NEW YORK APPELLATE DIGEST, LLC

Bruce F. Freeman, Esq., Editor

Email: NewYorkAppellateDigest@gmail.com

Phone: 585 645 8902

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

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Major Categories Addressed In The Digest This Month:

Appellate Division: Administrative Law, Arbitration, Attorneys, Civil Procedure, Cooperatives, Contract Law, Corporation Law, Criminal Law, Debtor-Creditor, Defamation, Disciplinary Hearing, Education-School Law, Employment Law, Environmental Law, Family Law, Foreclosure, Fraud, Insurance Law, Labor Law-Construction Law, Landlord-Tenant, Mental Hygiene Law, Municipal Law, Negligence, Products Liability, Real Estate, Real Property Law, Tax Law, Trusts And Estates, Unemployment Insurance, Workers' Compensation Law, Zoning.

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The Third Department, reversing Supreme Court, determined the NYS Comptroller had the power to issue a subpoena for patients' billing records as part of an audit of a health services provider paid under the state's Empire Plan. Neither the CPLR, which governs the confidentiality of medical records sought in discovery as part of litigation, nor the Health Insurance Portability and Accountability Act (HIPAA), precluded the Comptroller from accessing the billing records:

> We find that, contrary to petitioner's claims and the holding of Supreme Court, the subpoena was validly issued in furtherance of [the Comptroller's] constitutional and statutory authority and obligation to audit payments made by the state for medical services provided under the Empire Plan ... . In Matter of Martin H. Handler, M.D., P.C. v DiNapoli (23 NY3d at 242-243, 245-248) ... the Court of Appeals outlined ... the obligations of participating and

nonparticipating health care providers with regard to billing patients, and [the Comptroller's] independent authority and obligation to audit the state's payments to both categories of providers. As the Court of Appeals outlined, respondent is constitutionally obligated to audit state payments to health insurance vendors ... .

The plain language of CPLR 3122 (a) (1) and (2), read together, makes clear that the provisions apply to subpoenas issued during the discovery phase of litigation, and are not applicable to the subpoena issued by [the Comptroller] here pursuant to its authority under State Finance Law § 9 ... .

... HIPAA's privacy regulations provide that "[a] covered entity may disclose protected health information to a health oversight agency for oversight activities authorized by law, including audits; civil, administrative, or criminal investigations; . . . criminal proceedings or actions; or other activities necessary for appropriate oversight of . . . [e]ntities subject to government regulatory programs for which health information is necessary for determining compliance with program standards," without the written authorization of the patient ... . **Matter of The Plastic Surgery Group, P.C. v Comptroller of The State of New York, 2017 NY Slip Op 08247, Third Dept 11-22-17**

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The First Department, in a full-fledged opinion by Justice Gesmer, over a two-justice dissent, determined the NYC Landmarks Preservation Commission's (LPC's) decision to allow the electrification of a landmark nineteenth century clocktower (similar in structure to Big Ben) was based upon an error of law and was irrational. The clocktower had been sold to a private party which planned to convert it to a residence. The LPC found, in effect, that the commission did not have authority over the now privately-owned clocktower:

We hold that the LPC has authority under the Landmarks Law to regulate the clock mechanism for two reasons.

First, this result effectuates the statutory purposes. The Landmarks Law, New York City's first historic preservation statute, * * * declares that "the protection, enhancement, perpetuation and use of improvements . . . of special character or special historical or aesthetic interest or value is a public necessity and is required in the interest of the health, prosperity, safety and welfare of the people" (Landmarks Law § 25-301[b]). ... * * *

Second, the Landmarks Law defines the term "interior architectural feature" to include the "components of an interior, including, but not limited to . . . the type and style of all . . . fixtures appurtenant to such interior" (Landmarks Law § 25-302[l]). **Matter of Save America's Clocks, Inc. v City of New York, 2017 NY Slip Op 08457, First Dept 11-30-17**

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The Third Department determined the arbitrator's ruling in this employment matter violated public policy because the ruling, which dismissed the charges and imposed no penalty, acknowledged that petitioner had violated the Public Officers Law by sharing confidential information with her husband. Petitioner was employed by respondent Department of Corrections and Community Supervision (hereinafter DOCCS) ... . Petitioner was suspended without pay for allegedly releasing confidential information to her husband, who had recently been released from prison on parole supervision in connection with his rape conviction. The decision too detailed to be fairly summarized here. It provides a comprehensive overview of the court's role and powers in reviewing an arbitrator's findings and is well worth reading carefully:

Section 33.5 (f) (4) of the CBA [collective bargaining agreement] prohibits arbitrators from adding new requirements to the provisions of the agreement. The arbitrator exceeded his power by adding a requirement to the CBA regarding what proof could be considered [in making an interim award] and by refusing to consider hearing evidence submitted by DOCCS to determine whether probable cause existed for petitioner's suspension [without pay pending a hearing]. Therefore, the interim decision and award by the arbitrator was improper. * * *

... [T]he CBA could be read to require proof of every aspect of a particular charge before finding an employee guilty thereof, so we should not set aside the arbitrator's conclusions on the ground that they are based on that interpretation ... . DOCCS could have specified separate charges for each time petitioner accessed, and for each time she shared, confidential information. Instead, DOCCS proffered a single charge that petitioner accessed confidential information at least 14 times when she had no job-related reason to do so and shared that information with her husband at least eight times. Having found that DOCCS failed to establish that petitioner engaged in all of the conduct contained in the notice of discipline's single charge, the arbitrator found her not guilty and imposed no penalty. As courts may not review an arbitrator's findings of fact or law, even if the arbitrator made errors ... , as long as the CBA was reasonably susceptible of the interpretation given to it by the arbitrator, Supreme Court erred in determining that the arbitrator exceeded his power. ...

Although the arbitrator concluded that DOCCS failed to establish the charge as set forth in the notice of discipline, he factually determined that petitioner improperly accessed a confidential database 14 times, and at least one time she shared DOCCS's confidential information with a parolee. These factual findings, which we must accept... , establish that petitioner violated Public Officers Law § 74 (3) (c). ... [T]he relief granted in the arbitrator's award — dismissal of the charges, with no penalty or repercussions for her misconduct, and reinstating her to the position in which she would continue to have access to confidential information — violated public policy, requiring vacatur of that award... . **Matter of Virginia Livermore-johnson, 2017 NY Slip Op 08239, Third Dept 11-22-17**

ATTORNEYS

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The Third Department affirmed most of Supreme Court's rulings on the disclosure of documents in a billing dispute, including a report from a consultant, finding that the documents were not protected by privileges for attorney-client communications, attorney work-product, or material prepared for litigation. The criteria for all were described:

> ... [T]he report "does not include any legal advice, legal analysis or discussion of legal issues" nor does it disclose confidences of defendant, and ,,, it is not a communication "of a legal character" ... . * * *Thus, the report was not protected by the attorney-client privilege.
>
> ...[T]he report was not protected from disclosure as attorney work product, as this "privilege should be narrowly applied to materials prepared by an attorney, acting as an attorney, which contain his [or her] analysis and trial strategy" ... .
>
> Materials such as reports prepared by a third party, a nonlawyer consultant, during an investigation do not ordinarily qualify under this exception ... . * * *
>
> With regard to the claim that the report was protected from disclosure as material prepared for litigation, defendant's "burden was to demonstrate that [the report] was obtained solely for litigation purposes" ... , which "cannot be satisfied with wholly conclusory allegations"... . "[M]ixed or multipurpose reports are not free from disclosure" ... . **NYAHSA Servs., Inc., Self-Insurance Trust v People Care Inc., 2017 NY Slip Op 07909, Third Dept 11-9-17**

CIVIL PROCEDURE

CIVIL PROCEDURE (HOLOCAUST EXPROPRIATED ART RECOVERY ACT CONTROLS THE APPLICABLE STATUTE OF LIMITATIONS IN AN ACTION SEEKING RECOVERY OF A PAINTING CONFISCATED DURING THE GERMAN OCCUPATION OF FRANCE (FIRST DEPT))/HOLOCAUST EXPROPRIATED ART RECOVERY ACT (STATUTE OF LIMITATIONS, HOLOCAUST EXPROPRIATED ART RECOVERY ACT CONTROLS THE APPLICABLE STATUTE OF LIMITATIONS IN AN ACTION SEEKING RECOVERY OF A PAINTING CONFISCATED DURING THE GERMAN OCCUPATION OF FRANCE (FIRST DEPT))/STATUTE OF LIMITATIONS (HOLOCAUST EXPROPRIATED ART RECOVERY ACT CONTROLS THE APPLICABLE STATUTE OF LIMITATIONS IN AN ACTION SEEKING RECOVERY OF A PAINTING CONFISCATED DURING THE GERMAN OCCUPATION OF FRANCE (FIRST DEPT))/PAINTINGS (HOLOCAUST EXPROPRIATED ART RECOVERY ACT CONTROLS THE APPLICABLE STATUTE OF LIMITATIONS IN AN ACTION SEEKING RECOVERY OF A PAINTING CONFISCATED DURING THE GERMAN OCCUPATION OF FRANCE (FIRST DEPT))

CIVIL PROCEDURE.

HOLOCAUST EXPROPRIATED ART RECOVERY ACT CONTROLS THE APPLICABLE STATUTE OF LIMITATIONS IN AN ACTION SEEKING RECOVERY OF A PAINTING CONFISCATED DURING THE GERMAN OCCUPATION OF FRANCE (FIRST DEPT).

The First Department determined the Holocaust Expropriated Art Recovery Act of 2016 (HEAR) controlled an action in New York making a claim to a painting that was confiscated during the German occupation of France in 1944. Under HEAR the action was timely commenced:

> HEAR supplants the statute of limitations provisions otherwise applicable to civil claims such as these (see Pub L 114-308, § 5[a]). Under HEAR, the applicable statute of limitations is six years from the date of "actual discovery" of "the identity and location of the artwork" and "a possessory interest of the claimant in the artwork" (id.). We reject defendants' argument that HEAR can be displaced by a choice-of-law analysis.
>
> Under section 5(c) of HEAR, for purposes of starting the running of the six-year statute of limitations provided by section 5(a), a preexisting claim covered by HEAR is "deemed to have been actually discovered on the date of enactment of [HEAR]." However, section 5(c) is made subject to the exception provided in section 5(e), which, as here relevant, provides that HEAR does not save a preexisting claim that was "barred on the day before the date of enactment of [HEAR] by a Federal or State statute of limitations" where "not less than 6 years have passed from the date [the] claimant . . . acquired such knowledge and during which time the civil claim or cause of action was not barred by a Federal or State statute of limitations." Accordingly, to establish that HEAR does not save the subject claim, defendants were required to show that [plaintiff] discovered the claim on or before December 15, 2010 (six years before the day before the date of HEAR's enactment). This they have failed to do. **Maestracci v Helly Nahmad Gallery, Inc., 2017 NY Slip Op 07676, First Dept 11-2-17**

CIVIL PROCEDURE (SUPREME COURT SHOULD NOT HAVE STAYED THE ENFORCEMENT OF PLAINTIFFS' JUDGMENT PURSUANT TO CPLR 5240 BASED ON COUNTERCLAIMS ASSERTED BY DEFENDANTS, ACTION ON THE COUNTERCLAIMS COULD PROCEED DESPITE ENFORCEMENT OF THE JUDGMENT (SECOND DEPT))/JUDGMENT, STAY OF ENFORCEMENT (SUPREME COURT SHOULD NOT HAVE STAYED THE ENFORCEMENT OF PLAINTIFFS' JUDGMENT PURSUANT TO CPLR 5240 BASED ON COUNTERCLAIMS ASSERTED BY DEFENDANTS, ACTION ON THE COUNTERCLAIMS COULD PROCEED DESPITE ENFORCEMENT OF THE JUDGMENT (SECOND DEPT))/CPLR 5240 (STAY OF ENFORCEMENT OF JUDGMENT, SUPREME COURT SHOULD NOT HAVE STAYED THE ENFORCEMENT OF PLAINTIFFS' JUDGMENT PURSUANT TO CPLR 5240 BASED ON COUNTERCLAIMS ASSERTED BY DEFENDANTS, ACTION ON THE COUNTERCLAIMS COULD PROCEED DESPITE ENFORCEMENT OF THE JUDGMENT (SECOND DEPT))/STAY OF ENFORCEMENT OF JUDGMENT (SUPREME COURT SHOULD NOT HAVE STAYED THE ENFORCEMENT OF PLAINTIFFS' JUDGMENT PURSUANT TO CPLR 5240 BASED ON COUNTERCLAIMS ASSERTED BY DEFENDANTS, ACTION ON THE COUNTERCLAIMS COULD PROCEED DESPITE ENFORCEMENT OF THE JUDGMENT (SECOND DEPT))

CIVIL PROCEDURE.

SUPREME COURT SHOULD NOT HAVE STAYED THE ENFORCEMENT OF PLAINTIFFS' JUDGMENT PURSUANT TO CPLR 5240 BASED ON COUNTERCLAIMS ASSERTED BY DEFENDANTS, ACTION ON THE COUNTERCLAIMS COULD PROCEED DESPITE ENFORCEMENT OF THE JUDGMENT (SECOND DEPT).

The Second Department, in a "summary judgment in lieu of complaint" action on a note, determined Supreme Court should not have stayed the enforcement of a judgment because defendants had asserted counterclaims. The counterclaims could proceed despite enforcement of the judgment:

> The Supreme Court erred in, upon renewal and reargument, staying enforcement of a judgment in favor of the plaintiffs. Pursuant to CPLR 5240, a court may, on its own initiative or on motion, stay the enforcement of a judgment. The purpose of this "broad discretionary power" is to permit the trial court to " prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the court'" ... . Here, that the defendants remain free to assert their counterclaims against the plaintiffs in a separate action does not preclude enforcement of the judgment in favor of the plaintiffs and against the defendants. The defendants proffered no evidence that permitting the plaintiffs to enforce the judgment would cause unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice. **Castle Restoration & Constr., Inc. v Castle Restoration, LLC, 2017 NY Slip Op 07703, Second Dept 11-8-17**

CIVIL PROCEDURE (STATUTE OF LIMITATIONS, AFFIRMATIVE DEFENSE WHICH ARISES FROM THE ACTION BROUGHT IS NOT TIME-BARRED (SECOND DEPT))/AFFIRMATIVE DEFENSES (STATUTE OF LIMITATIONS, AFFIRMATIVE DEFENSE WHICH ARISES FROM THE ACTION BROUGHT IS NOT TIME-BARRED (SECOND DEPT))/STATUTE OF LIMITATIONS (AFFIRMATIVE DEFENSE WHICH ARISES FROM THE ACTION BROUGHT IS NOT TIME-BARRED (SECOND DEPT))/CPLR 203 (d) (STATUTE OF LIMITATIONS, AFFIRMATIVE DEFENSE WHICH ARISES FROM THE ACTION BROUGHT IS NOT TIME-BARRED (SECOND DEPT))

CIVIL PROCEDURE.

AFFIRMATIVE DEFENSE WHICH ARISES FROM THE ACTION BROUGHT IS NOT TIME-BARRED (SECOND DEPT).

The Second Department determined an affirmative defense was not time-barred. Plaintiffs alleged a local law was not properly enacted and was therefore invalid. Defendants asserted in their answer that the law was properly enacted a valid as an affirmative defense:

> ... [T]he Supreme Court erred when it, in effect, dismissed the defendants' affirmative defense. "[T]he statute of limitations governs the commencement of an action, not the assertion of a defense" (... see CPLR 201, 217). If a defense "arose from the transactions, occurrences, or series of transactions or occurrences, upon which a claim asserted in the complaint depends, it is not barred to the extent of the demand in the complaint notwithstanding that it was barred at the time the claims asserted in the complaint were interposed" (CPLR 203[d] ...) . * * *
>
> ... [T]he defendants' answer does not seek any affirmative relief. Rather, it raises a defense that is "predicated on [an] act or fact growing out of the matter constituting the cause or ground of the action brought" by the plaintiffs ... . In other words, the assertion that the Local Law was not validly enacted in accordance with the applicable referendum procedures specified in state and local law "arises from, and directly relates to" the plaintiffs' claim that the Local Law was, in fact, enacted in accordance with the applicable referendum procedures and that they were therefore entitled to a declaration that the Local Law was valid ... . Accordingly, the court erred when it, in effect, dismissed the affirmative defense contained in the defendants' answer alleging that the Local Law was not validly enacted on the ground that the affirmative defense was time-barred (see CPLR 203[d]). Since the merits of the defendants' affirmative defense were not reached by the court, it should not have awarded judgment in favor of the plaintiffs. **Matter of Jenkins v Astorino, 2017 NY Slip Op 07730, Second Dept 11-8-17**

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CIVIL PROCEDURE.

DUE DILIGENCE STANDARD FOR SERVICE OF PROCESS PURSUANT TO CPLR 308 (4) WAS MET (SECOND DEPT).

The Second Department determined Supreme Court should not have dismissed the complaint in this foreclosure action on the ground that efforts to serve the defendant were inadequate pursuant to CPLR 308 (4). The Second Department found the efforts to serve defendant met the due diligence standard:

> Here, the affidavit of the process server demonstrated that three visits were made to the homeowner's residence, each on different days and at different times of the day. The process server also described in detail his unsuccessful attempt to obtain an employment address for the homeowner, including interviewing a neighbor. Under these circumstances, the Supreme Court improperly concluded that the due diligence requirement was not satisfied ... . **U.S. Bank, N.A. v Cepeda, 2017 NY Slip Op 07767, Second Dept 11-8-17**

CIVIL PROCEDURE (LAW OF THE CASE, TRIAL COURT VIOLATED THE LAW OF THE CASE DOCTRINE, PRIOR RULING BY THE COMMERCIAL DIVISION BECAME THE LAW OF THE CASE (SECOND DEPT))/LAW OF THE CASE (LAW OF THE CASE, TRIAL COURT VIOLATED THE LAW OF THE CASE DOCTRINE, PRIOR RULING BY THE COMMERCIAL DIVISION BECAME THE LAW OF THE CASE (SECOND DEPT))

CIVIL PROCEDURE.

TRIAL COURT VIOLATED THE LAW OF THE CASE DOCTRINE, PRIOR RULING BY THE COMMERCIAL DIVISION BECAME THE LAW OF THE CASE (SECOND DEPT).

The First Department determined the law of the case doctrine prohibited the trial court, a court of coordinate jurisdiction, from deviating from a prior ruling in the commercial division. The commercial division had ruled the plaintiff restaurant's exhaust system violated the NYC Mechanical Code:

> The "law of the case doctrine is designed to eliminate the inefficiency and disorder that would follow if courts of coordinate jurisdiction were free to overrule one another in an ongoing case" ... . Here, the trial court was prohibited from finding that plaintiff's commercial kitchen exhaust system did not violate the Mechanical Code. The trial court adopted the earlier finding ... when it held that [the] orders were the "law of the case," and limited the issue at trial ... . **Glaze Teriyaki, LLC v MacArthur Props. I, LLC, 2017 NY Slip Op 07770, First Dept 11-9-17**

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CIVIL PROCEDURE.

MOTION TO AMEND PLEADINGS NO LONGER REQUIRES A SHOWING OF THE MERIT OF THE PROPOSED AMENDMENT, THIRD DEPARTMENT JOINS THE OTHER THREE DEPARTMENTS (THIRD DEPT).

The Third Department, in a full-fledged opinion by Justice Mulvey, following the other three departments, determined that a motion to amend the pleadings no longer requires a demonstration of the merit of the proposed amendment:

> We have previously adhered to a rule requiring the proponent of a motion for leave to amend a pleading to make a "sufficient evidentiary showing to support the proposed claim" ... , that is, to make an "evidentiary showing that the proposed amendments have merit" ... . However, we are persuaded to depart from that line of authority and follow the lead of the other three Departments, and we now hold that "[n]o evidentiary showing of merit is required under CPLR 3025 (b)" ... . Thus, the rule on a motion for leave to amend a pleading is that the movant need not establish the merits of the proposed amendment and, "[i]n the absence of prejudice or surprise resulting directly from the delay in seeking leave, such applications are to be freely granted unless the proposed amendment is palpably insufficient or patently devoid of merit"... . The rationale for adopting this rule is that the liberal standard for leave to amend that was adopted by the drafters of the CPLR is inconsistent with requiring an evidentiary showing of merit on such a motion. "If the opposing party [on a motion to amend] wishes to test the merits of the proposed added cause of action or defense, that party may later move for summary judgment [or to dismiss] upon a proper showing" ... . **NYAHSA Servs., Inc., Self-Insurance Trust v People Care Inc., 2017 NY Slip Op 07918, Third Dept 11-9-17**

CIVIL PROCEDURE (RETURN DATE, FAILURE TO INCLUDE RETURN DATE IN A NOTICE OF PETITION IS NO LONGER A JURISDICTIONAL DEFECT, HERE THERE WAS ACTUAL NOTICE AND NO PREJUDICE (FOURTH DEPT))/PETITION, NOTICE OF (RETURN DATE, FAILURE TO INCLUDE RETURN DATE IN A NOTICE OF PETITION IS NO LONGER A JURISDICTIONAL DEFECT, HERE THERE WAS ACTUAL NOTICE AND NO PREJUDICE (FOURTH DEPT))/RETURN DATE (NOTICE OF PETITION, FAILURE TO INCLUDE RETURN DATE IN A NOTICE OF PETITION IS NO LONGER A JURISDICTIONAL DEFECT, HERE THERE WAS ACTUAL NOTICE AND NO PREJUDICE (FOURTH DEPT))/CPLR 403 (a) (RETURN DATE, FAILURE TO INCLUDE RETURN DATE IN A NOTICE OF PETITION IS NO LONGER A JURISDICTIONAL DEFECT, HERE THERE WAS ACTUAL NOTICE AND NO PREJUDICE (FOURTH DEPT))/CPLR 2001 (RETURN DATE, FAILURE TO INCLUDE RETURN DATE IN A NOTICE OF PETITION IS NO LONGER A JURISDICTIONAL DEFECT, HERE THERE WAS ACTUAL NOTICE AND NO PREJUDICE (FOURTH DEPT))

CIVIL PROCEDURE.

FAILURE TO INCLUDE RETURN DATE IN A NOTICE OF PETITION IS NO LONGER A JURISDICTIONAL DEFECT, HERE THERE WAS ACTUAL NOTICE AND NO PREJUDICE (FOURTH DEPT).

The Fourth Department noted that the failure to include a return date in a notice of petition is no longer a jurisdictional defect and can be overlooked where notice was actually provided:

> A "notice of petition shall specify the time and place of the hearing on the petition" (CPLR 403 [a]). The omission of a return date in a notice of petition does not, however, deprive a court of personal jurisdiction over the respondent ... . Indeed, such a technical defect is properly disregarded under CPLR 2001 so long as the respondent had adequate notice of the proceeding and was not prejudiced by the omission... .
>
> Here, it is undisputed that respondent had ample notice of the proceeding from its inception. Moreover, respondent has not identified any prejudice from the omitted return dates. The technical defects in the notices of petition should therefore be disregarded under CPLR 2001 ... . **Matter of Bender v Lancaster Cent. Sch. Dist., 2017 NY Slip Op 07853, Fourth Dept 11-9-17**

CIVIL PROCEDURE (WHERE A NOTE OF ISSUE HAS BEEN FILED BUT IS SUBSEQUENTLY IS VACATED, THE ACTION IS NOT SUBJECT TO DISMISSAL AS ABANDONED PURSUANT TO CPLR 3404 (FOURTH DEPT))/CPLR 3403 (WHERE A NOTE OF ISSUE HAS BEEN FILED BUT IS SUBSEQUENTLY IS VACATED, THE ACTION IS NOT SUBJECT TO DISMISSAL AS ABANDONED PURSUANT TO CPLR 3404 (FOURTH DEPT))/NOTE OF ISSUE (WHERE A NOTE OF ISSUE HAS BEEN FILED BUT IS SUBSEQUENTLY IS VACATED, THE ACTION IS NOT SUBJECT TO DISMISSAL AS ABANDONED PURSUANT TO CPLR 3404 (FOURTH DEPT))/ABANDONMENT (CPLR 3404, WHERE A NOTE OF ISSUE HAS BEEN FILED BUT IS SUBSEQUENTLY IS VACATED, THE ACTION IS NOT SUBJECT TO DISMISSAL AS ABANDONED PURSUANT TO CPLR 3404 (FOURTH DEPT))

CIVIL PROCEDURE.

WHERE A NOTE OF ISSUE HAS BEEN FILED BUT IS SUBSEQUENTLY VACATED, THE ACTION IS NOT SUBJECT TO DISMISSAL AS ABANDONED PURSUANT TO CPLR 3404 (FOURTH DEPT).

The Fourth Department, in a full-fledged opinion by Justice NeMoyer, determined that CPLR 3404, which deems an action abandoned if not restored within a year of being marked off or struck from the calendar, does not apply to cases where a note of issue was filed but subsequently was vacated. The First and Second Department adhere to this view, the Third Department does not:

> In accordance with the tenor and spirit of our existing case law, we now explicitly adopt the First and Second Departments' rule, and reject the Third Department's. It is axiomatic that CPLR 3404 has no applicability in the absence of an extant and valid note of issue ... , and we agree with the Second Department that "[t]he vacatur of a note of issue . . . returns the case to pre-note of issue status [and] does not constitute a marking off' or striking the case from the court's calendar within the meaning of CPLR 3404" ... . To state the obvious, a note of issue does not survive its own vacatur, and it makes no sense to apply CPLR 3404 when the statute's operative premise—i.e., the continuing vitality of the note of issue—no longer exists. **Bradley v Konakanchi, 2017 NY Slip Op 08125, Fourth Dept 11-17-17**

CIVIL PROCEDURE (NEGLECT TO PROSECUTE, WHERE ISSUE WAS NEVER JOINED, ACTION CANNOT BE DISMISSED FOR NEGLECT TO PROSECUTE PURSUANT TO CPLR 3216 (SECOND DEPT))/NEGLECT TO PROSECUTE (CPLR 3216, WHERE ISSUE WAS NEVER JOINED, ACTION CANNOT BE DISMISSED FOR NEGLECT TO PROSECUTE PURSUANT TO CPLR 3216 (SECOND DEPT))/CPLR 3216 (NEGLECT TO PROSECUTE, WHERE ISSUE WAS NEVER JOINED, ACTION CANNOT BE DISMISSED FOR NEGLECT TO PROSECUTE PURSUANT TO CPLR 3216 (SECOND DEPT))

CIVIL PROCEDURE.

WHERE ISSUE WAS NEVER JOINED, ACTION CANNOT BE DISMISSED FOR NEGLECT TO PROSECUTE PURSUANT TO CPLR 3216 (SECOND DEPT).

The Second Department determined, where issue has never been joined, that action cannot be dismissed for neglect to prosecute pursuant to CPLR 3216:

> Courts are prohibited from dismissing an action pursuant to CPLR 3216 based on neglect to prosecute unless the statutory preconditions to dismissal are met... . Specifically, issue must have been joined; at least one year must have elapsed since joinder of issue; the defendant or the court must have served on the plaintiff a written demand

to serve and file a note of issue within 90 days; and plaintiff must have failed to serve and file a note of issue within the 90-day period ... .

Here, the initial statutory precondition was not met, as none of the defendants served an answer and, therefore, there was no joinder of issue ... . **Deutsche Bank Natl. Trust Co. v Augustin, 2017 NY Slip Op 07973, Second Dept 11-15-17**

CIVIL PROCEDURE (MOTION TO CHANGE VENUE BROUGHT IN WRONG COUNTY SHOULD NOT HAVE BEEN ENTERTAINED (THIRD DEPT))/VENUE (CIVIL PROCEDURE, MOTION TO CHANGE VENUE BROUGHT IN WRONG COUNTY SHOULD NOT HAVE BEEN ENTERTAINED (THIRD DEPT))/CPLR 510 (MOTION TO CHANGE VENUE BROUGHT IN WRONG COUNTY SHOULD NOT HAVE BEEN ENTERTAINED (THIRD DEPT))/VENUE (CIVIL PROCEDURE, MOTION TO CHANGE VENUE BROUGHT IN WRONG COUNTY SHOULD NOT HAVE BEEN ENTERTAINED (THIRD DEPT))

CIVIL PROCEDURE.

MOTION TO CHANGE VENUE BROUGHT IN WRONG COUNTY SHOULD NOT HAVE BEEN ENTERTAINED (THIRD DEPT).

The Third Department, reversing Supreme Court, determine the motion to change venue was not brought in any county allowed by the statute and should not have been granted:

It is well-settled that a motion to change venue on a discretionary ground, such as the convenience of material witnesses pursuant to CPLR 510 (3), "must be made in the county in which the action is pending, or in any county in that judicial district, or in any adjoining county"... . Here, it is undisputed that the action is pending in Kings County and that Sullivan County is not in the same judicial district as Kings County nor is it an adjoining county. In light of this, we find that defendants failed to bring their motion in a proper county and, thus, Supreme Court should not have entertained the motion ... . **Minenko v Swinging Bridge Camp Grounds of N.Y., Inc., 2017 NY Slip Op 08245, Third Dept 11-22-17**

CIVIL PROCEDURE (LAW OF THE CASE, DISCOVERY, PRIOR APPELLATE DECISION VACATING AN ORDER CONCERNING A COUNTERCLAIM WAS THE LAW OF THE CASE, NOT A PRIOR SUPREME COURT RULING ON THE COUNTERCLAIM, ACCOUNTANT REPORT PREPARED FOR LITIGATION NOT DISCOVERABLE (FOURTH DEPT))/APPEALS (CIVIL PROCEDURE, LAW OF THE CASE, PRIOR APPELLATE DECISION VACATING AN ORDER CONCERNING A COUNTERCLAIM WAS THE LAW OF THE CASE, NOT A PRIOR SUPREME COURT RULING ON THE COUNTERCLAIM, ACCOUNTANT REPORT PREPARED FOR LITIGATION NOT DISCOVERABLE (FOURTH DEPT))/PRIVILEGE (MATERIAL PREPARED FOR LITIGATION, PRIOR APPELLATE DECISION VACATING AN ORDER CONCERNING A COUNTERCLAIM WAS THE LAW OF THE CASE, NOT A PRIOR SUPREME COURT RULING ON THE COUNTERCLAIM, ACCOUNTANT REPORT PREPARED FOR LITIGATION NOT DISCOVERABLE (FOURTH DEPT))/ACCOUNTANTS (PRIVILEGE, REPORT PREPARED FOR LITIGATION, PRIOR APPELLATE DECISION VACATING AN ORDER CONCERNING A COUNTERCLAIM WAS THE LAW OF THE CASE, NOT A PRIOR SUPREME COURT RULING ON THE COUNTERCLAIM, ACCOUNTANT REPORT PREPARED FOR LITIGATION NOT DISCOVERABLE (FOURTH DEPT))/LAW OF THE CASE (CIVIL PROCEDURE, PRIOR APPELLATE DECISION VACATING AN ORDER CONCERNING A COUNTERCLAIM WAS THE LAW OF THE CASE, NOT A PRIOR SUPREME COURT RULING ON THE COUNTERCLAIM, ACCOUNTANT REPORT PREPARED FOR LITIGATION NOT DISCOVERABLE (FOURTH DEPT))

CIVIL PROCEDURE, APPEALS, PRIVILEGE.

PRIOR APPELLATE DECISION VACATING AN ORDER CONCERNING A COUNTERCLAIM WAS THE LAW OF THE CASE, NOT A PRIOR SUPREME COURT RULING ON THE COUNTERCLAIM, ACCOUNTANT REPORT PREPARED FOR LITIGATION NOT DISCOVERABLE (FOURTH DEPT).

The Fourth Department, modifying Supreme Court, determined the decision vacating an order concerning a counterclaim in a prior appeal was the law of the case, despite the "otherwise affirmed" phrase in the decision, and Supreme Court should not have adhered to a prior ruling on the counterclaim in Supreme Court. The Fourth Department further held that Supreme Court properly found a report prepared by an accountant was prepared in anticipation of litigation and was not discoverable as a "mixed file:"

> "An appellate court's resolution of an issue on a prior appeal constitutes the law of the case and is binding on . . . Supreme Court, as well as on the appellate court . . . [T]he "law of the case" operates to foreclose re-examination of [the] question absent a showing of subsequent evidence or change of law' "... . Nevertheless, "where a court has vacated an earlier order, the doctrine of . . . law of the case no longer applies . . . Indeed, a vacated judgment has no preclusive force either as a matter of collateral or direct estoppel or as a matter of the law of the case' "... . While this Court may have "otherwise affirmed" the order insofar as it concerned the issues unrelated to the counterclaim, we dismissed the appeal from that part of the order concerning the counterclaim and vacated the judgment. That necessarily means that any determinations related to the counterclaim were not encompassed by the "otherwise affirmed" language related to the order ... . **Micro-Link, LLC v Town of Amherst, 2017 NY Slip Op 08120, Fourth Dept 11-17-17**

CIVIL PROCEDURE (SUMMARY JUDGMENT ENTERING A RENEWAL JUDGMENT PROPERLY GRANTED, CRITERIA EXPLAINED (SECOND DEPT))/DEBTOR-CREDITOR (RENEWAL JUDGMENT, SUMMARY JUDGMENT ENTERING A RENEWAL JUDGMENT PROPERLY GRANTED, CRITERIA EXPLAINED (SECOND DEPT))/RENEWAL JUDGMENT (SUMMARY JUDGMENT ENTERING A RENEWAL JUDGMENT PROPERLY GRANTED, CRITERIA EXPLAINED (SECOND DEPT))/CPLR 5014 (1) (RENEWAL JUDGMENT, SUMMARY JUDGMENT ENTERING A RENEWAL JUDGMENT PROPERLY GRANTED, CRITERIA EXPLAINED (SECOND DEPT))

CIVIL PROCEDURE, DEBTOR-CREDITOR.

SUMMARY JUDGMENT ENTERING A RENEWAL JUDGMENT PROPERLY GRANTED, CRITERIA EXPLAINED (SECOND DEPT).

In finding plaintiff was properly granted summary judgment in this action for entry of a renewal judgment the court explained the criteria:

> The Supreme Court properly granted the plaintiff's motion for summary judgment and entered a renewal judgment pursuant to CPLR 5014(1). The plaintiff established its prima facie entitlement to a renewal judgment as a matter of law by showing: (1) the existence of the original judgment; (2) that the defendant was the judgment debtor; (3) that the original judgment was docketed at least nine years prior to the commencement of this action; and (4) that the original judgment remains partially or completely unsatisfied ... . **Jones Morrison, LLP v Schloss, 2017 NY Slip Op 07712, Second Dept 11-8-17**

CIVIL PROCEDURE (STATUTES, APPLICATION OUT-OF-STATE, NEW YORK LABOR LAW WORK-PAY REQUIREMENTS DO NOT APPLY TO WORK DONE OUT-OF-STATE (FIRST DEPT))/EMPLOYMENT LAW (STATUTES, APPLICATION OUT-OF-STATE, NEW YORK LABOR LAW WORK-PAY REQUIREMENTS DO NOT APPLY TO WORK DONE OUT-OF-STATE (FIRST DEPT))/LABOR LAW (STATUTES, APPLICATION OUT-OF-STATE, NEW YORK LABOR LAW WORK-PAY REQUIREMENTS DO NOT APPLY TO WORK DONE OUT-OF-STATE (FIRST DEPT))/JURISDICTION (LABOR LAW STATUTES, APPLICATION OUT-OF-STATE, NEW YORK LABOR LAW WORK-PAY REQUIREMENTS DO NOT APPLY TO WORK DONE OUT-OF-STATE (FIRST DEPT))/STATUTES (JURISDICTION, LABOR LAW, NEW YORK LABOR LAW WORK-PAY REQUIREMENTS DO NOT APPLY TO WORK DONE OUT-OF-STATE (FIRST DEPT))/EMPLOYMENT LAW (STATUTES, APPLICATION OUT-OF-STATE, NEW YORK LABOR LAW WORK-PAY REQUIREMENTS DO NOT APPLY TO WORK DONE OUT-OF-STATE (FIRST DEPT))

CIVIL PROCEDURE, EMPLOYMENT LAW.

NEW YORK LABOR LAW WORK-PAY REQUIREMENTS DO NOT APPLY TO WORK DONE OUT-OF-STATE (FIRST DEPT).

The First Department determined New York Labor Law worker-pay requirements do not apply to work done outside the state:

> Under New York Law, it is a "settled rule of statutory interpretation, that unless expressly stated otherwise, no legislation is presumed to be intended to operate outside the territorial jurisdiction of the state enacting it" ... .
>
> Article 6 of the New York Labor Law, which contains the unlawful deductions, notice, and record keeping provisions which plaintiffs claim were violated, contains no indication that the provisions were intended to apply when the work in question is performed outside the state. Article 19 of the New York Labor Law, which contains the minimum

wage, overtime, and spread of hours provisions identified in the complaint, includes a "Statement of Public Policy" which states, in relevant part: "There are persons employed in some occupations in the state of New York at wages insufficient to provide adequate maintenance for themselves and their families.... Employment of persons at these insufficient rates of pay threatens the health and well-being of the people of this state and injures the overall economy" (Labor Law § 650).

Since these statutes do not expressly apply on an extraterritorial basis, plaintiffs' claims under these provisions, based on labor performed exclusively outside New York, do not state a cause of action under Article 6 or Article 19 of the New York Labor Law ... . **Rodriguez v KGA Inc., 2017 NY Slip Op 07948, First Dept 11-14-17**

CIVIL PROCEDURE (ABANDONMENT, BANK MOVED FOR AN ORDER OF REFERENCE WITHIN ONE YEAR OF DEFAULT IN THIS FORECLOSURE ACTION, THE ACTION SHOULD NOT HAVE BEEN DISMISSED AS ABANDONED (SECOND DEPT))/ABANDONMENT (CIVIL PROCEDURE, BANK MOVED FOR AN ORDER OF REFERENCE WITHIN ONE YEAR OF DEFAULT IN THIS FORECLOSURE ACTION, THE ACTION SHOULD NOT HAVE BEEN DISMISSED AS ABANDONED (SECOND DEPT))/FORECLOSURE (CIVIL PROCEDURE, (ABANDONMENT, BANK MOVED FOR AN ORDER OF REFERENCE WITHIN ONE YEAR OF DEFAULT IN THIS FORECLOSURE ACTION, THE ACTION SHOULD NOT HAVE BEEN DISMISSED AS ABANDONED (SECOND DEPT))/CPLR 3215 (c) (ABANDONMENT, BANK MOVED FOR AN ORDER OF REFERENCE WITHIN ONE YEAR OF DEFAULT IN THIS FORECLOSURE ACTION, THE ACTION SHOULD NOT HAVE BEEN DISMISSED AS ABANDONED (SECOND DEPT))/DEFAULT JUDGMENT (ABANDONMENT, BANK MOVED FOR AN ORDER OF REFERENCE WITHIN ONE YEAR OF DEFAULT IN THIS FORECLOSURE ACTION, THE ACTION SHOULD NOT HAVE BEEN DISMISSED AS ABANDONED (SECOND DEPT))

CIVIL PROCEDURE, FORECLOSURE.

