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Table of Contents

CLICK ON ANY TABLE OF CONTENTS ENTRY TO GO TO RELEVANT DECISION SUMMARY IN THE DIGEST. TO RETURN TO THE TABLE OF CONTENTS USE THE "TABLE OF CONTENTS" LINK AT THE TOP OF EACH PAGE.

TABLE OF CONTENTS

Table of Contents

APPELLATE DIVISION 14

ANIMAL LAW 14

ANIMAL LAW. 14

THEORY THAT DEFENDANT VETERINARY CLINIC WAS LIABLE IN NEGLIGENCE FOR A DOG BITE WHICH OCCURRED IN THE CLINIC WAITING ROOM REJECTED, ONLY A STRICT LIABILITY THEORY COULD APPLY AND PLAINTIFF CONCEDED RELIEF WAS NOT AVAILABLE PURSUANT TO STRICT LIABILITY (THIRD DEPT). 14

ARBITRATION 15

ARBITRATOR, NOT THE COURTS, MUST FIRST DETERMINE WHETHER THE MATTER IS ARBITRABLE, CITY HAD ISSUED NEW PROTOCOLS FOR FIRST RESPONDERS, THE UNION FILED A GRIEVANCE ARGUING THE NEW PROTOCOLS MUST BE THE SUBJECT OF ARBITRATION, AN ARBITRATOR MUST DECIDE WHETHER THE ISSUE IS COVERED BY THE COLLECTIVE BARGAINING AGREEMENT (SECOND DEPT). 15

ARBITRATION, MUNICIPAL LAW, EMPLOYMENT LAW, CONTRACT LAW. 16

ARBITRATOR DID NOT EXCEED HIS AUTHORITY IN FINDING THAT THE COLLECTIVE BARGAINING AGREEMENT REQUIRED DUE PROCESS PROTECTIONS, INCLUDING NOTICE, BEFORE AN EMPLOYEE COULD BE TERMINATED FOR ALLEGED MISCONDUCT, ARBITRATOR'S AWARD SHOULD HAVE BEEN CONFIRMED (FOURTH DEPT). 16

ATTORNEYS 17

ATTORNEYS. 17

LAW FIRM ENTITLED TO ATTORNEY'S FEES FROM ADDITIONAL DEFENDANTS WHO DID NOT SIGN THE RETAINER AGREEMENT, THE ADDITIONAL DEFENDANTS BENEFITED FROM THE SETTLEMENT AGREEMENT REACHED BY THE LAW FIRM AND THE ADDITIONAL DEFENDANTS HAD SIGNED THE SETTLEMENT AGREEMENT (FIRST DEPT). 17

ATTORNEYS, FAMILY LAW, FRAUD, FIDUCIARY DUTY, NEGLIGENCE, LEGAL MALPRACTICE. 17

BREACH OF FIDUCIARY DUTY, FRAUD AND JUDICIARY LAW 487 ALLEGATIONS STEMMING FROM DEFENDANT LAW FIRM'S REPRESENTATION OF PLAINTIFF IN DIVORCE PROCEEDINGS DUPLICATED THE LEGAL MALPRACTICE ALLEGATIONS, THE COMPLAINT SHOULD HAVE BEEN DISMISSED (FIRST DEPT). . 17

CIVIL PROCEDURE 18

CIVIL PROCEDURE. 18

PURELY CONCLUSORY ALLEGATIONS IN A COMPLAINT WILL NOT SURVIVE A PRE-ANSWER MOTION TO DISMISS (FOURTH DEPT). 18

CIVIL PROCEDURE. 18

INDICATING INCONSISTENT DECISIONS SHOULD NO LONGER BE FOLLOWED, THE SECOND DEPARTMENT DETERMINED SUPREME COURT COULD NOT DISMISS A CASE BASED ON THE FAILURE TO FILE A NOTE OF ISSUE WITHIN 90 DAYS OF THE COURT'S ORDER UNLESS THE STATUTORY REQUIREMENTS OF CPLR 3216 ARE COMPLIED WITH (SECOND DEPT). 18

Table of Contents

CIVIL PROCEDURE. 19
DEFENDANTS NEVER INTERPOSED AN ANSWER SO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED, DEFENDANTS' MOTION FOR PERMISSION TO SERVE A LATE ANSWER PROPERLY DENIED, MATTER REMITTED SO PLAINTIFF CAN MOVE FOR A DEFAULT JUDGMENT (THIRD DEPT). 19
CIVIL PROCEDURE, APPEALS. 20
PRIOR RULINGS ON APPEAL CONSTITUTE THE LAW OF THE CASE, SUPREME COURT RULING TO THE CONTRARY REVERSED (SECOND DEPT). 20
CIVIL PROCEDURE, ATTORNEYS. 20
LAW OFFICE FAILURE JUSTIFIED CONSIDERING EVIDENCE WHICH COULD HAVE BEEN PROVIDED IN SUPPORT OF THE ORIGINAL MOTION, MOTION TO RENEW PROPERLY GRANTED, HOWEVER DELAYS IN DISCOVERY WARRANTED SANCTIONS AGAINST PLAINTIFF (SECOND DEPT). 20
CIVIL PROCEDURE, CONTEMPT, CONSTITUTIONAL LAW, PRIVILEGE 21
DEFENDANTS ARE REQUIRED TO PRODUCE TAX AND WAGE DOCUMENTS AND TO PROVIDE FACTUAL BASES FOR THEIR REFUSAL TO ANSWER QUESTIONS, SUPREME COURT SHOULD NOT HAVE ACCEPTED DEFENDANTS' BLANKET ASSERTIONS OF THE PRIVILEGE AGAINST SELF-INCRIMINATION AND SPOUSAL PRIVILEGE IN THIS CONTEMPT PROCEEDING STEMMING FROM AN ACTION TO RECOVER A DEFICIENCY JUDGMENT (THIRD DEPT). 21
CIVIL PROCEDURE, CONTEMPT. MUNICIPAL LAW.22
TOWN SHOULD HAVE BEEN HELD IN CONTEMPT FOR FAILURE TO BUILD A FENCE IN ACCORDANCE WITH A STIPULATION (SECOND DEPT). 22
CIVIL PROCEDURE, CONTRACT LAW. 22
BY ENTERING A STIPULATION SETTLING A FORECLOSURE ACTION, DEFENDANT WAIVED ANY DEFECT IN SERVICE OF THE COMPLAINT, THE STIPULATION WAS VALID EVEN THOUGH IT DID NOT OCCUR IN COURT, EMAILS AND PAYMENT OF A SETTLEMENT AMOUNT MEMORIALIZED THE STIPULATION (SECOND DEPT). 22
CIVIL PROCEDURE, EVIDENCE. 23
INSUFFICIENT EVIDENCE THAT THE FAILURE TO TURN OVER REQUESTED INVOICES IN DISCOVERY WAS WILLFUL AND CONTUMACIOUS, BUT PRESENTATION OF EVIDENCE ABOUT THE INVOICES AT TRIAL SHOULD HAVE BEEN PRECLUDED (SECOND DEPT). 23
CIVIL PROCEDURE, FORECLOSURE. 24
MOTION TO VACATE DEFAULT JUDGMENT OF FORECLOSURE WAS SUPPORTED BY A SWORN DENIAL OF SERVICE AND SPECIFIC FACTS WHICH REBUTTED THE PRESUMPTION OF PROPER SERVICE, MATTER SENT BACK FOR A HEARING (SECOND DEPT). 24
CIVIL PROCEDURE, TRUSTS AND ESTATES. 24
MOTION TO SUBSTITUTE THE ADMINISTRATRIX OF PLAINTIFF'S ESTATE FOR THE DECEASED PLAINTIFF PROPERLY DENIED BECAUSE THE DELAY IN SEEKING SUBSTITUTION WAS NOT EXPLAINED, THE MERITS WERE NOT DESCRIBED, AND THE EXISTENCE OF PREJUDICE WAS NOT REBUTTED, HOWEVER THE ACTION COULD NOT BE DISMISSED ABSENT THE SUBSTITUTION OF A LEGAL REPRESENTATIVE (SECOND DEPT). 24
CIVIL PROCEDURE, WORKERS' COMPENSATION, TRUSTS AND ESTATES. 25
COUNTERCLAIMS AGAINST INDIVIDUAL TRUSTEES RELATED BACK TO THE COUNTERCLAIMS AGAINST THE TRUST AND THEREFORE WERE NOT TIME-BARRED, SUPREME COURT REVERSED (THIRD DEPT). .. 25

CONTRACT LAW 26
CONTRACT LAW. 26
ORAL AGREEMENTS BETWEEN PERSONS COHABITING TOGETHER ARE NOT PER SE REQUIRED TO BE IN WRITING, SEVERAL CAUSES OF ACTION SHOULD NOT HAVE BEEN DISMISSED BECAUSE THE UNDERLYING AGREEMENTS WERE NOT SUBJECT TO THE STATUTE OF FRAUDS (SECOND DEPT). 26
CONTRACT LAW, ACCOUNT STATED. 26
ALTHOUGH THERE WAS NO ENFORCEABLE CONTRACT TO INSTALL SOLAR PANELS, PLAINTIFF WAS ENTITLED TO SUMMARY JUDGMENT ON ITS ACCOUNT STATED CAUSE OF ACTION BASED ON INVOICES SENT TO DEFENDANT FOR THE SOLAR PANELS (THIRD DEPT). 26
CONTRACT LAW, CIVIL PROCEDURE. 27

Table of Contents

GENERAL RELEASE WAS NOT LIMITED TO A 2007 ACTION AND THEREFORE PRECLUDED THE 2014 ACTION, A UNILATERAL MISTAKE DOES NOT INVALIDATE A CONTRACT (THIRD DEPT). 27

CORPORATION LAW 28

CORPORATION LAW, CIVIL PROCEDURE. 28

IN THIS CPLR ARTICLE 4 PROCEEDING BROUGHT BY THE ATTORNEY GENERAL, THERE WERE QUESTIONS OF FACT ABOUT WHETHER THE RESPONDENT NOT-FOR-PROFIT CORPORATION VIOLATED ITS FIDUCIARY DUTY AND THE NOT-FOR-PROFIT-CORPORATION LAW WITH RESPECT TO ITS AFFILIATE NOT-FOR-PROFIT CORPORATIONS AND WHETHER THE BUSINESS JUDGMENT RULE APPLIED (THIRD DEPT). 28

CORPORATION LAW, LIMITED LIABILITY COMPANY LAW, CONTRACT LAW, LANDLORD-TENANT. 29

ALTHOUGH THE PLAINTIFF LIMITED LIABILITY COMPANY DID NOT EXIST AT THE TIME THE LEASE WAS SIGNED, DEFENDANT TOOK POSSESSION OF THE PROPERTY, UNDER THE DOCTRINE OF INCORPORATION BY ESTOPPEL, DEFENDANT CANNOT ESCAPE LIABILITY FOR BREACH OF THE LEASE (SECOND DEPT). 29

COURT OF CLAIMS 29

COURT OF CLAIMS, CRIMINAL LAW. 29

CLAIMANT WAS CONVICTED OF MURDER AND AN UNRELATED ROBBERY WHICH WERE CHARGED IN A SINGLE INDICTMENT, AFTER A MAN CONFESSED TO THE MURDER, CLAIMANT'S MURDER CONVICTION WAS VACATED BUT THE ROBBERY CONVICTION REMAINED, REVERSING THE COURT OF CLAIMS, THE THIRD DEPARTMENT DETERMINED CLAIMANT WAS ENTITLED TO COMPENSATION FOR THE UNJUST MURDER CONVICTION AND RELATED IMPRISONMENT (THIRD DEPT). 29

CRIMINAL LAW 30

CRIMINAL LAW. 30

28 MONTH DELAY DID NOT DEPRIVE DEFENDANT OF HIS CONSTITUTIONAL RIGHT TO A SPEEDY TRIAL, DELAY ATTRIBUTED TO PROSECUTION, HOWEVER, WAS CRITICIZED (FIRST DEPT). 30

CRIMINAL LAW. 31

THE 2015 COURT OF APPEALS DECISION WHICH PROHIBITED INSTRUCTING A JURY THAT IT COULD FIND A DEFENDANT GUILTY OF BOTH DEPRAVED INDIFFERENCE MURDER AND INTENTIONAL (TRANSFERRED INTENT) MURDER OF A SINGLE VICTIM SHOULD NOT BE APPLIED RETROACTIVELY (SECOND DEPT). 31

CRIMINAL LAW. 32

ALTHOUGH THE CRIME WITH WHICH DEFENDANT WAS CHARGED, ATTEMPTED DISSEMINATION OF INDECENT MATERIAL TO A MINOR FIRST DEGREE, CAN BE A FELONY SEX OFFENSE, THE ABSENCE OF STATUTORILY REQUIRED LANGUAGE IN THE ACCUSATORY INSTRUMENT PRECLUDED SENTENCING DEFENDANT AS A FELONY SEX OFFENDER (THIRD DEPT). 32

CRIMINAL LAW. 32

DENIAL OF A FOR CAUSE CHALLENGE TO A JUROR WHO SAID IT WOULD BE DIFFICULT TO REACH A VERDICT WITHOUT HEARING FROM THE DEFENDANT REQUIRED REVERSAL (FIRST DEPT). 32

CRIMINAL LAW. 33

THE MAJORITY CONCLUDED COMMUNITY OPPOSITION TO PETITIONER'S RELEASE ON PAROLE WAS PROPERLY CONSIDERED BY THE BOARD OF PAROLE AND UPHELD THE DENIAL OF PAROLE, TWO-JUSTICE DISSENT ARGUED COMMUNITY OPPOSITION IS NOT INCLUDED IN THE STATUTORY FACTORS TO BE CONSIDERED BY THE BOARD (THIRD DEPT). 33

CRIMINAL LAW, APPEALS. 33

DEFENDANT CANNOT PLEAD GUILTY TO A VIOLATION OF A STATUTE WHICH HAD NOT BEEN ENACTED AT THE TIME OF THE OFFENSE, THE DEFECT IS JURISDICTIONAL AND SURVIVES A WAIVER OF APPEAL (THIRD DEPT). 33

CRIMINAL LAW, APPEALS, EVIDENCE. 34

ALTHOUGH DEFENDANT THREATENED TO KILL A JUDGE THE EVIDENCE DID NOT SUPPORT THE TERRORISM CONVICTION, THERE WAS NO EVIDENCE THE THREAT WAS MADE TO INFLUENCE OR AFFECT THE POLICY OR CONDUCT OF A GOVERNMENTAL UNIT, CONVICTION REVERSED UNDER A WEIGHT OF THE EVIDENCE REVIEW (THIRD DEPT). 34

CRIMINAL LAW, ATTORNEYS. 35

Table of Contents

DEFENDANT WAS DEPRIVED OF HIS RIGHT TO COUNSEL WHEN DEFENSE COUNSEL TOLD THE COURT HE DID NOT WANT ANY PART OF DEFENDANT'S MOTION TO WITHDRAW HIS GUILTY PLEA (SECOND DEPT). 35
CRIMINAL LAW, ATTORNEYS, APPEALS. 35
LEGAL SENTENCE FOR A PERSISTENT FELONY OFFENDER DRASTICALLY REDUCED IN THE INTEREST OF JUSTICE PURSUANT TO A MOTION FOR A WRIT OF CORAM NOBIS BASED UPON APPELLATE COUNSEL'S FAILURE TO CONTEND THE SENTENCING COURT ABUSED ITS DISCRETION (FOURTH DEPT). 35
CRIMINAL LAW, ATTORNEYS, APPEALS. 36
ALTHOUGH THE PROSECUTOR WAS GUILTY OF SERIOUS MISCONDUCT, DEFENDANT DID NOT OBJECT TO THE PROSECUTOR'S REMARKS AND REVERSAL IN THE INTEREST OF JUSTICE WAS NOT WARRANTED, TWO-JUSTICE DISSENT (FOURTH DEPT). 36
CRIMINAL LAW, ATTORNEYS, EVIDENCE. 37
DEFENSE COUNSEL'S FAILURE TO REQUEST A JURY INSTRUCTION ON THE CORRECT LESSER INCLUDED OFFENSE CONSTITUTED INEFFECTIVE ASSISTANCE, PETIT LARCENY IS A LESSER INCLUDED OFFENSE OF ROBBERY THIRD, NEW TRIAL ORDERED (FIRST DEPT). 37
CRIMINAL LAW, ATTORNEYS, EVIDENCE. 37
DEFENSE COUNSEL'S FAILURE TO OBTAIN EXPERT OPINION EVIDENCE CONSTITUTED INEFFECTIVE ASSISTANCE OF COUNSEL, THE CASE TURNED ON WHETHER DEFENDANT WAS INTOXICATED, THE INTOXILYZER RESULTS WERE INCONSISTENT, CONVICTION REVERSED (FIRST DEPT). 37
CRIMINAL LAW, EVIDENCE. 38
ANONYMOUS 911 CALL DID NOT VIOLATE DEFENDANT'S RIGHT OF CONFRONTATION BECAUSE THE INFORMATION WAS NONTESTIMONIAL IN THAT IT DID NOT IDENTIFY THE DEFENDANT BUT MERELY ALERTED THE POLICE TO A BURGLARY IN PROGRESS (SECOND DEPT). 38
CRIMINAL LAW, EVIDENCE. 38
CONSECUTIVE SENTENCES NOT SUPPORTED BY ALLEGATIONS OR PLEA ALLOCUTION, NO ALLEGATION THE THREE CRIMINAL POSSESSION OF A WEAPON COUNTS WERE SEPARATE ACTS (SECOND DEPT)... 38
CRIMINAL LAW, EVIDENCE. 39
NO EVIDENCE THREE WEAPONS IN A SAFE WERE POSSESSED BY THREE SEPARATE ACTS, SENTENCES SHOULD HAVE BEEN CONCURRENT, DECISIONS TO THE CONTRARY SHOULD NO LONGER BE FOLLOWED (SECOND DEPT). 39
CRIMINAL LAW, EVIDENCE. 39
SENTENCES FOR MURDER AND CRIMINAL POSSESSION OF A WEAPON MUST RUN CONCURRENTLY (FOURTH DEPT). 39
CRIMINAL LAW, EVIDENCE. 40
COUNTY COURT SHOULD NOT HAVE DENIED THE REQUEST FOR A CROSS-RACIAL IDENTIFICATION JURY INSTRUCTION, THE COURT OF APPEALS CROSS-RACIAL IDENTIFICATION RULING IN PEOPLE V BOONE APPLIES RETROACTIVELY, HOWEVER THE ERROR WAS HARMLESS (SECOND DEPT). 40
CRIMINAL LAW, EVIDENCE, APPEALS. 40
THE AFORD PLEA WAS NOT SUPPORTED BY STRONG EVIDENCE OF DEFENDANT'S INTENT TO COMMIT GRAND LARCENY, THE PLEA WAS VACATED IN THE INTEREST OF JUSTICE (FOURTH DEPT). 40
CRIMINAL LAW, EVIDENCE, APPEALS. 41
THE PROOF REQUIREMENTS FOR DEPRAVED INDIFFERENCE MURDER CHANGED WHEN THE COURT OF APPEALS DECIDED PEOPLE V PAYNE, BEFORE DEFENDANT'S CONVICTION BECAME FINAL, SUPREME COURT SHOULD HAVE HEARD DEFENDANT'S MOTION TO VACATE THE CONVICTION AND SHOULD HAVE REVERSED THE DEPRAVED INDIFFERENCE MURDER CONVICTION AND DISMISSED THE COUNT (SECOND DEPT). 41
CRIMINAL LAW, EVIDENCE, APPEALS. 42
DETECTIVE'S TESTIMONY INDICATING DEFENDANT WAS IDENTIFIED IN A LINEUP IDENTIFICATION PROCEDURE CONSTITUTED INADMISSIBLE BOLSTERING, ALTHOUGH THIS WAS A ONE WITNESS IDENTIFICATION CASE, THE EVIDENCE WAS OVERWHELMING AND THE ERROR WAS DEEMED HARMLESS (SECOND DEPT). 42
CRIMINAL LAW, EVIDENCE, APPEALS. 42

Table of Contents

ALTHOUGH SUPREME COURT DENIED DEFENDANT'S MOTION TO SUPPRESS A GUN FOUND IN A VEHICLE, THE COURT DID NOT ARTICULATE THE REASON FOR THE DENIAL, THE SECOND DEPARTMENT DID NOT THEREFORE HAVE THE POWER TO REVIEW THE ISSUE, MATTER SENT BACK SO SUPREME COURT CAN ARTICULATE ITS REASONING (SECOND DEPT). 42
CRIMINAL LAW, SEX OFFENDER REGISTRATION ACT (SORA), EVIDENCE. 43
INSUFFICIENT EVIDENCE THAT DEFENDANT HAD A HISTORY OF DRUG AND ALCOHOL ABUSE, RISK ASSESSMENT REDUCED (FOURTH DEPT). 43

DEBTOR-CREDITOR 44
DEBTOR-CREDITOR, MUNICIPAL LAW, TAX LAW…44
ONCE THE CITY TAX LIENS HAD BEEN ASSIGNED PAYMENT TO THE CITY, INSTEAD OF THE LIENHOLDER, IS NOT APPLIED TO THE DEBT (FIRST DEPT). 44

DEFAMATION 44
DEFAMATION, CIVIL RIGHTS LAW, PRIVILEGE. 44
REMARKS ALLEGED TO BE DEFAMATORY REFLECTED THE RESULTS OF A JUDICIAL PROCEEDING AND WERE THEREFORE PRIVILEGED PURSUANT TO CIVIL RIGHTS LAW 74 (FIRST DEPT). 44

DISCIPLINARY HEARINGS 45
DISCIPLINARY HEARINGS (INMATES). 45
PETITIONER MAY NOT HAVE BEEN AFFORDED HIS RIGHT TO BE PRESENT WHEN THE UNAUTHORIZED MEDICATION WAS FOUND IN HIS CELL, DETERMINATION ANNULLED (THIRD DEPT). 45

EDUCATION-SCHOOL LAW 46
EDUCATION-SCHOOL LAW, NEGLIGENCE. 46
THE DIGNITY FOR ALL STUDENTS ACT (DASA) DOES NOT CREATE A PRIVATE RIGHT OF ACTION FOR IN-SCHOOL BULLYING AND HARASSMENT (SECOND DEPT), ... 46
EDUCATION-SCHOOL LAW, NEGLIGENCE, EMPLOYMENT LAW. 47
INFANT PLAINTIFF WAS ALLEGEDLY SEXUALLY ABUSED BY ANOTHER STUDENT ON A PRIVATE BUS TAKING THE CHILD HOME FROM SCHOOL, CERTAIN NEGLIGENCE CAUSES OF ACTION AGAINST THE SCHOOL SURVIVED A PRE-ANSWER MOTION TO DISMISS, NEGLIGENT SUPERVISION, HIRING AND TRAINING CAUSES OF ACTION DISMISSED BECAUSE THE EMPLOYEES WERE ALLEGED TO HAVE BEEN ACTING WITHIN THE SCOPE OF EMPLOYMENT, TWO DISSENTING JUSTICES ARGUED THE STUDENT WAS NO LONGER IN THE CUSTODY AND CONTROL OF THE SCHOOL WHEN THE ABUSE OCCURRED ON THE BUS (FOURTH DEPT). 47

FAMILY LAW 48
FAMILY LAW.....48
FAMILY COURT'S TERMINATION OF MOTHER'S PARENTAL RIGHTS WAS NOT SUPPORTED BY THE EVIDENCE, MOTHER WAS DEALING WITH HER MENTAL HEALTH AND DRUG PROBLEMS AND THE SPECIAL NEEDS OF THE CHILDREN WERE BEING ADDRESSED (SECOND DEPT). 48
FAMILY LAW.....49
FAMILY COURT SHOULD NOT HAVE DELEGATED ITS AUTHORITY TO ORDER VISITATION TO THE THERAPISTS BY CONDITIONING FATHER'S VISITATION ON HIS PARTICIPATION IN THERAPEUTIC COUNSELING (FOURTH DEPT). 49
FAMILY LAW, APPEALS. 49
MOTHER'S PETITION TO HAVE HER CHILD RETURNED AFTER TEMPORARY REMOVAL SHOULD HAVE BEEN GRANTED, EVEN THOUGH THE CHILD HAD BEEN RETURNED AT THE TIME OF THE APPEAL, THE ISSUE IS NOT ACADEMIC BECAUSE OF THE STIGMA ASSOCIATED WITH REMOVAL OF A CHILD (SECOND DEPT). 49
FAMILY LAW, ATTORNEYS. 50
FATHER WAS NOT ADEQUATELY INFORMED OF THE CONSEQUENCES OF PROCEEDING WITHOUT AN ATTORNEY, NEW HEARING ORDERED (SECOND DEPT). 50
FAMILY LAW, CIVIL PROCEDURE. 50
FAMILY COURT SHOULD NOT HAVE DETERMINED HAWAII WAS THE MORE APPROPRIATE FORUM FOR THIS CUSTODY DISPUTE, HAWAII NEVER HAD SUBJECT MATTER JURISDICTION AND WAS UNAWARE OF THE FATHER'S NEW YORK CUSTODY PROCEEDINGS UNTIL AFTER THE HAWAII PROCEEDINGS WERE

Table of Contents

COMPLETED, THE HAWAII RULINGS MUST BE VACATED, ONLY THEN CAN FAMILY COURT MAKE A VALID ANALYSIS OF THE APPROPRIATE FORUM (SECOND DEPT). 50
FAMILY LAW, CIVIL PROCEDURE. 51
IN THIS CUSTODY PROCEEDING BROUGHT BY MOTHER, A HEARING IS NECESSARY TO DETERMINE WHETHER NEW YORK HAD JURISDICTION AFTER THE CHILD SPENT FOUR OR FIVE MONTHS WITH FATHER IN NORTH CAROLINA (FOURTH DEPT). 51
FAMILY LAW, CIVIL PROCEDURE, MENTAL HYGIENE LAW, SOCIAL SERVICES LAW. 52
HEARING IS REQUIRED TO DETERMINE WHETHER A GUARDIAN SHOULD BE APPOINTED FOR MOTHER IN THIS TERMINATION OF PARENTAL RIGHTS PROCEEDING, MOTHER SUFFERS FROM SCHIZOPHRENIA (FOURTH DEPT)..... 52
FAMILY LAW, CIVIL RIGHTS LAW. 52
SUPREME COURT SHOULD NOT HAVE AUTHORIZED CHANGING THE CHILD'S NAME TO A NAME NOT REQUESTED IN FATHER'S PETITION, A HEARING IS REQUIRED TO DETERMINE WHETHER THE NAME CHANGE IS IN THE CHILD'S BEST INTERESTS (FOURTH DEPT). 52
FAMILY LAW, CRIMINAL LAW. 53
ABSENCE OF A SEXUAL RELATIONSHIP IS NOT NECESSARILY DETERMINATIVE IN AN ASSESSMENT OF WHETHER A PARTY IS A MEMBER OF A HOUSEHOLD FOR PURPOSES OF JURISDICTION OVER A FAMILY OFFENSE PROCEEDING, FAMILY COURT SHOULD NOT HAVE MADE A FINDING RESPONDENT WAS NOT A MEMBER OF THE HOUSEHOLD WITHOUT HOLDING A HEARING (SECOND DEPT)..... 53
FAMILY LAW, EVIDENCE. 54
MOTHER'S PETITION TO RELOCATE WITH THE CHILD SHOULD NOT HAVE BEEN GRANTED WITHOUT A HEARING, THE PETITION WAS GRANTED AFTER FATHER SCREAMED AT COURT PERSONNEL (SECOND DEPT). 54
FAMILY LAW, EVIDENCE. 54
FATHER MADE OUT A PRIMA FACIE CASE FOR A MODIFICATION OF CUSTODY BASED UPON LOSS OF EMPLOYMENT, PETITION SHOULD NOT HAVE BEEN DISMISSED, REMITTED FOR A CONTINUED HEARING (SECOND DEPT). 54
FAMILY LAW, EVIDENCE. 55
FATHER SHOULD NOT HAVE BEEN PRECLUDED FROM BRINGING FUTURE PARENTAL ACCESS PETITIONS WITHOUT COURT APPROVAL (SECOND DEPT). 55
FAMILY LAW, EVIDENCE. 56
FAMILY COURT DID NOT HAVE SUFFICIENT EVIDENCE TO DETERMINE IT WAS IN THE CHILD'S BEST INTERESTS TO BE WITH FATHER IN THIS TEMPORARY CUSTODY PROCEEDING, ALLEGATIONS OF EXCESSIVE CORPORAL PUNISHMENT REQUIRED A HEARING (SECOND DEPT). 56
FAMILY LAW, EVIDENCE. 56
EVIDENCE DID NOT SUPPORT TEMPORARY REMOVAL OF CHILD FROM FATHER'S CUSTODY DURING THE PENDENCY OF A CHILD PROTECTIVE PROCEEDING (SECOND DEPT). 56
FAMILY LAW, EVIDENCE. 57
FAILURE TO HOLD A LINCOLN HEARING WAS NOT AN ABUSE OF DISCRETION (THIRD DEPT). 57
FAMILY LAW, EVIDENCE. 57
FAMILY COURT SHOULD NOT HAVE GRANTED GRANDMOTHER'S PETITION FOR VISITATION, THE PARENTS WERE FIT AND THEIR TESTIMONY SHOULD HAVE BEEN GIVEN WEIGHT, INSTEAD FAMILY COURT IGNORED THE PARENTS' TESTIMONY (FOURTH DEPT)..... 57
FAMILY LAW, EVIDENCE. 58
EVIDENCE THE CHILD WITNESSED A PHYSICAL ALTERCATION BETWEEN MOTHER AND FATHER WAS SUFFICIENT FOR A FINDING FATHER NEGLECTED THE CHILD (SECOND DEPT). 58
FAMILY LAW, EVIDENCE. 58
FAMILY COURT SHOULD HAVE FOUND BISHME'S DAUGHTER TO HAVE BEEN DERIVATIVELY ABUSED AND NEGLECTED BASED UPON BISHME'S ABUSE AND NEGLECT OF ANOTHER CHILD (SECOND DEPT)..... 58
FAMILY LAW, EVIDENCE. 59
FAMILY COURT DID NOT HAVE SUFFICIENT EVIDENCE BEFORE IT TO GRANT FATHER'S PETITION FOR CUSTODY WHEN MOTHER FAILED TO APPEAR, MOTHER'S MOTION TO VACATE THE DEFAULT ORDER SHOULD HAVE BEEN GRANTED (FIRST DEPT)..... 59
FAMILY LAW, EVIDENCE, CRIMINAL LAW. 60

Table of Contents

FAMILY COURT, IN THE WIFE'S ABSENCE, SUA SPONTE, RAISED ALLEGATIONS NOT INCLUDED IN THE FAMILY OFFENSE PETITION BEFORE THE COURT, FAMILY COURT THEN ALLOWED THE ALLEGATIONS TO BE ADDED TO THE PETITION, AND THE COURT WENT ON TO FIND THAT THE WIFE HAD COMMITTED THE FAMILY OFFENSES OF HARASSMENT AND MENACING, BECAUSE THE WIFE WAS NOT GIVEN NOTICE OF THE ADDED ALLEGATIONS, REVERSAL WAS REQUIRED (THIRD DEPT). 60
FAMILY LAW, EVIDENCE, CRIMINAL LAW. 60
UNLIKE IN FAMILY COURT ACT ARTICLE 10 AND 6 PROCEEDINGS, CHILDREN'S HEARSAY STATEMENTS ARE NOT ADMISSIBLE IN FAMILY COURT ACT ARTICLE 8 (FAMILY OFFENSE) PROCEEDINGS (THIRD DEPT). 60
FAMILY LAW, EVIDENCE, JUDGES. 61
CUSTODY SHOULD NOT HAVE BEEN TRANSFERRED TO FATHER AND ALL CONTACT BETWEEN MOTHER AND CHILD SHOULD NOT HAVE BEEN SUSPENDED WITHOUT A HEARING, JUDGE, SUA SPONTE, SHOULD NOT HAVE PROHIBITED FUTURE PETITIONS FOR CUSTODY OR VISITATION BY MOTHER (FIRST DEPT). . 61
FAMILY LAW, IMMIGRATION LAW, SOCIAL SERVICES LAW. 62
FAMILY COURT SHOULD HAVE APPOINTED A GUARDIAN FOR THE CHILD AND MADE THE FINDINGS NECESSARY FOR THE CHILD TO PETITION FOR SPECIAL IMMIGRANT JUVENILE STATUS (SIJS) (SECOND DEPT). 62

FORECLOSURE 62
FORECLOSURE, CIVIL PROCEDURE. 62
CROSS-MOTION TO EXTEND THE TIME FOR SERVICE OF PROCESS PURSUANT TO CPLR 306-b IN THIS FORECLOSURE ACTION PROPERLY GRANTED, THE JUDGMENT OF FORECLOSURE HAD BEEN VACATED BECAUSE DEFENDANT WAS NOT PROPERLY SERVED INITIALLY (SECOND DEPT). 62
FORECLOSURE, CIVIL PROCEDURE, ATTORNEYS, APPEALS. 63
NOTICE OF APPEARANCE FILED BY DEFENDANT'S ATTORNEY WAIVED ANY SUBSEQUENT OBJECTION TO PERSONAL JURISDICTION IN THIS FORECLOSURE ACTION, ISSUE HEARD ON APPEAL ALTHOUGH NOT RAISED BELOW (SECOND DEPT). 63
FORECLOSURE, CIVIL PROCEDURE, EVIDENCE. ..63
PLAINTIFF BANK DID NOT DEMONSTRATE STANDING TO FORECLOSE ON THE REVERSE MORTGAGE WITH EVIDENCE ADMISSIBLE UNDER THE BUSINESS RECORDS EXCEPTION TO THE HEARSAY RULE (SECOND DEPT). 63
FORECLOSURE, CIVIL PROCEDURE, REAL PROPERTY ACTIONS AND PROCEEDINGS LAW (RPAPL). 64
DEFENDANT'S ALLEGATION THAT SHE DOES NOT LIVE AT THE ADDRESS WHERE HER BROTHER WAS SERVED IN THIS FORECLOSURE ACTION NECESSITATED A TRAVERSE HEARING (FIRST DEPT). 64
FORECLOSURE, EVIDENCE, REAL PROPERTY ACTIONS AND PROCEEDINGS LAW (RPAPL). 65
QUESTIONS OF FACT ABOUT WHETHER PLAINTIFF HAS STANDING IN THIS FORECLOSURE ACTION AND WHETHER THE RPAPL 1304 NOTICE WAS SERVED, PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (FIRST DEPT). 65
FORECLOSURE, REAL PROPERTY ACTIONS AND PROCEEDINGS LAW (RPAPL). 65
PROOF THAT DEFENDANT WAS SERVED WITH THE RPAPL 1304 NOTICE IN THIS FORECLOSURE PROCEEDING WAS NOT SUFFICIENT, THE BANK'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (FIRST DEPT). 65
FORECLOSURE, EVIDENCE, REAL PROPERTY ACTIONS AND PROCEEDINGS LAW (RPAPL). 66
BANK DID NOT DEMONSTRATE COMPLIANCE WITH THE NOTICE PROVISIONS OF REAL PROPERTY ACTIONS AND PROCEEDINGS LAW (RPAPL) 1304, BANK'S MOTION FOR SUMMARY JUDGMENT IN THIS FORECLOSURE ACTION SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT). 66
FORECLOSURE, EVIDENCE, REAL PROPERTY ACTIONS AND PROCEEDINGS LAW (RPAPL), UNIFORM COMMERCIAL CODE (UCC), CONTRACT LAW. 66
LOST NOTE AFFIDAVIT INSUFFICIENT BECAUSE UCC REQUIREMENTS NOT MET, PROOF OF RPAPL 1304 NOTICE INSUFFICIENT, PROOF OF COMPLIANCE WITH NOTICE CONDITION OF THE MORTGAGE INSUFFICIENT, SUPREME COURT SHOULD NOT HAVE GRANTED THE BANK'S MOTION FOR SUMMARY JUDGMENT IN THIS FORECLOSURE PROCEEDING (SECOND DEPT). 66

FRAUD 67
FRAUD, CONVERSION, BANKING LAW. 67

Table of Contents

COMPLAINT ALLEGED VALID CAUSES OF ACTION FOR AIDING AND ABETTING FRAUD AND AIDING AND ABETTING CONVERSION AGAINST A BANK WHICH PROVIDED A LETTER TO PLAINTIFF STATING DEFENDANT MAINTAINED ENOUGH IN HIS BANK ACCOUNTS TO COVER A POST-DATED CHECK FOR OVER $400,000 (FIRST DEPT). 67

INSURANCE LAW 68

INSURANCE LAW, ARBITRATION, CONTRACT LAW, CIVIL PROCEDURE. 68

INSURER WAIVED THE CONTRACTUAL ISSUE WHETHER PETITIONER WAS A PASSENGER IN THE CAR BY NOT SEEKING A STAY OF ARBITRATION, THEREFORE THE ARBITRATOR EXCEEDED HIS POWERS BY FINDING PETITIONER WAS NOT A PASSENGER AT THE TIME OF THE HIT AND RUN ACCIDENT (SECOND DEPT). 68

