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FIRST DEPARTMENT

CIVIL PROCEDURE, NEGLIGENCE, CORPORATION LAW.

EVEN THOUGH THE DEFENDANT CORPORATION DID NOT HAVE AN OFFICE IN NEW YORK COUNTY AND THE TRAFFIC ACCIDENT OCCURRED IN NASSAU COUNTY WHERE THE CORPORATION DID HAVE AN OFFICE, VENUE WAS APPROPRIATELY PLACED IN NEW YORK COUNTY BASED ON DEFENDANT'S CERTIFICATE OF INCORPORATION.

The First Department, reversing Supreme Court, determined the defendants' motion to change venue in this traffic accident case should not have been granted. Even though the accident didn't occur in New York County and defendant corporation did not have an office in New York County, the certificate of incorporation designated New York County as the location of its principal office and the certificate controls: "Plaintiff properly placed venue in New York County based upon the corporate defendant's initial certificate of incorporation designating New York County as the location of its principal office although the company has no office there (see CPLR 503 [c] ...). While defendants annexed to their moving papers the police report for the subject motor vehicle accident indicating that defendants' vehicle was registered to a Nassau County address on the day of the accident and an affidavit from the corporate defendant's Vice President averring that its office was in Nassau County when the action was commenced, the corporate residence designated in the initial certificate of incorporation controls for venue purposes ... . There was no evidence of an amended certificate of incorporation that changed the principal place of business to Nassau County. The general rule is that a transitory action, such as the subject motor vehicle accident, when other things are equal, should be tried in the county where the cause of action arose ... . This rule, however, is predicated on the convenience of material nonparty witnesses who are to be present at trial ... . While the situs of the accident provides a basis to change venue to Nassau County, defendants failed to sustain their burden, as the party moving for a discretionary change of venue pursuant to CPLR 510 (3), that there are material witnesses who would be inconvenienced by a trial in New York County ...". ***Marte v. Lampert*, 2023 N.Y. Slip Op. 00375, First Dept 1-26-23**

CONTRACT LAW, REAL PROPERTY LAW, LIMITED LIABILITY COMPANY LAW.

ALTHOUGH THE LIMITED LIABILITY COMPANY (LLC) VOTING AGREEMENT CONCERNED THE SALE OF REAL PROPERTY, IT WAS NOT SUBJECT TO THE STATUTE-OF-FRAUDS PROHIBITION OF ORAL AGREEMENTS.

The First Department, reversing (modifying) Supreme Court, determined the counterclaim adequately alleged breach of contract. The contract was an LLC voting agreement which was not subject to the statute of frauds even though the agreement authorized the sale of real property: "Supreme Court should not have dismissed defendants' counterclaims for breach of contract and specific performance, which it properly construed as a single claim for breach of contract seeking specific performance and monetary relief. The alleged agreement at issue was not an unenforceable oral contract for the sale of real property, as it did not provide for the sale or transfer of real property or any party's interest in real property (see General Obligations Law § 5-703[2]). Instead, giving defendants' allegations every favorable inference, defendants sufficiently pled that the oral agreement was effectively an LLC voting agreement under which plaintiff agreed to vote her membership interest in favor of defendants' sale of their membership interests or a sale of the property." ***Tsai v. Lo*, 2023 N.Y. Slip Op. 00291, First Dept 1-24-23**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

PLAINTIFF STRUCK HIS HEAD AS HE FELL AND WAS INJURED BY THE ABRUPT STOP OF HIS FALL BY THE SAFETY HARNESS AND LANYARD; PLAINTIFF WAS ENTITLED TO SUMMARY JUDGMENT ON HIS LABOR LAW § 240(1) CAUSE OF ACTION.

The First Department, reversing Supreme Court, determined plaintiff was entitled to summary judgment on the Labor Law § 240(1) cause of action. Plaintiff had a safety harness and a retractable lanyard which were tied off when he fell. Although the harness and lanyard prevented him from hitting the floor, he hit his head as he fell and was injured by the abrupt stop of his fall (by the harness and lanyard): "The record establishes that the safety devices 'proved inadequate to shield the injured worker from harm directly flowing from the application of the force of gravity' ... . The fact that plaintiff sustained injuries to his right shoulder and back when his body was caused to be pulled back up abruptly by his safety harness and lanyard demonstrates lack of adequate protection ...". ***Arias v. 139 E. 56th St. Landlord, LLC*, 2023 N.Y. Slip Op. 00261, First Dept 1-24-23**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

A HEAVY DOOR FELL ON PLAINTIFF'S HAND AS HE AND A CO-WORKER ATTEMPTED TO LIFT THE DOOR ONTO A TRUCK; NO LIFTING DEVICES WERE AVAILABLE; PLAINTIFF WAS ENTITLED TO SUMMARY JUDGMENT ON THE LABOR LAW § 240(1) CAUSE OF ACTION.

