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FIRST DEPARTMENT

CIVIL PROCEDURE, PRIVILEGE, INSURANCE LAW, SECURITIES.

A PRIVILEGE UNDER WISCONSIN INSURANCE LAW APPLIED IN THIS NEW YORK ACTION CONCERNING INSURANCE CLAIMS STEMMING FROM THE ISSUANCE OF RESIDENTIAL MORTGAGE-BACKED SECURITIES.

The First Department determined a privilege under Wisconsin Law protected certain emails and documents generated in a Wisconsin action by the Wisconsin Commissioner of Insurance concerning the payment of insurance claims stemming from the issuance of residential mortgage-backed securities, The decision doesn't explain the underlying facts: "The Commissioner appointed a Special Deputy Commissioner (SDC) to oversee all activities ... from Ambac's [plaintiffs'] New York offices, and, at the SDC's direction, plaintiffs commenced this action in New York, asserting claims of fraudulent inducement and breach of contract in connection with the policies Ambac issued on the securitizations sponsored by defendant. When defendant demanded the production of certain emails and other documents maintained by the SDC, plaintiffs responded by claiming the statutory privilege held by the Wisconsin Office of the Commissioner of Insurance (OCI) under Wisconsin law (see Wis Stat § 601.465). Defendant argued that New York law should be applied because, in adjudicating privilege issues, New York courts must apply the law of the place where the evidence will be introduced at trial or where the discovery proceeding is located. Supreme Court, after engaging in an interest-balancing analysis, determined that the Wisconsin statutory privilege was applicable, and denied defendant's motion to compel. We affirm. New York courts 'routinely apply the law of the place where the evidence in question will be introduced at trial or the location of the discovery proceeding when deciding privilege issues' ... . However, there are circumstances in which an interest-balancing analysis is properly undertaken to decide whether another state's law should govern the evidentiary privilege This is a case that presents such circumstances ...". ***Ambac Assur. Corp. v. Nomura Credit & Capital, Inc.*, 2019 N.Y. Slip Op. 06574, First Dept 9-17-19**

LANDLORD-TENANT, TAX LAW, MUNICIPAL LAW, CIVIL PROCEDURE.

COURT OF APPEALS 2009 RULING THAT LANDLORDS RECEIVING J-51 TAX BENEFITS CANNOT DEREGULATE NEW YORK CITY APARTMENTS APPLIES RETROACTIVELY IN THIS CLASS ACTION FOR RENT OVERCHARGES BROUGHT BY TENANTS; THE CLASS, HOWEVER, SHOULD NOT HAVE BEEN EXPANDED AFTER THE ACTION WAS COMMENCED.

The First Department, in a full-fledged opinion by Justice Richter too comprehensive to fairly summarize here, modifying Supreme Court, determined that the class action by tenants in defendant's large housing complex properly sought repayment of rent overcharges. The complaint alleged the landlord, under New York City rent control and stabilization law, and pursuant to a 2009 Court of Appeals case (Roberts v. Tishman, 13 NY3d 270), could not deregulate apartments while receiving so-called "J-51" tax benefits. The landlord argued unsuccessfully that the Roberts decision did not apply retroactively. The First Department remanded the case for recalculation of the overcharges and further held that Supreme Court should not have expanded the class. With regard to the expansion of the class, the court wrote: "CPLR 902 provides that a class action 'may be altered or amended before the decision on the merits.' However, that provision also states that '[an] action may be maintained as a class action only if the court finds that the prerequisites under [CPLR] 901 have been satisfied.' Those requirements are generally referred to as 'numerosity, commonality, typicality, adequacy of representation and superiority' (City of New York v. Maul, 14 NY3d 499, 508 [2010]). CPLR 902 further requires the court to consider a range of factors before certifying a class. Here, the motion court improvidently exercised its discretion in expanding the class. The court's order failed to analyze whether class action status was warranted based on the criteria set forth in CPLR 901 and CPLR 902. Conducting that analysis ourselves, we find that the redefined class represents such a fundamental change in the theory of plaintiffs' case that expansion of the class would be improper. When the class was originally certified, plaintiffs maintained, and the court agreed, that its members were tenants who received deregulated leases while the complex was receiving J-51 benefits. The expanded class, however, would include tenants who never lived in the complex during defendant's receipt of J-51 benefits, and who received regulated leases for their tenancies. Thus, the legal issues for this group of tenants are separate and distinct from those of the original class." ***Dugan v. London Terrace Gardens, L.P.*, 2019 N.Y. Slip Op. 06578, First Dept 9-17-19**

