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COURT OF APPEALS

ATTORNEYS.

ACTIONS TAKEN BY A NEW YORK ATTORNEY WHO IS NOT IN COMPLIANCE JUDICIARY LAW § 470, WHICH REQUIRES AN OFFICE IN NEW YORK, ARE NOT A NULLITY.

The Court of Appeals, in a full-fledged opinion by Judge Garcia, reversing the Appellate Division, determined that actions taken by an attorney who is admitted to practice in New York but is not in compliance with New York's office requirement are not a nullity: "We ... hold that a violation of Judiciary Law § 470 [requiring a New York office] does not render the actions taken by the attorney involved a nullity. Instead, the party may cure the section 470 violation with the appearance of compliant counsel or an application for admission pro hac vice by appropriate counsel ... . Where further relief is warranted, the trial court has discretion to consider any resulting prejudice and fashion an appropriate remedy and the individual attorney may face disciplinary action for failure to comply with the statute ... . This approach ensures that violations are appropriately addressed without disproportionately punishing an unwitting client for an attorney's failure to comply with section 470." ***Arrowhead Capital Fin., Ltd. v. Cheyne Specialty Fin. Fund L.P.*, 2019 N.Y. Slip Op. 01124, CtApp 2-14-19**

MENTAL HYGIENE LAW, ATTORNEYS.

OFFICE OF MENTAL HEALTH IS NOT REQUIRED TO ALLOW COUNSEL FROM MENTAL HEALTH LEGAL SERVICES TO PARTICIPATE IN TREATMENT PLANNING FOR A SEX OFFENDER.

The Court of Appeals, in a full-fledged opinion by Judge Stein, over a dissenting opinion, determined that a Mental Hygiene Legal Services (MHLS) attorney need not be granted permission to attend a treatment planning session for a client in the Sex Offender Treatment Program: "We hold that MHLS counsel is not entitled to be given an interview and an opportunity to participate in treatment planning simply by virtue of an attorney-client relationship with an article 10 respondent. * * * ... [T]he statutory language of Mental Hygiene Law §§ 10.10 (b) and 29.13 (b), as well as the relevant legislative history, support the conclusion that MHLS counsel was not intended to be included, as a matter of law, within the terms 'authorized representative' or 'significant individual.' Thus, OMH [Office of Mental Health] is not required, upon the respondent's request, to provide an interview and an opportunity to participate in treatment planning to MHLS counsel who has only a professional, attorney-client relationship with an article 10 respondent. However, as OMH concedes, a facility has the discretion to permit MHLS counsel to participate in treatment planning and, in a particular case, it is possible that counsel could develop and demonstrate a sufficient personal relationship with a patient such that counsel would qualify as a 'significant individual . . . otherwise concerned with the welfare of the patient,' entitled to participate therein." ***Matter of Mental Hygiene Legal Serv. v. Sullivan*, 2019 N.Y. Slip Op. 01122, CtApp 2-14-19**

MENTAL HYGIENE LAW, CIVIL PROCEDURE.

MENTAL HEALTH LEGAL SERVICES DOES NOT HAVE STANDING TO SEEK A WRIT OF MANDAMUS TO COMPEL A HOSPITAL TO COMPLY WITH THE MENTAL HYGIENE LAW PROCEDURE WHEN A PATIENT REQUESTS AN ADMISSION OR RETENTION HEARING.

The Court of Appeals, in a full-fledged opinion by Judge DiFiore, over a three-judge dissenting opinion, reversing the Appellate Division, determined Mental Hygiene Legal Services did not have standing to seek a writ of mandamus to compel a hospital to comply with Mental Hygiene Law 9.31 (b) "which sets forth the procedure that must be followed after a patient requests an admission or retention hearing:" "MHLS alleges that, in early 2016, it 'began to notice problems with the medical charts offered into evidence by BPC [Bronx Psychiatric Center]' because 'documents contained in the chart had been added or removed just prior to the hearing.' MHLS filed this CPLR article 78 petition in the nature of mandamus, in its own name — and separate from any specific client or proceeding — seeking an order compelling BPC to provide copies of a patient's entire clinical chart when it provides notice of a request for an admission or retention hearing, arguing the clinical chart is part of the "record of the patient" under Mental Hygiene Law § 9.31." ***Matter of Mental Hygiene Legal Serv. v. Daniels*, 2019 N.Y. Slip Op. 01123, CtApp 2-14-19**

FIRST DEPARTMENT

ATTORNEYS, PRIVILEGE, CIVIL PROCEDURE.

