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FIRST DEPARTMENT

CIVIL PROCEDURE, CONTRACT LAW, CORPORATION LAW.

NEW YORK'S BORROWING STATUTE APPLIES PURSUANT TO CONTRACTUAL CHOICE OF LAW PROVISION; UNDER THE BORROWING STATUTE, THE CANADIAN STATUTE OF LIMITATIONS APPLIES AND RENDERS THE ACTION BROUGHT BY A CANADIAN PLAINTIFF UNTIMELY.

The First Department, in a full-fledged opinion by Justice Gische, determined a broad choice of law provision in a contract required the application of New York's borrowing statute (CPLR 202). Plaintiff is a corporation incorporated under the law of the Province of Ontario Canada. The statute of limitations for breach of contract under Ontario law is two years. New York's statute of limitations is six years. Because, under the facts, New York's borrowing statute applies and therefore the Ontario statute of limitations controls, the action is untimely: "The borrowing statute is itself a part of New York's procedural law and is a statute of limitations in its own right, existing as a separate procedural rule within the rules of our domestic civil practice, addressing limitations of time ... . Thus, applying the borrowing statute is perfectly consistent with a broad choice-of-law contract clause that requires New York procedural rules to apply to the parties' disputes." ***2138747 Ontario, Inc. v. Samsung C&T Corp.*, 2016 N.Y. Slip Op. 06671, 1st Dept 10-11-16**

CRIMINAL LAW, EVIDENCE.

DEFENSE DID NOT OPEN THE DOOR TO HEARSAY EVIDENCE OF A CODEFENDANT'S CONVICTION; CRITERIA FOR BUSINESS RECORDS EXCEPTION TO HEARSAY RULE NOT MET; CONVICTIONS REVERSED.

The First Department, reversing the defendants' fraud-related convictions, determined (1) the defense did not "open the door" to the admission of hearsay evidence that a nontestifying codefendant (Solomon) pled guilty in a related matter, and (2) the criteria for the business records exception to the hearsay rule were not met: "... [T]he inquiry whether a defendant opened the door to the admission of otherwise inadmissible evidence 'is twofold — whether and to what extent, the evidence or argument said to open the door is incomplete and misleading, and what if any otherwise inadmissible evidence is reasonably necessary to correct the misleading impression' ... . * * * A party seeking to introduce evidence under the exception must demonstrate that 'each participant in the chain producing the record, from the initial declarant to the final entrant, [was] acting within the course of regular business conduct' when the record was made ... . We find that although bank personnel were acting under a business duty when the record was created, the record fails to demonstrate that Solomon was acting under such a duty when he supplied the information at issue." ***People v. Schlesinger Elec. Contrs., Inc.*, 2016 N.Y. Slip Op. 06742, 1st Dept 10-13-16**

MENTAL HYGIENE LAW, EVIDENCE.

PSYCHIATRIC CENTER DID NOT PRESENT SUFFICIENT EVIDENCE TO JUSTIFY CONTINUED RETENTION OF RESPONDENT.

The First Department affirmed the denial of the psychiatric center's (petitioner's) application for continued retention of respondent pursuant to Mental Hygiene Law § 9.33. The need for continued supervision was not demonstrated by conclusory allegations that respondent posed a threat of harm or by unsupported allegations of sexual misconduct: "Although respondent's treating psychiatrist stated in conclusory fashion that the requirements for continued involuntary retention were met, the court reasonably rejected these conclusions on the ground that they were not strongly supported by the evidence ... . The psychiatrist indicated that respondent recognized his mental illness, that he had been compliant with his medication regimen, and that his treatment in the facility for more than two years had alleviated the manic symptoms he had initially presented upon admission. The psychiatrist acknowledged that respondent's medications and therapy programs would remain readily available to him on an outpatient basis, and the psychiatrist provided no reason to doubt respondent's claim that he would continue taking his medication once released ... ". ***Matter of Gary F.*, 2016 N.Y. Slip Op. 06655, 1st Dept 10-11-16**

MUNICIPAL LAW (NYC).

NYC TAXI AND LIMOUSINE COMMISSION'S RULES RE: HYBRID AND WHEELCHAIR ACCESSIBLE TAXICABS AND LIVERY VEHICLES UPHELD.

