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FIRST DEPARTMENT

CRIMINAL LAW.

MOTION TO VACATE CONVICTION PROPERLY DENIED WITHOUT A HEARING DESPITE WITNESS RECANTATIONS AND CONFESSION BY ANOTHER PARTY, CRITERIA FOR SHOWING OF ACTUAL INNOCENCE EXPLAINED.

The First Department, in a full-fledged opinion by Justice Andrias, determined defendant's motion to vacate his conviction, based primarily upon newly discovered evidence, was properly denied without a hearing. Although two identification witnesses recanted, the recantations were suspect and there were other eyewitnesses. A confession to the crime by another was refuted by documentary evidence. With respect to the criteria for a showing of "actual innocence," the court explained: "To vacate a judgment based on actual innocence pursuant to CPL 440.10(h), defendant must demonstrate with clear and convincing evidence, which was not presented at trial, his factual innocence, i.e. that he was actually innocent of the crimes for which he was convicted ... . To be sufficient, clear and convincing evidence must establish that the claim asserted is 'highly probable.' 'Mere doubt as to the defendant's guilt, or a preponderance of conflicting evidence as to the defendant's guilt, is insufficient, since a convicted defendant no longer enjoys the presumption of innocence, and in fact is presumed to be guilty'... . 'A prima facie showing of actual innocence is made out when there is a sufficient showing of possible merit to warrant a fuller exploration by the court' ... . As recently explained by this Court ... , which agreed with the Second Department that CPL 440.10(h) embraces a claim of actual innocence, '[T]his specific standard for actual innocence claims should be considered in light of, and alongside, the more general standard applicable on any motion to vacate a conviction brought under CPL 440.10. Thus, statements of fact supporting the motion must be sworn ... . Further, hearsay statements in support of such motions are not probative evidence ... .'…". ***People v. Velazquez*, 2016 N.Y. Slip Op. 05961, 1st Dept 9-8-16**

DEBTOR-CREDITOR LAW, FRAUD.

CAUSES OF ACTION FOR BOTH CONSTRUCTIVE AND ACTUAL FRAUDULENT CONVEYANCE STATED, ELEMENTS DESCRIBED.

The First Department determined the complaint stated causes of action for both constructive and actual fraudulent conveyance. The facts are too complex to summarize here: "The complaint states a cause of action for constructive fraudulent conveyance against Globe Institute, the Rabinovich defendants and 878 LLC by alleging that the conveyance of Globe Institute's assets to 878 LLC was made without the exchange of 'fair consideration,' since the transaction could be viewed as resulting in part of the value of Globe Institute's assets being paid to its shareholders indirectly, suggesting bad faith (see Debtor and Creditor Law § 272[a]). * * * The cause of action for actual fraudulent conveyance under Debtor and Creditor Law § 276 is also adequately pleaded against Globe Institute, the Rabinovich defendants, and 878 LLC. Although the transaction was conducted at arm's length, plaintiff has sufficiently alleged 'badges of fraud,' i.e., 'circumstances so commonly associated with fraudulent transfers that their presence gives rise to an inference of intent,' …". ***172 Van Duzer Realty Corp. v. 878 Educ., LLC*, 2016 N.Y. Slip Op. 05957, 1st Dept 9-8-16**

EDUCATION-SCHOOL LAW, MUNICIPAL LAW.

CERTAIN CAUSES OF ACTION IN COMPLAINTS BROUGHT ALLEGING THE STATE HAS FAILED TO ADEQUATELY FUND NEW YORK CITY PUBLIC SCHOOLS ADEQUATELY PLED; MUNICIPALITY (CITY OF YONKERS), HOWEVER, DID NOT HAVE STANDING TO SUE.

