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COURT OF APPEALS

ATTORNEYS.

JUDICIARY LAW § 487 APPLIES ONLY TO MISREPRESENTATIONS BY AN ATTORNEY WHICH ARE MADE IN THE COURSE OF A LAWSUIT; THE STATUTE DOES NOT APPLY WHERE, AS HERE, THE MISREPRESENTATIONS WERE ALLEGEDLY MADE TO INDUCE PLAINTIFFS TO START A MERITLESS LAWSUIT TO GENERATE A LEGAL FEE.

The Court of Appeals, in a full-fledged opinion by Judge DiFiore, over an extensive dissenting opinion, determined the Judiciary Law § 487 cause of action, based upon the allegation plaintiffs' attorneys (defendants) deceitfully induced plaintiffs to bring a meritless lawsuit in order to generate a legal fee, was properly dismissed. A Judiciary Law § 487 cause of action lies only if misrepresentations are made in the course of litigation, as opposed to, as here, before litigation is commenced: "Here ... defendants established prima facie entitlement to judgment as a matter of law on the Judiciary Law § 487 (1) claim by demonstrating that plaintiffs failed to allege that defendants engaged in deceit or collusion during the course of the underlying federal intellectual property lawsuit ... . In response, plaintiffs failed to satisfy their burden to establish material, triable issues of fact ... . The affidavits plaintiffs submitted in opposition to summary judgment did not allege that defendants committed any acts of deceit or collusion during the pendency of the underlying federal lawsuit. To the extent defendants were alleged to have made deceitful statements, plaintiffs' allegation that defendants induced them to file a meritless lawsuit based on misleading legal advice preceding commencement of the lawsuit is not meaningfully distinguishable from the conduct we deemed insufficient to state a viable attorney deceit claim in Looff (97 NY at 482). The statute does not encompass the filing of a pleading or brief containing nonmeritorious legal arguments, as such statements cannot support a claim under the statute ... . Similarly, even assuming it constituted deceit or collusion, defendants' alleged months-long delay in informing plaintiffs that their federal lawsuit had been dismissed occurred after the litigation had ended and therefore falls outside the scope of Judiciary Law § 487 (1). Thus, plaintiffs' Judiciary Law § 487 cause of action was properly dismissed." ***Bill Birds, Inc. v. Stein Law Firm, P.C.*, 2020 N.Y. Slip Op. 02125, CtApp 3-31-20**

CRIMINAL LAW, EVIDENCE.

A FRYE HEARING SHOULD HAVE BEEN HELD TO DETERMINE THE ADMISSIBILITY OF THE LOW COPY NUMBER (LCN) DNA EVIDENCE AND THE EFFICACY OF A FORENSIC STATISTICAL TOOL (FST); THE ERROR WAS HARMLESS HOWEVER.

The Court of Appeals, in a full-fledged opinion by Judge Fahey, over a three-judge concurrence, ruled a *Frye* hearing should have been held to the determine admissibility of low copy number (LCN) DNA evidence and the efficacy of the forensic statistical tool (FST) used to conduct the statistical analysis. The abuse of discretion was deemed harmless however: "At the time this motion practice was initiated no court had completed a Frye hearing with respect to the FST, and only one court—namely, the Megnath (27 Misc 3d 405) court ...—had conducted such a hearing with respect to LCN testing. * * * ... [T]here was 'marked conflict' with respect to the reliability of LCN DNA within the relevant scientific community at the time the LCN issue was litigated in this case ... . * * * ... FST is a proprietary program exclusively developed and controlled by [the New York City Office of Chief Medical Examiner (OCME)]. The sole developer and the sole user are the same. That is not 'an appropriate substitute for the thoughtful exchange of ideas . . . envisioned by Frye' ... . It is an invitation to bias." ***People v. Williams*, 2020 N.Y. Slip Op. 02123, CtApp 3-31-20**

Similar issues and result in ***People v. Foster-Bey*, 2020 N.Y. Slip Op. 02124, CtApp 3-31-20**

CRIMINAL LAW, IMMIGRATION, APPEALS.

BECAUSE THE DEFENDANT WAS MADE AWARE OF THE POSSIBILITY OF DEPORTATION MONTHS BEFORE HE PLED GUILTY, HIS ARGUMENT THAT THE TRIAL JUDGE DID NOT INFORM HIM OF THE IMMIGRATION CONSEQUENCES OF HIS PLEA WAS SUBJECT TO THE PRESERVATION REQUIREMENT; THE FAILURE TO PRESERVE THE ERROR PRECLUDED APPEAL.

