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FIRST DEPARTMENT

CONTRACT LAW.

THE TYPOGRAPHICAL ERROR IN THE CONTRACT RENDERED A CRUCIAL SENTENCE AMBIGUOUS; THE ERROR COULD NOT BE CORRECTED WITHOUT POSSIBLY ALTERING THE PARTIES' INTENT; THEREFORE EXTRINSIC EVIDENCE IS NECESSARY TO INTERPRET THE CONTRACT.

The First Department, in full-fledged opinion by Justice Webber, over an extensive two-justice dissent, determined there was a typographical error in the sentence describing the effective date of the contract which rendered the contract ambiguous. The dissent argued the intended meaning of the sentence was clear and the error should be corrected by the court. The effective date of the contract was crucial to a determination whether the contract was enforceable or had expired: "[W]e are not ascribing one interpretation over the other. Rather, we are pointing out the multiple reasonable interpretations and concluding that additional information is necessary to ascertain the proper interpretation (*see Castellano v State of New York*, 43 NY2d 909 [1978]). In Castellano, when faced with a word in a lease clause that was grammatically inconsistent with the rest of the lease, the Court considered the different ways the parties proposed to change the clause to render it grammatically correct, both of which were reasonable. Each required altering a word in the lease. Rather than choosing one alteration over another, the Court found that there should be an exploration to ascertain the proper interpretation. ... [T]hese are not 'inadvertent errors,' or a 'mistake' that can be corrected without altering the intent of the parties ... . While 'mistakes in grammar, spelling or punctuation should not be permitted to alter, contravene or vitiate manifest intention of the parties as gathered from the language employed' ... , the [contract language] cannot be rendered grammatically correct without possibly altering the parties' intent. '[T]he question of whether an ambiguity exists must be ascertained from the face of an agreement without regard to extrinsic evidence' ... . Here, the ... language is literally unclear and ambiguous and must be interpreted in light of extrinsic evidence." ***Mak Tech. Holdings Inc. v. Anyvision Interactive Tech. Ltd.*, 2022 N.Y. Slip Op. 07507, First Dept 12-29-22**

CORPORATION LAW, JUDGES.

WHETHER THE CORPORATE VEIL SHOULD BE PIERCED IS A FACT-BASED DETERMINATION GENERALLY NOT SUITED FOR SUMMARY JUDGMENT; THE FINDINGS BY THE MOTION COURT WERE NOT SUPPORTED BY UNDISPUTED FACTS; SUMMARY JUDGMENT ALLOWING THE CORPORATE VEIL TO BE PIERCED REVERSED.

The First Department, reversing Supreme Court, determined the motion court should not have granted summary judgment allowing the corporate veil to be pierced and holding the defendants liable for a judgment against the corporation (DJJMS). The appellate division noted that a determination the corporate veil should be pierced is a fact-based analysis not suited to summary judgment: "The elements of veil piercing are that (1) the owners exercised complete domination and control of the corporation with respect to the transaction attacked; and (2) such domination was used to commit a fraud or wrong against the plaintiff, resulting in the plaintiff's injury ... . Plaintiffs who seek to pierce the corporate veil bear a heavy burden ... . '[C]omplete domination of the corporation is the key to piercing the corporate veil' ... , but the motion court did not cite sufficient, undisputed facts to show that defendants exercised complete domination of DJJMS. It noted that veil piercing occurs 'when the principals are using the corporation 'as their personal piggy-bank' but cited no facts to support its apparent determination that defendants so used DJJMS ... . The motion court did not adequately detail relevant, undisputed facts to show that defendants have 'abused the privilege of doing business in the corporate form,' including facts showing that, as a matter of law 'there was a failure to adhere to corporate formalities, inadequate capitalization, commingling of assets, and use of corporate funds for personal use' ... . The motion court apparently presumed that the transfer at issue ... caused DJJMS to be judgment proof, but the court does not cite any undisputed fact, other than the fact of the transfer itself, to support its conclusion." ***Etage Real Estate LLC v. Stern*, 2022 N.Y. Slip Op. 07499, First Dept 12-29-22**

MEDICAL MALPRACTICE, PERSONAL INJURY.

