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COURT OF APPEALS

PERSONAL INJURY, MUNICIPAL LAW.

PLAINTIFF'S DECEDENT WAS TORTURED AND MURDERED IN HER HOME BY HER MOTHER AND BROTHER; ALTHOUGH COUNTY AUTHORITIES HAD BEEN CALLED TO INVESTIGATE ALLEGATIONS PLAINTIFF'S DECEDENT HAD SUFFERED INJURIES AND SHERIFFS HAD RETURNED PLAINTIFF'S DECEDENT TO HER HOME AFTER SHE RAN AWAY, THERE WAS NO SPECIAL RELATIONSHIP WITH THE COUNTY SUCH THAT PLAINTIFF'S DECEDENT JUSTIFIABLY RELIED ON INTERVENTION BY COUNTY AUTHORITIES.

The Court of Appeals, in a full-fledged opinion by Judge Troutman, over an extensive dissenting opinion, determined plaintiff did not raise a question of fact about the existence of a special relationship between plaintiff's decedent, Laura, and the county such that the county could be liable for the torture and murder of Laura by her mother, Eva, and brother, Luke. Laura was a 23-year-old woman with developmental disabilities. Laura's brother, Richard, called county authorities about injuries to his sister. Richard's allegations were investigated and deemed unfounded. On one occasion Laura ran away from home after an argument with her mother and was returned by county sheriffs. The Court of Appeals held there was nothing about the way the authorities investigated Laura's alleged injuries and Laura's running away which met the criteria for a special relationship creating 'justifiable reliance' on intervention by county authorities: "[T]o establish that the government voluntarily assumed a duty to the plaintiff beyond what it generally owes to the public, the plaintiff must establish: '(1) an assumption by the municipality, through promises or actions, of an affirmative duty to act on behalf of the party who was injured; (2) knowledge on the part of the municipality's agents that inaction could lead to harm; (3) some form of direct contact between the municipality's agents and the injured party; and (4) that party's justifiable reliance on the municipality's affirmative undertaking' ... . '[A]ll four elements must be present for a special duty to attach' ... . [T]he justifiable reliance element 'provides the essential causative link between the 'special duty' assumed by the municipality and the alleged injury. Indeed, at the heart of most of these 'special duty' cases is the unfairness that the courts have perceived in precluding recovery when a municipality's voluntary undertaking has lulled the injured party into a false sense of security and has thereby induced [the injured party] either to relax [their] own vigilance or to forego other available avenues of protection' ... Months before her death, both CPS [Child Protective Services] and APS [Adult Protective Services] investigated the reports that Laura was being abused, concluded that those reports were unfounded, closed their investigations, and advised Richard that the investigations were closed and would not be reopened without new information. ... Richard 'did not in fact relax his own vigilance inasmuch as he made two follow-up calls to the APS caseworker asking her to reopen the investigation, and he was not induced to forego other avenues of relief' ... . Similarly, the Sheriff's deputies took no action that could have induced reliance." ***Maldovan v. County of Erie*, 2022 N.Y. Slip Op. 06632, Ct App 11-22-22**

PERSONAL INJURY, MUNICIPAL LAW.

ALTHOUGH THE POLICE HAD VISITED PLAINTIFF SEVERAL TIMES IN RESPONSE TO HER CALLS ABOUT HER EX-BOYFRIEND'S VIOLATIONS OF THE ORDER OF PROTECTION AND THE POLICE HAD SPOKEN TO HER EX-BOYFRIEND (WHO LIVED DIRECTLY ABOVE HER), THE MAJORITY CONCLUDED THERE WAS NO SPECIAL RELATIONSHIP BETWEEN PLAINTIFF AND THE POLICE SUCH THAT PLAINTIFF COULD HAVE JUSTIFIABLY RELIED ON THE POLICE FOR PROTECTION; HER EX-BOYFRIEND SUBSEQUENTLY THREW HER OUT OF A SECOND-FLOOR WINDOW.

The Court of Appeals, over two extensive dissenting opinions, determined the fact plaintiff's ex-boyfriend was subject to an order of protection at the time he attacked her and threw her out of a second-floor window did not create a special relationship with the police such that the municipality would be liable for failing to protect her. The majority concluded plaintiff could not have justifiably relied on any police promises that her ex-boyfriend would be arrested for violating the order of protection. "Justifiable reliance" is an essential element of a special relationship: "[Plaintiff] failed to raise a triable issue concerning the 'critical' fourth element of an assumed special duty ... . Plaintiff testified during her deposition that she had no contact with the police on the day of the incident prior to the attack, that her ex-boyfriend was in fact at liberty that day, and that the officers never told her that her ex-boyfriend would be arrested for violating the order of protection. Plaintiff's own testimony demonstrates that she did not relax her vigilance based on any police promises that her ex-boyfriend would be arrested for violating the order of protection. It also shows that the police were not on the scene or in a position to provide assistance if necessary ... , nor had they promised to 'provide assistance at some reasonable time' ... . In these circumstances, plaintiff could not have justifiably relied on any promises made or actions taken by defendants. **From Judge Wilson's dissent:** Mr. Gaskin [the ex-boyfriend] had violently assaulted Ms. Howell [plaintiff] before, beginning when she was pregnant with their child. The first time he assaulted her, he threw her on the floor and

kicked her stomach, causing her to bleed and require hospitalization. On the basis of that assault, Ms. Howell obtained an order of protection against Mr. Gaskin, requiring him to stay away from and not communicate with her. Based on Mr. Gaskin's subsequent conduct, Ms. Howell obtained seven additional orders of protection against him, the most recent of which issued less than two months before Mr. Gaskin threw her out of the window. How did it happen that a woman who obtained eight orders of protection against the same abuser wound up unprotected? * * * In the week before Mr. Gaskin threw Ms. Howell out of the window, Ms. Howell called the police several times to report that Mr. Gaskin was violating the order of protection. ... The officers told Ms. Howell that they would 'ensure . . . that [Mr. Gaskin] would be removed from the premises.' The officers spoke to Mr. Gaskin, who told the officers that he would leave his apartment [which was above Ms. Howell's] and stay at his uncle's house. ... The officers made Ms. Howell 'feel assured he won't be coming back.' " ***Howell v. City of New York*, 2022 N.Y. Slip Op. 06633, CtApp 11-22-22**

UNIFORM COMMERCIAL CODE, DEBTOR-CREDITOR, CONTRACT LAW.

PURSUANT TO UCC § 9-406 A LENDER'S SECURITY INTEREST IN A DEBTOR'S ACCOUNTS-RECEIVABLES IS AN ASSIGNMENT SUCH THAT A THIRD-PARTY WHICH HAS NOTICE OF THE ASSIGNMENT MUST MAKE ANY PAYMENTS OWED TO THE DEBTOR DIRECTLY TO THE LENDER.

