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FIRST DEPARTMENT

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

THE BANK DID NOT DEMONSTRATE STRICT COMPLIANCE WITH RPAPL 1304 IN THIS FORECLOSURE ACTION; SUMMARY JUDGMENT SHOULD HAVE BEEN AWARDED TO DEFENDANT.

The First Department, reversing Supreme Court, determined the plaintiff bank's motion for summary judgment should not have been granted and, upon a search of the record, summary judgment should have been granted to defendant in this foreclosure action. The proof of mailing of the notice required by RPAPL 1304 was not sufficient: "Plaintiff failed to establish prima facie its strict compliance with RPAPL 1304 ... . The copy of the certified mail receipt it submitted is undated and blank in other parts, and shows the signature of someone other than defendant. The copy of the pre-paid first-class mail envelope has no recipient's name or address on it. Further, the affidavits plaintiff submitted do not demonstrate the loan servicer's employees' familiarity with the mailing practices and procedures of the servicer that had mailed the 90-day notices and the notice of default." ***U.S. Bank, N.A. v. Calhoun*, 2021 N.Y. Slip Op. 00398, First Dept 1-26-21**

HUMAN RIGHTS LAW, EMPLOYMENT LAW.

PLAINTIFF, A PROBATIONARY EMPLOYEE, WAS TERMINATED FOR MARIJUANA USE; QUESTIONS OF FACT ABOUT WHETHER AN ACCOMMODATION FOR PLAINTIFF AS A MEDICAL MARIJUANA PATIENT SHOULD HAVE BEEN MADE.

The First Department determined there are questions of fact about whether plaintiff probationary employee was entitled to accommodation under the Human Rights Law (HRL). She was terminated for marijuana use. However, the marijuana use was a treatment for an illness, irritable bowel disease (IBD): "... [T]here are issues of fact, for purposes of plaintiff's claim for failure to accommodate under the State Human Rights Law (HRL), as to whether defendant adequately engaged in a cooperative dialogue with plaintiff ... . to determine whether it could reasonably accommodate her status as a medical marijuana patient (see PHL 3369[2]). Notably, questions of fact exist as to whether defendant improperly cut the dialogue process short when it discovered that plaintiff was a probationary employee, and refused to consider accommodating her — as it regularly did for permanent employees — by, for example, giving her discipline short of termination, or simply overlooking the one-time technical violation in light of her contemporaneously acquired status as a medical marijuana patient ... . The State HRL defines status as a medical marijuana patient as a protected disability, but the City HRL does not. Although the City HRL must be construed liberally to ensure maximum protection ... , certification as a medical marijuana patient is (other than as specified for purposes of claims under the State HRL) a legal classification. It is not a 'physical, medical, mental, or psychological impairment,' which is how disabilities are defined under the City HRL (Administrative Code § 8-102). Nevertheless, plaintiff's IBD, is a physical impairment and thus a disability under the City HRL. Accordingly, issues of fact exist as to whether defendant should have permitted plaintiff to treat her IBD through the medical use of marijuana, as a reasonable accommodation." ***Gordon v. Consolidated Edison Inc.*, 2021 N.Y. Slip Op. 00492, First Dept 1-28-21**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

PLAINTIFF WAS USING A CLOSED A-FRAME LADDER WHEN IT SLIPPED OUT FROM UNDER HIM; PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT ON HIS LABOR LAW 240(1) CAUSE OF ACTION SHOULD HAVE BEEN GRANTED.

The First Department, reversing Supreme Court, determined plaintiff's motion for summary judgment in this Labor Law 240(1) action should have been granted. Plaintiff was using a closed A-frame ladder when it slipped out from under him: " 'A worker's decision to use an A-frame ladder in the closed position is not a per se reason to declare him the sole proximate cause of an accident,' and plaintiff here 'gave a specific reason why he used the ladder in the closed position' ... . Defendants also did not elicit any evidence that it would have been plaintiff's 'normal and logical response' to use the taller ladder that they allege was available to plaintiff at the time of his accident ... . Similarly, as for plaintiff's putative recalcitrance, defendants failed to establish that, among other things: plaintiff knew that the taller ladder was available for his use; he was expected to use the taller ladder for his work; he 'chose for no good reason not to do so' ... ; and, he refused to follow a specific instruction to use the taller ladder for his work ... . Ultimately,'"[d]efendants' contentions would amount

to, at most, comparative negligence, which is not a defense to a Labor Law § 240(1) violation' ...". ***Morales v. 2400 Ryer Ave. Realty, LLC*, 2021 N.Y. Slip Op. 00498, First Dept 1-28-21**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

