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FIRST DEPARTMENT

ACCOUNT STATED, CONTRACT LAW, ATTORNEYS.

ATTORNEY'S FEES RECOVERABLE UNDER AN ACCOUNT-STATED THEORY DESPITE TERMINATION OF THE ATTORNY-CLIENT RELATIONSHIP.

The First Department, reversing Supreme Court, determined plaintiff law firm was entitled to summary judgment on the account-stated causes of action seeking payment of attorney's fees, despite the termination of the attorney-client relationship: "Plaintiff law firm ... established entitlement to summary judgment on its claim for an account stated with respect to its June invoices by production of documentary evidence showing defendants received the June invoices and defendants' admissions in their answer that they made partial payments for those invoices ... . Plaintiff also established entitlement to summary judgment on its account stated claim with respect to the July invoices. The documentary evidence established that defendant received the July invoices ... and the ... affidavit established that defendants retained those invoices without making any specific objection to them ... . [P]laintiff's termination does not prohibit its recovery under an account stated theory, and the law firm may recover for pretermination legal services billed to defendants at the agreed upon hourly rate, which defendants retained without objection ...". ***Katsky Korins LLP v. Moskovits*, 2021 N.Y. Slip Op. 05815, First Dept 10-26-21**

BATTERY, MUNICIPAL LAW.

ASSAULT AND BATTERY CAUSES OF ACTION AGAINST THE POLICE DO NOT REQUIRE A SPECIAL DUTY OWED TO PLAINTIFF.

The First Department, reversing Supreme Court, determined the assault and battery causes of action against the city did not require demonstration of a special duty owed plaintiffs by the police: "Plaintiff's ... causes of action sounded in assault and battery, and not negligence. Therefore, the question was not whether the police owed plaintiff a special duty ... , but whether the force used against her was more than necessary under the circumstances ... . Plaintiff's deposition testimony concerning the police officers' conduct toward her supported the elements of a claim for assault and battery ... . While defendants did not specifically recall interacting with plaintiff, they described a situation where they were disbursing a large crowd that was gathering around three different fights going on at the same time. Defendants do not dispute that plaintiff may have been pushed or shoved during the course of that incident. 'Because of its intensely factual nature, the question of whether the use of force was reasonable under the circumstances is generally best left for a jury to decide' ..". ***Butler v. City of New York*, 2021 N.Y. Slip Op. 05810, First Dept 10-26-21**

CRIMINAL LAW, JUDGES, ATTORNEYS.

DEFENDANT WAS NOT ADEQUATELY INFORMED ABOUT HIS SENTENCING EXPOSURE, THE NATURE OF THE CHARGES OR THE RISKS OF REPRESENTING HIMSELF; NEW TRIAL ORDERED.

The First Department, reversing defendant's conviction and ordering a new trial, determined defendant was not adequately warned about the risks of representing himself: "The record 'does not sufficiently demonstrate that defendant was aware of his actual sentencing exposure' ... , including the potential for his sentences in two pending cases, arising from unrelated incidents, to run consecutively. The court also failed to inquire into defendant's understanding of 'the nature of the charges' ... . This despite defendant's admission that he did '[n]ot necessarily' understand the charges in one case and was 'still coming to grips with the charges' in the other case. The court's statement during the waiver colloquy that defendant was 'facing felony charges' was inadequate for that purpose. Moreover, the court's inquiry did not 'accomplish the goals of adequately warning a defendant of the risks inherent in proceeding pro se and apprising a defendant of the singular importance of the lawyer in the adversarial system of adjudication' ... . The court failed to warn defendant about the numerous pitfalls of representing himself before and at trial, such as unfamiliarity with legal terms, concepts, and case names; the potential challenges of cross-examining witnesses and delivering an opening statement and summation as a pro se criminal defendant. While there is no mandatory 'catechism for this inquiry,' there must be a 'searching inquiry' conducted by a court before permitting self-representation ... . Under the particular circumstances of this case, we find that defendant's waiver of his right to counsel was not knowing, intelligent, and voluntary." ***People v. Perry*, 2021 N.Y. Slip Op. 05826, First Dept 10-26-21**

FAMILY LAW, CONTRACT LAW, REAL ESTATE.