MEMORANDUM PREPARED BY PLAINTIFF'S GENERAL COUNSEL PROTECTED FROM DISCLOSURE BY COMMON INTEREST PRIVILEGE.

The First Department determined the common interest privilege applied to a memorandum by plaintiff's general counsel: "The motion court properly held that a legal memorandum prepared by plaintiff's General Counsel, and addressed to its Chief Executive Officer, which provided a summary and analysis of its pending litigation matters, including the litigation at issue, and subsequently shared with potential merger partners during the due diligence period pursuant to a common interest agreement, was privileged and protected from disclosure. The common interest privilege is an exception to the traditional rule that the presence of a third-party at a communication between counsel and client is sufficient to deprive the communication of confidentiality. The common interest doctrine is a limited exception to waiver of the attorney-client privilege, and requires that: (1) the underlying material qualify for protection under the attorney-client privilege, (2) the parties to the disclosure have a common legal interest, and (3) the material must pertain to pending or reasonably anticipated litigation for it to be protected. The record, here, demonstrates that the common interest agreement was entered into in reasonable anticipation of litigation ...". ***Kindred Healthcare, Inc. v. SAI Global Compliance, Inc.*, 2019 N.Y. Slip Op. 01164, First Dept 2-14-19**

EDUCATION-SCHOOL LAW, EMPLOYMENT LAW.

TEACHER ACQUIRED TENURE BY ESTOPPEL.

The First Department determined petitioner, a special education teacher, acquired tenure by estoppel: " 'Tenure may be acquired by estoppel when a school board accepts the continued services of a teacher or administrator, but fails to take the action required by law to either grant or deny tenure prior to the expiration of the teacher's probationary term' ... . Here, petitioner obtained tenure by estoppel when she continued to be employed by the DOE and failed to receive any notice regarding the DOE's decision regarding her future by the expiration of her probationary period ... . In addition, the DOE failed to indicate to petitioner that the temporary assignment to perform clerical duties for the Committee on Special Education would not count toward her probationary period. Thus, petitioner's decision to accept the temporary reassignment did not 'serve to disrupt that teacher's probationary period, nor . . . lead to an increase in the length of that probationary period' ...". ***Matter of Wilson v. Department of Educ. of the City of N.Y.*, 2019 N.Y. Slip Op. 01161, First Dept 2-14-19**

SECOND DEPARTMENT

ATTORNEYS.

PLAINTIFF'S PRO SE MOTION TO DISQUALIFY DEFENDANT'S LAW FIRM PROPERLY GRANTED, AN ATTORNEY FROM THE FIRM RETAINED BY PLAINTIFF WORKED ON PLAINTIFF'S CASE AND SUBSEQUENTLY JOINED THE LAW FIRM REPRESENTING DEFENDANT,

The Second Department determined plaintiff's pro se motion to disqualify the law firm representing defendant (Ray, Mitiv) was properly granted. An attorney who worked for a law firm retained by plaintiff and who worked almost exclusively on plaintiff's case left the firm retained by plaintiff and joined Ray, Mitev: " 'A party seeking disqualification of its adversary's counsel based on counsel's purported prior representation of that party must establish (1) the existence of a prior attorney-client relationship between the moving party and opposing counsel, (2) that the matters involved in both representations are substantially related, and (3) that the interests of the present client and former client are materially adverse' ... . 'A party's entitlement to be represented in ongoing litigation by counsel of his or her own choosing is a valued right which should not be abridged absent a clear showing that disqualification is warranted, and the movant bears the burden on the motion'... . However, doubts as to the existence of a conflict of interest are resolved in favor of disqualification in order to avoid even the appearance of impropriety ... Here, the plaintiff's showing satisfied all three of the relevant factors, giving rise to an irrebuttable presumption of disqualification ... . Accordingly, based on the appearance of impropriety, disqualification was warranted ...". ***Janczewski v. Janczewski*, 2019 N.Y. Slip Op. 01062, Second Dept 2-13-19**

ATTORNEYS, CONTEMPT, FAMILY LAW.

DEFENDANT SHOULD HAVE BEEN HELD IN CONTEMPT FOR FAILURE TO PAY ATTORNEY'S FEES AS ORDERED BY THE COURT, THE CONTEMPT PROCEEDINGS WERE NOT FRIVOLOUS AND SANCTIONS SHOULD NOT HAVE BEEN IMPOSED FOR BRINGING THE CONTEMPT PROCEEDINGS.

