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FIRST DEPARTMENT

CONSUMER LAW, CONSTITUTIONAL LAW.

THE ATTORNEY GENERAL'S PETITION ALLEGING RESPONDENT DISINFECTANT-DISTRIBUTOR ENGAGED IN PRICE GOUGING AT THE OUTSET OF THE COVID-19 PANDEMIC SHOULD NOT HAVE BEEN DISMISSED; THE CONTROLLING STATUTE, GENERAL BUSINESS LAW § 396-R, IS NOT VOID FOR VAGUENESS.

The First Department, in a full-fledged opinion by Justice Higgitt, reversing Supreme Court, determined the attorney general's (AG's) petition alleging that the respondent distributor (Quality King Distributors, Inc) engaged in price gouging should not have been dismissed. The petition alleged Quality King raised the price of Lysol, a disinfectant, at the outset of the COVID-19 pandemic in violation of General Business Law § 396-r. The First Department rejected the argument the relevant statutory provisions were void for vagueness: "In the special proceeding underlying this appeal, petitioner Attorney General of the State of New York accused respondent Quality King Distributors, Inc. of engaging in price gouging in contravention of General Business Law § 396-r based on its sale of certain Lysol products in the first four months of 2020. ... [W]e reverse Supreme Court's order denying the AG's petition and, in effect, dismissing the proceeding, and remand the matter for further proceedings. * * * Employing the February 26, 2020 onset date, our review of the purchase and sale data discloses several instances in which the amount charged to a particular customer in a particular transaction represents, prima facie, a gross disparity between the price of the Lysol product and the price at which it was sold by Quality King in the usual course of business immediately prior to the onset of the abnormal disruption of the market. ... Thus, the AG's evidence demonstrated, prima facie, that Quality King sold the Lysol product at unconscionably excessive prices on at least several occasions." ***Matter of People of the State of N.Y. v. Quality King Distribs., Inc.*, 2022 N.Y. Slip Op. 05010, First Dept 8-23-22**

SECOND DEPARTMENT

CIVIL PROCEDURE, JUDGES, FORECLOSURE.

PLAINTIFF BANK'S FAILURE TO COMPLY WITH A STATUS-CONFERENCE SCHEDULING ORDER IN THIS FORECLOSURE ACTION WAS NOT A SUFFICIENT GROUND FOR THE "SUA SPONTE" DISMISSAL OF THE COMPLAINT.

The Second Department, reversing Supreme Court, determined the judge should not have, sua sponte, dismissed the complaint in this foreclosure action based upon plaintiff's failure to file a motion for judgment of foreclosure by a specified date: "[A] status conference order was entered ... which ... directed the plaintiff to file a motion for a judgment of foreclosure and sale by December 20, 2017, and warned that 'failure to comply with the terms of this order may result in the dismissal of this action without prejudice.' The plaintiff failed to file a motion for a judgment of foreclosure and sale as directed by the status conference order. ... [T]he Supreme Court, ... sua sponte, directed dismissal of the complaint without prejudice. ... 'A court's power to dismiss a complaint, sua sponte, is to be used sparingly and only when extraordinary circumstances exist to warrant dismissal'... . Here, the plaintiff's failure to comply with the directive of the status conference order was not a sufficient ground upon which to direct dismissal of the action ...". ***U.S. Bank N.A. v. Stuart*, 2022 N.Y. Slip Op. 05055, Second Dept 8-24-22**

CRIMINAL LAW, JUDGES, CONTRACT LAW.

HERE THE DEFENDANT DID NOT COMPLETE THE TREATMENT REQUIRED BY THE PLEA AGREEMENT; THE GUILTY PLEA WAS THEREFORE INDUCED BY AN UNFULFILLED PROMISE WHICH USUALLY REQUIRES THAT THE PLEA BE VACATED; HERE SUPREME COURT FELT DEFENDANT SHOULD NOT HAVE BEEN TERMINATED BY THE TREATMENT PROGRAM AND PROPERLY EXERCISED DISCRETION IN FASHIONING A SENTENCE MUCH LESS THAN THAT REQUIRED BY THE PLEA AGREEMENT, LEAVING THE GUILTY PLEA IN PLACE.