SUPREME COURT SHOULD NOT HAVE ORDERED THE SALE OF THE MARITAL RESIDENCE; HUSBAND AND WIFE HAD NOT AGREED ON THE MATERIAL TERMS OF THE SALE.

The First Department, reversing Supreme Court, in a full-fledged opinion by Justice Rodriguez, over a two-justice dissent, determined the wife did not consent to the sale of the marital residence. There was never a meeting of the minds. Therefore, Supreme Court should not have ordered the sale: "The husband's proposed order contained many of the conditions imposed by Supreme Court in the order on appeal, including scheduled mandatory price reductions and required acceptance of certain offers. The wife's proposed counter order, on the other hand, contained no proposed initial list price, no procedure for list price reduction or reevaluation, and no required acceptance of offers at any price level. As to a potential sale, the wife's proposed counter order provided that the property 'should either be listed for sale or the Wife shall advise the Husband in writing that she intends to buy-out his interest in the Townhouse' and, further, that '[t]he Townhouse will only be sold under the terms of an agreed Stipulation between the parties.' The order on appeal reflects that Supreme Court adopted the husband's order with minimal revisions, essentially rejecting the wife's preconditions to the sale of the townhouse and imposing its own additional conditions. ... [E]ven assuming arguendo that the dissent is correct that the wife initially agreed to the sale of the townhouse, she revoked her consent because the parties were unable to agree on the material terms of the sale ... ." ***Taglioni v. Garcia*, 2021 N.Y. Slip Op. 05936, First Dept 10-28-21**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

PLAINTIFF WAS ENTITLED TO SUMMARY JUDGMENT ON LABOR LAW §§ 240(1) AND 241(6) CAUSES OF ACTION STEMMING FROM TWO INCIDENTS: A WALL FELL ON PLAINTIFF; PLAINTIFF WAS INJURED BY A DEFECTIVE GRINDER.

The First Department, reversing (modifying) Supreme Court, determined plaintiff's motions for summary judgment on Labor Law §§ 240(1) and 241(6) causes of causes of action should have been granted. Two separate incidents were alleged: (1) a wall fell on plaintiff; and (2) plaintiff was injured after he was directed to use a defective grinder: "[Plaintiff] had been instructed to clean up debris directly underneath a form used for concrete, and that the form came off the wall and fell on top of him from a height of three to five feet ... . Plaintiff's inability to explain precisely what caused the form to fall on him does not preclude Labor Law § 240(1) liability ... . Plaintiff demonstrated that he was injured when the steel and plywood form fell on him because an elevation-related safety device failed, or no device was placed and operated so as to provide him with adequate protection ... . [P]laintiff was not required to supply an expert affidavit ... . Plaintiff was directed to use a visibly defective grinder that had no blade, safety guard or side handle. There was also no cut-off switch. While he was using the grinder, it spontaneously cut off and then turned back on, without plaintiff engaging the power switch. When plaintiff complained, he was instructed to proceed with the defective grinder or go home." ***Viruet v. Purvis Holdings LLC*, 2021 N.Y. Slip Op. 05840, First Dept 10-26-21**

MENTAL HYGIENE LAW. JUDGES.

THE INCAPACITATED PERSON'S SON SHOULD NOT HAVE BEEN REPLACED AS GUARDIAN BY A NON-FAMILY-MEMBER IN THE ABSENCE OF A TESTIMONIAL HEARING.

