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COURT OF APPEALS

CONTRACT LAW, INSURANCE LAW, CIVIL PROCEDURE.

THE BREACH OF CONTRACT (FIRE INSURANCE POLICY) CAUSE OF ACTION ALLEGED IN THE COMPLAINT DID NOT GIVE NOTICE OF THE CLAIM THE CONTRACT SHOULD BE REFORMED BASED UPON MUTUAL MISTAKE; THEREFORE THE PLAINTIFF SHOULD NOT HAVE BEEN ALLOWED TO CONFORM THE PLEADINGS TO THE PROOF AND THE JURY SHOULD NOT HAVE BEEN ALLOWED TO CONSIDER WHETHER THE ENDORSEMENT REQUIRING A SPRINKLER SYSTEM ON THE INSURED PREMISES WAS INCLUDED IN THE POLICY BY MUTUAL MISTAKE.

The Court of Appeals, reversing the Appellate Division, in a full-fledged opinion by Judge Rivera, determined plaintiff should not have been allowed to conform the pleadings to the proof and the jury should not have considered whether the contract, an insurance policy, should be reformed based upon mutual mistake. The complaint alleged defendant insurer breached the contract (the policy) by refusing to pay for fire damage. The insurance policy included a Protective Safeguards Endorsement (PSE) which required plaintiff to have a sprinkler system in good working order. The buildings apparently were vacant and did not have sprinkler systems. Based on testimony given at trial, plaintiff argued inclusion of the PSE was a mutual mistake and the contract (policy) should be reformed to exclude it. The jury and the appellate division so found. But the Court of Appeals held the courts should not have looked beyond the four corners of the pleadings, and the pleadings did not give notice of the reformation action: "[CPLR] Section 203 (f) requires the court to determine solely whether a plaintiff's or a defendant's original pleading gives notice of the transactions or occurrences underlying the proposed amendment ... To plead reformation, a plaintiff must allege sufficient facts supporting a claim of mutual mistake, meaning that 'the parties have reached an oral agreement and, unknown to either, the signed writing does not express that agreement' ... . Given the 'heavy presumption that a deliberately prepared and executed written instrument manifests the true intention of the parties, . . . [t]he proponent of reformation must show in no uncertain terms, not only that mistake or fraud exists, but exactly what was really agreed upon between the parties' ... . In contrast, to plead a cause of action for breach of contract, a plaintiff usually must allege that: (1) a contract exists ... ; (2) plaintiff performed in accordance with the contract ... ; (3) defendant breached its contractual obligations ... ; and (4) defendant's breach resulted in damages ... . The complaint ... alleges that plaintiffs complied 'with all of the conditions precedent and subsequent pursuant to the terms of the subject policy.' This ... allegation is fatal to plaintiffs' assertion that the complaint provides notice of the transactions or occurrences to be proved in support of a reformation claim. In fact, if anything, it suggests the opposite because, by asserting total compliance, plaintiffs necessarily disclaimed any challenge to the policy's terms, specifically the PSE." ***34-06 73, LLC v. Seneca Ins. Co.*, 2022 N.Y. Slip Op. 06029, CtApp 10-27-22**

FAMILY LAW, CIVIL PROCEDURE, SOCIAL SERVICES LAW.

THE INTERSTATE COMPACT ON THE PLACEMENT OF CHILDREN (ICPC) APPLIES ONLY TO PLACEMENT IN FOSTER CARE OR PLACEMENT RELATED TO ADOPTION; THEREFORE THE ICPC DID NOT APPLY HERE WHERE FATHER, A NORTH CAROLINA RESIDENT, SOUGHT CUSTODY OF THE CHILD; NORTH CAROLINA, APPLYING THE ICPC, DID NOT APPROVE PLACEMENT WITH FATHER; THE APPELLATE DIVISION'S DENIAL OF FATHER'S CUSTODY PETITION ON THAT GROUND WAS REVERSED.

The Court of Appeals, in a full-fledged opinion by Judge Cannataro, resolving a conflict between Second and First Departments, determined the Interstate Compact on the Placement of Children (ICPC), which requires that a state approve the placement of a child from another state, applies only to placement in foster care or adoption, and not, as here, placement with a parent. In this case, the child was in foster care in New York and father, a North Carolina resident, sought custody. Applying the ICPC, North Carolina did not approve placement with father in North Carolina, and the New York courts denied father's custody petition on that ground. The Court of Appeals held placement with father did not trigger the application of the ICPC: "By its terms, the ICPC governs the out-of-state 'placement' of children 'in foster care or as a preliminary to possible adoption' (Social Services Law § 374-a [1] [art III] [a] & [b]). The language of the statute thus unambiguously limits its applicability to cases of placement for foster care or adoption—which are substitutes for parental care that are not implicated when custody of the child is granted to a noncustodial parent. * * * Although the ICPC does not apply to placement with a parent, the Family Court Act contains other effective means to ensure the safety of a child before awarding custody to an out-of-state parent. Family Court retains jurisdiction over custody proceedings and has a broad array of powers under the Family Court Act to ensure a child's safety." ***Matter of D.L. v. S.B.*, 2022 N.Y. Slip Op. 05940, CtApp 10-25-22**

MUNICIPAL LAW, EMPLOYMENT LAW.

