NEW YORK APPELLATE DIGEST, LLC

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Covering All Four Departments of the Appellate Division of the New York State Supreme Court, as Well as the New York State Court of Appeals.

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Major Categories Addressed In the Digest This Month:

Appellate Division: Administrative Law, Arbitration, Attorneys, Civil Procedure, Contract Law, Cooperatives, Criminal Law, Debtor-Creditor, Disciplinary Hearings, Education-School Law, Employment Law, Environmental Law, Family Law, Foreclosure, Insurance Law, Labor Law-Construction Law, Limited Liability Company Law, Mortgages, Municipal Law, Negligence, Products Liability, Real Property Law, Real Property Actions And Proceedings Law, Real Property Tax Law, Unemployment Insurance, Workers' Compensation Law

Court of Appeals: Arbitration, Civil Procedure, Contract Law, Criminal Law, Employment Law, Mental Hygiene Law, Municipal Law, Negligence, Workers' Compensation Law

CLICK ON ANY TABLE OF CONTENTS ENTRY TO GO TO RELEVANT MAIN CATEGORY IN THE DIGEST.
TO RETURN TO THE TABLE OF CONTENTS USE THE "TABLE OF CONTENTS" LINK AT THE TOP OF EACH PAGE.
THE INDEX (P. 102) SERVES AS AN OUTLINE OF THE ISSUES ADDRESSED BY THE COURTS THIS MONTH. ALL THE BROAD CATEGORIES (I.E. "CRIMINAL LAW," "NEGLIGENCE," "INSURANCE") ARE COLLECTED IN ONE PLACE IN THE INDEX. ALL NARROWER ISSUES (I.E., "SLIP AND FALL, "TRAFFIC ACCIDENTS") ARE COLLECTED IN ONE PLACE IN THE INDEX AS WELL. USE YOUR PDF READER "NUMBER BOX" TO MOVE TO AND FROM THE INDEX (P. 102). THERE IS ALSO A LINK TO THE INDEX AT THE TOP OF EACH PAGE.

TABLE OF CONTENTS

APPELLATE DIVISION

ADMINISTRATIVE LAW

ADMINISTRATIVE LAW (STATE LIQUOR AUTHORITY SHOULD NOT HAVE DENIED APPLICATION FOR A LIQUOR LICENSE BASED UPON THE HISTORY OF PRIOR TAVERNS AT THE SAME LOCATION WITH WHICH THE CURRENT APPLICANT HAD NO CONNECTION (FIRST DEPT))/LIQUOR LICENSES (STATE LIQUOR AUTHORITY SHOULD NOT HAVE DENIED APPLICATION FOR A LIQUOR LICENSE BASED UPON THE HISTORY OF PRIOR TAVERNS AT THE SAME LOCATION WITH WHICH THE CURRENT APPLICANT HAD NO CONNECTION (FIRST DEPT))/STATE LIQUOR AUTHORITY (ADMINISTRATIVE LAW, (STATE LIQUOR AUTHORITY SHOULD NOT HAVE DENIED APPLICATION FOR A LIQUOR LICENSE BASED UPON THE HISTORY OF PRIOR TAVERNS AT THE SAME LOCATION WITH WHICH THE CURRENT APPLICANT HAD NO CONNECTION (FIRST DEPT))

ADMINISTRATIVE LAW.

STATE LIQUOR AUTHORITY SHOULD NOT HAVE DENIED APPLICATION FOR A LIQUOR LICENSE BASED UPON THE HISTORY OF PRIOR TAVERNS AT THE SAME LOCATION WITH WHICH THE CURRENT APPLICANT HAD NO CONNECTION (FIRST DEPT).

The First Department, over a substantive dissent, determined the New York State Liquor Authority (SLA) should not have denied the application for a liquor license based upon the prior history of businesses at the same location. The current applicant had no connection with the prior businesses:

> The SLA is given wide latitude in the exercise of its powers ... . In reviewing a determination made by the SLA, the test to be applied by the court is whether its determination has a rational basis in the record ... .
>
> The dissent correctly notes that the prior adverse license history of the subject premises, and the sensitive area in which it is located, may be proper factors to be considered in the licensing process. However, in doing so, the dissent ignores long-standing precedent from several Judicial Departments, including our own, that such history is not relevant where, as here, the principal of the applicant "ha[s] no ownership interest in the previous licensee and there is no reasonable factual basis to support a finding that he exercised managerial responsibilities with respect to that prior operation" ... .
>
> The SLA maintains that the applicant has the identical business plan for a nightclub as the previous two licensees whose licenses were revoked. Thus, the SLA contends that the fear of "history . . . repeat[ing] itself," especially in light of the proposed manager's "questionable" experience, has a rational basis and its denial should be upheld. However, its denial appears to be "based upon conclusory reasons unsupported by factual considerations of reasonable persuasiveness and should therefore . . . be set aside"... . Moreover, the SLA may not deny a proper license application based on the supposition that principals of the licensee would not exercise the "proper degree of personal supervision'" over the licensed premises to insure the premises would be operated in an orderly and lawful manner, as such denial would be based on speculative inferences ... . **Matter of Galaxy Bar & Grill Corp. v New York State Liq. Auth., 2017 NY Slip Op 07168, First Dept 10-12-17**

ARBITRATION

ARBITRATION (STATUTORY RIGHT TO ATTORNEY'S FEES IN A SUCCESSFUL ACTION FOR THE PAYMENT OF WAGES PURSUANT TO LABOR LAW 198 WAS VALIDLY WAIVED BY THE ARBITRATION AGREEMENT (FOURTH DEPT))/EMPLOYMENT LAW (LABOR LAW, STATUTORY RIGHT TO ATTORNEY'S FEES IN A SUCCESSFUL ACTION FOR THE PAYMENT OF WAGES PURSUANT TO LABOR LAW 198 WAS VALIDLY WAIVED BY THE ARBITRATION AGREEMENT (FOURTH DEPT))/LABOR LAW (UNPAID WAGES, (STATUTORY RIGHT TO ATTORNEY'S FEES IN A SUCCESSFUL ACTION FOR THE PAYMENT OF WAGES PURSUANT TO LABOR LAW 198 WAS VALIDLY WAIVED BY THE ARBITRATION AGREEMENT (FOURTH DEPT))/ATTORNEYS (LABOR LAW, UNPAID WAGES, ATTORNEY'S FEES, STATUTORY RIGHT TO ATTORNEY'S FEES IN A SUCCESSFUL ACTION FOR THE PAYMENT OF WAGES PURSUANT TO LABOR LAW 198 WAS VALIDLY WAIVED BY THE ARBITRATION AGREEMENT (FOURTH DEPT))/WAIVER (LABOR LAW 198, ATTORNEY'S FEES, STATUTORY RIGHT TO ATTORNEY'S FEES IN A SUCCESSFUL ACTION FOR THE PAYMENT OF WAGES PURSUANT TO LABOR LAW 198 WAS VALIDLY WAIVED BY THE ARBITRATION AGREEMENT (FOURTH DEPT))

ARBITRATION, EMPLOYMENT LAW, LABOR LAW, ATTORNEYS.

STATUTORY RIGHT TO ATTORNEY'S FEES IN A SUCCESSFUL ACTION FOR THE PAYMENT OF WAGES PURSUANT TO LABOR LAW 198 WAS VALIDLY WAIVED BY THE ARBITRATION AGREEMENT (FOURTH DEPT).

The Fourth Department, in a full-fledged opinion by Justice DeMoyer, determined the right to statutory attorney's fees in a wage dispute pursuant to Labor Law 198 was validly waived in the arbitration agreement. Here the arbitration agreement allowed, but did not require, the arbitrator to award the statutory attorney's fees. The arbitrator awarded more than $40,000 in unpaid wages, but did not award attorney's fees. The opinion is substantive and provides a clear explanation of the extent to which courts can review arbitration awards, which are creatures of contract:

> Arbitration is a creature of contract, and arbitrators draw their power from the consent of the arbitrants, not from the sovereignty of the State. It is thus "well settled that judicial review of arbitration awards is extremely limited"... . Indeed, "courts are obligated to give deference to the decision of the arbitrator . . . even if the arbitrator misapplied the substantive law" ... . An arbitration award is not immune from judicial scrutiny, however, and it will be vacated if, inter alia, the arbitrator "exceeded his power"... . An arbitrator can exceed his or her power in a variety of ways, three of which are relevant to this appeal.
>
> First, an arbitrator exceeds his or her power by transgressing a "specifically enumerated limitation" on their authority ... . * * *
>
> Second, an arbitrator exceeds his or her power by rendering an award that contravenes a "strong public policy" of this State ... . * * *
>
> Third, an arbitrator exceeds his power when he "manifestly disregard[s]" the substantive law applicable to the parties' dispute ... . * * *
>
> Plaintiff validly waived his right to the attorney's fees afforded by Labor Law § 198. He therefore cannot prevail on his present claim that the arbitrator violated public policy and manifestly disregarded the law by exercising the very discretion validly conferred by the arbitration agreement. **Schiferle v Capital Fence Co., Inc., 2017 NY Slip Op 07059, Fourth Dept 10-6-17**

ATTORNEYS

ATTORNEYS (LAWSUIT BROUGHT BY AN ATTORNEY WHO DID NOT HAVE A IN-STATE OFFICE WAS A NULLITY (FIRST DEPT))/JUDICIARY LAW (ATTORNEYS, IN-STATE OFFICE, LAWSUIT BROUGHT BY AN ATTORNEY WHO DID NOT HAVE A IN-STATE OFFICE WAS A NULLITY (FIRST DEPT))/LAW OFFICES (IN-STATE, (LAWSUIT BROUGHT BY AN ATTORNEY WHO DID NOT HAVE A IN-STATE OFFICE WAS A NULLITY (FIRST DEPT))

ATTORNEYS.

LAWSUIT BROUGHT BY AN ATTORNEY WHO DID NOT HAVE AN IN-STATE OFFICE WAS A NULLITY (FIRST DEPT).

The First Department determined a lawsuit started by an attorney who did not have a New York office was a nullity:

> The record supports the court's determination that plaintiff's counsel failed to maintain an in-state office at the time he commenced this action, in violation of Judiciary Law § 470 ... . Plaintiff's subsequent retention of co-counsel with an in-state office did not cure the violation, since the commencement of the action in violation of Judiciary Law § 470 was a nullity ... . The court properly permitted defendants to make a second dispositive motion to dismiss since at the time of the first motion defendants had no reason to suspect that plaintiff's counsel may have violated Judiciary Law § 470 ... . **Arrowhead Capital Fin., Ltd. v Cheyne Specialty Fin. Fund L.P., 2017 NY Slip Op 07219, First Dept 10-17-17**

CIVIL PROCEDURE

CIVIL PROCEDURE (JURY TRIAL, IN THE FOURTH DEPARTMENT, UNLIKE THE OTHER DEPARTMENTS, A DEFENDANT'S EQUITABLE COUNTERCLAIM DOES NOT WAIVE THE RIGHT TO A JURY TRIAL (FOURTH DEPT))/JURY TRIAL (CIVIL PROCEDURE, IN THE FOURTH DEPARTMENT, UNLIKE THE OTHER DEPARTMENTS, A DEFENDANT'S EQUITABLE COUNTERCLAIM DOES NOT WAIVE THE RIGHT TO A JURY TRIAL (FOURTH DEPT))/EQUITABLE CLAIMS (JURY TRIAL, IN THE FOURTH DEPARTMENT, UNLIKE THE OTHER DEPARTMENTS, A DEFENDANT'S EQUITABLE COUNTERCLAIM DOES NOT WAIVE THE RIGHT TO A JURY TRIAL (FOURTH DEPT))/COUNTERCLAIMS (EQUITABLE, JURY TRIAL, IN THE FOURTH DEPARTMENT, UNLIKE THE OTHER DEPARTMENTS, A DEFENDANT'S EQUITABLE COUNTERCLAIM DOES NOT WAIVE THE RIGHT TO A JURY TRIAL (FOURTH DEPT))

CIVIL PROCEDURE.

IN THE FOURTH DEPARTMENT, UNLIKE THE OTHER DEPARTMENTS, A DEFENDANT'S EQUITABLE COUNTERCLAIM DOES NOT WAIVE THE RIGHT TO A JURY TRIAL (FOURTH DEPT).

The Fourth Department, in affirming the denial of plaintiff's motion to strike defendants' demand for a jury trial, noted that the Fourth Department, unlike the other departments, does not hold that a defendant waives a jury trial by asserting a counterclaim which sounds in equity:

> We have declined to apply the prevailing rule in the other Departments of the Appellate Division that a defendant waives his or her right to a jury trial on jury-triable causes of action in the complaint by interposing an equitable counterclaim based on the same transaction (see id.). The plain text of CPLR 4102 (c) does not address that issue, and the rule that prevails in the other Departments would force defendants to commence separate actions to assert equitable counterclaims, thereby encouraging the prosecution of inefficient and wasteful parallel actions ... . We conclude, however, that "[t]he need for a full relitigation of the equitable claims and the possibility of inconsistent results can be avoided by permitting the legal action and the equitable claims to be tried at the same time" ... . **Pittsford Canalside Props., LLC v Pittsford Vil. Green, 2017 NY Slip Op 07052, Fourth Dept 10-6-17**

CIVIL PROCEDURE (ARTICLE 78 PETITION, RETURN DATE, IT IS NO LONGER A JURISDICTIONAL DEFECT TO FAIL TO INCLUDE A RETURN DATE IN AN ARTICLE 78 PETITION (FOURTH DEPT))/ARTICLE 78 (RETURN DATE, IT IS NO LONGER A JURISDICTIONAL DEFECT TO FAIL TO INCLUDE A RETURN DATE IN AN ARTICLE 78 PETITION (FOURTH DEPT))/RETURN DATE (ARTICLE 78 PETITION, IT IS NO LONGER A JURISDICTIONAL DEFECT TO FAIL TO INCLUDE A RETURN DATE IN AN ARTICLE 78 PETITION (FOURTH DEPT))

CIVIL PROCEDURE.

IT IS NO LONGER A JURISDICTIONAL DEFECT TO FAIL TO INCLUDE A RETURN DATE IN AN ARTICLE 78 PETITION (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, noted that the failure to include a return date in an Article 78 petition is no longer a jurisdictional defect:

> Supreme Court dismissed the petition on jurisdictional grounds because the notice of petition served and filed by petitioner omitted a return date in violation of CPLR 403 (a). We now reverse.
>
> In dismissing the petition, the court relied on a line of cases, all from the Third Department, holding that such an omission constitutes a jurisdictional defect ... . Those cases, however, were all decided before CPLR 2001 was amended in 2007 "to permit courts to disregard mistakes, omissions, defects or irregularities made at the commencement of a proceeding, which includes commencement by the filing of a petition" ... , and the Third Department has since held that "the rule articulated in [its] prior decisions—a notice of petition lacking a return date is jurisdictionally defective and, therefore, prohibits a court from exercising its authority under CPLR 2001—is no longer tenable" ... . We agree inasmuch as "the purpose behind amending CPLR 2001 was to allow courts to correct or disregard technical defects, occurring at the commencement of an action [or proceeding], that do not prejudice the opposing party' and to fully foreclose dismissal of actions for technical, non-prejudicial defects' " ... .
>
> We therefore reverse the judgment, reinstate the petition, and remit the matter to Supreme Court to exercise the discretion afforded to it under CPLR 2001. **Matter of Kennedy v New York State Off. for People With Dev. Disabilities, 2017 NY Slip Op 07082, Fourth Dept 10-6-17**

CIVIL PROCEDURE (DISCLOSURE, TAX RETURNS, INSUFFICIENT SHOWING DISCLOSURE OF TAX RETURNS WAS NECESSARY TO PROVE DEFENDANT'S CLAIMS (FIRST DEPT))/DISCLOSURE (CIVIL PROCEDURE, TAX RETURNS, INSUFFICIENT SHOWING DISCLOSURE OF TAX RETURNS WAS NECESSARY TO PROVE DEFENDANT'S CLAIMS (FIRST DEPT))/TAX RETURNS (CIVIL PROCEDURE, DISCLOSURE, INSUFFICIENT SHOWING DISCLOSURE OF TAX RETURNS WAS NECESSARY TO PROVE DEFENDANT'S CLAIMS (FIRST DEPT))

CIVIL PROCEDURE,

INSUFFICIENT SHOWING DISCLOSURE OF TAX RETURNS WAS NECESSARY TO PROVE DEFENDANT'S CLAIMS (FIRST DEPT).

The First Department, reversing Supreme Court, determined that a sufficient showing of need was not made by defendant (Greene) for the disclosure of tax returns by plaintiff (Pinnacle):

> Disclosure of tax returns is generally disfavored due to their confidential and private nature ... , and Greene has not made a sufficiently particularized showing that the information contained in Pinnacle's tax returns, even if redacted to only reveal Pinnacle's revenue, is necessary to prove his claims ... . Moreover, he does not address why other sources are inadequate, inaccessible, or unlikely to be productive ... . **Pinnacle Sports Media & Entertainment, LLC v Greene, 2017 NY Slip Op 07527, First Dept 10-26-17**

CIVIL PROCEDURE (APPEALS, DENIAL OF A MOTION TO DISMISS WITHOUT PREJUDICE IS APPEALABLE (FOURTH DEPT))/APPEALS (CIVIL PROCEDURE, DENIAL OF A MOTION TO DISMISS WITHOUT PREJUDICE IS APPEALABLE (FOURTH DEPT))/DISMISS, MOTION TO (CIVIL PROCEDURE, APPEALS, DENIAL OF A MOTION TO DISMISS WITHOUT PREJUDICE IS APPEALABLE (FOURTH DEPT))

CIVIL PROCEDURE, APPEALS.

DENIAL OF A MOTION TO DISMISS WITHOUT PREJUDICE IS APPEALABLE (FOURTH DEPT).

The Fourth Department determined Supreme Court should have granted defendants' motion to dismiss the complaint because the causes of action were inadequately pled or were defeated by the language of a contract. The case is mentioned here because it noted that the denial of a motion to dismiss without prejudice is appealable:

> Concluding that the motion was "premature" in the absence of discovery, Supreme Court denied it without reviewing the substantive contentions advanced therein. We conclude that the court erred in denying the motion.
>
> ... [C]ontrary to plaintiff's contention, the order is appealable despite the fact that the court denied the motion without prejudice ... . **Barrett v Grenda, 2017 NY Slip Op 07031, Fourth Dept 10-6-17**

CIVIL PROCEDURE (EVIDENCE, SPOLIATION, PRECLUDING EXPERT TESTIMONY WAS TOO SEVERE A SANCTION FOR SPOLIATION OF EVIDENCE IN THIS CONTRACT ACTION (SECOND DEPT))/EVIDENCE (SPOLIATION, PRECLUDING EXPERT TESTIMONY WAS TOO SEVERE A SANCTION FOR SPOLIATION OF EVIDENCE IN THIS CONTRACT ACTION (SECOND DEPT))/SPOLIATION (EVIDENCE, PRECLUDING EXPERT TESTIMONY WAS TOO SEVERE A SANCTION FOR SPOLIATION OF EVIDENCE IN THIS CONTRACT ACTION (SECOND DEPT))

CIVIL PROCEDURE, EVIDENCE.

PRECLUDING EXPERT TESTIMONY WAS TOO SEVERE A SANCTION FOR SPOLIATION OF EVIDENCE IN THIS CONTRACT ACTION (SECOND DEPT).

The Second Department determined precluding defendant from presenting expert testimony in this contract action was not justified as a sanction for spoliation. Plaintiff did construction work for defendant. Defendant was not satisfied with plaintiff's work, terminated plaintiff's employment, and had the work redone. Plaintiff paid an expert to inspect what he had done, but plaintiff's work could no longer be evaluated. The court properly ordered defendant to pay plaintiff's expert's fee:

> "A party that seeks sanctions for spoliation of evidence must show that the party having control over the evidence possessed an obligation to preserve it at the time of its destruction, that the evidence was destroyed with a culpable state of mind,' and that the destroyed evidence was relevant to the party's claim or defense such that the trier of fact could find that the evidence would support that claim or defense'"... . Where evidence has been intentionally or willfully destroyed, its relevance is presumed ... . However, where evidence has been destroyed negligently, the party seeking spoliation sanctions must establish that the destroyed evidence was relevant to the party's claim or defense ... . The Supreme Court has broad discretion in determining what, if any, sanction should be imposed for spoliation of evidence and may, under appropriate circumstances, impose a sanction even if "the evidence was destroyed before the spoliator became a party, provided the spoliator was on notice that the evidence might be needed for future litigation"... .
>
> Here, although the plaintiff demonstrated that the defendant hired contractors to alter and redo the plaintiff's work, the plaintiff failed to demonstrate that the defendant's conduct rose to the level of being intentional or willful ... . Nevertheless, it was undisputed that the evidence was relevant to the plaintiff's claim ... .
>
> Under the circumstances of this case, the appropriate sanction was to give an adverse inference charge at trial against the defendant with respect to the spoliation of physical evidence ... . Likewise, to the extent the defendant appeals from so much of the order as directed him to reimburse the plaintiff the sum of $2,695, which the plaintiff had paid his expert to inspect the premises and issue a report, we find that this sanction was properly imposed. **Smith v Cunningham, 2017 NY Slip Op 06938, Second Dept 10-4-17**

CIVIL PROCEDURE (MOTION TO AMEND THE COMPLAINT TO ADD NAMED DEPUTIES TO SUBSTITUTE FOR JOHN DOES AFTER THE STATUTE OF LIMITATIONS HAD RUN SHOULD HAVE BEEN GRANTED, RELATION BACK DOCTRINE APPLIED (SECOND DEPT))/MUNICIPAL LAW (JOHN DOES, MOTION TO AMEND THE COMPLAINT TO ADD NAMED DEPUTIES TO SUBSTITUTE FOR JOHN DOES AFTER THE STATUTE OF LIMITATIONS HAD RUN SHOULD HAVE BEEN GRANTED, RELATION BACK DOCTRINE APPLIED (SECOND DEPT))/RELATION BACK (CIVIL PROCEDURE, MUNICIPAL LAW, MOTION TO AMEND THE COMPLAINT TO ADD NAMED DEPUTIES TO SUBSTITUTE FOR JOHN DOES AFTER THE STATUTE OF LIMITATIONS HAD RUN SHOULD HAVE BEEN GRANTED, RELATION BACK DOCTRINE APPLIED (SECOND DEPT))

CIVIL PROCEDURE, MUNICIPAL LAW.

MOTION TO AMEND THE COMPLAINT TO ADD NAMED DEPUTIES TO SUBSTITUTE FOR JOHN DOES AFTER THE STATUTE OF LIMITATIONS HAD RUN SHOULD HAVE BEEN GRANTED, RELATION BACK DOCTRINE APPLIED (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, determined plaintiff's motion to amend the complaint to substitute named sheriff deputies for John Does, after the statute of limitations had run, should have been granted. The relation back doctrine applied:

> "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" ... . Here, the claims against the individual defendants arise out of the same conduct, transaction, or occurrence as claims asserted against the defendant County of Suffolk, and the individual defendants and the County are united in interest ... . Moreover, the individual defendants cannot claim prejudice, given that they were parties to a separate federal action brought by the estate of the plaintiff's brother. The parties stipulated to consolidate this action with the federal action, and although the federal court declined to consolidate the actions, discovery in both actions nevertheless proceeded in a coordinated manner. Thus, the individual defendants should have known that, but for the plaintiff's mistake, the action would have been brought against them as well ... . **Eriksen v County of Suffolk, 2017 NY Slip Op 06974, Second Dept 10-4-17**

CIVIL PROCEDURE (COUNTY COULD NOT BE SUED UNDER THE DOCTRINE OF RESPONDEAT SUPERIOR BASED UPON THE ACTIONS OF A DEPUTY SHERIFF, THE COMPLAINT COULD NOT BE AMENDED TO ADD THE DEPUTY UNDER THE RELATION BACK DOCTRINE (FOURTH DEPT))/MUNICIPAL LAW (CIVIL PROCEDURE, COUNTY COULD NOT BE SUED UNDER THE DOCTRINE OF RESPONDEAT SUPERIOR BASED UPON THE ACTIONS OF A DEPUTY SHERIFF, THE COMPLAINT COULD NOT BE AMENDED TO ADD THE DEPUTY UNDER THE RELATION BACK DOCTRINE (FOURTH DEPT))/SHERIFFS (CIVIL PROCEDURE, COUNTY COULD NOT BE SUED UNDER THE DOCTRINE OF RESPONDEAT SUPERIOR BASED UPON THE ACTIONS OF A DEPUTY SHERIFF, THE COMPLAINT COULD NOT BE AMENDED TO ADD THE DEPUTY UNDER THE RELATION BACK DOCTRINE (FOURTH DEPT))/RELATION BACK DOCTRINE (MUNICIPAL LAW, SHERIFFS, COUNTY COULD NOT BE SUED UNDER THE DOCTRINE OF RESPONDEAT SUPERIOR BASED UPON THE ACTIONS OF A DEPUTY SHERIFF, THE COMPLAINT COULD NOT BE AMENDED TO ADD THE DEPUTY UNDER THE RELATION BACK DOCTRINE (FOURTH DEPT))/EMPLOYMENT LAW (MUNICIPAL LAW, SHERIFFS, COUNTY COULD NOT BE SUED UNDER THE DOCTRINE OF RESPONDEAT SUPERIOR BASED UPON THE ACTIONS OF A DEPUTY SHERIFF, THE COMPLAINT COULD NOT BE AMENDED TO ADD THE DEPUTY UNDER THE RELATION BACK DOCTRINE (FOURTH DEPT))

CIVIL PROCEDURE, MUNICIPAL LAW, EMPLOYMENT LAW.

COUNTY COULD NOT BE SUED UNDER THE DOCTRINE OF RESPONDEAT SUPERIOR BASED UPON THE ACTIONS OF A DEPUTY SHERIFF, THE COMPLAINT COULD NOT BE AMENDED TO ADD THE DEPUTY UNDER THE RELATION BACK DOCTRINE (FOURTH DEPT).

The Fourth Department determined the county could not be sued under the doctrine of respondeat superior based on the alleged actions of a deputy sheriff. The court further determined the complaint could not be amended to add the deputy under the relation back doctrine:

> We reject plaintiff's challenges to the viability of our prior decisions holding that "[a] county may not be held responsible for the negligent acts of the Sheriff and his [or her] deputies on the theory of respondeat superior, in the absence of a local law assuming such responsibility"... . Although "[t]he 1989 amendment to New York Constitution, article XIII, § 13 (a) . . . allows a county to accept responsibility for the negligent acts of the Sheriff[,] it does not impose liability upon the county for the acts of the Sheriff or his [or her] deputies on a theory of respondeat superior" ... . Here, defendant established that it did not assume such responsibility by local law... .
>
> Plaintiff contends that defendant nonetheless assumed responsibility for the acts of its Sheriff's deputies when it entered into a collective bargaining agreement (CBA) with the Seneca County Sheriff's Police Benevolent Association. We reject that contention. Plaintiff's rationale is that the CBA provides for indemnification of employees from judgments and settlements upon claims arising from actions taken within the scope of such employees' public employment and duties. We note, however, that a CBA is not a local law and, in any event, the language of the CBA here does not expressly provide that defendant will assume responsibility for the tortious acts of its Sheriff's deputies ... . We reject plaintiff's further contention that General Municipal Law § 50-j (1) renders defendant liable for the actions of its Sheriff's deputies ... .
>
> Inasmuch as plaintiff asserted against defendant causes of action based only on respondeat superior, we conclude that the complaint "was properly dismissed against it because [defendant] did not assume liability for the acts of the Sheriff or his deputies, and plaintiff has alleged no other theory of liability against [defendant]" ... .
>
> Contrary to plaintiff's further contention, we conclude that the court properly denied her motion seeking leave to amend her complaint to add respondent as a defendant. Plaintiff failed to establish that respondent and defendant are united in interest, and thus plaintiff is not entitled to the benefit of the relation back doctrine ... . Here, respondent and defendant are not united in interest inasmuch as defendant cannot be held vicariously liable for the acts of its Sheriff's deputies ... . **Jones v Seneca County, 2017 NY Slip Op 07084, Fourth Dept 10-6-17**

CIVIL PROCEDURE (DRIVER'S AFFIDAVIT SUBSCRIBED AND SWORN TO OUT OF STATE SHOULD HAVE BEEN CONSIDERED IN THIS PEDESTRIAN ACCIDENT CASE, DESPITE ABSENCE OF CERTIFICATE OF CONFORMITY, PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT))/CERTIFICATE OF CONFORMITY (DRIVER'S AFFIDAVIT SUBSCRIBED AND SWORN TO OUT OF STATE SHOULD HAVE BEEN CONSIDERED IN THIS PEDESTRIAN ACCIDENT CASE, DESPITE ABSENCE OF CERTIFICATE OF CONFORMITY, PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT))/AFFIDAVITS (DRIVER'S AFFIDAVIT SUBSCRIBED AND SWORN TO OUT OF STATE SHOULD HAVE BEEN CONSIDERED IN THIS PEDESTRIAN ACCIDENT CASE, DESPITE ABSENCE OF CERTIFICATE OF CONFORMITY, PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT))/NEGLIGENCE (TRAFFIC ACCIDENTS, PEDESTRIANS, DRIVER'S AFFIDAVIT SUBSCRIBED AND SWORN TO OUT OF STATE SHOULD HAVE BEEN CONSIDERED IN THIS PEDESTRIAN ACCIDENT CASE, DESPITE ABSENCE OF CERTIFICATE OF CONFORMITY, PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT)) /TRAFFIC ACCIDENTS (PEDESTRIANS, DRIVER'S AFFIDAVIT SUBSCRIBED AND SWORN TO OUT OF STATE SHOULD HAVE BEEN CONSIDERED IN THIS PEDESTRIAN ACCIDENT CASE, DESPITE ABSENCE OF CERTIFICATE OF CONFORMITY, PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT))/PEDESTRIANS (TRAFFIC ACCIDENTS, DRIVER'S AFFIDAVIT SUBSCRIBED AND SWORN TO OUT OF STATE SHOULD HAVE BEEN CONSIDERED IN THIS PEDESTRIAN ACCIDENT CASE, DESPITE ABSENCE OF CERTIFICATE OF CONFORMITY, PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT))

CIVIL PROCEDURE, NEGLIGENCE.

DRIVER'S AFFIDAVIT SUBSCRIBED AND SWORN TO OUT OF STATE SHOULD HAVE BEEN CONSIDERED IN THIS PEDESTRIAN ACCIDENT CASE, DESPITE ABSENCE OF CERTIFICATE OF CONFORMITY, PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendant driver's affidavit should have been considered in opposition to plaintiff's summary judgment motion in this pedestrian accident case. Although the defendant's affidavit was subscribed and sworn to out of state and was not accompanied by a certificate of conformity, it should have been considered and it raised a triable question of fact:

> ... [I]n determining the motion, the Supreme Court should have considered the defendant driver's affidavit "notwithstanding that it was subscribed and sworn to out of state and not accompanied by a certificate of conformity as required by CPLR 2309(c), as such a defect is not fatal, and no substantial right of the [plaintiff] was prejudiced by disregarding the defect" ... . In his affidavit, the defendant driver provided an account of the incident which contradicted the plaintiff's account of the incident. The defendant driver averred that the traffic light was in his favor as his vehicle approached and crossed the subject crosswalk. He also averred that when he first saw the plaintiff, the plaintiff was running across the street, approximately 50 to 60 feet away from the crosswalk, and that he could not stop his vehicle in time to avoid the contact. Thus, the defendants raised a triable issue of fact as to whether the plaintiff was comparatively at fault in the happening of the accident ... . **Voskoboinyk v Trebisovsky, 2017 NY Slip Op 07481, Second Dept 10-25-17**

CIVIL PROCEDURE (WITNESS PRIVILEGE DID NOT PRECLUDE COUNTERCLAIMS WHICH WERE SUPPORTED BY THE WITNESS'S TRIAL TESTIMONY BUT WHICH WERE NOT BASED UPON THE TRIAL TESTIMONY (THIRD DEPT))/PRIVILEGE (WITNESS PRIVILEGE DID NOT PRECLUDE COUNTERCLAIMS WHICH WERE SUPPORTED BY THE WITNESS'S TRIAL TESTIMONY BUT WHICH WERE NOT BASED UPON THE TRIAL TESTIMONY (THIRD DEPT))/WITNESS PRIVILEGE (WITNESS PRIVILEGE DID NOT PRECLUDE COUNTERCLAIMS WHICH WERE SUPPORTED BY THE WITNESS'S TRIAL TESTIMONY BUT WHICH WERE NOT BASED UPON THE TRIAL TESTIMONY (THIRD DEPT))

CIVIL PROCEDURE, PRIVILEGE.

WITNESS PRIVILEGE DID NOT PRECLUDE COUNTERCLAIMS WHICH WERE SUPPORTED BY THE WITNESS'S TRIAL TESTIMONY BUT WHICH WERE NOT BASED UPON THE TRIAL TESTIMONY (THIRD DEPT).

The Third Department, modifying Supreme Court, determined counterclaims which were not based upon the expert witness's trial testimony were not prohibited by the witness privilege. Plaintiff is an expert witness hired by defendant law firm. After a mistrial was declared because plaintiff failed to disclose a basis for his opinion, defendant refused to pay the rest of plaintiff's fee. Plaintiff then sued to recover his fee. Although the counterclaims alleging plaintiff failed to adequately prepare for trial and failed to disclose the basis for his opinion were supported by plaintiff's trial testimony, they were not based on his trial testimony. Therefore those counterclaims were not precluded by the witness privilege:

> A "witness at a judicial or quasi-judicial proceeding enjoys an absolute privilege with respect to his or her testimony," as long as the statements made are material to the issues to be resolved therein ... . The purposes of this privilege are to further the truth-seeking process at trial and encourage cooperation of witnesses, particularly with regard to expert witnesses, so that they can discharge their public duty freely "with knowledge that they will be insulated from the harassment and financial hazard of subsequent litigation" ... .
>
> We conclude that a party cannot hold its own expert liable for the content of his or her testimony in prior litigation, but may pursue claims for negligence, professional malpractice, breach of contract or similar causes of action due to the expert's alleged failure to properly prepare for the trial or to perform agreed-upon litigation-related services. Although an expert may not be held liable for the substance of his or her prior testimony or the opinions expressed therein, such testimony may be used as evidence in connection with these other types of causes of action. As the Court of Appeals recently stated when addressing the witness privilege in another context, "[t]he test is 'whether the plaintiff can make out the elements of his [or her] . . . claim without resorting to the . . . testimony. If the claim exists independently of the . . . testimony, it is not "based on" that testimony . . . [but] if the claim requires the . . . testimony, the defendant enjoys absolute immunity'" .... Stated otherwise, a plaintiff may not assert a claim that is entirely based on the expert's prior testimony — and nothing more — but may assert a claim that is viable apart from, but supported by, that testimony ... . **Toaspern v Laduca Law Firm LLP, 2017 NY Slip Op 07374, Third Dept 10-19-17**

CONTRACT LAW

CONTRACT LAW (INDEMNIFICATION AGREEMENT, THE INDEMNIFICATION PROVISIONS OF THE CONTRACT DID NOT INCLUDE INDEMNIFICATION FOR ATTORNEY'S FEES (SECOND DEPT))/ATTORNEYS (FEES. (INDEMNIFICATION AGREEMENT, THE INDEMNIFICATION PROVISIONS OF THE CONTRACT DID NOT INCLUDE INDEMNIFICATION FOR ATTORNEY'S FEES (SECOND DEPT))/INDEMNIFICATION AGREEMENTS (THE INDEMNIFICATION PROVISIONS OF THE CONTRACT DID NOT INCLUDE INDEMNIFICATION FOR ATTORNEY'S FEES (SECOND DEPT))

CONTRACT LAW, ATTORNEYS.

THE INDEMNIFICATION PROVISIONS OF THE CONTRACT DID NOT INCLUDE INDEMNIFICATION FOR ATTORNEY'S FEES (SECOND DEPT).

The Second Department determined Supreme Court properly held that the indemnification agreement did not include reimbursement for legal fees:

> Here, the relevant indemnification language of the contract between R & L and Truck-Rite provides that Truck-Rite shall indemnify R & L and hold it harmless against "any and all claims asserted against [R & L] arising from the actions, omissions or negligence of [Truck-Rite's] employees, agents or servants," as well as any "claim of injury or damage" arising out of the agreement "unless such injury or damage is caused by [R & L]." This language is not sufficiently specific to require the reimbursement of legal expenses incurred by R & L, either in the defense of the main action ... , or in the prosecution of R & L's cause of action seeking contractual indemnification from Truck-Rite ... .The agreement contains no provision requiring Truck-Rite to assume the defense of indemnified third-party claims, a circumstance that might have provided some evidence to support Truck-Rite's broad interpretation of the indemnification language ... . Furthermore, in describing R & L's rights in the event of a material breach by Truck-Rite, the agreement expressly provided that "[i]f [R & L] prevails in an action against [Truck-Rite] for breach of this Agreement,[R & L] shall be entitled to payment of reasonable attorney fees and costs associated with prosecuting or defending such action." The inclusion of a specific contract provision addressing the recovery of costs and expenses associated with prosecuting or defending a claim, including attorneys' fees, in the context of a material breach by Truck-Rite, but not in the context of indemnification, leads to the conclusion that the parties did not agree to obligate Truck-Rite to reimburse the legal expenses incurred by R & L, either in the defense of the main action or in the prosecution of R & L's cause of action seeking contractual indemnification from Truck-Rite. **Lawson v R&L Carriers, Inc., 2017 NY Slip Op 07245, Second Dept 10-18-17**

CONTRACT LAW (ENERGY LAW, NOT CLEAR WHETHER WIND POWER CONTRACT INCLUDED RENEWABLE ENERGY CREDITS AS PART OF THE REVENUE, SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (FIRST DEPT))/ENERGY LAW (WIND POWER, RENEWABLE ENERGY CREDITS, NOT CLEAR WHETHER WIND POWER CONTRACT INCLUDED RENEWABLE ENERGY CREDITS AS PART OF THE REVENUE, SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (FIRST DEPT))/RENEWABLE ENERGY CREDITS (ENERGY LAW, NOT CLEAR WHETHER WIND POWER CONTRACT INCLUDED RENEWABLE ENERGY CREDITS AS PART OF THE REVENUE, SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (FIRST DEPT))/WIND POWER (RENEWABLE ENERGY CREDITS, NOT CLEAR WHETHER WIND POWER CONTRACT INCLUDED RENEWABLE ENERGY CREDITS AS PART OF THE REVENUE, SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (FIRST DEPT))

CONTRACT LAW, ENERGY LAW.

NOT CLEAR WHETHER WIND POWER CONTRACT INCLUDED RENEWABLE ENERGY CREDITS AS PART OF THE REVENUE, SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (FIRST DEPT).

The First Department, reversing (modifying) Supreme Court, determined a contract governing the revenue from a wind power installation in Maine was ambiguous about whether renewable energy credits (REC's) were part of the agreed compensation:

> This breach of contract action arises from a "Project Fee Agreement" (the PFA) by which plaintiff transferred to defendant its interest in developing a wind energy facility located near Kibby Mountain in Maine (the Kibby Project) in exchange for certain payments, including an annual "Operating Fee." Plaintiff claims that defendant breached the PFA by improperly calculating two components of the fee - "gross electricity sales revenue" and "Royalty Rate."
>
> Plaintiff argues that defendant wrongfully failed to include in "gross electricity sales revenue" revenue from sales of environmental attributes associated with the energy generated by the Kibby Project that are known as renewable energy credits (RECs). We find that the PFA is ambiguous as to the meaning of the term "gross electricity sales revenue" and that the extrinsic evidence submitted by the parties to prove their intent is inconclusive ... .
>
> Plaintiff emphasizes that the PFA does not expressly exclude REC revenue from "gross electricity sales revenue." Defendant counters that it does not expressly include REC revenue either. However, the question is what someone in the renewable energy industry would generally understand the term "gross electricity sales revenue," standing alone, to include, and the answer to that question is not clear as a matter of law from the face of the PFA. **DKRW Wind Holdings, LLC v Transcanada Energy, Ltd., 2017 NY Slip Op 06907, First Dept 10-3-17**

CONTRACT LAW (STIPULATION WAS AMBIGUOUS ABOUT WHETHER IT EXTENDED THE TIME FOR FILING OF CERTAIN NOTICES OF CLAIM IN THIS CONSTRUCTION CONTRACT DISPUTE, SUPREME COURT SHOULD NOT HAVE DISMISSED THOSE CLAIMS AT THE PLEADING STAGE (SECOND DEPT))/STIPULATIONS (STIPULATION WAS AMBIGUOUS ABOUT WHETHER IT EXTENDED THE TIME FOR FILING OF CERTAIN NOTICES OF CLAIM IN THIS CONSTRUCTION CONTRACT DISPUTE, SUPREME COURT SHOULD NOT HAVE DISMISSED THOSE CLAIMS AT THE PLEADING STAGE (SECOND DEPT))/CIVIL PROCEDURE (STIPULATION WAS AMBIGUOUS ABOUT WHETHER IT EXTENDED THE TIME FOR FILING OF CERTAIN NOTICES OF CLAIM IN THIS CONSTRUCTION CONTRACT DISPUTE, SUPREME COURT SHOULD NOT HAVE DISMISSED THOSE CLAIMS AT THE PLEADING STAGE (SECOND DEPT))/MUNICIPAL LAW (CONSTRUCTION CONTRACT, STIPULATION, NOTICES OF CLAIM, STIPULATION WAS AMBIGUOUS ABOUT WHETHER IT EXTENDED THE TIME FOR FILING OF CERTAIN NOTICES OF CLAIM IN THIS CONSTRUCTION CONTRACT DISPUTE, SUPREME COURT SHOULD NOT HAVE DISMISSED THOSE CLAIMS AT THE PLEADING STAGE (SECOND DEPT))

CONTRACT LAW, CIVIL PROCEDURE, MUNICIPAL LAW.

