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# FIRST DEPARTMENT

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

THE MOTION TO DISMISS THIS ACTION TO QUIET TITLE SHOULD NOT HAVE BEEN CONVERTED TO A MOTION FOR SUMMARY JUDGMENT TO WHICH PLAINTIFFS HAD NO OPPORTUNITY TO RESPOND; THE COMPLAINT STATED A CAUSE OF ACTION TO QUIET TITLE PURSUANT TO RPAPL ARTICLE 15.

The First Department, reversing Supreme Court, determined defendant's motion to dismiss the complaint seeking to quiet title should not have been converted to a summary judgment motion. The complaint stated a cause of action to quiet title pursuant to RPAPL article 15: "[T]he court should not have converted defendant's motion to dismiss into a motion for summary judgment under CPLR 3211(c), since plaintiffs did not agree to 'charting a summary judgment course,' and the case did not involve a 'purely legal question without any disputed issues of fact' ... . Conversion of the motion prejudiced plaintiffs, who had no opportunity to respond to the contentions raised by defendant for the first time in reply ... . ... 'To maintain a cause of action to quiet title [to real property], a plaintiff must allege actual or constructive possession of the property and the existence of a removable cloud on the property, which is an apparent title to the property, such as in a deed or other instrument, that is actually invalid or inoperative' (...see RPAPL 1515; RPAPL 1501[1]). Here, the complaint adequately alleges facts that, if established, could support a finding that plaintiffs attained equitable title arising from the contract of sale they allegedly entered into with codefendant ... for 25% of the property, as well as their payment of the agreed price and exclusive and actual occupancy of an apartment in the property ...". ***Davis v. Augoustopoulos*, 2021 N.Y. Slip Op. 05772, First Dept 10-21-21**

## CRIMINAL LAW, CONSTITUTIONAL LAW.

RETRIAL VIOLATED THE PROTECTION AGAINST DOUBLE JEOPARDY; DEFENDANT HAD MADE A MOTION FOR A MISTRIAL WITH PREJUDICE AND DID NOT CONSENT TO THE DISCHARGE OF THE JURY.

The First Department, reversing defendant's conviction in the retrial and dismissing the indictment, determined the trial court's failure to procure defendant's consent to discharge the jury after defendant's motion for a mistrial with prejudice triggered the protection against double jeopardy: "Double jeopardy bars a retrial except as to a defendant who has requested or consented to the mistrial ... . Here, the record does not show that either defendant consented to a mistrial without prejudice. Defendants initially made general motions for a mistrial, but on the next day they expressly limited their motions to requests for a mistrial with prejudice. Accordingly, when the court announced its ruling shortly afterwards, it should have obtained defendants' unequivocal consent before discharging the first jury or else have continued the trial with the same jury ... . The retrial thus violated the constitutional prohibitions against double jeopardy, and these prohibitions require reversal of defendants' convictions and dismissal of the indictment ... . Defendants' double jeopardy claim does not require preservation, although it may be expressly waived ... . However, there was no such waiver here." ***People v. Lantigua*, 2021 N.Y. Slip Op. 05671, First Dept 10-19-21**

# SECOND DEPARTMENT

## CIVIL PROCEDURE.

A LATE MOTION FOR SUMMARY JUDGMENT SHOULD NOT BE CONSIDERED ON THE MERITS ABSENT GOOD CAUSE FOR THE DELAY.

The Second Department, reversing Supreme Court, determined plaintiffs' late motion for summary judgment should not have been considered on the merits: "CPLR 3212(a) provides, inter alia, that the court may set a date after which no motion for summary judgment may be made, and '[i]f no such date is set by the court, such motion 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.' '[G]ood cause' in CPLR 3212(a) requires a showing of good cause for the delay in making the motion' ... . Here, the plaintiffs' motion was, in effect, for summary judgment. The plaintiffs do not dispute that they did not file their motion within the period specified by CPLR 3212(a), and no good cause for the delay was shown. Thus, the Supreme Court erred in considering the motion

on the merits ... , and should have denied the motion." ***Bennett v. State Farm Fire & Cas. Co.*, 2021 N.Y. Slip Op. 05687, Second Dept 10-20-21**

## CIVIL PROCEDURE.

WHERE RESPONDENTS MADE A PRE-ANSWER MOTION TO DISMISS, THE ULTIMATE RELIEF SOUGHT BY PETITIONER SHOULD NOT HAVE BEEN GRANTED; THE MATTER WAS REMITTED TO ALLOW RESPONDENTS TO ANSWER THE PETITION.

