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FIRST DEPARTMENT

ARBITRATION, CONTRACT LAW.

NONSIGNATORY NOT BOUND BY ARBITRATION CLAUSE IN ENGAGEMENT LETTER.

The First Department, noting that Supreme Court should have decided whether a nonsignatory was bound by an arbitration clause and deciding the issue in the interest of judicial economy, determined the nonsignatory was not bound: "Millennium Lab Holdings, Inc. and Millennium Lab Holdings II, LLC (Millennium Holdings, LLC), pursuant to an engagement letter, retained petitioner KPMG LLP to audit their financial statements for certain time periods. The engagement letter contained a clause requiring arbitration of '[a]ny dispute or claim arising out of or relating to this Engagement Letter or the services provided hereunder.' * * * The parties agree that the only theory under which respondent, as a nonsignatory to the engagement letter containing the arbitration clause, can be required to arbitrate is on the equitable estoppel/direct benefits grounds. We find that petitioner has not met its 'heavy burden' ... under that theory. The benefits that the investors whose interests respondent represents derived from the engagement letters between petitioner and nonparty Millennium were 'merely indirect' ... . Here ... respondent pleaded solely common-law claims and did not invoke the engagement letter ... . Millennium and petitioner did not contemplate that the investors represented by respondent would benefit from the engagement letter. ... [T]here is no indication in the record that the investors whom respondent represents had actual knowledge of the engagement letters between petitioner and Millennium ...". ***Matter of KPMG LLP v. Kirschner*, 2020 N.Y. Slip Op. 02286, First Dept 4-16-20**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

LABOR LAW §§ 200, 241(6) AND COMMON LAW NEGLIGENCE CAUSES OF ACTION PROPERLY SURVIVED SUMMARY JUDGMENT IN THIS WORKPLACE SLIP AND FALL CASE.

The First Department determined plaintiff's Labor Law §§ 200, 241(6) and common law negligence causes action properly survived summary judgment in this workplace slip and fall case. Plaintiff fell going down a staircase and there was evidence that dust and perhaps paint was on the stairway associated with sanding and painting the walls. Although the stairway was not a passageway pursuant to the Industrial Code, there was a question of fact whether the stairway was a work area, even though no work was being done at the time of the fall. The defendant responsible for cleaning up, Magnetic, could be liable as a statutory agent: "... [P]laintiff's identification of the cause of his slip and fall is not merely speculation. He testified that after he fell down the stairs, the steps he could see from the bottom of the staircase were dusty, his clothes were dusty, and his jacket was wet with paint. Further, there is testimony in the record that the walls of the stairway had been sanded and painted before plaintiff's accident. * * * Industrial Code § 23-1.7(e)(2) may serve as a predicate for plaintiff's Labor Law § 241(6) claim, as it applies to slipping as well as tripping hazards ... . Industrial Code § 23-1.7(d) is applicable to plaintiff's accident. While a staircase used to provide access to a job site is not a passageway or other working surface within the meaning of the provision unless it is the sole means of access ... , the provision is applicable if the staircase was a work area ... . Insofar as Magnetic was delegated authority for the injury-producing work, retained subcontractors to perform the injury-producing work, and was responsible for clean-up at the site, it may be held liable under Labor Law § 241(6) as a statutory agent ...". ***Ohadi v. Magnetic Constr. Group Corp.*, 2020 N.Y. Slip Op. 02278, First Dept 4-16-20**

WORKERS' COMPENSATION.

PLAINTIFF ENTITLED TO WORKERS' COMPENSATION BENEFITS FOR INJURIES CAUSED BY A CO-EMPLOYEE'S INTENTIONAL TORT (ASSAULT).

The First Department determined plaintiff was entitled to workers' compensation benefits for injuries from an intentional tort (assault) by an employee: "Plaintiff alleged that he was injured when, as he was attempting to sit down, defendant, his coworker, pulled his chair out from under him, causing him to fall to the ground. After plaintiff's accident, the Workers' Compensation Board determined that he was entitled to benefits for a work-related injury. An employee's rights to Workers' Compensation benefits is the employee's exclusive remedy against his employer or coemployee for injuries sustained during his employment (see Workers' Compensation Law §§ 11, 29[6]) ...). The Workers' Compensation Law, however, does not prevent an employee from recovering for intentional torts, such as an assault ... . Here, the motion court properly

denied defendant's motion for summary judgment dismissing the claim for assault. There are issues of fact as to whether defendant's conduct placed plaintiff in 'imminent apprehension of harmful contact' ...". ***Donnelly v. Christian***. 2020 N.Y. Slip Op. 02279, First Dept 4-16-20

THIRD DEPARTMENT

ADMINISTRATIVE LAW, SOCIAL SERVICES LAW.