BANK MOVED FOR AN ORDER OF REFERENCE WITHIN ONE YEAR OF DEFAULT IN THIS FORECLOSURE ACTION, THE ACTION SHOULD NOT HAVE BEEN DISMISSED AS ABANDONED (SECOND DEPT).

The Second Department determined Supreme Court should not have dismissed this foreclosure action as abandoned because the bank moved for an order of reference within one year of the default:

CPLR 3215(c) provides that "[i]f the plaintiff fails to take proceedings for the entry of judgment within one year after [a] default, the court shall not enter judgment but shall dismiss the complaint as abandoned, without costs, upon its own initiative or on motion, unless sufficient cause is shown why the complaint should not be dismissed." However, "[i]t is not necessary for a plaintiff to actually obtain a default judgment within one year of the default in order to avoid dismissal pursuant to CPLR 3215(c)" ... . Rather, it is enough that the plaintiff timely takes "the preliminary step toward obtaining a default judgment of foreclosure and sale by moving for an order of reference" to establish that it "initiated proceedings for entry of a judgment within one year of the default" for the purpose of satisfying CPLR 3215(c) ... . "[A]s long as proceedings are being taken, and these proceedings manifest an intent not to abandon the case but to seek a judgment, the case should not be subject to dismissal" ... . This is so even where, as here, a timely motion for an order of reference is subsequently withdrawn ... .

Here, the plaintiff took the preliminary step toward obtaining a default judgment of foreclosure and sale by moving for an order of reference (see RPAPL 1321[1]) ... within one year of the defendant's default. Accordingly, the plaintiff did not abandon the action ... . **Wells Fargo Bank, N.A. v Mayen, 2017 NY Slip Op 07768, Second Dept 11-817**

CIVIL PROCEDURE (AMEND COMPLAINT, FORECLOSURE, PLAINTIFF BANK SHOULD HAVE BEEN ALLOWED TO AMEND THE COMPLAINT BY ADDING PARTIES AND TO EXTEND THE REACH OF THE ACTION TO THE ENTIRE PREMISES WHICH HAD BEEN ACQUIRED BY ADVERSE POSSESSION (SECOND DEPT))/FORECLOSURE (CIVIL PROCEDURE, PLAINTIFF BANK SHOULD HAVE BEEN ALLOWED TO AMEND THE COMPLAINT BY ADDING PARTIES AND TO EXTEND THE REACH OF THE ACTION TO THE ENTIRE PREMISES WHICH HAD BEEN ACQUIRED BY ADVERSE POSSESSION (SECOND DEPT))/REAL PROPERTY ACTIONS AND PROCEEDINGS LAW (FORECLOSURE, PLAINTIFF BANK SHOULD HAVE BEEN ALLOWED TO AMEND THE COMPLAINT BY ADDING PARTIES AND TO EXTEND THE REACH OF THE ACTION TO THE ENTIRE PREMISES WHICH HAD BEEN ACQUIRED BY ADVERSE POSSESSION (SECOND DEPT))/ADVERSE POSSESSION (FORECLOSURE, CIVIL PROCEDURE, PLAINTIFF BANK SHOULD HAVE BEEN ALLOWED TO AMEND THE COMPLAINT BY ADDING PARTIES AND TO EXTEND THE REACH OF THE ACTION TO THE ENTIRE PREMISES WHICH HAD BEEN ACQUIRED BY ADVERSE POSSESSION (SECOND DEPT))

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

PLAINTIFF BANK SHOULD HAVE BEEN ALLOWED TO AMEND THE COMPLAINT BY ADDING PARTIES AND TO EXTEND THE REACH OF THE ACTION TO THE ENTIRE PREMISES WHICH HAD BEEN ACQUIRED BY ADVERSE POSSESSION (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff bank should have been allowed to amend its complaint in this foreclosure action to add parties and extend the reach of the action to the entire premises. There was evidence a party acquired title to the entire premises by adverse possession:

> In the absence of prejudice or surprise to the opposing party, leave to amend a pleading should be freely granted "unless the proposed amendment is palpably insufficient or patently devoid of merit" ... . Moreover, pursuant to CPLR 1003, "[p]arties may be added at any stage of the action by leave of court" ... .
>
> Here, the plaintiff's proposed cause of action was not "palpably insufficient or patently devoid of merit" ... . RPAPL 1501 provides that any person who "claims an estate or interest in real property' may maintain an action against any other person . . . to compel the determination of any claim adverse to that of the plaintiff which the defendant makes, or which it appears from the public records, . . . the defendant might make'"... . Pursuant to RPAPL 1501(5), the interest held by any mortgagee of real property is an "interest in real property" as that phrase is used in article 15... . Thus, contrary to the Supreme Court's determination, the plaintiff, as mortgagee of the subject premises, asserted a cause of action to quiet title pursuant to RPAPL 1501 based on its claim that the mortgage encumbered the entire premises because the mortgagor acquired title to the entire premises by adverse possession ... . Moreover, the plaintiff properly sought leave to amend the summons and complaint to add as defendants certain persons who might claim interests in the premises that are adverse to its own interest. **Emigrant Sav. Bank v Walters, 2017 NY Slip Op 07976, Second Dept 11-15-17**

CIVIL PROCEDURE (FRAUD, ALLEGATION THAT LAW FIRM ADDUCED FALSE EVIDENCE IN A PROCEEDING MUST BE ASSERTED IN A MOTION TO VACATE THE JUDGMENT IN THAT PROCEEDING, NOT AS A NEW ACTION (SECOND DEPT))/FRAUD (FRAUD, ALLEGATION THAT LAW FIRM ADDUCED FALSE EVIDENCE IN A PROCEEDING MUST BE ASSERTED IN A MOTION TO VACATE THE JUDGMENT IN THAT PROCEEDING, NOT AS A NEW ACTION (SECOND DEPT))/ATTORNEYS (FRAUD, ALLEGATION THAT LAW FIRM ADDUCED FALSE EVIDENCE IN A PROCEEDING MUST BE ASSERTED IN A MOTION TO VACATE THE JUDGMENT IN THAT PROCEEDING, NOT AS A NEW ACTION (SECOND DEPT))/FALSE TESTIMONY (ALLEGATION THAT LAW FIRM ADDUCED FALSE EVIDENCE IN A PROCEEDING MUST BE ASSERTED IN A MOTION TO VACATE THE JUDGMENT IN THAT PROCEEDING, NOT AS A NEW ACTION (SECOND DEPT))/EVIDENCE (FALSE TESTIMONY, FRAUD, ALLEGATION THAT LAW FIRM ADDUCED FALSE EVIDENCE IN A PROCEEDING MUST BE ASSERTED IN A MOTION TO VACATE THE JUDGMENT IN THAT PROCEEDING, NOT AS A NEW ACTION (SECOND DEPT))

CIVIL PROCEDURE, FRAUD, ATTORNEYS, EVIDENCE.

ALLEGATION THAT LAW FIRM ADDUCED FALSE EVIDENCE IN A PROCEEDING MUST BE ASSERTED IN A MOTION TO VACATE THE JUDGMENT IN THAT PROCEEDING, NOT AS A NEW ACTION (SECOND DEPT).

The Second Department noted that an action alleging attorneys adduced false testimony in a prior court proceeding must be brought as a motion to vacate the judgment in the prior case, not as a new action:

> Generally, a party who has lost an action as a result of alleged fraud or false testimony cannot collaterally attack the judgment in a separate action against the party who adduced the false evidence, and the plaintiff's remedy lies exclusively in moving to vacate the judgment ... . Under an exception to that rule, a separate action may be commenced where the alleged perjury or fraud in the underlying action was "merely a means to the accomplishment of a larger fraudulent scheme" ... which was "greater in scope than the issues determined in the prior proceeding" ... .
>
> Here, the moving defendants established their prima facie entitlement to summary judgment dismissing the causes of action alleging fraud, aiding and abetting fraud, violation of Judiciary Law § 487, and prima facie tort insofar as asserted against them by demonstrating that the plaintiffs are merely attempting to collaterally attack an order issued in the underlying action. In opposition, the plaintiffs only raised conclusory and unsubstantiated allegations that the moving defendants' fraud in the underlying action was "merely a means to the accomplishment of a larger fraudulent scheme" ... . **DeMartino v Lomonaco, 2017 NY Slip Op 07706, Second Dept 11-8-17**

CIVIL PROCEDURE (SERVICE AND VENUE PROVISIONS IN CONTRACT WITH A LIMITED LIABILITY COMPANY DID NOT APPLY TO DEFENDANT INDIVIDUALLY, DEFECTS IN SERVICE PROPERLY OVERLOOKED PURSUANT TO CPLR 2001 (THIRD DEPT))/LIMITED LIABILITY COMPANY (SERVICE AND VENUE PROVISIONS IN CONTRACT WITH A LIMITED LIABILITY COMPANY DID NOT APPLY TO DEFENDANT INDIVIDUALLY, DEFECTS IN SERVICE PROPERLY OVERLOOKED PURSUANT TO CPLR 2001 (THIRD DEPT))/CONTRACT LAW (SERVICE AND VENUE PROVISIONS IN CONTRACT WITH A LIMITED LIABILITY COMPANY DID NOT APPLY TO DEFENDANT INDIVIDUALLY, DEFECTS IN SERVICE PROPERLY OVERLOOKED PURSUANT TO CPLR 2001 (THIRD DEPT))/CPLR 2001 (SERVICE AND VENUE PROVISIONS IN CONTRACT WITH A LIMITED LIABILITY COMPANY DID NOT APPLY TO DEFENDANT INDIVIDUALLY, DEFECTS IN SERVICE PROPERLY OVERLOOKED PURSUANT TO CPLR 2001 (THIRD DEPT))

CIVIL PROCEDURE, LIMITED LIABILITY COMPANY LAW, CONTRACT LAW.

SERVICE AND VENUE PROVISIONS IN CONTRACT WITH A LIMITED LIABILITY COMPANY DID NOT APPLY TO DEFENDANT INDIVIDUALLY, DEFECTS IN SERVICE PROPERLY OVERLOOKED PURSUANT TO CPLR 2001 (THIRD DEPT).

The Third Department determined plaintiffs' service of process on defendant was flawed but Supreme Court properly overlooked the defects under CPLR 2001. The Third Department further held that the defendant's motion to change venue should have been granted. Both the method of service (mail) and venue were based on provisions in a purchase and sale contract. However, the purchase and sale agreement was with a limited liability company, but the confessions of judgment upon which the suit were based were signed by defendant in her personal capacity, not as the sole member of the LLC. Therefore the service and venue contract provisions did not apply:

> Defendant and the limited liability companies of which she is a member "are distinct entities," however, and the former is not individually bound by the contractual commitments of the latter... . Nothing in the purchase and sale agreement binds defendant to its terms, instead making clear that no "shareholder, director, officer of or principal or agent of" [the LLC] will "have any personal liability, directly or indirectly, under or in connection with" either the agreement or any amendments to it. ...
>
> Due to the inapplicability of those contractual provisions, plaintiffs' effort to serve defendant by mail was deficient in that service "under CPLR 3213 is subject to the rules governing service of the summons generally" ... . The mailing nevertheless placed defendant on notice of the pending motion for summary judgment in lieu of complaint, and she responded with a cross motion that opposed the motion on various grounds. Plaintiffs then arranged for proper, albeit untimely, service of defendant pursuant to CPLR 308 (2), and advised that they were amenable to any further adjournment of the return date "as defendant and [Supreme] Court may find proper."... Accordingly, while a wholesale failure to timely serve defendant with the initiatory papers constitutes "a fatal jurisdictional defect"... , defendant was placed on notice, then submitted a cross motion that raised various objections and included substantive opposition before being properly served. In light of these peculiar circumstances, as well as the absence of any prejudice flowing from plaintiffs' missteps, we are persuaded that the untimeliness of the proper service could be and rightly was overlooked (seeCPLR 2001, 2004 ...). **Capolino v Goren, 2017 NY Slip Op 08246, Third Dept 11-22-17**

CIVIL PROCEDURE (ADJOURNMENTS, TOWN'S REQUEST FOR AN ADJOURNMENT OF A HEARING ABOUT THE PLACEMENT OF A RESIDENCE FOR THE DEVELOPMENTALLY DISABLED IN THE TOWN WAS PROPERLY DENIED, THE REASONS FOR THE REQUEST FOR THE ADJOURNMENT WERE NOT PROVIDED UNTIL AFTER THE FACT (FOURTH DEPT))/MUNICIPAL LAW (OWN'S REQUEST FOR AN ADJOURNMENT OF A HEARING ABOUT THE PLACEMENT OF A RESIDENCE FOR THE DEVELOPMENTALLY DISABLED IN THE TOWN WAS PROPERLY DENIED, THE REASONS FOR THE REQUEST FOR THE ADJOURNMENT WERE NOT PROVIDED UNTIL AFTER THE FACT (FOURTH DEPT))/MENTAL HYGIENE LAW (TOWN'S REQUEST FOR AN ADJOURNMENT OF A HEARING ABOUT THE PLACEMENT OF A RESIDENCE FOR THE DEVELOPMENTALLY DISABLED IN THE TOWN WAS PROPERLY DENIED, THE REASONS FOR THE REQUEST FOR THE ADJOURNMENT WERE NOT PROVIDED UNTIL AFTER THE FACT (FOURTH DEPT))/RESIDENTIAL FACILITIES (TOWN'S REQUEST FOR AN ADJOURNMENT OF A HEARING ABOUT THE PLACEMENT OF A RESIDENCE FOR THE DEVELOPMENTALLY DISABLED IN THE TOWN WAS PROPERLY DENIED, THE REASONS FOR THE REQUEST FOR THE ADJOURNMENT WERE NOT PROVIDED UNTIL AFTER THE FACT (FOURTH DEPT))/DEVELOPMENTALLY DISABLED (TOWN'S REQUEST FOR AN ADJOURNMENT OF A HEARING ABOUT THE PLACEMENT OF A RESIDENCE FOR THE DEVELOPMENTALLY DISABLED IN THE TOWN WAS PROPERLY DENIED, THE REASONS FOR THE REQUEST FOR THE ADJOURNMENT WERE NOT PROVIDED UNTIL AFTER THE FACT (FOURTH DEPT))

CIVIL PROCEDURE, MUNICIPAL LAW, MENTAL HYGIENE LAW.

TOWN'S REQUEST FOR AN ADJOURNMENT OF A HEARING ABOUT THE PLACEMENT OF A RESIDENCE FOR THE DEVELOPMENTALLY DISABLED IN THE TOWN WAS PROPERLY DENIED, THE REASONS FOR THE REQUEST FOR THE ADJOURNMENT WERE NOT PROVIDED UNTIL AFTER THE FACT (FOURTH DEPT).

The Fourth Department, over a dissent, determined the town's request for an adjournment of a hearing was properly denied. After the hearing, the NYS Off. for People with Dev. Disabilities permitted the establishment of a community residential facility for the developmentally disabled within the town. Although the town requested that the hearing be adjourned, it did offer timely explanations of the reasons for the adjournment:

> Petitioner (the town) contends that, if it had been given additional time to prepare for the hearing, it could have proposed alternative sites, and thus the denial of an adjournment was an abuse of discretion. If petitioner believed that another site would be appropriate, however, it should have suggested another site in response to the sponsoring agency's initial notice or, if needed, asked for time to find such a site ... . Instead, petitioner decided to object to the facility outright ... , which led the sponsoring agency to request an "immediate hearing" ... . We therefore respectfully disagree with our dissenting colleague that there was no reason for petitioner to anticipate preparing for a hearing upon receiving notice from the sponsoring agency.
>
> We further respectfully disagree with our dissenting colleague that an adjournment should have been granted so that petitioner could study traffic and waste disposal concerns. In its requests for an adjournment, petitioner did not state that it needed time to study those issues. It was not until after the decision of respondent's Acting Commissioner, in which she stated that petitioner's traffic and septic concerns were not based on any studies, that petitioner argued that it should have been granted an adjournment to study those issues. To the extent that petitioner contends that its stated reason of needing "time to prepare" encompassed those specific issues, we reject that contention. To conclude otherwise would mean that adjournments should always be granted upon request, even when it is well settled that the decision to grant or deny an adjournment is a matter of discretion ... . **Matter of Town of Boston v New York State Off. for People with Dev. Disabilities, 2017 NY Slip Op 07803, Fourth Dept 11-9-17**

CIVIL PROCEDURE (NEGLIGENCE, PLAINTIFF'S DAUGHTER DIED AFTER THE LAWSUIT HAD BEGUN, MOTION TO AMEND THE COMPLAINT TO ADD A CAUSE OF ACTION FOR WRONGFUL DEATH PROPERLY GRANTED, NO MEDICAL PROOF OF A CAUSAL CONNECTION BETWEEN THE DEATH AND THE ALLEGATIONS IN THE COMPLAINT REQUIRED (THIRD DEPT))/COMPLAINT, AMENDMENT OF (NEGLIGENCE, PLAINTIFF'S DAUGHTER DIED AFTER THE LAWSUIT HAD BEGUN, MOTION TO AMEND THE COMPLAINT TO ADD A CAUSE OF ACTION FOR WRONGFUL DEATH PROPERLY GRANTED, NO MEDICAL PROOF OF A CAUSAL CONNECTION BETWEEN THE DEATH AND THE ALLEGATIONS IN THE COMPLAINT REQUIRED (THIRD DEPT))/NEGLIGENCE (CIVIL PROCEDURE, AMEND COMPLAINT, PLAINTIFF'S DAUGHTER DIED AFTER THE LAWSUIT HAD BEGUN, MOTION TO AMEND THE COMPLAINT TO ADD A CAUSE OF ACTION FOR WRONGFUL DEATH PROPERLY GRANTED, NO MEDICAL PROOF OF A CAUSAL CONNECTION BETWEEN THE DEATH AND THE ALLEGATIONS IN THE COMPLAINT REQUIRED (THIRD DEPT))/WRONGFUL DEATH (CIVIL PROCEDURE, AMEND COMPLAINT, PLAINTIFF'S DAUGHTER DIED AFTER THE LAWSUIT HAD BEGUN, MOTION TO AMEND THE COMPLAINT TO ADD A CAUSE OF ACTION FOR WRONGFUL DEATH PROPERLY GRANTED, NO MEDICAL PROOF OF A CAUSAL CONNECTION BETWEEN THE DEATH AND THE ALLEGATIONS IN THE COMPLAINT REQUIRED (THIRD DEPT))

CIVIL PROCEDURE, NEGLIGENCE.

PLAINTIFF'S DAUGHTER DIED AFTER THE LAWSUIT HAD BEGUN, MOTION TO AMEND THE COMPLAINT TO ADD A CAUSE OF ACTION FOR WRONGFUL DEATH PROPERLY GRANTED, NO MEDICAL PROOF OF A CAUSAL CONNECTION BETWEEN THE DEATH AND THE ALLEGATIONS IN THE COMPLAINT REQUIRED (THIRD DEPT).

The Third Department determined plaintiff's motion to amend the complaint to add a cause of action for wrongful death was properly granted. Plaintiff's daughter died after the lawsuit had begun. She had ingested a harmful substance at a festival and the complaint alleged the failure to prevent the use of drugs at the festival and the inadequacy of medical treatment facilities at the festival. Defendants argued there was insufficient evidence of a causal link between the ingestion of the harmful substance and plaintiff's daughter's death:

> ... [D]efendants failed to meet their burden of demonstrating either prejudice or hindrance and, on these facts, they cannot credibly claim surprise from the proposed amendment... . Moreover, we have previously recognized that plaintiff has a viable negligence cause of action based upon allegations that decedent's injuries were caused by defendants' failure to ensure that she received adequate and timely emergency medical care ... . Defendants have not demonstrated that the amendment, which adds a cause of action for wrongful death based upon that negligence ... , is "palpably insufficient or patently devoid of merit" ... .
>
> To the extent that defendants argue that the motion for leave to amend to add a cause of action for wrongful death must be supported by competent medical proof showing a causal connection between their alleged negligence and decedent's death, they are incorrect. Prior decisions have held that, "[w]here a plaintiff seeks to amend a complaint *alleging medical malpractice* to add a cause of action for wrongful death, such motion must be accompanied by 'competent medical proof showing a causal connection between the alleged negligence and the decedent's death'" ... . **Matter of Bynum v Camp Bisco, LLC, 2017 NY Slip Op 08433, Third Dept 11-30-17**

CIVIL PROCEDURE (MOTION TO AMEND THE BILL OF PARTICULARS TO ADD A NEW THEORY OF LIABILITY WHICH WAS FIRST RAISED BY PLAINTIFFS' EXPERT SHOULD HAVE BEEN GRANTED (SECOND DEPT))/BILL OF PARTICULARS (CIVIL PROCEDURE, MOTION TO AMEND THE BILL OF PARTICULARS TO ADD A NEW THEORY OF LIABILITY WHICH WAS FIRST RAISED BY PLAINTIFFS' EXPERT SHOULD HAVE BEEN GRANTED (SECOND DEPT/NEGLIGENCE (CIVIL PROCEDURE, MEDICAL MALPRACTICE, MOTION TO AMEND THE BILL OF PARTICULARS TO ADD A NEW THEORY OF LIABILITY WHICH WAS FIRST RAISED BY PLAINTIFFS' EXPERT SHOULD HAVE BEEN GRANTED (SECOND DEPT))/MEDICAL MALPRACTICE (CIVIL PROCEDURE, MOTION TO AMEND THE BILL OF PARTICULARS TO ADD A NEW THEORY OF LIABILITY WHICH WAS FIRST RAISED BY PLAINTIFFS' EXPERT SHOULD HAVE BEEN GRANTED (SECOND DEPT))/CPLR 3025[b] (MOTION TO AMEND THE BILL OF PARTICULARS TO ADD A NEW THEORY OF LIABILITY WHICH WAS FIRST RAISED BY PLAINTIFFS' EXPERT SHOULD HAVE BEEN GRANTED (SECOND DEPT))

CIVIL PROCEDURE, NEGLIGENCE, MEDICAL MALPRACTICE.

MOTION TO AMEND THE BILL OF PARTICULARS TO ADD A NEW THEORY OF LIABILITY WHICH WAS FIRST RAISED BY PLAINTIFFS' EXPERT SHOULD HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiffs' motion to amend the bill of particulars to add a new theory of liability should have been granted in this medical malpractice action. The amendment was based upon plaintiffs' expert's disclosures and the motion to amend was made shortly after the expert raised the issue:

> While leave to amend a bill of particulars is generally freely given in the absence of prejudice or surprise (see CPLR 3025[b]), where a motion for leave to amend a bill of particulars alleging a new theory of liability not raised in the claim or the original bill is made on the eve of trial, leave of court is required, and "judicial discretion should be exercised sparingly, and should be discreet, circumspect, prudent, and cautious"... . In exercising its discretion, the court should consider how long the party seeking the amendment was aware of the facts upon which the motion was predicated, whether a reasonable excuse for the delay was offered, and whether prejudice resulted therefrom ... . Here, the delay would not have been prejudicial since the plaintiffs' amendment sought to include a theory of causation of the decedent's death raised in the defendants' expert disclosures. Moreover, the plaintiffs did not delay in seeking the amendment after receiving the defendants' expert disclosures, and the defendants were permitted further discovery ... . **Moore v Franklin Hosp. Med. Center-North Shore-Long Is. Jewish Health Sys., 2017 NY Slip Op 08263, Second Dept 11-22-17**

CIVIL PROCEDURE (PARTIES, SUPREME COURT SHOULD NOT HAVE AWARDED A MONEY JUDGMENT AGAINST DEFENDANT PERSONALLY, DEFENDANT WAS ONLY A PARTY TO THE ACTION AS A TRUSTEE (SECOND DEPT))/TRUSTS AND ESTATES (CIVIL PROCEDURE, PARTIES, SUPREME COURT SHOULD NOT HAVE AWARDED A MONEY JUDGMENT AGAINST DEFENDANT PERSONALLY, DEFENDANT WAS ONLY A PARTY TO THE ACTION AS A TRUSTEE (SECOND DEPT))/TRUSTEES (CIVIL PROCEDURE, PARTIES, SUPREME COURT SHOULD NOT HAVE AWARDED A MONEY JUDGMENT AGAINST DEFENDANT PERSONALLY, DEFENDANT WAS ONLY A PARTY TO THE ACTION AS A TRUSTEE (SECOND DEPT))

CIVIL PROCEDURE, TRUSTS AND ESTATES.

SUPREME COURT SHOULD NOT HAVE AWARDED A MONEY JUDGMENT AGAINST DEFENDANT PERSONALLY, DEFENDANT WAS ONLY A PARTY TO THE ACTION AS A TRUSTEE (SECOND DEPT).

The Second Department, reversing Supreme Court, determined Supreme Court exceeded its authority when it, sua sponte, awarded a money judgment against defendant personally. Defendant was only a party to the action in his representative capacity (trustee):

> "[A] court may grant relief that is warranted by the facts plainly appearing on the papers on both sides, if the relief granted is not too dramatically unlike the relief sought, the proof offered supports it, and there is no prejudice to any party" ... . Here, the Supreme Court not only strayed from this principle ... , but did so by purporting to impose liability on an individual who was not even a party to the action. " It has been repeatedly held that persons suing or being sued in their official or representative capacity are, in contemplation of law, distinct persons, and strangers to any right or liability as an individual, and consequently a former judgment concludes a party only in the character in which he was sued'" ... . **Magid v Sunrise Holdings Group, LLC, 2017 NY Slip Op 07718, Second Dept 11-8-17**

COOPERATIVES

COOPERATIVES (WHOLLY ARBITRARY DECISION BY COOPERATIVE BOARD TO RESCIND PLAINTIFF'S PURCHASE CONTRACT NOT SHIELDED BY THE BUSINESS JUDGMENT RULE (FIRST DEPT))/BUSINESS JUDGMENT RULE (COOPERATIVES, WHOLLY ARBITRARY DECISION BY COOPERATIVE BOARD TO RESCIND PLAINTIFF'S PURCHASE CONTRACT NOT SHIELDED BY THE BUSINESS JUDGMENT RULE (FIRST DEPT))

COOPERATIVES.

WHOLLY ARBITRARY DECISION BY COOPERATIVE BOARD TO RESCIND PLAINTIFF'S PURCHASE CONTRACT NOT SHIELDED BY THE BUSINESS JUDGMENT RULE (FIRST DEPT).

The First Department determined the cooperative board's rescission of plaintiff's purchase contract was wholly arbitrary and was not shielded by the business judgment rule:

> Plaintiffs' application to purchase a unit in defendants' cooperative residential complex was approved by defendant Board of Directors, and then rescinded two weeks later, based upon a Board member's erroneous report that plaintiff Richard Kallop told her he did not intend to reside in the complex, as required by the purchase contract. Plaintiffs filed a complaint seeking, inter alia, to compel defendants to permit the sale to go forward. After defendants filed their answer, plaintiffs, by order to show cause, sought an order permitting the sale to close. An evidentiary hearing was held, at which the reporting Board member's testimony revealed that Richard Kallop had

not, as she claimed, informed her he intended to reside outside the cooperative complex. For his part, Richard testified that it had always been his plan to reside in the cooperative unit with his elderly mother, co-plaintiff Joan Kallop.

Under these facts, we conclude that defendants' decision to rescind its approval of plaintiffs' purchase application, being without any basis in reason and without regard to the facts, was wholly arbitrary, and thus not entitled to the protections generally provided to cooperative boards by the business judgment rule ... . **Kallop v Board of Directors for Edgewater Park Owners' Coop. Inc., 2017 NY Slip Op 08174, First Dept 11-21-17**

CONTRACT LAW

CONTRACT LAW (CONTRACT NOT ACTIONABLE BECAUSE IT DID NOT SPELL OUT THE CONSIDERATION FOR A PAST OR EXECUTED PROMISE, DECISION ON A MOTION TO DISMISS DOES NOT BECOME THE LAW OF THE CASE IN A SUBSEQUENT MOTION FOR SUMMARY JUDGMENT (FIRST DEPT))/CIVIL PROCEDURE (DECISION ON A MOTION TO DISMISS DOES NOT BECOME THE LAW OF THE CASE IN A SUBSEQUENT MOTION FOR SUMMARY JUDGMENT (FIRST DEPT))/GENERAL OBLIGATIONS LAW 5-1105 (CONTRACT NOT ACTIONABLE BECAUSE IT DID NOT SPELL OUT THE CONSIDERATION FOR A PAST OR EXECUTED PROMISE, DECISION ON A MOTION TO DISMISS DOES NOT BECOME THE LAW OF THE CASE IN A SUBSEQUENT MOTION FOR SUMMARY JUDGMENT (FIRST DEPT))/CONSIDERATION (CONTRACT LAW, CONTRACT NOT ACTIONABLE BECAUSE IT DID NOT SPELL OUT THE CONSIDERATION FOR A PAST OR EXECUTED PROMISE, DECISION ON A MOTION TO DISMISS DOES NOT BECOME THE LAW OF THE CASE IN A SUBSEQUENT MOTION FOR SUMMARY JUDGMENT (FIRST DEPT))

CONTRACT LAW, CIVIL PROCEDURE.

CONTRACT NOT ACTIONABLE BECAUSE IT DID NOT SPELL OUT THE CONSIDERATION FOR A PAST OR EXECUTED PROMISE, DECISION ON A MOTION TO DISMISS DOES NOT BECOME THE LAW OF THE CASE IN A SUBSEQUENT MOTION FOR SUMMARY JUDGMENT (FIRST DEPT).

The First Department, reversing (modifying) Supreme Court, determined a contract was not actionable because the consideration for a past or executed promise was not spelled out in it. The court noted that a decision on a motion to dismiss does not become the law of the case in a subsequent motion for summary judgment:

General Obligations Law (GOL) § 5-1105 provides:
"A promise in writing and signed by the promisor or by his agent shall not be denied effect as a valid contractual obligation on the ground that consideration for the promise is past or executed, if the consideration is expressed in the writing and is proved to have been given or performed and would be a valid consideration but for the time when it was given or performed."

It essentially codifies the notion that "[g]enerally, past consideration is no consideration and cannot support an agreement because the detriment did not induce the promise.' That is, since the detriment had already been incurred, it cannot be said to have been bargained for in exchange for the promise'"... . However, General Obligations Law § 5-1105 makes an exception where the past consideration is explicitly recited in a writing. To qualify for the exception, the description of the consideration must not be "vague" or "imprecise," nor may extrinsic evidence be employed to assist in understanding the consideration ... . * * *

... "[T]he law of the case doctrine does not apply when a motion to dismiss is followed by a summary judgment motion" ... . **Korff v Corbett, 2017 NY Slip Op 07677, First Dept 11-2-17**

CONTRACT LAW (CONTRACT WHICH CALLED FOR THE PRICE FOR EXHIBITS AT TRADE SHOWS TO BE AMORTIZED OVER UP-COMING EVENTS WAS NOT AN AGREEMENT TO AGREE AND WAS SUFFICIENTLY DEFINITE, LIQUIDATED DAMAGES CLAUSE ENFORCEABLE (FOURTH DEPT))/AGREEMENT TO AGREE (CONTRACT WHICH CALLED FOR THE PRICE FOR EXHIBITS AT TRADE SHOWS TO BE AMORTIZED OVER UP-COMING EVENTS WAS NOT AN AGREEMENT TO AGREE AND WAS SUFFICIENTLY DEFINITE, LIQUIDATED DAMAGES CLAUSE ENFORCEABLE (FOURTH DEPT))/DEFINITENESS DOCTRINE (CONTRACT WHICH CALLED FOR THE PRICE FOR EXHIBITS AT TRADE SHOWS TO BE AMORTIZED OVER UP-COMING EVENTS WAS NOT AN AGREEMENT TO AGREE AND WAS SUFFICIENTLY DEFINITE, LIQUIDATED DAMAGES CLAUSE ENFORCEABLE (FOURTH DEPT))/LIQUIDATED DAMAGES (CONTRACT LAW, CONTRACT WHICH CALLED FOR THE PRICE FOR EXHIBITS AT TRADE SHOWS TO BE AMORTIZED OVER UP-COMING EVENTS WAS NOT AN AGREEMENT TO AGREE AND WAS SUFFICIENTLY DEFINITE, LIQUIDATED DAMAGES CLAUSE ENFORCEABLE (FOURTH DEPT))/SOPHISTICATED BUSINESS ENTITIES (CONTRACT LAW, LIQUIDATED DAMAGES, CONTRACT WHICH CALLED FOR THE PRICE FOR EXHIBITS AT TRADE SHOWS TO BE AMORTIZED OVER UP-COMING EVENTS WAS NOT AN AGREEMENT TO AGREE AND WAS SUFFICIENTLY DEFINITE, LIQUIDATED DAMAGES CLAUSE ENFORCEABLE (FOURTH DEPT))

CONTRACT LAW.

CONTRACT WHICH CALLED FOR THE PRICE FOR EXHIBITS AT TRADE SHOWS TO BE AMORTIZED OVER UP-COMING EVENTS WAS NOT AN AGREEMENT TO AGREE AND WAS SUFFICIENTLY DEFINITE, LIQUIDATED DAMAGES CLAUSE ENFORCEABLE (FOURTH DEPT).

The Fourth Department determined a contract was not an agreement to agree and was sufficiently definite, and the liquidated damages clause was enforceable. The parties agreed that plaintiff would provide exhibit services at several trade shows with the price amortized over the upcoming shows. Defendant informed plaintiff it was not going to participate in the 2016 shows and this breach of contract action was brought:

> The agreement itself is ... sufficient to establish a binding contract inasmuch as the parties agreed to a fixed cost for each show that defendant was required to attend and set a minimum amount that defendant was obligated to spend in aggregate over the four shows ... .
>
> " [W]here the parties have completed their negotiations of what they regard as essential elements, and performance has begun on the good faith understanding that agreement on the unsettled matters will follow, the court will find and enforce a contract even though the parties have expressly left these other elements for future negotiation and agreement, if some objective method of determination is available, independent of either party's mere wish or desire' " ... .
>
> "Where, as here, the parties to the agreement were sophisticated business [entities], and the terms of the agreement were mutually negotiated, with each party represented by experienced counsel, a liquidated damages provision which is reached at arm's length is entitled to deference" ... . The evidence in the record ... establishes that plaintiff's damages "are sufficiently difficult to ascertain to satisfy the first requirement of a valid liquidated damages provision" ... . With respect to the second requirement, we conclude that the negotiated amount of liquidated damages is not " conspicuously disproportionate to [plaintiff's] foreseeable losses' " ... . **RES Exhibit Servs., LLC v Genesis Vision, Inc., 2017 NY Slip Op 07796, Fourth Dept 11-9-17**

CORPORATION LAW

CORPORATION LAW (CONTRACT LAW, EVEN THOUGH THE WRONG CORPORATION WAS NAMED IN THE CONTRACT DEFENDANT SIGNED AS PRESIDENT, DEFENDANT COULD NOT BE HELD PERSONALLY LIABLE (FOURTH DEPT))/CONTRACT LAW (CORPORATION LAW, EVEN THOUGH THE WRONG CORPORATION WAS NAMED IN THE CONTRACT DEFENDANT SIGNED AS PRESIDENT, DEFENDANT COULD NOT BE HELD PERSONALLY LIABLE (FOURTH DEPT))/CIVIL PROCEDURE (MOTION TO SET ASIDE THE VERDICT, EVEN THOUGH THE WRONG CORPORATION WAS NAMED IN THE CONTRACT DEFENDANT SIGNED AS PRESIDENT, DEFENDANT COULD NOT BE HELD PERSONALLY LIABLE, MOTION TO SET ASIDE THE VERDICT SHOULD HAVE BEEN GRANTED (FOURTH DEPT))/VERDICT, MOTION TO SET ASIDE, EVEN THOUGH THE WRONG CORPORATION WAS NAMED IN THE CONTRACT DEFENDANT SIGNED AS PRESIDENT, DEFENDANT COULD NOT BE HELD PERSONALLY LIABLE, MOTION TO SET ASIDE THE VERDICT SHOULD HAVE BEEN GRANTED (FOURTH DEPT))

CORPORATION LAW, CONTRACT LAW. CIVIL PROCEDURE.

EVEN THOUGH THE WRONG CORPORATION WAS NAMED IN THE CONTRACT DEFENDANT SIGNED AS PRESIDENT, DEFENDANT COULD NOT BE HELD PERSONALLY LIABLE, MOTION TO SET ASIDE THE VERDICT SHOULD HAVE BEEN GRANTED (FOURTH DEPT).