CIVIL SERVICE LAW § 71 ALLOWS THE CITY TO TERMINATE AN EMPLOYEE WHO WAS INJURED ON THE JOB AND IS UNABLE TO RETURN TO WORK AFTER A YEAR; THE PROCEDURE FOR TERMINATING SUCH AN EMPLOYEE IS SUBJECT TO THE COLLECTIVE BARGAINING REQUIREMENT OF THE TAYLOR LAW (CIVIL SERVICE LAW § 200 ET SEQ).

The Court of Appeals, in a full-fledged opinion by Justice Troutman, reversing the Second Department, determined the city was required to engage in collective bargaining with the union to agree on the procedure for terminating an employee (here a firefighter) who was injured on the job and has not returned to work after a year: "Does the Taylor Law (Civil Service Law § 200 et seq.) require a municipality to engage in collective bargaining over the procedures for terminating municipal employees after they have been absent from work for more than a year due to an injury sustained in the line of duty? We hold that collective bargaining is required. * * * '[W]here an employee has been separated from the service by reason of a disability resulting from occupational injury or disease as defined in the work[ers'] compensation law, [the employee] shall be entitled to a leave of absence for at least one year . . . ' (Civil Service Law § 71). * * * Section 71 [grants] an employee with a work-related disability a leave of absence of up to one year and conditional reinstatement—even after that year has passed—while allowing the employer to fill the position if it chooses to terminate the employee. ... '[T]here is no 'plain' and 'clear' evidence that the Legislature intended' to foreclose from mandatory bargaining the procedures for terminating employees covered by the statute ... . Both the language and legislative history of the section are silent on the issue of collective bargaining ... . [I]nasmuch as section 71 does not reference pretermination procedures at all, the statute plainly leaves room for the City and the Union to negotiate those procedures." ***Matter of City of Long Beach v. New York State Pub. Empl. Relations Bd.*, 2022 N.Y. Slip Op. 05939, CtApp 10-25-22**

RETIREMENT AND SOCIAL SECURITY LAW.

BECAUSE PETITIONER POLICE OFFICER WAS AWARE THE DOOR COULD SLAM SHUT, THE FACT THAT THE DOOR DID SLAM SHUT CRUSHING HER FINGER WAS NOT A COMPENSABLE "UNEXPECTED" "ACCIDENT" PURSUANT TO THE RETIREMENT AND SOCIAL SECURITY LAW; STRONG DISSENTING OPINION.

The Court of Appeals affirmed the denial of disability benefits on the ground the heavy door blowing shut on petitioner's finger was not an "accident" within the meaning of the Retirement and Social Security Law. The affirmance is a brief memorandum decision. The dissent by Judge Wilson is a full-fledged opinion. The majority noted that the petitioner was aware the door slammed shut. The event was not "unexpected" and therefore was not a compensable "accident:" "An 'injury which occurs without an unexpected event as the result of activity undertaken in the performance of ordinary employment duties, considered in view of the particular employment in question, is not an accidental injury' ... . Petitioner conceded that she knew that the heavy metal door slammed automatically and that on the day of the injury her movements were intended to avoid that quick and forceful closure. While the known condition may be a risk of the work site, it cannot be the cause of an accident compensable under Retirement and Social Security Law § 363. ... **From the dissent:** Rosa Rizzo worked for the Port Authority of New York and New Jersey as a police officer. On a cold February day, she trudged through the sleet and cold winds at the Lincoln Tunnel to tend to an ailing woman, staying with her until an ambulance arrived. Once it arrived, Officer Rizzo gathered the names of the parties and witness testimony and then headed towards the heated MTA booth so she could write her report. She had used the booth before and knew that its door could swing closed, but she had never heard of anyone being injured by it. As she squeezed into the booth, however, a violent gust of wind blew the 80 to 100 pound door shut, crushing her right index finger and permanently disabling her from returning to her to a full duty position." ***Matter of Rizzo v. DiNapoli*, 2022 N.Y. Slip Op. 06027, CtApp 10-27-22**

WORKERS' COMPENSATION, TRUSTS AND ESTATES.

A NONSCHEDULE AWARD AND A SCHEDULE AWARD ARE CALCULATED DIFFERENTLY; A NONSCHEDULE AWARD IS CALCULATED BASED UPON EARNING CAPACITY, WHICH OBVIOUSLY CEASES UPON DEATH; HERE, WHERE THE INJURED WORKER DIED FROM A CAUSE UNRELATED TO THE INJURY, THE BENEFICIARY IS THEREFORE NOT ENTITLED TO THE UNACCRUED PORTION OF THE NONSCHEDULE AWARD.

