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FIRST DEPARTMENT

CIVIL PROCEDURE, APPEALS, CONTRACT LAW, NEGLIGENCE, REAL PROPERTY LAW.

SEPARATE TRIALS WERE HELD ON THE TORT AND BREACH OF CONTRACT ACTIONS STEMMING FROM DAMAGE TO PLAINTIFFS' BUILDING CAUSED BY RENOVATION OF DEFENDANT'S NEIGHBORING BUILDING; THE DAMAGES AWARDED IN EACH ACTION WERE BASED UPON THE SAME EVIDENCE OF THE COST OF REPAIR AND ALTERNATE LIVING EXPENSES BUT THE AMOUNTS OF THE AWARDS DIFFERED; SUPREME COURT PROPERLY ENTERED THE DAMAGES AWARDED IN THE BREACH OF CONTRACT ACTION, PLUS INTEREST AND ATTORNEY'S FEES, AS THE APPEALABLE FINAL JUDGMENT.

The First Department, in an extensive opinion by Justice Moulton, addressed several unusual issues stemming from the allegation the renovation of defendant's neighboring property damaged plaintiffs' property. Two separate trials were held: a jury trial on tort (negligence) claims; and a nonjury trial on breach of contract claims (i.e., the contract allowing defendants access to plaintiffs' property to facilitate the renovation). In the nonjury breach of contract action plaintiffs were awarded $6,255,007 for repair costs and $1,152,000 for alternate living expenses. In the jury trial (tort action) plaintiffs were awarded $5,000,000 for repair and $500,000 for alternate living expenses. The issues decided in plaintiff's appeal are: the breach of contract judgment is appealable as a final judgment; Supreme Court properly precluded expert testimony on the loss of market value in plaintiffs' home. The issues decided in defendant's cross appeals are: Supreme Court properly denied defendant's motion to set aside the breach of contract judgment and adopt the jury's tort judgment; plaintiffs were entitled to conditional contractual indemnification from defendant. The final judgment which was entered used the breach of contract (nonjury trial) damages, plus interest and attorney's fees totaling over $12 million. With respect to whether the judgment was appealable as a final judgment, the court wrote: "Our conclusion that the contract judgment is a final judgment starts with the definition of a judgment. 'A judgment is the determination of the rights of the parties in an action or special proceeding and may be either interlocutory or final' (CPLR 5011; see also CPLR 105 [k] ['The word 'judgment' means a final or interlocutory judgment']). '[A] fair working definition of the concept can be stated as follows: a 'final' order or judgment is one that disposes of all of the causes of action between the parties in the action or proceeding and leaves nothing for further judicial action apart from mere ministerial matters' ...". ***Shah v. 20 E. 64th St., LLC*, 2021 N.Y. Slip Op. 04587, First Dept 7-29-21**

SECOND DEPARTMENT

CRIMINAL LAW, ATTORNEYS, APPEALS.

ALTHOUGH NO OBJECTIONS WERE MADE TO THE PROSECUTOR'S NUMEROUS INAPPROPRIATE REMARKS, THE APPEAL WAS CONSIDERED IN THE INTEREST OF JUSTICE AND A NEW TRIAL WAS ORDERED.

The Second Department, reversing defendant's conviction, determined prosecutorial misconduct deprived defendant of a fair trial. The errors were not preserved by objections, but the appeal was considered in the interest of justice. The prosecutor's remarks are detailed in the decision and are too numerous to include here: "The prosecutor denigrated any possible defense, invoked the jury's sympathy for the complainants based upon irrelevant evidence, vouched for the credibility of the People's witnesses, and misstated the law on circumstantial evidence ...". ***People v. Beck*, 2021 N.Y. Slip Op. 04556, Second Dept 7-28-21**

CRIMINAL LAW, EVIDENCE.

IN THIS RESENTENCING PROCEEDING, THE JUDGE SHOULD HAVE CONSIDERED DEFENDANT'S CONDUCT SINCE THE ORGINAL SENTENCE WAS IMPOSED IN 1998-99 AND SHOULD HAVE ORDERED AN UPDATED PRESENTENCE REPORT WHICH INCLUDED AN INTERVIEW WITH DEFENDANT.