The Court of Appeals, in a full-fledged opinion by Judge Garcia, over a three-judge concurrence, determined defendant's argument that the trial judge failed to inform him of the deportation consequences of his plea to a felony was subject to the preservation requirement. The defendant's failure to preserve the error precluded appeal: " '[D]ue process compels a

trial court to apprise a defendant that, if the defendant is not an American citizen, he or she may be deported as a consequence of a guilty plea to a felony' ... . However, before we may consider whether a trial court fulfilled that obligation, we must determine whether a defendant preserved the claim as a matter of law for our review or whether an exception to the preservation doctrine applies ... . Here, service on defendant, in open court and months before the plea proceedings, of a 'Notice of Immigration Consequences' form provided him with a reasonable opportunity to object to the plea court's failure to advise him of the potential deportation consequences of his plea, making the narrow exception to the preservation doctrine unavailable to him ... . * * * 'Generally, in order to preserve a claim that a guilty plea is invalid, a defendant must move to withdraw the plea on the same grounds subsequently alleged on appeal or else file a motion to vacate the judgment of conviction pursuant to CPL 440.10' (Peque, 22 NY3d at 182). While reiterating this rule in Peque, we also acknowledged that 'where a defendant has no practical ability to object to an error in a plea allocution which is clear from the face of the record, preservation is not required' (id.). This exception to the preservation requirement, however, remains narrow ... . * * * The very first sentence of the Notice explicitly told defendant that 'a plea of guilty to any offense' could 'subject[] [him] to a risk that adverse consequences w[ould] be imposed on [him] by the United States immigration authorities, including, but not limited to, removal from the United States . . . .' It further noted that, among other things, a conviction for 'burglary . . . or any other theft-related offense . . . for which a sentence of one year or more is imposed' would be deportable. Those unambiguous statements provided defendant with sufficient notice of possible immigration consequences, including deportation, of his conviction, giving him 'a reasonable opportunity' to express concerns to the court — during either his plea or at sentencing — regarding those consequences ...". ***People v. Delorbe*, 2020 N.Y. Slip Op. 02126, CtApp 3-31-20**

LANDLORD-TENANT, MUNICIPAL LAW.

THE HOUSING STABILITY AND TENANT PROTECTION ACT OF 2019 (HSTPA) DOES NOT APPLY RETROACTIVELY TO RENT OVERCHARGE ACTIONS UNDER THE RENT STABILIZATION LAW (RSL) COMMENCED BEFORE THE COURT OF APPEALS RULING IN *ROBERTS*.

The Court of Appeals, in a per curiam opinion, over a three-judge dissent, determined the Housing Stability and Tenant Protection Act of 2019 (HSTPA) did not apply retroactively to extend the look back period for rent overcharge actions from four to six years, and did not alter the overcharge calculation methodology for pre-*Roberts* actions. The opinion and the dissent are too comprehensive and detailed to fairly summarize here: "... [T]hese four appeals ... present a common issue under the Rent Stabilization Law (RSL): what is the proper method for calculating the recoverable rent overcharge for New York City apartments that were improperly removed from rent stabilization during receipt of J-51 benefits prior to our 2009 decision in Roberts v. Tishman Speyer Props., L.P. (13 NY3d 270 [2009]). ... [T]he HSTPA includes amendments that, among other things, extend the statute of limitations [and] alter the method for determining legal regulated rent for overcharge purposes and substantially expand the nature and scope of owner liability in rent overcharge cases ... . The tenants in these cases urge us to apply the new overcharge calculation provisions to these appeals that were pending at the time of the HSTPA's enactment, some of which seek recovery of overcharges incurred more than a decade before the new legislation. * * * We ... decline to create a new exception to the lookback rule and instead clarify that, under pre-HSTPA law, the four-year lookback rule and standard method of calculating legal regulated rent govern in Roberts overcharge cases, absent fraud. * * * We conclude that the overcharge calculation amendments [enacted by the HSTPA] cannot be applied retroactively to overcharges that occurred prior to their enactment." ***Matter of Regina Metro. Co., LLC v. New York State Div. of Hous. & Community Renewal*, 2020 N.Y. Slip Op. 02127, CtApp 4-2-20**

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

GENERAL BUSINESS LAW § 349 DECEPTIVE BUSINESS PRACTICES CAUSE OF ACTION IN THE CONTEXT OF A RENT STABILIZATION LAW (RSL) RENT-OVERCHARGE SUIT WAS PROPERLY DISMISSED.

The Court of Appeals, over a partial dissent, determined the General Business Law § 349 cause of action alleging deceptive business practices in the context of the Rent Stabilization Law (RSL) rent-overcharge suit was properly dismissed: "... General Business Law ... , section 349 prohibits 'deceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state' ... . We have held that this statute 'cannot fairly be understood to mean that everyone who acts unlawfully, and does not admit the transgression, is being deceptive' within the meaning of section 349 ... . For purposes of this appeal, we assume without deciding that a claim may lie under General Business Law § 349 based upon a landlord's alleged misrepresentation to the public that an apartment was exempt from rent regulation following deregulation in violation of the Rent Stabilization Law. Here, however, plaintiffs alleged only that defendants failed to admit that they violated the Rent Stabilization Law in deregulating plaintiffs' apartments—three of which were, in fact, never deregulated—rather than any affirmative conduct that would tend to deceive consumers. Inasmuch as plaintiffs failed to allege more than 'bare legal conclusions' ... regarding the existence of consumer-oriented, deceptive acts ... , their General Business Law claim was properly dismissed." ***Collazo v. Netherland Prop. Assets LLC*, 2020 N.Y. Slip Op. 02128, CtApp 4-2-20**

FIRST DEPARTMENT

CRIMINAL LAW.