ALTHOUGH PLAINTIFF FELL FROM A LADDER, HIS LABOR LAW § 240(1) CAUSE OF ACTION WAS PROPERLY DISMISSED; THERE WAS A VIDEO OF PLAINTIFF'S FALL WHICH SHOWED THE LADDER WAS SECURED TO THE SCAFFOLDING AND DID NOT MOVE.

The First Department determined plaintiff's Labor Law § 240(1) cause of action was properly dismissed. Plaintiff fell from a ladder, but there was a video of the fall which showed the ladder did not move and was secured to the scaffolding: "Defendant was properly granted summary judgment dismissing the § 240(1) claim. Surveillance footage of plaintiff falling from the ladder demonstrates that it did not move or shake, refuting plaintiff's testimony to the contrary ... . In addition, photographs taken soon after his fall show that the top of the ladder was connected to the sidewalk bridge and scaffolding above, and tied to the scaffolding structure about one-third of the way up." ***Cordova v. 653 Eleventh Ave. LLC.*, 2021 N.Y. Slip Op. 00490, First Dept 1-28-21**

PERSONAL INJURY, EVIDENCE, MUNICIPAL LAW.

THE NYC ADMINSTRATIVE CODE REQUIRES ABUTTING PROPERTY OWNERS TO REPAIR SIDEWALK FLAGS OVER 1/2 INCH; PLAINTIFF PRESENTED EVIDENCE THE FLAG WAS THREE INCHES; DEFENDANT'S MOTION FOR SUMMARY JUDGMENT IN THIS SIDEWALK SLIP AND FALL CASE SHOULD NOT HAVE BEEN GRANTED.

The First Department, reversing Supreme Court, determined defendant's motion for summary judgment in this sidewalk slip and fall case should not have been granted. There was evidence the sidewalk flag was three inches high and the NYC Administrative Code requires the abutting property owner to repair any flags over 1/2 inch: "The Administrative Code of the City of New York requires owners of real property abutting any sidewalk to maintain that sidewalk in a reasonably safe condition, which includes repaving, repairing and replacing defective sidewalk flags (Administrative Code § 7-210[3]). Furthermore, property owners are specifically required to, at their own cost and expense, repave or repair any portion of the sidewalk that constitutes a tripping hazard where "the vertical grade differential between adjacent sidewalk flags is greater than or equal to one half inch" ,,, , Plaintiff testified at the 50-h hearing that he tripped on a raised sidewalk flag that was approximately three inches higher than the adjacent flag, There is also photographic evidence that shows a visibly raised sidewalk flag in the area he identified as where his accident occurred." ***Tropper v. Henry St. Settlement*, 2021 N.Y. Slip Op. 00397, First Dept 1-26-21**

SECOND DEPARTMENT

CIVIL PROCEDURE, EVIDENCE.

DEFENDANT ATTORNEY'S AFFIDAVIT IN SUPPORT OF ADMITTING LAW-FIRM BUSINESS RECORDS DID NOT INDICATE THE AFFIANT WAS FAMILIAR WITH THE RECORD KEEPING PRACTICES AND PROCEDURES OF THE LAW FIRM; THEREFORE THE COURT SHOULD NOT HAVE CONSIDERED THE RECORDS IN THE SUMMARY JUDGMENT PROCEEDINGS.