STIPULATION WAS AMBIGUOUS ABOUT WHETHER IT EXTENDED THE TIME FOR FILING OF CERTAIN NOTICES OF CLAIM IN THIS CONSTRUCTION CONTRACT DISPUTE, SUPREME COURT SHOULD NOT HAVE DISMISSED THOSE CLAIMS AT THE PLEADING STAGE (SECOND DEPT).

The Second Department, reversing Supreme Court, determined a stipulation extending the time for filing of notices of claim in this construction contract dispute did not distinguish between claims that were timely when the stipulation was entered and claims that were untimely when the stipulation was entered. Therefore Supreme Court should not have dismissed the untimely claims:

> ... [T]he Supreme Court improperly granted that branch of the defendant's motion which was to dismiss for untimeliness. "The fundamental, neutral precept of contract interpretation is that agreements are construed in accord with the parties' intent [and] the best evidence of what parties to a written agreement intend is what they say in their writing"... . "Whether or not a writing is ambiguous is a question of law to be resolved by the courts" ... .. Ambiguity exists when, looking within the four corners of the document, terms are reasonably susceptible of more than one interpretation ... .
>
> Here, the parties agreed to extend the plaintiff's time to serve notices of claim and commence an action without distinguishing between timely and untimely claims. Absent a "strong countervailing public policy" ... , " [p]arties by their stipulations may in many ways make the law for any legal proceeding to which they are parties, which not only binds them, but which the courts are bound to enforce. They may stipulate away statutory, and even constitutional rights'" ... . The parties' extension agreement was subject to more than one reasonable interpretation, as they may have intended it to apply to the plaintiff's untimely claims as well as its timely claims. In light of this ambiguity, dismissal of the plaintiff's untimely claims pursuant to CPLR 3211 was improper ... . **AMCC Corp. v New York City Sch. Constr. Auth., 2017 NY Slip Op 06934, Second Dept 10-4-17**

COOPERATIVES

COOPERATIVES (ACTION BY COOPERATIVE APARTMENT OWNER CONTESTING RULES PROMULGATED BY THE COOPERATIVE BOARD MUST BE BROUGHT UNDER ARTICLE 78, ATTEMPT TO BRING A PLENARY ACTION DISMISSED AS TIME-BARRED (FIRST DEPT))/CIVIL PROCEDURE (COOPERATIVES, (ACTION BY COOPERATIVE APARTMENT OWNER CONTESTING RULES PROMULGATED BY THE COOPERATIVE BOARD MUST BE BROUGHT UNDER ARTICLE 78, ATTEMPT TO BRING A PLENARY ACTION DISMISSED AS TIME-BARRED (FIRST DEPT))/ARTICLE 78 (COOPERATIVES, ACTION BY COOPERATIVE APARTMENT OWNER CONTESTING RULES PROMULGATED BY THE COOPERATIVE BOARD MUST BE BROUGHT UNDER ARTICLE 78, ATTEMPT TO BRING A PLENARY ACTION DISMISSED AS TIME-BARRED (FIRST DEPT))

COOPERATIVES, CIVIL PROCEDURE.

ACTION BY COOPERATIVE APARTMENT OWNER CONTESTING RULES PROMULGATED BY THE COOPERATIVE BOARD MUST BE BROUGHT UNDER ARTICLE 78, ATTEMPT TO BRING A PLENARY ACTION DISMISSED AS TIME-BARRED (FIRST DEPT).

The First Department determined the cooperative owner's complaint was properly dismissed because the plenary action should have been brought as an Article 78 and was time-barred. The plaintiff alleged new cooperative rules concerning the allowed use of a terrace violated the terms of the proprietary lease. The court explained that disputes about rules promulgated by a cooperative board are properly the subject of a special proceeding (Article 78). The plaintiff's attempt to amend the complaint to allege a cause of action that might fly as a plenary action was rejected as violating the law of the case. The court had previously ruled a special proceeding was the appropriate vehicle for the dispute:

> Supreme Court properly dismissed, as time-barred, so much of the third cause of action that sought a declaratory judgment that the house rules enacted by the co-op, concerning use of the roof/terrace adjoining plaintiff's penthouse unit, were contrary to the terms of the proprietary lease. Plaintiff's allegations were in the nature of a dispute over the house rules pertaining to the use of the terrace. Where, as here, a cooperative shareholder seeks to challenge a co-op board's action, such challenge is to be made in the form of an article 78 proceeding ... .
>
> The cases of Shapiro v 350 E. 78th St. Tenants Corp. (85 AD3d 601 [1st Dept 2011]), and Estate of Del Terzo v 33 Fifth Ave. Owners Corp. (136 AD3d 486 [1st Dept 2016], affd 28 NY3d 1114 [2016]) do not dictate a different result, and indeed, have no application here because they do not involve a challenge to any bylaws or house rules, or other rules promulgated by the board. Shapiro concerned the board's failure to maintain the roof appurtenant to the plaintiff's unit, and a finding that this failure "deprived plaintiff of its use, in violation of the offering plan and proprietary lease" ... . Similarly, Estate of Del Terzo involved the board's "unreasonabl[e] withholding [of] its consent to an assignment of the lease and shares to a member of a lessee's family," which the court determined to be a violation of the proprietary lease ... . In contrast here, plaintiff takes issue with the new house rules promulgated by the board, and any attempt to repackage his grievances as a breach of the proprietary lease must fail. **Musey v 425 E. 86 Apts. Corp., 2017 NY Slip Op 06880, First Dept 10-3-17**

CRIMINAL LAW

CRIMINAL LAW (FAILURE TO CLARIFY WHETHER DEFENDANT WAS A CITIZEN REQUIRED VACATION OF THE GUILTY PLEA (FIRST DEPT))/GUILTY PLEA (DEPORTATION, FAILURE TO CLARIFY WHETHER DEFENDANT WAS A CITIZEN REQUIRED VACATION OF THE GUILTY PLEA (FIRST DEPT))/DEPORTATION (CRIMINAL LAW, GUILTY PLEA, FAILURE TO CLARIFY WHETHER DEFENDANT WAS A CITIZEN REQUIRED VACATION OF THE GUILTY PLEA (FIRST DEPT))

CRIMINAL LAW.

FAILURE TO CLARIFY WHETHER DEFENDANT WAS A CITIZEN REQUIRED VACATION OF THE GUILTY PLEA (FIRST DEPT).

The First Department, vacating defendant's guilty plea, determined the court did not clarify whether defendant was a citizen and did not inform the defendant that deportation of a non-citizen was a consequence of the plea:

> During the plea proceeding, the court asked defendant whether he was a United States citizen, and defendant answered "No." Rather than advising defendant that if he was not a United States citizen, he could be deported as a result of his plea, ... the court asked defendant, "You are not a U.S. citizen?" to which defendant answered, "Oh yeah, yeah." Given the phrasing of the question in the negative, the response could be interpreted as asserting either citizenship or noncitizenship. The court did not inquire further into defendant's answers or advise him of the immigration consequences of his plea, and the record is devoid of any indication that defendant was otherwise aware, such as through defense counsel, of those consequences. Nor does this exchange, in the context of the plea allocution, suggest that defendant affirmatively misrepresented his immigration status, as he accurately answered the court's question ... . Thus, his responses, even if contradictory, did not absolve the court of the obligation to state briefly that the guilty plea could render defendant deportable.
>
> Therefore, defendant should be afforded the opportunity to move to vacate his plea upon a showing that there is a "reasonable probability" that he would not have pleaded guilty had the court advised him of the possibility of deportation... . Accordingly, we remit for the remedy set forth in Peque (22 NY3d at 200-201), and we hold the appeal in abeyance for that purpose. **People v Bermudez, 2017 NY Slip Op 06888, First Dept 10-3-17**

CRIMINAL LAW (RESENTENCING, COURT WILL NOT LOSE JURISDICTION OVER A CASE DUE TO A DELAY BETWEEN SENTENCING AND RESENTENCING UNLESS PREJUDICE RESULTS FROM THE DELAY, NO PREJUDICE HERE (FOURTH DEPT))/SENTENCING (DELAY, COURT WILL NOT LOSE JURISDICTION OVER A CASE DUE TO A DELAY BETWEEN SENTENCING AND RESENTENCING UNLESS PREJUDICE RESULTS FROM THE DELAY, NO PREJUDICE HERE (FOURTH DEPT))/JURISDICTION (CRIMINAL LAW, DELAY IN SENTENCING, COURT WILL NOT LOSE JURISDICTION OVER A CASE DUE TO A DELAY BETWEEN SENTENCING AND RESENTENCING UNLESS PREJUDICE RESULTS FROM THE DELAY, NO PREJUDICE HERE (FOURTH DEPT))

CRIMINAL LAW.

COURT WILL NOT LOSE JURISDICTION OVER A CASE DUE TO A DELAY BETWEEN SENTENCING AND RESENTENCING UNLESS PREJUDICE RESULTS FROM THE DELAY, NO PREJUDICE HERE (FOURTH DEPT).

The Fourth Department determined the court had not lost jurisdiction of defendant's case because of a delay between sentencing and resentencing. A federal court had granted a habeas corpus petition and ordered retrial on one ount of the indictment and resentencing on the indictment if the count was not retried. Although there was a long delay before resentencing, defendant was unable to show any prejudice. Unlike a delay between conviction and sentencing, which will cause the court to lose jurisdiction without a showing of prejudice, a delay between sentencing and resentencing requires a showing of prejudice before jurisdiction will be deemed lost. Here, because defendant was still incarcerated for convictions on other counts, there was no prejudice:

> Contrary to defendant's contention, the court properly concluded that it had not lost jurisdiction over the case because of the delay in resentencing. The Court of Appeals has stated that " [s]entence must be pronounced without unreasonable delay' " and, "unless excused[, such a delay] result[s] in a loss of jurisdiction requiring dismissal of the indictment" (Drake, 61 NY2d at 367). This Court has "conclude[d] that the analysis in People v Drake applies to delays in resentencing as well as to those between conviction and sentencing, but with one salient difference. Prejudice is presumed to result from delays between conviction and sentence[. . . but, as] with other postjudgment delay . . . , defendant must demonstrate prejudice resulting from the delay between sentencing and resentencing" ... . Applying that principle here, we note that there was a "long and unexplained" delay between the Federal District Court's order and resentencing ... , but we conclude that defendant failed to demonstrate any prejudice resulting therefrom. The order of the Federal District Court merely directed that defendant be retried upon a single count of the indictment or be resentenced without respect to that count. The order had no impact on his incarceration on the remaining counts of the indictment, and County Court resentenced defendant simply by eliminating the sentence on the bribery count. In light of defendant's failure to demonstrate any prejudice with respect to the remaining counts of the indictment, we see no reason to conclude that the court lost jurisdiction over them because of the delay in resentencing ... . **People v Robinson, 2017 NY Slip Op 07073, Fourth Dept 10-6-17**

CRIMINAL LAW (COURT FAILED TO CONDUCT A SUFFICIENT INQUIRY INTO THE REASON FOR DEFENDANT'S ABSENCE FROM TRIAL BEFORE HEARING TESTIMONY, NEW TRIAL ORDERED (SECOND DEPT))/IN ABSENTIA (CRIMINAL LAW, COURT FAILED TO CONDUCT A SUFFICIENT INQUIRY INTO THE REASON FOR DEFENDANT'S ABSENCE FROM TRIAL BEFORE HEARING TESTIMONY, NEW TRIAL ORDERED (SECOND DEPT))/RIGHT TO BE PRESENT (CRIMINAL LAW, RIGHT TO BE PRESENT, COURT FAILED TO CONDUCT A SUFFICIENT INQUIRY INTO THE REASON FOR DEFENDANT'S ABSENCE FROM TRIAL BEFORE HEARING TESTIMONY, NEW TRIAL ORDERED (SECOND DEPT))

CRIMINAL LAW.

COURT FAILED TO CONDUCT A SUFFICIENT INQUIRY INTO THE REASON FOR DEFENDANT'S ABSENCE FROM TRIAL BEFORE HEARING TESTIMONY, NEW TRIAL ORDERED (SECOND DEPT).

The Second Department determined defendant was entitled to a new trial because Supreme Court did not sufficiently inquire into the reason defendant did not come to court on the third day of the trial. The court heard testimony from two witnesses in the defendant's absence. There was conflicting information about whether the defendant had refused to come to court or whether he was never picked up by jail personnel:

> "A defendant's right to be present at a criminal trial is encompassed within the confrontation clauses of the State and Federal Constitutions" ... . A defendant "may forfeit that right by deliberately absenting himself from the proceedings"... .However, "before proceeding in the defendant's absence, the court has an obligation to inquire into the surrounding circumstances to determine if the defendant's absence is deliberate and to recite on the record the reasons for its finding," and "[t]he failure to conduct such an inquiry constitutes reversible error" ... . Furthermore, "[w]hile the right to be present may, under some circumstances, be waived by a defendant's conduct, trial in absentia is not thereby automatically authorized'" ... . "Rather, the trial court must exercise its sound discretion upon consideration of all appropriate factors, including the possibility that defendant could be located within a reasonable period of time, the difficulty of rescheduling trial and the chance that evidence will be lost or witnesses will disappear" ... .
>
> Here, the Supreme Court failed to conduct a sufficient inquiry as to the circumstances surrounding the defendant's absence. Therefore, the record is insufficient to establish that the defendant deliberately absented himself from the proceedings and thereby forfeited his right to be present ... . Furthermore, the record does not reflect that the court considered any of the appropriate factors ... before deciding to proceed with the trial in the defendant's absence ... . **People v Johnson, 2017 NY Slip Op 07143, Second Dept 10-11-17**

CRIMINAL LAW (JURORS, PROSECUTOR'S FAILURE TO ARGUE DEFENSE COUNSEL'S REASONS FOR PEREMPTORY CHALLENGES WERE PRETEXTUAL AFTER MAKING A REVERSE BATSON OBJECTION REQUIRED REVERSAL AND A NEW TRIAL (SECOND DEPT))/JURORS (CRIMINAL LAW, PEREMPTORY CHALLENGES, PROSECUTOR'S FAILURE TO ARGUE DEFENSE COUNSEL'S REASONS FOR PEREMPTORY CHALLENGES WERE PRETEXTUAL AFTER MAKING A REVERSE BATSON OBJECTION REQUIRED REVERSAL AND A NEW TRIAL (SECOND DEPT))/BATSON (CRIMINAL LAW, PEREMPTORY CHALLENGES, PROSECUTOR'S FAILURE TO ARGUE DEFENSE COUNSEL'S REASONS FOR PEREMPTORY CHALLENGES WERE PRETEXTUAL AFTER MAKING A REVERSE BATSON OBJECTION REQUIRED REVERSAL AND A NEW TRIAL (SECOND DEPT))/REVERSE BATSON (CRIMINAL LAW, PEREMPTORY CHALLENGES, PROSECUTOR'S FAILURE TO ARGUE DEFENSE COUNSEL'S REASONS FOR PEREMPTORY CHALLENGES WERE PRETEXTUAL AFTER MAKING A REVERSE BATSON OBJECTION REQUIRED REVERSAL AND A NEW TRIAL (SECOND DEPT))/PEREMPTORY CHALLENGES (JURORS, BATSON, PROSECUTOR'S FAILURE TO ARGUE DEFENSE COUNSEL'S REASONS FOR PEREMPTORY CHALLENGES WERE PRETEXTUAL AFTER MAKING A REVERSE BATSON OBJECTION REQUIRED REVERSAL AND A NEW TRIAL (SECOND DEPT))

CRIMINAL LAW.

PROSECUTOR'S FAILURE TO ARGUE DEFENSE COUNSEL'S REASONS FOR PEREMPTORY CHALLENGES WERE PRETEXTUAL AFTER MAKING A REVERSE BATSON OBJECTION REQUIRED REVERSAL AND A NEW TRIAL (SECOND DEPT).

The Second Department determined the unjustified denial of defense counsel's peremptory challenges to two white jurors required reversal and a new trial. The prosecutor made a reverse Batson objection to the challenges. The defense offered a non-discriminatory reason. But the prosecutor did not then argue the proffered reason was a pretense:

> Here, the Supreme Court erred in disallowing the defendant's peremptory challenges to both of the subject prospective jurors. The defendant satisfied his burden of "articulat[ing] a non-discriminatory reason for striking the [prospective] juror[s]" ... , namely, that they had previously served on a criminal jury that reached a verdict ... . The People failed to satisfy their burden of demonstrating that the defendant's facially race-neutral explanation was a pretext for racial discrimination. Inasmuch as "the unjustified denial of a peremptory challenge violates CPL 270.25(2) and requires reversal without regard to harmless error" ... , the judgment must be reversed and the matter remitted to the Supreme Court, Kings County, for a new trial. **People v Owoaje, 2017 NY Slip Op 07147, Second Dept 10-11-17**

CRIMINAL LAW (DEPRAVED INDIFFERENCE MURDER, RARE CASE WHERE DEFENDANT WAS PROPERLY CONVICTED OF DEPRAVED INDIFFERENCE MURDER WHERE ONLY ONE VICTIM WAS ENDANGERED (SECOND DEPT))/DEPRAVED INDIFFERENCE MURDER (RARE CASE WHERE DEFENDANT WAS PROPERLY CONVICTED OF DEPRAVED INDIFFERENCE MURDER WHERE ONLY ONE VICTIM WAS ENDANGERED (SECOND DEPT))

CRIMINAL LAW.

RARE CASE WHERE DEFENDANT WAS PROPERLY CONVICTED OF DEPRAVED INDIFFERENCE MURDER WHEN ONLY ONE VICTIM WAS ENDANGERED (SECOND DEPT).

The Second Department determined the evidence was sufficient to support defendant's conviction for depraved indifference murder. Defendant's child was the victim and the only person endangered by the defendant's conduct. There was evidence defendant deliberately made the child sick over a period of years and ultimately caused the child's death by forcing salt into the child through the child's feeding tube:

"A defendant may be convicted of depraved indifference murder when but a single person is endangered in only a few rare circumstances," including when a defendant "engages in torture or a brutal, prolonged and ultimately fatal course of conduct against a particularly vulnerable victim" ... . Here, the evidence demonstrated that the defendant subjected the child to such a "brutal, prolonged and ultimately fatal course of conduct"... . In particular, the evidence showed that the defendant's course of conduct against the child in January 2014 included repeatedly sickening him and subjecting him to pain, to the point where he became unable to breathe on his own and, eventually, became brain dead ... . The People established that the defendant introduced salt into the child's G-tube on more than one occasion, despite being aware of its effect on the child's condition, and never informed the doctors of the cause of his symptoms as they struggled to treat him ... . This and other evidence of the defendant's conduct, including the manner in which she presented herself and the situation to others, demonstrated her fixation on garnering attention and sympathy for herself, and her utter indifference to the life of the child. Thus, although depraved indifference to the life of another is "rare" and "surely even rarer when the other person is one's own child" ... , under the unique circumstances of this case, the mens rea of depraved indifference to human life was proven beyond a reasonable doubt ... . **People v Spears, 2017 NY Slip Op 07148, Second Dept 10-11-17**

CRIMINAL LAW (MOTION COURT DENIED SUPPRESSION AFTER APPLYING THE WRONG STANDARD TO THE STREET STOP, SUPPRESSION GRANTED AND INDICTMENT DISMISSED (SECOND DEPT))/STREET STOPS (CRIMINAL LAW, SUPPRESSION, MOTION COURT DENIED SUPPRESSION AFTER APPLYING THE WRONG STANDARD TO THE STREET STOP, SUPPRESSION GRANTED AND INDICTMENT DISMISSED (SECOND DEPT))/SUPPRESS, MOTION TO (STREET STOPS, MOTION COURT DENIED SUPPRESSION AFTER APPLYING THE WRONG STANDARD TO THE STREET STOP, SUPPRESSION GRANTED AND INDICTMENT DISMISSED (SECOND DEPT))

CRIMINAL LAW.

MOTION COURT DENIED SUPPRESSION AFTER APPLYING THE WRONG STANDARD TO THE STREET STOP, SUPPRESSION GRANTED AND INDICTMENT DISMISSED (SECOND DEPT).

The Second Department, reversing defendant's conviction and dismissing the indictment, determined the trial court applied the wrong standard to analyzing whether the street stop of the defendant was valid. Because the wrong standard (founded suspicion criminal activity afoot) was applied and the People did not argue the correct standard (reasonable suspicion defendant had committed a crime) was met, the motion to suppress was granted on appeal:

... Police Officer Evan Murtaugh was on patrol ... in a marked police vehicle when he noticed a car parked on the right side of the road. The car's engine was running and the headlights were on, but the taillights were off. After pulling over behind the car, Officer Murtaugh approached the driver's side of the car and observed the defendant, who was alone in the vehicle and either asleep or unconscious, behind the wheel. Officer Murtaugh banged on the window with his hands and flashlight to get the defendant's attention. After between 30 and 45 seconds, the defendant awakened, looked in Officer Murtaugh's direction, and "floored the accelerator," causing the engine to increase the speed of its revolutions. The defendant then attempted to shift the car into gear, at which point Officer Murtaugh opened the car door, which was unlocked, leaned inside, and turned off the ignition. After Officer Murtaugh asked the defendant "where he was coming from, where he was going," Officer Murtaugh detected the "overwhelming odor of alcohol" and he observed that the defendant's eyes were "bloodshot glassy." ...

The Supreme Court denied [the motion to suppress] on the ground that, after the defendant tried to move the vehicle, the officer had a "founded suspicion" that criminal activity was afoot, and that he had the right to open the car door and turn off the ignition for that reason and for his own safety.

By reaching into the defendant's vehicle and turning off the ignition, Officer Murtaugh forcibly stopped the defendant, thus implicating the constitutional protections against unreasonable searches and seizures. A forcible stop is not permitted unless there is a reasonable suspicion that an individual is committing, has committed, or is about to commit a crime ... . **People v Noble, 2017 NY Slip Op 07280, Second Dept 10-18-17**

CRIMINAL LAW (DEFENDANT DID NOT INTEND TO COMMIT ASSAULT AT THE TIME HE REFUSED TO LEAVE HIS WIFE'S HOME, BURGLARY CONVICTION VACATED (FIRST DEPT))/BURGLARY (DEFENDANT DID NOT INTEND TO COMMIT ASSAULT AT THE TIME HE REFUSED TO LEAVE HIS WIFE'S HOME, BURGLARY CONVICTION VACATED (FIRST DEPT))

CRIMINAL LAW

DEFENDANT DID NOT INTEND TO COMMIT ASSAULT AT THE TIME HE REFUSED TO LEAVE HIS WIFE'S HOME, BURGLARY CONVICTION VACATED (FIRST DEPT).

The First Department, vacating defendant's burglary conviction, determined there was no evidence defendant intended to commit a crime (assault) when he refused to leave his wife's home. Defendant had stayed the night with his wife's permission but refused to leave the next day. The assault occurred after defendant refused to leave:

A person is guilty of burglary in the first degree when he or she "knowingly enters or remains unlawfully in a dwelling with intent to commit a crime therein" and "[c]auses physical injury to any person who is not a participant in the crime" ... .

"The purpose of the burglary statute is to protect against the specific dangers posed by entry into secured premises of intruders bent on crime" ... . The " remains unlawfully' language" was "principally intended to address circumstances involving an unauthorized remaining in a building after lawful entry'"... .

Here, the evidence, viewed in the light most favorable to the People, does not support the inference that defendant harbored the intent to assault the complainant when she ordered him to leave. Rather, a reasonable inference to be drawn from the events surrounding the assault is that defendant spontaneously committed violence, which does not fall within the intended scope of the burglary statute ... . **People v Swinson, 2017 NY Slip Op 07302, First Dept 10-19-17**

CRIMINAL LAW (TRIAL IN ABSENTIA, ALTHOUGH DEFENDANT HAD BEEN PROPERLY WARNED OF THE CONSEQUENCES OF NOT APPEARING FOR TRIAL, COUNTY COURT DID NOT TAKE ADEQUATE STEPS TO ATTEMPT TO SECURE DEFENDANT'S PRESENCE, CONVICTION REVERSED (THIRD DEPT))/ABSENTIA, TRIAL IN (CRIMINAL LAW, ALTHOUGH DEFENDANT HAD BEEN PROPERLY WARNED OF THE CONSEQUENCES OF NOT APPEARING FOR TRIAL, COUNTY COURT DID NOT TAKE ADEQUATE STEPS TO ATTEMPT TO SECURE DEFENDANT'S PRESENCE, CONVICTION REVERSED (THIRD DEPT))/ABSENCE FROM TRIAL (CRIMINAL LAW, ALTHOUGH DEFENDANT HAD BEEN PROPERLY WARNED OF THE CONSEQUENCES OF NOT APPEARING FOR TRIAL, COUNTY COURT DID NOT TAKE ADEQUATE STEPS TO ATTEMPT TO SECURE DEFENDANT'S PRESENCE, CONVICTION REVERSED (THIRD DEPT))/PARKER WARNINGS (TRIAL IN ABSENTIA, ALTHOUGH DEFENDANT HAD BEEN PROPERLY WARNED OF THE CONSEQUENCES OF NOT APPEARING FOR TRIAL, COUNTY COURT DID NOT TAKE ADEQUATE STEPS TO ATTEMPT TO SECURE DEFENDANT'S PRESENCE, CONVICTION REVERSED (THIRD DEPT))

CRIMINAL LAW.

ALTHOUGH DEFENDANT HAD BEEN PROPERLY WARNED OF THE CONSEQUENCES OF NOT APPEARING FOR TRIAL, COUNTY COURT DID NOT TAKE ADEQUATE STEPS TO ATTEMPT TO SECURE DEFENDANT'S PRESENCE, CONVICTION REVERSED (THIRD DEPT).

The Third Department, reversing defendant's conviction, determined the trial court did not take adequate steps to secure defendant's presence at trial before holding the trial in defendant's absence. The court had properly admonished the defendant about the consequences of his failure to appear, but erroneously relied on hearsay during its inquiry into the reasons for defendant's absence and did not make an adequate effort to execute a bench warrant:

> "Even where, as here, 'a defendant has waived the right to be present at trial by not appearing after being apprised of the right and the consequences of nonappearance, trial in absentia is not thereby automatically authorized.' Rather, it must also appear from the record that the trial court considered 'all appropriate factors' before proceeding in [the] defendant's absence, 'including the possibility that [the] defendant could be located within a reasonable period of time, the difficulty of rescheduling the trial and the chance that evidence will be lost or witnesses will disappear.' As the Court of Appeals has instructed, 'in most cases the simple expedient of adjournment pending execution of a bench warrant could provide an alternative to trial in absentia unless, of course, the prosecution can demonstrate that such a course of action would be totally futile'" ... . * * *
>
> In making its determination to try defendant in absentia, County Court improperly considered the hearsay statements made by the individuals interviewed by [a police investigator] as direct evidence of defendant's unavailability. Moreover, the record demonstrates that County Court failed to properly consider the appropriate factors. The fact that the trial commenced only five days after issuance of the bench warrant — two of which were weekend days during which no active effort was made to locate defendant — "demonstrates only a minimal effort to locate defendant prior to trial" ... , and no consideration was given to the likelihood that defendant could be located within a reasonable period of time ... . The record contains no evidence that any difficulty would result from rescheduling the trial, and there was little chance that an adjournment would cause evidence to be lost or witnesses to disappear because the primary witnesses were law enforcement officers and the evidence included defendant's admission to possession of the firearms that were seized. There also was no proof that further efforts to locate defendant would have been futile. In short, there was no reason not to take the "simple expedient" of adjourning the trial pending execution of the bench warrant ... . **People v Atkins, 2017 NY Slip Op 07342, Third Dept 10-19-17**

CRIMINAL LAW (DEFENDANT'S SENTENCE FOR ROBBING A PHARMACY OF OXYCODONE, OVER A DISSENT, REDUCED BASED IN PART ON HIS STATUS AS A WOUNDED VETERAN AND HIS OPIOID ADDICTION (THIRD DEPT))/SENTENCING (DEFENDANT'S SENTENCE FOR ROBBING A PHARMACY OF OXYCODONE, OVER A DISSENT, REDUCED BASED IN PART ON HIS STATUS AS A WOUNDED VETERAN AND HIS OPIOID ADDICTION (THIRD DEPT))

CRIMINAL LAW.

DEFENDANT'S SENTENCE FOR ROBBING A PHARMACY OF OXYCODONE REDUCED BASED IN PART ON HIS STATUS AS A WOUNDED VETERAN AND HIS OPIOID ADDICTION (THIRD DEPT).

The Third Department, over a dissent, reduced defendant's sentence for robbery of a pharmacy to procure oxycodone. The dissent argued the mitigating circumstances, including defendant's status as a wounded veteran, were not extraordinary:

> In light of defendant's admission from the outset that he perpetrated the robbery, albeit without a knife, the correlation between the illness that he contracted while serving in Afghanistan and an opioid addiction that precipitated this event, his duly expressed remorse and his lack of any prior criminal record, we find that his sentence for the criminal possession of a controlled substance conviction was unduly severe and should be reduced to three years, with five years of postrelease supervision, to run concurrently with the sentences for his other convictions. Correspondingly, we vacate the $5,000 fine. **People v Wyrick, 2017 NY Slip Op 07488, Third Dept 10-26-17**

CRIMINAL LAW (AGGRAVATED CRUELTY TO ANIMALS CONVICTION AFFIRMED (FIRST DEPT))/ANIMAL LAW (CRIMINAL LAW, AGGRAVATED CRUELTY TO ANIMALS CONVICTION AFFIRMED (FIRST DEPT))/CRUELTY TO ANIMALS (CRIMINAL LAW, AGGRAVATED CRUELTY TO ANIMALS CONVICTION AFFIRMED (FIRST DEPT))

CRIMINAL LAW, ANIMAL LAW.

AGGRAVATED CRUELTY TO ANIMALS CONVICTION AFFIRMED (FIRST DEPT).

The First Department determined defendant's conviction of aggravated cruelty to animals should be affirmed. Defendant crushed the victim's pet parakeet. The fact that the parakeet may have died quickly was not dispositive:

> The egregious manner in which defendant killed his former domestic partner's pet parakeet, along with the surrounding circumstances, established that he committed the crime of aggravated cruelty to animals, and specifically, that he intended to cause the bird extreme physical pain (Agriculture and Markets Law § 353-a[1][i]). Contrary to defendant's contentions, the evidence does not suggest that the brutal killing of the bird at issue caused a death that was so instantaneous that it would not be extremely painful. Defendant argues that this was an "ordinary killing" of an animal that should be punished as a misdemeanor offense of overdriving, torturing, and injuring animals (Agriculture and Markets Law § 353), the crime of which defendant was convicted for killing the victim's other pet parakeet. However, defendant's conduct toward the bird at issue was extremely heinous. The court could draw a reasonable inference of extreme physical pain from the fact that the bird had been crushed flat between the bars of its cage. The time it takes to kill an animal is not dispositive under the statute ... . **People v Jones, 2017 NY Slip Op 07171, First Dept 10-12-17**

CRIMINAL LAW (SECOND FELONY OFFENDER, SENTENCING, DEFENDANT SHOULD NOT HAVE BEEN SENTENCED AS A SECOND FELONY OFFENDER, CURRENT OFFENSE BEGAN BEFORE DEFENDANT WAS SENTENCED ON THE PRIOR FELONIES, ILLEGAL SENTENCE IS APPEALABLE WITHOUT PRESERVATION (FOURTH DEPT))/APPEALS (CRIMINAL LAW, ILLEGAL SENTENCE, DEFENDANT SHOULD NOT HAVE BEEN SENTENCED AS A SECOND FELONY OFFENDER, CURRENT OFFENSE BEGAN BEFORE DEFENDANT WAS SENTENCED ON THE PRIOR FELONIES, ILLEGAL SENTENCE IS APPEALABLE WITHOUT PRESERVATION (FOURTH DEPT))/SENTENCING (SECOND FELONY OFFENDER, DEFENDANT SHOULD NOT HAVE BEEN SENTENCED AS A SECOND FELONY OFFENDER, CURRENT OFFENSE BEGAN BEFORE DEFENDANT WAS SENTENCED ON THE PRIOR FELONIES, ILLEGAL SENTENCE IS APPEALABLE WITHOUT PRESERVATION (FOURTH DEPT))/SECOND FELONY OFFENDER (ILLEGAL SENTENCE, DEFENDANT SHOULD NOT HAVE BEEN SENTENCED AS A SECOND FELONY OFFENDER, CURRENT OFFENSE BEGAN BEFORE DEFENDANT WAS SENTENCED ON THE PRIOR FELONIES, ILLEGAL SENTENCE IS APPEALABLE WITHOUT PRESERVATION (FOURTH DEPT))

CRIMINAL LAW, APPEALS.

DEFENDANT SHOULD NOT HAVE BEEN SENTENCED AS A SECOND FELONY OFFENDER, CURRENT OFFENSE BEGAN BEFORE DEFENDANT WAS SENTENCED ON THE PRIOR FELONIES, ILLEGAL SENTENCE IS APPEALABLE WITHOUT PRESERVATION (FOURTH DEPT).

The Fourth Department determined defendant was not validly sentenced as a second felony offender rendering the sentence illegal, an error that need not be preserved for appeal. The prior felony convictions did not qualify as predicate offenses because defendant was sentenced on those felony convictions after he had begun, and while he was still in the midst of committing, the present felony. The matter was remitted for sentencing as a first time offender, which may result in less than the agreed upon sentence. In that circumstance the People can back out of the deal and start over:

> To qualify as a second felony offense, the sentence for the prior felony conviction must have been imposed before the commission of the present felony ... . Defendant's present felony conviction arises from the filing of 93 false unemployment certificates, which resulted in defendant unlawfully obtaining more than $10,000 in unemployment benefits during a 32-month period between November 2011 and June 2014. Defendant accepted a plea bargain in which he would waive indictment and plead guilty by superior court information to a single count of grand larceny in the third degree covering the entire 32-month period, in exchange for a sentence to a mandatory indeterminate term of incarceration as a second felony offender, based on two prior felony convictions. We conclude, however, that those two prior felony convictions do not qualify as predicate offenses for second felony offender purposes inasmuch as defendant was sentenced on those predicate felony convictions after he had begun, and while he was still in the midst of committing, the present felony ... . We therefore modify the judgment by vacating the sentence, and we remit the matter to County Court for resentencing.
>
> Upon remittal, the court must impose a lawful sentence on defendant as a first felony offender, which may result in a lesser sentence than that bargained for by the People and defendant. "[I]n that event, the court must entertain a motion by the People, should the People be so disposed, to vacate the plea and set aside the conviction in its entirety" ... . "Further, should the People be so disposed, they may withdraw their consent to the waiver of indictment" ... . **People v Jones, 2017 NY Slip Op 07072, Fourth Dept 10-6-17**

CRIMINAL LAW (APPEALS, COURT DID NOT MAKE SURE DEFENDANT KNEW HE WAS PLEADING GUILTY TO A DWELLING, AS OPPOSED TO A COMMERCIAL, BURGLARY, PLEA VACATED DESPITE FAILURE TO PRESERVE THE ERROR (FIRST DEPT))/APPEALS (CRIMINAL LAW, COURT DID NOT MAKE SURE DEFENDANT KNEW HE WAS PLEADING GUILTY TO A DWELLING, AS OPPOSED TO A COMMERCIAL, BURGLARY, PLEA VACATED DESPITE FAILURE TO PRESERVE THE ERROR (FIRST DEPT))/BURGLARY (PLEA VACATED, COURT DID NOT MAKE SURE DEFENDANT KNEW HE WAS PLEADING GUILTY TO A DWELLING, AS OPPOSED TO A COMMERCIAL, BURGLARY, PLEA VACATED DESPITE FAILURE TO PRESERVE THE ERROR (FIRST DEPT))/GUILTY PLEA (APPEALS, COURT DID NOT MAKE SURE DEFENDANT KNEW HE WAS PLEADING GUILTY TO A DWELLING, AS OPPOSED TO A COMMERCIAL, BURGLARY, PLEA VACATED DESPITE FAILURE TO PRESERVE THE ERROR (FIRST DEPT))

CRIMINAL LAW, APPEALS.

COURT DID NOT MAKE SURE DEFENDANT KNEW HE WAS PLEADING GUILTY TO A DWELLING, AS OPPOSED TO A COMMERCIAL, BURGLARY, PLEA VACATED DESPITE FAILURE TO PRESERVE THE ERROR (FIRST DEPT).

The First Department, vacating defendant's guilty plea, determined this was a rare case in which the adequacy of the plea could be reviewed on appeal despite the failure to preserve the error. Supreme Court did not make sure the defendant knew he was pleading guilty to a dwelling, as opposed to a commercial, burglary:

> The preservation requirement for challenges to guilty pleas does not apply in this "rare case" where "defendant's factual recitation negate[d] an essential element of the crime pleaded to" and the court "accept[ed] the plea without making further inquiry to ensure that defendant underst[ood] the nature of the charge and that the plea [was] intelligently entered." Depending on the particular facts, the burglary of a store in a mixed commercial and residential building may, or may not, constitute second-degree burglary ... . Viewing the plea allocution as a whole, we conclude that defendant's responses consistently asserted that he only committed commercial burglaries, notwithstanding that other portions of the buildings were residential, and that these responses thus tended to negate the "dwelling" element of second—degree burglary. The court's followup questions failed to establish that defendant understood he was admitting that the dwelling requirement was satisfied, and that he was giving up his right to litigate that factual issue.
>
> The fact that defendant attempted to raise this issue in an unsuccessful motion under CPL article 440 and failed to obtain leave to appeal does not foreclose review on direct appeal, but only limits it to review of the plea allocution record itself... . The issue is amply reviewable on the plea minutes themselves, and neither expansion of the record nor resort to anything extrinsic to the plea colloquy is necessary. **People v Ortiz, 2017 NY Slip Op 06990, First Dept 10-5-17**

CRIMINAL LAW (DEFENDANT PENALIZED FOR GOING TO TRIAL WITH AN EXCESSIVE SENTENCE, SENTENCE REDUCED IN THE INTEREST OF JUSTICE (SECOND DEPT))/SENTENCING (CRIMINAL LAW, DEFENDANT PENALIZED FOR GOING TO TRIAL WITH AN EXCESSIVE SENTENCE, SENTENCE REDUCED IN THE INTEREST OF JUSTICE (SECOND DEPT))/APPEALS (CRIMINAL LAW, DEFENDANT PENALIZED FOR GOING TO TRIAL WITH AN EXCESSIVE SENTENCE, SENTENCE REDUCED IN THE INTEREST OF JUSTICE (SECOND DEPT))

CRIMINAL LAW, APPEALS.

DEFENDANT PENALIZED FOR GOING TO TRIAL WITH AN EXCESSIVE SENTENCE, SENTENCE REDUCED IN THE INTEREST OF JUSTICE (SECOND DEPT).

The Second Department, reducing defendant's sentence, In the interest of justice (error not preserved), determined defendant was penalized for going to trial with an excessive sentence:

> "If a defendant refuses to plead guilty and goes to trial, retaliation or vindictiveness may play no role in sentencing following a conviction. Rather, the conventional concerns involved in sentencing, which include the considerations of deterrence, rehabilitation, retribution, and isolation, must be the only factors weighed when sentence is imposed" ... . "The fact that the sentence imposed after trial was greater than that offered during plea negotiations is not, standing alone, an indication that the defendant was punished for asserting his right to proceed to trial" ... . Nevertheless, such disparities are a factor in the court's overall analysis when deciding whether a sentence was vindictive... .
>
> The defendant, who has no prior felony convictions, was offered a sentence of a definite term of imprisonment of one year as part of a plea agreement. His codefendant, who pleaded guilty to burglary in the second degree, was sentenced to a determinate term of six years' imprisonment, to run concurrently with a four-year sentence that he was already serving on a different case. In addition, the sentencing court admonished the defendant for putting the elderly complaining witness through the "ordeal" of a trial even though the defendant was caught "red-handed." Under these circumstances, the sentence of seven years' imprisonment raises the inference that the defendant was penalized for exercising his right to a jury trial ... . **People v Hodge, 2017 NY Slip Op 07456, Second Dept 10-25-17**

CRIMINAL LAW (INEFFECTIVE ASSISTANCE, DEFENSE COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO ANTICIPATE THE HARASSMENT STATUTE WOULD BE DECLARED UNCONSTITUTIONAL SIX YEARS AFTER DEFENDANT'S PLEA (THIRD DEPT))/ATTORNEYS (CRIMINAL LAW, INEFFECTIVE ASSISTANCE, DEFENSE COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO ANTICIPATE THE HARASSMENT STATUTE WOULD BE DECLARED UNCONSTITUTIONAL SIX YEARS AFTER DEFENDANT'S PLEA (THIRD DEPT))/INEFFECTIVE ASSISTANCE (DEFENSE COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO ANTICIPATE THE HARASSMENT STATUTE WOULD BE DECLARED UNCONSTITUTIONAL SIX YEARS AFTER DEFENDANT'S PLEA (THIRD DEPT))

CRIMINAL LAW, ATTORNEYS.

DEFENSE COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO ANTICIPATE THE HARASSMENT STATUTE WOULD BE DECLARED UNCONSTITUTIONAL SIX YEARS AFTER DEFENDANT'S PLEA (THIRD DEPT).