The Second Department, reversing (modifying) Supreme Court, noted that because respondents had made a pre-answer motion to dismiss petitioner's cause of action, the motion court should not have granted the relief sought by petitioner. Rather the respondents should have been allowed to answer the petition: "... [T]he Supreme Court improperly awarded [petitioner] the ultimate relief sought on the second cause of action. Upon denying the respondents' pre-answer motion to dismiss, the Supreme Court should have permitted the respondents to answer the petition (see CPLR 7804[f] ...). ... [W]e remit the matter ... for the service and filing of an answer and the administrative record." ***Matter of O'Hara v. Board of Educ., Yonkers City Sch. Dist.*, 2021 N.Y. Slip Op. 05703, Second Dept 10-20-21**

## CRIMINAL LAW, JUDGES, ATTORNEYS.

THE TRIAL JUDGE DID NOT GIVE COUNSEL MEANINGFUL NOTICE OF A SUBSTANTIVE JURY NOTE; NEW TRIAL ORDERED.

The Second Department, ordering a new trial, determined the trial judge did not give counsel meaningful notice of a substantive jury note: "Pursuant to CPL 310.30, when a trial court receives a substantive jury inquiry, the court has two separate duties: 'the duty to notify counsel and the duty to respond'... . With regard to the former duty, the court must provide counsel 'notice of the actual specific content of the jurors' request' ... . A 'trial court's failure to provide counsel with meaningful notice of a substantive jury note is a mode of proceedings error that requires reversal' ... . Here, although marked as a court exhibit, the trial transcript does not reflect that the Supreme Court showed or read verbatim to counsel a jury note, which stated: 'We would like the DNA results in regards to the blood smear on the banister.' " ***People v. Carillo*, 2021 N.Y. Slip Op. 05710, Second Dept 10-20-21**

## FAMILY LAW, CIVIL PROCEDURE.

FAMILY COURT DID NOT MAKE THE REQUIRED INQUIRIES BEFORE DETERMINING NEW YORK DID NOT HAVE JURISDICTION OVER THIS NEGLECT PROCEEDING; MOTHER AND CHILD WERE IN CONNECTICUT, FATHER RESIDED IN NEW YORK.

The Second Department, reversing Family Court, determined Family Court did not make the required inquiries before finding New York did not have jurisdiction over this neglect proceeding. Mother and child lived in Connecticut and father resided in Westchester County: "The Family Court's jurisdiction in this child protective proceeding is governed by the Uniform Child Custody Jurisdiction and Enforcement Act ... . Nevertheless, the court failed to make any determination as to whether, despite the child's Connecticut residence at the time of the filing of the petition, it had jurisdiction under Domestic Relations Law § 76 on the basis that New York was the child's 'home state' ... . The court further failed to determine whether it had temporary emergency jurisdiction under Domestic Relations Law § 76-c ... . In addition, although a criminal proceeding was allegedly pending in Connecticut, the court failed to determine whether a 'proceeding concerning the custody of the child [had] been commenced in a court of another state having jurisdiction,' in which case the court would have been required to stay the proceedings and communicate with the court of the other state (Domestic Relations Law § 76-e[1] ...). Finally, in the event that the court determined that it was an inconvenient forum and that Connecticut was the more appropriate forum, there is no indication that the court considered the required factors (see Domestic Relations Law § 76-f[2][a]-[h]). Moreover, upon such a finding, the court is required to 'stay the proceedings upon condition that a child custody proceeding be promptly commenced in another designated state' (Domestic Relations Law § 76-f[3])." ***Matter of Jenny M. (Thomas M.)*, 2021 N.Y. Slip Op. 05701, Second Dept 10-20-21**

## FORECLOSURE, CIVIL PROCEDURE, ATTORNEYS.

IN A FORECLOSURE ACTION, ANY DEFICIENCIES IN PLAINTIFF'S COUNSEL'S CERTIFICATE OF MERIT (CPLR 3012-b) CAN NOT BE THE BASIS FOR DEFENDANT'S MOTION TO DISMISS ALLEGING PLAINTIFF'S LACK OF STANDING.

