NEW YORK APPELLATE DIGEST, LLC

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A Compilation of the Summaries of Selected Decisions and Opinions Released in November, 2018, by the First, Second, Third and Fourth Departments, as well as the Court of Appeals. The Table of Contents is Organized Alphabetically by Legal Category and Includes Concise Descriptions of the Issues. Each Decision-Summary Has a Link to the Decision. The Table of Contents for the Appellate Division Decisions Begins on Page 1 and the Table of Contents for the Court of Appeals Decisions Begins on Page 22. Click on a Table of Contents Entry to Go to the Summary. Click on "Table of Contents" in the Header to Return to the Table of Contents.

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APPELLATE DIVISION

ADMINSTRATIVE LAW

ADMINISTRATIVE LAW, CIVIL PROCEDURE, EMPLOYMENT LAW, APPEALS, MUNICIPAL LAW.

BECAUSE THE PETITIONERS CHOSE TO APPEAL THEIR TERMINATION FROM EMPLOYMENT AS CORRECTION OFFICERS TO THE NYC CIVIL SERVICE COMMISSION INSTEAD OF BRINGING AN ARTICLE 78, THE COURT'S REVIEW POWERS ARE EXTREMELY LIMITED, THE TERMINATION WAS UPHELD (FIRST DEPT).

The First Department determined the NYC Civil Service Commission (CSC) properly upheld the termination of the petitioner correction officers for using excessive force against an inmate. The court noted that, because the petitioners chose to appeal the determination of the administrative law judge to the CSC, instead of bringing an Article 78, the court's review powers are extremely limited:

> Civil Service Law § 76(1) permits a person whose civil service employment has been terminated to "appeal from such determination either by an application to the state or municipal commission having jurisdiction, or by an application to the court in accordance with [article 78]." If the former option is chosen, "[t]he decision of such civil service commission shall be final and conclusive, and not subject to further review in any court" ... . The Court of Appeals has clarified that, despite the plain language in the statute, judicial review is not completely foreclosed ... . Rather, the article 78 court, instead of being guided by the substantial evidence or arbitrary and capricious standards of review, is limited to reviewing whether "the agency has acted illegally, unconstitutionally, or in excess of its jurisdiction" ... .
>
> Petitioners argue that CSC acted unconstitutionally because it relied on the statements of the inmates, who never testified, thus depriving petitioners of any chance to cross-examine them. However, this point is unpreserved. Petitioners fail to point to anything in the record showing that they ever sought to cross-examine or call the inmates and were denied that opportunity. More importantly, they never protested that their constitutional rights were being violated. This Court has "no discretionary authority" to "reach[] an unpreserved issue in the interest of justice" in an article 78 proceeding challenging an administrative determination ... , including issues touching on due process ... and evidentiary challenges ... . **Matter of Almanzar v City of New York City Civ. Serv. Commn., 2018 NY Slip Op 08062, First Dept 11-27-18**

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ADMINISTRATIVE LAW, CONTRACT LAW, EMPLOYMENT LAW, EDUCATION-SCHOOL LAW, CIVIL PROCEDURE.

ALTHOUGH CPLR 2104 DOES NOT APPLY TO STIPULATIONS IN ADMINISTRATIVE PROCEEDINGS, THE STIPULATION SIGNED BY PLAINTIFF, IN WHICH HE AGREED TO RETIRE IN RETURN FOR THE CESSATION OF DISCIPLINARY PROCEEDINGS, WAS ENFORCEABLE UNDER CONTRACT PRINCIPLES DESPITE PLAINTIFF'S SUBSEQUENT CHANGE OF HEART (FIRST DEPT).

The First Department determined the stipulation signed by plaintiff teacher, who agreed to resign in return for discontinuing the disciplinary hearing, was binding under contract principles, despite the inapplicability of CPLR 2104 to administrative proceedings. After signing the stipulation, plaintiff changed his mind:

> In the stipulation, DOE (Department of Education] agreed to discontinue the disciplinary hearing on the pending misconduct charges and to take no further disciplinary action against plaintiff, in exchange for which plaintiff agreed "to irrevocably retire from his employment with [DOE] ... ." The agreement was signed by plaintiff, his counsel, and DOE's counsel ... . Annexed to the stipulation was a letter signed by plaintiff and addressed to District Superintendent Karen Watts stating, "I hereby irrevocably retire from [DOE] ... ." The stipulation contained a signature line for Superintendent Watts, who signed it several days later.
>
> Before Superintendent Watts signed the stipulation, plaintiff notified DOE that he had changed his mind and wanted to rescind the stipulation. He argues that the stipulation was unenforceable when he changed his mind because not all the parties had signed it. ...
>
> Although CPLR 2104 is not applicable to agreements entered into in administrative proceedings, the stipulation signed by plaintiff and counsel acting on behalf of DOE is binding under general contract principles ... . Plaintiff failed to show the existence of fraud, collusion, mistake or accident, or that counsel lacked DOE's consent to enter into the stipulation ... . Plaintiff's agreement to retire was irrevocable, and plaintiff understood its consequences. His change of mind is not a cause sufficient to set aside his agreement ... . Nor is his parol evidence, offered to show that the parties did not intend to be bound by the stipulation until Superintendent Watts had signed it, admissible to add to or vary the terms of the writing ... . **Matter of Nobile v Board of Educ. of the City Sch. Dist. of the City of N.Y., 2018 NY Slip Op 08065, First Dept 11-27-18**

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APPEALS

APPEALS, CIVIL PROCEDURE, ATTORNEYS.

APPEAL DISMISSED BECAUSE IT WAS FROM A STIPULATION ENTERED BY CONSENT, IT WAS NOT FROM AN APPEALABLE ORDER UNDER CPLR 5701, AND THE ISSUES COULD HAVE BEEN RAISED IN A PRIOR APPEAL, COUNSEL SHOULD HAVE NOTIFIED THE COURT OF THE PRIOR DISMISSED APPEAL (FOURTH DEPT).

The Fourth Department determined the appeal must be dismissed for three reasons: the stipulation appealed from was entered into by consent, the appeal is not from an appealable order under CPLR 5701, and the matters raised on appeal could have been raised on a prior appeal. The court noted that counsel should have informed the court of the prior dismissed appeal:

> We now dismiss the instant appeal for the following three reasons. First, defendant is not aggrieved by the "Stipulation and Order" on appeal because, as its title reflects, it constitutes an order entered on consent. As such, defendant "may not appeal from it" (... see CPLR 5511...). The fact that defendant is aggrieved by the prior summary judgment order is of no moment because the "Stipulation and Order" is not a final order or judgment, and it thus does not bring up for review that prior order ... .
>
> Second, the appeal must be dismissed because the paper from which defendant purports to appeal is not an appealable order under CPLR 5701 (a) (2), which authorizes an appeal as of right from certain specified orders "where the motion it decided was made upon notice." That provision is inapplicable here because the "Stipulation and Order" on appeal did not decide a motion, much less a motion made on notice ... .
>
> Third, it is well established that "[a]n appeal that has been dismissed for failure to prosecute bars, on the merits, a subsequent appeal as to all questions that could have been raised on the earlier appeal had it been perfected" ... . Defendant's substantive contentions on the instant appeal could have been raised on the prior appeal, had it been perfected. Thus, dismissal of the instant appeal is also warranted on that ground ... .
>
> Finally, given the parties' failure to inform us of the prior dismissed appeal in their appellate briefs, we must remind counsel that "attorneys for litigants in [an appellate] court have an obligation to keep the court informed of all . . . matters pertinent to the disposition of a pending appeal and cannot, by agreement between them, . . . predetermine the scope of [its] review" ... . **Dumond v New York Cent. Mut. Fire Ins. Co., 2018 NY Slip Op 07853, Fourth Dept 11-16-18**

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ARBITRATION

ARBITRATION CONTRACT LAW.

SIGNATORY TO AGREEMENT WITH AN ARBITRATION CLAUSE CANNOT AVOID ARBITRATION SIMPLY BECAUSE PARTIES ENTWINED IN THE PROCEEDINGS ARE NOT SIGNATORIES (SECOND DEPT).

The Second Department determined that a signatory to an agreement with an arbitration clause could not avoid arbitration because other parties entwined in the matter were not signatories:

> ... Supreme Court should have denied that branch of Garnick's motion which sought a permanent stay of arbitration of the claims against him by Teitelbaum and Coluccio, derivatively on behalf of Axcess I, LLC, and Brooklyn Axcess, LLC, respectively. Axcess I, LLC, and Brooklyn Axcess, LLC, are not signatories to the Axcess, Inc., shareholders agreement that contains the arbitration clause. Nevertheless, Garnick is estopped from avoiding arbitration with them based on the relatedness between Axcess, Inc., and its subsidiaries, Axcess I, LLC, and Brooklyn Axcess, LLC, and the agreements and controversies at issue, which are intertwined with the Axcess, Inc., shareholders agreement containing the arbitration clause, to which Garnick is a signatory. **Matter of DeNobile v Panetta, 2018 NY Slip Op 07722, Second Dept 11-14-18**

ARBITRATION, CIVIL PROCEDURE, CONTRACT LAW.

ARBITRATION AWARD SHOULD NOT HAVE BEEN VACATED, LIMITED COURT-REVIEW POWERS EXPLAINED (FIRST DEPT).

The First Department, reversing Supreme Court, determined the arbitrator's award should have been confirmed. The dispute concerned a broker's fee provision in a lease. The arbitrator reasoned that the lease provision did not control because at the time the tenants bought the property the lease had expired and tenancy was month to month. The First Department explained the extremely limited court-review powers re: arbitration awards:

> CPLR 7511 provides just four grounds for vacating an arbitration award, including that the arbitrator "exceeded his power" (CPLR 7511[b][1][iii]), which "occurs only where the arbitrator's award violates a strong public policy, is irrational or clearly exceeds a specifically enumerated limitation on the arbitrator's power"... . Mere errors of fact or law are insufficient to vacate an arbitral award ... . "[C]ourts are obligated to give deference to the decision of the arbitrator, ... even if the arbitrator misapplied the substantive law in the area of the contract" ... .
>
> Here, the arbitrator's conclusion that a sales commission was not due under the precise terms of the Agreement because the lease was not extended is neither wholly irrational nor contrary to any strong public policy ... . **Matter of NRT N.Y. LLC v Spell, 2018 NY Slip Op 07664, First Dept 11-13-18**

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ATTORNEYS

ATTORNEYS, LEGAL MALPRACTICE, NEGLIGENCE, CIVIL PROCEDURE.

COMPLAINT STATED A CAUSE OF ACTION FOR LEGAL MALPRACTICE, MOTION TO DISMISS SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the complaint stated a cause of action for legal malpractice and should not have been dismissed. The court explained that whether the action would survive a subsequent summary judgment motion is not to be considered. The complaint alleged plaintiff was injured by a pizza delivery driver and the attorneys failed to sue the employer (Dominos):

> "On a motion pursuant to CPLR 3211(a)(7) to dismiss for failure to state a cause of action, the court must accept the facts alleged in the complaint as true, accord the plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" ... . "Where a court considers evidentiary material in determining a motion to dismiss a complaint pursuant to CPLR 3211(a)(7), but does not convert the motion into one for summary judgment, the criterion becomes whether the plaintiff has a cause of action, not whether the plaintiff has stated one, and unless the movant shows that a material fact as claimed by the plaintiff is not a fact at all and no significant dispute exists regarding the alleged fact, the complaint shall not be dismissed" ... . "Whether the complaint will later survive a motion for summary judgment, or whether the plaintiff will ultimately be able to prove its claims, of course, plays no part in the determination of a prediscovery CPLR 3211 motion to dismiss" ... .
>
> Here, accepting the facts alleged in the complaint as true, and according the plaintiff the benefit of every possible favorable inference, the plaintiff stated a cause of action to recover damages for legal malpractice ... . The evidentiary submissions did not establish that a material fact alleged in the complaint is not a fact at all and that no significant dispute exists regarding it ... . Contrary to the defendants' contention, the plaintiff was entitled to commence this legal malpractice action even though the underlying personal injury action was still pending, as the legal malpractice action accrued, at the latest, in November 2014 ... . **Lopez v Lozner & Mastropietro, P.C. , 2018 NY Slip Op 08017, Second Dept 11-21-18**

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CIVIL PROCEDURE

CIVIL PROCEDURE.

MOTION PAPERS WERE MAILED TO DEFENDANT 20, NOT 21, DAYS BEFORE THE RETURN DATE, THEREFORE THE CROSS MOTION, SERVED SIX DAYS BEFORE THE RETURN DATE, WAS TIMELY (SECOND DEPT).

The Second Department, reversing Supreme Court, noted that the denial of a cross motion as untimely was improper because plaintiff did not mail the motion papers 21 days before the return date:

> The plaintiff served its motion by regular mail on March 17, 2016, with a return date of April 6, 2016. In order to make effective its demand for seven days' notice of answering papers or a cross motion (see CPLR 2214[b]; CPLR 2215), the plaintiff was required to have mailed its motion papers at least 21 days prior to the return date (seeCPLR 2103[b][2]; CPLR 2214[b]...). The plaintiff mailed its motion papers only 20 days before the return date. Thus, the cross motion, which was served six days before the return date, was timely (see CPLR 2215). **Zisholtz & Zisholtz, LLP v Mandel, 2018 NY Slip Op 07349, Second Dept 10-31-18**

CIVIL PROCEDURE.

SUPREME COURT SHOULD NOT HAVE GRANTED PLAINTIFF PERMISSION TO SERVE AN AMENDED COMPLAINT AND SIMULTANEOUSLY AWARDED PLAINTIFF SUMMARY JUDGMENT ON SEVERAL CAUSES OF ACTION, THE AMENDED COMPLAINT SUPERSEDES THE ORIGINAL AND MUST BE ANSWERED BEFORE FURTHER PROCEEDINGS (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, determined Supreme Court should not have simultaneously granted plaintiff permission to amend the complaint and granted summary judgment on several causes of action. An amended complaint supersedes the original complaint and should be answered before any further proceedings:

> ... Supreme Court should not have awarded the plaintiff summary judgment on the issue of liability on the first, third, and fourth causes of action in the amended complaint, while simultaneously allowing the plaintiff to serve the amended complaint ... . "When an amended complaint has been served, it supersedes the original complaint and becomes the only complaint in the case" ... . "Since an amended complaint supplants the original complaint, it would unduly prejudice a defendant if it were bound by an original answer when the original complaint has no legal effect" ... . As a result, "an amended complaint should ordinarily be followed by an answer" ... . Here, the court should not have awarded the plaintiff summary judgment on the issue of liability on the causes of action in the amended complaint before the defendant had answered the amended complaint ... . **R&G Brenner Income Tax Consultants v Gilmartin, 2018 NY Slip Op 07470, Second Dept 11-7-18**

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CIVIL PROCEDURE.

STATUTE OF LIMITATIONS FOR A DECLARATORY JUDGMENT ACTION IS DETERMINED BY THE NATURE OF THE UNDERLYING ACTION, HERE CONVERSION AND FRAUD (SECOND DEPT).

The Second Department noted that there is no specific statute of limitations for a declaratory judgment action the applicable limitations period is determined by the nature of the underlying action, here conversion and fraud:

> "Actions for declaratory judgments are not ascribed a certain limitations period. The nature of the relief sought in a declaratory judgment action dictates the applicable limitations period. Thus, if the action for a declaratory judgment could have been brought in a different form asserting a particular cause of action, the limitations period applicable to the particular cause of action will apply" ... . Here, the cause of action for declaratory relief could have been brought, and essentially was brought, in the form of the causes of action to recover damages for conversion and fraud. Since this action was commenced more than three years from the date the alleged conversion took place, and more than six years from the commission of the alleged fraud or two years from the discovery of the alleged fraud, the declaratory judgment cause of action is time-barred ... . **Schulman v Schulman, 2018 NY Slip Op 07770, Second Dept 11-14-18**

CIVIL PROCEDURE, ADMINISTRATIVE LAW, APPEALS.

EXCEPTION TO THE MOOTNESS DOCTRINE DID NOT APPLY AFTER THE UNDERLYING ACTION WAS SETTLED, CRITERIA EXPLAINED (SECOND DEPT).

The Second Department determined the exception to the mootness doctrine did not apply and the Department of Health's (DOH's) motion to dismiss causes of action pursuant to the Americans with Disabilities Act and the Rehabilitation Act should have been granted. The underlying action was brought by disabled residents of an adult-care facility which was being closed. The matter settled and the facility closed rendering further proceedings academic. Supreme Court had held that the state claims were moot, but the federal claims were viable under an exception to the mootness doctrine:

> The exception to the mootness doctrine does not apply here. That exception permits a court to pass on moot issues when there exists: "(1) a likelihood of repetition, either between the parties or among other members of the public; (2) a phenomenon typically evading review; and (3) a showing of significant or important questions not previously passed on, i.e., substantial and novel issues" ... . If one or more of these elements is missing, the exception does not apply... .
>
> Here, there is no likelihood of repetition because the issues are fact-specific ... . Furthermore, because the issues are fact-specific, they are not substantial and novel ... .
>
> The plaintiffs contend that their federal law causes of action are not fact-specific, in that they challenge the validity of the regulations pursuant to which the DOH approves of any closure plan for an assisted living residence ... . The plaintiffs contend that the regulations themselves violate the mandate in the ADA and Rehabilitation Act that services be administered in the most integrated setting appropriate to the needs of the resident ... . However, this facial challenge to the DOH's closure regulations is time-barred ... .

> The issues presented here also do not typically evade review... . An injunction maintaining the status quo was an effective procedure here and would be in a future case raising similar issues. The issues here only became moot when the plaintiffs voluntarily opted to settle their claims against the LLC ... . **Berger v Prospect Park Residence, LLC, 2018 NY Slip Op 08110, Second Dept 11-28-18**

CIVIL PROCEDURE, ADMINISTRATIVE LAW, HUMAN RIGHTS LAW, EMPLOYMENT LAW.

COMPLAINANT'S ACTUAL EMPLOYER WAS ADDED TO THE EMPLOYMENT DISCRIMINATION PROCEEDING MORE THAN ONE YEAR AFTER TERMINATION, THE RELATION-BACK DOCTRINE DID NOT APPLY, DISCRIMINATION FINDING ANNULLED (SECOND DEPT).

The Second Department, annulling the employment discrimination determination, held that the action against the employer, Food Corp., was untimely and the relation-back doctrine did not apply. Complainant had originally named Trade Fair as her employer and then added Food Corp. more than a year after her termination:

> Food Corp. does not dispute that the first prong of the relation-back test was satisfied, because the claims against Food Corp. arose out of the same transactions or occurrences as those asserted against Trade Fair. The complainant also established the third prong of the test by presenting evidence suggesting that Food Corp. had notice of the proceeding before the statute of limitations expired, and that Food Corp. should have known that, but for the complainant's mistake in omitting it as a respondent in her complaint, the proceeding would have been timely commenced against it as well.
>
> However, the complainant failed to satisfy the second prong of the relation-back test, because Food Corp. and Trade Fair were not united in interest. Respondents are "united in interest only when their interest in the subject-matter [of the proceeding] is such that [the respondents] stand or fall together and that judgment against one will similarly affect the other'" ... . "[T]he question of unity of interest is to be determined from an examination of (1) the jural relationship of the parties whose interests are said to be united and (2) the nature of the claim asserted against them by the [complainant]" ... . Respondents are not united in interest if there is a possibility that the new party could have a defense different from that of the original party ... . Here, the Commissioner dismissed the second amended complaint insofar as asserted against Trade Fair on the grounds that the complainant never interacted with or took direction from Trade Fair's employees, and that Trade Fair was not the complainant's employer. In contrast, the Commissioner determined that Food Corp. was the complainant's employer because Food Corp.'s personnel hired and fired the complainant and controlled the complainant's daily workplace activities. Thus, the record makes clear that Food Corp.'s and Trade Fair's interests in the administrative proceeding did not stand or fall together ... . **Matter of 130-10 Food Corp. v New York State Div. of Human Rights, 2018 NY Slip Op 08123, Second Dept 11-28-18**

CIVIL PROCEDURE, ATTORNEYS.

LAW OFFICE FAILURE EXCUSE WAS SUFFICIENT TO WARRANT GRANTING DEFENDANTS' MOTION TO VACATE THE DEFAULT JUDGMENTS, SUPREME COURT REVERSED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendants' "law office failure" excuse was sufficient to warrant granting the motion to vacate the default judgments:

> "A party seeking to vacate a default in appearing or answering pursuant to CPLR 5015(a)(1), and thereupon to serve a late answer, must demonstrate a reasonable excuse for the default and a potentially meritorious defense to the action"... . The determination of what constitutes a reasonable excuse lies within the sound discretion of the trial court, and in the exercise of that discretion, the court may accept law office failure as an excuse (see CPLR 2005...). Here, the defaulting defendants demonstrated a reasonable excuse, based upon law office failure arising from a miscommunication between their former counsel and their present counsel, for their default in answering the complaint or otherwise appearing in the action ... .
>
> The defaulting defendants also demonstrated that they had a potentially meritorious defense. ...
>
> Under the circumstances here, particularly in light of the evidence that the defaulting defendants' delay was not willful, the lack of prejudice to the plaintiffs resulting from the defaulting defendants' short delay in appearing and seeking to answer the complaint, the existence of a potentially meritorious defense, and the strong public policy favoring the resolution of cases on the merits, the Supreme Court improvidently exercised its discretion in denying the defaulting defendants' motion to vacate their default and to compel the plaintiffs to accept their late answer ... . **Government Employees Ins. Co. v Avenue C Med., P.C., 2018 NY Slip Op 08010, Second Dept 11-21-18**

CIVIL PROCEDURE, ATTORNEYS.

LAW OFFICE FAILURE EXCUSE INSUFFICIENT, MOTION TO VACATE DISCONTINUANCE SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the law office failure excuse was insufficient to warrant vacating the order of discontinuance:

> While courts have discretionary power to relieve a party from a judgment or order for sufficient reason and in the interest of substantial justice... , "[a] court's inherent power to exercise control over its judgments is not plenary, and should be resorted to only to relieve a party from judgments taken through [fraud,] mistake, inadvertence, surprise or excusable neglect" ... .
>
> Here, the plaintiff asserted that the action was erroneously discontinued by prior counsel due to confusion generated by an impending substitution of counsel. "Where a party asserts law office failure, it must provide a detailed and credible explanation of the default"... , and conclusory and unsubstantiated allegations of law office failure are insufficient ... . Contrary to the plaintiff's contention, the uncorroborated representation by its current counsel that the action was erroneously discontinued by prior counsel did not constitute a detailed and credible explanation warranting vacatur of the order of discontinuance and restoration of the action ... . Accordingly, the Supreme Court should have denied the plaintiff's motion to vacate the order of discontinuance and

to restore the action to the active calendar. **IndyMac Bank, FSB v Izzo, 2018 NY Slip Op 08014, Second Dept 11-21-18**

CIVIL PROCEDURE, CONTRACT LAW, ATTORNEYS.

STIPULATION OF DISCONTINUANCE ENTERED INTO BY PLAINTIFF'S ATTORNEY COULD NOT BE INVALIDATED, EVEN THOUGH PLAINTIFF CHANGED HER MIND BEFORE THE STIPULATION WAS FILED, NO EVIDENCE OF DURESS, FRAUD, MISTAKE, OVERREACHING (SECOND DEPT).

The Second Department determined a stipulation of settlement entered by plaintiff's attorney was a binding contract. The fact that plaintiff changed her mind before the stipulation was filed was of no consequence. Plaintiff made no effort to demonstrate the contract was invalid due to duress, fraud, mistake or overreaching:

> We agree with the Supreme Court's determination to deny the plaintiff's motion, inter alia, to vacate the stipulation of discontinuance. CPLR 2104 provides that, "[a]n agreement between parties or their attorneys relating to any matter in an action, other than one between counsel in open court, is not binding upon a party unless it is in a writing subscribed by him or his attorney or reduced to the form of an order and entered." Here, there is no dispute that on October 30, 2015, the plaintiff's former counsel had actual authority from his client to enter into the stipulation discontinuing the action on her behalf ... . Contrary to the plaintiff's contention, the stipulation of discontinuance clearly evidenced the plaintiff's intent to discontinue the action as of October 30, 2015, notwithstanding that she changed her mind prior to the filing of the stipulation on November 2, 2015 ... , even though it did not effect a discontinuance until it was filed with the clerk of the court on November 2, 2015 (CPLR 3217[a][2]). In seeking to vacate the stipulation, the plaintiff failed to meet her burden to establish good cause sufficient to invalidate a contract, such as that the stipulation was the result of duress, fraud, mistake, or overreaching, or that the terms of the stipulation were unconscionable ... . **Demetriou v Wolfer, 2018 NY Slip Op 07288, Second Dept 10-31-18**

CIVIL PROCEDURE, CONTRACT LAW, DEBTOR-CREDITOR.

COMPLAINT DID NOT SUFFICIENTLY DESCRIBE THE GOODS FOR WHICH PLAINTIFF WAS SEEKING PAYMENT IN THIS BREACH OF CONTRACT ACTION AS REQUIRED BY CPLR 3016, THEREFORE DEFENDANT DID NOT HAVE TO SPECIFICALLY DISPUTE EACH ITEM, A GENERAL DENIAL WAS SUFFICIENT, PLAINTIFF'S SUMMARY JUDGMENT MOTION SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined that plaintiff's motion for summary judgment in this breach of contract action should not have been granted. The criteria for a motion pursuant to CPLR 3016 (f) alleging the failure to pay for delivered goods were not met because the complaint did not sufficiently describe the goods and the prices. Therefore a general denial, as opposed to specific denials re: the items listed in the complaint, was sufficient. In addition defendant alleged the goods were not timely delivered, which is a valid defense that does not require specifically disputing each item described in the complaint:

> In an action involving, inter alia, goods sold and delivered, CPLR 3016(f) permits a plaintiff to "set forth and number in his [or her] verified complaint the items of his [or her] claim and the reasonable value or agreed price of each." "To meet the requirements of CPLR 3016(f), a complaint must contain a listing of the goods or services provided, with enough detail that it may readily be examined and its correctness tested entry by entry'" ... . If the complaint meets these requirements, the defendant may not generally deny allegations of the complaint, but must, instead, specifically dispute the items on the plaintiff's list ... .
>
> Here, the complaint failed to comply with CPLR 3016(f). The three invoices failed to state the price of each individual invoice item, or the date when each item was delivered. Although it was acknowledged that partial payment was made, the plaintiff did not specify what the partial payment was for. The plaintiff also alleged that the defendant made a partial payment toward one invoice without specifying to which of the invoiced items the defendant's payment was applied ... .
>
> In any event, even assuming CPLR 3016(f) was complied with, a general denial is sufficient where a defense to the cause of action pursuant to CPLR 3016(f) speaks to the "entirety of the parties' dealings" ... . In this case, the defense—that the plaintiff breached the contract by untimely delivering the items in the contract—goes to the entirety of the parties' dealings. Further, damages awarded on the counterclaim may offset liability for goods sold and delivered if the circumstances warrant it ... . **SSG Door & Hardware, Inc. v APS Contr., Inc., 2018 NY Slip Op 07481, Second Dept 11-7-18**

CIVIL PROCEDURE, CONTRACT LAW, LIEN LAW, MUNICIPAL LAW.

PLAINTIFF CONTRACTOR DID NOT ALLEGE IT WAS LICENSED TO DO HOME IMPROVEMENT WORK IN ITS COMPLAINT ALLEGING BREACH OF CONTRACT AND SEEKING TO FORECLOSE ON A MECHANIC'S LIEN, THE COMPLAINT SHOULD HAVE BEEN DISMISSED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the defendant general contractor's motion to dismiss the complaint brought by plaintiff subcontractor, based upon the subcontractor's failure to allege it was licensed to do home improvement work, should have been granted:

> "Pursuant to CPLR 3015(e), a complaint that seeks to recover damages for breach of a home improvement contract or to recover in quantum meruit for home improvement services is subject to dismissal under CPLR 3211(a)(7) if it does not allege compliance with the licensing requirement" ... . Moreover, a home improvement contractor who fails to possess and plead possession of a valid license as required by relevant laws may not commence an action to foreclose a mechanic's lien ... .
>
> Here, the complaint did not allege that the plaintiff was duly licensed in the Town of East Hampton at the time the services were rendered ... . Moreover, in opposition to the defendants' motion, the plaintiff did not dispute that it did not possess the necessary license. The plaintiff's contention that the work it performed was not for home improvement but, rather, was for the construction of a new home for which a home improvement contracting license was not necessary, is without merit. The Town Code defines "home improvement" as including, inter alia, "[n]ew home construction" ... . Moreover, contrary to the plaintiff's contention, the defendants are entitled to the protection of CPLR 3015(e) and the applicable licensing requirements ... . **Kristeel, Inc. v Seaview Dev. Corp., 2018 NY Slip Op 07296, Second Dept 10-31-18**

CIVIL PROCEDURE, CORPORATION LAW.

CORPORATE OFFICER WHO SIGNED THE CONTRACT AT ISSUE WAS NOT UNITED IN INTEREST WITH THE CORPORATION, THEREFORE THE ATTEMPT TO ADD AN UNTIMELY FRAUD CAUSE OF ACTION AGAINST THE OFFICER WAS NOT POSSIBLE UNDER THE RELATION BACK DOCTRINE (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the relation back doctrine did not apply to an attempt to amend the answer to add a fraud cause of action against Tam, an officer of plaintiff corporation, because Tam and the corporation were not united in interest. Tam had signed the contract at issue as an officer, not in his individual capacity:

> " The relation-back doctrine allows a party to be added to an action after the expiration of the statute of limitations, and the claim is deemed timely interposed, if (1) the claim arises out of the same conduct, transaction, or occurrence, (2) the additional party is united in interest with the original party, and (3) the additional party knew or should have known that but for a mistake by the plaintiff as to the identity of the proper parties, the action would have been brought against the additional party as well'" ... . The original counterclaim asserted against the plaintiff alleged that plaintiff breached contractual obligations for which Tam—an officer of the corporation—was not individually liable ... . "There is no legal theory of vicarious liability for breach of contract" by "an agent of a disclosed principal" ... . Tam, when signing the contract in issue, did so as president of the plaintiff, and not individually. Therefore, the cross movants are not united in interest. Further, since Tam signed the contract, [defendant] was aware of Tam's identity at the time the original answer was served. Therefore, failure to join Tam cannot be attributable to a mistake as to the identity of the proper parties ... . Thus, the addition of Tam as a party to this action was improper. **Roco G.C. Corp. v Bridge View Tower, LLC, 2018 NY Slip Op 08164, Second Dept 11-28-18**

CIVIL PROCEDURE, FORECLOSURE.

COURT HAD DISCRETION TO ACCEPT A BELATED ORDER OF REFERENCE SUBMITTED AFTER THE 60-DAY DEADLINE IN 22 NYCRR 202.48 IN THIS FORECLOSURE ACTION, LAW OF THE CASE DOCTRINE DOES NOT APPLY TO A DISCRETIONARY ORDER (SECOND DEPT).

The Second Department determined Supreme Court properly exercised its discretion to accept a belated order of reference in this foreclosure action. The court noted that the law of the case doctrine does not apply to a discretionary ruling:

> In this action to foreclose a mortgage, the Supreme Court denied the plaintiffs' motion for summary judgment on the complaint. On appeal, this Court reversed that determination ... . Thereafter, the plaintiffs moved, inter alia, for an order of reference. The Supreme Court, among other things, granted that branch of the motion and directed the plaintiffs to submit an order of reference along with certain supporting documents. The plaintiffs failed to submit the order of reference and supporting documents to the court, allegedly because the documents were lost in the mail.
>
> The plaintiffs made a second motion for an order of reference. The Supreme Court denied this motion without prejudice, finding that the plaintiffs abandoned their motion for an order of reference since they failed to submit the order of reference within 60 days after the signing and filing of the

order directing submission, without showing good cause for their failure, in violation of 22 NYCRR 202.48(a). The plaintiffs then moved, inter alia, in effect, to extend the time to submit an order of reference, and for an order of reference. In the order appealed from, the court granted those branches of the plaintiffs' motion, excusing the plaintiffs' failure to submit some of the supporting documents the court had directed them to provide in its earlier order.

" It is within the sound discretion of the court to accept a belated order or judgment for settlement'" . "Moreover, a court should not deem an action or judgment abandoned where the result would not bring the repose to court proceedings that 22 NYCRR 202.48 was designed to effectuate, and would waste judicial resources'" ... . **Solomon v Burden, 2018 NY Slip Op 07480, Second Dept 11-7-18**

CIVIL PROCEDURE, LABOR LAW-CONSTRUCTION LAW, JUDGES.

MOTION SEEKING SUMMARY JUDGMENT ON THE LABOR LAW 241 (6) CAUSE OF ACTION ON ONE GROUND DID NOT JUSTIFY, SUA SPONTE, SEARCHING THE RECORD AND GRANTING SUMMARY JUDGMENT ON A GROUND NOT RAISED IN THE MOTION PAPERS (FOURTH DEPT).

The Fourth Department, reversing (modifying Supreme Court), determined a motion seeking summary judgment on the Labor Law 241 (6) cause of action should not have been granted on a ground not raised in the motion. Defendants alleged the Labor Law 241 (6) cause of action should be dismissed because plaintiff was the sole proximate cause of his injuries. The judge, sua sponte, searched the record and granted summary judgment on a different ground:

... [T]he court erred in searching the record and granting summary judgment to plaintiff on his Labor Law § 241 (6) cause of action, and we therefore modify the order accordingly. Contrary to plaintiff's assertion, although defendants did not advance their contention before the trial court, we conclude that the contention is properly before us because defendants lacked an opportunity to raise it at any time before this appeal ... . Further, " [a] motion for summary judgment on one claim or defense does not provide a basis for searching the record and granting summary judgment on an unrelated claim or defense' " ... . Here, the only issue raised with respect to the Labor Law § 241 (6) cause of action was on defendants' motion, wherein they asserted that dismissal was warranted on the ground that plaintiff was the sole proximate cause of his injuries. The court therefore erred in granting summary judgment to plaintiff based on alleged violations of 12 NYCRR 23-1.7 (b) (1) (c) and 23-3.3 (c). **Lord v Whelan & Curry Constr. Servs., Inc., 2018 NY Slip Op 07563, Fourth Dept 11-9-18**

CIVIL PROCEDURE, NEGLIGENCE, EVIDENCE.

MOTION TO AMEND COMPLAINT AND BILL OF PARTICULARS TO CHANGE THE DATE OF THE ALLEGED SLIP AND FALL PROPERLY DENIED (FIRST DEPT).

The First Department determined the motion to amend the complaint and bill of particulars in this slip and fall case was properly denied. Plaintiff sought to change the dare of the accident from October 12, 2012, to August 15, 2012:

> Plaintiff alleges that she slipped and fell on rainwater that came in through negligently maintained windows in the hallway of defendants' building. In support of her motion to amend, plaintiff stated that she originally alleged that the accident occurred on October 13, 2012, but that after reviewing her medical records she realized that she was mistaken and that the accident actually occurred on August 15, 2012, the day before she sought treatment at the hospital.
>
> The motion court providently exercised its discretion in denying plaintiff's motion, as defendants demonstrated that the delay in notifying them that plaintiff had incorrectly identified the date of the accident prejudiced their ability to investigate the incident and to defend the action using surveillance videotapes of the hallway ... . Defendants showed that, after learning of plaintiff's claim, they retrieved surveillance tapes of the alleged accident date of October 13th, which showed that no accident occurred on that date, but that they were no longer able to retrieve videotapes from August 2012 by the time plaintiff informed them of the claimed error in the pleadings. Furthermore, the August 2012 hospital record plaintiff relies upon reflects that she sought treatment from a podiatrist for an unrelated foot condition, and does not reference any fall the previous day ... . **Otero v Walton Ave. Assoc. LLC, 2018 NY Slip Op 08083, First Dept 11-27-18**

CONDOMINIUMS

CONDOMINIUMS, ATTORNEYS.

PRODUCTION OF CONDOMINIUM RECORDS PROPERLY REQUESTED, THE BOARD'S PAYMENT OF THE SUBPOENAED PARTIES' LEGAL EXPENSES IN RESISTING THE SUBPOENAS FOR THE RECORDS WAS PROPER (FIRST DEPT).

The First Department determined the production of certain of the condominium's books and records was properly requested by petitioners and the subpoenaed parties' legal expenses in resisting petitioners' subpoenas were properly paid by the condominium board:

> In item (j), petitioners seek "all correspondence with . . . NY Urban [or its principal] from 2011 to the present." This body of correspondence is relevant and necessary to petitioners' investigation into NY Urban's dealings with respondents, and therefore is a proper subject of the common-law right of inspection ... .
>
> In item (g), petitioners seek "[a]ll documents and records relating to the Condominium's settlement agreement with the Condominium sponsor." We agree with petitioners that understanding how the Condominium reached the settlement agreement is a valid purpose. Indeed, respondents concede that petitioners are entitled to receive a copy of the final settlement agreement itself. The documents specified in item (g) following the word "including" are also reasonably relevant and necessary to the stated purpose of exploring the settlement process. We reject respondents' conclusory assertion that some unknown number of documents are protected by the attorney-client privilege or work product doctrine.
>
> In paying the subpoenaed parties' legal expenses, respondents were acting within the scope of their authority and in furtherance of the legitimate purpose of resisting litigation disclosure of

Condominium documents, and there is no evidence that they were acting in bad faith ... . **Matter of Healy v Carriage House Condominium, 2018 NY Slip Op 07970, First Dept 11-20-18**

CONTEMPT

CONTEMPT, APPEALS, FAMILY LAW.

PLAINTIFF COULD BE HELD IN CONTEMPT FOR FAILURE TO COMPLY WITH A COURT ORDER TO POST A BOND, EVEN THOUGH THE BOND REQUIREMENT WAS LATER ELIMINATED ON APPEAL, HOWEVER PLAINTIFF PRESENTED CREDIBLE EVIDENCE HE WAS UNABLE TO OBTAIN THE BOND WHICH IS A DEFENSE TO CIVIL AND CRIMINAL CONTEMPT (SECOND DEPT).

The Second Department, reversing Supreme Court, determined that plaintiff father was required to comply with a court order to post a bond even though the order was modified on appeal to eliminate the bond requirement. However plaintiff provided credible evidence he was not able to obtain the required bond, which is a defense to the contempt action:

> In an order dated July 19, 2013 (hereinafter the July 2013 order), the Supreme Court granted the defendant's motion to require the plaintiff to post a bond in the amount of $150,000, as security for the payment of the parties' daughter's private school tuition, to ensure his compliance with the parties' judgment of divorce. The July 2013 order was later modified by this Court, and the provision thereof requiring the plaintiff to post a bond was deleted... . However, before this Court modified the July 2013 order, the Supreme Court, in the order now appealed from, granted that branch of the defendant's motion which was to hold the plaintiff in contempt of court for failing to comply with the order by not posting the bond.
>
> The order appealed from, holding the father in contempt for failing to comply with the July 2013 order by not posting a bond, is not subject to reversal based on this Court's modification of the July 2013 order by deleting the requirement that the plaintiff post a bond, as "[o]bedience to a lawful order of the court is required even if the order is thereafter held erroneous or improvidently made or granted by the court under misapprehension or mistake" ... . Moreover, this Court's modification of the July 2013 order "does not render the instant appeal academic, since a party may be adjudicated in contempt of a court mandate which is later overturned on appeal" ... .
>
> Nevertheless, we reverse the order appealed from, since, in response to the defendant's showing that she was prejudiced by the plaintiff's knowing disobedience of a lawful order of the court which expressed an unequivocal mandate, the plaintiff proffered credible evidence of his inability to obtain the required bond. Inability to comply with an order is a defense to both civil and criminal contempt ... . **Lueker v Lueker, 2018 NY Slip Op 07421, Second Dept 11-7-18**

CONTRACT LAW

CONTRACT LAW

PLAINTIFF RETAILER ATTEMPTED TO RECOVER PAYMENTS MADE TO A BANK STEMMING FROM THE HACKING OF MASTERCARD CREDIT CARD INFORMATION FROM THE RETAILER'S ACCOUNTS UNDER EQUITABLE SUBROGATION, MONEY HAD AND RECEIVED AND UNJUST ENRICHMENT THEORIES, COMPLAINT PROPERLY DISMISSED (SECOND DEPT).

The Second Department determined MasterCard's motion to dismiss this equitable subrogation and unjust enrichment action by plaintiff (Jetro) stemming from the the alleged hacking or attempted hacking of MasterCard credit card information from Jetro computer systems was properly granted. MasterCard has a contract with PNC, a bank, which provided that MasterCard could recover assessments against PNC because of the hacking. Jetro was required to indemnify PNC for those assessments and sued MasterCard to recover the payments. There was no contract between MasterCard and Jetro, so the only possible viable causes of action were equitable subrogation, money had and received and unjust enrichment, which were rejected because of the terms of the relevant contracts:

> Pursuant to the doctrine of equitable subrogation, where the " property of one person is used in discharging an obligation owed by another or a lien upon the property of another, under such circumstances that the other would be unjustly enriched by the retention of the benefit thus conferred, the former is entitled to be subrogated to the position of the obligee or lien-holder'" ... .
>
> Here, Jetro's indemnification obligation, set forth in its contract with PNC, was based on Jetro's own "acts or omissions" relating to a data breach incident. The indemnification clause in the PNC-Jetro contract is broader than the obligation of PNC toward MasterCard with respect to data breaches. According to the complaint, the PNC-Jetro contract obligated Jetro to indemnify PNC for any penalties imposed by MasterCard, "even in cases when MasterCard violated the Standards or otherwise violated the law by imposing the assessment[s] in question." In light of these contractual provisions, even accepting the allegations of the complaint as true ... , in undertaking to indemnify PNC, Jetro satisfied its separate and distinct obligation to PNC, and it is not equitably subrogated to the rights of PNC as against MasterCard ... .
>
> "The essential elements of a cause of action for money had and received are (1) the defendant received money belonging to the plaintiff, (2) the defendant benefitted from receipt of the money, and (3) under principles of equity and good conscience, the defendant should not be permitted to keep the money" ... . " The elements of a cause of action to recover for unjust enrichment are (1) the defendant was enriched, (2) at the plaintiff's expense, and (3) that it is against equity and good conscience to permit the defendant to retain what is sought to be recovered'" ... .
>
> Here, the subject penalties were collected or retained by MasterCard pursuant to its contract with PNC, which then sought indemnification from Jetro pursuant to PNC's separate contract with Jetro. We agree with the Supreme Court that the exercise by MasterCard of its purported contractual rights against PNC was independent of the determination by PNC to enforce its indemnification rights against Jetro. Therefore, it cannot be said that MasterCard unjustly benefitted from its action, or that it would be inequitable to allow it to retain the subject funds ... . **Jetro Holdings, LLC v MasterCard Intl., Inc., 2018 NY Slip Op 07418, Second Dept 11-7-18**

CONTRACT LAW, EVIDENCE, FRAUD, ATTORNEYS.

