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FIRST DEPARTMENT

CONVERSION, REPLEVIN, UNJUST ENRICHMENT, CIVIL PROCEDURE.

CONVERSION, REPLEVIN AND UNJUST ENRICHMENT CAUSES OF ACTION TIME-BARRED, CRITERIA EXPLAINED.

Plaintiff executor sued defendant under conversion, replevin and unjust enrichment theories for artwork which decedent was allegedly entitled to but never picked up from the warehouse where it was stored. The First Department determined the conversion, replevin and unjust enrichment causes of action were time-barred: "Under CPLR 214(3), the statutory period of limitations for conversion and replevin claims is three years from the date of accrual. The date of accrual depends on whether the current possessor is a good faith purchaser or bad faith possessor. An action against a good faith purchaser accrues once the true owner makes a demand and is refused ... . This is 'because a good-faith purchaser of stolen property commits no wrong, as a matter of substantive law, until he has first been advised of the plaintiff's claim to possession and given an opportunity to return the chattel' ... . By contrast, an action against a bad faith possessor begins to run immediately from the time of wrongful possession, and does not require a demand and refusal ... . Thus, '[w]here replevin is sought against the party who converted the property, the action accrues on the date of conversion' ... . * * * Unjust enrichment occurs when a defendant enjoys a benefit bestowed by the plaintiff without adequately compensating the plaintiff ... . The statute of limitations for unjust enrichment generally accrues upon 'the occurrence of the alleged wrongful act giving rise to restitution' ...". **Swain v Brown, 2016 NY Slip Op 00574, 1st Dept 1-28-16**

CRIMINAL LAW.

JUDGE PROPERLY REFUSED TO DISQUALIFY A JUROR WHO SAID SHE COULD NOT CONTINUE DELIBERATING BECAUSE SHE COULD NOT SEPARATE HER EMOTIONS FROM THE CASE.

The First Department, affirming defendant's manslaughter conviction over an extensive dissent, determined the trial court properly refused to disqualify a juror after she stated she was not able to continue deliberating because she could not "separate [her] emotions from the case." The First Department explained the criteria for disqualifying a juror and noted the juror ultimately agreed she would be able to determine what the facts were, on her own, and then apply the law: "After a juror is sworn in, the juror should be disqualified only 'when it becomes obvious that [the] juror possesses a state of mind which would prevent the rendering of an impartial verdict' (CPL § 270.35[1]). The trial court properly concluded, based upon its observations of the juror and its interactions with her, that she was not grossly unqualified from continuing to serve (CPL § 270.35[1]...). Contrary to how the dissent characterizes the trial court's interactions with the juror, the colloquy, consisting of some 10 transcribed pages, shows that the court patiently listened to the juror and tactfully asked her probing questions to determine whether, for some reason, she could not be impartial ... . She was candid in her responses and forthright about her concerns. None of her concerns had to do with fear about her personal safety . . . , nor did she express any concerns about feeling coerced by her fellow jurors to vote in any particular way ... . The juror never expressed an inability to deliberate fairly and render an impartial verdict, nor did she make any statements that could be taken as evidence of bias or sympathy either towards the deceased or the defendant that would have prevented her from deciding defendant's guilt or innocence. The juror only said that she was having difficulty separating her emotions, not that she was incapable of deciding the facts or applying the law, or that she would disobey the court's instructions." **People v Spencer, 2016 NY Slip Op 00447, 1st Dept 1-26-16**

CRIMINAL LAW, EVIDENCE.

STATEMENT SHOULD NOT HAVE BEEN ADMITTED AS A PROMPT OUTCRY, CONVICTION REVERSED.

The First Department determined a text message sent by the 15-year-old victim of an alleged sexual assault should not have been admitted under the "prompt outcry" hearsay exception. Defendant's conviction was reversed: "A complaint is timely for purposes of the prompt outcry exception if made 'at the first suitable opportunity,' which is a 'relative concept dependent on the facts' ... . While a significant delay in reporting does not necessarily preclude outcry evidence, especially where the victim is a child ... , when the complainant is a teenager (or older), 'the concept of promptness necessarily suggests an immediacy not ordinarily present when months go by' ... . With respect to teenagers and adults rather than young children,

a reporting delay of several months may be justified if there were 'legally sufficient circumstances' that would excuse the victim's delay, such as the victim being 'under the control or threats of the defendant . . . or being among strangers and without others in whom [the victim] could confide' ... . Here . . . there is an absence of circumstances to bring this lengthy delay within the prompt outcry rule. While the evidence indicated that the complainant experienced confusion, shock, embarrassment, and fear of not being believed, as well as concern about her mother and grandmother's reactions, there is no evidence that she was threatened by defendant or was under his control. Although the outcry occurred after defendant was incarcerated on a parole violation, the complainant made the disclosure at least a month after that circumstance occurred, and she did not testify that she delayed her disclosure based on a fear of retribution." **People v Ortiz, 2016 NY Slip Op 00593, 1st Dept 1-28-16**

FAMILY LAW, CONTRACT LAW.