THE NATIONAL VACCINE INJURY COMPENSATION PROGRAM (PART 2 OF THE NATIONAL CHILDHOOD VACCINE INJURY ACT OF 1986), WHICH LIMITS THE LIABILITY OF A PHYSICIAN WHO ADMINISTERS A VACCINE TO $1000, DOES NOT APPLY TO PHYSICIANS WHO SUBSEQUENTLY TREAT A VACCINATED PERSON FOR A VACCINE-RELATED CONDITION.

The First Department determined the National Vaccine Injury Compensation Program, Part 2 of the National Childhood Vaccine Injury Act of 1986 (VICP or NCVIA) (42 U.S.C. § 300aa-10 *et seq.*), which limits the liability of a physician who administers a vaccine to $1000, applies only to those who actually administer the vaccine and not to those who subsequently treat the vaccinated person for medical problems

that may be linked to the vaccine: "On April 14, 2006, defendant Gargi Gandhi, M.D. administered two vaccines to infant plaintiff Diksha Batish, then age 13. Plaintiff's condition subsequently deteriorated. Two weeks after vaccination, plaintiff received care from defendant Drs. Imundo and Pascual. Several months later, in September 2006, plaintiff first sought treatment from Dr. Spiro. There is no dispute that only Dr. Gandhi administered the vaccines. * * * Here, none of the moving defendants administered the vaccine. Neither ... did they treat plaintiff for conditions allegedly exacerbated by subsequent vaccinations. They only provided post-vaccination care. Thus, the moving defendants cannot be considered vaccine administrators under the VICP. Since the moving defendants are not vaccine administrators, the VICP is inapplicable, and any toll authorized by the VICP is also inapplicable (see 42 USC § 300aa-16[c])." ***Batish v. Gandhi*, 2022 N.Y. Slip Op. 07494, First Dept 12-29-22**

SECOND DEPARTMENT

CRIMINAL LAW, EVIDENCE.

THE POLICE OFFICER'S TESTIMONY ABOUT HOW THE DEFENDANT'S DAUGHTER, WHO DID NOT TESTIFY AT THE TRIAL, DESCRIBED THE ALLEGED STABBING WAS INADMISSIBLE TESTIMONIAL HEARSAY; NEW TRIAL ORDERED.

The Second Department, reversing defendant's assault conviction, over a dissent, determined the police officer's (Costello's) testimony about the defendant's daughter's explanation of the alleged stabbing, which included a reenactment, was testimonial hearsay and should not have been admitted. The defendant's daughter did not testify at the trial. In addition, the defendant's son's statement to the defendant at the scene ("Why, why, why? Why did you stab my mom?") should not have been admitted as an excited utterance because the son did not witness the alleged stabbing: " 'Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution' ... . To determine which of these categories an out-of-court statement falls into, a court should focus on 'the purpose that the statement was intended to serve' ... , and to ascertain 'the 'primary purpose' of an interrogation,' a court should 'objectively evaluate the circumstances in which the encounter occurs and the statements and actions of the parties' ... . [T]he daughter's statements to Costello regarding the circumstances under which the defendant had stabbed the victim were testimonial in nature. Viewing the record objectively, at the time the statements were made, there was no ongoing emergency. The victim had been removed from the scene and taken to a hospital. The defendant had been taken into custody and transported to a police station. Indeed, Costello testified that a detective was never even assigned to the case, precisely because the police already 'had the alleged perpetrator in custody.' Although the daughter was still deeply upset as a result of the stabbing, she was not in need of police assistance, and it is clear that Costello's questions were not asked for the purpose of facilitating such assistance. Rather, the primary purpose of Costello's questioning of the daughter 'was to investigate a possible crime' ... . Costello 'was not seeking to determine . . . what is happening, but rather what happened' ... . Indeed, Costello expressly asked the daughter to 'indicate to [him] what happened.' Moreover, Costello went beyond simply asking what happened and requested that the daughter describe and illustrate exactly how it happened using simple words and gestures. While the People argue that Costello requested the use of gestures merely to overcome a language barrier, the fact remains that he asked the daughter to convey information about past events. The daughter's detailed account of those events, complete with a physical re-enactment of the crime, did 'precisely what a witness does on direct examination," and thus was "inherently testimonial' ...". ***People v. Vargas*, 2022 N.Y. Slip Op. 07460, Second Dept 12-28-22**

CRIMINAL LAW, EVIDENCE.