The Third Department determined defense counsel was not ineffective in allowing defendant to satisfy a harassment charge by plea simply because the harassment statute was declared unconstitutionally vague six years later:

> ... [D]efense counsel cannot be found to have provided ineffective representation based upon the failure to predict or anticipate that the underlying statutory provision would be ruled unconstitutional six years later. That is, even if counsel advised defendant to make those admissions, such advice did not, at the time, constitute an egregious error or a denial of meaningful representation so as to amount to ineffective representation under either the federal or state constitutional standards ... . Further, and as County Court accurately concluded, defendant is incorrect insofar as he asserts that the statutory provision had been ruled unconstitutional by federal courts. * * *
>
> Further, "in the context of a guilty plea, a defendant has been afforded meaningful representation when he or she receives an advantageous plea and nothing in the record casts doubt on the apparent effectiveness of counsel" ... . Here, a review of the proceedings demonstrates that counsel secured a favorable agreement that limited defendant's prison time and also resolved the new charges, and that defendant indicated at the time that he was satisfied with counsel's representation. Given the foregoing, we find that County Court properly denied defendant's motion to vacate, without a hearing ... . **People v Rapp, 2017 NY Slip Op 07006, Second Dept 10-5-17**

CRIMINAL LAW (INVENTORY SEARCH, PEOPLE DID NOT DEMONSTRATE THE INVENTORY SEARCH OF DEFENDANT'S VEHICLE WAS VALIDLY EXECUTED, HANDGUN FOUND IN THE SEARCH SHOULD HAVE BEEN SUPPRESSED (SECOND DEPT))/EVIDENCE (CRIMINAL LAW, INVENTORY SEARCH, PEOPLE DID NOT DEMONSTRATE THE INVENTORY SEARCH OF DEFENDANT'S VEHICLE WAS VALIDLY EXECUTED, HANDGUN FOUND IN THE SEARCH SHOULD HAVE BEEN SUPPRESSED (SECOND DEPT))/SEARCH AND SEIZURE (INVENTORY SEARCH, PEOPLE DID NOT DEMONSTRATE THE INVENTORY SEARCH OF DEFENDANT'S VEHICLE WAS VALIDLY EXECUTED, HANDGUN FOUND IN THE SEARCH SHOULD HAVE BEEN SUPPRESSED (SECOND DEPT))/INVENTORY SEARCH (CRIMINAL LAW, PEOPLE DID NOT DEMONSTRATE THE INVENTORY SEARCH OF DEFENDANT'S VEHICLE WAS VALIDLY EXECUTED, HANDGUN FOUND IN THE SEARCH SHOULD HAVE BEEN SUPPRESSED (SECOND DEPT))/SUPPRESS, MOTION TO (CRIMINAL LAW, INVENTORY SEARCH, PEOPLE DID NOT DEMONSTRATE THE INVENTORY SEARCH OF DEFENDANT'S VEHICLE WAS VALIDLY EXECUTED, HANDGUN FOUND IN THE SEARCH SHOULD HAVE BEEN SUPPRESSED (SECOND DEPT))

CRIMINAL LAW, EVIDENCE.

PEOPLE DID NOT DEMONSTRATE THE INVENTORY SEARCH OF DEFENDANT'S VEHICLE WAS VALIDLY EXECUTED, HANDGUN FOUND IN THE SEARCH SHOULD HAVE BEEN SUPPRESSED (SECOND DEPT).

The Second Department reversed defendant's firearm convictions because the inventory search of defendant's car was not demonstrated to have been validly executed. The conviction for possession of a gravity knife, which was discovered on defendant's person after a vehicle stop was affirmed. However, the dissenting justice argued the People also failed to prove the vehicle stop was lawful. The stop, which was made at night, was based upon the officer's inability to see inside the car, which was alleged to constitute a tinted-window violation:

> To further the goals justifying the exception, "an inventory search should be conducted pursuant to an established procedure clearly limiting the conduct of individual officers that assures that the searches are carried out consistently and reasonably'" ... . The police procedure must be standardized so as to "limit the discretion of the officer in the field" ... . "Thus, two elements must be examined: first, the relationship between the search procedure adopted and the governmental objectives that justify the intrusion and, second, the adequacy of the controls on the officer's discretion" (id.). In other words, there must be evidence of the policy as to inventory searches and that the particular inventory search at issue complied with that policy, and the court must evaluate the adequacy of the policy itself, to ensure that it furthers the proper goals of and limits on inventory searches ... . The written policy

itself need not be entered into evidence, but there must be some evidence of what the procedure requires ... , and the officer's compliance with it ... .

Here, no testimony was given at the suppression hearing about the content of any New York City Police Department policy regarding the conduct of inventory searches, or the officer's compliance with it. In the absence of any evidence satisfying the People's burden of establishing the lawfulness of the search of the defendant's automobile, the Supreme Court should have granted that branch of the defendant's motion which sought suppression of the handgun found during that search ... . **People v Bacquie, 2017 NY Slip Op 06924, Second Dept 10-4-17**

CRIMINAL LAW (VARIANCE BETWEEN THE ALLEGATIONS IN THE INDICTMENT AND BILL OF PARTICULARS AND THE PROOF AT TRIAL REQUIRED REVERSAL AND DISMISSAL OF THE INDICTMENT (FOURTH DEPT))/EVIDENCE (CRIMINAL LAW, VARIANCE BETWEEN THE ALLEGATIONS IN THE INDICTMENT AND BILL OF PARTICULARS AND THE PROOF AT TRIAL REQUIRED REVERSAL AND DISMISSAL OF THE INDICTMENT (FOURTH DEPT))/INDICTMENTS VARIANCE BETWEEN THE ALLEGATIONS IN THE INDICTMENT AND BILL OF PARTICULARS AND THE PROOF AT TRIAL REQUIRED REVERSAL AND DISMISSAL OF THE INDICTMENT (FOURTH DEPT))/BILL OF PARTICULARS (CRIMINAL LAW, VARIANCE BETWEEN THE ALLEGATIONS IN THE INDICTMENT AND BILL OF PARTICULARS AND THE PROOF AT TRIAL REQUIRED REVERSAL AND DISMISSAL OF THE INDICTMENT (FOURTH DEPT))/VARIANCE (CRIMINAL LAW, VARIANCE BETWEEN THE ALLEGATIONS IN THE INDICTMENT AND BILL OF PARTICULARS AND THE PROOF AT TRIAL REQUIRED REVERSAL AND DISMISSAL OF THE INDICTMENT (FOURTH DEPT))

CRIMINAL LAW, EVIDENCE.

VARIANCE BETWEEN THE ALLEGATIONS IN THE INDICTMENT AND BILL OF PARTICULARS AND THE PROOF AT TRIAL REQUIRED REVERSAL AND DISMISSAL OF THE INDICTMENT (FOURTH DEPT).

The Fourth Department, reversing defendant's conviction and dismissing the indictment, determined defendant was not tried on the allegations made in the indictment and bill of particulars. The defendant had a seizure while driving and struck two children, killing one of the them. He was charged with reckless manslaughter (and other charges) and was convicted of criminally negligent homicide and assault in the third degree:

Prior to trial, defendant served multiple demands for a bill of particulars requesting, inter alia, that the People specifically describe how defendant was reckless. In response, the People specified only that "[t]he ingestion of marihuana and a failure to take medication were both factors that contributed to the defendant's recklessness." Despite defendant's objections during the course of the trial, including a motion for a trial order of dismissal at the close of the People's case and renewal of that motion at the close of all proof ... , the People presented evidence that defendant was reckless based upon not only marihuana use and failure to take medication, but also based upon, inter alia, his lack of sleep, failure to inform his doctors of his syncope events, and failure to control his alcohol consumption. ...

... A conviction is supported by legally sufficient evidence "when, viewing the facts in [the] light most favorable to the People, there is a valid line of reasoning and permissible inferences from which a rational jury could have found the elements of the crime proved beyond a reasonable doubt' "... . "Where the charge against a defendant is limited either ... by a bill of particulars or the indictment itself, the defendant has a fundamental and nonwaivable right to be tried only on the crimes charged"... . Here, because the People specifically narrowed their theory of recklessness in the bill of particulars, County Court was " obliged to hold the prosecution to this narrower theory alone' "... .

The People did not present any evidence that marihuana use, in general, may cause seizures or that marihuana use caused defendant's specific seizure herein. In addition, the People did not present any evidence that defendant had been prescribed anti-seizure medication and that he had failed to take it. Inasmuch as there was a variance between the People's trial evidence and the indictment as amplified by the bill of particulars, and that evidence was insufficient to support the theories of defendant's recklessness set forth in the bill of particulars, defendant was essentially tried and convicted on charges for which he had not been indicted ... . **People v Bradley, 2017 NY Slip Op 07032, Fourth Dept 10-6-17**

CRIMINAL LAW (EVIDENCE OF DEFENDANT'S CONSTRUCTIVE POSSESSION OF COCAINE WAS CIRCUMSTANTIAL, FAILURE TO INSTRUCT THE JURY ON CIRCUMSTANTIAL EVIDENCE WAS REVERSIBLE ERROR (FOURTH DEPT))/EVIDENCE (CRIMINAL LAW, EVIDENCE OF DEFENDANT'S CONSTRUCTIVE POSSESSION OF COCAINE WAS CIRCUMSTANTIAL, FAILURE TO INSTRUCT THE JURY ON CIRCUMSTANTIAL EVIDENCE WAS REVERSIBLE ERROR (FOURTH DEPT))/CONSTRUCTIVE POSSESSION (EVIDENCE OF DEFENDANT'S CONSTRUCTIVE POSSESSION OF COCAINE WAS CIRCUMSTANTIAL, FAILURE TO INSTRUCT THE JURY ON CIRCUMSTANTIAL EVIDENCE WAS REVERSIBLE ERROR (FOURTH DEPT))/CIRCUMSTANTIAL EVIDENCE (CRIMINAL LAW, CONSTRUCTIVE POSSESSION, EVIDENCE OF DEFENDANT'S CONSTRUCTIVE POSSESSION OF COCAINE WAS CIRCUMSTANTIAL, FAILURE TO INSTRUCT THE JURY ON CIRCUMSTANTIAL EVIDENCE WAS REVERSIBLE ERROR (FOURTH DEPT))/JURY INSTRUCTION (CRIMINAL LAW, CIRCUMSTANTIAL EVIDENCE, EVIDENCE OF DEFENDANT'S CONSTRUCTIVE POSSESSION OF COCAINE WAS CIRCUMSTANTIAL, FAILURE TO INSTRUCT THE JURY ON CIRCUMSTANTIAL EVIDENCE WAS REVERSIBLE ERROR (FOURTH DEPT))

CRIMINAL LAW, EVIDENCE.

EVIDENCE OF DEFENDANT'S CONSTRUCTIVE POSSESSION OF COCAINE WAS CIRCUMSTANTIAL, FAILURE TO INSTRUCT THE JURY ON CIRCUMSTANTIAL EVIDENCE WAS REVERSIBLE ERROR (FOURTH DEPT).

The Fourth Department, reversing defendant's conviction and ordering a new trial, determined County Court should have given the circumstantial evidence jury instruction. Defendant was present in an apartment where cocaine was found. The evidence whether defendant constructively possessed the cocaine was circumstantial:

While executing a search warrant in an apartment leased to defendant's girlfriend, but in which defendant was present, police officers found baggies of cocaine in a bedroom. The baggies were located variously in a jacket pocket, in a dresser drawer, and on the floor behind the headboard of the bed. None of the baggies was in plain view. The officers also recovered a dilutant commonly used in the drug trade in a kitchen cabinet, numerous small baggies commonly used in the drug trade in a kitchen cabinet and a dresser drawer in the bedroom, and three cellular phones in a dresser drawer with one of the baggies of cocaine. On top of the dressers in the bedroom, in plain view, were a scale and a box of sandwich bags. Inside the box of sandwich bags were a smaller scale and a credit or debit card in defendant's name. In different locations in the apartment, police officers recovered documents in defendant's name. One had been mailed to defendant at the apartment, but a more recent document had been mailed to defendant at a different address. * * *

We conclude that reversal is required based on the court's refusal to provide a circumstantial evidence instruction. "Constructive possession can be proven directly or circumstantially" ... , and "[a] circumstantial evidence charge is required [only] where the evidence against a defendant is wholly circumstantial' " ... . Here, although there was direct evidence of defendant's dominion and control over the apartment based on his presence in the apartment, "there was no direct evidence of his dominion or control over the drugs . . . found in the apartment" ... . Contrary to

> the People's contention, the cocaine and most of the paraphernalia were not in plain view... . As a result, "to find that defendant had control over the contraband, the drawing of an additional inference was required. For this reason, the circumstantial evidence charge requested by defense counsel was required" ... . **People v Ayala, 2017 NY Slip Op 07041, Fourth Dept 10-6-17**

CRIMINAL LAW (DEFENSE COUNSEL SHOULD HAVE BEEN ALLOWED TO CROSS-EXAMINE THE ARRESTING DETECTIVE ABOUT A CIVIL SUIT AGAINST HIM, REVERSAL OF POSSESSION CONVICTION DID NOT REQUIRE REVERSAL OF SALE CONVICTION, CROSS-EXAMINATION OF DEFENDANT ABOUT A CONVICTION WHICH WAS SUBSEQUENTLY REVERSED DID NOT AFFECT THE CONVICTION (FIRST DEPT))/EVIDENCE (CRIMINAL LAW, DEFENSE COUNSEL SHOULD HAVE BEEN ALLOWED TO CROSS-EXAMINE THE ARRESTING DETECTIVE ABOUT A CIVIL SUIT AGAINST HIM, REVERSAL OF POSSESSION CONVICTION DID NOT REQUIRE REVERSAL OF SALE CONVICTION, CROSS-EXAMINATION OF DEFENDANT ABOUT A CONVICTION WHICH WAS SUBSEQUENTLY REVERSED DID NOT AFFECT THE CONVICTION (FIRST DEPT))/IMPEACHMENT (EVIDENCE, CRIMINAL LAW, DEFENSE COUNSEL SHOULD HAVE BEEN ALLOWED TO CROSS-EXAMINE THE ARRESTING DETECTIVE ABOUT A CIVIL SUIT AGAINST HIM, REVERSAL OF POSSESSION CONVICTION DID NOT REQUIRE REVERSAL OF SALE CONVICTION, CROSS-EXAMINATION OF DEFENDANT ABOUT A CONVICTION WHICH WAS SUBSEQUENTLY REVERSED DID NOT AFFECT THE CONVICTION (FIRST DEPT))/POLICE OFFICERS (CROSS-EXAMINATION, DEFENSE COUNSEL SHOULD HAVE BEEN ALLOWED TO CROSS-EXAMINE THE ARRESTING DETECTIVE ABOUT A CIVIL SUIT AGAINST HIM, REVERSAL OF POSSESSION CONVICTION DID NOT REQUIRE REVERSAL OF SALE CONVICTION, CROSS-EXAMINATION OF DEFENDANT ABOUT A CONVICTION WHICH WAS SUBSEQUENTLY REVERSED DID NOT AFFECT THE CONVICTION (FIRST DEPT))

CRIMINAL LAW, EVIDENCE.

DEFENSE COUNSEL SHOULD HAVE BEEN ALLOWED TO CROSS-EXAMINE THE ARRESTING DETECTIVE ABOUT A CIVIL SUIT AGAINST HIM, REVERSAL OF POSSESSION CONVICTION DID NOT REQUIRE REVERSAL OF SALE CONVICTION, CROSS-EXAMINATION OF DEFENDANT ABOUT A CONVICTION WHICH WAS SUBSEQUENTLY REVERSED DID NOT AFFECT THE CONVICTION (FIRST DEPT).

The First Department determined defendant was entitled to a new trial on the possession of a controlled substance charge because defense counsel was precluded from cross-examining the arresting detective about a federal civil suit against him. The Second Department found, however, that the conviction for sale of a controlled substance could not have been affected by the error. In addition, the Second Department held that cross-examination of the defendant about a conviction which was subsequently reversed on appeal could not have affected the verdict:

> The court erred in precluding defense counsel from questioning a detective about the factual allegations in a pending federal civil lawsuit, in which the detective was a named defendant. Specifically, counsel sought to ask the arresting detective "whether he in fact found the drugs on [the plaintiff in that case]; isn't it true that [the plaintiff] did not in fact have any drugs, nonetheless you still in fact arrested him." These allegations were relevant to the detective's credibility, and counsel laid the correct foundation for this form of impeachment ... .
>
> This error was not harmless with respect to the possession conviction, because this detective was the sole witness to testify to the circumstances of that charge, in which 17 bags of cocaine were allegedly found on defendant's person during a strip search. However, the error was harmless with respect to the sale conviction ... . **People v Robinson, 2017 NY Slip Op 07175, First Dept 10-12-17**

CRIMINAL LAW (JURY SHOULD HAVE BEEN INSTRUCTED ON THE JUSTIFICATION DEFENSE, EVIDENCE OF PRIOR BAD ACTS INVOLVING A DIFFERENT VICTIM NOT ADMISSIBLE (THIRD DEPT))/EVIDENCE (CRIMINAL LAW, JURY SHOULD HAVE BEEN INSTRUCTED ON THE JUSTIFICATION DEFENSE, EVIDENCE OF PRIOR BAD ACTS INVOLVING A DIFFERENT VICTIM NOT ADMISSIBLE (THIRD DEPT))/JUSTIFICATION DEFENSE (JURY SHOULD HAVE BEEN INSTRUCTED ON THE JUSTIFICATION DEFENSE, EVIDENCE OF PRIOR BAD ACTS INVOLVING A DIFFERENT VICTIM NOT ADMISSIBLE (THIRD DEPT))/MOLINEUX EVIDENCE (JURY SHOULD HAVE BEEN INSTRUCTED ON THE JUSTIFICATION DEFENSE, EVIDENCE OF PRIOR BAD ACTS INVOLVING A DIFFERENT VICTIM NOT ADMISSIBLE (THIRD DEPT))/PRIOR BAD ACTS (MOLINEUX, JURY SHOULD HAVE BEEN INSTRUCTED ON THE JUSTIFICATION DEFENSE, EVIDENCE OF PRIOR BAD ACTS INVOLVING A DIFFERENT VICTIM NOT ADMISSIBLE (THIRD DEPT))

CRIMINAL LAW, EVIDENCE.

JURY SHOULD HAVE BEEN INSTRUCTED ON THE JUSTIFICATION DEFENSE, EVIDENCE OF PRIOR BAD ACTS INVOLVING A DIFFERENT VICTIM NOT ADMISSIBLE (THIRD DEPT).

The Third Department, reversing defendant's conviction, determined the jury should have been instructed on the justification defense and evidence of prior bad acts not involving the victim were not admissible as Molineux evidence:

> A justification charge is required when there is any reasonable view of the evidence — whether presented by the People or the defendant ... — that could lead a jury to conclude that the defendant reasonably believed that the victim was using or was about to use deadly physical force and that the defendant could not safely retreat, or was under no duty to retreat ... . A defendant has no duty to retreat when he or she is within his or her own home and is not the initial aggressor ... . If the defendant requests a justification charge and the evidence, viewed in the light most favorable to the defendant, supports the defense, the failure to give the charge constitutes reversible error ... . In both of her written statements to the police, which were admitted into evidence, as well as her oral statements during the 911 call and at the scene, which were testified to by the 911 dispatcher and responding officers, defendant maintained that the victim had been the initial aggressor, having entered the apartment and attacked her with a knife. Defendant consistently stated that she reacted in self-defense and out of fear for her life and that she had "a black out moment" when she repeatedly struck the victim with the bat and stabbed him with the knife. In one of her statements, she asserted that she delivered the final stab wounds after the victim stated something that sounded like "'I'll get you.'" In addition, as testified to by the officers involved and as evidenced by one of her written statements, defendant claimed that the victim had previously perpetrated acts of physical, sexual and emotional abuse against her. She further stated that the victim had threatened to kill her during a fight a few days earlier. Significantly, in assessing whether a defendant reasonably believed that the victim was using or about to use deadly physical force, consideration may be given to "any relevant knowledge the defendant had about [the victim]," including incidents of past violence ... . **People v Ball, 2017 NY Slip Op 07341, Third Dept 10-19-17**

CRIMINAL LAW (HEARSAY NOT ADMISSIBLE AS BACKGROUND INFORMATION TO EXPLAIN THE REASON FOR A SEARCH, PEOPLE SHOULD NOT HAVE BEEN ALLOWED TO IMPEACH THEIR OWN WITNESS (THIRD DEPT))/EVIDENCE (CRIMINAL LAW, HEARSAY NOT ADMISSIBLE AS BACKGROUND INFORMATION TO EXPLAIN THE REASON FOR A SEARCH, PEOPLE SHOULD NOT HAVE BEEN ALLOWED TO IMPEACH THEIR OWN WITNESS (THIRD DEPT))/HEARSAY (CRIMINAL LAW, HEARSAY NOT ADMISSIBLE AS BACKGROUND INFORMATION TO EXPLAIN THE REASON FOR A SEARCH, PEOPLE SHOULD NOT HAVE BEEN ALLOWED TO IMPEACH THEIR OWN WITNESS (THIRD DEPT))/IMPEACHMENT (CRIMINAL LAW, HEARSAY NOT ADMISSIBLE AS BACKGROUND INFORMATION TO EXPLAIN THE REASON FOR A SEARCH, PEOPLE SHOULD NOT HAVE BEEN ALLOWED TO IMPEACH THEIR OWN WITNESS (THIRD DEPT))

CRIMINAL LAW, EVIDENCE.

HEARSAY NOT ADMISSIBLE AS BACKGROUND INFORMATION TO EXPLAIN THE REASON FOR A SEARCH, PEOPLE SHOULD NOT HAVE BEEN ALLOWED TO IMPEACH THEIR OWN WITNESS (THIRD DEPT).

The Third Department, reversing defendant's conviction, determined hearsay statements from two witnesses (Jones and Grierson) about the presence of a gun in the defendant's apartment were not admissible as background information to explain why the police searched the apartment. The court further found that the People should not have been allowed to impeach their own witness:

> ... [A]lthough general and cursory testimony by one of the officers would have sufficed to explain why they began to search for a weapon, County Court permitted all four officers to testify in detail that Jones and Grierson stated that defendant had a gun and also allowed the People to elicit further information from two of the officers as to Jones' and Grierson's description of the gun. In light of the repetitive and detailed nature of the testimony, we find that it exceeded the permissible scope of explanatory background information ... .
>
> Compounding this error, County Court improperly allowed the People to impeach Grierson, their own witness, with her prior grand jury testimony. A party may impeach its own witness with a prior contradictory statement when the "witness gives testimony upon a material issue or fact which 'tends to disprove the party's position or affirmatively damages the party's case'" ... . Although Grierson testified before the grand jury that she told the police officers about her previous conversation with defendant concerning a gun and her belief based upon that conversation that defendant might have a gun in the apartment, at trial she denied that she made those statements to the officers. She did admit, however, that she had the previous conversation with defendant. In our view, Grierson's trial testimony did not tend to disprove the People's position that defendant constructively possessed the gun, nor did it affirmatively damage their case. Rather, Grierson's trial testimony merely failed to corroborate or bolster the officers' explanatory background testimony. Accordingly, the People should not have been permitted to impeach Grierson with her grand jury testimony ... . **People v Grierson, 2017 NY Slip Op 07344, Third Department 10-19-17**

CRIMINAL LAW (EVIDENCE WAS SUFFICIENT TO SUPPORT MANSLAUGHTER CONVICTION FOR THE DEATH OF A BABY, TWO JUSTICE DISSENT (SECOND DEPT))/EVIDENCE (CRIMINAL LAW, EVIDENCE WAS SUFFICIENT TO SUPPORT MANSLAUGHTER CONVICTION FOR THE DEATH OF A BABY, TWO JUSTICE DISSENT (SECOND DEPT))/SHAKEN BABY SYNDROME (EVIDENCE WAS SUFFICIENT TO SUPPORT MANSLAUGHTER CONVICTION FOR THE DEATH OF A BABY, TWO JUSTICE DISSENT (SECOND DEPT))

CRIMINAL LAW, EVIDENCE.

EVIDENCE WAS SUFFICIENT TO SUPPORT MANSLAUGHTER CONVICTION FOR THE DEATH OF A BABY, TWO JUSTICE DISSENT (SECOND DEPT).

The Second Department, over a two-justice dissent, determined there was legally sufficient evidence to support the manslaughter conviction for the death of a baby. The dissenters argued there were two adults who could have committed the crime and there was insufficient evidence defendant was the perpetrator:

> The evidence presented by the People established that the defendant had one-on-one access to Annie during relevant time periods preceding her hospitalization. Further, the record is replete with evidence, including strong medical expert evidence, that Annie's death was a homicide caused by violent shaking and forceful impacts to her head. This proof, coupled with the defendant's devastating admission that he "carelessly bump[ed] her head on the night stand," was both legally and factually sufficient to sustain the jury's verdict. **People v Hang Bin Li, 2017 NY Slip Op 07454, Second Dept 10-25-17**

CRIMINAL LAW (INSUFFICIENT EVIDENCE LINKING DEFENDANT TO THREATS TO WITNESS, WITNESS'S GRAND JURY TESTIMONY SHOULD NOT HAVE BEEN READ TO THE JURY, WITNESS SHOULD NOT HAVE BEEN ALLOWED TO TESTIFY ABOUT THE THREATS, TWO JUSTICE DISSENT (SECOND DEPT))/EVIDENCE (CRIMINAL LAW, INSUFFICIENT EVIDENCE LINKING DEFENDANT TO THREATS TO WITNESS, WITNESS'S GRAND JURY TESTIMONY SHOULD NOT HAVE BEEN READ TO THE JURY, WITNESS SHOULD NOT HAVE BEEN ALLOWED TO TESTIFY ABOUT THE THREATS, TWO JUSTICE DISSENT (SECOND DEPT))/SIROIS HEARING (INSUFFICIENT EVIDENCE LINKING DEFENDANT TO THREATS TO WITNESS, WITNESS'S GRAND JURY TESTIMONY SHOULD NOT HAVE BEEN READ TO THE JURY, WITNESS SHOULD NOT HAVE BEEN ALLOWED TO TESTIFY ABOUT THE THREATS, TWO JUSTICE DISSENT (SECOND DEPT))

CRIMINAL LAW, EVIDENCE.

INSUFFICIENT EVIDENCE LINKING DEFENDANT TO THREATS TO WITNESS, WITNESS'S GRAND JURY TESTIMONY SHOULD NOT HAVE BEEN READ TO THE JURY, WITNESS SHOULD NOT HAVE BEEN ALLOWED TO TESTIFY ABOUT THE THREATS, TWO JUSTICE DISSENT (SECOND DEPT).

The Second Department, over a two-justice dissent, reversed defendant's conviction because a witness, Lopez, was allowed to testify he changed his testimony because he was threatened. Lopez's grand jury testimony was read into evidence and then Lopez testified in accordance with the grand jury testimony. The Second Department held that there was insufficient evidence the defendant was behind the threats to Lopez. The dissenters argued that the error was harmless:

" ... As a general rule, the Grand Jury testimony of an unavailable witness is inadmissible as evidence-in-chief. However, a limited exception to this prohibition, and to the prohibition against the admission of hearsay, applies where the People establish by clear and convincing evidence that the witness's unavailability was procured by misconduct on the part of the defendant. Where the People establish that a witness is unwilling to testify due to the defendant's own conduct, or by the actions of others with the defendant's knowing acquiescence, defendant forfeits the right to confrontation, and such out-of-court statements are admissible" ... . Here, the People failed to establish, by clear and convincing evidence, that Lopez had been made unavailable due to threats made at the initiative or acquiescence of the defendant ... . Accordingly, the Supreme Court violated the defendant's right to confrontation by allowing Lopez's grand jury testimony into evidence.

The Supreme Court also erred in allowing Lopez to testify at the trial that he had been threatened by a third party. Evidence that a third party threatened a witness with respect to testifying at a criminal trial is admissible as evidence of consciousness of guilt where there is " at least circumstantial evidence linking the defendant to the threat'" ... . Here, there was no evidence linking the defendant to the threat. **People v Vargas, 2017 NY Slip Op 07465, Second Dept 10-25-17**

CRIMINAL LAW (STATEMENTS, POLICE SHOULD HAVE STOPPED QUESTIONING AFTER DEFENDANT INDICATED HE WANTED TO SPEAK TO A LAWYER, SUBSEQUENT STATEMENTS SHOULD HAVE BEEN SUPPRESSED, ERROR HARMLESS HOWEVER (THIRD DEPT))/EVIDENCE (CRIMINAL LAW, STATEMENTS, POLICE SHOULD HAVE STOPPED QUESTIONING AFTER DEFENDANT INDICATED HE WANTED TO SPEAK TO A LAWYER, SUBSEQUENT STATEMENTS SHOULD HAVE BEEN SUPPRESSED, ERROR HARMLESS HOWEVER (THIRD DEPT))/ATTORNEYS (CRIMINAL LAW, EVIDENCE, POLICE SHOULD HAVE STOPPED QUESTIONING AFTER DEFENDANT INDICATED HE WANTED TO SPEAK TO A LAWYER, SUBSEQUENT STATEMENTS SHOULD HAVE BEEN SUPPRESSED, ERROR HARMLESS HOWEVER (THIRD DEPT))/SUPPRESSION (CRIMINAL LAW, STATEMENTS, POLICE SHOULD HAVE STOPPED QUESTIONING AFTER DEFENDANT INDICATED HE WANTED TO SPEAK TO A LAWYER, SUBSEQUENT STATEMENTS SHOULD HAVE BEEN SUPPRESSED, ERROR HARMLESS HOWEVER (THIRD DEPT))/COUNSEL, RIGHT TO (STATEMENTS, POLICE SHOULD HAVE STOPPED QUESTIONING AFTER DEFENDANT INDICATED HE WANTED TO SPEAK TO A LAWYER, SUBSEQUENT STATEMENTS SHOULD HAVE BEEN SUPPRESSED, ERROR HARMLESS HOWEVER (THIRD DEPT))

CRIMINAL LAW, EVIDENCE, ATTORNEYS.

POLICE SHOULD HAVE STOPPED QUESTIONING AFTER DEFENDANT INDICATED HE WANTED TO SPEAK TO A LAWYER, SUBSEQUENT STATEMENTS SHOULD HAVE BEEN SUPPRESSED, ERROR HARMLESS HOWEVER (THIRD DEPT).

The Third Department determined defendant had made a request for counsel which required the police to stop interrogating him. However, the error was deemed harmless:

... [D]efendant, handcuffed in a police interview room, was in custody ... . The video recording of the interrogation reflects that, after defendant was read Miranda warnings, he indicated that he understood them and then questioned the detective about why he had not received an earlier advisement of his rights and why he had been taken into custody, and the detective told him that he would need to cooperate in order to learn what was going on. At that point, defendant stated, "I will get a lawyer. As a matter of fact, I don't wanna talk no more" and then asked, "Can I please get a phone call?" Under these circumstances, defendant's statements were not "merely a forewarning of a possible, contingent desire to confer with counsel [but,] rather[, were] an unequivocal statement of [his] present desire to do so" ... . That is, defendant made clear his desire to speak with an attorney to represent him and to cease questioning, thereby unequivocally asserting his right to counsel and to remain silent ... . Questioning should have stopped, and any waiver of his right to counsel thereafter was ineffective in the absence

of counsel ... . Thus, we agree with defendant that the court erred in denying his motion to suppress his statements.

However, we find that the erroneous admission of defendant's statements was harmless error in that, considering "the totality of the evidence, there is no reasonable possibility that the error affected the jury's verdict"... . People v Leflore, 2017 NY Slip Op 07483, Third Dept 10-26-17

CRIMINAL LAW (SEALING, RECORD OF DEFENDANT'S DISORDERLY CONDUCT CONVICTION COULD NOT BE UNSEALED BY THE DISTRICT ATTORNEY'S OFFICE IN AN EVICTION PROCEEDING BASED UPON THE UNDERLYING DRUG CHARGE, DISTRICT ATTORNEY'S OFFICE WAS NOT ACTING AS A LAW ENFORCEMENT AGENCY IN THE EVICTION PROCEEDING WITHIN THE MEANING OF THE SEALING STATUTE (FIRST DEPT))/LANDLORD-TENANT (CRIMINAL LAW, EVICTION, RECORD OF DEFENDANT'S DISORDERLY CONDUCT CONVICTION COULD NOT BE UNSEALED BY THE DISTRICT ATTORNEY'S OFFICE IN AN EVICTION PROCEEDING BASED UPON THE UNDERLYING DRUG CHARGE, DISTRICT ATTORNEY'S OFFICE WAS NOT ACTING AS A LAW ENFORCEMENT AGENCY IN THE EVICTION PROCEEDING WITHIN THE MEANING OF THE SEALING STATUTE (FIRST DEPT))/SEALING (CRIMINAL RECORDS, RECORD OF DEFENDANT'S DISORDERLY CONDUCT CONVICTION COULD NOT BE UNSEALED BY THE DISTRICT ATTORNEY'S OFFICE IN AN EVICTION PROCEEDING BASED UPON THE UNDERLYING DRUG CHARGE, DISTRICT ATTORNEY'S OFFICE WAS NOT ACTING AS A LAW ENFORCEMENT AGENCY IN THE EVICTION PROCEEDING WITHIN THE MEANING OF THE SEALING STATUTE (FIRST DEPT))/UNSEALING (CRIMINAL RECORDS, RECORD OF DEFENDANT'S DISORDERLY CONDUCT CONVICTION COULD NOT BE UNSEALED BY THE DISTRICT ATTORNEY'S OFFICE IN AN EVICTION PROCEEDING BASED UPON THE UNDERLYING DRUG CHARGE, DISTRICT ATTORNEY'S OFFICE WAS NOT ACTING AS A LAW ENFORCEMENT AGENCY IN THE EVICTION PROCEEDING WITHIN THE MEANING OF THE SEALING STATUTE (FIRST DEPT))/EVICTION (CRIMINAL LAW, UNSEALING OF RECORDS, RECORD OF DEFENDANT'S DISORDERLY CONDUCT CONVICTION COULD NOT BE UNSEALED BY THE DISTRICT ATTORNEY'S OFFICE IN AN EVICTION PROCEEDING BASED UPON THE UNDERLYING DRUG CHARGE, DISTRICT ATTORNEY'S OFFICE WAS NOT ACTING AS A LAW ENFORCEMENT AGENCY IN THE EVICTION PROCEEDING WITHIN THE MEANING OF THE SEALING STATUTE (FIRST DEPT))/RECORDS (CRIMINAL CONVICTION, UNSEALING, RECORD OF DEFENDANT'S DISORDERLY CONDUCT CONVICTION COULD NOT BE UNSEALED BY THE DISTRICT ATTORNEY'S OFFICE IN AN EVICTION PROCEEDING BASED UPON THE UNDERLYING DRUG CHARGE, DISTRICT ATTORNEY'S OFFICE WAS NOT ACTING AS A LAW ENFORCEMENT AGENCY IN THE EVICTION PROCEEDING WITHIN THE MEANING OF THE SEALING STATUTE (FIRST DEPT))

CRIMINAL LAW, LANDLORD-TENANT.

RECORD OF DEFENDANT'S DISORDERLY CONDUCT CONVICTION COULD NOT BE UNSEALED BY THE DISTRICT ATTORNEY'S OFFICE IN AN EVICTION PROCEEDING BASED UPON THE UNDERLYING DRUG CHARGE, DISTRICT ATTORNEY'S OFFICE WAS NOT ACTING AS A LAW ENFORCEMENT AGENCY IN THE EVICTION PROCEEDING WITHIN THE MEANING OF THE SEALING STATUTE (FIRST DEPT).

The First Department, in a full-fledged opinion by Justice Kapnick, reversing Supreme Court, determined defendant's sealed record, associated with a plea to disorderly conduct in satisfaction of a drug charge, could not be unsealed in an eviction action under the Real Property Actions and Proceedings Law (RPAPL). The eviction action was based upon the underlying drug charge. Although the Criminal Procedure Law allows a record of a criminal proceeding to be unsealed by a "law enforcement agency," the First Department held that the district attorney's office, in assisting in a post-conviction eviction proceeding, was not acting as "a law enforcement agency" within the meaning of the sealing statute:

... [U]nsealing records pursuant to [Criminal Procedure Law]160.50(1)(d)(ii) [is] limited to instances in which the People [act] in an investigatory capacity, and, even then, [is] only available before the commencement of a criminal proceeding.

> * * * ... [A] court's authority to make sealed records available to a prosecutor depend[s] on whether or not a criminal proceeding ha[s] commenced. Thus, in order to qualify as a "law enforcement agency," as used in CPL 160.50(1)(d)(ii), not only must the District Attorney's Office be acting in its investigatory capacity, but, also, it must be doing so before the commencement of a criminal proceeding. Here, the District Attorney's Office sought to unseal defendant's records so that a third party could use them in a civil proceeding against defendant and his fellow tenants. This runs counter to the Legislature's intent in drafting the sealing statutes and their narrow exceptions. **People v F.B., 2017 NY Slip Op 07232, First Dept 10-17-17**

DEBTOR-CREDITOR

DEBTOR-CREDITOR (USURY, DEBTOR CAN SIMPLY REFUSE TO REPAY THE CRIMINALLY USURIOUS LOAN (SECOND DEPT))/USURY (DEBTOR CAN SIMPLY REFUSE TO REPAY THE CRIMINALLY USURIOUS LOAN (SECOND DEPT))/LOANS (USURY, DEBTOR CAN SIMPLY REFUSE TO REPAY THE CRIMINALLY USURIOUS LOAN (SECOND DEPT))

DEBTOR-CREDITOR.

DEBTOR CAN SIMPLY REFUSE TO REPAY THE CRIMINALLY USURIOUS LOAN (SECOND DEPT).

The Second Department determined a loan with a 50% per year interest rate was criminally usurious and the debtor could simply refuse to repay it:

> A borrower bears the burden of proving each element of usury by clear and convincing evidence, and usury "will not be presumed" ... . Here, the plaintiff admits that the interest on the loan was excessive, criminally so, at 50% per annum, or 100% over the two-year term of the loan. Further, where a loan agreement is usurious on its face, usurious intent will be implied and usury will be found as a matter of law ... . Thus, the defendants met their burden of establishing the elements of criminal usury. Moreover, there was no evidence of a "special relationship" between the parties ... , and no evidence that the defendants set a rate they knew to be usurious for the purpose of avoiding repayment of the loan ... . Accordingly, there is no triable issue of fact as to whether the defendants may be estopped from raising usury as a defense to the plaintiffs' action. Because an action by a lender on a usurious loan is impermissible ... , the plaintiff's motion was properly denied and that branch of the defendants' cross motion which was for summary judgment dismissing the action on the ground that the loan was usurious was properly granted ... . **Roopchand v Mohammed, 2017 NY Slip Op 07476, Second Dept 10-25-17**

DEBTOR-CREDITOR (PLAINTIFF ENTITLED TO A RENEWAL JUDGMENT PLUS ACCRUED INTEREST DESPITE MORE THAN TEN YEAR DELAY IN ENFORCEMENT (FIRST DEPT))/CIVIL PROCEDURE (RENEWAL JUDGMENT, LACHES, (PLAINTIFF ENTITLED TO A RENEWAL JUDGMENT PLUS ACCRUED INTEREST DESPITE MORE THAN TEN YEAR DELAY IN ENFORCEMENT (FIRST DEPT))/RENEWAL JUDGMENT (PLAINTIFF ENTITLED TO A RENEWAL JUDGMENT PLUS ACCRUED INTEREST DESPITE MORE THAN TEN YEAR DELAY IN ENFORCEMENT (FIRST DEPT))/LACHES (RENEWAL JUDGMENT, PLAINTIFF ENTITLED TO A RENEWAL JUDGMENT PLUS ACCRUED INTEREST DESPITE MORE THAN TEN YEAR DELAY IN ENFORCEMENT (FIRST DEPT))

DEBTOR-CREDITOR, CIVIL PROCEDURE.

PLAINTIFF ENTITLED TO A RENEWAL JUDGMENT PLUS ACCRUED INTEREST DESPITE MORE THAN TEN YEAR DELAY IN ENFORCEMENT (FIRST DEPT).

The First Department determined plaintiff was entitled to a renewal judgment plus interest. The more than ten-year delay in enforcing the judgment did not constitute laches:

> Plaintiff judgment creditor timely commenced this action for a renewal judgment more than ten years after the docketing of the original judgment as a lien against appellant's property (CPLR 5014[1]). Plaintiff made a prima facie showing of its entitlement to a renewal judgment by demonstrating that defendants have not satisfied any part of the judgment ... . In opposition, appellant argued that plaintiff was not entitled to a renewal judgment because it had unreasonably delayed in enforcing the original judgment, while interest accumulated on the judgment and tax liens were imposed. On appeal, he argues that the equitable doctrine of laches applies since his circumstances have worsened during the ten years since the judgment was docketed.
>
> The "mere delay" in enforcement of a judgment, without actual prejudice resulting from the delay, does not constitute laches ... . Appellant relies on facts outside the record which, in any event, do not constitute injury or prejudice resulting from plaintiff's delay. The accumulation of postjudgment interest does not support a claim of laches, since plaintiff is entitled by statute to interest on the unpaid amount of the original judgment, which is valid for twenty years (CPLR 211[b], 5004), regardless of whether the judgment is renewed. **C.T. Holdings, Ltd. v Schreiber Family Charitable Found., Inc., 2017 NY Slip Op 06914, First Dept 10-3-17**

DISCIPLINARY HEARINGS

DISCIPLINARY HEARINGS (INMATES) (UNEXPLAINED UNAVAILABILITY OF VIDEOTAPE ALLEGEDLY DEPICTING CHARGED BEHAVIOR REQUIRED ANNULMENT AND EXPUNGEMENT OF THE DETERMINATION (FOURTH DEPT))/EVIDENCE (DISCIPLINARY HEARINGS (INMATES) (UNEXPLAINED UNAVAILABILITY OF VIDEOTAPE ALLEGEDLY DEPICTING CHARGED BEHAVIOR REQUIRED ANNULMENT AND EXPUNGEMENT OF THE DETERMINATION (FOURTH DEPT))

DISCIPLINARY HEARINGS (INMATES), EVIDENCE.

UNEXPLAINED UNAVAILABILITY OF VIDEOTAPE ALLEGEDLY DEPICTING CHARGED BEHAVIOR REQUIRED ANNULMENT AND EXPUNGEMENT OF THE DETERMINATION (FOURTH DEPT).

