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SECOND DEPARTMENT

CIVIL PROCEDURE, EVIDENCE, JUDGES.

THE WRONG MAILING DATE IN AN AFFIDAVIT OF SERVICE CANNOT BE CORRECTED IN AN AMENDED AFFIDAVIT; MATTER REMITTED FOR A HEARING ON DEFENDANT'S MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION.

The Second Department, reversing Supreme Court and remitting for a hearing, determined a mistake in an affidavit of service of the summons and complaint (wrong mailing date) could not be corrected by an amended affidavit. Therefore a hearing on defendant's motion to dismiss for lack of personal jurisdiction was necessary: "[S]imilar to an erroneous address contained in an affidavit of service ... , an erroneous mailing date 'affects a defendant's substantial right to notice of the proceeding against him or her, and may not be corrected by an amendment' ... . Here, the second amended affidavit of service attempted to correct the admitted erroneous mailing date contained in the original affidavit of service and the first amended affidavit of service, and therefore should not have been considered ...". ***HSBC Bank USA, N.A. v. Rini*, 2023 N.Y. Slip Op. 03856, Second Dept 7-19-23**

CIVIL PROCEDURE, EVIDENCE, JUDGES.

PLAINTIFF'S FAILURE TO PROVIDE DISCOVERY AND A BILL OF PARTICULARS WARRANTED DISMISSAL OF THE COMPLAINT AS A SANCTION.

The Second Department, reversing (modifying) Supreme Court, determined defendant's motion to dismiss the complaint by plaintiff Morales based upon Morales's failure to provide discovery and a bill of particulars should have been granted: "... Morales's willful and contumacious conduct can be inferred from her repeated failures over an extended period of time to comply with court-ordered discovery and the parties' discovery stipulation and to respond to the defendants' demands for a verified bill of particulars and discovery without an adequate excuse ... . Contrary to the Supreme Court's determination, the requirements of 22 NYCRR 202.7 were satisfied by the affirmations of the defendants' attorneys, which, inter alia, adequately set forth counsels' good faith efforts to resolve the discovery issues raised by the defendants' motion ...". ***Morales v. Valeo*, 2023 N.Y. Slip Op. 03861, Second Dept 7-19-23**

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

THE RIGHT TO SEEK DISMISSAL OF THE FORECLOSURE ACTION PURSUANT TO CPLR 3215 (C) BASED ON PLAINTIFF BANK'S FAILURE TO SEEK A DEFAULT JUDGMENT WITHIN A YEAR WAS WAIVED BY DEFENDANT'S THREE-YEAR DELAY IN BRINGING THE MOTION TO DISMISS.

The Second Department, reversing Supreme Court, determined defendant, by waiting three years, waived the seek dismissal of the foreclosure action based on plaintiff bank's failure to move for a default judgment within one year: " 'A "defendant may waive the right to seek dismissal pursuant to [CPLR 3215(c)] by his or her conduct" ' ... . Here, the defendant did not move pursuant to CPLR 3215(c) to dismiss the complaint insofar as asserted against him until nearly three years after the defendant's attorney filed a notice of appearance on his behalf. Under these circumstances, the defendant waived his right to seek dismissal pursuant to CPLR 3215(c) by his active participation in the litigation ... . Moreover, the defendant never sought to vacate his default in answering the complaint. Thus, he was precluded from raising his proffered defenses of the plaintiff's failure to comply with RPAPL 1304 ...". ***Bank of Am., N.A. v. Carapella*, 2023 N.Y. Slip Op. 03844, Second Dept 7-19-23**

CIVIL PROCEDURE, COURT OF CLAIMS.

THE CLAIM IN THIS CHILD VICTIMS ACT ACTION SUFFICIENTLY STATED THE TIME AND NATURE OF THE SEXUAL ABUSE ALLEGEDLY OCCURRING DURING FOSTER CARE MORE THAN 40 YEARS AGO; THE PLEADING REQUIREMENTS IN THE COURT OF CLAIMS AND THE MECHANICS AND PURPOSE OF THE CHILD VICTIMS ACT CONCISELY EXPLAINED.

