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FIRST DEPARTMENT

CIVIL PROCEDURE. DEBTOR-CREDITOR.

THE STATE ACTION ON A MULTI-MILLION DOLLAR DEBT SHOULD NOT HAVE BEEN DISMISSED ON CLAIM PRECLUSION OR RES JUDICATA GROUNDS BASED UPON THE DISMISSAL OF A FEDERAL ACTION AGAINST A DEFENDANT WHO WAS NOT A PARTY IN THE STATE ACTION, THE FACT THAT THE PLAINTIFFS IN THE STATE ACTION MAY HAVE BEEN ABLE TO INTERVENE OR ASSIGN THEIR RIGHTS TO THE DEFENDANT IN THE FEDERAL ACTION WAS NOT A PROPER GROUND FOR CLAIM PRECLUSION.

The First Department, in a full-fledged opinion by Justice Moulton, reversing Supreme Court determined that the dismissal of action in federal court to recover on a multi-million dollar notes did not preclude the state action on claim preclusion (res judicata) grounds. The opinion is fact-specific and too complicated to be fairly summarized here: "Supreme Court dismissed the action with prejudice on claim preclusion grounds, and denied the motion to amend as moot. The court found that plaintiffs herein should have intervened in the federal action, or assigned their claims to [the defendant in the federal action,] Varshavsky. The failure to do so was a 'blatant misuse of the federal forum,' which resulted in a 'stunning' amount of discovery, and several motions, which Supreme Court found were wasted because plaintiffs herein failed to use the federal forum to resolve all 'claims aris[ing] from a common nucleus of operative facts.' * * * The doctrine of claim preclusion does not bar plaintiffs' claims herein. Varshavsky, the sole defendant in the federal action, was not himself the creditor of the subject loans and had no standing to assert a counterclaim for recovery of plaintiffs' loans in that action. Plaintiffs' putative rights to intervene as party defendants in the federal action, or to assign their claims to Varshavsky, are far from clear. Either option, intervention or assignment, might have been rejected by the federal court as an attempt to evade the strictures of diversity jurisdiction. Apart from the efficacy of these options, even if intervention or assignment were possible, there is no legal doctrine that would compel plaintiffs herein to litigate in the federal action. In short, plaintiffs herein, as nonparties to the federal litigation, are not precluded from asserting claims that no party in the federal litigation had standing to pursue. To hold otherwise would mean that a debtor may, by suing a creditor's principal or associate, require the creditor to participate in the action or have its claims precluded." ***Avilon Auto. Group v. Leontiev*, 2019 N.Y. Slip Op. 00058, First Dept 1-3-19**

CIVIL PROCEDURE, NEGLIGENCE, EMPLOYMENT LAW.

THE RELATION BACK DOCTRINE ALLOWED PLAINTIFF TO SERVE A SUPPLEMENTAL SUMMONS AND COMPLAINT ON THE DRIVER'S EMPLOYER IN THIS TRAFFIC ACCIDENT CASE PURSUANT TO THE RESPONDEAT SUPERIOR THEORY OF LIABILITY, AFTER THE ACTION WAS STARTED PLAINTIFF LEARNED THAT THE DRIVER OF THE CAR IN WHICH PLAINTIFF'S DECEDENT WAS A PASSENGER WAS PAID BY THE EMPLOYER TO TRANSPORT THE OTHER EMPLOYEES IN THE CAR TO WORK.