The Second Department, in a full-fledged opinion by Justice Dillon, over a partial dissent, determined deficiencies in the certificate of merit filed by plaintiff's counsel in this foreclosure action (pursuant to CPLR 3012-b) cannot be the basis for defendants' motion to dismiss alleging plaintiff's lack of standing: "This appeal implicates the extent to which there is interplay between a CPLR 3211(a) motion to dismiss in the context of a residential mortgage foreclosure action, the attorney certification requirements of CPLR 3012-b, and the moving party's burden of proof. For reasons analyzed below, we hold that a defendant moving to dismiss a complaint on the ground of the plaintiff's lack of standing does not meet the affirmative burden of proof by merely relying upon any defects that might exist with the certificate of merit submitted by the

plaintiff's attorney under CPLR 3012-b, or otherwise, if the certificate of merit fails to address all potential aspects of standing. * * * ... [I]n a mortgage foreclosure action, a motion to dismiss pursuant to CPLR 3211(a) on the ground of the plaintiff's lack of standing is not necessarily determined based on the adequacy or inadequacy of the certificate of merit filed by the plaintiff's counsel pursuant to CPLR 3012-b. ... The complaint serves the legal purpose of giving notice to defendants of the transactions, occurrences, or series of transactions or occurrences intended to be proved, and the material elements of each cause of action ... . The certificate of merit serves the ministerial and ethical purpose of requiring counsel to take good faith steps to assure that the action has merit, and to certify to the best of counsel's knowledge, information, and belief that a reasonable basis exists for commencing the action and that the plaintiff has standing to recover on the note underlying the action. Counsel's reasonable beliefs contained in a certificate of merit are irrelevant to whether defendants, in moving to dismiss a complaint under CPLR 3211(a), establish their own defined burden of proof for the dispositive relief of dismissal." ***Wilmington Sav. Fund Socy., FSB v. Matamoro*, 2021 N.Y. Slip Op. 05741, Second Dept 10-20-21**

## FORECLOSURE, EVIDENCE.

THE BANK'S FAILURE TO ATTACH THE BUSINESS RECORDS REFERRED TO IN THE FOUNDATIONAL AFFIDAVIT PRECLUDED SUMMARY JUDGMENT.

The Second Department, reversing Supreme Court, determined plaintiff bank's motion for summary judgment in this foreclosure action should not have been granted. The affidavit of the loan servicer's vice president (Lee) was deficient in content and did not identify or attach the records referenced: "Lee failed to aver to familiarity with the record-keeping practices and procedures of the entity that generated the records or establish that the records provided by the maker were incorporated into the recipient's own records and routinely relied upon by the recipient in its own business ... . ... [E]ven if Lee's affidavit set forth a proper foundation for the admissibility of the unspecified records he relied on ... , Lee 'failed to identify the records upon which [ ]he relied in making the statements, and the plaintiff failed to submit copies of the records themselves' ... . It is the business record itself, not the foundational affidavit, that serves as proof of the matter asserted ...". ***Deutsche Bank Trust Co. Ams. v. Miller*, 2021 N.Y. Slip Op. 05690, Second Dept 10-20-21**

Similar issues and result in ***Freedom Mtge. Corp. v. Engel*, 2021 N.Y. Slip Op. 05694, Second Dept 10-20-21**

## INSURANCE LAW.

THE ENDORSEMENT RELIED UPON BY THE DEFENDANT INSURER TO EXCLUDE COVERAGE FOR AN OIL SPILL DID NOT MEET THE STRICT CRITERIA FOR AN EXCLUSION.

