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BANKING LAW, SPECIAL RELATIONSHIP, NEGLIGENCE, FRAUD.

PLAINTIFF, UNDER NEW JERSEY LAW, SUFFICIENTLY PLED A SPECIAL RELATIONSHIP WITH DEFENDANT BANK GIVING RISE TO A DUTY TO ENFORCE ITS ANTI-FRAUD PROCEDURES; PLAINTIFF WIRED $300,000 TO AN ACCOUNT WHICH HAD BEEN SET UP TO DEFRAUD PLAINTIFF (FIRST DEPT).

The First Department, over a comprehensive dissent, determined defendant JPMorgan Chase Bank owed a duty to plaintiff based upon its anti-fraud polices advertised on the bank's website. Defendant David Tate opened an account at a New Jersey Chase bank in the name of his business, Alchemy. Tate did not provide

any personal identification or any corporate documentation to the bank. Plaintiff, thinking she was investing in Alchemy, wired $300,000 to the Alchemy account which was appropriated by Tate:

Under New Jersey law, a bank and its depositor have an arm's-length, debtor-creditor relationship … . Banks do not have a duty to protect depositors from the wrongful conduct of third parties with whom the bank has done business .. .

Nonetheless, a bank may have a duty of care "where a special relationship has been established from which a duty can be deemed to flow" … . A special relationship may be formed "by agreement, undertaking or contact" … . As pertinent here, an "undertaking" is "the willing assumption of an obligation by one party with respect to another or a pledge to take or refrain from taking particular action" … .

Crediting plaintiff's factual allegations, construing the complaint liberally, and according it the benefit of every possible favorable inference …, we find that the complaint adequately pleaded that Chase assumed a duty to abide by the anti-fraud procedures that it publicized.

… [P]laintiff has adequately pleaded the existence of a special relationship with Chase, giving rise to a duty to plaintiff to enforce its anti-fraud procedures … . Plaintiff has likewise stated a claim against Chase in negligence, based on its alleged failure to abide by these safeguards when Tate opened Alchemy's account with Chase … . Ben-Dor v Alchemy Consultant LLC, 2024 NY Slip Op 03797, Second Dept 7-11-24

Practice Point: In New Jersey, to sue a bank for the wrongful conduct of a third party, here the use of a bank account to defraud plaintiff, the bank must owe plaintiff a special duty. The majority held the anti-fraud policies on the bank's website may be the basis for such a special duty. There was an extensive and comprehensive dissent.

JULY 11, 2024

CHILD VICTIMS ACT, WORKERS' COMPENSATION.

WHETHER THE CHILD VICTIMS ACT (CVA) REVIVES OTHERWISE TIME-BARRED WORKERS' COMPENSATION CLAIMS AND WHETHER PLAINTIFF'S DAMAGES ARE LIMITED TO WORKERS' COMPENSATION BENEFITS ARE QUESTIONS OF LAW FOR THE COURT, NOT THE WORKERS' COMPENSATION BOARD (FOURTH DEPT).

The Fourth Department, reversing (modifying) Supreme Court, held the court, not the Workers' Compensation Board, must determine whether damages in this Child Victims Act (CVA) sexual-abuse action against the alleged perpetrator's employer are limited to Workers' Compensation benefits and whether claims for time-barred Workers' Compensation benefits are revived by the Child Victims Act (CVA):

" 'As a general rule, when an employee is injured in the course of . . . employment, [the employee's] sole remedy against [their] employer lies in [their] entitlement to a recovery under the Workers' Compensation Law' " … . "[T]he issue whether a plaintiff was acting as an employee of a defendant at the time of the injury is a question of fact to be resolved by the Board" … .

