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# FIRST DEPARTMENT

## LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

A STAIRWAY CAN BE A "PASSAGEWAY" WITHIN THE MEANING OF THE INDUSTRIAL CODE; THE LABOR LAW § 241(6) CAUSE OF ACTION SHOULD NOT HAVE BEEN DISMISSED.

The First Department, reversing (modifying) Supreme Court, determined that a stairway where plaintiff fell could be a "passageway" within the meaning of the Industrial Code. Therefore the Labor Law § 241(6) cause of action should not have been dismissed: "For purposes of the applicability of Industrial Code (12 NYCRR) § 23-1.7(d), a staircase may constitute a passageway when that staircase is the sole access to the work site ... . Here, plaintiff and his coworkers were required to use the loading dock entrance, where they would check in with security and go down to the basement level; from the basement, the workers proceeded to the floors where construction was ongoing. Although workers had the option of using a single-stop elevator to gain access to the basement, plaintiff's uncontradicted testimony showed that the workers used the staircase, not the elevator. At the time of plaintiff's accident, he was with several coworkers, all of whom had just checked in with the security guard and were using the staircase. CJS offered no evidence that any of the workers for any of the contracted trades used the single-stop elevator for purposes other than delivering construction material. Under these circumstances, where the staircase on which plaintiff fell the way in which the workers generally accessed the basement level, the staircase was a passageway for Labor Law § 241(6) purposes ...". ***Tolk v. 11 W. 42 Realty Invs., L.L.C.*, 2022 N.Y. Slip Op. 00150, First Dept 1-11-22**

## LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

QUESTION OF FACT WHETHER PLAINTIFF SLIPPED AND FELL ON ICE OR SNOW IN AN AREA WHICH HAD BEEN CLEARED SUCH THAT IT CONSTITUTED A "PASSAGEWAY" WITHIN THE MEANING OF THE INDUSTRIAL CODE RE: THIS LABOR LAW § 241(6) ACTION.

The First Department determined there was a question of fact in this Labor Law § 241(6) action about whether the area where plaintiff slipped and fell on ice or snow was a "passageway" within the meaning of the Industrial Code: "This personal injury action stems from injuries sustained by plaintiff when he allegedly slipped and fell on snow or ice while walking from an area on a roof, where he was performing mason work, to its exit. ... 'Although the regulations do not define the term 'passageway' . . . , courts have interpreted the term to mean a defined walkway or pathway used to traverse between discrete areas as opposed to an open area' ... . ... The record contains competing evidence as to the location of the accident, whether a path had been cleared so that workers could safely walk between the stairway and the location on the roof where the work was being performed and whether it was necessary for plaintiff to traverse the area where he allegedly fell. ... If, as defendants claim, plaintiff's accident occurred outside of the passageway or pathway defendants claim existed, then issues of fact exist as to whether it was necessary for plaintiff to traverse that area as part of his work ...". ***Venezia v. LTS 711 11th Ave.*, 2022 N.Y. Slip Op. 00152, First Dept 1-11-22**

## LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

THE SCAFFOLD BRACING BAR OVER WHICH PLAINTIFF TRIPPED WAS OPEN AND OBVIOUS AND NOT INHERENTLY DANGEROUS; LABOR LAW § 200 AND COMMON LAW NEGLIGENCE CAUSES OF ACTION DISMISSED.

The First Department, reversing Supreme Court, determined the scaffold-bracing bar over which plaintiff tripped was open and obvious and not inherently dangerous. Therefore the Labor Law § 200 and common law negligence causes of action should have been dismissed: "[T]he horizontal cross-bracing bar affixed to the scaffold, about 14 inches above the ground, which plaintiff tripped over while attempting to step over it, was open and obvious, and not inherently dangerous ... . Plaintiff, a carpenter for 28 years, testified that the cross-bracing was readily observable, he was aware of its presence, having stepped over it without incident on four to six prior occasions, and that the bar was stationary and secure and did not move or shift when his foot struck it. Plaintiff's own imprudent act of attempting to climb over the cross-bracing bar, rather than use the available openings in the scaffold without bars, was the sole proximate cause of his injury ... . Plaintiff

was admittedly aware that a safer method was available to him, and instead chose not to use it ...". ***Peranzo v. WFP Tower D Co. L.P.*, 2022 N.Y. Slip Op. 00147, First Dept 1-11-22**

### PERSONAL INJURY, CONTRACT LAW.

PLAINTIFF TRIPPED AND FELL ON AN UNEVEN MAT WHEN SHE STEPPED OFF THE DEFENDANT'S SKATING RINK; THE ACTION AGAINST THE COMPANY WHICH SOLD AND INSTALLED THE MAT SHOULD HAVE BEEN DISMISSED; THERE WAS NO CONTRACT BETWEEN THE OWNER OF THE SKATING RINK AND THE SELLER/INSTALLER OF THE MAT AND THERE WAS NO EVIDENCE THE SELLER/INSTALLER OF THE MAT LAUNCHED AN INSTRUMENT OF HARM.