The Second Department, reversing Supreme Court, determined defendant insurer was not entitled to summary judgment on the ground the oil spill damage was covered by a policy exclusion. The policy endorsement relied on by defendant did not meet the strict criteria for an exclusion from coverage: "In order 'to 'negate coverage by virtue of an exclusion, an insurer must establish that the exclusion is stated in clear and unmistakable language, is subject to no other reasonable interpretation, and applies in the particular case' ... . '[P]olicy exclusions are given a strict and narrow construction, with any ambiguity resolved against the insurer' ... . Here, in support of its motion for summary judgment, the defendant did not point to an applicable policy exclusion. Rather, the defendant relied on the ELF [Property Remediation for Escaped Liquid Fuel and Limited Lead and Escaped Liquid Fuel Liability Coverages] endorsement, which provided additional coverage for the remediation of escaped liquid fuel in limited circumstances not present here. Such argument is unavailing. On its face, the ELF endorsement is not an exclusion. While the defendant argues that the existence of the ELF endorsement compels the conclusion that the policy itself excludes coverage for escaped liquid fuel under any circumstances not specified in the endorsement, policy exclusions are 'not to be extended by interpretation or implication' ... . As such, the defendant failed to meet its initial burden of establishing, prima facie, that an exclusion not subject to any other reasonable interpretation applied in this case ...". ***Mulle v. Lexington Ins. Co.*, 2021 N.Y. Slip Op. 05707, Second Dept 10-20-21**

## LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

QUESTION OF FACT WHETHER THE TRIPPING HAZARD WAS INHERENT IN PLAINTIFF'S JOB; THEREFORE, THE LABOR LAW § 200 CAUSE OF ACTION SHOULD NOT HAVE BEEN DISMISSD.

The Second Department, reversing (modifying) Supreme Court, determined there was a question of fact whether the hazard which caused plaintiff to trip was inherent in his job. A sheet of plastic had been placed over a pipe: "Supreme Court should have denied those branches of the defendants' motion which were for summary judgment dismissing the Labor Law § 200 and common-law negligence causes of action. 'Owners and general contractors, and their agents, have a common-law duty to provide employees with a safe place to work,' and Labor Law § 200 'merely codified that duty' ... . The duty does not extend 'to hazards that are part of, or inherent in, the very work the employee is to perform or defects the employee is hired to repair' ... . Here, the evidence submitted by the defendants did not eliminate triable issues of fact as to whether the placement of the plastic sheet on top of, as opposed to underneath, the installed pipe was a hazard that was part of, or inherent in, the work the injured plaintiff was hired to perform ...". ***Fonck v. City of New York*, 2021 N.Y. Slip Op. 05693, Second Dept 10-20-21**

### LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

PLAINTIFF WAS STRUCK BY A BOARD FROM A DISMANTLED FENCE WHICH FELL OFF A FORKLIFT; DISMANTLING THE FENCE WAS A COVERED ACTIVITY AND THE ACCIDENT WAS THE RESULT OF A COVERED ELEVATION-RELATED HAZARD; SUMMARY JUDGMENT ON THE LABOR LAW § 240(1) CAUSE ACTION PROPERLY GRANTED.

The Second Department determined plaintiff was properly awarded summary judgment on his Labor Law § 240(1) cause of action. Plaintiff was struck by a board which fell off a forklift. The boards were part of a fence which was being dismantled. Dismantling the fence constituted "demolition" and "altering" within the meaning of the statute. And the accident involved an elevation-related risk: "[T]he disassembly and removal of the boards from the soccer field was a partial dismantling of a structure (see 12 NYCRR 23-1.4[16]), and constituted 'demolition' within the meaning of Labor Law § 240(1). Contrary to the defendant's contention, the disassembly and removal of the boards was also a significant physical change to the configuration of the structure ... , and constituted 'altering' within the meaning of Labor Law § 240(1). The plaintiff's role in hauling away the boards after they had been removed by the defendant was an act 'ancillary' to the demolition and alteration of the field structure, and protected under Labor Law § 240(1) ... . * * * ... [T]he plaintiff established that the forklift was being used to lift heavy soccer boards. The boards were stacked on top of the forks of the forklift, and lifted into the air so they could be transferred and stacked in the back of the box truck. The plaintiff testified at his deposition that a portion of the forklift had been removed so that it could fit through a certain doorway on the premises. At the time of the accident, the plaintiff and his coworkers were attempting to slide one of the boards from a stack on the raised forklift into the back of the truck. The stack was raised to a height of approximately 8 or 9 feet at the time of the accident. The plaintiff was struck in the head by a board, weighing approximately 200 pounds, when it slid sideways off the stack and over the cab of the forklift while the plaintiff stood at ground level. The plaintiff's submissions ... demonstrated that the forklift had been modified and lacked certain safety devices, including 'load guides and/or guide rails,' which could have been used to 'constrain the boards as they were moved from the elevated forks into the truck.' " ***Hensel v. Aviator FSC, Inc.*, 2021 N.Y. Slip Op. 05697, Second Dept 10-20-21**

