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SECOND DEPARTMENT

ASSOCIATIONS, REAL PROPERTY LAW.

THE HOMEOWNERS' ASSOCIATION ACTED WITHIN ITS AUTHORITY WHEN IT REQUIRED A HOMEOWNER TO TAKE DOWN A FENCE; HOWEVER THE AUTHORITY FOR THE HEAVY FINE (OVER $35,000) WAS NOT VALID PURSUANT TO THE REAL PROPERTY LAW.

The Second Department, reversing (modifying} Supreme Court, determined that the homeowners' association board (Fieldpoint) had the authority to require a homeowner to take down a fence and to fine the homeowner. However, the rule in effect at the time the fence was erected allowed only a one-time fine of $50.00. Supreme Court had awarded the homeowners' association over $35,000. The amendment to the by-laws which provided for heavier fines was not incorporated in a recorded amended declaration as required by Real Property Law § 339-u: " 'In reviewing the actions of a homeowners' association, a court should apply the business judgment rule and should limit its inquiry to whether the action was authorized and whether it was taken in good faith and in furtherance of the legitimate interests of the association' ... . Accordingly, a court should defer to the actions of a homeowners' association board so long as the board acts for the purposes of the homeowners' association, within the scope of its authority, and in good faith ... . Fieldpoint established ... that its actions in denying approval for the fence were protected by the business judgment rule ... . In opposition to Fieldpoint's prima facie showing, the plaintiffs failed to raise a triable issue of fact by submitting evidence that Fieldpoint acted '(1) outside the scope of its authority, (2) in a way that did not legitimately further the [interests of the association] or (3) in bad faith' ... . Accordingly, the Supreme Court properly determined that Fieldpoint's actions in denying approval for the fence were within the scope of its authority and taken in good faith. However, the court should have issued declarations to that effect rather than dismissing the causes of action seeking declarations to the contrary ...". ***Ives v. Fieldpoint Community Assn., Inc.*, 2021 N.Y. Slip Op. 05028, Second Dept 9-22-21**

CIVIL PROCEDURE, FORECLOSURE.

A DEFENDANT IN A FORECLOSURE ACTION WHICH HAS "FAILED TO APPEAR" IS NOT ENTITLED TO NOTICE OF A MOTION TO CONFIRM A REFEREE'S REPORT, NOTWITHSTANDING DICTA IN PRIOR SECOND DEPARTMENT RULINGS; A DETAILED AND COMPREHENSIVE DISCUSSION OF THE NOTICE REQUIREMENTS WHERE A DEFENDANT IN A FORECLOSURE ACTION HAS DEFAULTED.

The Second Department, in a comprehensive discussion of the requirements for seeking a default judgment, including the meaning of "failure to appear," determined the party which failed to appear in this foreclosure action was not entitled to notice of a motion to confirm a referee's report. The extensive and detailed explanation of the applicable law was deemed necessary to clear up dicta in Second Department decisions which indicated such notice was required: "CPLR 3215(g)(1) applies 'whenever application is made to the court or to the clerk.' By its plain language, it merely requires the plaintiff to provide 'notice of the time and place of the application' for a default judgment ... , which application must be held in a location authorized by CPLR 3215(e), and supported by, among other things, 'proof of . . . the amount due' ... . [T]he purpose of the notice is to provide a defaulted defendant with the 'opportunity to challenge the amount of damages sought by the plaintiffs' ... . Contrary to [defendant's] contention, CPLR 3215(g)(1) does not, once triggered, require a plaintiff to provide five days' notice of every subsequent motion or application in the action ... . The 2017 motion was not an 'application' for a default judgment within the meaning of CPLR 3215(b). Rather, the 2017 motion sought confirmation of the referee's report and entry of a judgment of foreclosure and sale, relief predicated on CPLR 4403 ... . Since the 2017 motion was not an 'application' within the meaning of CPLR 3215(b), the notice specified in CPLR 3215(g)(1) was inapplicable to the 2017 motion, and notice of that motion was instead governed by the general notice provisions applicable to all motions (see CPLR 2103[e]). As already observed, that section merely requires that notice be served on 'every other party who has appeared' ... . Since, at the time of the 2017 motion, [defendant's predecessor] still had not made any appearance in the action, it was not, without more, entitled to notice of that motion ...". ***21st Mtge. Corp. v. Raghu*, 2021 N.Y. Slip Op. 05016, Second Dept 9-22-21**

CIVIL PROCEDURE, FORECLOSURE.