The Fourth Department determined the unexplained unavailability of videotapes allegedly depicting the charged behavior required the annulment and expungement of the determination:

> ... [T]he determination that petitioner violated inmate rules 101.10 (7 NYCRR 270.2 [B] [2] [i] [engaging in sexual acts]) and 180.10 (7 NYCRR 270.2 [B] [26] [i] [violating a visitation procedure]) must be annulled. Petitioner was deprived of his right to reply to the evidence against him with respect to those charges because of the unexplained unavailability for use at the disciplinary hearing of the videotape that allegedly depicted his violations thereof ... . **Matter of Hubbard v Annucci. 2017 NY Slip Op 07036, Fourth Dept 10-6-17**

DISCIPLINARY HEARINGS (INMATES) (PETITIONER'S REQUEST FOR A WITNESS TO TESTIFY ABOUT THE CALIBRATION PROCEDURES FOR THE MACHINE USED TO TEST FOR THE PRESENCE OF MARIJUANA IN URINE SHOULD HAVE BEEN GRANTED (THIRD DEPT))/URINALYSIS (DISCIPLINARY HEARINGS (INMATES), PETITIONER'S REQUEST FOR A WITNESS TO TESTIFY ABOUT THE CALIBRATION PROCEDURES FOR THE MACHINE USED TO TEST FOR THE PRESENCE OF MARIJUANA IN URINE SHOULD HAVE BEEN GRANTED (THIRD DEPT))

DISCIPLINARY HEARINGS (INMATES).

PETITIONER'S REQUEST FOR A WITNESS TO TESTIFY ABOUT THE CALIBRATION PROCEDURES FOR THE MACHINE USED TO TEST FOR THE PRESENCE OF MARIJUANA IN URINE SHOULD HAVE BEEN GRANTED (THIRD DEPT).

The Third Department, annulling the determination, found that petitioner's request for a witness was improperly denied. Petitioner was charged with marijuana use based upon urinalysis done by a machine. Petitioner requested that a representative of the manufacturer of the machine testify about calibration procedures:

> Here, petitioner requested as a witness a representative from the manufacturer of the drug testing machine in order to refute the testimony of the correction officer who performed the urinalysis test regarding the operating procedures used to calibrate the machine. The Hearing Officer, in denying petitioner's request, found that the representative's testimony would necessarily be redundant to that offered by the correction officer. Upon our review of the record, however, it is unclear as to whether the correction officer's testimony regarding how the machine was calibrated was in accord with or was a departure from the recommendations in the manufacturer's procedural manual ... . Under such circumstances, we find an insufficient basis in the record to support the Hearing Officer's conclusion that the testimony of the manufacturer's representative would be redundant ... . Inasmuch as the Hearing Officer articulated a good faith reason for denying a manufacturer's representative as a witness, we find that petitioner's regulatory right to call a witness was violated and the proper remedy is remittal for a new hearing ... . **Matter of Paddyfote v Annucci, 2017 NY Slip Op 07502, Third Dept 10-26-17**

EDUCATION-SCHOOL LAW

EDUCATION-SCHOOL LAW (CASE ALLEGING SCHOOL DISTRICTS' FAILURE TO PROVIDE A SOUND BASIC EDUCATION AS REQUIRED BY THE NYS CONSTITUTION REMITTED FOR FINDINGS OF FACT WHETHER THE FUNDING FOR EACH OF THE EIGHT SCHOOL DISTRICTS PASSES CONSTITUTIONAL MUSTER (THIRD DEPT))/CONSTITUTIONAL LAW (EDUCATION - SCHOOL LAW, CASE ALLEGING SCHOOL DISTRICTS' FAILURE TO PROVIDE A SOUND BASIC EDUCATION AS REQUIRED BY THE NYS CONSTITUTION REMITTED FOR FINDINGS OF FACT WHETHER THE FUNDING FOR EACH OF THE EIGHT SCHOOL DISTRICTS PASSES CONSTITUTIONAL MUSTER (THIRD DEPT))/SOUND BASIC EDUCATION (EDUCATION -SCHOOL LAW, CASE ALLEGING SCHOOL DISTRICTS' FAILURE TO PROVIDE A SOUND BASIC EDUCATION AS REQUIRED BY THE NYS CONSTITUTION REMITTED FOR FINDINGS OF FACT WHETHER THE FUNDING FOR EACH OF THE EIGHT SCHOOL DISTRICTS PASSES CONSTITUTIONAL MUSTER (THIRD DEPT))

EDUCATION-SCHOOL LAW, CONSTITUTIONAL LAW.

CASE ALLEGING SCHOOL DISTRICTS' FAILURE TO PROVIDE THE SOUND BASIC EDUCATION REQUIRED BY THE NYS CONSTITUTION REMITTED FOR FINDINGS OF FACT WHETHER THE FUNDING FOR EACH OF THE EIGHT SCHOOL DISTRICTS PASSES CONSTITUTIONAL MUSTER (THIRD DEPT).

The Third Department reversing the dismissal of the complaint after trial, remitted the matter to Supreme Court to determine whether the reduction in funding to eight school districts pass constitutional must. The lawsuit alleged the school districts failed to provide the sound basic education mandated by the state constitution:

> Plaintiffs' causes of action — grounded in the assertion that the actual funding levels provided following the CFE cases [three Campaign for Fiscal Equity cases decided by the Court of Appeals] were insufficient to provide the affected students with a sound basic education — were based on detailed, district-specific allegations of insufficient inputs, deficient outputs and causation. More to the point, plaintiffs' proof at trial, which Supreme Court acknowledged established a prima facie case that defendant failed to fulfill its constitutional obligation, was more than sufficient to require analysis under the CFE II framework on a district-by-district basis ... . Indeed, by noting that changes in educational funding provided by defendant must still "deliver on its obligation to ensure that schoolchildren are provided the opportunity for a sound basic education" ... , the court acknowledged that any reductions in funding must pass constitutional muster, which is an inquiry that can be answered only through CFE II analysis.
>
> Thus, Supreme Court erred by proceeding directly to the "remedy" stage set forth in CFE III and affording deference to the Legislature without first applying the framework established in CFE II to determine whether plaintiffs had established a constitutional violation. No deference is due the Legislature when applying the CFE II factors to determine whether there is a violation in the first instance. Rather, courts must consider whether the evidence of inputs, outputs and causation establish that defendant has failed to provide constitutionally sufficient funding. It is only in adjudicating the sufficiency of the remedy for an established violation that deference to the political branches is required ... . **Maisto v State of New York, 2017 NY Slip Op 07511, Third Dept 10-26-17**

EMPLOYMENT LAW

EMPLOYMENT LAW (DEPARTMENT OF AGRICULTURE AND MARKETS PROPERLY PROHIBITED ITS MILK PLANT AND FARM INSPECTORS FROM SERVING AS COUNTY LEGISLATORS, THE RESULTING CONSTRAINT ON FREE SPEECH IS JUSTIFIED (THIRD DEPT))/DEPARTMENT OF AGRICULTURE AND MARKETS (DEPARTMENT OF AGRICULTURE AND MARKETS PROPERLY PROHIBITED ITS MILK PLANT AND FARM INSPECTORS FROM SERVING AS COUNTY LEGISLATORS, THE RESULTING CONSTRAINT ON FREE SPEECH IS JUSTIFIED (THIRD DEPT))/LEGISLATORS (EMPLOYMENT LAW, DEPARTMENT OF AGRICULTURE AND MARKETS PROPERLY PROHIBITED ITS MILK PLANT AND FARM INSPECTORS FROM SERVING AS COUNTY LEGISLATORS, THE RESULTING CONSTRAINT ON FREE SPEECH IS JUSTIFIED (THIRD DEPT))/CONSTITUTIONAL LAW (EMPLOYMENT LAW, DEPARTMENT OF AGRICULTURE AND MARKETS PROPERLY PROHIBITED ITS MILK PLANT AND FARM INSPECTORS FROM SERVING AS COUNTY LEGISLATORS, THE RESULTING CONSTRAINT ON FREE SPEECH IS JUSTIFIED (THIRD DEPT))/FREE SPEECH (EMPLOYMENT LAW, DEPARTMENT OF AGRICULTURE AND MARKETS PROPERLY PROHIBITED ITS MILK PLANT AND FARM INSPECTORS FROM SERVING AS COUNTY LEGISLATORS, THE RESULTING CONSTRAINT ON FREE SPEECH IS JUSTIFIED (THIRD DEPT))

EMPLOYMENT LAW, CONSTITUTIONAL LAW.

DEPARTMENT OF AGRICULTURE AND MARKETS PROPERLY PROHIBITED ITS MILK PLANT AND FARM INSPECTORS FROM SERVING AS COUNTY LEGISLATORS, THE RESULTING CONSTRAINT ON FREE SPEECH IS JUSTIFIED (THIRD DEPT).

The Third Department determined the NYS Department of Agriculture and Markets did not commit a constitutional violation when it constrained the petitioners' right to free speech by prohibiting them from serving as county legislators while working as milk plant and farm inspectors for the Department of Agriculture and Markets:

> Here, the parties do not dispute that declaring one's intent to campaign for elected political office constitutes speech on a matter of public concern ... . The primary issue, therefore, is whether Supreme Court erred when it determined that the Department's interest in reducing potential unethical behavior and preserving the professionalism and integrity of the Department outweighed the interest of [petitioners] to serve dual roles as both government inspectors and candidates for elected office. In applying this balancing test, courts have made clear that such a balance will tip in the employer's favor so long as '"(1) the employer's prediction of the disruption that such speech will cause is reasonable; (2) the potential for disruption outweighs the value of the speech; and (3) the employer took the adverse employment action not in retaliation for the employee's speech, but because of the potential for disruption'" ... .
>
> Upon balancing the relevant interests, we conclude that Supreme Court properly determined that the Pickering balance tips in respondents' favor and, therefore, the Department's disapprovals and revised outside activities policy were not unconstitutional. **Matter of Spence v New York State Dept. of Agric. & Mkts., 2017 NY Slip Op 07506, Third Dept 10-26-17**

EMPLOYMENT LAW (NYC HUMAN RIGHTS LAW, MOTION TO DISMISS PLAINTIFF'S GENDER DISCRIMINATION SUIT PROPERLY DENIED, EVEN IF DEFENDANT WAS NOT PLANTIFF'S EMPLOYER OR A JOINT EMPLOYER, IT COULD BE LIABLE FOR AIDING AND ABETTING DISCRIMINATION (FIRST DEPT))/HUMAN RIGHTS LAW (NYC) (MOTION TO DISMISS PLAINTIFF'S GENDER DISCRIMINATION SUIT PROPERLY DENIED, EVEN IF DEFENDANT WAS NOT PLANTIFF'S EMPLOYER OR A JOINT EMPLOYER, IT COULD BE LIABLE FOR AIDING AND ABETTING DISCRIMINATION (FIRST DEPT))/DISCRIMINATION (EMPLOYMENT, NYC HUMAN RIGHTS LAW, NYC HUMAN RIGHTS LAW, MOTION TO DISMISS PLAINTIFF'S GENDER DISCRIMINATION SUIT PROPERLY DENIED, EVEN IF DEFENDANT WAS NOT PLANTIFF'S EMPLOYER OR A JOINT EMPLOYER, IT COULD BE LIABLE FOR AIDING AND ABETTING DISCRIMINATION (FIRST DEPT))/AIDING AN ABETTING DISCRIMINATION (NYC HUMAN RIGHTS LAW, MOTION TO DISMISS PLAINTIFF'S GENDER DISCRIMINATION SUIT PROPERLY DENIED, EVEN IF DEFENDANT WAS NOT PLANTIFF'S EMPLOYER OR A JOINT EMPLOYER, IT COULD BE LIABLE FOR AIDING AND ABETTING DISCRIMINATION (FIRST DEPT))

EMPLOYMENT LAW, HUMAN RIGHTS LAW (NYC).

MOTION TO DISMISS PLAINTIFF'S GENDER DISCRIMINATION SUIT PROPERLY DENIED, EVEN IF DEFENDANT WAS NOT PLAINTIFF'S EMPLOYER OR A JOINT EMPLOYER, IT COULD BE LIABLE FOR AIDING AND ABETTING DISCRIMINATION (FIRST DEPT).

The First Department determined the motion to dismiss this gender discrimination suit was properly denied. Plaintiff, a woman, was employed as a construction crane operator. The court found that the defendant (Plaza) could be liable for aiding and abetting discrimination even if it was not plaintiff's employer or a joint employer:

> Even if Plaza is not plaintiff's employer or joint employer within the meaning of the City HRL [Human Rights Law], it may be held liable to the extent it "aid[ed], abet[ted], incite[d], compel[led] or coerce[d]" the alleged discrimination ... . Plaza's objection that plaintiff failed to allege the requisite "community of purpose" is unavailing ... . Plaintiff has clearly pleaded facts suggesting that Plaza bore the requisite discriminatory intent, and that it "compel[led] or coerce[d]" the alleged discriminatory employment decisions ... .The nature of plaintiff's employer's intent and involvement may be inferred from the fact that plaintiff's employer was the entity ultimately responsible for the allegedly discriminatory employment decisions.
>
> Plaintiff also sufficiently alleged the necessary elements of a gender discrimination claim, including that she was terminated "under circumstances giving rise to an inference of discrimination"... . Specifically, plaintiff alleged that a Plaza employee complained that she was "inadequate" before he had any opportunity to observe her work, when all he knew about her was that she was a woman, and thereafter continually harassed and insulted her. Although the alleged ensuing harassment and insults did not explicitly reference plaintiff's gender, the inference of gender-based discrimination is supported by the allegation that plaintiff was almost immediately replaced by a man... , as well as by the allegation that she was given a false reason for her termination - i.e., that her crane was being taken out of operation when in fact it continued to operate but with a new, male operator ... . **Schindler v Plaza Constr. LLC, 2017 NY Slip Op 07182, First Dept 10-12-17**

ENVIRONMENTAL LAW

ENVIRONMENTAL LAW (DEPARTMENT OF ENVIRONMENTAL CONSERVATION (DEC) HAD THE AUTHORITY TO RESCIND ITS NOTICE OF COMPLETE APPLICATION (NOCA) AND NEGATIVE DECLARATION RE THE EXPANSION OF AN OIL STORAGE FACILITY (THIRD DEPT)) /NOTICE OF COMPLETE APPLICATION (NOCA)) (ENVIRONMENTAL LAW, DEPARTMENT OF ENVIRONMENTAL CONSERVATION (DEC) HAD THE AUTHORITY TO RESCIND ITS NOTICE OF COMPLETE APPLICATION (NOCA) AND NEGATIVE DECLARATION RE THE EXPANSION OF AN OIL STORAGE FACILITY (THIRD DEPT)) /STATE ENVIRONMENTAL QUALITY REVIEW ACT (SEQRA) (DEPARTMENT OF ENVIRONMENTAL CONSERVATION (DEC) HAD THE AUTHORITY TO RESCIND ITS NOTICE OF COMPLETE APPLICATION (NOCA) AND NEGATIVE DECLARATION RE THE EXPANSION OF AN OIL STORAGE FACILITY (THIRD DEPT) /NEGATIVE DECLARATION (DEPARTMENT OF ENVIRONMENTAL CONSERVATION (DEC) HAD THE AUTHORITY TO RESCIND ITS NOTICE OF COMPLETE APPLICATION (NOCA) AND NEGATIVE DECLARATION RE THE EXPANSION OF AN OIL STORAGE FACILITY (THIRD DEPT)) /OIL STORAGE FACILITY (ENVIRONMENTAL LAW, DEPARTMENT OF ENVIRONMENTAL CONSERVATION (DEC) HAD THE AUTHORITY TO RESCIND ITS NOTICE OF COMPLETE APPLICATION (NOCA) AND NEGATIVE DECLARATION RE THE EXPANSION OF AN OIL STORAGE FACILITY (THIRD DEPT))

ENVIRONMENTAL LAW.

DEPARTMENT OF ENVIRONMENTAL CONSERVATION (DEC) HAD THE AUTHORITY TO RESCIND ITS NOTICE OF COMPLETE APPLICATION (NOCA) AND NEGATIVE DECLARATION RE: THE EXPANSION OF AN OIL STORAGE FACILITY (THIRD DEPT).

The Third Department, partially reversing Supreme Court, in a full-fledged opinion by Justice Pritzker, determined the Department of Environmental Conservation (DEC) had the authority to rescind a notice of complete application (NOCA) and its negative declaration re: the expansion of an oil storage facility:

> While it is true that DEC's discretionary authority to rescind a NOCA is not express, it is implied through the statutes and rules governing this dispute and is specifically addressed in the commentary explaining the federal regulations governing state delegated operating permit programs under the Clean Air Act ... . DEC initially contends that it rescinded the NOCA because it received new information during the review process and the project itself was modified, without the opportunity for public comment ... . While petitioner correctly asserts that the mere furnishing of additional information will not affect NOCA status ... , the receipt of materially relevant and new information can legally and logically trigger rescission because DEC could no longer "issue the permit within the specified deadlines" ... and the public was not on notice of project modifications ... .
>
> It is well-settled that when faced with new information or changed circumstances, agencies are permitted to reconsider and alter their prior determinations ... . More particularly, DEC's implied authority to revoke a NOCA under certain circumstances promotes the legislative intent of the Clean Air Act and SEQRA [State Environmental Quality Review Act]. * * * ... [A]s DEC had discretion to rescind the NOCA, the mandamus relief granted by Supreme Court, requiring DEC to take final action within 60 days, was unwarranted as petitioner cannot establish a clear right to the requested relief ... . **Matter of Global Cos. LLC v New York State Dept. of Envtl. Conservation, 2017 NY Slip Op 07495, Third Dept 10-26-17**

ENVIRONMENTAL LAW (VILLAGE PROPERLY GRANTED A PERMIT TO WITHDRAW WATER FROM AN AQUIFER, STANDING REQUIREMENTS EXPLAINED (THIRD DEPT))/WATER (MUNICIPAL WATER SUPPLY, ENVIRONMENTAL LAW, VILLAGE PROPERLY GRANTED A PERMIT TO WITHDRAW WATER FROM AN AQUIFER, STANDING REQUIREMENTS EXPLAINED (THIRD DEPT))/STANDING (ENVIRONMENTAL LAW, VILLAGE PROPERLY GRANTED A PERMIT TO WITHDRAW WATER FROM AN AQUIFER, STANDING REQUIREMENTS EXPLAINED (THIRD DEPT))/MUNICIPAL WATER SUPPLY (ENVIRONMENTAL LAW, VILLAGE PROPERLY GRANTED A PERMIT TO WITHDRAW WATER FROM AN AQUIFER, STANDING REQUIREMENTS EXPLAINED (THIRD DEPT))/STATE ENVIRONMENTAL QUALITY REVIEW ACT (SEQRA) (MUNICIPAL WATER SUPPLY, VILLAGE PROPERLY GRANTED A PERMIT TO WITHDRAW WATER FROM AN AQUIFER, STANDING REQUIREMENTS EXPLAINED (THIRD DEPT))

ENVIRONMENTAL LAW.

VILLAGE PROPERLY GRANTED A PERMIT TO WITHDRAW WATER FROM AN AQUIFER, REQUIREMENTS FOR STANDING TO CONTEST PERMIT AND NEGATIVE DECLARATION EXPLAINED (THIRD DEPT).

The Third Department determined the Village of Kiryas Joel's permit to withdraw water from an aquifer was properly issued by the Department of Environmental Conservation (DEC) and the action seeking annulment of the negative declaration under the State Environmental Quality Review Act (SEQRA) was properly dismissed as untimely. In addressing the standing requirement for bringing these actions, the court explained:

> Supreme Court determined, and we agree, that petitioner Black Rock Fish and Game Club of Cornwall, Inc. in proceeding No. 1, as well as the proceeding No. 2 petitioners, lacked standing. All of those petitioners are organizations who alleged that the approved water withdrawal might deplete ground water in the area to the extent that "water-dependent natural resources," such as the nearby Woodbury Creek, will be impacted. Accepting those allegations at face value — and assuming that these petitioners either did, or did not need to, articulate grounds for organizational standing ... — the harm is "no different in kind or degree from that suffered by the general public in the vicinity . . . and [does] not confer standing" ... .
>
> ... An impact upon a nearby landowner's water supply constitutes an injury specific enough to confer standing to challenge the action that caused it ... , and that is precisely the type of injury the neighbors allege the ... well will cause to their private wells. ... The neighbors ... "asserted a concrete interest in the matter [DEC] is regulating, and a concrete injury from the agency's failure to follow procedure" sufficient to confer standing ... . The municipalities made similar allegations that the approved use of the ... well will either affect the use of ground water in that area for municipal water supplies or impact residents who may suffer impacts to their private wells as a result of the withdrawal. Inasmuch as these allegations show "how [the municipalities'] personal or property rights, either personally or in a representative capacity, will be directly and specifically affected apart from any damage suffered by the public at large, and [how they] will suffer an injury that is environmental and not solely economic in nature," they also have standing ... . **Matter of Village of Woodbury v Seggos, 2017 NY Slip Op 07512, Third Dept 10-26-17**

FAMILY LAW

FAMILY LAW (NEGLECT, EVIDENCE OF MOTHER'S DRUG USE PRESENTED A PRIMA FACIE CASE OF CHILD NEGLECT (SECOND DEPT))/NEGLECT (EVIDENCE OF MOTHER'S DRUG USE PRESENTED A PRIMA FACIE CASE OF CHILD NEGLECT (SECOND DEPT))/DRUG USE (FAMILY LAW, NEGLECT, EVIDENCE OF MOTHER'S DRUG USE PRESENTED A PRIMA FACIE CASE OF CHILD NEGLECT (SECOND DEPT))

FAMILY LAW.

EVIDENCE OF MOTHER'S DRUG USE PRESENTED A PRIMA FACIE CASE OF CHILD NEGLECT (SECOND DEPT).

The Second Department, reversing Family Court, determined that the evidence of mother's drug use presented a prima facie case of child neglect:

> Unlike other forms of neglect, which require a showing that a child's well-being has been impaired or is in imminent danger of becoming impaired, proof that a parent " repeatedly misuses a drug or drugs . . . , to the extent that it has or would ordinarily have the effect of producing in the user thereof a substantial state of stupor, unconsciousness, intoxication, hallucination, disorientation, or incompetence, or a substantial impairment of judgment, or a substantial manifestation of irrationality'" ... , is prima facie evidence that a child of such a parent is a neglected child, unless the parent is "voluntarily and regularly participating in a recognized rehabilitative program" ... .
>
> Here, contrary to the Family Court's determination, viewing the evidence in the light most favorable to the petitioner and affording it the benefit of every favorable inference which could be reasonably drawn from the evidence... , the petitioner presented a prima facie case of neglect. At the fact-finding hearing, the evidence demonstrated that Isiah tested positive for cocaine at the time of his birth, and that the mother tested positive for cocaine and marijuana at that time. Additionally, the mother admitted to the petitioner's caseworker that she had been using drugs since she was a teenager, and that she had never attended any drug treatment program. The mother, who had been suffering from depression since she was a teenager, reported that in the four months preceding Isiah's birth, she stayed in bed all day until about 10:00 p.m., and barely interacted with her children. She further told the caseworker that shortly before Isiah's birth, she started using cocaine to help her get out of bed, and smoking marijuana to help her appetite. She also admitted that she used cocaine three days prior to Isiah's birth. This evidence established a prima facie case of neglect pursuant to Family Court Act § 1046(a)(iii) and, therefore, neither actual impairment of the children's physical, mental, or emotional condition, nor specific risk of impairment, needed to be established ... . **Matter of Isiah L. (Terry C.), 2017 NY Slip Op 06954, Second Dept 10-4-17**

FAMILY LAW (SPECIAL IMMIGRANT JUVENILE STATUS, EVEN THOUGH THE CHILD TURNED 21 FAMILY COURT HAD JURISDICTION TO MAKE CHANGES IN ITS SPECIAL IMMIGRANT JUVENILE STATUS FINDINGS (SECOND DEPT))/SPECIAL IMMIGRANT JUVENILE STATUS (SIJS) EVEN THOUGH THE CHILD TURNED 21 FAMILY COURT HAD JURISDICTION TO MAKE CHANGES IN ITS SPECIAL IMMIGRANT JUVENILE STATUS FINDINGS (SECOND DEPT))/GUARDIANSHIP (FAMILY LAW, SPECIAL IMMIGRANT JUVENILE STATUS, EVEN THOUGH THE CHILD TURNED 21 FAMILY COURT HAD JURISDICTION TO MAKE CHANGES IN ITS SPECIAL IMMIGRANT JUVENILE STATUS FINDINGS (SECOND DEPT))

FAMILY LAW.

EVEN THOUGH THE CHILD TURNED 21 FAMILY COURT HAD JURISDICTION TO MAKE CHANGES IN ITS SPECIAL IMMIGRANT JUVENILE STATUS FINDINGS (SECOND DEPT).

The Second Department, reversing Family Court, determined Family Court was not divested of subject matter jurisdiction to make changes in its findings for special immigrant juvenile status (SIJS) simply because the child turned 21 after his father was appointed guardian:

> Where a child who consented to the appointment of a guardian after his or her 18th birthday turns 21, the court is divested of subject matter jurisdiction in the guardianship proceeding ... . However, where the guardianship petition was granted prior to the child's 21st birthday, there is no jurisdictional impediment to the issuance of an order making the requisite declaration and specific findings to enable the child to petition for SIJS ... . Here, since the guardianship petition was granted ... prior to the child's 21st birthday, the Family Court improperly determined that it lacked subject matter jurisdiction to entertain the father's motion to amend the special findings order. **Matter of Juan R.E.M. (Juan R.E.), 2017 NY Slip Op 06977, Second Dept 10-4-17**

FAMILY LAW (ALTHOUGH THE CHILD SHOULD NOT HAVE BEEN REMOVED FROM PETITIONERS' HOME FOR PLACEMENT IN ANOTHER FOSTER HOME WITH THE CHILD'S SIBLINGS, SO MUCH TIME HAS ELAPSED A HEARING MUST BE HELD TO DETERMINE WHICH PLACEMENT IS NOW IN THE BEST INTERESTS OF THE CHILD (FOURTH DEPT))/FOSTER CARE (ALTHOUGH THE CHILD SHOULD NOT HAVE BEEN REMOVED FROM PETITIONERS' HOME FOR PLACEMENT IN ANOTHER FOSTER HOME WITH THE CHILD'S SIBLINGS, SO MUCH TIME HAS ELAPSED A HEARING MUST BE HELD TO DETERMINE WHICH PLACEMENT IS NOW IN THE BEST INTERESTS OF THE CHILD (FOURTH DEPT))/OFFICE OF CHILDREN AND FAMILY SERVICES (FOSTER CARE, ALTHOUGH THE CHILD SHOULD NOT HAVE BEEN REMOVED FROM PETITIONERS' HOME FOR PLACEMENT IN ANOTHER FOSTER HOME WITH THE CHILD'S SIBLINGS, SO MUCH TIME HAS ELAPSED A HEARING MUST BE HELD TO DETERMINE WHICH PLACEMENT IS NOW IN THE BEST INTERESTS OF THE CHILD (FOURTH DEPT))

FAMILY LAW.

ALTHOUGH THE CHILD SHOULD NOT HAVE BEEN REMOVED FROM PETITIONERS' HOME FOR PLACEMENT IN ANOTHER FOSTER HOME WITH THE CHILD'S SIBLINGS, SO MUCH TIME HAS ELAPSED A HEARING MUST BE HELD TO DETERMINE WHICH PLACEMENT IS NOW IN THE BEST INTERESTS OF THE CHILD (FOURTH DEPT).

The Fourth Department determined the child, born March 2015, should not have been removed from petitioners' foster home in June, 2016, and placed in another foster home with the child's siblings. However, so much time had passed during the court proceedings, the Fourth Department required that a hearing be held at this point to determine what placement is in the child's best interests:

> This case ... presents unique difficulties because well over a year has elapsed since the child's removal from petitioners' home and the subsequent fair hearing. We acknowledge that petitioners' expert testified at the hearing that the damage caused to the child could be mitigated or reversed if she were "swiftly" or "urgently" returned to petitioners' care, but the child has been living in the foster home with her siblings since June 1, 2016. It would be conjecture for us to conclude now that disrupting the child's life again and returning her to petitioners' home would be more consistent with her best interests than having her remain in her present foster home. Despite our conclusion that the court adjudicated this matter appropriately, the relief sought by petitioners, i.e., the immediate return of the child, is inappropriate at this juncture. In the exercise of our discretion, we therefore modify the judgment accordingly, and we remit the matter to OCFS [Office of Children and Family Services] to conduct a hearing forthwith to determine the best interests of the child and to fashion an appropriate remedy consistent with the evidence presented at the hearing ... . Should petitioners be aggrieved by OCFS's subsequent decision, they may seek review through another CPLR article 78 proceeding. **Matter of Schneiter v New York State Off. of Children & Family Servs., 2017 NY Slip Op 07035, Fourth Dept 10-6-17**

FAMILY LAW (GRANDPARENT'S VISITATION PETITION SHOULD NOT HAVE BEEN DENIED WITHOUT A HEARING, PETITION ALLEGED MOTHER PROHIBITED GRANDPARENT'S FROM SEEING THE CHILDREN (THIRD DEPT))/VISITATION (FAMILY LAW, GRANDPARENT'S VISITATION PETITION SHOULD NOT HAVE BEEN DENIED WITHOUT A HEARING, PETITION ALLEGED MOTHER PROHIBITED GRANDPARENT'S FROM SEEING THE CHILDREN (THIRD DEPT))/GRANDPARENTS (FAMILY LAW, VISITATION, GRANDPARENT'S VISITATION PETITION SHOULD NOT HAVE BEEN DENIED WITHOUT A HEARING, PETITION ALLEGED MOTHER PROHIBITED GRANDPARENT'S FROM SEEING THE CHILDREN (THIRD DEPT))

FAMILY LAW.

GRANDPARENTS' VISITATION PETITION SHOULD NOT HAVE BEEN DENIED WITHOUT A HEARING, PETITION ALLEGED MOTHER PROHIBITED GRANDPARENTS FROM SEEING THE CHILDREN (THIRD DEPT).

The Third Department, reversing Family Court, determined the grandparents had submitted enough information to demonstrate standing to seek visitation with the grandchildren. Family Court should have conducted a hearing. Because it was alleged mother prohibited the grandparents from seeing the children, the fact that the grandparents had not developed a relationship with the children could not be the basis for denying the visitation petition without a hearing:

> As relevant here, when the parents of the subject children are alive, a grandparent may acquire standing to seek visitation of the children by demonstrating that "conditions exist which equity would see fit to intervene" ... . The grandparents "must establish a sufficient existing relationship with their grandchild[ren], or in cases where [such a relationship] has been frustrated . . ., a sufficient effort to establish one, so that the court perceives it as one deserving the court's intervention" ... . The sufficiency of the grandparents' efforts in this regard "must always be measured against what they could reasonably have done under the circumstances" ... .
>
> On the sparse record before us, we find that the proof adduced in support of the grandparents' petition to be sufficient to confer standing to seek visitation with their grandchildren ... . Significantly, the circumstances indicate that the mother has made deliberate and immediate efforts to preclude the grandparents from having and/or developing any significant relationship with the subject children — since the very day they were born — without any stated reasonable justification for doing so ... . Further, given the young ages of the children and the brief amount of time that has elapsed between their respective births and the disruption of the grandparents' visitation, equity dictates that we not allow the lack of an established relationship be used as a pretext to prevent the grandparents from otherwise exercising their right to seek visitation ... , particularly where, as here, their efforts, to date, have

proved futile. We further note that, on appeal, the father does not oppose the relief sought by the grandparents. **Matter of Monroe v Monroe, 2017 NY Slip Op 07358, Third Dept 10-19-17**

FAMILY LAW (CHILD SUPPORT STANDARDS ACT, DIVORCE SUPPORT STIPULATION WHICH DEVIATED FROM THE PROVISIONS OF THE CHILD SUPPORT STANDARDS ACT WAS INVALID FROM THE OUTSET, PRIMARILY BECAUSE THE STIPULATION DID NOT INCLUDE THE STATUTORILY REQUIRED RECITALS (THIRD DEPT))/CHILD SUPPORT (CHILD SUPPORT STANDARDS ACT, DIVORCE SUPPORT STIPULATION WHICH DEVIATED FROM THE PROVISIONS OF THE CHILD SUPPORT STANDARDS ACT WAS INVALID FROM THE OUTSET, PRIMARILY BECAUSE THE STIPULATION DID NOT INCLUDE THE STATUTORILY REQUIRED RECITALS (THIRD DEPT))/CHILD SUPPORT STANDARDS ACT (DIVORCE SUPPORT STIPULATION WHICH DEVIATED FROM THE PROVISIONS OF THE CHILD SUPPORT STANDARDS ACT WAS INVALID FROM THE OUTSET, PRIMARILY BECAUSE THE STIPULATION DID NOT INCLUDE THE STATUTORILY REQUIRED RECITALS (THIRD DEPT))

FAMILY LAW.

DIVORCE SUPPORT STIPULATION WHICH DEVIATED FROM THE PROVISIONS OF THE CHILD SUPPORT STANDARDS ACT WAS INVALID FROM THE OUTSET, PRIMARILY BECAUSE THE STIPULATION DID NOT INCLUDE THE STATUTORILY REQUIRED RECITALS (THIRD DEPT).

The Third Department, reversing Family Court, determined the divorce stipulation, which included child support calculations which deviated from the provisions of the Child Support Standards Act (CSSA), was invalid from the outset, primarily because the stipulation did not include the statutorily required recitals:

> ... [A]ll child support stipulations seeking to deviate from the CSSA must "include a provision stating that the parties have been advised of the provisions of [the CSSA] and that the basic child support obligation provided for therein would presumptively result in the correct amount of child support to be awarded"... . "The purpose of such recitals is to ensure that the parties have a basic understanding of the CSSA and that agreements deviating from the presumptively correct amount under the CSSA are entered into knowingly" ... . Notably, such provision may not be waived by either party or counsel ... , and the failure to include such recitals in a stipulation agreeing to deviate from the CSSA guidelines will render it "invalid and unenforceable" ... .
>
> The mother was unrepresented by counsel in 2009 when the parties entered into their stipulation and settlement agreement and opted to deviate from the CSSA. The agreement states that the parties reviewed the provisions of the CSSA, understood them and were aware that, absent their agreement to deviate therefrom, the CSSA would govern the determination of the noncustodial parent's basic child support obligation. The agreement then indicates that the amount of child support to be paid by the mother, as the noncustodial parent, pursuant to the CSSA would be $79 per week. The mother's basic child support obligation, however, was miscalculated. Although, standing alone, such a miscalculation would be insufficient to invalidate the agreement ... , here, the parties' stipulation also fails to demonstrate that the parties were apprised that the application of the CSSA "would presumptively result in the correct amount of child support to be awarded" ... . **Matter of Hardman v Coleman, 2017 NY Slip Op 07373, Third Dept 10-19-17**

FAMILY LAW (NEGLECT, FAMILY COURT SHOULD HAVE FOUND FOUR MONTH OLD CHILD TO HAVE BEEN NEGLECTED, FATHER CHOKED MOTHER WITH CHILD IN THE ROOM (FIRST DEPT))/NEGLECT (FAMILY LAW, FAMILY COURT SHOULD HAVE FOUND FOUR MONTH OLD CHILD TO HAVE BEEN NEGLECTED, FATHER CHOKED MOTHER WITH CHILD IN THE ROOM (FIRST DEPT))/DOMESTIC VIOLENCE (FAMILY LAW, NEGLECT, FAMILY COURT SHOULD HAVE FOUND FOUR MONTH OLD CHILD TO HAVE BEEN NEGLECTED, FATHER CHOKED MOTHER WITH CHILD IN THE ROOM (FIRST DEPT))

FAMILY LAW.

FAMILY COURT SHOULD HAVE FOUND FOUR MONTH OLD CHILD TO HAVE BEEN NEGLECTED, FATHER CHOKED MOTHER WITH CHILD IN THE ROOM (FIRST DEPT).

The First Department, reversing Family Court, determined that the four-month-old child's (Jace's) presence in the room when father choked mother supported a finding Jace was neglected:

> The mother testified that the father choked her in the presence of six-year-old Isabella and only a couple of feet away from where then four-month-old Jace was sleeping in his crib. The mother's testimony was supported by shelter records; the father did not testify. Family Court found the mother's testimony was credible and supported a finding that the father neglected Isabella. The same evidence also supports a finding that the father neglected Jace.
>
> Even a single instance of domestic violence may be a proper basis for a finding of neglect, so long as it "occurred in the child's presence and resulted in physical, mental or emotional impairment or imminent danger thereof"... . Jace was in imminent danger of physical impairment due to his close proximity to the violence ... . The father's assertion that Jace was in "another part of" or "somewhere else in" the one-room residence at the time of the attack is unsupported by the record. **Matter of Isabella S. (Robert T.), 2017 NY Slip Op 07533, First Dept 10-26-17**

FAMILY LAW (CHILD SUPPORT, GARNISHMENT OF HUSBAND'S INCOME FOR CHILD SUPPORT ARREARS AT 65% DID NOT STRIKE A FAIR BALANCE BETWEEN THE NEEDS OF THE CREDITOR WIFE AND THE NEEDS OF THE DEBTOR HUSBAND, REDUCED TO 40% (SECOND DEPT))/CHILD SUPPORT (ARREARS, GARNISHMENT OF HUSBAND'S INCOME FOR CHILD SUPPORT ARREARS AT 65% DID NOT STRIKE A FAIR BALANCE BETWEEN THE NEEDS OF THE CREDITOR WIFE AND THE NEEDS OF THE DEBTOR HUSBAND, REDUCED TO 40% (SECOND DEPT))/ARREARS (CHILD SUPPORT, GARNISHMENT OF HUSBAND'S INCOME FOR CHILD SUPPORT ARREARS AT 65% DID NOT STRIKE A FAIR BALANCE BETWEEN THE NEEDS OF THE CREDITOR WIFE AND THE NEEDS OF THE DEBTOR HUSBAND, REDUCED TO 40% (SECOND DEPT))

FAMILY LAW.

GARNISHMENT OF HUSBAND'S INCOME FOR CHILD SUPPORT ARREARS AT 65% DID NOT STRIKE A FAIR BALANCE BETWEEN THE NEEDS OF THE CREDITOR WIFE AND THE NEEDS OF THE DEBTOR HUSBAND, REDUCED TO 40% (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the plaintiff husband was entitled to a reduction in his wage garnishment for child support arrears from 65% to 40%:

> Here, the Supreme Court determined that the 65% income execution was appropriate in light of the plaintiff's "history of substantial arrears." However, notwithstanding his history of arrears, the plaintiff demonstrated that, at the time of his motion, a 65% income execution was unduly prejudicial. Since the 2013 order, the defendant has

received the sum of at least $511,000 toward the arrears, both of the parties' children have become adults and attended college, and only one of the adult children lives in the defendant's home. The plaintiff demonstrated that the 65% income execution provided the defendant with a monthly payment of approximately $7,500, that the plaintiff received only about $3,000 per month after garnishment and other deductions, and that his monthly expenses were approximately $5,000. Significantly, the plaintiff's expenses included the sum of $575 per month for student loan payments on behalf of one of the parties' adult children. Additionally, the defendant has not disputed the plaintiff's assertion that she has other sources of income apart from the monies that she receives from the income execution.

Under all the circumstances present here, it cannot be said that, at the time of the instant motion, the 65% income execution struck "a fair balance between the needs of a creditor holding a valid money judgment and the needs of a debtor managing competing financial obligations" ... . To the contrary, the record reflects that the 65% income execution created a tremendous disparity between the plaintiff's expenses and his actual income after garnishment and deductions, and that the defendant did not have any particular need for the maximum garnishment percentage. **Fishler v Fishler, 2017 NY Slip Op 07429, Second Dept 10-25-17**

FAMILY LAW (NEGLECT, RESPONDENT WAS A PERSON LEGALLY RESPONSIBLE FOR THE CHILDREN, RESPONDENT'S VIOLENCE TOWARD MOTHER IN THE CHILDREN'S PRESENCE AND EXCESSIVE CORPORAL PUNISHMENT CONSTITUTED NEGLECT AND DERIVATIVE NEGLECT, FAMILY COURT REVERSED (SECOND DEPT))/NEGLECT (FAMILY LAW, RESPONDENT WAS A PERSON LEGALLY RESPONSIBLE FOR THE CHILDREN, RESPONDENT'S VIOLENCE TOWARD MOTHER IN THE CHILDREN'S PRESENCE AND EXCESSIVE CORPORAL PUNISHMENT CONSTITUTED NEGLECT AND DERIVATIVE NEGLECT, FAMILY COURT REVERSED (SECOND DEPT))/PERSON LEGALLY RESPONSIBLE (FAMILY LAW, NEGLECT, RESPONDENT WAS A PERSON LEGALLY RESPONSIBLE FOR THE CHILDREN, RESPONDENT'S VIOLENCE TOWARD MOTHER IN THE CHILDREN'S PRESENCE AND EXCESSIVE CORPORAL PUNISHMENT CONSTITUTED NEGLECT AND DERIVATIVE NEGLECT, FAMILY COURT REVERSED (SECOND DEPT))

FAMILY LAW.

RESPONDENT WAS A PERSON LEGALLY RESPONSIBLE FOR THE CHILDREN, RESPONDENT'S VIOLENCE TOWARD MOTHER IN THE CHILDREN'S PRESENCE AND EXCESSIVE CORPORAL PUNISHMENT CONSTITUTED NEGLECT AND DERIVATIVE NEGLECT, FAMILY COURT REVERSED (SECOND DEPT).

The Second Department, reversing Family Court, determined was in fact a person legally responsible for children in the household and had in fact neglected (and derivatively neglected) the children by committing domestic violence, and by administering excessive corporal punishment:

The evidence here showed that the respondent, as the long-term live-in boyfriend of the mother of the older children, had frequent contact with the older children, as they all lived in the same home for a period of several weeks during the summer of 2015. The respondent is also the father of the two younger children, who also lived in the same home. The evidence further established that the respondent exercised control over the older children, supervising them when the mother was not present, mediating arguments between the siblings, and disciplining them. Accordingly, the respondent acted as "the functional equivalent of a parent in a familial or household setting" for the subject children ... .