"[C]ourts defer to [an] administrative agency where the issue involves knowledge and understanding of underlying operational practices or entails an evaluation of factual data and inferences to be drawn therefrom" … . However, "[w]here . . . the question is one of pure statutory interpretation, [courts] need not accord any deference to [an administrative body's] determination and can undertake its function of statutory construction" … . As relevant here, although a factual determination with respect to the applicability of the Workers' Compensation Law should be referred to the Board, which has primary jurisdiction over that issue, questions of law remain within the domain of the court … . Here, whether the CVA revives otherwise time-barred claims for workers' compensation benefits, based on allegations of sexual abuse by a coworker, and whether plaintiffs are limited to benefits under the Workers' Compensation Law even if their claims are revived, are questions of law to be decided by the court, not the Board. Thus, we agree with the plaintiffs that Supreme Court erred in granting defendant's motion, staying the actions pending review by the Board, and holding plaintiffs' cross-motions to amend their complaints in abeyance pending the Board's decision. Bates v Gannett Co., Inc., 2024 NY Slip Op 03999, Fourth Dept 7-26-24

Practice Point: This decision deals with the questions of law raised by applying the Workers' Compensation Law to sexual abuse claims revived by the Child Victims Act (CVA).

JULY 26, 2024

CHILD VICTIMS ACT.

A TEACHER'S ALLEGED STATEMENT TO THE PLAINTIFF THAT HE WAS AWARE OF THE SEXUAL ABUSE OF THE PLAINTIFF BY ANOTHER TEACHER OCCURRING REPEATEDLY AT SCHOOL WAS DEEMED AN ADMISSION ATTRIBUTABLE TO THE SCHOOL DISTRICT RAISING A QUESTION OF FACT WHETHER THE SEXUAL ABUSE WAS FORESEEABLE BY THE SCHOOL DISTRICT (FOURTH DEPT).

The Fourth Department, over a concurrence disagreeing with the majority ruling that a teacher's alleged statement was admissible against the school district as an admission, affirmed the denial of the school district's motion for summary judgment in this Child Victims Act negligent supervision case. Plaintiff, who was a student in the late 60's, alleged repeated abuse by a teacher in a back room at the school. Another teacher was alleged to have overheard the abuse and allegedly threatened plaintiff with revealing it in an attempt to sexually abuse plaintiff himself. That statement was deemed an admission which raised a question of fact whether the abuse was foreseeable by the school district:

… [P]laintiff testified that the orchestra teacher offered her a ride home from a bus stop after an evening event at the school. Instead of taking her home, however, the orchestra teacher took her to a park where, according to plaintiff, he told her "that he knew what was going on because he could hear through the walls from the orchestra room into that back room [where Fleming's office was located] and that [plaintiff] didn't want it to get out — [plaintiff] wouldn't want it to come out, so [she] should be nice to him." When plaintiff responded that she did not know what the orchestra teacher was talking about, he attempted to kiss her. * * *

The court determined that the entirety of the statement attributed to the orchestra teacher was admissible as a vicarious party admission of defendant under CPLR 4549 and therefore properly considered when evaluating defendant's motion for

summary judgment, because the orchestra teacher was employed by defendant and "[r]ecognizing and responding to the abuse of students while on school grounds certainly falls within the scope of the duties of a teacher employed by [defendant]."
* * *

We conclude that it is within the scope of a teacher's employment relationship to identify and assist a student who they believe is being sexually abused, and that the orchestra teacher's statement indicating awareness of the abuse of plaintiff was therefore "on a matter within the scope of [the employment] relationship" … . We further conclude that the orchestra teacher's statement professing knowledge of the abuse occurred "during the existence of" the employment relationship, within the meaning of CPLR 4549, inasmuch as it is undisputed that he was employed by defendant at the time the statement was made. Therefore, we agree with the court that the statement is admissible pursuant to CPLR 4549. Bl Doe 5, 2024 NY Slip Op 03608, Fourth Dept 7-3-24

Practice Point: In a negligent supervision action against a school district, is a statement allegedly made by a teacher to a student indicating the teacher's awareness of repeated sexual abuse of the student by another teacher, taking place at school, admissible against the school district as an admission of its awareness of the abuse? Here the court answered "yes" over a concurrence which disagreed.

