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FIRST DEPARTMENT

CONTRACT LAW, REAL ESTATE.

COMPLAINT STATED CAUSES OF ACTION FOR BREACH OF REAL ESTATE BROKERAGE CONTRACT, QUANTUM MERUIT, UNJUST ENRICHMENT AND PROMISSORY ESTOPPEL, STATUTE OF FRAUDS DID NOT APPLY, COMPLAINT SHOULD NOT HAVE BEEN DISMISSED.

The First Department, reversing Supreme Court, determined that plaintiffs' complaint stated causes of action for breach of contract, quantum meruit, unjust enrichment and promissory estoppel. The contract between plaintiff, a real estate broker, and defendant, a real estate developer, gave plaintiff the exclusive right to broker sales of luxury apartments in return for a reduced commission rate. The complaint alleged defendant accepted plaintiff's services for two years but refused to pay after defendant received the benefits of the bargain: "Plaintiffs' failure to identify in the complaint the specific national real estate sales and marketing agency with which plaintiffs were going to partner, along with the terms of such partnership, is not fatal to plaintiffs' breach of contract claim. The alleged contract would imply a covenant of good faith and fair dealing pursuant to which plaintiffs would propose reasonable entities and defendants would reasonably accept or reject those proposals ... . As to the start and end date of the agreement, it can be inferred from the allegations in the complaint ... . With regard to the identity of the promisor, the complaint indicates that all negotiations and interactions were with defendant Kuzinez. ... The complaint should not have been dismissed pursuant to the statute of frauds. As an initial matter, defendants did not move to dismiss based on the statute of frauds and plaintiffs were not afforded the opportunity to address the issue ... . Moreover, the statute of frauds is inapplicable here as General Obligations Law § 5-701(a)(10) specifically exempts contracts to pay compensation to licensed real estate brokers, which is the type of contract alleged by plaintiffs. The declaratory judgment cause of action, which seeks a declaration that plaintiffs have the right to serve as exclusive broker for all residential sales for the subject development, should be reinstated based on our finding that the complaint sufficiently alleges a claim for breach of contract. Additionally, the quantum meruit, unjust enrichment, and promissory estoppel claims state causes of action. As to quantum meruit, the complaint alleges that plaintiffs provided services to defendants at a reduced cost or no cost, based on the promise of the oral agreement ... . As to promissory estoppel, the complaint alleges that defendants promised plaintiffs that they would serve as exclusive broker and that, in reasonable reliance on that promise, plaintiffs agreed, among other things, to substantially reduced commissions ...". ***Elhanani v. Kuzinez*, 2019 N.Y. Slip Op. 04042, First Dept 5-23-19**

CRIMINAL LAW, CIVIL PROCEDURE, DEBTOR-CREDITOR. LIEN LAW.

NEITHER THE VICTIM WITNESS PROTECTION ACT NOR THE MANDATORY VICTIM RESTITUTION ACT PROVIDES A PRIVATE RIGHT OF ACTION FOR A JUDGMENT BASED SOLELY UPON RESTITUTION ORDERED IN A CRIMINAL CASE.

The First Department, in a full-fledged opinion by Justice Acosta, determined that neither the Victim Witness Protection Act (VWPA) nor the Mandatory Victim Restitution Act (MVRA) provided for a private right of action for a judgment based solely upon restitution ordered in a criminal case: "[T]he VWPA makes civil remedies available to collect restitution but does not make restitution a civil judgment that can simply be enforced in a private suit ... . Rather, a victim may pursue a civil action for damages in connection with the injuries that resulted in a restitution order, and the restitution order may provide assistance in proving liability, but the petitioner may not rely entirely on the restitution order and the amount ordered in the criminal action. Thus, the petitioner can separately plead and prove liability and damages under either a statutory or a common-law cause of action if the restitution order fails to satisfy the victim ... . Some cases may support the conclusion that under the MVRA, a victim who has obtained a lien on property based on a restitution order may enforce that lien in a special court proceeding ... . However, these cases provide no support for the conclusion that a victim may enforce the abstract judgment itself without obtaining a lien, especially given that this would contradict the language of 18 USC § 3664(m), explicitly requiring a lien. Petitioner has obtained an abstract of judgment, but never recorded it as a lien on defendant's property or brought an action to enforce it. ... [T]he MVRA does not provide a cause of action for a private victim to enforce an abstract judgment on a restitution order, which is exactly what petitioner is seeking to do. Therefore, petitioner has no standing under the MVRA." ***Matter of Mikhlov v. Festinger*, 2019 N.Y. Slip Op. 04046, First Dept 5-23-19**

MUNICIPAL LAW, CIVIL RIGHTS LAW, CIVIL PROCEDURE, EMPLOYMENT LAW.

THE CITY AND DEFENDANT CORRECTION OFFICER ARE NOT UNITED IN INTEREST BECAUSE THE CITY IS NOT VICARIOUSLY LIABLE FOR ITS EMPLOYEES' VIOLATION OF 42 U.S.C. § 1983, THEREFORE THE RELATION-BACK DOCTRINE CAN NOT BE RELIED UPON TO SUBSTITUTE THE CORRECTION OFFICER FOR "JANE DOE" AFTER THE STATUTE OF LIMITATIONS HAS RUN.