The First Department, in a full-fledged opinion by Justice Kahn too detailed to be summarized here, upheld the validity of the New York City Taxi and Limousine Commission's (TLC's) "Accessibility Rules" which aim to increase the number of hybrid and wheel-chair-accessible taxicabs and livery vehicles: "In keeping with [the] legislative intent, the TLC promulgated sections 51-03, 58-50 and the other aspects of the Accessibility Rules. In those rules, the TLC established a precondition for commencement of the program that encouraged the development of a vehicle that is both compliant with [Administrative Code] § 19-533 [re: hybrid vehicles] and accessible, consistent with its twin statutory mandates of promoting cleaner air and serving disabled passengers. Recognizing that such a vehicle might not be developed, however, the TLC included language in this rule limiting the time period in which this precondition remained in effect to no later than January 1, 2016, 20 months after the Accessibility Rules were promulgated. In doing so, the TLC rationally promulgated rules providing for a reasonable period of time for the development of an accessible hybrid electric vehicle while ensuring that, at minimum, the TLC's mandate to increase the number of accessible taxicabs would be fulfilled." ***Matter of Clair v. City of New York*, 2016 N.Y. Slip Op. 06768, 1st Dept 10-13-16**

PERSONAL INJURY, LABOR LAW-CONSTRUCTION LAW.

ACCIDENT CAUSED BY HIGH PRESSURE, NOT GRAVITY; INJURY NOT COVERED BY LABOR LAW 240(1).

The First Department, reversing Supreme Court, determined plaintiff's injury was not the result of the force of gravity and was therefore not covered under Labor Law 240(1): "Plaintiff ... was struck by a pipe while it was being flushed clean with a highly pressurized mixture of air, water, and a rubber 'rabbit' device. The movement of this mixture through the pipe failed to bring the mechanism of plaintiff's injury within the ambit of section 240(1) because it did not involve 'the direct consequence of the application of the force of gravity to an object' ... . The mixture in the pipe did not move through the exercise of the force of gravity, but was rather intentionally propelled through the pipe through the use of high pressure ...". ***Joseph v. City of New York*, 2016 N.Y. Slip Op. 06649, 1st Dept 10-11-16**

SECOND DEPARTMENT

ANIMAL LAW, LANDLORD-TENANT.

QUESTION OF FACT WHETHER LANDLORD LIABLE FOR BITE BY TENANT'S DOG.

The Second Department determined Supreme Court properly denied the landlord's (appellant's) motion for summary judgment in this dog bite case. The plaintiff was bitten by a tenant's dog. The court explained the relevant law: "... [To] 'recover against a landlord for injuries caused by a tenant's dog on a theory of strict liability, the plaintiff must demonstrate that the landlord: (1) had notice that a dog was being harbored on the premises; (2) knew or should have known that the dog had vicious propensities, and (3) had sufficient control of the premises to allow the landlord to remove or confine the dog' ... . [T]he appellant established his prima facie entitlement to judgment as a matter of law dismissing the third cause of action insofar as asserted against him ... . In support of his motion, he submitted, inter alia, his deposition transcript and the deposition transcripts of the injured plaintiff and [the tenant]. This evidence demonstrated, prima facie, that the appellant was not aware, nor should have been aware, that the dog had any vicious propensities ... . In opposition, however, the plaintiffs raised triable issues of fact as to whether the dog did indeed have vicious propensities and whether the appellant knew or should have known of them ...". ***Kim v. Hong*, 2016 N.Y. Slip Op. 06698, 2nd Dept 10-12-16**

CRIMINAL LAW.

PENNSYLVANIA BURGLARY CONVICTION CANNOT SERVE AS A PREDICATE FELONY IN NEW YORK.

The Second Department determined a Pennsylvania burglary conviction could not serve as a predicate felony in New York because of the absence of the "knowingly" element: "... [T]here is no element in the Pennsylvania statute comparable to the element in the analogous New York statute that an intruder 'knowingly' enter or remain unlawfully in the premises (Penal Law § 140.20). The absence of this scienter requirement from the Pennsylvania burglary statute renders improper the use of the Pennsylvania burglary conviction as the basis of the defendant's predicate felony adjudication ...". ***People v. Flores*, 2016 N.Y. Slip Op. 06723, 2nd Dept 10-12-16**

CRIMINAL LAW, ATTORNEYS.

DEFENDANT ENTITLED TO A HEARING RE: WHETHER HIS CONVICTION SHOULD BE VACATED; DEFENDANT SUFFICIENTLY ALLEGED HE WAS NOT ADVISED OF THE DEPORTATION CONSEQUENCES OF THE PLEA, AND HE WOULD NOT HAVE PLED GUILTY HAD HE BEEN AWARE OF THE CONSEQUENCES.

