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FIRST DEPARTMENT

SECURITIES, CONTRACT LAW, TRUSTS AND ESTATES.

BREACH OF CONTRACT ACTIONS BY CERTIFICATEHOLDERS AGAINST THE TRUSTEE FOR RESIDENTIAL MORTGAGE-BACKED SECURITIES TRUSTS DISMISSED.

The First Department, in a full-fledged opinion by Justice Pitt, reversing (modifying) Supreme Court, dismissed the remaining actions brought by certificateholders against the trustee (US Bank National Association) for residential mortgage-backed securities (RMBS) trusts. The opinion is fact-specific, based upon contract language, and cannot be fairly summarized here: "This case involves residential mortgage-backed securities (RMBS). Usually, this type of case is filed by an RMBS trustee because they are generally the only party with standing to assert the trust's right to compel repurchase of defective loans and to take action against the parties responsible for the improper servicing of loans. Here, however, plaintiffs, as certificateholders of nine RMBS trusts, bring this action for breach of contract against defendant U.S. Bank National Association, as trustee of the nine RMBS trusts, for failure to carry out its alleged duties as trustee in response to the contractual breaches by other transaction parties. The main issues raised in this appeal are: (1) whether the governing trust documents imposed contractual obligations on the trustee ... to identify and take action before an event of default (EOD) arose (pre-EOD claims); and (2) whether plaintiffs may rely on the servicers' annual assessments and the trustee's letter to the servicer to satisfy the 'written notice' element of the claim that the trustee breached its contractual obligations to take action as a 'prudent' trustee after an EOD arose (post-EOD claims)." ***Western & Southern Life Ins. Co. v. U.S. Bank N.A.*, 2022 N.Y. Slip Op. 04886, First Dept 8-9-22**

SECOND DEPARTMENT

CIVIL PROCEDURE.

THE DEFAULTING DEFENDANT WHOSE ANSWER HAD BEEN STRUCK WAS NOT ENTITLED TO FURTHER DISCOVERY PRIOR TO THE INQUEST ON DAMAGES.

The Second Department, reversing Supreme Court, determined the defaulting defendant whose answer had been struck was not entitled to further discovery for the inquest on damages: "The Supreme Court erred in granting the defendant's motion to vacate the note of issue and certificate of readiness and to compel the plaintiff to provide additional discovery. 'While a defaulting defendant is entitled to present testimony and evidence and cross-examine the plaintiff's witnesses at the inquest on damages, such a defendant is not entitled to any further discovery since its answer was stricken' ... . Here, since the court struck the defendant's answer ... the defendant 'is not entitled to any further discovery' ...". ***Brasil-Puello v. Weisman*, 2022 N.Y. Slip Op. 04893, Second Dept 8-10-22**

CIVIL PROCEDURE, EVIDENCE.

THE CONDITIONAL PRECLUSION ORDER BECAME ABSOLUTE WHEN PLAINTIFF DID NOT COMPLY BY PROVIDING DEFENDANTS WITH MEDICAL AUTHORIZATIONS BY THE SPECIFIED DATE; BECAUSE PLAINTIFF OFFERED NO REASONABLE EXCUSE, PLAINTIFF SHOULD HAVE BEEN PRECLUDED FROM PRESENTING ANY MEDICAL EVIDENCE AT TRIAL.

The Second Department, reversing (modifying) Supreme Court, determined the plaintiff should have precluded from presenting any medical evidence at trial because plaintiff failed to comply with the conditional order requiring plaintiff to provide defendants with medical authorizations by a specified date: "[T]he plaintiff failed to comply with the conditional order by providing authorizations for the individuals and entities listed in the defendants' supplemental demands for authorizations. ... [T]he conditional order became absolute on February 14, 2020, and to be relieved from the adverse impact of the conditional order, the plaintiff was required to demonstrate a reasonable excuse for failing to comply with the conditional order and a potentially meritorious cause of action ... . The plaintiff failed to proffer a reasonable excuse for failing to comply with the conditional order, and thus, we need not reach the issue of whether he demonstrated the existence of a potentially meritorious cause of action ... . Since the plaintiff failed to make the requisite showing to be relieved from the adverse impact of the conditional order, the Supreme Court should not have imposed a limitation on the directive in the conditional order precluding the plaintiff from presenting at trial any medical evidence on the issue of damages ...". ***Martin v. Dormitory Auth. of the State of N.Y.*, 2022 N.Y. Slip Op. 04907, Second Dept 8-10-22**

CIVIL PROCEDURE, FORECLOSURE.

TO AVOID DISMISSAL PURSUANT TO CPLR 3215(c) THE PLAINTIFF NEED ONLY TAKE PROCEEDINGS FOR THE ENTRY OF A DEFAULT JUDGMENT WITHIN ONE YEAR AND NEED NOT OBTAIN A DEFAULT JUDGMENT WITHIN A YEAR; ANY DELAYS AFTER THE ONE-YEAR PERIOD ARE IRRELEVANT.

