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FIRST DEPARTMENT

CRIMINAL LAW, JUDGES.

THE JUDGE SHOULD HAVE INQUIRED FURTHER WHEN SEVERAL PROSPECTIVE JURORS INDICATED THEY WOULD BE INCLINED TO BELIEVE THE VICTIM IN THIS SEXUAL ABUSE CASE, NEW TRIAL ORDERED.

The First Department, reversing defendant's sexual-abuse conviction, determined the judge should have inquired further when several prospective jurors indicated they would be inclined to believe the victim: "'PROSPECTIVE JUROR [Mr. L.]: ... I would say that I do think that there is a lot of disincentives to come forward at all. And to come forward to this point, it would surprise me that someone would get that far without there being anything at all to it THE COURT: Okay. ... MR. LYNCH: I know some of you raised your hand. Who agrees with the statement that Mr. L. just said?' (at which time 5 jurors raised their hands). This statement by prospective juror (Mr. L.) and the apparent agreement by the other prospective jurors who raised their hands was sufficient to raise 'a serious doubt regarding the ability to be impartial' … . The court erred in not engaging in any further inquiry of these jurors in order to elicit an unequivocal assurance of their impartiality and their ability to follow the court's instructions ... . ***People v. Ledezma*, 2022 N.Y. Slip Op. 02236, First Dept 4-5-22**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

PLAINTIFF FELL LEAVING AN ELEVATOR HE HAD JUST MODIFIED TO PREVENT ACCESS TO A FLOOR; HIS WORK WAS NOT ROUTINE MAINTENANCE; INDUSTRIAL CODE PROVISIONS ABOUT GUARDING HAZARDOUS OPENINGS APPLIED; ONE DEFENDANT MAY BE LIABLE AS A STATUTORY AGENT; LABOR LAW §§ 200, 240(1) AND 241(6) CAUSES OF ACTION SHOULD NOT HAVE BEEN DISMISSED.

The First Department, reversing (modifying) Supreme Court; determined: (1) plaintiff's work on the elevator was not routine maintenance and therefore Labor Law §§ 240(1) and 241(6) were applicable; (2) the Labor Law § 241(6) cause of action based on Industrial Code provisions requiring the guarding of hazardous opening should not have been dismissed; and (3) there are questions of fact whether one defendant, Edge, based on a subcontract, was liable as a statutory agent under Labor Law §§ 200, 240(1) and 241(6): "Plaintiff and a coworker lowered a building's freight elevator into the basement to allow plaintiff to perform work on top of the elevator. Plaintiff testified that he spent about 40 minutes performing that work, which involved making changes to the elevator in order to prevent people from accessing a first-floor renovation site by means of the elevator's rear door. The elevator's front door opened onto an outdoor area. After performing this task, plaintiff claims that he tripped on a wooden ramp, which led from a loading dock to the elevator, and fell. ... [P]laintiff was engaged in altering the premises within the meaning of Labor Law § 240(1), since his work was intended to secure the premises in preparation for the renovation project ... . The Labor Law § 241(6) claim should be reinstated insofar as it is based on alleged violations of Industrial Code §§ 23-1.7(b)(1)(i) and 23-1.15(a), since there are issues of fact as to whether plaintiff's accident was proximately caused by the lack of a compliant 'safety railing' guarding the 'hazardous opening,' and it is undisputed that the opening was not 'guarded by a substantial cover fastened in place' (12 NYCRR § 23-1.7[b][1][i]). ... [T]here is testimonial evidence that the subcontract made Edge responsible for performing all aspects of the sidewalk excavation, including safety procedures. Moreover, there are issues of fact as to whether Edge created or had notice of the defective condition that caused plaintiff to fall into the excavation hole ...". ***Rooney v. D.P. Consulting Corp.*, 2022 N.Y. Slip Op. 02243, First Dept 4-5-22**

MEDICAL MALPRACTICE, PERSONAL INJURY.

