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FIRST DEPARTMENT

CRIMINAL LAW, ATTORNEYS.

PROSECUTOR'S CLOSING ARGUMENT RENDERED THE ROBBERY INDICTMENT COUNT DUPLICITOUS BY SUGGESTING THE COUNT COULD APPLY TO THE THEFT OF A BICYCLE WHICH WAS NOT CHARGED IN THAT COUNT.

The First Department determined the prosecutor's closing argument rendered an indictment count duplicitous by suggesting the robbery count could apply to either a cell phone or a bicycle (different victims). The indictment count charged robbery of the cell phone: "The indictment, as amplified by the bill of particulars, charged defendant in the first count with robbery in the second degree, for forcibly stealing one victim's cell phone, and in the second count with criminal possession of stolen property in the fifth degree, for possession of a bicycle, stolen from another victim, on which defendant attempted to flee the scene. In summation, the prosecutor repeatedly argued — in apparent response to defense counsel's argument that the evidence showed that defendant abandoned the phone before striking one of his pursuers, and therefore that a robbery could not be established — that even if the court did not find that defendant used force to retain the phone, it could still find that he used force to retain the bicycle. Defense counsel objected to these arguments and the court overruled them. We find that these arguments rendered the first count duplicitous by newly alleging that defendant was guilty under the first count if he forcibly stole either the phone or the bicycle (see CPL 200.30[1]). The lesser included offense of petit larceny, of which defendant was ultimately convicted, suffered from the same infirmity." ***People v. Perez*, 2018 N.Y. Slip Op. 01416, First Dept 3-1-18**

FAMILY LAW, CIVIL PROCEDURE.

ALTHOUGH FOSTER CARE RECORDS ARE CONFIDENTIAL, A FOSTER CHILD IS ENTITLED TO HER OWN FOSTER CARE RECORDS WITHOUT THE REDACTION OF THE NAMES OF CASEWORKERS AND OTHER PROFESSIONALS.

The First Department determined plaintiff mother was entitled to the infant plaintiff's foster care records in connection with her claim that SCO Family Services negligently certified the individual defendant as a foster parent, and failed to properly supervise the foster home: "Pursuant to Social Services Law § 372(1), SCO was required to maintain records while the children were in foster care. Those records are confidential, but are discoverable pursuant to article 31 of the CPLR (Social Services Law § 372[3]). The statutory confidentiality requirement is intended to protect the privacy of children in foster care and their natural parents ... , not to prevent former foster children from obtaining access to their own records. When a former foster child "seeks her own records, so she can further her own suit against the defendant custodian of those records, who would otherwise have unequal access to them"... , she is 'presumptively entitled to her own records' and 'only a powerfully compelling showing would justify the court in potentially restricting' her access to the records ... . In this case, the court properly undertook in camera review of the foster care records to ensure that no private information of nonparties would be disclosed. However, the court erred in determining that the identities of ACS caseworkers, mental health professionals and other professionals should be redacted. Plaintiffs sought access to those witnesses to determine whether they had any relevant knowledge, and SCO did not articulate any privacy interests of those professionals that would warrant redacting their names from the foster care records." ***K.B. v. SCO Family of Serv.*, 2018 N.Y. Slip Op. 01400, Second Dept 3-1-18**

FORECLOSURE.

COMPLIANCE WITH NOTICE REQUIREMENTS OF REAL PROPERTY ACTIONS AND PROCEEDINGS LAW 1304 NOT DEMONSTRATED, BANK'S MOTION FOR SUMMARY JUDGMENT IN THIS FORECLOSURE ACTION SHOULD NOT HAVE BEEN GRANTED.

The First Department, reversing Supreme Court, determined the bank's motion for summary judgment should not have been granted because the papers did not demonstrate compliance with the notice provisions of Real Property Actions and Proceedings Law (RPAPL) 1304: "...[T]he complaint should be dismissed as against defendant, without prejudice, because plaintiff failed to prove that it mailed the notices required by Real Estate Property Actions and Proceedings Law § 1304 ... . The affidavit by Diondra Doublin, submitted by plaintiff, failed to demonstrate a familiarity with plaintiff's mailing practices and procedures ... . The fact that some of the RPAPL 1304 notices bear a certified mail number is also insufficient ... .

We further note that defendant submitted an affidavit denying that he had received any RPAPL 1304 notice ... . Plaintiff's motion should be denied for the additional reason that the affidavit by defendant's wife creates an issue of fact as to whether plaintiff delivered the notice required by RPAPL 1303 with the summons and complaint ...". ***Nationstar Mtge., LLC v. Cogen*, 2018 N.Y. Slip Op. 01413, First Dept 3-1-18**

INSURANCE LAW.

SUIT SEEKING INDEMNIFICATION FOR A SETTLEMENT PAID TO DEFENDANT'S EMPLOYEE SHOULD NOT HAVE BEEN DISMISSED, RELEVANT LAW EXPLAINED.