The Second Department, reversing Supreme Court, determined defendants failed to lay a proper foundation for the admissibility of business records (the Matter Ledger Card) which purported to describe the legal work done by defendants for plaintiff: "We agree with the plaintiff that the court should not have considered these documents because the defendants failed to submit them in admissible form ... . The defendants failed to lay a proper foundation for the admissibility of the Matter Ledger Card pursuant to CPLR 4518. 'A proper foundation for the admission of a business record must be provided by someone with personal knowledge of the maker's business practices and procedures' ... . [Defendant's] affidavit failed to set forth that he 'was personally familiar with [the law firm's] record keeping practices and procedures' and, as a result, failed to lay a proper foundation for the admission of the Matter Ledger Card concerning the plaintiff's payment history ...". ***Anghel v. Ruskin Moscou Faltischek, P.C.*, 2021 N.Y. Slip Op. 00403, Second Dept 1-27-21**

CIVIL PROCEDURE, EVIDENCE.

DEFENDANTS DID NOT SEEK LEAVE OF COURT TO FILE A LATE MOTION FOR SUMMARY JUDGMENT AND OFFERED AN EXPLANATION FOR THE FIRST TIME IN REPLY PAPERS; THE EXPLANATION SHOULD NOT HAVE BEEN CONSIDERED AND THE MOTION SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined defendants' late motion for summary judgment should not have been granted. Defendants did not seek permission to make the late motion and only offered an explanation for the delay in reply papers, which should not have been considered: "Pursuant to CPLR 3212(a), unless the trial court directs otherwise, a motion for summary judgment 'shall be made no later than one hundred twenty days after the filing of the note of issue, except with leave of court on good cause shown' ... . Here, the defendants moved for summary judgment

dismissing the complaint more than 120 days after the filing of the note of issue without seeking leave of court or offering an explanation showing good cause for their delay. As a result, the Supreme Court improvidently exercised its discretion in considering the defendants' good cause argument, presented for the first time in reply papers, and in granting their motion ...". ***Rivera v. Zouzias*, 2021 N.Y. Slip Op. 00443, Second Dept 1-27-21**

CONTRACT LAW, CONSUMER LAW, INSURANCE LAW.

DAMAGES FOR EMOTIONAL DISTRESS ARE NOT AVAILABLE FOR BREACH OF CONTRACT; INSURANCE LAW § 2601 DOES NOT CREATE A PRIVATE RIGHT OF ACTION; A GENERAL BUSINESS LAW § 349 DECEPTIVE BUSINESS PRACTICES CAUSE OF ACTION WILL SUPPORT A CLAIM FOR PUNITIVE DAMAGES.

The Second Department, modifying Supreme Court, determined emotional-distress damages are not available for breach of contract and Insurance Law § 2601 does not create a private right of action. Plaintiff's property was damaged by Hurricane Sandy. Plaintiff and defendant insurers reached a settlement agreement in which defendants agreed to pay plaintiff $1.6 million within 21 days. Defendants paid only about $400,000, claiming that the over $1 million already paid, together with the $400,000, satisfied the $1.6 million agreed to. Supreme Court and the Second Department disagreed finding that the settlement agreement was unambiguous. Plaintiff was therefore entitled to summary judgment on the breach of contract cause of action (the defendants' mutual and unilateral mistake arguments were rejected). The deceptive business practices (General Business Law § 349) cause of action, together with the related punitive damages claim, survived defendants' motion to dismiss. With respect to damages for emotional distress, the court wrote: "... Supreme Court should have granted that branch of the defendants' cross motion which was to dismiss the plaintiff's demand for damages for emotional distress. A breach of a contractual duty does not create a right of recovery for damages for emotional distress ... . Here, the plaintiff alleges no facts giving rise to a relationship between him and the defendants apart from the insurance contract and settlement agreement. An alleged breach of the implied covenant of good faith and fair dealing does not support an award of damages for emotional distress ... . Inasmuch as Insurance Law § 2601 serves to regulate insurers' performance of their contractual obligations rather than to create a separate duty of care and does not give rise to a private cause of action ... , the defendants' alleged violation of their obligations under Insurance Law § 2601 does not support a claim for damages for emotional distress." ***Perlbinder v. Vigilant Ins. Co.*, 2021 N.Y. Slip Op. 00439, Second Dept 1-27-21**

FAMILY LAW.

THE VIRGINIA DIVORCE DID NOT CHANGE THE PARTIES' STATUS FROM TENANTS BY THE ENTIRETY TO TENANTS IN COMMON FOR THEIR NEW YORK MARITAL RESIDENCE; NEW YORK FOLLOWS THE "DIVISIBLE DIVORCE" DOCTRINE.

