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FIRST DEPARTMENT

AGENCY, CONTRACT LAW.

THE CONTRACTOR COULD NOT ESCAPE LIABILITY FOR PAYMENT OF THE SUBCONTRACTOR; THE PAY-WHEN-PAID CLAUSE IN THE CONTRACT IS INVALID; NOTHING IN THE CONTRACT INDICATED THE CONTRACTOR WAS ACTING SOLELY AS AN AGENT FOR THE OWNER.

The First Department, in a full-fledged opinion by Justice Moulton, determined defendant Sweet was not an agent such that it could avoid responsibility for paying a subcontractor, Arenson, for the construction work done by Arenson. The First Department further held General Business Law § 756-a did not invalidate the precedent prohibiting pay-when-paid clauses like the one in the contract between Sweet and Arenson: "The scope letter, which is on Sweet's letterhead, contains the following clause: 'Subcontractor understands that Contractor is acting as an agent for the Owner, and agrees to look only to funds actually received by the Contractor (from the Owner) as payment for the work performed under this Subcontract.' [This is the prohibited pay-when-paid clause.] * * * ... Sweet was not an agent for a disclosed principal. The clearest indicator of Sweet's role, its signature, supports this conclusion. The signature line for 'Sweet Construction Approval' and the signature do not indicate that Sweet signed the contract as agent on behalf of a disclosed principal or reflect any limitations ... . In characterizing itself as 'only a facilitator of payment' and 'merely a conduit' Sweet ignores that the subcontract provides that the work is to be performed pursuant to the 'SCC General Requirements.' Those requirements, which also appear in the scope letter, provide that Arenson will ... indemnify and hold Sweet harmless with respect to Arenson's work; obtain liability insurance in Sweet's favor; and recognize Sweet's authority to issue safety violations and correct unsafe conditions. These general requirements, on their face, apply to Sweet in its own capacity, and not in its capacity as an agent." ***Bank of Am., N.A. v. ASD Gem Realty LLC*, 2022 N.Y. Slip Op. 01379, First Dept 3-3-22**

ARBITRATION.

IF A PARTY IS AWARE OF AN ARBITRATOR'S BIAS AT THE OUTSET, THE ARBITRATOR'S BIAS IS NOT A GROUND FOR VACATION OF THE ARBITRATION AWARD.

The First Department noted that the involvement of one of the arbitrators with a will that was considered by the panel was not a ground for vacation of the award because the alleged bias of the arbitrator was known to the respondents-appellants at the outset: "Respondents-appellants contend the awards should be vacated because one of the arbitrators was intimately involved with a will that was considered by the panel (the 2009 will). However, '[i]f a party goes forward with arbitration, having actual knowledge of the arbitrator's bias, or of facts that reasonably should have prompted further . . . inquiry, [he] may not later claim bias based upon the failure to disclose such facts' ... . Respondents-appellants claim it is undisputed that the arbitrator failed to disclose his involvement with the 2009 will. However, a witness who has no financial interest in the arbitration or this proceeding and who went to school with both petitioner ... and respondent ... (i.e., who appears to be neutral) submitted an affirmation saying that the arbitrator disclosed such involvement before the arbitration began. In any event, respondent-appellants admit that all of the parties had general knowledge that the arbitrator was involved with the parents' estate, which was sufficient to trigger further inquiry before the arbitration took place." ***Matter of Finkelstein v. Finkelstein*, 2022 N.Y. Slip Op. 01268, First Dept 3-1-22**

CIVIL PROCEDURE, CONTRACT LAW, LANDLORD-TENANT.

THE STIPULATION OF SETTLEMENT IN THIS LANDLORD-TENANT ACTION WAS NOT INVALIDATED BY A CHANGE IN THE LAW BASED UPON A COURT OF APPEALS DECISION ISSUED A MONTH AFTER THE STIPULATION; A "MISTAKE OF LAW" DOES NOT INVALIDATE A STIPULATION OF SETTLEMENT.

The First Department determined that a stipulation of settlement in open court was valid, despite a Court of Appeals decision which ruled the Housing Stability and Tenant Protection Act (HSTPA) cannot be applied retroactively. The retroactive application of the HSTPA (to the stipulation) was deemed a "mistake of law" which is not a ground for invalidating a stipulation: "On ... the date of trial, the court facilitated settlement negotiations and the parties placed the material terms of their settlement on the record. 'The in-court oral stipulation made here . . . evidences [defendant]'s unconditional agreement, through authorized counsel, to settle' for a sum certain of $7.5 million, provide leases at specific monthly rents for plaintiffs

still living in the building, and enter into a confidentiality agreement ... . '[W]hen the transcript . . . is read in its entirety, it is clear that what was spread upon the record was an oral stipulation and not simply an agreement to agree' ... . 'The fact that it is necessary for the parties to exchange general releases and execute a confidentiality agreement does not render the agreement invalid'... , nor does the parties' representation that they would 'execute formal settlement papers' demonstrate that there was no agreement on material terms ... . We reject defendant's contention that the decision of the Court of Appeals ... , issued one month afterwards, requires that the settlement be vacated. While that decision held that the retroactive application of the [HSTPA] would violate due process ..., previous interpretations to the contrary constituted 'a mistake as to the law,' which is insufficient grounds for vacating a stipulation ...". ***Nieborak v. W54-7 LLC*, 2022 N.Y. Slip Op. 01397, First Dept 3-3-22**

CIVIL PROCEDURE, EVIDENCE.