The First Department, in a full-fledged opinion by Justice Tom, determined plaintiffs (parents of students, among others) had sufficiently pled certain causes of action based upon the state's alleged failure to adequately fund New York City public schools. The complex discussion cannot be summarized here. With respect to a municipality's (here, the City of Yonkers') lack of standing to sue the state in this context, the court explained: "The City of Yonkers maintains that it has capacity to sue ..., asserting that the educational funding cuts have deprived it of a proprietary interest in the Foundation Aid monies calculated to be apportioned to it by formula pursuant to the 2007 Budget and Reform Act. This argument is unpersuasive. Contrary to Yonkers's contention, the proprietary interest exception does not apply where a municipality has "a mere hope or expectancy" of receiving funds ... , but instead 'relate[s] to funds or property of a municipal corporation in its possession

or to which it had a right to immediate possession' ... . The Foundation Aid monies provided for under the 2007 Budget and Reform Act (codified in Education Law § 3602) are the product of a complex formula that turns on the application of numerous variables, including things like a school district's 'daily attendance figures' ... . Sums allocated pursuant to the formula therefore vary from year to year. Moreover, any sums provided for by Foundation Aid must themselves be the subject of a separate budgetary appropriation; absent such appropriation, they do not exist (see State Finance Law §§ 4[1]; 40[2][a]). Thus, the Foundation Aid formula does not create any 'specific sum of money" that would 'create[] a proprietary interest' in any school district ...". ***Aristy-Farer v. State of New York*, 2016 N.Y. Slip Op. 05960, 1st Dept 9-8-16**

ENVIRONMENTAL LAW.

USE OF PIER 55 FOR REVENUE-GENERATING EVENTS DOES NOT VIOLATE THE PUBLIC TRUST DOCTRINE.

The First Department, in affirming the decision of the Hudson River Park Trust to enter into a lease of Pier 55 on the Hudson River, noted that there is no case law in New York applying the public trust doctrine to state, as opposed to municipal, parkland, and, even if the doctrine applied, the lease did not violate it: "There is no case law in New York applying the public trust doctrine to state, as opposed to municipal, parkland (see *Matter of Niagara Preserv. Coalition, Inc. v. New York Power Auth.*, 121 AD3d 1507, 1511 [4th Dept 2014] ...). We need not decide whether to follow the Fourth Department because even if the doctrine applies here, the project and lease do not violate it. The Hudson River Park Act expressly authorizes the use of the park for revenue-generating events, including performing arts events (see Uncons Laws §§ 1642[c], [e]; 1643[h][ii]; 1647[10][a]), and courts have upheld the charging of fees for park facilities, provided that overall public access is not unduly constrained ... . Here, beyond the performances for which Pier 55 is designed, most of the park-like pier, most of the time, will be devoted to even more fundamental "public park uses, including passive and active public open space uses" (Uncons Laws § 1643[h][ii]). Additionally, the lease requires that 51% of the performances be free or low-cost." ***Matter of City Club of N.Y., Inc. v. Hudson Riv. Park Trust, Inc.*, 2016 N.Y. Slip Op. 05954, 1st Dept 9-8-16**

PERSONAL INJURY, LABOR LAW, EVIDENCE.

PLAINTIFF'S ALLEGEDLY INCONSISTENT ACCOUNTS OF THE CAUSE OF HIS FALL CREATED A QUESTION OF FACT.

The First Department, with a two-justice concurring memorandum, determined conflicting testimony raised questions of fact about whether a safety harness was available and whether the scaffold was defective. Plaintiff was not wearing a harness when he attempted to move from the roof to a scaffold and fell. With respect to the scaffold, the court noted that plaintiff's allegedly inconsistent accounts of the cause of the fall raised a question of fact: "According to plaintiff, as he attempted to swing down from the roof to the scaffold, a wire attaching the scaffold to the building snapped, causing the scaffold to swing away from the wall and resulting in plaintiff's fall to the ground below. The foreman, however, testified that, in conversation after the accident, plaintiff had admitted to him that he fell because his foot had slipped as he stepped onto the scaffold from the roof, without mentioning any movement of the scaffold. These two versions of how the accident happened, each given by plaintiff, the sole witness to the incident, are inconsistent with each other and give rise to an issue of fact as to whether plaintiff's fall was caused by a failure of a safety device within the purview of § 240(1). As this Court recently noted, '[W]here a plaintiff is the sole witness to an accident, an issue of fact may exist where he or she provides inconsistent accounts of the accident' ...". ***Albino v. 221-223 W. 82 Owners Corp.*, 2016 N.Y. Slip Op. 05953, 1st Dept 9-8-16**

REAL PROPERTY, CONTRACT LAW.