The First Department, reversing Supreme Court, determined plaintiff's injury to his hand when a heavy door fell as plaintiff attempted to lift the door onto a truck warranted summary judgment on the Labor Law § 240(1) cause of action. There was evidence no hoists or other lifting devices were available: "Plaintiff testified that there were no hoists, forklifts, or other lifting devices on the work site, and that the door fell because it was too heavy for him and his coworkers to hold up without such a device. Plaintiff further testified that he knew that the door weighed about 300 pounds because he could lift 100 pounds by himself, but that he and his coworker were unable to lift it together. The affidavit of his employer's foreman, who admittedly did not witness the accident, did not dispute most of the facts relevant to plaintiff's claim. The foreman's affidavit failed to raise a question of fact as to the door's weight, since he did not provide any basis for his bare claim that the door weighed about 100-120 pounds and could easily be lifted by two workers without the use of a hoist or forklift. Furthermore, the precise weight of the door, whether it fell from a height of 7 feet or 3 ½ feet, or whether a dolly was being used when it fell are not material in this case. It is undisputed that no lifting devices contemplated by Labor Law § 240(1) were available at the job site and that plaintiff's injuries flow 'directly from the application of the force of gravity to the object' ...". ***Taopanta v. 1211 6th Ave. Prop. Owner, LLC.*, 2023 N.Y. Slip Op. 00385, First Dept 1-26-23**

MEDICAL MALPRACTICE, EMPLOYMENT LAW, PERSONAL INJURY.

ATTENDING PHYSICIAN NOT VICARIOUSLY LIABLE FOR NEGLIGENCE OF PHYSICIAN'S ASSISTANT BASED UPON THE PHYSICIAN'S STATUS AS A SHAREHOLDER IN THE PROFESSIONAL SERVICE CORPORATION WHICH EMPLOYED THE PHYSICIAN'S ASSISTANT; $3 MILLION VERDICT EXCESSIVE.

The First Department set aside the verdict against the attending physician and found the $3 million damages award excessive in this medical malpractice action. The attending physician, Tigges, could not be held vicariously liable for the negligence of the physician's assistant, Caputo, based on Tigges being a shareholder in the professional service corporation which employed Caputo. The First Department held the plaintiff should stipulate to damages in the amount of $500,000: "Dr. Tigges was not involved in plaintiff's treatment during her admission, notwithstanding that he was often listed as the attending physician on her chart ... . He was also not liable for Caputo's conduct pursuant to Department of Health Regulations (10 NYCRR) § 94.2 or Business Corporation Law § 1505 (a). There is no indication that Dr. Tigges, and not another of the doctors at [defendant] OADC, was the doctor supervising Caputo at the time in question ... . We find that the $3 million jury award deviates materially from what would be reasonable compensation and should be reduced as indicated (see generally CPLR 5501[c] ...). Although none of the cases relied on by the parties are squarely on point, the subject award is well outside the range of awards in all of these cases ...". ***Appleyard v. Tigges*, 2023 N.Y. Slip Op. 00260, First Dept 1-24-23**

PERSONAL INJURY, EVIDENCE.

DEFENDANT SUPERMARKET DID NOT OFFER PROOF OF WHEN THE AREA OF THE SLIP AND FALL WAS LAST INSPECTED OR CLEANED PRIOR TO THE FALL; THEREFORE DEFENDANT DID NOT DEMONSTRATE A LACK OF CONSTRUCTIVE NOTICE OF THE GRAPES ON THE FLOOR.

The First Department, reversing Supreme Court, determined defendant supermarket's motion for summary judgment in this slip and fall case should not have been granted; Defendant did not demonstrate it lacked constructive notice of the grapes on the floor because it presented no specific evidence of when the area had last been inspected or cleaned prior to the fall: "While defendant showed that it did not create or have actual notice of loose grapes in the produce aisle at the time of plaintiff's accident, defendant failed to submit sufficient evidence to show, as a matter of law, that it lacked constructive notice of the condition. Specifically, defendant failed to show that its cleaning routine was followed on the day of the accident ... . Its store manager testified generally that an employee was assigned to inspect and clean the produce aisle throughout the day and that he personally walked the aisles during the day, but he did not testify regarding any specific cleaning or inspection of the area in question on the day of plaintiff's fall. A vice president testified that the cleaning protocols were verbal and were based on 'common sense,' but did not offer any information as to what steps were taken during the last cleaning cycle prior to plaintiff's accident, which also was not sufficient to establish lack of constructive notice on behalf of defendant. Accordingly, the burden did not shift to plaintiff to raise an issue of fact in opposition." ***Polanco v. 756 Jomo Food Corp.*, 2023 N.Y. Slip Op. 00284, First Dept 1-24-23**

SECOND DEPARTMENT

APPEALS, CIVIL PROCEDURE.