INSURANCE LAW, EVIDENCE, CIVIL PROCEDURE. 68

THE PETITION SEEKING LEAVE TO COMMENCE AN ACTION AGAINST THE MOTOR VEHICLE ACCIDENT INDEMNIFICATION CORPORATION (MVAIC) IN THIS PEDESTRIAN ACCIDENT CASE SHOULD NOT HAVE BEEN DISMISSED WITHOUT A HEARING, THERE WERE QUESTIONS OF FACT ABOUT WHETHER THE NOTICE CONDITIONS PRECEDENT TO THE ACTION WERE MET (SECOND DEPT). 68

INSURANCE LAW, NEGLIGENCE, EVIDENCE. 69

IN THIS TRAFFIC ACCIDENT CASE, AN AFFIDAVIT FROM A LICENSED CLINICAL SOCIAL WORKER (LCSW) CONSTITUTED COMPETENT EVIDENCE PLAINTIFF SUFFERS FROM POST-TRAUMATIC STRESS DISORDER (PTSD), PTSD IS A 'SERIOUS INJURY' WITHIN THE MEANING OF INSURANCE LAW 5102 (THIRD DEPT). 69

JUDGES 70

JUDGES. 70

LAWSUIT SEEKING TO ENJOIN JUDICIAL SALARY INCREASES WAS PROPERLY DISMISSED (THIRD DEPT). 70

LABOR LAW-CONSTRUCTION LAW 70

LABOR LAW-CONSTRUCTION LAW. 70

QUESTION OF FACT WHETHER PLAINTIFF'S SLIP AND FALL OCCURRED ON DEBRIS IN A WALKWAY WITHIN THE MEANING OF THE NYCRR IN THIS LABOR LAW 241(6) ACTION, HOWEVER, BECAUSE THE FALL OCCURRED OUTSIDE THE ENTRANCE TO A SHANTY, THE NYCRR PROVISION WHICH PERTAINS TO PASSAGEWAYS WAS NOT APPLICABLE (FIRST DEPT). 70

LABOR LAW-CONSTRUCTION LAW, EVIDENCE. 71

PLAINTIFF SHOULD HAVE BEEN GRANTED SUMMARY JUDGMENT ON HIS LABOR LAW 240 (1) CAUSE OF ACTION, PLAINTIFF'S LADDER SHIFTED AND HE FELL, HEARSAY IN A REPORT WHICH CONSTITUTED A MISTRANSLATION OF THE PLAINTIFF'S STATEMENT DID NOT RAISE A TRIABLE ISSUE OF FACT (FIRST DEPT). 71

LANDLORD-TENANT 72

LANDLORD-TENANT, CONTRACT LAW. 72

LEASE INCLUDED AN EXPRESS PROVISION ALLOWING TENANT TO WITHHOLD RENT IF THE PREMISES IS DAMAGED AND NOT REPAIRED, THEREFORE WITHHOLDING RENT WAS NOT AN ELECTION OF REMEDIES AND THE TENANT COULD WITHHOLD RENT AND SUE FOR DAMAGES (SECOND DEPT). 72

LANDLORD-TENANT, MENTAL HYGIENE LAW, MUNICIPAL LAW, FAIR HOUSING ACT. 72

HEARING WAS REQUIRED TO DETERMINE WHETHER A PERMANENT STAY OF EVICTION WAS A PROPER ACCOMMODATION FOR DISABLED TENANTS PURSUANT TO THE FAIR HOUSING ACT (FIRST DEPT). 72

MEDICAL MALPRACTICE 73

MEDICAL MALPRACTICE, NEGLIGENCE. 73

A BLOCKED TRACHEOSTOMY TUBE IS A FORESEEABLE EVENT FOR WHICH DEFENDANT ANESTHESIOLOGIST WAS TRAINED AND PREPARED, THEREFORE THE JURY SHOULD NOT HAVE BEEN INSTRUCTED ON THE EMERGENCY DOCTRINE, DEFENSE VERDICT IN THIS MEDICAL MALPRACTICE ACTION REVERSED AND NEW TRIAL ORDERED (SECOND DEPT). 73

MENTAL HYGIENE LAW 74

MENTAL HYGIENE LAW 74

ABSENT A FINDING THE GUARDIAN OF THE PROPERTY OF AN INCAPACITATED PERSON FAILED TO PROPERLY DISCHARGE HER DUTIES, THE COURT SHOULD NOT HAVE ORDERED THE GUARDIAN TO PAY THE ACCOUNTANT WHO ASSISTED IN PREPARING THE FINAL ACCOUNT FROM HER OWN FUNDS (SECOND DEPT). 74
MENTAL HYGIENE LAW, CRIMINAL LAW, EVIDENCE, APPEALS. 74
RESPONSE TO A JURY NOTE MAY HAVE MISLED THE JURY TO CONCLUDE THEY COULD MAKE THEIR OWN LAY JUDGMENT, AS OPPOSED TO RELYING ON EXPERT OPINION, ABOUT WHETHER DEFENDANT SEX OFFENDER SUFFERED FROM A MENTAL ABNORMALITY IN THIS CIVIL MANAGEMENT PROCEEDING, ISSUE REVIEWED ON APPEAL IN THE INTEREST OF JUSTICE, NEW TRIAL ORDERED (SECOND DEPT)..... 74

MUNICIPAL LAW 75
MUNICIPAL LAW, EMPLOYMENT LAW, CONTRACT LAW. 75
CITY EMPLOYEE'S CONTRACTUAL RIGHT TO MEDICAL BENEFITS VESTED BEFORE THE COLLECTIVE BARGAINING AGREEMENT WAS TERMINATED (FOURTH DEPT). 75

NEGLIGENCE..... 76
NEGLIGENCE. 76
PLAINTIFF ASSUMED THE RISK OF INJURY STEMMING FROM A FIGHT DURING A HOCKEY GAME (SECOND DEPT). 76
NEGLIGENCE. 76
QUESTION OF FACT WHETHER FRONTMOST DRIVER NEGLIGENTLY BROUGHT HER CAR TO A COMPLETE STOP IN THIS REAR-END COLLISION CASE, FRONTMOST DRIVER'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT). 76
NEGLIGENCE. 77
DEFENDANT BAR NOT LIABLE FOR INJURIES AND DEATH OF PLAINTIFF'S DECEDENT RESULTING FROM AN ALTERCATION ON A PUBLIC ROAD IN FRONT OF THE BAR, BAR EXERCISED NO CONTROL OVER THE AREA WHERE THE ALTERCATION OCCURRED (SECOND DEPT). 77
NEGLIGENCE, CONTRACT LAW. 78
PROPERTY OWNER DID NOT DEMONSTRATE A LACK OF CONSTRUCTIVE KNOWLEDGE OF THE SNOW AND ICE CONDITION IN THIS SLIP AND FALL CASE, AND THE SNOW REMOVAL CONTRACTOR DID NOT OFFER ANY EVIDENCE OF THE STATE OF THE AREA WHERE PLAINTIFF FELL, DEFENDANTS' SUMMARY JUDGMENT MOTIONS SHOULD NOT HAVE BEEN GRANTED (FIRST DEPT). 78
NEGLIGENCE, EMPLOYMENT LAW. 78
QUESTIONS OF FACT WHETHER THE EMPLOYER OF THE DRIVER WHO KILLED A BICYCLIST WHEN ATTEMPTING TO LEAVE THE EMPLOYER'S PREMISES IS LIABLE, QUESTIONS OF FACT WERE RAISED ABOUT (1) THE EMPLOYER'S SPECIAL USE OF THE AREA WHERE THE ACCIDENT OCCURRED, (2) A SPECIAL RELATIONSHIP WITH THE EMPLOYEE (MASTER-SERVANT) GIVING RISE TO A DUTY TO CONTROL THE EMPLOYEE, AND (3) PROXIMATE CAUSE (THIRD DEPT). 78
NEGLIGENCE, EVIDENCE. 79
ALTHOUGH THE RULES OF THE CITY OF NEW YORK REQUIRED THAT TIME WARNER MAINTAIN ONLY THE AREA 12 INCHES AROUND A METAL BOX COVER IN THE SIDEWALK, THERE WERE QUESTIONS OF FACT WHETHER TIME WARNER OR A PREDECESSOR CREATED THE DEFECT OR HAD CONSTRUCTIVE NOTICE OF THE DEFECT OUTSIDE THE 12 INCH AREA, SUPREME COURT REVERSED IN THIS SLIP AND FALL CASE (FIRST DEPT). 79
NEGLIGENCE, EVIDENCE. 80
DOCTRINE OF RES IPSA LOQUITUR MAY APPLY TO WINDOW FALLING ONTO PLAINTIFF, DEFENDANT BUILDING MANAGER'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (FIRST DEPT). 80
NEGLIGENCE, EVIDENCE. 81
DEFENDANT'S UNSUPPORTED ALLEGATION THAT PLAINTIFF STOPPED SUDDENLY WAS NOT ENOUGH TO DEFEAT PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT IN THIS REAR END COLLISION CASE (SECOND DEPT). 81
NEGLIGENCE, EVIDENCE. 81

Table of Contents

QUESTION OF FACT WHETHER SMALL TABLE OVER WHICH PLAINTIFF TRIPPED AND FELL WAS OPEN AND OBVIOUS, DEFENDANT'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (FIRST DEPT). 81
NEGLIGENCE, EVIDENCE. 82
EVEN PHYSICALLY SMALL DEFECTS, IN COMBINATION WITH OTHER FACTORS, CAN CONSTITUTE A DANGEROUS CONDITION, DEFENDANT'S SUMMARY JUDGMENT MOTION IN THIS SLIP AND FALL CASE SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT). 82
NEGLIGENCE, EVIDENCE. 82
DEFENDANT PROPERTY MANAGER AND DEFENDANT OWNER DID NOT DEMONSTRATE A LACK OF CONSTRUCTIVE KNOWLEDGE OF THE ICE AND SNOW CONDITION WHERE PLAINTIFF FELL IN THIS STRIP MALL PARKING LOT SLIP AND FALL CASE, DEFENDANTS' MOTION FOR SUMMARY JUDGMENT FOR SUMMARY JUDGMENT (SECOND DEPT)..... 82
NEGLIGENCE, EVIDENCE. 83
ISSUE OF FACT WHETHER DRIVER WITH THE RIGHT OF WAY SHOULD HAVE SEEN THE CAR THAT WAS NOT SLOWING DOWN AS IT APPROACHED THE INTERSECTION, SUPREME COURT REVERSED, TWO-JUSTICE DISSENT (FOURTH DEPT). 83
NEGLIGENCE, EVIDENCE, CIVIL PROCEDURE. 83
SUPREME COURT PROPERLY RELIED ON THE RESULTS OF A FRYE HEARING IN A PRIOR TRIAL TO ALLOW THE TESTIMONY OF A DEFENSE EXPERT (SECOND DEPT). 83
NEGLIGENCE, EVIDENCE, CIVIL PROCEDURE. 84
ADVERSE INFERENCE JURY INSTRUCTION IS THE PROPER SANCTION FOR THE NEGLIGENT DESTRUCTION OF AN EMPLOYEE'S RECORDS IN THIS NEGLIGENT SUPERVISION ACTION AGAINST A RESPITE CARE FACILITY (SECOND DEPT). 84
NEGLIGENCE, EVIDENCE, CIVIL PROCEDURE. 85
THERE WAS NO PROPER FOUNDATION FOR THE DEFENSE EXPERT'S TESTIMONY IN THIS TRAFFIC ACCIDENT CASE, DEFENSE VERDICT FINDING THAT PLAINTIFF DID NOT SUFFER A SERIOUS INJURY WAS NECESSARILY BASED ON THE DEFENSE EXPERT'S TESTIMONY, VERDICT WAS PROPERLY SET ASIDE (SECOND DEPT). 85
NEGLIGENCE, EVIDENCE, CIVIL PROCEDURE, INSURANCE LAW, VEHICLE AND TRAFFIC LAW. 85
THE PRESUMPTION OF OWNERSHIP OF A VEHICLE CREATED BY THE CERTIFICATE OF TITLE CAN BE REBUTTED BY PROOF OF DOMINION AND CONTROL OVER THE VEHICLE, PLAINTIFF'S MOTION TO DISCOVER THE INSURER'S FILE IN THIS TRAFFIC ACCIDENT CASE TO DETERMINE WHETHER DEFENDANT EXERCISED DOMINION AND CONTROL OVER THE VEHICLE SHOULD NOT HAVE BEEN DENIED (SECOND DEPT). 85
NEGLIGENCE, MEDICAL MALPRACTICE. 86
QUESTION OF FACT WHETHER FALL FROM BED WAS THE RESULT OF THE FAILURE TO TAKE ADEQUATE PRECAUTIONS AGAINST FALLING AND QUESTION OF FACT WHETHER THE FALL EXACERBATED THE PROGRESSION OF PLAINTIFF'S INTERCRANIAL HEMORRHAGE IN THIS MEDICAL MALPRACTICE ACTION, DEFENDANTS' SUMMARY JUDGMENT MOTION SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT)..... 86
NEGLIGENCE, MEDICAL MALPRACTICE, CIVIL PROCEDURE. 86
A STENT WAS DELIBERATELY INSERTED IN PLAINTIFF DURING SURGERY IN 1993 AND WAS DISCOVERED AND REMOVED IN 2012, ALTHOUGH THE STENT SHOULD HAVE SUBSEQUENTLY BEEN REMOVED, BECAUSE IT WAS INSERTED INTENTIONALLY AND SERVED A SURGICAL PURPOSE IT WAS NOT A 'FOREIGN OBJECT,' THEREFORE THE DISCOVERY OF THE STENT IN 2012 DID NOT START THE STATUTE OF LIMITATIONS, COMPLAINT DISMISSED AS TIME-BARRED (SECOND DEPT)..... 86
NEGLIGENCE, MEDICAL MALPRACTICE, EVIDENCE. 87
EXPERTS MAY NOT RELY ON DISPUTED FACTS IN RENDERING AN OPINION IN A MEDICAL MALPRACTICE CASE (FOURTH DEPT). 87
NEGLIGENCE, MUNICIPAL LAW, CIVIL PROCEDURE. 88
PETITION TO AMEND A NOTICE OF CLAIM WAS UNTIMELY WITH RESPECT TO THE PARENTS' DERIVATIVE ACTION IN THIS PEDESTRIAN-VEHICLE TRAFFIC ACCIDENT CASE, THE PETITIONERS DID NOT SHOW THAT THE TOWN HAD TIMELY KNOWLEDGE OF THE ALLEGED INVOLVEMENT OF TOWN PERSONNEL, PETITION SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT). 88
NEGLIGENCE, MUNICIPAL LAW, EVIDENCE. 89

Table of Contents

POLICE OFFICER SLIPPED AND FELL ON AN OUTSIDE STAIRWAY WHEN PATROLLING DEFENDANTS' PROPERTY, DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON THE NEGLIGENCE AND GENERAL MUNICIPAL LAW 205-a CAUSES OF ACTION SHOULD NOT HAVE BEEN GRANTED, PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT PROPERLY DENIED (SECOND DEPT). 89
NEGLIGENCE, MUNICIPAL LAW, EVIDENCE.....89
PETITION TO DEEM A LATE NOTICE OF CLAIM TIMELY SERVED SHOULD NOT HAVE BEEN GRANTED, THE CITY'S KNOWLEDGE OF THE CROSSWALK DEFECT IN THIS SLIP AND FALL CASE IS NOT EQUIVALENT TO TIMELY KNOWLEDGE OF THE NATURE OF PLAINTIFF'S CLAIM (SECOND DEPT). 89
NEGLIGENCE, VEHICLE AND TRAFFIC LAW 90
THE PARTY WITH THE RIGHT OF WAY ENTERING THE INTERSECTION WAS ENTITLED TO SUMMARY JUDGMENT AGAINST THE DRIVER MAKING A LEFT TURN, ALLEGATIONS THE PARTY WITH THE RIGHT OF WAY WAS SPEEDING DID NOT RAISE A QUESTION OF FACT BECAUSE THERE WAS NO EVIDENCE THE ACCIDENT COULD HAVE BEEN AVOIDED IF SPEEDING WAS NOT INVOLVED (SECOND DEPT). 90

PRODUCTS LIABILITY 91
PRODUCTS LIABILITY, EVIDENCE. 91
THE OWNER OF THE DEFECTIVE LADDER WHICH CAUSED PLAINTIFF'S INJURY ALLEGED THE LADDER WAS PURCHASED AT A PARTICULAR HOME DEPOT STORE, IN THE FACE OF PROOF THE STORE DID NOT OPEN UNTIL YEARS AFTER THE ALLEGED PURCHASE, THE OWNER OF THE LADDER ALLEGED THE LADDER WAS EITHER PURCHASED AT A DIFFERENT TIME OR AT A DIFFERENT HOME DEPOT STORE, HOME DEPOT'S SUMMARY JUDGMENT MOTION SHOULD HAVE BEEN GRANTED (SECOND DEPT). 91

REAL PROPERTY LAW 92
REAL PROPERTY LAW, CIVIL PROCEDURE, JUDGES. 92
SUPREME COURT SHOULD NOT HAVE, SUA SPONTE, SEARCHED THE RECORD AND ISSUED A DECLARATORY JUDGMENT ALLOWING PLANTIFFS TO PAVE AN EASEMENT (FOURTH DEPT). 92
REAL PROPERTY LAW, REAL PROPERTY ACTIONS AND PROCEEDINGS LAW, MUNICIPAL LAW, CIVIL PROCEDURE. 93
QUESTIONS OF FACT PRECLUDED SUMMARY JUDGMENT WITH RESPECT TO THE ADVERSE POSSESSION ACTION AND THE LACHES DEFENSE, THE ACTION INVOLVED LAND THAT WAS ONCE UNDER WATER CREATED BY THE MOVEMENT OF SAND DURING STORMS DECADES AGO (SECOND DEPT). 93

UNEMPLOYMENT INSURANCE 94
UNEMPLOYMENT INSURANCE.....94
DANCE INSTRUCTOR WAS AN EMPLOYEE OF THE FOUNDATION CHARTERED BY THE NYS BOARD OF REGENTS TO SET UP ARTISTIC PROGRAMS IN SCHOOLS (THIRD DEPT). 94
UNEMPLOYMENT INSURANCE.....94
NEWSPAPER CARRIER WAS AN EMPLOYEE ENTITLED TO UNEMPLOYMENT INSURANCE BENEFITS (THIRD DEPT). 94
UNEMPLOYMENT INSURANCE.....95
CLAIMANT, WHO HAD BEEN INJURED, DID NOT DEMONSTRATE SHE WAS ABLE TO WORK DURING THE TIME SHE WAS CERTIFIED FOR BENEFITS, UNEMPLOYMENT INSURANCE APPEALS BOARD RULING SHE WAS ENTITLED TO BENEFITS REVERSED (THIRD DEPT). 95

WORKERS' COMPENSATION LAW.....95
WORKERS' COMPENSATION, APPEALS. 95
THE WORKERS' COMPENSATION BOARD DID NOT PROVIDE AN EXPLANATION FOR DISQUALIFYING CLAIMANT FROM FUTURE WAGE REPLACEMENT BENEFITS, MATTER REMITTED SO THAT ASPECT OF THE PENALTY CAN BE REVIEWED ON APPEAL (THIRD DEPT). 95
WORKERS' COMPENSATION, EVIDENCE. 96
THE OPINION EVIDENCE THAT CLAIMANT'S PRE-EXISTING HEART CONDITION WAS A HINDRANCE TO HER EMPLOYABILITY WAS INSUFFICIENT, THE WORKERS' COMPENSATION CARRIER, THEREFORE, WAS NOT ENTITLED TO REIMBURSEMENT FROM THE SPECIAL DISABILITY FUND (THIRD DEPT). 96

ZONING 97
ZONING, LAND USE, ENVIRONMENTAL LAW, CIVIL PROCEDURE. 97

Table of Contents

FOUR MONTH STATUTE OF LIMITATIONS APPLIED TO THE DECISION BY THE PLANNING BOARD THAT NO ENVIRONMENTAL IMPACT STATEMENT WAS NECESSARY, PETITION TO ANNUL THAT DECISION WAS UNTIMELY (SECOND DEPT). 97

COURT OF APPEALS 98

CRIMINAL LAW 98

CRIMINAL LAW. 98

COUNTY COURT SHOULD NOT HAVE IMPANELED AN ANONYMOUS JURY (CT APP). 98

CRIMINAL LAW, APPEALS. 98

WHETHER A JUVENILE'S STATEMENT TO THE POLICE WAS VOLUNTARILY GIVEN PRESENTED A MIXED QUESTION OF LAW AND FACT WHICH IS NOT REVIEWABLE BY THE COURT OF APPEALS, TWO DISSENTERS ARGUED JUVENILES SHOULD NOT BE INTERROGATED OUTSIDE THE PRESENCE OF THEIR ADULT LEGAL GUARDIANS (CT APP). 98

CRIMINAL LAW, CORRECTION LAW, SEX OFFENDER REGISTRATION ACT (SORA). 99

ALTHOUGH DEFENDANT WAS REQUIRED TO REGISTER AS A SEX OFFENDER IN VIRGINIA, THERE WAS NO SEX-RELATED ELEMENT IN THE VIRGINIA OFFENSE, DEFENDANT NEED NOT REGISTER AS A SEX OFFENDER IN NEW YORK (CT APP). 99

CRIMINAL LAW, EVIDENCE. 99

THE MURDER COUNT, WHICH SHOULD HAVE BEEN DISMISSED BECAUSE THE PEOPLE DID NOT SEEK PERMISSION TO RESUBMIT IT AFTER THE GRAND JURY DEADLOCKED ON THE CHARGE, DID NOT TAINT THE CONVICTION ON THE MANSLAUGHTER COUNT UNDER A SPILL-OVER ANALYSIS (CT APP). 99

CRIMINAL LAW, VEHICLE AND TRAFFIC LAW. 100

A SENTENCING COURT MAY REQUIRE A DEFENDANT, AS A CONDITION OF PROBATION, TO PAY FOR ELECTRONIC MONITORING, IF A DEFENDANT CLAIMS AN INABILITY TO PAY, A HEARING MUST BE HELD TO DETERMINE WHETHER ANOTHER ALTERNATIVE TO INCARCERATION IS APPROPRIATE AND, IF NOT, THE DEFENDANT MAY BE SENTENCED TO PRISON (CT APP). 100

FREEDOM OF INFORMATION LAW (FOIL) 101

FREEDOM OF INFORMATION LAW (FOIL) 101

RECORDS OF DISCIPLINARY PROCEEDINGS CONCERNING A POLICE OFFICER ARE EXEMPT FROM DISCLOSURE EVEN IF THE IDENTIFYING INFORMATION IS REDACTED (CT APP). 101

REAL PROPERTY TAX LAW (RPTL) 102

REAL PROPERTY TAX LAW (RPTL). 102

LARGE CELLULAR DATA TRANSMISSION EQUIPMENT OWNED BY T-MOBILE IS TAXABLE REAL PROPERTY SUBJECT TO REAL PROPERTY TAX LAW 102 (CT APP). 102

WORKERS' COMPENSATION 103

WORKERS' COMPENSATION. 103

TIME LIMITS ON ADDITIONAL COMPENSATION FOR A PERMANENT PARTIAL DISABILITY INCLUDED IN WCL 15 (3) (w) APPLY TO THE CALCULATION OF THE AMOUNT OF THE BENEFITS IN WCL 15 (3) (v) (CT APP). 103

Table of Contents

APPELLATE DIVISION

ANIMAL LAW

ANIMAL LAW.

THEORY THAT DEFENDANT VETERINARY CLINIC WAS LIABLE IN NEGLIGENCE FOR A DOG BITE WHICH OCCURRED IN THE CLINIC WAITING ROOM REJECTED, ONLY A STRICT LIABILITY THEORY COULD APPLY AND PLAINTIFF CONCEDED RELIEF WAS NOT AVAILABLE PURSUANT TO STRICT LIABILITY (THIRD DEPT).

The Third Department determined defendant veterinary clinic could not be held liable for a dog bite which occurred in the clinic waiting room under a negligence (failure to provide a safe waiting room area) theory. Plaintiff contended the strict liability theory did not apply because defendant clinic did not own the dog:

> ... [W]e hold that for defendant to be liable for the personal injuries allegedly sustained due to the dog attack that occurred in the waiting room, plaintiff must establish that defendant knew or should have known about the dog's vicious propensities.
>
> ... [P]laintiff acknowledges in her appellate brief that she is not asserting a claim for strict liability against defendant and that her claims against it are grounded in negligence and premises liability. In her opposition to defendant's summary judgment motion, plaintiff likewise conceded that she did not have a strict liability claim against defendant. In any event, even if a strict liability claim could be extrapolated from plaintiff's pleadings... . As such, Supreme Court correctly granted defendant's motion for summary judgment and denied plaintiff's cross motion for partial summary judgment ... . **Hewitt v Palmer Veterinary Clinic, PC, 2018 NY Slip Op 08396, Third Dept 12-6-18**

Table of Contents

ARBITRATION

ARBITRATION, EMPLOYMENT LAW, CONTRACT LAW, MUNICIPAL LAW.

ARBITRATOR, NOT THE COURTS, MUST FIRST DETERMINE WHETHER THE MATTER IS ARBITRABLE, CITY HAD ISSUED NEW PROTOCOLS FOR FIRST RESPONDERS, THE UNION FILED A GRIEVANCE ARGUING THE NEW PROTOCOLS MUST BE THE SUBJECT OF ARBITRATION, AN ARBITRATOR MUST DECIDE WHETHER THE ISSUE IS COVERED BY THE COLLECTIVE BARGAINING AGREEMENT (SECOND DEPT).

The Second Department, reversing Supreme Court, held that whether the public sector employment matter was arbitrable under the terms of the collective bargaining agreement (CBA) must first be determined by the arbitrator, not the courts. The city had issued new protocols for first responders in the EMS program concerning active shooters, animal bites, suspicious packages, medical emergencies associated with criminal activity, etc. The union brought a grievance arguing that their members were not adequately trained for the new protocols and the issues should be the subject of arbitration:

> "... [A] dispute between a public sector employer and an employee is only arbitrable if it satisfies a two-prong test" ... . " Initially, the court must determine whether there is any statutory, constitutional, or public policy prohibition against arbitrating the grievance'" ... . " If there is no prohibition against arbitrating, the court must examine the parties' collective bargaining agreement and determine if they in fact agreed to arbitrate the particular dispute'" ... .
>
> When deciding whether a dispute is arbitrable, "the court shall not consider whether the claim with respect to which arbitration is sought is tenable, or otherwise pass upon the merits of the dispute" (CPLR 7501). "Even an apparent weakness of the claimed grievance is not a factor in the court's threshold determination. It is the arbitrator who weighs the merits of the claim" ... .
>
> Here, it is undisputed that there is no statutory, constitutional, or public policy prohibition to arbitration of the grievance. Therefore, the only issue is whether the parties in fact agreed to arbitrate the dispute. Where, as here, the relevant arbitration provision of the CBA is broad, if the matter in dispute bears a reasonable relationship to some general subject matter of the CBA, it will be for the arbitrator and not the courts to decide whether the disputed matter falls within the CBA ... .
>
> In this case, Local 628's grievance alleged that the City violated Article 33.1 of the CBA, which mandates that the EMS program be kept at the highest level of professional standards based upon the standards in place at the time of the agreement, by issuing General Order 4-15, which increased the call protocols and subjected its members to calls for which they are not trained and lack necessary equipment. Therefore, the grievance is reasonably related to at least one provision in the CBA, and the Supreme Court should have denied the petition to permanently stay arbitration. **Matter of City of Yonkers v Yonkers Fire Fighters, Local 628, IAFF, AFL-CIO, 2018 NY Slip Op 08294, Second Dept 12-5-18**

Table of Contents

ARBITRATION, MUNICIPAL LAW, EMPLOYMENT LAW, CONTRACT LAW.

ARBITRATOR DID NOT EXCEED HIS AUTHORITY IN FINDING THAT THE COLLECTIVE BARGAINING AGREEMENT REQUIRED DUE PROCESS PROTECTIONS, INCLUDING NOTICE, BEFORE AN EMPLOYEE COULD BE TERMINATED FOR ALLEGED MISCONDUCT, ARBITRATOR'S AWARD SHOULD HAVE BEEN CONFIRMED (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined the arbitration award in this employment matter should have been confirmed. The grievant was employed by the respondent town as a school crossing guard. Without notice, the town's chief of police called the grievant to his office and fired her for alleged misconduct. The arbitrator determined the collective bargaining agreement (CBA) required limited due process protections, including notice, and found termination of the grievant was without just cause:

> "[A]n arbitrator exceed[s] his [or her] power' under the meaning of the statute where his [or her] award violates a strong public policy, is irrational or clearly exceeds a specifically enumerated limitation on the arbitrator's power' "... .
>
> "Outside of these narrowly circumscribed exceptions, courts lack authority to review arbitral decisions, even where an arbitrator has made an error of law or fact' " ... . "An arbitrator is not bound by principles of substantive law or rules of evidence, and may do justice and apply his or her own sense of law and equity to the facts as he or she finds them to be" ... . The court lacks the power to review the legal merits of the award, or to substitute its own judgment for that of the arbitrator, "simply because it believes its interpretation would be the better one" ... .
>
> The "for cause" language contained in the management rights provision expressly circumscribed respondent's right to discipline or discharge the grievant. The arbitrator interpreted that language, consistent with arbitral precedent, as incorporating a just cause standard that encompasses a right to due process. We thus conclude that "the arbitrator merely interpreted and applied the provisions of the CBA, as [he] had the authority to do" ... . **Matter of Town of Greece Guardians' Club, Local 1170 (Town of Greece), 2018 NY Slip Op 08775, Fourth Dept 12-21-18**

Table of Contents

ATTORNEYS

ATTORNEYS.

LAW FIRM ENTITLED TO ATTORNEY'S FEES FROM ADDITIONAL DEFENDANTS WHO DID NOT SIGN THE RETAINER AGREEMENT, THE ADDITIONAL DEFENDANTS BENEFITED FROM THE SETTLEMENT AGREEMENT REACHED BY THE LAW FIRM AND THE ADDITIONAL DEFENDANTS HAD SIGNED THE SETTLEMENT AGREEMENT (FIRST DEPT).

The First Department determined the law firm, SGA, was entitled to attorney's fees and expenses from "additional defendants" who did not sign the retainer agreement but who benefited from the law firm's work:

> In a prior appeal in index no. 153449/14, this Court recognized that an award of attorneys' fees and expenses against additional defendants pursuant to the common fund doctrine was appropriate, because, although they did not sign the retainer agreement with plaintiffs' counsel (SGA), additional defendants "signed a settlement agreement obtained by SGA entitling [them] to receive a pro-rata payout from the proceeds of the sale of a building in which [they] had invested" ... . Additional defendants received a "substantial benefit" as a result of SGA's efforts, i.e., funds from the liquidation of an asset (the subject property) as to which defendants had successfully excluded them for 30 years ... .
>
> The fact that SGA has already been partially compensated by plaintiffs does not preclude a fee award, as that would be inconsistent with the purpose of the common fund doctrine to prevent unjust enrichment by "allow[ing] the others to obtain full benefit from the plaintiff's efforts without contributing equally to the litigation expenses" ... . **Ital Assoc. v Axon, 2018 NY Slip Op 09013, First Dept 12-27-18**

ATTORNEYS, FAMILY LAW, FRAUD, FIDUCIARY DUTY, NEGLIGENCE, LEGAL MALPRACTICE.

BREACH OF FIDUCIARY DUTY, FRAUD AND JUDICIARY LAW 487 ALLEGATIONS STEMMING FROM DEFENDANT LAW FIRM'S REPRESENTATION OF PLAINTIFF IN DIVORCE PROCEEDINGS DUPLICATED THE LEGAL MALPRACTICE ALLEGATIONS, THE COMPLAINT SHOULD HAVE BEEN DISMISSED (FIRST DEPT).

The First Department, in a full-fledged opinion by Justice Singh, determined that plaintiff's legal malpractice, breach of fiduciary duty, fraud and Judiciary Law 487 causes of action against the law firm which represented her in divorce proceedings should have been dismissed. The opinion is fact-specific. The legal issues mentioned include: the breach of fiduciary duty allegations were identical to the legal malpractice allegations and therefore required the "but for" element of

legal malpractice (which was missing), and the fraud and Judiciary Law 487 claims were identical and duplicated the legal malpractice allegations, requiring dismissal.
Knox v Aronson, Mayefsky & Sloan, LLP, 2018 NY Slip Op 09030, First Dept 12-27-18

CIVIL PROCEDURE

CIVIL PROCEDURE.

PURELY CONCLUSORY ALLEGATIONS IN A COMPLAINT WILL NOT SURVIVE A PRE-ANSWER MOTION TO DISMISS (FOURTH DEPT).

The Fourth Department, in determining a negligent training and supervision cause of action was properly dismissed, noted that purely conclusory allegations in a complaint will not survive a pre-answer motion to dismiss:

> We reject plaintiffs' contention that the court erred in dismissing the third cause of action, alleging negligent training and supervision. We are cognizant of our duty on a motion to dismiss to "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" .. , and that the issue " [w]hether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss' " ... . Nevertheless, although "it is axiomatic that a court must assume the truth of the complaint's allegations, such an assumption must fail where there are conclusory allegations lacking factual support . . . Indeed, a cause of action cannot be predicated solely on mere conclusory statements . . . unsupported by factual allegations"... . Here, the only factual allegations in the third cause of action concern the actions of other defendants not involved in this appeal; therefore, plaintiffs' conclusory allegations with respect to defendants fail to state a valid cause of action for negligent training and supervision against them ... . **Bratge v Simons, 2018 NY Slip Op 08778, Fourth Dept 12-21-18**

CIVIL PROCEDURE.

INDICATING INCONSISTENT DECISIONS SHOULD NO LONGER BE FOLLOWED, THE SECOND DEPARTMENT DETERMINED SUPREME COURT COULD NOT DISMISS A CASE BASED ON THE FAILURE TO FILE A NOTE OF ISSUE WITHIN 90 DAYS OF THE COURT'S ORDER UNLESS THE STATUTORY REQUIREMENTS OF CPLR 3216 ARE COMPLIED WITH (SECOND DEPT).

The Second Department, reversing Supreme Court and departing from precedent, determined that, because the court had not complied with CPLR 3216, the action had never been dismissed and plaintiff's very late (three years) motion to restore the matter to calendar should have been granted. In January 2013 the court certified the matter ready for trial and directed

plaintiff to file a note of issue within 90 days in an order which stated the failure to file the note of issue will result in dismissal without further order. Plaintiff moved to restore the matter in January, 2016:

> ... [T]he court order which purported to serve as a 90-day notice pursuant to CPLR 3216 "was defective in that it failed to state that the plaintiff's failure to comply with the notice will serve as a basis for a motion' by the court to dismiss the action for failure to prosecute"... . Moreover, the record contains no evidence that the court ever made a motion to dismiss, or that there was an "order" of the court dismissing the case ... , "[i]t is evident from this record that the case was ministerially dismissed," without the court having made a motion, and "without the entry of any formal order by the court dismissing the matter" ... . The procedural device of dismissing an action for failure to prosecute is a legislative creation, not a part of a court's inherent power ... , and, therefore, a court desiring to dismiss an action based upon the plaintiff's failure to prosecute must follow the statutory preconditions under CPLR 3216.
>
> Since the action was not properly dismissed pursuant to CPLR 3216, the Supreme Court should have granted that branch of the plaintiff's motion which was to restore the action to the active calendar. To the extent that prior cases from this Court are inconsistent with the holding herein (see e.g. Stroll v Long Is. Jewish Med. Ctr., 151 AD3d 789; Duranti v Dream Works Constr., Inc., 139 AD3d 1000, 1000; Bender v Autism Speaks, Inc., 139 AD3d 989; Dai Mang Kim v Hwak Yung Kim, 118 AD3d 661, 661; Bhatti v Empire Realty Assoc., Inc., 101 AD3d 1066, 1067), henceforth they should no longer be followed. **Element E, LLC v Allyson Enters., Inc., 2018 NY Slip Op 08915, Second Dept 12-26-18**

CIVIL PROCEDURE.

DEFENDANTS NEVER INTERPOSED AN ANSWER SO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED, DEFENDANTS' MOTION FOR PERMISSION TO SERVE A LATE ANSWER PROPERLY DENIED, MATTER REMITTED SO PLAINTIFF CAN MOVE FOR A DEFAULT JUDGMENT (THIRD DEPT).