The Second Department determined that the Virginia divorce did not affect the couple's status as tenants by the entirety for the marital home in New York: "The plaintiff contends that the tenancy by the entirety dissolved by operation of law when the Virginia divorce decree was entered, and that the ownership interest in the subject property transformed from a tenancy by the entirety to a tenancy in common ... . New York, however, follows the 'divisible divorce' doctrine, pursuant to which the ex parte Virginia divorce decree, obtained without personal jurisdiction over the defendant, terminated the parties' status as husband and wife, but had no effect on the defendant's property rights ... . In conformity with this doctrine, it is well established that an ex parte foreign divorce decree cannot divest the nonappearing spouse of his or her rights in a New York tenancy by the entirety ... . Contrary to the plaintiff's contention, the full faith and credit clause of the federal constitution requires only that New York recognize that the Virginia divorce decree dissolved the parties' marital status ... . Thus, the tenancy by the entirety in which the parties own their marital home has not been terminated." ***Bernhardt v. Schneider*, 2021 N.Y. Slip Op. 00407, Second Dept 1-27-21**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

THE HOMEOWNER AND THE GENERAL CONTRACTOR DID NOT HAVE SUFFICIENT SUPERVISORY AUTHORITY TO BE LIABLE IN THIS LABOR LAW § 200 AND COMMON-LAW NEGLIGENCE ACTION STEMMING FROM A SCAFFOLD COLLAPSE.

The Second Department, reversing Supreme Court, determined the Labor Law 200 and negligence causes of action against the homeowners (the Chetrits) and the general contractor (J & S) should have been dismissed in this scaffold-collapse case. Neither defendant had sufficient supervisory authority to trigger liability. Plaintiff worked for a company hired by J & S, the general contractor: " 'Section 200 of the Labor Law merely codified the common-law duty imposed upon an owner or general contractor to provide construction site work[ers] with a safe place to work' ... . 'To be held liable under Labor Law § 200 for injuries arising from the manner in which work is performed, a defendant must have authority to exercise supervision and control over the work' ... . Here, both the Chetrits and J & S demonstrated their prima facie entitlement to judgment as a matter of law dismissing the Labor Law § 200 and common-law negligence causes of action insofar as asserted against each of them, as the record demonstrates that neither the Chetrits nor J & S supervised, directed, or otherwise controlled the plaintiff's work ... . In opposition, the plaintiff failed to raise a triable issue of fact. Contrary to the plaintiff's contentions, the fact that Abraham Chetrit, David Chetrit, and J & S's employees often visited the work site to inspect the work, make

requests, and ask questions does not preclude summary judgment, as '[m]ere general supervisory authority at [the] work site for the purpose of overseeing the progress of the work and inspecting the work product is insufficient to impose liability under Labor Law § 200' ... . Moreover, although J & S employees had the power to stop any unsafe work at the work site, this alone is insufficient to impose liability under Labor Law § 200 ...". ***Debennedetto v. Chetrit*, 2021 N.Y. Slip Op. 00413, Second Dept 1-27-21**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

PLAINTIFF'S FALL FROM A LOW CONCRETE RETAINING WALL TO THE GROUND WAS NOT THE TYPE OF ELEVATION-RELATED INCIDENT COVERED BY LABOR LAW § 240(1).

The Second Department, reversing (modifying) Supreme Court determined the Labor Law § 240(1) cause of action should have been dismissed. Plaintiff alleged he stepped on a low concrete retaining wall and slipped on oil, which was not the type of elevation hazard covered by section 240(1): "... [T]he defendant established that it was entitled to judgment as a matter of law dismissing the cause of action alleging a violation of Labor Law § 240(1) on the ground that the plaintiff was not exposed to the type of elevation-related hazard contemplated by that statute. The evidence submitted by the defendant established that the height differential from the concrete retaining wall to the ground did not constitute a physically significant elevation differential covered by the statute ...". ***Eliassian v. G.F. Constr., Inc.*, 2021 N.Y. Slip Op. 00419, Second Dept 1-27-21**

MEDICAL MALPRACTICE, BATTERY, PERSONAL INJURY.