### SEPULCHER.

DURING THE FUNERAL PLAINTIFF (ALLEGEDLY) LEARNED DECEDENT'S BODY WAS NOT IN THE CASKET; THE LOSS OF SEPULCHER ACTION PROPERLY SURVIVED SUMMARY JUDGMENT.

The Second Department determined plaintiff's loss of sepulcher action properly survived summary judgment. During the funeral plaintiff learned the casket was empty: "Viewing the evidence in the light most favorable to the plaintiff as the nonmoving party, during the funeral service and burial intended for the decedent, the plaintiff became aware that the decedent's body was not in the casket and the decedent's body was not located for some period of time. Accordingly, the appellants failed to establish, prima facie, that their alleged actions or inactions did not interfere with the plaintiff's possession of the decedent's body and her right to find 'solace and comfort in the ritual of burial' ...". ***Gutnick v. Hebrew Free Burial Socy. for the Poor of the City of Brooklyn*, 2021 N.Y. Slip Op. 05696, Second Dept 10-20-21**

## THIRD DEPARTMENT

### CIVIL PROCEDURE, CONTRACT LAW, JUDGES.

SUPREME COURT ADDRESSED THE MERITS OF THE ACTION WITHOUT DISCOVERY AND TRIAL; THE COURT SHOULD ONLY HAVE DECIDED WHETHER PETITIONER WAS ENTITLED TO A PRELIMINARY INJUNCTION; MATTER REMITTED FOR PROCEEDINGS BEFORE A DIFFERENT JUDGE.

The Third Department, reversing Supreme Court and remitting the matter to a different judge, determined this breach-of-contract/preliminary-injunction/declaratory-judgment/Article-78 proceeding should not have been decided on the merits without discovery, the filing of a note of issue and a trial. The court should have decided only whether petitioner was entitled to a preliminary injunction. Petitioner is a contractor hired by respondents to install a water system for snow-making for ski trails. Respondents terminated the contract for cause and petitioner brought an action for a preliminary injunction (prohibiting respondents from awarding the contract to others without competitive bidding), a declaratory judgment, and breach of contract: "... Supreme Court should have confined ... its determination to whether petitioner was entitled to a preliminary injunction. ... Supreme Court prematurely resolved the merits of petitioner's declaratory judgment cause of action and respondents' counterclaims, without first affording the parties their rights to discovery and a jury trial on the claims/counterclaims raised in the plenary action (see CPLR 3103 [a]; 4101 ...), and without a note of issue and certificate of readiness having been filed. Moreover, Supreme Court did not acknowledge or address petitioner's third cause of action for breach of contract, even though the plenary action involves, at its heart, a contract dispute. Although petitioner also asserted a cause of action for a declaratory judgment, the award of declaratory relief hinges on the resolution of the contract dispute — that is, whether respondents wrongfully terminated the contract for cause under the terms of the contract." ***Matter of Murnane Bldg. Contrs., Inc. v. New York State Olympic Regional Dev. Auth.*, 2021 N.Y. Slip Op. 05756, Third Dept 10-21-21**

## FAMILY LAW, CIVIL PROCEDURE, JUDGES.

FAMILY COURT DOES NOT HAVE THE AUTHORITY TO DIRECT THE DEPARTMENT OF SOCIAL SERVICES (DSS) TO COMMENCE A NEGLECT PROCEEDING.

