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FIRST DEPARTMENT

CIVIL PROCEDURE.

THE ABSENCE OF A CERTIFICATE OF CONFORMITY FOR AN OUT-OF-STATE AFFIDAVIT OF SERVICE WAS A MERELY TECHNICAL DEFECT WHICH DID NOT PREVENT THE COURT FROM CONSIDERING THE AFFIDAVIT.

The First Department, reversing Supreme Court, noted that the absence of a certificate of conformity for an out-of-state affidavit of service did not prevent the court from considering the affidavit in this dispute about the legitimacy of service of process in Nevada: "Ameritek's [defendant's] argument that the lack of a certificate of conformity prevents the affidavit of service from being considered is unavailing. Even if such a finding may not be made until after the court's jurisdiction over Ameritek has been established ... , any defects resulting from the absence of the certificate of conformity in this instance are merely technical and do not raise questions about 'the likelihood that the summons and complaint will reach defendant and inform him that he is being sued' ...". ***GS Capital Partners, LLC v. Ameritek Ventures*, 2023 N.Y. Slip Op. 01942, First Dept 4-13-23**

CIVIL PROCEDURE, ATTORNEYS.

DEFENDANT DEMONSTRATED HE WAS NOT REPRESENTED BY THE ATTORNEY WHO PURPORTED TO WAIVE SERVICE OF PROCESS AND PERSONAL JURISDICTION DEFENSES ON BEHALF OF ALL DEFENDANTS; TWO-JUSTICE DISSENT.

The First Department, reversing (modifying) Supreme Court, over a two-justice dissent, determined that one foreign defendant (Koukis) demonstrated he was not represented by an attorney (Santamarina) who purported to waive all defenses based on service of process or lack of personal jurisdiction on behalf of all defendants. Supreme Court agreed Koukis demonstrated Santamarina did not represent him, but found personal jurisdiction over Koukis pursuant to CPLR 302(a)(2). The First Department held the court did not have personal jurisdiction over Koukis: "The motion court correctly found that there was no basis to conclude that Koukis authorized Santamarina to appear and waive all jurisdictional defenses on his behalf ... . Koukis emailed Santamarina, with a copy to his attorney, specifically stating that 'I have not authorized you to represent me in any legal or other matters.' Koukis also averred that he never communicated with Santamarina and that he never represented him, and there is no indication in the record that Koukis was even aware of Santamarina for any significant time prior to his ... email. The two ... emails referenced by the dissent were not from or to Santamarina and made no mention of any representation by Santamarina." ***Gibson, Dunn & Crutcher LLP v. Koukis*, 2023 N.Y. Slip Op. 01863, First Dept 4-11-23**

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

THE ATTORNEY AFFIDAVIT SUBMITTED IN SUPPORT OF THE SUMMARY JUDGMENT MOTION WAS WITHOUT EVIDENTIARY VALUE; THE DEFICIENCIES IN THE ORIGINAL SUBMISSION CANNOT BE CURED IN REPLY; FAILURE TO REGISTER AN APARTMENT WITH THE CITY DHCR AND INCREASING THE RENT DO NOT DEMONSTRATE A FRAUDULENT SCHEME TO DEREGULATE.

The First Department, reversing Supreme court, determined: (1) the summary judgment motion should have been supported by plaintiff's affidavit, not the attorney's affidavit; (2) papers submitted in reply cannot be used to remedy deficiencies in the original submission; and (3), to demonstrate a fraudulent scheme to deregulate an apartment, it is not enough to show the landlord did not register the apartment with the NYC Division of Housing and Community Renewal (DHCR) and increased the rent: "CPLR 3212(b) states, 'A motion for summary judgment shall be supported by affidavit . . . The affidavit shall be by a person having knowledge of the facts.' Plaintiff failed to submit an affidavit. While he submitted his attorney's affirmation, '[s]uch an affirmation . . . is without evidentiary value' ... . Although plaintiff submitted his complaint, it is not verified, so it cannot be used in lieu of an affidavit (see CPLR 105[u] ...). ... [I]n *Ampim v 160 E. 48th St. Owner II LLC* (208 AD3d 1085 [1st Dept 2022]), [we] said, 'an increase in rent and failure to register [an] apartment with . . . DHCR . . ., standing alone, are insufficient to establish a colorable claim of a fraudulent scheme to deregulate the apartment' ... . Plaintiff failed to demonstrate an increase in rent, or that landlord misrepresented the legal regulated rent ... . Plaintiff did show an increase in rent through documents submitted in reply. However, a movant may not use reply papers 'to remedy . . . basic deficiencies in [his] prima facie showing' ...". ***Tribbs v. 326-338 E 100th LLC*, 2023 N.Y. Slip Op. 01950, First Dept 4-13-23**

