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FIRST DEPARTMENT

ACCOUNTANT MALPRACTICE, FRAUD, CORPORATION LAW.

QUESTIONS OF FACT WHETHER THE ADVERSE INTEREST EXCEPTION TO THE IN PARI DELICTO DEFENSE APPLIES IN THIS ACCOUNTANT MALPRACTICE CASE.

The First Department, reversing Supreme Court, determined questions of fact were raised about whether the adverse interest exception bars the in pari delicto defense in this accountant malpractice case: "In this accounting malpractice action, plaintiffs, the liquidators of several hedge funds, allege that defendants failed to uncover fraudulent activity by the funds' investment managers. The issue before us is whether the adverse interest exception to the equitable defense of in pari delicto bars the defense in this case (see Kirschner v. KPMG LLP, 15 NY3d 446 [2010]). We find that plaintiffs raised issues of fact as to the adverse nature of their interests vis-a-vis those of their agents, the funds' investment managers, that preclude summary dismissal of the complaint on the ground of the in pari delicto defense. 'To come within the exception, the agent must have totally abandoned his principal's interests and be acting entirely for his own or another's purposes' ,,, . The exception is applied only where the fraud is committed 'against a corporation rather than on its behalf' ... . 'So long as the corporate wrongdoer's fraudulent conduct enables the business to survive — to attract investors and customers and raise funds for corporate purposes — this test is not met' ... . Thus, we conclude that the mere continuation of a corporate entity does not per se constitute a benefit that precludes application of the adverse interest exception. ... [R]eliance on speculation about the benefits to be derived from the continued existence of an entity is inconsistent with the analysis of the adverse interest exception in Kirschner. It may be possible in every case to construct a hypothetical scenario where the company teetering on the brink of insolvency because of its agent's fraud meets with an opportune circumstance that allows it to resume legitimate business operations. Permitting such speculation would render the adverse interest exception meaningless. Further, an ongoing fraud and a continued corporate existence may harm a corporate entity: The agent may prolong the company's legal existence so that he can continue to loot from it, as appears to have been the case here." ***Conway v. Marcum & Kliegman LLP*, 2019 N.Y. Slip Op. 07338, First Dept 10-10-19**

CIVIL PROCEDURE.

PLAINTIFF WAIVED ITS RIGHT TO A JURY TRIAL BY INCLUDING A REQUEST FOR EQUITABLE RELIEF; ONCE WAIVED THE RIGHT CANNOT BE REVIVED.

The First Department, reversing Supreme Court, determined plaintiff had waived its right to a jury trial by including a request for equitable relief and, once waived, the right cannot be revived: "Plaintiff has waived its right to a jury trial. When, as here, the complaint either joins legal and equitable causes of action arising out of the same alleged wrong or seeks both legal and equitable relief, there is a waiver of a plaintiff's right to a jury trial ... . Plaintiff's sixth cause of action for a permanent injunction sounds in equity, is not incidental to the remaining claims and as a result of its inclusion, it can no longer be said that money damages would afford a complete remedy ... . Furthermore, '[o]nce the right to a jury trial has been intentionally lost by joining legal and equitable claims, any subsequent dismissal, settlement or withdrawal of the equitable claim(s) will not revive the right to trial by jury' ...". ***Errant Gene Therapeutics, LLC v. Sloan-Kettering Inst. for Cancer Research*, 2019 N.Y. Slip Op. 07226, First Dept 10-8-19**

CRIMINAL LAW, CONSTITUTIONAL LAW.

THEFT OF GOLDMAN SACHS SOURCE CODE; THE PROHIBITION OF DOUBLE JEOPARDY DID NOT PRECLUDE THE PROSECUTION UNDER A STATE STATUTE AFTER DEFENDANT'S CONVICTION UNDER A FEDERAL STATUTE WAS REVERSED; THE STATE STATUTE INCLUDED AN ELEMENT NOT INCLUDED IN THE FEDERAL STATUTE.