The First Department, reversing Supreme Court, determined that the relation-back doctrine could not be relied upon to substitute the name of a correction officer for "Jane Doe" in the complaint in this 42 U.S.C. § 1983 action. The correction officer and the city are not "united in interest." The city cannot be held vicariously liable for its employees' violation of 42 U.S.C. § 1983: "In this action alleging a claim of deliberate indifference under the Eighth Amendment and 42 USC § 1983, plaintiff did not serve the Jane Doe correction officer defendant before the statute of limitations ran. Although the claims against the intended defendant arise out of the same transaction as the claims alleged in the complaint, plaintiff cannot rely on the relation-back doctrine. The correction officer and defendant City are not 'united in interest' because 'the City cannot be held vicariously liable for its employees' violations of 42 USC § 1983' ... . Nor can plaintiff's more than two-year delay in seeking to add the new defendant as a party after learning her identity be characterized as a mistake for relation-back purposes ... . Plaintiff's reliance on CPLR 1024 is unavailing, as he does not demonstrate diligence in seeking to identify the unknown correction officer prior to the expiration of the statute of limitations ...". ***Burbano v. New York City*, 2019 N.Y. Slip Op. 03937, First Dept 5-21-19**

MUNICIPAL LAW, LANDLORD-TENANT.

PETITIONER, IN THIS JUDICIARY LAW 509 PROCEEDING, CAN NOT COMPEL THE COMMISSIONER OF JURORS TO REVEAL THE RESPONDENT'S ADDRESS AND DATES OF JURY SERVICE IN ORDER TO IMPEACH RESPONDENT'S TESTIMONY THAT HE RESIDED IN PETITIONER'S BUILDING IN 2008 AND 2009 AND WAS THEREFORE ENTITLED TO LOFT LAW PROTECTION UNDER THE MULTIPLE DWELLING LAW.

The First Department, over a dissent, determined the petitioner in this Judiciary Law § 509(a) proceeding was not entitled to compel the Commissioner of Jurors to disclose respondent's (Swezey's) home and mailing address, as well as the dates of Swezey's jury service. Petitioner was seeking to disprove Swezey's testimony that he resided in a building owned by petitioner in 2008 and 2009 and was therefore entitled to Loft Law protection under the Multiple Dwelling Law: "Judiciary Law § 509(a) requires that juror 'questionnaires and records shall be considered confidential and shall not be disclosed except to the county jury board or as permitted by the appellate division.' The purpose of the statute is to 'provide a cloak of confidentiality for the information which the [juror] questionnaires contain' and to shield all information from disclosure in order to protect a juror's privacy interest and/or safety (Matter of Newsday, Inc. v. Sise , 71 NY2d 146, 152 [1987] ...). This blanket rule bars an individual from seeking any juror records unless the individual 'present[s] some factual predicate which would make it reasonably likely that the records would provide relevant evidence' (People v. Guzman, 60 NY2d 403, 415 [1983] ...). Here, petitioner failed to provide the necessary factual predicate to obtain these confidential records. Petitioner's sole reason for requesting Swezey's juror records is to impeach his testimony ... . However, disclosure for the purpose of impairing someone's credibility has been expressly rejected by the Court of Appeals in People v. Guzman." ***Matter of A. Trenkmann Estate, Inc. v. Tingling*, 2019 N.Y. Slip Op. 03923, First Dept 5-21-19**

MUNICIPAL LAW, NEGLIGENCE.

PETITIONER'S MOTION TO FILE A LATE NOTICE OF CLAIM SHOULD HAVE BEEN GRANTED, THE CITY HAD TIMELY NOTICE OF THE FACTS UNDERLYING PETITIONER'S INJURIES, THE FACTS SUPPORTING THE CITY'S NEGLIGENCE COULD HAVE BEEN DISCOVERED DURING THE INVESTIGATION WITH A MODICUM OF EFFORT, CITY DID NOT DEMONSTRATE PREJUDICE RELATING TO THE DELAY, PETITIONER'S FAILURE TO OFFER A REASONABLE EXCUSE FOR THE DELAY WAS NOT FATAL.

The First Department, reversing Supreme Court, determined that petitioner's motion to serve a late notice of claim should have been granted. Petitioner, a medical technician, alleged she was struck by an inmate in the custody of the Department of Correction (DOC) while the inmate was being treated at Bellevue Hospital. The petitioner reported and discussed the incident with a DOC captain (Obigumeda) on the day it happened and sought to file the notice of claim seven months late: "Supreme Court presumably agreed with respondent's argument that it lacked notice because petitioner never specified that she had told Obigumeda the manner in which DOC was negligent (namely, by failing to ensure that a correction officer was present when she spoke with the inmate). We disagree. To the extent that petitioner did not establish actual notice because she did not specify that her description of the assault included a recitation of who was in the room, 'municipal authorities have an obligation to obtain the missing information if that can be done with a modicum of effort' ... . Here, negligence is the only theory of liability that could be implied by petitioner's conversations with Obigumeda and, in any event, he could have determined who was in the room during the course of his investigation with 'a modicum of effort.' To hold otherwise would turn the statute into a sword, contrary to its remedial purpose ... . [R]espondent never provided Supreme Court with any evidence to substantiate that it was prejudiced by the mere passage of time. Instead, respondent made '[g]eneric

arguments and inferences' which cannot establish substantial prejudice 'in the absence of facts in the record to support such a finding' ... . While petitioner did not demonstrate a reasonable excuse for service of her late notice of claim, the lack of excuse is not fatal here ...". ***Matter of Rodriguez v. City of New York*, 2019 N.Y. Slip Op. 03921, First Dept 5-21-19**

PERSONAL INJURY, EMPLOYMENT LAW, CONTRACT LAW, AGENCY.