The Third Department determined Supreme Court should not have granted plaintiff's motion for summary judgment because defendants never interposed an answer. The Third Department further determined defendants' motion for permission to serve a late answer was properly denied. The matter was remitted to afford plaintiff the opportunity to make a late motion for a default judgment. The underlying matter is plaintiff's action to recover the cost of cleaning up a highway accident involving defendants' truck:

> Supreme Court erred in granting plaintiff summary judgment because defendants never filed an answer and, thus, issue was not joined, a prerequisite that is "strictly adhered to"... . Further, summary judgment was not granted here pursuant to CPLR 3211 (c) ... . Even if defendants are deemed to have appeared by filing a notice of removal of the action to federal court or by other conduct (see CPLR 320 [a]), they did not file a responsive pleading (see CPLR 3011) and, consequently, plaintiff was barred from seeking summary judgment ... .
>
> Although Supreme Court possessed discretion to permit late service of an answer "upon a showing of [a] reasonable excuse for [the] delay or default" (CPLR 3012 [d]...), the reasonableness of the excuse "is a discretionary, sui generis determination to be made by the court based on all relevant factors"... . ... We discern no basis for finding that Supreme Court abused its discretion in denying defendants' motion, given the absence of a reasonable excuse for the delay ... . **Gerster's Triple E. Towing & Repair, Inc. v Pishon Trucking, LLC, 2018 NY Slip Op 08979, Third Dept 12-27-18**

Table of Contents

CIVIL PROCEDURE, APPEALS.

PRIOR RULINGS ON APPEAL CONSTITUTE THE LAW OF THE CASE, SUPREME COURT RULING TO THE CONTRARY REVERSED (SECOND DEPT).

The Second Department determined the contested matters had already been ruled upon in a prior appeal and therefore constituted the law of the case which must be followed. The contrary ruling by Supreme Court was reversed:

> "An appellate court's resolution of an issue on a prior appeal constitutes the law of the case and is binding on the Supreme Court, as well as on the appellate court . . . [and] operates to foreclose reexamination of [the] question absent a showing of subsequent evidence or change of law" ... . On the prior appeal, this Court considered, and rejected, the arguments that Pascuitti [a resondent] was no longer a proper party to this proceeding and that the petitioner could not seek relief against the individual movants in the contempt motion ... . The Town and the individuals movants have failed to make a sufficient showing to warrant reexamination of these issues... . Accordingly, based on the law of the case doctrine, we disagree with the Supreme Court's determination granting the motion ... . **Matter of Norton v Town of Islip, 2018 NY Slip Op 08308, Second Dept 12-5-18**

CIVIL PROCEDURE, ATTORNEYS.

LAW OFFICE FAILURE JUSTIFIED CONSIDERING EVIDENCE WHICH COULD HAVE BEEN PROVIDED IN SUPPORT OF THE ORIGINAL MOTION, MOTION TO RENEW PROPERLY GRANTED, HOWEVER DELAYS IN DISCOVERY WARRANTED SANCTIONS AGAINST PLAINTIFF (SECOND DEPT).

The Second Department determined law office failure was an adequate excuse for failing to present evidence in support of plaintiff's original motion which was submitted in support of a motion to renew. However, in light of plaintiff's delays in discovery, sanctions were appropriate:

> ... Supreme Court providently exercised its discretion in considering the new evidence submitted by the plaintiff in support of those branches of her motion which were for leave to renew her prior motion and her opposition to the appellants' cross motion. Although the new facts may have been known to the plaintiff at the time of her prior motion, the plaintiff explained that the new evidence was not submitted in connection with her prior motion and opposition due to a misunderstanding by counsel that ultimately led to law office failure. * * *
>
> "The determination of what constitutes a reasonable excuse lies within the Supreme Court's discretion" ... . "Whether there is a reasonable excuse for a default is a discretionary, sui generis determination to be made by the court based on all relevant factors, including the extent of the delay, whether there has been prejudice to the opposing party, whether there has been willfulness, and the strong public policy in favor of resolving cases on the merits" ... . "[T]he court has discretion to accept law office failure as a reasonable excuse (see CPLR 2005) where that claim is supported by a detailed and credible explanation of the default at issue" ... .
>
> ... [A]though the plaintiff set forth a reasonable explanation for her failure to fully comply with the conditional order of dismissal, the fact remains that she failed to fully comply with that order, and her conduct during discovery cannot be countenanced ... . Consequently, ... a monetary sanction in the total sum of $5,000 is warranted to

compensate the appellants for the time expended and costs incurred in connection with the plaintiff's failure to fully and timely comply with the conditional order of dismissal ... . **Burro v Kang, 2018 NY Slip Op 08457, Second Dept 12-12-18**

CIVIL PROCEDURE, CONTEMPT, CONSTITUTIONAL LAW, PRIVILEGE

DEFENDANTS ARE REQUIRED TO PRODUCE TAX AND WAGE DOCUMENTS AND TO PROVIDE FACTUAL BASES FOR THEIR REFUSAL TO ANSWER QUESTIONS, SUPREME COURT SHOULD NOT HAVE ACCEPTED DEFENDANTS' BLANKET ASSERTIONS OF THE PRIVILEGE AGAINST SELF-INCRIMINATION AND SPOUSAL PRIVILEGE IN THIS CONTEMPT PROCEEDING STEMMING FROM AN ACTION TO RECOVER A DEFICIENCY JUDGMENT (THIRD DEPT).

The Third Department, reversing (modifying) Supreme Court, determined that the defendant's blanket assertion of his Fifth Amendment privilege against self-incrimination and his wife's assertion of her Fifth Amendment and her spousal privileges did not justify the denial of plaintiff's motion to hold defendant in contempt or the denial of a motion to compel defendant's wife to submit to a deposition and produce documents. Plaintiff sought payment of a multi-million dollar deficiency judgment. The Third Department explained that tax returns, W-2 forms and 1099 forms fall withing the "required records exception" to the privilege against self-incrimination. The Third Department further found that defendant and his wife must provide a factual basis for their refusal to answer each of the 358 questions posed by plaintiff because there had been no showing that criminal proceedings against the defendant were imminent or that the spousal privilege was applicable:

> ... [D]efendant's income tax returns, W-2 wage statements and 1099 forms — fall within the "required records exception" to the privilege against self-incrimination. Under this exception, "[t]he Fifth Amendment privilege which exists as to private papers cannot be asserted with respect to records which are required, by law, to be kept and which are subject to governmental regulation and inspection" ... . "To constitute 'required records,' the documents must satisfy a three-part test: (1) the requirement that they be kept must be essentially regulatory, (2) the records must be of a kind which the regulated party has customarily kept, and (3) the records themselves must have assumed 'public aspects' which render them analogous to public documents" ... .
>
> ... [I]t is not evident that every answer to the 358 questions propounded during the May 2015 deposition, and every disclosure of the remaining documents requested in the subpoena, would subject defendant to a real and substantial danger of self-incrimination. The questions put to defendant were those customarily asked at a judgment debtor examination, and there is no indication that the purpose of the deposition was "anything other than an ordinary search of [defendant's] assets in order to satisfy the judgment against him" ... . [T]here is nothing in this record indicating, nor does defendant assert, that he is the subject of any criminal investigation or proceeding. More to the point, defendant has not shown that his claimed fear of prosecution is anything other than "imaginary" ... .
>
> ... [W]e conclude that Supreme Court's order denying plaintiff's motion to compel as to Chava Nelkenbaum [defendant's wife] must be reversed and the matter remitted for an in camera inquiry to test the validity of her invocation of the Fifth Amendment privilege as to each of the questions asked and each of the documents demanded of her. To the extent that Chava Nelkenbaum invoked the spousal privilege as a basis for refusing to answer certain questions propounded at the deposition or to produce documents responsive to the subpoena, we note that the privilege "attaches only to those statements made in confidence and 'that are induced by the marital relation and prompted by the affection, confidence and loyalty engendered by such relationship'" ... . Further, this

privilege does not attach to "ordinary conversations relating to matters of business" ... . **Carver Fed. Sav. Bank v Shaker Gardens, Inc., 2018 NY Slip Op 08975, Third Dept 12-27-18**

CIVIL PROCEDURE, CONTEMPT. MUNICIPAL LAW.

TOWN SHOULD HAVE BEEN HELD IN CONTEMPT FOR FAILURE TO BUILD A FENCE IN ACCORDANCE WITH A STIPULATION (SECOND DEPT).

The Second Department, reversing Supreme Court, determined that the town should be held in contempt for failure to erect a fence on town land in accordance with a stipulation. Plaintiff had requested the fence because people were crossing town land to trespass on plaintiff's property:

> "In order to sustain a finding of civil contempt, it is not necessary that the disobedience be deliberate or willful; rather, the mere act of disobedience, regardless of its motive, is sufficient if such disobedience defeats, impairs, impedes or prejudices the rights of a party" ... .
>
> In order to adjudicate a party in civil contempt, a court must find: (1) that a lawful order of the court, clearly expressing an unequivocal mandate, was in effect, (2) that the party against whom contempt is sought disobeyed the order, (3) that the party who disobeyed the order had knowledge of its terms, and (4) that the movant was prejudiced by the offending conduct... . The party seeking a finding of civil contempt must prove these elements by clear and convincing evidence ... .
>
> Here, the plaintiff established by clear and convincing evidence that the so-ordered stipulation clearly expressed an unequivocal mandate to construct a fence... , that the Town had knowledge of the stipulation and nevertheless disobeyed it, and that the plaintiff was prejudiced by the offending conduct.
>
> In opposition, the Town failed to refute the plaintiff's showing or to offer evidence of a defense such as an inability to comply with the order ... . **Palmieri v Town of Babylon, 2018 NY Slip Op 08317, Second Dept 12-5-18**

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CIVIL PROCEDURE, CONTRACT LAW.

BY ENTERING A STIPULATION SETTLING A FORECLOSURE ACTION, DEFENDANT WAIVED ANY DEFECT IN SERVICE OF THE COMPLAINT, THE STIPULATION WAS VALID EVEN THOUGH IT DID NOT OCCUR IN COURT, EMAILS AND PAYMENT OF A SETTLEMENT AMOUNT MEMORIALIZED THE STIPULATION (SECOND DEPT).

The Second Department, reversing Supreme Court, over a dissent, determined that defendant Campbell had waived any defect in service of process by entering into a stipulation of settlement in this foreclosure action. The court held that the stipulation settling the deficiency judgment, which did not occur in court, was memorialized by emails and the payment of

an agreed settlement amount. The dissent argued there was insufficient evidence of a stipulation entered into by Campbell and therefore Campbell's motion to vacate the default judgment on the ground she was never served with the complaint should have been granted:

> ... [I]n vacating the settlement of the deficiency judgment "in the interests of justice," the Supreme Court incorrectly determined that Campbell was not represented by counsel. In fact, Campbell was represented by counsel when she settled and made payment on the deficiency judgment. As part of the settlement, the plaintiff agreed not to proceed in other pending foreclosure actions against Campbell. Additionally, Campbell retained the same attorney with respect to other actions arising out of the settlement. By settling the deficiency judgment, Campbell clearly submitted to the court's jurisdiction and acknowledged the validity of the judgment... . Therefore, we disagree with the court's determination granting Campbell's motion to vacate the judgment of foreclosure and sale, the subsequent foreclosure sale, the order of reference, the referee's deed, and the settlement of the deficiency judgment, the terms of which had been fully performed.
>
> Contrary to the position of our dissenting colleague, a formal stipulation of settlement need not be contained in the record. Here, the terms of the settlement were contained in contemporaneous emails between the plaintiff's attorney and Campbell's attorney, and by a check in the amount on which they had agreed. Campbell does not deny that she paid the amount for which she agreed to settle the deficiency judgment. That fully performed settlement two years before Campbell moved to vacate her default effectively waived her defense that the court lacked personal jurisdiction over her ... . **Eastern Sav. Bank, FSB v Campbell, 2018 NY Slip Op 08465, Second Dept 12-12-18**

CIVIL PROCEDURE, EVIDENCE.

INSUFFICIENT EVIDENCE THAT THE FAILURE TO TURN OVER REQUESTED INVOICES IN DISCOVERY WAS WILLFUL AND CONTUMACIOUS, BUT PRESENTATION OF EVIDENCE ABOUT THE INVOICES AT TRIAL SHOULD HAVE BEEN PRECLUDED (SECOND DEPT).

The Second Department determined that requested invoices which were alleged not to exist could not be the subject of evidence at trial:

> Durante's affidavit demonstrated that the requested invoices of Croton could not be located and that the invoices of Iron Age were not in the respondents' possession or control ... . Under the circumstances of this case, there was no clear showing that the respondents' failure to produce the invoices was willful and contumacious, since, inter alia, the respondents complied, albeit tardily, with the appellants' discovery demands and demonstrated that the invoices requested could not be located, or were not in their possession or control (see CPLR 3101[d][2] ...). Nevertheless, the respondents should have been precluded from later offering evidence regarding the requested invoices of Croton that were not produced ... . Accordingly, that branch of the appellants' motion which was to preclude the respondents from introducing at trial evidence of the requested invoices of Croton that were not provided should have been granted. **Cap Rents Supply, LLC v Durante, 2018 NY Slip Op 08458, Second Dept 12-12-18**

Table of Contents

CIVIL PROCEDURE, FORECLOSURE.

MOTION TO VACATE DEFAULT JUDGMENT OF FORECLOSURE WAS SUPPORTED BY A SWORN DENIAL OF SERVICE AND SPECIFIC FACTS WHICH REBUTTED THE PRESUMPTION OF PROPER SERVICE, MATTER SENT BACK FOR A HEARING (SECOND DEPT).

The Second Department, reversing Supreme Court, determined that defendant's motion to vacate his default in this foreclosure action should not have been denied without a hearing to determine whether he was served. Defendant's motion was supported by a sworn denial of service and specific facts, which was sufficient to rebut the presumption of proper service:

> "Ordinarily, a process server's affidavit of service establishes a prima facie case as to the method of service and, therefore, gives rise to a presumption of proper service" ... . To be entitled to vacatur of a default judgment under CPLR 5015(a)(4), a defendant must overcome the presumption raised by the process server's affidavit of service ... . "Although bare and unsubstantiated denials are insufficient to rebut the presumption of service, a sworn denial of service containing specific facts generally rebuts the presumption of proper service established by the affidavit of service and necessitates a hearing" ... . A determination as to whether service was properly made pursuant to CPLR 308(1), as here, turns on issues of credibility, which should be determined by a hearing ... . **Federal Natl. Mtge. Assn. v Alverado, 2018 NY Slip Op 08918, Second Dept 12-26-18**

CIVIL PROCEDURE, TRUSTS AND ESTATES.

MOTION TO SUBSTITUTE THE ADMINISTRATRIX OF PLAINTIFF'S ESTATE FOR THE DECEASED PLAINTIFF PROPERLY DENIED BECAUSE THE DELAY IN SEEKING SUBSTITUTION WAS NOT EXPLAINED, THE MERITS WERE NOT DESCRIBED, AND THE EXISTENCE OF PREJUDICE WAS NOT REBUTTED, HOWEVER THE ACTION COULD NOT BE DISMISSED ABSENT THE SUBSTITUTION OF A LEGAL REPRESENTATIVE (SECOND DEPT).

The Second Department agreed with Supreme Court's denial of a motion to substitute plaintiff's daughter, as administratrix, for the deceased plaintiff in an action because the delay in seeking substitution was not explained, the merits of the action were not described, and the presumption of prejudice was not rebutted. But the Second Department noted that the action should not have been dismissed because the plaintiff's stayed all proceedings pending substitution:

> CPLR 1021 provides, in part, that "[a] motion for substitution may be made by the successors or representatives of a party or by any party." Although a determination rendered without such substitution will generally be deemed a nullity, determinations regarding substitution pursuant to CPLR 1021 are a necessary exception to the general rule, and the court does not lack jurisdiction to consider such a motion ... . Here, the Supreme Court had jurisdiction to consider those branches of the motion which were pursuant to CPLR 1015 for leave to substitute the plaintiff's daughter as the plaintiff and, upon substitution, to restore the action thereafter (see CPLR 1021). On the merits, we agree with the court's determination to deny those branches of the motion given the failure to provide any detailed excuse for the delay in seeking substitution, the failure to include an affidavit of merit demonstrating that the claim against Rehab was potentially meritorious, and the failure to rebut Rehab's claim of prejudice stemming from the delay ... .

However, since the plaintiff's death triggered a stay of all proceedings in the action pending substitution of a legal representative ... , the Supreme Court should not have directed dismissal of the action pursuant to CPLR 3404, as the order was issued after the plaintiff's death and in the absence of any substitution of a legal representative ... . **Medlock v Dr. William O. Benenson Rehabilitation Pavilion, 2018 NY Slip Op 08922, Second Dept 12-26-18**

CIVIL PROCEDURE, WORKERS' COMPENSATION, TRUSTS AND ESTATES.

COUNTERCLAIMS AGAINST INDIVIDUAL TRUSTEES RELATED BACK TO THE COUNTERCLAIMS AGAINST THE TRUST AND THEREFORE WERE NOT TIME-BARRED, SUPREME COURT REVERSED (THIRD DEPT).

The Third Department, reversing (modifying) Supreme Court, determined the counterclaims against the trustees of the plaintiff workers' compensation self-insurance trust should not have been dismissed as time-barred because they related back to the counterclaims against the trust:

Supreme Court determined that, because defendant was aware of the identity of the trustees when it interposed its original answer and counterclaims in September 2010, its failure to assert claims against the individual trustees between September 2010 and December 2016 represented "either a strategic litigation decision on its part or a mistake of law," neither of which it found would entitle defendant to application of the doctrine. We disagree.

There is nothing in the record before us demonstrating that defendant intentionally elected not to assert its counterclaims against the individual trustees and/or that it did so to obtain "a tactical advantage in the litigation" ... . A review of defendant's pleadings demonstrates that it intended to sue the individual trustees ... . Although the specific names of the individual trustees could have been ascertained from certain documentation that the trust provided to defendant on an annual basis, "we need no longer consider whether [such a] mistake was excusable" ... . Rather, as the Court of Appeals has recognized, the primary question — and "the linchpin of the relation back doctrine" — is whether the newly added party had actual notice of the claim ... . As trustees of the trust, we find it implausible that the individual trustees were not aware of the trust's commencement of this action and the counterclaims that defendant asserted against the trust — such knowledge being imputed to them as trustees ... . **NYAHSA Servs., Inc., Self-Insurance Trust v People Care Inc., 2018 NY Slip Op 08735, Third Dept 12-20-18**

Table of Contents

CONTRACT LAW

CONTRACT LAW.

ORAL AGREEMENTS BETWEEN PERSONS COHABITING TOGETHER ARE NOT PER SE REQUIRED TO BE IN WRITING, SEVERAL CAUSES OF ACTION SHOULD NOT HAVE BEEN DISMISSED BECAUSE THE UNDERLYING AGREEMENTS WERE NOT SUBJECT TO THE STATUTE OF FRAUDS (SECOND DEPT).

The Second Department, modifying Supreme Court, determined that certain causes of action based upon oral agreements between plaintiff and defendant, who lived together for thirteen years, should not have been dismissed pursuant to the statute of frauds:

> We disagree with the Supreme Court as to the applicability of the statute of frauds to the plaintiff's allegations as to ... express oral agreements between the parties, namely those related to her provision of domestic and legal services in exchange for support and sharing of business profits. Agreements between persons cohabiting together are not per se required to be in writing ... . Moreover, the plaintiff's allegations as to the terms of the oral agreements do not otherwise fall within the statute of frauds (see General Obligations Law § 5-703 ...). ...
>
> We also disagree with the Supreme Court's determination granting that branch of the motion which was to dismiss the plaintiff's third cause of action pursuant to the statute of frauds. The third cause of action seeks the return of certain personal items that allegedly were owned by the plaintiff separately prior to her relationship with the defendant. Thus, the property that was the subject of that cause of action was not within the statute of frauds. **Baron v Suissa, 2018 NY Slip Op 08453, Second Dept 12-12-18**

CONTRACT LAW, ACCOUNT STATED.

ALTHOUGH THERE WAS NO ENFORCEABLE CONTRACT TO INSTALL SOLAR PANELS, PLAINTIFF WAS ENTITLED TO SUMMARY JUDGMENT ON ITS ACCOUNT STATED CAUSE OF ACTION BASED ON INVOICES SENT TO DEFENDANT FOR THE SOLAR PANELS (THIRD DEPT).

The Third Department, reversing (modifying) Supreme Court, determined plaintiff's breach of contract action was properly dismissed but plaintiff should have been granted summary judgment on its account stated cause of action based upon the submission of invoices for $1.9 million. There was no executed agreement between plaintiff and defendant for the installation of solar panels. However, defendant did not object to the invoices for the solar panels:

> Plaintiff attempted to raise "material questions of fact" with proof that it had already entered into an agreement to install one solar system at the complex, that defendants expressed interest in having plaintiff install the two additional systems, and that plaintiff purchased solar cells and performed other work in the expectation that it would

do so ... . These submissions did not, however, raise any question on the dispositive issue of whether the parties reached agreement on the material terms of a contract to install the additional systems ... .

We reach a different result with regard to plaintiff's claim for an account stated, which is "an agreement between parties to an account based upon prior transactions between them with respect to the correctness of the account items and balance due, and may be implied from the retention of an account rendered for an unreasonable period of time without objection and from the surrounding circumstances" ... . In the course of the unsuccessful negotiations over an agreement to install the two proposed systems, plaintiff purchased approximately $1.9 million worth of solar cells for one of the projects and, beginning in December 2011, periodically invoiced defendants for the purchase price and storage costs of the cells. The initial invoice stated that the solar cells were "purchased and held pursuant to agreement with" defendants, and noted that defendants' representative had "acknowledge[d] receipt of [defendants'] inventory." Plaintiff's chairperson averred that defendants' chief executive officer and a consultant had acknowledged receipt of the solar cells on behalf of defendants, and attached purchase documents for the solar cells bearing what plaintiff's chairperson stated were the initials of those two individuals.

In response, defendants admitted that they had never objected to the invoices, which "is deemed acquiescence and warrants enforcement of the implied agreement to pay" ... . **Solartech Renewables, LLC v Techcity Props., Inc., 2018 NY Slip Op 08739, Third Dept 12-20-18**

CONTRACT LAW, CIVIL PROCEDURE.

GENERAL RELEASE WAS NOT LIMITED TO A 2007 ACTION AND THEREFORE PRECLUDED THE 2014 ACTION, A UNILATERAL MISTAKE DOES NOT INVALIDATE A CONTRACT (THIRD DEPT).

The Third Department determined that, although the release signed by plaintiff (Moore) mentioned a 2007 action, the release stated it was not limited to the 2007 action. Therefore it applied to the instant action. The fact that plaintiff may not have intended that it apply to the current proceedings, a unilateral mistake, does not invalidate a contract:

The general release, executed by Moore after he commenced the present action, released defendant "from all manner of . . . claims and demands . . . in law or in equity that against [defendant] he ever had, now has or which he . . . shall or may have for any reason from the beginning of the world to the date of this release." Plaintiffs nonetheless argue that the release is limited by its terms to the 2007 action, noting that "where a release contains a recital of a particular claim . . . and there is nothing on the face of the instrument other than general words of release to show that anything more than the matters particularly specified was intended to be discharged, the general words of release are deemed to be limited thereby" ... . The release, however, does not limit or otherwise restrict itself to the 2007 action. Rather, it clearly and unambiguously specifies that it "includes, but is not limited to," the incident that led to the 2007 action ... . Moore executed the release with full knowledge that this action was pending against defendant, and the "timing and unequivocal and unconditional language" of the release therefore demonstrates its applicability to the 2014 action at issue here ... .

Although plaintiffs claim that Moore did not intend for the release to encompass this action when he executed it, "the fact that [Moore] may have intended something else is irrelevant[, as] a mere unilateral mistake . . . with respect to the meaning and effect of the release . . . does not constitute an adequate basis for invalidating" it ... . **Stevens v Town of Chenango (Forks), 2018 NY Slip Op 08389, Third Dept 12-6-18**

Table of Contents

CORPORATION LAW

CORPORATION LAW, CIVIL PROCEDURE.

IN THIS CPLR ARTICLE 4 PROCEEDING BROUGHT BY THE ATTORNEY GENERAL, THERE WERE QUESTIONS OF FACT ABOUT WHETHER THE RESPONDENT NOT-FOR-PROFIT CORPORATION VIOLATED ITS FIDUCIARY DUTY AND THE NOT-FOR-PROFIT-CORPORATION LAW WITH RESPECT TO ITS AFFILIATE NOT-FOR-PROFIT CORPORATIONS AND WHETHER THE BUSINESS JUDGMENT RULE APPLIED (THIRD DEPT).

The Third Department, reversing (modifying) Supreme Court, in a decision too fact-specific to be fairly summarized here, determined issues of fact were presented about whether certain actions taken by respondent not-for-profit corporation (TLCN) breached its fiduciary duty to its not-for-profit corporation affiliate (Coburn) and violated the Not-for-Profit Corporation Law. The action was brought by the Attorney General in a special proceeding pursuant to CPLR article 4 which is similar to a summary judgment motion. The Third Department further held there were questions of fact whether the business judgment rule could properly be applied:

> ... Supreme Court acted properly in ordering TLCN to adopt a conflict of interest policy ... .
>
> ... [I]nasmuch as Coburg is an independent corporation, TLCN may not operate Coburg in a manner inconsistent with Coburg's purpose, nor engage in related party transactions without complying with the relevant provisions of the Not-For-Profit Corporation Law. * * *
>
> Genuine issues of material fact exist as to whether respondents violated their duty to Coburg by improperly utilizing its surplus to benefit TLCN and its other affiliates and by engaging in related party transactions that were not in Coburg's best interest. ...
>
> ... [T]he business judgment rule has no place where corporate officers or directors take actions that exceed their authority under the relevant corporate bylaws ... , or where they make decisions affected by an inherent conflict of interest... . There are issues of fact in the present record that preclude application of the business judgment rule, specifically regarding whether respondents exceeded their authority by improperly utilizing Coburg's surplus to benefit TLCN and its other affiliates and by engaging in related party transactions that were not in Coburg's best interest. **Matter of The People of The State of New York v The Lutheran Care Network, Inc., 2018 NY Slip Op 08727, Third Dept 12-20-18**

Table of Contents

CORPORATION LAW, LIMITED LIABILITY COMPANY LAW, CONTRACT LAW, LANDLORD-TENANT.

ALTHOUGH THE PLAINTIFF LIMITED LIABILITY COMPANY DID NOT EXIST AT THE TIME THE LEASE WAS SIGNED, DEFENDANT TOOK POSSESSION OF THE PROPERTY, UNDER THE DOCTRINE OF INCORPORATION BY ESTOPPEL, DEFENDANT CANNOT ESCAPE LIABILITY FOR BREACH OF THE LEASE (SECOND DEPT).

The Second Department determined that the doctrine of incorporation by estoppel was properly applied in this breach of contract (lease) case. Although plaintiff limited liability company did not exist at the time the lease was signed, defendant took possession of the property. Defendant was therefore estopped from escaping liability under the lease based on the nonexistence of plaintiff limited liability company:

> "Since a nonexistent entity cannot acquire rights or assume liabilities, a corporation which has not yet been formed normally lacks capacity to enter into a contract"... . However, a corporation may be deemed to exist and possess the capacity to contract pursuant to the doctrine of incorporation by estoppel ... . The doctrine of incorporation by estoppel, or corporation by estoppel, is based on the principle that "one who has recognized the organization as a corporation in business dealings should not be allowed to quibble or raise immaterial issues on matters which do not concern him [or her] in the slightest degree or affect his [or her] substantial rights" ... . **TY Bldrs. II, Inc. v 55 Day Spa, Inc., 2018 NY Slip Op 08345, Second Dept 12-5-18**

COURT OF CLAIMS

COURT OF CLAIMS, CRIMINAL LAW.

CLAIMANT WAS CONVICTED OF MURDER AND AN UNRELATED ROBBERY WHICH WERE CHARGED IN A SINGLE INDICTMENT, AFTER A MAN CONFESSED TO THE MURDER, CLAIMANT'S MURDER CONVICTION WAS VACATED BUT THE ROBBERY CONVICTION REMAINED, REVERSING THE COURT OF CLAIMS, THE THIRD DEPARTMENT DETERMINED CLAIMANT WAS ENTITLED TO COMPENSATION FOR THE UNJUST MURDER CONVICTION AND RELATED IMPRISONMENT (THIRD DEPT).

The Third Department, reversing the Court of Claims, determined that claimant was entitled to compensation based upon his unjust conviction and imprisonment. Claimant's murder conviction was vacated after another man confessed to the murder. Claimant had been charged with an unrelated robbery and the murder and robbery charges were joined in a single indictment. At the time the murder conviction was vacated, defendant pled guilty to the robbery. The state contended that the guilty plea to robbery precluded the claimant from compensation for the unjust murder conviction

based upon the wording of the statute. The Third Department disagreed and interpreted the statute to allow compensation:

> Court of Claims Act § 8-b allows individuals who are unjustly convicted and imprisoned to recover damages from defendant. To avoid dismissal of his claim, claimant was required to establish, as relevant here, that "he did not commit any of the acts charged in the accusatory instrument" ... . Claimant admitted that he committed acts charged in the indictment when he pleaded guilty to first degree robbery; however, he argues that the term "accusatory instrument" must be construed as applying only to the murder charges because they arose from an event that had no connection to the robbery. * * *
>
> The term "accusatory instrument" could be literally construed to refer to the single indictment that charged claimant with crimes that arose from both events — the robbery and the subsequent murder. However, that conclusion must be measured against the intent of the legislation plainly expressed in the statute, which states that "[t]he [L]egislature finds and declares that innocent persons who have been wrongly convicted of crimes and subsequently imprisoned have been frustrated in seeking legal redress due to a variety of substantive and technical obstacles in the law and that such persons should have an available avenue of redress over and above the existing tort remedies to seek compensation for damages. The [L]egislature intends by enactment of the provisions of this section that those innocent persons who can demonstrate by clear and convincing evidence that they were unjustly convicted and imprisoned be able to recover damages against [defendant]" ... . Hence, "the linchpin of the statute is innocence" ... .
>
> Under the unique facts of this case, a literal interpretation of "accusatory instrument" would lead to an unreasonable result starkly at odds with the clearly-expressed intent of the statute by denying recovery to claimant — who is indisputably innocent of the murder for which he was wrongfully convicted and imprisoned — solely because the charges arising from events now known to be unrelated were joined in a single indictment. **Jones v State of New York, 2018 NY Slip Op 08985, Third Dept 12-27-18**

CRIMINAL LAW

CRIMINAL LAW.

28 MONTH DELAY DID NOT DEPRIVE DEFENDANT OF HIS CONSTITUTIONAL RIGHT TO A SPEEDY TRIAL, DELAY ATTRIBUTED TO PROSECUTION, HOWEVER, WAS CRITICIZED (FIRST DEPT).

The First Department, over a concurring decision, determined that the 28-month delay in prosecution did not rise to the level of a denial of defendant's constitutional right to a speedy trial. The concurrence agreed but took pains to note that much of the delay attributable to the prosecution was inexcusable:

> While the 28—month delay was substantial, it was attributable to both the prosecution and the defense. While most adjournments were either on consent or were otherwise satisfactorily explained, the People failed to provide an adequate reason for their delay in responding to defendant's motion to compel production of certain medical

records and in producing the records. Nevertheless, the charges were very serious and, although defendant was incarcerated the entire time, he has not demonstrated how his defense was impaired by the delay. This is not a case where the delay, and in particular the portion attributable to the People, was so egregious as to warrant dismissal regardless of prejudice ... . **People v Desselle, 2018 NY Slip Op 08252, First Dept 12-4-18**

CRIMINAL LAW.

THE 2015 COURT OF APPEALS DECISION WHICH PROHIBITED INSTRUCTING A JURY THAT IT COULD FIND A DEFENDANT GUILTY OF BOTH DEPRAVED INDIFFERENCE MURDER AND INTENTIONAL (TRANSFERRED INTENT) MURDER OF A SINGLE VICTIM SHOULD NOT BE APPLIED RETROACTIVELY (SECOND DEPT).

The Second Department determined that a 2015 Court of Appeals decision holding that a jury cannot be instructed that it could find defendant guilty of both depraved indifference murder and intentional murder of a single victim should not be applied retroactively. Defendant was shooting at another when he struck and killed his accomplice:

> In People v Dubarry (25 NY3d at 165), the Court of Appeals addressed "the novel question" of whether the defendant could be subject to multiple liability for a single homicide based on a theory of transferred intent. "The transferred intent theory, codified under Penal Law § 125.25(1), provides that where the resulting death is of a third person who was not the defendant's intended victim, the defendant may nonetheless be held to the same level of criminal liability as if the intended victim were killed'" ... . The Court in Dubarry concluded that the defendant "cannot be convicted of depraved indifference murder and intentional murder on a transferred intent theory in a case involving the death of the same person," and, "[t]herefore, the trial court erroneously submitted to the jury both charges in the conjunctive rather than in the alternative" ... . * * *
>
> ... Dubarry established new precedent and constitutes a new rule of law. Consequently, retroactivity analysis is required under this State's rules ... . "Whether a new rule of New York State law is to be given retroactive effect requires an evaluation of three factors: (1) the purpose to be served by the new rule, (2) the extent of reliance on the old rule, and (3) the effect on the administration of justice of retroactive application"... . "The second and third factors are, however, only given substantial weight when the answer to the retroactivity question is not to be found in the purpose of the new rule itself'" ... .
>
> As to the first factor, the Court of Appeals in Dubarry clarified the proper application of the transferred intent theory, which should be employed, not to multiply criminal liability, "but to prevent a defendant who has committed all the elements of a crime (albeit not upon the same victim) from escaping responsibility for that crime" ... . The Court's purpose was to dispel confusion concerning the application of the separate mens rea of intent and depraved indifference to the same outcome ... , and, similar to Policano, to make future homicide prosecutions more sustainable. Furthermore ... , "nonretroactivity poses no danger of a miscarriage of justice" ... . The other two Pepper factors also weigh in favor of nonretroactivity. ... [T]hree of the departments of the Appellate Division permitted the submission of both intentional (transferred intent) and depraved indifference crimes in the conjunctive. Moreover, "[a]ffording retroactivity to [the] defendant would mean that every defendant to whose case it was relevant, no matter how remote in time and merit, would become [a] beneficiary'" ... . **People v Drayton, 2018 NY Slip Op 08323, Second Dept 12-5-18**

Table of Contents

CRIMINAL LAW.

ALTHOUGH THE CRIME WITH WHICH DEFENDANT WAS CHARGED, ATTEMPTED DISSEMINATION OF INDECENT MATERIAL TO A MINOR FIRST DEGREE, CAN BE A FELONY SEX OFFENSE, THE ABSENCE OF STATUTORILY REQUIRED LANGUAGE IN THE ACCUSATORY INSTRUMENT PRECLUDED SENTENCING DEFENDANT AS A FELONY SEX OFFENDER (THIRD DEPT).

The Third Department determined the absence of statutorily-required language in the accusatory instrument precluded sentencing defendant as a felony sex offender:

> Although a conviction of attempted dissemination of indecent material to a minor in the first degree (see Penal Law §§ 110.00, 235.22) can be considered a felony sex offense subject to sentencing in accordance with Penal Law § 70.80, the accusatory instrument must specify that the offense is charged "as a sexually motivated felony" (CPL 200.50 [4]; see Penal Law § 130.91 [2]). Here, the accusatory instrument did not contain the requisite language, nor did it make any reference to Penal Law § 130.91. As such, defendant was not subject to the sentencing provisions of Penal Law § 130.91, rendering the imposed sentence illegal. **People v Lavelle, 2018 NY Slip Op 08378, Third Dept 12-6-18**

CRIMINAL LAW.

DENIAL OF A FOR CAUSE CHALLENGE TO A JUROR WHO SAID IT WOULD BE DIFFICULT TO REACH A VERDICT WITHOUT HEARING FROM THE DEFENDANT REQUIRED REVERSAL (FIRST DEPT).

The First Department, reversing Supreme Court, determined that defendant's for cause challenge to a juror who stated she wanted to hear from the defendant should have been granted:

> ... [T]he court erred in denying defendant's challenge for cause to a prospective juror who stated that her belief in "hearing both sides of the story" would make it difficult for her to reach a verdict "without hearing from the defendant," and who was repeatedly unable to give an equivocal assurance that she would follow the law as charged by the court. **People v Rivera, 2018 NY Slip Op 08750, First Dept 12-20-18**

Table of Contents

CRIMINAL LAW.

THE MAJORITY CONCLUDED COMMUNITY OPPOSITION TO PETITIONER'S RELEASE ON PAROLE WAS PROPERLY CONSIDERED BY THE BOARD OF PAROLE AND UPHELD THE DENIAL OF PAROLE, TWO-JUSTICE DISSENT ARGUED COMMUNITY OPPOSITION IS NOT INCLUDED IN THE STATUTORY FACTORS TO BE CONSIDERED BY THE BOARD (THIRD DEPT).