The First Department determined defendant's prosecution for unlawful use of secret scientific material did not violate the prohibition against double jeopardy. Defendant, while working for Goldman Sachs, had uploaded source code to a server in Germany. He was first charged under a federal statute, the National Stolen Property Act (NSPA). The Second Circuit reversed the NSPA conviction because the source code was deemed "intangible" at the time of the theft (when it was transmitted) and therefore did not meet the definition of "goods" in the federal statute. However, the state statute under which defendant was subsequently prosecuted, unlawful use of secret scientific material, included tangible electronically repro-

duced material, and the source code reproduced on the German server met that criteria: "Defendant's argument rests on the claim that the 'goods' element of the NSPA, which undisputedly requires that the property transported be 'tangible,' is equivalent to the 'tangible reproduction' element of New York's unlawful use statute. That statute provides that '[a] person is guilty of unlawful use of secret scientific material when, with intent to appropriate . . . the use of secret scientific material, and having no right to do so and no reasonable ground to believe that he [or she] has such right, [the person] makes a tangible reproduction or representation of such secret scientific material by means of writing, photographing, drawing, mechanically or electronically reproducing or recording such secret scientific material' (Penal Law § 165.07). * * * ... [T]he Second Circuit did not hold that the source codes were intangible as they existed on the German server. Rather, it held that 'at the time of the theft' ... — which was the same as the time that the codes were transmitted — the codes were purely intangible. Because the elements are not equivalent, there is no inconsistency between the Second Circuit's determination that the codes were intangible when transported and this Court's determination that defendant made a tangible reproduction when he uploaded them to the German server, where they resided within a physical medium." ***People v. Aleynikov*, 2019 N.Y. Slip Op. 07211, First Dept 10-18-19**

JUDGES, CIVIL PROCEDURE, CRIMINAL LAW.

JUDGE HAD THE AUTHORITY TO SEVER TWO COUNTS IN AN INDICTMENT AND REMOVE THE MATTER, INVOLVING A JUVENILE, TO FAMILY COURT; THE PEOPLE'S ARTICLE 78 SEEKING PROHIBITION DENIED AND DISMISSED.

The First Department denied the People's Article 78 action seeking to vacate an order by the respondent judge severing two counts which had been combined in an indictment and removing the charges to Family Court. The People objected to removing the prosecution of a 16-year-old to Family Court. In order the facilitate the removal, respondent judge severed the two counts. The People unsuccessfully argued the judged did not have the authority to sever the counts, and therefore could not send the charges to Family Court: "[T]he extraordinary remedy of prohibition lies only where there is a clear legal right, and only when a court . . . acts or threatens to act either without jurisdiction or in excess of its authorized powers in a proceeding over which it has jurisdiction' ... . 'Use of the writ is, and must be, restricted so as to prevent incessant interruption of pending judicial proceedings by those seeking collateral review of adverse determinations made during the course of those proceedings' … . There is no merit in the People's contention that the court lacks the authority to sever charges that were joined in a single indictment. This argument would have validity in cases where charges were properly joinable in a single indictment. However, the law is clear that the determination of whether the charges were, in fact, properly joinable in the first instance, is a duty of the court that is not delegated to the prosecution or the grand jury. The court has a duty to examine the indictment to determine whether joinder is proper pursuant to CPL 200.20(a) or (b). Notably, the People have not provided any precedent to support their position to the contrary. Courts routinely rule on the issue of whether charges in an indictment are properly joinable under CPL 200.20(2) and sever those charges that are not ... . While the People disagree with the court's finding that the ... charges were not properly joinable under CPL 200.20(2)(b), determination of this issue is not before us in this article 78 proceeding. Rather, we are only asked, and we only have the authority, to determine whether the court acted without jurisdiction or in excess of its authority." ***Matter of Vance v. Roberts*, 2019 N.Y. Slip Op. 07358, First Dept 10-10-19**

LABOR LAW-CONSTRUCTION LAW, CONTRACT LAW, NEGLIGENCE.

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT ON THE LABOR LAW § 240(1) CAUSE OF ACTION SHOULD HAVE BEEN GRANTED IN THIS CRANE-ACCIDENT CASE; THE *ESPINAL* 'LAUNCHED AN INSTRUMENT OF HARM' CAUSE OF ACTION AGAINST THE COMPANY WHICH REFURBISHED AND MAINTAINED THE CRANE SHOULD NOT HAVE BEEN DISMISSED.