The First Department, reversing Supreme Court, determined that the relation-back doctrine (CPLR 203(f)) allowed plaintiff, Polanco, to serve a supplemental summons and complaint against the employer of Elias-Tejada, the driver of the car in which plaintiff's decedent was a passenger. The Elias-Tejada car stalled on a bridge and was struck from behind. Plaintiff (Polanco) did not learn until after the action was started that Elias-Tejada was paid by his employer, Fairway, to transport the other occupants of his car, all Fairway employees, to work. Plaintiff (Polanco) sought to add Fairway as a defendant under a respondeat superior theory and the First Department held he could do so: "The claims that Polanco seeks to assert against Fairway arise out of the same occurrence as alleged in the complaint against Elias-Tejada [and the other two defendant drivers]. ... [W]e find that Polanco also satisfied the second condition, because under the doctrine of respondeat superior, an employer will be vicariously liable for the negligence of an employee committed while the employee is acting in the scope of his or her employment ... . Based on Elias-Tejada's employer/employee relationship with Fairway, they are united in interest because a judgment against one of them will similarly affect the other ... . [T]he Fairway defendants can, therefore, be charged as having notice of Polanco's potential claims against them, based upon the claims asserted against Elias-Tejada in the original summons and complaint ... . Only later, after depositions were held, including those of a key Fairway employee and Elias-Tejada, did [plaintiff] learn that Fairway compensated Elias-Tejada for hosting the car pool and that this travel arrangement was condoned, if not actually implemented and encouraged, by Fairway's human resources

department because Fairway reimbursed him for tolls and mileage." ***Ramirez v. Elias-Tejada*, 2019 N.Y. Slip Op. 00021, First Dept 1-3-19**

LABOR LAW-CONSTRUCTION LAW.

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT ON HIS LABOR LAW § 240(1) CAUSE OF ACTION SHOULD HAVE BEEN GRANTED, THE SCAFFOLD TILTED OR COLLAPSED CAUSING EVERYTHING IN IT TO CRASH ONTO HIM.

The First Department, reversing Supreme Court, determined plaintiff's motion for summary judgment on his Labor Law § 240(1) cause of action should have been granted: "Plaintiffs established entitlement to judgment as a matter of law in this action where plaintiff Steven Kind was injured when one end of a scaffold that he and a coworker were using to wash exterior windows on a building dropped out from under him and the scaffold came to rest at an angle, causing everything in it to crash down on him. The tilting or collapse of the scaffold was prima facie evidence of a violation of Labor Law § 240(1) ... , and plaintiffs were not required to demonstrate a specific defect ... . In opposition, defendants failed to raise a triable issue of fact as to whether plaintiff's actions were the sole proximate cause of the accident. The conclusion of the Department of Labor investigator that the scaffold tilted because plaintiff and his coworker caused a safety line to become caught in a spool for the scaffold's suspension cables was speculation unsupported by the evidence ... . Furthermore, defendant Titanium Scaffold Services, Inc., which contracted to maintain the scaffold, was an agent for purposes of the Labor Law." ***Kind v. 1177 Ave. of the Ams. Acquisitions, LLC*, 2019 N.Y. Slip Op. 00029, First Dept 1-3-19**

PERSONAL INJURY, EVIDENCE.

THE TRIAL EVIDENCE DID NOT SUPPORT THE PLAINTIFF'S EXPERT'S TESTIMONY THAT DEFECTS IN THE HANDRAIL OR THE STAIR RISER HEIGHTS CONSTITUTED THE PROXIMATE CAUSE OF PLAINTIFF'S FALL IN THIS STAIRWAY SLIP AND FALL CASE, THE OVER $500,000 PLAINTIFF'S VERDICT WAS VACATED AND A NEW TRIAL ORDERED.

The First Department vacated the plaintiff's jury verdict (over $500,000) in this stairway slip and fall case and ordered a new trial, finding that plaintiff's expert should not have been allowed to testify about defects in the handrail because the trial evidence did not allege the handrail was a proximate cause of the fall. The First Department further held, without explanation, that the riser heights should not have been charged as an independent theory of liability: "[D]efendants' argument that there was insufficient evidence adduced at trial to charge the jury on theories that either riser heights or the handrail were a proximate cause of plaintiff's fall, has merit... . Although plaintiff testified that it was her usual habit to hold a handrail while descending stairs, her testimony was equivocal on whether she held the handrail that day. Further, she testified that she did not attempt to reach for a handrail at the time of her fall, because the accident happened too fast. Nor did she provide any testimony connecting the handrail to her optical illusion theory. Thus, plaintiff's expert should not have been allowed to testify that the handrail was a contributing cause of plaintiff's fall, and the jury should not have been charged on the question whether the handrail was too short. Moreover, while the final step's size may have helped contribute to plaintiff's claim of optical illusion, the riser heights in the staircase should not have been charged as an independent theory of liability. The trial court's response to a jury note asking whether the building was 'up to code' was incorrect in light of the prior summary judgment order. Rather than responding that there was no evidence that the code was either violated or complied with, the jury should have been informed that the building code was not applicable to the staircase." ***Landau v. Balbona Rest. Corp.*, 2019 N.Y. Slip Op. 00051, First Dept 1-3-19**

THIRD DEPARTMENT

CRIMINAL LAW, EVIDENCE.