DESPITE THE HUSBAND'S EXTRAORDINARY WEALTH, THE WIFE'S OVERREACHING CAUSE OF ACTION SEEKING TO SET ASIDE THE PRENUPTIAL AGREEMENT SHOULD NOT HAVE SURVIVED SUMMARY JUDGMENT.
The First Department, in a full-fledged opinion by Justice Richter, over a full-fledged concurring opinion and a full-fledged dissenting opinion, determined the wife's action to set aside a prenuptial agreement, on the ground of overreaching, should have been dismissed. The fact that the husband's net worth allegedly was $188 million in 2013, and the resulting contrast between what the husband could afford to provide and what the prenuptial agreement called for, among several other factors, raised a question of fact about "overreaching" in the eyes of the dissent. The arguments raised in the three opinions are too lengthy and detailed to fairly summarize here. On the issue of overreaching, the majority wrote: "Here, the wife's motion did not challenge the prenuptial agreement on the ground that it is the product of coercion, duress or fraud. Nor did the wife argue that the agreement's terms as a whole are unconscionable. Rather, her only claim was that the agreement is manifestly unfair due to the husband's overreaching ... . Although no actual fraud need be shown to set aside the agreement on this ground, the challenging party must show overreaching in the execution, such as the concealment of facts, misrepresentation, cunning, cheating, sharp practice, or some other form of deception ... . In addition, the challenging party must show that the overreaching resulted in terms so manifestly unfair as to warrant equity's intervention ...". **Gottlieb v Gottlieb, 2016 NY Slip Op 00613, 1st Dept 1-28-16**

SECOND DEPARTMENT

ATTORNEYS, LEGAL MALPRACTICE, CIVIL PROCEDURE.

MALPRACTICE COMPLAINT SHOULD HAVE BEEN DISMISSED, ANALYTICAL CRITERIA EXPLAINED.
The Second Department, reversing Supreme Court, determined the attorney-defendants' motion to dismiss the malpractice complaint should have been granted. The allegations of malpractice were deemed insufficient and were "utterly refuted" by the documentary evidence submitted. The court explained the analytical criteria: " 'To state a cause of action to recover damages for legal malpractice, a plaintiff must allege: (1) that the attorney failed to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession; and (2) that the attorney's breach of the duty proximately caused the plaintiff actual and ascertainable damages' ... . 'To establish causation, a plaintiff must show that he or she would have prevailed in the underlying action or would not have incurred any damages but for the lawyer's negligence' ... . 'A claim for legal malpractice is viable, despite settlement of the underlying action, if it is alleged that settlement of the action was effectively compelled by the mistakes of counsel' ... . '[A] plaintiff must plead and prove actual, ascertainable damages as a result of an attorney's negligence' ... . 'Conclusory allegations of damages or injuries predicated on speculation cannot suffice for a malpractice action, and dismissal is warranted where the allegations in the complaint are merely conclusory and speculative' ...". **Janker v Silver, Forrester & Lesser, P.C., 2016 NY Slip Op 00481, 2nd Dept 1-27-16**

ADMINISTRATIVE LAW, ZONING.

EXCEPTION TO FINALITY RULE WHERE IT IS CLEAR FURTHER ADMINISTRATIVE PROCEEDINGS WOULD BE FUTILE; DEVELOPER DID NOT HAVE A PROPERTY INTEREST IN A SITE PLAN APPROVAL WHICH WOULD SUPPORT A VIOLATION-OF-DUE-PROCESS CAUSE OF ACTION.
In finding the town planning board's motion for summary judgment on several causes of action brought by respondent developer should have been granted, the Second Department explained (1) the finality rule need not be mechanically applied where it is clear further administrative proceedings would be futile, and (2) the developer did not have a property interest in a site plan approval which would support a violation-of-due-process cause of action: "In the area of land use, '[a] final decision exists when a development plan has been submitted, considered and rejected by the governmental entity with the power to implement zoning regulations' ... . In this regard, '[a] property owner, for example, will be excused from obtaining a final decision if pursuing an appeal to a zoning board of appeals or seeking a variance would be futile. That is, a property owner need not pursue such applications when a zoning agency lacks discretion to grant variances or has dug in its heels and made clear that all such applications will be denied' ... . Additionally, an exception to the finality requirement