JULY 3, 2024

CONTEMPT, JUDGES.

CIVIL CONTEMPT AIMS TO COMPENSATE THE OTHER PARTY FOR ANY LOSS ASSOCIATED WITH THE CONTEMPT (FAILURE TO COMPLY WITH A COURT ORDER); CRIMINAL CONTEMPT AIMS TO PUNISH; THEREFORE A $250 A DAY FINE, ALTHOUGH APPROPRIATE FOR CRIMINAL CONTEMPT, WAS NOT APPROPRIATE FOR THE CIVL CONTEMPT AT ISSUE HERE (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined fining defendants $250 a day for civil contempt was not appropriate. Civil contempt, unlike criminal contempt, is designed to compensate the other party for any loss, not to punish. The matter was remitted for a determination of any losses to plaintiffs associated with defendants' contempt. Defendants had ignored a court order requiring that the

contested reservation fee (over $700,000) be placed in escrow to prevent defendants from dissipating it:

“Unlike criminal contempt sanctions which are intended to punish, civil contempt fines are intended to compensate victims for their actual losses” … . Plaintiff did not establish an actual loss or injury as a result of the contempt … , and therefore Judiciary Law § 773 authorized the court to impose “a fine . . . not exceeding the amount of the complainant’s costs and expenses, and two hundred and fifty dollars in addition thereto.” Under these circumstances, the fine of $250 per day until the contempt was purged is not authorized by the statute and improperly sought to punish defendants for their continuing contempt, rather than to compensate plaintiff for an amount of damages suffered … . Rpower, LLC, 2024 NY Slip Op 03598, Fourth Dept 7-3-24

Practice Point: Civil contempt aims to address the contempt of the opposing party by compensating for the loss caused by the contempt. Criminal contempt, on the other hand, is designed to punish a party for failing to obey a court order. A fine is therefore appropriate for criminal contempt, but not for civil contempt.

JULY 3, 2024

CONTRACT LAW, ILLEGAL CONTRACT.

THE DENTISTS’ FEE-SPLITTING AGREEMENT VIOLATED THE EDUCATION LAW; A COURT WILL NOT ENFORCE AN ILLEGAL CONTRACT (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the complaint seeking to enforce an illegal contract should have been dismissed:

… [T]he plaintiff entered into an asset purchase agreement (hereinafter the APA) to sell certain assets of its dental practice to the defendant, a licensed dentist who retained his own separate practice. The APA specified a purchase price of $250,000. A portion of that amount was to be paid as a percentage of the monthly revenue generated by the plaintiff’s practice or, under certain conditions, a percentage of the revenue generated from a potential sale of the defendant’s separate practice. * * *

The defendant established his entitlement to dismissal of the causes of action alleging breach of contract and unjust enrichment pursuant to CPLR 3211(a)(7). As the defendant correctly contends, the APA constituted a voluntary prospective arrangement for the splitting of fees in violation of the Education Law because it required the defendant to pay the plaintiff a percentage of revenue generated by the plaintiff's practice and, under certain conditions, the defendant's own separate dental practice (see Education Law §§ 6509-a, 6530[19] …). "'It is the settled law of this State (and probably of every other State) that a party to an illegal contract cannot ask a court of law to help him or her carry out his or her illegal object, nor can such a person plead or prove in any court a case in which he or she, as a basis for his or her claim, must show forth his or her illegal purpose"' … . "'Where the parties' arrangement is illegal the law will not extend its aid to either of the parties . . . or listen to their complaints against each other, but will leave them where their own acts have placed them"' … . Advanced Dental of Ardsley, PLLC v Brown, 2024 NY Slip Op 03804, Second Dept 7-17-24

Practice Point: A fee-splitting agreement between dentists violates the Education Law.