The Fourth Department determined defendant's motion to set aside the verdict in this contract dispute should have been granted. Defendant signed the contract as president of a corporation which existed but was misnamed. Defendant could not be held personally liable:

> "According to the well settled general rule, individual officers or directors are not personally liable on contracts entered into on behalf of a corporation if they do not purport to bind themselves individually' . . . However, it is also well established that an agent who acts on behalf of a nonexistent principal may be held personally liable on the contract"... . "The rule [was] designed to protect a party who enters into a contract where the other signatory represents that he is signing on behalf of a business entity that in fact does not exist, under any name . . . [Thus,] as long as the identity of the corporation can be reasonably established from the evidence[,] . . . [an e]rror in the use of the corporate name will not be permitted to frustrate the intent which the name was meant to convey' . . . In such a situation, . . . there is no need or basis to impose personal liability on the person who signed the contract as agent for the entity"... . "Accordingly, absent an allegation that, at the time of the contract, a plaintiff was under an actual misapprehension that there was some other, unincorporated group with virtually the same name as that of the actual business entity, the [c]ourt will not permit the [plaintiff] to capitalize on [a] technical naming error in contravention of the parties' evident intentions' " ... .
>
> Thus, courts have determined that the individual who signed the contract may be liable where there was no existing corporation under any name because, under those circumstances, the plaintiff has "no remedy except against the individuals who acted as agents of those purported corporations"... . Where, as here, there was an existing corporation and merely a misnomer in the name of the corporation, courts have declined to impose liability on the individual who signed the contract because the plaintiff has a remedy against the existing, albeit misnamed, corporation... .
>
> Here, we conclude that no one was under an actual misapprehension that there was an entity with the name. **TBW, INC. J.N.K. Mach. Corp. v TBW, Ltd., 2017 NY Slip Op 08106, Fourth Dept 11-17-17**

CRIMINAL LAW

CRIMINAL LAW (HOT PURSUIT JUSTIFIED WARRANTLESS ARREST IN DEFENDANT'S HOME (SECOND DEPT))/SUPPRESS, MOTION TO (CRIMINAL LAW, HOT PURSUIT JUSTIFIED WARRANTLESS ARREST IN DEFENDANT'S HOME (SECOND DEPT))/WARRANTLESS ARREST (HOT PURSUIT JUSTIFIED WARRANTLESS ARREST IN DEFENDANT'S HOME (SECOND DEPT))/PAYTON RULE (WARRANTLESS ARREST, HOT PURSUIT JUSTIFIED WARRANTLESS ARREST IN DEFENDANT'S HOME (SECOND DEPT))/HOT PURSUIT (WARRENTLESS ARREST, HOT PURSUIT JUSTIFIED WARRANTLESS ARREST IN DEFENDANT'S HOME (SECOND DEPT))

CRIMINAL LAW.

HOT PURSUIT JUSTIFIED WARRANTLESS ARREST IN DEFENDANT'S HOME (SECOND DEPT).

The Second Department determined defendant's motion to suppress his statements based upon his warrantless arrest in the garage of his home was properly denied. Defendant had failed to stop, led the arresting officer on a high speed chase, and hid in the rafters of his garage:

> ... [T]he People established that the detective's entry was justified by the doctrine of hot pursuit. "[S]ubject only to carefully drawn and narrow exceptions, a warrantless search of an individual's home is per se unreasonable and hence unconstitutional" ... . However, "exigent circumstances or a true hot pursuit' may justify a warrantless entry"... . "[A] criminal suspect may not thwart an otherwise proper arrest which has been set in motion in a public place by retreating into his residence"... . Here, the exigent circumstances justifying the hot pursuit of the defendant into his garage included the defendant's observed erratic and dangerous driving, the crashing and abandoning of his vehicle, and the police officers' peaceful entry through the open door of the garage ... . **People v Caputo, 2017 NY Slip Op 07614, Second Dept 11-1-17**

CRIMINAL LAW (ASKING DEFENDANT DURING A TRAFFIC STOP WHETHER HE HAD ANYTHING ILLEGAL IN THE CAR WAS NOT JUSTIFIED BY A FOUNDED SUSPICION, ALL PHYSICAL EVIDENCE TAKEN FROM THE CAR AND SUBSEQUENT STATEMENTS AT THE POLICE STATION SHOULD HAVE BEEN SUPPRESSED (SECOND DEPT))/STREET STOPS (ASKING DEFENDANT DURING A TRAFFIC STOP WHETHER HE HAD ANYTHING ILLEGAL IN THE CAR WAS NOT JUSTIFIED BY A FOUNDED SUSPICION, ALL PHYSICAL EVIDENCE TAKEN FROM THE CAR AND SUBSEQUENT STATEMENTS AT THE POLICE STATION SHOULD HAVE BEEN SUPPRESSED (SECOND DEPT))/TRAFFIC STOPS (ASKING DEFENDANT DURING A TRAFFIC STOP WHETHER HE HAD ANYTHING ILLEGAL IN THE CAR WAS NOT JUSTIFIED BY A FOUNDED SUSPICION, ALL PHYSICAL EVIDENCE TAKEN FROM THE CAR AND SUBSEQUENT STATEMENTS AT THE POLICE STATION SHOULD HAVE BEEN SUPPRESSED (SECOND DEPT))/SUPPRESSION (CRIMINAL LAW, TRAFFIC STOPS, ASKING DEFENDANT DURING A TRAFFIC STOP WHETHER HE HAD ANYTHING ILLEGAL IN THE CAR WAS NOT JUSTIFIED BY A FOUNDED SUSPICION, ALL PHYSICAL EVIDENCE TAKEN FROM THE CAR AND SUBSEQUENT STATEMENTS AT THE POLICE STATION SHOULD HAVE BEEN SUPPRESSED (SECOND DEPT))/SEARCH AND SEIZURE (SUPPRESSION, TRAFFIC STOPS, ASKING DEFENDANT DURING A TRAFFIC STOP WHETHER HE HAD ANYTHING ILLEGAL IN THE CAR WAS NOT JUSTIFIED BY A FOUNDED SUSPICION, ALL PHYSICAL EVIDENCE TAKEN FROM THE CAR AND SUBSEQUENT STATEMENTS AT THE POLICE STATION SHOULD HAVE BEEN SUPPRESSED (SECOND DEPT))/STATEMENTS (CRIMINAL LAW, SUPPRESSION, ASKING DEFENDANT DURING A TRAFFIC STOP WHETHER HE HAD ANYTHING ILLEGAL IN THE CAR WAS NOT JUSTIFIED BY A FOUNDED SUSPICION, ALL PHYSICAL EVIDENCE TAKEN FROM THE CAR AND SUBSEQUENT STATEMENTS AT THE POLICE STATION SHOULD HAVE BEEN SUPPRESSED (SECOND DEPT))

CRIMINAL LAW.

ASKING DEFENDANT DURING A TRAFFIC STOP WHETHER HE HAD ANYTHING ILLEGAL IN THE CAR WAS NOT JUSTIFIED BY A FOUNDED SUSPICION, ALL PHYSICAL EVIDENCE TAKEN FROM THE CAR AND SUBSEQUENT STATEMENTS AT THE POLICE STATION SHOULD HAVE BEEN SUPPRESSED (SECOND DEPT).

The Second Department, over a dissent, determined the motion to suppress physical evidence (stolen property and a handgun) and subsequent statements made at the police station should have been granted. All charges except the traffic violations which led to the vehicle stop were dismissed. The arresting officer observed the defendant make an illegal turn and run a red light. Shortly after the vehicle stop, before the officers had any reason to suspect defendant's involvement in a recent robbery, the arresting officer asked defendant whether he had anything illegal in the car. The Second Department held that question was not justified by a suspicion of criminal activity:

> The evidence established that the officer did not have a "founded suspicion that criminality [was] afoot" that would justify his question as to whether the defendant had anything illegal in the vehicle ... . Although the stop was justified by the traffic violations, the intrusiveness of the officer's conduct exceeded that which is permissible during a normal traffic stop ... .
>
> "[A] request for information involves basic, nonthreatening questions regarding, for instance, identity, address or destination. . . . Once [an] officer asks more pointed questions . . . the officer is no longer merely seeking information . . . [and the inquiry] must be supported by a founded suspicion that criminality is afoot"... .
>
> Thus, the ... handbag, the cell phone, and the camera should have been suppressed as fruit of an illegal search, as well as the gun that was subsequently found upon an inventory of the vehicle ... .
>
> ...[T]he suppression record did not demonstrate that the causal connection between the illegal search and the defendant's statements was sufficiently attenuated to purge the taint of the illegal search... . **People v Newson, 2017 NY Slip Op 07752, Second Dept, 11-8-17**

CRIMINAL LAW (SENTENCING, BECAUSE PROMISE IN PLEA AGREEMENT RE CREDIT FOR JAIL TIME COULD NOT BE FULFILLED, SENTENCE VACATED AND CASE REMITTED FOR A SENTENCE WHICH COMPORTS WITH DEFENDANT'S LEGITIMATE EXPECTATIONS (FOURTH DEPT))/PLEA AGREEMENT (SENTENCING, BECAUSE PROMISE IN PLEA AGREEMENT RE CREDIT FOR JAIL TIME COULD NOT BE FULFILLED, SENTENCE VACATED AND CASE REMITTED FOR A SENTENCE WHICH COMPORTS WITH DEFENDANT'S LEGITIMATE EXPECTATIONS (FOURTH DEPT))/SENTENCING (CRIMINAL LAW, PLEA AGREEMENT, BECAUSE PROMISE IN PLEA AGREEMENT RE CREDIT FOR JAIL TIME COULD NOT BE FULFILLED, SENTENCE VACATED AND CASE REMITTED FOR A SENTENCE WHICH COMPORTS WITH DEFENDANT'S LEGITIMATE EXPECTATIONS (FOURTH DEPT))

CRIMINAL LAW.

BECAUSE PROMISE IN PLEA AGREEMENT RE CREDIT FOR JAIL TIME COULD NOT BE FULFILLED, SENTENCE VACATED AND CASE REMITTED FOR A SENTENCE WHICH COMPORTS WITH DEFENDANT'S LEGITIMATE EXPECTATIONS (FOURTH DEPT).

The Fourth Department, reversing (modifying) Supreme Court, determined that defendant was entitled to a sentence which comported with his expectations based upon the plea agreement. The Fourth Department vacated his sentence. It turned out defendant could not be credited with jail time in accordance with the plea agreement:

> The promise with respect to jail time credit ... could not be fulfilled. Penal Law § 70.30 (3) provides that "[t]he term of a definite sentence . . . imposed on a person shall be credited with and diminished by the amount of time the person spent in custody prior to the commencement of such sentence as a result of the charge that culminated in the sentence." Such credit, however, "shall not include any time that is credited against the term . . . of any previously imposed sentence . . . to which the person is subject" ... . Thus, "a person is prohibited from receiving jail time credit against a subsequent sentence when such credit has already been applied to time served on a previous sentence' "... . The correctional facility to which defendant was committed therefore properly determined that defendant was prohibited from receiving jail time credit against his sentence on the conviction of attempted CPCS in the fourth degree for the time that he had served between sentencing on the prior conviction and the subsequent sentencing proceeding ... .
>
> It is well established that " [a] guilty plea induced by an unfulfilled promise either must be vacated or the promise honored' " ... . " The choice rests in the discretion of the sentencing court' and there is no indicated preference for one course over the other' " ... . Where, as here, "the originally promised sentence cannot be imposed in strict compliance with the plea agreement, the sentencing court may impose another lawful sentence that comports with the defendant's legitimate expectations" ... . We therefore modify the judgment by vacating the sentence, and we remit the matter to Supreme Court to impose a sentence that comports with defendant's legitimate expectations of the negotiated plea agreement or to afford defendant an opportunity to withdraw his plea. **People v Drake, 2017 NY Slip Op 07844, Fourth Dept 11-9-17**

CRIMINAL LAW (SUPERIOR COURT INFORMATION (SCI) JURISDICTIONALLY DEFECTIVE BECAUSE THE A FELONY COMPLAINT WAS NOT DISMISSED UNTIL AFTER THE PLEA TO THE SCI (FOURTH DEPT))/WAIVER OF INDICTMENT (SUPERIOR COURT INFORMATION (SCI) JURISDICTIONALLY DEFECTIVE BECAUSE THE A FELONY COMPLAINT WAS NOT DISMISSED UNTIL AFTER THE PLEA TO THE SCI (FOURTH DEPT))/SUPERIOR COURT INFORMATION (SCI) (SUPERIOR COURT INFORMATION (SCI) JURISDICTIONALLY DEFECTIVE BECAUSE THE A FELONY COMPLAINT WAS NOT DISMISSED UNTIL AFTER THE PLEA TO THE SCI (FOURTH DEPT))

CRIMINAL LAW.

SUPERIOR COURT INFORMATION (SCI) JURISDICTIONALLY DEFECTIVE BECAUSE THE A FELONY COMPLAINT WAS NOT DISMISSED UNTIL AFTER THE PLEA TO THE SCI (FOURTH DEPT).

The Fourth Department, reversing defendant's conviction by waiver of indictment and plea to a superior court information (SCI), noted that defendant was still charged with an A felony at the time of the waiver and plea. The A felony complaint was not dismissed until after the plea:

> In a prior appeal, we reversed the judgment of conviction, determining that the superior court information (SCI) was jurisdictionally defective inasmuch as defendant had been charged with, inter alia, a class A felony and thus could not validly waive indictment or consent to be prosecuted by an SCI ... . We thus vacated the plea and waiver of indictment and dismissed the SCI, noting that " the People may present the case to the [g]rand [j]ury' " ... .
>
> On remittal, the People did not present the case to a grand jury but, rather, made a second attempt to proceed by SCI. As the People correctly concede, the SCI is again jurisdictionally defective inasmuch as the felony complaint charging defendant with the class A felony was not dismissed until after the waiver of indictment and plea to the SCI. As a result, defendant was still "charged" with a class A felony when he waived indictment and consented to be prosecuted by an SCI. "Where, as here, a defendant is charged with a class A felony, the defendant cannot validly waive indictment or consent to be prosecuted by a superior court information" ... . We therefore vacate defendant's plea and his waiver of indictment, and we dismiss the SCI, noting again that " the People may present the case to the [g]rand [j]ury' " ... . **People v Priest, 2017 NY Slip Op 07859, Fourth Dept 11-9-17**

CRIMINAL LAW (SECTION EIGHT HOUSING SUBSIDIES ARE NOT ADMINISTERED BY THE DEPARTMENT OF SOCIAL SERVICES, THEREFORE A WELFARE FRAUD PROSECUTION CANNOT BE BASED UPON SECTION EIGHT BENEFITS (FOURTH DEPT))/WELFARE FRAUD (CRIMINAL LAW, SECTION EIGHT HOUSING SUBSIDIES ARE NOT ADMINISTERED BY THE DEPARTMENT OF SOCIAL SERVICES, THEREFORE A WELFARE FRAUD PROSECUTION CANNOT BE BASED UPON SECTION EIGHT BENEFITS (FOURTH DEPT)))/SECTION EIGHT (CRIMINAL LAW, WELFARE FRAUD, SECTION EIGHT HOUSING SUBSIDIES ARE NOT ADMINISTERED BY THE DEPARTMENT OF SOCIAL SERVICES, THEREFORE A WELFARE FRAUD PROSECUTION CANNOT BE BASED UPON SECTION EIGHT BENEFITS (FOURTH DEPT))

CRIMINAL LAW.

SECTION EIGHT HOUSING SUBSIDIES ARE NOT ADMINISTERED BY THE DEPARTMENT OF SOCIAL SERVICES, THEREFORE A WELFARE FRAUD PROSECUTION CANNOT BE BASED UPON SECTION EIGHT BENEFITS (FOURTH DEPT).

The Fourth Department, reversing defendant's welfare fraud conviction, determined the statute required that the fraud involve a program administered by the department of social services. Here the fraud involved the federal section eight housing subsidy program, which was not administered by the department of social services:

> ... [D]efendant's interpretation of the statutory definition of public assistance benefits is supported by the legislative history of the statute, which shows that it was enacted primarily to combat Medicaid fraud ... , and Medicaid benefits are administered by the department of social services or social services district. In addition, we note that the People's interpretation of the statute would extend its reach beyond its intended meaning to include any "money, property or services provided directly or indirectly through programs of the federal government," without qualification ... For example, under the People's interpretation, veteran's benefits would be "money, property or services" falling within the definition of "[p]ublic assistance benefits" ... , but it seems unlikely that the Legislature intended the improper receipt of such benefits to be considered welfare fraud.
>
> We conclude that both [the People's and defendant's] interpretations of the statute are plausible. In such situations, the rule of lenity applies and we must adopt the interpretation of the statute that is more favorable to defendant ... . The People were therefore required to establish that the Section 8 funds were "administered by the department of social services" ... , which they failed to do. **People v Davis, 2017 NY Slip Op 07800, Fourth Dept 11-9-17**

CRIMINAL LAW (STREET STOP JUSTIFIED, FACTS AND LAW EXPLAINED IN DETAIL (FOURTH DEPT))/STREET STOPS (CRIMINAL LAW, STREET STOP JUSTIFIED, FACTS AND LAW EXPLAINED IN DETAIL (FOURTH DEPT))

CRIMINAL LAW.

STREET STOP JUSTIFIED, FACTS AND LAW EXPLAINED IN DETAIL (FOURTH DEPT).

The Fourth Department, in finding the street stop of defendant was justified, provided a useful, detailed discussion of the facts and the law (too detailed to summarize here):

> ... [W]e agree with the People that the officer had at least the requisite founded suspicion that criminal activity was afoot, and thus that his initial approach of defendant was proper under level two.

When defendant then immediately fled, the officer pursued him, which was a level three intrusion requiring reasonable suspicion that defendant had committed or was committing a crime. "In determining whether a pursuit was justified by reasonable suspicion, the emphasis should not be narrowly focused on . . . any . . . single factor, but [rather should be based] on an evaluation of the totality of circumstances, which takes into account the realities of everyday life unfolding before a trained officer" ... . We also note that, although "flight alone is insufficient to justify pursuit, defendant's flight in response to an approach by the police, combined with other specific circumstances indicating that the suspect may be engaged in criminal activity, may give rise to reasonable suspicion, the necessary predicate for police pursuit' " ... . Here, we agree with the People that the specific information known to the officer, coupled with the officer's observations of defendant's actions, furtive behavior, and immediate flight, gave the officer reasonable suspicion to believe that defendant was engaged in criminal activity, thereby justifying the officer's pursuit, detainment, and search of defendant. **People v Jones, 2017 NY Slip Op 07808, Fourth Dept 11-9-17**

CRIMINAL LAW (THE KILLING OF ONE PERSON AND WOUNDING OF TWO BY FIRING 13 SHOTS INTO A GROUP OF PEOPLE FROM A ROOFTOP WERE NOT SEPARATE AND DISTINCT OFFENSES, SENTENCES MUST BE CONCURRENT (SECOND DEPT))/SENTENCING THE KILLING OF ONE PERSON AND WOUNDING OF TWO BY FIRING 13 SHOTS INTO A GROUP OF PEOPLE FROM A ROOFTOP WERE NOT SEPARATE AND DISTINCT OFFENSES, SENTENCES MUST BE CONCURRENT (SECOND DEPT))

CRIMINAL LAW.

THE KILLING OF ONE PERSON AND WOUNDING OF TWO BY FIRING 13 SHOTS INTO A GROUP OF PEOPLE FROM A ROOFTOP WERE NOT SEPARATE AND DISTINCT OFFENSES, SENTENCES MUST BE CONCURRENT (SECOND DEPT).

The Second Department determined firing 13 shots from a rooftop into a group of people, killing one and wounding two, resulting in a murder and two assault convictions, were not separate events which would support consecutive sentences:

Under the circumstances of this case, the evidence was insufficient to establish that the defendant's acts underlying the crimes were separate and distinct. Accordingly, the imposition of consecutive terms of imprisonment was improper ... . **People v Lopez, 2017 NY Slip Op 08016, Second Dept 11-15-17**

CRIMINAL LAW (DEFENDANT PRESENTED EVIDENCE HE WOULD NOT HAVE PLED GUILTY HAD HE KNOWN HIS FEDERAL AND STATE SENTENCES WOULD NOT RUN CONCURRENTLY, MOTION TO VACATE CONVICTION SHOULD NOT HAVE BEEN DENIED WITHOUT A HEARING (SECOND DEPT))/SENTENCING (DEFENDANT PRESENTED EVIDENCE HE WOULD NOT HAVE PLED GUILTY HAD HE KNOWN HIS FEDERAL AND STATE SENTENCES WOULD NOT RUN CONCURRENTLY, MOTION TO VACATE CONVICTION SHOULD NOT HAVE BEEN DENIED WITHOUT A HEARING (SECOND DEPT))/CONVICTION, MOTION TO VACATE (DEFENDANT PRESENTED EVIDENCE HE WOULD NOT HAVE PLED GUILTY HAD HE KNOWN HIS FEDERAL AND STATE SENTENCES WOULD NOT RUN CONCURRENTLY, MOTION TO VACATE CONVICTION SHOULD NOT HAVE BEEN DENIED WITHOUT A HEARING (SECOND DEPT))

CRIMINAL LAW.

DEFENDANT PRESENTED EVIDENCE HE WOULD NOT HAVE PLED GUILTY HAD HE KNOWN HIS FEDERAL AND STATE SENTENCES WOULD NOT RUN CONCURRENTLY, MOTION TO VACATE CONVICTION SHOULD NOT HAVE BEEN DENIED WITHOUT A HEARING (SECOND DEPT).

The Second Department determined defendant's motion to vacate his judgment of conviction (by guilty plea) should not have been denied without a hearing. Defendant presented evidence he would not have pled guilty had he known his state and federal sentences would not run concurrently:

> A hearing will be appropriate where a defendant comes forward with "allegations that raise a triable issue of fact sufficient to challenge the presumed validity of a judgment of conviction" ... . Here, as the People concede, the evidence submitted by the defendant was sufficient to raise a triable issue of fact as to whether he believed, prior to pleading guilty, based on the advice of his attorney, that his state sentence would run concurrent with his federal sentence and whether he would have rejected the plea agreement in the absence of concurrent sentences ... . **People v Oquendo, 2017 NY Slip Op 08018, Second Dept 11-15-17**

CRIMINAL LAW (DEFENDANT WAS NOT ADVISED THE SENTENCE TO WHICH HE AGREED WHEN PLEADING GUILTY WAS FIXED REGARDLESS OF THE OUTCOME OF THE SECOND VIOLENT FELONY OFFENDER HEARING, PLEA VACATED (FOURTH DEPT))/SENTENCING (CRIMINAL LAW, DEFENDANT WAS NOT ADVISED THE SENTENCE TO WHICH HE AGREED WHEN PLEADING GUILTY WAS FIXED REGARDLESS OF THE OUTCOME OF THE SECOND VIOLENT FELONY OFFENDER HEARING, PLEA VACATED (FOURTH DEPT))/SENTENCE, MOTION TO VACATE (DEFENDANT WAS NOT ADVISED THE SENTENCE TO WHICH HE AGREED WHEN PLEADING GUILTY WAS FIXED REGARDLESS OF THE OUTCOME OF THE SECOND VIOLENT FELONY OFFENDER HEARING, PLEA VACATED (FOURTH DEPT))

CRIMINAL LAW.

DEFENDANT WAS NOT ADVISED THE SENTENCE TO WHICH HE AGREED WHEN PLEADING GUILTY WAS FIXED REGARDLESS OF THE OUTCOME OF THE SECOND VIOLENT FELONY OFFENDER HEARING, PLEA VACATED (FOURTH DEPT).

The Fourth Department determined defendant was not advised of the direct consequences of his guilty plea in that he was not advised that the sentence to which he agreed was fixed without regard to the outcome of the second violent felony offender hearing . The guilty plea was vacated and the matter sent back to County Court:

> "While a trial court has no obligation to explain to defendants who plead guilty the possibility that collateral consequences may attach to their criminal convictions, the court must advise a defendant of the direct consequences of the plea" ... . Defendant failed to preserve for our review his contention that County Court failed to fulfill its obligation to advise him at the time of the plea that the sentence imposed would include a period of postrelease supervision ..., and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice ... . Nevertheless, the record supports defendant's further contention that he was not advised that the sentence to which he agreed when pleading guilty was fixed without regard to the outcome of the second violent felony offender hearing, and thus that he was not properly advised of the direct consequences of the plea ... . **People v Smith, 2017 NY Slip Op 08132, Fourth Dept 11-17-17**

CRIMINAL LAW (COUNTY COURT DID NOT HAVE STATUTORY AUTHORITY TO IMPOSE INCARCERATION FOR VIOLATION OF THE TERMS OF A CONDITIONAL DISCHARGE, DEFENDANT HAD COMPLETED HIS ONE YEAR DEFINITE SENTENCE OF INCARCERATION FOR FELONY DWI AND WAS IN THE CONSECUTIVE PERIOD OF CONDITIONAL DISCHARGE WHEN HE DROVE WITHOUT AN IGNITION INTERLOCK DEVICE (THIRD DEPT))/SENTENCING (CRIMINAL LAW, COUNTY COURT DID NOT HAVE STATUTORY AUTHORITY TO IMPOSE INCARCERATION FOR VIOLATION OF THE TERMS OF A CONDITIONAL DISCHARGE, DEFENDANT HAD COMPLETED HIS ONE YEAR DEFINITE SENTENCE OF INCARCERATION FOR FELONY DWI AND WAS IN THE CONSECUTIVE PERIOD OF CONDITIONAL DISCHARGE WHEN HE DROVE WITHOUT AN IGNITION INTERLOCK DEVICE (THIRD DEPT))/CONDITIONAL DISCHARGE (CRIMINAL LAW, COUNTY COURT DID NOT HAVE STATUTORY AUTHORITY TO IMPOSE INCARCERATION FOR VIOLATION OF THE TERMS OF A CONDITIONAL DISCHARGE, DEFENDANT HAD COMPLETED HIS ONE YEAR DEFINITE SENTENCE OF INCARCERATION FOR FELONY DWI AND WAS IN THE CONSECUTIVE PERIOD OF CONDITIONAL DISCHARGE WHEN HE DROVE WITHOUT AN IGNITION INTERLOCK DEVICE (THIRD DEPT))

CRIMINAL LAW.

COUNTY COURT DID NOT HAVE STATUTORY AUTHORITY TO IMPOSE INCARCERATION FOR VIOLATION OF THE TERMS OF A CONDITIONAL DISCHARGE, DEFENDANT HAD COMPLETED HIS ONE YEAR DEFINITE SENTENCE OF INCARCERATION FOR FELONY DWI AND WAS IN THE CONSECUTIVE PERIOD OF CONDITIONAL DISCHARGE WHEN HE DROVE WITHOUT AN IGNITION INTERLOCK DEVICE (THIRD DEPT).

The Third Department, in a full-fledged opinion by Justice Aarons, reversing County Court, determined defendant, who had completed his one-year definite sentence for felony DWI, could not be sentenced to further incarceration for violating the terms of the conditional discharge by driving without an ignition interlock device:

> Defendant served the one-year jail term and ... served it first. ...[D]efendant did not serve part of his one-year sentence; rather, he completed the entirety of that definite sentence. Because of the statutory command of Penal Law § 60.21, the conditional discharge period had to run consecutively to the period of incarceration and, therefore, commenced upon his release from jail. It was during the time following defendant's completion of the one-year definite sentence that he admittedly operated a vehicle without an ignition interlock device and violated the terms of the conditional discharge. The statutory framework governing sentencing does not cover these factual circumstances. The enactment of Penal Law § 60.21 spawned the type of sentence that was imposed upon defendant in 2013 for his DWI conviction — i.e., a definite term of incarceration with a period of conditional discharge to run consecutively. There were, however, no corresponding statutes or amendments to already existing statutes that delineated the type of sanctions that courts could impose in a case such as this one. * * *
>
> "A defendant must be sentenced according to the law as it existed at the time that he or she committed the offense"... and, at the time defendant operated a vehicle without an ignition interlock device, the applicable law did not allow for the imposition of an additional period of imprisonment as done by County Court and as advocated by the People. Accordingly, defendant's sentence of 2 to 6 years followed by three years of conditional discharge must be vacated. **People v Coon, 2017 NY Slip Op 08216, Third Dept 11-22-17**

CRIMINAL LAW (STREET STOPS, OFFICER'S PURSUIT, FORCIBLE STOP, DETENTION AND ARREST OF FLEEING DEFENDANT NOT JUSTIFIED, MOTION TO SUPPRESS STATEMENTS AND ITEMS SEIZED IN SEARCHES PROPERLY GRANTED (THIRD DEPT))/STREET STOPS (CRIMINAL LAW, OFFICER'S PURSUIT, FORCIBLE STOP, DETENTION AND ARREST OF FLEEING DEFENDANT NOT JUSTIFIED, MOTION TO SUPPRESS STATEMENTS AND ITEMS SEIZED IN SEARCHES PROPERLY GRANTED (THIRD DEPT))/SUPPRESS, MOTION TO (CRIMINAL LAW, OFFICER'S PURSUIT, FORCIBLE STOP, DETENTION AND ARREST OF FLEEING DEFENDANT NOT JUSTIFIED, MOTION TO SUPPRESS STATEMENTS AND ITEMS SEIZED IN SEARCHES PROPERLY GRANTED (THIRD DEPT))'SEARCH AND SEIZURE (STREET STOPS, MOTION TO SUPPRESS, OFFICER'S PURSUIT, FORCIBLE STOP, DETENTION AND ARREST OF FLEEING DEFENDANT NOT JUSTIFIED, MOTION TO SUPPRESS STATEMENTS AND ITEMS SEIZED IN SEARCHES PROPERLY GRANTED (THIRD DEPT))

CRIMINAL LAW.

OFFICER'S PURSUIT, FORCIBLE STOP, DETENTION AND ARREST OF FLEEING DEFENDANT NOT JUSTIFIED, MOTION TO SUPPRESS STATEMENTS AND ITEMS SEIZED IN SEARCHES PROPERLY GRANTED (THIRD DEPT).

The Third Department determined defendant's motion to suppress statements and seized property (from the search of his person and home) based upon an unjustified street stop was properly granted. Fifteen minutes after receiving a report that the victim of a robbery had found his stolen car, Deputy Mauser drove around the block in the vicinity of the stolen car and saw defendant "walking pretty fast" "with a purpose." When Mauser activated his lights and got out of his car, the defendant fled and Mauser followed, forcibly stopped, detained and arrested him:

> In arguing that Mauser had, at least, a founded suspicion of criminality, the People rely heavily on defendant's geographic proximity to the stolen vehicle. However, time and again, courts have held that geographic location, without more, is insufficient to sustain a suspicion of criminality ... . Although Mauser testified that he arrived in the area 13 to 14 minutes after receiving the dispatch, the record is devoid of any indication that Mauser possessed information — such as the precise time that the vehicle was reported as found or how long it had been there prior to the report — that could lead to the reasonable inference that the person or persons involved in the theft of the vehicle might still be in the area. Nor does the record establish that Mauser was acting on reliable information identifying or describing the person suspected to have stolen the vehicle ... . Rather, Mauser solely relied on defendant's location in relation to the area in which the vehicle was reportedly found and the fact that he was walking at a brisk pace at 2:53 a.m. on a cold winter day. Together, these facts were insufficient to form a founded suspicion of criminality, so as to justify the common-law right to inquire ... .
>
> In any event, even if Mauser's initial encounter with defendant was considered to be a level one stop or if Mauser were found to have possessed a founded suspicion that criminality was afoot to justify a level two stop, defendant had the constitutional right to be let alone and, by disregarding Mauser's directive to stop, defendant did not elevate the level of suspicion to a reasonable suspicion that a crime had been, was being or was about to be committed... . While "[f]light, combined with other specific circumstances indicating that the suspect may be engaged in criminal activity, could provide the predicate necessary to justify pursuit" ... , the requisite additional facts supporting criminality were lacking here ... . Accordingly, Mauser's pursuit and forcible stop and detention of defendant were improper, and County Court properly suppressed the physical evidence found on defendant's person and in his home, as well as any statements he made to police ... . **People v Rose, 2017 NY Slip Op 08217, Third Dept 11-22-17**

CRIMINAL LAW (JUROR DID NOT REVEAL DURING VOIR DIRE SHE HAD APPLIED FOR A JOB IN THE DISTRICT ATTORNEY'S OFFICE TWO DAYS BEFORE, DEFENDANT WAS DEPRIVED OF AN IMPARTIAL JURY, NEW TRIAL ORDERED (FIRST DEPT))/JURIES (CRIMINAL LAW, JUROR DID NOT REVEAL DURING VOIR DIRE SHE HAD APPLIED FOR A JOB IN THE DISTRICT ATTORNEY'S OFFICE TWO DAYS BEFORE, DEFENDANT WAS DEPRIVED OF AN IMPARTIAL JURY, NEW TRIAL ORDERED (FIRST DEPT))

CRIMINAL LAW.

JUROR DID NOT REVEAL DURING VOIR DIRE SHE HAD APPLIED FOR A JOB IN THE DISTRICT ATTORNEY'S OFFICE TWO DAYS BEFORE, DEFENDANT WAS DEPRIVED OF AN IMPARTIAL JURY, NEW TRIAL ORDERED (FIRST DEPT).

The First Department, in a full-fledged opinion by Justice Tom, reversing Supreme Court, determined defendant's motion to vacate his conviction should have been granted. After the trial the prosecutor informed the court that a juror in defendant's trial had applied for a job at the district attorney's office two days before jury selection but did not disclose the application during voir dire. Ultimately the juror was hired by the district attorney's office. Although the juror had prior experience on the prosecution side, her position at the time of trial involved white collar criminal defense. Defense counsel stated at the hearing that the juror was chosen because of her criminal defense work and, had defense counsel been aware the juror had applied for work in the district attorney's office, the juror would have been struck:

> Here, due to the juror's concealment of material information regarding her job application, which also demonstrated a predisposition in favor of the prosecution, defendant was deprived of an impartial jury comprised of 12 jurors whom he had selected and approved through voir dire. In fact, defendant was tried by only 11 jurors whom he truly selected and approved; this violated his constitutional right to a jury of 12 of his own choice in a criminal case ... . He was also deprived of exercising the various safeguards put into place by our legislature. As defense counsel testified, had the juror timely disclosed this information he would have moved to strike her for cause, and if unsuccessful would have exercised a peremptory challenge against her ... While we recognize that there is no rule requiring automatic reversal in these situations ... , since the verdict was not returned by a fair and impartial jury and we find the juror would have been subject to removal for cause, we agree with defendant that he was denied a fair trial on the ground that he was not tried by a jury of his own choice. We thus remand for a new trial. Critically, the juror remaining on the jury was prejudicial to defendant because he was ultimately convicted by the jury. **People v Southall, 2017 NY Slip Op 08344, First Dept 11-28-17**

CRIMINAL LAW (DENIAL OF PAROLEE'S REQUEST TO LIVE IN HIS FAMILY HOME WAS APPARENTLY BASED UPON COMMUNITY PRESSURE AND WAS REVERSED AS ARBITRARY AND CAPRICIOUS (SECOND DEPT))/PAROLE (DENIAL OF PAROLEE'S REQUEST TO LIVE IN HIS FAMILY HOME WAS APPARENTLY BASED UPON COMMUNITY PRESSURE AND WAS REVERSED AS ARBITRARY AND CAPRICIOUS (SECOND DEPT))

CRIMINAL LAW.

DENIAL OF PAROLEE'S REQUEST TO LIVE IN HIS FAMILY HOME WAS APPARENTLY BASED UPON COMMUNITY PRESSURE AND WAS REVERSED AS ARBITRARY AND CAPRICIOUS (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the Department of Corrections and Community Supervision (DOCCS) acted arbitrarily and capriciously when it denied petitioner permission to live in his family home (Telford home) after released on parole, apparently based upon community pressure:

> "Pursuant to Executive Law § 259-c(2) and 9 NYCRR 8003.3, special conditions may be imposed upon a parolee's right to release. The courts routinely uphold these conditions as long as they are rationally related to the inmate's past conduct and future chance of recidivism. Acceptable parole restrictions have included geographical restrictions and restrictions requiring that parolees refrain from contact with certain individuals or classes of individuals"... .
>
> Under the circumstances of this case, speculation by DOCCS about possible community efforts to exclude the petitioner from otherwise suitable housing and about the petitioner's potential response to such efforts is not a rational basis for denial of otherwise suitable housing ... . As the respondents have articulated no other basis for denying approval of the proposed residence, the respondents' refusal to approve the Telford home as a suitable postrelease residence was arbitrary and capricious, as the determination bears no rational relation to the petitioner's past conduct or likelihood that he will re-offend ... . **Matter of Telford v McCartney, 2017 NY Slip Op 08384, Second Dept 11-29-17**

CRIMINAL LAW (ARREST WAS NOT AUTHORIZED, CONVICTION FOR RESISTING ARREST REVERSED IN THE INTEREST OF JUSTICE (ERROR NOT PRESERVED) (SECOND DEPT))/APPEALS (CRIMINAL LAW, INTEREST OF JUSTICE, ARREST WAS NOT AUTHORIZED, CONVICTION FOR RESISTING ARREST REVERSED IN THE INTEREST OF JUSTICE (ERROR NOT PRESERVED) (SECOND DEPT))/RESISTING ARREST (ARREST WAS NOT AUTHORIZED, CONVICTION FOR RESISTING ARREST REVERSED IN THE INTEREST OF JUSTICE (ERROR NOT PRESERVED) (SECOND DEPT))/ARREST (PROBABLE CAUSE, ARREST WAS NOT AUTHORIZED, CONVICTION FOR RESISTING ARREST REVERSED IN THE INTEREST OF JUSTICE (ERROR NOT PRESERVED) (SECOND DEPT))

CRIMINAL LAW, APPEALS.

ARREST WAS NOT AUTHORIZED, CONVICTION FOR RESISTING ARREST REVERSED IN THE INTEREST OF JUSTICE (ERROR NOT PRESERVED) (SECOND DEPT).

