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FIRST DEPARTMENT

CIVIL PROCEDURE.

THE PLAINTIFFS' REQUEST TO PROCEED ANONYMOUSLY IN THIS CHILD VICTIMS ACT CASE WAS NOT SUPPORTED BY SUFFICIENT EVIDENCE OF ANY HARM WHICH WOULD RESULT FROM USING PLAINTIFFS' LEGAL NAMES IN THE CAPTION.

The First Department, reversing Supreme Court, determined the plaintiffs in this Child Victims Act action should not have been allowed to proceed anonymously. The request was not supported by sufficient evidence of harm which would result from using plaintiff's legal names in the caption: "Several New York courts 'have addressed the legislature's intent in enacting the CVA [Child Victims Act] with respect to the use of pseudonyms and concluded that the legislature 'left it up to each alleged victim to determine whether to seek anonymity' . . . [and] 'left it to the courts to assess each individual case' ... . This Court has held that permission to use a pseudonym will not be granted automatically and has noted that the motion court 'should exercise its discretion to limit the public nature of judicial proceedings sparingly and then, only when unusual circumstances necessitate it' ... . In determining whether to grant a plaintiff's request to proceed anonymously, the motion court must 'use its discretion in balancing plaintiff's privacy interest against the presumption in favor of open trials and against any potential prejudice to defendant'... . A plaintiff seeking permission to proceed anonymously by employing a pseudonym must provide facts specific to the plaintiff that will allow the motion court to exercise its discretion in an informed manner ... . Here, plaintiffs' motion to allow 33 unnamed plaintiffs to proceed anonymously should have been denied because plaintiffs failed to submit sufficient evidence to support the relief requested. Plaintiffs only submitted a short attorney affirmation, which merely repeated the relief requested in the order to show cause and made a single vague statement that plaintiffs might suffer further mental harm should their identities be revealed. Plaintiffs failed to provide any specific evidence as to why each unnamed plaintiff should be entitled to proceed anonymously ...". ***Twersky v. Yeshiva Univ.*, 2022 N.Y. Slip Op. 00366, First Dept 1-20-22**

CIVIL PROCEDURE, JUDGES, ATTORNEYS, COOPERATIVES.

THE DEPOSITION OF THE NONPARTY MAJORITY SHAREHOLDER IN THE COOPERATIVE REGARDING LEAKS IN THE UNITS WAS PROPER AND SHOULD NOT HAVE BEEN STOPPED AND SUPPRESSED BY THE JUDGE; SANCTIONS AGAINST PLAINTIFF'S ATTORNEY FOR FRIVOLOUS AND UNPROFESSIONAL CONDUCT WERE WARRANTED.

The First Department, reversing Supreme Court, determined the deposition of a witness, Ruth Miller, was proper and the judge should not have ordered the deposition to cease and should not have suppressed the portion of the deposition which had already been taken. Miller was a nonparty majority shareholder in the cooperative and the action concerned leaks in the units. The First Department further determined that sanctions against plaintiff's counsel were warranted: "It was an improvident exercise of discretion for the court to issue a protective order under CPLR 3103(a) barring a continuation of the deposition of nonparty Ruth Miller. Miller is the majority shareholder of the Coop, and therefore is a key figure in the events surrounding plaintiffs' negligence and breach of contract claims regarding leaks in plaintiffs' units. Moreover, Miller was a member of the Board during a period of time when decisions were made about building maintenance, which is a relevant issue in plaintiffs' action. Thus, her testimony is "material and necessary" (CPLR 3101[a] ...). ... [i]t was error for the court to sua sponte issue a suppression order of the testimony previously taken (see CPLR 3103[c]). Defendants made no showing that evidence was improperly or irregularly obtained during the deposition, or that prejudice to a substantial right had accrued through discovery of improperly obtained evidence ... . [C]ounsel's behavior at the deposition was frivolous and unprofessional. Among other things, counsel called the witness 'a liar' and told her on the record that she had done 'plenty wrong' and had 'plenty to worry about in this case,' despite the fact that she is not even a party to the action. Sanctions against counsel are therefore warranted (22 NYCRR 130-1.1 ...)." ***Gendell v. 42 W. 17th St. Hous. Corp.*, 2022 N.Y. Slip Op. 00272, First Dept 1-18-22**

CRIMINAL LAW, ATTORNEYS.

