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FIRST DEPARTMENT

CIVIL PROCEDURE.

THE MOTION TO INTERVENE DID NOT HAVE THE PROPOSED PLEADING ATTACHED; THE MOTION SHOULD NOT HAVE BEEN GRANTED.

The First Department, reversing Supreme Court, determined the motion to intervene should have been denied because the proposed pleading was not attached to the motion: "A motion seeking leave to intervene, whether made pursuant to CPLR 1012 or 1013, must include the proposed intervenor's proposed pleading (see CPLR 1014 ...). Here, Plotch did not submit a proposed pleading with her motion for leave to intervene, nor did she submit an affidavit which in some cases may excuse the failure to attach a proposed pleading ... . Plotch's reliance on ***Oversea Chinese Mission v Well-Come Holdings*, Inc. (145 AD3d 634** [1st Dept 2016]) for the proposition that no proposed pleading is required is misplaced. That case made no reference to CPLR 1014, which specifically provides that '[a] motion to intervene shall be accompanied by a proposed pleading setting forth the claim or defense for which intervention is sought' ...". ***U.S. Bank Trust N.A. v. 21647 LLC*, 2023 N.Y. Slip Op. 02955, First Dept 6-1-23**

CRIMINAL LAW, EVIDENCE, APPEALS,

THE PEOPLE DID NOT DISPROVE THE JUSTIFICATION DEFENSE; THE FACT THAT THE VICTIM WAS SHOT IN THE BACK DURING A SHOOTOUT WAS NOT ENOUGH.

The First Department, exercising its interest of justice jurisdiction, reversing defendant's manslaughter conviction, determined the People did not disprove defendant's justification defense. The fact that, during a shoot-out, the victim was shot in the back was not enough: " 'When a defense of justification is raised, the People must prove beyond a reasonable doubt that [the] defendant's conduct was not justified. In other words, the People must demonstrate beyond a reasonable doubt that the defendant did not believe deadly force was necessary or that a reasonable person in the same situation would not have perceived that deadly force was necessary' ... . In this case, the evidence regarding which man initiated the gunfire was equivocal at best. Valentin, the lone eyewitness, testified that she did not know who fired first. Footage from numerous surveillance cameras, each of which captured only part of the scene, did not answer that question, nor did the ballistic evidence. There was no evidence that defendant approached displaying a firearm. Rather, the evidence strongly suggests that [the victim] was the first person to do so. In this case, we do not believe that the mere fact that the victim was shot in the back establishes that defendant was the initial aggressor, or that he did not reasonably believe that deadly physical force was still being used against him at the time he fired the fatal shot. Under the totality of the evidence, the fact that [the victim] had his back turned to defendant at the moment when he was shot does not establish that he was withdrawing from the gunfight or running away." ***People v. Skeeter*, 2023 N.Y. Slip Op. 02946, First Dept 6-1-23**

REAL PROPERTY LAW, CONTRACT LAW, ZONING.

BUYER WAS ENTITLED TO SPECIFIC PERFORMANCE OF A CONTRACT FOR THE SALE OF "INCLUSIONARY AIR RIGHTS" (IARs); IARs DICTATE THE ALLOWED SQUARE FOOTAGE OF BUILDINGS ON A PARCEL OF LAND (THE ALLOWED NUMBER OF FLOORS FOR EXAMPLE).