The Second Department, reversing Supreme Court, determined that plaintiff's law firm (Villar firm) was entitled to attorney's fees for work done before the firm was discharged without cause, the contempt action brought by the firm against defendant for failure to pay the fees as ordered by the court was valid and defendant should have been held in contempt,

and the contempt proceedings were not frivolous or designed to harass. Therefore sanctions for bringing the contempt proceedings should not have been imposed: "To prevail on a motion to hold another party in civil contempt, the movant is 'required to prove by clear and convincing evidence (1) that a lawful order of the court, clearly expressing an unequivocal mandate, was in effect, (2) that the order was disobeyed and the party disobeying the order had knowledge of its terms, and (3) that the movant was prejudiced by the offending conduct' ... . The movant in a civil contempt proceeding need not establish 'that the disobedience [was] deliberate or willful' ... . 'Once the movant establishes a knowing failure to comply with a clear and unequivocal mandate, the burden shifts to the alleged contemnor to refute the movant's showing, or to offer evidence of a defense, such as an inability to comply with the order' ... . 'In addition to or in lieu of awarding costs, the court, in its discretion may impose financial sanctions upon any party or attorney in a civil action or proceeding who engages in frivolous conduct' (22 NYCRR 130-1.1[a] ...). '[C]onduct is frivolous if . . . (1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law; (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or (3) it asserts material factual statements that are false' (22 NYCRR 130-1.1[c] ...). Contrary to the Supreme Court's determination, there is no evidence in the record to support a finding that the Villar firm pursued the contempt motion to harass the parties for settling their case ...". ***Rhodes v. Rhodes*, 2019 N.Y. Slip Op. 01113, Second Dept 2-13-19**

CIVIL PROCEDURE.

MOTION TO EXTEND TIME TO SERVE THE SUMMONS AND COMPLAINT PROPERLY GRANTED IN THE INTEREST OF JUSTICE, THE STATUTE OF LIMITATIONS HAD RUN AT THE TIME THE MOTION TO EXTEND WAS MADE.

The Second Department determined plaintiff was entitled to an extension of time to serve the summons and complaint in the interest of justice, noting that the statute of limitations had expired when plaintiff made her motion to extend: "The interest of justice standard 'requires a careful judicial analysis of the factual setting of the case and a balancing of the competing interests presented by the parties' ... . 'Unlike an extension request premised on good cause, a plaintiff [seeking an extension in the interest of justice] need not establish reasonably diligent efforts at service as a threshold matter' ... . 'However, the court may consider diligence, or lack thereof, along with any other relevant factor in making its determination, including expiration of the Statute of Limitations, the [potentially] meritorious nature of the cause of action, the length of delay in service, the promptness of a plaintiff's request for the extension of time, and prejudice to defendant' ... . We agree with the Supreme Court's determination granting, in the interest of justice, that branch of the plaintiff's motion which was pursuant to CPLR 306-b to extend the time to serve the summons and complaint upon the defendant. The statutory 120-day period for service of process commenced in November 2016... . In December 2016, the plaintiff attempted service on the defendant on multiple occasions. Moreover, she promptly moved, inter alia, for an extension of time to serve the summons and complaint after the defendant challenged the service on the ground that it was defective ... . The statute of limitations had expired at the time the plaintiff made her motion, and there was no demonstrable prejudice to the defendant." ***Darko v. Guerrino*, 2019 N.Y. Slip Op. 01058, Second Dept 2-13-19**

CIVIL PROCEDURE.

THE STATUTE OF LIMITATIONS DID NOT TOLL WHILE DEFENDANT WAS OUT OF STATE BECAUSE THE DEFENDANT COULD HAVE BEEN SERVED OUT OF STATE, PLAINTIFFS' ACTION WAS TIME-BARRED.

The Second Department, reversing Supreme Court, determined the statute of limitations did not toll while defendant was out of state and the action was therefore time-barred: "The plaintiffs' contention that the action was timely because they were entitled to the benefit of the tolling provision of CPLR 207 based on the defendant's alleged absence from the state did not raise a question of fact. Under that statute, as relevant here, when a defendant leaves the state after an action has accrued, and is continually absent from the state for at least four months, the time of the defendant's absence is not included in the time during which the action must be commenced. This tolling provision, however, does not apply 'while jurisdiction over the person of the defendant can be obtained without personal delivery of the summons to the defendant within the state' (CPLR 207[3] ...). In other words, the toll will not apply if there is a means by which the defendant may be served notwithstanding his or her absence from the state ... . Here, even during his alleged absence from New York State, the defendant was subject to service of process (see CPLR 302[a][2]; 308[5]; 313 ...). The plaintiffs did not submit evidence establishing that the defendant was attempting to evade service of process by, for example, living secretly in a foreign country, such that no means of service of process on him was available ...". ***MP v. Davidsohn*, 2019 N.Y. Slip Op. 01069, Second Dept 2-13-19**

COURT OF CLAIMS, CONTRACT LAW.