THE SECOND DEPARTMENT SEARCHED THE RECORD AND AWARDED SUMMARY JUDGMENT TO A NONAPPEALING PARTY IN THIS SLIP AND FALL CASE.

The Second Department noted that it has to power to search the record and award summary judgment to a party which did not appeal. This was a slip and fall case and decedent's estate (the nonappealing party) was a defendant. The evidence demonstrated decedent (Kass) did not have actual or constructive knowledge of the debris on the sidewalk which allegedly caused plaintiff to fall: "Although Kass did not properly appeal from the order, this Court has the authority to search the record and grant summary judgment to a nonappealing party with respect

to an issue that was the subject of a motion before the Supreme Court ... . Upon searching the record, we award Howard Alan Kave, as representative of Kass's estate, summary judgment dismissing the complaint insofar as asserted against him based upon the same rationale which supports the award of summary judgment in favor of the Mall [i.e., no actual or constructive notice of the condition]." ***Chiamulera v. New Windsor Mall*, 2023 N.Y. Slip Op. 00300, Second Dept 1-25-23**

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

THE ONE-YEAR-AND-NINETY-DAY TIME LIMIT FOR A SUIT AGAINST A SCHOOL DISTRICT IN GENERAL MUNICIPAL LAW 50-I(1)(C) IS SUBJECT TO THE INFANCY TOLL IN CPLR 208.

The Second Department, reversing (modifying) Supreme Court, determined the infancy toll (CPLR 208) applies to the one year and 90-day time limit for a suit against a school district (General Municipal Law § 50-i(1)(c)). Therefore the application for leave to file a late notice of claim in this action on behalf of an infant student against a school district should have been granted in its entirety: "Supreme Court erred in concluding that any claim by the infant plaintiff based upon incidents that occurred prior to May 31, 2017, would be time-barred. CPLR 208 tolls a statute of limitations for the period of infancy, including the limitation set forth in General Municipal Law § 50-i(1)(c) ... . It is undisputed that the infant plaintiff was an infant at the time of the events underlying this action and at the time that the action was commenced." ***M. S. v. Rye Neck Union Free Sch. Dist.*, 2023 N.Y. Slip Op. 00343, Second Dept 1-25-23**

CIVIL PROCEDURE, FORECLOSURE.

IN THIS FORECLOSURE ACTION, THE BANK'S FAILURE TO EXPLAIN WHY AN AFFIDAVIT DEMONSTRATING THE NOTICE OF DEFAULT WAS PROPERLY MAILED WAS NOT SUBMITTED WITH THE INITIAL MOTION FOR SUMMARY JUDGMENT PRECLUDED A MOTION FOR LEAVE TO RENEW.

The Second Department, reversing Supreme Court, determined plaintiff's motion for lease to renew in this foreclosure action should not have been granted. Supreme Court initially denied the bank's motion for summary judgment because the proof the notice of default was properly mailed was insufficient. The bank made a motion for leave to renew and submitted an affidavit which Supreme Court deemed sufficient. The Second Department held that the bank's failure to explain why the affidavit wasn't produced for the bank's initial motion precluded renewal: "In support of that branch of its motion which was for leave to renew, the plaintiff submitted the affidavit of Alicia Hernandez, who averred that the required notice of default was mailed by first-class mail and that the address to which the notice of default was sent was the actual notice address. The only explanation offered by the plaintiff for its failure to submit the Hernandez affidavit on its prior motion was that it reasonably believed that the evidentiary submission it had made on the prior motion was sufficient to establish its prima facie case. This contention is devoid of merit. 'A party seeking summary judgment should anticipate having to lay bare its proof and should not expect that it will readily be granted a second or third chance' ... . In the instant matter, the plaintiff failed to demonstrate any valid reason why the Hernandez affidavit could not have been submitted on its prior motion. Since the Hernandez affidavit was submitted without demonstrating a reasonable justification for failing to submit it on the prior motion, renewal should have been denied ...". ***JPMorgan Chase Bank N.A. v. EY Bay Ridge, LLC*, 2023 N.Y. Slip Op. 00311, Second Dept 1-25-23**

CIVIL PROCEDURE, MUNICIPAL LAW.

HERE NOTICE OF THE DENIAL OF PETITIONER'S APPLICATION TO THE TOWN FOR THE APPROVAL OF A FENCE AND GATE WAS MAILED TO PETITIONER; PETITIONER WAS ENTITLED TO THE PRESUMPTION THE NOTICE ARRIVED FIVE DAYS AFTER IT WAS MAILED; THEREFORE PETITIONER'S ARTICLE 78 PROCEEDING WAS TIMELY COMMENCED.