PLAINTIFFS' MOTION TO RENEW ON THE GROUND THE DEFENDANTS' WINNING ARGUMENT WAS RAISED FOR THE FIRST TIME IN REPLY PAPERS SHOULD HAVE BEEN GRANTED.

The First Department, reversing Supreme Court, determined plaintiffs' motion to renew should have been granted. Defendants' motion to dismiss was improperly granted based upon an argument first raised in reply papers: "The court granted defendants' motion to dismiss ... based on defendants' argument raised for the first time in their reply to their motion to dismiss, that [the] operating agreement contained a provision wherein plaintiffs purportedly waived any past, present, and future conflicts of interest. Plaintiffs moved for leave to renew and reargue, claiming that the issue of the waiver provision was improperly raised for the first time in reply, and in substance was contradicted by another section of the operating agreement that provides, among other things, that no one other than the members can enforce any provision of the operating agreement against any member. The motion to renew should have been granted. Plaintiffs' claim that the waiver issue was improperly raised in defendants' reply provides a reasonable justification for granting the renewal motion ... . Upon renewal, defendants' motion should be denied with respect to plaintiffs' breach of fiduciary duty claim ... . Dismissal is warranted only where documentary evidence 'conclusively establishes a defense to the asserted claims as a matter of law' ...". ***Mehra v. Morrison Cohen LLP*, 2022 N.Y. Slip Op. 01396, First Sept 3-3-22**

CIVIL PROCEDURE, EVIDENCE, REAL PROPERTY LAW, CRIMINAL LAW, FRAUD.

AFTER DEFENDANT'S CONVICTIONS FOR THE FRAUDULENT TRANSFER OF PROPERTY BY DEED WERE REVERSED, SUPREME COURT SHOULD NOT HAVE USED THE TRANSCRIPT OF THE CRIMINAL TRIAL AS THE BASIS FOR INVALIDATING THE DEEDS IN THE RELATED CIVIL ACTION.

The First Department, reversing Supreme Court, determined the transcript of a criminal trial should not have served as the basis for voiding deeds in a related civil action. The defendant was charged with and convicted of fraudulent transfers of real property by deed. But the convictions were overturned on appeal based upon defendant's (Zi's) invalid waiver of his right to counsel. In its first ruling, Supreme Court granted summary judgment invalidating the deeds under the doctrine of collateral estoppel based on the criminal convictions. After the convictions were reversed, upon a motion to renew, Supreme Court used the transcript of the criminal trial as the basis for adhering to its original ruling: "Because this Court overturned the convictions against Zi and ordered a new trial, collateral estoppel no longer applies ... Since the motion court based its June 2019 decision concerning title exclusively on the collateral estoppel effect of the conviction, it no longer has any foundation. In its decision on the motion to renew, the motion court relied on the transcript of the criminal trial testimony that was submitted with the summary judgment motion to reach the same conclusions it had reached in its earlier decision. However, CPLR 4517 defines the limited circumstances when such testimony can be used in a civil action and none of the enumerated circumstances are present here. Moreover, because Zi did not testify during his criminal trial, the submitted testimony does not qualify as an 'admission against interest' ... . Without the criminal trial testimony and convictions, the only evidence that the [deeds] are fraudulent are conclusory statements by the parties. The issue as to which deeds are enforceable is sharply disputed and turns on credibility, which cannot be appropriately determined on summary judgment. Accordingly, we find that the motion court improperly adhered to its prior decision." ***Aviation Distribs. Inc., Formed May 1945 v. Aviation Distribs. Inc., Formed 2014*, 2022 N.Y. Slip Op. 01378, First Dept 3-3-22**

FAMILY LAW, CIVIL PROCEDURE, CONTRACT LAW.

FAMILY COURT DID NOT HAVE JURISDICTION TO MODIFY A SEPARATION AGREEMENT WHICH WAS INCORPORATED BUT NOT MERGED INTO THE JUDGMENT OF DIVORCE; A PLENARY ACTION IS REQUIRED.

The First Department, reversing (modifying) Family Court, determined Family Court did not have jurisdiction to modify the separation agreement by putting a cap on the child-support/spousal-support credit father was entitled to for his payment of the mortgage and apartment expenses: "A stipulation of settlement which is incorporated but not merged into the parties' judgment of divorce may be reformed only in a plenary action ... . Family Court does not have jurisdiction to modify a separation agreement ... . Under the terms of the parties' stipulation of settlement, the father is entitled to pay his $2,100 in monthly child support directly to the mortgagee of the parties' former marital apartment. However, the Family Court erred in capping the father's credit against support arrears at $25,200 per year based on this provision. Although Family Court

found that there was no similar provision with respect to spousal support, in fact the parties' stipulation permits the father to also deduct the payment of apartment expenses, including the mortgage, from his spousal support. Accordingly, Family Court improperly amended the stipulation by imposing an annual maximum credit to which the father is entitled based solely on his child support obligation." ***Matter of Deborah K. v. Richard K.*, 2022 N.Y. Slip Op. 01391, First Dept 3-3-22**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

BECAUSE PLAINTIFF HAD TO STAND ON THE GUARDRAILS OF THE MANLIFT TO REACH WHAT HE WAS WORKING ON, THE MANLIFT WAS NOT APPROPRIATE EQUIPMENT; PLAINTIFFS WERE ENTITLED TO SUMMARY JUDGMENT ON THE LABOR LAW § 240(1) CAUSE OF ACTION.