The Second Department, reversing the Court of Claims, determined the claim in this Child Victims Act action, alleging abuse during foster care more than 40 years ago, sufficiently stated the time and nature of the abuse. The decision includes a clear, concise description of the pleading requirement in the Court of Claims, and the mechanics and purpose of the Child Victims Act, which extends that statute of limitations for sexual abuse occurring when the victim was under the age of 18: "Under the particular circumstances of this case, the date ranges provided in the claim indicating that the sexual abuse began when the claimant was 4 years old and 'occurred between two to three times a

week to three to four times a year' until she was 12 years old while she resided in a foster home, along with other information contained in the claim, including the identities of the claimant's foster parents, the address of the foster home, and names of the claimant's alleged abusers, were sufficient to satisfy the 'time when' requirement of the Court of Claims Act § 11(b) ... . * * * In this case, the claim sufficiently provided the defendant with a description of the manner in which the claimant was injured, and how the defendant was negligent in allegedly failing to protect the claimant from sexual abuse while she resided in a foster home. The claimant is not required to set forth the evidentiary facts underlying the allegations of negligence in order to satisfy the section 11(b) nature of the claim requirement ... . As the claim is sufficiently detailed to allow the defendant to investigate and ascertain its liability, it satisfies the nature of the claim requirement of Court of Claims Act § 11(b) ...". ***Fletcher v. State of New York*, 2023 N.Y. Slip Op. 03850, Second Dept 7-19-23**

FORECLOSURE, CIVIL PROCEDURE.

PLAINTIFF IN THIS FORECLOSURE ACTION TIMELY COMMENCED THE ACTION PURSUANT TO THE SIX-MONTH EXTENSION OF THE STATUTE OF LIMITATIONS PROVIDED BY CPLR 205-a.

The Second Department, reversing Supreme Court, determined the foreclosure action was timely commenced pursuant to the six-month extension of the statute of limitations provided by CPLR 205-a: "As part of the recently enacted Foreclosure Abuse Prevention Act ... , a new section, CPLR 205-a, which governs the termination of certain actions, including an action upon a bond or note, the payment of which is secured by a mortgage on real property related to real property, was enacted. As relevant here, under both CPLR 205(a) and CPLR 205-a, where an action is timely commenced and is terminated for any reason other than those specified in the statutes, the plaintiff may commence a new action upon the same transaction or occurrence within six months following the termination, provided that the new action would have been timely commenced within the applicable limitations period prescribed by law at the time of the commencement of the prior action and that service upon the original defendant is completed within such six-month period ... . * * * Here, the requirements of CPLR 205-a have been satisfied. It is uncontested that the instant action, commenced within six months of termination of the 2017 action ... , would have been timely commenced in 2017, and that the instant action is based on the same occurrence as the 2017 action, namely, the default on the payment obligations under the March note (see CPLR 205-a). Further, it is undisputed that the prior action was not terminated for any reason enumerated in CPLR 205-a." ***Sperry Assoc. Fed. Credit Union v. John*, 2023 N.Y. Slip Op. 03880, Second Dept 7-19-23**

FORECLOSURE, JUDGES, CONTRACT LAW, REAL PROPERTY LAW.

A JUDICIAL FORECLOSURE SALE SHOULD BE SET ASIDE IF THERE IS DOUBT ABOUT THE TITLE (HERE SUSPICION A DEED WAS FORGED); CAVEAT EMPTOR (BUYER BEWARE) IS NOT STRICTLY APPLIED TO A JUDICIAL SALE AT AUCTION.

The Second Department, reversing Supreme Court and setting aside the judicial foreclosure sale, determined the possibility a deed was forged cast suspicion on the fairness of the sale. The court noted that caveat emptor (buyer beware) is not strictly applied to a judicial sale: " '[A] purchaser at a judicial sale should not be compelled by the courts to accept a doubtful title,' and, 'if it was bad or doubtful, he [or she] should, on his [or her] application, be relieved from completing the purchase' ... . Moreover, '[t]he rule that a buyer must protect himself [or herself] against undisclosed defects does not apply in all strictness to a purchaser at a judicial sale' ... . '[A] sale of land in the haste and confusion of an auction room is not governed by the strict rules applicable to formal contracts made with deliberation after ample opportunity to investigate and inquire' ...". ***Golden Bridge, LLC v. Rutland Dev. Group, Inc.*, 2023 N.Y. Slip Op. 03854, Second Dept 7-19-23**

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

THE "NOTICE OF INTENT TO FORECLOSE" FELL SHORT OF AN ACCELERATION OF THE MORTGAGE DEBT AND DID NOT TRIGGER THE STATUTE OF LIMITATIONS FOR THE FORECLOSURE ACTION.

