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FIRST DEPARTMENT

CONTRACT LAW.

TERMS OF CONTRACT WERE NOT ABSOLUTE AND UNCONDITIONAL, MOTION TO DIMSISS BREACH AND REPUDIATION OF CONTRACT CAUSE OF ACTION SHOULD NOT HAVE BEEN GRANTED.

The First Department, over a two justice dissent, determined that the motion to dismiss the breach and repudiation of contract cause of action should not have been granted. The decision is fact-specific and cannot fairly be summarized here. In essence, plaintiff alleged the defendant did not have the right under the contract to refuse to cooperate in the settlement of a claim for the full amount. The majority concluded the language of the contract did not provide defendant with an unconditional and absolute right to refuse to cooperate by refusing to agree to certain reassignments of claims as part of the settlement: "Characterizing the assignment of the ... claims as absolute and unconditional, the dissent ... would hold that plaintiff did not have a contractual right to compel [defendant] to reassign those claims to a third party as a condition of a settlement that attributed no value to them. However, contrary to these findings, the assignment was not absolute and unconditional ...". ***Guidance Enhanced Green Terrain, LLC v. Bank of Am. Merrill Lynch*, 2017 N.Y. Slip Op. 00068, 1st Dept 1-5-17**

CORPORATION LAW.

PIERCING THE CORPORATE VEIL (ALTER EGO) ALLEGATIONS PROPERLY SURVIVED MOTION TO DISMISS.

The First Department determined defendants' motion to dismiss breach of contract causes of action founded in part on piercing the corporate veil was properly denied: "[Plaintiff] alleged that [defendant] Diaz Rivera, exercised 'complete dominion and control' and 'complete business discretion' over 'all aspects of [the corporation's] management and operations,' and that [the corporation] and Diaz Rivera failed 'to follow normal and customary corporate procedures with regard to [the corporation],' in that [the corporation] 'fail[ed] to hold required meetings for [the corporation's] partners, [and] fail[ed] to prepare and keep corporate records.' Finally, [defendant] alleged that Diaz Rivera, with an improper motive, commingled his funds with [corporation] funds, resulting in inadequate capitalization. ... We find that the allegations of an absence of corporate formalities, inadequate capitalization, and the commingling of corporate and personal funds, as well as the allegations that Diaz Rivera directed [the corporation] to take various actions that harmed [defendant], including failing to transfer property rights, siphoning resort revenues, and incurring unnecessary taxes, are sufficient to withstand this pre-answer motion to dismiss the complaint, based on alter ego liability, as against Diaz Rivera." ***Cargill Soluciones Empresariales, S.A. de C.V., SOFOM, ENR v. Desarrolladora Farallon S. de R.L. de C.V.*,2017 N.Y. Slip Op. 00069, 1st Dept 1-5-17**

CRIMINAL LAW.

DEFENDANT NOT ENTITLED TO JURY TRIAL ON MISDEMEANORS, DESPITE POSSIBLE DEPORTATION UPON CONVICTION.

The First Department determined defendant was not entitled to a jury trial on misdemeanor charges, even though conviction might result in deportation: "... '[A] defendant's right to a jury trial attaches only to serious offenses, not to petty crimes, the determining factor being length of exposure to incarceration' ... . 'An offense carrying a maximum prison term of six months or less is presumed petty, unless the legislature has authorized additional statutory penalties so severe as to indicate that the legislature considered the offense serious' ... . Despite the gravity of the impact of deportation on a convicted defendant (see *Padilla v. Kentucky*, 559 US 356 [2010]), deportation consequences are still collateral ... . and do not render an otherwise petty offense 'serious' for jury trial purposes. Furthermore, under defendant's approach, in order to decide whether to grant a jury trial to a noncitizen charged with B misdemeanors, the court would need to analyze the immigration consequences of a particular conviction on the particular defendant, and we find this to be highly impracticable. We note that the immigration impact of this defendant's conviction is unclear. He is already deportable as an undocumented alien, and only claims that the conviction would block any hypothetical effort to legalize his status." ***People v. Suazo*, 1st Dept 1-3-172017 N.Y. Slip Op. 00030**

LABOR LAW-CONSTRUCTION LAW.