The First Department, reversing (modifying) Supreme Court, determined that the action against the company "Classic" which sold and installed a mat used on an entrance ramp for a skating rink should have been dismissed. Plaintiff alleged the mat was uneven with lumpy ice build-ups which caused her to fall after she stepped off the skating rink. Classic had no contractual relationship with the owner of the skating rink, WRO, and there was no evidence Classic "launched an instrument of harm:" The record shows that WRO purchased the ramp matting from Classic and that Classic installed the matting. Classic owed no duty to plaintiff, and there was no contract between WRO and Classic. Thus, contrary to plaintiff's argument, Classic has no tort liability based upon Espinal v Melville Snow Contrs. (98 NY2d 136 [2002]), where under certain circumstances, a duty of care to noncontracting third parties may arise out of a contractual obligation. In any event, even if there had been a contractual relationship between WRO and Classic, the record does not raise any triable issue as to whether Classic 'launche[d] a force or instrument of harm' ...". ***Samuelsen v. Wollman Rink Operations LLC*, 2022 N.Y. Slip Op. 00149, First Dept 1-11-22**

### NEGLIGENCE, MUNICIPAL LAW, IMMUNITY, CIVIL PROCEDURE.

PLAINTIFF'S VERDICT IN THIS SUBWAY ACCIDENT CASE SHOULD HAVE BEEN SET ASIDE; PLAINTIFF WAS STRUCK BY A TRAIN AND ALLEGED THE ALLOWED SPEED FOR ENTERING A STATION WAS TOO HIGH; DEFENDANT TRANSIT AUTHORITY SHOULD HAVE BEEN ALLOWED TO PRESENT EVIDENCE THAT SPEED STUDIES HAD BEEN CONDUCTED IN SUPPORT OF THE QUALIFIED IMMUNITY DEFENSE.

The First Department, in a full-fledged opinion by Justice Mazzarelli, determined the NYC Transit Authority's (TA's) motion to aside the plaintiff's verdict in this subway accident case should have been granted. Plaintiff was on the tracks when he was struck by a train. Plaintiff argued the speed regulations allowed the train to enter the station at an unsafe speed. The trial judge prohibited the TA from introducing evidence demonstrating it was entitled to qualified immunity because it had conducted studies to determine the appropriate train speed: "The evidence that the TA proffered, and that the trial court precluded, suggested that it may have been entitled to qualified immunity. ... Korach's (the TA's expert's] testimony indicated that the TA's speed policy was consistent with 'universally accepted rapid transit system operating practice' ... . Accordingly, Korach should have been permitted to testify about the policies that other rapid transit systems have in place with respect to speed restrictions in subway and train stations, including in cases where those stations are situated on curved sections of track. Further, ... the testimony that the TA's own witnesses would have given was designed to demonstrate that the speed policy enabled the 'efficient running of a transportation system which serves millions of passengers every year' ... . This language suggests that the trial court's decision to limit evidence of speed policy decisions to their effects on a particular subway line was too restrictive, since the cases applying qualified immunity in subway speed cases take into account the effects that slower speeds would have on the entire subway system." ***Pedraza v. New York City Tr. Auth.*, 2022 N.Y. Slip Op. 00255, First Dept 1-13-22**

Similar issues in a case involving a similar accident in which the Pedraza (supra) trial-level evidentiary rulings on qualified immunity were applied under the doctrine of collateral estoppel. Because Pedraza was reversed, this case was reversed as well. ***Martinez v. New York City Tr. Auth.*, 2022 N.Y. Slip Op. 00252, First Dept 1-11-22**

# SECOND DEPARTMENT

### CRIMINAL LAW, ATTORNEYS, JUDGES.

DEFENDANT REFUSED TO SPEAK WITH HIS ATTORNEY; THE JUDGE DENIED REQUESTS FOR NEW COUNSEL WITHOUT QUESTIONING THE DEFENDANT, WHO WAS PRESENT IN THE COURTROOM; DEFENDANT'S RIGHT TO COUNSEL WAS NOT ADEQUATELY PROTECTED.