ALTHOUGH THE PEOPLE PRESENTED EVIDENCE OF THE SHOWUP IDENTIFICATION AT THE SUPPRESSION HEARING, THEY DID NOT PRESENT ANY EVIDENCE OF THE INITIAL STOP OF THE DEFENDANT; THE PEOPLE DID NOT MEET THEIR BURDEN TO SHOW THE LEGALITY OF THE POLICE CONDUCT; SUPPRESSION SHOULD HAVE BEEN GRANTED.

The Second Department, reversing defendant's conviction by guilty plea, determined the People did not present sufficient evidence at the suppression hearing and suppression of the seized evidence and statements should have been granted. Defendant was accused of a knifepoint robbery of a gas station and was identified in a showup procedure. At the suppression hearing, the People did not present any evidence of the initial stop of the defendant and therefore did not establish the legality of the police conduct: " 'On a motion to suppress, the People bear the burden of going forward to establish the legality of police conduct in the first instance' ... . 'Where a police encounter is not justified in its inception, it cannot be validated by a subsequently acquired suspicion' ... . Here, at the suppression hearing, the People failed to present any evidence establishing the basis for the police to have made the initial stop of the defendant. Thus, the People failed to carry their burden of establishing the legality of police conduct in the first instance, and all evidence recovered as a result of the unlawful stop must be suppressed ..." ***People v. Vazquez*, 2022 N.Y. Slip Op. 07461, Second Dept 12-28-22**

FAMILY LAW, ATTORNEYS.

ALTHOUGH DEFENDANT-WIFE'S ATTORNEY IN THIS DIVORCE ACTION MISSED A COUPLE OF THE 60-DAY BILLING PERIODS, THE ATTORNEY WAS IN SUBSTANTIAL COMPLIANCE WITH 22 N.Y.C.R.R. § 1400.3(9) AND THE WIFE'S REQUEST FOR ATTORNEY'S FEES SHOULD NOT HAVE BEEN DENIED; $135,315.90 AWARDED.

The Second Department, reversing Supreme Court, determined defendant-wife's attorney was in substantial compliance with the billing requirements of 22 N.Y.C.R.R. § 1400.3(9) and the wife's request for attorney's fees in this divorce action should not have been denied: "[T]he defendant's attorney was in substantial compliance with 22 NYCRR 1400.3(9) ... . Although the attorney for the defendant was dilatory in sending an initial invoice approximately 154 days after he was retained, the billable hours during that interval were itemized and accounted for, and the remainder of the invoices he sent all complied with the 60-day rule. Under the circumstances, the court should not have precluded the defendant from recovering an award of attorneys' fees for failure to comply with 22 NYCRR 1400.3(9), and we conclude that the plaintiff should be responsible for the balance of the defendant's attorneys' fees and expenses, net of his prior payments, less $3,487.50 related to a duplicative motion for expenses, which amounts to $135,315.90." ***Spataro v. Spataro*, 2022 N.Y. Slip Op. 07470, Second Dept 12-28-22**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

INSTALLING A TV ON A WALL IS NOT AN ACTIVITY COVERED BY LABOR LAW § 240(1).