Practice Point: A court will not enforce an illegal contract.

JULY 17, 2024

IMMUNITY, COVID, MEDICAL MALPRACTICE.

THE IMMUNITY CONFERRED ON HEALTHCARE PROVIDERS DURING THE COVID PANDEMIC CAN BE BASED ON THE OVERALL STRAIN ON THE OVERWHELMED HEALTHCARE SYSTEM; ALTHOUGH THE DEFENDANTS IN THIS MED MAL CASE MAY DEMONSTRATE ENTITLEMENT TO IMMUNITY AS THE CASE PROGRESSES, THEY DID NOT DEMONSTRATE ENTITLEMENT TO IMMUNITY AS A MATTER OF LAW SUCH THAT THE COMPLAINT SHOULD BE DISMISSED (SECOND DEPT).

The First Department, in a full-fledged opinion by Justice Higgitt, determined defendants in this med mal case were not entitled to dismissal of the complaint based upon the immunity conferred by the Emergency or Disaster Treatment

Protection Act (EDPTA) during the COVID pandemic. The plaintiff-patient, who did not have COVID, fell near his hospital bed and suffered a brain injury. After he fell, and before he suffered any symptoms of the injury from the fall, he was examined by two doctors. The doctors were not made aware of the fall. The defendants moved to dismiss the complaint at the outset of the case based on the EDPTA, noting that the immunity conferred by the statute was based upon the overall strain placed on the healthcare system by the pandemic. The Second Department determined that, although the defendants may be able to demonstrate their entitlement to immunity as the case progresses, they did not demonstrate entitlement to immunity as a matter of law such that the complaint should be dismissed at the outset:

… [O]f the three conditions imposed by former Public Health Law § 3082(1), there is no question that defendants were arranging for or providing health care services as per the statute, and were doing so in good faith. The parties' dispute distills to whether defendants established, conclusively, that "the treatment of [plaintiff was] impacted by [defendants'] decisions or activities in response to or as a result of the COVID-19 outbreak" (former Public Health Law § 3082[1][b]). * * *

A statute conferring immunity must be strictly construed … , and a party seeking its protections "must conform strictly with its conditions" … . In this regard, we note that only minimal discovery had been conducted at the time the motion was made, and that the applicability of the defense, itself, requires a fact-intensive inquiry. Whether or not defendants may ultimately be able to demonstrate that they are entitled to immunity, it is premature to deem the analysis completed at this juncture … . Holder v Jacob, 2024 NY Slip Op 03864, First Dept 7-18-24

Practice Point: Healthcare providers may be entitled to statutory immunity during the COVID pandemic. Here the defendants were unable to demonstrate entitlement to immunity as a matter of law such that the med mal complaint should be dismissed. But they may be able demonstrate entitlement to immunity as the case progresses.

JULY 18, 2024

INDIAN LAW.

THE JUDGMENTS ISSUED BY THE NATION COURT FOR A VIOLATION OF A CAYUGA NATION ORDINANCE CONSTITUTED FINES; A FOREIGN COUNTRY'S JUDGMENTS FOR FINES ARE NOT RECOGNIZED OR ENFORCEABLE IN NEW YORK STATE COURTS (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined the judgments granted by the Nation Court for violation of a Cayuga Nation ordinance constituted fines. Under the CPLR, a foreign -country judgment for a fine is not recognized or enforceable in New York State:

"Under CPLR article 53, a judgment issued by a foreign country is recognized and enforceable in New York State if it is 'final, conclusive and enforceable where rendered' " … . Article 53, however, "does not apply to a foreign country judgment, even if the judgment grants or denies recovery of a sum of money, to the extent the judgment is . . . a fine or penalty" … . "A party seeking recognition of a foreign country judgment has the burden of establishing that [article 53] applies to the foreign country judgment" .. .