The Second Department, reversing defendant's conviction for resisting arrest in the interest of justice (error not preserved), determined the arrest was not authorized. The complainant told the police a man in a white BMW had pointed a gun at him. When the complainant saw the defendant and another man standing near a white BMW he said "that's

them." Because the officers did not know which of the two men pointed the gun at the complainant, they did not have probable cause to arrest the defendant at the time he fled:

> A person is guilty of resisting arrest when he or she intentionally prevents or attempts to prevent a police officer from effectuating an authorized arrest of himself or herself or another person ... . "A key element of resisting arrest is the existence of an authorized arrest, including a finding that the arrest was premised on probable cause" ... . Although the defendant's contention that the prosecution failed to present legally sufficient evidence of an authorized arrest is unpreserved for appellate review ... , we reach it in the exercise of our interest of justice jurisdiction ... . Viewing the evidence in the light most favorable to the People ... , we agree with the defendant that the evidence was not legally sufficient to establish the element of authorized arrest because, as a matter of law, the evidence failed to establish that the police had probable cause to arrest the defendant. Generally, information provided by an identified citizen accusing another individual of a specific crime is legally sufficient to provide the police with probable cause to arrest ... . However, at the time that the complainant pointed to the defendant and [another] and stated "that's them," the police officers had only been informed that one individual pointed a firearm at the complainant. Therefore, under the circumstances presented here, the officers could not have concluded that it was more probable than not that the defendant ... had been driving the white BMW and pointed a firearm at the complainant. Accordingly, the evidence was legally insufficient to establish the defendant's guilt of the crime of resisting arrest. **People v Andrews, 2017 NY Slip Op 07747, Second Dept 11-8-17**

CRIMINAL LAW (GUILTY PLEA, PLEA COLLOQUY RAISED QUESTIONS ABOUT DEFENDANT'S MENTAL HEALTH, NARROW EXCEPTION TO PRESERVATION REQUIREMENT ALLOWED ISSUE TO BE HEARD ON APPEAL, PLEA VACATED (THIRD DEPT))/APPEALS (CRIMINAL LAW, GUILTY PLEA, PLEA COLLOQUY RAISED QUESTIONS ABOUT DEFENDANT'S MENTAL HEALTH, NARROW EXCEPTION TO PRESERVATION REQUIREMENT ALLOWED ISSUE TO BE HEARD ON APPEAL, PLEA VACATED (THIRD DEPT))/GUILTY PLEA (PLEA COLLOQUY RAISED QUESTIONS ABOUT DEFENDANT'S MENTAL HEALTH, NARROW EXCEPTION TO PRESERVATION REQUIREMENT ALLOWED ISSUE TO BE HEARD ON APPEAL, PLEA VACATED (THIRD DEPT))/COLLOQUY (CRIMINAL LAW, PLEA COLLOQUY RAISED QUESTIONS ABOUT DEFENDANT'S MENTAL HEALTH, NARROW EXCEPTION TO PRESERVATION REQUIREMENT ALLOWED ISSUE TO BE HEARD ON APPEAL, PLEA VACATED (THIRD DEPT))/MENTAL HEALTH (CRIMINAL LAW, GUILTY PLEA, PLEA COLLOQUY RAISED QUESTIONS ABOUT DEFENDANT'S MENTAL HEALTH, NARROW EXCEPTION TO PRESERVATION REQUIREMENT ALLOWED ISSUE TO BE HEARD ON APPEAL, PLEA VACATED (THIRD DEPT))

CRIMINAL LAW, APPEALS.

PLEA COLLOQUY RAISED QUESTIONS ABOUT DEFENDANT'S MENTAL HEALTH, NARROW EXCEPTION TO PRESERVATION REQUIREMENT ALLOWED ISSUE TO BE HEARD ON APPEAL, PLEA VACATED (THIRD DEPT).

The Third Department, vacating defendant's guilty plea, determined that defendant, during the plea colloquy, raised a mental health issue that was not adequately addressed by the judge. Because the issue was raised in the colloquy, it was appealable despite the lack of preservation:

> ... [D]efendant acknowledged during the plea colloquy that he had mental health problems, including posttraumatic stress disorder that caused him to experience hallucinations, that he heard a voice telling him to commit the crime at issue and that he was taking multiple medications, including Zoloft, to address his mental health problems. Although County Court observed that defendant appeared coherent and responsive during the plea proceedings, it did not ascertain if he was aware that a possible defense, emanating from his mental state at the time that he committed the crime, was available and that he was waiving it by pleading guilty. Inasmuch as an essential element

> of attempted burglary in the third degree is the intent to commit a crime inside a building that one has unlawfully entered ... , and defendant's mental state potentially negated such intent, County Court should have conducted a further inquiry before accepting defendant's guilty plea... . Accordingly, under the circumstances presented, we find that the guilty plea was not knowing, voluntary and intelligent and must be vacated. **People v Rogers, 2017 NY Slip Op 07889, Third Dept 11-9-17**

CRIMINAL LAW (DWI COUNTS WERE LESSER INCLUSORY COUNTS OF VEHICULAR MANSLAUGHTER AND SHOULD HAVE BEEN DISMISSED, ERROR DID NOT REQUIRE PRESERVATION (FOURTH DEPT))/APPEALS (CRIMINAL LAW, LESSER INCLUSORY COUNTS, DWI COUNTS WERE LESSER INCLUSORY COUNTS OF VEHICULAR MANSLAUGHTER AND SHOULD HAVE BEEN DISMISSED, ERROR DID NOT REQUIRE PRESERVATION (FOURTH DEPT))/LESSER INCLUSORY COUNTS (CRIMINAL LAW, DWI COUNTS WERE LESSER INCLUSORY COUNTS OF VEHICULAR MANSLAUGHTER AND SHOULD HAVE BEEN DISMISSED, ERROR DID NOT REQUIRE PRESERVATION (FOURTH DEPT))/VEHICULAR MANSLAUGHTER (DWI COUNTS WERE LESSER INCLUSORY COUNTS OF VEHICULAR MANSLAUGHTER AND SHOULD HAVE BEEN DISMISSED, ERROR DID NOT REQUIRE PRESERVATION (FOURTH DEPT))/DRIVING WHILE INTOXICATED (DWI COUNTS WERE LESSER INCLUSORY COUNTS OF VEHICULAR MANSLAUGHTER AND SHOULD HAVE BEEN DISMISSED, ERROR DID NOT REQUIRE PRESERVATION (FOURTH DEPT))

CRIMINAL LAW, APPEALS.

DWI COUNTS WERE LESSER INCLUSORY COUNTS OF VEHICULAR MANSLAUGHTER AND SHOULD HAVE BEEN DISMISSED, ERROR DID NOT REQUIRE PRESERVATION (FOURTH DEPT).

The Fourth Department, reversing the Driving While Intoxicated convictions, noted that the dwi counts were lesser inclusory counts of vehicular manslaughter. The error did not require preservation:

> The People correctly concede, however, that counts two and three, charging driving while intoxicated, must be dismissed as lesser inclusory counts of count one, charging vehicular manslaughter in the first degree ... , and we therefore modify the judgment accordingly. Defendant's failure to preserve the issue for our review is of no moment because preservation is not required ... . **People v Mastowski, 2017 NY Slip Op 08113, Fourth Dept 11-17-17**

CRIMINAL LAW (FAILURE TO INSTRUCT THE JURY THAT AN ACQUITTAL ON THE TOP COUNT BASED UPON THE JUSTIFICATION DEFENSE REQUIRED ACQUITTAL ON THE REMAINING CHARGES IS REVERSIBLE ERROR, DESPITE THE FAILURE TO PRESERVE THE ERROR (FIRST DEPT))/APPEALS (CRIMINAL LAW, FAILURE TO INSTRUCT THE JURY THAT AN ACQUITTAL ON THE TOP COUNT BASED UPON THE JUSTIFICATION DEFENSE REQUIRED ACQUITTAL ON THE REMAINING CHARGES IS REVERSIBLE ERROR, DESPITE THE FAILURE TO PRESERVE THE ERROR (FIRST DEPT))/JURY INSTRUCTIONS (CRIMINAL LAW, JUSTIFICATION DEFENSE, FAILURE TO INSTRUCT THE JURY THAT AN ACQUITTAL ON THE TOP COUNT BASED UPON THE JUSTIFICATION DEFENSE REQUIRED ACQUITTAL ON THE REMAINING CHARGES IS REVERSIBLE ERROR, DESPITE THE FAILURE TO PRESERVE THE ERROR (FIRST DEPT))/JUSTIFICATION DEFENSE (CRIMINAL LAW, JURY INSTRUCTIONS, FAILURE TO INSTRUCT THE JURY THAT AN ACQUITTAL ON THE TOP COUNT BASED UPON THE JUSTIFICATION DEFENSE REQUIRED ACQUITTAL ON THE REMAINING CHARGES IS REVERSIBLE ERROR, DESPITE THE FAILURE TO PRESERVE THE ERROR (FIRST DEPT))

CRIMINAL LAW, APPEALS.

FAILURE TO INSTRUCT THE JURY THAT AN ACQUITTAL ON THE TOP COUNT BASED UPON THE JUSTIFICATION DEFENSE REQUIRED ACQUITTAL ON THE REMAINING CHARGES IS REVERSIBLE ERROR, DESPITE THE FAILURE TO PRESERVE THE ERROR (FIRST DEPT).

The First Department, reversing defendant's conviction, noted the jury should have been informed that an acquittal on the top count (second degree murder) based on the justification defense required an acquittal on the remaining charges. The defendant was convicted of manslaughter. Although the error was not preserved for appeal, the court exercised its interest of justice jurisdiction:

> As in cases such as People v Velez (131 AD3d 129 [1st Dept 2015]), the court's charge failed to convey that an acquittal on the top count of second-degree murder based on a finding of justification would preclude consideration of the remaining charges. We find that this error was not harmless and warrants reversal in the interest of justice ... . **People v Santiago, 2017 NY Slip Op 08190, First Dept 11-21-17**

CRIMINAL LAW (DEFENDANT WAS TOLD HE COULD APPEAL THE DENIAL OF HIS SPEEDY TRIAL MOTION AFTER ENTERING A GUILTY PLEA, WRONG ADVICE WARRANTED VACATING THE PLEA DESPITE FAILURE TO PRESERVE THE ARGUMENT (FIRST DEPT))/APPEALS (CRIMINAL LAW, DEFENDANT WAS TOLD HE COULD APPEAL THE DENIAL OF HIS SPEEDY TRIAL MOTION AFTER ENTERING A GUILTY PLEA, WRONG ADVICE WARRANTED VACATING THE PLEA DESPITE FAILURE TO PRESERVE THE ARGUMENT (FIRST DEPT))/GUILTY PLEA, VACATION OF (DEFENDANT WAS TOLD HE COULD APPEAL THE DENIAL OF HIS SPEEDY TRIAL MOTION AFTER ENTERING A GUILTY PLEA, WRONG ADVICE WARRANTED VACATING THE PLEA DESPITE FAILURE TO PRESERVE THE ARGUMENT (FIRST DEPT))

CRIMINAL LAW, APPEALS.

DEFENDANT WAS TOLD HE COULD APPEAL THE DENIAL OF HIS SPEEDY TRIAL MOTION AFTER ENTERING A GUILTY PLEA, WRONG ADVICE WARRANTED VACATING THE PLEA DESPITE FAILURE TO PRESERVE THE ARGUMENT (FIRST DEPT).

The First Department, vacating defendant's guilty plea, determined the wrong advice about whether defendant could appeal after pleading guilty warranted reversal, despite the failure to preserved the error. Defendant was told he could appeal the denial of his speedy trial motion:

A defendant forfeits his right to appellate review of a CPL 30.30 motion upon a guilty plea ... . However, here, the record is clear that the court misadvised defendant that he could pursue his 30.30 claim on appeal of a guilty plea ... . Neither the defense counsel nor the prosecutor corrected the court's misadvice. Moreover, defendant accepted a lengthier sentence, and declined to replead to a different offense with a shorter prison sentence, based on this misstatement that his 30.30 claim could be raised on appeal. Under the totality of these circumstances, defendant's plea is vacated and the matter remanded ... . As defendant had no practical ability to object to the error because he was sentenced on the date the misstatement occurred, ... , he was not required to preserve his argument. **People v Sanchez, 2017 NY Slip Op 08193, First Dept 11-21-17**

CRIMINAL LAW (GUILTY PLEAS, DEFENDANT WAS TOLD HE COULD APPEAL THE DENIAL OF HIS SPEEDY TRIAL MOTION AFTER ENTERING A GUILTY PLEA, WRONG ADVICE WARRANTED VACATING THE PLEA (SECOND DEPT))/APPEALS (CRIMINAL LAW, GUILTY PLEAS, DEFENDANT WAS TOLD HE COULD APPEAL THE DENIAL OF HIS SPEEDY TRIAL MOTION AFTER ENTERING A GUILTY PLEA, WRONG ADVICE WARRANTED VACATING THE PLEA (SECOND DEPT))/GUILTY PLEA, VACATION OF (APPEALS, DEFENDANT WAS TOLD HE COULD APPEAL THE DENIAL OF HIS SPEEDY TRIAL MOTION AFTER ENTERING A GUILTY PLEA, WRONG ADVICE WARRANTED VACATING THE PLEA (SECOND DEPT))

CRIMINAL LAW, APPEALS.

DEFENDANT WAS TOLD HE COULD APPEAL THE DENIAL OF HIS SPEEDY TRIAL MOTION AFTER ENTERING A GUILTY PLEA, WRONG ADVICE WARRANTED VACATING THE PLEA (SECOND DEPT).

The Second Department, vacating defendant's guilty plea, determined that wrong advice about his ability to appeal the denial of his speedy trial motion warranted reversal:

A defendant who has entered a plea of guilty "forfeit[s] his [or her] right to claim that he [or she] was deprived of a speedy trial under CPL 30.30"... .However, where, as here, the assurance on which a defendant's plea was predicated is ineffectual to preserve the right to appeal, he or she is entitled, if he or she wishes, to withdraw the plea of guilty ... .

Here, it is clear from the record that the defendant pleaded guilty in reliance upon a promise from the Supreme Court that, upon his plea of guilty, he would retain the right to appeal the denial of his motion to dismiss the indictment pursuant to CPL 30.30. However, that promise could not be fulfilled .... Since the defendant is entitled to withdraw his plea of guilty ... , the judgment of conviction must be reversed, his plea vacated, and the matter remitted ... . **People v Smith, 2017 NY Slip Op 08288, Second Dept 11-22-17**

CRIMINAL LAW (DESPITE THE FAILURE TO RAISE THE ISSUE ON APPEAL, THE INCLUSORY CONCURRENT SECOND DEGREE MURDER COUNTS MUST BE DISMISSED BASED UPON THE FIRST DEGREE MURDER CONVICTION (THIRD DEPT))/APPEALS (CRIMINAL LAW, DESPITE THE FAILURE TO RAISE THE ISSUE ON APPEAL, THE INCLUSORY CONCURRENT SECOND DEGREE MURDER COUNTS MUST BE DISMISSED BASED UPON THE FIRST DEGREE MURDER CONVICTION (THIRD DEPT))/INCLUSORY CONCURRENT COUNTS (CRIMINAL LAW, DESPITE THE FAILURE TO RAISE THE ISSUE ON APPEAL, THE INCLUSORY CONCURRENT SECOND DEGREE MURDER COUNTS MUST BE DISMISSED BASED UPON THE FIRST DEGREE MURDER CONVICTION (THIRD DEPT))

CRIMINAL LAW, APPEALS.

DESPITE THE FAILURE TO RAISE THE ISSUE ON APPEAL, THE INCLUSORY CONCURRENT SECOND DEGREE MURDER COUNTS MUST BE DISMISSED BASED UPON THE FIRST DEGREE MURDER CONVICTION (THIRD DEPT).

The Third Department determined that defendant's second degree murder counts were lesser inclusory counts of first degree murder. Therefore the second degree murder counts should have been dismissed upon the first degree murder conviction. The fact that this issue was not raised below or on appeal did not preclude dismissal by the appellate court:

> ... [A]lthough not raised by either party, modification of the judgment is required. "With respect to inclusory concurrent counts, . . . [a] verdict of guilty upon the greatest count submitted is deemed a dismissal of every lesser count submitted" (CPL 300.40 [3] [b]). The two counts of murder in the second degree upon which defendant was convicted are inclusory concurrent counts of the count of murder in the first degree upon which he was also convicted ... . Consequently, defendant's convictions of murder in the second degree must be reversed and the respective counts of the indictment dismissed. **People v Davis, 2017 NY Slip Op 08214, Third Dept 11-22-17**

CRIMINAL LAW (JURY INSTRUCTION ALLOWED JURY TO CONSIDER UNCHARGED OFFENSE, A FUNDAMENTAL ERROR THAT NEED NOT BE PRESERVED, JURY SHOULD HAVE BEEN INSTRUCTED ON A LESSER INCLUDED OFFENSE, PROSECUTOR SHOULD NOT HAVE REFERRED TO EVIDENCE WHICH WAS DESTROYED (FOURTH DEPT))/APPEALS (CRIMINAL LAW, JURY INSTRUCTION ALLOWED JURY TO CONSIDER UNCHARGED OFFENSE, A FUNDAMENTAL ERROR THAT NEED NOT BE PRESERVED, JURY SHOULD HAVE BEEN INSTRUCTED ON A LESSER INCLUDED OFFENSE, PROSECUTOR SHOULD NOT HAVE REFERRED TO EVIDENCE WHICH WAS DESTROYED (FOURTH DEPT))/ATTORNEYS (CRIMINAL LAW, PROSECUTORIAL MISCONDUCT, JURY INSTRUCTION ALLOWED JURY TO CONSIDER UNCHARGED OFFENSE, A FUNDAMENTAL ERROR THAT NEED NOT BE PRESERVED, JURY SHOULD HAVE BEEN INSTRUCTED ON A LESSER INCLUDED OFFENSE, PROSECUTOR SHOULD NOT HAVE REFERRED TO EVIDENCE WHICH WAS DESTROYED (FOURTH DEPT))/JURY INSTRUCTIONS CRIMINAL LAW, JURY INSTRUCTION ALLOWED JURY TO CONSIDER UNCHARGED OFFENSE, A FUNDAMENTAL ERROR THAT NEED NOT BE PRESERVED, JURY SHOULD HAVE BEEN INSTRUCTED ON A LESSER INCLUDED OFFENSE, PROSECUTOR SHOULD NOT HAVE REFERRED TO EVIDENCE WHICH WAS DESTROYED (FOURTH DEPT))/LESSER INCLUDED OFFENSES (JURY INSTRUCTION ALLOWED JURY TO CONSIDER UNCHARGED OFFENSE, A FUNDAMENTAL ERROR THAT NEED NOT BE PRESERVED, JURY SHOULD HAVE BEEN INSTRUCTED ON A LESSER INCLUDED OFFENSE, PROSECUTOR SHOULD NOT HAVE REFERRED TO EVIDENCE WHICH WAS DESTROYED (FOURTH DEPT))/PROSECUTORIAL MISCONDUCT (JURY INSTRUCTION ALLOWED JURY TO CONSIDER UNCHARGED OFFENSE, A FUNDAMENTAL ERROR THAT NEED NOT BE PRESERVED, JURY SHOULD HAVE BEEN INSTRUCTED ON A LESSER INCLUDED OFFENSE, PROSECUTOR SHOULD NOT HAVE REFERRED TO EVIDENCE WHICH WAS DESTROYED (FOURTH DEPT))

CRIMINAL LAW, APPEALS, ATTORNEYS.

JURY INSTRUCTION ALLOWED JURY TO CONSIDER UNCHARGED OFFENSE, A FUNDAMENTAL ERROR THAT NEED NOT BE PRESERVED, JURY SHOULD HAVE BEEN INSTRUCTED ON A LESSER INCLUDED OFFENSE, PROSECUTOR SHOULD NOT HAVE REFERRED TO EVIDENCE WHICH WAS DESTROYED (FOURTH DEPT).

The Fourth Department ordered a new trial on the assault and unlawful imprisonment charges and reached a prosecutorial misconduct issue in the interest of justice (error not preserved). The prosecutorial misconduct, referring to evidence (a bloody t-shirt) which had been destroyed, was not deemed reversible. The Fourth Department found that a jury instruction on assault allowed the jury to consider a theory about how the victim was injured which was not charged in the indictment. Such an error affects the fundamental right to be tried only on what has been charged and need not be preserved. The Fourth Department also found that the evidence supported both the charged and a lesser included unlawful imprisonment offenses. The judge's refusal to charge the jury on the lesser included was reversible error:

> ... [The] conviction of assault in the second degree must be reversed because Supreme Court's instruction created the possibility that the jury convicted him upon a theory different from the one charged in the indictment. ... As a preliminary matter, we reject the People's contention that defendant was required to preserve his contention for our review. It is well settled that " defendant has a "fundamental and nonwaivable" right to be tried only on the crimes charged' " ... . With respect to the merits of defendant's contention, "[w]here the court's jury instruction on a particular count erroneously contains an additional theory that differs from the theory alleged in the indictment, as limited by the bill of particulars, and the evidence adduced at trial could have established either theory, reversal of the conviction on that count is required because there is a possibility that the jury could have convicted the defendant upon the uncharged theory" ... . We may not apply harmless error analysis to such an error because it would be impossible to determine whether the jury based its guilty verdict on the uncharged theory ... . **People v Barber, 2017 NY Slip Op 07807, Fourth Dept 11-9-17**

CRIMINAL LAW (MOTION TO VACATE CONVICTION, WHETHER A SUCCESSFUL MOTION TO DISMISS COULD HAVE BEEN MADE ON DOUBLE JEOPARDY GROUNDS PURSUANT TO CPL 40.20 COULD NOT HAVE BEEN DETERMINED ON DIRECT APPEAL, THEREFORE DEFENDANT'S MOTION TO VACATE HIS CONVICTION ON INEFFECTIVE ASSISTANCE GROUNDS SHOULD NOT HAVE BEEN DISMISSED WITHOUT A HEARING (FOURTH DEPT))/APPEALS (CRIMINAL LAW, MOTION TO VACATE CONVICTION, WHETHER A SUCCESSFUL MOTION TO DISMISS COULD HAVE BEEN MADE ON DOUBLE JEOPARDY GROUNDS PURSUANT TO CPL 40.20 COULD NOT HAVE BEEN DETERMINED ON DIRECT APPEAL, THEREFORE DEFENDANT'S MOTION TO VACATE HIS CONVICTION ON INEFFECTIVE ASSISTANCE GROUNDS SHOULD NOT HAVE BEEN DISMISSED WITHOUT A HEARING (FOURTH DEPT))/ATTORNEYS (CRIMINAL LAW, INEFFECTIVE ASSISTANCE, MOTION TO VACATE CONVICTION, WHETHER A SUCCESSFUL MOTION TO DISMISS COULD HAVE BEEN MADE ON DOUBLE JEOPARDY GROUNDS PURSUANT TO CPL 40.20 COULD NOT HAVE BEEN DETERMINED ON DIRECT APPEAL, THEREFORE DEFENDANT'S MOTION TO VACATE HIS CONVICTION ON INEFFECTIVE ASSISTANCE GROUNDS SHOULD NOT HAVE BEEN DISMISSED WITHOUT A HEARING (FOURTH DEPT))/INEFFECTIVE ASSISTANCE (MOTION TO VACATE CONVICTION, WHETHER A SUCCESSFUL MOTION TO DISMISS COULD HAVE BEEN MADE ON DOUBLE JEOPARDY GROUNDS PURSUANT TO CPL 40.20 COULD NOT HAVE BEEN DETERMINED ON DIRECT APPEAL, THEREFORE DEFENDANT'S MOTION TO VACATE HIS CONVICTION ON INEFFECTIVE ASSISTANCE GROUNDS SHOULD NOT HAVE BEEN DISMISSED WITHOUT A HEARING (FOURTH DEPT))/DOUBLE JEOPARDY (MOTION TO VACATE CONVICTION, WHETHER A SUCCESSFUL MOTION TO DISMISS COULD HAVE BEEN MADE ON DOUBLE JEOPARDY GROUNDS PURSUANT TO CPL 40.20 COULD NOT HAVE BEEN DETERMINED ON DIRECT APPEAL, THEREFORE DEFENDANT'S MOTION TO VACATE HIS CONVICTION ON INEFFECTIVE ASSISTANCE GROUNDS SHOULD NOT HAVE BEEN DISMISSED WITHOUT A HEARING (FOURTH DEPT))/CRIMINAL PROCEDURE LAW 40.20 (DOUBLE JEOPARDY, MOTION TO VACATE CONVICTION, WHETHER A SUCCESSFUL MOTION TO DISMISS COULD HAVE BEEN MADE ON DOUBLE JEOPARDY GROUNDS PURSUANT TO CPL 40.20 COULD NOT HAVE BEEN DETERMINED ON DIRECT APPEAL, THEREFORE DEFENDANT'S MOTION TO VACATE HIS CONVICTION ON INEFFECTIVE ASSISTANCE GROUNDS SHOULD NOT HAVE BEEN DISMISSED WITHOUT A HEARING (FOURTH DEPT))

CRIMINAL LAW, APPEALS, ATTORNEYS.

WHETHER A SUCCESSFUL MOTION TO DISMISS COULD HAVE BEEN MADE ON DOUBLE JEOPARDY GROUNDS PURSUANT TO CPL 40.20 COULD NOT HAVE BEEN DETERMINED ON DIRECT APPEAL, THEREFORE DEFENDANT'S MOTION TO VACATE HIS CONVICTION ON INEFFECTIVE ASSISTANCE GROUNDS SHOULD NOT HAVE BEEN DISMISSED WITHOUT A HEARING (FOURTH DEPT).

The Fourth Department determined defendant could not have raised the ineffective assistance argument on direct appeal and therefore county court should not have denied his motion to vacate his conviction without a hearing. There was a question whether defense counsel could have successfully moved to dismiss three felonies based on the violation of protections against double jeopardy in Criminal Procedure Law (CPL) 40.20. Defendant was indicted on three felonies and three misdemeanors. But defendant had already pled guilty to the three misdemeanors in town court. When that was discovered the county court judge sent the three misdemeanors back to town court and defendant was convicted of the three felonies in county court:

> ... [E]ven if separate prosecutions were not permitted under subdivision 40.20 (2) (b), defendant must also establish that separate prosecutions were not permitted under CPL 40.20 (2) (a) in order to establish that a motion to dismiss the felonies under CPL 40.20, if made, would have been successful.
>
> Unlike subdivision (2) (b), the determination whether separate prosecutions were permitted under subdivision (2) (a) could not have been made on the direct appeal because the "lower court paperwork" was not included in the record, and a review of the charging documents for the prior and current prosecutions is necessary to determine if acts establishing the misdemeanor offenses were "in the main clearly distinguishable from those establishing the [felony offenses]" ... .
>
> Inasmuch as the record on the direct appeal lacked the lower court paperwork, the record on direct appeal was insufficient to determine whether a motion to dismiss the felony counts under CPL 40.20, if made, would have been successful. **People v Pace, 2017 NY Slip Op 08137, Fourth Dept 11-17-17**

CRIMINAL LAW (MOTION TO VACATE CONVICTION, ALTHOUGH SOME OF THE INEFFECTIVE ASSISTANCE ISSUES SHOULD HAVE BEEN RAISED ON APPEAL, BECAUSE SOME OF THE INEFFECTIVE ASSISTANCE ISSUES COULD ONLY BE RAISED IN THE MOTION TO VACATE, ALL THE INEFFECTIVE ASSISTANCE ISSUES SHOULD HAVE BEEN CONSIDERED PURSUANT TO THE MOTION TO VACATE THE CONVICTION, HERE INEFFECTIVE ASSISTANCE WARRANTED A NEW TRIAL (THIRD DEPT))/VACATE CONVICTION, MOTION TO (INEFFECTIVE ASSISTANCE, ALTHOUGH SOME OF THE INEFFECTIVE ASSISTANCE ISSUES SHOULD HAVE BEEN RAISED ON APPEAL, BECAUSE SOME OF THE INEFFECTIVE ASSISTANCE ISSUES COULD ONLY BE RAISED IN THE MOTION TO VACATE, ALL THE INEFFECTIVE ASSISTANCE ISSUES SHOULD HAVE BEEN CONSIDERED PURSUANT TO THE MOTION TO VACATE THE CONVICTION, HERE INEFFECTIVE ASSISTANCE WARRANTED A NEW TRIAL (THIRD DEPT))/ATTORNEYS (CRIMINAL LAW, INEFFECTIVE ASSISTANCE, MOTION TO VACATE CONVICTION, ALTHOUGH SOME OF THE INEFFECTIVE ASSISTANCE ISSUES SHOULD HAVE BEEN RAISED ON APPEAL, BECAUSE SOME OF THE INEFFECTIVE ASSISTANCE ISSUES COULD ONLY BE RAISED IN THE MOTION TO VACATE, ALL THE INEFFECTIVE ASSISTANCE ISSUES SHOULD HAVE BEEN CONSIDERED PURSUANT TO THE MOTION TO VACATE THE CONVICTION, HERE INEFFECTIVE ASSISTANCE WARRANTED A NEW TRIAL (THIRD DEPT))/INEFFECTIVE ASSISTANCE (MOTION TO VACATE CONVICTION, ALTHOUGH SOME OF THE INEFFECTIVE ASSISTANCE ISSUES SHOULD HAVE BEEN RAISED ON APPEAL, BECAUSE SOME OF THE INEFFECTIVE ASSISTANCE ISSUES COULD ONLY BE RAISED IN THE MOTION TO VACATE, ALL THE INEFFECTIVE ASSISTANCE ISSUES SHOULD HAVE BEEN CONSIDERED PURSUANT TO THE MOTION TO VACATE THE CONVICTION, HERE INEFFECTIVE ASSISTANCE WARRANTED A NEW TRIAL (THIRD DEPT))

CRIMINAL LAW, ATTORNEYS.

ALTHOUGH SOME OF THE INEFFECTIVE ASSISTANCE ISSUES SHOULD HAVE BEEN RAISED ON APPEAL, BECAUSE SOME OF THE INEFFECTIVE ASSISTANCE ISSUES COULD ONLY BE RAISED IN THE MOTION TO VACATE, ALL THE INEFFECTIVE ASSISTANCE ISSUES SHOULD HAVE BEEN CONSIDERED PURSUANT TO THE MOTION TO VACATE THE CONVICTION, HERE INEFFECTIVE ASSISTANCE WARRANTED A NEW TRIAL (THIRD DEPT).

The Third Department, in a full-fledged opinion by Justice Taylor, over a dissent, reversing County Court, determined defendant's motion to vacate his conviction on ineffective assistance grounds should have been granted. Even though some of the ineffective assistance claims could be determined from the original record (and therefore should have been raised on appeal), because some of the claims could not be determined from the record, the court could consider all the ineffective assistance issues:

> ... [W]e do not find that all of the alleged failures on the part of trial counsel involve matters adequately reflected in the record that could have been raised upon direct appeal. Defendant's argument that trial counsel was ineffective for failing to impeach the cabdriver "is dependent upon [a] statement[] to the police that [is] outside the record" and, therefore, was properly raised in the context of the instant CPL 440.10 motion ... . Defendant also faults trial counsel for failing to request that the crime of assault in the third degree ... be submitted to the jury as a lesser included offense of assault in the second degree ... . While it is apparent from the face of the record that counsel did not request submission of assault in the third degree as a lesser included offense, it is axiomatic that "the decision to request or consent to the submission of a lesser included offense is often based on strategic considerations, taking into account a myriad of factors, including the strength of the People's case" ... . Because defendant's complaint about counsel in this regard is predicated on counsel's strategy, or lack thereof, which is not discernable from the face of the record, we likewise find that this claim of ineffectiveness may properly be advanced by way of a CPL 440.10 motion ... .
>
> The two other allegations of ineffectiveness raised on the motion — that counsel failed to object to County Court's Allen charge and failed to sufficiently articulate and support a request for an instruction on the defense of justification under Penal Law § 35.05 — are, as defendant concedes, based on matters that appear on the face of the record. Yet, relying on People v Maxwell (89 AD3d 1108 [2d Dept 2011]), defendant claims that these record-based allegations of ineffectiveness may appropriately be considered together with his nonrecord-based allegations in the context of this CPL 440.10 motion, thereby permitting review of his claim of ineffective assistance in its entirety. ... [W]e agree. **People v Taylor, 2017 NY Slip Op 07649, Third Dept 11-2-17**

CRIMINAL LAW (FAILURE TO REQUEST A JURY CHARGE ON THE INTOXICATION DEFENSE MAY HAVE BEEN A STRATEGIC DECISION WHICH THE APPELLATE COURT WILL NOT SECOND GUESS IN HINDSIGHT (SECOND DEPT))/ATTORNEYS (CRIMINAL LAW, AILURE TO REQUEST A JURY CHARGE ON THE INTOXICATION DEFENSE MAY HAVE BEEN A STRATEGIC DECISION WHICH THE APPELLATE COURT WILL NOT SECOND GUESS IN HINDSIGHT (SECOND DEPT))/INEFFECTIVE ASSISTANCE (FAILURE TO REQUEST A JURY CHARGE ON THE INTOXICATION DEFENSE MAY HAVE BEEN A STRATEGIC DECISION WHICH THE APPELLATE COURT WILL NOT SECOND GUESS IN HINDSIGHT (SECOND DEPT))/JURY INSTRUCTIONS (CRIMINAL LAW, INEFFECTIVE ASSISTANCE, FAILURE TO REQUEST A JURY CHARGE ON THE INTOXICATION DEFENSE MAY HAVE BEEN A STRATEGIC DECISION WHICH THE APPELLATE COURT WILL NOT SECOND GUESS IN HINDSIGHT (SECOND DEPT))

CRIMINAL LAW, ATTORNEYS.

FAILURE TO REQUEST A JURY CHARGE ON THE INTOXICATION DEFENSE MAY HAVE BEEN A STRATEGIC DECISION WHICH THE APPELLATE COURT WILL NOT SECOND GUESS IN HINDSIGHT (SECOND DEPT).

The Second Department determined defense counsel was not ineffective for failing to request a jury instruction on the intoxication defense in this murder and manslaughter case (two victims). Defense counsel had requested jury charges on the justification defense and lesser included offenses. It is possible defense counsel made a strategic decision against requesting the intoxication defense instruction:

> Assuming, without deciding, that the evidence at trial was sufficient to warrant an intoxication charge ... , defense counsel was not ineffective for failing to request that charge in this case ... . Defense counsel prudently pursued a justification defense, which would have been a total defense to the top count of murder in the second degree. Moreover, defense counsel successfully requested the lesser-included offenses of manslaughter in the first degree and manslaughter in the second degree, and the latter count was submitted over the People's objection. Defense counsel could have strategically determined that requesting an intoxication charge would have undermined, or distracted from, the justification defense in this particular case. Although reasonable legal minds may differ on the better strategy with respect to a charge of intoxication, we cannot second-guess defense counsel's decision with the benefit of hindsight. Accordingly, the defendant has not demonstrated the absence of strategic or other legitimate explanations for defense counsel's failure to request an intoxication charge ... . **People v Pagan, 2017 NY Slip Op 07753, Second Dept 11-8-17**

CRIMINAL LAW (MOTION TO VACATE A CONVICTION CAN BE BASED UPON A SHOWING OF ACTUAL INNOCENCE, NOT SHOWN HERE (THIRD DEPT))/EVIDENCE (CRIMINAL LAW, VACATE CONVICTION, ACTUAL INNOCENCE, MOTION TO VACATE A CONVICTION CAN BE BASED UPON A SHOWING OF ACTUAL INNOCENCE, NOT SHOWN HERE (THIRD DEPT))/VACATE CONVICTION, MOTION TO (ACTUAL INNOCENCE, MOTION TO VACATE A CONVICTION CAN BE BASED UPON A SHOWING OF ACTUAL INNOCENCE, NOT SHOWN HERE (THIRD DEPT))/ACTUAL INNOCENCE (CRIMINAL LAW, VACATE CONVICTION, MOTION TO VACATE A CONVICTION CAN BE BASED UPON A SHOWING OF ACTUAL INNOCENCE, NOT SHOWN HERE (THIRD DEPT))

CRIMINAL LAW, EVIDENCE.

MOTION TO VACATE A CONVICTION CAN BE BASED UPON A SHOWING OF ACTUAL INNOCENCE, NOT SHOWN HERE (THIRD DEPT).

The Third Department determined defendant's motion to vacate his conviction, in part on the ground of actual innocence, was properly denied. The court explained the standard of proof for actual innocence:

> In People v Hamilton (115 AD3d 12 [2014]), the Second Department determined that a claim of actual innocence must be established with clear and convincing evidence of "factual innocence, not mere legal insufficiency of evidence of guilt and must be based upon reliable evidence which was not presented at the trial" ... . While we recognize that in People v Caldavado (26 NY3d 1034 [2015]) the Court of Appeals opted not to determine whether a freestanding claim of actual innocence is viable ... , we concur with the analysis set forth in Hamilton and find that such a claim may be raised pursuant CPL 440.10 (1) (h) ... . * * *
>
> In our view, the evidence submitted at the hearing failed to establish by clear and convincing evidence that defendant did not murder the victims. Much of the evidence presented at the hearing was also presented to the jury, which considered and rejected defendant's explanation, and the jury's verdict was upheld on appeal ... . At best, the additional evidence submitted in support of the motion to vacate arguably raised "[m]ere doubt as to the defendant's guilt, or a preponderance of conflicting evidence as to the defendant's guilt," neither of which is sufficient to support a motion to vacate a judgment based on actual innocence ... . **People v Mosley, 2017 NY Slip Op 07648, Third Dept 11-2-17**

CRIMINAL LAW (DUCT TAPE USED TO SILENCE AND RESTRAIN THE VICTIM WAS A DANGEROUS INSTRUMENT WITHIN THE MEANING OF THE ROBBERY FIRST STATUTE, KIDNAPPING BASED UPON THE RESTRAINT OF THE VICTIM DID NOT MERGE WITH ROBBERY, DISSENT DISAGREED (SECOND DEPT))/EVIDENCE (CRIMINAL LAW, DUCT TAPE USED TO SILENCE AND RESTRAIN THE VICTIM WAS A DANGEROUS INSTRUMENT WITHIN THE MEANING OF THE ROBBERY FIRST STATUTE, KIDNAPPING BASED UPON THE RESTRAINT OF THE VICTIM DID NOT MERGE WITH ROBBERY, DISSENT DISAGREED (SECOND DEPT))/ROBBERY (DUCT TAPE USED TO SILENCE AND RESTRAIN THE VICTIM WAS A DANGEROUS INSTRUMENT WITHIN THE MEANING OF THE ROBBERY FIRST STATUTE, KIDNAPPING BASED UPON THE RESTRAINT OF THE VICTIM DID NOT MERGE WITH ROBBERY, DISSENT DISAGREED (SECOND DEPT))/KIDNAPPING (DUCT TAPE USED TO SILENCE AND RESTRAIN THE VICTIM WAS A DANGEROUS INSTRUMENT WITHIN THE MEANING OF THE ROBBERY FIRST STATUTE, KIDNAPPING BASED UPON THE RESTRAINT OF THE VICTIM DID NOT MERGE WITH ROBBERY, DISSENT DISAGREED (SECOND DEPT))/MERGER (CRIMINAL LAW, DUCT TAPE USED TO SILENCE AND RESTRAIN THE VICTIM WAS A DANGEROUS INSTRUMENT WITHIN THE MEANING OF THE ROBBERY FIRST STATUTE, KIDNAPPING BASED UPON THE RESTRAINT OF THE VICTIM DID NOT MERGE WITH ROBBERY, DISSENT DISAGREED (SECOND DEPT))/DUCT TAPE (CRIMINAL LAW, DANGEROUS INSTRUMENT, DUCT TAPE USED TO SILENCE AND RESTRAIN THE VICTIM WAS A DANGEROUS INSTRUMENT WITHIN THE MEANING OF THE ROBBERY FIRST STATUTE, KIDNAPPING BASED UPON THE RESTRAINT OF THE VICTIM DID NOT MERGE WITH ROBBERY, DISSENT DISAGREED (SECOND DEPT))

CRIMINAL LAW, EVIDENCE.