The Court of Appeals, reversing the appellate division, in a full-fledged opinion by Judge Wilson, determined that UCC § 9-406 allowed the lender to collect the accounts-receivables owed to the debtor by third parties. The lender (Worthy) had a security interest in payments made by a third-party (New Style) to the debtor (Checkmate) after the New Style received notice of the assignment: "We are called upon to determine whether, for purposes of New York's Uniform Commercial Code § 9-406, an 'assignee' includes the holder of a presently exercisable security interest in an assignor's receivables. We hold that it does. Under UCC 9-406, a security interest is an assignment and the UCC is purposefully structured to permit a debtor to grant creditors security interests in a debtor's receivables so that the secured creditor can direct account debtors to pay it directly. * * * Worthy filed a UCC-1 Financing Statement against Checkmate with the Secretary of State of New Jersey, perfecting its secured position regarding Checkmate's assets. ... Worthy sent New Style a notice of its security interest and collateral assignment in the New Style accounts and directed New Style that '[a]ll remittances for Accounts shall be made payable only to Worthy.' ... . * * * An account debtor who receives a secured creditor's notice asserting its right to receive payment directly can pay the secured creditor and receive a complete discharge (UCC 9-406 [a]) or, if in doubt, can seek proof from the secured creditor that it possesses a valid assignment and withhold payment in the interim (UCC 9-406 [c])." ***Worthy Lending LLC v. New Style Contrs., Inc.*, 2022 N.Y. Slip Op. 06631, CtApp 11-22-22**

FIRST DEPARTMENT

CIVIL PROCEDURE.

IF THE EVIDENCE PRESENTED IN A MOTION TO RENEW WAS AVAILABLE AT THE TIME OF THE ORIGINAL MOTION, THE FAILURE TO INCLUDE IT MUST BE EXPLAINED; HERE THE FAILURE WAS NOT EXPLAINED AND THE MOTION SHOULD NOT HAVE BEEN GRANTED.

The First Department, reversing Supreme Court, determined the evidence presented in plaintiff's motion to renew was available at the time of the initial motion. Therefore, plaintiff's failure to explain the failure to include it required denial of the renewal motion: "Plaintiff moved under CPLR 2221(e) for leave to renew defendants' motion to vacate the default and compel arbitration. In support of its motion, plaintiff submitted public court filings showing that the prior attorney was not incapacitated as he claimed between September 18 … December 31 … and that the prior attorney had appeared in at least one hearing during that time. Plaintiff argued that the prior attorney's explanation for his failure to appear on behalf of defendants, on which Supreme Court relied upon to vacate the default, contained material misrepresentations and that these new facts were sufficient to warrant renewal. In opposition, defendants submitted an affirmation from the prior attorney essentially reasserting the circumstances of his default. Supreme Court granted renewal, vacated the prior order, and reinstated the default judgment. The record demonstrates that the court filings plaintiff relies on, which are matters of public record, existed at the time it submitted opposition to defendants' vacatur motion. Plaintiff, however, did not provide in the renewal motion a 'reasonable justification for the failure to present such facts on the prior motion' (CPLR 2221[e][3]...)." ***Chris Grant Brohawk Films v. Digital Seven LLC*, 2022 N.Y. Slip Op. 06635, First Dept 11-22-22**

CRIMINAL LAW, JUDGES, ATTORNEYS, APPEALS.

THE JUDGE, PROSECUTOR AND DEFENSE COUNSEL AGREED DEFENDANT SHOULD STEP OUT OF THE COURTROOM WHEN HIS JUSTIFICATION DEFENSE WAS DISCUSSED IN A SIDEBAR CONFERENCE; DEFENSE COUNSEL'S AGREEMENT TO HAVE DEFENDANT STEP OUT OF THE COURTROOM WAS NOT A WAIVER OF DEFENDANT'S RIGHT TO BE PRESENT; CONVICTION REVERSED.

The First Department, in a full-fledged opinion by Justice Renwick, reversing Supreme Court, determined defendant should have been present for the sidebar conference about the justification defense in this attempted murder by stabbing case. Defendant claimed he had a heart condition triggered by stress which causes his heart to race until he passes out. Defense counsel argued the condition was relevant to the justification defense because defendant felt he had to stab the victim before he passed out to protect himself. Before the issue was discussed the judge, prosecutor and defense counsel agreed the defendant should step out of the courtroom. The judge ruled the evidence of the heart condition could not come in unless the defendant's testimony established a connection between the condition and the interaction with the

victim: "[T]he subject of the instant sidebar conference clearly implicated defendant's peculiar factual knowledge such that his participation might have assisted him in advancing his justification defense to the murder and assault counts. The subject of the conference was whether defendant would be permitted to testify as to a medical (heart) condition with regard to his justification defense. During the sidebar conference the court repeatedly implored defense counsel to explain how defendant's serious medical condition impacted his assessment of his physical safety. Defendant's presence at the sidebar conference would have afforded him an opportunity to apprise the court, defense counsel and prosecutor of the exact details of his heart condition in order to demonstrate that it affected his assessment of the circumstances he was confronted with prior to the stabbing incident ... . * * * Although the right to be present at a sidebar conference need not be preserved by an objection ... , the right may be waived. Such right may be waived either explicitly or implicitly by defendant ... . [D]efendant did not waive the right to be present at the sidebar conference. Contrary to the People's assertion, defendant did not personally waive his right to be present either explicitly or implicitly. At no time did defendant make an affirmative statement on the record that he did not wish to attend the side bar conference. And no one ever asked him directly. ... [H]e was commanded to leave the courtroom so that the sidebar conference could take place in his absence. ... [A]t no time was defendant made aware that he had the right to be present at the sidebar conference ... . [I]n the absence of any record discussion by the court with counsel and the prosecutor regarding defendant's right to be present at the sidebar conference, defense counsel's expression of lack of objection to his client absence from the sidebar conference is not an affirmative statement by counsel confirming that defendant himself was waiving his right to be present at the sidebar conference ...". ***People v. Girard*, 2022 N.Y. Slip Op. 06645, First Dept 11-22-22**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

THE FACT THAT PLAINTIFF COULD NOT EXPLAIN HOW THE IMPROPERLY SECURED BEAM WHICH STRUCK HIM FELL DID NOT PRECLUDE PLAINTIFF FROM BEING AWARDED SUMMARY JUDGMENT IN THIS LABOR LAW § 240(1) ACTION.