CONTRACT WAS SUBJECT TO THE STATE FINANCE LAW AND WAS NOT VALID UNTIL APPROVED BY THE STATE COMPTROLLER, NO RECOVERY FOR DELAYS IN THE PERIOD BEFORE THE CONTRACT WAS APPROVED.

The Second Department determined claimant, a company hired by defendant City University to install fire alarms, could not recover damages for alleged delays caused by the defendant prior to the approval of the contract by the comptroller. No contract with the state is valid until approval: "The parties' contract was subject to State Finance Law § 112(2)(a), which, at the time, provided that any contract exceeding $15,000 made by 'any state agency, department, board, officer, commission,

or institution . . . shall first be approved by the comptroller and filed in his or her office' '[b]efore . . . be[ing] executed or becom[ing] effective' ... . Moreover, the contract itself provided that it would 'not be valid, effective or binding upon the State until it ha[d] been approved by the State Comptroller and filed in his [or her] office.' In light of these provisions, the claimants may not recover damages based on delay occurring before the contract was approved by the Comptroller ...". ***C & L Elec., Inc. v. City Univ. of N.Y.*, 2019 N.Y. Slip Op. 01051, Second Dept 2-13-19**

CRIMINAL LAW, APPEALS, ATTORNEYS.

FAILURE TO IDENTIFY AN APPEALABLE ISSUE IN AN *ANDERS* BRIEF ARGUING THAT THERE ARE NO NONFRIVOLOUS ISSUES WARRANTING APPEAL DOES NOT NECESSARILY REQUIRE THE ASSIGNMENT OF NEW APPELLATE COUNSEL, HERE THE MISSING ISSUE WAS DEEMED INCONSEQUENTIAL AND THEREFORE THERE WAS NO NEED FOR ANOTHER ASSESSMENT BY ANOTHER ATTORNEY.

The Second Department, in a full-fledged opinion by Justice Dillon, announced a new rule concerning when new counsel should be assigned because an *Anders* brief did not demonstrate the absence of any issues which could be raised on appeal. The defendant had pled guilty and received the agreed upon sentence, which was the minimum sentence allowed. The defendant had also waived his right to appeal. The *Anders* brief addressed the plea and sentence (finding no appealable issues) but did not address the waiver of appeal. The Second Department determined there was no need to assign new counsel to the appeal because whether the waiver of appeal was valid or not, the result would not be affected: "[A]n Anders brief will not be deemed deficient under Step 1 of the Matter of Giovanni S. [89 AD3d at 252] analysis when assigned counsel fails to identify an issue, if it is demonstrable from the face of the brief that the missing issue would be inconsequential. We do not suggest that this new 'Matter of Giovanni S.-Murray rule' be applied where any missing issue would not be inconsequential. Since the brief would be sufficient under these circumstances, the court would then proceed to Step 2 of the Matter of Giovanni S. analysis, which requires an independent review of the record to determine whether counsel's assessment that there are no nonfrivolous issues for appeal is correct. This refinement safeguards the indelible right of a criminal defendant to a conscientious, effective, and zealous advocate that lies at the heart of Anders protection ... . At the same time, it recognizes a measure of practicality, that congested courts operating under tight budgets, with limited personnel, and finite taxpayer money, not be required to engage in Sisyphean efforts that cannot, as a matter of law, lead anywhere." ***People v. Murray*, 2019 N.Y. Slip Op. 01101, Second Dept 2-13-19**

CRIMINAL LAW, ATTORNEYS, EVIDENCE, APPEALS.

FAILURE TO GRANT AN ADJOURNMENT TO ALLOW DEFENSE COUNSEL, WHO HAD BEEN ACTING IN A LIMITED ADVISORY CAPACITY, TO ADEQUATELY PREPARE FOR A SUPPRESSION HEARING DEPRIVED DEFENDANT OF EFFECTIVE ASSISTANCE OF COUNSEL, NEW SUPPRESSION HEARING ORDERED, APPEAL HELD IN ABEYANCE.