Here, there is no dispute that each of the foreign country judgments at issue in these appeals is a fine. The foreign country judgments were granted by the Nation Court against respondents after the Nation Court found respondents in contempt of an order permanently enjoining respondents from operating Pipekeepers and in violation of a Cayuga Nation ordinance and assessed fines based on those findings. Thus, inasmuch as petitioner failed to meet its burdens of establishing that article 53 applied to the foreign country judgments … , the burdens never shifted to respondents to establish a mandatory or discretionary ground for non-recognition of the judgments under CPLR 5304 … . Matter of Cayuga Nation v Parker, 2024 NY Slip Op 03603, Fourth Dept 7-3-24

Practice Point: Judgments issued by the Nation Court for violations of a Cayuga Nation ordinance are considered foreign-county judgments by the CPLR. Foreign-country judgments for fines, like those issued here, are not recognized or enforceable in New York State courts.

JULY 3, 2024

NON-JURAL ENTITY, ASSOCIATIONS, RELIGION.

“UNITED METHODIST CHURCH” IS NOT A JURAL ENTITY WHICH CAN BE SUED IN THIS CHILD VICTIMS ACT LAWSUIT (SECOND DEPT).

The Second Department, in a full-fledged opinion by Justice Wan, reversing (modifying) Supreme Court, determined the “United Methodist Church” is not a jural entity which can be sued. In this Child Victims Act proceeding, the complaint alleged plaintiff was abused by an employee of the defendants United Methodist Church General Conference … , United Methodist Church Northeastern Jurisdiction New York-Connecticut District, New York Annual Conference of the United Methodist Church, United Methodist Church Long Island East District, Long Island East District of the New York Annual Conference of the United Methodist Church, … United Methodist Church of Woodbury New York. [and the] United Methodist Church … . The complaint alleged … United Methodist Church “is a not-for profit religious association and/or organization conducting business in the State of New York and organized and existing under the laws of the State of New York with its principal place of business located at c/o GFCA, 1 Music Circle North Nashville, Tennessee 37203.”

… [A]pplying neutral principles of law, we determine … the defendants established that United Methodist Church is not a jural entity with the capacity to be sued. Dismissal pursuant to CPLR 3211(a)(8) for lack of personal jurisdiction is warranted where a named defendant is not a legal entity amenable to suit … . New York law recognizes that “[a]n action or special proceeding may be maintained, against the president or treasurer” of an “unincorporated association” “upon any cause of action, for or upon which the plaintiff may maintain such an action or special proceeding, against all the associates, by reason of their interest or ownership, or claim of ownership therein, either jointly or in common, or their liability therefor, either jointly or severally” (General Associations Law § 13; see CPLR 1025 [“Two or more persons conducting a business as a partnership may sue or be sued in the partnership name, and actions may be brought by or against the president or treasurer of an unincorporated association on behalf of the association in accordance with the provisions of the general associations law”]). Although the term “unincorporated association” is not further defined by statute, New York courts have determined that “[i]t is only when a partnership has a President or a Treasurer that it is deemed an association within the meaning of” General

Associations Law § 13 … . As such, "[a]n unincorporated association . . . has 'no legal existence separate and apart from its individual members'" … .

* * * [W]e conclude that the defendants established that United Methodist Church … is a religious denomination with a single purpose—"to make disciples for Jesus Christ for the transformation of the world"—and not a jural entity amenable to suit as an unincorporated association. It is undisputed that United Methodist Church does not have a principal place of business, does not have its own offices or employees, and does not and cannot hold title to property, and there is no proof in the record that United Methodist Church has incorporated or held itself out as a jural entity in any other jurisdiction. Moreover, the defendants demonstrated at the hearing that United Methodist Church, as such, does not have any involvement in the staffing or the removal of clergy or staff at the local church level. Chestnut v United Methodist Church, 2024 NY Slip Op 03726, Second Dept 7-11-24

Practice Point: Here the "United Methodist Church" was deemed a nonjural entity which cannot be sued in New York–criteria explained in depth.