FAILURE TO TIE OFF HARNESS WAS NOT THE SOLE PROXIMATE CAUSE OF PLAINTIFF'S FALL, DEFENDANTS DID NOT DEMONSTRATE PLAINTIFF KNEW OF A SAFE PLACE TO TIE OFF, PLAINTIFF ENTITLED TO SUMMARY JUDGMENT ON LABOR LAW 240(1) AND 241(6) CAUSES OF ACTION.

The First Department determined plaintiff was entitled to summary judgment on both his Labor Law 240(1) and 241(6) causes of action. Defendants argued that plaintiff's failure to tie off a harness was the sole proximate cause for the accident (a fall from an elevated platform). The First Department found that defendants did not demonstrate plaintiff had been instructed where to tie off, and did not demonstrate plaintiff knew where to tie off: "Plaintiff established prima facie that while subjected to an elevation-related risk, he was injured due to defendants' failure to provide him with proper fall protection, namely, an appropriate place to which to attach his harness." ***Anderson v. MSG Holdings, L.P.*, 2017 N.Y. Slip Op. 00002, 1st Dept 1-3-17**

LABOR LAW-CONSTRUCTION LAW.

FALL ON THE SURFACE OF SCAFFOLDING NOT COVERED BY LABOR LAW 240(1), OVERSIGHT OF SITE SAFETY NOT ENOUGH FOR LABOR LAW 200 LIABILITY, SLIP AND FALL ON DUST ENTITLED PLAINTIFF TO SUMMARY JUDGMENT ON LABOR LAW 241(6) CAUSE OF ACTION.

The First Department determined plaintiff was entitled to summary judgment on his Labor Law 241(6) cause of action. Plaintiff slipped on accumulated dust and fell to the scaffolding surface (he did not fall off the scaffolding). The Labor Law 240(1) cause of action was properly dismissed because the fall was not related to the failure to provide a safety device. The Labor Law 200 cause of action was properly dismissed because the defendant's general oversight of the worksite did not amount to supervisory control over the means or methods of plaintiff's work: "The Labor Law § 240(1) claim was correctly dismissed since plaintiff's injuries 'result[ed] from a separate hazard wholly unrelated to the danger that brought about the need for the safety device[s] in the first instance' ... . Plaintiff does not point to any evidence that he was injured as a result of any attempts to avoid falling off the scaffold ... . The accumulation of paint chips and dust on the platform on which plaintiff was working 'was one of the usual and ordinary dangers at a construction site[,] to which the extraordinary protections of Labor Law § 240(1) [do not] extend' ... . The Labor Law § 200 and common-law negligence claims were correctly dismissed since the evidence that defendant's safety officer instructed plaintiff and his coworkers on safety rules, exercised general oversight over site safety, and conducted site walk-throughs does not establish that defendant exercised supervisory control over the means or methods of plaintiff's work ...". ***Serrano v. Consolidated Edison Co. of N.Y. Inc.*, 2017 N.Y. Slip Op. 00003, 1st Dept 1-3-17**

LABOR LAW-CONSTRUCTION LAW.

PLAINTIFF ALLEGED HE WAS PROVIDED WITH A DEFECTIVE LADDER, QUESTION OF FACT WHETHER THE LADDER WAS A DANGEROUS CONDITION CREATED BY DEFENDANT OR OF WHICH DEFENDANT HAD NOTICE, LABOR LAW 200 CAUSE OF ACTION SHOULD NOT HAVE BEEN DISMISSED.

