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An Organized Compilation of Summaries of Selected Decisions, Mostly Reversals, Released by Our New York State Appellate Courts March 11 – 15, 2024, and Posted on the New York Appellate Digest Website on Monday, March 18, 2024. The Entries in the Table of Contents Link to the Summaries Which Link to the Full Decisions on the Official New York Courts Website. Click on “Table of Contents” in the Header on Any Page to Return There. Right Click on the Citations to Keep Your Place in the Reversal Report. Copyright 2024 New York Appellate Digest, LLC

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WHERE A LAWSUIT AGAINST A UNION SEEKS INJUNCTIVE RELIEF, AS OPPOSED TO MONETARY DAMAGES, THE COMPLAINT NEED NOT ALLEGE EVERY MEMBER OF THE UNION RATIFIED THE CHALLENGED CONDUCT (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Garcia, determined the precedent (Martin v Curran (303 NY 276) prohibiting a lawsuit against a union (an unincorporated association) unless it was demonstrated every member of the union ratified the challenged action only applies when the lawsuit seeks monetary damages, not, as here, injunctive relief:

… [E]xtending [Martin v Curran (303 NY 276 [1951])] to bar union members from seeking any form of injunctive relief against a union, would have troubling implications. Respondents do not seriously dispute that, if Martin precludes petitioners' claim here, union members would have no recourse to the courts even when incumbent union officials are allegedly manipulating elections to maintain power. Applying Martin to bar suits seeking to compel union officials to abide by their respective union constitutions and bylaws would have "far-reaching consequences" and risk "stifl[ing] all criticism" and democracy "within the union" … .

We therefore clarify that where, as here, union members seek only injunctive relief against the union and state no claim for pecuniary damages, the pleading is not

governed by Martin and, as such, a plaintiff need not allege the participation of each individual member to bring a claim in accordance with General Associations Law § 13. The petition below was therefore improperly dismissed on that ground. Matter of Agramonte v Local 461, Dist. Council 37, Am. Fedn. of State, County & Mun. Empls., 2024 NY Slip Op 01332, CtApp 3-14-24

Practice Point: The complaint in a lawsuit against a union seeks injunctive relief, as opposed to monetary damages, the complaint need not allege that every member of the union ratified the challenged conduct.

MARCH 14, 2024

CIVIL PROCEDURE, CORPORATION LAW.

PLAINTIFF, A NEW YORK RESIDENT AND A SHAREHOLDER IN DEFENDANT LONDON CORPORATION, ALLEGED DEFENDANT WRONGFULLY FAILED TO PAY DIVIDENDS; THE LONDON DEFENDANT'S MOTION TO DISMISS ON FORUM NON CONVENIENS GROUNDS SHOULD HAVE BEEN GRANTED (FIRST DEPT).

The First Department, reversing Supreme Court, determined defendant's motion to dismiss on "forum non conveniens" grounds should have been granted. Plaintiff is a New York resident and the defendant is a London corporation (Anderson). Plaintiff, a shareholder of Anderson, alleged Anderson failed to pay dividends to shareholders:

The doctrine of forum non conveniens permits a court to dismiss an action when it finds that "in the interest of substantial justice the action should be heard in another forum" (CPLR 327[a]). In reviewing the motion court's exercise of discretion, this Court, however, may exercise such discretion independently … . The factors to be considered on a forum non conveniens motion include: "the burden on the New York courts, the potential hardship to the defendant, and the unavailability of an alternative forum in which plaintiff may bring suit. The court may also consider that both parties to the action are nonresidents and that the transaction out of which the cause of action arose occurred primarily in a foreign jurisdiction. No one factor

is controlling" … . New York courts "need not entertain causes of action lacking a substantial nexus with New York" … .

… Although plaintiff is a resident of New York, Anderson, its documents, and the witnesses are all located in the United Kingdom. The dispute involves an accounting of a British private company and will likely involve the application of British law to determine what duty, if any, is owed to plaintiff. Furthermore, the United Kingdom has a stronger interest than New York in the actions, duties, and governance of its companies … . Hayes v Anderson & Sheppard Ltd., 2024 NY Slip Op 01344, First Dept 3-14-24

Practice Point: Here plaintiff, a New York resident and a shareholder in defendant London corporation, alleged defendant wrongfully failed to pay dividends. The London defendant's motion to dismiss on forum non conveniens grounds should have been granted, criteria explained.

MARCH 14, 2024

CIVIL PROCEDURE, EDUCATION-SCHOOL LAW, NEGLIGENCE.

THE DISCOVERY DEMANDS IN THIS NEGLIGENT SUPERVISION ACTION AGAINST DEFENDANT SCHOOL DISTRICT ALLEGING SEXUAL ABUSE BY A TEACHER WERE OVERLY BROAD AND UNDULY BURDENSOME AND SHOULD HAVE BEEN STRUCK IN THEIR ENTIRETY (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the discovery demands in this negligent supervision action against a school district, alleging the sexual abuse of plaintiff-student by a teacher, were overly broad and unduly burdensome. Therefore the demands should have been struck in their entirety with no attempt to prune them:

… [A] "' …party is not entitled to unlimited, uncontrolled, unfettered disclosure'" … . "Pursuant to CPLR 3103(a), the Supreme Court may issue a protective order striking a notice for discovery and inspection that is palpably improper" … . A notice for discovery and inspection is palpably improper if it is overbroad,

burdensome, fails to specify with reasonable particularity many of the documents demanded, or seeks irrelevant or confidential information (see CPLR 3120[2] …). "Where the discovery demands are overbroad, the appropriate remedy is to vacate the entire demand rather than to prune it" … .

Here, many of the plaintiff's discovery demands were palpably improper in that they were overbroad and burdensome … . The plaintiff's discovery demands broadly sought, among other things, documents pertaining to any complaint of sexual abuse by any employee of the District from January 1, 1997, to the present and any suspected romantic or sexual relationship between any teacher and any student at the school from 1990 to the present. Thus, the Supreme Court should have denied the plaintiff's motion pursuant to CPLR 3124 to compel the District to comply with the plaintiff's first and second demands for discovery and granted the District's application pursuant to CPLR 3103(a) for a protective order striking those demands in their entirety instead of pruning them … . Ferrara v Longwood Cent. Sch. Dist., 2024 NY Slip Op 01293, Second Dept 3-13-24

Practice Point: In this negligent supervision action against a school district alleging sexual abuse by a teacher plaintiff's discovery demands included "documents pertaining to any complaint of sexual abuse by any employee of the District from January 1, 1997, to the present and any suspected romantic or sexual relationship between any teacher and any student at the school from 1990 to the present". The demand was overly broad and unduly burdensome and was struck in its entirety.

MARCH 13, 2024

CIVIL PROCEDURE, EVIDENCE.

AFTER BEING TOLD THE PREMISES WAS NOT DEFENDANT'S RESIDENCE, THE PROCESS SERVER DID NOT EXERCISE DUE DILIGENCE TO DETERMINE WHERE DEFENDANT RESIDED BEFORE RESORTING TO NAIL-AND-MAIL SERVICE; THE DEFAULT JUDGMENT AGAINST DEFENDANT VACATED (FIRST DEPT).

The First Department determined plaintiff failed to show defendant Lopez was properly served at the traverse hearing. The default judgment against Lopez was vacated. The decisions provides a rare opportunity to look inside a traverse hearing:

During the traverse hearing, plaintiff's process server testified that he posted the summons and complaint on the door of the subject premises located at 713 Prospect Avenue in the Bronx (the premises), after making four attempts to serve Lopez there. However, the process server also testified that while he was attempting to personally serve Lopez at the premises, which his employer had represented was her residence, someone at the premises told him Lopez did not live there. This testimony established that the nail-and-mail service of process on Lopez was insufficient because plaintiff's process server did not first comply with the due diligence requirement of CPLR 308(4) … . Upon obtaining information that Lopez did not reside at the premises, due diligence required the process server to investigate her whereabouts on the date of service and whether the service address was actually her dwelling place or usual place of abode before resorting to the alternative method of serving her with the summons and complaint by nail-and-mail service … . There is no evidence that the process server did so, and the affidavit of service simply states that the process server served Lopez at her "dwelling place/usual place of abode." Casanova v Lopez, 2024 NY Slip Op 01269, Frist Dept 3-12-24

Practice Point: Here the process server was told defendant did not reside at the premises but he did not exercise due diligence (CPLR 308(4)) to find out where defendant did reside before resorting to nail-and-mail service. The default judgment against defendant was vacated.