The First Department, reversing Supreme Court, determined the suit by a general contractor (Aragon) and property lessee seeking indemnification for a settlement paid to defendant subcontractor's (Port Richmond's) injured employee (Brown), as well as the suit alleging the failure to procure insurance, should not have been dismissed. The court explained the relevant indemnification law: "It is well settled that 'where an indemnitor does not receive notice of an action settled by the indemnitee, in order to recover reimbursement [for the settlement], [the indemnitee] must establish that [it] would have been liable and that there was no good defense to the liability'... . Conversely, '[w]here the indemnitor does receive notice of the claim against the indemnitee, . . . the general rule is that the indemnitor will be bound by any reasonable good faith settlement the indemnitee might thereafter make'... . As to notice, ' [i]t is sufficient that the party against whom ultimate liability is claimed is fully and fairly informed of the claim and that the action is pending with full opportunity to defend or to participate in the defense' ... . Applying these principles, we find that the motion court improperly dismissed the indemnification claim. The subcontract plainly requires indemnification for claims arising out of Port Richmond's work on the construction project. On appeal, Port Richmond does not argue that Brown's injuries did not arise from its work. Instead, Port Richmond contends that because the underlying action was dismissed against Aragon, plaintiffs cannot establish Aragon's liability for those injuries. However, where notice is given, the indemnitee need not establish its own liability for the underlying claim ... . There is no dispute that Port Richmond had notice of the underlying action as well as the settlement negotiations in this Court." ***Zurich Am. Ins. Co. v. Tower Natl. Ins. Co.*, 2018 N.Y. Slip Op. 01401, Second Dept 3-1-18**

INSURANCE LAW.

THE LAWSUIT ALLEGED ANTITRUST VIOLATIONS, WHICH ARE EXCLUDED FROM COVERAGE; THE PASSING REFERENCES TO PRODUCT DISPARAGEMENT, WHICH WOULD BE COVERED, DID NOT TRIGGER THE DUTY TO DEFEND.

The First Department upheld the declaratory judgment finding that defendant insurer does not have a duty to defend based upon the exclusion of coverage for antitrust violations. Despite the allegations in the complaint which colored the action as one for product disparagement, which would be covered, the complaint alleged antitrust violations: "The underlying lawsuit alleges, broadly, that plaintiff acquired and maintained its 90% market share of VHR (vehicle history report) sales by engaging in an anticompetitive scheme. Plaintiff contends that defendant owes it a defense in the suit because the suit alleges disparagement. It relies on the following allegations: 'By contractually committing these two websites to include hyperlinks to Carfax VHRs and to exclude VHRs of any other provider, Carfax has stigmatized any listing without such a link in the eyes of consumers who infer that the absence means that the car has a blemished history.' 'Carfax also utilizes its inflated revenues to disparage and falsely malign dealers in order to mislead consumers into believing its VHRs are necessary and accurate.' These passing references to disparagement do not allege a 'Wrongful Act' [within the meaning of the policy language]. They were made 'only in the context of the anti-trust claims, i.e. , as legal jargon pertinent to anti-trust and not as a means of even arguably alleging a separate claim for libel, slander or product disparagement' ...". ***Carfax, Inc. v. Illinois Natl. Ins. Co.*, 2018 N.Y. Slip Op. 01409, First Dept 3-1-18**

LABOR LAW-CONSTRUCTION LAW, EVIDENCE.

PROPERTY OWNER LIABLE FOR PLAINTIFF'S FALL FROM A LADDER (UNDER LABOR LAW § 240 (1)) WHILE WORKING FOR A TENANT, EVEN IF THE OWNER WAS NOT AWARE THE TENANT HIRED THE PLAINTIFF; WHERE ONLY HEARSAY EVIDENCE IS OFFERED IN OPPOSITION TO SUMMARY JUDGMENT, A QUESTION OF FACT IS NOT RAISED.

The First Department, reversing Supreme Court, determined plaintiff was entitled to summary judgment on his Labor Law 240 § (1) claim based upon a fall from a ladder. The court noted that the property owner was liable even if the property owner was unaware the plaintiff had been hired by a tenant (here a deli, also a defendant). The deli owner had provided the A-frame ladder which moved side to side and fell to the ground. The court noted that the defendant owner's opposition papers were entirely hearsay, which cannot defeat summary judgment: "Plaintiff's fall from an unsecured ladder establishes a violation of the statute ... for which defendant property owner is liable, even if the tenant contracted for the work without the owner's knowledge ... . Plaintiff sufficiently identified the location of the deli at his deposition, and also stated that the deli owner offered him money to paint the sign. In opposition, defendant failed to raise an issue of fact sufficient to defeat summary judgment. The statements of the owner of the deli and the deli worker were unsworn and inadmissible as hearsay. It should be noted that in the over 2 ½ years since the statements were taken, defendant never attempted to obtain affidavits

from these witnesses or attempted to depose them, proffering their statements only after plaintiff had moved for summary judgment. Indeed, in its responses to discovery requests, defendant affirmatively represented that it was 'not presently in possession of any statements from witnesses to the accident.' While hearsay statements may be offered in opposition to a motion for summary judgment, hearsay statements cannot defeat summary judgment 'where it is the only evidence upon which the opposition to summary judgment is predicated' ...". ***Gonzalez v. 1225 Ogden Deli Grocery Corp.*, 2018 N.Y. Slip Op. 01280, First Dept 2-27-18**

LABOR LAW-CONSTRUCTION LAW, LANDLORD-TENANT, PERSONAL INJURY.

PLAINTIFF WAS INJURED IN A WORK AREA ON THE 16TH FLOOR USED FOR RENOVATION WORK ON THE 41ST FLOOR, QUESTION OF FACT WHETHER THE 16TH FLOOR WAS A CONSTRUCTION AREA WITHIN THE MEANING OF LABOR LAW § 241(6), THE COURT NOTED A LESSEE IS AN OWNER WITHIN THE MEANING OF LABOR LAW § 241(6).