The Second Department, reversing Supreme Court in this resentencing proceeding, determined the sentencing judge could consider defendant's conduct after the original sentence was imposed and should have ordered an updated presentence report, including an interview with the defendant. Defendant had been sentenced in 1998 and 1999 to 125 years of imprisonment. In 2019 defendant moved to set aside his sentence on the ground that is was vindictive and the People consented

to setting the sentence aside: "The Supreme Court erred in determining that it had no discretion to consider the defendant's conduct after the original sentence was imposed. In *People v Kuey* (83 NY2d 278, 282), the Court of Appeals noted that when a defendant comes before the court for resentencing, 'the proper focus of the inquiry is on the defendant's record prior to the commission of the crime.' However, the Court of Appeals did not purport to limit the sentencing court's discretion. Indeed, in *Kuey*, the Court of Appeals further noted that the defendant was 'afforded the opportunity to supply information about his subsequent conduct,' and that the court had discretion to order an updated presentence report regarding the defendant's subsequent conduct, if it determined that such was necessary ... . Critically, unlike the resentencing proceeding in *Kuey*, the resentencing proceeding here was held because the original sentence was claimed to be vindictive, which is not merely a technical defect in the original sentence ... , but implicates the original sentencing court's failure to have observed sentencing principles before imposing sentence. Given the context under which the resentence was directed, the resentencing court must exercise discretion and give due consideration 'to, among other things, the crime charged, the particular circumstances of the individual before the [resentencing] court and the purpose of a penal sanction, i.e., societal protection, rehabilitation and deterrence' ...". ***People v. Garcia*, 2021 N.Y. Slip Op. 04558, Second Dept 7-28-21**

FAMILY LAW, CONSTITUTIONAL LAW.

BECAUSE A LIBERTY INTEREST IS AT STAKE, RESPONDENT SHOULD HAVE BEEN AFFORDED AN OPPORTUNITY TO BE HEARD IN OPPOSITION TO THE REVOCATION OF THE SUSPENSION OF THE ORDER OF COMMITMENT.

The Second Department, reversing Family Court, reversing the revocation of the suspension of the order of commitment, determined respondent was entitled to an opportunity to be heard because a liberty interest is at stake: " 'The court may suspend an order of commitment upon reasonable conditions and is also authorized to revoke such suspension at any time for good cause shown' ... . However, given the liberty interest at stake, the Family Court, before revoking a suspension of an order of commitment, must provide to a respondent an opportunity to be heard and to present witnesses on the issue of whether good cause exists to revoke the suspension ... . Here, because the father was deprived of this opportunity, we must reverse the order of commitment appealed from and remit the matter to the Family Court ... for a hearing and a determination thereafter of whether good cause exists to revoke the suspension." ***Matter of Gast v. Faria*, 2021 N.Y. Slip Op. 04549, Second Dept 7-28-21**

FAMILY LAW, CONTRACT LAW, CONTEMPT, EDUCATION-SCHOOL LAW.

THE SEPARATION AGREEMENT PROVIDED THAT THE PARTIES "SHALL" CONSULT EACH OTHER ON HEALTH DECISIONS FOR THE CHILD BUT FATHER HAD THE CHILD INOCULATED WITHOUT CONSULTING MOTHER; BECAUSE THE PARTIES AGREED THE CHILD WOULD ATTEND PUBLIC SCHOOL, AND INOCULATION IS REQUIRED BY THE PUBLIC HEALTH LAW, MOTHER DID NOT DEMONSTRATE SHE WAS PREJUDICED BY THE BREACH OF THE SEPARATION AGREEMENT; THEREFORE, MOTHER'S MOTION TO HOLD HUSBAND IN CONTEMPT WAS PROPERLY DENIED.