The Court of Appeals, reversing the Appellate Division, in a full-fledged opinion by Judge Garcia, determined the unaccrued portions of a nonschedule award under Workers' Compensation Law (WCL) § 15(3) do not pass to the beneficiary of an injured employee who died from causes unrelated to the work injury: "WCL § 15 (3), provides for two categories of awards for injuries resulting in permanent partial disability. A 'schedule loss of use' (SLU) award, provided for in section 15 (3) (a)-(u), is designed to 'compensate for loss of earning power, rather than the time that an employee actually loses from work or the injury itself' ... . A nonschedule award, in contrast, seeks to reimburse a claimant for earnings lost due to injury ... . The nature of nonschedule awards, dependent on an employee's actual earnings and the continuance of the disability, is such that there is no remaining portion of the award that can pass through to a beneficiary. … Schedule and nonschedule awards are calculated differently, reflecting the different purposes they serve. Nonschedule awards require fact-specific, individual calculations based on the impairment of wage-earning capacity. ... More than 100 years ago, this Court urged recognition of the difference between schedule and nonschedule awards, explaining that cases 'where the award is to be measured by the difference between wages and capacity [nonschedule awards] are, of course, not to be confused with those where the act prescribes a fixed and certain limit [schedule awards]' ...". ***Matter of Green v. Dutchess County BOCES*, 2022 N.Y. Slip Op. 06028, CtApp 10-27-22**

FIRST DEPARTMENT

CIVIL PROCEDURE, CONTRACT LAW, EVIDENCE, TRUSTS AND ESTATES.

THE CERTIFICATION OF ACKNOWLEDGMENT IS PRIMA FACIE EVIDENCE THE DECEDENT EXECUTED THE CONTRACT, BUT THAT EVIDENCE CREATES ONLY A REBUTTABLE PRESUMPTION; PLAINTIFF PRESENTED SUFFICIENT EVIDENCE TO RAISE A QUESTION OF FACT WHETHER DECEDENT SIGNED THE AGREEMENT.

The First Department, reversing (modifying) Supreme Court, determined the certification of acknowledgment is prima facie proof the contract was executed by decedent, but the certification only creates a rebuttable presumption: "[T]he agreement was notarized by defendant Rosemary Bellini. 'Certification of the acknowledgment or proof of a writing . . . in the manner prescribed by law for taking and certifying the acknowledgment or proof of a conveyance of real property within the state is prima facie evidence that it was executed by the person who purported to do so' (CPLR 4538). * * * 'The certification of acknowledgment becomes prima facie evidence that the writing was executed by the person who acknowledged having done so. [This] [p]rima facie evidence' is not conclusive; rather, it 'creates a rebuttable presumption' ... . Plaintiff marshalled considerable evidence casting doubt on whether decedent actually signed the purported agreement and, if so, whether he knew or understood what he was signing. Thus, plaintiff should be given a chance to rebut the presumption created by Bellini's notarization ...". ***Langbert v. Aconsky*, 2022 N.Y. Slip Op. 06067, First Dept 10-27-22**

CIVIL PROCEDURE, JUDGES.

DEFENDANT'S FAILURE TO COMPLY WITH DISCOVERY ORDERS WAS WILLFUL AND CONTUMACIOUS WARRANTING STRIKING ITS ANSWER.

The First Department, reversing Supreme Court, determined the defendant's (Motors's) failure to turn over records despite four court orders and defendant's attempt to mislead plaintiff about its compliance with the discovery requirements warranted striking defendant's answer: "We find that Motors's failure to produce these records was willful and contumacious, in view of the fact that it did not do so despite four courts orders, and in light of its interrogatory response implying that it had complied with its discovery obligations in an apparent attempt to mislead plaintiff (see CPLR 3216 ...). Although the other defendants were represented by the same counsel as Motors, there is no indication that they exercised control over Motors or were in possession of Motors's records ... . Motors's dilatory behavior warrants striking its answer ...". ***Lopez v. Bronx Ford, Inc.*, 2022 N.Y. Slip Op. 06068, First Dept 10-27-22**

CRIMINAL LAW, JUDGES.

THE JUDGE DID NOT READ THE JURY NOTE IN ITS ENTIRETY TO THE PARTIES AND THE JUDGE'S PARAPHRASE OF THE CONTENTS OMITTED SIGNIFICANT ASPECTS OF IT; THE FACT THAT THE JURY ANNOUNCED IT HAD REACHED A VERDICT BEFORE THE NOTE WAS CALLED TO THE PARTIES' ATTENTION DID NOT MATTER; THE MODE OF PROCEEDINGS ERROR REQUIRED REVERSAL.

The First Department, reversing defendant's conviction and ordering a new trial, determined the judge's failure to read the entire note from the jury to the parties was a mode of proceedings error. The fact that the jury announced it had reached a verdict before the note was read was not determinative: "The trial court's failure to read to the parties the entirety of a note submitted just before the jury reached a verdict deprived counsel of meaningful notice (see CPL 310.30 ...). The note was not shown to counsel, and the court's paraphrase omitted significant aspects of the jury's requests, including a request for reinstruction on the count charging second-degree assault, which was the only count on which defendant was found guilty. The fact that the jury announced that it had reached a verdict before the note was read did not cure this mode of proceedings error ...". ***People v. Heyworth*, 2022 N.Y. Slip Op. 06072, First Dept 10-27-22**

PERSONAL INJURY, EVIDENCE.

DEFENDANT DEMONSTRATED IT DID NOT HAVE CONSTRUCTIVE NOTICE OF THE WET CONDITION WHICH ALLEGEDLY CAUSED PLAINTIFF'S SLIP AND FALL.