The First Department, in a full-fledged opinion by Justice Kapnick, reversing Supreme Court, determined plaintiff's Labor Law 241 § (6) action should not have been dismissed. Plaintiff worked for a company hired to renovate building space leased by defendant (Cayre). Cayre's space was on the 41st and 42nd floors. The space where plaintiff was injured was on the 16th floor in an area used by plaintiff's employer for work related to the renovation of Cayre's space. Plaintiff's thumb was injured when he was using an unguarded saw on the 16th floor. The court noted that a lessee is deemed an owner within the meaning of Labor Law 241 (6): "We find that there are disputed issues of fact concerning whether the 16th floor space qualifies as a construction area. ... . '[G]enerally, the scope of a work site must be reviewed as a flexible concept, defined not only by the place but by the circumstances of the work to be done. Thus, Labor Law § 241(6) extends to areas where materials or equipment are being readied for use, as opposed to areas where they are merely stored for future use' ... . Here, although defendants contend that the 16th floor space is [plaintiff's employer's] permanent workshop, in fact, the 16th floor work space where the accident occurred belonged to 1407 Broadway [the net operating lessee], and the 41st floor location of the executive bathroom being renovated was owned by 1407 Broadway, and leased to Cayre. * * * We ... reject Cayre's argument that ... plaintiff's accident does not come within the ambit of Labor Law § 241(6) because he was engaged in the fabrication and transportation of materials to be used in connection with construction. As stated by the Court of Appeals, Labor Law § 241(6) covers industrial accidents that occur in the context of construction (Nagel v. D & R Realty Corp., 99 NY2d 98). Indeed, Shields v. General Elec. Co. (3 AD3d 715 [3d Dept 2004]) is instructive. There, the Court noted that 'work that is an integral part of the construction contract' and is necessitated by and incidental to the construction . . . and involve[s] materials being readied for use in connection therewith' is construction work' ...". ***Karwowski v. 1407 Broadway Real Estate, LLC*, 2018 N.Y. Slip Op. 01422, First Dept 3-2-18**

PERSONAL INJURY, CONTRACT LAW.

PLAINTIFF'S NEGLIGENCE ACTION AGAINST A SECURITY COMPANY HIRED BY KMART SHOULD HAVE BEEN DISMISSED, PLAINTIFF WAS INJURED IN A FIGHT WITH A KMART EMPLOYEE, PLAINTIFF WAS NOT A THIRD PARTY BENEFICIARY OF THE CONTRACT BETWEEN KMART AND THE SECURITY COMPANY, PLAINTIFF DID NOT RELY ON THE PERFORMANCE OF THE SECURITY COMPANY'S DUTIES, AND THE SECURITY COMPANY DID NOT FULLY DISPLACE KMART'S DUTY TO PROVIDE SECURITY (ESPINAL FACTORS).

The First Department, reversing Supreme Court, determined that plaintiff's negligence action against a security company (US Security) hired by Kmart did not state a cause of action. Plaintiff was injured in a fight with a Kmart employee in a Kmart store. The First Department held that plaintiff was not a third party beneficiary of the contract between Kmart and US Security, did not rely to his detriment on the performance of US Security's duties, and US Security did not entirely supplant Kmart's duty to secure the store: "Plaintiff was not an intended third-party beneficiary of the contract between Kmart and U.S. Security, which contains a 'No Third Party Beneficiaries' clause ... . Nor can a duty be imposed on U.S. Security on the ground either that plaintiff relied to his detriment on the continued performance of U.S. Security's contractual duties or that U.S. Security had entirely displaced Kmart's duty to secure its store ... . Plaintiff's affidavit says nothing about having knowledge of the contract between Kmart and U.S. Security or about detrimental reliance on U.S. Security's continued performance thereunder ... . As for entire displacement, while the written scope of U.S. Security's services included "the protection of ... customers ... in the Premises," the deposition testimony of the loss prevention manager at the relevant Kmart store makes it clear that, in actual practice, U.S. Security's services at that store were limited to deterring shoplifting ... . Furthermore, U.S. Security did not totally displace Kmart's duty to secure its store, because Kmart retained supervisory authority over the security guards and required U.S. Security's staff to complete training in accordance with its (Kmart's) safety policies and procedures ...". ***Santiago v. K Mart Corp.*, 2018 N.Y. Slip Op. 01296, First Dept 2-27-18**

SECOND DEPARTMENT

FAMILY LAW.

LEGAL GUARDIAN'S PETITION TO ADOPT CHILD SHOULD NOT HAVE BEEN DENIED BASED SOLELY UPON THE GUARDIAN'S CRIMINAL HISTORY.

The Second Department, reversing Family Court, determined the legal guardian's petition to adopt the child should not have been denied solely based upon petitioner's criminal history. The criminal history was 20 years old and petitioner had been the child's legal guardian for five years: "A court must determine whether a proposed adoption is in the best interests of the child ... . The court should consider all the relevant factors ... . '[P]erfection is not demanded of adoptive parents' ... , and 'even an unacceptable record of misconduct by adoptive parents may be mitigated by evidence that the proposed adoptive child is healthy and happy and considers petitioners to be his [or her] parents' ... . Here, the Family Court erred in determining that the adoption was not in the child's best interests based solely on the petitioner's criminal history. The court should have received evidence and considered other factors relevant to the issue. This is particularly true since the petitioner had been appointed the child's permanent guardian and had served in that role for over five years, which was most of the child's life, and all of the petitioner's convictions occurred more than 20 years before he commenced this proceeding ...". ***Matter of Isabella (Charles O.)*, 2018 N.Y. Slip Op. 01309, Second Dept 2-28-18**

FAMILY LAW.