The Family Court ... improperly determined that the respondent did not neglect the older children and did not derivatively neglect the younger children. Acts of domestic violence committed in a child's presence can support a finding of neglect against the abuser because such acts impair, or create an imminent danger of impairing, the

child's physical, emotional, or mental conditions ... . Additionally, "[a]lthough parents have a right to use reasonable physical force against a child in order to maintain discipline or promote the child's welfare, the use of excessive corporal punishment constitutes neglect" ... . "Striking a child repeatedly with a belt can constitute excessive corporal punishment" ... . Derivative neglect arises where a respondent's neglect of one child demonstrates "such an impaired level of parental judgment as to create a substantial risk of harm for any child in [his or her] care" ... . **Matter of Gary J. (Engerys J.), 2017 NY Slip Op 07441, Second Dept 10-25-17**

FAMILY LAW (CUSTODY, MOTHER'S PRO SE PETITION FOR A MODIFICATION OF CUSTODY SHOULD NOT HAVE BEEN DENIED WITHOUT A HEARING (THIRD DEPT))/CUSTODY (FAMILY LAW, MOTHER'S PRO SE PETITION FOR A MODIFICATION OF CUSTODY SHOULD NOT HAVE BEEN DENIED WITHOUT A HEARING (THIRD DEPT))

FAMILY LAW.

MOTHER'S PRO SE PETITION FOR A MODIFICATION OF CUSTODY SHOULD NOT HAVE BEEN DENIED WITHOUT A HEARING (THIRD DEPT).

The Third Department, reversing Family Court, determined mother's pro se petition for a modification of custody should not have been denied without a hearing:

"In any modification proceeding, the threshold issue is whether there has been a change in circumstances since the prior custody order . . . to warrant a review of the issue of custody to ensure the continued best interests of the child. A petition filed by a pro se litigant should be construed liberally when considering whether it sufficiently alleged a change in circumstances. While not every petition in a Family Ct Act article 6 proceeding is automatically entitled to a hearing, generally an evidentiary hearing is necessary and should be conducted unless the party seeking the modification fails to make a sufficient evidentiary showing to warrant a hearing or no hearing is requested and the court has sufficient information to undertake a comprehensive independent review of the child's best interests" ... .

We find that the pro se petition is sufficient to warrant an evidentiary hearing based on the allegations that the father violated certain provisions of the existing custody arrangement when he moved three times without informing the mother, made plans for the child's Bat Mitzvah without consulting her and failed to provide her with information regarding a one-week vacation that he was taking with the child ... . **Matter of Horowitz v Horowitz, 2017 NY Slip Op 07498, Third Dept 10-26-17**

FAMILY LAW (OBJECTIONS TO SUPPORT MAGISTRATE FINDINGS, FAMILY COURT ABUSED ITS DISCRETION WHEN IT FAILED TO CONSIDER OBJECTIONS TO RULINGS BY A SUPPORT MAGISTRATE FILED THE MORNING AFTER THE 30 DAY DEADLINE (THIRD DEPT))/CIVIL PROCEDURE (FAMILY LAW, 30 DAY PERIOD FOR FILING OBJECTIONS TO SUPPORT MAGISTRATE'S RULINGS, OBJECTIONS TO SUPPORT MAGISTRATE FINDINGS, FAMILY COURT ABUSED ITS DISCRETION WHEN IT FAILED TO CONSIDER OBJECTIONS TO RULINGS BY A SUPPORT MAGISTRATE FILED THE MORNING AFTER THE 30 DAY DEADLINE (THIRD DEPT) /OBJECTIONS (FAMILY LAW, OBJECTIONS TO SUPPORT MAGISTRATE FINDINGS, FAMILY COURT ABUSED ITS DISCRETION WHEN IT FAILED TO CONSIDER OBJECTIONS TO RULINGS BY A SUPPORT MAGISTRATE FILED THE MORNING AFTER THE 30 DAY DEADLINE (THIRD DEPT))

FAMILY LAW, CIVIL PROCEDURE.

FAMILY COURT ABUSED ITS DISCRETION WHEN IT FAILED TO CONSIDER OBJECTIONS TO RULINGS BY A SUPPORT MAGISTRATE FILED THE MORNING AFTER THE 30 DAY DEADLINE (THIRD DEPT).

The Third Department, reversing Family Court, determined the 30 day period for the filing of objections to rulings by a support magistrate in a child support matter is not as rigid as the 30 day period for the filing of an appeal. Under the facts, Family Court abused its discretion by refusing to consider objections filed the morning of the day after the deadline, where the filing deadline was missed because of inaccurate online information about the court's hours of operation:

> "Unlike the nonwaivable and jurisdictional time period for filing a notice of appeal, the courts need not require strict adherence" to this filing deadline ... . "Family Court has discretion to overlook a minor failure to comply with the statutory requirements regarding filing objections and address the merits" ... . **Matter of Alberino v Alberino, 2017 NY Slip Op 07370, Third Dept 10-19-17**

FAMILY LAW (ORDER OF PROTECTION, WHERE VIOLATION OF AN ORDER OF PROTECTION RESULTS IN JAIL TIME, THE VIOLATION MUST BE PROVED BEYOND A REASONABLE DOUBT (THIRD DEPT))/ORDER OF PROTECTION (FAMILY LAW, WHERE VIOLATION OF AN ORDER OF PROTECTION RESULTS IN JAIL TIME, THE VIOLATION MUST BE PROVED BEYOND A REASONABLE DOUBT (THIRD DEPT))/CONTEMPT (FAMILY LAW, VIOLATION OF ORDER OF PROTECTION, WHERE VIOLATION OF AN ORDER OF PROTECTION RESULTS IN JAIL TIME, THE VIOLATION MUST BE PROVED BEYOND A REASONABLE DOUBT (THIRD DEPT))

FAMILY LAW, CRIMINAL LAW.

WHERE VIOLATION OF AN ORDER OF PROTECTION RESULTS IN JAIL TIME, THE VIOLATION MUST BE PROVED BEYOND A REASONABLE DOUBT (THIRD DEPT).

The Third Department, in a full-fledged opinion by Justice Garry, affirming Family Court, noted that when the violation of an order of protection results in jail time with not opportunity to purge the contempt, the standard of proof is beyond a reasonable doubt. Here respondent's violation of the order of protection was proved beyond a reasonable doubt. The order required that respondent stay away from mother. Respondent allegedly walked past mother and threatened to kill her:

> As a general rule, a finding that an individual has willfully violated a court order within the context of Family Ct Act article 10 must be supported by clear and convincing evidence ... . However, in a case arising within the context of a Family Ct Act article 8 proceeding, this Court has recently held that in certain circumstances such violations must, instead, be found beyond a reasonable doubt. This higher standard applies where the violator is committed to a

period of incarceration as a punitive remedy "with no avenue to shorten the term by acts that extinguish the contempt" ... . The requisite level of proof was elevated in recognition of the fact that imposition of such a remedy renders the proceeding one involving criminal, rather than civil, contempt ... .

Significantly, both Family Ct Act §§ 1072 and 846-a employ identical language requiring that a court be "satisfied by competent proof" before committing a violator to jail for a period not to exceed six months ... . Accordingly, we now hold that where, as here, a definite term of incarceration is imposed pursuant to Family Ct Act § 1072, as a punitive remedy and without the possibility of purging the contempt, the requisite finding that a willful violation of a court order has occurred must be established beyond a reasonable doubt ... . **Matter of Cori Xx., 2017 NY Slip Op 07354, Third Dept 10-19-17**

FAMILY LAW (CUSTODY PETITION SHOULD NOT HAVE BEEN DISMISSED WITHOUT A HEARING, FAMILY COURT'S RELIANCE ON OFF THE RECORD DISCUSSIONS FRUSTRATED APPELLATE REVIEW (THIRD DEPT))/EVIDENCE (APPEALS, FAMILY LAW, CUSTODY PETITION SHOULD NOT HAVE BEEN DISMISSED WITHOUT A HEARING, FAMILY COURT'S RELIANCE ON OFF THE RECORD DISCUSSIONS FRUSTRATED APPELLATE REVIEW (THIRD DEPT))/APPEALS (FAMILY LAW, CUSTODY PETITION SHOULD NOT HAVE BEEN DISMISSED WITHOUT A HEARING, FAMILY COURT'S RELIANCE ON OFF THE RECORD DISCUSSIONS FRUSTRATED APPELLATE REVIEW (THIRD DEPT))

FAMILY LAW, EVIDENCE, APPEALS.

CUSTODY PETITION SHOULD NOT HAVE BEEN DISMISSED WITHOUT A HEARING, FAMILY COURT'S RELIANCE ON OFF THE RECORD DISCUSSIONS FRUSTRATED APPELLATE REVIEW (THIRD DEPT).

The Third Department, reversing Family Court, determined father's modification of custody petition should not have been dismissed without a hearing. The court noted that Family Court's reliance on off the record discussions with mental health professionals frustrated review on appeal:

Family Court erred in dismissing the petitions without holding a hearing. The father's modification and violation petitions set forth sufficient allegations "that, if established at an evidentiary hearing, could support granting the relief sought" ... .Generally, where a facially sufficient petition has been filed, "modification of a Family Ct Act article 6 custody order requires a full and comprehensive hearing at which a parent is to be afforded a full and fair opportunity to be heard" ... . The Court of Appeals recently reaffirmed the principles "that, as a general matter, custody determinations should be rendered only after a full and plenary hearing," and "should be based on admissible evidence" ... . Courts should not make custody determinations based on inadmissible hearsay statements, information provided at court appearances by persons not under oath or conclusions of experts or professionals "whose opinions and credibility were untested by either party" ... .

In rendering its decision here, Family Court relied on such information — namely, the statements of the mental health providers given during the off-the-record conference from which the parties were excluded — rather than admissible evidence. This procedure frustrated appellate review by preventing us from examining what Family Court relied upon in making its decision. Further, this procedure deprived the father of his due process right to a hearing at which he could cross-examine the mental health providers and submit his own proof ... . **Matter of Buck v Buck, 2017 NY Slip Op 07368, Third Dept 10-19-17**

FORECLOSURE

FORECLOSURE (BANK DID NOT DEMONSTRATE STANDING TO BRING THE FORECLOSURE ACTION (SECOND DEPT))/STANDING (FORECLOSURE, BANK DID NOT DEMONSTRATE STANDING TO BRING THE FORECLOSURE ACTION (SECOND DEPT))

FORECLOSURE.

BANK DID NOT DEMONSTRATE STANDING TO BRING THE FORECLOSURE ACTION (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the bank did not demonstrate it had standing to bring the foreclosure action:

> Here, the plaintiff failed to establish, prima facie, that it had standing to commence this action. The copy of the note, which was not annexed to the complaint but was submitted by the plaintiff in support of its motion, inter alia, for summary judgment, contained an undated endorsement to the plaintiff ... . Furthermore, although the document control officer of the plaintiff's loan servicer stated in his affidavit that the plaintiff was the holder of the note, he never stated that the plaintiff was the holder of the note at the time the action was commenced ... . **Wells Fargo Bank, N.A. v Allen, 2017 NY Slip Op 06922, Second Dept 10-4-17**

FORECLOSURE (MORTGAGE ON COMMERCIAL PROPERTY WAS NOT A HOME LOAN AND WAS THEREFORE NOT SUBJECT TO THE NOTICE REQUIREMENTS OF THE REAL PROPERTY ACTIONS AND PROCEEDINGS LAW (RPAPL), HOME LOAN ISSUE COULD BE RAISED FOR THE FIRST TIME ON APPEAL, MAILING REQUIREMENTS OF THE RPAPL MAY BE PROVED BY EVIDENCE OTHER THAN AN AFFIDAVIT OF SERVICE (SECOND DEPT))/APPEALS (PRESERVATION, FORECLOSURE, MORTGAGE ON COMMERCIAL PROPERTY WAS NOT A HOME LOAN AND WAS THEREFORE NOT SUBJECT TO THE NOTICE REQUIREMENTS OF THE REAL PROPERTY ACTIONS AND PROCEEDINGS LAW (RPAPL), HOME LOAN ISSUE COULD BE RAISED FOR THE FIRST TIME ON APPEAL, MAILING REQUIREMENTS OF THE RPAPL MAY BE PROVED BY EVIDENCE OTHER THAN AN AFFIDAVIT OF SERVICE (SECOND DEPT))/EVIDENCE (FORECLOSURE, RPAPL MAILING REQUIRMENTS, MORTGAGE ON COMMERCIAL PROPERTY WAS NOT A HOME LOAN AND WAS THEREFORE NOT SUBJECT TO THE NOTICE REQUIREMENTS OF THE REAL PROPERTY ACTIONS AND PROCEEDINGS LAW (RPAPL), HOME LOAN ISSUE COULD BE RAISED FOR THE FIRST TIME ON APPEAL, MAILING REQUIREMENTS OF THE RPAPL MAY BE PROVED BY EVIDENCE OTHER THAN AN AFFIDAVIT OF SERVICE (SECOND DEPT))/REAL PROPERTY ACTIONS AND PROCEEDINGS LAW (FORECLOSURE, MAILING REQUIREMENTS, MORTGAGE ON COMMERCIAL PROPERTY WAS NOT A HOME LOAN AND WAS THEREFORE NOT SUBJECT TO THE NOTICE REQUIREMENTS OF THE REAL PROPERTY ACTIONS AND PROCEEDINGS LAW (RPAPL), HOME LOAN ISSUE COULD BE RAISED FOR THE FIRST TIME ON APPEAL, MAILING REQUIREMENTS OF THE RPAPL MAY BE PROVED BY EVIDENCE OTHER THAN AN AFFIDAVIT OF SERVICE (SECOND DEPT))/HOME LOAN (FORECLOSURE, MORTGAGE ON COMMERCIAL PROPERTY WAS NOT A HOME LOAN AND WAS THEREFORE NOT SUBJECT TO THE NOTICE REQUIREMENTS OF THE REAL PROPERTY ACTIONS AND PROCEEDINGS LAW (RPAPL), HOME LOAN ISSUE COULD BE RAISED FOR THE FIRST TIME ON APPEAL, MAILING REQUIREMENTS OF THE RPAPL MAY BE PROVED BY EVIDENCE OTHER THAN AN AFFIDAVIT OF SERVICE (SECOND DEPT))/COMMERCIAL PROPERTY (FORECLOSURE, HOME LOAN, MORTGAGE ON COMMERCIAL PROPERTY WAS NOT A HOME LOAN AND WAS THEREFORE NOT SUBJECT TO THE NOTICE REQUIREMENTS OF THE REAL PROPERTY ACTIONS AND PROCEEDINGS LAW (RPAPL), HOME LOAN ISSUE COULD BE RAISED FOR THE FIRST TIME ON APPEAL, MAILING REQUIREMENTS OF THE RPAPL MAY BE PROVED BY EVIDENCE OTHER THAN AN AFFIDAVIT OF SERVICE (SECOND DEPT))/BUSINESS RECORDS (FORECLOSURE, PROOF OF MAILING, MORTGAGE ON COMMERCIAL PROPERTY WAS NOT A HOME LOAN AND WAS THEREFORE NOT SUBJECT TO THE NOTICE REQUIREMENTS OF THE REAL PROPERTY ACTIONS AND PROCEEDINGS LAW (RPAPL), HOME LOAN ISSUE COULD BE RAISED FOR THE FIRST TIME ON APPEAL, MAILING REQUIREMENTS OF THE RPAPL MAY BE PROVED BY EVIDENCE OTHER THAN AN AFFIDAVIT OF SERVICE (SECOND DEPT))/HEARSAY (FORECLOSURE, PROOF OF MAILING, MORTGAGE ON COMMERCIAL PROPERTY WAS NOT A HOME LOAN AND WAS THEREFORE NOT SUBJECT TO THE NOTICE REQUIREMENTS OF THE REAL PROPERTY ACTIONS AND PROCEEDINGS LAW (RPAPL), HOME LOAN ISSUE COULD BE RAISED FOR THE FIRST TIME ON APPEAL, MAILING REQUIREMENTS OF THE RPAPL MAY BE PROVED BY EVIDENCE OTHER THAN AN AFFIDAVIT OF SERVICE (SECOND DEPT))

FORECLOSURE, APPEALS, EVIDENCE.

MORTGAGE ON COMMERCIAL PROPERTY WAS NOT A HOME LOAN AND WAS THEREFORE NOT SUBJECT TO THE NOTICE REQUIREMENTS OF THE REAL PROPERTY ACTIONS AND PROCEEDINGS LAW (RPAPL), HOME LOAN ISSUE COULD BE RAISED FOR THE FIRST TIME ON APPEAL, MAILING REQUIREMENTS OF THE RPAPL MAY BE PROVED BY EVIDENCE OTHER THAN AN AFFIDAVIT OF SERVICE (SECOND DEPT).

The Second Department, over a dissent, determined the mortgage on an apartment house where the owner did not reside was not a "home loan" and therefore was not subject to the foreclosure notice requirements of the Real Property Actions and Proceedings Law (RPAPL). Although the "not a home loan" argument was not raised below, the Second Department held it could be considered on appeal because the issue involved a matter of law the lower court would have been required to address had it been raised the dissent disagreed). The court further found that the mailing requirements of the RPAPL, although not proved by an affidavit of service, were proved by admissible non-hearsay evidence:

> ... [T]he specific contention that this mortgage loan was not a "home loan" for purposes of RPAPL 1304 may be reached because it involves a question of law that is apparent on the face of this record and could not have been avoided by the court if it had been brought to its attention ... .
>
> ... [T]he record shows that the subject property is a multi-unit apartment building with several tenants, the defendant did not reside at the property at the time he signed the mortgage or at the time the action was commenced, and the deed transferring the property to the defendant was a commercial property deed. The

defendant does not refute that this was a commercial property and that he lived elsewhere. Thus, the record reflects that this was not a "home loan" subject to the notice requirements of RPAPL 1304. * * *

... "[T]here is no requirement that a plaintiff in a foreclosure action rely on any particular set of business records to establish a prima facie case, so long as the plaintiff satisfies the admissibility requirements of CPLR 4518(a), and the records themselves actually evince the facts for which they are relied upon" ... . Thus, mailing may be proved by any number of documents meeting the requirements of the business records exception to the hearsay rule under CPLR 4518 ... . **HSBC Bank USA, N.A. v Ozcan, 2017 NY Slip Op 07242, Second Dept 10-18-17**

FORECLOSURE (MOVING FOR AN ORDER OF REFERENCE WITHIN ONE YEAR OF DEFAULT IN A FORECLOSURE ACTION SUFFICIENT TO AVOID ABANDONMENT UNDER CPLR 3215 (SECOND DEPT))/CIVIL PROCEDURE (DEFAULT JUDGMENT, FORECLOSURE, MOVING FOR AN ORDER OF REFERENCE WITHIN ONE YEAR OF DEFAULT IN A FORECLOSURE ACTION SUFFICIENT TO AVOID ABANDONMENT UNDER CPLR 3215 (SECOND DEPT))/DEFAULT JUDGMENT (CIVIL PROCEDURE, (MOVING FOR AN ORDER OF REFERENCE WITHIN ONE YEAR OF DEFAULT IN A FORECLOSURE ACTION SUFFICIENT TO AVOID ABANDONMENT UNDER CPLR 3215 (SECOND DEPT))/ABANDONMENT (DEFAULT JUDGMENT, FORECLOSURE, MOVING FOR AN ORDER OF REFERENCE WITHIN ONE YEAR OF DEFAULT IN A FORECLOSURE ACTION SUFFICIENT TO AVOID ABANDONMENT UNDER CPLR 3215 (SECOND DEPT))

FORECLOSURE, CIVIL PROCEDURE.

MOVING FOR AN ORDER OF REFERENCE WITHIN ONE YEAR OF DEFAULT IN A FORECLOSURE ACTION SUFFICIENT TO AVOID ABANDONMENT UNDER CPLR 3215 (SECOND DEPT).

The Second Department found that the bank's moving for an order of reference within one year of defendant's default in a foreclosure action was sufficient to avoid dismissal of the action as abandoned:

CPLR 3215(c) states, in pertinent part: "If the plaintiff fails to take proceedings for the entry of judgment within one year after the default, the court shall not enter judgment but shall dismiss the complaint as abandoned, without costs, upon its own initiative or on motion, unless sufficient cause is shown why the complaint should not be dismissed" ... . To avoid dismissal pursuant to CPLR 3215(c), it is not necessary for a plaintiff to actually obtain a default judgment within one year of the default ... . As long as "proceedings" are being taken, and those proceedings manifest an intent not to abandon the case but to seek a judgment, the case should not be dismissed ... . Taking the preliminary step toward obtaining a default judgment of foreclosure and sale by moving for an order of reference within one year of the defendant's default is sufficient to timely initiate proceedings for entry of judgment pursuant to CPLR 3215(c) ... . Here, the plaintiff timely moved for an order of reference within one year of the defendants' default. **Wells Fargo Bank, N.A. v Lilley, 2017 NY Slip Op 07157, Second Dept 10-11-17**

FORECLOSURE (BANK FAILED TO DEMONSTRATE STANDING TO FORECLOSE, SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT))/EVIDENCE (FORECLOSURE, BANK FAILED TO DEMONSTRATE STANDING TO FORECLOSE, SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT))/HEARSAY (BUSINESS RECORDS EXCEPTION, FORECLOSURE, BANK FAILED TO DEMONSTRATE STANDING TO FORECLOSE, SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT))/BUSINESS RECORDS (HEARSAY, FORECLOSURE, (BANK FAILED TO DEMONSTRATE STANDING TO FORECLOSE, SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT))

FORECLOSURE, EVIDENCE.

BANK FAILED TO DEMONSTRATE STANDING TO FORECLOSE, SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff bank did not demonstrate standing to foreclose. The affidavit of the bank's vice president did not demonstrate the documents she relied on were subject to the business records exception to the hearsay rule:

> Here, the plaintiff attempted to establish its standing by submitting the affidavit of Katherine Cacho, a vice president at Bank of America, N.A., which serviced the defendants' loan on behalf of the plaintiff. Cacho averred, in relevant part, that her affidavit was based upon her review of unspecified records indicating that the note was physically transferred to the plaintiff on August 16, 2007. The plaintiff failed to demonstrate that the records relied upon by Cacho were admissible under the business records exception to the hearsay rule (see CPLR 4518[a]) because Cacho did not attest that she was personally familiar with the plaintiff's record-keeping practices and procedures ... . **Bank of N.Y. Mellon v Cutler, 2017 NY Slip Op 07424, Second Dept 10-25-17**

FORECLOSURE (AFFIDAVIT WAS SUFFICIENT TO DEMONSTRATE PLAINTIFF BANK'S ENTITLEMENT TO SUMMARY JUDGMENT IN THIS FORECLOSURE ACTION UNDER THE CONTROLLING ADMINISTRATIVE ORDER AND THE BUSINESS RECORDS EXCEPTION TO THE HEARSAY RULE (FIRST DEPT))/EVIDENCE (FORECLOSURE, AFFIDAVIT WAS SUFFICIENT TO DEMONSTRATE PLAINTIFF BANK'S ENTITLEMENT TO SUMMARY JUDGMENT IN THIS FORECLOSURE ACTION UNDER THE CONTROLLING ADMINISTRATIVE ORDER AND THE BUSINESS RECORDS EXCEPTION TO THE HEARSAY RULE (FIRST DEPT))/HEARSAY (BUSINESS RECORDS EXCEPTION, FORECLOSURE, AFFIDAVIT WAS SUFFICIENT TO DEMONSTRATE PLAINTIFF BANK'S ENTITLEMENT TO SUMMARY JUDGMENT IN THIS FORECLOSURE ACTION UNDER THE CONTROLLING ADMINISTRATIVE ORDER AND THE BUSINESS RECORDS EXCEPTION TO THE HEARSAY RULE (FIRST DEPT))/BUSINESS RECORDS (EXCEPTION TO HEARSAY RULE, FORECLOSURE, AFFIDAVIT WAS SUFFICIENT TO DEMONSTRATE PLAINTIFF BANK'S ENTITLEMENT TO SUMMARY JUDGMENT IN THIS FORECLOSURE ACTION UNDER THE CONTROLLING ADMINISTRATIVE ORDER AND THE BUSINESS RECORDS EXCEPTION TO THE HEARSAY RULE (FIRST DEPT))

FORECLOSURE, EVIDENCE.

AFFIDAVIT WAS SUFFICIENT TO DEMONSTRATE PLAINTIFF BANK'S ENTITLEMENT TO SUMMARY JUDGMENT IN THIS FORECLOSURE ACTION UNDER THE CONTROLLING ADMINISTRATIVE ORDER AND THE BUSINESS RECORDS EXCEPTION TO THE HEARSAY RULE (FIRST DEPT).

The First Department, reversing Supreme Court, in a full-fledged opinion by Justice Andrias, over a dissent, determined plaintiff bank (BOA) was entitled to summary judgment in this foreclosure action. At issue was whether an affidavit (by

Mattera) in support of a prior summary judgment proceeding satisfied the the operative Administrative Order and the business records exception to the hearsay rule:

> Administrative Order 431/11 ... requires the plaintiff's counsel in a residential mortgage foreclosure action to file an affirmation confirming that he or she communicated with a representative of the plaintiff who confirmed the factual accuracy of the plaintiff's pleadings, supporting documentation and submissions to the court ... .
>
> To fulfill his obligations under Administrative Order 431/11, plaintiff's counsel submitted an affidavit that comported with the form provided in Administrative Order 431/11. Counsel stated that ... he had communicated with Mattera ... .
>
> The dissent finds this affidavit deficient, stating that "because Mattera's affidavits do not establish a complete review of, or the indicia of reliability necessary to lay a business records foundation for, the records pre-dating ... acquisition of defendant's mortgage, counsel may not rely upon alleged communications with Mattera to comply with the requirements of the Administrative Order." However, defendant, who has continued to reside on the premises for the last 10 years without paying her mortgage, did not dispute her default or challenge the accuracy or sufficiency of Mattera's affidavit on the third summary judgment motion.
>
> Furthermore, CLPR 4518(a) does not require a person to have personal knowledge of each of the facts asserted in the affidavit of merit put before the court as evidence of a defendant's default in payment ... . Thus, in seeking to enforce a loan, an assignee of an original lender or intermediary predecessor may use an original loan file prepared by its assignor, when it relies upon those records in the regular course of its business... ..
>
> Here, Mattera ... satisfied these standards ... . **Bank of Am., N.A. v Brannon, 2017 NY Slip Op 07578, First Dept 10-31-17**

INSURANCE LAW

INSURANCE LAW (PLAINTIFF ENTITLED TO DISCLOSURE OF INSURER'S PRE-DENIAL FILE, CAUSES OF ACTION FOR BREACH OF CONTRACT AGAINST THE INSURER (DENIAL OF THE CLAIM) AND THE UNDERLYING NEGLIGENCE ACTION AGAINST THE INSURED MUST BE SEVERED (THIRD DEPT))/CIVIL PROCEDURE (INSURANCE LAW, DISCLOSURE, SEVERANCE, PLAINTIFF ENTITLED TO DISCLOSURE OF INSURER'S PRE-DENIAL FILE, CAUSES OF ACTION FOR BREACH OF CONTRACT AGAINST THE INSURER (DENIAL OF THE CLAIM) AND THE UNDERLYING NEGLIGENCE ACTION AGAINST THE INSURED MUST BE SEVERED (THIRD DEPT))/DISCLOSURE (INSURANCE LAW, PLAINTIFF ENTITLED TO DISCLOSURE OF INSURER'S PRE-DENIAL FILE, CAUSES OF ACTION FOR BREACH OF CONTRACT AGAINST THE INSURER (DENIAL OF THE CLAIM) AND THE UNDERLYING NEGLIGENCE ACTION AGAINST THE INSURED MUST BE SEVERED (THIRD DEPT))/SEVERANCE (CIVIL PROCEDURE, PLAINTIFF ENTITLED TO DISCLOSURE OF INSURER'S PRE-DENIAL FILE, CAUSES OF ACTION FOR BREACH OF CONTRACT AGAINST THE INSURER (DENIAL OF THE CLAIM) AND THE UNDERLYING NEGLIGENCE ACTION AGAINST THE INSURED MUST BE SEVERED (THIRD DEPT))

INSURANCE LAW, CIVIL PROCEDURE.

PLAINTIFF ENTITLED TO DISCLOSURE OF INSURER'S PRE-DENIAL FILE, CAUSES OF ACTION FOR BREACH OF CONTRACT AGAINST THE INSURER (DENIAL OF THE CLAIM) AND THE UNDERLYING NEGLIGENCE ACTION AGAINST THE INSURED MUST BE SEVERED (THIRD DEPT).

The Third Department, modifying Supreme Court, determined plaintiff was entitled to the insurer's pre-denial (of coverage) file and the insurance action (breach of contract, denial of claim) and the underlying tort action against the insured should be severed. The causes of action stemmed from property damage caused by a subcontractor (Rugar) working for plaintiff and the subcontractor's insurer's (Utica First's) denial of the related claim:

> "The payment or rejection of claims is a part of the regular business of an insurance company. Consequently, reports which aid it in the process of deciding whether to pay or reject a claim are made in the regular course of its business"... . As such, "[r]eports prepared by insurance investigators, adjusters, or attorneys before the decision is made to pay or reject a claim are not privileged and are discoverable" ... . Notably, all the documents set forth in the subject privilege log were prepared prior to Utica First's May 9, 2012 disclaimer of coverage. We find no merit, meanwhile, to Rugar and Utica First's contention that plaintiff's August 2, 2011 letter constituted anything other than a timely filed notice of claim received in Utica First's regular course of business. The affidavit of Susan Wheaton, Utica First's Vice President of Claims, was conclusory and failed to demonstrate that the materials derived from Utica First's investigation were collected solely in anticipation of litigation ... . Since Utica First failed to establish that the withheld documents were prepared solely in anticipation of litigation, the burden did not shift to plaintiff to demonstrate an undue hardship justifying disclosure of the pre-denial claim file ... .
>
> Generally speaking, "even where common facts exist, it is prejudicial to insurers to have the issue of insurance coverage tried before the jury that considers the underlying liability claims" ... . Here, there is no question that, absent severance, the jury in the negligence action against Rugar will discover the existence of liability insurance as a result of the breach of contract action against Utica First. Accordingly, we find that Supreme Court improvidently denied the motion for severance ... . **Cascade Bldrs. Corp. v Rugar, 2017 NY Slip Op 07375, Third Dept 10-19-17**

LABOR LAW-CONSTRUCTION LAW

LABOR LAW-CONSTRUCTION LAW (DECKING WHICH WAS TO BECOME A PERMANENT FLOOR COLLAPSED, PLAINTIFF ENTITLED TO SUMMARY JUDGMENT ON HIS LABOR LAW 240 (1) CAUSE OF ACTION BECAUSE WORK REMAINED TO COMPLETE THE FLOOR (FIRST DEPT))

LABOR LAW-CONSTRUCTION LAW.

DECKING WHICH WAS TO BECOME A PERMANENT FLOOR COLLAPSED, PLAINTIFF ENTITLED TO SUMMARY JUDGMENT ON HIS LABOR LAW 240 (1) CAUSE OF ACTION BECAUSE WORK REMAINED TO COMPLETE THE FLOOR (FIRST DEPT).

The First Department, reversing Supreme Court, determined plaintiff's motion for summary judgment on the Labor Law 240 (1) cause of action should have been granted. Plaintiff fell through decking to the floor below:

> Plaintiff ironworker ... was walking across an installed steel "q-decking" floor on a construction site, when two sheets of the decking floor collapsed, causing him to fall to the floor below. Even though the decking was to become a permanent part of the floor of the building under construction, it is undisputed that, at the time of the accident, additional work needed to be done, including the pouring of concrete, before the floors would be complete. **Cross v CIM Group, LLC, 2017 NY Slip Op 06912, First Dept 10-3-17**

LABOR LAW-CONSTRUCTIVE LAW (FAILED DEVICE WAS NOT A SAFETY DEVICE WITHIN THE MEANING OF LABOR LAW 240 (1) AND WAS NOT COVERED BY THE INDUSTRIAL CODE (LABOR LAW 241 (6)), HOWEVER THE LABOR LAW 200 CAUSE OF ACTION SHOULD NOT HAVE BEEN DISMISSED (SECOND DEPT))/SAFETY DEVICE (LABOR LAW-CONSTRUCTION LAW, FAILED DEVICE WAS NOT A SAFETY DEVICE WITHIN THE MEANING OF LABOR LAW 240 (1) AND WAS NOT COVERED BY THE INDUSTRIAL CODE (LABOR LAW 241 (6)), HOWEVER THE LABOR LAW 200 CAUSE OF ACTION SHOULD NOT HAVE BEEN DISMISSED (SECOND DEPT))

LABOR LAW-CONSTRUCTION LAW.

FAILED DEVICE WAS NOT A SAFETY DEVICE WITHIN THE MEANING OF LABOR LAW 240 (1) AND WAS NOT COVERED BY THE INDUSTRIAL CODE (LABOR LAW 241 (6)), HOWEVER THE LABOR LAW 200 CAUSE OF ACTION SHOULD NOT HAVE BEEN DISMISSED (SECOND DEPT).

The Second Department determined the Labor Law 240 (1) and 241 (6) causes of action were properly dismissed. But the Labor Law 200 cause of action should have survived summary judgment. Apparently two panels which were part of an exhibition booth fell on plaintiff because a pin and bracket securing the panels failed. The pin and bracket were not safety devices within the meaning of Labor Law 240 (1) because they were part of the booth after construction was complete. The pin and bracket were not covered by any industrial code provision (Labor Law 241 (6)). But there was a question of fact about the safety of the work site (Labor Law 200):

> ... [T]he Supreme Court erred in granting, upon renewal, that branch of the defendant's motion which was for summary judgment dismissing the cause of action alleging a violation of Labor Law § 200. Labor Law § 200 codifies the common-law duty of an owner or contractor to provide employees with a safe place to work ... . Where,

as here, the injured plaintiff's accident arose not from the manner in which the work was performed, but rather from an allegedly dangerous condition at the work site, liability for a violation of Labor Law § 200 will be imposed if the general contractor had control over the work site and either created the dangerous condition or had actual or constructive notice of it ... .

Contrary to the defendant's contention and the Supreme Court's conclusion, the defendant failed to establish, prima facie, that it did not serve as a general contractor or agent with control over the work site. Further, the defendant failed to demonstrate, prima facie, that it did not create the dangerous condition or have constructive notice of it. **Honeyman v Curiosity Works, Inc., 2017 NY Slip Op 07241, Second Dept 10-18-17**

LABOR LAW-CONSTRUCTION LAW (LICENSEE WAS THE OWNER OF THE PREMISES WITHIN THE MEANING OF THE LABOR LAW, EVIDENCE OF LICENSEE STATUS PROPERLY PRESENTED FOR THE FIRST TIME IN REPLY PAPERS, PLAINTIFF FELL FROM A STRUCTURE WITHIN THE MEANING OF LABOR LAW 240 (1) (FIRST DEPT))/CIVIL PROCEDURE (REPLY PAPERS, LICENSEE WAS THE OWNER OF THE PREMISES WITHIN THE MEANING OF THE LABOR LAW, EVIDENCE OF LICENSEE STATUS PROPERLY PRESENTED FOR THE FIRST TIME IN REPLY PAPERS, PLAINTIFF FELL FROM A STRUCTURE WITHIN THE MEANING OF LABOR LAW 240 (1) (FIRST DEPT))/STRUCTURE (LABOR LAW-CONSTRUCTION LAW, PLAINTIFF FELL FROM A STRUCTURE WITHIN THE MEANING OF LABOR LAW 240 (1) (FIRST DEPT))/ALTERATION (LABOR LAW-CONSTRUCTION LAW, PLAINTIFF FELL FROM A STRUCTURE WITHIN THE MEANING OF LABOR LAW 240 (1) (FIRST DEPT))/OWNER (LABOR LAW-CONSTRUCTION LAW, LICENSEE WAS THE OWNER OF THE PREMISES WITHIN THE MEANING OF THE LABOR LAW, EVIDENCE OF LICENSEE STATUS PROPERLY PRESENTED FOR THE FIRST TIME IN REPLY PAPERS (FIRST DEPT))

LABOR LAW-CONSTRUCTION LAW, CIVIL PROCEDURE.

LICENSEE WAS THE OWNER OF THE PREMISES WITHIN THE MEANING OF THE LABOR LAW, EVIDENCE OF LICENSEE STATUS PROPERLY PRESENTED FOR THE FIRST TIME IN REPLY PAPERS, PLAINTIFF FELL FROM A STRUCTURE WITHIN THE MEANING OF LABOR LAW 240 (1) (FIRST DEPT).

The First Department determined the defendant was the proper party in the Labor Law 240 (1) action, evidence defendant was the proper party was properly presented for the first time in reply papers, and the plaintiff was working on a structure within the meaning of the Labor Law when he fell and was injured:

The court properly granted plaintiff's motion for partial summary judgment on his Labor Law § 240(1) claim because Live Nation was the "owner" of the accident site in its role as licensee ... . The record demonstrates that as licensee, Live Nation had the sole authority to operate and maintain the premises, including the right to insist that workers on the site follow proper safety practices... . The court did not err in considering the merger agreement showing that Live Nation was the licensee of the premises for the first time in reply, because plaintiff submitted that document in response to an argument made in opposition to the motion ... .

The court also properly found that plaintiff was engaged in the alteration of a structure at the time of the accident. When he fell, plaintiff was helping set up the second tier truss system of a sponsorship booth. This truss system constituted a "structure" because, viewed as a whole, it extended the height of the booth from 10 feet to 16 feet, was comprised of several interlocking parts that were connected in a specific way, and required the use of a forklift and several people to construct it ... . Although this truss system was being set up to allow for the display of branding, it was not a " decorative modification' because the work. . . entail[ed] far more than a mere change[] [to] the outward appearance of" the booth and, instead, constituted an alteration to the preexisting structure ... .**Perez v Beach Concerts, Inc., 2017 NY Slip Op 07528, First Dept 10-26-17**

LIMITED LIABILITY COMPANY LAW

LIMITED LIABILITY COMPANY LAW (SUMMARY JUDGMENT IN FAVOR OF PETITIONER IN A SPECIAL PROCEEDING SEEKING DISSOLUTION OF A LIMITED LIABILITY COMPANY SHOULD NOT HAVE BEEN GRANTED, NO COMPETENT EVIDENTIARY PROOF SUBMITTED WITH THE PETITION (SECOND DEPT))/EVIDENCE (LIMITED LIABILITY COMPANY LAW, SUMMARY JUDGMENT IN FAVOR OF PETITIONER IN A SPECIAL PROCEEDING SEEKING DISSOLUTION OF A LIMITED LIABILITY COMPANY SHOULD NOT HAVE BEEN GRANTED, NO COMPETENT EVIDENTIARY PROOF SUBMITTED WITH THE PETITION (SECOND DEPT))/CIVIL PROCEDURE (SPECIAL PROCEEDINGS, LIMITED LIABILITY COMPANY LAW, SUMMARY JUDGMENT IN FAVOR OF PETITIONER IN A SPECIAL PROCEEDING SEEKING DISSOLUTION OF A LIMITED LIABILITY COMPANY SHOULD NOT HAVE BEEN GRANTED, NO COMPETENT EVIDENTIARY PROOF SUBMITTED WITH THE PETITION (SECOND DEPT))

LIMITED LIABILITY COMPANY LAW, EVIDENCE, CIVIL PROCEDURE.

SUMMARY JUDGMENT IN FAVOR OF PETITIONER IN A SPECIAL PROCEEDING SEEKING DISSOLUTION OF A LIMITED LIABILITY COMPANY SHOULD NOT HAVE BEEN GRANTED, NO COMPETENT EVIDENTIARY PROOF SUBMITTED WITH THE PETITION (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the petition for dissolution of the limited liability company was not accompanied by competent supporting evidence (as is required in a special proceeding). The petition alleged that one of the members (Homapour) "unilaterally usurped management and control over the LLC in violation of the operating agreement by, inter alia, collecting rents from the building's tenants and depositing rental payments into newly established bank accounts, and making himself the sole signatory on such accounts." The petition further alleged "that although the parties had reached an agreement to sell the building to an unnamed purchaser for $2.9 million, Homapour caused the agreement to collapse by refusing to produce certain of the leases he had signed with building tenants:"

> In a special proceeding, such as a proceeding for the judicial dissolution of a limited liability company, "[t]he court shall make a summary determination upon the pleadings, papers and admissions to the extent that no triable issues of fact are raised" (CPLR 409[b]). "Unlike a complaint in a plenary action, a petition in a special proceeding must be accompanied by competent evidence"... .
>
> Here, the petitioners failed to establish their entitlement to a summary determination of the proceeding because they offered no competent evidentiary proof to support their assertions that Homapour unilaterally usurped management and control over the LLC in alleged violation of the operating agreement, and thwarted an alleged agreement for the sale of the building. **Matter of FR Holdings, FLP v Homapour, 2017 NY Slip Op 07439, Second Dept 10-25-17**

MORTGAGES

MORTGAGES (EVEN THOUGH THE MORTGAGE NOTE WAS DISCHARGED IN BANKRUPTCY IN PERSONAM, THE HOLDER OF THE NOTE AND MORTGAGE HAD A SECURITY INTEREST IN REM (SECOND DEPT))/BANKRUPTCY (MORTGAGES AND NOTES, EVEN THOUGH THE MORTGAGE NOTE WAS DISCHARGED IN BANKRUPTCY IN PERSONAM, THE HOLDER OF THE NOTE AND MORTGAGE HAD A SECURITY INTEREST IN REM (SECOND DEPT))

MORTGAGES, BANKRUPTCY.

EVEN THOUGH THE MORTGAGE NOTE WAS DISCHARGED IN BANKRUPTCY IN PERSONAM, THE HOLDER OF THE NOTE AND MORTGAGE HAD A SECURITY INTEREST IN REM (SECOND DEPT).