The First Department, reversing Supreme Court, determined defendant demonstrated it did not have constructive notice of the wet condition which allegedly caused plaintiff's slip and fall: "Defendant demonstrated prima facie that it did not have actual or constructive notice of the dangerous condition by producing evidence of its maintenance activities on the day of the accident, specifically, that the wet condition did not exist when the stairs were cleaned by the porter less than three hours before plaintiff fell ... , and that there were no complaints about a wet condition on the stairs in the morning prior to her accident ... . Defendant was not required to produce a written schedule or log of its cleaning activities; the unrefuted testimony of its porter was sufficient. The porter's testimony also established that there was a reasonable cleaning schedule in place that addressed the alleged ongoing and recurring condition ... . Plaintiff failed to raise an issue of fact concerning who created the wet condition and when ... . Plaintiff presented no evidence that the ongoing and recurring condition was routinely left unaddressed by defendant, nor did she raise a factual issue that defendant's cleaning routine 'was manifestly unreasonable so as to require altering it' ...". ***Hartley v. Burnside Hous. Dev. Fund Corp.*, 2022 N.Y. Slip Op. 06065, First Dept 10-27-22**

PERSONAL PROPERTY, CONTRACT LAW, TRUSTS AND ESTATES, COOPERATIVES,

THE PLAINTIFF DID NOT DEMONSTRATE HIS DECEASED BROTHER MADE AN INTER VIVOS GIFT OF THE COOPERATIVE APARTMENT TO PLAINTIFF; THE STATUTE OF FRAUDS APPLIES AND THERE WAS NO WRITING; AND THE FAILURE TO FOLLOW THE TRANSFER PROVISIONS OF THE PROPRIETARY LEASE NEGATED A FINDING OF DONATIVE INTENT.

The First Department, reversing Supreme Court, determined plaintiff did not demonstrate his deceased brother made an inter vivos gift of a cooperative apartment to plaintiff. The alleged transfer of the property was subject to the Statute of Frauds and there was no writing memorializing the alleged gift: "Defendant established that there was no valid inter vivos gift to plaintiff of the shares and proprietary lease for the apartment, as the statute of frauds applies to the sale of stock in a housing cooperative and there was no writing to effect the transfer ... . … Plaintiff's claim further fails as a matter of law, as the decedent — his brother — failed to follow the transfer provisions of the proprietary lease, which required, among other things, a written assignment of shares signed by the shareholder and the approval of defendant's board of directors to make a valid transfer of the shares to the apartment within the decedent's lifetime ... . [E]ven if the decedent had not been required to abide by the terms of the proprietary lease to make a valid inter vivos gift of the apartment, the lack of a writing also militates against establishing the decedent's donative intent, which is a necessary element of a valid inter vivos gift ... . Not only does the decedent's failure to follow the procedures in the proprietary lease contradict any donative intent, but plaintiff also acknowledges that the delivery of the share certificate and proprietary lease were not made by the decedent himself, and the conflicting affidavits of the decedent's girlfriend fail to establish that she was acting as decedent's agent for that purpose." ***Rivera v. 98-100 Ave. C Hous. Dev. Fund Corp.*, 2022 N.Y. Slip Op. 06074, First Dept 10-27-22**

SECOND DEPARTMENT

CIVIL PROCEDURE, NEGLIGENCE, EVIDENCE, INSURANCE LAW.

THE MOTION TO CONSOLIDATE THE TRIALS OF TWO ACTIONS STEMMING FROM THE SAME FIRE, WHERE ONE PARTY WAS BOTH A DEFENDANT AND A PLAINTIFF, SHOULD HAVE BEEN GRANTED; ANY PREJUDICE RESULTING FROM THE JURY'S KNOWLEDGE OF THE EXISTENCE OF INSURANCE (ONE OF THE ACTIONS IS AGAINST AN INSURER) CAN BE HANDLED WITH JURY INSTRUCTIONS.

The Second Department, reversing (modifying) Supreme Court, determined the motion to consolidate the trials of two actions stemming from the same fire which damages two adjoining properties should have been granted. The court noted that one party is both a plaintiff and a defendant: "Although a motion pursuant to CPLR 602(a) is addressed to the sound discretion of the trial court ... , consolidation or joinder for trial is favored to avoid unnecessary duplication of trials, save unnecessary costs and expense, and prevent an injustice which would result from divergent decisions based on the same facts ... . 'Where common questions of law or fact exist, a motion [pursuant to CPLR 602(a)] to consolidate [or for a joint trial] should be granted, absent a showing of prejudice to a substantial right by the party opposing the motion' ... . Here ... the two actions involve common questions of law and fact. Assuming, arguendo, that the respondents would be prejudiced if the two actions are tried before the same jury since it would bring to the jury's attention the existence of insurance ... , any such prejudice is outweighed by the possibility of inconsistent verdicts if separate trials ensue ... . Furthermore, the possibility of such prejudice can be mitigated by appropriate jury instructions ... . Moreover, a joint trial, rather than consolidation, is appropriate where a party is both a plaintiff and a defendant ...". ***Calle v. 2118 Flatbush Ave. Realty, LLC*, 2022 N.Y. Slip Op. 05981, Second Dept 10-26-22**

CORPORATION LAW, CONTRACT LAW, ATTORNEYS.