The First Department, reversing Supreme Court, determined plaintiff was entitled to summary judgment in this Labor Law § 240(1) action. A beam which was not properly secured fell on plaintiff. The fact that plaintiff could not explain how the beam fell did not preclude the award of summary judgment: "Plaintiff's testimony that a beam fell on him as he was securing a scaffold on which his coworker was standing to strip concrete formwork beams from the ceiling, along with the unrebutted affidavit of his expert concluding that the beam was not properly secured, established his entitlement to summary judgment on liability on the Labor Law § 240(1) claim ... . That plaintiff was unable to explain how the beam fell did not preclude summary judgment in his favor ...". ***Fuentes v. YJL Broadway Hotel, LLC*, 2022 N.Y. Slip Op. 06636, First Dept 11-22-22**

SECOND DEPARTMENT

ATTORNEYS, JUDGES, PERSONAL INJURY.

THE DISCHARGED LAW FIRM HANDLED THE PERSONAL INJURY CASE FOR TWO YEARS; ALTHOUGH THE FIRM DID NOT SUBMIT ANY TIME RECORDS, SUPREME COURT ABUSED ITS DISCRETION IN REFUSING TO AWARD THE DISCHARGED FIRM A PORTION OF THE CONTINGENCY FEE AFTER THE CASE SETTLED.

The Second Department, reversing Supreme Court, determined the court abused its discretion in refusing to award attorney's fees to a law firm (Gross) which represented the plaintiff in a personal injury case for two years before being discharged. The case ultimately settled: "After being retained, Gross filed a no-fault benefits application, referred the plaintiff to several doctors, scheduled and rescheduled independent medical examinations, and helped the plaintiff obtain a presettlement loan. The principal of Gross also asserted that the firm investigated the accident scene, obtained and reviewed medical records and other relevant documents, and 'spen[t] a great deal . . . of time' on the phone with the plaintiff 'answering his many questions about his claim.' The plaintiff ultimately discharged Gross. In May 2018, the plaintiff retained nonparty Gregory Spektor & Associates, P.C. (hereinafter Spektor). In December 2018, Spektor filed a summons and complaint in this action on the plaintiff's behalf. In July 2020, the plaintiff obtained a $100,000 settlement. * * * ... [I]t cannot be said that the services performed by Gross were of no value ... . Although Gross failed to submit time records showing the hours allegedly spent investigating and discussing the claim with the plaintiff, Gross submitted evidence showing that it performed various services in connection with the plaintiff's case over a period in excess of two years, including, but not limited to, ensuring the plaintiff's appearances for independent medical examinations to determine the extent of his injuries and the need for additional treatment, and obtaining documentation vital to the plaintiff's case ... . Considering the amount of time spent by Gross working on matters pertaining to the plaintiff's case, the nature of the work performed, and the relative contributions of counsel, we deem it appropriate to award 10% of the net contingency fee to Gross." ***Jules v. David*, 2022 N.Y. Slip Op. 06696, Second Dept 11-23-22**

CIVIL PROCEDURE.

WHERE AN ACTION HAS BEEN MARKED OFF AS "INACTIVE," THERE IS NO NOTE OF ISSUE, THERE HAS BEEN NO 90-DAY DEMAND AND THERE IS NO ORDER DISMISSING THE COMPLAINT, RESTORATION TO THE CALENDAR AT ANY TIME IS AUTOMATIC.

The Second Department, reversing Supreme Court, determined plaintiff's motion to retore the action to the calendar after it was marked off because plaintiff failed to appear should have been granted. A note of issue had not been filed, there had been no 90-day notice pursuant

to CPLR 3216, and there was no order directing dismissal of the complaint. Therefore restoration to the calendar at any time is automatic: "Where, as here, the case was marked 'inactive' before a note of issue had been filed, there was no 90-day notice pursuant to CPLR 3216, and there was no order directing dismissal of the complaint pursuant to 22 NYCRR 202.27 for failure to appear at a compliance conference, 'restoring a case marked "inactive" is automatic' ... . Under these circumstances, a motion to restore the action to the calendar should be granted 'without considering whether the plaintiff had a reasonable excuse for the delay or whether [it] engaged in dilatory conduct' ... . Moreover, since this action was pre-note of issue and could not properly be marked off the calendar pursuant to CPLR 3404, the plaintiff was not required to move to restore the action to the calendar within any specified time frame ... . Thus, contrary to the Supreme Court's determination, the plaintiff's motion was not untimely." ***Fifth Third Mtge. Co. v. Schiro*, 2022 N.Y. Slip Op. 06689. Second Dept 11-23-22**

CIVIL PROCEDURE, PERSONAL INJURY, EDUCATION-SCHOOL LAW, CRIMINAL LAW.

HERE PLAINTIFF BROUGHT SUIT AGAINST A SCHOOL DISTRICT PURSUANT TO THE CHILD VICTIMS ACT ALLEGING THE SCHOOL DISTRICT NEGLIGENTLY FAILED TO PROTECT HER FROM SEXUAL ASSAULT BY A FELLOW STUDENT; THE FACT THAT THE STUDENT COULD NOT BE CRIMINALLY PROSECUTED FOR THE ASSAULT BECAUSE OF HIS AGE DID NOT PRECLUDE REVIVAL OF THE CAUSES OF ACTION AGAINST THE SCHOOL DISTRICT; IN OTHER WORDS THE CHILD VICTIMS ACT APPLIES TO REVIVE NEGLIGENCE CAUSES OF ACTION EVEN IF THE UNDERLYING SEXUAL ASSAULT COULD NOT HAVE BEEN PROSECUTED.

The Second Department determined negligent supervision and negligent hiring causes of action against a school district, pursuant to the Child Victims Act (CVA), alleging the failure to protect plaintiff from sexual abuse by a fellow minor student properly survived motions to dismiss. The case raised a question of first impression: Does the CVA revive causes of action which are based upon the actions of a minor who could not be criminally prosecuted for sexual offenses because of his age? The answer is "yes:" "[W]e are presented with an issue of first impression as to whether CPLR 214-g may be used to revive civil claims and causes of action asserted against a school district that are based on alleged acts of sexual assault committed by a minor who could not have been subjected to criminal liability at the time the alleged acts of sexual assault occurred. Resolution of this issue requires the Court to determine the meaning of the phrase 'conduct which would constitute a sexual offense as defined in [Penal Law article 130]' as used in CPLR 214-g, and in particular, whether that phrase is limited to conduct that would subject the person who committed the acts of sexual assault to criminal liability. * * * ... [W]e find that the plain meaning of the phrase 'conduct which would constitute a sexual offense as defined in [Penal Law article 130]' as used in CPLR 214-g refers to the conduct described in the enumerated provisions of the Penal Law, and is not limited to those situations in which the conduct would subject the actor to criminal liability ...". ***Anonymous v. Castagnola*, 2022 N.Y. Slip Op. 06682, Second Dept 11-23-22**

EMPLOYMENT LAW, EDUCATION-SCHOOL LAW, INSURANCE LAW, CONTRACT LAW.