The First Department, reversing Supreme Court, determined plaintiff was entitled to summary judgment on his Labor Law § 240(1) cause of action. Plaintiff had to stand on the guardrails of a manlift to reach what he was working on. He received an electric shock and fell: "Plaintiffs should be granted summary judgment as to defendants' liability under the statute. The record demonstrates that plaintiff Matthew S. Healy (plaintiff) fell from the guardrails of a manlift after sustaining an electric shock. Plaintiff was required to stand on the manlift's guardrails because HVAC ductwork prevented him from raising the manlift to the area in which he needed to work. Thus, the manlift was 'inappropriate for the task at hand in light of the configuration of the building' and failed to afford plaintiff adequate protection pursuant to the statute ...". ***Healy v. BOP One N. End LLC*, 2022 N.Y. Slip Op. 01388, First Dept 3-3-22**

MEDICAL MALPRACTICE, NEGLIGENCE, EVIDENCE, CIVIL PROCEDURE.

THE DEFENDANT OPHTHALMOLOGICAL SURGEON'S MOTION TO SET ASIDE THE PLAINTIFF'S VERDICT IN THIS MEDICAL MALPRACTICE ACTION WAS PROPERLY DENIED; CRITERIA EXPLAINED; PLAINTIFF LOST SIGHT IN HER RIGHT EYE AFTER CATARACT-REMOVAL SURGERY.

The First Department, in a full-fledged opinion by Justice Mendez, determined the defendant's motion to set aside the plaintiff's verdict in this medical malpractice action was properly denied. Plaintiff lost sight in her right eye after cataract-removal surgery. The opinion describes the surgeries and the theories presented by the experts in great detail: "In a medical malpractice action, the plaintiff is required to show that the defendant deviated from acceptable medical practice, and that the deviation is the proximate cause of her injuries. A defendant's negligence is the proximate cause when it is a substantial factor in the events that produced the injury ... . * * * The jury, which is in the best position to assess the credibility of the witnesses, is entitled to assess his credibility and decide what weight it will give to his testimony ... . Great deference is accorded to the factfinders, who had the opportunity to see and hear the witnesses ... . * * * The documentary evidence and the testimony of all the experts created factual and credibility issues that were properly determined by the jury ... . If the resolution of the case turns on the evaluation of conflicting testimony of expert witnesses, the resolution of such a conflict rests with the jury and not the court ... . The conclusions reached by the jury should not be overturned as against the weight of the evidence unless 'there is simply no valid line of reasoning, and permissible inferences which could possibly lead rational people to the conclusion reached by the jury' ...". ***Rozon v. Schottenstein*, 2022 N.Y. Slip Op. 01278, First Dept 3-1-22**

PERSONAL INJURY, EVIDENCE.

PLAINTIFFS-PARENTS' CAUSE OF ACTION FOR LOSS OF THEIR INJURED DAUGHTER'S SERVICES SHOULD HAVE BEEN DISMISSED; THE PARENTS DEMONSTRATED ONLY THAT THEIR DAUGHTER PERFORMED SERVICES IN HER EMPLOYMENT AT THE COMPANIES OWNED BY THE PARENTS.

The First Department, reversing Supreme Court, determined defendants' motion for summary judgment dismissing the parents' cause of action for loss of their injured daughter's services should have been granted: "Defendants established prima facie that plaintiffs Arlene and Herbert Klaar, the parents of the injured plaintiff, Deborah Klaar, are not entitled to recover damages for loss of their daughter's services since they showed only that their claim rests entirely on the services Deborah performed in her employment at the two companies they own ... . [P]laintiffs failed to raise an issue of fact. They cited deposition testimony demonstrating that Deborah served as a secretary, office manager, and assistant controller at her parents' companies, that she was expected to take over the businesses and provide her parents with a monthly payment, and that she had significant difficulty fulfilling all of her many duties following the accident. They did not submit evidence that Deborah regularly performed services for them as their daughter, such as doing chores or running errands for the household, nor that they sustained any pecuniary loss as a result of her failure to do so ...". ***Klaar v. Fedex Corp.*, 2022 N.Y. Slip Op. 01393, First Dept 3-3-22**

SECOND DEPARTMENT

CIVIL PROCEDURE, FORECLOSURE.

THE CONDITIONAL ORDER OF DISMISSAL DID NOT MEET THE REQUIREMENTS OF CPLR 3216 BECAUSE ISSUE WAS NEVER JOINED IN THIS FORECLOSURE ACTION; THE ACTION SHOULD NOT HAVE BEEN DISMISSED FOR FAILURE TO PROSECUTE.

