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FIRST DEPARTMENT

CONTRACT LAW, FRAUD.

ASSIGNMENT TO PLAINTIFF OF "ALL RIGHT, TITLE AND INTEREST" TO $626 MILLION IN RESIDENTIAL MORTGAGE-BACKED SECURITIES DID NOT SPECIFICALLY MENTION FRAUD CLAIMS; THE RIGHT TO SUE MORGAN STANLEY FOR FRAUD, THEREFORE, WAS NOT ASSIGNED TO PLAINTIFF.

In 2006 and 2007, plaintiff FSAM bought $626 million in residential mortgage-backed securities (RMBS) from defendant Morgan Stanley. "All right, title and interest" in those securities were then assigned to plaintiff Dexia, which paid FSAM the same amount FSAM paid Morgan Stanley. The plaintiffs, FSAM and Dexia, sued Morgan Stanley, alleging Morgan Stanley knew the RMBS were of poor quality but represented they were prudent AAA-rated securities. The First Department determined the fraud claims did not transfer to Dexia because no specific mention of them was made in the assignment. The court further determined FSAM did not have standing to assert the fraud claims because Dexia paid FSAM for them and FSAM, therefore, could not establish damages: "The Court of Appeals recently explained that 'the right to assert a fraud claim related to a contract or note does not automatically transfer with the respective contract or note' ... . 'Thus, where an assignment of fraud or other tort claims is intended in conjunction with the conveyance of a contract or note, there must be some language — although no specific words are required — that evinces that intent and effectuates the transfer of such rights' ... . 'Without a valid assignment, only the . . . assignor may rescind or sue for damages for fraud and deceit because the representations were made to it and it alone had the right to rely on them' ... . We find that plaintiff FSAM's agreement to deliver 'all right, title and interest' in the RMBS to the Dexia plaintiffs did not include fraud claims, since FSAM only assigned rights in the subject securities without explicitly referencing any related tort claims or the overall transaction between FSAM and defendants ... . Because FSAM received from the Dexia plaintiffs the same amount it originally paid for the securities, FSAM cannot establish damages ...". **Dexia SA/NV v Stanley, 2016 NY Slip Op 00122, 1st Dept 1-12-16**

CORPORATION LAW.

SHAREHOLDERS' DERIVATIVE ACTION AGAINST MORGAN STANLEY ARISING FROM THE LOSS OF $6.2 BILLION FROM HIGH-RISK TRADING DISMISSED; PLAINTIFFS FAILED TO DEMONSTRATE PRE-SUIT DEMAND WOULD BE FUTILE.

The First Department, in this shareholders' derivative action against Morgan Stanley, determined the plaintiffs did not demonstrate that a pre-suit demand upon the board of directors would have been futile. Therefore, the action was properly dismissed (without prejudice). The lawsuit involved the so-called "London Whale" debacle where $6.2 billion was lost in high-risk trading despite public representations the group engaged in only low-risk hedging. The court explained the relevant criteria for a futility demonstration: "Plaintiffs' claim, based on the Board's alleged failure to properly exercise its oversight duties, is premised on the theory of liability articulated in *In re Caremark Intl. Inc. Derivative Litig*. (698 A2d 959...). * * * In *Caremark* cases, allegations of demand futility are analyzed under the principles set forth in *Rales v Blasband* (634 A2d 927, 933-934 [Del 1993]) ...). Under *Rales*, the plaintiff must plead particularized facts raising 'a reasonable doubt that, [at] the time the complaint [was] filed, the board of directors could have properly exercised its independent and disinterested business judgment in responding to a demand' ... . To rebut the presumption of disinterestedness, the plaintiff must plead particularized facts that, if proved, would establish that a majority of the directors face a 'substantial likelihood' of personal liability for the wrongdoing alleged in the complaint ... . A 'mere threat' of liability is insufficient ... . Here, plaintiffs failed to make the requisite showing that the board could not exercise independent business judgment because a majority of directors faced a substantial likelihood of liability for the challenged conduct. At the time plaintiffs filed their complaint, the board consisted of 11 directors. At most, plaintiffs showed that four of them — inside director Dimon and the three members of the Risk Policy Committee — faced a substantial likelihood of liability ... . ; Because a majority of the directors are independent, demand is not excused'...". **Wandel v Dimon, 2016 NY Slip Op 00252, 1st Dept 1-14-16**

CRIMINAL LAW, CONSTITUTIONAL LAW.