The Second Department, reversing defendant's conviction, determined defendant's right to counsel had not been adequately protected and returned the case to pre-suppression-hearing status. Defendant refused to speak with his attorney and the judge, despite defendant's presence in the courtroom, never discussed the issue with the defendant before denying a request to assign new counsel: "[W]e conclude that the defendant's right to counsel was not adequately protected. The defendant's request for new counsel, made through assigned counsel, contained serious factual allegations concerning the defendant's complaints about his assigned counsel and the breakdown of communications between assigned counsel and

the defendant ... . Under the circumstances presented here, the Supreme Court failed to meet its ongoing duty to make inquiries to determine whether there was good cause for the requested substitution by denying the request without speaking directly with the defendant ... . Thus, reversal is warranted. Further, on the record presented, the matter should be restored to pre-suppression-hearing status. Accordingly, we vacate the court's suppression determination and remit the matter to the Supreme Court, Kings County, for further proceedings on the indictment." ***People v. English*, 2022 N.Y. Slip Op. 00189, Second Dept 1-12-22**

## CRIMINAL LAW.

SEVERAL COUNTS CHARGING CONTEMPT WERE RENDERED DUPLICITOUS BY THE TRIAL EVIDENCE, COUNTS DISMISSED.

The Second Department determined several counts charging contempt were rendered duplicitous by the trial evidence and therefore must be dismissed. The contempt charges alleged the violation of two orders of protection in favor of four people. Neither the jury instructions nor the verdict sheet allowed the jury to pinpoint which alleged violation applied to whom: "Here, counts 9, 10, 11, 14, 15, 16, and 17 of Indictment No. 5685/14 all charged the defendant with criminal contempt in the second degree, arising from his alleged violation of two orders of protection during two separate incidents that occurred on June 27, 2014. The first order of protection was in favor of a single individual; the second order was in favor of that same individual, as well as three others. Neither the verdict sheet nor the jury charge, however, explained how the testimony and evidence adduced at trial applied to the seven counts—i.e., which counts pertained to which of the two orders of protection and which of the four alleged victims. Therefore, as the People effectively concede, the challenged counts were duplicitous because it is impossible to determine the particular acts upon which the jury reached its verdict with respect to each of the counts ...". ***People v. Woodley*, 2022 N.Y. Slip Op. 00201, Second Dept 1-12-22**

## CRIMINAL LAW, ATTORNEYS, SEX OFFENDER REGISTRATION ACT (SORA).

DEFENSE COUNSEL INEFFECTIVE FOR FAILING TO MAKE A MOTION FOR A DOWNWARD DEPARTURE IN THIS SORA RISK-LEVEL ASSESSMENT PROCEEDING.

The Second Department, reversing the level three SORA risk assessment, determined defense counsel was ineffective for failing to make a motion for a downward departure. The only arguments defense counsel made were without merit, demonstrated a lack of understanding of the facts, and would not have reduced the risk assessment to level two even if successful: "[C]ounsel only challenged 35 of the 155 total points assessed against the defendant, and a resulting score of 120 would have still been within the range (between 110 and 300 points) of a presumptive level three (high) offender. Counsel did not seek a downward departure from the defendant's presumptive risk level designation as a level three sex offender, and the record supports the defendant's claim that his counsel failed to articulate any argument that would have had any effect on the outcome of the SORA proceeding ... . ... [T]he record does not demonstrate that counsel made a 'strategic decision to attack the assessment of points, while foregoing any request for a downward departure.' Any such strategy in this case "would have made no sense" because it would not have had any effect on the outcome of the SORA proceeding ... . Counsel's failure to make any application for a downward departure, under the particular circumstances of this case, worked to deprive the defendant of his right to zealous advocacy, and amounted to less than meaningful representation ...". ***People v. Morancis*, 2022 N.Y. Slip Op. 00202, Second Dept 1-12-22**

## CRIMINAL LAW, EVIDENCE.

A DEFENSE WITNESS WHO WOULD HAVE TESTIFIED THAT A KEY PROSECUTION WITNESS HAD A POOR REPUTATION FOR TRUTHFULNESS AND VERACITY SHOULD NOT HAVE BEEN PROHIBITED FROM TESTIFYING; CONVICTION REVERSED.

