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Editor: Bruce Freeman

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FIRST DEPARTMENT

CIVIL PROCEDURE, CONTRACT LAW, ATTORNEYS.

A DISMISSAL WITHOUT PREJUDICE IS NOT A FINAL DETERMINATION ON THE MERITS AND IS NOT SUBJECT TO COLLATERAL ESTOPPEL; ATTORNEY'S FEES ARE APPROPRIATE DAMAGES IN AN ACTION FOR BREACH OF A FORUM SELECTION CLAUSE.

The First Department, reversing Supreme Court, determined plaintiff's (Wormser's) action for breach of the forum selection clause seeking attorney's fees could go ahead. The defendant's (L'Oreal's) New Jersey action had been dismissed "without prejudice," and therefore was not precluded by collateral estoppel: "After the New Jersey court had dismissed [defendant's] complaint 'with prejudice within the jurisdiction of New Jersey,' L'Oréal commenced an action against Wormser in Supreme Court, New York County. Subsequently, a New Jersey appellate court amended the New Jersey trial court's orders to make the dismissal 'without prejudice' ... , and Wormser brought this action. Wormser's claim is not barred by the doctrine of res judicata, because the dismissal was without prejudice by the New Jersey appellate court and therefore was not a final determination on the merits ,,, , Wormser's claim for attorneys' fees may proceed, as 'damages may be obtained for breach of a forum selection clause, and an award of such damages does not contravene the American rule that deems attorneys' fees a mere incident of litigation' ...". ***Wormser Corp. v. L'Oréal USA, Inc.*, 2022 N.Y. Slip Op. 03093, First Dept 5-10-22**

EMPLOYMENT LAW, LABOR LAW, CIVIL PROCEDURE.

ACTION AGAINST AMAZON ALLEGING RETALIATION AGAINST WORKERS WHO PROTESTED COVID-RELATED WORKING CONDITIONS PREEMPTED BY NATIONAL LABOR RELATIONS ACT (NLRA).

The First Department, reversing Supreme Court, determined this action by the NYS Attorney General against Amazon alleging retaliation against workers for protesting COVID-related working conditions was preempted by the National Labor Relations Act (NLRA): "[W]e find that the Labor Law §§ 215 and 740 claims alleging retaliation against workers based, in part, on their participation in protests against unsafe working conditions plainly relate to the workers' participation in 'concerted activities for the purpose of . . . mutual aid or protection,' i.e., activities that are protected by the NLRA ... , and therefore that the claims are preempted ... . Where conduct is clearly protected or prohibited by the NLRA, the NLRB, and not the states, should serve as the forum for disputes arising out of the conduct ...". ***People v. Amazon.com*, 2022 N.Y. Slip Op. 03081, First Dept 5-10-22**

PERSONAL INJURY, EVIDENCE.

DEFENDANT PROPERTY OWNER DEMONSTRATED THAT THE STORM IN PROGRESS DOCTRINE APPLIED IN THIS SLIP AND FALL CASE (A PROPERTY OWNER WILL NOT BE LIABLE FOR A SNOW AND ICE CONDITION UNTIL A REASONABLE TIME AFTER THE PRECIPITATION HAS STOPPED); THE BURDEN THEN SHIFTED TO PLAINTIFF TO SHOW DEFENDANT'S EFFORT TO REMOVE SNOW HOURS BEFORE THE FALL CREATED THE DANGEROUS CONDITION; TO MEET THAT BURDEN AN EXPERT AFFIDAVIT SHOULD HAVE BEEN, BUT WAS NOT, SUBMITTED.

The First Department, reversing Supreme Court, determined the property owner's (Site A's) motion for summary judgment in this ice and snow slip and fall case should have been granted. The evidence demonstrate it was still snowing at the time of plaintiff's fall and plaintiff did not submit an expert affidavit demonstrating how defendant's snow removal efforts exacerbated the condition: "Site A made a prima facie showing of entitlement to summary judgment based on the storm-in-progress doctrine, because the meteorological data, its expert meteorological affidavit, and plaintiff's deposition testimony annexed to its moving papers establish that there was a storm in progress when the accident occurred ... . Although the burden shifted to plaintiff to establish that Site A created the alleged condition or made it more hazardous by attempting to remove the precipitation from the driveway about five hours before he fell, plaintiff failed to meet that burden as he submitted no expert affidavit explaining how Site A, by not salting or sanding the area before the accident, could have created or exacerbated the naturally occurring ice condition ...". ***Colon v. Site A - Wash. Hgts.*, 2022 N.Y. Slip Op. 03173, First Dept 5-12-22**

PERSONAL INJURY, MUNICIPAL LAW.