PLAINTIFF'S SIGNING A CONSENT FORM PRIOR TO SURGERY DID NOT REQUIRE DISMISSAL OF THE LACK OF INFORMED CONSENT CAUSE OF ACTION.

The Second Department, reversing Supreme Court, determined the medical malpractice, lack of informed consent and battery causes of action should not have been dismissed. Plaintiff alleged defendant doctor operated on the wrong site. Defendant testified she removed a cyst from plaintiff's left leg and plaintiff alleged defendant should have removed an abscess. The court noted that plaintiff's signing a consent form did not require dismissal of the lack of informed consent cause of action: "As to the lack of informed consent cause of action, the deposition testimony of the plaintiff and the defendant and the generic consent form signed by the plaintiff presented triable issues of fact as to whether the defendant informed the plaintiff about the procedure, the alternatives thereto, and the reasonably foreseeable risks and benefits of the proposed treatment and the alternatives ... . '[T]he fact that the plaintiff signed a consent form does not establish [the defendant's] entitlement to judgment as a matter of law' where, as here, the form was generic, and beyond a barebones handwritten notation of the areas of the body, 'Left Bartholin/Left Inguinal Abscess,' 'did not contain any details about the operation' ... . The consent form does not even indicate the procedure to be performed, but merely lists an area of the body, 'Left Bartholin,' and a condition, 'Left Inguinal Abscess.' " ***Preciado v. Ravins*, 2021 N.Y. Slip Op. 00441, Second Dept 1-27-21**

PERSONAL INJURY, CIVIL PROCEDURE.

ALTHOUGH DEFENDANTS MISSED THE DEADLINE AND THEREBY WAIVED THE RIGHT TO MEDICAL EXAMINATIONS OF PLAINTIFF, THE MOTION TO STRIKE THE NOTE OF ISSUE AND COMPEL AN EXAM SHOULD HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined the defendants' motion to strike the note of issue and certificate of readiness and compel a medical examination of plaintiff should have been granted. Although the defendants missed the agreed deadline for the exam, they had an adequate excuse and there was no prejudice: "Although a defendant waives the right to medical examinations of the plaintiff by failing to conduct them within the time period set forth in compliance conference orders ... , 'under certain circumstances and absent a showing of prejudice to the opposing party, the court may exercise its discretion to relieve a party of a waiver of the right to conduct a physical examination' ... . Here, a scheduled medical examination of the plaintiff failed to happen due to a clerical error by the vendor that scheduled the examination. Consequently, the defendants did not have the opportunity to conduct an independent medical examination of the plaintiff. Further, no prejudice was shown by the plaintiff." ***Andujar v. Boyle*, 2021 N.Y. Slip Op. 00400, Second Dept 1-27-21**

PERSONAL INJURY, EVIDENCE.

PLAINTIFF ALLEGED SHE TRIPPED ON A TWIG ON THE SIDEWALK WHICH WAS NOT ADEQUATELY ILLUMINATED; DEFENDANT, IN HER MOTION FOR SUMMARY JUDGMENT, DID NOT DEMONSTRATE A LACK OF CONSTRUCTIVE NOTICE OF THE CONDITIONS OR THAT THE CONDITIONS WERE NOT A PROXIMATE CAUSE OF THE FALL; DEFENDANT'S MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN DENIED WITHOUT CONSIDERING THE OPPOSING PAPERS.

The Second Department, reversing Supreme Court, determined the defendant property owner's motion for summary judgment in this slip and fall case should not have been granted. Plaintiff alleged she tripped on a twig on the sidewalk in an area which was not adequately illuminated. The defendant, in her motion papers, did not demonstrate she lacked construc-

tive notice of the conditions or that the conditions were not a proximate cause of the fall: "A property owner, or a party in possession or control of real property, has a duty to maintain the property in a reasonably safe condition ... . 'In a premises liability case, a defendant [real] property owner, or a party in possession or control of real property, who moves for summary judgment has the initial burden of making a prima facie showing that it neither created the alleged defective condition nor had actual or constructive notice of its existence' ... . A defendant has constructive notice of a hazardous condition on property when the condition is visible and apparent, and has existed for a sufficient length of time to afford the defendant a reasonable opportunity to discover and remedy it ... . Here, the defendant failed to establish, prima facie, that she lacked constructive notice of the alleged dangerous conditions—to wit, the twig on the sidewalk and inadequate lighting on the premises, or that these conditions were not a proximate cause of the plaintiff's fall ... . Since the defendant failed to meet her initial burden as the movant, the Supreme Court should have denied the defendant's motion for summary judgment dismissing the complaint, regardless of the sufficiency of the plaintiff's opposition papers ...". ***Wittman v. Nespola*, 2021 N.Y. Slip Op. 00454, Second Dept 1-27-21**

PERSONAL INJURY, LANDLORD-TENANT.