REDUCTION OF PETITIONER-SCHOOL-DISTRICT EMPLOYEE'S RETIREMENT HEALTH BENEFITS BELOW THE LEVEL AFFORDED ACTIVE EMPLOYEES VIOLATES INSURANCE LAW § 4235.

The Second Department, reversing Supreme Court, determined the school district's reduction of petitioner-employee's (Perrotta's) retirement health benefits below the level afforded active employees violated the Insurance Law: "The moratorium law [Insurance Law 4235] sets 'a minimum baseline or 'floor' for retiree health benefits' which is 'measured by the health insurance benefits received by active employees . . . In other words, the moratorium [law] does not permit an employer to whom the statute applies to provide retirees with lesser health insurance benefits than active employees' ... . Thus, a school district may not diminish retirees' health insurance benefits unless it makes 'a corresponding diminution in the health insurance benefits or contributions of active employees' ... . The purpose of the moratorium law is to protect the rights of retirees who 'are not represented in the collective bargaining process, [and] are powerless to stop unilateral depreciation or even elimination of health insurance benefits once the contract under which they retired has expired' ... . Here, since Perrotta submitted evidence establishing that the district diminished the health insurance contribution rate for certain retirees, and the district failed to proffer evidence that it made a corresponding diminution in the health insurance benefits or contributions for active employees, its determination violated the moratorium law. ... Supreme Court should have granted the petition and annulled the district's determination ...". ***Matter of Perrotta v. Syosset Cent. Sch. Dist.*, 2022 N.Y. Slip Op. 06704, Second Dept 11-23-22**

FORECLOSURE, EVIDENCE, CIVIL PROCEDURE.

THE REFEREE'S REPORT IN THIS FORECLOSURE ACTION DID NOT IDENTIFY THE RECORDS RELIED UPON FOR THE CALCULATIONS AND DID NOT ATTACH THE RELEVANT BUSINESS RECORDS; IN ADDITION, THE HEARING ON NOTICE REQUIRED BY CPLR 4313 WAS NOT HELD.

The Second Department, reversing Supreme Court, determined the referee's report in this foreclosure action was deficient because the business records used for the calculations were not identified or attached. In addition, the referee did not hold the evidentiary hearing required by CPLR 4313: " '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' ... . Here, with respect to the amount due on the mortgage loan, the referee based his findings on the affidavit of William Randolph, an employee of Seterus, Inc., the purported servicer of the mortgage loan, who asserted the total amount then due on the mortgage loan. Randolph, however, failed to identify the basis for his calculations, stating generally that the information in his affidavit was taken from the 'business activities' of Seterus, Inc. Nor did Randolph attach any business records to his affidavit. Accordingly, Randolph's assertions regarding the date of the defendant's default in making his mortgage payments and the total sum due and

owing under the mortgage loan constituted inadmissible hearsay and lacked probative value ... . Thus, the referee's findings with respect to the total amount due upon the mortgage loan, as well as payments for taxes, insurance, and other advances, were not substantially supported by the record ... . Further, the referee should not have computed the amount due on the mortgage loan without holding a hearing on notice to the defendant. CPLR 4313 provides in relevant part that '[u]nless the order of reference otherwise provides, the referee shall forthwith notify the parties of a time and a place for the first hearing to be held.' Here, there was no language in the order of reference indicating that a hearing was unnecessary. [plaintiff's] contention that the defendant waived his right to a hearing is without merit ... . Thus, the defendant was entitled to notice pursuant to CPLR 4313 ...". ***Onewest Bank, FSB v. Feffer*, 2022 N.Y. Slip Op. 06707, Second Dept 11-23-22**

FRAUD, CONTRACT LAW, EVIDENCE.

ALTHOUGH THE BREACH OF CONTRACT CAUSES OF ACTION WERE PROPERLY DISMISSED BECAUSE THE CONTRACT WAS NOT AMBIGUOUS AND PAROL EVIDENCE THEREFORE WAS NOT ADMISSIBLE; THE FRAUDULENT INDUCEMENT CAUSE OF ACTION, FOR WHICH PAROL EVIDENCE IS ADMISSIBLE, SHOULD NOT HAVE BEEN DISMISSED.

The Second Department, reversing (modifying) Supreme Court, determined the fraudulent inducement cause of action should not have been dismissed as duplicative of the breach of contract causes of action, which were properly dismissed because the contract was not ambiguous and parol evidence was therefore not admissible: "Supreme Court erred in granting that branch of the defendants' motion which was for summary judgment dismissing the cause of action to recover damages for fraudulent inducement. The fraudulent inducement cause of action is not duplicative of the breach of contract cause of action, as the fraudulent inducement cause of action is not based upon promised performance of an obligation of the defendants under the pledge agreement, and the plaintiffs sought separate and distinct damages for each cause of action ... . Furthermore, the use of parol evidence is not precluded to establish the fraudulent inducement cause of action ...". ***Goodale v. Central Suffolk Hosp.*, 2022 N.Y. Slip Op. 06691, Second Dept 11-23-22**

MEDICAL MALPRACTICE, PERSONAL INJURY, CIVIL PROCEDURE, EVIDENCE.

THE CONTINUOUS TREATMENT DOCTRINE TOLLED THE STATUTE OF LIMITATIONS IN THIS MEDICAL MALPRACTICE ACTION; ALTHOUGH THE PLAINTIFFS' EXPERT'S AFFIDAVIT WAS UNSWORN, IT SHOULD HAVE BEEN CONSIDERED BECAUSE DEFENDANTS DID NOT OBJECT; DESPITE PLAINTIFF'S SIGNING A GENERIC CONSENT FORM, THERE WERE QUESTIONS OF FACT WHETHER THERE WAS A LACK OF INFORMED CONSENT.