DAMAGES FOR BREACH OF HOME IMPROVEMENT CONTRACT NOT PROVEN, RESTITUTION IS NOT A REMEDY UNDER THE GENERAL BUSINESS LAW, GROUNDS FOR PUNITIVE DAMAGES NOT PROVEN, STATUTORY FEES, INCLUDING ATTORNEY'S FEES, APPLICABLE (SECOND DEPT).

The Second Department determined plaintiff did not submit sufficient proof of damages stemming from the alleged breach of a home improvement contract, and the restitution and punitive damages awards were improper. The statutory General Business Law awards, including attorney's fees, were applicable:

> ... [T]he plaintiff failed to meet her burden of proving damages for breach of contract. The appropriate measure of damages for breach of a home improvement contract by the contractor for defective construction is the cost to repair the defects ... , as of the date the cause of action accrued ... . Here, the plaintiff did not proffer competent evidence to establish her costs to repair the defendants' defective work as of the date the cause of action accrued ... . Accordingly, the damages award in the sum of $9,358.96 for breach of contract must be set aside.
>
> We also agree with the defendants that the jury improperly awarded the sum of $17,730 as restitution damages pursuant to General Business Law § 772, representing the total sum paid by the plaintiff under the home improvement contract before the defendants abandoned the project, since restitution damages are not provided for under that statute ... .
>
> Further, we agree with the defendants that the plaintiff is not entitled to recover punitive damages. Although the jury found that the defendants were liable for breach of contract, the plaintiff failed to establish that the defendants' conduct was egregious, directed toward the plaintiff, and part of a pattern directed at the public ... . Moreover, to the extent that the plaintiff's case rested on allegations of fraud, she failed to establish that the defendants' conduct was so gross, wanton, or willful, or of such high moral culpability, as to justify an award of punitive damages ... . **Crippen v Adamao2018 NY Slip Op 07287, Second Dept 10-31-18**

CONTRACT LAW, FRAUD, CONSUMER LAW, REAL ESTATE, COOPERATIVES.

THE ACTUAL DIMENSIONS OF THE COOPERATIVE APARTMENT WERE SMALLER THAN THE DIMENSIONS DESCRIBED IN THE LISTING, THE LISTING COULD NOT BE DEEMED INCORPORATED BY REFERENCE INTO THE PURCHASE AGREEMENT, THE COMPLAINT ALLEGING BREACH OF CONTRACT, FRAUD AND DECEPTIVE BUSINESS PRACTICES PROPERLY DISMISSED (FIRST DEPT).

The First Department determined the misrepresentation of the dimensions of the cooperative apartment in the listing could not be deemed incorporated by reference into the purchase agreement. The complaint was therefore properly dismissed:

> ... [P]laintiffs allege that defendants prepared a floor plan, which accompanied the listing for the unit at issue, that stated that the unit was "~1,966" square feet, when it was, in fact, approximately 1,495 square feet. Plaintiffs contend that the floor plan was incorporated into the offering plan by reference, and the offering plan, in turn, was incorporated into the purchase agreement. ...
>
> The doctrine of incorporation by reference "is appropriate only where the document to be incorporated is referred to and described in the instrument as issued so as to identify the

> referenced document beyond all reasonable doubt'"... . Here, the listing is not identified in any of the relevant purchase documents ... .
>
> Moreover, any purported representation or warranty is refuted by the clear terms of the purchase agreement, which contains a merger clause, states that no representations are being made by the sponsor, that the unit was being purchased "as is" and that the onus was on the buyer to inspect "to determine the actual dimensions" prior to purchasing ... .
>
> Reasonable reliance is an element of claims for fraud, aiding and abetting fraud and negligent misrepresentation... . Plaintiffs cannot as a matter of law establish reasonable reliance on a representation concerning the condition of the apartment since they had the means to ascertain the truth of the condition ... .
>
> .. [P]plaintiffs' allegations based on purported representations made in the listing fail to set forth a viable claim under General Business Law §§ 349 or 350, as they do not fall within the type of deceptive acts, that, if permitted to continue, would have a broad impact on consumers at large ... . **Von Ancken v 7 E. 14 L.L.C., 2018 NY Slip Op 08097, First Dept 11-27-18**

CONTRACT LAW, REAL ESTATE, CIVIL PROCEDURE, MUNICIPAL LAW.

PLAINTIFF'S COMPLAINT SEEKING SPECIFIC PERFORMANCE OF A REAL ESTATE PURCHASE CONTRACT PROPERLY DISMISSED BASED UPON THE LANGUAGE OF THE CONTRACT, PLAINTIFF DID NOT APPEAR AT EITHER SCHEDULED CLOSING AFTER SUBMITTING THE HIGHEST BID AND SIGNING THE CONTRACT (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the county's motion to dismiss plaintiff's complaint seeking specific performance, based on the language of the real estate purchase contract, should have been granted. Plaintiff was the highest bidder on real property and signed a purchase contract but did not appear on the closing dates:

> ... [W]e find that the terms and conditions of the contract of sale utterly refute the plaintiff's allegations and establish a defense as a matter of law. The contract clearly provides that the plaintiff's failure to close pursuant to the terms and conditions of sale will result in a forfeiture of the down payment; that in the event the closing is postponed at the plaintiff's request, then the adjourned date shall be deemed the final law date; that the plaintiff's failure to close on the final law date shall entitle the County to cancel the sale and to retain the down payment; and, in those circumstances, the plaintiff waives all claims of any right, title and interest in the subject property and the down payment. Additionally, the terms and conditions of the contract of sale demonstrate that a material fact claimed by the plaintiff—the alleged breach of contract by the County—is not a fact at all, and no significant dispute exists regarding it. **Mahmood v County of Suffolk, 2018 NY Slip Op 07715, Second Dept 11-14-18**

CONVERSION

CONVERSION, CIVIL PROCEDURE.

PLAINTIFF ENTITLED TO PREJUDGMENT INTEREST AT THE STATUTORY RATE IN THIS CONVERSION ACTION (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff was entitled to interest at the statutory rate based on the value of the property at the time and place of conversion:

> On a prior appeal in this action, this Court awarded summary judgment to the plaintiff, inter alia, on the cause of action to recover damages for conversion in the sum of $69,500, representing the amount of estate funds that were wrongfully converted by the defendant Rick Barrett. The Supreme Court subsequently entered an amended judgment that awarded the plaintiff the sum of $69,500 but failed to award prejudgment interest at the statutory rate of 9% per annum on that sum. The plaintiff appeals from so much of the amended judgment as failed to award prejudgment interest at the statutory rate on the $69,500 damages award.
>
> "The usual measure of damages for conversion is the value of the property at the time and place of conversion, plus interest" ... . Indeed, CPLR 5001(a) provides for the award of prejudgment interest upon sums awarded for the deprivation of or interference with another's property, and relevant case law clearly establishes that such interest is properly awarded as part of the recovery on a cause of action sounding in conversion ... . Moreover, interest is to be awarded at the statutory rate of 9% per annum ... . **Scotti v Barrett, 2018 NY Slip Op 07477, Second Dept 11-7-18**

CORPORATION LAW

CORPORATION LAW, CIVIL PROCEDURE, BANKING LAW, FIDUCIARY DUTY.

UK LAW REQUIRING COURT PERMISSION TO BRING A SHAREHOLDER DERIVATIVE ACTION WAS PROCEDURAL AND THEREFORE DID NOT APPLY IN THIS NEW YORK ACTION AGAINST LONDON-BASED HSBC FOR FAILURE TO IMPLEMENT MONEY-LAUNDERING PROTECTIONS, COMPLAINT DEMONSTRATED THE FUTILITY OF FIRST SEEKING REDRESS FROM THE CORPORATION, DOCTRINE OF FORUM NON CONVENIENS DID NOT APPLY, COMPLAINT SHOULD NOT HAVE BEEN DISMISSED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the shareholder derivative action against HSBC (bank) alleging breach of a fiduciary duty to implement money laundering prevention safeguards should not have been dismissed. The nominal defendant, HSBC Holdings, is organized under the laws of the United Kingdom and is headquartered in London. The motion to dismiss alleged the failure to seek permission for the action from the English High Court, as well as the failure to demonstrate the futility of seeking redress from the corporation, and the doctrine of forum non conveniens, required dismissal of the complaint. The Second Department held that the rule requiring permission of the English court was procedural and therefore the law of the forum (New York), not the United Kingdom, applied. The Second

Department further held that the complaint demonstrated the futility of first seeking redress from the corporation and New York was the proper forum:

> ... [T]he Court of Appeals decided Davis v Scottish Re Group Ltd. (30 NY3d 247), which held that a Cayman Islands court rule requiring plaintiffs in shareholder derivative actions to first apply to the Cayman Islands Grand Court for leave to continue the action is a procedural rule of the Cayman Islands, and "therefore does not apply where, as here, a plaintiff seeks to litigate his derivative claims in New York" ... . Based upon the analysis set forth in Davis, we find that the judicial-permission requirement set forth in the UK Companies Act is a procedural rule applicable only in England and Wales, or Northern Ireland. ...
>
> As an alternative ground for affirmance ... , the nominal defendants contend that the plaintiff lacks standing under New York law pursuant to Business Corporation Law § 626(c) because the amended complaint fails to allege that the plaintiff made efforts to secure initiation of the action by the board itself or set forth the reasons for not making such effort ... . * * *
>
> In view of the illegal purpose, magnitude, and duration of the alleged wrongdoing, as well as the identity of beneficiaries to the transactions, the allegations were such that the transactions should have come to the attention of senior management and the board of directors ... . * * *
>
> ... [G]iven that the allegations of wrongdoing occurred in New York, that only 21 of the 75 individual defendants live and work outside of New York, and that 3 of the nominal defendants are either incorporated or headquartered in New York, the Supreme Court providently exercised its discretion in determining that the nominal defendants were not entitled to dismissal on the ground of forum non conveniens [CPLR 327]. **Mason-Mahon v Flint, 2018 NY Slip Op 07716, Second Dept 11-14-18**

CRIMINAL LAW

CRIMINAL LAW.

FOR CAUSE CHALLENGE TO JUROR SHOULD HAVE BEEN GRANTED, CONVICTION REVERSED (FIRST DEPT).

The First Department, reversing Supreme Court, determined the for cause challenge to a juror should have been granted:

> The court improvidently exercised its discretion in denying defendant's challenge for cause to a prospective juror who repeatedly expressed a predisposition to credit police testimony, and a belief that innocent defendants would testify on their own behalf, since the totality of his responses established that he would be unable to put aside his inclinations and be fair and impartial ... . At no point did the panelist give an unequivocal assurance that he would put aside his beliefs and concerns and render an impartial verdict ... . **People v Brith, 2018 NY Slip Op 07250, First Dept 10-30-18**

CRIMINAL LAW.

DENIAL OF YOUTHFUL OFFENDER TREATMENT WAS NOT AN ABUSE OF DISCRETION, 35-YEAR SENTENCE WAS HARSH AND EXCESSIVE (FOURTH DEPT).

The Fourth Department, over a two-justice dissent, determined that Supreme Court did not abuse its discretion when it declined to sentence youthful offender treatment. The majority deemed the 35 year sentence excessive and directed that the sentences be served concurrently. The dissenters argued that the sentences were not excessive:

> CPL 720.10 (3) provides that "a youth who has been convicted of an armed felony offense . . . is an eligible youth if the court determines that one or more of the following factors exist: (i) mitigating circumstances that bear directly upon the manner in which the crime was committed; or (ii) where the defendant was not the sole participant in the crime, the defendant's participation was relatively minor although not so minor as to constitute a defense to the prosecution." Contrary to defendant's contention, "traditional sentencing factors, such as the criminal's age, background and criminal history, are not appropriate to the mitigating circumstances analysis . . . Rather, the court must rely only on factors related to the defendant's conduct in committing the crime, such as a lack of injury to others or evidence that the defendant did not display a weapon during the crime"... , or other factors that are directly related to the crime of which defendant was convicted ... . Here, we perceive no basis to disturb the court's determination that defendant is not an eligible youth because, in the first crime of which he was convicted, "defendant carried a gun to an encounter with known gang members, displayed the gun, . . . and . . . fired a shot that struck one of the" gang members... , and he was again armed with a loaded weapon when he was arrested several weeks later. ...
>
> The victim in this case is a rival gang member who attempted to rob members of defendant's gang. Defendant arrived at the scene of the attempted robbery and shot at the victim, who was struck by a bullet but survived. Defendant obviously deserves a stern sentence but, in our view, 35 years is too severe. Indeed, the maximum punishment for intentional murder is 25 years to life ... . Defendant has no prior criminal record (he was adjudicated a youthful offender on a misdemeanor), he was only 18 years old when he committed the crimes, and the People offered him a 20-year sentence prior to trial as part of a plea bargain. Under the circumstances, and considering that the victim was attempting to commit an armed robbery when he was shot, we conclude that defendant's sentence is unduly harsh and severe. **People v Jones, 2018 NY Slip Op 07556, Fourth Dept 11-9-18**

CRIMINAL LAW.

PEOPLE DID NOT PROVIDE A SUFFICIENT RACE-NEUTRAL REASON FOR STRIKING AN AFRICAN-AMERICAN JUROR, CONVICTION REVERSED (FOURTH DEPT).

The Fourth Department, reversing defendant's conviction, determined that the People did not provide a sufficient race-neutral reason for striking an African-American juror. The case had been remitted for a hearing on the issue:

> We agree with defendant that the People failed to meet their burden at step two of the Batson analysis to articulate a "race-neutral reason" for striking the prospective juror ... . On remittal, the prosecutor testified that he did not remember his reason for striking the prospective

> juror at issue, but stated that it had "nothing to do with race." The prosecutor testified that, instead, "there was something on [the prospective juror's] jury questionnaire . . . that [he] did not particularly like," which would have provided a basis for exercising a peremptory challenge if he "could not clarify [that] issue" during voir dire. The prosecutor, however, had no recollection of the subject prospective juror's actual questionnaire, which, apparently, was not preserved.
>
> We conclude that the prosecutor's articulated reason for striking the only African-American prospective juror was insufficient to satisfy the People's burden. As noted, the prosecutor could not recall a specific reason for striking the prospective juror, but rather assured the court in a conclusory fashion that the challenge was not based on race and was based, instead, on "something" in the prospective juror's questionnaire. Thus, the prosecutor's explanation "amounted to little more than a denial of discriminatory purpose and a general assertion of good faith" ... . Where, as here, "the facts establish, prima facie, purposeful discrimination and the prosecutor does not come forward with a neutral explanation for his action, . . . precedents require that [defendant's] conviction be reversed" ... . **People v Davis, 2018 NY Slip Op 07569, Fourth Dept 11-9-18**

CRIMINAL LAW.

DEFENDANT WAS NOT INFORMED OF THE POSTRELEASE SUPERVISION ASPECT OF HIS SENTENCE, PLEA VACATED (FOURTH DEPT).

The Fourth Department vacated defendant's guilty plea because he was not informed of the postrelease supervision aspect of the sentence:

> On appeal from a judgment convicting him upon his plea of guilty of criminal sexual act in the first degree ..., defendant contends that reversal of the judgment and vacatur of the plea are required because County Court failed to advise him, at the time of the plea, of the period of postrelease supervision that would be imposed at sentencing. We agree ... . **People v Hemingway, 2018 NY Slip Op 07587, Fourth Dept 11-9-18**

CRIMINAL LAW.

UNLIKE AN INDICTMENT, A WAIVER OF INDICTMENT MUST INCLUDE THE APPROXIMATE TIME OF THE OFFENSE, THE WAIVER HERE INCLUDED ONLY THE DAY OF THE OFFENSE AND WAS THEREFORE INVALID (THIRD DEPT).

The Third Department determined the waiver of indictment was invalid because it did not include the approximate time of the offense. The court noted that the time allegations required for an indictment do not include the approximate time of the offense, but the approximate time must be included in a waiver of indictment:

> Courts have held that "[w]hen time is not an essential element of an offense, the indictment, as supplemented by a bill of particulars, may allege the time in approximate terms. The indictment must, however, set forth a time interval which reasonably serves the function of protecting defendant's constitutional right to be informed of the nature and cause of the accusation, so as to

> enable the defendant to prepare a defense and to use the judgment against further prosecution for the same crime" ... . Those cases deal with indictments, however, not waivers of indictment. Pursuant to the statute, an indictment must include a statement "that the offense charged therein was committed on, or on or about, a designated date, or during a designated period of time" (CPL 200.50 [6]), whereas CPL 195.20 requires that waivers of indictment include the offense's "date and approximate time" ... . "[I]n the interpretation of a statute[,] we must assume that the Legislature did not deliberately place a phrase in the statute which was intended to serve no purpose[,] and each word must be read and given a distinct and consistent meaning" ... . Simply stating that the offense occurred on, or on or about, a specified date or within a range of time (such as a certain week, month or span of months) may meet the statutory requirements for an indictment ... , but is insufficient to meet CPL 195.20's additional "approximate time" requirement for a waiver of indictment ... . Any other interpretation would render the statute's language requiring the "approximate time" superfluous or redundant. **People v Busch-Scardino, 2018 NY Slip Op 07979, Third Dept 11-21-18**

CRIMINAL LAW.

NEW JERSEY FORGED INSTRUMENT CONVICTION WAS NOT THE EQUIVALENT OF A NEW YORK FELONY AND SHOULD NOT HAVE BEEN THE BASIS OF SECOND FELONY OFFENDER STATUS (FIRST DEPT).

The First Department, in a full-fledged opinion by Justice Renwick, ordering the resentencing of defendant, determined the defendant's prior New Jersey forged instrument conviction was not the equivalent of a New York felony and therefore could not be the basis of second felony offender status:

> The first mens rea element of both New York and New Jersey's crime of uttering a forged instrument are the same: that the defendant had knowledge that the subject instrument was forged. However, the second mens rea element of the New Jersey crime of uttering a forged instrument is broader than the second mens rea element of the New York crime of uttering a forged instrument. Because the New Jersey statute uses the disjunctive "or," the second mens rea element of the NJ crime of uttering a forged instrument can be satisfied in two different ways: that one who utters a forged instrument must act either with the intent to defraud (purpose to defraud or injure anyone) or with the knowledge that one is facilitating a fraud. By contrast, the second mens rea element of the New York crime of uttering a forged instrument can be satisfied only one way: that the person who utters a forged instrument acted with the "intent to defraud." Since the New Jersey statute punishes a broader range of mental states than its New York counterpart, it fails New York's strict equivalency test ... . **People v Allison, 2018 NY Slip Op 08194, First Dept 11-29-18**

CRIMINAL LAW, APPEALS.

DEFENDANT SHOULD NOT HAVE BEEN SENTENCED AS A SECOND FELONY OFFENDER BECAUSE THE PENNSYLVANIA BURGLARY WAS NOT THE EQUIVALENT OF A NEW YORK FELONY, ALTHOUGH THE ERROR WAS NOT PRESERVED THE ISSUE WAS CONSIDERED IN THE INTEREST OF JUSTICE (FOURTH DEPT).

The Fourth Department determined, in the interest of justice, that defendant should not have been sentenced as a second felony offender based upon a Pennsylvania burglary conviction:

> ... [T]he predicate conviction, i.e., the Pennsylvania crime of burglary (18 Pa Cons Stat § 3502), is not the equivalent of a New York felony. Although defendant failed to preserve that contention for our review ... , we exercise our power to address it as a matter of discretion in the interest of justice ... . Upon our review of Pennsylvania statutory and case law, "there is no element in the Pennsylvania statute comparable to the element in the analogous New York statute that an intruder knowingly' enter or remain unlawfully in the premises . . . [and t]he absence of this scienter requirement from the Pennsylvania burglary statute renders improper the use of the Pennsylvania burglary conviction as the basis of the defendant's predicate felony adjudication" ... . **People v Funk, 2018 NY Slip Op 07558, Fourth Dept 11-9-18**

CRIMINAL LAW, APPEALS.

IN A CLOSE CASE THE SECOND DEPARTMENT HELD DEFENDANT VALIDLY WAIVED HIS RIGHT TO APPEAL, THE COMPREHENSIVE OPINIONS BY TWO CONCURRING JUSTICES AIM TO INSTRUCT TRIAL JUDGES ON THE REQUIREMENTS FOR A VALID WAIVER (SECOND DEPT).

The Second Department, in a full-fledged opinion by Justice Leventhal, with a concurring opinion by Justice Scheinkman (joined by all of the justices), determined that defendant validly waived his right to appeal. The comprehensive opinions aim to instruct trial judges on what is required for a valid waiver:

> Although we hold that the defendant validly waived his right to appeal, precluding review of his contention that the sentence imposed was excessive, we take the opportunity to respectfully urge our trial courts to give greater attention to the colloquy used in taking a waiver of the right to appeal. * * *
>
> The defendant answered in the affirmative when the Supreme Court asked, "Do you understand that one of the terms of this plea agreement is that you will not exercise your right to appeal." The court's phrasing served to differentiate the rights the defendant gave up by pleading guilty from the right to appeal the defendant gave up as part of this plea agreement. The defendant also answered in the affirmative when the court later asked, "By waiving your right to appeal, you will be foreclosed forever from complaining about any errors that may have occurred in this proceeding. Do you realize that?" This question provided some explanation of the nature of the right to appeal and the consequences of waiving it, and was met with an affirmative response. Additionally, the defendant acknowledged signing the written waiver form, and answered that he discussed it with his attorney before he signed it, that he understood all those discussions, that he was satisfied with those discussions, and that he signed it of his own free will. Granted, whether the appeal waiver is valid in this case presents a very close question given, inter alia, that the on-the-record explanation of the nature of the right to appeal and the consequences of waiving it was terse and included no

> reference to a higher court or the Appellate Division; the defendant had a limited education, having stopped attending school in the eighth grade; and he had minimal prior experience with the criminal justice system, having been adjudicated a youthful offender but not having been convicted of a felony previously. Nonetheless, the record before us, consisting of the oral colloquy and the detailed written waiver, sufficiently demonstrates that the defendant knowingly, voluntarily, and intelligently waived his right to appeal. **People v Batista, 2018 NY Slip Op 07445, Second Dept 11-7-18**

CRIMINAL LAW, APPEALS.

DEFENDANT'S STATEMENT DURING THE PLEA ALLOCUTION RAISED A VIABLE AFFIRMATIVE DEFENSE WHICH REQUIRED FURTHER INQUIRY BY THE JUDGE, ERROR IS A RARE EXCEPTION TO THE PRESERVATION REQUIREMENT (FOURTH DEPT).

The Fourth Department, vacating defendant's guilty plea, determined defendant's statement during the plea allocution raised a viable affirmative defense which required further inquiry by the court. The error was considered on appeal under a rare exception to the preservation requirement:

> Although defendant's contention survives his valid waiver of the right to appeal ... , he failed to preserve that contention for our review inasmuch as he did not move to withdraw the plea or to vacate the judgment of conviction on that ground ... . This case nonetheless falls within the rare exception to the preservation requirement ... . Defendant made a statement during the plea allocution that raised a potentially viable affirmative defense pursuant to Penal Law § 130.10 (1), thereby "giving rise to a duty on the part of the court, before accepting the guilty plea, to ensure that defendant was aware of that defense and was knowingly and voluntarily waiving it" ... . We conclude that the court's inquiry here was insufficient to meet that obligation ... . **People v Rosario, 2018 NY Slip Op 07564, Fourth Dept 11-9-18**

CRIMINAL LAW, APPEALS.

DURING THE PLEA COLLOQUY DEFENDANT NEGATED AN ELEMENT OF THE CRIME AND THE COURT DID NOT CONDUCT FURTHER INQUIRY, THE ERROR NEED NOT BE PRESERVED FOR CONSIDERATION ON APPEAL, PLEA VACATED (THIRD DEPT).

The Third Department, vacating defendant's plea, determined that the court should have conducted further inquiry after defendant, during the plea colloquy, made a statement about the age of the victim which negated an element of the crime. The error triggered the narrow exception to the preservation requirement:

> Defendant contends that the plea must be vacated because he negated an essential element of the crime at sentencing. Although the record does not reflect that defendant made an appropriate postallocution motion in order to preserve this issue for our review, we find that a statement made by defendant at sentencing cast doubt upon his guilt and, therefore, triggered "the narrow exception to the preservation requirement and impos[ed] a duty upon County Court 'to inquire further to ensure that defendant's guilty plea [was] knowing and voluntary'" ... . "[S]tatements made by a defendant that negate an element of the crime to which a plea has been entered . . . or

> otherwise suggest an involuntary plea require[s] the trial court to then conduct a further inquiry or give the defendant an opportunity to withdraw the plea" ... .
>
> At sentencing, defendant stated that the sexual conduct started when the victim was 13 years old, not 12 years old. Such statement by defendant negated the element of predatory sexual assault against a child in the first degree that requires that the victim be under the age of 13 (see Penal Law § 130.96). Notwithstanding defendant's statement, County Court did not make any further inquiry or give defendant an opportunity to withdraw his plea prior to proceeding to sentencing. **People v Brassard, 2018 NY Slip Op 07978, Third Dept 11-21-18**

CRIMINAL LAW, ATTORNEYS, APPEALS, IMMIGRATION LAW.

DEFENDANT'S MOTION TO VACATE HIS CONVICTION BY GUILTY PLEA SHOULD NOT HAVE BEEN DENIED WITHOUT A HEARING, THE PAPERS SUFFICIENTLY RAISED THE QUESTION WHETHER DEFENSE COUNSEL FAILED TO INFORM DEFENDANT OF THE DEPORTATION CONSEQUENCES OF THE PLEA AND WHETHER THAT FAILURE AMOUNTED TO INEFFECTIVE ASSISTANCE UNDER THE FEDERAL STANDARD, THE ARGUMENT THAT THE COURT FAILED TO INFORM DEFENDANT OF THE DEPORTATION CONSEQUENCES WAS REJECTED BECAUSE THERE WAS A SUFFICIENT RECORD TO HAVE RAISED THAT ARGUMENT ON APPEAL (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendant's motion to vacate his conviction by guilty plea should not have been denied without a hearing. Defendant alleged he was incorrectly told by his attorney that he would not be deported as a result of the plea. Defendant's papers were sufficient to raise a question whether defendant was afforded effective assistance of counsel under the federal standard (which is explained in the decision). The court noted that the claim defendant was not informed of the risk of deportation at sentencing was properly rejected because there was a sufficient record to have raised that argument on appeal:

> Under the federal standard for asserting a claim of ineffective assistance of counsel, a defendant "must show that counsel's representation fell below an objective standard of reasonableness" and "that the deficient performance prejudiced the defense" ... . Although Padilla v Kentucky (559 US 356) is inapplicable to this case because the defendant's conviction became final before Padilla was decided ... , even prior to Padilla, the Court of Appeals had held that "inaccurate advice about a guilty plea's immigration consequences" fell below an objective standard of reasonableness, so as to satisfy the first prong of the standard set forth in Strickland [466 US 668].
>
> Here, the defendant alleged that his counsel incorrectly advised him that he would not be subject to deportation as a consequence of his plea of guilty to reckless endangerment in the first degree. The defendant affirmed that he was initially offered a plea agreement that included a period of incarceration and carried the risk of deportation and, in consultation with his counsel, the defendant rejected that plea offer because of the deportation risks. It was only after a second plea offer was made, for a length of probation conditioned upon the successful completion of a program, along with the representation that such a plea would not result in the defendant's deportation, that the defendant chose to plead guilty. ...
>
> In addition to demonstrating that defense counsel's performance was deficient, a defendant making a federal constitutional claim must also show, in order to satisfy the second prong of

> the Strickland standard, that there was " a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial'" ... .
>
> Here, the defendant's affidavit raised sufficient questions of fact as to whether it was reasonably probable that he would not have pleaded guilty had he been correctly advised as to the deportation consequences of the plea, given the fact that the defendant had already once rejected a plea offer that was objectively favorable to him, in favor of going to trial, because of the risk of deportation, and based upon his specific affirmation that, had he known the risk of deportation, he would not have pleaded guilty ... . **People v Malik, 2018 NY Slip Op 07452, Second Dept 11-7-18**

CRIMINAL LAW, ATTORNEYS.

DEFENSE COUNSEL APOLOGIZED TO COUNTY COURT AND INDICATED DEFENSE COUNSEL'S BEHAVIOR MAY HAVE CAUSED THE PEOPLE TO HAVE WITHDRAWN A MORE FAVORABLE PLEA OFFER, COUNTY COURT SHOULD HAVE ASSIGNED SUBSTITUTE COUNSEL AND SHOULD HAVE CONDUCTED AN INQUIRY TO DETERMINE WHETHER THE PEOPLE SHOULD BE COMPELLED TO REOFFER THE PRIOR PLEA DEAL (THIRD DEPT).

The Third Department, reversing County Court, determined County Court should have inquired into defense counsel's apology for his behavior which may have caused the People to withdraw a more favorable plea offer:

> County Court failed to take appropriate action in response to defense counsel's disclosures. Initially, County Court failed to recognize that defense counsel's statements disqualified him from continuing to represent defendant, particularly if defense counsel were required to provide testimony regarding the events that allegedly took place on the preceding Friday... . Accordingly, when presented with defense counsel's statements, County Court should have immediately explained the situation to defendant and adjourned the matter to allow for the substitution of counsel.
>
> Following substitution of counsel, County Court should have conducted a hearing to determine whether defendant received the ineffective assistance of counsel during the plea negotiation process and, thus, was entitled to an order directing the People to reoffer the more favorable plea offer that was allegedly available on the preceding Friday... . County Court, however, failed to appreciate that, if defendant made the requisite showing at that hearing, it could in its discretion direct the People to reoffer the prior, more favorable plea, if it was in fact made... . Indeed, a court may direct the People to reoffer a prior, more favorable plea offer on ineffective assistance of counsel grounds only if a defendant demonstrates (1) the existence of a prior, more favorable plea offer, (2) a reasonable probability that, but for defense counsel's conduct, he or she would have accepted the prior plea offer, (3) a reasonable probability that the agreement would have been presented to and accepted by the court and (4) that the conviction and/or sentence under the terms of the plea offer would have been less severe than the conviction and sentence ultimately imposed ... . County Court did not afford defendant the opportunity to make this showing here. Rather, it repeatedly misinformed defendant that it could not direct the People to reoffer the prior plea offer and that defendant could either take a new plea offer or go to trial. It is under these circumstances that defendant accepted the later plea offer and entered the underlying guilty plea. Therefore, we reverse the judgment of conviction and remit the matter for substitution of defense counsel and further proceedings. **People v McGee, 2018 NY Slip Op 08203, Third Dept 11-29-18**

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CRIMINAL LAW, ATTORNEYS, CONSTITUTIONAL LAW.

CONVICTION AFFIRMED BUT STRONG DISSENT ARGUED DEFENDANT WAS DEPRIVED OF HIS RIGHT TO COUNSEL AND WAS DENIED A FAIR TRIAL BECAUSE HE WORE THE SAME PRISON-ISSUE CLOTHES FOR EIGHT DAYS (SECOND DEPT).

The Second Department, over a detailed and comprehensive dissent (worth reading), affirmed defendant's attempted murder conviction. The dissent made it clear there was a strong right to counsel issue that, because it involved facts that are not on the record, must be brought in a motion to vacate the conviction. The dissent also argued defendant was deprived of a fair trial because he appeared in the same prison-issue clothes for eight days:

> **From the Dissent:**
>
> Since the Supreme Court was informed at the time of arraignment in Queens County that the defendant had established an attorney-client relationship with Eaddy in both the Kings County and Queens County cases, it was incumbent upon the court to assign her as counsel unless she was not ready, willing, or able to accept the assignment... . At the time of arraignment, there was no risk that Eaddy's participation would have delayed or disrupted the proceedings, created any conflict of interest, or resulted in prejudice to the prosecution or the defense. To the contrary, Eaddy's familiarity with the defendant and the case, as well as the defendant's preference for her as his assigned counsel, would most likely have expedited matters. Indeed, the attorney who was assigned to represent the defendant at the arraignment, Siff, was eventually discharged in March 2011 and replaced with Coppin, with whom the defendant expressed dissatisfaction and requested further substitution.
>
> Instead of inquiring as to Eaddy's availability at the time of arraignment, the Supreme Court summarily denied the defendant's request for the constitutionally impermissible reason that the defendant was too indigent to pay for her services ... . * * *
>
> Here, there is no question that the clothing worn by the defendant was prison-issued clothing. The defendant wore the same green top and bottom for three days of jury selection and more than five days of trial testimony. Even the Supreme Court described the defendant's clothing as "that thing." Based upon the description of the clothes and the fact that the defendant wore the same clothes for at least eight days, a reasonable juror could only conclude that the clothing was prison garb. Given the defendant's objection to wearing dirty prison clothes, I conclude that he preserved his contention for appellate review, and that, as a matter of law, he was deprived of a fair trial ... .
> **People v Ellis, 2018 NY Slip Op 08143, Second Dept 11-28-18**

CRIMINAL LAW, ATTORNEYS, EVIDENCE.

DESPITE THE PROSECUTION'S CALLING OF 13 MEDICAL PROFESSIONALS IN THIS SHAKEN BABY CASE, DEFENSE COUNSEL'S FAILURE TO PRESENT EXPERT MEDICAL OPINION EVIDENCE DID NOT AMOUNT TO INEFFECTIVE ASSISTANCE OF COUNSEL (SECOND DEPT).

The Second Department determined defendant's motion to vacate her conviction on ineffective assistance grounds was properly denied. The prosecution presented 13 medical professional in support of its shaken baby case, but defense counsel did not present a medical expert:

> Instead, trial counsel obtained the written report of a medical expert before the trial and retained a pediatric neurologist as a consulting expert, whom he consulted as issues arose during trial. During cross-examination of the People's witnesses, trial counsel elicited testimony that supported the defendant's theory of the case that the infant sustained injuries prior to being left at the defendant's home. * * *
>
> Generally, whether to call an expert is a tactical decision ... . In many instances, cross-examination of the People's expert will be sufficient to expose defects in an expert's presentation ... . "As long as the defense reflects a reasonable and legitimate strategy under the circumstances and evidence presented, even if unsuccessful, it will not fall to the level of ineffective assistance" ... .
>
> The record shows that trial counsel made efforts to investigate the medical issues in this case. He effectively cross-examined the People's witnesses, including the experts, and elicited testimony that was damaging to the People's case. The fact that the defense did not call its own expert witnesses was the result of trial counsel's legal strategy that the best way to defend this case was through impeachment of the People's witnesses. Under the particular circumstances of this case, trial counsel provided effective representation ... . **People v Caldavado, 2018 NY Slip Op 07743, Second Dept 11-14-18**

CRIMINAL LAW, ATTORNEYS, IMMIGRATION LAW.

DEFENDANT DID NOT RECEIVE EFFECTIVE ASSISTANCE OF COUNSEL CONCERNING THE POSSIBILITY OF DEPORTATION BASED UPON HIS GUILTY PLEA, MOTION TO WITHDRAW THE PLEA GRANTED (SECOND DEPT).

The Second Department, granting defendant's motion to withdraw his guilty plea, determined defense counsel did not provide effective assistance on whether the guilty plea would result in deportation and there was a reasonable probability defendant would not have pled guilty had he been correctly informed. Defense counsel told the court that defendant was going to be deported based upon a prior offense, but the facts indicated otherwise:

> The defendant, through his new counsel, subsequently made a timely motion to withdraw his plea, which was summarily denied by the County Court. Upon remittal from this Court, the County Court held a proceeding pursuant to People v Tinsley (35 NY2d 926) and, upon questioning the defendant, determined that he had not received effective assistance of counsel at the time of the plea. We discern no basis in the record to disturb the County Court's findings in this regard.
>
> In order for the defendant to obtain vacatur of his plea of guilty based on Padilla v Kentucky (559 US 356), he must establish that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial ... . Although the County Court did not specifically address this question in its report, the record is sufficient for us to conclude that, but for counsel's errors, there is a reasonable probability that the defendant—who has lived in the United States since the age of four and has significant family ties here, including a wife and three children, as well as parents and siblings—would not have pleaded guilty ... . **People v Ghingoree, 2018 NY Slip Op 07748, Second Dept 11-14-18**

CRIMINAL LAW, EVIDENCE.

FOR CAUSE CHALLENGE TO A JUROR SHOULD HAVE BEEN GRANTED, INDICTMENTS SHOULD NOT HAVE BEEN CONSOLIDATED BECAUSE OF A DISPARITY IN THE AMOUNT OF EVIDENCE, CONVICTIONS REVERSED (SECOND DEPT).

The Second Department, reversing defendant's conviction, determined a for cause challenge to a juror should have been granted and the two indictments should not have been consolidated for trial because of the disparity in the amount of evidence:

> "[A] prospective juror whose statements raise a serious doubt regarding the ability to be impartial must be excused unless the juror states unequivocally on the record that he or she can be fair and impartial" ... . Here, the prospective juror indicated that, given his experience in an area prone to crime, it was a "legitimate question" whether he could be fair to the defendant and the prospective juror was not sure whether he could be fair. The prospective juror's initial response was not rehabilitated by his collective response with the rest of the prospective jurors that he could be open, fair, and impartial ... . "[N]othing less than a personal, unequivocal assurance of impartiality can cure a juror's prior indication" of predisposition against a defendant ... .
>
> The offenses were properly joinable, as they were defined by the same or similar statutory provisions (seeCPL 200.20[2][c]). Where, as here, the offenses were not part of the same criminal transaction, the determination of a consolidation application is discretionary, with the court weighing "the public interest in avoiding duplicative, lengthy and expensive trials against the defendant's interest in being protected from unfair disadvantage" ... . " [I]n all cases a strong public policy favors joinder, because it expedites the judicial process, reduces court congestion, and avoids the necessity of recalling witnesses'"... . However, "compromise of a defendant's fundamental right to a fair trial free of undue prejudice as the quid pro quo for the mere expeditious disposition of criminal cases will not be tolerated" ... .
>
> Here, there was a substantial disparity in the evidence tying the defendant to the offenses contained in the separate indictments, which presented a strong possibility that the jury convicted the defendant of the offenses charged in Indictment No. 8114/13 by reason of the cumulative effect of the evidence ... . Furthermore, separate trials would not have resulted in the duplication of evidence ... . **People v Martinez, 2018 NY Slip Op 07329, Second Dept 10-31-18**

CRIMINAL LAW, EVIDENCE.

TRIAL TESTIMONY ALLEGING MULTIPLE INSTANCES OF SEXUAL INTERCOURSE IN THE SINGLE MONTH ENCOMPASSED BY THIRTY INDICTMENT COUNTS RENDERED THOSE COUNTS DUPLICITOUS REQUIRING DISMISSAL (SECOND DEPT).

The Second Department dismissed the counts of the sexual-offense indictment which were rendered duplicitous by the trial evidence. The counts alleging sexual intercourse with the complainant when she was 13 were not duplicitous on the face of the indictment, but the complainant testified sexual intercourse occurred at least 20 times during each month alleged in the relevant counts. The convictions for the counts where the complainant testified only one act occurred were upheld:

> Counts 28 through 47 and counts 49 through 58 of the indictment are valid on their face. However, at trial, the complainant testified that when she was 13 years old, the then 26-year-old defendant

had sexual intercourse with her and engaged in oral sex with her at least 20 times per month, i.e., at least 20 times during the one-month period encompassed by each of those counts. Thus, the complainant's testimony demonstrated that each of those counts was premised upon multiple acts of rape and criminal sexual act, and they are, therefore, void for duplicitousness ... . Accordingly, we vacate the convictions of rape in the second degree under counts 28 through 47 of the indictment and criminal sexual act in the second degree under counts 49 through 58 of the indictment, vacate the sentences imposed thereon, and dismiss those counts in the indictment.

The defendant was also charged under count 27 of the indictment with committing rape in the second degree (Penal Law § 130.30[1]) by, being 18 years old or more, engaging in an act of sexual intercourse with a person less than 15 years old between March 11, 2011, and March 31, 2011. Count 48 of the indictment charged the defendant with committing criminal sexual act in the second degree ... by, being 18 years old or more, engaging in oral sexual conduct with a person less than 15 years old between March 11, 2011, and March 31, 2011.

Where a crime, such as rape or criminal sexual act, "is made out by the commission of one act, that act must be the only offense alleged in the count" ... . Contrary to the defendant's contention, counts 27 and 48 of the indictment were not duplicitous on their face, since they each charged the defendant with a single act ... . Further, since the complainant testified at trial that a single act of rape and a single oral sexual act occurred during the period of March 11, 2011, to March 31, 2011, acts which formed the basis of counts 27 and 48 of the indictment, these counts are not duplicitous ... . **People v Gerardi, 2018 NY Slip Op 07325, Second Dept 10-31-18**

CRIMINAL LAW, EVIDENCE.

AGENT FOR US CUSTOMS WAS NOT ACTING AS A PEACE OFFICER WHEN HE EFFECTED A VEHICLE STOP AND DID NOT EFFECT A VALID CITIZEN'S ARREST, THEREFORE THE MOTION TO SUPPRESS THE FIREARM FOUND IN THE VEHICLE WAS PROPERLY GRANTED (FOURTH DEPT).

The Fourth Department determined the vehicle stop could not be justified on the ground that the stop was made by a peace officer, and also could not be justified on the ground the stop was a citizen's arrest. Therefore the motion to suppress the firearm found in the car was properly granted. The vehicle stop was made by an agent with the US Customs and Border Protection Air and Marine Operations after the agent became concerned about the driver's dangerous operation. The agent called the Buffalo Police Department and pulled the car over using his truck's emergency lights. A police officer arrived and the officer and the agent approached the car together:

In concluding that the agent unlawfully stopped the vehicle, the [motion] court determined that the agent had the powers of a peace officer, but that the traffic stop could not be justified on that basis because the agent was not acting pursuant to his special duties or within his geographical area of employment. The court also determined that the traffic stop could not be justified as a valid citizen's arrest because the agent, who had the powers of a peace officer, activated the emergency lights and approached the stopped vehicle with the BPD officer and therefore acted under color of law and with the accouterments of official authority rather than as a private citizen. ...

A private person, however, is not authorized to display such emergency lights from his or her private vehicle... . Moreover, a private person may not falsely express by words or actions that he or she is acting with approval or authority of a public agency or department with the intent to induce another to submit to such pretended official authority or to otherwise cause another to act in reliance upon that pretense ... . Thus, the agent was not lawfully acting merely as a private person

effectuating a citizen's arrest when he activated emergency lights that were affixed to his truck by virtue of his position in law enforcement. ...

Even if a violation of the citizen's arrest statute is not necessarily a violation of a constitutional right, we conclude that adherence to the requirements of the statute implicates the constitutional right to be free from unreasonable searches and seizures ... by precluding a person who "act[ed] under color of law and with all the accouterments of official authority" from justifying an unlawful search or seizure as a citizen's arrest ... , and that suppression is warranted where, as here, the purported private person is cloaked with official authority and acts with the participation and knowledge of the police in furtherance of a law enforcement objective ... . **People v Page, 2018 NY Slip Op 07552, Fourth Dept 11-9-18**

CRIMINAL LAW, EVIDENCE.

