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CasePrepPlus

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FIRST DEPARTMENT

CIVIL PROCEDURE.

ACTION BROUGHT BY EUROPEAN PLAINTIFFS' CONCERNING THE OWNERSHIP OF A PAINTING ILLEGALLY CONFISCATED BY THE NAZIS AND SOLD IN NEW YORK BY CHRISTIE'S PROPERLY DISMISSED ON FORUM NON CONVENIENS GROUNDS.

The First Department determined a lawsuit to determine ownership of a Degas painting illegally confiscated by Nazis and years later sold at a Christie's auction in New York was properly dismissed on forum non conveniens. The plaintiffs' rights arose in Germany and France and Swiss and French estate law apply: "The motion court properly dismissed this action on forum non conveniens grounds without first determining whether it had personal jurisdiction over all the defendants. Sinochem Intl. Co. Ltd. v. Malaysia Intl. Shipping Corp. (549 US 422 [2007]) is persuasive authority on this point. In that case, a unanimous United States Supreme Court held that a trial court 'has discretion to respond at once to a defendant's forum non conveniens plea, and need not take up first any other threshold objection. In particular, a court need not resolve whether it has authority to adjudicate the cause (subject matter jurisidiction) or personal jurisdiction over the defendant if it determines that, in any event, a foreign tribunal is plainly the more suitable arbiter of the merits of the case' (id. at 425). To be sure, as the Sinochem Court noted, if a court can readily determine that it lacks personal jurisdiction over a defendant, the proper course is to dismiss on that ground. However, where personal jurisdiction is difficult to determine, and forum non conveniens considerations clearly militate in favor of dismissal, a court may dismiss on the latter ground (id. at 436). ... Plaintiffs' rights as heirs to the painting arose in Germany and France, although the painting was allegedly wrongfully sold in New York. The burden on the New York court in applying Swiss and French estate law to determine the underlying issue of the lawful heirs to [the owner's] estate is significant. As the motion court noted, the parties 'not only dispute the applicable foreign law, but discuss the substance of the law . . . in a manner that is, at best, opaque.' 'The applicability of foreign law is an important consideration in determining a forum non conveniens motion . . . and weighs in favor of dismissal' ... . The potential hardships to the defendants of litigating in New York are clear. * * * Switzerland appears to be an available alternative forum. France and Germany also may be possible alternatives." ***Kainer v. UBS AG*, 2019 N.Y. Slip Op. 06053, First Dept 8-7-19**

CIVIL PROCEDURE, CORPORATION LAW.

DISPUTE INVOLVING MALAYSIAN BANKS, INCLUDING GOLDMAN SACHS SINGAPORE, PROPERLY DISMISSED ON FORUM NON CONVENIENS GROUNDS.

The First Department determined a dispute involving Goldman Sachs Singapore (GSS) was properly dismiss on forum non conveniens grounds: "The action was properly dismissed on forum non conveniens grounds, given the unduly burdensome inquiry involved in determining personal jurisdiction in these circumstances and the balance of the forum non conveniens considerations ... . The decision whether the court had jurisdiction over GSS because GSS was a mere department of New-York-based Goldman Sachs Group, Inc. (GSG) would involve an 'arduous inquiry'... into whether GSG controlled GSS's finances, interfered with the selection and assignment of executive personnel, and failed to observe corporate formalities, and whether defendant Tim Leissner had sufficient contacts with New York. Plaintiff's causes of action for fraud and breach of fiduciary duty lack a substantial nexus with New York ... . Furthermore, plaintiff is a Cayman Islands partnership, not a New York resident ... . Finally, Malaysia has a greater interest than New York in whether one Malaysian bank (nonparty Hong Leong Bank) corruptly took over another Malaysian bank (EON) ...". ***Primus Pac. Partners 1, LP v. Goldman Sachs Group, Inc.*, 2019 N.Y. Slip Op. 06052, First Dept 8-6-19**

CIVIL PROCEDURE, EVIDENCE.

SUPREME COURT SHOULD NOT HAVE DENIED PLAINTIFF'S REQUEST FOR A PRELIMINARY INJUNCTION WITHOUT A HEARING AND THE TEMPORARY RESTRAINING ORDER SHOULD NOT HAVE BEEN VACATED WITHOUT A HEARING, DEFENDANTS WERE SEEKING TO TERMINATE PLAINTIFF'S DIALYSIS TREATMENT BASED UPON SHARPLY CONFLICTING EVIDENCE OF PLAINTIFF'S BEHAVIOR.