MARCH 12, 2024

CIVIL PROCEDURE.

THE STATUTORY CRITERIA FOR A MOTION TO CHANGE VENUE IN CPLR 510(3) WERE NOT MET; THE MOTION SHOULD NOT HAVE BEEN GRANTED (FIRST DEPT).

The First Department, reversing Supreme Court, determined the defendants' motion to change the venue in this insurance-coverage dispute should not have been granted because the statutory criteria in CPLR 510(3) were not met. The statute requires detailed information about the witnesses who will testify and how those witnesses would be inconvenienced if venue is not changed:

To warrant a change of venue pursuant to CPLR 510(3), "[t]he affidavit in support of such motion must contain the names, addresses and occupations of the prospective witnesses, must disclose the facts to which the proposed witnesses will testify at the trial, must show that the proposed witnesses are, in fact, willing to testify and must show how the proposed witnesses would be inconvenienced in the event that a change of venue is not granted" … . Defendants have failed to meet any part of this standard. Defendants' general statements that nonparty witnesses involved in the renovation project will be inconvenienced by venue in New York County is inadequate to satisfy the standard … . Corner of Walnut LLC v Tompkins Ins. Agencies, Inc., 2024 NY Slip Op 01339, First Dept 3-14-24

Practice Point: CPLR 510(3) describes the required contents of a motion to change venue which includes detailed information about the witnesses who will testify and how the witnesses will be inconvenienced if venue is not changed.

MARCH 14, 2024

CONTRACT LAW, LIMITED LIABILITY COMPANY LAW.

THE AMENDED LIMITED LIABILITY COMPANY AGREEMENT SUPERSEDED THE PRIOR ORAL SIDE AGREEMENT BECAUSE IT INCLUDED AN UNAMBIGUOUS INTEGRATION AND MERGER CLAUSE (FIRST DEPT).

The First Department, in a full-fledged opinion by Justice Manzanet-Daniels, over a two-justice dissenting opinion, determined the amended Limited Liability Company (LLC) agreement with an integration and merger clause superseded the prior oral side agreement, called an exit opportunity agreement:

… [T]he amended LLC agreement contains a clear and unambiguous integration and merger clause providing that it "constitutes the sole and entire agreement of the parties to this Agreement with respect to the subject matter contained herein and therein, and supersedes all prior and contemporaneous understandings, agreements, representations and warranties, both written and oral, with respect to such subject matter;" the "subject matter" being the "allocation of profits and losses among the Members, distributions among the Members, [and] the rights, obligations and interests of the Members to each other and to the Company" … . * * *

… [T]he merger clause explicitly states that the amended LLC agreement supersedes all prior written and oral agreements concerning the subject matter of the amended LLC agreement … . Behler v Kai-Shing Tao, 2024 NY Slip Op 01337, First Dept 3-14-24

Practice Point: Here the unambiguous integration and merger clause in the amended Limited Liability Company agreement precluded enforcement of a prior oral side agreement. Although the issue here appears simple, it was the subject of a full-fledged majority opinion and a full-fledged two-justice dissenting opinion.

MARCH 14, 2024

CRIMINAL LAW, EVIDENCE, JUDGES, APPEALS.

THE SUPPRESSION COURT APPLIED THE WRONG "DEBOUR" LEVEL TO THE INITIAL INQUIRY BY THE OFFICER WHO APPROACHED DEFENDANT AND REQUESTED THAT HE STEP OUT OF THE CAR; BECAUSE THE SUPPRESSION ISSUE HAD NOT BEEN RULED UPON UNDER THE CORRECT "DEBOUR" STANDARD, THE APPELLATE COURT COULD NOT CONSIDER THE ISSUE AND THE MATTER WAS REMITTED FOR A RULING UNDER THE CORRECT "DEBOUR" STANDARD (FOURTH DEPT).

The Fourth Department, reserving decision, remitted the matter for another ruling on defendant's suppression motion. The trial judge determined that the police officer conducted a level one (DeBour) inquiry when he ordered the defendant out of the car. In fact, the officer conducted a level three inquiry which required reasonable suspicion of criminal activity. Because the ruling on defendant's suppression motion was based upon the wrong standard, the matter was remitted for a ruling under the correct standard:

… [T]he patrol lieutenant engaged in a level three intrusion under De Bour when he ordered the occupants out of the vehicle … . Although an "officer's initial approach of [a person] and request for identification [may constitute] a permissible level one encounter" under De Bour, it is well established that an "officer's request that [a person] exit [a] parked vehicle elevate[s] the situation to a level three encounter under De Bour" and requires reasonable suspicion that criminal activity is afoot … .

Because the court erroneously concluded that the patrol lieutenant engaged in only a level one intrusion when he directed defendant to step out of the vehicle, the court had no occasion to consider whether the patrol lieutenant had reasonable suspicion justifying that directive … . Although the People concede that the patrol lieutenant lacked reasonable suspicion, we are precluded "from reviewing an issue that . . . was not decided by the trial court" … . People v Taylor, 2024 NY Slip Op 01449, Fourth Dept 3-15-24

Practice Point: When the police officer approached defendant and asked defendant to get out of the car, the officer was conducting a level three DeBour inquiry which required reasonable suspicion of criminal activity. The suppression judge erroneously applied the criteria for a level one inquiry and denied suppression. Because the correct suppression issue was never ruled upon, the appellate court was forced to remit the matter for a ruling under the correct DeBour standard.

MARCH 15, 2024

CRIMINAL LAW, JUDGES, CIVIL PROCEDURE.

UNDER THE CIRCUMSTANCES, THE PETITIONER'S REQUEST TO CONTINUE THE TRIAL WITH ELEVEN JURORS SHOULD HAVE BEEN GRANTED; IN ADDITION IT WAS AN ABUSE OF DISCRETION TO DECLARE A MISTRIAL ON ALL COUNTS WITHOUT INQUIRING WHETHER A VERDICT HAD BEEN REACHED ON ANY OF THE COUNTS; RETRIAL OF THIS MURDER CASE PROHIBITED ON DOUBLE JEOPARDY GROUNDS; WRIT OF PROHIBITION GRANTED (FOURTH DEPT).

The Fourth Department, granting petitioner's request for a writ of prohibition, determined retrial of this murder case was prohibited on double jeopardy grounds. Apparently one juror (juror number five) had done independent research on the charge of murder in the second degree and jurors had complained about racial tension in the jury room, implicating the same juror. There was an indication that jurors had agreed on verdicts for five of six charges. Petitioner asked to continue the trial with 11 jurors, which requires the judge's consent. The judge denied the request. Defense counsel asked that the jury be polled on the counts for which verdicts had apparently been reached. The judge refused the request and declared a mistrial:

… [T]he People have not met their burden of demonstrating that the declaration of a mistrial was manifestly necessary. Assuming, arguendo, that juror number five was grossly unqualified to continue serving, we conclude that the court abused its discretion in declaring a mistrial without considering other alternatives. Petitioner expressed his desire to waive trial by a jury of 12 individuals and proceed with the remaining 11 jurors, an option that has been endorsed by the Court of Appeals "if

circumstances arise that warrant such a request" … . Although the court has discretion to deny a request to proceed with 11 jurors—as the court did here—that discretion is limited … . The record here is devoid of evidence that petitioner's request was not tendered in good faith, that the request was " 'a stratagem to procure an otherwise impermissible procedural advantage' " … , or that deliberation with 11 jurors could not "produce a fair verdict" … . Under the circumstances presented, as urged by defense counsel, "it would have been appropriate to poll the remainder of the jurors to ascertain whether they could render an impartial verdict" … .