DEFENDANT'S REPEATED REQUESTS TO REPRESENT HIMSELF WERE NOT ADEQUATELY ADDRESSED BY THE THREE JUDGES TO WHOM THE REQUESTS WERE MADE; CONVICTION REVERSED AND NEW TRIAL ORDERED.

The First Department, reversing defendant's conviction and ordering a new trial, determined defendant's repeated requests to represent himself had not been properly addressed by the three calendar judges to whom the requests were made: " 'The denial of defendant's repeated requests to proceed pro se deprived defendant of his right to represent himself and requires reversal of his conviction' ... . Although defendant made repeated unequivocal requests to proceed pro se, the calendar courts hearing these applications repeatedly deferred making a ruling. To the extent that these courts can be viewed as having denied the applications on the ground that defendant was disruptive, this was inappropriate because defendant's only outbursts were the product of his frustration at not receiving a ruling on his rightful applications ... . Furthermore, defendant was clearly fit to proceed to trial and fit to waive counsel ... . The fact that defendant's request to proceed pro se was based in part on his disagreements with counsel did not, standing alone, justify the denial of his request ... . Defendant expressly stated that he wanted to represent himself, whether or not the court assigned new counsel." ***People v. Goodwin*, 2022 N.Y. Slip Op. 00281, First Dept 1-18-22**

CRIMINAL LAW, EVIDENCE.

GIVEN THE INITIAL LACK OF DISCLOSURE BY THE PEOPLE AND DEFENDANT'S RESPONSES ONCE THE PEOPLE DISCLOSED THE TRANSMISSION WHICH LED TO HIS ARREST, DEFENDANT ALLEGED SUFFICIENT FACTS TO WARRANT A MAPP/DUNAWAY HEARING.

The First Department, reversing Supreme Court, determined defendant had alleged sufficient facts to warrant a hearing on whether the police had probable cause to arrest him: "[D]efendant's motion challenged the constitutional adequacy of 'any transmitted description on which the seizing officers relied in detaining and arresting the defendant.' Defendant's access to information was limited, because ... the People ... did not disclose 'by either voluntary discovery or otherwise, . . . the description radioed by the purchasing officer to the arresting officer' ... . Indeed, ... the People did not even specifically aver that such a communication occurred. ... [T]he absence of factual allegations regarding the content of a transmission from the undercover to the arresting officer did not render defendant's motion deficient. ... [D]efendant made allegations of facts within his knowledge that ... were pertinent to defendant's argument that probable cause to arrest him was lacking. ... [D]efendant described his own appearance at the time of arrest to the extent of stating that he was a 44-year-old black man, and that there was nothing 'particularly distinctive about his appearance' that would tend to 'preclude the possibility of misidentification.' This description allowed for a comparison between defendant's self-description and the transmitted description, once that description was disclosed." ***People v. Fleming*, 2022 N.Y. Slip Op. 00360, First Dept 1-20-22**

CRIMINAL LAW, SEX OFFENDER REGISTRATION ACT (SORA), CORRECTION LAW.

CONVICTION OF ASSAULT FIRST DEGREE AS A SEXUALLY MOTIVATED OFFENSE DOES NOT REQUIRE REGISTRATION AS A SEX OFFENDER PURSUANT TO THE SEX OFFENDER REGISTRATION ACT (SORA).