The First Department, reversing Supreme Court, determined the the temporary restraining order (TRO) preventing defendant dialysis provider from stopping plaintiff's treatment should not have been vacated and plaintiff's request for a preliminary injunction should have been denied without a hearing. The dialysis provider, Avantus, wanted to discontinue treatment because of plaintiff's behavior. However the evidence of plaintiff's behavior was sharply conflicting: "... [T]he motion court had found that Avantus had not produced evidence showing that it had complied with any of the federal procedural requirements for terminating a patient's care. Defendants had not presented any new evidence that it had done so before the court issued the order presently on appeal. Indeed, the court did not address the merits of defendants' decision to terminate plaintiff's care at all. Accordingly, the motion court should not have denied plaintiff's request for a preliminary injunction without holding a hearing. The motion court also improperly vacated the TRO without a hearing. Plaintiff's showing that he would be irreparably injured in the absence of a TRO never changed. The court was presented with no evidence inconsistent with its finding in issuing the TRO that 'there is no dispute that dialysis is a life-saving measure which plaintiff sorely needs, and at this stage of the litigation, the defendants have not established that the reasons for plaintiff's discharge from the facility outweigh the risks that discharge would carry with regard to plaintiff's health.' In addition, although the court concluded that plaintiff had failed to comply with the conditions set forth in the TRO, the parties presented sharply divergent facts on that issue, which could not be resolved without a hearing." ***Wilder v. Fresenius Med. Care Holdings, Inc.*, 2019 N.Y. Slip Op. 06054, First Dept 8-7-19**

SECOND DEPARTMENT

ARBITRATION, EMPLOYMENT LAW, CIVIL PROCEDURE.

WHERE ARBITRABLE AND NONARBITRABLE CLAIMS ARE INTERTWINED, COURT PROCEEDINGS SHOULD BE STAYED PENDING THE ARBITRATION DETERMINATION.

The Second Department, reversing Supreme Court, determined that, under the terms of the employment contract, even if the matter involves both arbitrable and nonarbitrable claims, any court procedures should be stayed until the determination of the arbitrable issues: "Paragraph 4(b) of the consulting agreement, which addresses the defendant's right to terminate the plaintiff's retention for cause, ends with the following sentence: 'Any dispute between the parties shall be resolved first by submitting same for mediation to AAA, and absent a resolution, then by a 3 member panel Arbitration through AAA.' ... The defendant moved pursuant to CPLR 7503(a) to compel arbitration and to stay this action pending completion of the arbitration, invoking the above-quoted arbitration clause. The plaintiff opposed the motion on the grounds, inter alia, that the clause applied only to disputes relating to termination, and not to actions alleging breach of contract. Without conceding that the scope of the arbitration clause was limited to the resolution of disputes involving termination, the defendant argued that the reason the plaintiff was not paid was because it was terminated for cause. The Supreme Court denied the motion, and the defendant appeals. ... '[W]here arbitrable and nonarbitrable claims are inextricably interwoven, the proper course is to stay judicial proceedings pending completion of the arbitration, particularly where the determination of issues in arbitration may well dispose of nonarbitrable matters'... . Even assuming, without deciding, that the only arbitrable dispute is whether the plaintiff was properly terminated for cause, judicial proceedings should be stayed until that issue is resolved, since that determination may also dispose of the plaintiff's breach of contract cause of action ...". ***Lake Harbor Advisors, LLC v. Settlement Servs. Arbitration & Mediation, Inc.*, 2019 N.Y. Slip Op. 06073, Second Dept 8-7-19**

CIVIL PROCEDURE, ATTORNEYS.

DEFENDANTS' CROSS-MOTION FOR SANCTIONS RELATING TO DISCLOSURE WAS NOT ACCOMPANIED BY DEFENSE COUNSEL'S AFFIRMATION DEMONSTRATING A GOOD FAITH EFFORT TO RESOLVE THE ISSUES ADDRESSED IN THE MOTION, THE CROSS-MOTION SHOULD NOT HAVE BEEN GRANTED.