The Second Department determined defendant was entitled to a hearing on his motion to vacate his conviction based upon ineffective assistance of counsel. Defendant sufficiently alleged he was misinformed about the deportation consequences

of his guilty plea and he would not have pled guilty if he had known of those consequences: "Here, the defendant alleged in an affidavit that his attorney advised him that there would be no immigration consequences to his plea of guilty if he was sentenced to not more than one year in jail, and that immigration authorities would not seek him out in Massachusetts, where he resided, since his case was in New York. * * * ... [A]lthough the defendant's claim of misadvice was based solely on his own sworn allegations, the defendant explained his failure to submit an affirmation from his former attorney and it is unlikely, as the People suggest, that there were witnesses to counsel's provision of confidential advice or any documents created reflecting the content of that advice * * * ... [T]he defendant averred that he had been a lawful permanent resident for 24 years, that he had a 7-year-old son, that his parents and four siblings all lived in the United States, and that he was employed at the same job for 10 years. Further, if sentenced as a first felony drug offender, as he was in connection with his plea of guilty, the defendant's sentencing exposure was a maximum of 5½ years of imprisonment (see Penal Law § 70.70[2][a][ii]). In light of these circumstances, there is a question of fact as to whether it is reasonably probable that the defendant would not have pleaded guilty had he been correctly advised as to the deportation consequences of the plea ...". ***People v. Roberts*, 2016 N.Y. Slip Op. 06729, 2nd Dept 10-12-16**

FAMILY LAW.

CONDITIONS OF FATHER'S VISITATION CANNOT BE DETERMINED BY A THERAPIST.

The Second Department determined Family Court improperly left the conditions for father's visitation with his child up to a therapist: "... [I]t is for the Family Court—not the child's therapist—to exercise its own discretion to determine how, when, and under what terms and conditions the father's visitation with the subject child ... is to resume ...". ***Matter of Rogan v. Guida*, 2016 N.Y. Slip Op. 06716, 2nd Dept 10-12-16**

INSURANCE LAW.

INSURER WAS NOTIFIED OF PLAINTIFFS' LAWSUIT BY THE INJURED PLAINTIFFS NOT THE INSURED; DISCLAIMER ONLY ADDRESSED INSURED'S NOTIFICATION FAILURE AND WAS THEREFORE INEFFECTIVE AGAINST PLANTIFFS.

The Second Department determined the insurer's disclaimer was ineffective against the injured plaintiffs. The policy required that the insured, here the snow removal contractor (Florite), notify the insurer of any lawsuit by an injured party. The insured did not notify the insurer of the plaintiffs' suit. After the plaintiffs were awarded a judgment, the plaintiffs notified the insurer. The insurer disclaimed coverage based solely on the insured's failure to notify it, but did not disclaim based upon any flaw in the plaintiffs' notification. In this situation, a disclaimer must address any flaws in both the insured's and the injured plaintiffs' notification: "Here, notice of the underlying action was not provided by Florite, but was provided directly by the plaintiffs in September 2010. In its subsequent notice of disclaimer, however, the insurer addressed only Florite's failure to provide notice of the underlying action, and did not directly address the notice provided by the plaintiffs." ***Pollack v. Scottsdale Ins. Co.*, 2016 N.Y. Slip Op. 06693, 2nd Dept 10-12-16**

MENTAL HYGIENE LAW.

SEX OFFENDER'S PETITION TO TERMINATE STRICT AND INTENSIVE SUPERVISION AND TREATMENT SHOULD HAVE BEEN GRANTED.

The Second Department determined a sex offender's petition to terminate his strict and intensive supervision and treatment (SIST) should have been granted: "... [T]he State ... failed to establish by clear and convincing evidence that the appellant had "serious difficulty in controlling" himself from committing sex offenses within the meaning of Mental Hygiene Law § 10.03(i). The only evidence in the record was that, while the appellant had a long history of committing sex offenses, the appellant had not committed any offense since 2002, had complied with all of his SIST requirements, and had been successful in treatment, where he learned and used skills and modalities to help him control himself from engaging in criminal sexual conduct ...". ***Matter of State of New York v. (Anonymous)*, 2016 N.Y. Slip Op. 06717, 2nd Dept 10-12-16**

MUNICIPAL LAW, PERSONAL INJURY.

