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FIRST DEPARTMENT

CONTRACT LAW, CIVIL PROCEDURE, EVIDENCE, JUDGES.

THE LETTER OF INTENT WAS AN AGREEMENT TO AGREE WHICH CONTEMPLATED ONLY OUT-OF-POCKET DAMAGES FOR A BREACH; THE JUDGE SHOULD NOT HAVE RELIED ON CREDIBILITY DETERMINATIONS TO, SUA SPONTE, AWARD SUMMARY JUDGMENT TO PLAINTIFFS.

The First Department, reversing Supreme Court, determined that the letter of intent (LOI) was an agreement to agree which, if breached, supported only out-of-pocket damages, not cover damages. The judge improperly relied on credibility determinations to, sua sponte, award summary judgment to plaintiffs: "[R]ecovery for breach of a preliminary agreement's confidentiality provision could not be based on 'the theory that it would have acquired' the company at issue, as the 'defendant[] w[as] not bound to go forward with the transaction' ... . * * * ... [T]he text of the LOI and the surrounding circumstances support a finding that the parties did not contemplate cover damages at the time of contracting. That the parties entered only a preliminary agreement with no obligation to close a transaction and no specific damage provision for breach conclusively shows that defendant did not wish to assume the risk of covering whatever replacement transaction plaintiffs might pursue ... . [T]he court improperly relied on credibility determinations to resolve material issues that should have been resolved by the jury. It is 'not the function of a court deciding a summary judgment motion to make credibility determinations' ...". ***Cresco Labs N.Y., LLC v. Fiorello Pharms., Inc.*, 2023 N.Y. Slip Op. 03305, First Dept 6-20-23**

FAMILY LAW, JUDGES, CIVIL PROCEDURE.

IN THIS DIVORCE PROCEEDING (1) THE HUSBAND'S REQUEST FOR CLOSURE OF THE COURTROOM SHOULD HAVE BEEN PUBLIC, NOT CONCEALED FROM THE PUBLIC IN EMAILS, AND (2), THE COURTROOM CLOSURE WAS IMPROPERLY BASED ON AN EXCEPTION TO THE PUBLIC-TRIAL REQUIREMENT WHICH IS NOT INCLUDED IN JUDICIARY LAW § 4.

The First Department, reversing Supreme Court, determined the judge should not have ordered closure of the courtroom pursuant to Judiciary Law § 4 in this divorce proceeding. The criteria for closure of a courtroom are discussed in some detail. Here the judge ordered some documents to be submitted under seal and then based the closure on the existence of sealed documents as evidence. That justification for closure is not one of the exceptions in Judiciary Law § 4: "The motion court did not provide the public and the press adequate notice of the husband's courtroom closure request. Because it directed the parties to file their submissions on the application for courtroom closure by email, the submissions were not reflected on 'the publicly maintained docket entries,' as required ... . We also reverse on substantive grounds. 'Public access to court proceedings is strongly favored, both as a matter of constitutional law . . . and as statutory imperative ...' ... . In the order appealed here, the motion court improperly read an exception into the 'statutory imperative' of NY Judiciary Law §4 that does not exist. The first part of that statute, entitled 'Sittings of courts to be public,' states: 'The sittings of every court within this state shall be public, and every citizen may freely attend the same . . .' The only exceptions to this rule are set forth in the statute's next sentence: 'except that in all proceedings and trials in cases for divorce, seduction, rape, assault with intent to commit rape, criminal sexual act, bastardy or filiation, the court may, in its discretion, exclude therefrom all persons who are not directly interested therein, excepting jurors, witnesses, and officers of the court' ... . Here, the motion court used its discretion to insert another, unwritten category of cases into the statutory exception: proceedings that could entail arguments that implicate documents filed under seal. We find its decision to do so to have been improper ...". ***Paulson v. Paulson*, 2023 N.Y. Slip Op. 03310, First Dept 6-20-23**

SECOND DEPARTMENT

CIVIL PROCEDURE, FORECLOSURE, EVIDENCE, JUDGES.

THE BANK'S SECOND MOTION IN THIS FORECLOSURE ACTION DID NOT MEET THE CRITERIA FOR A MOTION TO RENEW AND VIOLATED THE "SUCCESSIVE SUMMARY JUDGMENT MOTION" RULE.