exists where the municipal entity uses 'repetitive and unfair procedures in order to avoid a final decision' ... . [Respondent developer] alleged that it had a cognizable property interest in the approval of the application that was injured in violation of its right to due process under both the United States and New York State Constitutions. However, as the Planning Board has significant discretion in reviewing site plan applications . . . , East End does not have a cognizable property interest in the approval of a particular site plan application ...". **East End Resources, LLC v Town of Southold Planning Bd., 2016 NY Slip Op 00476, 2nd Dept 1-27-16**

CIVIL PROCEDURE, PERSONAL INJURY, MEDICAL MALPRACTICE.

REQUESTS FOR RECORDS OF SURGICAL PROCEDURES PERFORMED ON NON-PARTIES AND RECORDS OF COMPLAINTS AGAINST DEFENDANT SURGEON SHOULD NOT HAVE BEEN DENIED.

The Second Department, reversing Supreme Court, determined certain discovery requests made by plaintiff in a medical malpractice action should not have been denied. Plaintiff alleged the negligence of defendant surgeon and defendant hospital was related to the unprecedented number of surgeries performed by defendant surgeon. Plaintiff sought all the records re: surgeries performed by defendant surgeon on the days plaintiff was operated on. The Second Department held that those records, with non-party names redacted, should be turned over but should not be disclosed beyond the parties and experts. With respect to requests for disclosure of complaints against defendant surgeon, the Second Department held that the documents should be turned over for in camera review to see if they are immune from discovery under the Public Health Law (quality assurance immunity). **Gabriels v Vassar Bros. Hosp., 2016 NY Slip Op 00478, 2nd Dept 1-27-16**

CRIMINAL LAW.

YOUTHFUL OFFENDER ADJUDICATION PROPERLY USED TO DETERMINE SEX OFFENDER REGISTRATION ACT (SORA) RISK LEVEL.

The Second Department, in a full-fledged opinion by Justice Leventhal, over a dissent, determined the Board of Examiners of Sex Offenders (Board) and Supreme Court properly considered defendant's youthful offender adjudication in assessing defendant's Sex Offender Registration Act (SORA) risk level. The court distinguished *People v. Campbell*, 98 A.D.3d 5, where it ruled a juvenile delinquency adjudication could not be considered in a SORA risk-level analysis. Here, the youthful offender adjudication resulted in a level-three risk assessment. Without the youthful offender adjudication defendant would have been assessed a level-two risk. **People v Francis, 2016 NY Slip Op 00488, 2nd Dept 1-27-16**

FRAUD, CIVIL PROCEDURE.

FRAUD CAUSES OF ACTION DID NOT MEET PLEADING REQUIREMENTS.

The Second Department determined a fraud cause of action against defendant Ballard was duplicative of contract causes of action, and another fraud cause of action against other defendants did not meet pleading requirements. The court explained the applicable law: "[T]he alleged misrepresentations set forth in the causes of action alleging fraud against Ballard . . . are not sufficiently distinct from the claims that Ballard breached that contract so as to constitute separate causes of action ... . Not only did the fraud causes of action asserted against Ballard arise out of identical circumstances as the causes of action alleging breach of contract, but they were based upon identical allegations, and did not allege that a misrepresentation resulted in any loss independent of the damages allegedly incurred for breach of contract; indeed, the damages sought were identical ... . A cause of action to recover damages for fraud requires allegations of: (1) a false representation of fact, (2) knowledge of the falsity, (3) intent to induce reliance, (4) justifiable reliance, and (5) damages ... . Moreover, pursuant to CPLR 3016(b), where a cause of action is based upon fraud or aiding and abetting fraud, the 'circumstances constituting the wrong' must be 'stated in detail.' Here, inasmuch as the causes of action alleging fraud against [three of the defendants] contained only bare and conclusory allegations, without any supporting detail, they failed to satisfy the requirements of CPLR 3016(b)." **Doukas v Ballard, 2016 NY Slip Op 00474, 2nd Dept 1-27-16**

LABOR LAW, PERSONAL INJURY.