THE SEXUAL ASSAULT REFORM ACT (SARA), WHICH PROHIBITS CERTAIN SEX OFFENDERS FROM RESIDING OR TRAVELING WITHIN 1,000 FEET OF A SCHOOL, DOES NOT IMPOSE PUNISHMENT AND THEREFORE DOES NOT VIOLATE THE EX POST FACTO CLAUSE.

The First Department, in an extensive opinion by Justice Gische, over a dissenting opinion by Justice Kapnick, determined the Sexual Assault Reform Act (SARA), which prohibits certain sex offenders, including the appellant, from residing or traveling within 1,000 feet of school grounds, did not violate the federal or state constitutions. Appellant claimed there was no place he could reside in Manhattan, and no way to travel to the places he was required to visit in Manhattan, without violating the statute. SARA was enacted after appellant's conviction. Appellant argued the statute violated the prohibition against Ex Post Facto laws. The court applied the intent-effects analysis. If the intent of the legislation was to impose punishment, the statute would violate the Ex Post Facto prohibition and the court's inquiry would end. But if the intent was to establish civil proceedings, the court must go on to determine whether the effect of the statute is so punitive as to negate its civil nature. After an extensive analysis, the First Department held the statute was not intended to impose punishment, and the additional restrictions the statute imposed upon appellant, who was already otherwise restricted as a parolee, did not rise to the level of punishment: "[W]hile some factors favor petitioner, overall we do not find the clear proof that is necessary to support a determination that SARA is punitive in its effect. The legislature was not 'masking punitive provisions behind the veneer of a civil statute' ... . Consequently, we conclude that SARA does not violate the Ex Post Facto Clause of the United States Constitution." **Matter of Williams v Department of Corr. & Community Supervision, 2016 NY Slip Op 00135, 1st Dept 1-12-16**

FAMILY LAW, EVIDENCE, JUVENILE DELINQUENCY.

SUPPRESSION OF JUVENILE'S PROVIDING FALSE NAME AND DATE OF BIRTH TO POLICE OFFICER PROPERLY DENIED; JUVENILE DELINQUENCY ADJUDICATION BASED UPON THE FALSE PEDIGREE INFORMATION PROPER.

The First Department, over an extensive dissent, determined suppression of the juvenile's giving a false name and date of birth when asked for that information by a police officer was properly denied. The juvenile was warned by the officer that providing false pedigree information would result in a false personation charge (a class B misdemeanor). The juvenile was in fact found to have committed an act which, if committed by an adult, would constitute false personation. The court further determined the sentence of probation was the least restrictive alternative consistent with the juvenile's needs. The dissent focused on the propriety of the sentence. With respect to the denial of the suppression motion, the court explained: "The court properly denied appellant's motion to suppress her statement to the police, in which she gave a false name and date of birth, resulting in the false personation charge (Penal Law § 190.23). The police had probable cause to believe appellant was a runaway ... . The then 14-year-old appellant, who appeared to be as young as 13, was alone in a PATH station in New Jersey, but she vaguely claimed to live in 'upstate' New York. In addition, she had a bruised eye and was wearing provocative clothing, suggesting the possibility of some kind of sexual exploitation. The police were entitled to ask pedigree questions without Miranda warnings, even though an officer warned appellant, as required by the false personation statute, that providing false information would result in an additional charge ...". **Matter of Christy C., 2016 NY Slip Op 00095, 1st Dept 1-12-16**

LANDLORD-TENANT.

MOTION TO VACATE THE EXECUTED WARRANT OF EVICTION PROPERLY GRANTED.