POLICE OFFICER'S SENDING A TEXT TO DEFENDANT'S PHONE FROM A NUMBER USED TO COMMUNICATE WITH THE VICTIM, AND OBSERVING THE ARRIVAL OF A TEXT ON DEFENDANT'S PHONE SHORTLY THEREAFTER, DID NOT VIOLATE THE US SUPREME COURT'S RULING IN *RILEY* REQUIRING A WARRANT FOR A CELL PHONE SEARCH (FOURTH DEPT).

The Fourth Department determined the ruling by the US Supreme Court in *Riley v California* (124 S Ct 2473) did not provide grounds for defendant's second and untimely motion to suppress evidence seized from a search of his cell phone pursuant to a warrant. Before applying for the warrant, at the time of arrest, a police officer sent a text to a phone number used in communications between the victim and defendant and noted that a text message arrived on defendant's phone shortly thereafter. The Fourth Department held that sending the text and observing the arrival of a text did not violate *Riley:*

The Riley Court determined that "officers must generally secure a warrant before conducting [a search of data stored in a cell phone]" ... . Here, the search warrant application for defendant's phone indicates, among other things, that, after defendant's arrest and the recovery of a cell phone from him during a search incident to the arrest, the applicant officer sent a text message to the phone number that had been used during earlier communications between the victim and defendant, and the officer noted that the phone recovered from defendant upon his arrest signaled the arrival of a new text message moments later. Contrary to defendant's contention, however, nothing in the warrant application supports the inference that the police opened or manipulated the phone to get inside to retrieve data prior to obtaining the search warrant. Although Riley prohibits warrantless searches of cell phones incident to a defendant's arrest, Riley does not prohibit officers from sending text messages to a defendant, making observations of a defendant's cell phone, or even manipulating the phone to some extent upon a defendant's arrest ... Indeed, Riley provides that the search incident to arrest exception to the warrant requirement entitles law enforcement officers to "examine the physical aspects of the phone" after it has been seized ... . Inasmuch as the information included in the warrant application is not suggestive of a warrantless search of the phone, we conclude that the Supreme Court's decision in Riley did not provide good cause for defendant's untimely second suppression motion. Thus, the motion was properly denied ...

Moreover, even if the officer's actions in sending a confirmatory text message to defendant's phone did constitute an unlawful search under Riley, we nevertheless conclude that the validity of the warrant to search defendant's phone was not vitiated. The police did not use the alleged illegal search " to assure themselves that there [was] cause to obtain a warrant' in the first instance" ... , and the remaining factual allegations in the warrant application provided probable cause to search

the cell phone that was recovered from defendant at the time of his arrest. **People v Hackett, 2018 NY Slip Op 07557, Fourth Dept 11-9-18**

CRIMINAL LAW, EVIDENCE.

THE JURY SHOULD HAVE BEEN TOLD NOT TO CONSIDER THE LESSER INCLUDED OFFENSE IF THE JUSTIFICATION DEFENSE WAS PROVEN FOR THE HIGHER OFFENSE, THE JURY ALSO SHOULD HAVE BEEN INSTRUCTED ON THE 'TEMPORARY INNOCENT POSSESSION OF A WEAPON' DEFENSE, JUDGMENT OF CONVICTION REVERSED (SECOND DEPT).

The Second Department, reversing defendant's conviction, determined that the jury should have been instructed to stop deliberating on other counts if they found the justification defense to have been proven. The Second Department further determined that the facts justified a jury instruction on the temporary and innocent possession of a weapon:

> Here, we agree with the defendant that the Supreme Court's jury charge in conjunction with the verdict sheet failed to convey to the jury that if it found the defendant not guilty based on justification as to assault in the first degree, then "it should simply render a verdict of acquittal and cease deliberation, without regard to" assault in the second degree ... . Thus, the court's instructions, together with the verdict sheet, may have led the jurors to conclude that deliberation on each assault count ... required reconsideration of the justification defense, even if they had already acquitted the defendant of assault in the first degree based on justification... . Since we cannot say with any certainty and there is no way of knowing whether the acquittal on assault in the first degree was based on a finding of justification, a new trial is necessary ... . In light of the defendant's acquittal on the charge of assault in the first degree, the highest offense for which the defendant may be retried is assault in the second degree ... .
>
> Here, viewing the evidence in the light most favorable to the defendant, the evidence sufficiently supported the defense of temporary and lawful possession of a weapon ... . The defendant testified that he picked up a kitchen knife from the floor only after Grandu jumped on his back, at which point Herron was hitting the defendant in the head with her hands and with a pan while Grandu restrained the defendant. Although the defendant then stabbed Grandu with the knife, "should a jury believe that the defendant's use of the knife was justified, such use would have been lawful, and not utterly at odds with [the defendant's] claim of" temporary and innocent possession ... . **People v Fletcher, 2018 NY Slip Op 07747, Second Dept 11-14-18**

CRIMINAL LAW, EVIDENCE.

POLICE OFFICERS CERTIFIED AS GANG EXPERTS PRESENTED INADMISSIBLE TESTIMONIAL HEARSAY IN THE GUISE OF EXPERT OPINION, ONE OF THE OFFICERS ACTED AS A SUMMATION WITNESS USURPING THE JURY'S FUNCTION OF INTERPRETING THE EVIDENCE, CONVICTIONS REVERSED (SECOND DEPT).

The Second Department, reversing defendant's gang-related convictions, determined that the two police officers (Georg and Bracero) certified as experts in gang culture served as conduits for inadmissible

testimonial hearsay and acted as summation witnesses usurping the jury's role of interpreting the evidence:

> As a threshold matter, we note that Crawford does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted (see Crawford v Washington, 541 US at 60 n 9...). Thus, "it is permissible for an expert witness to form an opinion by applying [his or] her expertise to otherwise inadmissible evidence because, in that limited instance, the evidence is not being presented for the truth of the matter asserted" ... .
>
> Here ... information derived from the debriefing of arrested S.N.O.W. Gang members constitutes testimonial statements within the meaning of Crawford ... . The more difficult question presented is whether the substance of such statements was impermissibly conveyed to the jury by Georg and/or Bracero in the guise of expert testimony ... . We find that it was. ...
>
> Separate and apart from the Crawford errors, Georg's testimony also ran afoul of the proscription against police experts acting as summation witnesses, straying from their proper function of aiding the jury in its factinding, and instead " instructing the jury on the existence of the facts needed to satisfy the elements of the charged offense"' (People v Inoa, 25 NY3d 466, 475, quoting United States v Mejia, 545 F3d at 191). During the trial, Georg read Facebook posts verbatim to the jury, offered commentary about the time of each post in relation to key events in the case, and connected evidence of the parties exchanging their phone numbers with records confirming that a call was subsequently placed. The defendant's counsel correctly objected to such testimony, citing Mejia and Inoa, on the ground that Georg was no longer acting as an expert witness but was usurping the jury's function by interpreting, summarizing, and marshaling the evidence. Unlike the Crawford violation, this type of error is nonconstitutional in nature ... . **People v Jones, 2018 NY Slip Op 07752, Second Dept 11-14-18**

CRIMINAL LAW, EVIDENCE.

EVIDENCE THAT DEFENDANT JOINED A CONSPIRACY TO MURDER WAS LEGALLY INSUFFICIENT, MOTION FOR A TRIAL ORDER OF DISMISSAL SHOULD HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing defendant's conspiracy conviction, determined the evidence of defendant's participation was legally insufficient:

> ... [T]he People in this case were required, inter alia, to establish that the defendant entered into an agreement that was specifically intended to result in the death of Friday (count one) and Morris (count two) ... . While the record evidence, viewed in the light most favorable to the People, showed that the defendant conspired with others to retaliate against rival gang members for the recent shooting death of a member of the S.N.O.W. Gang, there was no direct or circumstantial evidence tying this defendant to any plan specifically intended to kill either Friday or Morris. Among other things, the defendant was not present at an alleged planning meeting in a park, at which many of the coconspirators were arrested. Moreover, the defendant is not listed as a participant in any social media discussions in which other S.N.O.W. Gang members named Friday and Morris as possible targets for retaliatory action. For this reason, the defendant's timely motion for a trial order of dismissal should have been granted, and the indictment dismissed insofar as asserted against him ... . **People v Lucas, 2018 NY Slip Op 07755, Second Dept 11-14-18**

CRIMINAL LAW, EVIDENCE.

DEFENDANT SHOULD HAVE BEEN ALLOWED TO PRESENT EVIDENCE OF A WITNESS'S MOTIVE TO LIE, PROMPT OUTCRY EVIDENCE SHOULD NOT HAVE INCLUDED THE IDENTITY OF THE ASSAILANT, CONVICTION REVERSED (FOURTH DEPT).

The Fourth Department, reversing defendant's conviction, determined two evidentiary errors deprived defendant of a fair trial. Defendant was precluded from presenting evidence of a witness's motive to lie, and the evidence of prompt outcry should not have included the identity of the assailant:

> It is well settled that " [t]he right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations' "... . "It is also well settled that in presenting the defense, counsel for the defendant may establish, during both cross[-]examination and on [defendant's] direct case, the [complainant's] . . . motive to lie . . . This is not a collateral inquiry, but is directly probative on the issue of credibility' " ... , "the excluded evidence was not speculative . . . or cumulative . . . , as it went directly to the credibility of the complainant[, and] the defense counsel offered a good faith basis for the excluded line of questioning [and evidence]." "Because it cannot be said that there is no reasonable possibility that the error contributed to the verdict, the error cannot be deemed harmless beyond a reasonable doubt and reversal therefore is required" ... .
>
> Defendant also correctly contends that the court erred in permitting the People to present prompt outcry testimony that exceeded the proper scope of such testimony. Although "evidence that a victim of sexual assault promptly complained about the incident is admissible to corroborate the allegation that an assault took place" ... , such evidence is limited to "only the fact of a complaint, not its accompanying details," including the identity of the assailant ... . We thus conclude that the court erred in permitting two of the three prompt outcry witnesses to testify concerning the identity of the alleged assailant ... .
>
> We thus conclude that either error, alone, would justify reversal and that the cumulative effect of the errors denied defendant a fair trial ... . **People v Vo, 2018 NY Slip Op 07909, Fourth Dept 11-16-18**

CRIMINAL LAW, EVIDENCE.

FOUR TRAMADOL PILLS DID NOT CONSTITUTE DANGEROUS CONTRABAND, PROMOTING PRISON CONTRABAND FIRST DEGREE REDUCED TO SECOND DEGREE (FOURTH DEPT).

The Fourth Department, in a full-fledged opinion by Justice Curran, determined the Tramadol pills possessed by the inmate defendant did not constitute dangerous contraband, requiring a reduction of the conviction from promoting prison contraband first degree to second degree. The Fourth Department disagreed with the cases from other departments which held small amounts of drugs to constituted dangerous contraband:

> The Court of Appeals in People v Finley (10 NY3d 647 [2008]) considered the unrelated prosecutions of two inmates for promoting and attempted promoting prison contraband in the first degree, both involving small amounts of marihuana. The Court pronounced the test for courts to apply: "[T]he test for determining whether an item is dangerous contraband is whether its particular characteristics are such that there is a substantial probability that the item will be used in a manner

> that is likely to cause death or other serious injury, to facilitate an escape, or to bring about other major threats to a detention facility's institutional safety or security" (id. at 657). * * *
>
> We recognize that, after Finley was decided, some courts have considered cases involving the possession of drugs other than marihuana and have concluded that the possessed drugs were dangerous contraband on what may be viewed as less "specific, competent proof" of a substantial probability that the item will be used in a manner that is likely to cause death or other serious injury, to facilitate an escape, or to bring about other major threats ... . For example, testimony that the defendants were engaged in drug trafficking has been held to be sufficient to establish that there was dangerous contraband (see e.g. People v Ariosa, 100 AD3d 1264, 1265-1266 [3d Dept 2012], lv denied 21 NY3d 1013 [2013]; People v Cooper, 67 AD3d 1254, 1256-1257 [3d Dept 2009], lv denied 14 NY3d 799 [2010]). We disagree with those cases to the extent that they do not focus on the dangerousness of the use of the particular drug at issue, but instead focus on broad concerns that could involve any sort of contraband, such as alcohol, cigarettes or other items that are not dangerous in themselves ... . **People v Flagg, 2018 NY Slip Op 07849, Fourth Dept (11-16-18**

CRIMINAL LAW, EVIDENCE.

DEFENDANT DEEMED TO HAVE CONSENTED TO THE RECORDING OF PHONE CALLS MADE FROM JAIL AND TO THE PRESENTATION OF THE RECORDINGS AS TRIAL EVIDENCE (FIRST DEPT).

The First Department determined the defendant's request to preclude recording of phone calls he made from jail was properly denied. Defendant was deemed to have consented to the recordings:

> "Defendant impliedly consented to the recording of the call(s) based on his receipt of multiple forms of notice that his calls would be recorded, and he was not entitled to separate notice that the calls might be subpoenaed by prosecutors" ... . **People v Mason, 2018 NY Slip Op 07944, First Dept 11-20-18**

CRIMINAL LAW, EVIDENCE.

SUPREME COURT PROPERLY FOUND THE GUNPOINT ARREST UNLAWFUL AND PROPERLY SUPPRESSED THE SEIZED ITEMS AND THE LINEUP IDENTIFICATION (FIRST DEPT).

The First Department determined Supreme Court properly suppressed evidence seized at the time of the illegal arrest, as well as the subsequent lineup identification:

> ... [A]t the time of the gunpoint seizure of the two defendants, the police had an anonymous tip that an undescribed suspect or suspects had burglarized an unspecified apartment on the sixth floor of a building, they spoke to building residents who reported noise on that floor, and they saw defendants leaving an apartment on that floor carrying undescribed bags. The totality of this information failed to provide reasonable suspicion to support an immediate forcible seizure without any inquiry. The police learned additional information, but only after the unlawful seizure.

> Therefore, the court properly suppressed all physical evidence as fruit of the illegality. Furthermore, the court also granted suppression, independently of the initial illegality, because the witness's recollection about the subsequent search of the contents of the bags, and about the recovery of gloves from the hallway floor, was so limited that the People did not meet their initial burden of coming forward with credible evidence to establish either a search of the bags incident to a lawful arrest or the abandonment of the gloves ... .
>
> The record also supports the court's determination to suppress an officer's lineup identification of [defendant] Salkey, who had fled the scene, as the unattenuated fruit of the unlawful stop and frisk ... . The vague testimony provided no explanation of how Salkey came to be placed in a lineup, and no basis for finding attenuation from the initial illegality. **People v Brown, 2018 NY Slip Op 07956, First Dept 11-20-18**

CRIMINAL LAW, EVIDENCE.

ADMITTING INTO EVIDENCE A PISTOL ALLEGED TO BE THE SAME TYPE OF WEAPON USED IN THE CRIME WAS NOT ERROR (FIRST DEPT).

The First Department determined the introduction of a handgun alleged to be the same type used in the crime and recovered three months after the crime was not error:

> The court providently exercised its discretion in admitting a black nine millimeter pistol, the same type of weapon that, according to other evidence, was used in the crime. The pistol was recovered, pursuant to a search warrant, from defendant's girlfriend's apartment three months after the commission of the crime, and the evidence showed that defendant resided in that apartment. This evidence was relevant to show that defendant had access to that type of weapon, and it thus tended to establish his involvement in the charged crimes ... . The jury could have drawn a reasonable inference that the weapon was in defendant's possession at the time of the crime, and the availability of other inferences went to weight rather than admissibility. Furthermore, the probative value of this evidence, which the court carefully limited, outweighed any prejudicial effect. **People v Birkett, 2018 NY Slip Op 08072, First Dept 11-27-18**

CRIMINAL LAW, EVIDENCE.

JURY SHOULD HAVE BEEN INSTRUCTED TO CONSIDER A LESSER INCLUDED OFFENSE AND AN ADVERSE INFERENCE INSTRUCTION SHOULD HAVE BEEN GIVEN CONCERNING SURVEILLANCE PHOTOS DESTROYED BY THE POLICE, CONVICTION REVERSED (FIRST DEPT).

The First Department, reversing defendant's conviction, determined the jury should have been instructed to consider a lesser included offense and an adverse inference instruction should have been given concerning photographs destroyed by the police:

> The court's first-degree robbery charge, consistent with the indictment, required the People to prove that defendant used or threatened to use a knife; it is undisputed that a finding that defendant wielded some weapon or object other than a knife would not support first-degree robbery in this case. There was a reasonable view of the evidence, viewed in the light most

favorable to defendant, that he forcibly stole property from the victim, but did not use or threaten to use a knife in the course of doing so... . On the facts presented, the jury could have reasonably reached these findings by generally crediting the victim's account, but finding that her testimony about seeing defendant using a knife was mistaken. Moreover, while this circumstance is not controlling, we note that the People joined in defendant's request for submission of third-degree robbery.

.. [T]the court should also have granted defendant's request for an adverse inference charge as to surveillance photos taken in the victim's livery cab after other photos, introduced at trial, were taken. The photos in evidence showed defendant in the back seat before he left and allegedly returned to rob the driver. The Police Department collected the photos but destroyed all but a few of them, which were introduced at trial through a detective who alleged that other members of his team selected them as the most relevant. Defendant established that the missing photos were "reasonably likely to be material" ... , since they might have shown what type of weapon or object was used by the perpetrator. The record fails to support the People's assertion that the camera could not have recorded the incident ... . **People v Holmes, 2018 NY Slip Op 08178, First Dept 11-29-18**

CRIMINAL LAW, EVIDENCE, APPEALS.

EXPERT EVIDENCE ON THE CROSS-RACE EFFECT ON THE ABILITY TO IDENTIFY THE PERPETRATOR SHOULD HAVE BEEN ALLOWED, THE REQUEST TO GIVE THE CROSS-RACIAL IDENTIFICATION JURY INSTRUCTION SHOULD HAVE BEEN GRANTED, THE NEW (2017) RULING ON CROSS-RACIAL IDENTIFICATION SHOULD BE RETROACTIVELY APPLIED TO CASES ON DIRECT APPEAL WHEN THE RULING WAS MADE (FIRST DEPT).

The First Department, reversing defendant's conviction, determined (1) defendant should have been allowed to present expert evidence of the cross-race effect on the ability of a witness to identify a defendant, and (2) the request to instruct the jury on the cross-race effect should have been granted. The First Department further held that the new (2017) cross-racial identification rule should be applied cases like this one, where the rule was announced while the direct appeal was pending:

The court should have permitted defendant to introduce expert testimony to the effect that witnesses are less likely to accurately identify persons of other racial groups than persons of their own race ... . The case turned on the accuracy of the victim's cross-racial identification of defendant, and there was no corroborating evidence connecting defendant to the crime. Furthermore, the circumstances surrounding the identification did not render it so reliable as to justify precluding expert testimony. The expert testimony produced during the Frye hearing sufficiently established that the cross-race effect has been generally accepted in the relevant scientific community. The People do not dispute that this phenomenon applies to identifications of certain racial groups. Moreover it can be deduced from the expert testimony that the cross-race effect applies to all racial groups.

The court should also have granted defendant's explicit request for a jury instruction on cross-racial identification. Initially, we reject the People's argument that defendant failed to preserve this issue.

People v Boone (30 NY3d 521, 535-536 [2017]), which requires that a jury charge on the cross-race effect be given on request, should be applied retroactively to cases pending on direct appeal. Boone plainly announces a new rule, and that rule is plainly based on state rather than

> federal law. Accordingly, its application to cases pending on appeal is not automatic, but depends on a balancing of the three factors set forth in the Mitchell-Pepper test ... .
>
> As to the first factor (the purpose of the rule), "standards that go to the heart of a reliable determination of guilt or innocence will be applied retroactively, but decisions which are only collateral to or relatively far removed from the fact-finding process at trial apply prospectively only" ... . Here, cross-racial identification instructions go to the fact-finding process, and are essential to a reliable determination of guilt or innocence... . Thus, the first factor favors retroactive application.
>
> As to the second factor (extent of reliance on the old rule), the People cite a number of cases showing that courts have relied on the pre-Boone rule in declining to give a charge on cross-racial identification, in the exercise of discretion. This favors prospective application of the rule, but we do not find that it outweighs the other factors.
>
> As to the third factor (effect on the administration of justice of retroactive application), retroactive application of Boone would not significantly affect the administration of justice. A limited number of cases turn on the accuracy of single-witness, cross-racial identifications, and the particular evidence could render a failure to give a cross-racial identification charge harmless. Moreover, the rule in Boone is expressly limited to cases where the charge has been requested ... , and the fact that Boone had not yet been decided at the time of a particular trial would not provide an exemption from the requirement of a timely request ... . Thus, contrary to the People's contention, it is unlikely that retroactive application of Boone would result in wholesale reversals and burden trial courts with unnecessary retrials ... . **People v Crovador, 2018 NY Slip Op 07273, First Dept 10-30-18**

CRIMINAL LAW, EVIDENCE, APPEALS.

TESTIMONY OF SOLE EYEWITNESS DEEMED INCREDIBLE AND UNRELIABLE, CONVICTION REVERSED UNDER A WEIGHT OF THE EVIDENCE ANALYSIS (SECOND DEPT).

The Second Department, reversing defendant's manslaughter conviction under a weight of the evidence analysis, determined that the testimony of the sole eyewitness, Geroulakis, was incredible and unreliable:

> On cross-examination, Geroulakis's testimony was incredible and unreliable. Geroulakis denied that, at the first trial, he had identified the defendant as the shorter man at the souvlaki stand. When Geroulakis was confronted with his testimony from the first trial, he responded, "I remember they told me who is who, who stabbed me and who stabbed Jimmy." Significantly, investigating detective Robert W. Henning testified that Geroulakis told him that he had argued with the shorter man, that they pushed and shoved each other, that the man "pulled out a knife" and stabbed Geroulakis "in the right thigh area" and then walked over to the car, reached in, and "stabbed [Zisimopoulos] in the abdomen." After reading his interview notes, Henning confirmed that Geroulakis stated that the same person stabbed both Geroulakis and Zisimopoulos. Furthermore, on cross-examination, Geroulakis testified that he did not remember what the man whom he identified as the defendant was wearing and denied previously describing the man as wearing a long-sleeved black shirt. Geroulakis recalled telling a detective only that "some were wearing black and one was wearing long sleeves." Geroulakis acknowledged that, in 2009, he had testified that the taller man wore a black shirt with long sleeves. A video-still from one of the clubs that the defendant visited in the early morning of the day of the incident revealed that the defendant was wearing a light-colored shirt with horizontal stripes and sleeves to the elbows. In addition, Detective Constantine Papadopoulos testified that the defendant had the same tattoo on his right arm at the time of trial that he had at the lineup, and Detective David Beutel testified that the

defendant had tattoos on both of his arms. Geroulakis, however, testified that the arms of the two men who allegedly stabbed Zisimopoulos were bare and that he did not observe any tattoos.

Moreover, Geroulakis's motive to identify the defendant as one of the people who stabbed Zisimopoulos is apparent from his exaggerated testimony at the second trial. It was only at second trial, nine years after the incident, that Geroulakis testified that he had observed the defendant, the taller of the two men, twice: once at the souvlaki stand and once by the car at the time of the stabbings. On cross-examination, however, Geroulakis admitted that, at the first trial, he stated that he recognized only the shorter man from the souvlaki stand, not the defendant. Despite this admission, Geroulakis continued to insist at the second trial that both the defendant and the shorter man were at the souvlaki stand.

Based on the weight of the credible evidence, we find that the jury was not justified in finding the defendant guilty of manslaughter in the first degree beyond a reasonable doubt ... . **People v Andujar, 2018 NY Slip Op 08028, Second Dept 11-21-18**

CRIMINAL LAW, EVIDENCE, APPEALS.

RESISTING ARREST COUNT RENDERED DUPLICITOUS BY TRIAL TESTIMONY, UNPRESERVED ERROR CONSIDERED IN THE INTEREST OF JUSTICE, RESISTING ARREST CONVICTION REVERSED (THIRD DEPT).

The Third Department, reversing defendant's resisting arrest conviction, determined that the trial evidence rendered the resisting arrest count of the indictment duplicitous. At trial evidence of two separate circumstance where defendant was alleged to have resisted arrest, involving different police officers, was presented. Although the error was not preserved, the court considered the issue under its interest of justice jurisdiction:

"Even if a count facially charges one criminal act, that count is duplicitous if the evidence makes plain that multiple criminal acts occurred during the relevant time period, rendering it nearly impossible to determine the particular act upon which the jury reached its verdict" ... . The indictment charged defendant with one count of resisting arrest. According to the record evidence, however, the jury was presented with two instances where defendant resisted an officer's arrest — one involving the victim that turned violent and the other involving the officers who discovered him in the dumpster. We also note that, during deliberation, the jury asked whether it could consider the incident at the dumpster with respect to the resisting arrest charge or solely defendant's encounter with the victim. In our view, Supreme Court's response in rereading count 5 of the indictment failed to dispel any confusion by the jury... . Although this argument is unpreserved for review, we take corrective action in the interest of justice by dismissing count 5 of the indictment with leave to the People to re-present any appropriate charges to a new grand jury ... . **People v Hilton. 2018 NY Slip Op 07981, Third Dept 11-21-18**

CRIMINAL LAW, EVIDENCE, ATTORNEYS.

THERE ARE QUESTIONS OF FACT WHETHER DEFENSE COUNSEL CONSENTED TO ADJOURNMENTS, DEFENDANT'S MOTION TO SET ASIDE HIS CONVICTION ALLEGING INEFFECTIVE ASSISTANCE IN THAT DEFENSE COUNSEL DID NOT MOVE TO DISMISS THE INDICTMENT ON SPEEDY TRIAL GROUNDS SHOULD NOT HAVE BEEN DENIED WITHOUT A HEARING (THIRD DEPT).

The Third Department determined Supreme Court should have held a hearing on defendant's motion to vacate his conviction alleging ineffective assistance counsel. i.e., the failure to move to dismiss the indictment based on a speedy trial violation. Although the People raised a question of fact about whether defendant's counsel consented to certain adjournments, the issue was not conclusively demonstrated, requiring a hearing:

> Defendant argued that he was deprived of effective assistance because his counsel failed to move to dismiss the indictment based on a violation of his statutory speedy trial rights. Failure to make a meritorious speedy trial motion, which would result in dismissal of the indictment, is sufficiently egregious to amount to ineffective assistance... . There is ordinarily no strategic reason for counsel to fail to make a dispositive motion that would result in dismissal of the charges with prejudice, so long as it is shown that the motion would have been successful ... .
>
> The Court of Appeals has clarified that " [a]djournments consented to by the defense must be clearly expressed to relieve the People of the responsibility for that portion of the delay. Defense counsel's failure to object to the adjournment or failure to appear does not constitute consent" ... A court may not deny a motion to dismiss for a statutory speedy trial violation "without a hearing unless '[a]n allegation of fact essential to support the motion is conclusively refuted by unquestionable proof'" ... . " Of course, only those periods for which the People have not provided 'unquestionable documentary proof' — for example, a transcript or letter evidencing defendant's consent — need be addressed at any hearing" ... . At least one court has held that calendar and file jacket notations" do not constitute unquestionable proof to meet the People's "burden of demonstrating sufficient excludable time" ... . **People v Matteson, 2018 NY Slip Op 07976, Third Dept 11-21-18**

CRIMINAL LAW, EVIDENCE, ATTORNEYS, AGENCY.

DEPARTMENT OF CORRECTIONAL SERVICES (DOCS) PERSONNEL WERE NOT ACTING AS AGENTS FOR THE POLICE WHEN INVESTIGATING THE PRISON KILLING WITH WHICH DEFENDANT WAS CHARGED, THEREFORE THE PROSECUTOR WAS NOT OBLIGATED TO LEARN ABOUT AND TURN OVER TO THE DEFENSE ANY ALLEGED EXCULPATORY EVIDENCE TURNED UP IN THE DOCS INVESTIGATION (THIRD DEPT).

The Third Department, in a full-fledged opinion by Justice McCarthy, determined defendant, an inmate, did not present sufficient proof that Department of Correctional Services (DOCS) personnel acted as agents for the police when investigating a killing in the prison. Defendant alleged that inmates were coerced into testifying against him and evidence of the coercion was *Brady* material which should have been provided to the defense by the prosecutor. The Third Department found defendant had not met his burden of proof concerning whether the DOCS personnel were acting as agents for the police. Rather,

there was evidence that the DOCS investigation and the police investigation were separate and had different purposes. Therefore defendant's motion to vacate his conviction was properly denied:

> Several cases have held that "[e]vidence gathered by prison staff . . . generally is not 'under the control or in the possession of the People or its agents, but [is] instead in the possession of an administrative agency that was not performing law enforcement functions'"... . That said, whether knowledge of a government official or employee may be imputed to the People appears to turn on whether participation in the criminal probe was an ancillary law enforcement task... or whether the level of cooperation between the employee and law enforcement in a particular criminal investigation renders the employee an agent of the People ... . Under agency principles, "acts of agents, and the knowledge they acquire while acting within the scope of their authority are presumptively imputed to their principals"... . For example, "[w]hile social workers are generally not agents of the police," in situations where they engage in a "joint venture" with police agencies to collaborate on child abuse or sexual abuse investigations, share information and a common purpose, and have a "cooperative working arrangement" with police, an agency relationship may exist such that the social workers' knowledge is imputed to the People ... .
>
> ... [I]t appears that the State Police and IG [the DOCS Investigator General] were conducting parallel investigations — one criminal and one administrative, albeit with some obvious and necessary overlap — addressing different aspects of the situation... . The report from the lead IG investigator — who was not called to testify — reveals that he interviewed inmates with the State Police, gathered information for two months after the incident, conferred with State Police and met with the District Attorney. But the report indicates that the IG closed its case six months before defendant's criminal trial, based on a finding that there was no evidence of staff misconduct, indicating the administrative focus of the IG's investigation. **People v Lewis, 2018 NY Slip Op 07980, Third Dept 11-21-18**

CRIMINAL LAW, EVIDENCE, CONSTITUTIONAL LAW.

THE PEOPLE OPENED THE DOOR AT TRIAL CREATING THE NEED FOR DEFENDANT TO CALL AN ALIBI WITNESS FOR WHOM THE DEFENDANT HAD NOT SERVED A NOTICE, THE DENIAL OF THE REQUEST IMPLICATED THE COMPULSORY PROCESS CLAUSE OF THE SIXTH AMENDMENT AND CONSTITUTED REVERSIBLE ERROR (THIRD DEPT).

The Third Department, reversing Supreme Court, determined the denial of defendant's request to present an alibi witness was reversible error, despite the fact that a notice of alibi had not been served. The People had opened the door at trial, creating the need to call the alibi witness:

> Pursuant to CPL 250.20 (3), "[i]f at the trial the defendant calls such an alibi witness without having served the demanded notice of alibi, . . . the court may exclude any testimony of such witness relating to the alibi defense." Precluding a criminal defendant from proffering evidence in support of his or her own case implicates the Compulsory Process Clause of the Sixth Amendment... , and, although CPL 250.20 (3) explicitly states that the trial court's decision to permit a late notice of alibi is discretionary, preclusion is only an appropriate penalty "in the most egregious circumstances"... . When a defendant's "omission was willful and motivated by a desire to obtain a tactical advantage that would minimize the effectiveness of cross-examination and the ability to adduce rebuttal evidence, it would be entirely consistent with the purposes of the Compulsory Process Clause simply to exclude the witness'[s] testimony"... .
>
> ... [A]lthough defendant did not serve an alibi notice in response to the People's demand for same, defendant did not intend to call an alibi witness except that the People — knowing that defendant

> had testified to having an alibi during the grand jury but that he had not presented that defense at trial — directly elicited testimony ... about what defendant was doing on the night of the shooting. In response to follow-up questions by the People, [the witness] provided the alibi witness's first name and generally discussed that defendant was friends with this person. The People's question regarding what defendant was doing the night of the shooting was the first reference to defendant's alibi during the trial, and defendant thereafter sought permission to call his friend ... as a witness for the first time. The People, despite raising and pursuing this line of questioning, objected because defendant had not served an alibi notice. Defendant argued that the People opened the door and created the issue and, as a result, defendant should not be precluded from calling Steward. We agree. **People v Perkins, 2018 NY Slip Op 07972, Third Dept 11-21-18**

CRIMINAL LAW, IMMIGRATION LAW, ATTORNEYS.

DEFENDANT ENTITLED TO A HEARING ON HIS MOTION TO VACATE HIS CONVICTION ON INEFFECTIVE ASSISTANCE GROUNDS, DEFENDANT ALLEGED HE WAS NOT INFORMED OF THE DEPORTATION CONSEQUENCES OF HIS MARIJUANA CONVICTION (THIRD DEPT).

The Third Department, reversing County Court, determined that defendant was entitled to a hearing on his motion to vacate his conviction on ineffective assistance grounds. Defendant's affidavit raised sufficient factual questions which could not be answered from the record to warrant a hearing. Defendant alleged he was not informed of the deportation consequences of the marijuana conviction:

> "Although a hearing on a CPL 440.10 motion is not always necessary, a hearing is required where the defendant bases the motion upon nonrecord facts that are material and, if established, would entitle the defendant to relief"... . In support of his motion to vacate the judgment of conviction, defendant tendered his own affidavit, wherein he asserted that he had completed his prison sentence and period of postrelease supervision and that he was being held at a federal detention facility pending deportation proceedings. He stated that trial counsel failed to inform him of the immigration consequences of being convicted as charged and that, had he been so informed, he would have asked trial counsel "to explore the possibility of a plea bargain rather than take the case to trial, even though [he] continued to maintain [his] innocence." He further stated that trial counsel's failure to present him with any plea offer, or to inform him of potential deportation consequences, "caused [him] to forgo any discussion of a plea bargain." **People v Blackman, 2018 NY Slip Op 07982, Third Dept 11-21-18**

CRIMINAL LAW, SEX OFFENDER REGISTRATION ACT (SORA). ADMINISTRATIVE LAW.

STATUTE PROHIBITING LEVEL THREE SEX OFFENDERS FROM ENTERING SCHOOL GROUNDS APPLIES TO ALL LEVEL THREE OFFENDERS, NOT ONLY THOSE INCARCERATED FOR AN ENUMERATED SEX CRIME AT THE TIME OF THEIR RELEASE ON PAROLE, HERE THE PETITIONER HAD PREVIOUSLY BEEN ADJUDICATED A LEVEL THREE SEX OFFENDER BUT WAS BEING PAROLED AFTER INCARCERATION FOR A ROBBERY CONVICTION (FOURTH DEPT).

The Fourth Department, in a full-fledged opinion by Justice Troutman, determined that the Executive Law provision which prohibits level three sex offenders from entering school grounds applies to all level three

sex offenders, not only those who are incarcerated for one of the enumerated sex crimes at the time they are released on parole. Petitioner was convicted of rape and adjudicated a level three offender in 1994. Subsequently petition was convicted of and incarcerated for robbery, which is not one of the enumerated crimes. The court noted that it was not, under administrative law principles, required to defer to the Board of Parole's ruling, but nevertheless it agreed with the ruling and Supreme Court's denial of the petition. The Fourth Department found the statute is ambiguous applying statutory-construction rules and then turned to the legislative history of the statute (Executive Law 259-c (14)):

> When Executive Law § 259-c (14) was first enacted, the school grounds mandatory condition applied only to persons serving a sentence for an enumerated offense against a minor ... . In 2005, the legislature amended the statute to add the reference to level three sex offenders ... . The sponsors' memorandum defined the purpose of that amendment: "To prohibit sex offenders placed on conditional release or parole from entering upon school grounds or other facilities where the individual has been designated as a level three sex offender" ... . As justification, the sponsors offered: "There is a need to prohibit those sex offenders who are determined to pose the most risk to children from entering upon school grounds or other areas where children are cared for" ... .
>
> Based on our review of the legislative history relating to the enactment of the relevant amendment to Executive Law § 259-c (14), we conclude that there existed a consensus among governmental and nongovernmental organizations that, for good or ill, the amended language was intended to extend the school grounds mandatory condition to all persons conditionally released or released to parole who have been designated level three sex offender. **People ex rel. Garcia v Annucci, 2018 NY Slip Op 07868, Fourth Dept 11-16-18**

CRIMINAL LAW, SEX OFFENDER REGISTRATION ACT (SORA), ATTORNEYS, APPEALS, CORRECTION LAW.

DEFENSE COUNSEL WROTE A LETTER TO THE COURT STATING THAT DEFENDANT'S PETITION FOR A DOWNWARD MODIFICATION OF HIS SORA RISK LEVEL LACKED MERIT, WHICH CONSTITUTED INEFFECTIVE ASSISTANCE, APPEAL OF THE DENIAL OF THE PETITION IS PURSUANT TO CPLR 5701, NOT CPL 450.10, THE CORRECTION LAW ALLOWS SUCH A PETITION ONCE A YEAR (FOURTH DEPT).

The Fourth Department, reversing County Court, determined that defendant was entitled to a hearing on his petition seeking a downward modification of his level three Sex Offender Registration Act (SORA) status because defense counsel wrote a letter to the court stating the petition did not have merit. Defendant was not afforded effective assistance of counsel. The Fourth Department noted that an appeal from the denial of a modification petition is pursuant to CPLR 5701, not CPL 450.10:

> We agree with defendant that he was denied effective assistance of counsel, and we therefore reverse the order, reinstate the petition, and remit the matter to County Court for a new hearing on the petition. Defendant contended in the petition, among other things, that he was entitled to a downward modification of his risk level classification. His assigned counsel, however, wrote a letter to the court indicating that the petition lacked merit, counsel would not support the petition, and he had advised defendant to withdraw the petition so that defendant would not needlessly delay his right to file a new modification petition in two years. We conclude that defense counsel "essentially[] became a witness against [defendant] and took a position adverse to him," which denied defendant effective assistance of counsel ... . In addition, a defendant may commence a Correction Law § 168-o (2) proceeding no more than once annually ... , thus defense counsel's advice was incorrect as well as adverse to defendant's position. **People v Griffith, 2018 NY Slip Op 07579, Fourth Dept 11-9-18**

DEBTOR-CREDITOR

DEBTOR-CREDITOR, CONTRACT LAW.

DEFENDANT SHOULD HAVE BEEN AFFORDED THE OPPORTUNITY TO CURE A DEFAULT IN MONTHLY PAYMENTS ON A LOAN BEFORE PLAINTIFF SOUGHT TO ENFORCE THE TERMS OF THE STIPULATION OF SETTLEMENT, WHICH WOULD RESULT IN DEFENDANT OWING MORE THAN TWICE WHAT REMAINED TO BE PAID (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court determined plaintiff should have given defendant the opportunity to cure an inadvertent failure to make a monthly payment pursuant to stipulation of settlement. Defendant had repaid much of the debt and, based on the default, would owe more than twice the amount that remained to be paid:

> ... Supreme Court should have granted the alternate branch of the defendant's motion, which was, in effect, to preclude the plaintiff from enforcing the default provision of the stipulation without affording the defendant a reasonable opportunity to cure his default. "Under almost any given state of facts, where to enforce a stipulation would be unjust or inequitable or permit the other party to gain an unconscionable advantage, courts will afford relief" ... .
>
> Here, the defendant's default was inadvertent and minor in nature when measured against the harsh result that would be obtained upon literal enforcement of the default provision in the stipulation... . Insofar as the plaintiff failed to offer the defendant any opportunity to cure his default before seeking to recover the full amount due under the judgment, the plaintiff's conduct could be interpreted as an attempt to take advantage of a technical default to obtain payment of the far greater sum which the plaintiff had originally sought, but agreed to forgo as part of the settlement ... . **RCS Recovery Servs., LLC v Mensah, 2018 NY Slip Op 07766, Second Dept 11-14-18**

DEBTOR-CREDITOR, CONTRACT LAW.

VOLUNTARY PAYMENT OF CERTAIN CHARGES ASSESSED IN CONNECTION WITH REFINANCING MULTI-MILLION DOLLAR LOANS WARRANTED DISMISSAL OF THE COMPLAINT WHICH ALLEGED THE CHARGES WERE UNENFORCEABLE PENALTIES AND WERE PAID UNDER DURESS (FIRST SEPT).

The First Department, in a full-fledged opinion by Justice Mazzarelli, affirmed the dismissal of a complaint alleging certain payments made in connection with refinancing multi-million dollar loans were unenforceable penalties and were paid under duress. The opinion is too detailed to fairly summarize here. The central issue was whether the voluntary payment of the charges in question without protest, i.e., the voluntary payment doctrine, warranted dismissal of the complaint. The issues were described as follows:

> The relative sophistication of the parties is not a factor to be considered in assessing a claim of economic duress ... . Economic duress exists where a party is compelled to agree to terms set by another party because of a wrongful threat by the other party that prevents it from exercising its free will. Accordingly, our analysis consists of two prongs: first, whether Blackrock's [defendant's] decision to demand the late charge and extra interest payment was lawful, that is, based on rights enumerated in the agreement; and second, if it was not, whether the demand placed plaintiff in a position such that it had no other choice but to accede. With respect to the first prong, Blackrock [argues] that, because the mezzanine loan agreement is part of the record, we can decide, even at this procedural posture, that, as a matter of law, the charges were not wrongful. ... Defendant argues that ... the agreement plainly establishes that it had the right to make the demand it did. Plaintiff, in contrast, asserts that the late charge provision is, at the very least, ambiguous with respect to how Blackrock was to calculate the charge, and that, even if the calculation was correct, it constitutes an unenforceable penalty. **Beltway 7 & Props., Ltd. v Blackrock Realty Advisers, Inc., 2018 NY Slip Op 07844, First Dept 11-15-18**

DEFAMATION

DEFAMATION, CIVIL PROCEDURE, CONSTITUTIONAL LAW.

MATERIAL PUBLISHED ON DEFENDANTS' WEBSITE DID NOT RISE TO THE LEVEL OF THREATENING SPEECH THAT WOULD ALLOW PRIOR RESTRAINT, PRELIMINARY INJUNCTION NOT GRANTED (FIRST DEPT).

The First Department determined the criteria for prior restraint of speech were not met in this action to impose a preliminary injunction and temporary restraining order prohibiting the publishing of accusations against plaintiff and offensive images on defendants' website:

> Plaintiff, a law professor, sat on the appellate panel of the Financial Industry Regulatory Authority, Inc. (FINRA) that affirmed the lifetime ban imposed on two stockbrokers, nonparties Talman Harris and William Scholander. Defendants allegedly control a website known as TheBlot, a tabloid-style platform that has published a substantial quantity of material attacking FINRA's ban of Harris and Scholander and the FINRA personnel, including plaintiff, who were involved in adjudicating that case. The attacks on plaintiff have included — in addition to name-calling, ridicule and various scurrilous accusations — juxtapositions of plaintiff's likeness to graphic images of the lynching of African Americans, and statements that the banning of Harris, who is African American, constituted a "lynching."
>
> In this action, plaintiff, who is also African American, seeks, as here relevant, an injunction against the posting on TheBlot of material attacking or libeling him. In this regard, he argues that the lynching images posted alongside photographs of him on TheBlot should be understood as a threat of violence against himself. ...
>
> ... [T]he preliminary injunction can be affirmed only if it enjoins a "true threat" against plaintiff ... . We find, however, that the speech at issue, as offensive as it is, cannot reasonably be construed as truly threatening or inciting violence against plaintiff. Rather, the lynching imagery at issue was plainly intended to draw a grotesque analogy between lynching and FINRA's banning of Harris, who is an African American (and is identified as such in the posts) ... . While this analogy is incendiary and highly inappropriate, plaintiff has not established that any reasonable viewer would have understood the posts as threatening or calling for violence against him. Moreover, even if the

posts could reasonably be construed as advocating unlawful conduct, plaintiff has not established that any "such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action" ... . **Brummer v Wey, 2018 NY Slip Op 07843, First Dept 11-15-18**

DEFAMATION, CIVIL RIGHTS LAW, PRIVILEGE.