The First Department, in a full-fledged opinion by Justice Kern, reversing Supreme Court, agreeing with the Second Department in a matter of first impression, determined conviction of assault in the first degree as a sexually motivated felony does not require registration as a sexual offender pursuant to the Sex Offender Registration Act (SORA): "The main issue on appeal is whether defendant was properly certified and required to register as a sex offender under the Sex Offender Registration Act (SORA) based on his conviction of assault in the first degree as a sexually motivated felony. We find that the certification was improper and therefore vacate that part of the judgment. * * * The question before us now is whether the definition of 'sex offense' under Correction Law § 168-a(2)(a) includes all the sexually motivated felony offenses listed in Penal Law § 130.91 or only those sexually motivated felony offenses that are based on offenses listed in subparagraphs (i) and (ii) of Correction Law §168-a(2)(a). Based on the clear and unambiguous text of Correction Law § 168-a(2)(a), we find that the only sexually motivated felony offenses that are included in the definition of 'sex offense,' and therefore registerable under SORA, are those based on offenses listed in subparagraphs (i) and (ii) of that provision. ... We find that, based on the clear and unambiguous text of Correction Law § 168-a (2)(a), first-degree assault as a sexually motivated felony is not a registerable offense under SORA because first-degree assault is not one of the enumerated offenses in subparagraphs (i) or (ii) of that provision." ***People v. Simmons*, 2022 N.Y. Slip Op. 00284, First Dept 1-18-22**

LANDLORD-TENANT, CIVIL PROCEDURE, APPEALS, JUDGES.

THE LANDLORD'S SUMMARY PROCEEDING WAS PROPERLY BROUGHT IN SUPREME COURT BECAUSE COVID EXECUTIVE ORDERS PROHIBITED BRINGING THE ACTION IN CIVIL COURT; ALTHOUGH SUA SPONTE ORDERS ARE NOT APPEALABLE, THE NOTICE OF APPEAL WAS DEEMED A MOTION FOR LEAVE TO APPEAL.

The First Department, reversing Supreme Court, determined Supreme Court should not have dismissed the landlord's summary proceeding on the ground that it should have been brought in Civil Court, not Supreme Court. COVID-related Executive Orders prohibited actions for nonpayment of rent in Civil Court. The First Department noted that a sua sponte or-

der is not appealable as of right, but deemed the notice of appeal to be a request for leave to appeal which was granted: "The motion court erred in sua sponte dismissing the complaint on the ground that this action was a landlord-tenant dispute that should have been brought as a summary proceeding in Civil Court. Supreme Court has unlimited general jurisdiction over all real property actions, including those commenced by a landlord against a tenant (NY Const, art VI, § 7[a] ...). Supreme Court, however, has the discretion to decline to entertain such an action on the ground that a pending action in Civil Court was the proper forum ... . Here, Supreme Court was the appropriate forum for this action to recover rental arrears because the Executive Orders implemented in response to the pandemic precluded the landlord from commencing a nonpayment proceeding in Civil Court during the relevant period, compelling the landlord to commence this action." ***A&L 1664 LLC v. Jaspar Hospitality LLC*, 2022 N.Y. Slip Op. 00264, First Dept 1-18-22**

SECOND DEPARTMENT

CIVIL PROCEDURE, CONTRACT LAW.

SUPREME COURT PROPERLY CONSIDERED A SUCCESSIVE AND LATE MOTION FOR SUMMARY JUDGMENT, CRITERIA EXPLAINED; DEFENDANT DEMONSTRATED PLAINTIFF WAS NOT A THIRD-PARTY BENEFICIARY OF THE CONTRACT AT ISSUE, CRITERIA EXPLAINED.