DUCT TAPE USED TO SILENCE AND RESTRAIN THE VICTIM WAS A DANGEROUS INSTRUMENT WITHIN THE MEANING OF THE ROBBERY FIRST STATUTE, KIDNAPPING BASED UPON THE RESTRAINT OF THE VICTIM DID NOT MERGE WITH ROBBERY, DISSENT DISAGREED (SECOND DEPT).

The Second Department affirmed, over a dissent, defendant's robbery and kidnapping convictions. The robbery first degree conviction was premised upon the use of duct tape over the victim's mouth and around the victim's wrists as constituting a dangerous instrument capable of inflicting serious injury. The kidnapping conviction was premised upon the restraint of the victim with duct tape. The dissent argued the tape was not a dangerous instrument and, under the facts, kidnapping merged with the robbery:

> Here ... the duct tape used by the defendant constituted a dangerous instrument. "Any instrument, article or substance, no matter how innocuous it may appear to be when used for its legitimate purpose, becomes a dangerous instrument when it is used in a manner which renders it readily capable of causing serious physical injury. The object itself need not be inherently dangerous. It is the temporary use rather than the inherent vice of the object which brings it within the purview of the statute" ... .
> ... [T]he convictions of kidnapping in the second degree and unlawful imprisonment in the first degree did not merge with the robbery convictions. The defendant's act of locking the complainant inside the storage unit was a crime in itself committed after the robbery had been completed that did not merge therewith ... . **People v Williams, 2017 NY Slip Op 07758, Second Dept 11-8-17**

CRIMINAL LAW (MOTION TO VACATE CONVICTION BASED UPON RECANTING TESTIMONY PROPERLY DENIED WITHOUT A HEARING, WEAKNESS OF RECANTING TESTIMONY EMPHASIZED (FOURTH DEPT))/EVIDENCE (CRIMINAL LAW, RECANTING TESTIMONY, MOTION TO VACATE CONVICTION BASED UPON RECANTING TESTIMONY PROPERLY DENIED WITHOUT A HEARING, WEAKNESS OF RECANTING TESTIMONY EMPHASIZED (FOURTH DEPT))/CONVICTION, MOTION TO VACATE (RECANTING TESTIMONY, MOTION TO VACATE CONVICTION BASED UPON RECANTING TESTIMONY PROPERLY DENIED WITHOUT A HEARING, WEAKNESS OF RECANTING TESTIMONY EMPHASIZED (FOURTH DEPT))/RECANTING TESTIMONY (CRIMINAL LAW, (MOTION TO VACATE CONVICTION BASED UPON RECANTING TESTIMONY PROPERLY DENIED WITHOUT A HEARING, WEAKNESS OF RECANTING TESTIMONY EMPHASIZED (FOURTH DEPT))

CRIMINAL LAW, EVIDENCE.

MOTION TO VACATE CONVICTION BASED UPON RECANTING TESTIMONY PROPERLY DENIED WITHOUT A HEARING, WEAKNESS OF RECANTING TESTIMONY EMPHASIZED (FOURTH DEPT).

The Fourth Department determined defendant's motion to vacate his conviction based upon recanting testimony was properly denied without a hearing. The court emphasized the weakness of recanting testimony:

> "There is no form of proof so unreliable as recanting testimony" ... , and such testimony is "insufficient alone to warrant vacating a judgment of conviction" ... . "Consideration of recantation evidence involves the following factors: (1) the inherent believability of the substance of the recanting testimony; (2) the witness's demeanor both at trial and at the evidentiary hearing; (3) the existence of evidence corroborating the trial testimony; (4) the reasons offered for both the trial testimony and the recantation; (5) the importance of facts established at trial as reaffirmed in the recantation; and (6) the relationship between the witness and defendant as related to a motive to lie" ... .
>
> Here, the victim gave abundant testimony at trial that amply supported his ultimate statement that he had "[n]o doubt" that defendant was the shooter. In contrast, the victim's affidavit was prepared more than 10 years following the shooting, after the victim had become an inmate at the same prison in which defendant is incarcerated, and the victim blamed an individual identified only as "Marvin," who was alleged to be deceased since 2008 ... . We therefore conclude that, "[n]otwithstanding the absence of an evidentiary hearing, the totality of the parties' submissions along with the trial record warrant a factual finding that the recantation is totally unreliable" ... , and that the court properly denied defendant's motion. **People v Pringle, 2017 NY Slip Op 08131, Fourth Dept 11-17-17**

CRIMINAL LAW (EVIDENCE, FRYE HEARINGS, DNA TESTING, IN DENYING DEFENDANT'S MOTIONS FOR FRYE HEARINGS, THE TRIAL COURT PROPERLY RELIED ON THE RESULTS OF FRYE HEARINGS IN OTHER COURTS OF COORDINATE JURISDICTION CONCERNING LCN AND FST DNA TESTING (FIRST DEPT))/EVIDENCE (CRIMINAL LAW, FRYE HEARINGS, DNA TESTING, IN DENYING DEFENDANT'S MOTIONS FOR FRYE HEARINGS, THE TRIAL COURT PROPERLY RELIED ON THE RESULTS OF FRYE HEARINGS IN OTHER COURTS OF COORDINATE JURISDICTION CONCERNING LCN AND FST DNA TESTING (FIRST DEPT))/FRYE HEARINGS (CRIMINAL LAW DNA TESTING, IN DENYING DEFENDANT'S MOTIONS FOR FRYE HEARINGS, THE TRIAL COURT PROPERLY RELIED ON THE RESULTS OF FRYE HEARINGS IN OTHER COURTS OF COORDINATE JURISDICTION CONCERNING LCN AND FST DNA TESTING (FIRST DEPT))/DNA (CRIMINAL LAW, FRYE HEARINGS, IN DENYING DEFENDANT'S MOTIONS FOR FRYE HEARINGS, THE TRIAL COURT PROPERLY RELIED ON THE RESULTS OF FRYE HEARINGS IN OTHER COURTS OF COORDINATE JURISDICTION CONCERNING LCN AND FST DNA TESTING (FIRST DEPT))

CRIMINAL LAW, EVIDENCE.

IN DENYING DEFENDANT'S MOTIONS FOR FRYE HEARINGS, THE TRIAL COURT PROPERLY RELIED ON THE RESULTS OF FRYE HEARINGS IN OTHER COURTS OF COORDINATE JURISDICTION CONCERNING LCN AND FST DNA TESTING (FIRST DEPT).

The First Department noted that the trial court's denial of a Frye hearing about DNA testing was properly denied based upon the results of an eight-month long Frye hearing on the same issues in a court of coordinate jurisdiction:

> The motion court's pretrial ruling ... denying defendant's motion to exclude, or alternatively to conduct a Frye ... hearing on, expert testimony relating to high sensitivity, or low copy number (LCN) DNA testing, was a provident exercise of discretion. At the time that the motion court's ruling was made, a court of coordinate jurisdiction, following an eight-month Frye hearing, had issued a decision holding that LCN DNA testing was "generally accepted as reliable in the forensic scientific community" and "not a novel scientific procedure" ... . "A court need not hold a Frye hearing where it can rely upon previous rulings in other court proceedings as an aid in determining the admissibility of the proffered testimony" ... .
>
> Likewise, the trial court's denial of defendant's renewed motion for a Frye hearing ... , which motion was recast to include evidence relating to both LCN DNA testing and a then-recently issued FST DNA testing report, was a provident exercise of discretion. The trial court's ruling was consistent with prior determinations of courts of coordinate jurisdiction that these procedures were not novel scientific techniques and were generally accepted by the relevant scientific community ... . **People v Gonzalez, 2017 NY Slip Op 08191, First Dept 11-21-17**

CRIMINAL LAW (PROSECUTION CAN NOT USE THE DOCTRINE OF COLLATERAL ESTOPPEL, BASED UPON A PRIOR ATTEMPTED MURDER CONVICTION, TO PROVE INTENT IN A MURDER PROSECUTION STEMMING FROM THE DEATH OF THE SAME VICTIM, EVIDENCE PRESENTED TO THE GRAND JURY INSUFFICIENT, INDICTMENT DISMISSED (THIRD DEPT))/COLLATERAL ESTOPPEL (CRIMINAL LAW, PROSECUTION CAN NOT USE THE DOCTRINE OF COLLATERAL ESTOPPEL, BASED UPON A PRIOR ATTEMPTED MURDER CONVICTION, TO PROVE INTENT IN A MURDER PROSECUTION STEMMING FROM THE DEATH OF THE SAME VICTIM, EVIDENCE PRESENTED TO THE GRAND JURY INSUFFICIENT, INDICTMENT DISMISSED (THIRD DEPT))/EVIDENCE (CRIMINAL LAW, GRAND JURY, COLLATERAL ESTOPPEL, PROSECUTION CAN NOT USE THE DOCTRINE OF COLLATERAL ESTOPPEL, BASED UPON A PRIOR ATTEMPTED MURDER CONVICTION, TO PROVE INTENT IN A MURDER PROSECUTION STEMMING FROM THE DEATH OF THE SAME VICTIM, EVIDENCE PRESENTED TO THE GRAND JURY INSUFFICIENT, INDICTMENT DISMISSED (THIRD DEPT))/GRAND JURY (COLLATERAL ESTOPPEL, EVIDENCE, PROSECUTION CAN NOT USE THE DOCTRINE OF COLLATERAL ESTOPPEL, BASED UPON A PRIOR ATTEMPTED MURDER CONVICTION, TO PROVE INTENT IN A MURDER PROSECUTION STEMMING FROM THE DEATH OF THE SAME VICTIM, EVIDENCE PRESENTED TO THE GRAND JURY INSUFFICIENT, INDICTMENT DISMISSED (THIRD DEPT))/CONSTITUTIONAL LAW (CRIMINAL LAW, EVIDENCE, COLLATERAL ESTOPPEL, PROSECUTION CAN NOT USE THE DOCTRINE OF COLLATERAL ESTOPPEL, BASED UPON A PRIOR ATTEMPTED MURDER CONVICTION, TO PROVE INTENT IN A MURDER PROSECUTION STEMMING FROM THE DEATH OF THE SAME VICTIM, EVIDENCE PRESENTED TO THE GRAND JURY INSUFFICIENT, INDICTMENT DISMISSED (THIRD DEPT))

CRIMINAL LAW, EVIDENCE.

PROSECUTION CAN NOT USE THE DOCTRINE OF COLLATERAL ESTOPPEL, BASED UPON A PRIOR ATTEMPTED MURDER CONVICTION, TO PROVE INTENT IN A MURDER PROSECUTION STEMMING FROM THE DEATH OF THE SAME VICTIM, EVIDENCE PRESENTED TO THE GRAND JURY INSUFFICIENT, INDICTMENT DISMISSED (THIRD DEPT).

The Third Department, in a full-fledged opinion by Justice Mulvey, determined the prosecution could not use the doctrine of collateral estoppel to fulfill its proof requirements at the grand jury stage. Defendant had been convicted of attempted murder, which included the intent to kill. After the victim died, the People indicted the defendant for murder. The grand jury was told the intent element had already been proven and the grand jury need only consider causation. The Third Department noted the difference between the application of collateral estoppel in civil and criminal cases. From the defendant's perspective, using the collateral estoppel doctrine in this context violated defendant's constitutional rights:

> While the People argue that their offensive use of collateral estoppel is fair play, in that had defendant been acquitted of attempted murder, he would defensively rely on collateral estoppel principles to argue against a subsequent murder trial, this analysis overlooks the obvious and critical difference between an accused's defensive use of this doctrine and a prosecutor's strategic use of it against an accused. An accused's defensive invocation of this doctrine implicates and protects constitutional rights — to a jury trial, to present a defense, to due process and to not be placed twice in jeopardy, among others — whereas the People's affirmative use is for matters of expediency and economy and lacks a constitutional imperative ... . A California intermediate appellate court that confronted this identical issue over 20 years ago similarly concluded that this strategic use of collateral estoppel was inconsistent with due process, noting that "the pursuit of judicial economy and efficiency may never be used to deny a defendant . . . a fair trial," and that instructing a jury that a murder trial was limited to causation created an impermissible "gravitational pull towards a guilty verdict" ... . **People v Morrison, 2017 NY Slip Op 08405, Third Dept 11-30-17**

CRIMINAL LAW (MANSLAUGHTER, PILL MILL, DOCTOR WHO OPERATED A PILL MILL FOR PERSONS ADDICTED TO OPIOIDS PROPERLY CONVICTED OF MANSLAUGHTER FOR OVERDOSE DEATHS (FIRST DEPT))/EVIDENCE (OPIOIDS, PILL MILL, DOCTOR WHO OPERATED A PILL MILL FOR PERSONS ADDICTED TO OPIOIDS PROPERLY CONVICTED OF MANSLAUGHTER FOR OVERDOSE DEATHS (FIRST DEPT))/OPIOIDS (CRIMINAL LAW, MANSLAUGHTER, PILL MILL, DOCTOR WHO OPERATED A PILL MILL FOR PERSONS ADDICTED TO OPIOIDS PROPERLY CONVICTED OF MANSLAUGHTER FOR OVERDOSE DEATHS (FIRST DEPT))/PILL MILL (CRIMINAL LAW, MANSLAUGHTER, PILL MILL, DOCTOR WHO OPERATED A PILL MILL FOR PERSONS ADDICTED TO OPIOIDS PROPERLY CONVICTED OF MANSLAUGHTER FOR OVERDOSE DEATHS (FIRST DEPT))

CRIMINAL LAW, EVIDENCE.

DOCTOR WHO OPERATED A PILL MILL FOR PERSONS ADDICTED TO OPIOIDS PROPERLY CONVICTED OF MANSLAUGHTER FOR OVERDOSE DEATHS (FIRST DEPT).

The First Department determined defendant, a doctor accused of operation a "pill mill" for persons addicted to opioids and Xanax, was properly convicted of manslaughter in the overdose deaths of two persons to whom he has supplied drugs:

> Defendant argues that the manslaughter convictions should be reversed because, as a matter of law, the sale of a controlled substance can never support a homicide charge in the absence of express legislative authorization. He bases this position on a Second Department decision, People v Pinckney (38 AD2d 217 [2d Dept 1972] ...). * * *
>
> ... Nothing in Pinckney suggests that one who provides a controlled substance, whether it be heroin by a street dealer, or opioids by a medical doctor, can never be indicted on a manslaughter charge. Indeed, in People v Cruciani (36 NY2d 304 [1975]), the Court of Appeals affirmed the second degree manslaughter conviction of the defendant, who injected the victim with heroin, because he knew she was already in a highly intoxicated state. The Cruciani Court distinguished Pinckney, because in the latter case there was not "any proof, as here, of awareness of the ongoing effect of drugs in the victim's body at the time any self-inflicted injection might have been made, or, beyond the general knowledge of the injuriousness of drug-taking, of a real threat to life. The remoteness of that fatal injection from the fact of sale diffused intent and scienter by possibly unknown or intervening events beyond Pinckney's control" ... .
>
> At bottom, all that was needed for the manslaughter charge to be sustained was for the People to satisfy its elements. That is, that defendant was "aware of and consciously disregard[ed] a substantial and unjustifiable risk that [death] [would] occur . . . The risk [being] of such nature and degree that disregard thereof constitute[d] a gross deviation from the standard of conduct that a reasonable person would observe in the situation" ... .
>
> The question then becomes whether the People presented sufficient evidence to establish that defendant consciously disregarded the risk that Haeg and Rappold would die as a result of his prescribing practices.
> ... **People v Stan XuHui Li, 2017 NY Slip Op 08438, First Dept 11-30-17**

CRIMINAL LAW (PAIN AND PRESENCE OF BULLET FRAGMENTS FOUR YEARS AFTER THE SHOOTING WAS SUFFICIENT PROOF OF SERIOUS PHYSICAL INJURY, DISSENT DISAGREED (FIRST DEPT))/EVIDENCE (CRIMINAL LAW, ASSAULT, SERIOUS PHYSICAL INJURY, PAIN AND PRESENCE OF BULLET FRAGMENTS FOUR YEARS AFTER THE SHOOTING WAS SUFFICIENT PROOF OF SERIOUS PHYSICAL INJURY, DISSENT DISAGREED (FIRST DEPT))/ASSAULT (CRIMINAL LAW, SERIOUS PHYSICAL INJURY, PAIN AND PRESENCE OF BULLET FRAGMENTS FOUR YEARS AFTER THE SHOOTING WAS SUFFICIENT PROOF OF SERIOUS PHYSICAL INJURY, DISSENT DISAGREED (FIRST DEPT))/SERIOUS PHYSICAL INJURY (CRIMINAL LAW, ASSAULT, PAIN AND PRESENCE OF BULLET FRAGMENTS FOUR YEARS AFTER THE SHOOTING WAS SUFFICIENT PROOF OF SERIOUS PHYSICAL INJURY, DISSENT DISAGREED (FIRST DEPT))

CRIMINAL LAW, EVIDENCE.

PAIN AND PRESENCE OF BULLET FRAGMENTS FOUR YEARS AFTER THE SHOOTING WAS SUFFICIENT PROOF OF SERIOUS PHYSICAL INJURY, DISSENT DISAGREED (FIRST DEPT).

The First Department, over a dissent, affirmed the first degree assault convictions. The dissent argued the proof of "serious physical evidence" was not sufficient:

> The element of serious physical injury ... required for the assault convictions ... was established by evidence showing that four years after the complainant was struck by a bullet, he still felt pain and the bullet fragments in his leg and could not engage in sports at the same level as before the incident. This proof sufficiently shows a protracted impairment of health or protracted impairment of the function of a bodily organ to support a finding of serious physical injury ... . * * *
>
> **From the dissent:**
>
> There is no proof of injury connected to the bullet fragments, nor is there proof that [the victim's] life was endangered by the presence of the fragments ... .Notably, the People's expert was unable to opine as to whether [the victim] had suffered permanent deficits associated with the injury.
>
> The fact that [the victim] suffered a gunshot wound does not ipso facto establish that he suffered a "serious physical injury" ... . **People v Garland, 2017 NY Slip Op 08302, First Dept 11-28-17**

CRIMINAL LAW (UNEXPECTED ABSENCE OF A PROSECUTION WITNESS AFTER ARRESTING OFFICERS TESTIFIED ABOUT THE WITNESS'S INVOLVEMENT IN DEFENDANT'S ARREST DEPRIVED DEFENDANT OF HIS RIGHT TO CONFRONT THE WITNESSES AGAINST HIM, CONVICTION REVERSED IN THE INTEREST OF JUSTICE (SECOND DEPT))/EVIDENCE (CRIMINAL LAW, (UNEXPECTED ABSENCE OF A PROSECUTION WITNESS AFTER ARRESTING OFFICERS TESTIFIED ABOUT THE WITNESS'S INVOLVEMENT IN DEFENDANT'S ARREST DEPRIVED DEFENDANT OF HIS RIGHT TO CONFRONT THE WITNESSES AGAINST HIM, CONVICTION REVERSED IN THE INTEREST OF JUSTICE (SECOND DEPT))/CONSTITUTIONAL LAW (CRIMINAL LAW, CONFRONTATION, UNEXPECTED ABSENCE OF A PROSECUTION WITNESS AFTER ARRESTING OFFICERS TESTIFIED ABOUT THE WITNESS'S INVOLVEMENT IN DEFENDANT'S ARREST DEPRIVED DEFENDANT OF HIS RIGHT TO CONFRONT THE WITNESSES AGAINST HIM, CONVICTION REVERSED IN THE INTEREST OF JUSTICE (SECOND DEPT))/APPEALS (CRIMINAL LAW, INTEREST OF JUSTICE, UNEXPECTED ABSENCE OF A PROSECUTION WITNESS AFTER ARRESTING OFFICERS TESTIFIED ABOUT THE WITNESS'S INVOLVEMENT IN DEFENDANT'S ARREST DEPRIVED DEFENDANT OF HIS RIGHT TO CONFRONT THE WITNESSES AGAINST HIM, CONVICTION REVERSED IN THE INTEREST OF JUSTICE (SECOND DEPT))/CONFRONTATION CLAUSE (CRIMINAL LAW, UNEXPECTED ABSENCE OF A PROSECUTION WITNESS AFTER ARRESTING OFFICERS TESTIFIED ABOUT THE WITNESS'S INVOLVEMENT IN DEFENDANT'S ARREST DEPRIVED DEFENDANT OF HIS RIGHT TO CONFRONT THE WITNESSES AGAINST HIM, CONVICTION REVERSED IN THE INTEREST OF JUSTICE (SECOND DEPT))

CRIMINAL LAW, EVIDENCE, CONSTITUTIONAL LAW, APPEALS.

UNEXPECTED ABSENCE OF A PROSECUTION WITNESS AFTER ARRESTING OFFICERS TESTIFIED ABOUT THE WITNESS'S INVOLVEMENT IN DEFENDANT'S ARREST DEPRIVED DEFENDANT OF HIS RIGHT TO CONFRONT THE WITNESSES AGAINST HIM, CONVICTION REVERSED IN THE INTEREST OF JUSTICE (SECOND DEPT).

The Second Department, reversing defendant's conviction, determined, in the interest of justice (error not preserved), the defendant was deprived of his right to confront a witness against him. A witness to the stabbing, Torres, could not be located and did not testify at the trial. Before it was clear Torres would not testify, two officers had already testified to facts that made it obvious Torres had identified the defendant as the perpetrator:

> The record reveals ... that the trial court understood full well the risk that the jurors, based on the detailed testimony of the arresting officers, might conclude that Torres—now a nontestifying witness—had identified the defendant as one of the perpetrators. Before summations, the court expressly warned both sides: "if I find that either of you are making any representation to this jury that Mr. Jose Torres made an identification of the defendant you will regret it." Later, the court again warned the prosecutor in the following terms: "[S]ince Jose Torres did not testify, there is no way you are going to argue to this jury or infer to this jury in any way, shape or form that Jose Torres made an identification. Because that's clearly the only import of your subsequent questioning about what did you do afterwards? Of course, the defendant got arrested. So it doesn't take a rocket scientist to understand Jose Torres obviously identified something in this case."
>
> Both sides followed the court's instructions during summations. However, during the jury's deliberations, the jurors specifically requested a readback of [a police officer's] testimony regarding "what Jose Torres told him relating to the perpetrator's identification and what happened when he identified the defendant." The requested testimony was read to the jury without any limiting instruction.
>
> Under the unusual circumstances presented, the jury's note demonstrates that the risk foreshadowed by the trial court had materialized, namely, that the jury had inferred from the arresting officers' testimony that Torres had identified the defendant as one of Rivera's attackers. Although neither side can be faulted for the introduction of the arresting officers' testimony at a time when everyone believed in good faith that Torres would testify, once it became clear that Torres would not be produced as a witness, the arresting officers' testimonial hearsay regarding the information conveyed to them by Torres violated the defendant's constitutional right to confront the witnesses against him ... . **People v Tavarez, 2017 NY Slip Op 07756, Second Dept 11-8-17**

CRIMINAL LAW (EXCESSIVE INTERVENTION IN THE QUESTIONING OF DEFENDANT AND WITNESSES BY THE TRIAL JUDGE REQUIRED A NEW TRIAL, DEFENDANT SHOULD NOT HAVE BEEN QUESTIONED ABOUT HIS BEING INCARCERATED DURING THE TRIAL (SECOND DEPT))/JUDGES (CRIMINAL LAW, EXCESSIVE INTERVENTION IN THE QUESTIONING OF DEFENDANT AND WITNESSES BY THE TRIAL JUDGE REQUIRED A NEW TRIAL, DEFENDANT SHOULD NOT HAVE BEEN QUESTIONED ABOUT HIS BEING INCARCERATED DURING THE TRIAL (SECOND DEPT))/EVIDENCE (CRIMINAL LAW, EXCESSIVE INTERVENTION IN THE QUESTIONING OF DEFENDANT AND WITNESSES BY THE TRIAL JUDGE REQUIRED A NEW TRIAL, DEFENDANT SHOULD NOT HAVE BEEN QUESTIONED ABOUT HIS BEING INCARCERATED DURING THE TRIAL (SECOND DEPT))

CRIMINAL LAW, JUDGES, EVIDENCE.

EXCESSIVE INTERVENTION IN THE QUESTIONING OF DEFENDANT AND WITNESSES BY THE TRIAL JUDGE REQUIRED A NEW TRIAL, DEFENDANT SHOULD NOT HAVE BEEN QUESTIONED ABOUT HIS BEING INCARCERATED DURING THE TRIAL (SECOND DEPT).

The Second Department reversed defendant's conviction in this murder case because the trial judge took over the questioning of one of the complaining witness and intervened in the questioning of the defendant. The court noted the prosecutor should not have questioned the defendant about his being incarcerated during the trial:

> During the course of the trial, the Supreme Court repeatedly and prejudicially questioned the defendant, who testified in his own behalf, and also extensively intervened in the questioning of prosecution witnesses. Although defense counsel did not specifically object to the court's questioning of the witnesses ... .
>
> While trial judges play a vital role in "clarifying confusing testimony and facilitating the orderly and expeditious progress of the trial," their power to examine witnesses "is one that should be exercised sparingly" ... . Indeed, such power "carries with it so many risks of unfairness that it should be a rare instance when the court rather than counsel examines a witness" ... .
>
> Here, the Supreme Court effectively took over the direct examination of one of the complaining witnesses at key moments in her testimony where she was describing how the defendant shot the victim ... . Moreover, in its extensive questioning of the defendant, the court repeatedly highlighted apparent inconsistencies in the defendant's testimony. Viewing the record as a whole, the court assumed the appearance, if not the function, of an advocate at the trial by its extensive examination of certain witnesses ... . Accordingly, we must remit the matter to the Supreme Court, Kings County, for a new trial.
>
> As a new trial must be ordered, we note that it was improper for the prosecutor to elicit from the defendant the fact that he was incarcerated pending trial ... , as no legitimate State interest was served by disclosing that information under the circumstances of this case ... . **People v Estevez, 2017 NY Slip Op 07615, Second Dept 11-1-17**

CRIMINAL LAW (GRAND JURY EVIDENCE SUFFICIENT TO SUPPORT OFFERING A FALSE INSTRUMENT FOR FILING CHARGES, INSTRUMENTS WERE PREPARED FOR A PRIVATE COMPANY UNDER CONTRACT WITH THE COUNTY, COUNTY COURT REVERSED (FOURTH DEPT))/MUNICIPAL LAW (CRIMINAL LAW, GRAND JURY EVIDENCE SUFFICIENT TO SUPPORT OFFERING A FALSE INSTRUMENT FOR FILING CHARGES, INSTRUMENTS WERE PREPARED FOR A PRIVATE COMPANY UNDER CONTRACT WITH THE COUNTY, COUNTY COURT REVERSED (FOURTH DEPT))/OFFERING A FALSE INSTRUMENT FOR FILING (CRIMINAL LAW, GRAND JURY EVIDENCE SUFFICIENT TO SUPPORT OFFERING A FALSE INSTRUMENT FOR FILING CHARGES, INSTRUMENTS WERE PREPARED FOR A PRIVATE COMPANY UNDER CONTRACT WITH THE COUNTY, COUNTY COURT REVERSED (FOURTH DEPT))

CRIMINAL LAW, MUNICIPAL LAW.

GRAND JURY EVIDENCE SUFFICIENT TO SUPPORT OFFERING A FALSE INSTRUMENT FOR FILING CHARGES, INSTRUMENTS WERE PREPARED FOR A PRIVATE COMPANY UNDER CONTRACT WITH THE COUNTY, COUNTY COURT REVERSED (FOURTH DEPT).

The Fourth Department, reversing County Court, determined the "offering a false instrument for filing" charges should not have been dismissed based upon the evidence presented to the grand jury. Defendant was a county employee who worked with a private company (Casella) which managed a land fill under a contract with the county. The documents in question were submitted by the defendant to Casella. County Court found that the documents were submitted to a private party, not the government. The Fourth Department disagreed, finding a sufficient relationship between Casella and the county to support the charges:

> "The essential elements of the crime of offering a false instrument for filing in the first degree . . . are (1) knowledge that a written instrument contains a false statement or false information, (2) intent to defraud the State or any political subdivision thereof, and (3) offering or presenting such instrument to a public office or public servant with the knowledge or belief that it will be filed" ... . The term "public servant" is defined as "(a) any public officer or employee of the state or of any political subdivision thereof or of any governmental instrumentality within the state, or (b) any person exercising the functions of any such public officer or employee" ... .
>
> Here, we agree with the People that the evidence before the grand jury was legally sufficient to establish that Casella, in accepting the reports from defendant for purposes of complying with the County's permit issued by the State, was "not acting as a private concern" but rather was exercising a governmental function as an agent of the County ... , and thus was acting as a public servant within the meaning of the statute. In addition, we conclude that the evidence before the grand jury, viewed in the light most favorable to the People... , was sufficient to allow the grand jury to infer that defendant intended to defraud the County by submitting reports with fabricated information while still receiving a salary as a County employee ... . **People v Rafferty, 2017 NY Slip Op 07797, Fourth Dept 11-9-17**

CRIMINAL LAW (DRIVING WITH HIGH BEAMS ON JUSTIFIED THE VEHICLE STOP WHICH LED TO A DWI ARREST (THIRD DEPT))/VEHICLE AND TRAFFIC LAW (HIGH BEAMS, DRIVING WITH HIGH BEAMS ON JUSTIFIED THE VEHICLE STOP WHICH LED TO A DWI ARREST (THIRD DEPT))/TRAFFIC STOPS (DRIVING WITH HIGH BEAMS ON JUSTIFIED THE VEHICLE STOP WHICH LED TO A DWI ARREST (THIRD DEPT)/HIGH BEAMS (VEHICLE AND TRAFFIC LAW, DRIVING WITH HIGH BEAMS ON JUSTIFIED THE VEHICLE STOP WHICH LED TO A DWI ARREST (THIRD DEPT))/REVOCATION (DRIVER'S LICENSE, DRIVING WITH HIGH BEAMS ON JUSTIFIED THE VEHICLE STOP WHICH LED TO A DWI ARREST (THIRD DEPT))/DRIVER'S LICENSE (REVOCATION, DRIVING WITH HIGH BEAMS ON JUSTIFIED THE VEHICLE STOP WHICH LED TO A DWI ARREST (THIRD DEPT))/REFUSAL (CHEMICAL TEST, DWI, DRIVER'S LICENSE REVOCATION, DRIVING WITH HIGH BEAMS ON JUSTIFIED THE VEHICLE STOP WHICH LED TO A DWI ARREST (THIRD DEPT))/DRIVING WHILE INTOXICATED (TRAFFIC STOP, REVOCATION HEARING, DRIVING WITH HIGH BEAMS ON JUSTIFIED THE VEHICLE STOP WHICH LED TO A DWI ARREST (THIRD DEPT))

CRIMINAL LAW, VEHICLE AND TRAFFIC LAW.

DRIVING WITH HIGH BEAMS ON JUSTIFIED THE VEHICLE STOP WHICH LED TO A DWI ARREST (THIRD DEPT).

The Third Department determined the state trooper properly stopped the defendant, which led to his arrest for DWI, because the defendant had his high beams on as he approached the trooper:

> Petitioner contends that the revocation of his driver's license must be reversed because the trooper's testimony at the revocation hearing was insufficient to establish that he violated Vehicle and Traffic Law § 375 (3), thereby rendering the traffic stop unlawful. We disagree. A police officer may lawfully execute a traffic stop of a vehicle when he or she has probable cause to believe that the driver of the vehicle has committed a violation of the Vehicle and Traffic Law ... . Pursuant to Vehicle and Traffic Law § 375 (3), a driver shall operate his or her headlights in such a manner "that dazzling light does not interfere with the driver of [an] approaching vehicle." To establish such a violation, it must be shown that the operator of the motor vehicle used his or her high beams within 500 feet of an approaching vehicle and that the use of such high beams interfered with the vision of that driver by "hampering or hindering [his or her] vision" ... .
>
> At the hearing, the trooper testified that he was traveling westbound ... , when he observed petitioner's vehicle approximately 500 feet away in the eastbound lane of travel with his high beams activated. The trooper testified that petitioner's high beams caused "a glare to [his] vision" and affected his driving insofar as he had to "adjust [his] eyes." In our view, such testimony sufficiently established that he had probable cause to believe that petitioner had committed a violation of the Vehicle and Traffic Law ... and, together with the negative inference that the Appeals Board permissibly drew from petitioner's failure to testify at the hearing ... , we conclude that the determination was supported by substantial evidence ... . **Matter of Barr v New York State Dept. of Motor Vehicles, 2017 NY Slip Op 07664, Third Dept 11-2-17**

DEBTOR-CREDITOR

DEBTOR-CREDITOR (USURY, GUARANTOR OF A CRIMINALLY USURIOUS LOAN WAS ENTITLED TO SUMMARY JUDGMENT IN AN ACTION SEEKING PAYMENT, THE DOCTRINE OF ESTOPPEL IN PAIS DID NOT APPLY (SECOND DEPT))/USURY (GUARANTOR OF A CRIMINALLY USURIOUS LOAN WAS ENTITLED TO SUMMARY JUDGMENT IN AN ACTION SEEKING PAYMENT, THE DOCTRINE OF ESTOPPEL IN PAIS DID NOT APPLY (SECOND DEPT))/ESTOPPEL IN PAIS (USURY, GUARANTOR OF A CRIMINALLY USURIOUS LOAN WAS ENTITLED TO SUMMARY JUDGMENT IN AN ACTION SEEKING PAYMENT, THE DOCTRINE OF ESTOPPEL IN PAIS DID NOT APPLY (SECOND DEPT))

DEBTOR-CREDITOR.

GUARANTOR OF A CRIMINALLY USURIOUS LOAN WAS ENTITLED TO SUMMARY JUDGMENT IN AN ACTION SEEKING PAYMENT, THE DOCTRINE OF ESTOPPEL IN PAIS DID NOT APPLY (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendant Jarvis, who guaranteed payment on a note, was entitled to summary judgment because the loan was criminally usurious. The plaintiff did not raise a question of fact about the applicability of the doctrine of estoppel in pais:

> Jarvis established his prima facie entitlement to summary judgment by demonstrating that the interest rate on the loan was criminally usurious; a loan that is criminally usurious is void ... . In opposition to that prima facie showing, the plaintiff failed to raise a triable issue of fact. The doctrine of estoppel in pais provides that "a borrower may be estopped from interposing a usury defense when, through a special relationship with the lender, the borrower induces reliance on the legality of the transaction. . . . Otherwise, a borrower could void the transaction, keep the principal, and achieve a total windfall, at the expense of an innocent person, through his own subterfuge and inequitable deception'" ... . Here, the plaintiff did not submit any evidence of a special relationship ... . Accordingly, the Supreme Court erred in finding that triable issues of fact exist regarding the doctrine of estoppel in pais. **Kingsize Entertainment, LLC v Martino, 2017 NY Slip Op 07986, Second Dept 11-15-17**

DEBTOR-CREDITOR (ORAL AGREEMENT BETWEEN TWO BOOKMAKERS FOR REPAYMENT OF A $170,000 LOAN ENFORCEABLE, DESPITE THE MONEY-LAUNDERING PURPOSE (THIRD DEPT))/CONTRACT LAW (STATUTE OF FRAUDS, DEBTOR-CREDITOR, ORAL AGREEMENT BETWEEN TWO BOOKMAKERS FOR REPAYMENT OF A $170,000 LOAN ENFORCEABLE, DESPITE THE MONEY-LAUNDERING PURPOSE (THIRD DEPT))/CRIMINAL LAW (DEBTOR-CREDITOR, MONEY LAUNDERING, ORAL AGREEMENT BETWEEN TWO BOOKMAKERS FOR REPAYMENT OF A $170,000 LOAN ENFORCEABLE, DESPITE THE MONEY-LAUNDERING PURPOSE (THIRD DEPT))/MONEY LAUNDERING (DEBTOR-CREDITOR, CONTRACT LAW, (ORAL AGREEMENT BETWEEN TWO BOOKMAKERS FOR REPAYMENT OF A $170,000 LOAN ENFORCEABLE, DESPITE THE MONEY-LAUNDERING PURPOSE (THIRD DEPT))

DEBTOR-CREDITOR, CONTRACT LAW, CRIMINAL LAW.

ORAL AGREEMENT BETWEEN TWO BOOKMAKERS FOR REPAYMENT OF A $170,000 LOAN ENFORCEABLE, DESPITE THE MONEY-LAUNDERING PURPOSE (THIRD DEPT).

The Third Department, over a two-justice dissent, determined that the trial court's finding that an oral agreement concerning the repayment of a $170,000 loan was enforceable, because the loan could have been paid off within a year

(re: the statute of frauds). Both plaintiff and defendant were bookmakers who had been convicted of promoting gambling. The fact that plaintiff refused to answer questions about whether he paid income tax on the proceeds, based upon the Fifth Amendment, did not affect the result because there was nothing illegal about the loan agreement itself. The two dissenters argued the parties were engaged in money laundering and the loan agreement should not be enforced as a matter of public policy:

> We are mindful that plaintiff testified that the source of the loan proceeds was cash obtained through his illegal bookmaking activities. Indeed, both plaintiff and defendant were convicted of promoting gambling and required to pay fines in the amount of $100,000 and $50,000, respectively. Although plaintiff asserted his Fifth Amendment right against self-incrimination when asked whether he ever reported the cash as income, we are not persuaded by defendant's contention that Supreme Court erred in failing to draw a negative inference because the source and/or taxable status of the funds was not probative of the issue presented. According due deference to Supreme Court's credibility assessments, we find ample evidence to support the determination that plaintiff and defendant agreed to the loan that defendant breached by failing to make all of the payments due... . Contrary to defendant's argument, because there was nothing prohibiting defendant from repaying the loan within one year, the statute of frauds did not bar enforcement of the oral agreement ... .
>
> We also find that defendant waived his right to challenge the loan on the basis of illegality because it was not raised as an affirmative defense ... . Were we to consider the issue, we would find that, because neither the agreement nor the performance of the agreement was illegal, the judgment was enforceable ... . **Centi v McGillin, 2017 NY Slip Op 08430, Third Dept 11-30-17**

DEFAMATION

DEFAMATION (SIGN ON PLAINTIFF'S PROPERTY SAYING THE DEFENDANT "SCREWED US BEWARE" WAS ACTIONABLE DEFAMATION, MOTION TO DISMISS THE DEFAMATION COUNTERCLAIM IN THIS CONTRACT ACTION PROPERLY DENIED (FOURTH DEPT))

DEFAMATION.

