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FIRST DEPARTMENT

FAMILY LAW, SOCIAL SERVICES LAW, CONTEMPT, EVIDENCE.

FATHER MADE A PRIMA FACIE SHOWING THE NYC ADMINISTRATION OF CHILDREN'S SERVICES (ACS) SHOULD BE HELD IN CONTEMPT FOR FAILING TO PROVIDE UNREDACTED REPORTS OF CHILD ABUSE OR NEGLECT WHICH WERE DEEMED UNFOUNDED; MATTER REMITTED.

The First Department, reversing (modifying) Family Court and remitting the matter, determined father made a prima facie showing that the NYC Administration of Children's Services (ACS) should be held in contempt for failing to provide unredacted reports of child abuse or neglect which were deemed unfounded. Father's request for the unredacted documents should not have been denied absent a finding by Family Court the safety of the person(s) who made the report or cooperated with the investigation would be jeopardized by revealing the name(s): "As the subject of the unfounded reports, the father is a person entitled to receive access to the otherwise sealed reports (Social Services Law § 422 [5][a][iv]). * * * ... [F]ather made a prima facie showing of the elements necessary to hold ACS in contempt for its failure to fully comply with a lawful judicial subpoena ... The subpoena was a valid order expressing an unequivocal mandate, requiring ACS to produce 'complete' investigation and unfounded reports of suspected child abuse concerning the children. ACS does not deny that it was aware of the order. Further, ACS did not comply with the subpoena, as it produced reports that redacted the names of sources, not complete reports. Finally, the father suffered prejudice, because his modification petition alleges that the mother was causing false abuse reports to be filed with the authorities, and the unredacted unfounded reports may be admissible in such a proceeding ... . Once the father met his prima facie burden, it was incumbent on ACS to refute the showing or to offer evidence of a defense ... . ACS asserted that Social Services Law §422(7) permits the commissioner 'to prohibit the release of data that would identify the person who made the report or who cooperated in a subsequent investigation . . . which he reasonably finds will be detrimental to the safety or interests of such person.' However, there was no indication that any such determination had actually been made." ***Matter of Michael Y. v. Dawn S.*, 2023 N.Y. Slip Op. 00193, First Dept 1-17-23**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

PLAINTIFF ALLEGEDLY FELL INTO A DITCH WHICH WAS COVERED BY A TARP; THE FACT THAT PLAINTIFF WAS THE ONLY WITNESS AND THE ALLEGATION PLAINTIFF COULD HAVE TAKEN A DIFFERENT ROUTE DID NOT PRECLUDE SUMMARY JUDGMENT IN PLAINTIFF'S FAVOR ON THE LABOR LAW § 240(1) CAUSE OF ACTION.

The First Department, reversing Supreme Court, determined plaintiff was entitled to summary judgment in this Labor Law § 240(1) action. Plaintiff alleged he fell into a ditch which was covered by a tarp. That there were no witnesses to the incident did not require denial of summary judgment. The allegation plaintiff could have taken a different route raised an issue of comparative negligence which is not a bar to summary judgment on a Labor Law § 240(1) cause of action: "Defendants ... failed to raise an issue of fact as to whether plaintiff was the sole proximate cause of his accident. Defendants contend that plaintiff chose to use a bathroom further away from his workstation and attempted to cross over the ditch without first inspecting the covering that had replaced the plank before stepping on it. However, these circumstances still demonstrate that plaintiff's accident was the result of the absence of a safety device, and raise only an issue as to plaintiff's comparative negligence, which is not a defense to a Labor Law § 240(1) claim ... . The fact that plaintiff was the only witness to his accident does not preclude summary judgment in his favor, as nothing in the record controverted his account of the accident or called into question his credibility ...". ***Sotelo v. TRM Contr., LP*, 2023 N.Y. Slip Op. 00190, First Dept 1-17-23**

PERSONAL INJURY, LANDLORD-TENANT, CONTRACT LAW.

PLAINTIFF FELL THROUGH A STOREFRONT WINDOW IN DEFENDANT PLANET ROSE'S KARAOKE BAR; GIVEN THE CIRCUMSTANCES, THE FAILURE TO INSTALL TEMPERED GLASS MAY HAVE BEEN NEGLIGENT; BY THE TERMS OF THE LEASE, THE OUT-OF-POSSESSION LANDLORD, DEFENDANT 219 AVE. A, COULD NOT BE HELD LIABLE.