The Second Department determined Supreme Court properly exercised discretion in the face of defendant's failure to complete treatment as required by the plea agreement. The court found that, although defendant had relapsed during the treatment for alcoholism, the relapse did not justify his being terminated by the program. Therefore the court did not vacate defendant's guilty plea (on the ground it was induced by an unfulfilled promise) and fashioned a drastically reduced sentence (time served): " '[I]n most instances when a guilty plea has been induced by an unfulfilled promise either the plea must be vacated or the promise honored, but that the choice rests in the discretion of the sentencing court' ... . In this case, the Supreme Court providently exercised its discretion in determining that, although the defendant spent more than a year in residential substance abuse treatment programs, specific performance of the conditional plea agreement was not warranted. Although

the court did not believe that the defendant's alcohol relapse and other reported problems at the final treatment program he attended were the real reason for his discharge, those issues nevertheless suggested that the defendant's alcoholism, which played a role in his commission of the instant offenses, remained an unresolved concern. Moreover, the manner in which this case was ultimately resolved essentially split the difference between what was promised if the defendant was successful in treatment, and the sentence the Supreme Court could have imposed if he was not. Although the defendant's conviction of sexual abuse in the first degree was not vacated, he was effectively sentenced to time served, instead of four years in prison. In addition, the alternative sentence that was contemplated at the time of the defendant's pleas of guilty included seven years of postrelease supervision. Because the court sentenced the defendant to definite terms of imprisonment, however, he avoided being subject to postrelease supervision ...". ***People v. Boissard*, 2022 N.Y. Slip Op. 05042, Second Dept 8-24-22**

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

AN ACTION FOR "STRICT FORECLOSURE" PURSUANT TO RPAPL 1352 ALLOWS THE PURCHASER OF FORECLOSED PROPERTY TO EXTINGUISH ANY POTENTIAL CLAIM TO THE PROPERTY BY A NECESSARY PARTY NOT INCLUDED IN THE ORIGINAL FORECLOSURE PROCEEDINGS.

The Second Department explained that an action for "strict foreclosure" pursuant to RPAPL 1352 is properly brought by the purchaser of foreclosed property to extinguish any claim to the property by a necessary party who not named in the foreclosure action: "Where, as here, a necessary party was omitted from a foreclosure action, the purchaser of the foreclosed property may commence a strict foreclosure action pursuant to RPAPL 1352 ... . 'RPAPL 1352 permits a strict foreclosure action against a person not named in the original foreclosure action, who has either a right of redemption to the subject property or a right to foreclose a subordinate mortgage or other lien' ... . The statute authorizes the court to issue a judgment that fixes a time period within which any such person must act to redeem or begin a foreclosure action. If the person fails to redeem the property or commence a foreclosure action within the time period fixed by the court, such person 'shall be excluded from claiming any title or interest in such property and all title or interest of such person . . . or the right to foreclose a subordinate mortgage or other lien against such property shall thereby be extinguished and terminated' ... . 'Since RPAPL 1352 operates to dispose of the encumbrances of those whose interests were junior at the time of the original foreclosure but who were not joined as parties to that action, a judgment of strict foreclosure cures a defect in the judgment or sale under the first foreclosure' ...". ***71-21 Loubet, LLC v. Bank of Am., N.A.*, 2022 N.Y. Slip Op. 05012, Second Dept 8-24-22**

LABOR LAW-CONSTRUCTION LAW, APPEALS, PERSONAL INJURY.

APPEAL FROM A DENIAL OF A MOTION TO REARGUE CONSIDERED DESPITE THE DISMISSAL OF THE APPEAL FROM THE INITIAL DENIAL OF SUMMARY JUDGMENT FOR FAILURE TO PROSECUTE; PLAINTIFF'S LABOR LAW § 240(1) CAUSE OF ACTION STEMMING FROM A FALL INTO A PIT SHOULD NOT HAVE BEEN DISMISSED.