SIGN ON PLAINTIFF'S PROPERTY SAYING THE DEFENDANT "SCREWED US BEWARE" WAS ACTIONABLE DEFAMATION, MOTION TO DISMISS THE DEFAMATION COUNTERCLAIM IN THIS CONTRACT ACTION PROPERLY DENIED (FOURTH DEPT).

The Fourth Department, over a dissent, determined a sign on plaintiff's property saying "R. KESSLER [the defendant] SCREWED US BEWARE" was actionable defamation. Therefore the defendant's defamation counterclaim survived a motion to dismiss:

> ... Supreme Court properly denied that part of plaintiffs' motion pursuant to CPLR 3211 (a) (7) seeking to dismiss the defamation counterclaim. Contrary to plaintiffs' contention, the statement is "reasonably susceptible of a defamatory connotation" ... . Furthermore, it is a mixed statement of opinion and fact and thus is actionable inasmuch as it is "an opinion that implies that it is based upon facts which justify the opinion but are unknown to those reading or hearing it' "... . The answer thus sufficiently states a counterclaim for defamation ... . **Sallustio v R. Kessler & Assoc., Inc., 2017 NY Slip Op 07792, Fourth Dept 11-9-17**

DISCIPLINARY HEARINGS

DISCIPLINARY HEARINGS (INMATES) (PETITIONER'S REQUEST FOR A WITNESS SHOULD NOT HAVE BEEN DENIED, NEW HEARING ORDERED (THIRD DEPT))

DISCIPLINARY HEARINGS (INMATES).

PETITIONER'S REQUEST FOR A WITNESS SHOULD NOT HAVE BEEN DENIED, NEW HEARING ORDERED (THIRD DEPT).

The Third Department determined the petitioner was entitled to a new hearing because the witness he requested could have provided relevant information. The request should not have been denied by the hearing officer:

> ... [P]etitioner was improperly denied a witness. The Hearing Officer denied petitioner's request to question a correction officer who searched the empty cell on the day prior to that upon which petitioner was alleged to have thrown the bottle, and petitioner claimed that the officer could confirm that the bottle was already in the empty cell. Contrary to the Hearing Officer's conclusion, the testimony of this correction officer regarding whether the bottle was already in the empty cell would not have been irrelevant. **Matter of Castillo v Annucci, 2017 NY Slip Op 07922, Third Dept 11-9-17**

EDUCATION-SCHOOL LAW

EDUCATION-SCHOOL LAW (EMPLOYMENT LAW, TRANSFER OF ASSISTANT SUPERINTENDENT TO A LOWER PAYING JOB WAS NOT DISCIPLINE UNDER THE EDUCATION LAW AND DID NOT CONSTITUTE A DUE PROCESS VIOLATION (THIRD DEPT))/EMPLOYMENT LAW (EDUCATION-SCHOOL LAW, TRANSFER OF ASSISTANT SUPERINTENDENT TO A LOWER PAYING JOB WAS NOT DISCIPLINE UNDER THE EDUCATION LAW AND DID NOT CONSTITUTE A DUE PROCESS VIOLATION (THIRD DEPT))

EDUCATION-SCHOOL LAW, EMPLOYMENT LAW.

TRANSFER OF ASSISTANT SUPERINTENDENT TO A LOWER PAYING JOB WAS NOT DISCIPLINE UNDER THE EDUCATION LAW AND DID NOT CONSTITUTE A DUE PROCESS VIOLATION (THIRD DEPT).

The Third Department determined that the transfer of a school assistant superintendent to another job with lower pay did not violate the Education Law (pay reduction was not discipline) or due process (deprivation of property without due process of law):

> ... [W]e conclude that the term "discipline[]" in Education Law § 3020 refers not merely to action that has an adverse impact, but adverse action that is motivated by a punitive intent.

Case law applying and interpreting Education Law § 3020 supports our reading of the statute. "The purpose of [Education Law § 3020] is to protect [tenured educators] from arbitrary imposition of formal discipline. It was not intended to interfere with the day-to-day operation of the educational system" ... . * * *

Petitioner's reliance on cases involving employees covered under Civil Service Law § 75, which prohibits imposition of a "disciplinary penalty" without a hearing, is misplaced. While it has been held that a lateral transfer of a tenured civil service employee that results in a diminution of salary or benefits constitutes a form of discipline requiring compliance with the procedural safeguards of Civil Service Law § 75 ... , this is so because Civil Service Law § 75 specifically provides that a "demotion in grade and title" constitutes a disciplinary penalty ... . No comparable statutory language exists within the Education Law. * * *

Here, petitioner's right to receive the specific level of compensation earned in his position as Assistant Superintendent derived not from any tenure rights granted under the Education Law, but solely from the terms of his employment contract. Such contract expired on June 30, 2012, prior to the alleged deprivation. Moreover, the contract makes clear that it does not provide for the payment of salary beyond that date and that renewal or extension of its terms could only be effectuated by agreement of the Board. Under these circumstances, petitioner did not have a constitutionally protected property interest in the compensation and benefits derived from his employment contract beyond its June 30, 2012 expiration date ... . **Matter of Soriano v Elia, 2017 NY Slip Op 08431, Third Dept 11-30-17**

EMPLOYMENT LAW

EMPLOYMENT LAW (AGE DISCRIMINATION LAWSUIT PROPERLY DISMISSED FOR FAILURE TO STATE A CAUSE OF ACTION (SECOND DEPT))/AGE DISCRIMINATION (AGE DISCRIMINATION LAWSUIT PROPERLY DISMISSED FOR FAILURE TO STATE A CAUSE OF ACTION (SECOND DEPT))/AGE DISCRIMINATION IN EMPLOYMENT ACT (AGE DISCRIMINATION LAWSUIT PROPERLY DISMISSED FOR FAILURE TO STATE A CAUSE OF ACTION (SECOND DEPT))

EMPLOYMENT LAW.

AGE DISCRIMINATION LAWSUIT PROPERLY DISMISSED FOR FAILURE TO STATE A CAUSE OF ACTION (SECOND DEPT).

The Second Department determined plaintiff teacher's age discrimination suit was properly dismissed for failure to state a cause of action:

The Age Discrimination in Employment Act of 1967 (hereinafter the ADEA) provides, in relevant part: "It shall be unlawful for an employer . . . to discharge any individual or otherwise discriminate against any individual with respect to [her] compensation, terms, conditions, or privileges of employment, because of such individual's age" ... . "To establish a prima facie case of age discrimination under the ADEA, a claimant must demonstrate that: 1) [she] was within the protected age group; 2) [she] was qualified for the position; 3) [she] was subject to an adverse employment action; and 4) the adverse action occurred under circumstances giving rise to an inference of discrimination'" ... .

> ... [T]he general allegation in the amended complaint that the plaintiff and two other "older" teachers had been "continuously harassed" by the principal and the assistant principal are vague and conclusory ... . Furthermore, the specific instances of discrimination described in the amended complaint, which allegedly occurred over a period of more than three years, were isolated and episodic. For instance, the amended complaint alleged that the plaintiff "was required to teach a class that she was not qualified to teach," that the principal left her name off an art fair newsletter, that the assistant principal gave the plaintiff "a useless laptop to complete a survey," and that on two separate occasions the principal slammed her hand on the table and screamed at her. These occurrences were "not severe or pervasive enough to create an objectively hostile or abusive work environment" ... . **Murphy v Department of Educ. of the City of New York, 2017 NY Slip Op 07609, Second Dept 11-1-17**

EMPLOYMENT LAW (LAW FIRM ASSOCIATE WAS ENTITLED TO 5% OF $5 MILLION FEE UNDER A BREACH OF ORAL CONTRACT THEORY, BUT NOT UNDER LABOR LAW 190 THEORY (FOURTH DEPT))/LABOR LAW (INCENTIVE COMPENSATION, LAW FIRM ASSOCIATE WAS ENTITLED TO 5% OF $5 MILLION FEE UNDER A BREACH OF ORAL CONTRACT THEORY, BUT NOT UNDER LABOR LAW 190 THEORY (FOURTH DEPT))/INCENTIVE COMPENSATION (LABOR LAW, LAW FIRM ASSOCIATE WAS ENTITLED TO 5% OF $5 MILLION FEE UNDER A BREACH OF ORAL CONTRACT THEORY, BUT NOT UNDER LABOR LAW 190 THEORY (FOURTH DEPT))/CONTRACT LAW (EMPLOYMENT LAW, (LAW FIRM ASSOCIATE WAS ENTITLED TO 5% OF $5 MILLION FEE UNDER A BREACH OF ORAL CONTRACT THEORY, BUT NOT UNDER LABOR LAW 190 THEORY (FOURTH DEPT))

EMPLOYMENT LAW, LABOR LAW, CONTRACT LAW.

LAW FIRM ASSOCIATE WAS ENTITLED TO 5% OF $5 MILLION FEE UNDER A BREACH OF ORAL CONTRACT THEORY, BUT NOT UNDER A LABOR LAW 190 THEORY (FOURTH DEPT).

The Fourth Department determined plaintiff, an associate in defendant law firm, was entitled to 5% of the $5 million fee collected by the law firm in an action on behalf of a client brought in by the associate. The jury found that the plaintiff was entitled to payment under the Labor Law 190 cause of action, as well as under the breach of contract cause of action. The Fourth Department determined the verdict on the Labor Law 190 cause of action should have been set aside because, under the law described in the jury instructions, the jury should have found the payment to be "incentive compensation" which is excluded from the type of pay covered by the Labor Law:

> Applying the facts to the law as stated in the jury charge, the evidence establishes that the collections bonus was "incentive compensation" because it was based on more than just plaintiff's performance. Among other things, the matter took considerable effort from other attorneys, some of whom billed far more hours on the matter than plaintiff, and a partner conducted international arbitration and filed enforcement proceedings to secure a settlement collectible by the client. Contrary to plaintiff's contention, inasmuch as the collections bonus was calculated as a percentage of the fee in the matter and "the fee collected" by defendant was based on the abovementioned factors outside of plaintiff's control, the jury could not have rationally concluded that the collections bonus was anything other than "incentive compensation" excluded from protection under Labor Law § 193 (1). ...
>
> ... [T]he evidence adduced by plaintiff established, prima facie, that the parties entered into a binding oral agreement in which at least one of defendant's partners promised to pay plaintiff a bonus consisting of 5% of the fee collections from any client generated by plaintiff if such fees exceeded $100,000, that plaintiff subsequently performed under the agreement by generating the client, and that defendant breached the agreement by failing to pay the collections bonus, thereby causing plaintiff to incur damages ... . **Doolittle v Nixon Peabody LLP, 2017 NY Slip Op 08126, Fourth Dept 11-17-17**

EMPLOYMENT LAW (WHISTLEBLOWER CAUSE OF ACTION WAS TIMELY UNDER THE RELATION-BACK DOCTRINE AND DID NOT WAIVE THE HUMAN RIGHTS LAW GENDER DISCRIMINATION CLAIM (FIRST DEPT))/LABOR LAW (WHISTLEBLOWER CAUSE OF ACTION WAS TIMELY UNDER THE RELATION-BACK DOCTRINE AND DID NOT WAIVE THE HUMAN RIGHTS LAW GENDER DISCRIMINATION CLAIM (FIRST DEPT))/HUMAN RIGHTS LAW (WHISTLEBLOWER CAUSE OF ACTION WAS TIMELY UNDER THE RELATION-BACK DOCTRINE AND DID NOT WAIVE THE HUMAN RIGHTS LAW GENDER DISCRIMINATION CLAIM (FIRST DEPT))/CIVIL PROCEDURE (WHISTLEBLOWER CAUSE OF ACTION WAS TIMELY UNDER THE RELATION-BACK DOCTRINE AND DID NOT WAIVE THE HUMAN RIGHTS LAW GENDER DISCRIMINATION CLAIM (FIRST DEPT))/CPLR 203 (RELATION BACK, WHISTLEBLOWER CAUSE OF ACTION WAS TIMELY UNDER THE RELATION-BACK DOCTRINE AND DID NOT WAIVE THE HUMAN RIGHTS LAW GENDER DISCRIMINATION CLAIM (FIRST DEPT))/DISCRIMINATION (HUMAN RIGHTS LAW, EMPLOYMENT LAW, WHISTLEBLOWER CAUSE OF ACTION WAS TIMELY UNDER THE RELATION-BACK DOCTRINE AND DID NOT WAIVE THE HUMAN RIGHTS LAW GENDER DISCRIMINATION CLAIM (FIRST DEPT))

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

WHISTLEBLOWER CAUSE OF ACTION WAS TIMELY UNDER THE RELATION-BACK DOCTRINE AND DID NOT WAIVE THE HUMAN RIGHTS LAW GENDER DISCRIMINATION CLAIM (FIRST DEPT).

The First Department determined plaintiff's whistleblower (Labor Law 740) cause of action in the amended complaint was not time-barred because defendant had timely notice of the facts underlying the claim in the original complaint. The relation-back doctrine applied. The court further held that the gender discrimination action under the Human Rights Law was separate and distinct from the whistleblower cause of action:

> The court properly applied the relation back doctrine (CPLR 203[f]) to plaintiff's whistleblower claim pursuant to Labor Law § 740, which requires such actions to be commenced within one year of the alleged retaliatory action (Labor Law § 740[4][a]). Although that claim was not asserted until the Second Amended Complaint, filed on October 19, 2015, more than one year after her termination on February 4, 2014, the original complaint, filed on January 31, 2015, alleged that on February 3, 2014, plaintiff reported to the defendants' Business Practices Office defendants' improper practices regarding its procurement of chemicals to manufacture its highest grossing drug, and that those practices did not comply with FDA regulations. It further alleged that she was terminated the next day in retaliation for that conduct. ...
>
> The motion court correctly concluded that Labor Law § 740(7), the "election-of-remedies" provision, does not waive plaintiff's claim of discrimination under the New York State Human Rights Law (State HRL) (Executive Law § 296) because, in alleging discrimination on account of plaintiff's gender, national origin, and religion, plaintiff does not seek the same rights and remedies as she does in connection with her whistleblowing claim, notwithstanding that both claims allege that she was wrongfully terminated ... . **Demir v Sandoz Inc., 2017 NY Slip Op 07961, First Dept 11-14-17**

EMPLOYMENT LAW (PLAINTIFF'S SEX AND AGE DISCRIMINATION CAUSES OF ACTIONS, AS WELL AS A RETALIATION CAUSE OF ACTION, SHOULD NOT HAVE BEEN DISMISSED, FIRST AMENDMENT VIOLATION CAUSE OF ACTION AGAINST CITY REQUIRES A NOTICE OF CLAIM, MOTION TO AMEND COMPLAINT TO ADD A FIRST AMENDMENT VIOLATION UNDER FEDERAL LAW, WHICH DOES NOT REQUIRE A NOTICE OF CLAIM, SHOULD HAVE BEEN GRANTED (SECOND DEPT))/MUNICIPAL LAW (EMPLOYMENT LAW, PLAINTIFF'S SEX AND AGE DISCRIMINATION CAUSES OF ACTIONS, AS WELL AS A RETALIATION CAUSE OF ACTION, SHOULD NOT HAVE BEEN DISMISSED, FIRST AMENDMENT VIOLATION CAUSE OF ACTION AGAINST CITY REQUIRES A NOTICE OF CLAIM, MOTION TO AMEND COMPLAINT TO ADD A FIRST AMENDMENT VIOLATION UNDER FEDERAL LAW, WHICH DOES NOT REQUIRE A NOTICE OF CLAIM, SHOULD HAVE BEEN GRANTED (SECOND DEPT))/HUMAN RIGHTS LAW (EMPLOYMENT LAW, PLAINTIFF'S SEX AND AGE DISCRIMINATION CAUSES OF ACTIONS, AS WELL AS A RETALIATION CAUSE OF ACTION, SHOULD NOT HAVE BEEN DISMISSED, FIRST AMENDMENT VIOLATION CAUSE OF ACTION AGAINST CITY REQUIRES A NOTICE OF CLAIM, MOTION TO AMEND COMPLAINT TO ADD A FIRST AMENDMENT VIOLATION UNDER FEDERAL LAW, WHICH DOES NOT REQUIRE A NOTICE OF CLAIM, SHOULD HAVE BEEN GRANTED (SECOND DEPT))/NOTICE OF CLAIM (MUNICIPAL LAW, EMPLOYMENT LAW, PLAINTIFF'S SEX AND AGE DISCRIMINATION CAUSES OF ACTIONS, AS WELL AS A RETALIATION CAUSE OF ACTION, SHOULD NOT HAVE BEEN DISMISSED, FIRST AMENDMENT VIOLATION CAUSE OF ACTION AGAINST CITY REQUIRES A NOTICE OF CLAIM, MOTION TO AMEND COMPLAINT TO ADD A FIRST AMENDMENT VIOLATION UNDER FEDERAL LAW, WHICH DOES NOT REQUIRE A NOTICE OF CLAIM, SHOULD HAVE BEEN GRANTED (SECOND DEPT))/CONSTITUTIONAL LAW (FREE SPEECH, EMPLOYMENT LAW, MUNICIPAL LAW, PLAINTIFF'S SEX AND AGE DISCRIMINATION CAUSES OF ACTIONS, AS WELL AS A RETALIATION CAUSE OF ACTION, SHOULD NOT HAVE BEEN DISMISSED, FIRST AMENDMENT VIOLATION CAUSE OF ACTION AGAINST CITY REQUIRES A NOTICE OF CLAIM, MOTION TO AMEND COMPLAINT TO ADD A FIRST AMENDMENT VIOLATION UNDER FEDERAL LAW, WHICH DOES NOT REQUIRE A NOTICE OF CLAIM, SHOULD HAVE BEEN GRANTED (SECOND DEPT))/FREE SPEECH (EMPLOYMENT LAW, MUNICIPAL LAW, PLAINTIFF'S SEX AND AGE DISCRIMINATION CAUSES OF ACTIONS, AS WELL AS A RETALIATION CAUSE OF ACTION, SHOULD NOT HAVE BEEN DISMISSED, FIRST AMENDMENT VIOLATION CAUSE OF ACTION AGAINST CITY REQUIRES A NOTICE OF CLAIM, MOTION TO AMEND COMPLAINT TO ADD A FIRST AMENDMENT VIOLATION UNDER FEDERAL LAW, WHICH DOES NOT REQUIRE A NOTICE OF CLAIM, SHOULD HAVE BEEN GRANTED (SECOND DEPT))/CIVIL PROCEDURE (AMEND COMPLAINT, EMPLOYMENT LAW, MUNICIPAL LAW, PLAINTIFF'S SEX AND AGE DISCRIMINATION CAUSES OF ACTIONS, AS WELL AS A RETALIATION CAUSE OF ACTION, SHOULD NOT HAVE BEEN DISMISSED, FIRST AMENDMENT VIOLATION CAUSE OF ACTION AGAINST CITY REQUIRES A NOTICE OF CLAIM, MOTION TO AMEND COMPLAINT TO ADD A FIRST AMENDMENT VIOLATION UNDER FEDERAL LAW, WHICH DOES NOT REQUIRE A NOTICE OF CLAIM, SHOULD HAVE BEEN GRANTED (SECOND DEPT))/DISCRIMINATION (EMPLOYMENT LAW, HUMAN RIGHTS LAW, MUNICIPAL LAW, PLAINTIFF'S SEX AND AGE DISCRIMINATION CAUSES OF ACTIONS, AS WELL AS A RETALIATION CAUSE OF ACTION, SHOULD NOT HAVE BEEN DISMISSED, FIRST AMENDMENT VIOLATION CAUSE OF ACTION AGAINST CITY REQUIRES A NOTICE OF CLAIM, MOTION TO AMEND COMPLAINT TO ADD A FIRST AMENDMENT VIOLATION UNDER FEDERAL LAW, WHICH DOES NOT REQUIRE A NOTICE OF CLAIM, SHOULD HAVE BEEN GRANTED (SECOND DEPT))

EMPLOYMENT LAW, MUNICIPAL LAW, HUMAN RIGHTS LAW, CONSTITUTIONAL LAW.

PLAINTIFF'S SEX AND AGE DISCRIMINATION CAUSES OF ACTIONS, AS WELL AS A RETALIATION CAUSE OF ACTION, SHOULD NOT HAVE BEEN DISMISSED, FIRST AMENDMENT VIOLATION CAUSE OF ACTION AGAINST CITY REQUIRES A NOTICE OF CLAIM, MOTION TO AMEND COMPLAINT TO ADD A FIRST AMENDMENT VIOLATION UNDER FEDERAL LAW, WHICH DOES NOT REQUIRE A NOTICE OF CLAIM, SHOULD HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing in part Supreme Court, determined plaintiff's complaint stated employment (sex and age) discrimination and retaliation causes of action pursuant to the NYC Human Rights Law, a notice of claim was required for the First Amendment violation cause of action against the city (plaintiff's employer), and plaintiff's motion to amend the complaint to state the First Amendment violation cause of action pursuant to 18 USC 1983 (which does not require a notice of claim) should have been granted:

> Here, the Supreme Court erred in granting those branches of the defendants' motion which were pursuant to CPLR 3211(a)(7) to dismiss the causes of action alleging employment discrimination on the basis of sex and age in violation of the NYCHRL ... . The allegation that a coworker repeatedly demonstrated a sex toy to the plaintiff was sufficient to state a cause of action to recover damages for sexual harassment in violation of the NYCHRL ... . Further, in opposition to the defendants' motion, the plaintiff submitted an affirmation of a separate coworker

detailing detailing further allegations of sexual harassment directed toward the plaintiff. The court erred in determining that the cause of action must be dismissed because the behavior constituted no more than petty slights or trivial inconveniences. A contention that the behavior was a petty slight or trivial inconvenience constitutes an affirmative defense ... which should be raised in the defendants' answer and does not lend itself to a pre-answer motion to dismiss ... .

Further, the allegations of disparate treatment of older employees, including the plaintiff, and that the plaintiff's demotion was based, in part, on age discrimination, sufficiently stated a cause of action to recover damages for age discrimination in violation of the NYCHRL ... .

The Supreme Court also erred in granting dismissal of the cause of action alleging unlawful retaliation based on the plaintiff's complaints of sexual harassment. ... The allegations that, following the plaintiff's complaint to a supervisor concerning alleged sexual harassment, the plaintiff was assigned double the normal workload, subjected to increased scrutiny of her work and reprimands for minor errors, and ultimately demoted a few months later, sufficiently stated a cause of action to recover damages for unlawful retaliation for the plaintiff's complaints of sexual harassment in violation of the NYCHRL ... . However, the complaint failed to allege that the plaintiff ever complained about the alleged age discrimination, and thus the court properly granted dismissal of the cause of action alleging unlawful retaliation based on complaints of age discrimination. **Kassapian v City of New York, 2017 NY Slip Op 07985, Second Dept 11-15-17**

EMPLOYMENT LAW (PUBLIC OFFICERS LAW, CORRECTIONS OFFICER'S OFFICIAL MISCONDUCT PLEA ALLOCUTION DID NOT ADDRESS ALL THE ALLEGATIONS IN THE INMATE'S CIVIL COMPLAINT AGAINST THE OFFICER, THEREFORE THE STATE WAS OBLIGATION TO DEFEND THE OFFICER IN THE CIVIL PROCEEDING (THIRD DEPT))/PUBLIC OFFICERS LAW (EMPLOYMENT LAW, CORRECTIONS OFFICER'S OFFICIAL MISCONDUCT PLEA ALLOCUTION DID NOT ADDRESS ALL THE ALLEGATIONS IN THE INMATE'S CIVIL COMPLAINT AGAINST THE OFFICER, THEREFORE THE STATE WAS OBLIGATION TO DEFEND THE OFFICER IN THE CIVIL PROCEEDING (THIRD DEPT))/CRIMINAL LAW (EMPLOYMENT LAW, PUBLIC OFFICERS LAW, CORRECTIONS OFFICER'S OFFICIAL MISCONDUCT PLEA ALLOCUTION DID NOT ADDRESS ALL THE ALLEGATIONS IN THE INMATE'S CIVIL COMPLAINT AGAINST THE OFFICER, THEREFORE THE STATE WAS OBLIGATION TO DEFEND THE OFFICER IN THE CIVIL PROCEEDING (THIRD DEPT))/OFFICIAL MISCONDUCT (CORRECTIONS OFFICERS, EMPLOYMENT LAW, PUBLIC OFFICERS LAW, CORRECTIONS OFFICER'S OFFICIAL MISCONDUCT PLEA ALLOCUTION DID NOT ADDRESS ALL THE ALLEGATIONS IN THE INMATE'S CIVIL COMPLAINT AGAINST THE OFFICER, THEREFORE THE STATE WAS OBLIGATION TO DEFEND THE OFFICER IN THE CIVIL PROCEEDING (THIRD DEPT))/CORRECTIONS OFFICERS (EMPLOYMENT LAW, PUBLIC OFFICERS LAW, OFFICIAL MISCONDUCT, OFFICER'S OFFICIAL MISCONDUCT PLEA ALLOCUTION DID NOT ADDRESS ALL THE ALLEGATIONS IN THE INMATE'S CIVIL COMPLAINT AGAINST THE OFFICER, THEREFORE THE STATE WAS OBLIGATION TO DEFEND THE OFFICER IN THE CIVIL PROCEEDING (THIRD DEPT))

EMPLOYMENT LAW, PUBLIC OFFICERS LAW, CRIMINAL LAW.

CORRECTIONS OFFICER'S OFFICIAL MISCONDUCT PLEA ALLOCUTION DID NOT ADDRESS ALL THE ALLEGATIONS IN THE INMATE'S CIVIL COMPLAINT AGAINST THE OFFICER, THEREFORE THE STATE WAS OBLIGATED TO DEFEND THE OFFICER IN THE CIVIL PROCEEDING (THIRD DEPT).

The Third Department determined the state was obligated to defendant the petitioner, a corrections officer, in a civil action brought by an inmate against the petitioner. The state argued its obligation to defend the petitioner ended when petitioner pled guilty to official misconduct. The court found that the sparse plea allocution did not indicate the acts alleged in the civil complaint were outside the scope of petitioner's employment, the allegations in the bill of particulars could not be used to supplement the plea allocution, and the plea did not address at all some of the allegations in the civil complaint:

As is the case in the private insurance realm, the state's determination to disclaim financial responsibility for an employee's defense is rational only if it can be determined, as a matter of law, "that there is no possible factual or legal basis on which the [s]tate may be obligated to indemnify the employee" ... . Pursuant to Public Officers Law § 17 (3) (a), the state has an obligation to indemnify its employees for any judgment or settlement obtained against them in state or federal court, so long as "the act or omission from which [the] judgment or settlement arose occurred while the employee was acting within the scope of his [or her] public employment or duties" and "the injury or damage [did not] result[] from intentional wrongdoing on the part of the employee." Stated differently, the state will not have a duty to indemnify an employee if the act or omission giving rise to the civil judgment or settlement occurred outside the scope of his or her employment or was the product of intentional wrongdoing ... .

Generally, "a particular issue expressly or necessarily decided in a criminal proceeding may be given preclusive effect in a subsequent affected civil action" if "the issue is identical in both actions, necessarily decided in the prior criminal action[,] . . . decisive in the civil action [and the defendant in the criminal action] had a full and fair opportunity . . . to litigate the now-foreclosed issue" ... . Contrary to respondent's contentions, neither petitioner's plea allocution nor the elements of official misconduct preclusively established that the acts alleged in the civil complaint occurred while petitioner was acting outside the scope of his employment or that the injuries or damages allegedly sustained by [the inmate] were the result of petitioner's intentional wrongdoing ... . **Matter of Rademacher v Schneiderman, 2017 NY Slip Op 08416, Third Dept 11-30-17**

ENVIRONMENTAL LAW

ENVIRONMENTAL LAW (PLANNING BOARD'S APPROVAL OF DEVELOPMENT INCLUDING WETLANDS NEEDED APPROVAL BY THE ARMY CORPS OF ENGINEERS, REQUEST FOR A SUPPLEMENTAL ENVIRONMENTAL IMPACT STATEMENT SHOULD HAVE BEEN GRANTED (SECOND DEPT))/ZONING (PLANNING BOARD'S APPROVAL OF DEVELOPMENT INCLUDING WETLANDS NEEDED APPROVAL BY THE ARMY CORPS OF ENGINEERS, REQUEST FOR A SUPPLEMENTAL ENVIRONMENTAL IMPACT STATEMENT SHOULD HAVE BEEN GRANTED (SECOND DEPT))/MUNICIPAL LAW (PLANNING BOARD'S APPROVAL OF DEVELOPMENT INCLUDING WETLANDS NEEDED APPROVAL BY THE ARMY CORPS OF ENGINEERS, REQUEST FOR A SUPPLEMENTAL ENVIRONMENTAL IMPACT STATEMENT SHOULD HAVE BEEN GRANTED (SECOND DEPT))/STATE ENVIRONMENTAL QUALITY REVIEW ACT (SEQRA) (PLANNING BOARD'S APPROVAL OF DEVELOPMENT INCLUDING WETLANDS NEEDED APPROVAL BY THE ARMY CORPS OF ENGINEERS, REQUEST FOR A SUPPLEMENTAL ENVIRONMENTAL IMPACT STATEMENT SHOULD HAVE BEEN GRANTED (SECOND DEPT))/ENVIRONMENTAL IMPACT STATEMENT (PLANNING BOARD'S APPROVAL OF DEVELOPMENT INCLUDING WETLANDS NEEDED APPROVAL BY THE ARMY CORPS OF ENGINEERS, REQUEST FOR A SUPPLEMENTAL ENVIRONMENTAL IMPACT STATEMENT SHOULD HAVE BEEN GRANTED (SECOND DEPT))/WETLANDS (ENVIRONMENTAL LAW, PLANNING BOARD'S APPROVAL OF DEVELOPMENT INCLUDING WETLANDS NEEDED APPROVAL BY THE ARMY CORPS OF ENGINEERS, REQUEST FOR A SUPPLEMENTAL ENVIRONMENTAL IMPACT STATEMENT SHOULD HAVE BEEN GRANTED (SECOND DEPT))/ARMY CORPS OF ENGINEERS (ENVIRONMENTAL LAW, WETLANDS, PLANNING BOARD'S APPROVAL OF DEVELOPMENT INCLUDING WETLANDS NEEDED APPROVAL BY THE ARMY CORPS OF ENGINEERS, REQUEST FOR A SUPPLEMENTAL ENVIRONMENTAL IMPACT STATEMENT SHOULD HAVE BEEN GRANTED (SECOND DEPT))

ENVIRONMENTAL LAW, ZONING, MUNICIPAL LAW.

PLANNING BOARD'S APPROVAL OF DEVELOPMENT INCLUDING WETLANDS NEEDED APPROVAL BY THE ARMY CORPS OF ENGINEERS, REQUEST FOR A SUPPLEMENTAL ENVIRONMENTAL IMPACT STATEMENT SHOULD HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined that the town planning board's approval of the development of land should be annulled. The land included wetlands which required an investigation and approval by the Army Corps of Engineers (ACOE) and those requirements had not been met. The petitioners' request for a Supplemental Environmental Impact Statement (SEIS) should have been granted:

> "A lead agency's determination whether to require a SEIS . . . is discretionary" ... . "The lead agency may require a supplemental EIS, limited to the specific significant adverse environmental impacts not addressed or inadequately addressed in the EIS that arise from: (a) changes proposed for the project; (b) newly discovered information; or (c) a change in circumstances related to the project" ... . "The decision to prepare a SEIS as a result of newly discovered information must be based upon . . . (a) the importance and relevance of the information; and (b) the present state of the information in the EIS'" ... . The limitations that apply to a court's review of an agency's SEQRA determination, that is, only to ascertain whether the agency took a hard look at the relevant areas of environmental concern and made a reasoned elaboration of the basis for its determination, also apply to the agency's determination regarding whether a SEIS is needed, and the court may no more substitute its judgment on this point than it may on other aspects of agency decision-making ... .
>
> Here, the petitioners contend that a SEIS is needed because Scenic never obtained a jurisdictional determination from the United States Army Corps of Engineers (hereinafter ACOE) validating [the developer's] delineation of wetlands on the subject property. They argue that, prior to issuing the determinations challenged on appeal, the Planning Board was presented with critical new evidence demonstrating that no jurisdictional determination had been issued by the ACOE for the subject property. The petitioners are correct. **Matter of Shapiro v Planning Bd. of the Town of Ramapo, 2017 NY Slip Op 07734, Second Dept 11-8-17**

ENVIRONMENTAL LAW (PLANNING BOARD DID NOT TAKE THE REQUISITE HARD LOOK AT THE IMPACT OF THE PROPOSED DEVELOPMENT, SUPPLEMENTAL ENVIRONMENTAL IMPACT STATEMENT REQUIRED (SECOND DEPT))/ZONING (ENVIRONMENTAL LAW, PLANNING BOARD DID NOT TAKE THE REQUISITE HARD LOOK AT THE IMPACT OF THE PROPOSED DEVELOPMENT, SUPPLEMENTAL ENVIRONMENTAL IMPACT STATEMENT REQUIRED (SECOND DEPT))/MUNICIPAL LAW (ENVIRONMENTAL LAW, ZONING, PLANNING BOARD DID NOT TAKE THE REQUISITE HARD LOOK AT THE IMPACT OF THE PROPOSED DEVELOPMENT, SUPPLEMENTAL ENVIRONMENTAL IMPACT STATEMENT REQUIRED (SECOND DEPT))/STATE ENVIRONMENTAL QUALITY REVIEW ACT (SEQRA) (PLANNING BOARD DID NOT TAKE THE REQUISITE HARD LOOK AT THE IMPACT OF THE PROPOSED DEVELOPMENT, SUPPLEMENTAL ENVIRONMENTAL IMPACT STATEMENT REQUIRED (SECOND DEPT)/ENVIRONMENTAL IMPACT STATEMENT (PLANNING BOARD DID NOT TAKE THE REQUISITE HARD LOOK AT THE IMPACT OF THE PROPOSED DEVELOPMENT, SUPPLEMENTAL ENVIRONMENTAL IMPACT STATEMENT REQUIRED (SECOND DEPT))

ENVIRONMENTAL LAW, ZONING, MUNICIPAL LAW.

PLANNING BOARD DID NOT TAKE THE REQUISITE HARD LOOK AT THE IMPACT OF THE PROPOSED DEVELOPMENT, SUPPLEMENTAL ENVIRONMENTAL IMPACT STATEMENT REQUIRED (SECOND DEPT).

The Second Department, reversing (in part) Supreme Court, determined the town planning board did not take the requisite "hard look" at the combined effect of the proposed development and the proximity of the development to a gas line. Therefore a Supplemental Environmental Impact Statement (SEIS) was required. Petitioners arguments that the proposed development conflicted with the town's comprehensive plan and constituted prohibited spot zoning were rejected:

> ... [W]e agree with the petitioner's contention that the Town Board failed to take a "hard look" at the environmental impact of placing the proposed development in close proximity to the existing Columbia Gas pipeline, and the combined environmental impact of the pipeline and the development together. The Draft Environmental Impact Statement (hereinafter DEIS) contains only a brief mention of the pipeline which bisects the property, and Columbia Gas was omitted from the list of "interested agencies." In addition, there is nothing in the Town Board's determinations that suggests that it considered these issues outside the context of the DEIS and the final environmental impact statement (hereinafter FEIS), and they are not discussed in the Town's SEQRA findings statement. Thus, the record supports the petitioner's contention that the Town Board did not take a "hard look" at these issues or make a "reasoned elaboration" of the basis for its determination regarding them ... , and the Supreme Court should have annulled the Town Board's determination resolving to approve the findings statement pursuant to SEQRA for the proposed zone change. **Matter of Youngewirth v Town of Ramapo Town Bd., 2017 NY Slip Op 07744, Second Dept 11-8-17**

FAMILY LAW

FAMILY LAW (DERIVATIVE NEGLECT FINDING CANNOT BE BASED UPON A PRIOR ADJOURNMENT IN CONTEMPLATION OF DISMISSAL (ACD) WHICH IS NOT A DETERMINATION ON THE MERITS (SECOND DEPT))/NEGLECT (DERIVATIVE NEGLECT FINDING CANNOT BE BASED UPON A PRIOR ADJOURNMENT IN CONTEMPLATION OF DISMISSAL (ACD) WHICH IS NOT A DETERMINATION ON THE MERITS (SECOND DEPT))/DERIVATIVE NEGLECT (DERIVATIVE NEGLECT FINDING CANNOT BE BASED UPON A PRIOR ADJOURNMENT IN CONTEMPLATION OF DISMISSAL (ACD) WHICH IS NOT A DETERMINATION ON THE MERITS (SECOND DEPT))/ADJOURNMENT IN CONTEMPLATION OF DISMISSAL (ACD) (DERIVATIVE NEGLECT FINDING CANNOT BE BASED UPON A PRIOR ADJOURNMENT IN CONTEMPLATION OF DISMISSAL (ACD) WHICH IS NOT A DETERMINATION ON THE MERITS (SECOND DEPT))/ACD (DERIVATIVE NEGLECT FINDING CANNOT BE BASED UPON A PRIOR ADJOURNMENT IN CONTEMPLATION OF DISMISSAL (ACD) WHICH IS NOT A DETERMINATION ON THE MERITS (SECOND DEPT))

FAMILY LAW.

DERIVATIVE NEGLECT FINDING CANNOT BE BASED UPON A PRIOR ADJOURNMENT IN CONTEMPLATION OF DISMISSAL (ACD) WHICH IS NOT A DETERMINATION ON THE MERITS (SECOND DEPT).