The Second Department determined defendants' cross-motion for sanctions pursuant to CPLR 3126 relating to disclosure should not have been granted. The cross-motion was not accompanied by defense counsel's affirmation demonstrating a good faith effort to resolve the issues addressed by the motion: "Pursuant to 22 NYCRR 202.7(a) and (c), a motion relating to disclosure must be accompanied by an affirmation from moving counsel attesting to a good faith effort to resolve the issues raised in the motion, including the time, place and nature of the consultation as well as the issues discussed. Here, the affirmation of good faith submitted by the defendants' counsel in support of the cross motion for sanctions pursuant to CPLR 3126 failed to provide any detail of the claimed efforts to resolve the issues. While the defendants' counsel asserted that he had conversations with the plaintiff's counsel, he did not identify the dates of such conversations or the name of

the attorney with whom he conversed. Therefore, the cross motion should have been denied ...". ***Bronstein v. Charm City Hous., LLC*, 2019 N.Y. Slip Op. 06058, Second Dept 8-7-19**

CIVIL PROCEDURE, CIVIL CONTEMPT, ATTORNEYS, PRIVILEGE, FORECLOSURE.

MOTION TO QUASH SUBPOENA ISSUED TO ATTORNEY WHO REPRESENTED THE ORIGINAL BORROWERS AGAINST PROPERTY SUBJECT TO FORECLOSURE PROCEEDINGS SHOULD NOT HAVE BEEN QUASHED, CIVIL CONTEMPT ACTION AGAINST THE ATTORNEY SHOULD NOT HAVE BEEN DISMISSED, CRITERIA FOR BOTH TYPES OF PROCEEDINGS EXPLAINED.

The Second Department determined the subpoena issued by the current owners of property subject to a foreclosure action (the Frankels) to the attorney (Satran) who represented the parties who initially took out the loan (the Confinos) should not have been quashed, the action for civil contempt against the attorney should not have been dismissed, and attorney-client privilege could only be asserted at a subsequent deposition: " 'A party or nonparty moving to quash a subpoena has the initial burden of establishing either that the requested disclosure is utterly irrelevant to the action or that the futility of the process to uncover anything legitimate is inevitable or obvious' ... . 'Should the [movant] meet this burden, the subpoenaing party must then establish that the discovery sought is material and necessary to the prosecution or defense of [the] action' ... . Here, Satran failed to meet his initial burden of demonstrating either that the requested disclosure was 'utterly irrelevant' to the action or that the 'futility of the process to uncover anything legitimate is inevitable or obvious' ... . * * * Additionally, the Supreme Court should have granted the Frankels' motion to hold Satran in civil contempt for failure to comply with the subpoena by failing to appear for a deposition. 'To prevail on a motion to hold another in civil contempt, the moving party must 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' ... . ' To satisfy the prejudice element, it is sufficient to allege and prove that the contemnor's actions were calculated to or actually did defeat, impair, impede, or prejudice the rights or remedies of a party' ... . Here, it was undisputed that Satran failed to comply with the subpoena by failing to appear for a deposition and that he had knowledge of the terms of the subpoena. Moreover, the Frankels demonstrated that Satran's conduct prejudiced their right under CPLR 3101(a)(4) to obtain all information relevant and necessary to their defense of the present action and their cross claims against the Confinos ...". ***Wells Fargo Bank, N.A. v. Confino*, 2019 N.Y. Slip Op. 06114, Second Dept 8-7-19**

CIVIL PROCEDURE, LABOR LAW, PERSONAL INJURY.

ALTHOUGH THE BETTER PRACTICE IS TO SUBMIT A SEPARATE AFFIRMATION, DEFENSE COUNSEL'S PRIMARY AFFIRMATION IN SUPPORT OF THE MOTION TO COMPEL PLAINTIFF TO SUBMIT TO A VOCATIONAL EXAM DESCRIBED THE GOOD FAITH EFFORTS TO RESOLVE THE ISSUE, THE MOTION TO COMPEL WAS PROPERLY GRANTED.