The First Department, over an extensive concurrence by Justice Saxe, determined Civil Court properly granted tenant's post-eviction motion to vacate the warrant of eviction and restore the tenant to possession. The tenant was disabled and had trouble securing the emergency rental assistance to cover the arrears. Eventually the landlord was paid in full and the costs of the eviction were reimbursed. The concurrence expressed concern over the validity of the relevant precedent and the need for landlords to essentially lend money at no interest to low-income tenants "who rely on the slow process of obtaining grants and supplemental payments to cover their rent." With respect to the authority to vacate an executed warrant of eviction, the court wrote: "We reject the landlord's contention, premised on RPAPL 749(3), that the Civil Court lacked the authority to grant the tenant's post-eviction motion ... . '[T]he Civil Court may, in appropriate circumstances, vacate the warrant of eviction and restore the tenant to possession even after the warrant has been executed' ... . Here, the Civil Court providently exercised its discretion, as the record shows that the long-term, disabled tenant 'did not sit idly by[,]' but instead made appreciable payments towards his rental arrears and 'engaged in good faith efforts to secure emergency rental assistance to cover the arrears' ... . Moreover, the tenant has paid the rental arrears for the unit and the landlord's costs for the underlying proceeding ..., and the record shows that the delays in payment were, to a certain extent, attributable to others, including the landlord ...". **Matter of Lafayette Boynton Hsg. Corp. v Pickett, 2016 NY Slip Op 00253, 1st Dept 1-14-16**

PERSONAL INJURY, EVIDENCE, CIVIL PROCEDURE.

DEFENDANT, WHICH OPERATED A STUDY-ABROAD PROGRAM, OWED A DUTY OF CARE TO INJURED STUDENT; BECAUSE DEFENDANT PRESENTED NO AFFIRMATIVE PROOF ON CAUSATION IN SUPPORT OF ITS SUMMARY JUDGMENT MOTION, THE BURDEN OF PROOF ON THAT ISSUE NEVER SHIFTED TO PLAINTIFF.

The First Department, over a two-justice dissent, determined defendant synagogue's motion for summary judgment was properly denied. Plaintiff was a participant in a study-abroad program run by defendant in Israel. She injured her knee and alleged that she was prescribed physical therapy but defendant refused to provide it (delaying and compromising recovery). The First Department held that defendant owed a duty of care to plaintiff because it had agreed to provide medical care and was in the best position to protect plaintiff from injury. The court noted that defendant's attempt to place the burden on plaintiff to demonstrate a causal link between her injury and the failure to provide physical therapy must fail in the context of a defense summary judgment motion. The burden never shifted to plaintiff on that issue because the defendant did not demonstrate, through an expert affidavit, the absence of causation. [Yet another example of the need for a defendant to present affirmative proof on every relevant issue when seeking summary judgment. Without affirmative proof on a necessary issue, the burden never shifts to plaintiff.]: "In determining the threshold question of whether a defendant owes a plaintiff a duty of care, courts must balance relevant factors, 'including the reasonable expectations of parties and society generally, the proliferation of claims, the likelihood of unlimited or insurer-like liability, disproportionate risk and reparation allocation, and public policies affecting the expansion or limitation of new channels of liability' ... . The parties' relationship may create a duty where it 'places the defendant in the best position to protect against the risk of harm [] and [] the specter of limitless liability is not present' ... . Thus, where a defendant exercises a sufficient degree of control over an event, a duty of care to plaintiff may arise …". **Katz v United Synagogue of Conservative Judaism, 2016 NY Slip Op 00094, 1st Dept 1-12-16**

PERSONAL INJURY, LABOR LAW.

THE FACT THAT A (NON-DEFECTIVE) A-FRAME LADDER FELL OVER WHILE PLAINTIFF HELD ON TO IT AFTER PLAINTIFF WAS JOLTED WITH ELECTRICITY JUSTIFIED SUMMARY JUDGMENT ON PLAINTIFF'S LABOR LAW 240(1) CAUSE OF ACTION.

