slip Op. 05972, First Dept 9-6-18**

THIRD DEPARTMENT

RETIREMENT AND SOCIAL SECURITY LAW, PERSONAL INJURY.

FIREFIGHTER'S FALL EXITING AN AMBULANCE WAS AN ACCIDENT WITHIN THE MEANING OF THE RETIREMENT AND SOCIAL SECURITY LAW.

The Third Department determined the incident in which petitioner firefighter was injured constituted an accident within the meaning of the Retirement and Social Security Law: "Petitioner testified that he had entered and exited ambulances hundreds of times during the course of his career as a firefighter. He was familiar with the folding step located at the rear of the ambulance and indicated that it was usually down and in an open position so that people could safely get in and out of the ambulance. He explained that the step was designed to flip up temporarily when a stretcher was being loaded into the ambulance to keep the wheels from striking the step and then to flip back down. Petitioner stated that, when he entered the ambulance on the date in question, the stretcher had already been removed, so he assumed that the step was down when he went to exit. He indicated that, as he was exiting the ambulance, he placed his foot on the edge of the step, which was a color similar to the bumper, while it was flipped up and flush against the bumper. When he did so, it collapsed downward,

causing him to fall to the ground. Under these circumstances, the precipitating external event, i.e., the flipping down of the folding step, was sudden, unexpected and not a risk inherent in petitioner's ordinary job duties ... . Likewise, petitioner's fall was not attributable to inattention or a mere misstep , but rather to an apparently malfunctioning piece of equipment that was designed, under normal circumstances, to promote safety ... . Accordingly, respondent's denial of petitioner's application on the ground that the incident was not an accident within the meaning of the Retirement and Social Security Law is not supported by substantial evidence and must be annulled." ***Matter of Loia v. DiNapoli I*, 2018 N.Y. Slip Op. 05984, Third Dept 9-6-18**

WORKERS' COMPENSATION.

NO SCHEDULE LOSS OF USE (SLU) BENEFITS CALCULATED BASED UPON THE LOSS OF USE OF THE KNEE AND ANKLE SEPARATELY, AS OPPOSED A CALCULATION BASED UPON THE LOSS OF USE OF THE LEG AS A WHOLE.
The Third Department determined claimant was not entitled to schedule loss of use (SLU) benefits calculated on loss of use of his knee and ankle, as opposed to SLU calculated on loss of use of his leg generally: "Workers' Compensation Law § 15 (3) sets forth SLU awards that the Board may make resulting from permanent injuries to certain body parts, losses of hearing or vision and facial disfigurements. This Court has observed that such awards are not given for particular injuries, but rather 'for the residual physical and functional impairments' ... . Consistent with this observation, neither the statute nor the Board's guidelines lists the ankle or the knee as body parts lending themselves to separate SLU awards. Rather, impairments to these extremities are encompassed by awards for the loss of use of the leg ...". ***Matter of Genduso v. New York City Dept. of Educ.*, 2018 N.Y. Slip Op. 05981, Third Dept 9-6-18**

FOURTH DEPARTMENT

ELECTION LAW.

"OPPORTUNITY TO BALLOT" REMEDY AVAILABLE WHERE SIGNATURES ON A NOMINATING PETITION INVALIDATED FOR A TECHNICAL DEFECT AND THE PARTY WOULD BE LEFT WITHOUT A CANDIDATE.
The Fourth Department determined, pursuant to the "opportunity to ballot" remedy, 24 signatures on a nominating petition should not have been invalidated because the signatures had appeared on a prior nominating petition for a candidate who had withdrawn: "... [T]he equitable remedy of opportunity to ballot is appropriate here ... . The remedy of an 'opportunity to ballot' . . . was designed to give effect to the intention manifested by qualified party members to nominate some candidate, where that intention would otherwise be thwarted by the presence of technical, but fatal defects in designating petitions, leaving the political party without a designated candidate for a given office'... . Here, the Board determined that 24 of the signatures on petitioner's nominating petition were invalid because the signers had previously signed the nominating petition of a candidate who later withdrew from the race. Although the fact that a voter has previously signed another candidate's petition is typically a substantive defect ... , we conclude that such a defect is a technical one where, as here, the candidate with a prior nominating petition withdrew that petition prior to the voters signing the second nominating petition ... . We thus conclude that the registered voters of the Republican Party should be afforded an opportunity to ballot for the office at issue, and we therefore modify the order accordingly." ***Matter of Trevisani v. Karp*, 2018 N.Y. Slip Op. 05966, Fourth Dept 9-5-18**

ELECTION LAW, FRAUD.

FRAUD WARRANTED INVALIDATION OF THE DESIGNATING PETITION.
The Fourth Department determined the designating petition was properly invalidated on the basis of fraud: " 'As a general rule, a candidate's designating petition will be invalidated on the ground of fraud only if there is a showing that the entire designating petition is permeated with that fraud' ... . 'Even where the designating petition is not permeated with fraud, however, when the candidate has participated in or is chargeable with knowledge of the fraud, the designating petition will generally be invalidated' … . Here, petitioners established that multiple subscribing witnesses, including respondent, attested falsely that they had witnessed certain signatures on the designating petition inasmuch as they had allowed third-parties to sign the petition on behalf of the person named as the signatory on the designating petition ... , and that respondent attested to certain signatures although he was not 'in the presence of the signatories when [they] signed the [designating] petition' ... . Thus, the court properly determined that respondent's participation in fraudulent acts warranted invalidating the designating petition for the Democratic Party ...". ***Matter of Buttenschon v. Salatino*, 2018 N.Y. Slip Op. 05988, Fourth Dept 9-7-18**

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