The Second Department determined Supreme Court was not required to deny defendants' motion to compel plaintiff to submit to a vocational exam because defense counsel did not submit a separate affirmation demonstrating a good faith effort to resolve the dispute. The requirements of 22 N.Y.C.R.R. § 202.7(c) were met in the primary affirmation submitted is support of the motion. The Second Department also determined the plaintiff was properly ordered to submit to a vocational rehabilitation examination in this Labor Law personal injury action: "... [T]he Supreme Court was not required to deny that branch of the defendants' motion on the ground that the defendant failed to submit an affirmation attesting to a good faith pre-motion attempt to resolve the dispute with the plaintiff. While it may be the better practice for the movant to detail such good faith efforts in an affirmation separate from the affirmation addressing the merits of the motion, under the circumstances of this case, the requirements of 22 NYCRR 202.7(c) were satisfied by the primary affirmation of counsel submitted in support of the motion wherein counsel detailed her efforts to obtain the plaintiff's compliance with the extant court order, including the failure of the plaintiff to appear for a duly noticed examination and the failure of the plaintiff's counsel to respond to correspondence, submitted with the defendants' motion papers, seeking the plaintiff's voluntary cooperation. Thus, the defendants amply demonstrated that the plaintiff was refusing to voluntarily cooperate with a court-ordered examination ... . [T]he plaintiff was noticed and directed to appear for a medical examination to be conducted by a vocational rehabilitation specialist on February 26, 2018. The plaintiff failed to respond to the notice or appear for the examination. Given the nature of this action and the parties' past discovery disputes, the Supreme Court providently exercised its discretion in granting that branch of the defendants' motion which was pursuant to CPLR 3124 to compel the plaintiff to submit to a vocational rehabilitation examination ...". ***Encalada v. Riverside Retail, LLC*, 2019 N.Y. Slip Op. 06066, Second Dept 8-7-19**

CIVIL PROCEDURE, MEDICAL MALPRACTICE, TRUSTS AND ESTATES, PERSONAL INJURY.

PROTRACTED DELAY IN PLAINTIFFS' SEEKING SUBSTITUTION OF PARTIES IN THIS MEDICAL MALPRACTICE ACTION AFTER INFANT PLAINTIFF'S DEATH DID NOT REQUIRE DISMISSAL OF THE COMPLAINT, DEFENDANTS WERE IN POSSESSION OF THE MEDICAL RECORDS AND OTHER RELEVANT INFORMATION AND THEREFORE WERE NOT PREJUDICED BY THE DELAY; IN ADDITION, THE MOTION TO AMEND THE COMPLAINT TO ADD WRONGFUL DEATH SHOULD HAVE BEEN GRANTED UNDER THE RELATION-BACK DOCTRINE.

The Second Department, reversing Supreme Court, determined plaintiffs' protracted delay in substituting father for the deceased infant in this medical malpractice action did not require dismissal of the complaint because the defendants were in possession of all the relevant medical records and therefore were not prejudiced by the delay. The court also noted that motion to amend the complaint to assert wrongful death should have been granted under the relation-back doctrine: "CPLR 1021 requires a motion for substitution to be made within a reasonable time ... , and the determination of whether the timing is reasonable requires consideration of several factors, including the diligence of the party seeking substitution, the prejudice to the other parties, and whether the party to be substituted has shown that the action or the defense has potential merit ... . Here, the plaintiffs moved, inter alia, for leave to substitute Jean Petion, who is the father of the plaintiff Jeremiah Prince Petion (hereinafter the deceased infant) and administrator of the deceased infant's estate (hereinafter the administrator), in place of the deceased infant as a party plaintiff and to amend the caption accordingly. Although the plaintiffs admit that the delay in seeking the substitution of the administrator was protracted ... , the plaintiffs showed that there was no prejudice to the defendants because the defendants were on notice of the claims against them as early as February 2, 2009, when the plaintiffs filed a notice of claim against the defendant New York City Health and Hospitals Corporation, and the defendants possessed all of the relevant medical records ... . In opposition, the defendants asserted only conclusory allegations of prejudice based solely on the passage of time ... . The plaintiffs also demonstrated that they have potentially meritorious causes of action through their expert's affidavit of merit, the pleadings, and the testimony of Marie Petion at the General Municipal Law § 50-h hearing ...". ***Petion v. New York City Health & Hosps. Corp.*, 2019 N.Y. Slip Op. 06107, Second Dept 8-7-19**

CIVIL PROCEDURE, MUNICIPAL LAW, EVIDENCE, PERSONAL INJURY.