JULY 10, 2024

RELATION-BACK DOCTRINE, NEGLIGENCE.

HERE THE RELATION-BACK DOCTRINE SHOULD HAVE BEEN APPLIED TO ADD DEFENDANT DESIGN, WHICH HAD A UNITY OF INTEREST WITH DEFENDANT EISENBACH, DESIGN'S CEO; THE PLAINTIFF HAD AGREED TO DISCONTINUE THE TIMELY ACTION AGAINST EISENBACH BASED ON MISREPRESENTATIONS MADE ON EISENBACH'S BEHALF (SECOND DEPT).

The Second Department, in a full-fledged opinion by Justice Dillon, reversing Supreme Court, determined the relation-back doctrine should have been applied to add a defendant, Design, to the lawsuit. The CEO of Design, Eisenbach, had been timely sued but the action was discontinued based upon misrepresentations made to plaintiff's counsel on behalf of Eisenbach. Because of that unusual circumstance, based on the unity of interest between Design and its CEO, Eisenbach, plaintiff should have been allowed to add Design as a defendant after the statute of limitations had run for all parties (including Eisenbach):

These appeals involve the application of the relation-back doctrine to an unusual set of facts. Here, the plaintiffs seek to interpose untimely claims against a proposed corporate defendant by relating those claims back under CPLR 203(c) and (f) to an individual defendant who had been timely sued, discontinued from the action before the statute of limitations had run, and re-added as a defendant after the applicable statute of limitations had expired for all parties. Normally, the relation-back doctrine may only be applied when the party being added relates back to another party which has already been timely sued and which is a continuing defendant in the case. Under the peculiar circumstances of this case, where no party objected to, raised any contentions concerning, or appealed the granting of leave to re-add the previously discontinued individual as a party defendant, the relation-back doctrine may be applied. * * *

… [T]here is a fair reading of the record that had Eisenbach not been discontinued from the action based upon inaccurate representations, Design's role at the construction site would have been revealed and an action timely commenced against it. Further, with Eisenbach named as an original defendant in the action, Design knew or should have known that but for a mistake as to the identity of the parties, it would have been named as a party defendant as well. **Bisono v Mist Enters., Inc., 2024 NY Slip Op 03873, Second Dept 7-24-24**

Practice Point: Usually the relation-back doctrine can be applied only to add a party with a unity of interest with a timely sued defendant. Here, although the defendant had been timely sued, the action had been discontinued based upon misrepresentations made by the defendant to the plaintiff. Under that unique circumstance, the relation-back doctrine was deemed available to the plaintiff.

JULY 24, 2024

RESTORE TO ACTIVE CALENDAR, MOTION TO.

IN 2017 PLAINTIFF MISSED A COURT-ORDERED DEADLINE FOR FILING A NOTE OF ISSUE; IN 2022 PLAINTIFF MADE A MOTION TO RESTORE THE ACTION TO THE ACTIVE CALENDAR; THE MOTION SHOULD HAVE BEEN GRANTED, RESTORATION IS AUTOMATIC UNDER THE CIRCUMSTANCES HERE (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff's 2022 motion to restore the action to the active calendar should have been granted without considering whether there is a reasonable excuse for the delay. In 2017, plaintiff had failed to meet a court-ordered deadline for filing a note of issue, but no 90-day notice had been served and there was no order dismissing the complaint pursuant to 22 NYCRR 202.27. In that circumstance restoration is automatic and there is no specific time frame for a motion to restore:

Pursuant to a compliance conference order dated April 5, 2017, the plaintiff was required to file a note of issue on or before December 8, 2017. The plaintiff did not file a note of issue by that date, and the action was marked "inactive."

In November 2022, the plaintiff moved to restore the action to the active calendar. … Supreme Court denied the plaintiff's motion without prejudice to renewal "upon proper papers," including an affirmation detailing the reasons for the delay in moving for the relief requested. The plaintiff appeals from so much of the order as denied that branch of his motion which was to restore the action to the active calendar.