SECOND DEPARTMENT

CIVIL PROCEDURE, PRODUCTS LIABILITY, NEGLIGENCE, CORPORATION LAW.

GOODYEAR DEMONSTRATED IT DID NOT HAVE SUFFICIENT AFFILIATIONS WITH NEW YORK TO CONFER JURISDICTION IN THIS TIRE-MALFUNCTION OUT-OF-STATE ACCIDENT CASE.

The Second Department, reversing Supreme Court, determined that Goodyear's motion to dismiss the products liability complaint for lack of jurisdiction should have been granted. Plaintiff, a New York resident, was injured when a tire manufactured by Goodyear allegedly malfunctioned causing the car to overturn in Virginia. The Second Department held that plaintiff did not rebut Goodyear's argument that it did not have significant affiliations with New York and noted that a corporation's registration with the New York State Department of State does not confer jurisdiction on New York: " 'While the ultimate burden of proof rests with the party asserting jurisdiction, the plaintiffs, in opposition to a motion to dismiss pursuant to CPLR 3211(a)(8), need only make a prima facie showing that the defendant was subject to the personal jurisdiction of the Supreme Court' ... . 'General jurisdiction in New York is provided for in CPLR 301, which allows a court to exercise such jurisdiction over persons, property, or status as might have been exercised heretofore'... . A court may exercise general jurisdiction over foreign corporations 'when their affiliations with the State are so continuous and systematic as to render them essentially at home in the forum State' ... . Here, in opposition to Goodyear's motion, the plaintiff failed to make a prima facie showing that personal jurisdiction over Goodyear existed under CPLR 301. The plaintiff did not rebut the evidence submitted by Goodyear showing that Goodyear's affiliations with New York are not so continuous and systematic as to render it essentially at home here ... . Furthermore, contrary to the Supreme Court's determination, 'a corporate defendant's registration to do business in New York and designation of the Secretary of State to accept service of process in New York does not constitute consent by the corporation to submit to the general jurisdiction of New York for causes of action that are unrelated to the corporation's affiliations with New York' ...". ***Aybar v. Goodyear Tire & Rubber Co.*, 2019 N.Y. Slip Op. 06584, Second Dept 9-18-19**

CRIMINAL LAW, EVIDENCE.

POLICE PURSUIT OF DEFENDANT WAS NOT JUSTIFIED, WEAPON FOUND NEARBY PROPERLY SUPPRESSED.

The Second Department determined the police did not have reasonable suspicion of criminal activity at the time defendant fled and the police pursued him. The police responded to reports of gunshots heard in the vicinity. A witness reported hearing a gunshot and seeing two men walking, one wearing dark clothes and the other wearing a white jacket. The defendant and another man matched that description. When the police approached the defendant he ran. The defendant was arrested after a pursuit and a gun was found nearby. Defendant was charged with criminal possession of a weapon. The motion court suppressed the gun: " 'Police pursuit of an individual significantly impede[s] the person's freedom of movement and thus must be justified by reasonable suspicion that a crime has been, is being, or is about to be committed' ... . A suspect's flight alone, even in conjunction with equivocal circumstances that might justify a common law inquiry, is insufficient to justify pursuit ... . However, a defendant's flight plus 'other specific circumstances indicating that the suspect may be engaged in criminal activity, may give rise to reasonable suspicion, the necessary predicate for police pursuit' ... . Here, the police lacked reasonable suspicion that the defendant had committed, was committing, or was about to commit a crime, the necessary predicate for pursuit. Although clothing worn by the defendant and his companion matched the clothing described by the unidentified witness, the witness never saw either of the two men fire or possess a gun. There is no evidence in the record that the police saw any weapons or a bulge or outline of a weapon on the defendant which could indicate that he was involved in a crime ... . Furthermore, contrary to the People's contention, the manner in which the defendant held his hands while he ran did not give the police reasonable suspicion to pursue. A stop must be 'justified in its inception'... , and at the time that the police began to chase the defendant, he had both his hands in his jacket pocket, an 'innocuous' placement that is 'susceptible of an innocent as well as a culpable interpretation' ...". ***People v. Ravenell*, 2019 N.Y. Slip Op. 06630, Second Dept 9-18-19**