PLAINTIFF'S VERDICT IN THIS PERSONAL INJURY ACTION BROUGHT BY A FIREFIGHTER PURSUANT TO GENERAL MUNICIPAL LAW § 205-a AND LABOR LAW § 27-a SHOULD NOT HAVE BEEN SET ASIDE, CRITERIA FOR SETTING ASIDE A VERDICT EXPLAINED IN DEPTH.

The Second Department reversed Supreme Court's setting aside the verdict in this personal injury action brought by a firefighter pursuant to General Municipal Law § 205-a and Labor Law § 27-a. The firefighter alleged he tripped over a torn rug in the fire department office. The torn rug violated provisions of the NYC Administrative Code. The Second Department took great pains to explain the criteria for setting aside a verdict as a matter of law and as against the weight of the evidence pursuant to CPLR 4404: "Although there were no other individuals present when the plaintiff fell, his supervisor immediately responded to 'the loud bang' that resulted from the accident. The plaintiff's supervisor prepared a report that morning, which stated that the plaintiff had tripped on a piece of loose rug. Another one of the plaintiff's supervisors testified that he responded to the location of the accident and observed 'a ripped carpet there.' Photographs of the tear in the carpet that caused the plaintiff to fall were admitted into evidence and identified by the plaintiff's witnesses. * * * The plaintiff testified that at the time of the accident, he felt a 'popping in [his] leg.' A doctor who examined the plaintiff after the accident, Leonard Harrison, testified that the plaintiff tore his hamstring as the result of the subject accident. The City did not present any evidence to show that the plaintiff's accident was caused by something other than the tear in the carpet, or that the accident did not occur at all. Although the jury was not required, as a matter of law, to credit the plaintiff's uncontradicted testimony ... the City's efforts to impeach the plaintiff as to the cause of the accident were particularly weak. * * * Despite the City's attacks, the plaintiff's testimony as to the cause of the accident was consistent throughout the course of the trial. Moreover, his testimony regarding the cause of the accident was consistent with the testimony he gave at his deposition, in which he repeatedly testified that '[his] foot got caught on a piece of torn rug, where [he] los[t] [his] balance and tripped.' The plaintiff's trial testimony was also consistent with the reports he gave to his supervisor and to doctors shortly after the accident occurred. On this record, any conclusion that the plaintiff's accident was the result of some other unidentified cause, or that the entire incident was fabricated, could only be based upon mere speculation ...". ***Annunziata v. City of New York*, 2019 N.Y. Slip Op. 06055, Second Dept 8-7-19**

FAMILY LAW, ATTORNEYS, CIVIL PROCEDURE.

FAMILY COURT DID NOT HAVE A SUFFICIENT BASIS. I.E. STATEMENTS BY A CASEWORKER AND THE ATTORNEY FOR THE CHILD, TO DETERMINE NEW YORK HAD BEEN DIVESTED OF JURISDICTION IN THIS CUSTODY CASE; MOTHER WAS NOT ADEQUATELY INFORMED OF HER RIGHT TO COUNSEL.

The Second Department, reversing Supreme Court, determined that the judges should not have dismissed mother's petition to modify custody solely on the basis of statements made by a caseworker and the attorney for the child indicating the child lived in New Jersey. The Second Department further found that Family Court did not adequately inform mother of

the rights she was giving up by representing herself: "Pursuant to the Uniform Child Custody Jurisdiction and Enforcement Act, codified at article 5-A of the Domestic Relations Law, a court of this state which has made an initial custody determination has exclusive, continuing jurisdiction over that determination until it finds that it should relinquish that jurisdiction because 'neither the child' nor 'the child and one parent' have a 'significant connection' with New York, and 'substantial evidence is no longer available in this state concerning the child's care, protection, training, and personal relationships' (Domestic Relations Law § 76-a[1][a] ...). Here, it is undisputed that the initial custody determination was rendered in New York. Nothing on the record before the Family Court established that it had been divested of exclusive, continuing jurisdiction pursuant to Domestic Relations Law § 76-a(1). * * * Moreover, the parent of any child seeking custody in any proceeding before the Family Court has the right to the assistance of counsel (see Family Ct Act § 262[a][v]). A party may waive that right and proceed without counsel provided he or she makes a knowing, voluntary, and intelligent waiver of the right to counsel ... . In order to determine whether a party has validly waived the right to counsel, a court must conduct a 'searching inquiry' to ensure that the waiver has been made knowingly, voluntarily, and intelligently ... . A waiver is valid where the party was aware of the dangers and disadvantages of proceeding without counsel ... . Here, the Family Court did not conduct a sufficiently searching inquiry to ensure that the mother's waiver of her right to counsel was knowingly, voluntarily, and intelligently made ... . ***Matter of Means v. Miller*, 2019 N.Y. Slip Op. 06088, Second Dept 8-7-19**

FAMILY LAW, CIVIL PROCEDURE, APPEALS.