The Second Department, reversing (modifying) Supreme Court, determined plaintiff's breach of contract cause of action should have been dismissed because plaintiff did not qualify as a third-party beneficiary of the contract entered into by defendant county. The Second Department noted that Supreme Court properly exercised its discretion in allowing the defendant county to make a successive and late motion for summary judgment: " '... [A] subsequent summary judgment motion may be properly entertained when it is substantively valid and the granting of the motion will further the ends of justice and eliminate an unnecessary burden on the resources of the courts' ... . [T]he 'Supreme Court is afforded wide latitude with respect to determining whether good cause exists for permitting late motions. It may . . . entertain belated but meritorious motions in the interest of judicial economy where the opposing party fails to demonstrate prejudice' ... . 'A party asserting rights as a third-party beneficiary must establish (1) the existence of a valid and binding contract between other parties, (2) that the contract was intended for [its] benefit and (3) that the benefit to [it] is sufficiently immediate, rather than incidental, to indicate the assumption by the contracting parties of a duty to compensate [it] if the benefit is lost' ... . * * * ... [T]he County established ... that the plaintiff was not a third-party beneficiary of the ... contract, by showing that the plaintiff was not the only entity that could recover under the contract, and that the contract did not contain any language evincing the parties' intent to authorize the plaintiff to enforce any obligations thereunder ...". ***Old Crompond Rd., LLC v. County of Westchester*, 2022 N.Y. Slip Op. 00310, Second Dept 1-19-22**

CRIMINAL LAW, EVIDENCE.

DEFENDANT WAS ENTITLED TO A HEARING ON HIS MOTION TO VACATE HIS MURDER CONVICTION ON THE GROUND OF ACTUAL INNOCENCE.

The Second Department, reversing Supreme Court, determined defendant should have been afforded a hearing on his motion to vacate his murder conviction on the ground of actual innocence: " '[A]ctual innocence' means factual innocence, not mere legal insufficiency of evidence of guilt, and must be based upon reliable evidence which was not presented at the trial' ... . Further, '[m]ere doubt as to the defendant's guilt, or a preponderance of conflicting evidence as to the defendant's guilt, is insufficient, since a convicted defendant no longer enjoys the presumption of innocence, and in fact is presumed to be guilty' ... . 'A prima facie showing of actual innocence is made out when there is 'a sufficient showing of possible merit to warrant a fuller exploration'"... . Upon a prima facie showing, a hearing should be conducted on a defendant's claim of actual innocence ... . [T]he defendant made a prima facie showing based upon the five affidavits from the alleged witnesses that he submitted and [the] recantation of [a witness's] trial testimony [identifying defendant as the shooter]." ***People v. Green*, 2022 N.Y. Slip Op. 00315, Second Dept 1-19-22**

PERSONAL INJURY, CONTRACT LAW, CIVIL PROCEDURE.

IN THIS ELEVATOR-ACCIDENT CASE, THE BUILDING OWNERS WERE ENTITLED TO A CONDITIONAL JUDGMENT ON CONTRACTUAL INDEMNIFICATION AGAINST THE ELEVATOR-MAINTENANCE COMPANY BEFORE THE PRIMARY ACTION IS DETERMINED.

The Second Department, reversing Supreme Court, determined defendant property owner in this elevator accident case was entitled to a conditional judgment (pending determination of the primary action) against the elevator maintenance company (Otis) for contractual indemnification: " 'A court may render a conditional judgment on the issue of indemnity pending determination of the primary action in order that the indemnitee may obtain the earliest possible determination as to the extent to which he or she may expect to be reimbursed' ... . To obtain conditional relief on a claim for contractual indemnification, 'the one seeking indemnity need only establish that it was free from any negligence and [may be] held liable solely by virtue of . . . statutory [or vicarious] liability' ... . [The building-owner] defendants established their ... enti-

tlement to judgment as a matter of law by showing that they did not have notice of the alleged defect in the subject elevator ... , and Otis did not notify the [them] when repairs and/or maintenance was performed on the elevators in the building." ***Winter v. ESRT Empire State Bldg., LLC*, 2022 N.Y. Slip Op. 00333, Second Dept 1-19-22**

PERSONAL INJURY, MUNICIPAL LAW, CIVIL PROCEDURE, EVIDENCE, VEHICLE AND TRAFFIC LAW.