The First Department, reversing (modifying) Supreme Court, determined plaintiff's motion for summary judgment on his Labor Law § 240 (1) cause of action should have been granted in this crane-accident case. The First Department also held that the negligence action against the company (Hoffman) which refurbished and maintained the crane, based upon the *Espinal* "launched an instrument of harm" theory, should not have been dismissed: "The collapse of a crane constitutes a prima facie violation of Labor Law § 240(1) ... . A plaintiff need not be directly injured by a portion of the crane for the Labor Law to apply — injuries that occur while trying to avoid being struck during a hoisting accident may qualify ... . While plaintiff's testimony at his deposition varied somewhat from his 50-h testimony, he repeatedly cautioned that the accident happened so fast it was difficult for him to describe exactly how it occurred. In any event, no matter which version is accepted, Labor Law § 240(1) applies to the ... defendant ... . Hoffman refurbished the subject crane one year before the accident and performed maintenance on it several times thereafter. Although a contractual obligation, standing alone, will generally not give rise to tort liability in favor of a third person ... , an exception exists where a contractor who undertakes to perform services pursuant to a contract negligently creates or exacerbates a dangerous condition so as to have 'launched a force or instrument of harm' (Espinal v. Melville Snow Contrs., 98 NY2d 136, 141-142 [2002] ...). Hoffman failed to adequately address the findings of the independent crane company that conducted the post-accident investigation, which concluded that

several maintenance and repair issues contributed to over wear on the crane's wire ropes ...". ***DeGidio v. City of New York*, 2019 N.Y. Slip Op. 07218, First Dept 10-8-19**

LABOR LAW-CONSTRUCTION LAW, EVIDENCE.

PLAINTIFFS FELL FROM A LIFT TRUCK WHICH WAS STRUCK BY A BUS, SUMMARY JUDGMENT ON THE LABOR LAW § 240(1) CAUSE OF ACTION SHOULD HAVE BEEN GRANTED; HEARSAY ALONE WILL NOT DEFEAT A MOTION FOR SUMMARY JUDGMENT.

The First Department, reversing Supreme Court, determined plaintiffs' motion for summary judgment on the Labor Law § 240(1) cause of action should have been granted, noting that hearsay alone will not defeat a summary judgment motion: "Plaintiffs ... established prima facie that defendants are liable for their injuries under Labor Law § 240(1) by submitting evidence that they fell to the ground and were injured when the lift truck upon which they were working moved when it was struck by a passing bus ... . Moreover, the lift truck, which was being used as an elevated work platform, lacked a guardrail to prevent ... . In opposition, defendants failed to raise an issue of fact. They rely instead on hearsay evidence as to how the accident may have occurred. Such hearsay evidence alone is insufficient to defeat a motion for summary judgment ...". ***South v. Metropolitan Transp. Auth.*, 2019 N.Y. Slip Op. 07213, First Dept 10-8-19**

SECOND DEPARTMENT

ARBITRATION.

REVIEW POWERS OF A MASTER ARBITRATOR EXPLAINED; HERE THE MASTER ARBITRATOR'S AWARD WAS PROPERLY VACATED AND THE ORIGINAL ARBITRATOR'S AWARD WAS PROPERLY REINSTATED.

The Second Department determined Supreme Court had properly vacated the master arbitrator's award and reinstated the original arbitrator's award in this no-fault benefit case. The court explained the authority of a master arbitrator: "A master arbitrator may not review the facts by weighing the evidence, assessing the credibility of witnesses, or making independent findings of fact ... . A master arbitrator's review powers, however, do include reviewing the facts to determine 'whether or not the evidence is sufficient, as a matter of law, to support the determination of the arbitrator' ... . Here, there is no rational basis for the determination of the master arbitrator that the original arbitrator committed an error of law ...". ***Matter of V.S. Care Acupuncture, P.C. v. Country-Wide Ins. Co.*, 2019 N.Y. Slip Op. 07265, Second Dept 10-9-19**

ARBITRATION, INSURANCE LAW, CORPORATION LAW.

MASTER ARBITRATOR'S AWARD SHOULD NOT HAVE BEEN VACATED, REVIEW POWERS OF MASTER ARBITRATOR AND COURT EXPLAINED.