The Third Department, reversing Family Court, determined Family Court does not have the authority to direct the Department of Social Services (DSS) to commence a neglect proceeding: "Neither DSS nor the attorney for the child disputes the ability of DSS to commence a neglect proceeding without leave of a court. They also do not dispute that Family Court, under Family Ct Act § 1034, may order DSS to conduct a child protective investigation and report its findings to the court. What is disputed is whether Family Court may order a child protective agency, such as DSS, to commence a neglect proceeding against a parent. ... 'Family Court is a court of limited jurisdiction that cannot exercise powers beyond those granted to it by statute' ... . The relevant statute provides that a proceeding under Family Ct Act article 10 may be 'originate[d]' either by 'a child protective agency' or 'a person on the court's direction' (Family Ct Act § 1032 [a], [b]). In view of the express terms of the statute, Family Court has the authority to direct the commencement of a Family Ct Act article 10 proceeding. That authority, however, is limited to directing only a 'person' to do so ... — which DSS is not." ***Matter of Donald QQ. v. Stephanie RR.*, 2021 N.Y. Slip Op. 05760, Third Dept 10-21-21**

## FAMILY LAW, EVIDENCE.

IN CONSIDERING A MOTION TO DISMISS A PETITON TO MODIFY CUSTODY TO ALLOW RELOCATION, FAMILY COURT MUST ACCEPT THE FACTS ALLEGED IN THE PETITION AS TRUE AND AFFORD PETITIONER EVERY FAVORABLE INFERENCE; MOTHER'S PETITION SHOULD NOT HAVE BEEN DISMISSED WITHOUT A HEARING.

The Third Department, reversing Family Court, determined mother's petition for a modification of custody to allow her to relocate to New Jersey should not have been dismissed without a hearing: " 'While not every petition in a Family Ct Act article 6 proceeding is automatically entitled to a hearing' ... , an evidentiary hearing is generally 'necessary and should be conducted unless the party seeking the modification fails to make a sufficient evidentiary showing to warrant a hearing or no hearing is requested and the court has sufficient information to undertake a comprehensive independent review of the child[]'s best interests' ... . 'In assessing whether the petitioner has alleged the requisite change in circumstances, so as to withstand a motion to dismiss for failure to state a claim, Family Court must liberally construe the petition, accept the facts alleged in the petition as true, afford the petitioner the benefit of every favorable inference and resolve all credibility questions in favor of the petitioner' ... . The change in circumstances alleged by the mother in her petition included, among other things, the child's 'strong desire to relocate' with the mother to New Jersey and a recent breakdown in the child's relationship with the father. In concluding that these allegations were facially insufficient, Family Court failed to accept the mother's allegations as true, afford her the benefit of every favorable inference and resolve credibility issues in her favor." ***Matter of Sarah OO. v. Charles OO.*, 2021 N.Y. Slip Op. 05758, Third Dept 10-21-21**

## FAMILY LAW, EVIDENCE.

THE DEPARTMENT OF SOCIAL SERVICES DID NOT MEET ITS BURDEN OF PROOF ON ITS ABANDONMENT CLAIMS IN THIS TERMINATION-OF-PARENTAL-RIGHTS PROCEEDING; PETITION DISMISSED.

The Third Department, reversing Family Court, determined the petitioner (Department of Social Services) did not meet its burden of proof on whether respondent had abandoned the child in this termination-of-parental-rights proceeding: " 'A finding of abandonment is warranted when it is established by clear and convincing evidence that the parent failed to visit or communicate with the child or the petitioning agency during the six-month period immediately prior to the filing of the abandonment petition, although able to do so and not prevented or discouraged from doing so by petitioner' ( ... see Social Services Law § 384-b [5] [a] ...). It is presumed that a parent has the ability to visit and/or communicate with his or her child and, therefore, '[o]nce the petitioning agency establishes that the parent failed to maintain contact with his or her child, the burden shifts to the parent to prove an inability to maintain contact or that he or she was prevented or discouraged from doing so by the petitioning agency' ... . ... The caseworker... only observed two ... visitations, each for only a limited period of time, during which she acknowledged that respondent brought snacks for the child. Respondent was otherwise precluded from making any other attempts to contact the child — i.e., telephone calls — outside of her scheduled supervised parenting time. The caseworker ... acknowledged that ... respondent was hospitalized with an injury that required emergency brain surgery, which prevented her from exercising one of her scheduled visitations that month, and respondent subsequently executed a medical release so that petitioner could verify same. ... [A]lthough the caseworker initially indicated that she had not had any contact with respondent since May 2019, during cross-examination she indicated that respondent had, in fact, called her one or two times during the relevant time period." ***Matter of Khavonye FF. (Latasha EE.)*, 2021 N.Y. Slip Op. 05753, Third Dept 10-21-21**

## FAMILY LAW, EVIDENCE.

THE DEPARTMENT OF SOCIAL SERVICES DID NOT DEMONSTRATE RESPONDENTS (MOTHER AND FATHER) VIOLATED THE ORDER OF SUPERVISION; IN THIS ORDER-VIOLATION PROCEEDING, FAMILY COURT SHOULD NOT HAVE RELIED UPON AND REFERRED TO EVIDENCE, SOME OF WHICH WAS INADMISSIBLE HEARSAY, FROM THE UNDERLYING NEGLECT PROCEEDING.