EVEN THOUGH PARTY DEPOSITIONS HAD NOT YET BEEN TAKEN IN THIS TRAFFIC ACCIDENT CASE, PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT WAS NOT PREMATURE AND PLAINTIFF WAS ENTITLED TO SUMMARY JUDGMENT; DEFENDANT'S OPPOSITION PAPERS DID NOT RAISE A QUESTION OF FACT BECAUSE NO EXPLANATION OF THE ACCIDENT WAS OFFERED; PLAINTIFF ALLEGED DEFENDANT'S BUS CROSSED A DOUBLE YELLOW LINE AND STRUCK HIS TAXICAB.

The Second Department, reversing Supreme Court determined; (1) the motion for summary judgment in this traffic accident case was not premature; and (2) plaintiff was entitled to summary judgment on liability. Plaintiff alleged his taxicab was struck by defendant's bus which crossed the double yellow line. Party depositions had not yet been taken: " 'Pursuant to CPLR 3212(f), where facts essential to justify opposition to a motion for summary judgment are exclusively within the knowledge and control of the movant, summary judgment may be denied' ... . '[M]ere hope that some evidence might be uncovered during further discovery is insufficient to deny summary judgment' ... . Here, the defendants' opposition to the plaintiff's motion consisted solely of legal argument that the motion was premature. However, the defendants did not explain why the bus operator offered no affidavit in opposition countering the plaintiff's testimony as to how the alleged incident occurred. Moreover, the defendants offered nothing beyond mere speculation and bald conjecture concerning what relevant evidence they hoped to uncover during discovery which would bear on their liability for the alleged incident. … 'To be entitled to partial summary judgment a plaintiff does not bear the . . . burden of establishing . . . the absence of his or her own comparative fault' ... ; instead, '[a] violation of the Vehicle and Traffic Law constitutes negligence as a matter of law ...' ". ***Shah v. MTA Bus Co.*, 2022 N.Y. Slip Op. 00327, Second Dept 1-19-22**

PRODUCTS LIABILITY, PERSONAL INJURY, EVIDENCE.

DEFENDANT MANUFACTURER AND RETAILER SHOULD NOT HAVE BEEN AWARDED SUMMARY JUDGMENT ON THE DESIGN DEFECT, FAILURE TO WARN AND IMPLIED WARRANTY CAUSES OF ACTION; PLAINTIFF WAS INJURED USING A "HOVERBOARD."

The Second Department, reversing Supreme Court, determined summary judgment should not have been awarded to the manufacturer and retailer of a "hoverboard" on the products liability (design defect), failure to warn and implied warranty causes of action. Plaintiff alleged she was using the hoverboard in accordance with the instructions and was injured. The expert affidavit provided by the defendants was conclusory and did not eliminate questions of fact on the design defect cause of action: "A defendant moving for summary judgment dismissing a design defect cause of action must establish, prima facie, that the subject product was reasonably safe for its intended use or that the plaintiff's actions constituted the sole proximate cause of his or her injuries ... . The defendants' expert, in his affidavit, opined in mere conclusory fashion that the hoverboard was not defectively designed, without providing any explanation of the hoverboard's design, or any discussion of industry standards or costs. Nor did the expert state whether the defendants had received complaints about any of the other hoverboards they had sold. The conclusory affidavit was insufficient to affirmatively demonstrate, prima facie, that the hoverboard was reasonably safe for its intended use ...". ***LaScala v. QVC*, 2022 N.Y. Slip Op. 00305. Second Dept 1-19-22**

REAL PROPERTY LAW, REAL PROPERTY ACTIONS AND PROCEEDINGS LAW (RPAPL).

PLAINTIFF AND DEFENDANTS OWN ADJOINING LOTS ORIGINALLY CONVEYED BY THE SAME GRANTOR WITH A RESTRICTION ALLOWING ONLY ONE RESIDENCE PER LOT; PLAINTIFF HAD THE REQUISITE "VERTICAL PRIVITY" TO ENFORCE THE RESTRICTION WHEN DEFENDANTS SOUGHT TO SUBDIVIDE THEIR LOT; DEFENDANTS RAISED A QUESTION OF FACT WHETHER THE COVENANT WAS UNENFORCEABLE DUE TO RPAPL 1951 BECAUSE THE AREA HAD CHANGED.

