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FIRST DEPARTMENT

CIVIL PROCEDURE, EMPLOYMENT LAW, ARBITRATION, INSURANCE LAW.

A CLAUSE IN AN EMPLOYMENT CONTRACT PURPORTING TO WAIVE THE RIGHT TO BRING A CLASS ACTION SUIT AND SUBMIT COLLECTIVE CLAIMS TO ARBITRATION VIOLATED THE NATIONAL LABOR RELATIONS ACT AND IS UNENFORCEABLE.

The First Department, modifying Supreme Court, in a full-fledged opinion by Justice Moskowitz, over a two-justice dissenting opinion, determined an arbitration provision in plaintiff insurance agent's employment contract was unenforceable with respect to collective actions, here a class action concerning wage and hour claims: "... [W]e conclude ... that arbitration provisions such as the one in [plaintiff's] contract, which prohibit class, collective, or representative claims, violate the National Labor Relations Act (NLRA) and thus, that those provisions are unenforceable. In reaching this conclusion, we agree with the reasoning in Lewis v. Epic Sys. Corp. (823 F3d 1147 [7th Cir 2016], cert granted __ US __, 137 S Ct 809 [2017]), the recent case from the United States Court of Appeals for the Seventh Circuit, which addressed the enforceability of arbitration agreements prohibiting collective actions. In Lewis, the plaintiff employee agreed to an arbitration agreement mandating that wage and hour claims could be brought only through individual arbitration and requiring employees to waive 'the right to participate in or receive money or any other relief from any class, collective, or representative proceeding' ... . The arbitration agreement also included a clause stating that if the waiver were unenforceable, 'any claim brought on a class, collective, or representative action basis must be filed in a court of competent jurisdiction' ... . The plaintiff [in Lewis] argued that the arbitration clause violated the NLRA because it interfered with employees' right to engage in concerted activities for mutual aid and protection, and was therefore unenforceable ...". ***Gold v. New York Life Ins. Co.*, 2017 N.Y. Slip Op. 05695, 1st Dept 7-18-17**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

ALTHOUGH THE BOOM TRUCK WAS 700 FEET FROM WHERE IT WAS LOADED WHEN THE BOOM STRUCK AN OVERHEAD SIGN, THE TRUCK WAS AT THE WORK SITE WITHIN THE MEANING OF THE LABOR LAW, ALTHOUGH THE INDUSTRIAL CODE PROVISION ADDRESSED THE POSITION OF THE BOOM BUT NOT THE NATURE OF THE ACCIDENT, THE PROVISION WAS BROADLY WORDED AND RAISED A QUESTION OF FACT ON THE LABOR LAW § 241(6) CAUSE OF ACTION.

The First Department, reversing (modifying) Supreme Court, over an extensive dissent, determined defendants should not have been awarded summary judgment on plaintiff's Labor Law § 241(6) cause of action. Plaintiffs were injured when the extended boom on a boom truck struck an overhead sign on a bridge as the truck was being driven away from where it was loaded. Supreme Court had found the accident did not occur at the work site so the Labor Law was not implicated. The First Department held that the truck, which was 700 feet from where it was loaded when the boom struck the sign, was at the work site within the meaning of the Labor Law. The court further found that an Industrial Code provision which related to the position of the boom, but not to the precise facts of the accident, raised a question of fact sufficient to allow the Labor Law § 241(6) cause of action to proceed: "At this stage, ... an issue of fact exists as to whether defendants violated section 23-8.2(d)(3) of the Industrial Code, pertaining to '[m]obile crane travel,' which provides that '[a] mobile crane, with or without load, shall not travel with the boom so high that it may bounce back over the cab'... . ... Defendants complain that there was no evidence that the boom bounced back over the cab. However, the regulation is violated when a mobile crane has 'the boom so high that it may bounce back over the cab' ... . Even assuming defendants are correct, the boom was high enough to strike a gantry sign. We reject the dissent's argument that the regulation was not implicated because plaintiffs were not injured by the boom bouncing over the cab, but rather, when the boom hit the road sign." ***James v. Alpha Painting & Constr. Co., Inc.*, 2017 N.Y. Slip Op. 05692, 1st Dept 7-18-17**

SECOND DEPARTMENT

ANIMAL LAW, MUNICIPAL LAW, IMMUNITY.

CITY NOT LIABLE FOR A DOG BITE AT CITY ANIMAL SHELTER.