The Second Department, reversing Supreme Court, determined: (1) the appeal from the denial of a motion to reargue would be considered even though the appeal from the initial denial of summary judgment was dismissed for failure to prosecute; (2) the Labor Law § 240(1) cause of action stemming from plaintiff's fall into a pit should not have been dismissed: " 'As a general rule, we do not consider any issue raised on a subsequent appeal that was raised, or could have been raised, in an earlier appeal that was dismissed for lack of prosecution, although we have the inherent jurisdiction to do so' ... . Since the plaintiff appealed from an order superseding the prior order appealed from at a time before the prior appeal was deemed dismissed, we exercise that discretion here. ... [T]he defendants failed to establish their prima facie entitlement to judgment as a matter of law dismissing the Labor Law § 240(1) cause of action ... . Contrary to the defendants' contention, the risk of falling into a 16-foot pit on an excavation site is a type of elevation-related risk within the purview of protection of Labor Law § 240(1) ... . Furthermore, the defendants failed to establish, prima facie, that the plaintiff's negligence was the sole proximate cause of his injuries. The deposition testimony of the plaintiff and the foreman, which were submitted in support of the defendants' motion, contain conflicting testimony raising a triable issue of fact as to whether the plaintiff received instructions not to stand within five feet of the pit. The defendants also did not establish, prima facie, that the installation of a protective device 'would have been contrary to the objectives of the work' ...". ***Thorpe v. One Page Park, LLC*, 2022 N.Y. Slip Op. 05053, Second Dept 8-24-22**

PERSONAL INJURY.

THE LEG OF A LARGE DECORATIVE THRONE IN DEFENDANT'S BAR WAS OPEN AND OBVIOUS AND THEREFORE WAS NOT AN ACTIONABLE TRIPPING HAZARD; PLAINTIFF HAD FREQUENTED THE BAR AND THE THRONE WAS READILY OBSERVABLE.

The Second Department, reversing Supreme Court, determined the leg of a large decorative throne in defendant's bar was open and obvious and therefore was not an actionable tripping hazard: "[T]he defendant established ... that the large decorative throne that allegedly caused the plaintiff to fall was open and obvious and not inherently dangerous ... . '[T]here is no duty to protect or warn of conditions that are not inherently dangerous and that are readily observable by the reasonable use of one's senses' ... . 'A condition is open and obvious if it is readily observable by those employing the reasonable use of their senses, given the conditions at the time of the accident' ... . 'The determination of [w]hether an asserted hazard is open and obvious cannot be divorced from the surrounding circumstances, and whether a condition is not inherently dangerous, or constitutes a reasonably safe environment, depends on the totality of the specific facts of each case' ... . Here, ... the alleged defective condition was readily observable by those employing the reasonable use of their senses and was not inherently dangerous. The deposition testimony of a pianist who had performed at the bar for more than 20 years established that the throne was a novelty of the establishment, which drew in patrons. Further, the plaintiff's own testimony established that he was aware of the throne, as he frequented the

establishment and purported to have previously complained to the manager about its location ...". ***Rider v. Manhattan Monster, Inc.*, 2022 N.Y. Slip Op. 05048, Second Dept 8-24-22**

PERSONAL INJURY.

PLAINTIFF WAS A PASSENGER IN DEFENDANT MCRAE'S VEHICLE WHEN MC RAE'S VEHICLE WAS STRUCK FROM BEHIND; THE ALLEGATION THAT MC RAE STOPPED FOR NO APPARENT REASON RAISED A QUESTION OF FACT WHETHER MCRAE WAS COMPARATIVELY NEGLIGENT; COMPARATIVE NEGLIGENCE WILL PRECLUDE SUMMARY JUDGMENT WITH RESPECT TO CROSS CLAIMS BETWEEN DEFENDANTS.