CIVIL PROCEDURE, JUDGES.

IN 2011 PLAINTIFF WITHDREW THE MOTION FOR SUMMARY JUDGMENT IN LIEU OF COMPLAINT WITHOUT PREJUDICE AND SUBSEQUENTLY ENGAGED IN SETTLEMENT NEGOTIATIONS FOR YEARS; THE ACTION SHOULD NOT HAVE BEEN DISMISSED AS ABANDONED AND TIME-BARRED.

The First Department, reversing Supreme Court, determined plaintiff's action for a money judgment should not have been dismissed as abandoned and time-barred. In 2011 plaintiff withdrew its motion for summary judgment in lieu of complaint, without prejudice, and continued settlement negotiations for years, demonstrating plaintiff did not intend to abandon the lawsuit: "Supreme Court incorrectly determined that the action had been rendered a nullity by plaintiff's withdrawal of his initial summons and motion for summary judgment in lieu of a complaint (CPLR 3213), as the parties' course of conduct reflected an understanding that plaintiff was not discontinuing or abandoning the action. Plaintiff withdrew the summons and motion 'without prejudice' after reaching a settlement agreement with Progressive and, by contrast, the settlement agreement expressly stated that the matter would be discontinued 'with prejudice' upon Progressive's full and complete compliance with its payment obligations. After Progressive defaulted, plaintiff and defendant, participated in further settlement discussions, court conferences, and motion practice for years before defendant invoked the argument that the action had been discontinued or abandoned." ***Rizzo v. Progressive Capital Solutions, LLC*, 2023 N.Y. Slip Op. 01948, First Dept 4-13-23**

HUMAN RIGHTS LAW, EMPLOYMENT LAW, MUNICIPAL LAW.

UNDER THE NEW YORK CITY HUMAN RIGHTS LAW, PLAINTIFF NEED NOT DEMONSTRATE AN ADVERSE EMPLOYMENT ACTION TO RECOVER FOR GENDER DISCRIMINATION.

The First Department, reversing Supreme Court, determined plaintiff's gender discrimination action under the NYC Human Rights Law (City HRL) should not have been dismissed: "Since '[t]he City HRL does not differentiate between sexual harassment and other forms of gender discrimination, but requires that sexual harassment be viewed as one species of sex- or gender-based discrimination' ... , it was error to grant summary judgment dismissing plaintiff's gender discrimination claim, while denying the motion with respect to the hostile work environment and sexual harassment claim. Moreover, plaintiff need not show an adverse employment action in order to establish a prima facie case of gender discrimination under the City HRL ... . On this motion for summary judgment dismissing a claim under the City HRL, defendant bore the burden of showing that, based on the record evidence and drawing all reasonable inferences in plaintiff's favor, no jury could find defendant liable for gender-based discrimination ... . Here, plaintiff submits sufficient evidence to support her assertions that, after she rejected her supervisor's sexual advances, she was unjustifiably criticized for her work product and attendance by her supervisors and was stripped of her assignments, which permits a finding that she was treated 'less well' based on her gender ...". ***Bond v. New York City Health & Hosps. Corp.*, 2023 N.Y. Slip Op. 01939, First Dept 4-13-23**

INSURANCE LAW, CONTRACT LAW, NEGLIGENCE.

THE DEFENDANTS' FAILURE TO APPEAR AT THE SCHEDULED EXAMINATIONS UNDER OATH BREACHED A CONDITION PRECEDENT FOR INSURANCE COVERAGE ENTITLING THE INSURER TO SUMMARY JUDGMENT ON ITS CAUSE OF ACTION FOR A DECLARATORY JUDGMENT OF NONCOVERAGE.