The Second Department determined the city, which operated an animal shelter, was not liable for a dog-bite injury to infant plaintiff. The Second Department held that the operation of the shelter was a government function and there was no special relationship between the city and the plaintiff. Therefore the city was entitled to immunity from liability: "It is undisputed that the City operates the Shelter pursuant to a statutory mandate. Specifically, Agriculture and Markets Law § 114 (former § 115) requires, inter alia, that each town or city that issues dog licenses 'shall . . . establish and maintain a pound or shelter for dogs' ... . This provision is contained in article 7 of the Agriculture and Markets Law, which states that the purpose of the article 'is to provide for the licensing and identification of dogs, the control and protection of the dog population and the protection of persons, property, domestic animals and deer from dog attack and damage' ... . The City's act of providing an animal shelter constitutes a governmental function and, therefore, it cannot be held liable absent the existence of a special relationship between it and the plaintiffs giving rise to a special duty of care ... . 'A special relationship can be formed in three ways: (1) when the municipality violates a statutory duty enacted for the benefit of a particular class of persons; (2) when it voluntarily assumes a duty that generates justifiable reliance by the person who benefits from the duty; or (3) when the municipality assumes positive direction and control in the face of a known, blatant and dangerous safety violation' ...". ***Abrahams v. City of Mount Vernon*, 2017 N.Y. Slip Op. 05699, 2nd Dept 7-19-17**

CIVIL PROCEDURE, ATTORNEYS.

PETITIONER, WHO WAS ADMITTED TO THE PRISON NURSERY PROGRAM AFTER STARTING AN ARTICLE 78 PROCEEDING CONTESTING THE WITHDRAWAL OF ADMISSION, WAS NOT A PREVAILING PARTY WITHIN THE MEANING OF THE EQUAL ACCESS TO JUSTICE ACT, SHE WAS NOT, THEREFORE, ENTITLED TO ATTORNEY FEES.

The Second Department determined petitioner, an inmate who sought admission to the prison nursery program for her and her child, was not entitled to attorney fees under the Equal Access to Justice Act (EAJA). Petitioner's admission to the program had been withdrawn by the prison superintendent (Kaplan) so petitioner brought an Article 78 proceeding with an order to show cause. The judge signed the order to show cause and allowed petitioner's admission to the program pending a hearing. Before the hearing, the superintendent reversed her prior ruling and allowed petitioner to stay in the program. The Second Department held that petitioner was not a "prevailing party" within the meaning of the EAJA, and, even if she had been a prevailing party, the superintendent's actions were justified: "We conclude that the Supreme Court properly determined that the petitioner was not a "prevailing party" under CPLR 8601(a) and 8602(f), albeit for a different reason. Contrary to the petitioner's contention, the stipulation entered into between the parties ..., which was so-ordered by the court, did not reflect a material change in the legal relationship between the parties because the petitioner's claims had already been rendered moot by Kaplan's voluntary decision on December 30, 2014, to vacate her earlier decision removing the petitioner from the Nursery Program ... . Furthermore, the petitioner did not achieve prevailing party status by obtaining a temporary restraining order and a preliminary injunction from the court directing the respondents to admit the petitioner to the Nursery Program pending the outcome of the proceeding ...". ***Matter of Gonzalez v. New York State Dept. of Corr. & Community Supervision*, 2017 N.Y. Slip Op. 05724, 2nd Dept 7-19-17**

CORPORATION LAW, REAL PROPERTY.

REAL PROPERTY TRANSFER BY RELIGIOUS CORPORATION INVALID, CORPORATION DID NOT SEEK COURT APPROVAL FOR THE TRANSFER.

The Second Department determined summary judgment was properly awarded to plaintiff in this action to quiet title. Plaintiff religious corporation was required to get the court's permission before selling property to defendant. Because plaintiff did not seek leave of court, its transfer of the property to defendant was invalid: "Religious Corporations Law § 12(1) provides that in order to sell any of its real property, a religious corporation must apply for, and obtain, leave of court pursuant to Not-For-Profit Corporation Law § 511 ... . 'The purpose of this requirement is to protect the members of the religious corporation, the real parties in interest, from loss through unwise bargains and from perversion of the use of the property' ... . Here, the plaintiff, a religious corporation subject to the requirements of Religious Corporations Law § 12(1), established, prima facie, that its conveyance of the subject property to the defendants was invalid because it was made without leave of court ... ". ***Heights v. Schwarz*, 2017 N.Y. Slip Op. 05707, 2nd Dept 7-19-17**

CRIMINAL LAW.

JUDGE SHOULD NOT HAVE VACATED DEFENDANT'S GUILTY PLEA OVER DEFENDANT'S OBJECTION.

The Second Department, reversing Supreme Court, determined the sentencing judge should not have vacated defendant's guilty plea. Under the plea bargain defendant was promised an 18-year sentence. After trial he was sentenced to 50 years. Although defendant indicated he didn't remember the underlying events because he was intoxicated, both he and his at-