The Second Department, reversing Supreme Court, determined the Article 78 action was timely brought. The petitioner's application to the town Architectural Review Board for approval of a fence and a gate was denied. The denial determination was filed with the town clerk on April 26, 2019, and mailed to the petitioner on April 29, 2019. The Article 78 proceeding was commenced on August 29, 2019. Supreme Court held the Article 78 was time-barred but failed to add the five days for mailing: " 'A proceeding pursuant to CPLR article 78 must be commenced within four months after the determination to be reviewed becomes final and binding on the petitioner' ... . A determination becomes 'final and binding upon the petitioner' when the petitioner receives notice that the agency has 'reached a definitive position on the issue that inflicts actual, concrete injury and . . . the injury inflicted may not be prevented or significantly ameliorated by further administrative action or by steps available to the [petitioner]' ... . Proof of proper mailing gives rise to a rebuttable presumption that the determination was received by the petitioner five days after mailing (see CPLR 2103[b][2]...). Here, based on the undisputed evidence demonstrating that the mailing of the determination to the petitioner occurred on April 29, 2019, it is presumed that the petitioner received the determination on May 4, 2019. Thus, his time to commence the instant proceeding did not expire until four months later, on September 4, 2019." ***Matter of Fiondella v. Town of E. Hampton Architectural Review Bd.*, 2023 N.Y. Slip Op. 00319, Second Dept 1-25-23**

CIVIL PROCEDURE, PRODUCTS LIABILITY.

NEW YORK DID NOT HAVE LONG-ARM OR PERSONAL JURISDICTION OVER THE ITALIAN MANUFACTURER OF A HOSE USED AS A COMPONENT IN A DISHWASHER MADE AND SOLD BY A NONPARTY.

The Second Department, reversing Supreme Court, determined New York did not have long-arm or personal jurisdiction over an Italian company which manufactured a hose used as a component in a dishwasher made and sold by a nonparty: "[T]he defendant was an Italian corporation with its business located in that country. It manufactured, sold, and distributed its goods in Italy, and had no office or agent in New York. The plaintiff failed to show that the defendant purposefully availed itself of the privilege of conducting activities in New York so

as to subject it to long-arm jurisdiction pursuant to CPLR 302(a)(1) ... . The plaintiff also failed to make a prima facie showing that personal jurisdiction exists under CPLR 302(a)(3). Since the defendant was not subject to the jurisdiction of New York, the plaintiff's service of process upon it was not valid (see CPLR 313 ...)." ***Economy Premier Assur. Co. v. Miflex 2 S.p.A.*, 2023 N.Y. Slip Op. 00303,Second Dept 1-25-23**

CONTRACT LAW, EVIDENCE.

PLAINTIFF'S FAILURE TO PROVIDE EVIDENCE OF THE EXACT AMOUNT OF DAMAGES HE SUFFERED FROM DEFENDANT'S BREACH OF CONTRACT PRECLUDED SUMMARY JUDGMENT.

The Second Department, reversing Supreme Court, determined plaintiff's failure to submit evidence of the exact amount of damages he suffered due to defendant's breach of contract. Therefore plaintiff should not have been awarded summary judgment: " 'A motion for summary judgment should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility' ... . 'The function of the court on a motion for summary judgment is not to resolve issues of fact or determine matters of credibility, but merely to determine whether such issues exist' ... . Here, the plaintiff failed to submit competent evidence establishing the exact amount of damages that he sustained as a result of defendant's breaches of the parties' agreements, and 'the record does not permit precise determination of the amount of the money judgment to which the plaintiff is entitled, including a calculation of prejudgment interest' ...". ***Spilman v. Matyas*, 2023 N.Y. Slip Op. 00344, Second Dept 1-25-23**

CRIMINAL LAW, JUDGES.

THE INDICTMENT CHARGED DEFENDANT WITH POSSESSION OF A WEAPON OUTSIDE HIS HOME OR BUSINESS; THE JUDGE INSTRUCTED THE JURY THEY NEED ONLY FIND DEFENDANT POSSESSED A LOADED FIREARM; THE POSSESSION OF A WEAPON CONVICTION WAS REVERSED.