The First Department, reversing Supreme Court, determined the plaintiff insurer was entitled to summary judgment for a declaratory judgment of noncoverage because the defendants did not appear at the scheduled Examinations Under Oath (EUOs): "Plaintiff insurer seeks a declaratory judgment of noncoverage based, among other things, on its allegations that defendants Munoz, Cameron, and Santiago (collectively, the claimants) each breached a condition precedent to coverage by failing to appear for properly noticed Examinations Under Oath (EUOs). In support of its motion for a default judgment against the defaulting defendants, plaintiff demonstrated through admissible evidence that the claimants each breached a condition precedent to coverage by failing to appear for properly and timely noticed EUOs ... . The documentary evidence shows that plaintiff sent the EUO scheduling letters to the claimants within 15 business days of receiving the prescribed verification forms (in this case, NF-3 forms), as required ... . Contrary to the motion court's calculation, the 15-day period starts with receipt of the NF-3 forms, not the NF-2 Application for No-Fault Benefits forms ...". ***State Farm Fire & Cas. Co. v. Soliman*, 2023 N.Y. Slip Op. 01949, First Dept 4-13-23**

LANDLORD-TENANT, MUNICIPAL LAW, FRAUD.

PLAINTIFFS COULD NOT DEMONSTRATE RELIANCE UPON THE INFLATED RENTS DESCRIBED IN THE FILED REGISTRATION STATEMENTS; THEREFORE THE COMPLAINT ALLEGING A FRAUDULENT SCHEME TO DEREGULATE APARTMENTS SHOULD HAVE BEEN DISMISSED.

The First Department, reversing Supreme Court, in a full-fledged opinion by Justice Friedman, determined defendant landlord's motion to dismiss the complaint alleging a fraudulent scheme to deregulate apartments should have been granted. The court found that the plaintiffs did not demonstrate the "reliance" element of fraud: "The primary question on this appeal is whether plaintiffs, who allege that the predecessor in interest of defendant 75-25 153rd Street, LLC initially registered an unlawfully inflated 'legal regulated rent' for each of their apartments in 2007, have sufficiently alleged, in this action commenced in 2020, the perpetration of 'a fraudulent scheme to deregulate' so as to avoid the bar of the four-year lookback rule and to allow recalculation of the legal rent on the base date (in 2016), utilizing the default formula referenced in *Regina* [35 NY3d 332], as a basis for overcharge damages. We hold that plaintiffs have failed to allege such a fraudulent scheme because neither plaintiffs nor their predecessors in interest could have reasonably relied upon the inflated legal regulated rents on the registration

statements. As the Court of Appeals recognized in *Regina* [35 NY3d 332], reasonable reliance is as much an element of fraud in this context as in others (see id. at 356 n 7 ['Fraud consists of evidence of a representation of material fact, falsity, scienter, reliance and injury'] [emphasis added, internal quotation marks and brackets omitted]). As more fully explained below, the inflation of the legal regulated rents set forth on the publicly filed registration statements was evident from the registration statements themselves, negating the element of reliance as a matter of law." ***Burrows v. 75-25 153rd St., LLC*, 2023 N.Y. Slip Op. 01940, First Dept 4-13-23**

SECOND DEPARTMENT

CIVIL PROCEDURE, JUDGES.

ALTHOUGH THE COURT DID NOT HAVE THE POWER TO GRANT THE MOTION TO INTERVENE BECAUSE THE PROPOSED ANSWER WAS NOT INCLUDED IN THE PAPERS, A THRESHOLD SHOWING INTERVENTION WAS WARRANTED WAS MADE AND THE DENIAL SHOULD HAVE BEEN "WITH LEAVE TO RENEW."