The Second Department, reversing Supreme Court, determined that the master arbitrator's award in this no-fault insurance, fraudulent incorporation case should not have been vacated: " '[A]n arbitrator's rulings, unlike a trial court's, are largely unreviewable' ... . A court reviewing the award of a master arbitrator is limited to the grounds set forth in CPLR article 75, which include, in this compulsory arbitration, the question of whether the determination had evidentiary support, was rational, or had a plausible basis ... . Notably, the master arbitrator's review power is broader than that of the courts' because it includes the power to review for errors of law ... . In contrast, the courts 'generally will not vacate an arbitrator's award where the error claimed is the incorrect application of a rule of substantive law, unless it is so irrational as to require vacatur' ... . Here, since Country-Wide submitted evidence tending to support its fraudulent incorporation defense, it cannot be said that the determination of the master arbitrator affirming the original arbitrator's award lacked evidentiary support. Nor can it be said that the determination to affirm the original arbitrator, who supported her determination with reasons based on the evidence, lacked a rational basis. Thus, even if it was an error of law to conclude that Country-Wide proved its defense as a matter of law ...". ***Matter of Acuhealth Acupuncture, P.C. v. Country-Wide Ins. Co.*, 2019 N.Y. Slip Op. 07246, Second Dept 10-9-19**

CRIMINAL LAW, APPEALS, AGENCY.

UNDER A WEIGHT OF THE EVIDENCE ANALYSIS, THE PEOPLE DID NOT DISPROVE DEFENDANT'S AGENCY DEFENSE; THE VERDICT WAS REPUGNANT IN THAT GUILTY AND NOT GUILTY FINDINGS CAN NOT BE RECONCILED.

The Second Department vacated defendant's convictions in this drug/possession/sale case, finding the People did not disprove the agency defense with respect to one of the two transactions, and the verdict was repugnant in the sense guilty and not guilty findings could not be reconciled. With respect to the agency defense, the Second Department applied a "weight of the evidence" analysis. The facts are too complex to fairly summarize here: "The following factors are considered in evaluating the strength of an agency defense: '(1) did the defendant act as a mere extension of the buyer throughout the relationship, with no independent desire to promote the transaction; (2) was the purchase suggested by the buyer; (3) did the defendant have any previous acquaintance with the seller; (4) did the defendant exhibit any salesman like behavior;

(5) did the defendant use his [or her] own funds; (6) did the defendant procure from many sources for a single buyer; (7) did the buyer pay the seller directly; (8) did the defendant stand to profit; and (9) was any reward promised in advance' ... . A verdict is repugnant only if, when viewed in light of the elements of each crime as charged to the jury, 'it is legally impossible—under all conceivable circumstances—for the jury to have convicted the defendant on one count but not the other' ... . The purpose of the rule is to ensure that an individual is not convicted of a crime of which a jury has necessarily decided that one of the essential elements was not proven beyond a reasonable doubt ...". ***People v. Cruz*, 2019 N.Y. Slip Op. 07273, Second Dept 10-9-19**

CRIMINAL LAW, EVIDENCE.

PHYSICAL INJURY IS NOT AN ELEMENT OF ATTEMPTED MURDER; REQUEST FOR THE MISSING WITNESS JURY INSTRUCTION BASED UPON THE COMPLAINANT'S FAILURE TO TESTIFY PROPERLY DENIED; PERSISTENT FELONY SENTENCING PROCEDURE WAS NOT FOLLOWED.

The Second Department affirmed defendant's attempted murder conviction, noting that proof of attempted murder does not require proof of serious injury, or any injury at all. The court further noted that the complainant was not under the People's control and therefore the request for the missing witness jury instruction was properly denied. Defendant, however, was not properly sentenced: "... [W]e note that while none of the complainant's injuries in this case were life-threatening, 'the crime of attempted murder does not require actual physical injury to a victim at all' ... . Here, the forensic evidence showing that two separate knives were used in the attack, coupled with the fact that the defendant, still holding a knife, chased the complainant outside the apartment complex and broke off his attack only after a bystander intervened, provides factually sufficient evidence of the defendant's intent to kill. Contrary to the defendant's contentions, the County Court properly declined to give a missing witness charge with regard to the complainant, as the record reflects that the complainant was not under the People's control ... . The sentencing minutes do not establish that the County Court asked the defendant whether he wished to controvert any allegations made in the statement filed pursuant to CPL 400.16(2) ... . Accordingly, we vacate the sentences and remit the matter to the County Court, Suffolk County, for resentencing in accordance with CPL 400.16 ...". ***People v. Gunn*, 2019 N.Y. Slip Op. 07279, Second Dept 10-9-19**

CRIMINAL LAW, EVIDENCE.