The Second Department held the appeal in abeyance to allow a new suppression hearing. defense counsel. Defense counsel was acting in a limited advisory capacity when he was asked by the judge to conduct the suppression hearing. Defendant asked for an adjournment to allow counsel to review the voluminous discovery materials, but the request was denied. The Second Department held that the denial of the adjournment deprived defendant of his right to counsel: " '[T]he right of a defendant to be represented by an attorney means more than just having a person with a law degree nominally represent him [or her] upon a trial and ask questions' ... . '[T]he right to effective representation includes the right to assistance by an attorney who has taken the time to review and prepare both the law and the facts relevant to the defense and who is familiar with, and able to employ . . . basic principles of criminal law and procedure' ... . Here, the Supreme Court improvidently exercised its discretion in denying the defendant's request for an adjournment to give his attorney more time to prepare for the suppression hearing. Prior to the hearing, counsel acted in the limited capacity of advisor since the defendant wished to proceed pro se. However, at the court's urging, counsel agreed to represent the defendant at the suppression hearing but expressed his concern that he had not had an adequate opportunity to review voluminous discovery materials ...". ***People v. Costan*, 2019 N.Y. Slip Op. 01089, Second Dept 2-13-19**

ENVIRONMENTAL LAW.

ATTORNEY GENERAL MAY IMPOSE CIVIL PENALTIES FOR VIOLATION OF THE TIDAL WETLANDS ACT AND THE DEPARTMENT OF ENVIRONMENTAL CONSERVATION WAS ENTITLED TO SUMMARY JUDGMENT ON ITS ACTION TO COMPEL DEFENDANT TO SUBMIT A RESTORATION PLAN AFTER DEFENDANT, CLEARED AND FILLED WETLANDS AND CONSTRUCTED A BULKHEAD AND FENCE ON WETLANDS.

The Second Department, reversing Supreme that the attorney general (AG) can impose civil penalties pursuant to the Environmental Conservation La (ECL) for violations of Tidal Wetlands Act and the Department of Environmental Conservation was entitle to summary on its action to impose penalties and compel defendant to submit a restoration plan: "[P]laintiffs established their prima facie entitlement to judgment as a matter of law on the issue of liability on the fourth cause of action in the amended complaint, which sought to recover civil penalties pursuant to ECL 71-2505 for the defendant's post-Febru-

ary 1, 2008, violations of the Tidal Wetlands Act, and to compel the defendant to submit a restoration plan addressing those violations. In support of their motion, the plaintiffs submitted evidence demonstrating, inter alia, that between 2011 and 2012, the defendant, without a permit, cleared wetland vegetation and placed fill, constructed a bulkhead in delineated state tidal wetlands and in the tidal creek, and installed a 900-foot long fence in tidal wetland adjacent areas in violation of ECL 25-0401... . In opposition, the defendant failed to raise a triable issue of fact ...". ***New York State Dept. of Envtl. Conservation v. Segreto*, 2019 N.Y. Slip Op. 01084, Second Dept 2-13-19**

FAMILY LAW, IMMIGRATION LAW.

CHILD'S MOTION FOR FINDINGS TO ALLOW HIM TO PETITION FOR SPECIAL IMMIGRANT JUVENILE STATUS (SIJS) SHOULD HAVE BEEN GRANTED, THERE WAS EVIDENCE THE CHILD WOULD BE KILLED UPON RETURN TO EL SALVADOR.

The Second Department, reversing Family Court, determined that the motion for an order making the findings necessary for the child to petition for special immigrant juvenile status (SIJS) should have been granted: "Based upon our independent factual review, the record supports a finding that reunification of the child with the father is not a viable option due to parental neglect... . The record demonstrates that when the child lived with the mother and the father in El Salvador, the father would physically mistreat the mother in the presence of the child by hitting her with objects such as a book and shoes, causing her bruising, and that, when the child attempted to defend the mother, the father would hit the child. The child also averred in his affidavit that '[w]hen [the father] would get angry, which was often, he became very violent toward me, yelling at me and punching me,' and the mother indicated that she had to send the child to live with his maternal grandmother in El Salvador because she was afraid of what the father would do to the child. The record also demonstrates that the father had provided no financial support for the child since the child was 10 years old. Thus, the father's conduct, including acts of domestic violence perpetrated in the presence of the child, constituted neglect ... , which established that the child's reunification with the father is not viable ... . The record also does not support the Family Court's determination that the child failed to show that it would not be in his best interests to return to El Salvador. The child testified that gang members in El Salvador tried to recruit him, but he refused to join, that after his refusal to join, the gang members threatened and assaulted him multiple times, 'hurt me[ ] very bad,' 'left me on the streets after they beat me up,' and would have killed him on one occasion if not for a police patrol 'coming by that moment,' that he was afraid to go outside after the incident when he was almost killed, and that 'if I go back [to El Salvador] they will kill me' ...". ***Matter of Lucas F.V. (Jose N.F.)*, 2019 N.Y. Slip Op. 01079, Second Dept 2-13-19**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

PLAINTIFF, WHO WAS HIRED TO MONITOR ASBESTOS LEVELS AT THE WORK SITE, AND WHO FELL AT THE SITE, WAS ENGAGED IN AN ACTIVITY COVERED BY THE LABOR LAW.