PRIOR CONVICTION OF CRIMINAL POSSESSION OF A WEAPON DID NOT DISQUALIFY DEFENDANT FROM ELIGIBILITY FOR YOUTHFUL OFFENDER STATUS; IT IS NOT AN 'ARMED FELONY.'

The First Department, vacating defendant's sentence, determined the prior conviction of criminal possession of a weapon was not an "armed felony" did not render defendant ineligible for youthful offender status: "Defendant's prior conviction of criminal possession of a weapon in the second degree, for 'possess[ing] a loaded firearm' (Penal Law § 265.03[1][b]) was not an 'armed felony' within the meaning of CPL 720.10(2)(a). As relevant here, CPL 1.20, which CPL 720.10(2)(a) incorporates, defines 'armed felony' as 'any violent felony offense defined in section 70.02 of the penal law that includes as an element . . . possession . . . of a deadly weapon, if the weapon is a loaded weapon from which a shot, readily capable of producing death or other serious physical injury may be discharged' ... . The statutory definition of 'loaded firearm' explicitly does not require that the firearm be 'actually' loaded, because it includes within the definition a 'firearm which is possessed by one who, at the same time, possesses a quantity of ammunition which may be used to discharge such firearm' (Penal Law § 265.00[15]). In contrast, the definition of 'deadly weapon' contains no proviso indicating that an actually unloaded weapon is deemed 'loaded,' and the definition is therefore met, where usable ammunition is readily available. Accordingly, 'in order to be a deadly weapon, a gun must actually be loaded, as that term is commonly understood' ... . Since a 'loaded firearm' is therefore not always a 'deadly weapon,' the crime to which defendant pleaded guilty did not 'include[] as an element . . . possession . . . of a deadly weapon' (CPL 1.20[41][a]), and the court should not have found that defendant's conviction rendered him presumptively ineligible." ***People v. Ochoa*, 2020 N.Y. Slip Op. 02156, First Dept 4-2-20**

CRIMINAL LAW, ATTORNEYS.

DEFENDANT'S REPEATED REQUESTS TO REPRESENT HIMSELF SHOULD NOT HAVE BEEN DENIED; NEW TRIAL ORDERED.

The First Department, in a full-fledged opinion by Justice Manzanet-Daniels, reversed defendant's conviction and ordered a new trial, finding that defendant had been denied his right to represent himself. The opinion is basically a detailed rendition of the facts demonstrating that defendant repeatedly requested that he be allowed to represent himself and was repeatedly assigned new counsel after he repeatedly was found mentally fit for trial. There was no evidence defendant was seeking to delay the trial or otherwise interfere with the proceedings: "When a defendant desires to exercise the right to represent himself, 'the court's only function is to ensure that the defendant is acting knowingly and voluntarily, that is, that the defendant is aware of the disadvantages and risks of waiving his right to counsel' ... . If the waiver is knowing and voluntary, the request must be granted ... . * * * The court's belated finding ... that defendant intended to 'disrupt' the proceedings cannot be used as post-hoc justification of its earlier denials of repeated requests to proceed pro se. Defendant's requests to proceed pro se were denied throughout 2008, 2009, and much of 2010, without mention of 'disruption' as a basis. It was hardly surprising that defendant expressed increasing frustration with the process, given that he had repeatedly been found fit to proceed, and yet the court continued to deny his requests to proceed pro se and to ignore his complaints regarding counsel. As the Court of Appeals has observed, in finding a defendant's "outburst" insufficient to trump his right to self-representation, 'Just as the court may not rely on a postruling outburst to validate an erroneous denial, the court may not goad the defendant to disruptive behavior by conducting its inquiry in an abusive manner calculated to belittle a legitimate application. An outburst thus provoked will not justify the forfeiture of the right to self-representation' ... . That defendant on occasion agreed to the appointment of new lawyers does not render his requests to proceed pro se equivocal ... . A defendant who elects to proceed pro se 'is frequently motivated by dissatisfaction with trial strategy or a lack of confidence in counsel' ... . An erroneous denial of the right to defend onself is not subject to a harmless error analysis. We are therefore obliged to reverse the conviction and remand for a new trial." ***People v. Trammell*, 2020 N.Y. Slip Op. 02190, First Dept 4-2-20**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

FALL AFTER STEPPING ON LOOSE PIPES NOT COVERED BY LABOR LAW § 240(1); LABOR LAW §§ 200 AND 241(6) CAUSES OF ACTION SHOULD NOT HAVE BEEN DISMISSED.