DEFINITION OF 'PARENT' IS THE SAME FOR PARENTAL ACCESS AND CUSTODY; JUDICIAL ESTOPPEL AND COLLATERAL ESTOPPEL DOCTRINES PRECLUDED SUPREME COURT'S FINDING THAT FATHER DID NOT HAVE STANDING IN THE CUSTODY MATTER.

The Second Department, reversing Supreme Court, determined the doctrines of judicial estoppel and collateral estoppel precluded Family Court from finding father did not have standing to seek custody of a child. Father had previously been deemed a "parent' in the context of parental access. The definition of 'parent' is the same in the context of custody: "In the prior appeal, this Court expressly stated that the father had standing to proceed as Isabella's parent under Domestic Relations Law § 70 based on the doctrine of judicial estoppel ... . As the term 'parent' has the same definition under Domestic Relations Law § 70 whether the party is seeking custody or parental access ... , it is immaterial that our prior determination did not specifically mention custody when it concluded that the father had standing to seek parental access with Isabella. Since the mother is judicially estopped from arguing that the father is not Isabella's parent under Domestic Relations Law § 70, the father was free to seek custody under Domestic Relations Law § 70 as Isabella's 'parent with coequal rights' to the mother ...". ***Matter of Paese v. Paese*, 2019 N.Y. Slip Op. 06090, Second Dept 8-7-19**

FORECLOSURE, REAL PROPERTY ACTIONS AND PROCEEDINGS LAW (RPAPL), EVIDENCE, CIVIL PROCEDURE.

BANK DID NOT SUBMIT SUFFICIENT PROOF OF A LOST NOTE AND COMPLIANCE WITH NOTICE REQUIREMENTS IN THIS FORECLOSURE ACTION; SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED.

The Second Department, modifying Supreme Court, determined the bank, inter alia, did not demonstrate compliance with the RPAPL 1304 notice provisions and failed to submit sufficient proof of a lost note in this foreclosure action: "... [A]lthough the plaintiff came forward with evidence establishing that the note was assigned to it and establishing the note's terms, the affidavit of lost note submitted in support of its motion failed to establish the facts that prevent the production of the original note (see UCC 3-804 ...). Additionally, we note that Riley's out-of-state affidavit lacked a certificate of conformity as required by CPLR 2309(c), although such defect by itself would not be fatal to the plaintiff's motion ... . Further, the evidence submitted in support of the plaintiff's motion failed to establish, prima facie, that the plaintiff strictly complied with RPAPL 1304. Proper service of the RPAPL 1304 notice containing the statutorily mandated content is a condition precedent to the commencement of a foreclosure action ... . The plaintiff failed to submit an affidavit of service or any proof of mailing by the post office demonstrating that it properly served the defendant pursuant to the terms of the statute ... . Contrary to the plaintiff's contention, the affidavit of a representative of its loan servicer was insufficient to establish that the notice was sent to the defendant in the manner required by RPAPL 1304, as the representative did not provide evidence of a standard office mailing procedure and provided no independent evidence of the actual mailing ... . Likewise, the plaintiff failed to establish, prima facie, that it complied with the condition precedent contained in the mortgage requiring it to give notice of default prior to demanding payment in full ...". ***U.S. Bank N.A. v. Cope*, 2019 N.Y. Slip Op. 06111, Second Dept 8-7-19**

LEGAL MALPRACTICE, ATTORNEYS.

THE TRANSCRIPT OF THE SETTLEMENT PROCEEDING UTTERLY REFUTED PLAINTIFF'S CLAIM TO HAVE BEEN COERCED INTO SETTLING, THE LEGAL MALPRACTICE COMPLAINT SHOULD HAVE BEEN DISMISSED.