The First Department, reversing (modifying) Supreme Court, determined the defendant 219 Ave. A was an out-of-possession landlord which, by the terms of the lease, was not obligated to repair or maintain the premises where plaintiff's fall occurred. Plaintiff was standing on a couch in defendant Planet Rose's karaoke bar when she fell backwards through a storefront window: "[T]he owner of Planet Rose acknowledged that when vandals smashed another window in the storefront years earlier, the glazier recommended tempered glass as the best option for a storefront, and she accepted that recommendation. She also testified that there were many times over the years that patrons stood on the couch, as shown in photographs posted on Planet Rose's social media. Thus, the record presents issues of fact as to whether defendants were negligent in failing to use tempered glass in the window to prevent a foreseeable injury ... . Given the evidence that patrons of the karaoke bar sometimes

stood on the couch, plaintiff's conduct was not extraordinary or unforeseeable, and it therefore cannot be said that the setup at the bar merely furnished the occasion for the harm ... . 219 Ave. A demonstrated that it had relinquished sufficient control of the premises to be deemed an out-of-possession landlord, and as such, was not contractually obligated to make repairs or maintain the premises ... . Accordingly, its liability is limited to claims 'based on a significant structural or design defect that is contrary to a specific statutory safety provision,' which are not at issue here ...". ***Kitziger v. 219 Ave. A. NYC LLC*, 2023 N.Y. Slip Op. 00239, First Dept 1-19-23**

SECOND DEPARTMENT

ATTORNEYS, LEGAL MALPRACTICE, NEGLIGENCE.

PLAINTIFF IN THIS TRAFFIC ACCIDENT CASE ALLEGED DEFENDANT ATTORNEY NEGLIGENTLY FAILED TO PURSUE DAMAGES IN EXCESS OF THE POLICY LIMITS AGAINST THE TORTFEASOR PERSONALLY; DEFENDANT DID NOT DEMONSTRATE PLAINTIFF WOULD NOT HAVE PREVAILED AGAINST THE TORTFEASOR PERSONALLY; DEFENDANT'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing (modifying) Supreme Court, determined the legal malpractice should not have been dismissed. It was alleged the defendant attorney, in this traffic accident case, failed to pursue damages in excess of the insurance-policy limits against the tortfeasor personally. Defendant did not demonstrate plaintiff would not have prevailed in an action against the tortfeasor personally: " 'In an action to recover damages for legal malpractice, a plaintiff must demonstrate that the attorney failed to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession and that the attorney's breach of this duty proximately caused the plaintiff to sustain actual and ascertainable damages' ... . 'The plaintiff is required to plead actual, ascertainable damages that resulted from the attorneys' negligence' ... . Here, the defendants failed to establish, prima facie, that the plaintiff had no actual or ascertainable damages. 'The defendant must affirmatively demonstrate the absence of one of the elements of legal malpractice' ... . The complaint alleged that the damages included the failure to pursue SUM benefits, as well as the failure to pursue recovery against the alleged tortfeasor. Since it was alleged ... that the defendants' legal malpractice prevented the plaintiff from obtaining a judgment against the alleged tortfeasor, the defendants had the burden of affirmatively demonstrating that the plaintiff would not have prevailed against the alleged tortfeasor or that the alleged tortfeasor did not have personal assets such that his motorist insurance policy limit that was recovered in the amount of $50,000, was the maximum judgment that could have been obtained from him ... . The defendants failed to do so." ***Chicas v. Cassar*, 2023 N.Y. Slip Op. 00202, Second Dept 1-18-23**

CIVIL PROCEDURE.

THE TEN-MONTH DELAY BEFORE SEEKING TO AMEND THE COMPLAINT AND DEFENDANT'S SPECULATIVE ALLEGATION OF PREJUDICE WERE NOT SUFFICIENT GROUNDS FOR DENYING THE MOTION TO AMEND.