CRIMINAL LAW, JUDGES.

DEFENSE COUNSEL'S PEREMPTORY CHALLENGE TO A JUROR WAS SLIGHTLY LATE; TO DENY THE REQUEST IN THE ABSENCE OF DISCERNABLE INTERFERENCE OR UNDUE DELAY WAS AN ABUSE OF DISCRETION; NEW TRIAL ORDERED.

The Second Department, reversing defendant's conviction, determined the denial of defense counsel's slightly late peremptory challenge to an unsworn juror was an abuse of discretion: "The court named prospective juror number one to be assigned a seat and said, 'We now have ten, need two. Looking at Chavez - -,' when defense counsel interrupted, stating that he had made an error and had intended to exercise a peremptory challenge to prospective juror number one. Defense counsel acknowledged that the challenge was 'a couple of seconds' late, and requested permission to excuse prospective juror number one. The court summarily denied the request. 'The defendant contends that the Supreme Court improvidently exercised its discretion in denying his belated peremptory challenge. We agree. Under CPL 270.15, 'the decision to entertain

a belated peremptory challenge is left to the discretion of the trial court' ... . Where a belated peremptory challenge to as-yet unsworn prospective jurors 'would interfere with or delay the process of jury selection,' it is a proper exercise of the court's discretion to refuse to permit the challenge … . However, where there is 'no discernable interference or undue delay caused by defense counsel's momentary oversight that would justify [the court's] hasty refusal to entertain [the] defendant's challenge,' it is an improvident exercise of discretion to deny it … . Here, the delay in challenging prospective juror number one was de minimis .... There was no discernable interference or undue delay caused by defense counsel's momentary oversight, and the voir dire of the next subgroup of jurors was still to be conducted ...". ***People v. Price*, 2019 N.Y. Slip Op. 06629, Second Dept 9-18-19**

DEBTOR-CREDITOR, FRAUD, CIVIL PROCEDURE, CONTRACT LAW, CONDOMINIUMS.

THE "PARTICULARITY" PLEADING-REQUIREMENTS FOR A FRAUD CAUSE OF ACTION DO NOT APPLY TO CAUSES OF ACTION ALLEGING A FRAUDULENT CONVEYANCE PURSUANT TO THE DEBTOR-CREDITOR LAW.

The Second Department, reversing Supreme Court, determined that, because a fraudulent conveyance action does not require an intent to defraud, the specificity requirement in the CPLR for pleading a fraud cause of action do not apply. Here plaintiff alleged the defective design and construction of a condominium: "Pursuant to Debtor and Creditor Law § 273, a conveyance that renders the conveyor insolvent is fraudulent as to creditors without regard to actual intent, if the conveyance was made without fair consideration (see Debtor and Creditor Law § 273 ...). Pursuant to Debtor and Creditor Law § 274, a conveyance is fraudulent as to creditors without regard to actual intent when it is 'made without fair consideration when the person making it is engaged or is about to engage in a business or transaction for which the property remaining in his [or her] hands after the conveyance is an unreasonably small capital' ... . Section 270 of the Debtor and Creditor Law defines 'creditor' as any 'person having any claim, whether matured or unmatured, liquidated or unliquidated, absolute, fixed, or contingent.' Here, the complaint's fifth cause of action sufficiently states cognizable claims alleging fraudulent conveyances pursuant to Debtor and Creditor Law §§ 273 and 274. Since valid claims of violations of Debtor and Creditor Law §§ 273 and 274 do not require proof of actual intent to defraud, such claims are not required to be ple[a]ded with the particularity required by CPLR 3016(b) ... . Further, the plaintiff sufficiently alleged that it is a creditor of the sponsor since it asserted a breach of contract cause of action against the sponsor, even though said cause of action was unmatured at the time of the alleged conveyances ...". ***Board of Mgrs. of E. Riv. Tower Condominium v. Empire Holdings Group, LLC*, 2019 N.Y. Slip Op. 06587, Second Dept 9-18-19**