THE NEGLIGENT ROADWAY DESIGN CAUSE OF ACTION IN THIS TRAFFIC ACCIDENT CASE SHOULD NOT HAVE BEEN DISMISSED; PLAINTIFFS ALLEGED THE ABSENCE OF TURNOUTS FOR DISABLED VEHICLES CREATED A DANGEROUS CONDITION.

The First Department, reversing (modifying) Supreme Court, determined the negligent roadway design cause of action against the city should not have been dismissed in this traffic accident case. Plaintiffs alleged the absence of turnouts for disabled vehicles on Harlem River Drive created a dangerous condition: "Defendants failed to establish that they were unaware of dangerous highway conditions on the northbound Harlem River Drive where the decedent's accident occurred ... , or that the previous accidents in that area of the Drive disclosed by the record were not of a similar nature to the decedent's accident, or that the causes of those accidents were not similar to the alleged design-related cause(s) of the decedent's accident ... . [I]n or about 1983, 'the City had received a study recommending that shoulders be added to this section of the Harlem River Drive, and even the City's engineer admitted that the absence of a shoulder or other place of refuge created an unsafe traffic condition' ... . [T]he record in this case discloses that at least 11 more motor vehicle accidents occurred on the Harlem River Drive between 165th and 183rd Streets between October 1990 and September 1993 that were 'related to disabled vehicles in the travel lanes that could be directly attributed to the Drive's lack of shoulders.' The record also reveals that ... the City has justified its inaction by minimizing the significance of pertinent accident data, suggesting that the safety benefit of adding shoulders or turnouts to the Harlem River Drive would be outweighed by the onerousness of the undertaking, and estimating a multimillion-dollar cost of the endeavor. A municipality breaches its 'nondelegable duty to keep its roads reasonably safe . . . when [it] is made aware of a dangerous highway condition and does not take action to remedy it' ...". ***Chowdhury v. Phillips*, 2022 N.Y. Slip Op. 03067, First Dept 5-10-22**

SECOND DEPARTMENT

ARBITRATION, CONTRACT LAW, EMPLOYMENT LAW.

TO BE ENFORCEABLE, AN AGREEMENT TO ARBITRATE MUST BE CLEAR, EXPLICIT AND UNEQUIVOCAL; HERE THE WORD "DISAGREEMENTS" IN THE ARBITRATION CLAUSE WAS TOO VAGUE AND AMBIGUOUS TO REQUIRE PLAINTIFF TO ARBITRATE HER CLAIMS OF UNPAID COMMISSIONS AND WRONGFUL TERMINATION.

The Second Department, reversing Supreme Court, determined the arbitration clause in the employment agreement was ambiguous and vague. The clause could not be the basis for forcing plaintiff to arbitrate her claims that she was not paid commissions owed to her and was wrongfully terminated: "... '[A] party will not be compelled to arbitrate and, thereby, to surrender the right to resort to the courts, absent 'evidence which affirmatively establishes that the parties expressly agreed to arbitrate their disputes' ... . 'The agreement must be clear, explicit and unequivocal and must not depend upon implication or subtlety' ... . Here, the provision, '[t]hird party in case of a disagreement: Rabbi Shlomo Gross (Belze Dayan) or Rabbi Meir Labin,' does not expressly and unequivocally establish that the parties agreed to arbitrate the plaintiffs' claims for unpaid commissions or wrongful termination ... . Moreover, this provision ambiguously refers to a disagreement, but does not specify the types of disagreements to which it applies ...". ***Rubinstein v. C & A Mktg., Inc.*, 2022 N.Y. Slip Op. 03136, Second Dept 5-11-22**

CIVIL PROCEDURE.

DEFENDANT RAISED A QUESTION OF FACT WHETHER THE ADDRESS AT WHICH SERVICE OF PROCESS WAS ATTEMPTED WAS DEFENDANT'S ACTUAL PLACE OF BUSINESS; AN AFFIDAVIT OF SERVICE MAY NOT BE AMENDED TO CURE AN ERRONEOUS ADDRESS.