THE AUTOMATIC ORDERS WHICH PRECLUDE TRANSFER OF MARITAL PROPERTY WHILE DIVORCE PROCEEDINGS ARE PENDING CANNOT BE USED AS THE BASIS FOR CIVIL CONTEMPT AFTER THE JUDGMENT OF DIVORCE.

The Second Department, reversing Supreme Court, in a full-fledged opinion by Justice Duffy, determined the automatic orders which preclude the transfer of marital property ("the Property") when a divorce proceeding is pending cannot be the basis of a contempt order after the judgment of divorce. Here the wife learned the husband had sold a marital asset while the divorce was pending and the court, based upon the automatic orders, after judgment, found the husband in contempt and ordered payment of a purge amount to the wife under threat of incarceration: "At the time the defendant sold the Property, both Domestic Relations Law § 236(B)(2)(b) and 22 NYCRR 202.16-a were in full force and effect. As is relevant to this appeal, each provision, with language that virtually mirrors the other, precludes either of the parties in a matrimonial action from transferring or in any way disposing of marital assets such as the Property without the written consent of the other party or order of the court, except under certain circumstances not applicable to this case ... . The automatic orders are binding upon a plaintiff upon commencement of the matrimonial action and upon a defendant upon service of the summons or summons and complaint ... . * * * Upon entry of a judgment of divorce, the purpose of the automatic orders ends, and, when the life of the automatic orders thus expires, the statutory remedies for their enforcement fall at the same time ... . Here, after the judgment of divorce was entered, the automatic orders ceased to exist for the purposes of enforcement ... given that the judgment of divorce was the final determination of the action and, along with legally ending the marriage of the parties, disposed of all outstanding issues relating to the division of the parties' property, the award of maintenance, child custody, and other marital issues ... . * * * ... [T]he unavailability of civil contempt as a remedy to enforce the terms of the automatic orders after the entry of the judgment of divorce does not render this plaintiff without available remedies. For example, vacatur of the judgment of divorce based on newly discovered evidence, a civil contempt motion for a violation of the judgment of divorce, a proceeding to enforce the terms of the judgment of divorce or to obtain an order directing the payment of 50% of the value of the Property which was awarded to the plaintiff in the judgment of divorce, or amendment of the judgment of divorce are all remedies that the plaintiff could have sought ...". ***Spencer v. Spencer*, 2018 N.Y. Slip Op. 01348, Second Dept 2-28-18**

FAMILY LAW, ATTORNEYS.

FAMILY COURT SHOULD NOT HAVE REFUSED TO ALLOW FATHER TO REPRESENT HIMSELF IN THIS CUSTODY PROCEEDING.

The Second Department, reversing Family Court, determined father's desire to represent himself in this custody proceeding should have been honored by the court. Family Court had ordered that father be allowed only supervised visitation until he retained counsel: "The father had a statutory right to counsel in these Family Court proceedings ... . However, he also had the right to waive counsel and proceed pro se, provided he waived his right to counsel knowingly, intelligently, and voluntarily ... . 'Where a respondent has made a knowing, intelligent, and voluntary choice to represent himself or herself, forcing a lawyer upon [him or her] is contrary to his [or her] basic right to defend himself [or herself]' ... . Where a party unequivocally and timely asserts the right to self-representation, the court must conduct a searching inquiry to ensure that the waiver of the right to counsel is knowing, intelligent, and voluntary ... . 'While there is no rigid formula to the court's inquiry, there must be a showing that the party was aware of the dangers and disadvantages of proceeding without counsel'

... . The Court of Appeals has stated that the better practice is to ask the party about his or her age, education, occupation, previous exposure to legal procedures, and other relevant factors bearing on a competent, intelligent, and voluntary waiver ... . Here, the father unequivocally and timely asserted his right to represent himself in the Family Court proceedings. The Family Court engaged in a searching inquiry of the father, which revealed that he knowingly, intelligently, and voluntarily waived his right to counsel, and that it was his desire and personal choice to proceed pro se. The court properly warned him of the perils of self-representation, which he acknowledged. The father is a tax attorney, and his relative ignorance of family law did not justify the court's denial of his request, as mere ignorance of the law is insufficient to deprive one of the right to self-representation ...". ***Matter of Aleman v. Lansch*, 2018 N.Y. Slip Op. 01303, Second Dept, 2-28-18**

FORECLOSURE, CIVIL PROCEDURE.

FORECLOSURE ACTION SHOULD NOT HAVE BEEN DISMISSED AS UNTIMELY FOR TWO DISTINCT REASONS; THE 2007 COMPLAINT WAS DISMISSED FOR LACK OF STANDING AND THEREFORE DID NOT SERVE TO ACCELERATE THE DEBT; THE SECOND ACTION, BROUGHT BY A SUCCESSOR IN INTEREST, WAS STARTED WITHIN SIX MONTHS OF THE DISMISSAL OF THE INITIAL ACTION AND WAS THEREFORE TIMELY UNDER CPLR 205(a).