FAMILY LAW, JUDGES.

JUDGE DID NOT HAVE THE DISCRETION TO DENY PLAINTIFF'S MOTION FOR ARREARS AND COUNSEL FEES MADE AFTER THE JUDGMENT OF DIVORCE; ANY DISPUTE ABOUT THE AMOUNT MUST BE RESOLVED BY A HEARING.

The Second Department, reversing Supreme Court, determined plaintiff's motion for leave to enter a money judgment for arrears and counsel fees should not have been denied. The motion for arrears was properly made after the judgment of divorce and any question of the amount owed should have been resolved by a hearing: "A party to a matrimonial action may make an application for a judgment directing the payment of arrears at any time prior to or subsequent to the entry of a judgment of divorce (see Domestic Relations Law § 244 ...). Here, the court did not have the discretion to deny the plaintiff's application for leave to enter a money judgment since she established that arrears were due and unpaid ... . Where, as here, there are triable issues of fact as to the amount of arrears, an evidentiary hearing should be held ... . Furthermore, upon determining the amount of arrears owed, the court should have considered the plaintiff's request for prejudgment interest ... and an award of counsel fees ...". ***Uttamchandani v. Uttamchandani*, 2019 N.Y. Slip Op. 06645, Second Dept 9-18-19**

MEDICAL MALPRACTICE, NEGLIGENCE, CIVIL PROCEDURE.

THE DEFENDANT HOSPITAL DID NOT DEMONSTRATE THAT A DOCTOR ORDERED THE RESTRAINT OF PLAINTIFF'S DECEDENT AND THEREFORE DID NOT DEMONSTRATE THAT MEDICAL MALPRACTICE, AS OPPOSED TO NEGLIGENCE, WAS THE APPROPRIATE THEORY; THE ACTION SHOULD NOT HAVE BEEN DISMISSED BASED UPON THE EXPIRATION OF THE 2 1/2 YEAR STATUTE OF LIMITATIONS FOR MEDICAL MALPRACTICE.

The Second Department, reversing Supreme Court, determined defendant's motion to dismiss the complaint on statute of limitations grounds should not have been granted. Plaintiff's decedent's injuries were alleged to relate to defendant-hospital's improper restraint of plaintiff's decedent (apparently to keep him from getting up from his hospital bed). Defendant argued the 2 1/2 year statute of limitations for medical malpractice actions had passed. The Second Department held that defendant did not demonstrate that a doctor had ordered the restraints; therefore the defendant had not made out a prima facie case that the action sounded in medical malpractice as opposed to negligence: " 'The critical question in determining whether an action sounds in medical malpractice or simple negligence is the nature of the duty to the plaintiff which the defendant is alleged to have breached' ... . ' When the duty arises from the physician-patient relationship or is substantially related to medical treatment, the breach gives rise to an action sounding in medical malpractice, not simple negligence'

... . ' The distinction between ordinary negligence and malpractice turns on whether the acts or omissions complained of involve a matter of medical science or art requiring special skills not ordinarily possessed by lay persons or whether the conduct complained of can instead be assessed on the basis of the common everyday experience of the trier of the facts' ... . Here, the defendant failed to establish, prima facie, that the plaintiff's claims were time-barred under the 2½-year statute of limitations applicable to medical malpractice actions (see CPLR 214-a). Since the defendant did not present any evidence that a doctor ordered the decedent to be restrained at any point prior to or during the subject incident, the defendant failed to establish that the plaintiff's claims related to medical treatment, as opposed to the failure of hospital staff to exercise ordinary and reasonable care to prevent harm to the decedent ...". ***Wesolowski v. St. Francis Hosp.*, 2019 N.Y. Slip Op. 06646, Second Dept 9-18-19**

REAL ESTATE, CONTRACT LAW, ATTORNEYS.