The Second Department, reversing (modifying) Supreme Court, determined the motion to intervene by Poloncarz was properly denied because the proposed answer was not included with the motion papers. but because Poloncarz made a showing warranting intervention, the motion should have been denied with leave to renew: " 'A motion seeking leave to intervene, whether made under CPLR 1012 or 1013, must include the proposed intervenor's . . . complaint or answer (CPLR 1014)' ... . 'The court has no power to grant leave to intervene where, as here, the prospective intervenor[ ] did not include in [his] motion papers 'a proposed pleading setting forth the claim or defense for which intervention is sought' … . Here, Poloncarz, in his official capacity as Erie County Executive, failed to include his proposed answer in his motion papers. Nevertheless, he made a threshold showing that his defense and the Nassau action have a common question of law and fact, that he has a real and substantial interest in the outcome of the proceedings, and that intervention will not unduly delay the determination of the Nassau action or prejudice the substantial rights of any party ... . Accordingly, although the Supreme Court was 'without the power to grant such relief inasmuch as [Poloncarz, in his official capacity as Erie County Executive,] has failed to comply with CPLR 1014,' the court should have denied the motion with leave to renew that branch of the motion which was for leave to intervene in the Nassau action on proper papers ...". ***Landa v. Poloncarz*, 2023 N.Y. Slip Op. 01891, Second Dept 4-12-23**

CIVIL PROCEDURE, JUDGES

IN A HYBRID PROCEEDING SEEKING REVIEW UNDER CPLR ARTICLE 78 AND SEEKING A DECLARATORY JUDGMENT AND DAMAGES, A MOTION FOR SUMMARY JUDGMENT MUST BE MADE FOR BOTH; HERE THERE WAS NO MOTION TO DISMISS THE DECLARATORY JUDGMENT AND DAMAGES CAUSES OF ACTION; MATTER REMITTED.

The Second Department, reversing (modifying) Supreme Court, determined the declaratory judgment causes action should not have been dismissed because the motion for summary judgment did not seek that relief. Summary judgment on the CPLR Article 78 causes of action was properly granted, however: " 'In a hybrid proceeding and action, separate procedural rules apply to those causes of action which are asserted pursuant to CPLR article 78, on the one hand, and those which seek to recover damages and declaratory relief, on the other hand' ... . 'The Supreme Court may not employ the summary procedure applicable to a CPLR article 78 cause of action to dispose of causes of action to recover damages or seeking a declaratory judgment' ... . 'Thus, where no party makes a request for a summary determination of the causes of action which seek to recover damages or declaratory relief, it is error for the Supreme Court to summarily dispose of those causes of action' ... . Here, since no party made such a motion, the Supreme Court erred in summarily disposing of the petitioner/plaintiff's third through eighth causes of action. Accordingly, we remit the matter to the Supreme Court ... for further proceedings on those causes of action ...". ***Matter of Kelly v. Farmingdale State Coll., State Univ. of N.Y.*, 2023 N.Y. Slip Op. 01895, Second Dept 4-12-23**

CIVIL PROCEDURE. TRUSTS AND ESTATES.

THE PLAINTIFFS IN THIS SUIT AMONG BROTHERS ABOUT THE FATHER'S ESTATE DID NOT HAVE THE AUTHORITY TO ACT ON BEHALF OF THE ESTATE OR TO SUE AS BENEFICIARIES OF THE ESTATE; THE ACTION SHOULD HAVE BEEN DISMISSED.

The Second Department, reversing Supreme Court, determined the plaintiffs in this dispute among brothers about the father's estate did not have the authority to act on behalf of the estate or to sue as beneficiaries of the estate. Therefore the action should have been dismissed: " 'It is elementary that the executors or administrators represent the legatees, creditors and distributees in the administration of the estate; that their duty is to recover the property of the estate; and that the legatees and next of kin are concluded by their determination in respect to actions therefor and have no independent cause of action, either in their own right or the right of the estate' ... . Here, the plaintiffs did not purport to commence this action as personal representatives of the decedent's estate. The plaintiffs lacked 'letters of administration authorizing [them] to act at the key points when this action was commenced and an amended complaint . . . was served' ... . Absent extraordinary circumstances which are not present here, a beneficiary has no authority to act on behalf of an estate or to exercise a fiduciary's rights with respect to estate property ... . Accordingly, the Supreme Court should have granted that branch of the defendants' motion which was pursuant to CPLR 3211(a)(3) to dismiss, insofar as asserted against them, the causes of action in the amended complaint asserted by the plaintiffs in their derivative capacity on behalf of the decedent's estate, as well as the causes of action asserted by the plaintiffs in their individual capacity as beneficiaries of the estate to recover assets of the estate ...". ***Levy v. Levy*, 2023 N.Y. Slip Op. 01892, Second Dept 4-12-23**

CRIMINAL LAW, SEX OFFENDER REGISTRATION ACT (SORA), ATTORNEYS.