The Second Department, reversing (modifying) Supreme Court, determined defendant driver's (McRae's) motion for summary judgment in this rear-end collision case should not have been granted. Plaintiff was a passenger in defendant McRae's vehicle. McRae alleged his vehicle was stopped when it was struck by defendant NYC Transit Authority's (NYCTA's) bus (driven by defendant Pena). Defendants NYCTA and Pena alleged McRae stopped his vehicle for no apparent reason raising a question of fact about whether defendant McRae was comparatively negligent. Comparative negligence will preclude summary judgment with respect to cross claims between defendants: "[T]he plaintiff established, prima facie, that NYCTA and Pena were negligent. In support of his motion, the plaintiff submitted, inter alia, the transcript of his deposition testimony, which demonstrated that the bus Pena was operating struck McRae's stopped vehicle in the rear. In opposition, the NYCTA defendants failed to raise a triable issue of fact. The NYCTA defendants submitted, among other things, an affidavit in which Pena averred that McRae made a right turn into the path of the bus and began to move forward, but then stopped short. In essence, this explanation amounts to nothing more than a claim that McRae's vehicle came to a sudden stop which, without more, failed to raise a triable issue of fact as to NYCTA and Pena's liability ... . The Supreme Court should have denied that branch of McRae's motion which was for summary judgment dismissing all cross claims insofar as asserted against him. In support of his motion, McRae submitted his affidavit, in which he averred that his vehicle, while stopped at a red light, was struck in the rear by the bus operated by Pena. Thus, McRae established, prima facie, that Pena was solely at fault in the happening of the accident ... . In opposition, however, the NYCTA defendants raised a triable issue of fact as to whether McRae was comparatively at fault in the happening of the accident because he stopped suddenly for no apparent reason ...". ***Thompson v. New York City Tr. Auth.*, 2022 N.Y. Slip Op. 05052, Second Dept 8-24-22**

PERSONAL INJURY, EDUCATION-SCHOOL LAW.

PLAINTIFF, A SCHOOL PSYCHOLOGIST, WAS ASSAULTED BY AN AUTISTIC STUDENT; THE NEGLIGENT-PARENTAL-SUPERVISION CAUSE OF ACTION AGAINST THE STUDENT'S PARENTS SHOULD NOT HAVE BEEN DISMISSED.

The Second Department, reversing Supreme Court, determined the "negligent parental supervision" cause of action against the parents of an autistic child who assaulted plaintiff school psychologist should not have been dismissed. In addition, the parents did not demonstrate their son was, due to his disability, incapable of being liable for negligence or assault. The facts are not discussed: "The plaintiff * * * was assaulted by the defendant David George (hereinafter David), an autistic student with an IQ of 41, who was almost 14 years old at the time. * * * 'While, as a general rule, parents are not liable for the torts of their child, a parent may be held liable, inter alia, where the parent[s] negligence consists entirely of his [or her] failure reasonably to restrain the child from vicious conduct imperiling others, when the parent has knowledge of the child's propensity toward such conduct' ... . Thus, a parent moving for summary judgment dismissing a cause of action alleging negligent supervision based on the physical tortious conduct of the parent's child, must establish, prima facie, that the parent was not aware that, prior to the subject incident, his or her child engaged in violent or vicious conduct that would endanger a third party ... . The defendants' contention that the branch of their motion which was for summary judgment dismissing the complaint insofar as asserted against David, on the ground that due to his developmental disability he was 'non sui juris and incapable of being liable for negligence' or assault ..., is without merit." ***Levine v. George*, 2022 N.Y. Slip Op. 05032, Second Dept 8-24-22**

PERSONAL INJURY, MUNICIPAL LAW.

QUESTIONS OF FACT WHETHER DEFENDANT BUS DRIVER WAS NEGLIGENT; PLAINTIFF'S HAND WAS CAUGHT IN THE CLOSED DOOR OF THE BUS.