PLAINTIFF BANK DID NOT PROVIDE AN ADEQUATE EXCUSE FOR FAILING TO TAKE A TIMELY DEFAULT JUDGMENT; THE FORECLOSURE ACTION WAS ABANDONED.

The Second Department, reversing Supreme Court, determined the foreclosure action should have been dismissed because plaintiff's excuse for failing to take a timely default judgment was inadequate: "To avoid dismissal of a complaint pursuant to CPLR 3215(c) as abandoned, a plaintiff must demonstrate both that there is a reasonable excuse for the delay and that the action is meritorious ... . 'Although the determination of what constitutes a reasonable excuse lies within the sound discretion of the Supreme Court, reversal is warranted if that discretion is improvidently exercised' ... . Here, contrary to the Supreme Court's determination, the excuse for the plaintiff's failure to take proceedings for the entry of a judgment within one year after the action was released from the foreclosure settlement conference part was not reasonable ... . Throughout the course of this litigation, there were unexplained gaps of time where months of inactivity passed. Neither the need to move for the appointment of a successor guardian nor the plaintiff's change of attorney which change occurred after the statutory one-year period had expired constitutes a reasonable excuse for the plaintiff's failure to timely prosecute this action ...". ***HSBC Bank USA, N.A. v. Whaley*, 2021 N.Y. Slip Op. 05027, Second Dept 9-22-21**

CONTRACT LAW, ATTORNEYS.

PLAINTIFF ATTORNEY'S QUANTUM MERUIT ACTION FOR ATTORNEY'S FEES SHOULD NOT HAVE BEEN DISMISSED ON THE GROUND THAT IT WAS PRECLUDED BY A WRITTEN CONTRACT.

The Second Department, reversing (modifying) Supreme Court determined plaintiff-attorney's quantum meruit action for legal services should not have been dismissed. The evidence did not demonstrate the existence of a written contract (which would preclude the quantum meruit action): " 'In order to succeed on a cause of action to recover in quantum meruit, the plaintiff must prove (1) the performance of services in good faith, (2) the acceptance of the services by the person to whom they were rendered, (3) an expectation of compensation therefor, and (4) the reasonable value of the services' ... . Recovery under the theory of quantum meruit is not appropriate where an express contract governs the subject matter involved ... . '[A] written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms' ... . '[A]n unsigned contract may be enforceable, provided there is objective evidence establishing that the parties intended to be bound' ... . 'In determining whether the parties entered into a contractual agreement and what were its terms, it is necessary to look . . . to the objective manifestations of the intent of the parties as gathered by their expressed words and deeds' ...". ***Gould v. Decolator, Cohen & DiPrisco, LLP*, 2021 N.Y. Slip Op. 05026, Second Dept 9-22-21**

FORECLOSURE, ABUSE OF PROCESS, MALICIOUS PROSECUTION.

IN THIS FORECLOSURE ACTION, DEFENDANT'S COUNTERCLAIMS FOR ABUSE OF PROCESS AND MALICIOUS PROSECUTION SHOULD HAVE BEEN DISMISSED.

The Second Department, reversing (modifying) Supreme Court in this foreclosure action, determined defendant's (Yeshiva's) counterclaims for abuse of process and malicious prosecution should have been dismissed: "Supreme Court should have granted those branches of Maspeth's [the bank's] motion which were to dismiss Yeshiva's second and third counterclaims, sounding in abuse of process and malicious prosecution, respectively. To state a cause of action to recover damages for abuse of process, a party must allege the existence of (1) regularly issued process, (2) an intent to do harm without excuse or justification, and (3) the use of process in a perverted manner to obtain a collateral objective ... . Here, Yeshiva failed to allege any actual misuse of the process to obtain an end outside its proper scope ... . Moreover, '[t]he elements of the tort of malicious prosecution of a civil action are (1) prosecution of a civil action against the plaintiff, (2) by or at the instance of the defendant, (3) without probable cause, (4) with malice, (5) which terminated in favor of the plaintiff, and (6) causing special injury' ... . Here, Yeshiva failed to adequately allege malice on the part of Maspeth in commencing the action, a termination of the action in favor of Yeshiva, or the requisite special injury." ***Maspeth Fed. Sav. & Loan Assn. v. Elizer*, 2021 N.Y. Slip Op. 05030, Second Dept 9-22-21**