VILLAGE FAILED TO DEMONSTRATE MELTING AND FREEZING OF A PILE OF SNOW DID NOT CREATE THE HAZARD, SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined summary judgment in favor of the defendant village should not have been granted in this sidewalk slip and fall case. Although the village demonstrated it did not have written notice of snow and ice on the sidewalk, it did not demonstrate its practice of piling snow did not create the hazard: "While the mere failure to remove all snow or ice from a sidewalk is an act of omission, rather than an affirmative act of negligence ... , a municipality's act in piling snow as part of its snow removal efforts, which snow pile then melts and refreezes to create a dangerous icy condition, constitutes an affirmative act excepting the dangerous condition from the prior written notice requirement ... . The defendant's evidence demonstrated that the temperature rose and remained above freezing for an extended period of time on the day before the plaintiff's accident, after the defendant created the snow piles. On the day of the

plaintiff's accident, however, the temperature dropped to below freezing. While the defendant submitted an affidavit of an employee who stated that he applied sand and salt to the area of the sidewalk where the plaintiff fell sometime between 7:30 a.m. and 4:00 p.m. on the day of plaintiff's accident, the plaintiff testified at his hearing held pursuant to General Municipal Law § 50-h that there was no sand or salt on the sidewalk at the time of his fall. Evidence submitted by the defendant also indicates that the ice upon which the plaintiff fell was located on a portion of the sidewalk that sloped down from the snow piles." ***Larenas v. Incorporated Vil. of Garden City*, 2016 N.Y. Slip Op. 06684, 2nd Dept 10-12-16**

MUNICIPAL LAW (NYC), PERSONAL INJURY, CIVIL PROCEDURE.

DOCTRINE OF EQUITABLE ESTOPPEL APPLIED TO DENY NYC TRANSIT AUTHORITY'S MOTION TO DISMISS FOR FAILURE TO SERVE A NOTICE OF CLAIM; THE NOTICE HAD BEEN TIMELY SERVED ON THE METROPOLITAN TRANSIT AUTHORITY AND A 50-h HEARING HAD BEEN HELD.

The Second Department, reversing Supreme Court, determined the doctrine of equitable estoppel should have been applied to deny the NYC Transit Authority's (NYCTA's) motion to dismiss for failure to timely serve a notice of claim. The notice of claim had been timely served on the Metropolitan Transit Authority (MTA) and a 50-h hearing had been held: "Although the MTA and NYCTA share an affiliation, they are separate entities ... . Thus, service of a notice of claim upon the MTA does not satisfy the condition precedent of serving a notice of claim upon the NYCTA ... . However, a municipal corporation may be equitably estopped from asserting lack of notice of claim when it has wrongfully or negligently engaged in conduct that misled or discouraged a party from serving a timely notice of claim or making a timely application for leave to serve a late notice of claim, and when that conduct was justifiably relied upon by that party ... . 'By applying the doctrine of equitable estoppel to notice of claim situations, the courts may insure that statutes like section 50-e of the General Municipal Law, do not become a trap to catch the unwary or the ignorant' ...". ***Konner v. New York City Tr. Auth.*, 2016 N.Y. Slip Op. 06683, 2nd Dept 10-12-16**

PERSONAL INJURY.

DEFENDANT PROPERTY OWNER DID NOT DEMONSTRATE A LACK OF CONSTRUCTIVE NOTICE OF SNOW AND ICE ON THE SIDEWALK AND DID NOT DEMONSTRATE HE DID NOT CREATE THE HAZARD BY SNOW REMOVAL, SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined defendant property-owner should not have been granted summary judgment in this sidewalk slip and fall case. Under the NYC Administrative Code the property owner had a duty to keep the sidewalk clear of ice and snow. The evidence submitted by defendant did not demonstrate a lack of constructive notice of the snow and ice or that he did not create the hazard by efforts to remove snow and ice: "Administrative Code of the City of New York § 7-210 imposes a duty upon property owners to maintain the sidewalk adjacent to their property, and shifts tort liability to such owners for the failure to maintain the sidewalk in a reasonably safe condition, including the negligent failure to remove snow and ice ... . However, Administrative Code of the City of New York § 7-210 does not impose strict liability upon the property owner, and the injured party has the obligation to prove the elements of negligence to demonstrate that an owner is liable ... . Thus, to prevail on his summary judgment motion, the defendant was required to establish that he neither created the alleged hazardous condition nor had actual or constructive notice of its existence for a sufficient length of time to discover and remedy it ... . Here, in support of his motion, the defendant submitted evidence which included his own deposition testimony. The defendant's deposition testimony indicated that while he regularly cleared snow from the sidewalk in front of his building during the winter months, he had no specific recollection of what days it snowed during February 2013, or what snow removal efforts he undertook during that month." ***Kabir v. Budhu*, 2016 N.Y. Slip Op. 06682, 2nd Dept 10-12-16**

PERSONAL INJURY, CONTRACT LAW.

ELEVATOR MAINTENANCE COMPANY UNDER CONTRACT WITH NURSING HOME MAY BE LIABLE IN TORT TO THIRD PARTY INJURED BY ELEVATOR MALFUNCTION.