The First Department, reversing (modifying) Supreme Court, determined the Labor Law § 240(1) cause of action based upon plaintiff's fall when he stepped on a pile of loose pipes was properly dismissed. However the Labor Law § 200 cause of action and the Labor Law § 241(6) cause of action against some of the defendants should not have been dismissed: "The court correctly dismissed the Labor Law § 240(1) claim, as that statute does not cover a fall allegedly caused by stepping on a pile of unsecured pipes on the floor of a construction site ... . The Labor Law § 200 and common-law negligence claims should not be dismissed as against UA, Independent Mechanical, Intel Plumbing, and WeWork. The cause of plaintiff's accident was not the manner in which his work was performed but a dangerous condition on the premises, i.e., the loose pipes that had been laid on the floor directly in front of a doorway ... . [T]he record does not support the summary dismissal of the Labor Law § 241(6) claim as against the UA and 401 Park defendants. Plaintiff's testimony that his fall was caused by a pile

of loose pipes obstructing the doorway presents an issue of fact as to whether the accident was caused by a tripping hazard in a passageway (Industrial Code [12 NYCRR] § 23-1.7[e][1] ...). There is also an issue of fact as to whether the accident was caused by a violation of 12 NYCRR 23-1.7(e)(2), since part of the floor where workers worked or passed was not kept free from scattered tools or materials ... . In addition, there is an issue of fact as to whether the unsecured pipes, which were allegedly piled about two feet high directly in front of the doorway, were safely stored pursuant to 12 NYCRR 23-2.1(a)(1) ...". ***Armental v. 401 Park Ave. S. Assoc., LLC*, 2020 N.Y. Slip Op. 02154, First Dept 4-2-20**

PERSONAL INJURY, CONTRACT LAW.

QUESTIONS OF FACT WHETHER PLAINTIFF-NURSE WHO WAS ASSAULTED BY A PATIENT WAS A THIRD-PARTY BENEFICIARY OF THE SECURITY-COMPANY CONTRACT AND WHETHER PLAINTIFF DETRIMENTALLY RELIED UPON A SECURITY GUARD'S PROMISE TO RESPOND TO HER CALL FOR HELP.

The First Department determined defendant security company's (Sera's) motion for summary judgment in this patient-assault case was properly denied. Plaintiff, a nurse at a healthcare facility, was assaulted by a patient. Sera argued it was only responsible for providing protection against intruders, not patients. Because the contract with Sera was ambiguous the court properly considered extrinsic evidence (deposition testimony) which indicated Sera responded to staff's calls for help dealing with patient "altercations" or "fighting." There were questions of fact whether plaintiff was a third-party beneficiary of the Sera's contract with the facility and whether plaintiff detrimentally relied on Sera to protect her from the assault. Questions of fact about Sera's duty to plaintiff and the foreseeability of the assault were raised: "Given [the] testimony and the contractual language, the motion court properly denied summary judgment on the issue of whether defendant is liable to plaintiff as a third-party beneficiary of the contract. Similarly, the motion court also properly concluded that plaintiff raised questions of fact sufficient to overcome summary judgment as to whether Sera is liable to plaintiff under a theory of detrimental reliance based on plaintiff's allegation that the Sera security guard promised to respond to plaintiff's call for assistance, but failed to do so in a timely manner or failed to call the police promptly or at all (see Espinal, 98 NY2d at 140). Defendant's security guard testified that he could not recall when he received the call from his colleague directing him to go to the floor where plaintiff worked, whether he was advised of any details of what was occurring, or how long it took him to get there. He further testified that he was trained to investigate calls prior to determining whether to call the police, and that, if a staff member called the security station about an incident, it was the Sera security guards' responsibility to call 911 or the police when warranted." ***Kuti v. Sera Sec. Servs.*, 2020 N.Y. Slip Op. 02153, First Dept 4-2-20**

SECOND DEPARTMENT

CRIMINAL LAW, EVIDENCE.

DISCLOSURE OF WITNESS CONTACT INFORMATION SHOULD HAVE BEEN DELAYED UNTIL 15 DAYS BEFORE TRIAL.

The Second Department, reversing Supreme Court, determined disclosure of contact information re: the complainant's mother and two 911 callers must be delayed until 15 days before trial: "Where, as here, 'the issue involves balancing the defendant's interest in obtaining information for defense purposes against concerns for witness safety and protection, the question is appropriately framed as whether the determination made by the trial court was a provident exercise of discretion' ... . Applying the factors set forth in CPL 245.70(4), including concerns for witness safety and protection, I conclude that the Supreme Court improvidently exercised its discretion in directing immediate disclosure of the subject materials to counsel for the defendant, counsel's investigator, and the defendant. Under the particular facts and circumstances of this case, the Supreme Court should have delayed disclosure of the address and contact information of the complainant, and of the name, address, and contact information of the complainant's mother and the individuals identified as the first and second 911 callers ...". ***People v. Harper*. 2020 N.Y. Slip Op. 02193, Second Dept 4-2-20**

CRIMINAL LAW, EVIDENCE.