The Third Department, over a two-justice dissent, determined that petitioner's request to be released on parole was properly denied. The majority held that community opposition to release is a factor to be considered. The dissenters argued that community opposition is not included in the statutory factors to be considered:

> By statutorily protecting the confidentiality of those members of the community — in addition to the crime victim or victim's representative — who choose to express their opinion, either for or against, an inmate's bid to obtain parole release, the Legislature demonstrated a clear intent that such opinions are a factor that may be considered by respondent in rendering its ultimate parole release decision. Significantly, such statements and opinions are germane to respondent's determination as to whether an inmate will live and remain at liberty without violating the law, whether such release is compatible with the welfare of society and whether an inmate's release will deprecate the seriousness of the underlying crime as to undermine respect for the law — statutory factors that respondent must consider in rendering its parole release determinations (see Executive Law § 259-i [2] [c] [A] ...).
>
> **From the Dissent:** Respondent based its denial of petitioner's parole, in part, on "consistent community opposition" — an element that is not among the factors that the Legislature directed respondent to consider in making parole release determinations (see Executive Law § 259-i [2] [c] [A]). Although the majority's approach may have some practical appeal, we are bound by the governing law. It is well established that respondent may not rely upon factors outside the scope of Executive Law § 259-i in making decisions concerning parole release ... . **Matter of Applewhite v New York State Bd. of Parole, 2018 NY Slip Op 08989, Third Dept 12-27-18**

CRIMINAL LAW, APPEALS.

DEFENDANT CANNOT PLEAD GUILTY TO A VIOLATION OF A STATUTE WHICH HAD NOT BEEN ENACTED AT THE TIME OF THE OFFENSE, THE DEFECT IS JURISDICTIONAL AND SURVIVES A WAIVER OF APPEAL (THIRD DEPT).

The Third Department held that sexual abuse first degree charge in the superior court information (SCI) was based on a statute which had not yet been enacted at the time of the offense. The defect was jurisdictional and survived the waiver of appeal:

> Initially, defendant contends that the waiver of indictment and the SCI are jurisdictionally defective with respect to the crime of sexual abuse in the first degree under Penal Law § 130.65 (4) because this provision of the Penal Law was not in effect in 2009 when the alleged criminal conduct occurred. Preliminarily, we note that defendant is not precluded by her unchallenged waiver of the right to appeal from raising this jurisdictional challenge ... . The People concede that a jurisdictional defect exists inasmuch as the relevant Penal Law provision did not become effective

until November 1, 2011 ... , and a defendant may not be charged with a crime that does not exist at the time that the act was committed ... . Consequently, defendant's plea of guilty to sexual abuse in the first degree must be vacated and count 2 of the SCI charging her with this crime must be dismissed. **People v Gannon, 2018 NY Slip Op 08582, Thrid Dept 12-13-18**

CRIMINAL LAW, APPEALS, EVIDENCE.

ALTHOUGH DEFENDANT THREATENED TO KILL A JUDGE THE EVIDENCE DID NOT SUPPORT THE TERRORISM CONVICTION, THERE WAS NO EVIDENCE THE THREAT WAS MADE TO INFLUENCE OR AFFECT THE POLICY OR CONDUCT OF A GOVERNMENTAL UNIT, CONVICTION REVERSED UNDER A WEIGHT OF THE EVIDENCE REVIEW (THIRD DEPT).

The Third Department, reversing defendant's conviction under New York's terrorism statute, applying a weight of the evidence review, determined that, although the defendant threatened to kill a judge in letters to his wife, there was no proof the threat was made to influence or affect the policy or conduct of a unit of government:

> As relevant here, "[a] person is guilty of making a terroristic threat when[,] with intent to . . . influence the policy of a unit of government by intimidation or coercion, or affect the conduct of a unit of government by murder, assassination or kidnapping, he or she threatens to commit or cause to be committed a specified offense and thereby causes a reasonable expectation or fear of the imminent commission of such offense"... .
>
> ... [C]ritically missing is evidence demonstrating that defendant intended to influence a policy of a governmental unit by intimidation or coercion or affect the conduct of a governmental unit — a necessary element of the crime of making a terroristic threat ... .
>
> ... [T]he letters here do not indicate that defendant, by threatening violent acts, intended to influence the judge's policy or conduct. Indeed, the record reflects that, in the time between when the two letters were written, defendant was granted visitation by the subject judge. In our view, they reflect defendant's vented anger towards those individuals involved in his Family Court proceedings ... . [V]iewing the evidence in a neutral light, it cannot be concluded that defendant intended by his actions to influence a governmental policy or affect a governmental unit and, therefore, the verdict finding defendant guilty of making a terroristic threat is against the weight of the evidence ... . **People v Richardson, 2018 NY Slip Op 08368, Thirid Dept 12-6-18**

Table of Contents

CRIMINAL LAW, ATTORNEYS.

DEFENDANT WAS DEPRIVED OF HIS RIGHT TO COUNSEL WHEN DEFENSE COUNSEL TOLD THE COURT HE DID NOT WANT ANY PART OF DEFENDANT'S MOTION TO WITHDRAW HIS GUILTY PLEA (SECOND DEPT).

The Second Department determined defendant was denied his right to counsel when defense counsel told the court he did not want to be a party to defendant's motion to withdraw his guilty plea:

> The defendant stated that he wished to withdraw his plea of guilty on the grounds that he was innocent and that he was coerced into pleading guilty. His attorney stated that he did not want to be a party to the motion. His attorney further stated: "I fought long and hard to get this. I thought we had this." The court advised the defendant not to say anything further, and noted that the defendant could be charged with perjury. The court denied the defendant's motion, and imposed sentence.
>
> The defendant's right to counsel was adversely affected when his attorney took a position adverse to the defendant with respect to his motion to withdraw his plea of guilty... . The Supreme Court should have assigned a different attorney to represent the defendant before it determined the defendant's motion ... . We further note that, in advising the defendant not to say anything further because he could be charged with perjury, the court deprived the defendant of the opportunity to present his contentions ... . **People v Sarner, 2018 NY Slip Op 08335, Second Dept 12-5-18**

CRIMINAL LAW, ATTORNEYS, APPEALS.

LEGAL SENTENCE FOR A PERSISTENT FELONY OFFENDER DRASTICALLY REDUCED IN THE INTEREST OF JUSTICE PURSUANT TO A MOTION FOR A WRIT OF CORAM NOBIS BASED UPON APPELLATE COUNSEL'S FAILURE TO CONTEND THE SENTENCING COURT ABUSED ITS DISCRETION (FOURTH DEPT).

The Fourth Department drastically reduced defendant's sentence pursuant to a motion for a writ of coram nobis based on appellate counsel's failure to to contend that the sentencing court abused its discretion in finding defendant to be a persistent felony contender. The Fourth Department found that the sentencing court was not erroneous as a matter of law because it did not act arbitrarily or irrationally. However, the Fourth Department noted that it has the authority to vacate a harsh or severe persistent felony offender finding pursuant to Criminal Procedure Law (CPL) 470.20 (6) and did so. Defendant's 15 to life sentence was reduced to an aggregate sentence of 5 1/2 to 11:

> Although defendant has a lengthy criminal history, almost all of his offenses stem from him stealing from stores to get money to support his long-standing drug habit. It does not appear from the presentence report that defendant has ever inflicted violence on anyone, and he certainly did not physically harm anyone in this case.
>
> We note that the People never requested that defendant be adjudicated a persistent felony offender; instead, the court sua sponte ordered the persistent felony offender hearing. As noted, the People, in a pretrial plea bargain, offered defendant a sentence of concurrent indeterminate terms of incarceration of 2 to 4 years. Moreover, the judge who initially handled this case transferred it to Drug Treatment Court, which rejected defendant due to his

extended period of sobriety—he had been in jail for more than a year at the time awaiting trial. Defendant thus went from having his case transferred to Drug Treatment Court, where successful completion may have resulted in reduction of the felony charges to misdemeanors, to being sentenced to 20 years to life, on the same charges [reduced to 15 to life on a prior appeal]. Such a disparity between the plea offer and the ultimate sentence militates in favor of a sentence reduction, especially for a nonviolent offender such as defendant. **People v Ellison, 2018 NY Slip Op 08833, Fourth Dept 12-21-18**

CRIMINAL LAW, ATTORNEYS, APPEALS.

ALTHOUGH THE PROSECUTOR WAS GUILTY OF SERIOUS MISCONDUCT, DEFENDANT DID NOT OBJECT TO THE PROSECUTOR'S REMARKS AND REVERSAL IN THE INTEREST OF JUSTICE WAS NOT WARRANTED, TWO-JUSTICE DISSENT (FOURTH DEPT).

The Fourth Department determined the prosecutor had exceeded the bounds of the propriety but the prosecutorial misconduct, which was not preserved for appeal by objection, did not warrant reversal. Two dissenting justices argued the misconduct warranted reversal:

We agree with defendant, however, that the prosecutor exceeded the bounds of propriety by cross-examining a defense witness regarding an uncharged crime that defendant allegedly committed and by placing his own credibility in issue while doing so. "A prosecutor may not refer to matters not in evidence or call upon the jury to draw conclusions that cannot fairly be inferred from the evidence" ... and, in this case, the prosecutor strayed outside " the four corners of the evidence' " when he implied that defendant committed different crimes ... . Nevertheless, reversal is unwarranted where a prosecutor's error has not substantially prejudiced a defendant's trial ... and, although the dissent is correct that we have previously admonished this prosecutor, the instant trial occurred before that admonition. Therefore, although we strongly condemn the prosecutor's conduct during cross-examination, we conclude that it does not warrant reversal here ... .

From the Dissent: We agree with defendant that the prosecutor caused him substantial prejudice during the cross-examination of a defense witness. " It is fundamental that evidence concerning a defendant's uncharged crimes or prior misconduct is not admissible if it cannot logically be connected to some specific material issue in the case, and tends only to demonstrate that the defendant was predisposed to commit the crime charged' " ... .

We further agree with defendant that remarks in the prosecutor's summation were inflammatory and prejudicial. The prosecutor referred to defendant's witnesses as "liars," compounding the prejudicial effect of his improper cross-examination ... . More egregiously, the prosecutor referred to defendant as a "monster" four times. **People v Fick, 2018 NY Slip Op 08788, Fourth Dept 12-21-18**

Table of Contents

CRIMINAL LAW, ATTORNEYS, EVIDENCE.

DEFENSE COUNSEL'S FAILURE TO REQUEST A JURY INSTRUCTION ON THE CORRECT LESSER INCLUDED OFFENSE CONSTITUTED INEFFECTIVE ASSISTANCE, PETIT LARCENY IS A LESSER INCLUDED OFFENSE OF ROBBERY THIRD, NEW TRIAL ORDERED (FIRST DEPT).

The First Department, reversing defendant's conviction, determined that defense counsel was ineffective for failing to request a jury instruction on petit larceny as a lesser included offense of robbery. The defense theory was that defendant did not use violence to take $20.00 from the victim but rather used trickery, claiming the victim had broken defendant's liquor bottle. Defense counsel requested a jury charge on fraudulent accosting, which is not a lesser included offense of robbery:

> ... [P]etit larceny, which is defined as "steal[ing] property," qualifies in the abstract as a lesser included offense of robbery in the third degree, which is defined as "forcibly steal[ing] property" ... . There is no separate crime of petit larceny "by false pretenses," and the fact that a nonforcible taking is committed by fraud does not disqualify it as a lesser included offense of robbery.
>
> It is clear that defense counsel's failure to seek a petit larceny charge was not strategic. The defense strategy was to concede that a nonforcible theft occurred and seek a misdemeanor conviction. There is no merit to the People's suggestion that counsel may have had a strategic reason for requesting fraudulent accosting but not petit larceny.
>
> We also find that counsel's failure to request a petit larceny charge was prejudicial. There was plainly a reasonable view of the evidence to support petit larceny. Furthermore, the evidence that the theft was forcible rather than a scam was not so overwhelming as to render a request for petit larceny futile. The victims were tourists who returned to their home country and did not testify, and the sole eyewitness's ability to establish the element of force was in question. **People v Jones, 2018 NY Slip Op 08356, First Dept 12-4-18**

CRIMINAL LAW, ATTORNEYS, EVIDENCE.

DEFENSE COUNSEL'S FAILURE TO OBTAIN EXPERT OPINION EVIDENCE CONSTITUTED INEFFECTIVE ASSISTANCE OF COUNSEL, THE CASE TURNED ON WHETHER DEFENDANT WAS INTOXICATED, THE INTOXILYZER RESULTS WERE INCONSISTENT, CONVICTION REVERSED (FIRST DEPT).

The First Department, reversing Supreme Court, determined defendant's motion to vacate the judgment of conviction on ineffective assistance grounds should have been granted:

> This case turned on whether defendant was intoxicated at the time of the vehicular accident at issue, and there was a serious issue about the accuracy of the final Intoxilyzer reading, which conflicted with an earlier reading showing no intoxication. Defense counsel failed to take steps to consult with and produce an appropriate expert on breath and blood alcohol analysis to rebut the People's proof ... .
>
> At the 440.10 hearing, trial counsel conceded that his only reason for not calling an expert was the inability of his client, who was also unable to pay counsel's fee, to pay for an expert. He also conceded that he took no steps to

obtain a court-appointed expert, and was unaware that this remedy might be available. This constituted constitutionally deficient performance ... . As for the prejudice prong of an ineffective assistance claim, we find that there is a reasonable probability that calling an expert would have affected the outcome of the trial, and that the absence of expert testimony rendered the proceeding unfair under the facts of the case. **People v Carter, 2018 NY Slip Op 08745, First Dept 12-20-18**

CRIMINAL LAW, EVIDENCE.

ANONYMOUS 911 CALL DID NOT VIOLATE DEFENDANT'S RIGHT OF CONFRONTATION BECAUSE THE INFORMATION WAS NONTESTIMONIAL IN THAT IT DID NOT IDENTIFY THE DEFENDANT BUT MERELY ALERTED THE POLICE TO A BURGLARY IN PROGRESS (SECOND DEPT).

The Second Department noted that the anonymous 911 was properly admitted into evidence, in part, because the call was nontestimonial:

We agree with the Supreme Court's determination to admit into evidence at the trial a recording of a 911 emergency telephone call made by an unidentified caller. The recording was admissible under the present sense impression exception to the hearsay rule ... . Moreover, the admission of the recording did not violate the defendant's right of confrontation. Since the primary purpose of the statements by the unidentified caller was to obtain an emergency response to a burglary in progress, the statements were not testimonial in nature ... . **People v Torres, 2018 NY Slip Op 08337, Second Dept 12-5-18**

CRIMINAL LAW, EVIDENCE.

CONSECUTIVE SENTENCES NOT SUPPORTED BY ALLEGATIONS OR PLEA ALLOCUTION, NO ALLEGATION THE THREE CRIMINAL POSSESSION OF A WEAPON COUNTS WERE SEPARATE ACTS (SECOND DEPT).

The Second Department determined consecutive sentences should not have been imposed for the three counts of criminal possession of a weapon to which defendant pled guilty. There were no allegations of three separate acts of possession:

Sentences imposed for two or more offenses may not run consecutively where, inter alia, "a single act constitutes two offenses" ... . Conversely, consecutive sentences may be imposed when, among other things, "the facts demonstrate that the defendant's acts underlying the crimes are separate and distinct" ... . The People bear the burden of establishing the legality of consecutive sentencing ... .

Here, no facts were alleged in the Superior Court Information or adduced at the defendant's plea allocution which establish three separate acts of possession ... . Accordingly, there was no basis for imposing consecutive

sentences for three counts of criminal possession of a weapon in the third degree ... . **People v Bailey, 2018 NY Slip Op 08674, Second Dept 12-19-18**

CRIMINAL LAW, EVIDENCE.

NO EVIDENCE THREE WEAPONS IN A SAFE WERE POSSESSED BY THREE SEPARATE ACTS, SENTENCES SHOULD HAVE BEEN CONCURRENT, DECISIONS TO THE CONTRARY SHOULD NO LONGER BE FOLLOWED (SECOND DEPT).

The Second Department determined there was no indication the three weapons in a safe were possessed by three separate acts. The sentences therefore should have been concurrent:

> ... [T]he defendant's convictions of criminal possession of a weapon in the third degree ... were based upon his act of constructively possessing three guns in a safe on December 2, 2009 ... . Since these convictions were based upon the defendant's constructive possession of guns in the same location at the same time, and there was no proof of any separate act by the defendant which constituted possession of one of the guns, as opposed to either of the other two guns, the convictions were based upon the same act, and the sentencing court was required to impose concurrent sentences ... . [T]he mere fact that the defendant possessed three guns does not prove three separate acts of possession, and, to the extent that our decisions in People v Horn (196 AD2d 886) and People v Negron (184 AD2d 532, 533) can be read to so hold, those cases should no longer be followed. In an analogous context, the Court of Appeals held, to the contrary, that a sentencing court was not authorized to impose consecutive sentences on a defendant's convictions of three counts of possessing a sexual performance by a child, despite the defendant's possession of separate images depicting child pornography, because the People failed to allege or adduce facts demonstrating separate acts of downloading the digital images (see People v Dean, 8 NY3d at 930-931). Similarly, possession of three guns without further proof of separate and distinct acts of possession cannot support consecutive sentences for three counts of criminal possession of a weapon in the third degree ... . **People v Smith, 2018 NY Slip Op 08695, Second Dept 12-19-18**

CRIMINAL LAW, EVIDENCE.

SENTENCES FOR MURDER AND CRIMINAL POSSESSION OF A WEAPON MUST RUN CONCURRENTLY (FOURTH DEPT).

The Fourth Department determined consecutive sentences for murder and criminal possession of a weapon were illegal:

> ... [T]he sentence is illegal insofar as the court directed that the sentence imposed for criminal possession of a weapon in the second degree shall run consecutively to the sentence imposed for murder in the second degree... . As the People correctly concede, "the sentence on the murder conviction should run concurrently with the sentence on the weapon possession conviction that requires unlawful intent ... , because the latter offense was not complete until defendant shot the victim[]" ... . **People v Maull, 2018 NY Slip Op 08780, Fourth Dept 12-21-18**

Table of Contents

CRIMINAL LAW, EVIDENCE.

COUNTY COURT SHOULD NOT HAVE DENIED THE REQUEST FOR A CROSS-RACIAL IDENTIFICATION JURY INSTRUCTION, THE COURT OF APPEALS CROSS-RACIAL IDENTIFICATION RULING IN PEOPLE V BOONE APPLIES RETROACTIVELY, HOWEVER THE ERROR WAS HARMLESS (SECOND DEPT).

The Second Department determined County Court should have given the cross-racial jury instruction, but deemed the error harmless:

> The defendant correctly contends that the County Court erred in denying his request for a jury charge on cross-racial identification. In People v Boone (30 NY3d 521, 526), the Court of Appeals held that where, as here, "identification is an issue in a criminal case and the identifying witness and defendant appear to be of different races, upon request, a party is entitled to a charge on cross-racial identification." Contrary to the People's contention, Boone applies retroactively to cases pending on direct appeal ... .
>
> Nevertheless, the County Court's failure to give a cross-racial identification charge constituted harmless error. At trial, the complainant identified the defendant as one of the three perpetrators who robbed him inside the office of the car wash. The evidence at trial established that shortly after the robbery, a police officer located the defendant and his accomplices, who matched the descriptions of the perpetrators, in a car. The defendant and his accomplices then led the police on a high-speed car chase and a subsequent chase on foot. When the defendant was apprehended following the foot chase, the police searched him for weapons, and the defendant stated, "they're not on me, the guns are in the car." The guns and proceeds of the robbery were found in the car from which the defendant and his accomplices fled. Additionally, money that the complainant had withdrawn from the bank earlier that day, which was bound with blue bands, was recovered from a jacket the defendant had discarded as he was running from the police. Under these circumstances, the error in failing to give the charge on cross-racial identification was harmless, as there was overwhelming evidence of the defendant's guilt, and no significant probability that the defendant would have been acquitted if not for the error ... . **People v Jordan, 2018 NY Slip Op 08956, Second Dept 12-26-18**

CRIMINAL LAW, EVIDENCE, APPEALS.

THE AFORD PLEA WAS NOT SUPPORTED BY STRONG EVIDENCE OF DEFENDANT'S INTENT TO COMMIT GRAND LARCENY, THE PLEA WAS VACATED IN THE INTEREST OF JUSTICE (FOURTH DEPT).

The Fourth Department vacated defendant's Alford plea finding that the record lacked the requisite strong evidence of actual guilt. The defendant and two codefendants were seen by a security guard heading toward the exit of a store with unpaid merchandise in a cart. They abandoned the merchandise near the exit, got in a car, and led the police on a high speed chase resulting in two accidents and injury to a police officer. The Alford plea issue was not preserved but the Fourth Department reviewed it in the interest of justice. The Fourth Department found the evidence of intent to commit grand larceny lacking:

We agree with defendant, however, that County Court erred in accepting his Alford plea because the record lacks the requisite strong evidence of his actual guilt ... . Although defendant failed to preserve that contention for our review by moving to withdraw his plea or to vacate the judgment of conviction ... , and this case does not fall within the rare exception to the preservation requirement set forth in People v Lopez (71 NY2d 662, 666 [1988]...), we exercise our power to review defendant's unpreserved contention as a matter of discretion in the interest of justice (see CPL 470.15 [3] [c]...).

The record, which includes sworn grand jury testimony, sufficiently establishes that defendant "exercised dominion and control over the property for a period of time, however temporary, in a manner wholly inconsistent with the owner's continued rights" ... , and that the value of such property exceeded one thousand dollars... . We conclude, however, that the record lacks strong evidence that defendant acted with the intent to deprive the owner of the property or to appropriate the property to himself or to a third person ... . Thus, inasmuch as the record lacks strong evidence that defendant acted with the intent to commit grand larceny in the fourth degree, the record also lacks strong evidence that defendant caused injury to a person in the course of and in furtherance of the commission or attempted commission of that crime or during the immediate flight therefrom ... . **People v Johnson, 2018 NY Slip Op 08802, Fourth Dept 12-21-18**

CRIMINAL LAW, EVIDENCE, APPEALS.

THE PROOF REQUIREMENTS FOR DEPRAVED INDIFFERENCE MURDER CHANGED WHEN THE COURT OF APPEALS DECIDED PEOPLE V PAYNE, BEFORE DEFENDANT'S CONVICTION BECAME FINAL, SUPREME COURT SHOULD HAVE HEARD DEFENDANT'S MOTION TO VACATE THE CONVICTION AND SHOULD HAVE REVERSED THE DEPRAVED INDIFFERENCE MURDER CONVICTION AND DISMISSED THE COUNT (SECOND DEPT).

The Second Department, reversing Supreme Court, determined: (1) the law on the proof requirements for depraved indifference murder changed when People v Payne (3 NY2d 266) was decided, not later when People v Feingold (7 NY3d 288) was decided; (2) defendant's judgment of conviction did not become final until after People v Payne was decided; (3) therefore defendant's motion to vacate his judgment of conviction should have been heard on the merits; and (4) the evidence of depraved indifference murder was not sufficient to support the verdict:

As noted, the motion court determined that the law regarding depraved indifference murder did not change until People v Feingold, and that the defendant is therefore not entitled to any benefit under the new law ... . However, in People v Wilkens (126 AD3d 1293) and People v Baptiste (51 AD3d 184), the Third and Fourth Departments of the Appellate Division each held that the law changed on October 19, 2004, when the Court of Appeals decided People v Payne. We agree with the Third and Fourth Departments that People v Payne signaled the change in the law of depraved indifference murder. ...

Under the unique circumstances of this case, where the cases here relied upon ... had not yet been decided at the time that the direct appeal was perfected, we find that the failure to challenge the legal sufficiency of the evidence on direct appeal was justified. ...

... [T]he trial evidence was not legally sufficient to support a verdict of guilt of depraved indifference murder ... . **People v Hernandez, 2018 NY Slip Op 08690, Second Dept 12-19-18**

Table of Contents

CRIMINAL LAW, EVIDENCE, APPEALS.

DETECTIVE'S TESTIMONY INDICATING DEFENDANT WAS IDENTIFIED IN A LINEUP IDENTIFICATION PROCEDURE CONSTITUTED INADMISSIBLE BOLSTERING, ALTHOUGH THIS WAS A ONE WITNESS IDENTIFICATION CASE, THE EVIDENCE WAS OVERWHELMING AND THE ERROR WAS DEEMED HARMLESS (SECOND DEPT).

The Second Department, reviewing the unpreserved issue in the interest of justice, determined that the detective's testimony indicated defendant had been identified in a lineup was inadmissible bolstering. The unpreserved error was reviewed in the interest of justice. In light of the overwhelming evidence, however, the error was deemed harmless:

> We conclude that the detective's testimony that the defendant was arrested "[a]fter the lineup was conducted" could have led the jury to believe that the police were induced to take action as a result of the lineup identification, and therefore constituted improper implicit bolstering of the witness's identification testimony ... .
>
> ... "Harmless error analysis proceeds in two stages" ... . First, "unless the proof of the defendant's guilt, without reference to the error, is overwhelming, there is no occasion for consideration of any doctrine of harmless error" ... . Second, for a nonconstitutional error to be harmless the appellate court must conclude "that there is [no] significant probability . . . in the particular case that the jury would have acquitted the defendant had it not been for the error or errors which occurred"... .
>
> In analyzing the effect of a bolstering error, the Court of Appeals has stated that "[t]he standard of harmlessness ... is whether the evidence of identity is so strong that there is no substantial issue on the point'"... . In the context of a case involving an identification by a single witness, the Court of Appeals has concluded that a bolstering error was harmless in light of, among other things, the "unusually credit-worthy" nature of the witness's identification ... .
>
> Here, although the only direct evidence connecting the defendant to the commission of the crimes charged was the identification testimony of a single witness, the evidence of the defendant's guilt, without reference to the error, was overwhelming ... . **People v Holmes, 2018 NY Slip Op 08954, Second Dept 12-26-18**

CRIMINAL LAW, EVIDENCE, APPEALS.

ALTHOUGH SUPREME COURT DENIED DEFENDANT'S MOTION TO SUPPRESS A GUN FOUND IN A VEHICLE, THE COURT DID NOT ARTICULATE THE REASON FOR THE DENIAL, THE SECOND DEPARTMENT DID NOT THEREFORE HAVE THE POWER TO REVIEW THE ISSUE, MATTER SENT BACK SO SUPREME COURT CAN ARTICULATE ITS REASONING (SECOND DEPT).

The Second Department remitted the matter to Supreme Court for the basis of its ruling on a suppression motion:

> This Court is statutorily limited to reviewing errors or defects that "may have adversely affected the appellant" (CPL 470.15[1]), and thus has no power "to review issues either decided in an appellant's favor, or not ruled upon, by the

trial court"... . The Court of Appeals has observed that, once the Appellate Division has rejected a trial court's ruling on a particular issue, it may not proceed to consider other issues that might provide a basis for affirmance if they were not determined adversely to the appellant... .

Here, the defendant contends that the Supreme Court incorrectly denied that branch of his omnibus motion which was to suppress the gun, arguing that the inevitable discovery and search incident to a lawful arrest exceptions did not apply. The People contend, as they did before the Supreme Court, that the automobile exception applies. However, the court did not set forth the basis for its denial of the branch of the defendant's motion which was to suppress the gun. Furthermore, on this record, we cannot determine the unarticulated predicate for the court's evidentiary ruling ... Therefore, in order to avoid exceeding our statutory authority pursuant to CPL 470.15(1), we hold the appeal in abeyance and remit the matter to the Supreme Court, Queens County, for a new determination of that branch of the defendant's omnibus motion which was to suppress the gun. **People v Thomas, 2018 NY Slip Op 08962, Second Dept 12-26-18**

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

INSUFFICIENT EVIDENCE THAT DEFENDANT HAD A HISTORY OF DRUG AND ALCOHOL ABUSE, RISK ASSESSMENT REDUCED (FOURTH DEPT).

The Fourth Department, in this Sex Offender Registration Act (SORA) risk assessment proceeding, determined there was insufficient evidence that defendant had a history of alcohol and drug abuse:

We agree with defendant that the People failed to prove by the requisite clear and convincing evidence that he had a history of alcohol and drug abuse ... .

The SORA Risk Assessment Guidelines and Commentary for risk factor 11 state in relevant part that "[a]lcohol and drug abuse are highly associated with sex offending . . . The guidelines reflect this fact by adding 15 points if an offender has a substance abuse history . . . It is not meant to include occasional social drinking. In instances where the offender abused drugs and/or alcohol in the distant past, but his more recent history is one of prolonged abstinence, the . . . court may choose to score zero points in this category" (Sex Offender Registration Act: Risk Assessment Guidelines and Commentary at 15 [2006]). At the SORA hearing, the People presented evidence that defendant drank one can of beer each month. We agree with defendant that such evidence was insufficient to warrant the assessment of points under risk factor 11 ... . The People also presented evidence that defendant smoked marihuana in his teenage years and early twenties, but thereafter participated in a drug treatment program and, at the time of the presentence interview, had not smoked marihuana for four years. We agree with defendant that the People's evidence established that his recent history of drug use was one of prolonged abstinence and was also insufficient to warrant the assessment of points under risk factor 11 ... . **People v Madonna, 2018 NY Slip Op 08789, Fourth Dept 12-21-18**

Table of Contents

DEBTOR-CREDITOR

DEBTOR-CREDITOR, MUNICIPAL LAW, TAX LAW.

ONCE THE CITY TAX LIENS HAD BEEN ASSIGNED PAYMENT TO THE CITY, INSTEAD OF THE LIENHOLDER, IS NOT APPLIED TO THE DEBT (FIRST DEPT).

The First Department, reversing Supreme Court, determined the tax and sewer charges paid to the city by defendant after defendant had been notified that the tax liens had been assigned could not be applied to the debt:

> Plaintiffs are the lawful assignees of certain City of New York water and sewer tax liens against property owned by defendant. The City complied fully with the provisions of Administrative Code of City of NY § 11-320, which requires, inter alia, that four notices of the sale of the liens be sent to the property owner at specified intervals before the sale and that another notice be sent 30 days after the sale ... . The City's four pre-sale notices informed defendant of the debt, of the impending sale, and of defendant's obligation to pay the City, if at all, by August 1, 2011. The notices also informed defendant that, after the sale, it should make payment arrangements with the new lienholder's representative.
>
> Defendant did not pay the amounts owed by August 1, 2011. On the day after the tax liens were assigned to plaintiffs, defendant made payments to the City. The payments were not credited against defendant's debt, because, once the assignment had taken place, payments had to be made to plaintiffs ... .
>
> Contrary to defendant's argument, there is no tension between the Administrative Code's provisions for tax liens and tax sales and the law generally governing payments of an assigned debt. Once a debtor has notice that the debt has been assigned, or has been put "on inquiry" as to an assignment of the debt, payments to the assignor (the original creditor) are not applied to the debt ... . **NYCTL 1998-2 Trust v 70 Orchard LLC, 2018 NY Slip Op 09004, First Dept 12-27-18**

DEFAMATION

DEFAMATION, CIVIL RIGHTS LAW, PRIVILEGE.

REMARKS ALLEGED TO BE DEFAMATORY REFLECTED THE RESULTS OF A JUDICIAL PROCEEDING AND WERE THEREFORE PRIVILEGED PURSUANT TO CIVIL RIGHTS LAW 74 (FIRST DEPT).

The First Department determination the complaint alleging defamation causes of action against attorneys who had been interviewed about litigation involving plaintiff and Elizabeth Etling, whom the defendant attorneys represented. The court

held that the remarks alleged to be defamatory were either protected descriptions of judicial determinations in the case or were otherwise not actionable. With respect to the Civil Rights Law privilege, the court wrote:

> Defendants' comment about plaintiff's "massive spoliation" or "spoliation in droves" is protected under Civil Rights Law § 74 as a fair and true report, even if the Delaware Chancery Court did not use defendants' exact words in its decision... . The court concluded that plaintiff had intended and attempted to destroy "a substantial amount of information," and detailed plaintiff's responsibility for the deletion, in violation of court order, of approximately 41,000 files from his computer. Plaintiff argues that defendants overstated the matter, because his spoliation proved largely reversible. Indeed, of the 41,000 files deleted, 1,000 were permanently destroyed. However, plaintiff did not cause the recovery of the data; rather, it occurred in spite of him. Moreover, he lied under oath about his spoliating conduct. As the court observed, an unsuccessful spoliator is still a spoliator... .
>
> Defendants' comment that plaintiff was "holding Elting hostage" is protected under Civil Rights Law § 74. During the interviews at issue, defendants cited the section of the post-trial decision in which the court used similar language in summarizing Elting's position ... . Defendants' statement that "no rational person would ever want to partner with [plaintiff]," which is nearly a verbatim quotation from the court's decision, is protected under the statute. **Shawe v Kramer Levin Naftalis & Frankel LLP, 2018 NY Slip Op 08550, First Dept 12-13-18**

DISCIPLINARY HEARINGS

DISCIPLINARY HEARINGS (INMATES).

PETITIONER MAY NOT HAVE BEEN AFFORDED HIS RIGHT TO BE PRESENT WHEN THE UNAUTHORIZED MEDICATION WAS FOUND IN HIS CELL, DETERMINATION ANNULLED (THIRD DEPT).

The Third Department held that the determination petitioner was guilty of possessing unauthorized medication must be annulled because petitioner may not have been afforded his right to be present when the pill was discovered:

> ... [T]he part of the determination finding petitioner guilty of possessing unauthorized medication must be annulled as the record reflects that petitioner may not have been afforded his conditional right to observe that portion of the cell search that resulted in the pill being discovered. As such, the determination must be annulled to that extent and all references to the charge of possessing unauthorized medication must be expunged from his institutional record ... . **Matter of Torres v Annucci, 2018 NY Slip Op 08595, Third Dept 12-13-18**

Table of Contents

EDUCATION-SCHOOL LAW

EDUCATION-SCHOOL LAW, NEGLIGENCE.

THE DIGNITY FOR ALL STUDENTS ACT (DASA) DOES NOT CREATE A PRIVATE RIGHT OF ACTION FOR IN-SCHOOL BULLYING AND HARASSMENT (SECOND DEPT),

The Second Department, reversing Supreme Court, in a full-fledged opinion by Justice Brahwaite Nelson, determined that the Dignity for All Students Act (DASA, Education Law section 10) does not create a private right of action for a student injured by a school's failure to enforce policies prohibiting discrimination and harassment. The plaintiffs alleged Joshua, a student, was bullied and the complaint, in addition to alleging a violation of DASA, alleged negligent supervision and negligent retention of employees. The negligence causes of action properly survived the motions to dismiss:

> A private right of action "may be fairly implied when (1) the plaintiff is one of the class for whose particular benefit the statute was enacted; (2) recognition of a private right of action would promote the legislative purpose of the governing statute; and (3) to do so would be consistent with the legislative scheme" ... .
>
> A review of DASA's legislative history shows that finding a private right of action under the act would be inconsistent with the legislative scheme. As noted above, DASA requires school districts to create and implement certain policies, procedures, and guidelines aimed at creating an educational environment in which children can thrive free of discrimination and harassment (see Education Law §§ 10, 13). In a letter to the Governor, Senator Thomas Duane described DASA as focusing "on the education and prevention of harassment and discrimination before it begins rather than punishment after the fact" ... The letter stated that under the existing regime, school districts were paying "a high cost in civil damages for failure to prevent bullying," thereby suggesting that implementing DASA would alleviate such costs (id. at 9). Similarly, the Assembly sponsor of the bill also advised the Governor that "the Legislature intends [DASA] to be primarily a preventive, rather than punitive, measure; it should therefore be implemented accordingly, with the emphasis on proactive techniques such as training and early intervention to prevent discrimination and harassment" ... . E**skenazi-McGibney v Connetquot Cent. Sch. Dist., 2018 NY Slip Op 08467, Second Dept 12-12-18**

Table of Contents

EDUCATION-SCHOOL LAW, NEGLIGENCE, EMPLOYMENT LAW.

INFANT PLAINTIFF WAS ALLEGEDLY SEXUALLY ABUSED BY ANOTHER STUDENT ON A PRIVATE BUS TAKING THE CHILD HOME FROM SCHOOL, CERTAIN NEGLIGENCE CAUSES OF ACTION AGAINST THE SCHOOL SURVIVED A PRE-ANSWER MOTION TO DISMISS, NEGLIGENT SUPERVISION, HIRING AND TRAINING CAUSES OF ACTION DISMISSED BECAUSE THE EMPLOYEES WERE ALLEGED TO HAVE BEEN ACTING WITHIN THE SCOPE OF EMPLOYMENT, TWO DISSENTING JUSTICES ARGUED THE STUDENT WAS NO LONGER IN THE CUSTODY AND CONTROL OF THE SCHOOL WHEN THE ABUSE OCCURRED ON THE BUS (FOURTH DEPT).