The Second Department determined that plaintiff's mortgage/note, which was never recorded and was discharged in a bankruptcy proceeding, could still be enforced in rem. The defendant's discharge in bankruptcy was in personam:

> ... [T]he defendant filed a petition under chapter 7 of the United States Bankruptcy Code ... , listing the plaintiff, the current holder of the ... note and mortgage, as a creditor holding a secured claim. ...[T]he defendant was granted a discharge ... and the chapter 7 case was closed. Thereafter, the plaintiff commenced this action to quiet title to its mortgage interest in the subject property ... to be equitably subrogated to the first mortgage lien ... .
>
> "Where, as here, the funds of a mortgagee are used to discharge a prior lien upon the property of another, the doctrine of equitable subrogation applies to prevent unjust enrichment by subrogating the mortgagee to the position of the senior lienholder" ... . Here, the plaintiff established its prima facie entitlement to judgment as a matter of law on its equitable subrogation cause of action ... . In opposition, the defendant failed to raise a triable issue of fact ... . Contrary to the defendant's contention, the plaintiff's security interest in the subject property survived the defendant's discharge in bankruptcy. "Although a bankruptcy discharge extinguishes one mode of enforcing a note—namely, an action against the debtor in personam, it leaves intact another—namely, an action against the debtor in rem" ... . **Citimortgage, Inc. v Chouen, 2017 NY Slip Op 07427, Second Dept 10-25-17**

MUNICIPAL LAW

MUNICIPAL LAW (NOTICE OF CLAIM, PETITIONER DEMONSTRATED CITY WOULD NOT BE PREJUDICED BY THE FILING OF A LATE NOTICE OF CLAIM, BUT DID NOT SHOW THE CITY HAD TIMELY KNOWLEDGE OF THE CLAIM AND DID NOT PRESENT AN ADEQUATE EXCUSE FOR FAILURE TO FILE ON TIME, LEAVE TO FILE A LATE NOTICE PROPERLY DENIED, TWO JUSTICE DISSENT (SECOND DEPT))/LATE NOTICE OF CLAIM (PETITIONER DEMONSTRATED CITY WOULD NOT BE PREJUDICED BY THE FILING OF A LATE NOTICE OF CLAIM, BUT DID NOT SHOW THE CITY HAD TIMELY KNOWLEDGE OF THE CLAIM AND DID NOT PRESENT AN ADEQUATE EXCUSE FOR FAILURE TO FILE ON TIME, LEAVE TO FILE A LATE NOTICE PROPERLY DENIED, TWO JUSTICE DISSENT (SECOND DEPT))

MUNICIPAL LAW.

PETITIONER DEMONSTRATED CITY WOULD NOT BE PREJUDICED BY THE FILING OF A LATE NOTICE OF CLAIM, BUT DID NOT SHOW THE CITY HAD TIMELY KNOWLEDGE OF THE CLAIM AND DID NOT PRESENT AN ADEQUATE EXCUSE FOR FAILURE TO FILE ON TIME, LEAVE TO FILE A LATE NOTICE PROPERLY DENIED, TWO JUSTICE DISSENT (SECOND DEPT).

The Second Department, over a two-justice dissent, determined petitioner's request for leave to file a late notice of claim in an action for false arrest and false imprisonment was properly denied. Although the petitioner made a sufficient showing the city would not be prejudiced by the late notice, the petitioner did not demonstrate the city had timely knowledge of the claim:

> "... [W]hether the municipality had actual knowledge of the essential facts constituting the claim is of great importance'" ... . In order for a municipality to have actual knowledge of the essential facts constituting the claim, "[it] must have knowledge of the facts that underlie the legal theory or theories on which liability is predicated in the notice of claim" ... . Unsubstantiated contentions that the municipality acquired timely actual knowledge of the essential facts constituting the claim through the content of reports and other documentation are insufficient ... .
>
> Here, the petitioner, while alleging that the City had actual knowledge of the facts constituting the claims of false arrest and false imprisonment within 90 days after the claims arose or a reasonable time thereafter, failed to submit any evidence establishing such actual knowledge ... . Moreover, the petitioner's assertion that he knowingly delayed service of a timely notice of claim while the criminal charges were pending due to an unsubstantiated fear of reprisal, does not, under the circumstances of this case, constitute a reasonable excuse ... . Furthermore, as to the issue of reasonable excuse, the petitioner failed to explain why, after the criminal charges were dismissed ... , he waited approximately two more months to commence this proceeding. **Matter of Ruiz v City of New York, 2017 NY Slip Op 07445, Second Dept 10-25-17**

NEGLIGENCE

NEGLIGENCE (TRAFFIC ACCIDENTS, DRIVER'S NEGLIGENCE IS NOT ALWAYS A QUESTION OF FACT WHEN THE DRIVER IS AWARE OF THE POSSIBILITY CHILDREN ARE PRESENT, PLAINTIFFS' CHILD WAS STRUCK BY DEFENDANT'S CAR, SUMMARY JUDGMENT PROPERLY AWARDED TO DEFENDANT DRIVER (FIRST DEPT))/TRAFFIC ACCIDENTS (CHILD STRUCK, DRIVER'S NEGLIGENCE IS NOT ALWAYS A QUESTION OF FACT WHEN THE DRIVER IS AWARE OF THE POSSIBILITY CHILDREN ARE PRESENT, PLAINTIFFS' CHILD WAS STRUCK BY DEFENDANT'S CAR, SUMMARY JUDGMENT PROPERLY AWARDED TO DEFENDANT DRIVER (FIRST DEPT))/CHILDREN (TRAFFIC ACCIDENTS, DRIVER'S NEGLIGENCE IS NOT ALWAYS A QUESTION OF FACT WHEN THE DRIVER IS AWARE OF THE POSSIBILITY CHILDREN ARE PRESENT, PLAINTIFFS' CHILD WAS STRUCK BY DEFENDANT'S CAR, SUMMARY JUDGMENT PROPERLY AWARDED TO DEFENDANT DRIVER (FIRST DEPT))

NEGLIGENCE.

DRIVER'S NEGLIGENCE IS NOT ALWAYS A QUESTION OF FACT WHEN THE DRIVER IS AWARE OF THE POSSIBILITY CHILDREN ARE PRESENT, PLAINTIFFS' CHILD WAS STRUCK BY DEFENDANT'S CAR, SUMMARY JUDGMENT PROPERLY AWARDED TO DEFENDANT DRIVER (FIRST DEPT).

The First Department determined summary judgment was properly awarded to defendant in this traffic accident case. Plaintiffs' child was struck by the defendant's car. Defendant was driving between 5 and 10 miles per hour and the child ran out from between parked cars. The court noted that there is no requirement that extra care be exercised because of the presence of children:

> "A driver in an area where children are playing need not exercise extreme care or caution,' although [he] must exercise the care that a reasonably prudent person would exercise under the circumstances"... . Here, defendant established his entitlement to judgment as a matter of law by producing evidence that he was not speeding, driving only about 5-10 miles per hour, and that the infant plaintiff ran out from between two parked cars into the side of his vehicle ... .
>
> No issues of fact exist as to whether defendant's speed was excessive under the circumstances ... . Contrary to plaintiffs' argument, Ferrer v Harris (55 NY2d 285 [1982]) does not stand for the broad proposition that a driver's negligence is always a question of fact when the driver was aware that children were possibly present. Plaintiffs failed to raise a triable issue of fact as to whether defendant ought to have seen the infant plaintiff before the impact. Accordingly, the point of impact was not a material issue of fact warranting denial of summary judgment ... . **A.C. v Ajisogun, 2017 NY Slip Op 06894, First Dept 10-3-17**

NEGLIGENCE (ALTHOUGH DEFENDANT HAD RIGHT OF WAY AND ON-COMING CAR RAN A RED LIGHT, DEFENDANT FAILED TO DEMONSTRATE FREEDOM FROM COMPARATIVE FAULT, SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT))/TRAFFIC ACCIDENTS (ALTHOUGH DEFENDANT HAD RIGHT OF WAY AND ON-COMING CAR RAN A RED LIGHT, DEFENDANT FAILED TO DEMONSTRATE FREEDOM FROM COMPARATIVE FAULT, SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT))/COMPARATIVE FAULT (TRAFFIC ACCIDENTS, ALTHOUGH DEFENDANT HAD RIGHT OF WAY AND ON-COMING CAR RAN A RED LIGHT, DEFENDANT FAILED TO DEMONSTRATE FREEDOM FROM COMPARATIVE FAULT, SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT))/SUMMARY JUDGMENT (NEGLIGENCE, TRAFFIC ACCIDENTS, ALTHOUGH DEFENDANT HAD RIGHT OF WAY AND ON-COMING CAR RAN A RED LIGHT, DEFENDANT FAILED TO DEMONSTRATE FREEDOM FROM COMPARATIVE FAULT, SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT))

NEGLIGENCE.

ALTHOUGH DEFENDANT HAD RIGHT OF WAY AND ON-COMING CAR RAN A RED LIGHT, DEFENDANT FAILED TO DEMONSTRATE FREEDOM FROM COMPARATIVE FAULT, SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendants' motion for summary judgment in this intersection accident case should not have been granted. Although the defendant driver demonstrated she had the right of way in making a left turn and the on-coming car which struck her ran a red light, defendant driver did not demonstrate freedom from comparative fault:

> Defendants moving for summary judgment in a personal injury action must demonstrate, prima facie, that they did not proximately cause the plaintiff's injuries. Since, however, there can be more than one proximate cause of a plaintiff's injuries, defendants do not carry their burden simply by establishing that another party's actions were a proximate cause; they must establish their own freedom from comparative fault ... . Moreover, although the operators of vehicles with the right-of-way are entitled to anticipate that other operators will yield in compliance with the Vehicle and Traffic Law ... ,drivers with the right-of-way may nonetheless be found to have proximately caused the happening of an accident if they did not use reasonable care to avoid the accident ... . **Fargione v Chance, 2017 NY Slip Op 06965, Second Dept 10-4-17**

NEGLIGENCE (BUS DRIVER ACTED REASONABLY IN RESPONSE TO AN EMERGENCY SITUATION (AN ASSAULT ON THE DRIVER), PLAINTIFF PASSENGER'S NEGLIGENCE AND FALSE IMPRISONMENT ACTION SHOULD HAVE BEEN DISMISSED (FIRST DEPT))/COMMON CARRIERS (BUS DRIVER ACTED REASONABLY IN RESPONSE TO AN EMERGENCY SITUATION (AN ASSAULT ON THE DRIVER), PLAINTIFF PASSENGER'S NEGLIGENCE AND FALSE IMPRISONMENT ACTION SHOULD HAVE BEEN DISMISSED (FIRST DEPT))/EMERGENCIES (NEGLIGENCE, COMMON CARRIERS, BUS DRIVER ACTED REASONABLY IN RESPONSE TO AN EMERGENCY SITUATION (AN ASSAULT ON THE DRIVER), PLAINTIFF PASSENGER'S NEGLIGENCE AND FALSE IMPRISONMENT ACTION SHOULD HAVE BEEN DISMISSED (FIRST DEPT))/BUSES (NEGLIGENCE, COMMON CARRIERS, BUS DRIVER ACTED REASONABLY IN RESPONSE TO AN EMERGENCY SITUATION (AN ASSAULT ON THE DRIVER), PLAINTIFF PASSENGER'S NEGLIGENCE AND FALSE IMPRISONMENT ACTION SHOULD HAVE BEEN DISMISSED (FIRST DEPT))

NEGLIGENCE.

BUS DRIVER ACTED REASONABLY IN RESPONSE TO AN EMERGENCY SITUATION (AN ASSAULT ON THE DRIVER), PLAINTIFF PASSENGER'S NEGLIGENCE AND FALSE IMPRISONMENT ACTION SHOULD HAVE BEEN DISMISSED (FIRST DEPT).

The First Department, reversing Supreme Court, determined the NYC Transit Authority's motion for summary judgment should have been granted. Plaintiff was on a bus when a man attempted to get on the bus without paying and assaulted the driver. Plaintiff and others moved to the back of the bus and demanded that the driver, Hamblin, open the rear door (the door was not opened). Plaintiff allegedly suffered a panic attack which created a condition requiring that a defibrillation device be implanted in her chest. The court held that Hamblin was faced with an emergency situation to which he reacted appropriately:

> Defendant established entitlement to judgment as a matter of law as to plaintiff's negligence claim by submitting evidence showing that the incident was the result of an emergency situation that was not of Hamblin's own making and that afforded him little or no time to consider an alternate course of action... . The record demonstrates that Hamblin reasonably and prudently responded to the emergency by making sure that the bus's emergency brake was activated and pressing the silent alarm to summon the police ... .
>
> In opposition, plaintiff failed to raise a triable issue of fact. She only presented unsubstantiated assertions and speculation that Hamblin may have breached a duty of care by not making sure that the rear exit door was unlocked and that her injuries might have been avoided if he had acquiesced to the assailant's demand that he be permitted to board the bus without paying the fare ... .
>
> Dismissal of the false imprisonment claim is also warranted, since there is no evidence that Hamblin intended to confine plaintiff ... . **Savinon v New York City Tr. Auth., 2017 NY Slip Op 07390, First Dept 10-24-17**

NEGLIGENCE (INTERSECTION ACCIDENT, PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT IN THIS INTERSECTION ACCIDENT CASE SHOULD HAVE BEEN GRANTED (SECOND DEPT))/TRAFFIC ACCIDENTS (INTERSECTION ACCIDENT, PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT IN THIS INTERSECTION ACCIDENT CASE SHOULD HAVE BEEN GRANTED (SECOND DEPT))/COMPARATIVE NEGLIGENCE (INTERSECTION ACCIDENT, PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT IN THIS INTERSECTION ACCIDENT CASE SHOULD HAVE BEEN GRANTED, PLAINTIFF DEMONSTRATED ABSENCE ON COMPARATIVE NEGLIGENCE (SECOND DEPT))

NEGLIGENCE.

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT IN THIS INTERSECTION ACCIDENT CASE SHOULD HAVE BEEN GRANTED, PLAINTIFF DEMONSTRATED ABSENCE OF COMPARATIVE NEGLIGENCE (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff's summary judgment motion in this intersection accident case should have been granted. Defendant made a left turn into plaintiff's path as plaintiff entered the intersection:

> The plaintiff demonstrated, prima facie, that the defendant was negligent in violating Vehicle and Traffic Law § 1141 by making a left turn into the path of oncoming traffic without yielding the right-of-way to the plaintiff when the turn could not be made with reasonable safety ... .The defendant testified at her deposition that she observed the plaintiff's vehicle traveling in the opposite direction prior to the accident, but that she thought that she had enough time to cross the opposite lane of travel notwithstanding the fact that she was unable to gauge the speed of the plaintiff's vehicle. The undisputed fact that the defendant was, in fact, unable to complete her turn without being struck by the plaintiff's vehicle is compelling evidence of the immediate hazard created by the plaintiff's vehicle as it approached the intersection... . The evidence demonstrated that the defendant violated Vehicle and Traffic Law § 1141 by failing to "yield the right of way to any vehicle approaching from the opposite direction which [was] . . . so close as to constitute an immediate hazard" ... . Regardless of which vehicle entered the intersection first, the plaintiff, as the driver with the right-of-way, was entitled to anticipate that the defendant would obey traffic laws which required her to yield ... .
>
> The plaintiff also demonstrated that the defendant's negligence was the sole proximate cause of the accident, and that she was not comparatively at fault in the happening of the accident. The plaintiff testified at her deposition that she entered the intersection with the light in her favor, and that she first saw the defendant attempt to cross into her lane of travel as she was traveling through the intersection, at which time she slammed on her brakes in an unsuccessful attempt to avoid the collision. **Giwa v Bloom, 2017 NY Slip Op 07430, Second Dept 10-25-17**

NEGLIGENCE (TRIAL JUDGE PROPERLY INSTRUCTED THE JURY ON THE IMPLIED ASSUMPTION OF RISK DOCTRINE, RATHER THAN THE PRIMARY ASSUMPTION OF RISK DOCTRINE (THIRD DEPT))/ASSUMPTION OF THE RISK (NEGLIGENCE, TRIAL JUDGE PROPERLY INSTRUCTED THE JURY ON THE IMPLIED ASSUMPTION OF RISK DOCTRINE, RATHER THAN THE PRIMARY ASSUMPTION OF RISK DOCTRINE (THIRD DEPT))

NEGLIGENCE.

TRIAL JUDGE PROPERLY INSTRUCTED THE JURY ON THE IMPLIED ASSUMPTION OF RISK DOCTRINE, RATHER THAN THE PRIMARY ASSUMPTION OF RISK DOCTRINE (THIRD DEPT).

The Third Department upheld the substantial plaintiff's verdict where plaintiff, who was 48, was injured while jumping on a trampoline with her young nephew who threw her off-balance by "double jumping." The defense argued the verdict should have been set aside because the trial judge gave the implied assumption of risk charge to the jury, rather than the primary assumption of risk charge. The Third Department held that the circumstances did not fit the requirements for the primary assumption of risk doctrine, which precludes recovery completely and is reserved for sporting events (which public policy encourages):

> Here, defendants concede that the injury-producing activity does not fit within the narrow group of cases to which the doctrine of primary assumption of risk has been applied ... . Instead, defendants assert that this Court should find that an exception to the general rule is warranted here ... . In our view, however, jumping on a trampoline, whether double jumping or otherwise, in the yard of a private residence "does not fit comfortably within the parameters of the [primary assumption of risk] doctrine" as set out by the Court of Appeals ... . In this regard, we find that the activity at issue here is not the type of "'socially valuable voluntary [sport or recreational] activity' that the doctrine seeks to encourage" ... , nor would application of the doctrine under these facts serve to promote the policy rationale underlying its continued retention — namely, "to facilitate free and vigorous participation in athletic activities" ... . **DeMarco v DeMarco, 2017 NY Slip Op 07504, Third Dept 10-26-17**

NEGLIGENCE (QUESTION OF FACT WHETHER DRIVER WAS LIABLE IN COLLISION WITH BICYCLIST, DESPITE THE FACT THE BICYCLIST WAS NEGLIGENT AS A MATTER OF LAW FOR RIDING THE WRONG WAY ON A ONE WAY STREET (SECOND DEPT))/TRAFFIC ACCIDENTS (QUESTION OF FACT WHETHER DRIVER WAS LIABLE IN COLLISION WITH BICYCLIST, DESPITE THE FACT THE BICYCLIST WAS NEGLIGENT AS A MATTER OF LAW FOR RIDING THE WRONG WAY ON A ONE WAY STREET (SECOND DEPT))/BICYCLES (TRAFFIC ACCIDENTS, QUESTION OF FACT WHETHER DRIVER WAS LIABLE IN COLLISION WITH BICYCLIST, DESPITE THE FACT THE BICYCLIST WAS NEGLIGENT AS A MATTER OF LAW FOR RIDING THE WRONG WAY ON A ONE WAY STREET (SECOND DEPT))

NEGLIGENCE.

QUESTION OF FACT WHETHER DRIVER WAS LIABLE IN COLLISION WITH BICYCLIST, DESPITE THE FACT THE BICYCLIST WAS NEGLIGENT AS A MATTER OF LAW FOR RIDING THE WRONG WAY ON A ONE WAY STREET (SECOND DEPT).

The Second Department determined there was a question of fact concerning defendant driver's liability for a collision with a bicycle, despite the fact that the bicyclist, Sanchez, was going the wrong way on an one-way street:

> Although Sanchez was negligent as a matter of law in traveling the wrong way on Irving Avenue ... , the transcript of the defendant's deposition testimony, submitted in support of his motion, presented a triable issue of fact as to whether he failed to see what was there to be seen through the proper use of his senses ... . **Rojas v Solis, 2017 NY Slip Op 07475, Second Dept 10-25-17**

NEGLIGENCE (DEFENSE COUNSEL DID NOT CREATE THE IMPRESSION DEFENDANT DID NOT HAVE INSURANCE IN THIS TRAFFIC ACCIDENT CASE, DISSENT DISAGREED (FOURTH DEPT))/ATTORNEYS (TRAFFIC ACCIDENT CASE, INSURANCE COVERAGE, DEFENSE COUNSEL DID NOT CREATE THE IMPRESSION DEFENDANT DID NOT HAVE INSURANCE IN THIS TRAFFIC ACCIDENT CASE, DISSENT DISAGREED (FOURTH DEPT))/TRAFFIC ACCIDENTS (ATTORNEYS, INSURANCE COVERAGE, (DEFENSE COUNSEL DID NOT CREATE THE IMPRESSION DEFENDANT DID NOT HAVE INSURANCE IN THIS TRAFFIC ACCIDENT CASE, DISSENT DISAGREED (FOURTH DEPT))/INSURANCE COVERAGE (TRAFFIC ACCIDENT, ATTORNEYS, DEFENSE COUNSEL DID NOT CREATE THE IMPRESSION DEFENDANT DID NOT HAVE INSURANCE IN THIS TRAFFIC ACCIDENT CASE, DISSENT DISAGREED (FOURTH DEPT))

NEGLIGENCE, ATTORNEYS.

DEFENSE COUNSEL DID NOT CREATE THE IMPRESSION DEFENDANT DID NOT HAVE INSURANCE IN THIS TRAFFIC ACCIDENT CASE, DISSENT DISAGREED (FOURTH DEPT).

The Fourth Department, over a dissent, determined defendant's attorney did not imply that the defendant did not have insurance in this traffic accident case. The dissent would have granted a new trial because defense counsel created the impression defendant had no money and no insurance:

> Plaintiff contends that she is entitled to a new trial because defense counsel repeatedly made statements to the jury implying that defendant had no insurance. We reject that contention. References to insurance coverage are generally irrelevant to the issues and are improper because of their prejudicial nature (see Leotta v Plessinger, 8 NY2d 449, 461, rearg denied 9 NY2d 688, mot to amend remittitur granted 9 NY2d 686; Rendo v Schermerhorn, 24 AD2d 773, 773; see also Salm v Moses, 13 NY3d 816, 817-818). Contrary to plaintiff's contention, defense counsel's references to defendant as her "client" were not improper, and her statements that defendant should not be held "responsible" for certain medical expenses were in response to plaintiff's testimony and the arguments of plaintiff's counsel. Defense counsel never stated or implied that defendant lacked insurance coverage for the accident or would have to pay out of pocket ... . * * *
>
> **FROM THE DISSENT:**
>
> At the outset of his opening statement, defense counsel, referring to defendant, said, "You know, he's an immigrant, he works full time, he has two jobs, and just trying to make a living." Although defendant did in fact have insurance coverage for the accident and defense counsel had been retained by the carrier, defense counsel went on to say that defendant "hired me to defend him in this lawsuit," and that plaintiff, who "wasn't working at the time of the accident," is "trying to get money from my client." Defense counsel further stated in his opening: "I don't think it's my client's responsibility to pay this woman;" "Should my client be responsible for paying this woman's [medical] bills?;" and "[defendant] shouldn't have to pay for plaintiff's pain medication." Plaintiff's counsel objected three times to these comments, but the court overruled the objections and declined to give a curative instruction. In his summation, defense counsel again suggested that defendant himself would have to satisfy a judgment with his own funds, stating, "I don't think my client should have to pay for" certain of plaintiff's claimed expenses arising from the accident.

> In my view, the above comments "may very well have engendered sympathy [for defendant] in the jurors' minds" ... , thus depriving plaintiff of a fair trial. **Boehm v Rosario, 2017 NY Slip Op 07049, Fourth Dept 10-6-17**

NEGLIGENCE (PLAINTIFF'S MOTION TO RENEW AND REARGUE HER OPPOSITION TO THE CITY'S SUMMARY JUDGMENT MOTION IN THIS SIDEWALK SLIP AND FALL CASE SHOULD HAVE BEEN GRANTED, NEWLY DISCOVERED DOCUMENTS RAISED A QUESTION OF FACT WHETHER THE CITY CREATED THE DANGEROUS CONDITION (SECOND DEPT))/CIVIL PROCEDURE (MOTION TO RENEW, PLAINTIFF'S MOTION TO RENEW AND REARGUE HER OPPOSITION TO THE CITY'S SUMMARY JUDGMENT MOTION IN THIS SIDEWALK SLIP AND FALL CASE SHOULD HAVE BEEN GRANTED, NEWLY DISCOVERED DOCUMENTS RAISED A QUESTION OF FACT WHETHER THE CITY CREATED THE DANGEROUS CONDITION (SECOND DEPT))/SIDEWALKS (SLIP AND FALL, PLAINTIFF'S MOTION TO RENEW AND REARGUE HER OPPOSITION TO THE CITY'S SUMMARY JUDGMENT MOTION IN THIS SIDEWALK SLIP AND FALL CASE SHOULD HAVE BEEN GRANTED, NEWLY DISCOVERED DOCUMENTS RAISED A QUESTION OF FACT WHETHER THE CITY CREATED THE DANGEROUS CONDITION (SECOND DEPT))/SLIP AND FALL (SIDEWALKS, PLAINTIFF'S MOTION TO RENEW AND REARGUE HER OPPOSITION TO THE CITY'S SUMMARY JUDGMENT MOTION IN THIS SIDEWALK SLIP AND FALL CASE SHOULD HAVE BEEN GRANTED, NEWLY DISCOVERED DOCUMENTS RAISED A QUESTION OF FACT WHETHER THE CITY CREATED THE DANGEROUS CONDITION (SECOND DEPT))/MUNICIPAL LAW PLAINTIFF'S MOTION TO RENEW AND REARGUE HER OPPOSITION TO THE CITY'S SUMMARY JUDGMENT MOTION IN THIS SIDEWALK SLIP AND FALL CASE SHOULD HAVE BEEN GRANTED, NEWLY DISCOVERED DOCUMENTS RAISED A QUESTION OF FACT WHETHER THE CITY CREATED THE DANGEROUS CONDITION (SECOND DEPT)

NEGLIGENCE, CIVIL PROCEDURE, MUNICIPAL LAW.

PLAINTIFF'S MOTION TO RENEW AND REARGUE HER OPPOSITION TO THE CITY'S SUMMARY JUDGMENT MOTION IN THIS SIDEWALK SLIP AND FALL CASE SHOULD HAVE BEEN GRANTED, NEWLY DISCOVERED DOCUMENTS RAISED A QUESTION OF FACT WHETHER THE CITY CREATED THE DANGEROUS CONDITION (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff's motion to renew and reargue her opposition to the city's summary judgment motion in this sidewalk slip and fall case should have been granted. And, upon renewal, the city's motion should have been denied. Plaintiff alleged she slipped on a wet sidewalk which was sloping as opposed to flat. After the city's motion was initially granted, plaintiff received documents pursuant to a Freedom of Information Law (FOIL) request which indicated the city was responsible for the design and installation of the smooth granite sidewalk:

> Here, the plaintiff proffered new facts not offered in opposition to the NYC defendants' prior motion, consisting of documents that she received in response to her FOIL request after the prior motion was decided that would change the prior determination. Specifically, the plaintiff submitted documents demonstrating that one of the agencies of the NYC defendants approved the design of the sidewalk at issue and that the installation of the sidewalk was part of an extensive sidewalk improvement project proposed by the New York City Economic Development Corporation, formerly known as the Public Development Corporation. Since the plaintiff's proffered basis for her failure to submit these documents in opposition to the prior motion was reasonable—she had not received these documents, which were responsive to her FOIL request and in the sole possession and control of the NYC defendants, until after the December 2014 order ... —and the documents raise a triable issue of fact as to whether the NYC defendants created the condition complained of by the plaintiff ... , the Supreme Court should have granted that branch of the plaintiff's motion which was for leave to renew her opposition to the prior motion.
>
> Upon renewal, the Supreme Court also should have denied that branch of the motion of the NYC defendants which was for summary judgment dismissing the complaint insofar as asserted against them because the new facts

proffered by the plaintiff establish that triable issues of fact exist as to whether the NYC defendants created the sidewalk condition complained of by the plaintiff ... . **Trawinski v Jabir & Farag Props., LLC, 2017 NY Slip Op 07479, Second Dept 10-25-17**

NEGLIGENCE (PLAINTIFF'S DECEDENT DIED AFTER BECOMING INTOXICATED AT A PARTY HELD BY CO-WORKERS, THE PARTY WAS NOT SANCTIONED BY THE EMPLOYER, EMPLOYER'S MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED (FIRST DEPT))/EMPLOYMENT LAW (DUTY OF CARE, OFF DUTY EMPLOYEES, PLAINTIFF'S DECEDENT DIED AFTER BECOMING INTOXICATED AT A PARTY HELD BY CO-WORKERS, THE PARTY WAS NOT SANCTIONED BY THE EMPLOYER, EMPLOYER'S MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED (FIRST DEPT))/DUTY OF CARE (EMPLOYMENT LAW, PLAINTIFF'S DECEDENT DIED AFTER BECOMING INTOXICATED AT A PARTY HELD BY CO-WORKERS, THE PARTY WAS NOT SANCTIONED BY THE EMPLOYER, EMPLOYER'S MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED (FIRST DEPT))/INTOXICATION (NEGLIGENCE, EMPLOYMENT LAW, PLAINTIFF'S DECEDENT DIED AFTER BECOMING INTOXICATED AT A PARTY HELD BY CO-WORKERS, THE PARTY WAS NOT SANCTIONED BY THE EMPLOYER, EMPLOYER'S MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED (FIRST DEPT))

NEGLIGENCE, EMPLOYMENT LAW.

PLAINTIFF'S DECEDENT DIED AFTER BECOMING INTOXICATED AT A PARTY HELD BY CO-WORKERS, THE PARTY WAS NOT SANCTIONED BY THE EMPLOYER, EMPLOYER'S MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED (FIRST DEPT).

The First Department, reversing Supreme Court, determined plaintiff's negligence and wrongful death action against plaintiff's decedent's employer (MSK) should have been dismissed because MSK owed no duty of care to plaintiff's decedent. Decedent was at a party for employees who worked together, but the party was not sanctioned by the employer and all employees were off duty. Plaintiff's decedent became intoxicated and was picked up by his wife (the plaintiff) who was a nurse. Plaintiff's decedent's co-workers placed him in the car. Plaintiff drove home an left plaintiff's decedent in the car to sleep it off. He died in the car:

> Decedent, plaintiff's husband and an employee of MSK, became intoxicated at a holiday party organized by workers in MSK's facilities department. The party was not sanctioned by MSK, held on MSK property, or paid for by MSK, and all employees there were off duty. Coworker friends of the decedent contacted plaintiff, a registered nurse at MSK, and then helped decedent into her car. Plaintiff drove home and left decedent in the car, parked in their driveway, to sleep off his condition. Approximately one hour later, plaintiff checked on decedent, and found him now on the floor of the back seat, unresponsive. The autopsy report lists the cause of the death as alcohol intoxication and positional asphyxia.
>
> The motion court erred in denying summary judgment to MSK. Their employees, in assisting decedent and placing him in his wife's care, did not assume a duty, and nothing they did placed him in a worse or different position of danger ... . Any opinions rendered about medical attention being unnecessary were nonactionable gratuitous commentary ... . Moreover, placing decedent into the car was not the proximate cause of his death; it merely furnished the occasion for the unfortunate occurrence ... . **Gillern v Mahoney, 2017 NY Slip Op 06979, First Dept 10-5-17**

NEGLIGENCE (EMPLOYER LIABILITY FOR THIRD PARTY ASSAULT, RESIDENTIAL CARE FACILITY NOT LIABLE FOR ASSAULT ON PLAINTIFF EMPLOYEE BY A RESIDENT, ASSAULT WAS NOT FORESEEABLE (THIRD DEPT))/EMPLOYMENT LAW (EMPLOYER LIABILITY FOR THIRD PARTY ASSAULT, RESIDENTIAL CARE FACILITY NOT LIABLE FOR ASSAULT ON PLAINTIFF EMPLOYEE BY A RESIDENT, ASSAULT WAS NOT FORESEEABLE (THIRD DEPT))/ASSAULT (NEGLIGENCE, EMPLOYMENT LAW, RESIDENTIAL CARE FACILITY NOT LIABLE FOR ASSAULT ON PLAINTIFF EMPLOYEE BY A RESIDENT, ASSAULT WAS NOT FORESEEABLE (THIRD DEPT))/FORESEEABILITY (EMPLOYER LIABILITY FOR THIRD PARTY ASSAULT, RESIDENTIAL CARE FACILITY NOT LIABLE FOR ASSAULT ON PLAINTIFF EMPLOYEE BY A RESIDENT, ASSAULT WAS NOT FORESEEABLE (THIRD DEPT))

NEGLIGENCE, EMPLOYMENT LAW.

RESIDENTIAL CARE FACILITY NOT LIABLE FOR ASSAULT ON PLAINTIFF EMPLOYEE BY A RESIDENT, ASSAULT WAS NOT FORESEEABLE (THIRD DEPT).

The Third Department determined the residential care facility's motion for summary judgment was properly granted in this action by an employee of the facility stemming from an assault by a resident. The court held that there was no evidence demonstrating the facility was aware of the danger posed by the resident, i.e., no evidence the assault was foreseeable from the standpoint of the employer:

> Defendant, "like any other property owner, has a duty to protect persons lawfully present on its premises, including patients and visitors, from the reasonably foreseeable criminal or tortious acts of third persons" ... . Accordingly, since "liability require[s] a showing that the wrongdoer's conduct was foreseeable to the defendant"... , defendant may "establish[] its entitlement to judgment as a matter of law by showing that it had no notice of any prior similar incidents or similar aggressive behavior by the patient such that it should have anticipated the alleged incident and protected the plaintiff from it" ... .
>
> Here, while plaintiff and her coworkers may have been aware of the resident's history of assaultive conduct, there is nothing beyond the speculation of plaintiff and a coworker (her daughter) to suggest that anyone employed by defendant had a similar awareness. * * * ... [D]efendant satisfied its ... burden of showing that it could not have reasonably anticipated the attack on plaintiff ... . **Boudreaux v Columbia Mem. Hosp., 2017 NY Slip Op 07513, Third Dept 10-26-17**

NEGLIGENCE (REAR-END COLLISION, BASES FOR DEFENSE EXPERT'S OPINION THAT PLAINTIFF'S INJURIES COULD NOT HAVE BEEN CAUSED BY THE REAR-END COLLISION WERE NOT SUFFICIENTLY DESCRIBED, NEW DAMAGES TRIAL ORDERED (SECOND DEPT))/EVIDENCE (INJURIES, EXPERT OPINION, BASES FOR DEFENSE EXPERT'S OPINION THAT PLAINTIFF'S INJURIES COULD NOT HAVE BEEN CAUSED BY THE REAR-END COLLISION WERE NOT SUFFICIENTLY DESCRIBED, NEW DAMAGES TRIAL ORDERED (SECOND DEPT))/EXPERT OPINION (INJURIES, EXPERT OPINION, BASES FOR DEFENSE EXPERT'S OPINION THAT PLAINTIFF'S INJURIES COULD NOT HAVE BEEN CAUSED BY THE REAR-END COLLISION WERE NOT SUFFICIENTLY DESCRIBED, NEW DAMAGES TRIAL ORDERED (SECOND DEPT))/TRAFFIC ACCIDENTS (INJURIES, EXPERT OPINION, BASES FOR DEFENSE EXPERT'S OPINION THAT PLAINTIFF'S INJURIES COULD NOT HAVE BEEN CAUSED BY THE REAR-END COLLISION WERE NOT SUFFICIENTLY DESCRIBED, NEW DAMAGES TRIAL ORDERED (SECOND DEPT))/REAR-END COLLISIONS (INJURIES, EXPERT OPINION, BASES FOR DEFENSE EXPERT'S OPINION THAT PLAINTIFF'S INJURIES COULD NOT HAVE BEEN CAUSED BY THE REAR-END COLLISION WERE NOT SUFFICIENTLY DESCRIBED, NEW DAMAGES TRIAL ORDERED (SECOND DEPT))/CAUSATION (INJURIES, EXPERT OPINION, BASES FOR DEFENSE EXPERT'S OPINION THAT PLAINTIFF'S INJURIES COULD NOT HAVE BEEN CAUSED BY THE REAR-END COLLISION WERE NOT SUFFICIENTLY DESCRIBED, NEW DAMAGES TRIAL ORDERED (SECOND DEPT))

NEGLIGENCE, EVIDENCE.

BASES FOR DEFENSE EXPERT'S OPINION THAT PLAINTIFF'S INJURIES COULD NOT HAVE BEEN CAUSED BY THE REAR-END COLLISION WERE NOT SUFFICIENTLY DESCRIBED, NEW DAMAGES TRIAL ORDERED (SECOND DEPT).

The Second Department determined the defendants' expert (Bowles) should not have been allowed to testify plaintiff's knee injuries could not have been caused by the rear-end collision. The bases of the expert's opinion were not sufficiently described:

> Here, the defendants did not sustain their burden of establishing that Bowles's opinion that the force generated by the accident could not have caused the plaintiff's knee injuries was based on generally accepted principles and methodologies ... or that there was a proper foundation for the admission of that opinion ... . The expert disclosure notice simply stated that Bowles analyzed "the medical and engineering aspects of the accident." While the defendants cited to three works in opposition to the motion in limine, they did not identify the authors, years of publication, and contents of those works, or any explanation as to their relevance in evaluating the cause of knee injuries. Moreover, the defendants provided no description of the methodology Bowles utilized to determine the force of the accident, and the biomechanical engineering principles he relied upon in reaching his conclusion that the force generated by the accident could not have caused the plaintiff's knees to come into contact with the vehicle dashboard. Under these circumstances, the Supreme Court should have granted the plaintiff's motion to the extent of precluding Bowles from offering his opinion testimony that the force generated by the accident could not have caused the plaintiff's knee injuries ... . Accordingly, we reverse the judgment and remit the matter to the Supreme Court, Suffolk County, for a new trial on the issue of damages. **Dovberg v Laubach, 2017 NY Slip Op 07238, Second Dept 10-18-17**

NEGLIGENCE (FUTURE PAIN AND SUFFERING, NONTREATING PHYSICIAN WHO SAW PLAINTIFF ONCE CAN TESTIFY ABOUT FUTURE PAIN AND SUFFERING, TESTIMONY SHOULD NOT HAVE BEEN PRECLUDED AND FUTURE PAIN AND SUFFERING SHOULD HAVE BEEN CONSIDERED BY THE JURY (SECOND DEPT))/EVIDENCE (PAIN AND SUFFERING, FUTURE PAIN AND SUFFERING, NONTREATING PHYSICIAN WHO SAW PLAINTIFF ONCE CAN TESTIFY ABOUT FUTURE PAIN AND SUFFERING, TESTIMONY SHOULD NOT HAVE BEEN PRECLUDED AND FUTURE PAIN AND SUFFERING SHOULD HAVE BEEN CONSIDERED BY THE JURY (SECOND DEPT))/NONTREATING PHYSICIAN (FUTURE PAIN AND SUFFERING, NONTREATING PHYSICIAN WHO SAW PLAINTIFF ONCE CAN TESTIFY ABOUT FUTURE PAIN AND SUFFERING, TESTIMONY SHOULD NOT HAVE BEEN PRECLUDED AND FUTURE PAIN AND SUFFERING SHOULD HAVE BEEN CONSIDERED BY THE JURY (SECOND DEPT))/EXPERT OPINION (FUTURE PAIN AND SUFFERING, NONTREATING PHYSICIAN WHO SAW PLAINTIFF ONCE CAN TESTIFY ABOUT FUTURE PAIN AND SUFFERING, TESTIMONY SHOULD NOT HAVE BEEN PRECLUDED AND FUTURE PAIN AND SUFFERING SHOULD HAVE BEEN CONSIDERED BY THE JURY (SECOND DEPT)) /PAIN AND SUFFERING (FUTURE PAIN AND SUFFERING, NONTREATING PHYSICIAN WHO SAW PLAINTIFF ONCE CAN TESTIFY ABOUT FUTURE PAIN AND SUFFERING, TESTIMONY SHOULD NOT HAVE BEEN PRECLUDED AND FUTURE PAIN AND SUFFERING SHOULD HAVE BEEN CONSIDERED BY THE JURY (SECOND DEPT))

NEGLIGENCE, EVIDENCE.

NONTREATING PHYSICIAN WHO SAW PLAINTIFF ONCE CAN TESTIFY ABOUT FUTURE PAIN AND SUFFERING, TESTIMONY SHOULD NOT HAVE BEEN PRECLUDED AND FUTURE PAIN AND SUFFERING SHOULD HAVE BEEN CONSIDERED BY THE JURY (SECOND DEPT).

The Second Department, ordering a new trial on damages for future pain and suffering, held that a nontreating physician (Lubliner) who met with the plaintiff once could testify about future pain and suffering. The trial court should not have precluded that testimony and should not have refused to submit the determination of damages for future pain and suffering to the jury:

> ... [A] nontreating physician is not precluded from testifying as to a relevant medical opinion ... . A physician who sees the plaintiff once can testify as to the plaintiff's future prognosis, even if the witness does not provide treatment ... . Further, a nontreating physician can testify as to future pain and suffering ... . Thus, Lubliner was improperly precluded from testifying as to future pain and suffering. The weight to be given his testimony was a consideration for the jury. Further, the issue of damages for future pain and suffering should have been submitted to the jury. Accordingly, the plaintiff is entitled to a new trial on the issue of damages for future pain and suffering. **Knight v Barsch, 2017 NY Slip Op 07244, Second Dept 10-18-17**

NEGLIGENCE (COMPLAINT AGAINST STATE TROOPER BASED UPON INJURY TO A DOCTOR BY A VIOLENT PATIENT BROUGHT TO THE HOSPITAL BY THE TROOPER DISMISSED ON GOVERNMENTAL IMMUNITY GROUNDS (THIRD DEPT))/IMMUNITY (GOVERNMENTAL, COMPLAINT AGAINST STATE TROOPER BASED UPON INJURY TO A DOCTOR BY A VIOLENT PATIENT BROUGHT TO THE HOSPITAL BY THE TROOPER DISMISSED ON GOVERNMENTAL IMMUNITY GROUNDS (THIRD DEPT))/POLICE (NEGLIGENCE, IMMUNITY, COMPLAINT AGAINST STATE TROOPER BASED UPON INJURY TO A DOCTOR BY A VIOLENT PATIENT BROUGHT TO THE HOSPITAL BY THE TROOPER DISMISSED ON GOVERNMENTAL IMMUNITY GROUNDS (THIRD DEPT))/SPECIAL RELATIONSHIP (NEGLIGENCE, IMMUNITY, POLICE, COMPLAINT AGAINST STATE TROOPER BASED UPON INJURY TO A DOCTOR BY A VIOLENT PATIENT BROUGHT TO THE HOSPITAL BY THE TROOPER DISMISSED ON GOVERNMENTAL IMMUNITY GROUNDS (THIRD DEPT))

NEGLIGENCE, IMMUNITY.