The Second Department, reversing Supreme Court, determined defendants' motions for summary judgment dismissing the Labor Law § 240(1) cause of action should have been granted. Plaintiff fell from an A-frame ladder while attempting to install a television on a wall in a doctor's office: "Labor Law § 240(1) states that all contractors, owners, and their agents must supply protective equipment to laborers who are engaged in the 'erection, demolition, repairing, altering, painting, cleaning or pointing of a building' ... . As such, '[t]o successfully assert a cause of action under Labor Law § 240(1), a plaintiff must establish that he or she was injured during 'the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure' ... . '[T]he term 'altering' in section 240(1) 'requires making a significant physical change to the configuration or composition of the building or structure' ... . This definition excludes "routine maintenance' and 'decorative modifications' ... The defendants established that the plaintiff was not engaged in any of the enumerated activities under Labor Law § 240(1). Contrary to the plaintiff's contention, affixing a bracket to a wall so that a television might be mounted on it did not make a 'significant physical change to the configuration or composition of the building or structure' ...". ***Saitta v. Marsah Props., LLC*, 2022 N.Y. Slip Op. 07467, Second Dept 12-28-22**

PERSONAL INJURY, LANDLORD-TENANT.

BY THE TERMS OF HIS LEASE, PLAINTIFF WAS RESPONSIBLE FOR SNOW AND ICE REMOVAL IN THIS SLIP AND FALL CASE; THE OUT--OF-POSSESSION LANDLORDS WERE NOT RESPONSIBLE AND THEIR MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined defendants-out-of-possession landlords were not responsible for snow and ice removal in the area where plaintiff slipped and fell, In fact, plaintiff, by the terms of his lease, was responsible for the snow and ice removal: "[T]he defendants demonstrated, prima facie, that they were out-of-possession landlords who were not contractually obligated to remove snow and ice from the subject driveway, that they did not assume such a duty through a course of conduct, and that they did not violate any relevant statute or regulation ... . In opposition, the plaintiff failed to raise a triable issue of fact as to whether the defendants had a duty to remove snow or ice under statute or regulation, the terms of the lease, or a course of conduct ...". ***Sweeney v. Hoey*, 2022 N.Y. Slip Op. 07471, Second Dept 12-28-22**

PERSONAL INJURY, VEHICLE AND TRAFFIC LAW, EVIDENCE.

ALTHOUGH DEFENDANT WAS PROCEEDING THROUGH AN INTERSECTION WHEN THE CAR IN WHICH PLAINTIFF WAS A PASSENGER ATTEMPTED A LEFT TURN, DEFENDANT'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED; THE POLICE REPORT, PHOTOS AND DASHBOARD VIDEO WERE INADMISSIBLE AND DEFENDANT'S AFFIDAVIT DID NOT DEMONSTRATE HE WAS FREE FROM FAULT.

The Second Department, reversing Supreme Court, determined the defendant (Wen Xu) in this intersection traffic accident case should not have been granted summary judgment. The defendant was apparently proceeding through the intersection when the driver of the car in which plaintiff was a passenger was attempting to make a left turn. The uncertified police report, photos and dashboard video submitted by the defendant were inadmissible and his affidavit did not demonstrate he was free from fault: "Pursuant to Vehicle and Traffic Law § 1141, '[t]he driver of a vehicle intending to turn . . . left within an intersection . . . shall yield the right of way to any vehicle approaching from the opposite direction which is within the intersection or so close [to it] as to constitute an immediate hazard.' 'The operator of a vehicle with the right-of-way is entitled to assume that the opposing driver will obey the traffic laws requiring him or her to yield' ... 'However, a driver who has the right-of-way has a duty to exercise reasonable care to avoid a collision with another vehicle that allegedly failed to yield the right-of-way' ... . Here, Wen Xu failed to demonstrate his prima facie entitlement to judgment as a matter of law, as he failed to establish that he was free from fault in the happening of the accident. In support of his motion, Wen Xu submitted, inter alia, an uncertified police accident report, photographs, a dashboard video camera recording, and his own affidavit. However, the uncertified police accident report constitutes inadmissible hearsay evidence ... The photographs and dashboard video camera recording are similarly inadmissible, as they were not properly authenticated ... . Moreover, Wen Xu's affidavit was insufficient to establish his prima facie entitlement to judgment as a matter of law as it

failed to eliminate triable issues of fact with regard to whether he was free from fault in the happening of the accident ... . Wen Xu failed to establish that he 'took reasonable care to avoid the collision' with the other vehicle ...". ***Rosa v. Gordils*, 2022 N.Y. Slip Op. 07466, Second Dept 12-28-22**

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