PLAINTIFF'S LEANING TO THE SIDE OF A NON-DEFECTIVE LADDER WAS THE SOLE PROXIMATE CAUSE OF INJURY.

The Second Department determined summary judgment was properly granted to defendants in a Labor Law § 240(1) cause of action. Plaintiff was using an A-frame ladder which was not defective. Plaintiff was injured when he leaned to the side of the ladder and the ladder tipped and the plaintiff fell. It was the act of reaching to the side, not a defective ladder, which was the proximate cause of plaintiff's injury: " 'Labor Law § 240(1) imposes a nondelegable duty upon owners, lessees that control the work performed, and general contractors to provide safety devices necessary to protect workers from risks inherent in elevated work sites' ... . 'To recover on a cause of action pursuant to Labor Law § 240(1), a plaintiff must demonstrate that there was a violation of the statute, and that the violation was a proximate cause of the accident' ... . 'Where there is no statutory violation, or where the plaintiff is the sole proximate cause of his or her own injuries, there can be no recovery under Labor Law § 240(1)' ... . Here, the defendants established their prima facie entitlement to judgment as a matter of

law dismissing the cause of action alleging a violation of Labor Law § 240(1) insofar as asserted against each of them. Their submissions demonstrated, prima facie, that the injured plaintiff improperly positioned and misused the ladder, which was the sole proximate cause of his injuries ...". **Scofield v Avante Contr. Corp., 2016 NY Slip Op 00493, 2nd Dept 1-27-16**

MUNICIPAL LAW.

UNDER THE CITY CHARTER, THE MAYOR DID NOT HAVE THE POWER TO ABOLISH A CIVIL SERVICE POSITION; ONLY THE BODY EMPOWERED TO CREATE THE POSITION CAN ABOLISH IT.

The Second Department, affirming Supreme Court, determined the city charter did not give the mayor the authority to abolish a civil service position. Only the Board of Estimate and Apportionment had the power to create the position at issue, therefore only the Board could abolish the position: "Here, the Supreme Court correctly concluded that the Mayor did not have the authority to unilaterally abolish the position of part-time code enforcement officer. The City Charter grants the Middletown Board of Estimate and Apportionment the power to create civil service positions in Middletown, by providing that it 'shall fix the powers and duties and regulate the salaries and compensation of all city officers and employees' (City Charter § 64). Although the City Charter authorizes the Mayor, with certain limitations, to suspend an employee for cause (see City Charter § 54), there is nothing in the City Charter conferring upon the Mayor the authority to unilaterally abolish civil service employment positions. 'The general rule, when not qualified by positive law, is that the power which creates an office may abolish it in its discretion and this rule applies to municipal offices created by the act of some municipal body' ... . Having been granted the power to create civil service employment positions in Middletown, it is the Board of Estimate and Apportionment, and not the Mayor, that is vested with the power to abolish them ...". **Matter of Moser v Tawil, 2016 NY Slip Op 00501, 2nd Dept 1-27-16**

MUNICIPAL LAW, UNIONS.

COUNTY CHARTER CONTROLLED WHERE THERE WAS A CONFLICT BETWEEN THE CHARTER AND AN ADMINISTRATIVE CODE PROVISION RE: ARBITRATION OF POLICE DISCIPLINARY MATTERS.

The Second Department determined the county did not have the authority to enter into an agreement with the police union (PBA) to arbitrate certain police disciplinary matters. The county charter vested the power to discipline police in the police commissioner. The charter provision was deemed controlling. Therefore the administrative code provision allowing the binding arbitration of disciplinary matters was properly repealed by a local law subsequently enacted by the county: "[S]ince the County Charter vested the power to discipline members of the Nassau County Police Department exclusively with the Commissioner of Police, the County Legislature's attempt to divest the Commissioner of a portion of that disciplinary authority by amending the County Administrative Code to allow for binding arbitration of certain disciplinary matters created a conflict between the code and the charter, and, in the face of such a conflict, the charter controlled ... . Therefore, the court properly concluded that the County Legislature's enactment of section 8-13.0(e) of the Nassau County Administrative Code was invalid, and that the subsequent repeal of section 8-13.0(e) of the County Administrative Code by Local Law No. 9-2012 of the County of Nassau was proper and should not be enjoined. Moreover, as the County Legislature expressly committed disciplinary authority over the Nassau County Police Department to the Commissioner of Police, collective bargaining over disciplinary matters was prohibited ...". **Carver v County of Nassau, 2016 NY Slip Op 00466, 2nd Dept 1-27-16**

PERSONAL INJURY.