The Second Department, reversing Supreme Court, determined that defendants-attorneys' motion to dismiss the complaint in this legal malpractice action should have been granted because the transcript of the settlement proceeding utterly refuted the allegations in the complaint. Plaintiff alleged it was coerced into settling the action: "A motion to dismiss a complaint

pursuant to CPLR 3211(a)(1) 'may be appropriately granted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law' ... . A legal malpractice cause of action 'is viable, despite settlement of the underlying action, if it is alleged that settlement of the action was effectively compelled by the mistakes of counsel' ... . In support of their motion, the defendants submitted the transcript of the court proceeding setting forth the terms of the settlement of the underlying action, which conclusively established that the plaintiff was not coerced into settling ... . The plaintiff's allegations that it was coerced into settling the underlying action were utterly refuted by the admissions of its principals during the settlement proceeding that they had discussed the terms of the settlement with their attorneys, understood the settlement terms, and had no questions about them; that they were entering into the settlement freely, of their own volition, and without undue influence or coercion; and that they were satisfied with their legal representation ...". ***Glenwayne Dev. Corp v. James J. Corbett, P.C.*, 2019 N.Y. Slip Op. 06069, Second Dept 8-7-19**

PERSONAL INJURY.

DRIVER OF MIDDLE VEHICLE IN THIS THREE-CAR REAR-END TRAFFIC ACCIDENT CASE ENTITLED TO SUMMARY JUDGMENT.

The Second Department, reversing Supreme Court, determined the middle driver, Budziak, in this three-car rear-end collision case was entitled to summary judgment: " 'A rear-end collision with a stopped or stopping vehicle establishes a prima facie case of negligence on the part of the operator of the rear vehicle, requiring that operator to come forward with evidence of a nonnegligent explanation for the collision to rebut the inference of negligence' ... . ' Evidence that a vehicle was struck in the rear and propelled into the vehicle in front of it may provide a sufficient non-negligent explanation' ... . Thus, '[i]n a chain collision accident, the operator of the middle vehicle may establish prima facie entitlement to judgment as a matter of law by demonstrating that the middle vehicle was properly stopped behind the lead vehicle when it was struck from behind by the rear vehicle and propelled into the lead vehicle' ... . Here, Budziak established her prima facie entitlement to judgment as a matter of law by demonstrating that she was stopped in traffic behind Hakimi's vehicle when her vehicle was struck in the rear by Barnett's vehicle and propelled into Hakimi's vehicle ...". ***Mihalatos v. Barnett*, 2019 N.Y. Slip Op. 06082, Second Dept 8-7-19**

PERSONAL INJURY, COMMON CARRIERS.

QUESTION OF FACT WHETHER THE BUS DRIVER RESPONDED REASONABLY UPON HEARING THE SIREN OF A FIRE TRUCK APPROACHING AN INTERSECTION; PLAINTIFF, A PASSENGER, WAS INJURED WHEN THE BUS DRIVER SLAMMED ON THE BRAKES.

The Second Department, reversing Supreme Court, determined there was a question of fact whether the bus driver reacted properly to an emergency. Plaintiff, a passenger, was injured when the bus suddenly braked to avoid a fire truck entering an intersection. There was a question whether the driver slowed down upon hearing the siren: "The evidence proffered in support of the defendants' motion demonstrated, prima facie, that the operator of the bus was presented with an emergency situation, to wit, a fire truck that was entering the intersection against the traffic light, and that the operator acted as a reasonable person would under the circumstances ... . However, in opposition, the plaintiff noted that the operator testified at her deposition that, as she approached the intersection, she heard a fire truck siren. Although the operator claimed she slowed down prior to reaching the intersection, the plaintiff testified at her deposition that the operator was driving 'pretty fast' prior to the accident and that there was no change in speed. The operator's alleged entry into the intersection without slowing down, after hearing sirens approaching the intersection, raised a triable issue of fact as to whether the operator was faced with an emergency situation not of her own making and whether her actions in relation thereto were reasonable ...". ***Liang-Ying Ren v. Doe*, 2019 N.Y. Slip Op. 06074, Second Dept 8-7-19**

PERSONAL INJURY, EMPLOYMENT LAW, EVIDENCE.