Moreover, "it was an abuse of discretion to have declared a mistrial on all of the counts in the indictment without inquiring whether a decision had been reached on any of the charges" … . Although there was not "overwhelming evidence" that a partial verdict had been reached … , the jury's note asking for guidance on next steps "[i]f we have a decision on five counts but not on one of them" presented more than a mere inference that the jury may have reached a partial verdict, and the subsequent communications with the jury did not indicate otherwise … . Under these circumstances, the court was required to make an inquiry "as to whether a verdict had been reached on any of the counts . . . before declaring a mistrial over the petitioner's objection" … .

On this record, "[n]either physical impossibility to proceed nor manifest necessity to declare a mistrial as to the entire indictment has been demonstrated" … because the court failed "to obtain enough information" whether a mistrial was actually necessary as to all counts … . Matter of Shipmon v Moran, 2024 NY Slip Op 01424, Fourth Dept 3-15-24

Practice Point: Under these facts, it was an abuse of discretion to deny petitioner's request to continue the trial with 11 jurors. Retrial prohibited on double jeopardy grounds.

Practice Point: Under these facts, it was an abuse of discretion to fail to inquire whether the jury had reached a verdict on any counts. Retrial prohibited on double jeopardy grounds.

MARCH 15, 2024

CRIMINAL LAW, JUDGES, VEHICLE AND TRAFFIC LAW.

DEFENDANT WAS NOT INFORMED OF ALL THE DIRECT CONSEQUENCES OF THE GUILTY PLEA, INCLUDING THE FINE; GUILTY PLEA VACATED (FOURTH DEPT).

The Fourth Department, vacating defendant's conviction to driving while ability impaired by drugs, determined the sentencing judge did not inform defendant of the direct consequences of the guilty plea:

"It is well settled that, in order for a plea to be knowingly, voluntarily and intelligently entered, a defendant must be advised of the direct consequences of that plea" … . "The direct consequences of a plea—those whose omission from a plea colloquy makes the plea per se invalid—are essentially the core components of a defendant's sentence: a term of probation or imprisonment, a term of postrelease supervision, a fine" … , and the failure to advise a defendant at the time of the guilty plea of all of the potential direct consequence of that plea "requires that [the] plea be vacated" … . Here, the court advised defendant that, upon a violation of interim probation, he could be sentenced "to anything allowable by law which . . . is up to two and a third to seven years in the department of corrections," but failed to advise him of any other potential direct consequences of the plea, including a fine (see Vehicle and Traffic Law § 1193 [1] [c] [ii]). We note that defendant's challenge to the voluntariness of his plea is not encompassed in an appeal waiver … , and that preservation of defendant's contention was not required under the circumstances of this case inasmuch as "defendant did not have sufficient knowledge of the terms of the plea at the plea allocution and, when later advised, did not have sufficient opportunity to move to withdraw [his] plea" … . People v Abraham, 2024 NY Slip Op 01419, Fourth Dept 3-15-24

Practice Point: If a judge fails to inform a defendant of the direct consequences of a guilty plea, including the fine, the plea must be vacated.

MARCH 15, 2024

CRIMINAL LAW, VEHICLE AND TRAFFIC LAW.

REFUSING TO SUBMIT TO A BREATH TEST IS NOT A CRIMINAL OFFENSE (FOURTH DEPT).

The Fourth Department, reversing defendant's conviction on one count of the indictment, noted that "refusal to submit to a breath test" is not a criminal offense:

Defendant appeals from a judgment convicting him, upon a jury verdict, of … refusal to submit to a breath test (§ 1194 [1] [b]). As defendant contends and the People correctly concede, refusal to submit to a breath test mandated by Vehicle and Traffic Law § 1194 (1) (b) "is not a cognizable offense for which a person may be charged or convicted in a criminal court" … . Inasmuch as defendant was convicted by the jury of the nonexistent offense of refusal to submit to a breath test, we modify the judgment by reversing that part convicting him of count 3 of the indictment and dismissing that count … . People v Khadka, 2024 NY Slip Op 01402, Fourth Dept 3-15-24

Practice Point: Here in this DWI case, the defendant was convicted of refusing to submit to a breath test, which is not a criminal offense. Conviction reversed.

MARCH 15, 2024

CRIMINAL LAW.

PROMOTING PROSTITUTION CONVICTIONS REVERSED BECAUSE THE PROMOTING PROSTITUTION COUNTS ARE INCLUSORY CONCURRENT COUNTS OF SEX TRAFFICKING (FOURTH DEPT).

The Fourth Department dismissed the "promoting prostitution" counts of the indictment as inclusory concurrent counts of sex trafficking:

We note … that count 15 of the indictment, charging defendant with promoting prostitution in the second degree (Penal Law § 230.30 [1]), is an inclusory concurrent count of sex trafficking as charged in counts 12, 13, and 14 (§ 230.34 [5] [a], [c], [h]; see generally CPL 1.20 [37]; 300.30 [4]). Similarly, count 24 of the indictment, charging defendant with promoting prostitution in the second degree, is

an inclusory concurrent count of sex trafficking as charged in counts 21, 22, and 23. We therefore conclude that counts 15 and 24 must be dismissed as a matter of law because defendant was found guilty of counts 12 through 14 and 21 through 23, and "a verdict of guilty upon the greater [counts] is deemed a dismissal of every lesser [inclusory concurrent count]" … . People v Spencer, 2024 NY Slip Op 01448, Fourth Dept 3-15-25

Practice Point: If a defendant is convicted of sex trafficking and promoting prostitution, the promoting prostitution convictions must be reversed as inclusory concurrent counts of sex trafficking.

MARCH 15, 2024

FAMILY LAW, APPEALS.

NEW FACTS RENDERED THE RECORD INSUFFICIENT FOR APPELLATE REVIEW IN THIS TERMINATION-OF-PARENTAL-RIGHTS PROCEEDING; MATTER REMITTED FOR A "BEST INTERESTS OF THE CHILDREN" HEARING (FOURTH DEPT).

The Fourth Department, sending the matter back for a "best interests of the children" hearing in this termination-of-parental rights proceeding, determined new facts prohibited an adequate review:

… [T]he three oldest children, along with the father, assert that new facts and allegations warrant remittal for a new dispositional hearing to determine the best interests of those children. We may "consider . . . new facts and allegations 'to the extent [that] they indicate that the record before us is no longer sufficient' to determine whether termination of . . . parental rights is in [a child's] best interests" … . * * * … [W]e conclude that the record before us is no longer sufficient to determine whether termination of respondents' parental rights is in the best interests of those children … . Matter of Noah C. (Greg C.), 2024 NY Slip Op 01430, Fourth Dept 3-15-24

Practice Point: In a Family Court case, new facts which render the record inadequate for appellate review require remittal for a hearing.

MARCH 15, 2024

FAMILY LAW, JUDGES.

BECAUSE MOTHER HAD RELINQUISHED CUSTODY OF THE CHILD TO THE MATERNAL GRANDFATHER FOR MORE THAN 24 MONTHS, THE JUDGE SHOULD HAVE HELD A "BEST INTERESTS OF THE CHILD" HEARING BEFORE RULING ON MOTHER'S PETITION FOR SOLE CUSTODY (SECOND DEPT).

The Second Department, reversing Family Court, determined the maternal grandfather, who had custody of the child for more than 24 months with the consent of mother, demonstrated "extraordinary circumstances' which warrant a "best interests of the child" hearing before ruling on mother's petition for custody:

Pursuant to Domestic Relations Law § 72, "an 'extended disruption of custody' between the child and the parent 'shall constitute an extraordinary circumstance'" … . "The statute defines 'extended disruption of custody' as including, but not limited to, 'a prolonged separation of the respondent . . . and the child for at least twenty-four continuous months during which the parent voluntarily relinquished care and control of the child and the child resided in the household of the petitioner grandparent or grandparents'" … . "Where extraordinary circumstances are present, the court must then consider the best interests of the child in awarding custody" … .