IN THIS BREACH OF CONTRACT SUIT CONCERNING SHARING ATTORNEY'S FEES, THE COMPLAINT DID NOT ALLEGE SUFFICIENT FACTS TO STATE A CAUSE OF ACTION AGAINST AN INDIVIDUAL ATTORNEY, AS OPPOSED TO THE ATTORNEY'S FIRM.

The Second Department, in this breach of contract action, determined the complaint did not allege sufficient facts to state a cause of action against an attorney (Lefft) as an individual, as opposed to against the attorney's law firm: " 'As a general rule, the law treats corporations as having an existence separate and distinct from that of their shareholders and, consequently, will not impose liability upon shareholders for the acts of the corporation' (... Business Corporation Law § 1505). 'In order for a plaintiff to state a viable claim against a shareholder of a corporation in his or her individual capacity for actions purportedly taken on behalf of the corporation, [the] plaintiff must allege facts that, if proved, indicate that the shareholder exercised complete domination and control over the corporation and 'abused the privilege of doing business in the corporate form to perpetrate a wrong or injustice' ... . Here, while the complaint alleged that Lefft had authority to make decisions on behalf of the firm, and that Leftt 'ratified' both that the plaintiffs held an 'of counsel' position with the firm, as well as the compensation arrangement ... , the complaint does not allege that Leftt exercised 'complete dominion and control over' the firm, or otherwise 'abused the privilege of doing business in the corporate form' that would form the basis for personal liability ...". ***Hymowitz v. Hoang Q. Nguyen*, 2022 N.Y. Slip Op. 05997, Second Dept 10-26-22**

CRIMINAL LAW, JUDGES.

THE SENTENCING JUDGE IMPROPERLY SPECULATED AND CONSIDERED UNCHARGED CRIMES; SENTENCE VACATED.

The Second Department, vacating defendant's sentence, determined the sentencing judge improperly speculated and considered uncharged crimes: "[C]ertain remarks made by the County Court demonstrate that, in imposing sentence, it improperly speculated and considered that the defendant had committed additional similar crimes for which she had not been apprehended. Consequently, the defendant must be resentenced ...". ***People v. Jeffriesel*, 2022 N.Y. Slip Op. 06012, Second Dept 10-2622**

CRIMINAL LAW, JUDGES.

A FINE NOT INCLUDED IN THE PLEA AGREEMENT SHOULD NOT HAVE BEEN IMPOSED.

The Second Department, vacating the fine imposed at sentencing, determined the sentencing judge should not have imposed a fine that was not part of the plea agreement: "County Court improperly enhanced the defendant's sentence by imposing a fine that was not part of the negotiated plea agreement ... . Under the circumstances of this case, we find it appropriate to vacate so much of his sentence as imposed a fine, so as to conform the sentence imposed to the promise made to the defendant in exchange for his plea of guilty ...". ***People v. Ruiz*, 2022 N.Y. Slip Op. 06016, Second Dept 10-26-22**

DISCIPLINARY HEARINGS (INMATES).

THE DISORDERLY CONDUCT AND VIOLENT CONDUCT MISBEHAVIOR DETERMINATIONS WERE NOT SUPPORTED BY SUBSTANTIAL EVIDENCE.

The Second Department, reversing (modifying) the superintendent's determination, held that the disorderly conduct and violent conduct determinations were not supported by substantial evidence: "[T]he determination that the petitioner was guilty of violating rule 100.15, which provides that an incarcerated individual shall not engage in unauthorized sparring, wrestling, body-punching, or other forms of disorderly conduct, was not supported by substantial evidence. The misbehavior report does not state that the petitioner engaged in any particular act of disorderly conduct set forth in the rule, or any other similar act that could be defined as disorderly conduct within the meaning of the rule, which contemplates some form of physical contact by an inmate with another individual. Nor does the misbehavior report constitute substantial evidence to establish that the petitioner was guilty of violating rule 104.11, prohibiting violent conduct. The report does not indicate that the petitioner committed any particular violent act, merely stating that '[f]orce became necessary,' without indicating what the petitioner did to necessitate the use of such force. Furthermore, there is no evidence outside the report to support the determination that the petitioner was guilty of disorderly conduct or violent conduct ... " ***Matter of White v. LaManna*, 2022 N.Y. Slip Op. 06010, Second Dept 10-26-22**

FAMILY LAW, SOCIAL SERVICES LAW, JUDGES, CIVIL PROCEDURE, PERSONAL INJURY.

IN THIS CHILD VICTIMS ACT SUIT ALLEGING ABUSE BY AN EMPLOYEE OF A GROUP FOSTER HOME, THE JUDGE SHOULD HAVE HELD A DISCOVERABILITY HEARING BEFORE DETERMINING WHICH FOSTER-CARE RECORDS WERE DISCOVERABLE.