The First Department, reversing Supreme Court, determined the Incapacitated Person's (IP's) son should not have been removed as guardian and replaced with a non-family-member in the absence of a testimonial hearing: "Rather than hold a testimonial hearing, Supreme Court simply accepted what the Court Examiner claimed in her motion. The Court did not make any findings of fact or conclusions of law to justify the removal of petitioner. Nor did it hold that removal of the petitioner was in the best interest of the IP. Petitioner did not have any opportunity to testify under oath, or rebut the allegations made against him, despite his competency as a guardian being directly at issue ... . A testimonial hearing in this case is necessary so that the record can be developed, and the disputed issues of fact and law can be resolved. We have long recognized that strangers will not be appointed either a guardian of the person or the property unless it is impossible to find someone within the family circle who is qualified to serve ... . The preference for a relative may be overridden by a showing that the guardian-relative has rendered inadequate care to the IP, has an interest adverse to the IP or is otherwise unsuitable to exercise the powers necessary to assist the IP … . Moreover, the ultimate remedy of removal may be an abuse of discretion, where a guardian's errors do not prejudice or harm the estate. The court should also consider whether other less drastic remedies, such as ordering compliance or reducing the guardian's compensation, would be appropriate." ***Matter of Roberts v. Maxis*, 2021 N.Y. Slip Op. 05833, First Dept 10-26-21**

REAL ESTATE, CONTRACT LAW.

THE CONTRACT OF SALE INCLUDED THE PURCHASER'S AGREEMENT TO FORFEIT THE DOWN PAYMENT IF SHE DID NOT CLOSE ON THE AGREED DATE; THEREFORE, THE SELLERS WERE ENTITLED TO THE DOWN PAYMENT; UNJUST ENRICHMENT CANNOT BE CLAIMED IN THE FACE OF A WRITTEN AGREEMENT.

The First Department, reversing Supreme Court, determined the failure to close on the date agreed to in the contract of sale was a default entitling defendants to retain the down payment: "Defendants submitted a signed copy of the contract of sale, which contains all the material terms, and the amendment to the contract, pursuant to which plaintiff agreed that, in exchange for additional time to close on the purchase, she would cover defendants' carrying costs and would waive any right to recovery of the down payment if she did not close on the sale by the agreed-to date. Plaintiff did not close by the required date, and the balance of the down payment was remitted to defendants. Plaintiff's failure to close by the agreed-to date constitutes a default under the purchase agreement and the amendment thereto, and the default entitles defendants to retain the down payment as liquidated damages pursuant to paragraph 13.1 of the purchase agreement and paragraph 5 of the amendment ... . Similarly, a claim for unjust enrichment will not stand in the face of the written agreement ... . An appeal to equity is equally unavailing, since the law is established that 'a vendee who defaults on a real estate contract without lawful excuse cannot recover his or her down payment' ...". ***Jennings v. Silfen*, 2021 N.Y. Slip Op. 05923, First Dept 10-28-21**

SECOND DEPARTMENT

CIVIL PROCEDURE, FORECLOSURE.

THE COURT NEVER ENTERED AN ORDER RE: DEFENDANT'S MOTION TO DISMISS; THEREFORE, THE TIME FOR DEFENDANT TO INTERPOSE AN ANSWER IN THIS FORECLOSURE ACTION NEVER STARTED TO RUN.

The Second Department, reversing Supreme Court, determined the time for interposing an answer in this foreclosure action never started to run because the court never entered an order deciding defendant's motion to dismiss: "The Supreme Court, however, erred in granting those branches of the plaintiff's motion which were for leave to enter a default judgment against the defendant and for an order of reference. In the order ... , the court held that branch of the defendant's motion which was pursuant to CPLR 3211(a)(3) in abeyance pending the framed-issue hearing, and the defendant therefore had until 10 days after service of notice of entry of the order deciding that branch of the motion to file an answer ... . Since the court failed to issue an order deciding that branch of the defendant's motion which was pursuant to CPLR 3211(a)(3) prior to granting those branches of the plaintiff's motion which were for leave to enter a default judgment against the defendant and for an order of reference, the defendant's time to file an answer had not yet begun to run and the defendant therefore was not in default ... . Contrary to the plaintiff's contention, the referee's report cannot be considered a determination that, in effect, denied that branch of the defendant's motion which was pursuant to CPLR 3211(a)(3) to dismiss the complaint ... , as there is no evidence in the record that the parties consented to the reference, and the referee therefore lacked the authority to determine the issue of standing conclusively ...". ***HSBC Bank USA, N.A.. v. Sewell*, 2021 N.Y. Slip Op. 05850, Second Dept 10-27-21**

CIVIL PROCEDURE, FORECLOSURE.