FORECLOSURE, EVIDENCE.

THE REFEREE'S REPORT WAS BASED UPON INFORMATION IN BUSINESS RECORDS WHICH WERE NOT ATTACHED TO THE AFFIDAVIT IN WHICH THE RECORDS WERE DESCRIBED; THE INFORMATION IN THE AFFIDAVIT WAS THEREFORE INADMISSIBLE HEARSAY.

The Second Department, reversing Supreme Court, determined the referee in this foreclosure action relied on information in business records which were not provided along with the affidavit describing them: "The defendant argues ... that the Supreme Court erred in confirming the referee's report because the referee's computation was premised upon unproduced business records. 'The report of a referee should be confirmed whenever the findings are substantially supported by the record, and the referee has clearly defined the issues and resolved matters of credibility' ... . Here, the affidavit executed by an employee of the plaintiff submitted for the purpose of establishing the amount due and owing under the subject mortgage loan constituted inadmissible hearsay and lacked probative value because the affiant did not produce any of the business

records she purportedly relied upon in making her calculations ... . Consequently, the referee's findings with respect to the total amount due under the mortgage were not substantially supported by the record ...". ***Wells Fargo Bank, NA v. Clerge*, 2021 N.Y. Slip Op. 05038, Second Dept 9-22-21**

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

PROOF OF MAILING OF THE RPAPL 1304 NOTICE TO THE CORRECT ADDRESS WAS NOT INCLUDED IN THE INITIAL MOTION PAPERS AND THEREFORE WAS NOT PART OF PLAINTIFF'S ATTEMPT TO MAKE OUT A PRIMA FACIE CASE; IN ADDITION, THE PROOF OF MAILING OF THE RPAPL 1304 NOTICE WAS DEFICIENT.

The Second Department, reversing Supreme Court, determined the defendant failed to demonstrate compliance with the RPAPL 1304 notice requirements in this foreclosure action. The proof of mailing to the correct address was first provided in reply papers for the motion to confirm the referee's report and was not part of plaintiff's initial summary judgment motion. And the proof of mailing was not supported by proof of the affiant's knowledge of the mailing practices and procedures of the party which actually mailed the documents: "Although Cantu [plaintiff's default servicing officer] stated in his affidavit that the RPAPL 1304 notices were mailed by certified and first-class mail to the defendants at the property, and he attached copies of 90-day notices with corresponding certified and first-class envelopes, Cantu did not attach the 90-day notices and envelopes addressed to the property where the defendants resided or any United States Post Office documentation showing that the purported mailings to the property actually occurred ... . To the extent the plaintiff relies on copies of the 90-day notices with corresponding certified and first-class envelopes addressed to the property which were submitted for the first time in its reply papers on its subsequent motion ... to confirm the referee's report, those documents were insufficient to satisfy the plaintiff's prima facie burden on its initial motion ... for summary judgment ... . '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' ... . Further, while Cantu asserted that he had personal knowledge of the plaintiff's procedures for creating and maintaining its business records, he did not attest that he was familiar with the mailing practices and procedures of Walz, the third-party entity that he acknowledged sent the notices ... . Thus, the plaintiff failed to establish proof of standard office practices and procedures designed to ensure the notices were properly addressed and mailed ...". ***Caliber Home Loans, Inc. v. Weinstein*, 2021 N.Y. Slip Op. 05021, Second Dept 9-22-21**

REAL PROPERTY LAW, FRAUD, TRUSTS AND ESTATES.