DEFENDANT RESTAURANT CAN BE LIABLE FOR THE NEGLIGENCE OF THE VALET PARKING SERVICE WITH WHICH IT CONTRACTED IF THE RESTAURANT HAD THE ABILITY AND OPPORTUNITY TO CONTROL THE CONDUCT OF THE CONTRACTOR, IF ESPINAL EXCEPTIONS APPLY, AND UNDER AN AGENCY THEORY, THE RESTAURANT'S MOTION FOR SUMMARY JUDGMENT WAS PROPERLY DENIED.

The First Department determined the restaurant's (Dolphin's) motion for summary judgment in this action alleging negligence on the part of a valet parking service (APV) with which the restaurant had contracted was properly denied.: "A restaurant providing valet parking services can be held liable for the negligence of the service whose attendants are alleged to have caused an accident to a third party. This is the case even where the service is an independent contractor with which the restaurant has contracted ... . This duty arises [under Espinal] when there is an ability and opportunity to control the conduct of the restaurant's contractors and an awareness of the need to do so. Thus, Dolphin cannot assert that it signed a contract with the valet parking service and then 'covered its eyes with a blindfold'; rather, Dolphin was required to select a company 'with, at the minimum, both appropriate insurance and competent drivers' … . Defendant restaurant was able to decline to enter into any contract for valet services it felt insufficient, and therefore in the best position to protect against the risk of harm. Dolphin similarly failed to demonstrate that it did not create an unreasonable risk of harm to others or that APV entirely displaced its duty to maintain the valet parking area safely ... . Indeed, the evidence showed, inter alia, that the restaurant and the valet service communicated on a daily basis to determine proper staffing. The restaurant, further, obtained parking spots for the valet service to utilize on its behalf. The restaurant informed the valet service in advance of functions so that staffing could be arranged. The parties' agreement similarly provided that service was provided 'as requested' by the restaurant, and that it was the restaurant's obligation to provide the schedule for each week. Dolphin may also be liable under the doctrine of ostensible agency or apparent authority and thus estopped from denying liability for an entity it held out as its agent ...". ***Evans v. Norecaj*, 2019 N.Y. Slip Op. 04029, First Dept 5-23-19**

NUISANCE.

NUISANCE COUNTERCLAIM BASED UPON PLAINTIFF'S PLAYING PIANO IN HER CONDOMINIUM SHOULD HAVE BEEN DISMISSED, NO SHOWING THE SOUND LEVEL WAS UNREASONABLE.

The First Department, reversing Supreme Court, determined that plaintiff's motion for summary judgment dismissing defendant's (Harlan's) nuisance counterclaim should have been granted. The nuisance counterclaim was based upon plaintiff's playing piano in her condominium: "Plaintiff made a prima facie showing that her piano playing and piano lessons were reasonable by averring that these activities usually occurred during business hours on weekdays, they usually totaled less than 4½ hours a day, and her sound technician concluded that the noise emanating from her piano was within acceptable boundaries ... . Harlan failed to raise a triable issue of fact in opposition because she did not submit any evidence showing that the level of sound that entered her apartment from plaintiff's piano was unreasonable. Harlan's reliance on the recordings by plaintiff's sound technician is unavailing; the expert did not take any volume measurements in Harlan's apartment and the recording taken in the condominium stairwell did not exceed that of a normal conversation." ***Leon v. Harlan*, 2019 N.Y. Slip Op. 04045, First Dept 5-23-19**

SECOND DEPARTMENT

ACCOUNT STATED.

PLAINTIFF ENTITLED TO RECOVER THE FULL AMOUNT OF THE INVOICE UNDER AN ACCOUNT STATED THEORY.

The Second Department, reversing (modifying) Supreme Court, determined that plaintiff was entitled to full payment for beer delivered to defendants under an account stated theory: "At trial, the plaintiff established that the defendants received the first invoice and made partial payment on it. While the defendants claim that the number of cases of beer and manner of shipping did not conform with their order, there is no evidence in the record that they raised that objection prior to the commencement of this lawsuit, or that they ever disputed the invoice. Accordingly, the evidence presented at trial warranted a determination in the plaintiff's favor in the principal sum of $12,345 on the cause of action to recover on an account stated based on the invoice ...". ***Stardom Brands, LLC v. S.K.I. Wholesale Beer Corp.*, 2019 N.Y. Slip Op. 04018, Second Dept 5-22-19**

ANIMAL LAW.

BARKING AND STRAINING AT THE LEASH CONSTITUTE NORMAL CANINE BEHAVIOR AND DID NOT SERVE TO MAKE DEFENDANTS AWARE OF THE DOG'S ALLEGED VICIOUS PROPENSITIES, DEFENDANTS' MOTION FOR SUMMARY JUDGMENT IN THIS DOG BITE CASE PROPERLY GRANTED.