IN THIS MEDICAL MALPRACTICE CASE, WHETHER DEFENDANT REGISTERED NURSE AND DEFENDANT PHYSICIAN'S ASSISTANT GAVE PLAINTIFF THE APPROPRIATE DISCHARGE INSTRUCTIONS AFTER DISCOVERING A LUMP IN PLAINTIFF'S BREAST CREATED A QUESTION OF FACT; THERE WAS A QUESTION OF FACT WHETHER THE DOCTOR WHO COSIGNED THE PHYSICIAN ASSISTANT'S CHART SHOULD HAVE REVIEWED THE CHART.

The First Department, reversing Supreme Court, determined questions of fact precluded summary judgment in favor of defendant registered nurse (Varas), defendant physician's assistant (Rogan), and defendant doctor who cosigned the physician assistant's chart (Shaukat). Plaintiff alleged she was told the lump in her breast was a cyst and was given no follow-up in-

structions. Defendants allege plaintiff was given the appropriate follow-up instructions (to rule out cancer). Several months later plaintiff was diagnosed with stage IV breast cancer: "Defendants Varas and Rogan made a prima facie showing that they did not depart from the applicable standard of care in providing plaintiff with verbal or written discharge instructions ... . There are disputed issues of fact, however, that preclude summary judgment, including what, if anything at all, plaintiff was told upon discharge. Dr. Shaukat established prima facie that she did not depart from the applicable standard of care through her expert physician's opinion that cosigning a physician assistant's chart 'is a customary administrative function in major accredited hospitals,' and that she acted within that standard of care by cosigning plaintiff's chart. In opposition, however, plaintiff raised an issue of fact through her expert physician's opinions that 'this function is not merely administrative'; that, in accordance with American Medical Association policy, 'physician[s] must review the [physician assistants'] work to ensure conformity with the standard of care, not to simply rubberstamp medical records for 'administrative' purposes only'; and that Dr. Shaukat failed to conform to this standard of care by not recognizing alleged deficiencies in plaintiff's chart and by not instructing Rogan to call plaintiff to tell her that she required imaging promptly in order to rule out a more serious condition, such as breast cancer ...". ***Almonte v. Shaukat*, 2022 N.Y. Slip Op. 02221, First Dept 4-5-22**

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

ALTHOUGH THE RECORDS OF TRAFFIC INFRACTIONS ARE SEALED PURSUANT TO CPL 160.55, THE RECORDS OF A VIOLATION OF NYC ADMINISTRATIVE CODE 19-190(b), AN UNCLASSIFIED MISDEMEANOR WHICH CRIMINALIZES STRIKING A PEDESTRIAN WHO HAS THE RIGHT OF WAY, ARE NOT SEALED; THEREFORE PLAINTIFF IS ENTITLED TO DISCOVERY OF THOSE RECORDS IN THIS VEHICLE-PEDESTRIAN ACCIDENT CASE.

The First Department, reversing Supreme Court, determined plaintiff in this vehicle-pedestrian accident case was entitled to the records of the driver's guilty plea to an unclassified misdemeanor (under the NYC Administrative Code), which criminalizes striking a pedestrian who has the right of way: The unclassified misdemeanor is not covered by the sealing statute, Criminal Procedure Law (CPL) 160.55 which seals records of Vehicle and Traffic Law infractions: "[Defendant driver] was arrested, charged, and subsequently pled guilty to Administrative Code of City of NY § 19-190(b), an unclassified misdemeanor, and to Vehicle and Traffic Law § 1146(c)(1), a traffic violation, for failing to yield to plaintiff's decedent and causing him injury. Plaintiff ... now seeks the records pertaining to [the driver's] unclassified misdemeanor. The City defendants argue that these records are not discoverable because they overlap with [the driver's] traffic infraction records, which are sealed pursuant to CPL 160.55. Under CPL 160.55, all records and papers relating to the arrest or prosecution of an individual convicted of a traffic infraction or violation, following a criminal action or proceeding, shall be sealed and not made available to any person or public or private agency ... . Plaintiff is entitled to [the driver's] records pertaining to his unclassified misdemeanor, as the records are not subject to CPL 160.55, and it does not appear that they were sealed ... . To the extent these records contain references or information related solely to [the driver's] sealed traffic violation case, the City must redact or remove it from its production." ***Lu-Wong v. City of New York*, 2022 N.Y. Slip Op. 02226, First Dept 4-5-22**

PERSONAL INJURY, EVIDENCE, JUDGES.