The First Department, over an extensive concurring memorandum, reversing Supreme Court, determined plaintiff was entitled to summary judgment on his Labor Law 240(1) cause of action. Plaintiff was standing on an A-frame ladder when he was jolted by contact with an electric wire and the ladder fell over as plaintiff held on to it. There was no evidence the ladder was defective. The majority held the fact the ladder was not secured to something, and therefore fell over while plaintiff was hanging on to it, demonstrated the failure to provide plaintiff with an adequate safety device. The concurring memorandum argued plaintiff's fall from a non-defective ladder was not enough to justify summary judgment, but rather the fall from the ladder after contact with electricity raised a question of fact about the adequacy of the safety devices provided. The majority wrote: "Here, plaintiff was injured when he was jolted by the electrical charge and although he hung onto the ladder, because it was not secured to something stable, it and he fell to the ground ... . The lack of a secure ladder is a violation of Labor Law § 240(1), and is a proximate cause of the accident ...". **Nazario v 222 Broadway, LLC, 2016 NY Slip Op 00251, 1st Dept 1-14-16**

SECOND DEPARTMENT

CONTRACT LAW, DAMAGES.

LOST PROFITS PROPERLY AWARDED FOR WRONGFUL TERMINATION OF SUBCONTRACT; CRITERIA EXPLAINED.

The Second Department determined plaintiff was entitled to lost profits as damages for the wrongful termination of a subcontract. Plaintiff had completed three of seven work items when the contract was terminated and, pursuant to the contract, would have been paid for the remaining four work items in a lump sum and would have been given additional paid work in the form of change orders. The measure of lost-profit damages for the unfinished work was the contractual lump sum minus plaintiff's anticipated costs. The measure of lost-profit damages for the change orders were the relevant amounts paid to the subcontractor who replaced plaintiff: " 'A party may not recover damages for lost profits unless they were within the contemplation of the parties at the time the contract was entered into and are capable of measurement with reasonable certainty. The rule that damages must be within the contemplation of the parties is a rule of foreseeability. The party breaching the contract is liable for those risks foreseen or which should have been foreseen at the time the contract was made' ... . For damages to be 'reasonably certain, does not require absolute certainty. Damages resulting from the loss of future profits are often an approximation. The law does not require that they be determined with mathematical precision. It requires only that damages be capable of measurement based upon known reliable factors without undue speculation' ...". **Inspectronic Corp. v Gottlieb Skanska, Inc., 2016 NY Slip Op 00155, 2nd Dept 1-13-16**

CONTRACT LAW, STATUTE OF FRAUDS.

ALTHOUGH THE ORAL CONTRACT CALLED FOR THE MATURATION OF A LOAN AFTER 15 YEARS, THE STATUTE OF FRAUDS DID NOT APPLY BECAUSE IT WAS POSSIBLE TO PERFORM THE CONTRACT WITHIN A YEAR.

In 1998, plaintiff and defendant allegedly entered an oral agreement for a loan of $71,500 at 9% annual interest. The loan matured on December 31, 2013. When plaintiff sued for payment, the defendant sought to dismiss the complaint, arguing the statute of frauds prohibited the oral agreement because the agreement could not be performed within a year. The Second Department affirmed Supreme Court's denial of the defendant's motion, finding that it was possible the agreement could have been performed within a year: "Pursuant to the statute of frauds, an agreement not reduced to writing is void if, by its terms, it cannot be performed within one year of its making (see General Obligations Law § 5-701[a][1]…). Only those agreements which, by their terms, have absolutely no possibility in fact and law of full performance within one year' will fall within the statute of frauds … . 'As long as the agreement may be fairly and reasonably interpreted such that it may be performed within a year, the Statute of Frauds will not act as a bar however unexpected, unlikely, or even improbable that such performance will occur during that time frame … . Here, contrary to the defendant's contention, the oral agreement between the parties, by its terms, was capable of being performed within one year of its making. As such, the statute of frauds was inapplicable." **JNG Constr., Ltd. v Roussopoulos, 2016 NY Slip Op 00156, 2nd Dept 1-13-16**

DEFAMATION.

HOSPITAL DEFENDANTS ENTITLED TO MEDICAL-PEER-REVIEW AND COMMON-INTEREST QUALIFIED PRIVILEGE RE: COMMENTS MADE IN CONNECTION WITH THE TERMINATION OF PLAINITFF-PHYSICIAN'S HOSPITAL PRIVILEGES.