The Second Department, reversing Supreme Court in this foreclosure action, determined the complaint should not have been dismissed because plaintiff bank took steps to procure a default judgment within one year of the default. Any subsequent delays were irrelevant: "[A]pproximately two months after the defendant's default, the plaintiff moved for an order of reference. The fact that the Supreme Court later 'marked off the calendar' the motion was irrelevant for the purposes of satisfying CPLR 3215(c) because the plaintiff was only required to 'take proceedings for the entry of judgment' within the one-year time frame, and not actually obtain the judgment ... . '[I]t is enough that the plaintiff timely takes the preliminary step toward obtaining a default judgment of foreclosure and sale by moving for an order of reference to establish that it initiated proceedings for entry of a judgment within one year of the default for the purposes of satisfying CPLR 3215(c)' ... . [T]he plaintiff was not required to account for any additional periods of delay that may have occurred subsequent to the initial one-year period contemplated by CPLR 3215(c) ...". ***Deutsche Bank Natl. Trust Co. v. Khalil*, 2022 N.Y. Slip Op. 04898, Second Dept 8-10-22**

CRIMINAL LAW, CONSTITUTIONAL LAW, EVIDENCE.

ALTHOUGH DEFENDANT WAS PROPERLY DETAINED, ONCE THE PAT-DOWN SEARCH REVEALED DEFENDANT DID NOT HAVE A WEAPON THE POLICE WERE NOT JUSTIFIED IN REMOVING THE (STOLEN) WALLET FROM DEFENDANT'S POCKET AND SEARCHING IT; THE ERROR WAS NOT HARMLESS UNDER THE STANDARD FOR CONSTITUTIONAL ERROR.

The Second Department, reversing Supreme Court, determined defendant's motion to suppress the wallet seized in the search of his person should have been granted. The related robbery convictions were reversed and a new trial on those counts was ordered. Defendant fled from the scene of the mugging and was properly detained by the police. However, once the pat-down search revealed defendant did not have a weapon, the police should not have seized the (stolen) wallet from defendant's pocket and searched it. The "constitutional" error was not harmless because, under the facts, the error could have influenced the factfinder: "[E]ven assuming that the officers were justified in performing a protective frisk ... , there was no justification for searching the defendant's pants pocket, reaching into it, and removing the wallet. In the course of conducting a protective pat-down based upon reasonable suspicion, "[o]nce an officer has concluded that no weapon is present, the search is over and there is no authority for further intrusion" ... . There was no evidence presented at the suppression hearing that, during his frisk of the defendant, Nelson felt anything in the defendant's pocket that seemed to be a weapon or that could have posed a danger to the officers at the scene. Indeed, Nelson did not testify at the hearing. Accordingly, there was no lawful basis for removing the wallet from the defendant's pocket ... , and that act violated the defendant's Fourth Amendment right to be free from unreasonable searches and seizures ... . The officers committed an additional constitutional violation when, after retrieving the wallet from the defendant's pocket, they opened it and conducted a warrantless search of its contents ... . * * * ... [U]nder the constitutional standard, an error cannot be harmless if there is a reasonable possibility that it may have been a contributing factor that influenced the factfinder's determination ...". ***People v. Lewis*, 2022 N.Y. Slip Op. 04920, Second Dept 8-10-22**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

THE INDUSTRIAL CODE PROVISION WHICH WAS THE BASIS OF THE LABOR LAW § 241(6) CAUSE OF ACTION DID NOT APPLY TO PLAINTIFF'S DEMOLITION-WORK-INJURY; THE DEFENDANT GENERAL CONTRACTOR DID NOT EXERCISE SUPERVISORY CONTROL OVER PLAINTIFF'S WORK AND WAS NOT, THEREFORE, LIABLE UNDER LABOR LAW § 200.

The Second Department, reversing (modifying) Supreme Court, determined the Industrial Code provision which was the basis of the Labor Law § 241(6) cause of action did not apply to plaintiff's demolition-work-injury and defendant general contractor (Lad) did not exercise supervisory control over defendant's work and was not therefore liable under Labor Law § 200: "[T]he cause of action alleging a violation of Labor Law § 241(6) is predicated on Industrial Code 12 NYCRR 23-3.3(c), which mandates continuing inspections during hand demolition operations to detect hazards 'resulting from weakened or deteriorated floors or walls or from loosened material.' ... [Defendant] established ...the inapplicability of this provision by demonstrating that the hazard arose from the plaintiff's actual performance of the demolition work itself, and not structural instability caused by the progress of the demolition ... . 'Although property owners [and general contractors] often have a general authority to oversee the progress of the work, mere general supervisory authority at a work site for the purpose of overseeing the progress of the work and inspecting the work product is insufficient to impose liability under Labor Law § 200' or for common-law negligence ... . 'A defendant has the authority to supervise or control the work for the purposes of Labor Law § 200 when that defendant bears the responsibility for the manner in which the work is performed' ... . Here, Lad established, prima facie, that it did not possess the authority to supervise or control the means and methods of the plaintiff's work ...". ***Flores v. Crescent Beach Club, LLC*, 2022 N.Y. Slip Op. 04901, Second Dept 8-10-22**

PERSONAL INJURY.