The Second Department, reversing Supreme Court in this medical malpractice action, determined: (1) the continuous treatment doctrine tolled the statute of limitations for some of the causes of action; (2) the plaintiffs' expert's unsworn affidavit raised questions of fact about a departure from the requisite standard of care (although the unsworn affidavit was not in admissible form, defendants did not object); and (3) the lack of informed consent cause of action should not have been dismissed: "[C]ontinuous treatment may be found when a plaintiff 'returns to the doctor because of continued pain in that area for which medical attention was first sought' ... . Here, the plaintiffs demonstrated that, continuing until at least October 23, 2014, the injured plaintiff repeatedly sought treatment ... for ongoing and sometimes increasing symptoms relating to her original complaints ... . * * * Although the unsworn affidavit of the plaintiffs' expert does not constitute competent evidence to oppose a motion for summary judgment (see CPLR 2106 ...), the defendants failed to object to the unsworn affidavit on this ground in the Supreme Court and, therefore, any deficiency in the submission has been waived ... . * * * ' ... [T]he fact that the [injured] plaintiff signed a [generic] consent form does not establish [the defendants'] prima facie entitlement to judgment as a matter of law' dismissing this cause of action insofar as asserted against the North Shore defendants ... . [T]he transcripts of the deposition testimony of the injured plaintiff and of the physicians ... , submitted by the defendants in support of their motion, did not establish that the injured plaintiff was given sufficient information on the risks and alternatives regarding the materials used and the procedures performed. ... [D]efendants failed to establish that a reasonably prudent person in the injured plaintiff's position would not have declined to undergo the procedures if she or he had been fully informed of the risks and alternatives regarding the materials used and the procedures performed (see Public Health Law § 2805-d[3] ...)." ***Hall v. Bolognese*, 2022 N.Y. Slip Op. 06692, Second Dept 11-23-22**

PERSONAL INJURY.

DEFENDANTS' CAR WAS STOPPED IN THE SHOULDER LANE FOR A NON-EMERGENCY REASON WHEN THE CAR IN WHICH PLAINTIFF WAS A PASSENGER STRUCK IT FROM BEHIND; THERE WERE QUESTIONS OF FACT WHETHER STOPPING THE CAR IN THE SHOULDER LANE FOR A NON-EMERGENCY REASON WAS A PROXIMATE CAUSE OF THE ACCIDENT (AS OPPOSED TO MERELY FURNISHING THE OCCASION FOR THE ACCIDENT?).

The Second Department, reversing Supreme Court, determined that the Feder defendants were not entitled to summary judgment dismissing the complaint in this rear-end collision traffic-accident case. Plaintiff was a passenger in a car when the driver pulled into the shoulder lane because a speeding car crossed his lane. The Feder defendants' car was stopped in the shoulder lane and the car in which plaintiff was a passenger struck it. The Feder defendants were not entitled to summary judgment because there were questions of fact whether stopping in the shoulder lane for a non-emergency reason constituted a proximate cause of the accident (as opposed to merely furnishing the occasion for the accident?): " 'A rear-end collision with a stopped or stopping vehicle establishes a prima facie case of negligence on the part of the operator of the rear vehicle, thereby requiring that operator to rebut the inference of negligence by providing a nonnegligent explanation for the collision' ... . However, '[t]he mere fact that other persons share some responsibility for plaintiff's harm does not absolve defendant from liability because

there may be more than one proximate cause of an injury' ... . 'Generally, it is for the trier of fact to determine the issue of proximate cause' ... . Here, the Feder defendants failed to establish their prima facie entitlement to judgment as a matter of law dismissing the complaint and all cross claims insofar as asserted against them. The Feder defendants' own submissions raised triable issues of fact as to whether Abraham Feder's conduct in stopping on the shoulder of the highway for a non-emergency purpose imposed upon them a duty of reasonable care to warn other drivers of the hazard posed by their stopped vehicle, and whether their failure to exercise reasonable care was a proximate cause of the accident ...". ***Georgiadis v. Feder*, 2022 N.Y. Slip Op. 06690, Second Dept 11-23-22**

PERSONAL INJURY, CIVIL PROCEDURE.

THE CAUSES OF ACTION FOR INDEMNITY AND CONTRIBUTION IN THIS SLIP AND FALL CASE DO NOT ACCRUE UNTIL THE UNDERLYING CLAIM IS PAID, WHICH HAS NOT HAPPENED YET; THEREFORE, THE STATUTE OF LIMITATIONS ON THOSE CAUSES OF ACTION HAS NOT YET STARTED TO RUN.

The Second Department, reversing Supreme Court, determined the indemnity and contribution causes of action in the slip and fall case should not have been dismissed as time-barred. The statute of limitations starts to run on these causes action when the underlying claim has been paid, which had not yet occurred: " 'The statute of limitations on a claim for indemnity or contribution accrues only when the person seeking indemnity or contribution has paid the underlying claim' ... . Here, it is undisputed that the plaintiff has yet to recover any judgment against the defendants. Thus, since the sixth and seventh causes of action in the third-party complaint ... are predicated upon [the] alleged obligation to indemnify the defendants, those causes of action have yet to accrue." ***Sibrian v. 244 Madison Realty Corp.*, 2022 N.Y. Slip Op. 06732, Second Dept 11-23-22**

PERSONAL INJURY, CONTRACT LAW.

THE CONTRACT BETWEEN DEFENDANT AIRWAY CLEANERS AND DEFENDANT AMERICAN AIRLINES IN THIS AIRPORT SLIP AND FALL CASE DID NOT ENTIRELY DISPLACE AMERICAN AIRLINES' DUTY TO KEEP THE BATHROOM SAFE; THEREFORE, THE CONTRACT COULD NOT SERVE AS THE BASIS FOR AIRWAY CLEANERS' LIABILITY TO PLAINTIFF UNDER ESPINAL.

The Second Department, reversing Supreme Court, determined defendant Airway Cleaners' contract with American Airlines did not entirely displace defendant American Airlines' duty to maintain the bathroom where plaintiff slipped and fell. Therefore, the contract between Airway Cleaners and American Airlines could not serve as the basis for Airway Cleaners' liability to third parties (plaintiff) under Espinal: " 'Generally, a contractual obligation, standing alone, will not give rise to tort liability in favor of a third party' ... . However, insofar as relevant here, an exception to this general rule applies where 'the contracting party has entirely displaced the other party's duty to maintain the premises safely' (Espinal v Melville Snow Contrs., 98 NY2d at 140). Here, the defendants established their prima facie entitlement to judgment as a matter of law dismissing the complaint insofar as asserted against Airway Cleaners, LLC, by demonstrating that a limited janitorial service agreement between Airway Cleaners, LLC, and American Airlines was not a comprehensive and exclusive agreement which entirely displaced American Airlines' duty to maintain the premises in a reasonably safe condition ...". ***DaCruz v. Airway Cleaners, LLC*, 2022 N.Y. Slip Op. 06687, Second Dept 11-23-22**

PERSONAL INJURY, MUNICIPAL LAW, VEHICLE AND TRAFFIC LAW.

THERE IS A QUESTION OF FACT WHETHER DEFENDANT POLICE OFFICER VIOLATED THE RECKLESS-DISREGARD-FOR-THE-SAFETY-OF-OTHERS STANDARD OF CARE FOR POLICE VEHICLES IN PURSUIT.