THE TRIAL JUDGE HAS THE DISCRETION TO PERMIT REBUTTAL TESTIMONY; HERE PLAINTIFF'S TREATING PHYSICIAN WAS PROPERLY ALLOWED TO REBUT THE TESTIMONY OF DEFENDANTS' EXPERT, EVEN THOUGH THE TREATING PHYSICIAN'S TESTIMONY COULD HAVE BEEN PRESENTED IN THE CASE-IN-CHIEF.

The First Department noted that the trial judge properly allowed plaintiff to call her treating physician to rebut the testimony of defendants' expert, even though the doctor's testimony could have been presented in her case-in-chief: "The trial court providently exercised its discretion in permitting plaintiff to call her treating radiologist as a rebuttal witness ... . While plaintiff's radiologist's testimony could have been offered as part of her case-in-chief, and her failure to offer the testimony at that time deprived her of the right to make use of it as affirmative evidence, she still had the right to offer the testimony in order "to impeach or discredit" the testimony of defendants' expert radiologist ...". ***Reinoso v. New York City Tr. Auth.*, 2022 N.Y. Slip Op. 02242, First Dept 4-5-22**

SECOND DEPARTMENT

CRIMINAL LAW.

BURGLARY SECOND COUNT DISMISSED AS A LESSER INCLUDED CONCURRENT COUNT OF BURGLARY FIRST.

The Second Department, vacating the sentence and dismissing the count, determined burglary second is a lesser included concurrent count of burglary first: "[T]he defendant's conviction of burglary in the second degree under Penal Law § 140.25(2), as well as the sentence imposed thereon, must be vacated and that count dismissed as a lesser included concurrent count of burglary in the first degree under Penal Law § 140.30(4) (see CPL 300.40[3][b] ...)." ***People v. Joseph*, 2022 N.Y. Slip Op. 02282, Second Dept 4-6-22**

EDUCATION-SCHOOL LAW, NEGLIGENCE, MUNICIPAL LAW.

THE FACT THAT THE SCHOOL WAS AWARE OF THE PETITIONERS' CHILD'S INJURY AT THE TIME IT OCCURRED DOES NOT MEAN THE SCHOOL HAD TIMELY KNOWLEDGE OF THE POTENTIAL LAWSUIT; PETITIONERS' APPLICATION TO DEEM A LATE NOTICE OF CLAIM TIMELY SERVED SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined the petitioners' application to deem the late notice of claim timely served nunc pro tunc should not have been granted. Apparently, petitioners' child tripped and fell on a stairwell at her school. The fact that the school was aware of the child's injury at the time does not mean the school was aware of a potential lawsuit. The year-long delay was not adequately explained; infancy is not enough. And the petitioners did not show the school was not prejudiced by the delay: "The appellant's 'knowledge of the accident and the injury, without more, does not constitute actual knowledge of the essential facts constituting the claim, at least where the incident and the injury do not necessarily occur only as the result of fault for which it may be liable' ... . The petitioner mother stated in an affidavit submitted in support of the application that the school nurse called her on the day of the accident, advising her that her daughter fell on the stairs and injured her right foot. This statement, however, did not provide the appellant with actual knowledge of the facts underlying the petitioners' claim of negligent supervision ... . Similarly, although the petitioner mother stated in her affidavit that she spoke to an employee of the appellant about the accident approximately two months after it occurred, the mother's affidavit indicates that the employee had no information or details to share. Moreover, letters sent by the petitioners' attorneys to the appellant did not advise it of the essential facts underlying the negligent supervision claim." ***J. G. v. Academy Charter Elementary Sch.*, 2022 N.Y. Slip Op. 02251, Second Dept 4-6-22**

FAMILY LAW, CIVIL PROCEDURE.

THE ORIGINAL CHILD SUPPORT ORDER WAS ISSUED IN VIRGINIA, WHERE FATHER RESIDES; FATHER'S NEW YORK CHILD SUPPORT PETITION WAS ACTUALLY SEEKING MODIFICATION OF THE VIRGINIA ORDER; NEW YORK THEREFORE DID NOT HAVE JURISDICTION OVER FATHER'S PETITION.