The Second Department, reversing Supreme Court, determined there were questions of fact whether the driver of the bus negligent in closing the door on plaintiff's hand and in failing to open the door to release plaintiff's hand: "A 'defendant moving for summary judgment in a negligence action has the burden of establishing, prima facie, that he or she was not at fault in the happening of the subject accident' ... . 'There can be more than one proximate cause of an accident' ..., and '[g]enerally, it is for the trier of fact to determine the issue of proximate cause' ... . Here, the defendants failed to establish their prima facie entitlement to judgment as a matter of law dismissing the complaint ... . The evidence submitted in support of the motion failed to eliminate all triable issues of fact as to whether [the driver] negligently closed the doors as the plaintiff was attempting to board the bus, and negligently failed to reopen the doors and release the plaintiff's hand after it became trapped." ***John v. Dobson*, 2022 N.Y. Slip Op. 05029, Second Dept 8-24-22**

PERSONAL INJURY, VEHICLE AND TRAFFIC LAW.

QUESTION OF FACT WHETHER DEFENDANT'S DOUBLE-PARKED TRUCK MERELY FURNISHED THE OCCASION FOR THE MOTORCYCLE ACCIDENT OR WAS A PROXIMATE CAUSE OF THE ACCIDENT; PLAINTIFF FLIPPED OVER THE MOTORCYCLE BRAKING TO AVOID COLLIDING WITH THE TRUCK.

The Second Department, reversing Supreme Court, determined plaintiff motorcyclist raised a question of fact whether defendant's double-parked truck was a proximate cause of the accident. Plaintiff alleged the motorcycle struck a defect in the road which cause the motorcycle to veer toward defendant's truck. Plaintiff flipped over the motorcycle when he braked to avoid colliding with truck. The issue was whether the double-parked trucked merely furnished the occasion for the accident or whether the double-parked truck was a proximate cause of the accident (a difficult distinction which comes up occasionally in the appellate decisions): "In support of its motion, [defendant] Peapod submitted the transcript of the plaintiff's deposition testimony in which the plaintiff testified that his motorcycle struck a road defect, but that the defect did not cause him to immediately fall or apply the brakes. Instead, when the motorcycle encountered the defect, the motorcycle veered toward Peapod's double-parked truck 40 yards ahead of him in the same lane of traffic. In order to avoid colliding with the truck, the plaintiff applied the front brakes of the motorcycle, which resulted in him flipping over the motorcycle. Given this evidence, it cannot be said that Peapod established as a matter of law that the truck merely furnished the occasion for the accident ... . Rather, this testimony demonstrated the existence of a triable issue of fact as to whether the presence of Peapod's double-parked truck was a proximate cause of the accident ... . Further, the evidence relied upon by Peapod in support of its motion failed to establish, prima facie, that its truck was not negligently parked or violating applicable traffic regulations ...". ***Colletti v. City of New York*, 2022 N.Y. Slip Op. 05019, Second Dept 8-24-22**

PERSONAL INJURY, VEHICLE AND TRAFFIC LAW.

DEFENDANT MADE A LEFT TURN IN FRONT OF PLAINTIFF IN VIOLATION OF THE VEHICLE AND TRAFFIC LAW; PLAINTIFF SHOULD HAVE BEEN AWARDED SUMMARY JUDGMENT.

The Second Department, reversing Supreme Court, determined plaintiff was entitled to summary judgment in this intersection traffic accident case. Defendant attempted to make a left turn in front of plaintiff's vehicle from the middle lane, cutting off plaintiff. The court noted that a plaintiff's comparative negligence is not a bar to summary judgment: "The accident allegedly occurred when the defendants' vehicle attempted to make a left turn from the middle lane of Rockaway Boulevard in front of the plaintiff's vehicle, and cut off the plaintiff's vehicle. ... 'A plaintiff in a negligence action moving for summary judgment on the issue of liability must establish, prima facie, that the defendant breached a duty owed to the plaintiff and that the defendant's negligence was a proximate cause of the alleged injuries' ... . 'To be entitled to . . . summary judgment [on the issue of liability] a plaintiff does not bear the . . . burden of establishing . . . the absence of his or her own comparative fault' ... . A violation of the Vehicle and Traffic Law constitutes negligence as a matter of law ... . Here, the plaintiff established his prima facie entitlement to judgment as a matter of law on the issue of liability by submitting, inter alia, his own affidavit, which demonstrated that the driver of the defendants' vehicle was negligent in striking the plaintiff's vehicle while attempting to make a left turn from the middle lane of traffic (see Vehicle and Traffic Law §§ 1128[a]; 1160[b ...)". ***Jaipaulsingh v. Umana*, 2022 N.Y. Slip Op. 05028, Second Dept 8-24-22**

PERSONAL INJURY, VEHICLE AND TRAFFIC LAW.