The Second Department determined defendants' motion for summary judgment in this dog bite case was properly granted. The fact that defendants were aware the dog had barked at plaintiff and her dog and strained at his leash did not demonstrate defendants were aware of defendants' dog's vicious propensities: "Here, the ... defendants ... established their prima facie entitlement to judgment as a matter of law by demonstrating that the dog did not have vicious propensities and, in any event, that they neither knew nor should have known that the dog had vicious propensities ... . In opposition, the plaintiff failed to raise a triable issue of fact regarding whether the dog had vicious propensities. Contrary to the plaintiff's contention, her deposition testimony that the dog barked at her and her dog and that the dog strained its leash toward her dog was insufficient to raise a triable issue of fact as to whether it had vicious propensities ... . Moreover, regardless of whether the Beach Haven defendants were aware of the behavior the plaintiff described in her testimony, it was insufficient to raise a triable issue of fact with respect to the Beach Haven defendants' knowledge of the dog's allegedly vicious propensities. The dog's actions in barking at another dog and pulling its leash are 'consistent with normal canine behavior' ...". ***Bukhtiyarova v. Cohen*, 2019 N.Y. Slip Op. 03945, Second Dept 5-22-19**

CIVIL PROCEDURE, CORPORATION LAW.

QUEENS COUNTY ACTION SHOULD NOT HAVE BEEN DISMISSED ON THE GROUND IT WAS SUBSTANTIALLY THE SAME AS THE NASSAU COUNTY ACTION, A CORPORATION IS NOT THE SAME PARTY AS A PRINCIPAL OF THE CORPORATION WITHOUT A SHOWING THE CORPORATE VEIL SHOULD BE PIERCED.

The Second Department, reversing Supreme Court, determined the Queens County action did not involve the same parties as the Nassau County action and therefore should not have been dismissed pursuant to CPLR 3211(a)(4). A corporation is not the same party as an individual principal of the corporation and should not be so considered in the absence of a demonstration the corporate veil should be pierced:" 'Pursuant to CPLR 3211(a)(4), a court has broad discretion in determining whether an action should be dismissed based upon another pending action where there is a substantial identity of the parties, the two actions are sufficiently similar, and the relief sought is substantially the same' ... . '[W]hile a complete identity of parties is not a necessity for dismissal under CPLR 3211(a)(4), there must be a substantial' identity of parties, which generally is present when at least one plaintiff and one defendant is common in each action' ... . Here, there is no common plaintiff in the Nassau County action and the instant action. Although Queens NY Realty and the plaintiff share the same owner, who was added as a third-party plaintiff in the Nassau County action, ' [i]ndividual principals of a corporation are legally distinguishable from the corporation itself' and a court may not find an identity of parties by, in effect, piercing the corporate veil without a request that this be done and, even more importantly, any demonstration by defendant that such a result is warranted' ... . Furthermore, the relief sought by the plaintiff in this action is not substantially the same as the relief sought by Queens NY Realty in the Nassau County action ...". ***Mason ESC, LLC v. Michael Anthony Contr. Corp.*, 2019 N.Y. Slip Op. 03962, Second Dept 5-22-19**

CRIMINAL LAW, EVIDENCE.

911 CALL MADE FIVE MINUTES AFTER THE ASSAULT PROPERLY ADMITTED AS AN EXCITED UTTERANCE, AN EXCEPTION TO THE HEARSAY RULE.

The Second Department determined the victim's 911 call was properly admitted as an excited utterance, even though the call was made about five minutes after the assault with a butcher knife: " 'A spontaneous declaration or excited utterance—made contemporaneously or immediately after a startling event—which asserts the circumstances of that occasion as observed by the declarant is an exception to the prohibition on hearsay' ... . The determination of admissibility of a statement as an excited utterance is entrusted in the first instance to the trial court, which 'must assess not only the nature of the startling event and the amount of time which has elapsed between the occurrence and the statement, but also the activities of the declarant in the interim to ascertain if there was significant opportunity to deviate from the truth' ... . Here, the evidence demonstrated that the 911 calls qualified as excited utterances. First, the nature of the attack on the complainant was the type of startling event that would cause 'physical shock or trauma' ... . Further, the 911 calls were made only approximately five minutes after the event, and in those intervening minutes, the complainant ran across the street from the scene of the incident to his apartment to bandage his wound. Under these circumstances, this short interval of time did not 'detract[ ] from [the] spontaneity' of the statements ...". ***People v. Jaber*, 2019 N.Y. Slip Op. 03988, Second Dept 5-22-19**

DEBTOR-CREDITOR, CONTRACT LAW, CONVERSION, REAL PROPERTY, CIVIL PROCEDURE, FORECLOSURE.

UNJUST ENRICHMENT CAUSE OF ACTION SHOULD NOT HAVE BEEN DISMISSED, CONVERSION DOES NOT LIE WHEN PROPERTY INVOLVED IS REAL PROPERTY.