The Second Department, reversing Family Court, determined New York did not have jurisdiction over father's petition for child support. The original child support order was issued in Virginia, where father resides. Therefore the New York petition was a petition for modification of the Virginia order, which cannot be addressed by a New York court: "The mother and the father are the parents of a child who was born in the Commonwealth of Virginia in 2007. In September 2020, the father commenced the instant proceeding in New York for child support pursuant to the Uniform Interstate Family Support Act (Family Ct Act art 5-B; hereinafter UIFSA). * * * 'Under the [Full Faith and Credit for Child Support Orders Act] and UIFSA, the state issuing a child support order retains continuing, exclusive jurisdiction over its child support orders so long as an individual contestant continues to reside in the issuing state' ... . 'Accordingly, a state may modify the issuing state's order of child support only when the issuing state has lost continuing, exclusive jurisdiction' ... . Here ... support for the parties' child was previously awarded to the mother in an order issued by a court within the jurisdiction of the Commonwealth of Virginia prior to the filing of the father's petition. Accordingly ... his petition was in the nature of a 'modification' petition, rather than a 'de novo' application ... . Since the father resides in the Commonwealth of Virginia, that entity retains continuing, exclusive jurisdiction of its child support order, and New York does not have jurisdiction to modify it ... ". ***Matter of Salim v. Freeman*, 2022 N.Y. Slip Op. 02268, Second Dept 4-6-22**

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

RPAPL 1301(3) PROHIBITS MORE THAN ONE FORECLOSURE AT A TIME; THE VIOLATION OF THAT STATUTE HERE WAS A MERE IRREGULARITY WHICH SHOULD HAVE BEEN DISREGARDED; THE PRIOR ACTION WAS DISMISSED AFTER THE INSTANT ACTION WAS COMMENCED.

The Second Department, reversing Supreme Court, determined the fact that RPAPL 1301(3), which prohibits more than one foreclosure at a time, was technically violated did not warrant dismissing the second action: "Here, the plaintiff failed to seek leave of court to commence this action while the 2010 action was still pending. However, the 2010 action had previously been marked disposed, and no further action occurred in the 2010 action until the administrative dismissal on April 9, 2018. Additionally, by the time the defendants cross-moved in this action for summary judgment dismissing the complaint insofar as asserted against them, the 2010 action had already been dismissed for nearly six months. Thus, the defendants were not prejudiced by having to defend against more than one action, and the plaintiff's failure to strictly comply with RPAPL 1301(3) should have been disregarded as a mere irregularity ...". ***HSBC Bank USA, N.A. v. Kading*, 2022 N.Y. Slip Op. 02255, Second Dept 4-6-22**

FREEDOM OF INFORMATION LAW (FOIL), JUDGES.

A COURT REVIEWING THE DENIAL OF A FOIL REQUEST CANNOT BASE ITS RULING AFFIRMING THE DENIAL ON A GROUND NOT RAISED BY THE AGENCY TO WHICH THE REQUEST WAS MADE.

The Second Department, reversing (modifying) Supreme Court, noted that a court reviewing the denial of a FOIL request cannot base its ruling on a ground that was not cited by the agency to which the request was made: " 'In a proceeding

pursuant to CPLR article 78 to compel the production of material pursuant to FOIL, the agency denying access has the burden of demonstrating that the material requested falls within a statutory exemption, which exemptions are narrowly construed' ... This showing requires the agency 'to articulate a particularized and specific justification for denying access,' and '[c]onclusory assertions that certain records fall within a statutory exemption are not sufficient; evidentiary support is needed' ... . 'If the court is unable to determine whether withheld documents fall entirely within the scope of the asserted exemption, it should conduct an in camera inspection of representative documents and order disclosure of all nonexempt, appropriately redacted material' ... . 'It is the settled rule that judicial review of an administrative determination is limited to the grounds invoked by the agency' ... . A reviewing court 'is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis' ...". ***Matter of McFadden v. McDonald*, 2022 N.Y. Slip Op. 02265, Second Dept 4-6-22**

LIEN LAW.