ALLEGATION THAT PETITIONER FAILED TO REPORT AN INCIDENT OF SUSPECTED ABUSE BY ANOTHER EMPLOYEE OF THE NYS OFFICE FOR PEOPLE WITH DEVELOPMENTAL DISABILITIES WAS SUBSTANTIATED DESPITE THE FAILURE TO SUBSTANTIATE THE ALLEGATION OF ABUSE BY THE OTHER EMPLOYEE.

The Third Department determined the NYS Office for People with Developmental Disabilities's (OPWDD's) finding that petitioner's failure to report an incident of suspected abuse by another employee was substantiated was supported by the evidence, despite the fact that allegation of abuse by the other employee was not substantiated: "The evidence at the hearing established that the service recipient reported to petitioner every time the other employee was 'rude' to him over the course of six months, and petitioner did not act on this information. By petitioner's own testimony, she saw the other employee shout at and belittle the service recipient, yet she reported nothing. Although petitioner disputed the characterizations of her statements at the meeting or that she thought the other employee was abusive, and offered many reasons as to why she did not act on her observations, respondent was free to make credibility determinations and credit contrary testimony, as 'it is the responsibility of [respondent] to weigh the evidence and choose from among competing inferences therefrom' … . We reject petitioner's contention that obstruction of reporting cannot be substantiated against her since the underlying allegations of abuse against the other employee were not substantiated. Pursuant to statute, reportable incidents must be reported when they are 'suspected,' rather than confirmed ...". ***Matter of Taylor v. Justice Ctr. for the Protection of People with Special Needs*, 2020 N.Y. Slip Op. 02299, Third Dept 4-16-20**

ADMINISTRATIVE LAW, SOCIAL SERVICES LAW, MEDICAID.

SERVICES PROVIDED TO A DISABLED MAN BY THE NYS OFFICE OF PEOPLE WITH DEVELOPMENTAL DISABILITIES COULD NOT BE CURTAILED BECAUSE OF A LACK OF FUNDS.

The Third Department determined the NYS Office for People with Developmental Disabilities (OPWDD) was properly prohibited from curtailing services to and disabled man, M,D., because of a lack of funds: "Even if the catch-all of 'any other relevant considerations advanced by the parties' (OPWDD Policy and Procedures, Topic No. CP-10 [Rev (Feb. 1995)], at 4, ¶ 10) includes a provider agency's financial difficulties connected to the provision of services to an individual, the Hearing Officer noted that petitioner 'may well have valid fiscal concerns,' but concluded that it would not be proper or in M.D.'s best interest to discharge him on the basis of a lack of funding. We acknowledge the conundrum raised by petitioner — that providers face a difficulty in providing excellent services to a population with special needs but with no avenue of relief to help them financially when those services are more expensive than expected or than the maximum allowed under the HCBS [Home Community Based Services] waiver program. While we applaud providers such as petitioner for striving to provide excellent services to an underserved population, and are cognizant of their frustration when they deem the funding available for such services to be inadequate, the remedy must be for the service providers to apply to or lobby the relevant agencies, the Legislature or the Governor to provide more funding; the answer cannot be that administrative agencies or courts should allow service providers to simply discharge individuals with developmental disabilities from their services whenever the providers deem them too expensive. Based on consideration of the relevant factors, substantial evidence supports the Commissioner's determination that it was not reasonable to allow petitioner to discharge M.D. from its program." ***Matter of Community, Work, & Independence, Inc. v. New York State Off. for People with Dev. Disabilities*, 2020 N.Y. Slip Op. 02301, Third Dept 4-16-2**

APPEALS, REAL ESTATE, REAL PROPERTY, REAL PROPERTY ACTIONS AND PROCEEDINGS LAW (RPAPL), FORECLOSURE.

THE APPEAL WAS RENDERED MOOT BY DEFENDANT'S TRANSFER OF THE PROPERTY AFTER SUPREME COURT RULED DEFENDANT HAD TITLE TO THE PROPERTY.