The Second Department, reversing Supreme Court, determined the second motion for summary judgment made by the bank in this foreclosure action was not a valid motion to renew and violated the "successive summary judgment rule:" " 'While a court has discretion to entertain renewal based on facts known to the movant at the time of the original motion, the movant must set forth a reasonable justification for the failure to submit the information in the first instance. When no reasonable justification is given for failing to present new facts on the prior motion, the Supreme Court lacks discretion to grant renewal' ... . [P]laintiff failed to provide any justification for its failure to present the

new evidence supporting the second motion as part of its prior motion. ‘Even considered as a successive motion for summary judgment, such a motion ‘should not be entertained in the absence of good cause, such as a showing of newly discovered evidence’ ... . Here, the plaintiff failed to present good cause. The second motion also did not fit within the ‘narrow exception’ to the successive summary judgment rule ... . This narrow exception permits entertainment of a successive motion when it is ‘substantively valid and the granting of the motion will further the ends of justice and eliminate an unnecessary burden on the resources of the courts’ ... . Here, entertaining a second summary judgment motion involved review of multiple disputed issues, including whether the plaintiff established the defendants’ default, the plaintiff’s compliance with the contractual condition precedent, and the plaintiff’s compliance with RPAPL 1304. Thus, rather than eliminating a burden on the Supreme Court, the court’s consideration of the second motion actually imposed an additional burden on the court. ‘Successive motions for the same relief burden the courts and contribute to the delay and cost of litigation. A party seeking summary judgment should anticipate having to lay bare its proof and should not expect that it will readily be granted a second or third chance’ ...”. ***Wells Fargo Bank, N.A. v. Gittens*, 2023 N.Y. Slip Op. 03373, Second Dept 6-21-23**

CIVIL PROCEDURE, FRAUD, CONTRACT LAW, REAL PROPERTY LAW, REAL PROPERTY ACTIONS AND PROCEEDINGS LAW.

THE APPLICABLE STATUTES OF LIMITATIONS FOR DECLARATORY-JUDGMENT CAUSES OF ACTION DEPEND ON THE NATURE OF THE UNDERLYING ALLEGATIONS; HERE THE ALLEGATIONS SOUNDED IN FRAUD, UNJUST ENRICHMENT AND VIOLATIONS OF THE REAL PROPERTY LAW; ALL WERE TIME-BARRED.

The Second Department, revering Supreme Court, determined the declaratory judgment causes of action were time-barred according to the statutes of limitations applicable to the underlying allegations, i.e., fraud, unjust enrichment, Real Property Law (RPL) and Real Property Actions and Proceedings Law (RPAPL) causes of action: “ ‘Actions for declaratory judgments are not ascribed a certain limitations period. The nature of the relief sought in a declaratory judgment action dictates the applicable limitations period. Thus, if the action for a declaratory judgment could have been brought in a different form asserting a particular cause of action, the limitations period applicable to the particular cause of action will apply’ ... . Here, the cause of action for declaratory relief could have been, and previously was, brought in the form of causes of action to recover damages for fraud and intentional misrepresentation. Since the instant action was commenced more than six years after the plaintiff allegedly was fraudulently induced to convey title to the property and more than two years from the discovery of the alleged fraud, the cause of action for declaratory relief was time-barred ... . [T]he second cause of action ... seeks to void the defendant’s title to the property by virtue of the plaintiff’s claim that the plaintiff was fraudulently induced into conveying title to the defendant. Accordingly, this cause of action is governed by the six-year statute of limitations governing actions based upon fraud and, therefore, was untimely. ... [T]he cause of action to recover damages for unjust enrichment accrued ... when the deed conveying title to the defendant was executed, and, therefore, this cause of action was also time-barred. ... [T]he cause of action alleging a violation of Real Property Law § 265-a was time-barred since it was commenced more than two years after recordation of the subject deed and more than six years after the alleged fraudulently induced conveyance.” ***Mahabir v. Snyder Realty Group, Inc.*, 2023 N.Y. Slip Op. 03342, Second Dept 6-21-23**

CIVIL PROCEDURE, MEDICAL MALPRACTICE, NEGLIGENCE.