The Second Department determined Family Court should not have made a finding of derivative neglect based upon a prior ACD (adjournment in contemplation of dismissal) which is not a determination on the merits:

> "Where a person's conduct toward one child demonstrates a fundamental defect in the parent's understanding of the duties of parenthood, or demonstrates such an impaired level of parental judgment as to create a substantial risk of harm for any child in his or her care, an adjudication of derivative neglect with respect to the other children is warranted" ... . " In determining whether a child born after the underlying acts of neglect should be adjudicated as a child who was derivatively neglected, the determinative factor is whether, taking into account the nature of the conduct and any other pertinent considerations, the conduct that formed the basis for a finding of neglect as to one child is so proximate in time to the derivative proceeding that it can reasonably be concluded that the condition still exists'" ... . However, "[a]n ACD is emphatically not a determination on the merits. It is not akin to a finding of parental neglect, but, rather, it leaves the question unanswered" ... .
>
> Here, the Family Court did not enter a finding of neglect against the father in 2015. Instead, it entered an ACD against him based on his admission that he failed to provide a stable home for the child. Moreover, the DSS did not seek to reopen the earlier proceeding to establish the father's neglect based on his failure to comply with the conditions set forth by the court. Under these circumstances, the court erred in entering a finding of derivative neglect against the father ... . **Matter of Delilah D. (Richard D.), 2017 NY Slip Op 07724, Second Dept 11-8-17**

FAMILY LAW (NEGLECT, THIRD CHILD SHOULD HAVE BEEN FOUND TO HAVE BEEN DERIVATIVELY NEGLECTED BASED UPON PROOF FATHER INJURED THE TWO OTHER CHILDREN (SECOND DEPT))/NEGLECT (THIRD CHILD SHOULD HAVE BEEN FOUND TO HAVE BEEN DERIVATIVELY NEGLECTED BASED UPON PROOF FATHER INJURED THE TWO OTHER CHILDREN (SECOND DEPT))/DERIVATIVE NEGLECT (THIRD CHILD SHOULD HAVE BEEN FOUND TO HAVE BEEN DERIVATIVELY NEGLECTED BASED UPON PROOF FATHER INJURED THE TWO OTHER CHILDREN (SECOND DEPT))/ABUSE (FAMILY LAW, THIRD CHILD SHOULD HAVE BEEN FOUND TO HAVE BEEN DERIVATIVELY NEGLECTED BASED UPON PROOF FATHER INJURED THE TWO OTHER CHILDREN (SECOND DEPT))/DERIVATIVE ABUSE (FAMILY LAW, THIRD CHILD SHOULD HAVE BEEN FOUND TO HAVE BEEN DERIVATIVELY NEGLECTED BASED UPON PROOF FATHER INJURED THE TWO OTHER CHILDREN (SECOND DEPT))

FAMILY LAW.

THIRD CHILD SHOULD HAVE BEEN FOUND TO HAVE BEEN DERIVATIVELY NEGLECTED BASED UPON PROOF FATHER INJURED THE TWO OTHER CHILDREN (SECOND DEPT).

The Second Department determined Family Court properly found that a child (Nasir) was not derivatively abused based upon proof father had injured the two other children, but should have found the child derivatively neglected:

> "[P]roof of the abuse or neglect of one child shall be admissible evidence on the issue of the abuse or neglect of any other child of, or the legal responsibility of, the respondent" ... . Contrary to the contention of ACS [Administration for Children's Services), the Family Court properly found that ACS failed to establish that Nasir was derivatively abused by the father ... . However, we agree with ACS that it established, by a preponderance of the evidence ... , that the father derivatively neglected Nasir ... . "The focus of the inquiry to determine whether derivative neglect is present is whether the evidence of abuse or neglect of one child indicates a fundamental defect in the parent's understanding of the duties of parenthood. Such flawed notions of parental responsibility are generally reliable indicators that a parent who has abused one child will place his or her other children at substantial risk of harm" ... The father's physical abuse of Nyair demonstrated a fundamental defect in his understanding of parental duties relating to the care of children, placing Nasir in imminent danger of impairment of his physical, mental, or emotional condition... . Accordingly, the court should have made a finding that the father derivatively neglected Nasir. **Matter of Nyair J. (Vernon J.), 2017 NY Slip Op 07729, Second Dept 11-8-17**

FAMILY LAW (ALTHOUGH CHILD RESIDED WITH NON-PARENT FOR A NUMBER OF YEARS, THE ARRANGEMENT WAS TEMPORARY TO ALLOW FATHER TO ATTEND LAW SCHOOL, NON-PARENT'S PETITION FOR CUSTODY PROPERLY DISMISSED WITHOUT A HEARING (SECOND DEPT))/CUSTODY (FAMILY LAW, NON-PARENT, ALTHOUGH CHILD RESIDED WITH NON-PARENT FOR A NUMBER OF YEARS, THE ARRANGEMENT WAS TEMPORARY TO ALLOW FATHER TO ATTEND LAW SCHOOL, NON-PARENT'S PETITION FOR CUSTODY PROPERLY DISMISSED WITHOUT A HEARING (SECOND DEPT))/STANDING (FAMILY LAW, NON-PARENT, ALTHOUGH CHILD RESIDED WITH NON-PARENT FOR A NUMBER OF YEARS, THE ARRANGEMENT WAS TEMPORARY TO ALLOW FATHER TO ATTEND LAW SCHOOL, NON-PARENT'S PETITION FOR CUSTODY PROPERLY DISMISSED WITHOUT A HEARING (SECOND DEPT))/NON-PARENT (FAMILY LAW, CUSTODY, STANDING, ALTHOUGH CHILD RESIDED WITH NON-PARENT FOR A NUMBER OF YEARS, THE ARRANGEMENT WAS TEMPORARY TO ALLOW FATHER TO ATTEND LAW SCHOOL, NON-PARENT'S PETITION FOR CUSTODY PROPERLY DISMISSED WITHOUT A HEARING (SECOND DEPT))

FAMILY LAW.

ALTHOUGH CHILD RESIDED WITH NON-PARENT FOR A NUMBER OF YEARS, THE ARRANGEMENT WAS TEMPORARY TO ALLOW FATHER TO ATTEND LAW SCHOOL, NON-PARENT'S PETITION FOR CUSTODY PROPERLY DISMISSED WITHOUT A HEARING (SECOND DEPT).

The Second Department determined Supreme Court properly dismissed without a hearing a non-parent's petition seeking custody of a child. Although the child resided with the petitioner for a significant period of time, there was evidence the arrangement was temporary to allow father, who was working full-time, to attend law school at night:

> The Court of Appeals has created a "two-prong inquiry for determining whether a nonparent may obtain custody as against a parent" ... . "First, the nonparent must prove the existence of extraordinary circumstances such as surrender, abandonment, persisting neglect, unfitness, and unfortunate or involuntary disruption of custody over an extended period of time" ... . "If extraordinary circumstances are established such that the nonparent has standing to seek custody, the court must make an award of custody based on the best interest of the child" ... .
>
> "A hearing to determine the issue of standing is not necessary where there are no triable issues of fact raised in the papers submitted"... .
>
> ... [T]he period of time when the child resided primarily with the petitioner and not the father largely coincided with the period of time when the father was working full time and attending law school at night. During that period of time, the father contributed financially to the child's support. The petitioner and the father completed certain forms designating the petitioner as the child's caregiver for stated purposes, yet these forms were for a limited duration, and some of the forms contained notations to the effect that the father was not giving up his custodial rights. **Matter of Schmitt v Troche, 2017 NY Slip Op 07732, Second Dept 11-8-17**

FAMILY LAW (RELOCATION AND CUSTODY MODIFICATION ISSUES REQUIRED A HEARING FOCUSING ON THE BEST INTERESTS OF THE CHILD (FOURTH DEPT))/CUSTODY (FAMILY LAW, RELOCATION AND CUSTODY MODIFICATION ISSUES REQUIRED A HEARING FOCUSING ON THE BEST INTERESTS OF THE CHILD (FOURTH DEPT))

FAMILY LAW.

RELOCATION AND CUSTODY MODIFICATION ISSUES REQUIRED A HEARING FOCUSING ON THE BEST INTERESTS OF THE CHILD (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined the relocation/custody modification issues required a hearing focusing on the best interests of the child:

> We agree with the father that the court erred in giving him a deadline to relocate within the 15-mile radius provided in the [Separation] Agreement without conducting a hearing, and that the court further erred in denying that part of the father's cross motion seeking modification of the custody and visitation provisions of the Agreement, also without conducting a hearing. ...
>
> While " [a] hearing is not automatically required whenever a parent seeks modification of a custody order' " ... , here we conclude that the combined effect of the parties' "relocation[s] was a change of circumstances warranting a reexamination of the existing custody arrangement" at an evidentiary hearing ... . While the parties' Agreement provided that the father must reside within a 15-mile radius of the mother's residence upon her relocation, the overriding consideration in determining whether to enforce such a provision is the child's best interests ... .. It is impossible to determine on this record the effect on the child of enforcing or modifying the Agreement, and we conclude that the parties should be afforded an opportunity to present evidence concerning the child's best interests. **Shaw v Shaw, 2017 NY Slip Op 08138, Fourth Dept 11-17-17**

FAMILY LAW (QDRO WAS ENTERED IN VIOLATION OF THE SEPARATION AGREEMENT, SUPREME COURT SHOULD HAVE VACATED THE QDRO, LACHES INAPPLICABLE (FOURTH DEPT))/QUALIFIED DOMESTIC RELATIOINS ORDER (QDRO) (QDRO WAS ENTERED IN VIOLATION OF THE SEPARATION AGREEMENT, SUPREME COURT SHOULD HAVE VACATED THE QDRO, LACHES INAPPLICABLE (FOURTH DEPT))/LACHES (FAMILY LAW. MOTION TO VACATE QDRO, QDRO WAS ENTERED IN VIOLATION OF THE SEPARATION AGREEMENT, SUPREME COURT SHOULD HAVE VACATED THE QDRO, LACHES INAPPLICABLE (FOURTH DEPT))

FAMILY LAW.

QDRO WAS ENTERED IN VIOLATION OF THE SEPARATION AGREEMENT, SUPREME COURT SHOULD HAVE VACATED THE QDRO, LACHES INAPPLICABLE (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined the qualified domestic relations order (QDRO) should have been vacated because the separation agreement called for the QDRO to terminate upon the wife's (plaintiff's) remarriage, which took place in 1995. The doctrine of laches was inapplicable:

> "A QDRO obtained pursuant to a separation agreement can convey only those rights . . . which the parties [agreed to] as a basis for the judgment' "... . Thus, it is well established that "a court errs in granting . . . a QDRO more

expansive than an underlying written separation agreement" ... , regardless whether the parties or their attorneys approved the QDRO without objecting to the inconsistency ... . Under such circumstances, the court has the authority to vacate or amend the QDRO as appropriate to reflect the provisions of the separation agreement ... . Here, the QDRO should never have been entered in the first instance because the clear and unambiguous language of the separation agreement provided that plaintiff's rights in defendant's pension benefits had terminated upon her remarriage.

We reject plaintiff's contention that defendant is barred by laches from seeking to vacate the QDRO. "The defense of laches requires both delay in bringing an action and a showing of prejudice to the adverse party" ... . Even assuming, arguendo, that there was a delay in seeking to vacate the QDRO, we conclude that plaintiff has not demonstrated that she was prejudiced by that delay ... . **Santillo v Santillo, 2017 NY Slip Op 08155, Fourth Dept 11-17-17**

FAMILY LAW (FAMILY COURT SHOULD HAVE MADE FINDINGS TO ALLOW JUVENILE TO APPLY FOR SPECIAL IMMIGRANT JUVENILE STATUS (SIJS), REUNIFICATION WITH A PARENT AND RETURN TO INDIA WERE NOT IN THE CHILD'S BEST INTERESTS (SECOND DEPT))/SPECIAL IMMIGRANT JUVENILE STATUS (FAMILY LAW, (FAMILY COURT SHOULD HAVE MADE FINDINGS TO ALLOW JUVENILE TO APPLY FOR SPECIAL IMMIGRANT JUVENILE STATUS (SIJS), REUNIFICATION WITH A PARENT AND RETURN TO INDIA WERE NOT IN THE CHILD'S BEST INTERESTS (SECOND DEPT))/IMMIGRATION (FAMILY LAW, SPECIAL IMMIGRANT JUVENILE STATUS, FAMILY COURT SHOULD HAVE MADE FINDINGS TO ALLOW JUVENILE TO APPLY FOR SPECIAL IMMIGRANT JUVENILE STATUS (SIJS), REUNIFICATION WITH A PARENT AND RETURN TO INDIA WERE NOT IN THE CHILD'S BEST INTERESTS (SECOND DEPT))

FAMILY LAW.

FAMILY COURT SHOULD HAVE MADE FINDINGS TO ALLOW JUVENILE TO APPLY FOR SPECIAL IMMIGRANT JUVENILE STATUS (SIJS), REUNIFICATION WITH A PARENT AND RETURN TO INDIA WERE NOT IN THE CHILD'S BEST INTERESTS (SECOND DEPT).

The Second Department, reversing Family Court, determined Family Court should have made the requisite findings to allow the juvenile to apply for special immigrant juvenile status (SIJS):

... [A] special immigrant is a resident alien who, inter alia, is under 21 years of age, unmarried, and dependent upon a juvenile court or legally committed to an individual appointed by a state or juvenile court. Additionally, for a juvenile to qualify for SIJS, a court must find that reunification of the juvenile with one or both of the juvenile's parents is not viable due to parental abuse, neglect, abandonment, or a similar basis found under state law ... , and that it would not be in the juvenile's best interests to be returned to his or her previous country of nationality or country of last habitual residence... .

Based upon our independent factual review, we find that reunification of the child with his father is not a viable option due to parental neglect, which includes the infliction of excessive corporal punishment and requiring the child to begin working at the age of 15 instead of attending school on a regular basis ... . The record also supports a finding that it would not be in the child's best interests to be returned to India ... . **Matter of Gurwinder S., 2017 NY Slip Op 08272, Second Dept 11-22-17**

FAMILY LAW (VISITATION, COURT IMPROPERLY DELEGATED ITS AUTHORITY BY ALLOWING MOTHER TO CANCEL VISITATION IF FATHER WAS MORE THAN 15 MINUTES LATE (SECOND DEPT))/VISITATION (FAMILY LAW, COURT IMPROPERLY DELEGATED ITS AUTHORITY BY ALLOWING MOTHER TO CANCEL VISITATION IF FATHER WAS MORE THAN 15 MINUTES LATE (SECOND DEPT))

FAMILY LAW.

COURT IMPROPERLY DELEGATED ITS AUTHORITY BY ALLOWING MOTHER TO CANCEL VISITATION IF FATHER WAS MORE THAN 15 MINUTES LATE (SECOND DEPT).

The Second Department determined Family Court should not have given mother the power to cancel father's visit with a child if the father was more than 15 minutes late:

> The Family Court erred in granting the mother the authority to unilaterally cancel the father's visitation if he were more than 15 minutes late to pick up or drop off the child. This provision did not give the father an opportunity to judicially challenge the mother's determination, or to present a legitimate reason for his tardiness before having a visit canceled ... . Thus, the court improperly delegated its authority to the mother to determine when the child would visit with the father ... . **Matter of Michael R. v Aliesha H., 2017 NY Slip Op 08377, Second Dept 11-29-17**

FAMILY LAW (FATHER WHO WAS EXCLUDED FROM THE HOME AFTER CHILD ABUSE ALLEGATIONS HAD A RIGHT TO AN EXPEDITED HEARING PURSUANT TO FAMILY COURT ACT 1028, BECAUSE THE ISSUE IS IMPORTANT AND LIKELY TO RECUR THE MOOTNESS DOCTRINE WAS NOT APPLIED TO PRECLUDE APPEAL (SECOND DEPT))/APPEALS (MOOTNESS DOCTRINE, FAMILY LAW, FATHER WHO WAS EXCLUDED FROM THE HOME AFTER CHILD ABUSE ALLEGATIONS HAD A RIGHT TO AN EXPEDITED HEARING PURSUANT TO FAMILY COURT ACT 1028, BECAUSE THE ISSUE IS IMPORTANT AND LIKELY TO RECUR THE MOOTNESS DOCTRINE WAS NOT APPLIED TO PRECLUDE APPEAL (SECOND DEPT))/MOOTNESS DOCTRINE (APPEALS, FAMILY LAW, FATHER WHO WAS EXCLUDED FROM THE HOME AFTER CHILD ABUSE ALLEGATIONS HAD A RIGHT TO AN EXPEDITED HEARING PURSUANT TO FAMILY COURT ACT 1028, BECAUSE THE ISSUE IS IMPORTANT AND LIKELY TO RECUR THE MOOTNESS DOCTRINE WAS NOT APPLIED TO PRECLUDE APPEAL (SECOND DEPT))

FAMILY LAW, APPEALS.

FATHER WHO WAS EXCLUDED FROM THE HOME AFTER CHILD ABUSE ALLEGATIONS HAD A RIGHT TO AN EXPEDITED HEARING PURSUANT TO FAMILY COURT ACT 1028, BECAUSE THE ISSUE IS IMPORTANT AND LIKELY TO RECUR THE MOOTNESS DOCTRINE WAS NOT APPLIED TO PRECLUDE APPEAL (SECOND DEPT).

The Second Department, in a comprehensive, full-fledged opinion by Justice Mastro (not fully summarized here), reversing Family Court, determined father, who had been excluded from the home because of sexual abuse allegations involving a child, was entitled to an expedited hearing pursuant to Family Court Act 1028. Although the father had been returned to the home by the time the appeal was heard, the court deemed the issue important and likely to recur thereby warranting an exception to the mootness doctrine:

> Since the removal of a child from the family home and the exclusion of a parent from that same home require equal showings of imminent risk, and both result in similar infringements on the constitutionally protected parent-child relationship, we conclude that both trigger the same due process protections. Accordingly, in cases such as the

> one before us, where no "imminent risk" hearing is held before the parent is excluded from the household and the parent-child relationship is thereby severed, the holding of an expedited hearing within three court days pursuant to Family Court Act § 1028, upon the parent's request, is mandated so that the question of reunification of the parent and child pending resolution of the proceeding may be determined. Due process requires the parent's prompt, full, and fair opportunity to contest his or her exclusion from daily interaction with his or her children in this manner. **Matter of Elizabeth C. (Omar C.), 2017 NY Slip Op 08370, Second Dept 11-29-17**

FAMILY LAW (SEPARATION AGREEMENT REQUIRED BOTH PARENTS TO CONTRIBUTE TO COLLEGE EXPENSES BUT DID NOT INDICATE HOW MUCH EACH PARTY SHOULD CONTRIBUTE, AGREEMENT BREACHED BY WIFE'S FAILURE TO PAY ANYTHING, FAMILY COURT TO DETERMINE EACH PARENT'S APPROPRIATE CONTRIBUTION (THIRD DEPT))/CONTRACT LAW (FAMILY LAW, SEPARATION AGREEMENT REQUIRED BOTH PARENTS TO CONTRIBUTE TO , OLLEGE EXPENSES BUT DID NOT INDICATE HOW MUCH EACH PARTY SHOULD CONTRIBUTE, AGREEMENT BREACHED BY WIFE'S FAILURE TO PAY ANYTHING, FAMILY COURT TO DETERMINE EACH PARENT'S APPROPRIATE CONTRIBUTION (THIRD DEPT))/SEPARATION AGREEMENT (FAMILY LAW, CONTRACT LAW, SEPARATION AGREEMENT REQUIRED BOTH PARENTS TO CONTRIBUTE TO COLLEGE EXPENSES BUT DID NOT INDICATE HOW MUCH EACH PARTY SHOULD CONTRIBUTE, AGREEMENT BREACHED BY WIFE'S FAILURE TO PAY ANYTHING, FAMILY COURT TO DETERMINE EACH PARENT'S APPROPRIATE CONTRIBUTION (THIRD DEPT))/COLLEGE EXPENSES (FAMILY LAW, SEPARATION AGREEMENT REQUIRED BOTH PARENTS TO CONTRIBUTE TO COLLEGE EXPENSES BUT DID NOT INDICATE HOW MUCH EACH PARTY SHOULD CONTRIBUTE, AGREEMENT BREACHED BY WIFE'S FAILURE TO PAY ANYTHING, FAMILY COURT TO DETERMINE EACH PARENT'S APPROPRIATE CONTRIBUTION (THIRD DEPT))

FAMILY LAW, CONTRACT LAW.

SEPARATION AGREEMENT REQUIRED BOTH PARENTS TO CONTRIBUTE TO COLLEGE EXPENSES BUT DID NOT INDICATE HOW MUCH EACH PARTY SHOULD CONTRIBUTE, AGREEMENT BREACHED BY WIFE'S FAILURE TO PAY ANYTHING, FAMILY COURT TO DETERMINE EACH PARENT'S APPROPRIATE CONTRIBUTION (THIRD DEPT).

The Third Department determined the separation agreement should not have been interpreted to require that the cost of college tuition be split 50-50. The agreement simply capped each party's contribution at 50%. Family Court must determine the proper contribution based upon resources. The wife's failure to pay anything, however, violated the agreement:

> Here, the parties agreed to "share in the costs of the child's higher education," with such contribution being capped at 50% of tuition at a state university, plus the cost of reasonable living expenses. By its plain language, the disputed provision unequivocally demonstrates that the parties intended to encourage and facilitate the child's pursuit of a college degree and to make some financial contribution — up to, but not necessarily equaling, 50% of the total cost of tuition at a state university — toward that pursuit. In agreeing to contribute, the parties did not use language such as "split" or "50-50," despite such language appearing elsewhere in the separation agreement, including in the sections addressing dependent care expenses and the cost of health insurance coverage. Given the appearance of such language elsewhere in the agreement, its absence in the relevant provision is telling, as it suggests that the parties did not intend, as Family Court found, to equally split the total cost of the child's college tuition — subject to the cap — and living expenses ... .. Furthermore, while the separation agreement provided that each party's financial exposure would not exceed the tuition cap, it stopped short of defining the parties' respective obligations. The absence of language defining their obligations does not render the provision ambiguous. Rather, by its omission, it is apparent that the parties contemplated a later agreement between themselves and, failing that, a subsequent determination by the court as to their respective contributions … .Thus, while we agree that the

mother's failure to contribute anything toward the cost of the child's college education constituted a willful violation of the separation agreement, Family Court erred in concluding that the parties intended to equally share the total cost of the child's college tuition and living expenses, subject to the tuition cap, and entering a judgment against the mother in the amount of $28,377.50. **Matter of Dillon v Dillon, 2017 NY Slip Op 08062, Second Dept 11-15-17**

FAMILY LAW (CHILD SUPPORT, STIPULATION COMPLIED WITH THE CHILD SUPPORT STANDARDS ACT AND STATED THE PROPER STANDARD FOR AN UPWARD MODIFICATION OF SUPPORT (THIRD DEPT))/CHILD SUPPORT (FAMILY LAW, STIPULATION COMPLIED WITH THE CHILD SUPPORT STANDARDS ACT AND STATED THE PROPER STANDARD FOR AN UPWARD MODIFICATION OF SUPPORT (THIRD DEPT))/CONTRACT LAW (FAMILY LAW, STIPULATION, CHILD SUPPORT, STIPULATION COMPLIED WITH THE CHILD SUPPORT STANDARDS ACT AND STATED THE PROPER STANDARD FOR AN UPWARD MODIFICATION OF SUPPORT (THIRD DEPT))/STIPULATION (FAMILY LAW, CHILD SUPPORT, STIPULATION COMPLIED WITH THE CHILD SUPPORT STANDARDS ACT AND STATED THE PROPER STANDARD FOR AN UPWARD MODIFICATION OF SUPPORT (THIRD DEPT))/UPWARD MODIFICATION (FAMILY LAW, CHILD SUPPORT, , STIPULATION COMPLIED WITH THE CHILD SUPPORT STANDARDS ACT AND STATED THE PROPER STANDARD FOR AN UPWARD MODIFICATION OF SUPPORT (THIRD DEPT))

FAMILY LAW, CONTRACT LAW.

STIPULATION COMPLIED WITH THE CHILD SUPPORT STANDARDS ACT AND STATED THE PROPER STANDARD FOR AN UPWARD MODIFICATION OF SUPPORT (THIRD DEPT).

The Third Department, reversing Family Court, determined the child support provisions of a stipulation complied with the Child Support Standards Act (CSSA) and were enforceable. The Third Department further found that the proper standard for an upward modification of support was that which was agreed to in the stipulation:

> The stipulation, as well as the order of support, recite that the parties had been advised of and fully understood the child support provisions of the CSSA and that the application of the statute would result in the presumptively correct amount of child support to be awarded. The stipulation then sets forth the presumptive amount of child support that would be awarded under the CSSA and the agreed-upon figures used to calculate that amount, states that the parties are deviating from the presumptive amount and provides a detailed explanation of the reasons for the deviation therefrom. Thus, the opt out provisions of the stipulation fully comply with the CSSA ... . That the judgment of divorce does not explicitly set forth the CSSA recitals is not determinative, as the statute only requires the inclusion of such recitals in the "agreement or stipulation . . . presented to the court for incorporation in an order or judgment" ... .
>
> Generally, a party seeking modification of a child support provision derived from an agreement or stipulation incorporated but not merged into a judgment of divorce has the burden of proving, insofar as is relevant here, "that an unanticipated and unreasonable change of circumstances has occurred resulting in a concomitant increased need or that the needs of the children are not being adequately met"... . "The parties are free, however, to agree to different terms triggering a change in the obligations of the payor spouse, including the application of a standard other than substantial unanticipated and unreasonable change in circumstances as the basis for determining a modification application, provided that . . . the children's personal right to receive adequate support is not adversely affected and public policy is not offended" ... . Here, the parties' 1999 stipulation expressly provides that either party may petition a court for a modification of child support based upon "a change of circumstances." Through this clear and unqualified language, the parties plainly expressed an intent to dispense with the "unanticipated and unreasonable change of circumstances" standard in favor of a less burdensome "change of circumstances" standard ... . **Matter of Frederick-Kane v Potter, 2017 NY Slip Op 08219, Third Dept 11-22-17**

FAMILY LAW (ORDERS OF PROTECTION, BECAUSE INCARCERATION IMPOSED AS PART OF A FAMILY COURT NEGLECT/PROTECTIVE-ORDER-VIOLATION DISPOSITION WAS REMEDIAL, NOT PUNITIVE, CRIMINAL PROSECUTION FOR CONTEMPT STEMMING FROM THE VIOLATIONS OF THE PROTECTIVE ORDER NOT PRECLUDED BY THE DOUBLE JEOPARDY RULE (THIRD DEPT))/CRIMINAL LAW (FAMILY LAW, ORDERS OF PROTECTION, CONTEMPT, DOUBLE JEOPARDY, ORDERS OF PROTECTION, BECAUSE INCARCERATION IMPOSED AS PART OF A FAMILY COURT NEGLECT/PROTECTIVE-ORDER-VIOLATION (DISPOSITION WAS REMEDIAL, NOT PUNITIVE, CRIMINAL PROSECUTION FOR CONTEMPT STEMMING FROM THE VIOLATIONS OF THE PROTECTIVE ORDER NOT PRECLUDED BY THE DOUBLE JEOPARDY RULE (THIRD DEPT))/CONTEMPT (FAMILY LAW, ORDERS OF PROTECTION, CONTEMPT, DOUBLE JEOPARDY, ORDERS OF PROTECTION, BECAUSE INCARCERATION IMPOSED AS PART OF A FAMILY COURT NEGLECT/DOUBLE JEOPARDY (FAMILY LAW, ORDERS OF PROTECTION, CRIMINAL CONTEMPT, ORDERS OF PROTECTION, BECAUSE INCARCERATION IMPOSED AS PART OF A FAMILY COURT NEGLECT

FAMILY LAW, CRIMINAL LAW.

BECAUSE INCARCERATION IMPOSED AS PART OF A FAMILY COURT NEGLECT/PROTECTIVE-ORDER-VIOLATION DISPOSITION WAS REMEDIAL, NOT PUNITIVE, CRIMINAL PROSECUTION FOR CONTEMPT STEMMING FROM THE VIOLATIONS OF THE PROTECTIVE ORDER NOT PRECLUDED BY THE DOUBLE JEOPARDY RULE (THIRD DEPT).

The Third Department determined criminal contempt charges were not precluded by the double jeopardy rule. As part of a neglect proceeding defendant admitted violating orders of protection. Although a 60-day period of incarceration was part of the disposition, it was repeatedly delayed as the court monitored defendant's compliance (and was never imposed). Because the incarceration was deemed to induce compliance with Family Court's orders, it was remedial, not punitive in nature. Therefore a subsequent prosecution for criminal contempt, arising from the violations of the orders of protection, did not violate the double jeopardy prohibition:

> The double jeopardy protections of the US and NY Constitutions "shield a defendant from multiple criminal punishments arising from the same offense" ... . Whether double jeopardy bars a criminal prosecution subsequent to a finding of contempt or similar violation of a court order depends not on the labels used to describe the previously imposed sentence, but on "the character and purpose" of that sentence ... . In a contempt matter, the sentence imposed for violation of a court order is remedial if it was intended "to coerce compliance" with a court order ... . By contrast, when "a contemnor is sentenced to imprisonment for a definite period which cannot be affected — that is, ended — by the contemnor's compliance with the law [or a court order], then the contempt is not remedial but punitive" ... . Double jeopardy precludes "a subsequent prosecution where a prior contempt sentence serves a punitive rather than remedial purpose" ... . However, if the imposed sentence was remedial, double jeopardy does not apply ... . **People v Lamica, 2017 NY Slip Op 07646, Third Dept 11-2-17**

FAMILY LAW (FAMILY OFFENSES OF AGGRAVATED HARASSMENT AND ASSAULT THIRD NOT SUPPORTED BY PROOF OF PHYSICAL INJURY (SECOND DEPT))/CRIMINAL LAW (FAMILY OFFENSES OF AGGRAVATED HARASSMENT AND ASSAULT THIRD NOT SUPPORTED BY PROOF OF PHYSICAL INJURY (SECOND DEPT))/AGGRAVATED HARASSMENT (FAMILY OFFENSES OF AGGRAVATED HARASSMENT AND ASSAULT THIRD NOT SUPPORTED BY PROOF OF PHYSICAL INJURY (SECOND DEPT))/ASSAULT THIRD DEGREE (FAMILY OFFENSES OF AGGRAVATED HARASSMENT AND ASSAULT THIRD NOT SUPPORTED BY PROOF OF PHYSICAL INJURY (SECOND DEPT))/FAMILY OFFENSES (FAMILY OFFENSES OF AGGRAVATED HARASSMENT AND ASSAULT THIRD NOT SUPPORTED BY PROOF OF PHYSICAL INJURY (SECOND DEPT))

FAMILY LAW, CRIMINAL LAW.

FAMILY OFFENSES OF AGGRAVATED HARASSMENT AND ASSAULT THIRD NOT SUPPORTED BY PROOF OF PHYSICAL INJURY (SECOND DEPT).

The Second Department, reversing Family Court, found that the charged family offenses of aggravated harassment and assault third were not supported by proof of physical injury:

> ... [T]he petitioner failed to establish by a fair preponderance of the evidence that the appellant committed the family offenses of aggravated harassment and assault in the third degree. Both of those family offenses require proof of physical injury, which is defined as "impairment of physical condition or substantial pain" ... . Contrary to the Family Court's determination, the evidence presented at the fact-finding hearing failed to adequately demonstrate that the petitioner suffered a physical injury as a result of the conduct alleged in the petition ... . Since the court's factual determinations were not supported by the record, we vacate the finding that the appellant committed the family offenses of aggravated harassment and assault in the third degree ... .. Inasmuch as the petitioner has not raised any alternative grounds for affirmance of the order of protection ... , under the circumstances, we reverse the order of protection, deny the family offense petition, and dismiss the proceeding ... . **Matter of Stanislaus v Stanislaus, 2017 NY Slip Op 08274, Second Dept 11-22-17**

FAMILY LAW (CHILD ABUSE, NEGLECT, EVIDENCE DID NOT SUPPORT CONCLUSION THAT MOTHER WAS OR SHOULD HAVE BEEN AWARE FATHER HAD INJURED THE CHILD, CHILD ABUSE AND NEGLECT FINDINGS REVERSED (THIRD DEPT))/CHILD ABUSE (FAMILY LAW, EVIDENCE DID NOT SUPPORT CONCLUSION THAT MOTHER WAS OR SHOULD HAVE BEEN AWARE FATHER HAD INJURED THE CHILD, CHILD ABUSE AND NEGLECT FINDINGS REVERSED (THIRD DEPT))/NEGLECT (FAMILY LAW, EVIDENCE DID NOT SUPPORT CONCLUSION THAT MOTHER WAS OR SHOULD HAVE BEEN AWARE FATHER HAD INJURED THE CHILD, CHILD ABUSE AND NEGLECT FINDINGS REVERSED (THIRD DEPT))/EVIDENCE (FAMILY LAW, CHILD ABUSE, NEGLECT, EVIDENCE DID NOT SUPPORT CONCLUSION THAT MOTHER WAS OR SHOULD HAVE BEEN AWARE FATHER HAD INJURED THE CHILD, CHILD ABUSE AND NEGLECT FINDINGS REVERSED (THIRD DEPT))

FAMILY LAW, EVIDENCE.

EVIDENCE DID NOT SUPPORT CONCLUSION THAT MOTHER WAS OR SHOULD HAVE BEEN AWARE FATHER HAD INJURED THE CHILD, CHILD ABUSE AND NEGLECT FINDINGS REVERSED (THIRD DEPT).

The Third Department, reversing Family Court, determined the evidence did not support child abuse and neglect findings against the respondent mother. Injuries to the child were caused by father. But the evidence did not support the finding that mother knew or should have known father had injured the child:

Based upon our review of the evidence in this record, we cannot conclude that respondent knew or should reasonably have known that she was placing the younger child in danger by leaving him in the care of his father while she went to work. Respondent consistently maintained, in her testimony and in her various statements to law enforcement and a Child Protective Services caseworker, that she did not know how the fractures had occurred, that she did not think the father had caused them and that, prior to observing redness and swelling in the child's leg ... , she had not noticed anything unusual or concerning with respect to the younger child. ...

Nor do we find that respondent neglected the younger child by failing to seek medical care for the child when she observed redness and swelling in his leg ... . Respondent testified that the child was not crying, that she thought the redness and swelling could be a reaction to vaccines that the child had a few days earlier and that she continually monitored the child's condition that evening and throughout the next day. According to respondent, prior to leaving for work the following morning, she directed the father to monitor the child's leg and let her know if it got worse. Respondent testified that she checked in with the father on her lunch break, scheduled an appointment with the child's pediatrician for immediately after work and instructed the father to take the child to the doctor earlier if he determined that it could not wait. Under these circumstances, the record does not support a finding that respondent neglected the younger child by, as petitioner contends, failing to secure prompt medical attention ... . **Matter of Lucien HH. (Michelle PP.), 2017 NY Slip Op 08224, Third Dept 11-22-17**

FAMILY LAW (CUSTODY, EVIDENCE DID NOT SUPPORT THE AWARD OF SOLE CUSTODY OF THE CHILDREN TO THE MATERNAL GRANDMOTHER, MATTER REMITTED FOR FURTHER INQUIRY ABOUT A LEVEL ONE SEX OFFENDER IN THE HOME (THIRD DEPT))/CUSTODY (FAMILY LAW, EVIDENCE DID NOT SUPPORT THE AWARD OF SOLE CUSTODY OF THE CHILDREN TO THE MATERNAL GRANDMOTHER, MATTER REMITTED FOR FURTHER INQUIRY ABOUT A LEVEL ONE SEX OFFENDER IN THE HOME (THIRD DEPT))/GRANDPARENTS (FAMILY LAW, CUSTODY, EVIDENCE DID NOT SUPPORT THE AWARD OF SOLE CUSTODY OF THE CHILDREN TO THE MATERNAL GRANDMOTHER, MATTER REMITTED FOR FURTHER INQUIRY ABOUT A LEVEL ONE SEX OFFENDER IN THE HOME (THIRD DEPT))/EVIDENCE (FAMILY LAW, MODIFICATION OF CUSTODY, EVIDENCE DID NOT SUPPORT THE AWARD OF SOLE CUSTODY OF THE CHILDREN TO THE MATERNAL GRANDMOTHER, MATTER REMITTED FOR FURTHER INQUIRY ABOUT A LEVEL ONE SEX OFFENDER IN THE HOME (THIRD DEPT))/EVIDENCE (FAMILY LAW, EVIDENCE FIRST LEARNED IN A LINCOLN HEARING MAY NOT BE RELIED UPON WITHOUT FURTHER INVESTIGATION (THIRD DEPT))/LINCOLN HEARING (FAMILY LAW, EVIDENCE FIRST LEARNED IN A LINCOLN HEARING MAY NOT BE RELIED UPON WITHOUT FURTHER INVESTIGATION (THIRD DEPT))

FAMILY LAW, EVIDENCE.

EVIDENCE DID NOT SUPPORT THE AWARD OF SOLE CUSTODY OF THE CHILDREN TO THE MATERNAL GRANDMOTHER, MATTER REMITTED FOR FURTHER INQUIRY ABOUT A LEVEL ONE SEX OFFENDER IN THE HOME, INFORMATION FIRST LEARNED IN A LINCOLN HEARING CANNOT BE RELIED UPON WITHOUT FURTHER INVESTIGATION (THIRD DEPT).

The Third Department, reversing Family Court and remitting the case, determined the record did not support the awarding of sole custody to the maternal grandmother, in this appeal by the parents:

While we accord considerable deference to Family Court's credibility assessments and factual findings on appeal, we conclude from our review of the trial testimony, without factoring in the Lincoln hearing, that petitioner failed to meet her threshold burden of establishing extraordinary circumstances. The record indicates that the mother and the father were only briefly incarcerated, during which time the children resided with the paternal grandmother — not the maternal grandmother. Upon their release, the mother and the father soon moved into the paternal grandmother's home and the father obtained full-time employment — a sequence that does not establish an

extended disruption of the mother and the father's custody ... . Moreover, while DSS made a finding of neglect, a DSS representative informed Family Court ... that DSS did not have any ongoing child protective concerns. In doing so, DSS recognized that the father's brother, a level one sex offender, lived in the paternal grandmother's home. There is no evidence that the brother ever mistreated the children... . The father testified that he trusts his brother to be around the children, but would not and does not leave the children alone with him. The mother is not employed and is at home with the children.