The Second Department, reversing Supreme Court, determined the conditional order of dismissal of this foreclosure action did not meet the requirements of CPLR 3216 because issue was never joined. Therefore the action should not have been dismissed: " 'A court may not dismiss an action based on neglect to prosecute unless the CPLR 3216 statutory preconditions to dismissal are met' ... , including that issue has been joined in the action (see CPLR 3216[b][1] ...). Here, the dismissal of the action pursuant to the conditional order of dismissal was improper, since none of the defendants had submitted an answer to the complaint and, thus, issue was never joined ...". ***Central Mtge. Co. v. Ango*, 2022 N.Y. Slip Op. 01286, Second Dept 3-2-22**

CRIMINAL LAW.

SUPREME COURT DID NOT MAKE THE REQUIRED FINDINGS RE: WHETHER DEFENDANT SHOULD BE AFFORDED YOUTHFUL OFFENDER STATUS; MATTER REMITTED.

The Second Department determined Supreme Court did not make the required findings re: whether defendant should be afforded youthful offender status and remitted the matter: "CPL 720.20(1) requires 'that there be a youthful offender determination in every case where the defendant is eligible, even where the defendant fails to request it, or agrees to forgo it as part of a plea bargain' ... . With regard to the defendant's conviction of criminal possession of a weapon in the second degree ..., which, contrary to the defendant's contention, is an armed felony (see CPL 1.20[41]; Penal Law §§ 70.02[1][b]; 265.03[3] ...), the People concede that the Supreme Court improperly failed to determine on the record whether the defendant was an 'eligible youth' (CPL 720.10[2], [3]) and, if so, whether he should be afforded youthful offender treatment ... . With regard to the defendant's conviction of resisting arrest ..., the defendant contends, and the People concede, that the court also failed to determine whether he should be afforded youthful offender status (see CPL 720.20[1]). The parties are correct that the record does not demonstrate that the court made either of these required determinations ...". ***People v. Hunter*, 2022 N.Y. Slip Op. 01320, Second Dept 3-2-22**

CRIMINAL LAW, APPEALS.

THE CONSENT-TO-SEARCH PROBATION CONDITION WAS NOT INDIVIDUALLY TAILORED TO THE OFFENSE AND SHOULD NOT HAVE BEEN IMPOSED; IT WAS NOT NECESSARY TO PRESERVE THE ERROR FOR APPEAL AND APPEAL WAS NOT PROHIBITED BY THE DEFENDANT'S WAIVER OF HIS RIGHT TO APPEAL.

The Second Department, reversing Supreme Court, determined there was no justification for the "consent-to-search" probation condition. Defendant stole a cab driver's cell phone and pled guilty to attempted assault. The court noted it was not necessary to preserve the error for appeal and appeal was not prohibited by the waiver of appeal: "The probation department [requested] that as a condition of probation, the defendant be required to consent to a search by a probation officer of his person, vehicle, and place of abode, and the seizure of any illegal drugs, drug paraphernalia, gun/firearm or other weapon, or other contraband found (Condition No. 28). At sentencing, the Supreme Court imposed the consent to search condition of probation. On appeal, the defendant argues that this condition of his probation was improperly imposed. The defendant correctly argues, and the People do not dispute, that this issue was not required to be preserved for appellate review, and that appellate review is not precluded by his waiver of the right to appeal ... . [T]he defendant was a first-time offender and was not armed with a weapon at the time he committed the offense. While the defendant told the probation department that he was under the influence of alcohol at the time of the offense, he was not assessed as being in need of alcohol or substance abuse treatment. Under the circumstances, the consent to search condition of probation was improperly imposed because it was not individually tailored in relation to the offense, and was not, therefore, reasonably related to the defendant's rehabilitation, or necessary to ensure that the defendant will lead a law abiding life ...". ***People v. Dranchuk*, 2022 N.Y. Slip Op. 01312, Second Dept 3-2-22**

CRIMINAL LAW, EVIDENCE.

CONFLICTING ACCOUNTS OF WHAT THE POLICE OFFICERS SAW WHEN THEY APPROACHED THE VAN IN WHICH DEFENDANT WAS A PASSENGER FAILED TO DEMONSTRATE PROBABLE CAUSE FOR THE SEARCH OF THE VAN; THE WEAPON SEIZED FROM THE VAN SHOULD HAVE BEEN SUPPRESSED; DEFENDANT'S POSSESSION OF A WEAPON CONVICTION REVERSED.

The Second Department, reversing the possession of a weapon conviction, determined defendant's motion to suppress a handgun found in a van in which defendant was a passenger should have been granted. Inconsistencies in the police

officer's accounts of what the officers saw when they approached the van rendered the People's proof at the suppression hearing insufficient to demonstrate a lawful search incident to arrest: "The Supreme Court credited the accounts of both Ramos and Pimentel and concluded that what Pimentel testified that he had observed gave the officers probable cause to search the minivan for a gun ... . However, the officers' versions of events sharply conflicted with each other as to where the defendant was sitting in the minivan, and what he was doing, when the officers arrived at the minivan's front windows. According to Ramos, the defendant was sitting in the front passenger seat, while Pimentel claimed that the defendant was sitting in the middle row, and attempting to conceal a gun in a bag at his feet. Ramos, though, did not see a gun, furtive movements, or a bag. It seems improbable that, if the defendant did what Pimentel said he did, Ramos could somehow have failed to notice it. Ramos's and Pimentel's accounts both could not have been true, since both officers acknowledged that they approached the minivan simultaneously and reached the front seats at the same time." ***People v. Austin*, 2022 N.Y. Slip Op. 01306, Second Dept 3-2-22**

CRIMINAL LAW, EVIDENCE.