The Second Department, reversing Supreme Court, determined there was a question of fact whether defendant police officer, Benbow, violated the reckless disregard standard of care in this traffic accident case. Plaintiff was the driver's partner in the police car which collided with another car in an intersection when the driver was pursuing a car with excessively tinted windows: "[There is] a triable issue of fact as to whether Benbow acted with reckless disregard for the safety of others. In contrast to Benbow's deposition testimony that he stopped at the red light and looked in both directions before slowly proceeding into the intersection against the red light, the plaintiff testified at her deposition that she and Benbow were responding to a call of a security alarm at a school, that Benbow did not stop before entering the intersection, that he was going to turn right and looked only to the left, that after he had entered the intersection he said that he 'saw something' and suddenly accelerated and turned to the left, without ever looking to the right, that the plaintiff saw Ilyaich's vehicle and said 'watch out,' and that in response, Benbow then looked to the right, but did not attempt to move the police vehicle away from the collision ...". ***Thompson v. City of New York*, 2022 N.Y. Slip Op. 06733, Second Dept 11-23-22**

PERSONAL INJURY, VEHICLE AND TRAFFIC LAW, EVIDENCE.

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT IN THIS TRAFFIC ACCIDENT CASE SHOULD NOT HAVE BEEN GRANTED; THAT PLAINTIFF PLED GUILTY TO A TRAFFIC INFRACTION DOES NOT PROVE SHE WAS NEGLIGENT; PLAINTIFF ALLEGED SHE PLED GUILTY BECAUSE SHE DID NOT HAVE THE MONEY TO DRIVE FROM HER HOME FOR COURT APPEARANCES.

The Second Department, reversing Supreme Court, determined defendants' motion for summary judgment in this bus-car traffic accident should not have been granted. The defendants submitted conflicting evidence about how the accident happened. The fact that plaintiff pled guilty to a traffic infraction does not necessarily prove she was negligent. Plaintiff alleged she pled guilty to avoid traveling from her home in New Jersey for court appearances: "[T]he defendants failed to establish, prima facie, that they were free from fault in the happening of the

accident, because their submissions in support of the motion contained conflicting accounts of how the accident happened, and failed to eliminate triable issues of fact, including which vehicle entered the other vehicle's lane prior to the collision ... . Contrary to the defendants' contention, the fact that the plaintiff pleaded guilty to the traffic offense of driving or operating a motor vehicle in an unsafe manner does not conclusively establish that she was negligent ... . 'It is well settled that a person who pleads guilty to a traffic offense is permitted to explain the reasons for the plea, and it is for the jury to decide what weight, if any, to give to the testimony' ... . Here, the plaintiff contended that she pleaded guilty, inter alia, because she did not have the money to keep traveling to New Jersey for court appearances, and thus, it is for a jury to evaluate her explanation and determine what weight, if any, the plea is entitled to in determining if she was negligent ...". ***Charles v. American Dream Coaches*, 2022 N.Y. Slip Op. 06685, Second Dept 11-23-22**

THIRD DEPARTMENT

CRIMINAL LAW, EVIDENCE.

THE COURT DID NOT CONDUCT ANY INQUIRY TO DETERMINE WHETHER A THREE-YEAR-OLD CHILD HAD THE CAPACITY TO TESTIFY; CONVICTION REVERSED.

The Third Department, reversing defendant's conviction in this sexual abuse case, held the court should have conducted an inquiry of a three-year-old child to determine the child's capacity to testify. The child was the alleged victim of the sexual abuse: "It is undisputed that, prior to the child giving unsworn testimony, County Court did not conduct any form of inquiry or examination of the child to determine whether the child possessed sufficient intelligence and capacity to give unsworn testimony ... . Without such inquiry or examination, the court could not make any determination as to whether the child was competent to give unsworn testimony. Indeed, there is no indication that the court made any findings or specific determination of the child's competency ... . In view of the foregoing, the court erred by failing to conduct an inquiry of the child that satisfied the commands of CPL 60.20 (2) ... . The People contend that the initial questioning by the prosecutor and the child's responses thereto concerning pedigree information satisfied the strictures of CPL 60.20 (2). Even if we agreed with the People that such questioning was procedurally proper, the colloquy between the prosecutor and the child fails to disclose that the child 'understood the difference between a truth and a lie and was competent to testify' ...". ***People v. Reed*, 2022 N.Y. Slip Op. 06657, Third Dept 11-23-22**

CRIMINAL LAW, EVIDENCE.

THERE WAS NO EVIDENCE DEFENDANT WAS AWARE OF THE SPONTANEOUS USE OF A KNIFE BY THE PERPETRATOR IN THIS MURDER CASE; THE EVIDENCE DEFENDANT SHARED THE PERPETRATOR'S INTENT, THEREFORE, WAS INSUFFICIENT.

The Third Department, reversing defendant's conviction for murder under an accomplice theory, determined the evidence defendant shared the intent of Mack, who stabbed the victim, was insufficient: "To hold a person responsible for the criminal conduct of another, the People must demonstrate that 'when, acting with the mental culpability required for the commission thereof, he [or she] solicit[ed], request[ed], command[ed], importune[d], or intentionally aid[ed] [the principal] to engage in such conduct' (Penal Law § 20.00 ...). In other words, when proceeding 'under an acting in concert theory, [the People must prove that] the accomplice and principal [shared] a 'community of purpose' ... . Moreover, in the case of willful homicide, 'a spontaneous and not concerted or planned use of [a] weapon to kill is not, without more, attributable to the companion whose guilt in a joint design to effect death must be established beyond a reasonable doubt' ... . In this respect, '[i]t is essential that the intent by [the defendant] to kill be fairly deducible from the proof and that the proof exclude any other purpose' ... . The sole eyewitness testimony presented by the People established that the altercation between Mack and the victim began as a fist fight until the victim gained the upper hand and knocked Mack to the ground. When Mack got up, he began swinging wildly at the victim, at which point the eyewitness first observed that Mack had a knife in his hand, which had become visible because of the lights from neighboring establishments. The witness testified that he had not seen the knife prior to the victim knocking Mack down and no other evidence presented at trial established that the knife was visible prior to that point. * * * Even viewing the evidence in the light most favorable to the People ... , we find that the jury would have been required to speculate that defendant had become aware of Mack's spontaneous use of a knife during the altercation ...". ***People v. Jenkins*, 2022 N.Y. Slip Op. 06652. Third Dept 11-23-22**

FAMILY LAW.