PETITIONER, PURSUANT TO LIEN LAW 38, HAS A RIGHT TO AN ITEMIZED STATEMENT BREAKING DOWN THE AMOUNT OF A MECHANIC'S LIEN; THE INFORMATION PROVIDED BY THE RESPONDENT HERE WAS DEEMED INSUFFICIENT TO SATISFY LIEN LAW § 38.

The Second Department, reversing Supreme Court, determined the petition seeking an itemized statement breaking down the amount of a mechanic's lien should have been granted: "Lien Law § 38 provides, in relevant part, that '[a] lienor who has filed a notice of lien shall, on demand in writing, deliver to the owner or contractor making such demand a statement in writing which shall set forth the items of labor and/or material and the value thereof which make up the amount for which he [or she] claims a lien, and which shall also set forth the terms of the contract under which such items were furnished.' The documents provided by the respondent in opposition to the petition failed to comply with the requirements of Lien Law § 38. The documents, among other things, failed to sufficiently set forth 'the items and cost of labor, or the items and cost of materials' ...". ***Matter of Red Hook 160, LLC v. Borough Constr. Group, LLC*, 2022 N.Y. Slip Op. 02267. Second Dept 4-6-22**

PERSONAL INJURY, EVIDENCE.

IN ORDER TO HOLD A PROPERTY OWNER LIABLE FOR THE CREATION OF A DANGEROUS CONDITION, HERE THE INSTALLATION OF A COMPOSITE MATERIAL AT THE TOP OF A STAIRWELL WHICH ALLEGEDLY BECAME SLIPPERY WHEN WET, A PLAINTIFF MUST SHOW THE DEFENDANT WAS AWARE OF THE DANGER.

The Second Department, reversing Supreme Court, determined defendants' motion for summary judgment in this slip and fall case should not have been granted. Plaintiff alleged a composite material used at the top of a staircase was inappropriate for that purpose because the surface became slippery when wet from rain. The Second Department found that the defendants did not demonstrate they did not have constructive knowledge of the condition, mainly because the evidence relied upon was inadmissible hearsay. But the Second Department also noted the plaintiff must show more than the creation of a dangerous condition to hold the defendants liable. It must also be shown the defendants knew or should have known of the danger: " 'In a premises liability case, a defendant property owner, or a party in possession or control of real property, who moves for summary judgment has the initial burden of making a prima facie showing that it neither created the alleged defective condition nor had actual or constructive notice of its existence' ... . Contrary to the plaintiff's contention, the defendants may not be held liable merely because they created the allegedly dangerous condition by directing the installation of the composite decking material on the landing. '[A]bsent a statute imposing strict liability, a defendant may not be held liable for creating a dangerous or defective condition upon property unless the defendant had actual, constructive, or imputed knowledge of the danger created' ...". ***San Antonio v. 340 Ridge Tenants Corp.*, 2022 N.Y. Slip Op. 02298, Second Dept 4-6-22**

THIRD DEPARTMENT

CRIMINAL LAW, JUDGES.

THE JUDGE, IN DENYING DEFENDANT'S SECOND MOTION TO SET ASIDE HIS SENTENCE, SHOULD NOT HAVE PRECLUDED DEFENDANT FROM MAKING "ADDITIONAL APPLICATIONS" WITHOUT THE PERMISSION OF THE COURT.

The Third Department noted that the judge who denied defendant's second motion to set aside his sentence should not have precluded defendant from making "additional applications" without the permission of the court: "We ... agree with defendant that County Court abused its discretion in ordering that prior court approval was required before any further motions were filed. Notably, the authority cited by County Court — 22 NYCRR part 130-1.1 — by its own terms applies to only civil actions or proceedings (see 22 NYCRR 130-1.1 [a]). Moreover, even if such authority does exist in a criminal action ... , defendant has not engaged in sufficiently excessive, protracted and/or unwarranted litigation as to justify such action here. ...". ***People v. Maloy*, 2022 N.Y. Slip Op. 02312, Third Dept 4-7-22**

CRIMINAL LAW, JUDGES, ATTORNEYS.