The Third Department, reversing Family Court, determined the Department of Social Services (petitioner) did not demonstrate respondents (mother and father) violated the order of supervision and Family Court should not have incorporated evidence from a separate neglect proceeding into the order-violation proceeding: "[I]t was error in the context of a violation motion for Family Court to find that respondents were in 'technical' compliance with the order of supervision but were nonetheless in violation of said order. ... [T]he quantum of proof required to establish a willful violation of a court order pursuant to Family Ct Act § 1072 is clear and convincing evidence ... , which was not established here. * * * ... [T]he court permitted petitioner to introduce unproven allegations against respondents from the underlying neglect proceeding, evidence relating to other conduct that predated the ... order, as well as inadmissible hearsay contained in the case notes authored by petitioner's employees and the children's therapists. As the court's decision is replete with references to this evidence, the admission of this evidence, if relied upon at all to establish willful violations, irreparably tainted its decision ...". ***Matter of Nicholas L. (Melissa L.)*, 2021 N.Y. Slip Op. 05746, Third Dept 10-21-21**

## FORECLOSURE, CIVIL PROCEDURE, ATTORNEYS, JUDGES.

PURSUANT TO CPLR 3408(B), WHEN DEFENDANTS IN THIS FORECLOSURE ACTION APPEARED WITHOUT COUNSEL AT THE SETTLEMENT CONFERENCE, SUPREME COURT SHOULD HAVE DETERMINED WHETHER THEY WERE ENTITLED TO ASSIGNED COUNSEL, MATTER REMITTED.

The Third Department, remitting the matter for a finding whether defendants in this foreclosure action are eligible for assigned counsel, determined the judge did not comply with CPLR 3408(b) at the settlement conference: "[CPLR 3408 (b)] provides that, at the initial foreclosure settlement conference, 'any defendant currently appearing pro se[] shall be deemed to have made a motion to proceed as a poor person under [CPLR 1101]. The court shall determine whether such permission shall be granted pursuant to standards set forth in [CPLR 1101]' (CPLR 3408 [b]). Because defendants appeared at the June 2016 settlement conference without representation, each was 'deemed to have made a motion to proceed as a poor person' and Supreme Court was required to determine such motion (CPLR 3408 [b]). Although Supreme Court erred in failing to adhere to its obligations under CPLR 3408 (b), the question remains whether defendants would have been eligible for the assignment of counsel based upon their financial circumstances. The record does not contain adequate information to render such a determination (see CPLR 1101 [a]). The eligibility for assigned counsel is a threshold issue that must be resolved before we can determine the merits of this appeal. As such, we withhold decision and remit the matter to Supreme Court to render a determination as to defendants' eligibility for assigned counsel as of the June 2016 settlement conference ...". ***Carrington Mtge. Servs., LLC v. Fiore*, 2021 N.Y. Slip Op. 05743, Third Dept 10-21-21**

## PERSONAL INJURY, EMPLOYMENT LAW.

PLAINTIFF, A LANDSCAPING CONTRACTOR, DID YARD WORK FOR DEFENDANT HOMEOWNER, INCLUDING SPREADING MULCH AND USING HIS OWN LADDER TO TRIM A TREE; PLAINTIFF POSITIONED THE LADDER ON THE MULCH; THE LADDER FELL OVER WHEN PLAINTIFF WAS STANDING ON IT; DEFENDANT HOMEOWNER DID NOT CREATE OR HAVE NOTICE OF THE DANGEROUS CONDITION (THE MULCH) AND DID NOT SUPERVISE OR DIRECT PLAINTIFF'S TREE-TRIMMING WORK; DEFENDANT'S SUMMARY JUDGMENT MOTION SHOULD HAVE BEEN GRANTED (THIRD DEPT).