THE GRANTOR WAS NOT THE SOLE HEIR OF THE TITLE HOLDER; THEREFORE THE DEED PURPORTING TO TRANSFER A 100% INTEREST IN THE PROPERTY WAS VOID AB INITIO.

The Second Department determined a deed was null and void because the grantor was not the sole heir of the title holder: "By a deed dated July 25, 2012, Colie Gallman, Jr., alleged to be the sole heir of Lillian Hudson, purportedly transferred his 100% interest in certain real property owned by Hudson to the defendant. In January 2015, the plaintiff commenced this action against the defendant seeking a judgment declaring that the July 25, 2012 deed is null and void. * * * A misrepresentation in a deed that the seller of the property is the sole heir of the holder of the title to the property renders the conveyance void ab initio ... . Here, the evidence and affidavits submitted by the plaintiff to the Supreme Court during the course of motion practice in this action established that Colie Gallman, Jr., was not the sole heir of Hudson as of the date of the subject deed, and thus, the deed purporting to convey all of the interest in the subject property is void ab initio ... . In opposition, the defendant failed to raise a triable issue of fact." ***23A Vernon, LLC v. Oneal*, 2021 N.Y. Slip Op. 05017, Second Dept 9-22-21**

THIRD DEPARTMENT

CRIMINAL LAW, CONTRACT LAW, VEHICLE AND TRAFFIC LAW.

THE SENTENCE AGREED TO IN THE PLEA BARGAIN AND IMPOSED BY THE COURT WAS ILLEGAL BECAUSE IT WAS LESS THAN STATUTORILY REQUIRED; THE SENTENCE WAS VACATED AND THE MATTER REMITTED TO GIVE DEFENDANT THE OPPORTUNITY TO WITHDRAW THE PLEA.

The Third Department determined defendant's sentence was illegal because it was less than statutorily required. Because the plea agreement included the illegal sentence, the sentence was vacated and the matter was remitted to give the defendant the opportunity to withdraw his plea: "Defendant had previously been convicted of driving while intoxicated in violation of Vehicle and Traffic Law § 1192 (3) in 2019. Inasmuch as that conviction was within five years of the instant plea of guilty to driving while intoxicated, Vehicle and Traffic Law § 1193 (1-a) (a) requires the additional penalty of either five days in jail or 30 days of community service. As no such penalty was imposed by the court, the sentence imposed is less than is statutorily required and, therefore, is illegal. 'Where the plea bargain includes a sentence which is illegal because the minimum imposed is less than that required by law, . . . the proper remedy is to vacate the sentence and afford the defendant, having been denied the benefit of the bargain, the opportunity to withdraw the plea' ... . Accordingly, the matter must be

remitted to County Court for resentencing in accordance with the governing sentencing statute, with the opportunity for defendant to withdraw from the plea agreement ...". ***People v. Gary*, 2021 N.Y. Slip Op. 05052, Third Dept 9-23-21**

UNEMPLOYMENT INSURANCE.

CLAIMANT, WHO WAS NOT EMPLOYED AT THE TIME COVID-PANDEMIC-RELATED UNEMPLOYMENT BENEFITS BECAME AVAILABLE, WAS NOT ELIGIBLE TO RECEIVE THE COVID-PANDEMIC BENEFITS.

The Third Department determined claimant was not entitled to COVID-pandemic-related unemployment insurance benefits because she was not employed at the time the benefits became available: "Claimant was ineligible for regular unemployment insurance benefits given her failure to work during the relevant period and contended that she was unable and unavailable to work due to one of the qualifying factors for pandemic unemployment assistance, namely, that she was 'unable to reach [her] place of employment because [she was] advised by a health care provider to self-quarantine due to concerns related to COVID-19' (15 USC § 9021 [a] [3] [A] [ii] [I] [ff]). ... The statutory directive that an applicant be 'unable to reach the place of employment' presupposes that he or she has a place of employment to reach, however, removing from its scope individuals such as claimant who were not working or scheduled to start working at the time they were directed to self-quarantine (15 USC § 9021 [a] [3] [A] [ii] [I] [ff]). The Board read the statutory language in that manner and in accord with guidance from the United States Department of Labor — the federal agency tasked with providing operating instructions for the joint federal-state pandemic unemployment insurance program (see 15 USC § 9032 [b]) and from which we take judicial notice — that an individual 'must have an attachment to the labor market and must have experienced a loss of wages and hours or [be] unable to start employment following a bona fide job offer' in order to obtain pandemic unemployment assistance ... . Thus, as 'the federal agency expressly concurs in the state's interpretation of the statute, and the interpretation is a permissible construction of the statute,' the interpretation is entitled to deference,' and it follows that substantial evidence supports the Board's finding that claimant was not entitled to pandemic unemployment assistance ...". ***Matter of Mangiero (Commissioner of Labor)*, 2021 N.Y. Slip Op. 05062, Third Dept 9-23-21**