The First Department, reversing (modifying) Supreme Court, in a full-fledged opinion by Justice Gonzalez, determined that a contract for the purchase of "inclusionary air rights" (IARs) was subject to specific performance. "Air rights" are controlled by zoning regulations. For example, if a 10,000-square-foot parcel of land is allowed 50,000 square feet of floor space, the air rights for that 10,000-square-foot parcel constitute 40,000 square feet. Here the contract for the purchase of air rights between sophisticated real estate developers was deemed to be subject to specific performance. Defendant seller tried to back out of the deal because the selling price was too low: "... New York courts have consistently considered air rights an 'interest in real property' ... . [S]pecific performance is not solely limited to real property; the remedy may also apply in other instances, such as a conveyance of shares of stock in a close corporation or an agreement to sell shares in a cooperative real estate corporation ... . [S]pecific performance may be available in actions where the market is opaque and the price of the goods is subject to intense fluctuation ... . [S]pecific performance is warranted because of the parties' incorporation of a specific performance in their agreement, defendant's willful breach of the agreement, the absence of an inequitable or disproportionate burden, and the admitted uncertainty of valuing IARs." ***301 E. 60th St. LLC v. Competitive Solutions LLC*, 2023 N.Y. Slip Op. 02842, First Dept 5-30-23**

SECOND DEPARTMENT

CRIMINAL LAW, CIVIL PROCEDURE.

THE EXECUTIVE-ORDER COVID TOLLS APPLY TO THE SPEEDY TRIAL STATUTE, RENDERING THE INDICTMENT OF THE DEFENDANT TIMELY.

The Second Department, reversing County Court, determined the speedy-trial statute was tolled by the COVID executive orders, rendering the prosecution of defendant timely: "Where, as here, a defendant is charged with a felony, the People are required to be ready for trial within six months of the commencement of the criminal action (see CPL 30.30[1][a] ...). In response to the COVID-19 pandemic, on December 30, 2020, former Governor Andrew Cuomo issued Executive Order No. 202.87, which provided 'Section 30.30 and Section 190.80 of the criminal procedure law are suspended to the extent necessary to toll any time periods contained therein for the period during which the criminal action is proceeding on the basis of a felony complaint through arraignment on the indictment or on a superior court information and thereafter shall not be tolled' ... . Successive executive orders extended Executive Order No. 202.87 through May 23, 2021 (see 9 NYCRR 8.202.87-202.106). Contrary to the determination of the County Court, while it was in effect, Executive Order No. 202.87 constituted a toll of the time within which the People must be ready for trial for the period from the date a felony complaint was filed through the date of a defendant's arraignment on the indictment, with no requirement that the People establish necessity for a toll in each particular case ...". ***People v. Fuentes*, 2023 N.Y. Slip Op. 02892, Second Dept 5-31-23**

FAMILY LAW, ATTORNEYS, JUDGES.

THE AWARD OF COUNSEL FEES TO MOTHER IN THIS MODIFICATION OF CUSTODY PROCEEDING WAS AN ABUSE OF DISCRETION; FATHER WAS NOT GIVEN ADEQUATE NOTICE OF ANY FRIVOLOUS CONDUCT; THE FINANCIAL CIRCUMSTANCES OF THE PARTIES WERE NOT CONSIDERED; THE RELEVANT REGULATORY AND STATUTORY CRITERIA EXPLAINED.

The Second Department, reversing Supreme Court, determined the court should not have awarded counsel fees to mother. Mother brought an action for modification of a custody order on the ground father had lied about the method of transportation he used to go to Alabama with the child. Apparently father told mother they were going to drive, when in fact they flew. Mother was awarded $25,000 in counsel fees: "... Supreme Court permitted the mother to make a written application for counsel fees, [but] the court did not state whether the application should be made under 22 NYCRR 130-1.1 ... . [T]he court did not ... make a finding that the father's conduct was 'frivolous' within the meaning of 22 NYCRR 130-1.1. ... [T]o the extent the court granted the mother's application for an award of counsel fees pursuant to 22 NYCRR 130-1.1, the father did not receive sufficient notice of the alleged frivolous conduct, and, therefore, was not given 'a reasonable opportunity to be heard' ... . [T]o the extent that the Supreme Court granted the mother's application for an award of counsel fees under 22 NYCRR 130-1.1, the court improperly based its determination to grant the application, in part, on the father's act of lying to the mother about flying to Alabama with the parties' child, since this conduct occurred outside of the proceeding before the court ... . * * * ... [T]o the extent that the Supreme Court granted the mother's application for an award of counsel fees pursuant to Domestic Relations Law § 237(b), the court did not adequately consider the disparate financial circumstances of the parties ...". ***LeBoeuf v. Greene*, 2023 N.Y. Slip Op. 02870, Second Dept 5-31-23**

FAMILY LAW, IMMIGRATION LAW, EVIDENCE, JUDGES.