The Second Department, reversing Supreme Court, over a two-justice dissent, determined defendant's motion to dismiss the foreclosure complaint as time-barred should have been denied. The first foreclosure action was started in 2007. The defendant's default did not automatically accelerate the debt because the language in the note and mortgage made acceleration optional. Although the 2007 complaint sought to accelerate the debt, the complaint was dismissed for lack of standing and therefore could not be relied upon as evidence the debt was accelerated. The Second Department also considered, and found valid, an argument raised below but not considered by Supreme Court, i.e., the current action was started within six months of the dismissal of the 2007 action and was therefore timely pursuant to CPLR 205(a). This rationale was deemed applicable even though the parties which commenced to two actions were not technically the same: "... [I]nasmuch as the acceleration provisions in the note and mortgage were made optional at the discretion of the holder and were not automatically triggered upon Rose Gordon's default (see generally 1-4 Bergman on New York Mortgage Foreclosures § 4.03[2017]), the allegation in the 2007 complaint that Rose Gordon defaulted on March 1, 2007, did not constitute evidence that the mortgage was accelerated on that date ... . * * * ... [T]he prior plaintiff in the 2007 action did not have standing to commence that action because it was not the holder of the note and mortgage at the time that the 2007 action was commenced. Accordingly, service of the 2007 complaint was ineffective to constitute a valid exercise of the option to accelerate the debt, since the prior plaintiff did not have the authority to accelerate the debt or to sue to foreclose at that time ... . Although, as a general matter, only the plaintiff in the original action is entitled to the benefits of CPLR 205(a), the Court of Appeals has nevertheless recognized an exception to this general rule under certain circumstances where the plaintiff in the new action is seeking to enforce 'the rights of the plaintiff in the original action'"... . More specifically to the facts here, this Court has recently held that 'a plaintiff in a mortgage foreclosure action which meets all of the other requirements of the statute is entitled to the benefit of CPLR 205(a) where . . . it is the successor in interest as the current holder of the note'... . Here, even assuming that there were no questions of fact as to whether the plaintiffs in the 2007 and 2013 actions were legally distinct entities, the plaintiff in this action is entitled to the benefit of CPLR 205(a). As the assignee and subsequent holder of the note and mortgage, the plaintiff in the 2013 action had a statutory right, pursuant to CPLR 1018, to continue the 2007 action in the place of the prior plaintiff once the assignment occurred in 2009, even in the absence of a formal substitution ...". ***U.S. Bank N.A. v. Gordon*, 2018 N.Y. Slip Op. 01349, Second Dept 2-28-18**

FORECLOSURE, EVIDENCE.

EVIDENCE OF STANDING DID NOT MEET THE REQUIREMENTS OF THE BUSINESS RECORDS HEARSAY EXCEPTION, SUPREME COURT SHOULD NOT HAVE DONE INTERNET RESEARCH TO MAKE A SUA SPONTE FINDING THAT THE BANK HAD STANDING.

The Second Department determined plaintiff bank's (OneWest's) motion for summary judgment should have been denied because standing was not demonstrated with evidence meeting the business records hearsay exception requirements. The Second Department criticized Supreme Court for doing its own Internet research and making a sua sponte finding that OneWest had standing: "In support of its motion, OneWest submitted the affidavit of Jillian Thrasher, an employee of its loan servicer, who averred that OneWest was the holder of the note, which is endorsed in blank, and assignee of the mortgage at the time the action was commenced. However, OneWest failed to demonstrate the admissibility of the records that Thrasher relied upon under the business records exception to the hearsay rule (see CPLR 4518[a]), since she did not attest that she was personally familiar with OneWest's record-keeping practices and procedures ... . Insofar as the Supreme Court reached its determination that OneWest had standing by, sua sponte, 'independently tak[ing] judicial notice of the FDIC website,' this Court has repeatedly cautioned against such independent Internet investigations, especially when conducted without providing notice or an opportunity for the parties to be heard ...". ***OneWest Bank, FSB v. Berino*, 2018 N.Y. Slip Op. 01318, Second Dept 2-28-18**

PERSONAL INJURY.

DEFENDANT DID NOT MAKE A PRIMA FACIE SHOWING THE CRACK OVER WHICH PLAINTIFF TRIPPED WAS TRIVIAL, THEREFORE THE BURDEN NEVER SHIFTED TO PLAINTIFF TO RAISE A QUESTION OF FACT, DEFENDANT'S MOTION FOR SUMMARY JUDGMENT PROPERLY DENIED.

The Second Department determined defendant did not meet its prima facie burden to demonstrate the crack in a concrete floor was trivial in this slip and fall case. Therefore the burden never shifted to plaintiff to raise a question of fact. Defendant's motion for summary judgment was properly denied: "Generally, the issue of whether a dangerous or defective condition exists on the property of another depends on the facts of each case and is a question of fact for the jury ... . However, a property owner may not be held liable for trivial defects, not constituting a trap or nuisance, over which a pedestrian might merely stumble, stub his or her toes, or trip ... . In determining whether a defect is trivial, the court must examine all of the facts presented, including the 'width, depth, elevation, irregularity and appearance of the defect along with the time, place and circumstance of the injury' ... . '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' ... . Contrary to the defendant's contention, it failed to establish, prima facie, that the alleged defective condition was trivial as a matter of law and therefore not actionable ...". ***Cortes v. Taravella Family Trust*, 2018 N.Y. Slip Op. 01301, Second Dept 2-28-18**

PERSONAL INJURY.