The Second Department, reversing Supreme Court in this Child Victims Act case, determined the judge should have held a discoverability hearing before which foster-care records could be released to the plaintiff. Plaintiff alleged he was abused in 1991 and 1992 by an employee of a group foster home (Little Flower): "Social Services Law § 372(3) requires 'authorized agenc[ies],' including Little Flower, to 'generate and keep records of those [children] who are placed in [their] care' ... . Foster care records are deemed confidential (see Social Services Law § 372[3]), 'considering that they must contain individualized and often highly personal information about the [children]' ... . The confidential nature of such records serves "'t]o safeguard both the child and [his or her] natural parents' ... , as well as others who may be 'the subjects of such records' ... . Although foster care records are entitled to a presumption of confidentiality, they may nonetheless be deemed discoverable pursuant to the provisions of CPLR article 31 ... . Moreover, since '[the] statutory confidentiality requirement is intended [in part] to protect the privacy of children in foster care,' it should not be used 'to prevent former foster children from obtaining access to their own records' ... , although this does not mean that they are always entitled to unfettered disclosure thereof. Even when considering a request for disclosure from a former foster child, '[a]n agency [may] move for a protective order where some part of the record should not be produced' ... . * * * Supreme Court improvidently exercised its discretion when it declined to conduct a discoverability hearing before deciding that branch of Little Flower's motion which sought a protective order regarding the purportedly confidential portions of the records. We therefore remit the matter to the Supreme Court, Nassau County, to conduct such a hearing and to 'clearly specify the grounds for its denial or approval of disclosure with respect to each document or category of documents' ...". ***Cowan v. Nassau County Dept. of Social Servs.*, 2022 N.Y. Slip Op. 05989, Second Dept 10-26-22**

FORECLOSURE, EVIDENCE.

THE BUSINESS RECORDS UPON WHICH THE CALCULATIONS IN THE REFEREE'S REPORT WERE BASED WERE NOT SUBMITTED; THE REPORT SHOULD NOT HAVE BEEN CONFIRMED.

The Second Department, reversing Supreme Court, determined the referee's report in this foreclosure action should not have been confirmed because the business records upon which the referee's calculations were based were not submitted: "Supreme Court erred in granting the

plaintiff's motion to confirm the referee's report and for a judgment of foreclosure and sale. 'The report of a referee should be confirmed whenever the findings are substantially supported by the record, and the referee has clearly defined the issues and resolved matters of credibility' ... . However, computations based on the 'review of unidentified and unproduced business records . . . constitute[ ] inadmissible hearsay and lack[ ] probative value' ... . Although the plaintiff contends that the referee's report was supported by the affidavit of an employee of its loan servicer, the plaintiff did not submit the business records upon which that employee purportedly relied in computing the total amount due on the mortgage. Consequently, the referee's findings in that regard were not substantially supported by the record ...". ***Bank of N.Y. Mellon v. Conforti*, 2022 N.Y. Slip Op. 05973, Second Dept 10-26-22**

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

PLAINTIFF BANK IN THIS FORECLOSURE ACTION DID NOT DEMONSTRATE THE FIVE HOUSING COUNSELING AGENCIES LISTED IN THE RPAPL 1304 WERE DESIGNATED BY THE NYS DIVISION OF HOUSING AND COMMUNITY RENEWAL (DHCR) AND THEREFORE DID NOT DEMONSTRATE STRICT COMPLIANCE WITH RPAPL 1304.

The Second Department, reversing Supreme Court in this foreclosure action, determined the five housing counseling agencies listed on the 90-day notice were designated by the NYS Division of Housing and Community Renewal (DHCR) at the time the notice was sent: " 'It is the plaintiff's burden, on its motion for summary judgment, to demonstrate its strict compliance with the applicable provisions of RPAPL 1304' ... . As relevant here, RPAPL 1304(2) ... required that the 90-day notice sent to the borrower 'contain a list of at least five housing counseling agencies as designated by the division of housing and community renewal, that serve the region where the borrower resides,' and that the lists of designated agencies published on the websites of the New York State Department of Financial Services (hereinafter DFS) and the DHCR be used by the lender, assignee, or mortgage loan servicer to meet these requirements ... . [P]laintiff failed to establish ... its strict compliance with RPAPL 1304(2), as it failed to demonstrate that the five entities listed on the 90-day notices sent to the defendant were designated by the DHCR as of when the notices were sent ... ". ***Bank of N.Y. Mellon v. Maldonado*, 2022 N.Y. Slip Op. 05974, Second Dept 10-26-22**

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

IN THIS FORECLOSURE ACTION, THE WRONG TYPEFACE IN THE RPAPL 1303 NOTICE REQUIRED DENIAL OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT.

The Second Department, reversing Supreme Court, determined the plaintiff in this foreclosure action did not demonstrate compliance with the typeface requirements for the RPAPL 1303 notice. Therefore, plaintiff's motion for summary judgment should have been denied: "RPAPL 1303 'requires the foreclosing party to deliver, along with the summons and complaint, a notice titled 'Help for Homeowners in Foreclosure' in residential foreclosure actions involving owner-occupied, one-to-four family dwellings. The statute mandates that the notice include specific language relating to the summons and complaint, sources of information and assistance, rights and obligations, and foreclosure rescue scams. It also mandates that the notice be in bold, 14-point type and printed on colored paper that is other than the color of the summons and complaint, and that the title of the notice be in bold, 20-point type' ... . 'Proper service of the notice required by RPAPL 1303 . . . is a condition precedent to the commencement of a foreclosure action, and it is the plaintiff's burden to show compliance with that statute' ... . Here, the plaintiff failed to meet its prima facie burden since it is not apparent upon review of the copy of the RPAPL 1303 notice served upon the defendant that the correct typeface was utilized. In addition, the process server's affidavit of service did not indicate that the notice served upon the defendant complied with all of the requirements of RPAPL 1303, including the proper typeface ...". ***MTGLQ Invs., L.P. v. Assim*, 2022 N.Y. Slip Op. 06000, Second Dept 10-26-22**

MUNICIPAL LAW, NUISANCE, TAX LAW, CRIMINAL LAW.