The Fourth Department, over a two-justice dissent, determined certain negligence causes of action against the school properly survived a pre-answer motion to dismiss. Infant plaintiff, a special needs student, was allegedly sexually abused by another student on a private bus which provided transportation from the school under a contract with the city. All the justices agreed that the negligent hiring, supervision and training causes of action were properly dismissed because the relevant employees were alleged to have been acting within the scope of their employment, rendering the employer liable under the doctrine of respondeat superior. The dissenters argued that the child was no longer in the custody of the school when the child was on the private bus:

> **From the Dissent:** "[A] school has a duty of care while children are in its physical custody or orbit of authority" (Chainani v Board of Educ. of City of N.Y., 87 NY2d 370, 378 [1995]), which generally "does not extend beyond school premises"... . A school continues to have a duty of care to a child released from its physical custody or orbit of authority only under certain narrow circumstances, specifically, where the school "releases a child without further supervision into a foreseeably hazardous setting it had a hand in creating" (Ernest v Red Cr. Cent. Sch. Dist., 93 NY2d 664, 672 [1999], rearg denied 93 NY2d 1042 [1999]...).
>
> In determining that the sixth, ninth, twelfth, thirteenth, and fourteenth causes of action adequately set forth a cognizable theory of negligence, the majority effectively ignores the language in Ernest limiting a school's duty of care to instances where "it releases a child without further supervision"... . Those circumstances do not exist here inasmuch as the child was released to the care of the bus company, which was then responsible for the "further supervision" of the child (id.). The majority also ignores the precedent set by Chainani, which states that a school that has "contracted-out responsibility for transportation" to a private bus company "cannot be held liable on a theory that the children were in [the school's] physical custody at the time of injury" ... . Therefore, defendants' duty of care ended when the child was released to the physical custody of the bus company, especially where, as here, the bus company was hired by the City and had no contractual relationship with the School. **Brown v First Student, Inc., 2018 NY Slip Op 08776, Fourth Dept 12-21-18**

Table of Contents

FAMILY LAW

FAMILY LAW.

FAMILY COURT'S TERMINATION OF MOTHER'S PARENTAL RIGHTS WAS NOT SUPPORTED BY THE EVIDENCE, MOTHER WAS DEALING WITH HER MENTAL HEALTH AND DRUG PROBLEMS AND THE SPECIAL NEEDS OF THE CHILDREN WERE BEING ADDRESSED (SECOND DEPT).

The Second Department, reversing Family Court, determined that the proof requirements for the termination of parental rights were not met:

> To establish that a parent has permanently neglected a child, an agency must demonstrate, by clear and convincing evidence, that the parent "failed for a period of either at least one year or fifteen out of the most recent twenty-two months following the date such child came into the care of an authorized agency substantially and continuously or repeatedly to maintain contact with or plan for the future of the child, although physically and financially able to do so, notwithstanding the agency's diligent efforts to encourage and strengthen the parental relationship when such efforts will not be detrimental to the best interests of the child" (Social Services Law § 384-b[7][a]).
>
> ... The mother testified that she complied with all of the requirements that were communicated to her in order for the children to be returned to her care. According to the mother, these requirements included visiting with the children regularly, undergoing multiple mental health evaluations, consistently participating in mental health treatment, undergoing drug testing, completing parenting skills classes, visiting the children's school as much as allowed, and keeping up with the children's health status. The case files ... generally supported the mother's testimony ... .
>
> In light of the petitioner's failure to adduce other evidence beyond the mother's own testimony as to the initial reasons for the children's removal from her care, the significance of the mother's mental health diagnosis, or the significance of the special needs diagnoses of the children, there was no basis for a determination that the mother's testimony on these subjects demonstrated a failure "to take such steps as may be necessary to provide an adequate, stable home and parental care for the child[ren] within a period of time which is reasonable under the financial circumstances available to the parent" ... . **Matter of Jaylen R.B. (Lisa G.)2018 NY Slip Op 08643, Second Dept 12-19-18**

Table of Contents

FAMILY LAW.

FAMILY COURT SHOULD NOT HAVE DELEGATED ITS AUTHORITY TO ORDER VISITATION TO THE THERAPISTS BY CONDITIONING FATHER'S VISITATION ON HIS PARTICIPATION IN THERAPEUTIC COUNSELING (FOURTH DEPT).

The Fourth Department determined Family Court should not have conditioned father's visitation upon his participation in therapeutic counseling because the condition effectively delegated the court's power to order visitation to the therapists:

> ... [T]he court erred in conditioning the father's visitation upon his participation in therapeutic counseling. "Although a court may include a directive to obtain counseling as a component of a custody or visitation order, the court does not have the authority to order such counseling as a prerequisite to custody or visitation"... . Here, the court erred in making participation in counseling the "triggering event" in determining visitation ... . We further conclude that the court impermissibly delegated the decision to hold family therapy sessions to the father's and the child's therapists and therefore improperly gave the therapists the authority to determine if and when visitation would occur... . We therefore modify the order by vacating the sixth, seventh, and eighth ordering paragraphs, and we remit the matter to Family Court to fashion a specific and definitive schedule for visitation between the father and the subject child. **Matter of Rice v Wightman, 2018 NY Slip Op 08813, Fourth Dept 12-21-18**

FAMILY LAW, APPEALS.

MOTHER'S PETITION TO HAVE HER CHILD RETURNED AFTER TEMPORARY REMOVAL SHOULD HAVE BEEN GRANTED, EVEN THOUGH THE CHILD HAD BEEN RETURNED AT THE TIME OF THE APPEAL, THE ISSUE IS NOT ACADEMIC BECAUSE OF THE STIGMA ASSOCIATED WITH REMOVAL OF A CHILD (SECOND DEPT).

The Second Department, reversing Family Court, determined mother's petition to have her child returned after removal should have been granted. The child had been removed because of concern the home was not safety-proofed. Mother demonstrated she had taken adequate steps to safety-proof the home. The court noted that, although the child had been returned, the appeal was not academic because of the stigma associated with removing the child:

> "An application pursuant to Family Court Act § 1028(a) for the return of a child who has been temporarily removed shall be granted unless the court finds that the return presents an imminent risk to the child's life or health'"... . The court must "weigh, in the factual setting before it, whether the imminent risk to the child can be mitigated by reasonable efforts to avoid removal" ... . "The court must balance that risk against the harm removal might bring, and it must determine factually which course is in the child's best interests'"... .

Here, the record fails to provide a sound and substantial basis for the Family Court's determination... . Any concerns that the parents' substantial efforts to safety-proof their home were inadequate and subjected the child to possible risk of ingesting harmful substances did not amount to an imminent risk to the child's life or health that could not have been mitigated by reasonable efforts to avoid removal. This is especially so under the circumstances of this case, where the petitioner had been directed to assist the family in safety-proofing the home and failed to do so ... . Additionally, the mother presented evidence at the hearing establishing that she had taken substantial measures to safety-proof the home

after the child was removed, and had taken the child to the doctor and dentist. Therefore, the evidence did not establish that the return of the child posed an imminent risk to his life or health, since the offending circumstances had been remedied ... . **Matter of Saad A. (Umda M.), 2018 NY Slip Op 08292, Second Dept 12-5-18**

FAMILY LAW, ATTORNEYS.

FATHER WAS NOT ADEQUATELY INFORMED OF THE CONSEQUENCES OF PROCEEDING WITHOUT AN ATTORNEY, NEW HEARING ORDERED (SECOND DEPT).

The Second Department, reversing Family Court in this neglect proceeding, determined father was not adequately informed of his right to an attorney:

> ... [A]lthough the Family Court repeatedly asked the father whether he wanted to represent himself, told him that he would have to follow the same legal rules as the other parties, and cautioned him generally against self representation, the court did so without detailing the dangers and disadvantages of proceeding pro se ... . More specifically, the court failed to adequately warn the father of the risks inherent in proceeding without an attorney; failed to adequately apprise the father of the critical importance of having an attorney in a child neglect proceeding, particularly where there is a related criminal matter pending; failed to adequately explore the defendant's age, education, occupation, previous exposure to legal procedures and other factors bearing on a competent, intelligent, voluntary waiver; and failed to ensure that the father acknowledged his understanding of the perils of self-representation. Because the court failed to conduct a sufficiently searching inquiry of the father to be reasonably certain that he understood the dangers and disadvantages of giving up the fundamental right to counsel, and thus failed to ensure that the father's waiver of his right to counsel was made knowingly, intelligently, and voluntarily, we must reverse the order and remit the matter to the Family Court, Suffolk County, for a new hearing and a new determination, after a proper inquiry into the father's understanding of the consequences of self-representation ... . **Matter of Alivia F. (John F.), 2018 NY Slip Op 08649, Second Dept 12-19-18**

FAMILY LAW, CIVIL PROCEDURE.

FAMILY COURT SHOULD NOT HAVE DETERMINED HAWAII WAS THE MORE APPROPRIATE FORUM FOR THIS CUSTODY DISPUTE, HAWAII NEVER HAD SUBJECT MATTER JURISDICTION AND WAS UNAWARE OF THE FATHER'S NEW YORK CUSTODY PROCEEDINGS UNTIL AFTER THE HAWAII PROCEEDINGS WERE COMPLETED, THE HAWAII RULINGS MUST BE VACATED, ONLY THEN CAN FAMILY COURT MAKE A VALID ANALYSIS OF THE APPROPRIATE FORUM (SECOND DEPT).

The Second Department, reversing Family Court, determined that Hawaii should not have been found to be the more appropriate forum for this custody proceeding without first assuring that all the findings made in Hawaii were vacated. Mother had moved to Hawaii and her custody proceedings there were completed before the Hawaii court was alerted by

Family Court of father's custody proceedings in New York. Hawaii never had subject matter jurisdiction so the matter was sent back to Family Court for a fresh ruling on whether New York is an inconvenient forum:

> ... [G]iven the substance of its discussions with the Hawaii Court, the Family Court's determination to engage in an inconvenient forum analysis under Domestic Relations Law § 76-f(1) was an improvident exercise of discretion. Since New York was the child's home state pursuant to the UCCJEA [Uniform Child Custody Jurisdiction and Enforcement Act] , the Hawaii Court lacked subject matter jurisdiction to make determinations on the mother's child custody petition... . When the Family Court conferred with the Hawaii Court, the Hawaii Court informed the Family Court that the father was personally served with the mother's custody petition, which suggested that the Hawaii Court determined that it had personal jurisdiction over the father. But, having been informed of the facts establishing that New York was the child's home state, the Hawaii Court did not acknowledge its own lack of subject matter jurisdiction to have issued orders regarding child custody ... . "A judgment or order issued without subject matter jurisdiction is void, and that defect may be raised at any time and may not be waived" ... . In the absence of any indication that the Hawaii Court vacated those orders, the Family Court should not have determined that the Hawaii Court was a more appropriate forum. Indeed, the father did not participate in any of the proceedings in Hawaii and there was no certainty that Hawaii would permit the father to not only reopen the hearings previously held in order to submit his own testimony and evidence, but also, that he would be given an opportunity to challenge the evidence already submitted, including to cross-examine the mother. **Matter of Montanez v Tompkinson, 2018 NY Slip Op 08305, Second Dept 12-5-18**

FAMILY LAW, CIVIL PROCEDURE.

IN THIS CUSTODY PROCEEDING BROUGHT BY MOTHER, A HEARING IS NECESSARY TO DETERMINE WHETHER NEW YORK HAD JURISDICTION AFTER THE CHILD SPENT FOUR OR FIVE MONTHS WITH FATHER IN NORTH CAROLINA (FOURTH DEPT).

The Fourth Department, reversing Family Court, found that a hearing is necessary in this custody proceeding to determine whether New York had jurisdiction after the child spent four or five months in North Carolina:

> Petitioner mother appeals from an order that dismissed for lack of jurisdiction her petition for custody of the subject child. Domestic Relations Law § 76 (1) (a) provides in relevant part that a New York court has jurisdiction to make an initial custody determination if New York "is the home state of the child on the date of the commencement of the proceeding, or was the home state of the child within six months before the commencement of the proceeding and the child is absent from this state but a parent . . . continues to live in this state . . . ." " Home state' means the state in which a child lived with a parent . . . for at least six consecutive months immediately before the commencement of a child custody proceeding" (§ 75-a [7]). A period of temporary absence during the six-month time frame is considered part of the time period to establish home-state residency ... . Moreover, if "a parent wrongfully removes a child from a state, the time following the removal is considered a temporary absence" ... .
>
> We conclude that Family Court erred in dismissing the petition based on lack of jurisdiction without holding a hearing. Here, there are disputed issues of fact whether the child's four- or five-month stay in North Carolina constituted a temporary absence from New York State in light of allegations that respondent father withheld the child from the mother for purposes of establishing a "home state" in North Carolina ... and whether the mother's absence from New York State interrupted the child's six-month pre-petition residency period required by Domestic Relations Law § 76 (1) (a) ... . **Matter of Dean v Sherron, 2018 NY Slip Op 08807, Fourth Dept 12-21-18**

Table of Contents

FAMILY LAW, CIVIL PROCEDURE, MENTAL HYGIENE LAW, SOCIAL SERVICES LAW.

HEARING IS REQUIRED TO DETERMINE WHETHER A GUARDIAN SHOULD BE APPOINTED FOR MOTHER IN THIS TERMINATION OF PARENTAL RIGHTS PROCEEDING, MOTHER SUFFERS FROM SCHIZOPHRENIA (FOURTH DEPT).

The Fourth Department, reversing Family Court, determined a guardian should have been appointed for mother in the proceeding which terminated her parental rights:

> It is well settled that courts cannot "shut their eyes to the special need of protection of a litigant actually incompetent but not yet judicially declared such. There is a duty on the courts to protect such litigants"... . Indeed, "[t]he public policy of this State . . . is one of rigorous protection of the rights of the mentally infirm"... . Thus, " where there is a question of fact . . . whether a guardian ad litem should be appointed, a hearing must be conducted' " ... , and the failure to make such an inquiry once a meritorious question of a litigant's competence has been raised requires remittal ... .
>
> ... [W]e conclude that a meritorious question of the mother's competence was raised. It is of no moment that the mother's attorney did not move for the appointment of a guardian ad litem inasmuch as the court may make such an appointment on its own initiative (see CPLR 1202 [a] ...). ...
>
> There is no dispute that the mother, who had been diagnosed with, inter alia, schizophrenia, had been in and out of psychiatric hospitals throughout her life. Indeed, at the time of the subject child's birth, which was two years before this termination proceeding, the mother had been committed to a psychiatric unit after being found incompetent to stand trial in a criminal court. During the course of the hearing in this proceeding, the mother was involuntarily committed to a psychiatric unit, and the matter had to be adjourned until her release. Additionally, during the mother's brief testimony upon resumption of the hearing, the court and the AFC [attorney for the child] had to interrupt her repeatedly inasmuch as her answers to questions were nonresponsive and, at times, completely nonsensical.
>
> Given "the magnitude of the rights at stake [in a termination proceeding], as well as the allegations of mental illness" ..., we conclude that the court erred in failing to hold a hearing on whether a guardian ad litem should have been appointed for the mother. **Matter of Jesten J.F. (Ruth P.S.), 2018 NY Slip Op 08812, Fourth Dept 12-21-18**

FAMILY LAW, CIVIL RIGHTS LAW.

SUPREME COURT SHOULD NOT HAVE AUTHORIZED CHANGING THE CHILD'S NAME TO A NAME NOT REQUESTED IN FATHER'S PETITION, A HEARING IS REQUIRED TO DETERMINE WHETHER THE NAME CHANGE IS IN THE CHILD'S BEST INTERESTS (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined that the court should not have authorized a change in the child's name to a different name than that requested in father's petition. The Fourth Department further found that a hearing to determine whether the name change is in the best interests of the child must be held:

The father filed the instant petition seeking to change the last name of the child to his surname and to alter the child's first name because the father's older daughter has the same name and lives with him and the child. The mother opposed the petition via sworn affidavit and provided a list of alternative names for the child to which she would not object. In its order, Supreme Court authorized the child to assume one of the names proposed by the mother, concluding that "the inclusion of both biological parents' names in a child's last name is reasonable and in the best interests of the child, particularly where, as here, both parents are active participants in the child's life." Thus, the court, in essence, denied the father's petition in its entirety, and the father appeals.

... Civil Rights Law § 63 provides that, upon presentation of a petition for a name change, if the court "is satisfied . . . that the petition is true, and that there is no reasonable objection to the change of name proposed, . . . the court shall make an order authorizing the petitioner to assume the name proposed." In the absence of a cross petition filed by the mother proposing a name change for the child, the only name that was properly before the court for consideration was the name change sought by the father in his petition.

Furthermore, "if the petition be to change the name of an infant, . . . the interests of the infant [must] be substantially promoted by the change"... . "With respect to the interests of the infant, the issue is not whether it is in the infant's best interests to have the surname of the mother or father, but whether the interests of the infant will be promoted substantially by changing his [or her] surname" ... . "As in any case involving the best interests standard, whether a child's best interests will be substantially promoted by a proposed name change requires a court to consider the totality of the circumstances" ... . **Matter of Segool v Fazio, 2018 NY Slip Op 08799, Fourth Dept 12-21-18**

FAMILY LAW, CRIMINAL LAW.

ABSENCE OF A SEXUAL RELATIONSHIP IS NOT NECESSARILY DETERMINATIVE IN AN ASSESSMENT OF WHETHER A PARTY IS A MEMBER OF A HOUSEHOLD FOR PURPOSES OF JURISDICTION OVER A FAMILY OFFENSE PROCEEDING, FAMILY COURT SHOULD NOT HAVE MADE A FINDING RESPONDENT WAS NOT A MEMBER OF THE HOUSEHOLD WITHOUT HOLDING A HEARING (SECOND DEPT).

The Second Department, reversing Family Court, determined that Family Court should not have found that respondent and petitioner did not have an intimate relationship without holding a hearing. Petitioner sought an order of protection against respondent. Under the Family Court Act the court has jurisdiction in a family offense proceeding only if the parties are deemed to have an intimate relationship. Family Court found that, because the relationship was not sexual, it did not constitute an intimate relationship. The Second Department noted that the existence of a sexual relationship is not necessarily determinative and sent the matter back for a hearing:

The Family Court is a court of limited subject matter jurisdiction and "cannot exercise powers beyond those granted to it by statute"... . Pursuant to Family Court Act § 812(1), the Family Court's jurisdiction in family offense proceedings is limited to certain prescribed acts that occur "between spouses or former spouses, or between parent and child or between members of the same family or household" ... .

Effective July 21, 2008 ... , the Legislature expanded the definition of "members of the same family or household" to include, among others, "persons who are not related by consanguinity or affinity and who are or have been in an intimate relationship regardless of whether such persons have lived together at any time" (Family Ct Act § 812[1][e] ...). The Legislature also expressly excluded from the definition of "intimate relationship" a "casual acquaintance" and "ordinary fraternization between two individuals in business or social contexts"... . Beyond those delineated

> exclusions, the Legislature left it to the courts to determine on a case-by-case basis whether a particular relationship constitutes an "intimate relationship" within the meaning of Family Court Act § 812(1)(e). The Legislature provided that "[f]actors the court may consider in determining whether a relationship is an intimate relationship' include but are not limited to: the nature or type of relationship, regardless of whether the relationship is sexual in nature; the frequency of interaction between the persons; and the duration of the relationship"... . The determination of whether persons are or have been in an "intimate relationship" within the meaning of the statute may require a hearing ... . **Matter of Raigosa v Zafirakopoulos, 2018 NY Slip Op 08485, Second Dept 12-12-18**

FAMILY LAW, EVIDENCE.

MOTHER'S PETITION TO RELOCATE WITH THE CHILD SHOULD NOT HAVE BEEN GRANTED WITHOUT A HEARING, THE PETITION WAS GRANTED AFTER FATHER SCREAMED AT COURT PERSONNEL (SECOND DEPT).

The Second Department determined Family Court should not have granted mother's petition to relocate in this custody modification proceeding without holding a hearing. Family Court granted the petitioner after father appeared and screamed at court personnel:

> Where a custodial parent seeks to relocate over the objection of the non-custodial parent, the court must consider each relocation request "on its own merits with due consideration of all the relevant facts and circumstances and with predominant emphasis being placed on what outcome is most likely to serve the best interests of the child" ... . "In the end, it is for the court to determine, based on all of the proof, whether it has been established by a preponderance of the evidence that a proposed relocation would serve the child's best interests" ... .
>
> Although "[a] parent seeking a change of custody is not automatically entitled to a hearing" ... , "custody determinations should [g]enerally' be made only after a full and plenary hearing and inquiry'" ... . "This general rule furthers the substantial interest, shared by the State, the children, and the parents, in ensuring that custody proceedings generate a just and enduring result that, above all else, serves the best interest of a child" ... . "When the allegations of fact in a petition to change custody are controverted, the court must, as a general rule, hold a full hearing" ... . **Matter of Williams v Jenkins, 2018 NY Slip Op 08491, Second Dept 12-12-18**

FAMILY LAW, EVIDENCE.

FATHER MADE OUT A PRIMA FACIE CASE FOR A MODIFICATION OF CUSTODY BASED UPON LOSS OF EMPLOYMENT, PETITION SHOULD NOT HAVE BEEN DISMISSED, REMITTED FOR A CONTINUED HEARING (SECOND DEPT).

The Second Department, reversing Family Court, determined father's petition to modify the custody arrangement should not have been dismissed and the matter was remitted for a continued hearing. Father's proof had made out a prima facie case based upon the loss of employment:

> ... [F]ather petitioned to modify the order of custody and parental access to remove the requirement that the parental access be professionally supervised at his expense, on the ground that he had recently lost his job and could not afford the cost of professional supervision. At a hearing on his petition, the father testified that he had lost his job in February 2016, a few months after the order of custody and parental access was made, and since that time, he had exercised parental access with the child on a limited basis due to the cost of professional supervision. He admitted that the cost of professional supervision was prohibitive even when he was employed but that, since losing his job, his parental access had further decreased. ...
>
> A party seeking modification of an existing custody or parental access order must demonstrate that there has been a change in circumstances such that modification is required to protect the best interests of the child ... . The best interests of the child are determined by a review of the totality of the circumstances ... . In deciding a motion to dismiss for failure to establish a prima facie case, the court must accept the petitioner's evidence as true and afford the petitioner the benefit of every favorable inference that can reasonably be drawn therefrom ... .
>
> Here, accepting the father's evidence as true and affording him the benefit of every favorable inference, the father presented sufficient prima facie evidence of a change of circumstances which might warrant modification of parental access in the best interests of the child. **Matter of Gonzalez v Santiago, 2018 NY Slip Op 08652, Second Dept 12-19-18**

FAMILY LAW, EVIDENCE.

FATHER SHOULD NOT HAVE BEEN PRECLUDED FROM BRINGING FUTURE PARENTAL ACCESS PETITIONS WITHOUT COURT APPROVAL (SECOND DEPT).

The Second Department, reversing Family Court in this modification of custody proceeding, determined father should not have been precluded from submitting future parental access petitions:

> A party seeking modification of an existing custody or parental access order must demonstrate that there has been a change in circumstances such that modification is required to protect the best interests of the child... . "One who seeks a change in [parental access] is not automatically entitled to a hearing but must make a sufficient evidentiary showing of a material change of circumstances to warrant a hearing"... . However, where a facially sufficient petition has been filed, a full and comprehensive hearing is required to afford the parent a full and fair opportunity to be heard ... .
>
> Here, the Family Court should not have dismissed the father's petition without a hearing. His evidentiary submissions were sufficient to warrant a hearing ... .
>
> The Family Court improvidently exercised its discretion in enjoining the father from filing any future parental access petitions without prior express written permission from the court. The court's conclusion that the father had previously filed an "excessive number of petitions" was not supported by the record, nor was there any evidence that the father's continued litigation had become abusive and vexatious ... . **Matter of Gonzalez v Santiago, 2018 NY Slip Op 08653, Second Dept 12-19-18**

Table of Contents

FAMILY LAW, EVIDENCE.

FAMILY COURT DID NOT HAVE SUFFICIENT EVIDENCE TO DETERMINE IT WAS IN THE CHILD'S BEST INTERESTS TO BE WITH FATHER IN THIS TEMPORARY CUSTODY PROCEEDING, ALLEGATIONS OF EXCESSIVE CORPORAL PUNISHMENT REQUIRED A HEARING (SECOND DEPT).

The Second Department, reversing Family Court, determined questions of fact about father's use of corporal punishment required a hearing in this temporary custody matter about whether it was in the child's best interests to be placed with father:

> "[I]n any action concerning custody or [parental access] where domestic violence is alleged, the court must consider the effect of such domestic violence upon the best interest of the child, together with other factors and circumstances as the court deems relevant in making an award of custody" (...see Domestic Relations Law § 240[1]...). In addition, consideration may be given to the express wishes of older and more mature children, but such wishes are not dispositive ... .
>
> As a general rule, "a custody determination should be made only after a full and fair hearing at which the record is fully developed"... . Under the circumstances of this case, the Family Court did not have sufficient evidence before it to reach a sound conclusion that it was in the subject child's best interests for the father to have temporary custody pending determination of the issue of permanent custody. Throughout the proceedings, there were controverted allegations of excessive corporal punishment by the father against the subject child and the court was informed that the subject child suffers from certain mental health issues that were being treated in Connecticut. **Matter of Poltorak v Poltorak, 2018 NY Slip Op 08662, Second Dept 12-19-18**

FAMILY LAW, EVIDENCE.

EVIDENCE DID NOT SUPPORT TEMPORARY REMOVAL OF CHILD FROM FATHER'S CUSTODY DURING THE PENDENCY OF A CHILD PROTECTIVE PROCEEDING (SECOND DEPT).

The Second Department, reversing Family Court, determined the evidence did not support temporary removal of the child from father's custody during the pendency of a child protective proceeding:

> "[O]nce a child protective petition has been filed, Family Court Act § 1027(a)(iii) authorizes the court to conduct a hearing to determine whether the child's interests require protection, including whether the child should be removed from his or her parent"... . Upon such a hearing, temporary removal is only authorized where the court finds it necessary "to avoid imminent risk to the child's life or health" ... . "In determining a removal application pursuant to Family Court Act § 1027, the court must engage in a balancing test of the imminent risk with the best interests of the child and, where appropriate, the reasonable efforts made to avoid removal or continuing removal'" ... .
>
> Here, the petitioner failed to establish that Chloe would be subject to imminent risk if she remained in the father's care pending the outcome of the neglect proceeding ... . The hearing evidence showed that at no time did the father inflict excessive corporal punishment upon Chloe. In addition, the evidence showed that Dasanie may have been coached by Chloe's mother, and Dasanie recanted, before several individuals, the allegations that the father

inflicted excessive corporal punishment upon her. **Matter of Chloe-Elizabeth A.T. (Albert T.), 2018 NY Slip Op 08666, Second Dept 12-19-18**

FAMILY LAW, EVIDENCE.

FAILURE TO HOLD A LINCOLN HEARING WAS NOT AN ABUSE OF DISCRETION (THIRD DEPT).

The Third Department, over a two-justice dissent, determined that Family Court's custody and parenting time rulings were supported by the evidence. The dissenting justices argued a Lincoln hearing should have been held to learn the preferences of the older child. The majority ruled Family Court did not abuse its discretion in not holding a Lincoln hearing:

> We ... do not share Family Court's view that "[c]ourts are rarely only supposed to have Lincoln [h]earings." To the contrary, conducting such hearings is the "preferred practice" ... . That said, whether to conduct a Lincoln hearing rests in the discretion of Family Court ... . Family Court noted that the testimony from the fact-finding hearing was "not remarkable nor extremely disturbing" and did not raise "any red flags." In our view, the record was sufficiently developed for the court to make a custody and visitation determination. Furthermore, although the wishes of the older child, who was nearly 11 years old at the time of the hearing, were "entitled to consideration" ... , this is just one factor in the best interests analysis and is not dispositive ... . As such, under the circumstances of this case, we find no abuse of discretion ... . **Matter of Lorimer v Lorimer, 2018 NY Slip Op 08721, Third Dept 12-20-18**

FAMILY LAW, EVIDENCE.

FAMILY COURT SHOULD NOT HAVE GRANTED GRANDMOTHER'S PETITION FOR VISITATION, THE PARENTS WERE FIT AND THEIR TESTIMONY SHOULD HAVE BEEN GIVEN WEIGHT, INSTEAD FAMILY COURT IGNORED THE PARENTS' TESTIMONY (FOURTH DEPT).

The Fourth Department, reversing Family Court, determined the record did not support granting visitation rights to grandmother. The parents of the children were deemed fit and the relationship between the parents and the children was deemed to be loving and supportive. Therefore the wishes of the parents were to be given weight, Family Court ignored the testimony of the parents. Grandmother is an attorney who practices in Family Court. After a minor argument at her home between father and his brother, grandmother instituted litigation, which the Fourth Department characterized as using her position in the legal system to undermine the parental relationship:

> It is well established that a fit parent has a "fundamental constitutional right" to make parenting decisions ... . For that reason, the Court of Appeals has emphasized that "the courts should not lightly intrude on the family relationship against a fit parent's wishes. The presumption that a fit parent's decisions are in the child's best interests is a strong one" ... .

> Because the parents are fit, their decision to prevent the children from visiting the grandmother is entitled to "special weight" ... .
>
> [The] evidence makes it difficult to draw any conclusion other than that the grandmother "is responsible for escalating a minor incident into a full-blown family crisis, totally ignoring the damaging impact [her] behavior would have on the [family relationships] and making no effort to mitigate that impact" ... . **Matter of Jones v Laubacker, 2018 NY Slip Op 08822, First Dept 12-20-18**

FAMILY LAW, EVIDENCE.

EVIDENCE THE CHILD WITNESSED A PHYSICAL ALTERCATION BETWEEN MOTHER AND FATHER WAS SUFFICIENT FOR A FINDING FATHER NEGLECTED THE CHILD (SECOND DEPT).

The Second Department, reversing Family Court in this child neglect proceeding, determined there was sufficient admissible evidence to find father had neglected the child. Although hearsay statements by mother were properly deemed inadmissible, the evidence that the child witnessed a physical altercation between mother and father was sufficient:

> "[E]xposing a child to domestic violence is not presumptively neglectful"... However, a finding of neglect based on an incident or incidents of domestic violence is proper where a preponderance of the evidence establishes that the child was actually placed in imminent danger of harm by reason of the failure of the parent or caretaker to exercise a minimal degree of care ... . Except for certain exceptions provided for in the Family Court Act, only competent, material, and relevant evidence may be admitted at a fact-finding hearing held under article 10 of the Family Court Act ... .
>
> ... [R]elevant evidence, which included, ... the mother's in-court admission that she and the father engaged in a physical altercation in the child's presence, as well as other competent, material, and relevant evidence establishing a history of domestic violence between the parents, established that the child's physical, mental, or emotional condition was in imminent danger of being impaired as a result of the father's failure to exercise a minimum degree of care ... . **Matter of Meeya P. (Anthony C.), 2018 NY Slip Op 08938, Second Dept 12-26-18**

FAMILY LAW, EVIDENCE.

FAMILY COURT SHOULD HAVE FOUND BISHME'S DAUGHTER TO HAVE BEEN DERIVATIVELY ABUSED AND NEGLECTED BASED UPON BISHME'S ABUSE AND NEGLECT OF ANOTHER CHILD (SECOND DEPT).

The Second Department, reversing Family Court, determined that the derivative abuse and neglect petition against Bishme A. should not have been dismissed and found that Bishme A. had derivatively abused his own daughter based upon the abuse and neglect of another child, Jassir R.:

> The Administration for Children's Services (hereinafter ACS) commenced two related child protective proceedings pursuant to Family Court Act article 10. One proceeding was against Jazmin R. and Bishme A., alleging that they abused and neglected the child Jassir R. when that child was approximately 14 months of age. The other proceeding was against Bishme A., alleging that he derivatively abused his own daughter, Akeliah A., who was several weeks older than Jassir R. I... [A]fter a fact-finding hearing, the court ... denied the petition alleging that Bishme A. derivatively abused Akeliah A., and dismissed that proceeding. ...
>
> The Family Court should have found that Bishme A. derivatively abused Akeliah A. In a child protective proceeding pursuant to Family Court Act article 10, "proof of the abuse or neglect of one child shall be admissible evidence on the issue of the abuse or neglect of any other child" (Family Ct Act § 1046[a][i]). ACS established that Jassir R. suffered extensive inflicted injuries while in the care of Bishme A. Based on this evidence, ACS established, by a preponderance of the evidence, that Bishme A. derivatively abused Akeliah A. **Matter of Akeliah A. (Bishme A.), 2018 NY Slip Op 08925, Second Dept 12-26-18**

FAMILY LAW, EVIDENCE.

FAMILY COURT DID NOT HAVE SUFFICIENT EVIDENCE BEFORE IT TO GRANT FATHER'S PETITION FOR CUSTODY WHEN MOTHER FAILED TO APPEAR, MOTHER'S MOTION TO VACATE THE DEFAULT ORDER SHOULD HAVE BEEN GRANTED (FIRST DEPT).

The First Department, reversing Family Court, determined the court did not have sufficient evidence before it to grant father's petition for custody when mother did not appear:

> While the decision to grant or deny a motion to vacate a default rests in the sound discretion of the court, "default orders are disfavored in cases involving the custody or support of children, and thus the rules with respect to vacating default judgments are not to be applied as rigorously" ... .
>
> Although the mother did not demonstrate a reasonable excuse for her default in the change of custody case, she had a meritorious defense. The children have resided primarily with her, and insufficient evidence was submitted to make an informed change of circumstances determination (see Family Ct Act § 467[b][ii]) that serves the best interests of the children ... .
>
> Also, the court failed to sua sponte appoint an attorney for the children, which, based upon the insufficient evidence it had to make an informed best interests determination, would have been advisable ... . **Matter of Abel A. v Imanda M., 2018 NY Slip Op 09000, First Dept 12-27-18**

Table of Contents

FAMILY LAW, EVIDENCE, CRIMINAL LAW.

FAMILY COURT, IN THE WIFE'S ABSENCE, SUA SPONTE, RAISED ALLEGATIONS NOT INCLUDED IN THE FAMILY OFFENSE PETITION BEFORE THE COURT, FAMILY COURT THEN ALLOWED THE ALLEGATIONS TO BE ADDED TO THE PETITION, AND THE COURT WENT ON TO FIND THAT THE WIFE HAD COMMITTED THE FAMILY OFFENSES OF HARASSMENT AND MENACING, BECAUSE THE WIFE WAS NOT GIVEN NOTICE OF THE ADDED ALLEGATIONS, REVERSAL WAS REQUIRED (THIRD DEPT).

The Third Department, reversing Family Court, determined the wife was not given notice of the allegations which led to the court's finding she had committed the family offenses of harassment and menacing . The wife did not appear in court and her attorney told the court she was not authorized to represent her in the proceeding. Certain allegations were added to the family offense petition in the wife's absence and without prior notice to her:

> The court ... , sua sponte, addressed a new subject, inquiring about allegations that had apparently been raised on some other occasion. When the court asked whether the alleged events had occurred, the husband responded, "Yes, ma'am," without specifically describing those factual allegations. Upon this basis, the court then granted a request by the husband's counsel to amend the petition to add certain offenses; notably, counsel made no request to amend the petition's substantive allegations. The court then found the wife had committed the family offenses of harassment in the second degree, assault in the third degree, and menacing in the third degree, and directed the entry of a two-year order of protection.
>
> Nothing in the record indicates that the wife was given any notice that the matters raised by Family Court would be addressed at the hearing. The allegations described by the court were not set forth within the husband's July 2016 petition. ...
>
> "[N]otice is a fundamental component of due process" ... . In the absence of notice to the wife, Family Court's sua sponte consideration of extraneous allegations violated the wife's due process rights ... . **Matter of King v King, 2018 NY Slip Op 08724, Third Dept 12-20-18**

FAMILY LAW, EVIDENCE, CRIMINAL LAW.

UNLIKE IN FAMILY COURT ACT ARTICLE 10 AND 6 PROCEEDINGS, CHILDREN'S HEARSAY STATEMENTS ARE NOT ADMISSIBLE IN FAMILY COURT ACT ARTICLE 8 (FAMILY OFFENSE) PROCEEDINGS (THIRD DEPT).

The Third Department, reversing Family Court in this family offense proceeding, in a full-fledged opinion by Justice McCarthy, determined the hearsay statements of the children should not have been admitted in evidence. Family Court had found that father committed harassment by grabbing one of the children. Although children's hearsay has been deemed admissible in Family Court Act article 10 and 6 proceedings, such hearsay is not admissible in Family Court Act article 8 (family offense) proceedings:

Despite the extension of the exception from Family Ct Act articles 10 and 10-A to article 6, this Court has never directly addressed whether Family Ct Act § 1046 (a) (vi) can be applied in a proceeding pursuant to Family Ct Act article 8 ... . The First and Second Departments have concluded that even though the exception has been applied in custody proceedings under article 6 that are founded on abuse or neglect, because Family Ct Act § 1046 (a) (vi) "is explicitly limited to child protective proceedings under articles 10 and 10-A, [it] has no application to family offense proceedings under article 8" ... . This conclusion comports with the language of the statute. ...

Having determined that Family Court should not have relied upon the children's hearsay statements, we must consider whether the remaining evidence at the fact-finding hearing was sufficient to establish that the father committed a family offense. Setting aside the children's statements to the detectives, to the mother and on the videotape, the evidence directly related to the incident is extremely limited. It includes a photograph showing a barely visible bruise on the middle child's arm, the detectives' evaluation of the children's body language and the father's testimony that he grabbed the middle child while removing him from a situation where he was misbehaving. The father testified that his intention in taking hold of the child was not to alarm him, but to get him and the situation under control. This testimony contradicts the intent required to prove harassment in the second degree and supports the father's defense of justification, which permits a parent to use physical force to the extent that he or she deems reasonably necessary to maintain discipline ... . Although the court could have disbelieved the father's testimony and inferred his state of mind from the circumstances ... , without the hearsay testimony, there was not a sufficient basis for the court to find that the father committed a family offense. **Matter of Kristie GG. v Sean GG., 2018 NY Slip Op 08718, Third Dept 12-20-18**

FAMILY LAW, EVIDENCE, JUDGES.