The First Department, reversing Supreme Court, determined plaintiff's Labor Law 200 claims should not have been dismissed. Plaintiff alleged defendant provided him with a defective ladder (proper footing missing) and he was injured when the ladder slipped from under him. The court explained that the proper analysis, where the accident did not arise from the means or methods of work, is whether defendant created or had notice of the dangerous condition: "Where, as here, plaintiff alleged that defendants — the premises owners — provided him with the defective ladder, 'the legal standard that governs claims under Labor Law § 200 is whether the owner created the dangerous or defective condition or had actual or constructive notice thereof,' not whether the accident arose out of the means and methods of plaintiff's work … . The conflicting deposition testimony submitted by the parties shows that there is a triable issue as to whether defendants provided plaintiff with the allegedly defective ladder. Moreover, plaintiff's testimony that the ladder was missing its feet was sufficient to raise an issue of fact as to whether defendants had constructive notice of the defect because of its visible and apparent nature ...". ***Jaycoxe v. VNO Bruckner Plaza, LLC*, 2017 N.Y. Slip Op. 00012, 1st Dept 1-3-17**

MUNICIPAL LAW.

NEW YORK CITY LOCAL LAW BANNING E-CIGARETTES DOES NOT VIOLATE THE ONE SUBJECT RULE OF THE NEW YORK STATE CONSTITUTION, THE MUNICIPAL HOME RULE LAW, OR THE NEW YORK CITY CHARTER.

The First Department, in a full-fledged opinion by Justice Saxe, determined a New York City Local Law (Local Law 152), which included electronic or e-cigarettes in the law's smoking ban, did not violate the "one subject" rule in the New York State Constitution. Although the court found that the constitutional prohibition only applies to state statutes, it noted that the Municipal Home Rule Law and the New York City Charter have a similar prohibition. The idea behind the "one subject" rule is to prevent a statute which ostensibly relates to a particular subject from including "hidden" provisions which address another unrelated subject: "Municipal Home Rule Law § 20(3) states that '[e]very such local law shall embrace only one subject. The title shall briefly refer to the subject matter'; the New York City Charter provides that '[e]very local law

shall embrace only one subject. The title shall briefly refer to the subject-matter' (NY City Charter § 32). Local Law 152 does not violate those requirements. It was titled 'A Local Law to amend the administrative code ..., in relation to the regulation of electronic cigarettes.' The regulation of electronic cigarettes was the only subject of the bill and that subject was clearly stated in its title. Therefore, the bill met the transparency requirement of the one-subject rule and adequately apprised the City Council and members of the public of its contents and purpose ...". ***NYC C.L.A.S.H. v. City of New York*, 2017 N.Y. Slip Op. 00042, 1st Dept 1-3-17**

PERSONAL INJURY, MUNICIPAL LAW.

BIG APPLE MAP RAISED QUESTION OF FACT WHETHER THE CITY WAS AWARE OF MANHOLE-SIDEWALK DEFECT, SUMMARY JUDGMENT SHOULD NOT HAVE BEEN AWARDED TO THE CITY IN THIS SLIP AND FALL CASE.

The First Department determined the city's (NYC's) motion for summary judgment in this sidewalk slip and fall case should not have been granted. There was a question of fact whether the Big Apple Map gave the city notice of the defect: "The affidavit of Ralph Gentles, an associate production manager of Sanborn Map Co., Inc. responsible for the legend on Big Apple Maps, wherein he averred that the symbol for a 'raised or uneven portion of the side walk,' which appears on the Big Apple Map in the area where plaintiff tripped over a raised manhole cover, also applied to the manhole cover which would have been considered part of the sidewalk, was competent evidence of the business or professional custom or practice of the designations used by the company ... . As such, it raised a triable issue of fact as to whether the Big Apple Map gave the City prior written notice of the defect, and the court should have denied the City's motion for summary judgment predicated on the lack of such notice." ***Hennessey-Diaz v. City of New York*, 2017 N.Y. Slip Op. 00025, 1st Dept 1-3-17**

PERSONAL INJURY, WORKERS' COMPENSATION LAW, EMPLOYMENT LAW.