The Second Department determined defendant's motion for summary judgment on the Labor Law §§ 240(1) and 200 causes of action should not have been granted. Plaintiff was hired to test the air for asbestos at the construction site. He fell when he stepped on a milk crate which was allegedly used by workers to access a scaffold. The court noted that the type of inspection work done by the plaintiff was covered by the Labor Law: "Whether inspection work falls within the purview of Labor Law §§ 240(1) and 241(6) 'must be determined on a case-by-case basis, depending on the context of the work' ... . Here, the plaintiff, an environmental technician tasked with ensuring that asbestos was properly removed from the school, was a 'covered' person under Labor Law §§ 240(1) and 241(6) because 'his inspections were essential, ongoing, and more than mere observation' ...". ***Channer v. ABAX Inc.*, 2019 N.Y. Slip Op. 01053, Second Dept 2-13-19**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

INJURY FROM A FALLING BLOCK AND CHAIN USED TO REPLACE A ROLL UP DOOR WAS COVERED UNDER LABOR LAW § 240(1) BUT NOT UNDER LABOR LAW § 241(6).

The Second Department, reversing Supreme Court, determined defendant was entitled to summary judgment on his Labor Law § 240(1) cause of action, but defendant was entitled to summary judgment on the Labor Law § 241(6) cause of action. "The plaintiff allege[d] that he was injured ... when a differential block and chain fell onto his head as he and his coworkers were preparing a hoisting apparatus to remove and replace a broken roll-up gate on the defendants' premises:" " '[T]he statutory requirement that workers be provided with proper protection extends not only to the hazards of building materials falling,' but to the hazards of defective parts of safety devices falling from an elevated level to the ground' ... . Here, the defendants are liable whether the plaintiff's coworker accidently dropped the differential while preparing to use the hoisting apparatus to remove the old roll-up gate, or the differential fell because it was inadequately secured ... . However, unlike Labor Law § 240, which includes repair work, Labor Law § 241(6) is limited to those areas in which construction, excavation, or demolition work is being performed (compare Labor Law § 240[1], with Labor Law § 241[6]). In this case, Labor Law § 241(6) is inapplicable because the plaintiff was not performing work in the context of construction, demolition, or excavation ...". ***Barrios v. 19-19 24th Ave. Co., LLC*, 2019 N.Y. Slip Op. 01046, Second Dept 2-13-19**

LABOR LAW-CONSTRUCTION LAW, CIVIL PROCEDURE, PERSONAL INJURY.

PLAINTIFF SLIPPED AND FELL ON ICE INSIDE THE BUILDING SHE WAS WORKING IN, THE JURY COULD RATIONALLY CONCLUDE THE ICE WAS THE RESULT OF NEGLIGENCE ON THE PART OF SOMEONE INVOLVED IN THE CONSTRUCTION PROJECT, THE MOTION TO SET ASIDE THE VERDICT AS BASED ON LEGALLY INSUFFICIENT EVIDENCE IN THIS LABOR LAW § 241(6) ACTION WAS PROPERLY DENIED.

The Second Department determined defendant's motion to set aside the verdict as based on legally insufficient evidence was properly denied in this Labor Law § 241(6) action. Plaintiff's job was removing asbestos from a building. After getting out of her asbestos suit in the decontamination room and walking in the interior of the building she slipped and fell on ice. The Second Department held that the jury could have rationally concluded someone participating in the construction project was negligent: "We agree with the Supreme Court's determination denying that branch of the defendant's motion pursuant to CPLR 4404(a) which was to set aside the jury verdict as based on legally insufficient evidence and for judgment as a matter of law. There was a valid line of reasoning and permissible inferences which could have led a rational jury to conclude that the negligence of some party to, or participant in, the construction project caused the plaintiff's injuries ... . The jury could have credited the plaintiff's trial testimony that she slipped on a large patch of ice on the floor of a building that did not have heating on a cold January day, and therefore, rationally conclude that 'someone within the chain of the construction project was negligent in not exercising reasonable care, or acting within a reasonable time, to prevent or remediate the hazard, and that plaintiff's slipping, falling and subsequent injury proximately resulted from such negligence' ...". ***Bocanegra v. Chest Realty Corp.*, 2019 N.Y. Slip Op. 01048, Second Dept 2-13-19**

LIMITED LIABILITY COMPANY LAW, CONTRACT LAW.