THE PEOPLE DID NOT DEMONSTRATE THE IMPOUNDMENT OF DEFENDANT'S CAR AND THE INVENTORY SEARCH WERE LAWFUL; SEIZED EVIDENCE SUPPRESSED AND INDICTMENT DISMISSED.

The Second Department, reversing defendant's conviction and dismissing the indictment, determined the People did not demonstrate the impoundment of defendant's car and the inventory search which turned up a weapon and a marijuana cigarette were lawful. Therefore the seized items should have been suppressed. The defendant parked in a visitor's space and went into the police station to pick up a friend's property. After presenting his ID, the police discovered a bench warrant, arrested him, impounded his car and conducted an inventory search: "The People failed to establish the lawfulness of the impoundment of the defendant's car and subsequent inventory search ... . The arresting officer testified that the defendant's vehicle was legally parked in a visitor's parking space, and the officer was unaware of posted time limits pertaining to the visitor parking spaces. Although the officer testified that he impounded the defendant's vehicle to safeguard the

defendant's property against a potential burglary, the People presented no evidence demonstrating any history of burglary or vandalism in the area where the defendant had parked his vehicle. Thus, the People failed to establish that the impoundment of the defendant's vehicle was in the interests of public safety or part of the police's community caretaking function ... . Moreover, the People failed to present any evidence as to whether the New York City Police Department had a policy regarding impoundment of vehicles, what that policy required, or whether the arresting officer complied with that policy when he impounded the defendant's vehicle ...". ***People v. Weeks*, 2020 N.Y. Slip Op. 02198, Second Dept 4-2-20**

THIRD DEPARTMENT

CIVIL PROCEDURE, EDUCATION-SCHOOL LAW, ATTORNEYS, EMPLOYMENT LAW.

WHETHER THE SCHOOL PRINCIPAL RECEIVED COMPETENT REPRESENTATION AT HER DISCIPLINARY PROCEEDINGS BEFORE THE NYC DEPARTMENT OF EDUCATION WAS RELEVANT TO HER DECERTIFICATION PROCEEDINGS BEFORE THE NYS DEPARTMENT OF EDUCATION; THEREFORE THE MOTION THE QUASH THE SUBPOENA SEEKING THE ATTORNEY'S TESTIMONY SHOULD NOT HAVE BEEN GRANTED.

The Third Department, reversing Supreme Court, determined that the motion to quash a subpoena seeking an attorney's (Guerra's) testimony in a teacher decertification proceeding should not have been granted. The attorney was seeking employment with the NYC Department of Education (NYCDOE) at the time she was representing the respondent school principal (Klingsberg) in disciplinary proceedings brought by the NYCDOE. The issue of whether respondent received competent representation in the disciplinary proceedings was relevant to whether those proceedings should be given collateral estoppel effect in the New York State Department of Education (SED) teacher decertification proceedings: " '[A] subpoena will be quashed only where the futility of the process to uncover anything legitimate is inevitable or obvious or where the information sought is utterly irrelevant to any proper inquiry' ... . The party moving to quash bears 'the burden of establishing that the subpoena should be [quashed] under such circumstances' ... . * * * ... [W]hether Klingsberg was competently represented at that prior proceeding so as to warrant giving preclusive effect to its factual findings is very much in issue in this decertification proceeding and, given that Guerra has firsthand knowledge regarding her representation of Klingsberg at that prior proceeding, it cannot be said that 'the information sought [from Guerra] is utterly irrelevant' to the decertification inquiry ... . Rather, Guerra's testimony is highly relevant to whether collateral estoppel will be applied in the pending decertification proceeding. For this reason, petitioners have not satisfied their burden of proof on their motion to quash the subpoena ...". ***Matter of Board of Educ. of the City Sch. Dist. of the City of N.Y. v. New York State Dept. of Educ.*, 2020 N.Y. Slip Op. 02140, Third Dept 4-2-20**

CIVIL PROCEDURE, TORTIOUS INTERFERENCE WITH CONTRACT, DEFAMATION, EVIDENCE.

THE TORTIOUS INTERFERENCE WITH CONTRACT AND DEFAMATION CAUSES OF ACTION WERE NOT REFUTED BY DOCUMENTARY EVIDENCE AND WERE ADEQUATELY PLED.