torney objected when the judge vacated the plea: " '[I]n the absence of fraud, misrepresentation, deceit, or trickery, courts have no inherent power to set aside a plea of guilty absent the defendant's consent other than to correct their own mistakes' ... . Moreover, a court may not vacate a plea over a defendant's objection ... . Here, the People fail to identify, nor is there apparent, any error or mistake made by the Supreme Court in accepting the defendant's plea. Nor is there any evidence of fraud, misrepresentation, deceit, or trickery presented on this record ... … The defendant's statements to the probation department to the effect that he was intoxicated and did not remember what had occurred on the night of the shootings cannot be said to constitute consent on the part of the defendant to the vacatur of his plea of guilty and the reinstatement of his plea of not guilty ... . Further, notwithstanding the court's conclusion and the People's assertion to the contrary, in response to the court's questioning as to whether the defendant wished to proceed to trial and assert an intoxication defense, the defendant merely indicated that he had wished to do so in the past, not that he wished to withdraw the plea and go to trial now. Nor did the defendant unequivocally inform the court that he had been coerced into pleading guilty ... . Instead, the record shows that, when the court stated that it would strike the plea and set the matter down for trial, the defendant and his attorney immediately protested, but the court overruled their objections and moved on. The court erred in vacating the plea over the defendant's objections ... ". ***People v. Brown*, 2017 N.Y. Slip Op. 05748, 2nd Dept 7-19-17**

CRIMINAL LAW, EVIDENCE.

FAILURE TO INSTRUCT THE JURY ON THE NEED FOR CORROBORATION OF THE TESTIMONY OF AN ACCOMPLICE REQUIRED A NEW TRIAL.

The Second Department, reversing defendant's murder conviction and ordering a new trial, determined the trial judge should have given the jury the accomplice-in-fact instruction concerning the need for corroboration of the testimony of an accomplice: " 'A defendant may not be convicted of any offense upon the testimony of an accomplice unsupported by corroborative evidence tending to connect the defendant with the commission of such offense' (CPL 60.22[1]). A witness in a criminal action is an accomplice if he or she 'may reasonably be considered to have participated in . . . the offense charged or an offense based upon the same or some of the same facts or conduct which constitute the offense charged'... . A witness who is a criminal facilitator is an accomplice for corroboration purposes ... . The factual issue of whether a particular witness is an accomplice should be submitted to the jury if different inferences may reasonably be drawn from the proof regarding complicity ... . Here, different inferences may reasonably be drawn ... as to whether the second eyewitness drove Gill and the shooter to the scene, with the knowledge that one or the other of them intended to use the gun. Under these circumstances, the Supreme Court erred in failing to provide the jury with an accomplice-in-fact charge. The error was not harmless, because the evidence of the defendant's guilt was not overwhelming. It is possible that the jury, properly charged on whether to treat the second eyewitness as an accomplice, and, if so, how to consider his testimony, could have discounted his version of the events. In that case, it was for the jury to decide whether the remaining evidence established the defendant's guilt beyond a reasonable doubt ...". ***People v. Riley*, 2017 N.Y. Slip Op. 05755, 2nd Dept 7-19-17**

FAMILY LAW.

NO PRESUMPTION THE BEST INTERESTS OF A CHILD ARE SERVED BY PLACEMENT WITH A FAMILY MEMBER, FAMILY COURT REVERSED.

The Second Department, reversing Family Court, determined that it was not in the best interests of the children to be removed from foster care and placed with family members: " 'When considering guardianship appointments, the child's best interests are paramount' ... . Once parental rights have been terminated, there is no presumption favoring the child's biological family over the proposed adoptive parents selected by an authorized agency ... . Here, the Family Court's determination that it was in the children's best interests to grant the respective petitions for guardianship, rather than keeping the children with their foster parents for the purpose of adoption, lacks the requisite sound and substantial basis in the record ... . The children Hailey and Kailyn have resided in the same foster home since June 2015, and the children Danielle and Belicia have resided in the same foster home since November 2015, where they have bonded with their foster parents and are happy, healthy, and well provided for ... . There is no presumption that the children's best interests will be better served by returning them to a family member, and it would not be in the children's best interests to do so here ...". ***Matter of Rebecca B. v. Michael B.*, 2017 N.Y. Slip Op. 05720, 2nd Dept 7-19-17**

FAMILY LAW.

AFTER MOTHER CONSENTED TO A NEGLECT FINDING AND THE CHILD WAS PLACED IN KINSHIP FOSTER CARE, MOTHER SHOULD NOT HAVE BEEN AWARDED UNSUPERVISED VISITATION WITHOUT A HEARING.

The Second Department, reversing Family Court, determined mother should not have been awarded unsupervised visitation without a hearing. Mother had previously consented to a neglect finding and the child had been placed in kinship foster care: " 'In a child protective proceeding pursuant to Family Court Act article 10, [t]he best interests of the children determine whether visitation should be permitted to a parent who has committed abuse or neglect. Pursuant to Family Court Act § 1061, the court may modify any order issued during the course of a child protective proceeding for good cause shown.' As with the initial order, the modified order must reflect a resolution consistent with the best interests of the chil-

dren after consideration of all relevant facts and circumstances'... 'Before making children available for unsupervised visits, a Family Court must find that a person with a history of abuse or neglect of her children has successfully overcome her prior inclinations and behavior patterns, despite what may be the best of intentions'... . Where facts material to a best interests analysis, and the circumstances surrounding such facts, remain in dispute, a hearing is required ... . Under the circumstances of this case, a hearing was necessary to determine whether unsupervised overnight visitation between the mother and the child was in the child's best interests ...". ***Matter of Jeanette V. (Marina L.)*, 2017 N.Y. Slip Op. 05741, 2nd Dept 7-19-17**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

QUESTION OF FACT WHETHER PLAINTIFF WAS ENGAGED IN ROUTINE MAINTENANCE OR REPAIR COVERED BY LABOR LAW § 240(1) WHEN HE FELL FROM A LADDER.