QUESTION OF FACT WHETHER QUITCLAIM DEED WAS UNCONSCIONABLE; DOCTRINES OF PROCEDURAL AND SUBSTANTIVE UNCONSCIONABILITY DISCUSSED.

The First Department, over a two-justice dissent, determined there were questions of fact about whether plaintiff's signing of a quitclaim deed was procedurally and substantively unconscionable. Plaintiff, who believed he no longer owned the land, signed the deed in return for $5000. The property was worth $1,000,000: "No one procedural factor can be relied upon to support or discount a claim of procedural unconscionability. Such claims are most often fact sensitive and dependent upon the particular circumstances surrounding a transaction, which, at the very least, mandate the opportunity for an evidentiary hearing ... . Certainly, the factual allegations ... raise material issues of fact as to whether plaintiff was afforded a 'meaningful choice' in his decision to execute the quitclaim deed and whether the terms of the agreement are 'unreasonably favorable' to [defendants]. These issues cannot be resolved by summary judgment. With respect to the element of substantive unconscionability, we also find that there are material issues of fact. In order to determine if the agreement is substantively unconscionable, there must be an 'analysis of the substance of the bargain to determine whether the terms were unreasonably favorable to the party against whom unconscionability is urged' ... .[D]espite the fact that plaintiff believed he no longer owned the property, there is nothing in this record to indicate that he was ever divested of title by either an in rem proceeding or direct sale ...". ***Green v. 119 W. 138th St. LLC*, 2016 N.Y. Slip Op. 05955, 1st Dept 9-8-16**

SECOND DEPARTMENT

FAMILY LAW.

PETITIONER HAS THE RIGHT TO PETITION FOR CUSTODY DESPITE ABSENCE OF BIOLOGICAL OR ADOPTIVE RELATIONSHIP.

Applying the recent overruling of precedent by the Court of Appeals, the Second Department determined petitioner had the right to seek custody of children, despite the absence of a biological or adoptive relationship. The children had been carried by a surrogate, who also sought custody: "During the pendency of this appeal, the Court of Appeals, in *Matter of Brooke S.B. v. Elizabeth A. C.C.* ... , overruled Alison D. because, inter alia, its definition of 'parent' had 'become unworkable when applied to increasingly varied familial relationships' ... . In Brooke S.B., the Court held that, where a partner to a biological parent 'shows by clear and convincing evidence that the parties agreed to conceive a child and to raise the child together, the non-biological, non-adoptive partner has standing to seek visitation and custody under Domestic Relations Law § 70(a)' ... . Here, Joseph sufficiently demonstrated by clear and convincing evidence that he and Frank entered into a pre-conception agreement to conceive the children and to raise them together as their parents. Although the surrogacy contract is not enforceable as against Renee to deprive her of standing under Domestic Relations Law § 70 (see Domestic Relations Law § 124[1]), it is evidence of the parties' unequivocal intention that Frank and Joseph become the parents of the children. Moreover, Frank and Joseph equally shared the rights and responsibilities of parenthood, and were equally regarded by the children as their parents. Therefore, Joseph established standing to seek custody or visitation under Domestic Relations Law § 70...". ***Matter of Frank G. v. Renee P.-F.*, 2016 N.Y. Slip Op. 05946, 2nd Dept 9-8-16**

FAMILY LAW, CONTRACT LAW.

SURROGACY CONTRACT DOES NOT DEPRIVE MOTHER OF HER PARENTAL RIGHTS.

In a proceeding related to Matter of Frank G... summarized above, the Second Department noted that the surrogacy contract did not deprive the mother of the child (Renee P.-F.) of her parental rights: "Renee P.-F.'s parental rights were not terminated by virtue of her entering into a surrogacy contract. Surrogate parenting contracts have been declared contrary to the public policy, and are void and unenforceable (see Domestic Relations Law § 122). Moreover, Domestic Relations Law § 124(1) expressly states that 'the court shall not consider the birth mother's participation in a surrogate parenting contract as adverse to her parental rights, status, or obligations.' " ***Matter of Giavonna F. P.-G. (Frank G.–Renee P.-F.)*, 2016 N.Y. Slip Op. 05948, 2nd Dept 9-8-16**

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