RES JUDICATA PRECLUDED CLAIMS WHICH COULD HAVE BEEN RAISED IN A PRIOR PROCEEDING.

The Second Department, reversing Supreme Court, determined the causes of action for tortious interference with contract and tortious interference with business relations against defendant JAZ were precluded by the doctrine of res judicata: " 'Under res judicata, or claim preclusion, a valid final judgment bars future actions between the same parties on the same cause of action' ... . 'One linchpin of res judicata is an identity of parties actually litigating successive actions against each other: the doctrine applies only when a claim between the parties has been previously brought to a final conclusion' ... . 'The doctrine of res judicata operates to preclude the reconsideration of claims actually litigated and resolved in a prior proceeding, as well as claims for different relief against the same party which arise out of the same factual grouping or transaction, and which should have or could have been resolved in the prior proceeding' ... . 'A pragmatic test has been applied to make this determination—analyzing whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage' ... . Here, the tortious interference with contract and tortious interference with business relations causes of action insofar as asserted against JAZ in this action could have been raised in the prior action, which arose out of the same transaction or series of transactions as those presented in this action ...". ***Jacobson Dev. Group, LLC v. Grossman*, 2021 N.Y. Slip Op. 05851, Second Dept 10-27-21**

CORPORATION LAW, CIVIL PROCEDURE.

PLAINTIFF SHOULD NOT HAVE BEEN ALLOWED TO CONFORM THE PLEADINGS TO THE PROOF RE: PIERCING THE CORPORATE VEIL; DEFENDANT WAS PREJUDICED BY THE FAILURE TO PLEAD THE SUPPORTING ALLEGATIONS.

The Second Department, reversing Supreme Court, determined plaintiff should not have been allowed to conform the pleadings to the proof re: piercing the corporate veil for two reasons: (1) defendant Chilled was prejudiced by the failure to plead facts supporting the alter ego theory; and (2) the proof at trial did not demonstrate Chilled was the alter ego of defendant EMB: "Chilled demonstrated that it was prejudiced in the preparation of its defense by the lack of notice that the plaintiff would seek to pierce EMB's corporate veil or prove that Chilled was an alter ego of EMB ... . In general, claims involving veil piercing or alter ego liability are fact-laden ... . Chilled established that the lack of notice hindered its ability to present evidence that might have shown ... that corporate formalities were respected or that EMB and Chilled dealt with each other at arms' length. * * * ... [T]he plaintiff failed to establish that Chilled exercised complete domination over EMB in the transaction with the plaintiff ... . ,,, [T]he plaintiff failed to establish that Chilled used its alleged domination of EMB to commit a fraud or wrong against the plaintiff ...". ***Americore Drilling & Cutting, Inc. v. EMB Contr. Corp.*, 2021 N.Y. Slip Op. 05845, Second Dept 10-27-21**

ENVIRONMENTAL LAW, ZONING, LAND USE.

ALLOWING THE APPLICANT FOR SITE PLAN APPROVAL TO RETURN WITH A SIGNAGE PROPOSAL AFTER THE PLAN WAS APPROVED DID NOT CONSTITUTE (IMPERMISSIBLE) SEGMENTATION UNDER SEQRA.