PLAINTIFF COULD NOT IDENTIFY THE CAUSE OF HER STAIRCASE FALL, DEFENDANT'S MOTION FOR SUMMARY JUDGMENT PROPERLY GRANTED.

The Second Department determined defendant's motion for summary judgment in this slip and fall case was properly granted because the plaintiff could not identify the cause of her staircase fall. The allegation that the staircase lacked a handrail in violation of the building code did not raise a question of fact: "In support of its motion, the defendant established its prima facie entitlement to judgment as a matter of law by demonstrating that the plaintiff was unable to identify the cause of her fall ... . In opposition, the plaintiff failed to raise a triable issue of fact ... . The plaintiff's conclusory assertion that the absence of a handrail on the side of the stairs where she fell constituted a building code violation was insufficient to defeat the defendant's motion." ***Morchyk v. Acadia 3780-3858 Nostrand Ave., LLC*, 2018 N.Y. Slip Op. 01302, Second Dept 2-28-18**

PERSONAL INJURY.

ALTHOUGH PLAINTIFF VIOLATED THE VEHICLE AND TRAFFIC LAW BY TURNING LEFT INTO PLAINTIFF'S PATH, DEFENDANT RAISED A QUESTION OF FACT ABOUT WHETHER PLAINTIFF WAS SPEEDING.

The Second Department determined plaintiff's motion for summary judgment in this traffic accident case was properly denied. Plaintiff made out a prima facie case by demonstrating defendant, Gavitt, made a left turn across the plaintiff's path and plaintiff entered an intersection. However Gavitt raised a question of fact by alleging plaintiff was speeding: "Here, the plaintiff demonstrated, prima facie, that Gavitt was negligent in violating Vehicle and Traffic Law § 1141 'by making a left turn into the path of oncoming traffic without yielding the right of way to the plaintiff when the turn could not be made with reasonable safety'... . The undisputed fact that Gavitt was, in fact, unable to complete his left turn 'without being struck by [the plaintiff's] vehicle' ... demonstrates that he violated Vehicle and Traffic Law § 1141 by failing to 'yield the right of way to any vehicle approaching from the opposite direction which [was] . . . so close as to constitute an immediate hazard' ... . 'Regardless of which vehicle entered the intersection first, [the plaintiff], as the driver with the right-of-way, was entitled to anticipate that [Gavitt] would obey traffic laws which required [him] to yield'... . The plaintiff also demonstrated, prima facie, that Gavitt's negligence was the sole proximate cause of the accident, and that the plaintiff was not comparatively at fault in the happening of the accident. In this regard, the plaintiff testified at his deposition that he was traveling at 25 miles per hour immediately prior to the accident and, upon seeing Gavitt commence making the left turn in front of him, he immediately applied his brakes in an attempt to avoid colliding with Gavitt's vehicle, but he was unable to avoid the collision ... . In opposition to the plaintiff's prima facie showing, however, the defendants raised a triable issue of fact as to whether the plaintiff was traveling at an excessive rate of speed immediately prior to the accident and whether he could have avoided the accident through the exercise of reasonable care ...". ***Shashaty v. Gavitt*, 2018 N.Y. Slip Op. 01347, Second Dept 2-28-18**

SOCIAL SERVICES LAW.

ALTHOUGH THE CHILD SUPPORT INCOME FOR TWO CHILDREN IN COLLEGE WAS COUNTED AS PART OF THE HOUSEHOLD INCOME, THE TWO COLLEGE STUDENTS WERE PROPERLY NOT COUNTED FOR FOOD STAMP ELIGIBILITY, THE DENIAL OF FOOD STAMPS WAS PROPER.

The Second Department determined the Commissioner of the NYS Office of Temporary and Disability Assistance properly interpreted the food stamp regulations. Petitioner's application to continue her Supplemental Nutritional Assistance

Program (SNAP) (food stamp) benefits was denied. Petitioner had five children, two in college. The two college students were not counted as part of the household for SNAP purposes but the child support income petitioner received for the two college students was counted. So petitioner's income was deemed too high for food stamp eligibility: "Pursuant to 7 CFR 273.7(a)(1), '[a]s a condition of eligibility for SNAP benefits, each household member not exempt under paragraph (b)(1) of this section must comply with the following SNAP work requirements,' including registering for work. According to 7 CFR 273.7(b)(1)(viii), students enrolled at least half time in institutions of higher education are only exempt if they meet 'the student eligibility requirements listed in' 7 CFR 273.5(b), which includes students under 18, students with special needs, students in work study programs, or students employed for a minimum of 20 hours per week. Similarly, 18 NYCRR 387.16(d) provides for the inclusion of income from nonhousehold members who have been disqualified for an intentional program violation, ineligible alien status, failure to attest to citizenship or alien status, or failure to comply with a food stamp work registration or work requirement as provided in 18 NYCRR 385.3. Under 18 NYCRR 385.3 and 18 NYCRR 387.1(jj), such students are not exempt from work requirements, and are not eligible for food stamps. Pursuant to 18 NYCRR 387.16(d) their income has to be included in household income. The college students were not employed a minimum of 20 hours per week or otherwise eligible for an exemption. Accordingly, their income was properly included in household income." ***Matter of Leggio v. Devine*, 2018 N.Y. Slip Op. 01312, Second Dept 2-28-18**

THIRD DEPARTMENT

ADMINISTRATIVE LAW, ENVIRONMENTAL LAW.