THE NINE YEARS OF PENSION CREDITS THE HUSBAND EARNED BEFORE THE MARRIAGE ARE HIS SEPARATE PROPERTY; HOWEVER, THE MARITAL FUNDS USED TO PURCHASE THOSE CREDITS DURING THE MARRIAGE ARE SUBJECT TO EQUITABLE DISTRIBUTION.

The Third Department, reversing Supreme Court in this divorce proceeding, in a full-fledged opinion by Justice Reynolds Fitzgerald, determined the pension credits earned by the husband during the nine years prior to the marriage were his separate property. But the marital funds used to purchase those credits during the marriage were subject to equitable distribution: " '[A] pension benefit is, in essence, a form of deferred compensation derived from employment and an asset of the marriage that both spouses expect to enjoy at a future date' ... . 'Even though workers are unable to gain access to the money until retirement, their right to it accrues incrementally during the years of employment. Thus, that portion of a pension based on years of employment during the marriage is marital property' ... . In effecting the intent of Domestic Relations Law § 236 (B), the Court of Appeals held that 'these post-divorce benefits were marital property to the extent that they were compensation for past services rendered during the marriage' ... . Accordingly, 'it becomes evident that an employee's interest in such a plan, except

to the extent that it is earned before marriage or after commencement of a matrimonial action, is marital property' ... . * * * ... [C]ompensation for past services earned prior to the marriage is separate property. The nine years of premarriage ... credits were earned outside the marriage and are based on the fruit of the titled spouse's sole labors. As they are not due in any way to the indirect contributions of the non-titled spouse ... , the wife's contention that she is entitled to an equitable share of any 'appreciation' in the value of credits that have been classified as the husband's separate property is unpersuasive. The acquisition of the separate pension credits cannot serve to transform such property into a marital asset ... [A]s marital funds were utilized to purchase the pension credits, said funds are subject to equitable distribution." ***Szypula v. Szypula*, 2022 N.Y. Slip Op. 06664, Third Dept 11-23-22**

FAMILY LAW, CRIMINAL LAW.

THE THREATS ALLEGEDLY MADE TO PETITIONER WERE NOT MADE IN PUBLIC AND THERE WAS NO EVIDENCE THE THREATS WERE MADE WITH THE INTENTION TO CAUSE A PUBLIC DISTURBANCE; THEREFORE, THE FAMILY OFFENSE PETITION ALLEGING DISORDERLY CONDUCT SHOULD HAVE BEEN DISMISSED.

The Third Department, reversing Family Court, determined the alleged threats against petitioner were made privately and did not create a public disturbance. In addition, there was no proof the alleged threats were made with the intent to cause a public disturbance. Therefore the petition alleging disorderly conduct as a family offense should have been dismissed: "... '[A] person is guilty of disorderly conduct when, with intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof[,] . . . [h]e [or she] engages in fighting or in violent, tumultuous or threatening behavior' (Penal Law § 240.20 [1]). Pursuant to both CPL 530.11 (1) and Family Court Act § 812 (1), 'disorderly conduct' includes disorderly conduct not in a public place.' Yet, 'even where the conduct at issue is alleged to have occurred in a private residence, in order for a petitioner to meet his or her burden of establishing the family offense of disorderly conduct, there must be a prima facie showing that the conduct was either intended to cause, or recklessly created a risk of causing, public inconvenience, annoyance, or alarm. The intent to cause, or recklessness in causing, public harm, is the mens rea of the offense of disorderly conduct' ... . * * * ... [P]etitioner failed to meet her burden of making a prima facie showing that respondent had the requisite intent to create public inconvenience, annoyance or alarm, or recklessly causing a risk of the same ... . In this respect, petitioner's evidence does not establish that respondent's actions were public in a manner that would support such a finding ... . Respondent's threat against petitioner's life would have undoubtedly caused public disorder if others had heard the threat ... ; however, the record reveals that respondent appears to have threatened petitioner's life in only their company, and without having drawn the attention of others to the scene ... . Further, although the police were called on one instance, without a police report in evidence, it is impossible to determine which one of the parties — or if, in fact, a neighbor — had called the police to therefore permit a finding that respondent's conduct rose to the level of creating a public disturbance." ***Matter of Kilts v. Kilts*, 2022 N.Y. Slip Op. 06660, Third Dept 11-23-22**

FAMILY LAW, EVIDENCE.

EVIDENCE OF ABUSE OR NEGLECT OF ANOTHER CHILD IS ADMISSIBLE IN A MODIFICATION OF CUSTODY PROCEEDING; ALTHOUGH CHILD PROTECTIVE SERVICES RECORDS REGARDING NEGLECT ARE HEARSAY, THE HEARSAY IS ADMISSIBLE IF CORROBORATED.

The Third Department, reversing Family Court in this modification of custody proceeding, determined it was error to exclude Child Protective Services (CPS) records regarding mother's alleged neglect of another child. Family Court excluded the records because the proceeding was not a neglect proceeding and because the evidence was hearsay. The Third Department noted that evidence of abuse or neglect is admissible in a custody proceeding and hearsay is admissible if corroborated: "The agency records that the father sought to admit are not in the record and, thus, not before this Court. A review of the father's modification petition reveals that he noted CPS's involvement with the mother and cited to such as establishing a change in circumstances. Specifically, he alleged there had been 'ongoing child protective involvement in the [mother's] home[,]' that the subject child has indicated there is domestic abuse taking place in the home and that the child has reported that he is being neglected by the mother. The petition states that 'it was revealed through the CPS open investigation that the child is reporting that there is no food at the [mother's] home and that he goes without meals.' Based on the foregoing, Family Court erred in refusing to allow the CPS records into evidence based upon the rationale that no hearsay exception existed for abuse and neglect allegations in a Family Ct Act article 6 proceeding. In this respect, although this is not a Family Ct Act article 10 proceeding, the law is well established that hearsay evidence as to allegations of abuse or neglect can be admitted into evidence during a custody proceeding if corroborated by other evidence . As such, this case must be reversed and remitted to Family Court for the admission of such evidence at a new fact-finding hearing on the parties' modification petitions." ***Matter of Sarah QQ. v. Raymond PP.*, 2022 N.Y. Slip Op. 06659, Third Dept 11-23-22**

FAMILY LAW, EVIDENCE, JUDGES.

IN THIS MODIFICATION OF CUSTODY PROCEEDING, MOTHER'S PROOF OF THE CHILD'S INJURIES IN FATHER'S CARE AND HER IMPROVED PARENTING SKILLS AND LIVING CONDITIONS WAS SUFFICIENT TO WITHSTAND FATHER'S MOTION TO DISMISS; THE JUDGE APPEARS TO HAVE PREJUDGED THE CASE; MATTER REMITTED TO BE HEARD BY A DIFFERENT JUDGE.