DEFENDANT WAS CONVICTED OF 37 COUNTS OF SEXUAL OFFENSES, THE TESTIMONY AT TRIAL RENDERED 26 COUNTS DUPLICITOUS REQUIRING REVERSAL.

The Third Department determined that 26 of the 37 sexual offense counts on which defendant was convicted must be reversed because they were rendered duplicitous by the trial testimony: "An indictment count is duplicitous when it charges more than one crime that is completed by a discrete act in the same count ... . 'Even if a count is valid on its face, it is nonetheless duplicitous where the evidence presented to the grand jury or at trial 'makes plain that multiple criminal acts occurred during the relevant time period, rendering it nearly impossible to determine the particular act upon which the jury reached its verdict' ... . Thus, when 'the trial testimony provides evidence of repeated acts that cannot be individually related to specific counts in the indictment, the prohibition against duplicitousness has been violated' ... . For example, counts 1 and 2 of the indictment used identical language to charge defendant with predatory sexual assault against a child on the ground that he committed the crime of criminal sexual assault in the first degree against victim 1 during the summer of 2006 ... . Victim 1 testified that, during the summer of 2006 when he was 12 years old, defendant put his mouth on victim 1's penis '[a]t least two times.' Likewise, counts 5 and 6 charged defendant with criminal sexual act in the second degree

consisting of oral sexual conduct with victim 1 during the summer of 2007, counts 7 and 8 charged defendant with the commission of the same crime during the summer of 2008, counts 9 through 12 charged defendant with the commission of two counts of criminal sexual act in the third degree in each of the summers of 2009 and 2010, and count 13 charged defendant with the commission of sexual abuse in the second degree during the summer of 2006. Victim 1 testified that the charged conduct occurred at least twice during each of the specified time periods. He provided no further specifics about the frequency or timing of any particular act, and the prosecutor did not seek to distinguish among them by, for example, drawing victim 1's attention to the first incident in one of the specified time periods and then asking him to describe that particular event ... . Likewise, the jury was given no instructions that distinguished between the counts pertaining to any of the time periods in a way that would have permitted it to relate each of the counts to a specific act ...". ***People v. Madsen*, 2019 N.Y. Slip Op. 00003, Third Dept 1-3-19**

FAMILY LAW.

FAMILY COURT SHOULD NOT HAVE DENIED INCARCERATED FATHER'S PRO SE PETITION SEEKING VISITATION BASED UPON THE EXISTENCE OF TWO ORDERS OF PROTECTION, THE FAMILY COURT ORDER OF PROTECTION, BY LAW, EXPIRED AFTER ONE YEAR, NOT WITHSTANDING A 2022 EXPIRATION DATE IN THE ORDER, AND THE ORDER OF PROTECTION IN THE CRIMINAL MATTER DID NOT PERTAIN TO THE CHILDREN.

The Third Department, reversing Family Court, determined the incarcerated father's petition seeking visitation with his children should not have been dismissed based upon two orders of protection. Although the Family Court order of protection, on its face, was to expire in 2022, it could not, under the law, exceed one year. The Family Court order of protection therefore expired in 2016. As for the order of protection issued in a criminal proceeding, it did not specifically pertain to the children and Family Court does not have the authority to change it: "Family Court, among other things, issued an order of protection that prohibited the father from having contact with the children ... and such order expires on January 22, 2022. This expiration date, however, was not permissible. In this regard, because of the biological relationship between the father and the children, the duration of this order of protection could not exceed one year from the disposition of the matter, subject to any further extensions ... . We therefore modify the order of protection to reflect an expiration date of March 2, 2016. ... The order of protection issued in connection with petitioner's criminal matter is likewise inapplicable. We note that Family Court generally does not have the authority to countermand the dictates of a criminal court order of protection ... . That said, the order of protection issued against the father in his criminal matter did not specifically pertain to the subject children." ***Matter of Pedro A. v. Gloria A.*, 2019 N.Y. Slip Op. 00010, Third Dept 1-3-19**

FORECLOSURE, CIVIL PROCEDURE, EVIDENCE.