The Second Department, reversing the possession-of-a-weapon conviction, determined the People were required to prove what was alleged in the indictment and the bill of particulars, i.e., that defendant possessed the weapon outside his home or business. The judge charged the jury they need only find defendant has knowingly possessed any firearm: "[T]he defendant was charged in count 1 of the indictment with criminal possession of a weapon in the second degree under the theory that, on the date in question, he knowingly possessed a loaded firearm and that such possession was not in his home or place of business (see Penal Law § 265.03[3]). * * * 'Where the prosecution is limited by the indictment or bill of particulars to a certain theory or theories, the court must hold the prosecution to such narrower theory or theories' ... . Under the circumstances of this case, the People were required to prove at trial as an element of criminal possession of a weapon in the second degree that the possession of the loaded firearm was not in the defendant's home or place of business (see Penal Law § 265.03[3] ...). As the defendant correctly contends, the Supreme Court's instruction impermissibly removed from the jury's consideration an element of the crime of criminal possession of a weapon in the second degree as charged in count 1 of the indictment ...". ***People v. Reid*, 2023 N.Y. Slip Op. 00336, Second Dept 1-25-23**

FAMILY LAW, ATTORNEYS, JUDGES.

FAMILY COURT SHOULD NOT HAVE PROCEEDED WITH THE CUSTODY HEARING WITHOUT A SEARCHING INQUIRY INTO WHETHER RESPONDENT FATHER WAS KNOWINGLY, INTELLIGENTLY AND VOLUNTARILY WAIVING HIS RIGHT TO COUNSEL.

The Second Department, reversing Supreme Court, determined the judge in this custody proceeding should not have proceeded without a searching inquiry into whether father was making an intelligent waiver of his right to counsel: "At an appearance before the Family Court on the mother's petition, the court advised the father of his right to counsel, and the father requested an adjournment to obtain an attorney. The court stated that it would email the father contact information for Legal Aid and scheduled a date for a virtual hearing on the petition. On the scheduled hearing date, the father appeared without counsel and the court did not inquire whether the father was waiving his right to counsel. The court commenced the hearing with the father proceeding pro se. By order ... , the court, after the hearing, among other things, awarded the mother primary physical custody of the child, with parental access to the father. The father appeals. The father, as a respondent in a proceeding pursuant to Family Court Act article 6, had the right to be represented by counsel ... . 'A party may waive that right and proceed without counsel provided he or she makes a knowing, voluntary, and intelligent waiver of the right to counsel' ... . '[T]o determine whether a party has validly waived the right to counsel, a court must conduct a searching inquiry to ensure that the waiver has been made knowingly, voluntarily, and intelligently' ... . Here, the Family Court failed to conduct a searching inquiry to ensure that the father's waiver of his right to counsel was knowingly, voluntarily, and intelligently made ...". ***Matter of Mercado v. Arzola*, 2023 N.Y. Slip Op. 00321, Second Dept 1-25-23**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

PLAINTIFF'S CONDUCT WAS THE SOLE PROXIMATE CAUSE OF HIS FALL; THE LABOR LAW §§ 240(1), 241(6) AND 200 CAUSES OF ACTION SHOULD HAVE BEEN DISMISSED.

The Second Department, reversing Supreme Court, determined plaintiff's conduct was the sole proximate cause of his fall and the Labor Law §§ 240(1), 241(6) and 200 causes of action should have been dismissed. Plaintiff stepped on a wooden brace getting out of a ditch and fell. The brace was not to be used as a walkway or ramp and ladders had been provided: "[P]laintiff exited the excavation by stepping on a wooden cross brace which was not intended as a walkway, rather than using one of the ladders that were provided, and which he had been instructed

to use, for that purpose. Thus, the defendants established that the plaintiff's conduct was the sole proximate cause of his injuries ... . Insofar as [the Labor Law 241(6)] cause of action is predicated upon violations of 12 NYCRR 23-1.22(b)(2) and (4), the defendants established that those regulations are inapplicable to the facts of this case, as the wooden cross brace from which the plaintiff fell, was not a runway or ramp constructed for the use of persons ... . Insofar as that cause of action is predicated upon violations of 12 NYCRR 23-1.7(f) and 23-4.3, the defendants established, prima facie, that the City did not violate those regulations, in that ladders were provided at the excavation site ... . [Re: the Labor Law 200 cause of action] defendants demonstrated ... that the plaintiff's alleged injuries did not result from a dangerous condition, but rather were caused by the plaintiff's own conduct in stepping on a wooden cross brace which was not intended for that purpose ...". ***Calle v. City of New York*, 2023 N.Y. Slip Op. 00297, Second Dept 1-25-23**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

THERE WAS A QUESTION OF FACT WHETHER REPLACEMENT OF DAMAGED CEILING TILES WAS REPAIR, COVERED BY LABOR LAW §§ 240(1) AND 241(6), OR ROUTINE MAINTENANCE, WHICH IS NOT COVERED.