The Second Department, reversing (modifying) Supreme Court, determined plaintiffs' unjust enrichment cause of action should not have been dismissed and noted that a conversion cause of action does not lie where the property involved is real property. The facts of the case are too complex to fairly summarize here. In a nutshell the plaintiffs, to avoid paying a broker's fee, arranged to have defendants' deceased father purchase real property on their behalf. Defendants (the Passalacquas) took out a mortgage on the property (Wells Fargo mortgage), in violation of the agreement defendants' father had with plaintiffs, which plaintiffs paid off when they sold the property. Plaintiffs sought to recover the amount of the mortgage from the Passalacquas under unjust enrichment and conversion theories: "Here, the amended complaint sufficiently alleges that the Passalacquas were unjustly enriched, at the plaintiffs' expense, by the plaintiffs' payment of the Passalacquas' debt to Wells Fargo, and that it would be against equity and good conscience to permit the Passalacquas to retain what is sought to be recovered ... . To the extent that the Passalacquas contend that they used proceeds of the Wells Fargo mortgage to benefit the premises, that contention involves factual issues not properly resolved on a motion to dismiss the complaint pursuant to CPLR 3211(a)(7) ... . Contrary to the determination of the Supreme Court, the plaintiffs do not have an adequate remedy at law by suing to enforce the consolidated note ... . Further, even if the plaintiffs are entitled to assignment of the consolidated note from Wells Fargo, obtaining such an assignment would require an action in equity ... . The unjust enrichment cause of action is also not barred by the existence of the plaintiffs' contract of sale with the Passalacquas' late father ... . Contrary to the Passalacquas' contention, advanced as an alternative ground for affirmance ... , the unjust enrichment cause of action was timely asserted. The parties agree that the unjust enrichment cause of action is subject to a six-year statute of limitations (see CPLR 213[1]). Such a cause of action accrues 'upon the occurrence of the alleged wrongful act giving rise to the duty of restitution' ... . Here, the amended complaint alleges that the plaintiffs' payment to Wells Fargo was necessitated by the Passalacquas' default in making payments on the consolidated note, which resulted in Wells Fargo's acceleration of the debt and the threat of a foreclosure action. Accordingly, this cause of action accrued, at the earliest, in late 2010, when the Passalacquas stopped making payments on the Wells Fargo consolidated mortgage." ***Mannino v. Passalacqua*, 2019 N.Y. Slip Op. 03961, Second Dept 5-22-19**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

PLAINTIFF INJURED HIS NECK ATTEMPTING TO THROW A HEAVY HOSE TO AN AREA 15 TO 20 FEET ABOVE HIM, THE INJURY WAS NOT CAUSED BY AN ELEVATION-RELATED RISK COVERED BY LABOR LAW § 240(1).

The Second Department determined defendants' motion for summary judgment on the Labor Law § 240(1) cause of action was properly granted. Plaintiff injured his neck attempting to throw a hose to an area 15 to 20 feet above him: "Labor Law § 240(1) imposes strict liability on building owners and contractors for failure to provide proper protection against elevation-related hazards ... . At the time that the plaintiff was injured, he was standing on the ground level, moving a 100-pound hose. Although the accident tangentially involved elevation, it was not caused by any elevation-related risk contemplated by the statute ...". ***Clark v. FC Yonkers Assoc., LLC*, 2019 N.Y. Slip Op. 03948, Second Dept 5-22-10**

PERSONAL INJURY.

DEFENDANT DID NOT DEMONSTRATE THE AREA WHERE PLAINTIFF SLIPPED AND FELL ON ICE WAS CLEANED OR INSPECTED DURING THE THREE DAYS PRIOR TO THE FALL, THEREFORE DEFENDANT DID NOT DEMONSTRATE IT LACKED CONSTRUCTIVE NOTICE OF THE ICY CONDITION, DEFENDANT'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined defendant school district did not demonstrate that it did not have constructive notice of the icy condition in this slip and fall case. Although the district demonstrated that it removed snow and slush from the area as late as January 6, it did not demonstrate that it inspected or cleaned the area between January 6 and January 9 when plaintiff fell: "Here, the School District failed to meet its initial burden as the movant. The evidence submitted by the School District demonstrated that snow fell on January 2 and 3, 2014. On January 2, 3, and 4, 2014, the School District removed snow and ice from all of its property, including the subject elementary school. On January 6, 2014, between 5:00 a.m. and 7:00 a.m., the School District removed slush from all of its property. However, no evidence was submitted as to what the accident site looked like after the School District performed work on the premises on January 6, 2014, and what, if any, cleaning procedures or inspection procedures were performed from 7:00 a.m. on January 6, 2014, until the time of the plaintiff's accident on January 9, 2014. Accordingly, the School District failed to establish, prima facie, that it did not have constructive notice of the alleged ice condition that caused the plaintiff to fall ...". ***Muzio v. Levittown Union Free Sch. Dist.*, 2019 N.Y. Slip Op. 03974, Second Dept 5-22-19**

PERSONAL INJURY, EVIDENCE, CIVIL PROCEDURE.

PLAINTIFF HAD NO MEMORY OF THE ACCIDENT AND THE JURY WAS GIVEN THE *NOSEWORTHY* CHARGE, DEFENDANT'S MOTION TO SET ASIDE THE VERDICT IN THIS TRAFFIC ACCIDENT CASE PROPERLY DENIED.

The Second Department determined the motion to set aside the verdict in this traffic accident case was properly denied. Plaintiff had no memory of the accident and testified about his habit or routine practice of riding his bicycle home from work. The court had given the *Noseworthy* jury instruction: "The plaintiff testified that, while he did not recall the accident, he did recall leaving work and getting on his bicycle with the intent of taking the route he usually took home, which route he detailed, explaining that he took the same route every day, except for when he took the bus. While that route would have had the plaintiff traveling with traffic at the time of the accident, the defendant testified, inter alia, that the plaintiff was traveling against traffic ... . The jury could have credited the plaintiff's testimony as to his habit or routine practice, as to which the plaintiff submitted sufficient evidence 'to allow the inference of its persistence' at the time of this accident ... , while also making reasonable inferences based on the defendant's own testimony that, inter alia, the defendant failed to see that which through proper use of the driver's senses she should have seen, for which the defendant could be found liable even if the plaintiff, as the defendant here argues, could not establish that he obeyed all the rules of the road ...". ***Ortega v. Ting*, 2019 N.Y. Slip Op. 03977, Second Dept 5-22-19**

PERSONAL INJURY, LANDLORD-TENANT.