The Second Department, reversing Supreme Court, determined the defendant's affidavit that the address at which service of process was made was not his business address and the affidavit of service could not be amended to cure the address-error: "[A]n affidavit submitted by [defendant] Harooni ... was sufficient to demonstrate that the address where service was alleged to have been effected in the affidavit of service ... , was not in fact the address of Harooni's 'actual place of business' (CPLR 308[2] ...). ... Pursuant to CPLR 305(c), a court, '[a]t any time, in its discretion and upon such terms as it deems just, . . . may allow any . . . proof of service of a summons to be amended, if a substantial right of a party against whom the summons is issued is not prejudiced' ... . An 'erroneous address' contained in an affidavit of service affects a defendant's substantial right to notice of the proceeding against him or her, and may not be corrected by an amendment ...". ***Jampolskaya v. Ilona Genis, MD, P.C.*, 2022 N.Y. Slip Op. 03104, Second Dept 5-11-22**

CRIMINAL LAW, IMMIGRATION LAW, ATTORNEYS.

DESPITE THE STRENGTH OF THE EVIDENCE AGAINST HIM, DEFENDANT DEMONSTRATED A DECISION TO GO TO TRIAL WOULD HAVE BEEN RATIONALE BECAUSE OF HIS FAMILY OBLIGATIONS; DEFENDANT WAS ENTITLED TO A HEARING ON HIS MOTION TO VACATE HIS CONVICTION ON INEFFECTIVE ASSISTANCE GROUNDS; DEFENDANT ALLEGED HIS ATTORNEY MISADVISED HIM ON THE DEPORTATION CONSEQUENCES OF A GUILTY PLEA.

The Second Department, reversing (modifying) Supreme Court, determined defendant should have been afforded a hearing on his motion to vacate his conviction on ineffective assistance grounds. Defendant alleged he was misadvised of the deportation consequence of his guilty plea. "[N]either the fact that the defendant had previously been convicted of an offense that may subject him to removal, nor the seemingly strong evidence against him with respect to the instant offense, nor the favorable plea bargain he received, necessarily requires a finding that the defendant was not prejudiced by his counsel's alleged misadvice ... . The defendant's averments, including that he has resided in the United States since he was 10 years old, that he is married to his spouse with whom he has two minor children, that his spouse is unable to work due to a medical condition, that he is gainfully employed, and that he is the sole source of financial support to his family, sufficiently alleged that a decision to reject the plea offer would have been rational ...". ***People v. Samaroo*, 2022 N.Y. Slip Op. 03128, Second Dept 5-11-22**

ELECTION LAW, CIVIL PROCEDURE.

THE VALIDATING PETITION SHOULD NOT HAVE BEEN DISMISSED ON THE GROUND THE PETITION WAS NOT VERIFIED; THE FAILURE TO RAISE THE OBJECTION WITH DUE DILIGENCE WAIVED IT; ALTHOUGH THE LANGUAGE IN THE PETITION WAS NOT EXACTLY THAT IN CPLR 3021, THE PETITION WAS IN FACT VERIFIED.

The Second Department, reversing Supreme Court, determined petitioner's validating petition should not have been dismissed on the ground that the petition was not verified because: (1) the respondents waived the issue by not objecting with due diligence; and (2) although the exact words re: verification in CPLR 3021 were not used, the language used in the petition had the same effect as verification: " 'Section 16-116 of the Election Law requires that a special proceeding brought under article 16 of the Election Law shall be heard upon a verified petition. The requirement is jurisdictional in nature'… . However, the objection to the alleged lack of verification of the validating petition was waived by the objectors' failure to raise that objection with due diligence as required by CPLR 3022 … . Moreover, the mere fact that a petition does not use the exact words set forth in CPLR 3021 does not mean that the petition is not verified, so long as the language used has the same effect as a verification … . Here, the language used in the validating petition had the same effect as a verification and, therefore, the validating petition was 'verified' within the meaning of Election Law § 16-116." ***Matter of Francois v. Rockland County Bd. of Elections*, 2022 N.Y. Slip Op. 03190, Second Dept 5-12-22**

FAMILY LAW, SOCIAL SERVICES LAW, EVIDENCE.

THE "ABANDONMENT" EVIDENCE WAS NOT SUFFICIENT; MOTHER'S PARENTAL RIGHTS SHOULD NOT HAVE BEEN TERMINATED.