The Second Department determined Supreme Court properly denied defendant-mother's motion to hold plaintiff-father in contempt for having the child inoculated for common childhood diseases. The separation agreement required that the parties consult each other on health decisions for the child. Father did not consult with mother before having the child inoculated. The separation agreement did not unequivocally prohibit plaintiff from having the child inoculated and the parties agreed the child would attend public school, for which inoculation is required. Therefore, defendant was unable to demonstrate a violation of the separation agreement which prejudiced her: "The separation agreement provided that '[t]he parties shall continue to cooperate and consult with one another to arrive at decisions which they believe are in the best interest of the [c]hild with respect to health.' Despite this language, on two occasions, the plaintiff, without first consulting with the defendant, took the child, who had not received any vaccinations since the age of two, to get vaccinated. However, the parties' separation agreement did not unequivocally prohibit the plaintiff from having the child inoculated. Moreover, in light of the parties' express intention to maintain the child's enrollment in public education, and New York State's then newly enacted public school vaccine mandate requiring such inoculations in order for the child to continue to attend public school (see Public Health Law § 2164; *C.F. v New York City Dept. of Health & Mental Hygiene*, 191 AD3d 52, 70), the defendant cannot demonstrate that she was prejudiced by the failure of the plaintiff to consult with her prior to having the child inoculated." ***Heffer v. Krebs*, 2021 N.Y. Slip Op. 04542, Second Dept 7-29-21**

FAMILY LAW, JUDGES, EVIDENCE.

IN THIS DIVORCE ACTION SUPREME COURT ABUSED ITS DISCRETION IN IMPUTING TOO MUCH INCOME TO AND AWARDING TOO LITTLE MAINTENANCE TO PLAINTIFF WIFE; IN ADDITION DEFENDANT SHOULD NOT HAVE BEEN AWARDED 50% OF THE VALUE OF PLAINTIFF'S BUSINESS AND THE COURT SHOULD NOT HAVE ORDERED A POSTTRIAL VALUATION OF THE BUSINESS.

The Second Department, reversing Supreme Court in this divorce action, determined the imputation of income to plaintiff, the amount of maintenance awarded to plaintiff were not supported by the evidence. In addition the award of 50% of plaintiff's business to defendant and the ordering of a posttrial valuation of the business were deemed improper:

"... [T]he Supreme Court improvidently exercised its discretion by imputing an annual income of $80,000 to the plaintiff when calculating her maintenance award. During this 28-year marriage, notwithstanding her college degree and various certifications, the plaintiff, who was 55 years old at the time of trial, had been a stay at home mother and homemaker for almost 10 years and had never earned more than $19 per hour from employment upon returning to work outside the home, while the defendant was the primary wage earner for the family and earned a substantial income. Moreover, the plaintiff's business was not a financial success. ... 'In cases such as this one, commenced prior to January 23, 2016 ..., factors to be considered are, among others, the standard of living of the parties, the income and property of the parties, the distribution of property, the duration of the marriage, the health of the parties, the present and future earning capacity of the parties, the ability of the party seeking maintenance to become self-supporting, the reduced or lost earning capacity of the party seeking maintenance, and the presence of children of the marriage in the respective homes of the parties' ...". ***Weiss v. Nelson*, 2021 N.Y. Slip Op. 04573, Second Dept 7-28-21**

FORECLOSURE, CIVIL PROCEDURE, EVIDENCE.

ALTHOUGH DEFENDANT WAS IN DEFAULT IN THIS FORECLOSURE ACTION, SHE STILL CAN CONTEST THE AMOUNT OWED; THE REFEREE'S REPORT HERE WAS REJECTED BECAUSE IT WAS BASED IN PART ON UNPRODUCED BUSINESS RECORDS AND THE MATTER WAS REMITTED FOR RECALCULATION.