The Second Department, reversing Supreme Court, determined defendant hospital and administrators were entitled to summary judgment dismissing plaintiff's defamation complaint. Plaintiff was a physician with privileges at defendant hospital. Based upon complaints about plaintiff's behavior, the hospital terminated plaintiff's hospital privileges pursuant to a recommendation of the hospital's credentials committee. The statements at issue were made before, during and after the administrative proceedings at the hospital. The Second Department determined the defendants were not entitled to absolute privilege for comments made during the meeting of the credentials committee because those proceedings were not judicial or quasi-judicial in nature. However, the defendants were entitled to qualified privilege for medical peer review proceedings pursuant to 42 U.S.C. 1111. With respect to comments made both prior to and during the meeting of the credentials committee, the Second Department found that a "qualified privilege of common interest" applied. The Second Department rejected Supreme Court's finding that plaintiff had raised a question of fact whether the defendants acted with malice (which would have removed the qualified privilege). With respect to comments made after the termination of plaintiff's hospital privileges, the Second Department found, based upon plaintiff's public comments, plaintiff was a limited-purpose public figure and there was no showing defendants' post-termination comments were made with actual malice. **Colantonio v Mercy Med. Ctr., 2016 NY Slip Op 00147, 2nd Dept 1-13-16**

LANDLORD-TENANT, CONTRACT LAW, MUNICIPAL LAW, STATUTES.

RENTAL PERMIT REQUIRED BY TOWN CODE WAS A CONDITION PRECEDENT TO THE LEASE; CODE PROVISION CREATED A PRIVATE RIGHT OF ACTION TO SEEK RESCISSION OF THE LEASE AND RETURN OF RENT PAID.

The Second Department determined plaintiffs-lessees were entitled to bring a private action (pursuant to a provision of the town code) to rescind a lease, and were entitled to rescission and return of the paid rent. After paying $216,000 to lease defendant's residential property for approximately 3 1/2 months, the plaintiffs learned defendant did not have a rental permit required by § 270 of the town code. The code provision was enacted to address overcrowding in properties rented for the summer. The Second Department held the code provision created a private right of action and the rental permit was a condition precedent to any lease. With respect to the private right of action, the court wrote: "Town Code § 270 is intended to benefit the occupants of rental properties in the Town of Southampton by requiring owners to obtain a valid rental permit as a condition precedent to the collection of rent (*see* Town Code § 270-13). Moreover, the legislative purpose is promoted by preventing owners from profiting from the rental of properties that are overcrowded, substandard, or otherwise violate State and Town laws. … Town Code § 270 is directed toward protecting the health, safety, and well-being of persons renting homes in the Town of Southampton. In that regard, Town Code § 270-6 requires that prior to the issuance of a rental permit, the enforcement authority must 'make an on-site inspection of the proposed rental property' to ensure that the property 'complies with the New York State Uniform Fire Prevention and Building Code and the Code of the Town of Southampton' (Town Code § 270-6). Although Town Code § 270 is intended to be enforced by designated Town officials and provides for penalties and fines, 'without the threat of recoupment of rent, aside from the possibility of administrative enforcement, there is no incentive for a landlord to obtain a license, which is an overriding concern of the Town ...". **Ader v Guzman, 2016 NY Slip Op 00137, 2nd Dept 1-13-16**

THIRD DEPARTMENT

HUMAN RIGHTS LAW, CONSTITUTIONAL LAW.

PETITIONERS, WHO HELD CATERED EVENTS, INCLUDING WEDDINGS, AT THEIR FARM, COMMITTED AN UNLAWFUL DISCRIMINATORY PRACTICE WHEN THEY REFUSED TO ALLOW RESPONDENTS' SAME-SEX MARRIAGE AT THE FARM.