The Second Department, reversing Family Court, determined the petitioner did not prove mother had abandoned her children. Mother's parental rights should not have been terminated: "[T]he petitioner failed to establish by clear and convincing evidence that the mother evinced an intent to forego her parental rights. The record demonstrates that, during the six-month abandonment period, the mother visited with the children on two occasions, saw the children on at least one additional occasion at a family gathering, purchased clothing for the children, spoke with the case worker on the phone multiple times, and objected to the goal for the children's placement changing to a kinship adoption rather than returning the children to the mother. Under these circumstances, the Family Court should have denied the petitions on the merits, insofar as asserted against the mother ... . We further note that the record contains testimony from a case worker that, during family visits subsequent to the filing of the petitions, the mother's interactions with the children were 'very positive.' 'While a parent's conduct outside the abandonment period is not determinative in an abandonment proceeding, it may be relevant to assessing parental intent' ...". ***Matter of Grace E. W.-F. (Zanovia W.)*, 2022 N.Y. Slip Op. 03119, Second Dept 5-11-22**

FORECLOSURE, CONTRACT LAW.

THE NOTICE SENT TO THE BORROWERS IN 2012 WAS NOT SUFFICIENT TO ACCELERATE THE MORTGAGE DEBT; THEREFORE THE FORECLOSURE COMPLAINT WAS PROPERLY DISMISSED.

The Second Department determined the notice sent to the defendants was not sufficient to accelerate the mortgage debt and, therefore, the debt had not been accelerated at the time this foreclosure action was brought: Supreme Court properly dismissed the foreclosure complaint: "[T]he defendants' submissions in support of that branch of their cross motion which was for summary judgment dismissing the complaint demonstrated that the loan matured in 2038 and that the defendants had not commenced a prior foreclosure action. The defendants also submitted a copy of the 2012 notice, which did not demand the entire outstanding balance on the loan, but, as the Supreme Court found, only demanded the amount due as

of that date. Notably, the 2012 notice stated that if the plaintiffs were unable to pay the arrears, there were 'various options that may be available . . . to prevent a foreclosure sale of [the] property; such as a repayment plan, loan modification, sale of the property, or deeding the property to the noteholder. Thus, the 2012 notice did not set forth the defendants' clear and unequivocal election to accelerate the debt, but instead, was a letter discussing acceleration as a possible future event ... . Accordingly, the defendants established, prima facie, that the consolidated mortgage had not been accelerated at the time the plaintiffs commenced this action. In opposition, the plaintiffs failed to raise a triable issue of fact. Contrary to the plaintiffs' contention, the plain meaning of the word 'may' as it appears in paragraph 22 of the consolidated mortgage renders that provision optional, and '[w]here, as here, the acceleration of the maturity of a mortgage debt is made optional with the holder of the note and mortgage, 'some affirmative action must be taken evidencing the holder's election to take advantage of the accelerating provision, and until such action has been taken the provision has no operation' ...". ***Knox v. Countrywide Home Loans, Inc.*, 2022 N.Y. Slip Op. 03107, Second Dept 5-11-22**

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

THE BANK DID NOT RAISE A QUESTION OF FACT ABOUT WHETHER IT VIOLATED THE SEPARATE-ENVELOPE RULE IN THIS FORECLOSURE ACTION; THE BANK'S SUMMARY JUDGMENT MOTION SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined the defendants demonstrated the bank in this foreclosure action did not demonstrate compliance with the notice requirements of RPAPL 1304, which requires the notice of foreclosure be mailed in a separate envelope which includes nothing else: "[T]he defendants established that the plaintiff failed to strictly comply with RPAPL 1304, on the ground that additional information was included in the same envelope as the 90-day notice required by RPAPL 1304 ... . The plaintiff failed to raise a triable issue of fact in opposition." ***HSBC Bank USA, N.A. v. Hibbert*, 2022 N.Y. Slip Op. 03102. Second Dept 5-11-22**

PERSONAL INJURY, EVIDENCE.

DEFENDANTS PRESENTED NO PROOF OF WHEN THE AREA OF THE SLIP AND FALL WAS LAST INSPECTED; THEREFORE, DEFENDANTS DID NOT DEMONSTRATE A LACK OF CONSTRUCTIVE NOTICE.