ANALYTICAL CRITERIA FOR DETERMINING LIABILITY IN A REAR-END COLLISION CASE CLEARLY EXPLAINED.

The Second Department, reversing Supreme Court, determined plaintiff was entitled to summary judgment in this rear-end collision case. The court offered a clear, succinct explanation of the analytical criteria: " 'When the driver of an automobile approaches another automobile from the rear, he or she is bound to maintain a reasonably safe rate of speed and control over his vehicle, and to exercise reasonable care to avoid colliding with the other vehicle' (... see Vehicle and Traffic Law § 1129[a] ...). A rear-end collision with a stopped or stopping vehicle establishes a prima facie case of negligence on the part of the operator of the rear vehicle, requiring that operator to come forward with evidence of a nonnegligent explanation for the collision in order to rebut the inference of negligence ... . A nonnegligent explanation may include evidence of a mechanical failure, a sudden, unexplained stop of the vehicle ahead, an unavoidable skidding on wet pavement, or any other reasonable cause ... . Here, on his motion for summary judgment on the issue of liability, the plaintiff established his prima facie entitlement to judgment as a matter of law by submitting an affidavit in which he stated that his vehicle was stopped when it was struck in the rear ... . In opposition, the defendant failed to submit evidence either denying the plaintiff's allegations or offering a nonnegligent explanation for the collision ...". **Binkowitz v Kolb, 2016 NY Slip Op 00462, 2nd Dept 1-27-16**

PERSONAL INJURY, LANDLORD-TENANT.

DEFENDANT DID NOT DEMONSTRATE NON-PARTY SUBLESSEE WAS RESPONSIBLE FOR MAINTAINING THE PREMISES; DEFENDANT'S SUMMARY JUDGMENT MOTION IN THIS SLIP AND FALL CASE SHOULD HAVE BEEN DENIED.

The Second Department, reversing Supreme Court, determined defendant was not entitled to summary judgment in a slip and fall case because defendant did not demonstrate the non-party sublessee was responsible for maintaining the premises: " '[A]n out-of-possession landlord may be liable for injuries occurring on the premises if it has retained control of the premises, is contractually obligated to perform maintenance and repairs, or is obligated by statute to perform such maintenance and repairs' ... . However, 'where the premises have been leased and subleased and the subtenant assumes the exclusive obligation to maintain the premises, both the out-of-possession landlord and the out-of-possession lessee/sublessor will be free from liability for injuries to a third party caused by the negligence of the subtenant in possession' ... . Here, viewing the evidence in the light most favorable to the plaintiff, the defendant failed to establish, prima facie, that the nonparty sublessee assumed the exclusive obligation to maintain the premises, and that the defendant, as the lessee/sublessor, had no duty to maintain the premises ... . Since the defendant failed to meet its initial burden as the movant, it is not necessary to review the sufficiency of the plaintiff's opposition papers ...". **Iturrino v Brisbane S. Setauket, LLC, 2016 NY Slip Op 00480, 2nd Dept 1-27-16**

REAL PROPERTY.

EASEMENT APPURTENANT PASSES TO SUBSEQUENT OWNERS EVEN IF NOT SPECIFICALLY MENTIONED IN THE DEED.

The Second Department, in affirming the grant of summary judgment to plaintiffs, explained the criteria for an easement appurtenant and noted that such an easement passes to subsequent purchasers without an express provision in the subsequent deed: " 'An easement appurtenant is created for the benefit of its owner's use and possession of his real property' ... . 'An easement appurtenant occurs when the easement (1) is conveyed in writing, (2) is subscribed by the creator, and (3) burdens the servient estate for the benefit of the dominant estate' ... . The easement will 'pass[ ] to subsequent owners of the dominant estate through appurtenance clauses, even if it is not specifically mentioned in the deed' ... ". **Reilly v Achitoff, 2016 NY Slip Op 00491, 2nd Dept 1-27-16**

TRUSTS AND ESTATES.

DEVISE OF REAL PROPERTY HAD NOT ADEEMED, DESPITE DEED PURPORTING TO TRANSFER PROPERTY PRIOR TO DEATH.