LESSEE RESPONSIBLE FOR MAINTAINING THE LAUNDRY ROOM COULD BE LIABLE FOR INJURY CAUSED BY A DEFECTIVE WASHING MACHINE, LESSEE DID NOT ELIMINATE QUESTION OF FACT WHETHER IT HAD CONSTRUCTIVE NOTICE OF THE DEFECT, DISSENT.

The Second Department, reversing Supreme Court, over a dissent, determined that defendant Coinmach, which leased the laundry room, was not entitled to summary judgment in this personal injury case. Plaintiff alleged the soap tray on the washing machine she was using came all the way out of the machine when she pulled it open, causing her to fall backward from an elevated step in front of the machine. The Second Department determined Coinmach, the lessee of the laundry room, could be held liable because it was responsible for maintaining the laundry room. The court further held that Coinmach did not eliminate questions of fact concerning its constructive notice of the defect which caused the tray to pull out of the machine, because there was no evidence when the machine was last inspected: "Coinmach was the lessee of the laundry room with 'the sole and exclusive occupancy, possession and control' for a term of seven years. In return, Coinmach agreed to make monthly rent payments. A tenant has a common-law duty to keep the premises it occupies in a reasonably safe condition, even when the landlord has explicitly agreed in the lease to maintain the premises ... . Coinmach failed to make a prima facie showing that it did not have constructive notice that the soap tray was broken. Coinmach's area vice president testified at his deposition that Coinmach did not perform any routine maintenance on the machines, which were serviced whenever Coinmach received a service call requesting repairs. The area vice president testified that at each such service call, the technician would perform a 'touch and feel test' on each machine, which would include opening the soap tray to make sure it was secure. However, there is no evidence in the record as to the date of the last service call, and therefore no evidence as to when Coinmach last inspected the subject soap tray before the injured plaintiff's accident ...". ***Gatto v. Coinmach Corp.*, 2019 N.Y. Slip Op. 03956, Second Dept 5-22-19**

PERSONAL INJURY, VEHICLE AND TRAFFIC LAW, EVIDENCE, CIVIL PROCEDURE.

DEFENDANT DRIVER ATTEMPTED TO RAISE A FEIGNED FACTUAL ISSUE IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT BY CONTRADICTING A STATEMENT ATTRIBUTED TO DEFENDANT IN THE POLICE REPORT, PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT IN THIS INTERSECTION TRAFFIC ACCIDENT CASE SHOULD HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined plaintiffs' motion for summary judgment in this intersection traffic accident case should have been granted. Defendant driver (Karen) made a statement included in the police report indicating she did not see plaintiffs' motorcycle before the accident. In response to plaintiffs' motion for summary judgment defendant driver (Karen) averred that she came to a stop at the stop sign, pulled out into the intersection and then saw the motorcycle moving "extremely fast." The Second Department held that defendant had raised a feigned factual issue. The court also noted that, although the motion for summary judgment was made before discovery was complete, defendants did not show that additional discovery would lead to relevant evidence: "In support of their motion, the plaintiffs submitted, among other things, affidavits from the injured plaintiff and a witness, Shahiem Smith, who observed the collision. According to those affidavits, Karen drove ... into the intersection without yielding the right-of-way to the injured plaintiff's motorcycle in violation of Vehicle and Traffic Law § 1142(a) and struck the motorcycle as it was lawfully proceeding through the intersection ... . 'A violation of the Vehicle and Traffic Law constitutes negligence as a matter of law' ... . Moreover, the plaintiffs also submitted a copy of a police accident report which contained Karen's statement that she did not see the injured plaintiff. Therefore, the plaintiffs established their prima facie entitlement to judgment as a matter of law on the issue of liability ...". ***Kerolle v. Nicholson*, 2019 N.Y. Slip Op. 03959, Second Dept 5-22-19**

REAL ESTATE, CONTRACT LAW, NEGLIGENCE.

DEFENDANT-SELLERS NOT LIABLE FOR MOLD AND MICE IN HOUSE SOLD TO PLAINTIFFS, UNDER THE MERGER DOCTRINE NO PROVISION OF THE CONTRACT SURVIVED THE DELIVERY OF THE DEED, THE DOCTRINE OF CAVEAT EMPTOR APPLIED, NO DUTY OF CARE OWED TO THE PLAINTIFFS OVER AND ABOVE THE CONTRACT PROVISIONS, THE PRIVITY ELEMENT OF NEGLIGENT MISREPRESENTATION WAS ABSENT.