… [T]he maternal grandfather sustained his burden of demonstrating the existence of extraordinary circumstances. The evidence at the hearing established a prolonged separation of the subject child from the mother for more than 24 continuous months, during which the mother voluntarily relinquished care and control of the child and the child resided in the household of the maternal grandfather … . Matter of Elisa F. v Daniel D., 2024 NY Slip Op 01306, Second Dept 3-13-24

Practice Point: Here the child, with mother's consent, was in the custody of the maternal grandfather for more than 24 months before mother brought the petition for sole custody. The maternal grandfather's custody of the child for mote than 24

months constituted "extraordinary circumstances" warranting a "best interests of the child" hearing before ruling on mother's petition.

MARCH 13, 2024

HUMAN RIGHTS LAW, EMPLOYMENT LAW.

THE DENIAL OFTHE NON-RESIDENT'S APPLICATION FOR EMPLOYMENT IN NEW YORK CITY IS SUBJECT TO THE EMPLOYMENT-DISCRIMINATION PROHIBITIONS IN THE NEW YORK CITY AND NEW YORK STATE HUMAN RIGHTS LAW (CT APP).

The Second Department, answering a certified question from the Second Circuit, in a full-fledged opinion by Judge Singas, determined that the denial of an non-New-York-resident's application for employment in New York City is subject to the prohibitions of employment discrimination under the NYS and NYC Human Rights Law. Plaintiff was employed by defendant in Washington DC and sought, but was denied, a new position with the defendant in New York City:

… [A] nonresident who has been discriminatorily denied a job in New York City or State loses the chance to work, and perhaps live, within those geographic areas. The prospective employee personally feels the impact of a discriminatory refusal to promote or hire in New York City or State, because that is where the person wished to work (and perhaps relocate) and where they were denied the chance to do so. When applying the required liberal construction of "inhabitants" and "individual within this state" (Executive Law § 290 [3]; Administrative Code § 8-101), a prospective inhabitant or employee, who was denied a job opportunity because of discriminatory conduct, fits comfortably within the Human Rights Laws' protection. Syeed v Bloomberg L.P., 2024 NY Slip Op 01330, CtApp 3-14-24

Practice Point: Plaintiff worked for defendant in Washington DC and sought, but was denied, a new position with defendant in New York City. Although a non-resident, plaintiff could bring a failure-to-hire/failure-to-promote employment-discrimination action in New York pursuant to the NYC and NYS Human Rights Law.

MARCH 14, 2024

INSURANCE LAW, TOXIC TORTS.

QUESTIONS OF FACT ABOUT WHETHER THE INSURER WAS TIMELY NOTIFIED OF THE ASBESTOS-EXPOSURE CLAIM AND WHEN THE INJURY-IN-FACT OCCURRED PRECLUDED SUMMARY JUDGMENT (FOURTH DEPT).

The Fourth Department, reversing (modifying) Supreme Court, determined there are questions of fact whether the defendant insurer was timely notified of the claim in this asbestos-exposure case, and there are questions of fact, raised by conflicting expert evidence, about when the injury-in-fact occurred:

Defendant contends that the Meissners' [plaintiffs'] delay of 68 days—from when they were first informed that Ridge Construction [defendant] had excess insurance policies issued by defendant to the date that the Meissners' counsel wrote to provide defendant notice of the claim—was unreasonable as a matter of law. In response, plaintiff asserts that the delay was reasonable because the Meissners were not aware for the first 63 of those days that Ridge Construction had failed to provide defendant with notice. "The reasonableness of the delay in giving notice is ordinarily a question for the fact-finder" … .

* * * The parties … "dispute when an asbestos-related injury actually begins: plaintiff[ ] assert[s] that injury-in-fact occurs upon first exposure to asbestos, while defendant denies that assertion and instead maintains that injury-in-fact occurs only when a threshold level of asbestos fiber or particle burden is reached that overtakes the body's defense mechanisms" … . Inasmuch as the parties here submitted conflicting expert opinions as to when the injury-in-fact occurs in an asbestos-related injury, summary judgment on that basis was not proper … . Meissner v Ridge Constr. Corp., 2024 NY Slip Op 01445, Fourth Dept 3-15-24

Practice Point: Whether the insurer was timely notified of the asbestos-exposure claim is a question of fact which should not have been determined as a matter of law at the summary judgment stage.

Practice Point: Here conflicting expert evidence was presented about when the injury-in-fact occurs in an asbestos-exposure case. The issue should not have been determined as a matter of law at the summary judgment stage.

MARCH 15, 2024

LABOR LAW-CONSTRUCTION LAW, CIVIL PROCEDURE, JUDGES.

PORTIONS OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT PROPERLY DENIED AS UNTIMELY; THE PORTION OF THE UNTIMELY MOTION WHICH HAD BEEN TIMELY RAISED BY ANOTHER DEFENDANT WAS PROPERLY CONSIDERED; THE LABOR LAW 241(6) CAUSE OF ACTION PROPERLY RELIED ON INDUSTRIAL CODE PROVISIONS REQUIRING THAT ELECTRICAL POWER BE SHUT DOWN TO PROTECT ELECTRICAL WORKERS (SECOND DEPT).

The Second Department, reversing Supreme Court in this Labor Law 241(6, 200 and common law negligence action, determined; (1) portions of a defendant's summary judgment motion brought more than a month after the ordered deadline where properly dismissed as untimely; (2) the aspect of the untimely summary judgment motion which had been timely raised in another defendant's summary judgment motion was properly considered; (3) the industrial code requires shutting down the electricity when worker's are doing electrical work, therefore plaintiff's Labor Law 241(6) cause of action should not have been dismissed. Plaintiff was in an aerial bucket working on electrical lines when injured in an explosion:

Absent a "satisfactory explanation for the untimeliness," constituting good cause for the delay, an untimely summary judgment motion must be denied without consideration of the merits … . However, "[a]n untimely motion or cross motion for summary judgment may be considered by the court where a timely motion was made on nearly identical grounds" … . * * *

… [T]he defendants … failed to establish their prima facie entitlement to judgment as a matter of law dismissing the cause of action alleging a violation of Labor Law § 241(6), which was predicated on 12 NYCRR 23-1.13(b)(3) and (4). 12 NYCRR

23-1.13(b)(3) provides, among other things, that where the performance of the work may bring any person into physical or electrical contact with an electric power circuit, the employer "shall advise his [or her] employees of the locations of such lines, the hazards involved and the protective measures to be taken." 12 NYCRR 23-1.13(b)(4) requires, in pertinent part, that employees who may come into contact with an electric power circuit be protected against electric shock "by de-energizing the circuit and grounding it or by guarding such circuit by effective insulation or other means" … . These regulations, which refer to the duty of employers, also impose a duty upon owners … . Wittenberg v Long Is. Power Auth., 2024 NY Slip Op 01329

Practice Point: A summary judgment motion brought a month after the ordered deadline may be dismissed as untimely.

Practice Point: A portion of an untimely summary judgment motion which was timely raised by another defendant may be considered.

Practice Point: The industrial code provisions requiring that electrical power be shut down to protect electrical workers supported plaintiff's Labor Law 241(6) cause of action.

MARCH 13, 2024

LABOR LAW-CONSTRUCTION LAW, EVIDENCE.

THE EVIDENCE WAS SUFFICIENT TO WARRANT SUMMARY JUDGMENT IN FAVOR OF PLAINTIFF IN THIS LABOR LAW 240(1) FALLING-OBJECT CASE; BRICK WORK WAS BEING DONE ON THE BUILDING ABOVE WHERE PLAINTIFF WAS STANDING AND PLAINTIFF WAS STRUCK BY A FALLING BRICK; THERE WAS NO SAFETY NETTING TO PROTECT AGAINST FALLING OBJECTS (FIRST DEPT).