The will bequeathed real property to decedent's two daughters, Watson and Fitzsimmons, with a life estate to Watson. Before decedent's death Watson used a power of attorney to deed the property to herself. The Second Department determined decedent retained equitable title to the property at death. The deed was determined to be voidable, not void ab initio, and was not declared void until after death. Fitzsimmons argued that the devise of the property adeemed because it was not in decedent's estate at death. Therefore, Fitzsimmons argued, the life estate awarded Watson in the will was cut off. Affirming Surrogate's Court, the Second Department held the devise of the property had not adeemed: "The doctrine of ademption provides that '[u]nless the property devised or the thing bequeathed was found in the estate of the [decedent] at the time of [his or] her death, the will was necessarily inoperative as to that provision' ... . * * * Under the particular circumstances of this case, the Surrogate's Court properly held that the specific devise of property should not be determined to have adeemed, although it was not owned by the decedent at the time of her death. The deed by which the property was transferred to Watson was voidable, and thus, the decedent retained equitable title to the property, which title reverted to her estate when Fitzsimmons successfully asserted the estate's claims to it ...". **Matter of Hill, 2016 NY Slip Op 00499, 2nd Dept 1-27-16**

THIRD DEPARTMENT

ENVIRONMENTAL LAW, REAL PROPERTY.

ACTION SEEKING RESCISSION OF A CONSERVATION EASEMENT RESTRICTING DEVELOPMENT ON UPSTATE LAND WITHIN THE NEW YORK CITY WATERSHED PROPERLY DISMISSED; UNIQUE LAW RE: MODIFICATION OR EXTINGUISHMENT OF A CONSERVATION EASEMENT EXPLAINED.

In an action seeking rescission of a conservation easement which restricts development on upstate land within the watershed for New York City, the Third Department affirmed the dismissal of the complaint and explained the unique law which pertains to the modification or extinguishment of a conservation easement: " 'Conservation easements are of a character wholly distinct from the easements traditionally recognized at common law and are excepted from many of the defenses that would defeat a common-law easement' (... see ECL 49-0305 [2], [5]...). Pursuant to ECL 49-0307 (1), '[a] conservation easement held by a not-for-profit conservation organization may only be modified or extinguished' (1) pursuant to the

terms of the instrument creating the easement, (2) in a proceeding pursuant to RPAPL 1951, or (3) by eminent domain. Notably, ECL 49-0307 provides the exclusive means by which a conservation easement may be modified or extinguished (see ECL 49-0305 [2]).” **Argyle Farm & Props., LLC v Watershed Agric. Council of the N.Y. City Watersheds, Inc., 2016 NY Slip Op 00559, 3rd Dept 1-28-16**

LANDLORD-TENANT

LANDLORD ACCEPTED TENANT’S SURRENDER OF THE PREMISES BY OPERATION OF LAW, CRITERIA EXPLAINED.

The Third Department, affirming Supreme Court, found plaintiffs-landlord had accepted defendant-tenant’s surrender of the premises by operation of law. The tenant, upon sufficient notice to the landlord, had moved most of its operation to a new location but continued to pay rent. The landlord then rented parts of the premises to two new tenants and changed the locks so defendant could not access the premises. At that point the tenant stopped paying rent and the landlord sued for the rent for the remaining portion of the lease. The court explained the elements of “surrender by operation of law:” “ ‘A surrender by operation of law occurs when the parties to a lease both do some act so inconsistent with the landlord-tenant relationship that it indicates their intent to deem the lease terminated’ ... . A surrender by operation of law is inferred from the conduct of the parties, namely, the tenant’s abandonment of the demised premises and the landlord’s acceptance there-of; whether a surrender by operation of law has occurred in a particular case is generally a factual determination ...”. **Fragomeni v Aim Servs., Inc., 2016 NY Slip Op 00563, 3rd Dept 1-28-16**

UNEMPLOYMENT INSURANCE.

PART-TIME AEROBICS INSTRUCTOR WAS AN EMPLOYEE.