DEFENDANT PROPERTY OWNER NOT LIABLE FOR INJURY CAUSED BY THE SPONTANEOUS ACT OF A BAR PATRON.

The Second Department, reversing Supreme Court, determined defendant bar owner could not be liable for the spontaneous act of a bar patron which injured plaintiff: "[T]he plaintiff allegedly sustained personal injuries at the defendants' bar in Nassau County. At the time of the alleged incident, a female patron purportedly jumped onto the lap of a male patron, who was sitting on a bar stool. This apparently caused the two patrons and the bar stool to fall on top of the plaintiff, who was standing nearby. The plaintiff was 'knocked' down to the floor... . ... A property owner, which must act in a reasonable manner to prevent harm to those on its premises, has a duty to control the conduct of persons on its premises when it has the opportunity to control such conduct, and is reasonably aware of the need to do so ... . Here, the defendants established, prima facie, that the alleged incident was spontaneous, and could not have been reasonably anticipated and prevented ...". ***York v. Paddy's Loft Corp.*, 2022 N.Y. Slip Op. 04931, Second Dept 8-10-22**

PERSONAL INJURY, CIVIL PROCEDURE.

DEFENDANT IN THIS REAR-END COLLISION CASE RAISED A QUESTION OF FACT ABOUT A NONNEGLIGENT EXPLANATION FOR DEFENDANT'S STRIKING PLAINTIFF'S CAR.

The Second Department, reversing Supreme Court, determined there was a question of fact about whether plaintiff, the front-most driver in this rear-end collision action, was negligent: "Hersh [defendant] raised a triable issue of fact sufficient to defeat summary judgment ... . Hersh submitted his own affidavit in which he asserted that, prior to the accident, traffic was moving well and there was no ongoing road construction. Hersh asserted that the plaintiff then 'suddenly and unexpectedly jammed on his brakes in front of me,' that Hersh 'braked hard' and was able to stop without hitting the plaintiff's vehicle, but that the vehicle behind Hersh then struck Hersh's vehicle 'twice in the rear,' pushing Hersh's vehicle into the plaintiff's vehicle. Hersh stated in his affidavit that, after the accident, he 'looked all around on the nearby grass and even under plaintiff's SUV but did not see any cone' obstructing the lane as the plaintiff claimed. Hersh's affidavit was sufficient to raise a triable issue of fact as to whether Hersh had a nonnegligent explanation for hitting the plaintiff's vehicle ...". ***Joseph-Felix v. Hersh*, 2022 N.Y. Slip Op. 04905, Second Dept 8-10-22**

PERSONAL INJURY, EVIDENCE.

PLAINTIFF'S EVIDENCE OF THE CAUSE OF THE SLIP AND FALL, A RAISED SIDEWALK FLAG IDENTIFIED IN A PHOTOGRAPH, WAS SUFFICIENT TO DEFEAT DEFENDANT'S MOTION FOR SUMMARY JUDGMENT.

The Second Department, reversing Supreme Court, determined plaintiff sufficiently identified the cause of the slip and fall. Defendant's motion for summary judgment should not have been granted: "[T]he defendant failed to establish, prima facie, that the plaintiff was unable to identify the cause of his fall without resort to speculation. In support of his motion, the defendant submitted, inter alia, a transcript of the plaintiff's deposition testimony, who identified a 'raised up' sidewalk flag in photographs depicting the sidewalk where he fell, and, referring to the photographs, testified that he 'tripped there.' Contrary to the determination of the Supreme Court, this evidence raised a triable issue of fact as to whether the plaintiff tripped on the sidewalk defect referenced ...". ***Santiago v. Williams*, 2022 N.Y. Slip Op. 04922, Second Dept 8-10-22**

THIRD DEPARTMENT

REAL PROPERTY TAX LAW, MUNICIPAL LAW.

THE CITY PROPERLY AMENDED ITS CHARTER DELETING THE PROVISIONS REQUIRING THE CITY TO ENFORCE PAYMENT OF DELINQUENT PROPERTY TAXES, IMPOSING THAT DUTY ON THE COUNTY.

The Third Department, over a two-justice dissent, determined the city properly amended its charter by deleting the provisions requiring the city to enforce payment of delinquent property taxes, thereby imposing that duty upon the county: "By adopting Local Law No. 2, the City amended its charter by deleting the provisions requiring the City to enforce the payment of delinquent taxes, leaving the County with that obligation under RPTL article 11. The City was statutorily authorized to do so pursuant to RPTL 1104 (2), which recognizes that a city charter 'may from time to time be amended.' As a consequence of the amendment, the City is no longer a 'tax district' for purposes of RPTL article 11 ... and the County treasurer becomes the enforcing officer ... . As such, the County treasurer is statutorily required to credit the City for unpaid delinquent taxes upon the return at the end of the fiscal year ... . This outcome is neither an expansion nor impairment of the County's powers but simply a consequence of the statutory structure outlined in RPTL articles 9 and 11." ***Matter of St. Lawrence County v. City of Ogdensburg*, 2022 N.Y. Slip Op. 04932, Third Dept 8-11-22**

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