The Second Department, reversing Supreme Court, determined plaintiff's motion pursuant to RPAPL 1501(4) to cancel and discharge a mortgage should not have been granted. The ground for the motion was the claim the statute of limitations for a foreclosure action had run. But the Second Department determined the "Notice of Intent to Foreclose" did not accelerate the mortgage. Therefore the statute of limitations had not begun to run: " 'The law is well settled that, even if a mortgage is payable in installments, once a mortgage debt is accelerated, the entire amount is due and the Statute of Limitations begins to run on the entire debt' ... . Acceleration occurs, inter alia, by the commencement of a foreclosure action wherein the holder of the note elects in the complaint to call due the entire amount secured by the mortgage, or through an unequivocal acceleration notice transmitted to the borrower ... . A notice of acceleration of a debt must be clear and unequivocal, and to constitute such clear and unequivocal acceleration of a debt, the notice must demand an immediate payment of the entire outstanding loan and not refer to acceleration only as a future event ... . Here, the plaintiff failed to establish her prima facie entitlement to judgment on the complaint as a matter of law. The language in a 2008 'Notice of Intent to Foreclose,' that the mortgage debt would be accelerated if the borrower did not pay the arrears as set forth in the notice by September 19, 2008, was merely an expression of future intent that fell short of an actual acceleration ...". ***Sansone v. North Shore Invs. Realty Group, LLC*, 2023 N.Y. Slip Op. 03876, Second Dept 7-19-23**

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

ALTHOUGH PLAINTIFF FELL THROUGH THE FLOOR OF THE BUILDING UNDER RENOVATION WHEN HE WENT IN TO GET A TOOL FOR HIS WORK ON AN ADJACENT BUILDING, HE WAS PERFORMING DUTIES ANCILLARY TO THE CONSTRUCTION WORK AND WAS THEREFORE ENTITLED TO SUMMARY JUDGMENT ON HIS LABOR LAW § 240(1) CAUSE OF ACTION; HEARSAY EVIDENCE IN THE MEDICAL RECORDS WAS NOT ENOUGH TO RAISE A QUESTION OF FACT.

The Second Department, reversing (modifying) Supreme Court, determined plaintiff was entitled to summary judgment on his Labor Law § 240(1) cause of action. Plaintiff was hired to remove carpet from a building adjacent to the building to the building undergoing renovation (the carpet had been damaged by flooding in the building being renovated), Plaintiff went inside the building under renovation to get a tool when he fell through a temporary plywood floor: The court noted that opposition to a summary judgment motion based solely on hearsay does not raise a question of fact: "[T]he plaintiff was assigned the task of removing damaged carpeting and flooring from a property adjacent to the subject premises, which allegedly had flooded as a result of renovations to the subject premises. When the plaintiff went inside the subject premises to get a tool, he fell through a temporary plywood floor, which consisted of several pieces of plywood placed on top of beams. ... [P]laintiff established, prima facie, that he was at the subject premises, which was a construction site, in order to perform duties ancillary to the construction work, which was covered by Labor Law § 240(1) ... . Further, the plaintiff established that he was exposed to an elevation-related risk for which no safety devices were provided, and that such failure was a proximate cause of his injuries ... . In opposition, the defendant failed to raise a triable issue of fact as to whether the plaintiff was engaged in an enumerated activity, whether the plaintiff was recalcitrant in deliberately failing to use available safety devices, or whether his actions were the sole proximate cause of his injuries ... . There is no evidence that anyone instructed the plaintiff that he was not to enter the subject premises or that he was to obtain the tools he needed to work on the adjacent property from somewhere else ... . To the extent that the defendant contends that the plaintiff's uncertified hospital records raise a triable issue of fact as how the accident occurred, '[w]hile hearsay may be considered in opposition to a motion for summary judgment, it is insufficient to raise a triable issue of fact where, as here, it is the only evidence upon which opposition to the motion was predicated' ...". ***Estrella v. ZRHLE Holdings, LLC*, 2023 N.Y. Slip Op. 03848, Second Dept 7-19-23**

THIRD DEPARTMENT

CIVIL PROCEDURE, ATTORNEYS, MEDICAL MALPRACTICE, NEGLIGENCE, EVIDENCE, JUDGES.

ALTHOUGH THE PLAINTIFF'S FAILURE TO COMPLY WITH DISCOVERY ORDERS WAS WILLFUL AND CONTUMACIOUS, PRECLUSION OF EXPERT EVIDENCE IN THIS MEDICAL MALPRACTICE CASE WAS TOO SEVERE A SANCTION; PLAINTIFF'S ATTORNEY FINED $5000.