The Third Department, in a full-fledged opinion by Justice Peters, determined the State Division of Human Rights (SDHR) properly found petitioners (the Giffords) discriminated against respondents (the McCarthys) by refusing to hold the McCarthys' same-sex marriage on the Giffords' farm (Liberty Ridge). The Giffords held catered events at their farm, including weddings. The Third Department held the farm was "a place of public accommodation" within the meaning of the Human Rights Law (Executive law 290 [3]) and was therefore subject to the statutory prohibition of "unlawful discriminatory practice[s]" in "a place of public accommodation." The federal and state constitutional arguments raised by the owners of the farm (free exercise of religion, free speech, compelled speech and expressive association) were discussed in detail and rejected. SDHR's award of $1,500 each to the respondents, and the imposition of a $10,000 civil penalty on the Giffords was upheld. With respect to the definition of "a place of public accommodation," the court explained: "Executive Law § 292 (9) defines place of public accommodation, resort or amusement inclusively and illustratively, not specifically, and sets forth an extensive list of examples of places within the statute ... . Such term includes establishments dealing with goods or services of any kind and any place where food is sold for consumption on the premises (Executive Law § 292 [9]). Over the years, the statutory definition has been expanded repeatedly, provid[ing] a clear indication that the Legislature used the phrase place of public accommodation in the broad sense of providing conveniences and services to the public and that it intended that the definition of place of accommodation should be interpreted liberally ... . Here, Liberty Ridge's wedding facilities fall comfortably within the broad definition of place of public accommodation. It is undisputed that petitioners open Liberty Ridge to the public as a venue for wedding ceremonies and receptions and offer several wedding-related event services in connection therewith …". [internal quotation marks omitted] **Matter of Gifford v McCarthy, 2016 NY Slip Op 00230, 3rd Dept 1-14-16**

CRIMINAL LAW, EVIDENCE.

WHERE THE EVIDENCE OF GUILT WAS NOT OVERWHELMING, COUNTY COURT'S ERROR IN ALLOWING EVIDENCE AT TRIAL WHICH THE COURT HAD PREVIOUSLY PRECLUDED REQUIRED REVERSAL AND A NEW TRIAL.

The Third Department determined it was reversible error to allow a police officer's testimony identifying defendant as a person depicted in surveillance video from a store about an hour before the robbery of which defendant was convicted. Defendant claimed he was shopping in the store at the time of the robbery. The evidence of defendant's participation in the robbery was not overwhelming. The trial judge had ruled the video could be introduced in evidence but no testimony identifying the defendant as a person depicted in the video could be offered. At trial, however, over objection, Cornell, a police officer, was permitted to identify the defendant in the video: "[E]arlier in the proceedings County Court had ruled that, to the extent that the People were going to offer such surveillance footage into evidence, they were precluded from offering testimony identifying defendant in such footage. Cornell then testified on direct examination that he obtained the video surveillance footage from the store where defendant had claimed to have been shopping at the time of the robbery and described a group of five people that entered at approximately 6:20 p.m. and left at approximately 6:45 p.m., approximately one hour before the robbery. Upon the People's question, 'And the group being [defendant], three women and a toddler,' Cornell answered, 'That's correct.' Defendant objected to the question and the answer, which was overruled by County Court. Inasmuch as this testimony violated County Court's prior ruling because it identified defendant as being the individual in the video who was accompanied by three women and a toddler, it should have been precluded." **People v Myrick, 2016 NY Slip Op 00217, 3rd Dept 1-14-16**

FREEDOM OF INFORMATION LAW (FOIL), TRADE SECRETS.

TRADE SECRET EXEMPTION DOES NOT REQUIRE PROOF DISCLOSURE WOULD RESULT IN COMPETITIVE INJURY.

The Third Department, in a full-fledged opinion by Justice Rose, determined the exemption from disclosure under the Freedom of Information Law (FOIL) for trade secrets did not require a showing that disclosure of the trade secrets would result in substantial competitive injury. Rather, the statute, Public Officers Law 87(2)(d), provides two distinct exemptions from disclosure: one for bona fide trade secrets and one for documents which, if disclosed, would cause substantial injury to the competitive position of the owner of the documents. Supreme Court's finding that the exemption for trade secrets did not require proof of injury to competitive position was upheld. There are strict criteria in place for determining whether information constitutes a bona fide trade secret. Applying those criteria, Supreme Court properly determined several docu-

ments provided by petitioner (Verizon) to the Department of Public Service were exempt from FOIL disclosure as bona fide trade secrets. **Matter of Verizon N.Y., Inc. v New York State Pub. Serv. Commn., 2016 NY Slip Op 00239, 3rd Dept 1-14-16**

PERSONAL INJURY, AGENCY.