The Second Department, reversing Supreme Court, determined plaintiff's motion to amend the complaint should have been granted. The ten-month delay in seeking the amendment was not a sufficient ground for denying the motion: "A party may amend a pleading 'at any time' by leave of the court (CPLR 3025[b] ...). 'In the absence of prejudice or surprise resulting directly from the delay in seeking leave, such applications are to be freely granted unless the proposed amendment is palpably insufficient or patently devoid of merit' ... The determination to permit or deny amendment is committed to the sound discretion of the trial court ... . 'In exercising its discretion, the court should consider how long the party seeking the amendment was aware of the facts upon which the motion was predicated [and] whether a reasonable excuse for the delay was offered' ... . However, '[m]ere lateness is not a barrier to the amendment. It must be lateness coupled with significant prejudice to the other side, the very elements of the laches doctrine' ... . 'The party opposing the application has the burden of establishing prejudice, which requires a showing that the party has been hindered in the preparation of [its] case or has been prevented from taking some measure in support of [its] position' ... . [Defendant] failed to demonstrate that it would be surprised or prejudiced by the proposed amendments ... . The details concerning the communications between the parties regarding the plaintiff's claims were 'premised upon the same facts, transactions or occurrences alleged in the original complaint' ... and merely elaborated on the same theory of liability alleged in the original complaint ... . [Defendant's] contention that evidence may have been lost in the months following the independent medical examination was too speculative to demonstrate any prejudice from the plaintiff's delay ...". ***Flowers v. Mombrun*, 2023 N.Y. Slip Op. 00206, Second Dept 1-18-23**

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

PLAINTIFF BANK DID NOT DEMONSTRATE THE NOTICE OF FORECLOSURE WAS MAILED IN ACCORDANCE WITH RPAPL 1304; THE BANK'S MOTION FOR SUMMARY JUDGMENT SHOULDN'T HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined the plaintiff bank in this foreclosure action did not demonstrate the notice of foreclosure was mailed in accordance with the requirements of RPAPL 1304: "[T]he plaintiff relied on the affidavit of Brown, an employee of Nationstar, the plaintiff's loan servicer, who stated that the plaintiff had mailed the RPAPL 1304 notice in accordance with the plaintiff's practices and procedures. However, Brown then stated that her conclusion was based on her review of Nationstar's file, and on Nationstar's mailing practices and procedures. Thus, Brown's affidavit failed to eliminate triable issues of fact as to who actually mailed the RPAPL 1304 notice, and the plaintiff failed to establish, prima facie, that it complied with RPAPL 1304 ...". ***Wells Fargo Bank, N.A. v. Matsuoka*, 2023 N.Y. Slip Op. 00230, Second Dept 1-18-23**

THIRD DEPARTMENT

CRIMINAL LAW, EVIDENCE.

DEFENDANT'S RAPE CONVICTION BASED SOLELY ON HIS UNCORROBORATED ADMISSION WAS NOT SUPPORTED BY LEGALLY SUFFICIENT EVIDENCE.

The Third Department, reversing defendant's conviction on one count of rape in the second degree, determined there was no corroboration of defendant's admission to having sex with the victim. Therefore, the conviction was not supported by legally sufficient evidence: "After reviewing the record, we find no evidence corroborating defendant's admission that he and the victim engaged in sexual intercourse 'a few times' in August 2017. Due to the lack of corroboration, the evidence is legally insufficient to support that conviction, and the charge under count 1 must be dismissed ...". ***People v. Bateman*, 2023 N.Y. Slip Op. 00249, Third Dept 1-19-23**

CRIMINAL LAW, JUDGES.

AFTER A JUROR CAME FORWARD DURING DELIBERATIONS TO SAY SHE THOUGHT THE DEFENDANT HAD FOLLOWED HER IN HIS CAR DURING THE TRIAL AND OTHER JURORS EXPRESSED SAFETY CONCERNS WITH RESPECT TO TRIAL SPECTATORS, THE JUDGE INTERVIEWED EACH JUROR AND PROPERLY DENIED DEFENDANT'S MOTION FOR A MISTRIAL BASED ON A GROSSLY-UNQUALIFIED-JUROR ARGUMENT; TWO-JUSTICE DISSENT.