ALTHOUGH THE COMPLAINANT IDENTIFIED THE DEFENDANT FROM A PHOTO ARRAY IN A PROCEDURE CONDUCTED BY A POLICE OFFICER, THERE WAS NO PROOF OF THE BASIS FOR DEFENDANT'S ARREST BY ANOTHER OFFICER, THEREFORE DEFENDANT'S SUPPRESSION MOTION SHOULD HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined the evidence did not demonstrate that the officer who arrested defendant had probable cause to do so. Therefore defendant's motion to suppress should have been granted. The People presented evidence that Officer Gorman conducted a photo identification procedure and, after the robbery complainant identified the defendant, Officer Gorman issued an "I-card." But there was no evidence of the arresting officer's basis for arrest: "Under the fellow officer rule, 'even if an arresting officer lacks personal knowledge sufficient to establish probable cause, the arrest will be lawful if the officer acts upon the direction of or as a result of communication with a superior or [fellow] officer or another police department provided that the police as a whole were in possession of information sufficient to constitute probable cause to make the arrest' ... .The evidence presented by the People did not establish that the officer who actually arrested the defendant had probable cause to do so ... . Officer Gorman testified that he issued an I-Card for the defendant, but he also testified that the defendant was arrested 'on a different matter.' The People did not present any testimony from the arresting officer as to what information he possessed or how he received that information ... . Therefore, contrary to the People's contention, there was insufficient evidence from which to infer that the police arrested the defendant pursuant to the I-Card or at the direction of Officer Gorman ... . Furthermore, the People presented no evidence at the hearing regarding the circumstances of the defendant's arrest or the charges on which he was arrested, nor do they argue on appeal that there was any source of probable cause for the defendant's arrest other than the I-Card." ***People v. Hightower*, 2019 N.Y. Slip Op. 07280, Second Dept 10-9-19**

CRIMINAL LAW, EVIDENCE, APPEALS.

THE STANDARD OF PROOF REQUIRED IN AN ENTIRELY CIRCUMSTANTIAL-EVIDENCE CASE WAS NOT MET IN THIS MURDER PROSECUTION; CONVICTION REVERSED AS AGAINST THE WEIGHT OF THE EVIDENCE.

The Second Department, reversing defendant's murder conviction, determined the conviction was against the weight of the evidence. There was no forensic evidence linking defendant to the murder, which occurred 11 years before the trial, and the circumstantial evidence merely raised the possibility defendant committed the murder. The decision recounts the evidence in a level of detail which cannot be fairly summarized here: "Where the prosecution relies entirely on circumstantial evidence, before the fact-finder can draw an inference of guilt, that inference must be the only one that can fairly and reasonably be drawn from the proven facts, and the evidence must exclude beyond a reasonable doubt every reasonable hypothesis of innocence ... . The inferences to be drawn from the People's evidence in this case as to coincidence of time,

place, and behavior are sufficient only to create suspicion. The evidence presented at trial is not inconsistent with the defendant's innocence, and any determination of guilt requires too much speculation to fill the gaps in the People's evidence to constitute proof beyond a reasonable doubt. * * * [T]he evidence presented at trial supports the possibility that the defendant was the person who killed Perez. '[H]owever, speculation and conjecture are no substitute for proof beyond a reasonable doubt' ... . It is not enough for the jury to determine 'that the defendant is probably guilty' ... . The People must prove beyond a reasonable doubt that the defendant is the person who committed the crime. On this record, we find that the jury was not justified in finding the defendant guilty beyond a reasonable doubt." ***People v. Clavell*, 2019 N.Y. Slip Op. 07271, Second Dept 10-10-19**

CRIMINAL LAW, EVIDENCE, APPEALS.

PROOF DID NOT DEMONSTRATE THAT THE VICTIM'S EYE INJURY ROSE TO THE LEVEL OF 'SERIOUS PHYSICAL INJURY;' BASED UPON A WEIGHT OF THE EVIDENCE ANALYSIS, ASSAULT FIRST REDUCED TO ASSAULT SECOND.