In the context of a legal malpractice action based on the failure to timely commence a Labor Law § 240(1) action, the Second Department determined there was a question of fact whether plaintiff was engaged in routine maintenance (not covered by the Labor Law) or repair (covered by the Labor Law) at the time he fell from a ladder: "Here, the defendants' own submissions failed to eliminate triable issues of fact as to whether the plaintiff was engaged in 'repair[s]' at the time of his accident or whether he was engaged in routine maintenance. On the one hand, the defendants submitted evidence establishing that the plaintiff was changing a ballast in a light fixture at the time of his accident, a job which constitutes routine maintenance since the replacement of this component occurs in the course of normal wear and tear ... . However, the defendants also submitted the plaintiff's deposition testimony in support of their motion. The plaintiff testified at his deposition that he was in the midst of disconnecting, splicing, cleaning, and assessing the internal electrical wires in order to fix a light fixture when he fell from the ladder. Thus, the plaintiff's deposition testimony demonstrated the existence of a triable issue of fact as to whether the plaintiff was "repairing" the light fixture at the time of his accident ...". ***Ferrigno v. Jaghab, Jaghab & Jaghab, P.C.*, 2017 N.Y. Slip Op. 05709, 2nd Dept 7-19-17**

PERSONAL INJURY.

DEFENDANTS PROPERLY GRANTED SUMMARY JUDGMENT UNDER THE STORM IN PROGRESS RULE IN THIS SLIP AND FALL CASE.

The Second Department determined defendants were properly granted summary judgment in this ice and snow slip and fall case. The defendants demonstrated there was a storm in progress and their snow removal efforts did not create or exacerbate the condition: " ' Under the so-called storm in progress' rule, a property owner will not be held responsible for accidents occurring as a result of the accumulation of snow and ice on its premises until an adequate period of time has passed following the cessation of the storm to allow the owner an opportunity to ameliorate the hazards caused by the storm' ... . 'However, even if a storm is ongoing, once a property owner elects to remove snow or ice, it must do so with reasonable care or it could be held liable for creating a hazardous condition or exacerbating a natural hazard created by the storm' ... . Here, the defendants established their prima facie entitlement to judgment as a matter of law by submitting their deposition testimony and certified weather reports, which demonstrated that there was a storm in progress at the time of the plaintiff's accident, and that their efforts to prevent ice accumulation neither created a hazardous condition nor exacerbated a natural hazard created by the storm ...". ***Bradshaw v. PEL 300 Assoc.*, 2017 N.Y. Slip Op. 05701, 2nd Dept 7-19-17**

PERSONAL INJURY.

DEFENDANTS DID NOT DEMONSTRATE THE RAISED BRICK WAS A TRIVIAL DEFECT OR AN OPEN AND OBVIOUS DEFECT IN THIS SLIP AND FALL CASE, SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined defendants did not demonstrate the raised brick over which plaintiff allegedly tripped was a trivial defect or an open and obvious defect: "The defendant failed to establish, prima facie, that the alleged defect was trivial as a matter of law. 'A defendant seeking dismissal of a complaint on the basis that the alleged defect is trivial must make a prima facie showing that the defect is, under the circumstances, physically insignificant and that the characteristics of the defect or the surrounding circumstances do not increase the risk it poses. Only then does the burden shift to the plaintiff to establish an issue of fact' ... . In support of its motion, the defendant submitted, inter alia, transcripts of the deposition testimony of the plaintiff and the Director of Horticulture of the defendant, the affidavit of an expert witness, and two photographs that the plaintiff claimed showed her lying on the walkway shortly after her accident but did not portray the raised brick on which she allegedly fell. Viewed in the light most favorable to the plaintiff as the nonmovant ..., the evidence submitted by the defendant failed to eliminate all triable issues of fact as to the dimensions of the alleged defect, and failed to establish that the condition was trivial and, therefore, not actionable ... . The defendant also failed to make a prima facie showing that the alleged raised brick was an open and obvious condition that is inherent to the nature of the property and could be reasonably anticipated by those using it ... . Furthermore, the defendant failed to demonstrate, prima facie, that it lacked constructive notice of the allegedly raised brick ...". ***Chojnacki v. Old Westbury Gardens, Inc.*, 2017 N.Y. Slip Op. 05706, 2nd Dept 7-191-17**

PERSONAL INJURY.

DEFECT WHICH CAUSED SLIP AND FALL WAS TRIVIAL AS A MATTER OF LAW.