THE PEOPLE'S APPLICATION FOR A PROTECTIVE ORDER PRECLUDING DISCLOSURE OF CERTAIN DISCOVERABLE MATERIALS TO THE DEFENDANT UNTIL A WEEK BEFORE TRIAL SHOULD HAVE BEEN PROVIDED TO DEFENSE COUNSEL TO ALLOW THE ISSUES TO BE FULLY LITIGATED; MATTER REMITTED.

The Third Department, reversing (modifying) the protective order upon an expedited review (CPL § 245.70), determined that defense counsel should have been provided with the People's application to withhold certain discoverable materials from the defendant until a week before trial: "Inasmuch as the People offered no basis to withhold these materials from defense counsel and, in fact, pursuant to the proposed order submitted by the People, defense counsel would be permitted to access them as soon as County Court signed the order, the better practice would have been to permit defense counsel access to the application and materials prior to the hearing on the protective order so that counsel could participate in it to the fullest extent practicable. ... Defense counsel should, with the appropriate caveat not to disclose them to or discuss their contents with his client pending determination of the application, be permitted to view the application and the materials at issue and thereby meaningfully participate in the hearing before County Court in order to advocate on behalf of his client and assist in reaching an appropriate outcome. Accordingly, the instant application should be granted and the matter remitted for a new hearing following further disclosure to defense counsel." ***People v. Escobales*, 2022 N.Y. Slip Op. 02354, Third Dept 4-8-22**

EMPLOYMENT LAW, HUMAN RIGHTS LAW.

PLAINTIFF STATED A HOSTILE WORK ENVIRONMENT CAUSE OF ACTION WITH THE ALLEGATION (AMONG OTHERS) THAT HIS ACCENT WAS MOCKED, BUT PLAINTIFF DID NOT DEMONSTRATE HIS DEMOTION WAS RELATED TO SUCH ANIMUS; THEREFORE THE DISCRIMINATION CAUSE OF ACTION SHOULD HAVE BEEN DISMISSED.

The First Department, reversing (modifying) Supreme Court, determined plaintiff's employment discrimination claims under the NYS and NYC Human Rights Law stemming from his demotions should have been dismissed: "The discrimination claims should not have been allowed to proceed. Defendants proffered evidence supporting several legitimate reasons for demoting him from his provisional managerial position, including (1) an agency-wide restructuring, (2) plaintiff's lack of accounting and management skills, and (3) evidence that he was a poor manager whose routinely hostile demeanor demoralized his subordinates, as evidenced by complaints made against him by several of those subordinates ... In the face of this evidence, plaintiff failed to come forward with any evidence raising an issue of fact as to whether these reasons were mere pretext for discrimination (under the State HRL) or whether discrimination was one of the motivating factors for the demotion (under the City HRL) ... . Plaintiff presented no evidence of any disparity between defendants' treatment of him and defendants' treatment of employees of other races or ethnicities under similar circumstances. While plaintiff's allegations of remarks that could be interpreted as derogatory or indicative of animus suffice to support the hostile work environment claim ... plaintiff fails to identify any evidence connecting such animus, if any, to the decision to demote him ...". ***Kwong v. City of New York*, 2022 N.Y. Slip Op. 02342, First Dept 4-7-22**

INSURANCE LAW.

LOSS OF RESTAURANT CUSTOMERS DUE TO COVID DOES NOT CONSTITUTE "DIRECT PHYSICAL LOSS OR DAMAGE" WITHIN THE MEANING OF THE BUSINESS-INTERRUPTION INSURANCE POLICY.

The First Department, in a full-fledged opinion by Justice Gische, determined plaintiff's allegation his restaurant lost business because of COVID did not constitute "direct physical loss or damage" within the meaning of the business-interruption insurance policy: "This appeal concerns the issue of whether the actual or possible presence of COVID-19 in plaintiff's restaurants caused 'direct physical loss or damage' to its property, within the meaning of the insurance policy that plaintiff purchased from defendant. The issue of whether business interruptions due to COVID-19 is caused by direct 'physical' damage to property presents an issue of first impression for an appellate court in New York. This Court has, however, previously construed the phrase 'direct physical loss or damage' in other contexts involving similar insurance contracts. As more fully explained below, we hold that where a policy specifically states that coverage is triggered only where there is 'direct physical loss or damage' to the insured property, the policy holder's inability to fully use its premises as intended because of COVID-19, without any actual, discernable, quantifiable change constituting 'physical' difference to the property from what it was before exposure to the virus, fails to state a cause of action for a covered loss." ***Consolidated Rest. Operations, Inc. v. Westport Ins. Corp*, 2022 N.Y. Slip Op. 02336, First Dept 4-7-22**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