CUSTODY SHOULD NOT HAVE BEEN TRANSFERRED TO FATHER AND ALL CONTACT BETWEEN MOTHER AND CHILD SHOULD NOT HAVE BEEN SUSPENDED WITHOUT A HEARING, JUDGE, SUA SPONTE, SHOULD NOT HAVE PROHIBITED FUTURE PETITIONS FOR CUSTODY OR VISITATION BY MOTHER (FIRST DEPT).

The First Department, reversing Family Court, determined mother should not have transferred custody to father and suspended all contact between the child and mother for a year without conducting a hearing. The First Department further held that the judge should not have, sua sponte, prohibited mother from filing future petitions for custody or visitation without leave of court because no party requested that relief:

... [T]he court erred when, without holding an evidentiary hearing, it made a final order transferring physical and legal custody to the father and suspending all contact between the mother and the child for a year. Determination of the child's best interests requires examination of the totality of the circumstances ... . We have consistently held that "an evidentiary hearing is necessary before a court modifies a prior order of custody or visitation," even where the court is familiar with the parties and child, and particularly where there are facts in dispute ... . Furthermore, while we have stated that a hearing on modification of a custody arrangement in the child's best interests "may be as abbreviated, in the court's broad discretion, as the particular allegations and known circumstances warrant. . . ,' it must include an opportunity for both sides, and the children's attorney when there is one, to present their respective cases, and the factual underpinnings of any temporary order [must be] made clear on the record'" ... .

Here, the court made a final determination without taking any testimony or entering any documents into evidence. The court's reliance on statements made by the ACS caseworker during a court conference was inappropriate, since the mother's attorney had requested, but was denied, a full hearing at which counsel could have cross-examined the caseworker. **Matter of Michael G. v Katherine C., 2018 NY Slip Op 08568, First Dept 12-13-18**

Table of Contents

FAMILY LAW, IMMIGRATION LAW, SOCIAL SERVICES LAW.

FAMILY COURT SHOULD HAVE APPOINTED A GUARDIAN FOR THE CHILD AND MADE THE FINDINGS NECESSARY FOR THE CHILD TO PETITION FOR SPECIAL IMMIGRANT JUVENILE STATUS (SIJS) (SECOND DEPT).

The Second Department, reversing Family Court, determined that a guardian should have been appointed for the child and findings should have been made to allow the child to petition for special immigrant juvenile status (SIJS):

> "When considering guardianship appointments, the infant's best interests are paramount" ... . Here, the Family Court erred in determining that the proposed guardian should not be appointed (see generally Family Ct Act § 355.5[7][d][ii]; Social Services Law § 371[7]), as it failed to base its decision on any assessment of the credibility of the witnesses at the hearing, and failed to examine the facts of the case within the context of the required best interests analysis ... .
>
> ... [T]he child is under the age of 21 and unmarried, and since we have found that the proposed guardian should have been appointed as the child's guardian, a finding also should have been made that the child is dependent on a juvenile court within the meaning of 8 USC § 1101(a)(27)(J)(i) ... .Further, based upon our independent factual review, the record supports a finding that reunification of the child with her father is not a viable option due to parental neglect ... . **Matter of Grechel L.J., 2018 NY Slip Op 08934, Second Dept 12-26-18**

FORECLOSURE

FORECLOSURE, CIVIL PROCEDURE.

CROSS-MOTION TO EXTEND THE TIME FOR SERVICE OF PROCESS PURSUANT TO CPLR 306-b IN THIS FORECLOSURE ACTION PROPERLY GRANTED, THE JUDGMENT OF FORECLOSURE HAD BEEN VACATED BECAUSE DEFENDANT WAS NOT PROPERLY SERVED INITIALLY (SECOND DEPT).

The Second Department, modifying Supreme Court, determined the judgment of foreclosure should have been vacated because defendant was not served and therefore the court did not acquire personal jurisdiction. However, plaintiff's timely cross-motion to extend the time for service pursuant to CPLR 306-b was properly granted:

> "If service is not made upon a defendant within the time provided in [CPLR 306-b], the court, upon motion, shall dismiss the action without prejudice as to that defendant, or upon good cause shown or in the interest of justice, extend the time for service" ... . Good cause requires the plaintiff to demonstrate, as a threshold matter, "reasonably diligent efforts" in attempting to effect service ... . In deciding whether, in the interest of justice, to grant an extension of time to serve a summons and complaint, "the court may consider diligence, or lack thereof, along

with any other relevant factor in making its determination, including expiration of the Statute of Limitations, the [potentially] meritorious nature of the cause of action, the length of delay in service, the promptness of a plaintiff's request for the extension of time, and prejudice to defendant" ... . "A determination of whether to grant the extension in the interest of justice is generally within the discretion of the motion court" ... . **Bank United, FSB v Verbitsky, 2018 NY Slip Op 08623, Second Dept 12-19-18**

FORECLOSURE, CIVIL PROCEDURE, ATTORNEYS, APPEALS.

NOTICE OF APPEARANCE FILED BY DEFENDANT'S ATTORNEY WAIVED ANY SUBSEQUENT OBJECTION TO PERSONAL JURISDICTION IN THIS FORECLOSURE ACTION, ISSUE HEARD ON APPEAL ALTHOUGH NOT RAISED BELOW (SECOND DEPT).

The Second Department, reversing Supreme Court on a ground not raised below, determined that defendant's attorney's notice of appearance waived any objection to personal jurisdiction over defendant:

"The filing of a notice of appearance in an action by a party's counsel serves as a waiver of any objection to personal jurisdiction in the absence of either the service of an answer which raises a jurisdictional objection, or a motion to dismiss pursuant to CPLR 3211(a)(8) for lack of personal jurisdiction" ... . Here, in November 2014, the defendant's attorney appeared in the action on her behalf by filing a notice of appearance dated October 31, 2014, and did not move to dismiss the complaint on the ground of lack of personal jurisdiction at that time, or assert lack of personal jurisdiction in a responsive pleading... . The defendant did not move to dismiss the complaint until September 2015, 10 months after filing a notice of appearance. Under those circumstances, the defendant waived any claim that the Supreme Court lacked personal jurisdiction over her in this action ... .

Although the plaintiff raises this issue for the first time on appeal, it involves a question of law that appears on the face of the record, and could not have been avoided if brought to the attention of the Supreme Court ... . **Deutsche Bank Natl. Trust Co. v Vu, 2018 NY Slip Op 08629, Second Dept 12-19-18**

FORECLOSURE, CIVIL PROCEDURE, EVIDENCE.

PLAINTIFF BANK DID NOT DEMONSTRATE STANDING TO FORECLOSE ON THE REVERSE MORTGAGE WITH EVIDENCE ADMISSIBLE UNDER THE BUSINESS RECORDS EXCEPTION TO THE HEARSAY RULE (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, determined that plaintiff bank did not demonstrate standing to foreclose on the reverse mortgage. The evidence submitted did not meet the requirements of the business records exception to the hearsay rule:

> ... [T]he plaintiff submitted, among other things, the affidavit of Stephen Craycroft, an assistant secretary of Nationstar Mortgage, LLC, who attested that the plaintiff was in possession of the note at the time of the commencement of this action. However, the plaintiff failed to demonstrate the admissibility of the records relied upon by Craycroft under the business records exception to the hearsay rule (see CPLR 4518[a]), since Craycroft did not clearly attest that he was personally familiar with the plaintiff's record-keeping practices and procedures ... . Inasmuch as the plaintiff's cross motion was based on evidence that was not in admissible form, the plaintiff failed to establish its prima facie entitlement to judgment as a matter of law ... .
>
> Contrary to the plaintiff's contention, the copy of the note annexed to the summons and complaint was insufficient to demonstrate, prima facie, its standing to commence the action, since the note bore a specific endorsement to an entity other than the plaintiff ... . **Nationstar HECM Acquisition Trust 2015-2 v Andrews, 2018 NY Slip Op 08944, Second Dept 12-26-18**

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

DEFENDANT'S ALLEGATION THAT SHE DOES NOT LIVE AT THE ADDRESS WHERE HER BROTHER WAS SERVED IN THIS FORECLOSURE ACTION NECESSITATED A TRAVERSE HEARING (FIRST DEPT).

The First Department, reversing Supreme Court, found that a traverse hearing should have been held to determine whether defendant was properly served with the summons, complaint and Real Property Actions and Proceedings Law (RPAPL) 1303 notice:

> In this foreclosure matter commenced in 2009, plaintiff's affidavit of service indicated that service of the summons, complaint and RPAPL 1303 notice was effectuated upon defendant Nicola McCallum pursuant to CPLR 308(2) by serving an individual, who allegedly identified himself as her brother, at her "dwelling place," and mailing the same documents to that address.
>
> In response, defendant averred that she was never served with the summons and complaint, that she does not reside at the address where service was made, and that her primary residence has always been at the property that is the subject of this foreclosure action.
>
> "While a proper affidavit of a process server attesting to personal delivery upon a defendant constitutes prima facie evidence of proper service, a sworn non-conclusory denial of service by a defendant is sufficient to dispute the veracity or content of the affidavit, requiring a traverse hearing"... . The competing averments concerning plaintiff's residence at the time of service raise a factual issue concerning whether the service address was her "dwelling place or usual place of abode" at the time of service (CPLR 308[2]) warranting a traverse hearing concerning whether defendant was properly served with the summons, complaint and RPAPL 1303 notice ... . **Nationstar Mtge. LLC v McCallum, 2018 NY Slip Op 08755, First Dept 12-20-18**

Table of Contents

FORECLOSURE, EVIDENCE, REAL PROPERTY ACTIONS AND PROCEEDINGS LAW (RPAPL).

QUESTIONS OF FACT ABOUT WHETHER PLAINTIFF HAS STANDING IN THIS FORECLOSURE ACTION AND WHETHER THE RPAPL 1304 NOTICE WAS SERVED, PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (FIRST DEPT).

The First Department, reversing Supreme Court, determined plaintiff's motion for summary judgment in this foreclosure action should not have been granted. There exist questions of fact on whether plaintiff has standing and whether the RPAPL 1304 notice was served:

> The borrower raised a meritorious standing defense based on questions as to the sufficiency of the content of the conclusory lost note affidavit, which does not state that a thorough and diligent search was made based on a review of the business records or anything else, does not state that any search was made or by whom, and does nothing to indicate when approximately the note was lost ... .
>
> The borrower also raised a plausible notice defense regarding plaintiff's service of the requisite 90-day notice under RPAPL 1304 ... . **AS Helios LLC v Chauhan, 2018 NY Slip Op 08565, First Dept 12-13-18**

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

PROOF THAT DEFENDANT WAS SERVED WITH THE RPAPL 1304 NOTICE IN THIS FORECLOSURE PROCEEDING WAS NOT SUFFICIENT, THE BANK'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (FIRST DEPT).

The First Department, reversing Supreme Court, determined that the bank's motion for summary judgment in this foreclosure action should not have been granted. The proof of service of the RPAPL 1304 notice was deemed insufficient:

> Plaintiff failed to establish a presumption that it properly served defendant with RPAPL 1304 notice through proof either of actual mailing or of a standard office practice or procedure for proper addressing and mailing ... . Its business operations analyst testified at the hearing on this issue that she was familiar with plaintiff's record keeping practices and procedures. However, she did not testify either that she was familiar with plaintiff's mailing procedures or that she was personally aware that RPAPL 1304 notices had been mailed to defendant... . Nor does the fact that some of the RPAPL 1304 notices admitted into evidence at the hearing bear a certified mail number suffice to raise the presumption of proper service ... . **CitiMortgage, Inc. v Moran, 2018 NY Slip Op 08435, First Dept 12-11-18**

Table of Contents

FORECLOSURE, EVIDENCE, REAL PROPERTY ACTIONS AND PROCEEDINGS LAW (RPAPL).

BANK DID NOT DEMONSTRATE COMPLIANCE WITH THE NOTICE PROVISIONS OF REAL PROPERTY ACTIONS AND PROCEEDINGS LAW (RPAPL) 1304, BANK'S MOTION FOR SUMMARY JUDGMENT IN THIS FORECLOSURE ACTION SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the proof defendant was properly served with notice pursuant to Real Property Actions and Proceedings Law (RPAPL) 1304 was insufficient. The bank's motion for summary judgment should not have been granted:

> ... [T]he bank failed to submit an affidavit of service, or proof of mailing by the post office, evincing that it properly served the defendant pursuant to RPAPL 1304. Contrary to the Supreme Court's conclusion, the affidavit of the employee of the plaintiff's successor in interest failed to establish that the notices were sent to the defendant in the manner required by RPAPL 1304. The affiant did not aver that she was familiar with the mailing practices and procedures of the entity that allegedly sent the RPAPL 1304 notice. Accordingly, her affidavit did not establish proof of a standard office practice and procedure designed to ensure that items are properly addressed and mailed ... . Nor was the affidavit of the employee of the plaintiff's successor in interest sufficient to lay a foundation for the admission of business records to establish a proper mailing. The affiant did not state that the records of the entity that allegedly sent the RPAPL 1304 notice had been incorporated into the records of the plaintiff's successor in interest and were routinely relied upon by the successor in interest in its business ... . **Aurora Loan Servs., LLC v Vrionedes, 2018 NY Slip Op 08622, Second Dept 12-19-18**

FORECLOSURE, EVIDENCE, REAL PROPERTY ACTIONS AND PROCEEDINGS LAW (RPAPL), UNIFORM COMMERCIAL CODE (UCC), CONTRACT LAW.

LOST NOTE AFFIDAVIT INSUFFICIENT BECAUSE UCC REQUIREMENTS NOT MET, PROOF OF RPAPL 1304 NOTICE INSUFFICIENT, PROOF OF COMPLIANCE WITH NOTICE CONDITION OF THE MORTGAGE INSUFFICIENT, SUPREME COURT SHOULD NOT HAVE GRANTED THE BANK'S MOTION FOR SUMMARY JUDGMENT IN THIS FORECLOSURE PROCEEDING (SECOND DEPT).

The Second Department, reversing Supreme Court, determined that plaintiff's motion for summary judgment in this foreclosure action should not have been granted for three reasons: (1) the lost note affidavit was insufficient pursuant to the requirements of the Uniform Commercial Code (UCC); (2) the proof of compliance with the notice requirements of Real Property Actions and Proceedings Law (RPAPL) 1304 was not sufficient; and (3) the plaintiff did not show it had complied the notice condition of the mortgage (a condition precedent ro foreclosure):

> Pursuant to UCC 3-804, the owner of a lost note may maintain an action "upon due proof of [1] his [or her] ownership, [2] the facts which prevent his [or her] production of the instrument and [3] its terms" (UCC 3-804). The party seeking to enforce a lost instrument is required to "account for its absence" ... .

Here, although the plaintiff came forward with evidence establishing that the note was assigned to it and establishing the note's terms, the affidavit of lost note submitted in support of its motion failed establish the facts that prevent the production of the original note ... .

... [T]he affidavit of a representative of its loan servicer was insufficient to establish that the notice was sent to the defendant in the manner required by RPAPL 1304, as the representative did not provide proof of a standard office mailing procedure and provided no independent proof of the actual mailing ... .

.. [T]the plaintiff failed to establish, prima facie, that it complied with the condition precedent contained in the mortgage requiring it to give notice of default prior to demanding payment in full ... . The affidavit of a representative of the plaintiff's loan servicer claiming that notice of default was sent to the defendant ... was conclusory and unsubstantiated and ... was insufficient to prove that the notice was sent in accordance with the terms of the mortgage ... . **U.S. Bank N.A. v Cope, 2018 NY Slip Op 08709, Second Dept 12-19-18**

FRAUD

FRAUD, CONVERSION, BANKING LAW.

COMPLAINT ALLEGED VALID CAUSES OF ACTION FOR AIDING AND ABETTING FRAUD AND AIDING AND ABETTING CONVERSION AGAINST A BANK WHICH PROVIDED A LETTER TO PLAINTIFF STATING DEFENDANT MAINTAINED ENOUGH IN HIS BANK ACCOUNTS TO COVER A POST-DATED CHECK FOR OVER $400,000 (FIRST DEPT).

The First Department, reversing Supreme Court, over a dissent, determined that plaintiff auction house stated causes of action for aiding and abetting fraud and aiding and abetting conversion against defendant bank HSBC. Defendant Stettner bid over $425,000 for antique jewelry and sought to pay with a post-dated check. At plaintiff's request HSBC provided a letter attesting to Stettner's good standing at the bank and stating that Stettner maintained a balance of between $1 and $20 million. Stettner's check bounced. The dissent argued that the complaint did not allege the bank's knowledge of the fraud and conversion:

"A plaintiff alleging an aiding-and-abetting fraud claim must allege the existence of the underlying fraud, actual knowledge, and substantial assistance" ... . In turn, the elements of an underlying fraud are "a misrepresentation or a material omission of fact which was false and known to be false by defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury" ... .

Aiding and abetting conversion requires the existence of a conversion by the primary tortfeasor, actual knowledge, and substantial assistance... . "A conversion takes place when someone, intentionally and without authority, assumes or exercises control over personal property belonging to someone else, interfering with that person's right of possession" ... . **William Doyle Galleries, Inc. v Stettner, 2018 NY Slip Op 08743, First Dept 12-20-18**

Table of Contents

INSURANCE LAW

INSURANCE LAW, ARBITRATION, CONTRACT LAW, CIVIL PROCEDURE.

INSURER WAIVED THE CONTRACTUAL ISSUE WHETHER PETITIONER WAS A PASSENGER IN THE CAR BY NOT SEEKING A STAY OF ARBITRATION, THEREFORE THE ARBITRATOR EXCEEDED HIS POWERS BY FINDING PETITIONER WAS NOT A PASSENGER AT THE TIME OF THE HIT AND RUN ACCIDENT (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the insurer (GEICO) had waived the contractual issue whether petitioner was a "qualified person" entitled to uninsured motorist benefits in this hit and run accident by not moving to stay arbitration. Therefore the arbitrator exceeded his powers in finding petitioner was not a "qualified person" because he was not a passenger in the car at the time of the accident. The matter was remitted to be heard by another arbitrator to determine whether petitioner suffered "serious injury:"

> ...[T]he issue presented to the arbitrator was whether the claimants, the petitioner and his girlfriend, sustained serious injuries as a result of the negligence of the operator of the hit-and-run vehicle, and if so, the reasonable compensatory value thereof. With a hit-and-run cause of action, in order to proceed to arbitration, there must be "physical contact" by a hit-and-run vehicle to a "qualified person" (Insurance Law § 5217). Accordingly, the determination of whether the petitioner is a "qualified person" pursuant to the policy is a condition precedent to arbitration and therefore is a basis for an application to stay arbitration to be determined by the courts ... . Here, since GEICO never moved to stay the arbitration, it waived the ability to litigate this issue and essentially conceded that the petitioner was a covered person under the policy ... . **Matter of Banegas v GEICO Ins. Co., 2018 NY Slip Op 08644, Second Dept 12-19-18**

INSURANCE LAW, EVIDENCE, CIVIL PROCEDURE.

THE PETITION SEEKING LEAVE TO COMMENCE AN ACTION AGAINST THE MOTOR VEHICLE ACCIDENT INDEMNIFICATION CORPORATION (MVAIC) IN THIS PEDESTRIAN ACCIDENT CASE SHOULD NOT HAVE BEEN DISMISSED WITHOUT A HEARING, THERE WERE QUESTIONS OF FACT ABOUT WHETHER THE NOTICE CONDITIONS PRECEDENT TO THE ACTION WERE MET (SECOND DEPT).

The Second Department, reversing Supreme Court, determined this pedestrian accident action seeking coverage by the Motor Vehicle Accident Indemnification Corporation (MVAIC) should not have been dismissed without a hearing:

> A petitioner seeking leave of court to commence an action against the MVAIC has the initial burden of demonstrating that he or she is a "[q]ualified person" within the meaning of Insurance Law § 5202 and by making an evidentiary showing that he or she has satisfied certain other statutory requirements ... . In a special proceeding,

to the extent that no triable issues of fact are raised, the court is empowered to make a summary determination (see CPLR 409[b]). If, however, triable issues of fact are raised, an evidentiary hearing must be held (see CPLR 410).

Here, there are triable issues of fact as to whether the petitioner is an uninsured resident of New York, and, therefore, a "[q]ualified person" pursuant to article 52 of the Insurance Law (Insurance Law § 5202[b]); whether the accident, which the petitioner admitted that he did not report to the police within 24 hours as required by Insurance Law § 5208(a)(2)(A), was, nonetheless, reported to the police "as soon as was reasonably possible" within the meaning of Insurance Law § 5208(a)(2)(B); and whether the petitioner served a notice of claim upon the MVAIC within 90 days of the accident (see Insurance Law § 5208[a][2][A]), which issues could not have been resolved without an evidentiary hearing ... . **Matter of Laszlone v Motor Veh. Acc. Indem. Corp., 2018 NY Slip Op 08657, Second Dept 12-19-18**

INSURANCE LAW, NEGLIGENCE, EVIDENCE.

IN THIS TRAFFIC ACCIDENT CASE, AN AFFIDAVIT FROM A LICENSED CLINICAL SOCIAL WORKER (LCSW) CONSTITUTED COMPETENT EVIDENCE PLAINTIFF SUFFERS FROM POST-TRAUMATIC STRESS DISORDER (PTSD), PTSD IS A 'SERIOUS INJURY' WITHIN THE MEANING OF INSURANCE LAW 5102 (THIRD DEPT).

The Third Department, reversing Supreme Court, determined an affidavit from a licensed clinical social worker (LCSW) was competent evidence that plaintiff in this traffic accident case suffered from post-traumatic stress disorder (PTSD) which is recognized as a "serious injury" within the meaning of Insurance Law 5102 (d):

Under Education Law § 7701 (2), an LCSW can diagnose "mental, emotional, behavioral, addictive and developmental disorders and disabilities" and can administer and interpret tests of psychological functioning, create assessment-based treatment plans and provide "short-term and long-term psychotherapy and psychotherapeutic treatment." These are functions comparable to those of a psychologist (see Education Law § 7601-a [1], [2]). For licensing purposes, an LCSW must "have at least three years full-time supervised postgraduate clinical social work experience in diagnosis, psychotherapy, and assessment-based treatment plans, or its part-time equivalent, obtained over a continuous period not to exceed six years, under the supervision . . . of a psychiatrist, a licensed psychologist, or [an LCSW] in a facility setting" ... . Given the above, we conclude that an LCSW is competent to render an opinion as to whether a person has PTSD for purposes of establishing a serious injury under the Insurance Law. ...

Iantorno [the LCSW] averred that she "personally witnessed physical anxiety exhibited by . . . Vergine [plaintiff]. This was visible to me and further validated diagnosis of PTSD." Such clinical observations qualify as objective medical evidence for purposes of establishing a serious injury ... . Iantorno opined that Vergine was significantly limited in her ability to drive and even distressed as a passenger, conditions that impacted her independence and imposed a significant limitation of her psychological function. We find that this submission presents an issue of fact as to whether Vergine sustained causally-related PTSD, constituting a "significant limitation of use of a body function or system" (Insurance Law § 5102 [d]). **Vergine v Phillips, 2018 NY Slip Op 08740, Third Dept 12-20-18**

Table of Contents

JUDGES

JUDGES.

LAWSUIT SEEKING TO ENJOIN JUDICIAL SALARY INCREASES WAS PROPERLY DISMISSED (THIRD DEPT).

The Third Department determined summary judgment dismissing the action brought by the Center for Judicial Accountability was properly granted:

> ... [P]laintiff Center for Judicial Accountability, Inc. (hereinafter CJA) and plaintiff Elena Ruth Sassower, CJA's director, commenced this action seeking, among other things, a declaratory judgment that the bill establishing the budgets for the Legislature and the Judiciary for the 2016-2017 fiscal year ... was unconstitutional and also seeking an injunction permanently enjoining respondents from making certain disbursements under the bill, including judicial salary increases. * * *
>
> ... Supreme Court properly granted defendants' cross motion for summary judgment dismissing the sixth cause of action ... which alleged that the enabling statute that created the Commission [Commission on Legislative, Judicial and Executive Compensation] is facially unconstitutional with respect to judicial compensation. **Center for Jud. Accountability, Inc. v Cuomo, 2018 NY Slip Op 08996, Third Dept 12-27-18**

LABOR LAW-CONSTRUCTION LAW

LABOR LAW-CONSTRUCTION LAW.

QUESTION OF FACT WHETHER PLAINTIFF'S SLIP AND FALL OCCURRED ON DEBRIS IN A WALKWAY WITHIN THE MEANING OF THE NYCRR IN THIS LABOR LAW 241(6) ACTION, HOWEVER, BECAUSE THE FALL OCCURRED OUTSIDE THE ENTRANCE TO A SHANTY, THE NYCRR PROVISION WHICH PERTAINS TO PASSAGEWAYS WAS NOT APPLICABLE (FIRST DEPT).

The First Department, in a full-fledged opinion by Justice Tom, modifying Supreme Court, determined there were questions of fact about the applicability of certain provisions of the New York Code Rules and Regulations (NYCRR) to plaintiff's accident in this Labor Law 241(6), 200 and common law negligence action. Plaintiff slipped and fell on snow covered pipes near the entrance to the employer's work site shanty. The Labor Law 241(6) cause of action predicated on a violation of 12 NYCRR 23-1,7(d) should not have dismissed because there is a question of fact whether the slip and fall occurred in a "walkway." The Labor Law 241(6) cause of action predicated on a violation of 12 NYCRR 23-1.7(e)(1), which deals with "passageways" as opposed to "walkways," was properly dismissed:

> The Labor Law § 241(6) claim predicated on a violation of 12 NYCRR 23-1.7(d) should not have been dismissed because there was an issue of fact as to whether the accident occurred in a walkway. There were

conflicting accounts of whether the pipes were located in a manner that impeded ingress and egress into the shanty. ...

.. .[I]n contrast to 12 NYCRR 23-1.7(d) which pertains to slipping hazards on a "floor, passageway, walkway, scaffold, platform or other elevated working surface," 12 NYCRR 23-1.7(e)(1) is limited to passageways. A "passageway" is commonly defined and understood to be "a typically long narrow way connecting parts of a building" and synonyms include the words corridor or hallway ... . In other words, it pertains to an interior or internal way of passage inside a building. **Quigley v Port Auth. of N.Y. & N.J., 2018 NY Slip Op 08577, First Dept 12-13-18**

LABOR LAW-CONSTRUCTION LAW, EVIDENCE.

PLAINTIFF SHOULD HAVE BEEN GRANTED SUMMARY JUDGMENT ON HIS LABOR LAW 240 (1) CAUSE OF ACTION, PLAINTIFF'S LADDER SHIFTED AND HE FELL, HEARSAY IN A REPORT WHICH CONSTITUTED A MISTRANSLATION OF THE PLAINTIFF'S STATEMENT DID NOT RAISE A TRIABLE ISSUE OF FACT (FIRST DEPT).

The First Department, reversing Supreme Court, determined plaintiff was entitled to summary judgment on his Labor Law 240 (1) cause of action based upon his fall from a ladder which shifted. The hearsay evidence in a report which mistranslated plaintiff's statement using the word "stairs" rather than "ladder" (the Spanish word means both) did not create an issue of fact. The court noted that the tenant who hired plaintiff's employer and the property owner were liable:

Defendants ... failed to raise a triable issue of fact. Hearsay, standing alone, is insufficient to defeat summary judgment. The mistranslated statement in the C-3 report ("while walking I fell down stairs") does not qualify as a prior inconsistent statement or as a business record so as to fit within an exception to the hearsay rule ... . The declaration against interest hearsay exception to the hearsay rule is likewise inapplicable inasmuch as, among other reasons, the declarant was indisputably unaware that the statement was adverse when made ... .

Defendants, as the proponents of the evidence, were obligated to show that plaintiff was the source of the information recorded in the C-3 indicating that he fell from "stairs," and that "the translation was provided by a competent, objective interpreter whose translation was accurate, a fact generally established by calling the translator to the stand" ... . This defendants have failed to do. **Nava-Juarez v Mosholu Fieldston Realty, LLC, 2018 NY Slip Op 08744, First Dept 12-20-18**

Table of Contents

LANDLORD-TENANT

LANDLORD-TENANT, CONTRACT LAW.

LEASE INCLUDED AN EXPRESS PROVISION ALLOWING TENANT TO WITHHOLD RENT IF THE PREMISES IS DAMAGED AND NOT REPAIRED, THEREFORE WITHHOLDING RENT WAS NOT AN ELECTION OF REMEDIES AND THE TENANT COULD WITHHOLD RENT AND SUE FOR DAMAGES (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, determined that an express lease provision allowed the tenant to withhold rent when the property is damaged, and therefore the withholding of rent did not constitute an election of remedies:

> The second affirmative defense stated that the tenant elected a remedy by not paying rent, and therefore the tenant is not entitled to damages. However, the lease contained an express provision that the tenant could withhold rent if the premises were damaged and not repaired. Generally, a tenant's duty to continue to pay rent is not suspended if the tenant remains in possession of the leased premises, even if the landlord breaches its obligations under the lease, unless there is an express provision in the lease declaring the circumstances under which the tenant may withhold rent ... . Such an express provision was present here. Therefore, the withholding of rent was not an election of remedies. **Fifth Line, LLC v Fitch, 2018 NY Slip Op 08630, Second Dept 12-19-18**

LANDLORD-TENANT, MENTAL HYGIENE LAW, MUNICIPAL LAW, FAIR HOUSING ACT.

HEARING WAS REQUIRED TO DETERMINE WHETHER A PERMANENT STAY OF EVICTION WAS A PROPER ACCOMMODATION FOR DISABLED TENANTS PURSUANT TO THE FAIR HOUSING ACT (FIRST DEPT).

The First Department, reversing (modifying) the Appellate Term, First Department, ruled that a hearing should be held to determine whether eviction proceedings should be permanently stayed. A guardian (GAL) had been appointed pursuant to Mental Hygiene Law article 81 for the disabled tenants who had not complied with stipulations for fumigation of the apartment to rid it of bed bugs. With the GAL's help the apartment was eventually fumigated. Under the Fair Housing Act the tenants were entitled to accommodations for their disabilities. A hearing was required to determine whether a permanent stay of eviction was an appropriate accommodation:

> Under the Fair Housing Act (FHA), as amended, it is unlawful to discriminate in housing practices on the basis of a "handicap" (42 USC § 3604[f][2][A]). Handicap is very broadly defined, and a person is considered handicapped and thereby protected under the FHA if he or she: 1. Has a physical or mental impairment that substantially limits one or more major life activities, or 2. Has a record of such impairment, or 3. Is regarded as having such an impairment.

No specific diagnosis is necessary for a person to be "handicapped" and protected under the statute. In fact, the determination may even be based upon the observations of a lay person ... . The appointment of an article 81 guardian for tenants sufficiently establishes that these tenants are "handicapped" within the meaning of the FHA, leading us to consider whether they are entitled to a reasonable accommodation. What is "reasonable" varies from case to case, because it is necessarily fact-specific ... . The overarching guiding factor, however, is that a landlord is obligated to provide a tenant with a reasonable accommodation if necessary for the tenant to keep his or her apartment. The " refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford [the handicapped individual] equal opportunity to use and enjoy a dwelling'" is a discriminatory practice... . A landlord does not have to provide a reasonable accommodation if it puts other tenants at risk, but should consider whether such risks can be minimized ... . **Matter of Prospect Union Assoc. v DeJesus, 2018 NY Slip Op 09016, First Dept 12-27-18**

MEDICAL MALPRACTICE

MEDICAL MALPRACTICE, NEGLIGENCE.

A BLOCKED TRACHEOSTOMY TUBE IS A FORESEEABLE EVENT FOR WHICH DEFENDANT ANESTHESIOLOGIST WAS TRAINED AND PREPARED, THEREFORE THE JURY SHOULD NOT HAVE BEEN INSTRUCTED ON THE EMERGENCY DOCTRINE, DEFENSE VERDICT IN THIS MEDICAL MALPRACTICE ACTION REVERSED AND NEW TRIAL ORDERED (SECOND DEPT).

The Second Department, reversing the defense verdict and ordering a new trial in this medical malpractice action, determined the jury should not have been charged on the emergency doctrine. Plaintiff's decedent died after her tracheostomy tube became blocked. Because a blocked tracheostomy tube is a foreseeable condition, the emergency doctrine did not apply:

In the days after ... surgery, Jones [plaintiff's decedent] was improving and was out of bed and talking. On March 30, 2007, a nurse and respiratory therapist were removing a Passy-Muir valve (a device designed to allow a patient to speak with a tracheostomy tube in place) and met resistance while attempting to place an inner cannula into the tube. Jones began to experience shortness of breath. Despite attempts to suction the tube and ventilate Jones manually with an Ambu bag, Jones's oxygen saturation levels continued to drop to the low 60s, and her level of consciousness rapidly decreased. Accordingly, Sher [defendant], an anesthesiologist, and Joann Noto, a physician assistant, were paged. * * *

... [W]e disagree with the Supreme Court's determination to instruct the jury on the emergency doctrine. The emergency doctrine "has been reserved, in a medical context, to situations where a doctor is confronted by a sudden and unforeseen condition' and is forced to undertake care under less than optimal circumstances," and is inapplicable where the defendant physician was trained and prepared for the specific emergency ... . Here, there is no dispute that it was foreseeable for secretions to block a tracheostomy tube and that Sher was qualified as an anesthesiologist to replace a blocked tracheostomy tube. Indeed, Sher admitted that, in his 30 years of experience, creating airways for patients is what anesthesiologists do. Further, Sher was advised by Noto that a mucus plug was blocking the tracheostomy tube which Sher was ultimately able to replace within seconds. Accordingly, there was no sudden and unforeseen condition for which Sher was not trained or prepared. **Crayton v Sher, 2018 NY Slip Op 08461, Second Dept 12-12-18**

MENTAL HYGIENE LAW

MENTAL HYGIENE LAW.

ABSENT A FINDING THE GUARDIAN OF THE PROPERTY OF AN INCAPACITATED PERSON FAILED TO PROPERLY DISCHARGE HER DUTIES, THE COURT SHOULD NOT HAVE ORDERED THE GUARDIAN TO PAY THE ACCOUNTANT WHO ASSISTED IN PREPARING THE FINAL ACCOUNT FROM HER OWN FUNDS (SECOND DEPT).

The Second Department, reversing Supreme Court, determined that, absent a showing of misconduct, the guardian of the property of an incapacitated person should not have been required to pay the accountant used to prepare the final account from her own funds:

> A court is authorized to award "reasonable compensation" to a guardian (Mental Hygiene Law § 81.28[a]). The award of compensation "must take into account the specific authority of the guardian or guardians to provide for the personal needs and/or property management for the incapacitated person, and the services provided to the incapacitated person by such guardian" (id.). However, "[i]f the court finds that the guardian has failed to discharge his or her duties satisfactorily in any respect, the court may deny or reduce the compensation which would otherwise be allowed" (Mental Hygiene Law § 81.28[b]).
>
> Here, since the Supreme Court did not find that the guardian failed to discharge her duties satisfactorily in any respect, the court should not have directed the guardian to pay the accountant's fee from her own funds ... . **Matter of Ruby T. (Carrion), 2018 NY Slip Op 08314, Second Dept 12-5-18**

MENTAL HYGIENE LAW, CRIMINAL LAW, EVIDENCE, APPEALS.

RESPONSE TO A JURY NOTE MAY HAVE MISLED THE JURY TO CONCLUDE THEY COULD MAKE THEIR OWN LAY JUDGMENT, AS OPPOSED TO RELYING ON EXPERT OPINION, ABOUT WHETHER DEFENDANT SEX OFFENDER SUFFERED FROM A MENTAL ABNORMALITY IN THIS CIVIL MANAGEMENT PROCEEDING, ISSUE REVIEWED ON APPEAL IN THE INTEREST OF JUSTICE, NEW TRIAL ORDERED (SECOND DEPT).