The Third Department, over a two-justice dissent, determined County Court properly denied defendant's CPL § 330.30 motion to set aside the verdict on the ground a juror was grossly unqualified. A juror (No. 6) had come forward during deliberations to say she thought the defendant had followed her in his car during the trial and had concerns for her safety. According to Juror No. 6, other jurors expressed safety concerns with respect to spectators at the trial. The judge interviewed each juror and concluded a mistrial should not be granted: "Upon review of the private colloquy between County Court and juror No. 6, we disagree with the dissent's view that County Court failed to engage in a probing and tactful inquiry taking into due account the juror's responses. 'The [t]rial [j]udge generally is accorded latitude in making the findings necessary to determine whether a juror is grossly unqualified under CPL 270.35, because that [j]udge is in the best position to assess partiality in an allegedly biased juror' ... .The trial court is tasked with 'evaluat[ing] the nature of what the juror has seen, heard, or has acquired knowledge of, and assess its importance and its bearing on the case' ... . County Court, '[i]n concluding that a juror is grossly unqualified, . . . may not speculate as to possible partiality of the juror based on [his or] her equivocal responses. Instead, it must be convinced that the juror's knowledge will prevent [him or] her from rendering an impartial verdict' ... . This Court likewise should not speculate." ***People v. Fisher*, 2023 N.Y. Slip Op. 00248, Third Dept 1-19-23**

FAMILY LAW.

ALLEGATIONS FATHER DID NOT ABIDE BY THE VISITATION TERMS AND USED DRUGS DURING VISITATION SUPPORTED MOTHER'S PETITION FOR A MODIFICATION OF CUSTODY BASED UPON CHANGED CIRCUMSTANCES.

The Third Department, reversing Family Court, determined mother's custody modification petition should not have been dismissed. Mother's allegations that father had not abided by the visitation terms (visits must be in a public place) and father used drugs during visitation adequately alleged a change in circumstances: "To establish a change in circumstances, the party must demonstrate 'new developments or changes that have occurred since the previous custody order was entered' ... . Testimony at the fact-finding hearing established, by a preponderance of the evidence ... that the father was not abiding by the visitation terms as set forth in the prior order ... . Specifically, although the prior order required that the father's visitation occur in a public place, the preponderance of the proof demonstrated that much of it was occurring in private residences or hotels. Moreover, there was also testimony that the father was using drugs during the child's visits. Given the circumstances of this case, the father's failure to comply with the visitation terms as set forth in the prior order constitute a change in circumstances ...". ***Matter of Harvey P. v. Contrena Q.*, 2023 N.Y. Slip Op. 00257, Third Dept 1-19-23**

FAMILY LAW, JUDGES.

ALTHOUGH THE RECORD SUPPORTED FATHER'S PERMANENT NEGLECT AND THE TERMINATION OF FATHER'S PARENTAL RIGHTS, FAMILY COURT SHOULD NOT HAVE DISPENSED WITH THE DISPOSITIONAL HEARING ABSENT FATHER'S CONSENT; MATTER REMITTED.

The Third Department determined that although the record supported terminating father's parental rights based upon permanent neglect, Family Court should not have dispensed with the dispositional hearing absent the consent of the parties: "Both petitioner and the attorney for the child share the position that Family Court properly dispensed of the matter without a separate dispositional hearing and, alternatively, that there is sufficient evidence in the record for this Court to render a disposition. However, Family Ct Act § 625 (a) expressly provides that, '[u]pon completion of [a] fact-finding hearing, [a] dispositional hearing may commence immediately after the required findings are made; provided, however, that if all parties consent the court may, upon motion of any party or upon its own motion, dispense with the dispositional hearing and make an order of disposition on the basis of competent evidence admitted at the fact-finding hearing' … . Here, the court stated that there was 'no need for a further or separate dispositional hearing' before rendering its determination that respondent had permanently neglected the child and terminating his parental rights. However, there is no indication that respondent affirmatively consented to dispense with the hearing and, 'absent consent, the requirement of a dispositional hearing may not be circumvented' ...". ***Matter of Harmony F. (William F.)*, 2023 N.Y. Slip Op. 00259, Third Dept 1-19-23**

FAMILY LAW, SOCIAL SERVICES LAW.