THE PEOPLE DID NOT MEET THEIR BURDEN TO SHOW THE LEGALITY OF THE SEIZURE OF DEFENDANT'S CLOTHES BY A DETECTIVE AT THE HOSPITAL WHERE DEFENDANT WAS BEING TREATED FOR A GUNSHOT WOUND; THE CLOTHES AND THE DNA EVIDENCE TAKEN FROM THE CLOTHES SHOULD HAVE BEEN SUPPRESSED; THE ERROR WAS HARMLESS HOWEVER.

The Second Department determined the defendant's clothes seized at the hospital where defendant was being treated for a gunshot wound should have been suppressed. The error was deemed harmless however: "The defendant had a legitimate expectation of privacy in his clothing, and the fact that the police perceived the defendant as a victim rather than a suspect at the time his clothing was seized did not strip the defendant of his Fourth Amendment protection ... . Moreover, the People failed to establish that the testifying detective knew that the clothes would have covered the part of the defendant's body where he was shot, as the detective admitted that he did not know what type of clothing was in the bag that was seized ... . The People also failed to establish any exigent circumstances to justify seizure of the clothing, as they provided no evidence that the clothing was in danger of being removed or destroyed ... . Accordingly, the seizure of the defendant's clothing at the hospital was illegal, and the DNA evidence obtained from the items seized should not have been admitted into evidence at trial ...". ***People v. Gough*, 2022 N.Y. Slip Op. 01317, Second Dept 3-2-22**

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

A SEX OFFENDER CERTIFICATION IS NOT PART OF A DEFENDANT'S SENTENCE; THEREFORE THE CERTIFICATION CANNOT BE SET ASIDE PURSUANT TO A MOTION TO SET ASIDE THE SENTENCE.

The Second Department, reversing Supreme Court, determined defendant's certification as a sex offender was not part of his sentence. Therefore the certification could not be set aside pursuant to CPL § 440.20: "Prior to the defendant's release from prison, the defendant moved, inter alia, pursuant to CPL 440.20 to vacate his certification as a sex offender on the ground that his certification was unlawful because the crime he was convicted of was not a sex offense or a sexually violent offense under Correction Law § 168-a. The Supreme Court granted that branch of the defendant's motion and set aside so much of the sentence as certified the defendant as a sex offender and required him to pay a sex offender registration fee. The court then resentenced the defendant to the originally-imposed term of imprisonment and post-release supervision. The People appeal. While a defendant's certification as a sex offender under SORA is part of the judgment of conviction ... , 'SORA certification is not part of a sentence' ... . Thus, the relief sought by the defendant was not available to him under CPL 440.20(1), which only authorizes a motion to set aside a sentence ...". ***People v. David*, 2022 N.Y. Slip Op. 01310, Second Dept 3-2-22**

EMPLOYMENT LAW, HUMAN RIGHTS LAW.

PLAINTIFF RAISED QUESTIONS OF FACT ABOUT WHETHER SHE WAS THE VICTIM OF GENDER DISCRIMINATION; UPON HER RETURN FROM MATERNITY LEAVE SHE WAS TOLD HER POSITION HAD BEEN ELIMINATED.

The Second Department, reversing Supreme Court, determined plaintiff's gender-discrimination action against defendant employer should not have been dismissed. Upon returning from maternity leave, plaintiff was informed her management-level position had been eliminated and replaced by a position for which she was not qualified. Defendant did offer plaintiff a job as a temporary social worker at the same salary: " 'Discrimination on the basis of pregnancy is a form of gender discrimination' ... . [T]he defendant failed to eliminate triable issues of fact as to whether the position offered to the plaintiff involved a materially adverse change in the terms of her employment, since the social worker position did not involve any of the management responsibilities that the plaintiff had performed ... . [T[here were triable issues of fact as to whether the plaintiff's supervisor, Segree, made remarks [re: her pregnancy] indicative of a discriminatory motive to terminate the plaintiff's employment ... . Contrary to the defendant's contention, it also failed to eliminate triable issues of fact as to whether the proffered explanation for terminating the plaintiff's employment was a pretext for discrimination

... . Although McDonald averred that the plaintiff's employment was terminated because she had no business education and no sales or marketing experience, he acknowledged that a business education was not required." ***Lefort v. Kingsbrook Jewish Med. Ctr.*, 2022 N.Y. Slip Op. 01294, Second Dept 3-2-22**

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

THE BANK DID NOT COMPLY WITH THE "ONE ENVELOPE" RULE FOR THE MAILING OF THE RPAPL 1304 NOTICE OF DEFAULT IN THIS FORECLOSURE ACTION.