FOURTH DEPARTMENT

ELECTION LAW, CONSTITUTIONAL LAW.

BUFFALO MAYOR'S CONSTITUTIONAL CHALLENGE TO THE ELECTION-LAW DEADLINE FOR FILING AN INDEPENDENT NOMINATING PETITION, WHICH WAS ACCEPTED BY SUPREME COURT, REJECTED BY THE FOURTH DEPARTMENT.

The Fourth Department, reversing Supreme Court, determined Election Law § 6-158(9) was not unconstitutional as applied to a Buffalo mayoral race. The petitioner, who had lost in a primary, attempted to file an independent nominating petition in August but the Election Law required filing in May: "The degree of scrutiny used to analyze the constitutionality of a state election regulation depends on the severity of the regulation's burden on the constitutional rights of candidates and their supporters ... . If that burden is severe, the law 'must be narrowly drawn to advance a state interest of compelling importance' ... . A provision imposing 'only reasonable, nondiscriminatory restrictions,' however, can be justified by a state's 'important regulatory interests' ... and is subject to a review that is 'quite deferential' and requires 'no elaborate, empirical verification' ... . The totality of a state's overall plan of election regulation should be considered in determining the severity of the restrictions ... . * * * Because a 'reasonably diligent candidate' could be expected to meet New York's requirements for independent candidates and gain a place on the ballot ... and because those requirements do not unfairly discriminate against independent candidates ... , we conclude that Election Law § 6-158 (9) places only a minimal burden on the constitutional rights of those candidates and their voters." ***Matter of Brown v. Erie County Bd. of Elections*, 2021 N.Y. Slip Op. 05014, Fourth Dept 9-16-21**

ELECTION LAW, EVIDENCE.

IN THIS ELECTION LAW CASE, THE SIGNATORIES' NAMES WERE PRINTED ON THE DESIGNATING PETITION BUT WERE INSCRIBED ON THE VOTER REGISTRATION FORMS; SUPREME COURT PROPERLY ACCEPTED PROOF THAT THE SIGNATORIES WHOSE NAMES WERE PRINTED WERE IN FACT THE SAME AS THOSE WHOSE SIGNATURES WERE ON THE REGISTRATION FORMS.

The Fourth Department determined Supreme Court properly received evidence that signatories whose names were printed on the independent nominating petition were in fact the same as those whose signatures were inscribed on the voter registration forms: " 'It is well settled that [t]o prevent fraud and allow for a meaningful comparison of signatures when challenged, a signature on a designating petition should be made in the same manner as on that signatory's registration form' ... . Nevertheless, where there is 'credible evidence from the signatories or from any of the subscribing witnesses attesting to the fact that the individuals who signed the registration forms were the same individuals whose signatures appeared on the independent nominating petition,' the signatures are valid, notwithstanding a discrepancy with the voter registration forms

... . Here, respondents submitted affidavits from 21 of the 47 signatories with printed signatures in which they attested that they were the same individuals whose signatures appeared on the independent nominating petition. Based on those affidavits, which the court properly received in evidence, we conclude that the court did not err in determining that petitioner failed to meet her burden of proof with respect to the invalidity of those 21 signatures ...". ***Matter of Maclay v. Dipasquale*, 2021 N.Y. Slip Op. 05013, Fourth Dept 9-16-21**

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