The Second Department determined the company (Mainco) under contract with the Bronx Center (a nursing home) to maintain an elevator could be liable to plaintiff, who was injured when the elevator fell. The court explained the analytical criteria for liability in tort to third parties stemming from a contract: "Mainco failed to demonstrate its prima facie entitlement to judgment as a matter of law dismissing the complaint insofar as asserted against it on the ground that it did not have a duty to the plaintiff. 'An elevator company which agrees to maintain an elevator in safe operating condition may be liable to a passenger for failure to correct conditions of which it has knowledge or failure to use reasonable care to discover and correct a condition which it ought to have found' ... . Further, 'a party who enters into a contract to render services may be said to have assumed a duty of care—and thus be potentially liable in tort—to third persons . . . where the contracting party has entirely displaced the other party's duty' of safe maintenance ... . ***Fajardo v. Mainco El. & Elec. Corp.*, 2016 N.Y. Slip Op. 06678, 2nd Dept 10-12-16**

PERSONAL INJURY, MUNICIPAL LAW.

ABUTTING PROPERTY OWNER NOT LIABLE IN NEGLIGENCE FOR INJURY TO POLICE OFFICER DUE TO THE CONDITION OF THE SIDEWALK; HOWEVER PROPERTY OWNER MAY BE LIABLE UNDER GENERAL MUNICIPAL LAW 205-e BASED UPON CODE VIOLATIONS RE: SIDEWALK MAINTENANCE.

The Second Department determined the common law negligence cause of action brought by a police officer against the owner of property abutting the sidewalk where the officer allegedly slipped and fell, was properly dismissed. The applicable village and town codes did not make an abutting landowner liable in tort to someone injured on the sidewalk. However, the police officer's action under General Municipal Law 205-e properly survived summary judgment. A property owner's violation of a code provision requiring maintenance of the sidewalk was a proper basis for an action under General Municipal Law 205-e: "... [t]he Supreme Court properly denied that branch of the defendant's motion which was for summary judgment dismissing the second cause of action, which seeks to recover damages pursuant to General Municipal Law § 205-e. 'A police officer seeking to recover under General Municipal Law § 205-e must identify a statute or ordinance with which the defendant failed to comply and must, in addition, set forth facts from which it may be inferred that the defendant's negligence directly or indirectly caused harm to him or her' ... . As a prerequisite to recovery pursuant to a General Municipal Law § 205-e cause of action, a police officer must demonstrate injury resulting from negligent noncompliance with a requirement found in a well-developed body of law and regulation that imposes clear legal duties ... . * * * Section 302.3 of the 2007 Property Maintenance Code of New York State (see 19 NYCRR 1226.1) has been found by this Court to be a proper predicate for recovery under General Municipal Law § 205-e ... . Further, § 181-11 of the Town Code and § 250-27 of the Village Code are well-developed bodies of law that impose clear duties upon every property owner to keep his or her sidewalk in good and safe repair." ***Lewis v. Palazzolo*, 2016 N.Y. Slip Op. 06686, 2nd Dept 10-12-16**

REAL PROPERTY.

COTENANT ACQUIRED THE OTHER COTENANT'S INTEREST BY ADVERSE POSSESSION.

The Second Department determined, under the law applicable at the time, a cotenant in possession (Midgley, Jr.) acquired full title to the property (i.e., acquired the cotenant's interest) by adverse possession: "Midgley, Sr., left his estate, in equal parts, to Midgley, Jr., and a man named Robert E. Sayre, Sr. (hereinafter Sayre, Sr.). Midgley, Jr., claimed that, in 1971, Sayre, Sr., refused to participate in the operation or maintenance of the property and that Midgley, Jr., exclusively possessed and operated the property from that point forward. Midgley, Jr., paid the real estate taxes on the property and leased the property to various farmers and a nursery. All rents from these tenants were paid to Midgley, Jr. Midgley, Jr., farmed the property, growing rye, during the years that he could not find a suitable tenant. Sayre, Sr., died in 2005. In 2009, Midgley, Jr., commenced this action, alleging that he had become the sole lawful owner of the property by adverse possession and, therefore, was entitled to a judgment barring any claim to the property by, among others, the heirs of Sayre, Sr. Under the law existing at the time title allegedly vested here, in the absence of an overt acknowledgment during the statutory period that ownership rested with another party, actual knowledge of the true owner, or co-owner as is the case here, did not destroy the element of claim of right ... . 'Where . . . the party claiming adverse possession is a tenant-in-common in exclusive possession, the statutory period required by RPAPL 541 is 20 years of continuous exclusive possession before a cotenant may acquire full title by adverse possession' ...". ***Midgley v. Phillips*, 2016 N.Y. Slip Op. 06688, 2nd Dept 10-12-16**

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