The Second Department, reversing Supreme Court, determined the bank violated the notice requirements of RPAPL 1304 by including other documents in the envelope containing the notice of default in this foreclosure action: "RPAPL 1304(1) provides that 'at least ninety days before a lender, an assignee or a mortgage loan servicer commences legal action against the borrower . . . including mortgage foreclosure, such lender, assignee or mortgage loan servicer shall give notice to the borrower.' RPAPL 1304(2) states that '[t]he notices required by this section shall be sent by the lender, assignee or mortgage loan servicer in a separate envelope from any other mailing or notice.' Here, the inclusion of additional 'Important Disclosures' regarding bankruptcy and rights for military personnel on page 7 of the 90-day notice violated RPAPL 1304(2), which requires strict compliance ...". ***Deutsche Bank Natl. Trust Co. v. Salva*, 2022 N.Y. Slip Op. 01290, Second Dept 3-2-22**

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

THE BUSINESS RECORDS REFERRED TO IN THE AFFIDAVIT SUBMITTED TO SHOW THE BANK'S COMPLIANCE WITH THE RPAPL 1304 NOTICE REQUIREMENTS IN THIS FORECLOSURE ACTION WERE NOT ATTACHED, RENDERING THE AFFIDAVIT INADMISSIBLE HEARSAY.

The Second Department, reversing Supreme Court, determined the bank did not demonstrate compliance with the notice requirements of RPAPL 1304 in this foreclosure action. The failure to attached the business records referred to in the affidavit purporting to demonstrate compliance rendered the affidavit inadmissible hearsay: "Although the plaintiff submitted copies of the 90-day notices purportedly sent to the defendant, the plaintiff failed to demonstrate, prima facie, that the notices were actually mailed, through either an affidavit of service, other proof of mailing by the United States Postal Service, or evidence of a standard office mailing procedure designed to ensure that items are properly addressed and mailed, sworn to by someone with personal knowledge of the procedure ... . The assertion in an affidavit of an employee of the plaintiff's loan servicer that the 90-day notices were sent in accordance with RPAPL 1304 was insufficient to establish that the notices were actually mailed to Blackman by first-class and certified mail. The affiant based his assertions upon his review of records which were created by a third-party vendor, and as those business records were not incorporated into the servicer's own electronic files, they were inadmissible hearsay ... . 'It is the business record itself, not the foundational affidavit, that serves as proof of the matter asserted' ...". ***Deutsche Bank Natl. Trust Co. v. Blackman*, 2022 N.Y. Slip Op. 01289, Second Dept 3-2-22**

LEGAL MALPRACTICE, NEGLIGENCE, EVIDENCE.

PLAINTIFF DID NOT HAVE TO PROVE THE EXISTENCE OF A RETAINER AGREEMENT TO DEMONSTRATE AN ATTORNEY-CLIENT RELATIONSHIP WITH DEFENDANTS IN THIS LEGAL MALPRACTICE ACTION.

The Second Department, reversing Supreme Court, determined the legal malpractice action should not have been dismissed on the ground plaintiff did not demonstrate the existence of an attorney-client relationship. Plaintiff did not have to produce a retainer agreement: "[T]he Supreme Court erred in granting dismissal of the legal malpractice cause of action based upon the plaintiff's failure to produce evidence of an attorney-client relationship. An attorney-client relationship does not depend on the existence of a formal retainer agreement ... , and the plaintiff had no obligation to demonstrate evidentiary facts to support the allegations contained in the complaint ... . Furthermore, the complaint sufficiently alleges the existence of an attorney-client relationship between the plaintiff and the ... defendants ... , as well as the other elements of legal malpractice, including damages, to support a legal malpractice cause of action ...". ***Ripa v. Petrosyants*, 2022 N.Y. Slip Op. 01336, Second Dept 3-2-22**

MEDICAL MALPRACTICE, PERSONAL INJURY, JUDGES, ATTORNEYS, CIVIL PROCEDURE, APPEALS.

REMARKS BY THE JUDGE AND DEFENDANT'S COUNSEL PREJUDICED THE JURY IN THIS MEDICAL MALPRACTICE CASE; ALTHOUGH NOT PRESERVED, THE ISSUE WAS CONSIDERED ON APPEAL IN THE INTEREST OF JUSTICE; DEFENSE VERDICT SET ASIDE.

The Second Department, reversing the defendants' verdict in this medical malpractice action and considering the appeal in the interest of justice, determined the trial judge and a defendant's attorney made comments which prejudiced the jury: "[T]he Supreme Court's repeated prejudicial comments and interjections prejudiced the plaintiff. For example, the court barred the plaintiff's counsel from referring to the growth at issue on the plaintiff's left foot as a tumor, ordered that the growth be referred to as a wart, and continued to refer to it as a wart through the trial. Thus, the court, in effect, determined a pivotal issue of fact that was properly for the jury to resolve ... . In addition, the court opined multiple times before the jury that there was no proof that the plaintiff was misdiagnosed by the defendants, despite testimony by the plaintiff's ex-

pert to the contrary which had already been elicited. Although the court later directed the jury to disregard its remarks, the instruction was not sufficient to cure the prejudice caused by its improvident comments and interjections ... . The comments of [defendant] Oami's counsel also prejudiced the plaintiff. Oami's counsel made multiple improper and inflammatory comments about the relationship between counsel for the plaintiff and the plaintiff's expert pathologist during the cross examination of that expert and during his summation to the jury on behalf of Oami. Contrary to the Supreme Court's determination, these remarks were so inflammatory and unduly prejudicial as to have deprived the plaintiff of a fair trial ...". ***Valenti v. Gadomski*, 2022 N.Y. Slip Op. 01342, Second Dept 3-2-22**

PERSONAL INJURY, CONTRACT LAW.