The Third Department, reversing (modifying) Supreme Court, determined defendant homeowner's motion for summary judgment in this ladder-fall case should have been granted. Plaintiff alleged defendant asked him to trim some tree branches. Plaintiff placed his own ladder on mulch which he (plaintiff) had spread there as part of his landscaping work. Plaintiff alleged the mulch constituted a dangerous condition which caused the ladder to tip. Plaintiff also alleged the owner exercised supervision and control over his work and was liable for directing him to trim the tree: "Even assuming that defendant had a conversation with plaintiff, the request to trim the trees was a general instruction about what needed to be done without any direction about how to perform the task ... . It is undisputed that defendant neither provided any equipment for the project nor directed the manner in which the ladder was placed or the trimming performed ... . ... As to the dangerous condition theory of liability, ... defendant did not create the hazard, as it is undisputed that plaintiff and his associates were the ones who spread the mulch and placed the ladder ... . Nor is there any evidence that defendant had actual or constructive notice of the allegedly dangerous condition. Defendant was not shown to have expertise in landscaping and, even if he was inside the house when the ladder was being set up on the mulch, this general awareness would be insufficient to establish notice of an unsafe condition ...". ***Vickers v. Parcells*, 2021 N.Y. Slip Op. 05762, Third Dept 10-21-21**

## NEGLIGENCE, NUISANCE, ENVIRONMENTAL LAW.

NOXIOUS ODORS FROM A LANDFILL DID NOT SUPPORT THE PUBLIC NUISANCE AND NEGLIGENCE CAUSES OF ACTION; COMPLAINT DISMISSED.

The Third Department, in a full-fledged opinion by Justice Lynch, over a dissent, reversing Supreme Court, determined the public nuisance and negligence causes of action stemming from odors from a landfill should have been dismissed. The public nuisance cause of action alleged only injury to the public at large, not the required special injury unique to the parties. The negligence cause of action did not allege any tangible property damage or physical injury: "[P]laintiffs here have not asserted an injury that is different in kind from the relevant community at large, which, in our view, consists of the other homeowners and renters impacted by the landfill's odors ... . * * * To recover in negligence, a plaintiff must sustain either physical injury or property damage resulting from the defendant's alleged negligent conduct ... . ... [T]he noxious odors at issue are transient in nature and do not have a continuing physical presence. ... [P]laintiffs have not alleged any tangible property damage or physical injury resulting from exposure to the odors. ... [T]he economic loss resulting from the diminution of plaintiffs' property values is not, standing alone, sufficient to sustain a negligence claim under New York law ...". ***Davies v. S.A. Dunn & Co., LLC*, 2021 N.Y. Slip Op. 05751, Third Dept 10-21-21**

Similar issues and result in ***Duncan v. Capital Region Landfills, Inc.*, 2021 N.Y. Slip Op. 05757, Third Dept 10-21-21**

## UNEMPLOYMENT INSURANCE.

CLAIMANT WAS NOT AN EMPLOYEE OF A COMPANY RUNNING A WEBSITE AND APP TO CONNECT PET OWNERS WITH PET SITTERS, WALKERS AND BOARDERS, ETC.

The Third Department, reversing the Unemployment Insurance Appeal Board ("Board"), determined claimant was not an employee of Rover, a website which connects pet owners to pet sitters, walkers, boarders, etc.: "Rover only exercises control over the platform that a provider uses to find client pet owners and not any part of the job itself ... , and this type of incidental control over the provider's services is insufficient to establish an employer-employee relationship ... . More analogous to fitness instructors and odd-job taskers, and, in contrast to Uber drivers or Postmates couriers, providers are individually selected by their client pet owners and 'have the ability to create a following or generate their own [repeat] customer base' ... . As Rover does not exercise any control over the manner in which the providers perform their services, the means used or results produced, substantial evidence does not support the Board's determination that Rover exercised sufficient direction, supervision and control over the providers to demonstrate an employment relationship ...". ***Matter of Hawkins (A Place for Rover Inc.--Commissioner of Labor)*, 2021 N.Y. Slip Op. 05748, Third Dept 10-21-21**

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