The Second Department, reversing defendant's conviction, determined the witness who would have testified that the complainant's mother, a prosecution witness, had a poor reputation for truthfulness and veracity should not have been prohibited from testifying: "[T]he defendant sought to introduce testimony from Marie Anisca-Oral, a friend of his older sister, on the subject of the reputation for truthfulness and veracity of the eight-year-old complainant's mother (hereinafter the mother), who testified for the prosecution. In order to lay the foundation for such testimony, Anisca-Oral, a staff sergeant in the United States Army, described a community of seven or eight friends and acquaintances, predominantly of Haitian nationality, and predominantly living within certain neighborhoods in Brooklyn. Anisca-Oral testified that she had known the mother since 1999, that almost everyone she knew also knew the mother, and that every time she saw her acquaintances among this group, the mother's reputation for truthfulness and veracity was discussed. '[T]he presentation of reputation evidence by a criminal defendant is a matter of right, not discretion, once a proper foundation has been laid'... . 'A reputation may grow wherever an individual's associations are of such quantity and quality as to permit him to be personally observed by a sufficient number of individuals to give reasonable assurance of reliability' ... . 'The trial court must allow such testimony, once a foundation has been laid, so long as it is relevant to contradict the testimony of a key witness and is limited to general reputation for truth and veracity in the community; the weight given to such evidence should be left in the hands of the jury ...". ***People v. Lisene*, 2022 N.Y. Slip Op. 00194, Second Dept 1-12-22**

## CRIMINAL LAW, JUDGES.

DEFENDANT WAS ARRESTED AND INDICTED WHILE OUT ON BAIL; THE COURT SHOULD HAVE HELD A HEARING BEFORE REVOKING THE ORDER RELEASING DEFENDANT ON BAIL.

The Second Department, reversing Supreme Court, determined the courts was required to hold a hearing before revoking the order releasing defendant on bail. Defendant was out on bail when he was arrested three times and indicted on one set of charges: "... CPL 530.60(2)(a) states that '[w]henever in the course of a criminal action or proceeding a defendant charged with the commission of a felony is at liberty as a result of an order of recognizance, release under non-monetary conditions or bail issued pursuant to this article it shall be grounds for revoking such order that the court finds reasonable cause to believe the defendant committed one or more . . . violent felony offenses.' By its express terms, this statutory section applies to situations where a principal is accused of committing violent felony offenses while he or she was 'at liberty as a result of . . . bail' on a pending felony charge (id.). A principal charged with a felony who was out on bail on that charge necessarily includes individuals charged with qualifying offenses since the setting of bail is not initially authorized for nonqualifying offenses (see CPL 510.10[1], [3], [4]). ... CPL 530.60(2)(a) clearly applies to the circumstances here. Since the People applied for remand on the sole basis that the principal was accused of committing violent felony offenses while at liberty on the underlying felony charges, the court was required to apply the standard in CPL 530.60(2)(a) and to conduct the hearing mandated in CPL 530.60(2)(c)." ***People ex rel. Rankin v. Brann*, 2022 N.Y. Slip Op. 00153, Second Dept 1-11-22**

## DEBTOR-CREDITOR, CONTRACT LAW.

THE AGREEMENT WHICH PROVIDED PLAINTIFF WOULD PAY DEFENDANT ABOUT $38,500 AND PLAINTIFF WOULD BE ENTITLED TO MONTHLY PAYMENTS FROM DEFENDANT'S REVENUE TOTALING ABOUT $52,500 WAS NOT A "LOAN" TO WHICH THE USURY DEFENSE COULD BE APPLIED.

The Second Department, reversing Supreme Court, determined the contract between plaintiff and defendant (I Do) in which plaintiff paid defendant about $38,500 in return for monthly payments from defendant's revenue totally about $52,500 did not constitute a "loan" to which the usury defense would apply: " '… Unless a principal sum advanced is repayable absolutely, the transaction is not a loan. Usually, courts weigh three factors when determining whether repayment is absolute or contingent: (1) whether there is a reconciliation provision in the agreement; (2) whether the agreement has a finite term; and (3) whether there is any recourse should the merchant declare bankruptcy' ... . ... [T]he plaintiff established that the transaction set forth in the agreement was not a loan. The terms of the agreement specifically provided for adjustments to the monthly payments made by I Do to the plaintiff based on changes in I Do's monthly sales. Concomitantly, as the amount of the monthly payments could change, the term of the agreement was not finite. Moreover, no contractual provision existed establishing that a declaration of bankruptcy would constitute an event of default ...". ***Principis Capital, LLC v. I Do, Inc.*, 2022 N.Y. Slip Op. 00203, Second Dept 1-12-22**

## FORECLOSURE, CIVIL PROCEDURE.

IN THIS FORECLOSURE ACTION, THE ACCRUAL OF INTEREST SHOULD HAVE BEEN TOLLED DURING THE BANK'S UNEXPLAINED DELAYS IN PROCURING AND ENTERING AN ORDER OF REFERENCE.