The Second Department determined the fact the site plan was approved by the planning board without signage did not constitute segmentation under the State Environmental Quality Review Act (SEQRA): "The fact that the site plan was approved without signage did not constitute segmentation under SEQRA. Segmentation is defined as the division of the environmental review of a single action such that various activities or stages are addressed as though they are independent, unrelated activities, needing individual determinations of significance (see 6 NYCRR 617.2[ah]). The regulations which prohibit segmentation are designed to guard against a distortion of the approval process by preventing a project with potentially significant environmental effects from being split into two or more smaller projects, each falling below the threshold requiring full-blown review ... . Here, signage is not being treated as an independent, unrelated activity, but as a part of the entire project, and allowing [the applicant] to return to the Planning Board with a signage proposal will not distort the approval process." ***Matter of Route 17K Real Estate, LLC v. Planning Bd. of the Town of Newburgh*, 2021 N.Y. Slip Op. 05858, Second Dept 10-27-21**

FAMILY LAW, ATTORNEYS.

FAMILY COURT DID NOT ENSURE FATHER'S WAIVER OF HIS RIGHT TO COUNSEL IN THIS CUSTODY MODIFICATION PROCEEDING WAS KNOWING, INTELLIGENT AND VOLUNTARY; NEW HEARING ORDERED.

The Second Department, ordering a new modification of custody hearing, determined Family Court did not ensure that father's waiver of his right to counsel was voluntarily and intelligently made: "In order to determine whether a party has validly waived the right to counsel, a court must conduct a 'searching inquiry' to ensure that the waiver has been made knowingly, voluntarily, and intelligently ... . 'While there is no rigid formula to be followed in such an inquiry, and the approach is flexible, the record must demonstrate that the party was aware of the dangers and disadvantages of proceeding without counsel' ... . 'For example, the court may inquire about the litigant's 'age, education, occupation, previous exposure to legal procedures and other relevant factors bearing on a competent, intelligent, voluntary waiver' ... . Here, the Family Court did not conduct a sufficiently searching inquiry to ensure that the father's waiver of his right to counsel was knowingly, voluntarily, and intelligently made ... . '[T]he deprivation of a party's fundamental right to counsel in a custody or visitation proceeding requires reversal, without regard to the merits of the unrepresented party's position' ...". ***Matter of Lherisson v. Goffe*, 2021 N.Y. Slip Op. 05856, Second Dept 10-27-21**

MEDICAL MALPRACTICE, EVIDENCE.

EVIDENCE PLAINTIFF'S DECEDENT'S SISTER CARRIED A GENE WHICH INCREASED THE CHANCE OF DEVELOPING OVARIAN CANCER SHOULD NOT HAVE BEEN EXCLUDED FROM THIS MEDICAL MALPRACTICE TRIAL.

The Second Department, reversing Supreme Court in this medical malpractice action, determined evidence that plaintiff's decedent's sister carried a gene which increased the chance of developing ovarian cancer should have been admitted: " 'Establishing proximate cause in medical malpractice cases requires a plaintiff to present sufficient medical evidence from which a reasonable person might conclude that it was more probable than not that the defendant's departure was a substantial factor in causing the plaintiff's injury' ... . 'A plaintiff's evidence of proximate cause may be found legally sufficient even if his or her expert is unable to quantify the extent to which the defendant's act or omission decreased the plaintiff's

chance of a better outcome or increased the injury, as long as evidence is presented from which the jury may infer that the defendant's conduct diminished the plaintiff's chance of a better outcome or increased [the] injury' ... . The evidence that the decedent's sister tested positive for the harmful variant of the BRCA2 gene was not unduly prejudicial and was relevant to the issue of proximate cause, as it would have supported the plaintiff's argument and the testimony of the plaintiff's expert that the decedent would have undergone gene testing if properly advised to do so, and more likely than not would have tested positive for the harmful gene variant and undergone a procedure to remove her ovaries, diminishing her chances of developing ovarian cancer. This evidence also would have contradicted the position of the Akhund defendants that the decedent's chances of testing positive for the harmful gene variant were as low as 2.5 to 5% ... . The weight to be accorded to this evidence is a matter to be determined by the jury ...". ***Walsh v. Akhund*, 2021 N.Y. Slip Op. 05890, Second Dept 10-27-21**

THIRD DEPARTMENT

CRIMINAL LAW, JUDGES.