The Second Department, reversing Supreme Court, determined there was a question of fact whether plaintiff, who was replacing damaged ceiling tiles when he fell, was doing repair work covered by Labor Law §§ 240(1) and 241(6), or routine cleaning, which is not covered: " 'In determining whether a particular activity constitutes 'repairing,' courts are careful to distinguish between repairs and routine maintenance' ... , since 'routine maintenance' work performed 'in a nonconstruction, nonrenovation context' is not a covered activity ... . [T]he City failed to establish ... that the tasks [plaintiff] was performing at the time of the accident were associated with routine maintenance, which is not a covered activity under the Labor Law, rather than repair work, which may be covered, even if it was not part of a larger renovation project ...". ***Nooney v. Queensborough Pub. Lib.*, 2023 N.Y. Slip Op. 00327, Second Dept 1-25-23**

MEDICAL MALPRACTICE, PERSONAL INJURY.

A SIGNED CONSENT FORM ALONE DOES NOT PRECLUDE A LACK-OF-INFORMED-CONSENT CAUSE OF ACTION IN A MEDICAL MALPRACTICE CASE.

The Second Department, reversing Supreme Court, determined questions of fact precluded summary judgment in this medical malpractice/lack of informed consent case: The court noted that a signed consent form does not preclude a lack-of-informed-consent cause of action: "To establish a cause of action to recover damages for malpractice based on lack of informed consent, a plaintiff must prove (1) that the person providing the professional treatment failed to disclose alternatives thereto and failed to inform the patient of reasonably foreseeable risks associated with the treatment, and the alternatives, that a reasonable medical practitioner would have disclosed in the same circumstances, (2) that a reasonably prudent patient in the same position would not have undergone the treatment if he or she had been fully informed, and (3) that the lack of informed consent is a proximate cause of the injury ... . The fact that a plaintiff signed a consent form, standing alone, does not establish a defendant's prima facie entitlement to judgment as a matter of law ... . Here, the defendants' submissions failed to establish, prima facie, that the plaintiff was informed about the risks and benefits of inducing labor immediately, and the available alternatives thereto. Thus, the defendants failed to establish the absence of triable issues of fact with respect to the cause of action alleging lack of informed consent ...". ***Guinn v. New York Methodist Hosp.*, 2023 N.Y. Slip Op. 00308, Second Dept 1-25-23**

PERSONAL INJURY, CONTRACT LAW.

IN THIS SLIP AND FALL CASE, THE DEFENDANT SNOW-REMOVAL CONTRACTOR DID NOT NEED TO ADDRESS ANY ESPINAL EXCEPTION IN ITS ANSWER BECAUSE PLAINTIFF DID NOT ALLEGE AN EXCEPTION APPLIED; PLAINTIFF DID NOT DEMONSTRATE THAT AN ESPINAL EXCEPTION APPLIED IN OPPOSITION TO SUMMARY JUDGMENT; DEFENDANT'S SUMMARY JUDGMENT MOTION SHOULD HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court in this slip and fall case, determined defendant snow-removal company (WM) did not need to address in its answer any Espinal exception to the rule that a contractor is not liable to a plaintiff who is not a party to the snow-removal contract because no Espinal exception was raised by the plaintiff in the pleadings. In opposition to the summary judgment motion, plaintiff did not demonstrate that any of the Espinal exceptions applied: "... WM demonstrated its prima facie entitlement to judgment as a matter of law dismissing the complaint insofar as asserted against it by coming forward with evidence that the plaintiff was not a party to the snow removal contract ... . Since the plaintiff did not allege facts in the pleadings that would establish the possible applicability of any of the Espinal exceptions, WM was not required to affirmatively demonstrate that these exceptions did not apply in order to establish its prima facie entitlement to judgment as a matter of law ... . In opposition, the plaintiff failed to raise a triable issue of fact as to whether WM launched an instrument of harm ... , and failed to raise a triable issue of fact as to the applicability of the other Espinal exceptions. Accordingly, the Supreme Court should have granted that branch of WM's motion which was for summary judgment dismissing the complaint insofar as asserted against it." ***Forbes v. Equity One Northeast Portfolio, Inc.*, 2023 N.Y. Slip Op. 00305, Second Dept 1-25-23**

PERSONAL INJURY, EVIDENCE.

ALTHOUGH PLAINTIFF ALLEGED HE TRIPPED OVER A HOSE HE HAD PLACED ON THE STEPS, THERE WAS A QUESTION OF FACT WHETHER INADEQUATE LIGHTING WAS ANOTHER PROXIMATE CAUSE OF THE SLIP AND FALL.