DEFENDANT MADE A LEFT TURN IN THE PATH OF PLAINTIFF'S VEHICLE IN VIOLATION OF THE VEHICLE AND TRAFFIC LAW; PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT ON LIABILITY AND DISMISSING THE COMPARATIVE NEGLIGENCE AFFIRMATIVE DEFENSE SHOULD HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined plaintiff's motion for summary judgment on liability and dismissing the comparative negligence affirmative defense in this intersection traffic accident case should have been granted: "[T]he plaintiff established his prima facie entitlement to judgment as a matter of law on the issue of liability by submitting his deposition testimony and the deposition testimony of the defendant driver, which demonstrated that the defendant driver made a left turn directly into the path of the plaintiff's vehicle without yielding the right-of-way to the plaintiff, in violation of Vehicle and Traffic Law § 1141, and when it was not reasonably safe to make a left turn, in violation of Vehicle and Traffic Law § 1163(a) ... . The plaintiff also established, prima facie, that he was entitled to judgment as a matter of law dismissing the affirmative defense alleging comparative negligence by demonstrating that he was not at fault in the happening of the accident and that the defendant driver's negligence was the sole proximate cause of the accident ... . The plaintiff, who had the right-of-way, was entitled to anticipate that a vehicle turning left would obey the traffic laws requiring that vehicle to yield, and the evidence established that the plaintiff did not have a sufficient opportunity to avoid the accident when the defendant driver turned left directly into the path of the plaintiff's vehicle ...". ***Seizeme v. Levy*, 2022 N.Y. Slip Op. 05049, Second Dept 8-24-22**

ZONING, LAND USE.

PETITIONER WAS ISSUED A PERMIT TO CONSTRUCT COMMERCIAL SPACE WITH 557 PARKING SPACES; THE PERMIT WAS REVOKED BECAUSE THE TOWN CODE REQUIRED 624 PARKING SPACES; BECAUSE THE PERMIT WAS INVALID, PETITIONER COULD NOT INVOKE THE "DOCTRINE OF VESTED RIGHTS" FOR A VARIANCE ALLOWING 557 SPACES.

The Second Department, reversing Supreme Court, determined the petitioner was not entitled to a variance pursuant to the doctrine of vested rights. Petitioner had been issued a permit to build commercial space which included 557 parking spaces. The town subsequently revoked the permit because the town code required 624 parking spaces. Petitioner then applied for a variance arguing the permit which had been

issued conveyed a vested right to the originally approved 557 parking spaces: " 'The doctrine of vested rights is implicated when a property owner seeks to continue to use property, or to initiate the use of property, in a way that was permissible before enactment or amendment of a zoning ordinance but would not be permitted under a new zoning law' ... . Such 'a vested right can be acquired when, pursuant to a legally issued permit, the landowner demonstrates a commitment to the purpose for which the permit was granted by effecting substantial changes and incurring substantial expenses to further the development' ... . However, '[v]ested rights cannot be acquired in reliance upon an invalid permit' ... . '[T]he mistaken or erroneous issuance of a permit does not estop a municipality from correcting errors, even where there are harsh results' ... . Here, as the ZBA [zoning board of appeals] soundly determined, the permit issued to the petitioner was invalid, since the Town Code plainly sets forth the method for calculating the nonresidential gross floor area according to which the number of required parking spaces is set and pursuant to that method, the required number of spaces exceeded the 557 spaces planned by the petitioner ... . Since the permit issued to the petitioner was invalid, it could not have conferred vested rights ...". ***Matter of C & B Realty #3, LLC v. Van Loan*, 2022 N.Y. Slip Op. 05036, Second Dept 8-24-22**

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