STATEMENTS IN A NEWSPAPER ARTICLE ABOUT PLAINTIFF'S DIVORCE WHICH REFERRED TO PLAINTIFF'S CONVICTION STEMMING FROM A BOILER ROOM PENNY STOCK OPERATION WERE ABSOLUTELY PRIVILEGED UNDER THE CIVIL RIGHTS LAW (SECOND DEPT).

The Second Department determined the defamation action against a newspaper was properly dismissed. A newspaper article about plaintiff's divorce referred to plaintiff's criminal conviction stemming from a "boiler room" penny-stock operation and stating that plaintiff "tried to use his old tricks to swindle his estranged wife out of millions of dollars...". Plaintiff stock operation inspired the movie "Boiler Room:"

> "Civil Rights Law § 74 is an affirmative defense to a claim of defamation" ... . That section provides that "[a] civil action cannot be maintained against any person, firm or corporation, for the publication of a fair and true report of any judicial proceeding, legislative proceeding or other official proceeding" (Civil Rights Law § 74). The privilege afforded by this statute is absolute "and is not defeated by the presence of malice or bad faith" ... . "This absolute privilege applies only where the publication is a comment on a judicial, legislative, or other official proceeding . . . and is a fair and true' report of that proceeding" ... .
>
> As to the threshold requirement that the publication purport to comment on a judicial, legislative, or other official proceeding, if the context in which the statements are made makes it impossible for the ordinary viewer, listener, or reader to determine whether the defendant was reporting on a judicial or other official proceeding, the absolute privilege does not apply ... .
>
> As to the requirement that the publication be a fair and true report of the official proceeding, the Court of Appeals has recognized that "newspaper accounts of legislative or other official proceedings must be accorded some degree of liberality" ... . Accordingly, "[w]hen determining whether an article constitutes a fair and true' report, the language used therein should not be dissected and analyzed with a lexicographer's precision"... . Rather, "[f]or a report to be characterized as fair and true' within the meaning of the statute, thus immunizing its publisher from a civil suit sounding in libel, it is enough that the substance of the article be substantially accurate"... .
>
> Here, the subject newspaper article explicitly stated that it was describing the divorce action commenced against the plaintiff by his former wife ... . Furthermore, the defendants' documentary evidence established, as a matter of law, that the disputed language in the newspaper article was a "fair and true" report of the factual findings made in the divorce action ... . Contrary to the plaintiff's contention, "the inaccuracies cited by the plaintiff were not so egregious as to remove the article from the protection of Civil Rights Law § 74" ... . **Gillings v New York Post, 2018 NY Slip Op 07413, Second Dept 11-7-18**

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EDUCATION-SCHOOL LAW

EDUCATION-SCHOOL LAW, ADMINISTRATIVE LAW.

AFTER REVERSAL BY THE COURT OF APPEALS, THE EXPULSION OF PETITIONER STUDENT FOR SEXUAL MISCONDUCT IN VIOLATION OF THE COLLEGE'S STUDENT CODE CONFIRMED, COLLEGE APPEALS BOARD HAD THE POWER TO IMPOSE ANY AVAILABLE REMEDY INCLUDING EXPULSION (THIRD DEPT).

The Third Department, after a reversal by the Court of Appeals, confirmed the college's determination to expel petitioner, a student accused of sexual misconduct in violation of the student code:

> ... [T]he Court of Appeals agreed with us "that petitioner's due process arguments were not preserved at the administrative level" ... . To the extent that petitioner's procedural claims go beyond those arguments, they are also unpreserved due to him either failing to raise them at the administrative hearing when they could have been corrected or failing to raise them altogether ... . We accordingly focus upon the penalty of expulsion recommended by SUNY's Appellate Board and imposed by respondent Kristen Esterberg, SUNY's president.
>
> Petitioner may not have been aware of the fact when he took an administrative appeal from a decision of the Hearing Board that suspended him for a semester, but the Appellate Board was empowered by article IX (C) of the student code of conduct to "alter the sanctions imposed" and punish him with "any of the [available] sanctions," including more severe ones. Article IX misstates the student code of conduct sections dealing with the jurisdiction of the Appellate Board and the permissible sanctions, but a review of the pertinent provisions leaves no doubt that those misstatements were drafting errors that may be disregarded... . The Appellate Board chose one of the available remedies by recommending expulsion and, while no explanation was offered as to why it did so, the student code of conduct did not require one. Esterberg adopted the recommendation. **Matter of Haug v State Univ. of N.Y. At Potsdam, 2018 NY Slip Op 08208, Third Dept 11-29-18**

EDUCATION-SCHOOL LAW, NEGLIGENCE.

NEGLIGENT SUPERVISION ACTION AGAINST THE SCHOOL DISTRICT AND BUS COMPANY STEMMING FROM A FIGHT INSTIGATED BY A STUDENT ON THE BUS SHOULD NOT HAVE BEEN DISMISSED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the school district's and school bus company's motions for summary judgment in this negligent supervision, third party assault, case should not have been granted. A six minute fight erupted on a school bus during which the two student plaintiffs were punched by another student. The school district did not demonstrate the student's (Torres's) violence was not foreseeable, and there was evidence the school aide observed the fight but did nothing to stop it:

> Schools have a duty to adequately supervise the students in their care and may be held liable for foreseeable injuries proximately related to the absence of adequate supervision ... . The standard

for determining whether a school has breached its duty is to compare the school's supervision and protection to that of a parent of ordinary prudence placed in the same situation and armed with the same information ... . Where the complaint alleges negligent supervision in the context of injuries caused by an individual's intentional acts, the plaintiff generally must demonstrate that the school knew or should have known of the individual's propensity to engage in such conduct, such that the individual's acts could be anticipated or were foreseeable... .

Here, the school defendants failed to establish, prima facie, that they had no specific knowledge or notice of Torres's propensity to engage in the misconduct alleged. In support of their motion, the school defendants submitted, inter alia, the deposition testimony of assistant principal Sharon Flynn, who testified that Torres had a disciplinary record. When asked whether Torres' prior disciplinary history involved violence, Flynn replied only, "Not that I remember." Thus, the school defendants failed to sustain their prima facie burden of establishing that they had no actual or constructive notice of Torres's propensity to engage in the misconduct alleged ... .

... [T]riable issues of fact also exist as to whether Torres's dangerous conduct occurred in such a short span of time that no amount of supervision by the school defendants could have prevented the infant plaintiffs' injuries ... , whether the infant plaintiffs' injuries were a foreseeable consequence of the security aide's alleged failure to respond appropriately as the events unfolded ... , and whether security personnel took "energetic steps to intervene" in the fight to stop Torres from injuring the infant plaintiff ... . **Palopoli v Sewanhaka Cent. High Sch. Dist., 2018 NY Slip Op 07441, Second Dept 11-7-18**

EDUCATION-SCHOOL LAW, NEGLIGENCE, MUNICIPAL LAW.

PLAINTIFF STUDENT INJURED WHEN GYMNASIUM DOOR CLOSED ON HIS FINGER, INADEQUATE SUPERVISION WAS NOT THE PROXIMATE CAUSE OF THE INJURY, CITY IS NOT LIABLE FOR TORTS OF THE DEPARTMENT OF EDUCATION, NOTICE OF CLAIM DID NOT INCLUDE ALLEGATION THAT THE DOOR WAS DEFECTIVE (SECOND DEPT).

The Second Department determined plaintiff student's negligent supervision cause of action against the city and the school district was properly dismissed. The city cannot be liable for the torts of the Department of Education. The student was injured when the gymnasium door closed on his finger. Negligent supervision was not the proximate cause of the injuries because the injury happened so fast. The theory that the door was defective was not included in the notice of claim and could not be raised to defeat summary judgment:

Although schools have a duty to provide supervision to ensure the safety of those in their charge ... , schools will be held liable only for foreseeable injuries proximately related to the absence of adequate supervision ... . When an accident occurs in so short a span of time that even the most intense supervision could not have prevented it, lack of supervision is not the proximate cause of the injury ... .

Here, the defendants made a prima facie showing of the DOE's entitlement to judgment as a matter of law dismissing the negligent supervision cause of action by establishing that any alleged inadequacy in the level of supervision was not a proximate cause of the accident ... .

The plaintiffs' allegation that the subject door was negligently maintained does not defeat the defendants' motion. Since this theory of liability was not included in the notice of claim or the complaint ... , and there was nothing in the notice of claim that would provide notice to the

> defendants about this allegation ... , it does not raise a triable issue of fact to defeat the defendants' motion for summary judgment. Furthermore, the plaintiffs did not seek leave to amend the notice of claim pursuant to General Municipal Law § 50-e ... . **K.B. v City of New York, 2018 NY Slip Op 07710, Second Dept 11-14-18**

EMPLOYMENT LAW

EMPLOYMENT LAW, LABOR LAW, CONTRACT LAW.

EMPLOYEES OF SUBCONTRACTOR CAN SUE FOR THE PREVAILING WAGE REQUIRED BY LABOR LAW 220 AS THIRD PARTY BENEFICIARIES OF THE PRIME CONTRACT (FIRST DEPT).

The First Department affirmed the denial of defendant employer's (SLSCO's) motion to dismiss the plaintiff employees' breach of contract complaint. The complaint alleged that SLSCO and the subcontractor, PMJ, which employed plaintiffs, breached the prime employment contract by failing to pay the prevailing wage for work done for the Department of Environmental Protection (DEP). The court noted the employees were third party beneficiaries of the contract and the clause in the contract which purported to prohibit third-party actions seeking the prevailing wage would be void as against public policy:

> Plaintiffs are employees of PMJ. They commenced this action for breach of contract against PMJ and SLSCO, predicated upon a third-party contract beneficiary theory, alleging that PMJ failed to pay them prevailing wages as required by the terms of the prime contract ... .
>
> Labor Law § 220(3) provides, in pertinent part, that wages paid to laborers, workers, or mechanics on a public works project shall be the prevailing rate of wages in that locality, and that the public works contracts, including subcontracts thereunder "shall contain a provision that each laborer, workman or mechanic, employed by such contractor, subcontractor or other person about or upon such public work shall be paid the wages herein". This statute "has as its entire aim the protection of workingmen against being induced, or obliged, to accept wages below the prevailing rate" and "must be construed with the liberality needed to carry out its beneficent purposes"... . In keeping with this liberal reading of the statute, the courts of this state have consistently held that, in public works contracts, a subcontractor's employees have both an administrative remedy under the statute as well as a third-party right to make a breach of contract claim for underpayment against the general contractor ... . **Wroble v Shaw Envtl. & Infrastructure Eng'g of N.Y., P.C., 2018 NY Slip Op 08061, First Dept 11-27-18**

EMPLOYMENT LAW, LABOR LAW, FRAUD.

LAID OFF AT-WILL EMPLOYEE'S WHISTLEBLOWER (LABOR LAW 740) AND FRAUDULENT INDUCEMENT CAUSES OF ACTION PROPERLY DISMISSED (SECOND DEPT).

The Second Department determined plaintiff's whistleblower (Labor Law 740) and fraudulent inducement causes of action were properly dismissed. Plaintiff's allegations did not meet the statutory criteria of Labor Law 740 and at-will employees who are laid off generally can not bring an action alleging fraudulent inducement:

> [Labor Law 740] provides, in relevant part, that "[a]n employer shall not take any retaliatory personnel action against an employee because such employee . . . discloses, or threatens to disclose to a supervisor or to a public body an activity, policy or practice of the employer that is in violation of law, rule or regulation" that either "creates and presents a substantial and specific danger to the public health or safety, or . . . constitutes health care fraud" (Labor Law § 740[2][a]).
>
> While the plaintiff in a whistleblower action must prove, at trial, that an actual violation of law, rule, or regulation occurred ... , it is not necessary, for pleading purposes, that the plaintiff identify in the complaint the specific law, rule, or regulation that the defendant allegedly violated ... .
>
> Here, while the amended complaint sufficiently alleges a violation of law, rule, or regulation, it fails to allege any substantial and specific danger to the public health or safety resulting from such violation ... .
>
> "New York law is clear that absent a constitutionally impermissible purpose, a statutory proscription, or an express limitation in the individual contract of employment, an employer's right at any time to terminate an employment at will remains unimpaired," and the Court of Appeals has "repeatedly refused to recognize exceptions to, or pathways around, these principles" ... . Hence, as a general rule, at-will employees may not claim that they were induced to accept their position based on the belief that they would enjoy continued employment ..., "even where the circumstances pertain to a plaintiff's acceptance of an offer of a position rather than his or her termination" ... . Since the plaintiff failed to allege any injury independent of termination of her employment, she cannot recover damages for what is, at most, an alleged breach of contract in the guise of a tort ... . **Coyle v College of Westchester, Inc., 2018 NY Slip Op 07699, Second Dept 11-14-18**

EMPLOYMENT LAW, CONTRACT LAW, NEGLIGENCE, CIVIL PROCEDURE.

VOLUNTEER AGREEMENT WHICH PURPORTED TO RELEASE DEFENDANT EMPLOYER FROM LIABILITY FOR PLAINTIFF'S ON THE JOB INJURY WAS VOID AS AGAINST PUBLIC POLICY, MOTION TO AMEND THE ANSWER TO ASSERT THE RELEASE AS A DEFENSE SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendant employer should not have been allowed to amend its answer to assert a release from liability for plaintiff's injury based on plaintiff's signing a "Volunteer Agreement." The Volunteer Agreement purported to release the employer from any liability for injury to plaintiff on the job. Plaintiff was struck by a forklift operated by defendant's employee. The release violated public policy:

> While leave to amend a pleading should be freely granted unless the proposed amendment is palpably insufficient or patently devoid of merit (see CPLR 3025[b] ...), here, the proposed amendment was patently devoid of merit ... . New York courts have long found agreements between an employer and an employee attempting to exonerate the employer from liability for future negligence whether of itself or its employees or limiting its liability on account of such negligence void as against public policy ... .
>
> As observed by the Court of Appeals more than a century ago, "[t]he state is interested in the conservation of the lives and of the healthful vigor of its citizens, and if employers could contract away their responsibility at common law, it would tend to encourage on their part laxity of conduct in, if not an indifference to, the maintenance of proper and reasonable safeguards to human life and limb" ... . Contrary to the defendant's contentions, the public policy considerations applicable to paid employees also apply to a volunteer employee, such as the plaintiff herein. The purported release contained in the "Volunteer Agreement" is void as against public policy. **Richardson v Island Harvest, Ltd., 2018 NY Slip Op 07768, Second Dept 11-14-18**

FAMILY LAW

FAMILY LAW.

FATHER'S PETITION TO MODIFY SUPPORT SHOULD HAVE BEEN GRANTED, ALTHOUGH FATHER VOLUNTARILY LEFT A BETTER PAYING JOB IN VIRGINIA, HE DID SO TO BE NEARER TO HIS SON WHO HAD MOVED WITH MOTHER TO NEW YORK FROM VIRGINIA (FOURTH DEPT).

The Fourth Department, reversing Family Court, determined that, although father left his job in Virginia voluntarily, his petition to modify his support after taking a lower-paying job in New York should have been granted. Father left the better paying job to be closer to his son, who had recently moved with his mother from Virginia to New York:

> "It is well settled that a loss of employment may constitute a change in circumstances justifying a downward modification of [child support] obligations where [such loss] occurred through no fault of the [party seeking modification] and the [party] has diligently sought re-employment" ... . As a general rule, a parent who voluntarily quits a job will not be deemed without fault in losing such employment... . Nevertheless, that general rule should not be inflexibly applied where a parent quits a job for a sufficiently compelling reason, such as the need to live closer to a child ... . As one court has explained, a "parent who chooses to leave his [or her] employment rather than [live] hundreds of miles away from his [or her] children is not voluntarily unemployed or underemployed. Instead, he [or she] is a loving parent attempting to do the right thing for his [or her] children. To punish such a parent by requiring higher child support . . . is neither good law nor good policy" ... . **Matter of Parmenter v Nash, 2018 NY Slip Op 07553, Fourth Dept 11-9-18**

FAMILY LAW.

DESPITE FATHER'S PRO SE MOTION SEEKING VISITATION, NO PROVISION FOR VISITATION WAS MADE IN THE CUSTODY ORDER, MATTER REMANDED FOR A HEARING (FIRST DEPT).

The First Department, remanding the matter for a hearing in Family Court, noted that the final custody order did not make any provision for visitation:

> ... [T]he final custody order did not make any provision for visitation, and the father's pro se motion explicitly sought visitation with the child. Family Court implicitly denied this request without providing any rationale. Visitation is a joint right of the child and noncustodial parent and, absent "exceptional circumstances," it "follows almost as a matter of course," and is presumed to be in the child's best interest ... . The record of the custody hearing established that the father had regular unsupervised and overnight visitation with the child throughout the prolonged custody proceedings, although there were some late pickups and missed visits in the months before the custody order was issued. We note the child's attorney represents that the child strongly wishes to resume visits with the father ... . **Matter of Jolanda K. v Damian B., 2018 NY Slip Op 07675, First Dept 11-13-18**

FAMILY LAW.

FATHER'S PETITION TO MODIFY CUSTODY SHOULD NOT HAVE BEEN DENIED, MOTHER HAD RELOCATED TO FLORIDA WITHOUT FATHER'S CONSENT AND WITHOUT THE PERMISSION OF THE COURT (FIRST DEPT).

The First Department, reversing Family Court, determined that father's petition to modify custody should not have been denied without a hearing. Mother had relocated to Florida without father's consent or the permission of the court:

> Family Court correctly determined that the mother's testimony about her unilateral relocation constituted a change in circumstances, triggering an inquiry into whether the child remaining in the mother's custody in Florida is in the child's best interests ... . However, the court abused its discretion in making a final determination on that issue without a full hearing at which the parties and the child's attorney had an opportunity to present relevant evidence. The question of a child's relocation out of state necessarily requires "due consideration of all the relevant facts and circumstances and with predominant emphasis being placed on what outcome is most likely to serve the best interests of the child ... . [C]ustody and visitation decisions should be made with a view toward minimizing the parents' discomfort and maximizing the child's prospects of a stable, comfortable and happy life"... . Relevant factors include the parties' good faith in requesting or opposing the move, the child's attachments to each parent, the quality of the life-style that the child would have if the proposed move were permitted or denied, the effect that the move may have on any extended family relationships, and whether a visitation plan can be achieved that permits the noncustodial parent to maintain a meaningful parent-child relationship (id.). In this case, since the father had raised concerns in his petition about the child's education, the parties should have had the opportunity to present evidence about this, in addition to other relevant factors. **Matter of Michael B. v Latasha T.-M., 2018 NY Slip Op 07929, First Dept 11-20-18**

FAMILY LAW.

FAMILY COURT ABUSED ITS DISCRETION IN ORDERING UNSUPERVISED VISITATION WITH CHILDREN WHO HAD BEEN REMOVED FROM THE PARENTS' CARE, THERE WAS NO EVIDENCE OF A CHANGE IN CIRCUMSTANCES SINCE THE DENIAL OF THE PARENTS' APPLICATION TO HAVE THE CHILDREN RETURNED TO THEM (FIRST DEPT).

The First Department, reversing Family Court, determined the record did not support ordering unsupervised visitation with the parents:

> Respondents continue to refuse to admit or even to acknowledge the possibility that the children, all of whom tested positive for sexually transmitted diseases (STD), were sexually abused. Even as recently as May 2018, and although they ostensibly had participated in various services and counseling, the parents continued to offer implausible explanations for the children's medical condition. ...
>
> In November 2017, Family Court (Ta-Tanisha James, J.) denied the parents' application pursuant to Family Court Act § 1028 to have the children returned to their care. Since then there has been no change in the circumstances upon which the denial of that application was based. The court (Frias-Colon, J.) issued the instant order without benefit of a full fact-finding hearing, apparently to avoid delay and stagnation in the proceeding. This justification is inadequate. The permanency reports and treatment updates before the court reiterated the parents' ongoing inability to acknowledge that their children had been sexually abused and did not advocate unsupervised visitation. In view of the gravity of the allegations and the parents' attitude toward, and role in, the events at issue, we find that the court abused its discretion in ordering unsupervised visitation on the record before it. **Matter of Abass D. (Mamadou D.--Sitan D.), 2018 NY Slip Op 07968, First Dept 11-20-18**

FAMILY LAW.

FATHER, WHO WAS INCARCERATED, SHOULD HAVE BEEN PRODUCED FOR THE PROCEEDING TO APPOINT A GUARDIAN FOR THE CHILD, NEW HEARING ORDERED (SECOND DEPT).

The Second Department, reversing Family Court, determined father, who was incarcerated, had a fundamental right to be heard in the guardianship proceeding and shouild have been produced in court:

> The order, after a hearing at which the father was neither present nor represented, and upon the mother's consent, granted the petition of Krystle L. B. to be appointed permanent guardian of the subject child. ...
>
> An incarcerated parent has a fundamental right to be heard in a proceeding impacting the care and control of his or her child ... . Here, the incarcerated father's rights were violated when the Family Court elected to hear and determine the guardianship petition without producing the father in court or affording him an opportunity to be heard.
>
> Accordingly, we reverse the order appealed from, and remit the matter ... for a hearing at which the father's constitutional right to be heard will not be abridged and a new determination thereafter on the guardianship petition. **Matter of Krystle L.B. v Crystal L.W., 2018 NY Slip Op 08019, Second Dept 11-21-18**

FAMILY LAW, APPEALS.

FAMILY COURT DID NOT MAKE FACTUAL FINDINGS IN SUPPORT OF ITS GRANT OF SOLE CUSTODY, MATTER REMITTED (FOURTH DEPT).

The Fourth Department reversed Family Court's custody ruling because the ruling was not supported by factual findings. The matter was remitted:

> It is "well established that the court is obligated to set forth those facts essential to its decision' " (...see CPLR 4213 [b]; Family Ct Act § 165 [a]). Here, the court utterly failed to follow that well-established rule inasmuch as it made no findings to support its determination. "Effective appellate review, whatever the case but especially in child visitation, custody or neglect proceedings, requires that appropriate factual findings be made by the trial court—the court best able to measure the credibility of the witnesses" ... . We therefore reverse the order, reinstate the mother's petition, and remit the matter to Family Court to make a determination on the petitions, including specific findings as to a change in circumstances and the best interests of the child, following an additional hearing if necessary ... . **Matter of Brown v Orr, 2018 NY Slip Op 07905, Fourth Dept 11-16-28**

FAMILY LAW, APPEALS.

APPEAL RENDERED MOOT BY THE RETURN OF THE CHILD IN THIS CHILD NEGLECT - TEMPORARY REMOVAL PROCEEDING AND THE EXCEPTION TO THE MOOTNESS DOCTRINE DID NOT APPLY, TWO JUSTICE DISSENT ARGUED A NOVEL ISSUE HAD BEEN RAISED CONCERNING CONSENT TO THE TEMPORARY REMOVAL AND THE EXCEPTION TO THE MOOTNESS DOCTRINE WAS APPLICABLE (THIRD DEPT).

The Third Department, over a two-justice dissent, determined that the appeal in this child neglect/temporary matter removal had been rendered moot by a disposition which returned the child and the exception to the mootness doctrine, which would allow consideration on appeal, did not apply. The dissent argued that the exception to the mootness doctrine was applicable:

> Family Court ... rejected respondent's offer to consent to the continued removal without also admitting that the removal was "necessary to avoid imminent risk to the child's life or health"... . Family Court made such a finding at the conclusion of the hearing and issued an order continuing the temporary removal....
>
> Following the issuance of the appealed-from order, respondent agreed to a resolution in which the violation petition was withdrawn, the neglect petition was adjourned in contemplation of dismissal and the child returned to respondent's care. Contrary to her contention, these developments rendered her appeal moot... She further argues that this case presents an issue that is "likely to recur, typically evades review, and raises a substantial and novel question" so as to fall within the exception to the mootness doctrine, pointing to Family Court's refusal to allow her to waive the removal hearing and consent to the continued removal absent an admission of imminent risk ... . Appeals from temporary removal orders are often rendered moot when the petition is disposed of before an appeal on the temporary order is decided ... , but issues arising from such orders need not evade review considering the preference available for appeals from orders issued under Family Ct Act article 10 ... More importantly, the law is clear that any order of temporary removal must include a finding that removal "is necessary to avoid imminent risk to the child's life or health" ... .

> The contention that this requirement can be waived at respondent's convenience is not "sufficiently substantial to warrant [invoking] the exception to the mootness doctrine" ... .
>
> **From the dissent:**
>
> While we agree with the majority that this appeal is moot, we find that the exception to the mootness doctrine applies. The substantive issue presented is whether a respondent in a proceeding under Family Ct Act article 10, part 2 may consent to the temporary removal of his or her child. The record shows that Family Court interpreted both Family Court §§ 1022 and 1027 as requiring the court to make a factual finding that a child is in imminent danger before issuing a temporary removal order. That is certainly the case in a contested proceeding... . The distinct question here, however, is whether a parent may consent to the temporary removal, obviating the need for either an admission of wrongdoing or a hearing eliciting facts of imminent risk as required by Family Court. Given the court's position, it is evident that the issue will readily recur in proceedings before that court. Moreover, appeals from temporary removal orders are routinely found to be moot because a disposition is reached before an appeal is decided ... . Because the procedures surrounding the removal of children from their parents are manifestly of public importance, we consider the consent issue important to resolve. It also appears to be novel. As such, we are persuaded that the exception to the mootness doctrine should be applied ... . **Matter of Tyrell FF. (Jaquasisa GG.), 2018 NY Slip Op 07985, Third Dept 11-21-18**

FAMILY LAW, ATTORNEYS.

FATHER DEPRIVED OF HIS RIGHT TO COUNSEL IN THIS MAINTENANCE AND SUPPORT ARREARS PROCEEDING, SUPREME COURT REVERSED (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined father was denied his right to counsel in this maintenance, child support, eduction and medical expense arrears proceeding:

> We agree with the father that he was denied his right to counsel at the hearing to determine whether he was in willful violation of the support order ... . Supreme Court "failed to inform the father of his right to have counsel assigned if he could not afford to retain an attorney" ... , and failed to grant the father an adjournment at the outset of the second day of the hearing when he requested the assistance of counsel ... . To the extent that the father thereafter chose to proceed pro se, the court also failed to "engage the father in the requisite searching inquiry concerning his decision to proceed pro se and thereby ensure that the father was knowingly, intelligently and voluntarily waiving his right to counsel" ... . **Villella v Villella, 2018 NY Slip Op 07917, Fourth Dept 11-16-18**

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FAMILY LAW, ATTORNEYS.

LOSS OF EMPLOYMENT DID NOT JUSTIFY DOWNWARD MODIFICATION OF MAINTENANCE AND SUPPORT, NO SHOWING FATHER WAS NOT AT FAULT FOR LOSING THE JOB, BECAUSE FATHER DID NOT HAVE A RIGHT TO COUNSEL IN THESE PROCEEDINGS, HIS INEFFECTIVE ASSISTANCE ARGUMENT MUST BE BASED UPON EXTRAORDINARY CIRCUMSTANCES WHICH WERE NOT DEMONSTRATED (SECOND DEPT).

The Second Department affirmed Family Court's denial of father's petition for downward modification of maintenance and support and the rejection of father's claim he was denied effective assistance of counsel. The court noted that father did not demonstrate he was not at fault for losing his job and that, because father did not have a right to counsel for these proceedings, he was required to show extraordinary circumstances in support of his ineffective assistance claim:

> A party seeking a downward modification of his or her spousal maintenance and child support obligations set forth in a judgment of divorce must establish a substantial change in circumstances ... . Loss of employment may constitute a substantial change in circumstances where the termination occurred through no fault of the party seeking modification and he or she diligently sought re-employment commensurate with his or her earning capacity... . Here, the father failed to establish that the termination of his employment did not occur though his own fault ... , or that he diligently sought new employment commensurate with his qualifications and experience. Accordingly, we agree with the Family Court's denial of the father's objections to the Support Magistrate's finding that the father was not entitled to a downward modification of his support obligations... .
>
> The father contends that he was deprived of the effective assistance of counsel. Since the father did not have the right to assigned counsel in this support modification proceeding... , he must establish the existence of extraordinary circumstances in order for his claim of ineffective assistance of counsel to be entertained... . Here, the father failed to establish the existence of any extraordinary circumstances to warrant entertaining such a claim ... . **Matter of Berg v Berg, 2018 NY Slip Op 07720, Second Dept 11-14-18**

FAMILY LAW, ATTORNEYS.

FATHER DENIED HIS RIGHT TO COUNSEL IN THIS MODIFICATION OF CUSTODY PROCEEDING (THIRD DEPT).

The Third Department, reversing Supreme Court, determined father had been denied his right to counsel in this modification of custody proceeding for the reasons explained in Matter of Hensley v DeMun, 163 AD3d 1100, 1101 [2018]:

> For the reasons stated in Matter of Hensley v DeMun (supra) - the appeal by the father regarding Supreme Court's resolution of the two petitions filed by the mother of the nonsubject child - we find that the father was denied the right to counsel, and we must therefore reverse and remit for further proceedings. **Matter of DeMun v DeMun, 2018 NY Slip Op 07987, Third Dept 11-21-18**

FAMILY LAW, ATTORNEYS.

CHILD DID NOT RECEIVE EFFECTIVE ASSISTANCE OF COUNSEL, MOTHER SOUGHT A MODIFICATION OF VISITATION WITH FATHER BASED UPON THE CHILD'S REACTIONS TO VISITS WITH FATHER, THE ATTORNEY FOR THE CHILD DID NOT MAKE A SUFFICIENT RECORD ON THE RELEVANT ISSUES THROUGH QUESTIONING THE CHILD AND CROSS-EXAMINING MOTHER (THIRD DEPT).

The Third Department, reversing Family Court, determined the child did not receive effective assistance of counsel in this proceeding to modify visitation. Mother sought to eliminate the scheduled visitation with father and allow the child to visit father as the child wished. Family Court denied the petition:

> To effectively represent and protect a child's interests, the attorney for the child's role is twofold: (1) help the child express his or her wishes to the court, and (2) take an active role in the proceedings ... . By meeting with the child and informing Family Court that the child did not want to continue visitation as ordered, and by requesting and participating in the Lincoln hearing, the trial attorney for the child met the first objective. Given the mother's limited testimony, however, Family Court understandably characterized the record as "thin." In our view, the attorney for the child should have taken a more active role in the proceedings by presenting witnesses that could speak to the child's concerns and/or conducting a more thorough cross-examination of the mother. During his brief cross-examination of the mother, for example, the trial attorney for the child did not attempt to elicit any further information about his client's behavior and demeanor relative to his visits with the father. On this record, we agree with the argument made by the appellate attorney for the child that the trial attorney for the child did not provide effective assistance. Consequently, the order dismissing the petition should be reversed and the matter remitted to Family Court for further proceedings, including a new fact-finding hearing. **Matter of Payne v Montano, 2018 NY Slip Op 07990, Third Dept 11-21-18**

FAMILY LAW, ATTORNEYS.

FATHER WAS NEVER PROPERLY INFORMED OF HIS RIGHT TO COUNSEL IN THIS MAINTENANCE AND CHILD SUPPORT ENFORCEMENT PROCEEDING AND NEVER WAIVED THAT RIGHT, ORDER OF COMMITMENT REVERSED (SECOND DEPT).

The Second Department, reversing Family Court in this child support and maintenance arrears proceeding, determined that father was never properly advised of his right to counsel by the support magistrate. It was not sufficient that father was told the matter could be adjourned to allow him to speak to an attorney or that father could get in touch with legal aid:

> ... [W]hen the father first appeared in the Family Court, the Support Magistrate informed him that he had the right to request an adjournment to hire or speak with an attorney, or he could proceed to represent himself. The father elected to proceed representing himself, and no further advisement or inquiry was made by the court. At the next appearance, the Support Magistrate indicated that she would give the father contact information for the Legal Aid Society of Orange County, but she did not advise the father of his right to have counsel assigned by the court if he was financially unable to retain counsel. Several months later, when the parties appeared for the fact-finding hearing, both pro se, the Support Magistrate again advised the father that he had the right to request an adjournment to hire or speak with an attorney, or he could waive that right and

represent himself. The father stated that he would represent himself, no further advisement or inquiry was made, and the fact-finding hearing was held, with both parties proceeding pro se.

By representing himself, the father was necessarily forgoing the benefits associated with the right to counsel ... . Although a party may waive the right to counsel and opt for self-representation, prior to permitting a party to proceed pro se, the court must conduct a "searching inquiry" to ensure that the party's waiver is knowing, intelligent, and voluntary ... . A waiver is valid where the party was aware of the dangers and disadvantages of proceeding without counsel ... .

Here, the record demonstrates that the father was not advised of his right to assigned counsel, as required. Further, there is no indication that he validly waived his right to counsel. Under these circumstances, the father was deprived of his right to counsel and reversal is required, without regard to the merits of his position in the enforcement proceeding ... . **Matter of Gallousis v Gallousis, 2018 NY Slip Op 08129. Second Dept 11-28-18**

FAMILY LAW, ATTORNEYS, CRIMINAL LAW.

RESPONDENT WAS NOT AFFORDED EFFECTIVE ASSISTANCE OF COUNSEL IN THIS FAMILY OFFENSE PROCEEDING, DEFENSE COUNSEL DID ALMOST NOTHING TO ASSIST HIS CLIENT, FINDINGS AND ORDER OF PROTECTION REVERSED (THIRD DEPT).

The Third Department, reversing Family Court, determined that respondent did not receive effective assistance of counsel in this family offense proceeding:

Petitioner filed a family offense petition alleging that respondent harassed and stalked her. ...

Viewing the record in its entirety, we agree with respondent's argument that he was denied meaningful representation ... .. Before the hearing, counsel did not engage in any discovery. At the hearing, counsel did not present an opening or closing statement. Nor did counsel object when Family Court questioned petitioner — who appeared pro se — and admittedly assisted her in establishing a foundation for two of her three photographic exhibits. Counsel asked questions of petitioner regarding those exhibits on voir dire, but objected to admission of only one of them, did not request that the court disregard petitioner's handwritten notes on the exhibits, and did not object to the many hearsay statements made by petitioner. Counsel declined to cross-examine petitioner, at which point the court stated that she had established a prima facie case and did not need to call any further witnesses. Even though respondent had stated — while not under oath — that one of the photographs was taken when the parties were out together, rather than while petitioner was unaware of his presence, counsel did not call respondent or any other witnesses to testify. In short, counsel did almost nothing to assist his client. **Matter of Wood v Rebich, 2018 NY Slip Op 08213, Third Dept 11-29-18**

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FAMILY LAW, CIVIL PROCEDURE, EVIDENCE, ATTORNEYS.

SUPREME COURT SHOULD HAVE PRECLUDED DEFENDANT FROM INTRODUCING CERTAIN EVIDENCE AT TRIAL BECAUSE OF THE FAILURE TO COMPLY WITH DISCOVERY ORDERS, HOWEVER, SUPREME COURT PROPERLY DENIED DEFENDANT'S REQUEST FOR ATTORNEY'S FEES BECAUSE PLAINTIFF IS THE LESS-MONIED SPOUSE (SECOND DEPT).

The Second Department, modifying (reversing) Supreme Court in this action for divorce, determined that defendant's motion to preclude plaintiff from introducing certain evidence at trial because of the failure to comply with discovery orders should have been granted. Defendant's request for attorney's fees was properly denied, however, because plaintiff is the less-monied spouse:

> A court may prohibit a party "from producing in evidence designated things or items of testimony" if the party "refuses to obey an order for disclosure or willfully fails to disclose information which the court finds ought to have been disclosed" (CPLR 3126[2] ...). Before a court invokes the drastic remedy of precluding evidence, there must be a clear showing that the failure to comply with court-ordered discovery was willful and contumacious ... . The willful and contumacious character of a party's conduct can be inferred from either (1) the repeated failure to respond to demands or comply with court-ordered discovery, without a reasonable excuse for these failures, or (2) the failure to comply with court-ordered discovery over an extended period of time ... .
>
> Here, the defendant demonstrated that the plaintiff failed to comply with court-ordered discovery over an extended period of time. The willful and contumacious character of the plaintiff's conduct may be inferred from her failure to respond to the defendant's letter ... , despite two court orders directing her to do so, and her failure to proffer any excuse for her failure. Accordingly, that branch of the defendant's motion which was to preclude the plaintiff from producing physical evidence or testimony at trial relating to certain limited items previously requested but not disclosed should have been granted.
>
> We agree, however, with the Supreme Court's denial of that branch of the defendant's motion which was to direct the plaintiff to pay interim counsel fees in the sum of $5,000, since the plaintiff is the less-monied spouse ... . **Maliah-Dupass v Dupass, 2018 NY Slip Op 08018, Second Dept 11-21-18**

FAMILY LAW, CONSTITUTIONAL LAW.

PROCEEDING LEADING TO THE REVOCATION OF APPELLANT'S ADJOURNMENT IN CONTEMPLATION OF DISMISSAL (ACD) AND ADJUDGING HIM A PERSON IN NEED OF SUPERVISION (PINS) FATALLY FLAWED BECAUSE APPELLANT WAS NEVER TOLD OF HIS RIGHT TO REMAIN SILENT (SECOND DEPT).

The Second Department, reversing Family Court, determined the proceeding which led to the revocation of appellant's Adjournment in Contemplation of Dismissal (ACD) and adjudging him a person in need of supervision (PINS) was fatally flawed because appellant was never informed of his right to remain silent:

> Although the appellant's term of custody has expired by the terms of the order appealed from, the order is not academic in light of the enduring consequences which might flow from the finding that the appellant violated the terms of the ACD order ... .

> Family Court Act § 741(a) provides, in relevant part: "[a]t the initial appearance of a respondent in a proceeding and at the commencement of any hearing under this article, the respondent and his or her parent or other person legally responsible for his or her care shall be advised of the respondent's right to remain silent" ... . The failure to apprise a respondent of the right to remain silent constitutes reversible error, even if the respondent consents to the disposition in the presence of counsel ... or fails to seek to withdraw his or her admissions based on the failure ... .
>
> Here, the Family Court never apprised the appellant of his right to remain silent—not at the initial appearance on the PINS petition, nor prior to accepting his admission to the allegations in the petition and entering the ACD order, nor at the fact-finding and dispositional hearing ... , addressing the alleged violation of the ACD order. The court's failure to advise the appellant of his right to remain silent cannot be considered harmless error ... , as the court never advised the appellant of his right to remain silent at any time during the course of this proceeding or the original PINS proceeding. Thus, the order must be reversed ... . **Matter of Tyler D., 2018 NY Slip Op 07427, Second Dept 11-7-18**

FAMILY LAW, EVIDENCE.

FINDING THAT DENNIS T IS A PERSON LEGALLY RESPONSIBLE FOR THE CARE OF A CHILD WAS PROPER, EVIDENTIARY RULE ANALOGOUS TO RES IPSA LOQUITUR SUPPORTED THE ABUSE FINDING (SECOND DEPT).

The Second Department determined Family Court properly found Dennis T was a person legally responsible for the child Steven L. The court agreed with Family Court's finding of abuse against three persons using the Family Court Act evidence rule analogous to res ipsa loquitur:

> "A person is a proper respondent in an article 10 proceeding as an other person legally responsible for the child's care' if that person acts as the functional equivalent of a parent in a familial or household setting"... . "Determining whether a particular person has acted as the functional equivalent of a parent is a discretionary, fact-intensive inquiry which will vary according to the particular circumstances of each case" ... . "Factors such as the frequency and nature of the contact between the child and respondent, the nature and extent of the control exercised by the respondent over the child's environment, the duration of the respondent's contact with the child, and the respondent's relationship to the child's parent(s) are some of the variables which should be considered and weighed by a court in determining whether a respondent fits within the catch-all category of section 1012 (g)" ... . * * *
>
> Section 1046(a)(ii) of the Family Court Act "authorizes a method of proof which is closely analogous to the negligence rule of res ipsa loquitur" ... . "The statute also permits findings of abuse against more than one caretaker where multiple individuals had access to the child in the period in which the injury occurred" ... . "In such cases, the petitioner is not required to establish which caregiver actually inflicted the injury or whether they did so together" ... . "[Once] the petitioner establishes a prima facie case of abuse the burden of going forward shifts to respondents to rebut the evidence of . . . culpability, although the burden of proof always remains with the petitioner" ... . **Matter of Unity T. (Dennis T.), 2018 NY Slip Op 07437, Second Dept 11-7-18**

FAMILY LAW, EVIDENCE.

EVIDENCE DID NOT SUPPORT NEGLECT FOR FAILURE TO PROVIDE ADEQUATE SHELTER, EVIDENCE DEMONSTRATED THE HOME WAS IN DISARRAY BUT NOT THAT IT WAS UNSANITARY OR UNSAFE (SECOND DEPT).

The Second Department determined the evidence did not support the finding that mother neglected the child by failing to provide adequate shelter:

> We agree with the Family Court's finding that the petitioner established, by a preponderance of the evidence, that the mother failed to provide the child with proper supervision and guardianship. The evidence demonstrated that she placed the child in near proximity to narcotics and to the very dangerous activity of narcotics trafficking, which posed an imminent danger to the child's physical, mental, and emotional well-being... .
>
> However, we disagree with the Family Court's finding that the petitioner established, by a preponderance of the evidence, that the mother neglected the child by failing to supply the child with adequate shelter based on the unsanitary conditions of the home. While the evidence adduced at the fact-finding hearing demonstrated that the home was in a general state of disarray, it did not establish unsanitary or unsafe conditions such that the child's physical, mental, or emotional condition was impaired or in imminent danger of impairment ... . **Matter of Majesty M. (Brandy P.), 2018 NY Slip Op 07726, Second Dept 11-14-18**

FAMILY LAW, EVIDENCE.

FAMILY COURT DID NOT HAVE ENOUGH EVIDENCE TO WARRANT DENIAL OF MOTHER'S PETITION TO MODIFY CUSTODY, A HEARSAY LETTER FROM THE NYS OFFICE OF CHILDREN AND FAMILY SERVICES CHILD ABUSE AND MALTREATMENT REGISTER, FINDING CERTAIN ALLEGATIONS AGAINST FATHER TO BE UNFOUNDED, WAS INSUFFICIENT (FIRST DEPT).