The Second Department, reversing Supreme Court, determined defendant's motion for summary judgment in this slip and fall case should not have been granted. Plaintiff apparently tripped over a hose he had placed on a step. Plaintiff alleged he didn't see the hose because the

light fixture was not working. The court noted that there can be more than one proximate cause of an accident (the hose and the lighting): " 'There can be more than one proximate cause of an accident and [g]enerally, it is for the trier of fact to determine the issue of proximate cause' ... . Here, the defendant failed to eliminate triable issues of fact as to whether inadequate lighting in the area of the subject steps contributed to the plaintiff's accident ... . A defendant moving for summary judgment in a premises liability case may also establish its prima facie entitlement to judgment as a matter of law by demonstrating that it neither created nor had actual or constructive notice of the existence of the allegedly hazardous condition for a sufficient length of time to discover and remedy it ... . Here, the deposition testimony of the defendant's witness that he would have known if the light fixture near the steps was not working was conclusory and speculative, and failed to address the adequacy of the lighting, even assuming that the light fixture was working ...". ***Reyes v. S. Nicolia & Sons Realty Corp.*, 2023 N.Y. Slip Op. 00340, Second Dept 1-25-23**

PERSONAL INJURY, EDUCATION-SCHOOL LAW, MUNICIPAL LAW.

THE PETITION FOR LEAVE TO FILE A LATE NOTICE OF CLAIM IN THIS SCHOOL PLAYGROUND ACCIDENT CASE SHOULD NOT HAVE BEEN GRANTED; PETITIONER DID NOT DEMONSTRATE THE SCHOOL HAD TIMELY ACTUAL KNOWLEDGE OF THE POTENTIAL NEGLIGENT-SUPERVISION CLAIM AND PETITIONER DID NOT OFFER A REASONABLE EXCUSE FOR FAILURE TO TIMELY FILE.

The Second Department, reversing Supreme Court, determined the petition for leave to file a late notice of claim against the school board should not have been granted. Petitioner alleged her child was not properly supervised at recess. The child apparently ran into a piece of equipment when being chased by classmates. There was an accident report and the three recess supervisors indicated they did not see the incident. The Second Department held that the school did not have timely notice of the potential claim and petitioner did not have an adequate excuse for failing to timely file: "[T]he accident claim form states that three school employees were supervising recess but did not see the infant petitioner become injured. This, standing alone, is insufficient to establish actual knowledge of a potential negligent supervision claim because it is well established that schools 'cannot reasonably be expected to continuously supervise and control all movements and activities of students' ... The petitioners also failed to establish that the School Board had actual knowledge of the facts constituting their other two claims ... . The petitioners identify no factual connection between the recess supervisors not seeing the infant petitioner's injury and either the allegedly defective nature of the playground equipment or the instruction given or not given to students at recess. It is not even clear from the description of the incident on the accident claim form whether the school was aware that the infant petitioner injured himself on a "metal joint" as alleged in the petition and the notice of claim. Thus, the petitioners failed to establish that the School Board had actual knowledge of the facts constituting their claims ...". ***Matter of R. M. v. Board of Educ. of the Long Beach City Sch. Dist.*, 2023 N.Y. Slip Op. 00320, Second Dept 1-25-23**

REAL ESTATE, REAL PROPERTY LAW, CONTRACT LAW.

THE STIPULATION SETTING A DATE FOR THE CLOSING ON DEFENDANT'S PURCHASE OF THE PROPERTY DID NOT INFORM DEFENDANT HE WOULD BE CONSIDERED TO BE IN DEFAULT IF THE CLOSING DID NOT TAKE PLACE BY THAT DATE; THEREFORE THERE WAS NO "TIME OF THE ESSENCE" AGREEMENT AND PLAINTIFF WAS NOT ENTITLED TO THE DOWN PAYMENT.

The Second Department, reversing Supreme Court, determined the stipulation waiving defendant's payment of rent as long as the closing on defendant's purchase of the property occurred by a designated date did not inform defendant "time was of the essence" such that plaintiff could keep the down payment. "Sometime after the parties entered into the contract, the defendant commenced a landlord-tenant proceeding against the plaintiff, which the parties settled in a stipulation dated February 16, 2011. Paragraph 2 of the stipulation provided that '[i]n settlement and satisfaction of all claims by [the plaintiff], and in consideration of [the plaintiff] closing title on the purchase of 1474 Ralph Avenue, Brooklyn, New York, no later than March 31, 2011, [the defendant] waives the rent due for July 2010.' The closing never occurred. * * * Where, as here, 'time was not made of the essence in the original contract' ... , 'one party may make time of the essence by giving proper notice to the other party' ... and avail himself [or herself] of forfeiture on default' ... . 'The notice setting a new date for the closing must (1) give clear, distinct, and unequivocal notice that time is of the essence, (2) give the other party a reasonable time in which to act, and (3) inform the other party that if he [or she] does not perform by the designated date, he [or she] will be considered in default' ... . 'A party need not state specifically that time is of the essence, as long as the notice specifies a time on which to close and warns that failure to close on that date will result in default' ... . It does not matter that the date is unilaterally set ... , and '[w]hat constitutes a reasonable time for performance depends upon the facts and circumstances of the particular case' ... . [T]he stipulation did not inform the plaintiff that if he did not perform, he would be considered in default ... ". ***Lashley v. BDL Real Estate Dev. Corp.*, 2023 N.Y. Slip Op. 00314, Second Dept 1-25-23**

REAL PROPERTY TAX LAW (RPTL), CORPORATION LAW.