QUESTION OF FACT WHETHER HOTEL DEFENDANTS WERE VICARIOUSLY LIABLE FOR THE NEGLIGENCE OF A SNOWMOBILE TOUR GUIDE UNDER AN APPARENT AGENCY THEORY.

The Third Department affirmed the denial of the hotel defendants' motion for summary judgment. Plaintiff was severely injured and her husband was killed when the snowmobile they were using was struck by a car. The hotel promoted snowmobile tours. All the arrangements for the tour were made by the plaintiffs and hotel personnel. The actual tour was conducted by Adirondack Snowmobile Rental (ASR). The tour guide, driving the lead snowmobile, crossed a road without waiting for plaintiff and plaintiff's decedent, who were following. Plaintiff and plaintiff's decedent were struck by a car when they attempted to cross the road. The Third Department determined plaintiff had stated a cause of action in negligence against the hotel defendants, alleging the hotel defendants were vicariously liable for the negligence of ASR under an apparent agency theory. **Taylor v The Point at Saranac Lake, Inc., 2016 NY Slip Op 00247, 3rd Dept 1-14**

PERSONAL INJURY, LABOR LAW.

STACKED SCAFFOLDING FRAMES WHICH TOPPLED ONTO PLAINTIFF DID NOT CONSTITUTE AN ELEVATION RISK, LABOR LAW 240(1) CAUSE OF ACTION PROPERLY DISMISSED; LABOR LAW 241(6) CAUSE OF ACTION, BASED UPON CODE PROVISION REQUIRING SAFE, STABLE STORAGE OF BUILDING MATERIALS, PROPERLY SURVIVED.

Scaffolding frames had been stacked vertically against a column on ground level. Plaintiff was injured when he attempted to move a frame and other frames toppled onto him. The Third Department determined the accident was not the result of an "elevation risk" and therefore would not support a Labor Law 240(1) cause of action. However, the Labor Law 241(6) cause of action was supported by an industrial code provision requiring safe, stable storage of building materials. **Hebbard v United Health Servs. Hosps., Inc., 2016 NY Slip Op 00248, 3rd Dept 1-14-16**

UNEMPLOYMENT INSURANCE.

INTERPRETER WAS AN EMPLOYEE, NOT AN INDEPENDENT CONTRACTOR.

The Third Department determined claimant, a Cantonese and Mandarin interpreter, was an employee of Language Services Associates, Inc. (LSA), not an independent contractor: "The record establishes that LSA advertises for interpreters, like claimant, to provide translation services to its clients. Interpreters are screened for their experience and, if approved by LSA following an interview, they are placed on a roster for future assignments. Clients contact LSA directly to request the services of an interpreter, at which point LSA decides who to call from its pool of interpreters. Although interpreters are free to decline assignments, there was testimony that they are not permitted to substitute someone else in their place once an assignment is accepted. LSA provides interpreters with the requisite information for accepted assignments, and interpreters are advised by LSA, not the client, of any changes in assignments. Moreover, interpreters are prohibited from accepting future assignments from a client without obtaining LSA's permission and are subject to penalties for arriving late or failing to appear for an assignment without providing LSA with notice and a reasonable explanation. LSA requires interpreters to submit invoices detailing the hours worked for each in-person interpretation assignment, pays interpreters directly and reimburses them for transportation expenses associated with assignments. The record further reflects that LSA records and monitors telephone interpretation services to ensure that interpreters are adequately performing their services. To that end, LSA assigned interpreters, including claimant, to evaluate other interpreters' telephone services. Claimant herself received feedback and instructions from LSA on how to improve her services, and she conducted, at LSA's request, numerous evaluations of other interpreters' services. Based upon these evaluations, interpreters are given a rating that could affect whether an interpreter receives future assignments from LSA." **Matter of Soo Tsui (Commissioner of Labor), 2016 NY Slip Op 00229, 3rd Dept 1-14-16**

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