FORMER COMMISSIONER OF ENVIRONMENTAL CONSERVATION DID NOT HAVE THE AUTHORITY TO REVISIT A PRIOR FINDING THAT A ROAD WITHIN THE ADIRONDACK PARK HAD NOT BEEN ABANDONED AND THEREFORE COULD BE USED BY SNOWMOBILERS.

The Third Department, in a full-fledged opinion by Justice Mulvey, annulled the former Commissioner of Environmental Conservation's determination that a road within the Adirondack Park had been abandoned and therefore could not be used by snowmobilers. The determination reversed an earlier determination that the road had not been abandoned. The second determination was made pursuant to the Department of Environmental Conservation's (DEC's) motion to clarify. The Third Department held that, although tilted a motion to clarify, the motion was actually a motion to reconsider, the criteria for which were not met: "The motion was, in effect, one to reconsider the 2009 determination. Yet, no statutory authority exists for DEC to reconsider a final determination issued in an administrative enforcement proceeding. ... While the regulations governing enforcement proceedings allow a Commissioner to reopen the hearing record to consider 'significant new evidence,' the Commissioner may only do so 'prior to issuing the final [determination]' ... . 'In the absence of any statutory [or regulatory] reservation of discretionary agency authority to reconsider its determinations, New York applies a long-standing policy of finality to the . . . determinations of an administrative agency' ... . 'Public officers or agents who exercise judgment and discretion in the performance of their duties may not revoke their [quasi-judicial] determinations nor review their own orders once properly and finally made, however much they may have erred in judgment on the facts, even though injustice is the result' ... . This is not to say, of course, that an administrative body may never reconsider a previously issued final determination. Under settled law, a final agency determination may be corrected if it suffers from an error that 'was the result of illegality, irregularity in vital matters, or fraud'... . Likewise, an agency has the inherent authority to reconsider a prior determination to "correct its erroneous interpretations of the law'... , or upon a showing of new information or changed circumstances ... . In our view, [the former Commissioner of Environmental Conservation's] actions here ran afoul of the principle of finality attached to administrative determinations." ***Matter of Town of N. Elba v. New York State Dept. of Envtl. Conservation*, 2018 N.Y. Slip Op. 01369, Third Dept 3-1-18**

CRIMINAL LAW, EVIDENCE, APPEALS.

DISTINCTION BETWEEN LEGAL INSUFFICIENCY AND WEIGHT OF THE EVIDENCE EXPLAINED; CRIMINALLY NEGLIGENT HOMICIDE IS NOT A LESSER INCLUDED OFFENSE WITHIN DEPRAVED INDIFFERENCE MURDER.

The Third Department, affirming defendant's depraved indifference murder conviction, noted the difference between a "legal sufficiency" analysis and a "weight of the evidence" analysis on appeal, and reiterated that criminally negligent homicide is not a lesser included offense within depraved indifference murder. Here the two-year old victim was subjected to severed physical abuse over a period of days or longer: "Defendant argues that the verdict was not supported by legally sufficient evidence and was against the weight of the evidence. A legal sufficiency challenge requires us to 'view the evidence in the light most favorable to the People and evaluate whether 'there is any valid line of reasoning and permissible inferences which could lead a rational person to the conclusion reached by the jury on the basis of the evidence at trial and as a matter of law satisfy the proof and burden requirements for every element of the crime charged' ... . A legally sufficient verdict may, however, be against the weight of the evidence … . The latter review requires us to assess whether acquittal was a reasonable possibility and, if so, to weigh 'the relative probative force of conflicting testimony and the relative strength of conflicting inferences that may be drawn from the testimony' in deciding whether the verdict was justified ... . * * * Crimi-

nally negligent homicide demands that a person act 'with criminal negligence' and, in doing so, 'causes the death of another person' (Penal Law § 125.10). Inasmuch as criminal negligence involves a person failing 'to perceive [the] substantial and unjustifiable risk' of the result set forth by the statute (Penal Law § 15.05 [4]), a person does not commit criminally negligent homicide unless he or she fails to perceive a substantial and unjustifiable risk of death ... In contrast, Penal Law § 125.25 (4) demands that an adult person, '[u]nder circumstances evincing a depraved indifference to human life, . . . recklessly engage[] in conduct which creates a grave risk of *serious physical injury or death* to another person less than [11] years old' and that ends in the other person's death (emphasis added). The definition of serious physical injury encompasses injuries that do not create a substantial risk of death or cause death, such as those that cause 'serious and protracted disfigurement, protracted impairment of health or protracted loss or impairment of the function of any bodily organ' (Penal Law § 10.00 [10]). As we have previously held, it is therefore theoretically possible to commit depraved indifference murder of a child by 'engag[ing] in conduct that creates and disregards a grave risk of serious physical injury, causing death, without . . . engaging in conduct that creates . . . a substantial risk of death, causing death' ...". ***People v. Stahli*, 2018 N.Y. Slip Op. 01359, Third Dept 3-1-18**

FAMILY LAW.

DESPITE MOTHER'S FAILURE TO COMPLY WITH SEVERAL DIRECTIONS BY THE COURT THAT SHE RETURN TO NEW YORK WITH THE CHILDREN, FATHER SHOULD NOT HAVE BEEN AWARDED CUSTODY IN THE ABSENCE OF A FULL HEARING.