The First Department, reversing (modifying) Supreme Court, in a full-fledged opinion by Justice Manzanet-Daniels, determined plaintiff was entitled to summary judgment on his Labor Law 240(1) cause of action in this falling object case. Plaintiff was unloading a truck in a designated "delivery zone" near the building

where bricks were being drilled out to accommodate the installation of windows. Plaintiff was struck on the head by a brick which damaged his hard hat and injured his head:

In the context of falling objects, the risk to be guarded against is the unchecked or insufficiently checked descent of the object" … . It is settled law that a plaintiff establishes a prima facie entitlement to liability on a Labor Law § 240(1) "falling object" claim where he shows that he was struck by a falling object, that such object required securing for the purposes of the undertaking, and that the lack of adequate overhead protection failed to shield against the falling of such object and therefore proximately caused plaintiff's injuries … . * * *

… [A] "… plaintiff's prima facie case in a Labor Law § 240(1) action involving falling objects is not dependent on whether the plaintiff observed the object that hit him. . A plaintiff is not required to show the exact circumstances under which the object fell, where a lack of a protective device proximately caused the injuries. Further, [the general contractor's project manager] identified a photograph of the brick that struck plaintiff, stating that the brick in the photo was consistent with the lone type of brick that was used on the faÇade of the building at the time of the incident … . Torres-Quito v 1711 LLC, 2024 NY Slip Op 01279, Frist Dept 3-12-24

Practice Point: The absence of safety netting to protect against falling objects was deemed the proximate cause of plaintiff's injury from a falling brick in this Labor Law 240(1) case.

MARCH 12, 2024

LABOR LAW-CONSTRUCTION LAW.

A STACK OF DRYWALL LEANING AGAINST A WALL AND PARTIALLY BLOCKING A DOORWAY FELL OVER ON PLAINTIFF'S ANKLE AS PLAINTIFF ATTEMPTED TO MOVE IT; THE LABOR LAW 240(1) AND 241(6) CAUSES OF ACTION SHOULD NOT HAVE BEEN DISMISSED (FOURTH DEPT).

The Fourth Department, reversing (modifying(Supreme Court, determined the Labor Law 240(1) and 241(6) causes of action should not have been dismissed. A stack of drywall leaning against a wall and partially blocking a doorway fell over onto plaintiff's ankle when plaintiff and another attempted to move it:

Although the drywall that fell on plaintiff was located on the floor and was not being hoisted or secured, issues of fact exist whether section 240 (1) applies to this case … .

… [The] Labor Law § 241 (6) cause of action insofar … is premised on an alleged violation of 12 NYCRR 23-2.1 (a) (1) … .. Issues of fact exist whether the drywall was stored safely at the construction site and whether the drywall was a material pile that blocked a passageway … . Jesmain v Time Cap Dev. Corp., 2024 NY Slip Op 01444, Fourth Dept 3-15-24

Practice Point: A stack of drywall which was leaning against the wall and partially blocked a doorway fell over on plaintiff's ankle when he attempted to move it. That scenario presented issues of fact precluding summary judgment in favor of defendants on the Labor Law 240(1) and 241(6) causes of action.

MARCH 15, 2024

LABOR LAW-CONSTRUCTION LAW.

IT WAS FORESEEABLE THAT DIESEL FUMES FROM A BOOM LIFT USED BY PLAINTIFF FOR INTERIOR PAINTING WOULD ACCUMULATE AND CAUSE DIZZINESS RESULTING IN PLAINTIFF'S FALL FROM THE LIFT; PLAINTIFF'S LABOR LAW 240(1) CAUSE OF ACTION SHOULD NOT HAVE BEEN DISMISSED (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined plaintiff's Labor Law 240(1) cause of action should not have been dismissed. Plaintiff was spray painting the interior of a factory using a boom lift when he became dizzy and fell from the lift. Plaintiff diesel fumes from the lift accumulated above him, causing the dizziness:

… [I]t is undisputed that plaintiff fell from the lift while it was raised six to eight feet in the air. In support of his motion, plaintiff submitted evidence establishing that his injuries were causally related to the fall from the lift and that plaintiff was using a boom lift that discharged fumes into the factory. Plaintiff also submitted the affidavit of an expert who opined that defendants violated Labor Law § 240 (1) by failing to ensure that the boom lift was " 'so constructed, placed and operated as to give proper protection' " to plaintiff and by allowing plaintiff to place the boom lift in a position where diesel fumes were likely to accumulate above him and cause dizziness. We conclude that plaintiff thus met his prima facie burden on his motion by establishing that his fall was a "normal and foreseeable" consequence of the placement of the lift, which exhausted noxious fumes too close to plaintiff … .

In response, defendants failed to raise a triable issue of fact whether the hazard of fumes is "of such an extraordinary nature or so attenuated from the statutory violation as to constitute a superseding cause sufficient to relieve [them] of liability" … . Defendants also failed to raise an issue of fact whether plaintiff deliberately unclipped his safety harness, and we note that the issue presents, at best, a question of comparative negligence, which is not a defense to liability under Labor Law § 240 (1) … . Wolfanger v Once Again Nut Butter Collective Inc., 2024 NY Slip Op 01452, Fourh Dept 3-15-24

Practice Point: Plaintiff was using a boom lift for interior painting and alleged that diesel fumes from the lift made him dizzy, causing him to fall. That scenario was not so attenuated from the statutory violation as to constitute a superseding cause of plaintiff's injury. Plaintiff's Labor Law 240(1) cause of action should not have been dismissed.

MARCH 15, 2024

LANDLORD-TENANT, NEGLIGENCE.

THE FACT THAT PLAINTIFF WAS SPECIFICALLY TARGETED FOR A HOME INVASION DID NOT PRECLUDE A FINDING THAT INADEQUATE BUILDING SECURITY WAS A PROXIMATE CAUSE (FIRST DEPT).

The First Department, reversing Supreme Court, determined defendant property owners should not have been awarded summary judgment in this home invasion case. The fact that plaintiff was specifically targeted did not preclude a finding that building security was inadequate:

Plaintiff was the victim of a home invasion of his apartment in a building owned and operated by defendants. The incident began when someone knocked on plaintiff's apartment door and asked by name for his niece, who also lived in the apartment. When plaintiff looked through the peephole, he thought he saw a young woman, but the peephole was blurry, as it had been since plaintiff had moved in three or four years earlier. Plaintiff also testified that the chain guard on the door did not function properly. When plaintiff opened the door slightly, the young woman and a man he had not seen through the peephole pushed their way into the apartment and pistol whipped him. After demanding $5,000 that had purportedly been sent to plaintiff's niece, the two assailants assaulted plaintiff for an extended period and looted the apartment before leaving.

Defendants failed to establish their entitlement to summary judgment dismissing the complaint, as evidence that an attack was targeted toward a particular person does not sever the proximate cause link as a matter of law in cases alleging negligent security … . In light of the record evidence that the building's locks were malfunctioning, and that plaintiff's apartment peephole and chain lock were

defective, proximate cause is for the factfinder to decide … . Cabrera-Perez v Promesa Hous. Dev. Fund Corp., 2024 NY Slip Op 01338, First Dept 3-14-24

Practice Point: The fact that plaintiff was deliberately and specifically targeted for a home invasion did not preclude a finding that malfunctioning locks and a defective peephole constituted a proximate cause of the invasion and consequent injury.

MARCH 14, 2024

NEGLIGENCE, EVIDENCE.

PLAINTIFF, AN EXPERIENCED GOLFER WHO WAS PARTICIPATING IN A TOURNAMENT, ASSUMED THE RISK OF BEING STRUCK IN THE EYE BY A GOLF BALL WHILE RIDING IN A GOLF CART (THIRD DEPT).