The Third Department determined a part-time aerobics instructor at a fitness club (Synchronicity) was an employee entitled to unemployment insurance benefits: “Here, the evidence in the record reflects that Synchronicity established the fees that members of its fitness club were required to pay for their membership and claimant’s aerobics classes. Members would pay those fees to Synchronicity directly; claimant never collected money from any of the club’s members or charged them for attending her aerobics classes. While there is evidence that claimant’s rate of pay was negotiated, the record also reflects that all instructors at the fitness club were paid the same amount and were directly paid by check from Synchronicity once a week. While claimant would bring some of her own fitness equipment for her classes, including music and Pilates equipment, Synchronicity also provided her with an instruction room and made certain fitness equipment available to her, such as steps and free weights. Further, claimant was not allowed to solicit members of the club to attend classes that she offered at other fitness clubs.” **Matter of Raynor (Commissioner of Labor), 2016 NY Slip Op 00558, 3rd Dept 1-28-16**

UNEMPLOYMENT INSURANCE.

CONSULTANT HIRED TO EVALUATE TEACHERS WAS AN EMPLOYEE.

The Third Department determined claimant was an employee of RMC, an educational research firm which contracted with the NYC Department of Education. Pursuant to a “consultancy agreement,” claimant was hired to evaluate teachers who had been given unsatisfactory ratings: “[C]laimant was required as part of RMC’s hiring process to submit an application, undergo an interview and provide references. Once hired and after signing the consultant agreement, he received six hours of training, was paid a hourly rate set by RMC, was expected to work three to four hours per week for a total of 36 weeks during the 10-week assignment and submitted a voucher provided by RMC on the 15th of each month to receive payment for hours worked. Notably, claimant was paid for services rendered regardless of whether RMC received payment from the client. Moreover, RMC’s name appeared at the top of the documents that claimant was required to prepare and it determined their format. Furthermore, during the course of his assignment, claimant interacted with RMC’s project director who reviewed his observation reports for comprehensiveness, clarity, spelling and grammar. Any complaints about claimant’s performance or that of the other peer observers were directed to RMC, and it arranged for a replacement if an assignment could not be completed.” **Matter of Strauss (Commissioner of Labor), 2016 NY Slip Op 00561, 3rd Dept 1-28-16**

UNEMPLOYMENT INSURANCE; LABOR LAW.

UNEMPLOYMENT INSURANCE EXPERIENCE RATINGS PROPERLY TRANSFERRED TO NEW BUSINESS ENTITIES DOING THE SAME WORK, EMPLOYING SOME OF THE SAME PEOPLE, AND OPERATING FROM THE SAME ADDRESS.

The Third Department determined that the unemployment insurance experience ratings of businesses which had ceased operation and then reopened under new names were properly transferred to the new businesses: “Labor Law § 581 (7) (a) (1) states that ‘[i]f an employer transfers its organization, trade or business, or a portion thereof, to another employer and, at the time of the transfer, there is at least a ten percent common ownership, management or control of the two employers,

then the unemployment experience attributable to the transferred organization, trade or business shall be transferred to the employer to whom such organization, trade or business is so transferred,' and '[f]or purposes of this subdivision "organization, trade or business" shall include the employer's workforce.' " **Matter of Prod. Processing Inc. (Commissioner of Labor), 2016 NY Slip Op 00565, 3rd Dept 1-28-16**

WORKERS' COMPENSATION LAW.

CLAIMANT PROPERLY COMPENSATED FOR WORK-RELATED STRESS.

The Third Department determined claimant was properly awarded workers' compensation benefits for work-related stress. The employer argued the stress was related to warning letters about claimant's performance, which would not be compensable. One of the warning letters was deemed not to have been issued in good faith. And claimant submitted proof her stress-related symptoms appeared before the warning letters were issued. Claimant was a licensed clinical social worker who had been attacked by a client: "Workers' Compensation Law § 2 (7) precludes claims for mental injuries based upon work-related stress 'if such mental injury is a direct consequence of a lawful personnel decision involving a disciplinary action, work evaluation, job transfer, demotion, or termination taken in good faith by the employer.' 'Whether the employer's actions constituted a lawful personnel decision undertaken in good faith is a factual issue to be resolved by the Board' ... . * * * 'According deference to the Board's resolution of witness credibility issues' . . . , and in light of the evidence that claimant suffers from a mental injury stemming from work-related stress and that she was being treated for the condition prior to the issuance of the warning letters, the Board's determination that the claim was not barred by Workers' Compensation Law § 2 (7) is supported by substantial evidence and will not be disturbed ... . Further, based upon the foregoing, we find that the Board's determination that the stress that caused claimant's injury was greater than that of other similarly situated workers also is supported by substantial evidence ...". **Matter of Haynes (Catholic Charities), 2016 NY Slip Op 00560, 3rd Dept 1-28-16**

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