The Second Department, reversing Supreme Court, determined the defendants demonstrated the defective tile which caused plaintiff's slip and fall constituted a trivial defect which was not actionable: " 'A defendant seeking dismissal of a complaint on the basis that the alleged defect is trivial must make a prima facie showing that the defect is, under the circumstances, physically insignificant and that the characteristics of the defect or the surrounding circumstances do not increase the risks it poses. Only then does the burden shift to the plaintiff to establish an issue of fact' ... . Here, the evidence submitted by the defendants in support of their motion included photos of the alleged defective condition as identified by the plaintiff, a damaged piece of tile, as well as measurements placing the depression at the damaged tile to be, at most, one-eighth of an inch. These photographs, along with the plaintiff's description of the time, place, and circumstance of the injury, established, prima facie, that the alleged defect was trivial as a matter of law, and therefore, not actionable ... ". ***Kavanagh v. Archdiocese of the City of N.Y.*, 2017 N.Y. Slip Op. 05711, 2nd Dept 7-19-17**

PERSONAL INJURY.

QUESTION OF FACT WHETHER HOMEOWNER WAS LIABLE FOR A LATENT DEFECT IN AN OUTSIDE STEP UNDER THE DOCTRINE OF RES IPSA LOQUITUR.

The Second Department, reversing Supreme Court, determined there was a question of fact whether a latent defect was actionable under the doctrine of res ipsa loquitur. An outside step flipped up when plaintiff stepped on it, causing plaintiff to fall. The underside of the step was rotten and the nails didn't hold. Apparently the condition of the step was not visible until the underside was exposed: "... [P]laintiff raised a triable issue of fact as to the application of the doctrine of res ipsa loquitur ... . 'Under appropriate circumstances, the evidentiary doctrine of res ipsa loquitur may be invoked to allow the factfinder to infer negligence from the mere happening of an event' ... . A plaintiff makes a prima facie case of negligence under res ipsa loquitur by establishing three elements: '(1) the event must be of a kind which ordinarily does not occur in the absence of someone's negligence; (2) it must be caused by an agency or instrumentality within the exclusive control of the defendant; (3) it must not have been due to any voluntary action or contribution on the part of the plaintiff' ... . Res ipsa loquitur does not create a presumption of negligence; rather, it is a rule of circumstantial evidence that permits, but does not require, the jury to infer negligence ... . Here, the defendant contends that the plaintiff failed to raise an issue of fact as to the applicability of the doctrine because the homeowner did not have exclusive control over the deck steps. However, the concept of exclusive control does not require rigid application, since the general purpose of the element is to indicate from the circumstances that it was probably the negligence of the defendant, rather than another, which caused the accident ... . Although there was evidence that other guests used the deck steps, the steps were located on private residential property, not an area open to the general public ... . Under these circumstances, the plaintiff raised a triable issue of fact as to the homeowner's exclusive control of the deck step and whether an inference of negligence is warranted under the doctrine of res ipsa loquitur ... ". ***Marinaro v. Reynolds*, 2017 N.Y. Slip Op. 05714, 2nd Dept 7-19-17**

PERSONAL INJURY.

STORM IN PROGRESS RULE DID NOT APPLY, STORM STOPPED 12 HOURS BEFORE THE SLIP AND FALL.

The Second Department determined defendant Home Depot's motion for summary judgment in this slip and fall case was properly denied. The storm in progress rule did not apply because the precipitation stopped 12 hours before the fall, and the temperature dipped below freezing 10 hours before the fall: "Home Depot failed to establish its prima facie entitlement to judgment as a matter of law dismissing the complaint by demonstrating that there was a storm in progress at the time of the injured plaintiff's accident or that it did not have a reasonable opportunity after the cessation of the storm to remedy the allegedly dangerous condition ... . The climatological data submitted by Home Depot showed that there was an accumulation of about three inches of snow, which had ceased to fall by 7:00 p.m. on January 18, 2004, about 12 hours prior to the accident, and that the temperature dropped to below freezing by 9:00 p.m., about 10 hours prior to the accident, and remained below freezing through the time of the accident. Thus, Home Depot failed to establish, prima facie, that it did not have a reasonable time to ameliorate the snow and ice condition in the parking lot ... ". ***Morris v. Home Depot USA*, 2017 N.Y. Slip Op. 05717, 2nd Dept 7-19-17**

PERSONAL INJURY.

PLAINTIFF PASSENGER'S MOTION FOR SUMMARY JUDGMENT IN THIS REAR-END COLLISION CASE SHOULD NOT HAVE BEEN GRANTED, DEFENDANT RAISED A QUESTION OF FACT ABOUT THE LEAD DRIVER'S COMPARATIVE NEGLIGENCE.