APPELLANT PHYSICIAN’S ASSISTANT HAD LEFT DEFENDANT-PRACTICE AT THE TIME THE MEDICAL MALPRACTICE ACTION WAS BROUGHT AGAINST THE PRACTICE; THE PLAINTIFFS DID NOT DEMONSTRATE APPELLANT HAD TIMELY NOTICE OF THE SUIT; THEREFORE, THE RELATION-BACK DOCTRINE DID NOT SUPPORT THE MOTION TO ADD THE APPELLANT AS A DEFENDANT AFTER THE STATUTE OF LIMITATIONS HAD RUN.

The Second Department, reversing Supreme Court, determined the motion to amend the complaint to add appellant, a physician’s assistant, to this medical malpractice action should not have been granted. The statute of limitations has run and the relation-back theory was not supported by evidence appellant had timely notice of the suit. Appellant had stopped working for defendant practice at the time the suit was commenced: “ ‘In order for a claim asserted against a new defendant to relate back to the date the claim was filed against another defendant, the plaintiffs must establish that (1) both claims arose out of [the] same conduct, transaction, or occurrence; (2) the new defendant is united in interest with the original defendant, and by reason of that relationship can be charged with notice of the institution of the action such that he [or she] will not be prejudiced in maintaining his [or her] defense on the merits; and (3) the new defendant knew or should have known that, but for a mistake by the plaintiffs as to the identity of the proper parties, the action would have been brought against him [or her] as well’ ... . ‘The linchpin of the relation-back doctrine is whether the new defendant had notice within the applicable limitations period’ ... . Here, the plaintiffs failed to meet their burden as to the third prong of the relation-back doctrine. The record establishes that the appellant was no longer working for the practice at the time of the commencement of the action, and there is no evidence that she had actual or constructive knowledge within the limitations period of the commencement of the action ...”. ***Dixon v. Jones*, 2023 N.Y. Slip Op. 03336, Second Dept 6-21-23**

CIVIL PROCEDURE, MUNICIPAL LAW, NEGLIGENCE.

PLAINTIFF'S DECEDENT WAS SHOT IN A DARK AREA OF DEFENDANT NEW YORK CITY HOUSING AUTHORITY'S (NYCHA'S) APARTMENT COMPLEX; THE NOTICE OF CLAIM ALLEGED THE LACK OF LIGHTING CONSTITUTED NEGLIGENT SECURITY; THE ADDITIONAL ALLEGATIONS OF SECURITY-RELATED NEGLIGENCE IN THE BILL OF PARTICULARS SHOULD HAVE BEEN STRUCK.

The Second Department, reversing Supreme Court, determined certain allegations of negligence in the bill of particulars should have been struck because the notice of claim did not provide notice of them. The appellate division interpreted the notice of claim to allege that the lack of security at defendant's apartment complex stemmed from inadequate lighting. Plaintiff's decedent was shot and killed in an area which, allegedly, was completely dark. The additional claims of negligence in the bill of particulars were struck: "[T]he crux of the notice of claim is that [defendant] NYCHA was negligent in failing to provide adequate security by failing to provide adequate lighting at the location where the decedent was shot and killed ... . [T]he notice of claim did not directly or indirectly reference those allegations raised in ... the bill of particulars that concern NYCHA's failure to protect tenants from criminal activities and criminal intrusions, NYCHA's failure to remove alleged known criminals from its premises in violation of its Permanent Exclusion Policy and Real Property Law § 231(2), NYCHA's failure to install CCTV cameras, and the alleged sale of drugs on NYCHA premises. These allegations go beyond mere amplification of the inadequate lighting allegation and are instead new, distinct, and independent theories of liability that cannot be corrected pursuant to General Municipal Law § 50-e(6) ...". ***Mosley v. City of New York*, 2023 N.Y. Slip Op. 03345, Second Dept 6-21-23**

FAMILY LAW, IMMIGRATION LAW.

FAMILY COURT SHOULD HAVE GRANTED THE GUARDIANSHIP PETITIONS AND MADE FINDINGS ENABLING THE CHILDREN TO APPLY FOR SPECIAL IMMIGRANT JUVENILE STATE (SIJS).