THE CITY'S COMPLAINT ALLEGED A CAUSE OF ACTION FOR PUBLIC NUISANCE BASED UPON DEFENDANT'S ALLEGED SALE OF UNSTAMPED, UNTAXED CIGARETTES.

The Second Department, reversing Supreme Court, determined the plaintiff-city's complaint stated a cause of action for public nuisance against defendant City Tobacco House for selling unstamped, untaxed cigarettes: "[T]he complaint alleged that City Tobacco House was a commercial establishment where several violations of Tax Law § 1814(b) and Administrative Code § 11-4012(b) had occurred during the six-month period preceding the commencement of this action. On one occasion, law enforcement officers allegedly recovered 8.4 cartons of untaxed cigarettes at the subject premises, and one person was arrested and charged with violating Tax Law § 1814. On another occasion, 28 packs of untaxed cigarettes allegedly were recovered from the subject premises, and one person was arrested and charged with violating Tax Law § 1814. On two other occasions, an undercover police officer allegedly purchased one pack of untaxed cigarettes from an employee in the subject premises. On another occasion, the execution of a search warrant at the subject premises allegedly resulted in the seizure of 64 packs of untaxed cigarettes and the arrest of one person. * * * The allegations of unlawful conduct ... , along with the allegation in the complaint that City Tobacco House knowingly conducted or maintained the subject premises as a place where persons gathered for purposes of engaging in conduct that violated Tax Law § 1814 and Administrative Code § 11-4012(b), were sufficient to allege the commission of criminal nuisance in the second degree, as defined in Penal Law § 240.45. Thus, having alleged facts supporting the proposition that City Tobacco House was a place 'wherein there is occurring a criminal nuisance as defined in section 240.45 of the penal law' (Administrative Code § 7-703[l]), the complaint validly alleged the existence of a public nuisance at the subject premises." ***City of New York v. Land & Bldg. Known as 4802 4th Ave.*, 2022 N.Y. Slip Op. 05988, Second Dept 10-26-22**

PERSONAL INJURY, EMPLOYMENT LAW, FAMILY LAW.

PLAINTIFF, IN THIS CHILD VICTIMS ACT SUIT, ALLEGED HE WAS ABUSED BY AN EMPLOYEE OF FAMILY SERVICES OF WESTCHESTER (FSW) AND BROUGHT CAUSES OF ACTION FOR NEGLIGENT HIRING AND NEGLIGENT SUPERVISION AGAINST FSW; THOSE CAUSES OF ACTION WERE DISMISSED FOR FAILURE TO SUFFICIENTLY ALLEGE FSW WAS AWARE OF THE EMPLOYEE'S PROPENSITY TO COMMIT THE WRONGFUL ACTS ALLEGED.

The Second Department, reversing Supreme Court, determined plaintiff's negligence hiring and negligent supervision causes of action against Family Services of Westchester (FSW) should have been dismissed. Plaintiff, in this Child Victims Act suit, alleged he was abused by a youth mentor employed by FSW when he was 10–12 years old: "To sustain a cause of action sounding in negligent supervision of a child under the alleged facts of this case, the plaintiff must establish that the defendant 'had sufficiently specific knowledge or notice of the dangerous conduct which caused injury; that is, that the third-party acts could reasonably have been anticipated' ... . Similarly, '[t]o establish a cause of action based on negligent hiring, negligent retention, or negligent supervision [of an employee], it must be shown that the employer knew or should have known of the employee's propensity for the conduct which caused the injury' ... . Here, the complaint failed to state a cause of action to recover damages for negligent supervision of the plaintiff, since it failed to sufficiently allege that the third party acts were foreseeable ... . Similarly, the complaint failed to state causes of action to recover damages for negligent hiring and negligent training and supervision related to the plaintiff's alleged youth mentor, since it failed to sufficiently allege that FSW knew, or should have known, of a propensity on the part of the youth mentor to commit the alleged wrongful acts ...". ***Fuller v. Family Servs. of Westchester, Inc.*, 2022 N.Y. Slip Op. 05992, Second Dept 10-26-22**

PERSONAL INJURY, INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS.

THE ALLEGED INTENTIONAL ACT OF THROWING A HAND TRUCK AT A BUS INJURING PLAINTIFF-PASSENGER DID NOT SUPPORT NEGLIGENCE OR NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS CAUSES OF ACTION, BUT DID SUPPORT AN INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS CAUSE OF ACTION.