The First Department, reversing Family Court, determined that Family Court did not have enough evidence before to justify denying mother's petition to modify custody. Family Court relied upon a hearsay letter from the NYS Office of Children and Family Services Child Abuse and Maltreatment Register to the effect that certain allegations against the father were unfounded or unsubstantiated:

> First, the Family Court improperly denied the mother an opportunity to respond to the "unfounded" letter, which was hearsay. Moreover, although the father apparently had it in his possession for approximately two months, he did not provide it to her until the September 20 court appearance.
>
> Second, * * * even if the "unsubstantiated" letter referred to the report made by the older child's school social worker, that letter did not disprove the mother's uncontroverted assertion that, both before and after that report was made, the children had expressed fear of and a desire not to visit with the father. ...
>
> Finally, to the extent that Family Court was making a determination that the parties' child's fear of his father was unfounded based on the "unsubstantiated" letter, and that modification was therefore not in the child's best interests, this was error. Since this was the parties' first appearance before this judge, the court did not have sufficient information about the parties and their child to

> make a comprehensive and independent determination about the child's best interests ... . **Matter of Juliette S. v Tykym S., 2018 NY Slip Op 07960, First Dept 11-20-18**

FAMILY LAW, EVIDENCE.

FAMILY COURT'S FINDING THAT FREEING THE CHILD FOR ADOPTION WOULD NOT BE IN THE CHILD'S BEST INTERESTS WAS NOT SUPPORTED BY A SOUND AND SUBSTANTIAL BASIS (SECOND DEPT).

The Second Department, reversing Family Court, determined it was in the best interests of the child to free the child for adoption without the consent of father. Mother's parental rights had terminated, but the court-appointed evaluator testified the relationship with father was positive and should not be terminated. The Second Department held that other evidence which supported freeing the child for adoption was not given sufficient weight:

> "This Court will not disturb a Family Court's determination regarding the best interests of the child unless it lacks a sound and substantial basis in the record" ... . Here, the hearing court's finding that it would be in the best interests of the child to remain in foster care instead of being freed for adoption lacks such a sound and substantial basis. The finding was based primarily on the opinions offered by the court-appointed evaluator, who recommended that the foster mother have custody of the child because she raised him since he was an infant, she has an "extremely close bond" with him, and she is able to take care of the child's special needs. While the evaluator also opined that the child has a "very positive relationship" with the father, and that it would not be in the best interests of the child to sever that relationship by freeing the child for adoption, the evaluator conceded that the foster mother and the father view each other with "significant distrust," that the child "hears conflicting information" from the foster mother and the father, that the child "senses their anger and conflict," and that the conflict was "very stre not determinative ... . Based on the record before us, we find that the hearing court gave undue weight to the evaluator's conclusions with regard to the benefits of the child's relationship with the father ... and failed to accord sufficient weight to the impact on the child of long-term foster care, which would continue to expose him to the distrust between the foster mother and the father, and deprive the child of "a permanent, nurturing family relationship" ... .
>
> Moreover, the Family Court did not give sufficient weight to testimony from the assigned case planner and the foster mother that the child repeatedly had contact with the birth mother during his visits with the father, in violation of the court's directive precluding such contact with the birth mother. Similarly, the evaluator did not consider either the possibility that the father was exposing the child to the birth mother or the effects on the child of continued contact with the birth mother, information vital to assessing the best interests of the child. **Matter of Jasiah T.-V. S.J. (Joshua W.--Shatesse J.), 2018 NY Slip Op 08020, Second Dept 11-21-18**

FAMILY LAW, EVIDENCE.

TERMINATION OF FATHER'S VISITATION RIGHTS WAS NOT SUPPORTED BY A SOUND AND SUBSTANTIAL BASIS IN THE RECORD, WHICH INCLUDED HEARSAY (THIRD DEPT).

The Third Department, reversing Family Court, determined termination of father's visitation was not supported by a sound and substantial basis in the record:

> It is undisputed that the father engaged in physical violence and verbal abuse directed at the mother. Although the record demonstrates strong support for a change in circumstances and supervised visitation, the record lacks direct evidence that visitation is detrimental to the child; as such, it is presumed that it is in the child's best interests to continue visitation ... . Further, although the mother and maternal grandmother testified regarding concerns about the father's sexual behavior, these concerns were based on hearsay and speculation from vulgar and inappropriate comments made by the father. Concern regarding abuse or potential abuse must have a basis in the record to justify denial of visitation; uncorroborated hearsay alone is not enough ... . Notably, both the mother and the attorney for the child supported continued supervised visitation ... . Thus, Family Court's determination to terminate visitation lacks a sound and substantial basis in the record ... . **Matter of Boisvenue v Gamboa, 2018 NY Slip Op 08211, Third Dept 11-29-18**

FAMILY LAW, EVIDENCE.

FAMILY COURT'S CONCLUSIONS IN THIS CUSTODY MATTER WERE NOT SUPPORTED BY THE RECORD, MATTER REMITTED FOR PROCEEDINGS BEFORE A DIFFERENT JUDGE (THIRD DEPT).

The Third Department, reversing Family Court, determined that the custody determinations were not supported by the record and remitted the matter for further proceedings before a different judge. The decision is too fact-specific to fairly summarize here:

> We agree with the mother that Family Court's decision and order mischaracterizes and, at times, inaccurately reflects the record evidence and that, therefore, its determination lacks a sound and substantial basis in the record. ...
>
> ... [T]he record evidence does not support Family Court's depiction of the mother as "a hands-off parent who appears to pay little attention to the child's needs when he is in her care" or its converse depiction of the father as a "devote[d]" parent with few, if any, flaws. Our review of the evidence reveals a more complicated picture than that portrayed by Family Court. ...
>
> ... [T]he record evidence, including the father's own admissions, completely contradicts Family Court's conclusion that there was no support for the mother's claim of substance abuse and domestic violence by the father. ...
>
> Family Court's conclusion that there "was no credible evidence of domestic violence" by the father against the mother was also contradicted by the record. ...
>
> ... Family Court misconstrued, mischaracterized and otherwise amplified the evidence to portray the mother in the light least favorable. ...

> Moreover, even if Family Court's determination to award the father primary physical custody were supported by a sound and substantial basis, there was no basis for the severe reduction of the mother's overall time with the child, particularly since the parties had previously shared 50/50 custody of the child ... . **Matter of Shirreece AA. v Matthew BB., 2018 NY Slip Op 08215, Third Dept 11-29-18**

FAMILY LAW, IMMIGRATION LAW.

FAMILY COURT SHOULD AMEND ITS ORDER GRANTING A SPECIAL IMMIGRANT JUVENILE STATUS (SIJS) PETITION TO ADDRESS THE REASONS FOR THE REVOCATION OF THE PETITION BY THE US CITIZENSHIP AND IMMIGRATION SERVICES (SECOND DEPT).

The Second Department, reversing Family Court, determined that Family Court should amend its Special Immigrant Juvenile Status (SIJS) order to address the reasons for the revocation of the initial approval of the petition by the US Citizenship and Immigration Services (USCIS):

> The child moved for the issuance of an order making the requisite declaration and specific findings so as to enable him to petition for SIJS. ... [T]he Family Court granted the child's motion.
>
> Thereafter, the child submitted an I-360 petition for SIJS to USCIS. Although the I-360 petition was initially approved, USCIS thereafter advised the child of its intention to "revoke the approval" based upon certain deficiencies in the special findings order. The child then moved to amend the special findings order to address the deficiencies, and the father joined in the motion. In an order dated February 26, 2018, the Family Court denied the motion to amend the special findings order. ...
>
> Under the circumstances presented, we deem it appropriate to amend the special findings order to clarify that the basis for the Family Court's exercise of jurisdiction over this custody proceeding is under New York State law pursuant to Family Court Act § 651(a). We also deem it appropriate to amend the special findings order to specify that it would not be in the best interests of the child to be returned to El Salvador because the mother is unable to protect the child from harm by gang members in El Salvador, who have made threats of violence against him ... . **Matter of Argueta v Santos, 2018 NY Slip Op 07424, Second Dept 11-7-18**

FAMILY LAW, JUDGES.

FAMILY COURT SHOULD NOT HAVE LEFT SCHEDULING SUPERVISED THERAPEUTIC PARENTAL ACCESS TO THE PARTIES (SECOND DEPT).

The Second Department determined Family Court should not have left it to the parties to work out mother's supervised therapeutic parental access:

> Here, the Family Court's determination that there had been a change in circumstances and that it was in the children's best interests to award the father sole legal and residential custody, with the mother's access limited to supervised therapeutic parental access is supported by a sound and substantial basis in the record and, thus, will not be disturbed ... .

> However, the Family Court should have set forth in its order a schedule and designated a provider for supervised therapeutic parental access, rather than implicitly delegating the resolution of those issues to the parties ... . Accordingly, we remit the matter to the Family Court, Orange County, to forthwith set an appropriate schedule and select a provider for the mother's supervised therapeutic parental access with the children. **Matter of Thomas R.K. v Tamara S.K., 2018 NY Slip Op 07725, Second Dept 11-14-18**

FAMILY LAW, JUDGES, APPEALS.

ALTHOUGH FATHER HAD COMPLETED THE PERIOD OF INCARCERATION IMPOSED IN THIS SUPPORT ARREARS PROCEEDING, THE COMMITMENT ORDER IS APPEALABLE BECAUSE OF THE STIGMA ATTACHED TO VIOLATING SUPPORT ALLEGATIONS, ALTHOUGH THE JUDICIAL BIAS ARGUMENT WAS NOT PRESERVED, THE SECOND DEPARTMENT CONSIDERED THE ISSUE AND REVERSED IN THE INTEREST OF JUSTICE (SECOND DEPT).

The Second Department, reversing Family Court, determined that the Family Court judge exhibited bias against the father in this maintenance and support arrears proceeding and the matter was remitted to Family Court before a different judge. Although father had completed the period of incarceration imposed, the commitment order was deemed appealable because of the stigma attached to violating support obligations. The court noted that father should have pbjected and moved to recuse the judge to preserve the bias claim, but the court considered the argument in the interest of justice:

> "[W]hen a claim of bias is raised, the inquiry on appeal is limited to whether the judge's bias, if any, unjustly affected the result to the detriment of the complaining party'" ... . Here, the record reflects that when the parties appeared before the Family Court Judge, the Judge took an adversarial stance toward the father and made numerous improper remarks to him ... . The Judge told the father, among other things, that he "symbolizes everything that's wrong with the world today," and that he was "[s]elfish, self-interested, [and] self-seeking." The Judge repeated similar remarks multiple times during the proceeding. The Judge also called the father "lazy" and "arrogant," and remarked that he was "the last guy that [the Judge would] want to be in a fox hole with" because he would "fold like a cheap suit." The Judge compared the father's accumulation of arrears to "an arsonist that starts a fire that kills one person, that kills ten." Additionally, the Judge made the matter personal by comparing the father's experiences to the Judge's own. For instance, the Judge described his own past misfortune, and detailed how he picked himself up to became a judge. At the conclusion of the proceeding, the Judge committed the father to four times the period of incarceration recommended by the Support Magistrate. Under the circumstances, the bias of the Family Court Judge apparently unjustly affected the result of the proceeding to the detriment of the father. **Matter of Berg v Berg, 2018 NY Slip Op 07719, Second Dept 11-14-18**

FORECLOSURE

FORECLOSURE, BANKING LAW.

PLAINTIFF BANK DID NOT MEET FACE TO FACE WITH DEFENDANT BEFORE THREE MONTHLY MORTGAGE PAYMENTS WERE MISSED, PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT IN THIS FORECLOSURE ACTION SHOULD NOT HAVE BEEN GRANTED (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined plaintiff's motion for summary judgment in this foreclosure action should not have been denied. Plaintiff bank did not seek a face to face meeting with defendant before three mortgage payments were missed:

> In her pro se answer to the amended complaint, defendant alleged that the loan was subject to Federal Housing Administration guidelines and that plaintiff failed to comply with the regulations of the Department of Housing and Urban Development requiring the mortgagee to undertake certain pre-foreclosure measures, including a face-to-face meeting with the mortgagor, with respect to such loans. Although defendant did not specifically cite 24 CFR 203.604, the regulation establishing the face-to-face meeting requirement, in her answer, we afford the pro se answer a liberal reading ... , and conclude that defendant "sufficiently apprise[d] plaintiff" that she was challenging plaintiff's compliance with the requirements of that regulation ... .
>
> Plaintiff failed to establish that it complied with the requirements of 24 CFR 203.604 and thus failed to establish that it was entitled to judgment as a matter of law on the amended complaint... . More specifically, plaintiff did not arrange or attempt to arrange a face-to-face interview with defendant at any time "before three full monthly installments . . . [were] unpaid" (§ 203.604 [b]). Instead, the first attempt was made in June 2011, i.e., more than six months after the first installment went unpaid. Moreover, plaintiff did not establish that it sent notices to defendant by certified mail, as required by section 203.604 (d). **Bank of Am., N.A. v Spencer, 2018 NY Slip Op 07573, Fourth Dept 11-9-18**

FORECLOSURE, CIVIL PROCEDURE.

MOTION TO DISMISS THE COMPLAINT IN THIS FORECLOSURE ACTION FOR FAILURE TO TIMELY SERVE WITHIN THE 120 DAY WINDOW SHOULD HAVE BEEN GRANTED, CRITERIA FOR ALLOWING LATE SERVICE EXPLAINED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendants' motion pursuant to CPLR 306-b to dismiss the complaint in this foreclosure action (with regard to defendant Joseph) because it was not served within 120 days of filing should have been granted. The court explained the criteria for allowing extra time to serve:

> As relevant here, CPLR 306-b provides that "[s]ervice of the summons and complaint . . . shall be made within one hundred twenty days after the commencement of the action." Further, "[i]f service is not made upon a defendant within the time provided in this section, the court, upon motion, shall dismiss the action without prejudice as to that defendant, or upon good cause shown or in the interest of justice, extend the time for service." " Good cause' and interest of justice' are two separate and independent statutory standards" ... . "To establish good cause, a plaintiff must

> demonstrate reasonable diligence in attempting service" ... . "If good cause for an extension is not established, courts must consider the interest of justice' standard of CPLR 306-b" ... , which "requires a careful judicial analysis of the factual setting of the case and a balancing of the competing interests presented by the parties" ... . "Unlike an extension request premised on good cause, a plaintiff [seeking an extension in the interest of justice] need not establish reasonably diligent efforts at service as a threshold matter" ... . "However, the court may consider diligence, or lack thereof, along with any other relevant factor in making its determination, including expiration of the statute of limitations, the potentially meritorious nature of the cause of action, the length of delay in service, the promptness of a plaintiff's request for the extension of time, and prejudice to defendant" ... . "No one factor is determinative—the calculus of the court's decision is dependent on the competing interests of the litigants and a clearly expressed desire by the Legislature that the interests of justice be served" ... .
>
> The plaintiff failed to establish that it exercised reasonably diligent efforts in attempting to effect proper service of process upon Joseph and, thus, failed to show good cause ... . Further, the plaintiff failed to establish that an extension of time was warranted in the interest of justice ... . Where the plaintiff's delay in serving a defendant is protracted, and the defendant has no notice of the action for a protracted period of time, an inference of substantial prejudice arises ... The plaintiff failed to rebut the inference of substantial prejudice that arose due to its protracted delay in serving Joseph, as it failed to come forward with any proof that Joseph had notice of this action prior to being served more than 5½ years after the action was commenced ... . Moreover, the plaintiff failed to explain its more than six-month delay in moving for relief pursuant to CPLR 306-b after it effectuated service upon Joseph ... . Under theses circumstances, the plaintiff failed to establish its entitlement to an extension of time to serve Joseph under the interest of justice standard ... , and its motion should have been denied. **Wells Fargo Bank, NA v Barrella, 2018 NY Slip Op 07486, Second Dept 11-7-18**

FORECLOSURE, CIVIL PROCEDURE, JUDGES.

THE DEFENSE OF LACK OF STANDING WAS NOT RAISED IN THE ANSWER AND WAS THEREFORE WAIVED, JUDGE SHOULD NOT HAVE, SUA SPONTE, DISMISSED THE COMPLAINT ON THAT GROUND (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff's motion for a default judgment and an order of reference should have been granted. By not raising lack of standing as a defense in the answer, the defense was waived. Supreme Court did not have the authority to, sua sponte, deny plaintiff's motion on that ground:

> ... [U]nder this Court's well-established precedent, as articulated in Wells Fargo Bank Minn., N.A. v Mastropaolo (42 AD3d 239), the defense of lack of standing is waived if not raised by the defendant in an answer or pre-answer motion to dismiss. Accordingly, by failing to answer the complaint or to make a pre-answer motion to dismiss the complaint, the defendants waived the defense of lack of standing ... . Under the circumstances of this case, we remit the matter to the Supreme Court, Kings County, for further proceedings before a different Justice. **Wells Fargo Bank, N.A. v Halberstam, 2018 NY Slip Op 07485, Second Dept 11-7-18**

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FORECLOSURE, CONTRACT LAW, EVIDENCE.

PLAINTIFF DID NOT DEMONSTRATE THE CONDITIONS PRECEDENT TO THE ACCELERATION OF THE MORTGAGE DEBT HAD BEEN SATISFIED, PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined that plaintiff's motion for summary judgment in this foreclosure action should not have been granted. The mortgage included conditions precedent to the acceleration of the debt and plaintiff's papers did not demonstrate satisfaction of the conditions precedent:

> The mortgage required that the lender give notice of a date by which the borrower must correct a default in order to avoid acceleration. It further required that the date specified in the notice "be at least 30 days from the date on which the notice is given." The mortgage also provided that notice by first-class mail "is considered given" on the date mailed.
>
> In support of its motion for summary judgment, the plaintiff failed to establish, prima facie, that it complied with this condition precedent to accelerating the mortgage. Specifically, in support of its motion for summary judgment, the plaintiff presented conflicting evidence as to whether it mailed the notice at least 30 days before the date specified in that notice. Inasmuch as the plaintiff's own evidence submitted in support of the motion demonstrated the existence of a triable issue of fact as to whether the plaintiff complied with the 30-day notice provision, the plaintiff's motion should have been denied without regard to the sufficiency of the defendant's opposition papers ...
> . **Wilmington Sav. Fund Socy. FSB v Yisroel, 2018 NY Slip Op 08174, Second Dept 11-28-18**

FORECLOSURE, EVIDENCE.

IT IS NOT NECESSARY TO HAVE POSSESSION OF THE MORTGAGE, AS OPPOSED TO THE NOTE, AT THE TIME OF THE COMMENCEMENT OF A FORECLOSURE ACTION, EVIDENCE ADMISSIBLE UNDER THE BUSINESS RECORDS EXCEPTION TO THE HEARSAY RULE RAISED A QUESTION OF FACT ABOUT PLAINTIFF'S STANDING (FIRST DEPT).

The First Department determined plaintiff had raised a question of fact about whether it had standing to bring this foreclosure action. The court noted that it is not necessary to have possession of the mortgage, as opposed to the note, at the time the action is commenced. A question of fact about possession of the note was raised by evidence admissible pursuant to the business records exception to the hearsay rule:

> "[T]o have standing, it is not necessary to have possession of the mortgage at the time the action is commenced . . . . [T]he note, and not the mortgage, is the dispositive instrument that conveys standing to foreclose under New York law" ... . Plaintiff raised a question of fact as to its possession of the note prior to commencement of the action through the affidavit of Anthony D'Addona, who averred that he reviewed the books and records of plaintiff, kept in the ordinary course of business, and that plaintiff was the holder of the note and mortgage. This affidavit was sworn to on September 28, 2015, prior to commencement of this action. "It is well settled that a business entity may admit a business record through a person without personal knowledge of the document, its history or its specific contents where that person is sufficiently familiar with the corporate records to aver that the record is what it purports to be and that it came out of the entity's files" ... . **DLJ Mtge. Capital v Mahadeo, 2018 NY Slip Op 07963, First Dept 11-20-18**

FORECLOSURE, JUDGES, CIVIL PROCEDURE.

SUPREME COURT SHOULD NOT HAVE, SUA SPONTE, FOUND THAT A DEFENDANT WHO HAD NOT BEEN SERVED WAS A NECESSARY PARTY AND SHOULD NOT HAVE DISMISSED THE FORECLOSURE ACTION AGAINST OTHER DEFENDANTS ON THAT GROUND (SECOND DEPT).

The Second Department, in this foreclosure action, determined Supreme Court should not have, sua sponte, held that a party (Moreno) was a necessary party and should not have dismissed the complaint against the other defendants on that ground:

> Bromley [plaintiff] argues, in effect, that it was denied due process as a result of being unable to contest whether Dual Properties is the fee owner and whether Moreno is a necessary party.
>
> "The lack of notice and opportunity to be heard implicates the fundamental issue of fairness that is the cornerstone of due process" ... .
>
> Here, the record does not support the Supreme Court's conclusion that Moreno's ownership of the property was "uncontested." In any event, the court's determination that Moreno was a necessary party prejudiced Bromley in that "it was never afforded the opportunity to present evidence refuting the court's sua sponte determination" ... .
>
> Accordingly, we disagree with the Supreme Court's determination to, sua sponte, direct the dismissal of the complaint insofar as asserted against the remaining defendants for failure to join a necessary party. **Aurora Loan Servs., LLC v Moreno, 2018 NY Slip Op 08107, Second Dept 11-28-18**

FRAUD

FRAUD, APPEALS.

DAMAGES FOR FRAUD SHOULD HAVE BEEN BASED UPON OUT OF POCKET LOSS, NOT PROFITS THAT WOULD HAVE BEEN EARNED ABSENT THE FRAUD, EVEN THOUGH RESPONDENT WAS ENTITLED TO MORE DAMAGES UNDER THE OUT OF POCKET RULE, NO RELIEF CAN BE AFFORDED TO THE NONAPPEALING PARTY (SECOND DEPT).

The Second Department determined that the trial court used the wrong criteria for assessing damages for fraud, but further determined the damages should be reduced and, even though the respondent was entitled to a higher damages award, no relief could be afforded to a nonappealing party. Damages for fraud must be based on out-of-pocket losses, not profits that would have been earned absent the fraud:

> "The true measure of damage is indemnity for the actual pecuniary loss sustained as the direct result of the wrong" ... . Under this rule, the loss is computed by ascertaining the "difference between the value of the bargain which a plaintiff was induced by fraud to make and the amount or value of the consideration exacted as the price of the bargain"... . Damages are to be calculated to compensate plaintiffs for what they lost because of the fraud, not to compensate them for what they might have gained ... . Under the out-of-pocket rule, there can be no recovery of profits which would have been realized in the absence of fraud ... . **Global Granite Sales Corp. v Sabovic, 2018 NY Slip Op 07414, Second Dept 11-7-18**

IMMIGRATION LAW

IMMIGRATION LAW, MUNICIPAL LAW, APPEALS, CRIMINAL LAW.

STATE AND LOCAL LAW ENFORCEMENT OFFICERS ARE NOT AUTHORIZED TO EFFECT CIVIL ADMINISTRATIVE ARRESTS PURSUANT TO ICE DETAINERS, IMMIGRATION LAW VIOLATIONS ARE NOT CRIMES, HABEAS CORPUS PETITION GRANTED TO FRANCES, A CITIZEN OF INDIA WHO WAS HELD IN A COUNTY JAIL OSTENSIBLY PURSUANT TO AN ICE DETAINER, EVEN THOUGH FRANCES IS NO LONGER IN THE CUSTODY OF THE COUNTY, THE PETITIONER'S CIRCUMSTANCE IS LIKELY TO RECUR AND THE APPEAL WAS CONSIDERED AS AN EXCEPTION TO THE MOOTNESS DOCTRINE (SECOND DEPT).

The Second Department, in a comprehensive opinion by Justice Scheinkman, considering a matter of first impression, determined state and local law enforcement officers are not authorized to effect civil immigration arrests in connection with ICE [Immigration and Customs Enforcement] detainers. The matter came before the court as a habeas corpus petition. The petition alleged that the continued detention (in county jail) of Frances, a citizen of India who had been in the US since his visa expired in 1996, after his criminal sentence was complete, was illegal. Although Frances was in ICE custody at the time of the appeal, Frances's circumstance was deemed likely to recur and the appeal was therefore heard as an exception to the mootness doctrine:

> Following the conclusion of his court proceeding, at which he was sentenced to time served, [Frances] was handcuffed and taken to a courthouse holding cell by members of the Sheriff's Office ... . [B]ased on the ICE warrant, ... Francis was regarded by the Sheriff as being in the custody of ICE. Francis was placed in a jail cell rented by ICE. * * *
>
> Illegal presence in the country, standing alone, is not a crime... ; it is a civil violation that subjects the individual to removal ... . The federal process for removing someone from the country is a civil administrative matter, not a criminal one ... . * * *
>
> New York statutes do not authorize state and local law enforcement to effectuate warrantless arrests for civil immigration law violations. An arrest without a warrant is permitted where an individual "has committed or is believed to have committed an offense and who is at liberty within the state" under certain circumstances prescribed by statute (CPL 140.05). County sheriffs and their deputies are police officers (see CPL 1.20[34]), as are members of the state police, county police, and municipal police. * * *

> The narrow issue in this case is whether New York law permits New York state and local law enforcement officers to effectuate civil immigration arrests, and not whether federal civil immigration officers have the authority to effectuate such arrests. Nor do we decide any issues under federal law deputizing state and local law enforcement officers to act as federal immigration officers. ... [W]e conclude that the Sheriff's policy ... directing the retention of prisoners, who would otherwise be released, pursuant to ICE detainers and administrative warrants is unlawful ... . **People ex rel. Wells v DeMarco, 2018 NY Slip Op 07740, Second Dept 11-14-18**

INSURANCE LAW

INSURANCE LAW.

FAILURE OF NO-FAULT BENEFIT ASSIGNEE TO APPEAR AT EXAMINATIONS UNDER OATH (EUO'S) REQUESTED BY THE CARRIER IS NOT A DEFENSE TO THE CARRIER'S OBLIGATION TO PAY THE NO-FAULT CLAIMS WHERE COVERAGE HAS NOT BEEN TIMELY DENIED (FOURTH DEPT).

The Fourth Department, in a full-fledged opinion by Justice Peradotto, disagreeing with the First Department, reversing Supreme Court, determined that the defendant medical professional corporation's failure to appear at examinations under oath (EUO's) requested by plaintiff insurer (Nationwide) was not a defense to Nationwide's obligation to pay no-fault claims submitted by defendant (where Nationwide had not timely disclaimed coverage):

> Defendant is a medical professional corporation that was assigned claims for no-fault benefits by individuals who purportedly received treatment for injuries allegedly sustained in motor vehicle accidents. Defendant submitted bills for the services it purportedly rendered, along with the assignment of benefit forms, to the insurance carrier plaintiffs (hereafter, Nationwide) seeking reimbursement pursuant to the no-fault law and regulations (see Insurance Law art 51...). As part of an investigation of the validity of the claims, Nationwide sought additional information and requested that defendant submit to EUOs. Despite Nationwide's repeated requests, defendant failed to appear at any of the scheduled EUOs.
>
> Thereafter, Nationwide commenced this declaratory judgment action alleging that, by failing to appear for properly scheduled and noticed EUOs, defendant "breached a material condition precedent to coverage" under the insurance policies and no-fault regulations. Nationwide moved for summary judgment declaring that, as a result of such breach, it was under no obligation to pay or reimburse any of the subject claims, and defendant cross-moved for, inter alia, summary judgment dismissing the complaint.
>
> Supreme Court subsequently granted the motion, and denied the cross motion. The court declared, among other things, that defendant breached a condition precedent to coverage by failing to appear at the scheduled EUOs and determined that Nationwide therefore had the right to deny all claims retroactively to the date of loss, regardless of whether it had issued timely denials.
>
> ... [D]efendant contends that the court erred in granting the motion because ... an insurer is precluded from asserting a litigation defense premised upon nonappearance at an EUO in the absence of a timely denial of coverage and that Nationwide failed to meet its burden of establishing that it issued timely denials. We agree ... . **Nationwide Affinity Ins. Co. of Am. v Jamaica Wellness Med., P.C., 2018 NY Slip Op 07850, Fourth Dept 11-16-18**

INSURANCE LAW, NEGLIGENCE, LABOR LAW-CONSTRUCTION LAW.

ANTISUBROGATION RULE BARRED PLAINTIFF INSURER'S CAUSES OF ACTION, THE UNDERLYING ACTION ALLEGED NEGLIGENCE AND LABOR LAW VIOLATIONS STEMMING FROM A CONSTRUCTION ACCIDENT (SECOND DEPT).

The Second Department, in this construction accident case with multiple subcontractors, insurers and insureds, determined that the antisubrogation rule barred plaintiff-insurer's causes of action:

> The nonparty-respondent The New School (hereinafter TNS) entered into a contract with the nonparty-respondent Tishman Construction Corporation of New York (hereinafter Tishman) for the building of a new facility. Pursuant to the agreement, Tishman entered into trade contracts with various subcontractors, including ... the defendant subcontractors. Tishman also contracted with nonparty ... Geller to provide electrical services.
>
> The defendant subcontractors elected to participate in a Contractor Controlled Insurance Program (hereinafter the CCIP) implemented by Tishman. Geller did not participate in the CCIP, and instead obtained a policy of insurance issued by the plaintiff, Wausau Underwriters Insurance Company ... . As required by the trade contract, both TNS and Tishman were named as additional insureds under the Wausau policy.
>
> The nonparty Harripersaud ..., an employee of Geller, allegedly was injured when he tripped and fell while working at the construction site. Harripersaud commenced a personal injury action ... against TNS and Tishman, alleging negligence and violations of the Labor Law. Tishman's insurer tendered the complaint to the plaintiff, which accepted the tender and agreed to defend and indemnify Tishman and TNS. Subsequently, the plaintiff, as subrogee for Tishman and TNS, commenced this action against the defendant subcontractors. Tishman and TNS moved for leave to intervene and ...to dismiss the complaint. The plaintiff cross-moved to consolidate this action with the Harripersaud personal injury action. ...
>
> The antisubrogation rule operates to bar the plaintiff's causes of action. Under the antisubrogation rule, "an insurer has no right of subrogation against its own insured for a claim arising from the very risk for which the insured was covered" .. . This rule prevents an insurer from passing its losses to its own insured ... . Here, the defendant subcontractors were members of the CCIP, and the CCIP imposed a $500,000 retention obligation on Tishman, as to each occurrence under the policy. Accordingly, the antisubrogation rule bars Tishman and TNS from asserting claims against the defendant subcontractors... . Inasmuch as the antisubrogation rule would bar Tishman and TNS from asserting causes of action against the defendant subcontractors, it bars the plaintiff's causes of action as well. A subrogee "is subject to any defenses or claims which may be raised against the subrogor. Thus, a subrogee may not acquire any greater rights than the subrogor" ... . **Wausau Underwriters Ins. Co. v Gamma USA, Inc., 2018 NY Slip Op 08055, Second Dept 11-21-18**

JUDGES

JUDGES, ATTORNEYS, CIVIL PROCEDURE.

COURT SHOULD NOT HAVE ORDERED THE PAYMENT OF ATTORNEY'S FEES FOR FRIVOLOUS CONDUCT WITHOUT ALLOWING THE AFFECTED PARTY TO BE HEARD (SECOND DEPT).

The Second Department, reversing Supreme Court, determined that the judge should not have ordered the payment of attorney's fees for frivolous conduct without allowing the affected party to be heard on the question:

> "The court, in its discretion, may award to any party or attorney in any civil action or proceeding before the court, . . . costs in the form of reimbursement for . . . reasonable attorney's fees, resulting from frivolous conduct" (22 NYCRR 130-1.1[a]). An award of costs or the imposition of sanctions "may be made either upon motion in compliance with CPLR 2214 or 2215 or upon the court's own initiative, after a reasonable opportunity to be heard" (22 NYCRR 130-1.1[d]). Here, the respondents did not cross-move for costs or sanctions in compliance with CPLR 2215, the respondents' opposition to the petitioner's motion for leave to renew did not clearly articulate a request for costs or sanctions, and there is no indication in this record that the petitioner was afforded an opportunity to be heard on this issue ... . Accordingly, the court improvidently exercised its discretion in awarding costs to the respondents in the form of attorneys' fees in the sum of $2,500 ... . **Matter of Garvey v Sullivan, 2018 NY Slip Op 07724, Second Dept 11-14-18**

LABOR LAW-CONSTRUCTION LAW

LABOR LAW-CONSTRUCTION LAW.

COMPANY WHICH HIRED PLAINTIFF'S EMPLOYER AND PROPERTY OWNER LIABLE FOR PLAINTIFF'S FALL UNDER LABOR LAW 240 (1) AND 241 (6), THE COMPANY WHICH HIRED PLAINTIFF'S EMPLOYER WAS A PROPER DEFENDANT BECAUSE IT HAD THE AUTHORITY TO SUPERVISE, EVEN IF IT DID NOT EXERCISE THAT AUTHORITY (SECOND DEPT).

The Second Department, reversing Supreme Court, determined that the company which hired plaintiff's employer, New York Plumbing, and the property owner,, Park Plaza, were liable for plaintiff's fall, pursuant to Labor Law 240 (1) and 241 (6). New York Plumbing was liable because it had the authority to supervise plaintiff's work, even if it did not exercise that authority. Park Plaza was not entitled to summary judgment on its indemnification action against New York Plumbing because it did not demonstrated New York Plumbing exercised actual supervision over plaintiff's work. Plaintiff fell from the top of a temporary oil storage tank which was being emptied and cleaned:

> Contrary to New York Plumbing's contention, the plaintiff demonstrated, prima facie, that New York Plumbing had the authority to exercise control over the plaintiff's work, even if it did not actually do so, and that New York Plumbing was therefore a proper defendant under the Labor Law ... .
>
> Moreover, the plaintiff demonstrated that he was engaged in a protected activity under Labor Law §§ 240(1) and 241(6) when he was injured ... .
>
> The plaintiff demonstrated his prima facie entitlement to judgment as a matter of law on the issue of liability on the Labor Law § 240(1) cause of action insofar as asserted against the Park Plaza defendants [the property owner] and New York Plumbing. The plaintiff submitted evidence that he fell from a 12-to 16-foot high surface, and that he had not been provided with safety devices to protect him from such a fall ... .
>
> The plaintiff's Labor Law § 241(6) cause of action was predicated on an alleged violation of 12 NYCRR 23-1.7(d) ... . The Park Plaza defendants and New York Plumbing failed to establish, prima facie, that a slippery condition on the oil tank was not a proximate cause of the plaintiff's fall ... .
>
> Finally, the Park Plaza defendants did not demonstrate their prima facie entitlement to judgment as a matter of law on their cross claim for common-law indemnification against New York Plumbing, as their submissions did not establish, prima facie, that New York Plumbing exercised actual supervision over the plaintiff's work ... . **Padilla v Park Plaza Owners Corp., 2018 NY Slip Op 07317, Second Dept 10-31-18**

LABOR LAW-CONSTRUCTION LAW.

PLAINTIFF WAS NOT INVOLVED IN CONSTRUCTION WORK WHEN HE FELL, LABOR LAW 240(1) CAUSE OF ACTION PROPERLY DISMISSED (SECOND DEPT).

The Second Department determined defendant's summary judgment motion on the Labor Law 240(1) cause of action was properly granted. Although plaintiff fell when attempting to replace light bulbs in a strobe light on top of a van, he was not involved in construction work:

> Labor Law § 240(1) "does not cover routine maintenance done outside the context of construction work" ... . The replacement of "components that require replacement in the course of normal wear and tear" constitutes routine maintenance ... . At the time of his fall, the plaintiff was engaged in the task of replacing burnt out light bulbs, which constitutes routine maintenance and therefore falls outside of the scope of Labor Law § 240(1) ... . Contrary to the plaintiff's contention, his work did not take place in the context of a larger project which "encompassed activity protected under the statute ... . **Trotman v Verizon Communications, Inc., 2018 NY Slip Op 07483, Second Dept 11-7-18**

LABOR LAW-CONSTRUCTION LAW.

DEFENDANTS DID NOT EXERCISE SUPERVISORY CONTROL OVER THE MEANS AND MANNER OF PLAINTIFF'S WORK. LABOR LAW 200 AND COMMON LAW NEGLIGENCE CAUSES OF ACTION PROPERLY DISMISSED (FOURTH DEPT).

The Fourth Department determined the Labor Law 200 and common law negligence causes of action were properly dismissed because the plaintiff's injuries resulted from the means and manner of work and defendants did not exercise supervisory control over plaintiff's work:

> "It is settled law that where the alleged defect or dangerous condition arises from the contractor's methods and the owner exercises no supervisory control over the operation, no liability attaches to the owner under the common law or under section 200 of the Labor Law"... . "Defendants moving for summary judgment on Labor Law § 200 and common-law negligence causes of action may thus show their entitlement to summary judgment by establishing that plaintiff's accident resulted from the manner in which the work was performed, not from any dangerous condition on the premises, and [that] defendants exercised no supervisory control over the work' "... . Here, defendants established that the wires hanging above the roof of the garage did not, as alleged by plaintiff, constitute a "tripping and walking hazard" along an area of the property leading to the work site; instead, the alleged defect arose from plaintiff's method of performing the work by foregoing appropriate, authorized means of obtaining access to the utility pole and deciding to traverse the pitched roof of the garage over which the wires hung ... . Inasmuch as defendants exercised no supervisory control over the injury-producing work, defendants established their entitlement to summary judgment dismissing the section 200 and common-law negligence causes of action ... . **Anderson v National Grid USA Serv. Co., 2018 NY Slip Op 07572, Fourth Dept 11-9-18**

LABOR LAW-CONSTRUCTION LAW.

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT ON THE LABOR LAW 240 (1) CAUSE OF ACTION PROPERLY DENIED, PLAINTIFF TESTIFIED OTHER SAFETY DEVICES (LADDERS, SCAFFOLDS) WERE AVAILABLE AND DID NOT DEMONSTRATE HIS ACTIONS WERE NOT THE SOLE PROXIMATE CAUSE OF HIS INJURIES (SECOND DEPT).

The Second Department determined plaintiffs' motion for summary judgment on the Labor Law 240 (1) cause of action was properly denied. Plaintiff was directed to repair the top rung of a permanent ladder which was missing a bolt. Plaintiff tried to pull himself up by grabbing the top rung which allegedly gave way causing him to fall. Plaintiff testified there were other safety devices (ladders, scaffolding) he could have used and did not demonstrate his actions did not constitute the sole proximate cause of his injuries:

> "The single decisive question in determining whether Labor Law § 240(1) is applicable is whether the plaintiff's injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential" ... .
>
> In order to obtain summary judgment on the issue of liability on a Labor Law § 240(1) cause of action, a plaintiff is required to demonstrate, prima facie, that there was a violation of the statute and that the violation was a proximate cause of his or her injuries ... . "Merely because a worker is injured while working above ground does not ipso facto mean that the injury resulted from an elevation-related risk contemplated by Section 240(1) of the Labor Law'" ... .

> Here, the plaintiffs failed to establish, prima facie, that there was a violation of Labor Law § 240(1), or that the injured plaintiff's actions were not the sole proximate cause of his injuries... In support of their motion, the plaintiffs submitted the injured plaintiff's deposition testimony in which he stated that he fell when the top rung of the ship's ladder, which he knew was missing a bolt and which he had been sent up to the roof to replace, detached while he was in the process of climbing the ladder and after he had attempted to pull himself up by placing his hand on the top rung. The injured plaintiff also testified at his deposition that there were other ladders and pipe scaffolding available to use at the jobsite. **Jones v City of New York, 2018 NY Slip Op 07708, Second Dept 11-14-18**

LABOR LAW-CONSTRUCTION LAW, CIVIL PROCEDURE.

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT ON HIS LABOR LAW 240(1) CAUSE OF ACTION SHOULD HAVE BEEN GRANTED, ARGUMENT IN PLAINTIFF'S REPLY PAPERS SHOULD HAVE BEEN CONSIDERED (FIRST DEPT).

The First Department determined plaintiff's motion for summary judgment on his Labor Law 240(1) cause of action should have been granted, noting that plaintiff's argument in the reply papers should have been considered because it was a response to defendants' opposition motion:

> Plaintiff was injured when a metal shim plate affixed to a steel column, that was being installed as part of a temporary truss system, suddenly detached and hit him in the head. Plaintiff established that the accident was proximately caused by the undisputed failure of safety devices that were supposed to afford proper protection against the elevation-related risks that plaintiff faced during the installation of the column being hoisted into place ... . The tack welds used to secure the metal shim plate to the column were "safety devices" for the purposes of Labor Law § 240(1) because they were intended to be a temporary measure to keep the shim plate attached to the column during installation ... . The welds were to be removed once the column was in place, at which time the plates would be permanently bolted into place. The evidence established that the accident occurred when the welds failed, inasmuch as the shim plate, which weighed between 200 and 400 pounds, was welded on only one side of the metal column ... . Thus, the shim plate "fell because of the inadequacy of a safety device. . .[that was] put in place as to give proper protection for" plaintiff, entitling him to partial summary judgment ... .
>
> The motion court should have considered plaintiff's reply argument that the one-sided tack welds were insufficient to safely secure the shim plate to the column because it was made in response to defendants' opposition to the motion ... . **Keerdoja v Legacy Yards Tenant, LLC, 2018 NY Slip Op 07537, First Dept 11-8-18**

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LABOR LAW-CONSTRUCTION LAW, CIVIL PROCEDURE, WORKERS' COMPENSATION, JUDGES.

LABOR LAW 200 CAUSE OF ACTION SHOULD HAVE BEEN DISMISSED BECAUSE DEFENDANT GENERAL CONTRACTOR DID NOT EXERCISE SUPERVISORY CONTROL OVER THE MANNER OF PLAINTIFF'S WORK, SUPREME COURT SHOULD NOT HAVE, SUA SPONTE, DISMISSED CROSS CLAIMS BECAUSE THAT RELIEF WAS NOT REQUESTED, PLAINTIFF'S EMPLOYER WAS NOT ENTITLED TO PROTECTION FROM SUIT UNDER THE WORKERS' COMPENSATION LAW BECAUSE IT DID NOT MAINTAIN A WORKERS' COMPENSATION POLICY (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, in a comprehensive decision, over a comprehensive dissent, determined that the general contractor, Ultimate, was not liable under Labor Law 200 for plaintiff's fall through an opening in planks and plywood covering a stairwell opening because the accident was attributable to the manner of the work and Ultimate did not exercise any supervisory control over the installation of drywall by the plaintiff. The dissent argued that there was a question of fact whether the opening in the stairwell covering was a dangerous condition of which Ultimate had notice, which is also a ground for liability under Labor Law 200. The Second Department noted that the court should not have sua sponte dismissed Ultimate's cross claims against the drywall company (Fortin) because such relief was not requested. The Second Department further noted that Fortin was not entitled to protection from plaintiff's suit under the Workers' Compensation Law on the ground that plaintiff was Fortin's employee because Fortin did not maintain a Workers' Compensation policy:

> "Labor Law § 200(1) is a codification of the common-law duty of an owner or general contractor to provide workers with a safe place to work"... . "Cases involving Labor Law § 200 fall into two broad categories: namely, those where workers are injured as a result of dangerous or defective premises conditions at a work site, and those involving the manner in which the work is performed" ... . Where "a claim arises out of alleged defects or dangers arising from a subcontractor's methods or materials, recovery against the owner or general contractor cannot be had unless it is shown that the party to be charged exercised some supervisory control over the operation" ... . "A defendant has the authority to supervise or control the work for purposes of Labor Law § 200 when that defendant bears the responsibility for the manner in which the work is performed" ... . "[M]ere general supervisory authority at a work site for the purpose of overseeing the progress of the work and inspecting the work product is insufficient to impose liability under Labor Law § 200" ... .
>
> ... Ultimate established, ... that the accident arose from the method and manner in which the plaintiff and Jean-Guy Fortin covered the stairwell opening ... .
>
> The Supreme Court should not have, in effect, sua sponte, directed dismissal of Ultimate's cross claims against Fortin for common-law indemnification and contribution, which relief Fortin did not request in its motion papers... . Moreover, the Supreme Court should have granted that branch of Ultimate's motion which was for summary judgment on its cross claim against Fortin for common-law indemnification. Contrary to Fortin's contention, Ultimate's cross claims are not barred by Workers' Compensation Law § 11. ... Ultimate established that Fortin did not procure workers' compensation on behalf of the plaintiff ... . Therefore, Fortin is not entitled to the benefit of the workers' compensation bar. **Poulin v Ultimate Homes, Inc., 2018 NY Slip Op 07468, Second Dept 11-7-18**

LABOR LAW-CONSTRUCTION LAW, EVIDENCE, CIVIL PROCEDURE, APPEALS.