PLAINTIFF WAS A NONMEMBER PURCHASER OF A MEMBER'S INTEREST IN THE LIMITED LIABILITY COMPANY (LLC) AND THEREFORE COULD NOT BRING DERIVATIVE CAUSES OF ACTION ON BEHALF OF THE LLC.

The Second Department, reversing Supreme Court, determined plaintiff, who was a nonmember purchaser of a member's interest in the limited liability company (LLC), could not bring derivative causes of action on behalf of the LLC: "A '[m]ember' is a person who has been admitted as a member of a limited liability company in accordance with the terms and provisions of the Limited Liability Company Law and the limited liability company's operating agreement, and who has a membership interest in the limited liability company with the rights, obligations, preferences, and limitations specified under the Limited Liability Company Law and the operating agreement (Limited Liability Company Law § 102[q]). A '[m]embership interest' means 'a member's aggregate rights in a limited liability company, including, without limitation: (i) the member's right to a share of the profits and losses of the limited liability company; (ii) the member's right to receive distributions from the limited liability company; and (iii) the member's right to vote and participate in the management of the limited liability company' (Limited Liability Company Law § 102[r]). Here, the plaintiff does not dispute that she failed to obtain the consent of the nonselling members to be admitted as a member of the LLC when she acquired her membership interest. Paragraph 8 of the LLC's operating agreement provides that '[n]ew members may be admitted only upon the unanimous consent of the Members and upon compliance with the provisions of this agreement,' and paragraph 32(e) of the operating agreement provides that '[a] non-member purchaser of a member's interest cannot exercise any rights of a Member unless, by unanimous vote, the non-selling Members consent to him becoming a Member' (see Limited Liability Company Law § 602). Therefore, contrary to the Supreme Court's determination, the plaintiff, as a nonmember purchaser who had not been admitted as a member of the LLC, lacks standing to pursue derivative causes of action on behalf of the LLC ...". ***Kaminski v. Sirera*, 2019 N.Y. Slip Op. 01067, Second Dept 2-13-19**

PERSONAL INJURY.

NISSAN, AS THE LESSOR OF THE VEHICLE, WAS ENTITLED TO DISMISSAL OF THE COMPLAINT IN THIS TRAFFIC ACCIDENT CASE PURSUANT TO THE GRAVES AMENDMENT, THE COMPLAINT ALLEGED NEGLIGENT MAINTENANCE OR MECHANICAL MALFUNCTION, NISSAN DEFENDANTS DEMONSTRATED THEY DO NOT INSPECT, REPAIR, MAINTAIN OR SERVICE THE VEHICLES THEY LEASE.

The Second Department, reversing Supreme Court, determined Nissan's motion to dismiss the complaint in this traffic accident case should have been granted pursuant to the Graves Amendment: "Under the Graves Amendment, in order for recovery to be barred, the owner, or an affiliate of the owner, must be engaged in the trade or business of renting or leasing motor vehicles, and the owner, or its affiliate, must not be negligent ... . Here, the Nissan defendants demonstrated that they were the owners of the subject vehicle and were engaged in the business of renting or leasing motor vehicles... . Additionally, to the extent that the plaintiff's theory of negligent maintenance or mechanical malfunction was supported by factual allegations, the Nissan defendants established that the allegations were not facts at all through its submissions showing that the Nissan defendants never possess, inspect, repair, maintain, or service the vehicles they lease and that it was the sole responsibility of the lessee of the subject vehicle ... to maintain that vehicle ...". ***Cukoviq v. Iftikhar*, 2019 N.Y. Slip Op. 01057, Second Dept 2-13-19**

PERSONAL INJURY.

LOCK BOX ON THE OUTSIDE OF A BUILDING ON WHICH PLAINTIFF STRUCK HIS HEAD WAS OPEN AND OBVIOUS AND NOT INHERENTLY DANGEROUS.

The Second Department, reversing Supreme Court, determined that the key lock box on the outside of building, on which plaintiff struck his head, was open and obvious and not inherently dangerous: "The plaintiff alleges that ..., as he was walking out of the defendants' Wendy's restaurant, he turned right and struck his head on a black Fire Department key lock box that was affixed to the exterior of the red brick wall of the building. The plaintiff commenced this action against the defendants, alleging negligence in, among other things, the maintenance of their premises. In his pleadings, the plaintiff alleged that the presence and positioning of the lock box on the exterior wall constituted a dangerous condition. ... On their motion for summary judgment, the defendants made a prima facie showing of their entitlement to judgment as a matter of law by demonstrating that the subject condition was both open and obvious, and not inherently dangerous ... . In opposition, the plaintiff failed to raise a triable issue of fact ...". ***Erario v. Wen Shirley, LLC*, 2019 N.Y. Slip Op. 01059, Second Dept 2-13-19**

PERSONAL INJURY, MUNICIPAL LAW.