The Third Department, reversing Family Court, determined that the court erred in awarding custody to the father without an evidentiary hearing. Mother had repeatedly promised to return with the children from New Mexico but did not. Although Family Court was justifiably irked by the mother's behavior, a custody hearing was still required: "We do ... agree with the mother that Family Court erred in granting the father's custody petition without conducting an evidentiary hearing. '[C]ustody determinations should generally be made only after a full and plenary hearing and inquiry'... . A court's final custody determination must be based on admissible evidence and not on, as relevant here, 'information provided at court appearances by persons not under oath'... . The record reveals that Family Court's ultimate custody and visitation determination was made only after a few preliminary court appearances in which no witness gave sworn testimony or documentary evidence was received, and there is no indication that Family Court considered the various factors relative to the best interests of the children. While Family Court was justifiably irked at the mother's actions in frustrating the purpose of the court's prior orders, such actions, although certainly relevant, are not solely dispositive in this case on the issues of custody and visitation ... . Because Family Court 'did not possess sufficient information to render an informed determination that was consistent with the children's best interests'... , the matter must be remitted for a full evidentiary hearing on the father's custody petition." ***Matter of Richard T. v. Victoria U.*, 2018 N.Y. Slip Op. 01364, Third Dept 3-1-18**

LABOR LAW-CONSTRUCTION LAW.

PLAINTIFF WAS NOT ALTERING OR ERECTING A STRUCTURE WITHIN THE MEANING OF LABOR LAW § 240(1), DEFENDANT PROPERTY OWNER DID NOT EXERCISE SUPERVISORY CONTROL OVER THE METHOD OR MANNER OF PLAINTIFF'S WORK, PLAINTIFF'S LABOR LAW §§ 240(1) AND 200 CAUSES OF ACTION PROPERLY DISMISSED.

The Third Department determined plaintiff was not engaged in an activity protected by Labor Law § 240(1) when he was injured and the defendant owner of the property did not supervise or control the manner of plaintiff's work, requiring dismissal of the Labor Law § 200 cause of action as well. The plaintiff worked for a car crushing busing and was standing on a crushed car on a trailer when he was knocked into the air by a piece of heavy equipment: "... [E]ven if we were to agree with plaintiff that the open trailer was a structure as that term is used in Labor Law § 240 (1), the record provides us with no basis to conclude that the activity in which plaintiff was engaged was a protected activity or, as relevant here, that plaintiff was altering or erecting a structure. ... 'When an alleged defect or dangerous condition arises from [a] contractor's methods and the owner exercises no supervisory control over the operation, no liability attaches to the owner under the common law or under Labor Law § 200' ...". ***Lopez v. 6071 Enters., LLC*, 2018 N.Y. Slip Op. 01372, Third Dept 3-1-18**

PRODUCTS LIABILITY, CIVIL PROCEDURE, APPEALS, PERSONAL INJURY.

QUESTIONS OF FACT PRECLUDED SUMMARY JUDGMENT DISMISSING THE PRODUCTS LIABILITY COMPLAINT AGAINST THE DISTRIBUTOR AND SELLER OF CLOTHES WHICH CAUGHT FIRE AFTER CONTACT WITH A HEATER, THE HEATER DEFENDANTS WERE AGGRIEVED BY THE DISMISSAL UNDER JOINT LIABILITY PRINCIPLES AND THEREFORE COULD APPEAL.

The Third Department reversed (modified) Supreme Court's dismissal of products liability complaint against the distributor (At Last Sportswear) and seller (Walmart) of plaintiff's clothing which caught fire. The court also determined the Enerco defendants (the manufacturer, designer, and distributor of the heater which ignited the clothes) were aggrieved by the order, based upon joint liability principles, and therefore could appeal it: "Although liability can be apportioned between any tortfeasors, whether they are codefendants or nonparties, if an alleged tortfeasor was a codefendant whom the court had

dismissed from the case, the law of the case doctrine would preclude the remaining defendants from introducing at trial any evidence regarding the same type of defect or error by that alleged tortfeasor that was previously litigated ... . Thus, the Enerco defendants were entitled to challenge motions by any codefendants seeking to be released from the action, they were aggrieved by any orders granting dismissal and they could, therefore, appeal any such orders. ... [At Last's and Walmart's] expert opined that the dress materials complied with and exceeded the requirements of the Federal Flammable Fabrics Act (15 USC § 1191 et seq. [hereinafter FFA]) and accompanying regulations (16 CFR part 1610) for general wearing apparel, as well as the industry standard, that the dress was reasonably safe and suitable for its intended use, that it was not defective in any manner and that this type of 100% cotton dress was a standard commodity. ... ... [T]he Enerco defendants submitted an affidavit from their own expert, who opined that the FFA standards are insufficient to determine whether a garment is safe because it addresses only some factors affecting flammability of the fabric but not the design of the garment itself ... . He supported his opinion with literature in which industry professionals addressed the inadequacy of the FFA standards to protect consumers. These competing expert opinions present a triable issue of fact regarding whether a design defect exists ... .The parties' experts disagreed as to whether labels warning about the dress's flammability and the need to be cautious around heat sources were appropriate for such general wearing apparel and existed in the United States market for this type of garment. Thus, factual issues remain regarding whether At Last Sportswear and the Wal-Mart defendants breached a duty to warn." ***Palmatier v. Mr. Heater Corp.*, 2018 N.Y. Slip Op. 01368, Third Dept 3-1-18**

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