QUESTION OF FACT WHETHER PLAINTIFF-DECEDENT'S INJURY WAS CAUSED BY A TIPPING LADDER, FACTUAL ASSERTIONS IN A MEMO OF LAW OPPOSING PLAINTIFF-DECEDENT'S MOTION FOR SUMMARY JUDGMENT ON THE LABOR LAW 240 (1) CAUSE OF ACTION PRESERVED ISSUES FOR APPEAL, PLAINTIFF-DECEDENT'S STATEMENT TO HIS WIFE IN THE EMERGENCY ROOM PROPERLY CONSIDERED AS A DECLARATION AGAINST INTEREST (FIRST DEPT).

The First Department, reversing Supreme Court, determined that plaintiff-decedent's motion for summary judgment on his Labor Law 240 (1) cause of action should not have been granted. Decedent's statement to his wife in the emergency room, to the effect he should not have used the ladder as he did, was admissible as a declaration against interest. There was evidence from a co-worker that the ladder may not have been the cause of decedent's injuries, i.e., there was evidence decedent was suffering chest pains 10 feet away from the ladder, which was upright. The court noted that factual assertions included in a memorandum of law in opposition to plaintiff-decedent's motion were properly considered and preserved issues for appeal:

> Plaintiff made a prima facie showing of entitlement to judgment as a matter of law on the Labor Law § 240(1) claim by presenting decedent's statement that he was working on a ladder when it started to move, and when he tried to stabilize the ladder, it tipped and struck him in the chest ... . Plaintiff was not "required to present further evidence that the ladder was defective" ... .
>
> However, defendants raised triable issues of fact as to whether decedent's injuries were caused by an accident involving a ladder. Two accident reports set forth his alleged statement that he was working on the ladder when he started feeling chest pains and his legs became "unsteady" or "wobbly." Moreover, decedent's coworker, who was working in the same apartment unit separated from decedent by a concrete wall but went over to decedent's area, not in response to any commotion but for routine purposes, saw that the ladder was in the upright position about 10 feet away from decedent when he expressed that he was suffering from chest pains ... . Although decedent was disoriented and unable to answer basic questions at some points, he eventually became alert while in the hospital, yet his medical records do not refer to any ladder accident.
>
> Contrary to plaintiff's assertion, defendants preserved their arguments about triable issues of fact by asserting them in their memorandum of law in opposition to plaintiff's partial summary judgment motion. **Caminiti v Extell W. 57th St. LLC, 2018 NY Slip Op 07667, First Dept 11-13-18**

LANDLORD-TENANT

LANDLORD-TENANT, CONTRACT LAW.

PROPRIETARY LEASE PROVISION ALLOWING THE LANDLORD TO RECOVER ATTORNEY'S FEES EVEN WHEN THE LANDLORD IS IN DEFAULT IS UNCONSCIONABLE AND UNENFORCEABLE (FIRST DEPT).

The First Department determined that a provision in a lease which required the petitioner tenant to pay the respondent landlord's attorney's fees even where the landlord was in default was unenforceable as

unconscionable. Petitioner tenant had sued the landlord for failure to transfer shares in an apartment in accordance with petitioner's husband's wishes:

> In 2012, petitioner's husband, who owned the shares to another apartment in the building, agreed to transfer his shares to petitioner. Petitioner paid a transfer fee to respondent so that it would transfer the shares to her. She later sued respondent for default of the lease agreement and for statutory violations because respondent had not transferred the shares to her husband's apartment to her. Respondent answered petitioner's complaint and asserted a counterclaim for attorneys' fees under paragraph 6(7)(c). * * *
>
> .. [W]we find that an attorneys' fees provision which provides that the tenant must pay attorneys' fees if it commences an action against the landlord based upon the default of the landlord is unconscionable and unenforceable as a penalty. Paragraph 6(7)(c) of the proprietary lease permits the landlord to recover attorneys' fees when the tenant brings an action against the landlord even when the landlord is in default. To enforce such a provision would produce an unjust result because it would dissuade aggrieved parties from pursuing litigation and preclude tenant-shareholders from making meaningful decisions about how to vindicate their rights in legitimate instances of landlord default. **Matter of Krodel v Amalgamated Dwellings Inc., 2018 NY Slip Op 07531, First Dept 11-8-18**

LEGAL MALPRACTICE

LEGAL MALPRACTICE, CIVIL PROCEDURE, ATTORNEYS, NEGLIGENCE.

QUESTION OF FACT WHETHER THE CONTINUOUS REPRESENTATION DOCTRINE TOLLED THE STATUTE OF LIMITATIONS IN THIS LEGAL MALPRACTICE ACTION (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, determined there was a question of fact whether the continuous representation doctrine tolled the statute of limitations. Defendant attorney (Weiss) were hired by plaintiff to bring a personal injury action. The legal malpractice action was filed more than three years after the statute had run on the personal injury case:

> The complaint alleged that after the plaintiff executed the retainer agreement, Weis informed the plaintiff that the defendants were going to commence a personal injury and products liability action against the owner of the table saw, the manufacturer of the table saw, and " everyone that touched the table saw'" until it was sold to the homeowner; the personal injury claim was " worth millions of dollars'"; and it "would take up to seven (7) years to resolve" the personal injury claim. The complaint further alleged that from approximately September 2008 to late 2008, the plaintiff contacted Weis approximately every two weeks to inquire about the status of the personal injury claim. Weis allegedly advised the plaintiff to " put the case on the back burner as it was going to take a long time to resolve,'" and that Weis " had the plaintiff's contact information,'" and " if he needed the plaintiff, he would contact him.'" The complaint also alleged that between approximately late 2008 and July 2014, the plaintiff called the defendants' law office every six to eight months to check on the status of the personal injury claim and spoke to a secretary each time. The complaint alleged that on July 29, 2014, the plaintiff went to the defendants' office and asked Weis "when his court date was" because "it was getting close" to the seven-year "anniversary of the accident." Weis allegedly told the plaintiff that he had " no case,'" and that Weis thought the plaintiff had " disappeared.'" ...

.. [T]the plaintiff raised a question of fact as to whether the continuous representation doctrine tolled the running of the statute of limitations until July 29, 2014, when Weis allegedly informed the plaintiff that he did not have a case. Upon entering into the retainer agreement, the plaintiff and the defendants reasonably intended that their professional relationship of trust and confidence, focused upon the personal injury claim, would continue. The complaint adequately alleged that the plaintiff was "left with the reasonable impression" that the defendants were, "in fact, actively addressing [his] legal needs" until that date. The allegations in the complaint failed to reflect, as a matter of law, that the plaintiff knew or should have known that the defendants had withdrawn from representation on the personal injury claim more than three years before the legal malpractice action was commenced ... . **Schrull v Weis, 2018 NY Slip Op 07769, Second Dept 11-14-18**

LIEN LAW

LIEN LAW.

THE LIEN LAW DOES NOT PROVIDE THAT A TOWING COMPANY STORING A CAR PURSUANT TO A POLICE IMPOUND HAS THE RIGHT TO DEMAND A RELEASE FROM THE POLICE DEPARTMENT AND A HOLD HARMLESS AGREEMENT BEFORE RELEASING THE CAR, THE CAR SHOULD HAVE BEEN RELEASED WHEN PETITIONER FIRST REQUESTED IT, IN ADDITION, THE $50 A DAY STORAGE FEE IS EXCESSIVE (THIRD DEPT).

The Third Department determined respondent towing company, which was storing petitioner's car pursuant to a police impound, did not have the authority to demand police approval for release of the car or a hold harmless agreement, and the $50 a day storage fee was excessive. The car should have been released when petitioner first requested it:

On October 29, 2016, respondent All County Towing and Recovery (hereinafter respondent) towed a vehicle to its facility at the direction of a local police department. On November 2, 2016, respondent mailed a notice to the registered owner of the vehicle and petitioner, a lienholder, advising that the vehicle was in its possession as a result of a police impound, that a lien was being asserted pursuant to Lien Law § 184, that storage fees were accruing in the amount of $50 per day and that, once the vehicle was released from police impound, it could be retrieved "upon full payment of all charges accrued" as of the date of release. That same day, petitioner offered to pay the fees then due in order to take possession of the vehicle, but respondent refused to surrender the vehicle unless petitioner obtained a release authorization from the local police department. Petitioner's agent again attempted to recover the vehicle on November 7, 2016, and reported that respondent now demanded, in addition to a police release, the execution of a hold-harmless agreement in its favor. ...

... [W]e conclude that nothing in Lien Law § 184 authorized respondent to condition the release of a vehicle upon the provision of a release authorization from law enforcement officials or the execution of a hold-harmless agreement in its favor ... .

... [W]e agree with Supreme Court that respondent's $50

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MENTAL HYGIENE LAW

MENTAL HYGIENE LAW, CRIMINAL LAW, APPEALS, EVIDENCE.

PETITIONER SEX OFFENDER HAD THE RIGHT TO APPEAL FROM A RULING WHICH GRANTED RELIEF REQUESTED IN THE ALTERNATIVE BUT DENIED THE MORE COMPLETE RELIEF REQUESTED, EVIDENCE SUPPORTED FINDING THAT PETITIONER SUFFERED FROM A MENTAL ABNORMALITY AND REQUIRED A REGIMEN OF STRICT AND INTENSIVE SUPERVISION AND TREATMENT (SIST) (FOURTH DEPT).

The Fourth Department determined petitioner had the right to appeal a ruling which granted relief he had requested in the alternative but denied the more complete relief requested in the petition. The court further found that the evidence supported the finding that petitioner is a detained sex offender with a mental abnormality and required a regimen of strict and intensive superivsion and treatment (SIST):

> ... [W]e conclude that petitioner is aggrieved by the order because, although Supreme Court granted one of the forms of the relief he requested in the alternative, i.e., release under a regimen of SIST, the primary relief he sought was release to the community without conditions, and the denial of that part of the petition involved a substantial right of petitioner ... .
>
> We ... reject petitioner's contention that basing the determination that he has a mental abnormality on a diagnosis of unspecified paraphilic disorder does not comport with the requirements of due process. That diagnosis is contained in the current edition of the Diagnostic and Statistical Manual — Fifth Edition (DSM-5). Although there is limited case law concerning that diagnosis, the Court of Appeals has repeatedly held that basing such a determination on the very similar former diagnosis of paraphilia not otherwise specified (paraphilia NOS) meets the requirements of due process ... , and the diagnosis of unspecified paraphilic disorder has similar diagnostic requirements as the former diagnosis of paraphilia NOS. ...
>
> In addition, "to the extent that [petitioner] challenges the validity of [unspecified paraphilic disorder] as a predicate condition, disease or disorder,' we need not reach that argument because he did not mount a Frye challenge to the diagnosis" ... . **Matter of Luis S. v State of New York, 2018 NY Slip Op 07852, Fourth Dept 11-16-18**

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MUNCIPAL LAW

MUNICIPAL LAW, CIVIL RIGHTS LAW, CIVIL PROCEDURE, FALSE ARREST, FALSE IMPRISONMENT, ASSAULT, BATTERY. MALICIOUS PROSECUTION.

NO NOTICE OF CLAIM REQUIRED FOR ALLEGED VIOLATIONS OF 42 USC 1983, STATUTE OF LIMITATIONS EXPIRED ON ASSAULT AND BATTERY, PERMISSION TO FILE LATE NOTICE OF CLAIM ON THE REMAINING STATE CHARGES SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined petitioner's application for permission to file a late notice of claim should not have been granted. After criminal charges were dismissed, eight months after the deadline for filing a notice of claim, petitioner sought to bring an action alleging violations of 42 USC 1983, false arrest, false imprisonment, assault, battery, and malicious prosecution. The Second Department found that a notice of claim is not required for the 42 USC 1983 action, the statute of limitations had expired on the assault and battery actions, reports documenting an investigation did not provide the city with timely notice of the essential facts of the claim, the excuse for the delay was not reasonable, and petitioner did not show the city was not prejudiced by the delay:

> The branch of the petition which sought leave to serve a late notice of claim to assert, pursuant to 42 USC § 1983, violations of the petitioner's federal civil and constitutional rights, should have been denied as unnecessary... . Such a claim is not subject to the State statutory notice of claim requirement ... .
>
> We disagree with the Supreme Court's conclusion that the City acquired actual knowledge of the essential facts constituting the relevant state law claims within 90 days after they arose or a reasonable time thereafter. Actual knowledge could not be readily inferred from two reports dated June 18, 2015, documenting an internal investigation conducted by the police department to determine how a firearm was allegedly carried into, and concealed within, the station house, that "a potentially actionable wrong had been committed by the [City]" against the plaintiff ... . Moreover, the mere alleged existence of other police reports and records, without evidence of their content, and the involvement of the City's police officers in the alleged incident, without more, were insufficient to impute actual knowledge to the City ... .
>
> We also disagree with the Supreme Court's conclusion that the petitioner presented a reasonable excuse for his failure to serve a timely notice of claim. The petitioner's incarceration did not constitute such an excuse, since the relevant state law claims did not accrue, and the petitioner's time to serve a notice of claim did not begin to run, until he was released from custody ... . **Matter of Nicholson v City of New York, 2018 NY Slip Op 08134, Second Dept 11-28-18**

MUNICIPAL LAW, ENVIRONMENTAL LAW, EMPLOYMENT LAW.

BUILDING INSPECTOR WAS PROPERLY TERMINATED FOR FAILURE TO REQUIRE ASBESTOS ABATEMENT FOR A DEMOLISHED BUILDING, BECAUSE THE ACTIONS OF THE INSPECTOR CONSTITUTED CRIMES UNDER THE ENVIRONMENTAL CONSERVATION LAW AND PENAL LAW, THE EMPLOYMENT-RELATED CHARGES WERE TIMELY (THIRD DEPT).

The Third Department determined that petitioner, formerly a village building inspector, was properly terminated for failing to require asbestos abatement for a demolished building. Because the allegations constituted crimes pursuant to the Environmental Conservation Law (ECL) the charges were not time-barred. The evidence was deemed sufficient to support the charges:

> Petitioner's primary contention on appeal is that the charge should have been dismissed as untimely. Indeed, "no removal or disciplinary proceeding shall be commenced more than eighteen months after the occurrence of the alleged incompetency or misconduct complained of and described in the charges" (Civil Service Law § 75 [4... . However, this limitations period does not apply "where the incompetency or misconduct complained of and described in the charges would, if proved in a court of appropriate jurisdiction, constitute a crime" ... .
>
> ... [P]etitioner is alleged to have "knowingly, unlawfully and intentionally engage[d] persons to effect the unauthorized demolition of the [building], knowing that unabated asbestos was located therein or thereupon, causing the release of a substance hazardous to public health, safety or the environment, said substance being asbestos." If proven, these allegations would constitute the crime of endangering public health, safety or the environment in the fourth degree (see ECL 71-2711 [3]). As to count 9, petitioner is alleged, with regard to the demolition of the building, to have "engag[ed] persons neither certified nor qualified to abate the asbestos located therein, . . . knowing that asbestos was located therein, such demolition having been performed without asbestos abatement or any reasonable procedure to prevent the release of asbestos into the public air, . . . [and] having released a considerable amount of [asbestos] dust and debris into the air" in a populated area. These allegations would, if proven at trial, constitute the crime of criminal nuisance in the second degree (see Penal Law § 240.45 [1]). Likewise, we find that the allegations against petitioner as detailed in counts 5 through 7 would constitute, if established at trial, official misconduct (see Penal Law § 195.00 [2] ...). Accordingly, the Hearing Officer properly found that the charge is not time-barred ... .
>
> At the hearing, petitioner admitted that he was aware that the demolition of the building not only began without the requisite permits, but that the contractors hired to complete the job agreed to do so for only $5,000 — rather than an estimated $150,000 — in exchange for future contracts. It is further undisputed that the demolition resulted in the release of asbestos fibers where workers and passersby would be exposed to the legislatively-recognized carcinogenic agent... . As to the quantity of asbestos released, a report conducted more than a year prior to the building's demolition found varying percentages of asbestos in the building's products — from 1.4% to 23.5% — far exceeding the 1% threshold necessary to trigger abatement requirements ... . Petitioner testified that, although he was aware that the building contained asbestos and had discussed this report with respondent's civil engineer, John Fuller, he had not read the report and "assumed" that the quantity of asbestos present did not require abatement. When asked why he did not investigate the issue of abatement further in his role as respondent's Code Enforcement Officer, he stated that he "had no obligation" to do so. Further, the Hearing Officer credited the testimony of Chief of Police Robert Mir that petitioner had told one of the demolition contractors, Sam Kearney, that he was "good to go" in response to concerns about whether asbestos was present in the building. Marciano Soto, a contractor hired to supervise the demolition of the building, similarly testified that petitioner told him on multiple occasions that the building did not contain asbestos. Upon our review, we find substantial evidence in the record to sustain the charge that petitioner "committ[ed]

> acts constituting crimes" — namely, endangering public health, safety or the environment in the fourth degree, official misconduct and criminal nuisance in the second degree — and, thus, to support the determination terminating petitioner's employment ... . **Matter of Snowden v Village of Monticello, 2018 NY Slip Op 08226, Third Dept 11-29-18**

MUNICIPAL LAW, NEGLIGENCE, LABOR LAW-CONSTRUCTION LAW.

MOTION TO DEEM NOTICE OF CLAIM FILED ONE DAY LATE TIMELY SHOULD HAVE BEEN GRANTED (FIRST DEPT).

The First Department, reversing Supreme Court, determined petitioner's motion to deem the notice of claim timely filed should have been granted even if the excuse for the delay was not reasonable. The notice of claim was one day late:

> CUCF [defendant City University Construction Fund] acquired actual notice of the essential facts constituting the claim within a reasonable time after the expiration of the 90-day statute of limitations period due to the fact that petitioner filed his notice of claim only one day late, on the 91st day after the accident occurred. Moreover, the notice of claim provides the essential facts constituting the claim and further describes CUCF's alleged negligence and alleged violations of Labor Law §§ 240(1), 241(6) and 200, and certain Industrial Code provisions.
>
> Additionally, petitioner has demonstrated that his one-day delay in serving the notice of claim on CUCF did not substantially prejudice CUCF's defense on the merits. CUCF had actual knowledge of the facts constituting petitioner's claim only one day after the expiration of the 90-day statutory period and thus, had ample opportunity to conduct a thorough investigation. ...
>
> Even if petitioner's excuse for the delay in filing the notice of claim, specifically, that such delay was due to a clerical error made by the process server, was unreasonable, "the absence of a reasonable excuse is not, standing alone, fatal to the application," especially in a case such as this one where respondent had actual notice of the essential facts constituting petitioner's claim and where respondent was not prejudiced by the delay ... . **Matter of Dominguez v City Univ. of N.Y., 2018 NY Slip Op 08084, First Dept 11-27-18**

NEGLIGENCE

NEGLIGENCE.

DRAM SHOP CAUSE OF ACTION AGAINST DEFENDANT RESTAURANT IN THIS THIRD-PARTY ASSAULT CASE PROPERLY DISMISSED, BUT NEGLIGENCE CAUSE OF ACTION SHOULD NOT HAVE BEEN DISMISSED (FIRST DEPT).

The First Department determined defendant's motion for summary judgment on the Dram Shop Act cause of action was properly granted, but the negligence cause of action in this third-party assault case should not have been granted. There was uncontested evidence the assailant did not appear to be drunk when served. But there was a question of fact whether the defendant restaurant took adequate measures to protect plaintiff from a second attack by the assailant:

> Defendant was entitled to summary judgment dismissing plaintiff's cause of action under the Dram Shop Act (General Obligations Law § 11-101; see also Alcohol Beverage Control Law § 65). A witness testified that plaintiff's assailant did not appear visibly intoxicated at the time he was served two drinks by defendant. This evidence was sufficient to make out a prima facie showing that the assailant was not visibly intoxicated at the time he was served alcohol, since it is clear from the record that he was not served from that point in time until he attacked plaintiff ... .
>
> While the first assault was sudden and unforseeable, and therefore not actionable, defendant failed to demonstrate as a matter of law that it took reasonable actions to protect plaintiff from the assailant on the second assault and that it was not foreseeable. It is true that the husband of defendant's owner averred that he was escorting the assailant, who appeared to have calmed down "somewhat," from the premises, when he suddenly lunged two or three feet to where plaintiff was standing, and struck him. However, another witness testified that immediately prior to assailant's attack on plaintiff, he did not see anyone accompanying or escorting the assailant while the assailant exited defendant's establishment. **Ricaurte v Inwood Beer Garden & Bistro Inc., 2018 NY Slip Op 07242, First Dept 10-30-18**

NEGLIGENCE.

DEFENDANT TOWN DID NOT DEMONSTRATE THE HUMP OVER WHICH PLAINTIFF ALLEGEDLY TRIPPED AND FELL WAS OPEN AND OBVIOUS, TOWN'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined that the defendant town did not demonstrate the hump over which plaintiff allegedly tripped and fell was open and obvious. Therefore the town's motion for summary judgment should not have been granted:

> The Town had installed a drain to keep water off this particular ballfield and covered the drain with asphalt, creating a hump. This hump extended to the area between the players' benches and the entrance to the ballfield on the third base side. The injured plaintiff was attempting to move through the entrance on the third base side when he tripped and fell over the hump. ...

> A landowner has a duty to maintain its premises in a reasonably safe condition ... . There is, however, no duty to protect or warn against conditions that are open and obvious and not inherently dangerous ... . Whether a dangerous or defective condition exists on the property so as to give rise to liability depends on the particular circumstances of each case and is generally a question of fact for the jury ... . "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" ... .
>
> Here, the Town failed to establish, prima facie, that the condition of the hump was open and obvious and not inherently dangerous given the surrounding circumstances at the time of the accident ... . In support of the motion, the Town submitted, inter alia, transcripts of the testimony of the injured plaintiff at his hearing pursuant to General Municipal Law § 50-h and at his deposition. The injured plaintiff testified that at the time of the accident, the hump was completely covered with dirt and sand and players were standing around it, thus obscuring his view of the hump. Since the Town failed to meet its initial burden as the movant, the burden never shifted to the plaintiffs to submit evidence sufficient to raise triable issues of fact ... . **Dillon v Town of Smithtown, 2018 NY Slip Op 07289, Second Dept 10-31-18**

NEGLIGENCE.

PLAINTIFF ALLEGEDLY TRIPPED AND FELL WHEN SHE CAUGHT HER FOOT UNDER A TIRE-WHEEL STOP IN A PARKING LOT, DEFENDANTS DID NOT DEMONSTRATE WHEN THE WHEEL STOP WAS LAST INSPECTED, DEFENDANTS' MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendants' motion for summary judgment in this slip and fall case should not have been granted. Plaintiff allegedly caught her foot under a tire/wheel stop in defendants' parking lot. The defendants did not present any evidence about when the wheel stop was last inspected:

> The defendants failed to establish, prima facie, that they lacked constructive notice of the allegedly dangerous condition. They failed to submit evidence as to when, prior to the accident, the tire/wheel stop at issue was last inspected ... . Since the defendants failed to demonstrate their prima facie entitlement to judgment as a matter of law, the Supreme Court should have denied their motion, without regard to the sufficiency of the opposition papers ... . **Troina v Canyon Donuts Jericho Turnpike, Inc.. 2018 NY Slip Op 07482, Second Dept 11-7-18**

NEGLIGENCE.

DEFENDANT RAISED A QUESTION OF FACT ABOUT WHETHER THERE EXISTS A NONNEGLIGENT EXPLANATION FOR THIS REAR END COLLISION, PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff's motion for summary judgment in this rear end collision case should not have been granted. Although plaintiff made out a prima facie case (because there is no

longer any need to demonstrate freedom from comparative fault in the motion papers), defendant alleged plaintiff suddenly changed lanes and stopped suddenly:

> The plaintiff is no longer required to show freedom from comparative fault in order to establish his prima facie entitlement to judgment as a matter of law on the issue of liability... . A rear-end collision with a stopped or stopping vehicle establishes a prima facie case of negligence on the part of the operator of the rear vehicle ... . However, the inference of negligence may be rebutted by evidence that the accident was caused by the lead vehicle abruptly changing lanes in front of the rear vehicle and then slowing down or coming to a sudden stop ... .
>
> Here, the plaintiff failed to establish his prima facie entitlement to judgment as a matter of law on the issue of liability. Although the plaintiff submitted evidence that his vehicle was struck in the rear by the defendants' vehicle, he also submitted the deposition testimony of the defendant driver that the plaintiff's vehicle changed lanes abruptly in front of defendants' vehicle and then came to a sudden stop. Under these circumstances, the plaintiff's submissions failed to eliminate triable issues of fact as to whether the defendant driver was negligent. The deposition testimony of the defendant driver, if true, would constitute a nonnegligent explanation for the rear-end collision into the plaintiff's vehicle ... . Any inconsistencies in the deposition testimony of the defendant driver, and the other evidence submitted in support of the motion, did not render the defendant driver's deposition testimony incredible as a matter of law or unworthy of belief, but rather, raised issues of credibility to be resolved by the factfinder ... . **Merino v Tessel, 2018 NY Slip Op 07717, Second Dept 11-14-18**

NEGLIGENCE.

QUESTIONS OF FACT WHETHER THE DEFENDANT CITY WAS AWARE OF A DEFECT IN THE SOFTBALL PLAYING FIELD, WHETHER THE DEFECT WAS NEGLIGENTLY REPAIRED AND WHETHER PLAINTIFF ASSUMED THE RISK OF INJURY, DEFENDANT'S SUMMARY JUDGMENT MOTION SHOULD NOT HAVE BEEN GRANTED (FIRST DEPT).

The First Department, reversing Supreme Court, determined there were questions of fact whether defendant city had notice of a defect in a softball field, whether the defect was negligently repaired, and whether plaintiff assumed the risk of injury from playing baseball on the field:

> Plaintiff Rory Martin was injured when, while playing softball on defendant's field, he unsuccessfully attempted to jump over a hole that was in the field near home plate. Plaintiff testified at his 50-h hearing that a six-inch-deep hole, three-to-four feet long, and four-to-five feet wide, near the right hand batter's box, had been filled in with loose clay and appeared to be level when he stepped into the batter's box. After plaintiff safely reached first base and additional players used the batter's box, the hole became more exposed and surprised plaintiff as he ran home to try to score. When plaintiff saw the size of the hole and attempted to jump over it, his left foot struck a clay-obscured edge of the hole, causing him to suffer a fractured ankle.
>
> Under the circumstances presented, triable issues exist as to whether the City had notice of this particular defect, and, if so, whether the City negligently or improperly repaired the defect, whether the playing field was as safe as it appeared to be, whether plaintiff's injury arose as a consequence of a condition or practice common to the particular sport, and whether plaintiff assumed the risk of playing on the subject field ... . **Martin v City of New York, 2018 NY Slip Op 07946, First Dept 11-20-18**

NEGLIGENCE, BATTERY. NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS.

ALTHOUGH DEFENDANT MAY NOT HAVE INTENDED TO INJURE PLAINTIFF IN A PHYSICAL ALTERCATION WITH OTHERS, THE COMPLAINT ALLEGED ONLY INTENTIONAL CONDUCT BY THE DEFENDANT, THE NEGLIGENCE AND NEGLIGENT INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS CAUSES OF ACTION WERE PROPERLY DISMISSED (SECOND DEPT).

The Second Department determined the negligence and negligent infliction of emotional distress causes of action were property dismissed. Although defendant (Domnitser) may not have intended to strike plaintiff in an altercation with others, the complaint alleged only intentional conduct by the defendant:

> Although "the same act may constitute battery or negligence depending on whether or not it was intentional, . . . there cannot be recovery for both"... . As such, "if the only inference that may be drawn from plaintiff's evidence is that defendant's contact with plaintiff was intentional, plaintiff may recover only in battery and the issue of negligence should not be submitted to the jury". Accordingly, "[o]nce intentional offensive contact has been established, the actor is liable for battery, not negligence" ... .
>
> Here, the plaintiff alleged that he was injured as a result of Domnitser's intentional acts which were directed toward third parties during the physical altercation. Contrary to the plaintiff's contention, even if Domnitser lacked any intent to make physical contact with, or otherwise injure, the plaintiff, the conduct attributed to Domnitser in the amended complaint, even as amplified by the plaintiff's affidavit, constituted intentional, rather than negligent, conduct ... .
>
> "A cause of action to recover damages for negligent infliction of emotional distress generally requires a plaintiff to show a breach of a duty owed to him [or her] which unreasonably endangered his [or her] physical safety, or caused him [or her] to fear for his [or her] own safety" ... . A negligent infliction of emotional distress cause of action "must fail where, as here, [n]o allegations of negligence appear in the pleadings'" ... . **Borrerro v Haks Group, Inc., 2018 NY Slip Op 07282, Second Dept 10-31-18**

NEGLIGENCE, CIVIL PROCEDURE, ATTORNEYS, EVIDENCE.

WHETHER A CONDITION IS OPEN AND OBVIOUS SPEAKS TO COMPARATIVE NEGLIGENCE, AN OPEN AND OBVIOUS CONDITION CAN BE THE BASIS FOR LIABILITY IF THE CONDITION AMOUNTS TO A TRAP FOR THE UNWARY OR DISTRACTED, MOTION TO SET ASIDE THE VERDICT SHOULD NOT HAVE BEEN GRANTED, MOTION FOR SANCTIONS AGAINST DEFENSE COUNSEL FOR BRINGING THE MOTION TO SET ASIDE SHOULD HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, over a partial dissent, determined defendants' motion to set aside the verdict in this stairway slip and fall case should not have been granted, and the plaintiff's motion for sanctions (attorney's fees) for frivolous conduct (bringing the motion to set aside) should have been granted. The dissenting justice agreed the verdict should not have been set aside, but disagreed with the imposition of sanctions on defense counsel. The plaintiff alleged she fell (19 inches) because there was no handrail on one side to the stairs. The Second Department explained that even if the jury

found the absence of a handrail to be open and obvious, the jury still could have found the absence of the handrail acted as a trap for the unwary:

> "Proof that a dangerous condition is open and obvious does not preclude a finding of liability against an owner for failure to maintain property in a safe condition"... . "While such proof is relevant to the issue of a plaintiff's comparative negligence, a hazard that is open and obvious may be rendered a trap for the unwary where the condition is obscured or the plaintiff distracted" ... . "The determination of . . . whether a condition is not inherently dangerous, or constitutes a reasonably safe environment, depends on the totality of the specific facts ... .
>
> .. [T}he Supreme Court should have granted the plaintiff's cross motion for an award of costs in the form of reimbursement of reasonable attorneys' fees pursuant to 22 NYCRR 130-1.1 based on the frivolous conduct of the defendants in moving to set aside the verdict pursuant to CPLR 4404(a) to the extent that the motion was predicated upon the ground that the plaintiff failed to establish at trial that they owned the subject property. * * *
>
> ... [T]he record shows that the defendants' ownership of the property was never genuinely disputed. **Cram v Keller, 2018 NY Slip Op 08007, Second Dept 11-21-18**

NEGLIGENCE, CIVIL PROCEDURE, EVIDENCE, APPEALS.

PLAINTIFF'S VERDICT SET ASIDE IN THIS SUBWAY SLIP AND FALL CASE AS AGAINST THE WEIGHT OF THE EVIDENCE, TRIAL EVIDENCE INDICATED COMPARATIVE NEGLIGENCE ON PLAINTIFF'S PART (SECOND DEPT).

The Second Department determined the plaintiff's verdict in this subway slip and fall case should be set aside as against the weight of the evidence. The trial evidence indicated comparative fault on the part of the plaintiff. Plaintiff stepped into a gap between the train and the platform, just after she had stepped over it. In addition, plaintiff had used that same train for a year:

> The jury found that the NYCTA [New York City Transit Authority] was negligent, that its negligence was a substantial factor in causing the accident, and that the injured plaintiff was not negligent. The NYCTA moved, in effect, pursuant to CPLR 4404(a) to set aside the jury verdict on the issue of liability as contrary to the weight of the evidence and for a new trial. The Supreme Court denied the motion. Insofar as relevant on this appeal, a judgment was subsequently entered in favor of the injured plaintiff and against the NYCTA.
>
> "A jury verdict is contrary to the weight of the evidence when the evidence so preponderates in favor of the movant that the verdict could not have been reached on any fair interpretation of the evidence" ... . "Whether a jury verdict should be set aside as contrary to the weight of the evidence does not involve a question of law, but rather requires a discretionary balancing of many factors"... .
>
> The jury's finding that the NYCTA was solely at fault for the accident was contrary to the weight of the evidence. The evidence at trial demonstrated that, just prior to the accident, the injured plaintiff had exited the B train and stepped over the subject gap, without incident, onto the platform of the Prospect Park station. She then stepped into that same gap while attempting to reenter the train moments later. Additionally, the injured plaintiff had used the Prospect Park station on previous occasions. She testified that, for approximately one year, she had been taking the B train to the Prospect Park station where she would transfer to the shuttle train if it was at the station when she arrived. Under the circumstances, the jury's verdict on the issue of liability completely absolving the

injured plaintiff of comparative fault was not supported by a fair interpretation of the evidence ... . **Stallings-Wiggins v New York City Tr. Auth., 2018 NY Slip Op 07774, Second Dept 11-14-18**

NEGLIGENCE, CIVIL PROCEDURE, EVIDENCE.

DEFENDANT HAD PLED GUILTY TO SCALDING A DISABLED CHILD BY BATHING HER IN WATER THAT WAS TOO HOT, AT THE SUBSEQUENT CIVIL TRIAL DEFENDANT WAS ALLOWED TO CROSS-EXAMINE PLAINTIFF'S EXPERTS ABOUT THE EVIDENCE THAT THE CHILD SUFFERED AN ALLERGIC REACTION AND HAD NOT BEEN SCALDED, THE DEFENSE VERDICT WAS AFFIRMED, PLAINTIFF'S MOTION IN LIMINE REQUESTING THAT THE GUILTY PLEA BE GIVEN COLLATERAL ESTOPPEL EFFECT AND THAT THE PLAINTIFF BE PRECLUDED FROM PRESENTING EVIDENCE OF THE ALLERGIC REACTION WAS ACTUALLY AN UNTIMELY SUMMARY JUDGMENT MOTION, DESPITE SUPREME COURT'S GRANTING OF THE MOTION, THE DEFENSE VERDICT MAKES ANY FURTHER CONSIDERATION OF THE ERROR UNNECESSARY (SECOND DEPT).

The Second Department affirmed the defense jury verdict in a case preceded by defendant's guilty plea to endangering the welfare of an incompetent or physically disabled person. It was alleged that defendant (Tiger), a nurse, scalded a 10-year-old severely disabled child (Alejandra) by bathing the child in hot water. After defendant pled guilty she moved set aside her conviction and submitted evidence the child suffered an allergic reaction which was misinterpreted as skin burns. The Appellate Division granted the motion to set aside the conviction. The Court of Appeals reversed, ruling that the "actual innocence" defense is not available after a guilty plea. In the subsequent civil trial, plaintiff had brought a motion in limine requesting that the guilty plea be given collateral estoppel effect and that the defendant be prohibited from presenting evidence of the allergic reaction. Supreme Court essentially granted the motion but allowed cross-examination of the plaintiff's experts about the allergic reaction. The Second Department determined the motion in limine was actually an untimely motion for summary judgment. But in light of the defense verdict, no further action by the appellate court was necessary:

> During the trial in this action, the defendants sought to establish that Alejandra's injuries were not caused by scalding water, relying upon medical records and cross-examining the plaintiff's expert witnesses as to whether Alejandra's injuries were the result of toxic epidermal necrolysis (hereinafter TEN), a type of severe skin reaction, purportedly caused by a drug Alejandra had been prescribed prior to the incident in question. Of note, Alejandra's skin was biopsied at the hospital one day after the incident, and a pathology report, which the defendants did not discover until very late during the litigation, concluded that the biopsy was, inter alia, consistent with a diagnosis of TEN. Tiger has sought to set aside her conviction based upon, inter alia, the conclusions asserted in the belatedly discovered pathology report ... .
>
> The plaintiff contends that the Supreme Court failed to give the criminal plea proper collateral estoppel effect and that the sole question for the jury should have been the amount of damages. On the eve of trial, the plaintiff sought an in limine ruling, based upon the doctrine of collateral estoppel, that Tiger's criminal plea conclusively established that she was negligent as a matter of law and that her negligence proximately caused Alejandra's injuries. Further, the plaintiff argued that the defendants should be precluded from introducing any evidence that Alejandra's injuries were caused by TEN. The court, in effect, granted the plaintiff's application in part, by submitting only the question of proximate cause to the jury and, thus, in effect, awarding the plaintiff judgment as a matter of law on the issue of Tiger's negligence. The court further ruled that the defendants were precluded from introducing evidence regarding TEN in their case-in-chief, but permitted them

> to cross-examine the plaintiff's experts regarding the medical records concluding that Alejandra's injuries were caused by TEN.
>
> We agree with the defendants' contention that the plaintiff's pretrial application, characterized as one for in limine relief, was the functional equivalent of an untimely motion for summary judgment on the issue of liability ... . "[A] motion in limine is an inappropriate substitute for a motion for summary judgment" ... . Further, "in the absence of any showing of good cause' for the late filing of such a motion (CPLR 3212[a]) the Supreme Court should have denied the motion"... . We note that, in light of the verdict in favor of the defendants, we do not otherwise review the propriety of the court's ruling on the plaintiff's in limine application. **Farias-Alvarez v Interim Healthcare of Greater N.Y., 2018 NY Slip Op 08115, Second Dept 11-28-18**

NEGLIGENCE, CIVIL PROCEDURE, JUDGES.

THE REAR-END CHAIN-REACTION ACCIDENT OCCURRED IN PENNSYLVANIA BUT ALL PARTIES RESIDED IN NEW YORK, SUPREME COURT SHOULD NOT HAVE, SUA SPONTE, DETERMINED THAT PENNSYLVANIA LAW APPLIED, BECAUSE THE PARTIES DID NOT RAISE THE CHOICE OF LAW ISSUE THEY ARE DEEMED TO HAVE CONSENTED TO THE APPLICABILITY OF NEW YORK LAW (SECOND DEPT).

The Second Department, reversing Supreme Court, determined that the Ibrahims, the driver and owner of the second car in a four-car chain-reaction rear-end accident, were entitled to summary judgment. The accident occurred in Pennsylvania but all parties were residents of New York. Supreme Court, sua sponte, held that Pennsylvania law applied and the Ibrahims summary judgment motion must be denied under Pennsylvania law. The Second Department noted that none of the parties raised the choice of law issue and therefore the parties must be deemed to have consented to the applicability of New York law:

> The Supreme Court should not have raised the issue of Pennsylvania law of its own accord, and should not have based its determination of the motion on a ground that was neither raised nor briefed by the parties ... . "Parties to a civil litigation, in the absence of a strong countervailing public policy, may consent, formally or by their conduct, to the law to be applied" ... . By failing to raise a choice of law issue in opposition to Ibrahim's motion for summary judgment, the codefendants are deemed to have consented to the application of New York law... .
>
> In this case, Ibrahim established his prima facie entitlement to judgment as a matter of law by submitting evidence that he brought his vehicle safely to a stop behind the lead vehicle before being struck in the rear by the Goldman vehicle ... . **Abdou v Malone, 2018 NY Slip Op 08106, Second Dept 11-28-18**

NEGLIGENCE, CONTRACT LAW.

CONSTRUCTIVE NOTICE OF LIQUID ON THE FLOOR IN THIS SLIP AND FALL CASE NOT DEMONSTRATED WITH RESPECT TO THE BUILDING OWNER, NO ESPINAL FACTORS ALLEGED WITH RESPECT TO THE CLEANING SERVICE, DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the defendants' motions for summary judgment in this slip and fall case should have been granted. Constructive notice of the liquid on the floor was not demonstrated with respect to the building owner (Berkshire) and none of the Espinal factors were alleged with respect to the cleaning service (Temco):

> Here, the evidence submitted by Berkshire in support of its motion, including the transcript of the plaintiff's deposition testimony, was sufficient to establish, prima facie, that Berkshire did not create the alleged hazardous condition or have actual or constructive notice of its existence for a sufficient period of time to have discovered and remedied it ... . The plaintiff testified that when he traversed the accident site approximately 20 minutes before the incident, he did not see the condition that had caused him to slip. In opposition, the plaintiffs failed to raise a triable issue of fact.
>
> With respect to Temco's motion, "[g]enerally, a contractual obligation, standing alone, will not give rise to tort liability in favor of a third party" ... . However, there are three exceptions to this general rule: (1) where the contracting party, in failing to exercise reasonable care in the performance of its duties, launches a force or instrument of harm or creates or exacerbates a hazardous condition; (2) where the plaintiff detrimentally relies on the continued performance of the contracting party's duties; and (3) where the contracting party has entirely displaced the other party's duty to maintain the premises safely... .
>
> Here, Temco established its prima facie entitlement to judgment as a matter of law by demonstrating, prima facie, that the plaintiff was not a party to its cleaning services contract, and that it, thus, owed him no duty of care ... . Since the plaintiffs did not allege facts in the complaint or bill of particulars that would establish the applicability of any of the Espinal exceptions, Temco was not required to affirmatively demonstrate that these exceptions were inapplicable in order to establish its prima facie entitlement to judgment as a matter of law ... . **Hagan v City of New York, 2018 NY Slip Op 07415, Second Dept 11-7-18**

NEGLIGENCE, EDUCATION-SCHOOL LAW.

SCHOOL DISTRICT NOT LIABLE FOR A SEXUAL ASSAULT BY A STUDENT BEFORE CLASSES STARTED, THE ATTACK WAS NOT FORESEEABLE, ALTHOUGH PLAINTIFF WAS A SPECIAL EDUCATION STUDENT, HER EDUCATION PLAN DID NOT PROVIDE FOR AN AIDE TO ESCORT HER FROM THE BUS TO THE SCHOOL OR BETWEEN CLASSES (SECOND DEPT).