FAMILY COURT SHOULD HAVE APPOINTED MOTHER GUARDIAN OF THE JUVENILE, DISPENSED WITH SERVICE ON FATHER, AND MADE FINDINGS TO ALLOW THE JUVENILE TO APPLY FOR SPECIAL JUVENILE IMMIGRATION STATUS (SJIS); ALL OF THE COMPLICATED, INTERTWINED STATUTORY LAW EXPLAINED.

The Second Department, reversing Family Court, determined mother should have been appointed guardian of the juvenile and the court should have made findings to allow the juvenile to apply for special immigration juvenile status (SIJS). Family Court should not have required a birth certificate to prove the juvenile's age: "Family Court Act § 661(a) permits the Family Court to appoint a guardian for a youth between the ages of 18 and 21 in order to establish that the youth is 'dependent on a juvenile court' (8 USC § 1101[a][27][J][i]) for purposes of an application for SIJS ... . The provisions of the Surrogate's Court Procedure Act (hereinafter SCPA) apply to the extent they are applicable to guardianship of the person of a minor or infant and do not conflict with the provisions of the Family Court Act ... . [T]here is no express requirement to submit certified copies of birth certificates in a proceeding such as this pursuant to Family Court Act § 661(a) ... . [T]he Family Court is only required to ascertain the juvenile's age, and there is no statutory requirement that a petitioner submit any particular evidence to establish the juvenile's age (see id.; SCPA 1706[1]). Here, for purposes of this proceeding pursuant to Family Court Act § 661(a), the record supports a finding that the child is under the age of 21 ... . Family Court should have granted the guardianship petition and the mother's motions to dispense with service on the father and for the issuance of an order making the requisite declaration and specific findings so as to enable the child to petition for SIJS." ***Matter of Joel A. A. R. (Eddy A. A. G.)*, 2023 N.Y. Slip Op. 02881, Second Dept 5-31-23**

FAMILY LAW, TAX LAW.

FATHER, AS THE NONCUSTODIAL PARENT PROVIDING MOST OF THE FINANCIAL SUPPORT FOR THE CHILDREN, WAS ENTITLED TO DECLARE THE CHILDREN DEPENDENTS FOR INCOME TAX PURPOSES.

The Second Department, reversing (modifying) Supreme Court, determined father, as the noncustodial parent contributing most of the financial support for the children, was entitled to declare the children dependents for income-tax purposes: "Where, as here, the noncustodial parent is contributing the majority of the financial support of the parties' children, 'the court may determine that the noncustodial parent is entitled to declare the children as dependents on his or her income tax returns' ... . Accordingly, under the circumstances here, the plaintiff is entitled to declare all of the parties' unemancipated children as his dependents for income tax purposes ...". ***Miller v. Miller*, 2023 N.Y. Slip Op. 02872, Second Dept 5-31-23**

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

SENDING THE 90-DAY FORECLOSURE NOTICE TO THE TWO BORROWERS IN THE SAME ENVELOPE VIOLATED RPAPL 1304.