The Second Department, reversing Family Court, determined the guardianship petitions should have been granted and findings enabling the children to apply for special immigrant juvenile status should have been made: "[T]he record supports a finding that the children are under the age of 21 and unmarried, and, since we have appointed the petitioner as the children's guardian, the children are dependent on a juvenile court within the meaning of 8 USC § 1101(a)(27)(J)(i) ... . Further, based upon our independent factual review, the record supports a finding that the children's father is deceased, and therefore, reunification is not possible ... . Lastly, the record supports a finding that it would not be in the best interests of the children to return to El Salvador, their previous country of nationality or country of last habitual residence ...". ***Matter of Jose S. S. G. (Norma C. G. C.)*, 2023 N.Y. Slip Op. 03350, Second Dept 6-21-23**

FAMILY LAW, IMMIGRATION LAW, EVIDENCE.

IN A PROCEEDING SEEKING FINDINGS TO ENABLE A CHILD TO APPLY FOR SPECIAL IMMIGRANT JUVENILE STATUS (SIJS) THE SUBMISSION OF CERTIFIED COPIES OF BIRTH CERTIFICATES OR DEATH CERTIFICATES IS NOT REQUIRED; THE PROCEEDING SHOULD NOT HAVE BEEN DISMISSED ON THAT GROUND.

The Second Department, reversing Family Court, determined this proceeding seeking findings to enable the child to apply for special immigrant juvenile status (SIJS) should not have been dismissed on the ground that certified copies of birth certificates and/or death certificates were not submitted: "[P]etitioner ... commenced this proceeding pursuant to Family Court Act article 6 to be appointed as the guardian of the child. Thereafter, the petitioner moved for the issuance of an order ... making specific findings so as to enable the child to petition the United States Citizenship and Immigration Services for special immigrant juvenile status (hereinafter SIJS) pursuant to 8 USC § 1101(a)(27)(J). ... Family Court dismissed the petition and denied the petitioner's motion. ... [T]here is no express requirement to submit certified copies of birth certificates or death certificates in a proceeding such as this pursuant to Family Court Act § 661(a) ... .[S]ince the court dismissed the petition without conducting a hearing or considering the child's best interests, we remit the matter to the Family Court ...". ***Matter of Anuar S. A. O. (Yari C. B. M. Lizeth O. M.)*, 2023 N.Y. Slip Op. 03353, Second Dept 6-21-23**

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

THE BANK DID NOT DEMONSTRATE COMPLIANCE WITH THE NOTICE REQUIREMENTS OF RPAPL 1304 IN THIS FORECLOSURE ACTION.

The Second Department, reversing Supreme Court, determined the bank in this foreclosure action did not present sufficient proof of compliance with the notice requirements of RPAPL 1304: "[A]lthough the affidavit of the servicing agent stated that the 90-day notice was mailed to the defendant by certified mail and regular first-class mail, the affiant did not attest to having personally mailed the notices, nor that she was familiar with the mailing procedures of the entity that mailed the notices and that such procedures were designed to ensure that the notices were properly addressed and mailed ... The plaintiff also failed to submit documentation from the United States Postal Service proving the first-class mailing of the 90-day notice to the defendant ...". ***U.S. Bank Trust, N.A. v. Smith*, 2023 N.Y. Slip Op. 03372, Second Dept 6-21-23**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

EVIDENCE THAT THE LADDER TILTED CAUSING PLAINTIFF TO JUMP OFF WARRANTED SUMMARY JUDGMENT ON THE LABOR LAW § 240(1) CAUSE OF ACTION.

The Second Department, reversing Supreme Court, determined plaintiff was entitled to summary judgment on the Labor Law § 240(1) cause of action in this ladder fall case. It was enough that the ladder tilted causing plaintiff to jump off onto a plank below. Plaintiff alleged a nail which would have prevented the ladder from tilting was missing. Plaintiff's actions were not the sole proximate cause of the injury: " 'Labor Law § 240(1) imposes upon owners and general contractors, and their agents, a nondelegable duty to provide safety devices necessary to protect workers from risks inherent in elevated work sites' ... . 'In order to prevail on a Labor Law § 240(1) cause of action, a plaintiff must establish that the statute was violated and that the violation was a proximate cause of his or her injuries' ... . Here, the plaintiff established, prima facie, that his injuries were proximately caused by a violation of Labor Law § 240(1) by submitting, inter alia, his deposition testimony that he was working on a ladder which tilted, causing him to lose his balance and jump onto the plank below ... . The defendants' contentions that the plaintiff leaned to one side while he was working and that he jumped off the ladder as it began to tilt were insufficient to raise a triable issue of fact as to whether the plaintiff's actions were the sole proximate cause of his injuries ...". ***Acevedo v. PSM Long Is. Corp.*, 2023 N.Y. Slip Op. 03322, Second Dept 6-21-23**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