The Third Department, reversing Supreme Court, in a full-fledged opinion by Justice Clark, determined preclusion of evidence in this medical malpractice case as a sanction for failure to provide discovery was too severe a sanction. The appellate court imposed a monetary sanction on plaintiff's attorney: "Supreme Court found that plaintiff's trial counsel engaged in willful and contumacious conduct which delayed resolution of this case, and the record supports such a finding. Defense counsel requested an amended bill of particulars in May 2019 and an amended expert disclosure in October 2019. Despite a plethora of emails and letters from defense counsel, various conferences, scheduling orders and an order compelling compliance with discovery, plaintiff's trial counsel failed to correct the deficiencies in the discovery disclosure prior to defendant filing a motion for sanctions. Under these circumstances, we agree with Supreme Court that the conduct exhibited by plaintiff's trial counsel was willful and contumacious and that, upon such finding, the drastic sanction of preclusion was available ... . * * * Having considered the record as a whole, including the supplemental discovery disclosures, the affidavit of merit, the lack of prejudice to defendant and the nature and root of the misconduct, we vacate the August 2022 order that precluded plaintiff from proffering certain evidence and expert witnesses. Exercising our discretion, and given the strong public policy favoring resolution of actions on the merits, we accept the late amended bill of particulars as responsive to the outstanding demand ... . However, the willful and contumacious misconduct by plaintiff's trial counsel cannot be condoned, as disregard of court orders hinders the efficient resolution of cases ... . To dissuade this conduct from repeating, we impose a monetary sanction on plaintiff's trial counsel in the amount of $5,000 ...". ***M.F. v. Albany Med. Ctr.*, 2023 N.Y. Slip Op. 03896, Third Dept 7-20-23**

PERSONAL INJURY, NEGLIGENCE, MUNICIPAL LAW, EMPLOYMENT LAW, EVIDENCE, CIVIL PROCEDURE.

THE NEGLIGENCE AND NEGLIGENT SUPERVISION AND HIRING CAUSES OF ACTION AGAINST THE WARREN COUNTY DEFENDANTS IN THIS CHILD VICTIMS ACT CASE ALLEGING ABUSE IN FOSTER CARE SHOULD HAVE BEEN DISMISSED; THE COMPLAINT DID NOT ADEQUATELY ALLEGE THE WARREN COUNTY DEFENDANTS WERE AWARE OF THE DANGER POSED BY PLAINTIFF'S FOSTER FATHER.

The Third Department, reversing (modifying) Supreme Court, determined the negligence and negligent supervision causes of action against the Warren County defendants in this Child Victims Act case should have been dismissed. The complaint did not adequately allege the Warren County defendants were aware of the danger posed by plaintiff's foster father: "[W]e agree with the Warren County defendants that Supreme Court should have dismissed the negligence and negligent hiring, retention, supervision and/or direction causes of action as they relate to the conduct in Warren County. The complaint alleged that, in approximately 1979, plaintiff was placed in a foster home in Warren County, where he was sexually abused by his foster father on numerous occasions. Although we are cognizant that pleadings alleging negligent

hiring, retention and supervision need not be pleaded with specificity ... , the complaint merely asserts that the Warren County defendants 'knew or, in the exercise of reasonable care, should have known' that the foster father 'had the propensity to engage in sexual abuse of children.' Unlike in the counties of Albany and Cayuga — where plaintiff alleges that he reported the sexual abuse, thereby providing the municipal defendants with notice of the dangerous condition — the complaint fails to assert any allegations of fact that would have provided the Warren County defendants with notice that the foster father presented a foreseeable harm. Because plaintiff failed to sufficiently plead that the Warren County defendants were provided notice of a dangerous condition present in the Warren County foster home, that claim could not survive a pre-answer motion to dismiss pursuant to CPLR 3211 (a) (7) ... , and Supreme Court should have dismissed those claims against the Warren County defendants." ***Easterbrooks v. Schenectady County*, 2023 N.Y. Slip Op. 03889, Third Dept 7-20-23**

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

DEFENDANT DID NOT PROVE THE EXISTENCE OF A PRESCRIPTIVE EASEMENT OVER PLAINTIFF'S LAND; PLAINTIFF DID NOT PROVE THE DAMAGES ELEMENT OF TRESPASS.

The Third Department, reversing (modifying) Supreme Court, determined the requirements for a prescriptive easement over plaintiff's property were not met and plaintiff did not prove the damages element of the trespass action. Plaintiff, however, was entitled to nominal damages for trespass: "[O]ur independent review of the trial evidence reflects that defendant did not establish that the adverse use of the road continued for the requisite 10-year period. It follows that defendant's counterclaim for a prescriptive easement must be dismissed and that, in the absence of that easement, [defendant] committed a trespass when he entered upon plaintiff's property in 2004 ... . * * * ... [P]laintiff failed to meet her burden of proving '[t]he lesser of the diminution in value of the property or the cost to repair' that would be the ordinary measure of damages for a trespass ... or, for that matter, the loss of a specific number of trees for purposes of RPAPL 861 ... . She was accordingly not entitled to an award of actual damages. Nevertheless, because 'nominal damages can be presumed in an action for trespass to real property,' dismissal of her trespass claim was not warranted upon that basis ...". ***Mastbeth v. Shiel*, 2023 N.Y. Slip Op. 03895, Third Dept 7-20-23**

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