THE ABANDONMENT PETITION SHOULD NOT HAVE BEEN GRANTED; PETITIONER DID NOT DEMONSTRATE RESPONDENT FATHER INTENDED TO FOREGO HIS PARENTAL RIGHTS AND, IN FACT, PETITIONER AFFIRMATIVELY INTERFERED WITH FATHER'S ATTEMPTS TO MAINTAIN CONTACT WITH THE CHILDREN.

The Third Department, reversing Family Court, determined the petitioner (Schenectady County Department of Social Services) did not demonstrate father (respondent) had abandoned the children and, in fact, had improperly prevented father from visiting the children. The abandonment petition should have been dismissed: "[P]etitioner failed to establish by clear and convincing evidence that respondent evinced an intent to forego his parental rights ... . The record demonstrates that respondent filed numerous motions to resume visitation, return his children, intervene in the neglect proceeding against the mother and terminate the children's placement. During at least one appearance, respondent remarked that he would continue to 'battle' for the return of his children, even prompting Family Court to candidly admit that respondent has been an active participant during the entire proceeding ... . Respondent had several visits with the children where he inquired if he could obtain their school records and asked what clothing or supplies they needed. The record further reflects that respondent made several inquiries to the caseworker and the mother, including during the delay caused by the pandemic. … There are several troubling instances in the record where the caseworker or the coordinator cancelled respondent's scheduled visitation with the children due to his late confirmation of the scheduled visit or arrival — including one egregious incident where respondent was three minutes late to confirm an appointment for later that day. * * * Notwithstanding the fact that respondent cancelled one visit due to illness, attended five visits and had seven visits cancelled on him in the foregoing manner, the caseworker then reported to Family Court that respondent had only attended 4 out of 20 scheduled visits. Based on the incorrect information presented by the caseworker — who relied on text messages from the coordinator, who did not testify at the hearing — petitioner was successful in obtaining an order suspending respondent's visitation with the children in December 2019, thereby making it more difficult for respondent to visit and communicate with the children." ***Matter of Syri'annah PP. (Sayyid PP.)*, 2023 N.Y. Slip Op. 00252, Third Dept 1-19-23**

TRUSTS AND ESTATES, EVIDENCE.

CONFLICTING EVIDENCE OF DECEDENT'S TESTAMENTARY CAPACITY AND PETITIONER'S UNDUE INFLUENCE PRECLUDED SUMMARY DISMISSAL OF RESPONDENT'S OBJECTIONS TO THE WILL SUBMITTED FOR PROBATE BY PETITIONER.

The Third Department, reversing Surrogate's Court, in a full-fledged opinion by Justice Reynolds Fitzgerald, determined the respondent's (decedent's niece's) objections to the probate of the will submitted by petitioner (decedent's agent) should not have been dismissed. Decedent, in a 2011 will, made respondent the sole beneficiary of his estate. Subsequently decedent executed a 2015 will making petitioner the sole beneficiary of his estate. The Third Department found summary judgment dismissing respondent's objections was inappropriate because there was conflicting evidence of decedent's testamentary capacity and petitioner's undue influence: "[T]he witnesses affirmed that beginning in late 2014, decedent's personal hygiene declined, he acted unusual, was confused and forgetful. The medical records, spanning from the fall of 2014, including a contemporaneous record four days subsequent to the execution of the 2015 will, are replete with observations that decedent refused to care for himself resulting in numerous hospitalizations for hyperglycemia, hypoglycemia and urinary tract infections. The records contain multiple entries that decedent suffered from an altered mental state, confusion and was incoherent. This evidence is sufficient to raise an issue of fact regarding decedent's testamentary capacity ... . * * * Much of the evidence submitted by respondent on the issue of testamentary capacity is also relevant to the issue of undue influence ... . Respondent's witnesses all affirm that while residing at the assisted living facility, decedent was lethargic, frequently complained of being ill, slept a good deal, was unresponsive and was in a weakened state. Decedent's closest friend described him as being easily manipulated, and stated that he was especially vulnerable to petitioner, with whom he was infatuated. In presenting evidence demonstrating decedent's physical decline, coupled with his increasing confusion and personality changes, respondent has raised an issue as to whether decedent was unduly influenced by petitioner ...". ***Matter of Linich*, 2023 N.Y. Slip Op. 00250, Third Dept 1-19-23**

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