The Third Department dismissed the appeal as moot. Property which had been validly foreclosed by defendant was transferred to a third party. Plaintiff had brought an action pursuant to Real Property Actions and Proceedings Law (RPAPL) Article 15 to determine its rights to a portion of the foreclosed property. Supreme Court granted defendant's motion for summary judgment on its counterclaim for strict foreclosure (RPAPL 1352) and plaintiff appealed. The appeal was deemed moot and dismissed because defendant had a right to transfer the property after Supreme Court's ruling: " '[T]he jurisdiction of this Court extends only to live controversies and, as such, an appeal will be considered moot unless an adjudication of the merits will result in immediate and practical consequences to the parties' ... . 'Since the ability to transfer clear title is a natural incident of [property] ownership, it follows that when a complaint involving title to or the right to possess and

enjoy real property has been dismissed on the merits and there is no outstanding notice of pendency or stay, the property owner has a right to transfer or otherwise dispose of the property unrestricted by the dismissed claim' ... . '[A] purchaser's actual knowledge of litigation and a pending appeal is not legally significant and[,] absent a validly recorded notice of pendency, an owner has the ability to transfer clear title' ... . Here, Supreme Court canceled plaintiff's notice of pendency and this Court denied his motion for a stay pending appeal. Therefore, defendants had the right to transfer the property when they did, and the purchaser obtained clear title despite its knowledge of the pending appeals." ***Govel v. Trustco Bank*, 2020 N.Y. Slip Op. 02306, Third Dept 4-16-20**

CIVIL PROCEDURE, FORECLOSURE.

MOTION TO VOLUNTARILY DISCONTINUE THE FORECLOSURE ACTION WAS PROPERLY GRANTED WITHOUT PREJUDICE.

The Third Department determined plaintiff's motion to voluntarily discontinue the foreclosure action (CPLR 3217(b)) was properly granted without prejudice. The litigation was still in the early stages and, although defendant had interposed a counterclaim, defendant did not move for a default judgment within a year and thereby abandoned the counterclaim: "Although this action had been pending for approximately three years at the time of the motion, the litigation itself remained in its early stages. In addition, the record confirms that defendant never sought default nor moved to compel discovery. Furthermore, the parties had not yet participated in the mandatory settlement conference (see CPLR 3408). Indeed, determination of plaintiff's motion was the first occasion where Supreme Court was called upon to intervene in this action. Although defendant alleged that she would sustain prejudice if her discovery went unanswered, Supreme Court correctly determined that there was no evidence of prejudice to defendant or other improper consequences flowing from the discontinuance, as the parties can engage in necessary discovery in a subsequent foreclosure action ... . [T]he interposition of a counterclaim in and of itself is not dispositive with respect to the discontinuance. The discontinuance must work a particular prejudice against a defendant. Here, defendant is not prejudiced, as she will be able to assert her counterclaim in a subsequent foreclosure action. Although defendant argues that 'one's home is an interest that is unquantifiable,' she will be able to continue to reside in the mortgaged premises pending another action and will have the same rights available to her as were in the discontinued action ...". ***Green Tree Servicing LLC v. Shiow Fei Ju*, 2020 N.Y. Slip Op. 02307, Third Dept 4-16-20**

CRIMINAL LAW.

SHORTLY BEFORE TRIAL, THE PEOPLE WERE PROPERLY ALLOWED TO AMEND THE REFERENCE TO A DATE IN THE INDICTMENT.

The Third Department noted that the People were properly allowed to amend the designation of the date of an offense alleged in the indictment shortly before the trial began: " 'At any time before or during trial, the court may, upon application of the [P]eople and with notice to the defendant and opportunity to be heard, order the amendment of an indictment with respect to defects, errors or variances from the proof relating to . . . time . . ., when such an amendment does not change the theory or theories of the prosecution as reflected in the evidence before the grand jury which filed such indictment, or otherwise tend to prejudice the defendant on the merits' (CPL 200.70 [1]). Here, the original indictment asserted that defendant's first assault upon the victim took place on June 15, 2017. About two weeks before the commencement of the trial, the People sought leave to amend it to provide that the incident occurred 'on or about' June 15, 2017, on the ground that the initial date had been an approximation and that subsequent investigation had narrowed down the time to the late evening hours of June 15, 2017 and/or the early morning hours of June 16, 2017. The amendment did not alter the theory of the prosecution; the People consistently maintained, both before the grand jury and at trial after the amendment, that defendant strangled and assaulted the victim in their room after the gathering in the motel office and before her first treatment at the hospital on the morning of June 16, 2017. The amendment merely served to address the possibility that the incident began in the evening of June 15, 2017 and continued past midnight into the early morning hours of the next day. There was no prejudice to defendant, who did not proffer an alibi defense ...". ***People v. Baber*, 2020 N.Y. Slip Op. 02294, Third Dept 4-16-20**

CRIMINAL LAW, ATTORNEYS.