PLAINTIFF BANK WAS PROPERLY ALLOWED TO RECOMMENCE THE FORECLOSURE ACTION AFTER IT WAS DISMISSED AS ABANDONED PURSUANT TO CPLR 3215, HOWEVER PLAINTIFF DID NOT DEMONSTRATE IT HAD STANDING AND ITS SUMMARY JUDGMENT MOTION SHOULD NOT HAVE BEEN GRANTED.

The Third Department, reversing Supreme Court, determined that plaintiff bank did not demonstrate it had standing to bring this foreclosure action. Therefore plaintiff's summary judgment motion should not have been granted. The court noted that Supreme Court properly allowed plaintiff an additional six months to commence another action (CPLR 205 (a)) after the first was dismissed as abandoned pursuant to CPLR 3215 (c): "... [P]laintiff failed to demonstrate that it has standing as the assignee of the mortgage from MERS. By its express terms, the initial written assignment from MERS only assigns the mortgage, not the note, and no proof was submitted establishing that MERS was ever conferred with the requisite authority to assign the note... . Moreover, contrary to Supreme Court's holding, this Court has held that merely attaching the note with a blank indorsement to the complaint is not sufficient for plaintiff to meet its prima facie burden on the issue of standing or to prove plaintiff's possessory interest in the note; proof of actual possession is required ... . Plaintiff similarly failed to establish its standing by demonstrating that it had physical possession of the note at the time of the commencement of the action. In support of its motion for summary judgment, plaintiff submitted, among other things, a copy of its complaint, the mortgage, the unpaid note (indorsed in blank), the relevant assignments of the mortgage and proof of defendants' default. Plaintiff also tendered the affidavit of the authorized officer for Caliber Home Loans, Inc., the mortgage loan servicing agent and attorney-in-fact for plaintiff ... . The affidavit of the authorized officer indicates the source of her knowledge to be her 'review of the electronic records of Caliber Home Loans, Inc.' regarding defendants' delinquent account, which includes, among other things, 'electronic images of the note and electronic records maintained by Caliber Home Loans, Inc.' Other than alleging that she reviewed these electronic records, the authorized officer's affidavit fails to provide any indication that she actually examined the original note, nor did it provide any details with regard to whether plaintiff ever obtained possession thereof and, if so, how and when it came into its possession ... . Moreover, the complaint is equivocal and alleges in the alternative that plaintiff is 'the current owner and holder of the subject mortgage and note, or has been delegated the authority to institute a mortgage foreclosure action by the owner and holder of the subject mortgage and note.' Such language is insufficient to establish that plaintiff had physical possession of the note at the time it commenced this action ...". ***U.S. Bank Trust, N.A. v. Moomey-Stevens*, 2019 N.Y. Slip Op. 00016, Third Dept 1-3-19**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

PLAINTIFF, WHO IS DEFENDANT'S SON, FELL FROM A LADDER WHEN ATTEMPTING TO INSPECT A DAMAGED CHIMNEY ON DEFENDANT'S RENTAL PROPERTY, QUESTIONS OF FACT ABOUT WHETHER PLAINTIFF WAS AN EMPLOYEE OR A VOLUNTEER, WHETHER THE INSPECTION WAS COVERED BY THE LABOR LAW, AND WHETHER DEFENDANT SUPERVISED PLAINTIFF'S WORK PRECLUDED SUMMARY JUDGMENT ON THE LABOR LAW §§ 240(1), 241(6), 200 AND COMMON LAW NEGLIGENCE CAUSES OF ACTION.