IN THIS THIRD-PARTY ASSAULT CASE, THE FACT THAT THE INTRUDER KILLED PLAINTIFF'S DECEDENT, A RESIDENT OF DEFENDANT'S APARTMENT BUILDING, IN A PRE-MEDITATED, TARGETED ATTACK DID NOT, AS A MATTER OF LAW, INSULATE THE LANDLORD FROM LIABILITY BASED UPON AN ALLEGEDLY BROKEN LOCK ON THE BUILDING'S EXTERIOR DOOR; THE 2ND DEPARTMENT DISAGREED WITH A LINE OF 1ST DEPARTMENT CASES.

The Second Department, in a full-fledged opinion by Justice Dillon, disagreeing with a line of First Department decisions, determined a targeted, premeditated attack on a building resident is not necessarily an intervening cause which insulates the landlord from liability. Here plaintiff's decedent was targeted by her former fiancé (Boney) who set her, himself and one of her children on fire in the hallway outside plaintiff's decedent's apartment. There was evidence the exterior door to the building did not have a functioning lock. The Second Department held that the defendant landlord (the New York City Housing Authority [NYCHA]) did not eliminate questions of fact about whether the broken lock was a proximate cause of the attack and whether the attack was foreseeable: "The test in determining summary judgment motions involving negligent door security should ... not focus on whether the crime committed within the building was 'targeted' or 'random,' but whether or not, and to what extent, an alleged negligently maintained building entrance was a concurrent contributory factor in the happening of the criminal occurrence. In examining whether there is a triable issue of fact as to foreseeability and proximate cause requiring trial, a jury could conceivably conclude that the chronically broken lock at the building's front door provided Boney with an opportunity to attack the decedent, in a manner that might not otherwise have been possible, and that NYCHA could have foreseeably anticipated that its broken front door lock would result in the entry of intruders into the building for the commission of criminal activities against known or unknown specific tenants ... . All of these actions should be examined sui generis, recognizing the unique facts of individualized matters, rather than simplistically or arbitrarily channeling them into either 'targeted' or 'random' criminal boxes that do not accommodate the factual nuances that may vary from case to case." ***Scurry v. New York City Hous. Auth.*, 2021 N.Y. Slip Op. 00447, Second Dept 1-27-21**

THIRD DEPARTMENT

DISCIPLINARY HEARINGS (INMATES), CIVIL PROCEDURE, ATTORNEYS.

BEFORE PETITIONER INMATE'S ARTICLE 78 PETITION WAS CONSIDERED RESPONDENT VOLUNTARILY REVERSED THE GUILTY FINDINGS ON THE PRISON DISCIPLINARY VIOLATIONS; PETITIONER WAS NOT ENTITLED TO ATTORNEY'S FEES PURSUANT TO THE EQUAL ACCESS TO JUSTICE ACT UNDER THE "CATALYST THEORY."

The Third Department determined petitioner inmate was not entitled to attorney's fees as a prevailing party pursuant to the Equal Access to Justice Act [EAJA] (CPLR Article 86). Petitioner contested guilty findings on several prison disciplinary violations and brought an Article 78 proceeding. Before the Article 78 petition was considered the respondent reversed the disposition and expunged it from petitioner's prison record. Petitioner then sought attorney's fees as the prevailing party: "Petitioner contends that he is entitled to counsel fees because he prevailed in the litigation under the 'catalyst theory.' [The catalyst theory posits that a petitioner is a prevailing party if the desired result is achieved because the proceeding brought about the voluntary change in the respondent's conduct ... .] * * * Although this Court has not decided whether it will adopt the catalyst theory in EAJA cases, when this Court has been asked to adopt the catalyst theory in other counsel fee award cases, it has declined to do so as the 'United States Supreme Court has clearly held that a voluntary resolution of a matter lacks the necessary judicial imprimatur to warrant an award of [counsel] fees' ... . [T]he Court of Appeals specifically agreed ... . The same reasoning applies here. The change in the legal relationship was accomplished prior to answering the petition, was based on the voluntary actions of the Department of Corrections and Community Supervision, and was 'not