The Second Department, in a full-fledged opinion by Justice Duffy, over a dissent, reversed the finding that defendant sex offender (Timothy R.) suffers from a mental abnormality and requires civil commitment and ordered a new trial. The jury sent out a note asking whether they must agree with the diagnosis of one of the experts to find defendant has a mental abnormality. The court, over defendant's counsel's objection, answered "no." On appeal defendant argued that the jury was effectively told it could ignore the experts and come to their own judgment on the mental abnormality issue. Although that specific argument was not made below, and therefore was not preserved, the Second Department reviewed it in the

interest of justice and held that the jury would have to agree with an expert's diagnosis to find defendant suffered from a mental abnormality:

> ... [C]ontrary to the Supreme Court's response to the jury note, in order to conclude that Timothy R. has a mental abnormality, the jury was required to accept expert testimony as to at least one diagnosis that meets the legal predicate for mental abnormality. When the court answered the note in the negative and reiterated to the jury the general instruction as to accepting or rejecting all or some of an expert's testimony as it sees fit ... , the jury could have been misled into relying solely upon its own lay opinion or so much of the expert testimony as relied upon nonpredicate diagnoses, without regard to the expert testimony, that Timothy R. has a congenital or acquired condition, disease, or disorder ... . **Matter of State of New York v Timothy R., 2018 NY Slip Op 08940, Second Dept 12-26-18**

MUNICIPAL LAW

MUNICIPAL LAW, EMPLOYMENT LAW, CONTRACT LAW.

CITY EMPLOYEE'S CONTRACTUAL RIGHT TO MEDICAL BENEFITS VESTED BEFORE THE COLLECTIVE BARGAINING AGREEMENT WAS TERMINATED (FOURTH DEPT).

The Fourth Department determined that plaintiff city employee's medical benefits vested before the collective bargaining agreement (CBA) was terminated:

> "As a general rule, contractual rights and obligations do not survive beyond the termination of a collective bargaining agreement . . . However, [r]ights which accrued or vested under the agreement will, as a general rule, survive termination of the agreement' . . . , and we must look to well established principles of contract interpretation to determine whether the parties intended that the contract give rise to a vested right. [A] written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms' " ... .
>
> ... [W]e conclude that the court properly determined that the plain meaning of the provisions at issue in the ... CBA establishes that plaintiff has a vested right to medical benefits, those rights vested when he completed his 20th year of service, and plaintiff became eligible to receive said benefits when he reached retirement age... . Plaintiff's right to medical benefits vested when he satisfied the criteria in the ... CBA, and there is no language in the ... CBA indicating that employees would forfeit or surrender their vested rights if they transferred jobs or unions prior to reaching retirement age. We thus conclude that the court's interpretation of the ... CBA " give[s] fair meaning to all of the language employed by the parties to reach a practical interpretation of the expressions of the parties so that their reasonable expectations will be realized . . . [and does] not . . . leave one of its provisions substantially without force or effect' " ... . **Timkey v City of Lockport, 2018 NY Slip Op 08792, Fourth Dept 12-21-18**

Table of Contents

NEGLIGENCE

NEGLIGENCE.

PLAINTIFF ASSUMED THE RISK OF INJURY STEMMING FROM A FIGHT DURING A HOCKEY GAME (SECOND DEPT).

The Second Department, reversing Supreme Court, determined that plaintiff, an amateur hockey player, assumed the risk of injury stemming from a fight on the ice. Plaintiff alleged he was injured when a referee tried to pull him away from the fight. Plaintiff voluntarily engaged in physical contact with a player involved in the fight (plaintiff alleged he was trying to pull a player out of the fight when the referee grabbed the plaintiff):

> Under the doctrine of primary assumption of risk, by engaging in a sport or recreational activity, a participant "consents to those commonly appreciated risks which are inherent in and arise out of the nature of the sport generally and flow from such participation" ... . "[B]y freely assuming a known risk, a plaintiff commensurately negates any duty on the part of the defendant to safeguard him or her from the risk" ... . If the risks of the activity are fully comprehended or perfectly obvious, the plaintiff has consented to them and the defendant has performed its duty... . However, a plaintiff will not be deemed to have assumed the risks of reckless or intentional conduct, or concealed or unreasonably increased risks ... .
>
> Here, the defendants established, prima facie, that the risks inherent in the sport of ice hockey, and in particular, involving oneself in an ongoing fight, were fully comprehended by the plaintiff and perfectly obvious. Further, the defendants established that the referees were permitted to make physical contact with players involved in a fight and, accepting the plaintiff's version of the events as true, the plaintiff voluntarily engaged in physical contact with a player involved in the fight. **Falcaro v American Skating Ctrs., LLC, 2018 NY Slip Op 08469, Second Dept 12-12-18**

NEGLIGENCE.

QUESTION OF FACT WHETHER FRONTMOST DRIVER NEGLIGENTLY BROUGHT HER CAR TO A COMPLETE STOP IN THIS REAR-END COLLISION CASE, FRONTMOST DRIVER'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the transit authority's and the frontmost driver's (Conway's) motions for summary judgment should not have been granted in this rear-end collision case. There was evidence the bus pulled into traffic suddenly without a turn signal, and there was evidence Conway negligently brought her car to a complete stop:

> A rear-end collision with a stopped or stopping vehicle establishes a prima facie case of negligence on the operator of the rear vehicle, requiring that operator to come forward with evidence of a non-negligent explanation for the collision in order to rebut the inference of negligence ... . "However, not every rear-end collision is the exclusive

fault of the rearmost driver" ... . "[W]here the frontmost driver also operates [their] vehicle in a negligent manner, the issue of comparative negligence is for a jury to decide" ... .

Gill [the driver behind Conway] testified at his deposition that the bus was in the right lane when the accident occurred and that, although he could not be sure, he did not recall the bus ever entering the left lane. Additionally, in contrast to Conroy's testimony that she attempted to gradually bring her vehicle to a stop, Gill testified that Conroy apparently panicked and slammed on her brakes when the bus pulled away from the curb. Thus, Gill's deposition testimony raised triable issues of fact as to whether the bus entered the left lane of traffic and whether Conroy negligently brought her vehicle to a complete stop ... . **Conroy v New York City Tr. Auth., 2018 NY Slip Op 08913, Second Dept 12-26-18**

NEGLIGENCE.

DEFENDANT BAR NOT LIABLE FOR INJURIES AND DEATH OF PLAINTIFF'S DECEDENT RESULTING FROM AN ALTERCATION ON A PUBLIC ROAD IN FRONT OF THE BAR, BAR EXERCISED NO CONTROL OVER THE AREA WHERE THE ALTERCATION OCCURRED (SECOND DEPT).

The Second Department, affirming the defendant bar's motion for summary judgment in this third party assault case, determined that the owner of the bar was not liable to plaintiff's decedent who died of injuries from an altercation which occurred on the public road in front of the bar:

Landowners in general have a duty to act in a reasonable manner to prevent harm to those on their property ... . In particular, they have a duty to control the conduct of third persons on their premises when they have the opportunity to control such persons and are reasonably aware of the need for such control... . Under this rationale, courts have recognized that a landowner may have responsibility for injuries caused by an intoxicated guest ... . However, it is "uniformly acknowledged that liability may be imposed only for injuries that occurred on defendant's property, or in an area under defendant's control, where defendant had the opportunity to supervise the intoxicated guest" ... . Moreover, a landowner is not an insurer of a visitor's safety, and has no duty to protect visitors against unforeseeable and unexpected assaults... .

Here, the bar defendants submitted evidence demonstrating that the altercation was a sudden and unforeseeable event, which occurred on a public roadway, outside of their premises and control ... . **Covelli v Silver Fist, Ltd., 2018 NY Slip Op 08914, Second Dept 12-26-18**

Table of Contents

NEGLIGENCE, CONTRACT LAW.

PROPERTY OWNER DID NOT DEMONSTRATE A LACK OF CONSTRUCTIVE KNOWLEDGE OF THE SNOW AND ICE CONDITION IN THIS SLIP AND FALL CASE, AND THE SNOW REMOVAL CONTRACTOR DID NOT OFFER ANY EVIDENCE OF THE STATE OF THE AREA WHERE PLAINTIFF FELL, DEFENDANTS' SUMMARY JUDGMENT MOTIONS SHOULD NOT HAVE BEEN GRANTED (FIRST DEPT).

The First Department, reversing (modifying) Supreme Court, determined that the property owner's (PA's) and snow removal contractor's (Cristi's) motions for summary judgment in this parking lot snow and ice slip and fall case. PA did not demonstrate a lack of constructive knowledge of the condition and Cristi offered no evidence of the actual state of the area where plaintiff fell:

> To demonstrate lack of constructive notice, a defendant must "produc[e] evidence of its maintenance activities on the day of the accident, and specifically that the dangerous condition did not exist when the area was last inspected or cleaned" ... . PA failed to produce such evidence. PA's representative testified that PA's logs for the day of and day prior to the accident did not identify any icy conditions in the parking lot. However, he also admitted that it would not necessarily be documented in these logs (or elsewhere) if a PA employee noticed an icy condition. Moreover, he testified that checking for icy conditions was not the focus of PA's inspections. ...
>
> "[A] contractual obligation, standing alone, will generally not give rise to tort liability in favor of a third party" ... . However, there are exceptions to this rule, including where "the contracting party, in failing to exercise reasonable care in the performance of [its] duties, launches a force or instrument of harm'" by "creat[ing] or exacerbat[ing]" a dangerous condition... . It is undisputed that Cristi performed snow removal and salting in the area of the accident and that it had a continuing obligation to inspect and maintain the area even after snow removal was complete, but it offered no evidence regarding the actual state of the area at issue prior to the accident. Its "silence with respect to the actual snow removal operations at issue" renders Cristi's prima facie showing "patently insufficient" ... . **Barrett v Aero Snow Removal Corp., 2018 NY Slip Op 08753, First Dept 12-20-18**

NEGLIGENCE, EMPLOYMENT LAW.

QUESTIONS OF FACT WHETHER THE EMPLOYER OF THE DRIVER WHO KILLED A BICYCLIST WHEN ATTEMPTING TO LEAVE THE EMPLOYER'S PREMISES IS LIABLE, QUESTIONS OF FACT WERE RAISED ABOUT (1) THE EMPLOYER'S SPECIAL USE OF THE AREA WHERE THE ACCIDENT OCCURRED, (2) A SPECIAL RELATIONSHIP WITH THE EMPLOYEE (MASTER-SERVANT) GIVING RISE TO A DUTY TO CONTROL THE EMPLOYEE, AND (3) PROXIMATE CAUSE (THIRD DEPT).

The Third Department, over a dissent, determined there were questions of fact whether the employer (BorgWarner) of the driver who killed a bicyclist (plaintiff's decedent) while exiting the employer's premises was liable. There was a question whether the employer exercised a special use of the area, whether the employer had a duty to control the conduct of the

employee because of a special relationship (master-servant), and whether the employer's acts or omissions constituted a proximate cause of the accident:

> A finding of a special use arises where there is a modification to the public sidewalk, such as the installation of a driveway, or a variance of the sidewalk to allow for ingress and egress... , that was "constructed in a special manner for the benefit of the abutting owner or occupier" ... . The owner must derive a "unique benefit unrelated to the public use" ... . Contrary to BorgWarner's claims that it uses Warren Road in the same manner as the general public, there was substantial evidence in the record, submitted by plaintiff, suggesting that the public roadway in question had been altered for the exclusive benefit of BorgWarner to facilitate its relocation. ...
>
> ... [A] duty may be created to control the conduct of a person when a special relationship exists, such as master-servant ... . Here, not only did BorgWarner control the flow of traffic from its private parking lot at the south exit via a control gate, but BorgWarner also placed a yield sign on BorgWarner South Drive for motorists entering the merge lane on Warren Road. Also, as an employer, BorgWarner had the opportunity to conduct training or communicate in some way to its employees to use due caution and follow traffic laws when using the south exit. In fact, BorgWarner did provide training programs, including obeying traffic signs, however, none were specific to the use of the south exit. This evidence raises a question of fact as to the extent of BorgWarner's control over its employees and whether this control is sufficient to establish a duty... .Further, although it is true that, at the time of the accident, [the employee] had completed her shift and was going home, activity arguably outside the scope of her employment, exiting the facility was also "necessary or incidental to such employment," and her actions were still controlled in part by the gate and signage installed by BorgWarner ... . **Giannelis v Borgwarner Morse Tec Inc., 2018 NY Slip Op 08593, Third Dept 12-13-18**

NEGLIGENCE, EVIDENCE.

ALTHOUGH THE RULES OF THE CITY OF NEW YORK REQUIRED THAT TIME WARNER MAINTAIN ONLY THE AREA 12 INCHES AROUND A METAL BOX COVER IN THE SIDEWALK, THERE WERE QUESTIONS OF FACT WHETHER TIME WARNER OR A PREDECESSOR CREATED THE DEFECT OR HAD CONSTRUCTIVE NOTICE OF THE DEFECT OUTSIDE THE 12 INCH AREA, SUPREME COURT REVERSED IN THIS SLIP AND FALL CASE (FIRST DEPT).

The First Department, reversing Supreme Court, determined that defendant Time Warner's motion for summary judgment in this sidewalk slip and fall case should not have been granted. Although the sidewalk defect was outside 12 inch area around the metal box cover in the sidewalk which the Rules of the City of New York (RCNY) require Time Warner to maintain, there were questions of fact whether Time Warner created the defect or had constructive notice of the defect:

> Time Warner ... has a common-law duty not to create a hazardous condition on the sidewalk ... , and, further, as a special user of the public sidewalk, has a "duty to maintain the area of the special use in a reasonably safe condition"... . Additionally, constructive notice may be imputed where, as here, there is a duty under the administrative code to conduct inspections of the box covers ... .
>
> Here, the evidence, including the testimony of Time Warner's construction manager, shows that Time Warner did not regularly inspect its box covers, as required by the regulation it relied upon ... , and that, if the area had been inspected, Time Warner would have repaired the cracked sidewalk condition around the box cover and replaced the sidewalk flag, which extends to the spot where plaintiff tripped. Time Warner also submitted the affidavit of an engineer who measured the distance between plaintiff's fall and the box cover as more than 12 inches, but did not

address whether or not the metal box installed in the sidewalk created the cracked condition around the box cover that extended to the spot where plaintiff fell. Furthermore, the fact that Time Warner did not install the box cover itself has no bearing since the duty to maintain the area of the special use "runs with the land as long as it is maintained for the benefit of a special user" ... . **Robles v Time Warner Cable Inc., 2018 NY Slip Op 08244, First Dept 12-4-18**

NEGLIGENCE, EVIDENCE.

DOCTRINE OF RES IPSA LOQUITUR MAY APPLY TO WINDOW FALLING ONTO PLAINTIFF, DEFENDANT BUILDING MANAGER'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (FIRST DEPT).

The First Department, reversing Supreme Court, determined there were questions of fact whether defendant building manager was liable for the injuries to plaintiff from a window which fell out and onto his head when he attempted to close it. The doctrine of res ipsa loquitur may apply:

> ... [P]laintiff used the locker room to change and opened one of the windows half a foot to cool down. When he attempted to close the window, he used a "little bit more force than [he] did when [he] lifted it." As the window closed, it reverberated a bit and then the whole window structure came out and crashed over plaintiff's head. ...
>
> The defendant met its prima facie burden on lack of constructive notice of a dangerous condition. While it is disputed that defendant never inspected the windows since installation in 2004, it did not have an affirmative duty to conduct reasonable inspections ... .
>
> We find that an issue of fact exists as to the applicability of the doctrine of res ipsa loquitur, which allows for an inference of negligence to be drawn on the occurrence of an accident. The doctrine requires that a plaintiff must demonstrate that the "event is the kind which ordinarily does not occur in the absence of negligence, that it was caused by an agency or instrumentality within the exclusive control of the defendant, and [that] it was not due to any voluntary action or contribution on the part of the plaintiff" ... .
>
> Here, "common experience" dictates that a window being shut does not simply fall out absent negligence. In order to establish exclusive control, plaintiff is not required to show that defendant "had sole physical access" to the window... . Further, here remains a question of fact whether plaintiff did something to contribute to the window falling on him. **Wilkins v West Harlem Group Assistance, Inc., 2018 NY Slip Op 08247, First Dept 12-4-18**

Table of Contents

NEGLIGENCE, EVIDENCE.

DEFENDANT'S UNSUPPORTED ALLEGATION THAT PLAINTIFF STOPPED SUDDENLY WAS NOT ENOUGH TO DEFEAT PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT IN THIS REAR END COLLISION CASE (SECOND DEPT).

The Second Department noted that defendant driver's allegation that plaintiff driver stopped suddenly in this rear end collision case was not sufficient to create a question of fact:

> ... [T]he plaintiff demonstrated his prima facie entitlement to judgment as a matter of law on the issue of liability by averring that he was stopped at a red light for 45 seconds before the defendant's vehicle struck the plaintiff's vehicle in the rear... . In opposition, the defendant averred that the accident occurred after the plaintiff made a sudden stop in the middle of the road. However, the defendant did not submit any evidence as to the distance he had maintained from the plaintiff's vehicle, or the speed at which he was traveling, prior to the collision. Without such evidence, the assertion that the plaintiff's vehicle came to a sudden stop was insufficient to rebut the inference that the defendant was negligent ... . **Auguste v Jeter, 2018 NY Slip Op 08274, Second Dept 12-5-18**

NEGLIGENCE, EVIDENCE.

QUESTION OF FACT WHETHER SMALL TABLE OVER WHICH PLAINTIFF TRIPPED AND FELL WAS OPEN AND OBVIOUS, DEFENDANT'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (FIRST DEPT).

The Second Department, reversing Supreme Court, determined that defendant-store's motion for summary judgment in this slip and fall case should not have been granted. Plaintiff fell over a small table that was behind a taller table thinking that it was possible to walk behind the taller table:

> "Whether a dangerous condition exists on real property so as to create liability on the part of the landowner depends on the particular facts and circumstances of each case and is generally a question of fact for the jury" ... . Even a condition that is generally apparent "to a person making reasonable use of their senses may be rendered a trap for the unwary where the condition is obscured or the plaintiff is distracted" ... . The determination of "[w]hether an asserted hazard is open and obvious cannot be divorced from the surrounding circumstances"... .
>
> Here, the defendants failed to establish, prima facie, that the table at issue was open and obvious and not dangerous given the surrounding circumstances at the time of the accident, including the evidence submitted by the defendants on their motion as to the lighting conditions and the presence of other customers in the area ... . Further, the defendants' own evidence, including the deposition testimony of their employees, demonstrated the existence of a triable issue of fact as to whether the space on the side of the table on which the plaintiff was injured could be anticipated as an area of egress by the plaintiff. **Elfassi v Hollister Co., 2018 NY Slip Op 08279, Second Dept 12-5-18**

Table of Contents

NEGLIGENCE, EVIDENCE.

EVEN PHYSICALLY SMALL DEFECTS, IN COMBINATION WITH OTHER FACTORS, CAN CONSTITUTE A DANGEROUS CONDITION, DEFENDANT'S SUMMARY JUDGMENT MOTION IN THIS SLIP AND FALL CASE SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined that the expert opinion submitted by both sides raised questions of fact whether "beveled edge between the dance floor and the adjoining rug" created a dangerous condition in this slip and fall case. The court noted that even physically small defects can become dangerous in combination with other factors, including lighting:

> The Court of Appeals has recognized that even a physically small defect may be actionable, such as where there is a jagged edge, a rough, irregular surface, the presence of other defects in the vicinity, or poor lighting, or if the defect is located where people are naturally distracted from looking down at their feet ... . Attention to the specific circumstances is always required, and undue or exclusive focus on whether a defect is a trap or snare is not appropriate ... .
>
> The plaintiffs submitted the expert affidavit of a professional engineer who inspected the dance floor and carpet area. He measured the static coefficient of friction of the beveled edges of the dance floor, and found that they did not provide proper slip resistance for an individual stepping on it while dancing. Additionally, he found that inadequate lighting contributed to the accident by "not providing visual clues to recognize that the dance floor had terminated with the subject metal edging." ... .
>
> Given the conflicting expert affidavits, and the circumstances of the accident, there are triable issues of fact as to whether the beveled edges of the dance floor constituted a dangerous condition that caused the injured plaintiff to slip and fall ... . **Poliziani v Culinary Inst. of Am., 2018 NY Slip Op 08519, Second Dept 12-12-18**

NEGLIGENCE, EVIDENCE.

DEFENDANT PROPERTY MANAGER AND DEFENDANT OWNER DID NOT DEMONSTRATE A LACK OF CONSTRUCTIVE KNOWLEDGE OF THE ICE AND SNOW CONDITION WHERE PLAINTIFF FELL IN THIS STRIP MALL PARKING LOT SLIP AND FALL CASE, DEFENDANTS' MOTION FOR SUMMARY JUDGMENT FOR SUMMARY JUDGMENT (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendants' motion for summary judgment in this parking lot slip and fall case should not have been granted. The defendant Benderson managed the strip mall where the slip and fall occurred, and defendant Fitzgerald owned the property. The defendants did not demonstrate they did not have construction notice of the snow and ice condition:

> A defendant who moves for summary judgment in a slip-and-fall case has the initial burden of making a prima facie showing that it neither created the hazardous condition nor had actual or constructive notice of its existence for a sufficient length of time to discover and remedy it ... . This burden cannot be satisfied merely by pointing out gaps in the plaintiff's case, as the defendants did here... . The defendants failed to show what the accident site actually

looked like within a reasonable time after the cessation of the prior snowstorm and what the accident site actually looked like within a reasonable time prior to the incident. The defendants also failed to submit any meteorological data to show that the alleged ice condition that caused the plaintiff to fall was not the product of a prior storm. **Bronstein v Benderson Dev. Co., LLC, 2018 NY Slip Op 08625, Second Dept 12-19-18**

NEGLIGENCE, EVIDENCE.

ISSUE OF FACT WHETHER DRIVER WITH THE RIGHT OF WAY SHOULD HAVE SEEN THE CAR THAT WAS NOT SLOWING DOWN AS IT APPROACHED THE INTERSECTION, SUPREME COURT REVERSED, TWO-JUSTICE DISSENT (FOURTH DEPT).

The Fourth Department, over a two-justice dissent, determined Supreme Court should not have granted the Sile defendants' motion for summary judgment in this intersection traffic accident case. Matthew Sile had the right of way when his truck was broadsided by a car (driven by Buck) which failed to stop an the intersection. The majority held that the papers submitted by the Sile defendants raised an issue of fact whether Matthew Sile should have seen the Buck car which was not slowing down as it approached the intersection:

> Although plaintiffs do not dispute that Buck was negligent in violating the Vehicle and Traffic Law or that Matthew had the right-of-way as he proceeded straight through the intersection, it is well settled that " there may be more than one proximate cause of [a collision]' "... . Thus, in their motions, the Sile defendants had the initial burden of establishing as a matter of law either that Matthew was not negligent or that any negligence on his part was not a proximate cause of the accident... . We conclude in both appeals that the Sile defendants failed to meet that burden ... .
>
> Although "a driver who has the right[-]of[-]way is entitled to anticipate that [the drivers of] other vehicles will obey the traffic laws that require them to yield" ... , that driver nevertheless has a "duty to exercise reasonable care in proceeding through [an] intersection" ... , and "cannot blindly and wantonly enter an intersection"... . Here, by their own submissions, the Sile defendants raised a triable issue of fact whether Matthew met his "duty to see what should be seen and to exercise reasonable care under the circumstances to avoid an accident" ... . **Gilkerson v Buck, 2018 NY Slip Op 08782, Fourth Dept 12-21-18**

NEGLIGENCE, EVIDENCE, CIVIL PROCEDURE.

SUPREME COURT PROPERLY RELIED ON THE RESULTS OF A FRYE HEARING IN A PRIOR TRIAL TO ALLOW THE TESTIMONY OF A DEFENSE EXPERT (SECOND DEPT).

The Second Department determined Supreme Court properly relied upon the results of a Frye hearing involving the same expert (and judge) in a prior trial. The expert was allowed to testify plaintiff's injuries could not have been caused by the traffic accident. There was a defense verdict:

> "The long-recognized rule of Frye v United States . . . is that expert testimony based on scientific principles or procedures is admissible but only after a principle or procedure has gained general acceptance in its specified field" ... . "General acceptance can be demonstrated through scientific or legal writings, judicial opinions, or expert opinions other than that of the proffered expert" ... . Further, even if the proffered expert opinion is based upon accepted methods, it must satisfy "the admissibility question applied to all evidence—whether there is a proper foundation—to determine whether the accepted methods were appropriately employed in a particular case" ... .
>
> In this case, we agree with the Supreme Court's determination to permit the expert's testimony without first holding a hearing to determine its admissibility ... . "A court need not hold a Frye hearing where[, as in the case at bar,] it can rely upon previous rulings in other court proceedings as an aid in determining the admissibility of the proffered testimony" ... . Moreover, in this particular case, there was a proper foundation for the admission of the expert's opinion. **Shah v Rahman, 2018 NY Slip Op 08342, Second Dept 12-5-18**

NEGLIGENCE, EVIDENCE, CIVIL PROCEDURE.

ADVERSE INFERENCE JURY INSTRUCTION IS THE PROPER SANCTION FOR THE NEGLIGENT DESTRUCTION OF AN EMPLOYEE'S RECORDS IN THIS NEGLIGENT SUPERVISION ACTION AGAINST A RESPITE CARE FACILITY (SECOND DEPT).

The Second Department, reversing Supreme Court, determined an adverse inference jury instruction, not striking the answer, was the appropriate sanction in this negligent supervision case. Plaintiffs, coguardians of a blind and disabled adult (Nicholas), alleged negligent supervision and training of an employee (Escajadillo) of the respite care facility where Nicholas fractured his leg. Rosa's employment records had been negligently destroyed by the facility:

> Striking a pleading is a drastic sanction to impose in the absence of willful or contumacious conduct and, in order to impose such a sanction, the court " will consider the prejudice that resulted from the spoliation to determine whether such drastic relief is necessary as a matter of fundamental fairness'" ... . In contrast, where the moving party has not been deprived of the ability to establish his or her case or defense, a less severe sanction is appropriate ... . Where evidence has been found to have been negligently destroyed, adverse inference charges have been found to be appropriate ... .
>
> Here, because the plaintiffs asserted causes of action alleging negligent training and supervision, the defendants' knowledge of any prior wrongdoing by its employees and information concerning their training are issues central to the plaintiffs' causes of action, and the employees' personnel files would be critical in determining those issues ... . In support of their motion, the plaintiffs established that the defendants improperly failed to "suspend [their] routine document retention/destruction policy and put in place a litigation hold' to ensure the preservation of relevant documents'" ... , resulting in the negligent destruction of Escajadillo's personnel file. However, the plaintiffs did not demonstrate that they were deprived of the ability to establish their case. Accordingly, the drastic sanction of striking the defendants' answer is not appropriate ... , but the lesser sanction of directing that an adverse inference charge be given at trial with respect to Escajadillo's personnel file is warranted ... . **Squillacioti v Independent Group Home Living Program, Inc., 2018 NY Slip Op 08343, Second Dept 12-5-18**

Table of Contents

NEGLIGENCE, EVIDENCE, CIVIL PROCEDURE.

THERE WAS NO PROPER FOUNDATION FOR THE DEFENSE EXPERT'S TESTIMONY IN THIS TRAFFIC ACCIDENT CASE, DEFENSE VERDICT FINDING THAT PLAINTIFF DID NOT SUFFER A SERIOUS INJURY WAS NECESSARILY BASED ON THE DEFENSE EXPERT'S TESTIMONY, VERDICT WAS PROPERLY SET ASIDE (SECOND DEPT).

The Second Department determined plaintiff's motion to set aside the verdict in this traffic accident case was properly granted. Plaintiff had been granted summary judgment on liability and proceeded to trial on damages. Defendants' expert, McGowan, purported to analyze the forces involved in the collision and opined that the impact could not have caused plaintiff's injuries. The jury returned a verdict finding that plaintiff did not suffer a "serious injury:"

> ... [W]e agree with the Supreme Court's determination to grant the plaintiff's motion pursuant to CPLR 4404(a) to set aside the jury verdict on the issue of damages... . "An expert's opinion must be based on facts in the record or personally known to the witness'"... . Here, a proper foundation was lacking for the admission of McGowan's opinion ... . Among other things, McGowan failed to calculate the force exerted by all four vehicles, the crash test he utilized to determine the delta-v differed in several significant respects from the instant accident, and he reviewed simulations in which the weight of the dummies was not similar to that of the plaintiff. **Imran v R. Barany Monuments, Inc., 2018 NY Slip Op 08921, Second Dept 12-26-18**

NEGLIGENCE, EVIDENCE, CIVIL PROCEDURE, INSURANCE LAW, VEHICLE AND TRAFFIC LAW.

THE PRESUMPTION OF OWNERSHIP OF A VEHICLE CREATED BY THE CERTIFICATE OF TITLE CAN BE REBUTTED BY PROOF OF DOMINION AND CONTROL OVER THE VEHICLE, PLAINTIFF'S MOTION TO DISCOVER THE INSURER'S FILE IN THIS TRAFFIC ACCIDENT CASE TO DETERMINE WHETHER DEFENDANT EXERCISED DOMINION AND CONTROL OVER THE VEHICLE SHOULD NOT HAVE BEEN DENIED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined that evidence that defendant exercised dominion of control of the vehicle would rebut the presumption of ownership created by a certificate of title. Here the tile was in defendant's wife's name and she was driving at the time of the traffic accident. Plaintiff sought to discover the insurer's file pursuant to CPLR 3124. Supreme Court should have granted the motion:

> "A certificate of title is prima facie evidence of ownership" (... Vehicle and Traffic Law §§ 128, 2101[g]; 2108[c]...) . However, this presumption may be rebutted by evidence demonstrating that another individual owns the subject vehicle... . This may include evidence that a person other than the title holder exercised "dominion and control" over the vehicle ... .
>
> Here, documents from the insurer concerning the vehicle and the accident are material and relevant to the issue of whether the defendant exercised dominion and control over the vehicle ... . Accordingly, the Supreme Court should

have granted the plaintiff's motion to compel the defendant to provide an executed authorization for documents in the insurer's possession concerning the vehicle and the accident ... . **Portillo v Carlson, 2018 NY Slip Op 08520, Second Dept 12-12-18**

NEGLIGENCE, MEDICAL MALPRACTICE.

QUESTION OF FACT WHETHER FALL FROM BED WAS THE RESULT OF THE FAILURE TO TAKE ADEQUATE PRECAUTIONS AGAINST FALLING AND QUESTION OF FACT WHETHER THE FALL EXACERBATED THE PROGRESSION OF PLAINTIFF'S INTERCRANIAL HEMORRHAGE IN THIS MEDICAL MALPRACTICE ACTION, DEFENDANTS' SUMMARY JUDGMENT MOTION SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiffs raised a question of fact about whether defendants in this medical malpractice case deviated for accepted standards of care. Plaintiff Salgado, who was suffering from an intercranial hemorrhage, fell out of bed, which may have exacerbated the progression of the hemorrhage. There was a question of fact whether proper precautions to prevent a fall were taken, given that Salgado had no right hand grip or right arm or leg movement:

> ... [T]he plaintiffs raised triable issues of fact as to whether the defendants departed from accepted standards of practice by failing to prevent Salgado from falling out of bed and whether his injuries were exacerbated by his fall. More particularly, the plaintiffs submitted the affirmation of an expert who opined that the monitoring and precautions against falls implemented by the hospital in its Medical Intensive Care Unit departed from accepted standards of practice because, given the medical condition noted in Salgado's chart, i.e., "calm" and "lethargic" with no right hand grip or right arm or leg movement early the same day, Salgado's fall could not have occurred unless restraints were improperly applied. Furthermore, with respect to causation, the plaintiffs' expert opined that the increase in the size of Salgado's intercranial hemorrhage from the morning of the fall, accompanied by the new onset of midline shift, was too extensive and rapid in onset to be due solely to the natural progression of Salgado's original hemorrhage. **Salgado v North Shore Univ. Hosp., 2018 NY Slip Op 08967, Second Dept 12-26-18**

NEGLIGENCE, MEDICAL MALPRACTICE, CIVIL PROCEDURE.

A STENT WAS DELIBERATELY INSERTED IN PLAINTIFF DURING SURGERY IN 1993 AND WAS DISCOVERED AND REMOVED IN 2012, ALTHOUGH THE STENT SHOULD HAVE SUBSEQUENTLY BEEN REMOVED, BECAUSE IT WAS INSERTED INTENTIONALLY AND SERVED A SURGICAL PURPOSE IT WAS NOT A 'FOREIGN OBJECT,' THEREFORE THE DISCOVERY OF THE STENT IN 2012 DID NOT START THE STATUTE OF LIMITATIONS, COMPLAINT DISMISSED AS TIME-BARRED (SECOND DEPT).

The Second Department. reversing Supreme Court, determined that the medical malpractice action should have been dismissed as time-barred. Plaintiff alleged a ureteral stent/catheter was inserted during surgery in 1993 and was discovered and removed in 2012. If the stent were a "foreign object," the action would have been timely. But the stent was

deliberately inserted for a medical purpose, although it should have been removed after up to six months. Because the stent was purposely inserted, it was not a "foreign object:"

> ... [T]he plaintiff failed to raise a triable issue of fact as to whether the ureteral stent/catheter allegedly inserted in his body was a "foreign object" such that the discovery rule should apply. According to the parties' experts, a ureteral stent/catheter is a tube that bridges the kidney to the bladder, and is inserted and intentionally left in a patient for up to six months to assist in the draining of the kidney when the ureter is obstructed or when damage to the ureter was repaired and it is healing. The parties' experts agree that if a ureteral stent/catheter was inserted in the plaintiff's body during the 1993 procedure, then it was intentionally left in his body for the purpose of assisting in the draining of the kidney. Thus, the device was retained in the plaintiff's body (if inserted at all) for " postsurgery healing purposes'" and was not "analogous to tangible items" or "surgical paraphernalia," such as clamps, scalpels, sponges, and drains, "introduced into a patient's body solely to carry out or facilitate a surgical procedure"... . For these reasons, the ureteral catheter/stent was not a "foreign object," and the action should have been dismissed as time-barred ... . **Livsey v Nyack Hosp., 2018 NY Slip Op 08289, Second Dept 12-5-18**

NEGLIGENCE, MEDICAL MALPRACTICE, EVIDENCE.

EXPERTS MAY NOT RELY ON DISPUTED FACTS IN RENDERING AN OPINION IN A MEDICAL MALPRACTICE CASE (FOURTH DEPT).

The Fourth Department, modifying Supreme Court in this medical malpractice action, noted that experts cannot rely on disputed facts when rendering an opinion:

> Although defendants submitted affidavits from medical experts opining that the individual defendants did not deviate from the standard of care and that any alleged deviation was not a proximate cause of the postsurgery medical complications, those experts relied solely on the symptoms as documented in the medical records of [two of the defendants]. ... [T]hose symptoms are vastly different from the symptoms allegedly reported to the remaining defendants and demonstrated by plaintiff before the surgery. It is well settled that experts may not rely upon disputed facts when rendering an opinion ... . Moreover, we note that defendants' experts failed to address plaintiff's contention that, had he been timely diagnosed, he would not have been required to undergo the surgery in the first place. ... "By ignoring the [allegation that the remaining defendants' malpractice caused plaintiff to undergo the very surgery that caused the brain bleed], defendant[s'] expert[s] failed to tender[ ] sufficient evidence to demonstrate the absence of any material issues of fact' . . . as to proximate causation and, as a result, [the remaining] defendant[s] [were] not entitled to summary judgment" with respect to those parts of their respective motions and cross motions ... . **Kubera v Bartholomew, 2018 NY Slip Op 08784, Fourth Dept 12-21-18**

Table of Contents

NEGLIGENCE, MUNICIPAL LAW, CIVIL PROCEDURE.

PETITION TO AMEND A NOTICE OF CLAIM WAS UNTIMELY WITH RESPECT TO THE PARENTS' DERIVATIVE ACTION IN THIS PEDESTRIAN-VEHICLE TRAFFIC ACCIDENT CASE, THE PETITIONERS DID NOT SHOW THAT THE TOWN HAD TIMELY KNOWLEDGE OF THE ALLEGED INVOLVEMENT OF TOWN PERSONNEL, PETITION SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined that the petition for leave to amend the notice of claim against the town in this pedestrian-vehicle traffic accident case should not have been granted. The infant petitioner was struck by a car crossing a road. The proposed amendment would have alleged a town park ranger waved the family across just before the child was struck. Because the request to amend was made more than a year and 90 days after the accident, the request was untimely for the derivative action by the parents, but the statute of limitations was tolled for the infant petitioner. The Second Department went on to find that petitioners did not demonstrate the town had timely knowledge of the the allegation the family was waved across the street by a town employee, even though the allegation was memorialized in a Suffolk County police report:

> ... [T]he petitioners failed to establish that the Town acquired actual knowledge, within 90 days of the collision or a reasonable time thereafter, of the essential facts constituting the claim that the Town park ranger waved to the family to cross the highway. It is not alleged that the child was struck by a Town vehicle or a Town employee. In addition, Magwood's [mother's] testimony at her hearing held pursuant to General Municipal Law § 50-h did not indicate that a Town park ranger waved to the family to cross the highway. Although several witnesses to the collision gave a statement to the effect that the Town park ranger waved to the family to cross the highway, these statements were made to Suffolk County Police Department (hereinafter SCPD) personnel and memorialized in SCPD reports... . Further, while the Town park ranger prepared a Town Division of Enforcement and Security Public Safety report on the date of the collision, that report did not indicate that the Town park ranger waved to the family to cross the highway. " [F]or a report to provide actual knowledge of the essential facts, one must be able to readily infer from that report that a potentially actionable wrong had been committed by the public corporation'" ... . The Town park ranger's report did not support a ready inference that the Town committed a potentially actionable wrong ... .
>
> Moreover, the petitioners failed to demonstrate a reasonable excuse for the failure to serve a timely notice of claim asserting the theory that the Town park ranger waved to the family to cross the highway and for the subsequent delay in filing this petition... . Although the petitioners satisfied their initial burden of showing a lack of substantial prejudice to the Town as a result of the late notice, and the Town failed to make a "particularized showing" of substantial prejudice ... , the presence or absence of any one factor is not necessarily determinative in deciding whether permission to serve a late notice of claim should be granted ... . **Matter of Johnson v County of Suffolk, 2018 NY Slip Op 08482, Second Dept 12-12-18**

Table of Contents

NEGLIGENCE, MUNICIPAL LAW, EVIDENCE.