MISTRIAL BASED UPON DEFENSE COUNSEL'S CONFLICTS OF INTEREST WAS PROPERLY GRANTED WITH DEFENDANT'S CONSENT; DOUBLE JEOPARDY DID NOT ATTACH.

The Third Department determined the mistrial, based upon defense counsel's conflict of interest (representation of prosecution witnesses) was properly granted with defendant's consent. Therefore double jeopardy did not attach: "Upon learning of defense counsel's potential conflicts of interest, County Court engaged in a lengthy colloquy with the parties, during which they explored — to no avail — ways to avoid the conflict, including the possibility of the Special Prosecutor foregoing testimony from the witnesses. The court explained the ramifications of the conflict to defendant more than once, emphasizing that defense counsel's ethical obligations to his prior clients — the intended prosecution witnesses — could 'impact his ability to cross-examine them as vigorously or as effectively or as thoroughly as he otherwise would.' Following this explanation, County Court presented defendant with the choice to waive any conflict and proceed with his assigned counsel or request the assignment of new counsel, thereby necessitating a mistrial and a retrial. Although defendant asserted that

he did not 'want to do this again,' he also expressed discomfort with being at a disadvantage should his assigned counsel be unable to fully cross-examine either of the prosecution witnesses and ultimately stated, 'I'd like to seek new counsel, I guess.' Later, in response to County Court's additional queries, defendant confirmed that he wanted a new attorney and reasserted his unwillingness to waive any potential conflict of interest. Thereafter, County Court asked if there was an application for a mistrial, to which defendant — through his assigned counsel — stated that there was. ... Upon our review of the entire colloquy, we find that defendant requested and, thus, consented to a mistrial ... . Inasmuch as the record wholly belies defendant's further contention that County Court and/or the Special Prosecutor deliberately engaged in misconduct intended to provoke a mistrial, defendant's retrial was not barred by double jeopardy protections ...". ***People v. Ellis*, 2020 N.Y. Slip Op. 02292, Third Dept 4-16-20**

CRIMINAL LAW, EVIDENCE.

AFTER THE INITIAL INVESTIGATION AT THE SCENE AND AFTER DEFENDANT WAS HANDCUFFED AND SEATED IN THE BACK OF THE POLICE CAR, THE OFFICER ASKED DEFENDANT "WHAT HAPPENED?"; DEFENDANT'S RESPONSE SHOULD HAVE BEEN SUPPRESSED; CONVICTION REVERSED.

The Third Department, reversing defendant's conviction, determined statements made by defendant when he was handcuffed in the back of a police car should have been suppressed. The officer (Nellis) asked the defendant "What happened?" after the initial investigation was over: "After Nellis arrived at the scene and discovered defendant in the driveway, he entered the residence and found the victim being treated by defendant's mother. The victim was convulsing and making gurgling sounds, and Nellis observed bruises and dried blood on her face. Nellis radioed emergency services to respond immediately, exited the residence and informed defendant that he was being detained for questioning. The officer did not immediately ask defendant what happened, but, after defendant was handcuffed and placed in the backseat of the patrol car, Nellis asked defendant, 'What happened?' In response, defendant told him that he 'snapped' and he 'wanted her to feel the pain he had.' 'Defendant also admitted, 'I choked her with a rope but never struck her in the face.' County Court allowed the statements, reasoning that the purpose of Nellis' questioning was to clarify the nature of the volatile situation rather than to elicit evidence of a crime. We disagree. The incident had been completed, the parties had been identified and medical assistance requested; defendant had been cooperative and responsive. '[W]here criminal events have been concluded and the situation no longer requires clarification of the crime or its suspects, custodial questioning will constitute interrogation' ... . We cannot say beyond a reasonable doubt that these statements did not contribute to defendant's conviction and, as such, the error was not harmless." ***People v. McCabe*, 2020 N.Y. Slip Op. 02288, Third Dept 4-16-20**

REAL PROPERTY TAX LAW, EDUCATION-SCHOOL LAW, UTILITIES.

OWNER OF A SOLAR ENERGY SYSTEM INSTALLED ON SCHOOL DISTRICT PROPERTY WAS ENTITLED TO THE STATUTORY EXEMPTION FROM REAL PROPERTY TAX DESPITE THE SCHOOL DISTRICT'S RESOLUTION OPTING OUT OF THE EXEMPTION; THE RESOLUTION WAS NEVER FILED AS REQUIRED BY THE REAL PROPERTY TAX LAW.