The Second Department, applying a weight of the evidence analysis, determined the People did not present sufficient proof to demonstrate the victim's eye injury rose to the level of "serious physical injury" and reduced the Assault First conviction to Assault Second. Defendant threw a brick from an overpass which struck the windshield of the victim's car, sending glass into her eye: "Before the incident, the victim had not experienced blurry vision in her left eye. She testified that her overall vision worsened since the incident, and that she has a permanent scar on her cornea. At the time of trial, the victim visited the doctor every six months for evaluation of her corneal scar. She acknowledged, however, that before the incident, she wore eyeglasses. The medical records indicated that she had been diagnosed and treated for an eye condition, blepharitis. The medical records further indicated that, in a follow-up visit in February 2016, the victim reported no pain or change in vision. Notably, the People did not proffer any medical testimony to interpret and explain the medical records; explain the nature, severity, and prognosis of the victim's eye injury; or to explain whether any preexisting eye condition or conditions were affected by the incident, or whether any such preexisting eye condition was a cause of any of her current complaints ... . Upon the exercise of our factual review power, we conclude that the verdict convicting the defendant of assault in the first degree and assault in the second degree was against the weight of the evidence. Given the lack of medical testimony to explain the nature of the victim's eye injury, an acquittal on the charges of assault in the first degree and assault in the second degree would have been reasonable. Giving appropriate weight to the evidence submitted on the issue of ' [s]erious physical injury,' we conclude that the jury was not justified in finding that the People proved, beyond a reasonable doubt, that the victim's eye injury created a substantial risk of death or constituted a 'serious and protracted disfigurement, protracted impairment of health or protracted loss or impairment of the function of any bodily organ' (Penal Law § 10.00[10] ...)." ***People v. Palant*, 2019 N.Y. Slip Op. 07289, Second Dept 10-9-19**

EMPLOYMENT LAW, CONTRACT LAW, MUNICIPAL LAW.

THE CITY DID NOT DEMONSTRATE THE SALARY PROMISED PLAINTIFF AT THE OUTSET WAS A MISTAKE WHICH HAD BEEN CORRECTED, THE CITY'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED; PLAINTIFF'S CROSS MOTION FOR SUMMARY JUDGMENT ON HER BREACH OF CONTRACT ACTION SHOULD HAVE BEEN GRANTED; SUPREME COURT'S ANALYSIS UNDER AN "AT-WILL EMPLOYEE" THEORY WAS NOT APPLICABLE.

The Second Department, reversing Supreme Court, determined the city-employer's motion for summary judgment in this salary dispute should have been denied, and plaintiff-employee's cross motion for summary judgment should have been granted. When plaintiff applied for the job the Notice of Appointment provided by the city indicated her salary would be approximately $47,000. However plaintiff was being paid approximately $41,000. The city argued the $47,000 figure was a mistake, but the evidence submitted by the city did not support that argument. In addition the city argued that plaintiff was an at-will employ. But the Second Department noted that this is a contract action for unpaid salary to which the "at-will employee" concept was not applicable: "The elements of a cause of action to recover damages for breach of contract are the existence of a contract, the plaintiff's performance pursuant to the contract, the defendant's breach of its contractual obligations, and resulting damages ... . The Supreme Court's reliance on the body of law concerning at-will employees was error. The plaintiff's breach of contract cause of action solely seeks to recover unpaid, agreed-to compensation for services rendered while she was actually employed by the City, and thus, the at-will doctrine does not apply ... . At best, the City's evidence suggests that after the plaintiff was hired at the Step 4 level, some budgeting concern caused the City to seek to readjust the plaintiff's salary to a Step 1 level. The City, however, produced no evidence demonstrating that there was any error in the Notice of Appointment or that there was any lawful change to the plaintiff's salary. Rather, it appears that the City simply reduced the plaintiff's salary to the Step 1 level, even though she was appointed at the Step 4 level. The City failed to demonstrate that it had any lawful basis for unilaterally changing the plaintiff's salary. Since the City failed to make a prima facie showing of entitlement to judgment as a matter of law, the Supreme Court should have denied its motion for

summary judgment dismissing the complaint." ***Ayers v. City of Mount Vernon*, 2019 N.Y. Slip Op. 07230, Second Dept 10-9-19**

FORECLOSURE, EVIDENCE, CIVIL PROCEDURE.

BANK'S EVIDENCE OF STANDING DID NOT MEET THE CRITERIA OF THE BUSINESS RECORDS EXCEPTION TO THE HEARSAY RULE.