The Third Department, reversing (modifying) Supreme Court, determined that plaintiff had stated causes of action for tortious interference with contract and defamation and the actions should not have been dismissed on either the "documentary evidence" or "failure to state a cause of action" ground: "Turning first to CPLR 3211 (a) (1), a motion to dismiss pursuant to this provision 'will be granted only if the documentary evidence resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim' ... . What may be deemed 'documentary evidence' for purposes of this subsection is quite limited. 'Materials that clearly qualify as documentary evidence include documents . . . such as mortgages, deed[s], contracts, and any other papers, the contents of which are essentially undeniable' ... . Here, Supreme Court relied upon the statements taken during defendant's investigation, as well as its non-harassment policy. As plaintiff argues, even sworn affidavits have been held inadequate to meet this statutory standard, and defendant's submissions here do not qualify as documentary evidence ... . The grounds for dismissal under CPLR 3211 (a) (7) are also strictly limited; the court is not allowed to render a determination upon a thorough review of the relevant facts adduced by both parties, but rather is substantially more constrained in its review, examining only the plaintiff's pleadings and affidavits ... . To establish a claim for tortious interference with a contract, the plaintiff must allege 'the existence of [his or her] valid contract with a third party, [the] defendant's knowledge of that contract, [the] defendant's intentional and improper procuring of a breach, and damages' ... . Here, plaintiff's complaint alleged that a valid contract existed between plaintiff and the distributor, that defendant intentionally spread 'false, specious and salacious accusations against [p]laintiff,' and that such conduct 'had no good faith or justifiable cause' and did not 'protect an economic interest.' Liberally construing these allegations, as we must, taking all of the alleged facts as true, and giving plaintiff every favorable inference ... , they do not fail to state a claim. The defamation claim will ultimately require 'proof that the defendant made 'a false statement, published that statement to a third party without privilege, with fault measured by at least a negligence standard, and the statement caused special damages or constituted defamation per se' ... . Here, the complaint sets forth the particular words complained of and the damages plaintiff allegedly sustained ... " ***Carr v. Wegmans Food Mkts., Inc.*, 2020 N.Y. Slip Op. 02141, Third Dept 4-2-20**

EDUCATION-SCHOOL LAW.

CORNELL DID NOT HAVE TO FOLLOW THE PROCEDURES IN ITS STUDENT CODE TO REFUSE ADMISSION TO PETITIONER WHO OMITTED FROM HIS APPLICATION THE FACT HE HAD BEEN EXPELLED FROM ANOTHER COLLEGE.

The Third Department, reversing Supreme Court, determined respondent Cornell did not act arbitrarily or capriciously when it refused to enroll petitioner because petitioner did not reveal he had been expelled from Kansas State for violations of its code of conduct. Petitioner argued Cornell did not follow the provisions in its Code when it refused to enroll petitioner. But the Third Department held the Code applied only to "students" and not to those who were filling out an application for admission: "In reviewing a determination rendered by a private educational institution where no hearing is required, a court will not disturb it 'unless a school acts arbitrarily and not in the exercise of its honest discretion, it fails to abide by its own rules or imposes a penalty so excessive that it shocks one's sense of fairness' ... . Petitioner argues that respondent was obliged to follow the provisions of the Code, which establishes standards of conduct for, as is relevant here, its students. A student is defined under the Code as a person 'currently registered' with respondent in one of its divisions or as a special student, 'currently enrolled in or taking classes' with respondent, 'currently using' respondent's facilities or property for academic purposes or 'currently on leave of absence or under suspension from being a student.' Inasmuch as petitioner was none of those things when he misrepresented his academic background on an application for admission to respondent, neither the Code nor the procedures created by it were applicable to his misconduct, and Supreme Court erred in concluding that they were ...". ***Matter of Kamila v. Cornell Univ.*, 2020 N.Y. Slip Op. 02150, Third Dept 4-2-20**

FAMILY LAW, ATTORNEYS, APPEALS.

ON APPEAL, THE ATTORNEY FOR THE CHILD DID NOT FULFILL HIS OBLIGATION TO CONSULT WITH THE CHILDREN TO DETERMINE THEIR WISHES OR TO ADEQUATELY EXPLAIN WHY CONSULTATION WAS NOT POSSIBLE; HE WAS RELIEVED OF HIS ASSIGNMENT,