The Second Department, reversing (modifying) Supreme Court, determined the allegation plaintiff was injured when defendant (McGregor) threw a hand truck at the bus in which plaintiff was a passenger did not support causes of action for negligence or negligent infliction of emotional distress, but did support a cause of action for intentional infliction of emotional distress: "[T]he only inference that may be drawn from the plaintiff's allegations is that the plaintiff's alleged injuries resulted solely from McGregor's intentional acts. Contrary to the plaintiff's contention, even if McGregor 'lacked any intent to make physical contact with, or otherwise injure, the plaintiff, the conduct attributed to [McGregor] in the amended complaint . . . constituted intentional, rather than negligent, conduct' ... . 'A negligent infliction of emotional distress cause of action must fail where, as here, no allegations of negligence appear in the pleadings' ... . [Re; intentional infliction of emotional distress:] ... [T]he complaint sufficiently alleged that McGregor engaged in conduct 'so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community' ... . Besides the alleged throwing of the hand truck that is the basis of the plaintiff's assault and battery causes of action, the plaintiff also alleges that McGregor threw other objects at the bus, attempted to board the bus, prevented the bus from moving, kicked the bus, and yelled threats and expletives." ***Chiesa v. McGregor*, 2022 N.Y. Slip Op. 05982, Second Dept 10-26-22**

THIRD DEPARTMENT

CRIMINAL LAW, SEX OFFENDER REGISTRATION ACT (SORA).

THE SUPERIOR COURT INFORMATION (SCI) DID NOT CHARGE DEFENDANT WITH CREATING AND FAILING TO REGISTER AN INTERNET IDENTIFIER, WHICH IS A VIOLATION OF THE CORRECTION LAW; INSTEAD, THE SCI CHARGED DEFENDANT WITH FAILURE TO REGISTER A FACEBOOK ACCOUNT, WHICH DOES NOT VIOLATE THE CORRECTION LAW.

The Third Department, reversing defendant's conviction and dismissing the superior court information (SCI) determined that the SCI did not charge defendant with a violation of Correction Law § 168-a(18). The statute requires a sex offender to register the creation of an "Internet identifier." But the SCI charged defendant with creating a Facebook account, which is not prohibited: "[T]he SCI did not charge defendant with failing to register or report a change in an Internet identifier; instead, defendant was solely charged with failing to report a change in Internet status in violation of Correction Law § 168-f (4). Even assuming, without deciding, that the generalized language employed — failing to report a change in Internet status — coupled with the statutory reference otherwise would be sufficient to allege the material elements of the crime charged ... , such reference was effectively negated 'by the inclusion of conduct that [did] not constitute the crime charged' ... — namely, 'establishing a Facebook account.' The governing statutes were written, and have been interpreted, narrowly. It has been clearly established 'that the existence of a Facebook account — as opposed to the Internet identifiers a sex offender may use to access Facebook or interact with other users on Facebook — need not be disclosed to DCJS [Division of Criminal Justice Services] pursuant to Correction Law § 168-f (4)' ... . Hence, the mere fact that defendant established a Facebook account was not an occurrence that defendant was required to report to DCJS, and his failure to do so did not constitute a violation of Correction Law § 168-f (4) ... . * * * ... [T]he People did not charge defendant with failing to register an Internet identifier; they charged him with failing to report a change in Internet status, i.e., 'establishing a Facebook account.' Stated differently, instead of 'correctly alleg[ing] that the omission constituting the offense was [defendant's] failure to register an Internet identifier used by him to access and identify himself on the Facebook account that he created and maintained, [the SCI]

improperly premise[d] the charge on his failure to register the Facebook account itself' ...". ***People v. Ferretti*, 2022 N.Y. Slip Op. 06030, Third Dept 10-27-22**

PERSONAL INJURY, CIVIL PROCEDURE.

THE RECEIVER APPOINTED TO CONTROL PROPERTY INVOLVED IN AN OWNERSHIP DISPUTE SHOULD HAVE BEEN SUBSTITUTED AS THE REPRESENTATIVE OWNER IN A SLIP AND FALL CASE.

The Third Department, reversing Supreme Court, determined the receiver, appointed to take control of two properties the ownership of which is in dispute, should have been substituted as the representative owner of the property in a slip and fall case: "Generally, a temporary receiver appointed pursuant to CPLR article 64 'is a person appointed by the court to take control of designated property and see to its care and preservation during litigation' ... . Pertinent here, the appointment order authorized the receiver 'to immediately take charge and enter possession of the properties,' and empowered the receiver to 'act as manager and landlord of the properties.' Correspondingly, the receiver was 'authorized and obligated to keep the properties insured against loss by damage of fire . . . and to procure such . . . other insurance as may be reasonably necessary.' Given these directives, we cannot agree with Supreme Court's assessment that the receiver was accorded only a limited role that did not include property maintenance. To the contrary, the receiver was charged with both the authority and responsibility to assume control over the properties. Pursuant to CPLR 1017, '[i]f a receiver is appointed for a party . . . the court shall order substitution of the proper parties.' That is the situation here. By the court's directive, responsibility over the management of the properties was passed from the disputing owners to the receiver ... . As such, the receiver should have been substituted as the representative owner of the ... property ...". ***Wen Mei Lu v. Wen Ying Gamba***, 2022 N.Y. Slip Op. 06037, Second Dept 10-27-22

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