POLICE OFFICER SLIPPED AND FELL ON AN OUTSIDE STAIRWAY WHEN PATROLLING DEFENDANTS' PROPERTY, DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON THE NEGLIGENCE AND GENERAL MUNICIPAL LAW 205-a CAUSES OF ACTION SHOULD NOT HAVE BEEN GRANTED, PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT PROPERLY DENIED (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, determined that defendants' motion for summary judgment in this slip and fall case should not have been granted. Plaintiff police officer was patrolling defendants' property (at defendants' request) when he slipped and fell an on outside stairway. Both the negligence cause of action and the General Municipal Law 205-a cause of action presented questions of fact. The section 205-a cause of action was properly based upon an alleged violation of the Property Maintenance Code of New York State:

> The injured plaintiff's mere inability to identify the precise nature of the slippery substance upon which he alleges he fell "cannot be equated with" a failure to identify the cause of his fall ... . The defendants ... failed to establish, prima facie, that they lacked constructive notice of the alleged hazardous substance on the step ... , that the lighting for the area was adequate, and that the lack of a handrail on the steps was not a hazardous condition that may have been a proximate cause of the injuries ... .
>
> The defendants ... failed to demonstrate, prima facie, that Property Maintenance Code of New York State (2010) § 306.1, which requires a handrail on "[e]very exterior and interior flight of stairs having more than four risers," did not apply to the location where the injured plaintiff's accident occurred. ...
>
> ... [W]e agree with the Supreme Court that the plaintiffs were not entitled to summary judgment on the issue of liability ... . The plaintiffs failed to demonstrate, prima facie, the defendants' "neglect, omission, willful or culpable negligence" in violating Property Maintenance Code of New York State ... . Moreover, the plaintiffs failed to eliminate all material issues of fact regarding whether the alleged hazardous condition actually existed. Furthermore, to the extent that the cause of action is predicated upon a violation of Property Maintenance Code of New York State... , the plaintiffs' proffered evidence ... failed to establish, prima facie, that the injured plaintiff's accident resulted directly or indirectly from the absence of a handrail ... . **Stancarone v Sullivan, 2018 NY Slip Op 08344, Second Dept 12-5-18**

NEGLIGENCE, MUNICIPAL LAW, EVIDENCE.

PETITION TO DEEM A LATE NOTICE OF CLAIM TIMELY SERVED SHOULD NOT HAVE BEEN GRANTED, THE CITY'S KNOWLEDGE OF THE CROSSWALK DEFECT IN THIS SLIP AND FALL CASE IS NOT EQUIVALENT TO TIMELY KNOWLEDGE OF THE NATURE OF PLAINTIFF'S CLAIM (SECOND DEPT).

The Second Department, reversing Supreme Court, determined that plaintiff's petition to deem the late notice of claim timely served should not have been granted in this slip and fall case. Plaintiff alleged she tripped and fell over a defect in a crosswalk. The notice of claim was serve eight months after the fall. Photos of the defect were alleged to have been taken "shortly after" the fall but were not authenticated. An Internet map service apparently depicted the defects in 2013 and

2014. The court held that the fact that the city may have known of the defect does not mean the city had timely notice of the nature of plaintiff's claim:

> ... [W]e disagree with the Supreme Court's determination that the City acquired actual knowledge of the essential facts constituting the claim within 90 days of the accident or a reasonable time thereafter. While the photographs submitted in support of the petition may have demonstrated that the City had prior knowledge of the crosswalk defect, actual knowledge of the defect is not tantamount to actual knowledge of the facts constituting the claim, since the City was not aware of the petitioner's accident, her injuries, and the facts underlying her theory of liability... . Similarly, the service of the notice of claim approximately five months after the expiration of the 90-day statutory period for service did not provide the City with the requisite actual knowledge within a reasonable time ... .
>
> We also disagree with the Supreme Court's determination, based on the photographs submitted by the petitioner, that she sustained her burden of demonstrating that the City would not be substantially prejudiced by the late notice. The petitioner contended that the photographic evidence showed that the defective condition was substantially the same in appearance at the time of her accident as it was some eight months later when her petition was served. However, the photographs purportedly taken "shortly after" the accident were never authenticated ... , nor did the petitioner identify the actual date the photographs were taken or the person who took them. Moreover, the more recent photographs were taken at different angles than the earlier photos, and neither set of images contained any measurements or dimensions to support the conclusion that a comparison of the two sets of photographs established that the defect did not change in the interim ... . **Matter of Bermudez v City of New York, 2018 NY Slip Op 08477, Second Dept 12-12-18**

NEGLIGENCE, VEHICLE AND TRAFFIC LAW.

THE PARTY WITH THE RIGHT OF WAY ENTERING THE INTERSECTION WAS ENTITLED TO SUMMARY JUDGMENT AGAINST THE DRIVER MAKING A LEFT TURN, ALLEGATIONS THE PARTY WITH THE RIGHT OF WAY WAS SPEEDING DID NOT RAISE A QUESTION OF FACT BECAUSE THERE WAS NO EVIDENCE THE ACCIDENT COULD HAVE BEEN AVOIDED IF SPEEDING WAS NOT INVOLVED (SECOND DEPT).

The Second Department, reversing Supreme Court in this traffic accident case, determined that the driver who had the right of way entering an intersection. Aly, was entitled to summary judgment against the driver, Varela, who made a left turn into Aly's path. The deposition testimony that Aly was speeding did not raise an issue of fact because there was no evidence Aly could have avoided the accident if traveling at the speed limit. In an apparent reference to the emergency doctrine the court noted that Aly had only seconds to react and therefore could not be deemed comparatively negligent:

> The moving [ALY] defendants established their prima facie entitlement to judgment as a matter of law dismissing the complaint and all cross claims insofar as asserted against them by submitting, among other things, the deposition transcripts of the parties, as well as video surveillance footage of the accident, which demonstrated that the sole proximate cause of the accident was Varela's violation of Vehicle and Traffic Law § 1141 in making a left turn into the path of the oncoming Aly vehicle without yielding the right-of-way... . As the driver with the right-of-way, Aly was entitled to anticipate that Varela would obey the traffic laws which required him to yield ... . " Although a driver with a right-of-way also has a duty to use reasonable care to avoid a collision, . . . a driver with the right-of-way who has only seconds to react to a vehicle which has failed to yield is not comparatively negligent for failing to avoid the collision'" ... . Here, the moving defendants established that Aly had only seconds to react to the Varela vehicle, which failed to yield.

In opposition, the plaintiffs and the Varela defendants failed to raise a triable issue of fact as to whether any negligence on the part of Aly was a substantial factor in the happening of the accident. Under the circumstances, the plaintiffs' respective deposition testimony that Aly was speeding is "inconsequential inasmuch as the [plaintiffs] did not raise a triable issue as to whether [Aly] could have avoided the accident even if she had been traveling at or below the posted speed limit" ... . **Rohn v Aly, 2018 NY Slip Op 08966, Second Dept 12-26-18**

PRODUCTS LIABILITY

PRODUCTS LIABILITY, EVIDENCE.

THE OWNER OF THE DEFECTIVE LADDER WHICH CAUSED PLAINTIFF'S INJURY ALLEGED THE LADDER WAS PURCHASED AT A PARTICULAR HOME DEPOT STORE, IN THE FACE OF PROOF THE STORE DID NOT OPEN UNTIL YEARS AFTER THE ALLEGED PURCHASE, THE OWNER OF THE LADDER ALLEGED THE LADDER WAS EITHER PURCHASED AT A DIFFERENT TIME OR AT A DIFFERENT HOME DEPOT STORE, HOME DEPOT'S SUMMARY JUDGMENT MOTION SHOULD HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined Home Depot's motion for summary judgment should have been granted in this defective ladder products liability case. Defendant Garberg, the owner of the ladder, alleged he purchased the ladder at a specific Home Depot store between 1994 and 1995. Home Depot demonstrate the store in question did not open until 2001. Garberg then submitted an affidavit alleging he either bought ladder after the store opened or he bought the ladder at another Home Depot store (which was identified):

" [L]iability may not be imposed for . . . strict products liability upon a party that is [*2]outside the manufacturing, selling, or distribution chain'"... . Here, Home Depot established its prima facie entitlement to judgment as a matter of law by demonstrating that it was outside the manufacturing, selling, or distribution chain... . In opposition, the plaintiff failed to raise a triable issue of fact on this issue. Garberg's 2016 affidavit contained assertions made for the first time in opposition to the motion and merely raised feigned issues designed to avoid the consequences of Garberg's earlier affidavit. Garberg swore to the 2016 affidavit after he settled with the plaintiff, after the close of discovery, and after Home Depot submitted its conclusive proof establishing that he could not have purchased the defective ladder when and where he claimed he had. The 2016 affidavit speculated about a possible purchase at a different Home Depot location that, unlike the Cropsey Avenue location, the parties did not have the opportunity to explore during discovery. Garberg also contradicted his prior unambiguous assertion about the timing of his purchase. His 2016 opposition affidavit was, therefore, insufficient to defeat summary judgment ... . **Rooney v Garberg, 2018 NY Slip Op 08521, Second Dept 11-12-18**

Table of Contents

REAL PROPERTY LAW

REAL PROPERTY LAW, CIVIL PROCEDURE, JUDGES.

SUPREME COURT SHOULD NOT HAVE, SUA SPONTE, SEARCHED THE RECORD AND ISSUED A DECLARATORY JUDGMENT ALLOWING PLANTIFFS TO PAVE AN EASEMENT (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined Supreme Court should not have, sua sponte, searched the record and issued a declaratory judgment allowing plaintiffs to pave an easement and further should not have granted defendant's motion for summary judgment. Plaintiffs have an easement which allows access to their driveway. Plaintiffs alleged the easement needed to be paved because their vehicle would hit bottom crossing it:

> A party's right of passage over an easement carries with it the " right to maintain it in a reasonable condition for such use' "... . The right to repair and maintain an easement includes "the right to carry out work as necessary to reasonably permit the passage of vehicles and, in so doing, to not only remove impediments but supply deficiencies in order to construct [or repair] a suitable road' "... . The right to repair and maintain, however, is "limited to those actions necessary to effectuate the express purpose of [the] easement' " ... , and thus the work performed must not "materially increase the burden of the servient estate[] or impose new and additional burdens on the servient estate[]" ... . Relatedly, the servient landowner has a "corresponding right[] to have the natural condition of the terrain preserved, as nearly as possible' . . . and to insist that the easement enjoyed shall remain substantially as it was at the time it accrued, regardless of whether benefit or damage will result from a proposed change' " ... .
>
> Defendant contends on his appeal that the court erred in searching the record and entering a declaratory judgment in plaintiffs' favor. We agree. As an initial matter, although plaintiffs did not seek declaratory relief, the court has the authority to "grant any type of relief within its jurisdiction appropriate to the proof whether or not demanded, imposing such terms as may be just" (CPLR 3017 [a]...). We conclude, however, that the declaration was not appropriate given the evidence presented here. **Tarsel v Trombino, 2018 NY Slip Op 08779, Fourth Dept 12-21-18**

Table of Contents

REAL PROPERTY LAW, REAL PROPERTY ACTIONS AND PROCEEDINGS LAW, MUNICIPAL LAW, CIVIL PROCEDURE.

QUESTIONS OF FACT PRECLUDED SUMMARY JUDGMENT WITH RESPECT TO THE ADVERSE POSSESSION ACTION AND THE LACHES DEFENSE, THE ACTION INVOLVED LAND THAT WAS ONCE UNDER WATER CREATED BY THE MOVEMENT OF SAND DURING STORMS DECADES AGO (SECOND DEPT).

The Second Department, modifying Supreme Court, determined there were questions of fact in this adverse possession case concerning who owned the land and when the adverse possession began. The land in question was once under water and was created by the movement of sand decades ago:

> CPLR 212(a) provides that "[a]n action to recover real property or its possession cannot be commenced unless the plaintiff, or his [or her] predecessor in interest, was seized or possessed of the premises within ten years before the commencement of the action." However, the 10-year limitations period does not begin to run against a record owner of property until the occupiers of the property begin to adversely possess it (see RPAPL 311...).
>
> We disagree with the Supreme Court's determination that the defendants are entitled to summary judgment dismissing the complaint ... on the ground that the action was barred by the statute of limitations. Calculation of the date from which the statute of limitations began to run on the plaintiffs' causes of action requires a threshold determination as to whether the plaintiffs are the record owners of the disputed land, and secondly, whether, and if so, when, the defendants began to adversely possess the land... . The defendants failed to conclusively establish that the plaintiffs are not the record owners of the disputed land for the purposes of determining a date upon which the statute of limitations began to run ... .
>
> The defendants also failed to establish ... that they are entitled to judgment as a matter of law on their laches defense. "The essence of the equitable defense of laches is prejudicial delay in the assertion of rights" ... . "In order for laches to apply to the failure of an owner of real property to assert his or her interest, it must be shown that [the] plaintiff inexcusably failed to act when [he or] she knew, or should have known, that there was a problem with [his or] her title to the property. In other words, for there to be laches, there must be present elements to create an equitable estoppel'" ... .
>
> Here, although the defendants established that the plaintiffs did not commence the action until a lengthy period of time after the alleged avulsive acts had occurred, the defendants failed to eliminate issues of fact as to whether the plaintiffs' failure to act was excusable, whether the defendants were taking actions to adversely possess the disputed land, and whether and when the plaintiffs should reasonably have become aware of such alleged acts. **Strough v Incorporated Vil. of W. Hampton Dunes, 2018 NY Slip Op 08525, Second Dept 12-12-18**

Table of Contents

UNEMPLOYMENT INSURANCE

UNEMPLOYMENT INSURANCE.

DANCE INSTRUCTOR WAS AN EMPLOYEE OF THE FOUNDATION CHARTERED BY THE NYS BOARD OF REGENTS TO SET UP ARTISTIC PROGRAMS IN SCHOOLS (THIRD DEPT).

The Third Department determined the claimant, a dance instructor, was an employee of the foundation which was chartered by the New York State Board of Regents to provide artistic programs in schools. Claimant was therefore entitled to unemployment insurance benefits:

> The evidence adduced at the hearing established that the Foundation retained control over important aspects of claimant's and other teaching artists' services. To that end, the Foundation solicited and worked with schools to establish an appropriate artistic program to meet their needs and budget, screened the artists, matched their skills and experience to the schools' needs and set the artists' rate of pay, which was less than the Foundation received by contract from the Department, and helps artists work in the academic settings. The Foundation paid the artists directly, upon receipt of weekly invoices provided by the Foundation and completed by the artist documenting hours worked, provided guidelines for them to follow and monitored their progress and hours to stay within the schools' budgets and program plans. The Foundation fielded and attempted to resolve complaints from schools regarding artists' conduct or performance and found replacements when needed, and its officers attended the final performances and held evaluation meetings at the end with school personnel and the artists. **Matter of Pearson (Commissioner of Labor), 2018 NY Slip Op 08588, Third Dept 12-13-18**

UNEMPLOYMENT INSURANCE.

NEWSPAPER CARRIER WAS AN EMPLOYEE ENTITLED TO UNEMPLOYMENT INSURANCE BENEFITS (THIRD DEPT).

The Third Department determined claimant, who delivered newspapers to residential customers, was an employee of Gannett Satellite Information Network:

> ... [W]e find that the indicators of control contained in Gannett Satellite's contract with claimant are practically the same as the relevant factors previously identified to establish an employer-employee relationship; accordingly, we find that substantial evidence supports the Board's decisions (see Matter of Smith [Gannett Satellite Info. Network, Inc.-Commissioner of Labor], ___ AD3d ___, ___, 85 NYS3d 796, 797 [2018]; Matter of Race [Gannett Satellite Info. Network, Inc.-Commissioner of Labor], 128 AD3d 1130, 1130 [2015]; Matter of Gager [Gannett Satellite Info. Network, Inc.-Commissioner of Labor, 127 AD3d 1348, 1348-1349 [2015]; Matter of Hunter [Gannett Co., Inc.-Commissioner of Labor], 125 AD3d 1166, 1167-1168 [2015]; Matter of Armison [Gannett Co., Inc.-Commissioner of Labor], 122 AD3d 1101, 1102-1103 [2014], lv dismissed 24 NY3d 1209 [2015]). **Matter of Nicholas (Commissioner of Labor), 2018 NY Slip Op 08589, Third Dept 12-13-18**

Table of Contents

UNEMPLOYMENT INSURANCE.

CLAIMANT, WHO HAD BEEN INJURED, DID NOT DEMONSTRATE SHE WAS ABLE TO WORK DURING THE TIME SHE WAS CERTIFIED FOR BENEFITS, UNEMPLOYMENT INSURANCE APPEALS BOARD RULING SHE WAS ENTITLED TO BENEFITS REVERSED (THIRD DEPT).

The Third Department, reversing the Unemployment Insurance Appeals Board, determined claimant was not entitled to unemployment insurance benefits because she had been injured and did not demonstrate she was able to work during the relevant period of time:

> The substantial and unrefuted medical documentation in the record, together with claimant's receipt of workers' compensation benefits, establishes that claimant was unable to perform any job duties required of her during the time period in which she certified for benefits ... . In addition, inasmuch as the essential job functions required of her included the performance of various physical tasks, including the manual operation of a school bus door three times in a certain amount of time, we are unpersuaded by claimant's contention that, at the time she applied for benefits and during the time period in question, no accommodation was made for her injury... . Moreover, although claimant testified that she previously worked as a waitress and that she was capable of performing such work while she recovered from her injury, claimant's testimony does not reflect that she sought, or was available for, this type of employment at any point during the time period in which she certified for benefits ... . In view of the foregoing, we conclude that the record does not contain substantial evidence to support the Board's finding that claimant was ready, willing and able to work in her employment as a school bus driver or in any other type of employment for which she is reasonably fitted by training and experience during the time period in which she certified for benefits ... . **Matter of Ormanian (Commissioner of Labor), 2018 NY Slip Op 08592, Third Dept 12-13-18**

WORKERS' COMPENSATION LAW

WORKERS' COMPENSATION, APPEALS.

THE WORKERS' COMPENSATION BOARD DID NOT PROVIDE AN EXPLANATION FOR DISQUALIFYING CLAIMANT FROM FUTURE WAGE REPLACEMENT BENEFITS, MATTER REMITTED SO THAT ASPECT OF THE PENALTY CAN BE REVIEWED ON APPEAL (THIRD DEPT).

The Third Department, remitting the matter to the Workers' Compensation Board, determined the Board must provide some explanation of the discretionary sanction against claimant disqualifying him from future benefits. The Board had found that claimant misrepresented his physical condition, based upon video surveillance evidence. The Third Department

held there was sufficient evidence to support the Board's finding on the misrepresentation claim before it, but an explanation for prohibiting future claims was required before that aspect of the penalty could be reviewed on appeal:

> Claimant also challenges the Board's imposition of the discretionary sanction disqualifying him from receiving future wage replacement benefits. By not providing any reason for its imposition of this discretionary penalty, the Board failed to satisfy its obligation to "provide some basis for appellate review" ... . Accordingly, the matter must be remitted so that the Board can fulfill its obligation and "provide some explanation for its determination in this regard" ... . **Matter of Papadakis v Fresh Meadow Power NE LLC, 2018 NY Slip Op 08728, Third Dept 12-29-18**

WORKERS' COMPENSATION, EVIDENCE.

THE OPINION EVIDENCE THAT CLAIMANT'S PRE-EXISTING HEART CONDITION WAS A HINDRANCE TO HER EMPLOYABILITY WAS INSUFFICIENT, THE WORKERS' COMPENSATION CARRIER, THEREFORE, WAS NOT ENTITLED TO REIMBURSEMENT FROM THE SPECIAL DISABILITY FUND (THIRD DEPT).

The Third Department, reversing the Workers' Compensation Board, determined the evidence did not support the finding that the claimant's pre-existing conditions posed a hindrance to her employability. Therefore the carrier was not entitled to reimbursement from the Special Disability Fund:

> Claimant, a licensed practical nurse, established a claim for a work-related injury to her right knee stemming from a September 3, 2004 accident that occurred while she was dispensing medication to patients. * * *
>
> We find that the carrier failed to prove that claimant's preexisting conditions hindered or were likely to hinder her employability. Although Moriarty, an orthopedist, did offer an opinion based upon a records review that claimant's heart conditions could pose a hindrance to employability, the opinion was based upon generalities and speculation, and did not rationally support the conclusion that claimant's present disability was "'materially and substantially greater than what would have arisen from the [2004] work-related injury by itself'" ... . Moriarty did not examine or interview claimant, and the record does not reflect that claimant was subject to any restrictions or that any of her preexisting conditions hindered her job performance or ability to work... . In addition, as noted in Moriarty's addendum, claimant's aortic insufficiency from a heart valve condition was controlled by medication, and "preexisting conditions that are controlled by medication have been found, without more, not to constitute a hindrance to employability" ... . In view of the lack of evidence that claimant's preexisting conditions hindered or were likely to hinder her employability, we find that the Board's decision is not supported by substantial evidence and, therefore, it must be reversed ... . **Matter of Ricci v Maria Regina Residence, 2018 NY Slip Op 08980, Third Dept 12-27-18**

Table of Contents

ZONING

ZONING, LAND USE, ENVIRONMENTAL LAW, CIVIL PROCEDURE.

FOUR MONTH STATUTE OF LIMITATIONS APPLIED TO THE DECISION BY THE PLANNING BOARD THAT NO ENVIRONMENTAL IMPACT STATEMENT WAS NECESSARY, PETITION TO ANNUL THAT DECISION WAS UNTIMELY (SECOND DEPT).

The Second Department determined the four-month statute of limitations applied to the planning board's decision that an environmental impact statement was not necessary and the petition to annul that decision was untimely:

> To the extent that the petition alleges the Planning Board's noncompliance with SEQRA [State Environmental Quality Review Act], the four-month statute of limitations applies (see CPLR 217[1]...). An action taken by an agency pursuant to SEQRA may be challenged only when such action is final (see CPLR 7801[1]). An agency action is final when the decision-maker arrives at a " definitive position on the issue that inflicts an actual, concrete injury'" ... . The position taken by an agency is not definitive and the injury is not actual or concrete if the injury purportedly inflicted by the agency could be prevented, significantly ameliorated, or rendered moot by further administrative action or by steps available to the complaining party ... . Here, the statute of limitations began to run with the issuance of the negative declaration for the project on February 19, 2015, as this constituted the Planning Board's final act under SEQRA and, accordingly, any challenge to the negative declaration had to be commenced within four months of that date ... . **Matter of Stengel v Town of Poughkeepsie Planning Bd., 2018 NY Slip Op 08488, Second Dept 12-12-18**

Table of Contents

COURT OF APPEALS

CRIMINAL LAW

CRIMINAL LAW.

COUNTY COURT SHOULD NOT HAVE IMPANELED AN ANONYMOUS JURY (CT APP).

The Court of Appeals affirmed the appellate division, holding that County Court should not have empaneled an anonymous jury:

> The trial court committed reversible error by empaneling an anonymous jury. Assuming that trial courts may, under certain circumstances, anonymize jurors, here County Court acted without any factual predicate for the extraordinary procedure. Indeed, the trial court expressly based its decision to empanel an anonymous jury on anecdotal accounts from jurors in unrelated cases and, then, exacerbated the error by taking "no steps to lessen the potential prejudice" to defendants ... . **People v Flores, 2018 NY Slip Op 08540, CtApp 12-13-18**

CRIMINAL LAW, APPEALS.

WHETHER A JUVENILE'S STATEMENT TO THE POLICE WAS VOLUNTARILY GIVEN PRESENTED A MIXED QUESTION OF LAW AND FACT WHICH IS NOT REVIEWABLE BY THE COURT OF APPEALS, TWO DISSENTERS ARGUED JUVENILES SHOULD NOT BE INTERROGATED OUTSIDE THE PRESENCE OF THEIR ADULT LEGAL GUARDIANS (CT APP).

The Court of Appeals, over a two-judge dissent, determined the finding that a juvenile's statement to police was voluntarily given presented a mixed question of law fact which is not reviewable by the Court of Appeals. The dissenters argued juveniles should not be interrogated outside the presence of their adult guardians. **Matter of Luis P., 2018 NY Slip Op 08427, CtApp 12-11-18**

Table of Contents

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

ALTHOUGH DEFENDANT WAS REQUIRED TO REGISTER AS A SEX OFFENDER IN VIRGINIA, THERE WAS NO SEX-RELATED ELEMENT IN THE VIRGINIA OFFENSE, DEFENDANT NEED NOT REGISTER AS A SEX OFFENDER IN NEW YORK (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Feinman, over a three-judge dissenting opinion, determined that defendant need not register as a sex offender in New York based upon a murder conviction in Virginia, even though Virginia law required such registration. There was no sex-related element in the offense. Defendant, in 1989, at age 19, murdered his half-sister because she was harassing him. At the time, he said he was "hearing voices telling him to kill people:"

> Blind deference to another jurisdiction's registry without asking, fundamentally, whether that jurisdiction considers its own registrant a sex offender would contravene the plain and limiting language of section 168-a (2) (d) (ii) and could subject an entire class of defendants with no relation to SORA's purpose to its strict requirements. * * *
>
> In concluding that SORA does not require defendant's registration because Virginia does not consider defendant a sex offender, we reserve weightier issues of a foreign registry's potential conflict with New York's due process guarantees or public policy for another day. ...
>
> ... Our holding today merely requires a court or the Board to determine—not based on "intuition," but rather on the offense of conviction and its relation to the foreign registry statute—whether the out-of-state defendant is considered a sex offender before requiring registration under SORA. ...
>
> Defendant's out-of-state felony conviction did not require him to "register as a sex offender" in Virginia under Correction Law § 168-a (2) (d) (ii) and, thus, he should not be required to register as a sex offender in New York. **People v Diaz, 2018 NY Slip Op 08424, CtApp 12-11-18**

CRIMINAL LAW, EVIDENCE.

THE MURDER COUNT, WHICH SHOULD HAVE BEEN DISMISSED BECAUSE THE PEOPLE DID NOT SEEK PERMISSION TO RESUBMIT IT AFTER THE GRAND JURY DEADLOCKED ON THE CHARGE, DID NOT TAINT THE CONVICTION ON THE MANSLAUGHTER COUNT UNDER A SPILL-OVER ANALYSIS (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Fahey, over a concurring opinion, reversing the appellate division, determined the murder count in the second indictment should have been dismissed because the People did not seek court permission to re-present it after the grand jury which issued the first indictment deadlocked on that charge. But the court further held the murder count, on which defendant was acquitted, did not taint the manslaughter conviction under a spill-over analysis. The manslaughter count was a valid count in the first indictment (both indictments were tried together);

> The People's failure to obtain court permission to resubmit a murder count to a new grand jury after the first grand jury deadlocked on that charge violated Criminal Procedure Law § 190.75 (3), and Supreme Court erred in denying defendant's pretrial motion to dismiss the murder count in the second indictment on that ground. * * *
>
> Under the particular circumstances of this case, we conclude that defendant is not entitled to a new trial on the manslaughter count. The People assert that all of the evidence admitted to prove defendant's guilt of murder in the second degree was also admissible to prove his guilt of manslaughter in the first degree, and defendant does not contend otherwise. ... [T]he presence of the tainted murder count here did not result in the admission of any prejudicial evidence that the jury would have been unable to consider if the murder count had been dismissed ... . **People v Allen, 2018 NY Slip Op 08537, CtApp 12-13-18**

CRIMINAL LAW, VEHICLE AND TRAFFIC LAW.

A SENTENCING COURT MAY REQUIRE A DEFENDANT, AS A CONDITION OF PROBATION, TO PAY FOR ELECTRONIC MONITORING, IF A DEFENDANT CLAIMS AN INABILITY TO PAY, A HEARING MUST BE HELD TO DETERMINE WHETHER ANOTHER ALTERNATIVE TO INCARCERATION IS APPROPRIATE AND, IF NOT, THE DEFENDANT MAY BE SENTENCED TO PRISON (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Feinman, over a dissenting opinion, determined that the sentencing court, as a condition of probation, may require a defendant to pay for a Secure Continuous Remote Alcohol Monitoring (SCRAM) bracelet. Defendant, who had pled guilty to felony driving while intoxicated, made several monthly payments for the bracelet but then stopped paying and the monitoring company removed the bracelet. County Court then sentenced defendant to prison. The Third Department held that the sentence was illegal because the court cannot require a defendant to pay the cost of electronic monitoring:

> Were we to hold that any monetary component of a condition that must be borne by a defendant per se invalidated said condition, sentencing courts would be divested of their broad authority to impose a myriad of probationary requirements, and consequently, would, in many instances, no longer view release into the community as a viable alternative to incarceration. In light of this, the requirement that defendant wear and pay for a SCRAM bracelet was well within County Court's statutory authority under Penal Law § 65.10 (4).
>
> This is not to say that requiring a defendant to wear and pay for an electronic monitoring device will always be reasonable. Courts cannot impose a condition of probation that includes costs a particular defendant cannot feasibly meet. Nor can courts incarcerate a defendant who has initially agreed to meet a condition requiring a payment, but who subsequently becomes unable to do so. * * *
>
> ... [I]f, at the imposition of the sentence or during the course of probation, a defendant asserts that they are unable to meet the financial obligations attendant to a certain condition, the sentencing court must hold a hearing on the matter ... . The defendant must be given the opportunity to be heard in person, present witnesses, and offer documentary evidence establishing that they made sufficient bona fide efforts to pay ... . If, after such inquiry, the sentencing court determines that the defendant has adequately demonstrated an inability to pay the costs associated with a particular condition despite bona fide efforts to do so, the court must attempt to fashion a reasonable alternative to incarceration ... . Conversely, if the sentencing court determines, by a preponderance of the evidence ... , that "a probationer has willfully refused to pay . . . when [that defendant] can pay, the [court] is

justified in revoking probation and using imprisonment as an appropriate penalty for the offense" ... . **People v Hakes, 2018 NY Slip Op 08538, CtApp 12-13-18**

FREEDOM OF INFORMATION LAW (FOIL)

FREEDOM OF INFORMATION LAW (FOIL).

RECORDS OF DISCIPLINARY PROCEEDINGS CONCERNING A POLICE OFFICER ARE EXEMPT FROM DISCLOSURE EVEN IF THE IDENTIFYING INFORMATION IS REDACTED (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Garcia, affirming the appellate division, over a concurring opinion and two dissenting opinions, determined that the records of New York Police Department disciplinary proceedings concerning a police officer are exempt from disclosure, even if the identifying information in the records is redacted:

> The FOIL exemption at issue, Public Officers Law § 87 (2) (a), provides that an agency may deny access to records that "are specifically exempted from disclosure by state or federal statute." The parties agree that the disciplinary decisions requested by the NYCLU are covered by a state statute: Civil Rights Law § 50-a. * * *
>
> "There can be no question" that Civil Rights Law § 50-a permits court-ordered disclosure "only in the context of an ongoing litigation" ... . Absent officer consent, protected personnel records are shielded from disclosure "except when a legitimate need for them has been demonstrated to obtain a court order" based on a "showing that they are actually relevant to an issue in a pending proceeding" ... . Here, in the context of the NYCLU's FOIL request, the requested records are not "relevant and material" to any pending litigation ... , and accordingly, they are not disclosable. * * *
>
> This case presents a straightforward application of Civil Rights Law § 50-a and Public Officers Law § 87 (2) (a), which mandate confidentiality and supply no authority to compel redacted disclosure. To the extent the dissent would prefer to revoke civil rights protections afforded to police officers (Civil Rights Law § 50-a), victims of sex crimes (Civil Rights Law § 50-b), medical patients (Public Health Law § 2803-c [3] [f]), or others, those arguments are properly directed to the Legislature. **Matter of New York Civ. Liberties Union v New York City Police Dept., 2018 NY Slip Op 08423, CtApp 12-13-18**

Table of Contents

REAL PROPERTY TAX LAW (RPTL)

REAL PROPERTY TAX LAW (RPTL).

LARGE CELLULAR DATA TRANSMISSION EQUIPMENT OWNED BY T-MOBILE IS TAXABLE REAL PROPERTY SUBJECT TO REAL PROPERTY TAX LAW 102 (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge DiFiore, determined that certain large cellular data transmission equipment owned by T-Moblle is taxable real property subject to Real Property Tax Law (RPTL) 102 (12) (i):

> T-Mobile owns large cellular data transmission equipment that it has installed on the exterior of buildings in Mount Vernon. The installations — which are large enough to require the use of "stealth walls" that shield them from view — consist of multiple pieces of interconnected equipment, including base transceiver stations (essentially cabinets housing wiring and providing battery power); antennas that transmit and receive the signals; and coaxial, T-1, and fiber optic cables running amongst the other components. T-Mobile enters multi-year leases with the owners of the buildings to enable it to occupy the exterior space on the buildings for installation of the equipment. * * *
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> Under the RPTL, all "real property within the state" is subject to real property taxation unless otherwise exempt by law (see RPTL 300). "Real property" is defined under subdivision (12) of RPTL 102. Under RPTL 102(12)(i), that term includes: "When owned by other than a telephone company as such term is defined in paragraph (d) hereof, all lines, wires, poles, supports and inclosures for electrical conductors upon, above and underground used in connection with the transmission or switching of electromagnetic voice, video and data signals between different entities separated by air, street or other public domain . . . ." ... .
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> The plain language of paragraph i encompasses each component of T-Mobile's data transmission equipment, which consists of base transceiver stations; antennas; and coaxial, T-1, and fiber optic cables. The base transceiver stations are essentially cabinets that house cables and other electrical components and provide battery power, so they qualify as "inclosures for electrical conductors." The large rectangular antennas are part of the base transceiver stations and, thus, also "inclosures for electrical conductors." The various cables in the installations are "lines" and/or "wires" under the plain text of the statute. Because the primary function of the equipment installations is to transmit cellular data, the components are "used in connection with the transmission or switching of electromagnetic voice, video and data signals between different entities separated by air, street or other public domain," as required by the statute. Thus, although ambiguities in tax statutes are generally resolved in favor of the taxpayer (... , that doctrine is not implicated here because the plain text of RPTL 102(12)(i) unambiguously indicates that T-Mobile's equipment installations are taxable real property. **Matter of T-Mobile Northeast, LLC v DeBellis, 2018 NY Slip Op 08539, CtApp 12-13-18**

Table of Contents

WORKERS' COMPENSATION

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TIME LIMITS ON ADDITIONAL COMPENSATION FOR A PERMANENT PARTIAL DISABILITY INCLUDED IN WCL 15 (3) (w) APPLY TO THE CALCULATION OF THE AMOUNT OF THE BENEFITS IN WCL 15 (3) (v) (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge DiFiore, over a dissenting opinion, determined the durational limits for compensation pursuant to Workers' Compensation Law (WCL) 15 (3) (w) (paragraph w) are incorporated into WCL 15 (3) (v) (paragraph v). Therefore the claimant was entitled to compensation for permanent partial disability (50 % loss of use of his left arm) only for the 275 weeks allowed by paragraph w:

> ... [N]othing in the language of paragraph v regarding termination of additional compensation upon eligibility for age-based social security benefits contradicts paragraph w's durational restrictions or precludes their application to paragraph v recipients. By incorporating the entirety of paragraph w's framework for calculating benefits, paragraph v provides additional compensation lasting a maximum number of weeks as a supplement to the schedule award the worker already received. Paragraph v's requirement that such payment terminates if the worker becomes eligible for age-based social security payments (regardless of how many weeks have passed) merely places another limit, where applicable, on the additional compensation a claimant can receive. ...
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> .. [N]either of the primary benefits that section 15(3) provides are open-ended. Both schedule loss of use awards and non-schedule benefits continue for a maximum number of weeks, depending on the nature or severity of the worker's disability. Interpreting paragraph v to grant a subset of recipients open-ended benefits limited only by eligibility for age-based social security payments — an award that would potentially span their working lifetimes — would uniquely benefit that small group above all other permanent partial disability award recipients. There is no textual support for such an exceptional interpretation. Rather, under the plain language of paragraph v, additional compensation awards are calculated pursuant to the formula and durational provisions of paragraph w, terminating earlier if or when a claimant becomes eligible for age-based social security benefits. **Matter of Mancini v Office of Children & Family Servs., 2018 NY Slip Op 08425, CtApp 12-11-18**