enforced by a consent decree or judgment of Supreme Court' ...". ***Matter of Clarke v. Annucci*, 2021 N.Y. Slip Op. 00473, Third Dept 1-28-21**

EMPLOYMENT LAW, LABOR LAW, MUNICIPAL LAW, EDUCATION-SCHOOL LAW.

A PUBLIC LIBRARY IS NOT SUBJECT TO THE PREVAILING WAGE REQUIREMENTS OF THE LABOR LAW; THEREFORE THE CLEANING CONTRACTOR HIRED BY THE LIBRARY WAS NOT REQUIRED TO PAY ITS EMPLOYEES THE PREVAILING WAGE.

The Third Department, in a full-fledged opinion by Justice Lynch, reversing Supreme Court, determined the public library was not subject to the prevailing wage requirements of the Labor Law, Therefore the petitioner cleaning service, hired by the library, was not required to pay its employees the prevailing wage: "Although we are mindful that the prevailing wage law 'is to be interpreted with the degree of liberality essential to the attainment of the end in view'... , that mandate does not permit an overly-broad reading of the statute that expands its reach to noncovered entities ... . The library at issue undoubtedly performs a public function and is closely intertwined with the school district that it serves, but it is not itself 'a municipal corporation, school district, district corporation [or] board of cooperative educational services' — the entities that are considered to be '[p]olitical subdivision[s]' of the state for purposes of public contracts ... . By statute, an 'education corporation' and a 'school district' are separately defined, indicating 'that they are mutually exclusive' ... . An 'education corporation' is a type of corporation formed for reasons 'other than for profit' ... , whereas a 'school district' is a type of 'municipal corporation' ... . Reflecting its status as a distinct entity, the library's Board of Trustees is vested with independent decision-making authority and operational control ... . Nor do we view the library as 'operat[ing] a public improvement' so as to be considered a public benefit corporation within the embrace of Labor Law § 230 (3) ... , or as constituting any of the other public entities included within Labor Law article 9. Consequently, we hold that the library at issue is not a public agency within the meaning of Labor Law § 230 (3)." ***Matter of Executive Cleaning Servs. Corp. v. New York State Dept. of Labor*, 2021 N.Y. Slip Op. 00461, Third Dept 1-28-21**

PERSONAL INJURY, EDUCATION-SCHOOL LAW.

PLAINTIFF HIGH SCHOOL BASEBALL PLAYER ASSUMED THE RISK OF BEING STRUCK WITH A BALL DURING A PRACTICE DRILL WHERE MULTIPLE BALLS WERE IN PLAY; TWO DISSENTING MEMORANDA.

The Third Department, over two separate dissents, determined plaintiff high school baseball player assumed the risk of injury from being struck with a ball during a so-called "Warrior Drill" where multiple balls are in play: "Having more than one ball in play may not be an inherent risk in a traditional baseball game, but the record indicates that it is a risk inherent in baseball team practices ... . Although plaintiff asserts that the presence of a screen between certain players may have provided a false sense of security that they would be protected, thereby creating a dangerous condition beyond the normal dangers inherent in the sport, this argument is belied by his testimony unequivocally establishing that he did not rely upon the screen for safety but, rather, thought that the drill was unsafe even in the presence of the screen. Thus, the conditions were 'as safe as they appear[ed] to be' ... . As the evidence showed that plaintiff was an experienced baseball player who 'knew of the risks, appreciated their nature and voluntarily assumed them,' defendants demonstrated their prima facie entitlement to summary judgment under the primary assumption of risk doctrine ...". ***Grady v. Chenango Val. Cent. Sch. Dist.*, 2021 N.Y. Slip Op. 00468, Third Dept 1-28-21**

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