COMPLAINT AGAINST STATE TROOPER BASED UPON INJURY TO A DOCTOR BY A VIOLENT PATIENT BROUGHT TO THE HOSPITAL BY THE TROOPER DISMISSED ON GOVERNMENTAL IMMUNITY GROUNDS (THIRD DEPT).

The Third Department determined the Court of Claims should have dismissed the action against a state trooper as prohibited by governmental immunity. A doctor was injured by a violent patient brought to the hospital by the trooper. The Court of Claims held there was a question of fact whether a special relationship existed between the trooper and the doctor. The Third Department disagreed:

> ... [W]e agree with defendant that it was entitled to summary judgment dismissing the entirety of the claim on the basis of governmental immunity. **Feeney v State of New York, 2017 NY Slip Op 07359, Third Dept 10-19-17**

NEGLIGENCE (PLAINTIFF WAS ONLY ABLE TO SPECULATE ABOUT THE CAUSE OF HER SLIP AND FALL, DEFENDANT'S SUMMARY JUDGMENT MOTION PROPERLY GRANTED (SECOND DEPT))/EVIDENCE (SLIP AND FALL, PLAINTIFF WAS ONLY ABLE TO SPECULATE ABOUT THE CAUSE OF HER SLIP AND FALL, DEFENDANT'S SUMMARY JUDGMENT MOTION PROPERLY GRANTED (SECOND DEPT))/SLIP AND FALL (PLAINTIFF WAS ONLY ABLE TO SPECULATE ABOUT THE CAUSE OF HER SLIP AND FALL, DEFENDANT'S SUMMARY JUDGMENT MOTION PROPERLY GRANTED (SECOND DEPT))

NEGLIGENCE, EVIDENCE.

PLAINTIFF WAS ONLY ABLE TO SPECULATE ABOUT THE CAUSE OF HER SLIP AND FALL, DEFENDANT'S SUMMARY JUDGMENT MOTION PROPERLY GRANTED (SECOND DEPT).

The Second Department determined defendant restaurant's motion for summary judgment in this slip and fall case was properly granted. Plaintiff testified "it could have been grease from the kitchen" which caused the fall. Plaintiff's failure to identify the cause of her fall was fatal to the lawsuit:

> In a slip-and-fall case, a plaintiff's inability to identify the cause of the fall is fatal to the cause of action because a finding that the defendant's negligence, if any, proximately caused the plaintiff's injuries would be based on speculation ... . Here, the defendant established its prima facie entitlement to summary judgment by demonstrating that the plaintiff could not identify the cause of her fall ... . **Cross v Friendship Rest. Group, LLC, 2017 NY Slip Op 07428, Second Dept 10-25-17**

NEGLIGENCE (CONFLICTING TESTIMONY RAISED QUESTIONS OF FACT IN THIS STAIRWAY FALL CASE WHETHER THE HANDRAIL WAS LOOSE AND LANDLORD HAD NOTICE OF THE CONDITION (THIRD DEPT))/SLIP AND FALL (STAIRWAY, HANDRAIL, CONFLICTING TESTIMONY RAISED QUESTIONS OF FACT IN THIS STAIRWAY FALL CASE WHETHER THE HANDRAIL WAS LOOSE AND LANDLORD HAD NOTICE OF THE CONDITION (THIRD DEPT))/STAIRWAY (SLIP AND FALL, CONFLICTING TESTIMONY RAISED QUESTIONS OF FACT IN THIS STAIRWAY FALL CASE WHETHER THE HANDRAIL WAS LOOSE AND LANDLORD HAD NOTICE OF THE CONDITION (THIRD DEPT))/HANDRAIL (SLIP AND FALL, CONFLICTING TESTIMONY RAISED QUESTIONS OF FACT IN THIS STAIRWAY FALL CASE WHETHER THE HANDRAIL WAS LOOSE AND LANDLORD HAD NOTICE OF THE CONDITION (THIRD DEPT))/LANDLORD-TENANT (CONFLICTING TESTIMONY RAISED QUESTIONS OF FACT IN THIS STAIRWAY FALL CASE WHETHER THE HANDRAIL WAS LOOSE AND ONE OF THE LANDLORDS HAD NOTICE OF THE CONDITION, OUT-OF-POSSESSION LANDLORD NOT LIABLE (THIRD DEPT))/OUT-OF-POSSESSION LANDLORD (CONFLICTING TESTIMONY RAISED QUESTIONS OF FACT IN THIS STAIRWAY FALL CASE WHETHER THE HANDRAIL WAS LOOSE AND ONE OF THE LANDLORDS HAD NOTICE OF THE CONDITION, OUT-OF-POSSESSION LANDLORD NOT LIABLE (THIRD DEPT))

NEGLIGENCE, LANDLORD-TENANT.

CONFLICTING TESTIMONY RAISED QUESTIONS OF FACT IN THIS STAIRWAY FALL CASE WHETHER THE HANDRAIL WAS LOOSE AND ONE OF THE LANDLORDS HAD NOTICE OF THE CONDITION, OUT-OF-POSSESSION LANDLORD NOT LIABLE (THIRD DEPT).

The Third Department determined conflicting testimony created questions of fact whether a handrail for an exterior stairway was loose, whether the landlord was aware the handrail was loose, and whether the loose handrail was proximate cause of plaintiff's fall. The court further noted that one of the owners was an out-of-possession landlord who had never seen the property and did not have any responsibility for maintenance of the property. The complaint against the out-of-possession landlord was therefore properly dismissed:

> To establish a prima facie entitlement to summary judgment, defendants were required to demonstrate that they "maintained the premises in a reasonably safe condition and neither created nor had actual or constructive notice of the allegedly dangerous condition" ... . * * * To that end, [the landlord] testified that he periodically inspected the stability of the handrail when he visited the premises during the 10 to 15 years following its installation — including within days after [plaintiff's] fall — and always found it to be secure. He further testified that he had not received any complaints about the handrail prior to [plaintiff's] fall, nor had he performed any maintenance or repairs on it either before or after this incident. Defendants also proffered the deposition testimony of the tenant occupying the adjoining duplex apartment at the time of the accident, who stated that he and his "overweight" father regularly used the handrail in question while traversing the exterior stairs and that it was "very sturdy" and never exhibited any movement. In addition, defendants tendered the sworn affidavit of a professional engineer who personally inspected the property, concluded that the stairs and handrail in question were in full compliance with the applicable codes and opined that they provided a safe means of ingress and egress. Such proof was sufficient to shift the burden to plaintiffs to establish the existence of a material issue of fact requiring a trial ... .
>
> In opposition, plaintiffs raised questions of fact as to whether [the landlord] had actual or constructive notice of a dangerous condition with regard to the handrail. Plaintiffs' son testified that when he and [the landlord] toured the property prior to the commencement of his tenancy, he observed — and Loso acknowledged — that the handrail was loose. He testified further that, during his occupancy of the premises, the handrail "moved and threw [him] off balance" every time he would grab it. Both he and his wife explained that they complained to [the landlord] about the condition of the handrail on a number of occasions, the most recent of which occurred approximately two months prior to the accident in question after their son fell while attempting to grasp the handrail as he descended the stairs. Plaintiffs' son further explained that, in reply to one of his complaints, [the landlord] stated that he would "have [it] take[n] care of." Moreover, plaintiffs' son and daughter-in-law each provided detailed testimony calling into question [the landlord's] claim that he did not repair the handrail in question in any way after the incident, noting that [the landlord] subsequently installed a second handrail on the opposite side of the stairway and that, following such installation, the handrail at issue "wouldn't move" at all. **Kraft v Loso, 2017 NY Slip Op 07514, Third Dept 10-26-17**

NEGLIGENCE (MEDICAID LIEN, SETTLEMENT AWARD, PLAINTIFF'S ARGUMENT THAT THE ENTIRE SETTLEMENT AMOUNT WAS ALLOCATED TO PAIN AND SUFFERING AND NOTHING WAS AVAILABLE TO PAY THE MEDICAID LIEN REJECTED (FIRST DEPT))/MEDICAID (LIEN, NEGLIGENCE, SETTLEMENT AWARD, PLAINTIFF'S ARGUMENT THAT THE ENTIRE SETTLEMENT AMOUNT WAS ALLOCATED TO PAIN AND SUFFERING AND NOTHING WAS AVAILABLE TO PAY THE MEDICAID LIEN REJECTED (FIRST DEPT))/LIENS (MEDICAL COSTS, SETTLEMENT AWARD, PLAINTIFF'S ARGUMENT THAT THE ENTIRE SETTLEMENT AMOUNT WAS ALLOCATED TO PAIN AND SUFFERING AND NOTHING WAS AVAILABLE TO PAY THE MEDICAID LIEN REJECTED (FIRST DEPT))/PAIN AND SUFFERING (MEDICAID LIEN, SETTLEMENT AWARD, PLAINTIFF'S ARGUMENT THAT THE ENTIRE SETTLEMENT AMOUNT WAS ALLOCATED TO PAIN AND SUFFERING AND NOTHING WAS AVAILABLE TO PAY THE MEDICAID LIEN REJECTED (FIRST DEPT))/ATTORNEYS (MEDICAID LIEN, NEGLIGENCE, SETTLEMENT AWARD, PLAINTIFF'S COUNSEL'S ARGUMENT THAT THE ENTIRE SETTLEMENT AMOUNT WAS ALLOCATED TO PAIN AND SUFFERING AND NOTHING WAS AVAILABLE TO PAY THE MEDICAID LIEN REJECTED (FIRST DEPT))

NEGLIGENCE, MEDICAID, ATTORNEYS.

PLAINTIFF'S COUNSEL'S ARGUMENT THAT THE ENTIRE SETTLEMENT AMOUNT WAS ALLOCATED TO PAIN AND SUFFERING AND NOTHING WAS AVAILABLE TO PAY THE MEDICAID LIEN REJECTED (FIRST DEPT).

The First Department determined Supreme Court properly ordered payment of the full Medicaid (Department of Social Services, DSS) lien for medical bills from the over $4 million settlement in the underlying negligence action. The court rejected the claim that the entire settlement amount was directed at pain and suffering, and therefore was unavailable for the lien:

> In New York, it has long been recognized that a Medicaid lien will not be defeated by the mere declaration of a plaintiff's attorney that the settlement does not relate to medical expenses... .. As we have explained, the court's determination "is not foreclosed by the form of the settlement documents or the language used by the attorneys in the settlement stipulation, if that form and language do not truly reflect the consideration of the settlement, or are chosen merely as a means to defeat DSS' recovery." ... .Among the factors we found relevant to the court's determination was whether the pleadings asserted a claim for medical expenses ... .
>
> In this case, after the parties declined the opportunity for a hearing, the motion court properly considered all of the surrounding facts and circumstances in making its determination of the portion of plaintiffs' $4.3 million settlement attributable to the medical expenses paid by Medicaid. Plaintiffs never proffered any breakdown of the settlement amount, nor disclosed its terms. Rather, plaintiffs characterized the entire payment as attributable to plaintiff's pain and suffering, notwithstanding the fact that in their complaint, plaintiffs had sought recompense for the medical care and attention he had incurred. The motion court reasonably rejected this characterization as an effort to deprive DSS of its Medicaid lien.
>
> Further, plaintiffs had ignored the request by DSS that it be permitted to participate in settlement discussions. As noted, although the court ordered a hearing ... , plaintiffs waived their right to it. And the court noted that the Medicaid lien, representing $250,070 paid over nine years, constituted less than 6% of the total settlement and thus did not unduly prejudice plaintiff's recovery.
>
> Under these circumstances, the motion court fairly determined that DSS was entitled to recoupment of its entire lien. **D.J. v 636 Holding Corp., 2017 NY Slip Op 07085, First Dept 10-10-17**

MEDICAL MALPRACTICE (THE CONCLUSORY ALLEGATIONS IN PLAINTIFF'S EXPERT'S AFFIDAVIT WERE INSUFFICIENT TO RAISE A QUESTION OF FACT ABOUT THE ADEQUACY OF PLAINTIFF'S TREATMENT, APPELLATE DIVISION REVERSED, TWO JUSTICE DISSENT (FIRST DEPT))/NEGLIGENCE (MEDICAL MALPRACTICE, THE CONCLUSORY ALLEGATIONS IN PLAINTIFF'S EXPERT'S AFFIDAVIT WERE INSUFFICIENT TO RAISE A QUESTION OF FACT ABOUT THE ADEQUACY OF PLAINTIFF'S TREATMENT, APPELLATE DIVISION REVERSED, TWO JUSTICE DISSENT (FIRST DEPT))/EVIDENCE (MEDICAL MALPRACTICE, THE CONCLUSORY ALLEGATIONS IN PLAINTIFF'S EXPERT'S AFFIDAVIT WERE INSUFFICIENT TO RAISE A QUESTION OF FACT ABOUT THE ADEQUACY OF PLAINTIFF'S TREATMENT, APPELLATE DIVISION REVERSED, TWO JUSTICE DISSENT (FIRST DEPT))/EXPERT OPINION (THE CONCLUSORY ALLEGATIONS IN PLAINTIFF'S EXPERT'S AFFIDAVIT WERE INSUFFICIENT TO RAISE A QUESTION OF FACT ABOUT THE ADEQUACY OF PLAINTIFF'S TREATMENT, APPELLATE DIVISION REVERSED, TWO JUSTICE DISSENT (FIRST DEPT))

NEGLIGENCE, MEDICAL MALPRACTICE, EVIDENCE.

THE CONCLUSORY ALLEGATIONS IN PLAINTIFF'S EXPERT'S AFFIDAVIT WERE INSUFFICIENT TO RAISE A QUESTION OF FACT ABOUT THE ADEQUACY OF PLAINTIFF'S TREATMENT, APPELLATE DIVISION REVERSED, TWO JUSTICE DISSENT (FIRST DEPT).

The First Department, over a two justice dissent, reversing Supreme Court, determined plaintiff's expert failed to raise a question of fact about a deviation from an accepted standard of care in this medical malpractice action. The decision is detailed and fact specific and cannot be fairly summarized here. The essence of the malpractice claim was the failure to diagnose a micro-arteriovenous malformation (micro-AVM) in plaintiff's brain. Plaintiff had sought treatment after injuring her head in a fall and subsequently experiencing headaches and vision and balance problems:

> ... [P]laintiffs failed to raise a triable issue of fact. Plaintiffs submitted the affirmation of a neurological expert offering opinions in conclusory fashion, without evidentiary substantiation. Plaintiffs' neurological expert opined that the accepted standard of medical care on plaintiff's presentation of symptoms following her ... hemorrhage was to order a "cerebral MRI and MRA or CTA [computed tomography angiography] or conventional cerebral angiography." The disjunctive phrasing of this statement apparently indicates that, in plaintiffs' expert's view, performance of either noninvasive or invasive testing would have been sufficient to meet the accepted standard of medical care. Put otherwise, the apparent view of the expert is that the performance of noninvasive tests such as an MRI and MRA would have obviated the need for a cerebral angiogram.
>
> The record clearly establishes, however, that plaintiff's micro-AVM was MRI-occult, and thus was never detectable by means of noninvasive testing ... .
>
> Plaintiffs' expert's conclusory opinion that noninvasive testing would have led to an earlier diagnosis failed to address the opinion of defendants' expert (based on the noninvasive testing over the six-month period after plaintiff left defendant's care) that the MRI-occult AVM was not diagnosable by such testing. Moreover, plaintiffs' expert failed to identify a basis for the apparent conclusion that, as an alternative to noninvasive testing, cerebral angiography was indicated prior to plaintiff's ... hemorrhage ... . **Brooks v April, 2017 NY Slip Op 07386, First Dept 10-24-17**

MEDICAL MALPRACTICE (PLAINTIFF'S EXPERTS DID NOT RAISE A QUESTION OF FACT ABOUT THE ADEQUACY OF DEFENDANTS' CARE, AFFIDAVITS WERE CONCLUSORY, DID NOT ADDRESS PROXIMATE CAUSE, AND DID NOT PROVIDE A FOUNDATION FOR OPINIONS OUTSIDE THE EXPERTS' AREA OF EXPERTISE (SECOND DEPT))/NEGLIGENCE (MEDICAL MALPRACTICE, (PLAINTIFF'S EXPERTS DID NOT RAISE A QUESTION OF FACT ABOUT THE ADEQUACY OF DEFENDANTS' CARE, AFFIDAVITS WERE CONCLUSORY, DID NOT ADDRESS PROXIMATE CAUSE, AND DID NOT PROVIDE A FOUNDATION FOR OPINIONS OUTSIDE THE EXPERTS' AREA OF EXPERTISE (SECOND DEPT))/EVIDENCE (MEDICAL MALPRACTICE, PLAINTIFF'S EXPERTS DID NOT RAISE A QUESTION OF FACT ABOUT THE ADEQUACY OF DEFENDANTS' CARE, AFFIDAVITS WERE CONCLUSORY, DID NOT ADDRESS PROXIMATE CAUSE, AND DID NOT PROVIDE A FOUNDATION FOR OPINIONS OUTSIDE THE EXPERTS' AREA OF EXPERTISE (SECOND DEPT))/EXPERT OPINION (MEDICAL MALPRACTICE, (PLAINTIFF'S EXPERTS DID NOT RAISE A QUESTION OF FACT ABOUT THE ADEQUACY OF DEFENDANTS' CARE, AFFIDAVITS WERE CONCLUSORY, DID NOT ADDRESS PROXIMATE CAUSE, AND DID NOT PROVIDE A FOUNDATION FOR OPINIONS OUTSIDE THE EXPERTS' AREA OF EXPERTISE (SECOND DEPT))

NEGLIGENCE, MEDICAL MALPRACTICE, EVIDENCE.

PLAINTIFF'S EXPERTS DID NOT RAISE A QUESTION OF FACT ABOUT THE ADEQUACY OF DEFENDANTS' CARE, AFFIDAVITS WERE CONCLUSORY, DID NOT ADDRESS PROXIMATE CAUSE, AND DID NOT PROVIDE A FOUNDATION FOR OPINIONS OUTSIDE THE EXPERTS' AREA OF EXPERTISE (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the conclusory affidavits of plaintiff's experts, and the failure to lay a foundation for opinions outside their areas of expertise, failed to raise a question of fact about the adequacy of defendants' care:

> ... [T]he plaintiff's evidence, including the expert affirmation of a radiologist and the affidavit of a gastroenterologist, was insufficient to raise a triable issue of fact. The plaintiff's experts did not differentiate between the acts or omissions of the various defendants, but merely stated in conclusory terms that all of the defendants who looked at the CT scan should have observed and diagnosed the esophageal perforation sooner. They also failed to lay a foundation tending to support the reliability of opinions rendered outside their fields of expertise. As such, the affirmation and affidavit did not raise a triable issue of fact ... . In any event, ... the plaintiff failed to submit evidence in admissible form showing that [defendants] departed from accepted standards of medical care by relying on the radiologist's interpretation ... . The opinions of the plaintiff's experts were conclusory and failed to address specific assertions made by the [defendants'] experts ... , including those regarding proximate causation ... . As such, there are no conflicting expert opinions that warrant a jury determination regarding the cause of action alleging medical malpractice insofar as asserted against [defendants]. **Tsitrin v New York Community Hosp., 2017 NY Slip Op 07480, Second Dept 10-25-17**

NEGLIGENCE (MUNICIPAL LAW, SIDEWALK SLIP AND FALL, DEFENDANT DID NOT DEMONSTRATE AS A MATTER OF LAW SHE WAS ENTITLED TO THE NYC ADMINISTRATIVE CODE EXEMPTION FROM LIABILITY FOR A SIDEWALK SLIP AND FALL, DEFENDANT HAD TWO OTHER HOMES (FIRST DEPT))/MUNICIPAL LAW (NEGLIGENCE, SIDEWALK SLIP AND FALL, DEFENDANT DID NOT DEMONSTRATE AS A MATTER OF LAW SHE WAS ENTITLED TO THE NYC ADMINISTRATIVE CODE EXEMPTION FROM LIABILITY FOR A SIDEWALK SLIP AND FALL, DEFENDANT HAD TWO OTHER HOMES (FIRST DEPT))/SLIP AND FALL (MUNICIPAL LAW, SIDEWALK SLIP AND FALL, DEFENDANT DID NOT DEMONSTRATE AS A MATTER OF LAW SHE WAS ENTITLED TO THE NYC ADMINISTRATIVE CODE EXEMPTION FROM LIABILITY FOR A SIDEWALK SLIP AND FALL, DEFENDANT HAD TWO OTHER HOMES (FIRST DEPT))/SIDEWALKS (SLIP AND FALL, MUNICIPAL LAW, DEFENDANT DID NOT DEMONSTRATE AS A MATTER OF LAW SHE WAS ENTITLED TO THE NYC ADMINISTRATIVE CODE EXEMPTION FROM LIABILITY FOR A SIDEWALK SLIP AND FALL, DEFENDANT HAD TWO OTHER HOMES (FIRST DEPT))

NEGLIGENCE, MUNICIPAL LAW (NYC).

DEFENDANT DID NOT DEMONSTRATE AS A MATTER OF LAW SHE WAS ENTITLED TO THE NYC ADMINISTRATIVE CODE EXEMPTION FROM LIABILITY FOR A SIDEWALK SLIP AND FALL, DEFENDANT HAD TWO OTHER HOMES (FIRST DEPT).

The First Department determined defendant property-owner, Herbst, did not demonstrate as a matter of law that she was entitled to the New York City Administrative Code's owner-occupied exemption from liability for a sidewalk slip and fall. Defendant had homes in Israel and New Hampshire where she received mail when she was in the US:

> Plaintiff alleges that she tripped and fell over a misleveled sidewalk slab between properties owned by Herbst and by appellants. Herbst moved for summary judgment dismissing the complaint and cross-claims as against her on the ground that she is exempt from personal liability for failure to maintain the sidewalk because her property is a "one-, two- or three-family residential real property that is (i) in whole or in part, owner occupied, and (ii) used exclusively for residential purposes" ... .
>
> The [Administrative Code provision] does not expressly contain a primary residence requirement as part of the owner-occupied exemption ... , but the term "owner occupied" generally is used to mean that the owner regularly occupies the property as a residence. Further, the legislative history shows that the exemption recognizes "the inappropriateness of exposing small-property owners in residence, who have limited resources, to exclusive liability with respect to sidewalk maintenance and repair" ... .
>
> * * * ... Herbst did not demonstrate prima facie that she regularly occupies the New York property as a residence, so as to be entitled to the benefit of the exemption provided by Administrative Code § 7-210 as a matter of law ... . **Kalajian v 320 E. 50th St. Realty Co., 2017 NY Slip Op 07225, First Dept 10-17-17**

PRODUCTS LIABILITY

PRODUCTS LIABILITY (MANUFACTURERS' MOTION TO AMEND THEIR ANSWER TO ADD A COUNTERCLAIM FOR CONTRIBUTION AND INDEMNIFICATION AGAINST THE MOTHER OF THE INJURED CHILD IN THIS PRODUCTS LIABILITY ACTION PROPERLY DENIED, THE COUNTERCLAIM WAS APPARENTLY PROHIBITED BY THE RULE OF INTRAFAMILIAL IMMUNITY (FIRST DEPT))/NEGLIGENCE (PRODUCTS LIABILITY, MANUFACTURERS' MOTION TO AMEND THEIR ANSWER TO ADD A COUNTERCLAIM FOR CONTRIBUTION AND INDEMNIFICATION AGAINST THE MOTHER OF THE INJURED CHILD IN THIS PRODUCTS LIABILITY ACTION PROPERLY DENIED, THE COUNTERCLAIM WAS APPARENTLY PROHIBITED BY THE RULE OF INTRAFAMILIAL IMMUNITY (FIRST DEPT))/IMMUNITY (PRODUCTS LIABILITY, MANUFACTURERS' MOTION TO AMEND THEIR ANSWER TO ADD A COUNTERCLAIM FOR CONTRIBUTION AND INDEMNIFICATION AGAINST THE MOTHER OF THE INJURED CHILD IN THIS PRODUCTS LIABILITY ACTION PROPERLY DENIED, THE COUNTERCLAIM WAS APPARENTLY PROHIBITED BY THE RULE OF INTRAFAMILIAL IMMUNITY (FIRST DEPT))/INTRAFAMILIAL IMMUNITY (MANUFACTURERS' MOTION TO AMEND THEIR ANSWER TO ADD A COUNTERCLAIM FOR CONTRIBUTION AND INDEMNIFICATION AGAINST THE MOTHER OF THE INJURED CHILD IN THIS PRODUCTS LIABILITY ACTION PROPERLY DENIED, THE COUNTERCLAIM WAS APPARENTLY PROHIBITED BY THE RULE OF INTRAFAMILIAL IMMUNITY (FIRST DEPT))

PRODUCTS LIABILITY, NEGLIGENCE, IMMUNITY.

MANUFACTURERS' MOTION TO AMEND THEIR ANSWER TO ADD A COUNTERCLAIM FOR CONTRIBUTION AND INDEMNIFICATION AGAINST THE MOTHER OF THE INJURED CHILD IN THIS PRODUCTS LIABILITY ACTION PROPERLY DENIED, THE COUNTERCLAIM WAS APPARENTLY PROHIBITED BY THE RULE OF INTRAFAMILIAL IMMUNITY (FIRST DEPT).

The First Department determined the manufacturers' motion to amend their answer to assert a counterclaim for contribution and indemnification against the mother of the injured child was properly denied. Mother purchased a blender made by defendants. She opened the box but did not take the blender out of the box. When she was out of the room her child took the blender out of the box, plugged it in and was injured. The defendants argued the rule of intrafamilial immunity did not apply:

> After plaintiff's deposition revealed the circumstances of the accident, defendants moved for leave to amend their answers to assert a counterclaim against her for contribution and indemnification. They argued that the general rule of intrafamilial immunity (Holodook v Spencer, 36 NY2d 35 [1974]), does not apply when a parent, like plaintiff here, negligently entrusts an instrumentality, which she alleged was unreasonably defective, to a child, thereby creating a risk to third parties ... .
>
> ... Here the proposed counterclaims, as pleaded, state nothing other than a claim that plaintiff negligently supervised her own children with respect to a "common, daily household hazard[]" ... , which ... does not implicate any duty owed to the public at large, and is insufficient to state a cognizable claim under Holodook. **Y.A. v Conair Corp., 2017 NY Slip Op 07542, First Dept 10-26-17**

REAL PROPERTY LAW

REAL PROPERTY LAW (A RIGHT OF FIRST REFUSAL IN A DEED IS NOT A RESERVATION WITHIN THE MEANING OF THE STRANGER TO THE DEED RULE (SECOND DEPT))/CIVIL PROCEDURE (A RIGHT OF FIRST REFUSAL IN A DEED IS NOT A RESERVATION WITHIN THE MEANING OF THE STRANGER TO THE DEED RULE, PLAINTIFFS FAILED TO GIVE THE NOTICE REQUIRED BY THE RIGHT OF FIRST REFUSAL, MATTER IS NOT YET A JUSTICIABLE CONTROVERSY (SECOND DEPT))/DEEDS (A RIGHT OF FIRST REFUSAL IN A DEED IS NOT A RESERVATION WITHIN THE MEANING OF THE STRANGER TO THE DEED RULE, PLAINTIFFS FAILED TO GIVE THE NOTICE REQUIRED BY THE RIGHT OF FIRST REFUSAL, MATTER IS NOT YET A JUSTICIABLE CONTROVERSY (SECOND DEPT))/RIGHT OF FIRST REFUSAL (A RIGHT OF FIRST REFUSAL IN A DEED IS NOT A RESERVATION WITHIN THE MEANING OF THE STRANGER TO THE DEED RULE, PLAINTIFFS FAILED TO GIVE THE NOTICE REQUIRED BY THE RIGHT OF FIRST REFUSAL, MATTER IS NOT YET A JUSTICIABLE CONTROVERSY (SECOND DEPT))/JUSTICIABLE CONTROVERSY (A RIGHT OF FIRST REFUSAL IN A DEED IS NOT A RESERVATION WITHIN THE MEANING OF THE STRANGER TO THE DEED RULE, PLAINTIFFS FAILED TO GIVE THE NOTICE REQUIRED BY THE RIGHT OF FIRST REFUSAL, MATTER IS NOT YET A JUSTICIABLE CONTROVERSY (SECOND DEPT))/STRANGER TO THE DEED RULE (A RIGHT OF FIRST REFUSAL IN A DEED IS NOT A RESERVATION WITHIN THE MEANING OF THE STRANGER TO THE DEED RULE, PLAINTIFFS FAILED TO GIVE THE NOTICE REQUIRED BY THE RIGHT OF FIRST REFUSAL, MATTER IS NOT YET A JUSTICIABLE CONTROVERSY (SECOND DEPT))

REAL PROPERTY LAW, CIVIL PROCEDURE.

A RIGHT OF FIRST REFUSAL IN A DEED IS NOT A RESERVATION WITHIN THE MEANING OF THE STRANGER TO THE DEED RULE, PLAINTIFFS FAILED TO GIVE THE NOTICE REQUIRED BY THE RIGHT OF FIRST REFUSAL, MATTER IS NOT YET A JUSTICIABLE CONTROVERSY (SECOND DEPT).

The Second Department determined Supreme Court properly denied plaintiff's motions for summary judgment in a declaratory judgment action about the validity of a right of first refusal in a deed. One of the defendant had conveyed vacant land to plaintiffs. The deed included a right of first refusal in favor of the defendants if the plaintiffs received a bona fide offer for the land. The plaintiffs received an offer from the town which was to preserve the land as undeveloped. Plaintiffs sought to have the defendants' right of first refusal declared invalid. The Second Department held that the "stranger to the deed" rule did not invalidate the right of first refusal and further held, because the plaintiffs never gave defendants the required notice of the bona fide offer, the matter was not yet a justiciable controversy:

> " [T]he long-accepted rule in this State holds that a deed with a reservation or exception by the grantor in favor of a third party, a so-called "stranger to the deed," does not create a valid interest in favor of that third party'" ... . Contrary to the plaintiffs' contention, a right of first refusal does not constitute a "reservation" falling within the ambit of that rule. A "reservation" is "always of something issuing, or coming out of, the thing or property granted, and not a part of the thing itself" ... . In practice, a "reservation" refers to an interest that touches the land, such as a right to use, occupy, profit from, or enjoy the land being conveyed ... . A right of first refusal, on the other hand, is a preemptive or contractual right to "receive an offer" ... . "[I]t is a restriction on the power of one party to sell without first making an offer of purchase to the other party upon the happening of a contingency: the owner's decision to sell to a third party" ... . Although a right of first refusal has been characterized as an interest in land ... , it is not the type of interest created by a reservation. Accordingly, the court properly determined that the rights of first refusal contained in the 1992 and 1997 deeds were not void under the stranger to the deed rule. **Peters v Smolian, 2017 NY Slip Op 07473, Second Dept 10-25-17**

REAL PROPERTY ACTIONS AND PROCEEDINGS LAW

REAL PROPERTY ACTIONS AND PROCEEDINGS LAW (RPAPL) (PETITIONER ENTITLED TO A LICENSE PURSUANT TO RPAPL 881 ALLOWING TEMPORARY ACCESS TO RESPONDENT'S PROPERTY DURING CONSTRUCTION ON PETITIONER'S ADJACENT PROPERTY (SECOND DEPT))/LICENSES (REAL PROPERTY ACTIONS AND PROCEEDINGS LAW, PETITIONER ENTITLED TO A LICENSE PURSUANT TO RPAPL 881 ALLOWING TEMPORARY ACCESS TO RESPONDENT'S PROPERTY DURING CONSTRUCTION ON PETITIONER'S ADJACENT PROPERTY (SECOND DEPT))

REAL PROPERTY ACTIONS AND PROCEEDINGS LAW (RPAPL).

PETITIONER ENTITLED TO A LICENSE PURSUANT TO RPAPL 881 ALLOWING TEMPORARY ACCESS TO RESPONDENT'S PROPERTY DURING CONSTRUCTION ON PETITIONER'S ADJACENT PROPERTY (SECOND DEPT).

The Second Department determined Supreme Court properly granted a petition pursuant to Real Property Actions and Proceedings Law (RPAPL) 881 allowing petitioner to temporarily enter respondent's property to facilitate construction nextdoor:

> ... Supreme Court properly granted the petition pursuant to RPAPL 881 for a license to temporarily access the appellant's property, since an assessment of the foregoing factors supported the petition. The affidavits of the executive director of the museum and the architect retained for the project demonstrated that the limited access and placement of structures would protect the appellant's property and would not interfere with the use of the premises; that the access would be limited to certain phases of the project and was expected by the petitioner to last no more than 18 to 24 months after the commencement of construction; that the temporary structures to be erected along the lot line would not be unduly invasive and were necessary in order for the petitioner to build out to the lot line while protecting the adjoining property as required by the New York City Building Code; that the public interest would be served by the development of the project; and that the appellant would be financially protected by the naming of the appellant as an additional insured on the relevant construction insurance policies and by the petitioner's promise to indemnify her for any loss... . Accordingly, the evidence supports the conclusion that the petitioner would suffer an undue hardship if the RPAPL 881 license was denied, whereas the appellant will experience temporary and relatively minor inconvenience as a result of the issuance of the license. **Matter of Queens Coll. Special Projects Fund, Inc. v Newman, 2017 NY Slip Op 07444, Second Dept 10-25-17**

REAL PROPERTY TAX LAW

REAL PROPERTY TAX LAW (A SERIES OF AGREEMENTS AND TRANSFERS OF INTERESTS IN REAL PROPERTY TO AN LLC CONSTITUTED A SINGLE TRANSACTION SUBJECT TO THE REAL PROPERTY TRANSFER TAX (FIRST DEPT))/ADMINISTRATIVE LAW (NYC REAL PROPERTY TRANSFER TAX, A SERIES OF AGREEMENTS AND TRANSFERS OF INTERESTS IN REAL PROPERTY TO AN LLC CONSTITUTED A SINGLE TRANSACTION SUBJECT TO THE REAL PROPERTY TRANSFER TAX (FIRST DEPT))/LIMITED LIABILITY CORPORATION LAW (NYC REAL PROPERTY TRANSFER TAX, A SERIES OF AGREEMENTS AND TRANSFERS OF INTERESTS IN REAL PROPERTY TO AN LLC CONSTITUTED A SINGLE TRANSACTION SUBJECT TO THE REAL PROPERTY TRANSFER TAX (FIRST DEPT))/REAL PROPERTY TRANSFER TAX (A SERIES OF AGREEMENTS AND TRANSFERS OF INTERESTS IN REAL PROPERTY TO AN LLC CONSTITUTED A SINGLE TRANSACTION SUBJECT TO THE REAL PROPERTY TRANSFER TAX (FIRST DEPT))/STEP TRANSACTION DOCTRINE (NYC REAL PROPERTY TRANSFER TAX, A SERIES OF AGREEMENTS AND TRANSFERS OF INTERESTS IN REAL PROPERTY TO AN LLC CONSTITUTED A SINGLE TRANSACTION SUBJECT TO THE REAL ESTATE TRANSFER TAX (FIRST DEPT))

REAL PROPERTY TAX LAW, ADMINISTRATIVE LAW, LIMITED LIABILITY CORPORATION LAW.

A SERIES OF AGREEMENTS AND TRANSFERS OF INTERESTS IN REAL PROPERTY TO AN LLC CONSTITUTED A SINGLE TRANSACTION SUBJECT TO THE REAL PROPERTY TRANSFER TAX (FIRST DEPT).

The First Department, in a full-fledged opinion by Justice Kahn, determined that the City of New York Tax Appeals Tribunal properly applied the step transaction doctrine to find that the transfer of interests in real property to an LLC, after a series of other transfers, constituted a single transaction and was subject to the real property transfer tax (RPTT):

> On April 9, 2007, petitioner GKK2 Herald LLC acquired a 45% tenant-in-common (TIC) interest in real property located at 2 Herald Square in Manhattan, while nonparty SLG LLC (SLG)acquired the remaining 55% TIC interest in the property. On December 14, 2010, 2 Herald Owner LLC (Herald LLC) was formed. On December 22, 2010, pursuant to a "TIC Contribution Agreement," petitioner and SLG contributed their respective 45% and 55% interests in the property to Herald LLC and in return received a 45% and 55% membership interest, respectively, in Herald LLC. The agreement also asserted that petitioner would pay "any and all" transfer taxes arising out of transactions. Furthermore, SLG had the sole right to terminate the TIC Contribution Agreement and sole conditional obligation to close.
>
> That same day, petitioner and SLG executed an operating agreement that provided that available profits and cash flow of the LLC would be "jointly determine[d] by members in their sole discretion," notwithstanding the set 45 percent and 55 percent membership interest. Petitioner and SLG also executed and delivered their respective deeds to their TIC interests in the property to Herald.
>
> Also on December 22, 2010, the parties entered into a Membership Interest Purchase Agreement (Purchase Agreement) under which petitioner agreed to sell and SLG agreed to purchase petitioner's 45 percent membership interest in Herald for $25,312,500, in addition to petitioner's release of its pro rata mortgage obligation, in the amount of $86,062,500 (totaling $111,375,000). Petitioner thereupon withdrew as a member of Herald LLC. Recitals in the Purchase Agreement describe the various separate but related transactions: the formation of Herald LLC, execution of LLC's Operating Agreement, acquisition of real property interest by Herald LLC and sale of petitioner's membership interest to SLG.
>
> Petitioner timely filed a Real Property Transfer Tax (RPTT) return reporting the sale of its membership interest in Herald LLC to SLG. The return reported no RPTT due, claiming that the transaction qualified for the "mere change

of form of ownership" exemption to imposition of the RPTT (Administrative Code of the City of NY § 11-2106[b][8]). **GKK 2 Herald LLC v City of N.Y. Tax Appeals Trib., 2017 NY Slip Op 07102, First Dept, 10-10-17**

UNEMPLOYMENT INSURANCE

UNEMPLOYMENT INSURANCE (REAL ESTATE BROKER WAS AN EMPLOYEE ENTITLED TO UNEMPLOYMENT BENEFITS (THIRD DEPT))/REAL ESTATE BROKERS (UNEMPLOYMENT INSURANCE, REAL ESTATE BROKER WAS AN EMPLOYEE ENTITLED TO UNEMPLOYMENT BENEFITS (THIRD DEPT))

UNEMPLOYMENT INSURANCE.

REAL ESTATE BROKER WAS AN EMPLOYEE ENTITLED TO UNEMPLOYMENT BENEFITS (THIRD DEPT).

The Third Department determined a real estate broker was an employee of a real estate services firm (Cushman & Wakefield) and was entitled to unemployment benefits:

> Cushman & Wakefield recruits experienced real estate brokers to provide real estate services to its clients, and, prior to retaining those brokers, it conducts a criminal background check. Cushman & Wakefield requires the brokers that it retains to then execute a written broker-salesperson agreement, which governs their relationship ... . Pursuant to the agreement, Cushman & Wakefield provided its brokers with an office, various equipment — including a desk, telephone, stationary and business cards bearing the company's name — and secretarial and other support services deemed by Cushman & Wakefield to facilitate the brokers' transactional work. The agreement also specified that Cushman & Wakefield would furnish the brokers with advice, information and assistance that it deemed necessary for the brokers' assigned real estate activities and required the brokers to follow its written policies and procedures. Cushman & Wakefield also provided its brokers with fringe medical and dental benefits and reported these benefits as taxable income for the brokers and retained the right, at any time and in its sole discretion, to modify these benefits.
>
> The agreement required brokers to faithfully devote their full business time and best efforts to aid and assist Cushman & Wakefield with the transaction of its business and, through the performance of their services, to promote the business and reputation of Cushman & Wakefield. * * *
>
> In addition, Cushman & Wakefield had the sole discretion to determine the commission or fee charged to a client when a real estate transaction was completed, and the brokers were required to use only real estate forms approved by Cushman & Wakefield. **Matter of Cushman & Wakefield, Inc. (Commissioner of Labor), 2017 NY Slip Op 07022, Third Dept 10-5-17**

WORKERS' COMPENSATION LAW

WORKERS' COMPENSATION LAW (MEMBER OF A JOINT VENTURE, INJURED ON THE JOB, COULD NOT SUE ANOTHER MEMBER OF THE JOINT VENTURE UNDER THE LABOR LAW, WORKERS' COMPENSATION WAS HIS EXCLUSIVE REMEDY (FIRST DEPT))/EMPLOYMENT LAW (MEMBER OF A JOINT VENTURE, INJURED ON THE JOB, COULD NOT SUE ANOTHER MEMBER OF THE JOINT VENTURE UNDER THE LABOR LAW, WORKERS' COMPENSATION WAS HIS EXCLUSIVE REMEDY (FIRST DEPT))/LABOR LAW-CONSTRUCTION LAW (MEMBER OF A JOINT VENTURE, INJURED ON THE JOB, COULD NOT SUE ANOTHER MEMBER OF THE JOINT VENTURE UNDER THE LABOR LAW, WORKERS' COMPENSATION WAS HIS EXCLUSIVE REMEDY (FIRST DEPT))/JOINT VENTURES (WORKERS' COMPENSATION LAW, MEMBER OF A JOINT VENTURE, INJURED ON THE JOB, COULD NOT SUE ANOTHER MEMBER OF THE JOINT VENTURE UNDER THE LABOR LAW, WORKERS' COMPENSATION WAS HIS EXCLUSIVE REMEDY (FIRST DEPT))

WORKERS' COMPENSATION LAW, EMPLOYMENT LAW, LABOR LAW-CONSTRUCTION LAW.

MEMBER OF A JOINT VENTURE, INJURED ON THE JOB, COULD NOT SUE ANOTHER MEMBER OF THE JOINT VENTURE UNDER THE LABOR LAW, WORKERS' COMPENSATION WAS HIS EXCLUSIVE REMEDY (FIRST DEPT).