PLAINTIFF, WHILE ATTENDING A BEACH-FRONT PARTY, SUFFERED SEVERE INJURY WHEN HE DOVE OFF A BULKHEAD INTO SHALLOW WATER; HIS ACTION AGAINST THE PROPERTY OWNER FOR FAILURE TO WARN SHOULD NOT HAVE BEEN DISMISSED; THE PROPERTY OWNER'S INDEMNIFICATION ACTION AGAINST THE PERSON WHO RENTED THE AREA FOR THE PARTY WAS DISMISSED.

The Second Department, reversing Supreme Court, determined plaintiff's action against the owner of beach-front property where a party was being held should not have been dismissed. Plaintiff dove off a bulkhead into shallow water and suffered severe injury. Plaintiff alleged a negligent failure to warn against diving. Apparently, the water was murky and the bulkhead extended 40 feet into a bay along a boat channel. In addition, the Second Department determined that the person who rented the area for the party (Hanson) did not agree, in the rental agreement, to indemnify the property owner for the owner's alleged negligence: "The plaintiff testified that he believed the waters to be deep in the area in which he dove because the bulkhead was adjacent to a boating channel, it extended approximately 40 feet into the bay from the beach, and he had seen people swimming earlier in the day. ... [I]t cannot be said as a matter of law that the plaintiff knew or should have known that he was diving into shallow waters, and thus, that his conduct constituted the sole proximate cause of the accident or an unforeseeable superseding event sufficient to absolve [the owner] of liability ... . Moreover, [the owner] did not demonstrate, as a matter of law, that the plaintiff's blood alcohol level was the sole proximate cause, or a superseding cause, of the accident ... . 'When a party is under no legal duty to indemnify, a contract assuming that obligation must be strictly construed to avoid reading into it a duty which the parties did not intend to be assumed' ... . 'The promise should not be found unless it can be clearly implied from the language and purpose of the entire agreement and the surrounding facts and circumstances' ... . Particularly with agreements to indemnify, '[a]lthough the words might 'seem to admit of a larger sense, . . . they should be restrained to the particular occasion and to the particular object which the parties had in view'' ... . Here, the indemnification provision on which [the owner] relies is contained in the agreement Hanson signed to rent the Community Center for a party. Hanson demonstrated ... that a promise on his part to indemnify PPI for its alleged negligence in relation to its ownership and maintenance of the beach area and bulkhead cannot be 'clearly implied from the language and purpose of [that] entire agreement and the surrounding facts and circumstances' ...". ***Reilly v. Patchogue Props., Inc.*, 2022 N.Y. Slip Op. 01334, Second Dept 3-2-22**

PERSONAL INJURY, MUNICIPAL LAW, EVIDENCE.

DEFENDANT DID NOT DEMONSTRATE IT WAS NOT RESPONSIBLE, PURSUANT TO THE TOWN CODE, FOR MAINTENANCE OF THE AREA OF THE SIDEWALK WHERE PLAINTIFF TRIPPED OVER A PROTRUDING BOLT; DEFENDANT'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing (modifying) Supreme Court, determined the Metropolitan Transit Authority (MTA), which had a station in the vicinity of where plaintiff tripped over a bolt protruding from the sidewalk, was not entitled to summary judgment in this slip and fall case. A town ordinance required abutting property owners to maintain the sidewalk and the MTA did not demonstrate the protruding bolt was not in an area of the sidewalk for which it was responsible: "[T]he MTA defendants failed to affirmatively demonstrate that they were not tenants or occupants of a lot or building abutting the subject sidewalk or that, for any other reason, section 191-16(A) of the Town Code did not apply to them. Among other things, the evidence they submitted did not clearly show the location of the sidewalk in relation to the station house and train platform, or clearly establish the Town's and the MTA defendants' relative use of, and duties with respect to, the portions of the property at issue. Accordingly, the Supreme Court should have denied that branch of the MTA defendants' motion which was for summary judgment dismissing the complaint insofar as asserted against them, without regard to the sufficiency of the opposition papers ...". ***Sanon v. MTA Long Is. R.R.*, 2022 N.Y. Slip Op. 01337, Second Dept 3-2-22**

PERSONAL INJURY, MUNICIPAL LAW, EVIDENCE, CIVIL PROCEDURE.

THERE WAS NO OBJECTIVE EVIDENCE TO SUPPORT PLAINTIFF'S ALLEGATION THAT THE CITY BUS STOPPED "VIOLENTLY," CAUSING HER TO FALL; THE PLAINTIFF'S VERDICT SHOULD HAVE BEEN SET ASIDE AS AGAINST THE WEIGHT OF THE EVIDENCE.