The Second Department, reversing Supreme Court, determined the referee's report in this foreclosure action should have been rejected because it was based in part on business records which were not produced. Although defendant was in default, she still could contest the amount owed: "The fact that the defendant defaulted in appearing did not mean that she was precluded from contesting the amount owed ... . The Supreme Court should not have confirmed the referee's report because the referee's recommendation that the plaintiff be awarded tax and hazard insurance disbursements was premised upon unproduced business records ... . Consequently, the referee's findings with respect to the total amount due upon the mortgage were not substantially supported by the record ... . Accordingly, we reject the referee's report and remit the matter to the Supreme Court, Kings County, for a new report computing the amount due to the plaintiff, followed by further proceedings in accordance with CPLR 4403 and the entry of an appropriate amended judgment thereafter." ***Wells Fargo Bank, N.A. v. Campbell*, 2021 N.Y. Slip Op. 04574, Second Dept 7-28-21**

FORECLOSURE, EVIDENCE.

DEFENDANTS' DEFAULT IN MAKING MORTGAGE PAYMENTS WAS NOT SUPPORTED BY THE SUBMISSION OF THE RELEVANT BUSINESS RECORDS; THEREFORE, PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT IN THIS FORECLOSURE ACTION SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined the proof of defendants' default in mortgage payments was based upon business records which were not produced: "... [T]he plaintiff failed to establish, prima facie, the defendants' default in payment by submitting the affidavit of Haley Pope, the Foreclosure Manager for its loan servicer. Pope did not specifically state that she had personal knowledge of the defendants' default in payment. To the extent Pope relied on her review of business records, she did not identify which records she relied on to assert a default in payment, or attach any business records to her affidavit to substantiate the alleged default in payment. Thus, the plaintiff failed to meet its prima facie burden by relying on Pope's conclusory assertion that the defendants defaulted in payment, which was not supported by a factual basis ...". ***Wilmington Sav. Fund Socy., FSB v. McLaughlin*, 2021 N.Y. Slip Op. 04576, Second Dept 7-28-21**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY

PLAINTIFF'S FALL FROM A LADDER OCCURRED DURING ROUTINE MAINTENANCE AND THEREFORE WAS NOT ACTIONABLE PURSUANT TO LABOR LAW § 240(1).

The Second Department determined plaintiff's Labor Law § 240(1) cause of action was properly dismissed because plaintiff was engaged in routine maintenance at the time of his fall from a ladder: " 'Generally, courts have held that work constitutes routine maintenance where the work involves 'replacing components that require replacement in the course of normal wear and tear' ... . [T]he defendants established ... that the replacement of the condenser fan motor, which, according to the deposition testimony of the injured plaintiff's employer, weighed approximately 1½ pounds and was the kind of part that required replacement 'all the time,' constituted routine maintenance and not repairing, or any of the other enumerated activities under Labor Law § 240(1) ... . 'The work here involved replacing [a] component[ ] that require[s] replacement in the course of normal wear and tear' ...". ***Stockton v. H&E Biffer Enters. No. 2, LLC*, 2021 N.Y. Slip Op. 04568, Second Dept 7-28-21**

PERSONAL INJURY, EVIDENCE.

THE CLIMATOLOGICAL RECORDS WERE NOT CERTIFIED AS BUSINESS RECORDS AND THEREFORE COULD NOT BE RELIED UPON TO SHOW A STORM IN PROGRESS AT THE TIME OF THE SLIP AND FALL; PROOF OF A GENERAL INSPECTION ROUTINE COULD NOT BE RELIED UPON TO SHOW THE ABSENCE OF CONSTRUCTIVE NOTICE OF THE BLACK ICE.