The Second Department determined the defendant-sellers were not liable under breach of contract or negligence theories for the presence of mold and mice in a house sold to plaintiffs: "The contract of sale contained language providing that, unless expressly stated, no covenant, warranty, or representation in the contract survived closing. A rider to the contract stated that the defendants were not aware of any mold or vermin infestation in the house. Prior to the closing, the plaintiffs conducted a home inspection which revealed, among other things, the presence of water staining and evidence of water infiltration on the interior of the house. The home inspection report stated that a mold evaluation was beyond the scope of the inspection and recommended that if the plaintiffs were concerned about potential mold issues, they should call a professional mold abatement company to perform an inspection. The report also stated that the need for some periodic general pest control should be anticipated. The plaintiffs did not undertake a mold inspection. * * * ... [O]nce title to the property closed and the deed was delivered, 'any claims the plaintiff[s] might have had arising from the contract of sale were extinguished by the doctrine of merger' since there was no 'clear intent evidenced by the parties that [the relevant] provision of the contract of sale [would] survive the delivery of the deed'. ... Furthermore, 'New York adheres to the doctrine of caveat emptor and imposes no duty on the seller or the seller's agent to disclose any information concerning the premises when the parties deal at arm's length, unless there is some conduct on the part of the seller or the seller's agent which constitutes active concealment' ... . A simple breach of contract is not to be considered a tort unless a legal duty independent of the contract itself has been violated ... . 'A claim for negligent misrepresentation requires the plaintiff[s] to demonstrate (1) the existence of a special or privity-like relationship imposing a duty on the defendant[s] to impart correct information to the plaintiff[s]; (2) that the information was incorrect; and (3) reasonable reliance on the information' ... . Here, the defendants demonstrated that there was no special or privity-like relationship between themselves and the plaintiffs in this arm's length transaction ...". ***Rosner v. Bankers Std. Ins. Co.*, 2019 N.Y. Slip Op. 04015, Second Dept 5-22-19**

THIRD DEPARTMENT

CRIMINAL LAW.

THE SUPERIOR COURT INFORMATION TO WHICH DEFENDANT PLED GUILTY WAS JURISDICTIONALLY DEFECTIVE BECAUSE IT DID NOT INCLUDE AN OFFENSE CHARGED IN THE FELONY COMPLAINT OR A LESSER INCLUDED OFFENSE.

The Third Department, reversing defendant's conviction, determined the Superior Court Information (SCI) to which defendant pled guilty was jurisdictionally defective because it did not include an offense that was charged in the felony complaint or a lesser included offense: "[T]he waiver of indictment and SCI are jurisdictionally defective because they did not charge an 'offense for which the defendant was held for action of a grand jury' (CPL 195.20 ...). Pursuant to CPL 195.20, a waiver of indictment must contain 'each offense to be charged in the [SCI]' which 'may include any offense for which the defendant was held for action of a grand jury and any offense or offenses properly joinable.' To that end, 'a defendant is held for the action of a [g]rand [j]ury on both the offense charged in the felony complaint as well as its lesser included offenses' ... , because, '[f]or purposes of waiver of indictment, a charge that is a lesser included offense of a crime charged in the felony complaint is viewed as the 'same offense' and may be substituted for the original charge in a waiver of indictment and SCI'... . Accordingly, 'a defendant may waive indictment and plead guilty to an SCI that names a different offense from that charged in the felony complaint only when the crime named in the SCI is a lesser included offense of the original charge' ... . Inasmuch as it is possible to commit the crime charged in the felony complaint — possession of a loaded weapon — without committing the crime charged in the SCI — possession with intent to use the weapon unlawfully — the crime charged in the SCI is not a lesser included offense of the former and the SCI could not serve as a proper jurisdictional predicate for defendant's guilty plea ...". ***People v. Diego*, 2019 N.Y. Slip Op. 04054, Third Dept 5-22-19**

CRIMINAL LAW.

SENTENCING COURT MUST MAKE A THRESHOLD DETERMINATION WHETHER DEFENDANT IS ELIGIBLE FOR YOUTHFUL OFFENDER STATUS IN THIS FIRST DEGREE RAPE CASE, SENTENCE VACATED.

The Third Department vacated defendant's sentence for rape first degree and remitted the matter for a determination of defendant's eligibility for youthful offender status: "[A] 'youth' is defined as 'a person charged with a crime alleged to have been committed when he [or she] was at least [16] years old and less than [19] years old' (CPL 720.10 [1]), and an 'eligible youth' is 'a youth who is eligible to be found a youthful offender' (CPL 720.10 [2]). 'Every youth is so eligible' (CPL 720.10 [2]) — subject to certain statutory exceptions including, as pertinent here, a conviction for 'rape in the first degree . . ., except as provided in [CPL 720.10 (3)]' ... . To that end, CPL 720.10 (3) provides, in relevant part, that 'a youth who has been

convicted of . . . rape in the first degree . . . is an eligible youth if the court determines that one or more [statutory] factors exist,' including 'mitigating circumstances that bear directly upon the manner in which the crime was committed' ... . Defendant was 17 years old at the time of the underlying offense and, despite his conviction of rape in the first degree, he was not statutorily precluded from being found to be an eligible youth (see CPL 720.10 [3]). Where, as here, a defendant has been convicted of an enumerated sex offense ... , the sentencing court, 'in order to fulfill its responsibility under CPL 720.20 (1) to make a youthful offender determination for every eligible youth, . . . must make the threshold determination as to whether the defendant is an eligible youth by considering the factors set forth in CPL 720.10 (3)' ... — 'even where the defendant has failed to ask to be treated as a youthful offender, or has purported to waive his or her right to make such a request' pursuant to a plea bargain' ...". ***People v. Robertucci*, 2019 N.Y. Slip Op. 04057, Third Dept 5-23-19**

CRIMINAL LAW, SEX OFFENDER REGISTRATION ACT (SORA).