FACT THAT DEFENDANT CONTRACTOR HAD BEEN ISSUED A PERMIT FOR DRILLING IN THE STREET DID NOT RAISE A QUESTION OF FACT ABOUT WHETHER THE CONTRACTOR CREATED A DEFECT IN THE SIDEWALK IN THIS SLIP AND FALL CASE.

The Second Department, reversing Supreme Court, determined the contractor's motion for summary judgment in this sidewalk slip and fall case should have been granted. The contractor presented evidence it did no work on the sidewalk. The fact that a permit for drilling on the street had been issued to the contractor did not raise a question of fact: "The plaintiff allegedly was injured when he tripped on a raised sidewalk flag. He commenced this personal injury action against, among others, the defendant Craig Geotechnical Drilling Co., Inc. (hereinafter Craig Drilling), a contractor, alleging that it was negligent in, among other things, creating the allegedly dangerous condition that caused the accident. ... A contractor may be liable for an affirmative act of negligence which results in the creation of a dangerous condition upon a public street or sidewalk ... . Here, Craig Drilling demonstrated its prima facie entitlement to judgment as a matter of law by presenting evidence that it performed no work in the area of the raised sidewalk flag prior to the subject accident ... . In opposition, the plaintiff failed to raise a triable issue of fact as to whether Craig Drilling created or exacerbated the raised sidewalk flag. Under the circumstances of this case, the mere fact that a permit had been issued to Craig Drilling to perform work on the

street was insufficient to raise a triable issue of fact as to whether Craig Drilling created or exacerbated the raised sidewalk flag ...". ***Sindoni v. City of New York*, 2019 N.Y. Slip Op. 06110, Second Dept 8-7-19**

THIRD DEPARTMENT

CIVIL PROCEDURE, MENTAL HYGIENE LAW, EDUCATION-SCHOOL LAW, SOCIAL SERVICES LAW, MEDICAID, APPEALS.

NO PRIVATE RIGHT OF ACTION FOR A DEVELOPMENTALLY DISABLED CHILD HOUSED FOR MORE THAN FIVE WEEKS IN A HOSPITAL EMERGENCY ROOM BECAUSE NO APPROPRIATE RESIDENTIAL FACILITY WAS AVAILABLE.

The Third Department, in a full-fledged opinion by Justice Garry, considering the appeal under an exception to the mootness doctrine, determined a 16-year-old developmentally disabled child (Olivia) did not have a private right of action against Champlain Valley Physicians Hospital (CVPH), the Office for People with Developmental Disabilities (OPWDD) or the Department of Health (DOH) for housing her in the CVPH emergency room when no appropriate residential facility was available. The opinion is too comprehensive and covers too many substantive issues to be fairly summarized here: "In 2018, Olivia CC. (hereinafter the child), a minor with complex developmental disabilities, was stranded in the emergency room of respondent Champlain Valley Physicians Hospital (hereinafter CVPH) for more than five weeks while she waited for a residential school placement. The child was not in need of medical or psychiatric care. However, neither her family nor the Office for People with Developmental Disabilities (hereinafter OPWDD) — the agency legislatively charged with protecting the welfare of persons with developmental disabilities — could provide her with safe interim housing. CVPH thus retained the child in the emergency room, where she could not attend school, participate in community activities or go outdoors, and CVPH was forced to use scarce medical resources to provide for her nonmedical needs. Unfortunately, the child is not the first minor with special needs to be marooned for weeks or months in an emergency room, as hospitals find themselves serving as the last resort for providing shelter to children in crisis ... . The difficult legal issues presented here call into question the extent of the responsibilities of the legislative and administrative functions of government to some of our society's most vulnerable members, and the limitations on the power of courts to protect them. * * * Our conclusion that the amended petition/complaint provides this Court with no grounds to intervene in respondents' operations should not be misunderstood as condonation of the child's prolonged and unnecessary hospitalization or of respondents' failure to provide her with appropriate assistance. Nevertheless, this record does not permit a determination of the propriety of constitutional or equitable relief, and relief grounded in the statutory provisions relied upon here must come from the Legislature or from respondents' policy choices. Thus, we will not disturb Supreme Court's judgment." ***Matter of Mental Hygiene Legal Serv. v. Delaney*, 2019 N.Y. Slip Op. 06119, Third Dept 8-8-19**

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