The Second Department, reversing (modifying) Supreme Court, determined: (1) plaintiff had "vertical privity" which allowed plaintiff to enforce a covenant in the deed from the original grantor of both plaintiff's and defendants' neighboring lots; and (2) defendants raised a triable issue of fact whether the covenant was unenforceable pursuant to RPAPL 1951 due to changes in the area. The covenant restricted each lot one residence. Defendants sough to subdivide their lot: "[P]laintiff has the requisite vertical privity to enforce the restrictive covenants ... . The plaintiff derived title to Lot 5 from the grantor, who subdivided the Lilac Farm subdivision. By deed dated June 4, 1929, the grantor burdened Lot 6, the property conveyed to the defendants' predecessor in title, by subjecting the conveyance to the restrictive covenants in question, and which accrued to the benefit of the property retained by the grantor, including Lot 5, which was conveyed to the plaintiff's predecessors in title by deed dated September 20, 1929. The defendants do not allege that the succession of conveyances from the grantor to the plaintiff was not continuous and lawful. Therefore, the plaintiff has the requisite vertical privity and did not need to demonstrate a common plan or scheme for the entire subdivision ... . [T]he defendants raised a triable issue

of fact as to whether the restrictive covenant prohibiting subdivision of the parcel is unenforceable pursuant to RPAPL 1951 due to changes in the area since the imposition of such covenant ...". ***Shehan v. Commisso*, 2022 N.Y. Slip Op. 00328, Second Dept 1-19-22**

THIRD DEPARTMENT

EDUCATION-SCHOOL LAW, NEGLIGENCE, IMMUNITY.

SUNY ALBANY NOT PROTECTED BY GOVERNMENT IMMUNITY IN THIS CASE BROUGHT BY A STUDENT WHO ALLEGED SHE WAS ASSAULTED IN HER DORM ROOM BY A PERSON NOT AUTHORIZED TO BE IN THE DORM; THERE WERE QUESTIONS OF FACT ABOUT THE ADEQUACY OF SECURITY AND THE FORESEEABILITY OF THE ASSAULT.

The Third Department determined defendant SUNY Albany's motion for summary judgment in this inadequate-security case was properly denied. Claimant was assaulted in her dorm room by a person who was not authorized to be in the dormitory. The Court of Claims held the school was not protected by government immunity because building security was a proprietary function (akin to a landlord's duty), as opposed to a governmental function, and therefore government immunity did not apply. There was evidence the lock on the dormitory door was not adequate and the sexual assault by an intruder was foreseeable: "As the Court of Appeals has recognized, '[a] governmental entity's conduct may fall along a continuum of responsibility to individuals and society deriving from its governmental and proprietary functions' and 'any issue relating to the safety or security of an individual claimant must be carefully scrutinized to determine the point along the continuum that the [governmental entity's] alleged negligent action falls into, either a proprietary or governmental capacity' (*Miller v State of New York*, 62 NY2d 506, 511-512 [1984]). In Miller, a student at a state university was raped by an intruder in the laundry room in her dormitory. The Court of Appeals permitted the claim of negligence — stemming from the defendant's failure to lock the entrance doors to the dormitory — to go forward in the defendant's proprietary capacity as a landlord. As in Miller, claimant's allegations that defendants failed to, among other things, install proper security devices, including locks, clearly implicate defendants' proprietary function as a landlord, and the Court of Claims therefore correctly rejected defendants' claim of governmental immunity. ... 'Landlords have a common-law duty to take minimal precautions to protect tenants from foreseeable harm, including foreseeable criminal conduct by a third person' ... . Criminal conduct is foreseeable if it is 'reasonably predictable based on the prior occurrence of the same or similar criminal activity at a location sufficiently proximate to the subject location' ...". ***P.R.B. v. State of New York*, 2022 N.Y. Slip Op. 00348, Third Dept 1-20-22**

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