The Third Department, reversing Supreme Court, over a two-justice dissent, determined plaintiff golfer assumed the risk of being struck by a golf ball during a golf tournament. Supreme Court and the dissenters concluded there was a question of fact whether the design of the defendant golf course unreasonably increased the risk:

Plaintiff was riding in a golf cart on the seventh hole fairway when he was hit by a ball struck by defendant Justin Hubbard, who had just teed off from the third hole. Both the third and seventh holes are over 400 yards in length. The fairways on each hole run parallel, in part, in the area in front of the third tee, and that part of the seventh fairway approaching the green, which from a vantage point on the fairway, is adjacent to and to the right of the third tee. * * *

… [I]t is well established that "being hit without warning by a shanked shot" is "a commonly appreciated risk" of participating in the sport … . " '[G]olfers are deemed to assume the risks of open topographical features of a golf course' "… , and "evidence establishing that the proximity of [a tee] to [a different] green and hole was open and obvious" will preclude liability against a golf course for injuries sustained as a result of such proximity … . Katleski v Cazenovia Golf Club, Inc., 2024 NY Slip Op 01366, Third Dept 3-14-24

Practice Point: The majority concluded plaintiff golfer assumed the risk of being struck by a golf ball. Supreme Court and the two dissenters argued the design of defendant golf course unreasonably increased the risk.

MARCH 14, 2024

NEGLIGENCE, LANDLORD-TENANT.

IN THIS SLIP AND FALL CASE, STEPS WHICH DO NOT HAVE UNIFORM RISER HEIGHTS COULD CONSTITUTE A DANGEROUS CONDITION UNDER COMMON LAW NEGLIGENCE PRINCIPLES, WITHOUT REFERENCE TO WHETHER A BUILDING CODE WAS VIOLATED; BOTH THE PROPERTY OWNER AND THE SUBLESSEE COULD BE LIABLE (FIRST DEPT).

The Second Department, reversing Supreme Court in this slip and fall case, determined the steps which did not have uniform riser heights could constitute a dangerous condition for which the property owner and the sublessee could be liable:

Here, the record demonstrates that the riser heights of the steps were not uniform and that the top riser was approximately three inches taller than the bottom riser. Viewing the evidence in the light most favorable to the plaintiff as the nonmoving party … , we find that both the defendant owner and the defendant car service [the sublessee] failed to demonstrate, prima facie, that a dangerous condition did not exist on the steps or that the disparity in riser heights was not a proximate cause of the accident … . Amparo v Christopher One Corp., 2024 NY Slip Op 01286, 3-13-24

Practice Point: Steps which do not have uniform riser heights can constitute a dangerous condition which is the proximate cause of a slip and fall under common law negligence principles, irrespective of whether the non-uniform riser heights violated a building code.

MARCH 13, 2024

NEGLIGENCE, VEHICLE AND TRAFFIC LAW.

NOT ALL REAR-END COLLISIONS ARE SOLELY THE FAULT OF THE REAR DRIVER; HERE PLAINTIFF, THE REAR DRIVER, RAISED CREDIBILITY ISSUES BY CONTRADICTING A STATEMENT ATTRIBUTED TO PLAINTIFF IN THE POLICE REPORT AND AVERRING DEFENDANT STOPPED SUDDENLY WITHOUT USING A TURN SIGNAL (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff, the driver of the car which rear-ended defendant's car, raised a question of fact about the whether the defendant stopped suddenly without using a turn signal:

"There can be more than one proximate cause of an accident" … , and a defendant moving for summary judgment in a negligence action has the burden of establishing, prima facie, that he or she was not at fault in the happening of the accident … . "Not every rear-end collision is the exclusive fault of the rearmost driver. The frontmost driver also has the duty not to stop suddenly or slow down without proper signaling so as to avoid a collision" … .

… [T]he plaintiff raised questions of credibility, which are for the jury to determine … . The plaintiff disputed the content of his statement, as reflected in the police accident report, as well as the veracity of the defendant's deposition testimony as to how the accident occurred. Specifically, the plaintiff disputed that the defendant utilized his left turn signal and averred that the defendant came to a sudden stop at the intersection. Kerper v Betancourt, 2024 NY Slip Op 01296, Second Dept 3-13-24

Practice Point: In this rear-end collision case, the plaintiff, the rear driver, raised credibility issues which can only be resolved by a jury. Plaintiff contradicted a statement attributed to him in the police report and averred that defendant stopped suddenly without using a turn signal. The rear driver in a rear-end collision is not always solely at fault.

MARCH 13, 2024

NEGLIGENCE.

EVEN IF PLAINTIFF'S STAIRWAY FALL RESULTED FROM A MISSTEP, EVIDENCE THAT PLAINTIFF WAS "LOOKING FOR A HANDRAIL" RAISED A QUESTION OF FACT WHETHER THE ABSENCE OF A HANDRAIL WAS A PROXIMATE CAUSE OF THE FALL (SECOND DEPT).

The Second Department, reversing Supreme Court in this stairway slip and fall case, determined that plaintiff's testimony that he was "looking for a handrail" at the time he fell was sufficient to raise a question of fact whether the absence of a handrail was a proximate cause of the fall. Even if a fall is the result of a misstep, the absence of a handrail could be a proximate cause of the fall:

… [E]ven if a plaintiff's fall is precipitated by a misstep, where the plaintiff testifies that he or she reached out to try to stop his or her fall, the absence of a handrail, if required by law, may raise an issue of fact as to whether the absence of the handrail was a proximate cause of his or her injury" … . In contrast, the absence of a handrail will not create an issue of fact where the plaintiff does not offer testimony demonstrating "that she [or he] reached out for a handrail either before or during her [or his] fall" or otherwise showing that "the lack of handrails contributed to [the] accident" … .

… Although he was not sure what caused him to lose his balance, the injured plaintiff testified that he was "looking for a handrail" before descending the final set of steps but observed that no handrails were available. "Even if the [injured] plaintiff's fall was precipitated by a misstep," his testimony indicating that he would have been using a handrail at the time of his accident had one been available was sufficient to create "an issue of fact as to whether the absence of [an accessible] handrail was a proximate cause of h[is] injur[ies]" … . Curto v Kahn Prop. Owner, LLC, 2024 NY Slip Op 01290, Second Dept 3-13-24

Practice Point: In a stairway-fall case, if the plaintiff indicates they reached for a handrail at the time of the fall, that raises a question of fact whether the absence of a handrail was a proximate cause of the fall, even if the fall was due to a misstep.

MARCH 13, 2024

NEGLIGENCE.

PLAINTIFF FELL WHEN HER FOOT BECAME ENTANGLED IN CORDS OR TUBES CONNECTED TO MEDICAL EQUIPMENT IN A HOSPITAL ROOM; DEFENDANT DID NOT DEMONSTRATE THE CORDS OR TUBES WERE OPEN AND OBVIOUS AND NOT INHERENTLY DANGEROUS; DEFENDANT SHOULD NOT HAVE BEEN AWARDED SUMMARY JUDGMENT (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the tubes or cords attached to medical equipment in a neurologic intensive care unit which caused plaintiff's slip and fall were not demonstrated to be "open and obvious and not inherently dangerous:"

"While a possessor of real property has a duty to maintain that property in a reasonably safe condition, there is no duty to protect or warn against an open and obvious condition that, as a matter of law, is not inherently dangerous" … . "A condition is open and obvious if it is readily observable by those employing the reasonable use of their senses, given the conditions at the time of the accident" … . Moreover, "[a] condition that is ordinarily apparent to a person making reasonable use of his or her senses may be rendered a trap for the unwary where the condition is obscured or the plaintiff is distracted" … . The question of whether a condition is open and obvious is usually a question of fact properly resolved by a jury … .

Here, the defendant failed to establish, prima facie, that the alleged condition of the tubes or cords was open and obvious and not inherently dangerous under the circumstances surrounding the accident … . Butler v NYU Winthrop Hosp., 2024 NY Slip Op 01289, Second Dept 3-13-24\

Practice Point: Whether a condition is open and obvious and not inherently dangerous is usually a question for the jury. Here, in this slip and fall case, there was a question of fact whether cords or tubes connected to medical equipment constituted an open and obvious condition which was not inherently dangerous.