The Second Department, reversing Supreme Court, determined that defendant school district's motion for summary judgment in this third party assault case should have been granted. Infant plaintiff, Deb B, a special education student, alleged she was sexually assaulted by another special education student outside the school building before classes started. Deb B.'s education plan did not provide for a school aide to escort her to school from the bus or between classes:

> After arriving at school one morning, she entered the building in the company of JG, another special education student who had been a passenger with her on the same school bus. After stopping by the school's cafeteria, and before the first-period class, JG asked Deb B. to accompany him outside the school building to the bleachers near the athletic field, and Deb B. agreed to do so. Deb B. alleges that JG then sexually assaulted her while they were on the bleachers. ...
>
> "Under the doctrine that a school district acts in loco parentis with respect to its minor students, a school district owes a special duty' to the students themselves" ... . Thus, schools have a duty to adequately supervise the students in their care, and may be held liable for foreseeable injuries proximately related to the absence of adequate supervision ... . "Schools are not, however, insurers of students' safety and cannot reasonably be expected to continuously supervise and control all movements and activities of students'" ... . "The standard for determining whether the school has breached its duty is to compare the school's supervision and protection to that of a parent of ordinary prudence placed in the same situation and armed with the same information" ... .
>
> Here, in support of their motion for summary judgment, the defendants submitted evidence that Deb B.'s individualized education plan did not provide for a school aide to escort her from the school bus to the school building or to escort her throughout the building as she moved between classes. Deb B.'s mother testified that she was aware that Deb B. was not so escorted, and that she had no expectation that this would be done. The evidence submitted by the defendants also indicated that Deb B. had no history of leaving the school building improperly. Finally, neither the complaint nor the bill of particulars alleged that JG had a propensity to engage in dangerous conduct, or that the defendants knew or should have known of any such propensity ... . **Deb B. v Longwood Cent. Sch. Dist., 2018 NY Slip Op 07280, Second Dept 10-31-18**

NEGLIGENCE, EDUCATION-SCHOOL LAW.

INFANT PLAINTIFF WAS INJURED DURING RECESS WHEN, PLAYING FOOTBALL OUTSIDE THE DESIGNATED FOOTBALL AREA, HE DOVE FOR THE BALL AND STRUCK A PIECE OF PLAYGROUND EQUIPMENT, THE SCHOOL DISTRICT'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined that the school district's motion for summary judgment in this negligent supervision, student injury case should not have been granted. Infant plaintiff was playing touch football during recess in a designated area near the playground. The student was injured when, outside the designated area, he dove to catch the ball and struck a piece of playground equipment:

> the defendants failed to meet their prima facie burden of demonstrating that the risk of colliding into the playground equipment located near the edge of the field was inherent in the activity of playing touch football on the field. Although the risks inherent in a sport include those "associated with the construction of the playing surface and any open and obvious condition on it" ... , the playground equipment was not a part of the football field or related to the game... . Accordingly, the defendants failed to establish, prima facie, that their alleged negligent supervision in permitting the students to play football near the playground did not "create[ ] a dangerous condition over and above the usual dangers that are inherent in the sport" ... . In addition, while the infant plaintiff was a willing

participant in the game, in light of his age, it cannot presently be determined as a matter of law that he was aware of and appreciated the risks involved in the activity in which he was engaged ... .

Further, the defendants failed to establish, prima facie, that the infant plaintiff's accident occurred in so short a span of time that even the most intense supervision could not have prevented it, thereby negating any alleged lack of supervision as the proximate cause of the infant plaintiff's injuries ... . Rather, there is a triable issue of fact as to whether the infant plaintiff "was participating in a prohibited activity for an extended period of time and more intense supervision may have prevented the accident" ... . **M.P. v Mineola Union Free Sch. Dist., 2018 NY Slip Op 08119, Second Dept 11-28-18**

NEGLIGENCE, EDUCATION-SCHOOL LAW, EVIDENCE.

NEITHER THE LEVEL OF PLAYGROUND SUPERVISION NOR THE PLAYGROUND EQUIPMENT CONSTITUTED THE PROXIMATE CAUSE OF INFANT PLAINTIFF'S FALL, PLAINTIFFS' EXPERT DID NOT DEMONSTRATE EXPERTISE RE: PLAYGROUND EQUIPMENT, THE SCHOOL DISTRICT'S MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the school district's motion for summary judgment in this playground student injury case should have been granted. Defendants demonstrated there was an adequate number of monitors supervising the children, infant plaintiff was using the equipment properly, and the equipment was in good working order. There was no showing that plaintiffs' expert had any expertise re: playground equipment. Infant plaintiff slipped off a bar and fell because his hands were wet:

The defendants submitted evidence demonstrating, prima facie, that the level of supervision afforded to the infant plaintiff and the other students at the time of the accident was adequate... , and, in any event, that any alleged lack of supervision was not the proximate cause of the infant plaintiff's injuries ... . Furthermore, the defendants submitted a report and affidavit from their expert, which established that the playground equipment was appropriate for the infant plaintiff's age group, and was not defective ... .

In opposition, the plaintiffs failed to raise a triable issue of fact. Although the plaintiffs submitted an affidavit from their purported expert, there was no showing that the purported expert had any specialized knowledge, experience, training, or education regarding playground equipment so as to qualify him to render an opinion in this area ... . **Ponzini v Sag Harbor Union Free Sch. Dist., 2018 NY Slip Op 08046, Second Dept 11-21-18**

NEGLIGENCE, EMPLOYMENT LAW, BATTERY.

EMPLOYEE WAS NOT ACTING WITHIN THE SCOPE OF HER EMPLOYMENT WHEN SHE ASSAULTED PLAINTIFF IN THE EMPLOYER'S PARKING LOT, SUMMARY JUDGMENT IN THIS THIRD PARTY ASSAULT CASE PROPERLY GRANTED (FOURTH DEPT).

The Fourth Department determined the employer's motion for summary judgment in this third-party assault case was properly granted. After an employee (Hartfield) had been asked to leave for the day by the employer, the employee assaulted plaintiff in the parking lot. The doctrine of respondeat superior did not apply because the employee was not acting within the scope of her employment at the time of the assault:

> ... [D]efendant established as a matter of law that the doctrine of respondeat superior is inapplicable because Hartfield was not acting within the scope of her employment at the time of the assault. The doctrine of respondeat superior renders an employer "vicariously liable for the tortious acts of its employees only if those acts were committed in furtherance of the employer's business and within the scope of employment"... .. Although the issue whether an employee is acting within the scope of his or her employment is generally a question of fact, summary judgment is appropriate "in a case such as this, in which the relevant facts are undisputed" ... . Here, we conclude that defendant met its initial burden of establishing that Hartfield's assault of plaintiff was not committed in furtherance of defendant's business and was not within the scope of employment ... . **Stribing v Bill Gray's Inc., 2018 NY Slip Op 07566, Fourth Dept 11-9-18**

NEGLIGENCE, EVIDENCE.

QUESTION OF FACT WHETHER THE ABSENCE OF A SECOND HANDRAIL, A VIOLATION OF THE BUILDING CODE, WAS A PROXIMATE CAUSE OF PLAINTIFF'S SLIP AND FALL IN A STAIRWAY, DEFENDANTS' MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined there was a question of fact whether the absence of a handrail on a stairway, a violation of the Building Code, was a proximate cause of plaintiff's slip and fall. Therefore defendants motion for summary judgment should not have been granted:

> ... [P]laintiff argued ... that the absence of a second handrail proximately caused her injuries. She submitted the affidavit of an engineering expert, who averred that the condition of the staircase violated various provisions of the 1984 New York State Fire Prevention and Building Code (hereinafter the Building Code). The plaintiff raised a triable issue of fact regarding the absence of a second handrail. There is no dispute that the staircase required a second handrail (see 9 NYCRR former 765.4[a][11]). Given the plaintiff's deposition testimony that there was nothing to grasp when she reached for the partial wall to her left, coupled with conflicting evidence as to whether the partial wall complied with section 765.4(a)(11) of the Building Code, triable issues of fact exist as to whether the Building Code was violated and whether a violation of that section of the Building Code, if any, was a proximate cause of the plaintiff's injuries ... . **Rakovsky v Rob-Lee Corp., 2018 NY Slip Op 07471, Second Dept 11-7-18**

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NEGLIGENCE, EVIDENCE.

QUESTION OF FACT WHETHER DEFENDANT WAS NEGLIGENT IN THIS REAR END COLLISION CASE, PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff's motion for summary judgment in this rear-end collision case should not have been granted. Plaintiff submitted defendant's deposition in which defendant testified plaintiff stopped abruptly for no apparent reason:

> A rear-end collision with a stopped or stopping vehicle establishes a prima facie case of negligence on the part of the operator of the rear vehicle, requiring that operator to rebut the inference of negligence by providing a nonnegligent explanation for the collision ... . "A nonnegligent explanation includes, but is not limited to, sudden or unavoidable circumstances'" ... .
>
> The Supreme Court should have denied the plaintiff's motion for summary judgment on the issue of liability. The plaintiff's deposition testimony, submitted in support of the motion, demonstrated that her vehicle was struck in the rear while stopped on the exit ramp due to traffic conditions, thus raising an inference of the defendant driver's negligence. However, the plaintiff's submissions also included a transcript of the defendant driver's deposition testimony, wherein he testified that the plaintiff's vehicle came to an abrupt stop when there was no vehicular traffic in front of it on the exit ramp, and the two vehicles collided. Under these circumstances, the plaintiff's motion papers presented a triable issue of fact as to whether the defendant driver was negligent in the happening of the subject accident ... . **Richter v Delutri, 2018 NY Slip Op 07475, Second Dept 11-7-18**

NEGLIGENCE, EVIDENCE.

EVIDENCE OF ROUTINE MAINTENANCE OF THE PARKING LOT WHERE PLAINTIFF ALLEGEDLY FELL, I.E. EVIDENCE OF HABIT, PROPERLY ADMITTED IN THIS ICE AND SNOW SLIP AND FALL CASE (FOURTH DEPT).

The Fourth Department determined evidence of routine maintenance of the parking lot, essentially evidence habit, was properly admitted in this slip and fall case which resulted in a defense verdict:

> ... [P]laintiff appeals from an order that, inter alia, denied that part of his pretrial motion seeking to preclude habit evidence. ...
>
> " Proof of a deliberate repetitive practice by one in complete control of the circumstances' is admissible provided that the party presenting such proof demonstrates a sufficient number of instances of the conduct in question' " ... . Here, the testimony of the maintenance staff concerning their daily routine in maintaining the subject parking lot was properly admitted as evidence of their conduct prior to the incident at issue. **Rozier v BTNH, Inc., 2018 NY Slip Op 07575, Fourth Dept 11-9-18**

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NEGLIGENCE, EVIDENCE.

A METAL PROTRUSION IN A PARKING LOT MEASURING AN INCH OR LESS WAS A NON-ACTIONABLE TRIVIAL DEFECT, SUPREME COURT REVERSED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined that a metal protrusion of an inch or less in a parking lot constituted a trivial defect which was not actionable in this slip and fall case:

> In determining whether a defect is trivial, courts "must examine all of the facts presented, including the width, depth, elevation, irregularity and appearance of the defect along with the time, place and circumstance of the injury" ... . "[T]here is no minimal dimension test' or per se rule that a defect must be a certain minimum height or depth in order to be actionable" ... . However, a defendant "may not be cast in damages for negligent maintenance by reason of trivial defects on a walkway, not constituting a trap or nuisance, as a consequence of which a pedestrian might merely stumble, stub his toes, or trip over a raised projection" ... .
>
> The defendants presented evidence that the alleged defect was an inch or less in size, that the incident occurred in the daytime hours under clear conditions, and that the area immediately surrounding the alleged defect was clear of debris and not dangerous or trap-like. **Easley v U Haul, 2018 NY Slip Op 08008, Second Dept 11-21-18**

NEGLIGENCE, EVIDENCE, PRIVILEGE.

PLAINTIFF DID NOT PLACE HER PRIOR KNEE INJURIES IN CONTROVERSY BY ALLEGING A LOSS OF ENJOYMENT OF LIFE, THEREFORE PLAINTIFF DID NOT WAIVE HER PATIENT-PHYSICIAN PRIVILEGE RE: THE KNEE-INJURY MEDICAL RECORDS, THE FIRST DEPARTMENT DECIDED NOT TO FOLLOW THE SECOND DEPARTMENT'S CONTRARY RULING, EXTENSIVE TWO-JUSTICE DISSENT (FIRST DEPT).

The First Department, in a full-fledged opinion by Justice Singh, over an extensive two-justice dissenting opinion, determined that the plaintiff in this traffic accident case did not place her prior knee injuries in controversy and the defendants' demand for the related medical authorizations should not have been granted. The First Department held plaintiff had not waived her patient-physician privilege regarding the knee injuries. Plaintiff had alleged injury to her back, neck and shoulder, but had also alleged a loss of enjoyment of life, including her inability to wear heels. Defendants argued that her prior knee injury and surgery were relevant to those same issues. The First Department decided not to follow the Second Department's contrary holding:

> Contrary to defendants' argument, neither plaintiff's bill of particulars nor her deposition testimony places her prior knee injuries in controversy. In paragraph 10 of her bill of particulars, plaintiff limits the injuries she sustained in the 2014 accident to her cervical spine, lumbar spine, and left shoulder. Accordingly, the specified bodily injuries that are affirmatively placed in controversy are the spinal and shoulder injuries. The claims for lost earnings and loss of enjoyment of life alleged in the bill of particulars are limited to these specified injuries. Plaintiff does not mention her prior knee treatments. Nor does she claim that the injuries to her knees were exacerbated or aggravated as a result of the 2014 automobile accident. * * *
>
> Defendants cite to Second Department precedent in support of their argument that the condition of plaintiff's knees is material and necessary to their defense. The Second Department has held that

> a party places his or her entire medical condition in controversy through "broad allegations of physical injuries and claimed loss of enjoyment of life due to those injuries" ... .
>
> We are not persuaded by the reasoning of the Second Department. In our view, the Second Department's precedent cannot be reconciled with the Court of Appeals' rulings that the physician-patient privilege is waived only for injuries affirmatively placed in controversy. **Brito v Gomez, 2018 NY Slip Op 08105, First Dept 11-27-18**

NEGLIGENCE, MEDICAL MALPRACTICE, MUNICIPAL LAW, EVIDENCE.

WHERE MALPRACTICE IS APPARENT FROM AN INDEPENDENT REVIEW OF MEDICAL RECORDS, THOSE RECORDS CONSTITUTE TIMELY NOTICE OF THE FACTS CONSTITUTING THE CLAIM, PLAINTIFF'S MOTION FOR LEAVE TO FILE A LATE NOTICE OF CLAIM PROPERLY GRANTED (SECOND DEPT).

The Second Department determined plaintiff's motion for leave to file a late notice of claim was properly granted. Apparently plaintiff had fallen. The ambulance call report, prepared by defendants, indicated that plaintiff had limited response in her lower body. Plaintiff was rendered a partial quadriplegic. Expert opinions submitted in support of the motion were based upon a review of the ambulance report and concluded that plaintiff should have been immobilized and her injuries would not have been so severe if she had been immobilized. The Second Department explained that where malpractice is apparent from and independent review of the records, the records constitute timely actual knowledge of the essential facts constituting the claim:

> While the ambulance call report, without more, does not establish actual knowledge of a potential injury where the record does not evince that the medical staff, by its acts or omissions, inflicted any injury ... , where malpractice is apparent from an independent review of the medical records, those records constitute "actual notice of the pertinent facts" ... . Here, the plaintiff submitted the expert opinions of Paul Werfel and Robert E. Todd. Werfel, a certified paramedic and professor of clinical emergency medicine at Stony Brook University, reviewed the medical records, including the appellants' ambulance report. In his affidavit, Werfel stated that, in his "opinion to a reasonable degree of EMT standards," Rescue Squad "failed to use spinal precautions and/or follow required EMT protocols as it relates to mobilizing and placing a patient on a stretcher who has a high index of having sustained a spinal cord injury." Werfel further averred that Rescue Squad and NDP failed to comply with required protocols when transferring the plaintiff to the hospital. ... Inasmuch as the ambulance report, upon independent review, suggested injury attributable to malpractice, it provided the appellants with actual knowledge of the essential facts constituting the claim ... .
>
> Furthermore, the plaintiff made an initial showing that the appellants were not prejudiced by the delay in serving a notice of claim inasmuch as the appellants acquired actual knowledge of the essential facts of the claim via their own ambulance report ... . **Ballantine v Pine Plains Hose Co., Inc., 2018 NY Slip Op 07697, Second Dept 11-14-18**

NEGLIGENCE, MUNICIPAL LAW, VEHICLE AND TRAFFIC LAW.

EMERGENCY EXEMPTION IN THE VEHICLE AND TRAFFIC LAW DID NOT APPLY TO THIS POLICE-VEHICLE TRAFFIC ACCIDENT CASE, PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined that plaintiff's motion for summary judgment in this police-vehicle traffic accident case should have been granted. The police vehicle backed into plaintiff's stopped care. The defendant's papers did not demonstrate that the emergency-vehicle exemption in the Vehicle and Traffic Law applied:

> Vehicle and Traffic Law § 1104 qualifiedly exempts drivers of emergency vehicles from certain traffic laws when they are involved in an emergency operation... . The "emergency operation" of a police vehicle includes "pursuing an actual or suspected violator of the law" (Vehicle and Traffic Law § 114-b...). Vehicle and Traffic Law § 1104(e) establishes a reckless disregard standard of care for determining civil liability for damages resulting from the privileged operation of an emergency vehicle... . Otherwise, the standard of care for determining civil liability is ordinary negligence ... .
>
> In support of her motion for summary judgment on the issue of liability, the plaintiff submitted, inter alia, a police accident report which included Officer Sforza's statement that, at the time of the accident, he was observing "what appeared to be suspicious activity" at a nearby address. Thus, the plaintiff established, prima facie, that the police officer was not engaged in an emergency operation when the accident occurred... . In opposition, the defendants submitted the affidavit of Officer Sforza, who clarified that, at the time of the accident, he had merely noticed an individual at a nearby address with what he believed to be an open alcoholic container. The defendants' submissions failed to raise a triable issue of fact as to whether the police vehicle was engaged in an emergency operation. **Portalatin v City of New York, 2018 NY Slip Op 07341, Second Dept 10-31-18**

NEGLIGENCE, MUNICIPAL LAW, VEHICLE AND TRAFFIC LAW.

POLICE OFFICER TOOK PRECAUTIONS BEFORE ATTEMPTING A U-TURN TO PURSUE A SUSPECT AND COLLIDING WITH PLAINTIFF'S VEHICLE, MOMENTARY JUDGMENT LAPSE DOES NOT MEET RECKLESS DISREGARD STANDARD, CITY'S MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined defendant city's motion for summary judgment in this police-car traffic accident case should have been granted because the officer's actions did not rise to the reckless disregard standard of Vehicle and Traffic La 1104. Plaintiff was behind the police car when the officer made an abrupt u-turn to pursue a suspect in a domestic incident. There was evidence the officer did not activate the emergency lights until after the collision:

> Before [the officer] attempted the U-turn, he checked his driver's side and rearview mirrors, turned his head, and saw no vehicles behind him. ...
>
> We agree with defendants that Supreme Court erred in denying their motion for summary judgment dismissing the complaint. "[T]he reckless disregard standard of care . . . applies when a driver of an authorized emergency vehicle involved in an emergency operation engages in the specific conduct exempted from the rules of the road by Vehicle and Traffic Law § 1104 (b)" ... . When the accident occurred, Baldwin was operating an "authorized emergency vehicle" (§ 1104 [a]), and he

"was engaged in an emergency operation by virtue of the fact that he was attempting a U-turn in order to pursu[e] an actual or suspected violator of the law' " ... . Thus, Baldwin's conduct was exempted from the rules of the road by section 1104 (b) (4) and is governed by the reckless disregard standard of care in section 1104 (e) ... .

A " momentary judgment lapse' does not alone rise to the level of recklessness required of the driver of an emergency vehicle in order for liability to attach" ... . In support of their motion, defendants submitted evidence of the precautions Baldwin took before he attempted the U-turn and established as a matter of law that Baldwin's conduct did not rise to the level of reckless disregard for the safety of others, i.e., "he did not act with conscious indifference' to the consequences of his actions" ... . **Flood v City of Syracuse, 2018 NY Slip Op 07869, Fourth Dept 11-16-18**

NEGLIGENCE, MUNICIPAL LAW, VEHICLE AND TRAFFIC LAW.

TOWN'S MOTION FOR SUMMARY JUDGMENT IN THIS SNOWPLOW TRAFFIC ACCIDENT CASE SHOULD HAVE BEEN GRANTED, PLAINTIFF DID NOT RAISE A QUESTION OF FACT ABOUT WHETHER THE SNOWPLOW OPERATOR'S ACTIONS ROSE TO THE RECKLESS DISREGARD STANDARD IN THE VEHICLE AND TRAFFIC LAW (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined defendant town's motion for summary judgment in this snowplow traffic accident case should have been granted. Defendant alleged the plow blade was in his lane, but there was evidence the road markings were covered with snow:

Vehicle and Traffic Law § 1103 (b) "exempts all vehicles actually engaged in work on a highway'—including [snowplows]—from the rules of the road" ... . Here, defendants established as a matter of law that the snowplow was "actually engaged in work on a highway" at the time of the incident... , and plaintiff's evidence that the plow blade was up at the time of the accident did not raise a triable issue of fact with respect thereto inasmuch as plaintiff did not dispute that Farr [the snowplow driver] was "working his run or beat at the time of the accident" ... .

At most, plaintiff established that Farr did not see plaintiff's vehicle and that a portion of the snowplow crossed the center line of the road, which does not amount to recklessness. Moreover, plaintiff failed to submit competent evidence that Farr's operation of the snowplow without either a "wing man" or certification to operate the snowplow without a wing man was reckless. Finally, while plaintiff and Farr provided different versions of the accident, those differences alone do not create a question of fact on the issue of reckless disregard here ... . **Clark v Town of Lyonsdale, 2018 NY Slip Op 07870. Fourth Dept 11-16-18**

NEGLIGENCE, PRODUCTS LIABILITY.

OWNER OF THE FARM AND HAY CONVEYOR OWED A DUTY OF CARE TO PLAINTIFF WHO WAS INJURED BY THE CONVEYOR, LICENSEES USING THE CONVEYOR ON OWNER'S LAND DID NOT OWE A DUTY OF CARE TO PLAINTIFF, WHO WAS A VOLUNTEER HELPING THE LICENSEES (FOURTH DEPT).

The Fourth Department, reversing (modifying) Supreme Court determined there was a question of fact whether, Burdick, the owner of a farm and a hay conveyor, was liable for plaintiff's injury from catching her finger in the unguarded conveyor chain. Burdick, as part of an oral agreement, allowed the Fosters to use the hay conveyor on Burdick's property and was aware that persons, like plaintiff, would assist the Fosters. Plaintiff was a volunteer, not an employee. The court found that Burdick, as the owner of the farm and the conveyor, owed a duty of care to the plaintitff and there was a question of fact whether the conveyor presented a dangerous condition that was not open and obvious. The Fosters owed no duty of care to plaintiff. But the Fosters, who now own the conveyor, were required to allow plaintiff to inspect the conveyor in connection with the lawsuit:

> It is well established that, "[b]ecause a finding of negligence must be based on the breach of a duty, a threshold question in tort cases is whether the alleged tortfeasor owed a duty of care to the injured party" ... . "New York landowners owe people on their property a duty of reasonable care under the circumstances to maintain their property in a safe condition" ... . "The duty of a landowner to maintain [his or her] property in a safe condition extends to persons whose presence is reasonably foreseeable by the landowner" ... . "[A] landowner's duty to warn of a latent, dangerous condition on his [or her] property is a natural counterpart to his [or her] duty to maintain [the] property in a reasonably safe condition" ... . "It is well settled that both owners and occupiers owe a duty of reasonable care to maintain property in a safe condition and to give warning of unsafe conditions that are not open and obvious" ... .
>
> Additionally, where, as here, "the defendant [property] owner provides . . . allegedly defective equipment, the legal standard [with respect to negligence] is whether the owner created the dangerous or defective condition or had actual or constructive notice thereof' . . . , because in that situation the defendant property owner is possessed of the authority, as owner, to remedy the condition' of the defective equipment" ... .
>
> The Fosters, at most, "had a license to [perform hay baling work on Burdick's farm with his hay conveyor], but the right to use the [farm and hay conveyor] does not establish control or give rise to a duty to warn"... . "In the absence of any authority to maintain or control the [farm or the hay conveyor], or to correct any unsafe condition, [the Fosters] owed no duty of care with respect to any unsafe condition on [Burdick's] premises" ... . **Breau v Burdick, 2018 NY Slip Op 07851, Fourth Dept 11-16-18**

NEGLIGENCE, VEHICLE AND TRAFFIC LAW.

QUESTION OF FACT WHETHER DEFENDANT SAW WHAT WAS TO BE SEEN IN THIS BICYCLE-CAR COLLISION CASE, SUPREME COURT REVERSED, TWO JUSTICE DISSENT (FOURTH DEPT).

The Fourth Department, in a full-fledged opinion by Justice Curran, over a two-justice dissent, reversing Supreme Court, determined that defendant driver's motion for summary judgment in this bicycle-car collision case should not have been granted. Apparently plaintiff was riding on the sidewalk and ran into the side of defendant's car at an intersection. The majority concluded there was a question of fact whether defendant saw what he should have seen. The dissent relied on the right of way provisions of the Vehicle and Traffic Law:

> Plaintiff [contended] that the provisions of the Vehicle and Traffic Law § 1234 (a) are inapplicable because plaintiff was riding his bicycle on a sidewalk and not a roadway, as contemplated by that section. Plaintiff further contended that issues of fact exist regarding whether defendant violated Vehicle and Traffic Law §§ 1142 and 1172 by failing to stop at the stop sign and failing to yield the right-of-way to plaintiff, and whether defendant failed to "see what [was] there to be seen." ...
>
> Defendant, as the movant for summary judgment, had the burden of establishing as a matter of law that he was not negligent or that, even if he was negligent, his negligence was not a proximate cause of the accident ... . To meet that burden, defendant was required to establish that he fulfilled his "common-law duty to see that which he should have seen [as a driver] through the proper use of his senses" ... , "and to exercise reasonable care under the circumstances to avoid an accident" ... , including that he met the obligation "to keep a reasonably vigilant lookout for bicyclists" .. . Defendant also had the burden of establishing as a matter of law that there was nothing he could do to avoid the accident ... . **Pagels v Mullen, 2018 NY Slip Op 07855, Fourth Dept 11-16-18**

NEGLIGENCE, VEHICLE AND TRAFFIC LAW.

DEALERSHIP HAD NOT TRANSFERRED OWNERSHIP OF THE CAR TO THE PURCHASER AT THE TIME OF THE ACCIDENT AND WAS THEREFORE LIABLE TO PLAINTIFF AS THE OWNER, THE DRIVER STRUCK A BARRICADE WHICH IN TURN STRUCK PLAINTIFF WHO WAS WALKING ON THE SIDEWALK, PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED (FIRST DEPT).

The First Department, reversing Supreme Court, determined defendant car dealership (Port Motors) had not transferred ownership of the car to the purchaser (Love) at the time of the accident and was therefore liable to plaintiff as the owner of the vehicle. Plaintiff was injured when the driver (Lemos) struck a barricade which in turn struck plaintiff, who was walking on the sidewalk:

> Because Port Motors "fail[ed] to comply with the statutory requirements regarding vehicle registration procedures . . . [it] is estopped from denying ownership of the vehicle and is fully liable to the plaintiff as if it were the owner' of the vehicle" ... . Although this Court has held that "title to a motor vehicle is transferred when the parties intend such transfer to occur" ... , here, there is no evidence that the parties intended to transfer title to the vehicle from Port Motors to Love prior to the accident. ...
>
> The metal barricade standing in the roadway was not "a sudden and unexpected circumstance which le[ft] little or no time for thought, deliberation or consideration, or cause[d] [Lemos] to be reasonably so disturbed that [he] [had to] make a speedy decision without weighing alternative courses of conduct . . . "... . Rather, by colliding with the barricade and propelling it onto the sidewalk, where it struck a pedestrian, Lemos failed to both operate his vehicle in a manner that was reasonable and prudent under the circumstances ... and to see what was there to be seen through the ordinary use of his senses ... . **Bunn v City of New York, 2018 NY Slip Op 07936, First Dept 11-20-18**

NEGLIGENCE, VEHICLE AND TRAFFIC LAW, EVIDENCE.

DEFENDANT VIOLATED THE VEHICLE AND TRAFFIC LAW WHEN SHE MADE A LEFT TURN INTO PLAINTIFF'S PATH, PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED, STATEMENT IN A MEDICAL RECORD ABOUT PLAINTIFF'S SPEED WAS UNRELATED TO DIAGNOSIS OR TREATMENT AND WAS NOT SOURCED, THE STATEMENT SHOULD NOT HAVE BEEN CONSIDERED AS AN ADMISSION (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff was entitled to summary judgment in this intersection traffic accident case. Defendant Lucia Wager made a left turn into plaintiff's path in violation of Vehicle and Traffic Law 1141. The unsourced statement in the medical record concerning plaintiff's speed was not related to his diagnosis or treatment and should not have been admitted:

> ... [T]he plaintiffs established their prima facie entitlement to judgment as a matter of law by demonstrating that Lucia Wager violated Vehicle and Traffic Law § 1141 when she made a left turn directly into the path of the injured plaintiff's motorcycle. Lucia Wager was negligent in failing to see what was there to be seen, and in attempting to make a left turn when it was hazardous to do so ... . Regardless of who entered the intersection first, the injured plaintiff, as the driver with the right-of-way, was entitled to anticipate that Lucia Wager would obey traffic laws which required her to yield ... . In opposition, the defendants failed to submit evidence sufficient to raise a triable issue of fact as to whether Lucia Wager had a nonnegligent explanation for colliding with the injured plaintiff's motorcycle ... . Contrary to the defendants' contention, the statement contained in the injured plaintiff's medical record as to how fast his motorcycle was traveling at the time of the collision was not admissible as an admission, since the source of the information was not identified and it did not contain information that was germane to his diagnosis or treatment ... . **Ming-Fai Jon v Wager, 2018 NY Slip Op 07304, Second Dept 10-31-18**

PRODUCTS LIABILITY

PRODUCTS LIABILITY, NEGLIGENCE, CIVIL PROCEDURE, EVIDENCE.

VEHICLE SOFT CLOSE AUTOMATIC DOOR CLOSING MECHANISM WAS REPLACED AND DESTROYED AFTER PLAINTIFF'S FINGER WAS ALLEGEDLY CRUSHED WHEN THE DOOR ON THE VAN CLOSED, PROPER SANCTION FOR SPOLIATION IS AN ADVERSE INFERENCE JURY INSTRUCTION (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, determined defendant's motion for sanctions for spoliation of evidence should not have been denied and an adverse inference jury instruction was appropriate. Plaintiff alleged a "soft-close" mechanism on a van malfunctioned causing her finger to be crushed. After the "soft-close" mechanism was replaced it was destroyed:

> ... [W]e disagree with the Supreme Court's determination to deny that branch of the defendant's motion which was to impose sanctions for spoliation of evidence. The defendant sustained its burden of establishing that the plaintiff was obligated to preserve the soft-close automatic door mechanism on the driver's side door at the time of its destruction in September 2015, when the plaintiff had the mechanism replaced, that the evidence was negligently destroyed before the defendant had an opportunity to inspect it, and that the destroyed evidence was relevant to the

> litigation ... . Nevertheless, since the defendant's ability to prove its defense was not fatally compromised by the destruction of the evidence... , the appropriate sanction for the spoliation herein is not to strike the complaint, but rather to direct that an adverse inference charge be given against the plaintiff at trial with respect to the unavailable evidence ... . **Richter v BMW of N. Am., LLC, 2018 NY Slip Op 08163, Second Dept 11-28-18**

REAL ESTATE

REAL ESTATE, CONTRACT LAW, EVIDENCE.

REAL ESTATE PURCHASE CONTRACT, ALTHOUGH MISSING SOME TERMS, SATISFIED THE STATUTE OF FRAUDS, SUMMARY JUDGMENT ON THE SPECIFIC PERFORMANCE ACTION, HOWEVER, SHOULD NOT HAVE BEEN GRANTED, PLAINTIFF FAILED TO DEMONSTRATE THE FINANCIAL ABILITY TO CLOSE ON THE LAW DATE (SECOND DEPT).

The Second Department agreed with Supreme Court that the real estate purchase contract, although some terms were missing, satisfied the statute of frauds, Therefore the motion to dismiss the action for specific performance was properly denied. However, Supreme Court should not have granted summary judgment because plaintiff failed to demonstrate he had the financial ability to purchase the property on the law date:

> "Only reasonable certainty, not absolute certainty, as to the terms of the agreement is required" ... . Here, the essential terms of the contract were explicitly contained in the agreement, thus satisfying the requirements of the statute of frauds. The agreement is subscribed by the parties to be charged, identifies the parties to the transaction, describes the property to be sold with sufficient particularity, and states the purchase price, the down payment received, and how the purchase price was to be paid ... . Additionally, while some terms, such as the closing date, the quality of title to be conveyed, and the risk of loss between the contract and the closing, are not included within the agreement, the remaining terms are clear and enforceable and, thus, the law will serve to fill in those missing provisions ... .
>
> ... [T]he plaintiff's submissions failed to demonstrate that he had the financial ability to consummate the sale of the property on January 25, 2016, the date which he had set for the closing in his time-is-of-the-essence letter to the defendant. The plaintiff's submissions highlighted, rather than eliminated, triable issues of fact as to whether he possessed the funds necessary to consummate the sale. In light of the foregoing, the plaintiff did not meet his prima facie burden on his motion, and thus, the motion should have been denied without regard to the sufficiency of the opposition papers ... . **O'Hanlon v Renwick, 2018 NY Slip Op 08027, Second Dept 11-21-18**

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REAL PROPERTY LAW

REAL PROPERTY LAW, ATTORNEYS.

CRITERIA FOR INTERPRETING AN EXPRESS EASEMENT AND A PRESCRIPTIVE EASEMENT EXPLAINED, PARTY PROPERLY SANCTIONED FOR COUNSEL'S FILING AN AMENDED COMPLAINT DIFFERENT FROM THE COMPLAINT APPROVED BY THE COURT (SECOND DEPT).

The Second Department determined that neither plaintiff nor defendants were entitled to summary judgment in this dispute over an plaintiff's ingress and egress easement over defendants' land. The court explained the criteria for interpretation of an express easement and a prescriptive easement. The court noted that plaintiff was properly sanctioned for her counsel's conduct in filing an amended complaint which differed from the complaint approved by the court:

> ,,, [T]he plaintiff moved for summary judgment on the amended complaint, arguing, in effect, that the language of the express easement should be amended to include certain curves in the right of way that were necessary to permit utility and delivery trucks to access the plaintiff's property. The plaintiff argued that she had obtained a prescriptive easement over the portions of the defendants' property which underlaid the proposed curves. The defendants cross-moved for summary judgment declaring that the plaintiff was not entitled to an expansion of the easement, by prescription or otherwise. ...
>
> "Easements by express grant are construed to give effect to the parties' intent, as manifested by the language of the grant" ... . "The extent of an easement claimed under a grant is generally limited by the language of the grant, as a grantor may create an extensive or a limited easement"... . "Where, as here, an easement provides for the ingress and egress of motor vehicles, it is granted in general terms and the extent of its use includes any reasonable use necessary and convenient for the purpose for which it is created'" ... .
>
> "An easement by prescription may be demonstrated by clear and convincing proof of the adverse, open and notorious, continuous, and uninterrupted use of the subject property for the prescriptive period" ... . **DiDonato v Dyckman, 2018 NY Slip Op 08113, Second Dept 11-28-18**

REAL PROPERTY LAW, TRUSTS AND ESTATES.

DECEDENT DIED INTESTATE, COTENANTS' INTERESTS IN THE REAL PROPERTY VESTED UPON DEATH, COTENANTS COULD THEREFORE CONVEY THEIR INTERESTS IN THE PROPERTY, SURROGATE'S COURT SHOULD NOT HAVE SET ASIDE DEEDS (SECOND DEPT).

The Second Department, reversing Surrogate's Court, determined deeds executed by decedent's cotenants should not have been set aside. Because decedent died intestate, the cotenants' interests in the real property vested upon death and the cotenants could validly convey their interests in the property:

> The Surrogate's Court should not have granted those branches of the petition which sought to set aside the subject deeds and to determine that title to the subject property was vested in the decedent's estate. When the decedent died intestate, title to the subject property automatically vested in her distributees as tenants in common ... . "[W]hen a cotenant who has a partial interest

> in real property executes a deed that purports to convey full title to the property, the deed is not entirely void; rather, the deed is effective, but only to the extent of conveying the grantor's interest in the property" ... . **Matter of Blango, 2018 NY Slip Op 07721, Second Dept 11-14-18**

RELIGION

RELIGION, CONSTITUTIONAL LAW, CIVIL PROCEDURE.

DISPUTE BETWEEN THE CHURCH AND THE NUN WHO WAS DEFROCKED AND EJECTED FROM THE CONVENT IS NOT JUSTICIABLE IN NEW YORK COURTS UNDER THE FIRST AMENDMENT (SECOND DEPT).

The Second Department, reversing Supreme Court, over a two-justice dissent, determined the action stemming from plaintiff church's defrocking and ejecting defendant nun from a convent was not justiciable in the New York courts because inquiry into religious doctrine or practice was required. Defendant nun had complained about sexual harassment by a priest and alleged she was retaliated against by the plaintiff church:

> "The First Amendment forbids civil courts from interfering in or determining religious disputes, because there is substantial danger that the state will become entangled in essentially religious controversies or intervene on behalf of groups espousing particular doctrines or beliefs" ... . A court may, however, properly preside over a dispute involving a religious body only when the dispute may be resolved utilizing neutral principles of law ... .
>
> Here, the summary proceedings for eviction and the action, inter alia, for ejectment are inextricably intertwined with the determinations of the ecclesiastical court, particularly its 2008 determination defrocking the defendant and ordering her to vacate the convent. Therefore, this consolidated action involves review of an ecclesiastical determination that may not be resolved by resort to neutral principles of law ... . Moreover, this matter does not involve a purely religious determination requiring this Court to accept the actions of the ecclesiastical court as final and binding ... . **Russian Orthodox Convent Novo-Diveevo, Inc. v Sukharevskaya, 2018 NY Slip Op 08167, Second Dept 11-28-18**

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SOCIAL SERVICES LAW

SOCIAL SERVICES LAW, ARBITRATION, CIVIL PROCEDURE.

COLLATERAL ESTOPPEL APPLIED TO THE OFFICE FOR PEOPLE WITH DEVELOPMENTAL DISABILITIES' (OPWDD'S) ARBITRATION PROCEEDINGS WHICH FOUND PETITIONER WAS NOT GUILTY OF SUPPLYING MARIJUANA TO A RESIDENT OF A GROUP HOME FOR PERSONS WITH DEVELOPMENTAL DISABILITIES, THE SUBSEQUENT PROCEEDINGS BY THE JUSTICE CENTER FOR THE PROTECTION OF PEOPLE WITH SPECIAL NEEDS WERE BOUND BY THE FINDINGS OF THE OPWDD ARBITRATION (THIRD DEPT).

The Third Department, in a full-fledged opinion by Justice Garry, determined that the arbitration proceeding conducted by Office for People with Developmental Disabilities (OPWDD) had a collateral estoppel effect upon subsequent proceedings concerning the same matter conducted by the Justice Center for the Protection of People with Special Needs. Petitioner was accused of providing marijuana to a resident of a group home for persons with developmental disabilities. The OPWDD arbitration concluded petitioner was not guilty. However the Justice Center essentially sustained the charges. The central question was whether the OPWDD and the Justice Center were in privity, such that the Justice Center must accept the outcome of the OPWDD arbitration:

> Collateral estoppel applies to arbitration proceedings, and when the doctrine's requirements are satisfied, "[an] arbitrator's factual findings must be accorded collateral estoppel effect" ... .
>
> ...[T]the Justice Center shared interests with OPWDD in the disciplinary proceeding stemming from its fundamental statutory obligation to "protect[] . . . vulnerable persons who reside in or receive services from [state-operated] facilities" and "assur[e], on behalf of the state, that vulnerable persons are afforded care that is of a uniformly high standard" ... . The Justice Center directly served these purposes by participating as counsel in the disciplinary proceeding conducted by OPWDD pursuant to its governing regulations and the pertinent collective bargaining agreement to determine whether petitioner should be terminated from her employment working with vulnerable persons... . ...
>
> ... The Justice Center is required by statute to develop the code of conduct that governs OPWDD employees such as petitioner who regularly work with vulnerable persons in facilities like the group home at issue here ... .
>
> ... [T]he OPWDD form that was used to report the incident ... included a section indicating that the Justice Center had been notified and providing the date, time and identification number of the notification ... . The Justice Center's subsequent investigation of the incident was carried out by an investigator who testified that he was employed by OPWDD. **Matter of Anonymous v New York State Justice Ctr. for The Protection of People With Special Needs, 2018 NY Slip Op 07996, Third Dept 11-21-18**

SOCIAL SERVICES LAW, MUNICIPAL LAW, CONSTITUTIONAL LAW, EVIDENCE.

PETITIONER'S PUBLIC ASSISTANCE BENEFITS SHOULD NOT HAVE BEEN TERMINATED, NOTICE DID NOT SPECIFY SPECIFIC INSTANCES OF A FAILURE TO COOPERATION WITH EMPLOYMENT TRAINING AND SOME EVIDENCE PRESENTED AT THE HEARING WAS NOT INCLUDED IN THE NOTICE, PETITIONER'S DUE PROCESS RIGHTS WERE VIOLATED (SECOND DEPT).

The Second Department, reversing the Commissioner of the New York State Office of Temporary and Disability Assistance, determined the Nassau County Department of Social Services' notice to petitioner of the termination of her public assistance benefits was defective and violated her right to due process. The notice did not include any specific instance of a refusal to cooperate with the employment training program, and the subsequent hearing considered evidence not mentioned in the notice:

> A local agency may not discontinue a recipient's public assistance benefits unless the recipient's failure to comply with one of the department's work rules is found to be willful and without good cause" (,,,see Social Services Law § 341[1]). A social services agency is required to provide an individual whose public assistance benefits are being discontinued with written notice that includes "the specific instance or instances of willful refusal or failure to comply without good cause" with employment requirements (Social Services Law § 341[1][b]). "A notice specifying the wrong charge as the basis for a reduction in benefits does not comply with the regulatory standard, nor with the constitutional standards of due process"... .
>
> Here, the petitioner correctly contends that the agency's notice was defective because it did not include any specific instances of her willful refusal without good cause to cooperate with the employment training program ... . Additionally, at the fair hearing, the agency offered evidence that the petitioner submitted a falsified timesheet indicating that she continued to attend training after her participation in the program was terminated, a charge not included in the notice. Accordingly, because the notice lacked specificity and failed to adequately advise the petitioner of the issues which were the subject of the hearing, the notice violated the petitioner's right to due process of law ... . **Matter of Pearl v Imhof, 2018 NY Slip Op 08024, Second Dept 11-21-18**

TRUSTS AND ESTATES

TRUSTS AND ESTATES.