METROPOLITAN OPERA STAR'S NEGLIGENCE SUIT STEMMING FROM A FALL DURING A PERFORMANCE SURVIVED A MOTION TO DISMISS WHICH ARGUED SHE WAS AN EMPLOYEE AND THE WORKERS' COMPENSATION LAW WAS HER ONLY REMEDY.

The First Department, in a full-fledged opinion by Justice Acosta, determined the defendant Metropolitan Opera's motion to dismiss the complaint was properly denied. Plaintiff is a singer who has performed with the Met for over twenty years as a featured soloist. Plaintiff, during a performance, fell from an elevated platform and was injured. She sued in negligence. The Met argued plaintiff was an employee and her only recourse was workers' compensation benefits. The court concluded the negligence cause of action was viable: WCL [Workers' Compensation Law] § 2(4) defines 'employee' to include 'a professional musician or a person otherwise engaged in the performing arts who performs services as such for ... a theatre ... or similar establishment ... unless, by written contract, such musician or person is stipulated to be an employee of another employer covered by this chapter.' Here, plaintiff's services were provided to the Met pursuant to a per-performance contractor's agreement, entered into between her corporation and the Met, that provided that the corporation 'agree[d] to furnish to The Met the services of its employee, Wendy White . . ., as singer on an individual performance basis.' Plaintiff's corporation meets the definition of an 'employer covered by this chapter,' inasmuch as it is a corporation 'having one or more persons in employment' (WCL § 2[3]). Thus, by written contract, plaintiff was stipulated to be an employee of another employer ... . The Met is correct that the plain language of WCL § 2(4) ... draws no distinction between regular performers and stars. * * * ... Here, the legislative history supports plaintiff's suggested distinction, since it indicates that the statutory definition of employees was intended to protect the vast majority of performers, who are not 'stars,' and that the statutory exception was designed to exclude those performers with the clout to negotiate the terms of their own engagements." ***White v. Metropolitan Opera Assn., Inc.*, 2017 N.Y. Slip Op. 00093, 1st Dept 1-5-17**

THIRD DEPARTMENT

DISCIPLINARY HEARINGS (INMATES).

HEARING OFFICER'S DENIAL OF REQUEST FOR A WITNESS AND FAILURE TO INQUIRE INTO INMATE WITNESSES' REFUSAL TO TESTIFY REQUIRED A NEW HEARING.

The Third Department determined the hearing officer's denial of petitioner's request for a witness and failure to inquire into the reasons witnesses refused to testify required a new hearing: "... [T]he Hearing Officer improperly denied petitioner's request to have a State Police investigator testify and failed to make a proper inquiry into the reasons that certain inmate witnesses refused to testify. Although the Hearing Officer denied the investigator's testimony as irrelevant because he was not present at the time of the attack and his investigation was separate from the one conducted by correction officials, petitioner maintained that the investigator obtained statements during the course of his investigation that materially contradicted the evidence relied upon by correction officials. Inasmuch as such testimony would have been potentially helpful to petitioner's defense, the Hearing Officer erred in denying it. However, given that the Hearing Officer articulated a good-faith reason for such denial, this was at most a regulatory violation entitling petitioner to a new hearing and not

expungement ... . As for the inmate witnesses' refusal to testify, the Hearing Officer relied upon the notations contained in the employee assistant form indicating that they were interviewed as potential witnesses, but did not agree to testify. The Hearing Officer, however, did not make any inquiry into the reasons for their refusal or obtain written refusal forms from them. Although this constituted a denial of petitioner's right to call witnesses, it too was only a regulatory violation inasmuch as the employee assistant had ascertained whether the inmate witnesses would be willing to testify and the Hearing Officer's reliance on the employee assistant form constitutes a good-faith basis for denying petitioner's request ...". ***Matter of Mosley v. Annucci*, 2017 N.Y. Slip Op. 00061, 3rd Dept 1-5-17**

WORKERS' COMPENSATION LAW, TRUSTS AND ESTATES.