The Second Department, reversing Supreme Court, determined defendants' motion for summary judgment in this slip and fall case should not have been granted. The defendants did not submit proof of when the area was last inspected and therefore did not demonstrate they lacked constructive notice of the condition: "A defendant has constructive notice of a hazardous condition on property when the condition is visible and apparent, and has existed for a sufficient length of time prior to the accident to afford the defendant a reasonable opportunity to discover and remedy it ... . To meet its burden on the issue of constructive notice, a defendant is required to offer evidence as to when the accident site was last inspected relative to the time when the plaintiff fell ... . Here, the defendants failed to demonstrate when they last inspected the walkway prior to the incident and they failed to establish, prima facie, that they did not have constructive notice of the alleged hazardous condition ... . The defendants also failed to establish, prima facie, that the cinder block was open and obvious and not inherently dangerous ...". ***Ferrer v. 120 Union Ave., LLC*, 2022 N.Y. Slip Op. 03096, Second Dept 5-11-22**

PERSONAL INJURY, VEHICLE AND TRAFFIC LAW.

PLAINTIFF DID NOT DEMONSTRATE THE GRAVES AMENDMENT, WHICH RELIEVES THE OWNER OF A LEASED VEHICLE FROM LIABILITY FOR A TRAFFIC ACCIDENT, DID NOT APPLY TO THE DEFENDANT OWNER; THEREFORE, PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined plaintiff did not demonstrate the Graves Amendment did not apply to the owner of the vehicle involved in the accident, relieving the owner of a leased vehicle of liability: "Pursuant to Vehicle and Traffic Law § 388(1), '[e]very owner of a vehicle used or operated in this state shall be liable and responsible for death or injuries to person or property resulting from negligence in the use or operation of such vehicle, in the business of such owner or otherwise, by any person using or operating the same with the permission, express or implied, of such owner.' However, pursuant to the Graves Amendment, which 'preempt[s] conflicting New York law' ... , the owner of a leased or rented motor vehicle (or an affiliate of the owner) cannot be held liable by reason of being the owner of the vehicle (or an affiliate of the owner) for personal injuries resulting from the use of such vehicle if: (1) the owner (or an affiliate of the owner) is engaged in the trade or business of renting or leasing motor vehicles, and (2) there is no negligence or criminal wrongdoing on the part of the owner (or an affiliate of the owner) (see 49 USC § 30106[a] ...)." ***Keys v. PV Holding Corp.*, 2022 N.Y. Slip Op. 03105, Second Dept 5-11-22**

THIRD DEPARTMENT

DISCIPLINARY HEARINGS (INMATES), EVIDENCE.

DESPITE THE APPARENT FAILURE TO PRESERVE A VIDEO OF A MEETING DURING WHICH PETITIONER ALLEGEDLY PLANNED A DEMONSTRATION AT THE PRISON, THE DETERMINATION FINDING PETITIONER GUILTY OF PLANNING THE DEMONSTRATION WAS CONFIRMED; THE DISSENT ARGUED PETITIONER WAS DEPRIVED OF DUE PROCESS BY THE FAILURE TO TURN OVER THE VIDEO, WHICH HAD BEEN REVIEWED BY THE OFFICER WHO PREPARED THE MISBEHAVIOR REPORT.

The Third Department confirmed the determination finding petitioner-inmate guilty of urging others to participate in a demonstration at the prison. There was a video of the meeting where the demonstration was allegedly planned. An officer who witnessed the meeting and testified about it apparently viewed the video. Petitioner made timely requests for the video, but it was never provided. The dissent argued the failure to retain and provide the video of the alleged meeting required that the determination be annulled: **From the dissent:** "The sergeant and the correction officer have described two distinctly different meetings, one involving 12 people, the other 30 to 40 ... . This discrepancy heightens the relevance of the ... video, as does the fact that the sergeant viewed the video and the Hearing Officer was uncertain whether that viewing occurred before or after the undefined retention period expired. Complicating matters, the Hearing Officer noted the three-week delay between the ... meeting and issuance and service of the misbehavior report on petitioner. … In a situation such as this, where there is an extended delay in issuing a misbehavior report and the author of that report has in fact reviewed a video, it is incumbent upon the correctional facility to preserve that evidence ... . The failure to do so here compromised petitioner's due process right to a fair evidentiary hearing ... . That is particularly so in view of the sergeant's affirmative testimony as to what ostensibly happened in the E-yard on May 29, 2020. It is further evident that the Hearing Officer should have, but failed to, inquire further as to the existence of the video or the circumstances of its deletion ...". ***Matter of Headley v. Annucci*, 2022 N.Y. Slip Op. 03166, Third Dept 5-12-22**

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