ALTHOUGH DEEMED HARMLESS, IT WAS ERROR TO HAVE THE DEFENDANT SHACKLED DURING A PORTION OF THE TRIAL.

The Third Department determined defendant should not have been shackled during the trial, but deemed the error harmless: "Defendant ... contends that County Court erred in allowing him to be shackled during a portion of the trial. It is well settled that 'a defendant has a right to be free of visible restraints during criminal proceedings unless the trial court states a case-specific reason for their use' ... . The use of shackles has been deemed appropriate 'for reasons of security, to prevent disruption of the trial, harm to those in the courtroom, escape or release of the accused, or the commission of other crimes' ... . The record discloses that, in making its determination, County Court considered the nature of the crime with which defendant was charged, deferred to the correction officers' recommendations and referenced defendant's verbal outbursts throughout the morning. These are insufficient reasons to restrain defendant ... . [W]e are satisfied that this error was harmless as the evidence demonstrated that defendant's guilt was overwhelming and there was no reasonable possibility that the error affected the outcome of the trial. We are even more confidant of this conclusion in light of the fact that County Court gave curative instructions to the jury on numerous occasions — including during jury selection, at the commencement of the trial and during final jury instructions — and especially considering that the jury was aware that defendant was already incarcerated ...". ***People v. Banch*, 2021 N.Y. Slip Op. 05894, Third Dept 10-28-21**

ENVIRONMENTAL LAW, MUNICIPAL LAW, UTILITIES.

IN APPROVING A WIND TURBINE INSTALLATION, THE STATE BOARD ON ELECTRIC GENERATION AND SITING AND THE ENVIRONMENT PROPERLY REFUSED TO CONSIDER LOCAL LAWS ENACTED BY THE TOWN AFTER THE EVIDENTIARY HEARING WAS CLOSED; THE LOCAL LAWS SOUGHT TO IMPOSE A MORATORIUM ON THE PROJECT.

The Third Department, in a full-fledged opinion by Justice Pritzker, determined the State Board on Electric Generation Siting and the Environment (siting board) had properly approved the Bluestone Wind Farm Project. The siting board properly ignored local laws enacted by the town after the evidentiary hearing was closed which attempted to impose a moratorium on the project to allow further study: "The legislative history and intent fully support this decision. In enacting the predecessor to Public Service Law article 10, the Legislature acted with the express purpose of providing 'for the expeditious resolution of all matters concerning the location of major steam electric generating facilities presently under the jurisdiction of multiple state and local agencies, including all matters of state and local law, in a single proceeding' ... . In its current iteration, article 10 'was enacted in 1992 to provide 'a comprehensive framework for developing and implementing sound energy policy for the [s]tate that integrates energy planning with consideration of environmental quality and [to provide] a one-stop process for the siting of major electric generating facilities' ... . 'One goal of the legislation was to permit comprehensive review of the benefits and impacts anticipated from proposed facilities without unreasonable delay [and,] . . . [i]ndeed, the expeditious resolution of siting applications is a goal noted throughout documents submitted in support of the legislation' ... . This goal was manifested in the 12-month deadline imposed on the Siting Board to issue a final determination on each application before it ... . Public Service Law article 10 requires the inclusion of all substantive local laws in the record by way of a specific exhibit to be incorporated into each application ... . Any disputes as to whether a proposed facility complies with a local substantive law are thus intended to be resolved by way of evidence presented during the hearing to the Hearing Examiners, and the statute explicitly places the burden on the municipality to present evidence in support of enforcement of the local law in question ... . 'Thus, the history and scope of article [10], as well as its comprehensive regulatory scheme, . . . would be frustrated by' last minute laws such as Local Law No. 4 ...". ***Matter of Broome County Concerned Residents v. New York State Bd. on Elec. Generation Siting & the Envt.*, 2021 N.Y. Slip Op. 05903, Third Dept 10-28-21**

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