ABUTTING PROPERTY OWNER ENTITLED TO SMALL PROPERTY OWNER EXEMPTION FROM LIABILITY IN THIS SIDEWALK SLIP AND FALL CASE.

The Second Department, reversing Supreme Court in this sidewalk slip and fall case, determined defendant property owner (Binienda) was entitled to the small-property-owner exemption from liability under the Administrative Code of NYC: "In 2003, the New York City Council enacted section 7-210 of the Administrative Code of the City of New York to shift tort liability for injuries resulting from defective sidewalk conditions from the City to abutting property owners... . However, this liability-shifting provision does not apply to 'one-, two- or three-family residential real property that is (i) in whole or in part, owner occupied, and (ii) used exclusively for residential purposes' (Administrative Code § 7-210[b] ...). 'The purpose of the exception in the Code is to recognize the inappropriateness of exposing small-property owners in residence, who have limited resources, to exclusive liability with respect to sidewalk maintenance and repair' ... . Here, Binienda demonstrated, prima facie, that she was exempt from liability by establishing that the subject dwelling qualified for the small-property owner exemption ... . Binienda additionally established, prima facie, that she did not create the alleged sidewalk defect or make special use of the sidewalk and thus could not be held liable under common-law principles ...". ***Cosme v. City of New York*, 2019 N.Y. Slip Op. 01055, Second Dept 2-13-19**

PERSONAL INJURY, MUNICIPAL LAW, MARITIME LAW.

IN THESE MARITIME LAW ACTIONS STEMMING FROM A FATAL BOATING ACCIDENT, THE TOWN DID NOT DEMONSTRATE ITS ENTITLEMENT TO SUMMARY JUDGMENT, THE COMPLAINTS ALLEGED NEGLIGENT PLACEMENT OF BUOYS.

The Second Department, reversing Supreme Court in this boat-accident case, determined that the town was not entitled to summary judgment. Four boat passengers were killed and others were injured. The complaints alleged the town was negligent in the placement of buoys: "Maritime law, which is applicable in this case, recognizes a general theory of liability for negligence... . '[N]egligent conduct on the navigable waters that causes loss to another constitutes a maritime tort'... . Once the Town set a channel through the use of navigational aids, it had a duty to maintain those navigational aids in a reasonable and prudent manner ... . Upon applying maritime law, we conclude that the Town failed to establish its prima facie entitlement to judgment as a matter of law. Although the Town submitted evidence suggesting that the accident may have been at least partly caused by negligence on the part of the boat's operator, the Town failed to meet its prima facie burden of demonstrating the lack of any triable issues of fact regarding the Town's comparative fault based on its placement and maintenance of the buoys ...". ***Sugamele v. Town of Hempstead*, 2019 N.Y. Slip Op. 01118, Second Dept 2-13-19**

PERSONAL INJURY, VEHICLE AND TRAFFIC LAW, INSURANCE LAW, EMPLOYMENT LAW.

PLAINTIFF, A PASSENGER ON A MOTORCYCLE, WAS ENTITLED TO SUMMARY JUDGMENT AGAINST THE VAN DRIVER AND THE EMPLOYER OF THE VAN DRIVER WHO MADE A LEFT TURN INTO THE MOTORCYCLE'S PATH, THE GRAVES AMENDMENT MAY APPLY TO THE LESSOR OF THE VAN, PLAINTIFF DID NOT HAVE TO DEMONSTRATE SERIOUS INJURY AS SHE WAS NOT A COVERED PERSON UNDER THE NO-FAULT INSURANCE LAW.

The Second Department addressed several issues in this motorcycle-vehicle accident case. Plaintiff was a passenger on a motorcycle that collided with a van which attempted to make a left turn across the motorcycle's path. The court held: (1) plaintiff was entitled to summary judgment against the van driver who violated Vehicle and Traffic Law §§ 1146 and 1126 in making the turn; (2) the van driver's employer was vicariously liable because the driver was operating the van during the course of his employment, the employer leased the van for more than 30 days and therefore was the owner of the van under Vehicle and Traffic Law 388; (3) the Graves Amendment may insulate the lessor of the van from liability; (4) plaintiff

was not a covered person under the no-fault provisions of the Insurance Law and therefore did not have to demonstrate serious injury before bringing suit. ***Jung v. Glover*, 2019 N.Y. Slip Op. 01066, Second Dept 2-13-19**

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