SELLER'S ACTION FOR SPECIFIC PERFORMANCE OF A REAL ESTATE PURCHASE AGREEMENT PROPERLY DISMISSED; THE CONTRACT WAS SUBJECT TO ATTORNEY APPROVAL BUT NO DEADLINE FOR ATTORNEY-APPROVAL WAS SET BY THE AGREEMENT; DEFENDANTS' COUNSEL INFORMED PLAINTIFF'S COUNSEL THAT DEFENDANTS DID NOT WISH TO GO FORWARD WITH THE PURCHASE EITHER SEVEN OR NINE DAYS AFTER THE CONTRACT WAS EXECUTED, WHICH WAS DEEMED A REASONABLE TIME.

The Second Department determined defendant-purchasers' motion to dismiss the complaint seeking specific performance of a real estate purchase agreement was property granted. The agreement was subject to attorney approval and defendants' attorney disapproved the contract either seven or nine days after the agreement was executed. There was no time-limit for attorney approval in the agreement, and seven or nine days were deemed a reasonable time: "… [T]he defendants established their entitlement to dismissal of the complaint pursuant to CPLR 3211(a)(7). 'On a motion to dismiss a complaint pursuant to CPLR 3211(a)(7) for failure to state a cause of action, the court must afford the pleading a liberal construction, accept all facts as alleged in the pleading to be true, accord the plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory' ... . 'Moreover, where evidentiary material is submitted and considered on a motion to dismiss a complaint pursuant to CPLR 3211(a)(7), and the motion is not converted into one for summary judgment, the motion should not be granted unless it has been shown that a material fact as claimed by the plaintiff to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it' ... . The evidentiary material submitted by the defendants in support of their motion demonstrated that the plaintiff had no cause of action against them. Contrary to the plaintiff's contention, the evidence conclusively established that the purchase agreement was unenforceable because it was subject to attorney approval, which was not given by the defendants' attorney. As the purchase agreement contained no time limit within which approval was required 'a reasonable time for cancellation thereunder is implied' ... . Whether, as acknowledged by the defendants, it was seven days after the parties entered into the purchase agreement that the defendants' attorney disapproved it, or as alleged by the plaintiff, it was nine days after the parties entered into the purchase agreement that the defendants' attorney disapproved it, the time between the parties entering into the agreement and the disapproval was minimal, during which no prejudice would inure to the plaintiff, and was a reasonable time period as a matter of law." ***Makris v. Boylan*, 2019 N.Y. Slip Op. 06598, Second Dept 9-18-19**

THIRD DEPARTMENT

DISCIPLINARY HEARINGS (INMATES), EVIDENCE.

THE EXISTENCE OF A VIDEOTAPE OF THE ALLEGED MISBEHAVIOR-INCIDENT, REQUESTED BY THE PETITIONER, SHOULD HAVE BEEN INVESTIGATED BY THE HEARING OFFICER, NEW HEARING ORDERED/

The Third Department, ordering a new hearing, determined the petitioner's request for a videotape of the alleged misbehavior-incident should have been looked into by the hearing officer. The hearing officer asserted no videotape existed, but a document indicated a videotape had been preserved: "Petitioner requested the videotape from his employee assistant and at the hearing. Although the Hearing Officer informed petitioner that no videotape existed, the record contains a facility Video Preservation Form indicating that a videotape, taken in the area of the incident on the date in question, was preserved. Inasmuch as the record does not indicate that the Hearing Officer undertook any measures to ascertain whether the videotape existed, we find that petitioner's request was improperly denied ...". ***Matter of Espinal v. Annucci*, 2019 N.Y. Slip Op. 06670, Third Dept 9-19-19**

DISCIPLINARY HEARINGS (INMATES), EVIDENCE.