The Third Department determined that questions of fact about (1) whether plaintiff was an employee or a volunteer, (2) whether the inspection work came within the scope of Labor Law coverage, and (3) whether defendant supervised plaintiff's work giving rise to Labor Law § 200 or common-law negligence liability. Plaintiff is defendant's son and lives with defendant. Defendant owns rental property next door. Defendant set up a ladder for plaintiff at the rental property and asked him to inspect the chimney because pieces of it had fallen to the ground. Plaintiff and the ladder fell when he attempted to inspect the chimney. Plaintiff brought Labor Law §§ 240(1), 241(6), 200 and common-law negligence causes of action: "[D]efendant's testimony … established that she directed plaintiff on what to do when he inspected the chimney, had previously paid him for repairs and would have paid him if he had carried out the chimney cap repairs. We agree with Supreme Court that this testimony presents a triable issue of fact as to whether plaintiff was a volunteer or an employee within the meaning of the Labor Law and the Industrial Code ... . As plaintiff and defendant both anticipated that plaintiff would carry out the repair if his inspection revealed that this would be feasible, this record does not permit a determination as a matter of law that the chimney inspection was 'a separate phase easily distinguishable from' the actual repair, and thus outside the statutory protection ... . Although defendant asserts that she did not supervise plaintiff's work and did not tell him how to use the ladder, her own testimony establishes that the ladder belonged to her and that she put it in place — allegedly on uneven ground — without plaintiff's participation, directed him to use the ladder, and told him what to do in inspecting the chimney. Thus, there is a triable issue of fact as to whether defendant exercised supervisory control over the manner and methods by which plaintiff performed the task of inspecting the chimney ...". ***Doskotch v. Pisocki*, 2019 N.Y. Slip Op. 00017, Third Dept 1-3-1**

MUNICIPAL LAW, EMPLOYMENT LAW, EDUCATION-SCHOOL LAW.

PLAINTIFF'S WHISTLEBLOWER ACTION AGAINST THE SCHOOL DISTRICT, ALLEGING THE DISTRICT TOOK RETALIATORY ACTION AGAINST PLAINTIFF BECAUSE OF ALLEGATIONS PLAINTIFF MADE AGAINST ANOTHER DISTRICT EMPLOYEE, SHOULD NOT HAVE BEEN DISMISSED.

The Third Department, reversing (modifying) Supreme Court, determined that plaintiff's Civil Service Law § 75-b action alleging disciplinary action against him was taken in retaliation for his reporting certain allegations about another school district employee should not have been dismissed. Defendant school district notified plaintiff, the district's head bus driver, he was charged with a conflict of interest in violation of General Business Law § 800 the day after plaintiff had made the allegations against the employee in front of the Board of Education. Supreme Court should not have dismissed plaintiff's whistleblower action by finding the General Municipal Law § 800 conflict of interest charge, not plaintiff's allegations against the employee, constituted the basis for the district's disciplinary action against plaintiff: "Supreme Court ... erred in the substantive application of Civil Service Law § 75-b relative to defendants' contention that an independent basis existed for placing plaintiff on administrative leave. To assert a whistleblower claim under Civil Service Law § 75-b, plaintiff must allege, '(1) an adverse personnel action; (2) disclosure of information to a governmental body (a) regarding a violation of a law, rule, or regulation that endangers public health or safety, or (b) which [the plaintiff] reasonably believes to be true and which [he or] she reasonably believes constitutes an improper governmental action; and (3) a causal connection between the disclosure and the adverse personnel action'... . The element of causation requires 'that 'but for' the protected activity, the adverse personnel action by the public employer would not have occurred'... . Here, the court found that the purported General Municipal Law violation sufficed as a separate and independent basis for the adverse action and dismissed plaintiff's claim. However, even assuming that the General Municipal Law violation is ultimately demonstrated, the trial court must make 'a separate determination regarding the employer's motivation' to ensure against pretextual dismissals and 'shield employees from being retaliated against by an employer's selective application of theoretically neutral rules' ...". ***Lilley v. Greene Cent. Sch. Dist.*, 2019 N.Y. Slip Op. 00019, Third Dept 1-3-19**

PERSONAL INJURY, MUNICIPAL LAW.