MARCH 13, 2024

NUISANCE, NEGLIGENCE.

PLAINTIFF REAL ESTATE DEVELOPER'S PRIVATE NUISANCE, PUBLIC NUISANCE AND NEGLIGENCE CAUSES OF ACTION BASED UPON THE ALLEGED NOXIOUS ODORS FROM DEFENDANT'S LANDFILL SHOULD HAVE BEEN DISMISSED (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined the plaintiff real estate developer causes of action against defendant landfill operation for private nuisance, public nuisance and negligence, based upon noxious odors from the landfill, should have been dismissed: Plaintiff alleged the odors made it difficult to sell homes and reduced the value of properties in the vicinity of the landfill:

… [A] private nuisance is one that "threatens one person or . . . relatively few" … . … [P]laintiff's allegations indicate that the noxious odors affected a large number of community residents and, therefore, we conclude that plaintiff's cause of action for private nuisance must be dismissed … . …

… [A] public nuisance consists of "a substantial interference with the exercise of a common right of the public, thereby offending public morals, interfering with the use by the public of a public place or endangering or injuring the property, health, safety or comfort of a considerable number of persons" … . "A public nuisance is actionable by a private person only if it is shown that the person suffered special injury beyond that suffered by the community at large" … .

Here, plaintiff alleged that it suffered a special injury because it "suffered lost profit[s] and other substantial economic loss," including "irreparable damage to its reputation in the community as a residential home builder." … [P]laintiff did not allege facts sufficient to support a public nuisance cause of action. It failed to allege that it sustained any harm or damages that were "different in kind, not merely in degree," from the community at large … .

* * * [P]laintiff "ha[s] not alleged any tangible property damage or physical injury resulting from exposure to the odors" and, "likewise, the economic loss resulting from the diminution of plaintiff['s] property values is not, standing alone, sufficient to sustain a negligence claim under New York law" … . William Metrose

Ltd. Builder/Developer v Waste Mgt. of N.Y., LLC, 2024 NY Slip Op 01458, Fourth Dept 3-15-24

Practice Point: Here noxious odors from a landfill did not support causes of action for private nuisance, public nuisance or negligence, criteria explained.

MARCH 15, 2024

NUISANCE, TRESPASS, CIVIL PROCEDURE.

PLAINTIFF ALLEGED CONSTRUCTION WORK ON DEFENDANT'S PROPERTY CAUSED WATER TO ENCROACH ON PLAINTIFF'S PROPERTY; THE NEGLIGENCE ACTION WAS TIME-BARRED BECAUSE THE CONSTRUCTION WORK WAS DONE MORE THAN THREE YEARS BEFORE THE ACTION WAS FILED; THE RELATED NUISANCE AND TRESPASS ACTIONS WERE NOT TIME-BARRED BECAUSE THEY MAY CONSTITUTE "CONTINUING WRONGS" (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, determined the negligence cause of action was time-barred but the related nuisance and trespass actions constituted "continuing wrongs" and therefore were not time-barred. Plaintiff alleged defendant did construction work on defendant's property which caused water to encroach on plaintiff's property. Because the construction work was done more than three years before the action was filed, the negligence action was not timely:

The defendant demonstrated, prima facie, that the negligence cause of action was barred under the applicable three-year statute of limitations (see CPLR 214[4]) by submitting evidence that the allegedly negligent construction work performed on its property occurred in or around June 2012, more than four years prior to the commencement of this action … .

… Here, the acts of continuous nuisance and trespass alleged in the amended complaint may give rise to successive causes of action pursuant to the continuous

wrong doctrine … . Jefferson v New Life Tabernacle, Inc., 2024 NY Slip Op 01295, Second Dept 3-13-24

Practice Point: Here construction work on defendant's land was alleged to have caused water to encroach on plaintiff's property. The negligence action accrued when the construction work was done and was time-barred. But the related nuisance and trespass actions may constitute "continuing wrongs" which were not time-barred.

MARCH 13, 2024

NUISANCE, TRESPASS.

PLAINTIFF AND DEFENDANTS ARE NEIGHBORS; PRIVATE NUISANCE CAUSES OF ACTION BASED UPON DEFENDANTS' YEARLY FIREWORKS DISPLAYS AND EXCESSIVE NOISE FROM POOL EQUIPMENT SHOULD NOT HAVE BEEN DISMISSED; A TRESPASS CAUSE OF ACTION BASED UPON DEBRIS FROM THE FIREWORKS FALLING ON PLAINTIFF'S PROPERTY SHOULD NOT HAVE BEEN DISMISSED (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, determined certain causes of action for private nuisance and trespass should not have been dismissed. Plaintiff and defendants are neighbors. The private nuisance causes of action based upon defendant's fireworks displays every year and excessive noise from defendants' pool equipment should not have been dismissed. In addition, the trespass action based upon debris falling on plaintiff's property from the fireworks should not have been dismissed:

"The elements of a private nuisance cause of action are: (1) an interference substantial in nature, (2) intentional in origin, (3) unreasonable in character, (4) with a person's property right to use and enjoy land, (5) caused by another's conduct in acting or failure to act" … . "Not every annoyance will constitute a nuisance. Nuisance imports a continuous invasion of rights—a pattern of continuity or recurrence of objectionable conduct" … . "Except for the issue of

whether the plaintiff has the requisite property interest, each of the other elements is a question for the jury, unless the evidence is undisputed" … * * *

"The elements of a cause of action sounding in trespass are an intentional entry onto the land of another without justification or permission, or a refusal to leave after permission has been granted but thereafter withdrawn" … . "An invasion of another's property or airspace need not be more than de minimis in order to constitute a trespass" … . "Generally, intangible intrusions, such as by noise, odor, or light alone, are treated as nuisances, not trespass because they interfere with nearby property owners' use and enjoyment of their land, not with their exclusive possession of it" … . Del Vecchio v Gangi, 2024 NY Slip Op 01292, Second Dept 3-13-24

Practice Point: The elements of private nuisance and trespass explained in the context of allegations by one neighbor against another concerning fireworks displays and excessive noise from pool equipment.

MARCH 13, 2024

REAL ESTATE, FIDUCIARY DUTY. CIVIL PROCEDURE.

IN THIS ACTION BY A PROPERTY OWNER WHO LOST THE PROPERTY TO FORECLOSURE: (1) THE JUDGE SHOULD NOT HAVE GRANTED DEFENDANT REAL ESTATE BROKERS SUMMARY JUDGMENT ON A GROUND NOT RAISED IN THE MOTION; AND (2) THE BREACH OF FIDUCIARY DUTY, BREACH OF REAL PROPERTY LAW 441-C, AND CONSTRUCTIVE TRUST CAUSES OF ACTION SHOULD NOT HAVE BEEN DISMISSED (SECOND DEPT).

The Second Department, reversed Supreme Court in this action against real state brokers who, plaintiff alleged, did not provide plaintiff with proper documentation for a short sale of plaintiff's property. The short sale was not approved by the lender and plaintiff lost the property in foreclosure. The Second Department determined: (1) the judge should not have granted summary judgment to defendants on the ground plaintiff suffered no damages because that issue was

not raised by defendants in the motion; (2) the breach of fiduciary duty cause of action should not have been dismissed; (3) the Real Property Law section 441-c action alleging defendants acted with "untrustworthiness and incompetency" should not have been dismissed; and (4) the constructive-trust cause of action should not have been dismissed:

A court is generally limited to the issues or defenses that are the subject of the motion … . * * *

"[I]t is well settled that a real estate broker is a fiduciary with a duty of loyalty and an obligation to act in the best interests of the principal" … . * * *

… [T]he causes of action pursuant to Real Property Law § 441-c(1)(a) and 19 NYCRR 175.4, alleging that they acted with "untrustworthiness and incompetency" in dealing with the plaintiff and the property [should not have been dismissed].. … [T]here exists a private right of action for such offenses … . Perez v Mendicino, 2024 NY Slip Op 01323, Second Dept 3-13-24

Practice Point: A judge does not have the authority to grant summary judgment on a ground not raised in the motion papers;

Practice Point: Real estate brokers owe a fiduciary duty to their clients.