PETITIONER'S REQUEST FOR TWO WITNESSES SHOULD NOT HAVE BEEN DENIED, NEW HEARING ORDERED.

The Third Department, ordering new hearing, determined petitioner's request to call witnesses should not have been denied: "... [T]he Hearing Officer improperly denied petitioner's request to call as witnesses the two inmates who were housed on each side of his cell, as their potential testimony was highly relevant to petitioner's defense that he was in his cell

during the time of the underlying incident ... . However, inasmuch as the Hearing Officer acted in good faith in denying the request on the ground of relevancy, petitioner's regulatory right to call witnesses was violated and a new hearing on these charges, rather than expungement, is the appropriate remedy ...". ***Matter of Parker v. Annucci*, 2019 N.Y. Slip Op. 06658, Third Dept 9-19-19**

MENTAL HYGIENE LAW.

DAUGHTER'S PETITION TO BE APPOINTED GUARDIAN FOR HER MOTHER, WHO HAS DEMENTIA AND ALZHEIMER'S, SHOULD NOT HAVE BEEN DENIED WITHOUT A HEARING (THIRD DEPT).

The Third Department, reversing Supreme Court, determined the petition by one of respondent's daughters, seeking to be appointed guardian, should not have been denied without a hearing. Respondent is 89 and has been diagnosed with dementia and Alzheimer's disease and lives with her other daughter, Elizabeth ZZ. Petitioner alleged that Elizabeth had been prohibiting communication and visitation with her mother: "Given the record before us, we find that the allegations set forth in the subject petition, as supplemented by the supporting affidavits affixed to the parties' motion papers and the court evaluator's report and subsequent status updates, create a genuine question of fact as to respondent's alleged incapacity, her ability to understand and appreciate the nature and consequences of her condition and functional limitations and whether the arrangements that have been put in place for her personal and property needs were the product of Elizabeth ZZ.'s undue influence such that petitioner adequately established her entitlement to a hearing (see Mental Hygiene Law §§ 81.02 [a] [2]; 81.11 [a], [b] ...)." ***Matter of Elizabeth TT. (Suzanne YY.--Elizabeth ZZ.)*, 2019 N.Y. Slip Op. 06667, Third Dept 9-19-19**

MUNICIPAL LAW, ARBITRATION, EMPLOYMENT LAW.

IN A TAYLOR LAW ARBITRATION, WHERE THE PARTIES CHOOSE THE ARBITRATORS, THE PARTIALITY OF A CHOSEN ARBITRATOR, WITHOUT MORE, IS NOT A GROUND FOR DISQUALIFICATION.

The Third Department determined Supreme Court properly denied petitioner's request to disqualify New York City's choice for an arbitrator in this Taylor Law action brought after the petitioner (Patrolmen's Benevolent Ass'n) and NYC were unable to negotiate a collective bargaining agreement. Petitioner argued the chosen arbitrator (Linn) should be disqualified as biased: "When CPLR 7511 (b) (1) (ii) was ... enacted, the phrase 'evident partiality' was removed and partiality was made a ground for vacatur only as to neutral arbitrators. * * * Accordingly, the 'evident partiality' of a party-appointed arbitrator, without more, is not a ground for vacatur or disqualification. ... If a party-arbitrator's statements of support for a party's position were sufficient, without more, as a ground for his or her disqualification, the principle that party-arbitrators need not be neutral would have no meaning. Linn's statements, although strongly voiced, do not reveal misconduct of any kind or indicate that he will disregard the evidence or has prejudged the issues ...". ***Matter of Patrolmen's Benevolent Assn. of the City of N.Y., Inc. v. New York State Pub. Empl. Relations Bd.*, 2019 N.Y. Slip Op. 06676, Third Dept 9-19-19**

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