TRIPPING OVER A GAP BETWEEN THE TOP STEP OF A STAIRCASE AND THE LANDING IS NOT A GRAVITY-RELATED INCIDENT COVERED BY LABOR LAW § 240(1); RE: LABOR LAW § 241(6), THE INDUSTRIAL CODE PROVISION REQUIRING COVERS OVER HAZARDOUS OPENINGS APPLIES ONLY TO OPENINGS A WORKER CAN COMPLETELY FALL THROUGH.

The Second Department, reversing (modifying) Supreme Court, determined (1) tripping because of a gap between the top step of a staircase and the landing was not the type of gravity-related incident covered by Labor Law § 240(1), (2) the industrial code provision requiring covers over hazardous openings applies only to openings through which a worker can completely fall through, and (3), the industrial code provision prohibiting tripping hazards was applicable: "[T]he plaintiff's injuries did not fall within the ambit of Labor Law § 240(1) because they did not occur as the result of an elevation-related or gravity-related risk ... 'Labor Law § 241(6) imposes a nondelegable duty upon owners and contractors to provide reasonable and adequate protection and safety to construction workers' ... 12 NYCRR 23-1.7(b)(1)(i) provides that '[e]very hazardous opening into which a person may step or fall shall be guarded by a substantial cover fastened in place or by a safety railing.' 'The provision pertaining to 'hazardous openings' ... does not apply to openings that are too small for a worker to completely fall through' ... . Supreme Court properly granted that branch of the plaintiff's motion which was for summary judgment on the issue of liability on so much of the Labor Law § 241(6) cause of action as was predicated on a violation of 12 NYCRR 23-1.7(e)(1), which relates to tripping hazards ...". ***Castro v. Wythe Gardens, LLC*, 2023 N.Y. Slip Op. 03329, Second Dept 6-21-23**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY, CIVIL PROCEDURE, JUDGES.

OUTSTANDING DISCOVERY CONSTITUTED GOOD CAUSE FOR A LATE (POST-NOTE-OF-ISSUE) MOTION FOR SUMMARY JUDGMENT; PLAINTIFF ENTITLED TO SUMMARY JUDGMENT ON THE LABOR LAW § 240(1) CAUSE OF ACTION IN THIS LADDER-FALL CASE; DEFENDANTS ENTITLED TO SUMMARY JUDGMENT ON THE LABOR LAW § 200 CAUSE OF ACTION.

The Second Department, reversing Supreme Court, determined outstanding discovery furnished good cause for plaintiff's late (post-note-of-issue) motion for summary judgment in this Labor Law § 240(1) ladder-fall case. The appellate division then reached the merits and granted plaintiff's motion for summary judgment on the Labor Law § 240(1) cause of action and granted defendant's cross-motion for summary judgment on the Labor Law § 200 cause of action: "[P]laintiff demonstrated good cause for his delay in moving for summary judgment ... . As an initial matter, we note that the court directed the plaintiff, over the plaintiff's objection, to file a note of issue or face sanctions or dismissal of the action, despite the fact that a significant amount of discovery, including ... the depositions of the parties, had yet to occur ... . * * * ... [P]laintiff established ... entitlement to judgment as a matter of law by demonstrating that his injuries were proximately caused by the defendants' failures, as the owner and the general contractor at the construction site, to satisfy their nondelegable duty to provide him with a safe and adequate ladder necessary for him to perform his elevation-related work at the site ... . * * * ... [D]efendants established ... entitlement to judgment as a matter of law dismissing the causes of action alleging a violation of Labor Law § 200 and common-law negligence by demonstrating that they did not create or have actual or constructive notice of the condition that the plaintiff alleged caused his injuries and that they had no authority to supervise or control the means and methods of the plaintiff's work at the time of his accident ...". ***Panfilow v. 66 E. 83rd St. Owners Corp.*, 2023 N.Y. Slip Op. 03357, Second Dept 6-21-23**

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