The Third Department, relieving the attorney for the child (AFC) of responsibility for the appeal, determined the AFC did not fulfill his responsibilities under the Rules of the Chief Judge (22 N.Y.C.R.R. § 7.2): "The Rules of the Chief Judge require that an AFC in a custody or visitation proceeding 'must zealously advocate the child's position' (22 NYCRR 7.2 [d]; see 22 NYCRR 7.2 [c]), and further provide that, '[i]f the child is capable of knowing, voluntary and considered judgment, the [AFC] should be directed by the wishes of the child, even if the [AFC] believes that what the child wants is not in the child's best interests' ... . The Rules establish only two circumstances in which an AFC may adopt a position that does not reflect the child's wishes — specifically, when he or she 'is convinced either that the child lacks the capacity for knowing, voluntary and considered judgment, or that following the child's wishes is likely to result in a substantial risk of imminent, serious harm to the child' ... . The AFC here wholly failed to fulfill the obligations imposed by these provisions upon this appeal. The only stated basis for his determination to advocate for the children's best interests rather than for their wishes was their ages. However, it was the AFC's obligation to 'consult with and advise the child[ren] to the extent of and in a manner consistent with [their] capacities' ... . At 10, the older child was certainly old enough to be capable of expressing her wishes, and whether the younger child, at 6, had the capacity to do so was not solely dependent upon her calendar age, but also upon such individual considerations as her level of maturity and verbal abilities ... . Here, the AFC's brief is devoid of any indication of the children's wishes, with no reference to 22 NYCRR 7.2 or to the analysis that this rule requires an AFC to undertake before advocating for a position that does not express the child's wishes ... . Additionally, although the record reveals that the AFC met with the children during the Family Court proceeding, it does not appear that he met or spoke with them again during the appeal ...". ***Matter of Jennifer VV. v. Lawrence WW.*, 2020 N.Y. Slip Op. 02136, Third Dept 4-2-20**

FAMILY LAW, ATTORNEYS, EVIDENCE.

ATTORNEY FOR THE CHILD PROPERLY ALLOWED TO ADOPT THE NEGLECT PETITION AFTER THE PETITIONER REQUESTED THE WITHDRAWAL OF THE PETITION.

The Third Department, reversing Family Court, determined the attorney for the child (AFC) was properly allowed to proceed with the neglect petition after the petitioner requested to withdraw the petition. However the evidence of educational and medical neglect was insufficient: "... [W]e perceive no error or abuse of discretion in Family Court declining to dismiss the petitions and allowing the attorney for the children to adopt the petitions and proceed on them (see Family Ct Act § 1032 [b] ...). Turning to the merits, as relevant here, a party seeking to establish neglect must prove, by a preponderance of the evidence, that a child's 'physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired as a result of the failure of his [or her] parent . . . to exercise a minimum degree of care . . . in supplying [him or her] with adequate . . . education in accordance with the provisions of part one of article [65] of the [E]ducation [L]aw, or medical . . . care, though financially able to do so or offered financial or other reasonable means to do so' ...". ***Matter of Abel XX. (Jennifer XX.)*, 2020 N.Y. Slip Op. 02129, Third Dept 4-2-20**

FAMILY LAW, EVIDENCE.

DENYING VISITATION TO MOTHER WHO HAD NOT SEEN THE CHILD IN NINE YEARS BUT HAD GAINED EMPLOYMENT AND STOPPED ABUSING DRUGS WAS NOT SUPPORTED BY SUFFICIENT EVIDENCE; FAMILY COURT GAVE UNDUE WEIGHT TO THE FORENSIC EVALUATOR'S FINDINGS AND TO MOTHER'S EMOTIONAL OUTBURSTS AT THE HEARING.

The Third Department, reversing Family Court, determined the denial of visitation to mother in this modification-of-visitation proceeding was not supported by the evidence. Mother had not seen the child in nine years but demonstrated she was employed and had stopped abusing drugs. Family Court gave undue weight to the findings of a forensic evaluator and to mother's emotional state during the hearing: "In our view, the forensic evaluator essentially acquiesced to the father's preferences that the child have no contact with the mother and, in effect, gave them a higher priority over any court directive. Any unwillingness by the father to facilitate visitation does not demonstrate that the child's welfare would be placed in harm if visitation between the mother and the child occurred and in no way rebuts the presumption that visitation with the mother is in the best interests of the child. In view of the flaws in the forensic evaluator's report, it should have been given minimal consideration. In our view, the forensic evaluator essentially acquiesced to the father's preferences that the child have no contact with the mother and, in effect, gave them a higher priority over any court directive. Any unwillingness by the father to facilitate visitation does not demonstrate that the child's welfare would be placed in harm if visitation between the mother and the child occurred and in no way rebuts the presumption that visitation with the mother is in the best interests of the child. In view of the flaws in the forensic evaluator's report, it should have been given minimal consideration. Family Court also found that the mother could not control her emotions during the trial. Although we do not discount a parent's emotional stability as one factor in the best interests analysis, there was little evidence, if any, indicating that the mother displayed the same emotional outbursts either with the children that she had just regained custody of or outside the courtroom setting. Accordingly, under the circumstances of this case, any inability of the mother to control her emotions at the hearing has little relevance ...". ***Matter of Jessica D. v. Michael E.*, 2020 N.Y. Slip Op. 02133, Third Dept 4-2-20**

PERSONAL INJURY, LANDLORD-TENANT.