The Second Department, reversing (modifying) Supreme Court, determined the accrual of interest should have been tolled during the bank's unexplained delays in procuring and entering an order or reference: "Supreme Court properly found that the nearly 17-month delay in the plaintiff's service of the notice of entry of the order of reference entered April 30, 2014, was excessive ... . However, it improvidently exercised its discretion in tolling the accrual of interest for only one year, as it should have been tolled for the entire period from April 30, 2014, through September 9, 2015. In addition, the court should have also tolled the accrual of interest for the time periods in which the plaintiff made two motions for an order of reference after its initial motion for an order of reference was denied for administrative reasons ... . The tolling of the accrual of interest during these time periods is not ... penalizing the plaintiff for losing its motions, but is instead a response to the plaintiff's unexplained delay in prosecuting the action by failing to promptly move for relief after the denial of its first and second motions. ... [A]fter the plaintiff's first motion for an order of reference was denied in August 2011, it failed to move again until February 2013. After the second motion was denied in September 2013, the plaintiff did not make its third motion until February 2014." ***Deutsche Bank Natl. Trust Co. v. Ould-Khattri*, 2022 N.Y. Slip Op. 00167, Second Dept 1-12-22**

## FORECLOSURE, EVIDENCE.

THE DOCUMENTS UPON WHICH THE CALCULATIONS IN THE REFEREE'S REPORT WERE BASED WERE NOT PRODUCED RENDERING THE REPORT INADMISSIBLE HEARSAY.

The Second Department, reversing Supreme Court, determined the referee's report was inadmissible hearsay because the documents upon which the calculations were based were not produced: "The defendant correctly contends, however, that the referee's calculation was not substantially supported by the record. Modlin's [the loan servicer's] affidavit, which was submitted to the referee for the purpose of establishing the amount due on the mortgage loan, appeared to lay a proper

foundation for the admission of the business records on which she relied, including the payment history for the loan, in making her calculations. Modlin averred that she was an authorized signatory of Caliber, U.S. Bank's loan servicer and attorney-in-fact, that she had reviewed Caliber's electronic records regarding the defendant's account, and that she had 'knowledge of how those electronic records [were] kept and maintained' ... . Modlin further averred that the business records of any prior servicer had been 'uploaded and boarded into [Caliber's] computer records' and were 'maintained in connection with the servicing of [the subject] loan',,, , In addition, U.S. Bank Trust demonstrated Caliber's authority to act on its behalf by submitting the limited power of attorney. Nevertheless, computations based on the review of unproduced business records amount to inadmissible hearsay and lack probative value ... . Here, U.S. Bank Trust did not submit to the referee copies of the business records upon which Modlin purportedly relied in computing the amount due on the mortgage loan. Consequently, the referee's findings in that respect were not substantially supported by the record ...". ***U.S. Bank Trust, N.A. v. Bank of Am., N.A.*, 2022 N.Y. Slip Op. 00213, Second Dept 1-12-22**

# THIRD DEPARTMENT

## ARBITRATION, MUNICIPAL LAW, EMPLOYMENT LAW.

THE NUMBER OF FIREFIGHTERS WHICH MUST BE ON DUTY DURING A SHIFT IS A HEALTH AND SAFETY ISSUE, WHICH IS ARBITRABLE PURSUANT TO THE COLLECTIVE BARGAINING AGREEMENT, NOT A JOB SECURITY ISSUE (WHICH IS NOT ARBITRABLE).

The Third Department, reversing Supreme Court, determined the number of firefighters which must be on duty during a shift is not a job-security issue and is therefore arbitrable pursuant to the collective bargaining agreement (CBA): "Respondent contends that Supreme Court erred in concluding that its grievance concerned nonarbitrable job security clauses as the clauses relate only to minimum shift staffing requirements and do not guarantee employment to bargaining unit members during the life of the CBA, a hallmark of a no-layoff job security clause. Respondent further asserts that minimum staffing requirements set forth in ... the CBA pertain to health and safety concerns and are properly the subject of arbitration. ... [T]he CBA 'does not purport to guarantee a[n] [officer] his or her employment while the CBA is in effect, nor does it prohibit layoffs' ... . 'It also does not protect officers "from abolition of their positions due to budget stringencies"' ... . ... [T]he CBA only sets forth "minimum staffing on particular shifts' ...". ***Matter of City of Ogdensburg (Ogdensburg Firefighters Assn. Local 1799, A.F.L., C.I.O., I.A.F.F)*, 2022 N.Y. Slip Op. 00237, Third Dept 1-13-22**

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