THE TERM 'AUTOMATIC OVERRIDE" DOES NOT MANDATE THAT AN OFFENDER WITH A PRIOR SEX-CRIME FELONY BE CLASSIFIED A LEVEL THREE SEX OFFENDER, BOTH COUNTY COURT AND DEFENSE COUNSEL MISUNDERSTOOD THE TERM.

The Third Department, reversing County Court, determined that both County Court and defense counsel misunderstood the meaning of "automatic override" in the context of whether an offender who has a prior felony sex-crime conviction mandates a level three classification: "[T]he use of the words 'automatically' or 'automatic override' does not mandate that a particular individual be classified as a risk level three sex offender; rather, the 'automatic' nature of the override results in a presumptive risk level three classification — a classification from which a court indeed may depart based upon the evidence presented ... . Thus, 'the application of the override for a prior felony sex crime is presumptive, not mandatory or automatic' ... , and '[t]reating the presumptive override as mandatory is a ground for reversal' ... . Defense counsel's misunderstanding of the override — as evidenced by his erroneous statement that defendant's prior felony conviction for a sex crime resulted in 'an automatic override' to a risk level three classification — deprived defendant of the opportunity to present factors in support of a downward departure; similarly, County Court's misapplication of the override — premised upon the court's mistaken belief that 'a mandatory override to a risk level [three] status' was 'required' — foreclosed any inquiry into whether the presumptive risk level three classification was in fact warranted ...". ***People v. Jones*, 2019 N.Y. Slip Op. 04060, Third Dept 5-22-19**

EMPLOYMENT LAW, CONSTITUTIONAL LAW, LABOR LAW.

THE LABOR LAW'S EXCLUSION OF FARM WORKERS FROM THE DEFINITION OF 'EMPLOYEES' ENTITLED TO ORGANIZE AND BARGAIN COLLECTIVELY VIOLATES THE NEW YORK CONSTITUTION AS A MATTER OF LAW.

The Third Department, in a full-fledged opinion by Justice Clark, reversing Supreme Court, over a dissent, determined that the NYS Employment Relations Act (SERA) is unconstitutional to the extent it excludes farm workers from the definition of "employees" given the right to organize and collectively bargain under the Act (Labor Law § 701[3][a]): "[P]laintiffs alleged that the farm laborer exclusion violates several provisions of the NY Constitution, including the right to organize and collectively bargain guaranteed to '[e]mployees' by article I, § 17 (first cause of action), the right to equal protection (second cause of action) (see NY Const, art I, § 11), the right to due process under the law (third cause of action) (see NY Const, art I, § 6), and the right to freedom of association (fourth cause of action) (see NY Const, art I, § 9). * * * ... [T]he choice to use the broad and expansive word 'employees' in NY Constitution, article I, § 17, without qualification or restriction, was a deliberate one that was meant to afford the constitutional right to organize and collectively bargain to any person who fits within the plain and ordinary meaning of that word ... . * * * ... [W]e are firmly convinced that the constitutional right bestowed upon 'employees' in this state 'to organize and bargain collectively through representatives of their own choosing' (NY Const, art I, § 17) is a fundamental right, and that any statute impairing this right must withstand strict scrutiny ... . Under strict scrutiny review, a statute that infringes upon a fundamental right is 'void unless necessary to promote a compelling [s]tate interest and narrowly tailored to achieve that purpose'... . ... [W]e declare that the exclusion of "individuals employed as farm laborers" from SERA's definition of the term 'employees,' set forth in Labor Law § 701 (3) (a), is unconstitutional as a matter of law." ***Hernandez v. State of New York*, 2019 N.Y. Slip Op. 04065, Third Dept 5-23-19**

FAMILY LAW, CONTEMPT.

THERE WAS NO SHOWING THAT THE DEPARTMENT OF SOCIAL SERVICE'S (DSS'S) VIOLATION OF A COURT ORDER LIMITING THE CHILD'S VISITATION WITH STEPMOTHER PREJUDICED THE CHILD'S RIGHTS, THEREFORE FAMILY COURT SHOULD NOT HAVE HELD DSS IN CONTEMPT.

The Third Department, reversing (modifying) Family Court, determined that the Department of Social Services (DSS) should not have been held in contempt for violation of an order limiting the child's visitation with the stepmother. DSS acknowledged it was aware of the order and acknowledged violating it. But there was no showing of prejudice to the child's rights: " 'A party seeking a finding of civil contempt based upon the violation of a court order must establish by clear and convincing evidence that the party charged with contempt had actual knowledge of a lawful, clear and unequivocal order, that the charged party disobeyed that order, and that this conduct prejudiced the opposing party's rights' ... . DSS does

not dispute that it was aware of the court's order limiting visitation with the stepmother, nor does it dispute that it did not follow that order, thereby establishing the first two elements for a civil contempt finding. Notably, however, DSS contacted the court immediately after receiving the order to advise that the stepmother had been certified as a foster parent and that the child was residing with her in that capacity. The AFC's petition, filed shortly thereafter, alleged that DSS had violated the order and sought to have the child placed with the foster parents, but failed to allege or present evidence establishing, by clear and convincing evidence, that DSS's failure to comply with the December 2016 order had 'prejudiced the [child's] rights' ...". ***Matter of Nilesha RR. (Loretta RR.)*, 2019 N.Y. Slip Op. 04063, Third Dept 5-23-19**

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