OUT-OF-POSSESSION LANDLORD MAY BE LIABLE FOR PLAINTIFF'S SLIP AND FALL ON ICE WHICH FORMED ON THE STEP LEADING TO HER APARTMENT, DESPITE IT BEING PLAINTIFF'S RESPONSIBILITY TO REMOVE ICE AND SNOW FROM THE AREA.

The Third Department, reversing Supreme Court, determined there was a question of fact whether defendant out-of-possession landlord is liable for plaintiff's slip and fall on ice on a step leading to her apartment, despite it being plaintiff's responsibility to remove ice and snow from the area. Plaintiff alleged the ice formed because of a leak in the porch roof: "... [P]laintiff contends that the condition that led to the formation of the ice patch was present and ascertainable for at least several days. ... '[A] landlord has a duty to use ordinary care to keep those areas which are reserved and intended for the common use of the tenants and owner of the building and subject to the landlord's control, i.e., the common areas, in a reasonably safe and suitable condition' ... . The roof here was not accessible or available for use by the tenants ... , but the record indicates that the exterior of the building may have been within defendants' control. Since purchasing the building in 1994, defendants had replaced the roof, replaced the gutter system along at least one side of the building and recoated part of the roof with tar. Defendant Timothy J. Charest, who was responsible for managing the property, testified that the gutter system was on the building when defendants purchased the property, but also testified that 'if there were problems with a gutter' on the side of the building containing the apartment entrances, 'there were repairs made,' though he could not remember when any such repairs had been made. Charest testified that he inspected the property approximately weekly, as well as after every storm. He did not keep records of his inspections but would do them on a weekday; plaintiff's accident occurred on a Friday evening. Neither defendant could specifically identify when he had last inspected the property." ***Harkins v. Tuma*, 2020 N.Y. Slip Op. 02145, Third Dept 4-2-20**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

PLAINTIFF WAS ENGAGED IN REPAIR NOT MAINTENANCE AND THE LADDER DID NOT PROVIDE ADEQUATE PROTECTION FROM A FALL; PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT ON HIS LABOR LAW § 240(1) CAUSE OF ACTION SHOULD HAVE BEEN GRANTED.

The Third Department, reversing (modifying) Supreme Court, determined plaintiff's (Markou's) motion for summary judgment on his Labor Law § 240 (1) cause of action should have been granted. Plaintiff was troubleshooting a problem with lighting when his ladder slid sideways. He jumped off the ladder and landed on his feet to avoid hitting his head on the ground. The plaintiff made out a prima facie case that he was engaged in a protected activity (repair rather than routine maintenance) and the ladder did not provide adequate protection: "... [W]e find that plaintiffs established that Markou was engaged in a protected activity under Labor Law § 240 (1), in that he was attempting to repair the overhead lighting system in the cold storage area of defendant's premises ... . Notwithstanding Supreme Court's denial of plaintiffs' motion, the court correctly concluded that plaintiffs, through the deposition testimony and sworn affidavit of their expert, sustained

their prima facie burden of showing that the ladder was not 'so constructed, placed and operated as to give proper protection' to Markou (Labor Law § 240 [1]), causing him to fall and sustain injuries." ***Markou v. Sano-Rubin Constr. Co., Inc.*, 2020 N.Y. Slip Op. 02144, Third Dept 4-2-20**

WORKERS' COMPENSATION.

CLAIMANT ADEQUATELY IDENTIFIED THE RULING OBJECTED TO IN HER APPLICATION FOR BOARD REVIEW; HER APPLICATION SHOULD NOT HAVE BEEN REJECTED ON THAT GROUND.

The Third Department, reversing the Worker's Compensation Board, determined claimant's application for Board review should not have been rejected based upon claimant's answer to question 15 which asks for the specific ruling objected to: "Claimant filed her application for Board review ... and question number 15 on the form RB-89 application and the accompanying instructions directed her to '[s]pecify the objection or exception interposed to the [WCLJ's] ruling and when it was interposed as required by 12 NYCRR 300.13 (b) (2) (ii)' ... . Claimant responded by stating that 'an exception was noted at the hearing on [January 11, 2018],' that the WCLJ had noted that exception in his decision and that the 'objection [was] continued by way of' the application for Board review. The Board found that this response was deficient because it failed to identify the exception. This finding overlooked the information already provided in the application for Board review, however, as claimant made clear in her responses to question numbers 11 and 12 that the challenged ruling was the finding of 'no compensable disability' from May 10, 2017 to November 27, 2017 and that the issue was whether the WCLJ had erred in crediting certain medical testimony to make that ruling. Claimant identified the ruling at issue in those responses and, by citing the 'exception' continued in her 'application for review,' her response to question number 15 unambiguously referred to the ruling named in her prior responses so as to provide the information required by 12 NYCRR 300.13 (b) (2) (ii) and demanded by the form instructions ...". ***Matter of Narine v. Montefiore Med. Ctr.*, 2020 N.Y. Slip Op. 02142, Third Dept 4-2-20**

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