TOWNHOUSES PURCHASED BY A NOT-FOR-PROFIT SCHOOL TO HOUSE FACULTY ARE TAX EXEMPT.

The Second Department, reversing the city board of assessment review (BAR) determined that townhouses purchased by the Rye County Day School (RCDS), a not-for-profit school, to house faculty were tax exempt: "RPTL 420-a(1)(a) provides that '[r]eal property owned by a corporation or association organized or conducted exclusively for religious, charitable, hospital, educational, or moral or mental improvement of men, women or children purposes, or for two or more such purposes, and used exclusively for carrying out thereupon one or more of such purposes either by the owning corporation or association or by another such corporation or association as hereinafter provided shall be exempt from taxation as provided in this section.' The word 'exclusively' in the statute has been broadly defined as 'principally' or 'primarily' ... , such that 'purposes and uses merely auxiliary or incidental to the main and exempt purpose and use will not defeat the exemption' ... . Thus, the

two-part test for determining entitlement to a property tax exemption under RPTL 420-a is '(1) whether the owner of the property is organized or conducted exclusively, or primarily, for an exempt purpose; and (2) whether the particular property for which the exemption is sought is itself primarily used for an exempt purpose' ... . RCDS demonstrated that the 'primary use' of the faculty-occupied townhouses furthered its 'primary purpose' of operating as a school. ... RCDS demonstrated that the 'primary use' of the faculty-occupied townhouses furthered its 'primary purpose' of operating as a school ...". ***Matter of Rye Country Day Sch. v. Whitty*, 2023 N.Y. Slip Op. 00323, Second Dept 1-25-23**

THIRD DEPARTMENT

RETIREMENT AND SOCIAL SECURITY LAW, PERSONAL INJURY.

PETITIONER POLICE OFFICER FELL TWICE AT NIGHT WHILE INVESTIGATING SUSPICIOUS ACTIVITY; HE FELL IN A THREE-FOOT DEEP HOLE WHEN CHECKING OUT A HOUSE AND HE FELL DOWN SOME STAIRS CHECKING OUT A PARKING LOT; NEITHER FALL WAS A COMPENSABLE "ACCIDENT."

The Third Department, in a full-fledged opinion by Justice Garry, determined the two falls by petitioner police officer were not compensable "accidents" within the meaning of the Retirement and Social Security Law and petitioner was not entitled to accidental disability retirement benefits. The opinion discusses in some depth the difficulties of determining what is and what is not an "accident" in this context: "[P]etitioner testified ... he was assigned to the midnight shift and was in his patrol car when, at approximately 1:00 a.m., he became suspicious upon observing a light coming from the second floor of a house that was under construction. According to petitioner, it was 'very dark' around the house due to the lack of streetlights in the area. Petitioner took a flashlight and began walking around the perimeter of the house, illuminating the second floor of the house as he walked, in accordance with police protocol. As he continued walking the perimeter of the house, petitioner fell in a three-foot-deep hole in the ground that had been dug alongside the house. As petitioner's regular employment duties included conducting investigations in the dark, the risk that he might fall due to an unseen condition while engaged in such activity is an inherent risk of that employment ... . [P]etitioner testified that, at approximately 2:00 a.m. ... , he was investigating a report of a 'suspicious party going through cars in a parking lot.' According to petitioner, it was drizzling that morning, and the area of the parking lot was dark. Petitioner was using a flashlight and, as he descended a wooden stairway that connected the parking lot to a baseball field, he was illuminating the field with the flashlight when he slipped and fell. Petitioner testified that, after his fall, he observed 'green algae [and] mold,' as well as leaves, on the stairs. 'When carrying out some police duties, an officer on foot may encounter, as part of the work being performed, a vast array of conditions, many of which are not easily traversed and can cause a fall. Encountering such conditions while actively engaged in police duties often is not an unexpected event, and the Comptroller may find a fall caused thereby to be an inherent risk of the job' ...". ***Matter of Compagnone v. DiNapoli*, 2023 N.Y. Slip Op. 00354, Third Dept 1-26-23**

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