The Second Department, reversing Supreme Court, determined sending the notice of foreclosure to the two borrowers in the same envelope violated RPAPL 1304 which must be strictly complied with: "RPAPL 1304(1) provides that, 'at least ninety days before a lender, an assignee or a mortgage loan servicer commences legal action against the borrower, . . . including mortgage foreclosure, such lender, assignee or mortgage loan servicer shall give notice to the borrower.' 'The statute further provides the required content for the notice and provides that the notice must be sent by registered or certified mail and also by first-class mail to the last known address of the borrower' ... . Strict compliance with RPAPL 1304 notice to the borrower is a condition precedent to the commencement of a foreclosure action ... . Here, the defendants established, prima facie, that the plaintiff did not comply with RPAPL 1304, since the 90-day notice was jointly addressed to both of the defendants ... . Moreover, while the plaintiff contends that two identical copies of the notice were included in the mailing, one for each of the defendants, the plaintiff concedes that they were mailed in the same envelope, which was also improper ...". ***HSBC Bank USA, N.A. v. Schneider*, 2023 N.Y. Slip Op. 02869, Second Dept 5-31-23**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

PLAINTIFF WAS MOVING A HEAVY COMPRESSOR ON A PLANK OVER A TWO-FOOT-DEEP TRENCH WHEN THE PLANK BROKE; THE INJURY WAS COVERED BY LABOR LAW § 240(1) AS AN ELEVATION-RELATED INCIDENT.

The Second Department, reversing Supreme Court, determined plaintiff's injury was covered by Labor Law § 240(1). Plaintiff was moving a heavy compressor on a plank over a trench when the plank broke: "[T]he injured plaintiff and his coworkers were attempting to transport a compressor, which weighed approximately 300 pounds, from a sidewalk to the street. To reach the street, the compressor had to cross a trench approximately two feet deep, which the workers had covered with a ramp made of plywood. As the workers moved the compressor across the ramp, the ramp broke, causing the compressor to fall into the trench and the handle of the compressor to strike the injured plaintiff's foot. * * * ... [P]laintiffs submitted evidence sufficient to establish, prima facie, that the injured plaintiff's accident was proximately caused by Madison's [defendant's] failure to provide appropriate safety devices to protect against gravity-related hazards posed by maneuvering the compressor over the trench ... . The plaintiffs also demonstrated that the injured plaintiff's accident was the result of an elevation differential within the scope of Labor Law § 240(1). Although the compressor only fell a short distance, given the weight of the compressor and the amount of force it was capable of generating, the height differential was not de minimis ... . Thus, the injured plaintiff suffered harm that flowed directly from the application of the force of gravity to the compressor ...". ***Gonzalez v. Madison Sixty, LLC*, 2023 N.Y. Slip Op. 02866, Second Dept 5-31-23**

PERSONAL INJURY, EVIDENCE, CIVIL PROCEDURE, BATTERY, MUNICIPAL LAW.

PLAINTIFF NURSE WAS ASSAULTED BY A PATIENT IN DEFENDANT'S HOSPITAL; SHE WAS ENTITLED TO DISCOVERY OF ANY NON-PRIVILEGED INFORMATION ABOUT THE PATIENT'S AGGRESSIVE BEHAVIOR IN HIS MEDICAL RECORDS.

The Second Department, reversing (modifying) Supreme Court, determined plaintiff was entitled to an in camera review her assailant's (Downing's) medical records to discovery of any non-privileged references to his aggressive behavior. Plaintiff was a nurse assigned to work in defendant's hospital when she was assaulted by defendant patient: "Information relating to the nature of medical treatment and the diagnoses made, including 'information communicated by the patient while the physician attends the patient in a professional capacity, as well as information obtained from observation of the patient's appearance and symptoms,' is privileged (...see CPLR 4504; Mental Hygiene Law § 33.13[c][1] ...). However, '[t]he physician-patient privilege generally does not extend to information obtained outside the realms of medical diagnosis and treatment' ... . Here, the plaintiff seeks information as to any prior aggressive or violent acts by Downing. Information of a nonmedical nature regarding prior aggressive or violent acts is not privileged ... . Accordingly, we remit the matter to the Supreme Court, Queens County, for an in camera review of the subject hospital records, to determine which records contain nonprivileged information that is subject to disclosure, and thereafter disclosure of such records ...". ***Gooden v. New York City Health & Hosps. Corp.*, 2023 N.Y. Slip Op. 02867, Second Dept 5-31-23**

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