PLAINTIFF SUED THE VOLUNTEER FIRE COMPANY, NOT THE FIRE DISTRICT WHICH WAS THE PROPER PARTY, PLAINTIFF NEVER SERVED A NOTICE OF CLAIM ON THE DISTRICT, THE ACTION WAS PROPERLY DISMISSED.

The Third Department determined the action against the Coeymans Hollow Volunteer Fire Company was properly dismissed and the proper party, the Coeymans Hollow Fire District #3, could not be sued because it was never served with a notice of claim. Plaintiff alleged she was injured when members of the Coeymans Hollow Volunteer Fire Company evacuated her from her house during a fire call: "A volunteer fire company, such as defendant, 'shall be under the control of the . . . fire district . . . having, by law, control over the prevention or extinguishment of fires therein' (N-PCL 1402 [e] [1]). Indeed,

the Fire District was responsible for preventing and extinguishing fires within its jurisdiction and trained and supervised defendant's members. Furthermore, when defendant's members responded to the fire at [plaintiff's] house, they acted under the direction of the Chief of the Fire District. Because defendant and the Fire District are separate entities and defendant does not exert control over its members, defendant cannot be held liable for the alleged negligence of its members ... . We reject plaintiff's contention that defendant and the Fire District are so inextricably intertwined that timely service of the notice of claim upon defendant equates to timely service upon the Fire District. Furthermore, although defendant conducted an examination of [plaintiff] under General Municipal Law § 50-h, equitable estoppel does not preclude any claim that Roberts failed to serve the notice of claim upon the proper party ... . We also note that, even though defendant was not obligated to inform Roberts that she failed to name the proper party ... , defendant did so as an affirmative defense in its answer. Plaintiff additionally contends that General Municipal Law § 50-e (3) (c) permits deeming the notice of claim served upon defendant as being timely served upon the Fire District. We disagree. This savings provision is 'limited in scope to defects in the manner of serving the notice of claim on the correct public entity' ... . That said, plaintiff fails to identify, nor does the record disclose, any infirmities in the service of the notice of claim. More critically, before any defects in service can be overlooked, service on the proper party must be accomplished in the first instance ...". ***Roberts v. Coeymans Hollow Volunteer Fire Co.*, 2019 N.Y. Slip Op. 00006, Third Dept 1-3-19**

RETIREMENT AND SOCIAL SECURITY LAW, PERSONAL INJURY.

ALTHOUGH PETITIONER SLIPPED AND FELL ON ICE STEPPING OFF A BUS SHE WAS CLEANING, THE INCIDENT QUALIFIED AS AN ACCIDENT WITHIN THE MEANING OF THE RETIREMENT AND SOCIAL SECURITY LAW ENTITLING PETITIONER TO ACCIDENTAL DISABILITY RETIREMENT BENEFITS, CLEANING BUSES WAS NOT PETITIONER'S NORMAL FUNCTION AND SHE HAD NEVER BEEN IN THE PARKING AREA WHERE SHE SLIPPED AND FELL.

The Third Department, annulling the Comptroller's ruling, determined that petitioner was injured in an accident as defined by the Retirement and Social Security Law and was therefore entitled to accidental disability retirement benefits. Petitioner, a school bus attendant, was injured when she slipped and fell on ice exiting a bus she had been asked to clean. Petitioner's job was to help disabled kids on the bus and was cleaning a bus when she slipped and fell: "The record reveals that petitioner had never been directed to wash buses as part of her duties as a bus attendant. She was normally involved in assisting disabled children get on and off the bus, and ensuring their safety while riding the bus. Notably, her job description made no mention of tasks involving either cleaning or maintaining the buses. Moreover, and significantly, except for the date in question, petitioner had never been to the parking lot where the buses were kept. She was therefore wholly unfamiliar with the surface conditions. According to petitioner, on the date of the incident, it was cold with a few snow flurries and there were a few piles of old snow a couple of bus widths away … . She testified that, as she exited the bus, her view of the ground was obstructed by the final step, which was longer than usual to accommodate disabled children getting on and off the bus. It was then that her foot made contact with the ice beneath the step, and she slipped and fell. Under the circumstances presented, the incident was clearly sudden, unexpected and not a risk of petitioner's ordinary job duties ...". ***Matter of Larivey v. DiNapoli*, 2019 N.Y. Slip Op. 00018, Third Dept 1-3-19**

TAX LAW, DEBTOR-CREDITOR.