Where, as here, a plaintiff has failed to file a note of issue by a court-ordered deadline, restoration of the action to the active calendar is automatic, unless either a 90-day notice has been served pursuant to CPLR 3216 or there has been an order directing dismissal of the complaint pursuant to 22 NYCRR 202.27 … .. Under these circumstances, a motion to restore the action to the calendar should be granted "without considering whether the plaintiff had a reasonable excuse for the delay or whether [he] engaged in dilatory conduct" … . "Moreover, since this action was pre-note of issue and could not properly be marked off the calendar pursuant to CPLR 3404, the plaintiff was not required to move to restore the action to the calendar within any specified time frame" … . Rosario v Scudieri, 2024 NY Slip Op 03769, Second Dept 7-10-24

Practice Point: If no 90-day notice has been served and there has been no dismissal pursuant to 22 NYCRR 202.27, restoration of an action to the active calendar is automatic, even five years beyond the court-ordered deadline for filing a note of issue.

JULY 10, 2024

STANDING, ENVIRONMENTAL LAW, ADMINISTRATIVE LAW.

PETITIONER, A NONPROFIT ORGANIZATION FOR THE PRESERVATION AND PROTECTION OF THE HEALTH OF THE FINGER LAKES, HAD STANDING TO CONTEST A PERMIT ALLOWING THE DUMPING OF TREATED WASTE IN CAYUGA LAKE; ONE OF PETITIONER'S MEMBER'S DRINKING WATER COMES FROM CAYUGA LAKE (THIRD DEPT).

The Third Department, reversing Supreme Court, determined petitioner, a nonprofit organization for the preservation and protection of the health of the Finger Lakes, had standing to contest a permit allowing treated waste to be dumped into Cayuga Lake. Standing is conferred if one of petitioner's members suffers harm greater than that suffered by the general public. Here a member's drinking water comes from Cayuga Lake:

… [T]he sole issue on this appeal is whether petitioner sufficiently pleaded that at least one of its members would suffer an injury-in-fact that is different from harm suffered by the public at large, such as to confer petitioner with standing. Petitioner alleged in its petition/complaint that its members would be harmed by the leachate produced by County Line [waste treatment facility], which would be treated by the Ithaca treatment facility and then dumped into Cayuga Lake. According to petitioner, the type of solid waste that County Line would handle would create leachate that contains per- or polyfluoroalkyl substances (hereinafter PFAS), a by-product linked to adverse health outcomes and which the Ithaca treatment facility is not capable of completely filtering out of the treated leachate. Because the Ithaca treatment facility dumps treated leachate into Cayuga Lake and is incapable of completely filtering out PFAS, petitioner alleged that if County Line was permitted to operate its facility in accordance with its application, as DEC's [*3]permit requires, PFAS would enter the lake and cause petitioner's members harm. In setting forth this harm, petitioner specifically identified a member whose potable

drinking water is only filtered through the ground in "beach wells" on Cayuga Lake. As these wells do not filter out PFAS, allowing PFAS to be dumped into the lake would render this member's water contaminated and unsafe to drink. Matter of Seneca Lake Guardian v New York State Dept. of Envtl. Conservation, 2024 NY Slip Op 03856, Third Dept 7-18-24

Practice Point: Here a nonprofit whose purpose is to preserve and protect the health of the Finger Lakes had standing to contest a permit allowing the dumping of treated waste in Cayuga Lake. One of the member's drinking water came from Cayuga Lake. Therefore the member suffered an injury greater than that suffered by the general public.

JULY 18, 2024

STANDING, REAL PROPERTY ACTIONS AND PROCEEDINGS LAW (RPAPL).