UNSIGNED FORM INSUFFICIENT TO MAKE RESPONDENT THE BENEFICIARY OF DECEDENT'S IRA (FIRST DEPT).

The First Department determined an unsigned form purporting to make respondent (Cunney) the beneficiary of decedent's IRA was insufficient and did not constitute substantial compliance:

> The Surrogate correctly determined that, despite the decedent's clear intent to designate respondent Cunney as the beneficiary of her IRAs, Cunney is not entitled to the proceeds of the IRAs in the absence of a signed change of beneficiary form (see EPTL 13-3.2[e][1] ["A designation of a beneficiary or payee to receive payment upon death of the person making the designation . . . must be made in writing and signed by the person making the designation"] ...).

> Citing the doctrine of substantial compliance, Cunney argues that Morgan Stanley's Client Data Form for New Personal Accounts filled out in the decedent's handwriting is sufficient to satisfy the requirement of a signed writing, as that document did not require a signature. However, she cites no authority for excusing the signed writing requirement in the context of a retirement account. Indeed, as the Surrogate noted, even in the insurance context, where strict compliance is not always required ... , this Court has rejected the contention that an insured's specific testamentary disposition of an insurance policy in a will constitutes substantial compliance with the policy's requirements for effecting a change in the beneficiary of the policy ... . **Matter of Durcan, 2018 NY Slip Op 07241, First Dept 10-30-18**

TRUSTS AND ESTATES, CIVIL PROCEDURE, APPEALS.

PETITIONER WAS A PARTY ALONG WITH DECEDENT IN SEVERAL ACTIONS WHICH RESULTED IN PENDING APPEALS, PETITIONER THEREFORE HAD STANDING TO SEEK THE APPOINTMENT OF AN ADMINISTRATOR OF THE ESTATE OF THE DECEDENT, SURROGATE'S COURT REVERSED (SECOND DEPT).

The Second Department, reversing Surrogate's Court, determined that petitioner had standing to seek the appointment of an administrator of the estate of the decedent who was a party, along with petitioner, is several actions which resulted in appeals pending before the Second Department:

> In this proceeding, the petitioner, the founder of Five Towns College, seeks the appointment of an administrator for the estate of John D. Quinn (hereinafter the decedent), a former member of the college's board of trustees. Prior to the decedent's death, the petitioner and decedent were parties in a number of actions that resulted in four appeals pending before this Court ... . Those appeals were automatically stayed pending the substitution of a legal representative for the decedent pursuant to CPLR 1015(a).
>
> The Surrogate's Court dismissed the petition, finding that the petitioner lacked standing to bring the petition. The petitioner, in effect, moved for leave to reargue the dismissal of the petition, and upon reargument, the court adhered to its original determination.
>
> Upon reargument, the Surrogate's Court should have found that the petitioner has standing to bring the petition. SCPA 1002(1) provides, in relevant part, that "a person interested in an action . . . in which the intestate . . . , if living, would be a proper party may present a petition to the court having jurisdiction praying for a decree granting letters of administration to him or to another person upon the estate of the intestate." In this case, the decedent was named as a party in the actions in which appeals are pending before this Court, and the petitioner, as a defendant in those actions and an appellant before this Court, has an interest in those actions. Thus, pursuant to SCPA 1002(1), the petitioner has standing to petition the Surrogate's Court for the appointment of an administrator for the decedent's estate. **Matter of Quinn, 2018 NY Slip Op 07433, Second Dept 11-7-18**

TRUSTS AND ESTATES, FIDUCIARY DUTY.

ONLY SERIOUS MISCONDUCT, NOT CONFLICTS OF INTEREST, JUSTIFIES REMOVAL OF NAMED EXECUTORS, SURROGATE'S COURT REVERSED, MATTER SENT BACK FOR A HEARING (THIRD DEPT).

The Third Department, reversing Surrogate's Court, determined that the petition seeking letters of administration on the ground that respondents, who were the named executors, had conflicts of interest and had breached their fiduciary duties, should not have been granted. The court explained that named executors can be removed only for serious misconduct, not conflicts of interest. The matter was sent back for a hearing:

> '"[I]t is actual misconduct, not a conflict of interest, that justifies the removal of a fiduciary"'... . Simply put, "a conflict does not make a fiduciary ineligible under SCPA 707, and public policy zealously protects the decedent's right to name a fiduciary, even one with a conflict" ... . Thus, petitioners' remedy for the alleged conflict of interest lies not in the ineligibility provisions of SCPA 707, but in the provisions of SCPA 702 authorizing the issuance of limited and restricted letters of administration under certain enumerated circumstances.
>
> To that end, SCPA 702 (9) specifically provides for the issuance of limited letters of administration to a party for the purpose of commencing "any action or proceeding against the fiduciary, in his or her individual capacity, or against anyone else against whom the fiduciary fails or refuses to bring such a proceeding." Indeed, this subdivision is designed to preserve a decedent's choice of fiduciary "by permitting the appointment of a second limited administrator instead of requiring the disqualification or removal of original fiduciaries where their conflicts of interests preclude them from pursuing claims against themselves or others to the prejudice of other persons interested in the estate" ... . For these reasons, we conclude that the conflict alleged did not render respondents ineligible to serve as fiduciaries of decedent's estate under SCPA 707. **Matter of Bolen, 2018 NY Slip Op 08001, Third Dept 11-21-18**

UNEMPLOYMENT INSURANCE

UNEMPLOYMENT INSURANCE.

LIMOUSINE DRIVER WAS AN EMPLOYEE ENTITLED TO UNEMPLOYMENT INSURANCE BENEFITS (THIRD DEPT).

The Third Department determined a limousine driver for XYZ was an employee entitled to unemployment insurance benefits:

> XYZ imposed rules "regarding every aspect of claimant's performance" and thereby "exercised control over the results produced [and, more importantly,] the means used" to service XYZ's clients ... . While XYZ was obligated to comply with the rules governing the for-hire car service industry established by the Taxi and Limousine Commission, the testimony and a comparative review of the rules together established that XYZ's rules were significantly more specific and detailed or involved interpretations that often went well beyond the Commission's rules ... . Indeed, an officer of XYZ

explained that these additional specific requirements were designed "to satisfy the customer expectation." Thus, as we have consistently done in similar cases, we find that substantial evidence supports the Board's factual determination that claimant was an employee of XYZ, despite the existence of evidence that might support a contrary conclusion ... . **Matter of Jung Yen Tsai (XYZ Two Way Radio Serv., Inc.--Commissioner of Labor), 2018 NY Slip Op 07807, Third Dept 11-15-18**

UTILITIES

UTILITIES, REAL PROPERTY LAW, EMINENT DOMAIN, ENVIRONMENTAL LAW.

ALTHOUGH THE FEDERAL ENERGY REGULATORY COMMISSION (FERC) APPROVED THE GAS PIPELINE, THE STATE DID NOT ISSUE A WATER QUALITY CERTIFICATION (WQC) FOR THE PROJECT, THEREFORE THE PIPELINE COMPANY CAN NOT SEEK EASEMENTS OVER PRIVATE LAND PURSUANT TO THE EMINENT DOMAIN PROCEDURE LAW (EDPL) TO INSTALL THE PIPELINE (FOURTH DEPT).

The Fourth Department, in a full-fledged opinion by Justice NeMoyer, over a two-justice dissent, considering a matter of first impression, reversing Supreme Court, determined that a gas supply company could not acquire easements over private property by eminent domain for the installation of a pipeline for which the state denied a permit:

> In February 2017, the FERC [Federal Energy Regulatory Commission] granted petitioner's application for a certificate of public convenience and necessity to construct and operate a 97-mile natural gas pipeline from Pennsylvania into western New York. The pipeline's proposed route travels directly across respondents' land ... . Within the voluminous certificate, the FERC found that petitioner's "proposed [pipeline] project is consistent with the Certificate Policy Statement," i.e., the public interest. "Based on this finding and the environmental review for the proposed project," the FERC further found "that the public convenience and necessity require approval and certification of the project." ...
>
> ... [T]he New York State Department of Environmental Conservation (DEC) denied petitioner's application for a WQC [water quality certification]. The WQC application, held the DEC, "fails to demonstrate compliance with New York State water quality standards." Petitioner has taken various steps to challenge the WQC denial, including the filing of a petition for judicial review in the Second Circuit pursuant to 15 USC § 717r (d). It appears that those challenges have not yet been finally resolved. It is undisputed, however, that if the WQC denial is ultimately upheld, the pipeline cannot be built ... . * * *
>
> ... [P]etitioner is trying to expropriate respondents' land in furtherance of a pipeline project that, as things currently stand, cannot legally be built. Such an effort turns the entire concept of eminent domain on its head. If the State's WQC denial is finally annulled or withdrawn, then petitioner can file a new vesting petition. But until that time, petitioner cannot commence a vesting proceeding to force a sale without going through the entire EDPL [Eminent Domain Procedure Law] article 2 process. **Matter of National Fuel Gas Supply Corp. v Schueckler, 2018 NY Slip Op 07550, Fourth Dept 11-9-18**

WORKERS' COMPENSATION

WORKERS' COMPENSATION.

NEW YORK WORKERS' COMPENSATION TREATMENT GUIDELINES APPLY TO CLAIMANTS WHO HAVE MOVED TO AND ARE TREATED IN OTHER STATES (THIRD DEPT).

The Third Department determined the Workers' Compensation Board properly ruled that the guidelines for back pain treatment applied to claimant in Nevada. Claimant qualified for benefits in New York in 1996 and moved to Nevada in 2005:

> ... [W]e disagree with claimant that the Board impermissibly departed from its earlier decisions, as the Board acknowledged such a departure in its May 2017 decision and articulated its reasons for doing so ... . Moreover, we find that the Board's decision to depart from its prior decisions and apply the guidelines to the out-of-state treatment received by claimant in this case was rational. "The Board has the authority to promulgate medical treatment guidelines defining the nature and scope of necessary treatment" ... .. "An agency's construction of its statutes and regulations will be upheld if rational and reasonable" ... .
>
> There is no dispute that claimant, who was injured in New York but has since moved to Nevada, is entitled to continue to receive medical treatment from qualified physicians in her new state and that the employer remains liable for the reasonable value of necessary medical treatment from qualified physicians in her new state ... . In our view, the plain language of the regulations governing the guidelines do not limit their applicability to such medical treatment provided to claimants in other states, and a "treating medical provider" includes "any physician, podiatrist, chiropractor or psychologist that is providing treatment and care to an injured worker pursuant to the Workers' Compensation Law" without regard to, or limitation of, geographic location ... . Consistent with the regulations, the guidelines also state that "[a]ny medical providerrendering services to a workers' compensation patient must utilize the . . . [g]uidelines as provided for with respect to all work-related injuries and/or illnesses" ... . **Matter of Gasparro v Hospice of Dutchess County, 2018 NY Slip Op 07815, Third Dept 11-15-18**

WORKERS' COMPENSATION.

IN ORDER FOR THE INJURED RAILROAD WORKER TO BE ELIGIBLE FOR WORKERS' COMPENSATION LAW BENEFITS, ALL PARTIES WOULD HAVE TO WAIVE FEDERAL JURISDICTION UNDER THE FEDERAL EMPLOYER'S LIABILITY ACT (FELA), MATTER SENT BACK (THIRD DEPT).

The Third Department determined that claimant, a railroad employee injured on the job, could only be found eligible for Workers' Compensation benefits if all the relevant parties consented to waive federal jurisdiction under the Federal Employer's Liability Act (FELA), which otherwise preempts the Workers' Compensation Law. The matter was sent back to the Workers' Compensation Board:

> FELA preempts state law remedies, including workers' compensation claims, "for railway employees injured in the course of employment when any part of that employment furthers interstate commerce" ... . An exception is contained in Workers' Compensation Law § 113, which empowers the Board to award workers' compensation benefits if "the claimant,

> employer and insurance carrier waive their federal rights and remedies" ... . This can be accomplished with an explicit waiver by all parties or, alternatively, when conduct such as " representation of the employer by experienced counsel; utilization by the parties of the [B]oard's machinery at a series of hearings resulting in a series of awards; and payment and acceptance of those awards" demonstrates an implied waiver ... . Absent "a joint waiver or agreement evidencing an intention to be bound by" a workers' compensation award in lieu of the otherwise exclusive FELA remedy, the workers' compensation claim cannot proceed ... . **Matter of McCray v CTS Enters., Inc., 2018 NY Slip Op 07997, Third Dept 11-21-18**

WORKERS' COMPENSATION, ATTORNEYS, EVIDENCE.

THE COMMUNICATION BETWEEN CLAIMANT'S ATTORNEY AND THE INDEPENDENT MEDICAL EXAMINER DID NOT CREATE THE APPEARANCE OF IMPROPRIETY, THE INDEPENDENT MEDICAL EXAMINER'S REPORT AND TESTIMONY SHOULD NOT HAVE BEEN PRECLUDED (THIRD DEPT).

The Third Department, reversing the Workers' Compensation Board, determined that the communication between claimant's counsel and the independent medical examiner (Saunders) who assessed claimant's loss of use of his left foot, did not create the appearance of impropriety and did not warrant the preclude Sauders' report and testimony:

> Workers' Compensation Law § 13-a (6) prohibits "the improper influencing or attempt by any person improperly to influence the medical opinion of any physician who has treated or examined an injured employee." Moreover, "any substantive communication with an independent medical examiner, or his or her office, regarding the claimant from any person or entity, including a claimant, an insurance carrier, or a third[-]party administrator, that takes place or is initiated outside of the independent medical examination" ... shall be filed with the Board within 10 days of the receipt of the communication ... .
>
> Pursuant to Subject No. 046-124, the Board requires that, in addition to strictly complying with the requirements of Workers' Compensation Law §§ 13-a (6) and 137 (1) (b), "parties and their representatives should make every effort to avoid even the appearance that they are attempting to influence the opinion of a health care professional" (Workers' Comp Bd Release Subject No. 046-124). The Board further requires that "to avoid even the appearance that they are not acting in good faith, parties and their representatives are required to send a copy of any written communication with a health care professional to the opposing parties and their legal representative" ... .
>
> ... [A]t the conclusion of Saunders' deposition, the employer's attorney inquired whether claimant's attorney had communicated with him regarding the claim. Saunders responded that he had received a text message from the attorney the day before the deposition indicating that the deposition would address claimant's schedule loss of use, but that there was no discussion with counsel. The employer's attorney asked no further questions and made no request for claimant to produce a copy of the text message, a copy of which is not in the record. We are left then with what appears to be a limited communication between claimant's counsel and Saunders confirming the subject of the deposition. Significantly, there is no dispute that Saunders' ensuing deposition testimony fully comported with the report that he had previously filed with the Board — an outcome illustrating that claimant's counsel in no way influenced Saunders' testimony through the text message. In our view, verifying the subject of the deposition was simply ministerial in nature and does not reflect an effort to influence the witness testimony. **Matter of Knapp v Bette & Cring LLC, 2018 NY Slip Op 08218, Third Dept 11-20-18**

WORKERS' COMPENSATION, EMPLOYMENT LAW.

CLAIMANT LEFT HIS EMPLOYER'S FARM BRIEFLY USING HIS EMPLOYER'S ATV AND WAS STRUCK BY A VEHICLE WHEN HE ATTEMPTED TO RETURN TO THE FARM, THERE WAS EVIDENCE CLAIMANT CONSUMED ALCOHOL WHICH WAS PROHIBITED BY HIS EMPLOYER, CLAIMANT'S INJURIES DID NOT ARISE FROM HIS EMPLOYMENT, WORKER'S COMPENSATION CLAIM PROPERLY DENIED (THIRD DEPT).

The Third Department determined claimant's injuries did not arise out of his employment. Claimant, a farm worker, used his employer's ATV to go across the street to where his girlfriend was moving into a house. There was evidence he may have drunk beer, which was prohibited by his employer. When crossing the street to return to the farm claimant was struck by a vehicle and injured:

> Regardless of whether claimant was permitted to use the employer's ATV or to take a break and leave the farm for a brief period of time before returning to work, the employer's testimony makes clear that consuming alcohol on the job was not a permitted, acceptable or customary deviation from claimant's employment ... . As the record as a whole provides substantial evidence to support the Board's finding that claimant was engaged in an impermissible deviation from his employment at the time of his accident, his resulting injuries did not arise out of and in the course of his employment and, therefore, are not compensable ... . **Matter of Button v Button, 2018 NY Slip Op 07809, Third Dept 11-15-18**

WORKERS' COMPENSATION, EMPLOYMENT LAW, CIVIL PROCEDURE.

WHERE THERE IS A QUESTION OF FACT WHETHER THE INJURED PLAINTIFF'S EXCLUSIVE REMEDY IS WORKERS' COMPENSATION BECAUSE THERE IS A QUESTION OF FACT WHETHER PLAINTIFF WAS AN EMPLOYEE OR AN INDEPENDENT CONTRACTOR, THE ISSUE MUST FIRST BE DECIDED BY THE WORKERS' COMPENSATION BOARD, NOT THE COURTS (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, determined a question of fact whether the injured plaintiff was an employee or an independent contractor (and therefore a question of fact whether the Workers' Compensation was plaintiff's exclusive remedy) must ruled on by the Workers' Compensation Board before the courts can get involved:

> Where the availability of workers' compensation benefits "hinges upon questions of fact or upon mixed questions of fact and law, the parties may not choose the courts as the forum for resolution of the questions, but must look to the Workers' Compensation Board for such determinations"... . "The question of whether a particular person is an employee within the meaning of the Workers' Compensation Law is usually a question of fact to be resolved by the Workers' Compensation Board" ... . Here, in light of the affidavit of the defendant's employee, who stated that he trained the plaintiff, supervised the plaintiff closely, set the plaintiff's hours on the days the plaintiff worked, and directed the plaintiff's work, there is a question of fact regarding whether the plaintiff was the defendant's employee on the date of the accident. Accordingly, because "there is a question of fact as to whether the plaintiff has a valid negligence cause of action against the defendant," "[t]hat determination must be made in the first instance by the Workers' Compensation Board ...". **Findlater v Catering by Michael Schick, Inc., 2018 NY Slip Op 07702, Second Dept 11-14-18**

ZONING

ZONING, LAND USE, ADMINISTRATIVE LAW, EVIDENCE.

DENIAL OF SPECIAL USE PERMIT FOR A GAS STATION WAS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE (SECOND DEPT).

The Second Department determined the denial of a special use permit for the construction of a gas station was not supported by substantial evidence:

> The subject two-acre parcel of land, upon which is located a used auto sales dealership, an automotive repair shop, and an area for the storage of cars and boats, is located in a business district in which gasoline service stations are a permitted use with a special permit. * * *
>
> Unlike a variance, a special permit does not entail a use of the property forbidden by the zoning ordinance but, instead, constitutes a recognition of a use which the ordinance permits under stated conditions ... . Thus, the burden of proof on an applicant seeking a special permit is lighter than that required for a hardship variance... . In reviewing a town board's determination on special permit applications, we are "limited to determining whether the action taken by the board was illegal, arbitrary, or an abuse of discretion," and we "consider substantial evidence only to determine whether the record contains sufficient evidence to support the rationality of the [b]oard's determination" ... . "A denial of a special . . . permit must be supported by evidence in the record and may not be based solely upon community objection"... .
>
> Here, the material findings of the Town Board were not supported by substantial evidence. With regard to the alleged increased volume of traffic, there was no showing that the proposed use of a gasoline service station would have a greater impact on traffic than would other uses unconditionally permitted ... . While there was evidence that traffic would be increased by 3%, there was no evidence indicating that the proposed use would have any greater impact than would other permitted uses. Thus, the alleged increase in traffic volume was an improper ground for the denial of the special permit. **Matter of QuickChek Corp. v Town of Islip, 2018 NY Slip Op 08136, Second Dept 11-28-18**

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COURT OF APPEALS

ADMINISTRATIVE LAW

ADMINISTRATIVE LAW, EVIDENCE.

REVOCATION OF RACEHORSE TRAINER'S LICENSE BY THE NYS RACING AND WAGERING BOARD SHOULD HAVE BEEN CONFIRMED, SUBSTANTIAL EVIDENCE STANDARD WAS MET (CT APP).

The Court of Appeals, reversing the Appellate Division, determined the revocation of petitioner's racehorse trainer's license by the NYS Racing and Wagering Board should have been confirmed. The Court of Appeals did not write a decision and adopted the reasoning of the dissenting justice on the Appellate Division:

> **From the Dissent in the Appellate Division's Decision at 144 AD3d 1244, 1247-1252:**
>
> I agree with the majority that if the dates found on veterinary records ... regarding specified forms of veterinary care represent the dates upon which such treatment was administered, those records, along with other evidence, chronicle 1,717 violations by petitioner of rules prohibiting the administration of specified substances to a horse within specified windows prior to a race. The majority, however, finds that a reasonable mind cannot reach the conclusion that those dates convey when treatment occurred. As a result, the majority annuls the entirety of respondent's determination. In contrast, I find that the inference that respondent made that the dates listed next to specified veterinary care represent the dates that such care was administered to be reasonable and plausible. That conclusion requires confirmance and, accordingly, I respectfully dissent. * * *
>
> Substantial evidence "demands only that a given inference is reasonable and plausible, not necessarily the most probable" ... . Where "room for choice" exists in the inferences to be drawn from evidence, this Court has no power to preference its own interpretation over that of the administrative agency tasked with the determination ... . This great deference accorded to such an agency determination derives from the Legislature's decision to task an agency with expertise in the relevant law and regulations—rather than a court of general jurisdiction that lacks such expertise—with the authority to initially resolve legal disputes ... . **Matter of Pena v New York State Gaming Commn., 2018 NY Slip Op 08060, CtApp 11-27-18**

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CIVIL PROCEDURE

CIVIL PROCEDURE, CONSTITUTIONAL LAW.

CPLR 8501 AND 8503, WHICH REQUIRE AN OUT OF STATE LITIGANT TO POST SECURITY FOR COSTS IN CASE THE NONRESIDENT LOSES THE CASE, DOES NOT VIOLATE THE PRIVILEGES AND IMMUNITIES CLAUSE (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Feinman, determined that CPLR 8501 (a) and 8503, which require an out-of-state litigant to post a minimum of $500 security for costs in case the nonresident loses, does not violate the Privileges and Immunities Clause:

> When plaintiff commenced this personal injury action, she was a New York resident. Plaintiff then relocated to Georgia, prompting defendants to move, pursuant to CPLR 8501 (a) and 8503, for an order compelling plaintiff—a nonresident at the time the motion was made—to post a minimum of $500 security for costs in the event she lost the case (see CPLR 8101). Defendants also requested a stay of the proceedings pursuant to CPLR 8502 until plaintiff complied with the order. In opposition, plaintiff argued that CPLR 8501 (a) and 8503 were unconstitutional because they violate the Privileges and Immunities Clause of the Federal Constitution by impairing nonresident plaintiffs' fundamental right of access to the courts.
>
> Supreme Court granted defendants' motion, opining that although access to the courts is a fundamental right protectable under the Privileges and Immunities Clause, CPLR 8501 (a) and 8503 do not bar access to the courts ... . Supreme Court further stated that security for costs provisions are common nationwide ... .
>
> The Appellate Division unanimously affirmed. The court held that CPLR article 85 satisfied the standard set forth by the United States Supreme Court in Canadian Northern R.R. Co. v Eggen (252 US 553 [1920]), and re-affirmed in McBurney v Young (569 US 221 [2013]), that nonresidents must be given "access to the courts of the state upon terms which in themselves are reasonable and adequate for the enforcing of any rights [they] may have" ... . On that basis, the Appellate Division held that "the challenged statutory provisions do not deprive noncitizens of New York of reasonable and adequate access to New York courts" ... . [[W]e ... affirm. **Clement v Durban, 2018 NY Slip Op 07693, CtApp 11-14-18**

CIVIL PROCEDURE, MUNICIPAL LAW, RELIGION, ANIMAL LAW.

WRIT OF MANDAMUS SEEKING TO COMPEL ENFORCEMENT OF ANIMAL CRUELTY LAWS IN CONNECTION WITH THE RELIGIOUS PRACTICE OF KILLING CHICKENS PROPERLY DENIED, MANDAMUS DOES NOT LIE FOR DISCRETIONARY ACTS OR TO COMPEL A PARTICULAR OUTCOME (CT APP).

The Court of Appeals determined a writ of mandamus seeking to compel the NYC Department of Health to enforce laws preventing animal cruelty was properly denied. The writ concerned the slaughter of chickens as part of the religious practice of Kaporos prior to Yom Kippur:

> A writ of mandamus "is an extraordinary remedy' that is available only in limited circumstances'" ... . Such remedy will lie "only to enforce a clear legal right where the public official has failed to perform a duty enjoined by law" ... . While mandamus to compel " is an appropriate remedy to enforce the performance of a ministerial duty, it is well settled that it will not be awarded to compel an act in respect to which [a public] officer may exercise judgment or discretion'"... . Discretionary acts " involve the exercise of reasoned judgment which could typically produce different acceptable results whereas a ministerial act envisions direct adherence to a governing rule or standard with a compulsory result'". Further, mandamus may only issue to compel a public officer to execute a legal duty; it may not " direct how [the officer] shall perform that duty'" ... .
>
> Enforcement of the laws cited by plaintiffs would involve some exercise of discretion (see Town of Castle Rock v Gonzales, 545 US 748, 760-761 [2005]). Moreover, plaintiffs do not seek to compel the performance of ministerial duties but, rather, seek to compel a particular outcome. Accordingly, mandamus is not the appropriate vehicle for the relief sought ... . **Alliance to End Chickens as Kaporos v New York City Police Dept., 2018 NY Slip Op 07694, CtApp 11-14-18**

CRIMINAL LAW

CRIMINAL LAW.

COUNTERFEIT CONCERT TICKETS FALL WITHIN THE AMBIT OF THE STATUTE PROHIBITING POSSESSION OF A FORGED INSTRUMENT (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Fahey, determined that counterfeit concert tickets fall within the ambit of the statute prohibiting possession of a forged instrument:

> Defendant's argument, a jurisdictional challenge to the indictments against him, amounts to the claim that the otherwise valid statement of the elements of the crime in each count is negated by the specific allegation in the "to wit" phrase that the forged instrument purported to be an event ticket. He insists, in effect, that counterfeit event tickets could never fall within the ambit of the second-degree forgery statute. Defendant's rationale is that event tickets, the instruments that defendant's counterfeit documents purported to be, are merely revocable licenses and do not "affect a legal right, interest, obligation or status." ...
>
> Defendant's premise that event tickets are revocable licenses is true. The case law saying as much is venerable. The purchase of an event admission ticket gives the holder "a revocable license . . . to enter the building in which [the event is held], and to attend the performance" ... . An event ticket, in other words, is a permission slip, subject to retraction.
>
> It does not follow, however, that an event ticket does not affect a legal right, i.e., "right created or recognized by law" ... , or status, i.e., "legal condition, whether personal or proprietary" ... . Indeed, the same decisions on which defendant relies to demonstrate the revocable nature of event tickets also describe the legal rights, albeit limited, that a ticket evidences or otherwise affects. An event ticket, the Court wrote, "is a license, issued by the proprietor . . . as convenient evidence of the right of the holder to admission"... . The Legislature has similarly defined a ticket, in the context of entertainment and the arts generally, as "any evidence of the right of entry to any place of entertainment"... . **People v Watts, 2018 NY Slip Op 07926, CtApp 11-20-18**

CRIMINAL LAW, CONSTITUTIONAL LAW, IMMIGRATION LAW.

EVEN THOUGH DEFENDANT WAS NOT ENTITLED TO A JURY TRIAL BECAUSE THE CHARGES WERE B MISDEMEANORS, THE FACT THAT DEPORTATION WAS A POTENTIAL PENALTY ENTITLED DEFENDANT TO A JURY TRIAL PURSUANT TO THE SIXTH AMENDMENT (CT APP).

The Court of Appeals, reversing the appellate division, in a full-fledged opinion by Judge Stein, over two separate dissenting opinions, determined that the potential penalty of deportation entitles a defendant to a jury trial, even if, as here, the charges are B misdemeanors which are triable without a jury pursuant to Criminal Procedure Law 340.40:

> The Sixth Amendment of the United States Constitution guarantees that a defendant will be judged by a jury of peers if charged with a serious crime. Today, as a matter of first impression, we hold that a noncitizen defendant who demonstrates that a charged crime carries the potential penalty of deportation—i.e. removal from the country—is entitled to a jury trial under the Sixth Amendment. * * *
>
> Defendant argues that, although the Sixth Amendment right to a jury trial did not automatically attach to the crimes with which he was charged because they are punishable by less than a six-month term of incarceration, he met his burden of establishing that the crimes carry an additional penalty beyond incarceration—namely, deportation—which he contends is a sufficiently severe penalty to rebut the presumption that the crimes are petty for Sixth Amendment purposes. We agree. **People v Suazo, 2018 NY Slip Op 08056, CtApp 11-27-18**

CRIMINAL LAW, CORRECTION LAW.

THE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION MET ITS STATUTORY BURDEN TO ASSIST PETITIONER, A SEX OFFENDER, IN FINDING SUITABLE HOUSING UPON RELEASE, APPELLATE DIVISION REVERSED (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge DiFiore, over a partial dissent and an extensive dissenting opinion, determined that the Department of Corrections and Community Supervision (DOCCS) had met its burden of providing assistance to sex offenders in finding suitable housing upon release. Here the petitioner was transferred to a residential treatment facility (RTF) when his sentence was complete because he was unable to find suitable housing as required by the Sexual Assault Reform Act (SARA):

> Correction Law § 201 (5) requires DOCCS to assist inmates prior to release and under supervision to secure housing. DOCCS has interpreted its obligation under the statute as satisfied when it actively investigates and approves residences that have been identified by inmates and when it provides the inmates with adequate resources to allow them to propose residences for investigation and approval. This interpretation is consistent with the plain language of the statute as well as the larger statutory framework. While the agency is free, in its discretion, to provide additional assistance to inmates in locating SARA-compliant housing — particularly where an inmate is nearing the maximum expiration date or is residing in an RTF with the associated restrictions on the ability to conduct a comprehensive search — there is no statutory basis in Correction Law § 201 (5) for imposing such an obligation.
>
> As to whether DOCCS met its obligation in this particular case, the record demonstrates that petitioner met biweekly with an ORC regarding SARA-compliant housing and also met several

> times with his parole officer. Petitioner was able to propose 58 residences which DOCCS investigated for SARA-compliance. The agency also affirmatively identified at least two housing options for petitioner in New York City — one was rejected by petitioner on the basis that he could not afford it and the other was the shelter in Manhattan where he was ultimately housed. Certainly, the record reflects that DOCCS provided more than passive assistance, given that it affirmatively contacted other agencies and providers on petitioner's behalf because of his financial needs. Indeed, petitioner was successfully placed with New York City's DHS through DOCCS' efforts, which were adequate to meet its statutory obligation to provide assistance.
>
> Finally, we agree with the Appellate Division that there was insufficient record evidence to establish that DOCCS' determination to place petitioner at the Woodbourne RTF was irrational or that the conditions of his placement at that facility were in violation of the agency's statutory or regulatory obligations ... .**Matter of Gonzalez v Annucci, 2018 NY Slip Op 08057, CtApp 11-27-18**

CRIMINAL LAW, EVIDENCE.

ENTERPRISE CORRUPTION CONVICTION NOT SUPPORTED BY LEGALLY SUFFICIENT EVIDENCE OF DEFENDANT'S KNOWLEDGE OF THE EXISTENCE OF THE ENTERPRISE AND HIS INTENT TO PARTICIPATE IN AFFAIRS OF THE ENTERPRISE (CT APP).

The Court of Appeals, in a memorandum decision supplemented with an extensive concurring opinion, determined that the defendant's conviction of enterprise corruption (Penal Law 460.20) was not supported by legally sufficient evidence:

> ... [T]he proof elicited at trial was not legally sufficient to establish the elements of defendant's knowledge of the existence of the subject criminal enterprise and the nature of its affairs or his intent to participate in such affairs ... .
>
> On the mens rea element, the People were required to prove, beyond a reasonable doubt, that defendant, "having knowledge of the existence of a criminal enterprise and the nature of its activities," and, "being employed by or associated with such enterprise . . . intentionally conduct[ed] or participate[d] in the affairs of an enterprise" ... . Consistent with this statutory mens rea requirement, the trial court additionally instructed the jury, without objection, that the People were required to show that defendant had "chosen to be part of the group and to have worked as a member of it or in affiliation with it to achieve its criminal purposes."
>
> Here, the evidence of defendant's knowledge of the existence of the criminal enterprise and his intention to participate in its affairs fell short as a matter of law. The evidence of defendant's participation in the three requisite criminal acts included in the pattern activity alone does not establish defendant's knowledge of the existence of the criminal enterprise and the nature of its activities. In addition, the critical trial testimony of the People's cooperating witness demonstrated that defendant was isolated from — rather than employed by or associated with — the enterprise, and that defendant acted independently on his own behalf, with the singular purpose of serving his own interests. **People v Jones, 2018 NY Slip Op 08058, CtApp 11-27-18**

CRIMINAL LAW, EVIDENCE, APPEALS.

THE PROSECUTION'S FAILURE TO PRESENT A WITNESS TO THE GRAND JURY, AS REQUESTED BY THE DEFENDANT, DID NOT RISE TO A CONSTITUTIONAL DEFECT, THEREFORE THE ISSUE DID NOT SURVIVE DEFENDANT'S GUILTY PLEA (CT APP).

The Court of Appeals, over a two-judge concurrence, determined the defendant's argument that the integrity of the grand jury proceedings was impaired by the prosecution's failure to call a witness requested by the defendant did not raise a constitutional issue and therefore was precluded by defendant's guilty plea:

> Defendant does not contend that the evidence before the grand jury was insufficient to support the indictment. Instead, defendant claims that the prosecutor's conduct impaired the integrity of the grand jury proceeding and argues his motion to dismiss the indictment for defective grand jury proceedings on that ground is not forfeited by his guilty plea. ...
>
> ... [W]e have explained that even after entering a valid guilty plea, "a defendant may not forfeit a claim of a constitutional [*2]defect implicating the integrity of the process" ... and we have recognized that certain claimed defects in a grand jury proceeding rise to this level ... .
>
> Defendant's claim in this case rests on the purported exclusion of a witness, the substance of whose testimony was contained in an affidavit provided to the courts below. That proffered testimony was largely inadmissible and, in any event, would have inculpated him by establishing that he had a relationship with the complainant and had been in her presence in violation of an order of protection. The exclusion of such testimony before the grand jury does not present "a constitutional defect implicating the integrity of the process"... and accordingly the claimed violation in this case did not survive defendant's guilty plea. **People v Manragh, 2018 NY Slip Op 07924, CtApp 11-20-18**

CRIMINAL LAW, EVIDENCE, APPEALS.

EVIDENCE OF SERIOUS PHYSICAL INJURY MET THE LEGALLY SUFFICIENT EVIDENCE APPELLATE REVIEW CRITERIA (CT APP).

The Court of Appeals, over a two-judge dissent, determined the evidence of serious physical injury in this first degree assault case met the "legally sufficient evidence" standard of appellate review. The victim was shot in the leg and bullet fragments remain in his body:

> The victim testified that he can still "feel [the bullet] poking out," and that he continues to endure the effects "of the metal inside [his] leg." Even four years after the shooting, the victim noted that the injury still "disturbs" him at times, and that "something is wrong with [his] leg." The victim stated that, because the bullet "didn't come out of [his] leg," his "life" had been "tampered with." For instance, he can no longer participate in competitive sports, as the injury would present a "very, very, very, very big risk." The medical expert further testified that there are "many repercussions" of the type of muscle damage that the victim sustained: "Muscle damage can cause long-term injuries to the kidneys from leakage of chemicals from the muscle, toxic to the kidneys, can cause pain and weakness, difficulty walking."

> As the dissent notes, there is certainly record evidence favorable to the defense that, when viewed in isolation, might have presented an issue of fact for the jury. That said, viewing the evidence in the light most favorable to the People, as our legal sufficiency standard requires, we have no trouble concluding that the jury acted rationally in finding that the victim's gunshot wound constituted a "serious physical injury" ... . **People v Garland, 2018 NY Slip Op 07927, CtApp 11-20-18**

EDUCATION-SCHOOL LAW

EDUCATION-SCHOOL LAW, ADMINISTRATIVE LAW.

SCHOOL DISTRICTS DO NOT HAVE THE AUTHORITY TO OVERSEE PRE-KINDERGARTEN PROGRAMS OFFERED BY CHARTER SCHOOLS, BECAUSE THE ISSUE IS ONE OF PURE STATUTORY INTERPRETATION, DEFERENCE TO THE COMMISSIONER OF EDUCATION'S CONTRARY CONCLUSION IS NOT REQUIRED (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Garcia, over an extensive two-judge dissenting opinion, determined that school districts do not have the authority to oversee pre-kindergarten programs offered by charter schools. The court noted that deference to the Commissioner of Education's contrary finding was not required because the question is one of pure statutory interpretation:

> Charter schools are listed among the various eligible providers under the Statewide Universal Full-Day Pre-Kindergarten Program. Unlike other providers, however, charter schools are separately governed by the New York Charter Schools Act, and all "monitoring, programmatic review and operational requirements" related to charter school pre-kindergarten programs are "the responsibility of the charter entity" and must be "consistent with the requirements" of the Charter Schools Act (Education Law § 3602-ee [12]). The issue before us is whether the statutory scheme governing charter school pre-kindergarten programs allows for shared oversight authority between charter entities and local school districts. We hold that it does not ... . * * *
>
> According to [the appellate division, affirmed here by the Court of Appeals], the Legislature's use of the word "all" in subdivision 12 provide the charter entity "with full responsibility for the relevant monitoring, programmatic review and operational requirements' for the relevant prekindergarten programs" and that the plain meaning of this provision "in no way indicates that another entity — such as a school district — holds concurrent responsibility or authority in this regard" (... quoting Education Law § 3602-ee [12]). This reading, in the Appellate Division's view, "best harmonizes the provisions of the statute in a manner consistent with the Legislature's announced purpose" of Universal Pre-K Law which was " to encourage program creativity through competition'" (... quoting Education Law § 3602-ee [1]). The Court also determined that the plain meaning of the term "inspection" did not include a right to regulate the curriculum (id.; see Education Law § 3602-ee [10]). The Appellate Division remitted the matter to the Commissioner, given that "the Commissioner's determination regarding Success Academy's request for funding was affected by its erroneous interpretation of" Universal Pre-K Law" ... . **Matter of DeVera v Elia, 2018 NY Slip Op 07922, CtApp 11-20-18**

LIEN LAW

LIEN LAW, LANDLORD-TENANT.

LANDLORD, BY THE TERMS OF THE LEASE WHICH REQUIRED THE TENANT TO DO RENOVATION WORK, IS DEEMED TO HAVE CONSENTED TO THE WORK, THE CONTRACTOR THEREFORE HAD A VALID MECHANIC'S LIEN WITH RESPECT TO THE LANDLORD (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Wilson, determined the landlord (COR), by the terms of the lease which required work on the premises to be done by the tenant restaurant (Peaches), consented to the work. Therefore the contractor who did the work had a valid mechanic's lien with respect to the landlord:

> The language of the lease agreement not only expressly authorized Peaches to undertake the electrical work, but also required it to do so to effectuate the purpose of the lease—that is, for Peaches to open the restaurant for business and operate it continuously, seven days a week, during hours specified by COR. Furthermore, the detailed language makes clear that COR was to retain close supervision over the work and authorized it to exercise at least some direction over the work by reviewing, commenting on, revising, and granting ultimate approval for the design drawings related to the electrical work. We therefore conclude that, under our prior precedents, the terms of the lease agreement between COR and Peaches, taken together, are sufficient to establish COR's consent under Lien Law § 3. **Ferrara v Peaches Cafe LLC, 2018 NY Slip Op 07925, CtApp 11-20-18**

MUNICIPAL LAW

MUNICIPAL LAW.

ALTHOUGH THE VILLAGE BUILT THE BRIDGE, THE VILLAGE NEVER IMPLEMENTED THE PROCEDURES IN THE VILLAGE CODE FOR ASSUMING CONTROL OVER THE BRIDGE, THEREFORE THE TOWN WAS RESPONSIBLE FOR REPAIR (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Stein, over a dissent, reversing the Appellate Division, determined that the Town, not the Village, was responsible for the repair of a bridge. Although the bridge apparently had been built by the Village, the procedure for assuming control over the bridge laid out in the Village Code, which includes a resolution and a permissive referendum, was never implemented. The case turned on interpretation of the code provisions:

> The Town argues, and the Appellate Division held, that a village has discretion to assume control of bridges in ways other than those enumerated in Village Law § 6-606. We disagree. " [W]here a law expressly describes a particular act, thing or person to which it shall apply, an irrefutable inference must be drawn that what is omitted or not included was intended to be omitted or excluded'" ... . Here, the legislature has limited the methods by which a village may assume control of a bridge by establishing specific procedures to be followed ... . Had the legislature intended for a village to have the ability to unilaterally construct, and thereby control, a bridge—without regard to

> the passage of resolutions, agreements with the town, or permissive referendums—the legislature could easily have so stated, and its failure to do so compels the conclusion that such other methods of assuming control are ineffective ... . **Town of Aurora v Village of E. Aurora, 018 NY Slip Op 07923, CtApp 11-20-18**

PRODUCTS LIABILITY

PRODUCTS LIABILITY, TOXIC TORTS, NEGLIGENCE, EMPLOYMENT LAW.

THE GRANT OF FORD'S MOTION TO SET ASIDE THE VERDICT IN THIS ASBESTOS CASE AFFIRMED, EVIDENCE OF A CAUSAL CONNECTION BETWEEN ASBESTOS IN BRAKE LININGS AND PLAINTIFF'S DECEDENT'S MESOTHELIOMA NOT SUPPORTED BY LEGALLY SUFFICIENT EVIDENCE (CT APP).

The Court of Appeals, affirming the grant of defendant-Ford's motion to set aside the verdict in this asbestos case, over two concurring opinions and a dissenting opinion, determined the evidence of a causal connection between the asbestos in brake linings on Ford vehicles and plaintiff's decedent's mesothelioma was legally insufficient. Plaintiff's decedent worked in a garage and was exposed to asbestos-laden dust from new and used brakes, clutches and manifold and engine gaskets:

> Viewing the evidence in the light most favorable to plaintiffs, the evidence was insufficient as a matter of law to establish that respondent Ford Motor Company's conduct was a proximate cause of the decedent's injuries pursuant to the standards set forth in Parker v Mobil Oil Corp. (7 NY3d 434 [2006]) and Cornell v 360 W. 51st St. Realty, LLC(22 NY3d 762 [2014]). Accordingly, on this particular record, defendant was entitled to judgment as a matter of law under CPLR 4404 (a) ... . **Matter of New York City Asbestos Litig., 2018 NY Slip Op 08059, CtApp 11-27-18**