The Second Department, reversing Supreme Court, determined defendant raised a question of fact whether the driver of the car in which plaintiff was a passenger was comparatively negligent. Therefore plaintiff passenger's summary judgment motion should not have been granted: " 'To prevail on a motion for summary judgment on the issue of liability, a plaintiff must

establish, prima facie, not only that the opposing party was negligent, but also that the plaintiff was free from comparative fault' ... . Thus, 'a plaintiff has a twofold burden that trial courts must bear in mind when determining motions for summary judgment, because more than one actor may be a proximate cause of a single accident' ... . The issue of comparative fault is generally a question for the jury to decide ... . In rear-end accident cases, just because a plaintiff is a passenger in the lead vehicle, the liability of the rear vehicle is not automatically established. Such a plaintiff moving for summary judgment on the issue of liability 'must meet the twofold burden of establishing that he or she was free from comparative fault and was, instead, an innocent passenger, and, separately, that the operator of the rear vehicle was at fault. If the plaintiff fails to demonstrate, prima facie, that the operator of the offending vehicle was at fault, or if triable issues of fact are raised by the defendants in opposition, . . . summary judgment on the issue of liability must be denied, even if the moving plaintiff was an innocent passenger' ... Here, the injured plaintiff established her prima facie entitlement to judgment as a matter of law through the submission of her affidavit which demonstrated that she was not negligent in the happening of the accident, as she was an innocent passenger, and that the actions of the defendant driver, Welna, were the sole proximate cause of the accident... . However, in opposition, the defendants raised a triable issue of fact as to whether Nicole Ortiz [the lead driver] contributed to the happening of the accident by the submission of Welna's affidavit, which alleged that she violated Vehicle and Traffic Law § 1163 by stopping abruptly in the intersection to turn left without signaling ...". ***Ortiz v. Welna*, 2017 N.Y. Slip Op. 05744, 2nd Dept 7-19-17**

PERSONAL INJURY.

QUESTION OF FACT WHETHER DEFENDANT DRIVER WAS COMPARATIVELY NEGLIGENT IN THIS REAR-END COLLISION CASE, DEFENDANT'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined defendant's motion for summary judgment in this rear-end collision case should not have granted. Although plaintiff and defendant alleged defendant's car was stopped behind plaintiff's car before defendant's car was pushed into plaintiff's car after defendant's car was struck from behind by Vitale's car, Vitale's affidavit alleged defendant's car collided with plaintiff's car before Vitale collided with defendant. Therefore there was a question of fact whether defendant was comparatively negligent: "Here, in support of their motion, the defendants submitted, inter alia, a transcript of the deposition testimony of the plaintiff driver and the defendant driver. The plaintiff driver testified at his deposition that the vehicle that he was operating had been stopped for a red traffic light for about 30 seconds when the defendants' vehicle struck it in the rear. Prior to the accident, the plaintiff driver had observed the defendants' vehicle stop behind his vehicle without touching it. The defendant driver attested that the vehicle that he was operating was stopped four feet behind the plaintiffs' stopped vehicle when it was struck in the rear by Vitale's vehicle. As a result, the defendants' vehicle was propelled forward into the rear of the plaintiffs' vehicle. Under the circumstances, the defendants met their initial burden as the movants by demonstrating, prima facie, that their stopped vehicle was propelled forward into the plaintiffs' vehicle after their vehicle was struck in the rear by a third vehicle, and that the defendant driver was not at fault in the happening of the accident ... . In opposition to the motion, the plaintiffs submitted, inter alia, Vitale's affidavit. Vitale's account of the accident differed from the parties' account of the accident, and it raised triable issues of fact as to whether the defendants' vehicle struck the plaintiffs' vehicle before Vitale's vehicle struck the defendants' vehicle and whether the defendant driver was comparatively at fault ..." . ***Hasan Sharif Williams v. Sala*, 2017 N.Y. Slip Op. 05762, 2nd Dept 7-19-17**

REAL PROPERTY.

DEVELOPMENT RIGHTS CONSTITUTE REAL PROPERTY WHICH CAN BE SOLD PURSUANT TO RPAPL 1602.

The Second Department, in a full-fledged opinion by Justice Connolly, in a matter of first impression, determined that development rights constituted real property within the meaning of Real Property Actions and Proceedings Law (RPAPL) 1602, but that the sale of the development rights in this case would not be "expedient" and therefore would violate RPAPL 1602. Here three of four siblings wanted to sell the development rights to the family farm in order to preserve it as a farm. One of the siblings, the defendant, objected to the idea. Overruling Supreme Court, the Second Department held that development rights constitute real property which can be sold pursuant to RPAPL 1602. But, because there was no purchaser for the development rights, the plaintiffs had not demonstrated the sale was "expedient" within the meaning of the statute: "... [D]evelopment rights, as that term was understood by the parties to this action, are clearly "real property, or a part thereof" (RPAPL 1602). Indeed, the Court of Appeals has held that development rights constitute interests within the metaphorical 'bundle of rights' that comprise fee interests in real property (see Seawall Assocs. v. City of New York, 74 NY2d 92, 109 ...). In Seawall, the Court of Appeals observed that '[t]here can be no question that the development rights which have been totally abrogated by the local law are, standing alone, valuable components of the bundle of rights' making up their fee interests,' ... Applying the bundle-of-rights metaphor to the case at bar, by seeking court approval to convey away the right to build as many homes as are allowed by zoning and planning regulations, the plaintiffs are seeking to convey those portions of the bundle of rights comprising the maximum development capacity of the property. Moreover, in drafting RPAPL 1602, the Legislature gave courts the authority to compel the mortgage, lease, or sale of 'real property, or a part thereof' ... , without placing any limitations on which 'parts' of the bundle of rights comprising real property are subject to the statute. 'Ordinari-