The Second Department, reversing Supreme Court, determined defendant's motion for summary judgment in this black-ice slip and fall case should not have been granted. The climatological records submitted to demonstrate there was a storm in progress at the time of the fall were not certified as business records and were otherwise insufficient. The evidence of routine inspection practices was not sufficient to demonstrate a lack of constructive notice: "... [T]he defendant relied upon, among other things, climatological data for Poughkeepsie Airport and Danbury Municipal Airport in Connecticut, as well as spotter reports of snowfall accumulation in neighboring towns. However, because these records were not certified as business records, they were inadmissible (see CPLR 4518[a] ...). In any event, the climatological data and spotter reports gathered from nearby areas were insufficient to demonstrate, prima facie, that the storm in progress rule applied ... . Moreover, the climatological data was inconsistent and contradicted the parties' deposition testimony, transcripts of which the defendant also submitted in support of its motion, as to whether precipitation was falling at or near the time of the plaintiff's accident ... . * * * ... '[M]ere reference to general cleaning practices, with no evidence regarding any specific cleaning or inspection of the area in question, is insufficient to establish a lack of constructive notice' ... . Here, the testimony of the defendant's witness, at best, established the defendant's general inspection practices with respect to snow and ice on the defendant's property ... . Thus, absent specific evidence that this area was inspected prior to the plaintiff's fall, the defendant cannot rely on this testimony in meeting its prima facie burden ...". ***Johnson v. Pawling Cent. Sch. Dist.*, 2021 N.Y. Slip Op. 04543, Second Dept 7-28-21**

TORTIOUS INTERFERENCE WITH BUSINESS RELATIONS; TORTIOUS INTERFERENCE WITH CONTRACT, UNFAIR COMPETITION.

DEFENDANT TORTIOUSLY INTERFERED WITH PLAINTIFF'S CONTRACT BUT DID NOT TORTIOUSLY INTERFERE WITH PLAINTIFF'S BUSINESS RELATIONS OR ENGAGE IN UNFAIR COMPETITION; THE ELEMENTS OF THE THREE CAUSES OF ACTION EXPLAINED.

The Second Department, reversing (modifying) Supreme Court, determined defendant was properly found to have tortiously interfered with plaintiff's contract but should not have been found to have tortiously interfered with plaintiff's business relations or to have engaged in unfair competition. The elements of each cause of action are clearly explained in the decision. With respect to tortious interference with business relations, the court wrote: " 'While a cause of action for interference with prospective contract or business relationship is closely akin to one for tortious interference with contract, the former requires proof of more culpable conduct on the part of defendant' ... . 'This standard is met where the interference with prospective business relations was accomplished by wrongful means or where the offending party acted for the sole purpose of harming the other party' ... . 'Wrongful means' has been defined to include 'physical violence, fraud or misrepresentation, civil suits and criminal prosecutions, and some degrees of economic pressure' ... . '[A]s a general rule, the defendant's conduct must amount to a crime or an independent tort. Conduct that is not criminal or tortious will generally be 'lawful' and thus insufficiently 'culpable' to create liability for interference with prospective contracts or other nonbinding economic relations' ... . In addition, conduct which is motivated by economic self-interest cannot be characterized as solely malicious ...". ***Stuart's, LLC v. Edelman*, 2021 N.Y. Slip Op. 04569, Second Dept 7-29-21**

THIRD DEPARTMENT

CRIMINAL LAW, JUDGES, APPEALS.

THE MAJORITY DETERMINED DEFENDANT'S ARGUMENT HIS GUILTY PLEA WAS NOT VOLUNTARILY ENTERED WAS NOT PRESERVED; THE DISSENT ARGUED DEFENDANT WAS NOT ADEQUATELY INFORMED OF HIS *BOYKIN* RIGHTS AND THE CONVICTION SHOULD BE REVERSED IN THE INTEREST OF JUSTICE.

The Third Department, over a dissent, determined defendant's argument that his guilty plea was not knowingly, voluntarily and intelligently entered was rejected by the majority as unpreserved. The dissent agreed the issue was not preserved but argued the judge's failure to adequately inform defendant of the *Boykin* rights warranted reversal in the interest of justice: **From the Dissent:** "Mindful that County Court was not required 'to specifically enumerate all the rights to which . . . defendant was entitled'.. , as defendant notes, the court nonetheless failed to explain, let alone refer to, any of the constitutional trial-related rights that he would forfeit by pleading guilty ... . Rather, at the plea proceeding, the court focused almost exclusively on defendant's waiver of an intoxication defense, as well as any other potential defenses, and whether defendant understood the benefits and risks of going forward with a trial. The record also fails to disclose that the court 'obtain[ed] any assurance that defendant had discussed with counsel the trial-related rights that are automatically forfeited

by pleading guilty or the constitutional implications of a guilty plea' ...". ***People v. Simpson*, 2021 N.Y. Slip Op. 04579, Third Dept 7-28-21**

FORECLOSURE, CIVIL PROCEDURE, ATTORNEYS, APPEALS.