THE BANK DID NOT DEMONSTRATE IT WAS THE HOLDER OR ASSIGNEE OF THE NOTE AT THE TIME THE ACTION TO RECORD THE MORTGAGE WAS BROUGHT; THE BANK DID NOT HAVE STANDING TO BRING THE ACTION (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff bank did not demonstrate standing in 2017 to record a mortgage securing a note issued in 2008:

A plaintiff has standing where it is the holder or assignee of the underlying note at the time the action is commenced … . "Either a written assignment of the underlying note or the physical delivery of the note prior to the commencement of the . . . action is sufficient to transfer the obligation, and the mortgage passes with the debt as an inseparable incident" … . "[A]n assignment of a note and mortgage need not be in writing and can be effectuated by physical delivery" .. .

Here, the affidavits of Fernandez were insufficient to establish the plaintiff's standing to record the mortgage. Although Fernandez's second affidavit provided a proper foundation for the admission of business records, and attached a business record … , "[i]t is the business record itself, not the foundational affidavit, that serves as proof of the matter asserted" … . The business record attached to

Fernandez's second affidavit failed to establish, prima facie, that the plaintiff had possession of the note prior to commencing the instant action, as it failed to mention the defendant or otherwise identify the note to which it was referring. Moreover, the business record identifies itself merely as a "Certification." It does not state when the note was either delivered to or assigned to the plaintiff. Bayview Loan Servicing, LLC v Healey, 2024 NY Slip Op 04054, Second Dept 7-31-24

Practice Point: Here the note was issued in 2008 and plaintiff bank sought to record the mortgage in 2017. The bank did not have standing to record the mortgage because it did not present proof it was the holder or assignee of the note when the action was brought.

JULY 31, 2024

VERDICT, MOTION TO SET ASIDE, EVIDENCE.

THE DEFENSE EXPERT SHOULD NOT HAVE BEEN PRECLUDED FROM TESTIFYING IN THIS CEILING-COLLAPSE CASE; THE MOTION TO SET ASIDE THE VERDICT SHOULD HAVE BEEN GRANTED; NEW TRIAL ORDERED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendants landlord and property manager were entitled to have the liability verdict set aside in the interest of justice because the judge should not have precluded testimony by defendants' expert. Plaintiff-tenants were injured when their apartment ceiling collapsed. The defendant expert would have testified there would have been no visible signs that the ceiling was about to collapse. The court noted that plaintiffs' request for a Frye hearing was properly denied because the expert would have testified based upon his personal training and experience:

"[E]xpert opinion is proper when it would help to clarify an issue calling for professional or technical knowledge, possessed by the expert and beyond the ken of the typical juror" … . The expert must possess "the requisite skill, training, education, knowledge or experience from which it can be assumed that the information imparted or the opinion rendered is reliable" … . "The expert's opinion, taken as a whole, must also reflect an acceptable level of certainty in order to be admissible" … .

Here, the defendants' CPLR 3101(d) disclosure indicated that Yarmus [the defense expert], a professional engineer with experience in construction management and building and safety code compliance, would testify, inter alia, as to the materials and manner of construction of the ceiling at issue, as well as the manner in which ceilings so constructed may detach and collapse, allegedly, without a defect that is detectable so as to give notice of a dangerous condition. Contrary to the plaintiffs' contention, Yarmus's proposed testimony was neither so conclusory or speculative, nor without basis in the record, as to render it inadmissible … .

… "[T]he long-recognized rule of Frye . . . is that expert testimony based on scientific principles or procedures is admissible but only after a principle or procedure has 'gained general acceptance' in its specified field … . An expert opinion based on personal training and experience is not subject to a Frye analysis … . Ghazala v Shore Haven Apt. Del, LLC, 2024 NY Slip Op 03681, Second Dept 7-3-24

Practice Point; If a judge makes a mistake by precluding admissible testimony, here testimony by the defense expert, the judge has the power to set aside the verdict in the interest of justice. The Appellate Division reversed the denial of the motion to set aside the verdict.

JULY 3, 2024

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