Practice Point: There exists a private right of action for a violation of Real Property Law 441-c for a real estate broker's "untrustworthiness and incompetency."

MARCH 13, 2024

RETIREMENT AND SOCIAL SECURITY LAW, EMPLOYMENT LAW.

DECEDENT'S WORK-RELATED COVID DEATH ENTITLED DECEDENT'S DAUGHTER, DECEDENT'S "STATUTORY BENEFICIARY," TO "ACCIDENTAL DEATH BENEFITS" UNDER A RECENT STATUTE; PETITIONER, DECEDENT'S PARTNER, WHO WAS DECEDENT'S "DESIGNATED BENEFICIARY" FOR "ORDINARY DEATH BENEFITS," WAS NOT ENTITLED TO THE "ACCIDENTAL DEATH BENEFITS" (CT APP).

The Court of Appeals, affirming the Appellate Division, determined the respondent Teachers' Retirement System properly awarded "accidental death benefits" to decedent's daughter under a recent law which classified certain work-related COVID death as "accidental." The dispute here was between the "statutory beneficiary," decedent's daughter who received the "accidental death benefits," and the "designated beneficiary," decedent's partner, who was entitled to any "ordinary death benefits:"

he statutory text refutes petitioner's argument that respondent's denial of her claim for ordinary death benefits was irrational. Retirement and Social Security Law § 607-i (a) (3) provides that the accidental death benefit "shall" be paid to a member's statutory beneficiary if the member meets the stated criteria. This is consistent with the recognition in the legislative history that "[o]nce the statutory beneficiary demonstrates this proof, entitlement to the [a]ccidental [d]eath [b]enefit is mandatory" … . Additionally, preexisting law provided that an ordinary death benefit is only available when accidental death benefits are unavailable (see Retirement and Social Security Law § 606-a [a] [3]). Matter of Colon v Teachers' Retirement Sys. of the City of N.Y., 2024 NY Slip Op 01331, CtApp 3-14-24

Practice Point: Here decedent's daughter was the "statutory beneficiary" of "accidental death benefits" under the Retirement and Social Security Law, and decedent's partner was the "designated beneficiary" for "ordinary death benefits" under the Retirement and Social Security Law. Decedent's daughter was properly awarded the "accidental death benefits" under a recent statute covering work-related COVID deaths.

MARCH 14, 2024

TORTIOUS INTERFERENCE WITH PROSPECTIVE BUSINESS RELATIONS, CONTRACT LAW, CIVIL PROCEDURE.

THE SIGHTSEEING BUS COMPANY'S COUNTERCLAIMS ALLEGING CONCERTED ANTI-COMPETITIVE BEHAVIOR BY OTHER BUS COMPANIES IN VIOLATION OF THE DONNELLY ACT (GENERAL BUSINESS LAW 340) SHOULD NOT HAVE BEEN DISMSSED (CT APP).

The Court of Appeals, reversing the Appellate Division, determined the counterclaims by a tour bus company, Go New York, alleging anti-competitive behavior in violation of the Donnelly Act by other bus companies, called the Gray Line respondents, should not have been dismissed:

The Donnelly Act prohibits "[e]very contract, agreement, arrangement or combination" through which "a monopoly . . . is or may be established or maintained," whereby "competition or the free exercise of any activity in the conduct of business . . . is or may be restrained," or whereby trade or business is or may be restrained "[f]or the purpose of establishing or maintaining any such monopoly or unlawfully interfering with the free exercise of any activity in the conduct of any business, trade or commerce" (General Business Law § 340 [1]). As with a claim brought "under its essentially similar federal progenitor, section 1 of the Sherman Act (15 USC § 1 et seq)," a claim brought under the Donnelly Act, at a minimum, "must allege both concerted action by two or more entities and a consequent restraint of trade within an identified relevant product market" … . The Court has recognized that "the sweep of Donnelly may be broader than that of Sherman" insofar as the Donnelly Act proscribes "arrangements" in addition to contracts, combinations, and conspiracies … . …

Go New York alleges that the Gray Line respondents conspired with other counterclaim defendants (which Go New York refers to as "Big Bus/Leisure Pass"), to leverage their market share to "shut out" Go New York from the "hop-on, hop-off sightseeing tour bus market." According to the facts asserted—which we must accept as true on this motion—representatives from various New York City attractions refused to do business with Go New York after Gray Line and Big

Bus/Leisure Pass impugned Go New York's reputation and threatened to end their business with those attractions if they did business with Go New York. Go New York also alleged that, although certain attractions referenced exclusive relationships with either Gray Line or Big Bus/Leisure Pass as a basis not to partner with Go New York, the attractions in fact partnered with both. Thus, it can be inferred that the claimed exclusive relationships were a pretext to cover for anticompetitive efforts to exclude Go New York. Although sparse, these factual assertions and all the possible inferences to be drawn therefrom are sufficient to allege concerted action between two or more entities and support a cognizable Donnelly Act counterclaim under our liberal notice pleading standards … . Taxi Tours Inc. v Go N.Y. Tours, Inc., 2024 NY Slip Op 01333, CtApp 3-14-24

Practice Point: The allegations here were deemed sufficient to state a cause of action for a violation of the Donnelly Act, which prohibits concerted anti-competitive behavior by businesses designed to exclude a competing business from the market.

MARCH 14, 2024

TRESPASS, REAL PROPERTY ACTIONS AND PROCEEDINGS LAW (RPAPL), CIVIL PROCEDURE.

TRESPASS BY PERMANENT PHYSICAL ENCROACHMENT (PLUMBING PIPES) IS NOT SUBJECT TO THE SAME STATUTE OF LIMITATIONS ANALYSIS AS TRESPASS BY THE ARTIFICIAL DIVERSION OF WATER; TRESPASS BY PERMANENT PHYSICAL ENCROACHMENT IS A CONTINUING TRESPASS UNTIL THE EXPIRATION OF THE TIME PERIOD FOR ADVERSE POSSESSION OR AN EASEMENT BY PRESCRIPTION (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined the trespass cause of action should not have been dismissed as time-barred. A trespass claim based upon a permanent physical encroachment (here plumbing pipes connected to a septic system) is a continuing trespass which gives rise to successive trespass

causes of action until the expiration of the time period for an easement by prescription or adverse possession:

… [P]laintiff's claim for trespass seeking monetary damages should not be analyzed for statute of limitations purposes in the same way as a claim for the artificial diversion of water onto an adjoining property … , inasmuch as plaintiff's trespass claim is based upon a permanent physical encroachment, i.e., the underground plumbing that defendants installed on plaintiff's property. "[The] encroaching structure is a continuing trespass [that] gives rise to successive causes of action, except where barred by acquisition of title or an easement by operation of law" … . " 'Thus, for purposes of the statute of limitations, suits will only be time-barred by the expiration of such time as would create an easement by prescription or change of title by operation of law,' [namely], by adverse possession" … . Inasmuch as the complaint, which was filed on July 23, 2021, alleges that defendants' "plumbing material" was unlawfully installed on plaintiff's property in 2014, plaintiff's claim for damages here is not barred by the statute of limitations (see RPAPL 501 [2]). Kramer v Kleiber, 2024 NY Slip Op 01387, Fourth Dept 3-15-24

Practice Point: Trespass by artificial diversion of water is not subject to the same statute of limitations analysis as trespass by a permanent physical encroachment (plumbing pipes in this case). Trespass by permanent physical encroachment is a continuing trespass until the expiration of the time period required for adverse possession or an easement by prescription.

MARCH 15, 2024

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