The Third Department determined the petitioner, Laertes Solar, the owner of a solar energy system installed on school district property, was entitled to the statutory exemption from property tax on the system. The school district had adopted a resolution opting out of the exemption. But the resolution had never been filed with the NYS Department of Taxation and Finance (Department) or the NYS Energy and Research Development Authority (NYSEARDA) as required by the Real Property Tax Law (RPTL 487): "The ... examination of 'the language of the statute and the legislative intent underlying it' ... leads us to agree with Supreme Court that the filing requirements of RPTL 487 (8) are mandatory and that the 2014 resolution was inapplicable to the system given the school district's failure to meet those requirements during the relevant period (see RPTL 487 [8] [a]). Indeed, although we need not defer to the Department's interpretation of RPTL 487 given that this case presents a question 'of pure statutory reading and analysis, dependent only on accurate apprehension of legislative intent'... , it is notable that the Department has also taken the position that an opt-out resolution 'must be filed' with both it and NYSERDA ... . It follows that — even assuming that the system may be viewed as a distinct parcel of real property that may be taxed — Laertes was entitled to the RPTL 487 exemption for which it applied (see RPTL 487 [6])." ***Matter of Laertes Solar, LLC v. Assessor of the Town of Harford*, 2020 N.Y. Slip Op. 02302, Third Dept 4-16-20**

WORKERS' COMPENSATION.

CLAIMANT, WHO WAS ON THE JOB OUT-OF-TOWN, WAS INJURED IN A TRAFFIC ACCIDENT WHILE DRIVING FROM HIS HOTEL TO WHERE THE EMPLOYEES PICKED UP THEIR TRUCKS; CLAIMANT WAS ENTITLED TO WORKERS' COMPENSATION BENEFITS UNDER THE TRAVELING EMPLOYEE EXCEPTION.

The Third Department determined claimant was entitled to workers' compensation benefits for injuries stemming from a traffic accident on his way to the site where the employees pick up their bucket trucks for tree-trimming work. Claimant was working about five or six hours from his home and his employer was paying a portion of his hotel costs. The traffic accident occurred when claimant was driving from the hotel to where the trucks were kept: "Under the traveling employee

exception, 'injuries to a traveling employee may be compensable even if the employee at the time of the accident was not engaged in the duties of his [or her] employment,' provided that the employee is engaged in a reasonable activity ... . We are not persuaded by the carrier's contention that the Board erred in applying this exception. The Board observed that claimant was working in an area about a 5½-to 6-hour drive from home. Although the employer's supervisor testified that claimant was not required to stay at the hotel, he agreed that it would not have been practical for claimant to commute from home. All of claimant's coworkers, including the general foreman, stayed at the hotel. Under these circumstances, the Board determined that claimant's status as an employee continued throughout his stay away from home. As claimant was engaged in a reasonable activity at the time of the accident, the record provides substantial evidence for the Board's conclusion that claimant's injuries arose out of and in the course of his employment ...". ***Matter of Wright v. Nelson Tree Serv.*, 2020 N.Y. Slip Op. 02312, Third Dept 4-20-20**

ZONING, LAND USE.

ZONING BOARD'S DENIAL OF A VARIANCE WAS BASED PRIMARILY ON COMMUNITY OPPOSITION; THE DENIAL WAS PROPERLY ANNULLED BY SUPREME COURT.

The Third Department determined the Board of Zoning Appeals improperly denied petitioner's application for a variance based primarily on community opposition: "... [W]e cannot say that respondent's determination to deny the area variance was rational. Respondent's findings reflect that an environmental review of the proposed project concluded that there would be no significant impacts to, among other things, aesthetic or historic resources, the air, land, drainage or open space area. The findings also indicated that the City of Ithaca Planning Board, at best, gave an equivocal opinion about the proposed project. In this regard, the findings stated that the Planning Board was 'unsure' whether the requested variance was consistent with the neighborhood and that it was 'conflicted' about petitioner's appeal to respondent. Furthermore, petitioner's proposed use of the property was a permitted use in the neighborhood. In addition, the record contains comments from individuals in the neighborhood — some of which supported and some of which disapproved of petitioner's request. Yet, respondent's consideration of the requisite factors (see Code of City of Ithaca § 325-40 [C] [3] [b] [1]-[5]) rested primarily on the opposing comments provided by those individuals living in the neighborhood ... . Given that the views of the community in opposition to petitioner's request by itself does not suffice to deny a variance, respondent's determination lacks a rational basis ...". ***Matter of 209 Hudson St., LLC v. City of Ithaca Bd. of Zoning Appeals*, 2020 N.Y. Slip Op. 02311, Third Dept 4-16-20**

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