ly, where the Legislature in enacting a statute utilized general terms, and did not, either expressly or by implication, limit their operation, the court will not impose any limitation' ...". ***Hahn v. Hagar*, 2017 N.Y. Slip Op. 05710, 2nd Dept 7-19-17**

THIRD DEPARTMENT

ADMINISTRATIVE LAW, EVIDENCE.

ENTIRELY HEARSAY EVIDENCE SUPPORTED THE ADMINISTRATIVE AGENCY'S ABUSE FINDING.

The Third Department determined abuse findings were supported by substantial evidence, which was entirely hearsay. The court explained how hearsay is evaluated in the context of a ruling by an administrative agency, here the Justice Center for the Protection of People with Special Needs. Petitioner is an employee of the Office of People with Developmental Disabilities and was accused of abusing a service recipient. It was alleged petitioner held the service recipient down while another employee, Roberts, kicked her: "Here, there is substantial evidence in the record to support the Justice Center's final determination that petitioner engaged in conduct constituting category three abuse. In interviews conducted by an investigator, three eyewitnesses to the incident — two residents of the unit and Monica Sutton, a service provider — made consistent statements about the material facts of the incident, specifically, that petitioner restrained the service recipient on the floor while she was kicked by Roberts. Although the eyewitness statements received at the hearing were hearsay, there were sufficient indicia of their reliability. The accounts of the eyewitnesses, who were interviewed separately, are consistent with each other, and, as noted by the Justice Center, were 'unwavering as to the core allegations.' Further, the statements from the residents were obtained in personal interviews conducted only three days after the incident, and, although Sutton's statement was obtained approximately four months after the incident, it is corroborated by the written report of abuse that she made on the date of the incident. Notably, petitioner and Roberts each testified that Sutton witnessed the incident and, although each denied that Roberts kicked the service recipient, both admitted that the service recipient fell to the floor, where she grabbed Roberts by the legs, Roberts moved her legs in an effort to free herself, and petitioner touched or held the service recipient by the shoulder when she was on the floor; these admissions are consistent with the eyewitness reports. Accordingly, the hearsay evidence in the record was sufficiently reliable to provide substantial evidence to support the Justice Center's determination." ***Matter of Watson v. New York State Justice Ctr. for The Protection of People With Special Needs*, 2017 N.Y. Slip Op. 05780, 3rd Dept 7-20-17**

ATTORNEYS.

SMALL INFORMAL LAW FIRM PROPERLY DISQUALIFIED BECAUSE AN ASSOCIATE PREVIOUSLY REPRESENTED THE OPPOSING PARTY.

The Third Department determined a law firm was properly disqualified from representing mother because an associate at the firm had previously represented father in a case involving the same child: "We ... address whether, due to the associate's former attorney-client relationship with the father and current employment with the law firm, the principal is also precluded from representing the mother. While the principal has apparently never represented the father, 'where an attorney working in a law firm is disqualified from undertaking a subsequent representation opposing a former client, all the attorneys in that firm are likewise precluded from such representation' ... . Application of this rule creates a rebuttable presumption that the law firm should be disqualified ... . To that end, '[a] court must examine the circumstances of the particular case and, if it is not clear as a matter of law that disqualification of the entire firm is required, the firm should be given an opportunity to rebut the presumption' ... . The presumption may be rebutted by proof that 'any information acquired by the disqualified lawyer [i.e., the associate] is unlikely to be significant or material in the [subject] litigation' and by evidence that the law firm screened the associate from receipt and dissemination of information subject to the attorney-client privilege ... . * * * We are mindful here that '[d]oubts as to the existence of a conflict of interest must be resolved in favor of disqualification'... , and that 'disqualification avoids any suggestion of impropriety and preserves [the client's] expectation of loyalty' ... . Under these facts, we are unpersuaded by the principal's assertion that a sufficient firewall exists to separate his work on behalf of the mother from the associate so as to screen her from the receipt of information that is protected by the attorney-client privilege in this small, informal law office environment. As the principal has not rebutted the presumption that all attorneys in his law firm are disqualified from representing the mother, the father's motion was properly granted, and Family Court's order will not be disturbed." ***Matter of Yeomans v. Gaska*, 2017 N.Y. Slip Op. 05786, 3rd Dept 7-20-17**

EMPLOYMENT LAW, CONTRACT LAW.