DEFENDANT'S ATTORNEY ESSENTIALLY FAILED TO TAKE ANY POSITION ON THE SORA RISK ASSESSMENT; NEW SORA HEARING ORDERED.

The Second Department, reversing Supreme Court and ordering a new SORA hearing, determined defendant did not receive effective assistance of counsel: " 'A sex offender facing risk level classification under SORA has a right to the effective assistance of counsel' ... . Here, the defendant's counsel failed to provide 'meaningful representation' … , as he 'failed to litigate any aspect of the adjudication' ... , essentially declining to take any position on the matter." ***People v. Motta*, 2023 N.Y. Slip Op. 01908, Second Dept, 4-12-23**

FORECLOSURE, EVIDENCE.

THE PLAINTIFF IN THIS FORECLOSURE ACTION DID NOT SUBMIT THE BUSINESS RECORDS DEMONSTRATING DEFENDANT'S DEFAULT; PLAINTIFF'S SUMMARY JUDGMENT MOTION SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined the plaintiff in this foreclosure proceeding did not demonstrate defendant's default because the relevant business documents were not submitted: "[P]laintiff submitted an affidavit of an employee of its loan servicer who averred ... that based upon his review of certain business records maintained by the loan servicer and the plaintiff, he was familiar with the underlying mortgage loan and payment history of Hernandez [defendant]. However, the affiant, and the plaintiff, failed to submit any business records substantiating the alleged default ... . 'Conclusory affidavits lacking a factual basis are without evidentiary value' ... . 'Even assuming that the subject affidavit established a sufficient foundation for the records relied upon, 'it is the business record itself, not the foundational affidavit, that serves as proof of the matter asserted' ...". ***Federal Natl. Mtge. Assn. v. Hernandez*, 2023 N.Y. Slip Op. 01888, Second Dept 4-12-23**

PERSONAL INJURY, CIVIL PROCEDURE, CONTRACT LAW, EVIDENCE.

THE LESSOR OF THE CAR INVOLVED IN THE TRAFFIC ACCIDENT DID NOT SUBMIT THE BUSINESS RECORDS DEMONSTRATING THE ASSIGNMENT OF THE LEASE; THEREFORE, DISMISSAL OF THE COMPLAINT PURSUANT TO THE GRAVES AMENDMENT SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined Chase, the defendant - lessor of the car involved in a traffic accident, did not present sufficient evidence of its status as the lessor for purposes of asserting the Graves-Amendment defense. The business records which would have established the lessor-lessee relationship were either illegible or were not submitted: "When evidentiary material is considered on a motion to dismiss pursuant to CPLR 3211(a)(7), and the motion is not converted into one for summary judgment, the motion should not be granted unless the evidentiary material 'conclusively [establishes] that the plaintiff has no cause of action' ... . Pursuant to the Graves Amendment, the owner of a leased or rented motor vehicle cannot be held liable for personal injuries resulting from the use of the vehicle if (1) 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 ... . Chase attempted to establish the fact that it leased the subject vehicle to [defendant] through the business records exception to the hearsay rule (see CPLR 4518[a]). ... [E]ven assuming that the ... affidavit had established a proper foundation, 'it is the business record itself, not the foundational affidavit, that serves as proof of the matter asserted' ... . Since Chase failed to submit the purported assignment of the lease agreement, it failed to conclusively establish that ... it was shielded by the Graves Amendment." ***Tello v. Upadhyaya*, 2023 N.Y. Slip Op. 01913, Second Dept 4-12-23**

THIRD DEPARTMENT

CRIMINAL LAW.