IN THIS FORECLOSURE ACTION PLAINTIFF'S ATTORNEY DID NOT FILE AN AFFIRMATION AS REQUIRED BY AN ADMINSTRATIVE ORDER; THE MAJORITY DID NOT ADDRESS THE ISSUE BECAUSE IT SHOULD HAVE BEEN RAISED IN A PRIOR APPEAL WHICH DEFENDANT DID NOT PERFECT; THE DISSENT ARGUED THE ISSUE COULD AND SHOULD BE CONSIDERED ON THIS APPEAL.

The Third Department, over a dissent, determined defendant in this foreclosure action could not raise the plaintiff's failure to comply with an Administrative Order (AO) because it could have been raised on a prior appeal which was not perfected. The dissent argued the court could and should address the "AO" issue on this appeal: **From the dissent:** "... [A] plaintiff's attorney is required to affirm after conferring with a representative of the plaintiff and upon the attorney's 'own inspection and other reasonable inquiry' that the pleadings and submissions 'contain no false statements of fact or law.' ... [P]laintiff's attorney was required to file the affidavit conforming with AO/431/11 and AO/208/13, an issue that was directly raised in defendant's motion to vacate and could have been addressed by this Court had defendant perfected his appeal from the court's April 2018 order. In an instance such as this, this Court 'has the authority to entertain a second appeal in the exercise of [our] discretion, even where a prior appeal on the same issue has been dismissed for failure to prosecute' ... . Given that the filing of an attorney affirmation is mandatory and, at the latest, must be filed five business days before a scheduled auction ... , I believe we should exercise our discretion and address the issue of noncompliance (*id*.). To assure the integrity of the foreclosure process, which is the entire objective of the Administrative Orders, we should modify the order by requiring a continued stay of any auction sale pending the submission of a compliant attorney affirmation." ***HSBC Bank USA, N.A. v. Sage*, 2021 N.Y. Slip Op. 04583, Third Dept 7-29-21**

MUNICIPAL LAW, CIVIL RIGHTS LAW.

THERE ARE QUESTIONS OF FACT ABOUT WHETHER THE ROAD LEADING TO PETITIONER'S PROPERTY WAS PROPERLY CERTIFIED "ABANDONED" SUCH THAT THE MUNICIPALITY IS NOT RESPONSIBLE FOR ITS MAINTENANCE; AND PETITIONER STATED AN EQUAL-PROTECTION CLAIM UNDER 42 U.S.C. § 1983.

The Third Department, reversing Supreme Court, over a two-justice dissent, determined there were questions of fact whether the road (Van Slyke Road) leading to petitioner's property should have been certified "abandoned" such that the town did not have to maintain it. The two dissenters argued petitioner had not stated an equal-protection claim alleging selective enforcement under 42 U.S.C. § 1983: "Petitioners assert that there are many other roads in the Town that have no outlet — with no or few residences situated on them — that are maintained by the Town. Specifically, petitioners point to Snell Road and Hunt Road as being roughly equivalent to Van Slyke Road. Like Van Slyke Road, these roads are dead ends, are comprised of compressed dirt and gravel, and have only one residence. Unlike Van Slyke Road, the Town maintains these roads. ... [V]iewing these allegations liberally, petitioners have stated an equal protection claim under 42 USC § 1983, * * * ... [W]e find that triable issues of fact exist as to the use and condition of Van Slyke Road such that neither party is entitled to summary judgment on the abandonment claim ...". ***Matter of Fernandez v. Town of Benson*, 2021 N.Y. Slip Op. 04584, Third Dept 7-29-21**

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