HEAVY BARN DOORS WHICH HAD BEEN TAKEN OFF THE HINGES FELL ON PLAINTIFF AS HE DELIVERED SHEETROCK TO THE BARN WHICH WAS BEING CONVERTED TO A MUSIC STUDIO; THERE WERE QUESTIONS OF FACT WHETHER THE DOORS PRESENTED A DANGEROUS CONDITION AND CONSTITUTED AN ELEVATION-RELATED HAZARD AND WHETHER THIS WAS A COMMERCIAL PROJECT TO WHICH THE HOMEOWNER EXEMPTION DID NOT APPLY (LABOR LAW §§ 200 AND 240(1)).

The Third Department, reversing (modifying) Supreme Court, determined defendant's motion for summary judgment on the Labor Law §§ 200 and 240(1) causes of action should not have been granted. Plaintiff was told to deliver sheetrock through an opening where heavy double barn doors were being restored. The hinges had been removed and the doors were held in place by wooden wedges. The doors fell on plaintiff. The Third Department found there were questions of fact whether the doors presented a dangerous condition (Labor Law § 200), an elevation-related hazard (Labor Law § 240(1)), and whether the project was commercial in nature such that the homeowner exemption did not apply. With regard to the homeowner exemption, the court wrote: "Although Labor Law § 240 (1) imposes a nondelegable duty upon owners to protect workers engaged in construction-related activities, 'the Legislature has carved out an exemption for the owners of one and two-family dwellings who contract for but do not direct or control the work' ... . 'That exemption, however, is not available to an owner who uses or intends to use the dwelling only for commercial purposes' ... . [D]efendants, as the parties seeking the benefit of the statutory exemption, had the burden of establishing that the property was not being used solely for commercial purposes ... . This they failed to do. [Defendant's] deposition testimony established that he is a professional musician and that the structure was being altered to use as a music studio and a photography workspace. Moreover, defendants failed to submit an affidavit addressing whether they intended to use the structure for commercial or noncommercial purposes. [W]e find that defendants failed to demonstrate their entitlement to the homeowner exemption as a matter of law and that a question of fact exists regarding the application of the homeowner exemption ...". ***Hawver v. Steele*, 2022 N.Y. Slip Op. 02322, Third Dept 4-7-22**

MUNICIPAL LAW, EMPLOYMENT LAW.

A PROBATIONARY FIREFIGHTER INJURED WHILE TRAINING TO COMPLETE A FIRE BASIC TRAINING PROGRAM WAS INJURED IN THE PERFORMANCE OF HIS DUTIES, ENTITLING HIM TO GENERAL MUNICIPAL LAW § 207-a DISABILITY BENEFITS.

The Third Department, in a full-fledged opinion by Justice McShan, determined Supreme Court properly found petitioner, a probationary firefighter, was entitled to disability benefits pursuant to General Municipal Law § 207-a. The fact that petitioner was injured while training for a test required for the completion of a fire basic training program did not mean petitioner was not injured in the performance of his duties, as argued by the city: "Although petitioner's injury did not occur in the course of his actual performance of the required test, successful completion of the candidate physical ability test was a necessary requirement of petitioner's position, and petitioner was engaged in the expected and foreseeable task of practicing for that test during a mandatory training program that was part of his duties as a probationary firefighter ... . The record further reflects that petitioner was attending the Fire Academy at the direction of the City, that the training was paid for by the City and that petitioner was receiving full pay for his attendance and participation in the program. Mindful that, as a remedial statute, General Municipal Law § 207-a 'should be liberally construed in favor of the injured employees the statute was designed to protect' ... , we find that the requisite causal relationship exists between petitioner's job duties and his injury ...". ***Matter of Smith v. City of Norwich*, 2022 N.Y. Slip Op. 02324, Third Dept 4-7-22**

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