The Third Department, reversing Family Court and remitting the case to a different judge, determined mother's petition for a modification of custody should not have been dismissed: " 'A parent seeking to modify an existing custody order must first show that a change in circumstances has occurred since the entry of the existing custody order that then warrants an inquiry into what custodial arrangement is in the best interests of the child' ... .. 'Only after this threshold hurdle has been met will the court conduct a best interests analysis' ... . 'When, as here,

Family Court is tasked with deciding a motion to dismiss at the close of the petitioner's proof, the court must accept the petitioner's evidence as true and afford the petitioner every favorable inference that could reasonably be drawn from that evidence, including resolving all credibility questions in the petitioner's favor' ... . * * * After reviewing the record, we find that the mother's proof regarding injuries suffered by the child during the father's parenting time, taken together with the mother's improved parenting abilities and living conditions, demonstrated a change in circumstances sufficient to overcome a motion to dismiss ... . * * * Based on Family Court's comments regarding its predispositions and its inappropriate comment regarding the mother's credibility, Family Court appears to have prejudged the case ... . Therefore, this matter must be remitted for a new hearing before a different judge." ***Matter of Nicole B. v. Franklin A.*, 2022 N.Y. Slip Op. 06672, Third Dept 11-23-22**

FAMILY LAW, EVIDENCE, JUDGES.

FAMILY COURT'S BEST INTERESTS RULING IN THIS MODIFICATION OF CUSTODY PROCEEDING DID NOT HAVE A SOUND AND SUBSTANTIAL BASIS IN THE RECORD; THE APPELLATE DIVISION AWARDED PRIMARY PHYSICAL CUSTODY TO MOTHER.

The Third Department, reversing Family Court, determined mother's petition for a modification of custody should have been granted: "Having concluded that Family Court's determination lacks a sound and substantial basis in the record, we are empowered to make our own independent determination of the child's best interests, and our authority in that regard is as broad as that of Family Court ... . In reviewing the record, we note that the mother testified without contradiction that she does not abuse alcohol or drugs, and while she previously struggled with her mental health, the hearing evidence showed that she has overcome that challenge and achieved a stable home life. By contrast, we find problematic the evidence of the father's regular drinking in the child's presence and his apparent lack of candor during the DWI assessment, as well as the dirty and unkempt condition of his apartment. We also find significant the strong position of the appellate attorney for the child in support of the mother's petition ... . In light of the foregoing, we hold that the child's best interests are served by having the parents continue to share joint legal custody but awarding primary physical custody to the mother, with parenting time for the father as the parties shall mutually agree ...". ***Matter of Brittni P. v. Michael P.*, 2022 N.Y. Slip Op. 06667, Third Dept 11-23-22**

FORECLOSURE, CIVIL PROCEDURE.

PLAINTIFF BANK'S 2017 DE-ACCELERATION LETTER IN THIS FORECLOSURE ACTION WAS NOT AMBIGUOUS AND THEREFORE SERVED TO STOP THE RUNNING OF THE STATUTE OF LIMITATIONS TRIGGERED BY THE INITIAL FORECLOSURE ACTION IN 2012; THEREFORE, THE SECOND FORECLOSURE ACTION BROUGHT IN 2018 WAS TIMELY.

The Third Department, reversing Supreme Court, in a full-fledged opinion by Justice Fisher, determined plaintiff bank's 2017 de-acceleration letter was not ambiguous and served to stop the running of the statute of limitations triggered when the mortgage loan was accelerated by initial the 2012 foreclosure action: "[P]laintiff submitted ... a copy of the September 27, 2018 de-acceleration notice sent by the mortgage servicer, indicating that 'we hereby revoke any prior acceleration of the loan, withdrawing any prior demand for immediate payment of all sums secured by the security instrument and re-institute the loan as an installment loan' ... . The notice advised that defendants could resume making monthly payments, which would now be accepted by plaintiff, and further provided that defendants 'also have the right to pay the monthly payments that came due prior to and would have come due during the prior acceleration, which has not been revoked.' ... Supreme Court found that this ... language — 'which has not been revoked' — made the entire notice unclear and ambiguous, we disagree. Such statement was advising defendants of their right to satisfy the arrears and their continuing obligation to make monthly payments; the next sentence in the notice warned that, if defendants failed to 'cure the payments in arrears,' plaintiff reserved the right 'to accelerate the loan anew.' To this end, defendants' claim that this language is inconsistent with the monthly statements sent before and after the de-acceleration notice is belied by the record, which confirms that such statements sought payment on the total amount of the arrears plus the monthly mortgage payment, and not the total principal of the mortgage." ***HSBC Bank, USA, N.A. v. Bresler*, 2022 N.Y. Slip Op. 06671, Third Dept 11-23-22**

UNEMPLOYMENT INSURANCE, LABOR LAW.

PURSUANT TO LABOR LAW SECTION 511, THE NEW YORK CITY SUPPER CLUB WAS NOT THE EMPLOYER OF THE MUSICIANS, DANCERS AND OTHER PERFORMERS WHO ENTERTAINED AT THE CLUB; THEREFORE, THE CLUB WAS NOT OBLIGATED TO MAKE UNEMPLOYMENT INSURANCE CONTRIBUTIONS ON BEHALF OF THE PERFORMERS.

The Third Department, reversing the Unemployment Insurance Appeal Board, determined that the musicians, dancers and other artists who performed at a New York City supper club (Griffs) were not employees of the club under Labor Law § 511. Therefore the club was not obligated to make additional unemployment insurance contributions with respect to those performers: "Pursuant to Labor Law § 511 (1) (b) (1-a), the term employment includes 'any service by a person for an employer . . . as a professional musician or a person otherwise engaged in the performing arts, and performing services as such for a . . . restaurant, night club or similar establishment unless, by written contract, such musician or person is stipulated to be an employee of another employer covered by [the Labor Law]' ... . 'The statute, which was designed to extend the availability of unemployment insurance and workers' compensation benefits to those in the performing arts, creates a rebuttal presumption of employment' ... — a presumption that may be rebutted by a written contract establishing that the performer in question is the employee of another covered employer ... . [T]he sole contested issue is whether a provision contained within the written agreements executed by the performers established that they were 'employee[s] of another employer covered by [the Labor Law]' (Labor Law § 511 [1] [b] [1-a]). To that end, paragraph No. 8 of the performers' contracts with Griffs provides, in relevant part, that Griffs 'is not nor shall become [the performers'] employer, as other corporations employ them' ...". ***Matter of Griffs Global Corp. (Commissioner of Labor)*, 2022 N.Y. Slip Op. 06670, Third Dept 11-23-22**

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