MANY (BUT NOT ALL) CAUSES OF ACTION ALLOWED TO GO FORWARD IN AN ACTION AGAINST ADMINISTRATORS AND TRUSTEES OF A WORKERS' COMPENSATION TRUST FOUND TO BE $188 MILLION IN DEBT.

The Third Department, in a full-fledged opinion by Justice Egan, determined that certain causes of action can go forward in a lawsuit by the Workers' Compensation Board against administrators and trustees of the Health Care Providers Self-Insurance Trust. The trust, which was to provide workers' compensation coverage for the trust's members, was found to be $188 million in debt. The opinion is fact-specific and much too detailed to be summarized here. Breach of fiduciary duty, aiding and abetting breach of fiduciary duty, fraud, negligent misrepresentation, breach of contract, breach of good faith and fair dealing, gross negligence, alter ego liability, among other theories, were alleged. Many causes of action were deemed time-barred. Some causes of action dismissed by Supreme Court were reinstated. ***State of N.Y. Workers' Compensation Bd. v. Wang*, 2017 N.Y. Slip Op. 00057, 3rd Dept 1-5-17**

WORKERS' COMPENSATION LAW, TRUSTS AND ESTATES, CONTRACT LAW.

IN A LAWSUIT BY EMPLOYERS AGAINST THE ADMINISTRATORS AND TRUSTEES OF A WORKERS' COMPENSATION TRUST FOUND TO BE $188 MILLION IN DEBT, THE EMPLOYERS WERE DEEMED THIRD PARTY BENEFICIARIES OF THE CONTRACT BETWEEN THE ADMINISTRATORS AND THE TRUST, MANY OF THE EMPLOYERS' NONCONTRACTUAL CLAIMS WERE PROPERLY DISMISSED AS DERIVATIVE (PERTAINING TO THE TRUST) RATHER THAN DIRECT.

In a case related to *State of N.Y. Workers' Compensation Bd. v. Wang*, 2017 N.Y. Slip Op. 00057, 3rd Dept 1-5-17, referenced immediately above, the Third Department, in a full-fledged opinion by Justice Garry (much too complex to summarize here), determined, inter alia, (1) the employer plaintiffs could sue as third-party beneficiaries of the contract between the workers' compensation trust and its administrators, and (2) many of the employers' noncontractual claims were properly dismissed as derivative, i.e., pertaining to the trust, rather than direct: "This Court recently held that an employer member of a group self-insured trust successfully alleges third-party beneficiary status by asserting '(1) the existence of a valid and binding contract between [the trust and its administrators], (2) that the contract was intended for [the employer member's] benefit, and (3) that the benefit to [the employer member] is sufficiently immediate to indicate the assumption by [the trust and its administrators] of a duty to compensate it if the benefit is lost' ... . * * * Supreme Court dismissed many of [the noncontractual] causes of action upon determining that they belonged in the first instance to the trust rather than to the employer members and were thus derivative rather than direct. The distinction between derivative and direct claims is grounded upon the principle that a stockholder does not have an individual cause of action that derives from harm done to the corporation, but may bring a direct claim when 'the wrongdoer has breached a duty owed directly to the shareholder which is independent of any duty owing to the corporation' ... . In determining whether a claim is direct or derivative, a court must 'look to the nature of the wrong and to whom the relief should go' and should consider '(1) who suffered the alleged harm (the corporation or the suing stockholders, individually); and (2) who would receive the benefit of any recovery or other remedy (the corporation or the stockholders, individually) ...". ***Accredited Aides Plus, Inc. v. Program Risk Mgt., Inc.*, 2017 N.Y. Slip Op. 00058, 3rd Dept 1-5-17**

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