The Second Department, reversing Supreme Court, determined the defendant Transit Authority's motion to set aside the plaintiff's verdict in this bus-passenger-injury case should have been granted. Plaintiff's testimony that the bus stopped "violently," causing her to fall, was not supported by any objective evidence: "[V]iewing the evidence in the light most

favorable to the plaintiff, there was no rational process by which the jury could have found for the plaintiff against the defendants. Although the plaintiff characterized the stop as 'violent,' neither her testimony regarding the nature of her fall nor the circumstances surrounding the stop nor any other evidence she presented was sufficient to provide the objective support necessary to demonstrate that the movement of the bus was 'unusual and violent' ...". ***Stark v. New York City Tr. Auth.*, 2022 N.Y. Slip Op. 01338, Second Dept 3-2-22**

THIRD DEPARTMENT

FREEDOM OF INFORMATION LAW (FOIL), ATTORNEYS, PRIVILEGE, CRIMINAL LAW.

CERTAIN FOIL REQUESTS RE: THE TRAINING AND PROCEDURES OF THE BOARD OF PAROLE PROTECTED BY ATTORNEY-CLIENT PRIVILEGE; TWO DISSENTERS DISAGREED.

The Third Department, over two partial dissents, determined the FOIL request for certain documents relating to the training and procedures of the Board of Parole was properly denied as protected by the attorney-client privilege: " '[T]he attorney-client privilege protects communications between an attorney and his or her client that convey facts relevant to a legal issue under consideration, even if the information contained in the communication is not privileged' ... . Regarding the minor offenders memoranda, these documents ... were created by counsel and contain legal advice to the Board regarding the state of law and how the Board should conduct interviews in accord with such law. The court-decisions handouts likewise provide counsel's summary, view and impression of recent case law to the Board. Similarly, the presentation slides and the parole interviews and decision-making handout discuss various legal standards and regulations and, as the Board's counsel noted, were provided to the Board so it could understand the requirements imposed by them and how it can comply with them. As to the remaining documents — handouts concerning Board interviews, sample decision language concerning departure from COMPAS [Correctional Offender Management Profiling for Alternative Sanctions] and hypothetical Board decisions — they also involve legal advice as to how to reach decisions on parole matters so as to be in compliance with applicable regulations.... . **From the two partial dissents:** ... [M]any of the documents contain sections that are devoted solely to informing the Board of Parole of its duly codified statutory and regulatory duties in rendering parole determinations, without any fact-specific discussions or legal advice on how to apply the law to particular scenarios. Although these documents were prepared by attorneys in the course of a professional relationship, the general legal principles outlined therein are not confidential ... * * * ... I disagree with the majority because it is my opinion that the proper basis to withhold these documents is the intra-agency exemption, rather than the attorney-client privilege exemption." ***Matter of Appellate Advocates v. New York State Dept. of Corr. & Community Supervision*, 2022 N.Y. Slip Op. 01354, Third Dept 3-3-22**

LANDLORD-TENANT, MUNICIPAL LAW, CONSTITUTIONAL LAW.

THIS ACTION WAS BROUGHT BY THE OWNERS OF RENTAL PROPERTIES IN THE DEFENDANT VILLAGE ALLEGING, AMONG OTHER CAUSES OF ACTION, VIOLATIONS OF THEIR CONSTITUTIONAL RIGHTS BY THE VILLAGE "NUISANCE LAW" WHICH WAS DECLARED UNCONSTITUTIONAL BECAUSE IT INFRINGED ON THE TENANTS' RIGHT TO CALL THE POLICE ("NUISANCE POINTS" WERE ASSESSED FOR CALLS TO THE POLICE); THE ACTION BY THE RENTAL-PROPERTY OWNERS WAS PROPERLY DISMISSED.

The Third Department affirmed the dismissal of this action brought by owners of rental properties in the defendant village asserting, among other causes of action, violations of their constitutional rights stemming from a local law (Nuisance Law) which was declared unconstitutional: "[This court] declar[ed] that the Nuisance Law was 'overbroad and facially invalid under the First Amendment' ... . As to the finding of facial invalidity under the First Amendment, this Court held that, because the Nuisance Law did not prohibit the assessment of nuisance points against a property for police involvement thereat, the law violated the right of plaintiffs' tenants to petition the government for redress of grievances by deterring them from calling the police in response to crimes committed at their properties ... . * * * ... Supreme Court properly dismissed the first cause of action for malicious prosecution. * * * As for the First Amendment claim, Supreme Court found ...that plaintiffs lacked standing to assert their tenants' constitutional rights. * * * With respect to the selective enforcement claim, nothing in the record suggests that plaintiffs were singled out for enforcement of the Nuisance Law due to the population of tenants to which they rented — i.e., individuals whose rent was paid by the Tompkins County Department of Social Services. * * * ... [P]laintiffs' due process claim, to the extent based upon defendants' alleged failure to follow the procedures set forth in the Nuisance Law, is not actionable." ***Pirro v. Board of Trustees of the Vil. of Groton*, 2022 N.Y. Slip Op. 01358, Third Dept 3-3-22**

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