AN AGREEMENT TO PAY COMMISSIONS CAN BE PERFORMED IN ONE YEAR AND THEREFORE IS NOT SUBJECT TO THE STATUTE OF FRAUDS.

The Third Department noted that an agreement to pay commissions is an agreement that can be performed in one year, so an oral agreement to pay commissions is not subject to the statute of frauds: " 'An agreement to pay an at-will employee commissions earned during the period of his or her employment is capable of performance within one year and does not violate the [s]tatute of [f]rauds' ... . Here, the gravamen of plaintiff's complaint is not about renewal commissions that ac-

crued after his resignation from WorldClaim ... . Rather, plaintiff seeks the payment of commissions that he claims were earned while he was still employed by WorldClaim ... . Indeed, the complaint alleged that plaintiff, '[d]uring the period from approximately April 2011 to January 2012, . . . earned $104,525 in commissions from sales, [and] $25,000 in monthly bonuses.' Given that plaintiff was still employed by WorldClaim during this alleged time period, the statute of frauds does not bar plaintiff's claim for unpaid commissions ... ". ***Kieper v. The Fusco Group Partners Inc.*, 2017 N.Y. Slip Op. 05782, 3rd Dept 7-20-17**

ENVIRONMENTAL LAW.

ELECTRIC GENERATING FACILITY WHICH USES HUDSON RIVER WATER TO COOL MACHINERY AND RETURNS WARM WATER TO THE RIVER WAS PROPERLY ALLOWED TO CONTINUE OPERATION UNDER RENEWED PERMITS.

The Third Department determined the two-year shutdown of electrical power generating facility, which uses Hudson River water to cool machinery and discharges warm water back into the Hudson, was not a permanent shutdown and therefore the operating permits were properly renewed by the Department of Environmental Conservation (DEC): "Contrary to petitioner's contention, DEC was not required to hold a public adjudicatory hearing prior to issuing final ... permits. It was incumbent upon DEC, after evaluating the permit applications and reviewing all comments submitted in response to them, to 'determine whether or not to conduct a public hearing 'based on whether the evaluation or comments raise substantive and significant issues relating to any findings or determinations [DEC] is required to make . . ., including the reasonable likelihood that [the permits] will be denied or can be granted only with major modifications to the project' ... . The ultimate burden rested on petitioner to show that its issues were 'substantive and significant' enough to warrant a public hearing ... . In that regard, while petitioner raised a number of concerns regarding the draft ... permit, it also acknowledged that the draft permit was largely identical to the existing permit ... , one that DEC noted had only been issued after extensive administrative proceedings and an adjudicatory hearing. Moreover, to the extent that the draft ... permit modified the terms of the prior permit, those modifications reduced the impact of the station upon the river. The objection to the Title V permit amounted to the rather obvious point that a station in service would create more atmospheric emissions than one offline. DEC issued a written response to petitioner's comments and, while it did make modifications as a result of the concerns raised, it gave no reason to believe that those concerns might have required extensive retooling of either permit or imperiled their issuance altogether. Accordingly, mindful as we are that our judgment should not be substituted for that of the agency, the determination that petitioner had failed to demonstrate the need for an adjudicatory hearing was not arbitrary and capricious ...". ***Matter of Riverkeeper, Inc. v. New York State Dept. of Envtl. Conservation*, 2017 N.Y. Slip Op. 05778, 3rd Dept 7-20-17**

REAL PROPERTY TAX LAW.

HOMEOWNERS REBUTTED THE PRESUMPTION THAT THE TAX ASSESSMENT OF THEIR PROPERTY WAS VALID.

The Third Department determined petitioners, who had recently purchased the property for $103,000, had rebutted the presumption that the tax assessment of over $156,000 was valid: "Supreme Court held that one can 'scarcely envision a better indicator of value than the price established within two weeks of the assessed valuation date in an arm's[ ]length sale of a property that was publicly listed for sale for a period of two years.' We agree, finding that petitioners' evidence was certainly adequate to rebut the presumption of validity and also to meet their burden upon the summary judgment motion... . Respondents offered no evidence that suggests or reveals that the arm's length transaction by which petitioners purchased the subject property was in any manner abnormal. Review of the record reveals that the reduction in the asking price was the natural product of the failure to sell the subject property for a period of two years, and respondents' assertions to the contrary are mere speculation. Respondents further rely upon the affidavit of a licensed real estate appraiser, who explains that he arrived at the property valuation by using the comparable sales method. However, as this appraiser was unable to inspect the interior or exterior of the subject property, his report merely averaged the sales prices of similar nearby homes; he 'was unable to make reliable adjustments to the comparable sales,' as the method requires ... . As further adjustments in the valuation might be required, he concluded that '[his] analysis is subject to change.' Respondents' submissions thus failed to provide a 'fair and realistic value' of the subject property ... and were conclusory and speculative, such that they were insufficient to defeat summary judgment ...". ***Matter of Weslowski v. Assessor of The City of Schenectady*, 2017 N.Y. Slip Op. 05784, 3rd Dept 7-20-17**

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