The Second Department, reversing Supreme Court. determined that the bank's motion for summary judgment should not have been granted because the evidence of standing submitted by the bank did not meet the requirements of the business records exception to the hearsay rule: "... [T]he plaintiff failed to meet its prima facie burden of establishing that it had standing .... The affidavits of Andrea Kruse, vice president of loan documentation for Wells Fargo Bank, N.A. (hereinafter Wells Fargo), the plaintiff's servicer, failed to lay the proper foundation under the business records exception to the hearsay rule to support her assertion that the note was transferred to the plaintiff's custodian prior to commencement of the action and remained in the possession of the plaintiff's custodian at the time of commencement .... While, in attempting to rely upon the documentary evidence that was annexed to the motion, Kruse averred in her first affidavit that she reviewed the books and records regularly created, maintained, and kept by Wells Fargo, and in her second affidavit that she reviewed the books and records regularly created, maintained, and kept by the plaintiff, she did not attest that she was personally familiar with the plaintiff's or Wells Fargo's record-keeping practices and procedures, or that the plaintiff's records were incorporated into Wells Fargo's own records or routinely relied upon in its business ...". ***US Bank Natl. Assn. v. Hunte*, 2019 N.Y. Slip Op. 07311, Second Dept 10-9-19**

FREEDOM OF INFORMATION LAW (FOIL), CONSUMER LAW, DEBTOR-CREDITOR.

REFERENCES TO JUDGMENTS IN A LICENSE APPLICATION SHOULD NOT HAVE BEEN REDACTED IN THE DOCUMENTS PROVIDED BY THE COUNTY CONSUMER AFFAIRS OFFICE IN RESPONSE TO A FOIL REQUEST.

The Second Department, reversing (modifying) Supreme Court, determined that the response of the Nassau County Office for Consumer Affairs to a request for documents relating to licenses held by Home Beyond Center, LLC should not have had the references to judgments redacted: "FOIL requires government agencies to 'make available for public inspection and copying all records,' subject to a number of exemptions (Public Officers Law § 87[2]). One such exemption permits an agency to deny access to records that 'if disclosed would constitute an unwarranted invasion of personal privacy' ... . Public Officers Law § 89(2)(b) provides that '[a]n unwarranted invasion of personal privacy includes, but shall not be limited to' seven specified kinds of disclosure ... . Where none of the seven specifications is applicable, a court 'must decide whether any invasion of privacy . . . is unwarranted' by balancing the privacy interests at stake against the public interest in disclosure of the information' ... . Here, the respondent failed to demonstrate that the redactions of information contained in the license application file of Home Beyond Center, LLC, relating to 'judgments' should be exempt from disclosure as an 'unwarranted invasion of personal privacy' ...". ***Matter of Liang v. Nassau County Off. of Consumer Affairs*, 2019 N.Y. Slip Op. 07251, Second Dept 10-9-19**

PERSONAL INJURY, EVIDENCE.

PEDESTRIAN PLAINTIFF WAS STRUCK BY DEFENDANT'S VEHICLE AS SHE WAS CROSSING THE ENTRANCE TO A PARKING LOT; DEFENDANT TESTIFIED HE NEVER SAW THE PLAINTIFF; PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND HER MOTION TO DISMISS DEFENDANT'S AFFIRMATIVE DEFENSE ALLEGING PLAINTIFF WAS COMPARATIVELY NEGLIGENT SHOULD HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined plaintiff-pedestrian's motion for summary judgment in this traffic accident case should have been granted, and defendant's affirmative defense alleged plaintiff was comparatively negligent should have been dismissed. Plaintiff was halfway through the entrance to a parking lot when defendant turned to enter the parking lot: "The injured plaintiff testified at her deposition, a transcript of which was also submitted in support of the plaintiffs' motion, that she had been walking on the sidewalk along Ardsley Road. She intended to cross the entrance to the parking lot to continue walking on the sidewalk along Ardsley Road. She testified that, before attempting to cross the entrance to the lot, she stopped and looked in both directions to check for approaching vehicles, and that she did not see any vehicles before she stepped into the entrance to the lot. The plaintiffs also submitted a transcript of the deposition testimony of a nonparty witness who testified that, just before impact, he observed the injured plaintiff turn her body to face the defendants' vehicle and put her hands up in front of her. He then saw the vehicle strike the injured plaintiff and launch her into the air. The photographs, in conjunction with the testimony of the defendant driver and the nonparty witness, demonstrated that the injured plaintiff was struck after she had already walked more than halfway across the entrance to the parking lot. A driver is bound to see what is there to be seen with the proper use of his or her senses ... . Here, the plaintiffs established their prima facie entitlement to judgment as a matter of law on the issue of liability by submitting evidence that the defendant driver never saw the injured plaintiff before striking her ...". ***Higashi v. M&R Scarsdale Rest., LLC*, 2019 N.Y. Slip Op. 07240, Second Dept 10-9-19**

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