OIL AND GAS INVESTMENT SCHEME PROPERLY FOUND TO BE AN ABUSIVE TAX AVOIDANCE TRANSACTION.

The Third Department, in a full-fledged opinion by Justice Pritzker, affirmed the Tax Appeals Tribunal's determination that petitioner's complex gas and oil drilling investment scheme constituted an abusive tax avoidance transaction. Therefore the notice of deficiency, penalties and interest assessed by the Department of Taxation and Finance were appropriate. The opinion is fact-specific and too complicated to fairly summarize here. The following quotation from the opinion is provided to demonstrate the nature of the issues: "The Tribunal's determination that the overall financing structure artificially inflated the actual capital contributions of the Belle Isle partners [the petitioner oil and gas drilling company], allowing large tax deductions based upon IDCs [intangible drilling costs] derived through the inflated turnkey contract, is rationally based and supported by substantial evidence ... . Beginning with the Belle Isle financing structure, particularly Sznajderman's [petitioner general partner's] subscription note, it is clear that Belle Isle did not have an intent to create a true debtor-creditor relationship as to 85% of the face value of the note. Specifically, while the face value of the subscription note was $540,000, the additional collateral agreement had the practical effect of satisfying the principal of said note by Sznajderman's payment of only 15% of the face value, which was to be used by SS & T, the so-called creditor, to purchase bonds. Importantly, these bonds were not collateral; rather, they were ostensibly used to pay off the principal of the subscription note in 25 years. ... Further, Sznajderman's payment of interest during the first year did not legitimize the debt because interest after the first year, which was designed to be paid from Sznajderman's net operating proceeds, was only paid sporadically, despite such proceeds being available. We agree with the Tribunal that, based upon this sporadic collection of interest, it is highly unlikely that Belle Isle would attempt to collect 'its partners' very large interest accruals when the subscription notes mature.' ... . As such, we find that substantial evidence supports the Tribunal's conclusion that, while Sznajderman's investment had

economic substance in general, ... the subscription note, to the extent of 85% of its face value, was artificially inflated and, as such, did not establish true debt and most certainly elevated form over substance ...". ***Matter of Sznajderman v. Tax Appeals Trib. of the State of N.Y.*, 2019 N.Y. Slip Op. 00007, Third Dept 1-3-19**

WORKERS' COMPENSATION, CONSUMER LAW, TRUSTS AND ESTATES.

GENERAL BUSINESS LAW § 349 CAUSE OF ACTION AGAINST A WORKERS' COMPENSATION LAW TRUST SHOULD NOT HAVE BEEN DISMISSED.

The Third Department determined that a General Business Law § 349 cause of action against a Workers' Compensation Law trust should not have been dismissed. The trust was taken over by the Workers' Compensation Board and was found to have a deficit of $220 million. Several lawsuits were brought by members of the trust alleging breach of contract, fraud, breach of a fiduciary duty, etc.: "... [W]ith respect to the General Business Law § 349 cause of action [we] disagree with Supreme Court's reasoning that the alleged misconduct was not consumer oriented. 'The threshold requirement of consumer-oriented conduct is met by a showing that the acts or practices have a broader impact on consumers at large in that they are directed to consumers or potentially affect similarly situated consumers' ... . The amended complaint alleged that '[d]efendants aggressively marketed and advised the [t]rust and self-insurance trusts to the public at large in general as a safe and less expensive alternative to traditional insurance' and that 'the information disseminated by [d]efendants was likely to mislead reasonable employers.' The amended complaint further alleged that defendants' actions 'injured and harmed [p]laintiffs, other members of self-insured trusts and the general public' and have 'jeopardized the workers' compensation benefits of New York employers and their employees.' Construing these allegations liberally, as we must, we find that plaintiffs sufficiently alleged that the misconduct at issue was consumer oriented …" . ***Belair Care Ctr., Inc. v. Cool Insuring Agency, Inc.*, 2019 N.Y. Slip Op. 00015, Third Dept 1-3-19**

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