THE SUPERIOR COURT INFORMATION (SCI) DID NOT AFFIRMATIVELY PLEAD THE EXCEPTION IN THE CRIMINAL MISCHIEF STATUTE; THEREFORE, THE CRIMINAL MISCHIEF COUNT WAS JURISDICTIONALLY DEFECTIVE.

The Third Department, reversing defendant's criminal mischief conviction, determined the underlying statute includes an exception which must be affirmatively pleaded. The exception was not affirmatively pleaded in the Superior Court Information (SCI): " 'In order to determine whether a statute defining a crime contains an exception that must be affirmatively pleaded as an element in the accusatory instrument or a proviso that need not be pleaded but may be raised by the accused as a bar to prosecution or a defense at trial, a court must look to the language of the statute itself' ... . To that end, 'legislative intent to create an exception that must be affirmatively pleaded has generally been found when the language of exclusion is contained entirely within a Penal Law provision' ... . Penal Law § 145.05 (2) provides that '[a] person is guilty of criminal mischief in the third degree when, with intent to damage property of another person, and having no right to do so nor any reasonable ground to believe that he or she has such right, he or she . . . damages property of another person in an amount exceeding [$250]' ... . Inasmuch as the qualifying language is contained within the statute itself, we agree that such language constitutes an exception. Given that count 1 of the 2016 SCI did not allege that defendant had neither a right to cause the property damage at issue nor a reasonable ground to believe that she had such right, that count — charging defendant with criminal mischief in the third degree — is jurisdictionally defective ...". ***People v. West*, 2023 N.Y. Slip Op. 01921, Third Dept 4-13-23**

CRIMINAL LAW.

THE MURDER SECOND-DEGREE COUNTS MUST BE DISMISSED AS INCLUSORY CONCURRENT COUNTS OF MURDER FIRST DEGREE.

The Third Department determined the second-degree murder counts must be dismissed as inclusory concurrent counts of defendant's murder first degree convictions: "[W]e agree with defendant's contention that his convictions for second degree murder (counts 2 and 3) must be dismissed as inclusory concurrent counts of his convictions for murder in the first degree (counts 7, 8 and 9) (see CPL 300.40 [3] [b])." ***People v. Burton*, 2023 N.Y. Slip Op. 01919, Third Dept 4-13-23**

RETIREMENT AND SOCIAL SECURITY LAW, PERSONAL INJURY.

PETITIONER POLICE OFFICER WAS AWARE OF THE DEFECT IN THE FLOOR WHICH CAUSED HIS CHAIR TO START TO TIP OVER BACKWARDS WHEN THE WHEELS CAUGHT IN THE DEFECT; THEREFORE, THE INCIDENT WAS NOT UNEXPECTED AND PETITIONER WAS NOT ENTITLED TO ACCIDENTAL DISABILITY RETIREMENT BENEFITS.

The Third Department, in a full-fledged opinion by Justice Pritzker, over a dissent, determined petitioner police officer was not entitled to accidental disability benefits for injuries incurred at his desk when he prevented himself from falling over backwards in his chair. When he attempted to roll the chair backwards it caught in a rut and petitioner was injured when he grabbed at a desk to keep from tipping over backwards: "Petitioner acknowledged that he was aware that the flooring at the front desk was in poor condition and that, both on previous occasions and prior to the incident that day, he had observed that there were two ruts in the flooring right behind the desk. Petitioner also testified that, in his estimation, the ruts were 'three inches across, maybe a little more.' His testimony also demonstrates that he was aware that the chair he was utilizing that day had wheels and that, when sitting at the desk, those wheels would be in the 'general area' of the holes. Given this testimony and the photographs of the floor that were admitted, respondent's finding that petitioner could have reasonably anticipated the hazard — i.e., that the small wheels catching a depression in the floor would cause the chair to tip — was reasonable and supported by substantial evidence, despite other reasonable interpretations. Therefore, the finding that the precipitating event was not unexpected and did not constitute an accident within the meaning of the Retirement and Social Security Law will not be disturbed ...". ***Matter of Bodenmiller v. DiNapoli*, 2023 N.Y. Slip Op. 01930, Third Dept 4-13-23**

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