The First Department determined plaintiff, who fell while he was working within the scope of his employment, as a member of a joint venture which included his employer (a construction company) and the defendant, Skanska, could not maintain actions against Skanska under Labor Law 240 (1) and 241 (6). Plaintiff's only remedy against Skanska was under the Workers' Compensation Law:

> To the extent plaintiff argues that the exclusivity provisions do not apply here because Skanska purportedly owed him a duty independent of its capacity as a member of the joint venture, the Court of Appeals has rejected this argument as "fundamentally unsound" ... . "[A]n employer remains an employer in his relations with his employees as to all matters arising from and connected with their employment. He may not be treated as a dual legal personality, a sort of Dr. Jekyll and Mr. Hyde'" ... . **Cortes v Skanska USA Civ. Northeast, Inc., 2017 NY Slip Op 07307, First Dept 10-19-17**

COURT OF APPEALS

ARBITRATION

ARBITRATION (WHETHER THE MATTER IS ARBITRABLE MUST BE DETERMINED BY THE ARBITRATOR (CT APP))/CONTRACT LAW (ARBITRATON, WHETHER THE MATTER IS ARBITRABLE MUST BE DETERMINED BY THE ARBITRATOR (CT APP))

ARBITRATION, CONTRACT LAW.

WHETHER THE MATTER IS ARBITRABLE MUST BE DETERMINED BY THE ARBITRATOR (CT APP).

The Court of Appeals, in a brief memorandum, reversed the First Department and held that, under the controlling agreements, whether the matter is arbitrable must be determined by the arbitrator. The First Department decision, with a two-justice dissent, is at **Garthon Bus Inc v Stein, 2016 NY Alip Op 03102, First Dept 4-26-16**:

> Under the circumstances of this case, including the terms of the parties' final agreements, which incorporated the rules of the London Court of International Arbitration, the issue of whether the dispute is arbitrable should be resolved by the arbitrator ... . **Garthon Bus. Inc. v Stein, 2017 NY Slip Op 07160, Ct App 10-12-17**

CIVIL PROCEDURE

CIVIL PROCEDURE (INQUEST, DAMAGES, PARTY PROPERLY PRECLUDED FROM PARTICIPATION IN DAMAGES INQUEST BASED UPON THE PARTY'S REFUSAL TO PROVIDE COURT-ORDERED DISCLOSURE OF TAX RETURNS (CT APP))/DAMAGES (INQUEST, PARTY PROPERLY PRECLUDED FROM PARTICIPATION IN DAMAGES INQUEST BASED UPON THE PARTY'S REFUSAL TO PROVIDE COURT-ORDERED DISCLOSURE OF TAX RETURNS (CT APP))/INQUEST (DAMAGES, PARTY PROPERLY PRECLUDED FROM PARTICIPATION IN DAMAGES INQUEST BASED UPON THE PARTY'S REFUSAL TO PROVIDE COURT-ORDERED DISCLOSURE OF TAX RETURNS (CT APP))/DISCLOSURE (INQUEST, DAMAGES, PARTY PROPERLY PRECLUDED FROM PARTICIPATION IN DAMAGES INQUEST BASED UPON THE PARTY'S REFUSAL TO PROVIDE COURT-ORDERED DISCLOSURE OF TAX RETURNS (CT APP))/TAX RETURNS (DISCLOSURE, PARTY PROPERLY PRECLUDED FROM PARTICIPATION IN DAMAGES INQUEST BASED UPON THE PARTY'S REFUSAL TO PROVIDE COURT-ORDERED DISCLOSURE OF TAX RETURNS (CT APP))

CIVIL PROCEDURE.

PARTY PROPERLY PRECLUDED FROM PARTICIPATION IN DAMAGES INQUEST BASED UPON THE PARTY'S REFUSAL TO PROVIDE COURT-ORDERED DISCLOSURE OF TAX RETURNS (CT APP).

The Court of Appeals, in a brief memorandum, determined Supreme Court did not abuse its discretion when it precluded a party's participation in an inquest to determine damages based upon the party's failure to comply with court orders directing disclosure of tax returns. The First Department's decision is at **Herman v Herman, 2016 NY Slip Op 07148, First Dept 11-1-16** which provides a citation for the Supreme Court decision:

> In review of submissions pursuant to section 500.11 of the Rules, order affirmed, with costs, and certified question answered in the affirmative. Supreme Court did not abuse its discretion in precluding defendant Julian Maurice Herman from participating in the inquest to assess damages against him. Moreover, the denial of that defendant's cross motion was proper. **Herman v Herman, 2017 NY Slip Op 07161, CtApp 10-12-17**

CIVIL PROCEDURE (CAPACITY TO SUE, LEGISLATIVELY CREATED INSURANCE LAW ADVISORY ASSOCIATION DID NOT HAVE THE CAPACITY TO SUE AN INSURER FOR FEES THE ASSOCIATION WAS AUTHORIZED TO RECEIVE (CT APP))/INSURANCE LAW (CAPACITY TO SUE, LEGISLATIVELY CREATED INSURANCE LAW ADVISORY ASSOCIATION DID NOT HAVE THE CAPACITY TO SUE AN INSURER FOR FEES THE ASSOCIATION WAS AUTHORIZED TO RECEIVE (CT APP))/CAPACITY TO SUE (INSURANCE LAW, LEGISLATIVELY CREATED INSURANCE LAW ADVISORY ASSOCIATION DID NOT HAVE THE CAPACITY TO SUE AN INSURER FOR FEES THE ASSOCIATION WAS AUTHORIZED TO RECEIVE (CT APP))

CIVIL PROCEDURE, INSURANCE LAW.

LEGISLATIVELY CREATED INSURANCE LAW ADVISORY ASSOCIATION DID NOT HAVE THE CAPACITY TO SUE AN INSURER FOR FEES THE ASSOCIATION WAS AUTHORIZED TO RECEIVE (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Stein, determined Excess Line Association of New York (ELANY) — a legislatively created advisory association under the supervision of the Department of Financial Services (DFS) — does not have the capacity to sue its members to recover fees that it is statutorily authorized to receive. ELANY was set

up to handle the paperwork that goes along with excess line insurance policies. ELANY collects stamping fees from the insurers based upon the premium amounts. The DFS entered a settlement with an insurer but did not seek payment of the stamping fees. ELANY then attempted to sue the insurer for the stamping fees:

> While section 2130 [of the Insurance Law] does designate ELANY as the recipient of the stamping fees, we reject ELANY's contention that capacity to sue for recovery of such fees can be inferred as a "necessary implication" from its responsibilities ... . Critically, ELANY is both supervised by DFS and required to "perform its functions" pursuant to a plan of operation approved by DFS ... . That plan expressly establishes a method of enforcing the payment of stamping fees — the relief that ELANY seeks here — by providing that, when such fees go unpaid, ELANY's remedy is to report the matter to DFS. In other words, DFS has not authorized ELANY to seek recovery of unpaid stamping fees through a plenary action. Instead, the plan of operation — which governs the scope of ELANY's authorized activities — limits ELANY's remedy to reporting violations to DFS, further supporting the conclusion that ELANY does not have implied capacity to sue for the relief sought.
>
> Finally, the legislative history of the statute creating ELANY demonstrates that the legislature characterized ELANY as an "advisory association," not a regulator ... . Nor does the plan of operation indicate that DFS has found it necessary, in order for ELANY to carry out its advisory function, to "accord[] [ELANY] the right to [enforce the payment of stamping fees] through a plenary judicial proceeding" ... . In short, the authority that ELANY urges this Court to recognize is negated by the nature of the responsibilities conferred upon ELANY, as established by the statutory structure, legislative history, and ELANY's plan of operation. Therefore, the courts below correctly concluded that capacity to sue cannot be inferred here. **Excess Line Assn. of N.Y. (ELANY) v Waldorf & Assoc., 2017 NY Slip Op 07301, CtApp 10-19-17**

CONTRACT LAW

CONTRACT LAW (ANTICIPATORY REPUDIATION, LAWSUIT SEEKING RESCISSION OR REFORMATION OF A REAL ESTATE PURCHASE AND SALE AGREEMENT DID NOT CONSTITUTE AN ANTICIPATORY BREACH OF THE CONTRACT, APPELLATE DIVISION REVERSED (CT APP))/ANTICIPATORY REPUDIATION (CONTRACT LAW, ANTICIPATORY REPUDIATION, LAWSUIT SEEKING RESCISSION OR REFORMATION OF A REAL ESTATE PURCHASE AND SALE AGREEMENT DID NOT CONSTITUTE AN ANTICIPATORY BREACH OF THE CONTRACT, APPELLATE DIVISION REVERSED (CT APP))

CONTRACT LAW.

LAWSUIT SEEKING RESCISSION OR REFORMATION OF A REAL ESTATE PURCHASE AND SALE AGREEMENT DID NOT CONSTITUTE AN ANTICIPATORY BREACH OF THE CONTRACT, APPELLATE DIVISION REVERSED (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Fahey, reversing the appellate division, determined plaintiff-buyer's lawsuit seeking rescission or reformation of a real property purchase and sale agreement did not constitute an anticipatory breach of the agreement, The original contract had been amended several times to push forward the final closing date because of remedial waterfront work required by the state. The lawsuit, in part, sought to nullify the amendments and reinstate the original agreement:

> For an anticipatory repudiation to be deemed to have occurred, the expression of intent not to perform by the repudiator must be "positive and unequivocal"... . We have taught that the party harmed by the repudiation must

make a choice either to pursue damages for the breach or to proceed as if the contract is valid ... . We have also clarified that "a wrongful repudiation of the contract by one party before the time for performance entitles the nonrepudiating party to immediately claim damages for a total breach" ... . * * *

This action is one based on the terms under which the amendments to the contract were entered, and essentially seeks to nullify those terms. ... [I]n this context — specifically, where the amended complaint seeks ... reformation of the amendments to the contract and specific performance of the original agreement — there was no "positive and unequivocal" repudiation ... . There is no material difference between this action and a declaratory judgment action. At bottom, both actions seek a judicial determination as to the terms of a contract, and the mere act of asking for judicial approval to avoid a performance obligation is not the same as establishing that one will not perform that obligation absent such approval ... . **Princes Point LLC v Muss Dev. L.L.C., 2017 NY Slip Op 07298, CtApp 10-19-17**

CRIMINAL LAW

CRIMINAL LAW (FOR CAUSE JUROR CHALLENGE SHOULD HAVE BEEN GRANTED, NEW TRIAL ORDERED (CT APP))/JURORS (CRIMINAL LAW, FOR CAUSE JUROR CHALLENGE SHOULD HAVE BEEN GRANTED, NEW TRIAL ORDERED (CT APP))/FOR CAUSE CHALLENGE (CRIMINAL LAW, JURORS, FOR CAUSE JUROR CHALLENGE SHOULD HAVE BEEN GRANTED, NEW TRIAL ORDERED (CT APP))

CRIMINAL LAW.

FOR CAUSE JUROR CHALLENGE SHOULD HAVE BEEN GRANTED, NEW TRIAL ORDERED (CT APP).

The Court of Appeals, in a brief memorandum, reversed defendant's conviction and ordered a new trial, finding that a for cause challenge to a juror should have been granted. The Second Department decision is at **People v Wright, 2015 NY Slip Op 09447, Second Dept 12-23-15**:

Pursuant to CPL 270.20 (1) (b), a prospective juror may be challenged for cause if the juror evinces "a state of mind that is likely to preclude [the juror] from rendering an impartial verdict based upon the evidence adduced at the trial" ... . Here, the prospective juror's statements raised serious doubt regarding her ability to be unbiased, and the trial court did not inquire further to obtain unequivocal assurance that she could be fair and impartial ... . Under the circumstances of this case, where it was error to deny defendant's challenge for cause and he eventually exhausted his peremptory challenges, defendant's conviction should be reversed and a new trial ordered ... . **People v Wright, 2017 NY Slip Op 07159, CtApp 10-12-17**

CRIMINAL LAW (TOW TRUCK WAS EQUIPPED WITH A POLICE SCANNER, EVEN THOUGH THE SCANNER WAS IN DEFENDANT'S POCKET, NOT ATTACHED TO THE TRUCK (CT APP)) /VEHICLE AND TRAFFIC LAW (TOW TRUCK WAS EQUIPPED WITH A POLICE SCANNER, EVEN THOUGH THE SCANNER WAS IN DEFENDANT'S POCKET, NOT ATTACHED TO THE TRUCK (CT APP)) /POLICE SCANNERS (TOW TRUCK WAS EQUIPPED WITH A POLICE SCANNER, EVEN THOUGH THE SCANNER WAS IN DEFENDANT'S POCKET, NOT ATTACHED TO THE TRUCK (CT APP)) /EQUIPPED (TOW TRUCK WAS EQUIPPED WITH A POLICE SCANNER, EVEN THOUGH THE SCANNER WAS IN DEFENDANT'S POCKET, NOT ATTACHED TO THE TRUCK (CT APP))

CRIMINAL LAW.

TOW TRUCK WAS "EQUIPPED" WITH A POLICE SCANNER, EVEN THOUGH THE SCANNER WAS IN DEFENDANT'S POCKET, NOT ATTACHED TO THE TRUCK (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Stein, over an extensive dissenting opinion, determined defendant was properly convicted of "equipping" his tow truck with a police scanner without a permit. The scanner was not attached to the vehicle. It was in the defendant's pocket:

> Our analysis begins with the language of the statute. Neither the VTL [Vehicle and Traffic Law] nor the Penal Law defines "equips" or any derivation of that word. Absent a statutory definition "we must give the term its 'ordinary' and 'commonly understood' meaning ... . To that end, "[i]n determining the meaning of statutory language, we 'have regarded dictionary definitions as useful guideposts'" ... .
>
> A review of recent sources and those available at the time the statute was enacted in 1933 indicates that "equips" does not necessitate physical attachment or a special adaptation. * * *
>
> Under these definitions "equip" means to provide something with a particular feature or ability. None states or implies any need for the object's physical attachment to the thing equipped. ... Giving "equip" its commonly understood meaning, VTL 397 applies regardless of whether the prohibited device is physically attached to the motor vehicle, so long as the device is ready for efficient service. **People v Andujar, 2017 NY Slip Op 07383, CtApp 10-24-17**

CRIMINAL LAW (RULE THAT A WARRANTLESS ARREST AT THE THRESHOLD OF AN APARTMENT DOORWAY DOES NOT VIOLATE THE PAYTON RULE REAFFIRMED, DISSENT ARGUED NEW YORK'S PERSISTENT FELONY OFFENDER STATUTE VIOLATES APPRENDI (CT APP))/PAYTON RULE (CRIMINAL LAW, RULE THAT A WARRANTLESS ARREST AT THE THRESHOLD OF AN APARTMENT DOORWAY DOES NOT VIOLATE THE PAYTON RULE REAFFIRMED, DISSENT ARGUED NEW YORK'S PERSISTENT FELONY OFFENDER STATUTE VIOLATES APPRENDI (CT APP))/APPRENDI (DISSENT ARGUED NEW YORK'S PERSISTENT FELONY OFFENDER STATUTE VIOLATES APPRENDI (CT APP))/PERSISTENT FELONY OFFENDER (DISSENT ARGUED NEW YORK'S PERSISTENT FELONY OFFENDER STATUTE VIOLATES APPRENDI (CT APP))/WARRANTLESS ARRESTS (PAYTON RULE, RULE THAT A WARRANTLESS ARREST AT THE THRESHOLD OF AN APARTMENT DOORWAY DOES NOT VIOLATE THE PAYTON RULE REAFFIRMED (CT APP))

CRIMINAL LAW.

RULE THAT A WARRANTLESS ARREST AT THE THRESHOLD OF AN APARTMENT DOORWAY DOES NOT VIOLATE PAYTON REAFFIRMED, DISSENT ARGUED NEW YORK'S PERSISTENT FELONY OFFENDER STATUTE VIOLATES APPRENDI (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Stein, over a partial dissenting opinion by Judge Fahey, and separate dissenting opinions by Judges Wilson and Rivera, left unchanged the rule that a warrantless arrest may be effected at the threshold of an apartment entrance door without violating Payton v New York (445 US 573 [1980]). Here the defendant answered the door when the police knocked. As defendant stood in the doorway, the arresting officer told him he was under arrest. The defendant then turned around with his hands behind his back and was handcuffed. Judge Fahey's dissent concerned defendant's sentence as a persistent felony offender. Judge Fahey argued that New York's persistent felony offender statute violates Apprendi v New Jersey (530 US 466) because the sentencing judge, not the jury, must make findings of fact before imposing the enhanced sentence. Judges Wilson and Rivera argued the Payton rule prohibiting warrantless arrests inside a suspect's home should apply to threshold arrests when the police have summoned the suspect to the door:

> ... Payton does not prohibit the police from knocking on a suspect's door because, "[w]hen law enforcement officers who are not armed with a warrant knock on a door, they do no more than any private citizen might do. And whether the person who knocks on the door and requests the opportunity to speak is a police officer or a private citizen, the occupant has no obligation to open the door or to speak" ... .
>
> Consistent with that understanding of Payton as prohibiting only "the police . . . crossing the threshold of a suspect's home to effect a warrantless arrest in the absence of exigent circumstances" ... , we have upheld warrantless arrests — both planned and unplanned — of defendants who emerged from their homes after police knocked on an open door and requested that the defendant come out ... , used a noncoercive ruse to lure the defendant outside ... , or directed the defendant to come out after seeing him peek through a window ... . We also upheld a planned, warrantless arrest where the defendant either voluntarily exited his house, or stood behind his mother in the front doorway, and stuck his head out of the door in response to a police request that he come outside ... . **People v Garvin, 2017 NY Slip Op 07382, CtApp 10-24-17**

CRIMINAL LAW (APPEALS, JUDGES, CITY COURT JUDGE WHO CONVICTED DEFENDANT AND WAS THEN ELECTED TO COUNTY COURT SHOULD HAVE RECUSED HIMSELF FROM ADJUDICATING THE APPEAL OF DEFENDANT'S CITY COURT CONVICTION (CT APP))/APPEALS (CRIMINAL LAW, JUDGES, CITY COURT JUDGE WHO CONVICTED DEFENDANT AND WAS THEN ELECTED TO COUNTY COURT SHOULD HAVE RECUSED HIMSELF FROM ADJUDICATING THE APPEAL OF DEFENDANT'S CITY COURT CONVICTION (CT APP))/JUDGES (CRIMINAL LAW, APPEALS, CITY COURT JUDGE WHO CONVICTED DEFENDANT AND WAS THEN ELECTED TO COUNTY COURT SHOULD HAVE RECUSED HIMSELF FROM ADJUDICATING THE APPEAL OF DEFENDANT'S CITY COURT CONVICTION (CT APP))/DUE PROCESS (CRIMINAL LAW, APPEALS, JUDGES, CITY COURT JUDGE WHO CONVICTED DEFENDANT AND WAS THEN ELECTED TO COUNTY COURT SHOULD HAVE RECUSED HIMSELF FROM ADJUDICATING THE APPEAL OF DEFENDANT'S CITY COURT CONVICTION (CT APP))

CRIMINAL LAW, APPEALS, JUDGES.

CITY COURT JUDGE WHO CONVICTED DEFENDANT AND WAS THEN ELECTED TO COUNTY COURT SHOULD HAVE RECUSED HIMSELF FROM ADJUDICATING THE APPEAL OF DEFENDANT'S CITY COURT CONVICTION (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Feinman, determined defendant's due process rights were violated when the judge who convicted defendant also heard his appeal. After the conviction in city court, the judge was elected to county court, the court to which the appeal was made:

> The right to an impartial jurist is a "basic requirement of due process" ... . Under federal constitutional jurisprudence, courts evaluate whether a "serious risk of actual bias," based on objective perceptions and considering all the circumstances alleged, rises to an unconstitutional level ... . Put differently, "[t]he Court asks not whether the judge is actually, subjectively biased, but whether the average judge in his [or her] position is 'likely' to be neutral, or whether there is an unconstitutional 'potential' for bias" ... . Not only must judges actually be neutral, they must appear so as well. We therefore conclude that, under principles of due process ... , a judge may not act as appellate decision-maker in a case over which the judge previously presided at trial.
>
> ... In this case, the same Judge ruled upon defendant's pretrial motions, served as the trier of fact, convicted defendant, sentenced defendant, and then proceeded to serve as the sole reviewing Judge on appeal. On these facts, there was a clear abrogation of our State's court structure that guarantees one level of independent factual review as of right. Here, there was a facial appearance of impropriety which "conflicted impermissibly with the notion of fundamental fairness" ... . Therefore, under these circumstances, recusal, as a matter of due process, was required. **People v Novak, 2017 NY Slip Op 07384, CtApp 10-24-17**

CRIMINAL LAW (EVIDENCE, DNA, CRIMINALIST'S TESTIMONY ABOUT THE DNA EVIDENCE PURPORTEDLY LINKING DEFENDANT TO THE BURGLARY SCENES WAS ENTIRELY HEARSAY, RIGHT TO CONFRONT WITNESSES VIOLATED, NEW TRIAL ORDERED (CT APP))/EVIDENCE (CRIMINAL LAW, DNA, CRIMINALIST'S TESTIMONY ABOUT THE DNA EVIDENCE PURPORTEDLY LINKING DEFENDANT TO THE BURGLARY SCENES WAS ENTIRELY HEARSAY, RIGHT TO CONFRONT WITNESSES VIOLATED, NEW TRIAL ORDERED (CT APP))/DNA (CRIMINAL LAW, EVIDENCE, CRIMINALIST'S TESTIMONY ABOUT THE DNA EVIDENCE PURPORTEDLY LINKING DEFENDANT TO THE BURGLARY SCENES WAS ENTIRELY HEARSAY, RIGHT TO CONFRONT WITNESSES VIOLATED, NEW TRIAL ORDERED (CT APP))/HEARSAY (CRIMINAL LAW, DNA, CRIMINALIST'S TESTIMONY ABOUT THE DNA EVIDENCE PURPORTEDLY LINKING DEFENDANT TO THE BURGLARY SCENES WAS ENTIRELY HEARSAY, RIGHT TO CONFRONT WITNESSES VIOLATED, NEW TRIAL ORDERED (CT APP))/CONFRONT WITNESSES, RIGHT TO (DNA, CRIMINALIST'S TESTIMONY ABOUT THE DNA EVIDENCE PURPORTEDLY LINKING DEFENDANT TO THE BURGLARY SCENES WAS ENTIRELY HEARSAY, RIGHT TO CONFRONT WITNESSES VIOLATED, NEW TRIAL ORDERED (CT APP))

CRIMINAL LAW, EVIDENCE.

CRIMINALIST'S TESTIMONY ABOUT THE DNA EVIDENCE PURPORTEDLY LINKING DEFENDANT TO THE BURGLARY SCENES WAS ENTIRELY HEARSAY, RIGHT TO CONFRONT WITNESSES VIOLATED, NEW TRIAL ORDERED (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge DeFiore, with a concurring opinion by Judge Garcia, determined the hearsay testimony by a criminalist about DNA test results violated defendant's right to confront the witnesses against him. A new trial was ordered. The criminalist had no first-hand knowledge of any of the DNA testing:

> ... [I]n order to satisfy the Confrontation Clause, defendant was entitled to cross-examine the analyst who either "performed, witnessed or supervised the generation of the critical numerical DNA profile" or who "used his or her independent analysis on the raw data" to arrive at his or her own conclusions ... . As we recently held, "it is the generated numerical identifiers and the calling of the alleles at the final stage of the DNA typing that effectively accuses defendant of his role in the crime charged" ... . The trial transcript plainly establishes that the criminalist had no such role here. Although the criminalist may have had some level of involvement in OCME's handling of some of the 2009 crime scene swabs, he had no role whatsoever in the testing of defendant's post-accusatory buccal swab. His testimony was, therefore, merely "a conduit for the conclusions of others" ... .
>
> On the whole, the criminalist's testimony was nothing more than a parroting of hearsay statements, made by other analysts and of which he had no personal knowledge. There is no question that his testimony as to the findings and conclusions of the nontestifying witnesses was elicited in order to prove the truth of those extrajudicial assertions — primarily, identifying defendant as the burglar ... . **People v Austin, 2017 NY Slip Op 07300, Ct App 10-19-17**

EMPLOYMENT LAW

EMPLOYMENT LAW (NEW YORK CITY HUMAN RIGHTS LAW DOES NOT PROTECT FROM DISCRIMINATION EMPLOYEES MISTAKENLY PERCEIVED BY THEIR EMPLOYER TO SUFFER FROM ALCOHOLISM (CT APP))/HUMAN RIGHTS LAW (NYC) (EMPLOYMENT DISCRIMINATION, NEW YORK CITY HUMAN RIGHTS LAW DOES NOT PROTECT FROM DISCRIMINATION EMPLOYEES MISTAKENLY PERCEIVED BY THEIR EMPLOYER TO SUFFER FROM ALCOHOLISM (CT APP))/DISABILITIES (EMPLOYMENT DISCRIMINATION, NEW YORK CITY HUMAN RIGHTS LAW DOES NOT PROTECT FROM DISCRIMINATION EMPLOYEES MISTAKENLY PERCEIVED BY THEIR EMPLOYER TO SUFFER FROM ALCOHOLISM (CT APP))/DISCRIMINATION (EMPLOYMENT DISCRIMINATION, NEW YORK CITY HUMAN RIGHTS LAW DOES NOT PROTECT FROM DISCRIMINATION EMPLOYEES MISTAKENLY PERCEIVED BY THEIR EMPLOYER TO SUFFER FROM ALCOHOLISM (CT APP))/ALCOHOLISM (EMPLOYMENT DISCRIMINATION, NEW YORK CITY HUMAN RIGHTS LAW DOES NOT PROTECT FROM DISCRIMINATION EMPLOYEES MISTAKENLY PERCEIVED BY THEIR EMPLOYER TO SUFFER FROM ALCOHOLISM (CT APP))

EMPLOYMENT LAW, HUMAN RIGHTS LAW.

NEW YORK CITY HUMAN RIGHTS LAW DOES NOT PROTECT FROM DISCRIMINATION EMPLOYEES MISTAKENLY PERCEIVED BY THEIR EMPLOYER TO SUFFER FROM ALCOHOLISM (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Fahey, over a two-judge dissent, determined that the New York City Human Rights Law (NYCHRL) did not protect from discrimination two New York City police officers who were sent to counseling based upon the employer's perception the officers were abusing alcohol, when in fact the officers were not alcoholics. The law was deemed, by its plain language, to protect only recovering or recovered alcoholics from discrimination, not those erroneously perceived by an employer to suffer from alcoholism:

> ... [T]he Administrative Code does not consider a mistaken perception of alcoholism to be a disability covered by the NYCHRL. As the Second Circuit noted, there is no ambiguity about the plain language of the NYCHRL, which is only open to one reasonable interpretation: the disability of alcoholism "shall only apply to a person who (1) is recovering or has recovered and (2) currently is free of such abuse" ... . Indeed, by its plain language, the NYCHRL does not regulate employer actions motivated by concern with respect to the abuse of alcohol. Rather, the NYCHRL covers circumstances in which employers unfairly typecast alcoholics who have sought treatment and who are not presently abusing alcohol, so as to ensure that such persons are afforded a fair opportunity at recovery. Said differently, the NYCHRL provides that, with respect to alcoholism, a person is considered to be disabled (so as to trigger the protections of that law) only when he or she "is recovering or has recovered" and "currently is free of such abuse" ... . **Makinen v City of New York, 2017 NY Slip Op 07208, Ct App 10-17-17**

FREEDOM OF INFORMATION LAW (FOIL)

FREEDOM OF INFORMATION ACT (FOIL) (DOCUMENTS RELATING TO AUDITS OF SPECIAL EDUCATION PROGRAMS PROPERLY REDACTED TO EXCLUDE INFORMATION ABOUT LAW ENFORCEMENT PROCEDURES, PETITIONER ENTITLED TO ATTORNEY'S FEES (CT APP))/EDUCATION LAW (FREEDOM OF INFORMATION ACT, DOCUMENTS RELATING TO AUDITS OF SPECIAL EDUCATION PROGRAMS PROPERLY REDACTED TO EXCLUDE INFORMATION ABOUT LAW ENFORCEMENT PROCEDURES, PETITIONER ENTITLED TO ATTORNEY'S FEES (CT APP))/ATTORNEYS (FREEDOM OF INFORMATION LAW, DOCUMENTS RELATING TO AUDITS OF SPECIAL EDUCATION PROGRAMS PROPERLY REDACTED TO EXCLUDE INFORMATION ABOUT LAW ENFORCEMENT PROCEDURES, PETITIONER ENTITLED TO ATTORNEY'S FEES (CT APP))/SPECIAL EDUCATION PROGRAMS (FREEDOM OF INFORMATION LAW, DOCUMENTS RELATING TO AUDITS OF SPECIAL EDUCATION PROGRAMS PROPERLY REDACTED TO EXCLUDE INFORMATION ABOUT LAW ENFORCEMENT PROCEDURES, PETITIONER ENTITLED TO ATTORNEY'S FEES (CT APP))

FREEDOM OF INFORMATION LAW (FOIL), EDUCATION LAW, ATTORNEYS.

DOCUMENTS RELATING TO AUDITS OF SPECIAL EDUCATION PROGRAMS PROPERLY REDACTED TO EXCLUDE INFORMATION ABOUT LAW ENFORCEMENT PROCEDURES, PETITIONER ENTITLED TO ATTORNEY'S FEES (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Stein, determined the Department of Education (DOE) properly redacted documents relating to the auditing of special education programs. The redactions fell under exemptions in the Public Officers Law for (1) information compiled for law enforcement purposes and (2) disclosures that would interfere with law enforcement investigations. The audits were were aimed at rooting out fraud and overcharging by special education providers. The Court of Appeals further held that the petitioner had substantially prevailed in her Freedom of Information Law (FOIL) request and was therefore entitled to attorney's fees:

> The propriety of the Department's redactions of the disclosed records, therefore, turns on whether the redacted portions qualify for exemption under Public Officers Law § 87 (2) (e) (i). This requires us to address both prongs of the exemption: (1) whether the records were compiled for law enforcement purposes; and (2) whether disclosure of the records would interfere with law enforcement investigations or judicial proceedings. We conclude that, under the circumstances presented here, both of these prongs are satisfied and the records were properly redacted.
>
> As to the first prong, we are persuaded that the records at issue were compiled for law enforcement purposes. The phrase "law enforcement purposes" is not defined in the FOIL statutes ... . * * * It is undisputed that the Department lacks jurisdiction to punish criminal violations of the law. However ... the term "law enforcement" is "not limited to the enforcement of criminal laws" ... . * * *
>
> Turning to the second inquiry, we agree with the courts below that the redactions made by the Department were necessary to prevent interference with a law enforcement investigation ... . Here, the Executive Coordinator for Special Education explained that the Department's redactions were imperative because releasing specific methods and procedures used by auditors in particular counties would supply providers subject to audit with "a roadmap to avoid disclosure of inappropriate costs" and would enable such providers to more effectively conceal fraudulent and criminal activities, thereby undermining the audit process. **Matter of Madeiros v New York State Educ. Dept., 2017 NY Slip Op 07209, CtApp 10-17-17**

MENTAL HYGIENE LAW

MENTAL HYGIENE LAW (SEX OFFENDERS, CIVIL COMMITMENT, MAJORITY FOUND THE PROOF SUFFICIENT TO JUSTIFY CONTINUED CIVIL COMMITMENT OF THE SEX OFFENDER DIAGNOSED WITH PEDOPHILIA, THE DISSENT DISAGREED AND FORCEFULLY ARGUED THE ACCEPTED STANDARDS OF PSYCHIATRIC/PSYCHOLOGICAL PROOF ARE FLAWED (CT APP))/EVIDENCE (MENTAL HYGIENE LAW, SEX OFFENDERS, CIVIL COMMITMENT, MAJORITY FOUND THE PROOF SUFFICIENT TO JUSTIFY CONTINUED CIVIL COMMITMENT OF THE SEX OFFENDER DIAGNOSED WITH PEDOPHILIA, THE DISSENT DISAGREED AND FORCEFULLY ARGUED THE ACCEPTED STANDARDS OF PSYCHIATRIC/PSYCHOLOGICAL PROOF ARE FLAWED (CT APP))/CRIMINAL LAW (MENTAL HYGIENE LAW, SEX OFFENDERS, CIVIL COMMITMENT, MAJORITY FOUND THE PROOF SUFFICIENT TO JUSTIFY CONTINUED CIVIL COMMITMENT OF THE SEX OFFENDER DIAGNOSED WITH PEDOPHILIA, THE DISSENT DISAGREED AND FORCEFULLY ARGUED THE ACCEPTED STANDARDS OF PSYCHIATRIC/PSYCHOLOGICAL PROOF ARE FLAWED (CT APP))/SEX OFFENDERS (MENTAL HYGIENE LAW, SEX OFFENDERS, CIVIL COMMITMENT, MAJORITY FOUND THE PROOF SUFFICIENT TO JUSTIFY CONTINUED CIVIL COMMITMENT OF THE SEX OFFENDER DIAGNOSED WITH PEDOPHILIA, THE DISSENT DISAGREED AND FORCEFULLY ARGUED THE ACCEPTED STANDARDS OF PSYCHIATRIC/PSYCHOLOGICAL PROOF ARE FLAWED (CT APP))/CIVIL COMMITMENT (SEX OFFENDERS, MAJORITY FOUND THE PROOF SUFFICIENT TO JUSTIFY CONTINUED CIVIL COMMITMENT OF THE SEX OFFENDER DIAGNOSED WITH PEDOPHILIA, THE DISSENT DISAGREED AND FORCEFULLY ARGUED THE ACCEPTED STANDARDS OF PSYCHIATRIC/PSYCHOLOGICAL PROOF ARE FLAWED (CT APP))

MENTAL HYGIENE LAW, EVIDENCE, CRIMINAL LAW.

MAJORITY FOUND THE PROOF SUFFICIENT TO JUSTIFY CONTINUED CIVIL COMMITMENT OF THE SEX OFFENDER DIAGNOSED WITH PEDOPHILIA, THE DISSENT DISAGREED AND FORCEFULLY ARGUED THE ACCEPTED STANDARDS OF PSYCHIATRIC/PSYCHOLOGICAL PROOF ARE FLAWED (CT APP).

The Court of Appeals, over a comprehensive and thoughtful dissent by Judge Wilson, determined the proof the respondent sex offender has "serious difficulty in controlling" his sexual conduct within the meaning of Mental Hygiene Law § 10.03 (i) was sufficient. Therefore placement of respondent in a "Strict and Intensive Supervision and Treatment" (SIST) program was justified. The dissent noted that the respondent had been confined for 15 years, only four of which were his term of imprisonment, and raised serious questions about the level of psychiatric/psychological proof accepted as sufficient for civil commitment:

> The State's expert witness testified, among other things, that he diagnosed respondent with pedophilia and antisocial personality disorder (ASPD), as well as substance abuse disorders. In the expert's opinion, respondent's "combination of a pedophilic disorder with [ASPD] . . . create[d] a very toxic mixture in the sense that [respondent] [wa]s more likely to act on the urges towards children and not feel remorse." * * *
>
> **From the Dissent:** As behavioral experts have opined, "It would seem tautological, and certainly not scientific to argue that the offender has pedophilia because he/she commits sexual acts against children and he/she commits sexual acts against children due to that pedophilic condition. Translating this premise into the control paradigm: the offender lacks the ability to control his/her behavior because the person fails to control that behavior" ... . When one looks more closely at the testimony of [the state's expert], it becomes apparent that he rests his opinions here on a host of information that ... does not allow him or us to distinguish volitional conduct from conduct caused by a mental abnormality. **Matter of State of New York v Floyd Y., 2017 NY Slip Op 07381, CtApp 10-24-17**

MUNICIPAL LAW

MUNICIPAL LAW (POLICE DISCIPLINARY PROCEDURES ARE NOT SUBJECT TO COLLECTIVE BARGAINING (CT APP))/EMPLOYMENT LAW (MUNICIPAL LAW, POLICE, POLICE DISCIPLINARY PROCEDURES ARE NOT SUBJECT TO COLLECTIVE BARGAINING (CT APP))/POLICE (DISCIPLINARY PROCEDURES, COLLECTIVE BARGAINING, POLICE DISCIPLINARY PROCEDURES ARE NOT SUBJECT TO COLLECTIVE BARGAINING (CT APP))/COLLECTIVE BARGAINING (MUNICIPAL LAW, POLICE DISCIPLINARY PROCEDURES ARE NOT SUBJECT TO COLLECTIVE BARGAINING (CT APP))/SECOND CLASS CITIES LAW (POLICE DISCIPLINARY PROCEDURES ARE NOT SUBJECT TO COLLECTIVE BARGAINING (CT APP))/TAYLOR LAW (POLICE DISCIPLINARY PROCEDURES ARE NOT SUBJECT TO COLLECTIVE BARGAINING (CT APP))

MUNICIPAL LAW, EMPLOYMENT LAW.

POLICE DISCIPLINARY PROCEDURES ARE NOT SUBJECT TO COLLECTIVE BARGAINING (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Wilson, determined that Schenectady's police disciplinary procedures were not subject to collective bargaining. The Second Class Cities Law, which provides for local government control over police discipline, is not superseded by the Taylor Law, which expresses a strong public policy in support of municipalities engaging in collective bargaining:

> The Second Class Cities Law has not been expressly repealed or superseded by the legislature nor was it implicitly repealed by the enactment of the Taylor Law in 1967. "The repeal of a statute by implication is not favored by law, for when the legislature intends to repeal an act it usually says so expressly" ... . "Generally, a statute is deemed impliedly repealed by another statute only if the two are in such conflict that it is impossible to give some effect to both. If a reasonable field of operation can be found for each statute, that construction should be adopted" ... . The Second Class Cities Law and the Taylor Law are not irreconcilable. Article 9 of the Second Class Cities Law governs disciplinary procedures for police officers in cities of the second class, whereas the Taylor Law generally requires public employers to negotiate but does not specifically require police disciplinary procedures to be a mandatory subject of collective bargaining. There is no express statutory conflict between the two laws; the only conflict is in the policies that they represent, and this Court has already resolved that policy conflict in favor of local control over police discipline ... . **Matter of City of Schenectady v New York State Pub. Empl. Relations Bd., 2017 NY Slip Op 07210, CtApp 10-17-17**

NEGLIGENCE

NEGLIGENCE (MEDICAL MALPRACTICE, SUMMARY JUDGMENT REVERSED (CT APP))/MEDICAL MALPRACTICE (SUMMARY JUDGMENT REVERSED (CT APP))

NEGLIGENCE, MEDICAL MALPRACTICE.

SUMMARY JUDGMENT REVERSED (CT APP).

The Court of Appeals, in a brief memorandum, determined a summary judgment motion in this medical malpractice action should have been denied. The Second Department decision is at **Burns v Goyal, 2016 NY Slip Op 08834, Second Dept 12-28-16**:

> On review of submissions pursuant to section 500.11 of the Rules, order modified, with costs to plaintiff against defendants Rakesh B. Patel and Suffolk Heart Group, LLP and to defendants Michael Torelli and South Shore Family Practice Associates, P.C. against plaintiff, by denying the motion of defendants Rakesh B. Patel and Suffolk Heart Group, LLP for summary judgment and, as so modified, affirmed. On this record, triable questions of fact preclude summary judgment in favor of these defendants. **Burns v Goyal, 2017 NY Slip Op 07162, Ct App 10-12-17**

WORKERS' COMPENSATION LAW

WORKERS' COMPENSATION LAW (AMENDMENT TO WORKERS' COMPENSATION LAW WHICH CLOSED THE SPECIAL FUND FOR REOPENED CASES IS CONSTITUTIONAL (CT APP))/INSURANCE LAW (WORKERS' COMPENSATION LAW, AMENDMENT TO WORKERS' COMPENSATION LAW WHICH CLOSED THE SPECIAL FUND FOR REOPENED CASES IS CONSTITUTIONAL (CT APP))/SPECIAL FUND (WORKERS' COMPENSATION LAW, AMENDMENT TO WORKERS' COMPENSATION LAW WHICH CLOSED THE SPECIAL FUND FOR REOPENED CASES IS CONSTITUTIONAL (CT APP))

WORKERS' COMPENSATION LAW, INSURANCE LAW.

AMENDMENT TO WORKERS' COMPENSATION LAW WHICH CLOSED THE SPECIAL FUND FOR REOPENED CASES IS CONSTITUTIONAL (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Fahey, reversing the appellate division, determined the amendment to Workers' Compensation Law 25-a, which closed the special fund for reopened cases, is constitutional, despite some retroactive effect on insurers. Plaintiffs are insurance companies that write workers' compensation insurance policies. They challenged the legislature's 2013 amendment ...which closed the special fund for reopened cases. The special fund was designed to relieve insurers of unexpected reopened claims in cases that had been closed seven or more years before:

> We conclude that, assuming the amendment has a retroactive impact by imposing unfunded costs upon plaintiffs for policies finalized before the amendment's effective date, that retroactive impact is constitutionally permissible. * * *

.. ."[T]he constitutional impediments to retroactive civil legislation are now modest" ... . "Absent a violation" of a specific constitutional provision, "the potential unfairness of retroactive civil legislation is not a sufficient reason for a court to fail to give a statute its intended scope" ... . * * *

.. .[T]he legislative amendment does not impair any term of plaintiffs' contracts with their insureds ... . * * *

Plaintiffs cannot identify any vested property interest impaired by the legislative amendment ... . * * *

Assuming that the 2013 amendment to section 25-a has some retroactive impact, we conclude that the retroactive impact is justified by a rational legislative purpose ... .[T]he closure of the Fund was intended to "save New York businesses hundreds of millions of dollars in assessments per year ...". **American Economy Ins. Co. v State of New York, 2017 NY Slip Op 07385, CtApp 10-24-17**

INDEX

USE THE PAGE "NUMBER BOX" AT THE TOP OF YOUR SCREEN TO NAVIGATE TO AND FROM THE INDEX. TYPE THE DESIRED PAGE NUMBER IN THE BOX AND PRESS ENTER. TYPE THE PAGE NUMBER WHERE YOU LEFT OFF IN THE INDEX TO RETURN TO THAT PAGE, OR SIMPLY CLICK ON THE "INDEX" LINK AT THE TOP OF EACH PAGE TO RETURN HERE.