As for the maternal grandmother, the record shows that she has never spent more than a couple of hours with the children and would only see them a few times each year. ...

Family Court's decision ... raises an additional concern. Specifically, the court's reference to "another male whose presence around children is questionable" — a person that the court then characterized as an undesirable — is not based on any testimony during the trial. As explained by the Court of Appeals in Matter of Lincoln v Lincoln (24 NY2d 270 [1969]), any new information adverse to the parents derived during a Lincoln hearing may not be considered by the court "without in some way checking on its accuracy during the course of the open hearing" ... . Under the circumstances presented, we conclude that the matter must be remitted to Family Court for further proceedings to address the circumstances concerning the other male in the paternal grandmother's home and to determine whether or not there has been a showing of extraordinary circumstances based on the totality of the evidence and, if so, what disposition is in the best interests of the children. **Matter of Shaver v Bolster, 2017 NY Slip Op 08232, Third Dept 11-22-17**

FAMILY LAW (FAMILY COURT RELINQUISHED ITS FACT-FINDING FUNCTION TO THE BIASED FORENSIC EVALUATOR AND FAILED TO CONSIDER THE CUSTODY-RELOCATION MODIFICATION FACTS (THIRD DEPT))/EVIDENCE (FAMILY LAW, CUSTODY-RELOCATION MODIFICATION, FAMILY COURT RELINQUISHED ITS FACT-FINDING FUNCTION TO THE BIASED FORENSIC EVALUATOR AND FAILED TO CONSIDER THE CUSTODY-RELOCATION MODIFICATION FACTS (THIRD DEPT))/CUSTODY (FAMILY LAW, CUSTODY-RELOCATION MODIFICATION, FAMILY COURT RELINQUISHED ITS FACT-FINDING FUNCTION TO THE BIASED FORENSIC EVALUATOR AND FAILED TO CONSIDER THE CUSTODY-RELOCATION MODIFICATION FACTS (THIRD DEPT))

FAMILY LAW, EVIDENCE.

FAMILY COURT RELINQUISHED ITS FACT-FINDING FUNCTION TO THE BIASED FORENSIC EVALUATOR AND FAILED TO CONSIDER THE CUSTODY-RELOCATION MODIFICATION FACTORS (THIRD DEPT).

The Third Department, in a full-fledged opinion by Justice Clark, modifying Family Court's custody/relocation ruling, determined Family Court relinquished its fact-finding role by adopting the findings and recommendations of the forensic evaluator, in the face of the evaluator's obvious bias in favor of the father. Family Court had granted sole custody to the father in North Carolina, without evaluating the custody/relocation-modification factors, despite the child's life-long residence in New York and evidence of a supportive home life:

In its decision and order, Family Court recognized that the testimony given by the forensic evaluator "demonstrated[,] at times[,] a little less than neutral tone" and that it was apparent from her testimony that she was "challenged in her dealings" with the mother and her husband. Nevertheless, Family Court wholly adopted the forensic evaluator's factual assertions, opinions, conclusions and recommendations, without any perceivable independent consideration given to the best interests of the child. In doing so, the court improperly delegated its fact-finding role and ultimate determination to the forensic evaluator... . We emphasize that "[t]he recommendations of court[-]appointed experts are but one factor to be considered" and, although entitled to some weight, such

recommendations are not determinative and should not usurp the trial court's independent impressions of the evidence and conclusions drawn from that evidence ... .

...[I]n granting the father sole legal and primary physical custody of the child, Family Court did not engage in an assessment of the relocation factors ... . Had the court done so, it would have been apparent that the father's proof was lacking in this regard. Neither the father nor the forensic evaluator offered demonstrable proof, such as photographs or a home study, as to the suitability of the father's home. In commenting on the quality of the father's home environment, the forensic evaluator relied solely on her assumptions and the self-serving representations made by the father. **Matter of Montoya v Davis, 2017 NY Slip Op 08434, Third Dept 11-30-17**

FORECLOSURE

FORECLOSURE (STATUTORY NOTICE REQUIREMENTS NOT MET IN THIS FORECLOSURE ACTION, BANK'S SUMMARY JUDGMENT MOTION SHOULD NOT HAVE BEEN GRANTED (FIRST DEPT))/NOTICE (FORECLOSURE, STATUTORY NOTICE REQUIREMENTS NOT MET IN THIS FORECLOSURE ACTION, BANK'S SUMMARY JUDGMENT MOTION SHOULD NOT HAVE BEEN GRANTED (FIRST DEPT))/REAL PROPERTY ACTIONS AND PROCEEDINGS LAW (RPAPL) (FORECLOSURE, STATUTORY NOTICE REQUIREMENTS NOT MET IN THIS FORECLOSURE ACTION, BANK'S SUMMARY JUDGMENT MOTION SHOULD NOT HAVE BEEN GRANTED (FIRST DEPT))

FORECLOSURE.

STATUTORY NOTICE REQUIREMENTS NOT MET IN THIS FORECLOSURE ACTION, BANK'S SUMMARY JUDGMENT MOTION SHOULD NOT HAVE BEEN GRANTED (FIRST DEPT).

The First Department, reversing Supreme Court, determined the bank did not demonstrate it had met the statutory notice requirements of the Real Property Actions and Proceeding Law (RPAPL). Therefore the bank's motion for summary judgment should have been denied:

RPAPL 1304 notice "shall be sent by [the] lender, assignee (including purchasing investor) or mortgage loan servicer to the borrower, by registered or certified mail and also by first-class mail to the last known address of the borrower, and to the residence that is the subject of the mortgage" (RPAPL 1304[2]). Proper service of a RPAPL 1304 notice containing the statutorily-mandated content is a condition precedent to the commencement of a foreclosure action, and plaintiff has the burden of establishing its strict compliance with this condition ... .

Plaintiff failed to establish that it strictly complied with RPAPL 1304. Plaintiff submitted an affidavit of its loan servicer, supported by copies of the 90-day notice it alleges was served and a copy of the unsigned, undated return receipt. These documents were insufficient to establish plaintiff's prima facie entitlement to summary judgment. In the affidavit, the loan servicer's vice president of loan documentation fails to demonstrate a familiarity with the servicer's mailing practices and procedures. Therefore, plaintiff did not establish proof of a standard office practice and procedure ... . Moreover, portions of the receipt in the record are blank, and an undated and unsigned return receipt is not sufficient to establish proof of the actual mailing ... . **HSBC Bank USA v Rice, 2017 NY Slip Op 07936, First Dept 11-14-17**

FORECLOSURE (INTEREST MUST BE RECALCULATED AND ATTORNEY'S FEES MUST BE SHOWN TO BE REASONABLE, PERHAPS IN A HEARING, IN THIS FORECLOSURE ACTION (SECOND DEPT))/ATTORNEYS (FORECLOSURE, INTEREST, FEES, INTEREST MUST BE RECALCULATED AND ATTORNEY'S FEES MUST BE SHOWN TO BE REASONABLE, PERHAPS IN A HEARING, IN THIS FORECLOSURE ACTION (SECOND DEPT))/INTEREST (FORECLOSURE, ATTORNEY'S FEES, INTEREST MUST BE RECALCULATED AND ATTORNEY'S FEES MUST BE SHOWN TO BE REASONABLE, PERHAPS IN A HEARING, IN THIS FORECLOSURE ACTION (SECOND DEPT))

FORECLOSURE, ATTORNEYS.

INTEREST MUST BE RECALCULATED AND ATTORNEY'S FEES MUST BE SHOWN TO BE REASONABLE, PERHAPS IN A HEARING, IN THIS FORECLOSURE ACTION (SECOND DEPT).

The Second Department determined the amount of interest and attorney's fees in this foreclosure proceeding must be recalculated. There was a three-year delay (which was not plaintiff's fault) for which interest should not have accrued. In addition there must be some showing the attorney's fees reflect the work actually done:

> "In an action of an equitable nature, the recovery of interest is within the court's discretion. The exercise of that discretion will be governed by the particular facts in each case, including any wrongful conduct by either party" ... . Here, in view of the lengthy delay by PE-NC's [plaintiff's] predecessors in interest in prosecuting this action, PE-NC should recover no interest for the roughly three-year period of time from when the action was commenced in 2005 to when the defendant filed a request for judicial intervention in 2008. While PE-NC did not cause this delay, it should not benefit financially, in the form of accrued interest, from this delay caused by its predecessors in interest. Furthermore, PE-NC should not recover interest on the counsel fees awarded to it. Paragraphs 7 and 21 of the mortgage are inconsistent regarding whether interest could be recovered on counsel fees. Since "ambiguities in a contractual instrument will be resolved contra proferentem, against the party who prepared or presented it" ... , this ambiguity must be resolved against PE-NC, whose predecessors in interest presented the mortgage. Moreover, interest awarded under paragraph 7 of the mortgage, on money advanced to protect the lender's rights in the property, should not have been awarded at the rate of 17%, but at the "Note rate," which, in this case, was 7.25%.
>
> "An award of an attorney's fee pursuant to a contractual provision may only be enforced to the extent that the amount is reasonable and warranted for the services actually rendered. In determining reasonable compensation for an attorney, the court must consider such factors as the time, effort, and skill required; the difficulty of the questions presented; counsel's experience, ability, and reputation; the fee customarily charged in the locality; and the contingency or certainty of compensation" ... . In this case, a determination must be made on the reasonableness of the counsel fees, following a hearing on that issue, if necessary. **Greenpoint Mtge. Corp. v Lamberti, 2017 NY Slip Op 08353, Second Dept 11-29-17**

FORECLOSURE (MOTION TO VACATE DEFAULT IN THIS FORECLOSURE PROCEEDING SHOULD HAVE BEEN GRANTED, THE REASON FOR THE DEFAULT WAS DEEMED EXCUSABLE, THERE WAS NO PREJUDICE, THERE WERE MERITORIOUS ISSUES RE NOTICE AND STANDING (FIRST DEPT))/CIVIL PROCEDURE (VACATE DEFAULT, FORECLOSURE, MOTION TO VACATE DEFAULT IN THIS FORECLOSURE PROCEEDING SHOULD HAVE BEEN GRANTED, THE REASON FOR THE DEFAULT WAS DEEMED EXCUSABLE, THERE WAS NO PREJUDICE, THERE WERE MERITORIOUS ISSUES RE NOTICE AND STANDING (FIRST DEPT))/DEFAULT (FORECLOSURE, MOTION TO VACATE DEFAULT IN THIS FORECLOSURE PROCEEDING SHOULD HAVE BEEN GRANTED, THE REASON FOR THE DEFAULT WAS DEEMED EXCUSABLE, THERE WAS NO PREJUDICE, THERE WERE MERITORIOUS ISSUES RE NOTICE AND STANDING (FIRST DEPT))

FORECLOSURE, CIVIL PROCEDURE.

MOTION TO VACATE DEFAULT IN THIS FORECLOSURE PROCEEDING SHOULD HAVE BEEN GRANTED, THE REASON FOR THE DEFAULT WAS DEEMED EXCUSABLE, THERE WAS NO PREJUDICE, THERE WERE MERITORIOUS ISSUES RE NOTICE AND STANDING (FIRST DEPT).

The First Department determined Supreme Court should have granted defendant's motion to vacate the default in this foreclosure proceeding. Defendant's counsel had neglected to file opposing papers when plaintiff moved for summary judgment and moved to vacate the default a month later. The failure to answer the motion was deemed excusable. The First Department found merit in defendant's allegations of flaws in the notice provided by the bank, flaws in the bank's proof of standing, and flaws in the bank's proof the note was lost:

> The borrower's prior counsel acknowledged that he failed to submit opposition to the summary judgment motion after stipulating to adjourn that motion. However, counsel moved to vacate the default less than one month after Supreme Court's decision was entered. Absent a pattern of dilatory behavior, the default was an excusable, one-time oversight, resulting in no prejudice ... .
>
> The borrower raised a colorable notice defense regarding plaintiff's service of the mortgage's 30-day default notice and the requisite 90-day notice under RPAPL 1304 ... . [T]he affidavit of plaintiff's servicing agent failed to indicate that she had familiarity with standard office mailing procedures ... . * * *
>
> Plaintiff seeks to foreclose the principal sum of $327,828.34, but there are gaps in its proof. * * *
>
> There is also a question as to the sufficiency of the content of the lost note affidavit submitted on summary judgment. The affidavit * * * does not state when the search was made or by whom, and does not indicate approximately when the note was lost. Therefore, the borrower has demonstrated a potentially meritorious standing defense ... . **US Bank N.A. v Richards, 2017 NY Slip Op 08299, First Dept 11-28-17**

FORECLOSURE (PARTY IS DEEMED TO HAVE READ A SIGNED DOCUMENT, JUDGMENT OF FORECLOSURE ON THIS CONSTRUCTION MORTGAGE PROPERLY GRANTED (SECOND DEPT))/CONSTRUCTION MORTGAGES (FORECLOSURE, BANKING LAW REQUIREMENTS DO NOT APPLY (SECOND DEPT))/BANKING LAW (FORECLOSURE, BANKING LAW REQUIREMENTS DO NOT APPLY (SECOND DEPT))/CONTRACT LAW (FORECLOSURE, PARTY IS DEEMED TO HAVE READ A SIGNED DOCUMENT, JUDGMENT OF FORECLOSURE ON THIS CONSTRUCTION MORTGAGE PROPERLY GRANTED (SECOND DEPT))/MORTGAGES (CONSTRUCTION MORTGAGES, FORECLOSURE, BANKING LAW REQUIREMENTS DO NOT APPLY TO CONSTRUCTION MORTGAGE (SECOND DEPT))

FORECLOSURE, MORTGAGES, CONTRACT LAW.

PARTY IS DEEMED TO HAVE READ A SIGNED DOCUMENT, JUDGMENT OF FORECLOSURE ON THIS CONSTRUCTION MORTGAGE PROPERLY GRANTED, BANKING LAW REQUIREMENTS DO NOT APPLY TO CONSTRUCTION MORTGAGE (SECOND DEPT).

The Second Department determined the judgment of foreclosure and sale was properly granted. Defendant claimed he was tricked into signing the construction mortgage. The Second Department noted that a construction mortgage is not subject to the requirements of Banking Law §§ 6-l and 590. And the Second Department held that a party is deemed to have read a signed document:

> "A party who executes a contract is presumed to know its contents and to assent to them"... .Thus, "[a] party who signs a document without any valid excuse for having failed to read it is conclusively bound by its terms" ... , "unless there is a showing of fraud, duress, or some other wrongful act on the part of any party to the contract" ... . "The elements of a cause of action sounding in fraud are a material misrepresentation of an existing fact, made with knowledge of the falsity, an intent to induce reliance thereon, justifiable reliance upon the misrepresentation, and damages" ... . Here, the defendant failed to establish the element of justifiable reliance on alleged misrepresentations ... , since the documents were provided to him, and he and his attorney could have read them. Nor has the defendant established any other valid excuse for his purported failure to read the construction mortgage and related documents before signing them. **Prompt Mtge. Providers of N. Am., LLC v Zarour, 2017 NY Slip Op 08028, Second Dept 11-15-17**

FORECLOSURE (DESPITE THE INITIAL FRAUDULENT TRANSFER OF THE MORTGAGED PROPERTY AND THE ABSENCE OF THE NOTE, PLAINTIFF LENDER COULD FORECLOSE AS THE UNDISPUTED HOLDER OF THE NOTE, THE INITIAL FRAUDULENTLY INDUCED DEED WAS VOIDABLE, NOT VOID (FIRST DEPT))/REAL PROPERTY LAW (DEEDS, DESPITE THE INITIAL FRAUDULENT TRANSFER OF THE MORTGAGED PROPERTY AND THE ABSENCE OF THE NOTE, PLAINTIFF LENDER COULD FORECLOSE AS THE UNDISPUTED HOLDER OF THE NOTE, THE INITIAL FRAUDULENTLY INDUCED DEED WAS VOIDABLE, NOT VOID (FIRST DEPT))/UNIFORM COMMERCIAL CODE (FORECLOSURE, HOLDER OF THE NOTE, DESPITE THE INITIAL FRAUDULENT TRANSFER OF THE MORTGAGED PROPERTY AND THE ABSENCE OF THE NOTE, PLAINTIFF LENDER COULD FORECLOSE AS THE UNDISPUTED HOLDER OF THE NOTE, THE INITIAL FRAUDULENTLY INDUCED DEED WAS VOIDABLE, NOT VOID (FIRST DEPT))/HOLDER (NOTE, UNIFORM COMMERCIAL CODE, FORECLOSURE, DESPITE THE INITIAL FRAUDULENT TRANSFER OF THE MORTGAGED PROPERTY AND THE ABSENCE OF THE NOTE, PLAINTIFF LENDER COULD FORECLOSE AS THE UNDISPUTED HOLDER OF THE NOTE, THE INITIAL FRAUDULENTLY INDUCED DEED WAS VOIDABLE, NOT VOID (FIRST DEPT))/DEEDS (VOIDABLE, DESPITE THE INITIAL FRAUDULENT TRANSFER OF THE MORTGAGED PROPERTY AND THE ABSENCE OF THE NOTE, PLAINTIFF LENDER COULD FORECLOSE AS THE UNDISPUTED HOLDER OF THE NOTE, THE INITIAL FRAUDULENTLY INDUCED DEED WAS VOIDABLE, NOT VOID (FIRST DEPT))

FORECLOSURE, REAL PROPERTY LAW, UNIFORM COMMERCIAL CODE.

DESPITE THE INITIAL FRAUDULENT TRANSFER OF THE MORTGAGED PROPERTY AND THE ABSENCE OF THE NOTE, PLAINTIFF LENDER COULD FORECLOSE AS THE UNDISPUTED HOLDER OF THE NOTE, THE INITIAL FRAUDULENTLY INDUCED DEED WAS VOIDABLE, NOT VOID (FIRST DEPT).

The First Department, in a full-fledged opinion by Justice Renwick, over a comprehensive dissenting opinion, determined plaintiff could foreclose on a mortgage despite the initial fraudulent transfer of the property and the absence of the note:

> ...[P]laintiff Peter Weiss seeks, among other things, a foreclosure and sale based on a Mortgage and Note Extension and Modification Agreement (CEMA) executed by defendant Edward Phillips. Plaintiff lent $500,000 to borrowers who purported to own the real estate property they sought to mortgage. The borrowers signed a note, in which they promised to pay the loan, and a mortgage, in which they gave the plaintiff/lender a security interest in the property they purported to own. The borrowers, however, acquired the property by fraudulent means. After the rightful owner, Phillips, reacquired the property, he executed the CEMA with the individual lender, Weiss. Pursuant to the CEMA, Phillips acknowledged Weiss's rights under the note and mortgage; and, Weiss agreed to forbear from foreclosing on the subject property for a year, presumably to permit Phillips to obtain refinancing.
>
> ... [W]e find that Weiss's interest in the property as a mortgagee was not rendered null and void because his borrowers, the mortgagors, had acquired the property by fraudulent means. In addition, we find that Weiss met his burden for summary judgment, on his claim for foreclosure and sale, by submitting the Mortgage and CEMA, along with undisputed evidence establishing both the existence of the note, which obviated the need to submit the note as proof that Weiss had the right to foreclose, and the nonpayment. * * *
>
> UCC 3-804 allows one to maintain an action as a "holder" on a promissory note even though the instrument has been lost or destroyed. The section does not apply here where it is established that plaintiff has the right to sue on the note as the undisputed "holder" of the note. * * *
>
> Forged deeds and/or encumbrances are those executed under false pretenses, and are void ab initio ... . The interests of subsequent bona fide purchasers or encumbrancers for value are thus not protected under Real Property Law § 266 when their title is derived from a forged deed or one that is the product of false pretenses ... . In contrast, a fraudulently induced deed is merely voidable, not void ... . **Weiss v Phillips, 2017 NY Slip Op 08209, First Dept 11-21-17**

FRAUD

FRAUD (CONTRACT, FRAUDULENT INDUCEMENT, PUNITIVE DAMAGES, FRAUDULENT INDUCEMENT AND DEMAND FOR PUNITIVE DAMAGES SHOULD NOT HAVE BEEN DISMISSED IN THIS BREACH OF CONTRACT ACTION, PLAINTIFF ALLEGED AIR AMBULANCE WAS NOT EQUIPPED WITH PROPER EQUIPMENT AND PERSONNEL (FIRST DEPT))/CONTRACT LAW (FRAUDULENT INDUCEMENT, PUNITIVE DAMAGES, FRAUDULENT INDUCEMENT AND DEMAND FOR PUNITIVE DAMAGES SHOULD NOT HAVE BEEN DISMISSED IN THIS BREACH OF CONTRACT ACTION, PLAINTIFF ALLEGED AIR AMBULANCE WAS NOT EQUIPPED WITH PROPER EQUIPMENT AND PERSONNEL (FIRST DEPT))/PUNITIVE DAMAGES (CONTRACT, FRAUDULENT INDUCEMENT AND DEMAND FOR PUNITIVE DAMAGES SHOULD NOT HAVE BEEN DISMISSED IN THIS BREACH OF CONTRACT ACTION, PLAINTIFF ALLEGED AIR AMBULANCE WAS NOT EQUIPPED WITH PROPER EQUIPMENT AND PERSONNEL (FIRST DEPT))

FRAUD, CONTRACT LAW.

FRAUDULENT INDUCEMENT AND DEMAND FOR PUNITIVE DAMAGES SHOULD NOT HAVE BEEN DISMISSED IN THIS BREACH OF CONTRACT ACTION, PLAINTIFF ALLEGED AIR AMBULANCE WAS NOT EQUIPPED WITH PROPER EQUIPMENT AND PERSONNEL (FIRST DEPT).

The Second Department determined plaintiff's fraudulent inducement cause of action and the punitive damages demand should not have been dismissed. Plaintiff contracted with defendants to transport his brother by air ambulance from Puerto Rico to New York. Plaintiff alleged no respiratory therapist was on the plane and the plane was not equipped with advanced life support equipment:

> The Supreme Court erred in granting that branch of the defendants' cross motion which was for summary judgment dismissing the cause of action alleging fraudulent inducement. Contrary to the court's determination, the cause of action alleging fraudulent inducement was not duplicative of the breach of contract cause of action, as it alleged that the defendants made misrepresentations of present fact that were collateral to the contract and served as an inducement to enter into the contract ... .Contrary to the defendants' contention, they failed to establish, prima facie, that their alleged misrepresentations of fact were not false and, therefore, not misrepresentations at all ... .
>
> The Supreme Court also erred in granting that branch of the defendants' cross motion which was for summary judgment dismissing so much of the complaint as sought to recover punitive damages. The defendants failed to make a prima facie showing that they did not engage in conduct having a high degree of moral culpability which manifested a conscious disregard for the rights of others or conduct so reckless as to amount to such disregard ... . **Greenberg v Meyreles, 2017 NY Slip Op 08351, Second Dept 11-20-17**

INSURANCE LAW

INSURANCE LAW (INSURED SETTLED THE MATTER WITHOUT INSURER'S CONSENT, INSURER NOT OBLIGATED TO DEFEND OR INDEMNIFY INSURED (SECOND DEPT))

INSURANCE LAW.

INSURED SETTLED THE MATTER WITHOUT INSURER'S CONSENT, INSURER NOT OBLIGATED TO DEFEND OR INDEMNIFY INSURED (SECOND DEPT).

The Second Department determined the insurer (Southwest) was entitled to summary judgment declaring it was not obligated to defend or indemnify the insured (Ralex). Ralex had settled the matter without Southwest's consent:

> Here, the subject insurance policy Southwest issued to Ralex provided that "[n]o insured will, except at that insured's own cost, voluntarily make a payment, assume any obligation, or incur any expense, other than for first aid, without [Southwest's] consent." Contrary to Ralex's contention, this provision is not ambiguous. "Contracts of insurance, like other contracts, are to be construed according to the sense and meaning of the terms which the parties have used, and if they are clear and unambiguous the terms are to be taken and understood in their plain, ordinary and proper sense" ... .
>
> Moreover, "New York law views an insurer's right to consent to any settlement as a condition precedent to coverage" ... . Here, the Supreme Court properly granted that branch of Southwest's motion which was pursuant to CPLR 3211(a)(1), since the documentary evidence it submitted showed that Ralex undertook its own defense in the underlying action, agreed to settle the underlying action, and incurred defense costs without first obtaining Southwest's consent. By doing so, Ralex breached the insurance contract and is not entitled to coverage ... . **Ralex Servs., Inc. v Southwest Mar. & Gen. Ins. Co., 2017 NY Slip Op 07763, Second Dept 11-8-17**

INSURANCE LAW (QUESTION OF FACT ABOUT WHETHER THE FIRE DAMAGED PROPERTY WAS PLAINTIFF'S RESIDENCE REQUIRED DENIAL OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT IN THIS DISCLAIMER ACTION (THIRD DEPT))/RESIDENCE (INSURANCE LAW, QUESTION OF FACT ABOUT WHETHER THE FIRE DAMAGED PROPERTY WAS PLAINTIFF'S RESIDENCE REQUIRED DENIAL OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT IN THIS DISCLAIMER ACTION (THIRD DEPT))/DISCLAIMER (INSURANCE LAW, RESIDENCE, QUESTION OF FACT ABOUT WHETHER THE FIRE DAMAGED PROPERTY WAS PLAINTIFF'S RESIDENCE REQUIRED DENIAL OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT IN THIS DISCLAIMER ACTION (THIRD DEPT))

INSURANCE LAW.

QUESTION OF FACT ABOUT WHETHER THE FIRE DAMAGED PROPERTY WAS PLAINTIFF'S RESIDENCE REQUIRED DENIAL OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT IN THIS DISCLAIMER ACTION (THIRD DEPT).

The Third Department determined plaintiff's motion for summary judgment in this action against a homeowner's insurance company for disclaiming coverage was properly denied. Coverage for fire damage was disclaimed based upon the

allegation the property was not plaintiff's residence. Apparently plaintiff lived elsewhere, at least part of the time, while the house was being extensively renovated:

> Plaintiff testified that she slept at the premises on several occasions, an average of two to four nights per week, and that she intended for the premises to be her permanent residence once renovations were completed. During his deposition, Larrea [the insurer's claim investigator] testified that he obtained a statement from plaintiff shortly after the fire in which she stated that she was not living at the premises. In opposition to the motion, defendant submitted an affidavit from Larrea, who averred that when he interviewed plaintiff by telephone eight days after the fire, she stated that at the time of the fire that she was in the process of relocating from her father's home to the apartment and, notably, that she had not been to the premises during the two weeks immediately preceding the fire and had stayed overnight at the premises only once.
>
> On this record, plaintiff's summary judgment motion was properly denied. The Court of Appeals has held that evidence similar to the record in this case presented issues of fact regarding residency that precluded the grant of summary judgment ... . Moreover, as Supreme Court correctly held, the contradictory statements that plaintiff made regarding the extent of her own physical presence at the premises are alone sufficient to create an issue of fact that may not be resolved by summary judgment. **Sosenko v Allstate Ins. Co., 2017 NY Slip Op 08425, Third Dept 11-30-17**

INSURANCE LAW (SUPREME COURT ERRED IN ORDERING DISCLOSURE OF SOME OF THE INSURER'S RECORDS AND MATERIALS, INCLUDING LEGAL OPINION OF OUTSIDE COUNSEL (FOURTH DEPT))/CIVIL PROCEDURE (INSURANCE LAW, SUPREME COURT ERRED IN ORDERING DISCLOSURE OF SOME OF THE INSURER'S RECORDS AND MATERIALS, INCLUDING LEGAL OPINION OF OUTSIDE COUNSEL (FOURTH DEPT))/ATTORNEYS (INSURANCE LAW, (SUPREME COURT ERRED IN ORDERING DISCLOSURE OF SOME OF THE INSURER'S RECORDS AND MATERIALS, INCLUDING LEGAL OPINION OF OUTSIDE COUNSEL (FOURTH DEPT))/PRIVILEGE (ATTORNEY-CLIENT, INSURANCE LAW, DISCLOSURE, (SUPREME COURT ERRED IN ORDERING DISCLOSURE OF SOME OF THE INSURER'S RECORDS AND MATERIALS, INCLUDING LEGAL OPINION OF OUTSIDE COUNSEL (FOURTH DEPT))/DISCLOSURE (INSURANCE LAW, SUPREME COURT ERRED IN ORDERING DISCLOSURE OF SOME OF THE INSURER'S RECORDS AND MATERIALS, INCLUDING LEGAL OPINION OF OUTSIDE COUNSEL (FOURTH DEPT))/CPLR 3101 (a) (INSURANCE LAW, SUPREME COURT ERRED IN ORDERING DISCLOSURE OF SOME OF THE INSURER'S RECORDS AND MATERIALS, INCLUDING LEGAL OPINION OF OUTSIDE COUNSEL (FOURTH DEPT))

INSURANCE LAW, CIVIL PROCEDURE, ATTORNEYS, PRIVILEGE.

SUPREME COURT ERRED IN ORDERING DISCLOSURE OF SOME OF THE INSURER'S RECORDS AND MATERIALS, INCLUDING LEGAL OPINION OF OUTSIDE COUNSEL (FOURTH DEPT).

The Fourth Department, reversing (modifying Supreme Court) determined plaintiff was not entitled to disclosure of the pre-disclaimer opinion of outside counsel for the insurer, and was not entitled to the insurer's manual without an in camera review of the manual for relevance. Supreme Court properly ordered disclosure of the pre-disclaimer claim notes which included statements made by the insured (father of the injured infant):

> ... [T]he court properly ordered disclosure of pre-disclaimer claim notes containing statements made by the father. It is well settled that "there must be full disclosure of accident reports prepared in the ordinary course of business that were motivated at least in part by a business concern other than preparation for litigation" ... . Here, the father

made his statements to defendant's investigators before defendant made the decision to disclaim, and there is no dispute that defendant's employees relied on those statements in making that decision.

... [T]he court abused its discretion in granting that part of plaintiff's motion seeking disclosure of the legal opinion of outside counsel and pre-disclaimer claim notes related thereto and denying that part of defendant's cross motion seeking a protective order with respect to those items, and we therefore modify the order accordingly. Although reports prepared in the regular course of business are discoverable ... , documents prepared by an attorney that are "primarily and predominantly of a legal character," and made to furnish legal services, are absolutely privileged and not discoverable, regardless of whether there was pending litigation at the time they were prepared ... .

[T]he court abused its discretion in granting that part of plaintiff's motion seeking disclosure of defendant's reserve information and denying that part of defendant's cross motion with respect thereto inasmuch as that information is not "material and necessary" to the action (CPLR 3101 [a]...).

... [T]he court abused its discretion in granting that part of plaintiff's motion seeking disclosure of defendant's claim investigation manual and denying that part of defendant's cross motion with respect thereto without first conducting an in camera review. As the moving party, plaintiff had the burden of demonstrating that "the method of discovery sought will result in the disclosure of relevant evidence or is reasonably calculated to lead to the discovery of information bearing on the claims" ... .[T]he court should have reviewed the manual in camera to determine whether it contained information material and relevant to the issues to be decided in the action ... . **Celani v Allstate Indem. Co., 2017 NY Slip Op 07799, Fourth Dept 11-9-17**

LABOR LAW-CONSTRUCTION LAW

LABOR LAW-CONSTRUCTION LAW (DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON PLAINTIFFS' LABOR LAW 240(1), 241(6) AND 200 CAUSES OF ACTION SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT))

LABOR LAW-CONSTRUCTION LAW.

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON PLAINTIFFS' LABOR LAW 240(1), 241(6) AND 200 CAUSES OF ACTION SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendants' motion for summary judgment should not have been granted in this Labor Law 240(1), 241(6) and 200 action. Plaintiff alleged he was directed to work without a scaffold. He rigged up a ladder with planks on it placed horizontally over a fire escape as a makeshift scaffold. The ladder tipped when a heavy object was placed on it and plaintiff fell:

Under Labor Law § 240(1), owners and general contractors, and their agents, have a nondelegable duty to provide safety devices necessary to protect workers from risks inherent in elevated work sites ... . "In order to prevail on a claim under Labor Law § 240(1), a plaintiff must establish that the statute was violated and that this violation was a proximate cause of his or her injuries" ... . No recovery is available under Labor Law § 240(1) when the plaintiff's actions were the sole proximate cause of the accident ... .

Here, the evidence submitted on the defendants' motion for summary judgment failed to establish, prima facie, that no [Labor Law 240(1)] violation occurred, or that the alleged violation was not a proximate cause of the accident ... .

Labor Law § 200 codifies the common-law duty of an owner or contractor to provide workers with a reasonably safe place to work ... . * * *

Here, the cause of action arose out of alleged defects or dangers in the methods or materials of the work. The defendants failed, prima facie, to eliminate triable issues of fact as to whether [defendant] had the authority to supervise or control the injured plaintiff's work, and as to causation ... .

Labor Law § 241(6) imposes a nondelegable duty on owners and contractors to provide reasonable and adequate protection and safety for workers and to comply with the specific safety rules and regulations promulgated by the Commissioner of the Department of Labor ... . Here, the plaintiffs alleged, inter alia, a violation of Industrial Code (12 NYCRR) § 23-1.16, which requires, in relevant part, that safety belts and harnesses be properly attached to a tail line or lifeline so that "if the user should fall such fall shall not exceed five feet" ... . **King v Villette, 2017 NY Slip Op 07596, Second Dept 11-1-17**

LABOR LAW-CONSTRUCTION LAW (NO SUPERVISORY CONTROL OVER THE MANNER OF PLAINTIFF'S WORK, INJURY WAS NOT THE RESULT OF THE ABSENCE OR FAILURE OF A SAFETY DEVICE, LABOR LAW 200 AND 240 (1) CAUSES OF ACTION PROPERLY DISMISSED (SECOND DEPT))

LABOR LAW-CONSTRUCTION LAW.

NO SUPERVISORY CONTROL OVER THE MANNER OF PLAINTIFF'S WORK, INJURY WAS NOT THE RESULT OF THE ABSENCE OR FAILURE OF A SAFETY DEVICE, LABOR LAW 200 AND 240 (1) CAUSES OF ACTION PROPERLY DISMISSED (SECOND DEPT).

The Second Department determined defendants' motions for summary judgment on the Labor Law 200 and 240 (1) causes of action were properly granted. The plaintiff was injured when attempting to move a 500-600 pound piece of granite. A co-worker lost his grip and the granite fell 18 or 20 inches onto plaintiff's toe. Because the defendants did not exercise and supervisory control over the manner of plaintiff's work, the Labor Law 200 cause of action was dismissed. Monitoring safety conditions does not amount to supervisory control. Because the action did not involve the failure or absence of a safety device, the Labor Law 240 (1) cause of action was dismissed:

"Where . . . a claim arises out of the means and methods of the work, a [defendant] may be held liable for . . . a violation of Labor Law § 200 only if [it] had the authority to supervise or control the performance of the work" ... . General supervisory authority for the purpose of overseeing the progress of the work is insufficient to impose liability under the statute ... . Here, the defendants established, prima facie, that the plaintiff's injuries arose solely out of the manner of his employer's work and the defendants exercised no supervisory control over that work ... . The defendants' authority to monitor safety conditions at the work site is merely indicative of their "general supervision and coordination of the work site and is insufficient to trigger liability" ... ,

The Supreme Court properly granted that branch of the defendants' motion which was for summary judgment dismissing the Labor Law § 240(1) cause of action insofar as asserted against them. In cases involving falling objects, section 240(1) applies only when "the object fell, while being hoisted or secured, because of the absence

or inadequacy of a safety device of the kind enumerated in the statute" ... . Here, the defendants established, prima facie, that the granite stone did not fall because of the absence or inadequacy of a safety device ... . **Portalatin v Tully Constr. Co.- E.E. Cruz & Co., 2017 NY Slip Op 07762, Second Dept 11-8-17**

LABOR LAW-CONSTRUCTION LAW (PRIME CONTRACTOR DID NOT CONTRACT WITH PLAINTIFF'S EMPLOYER, DID NOT SUPERVISE PLAINTIFF'S WORK AND DID NOT HAVE CONTROL OVER THE WORKSITE, ITS MOTION FOR SUMMARY JUDGMENT IN THIS LABOR LAW 241 (6) 200 AND COMMON LAW NEGLIGENCE ACTION SHOULD HAVE BEEN DISMISSED (FOURTH DEPT))/PRIME CONTRACTOR (LABOR LAW-CONSTRUCTION LAW, PRIME CONTRACTOR DID NOT CONTRACT WITH PLAINTIFF'S EMPLOYER, DID NOT SUPERVISE PLAINTIFF'S WORK AND DID NOT HAVE CONTROL OVER THE WORKSITE, ITS MOTION FOR SUMMARY JUDGMENT IN THIS LABOR LAW 241 (6) 200 AND COMMON LAW NEGLIGENCE ACTION SHOULD HAVE BEEN DISMISSED (FOURTH DEPT))/NEGLIGENCE (LABOR LAW-CONSTRUCTION LAW, PRIME CONTRACTOR DID NOT CONTRACT WITH PLAINTIFF'S EMPLOYER, DID NOT SUPERVISE PLAINTIFF'S WORK AND DID NOT HAVE CONTROL OVER THE WORKSITE, ITS MOTION FOR SUMMARY JUDGMENT IN THIS LABOR LAW 241 (6) 200 AND COMMON LAW NEGLIGENCE ACTION SHOULD HAVE BEEN DISMISSED (FOURTH DEPT))

LABOR LAW-CONSTRUCTION LAW.

PRIME CONTRACTOR DID NOT CONTRACT WITH PLAINTIFF'S EMPLOYER, DID NOT SUPERVISE PLAINTIFF'S WORK AND DID NOT HAVE CONTROL OVER THE WORKSITE, ITS MOTION FOR SUMMARY JUDGMENT IN THIS LABOR LAW 241 (6) 200 AND COMMON LAW NEGLIGENCE ACTION SHOULD HAVE BEEN GRANTED (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined defendant's motion for summary judgment in this Labor law 241 (6), 200 and common law negligence action should have been granted. Plaintiff was struck by a car while working in the median of a highway. Defendant, Oakgrove, was a prime contractor with whom the injured plaintiff's employer did not contract. And Oakgrove had no supervisory control over the plaintiff or the worksite:

> "The owner or general contractor is not synonymous with the prime contractor . . . Generally speaking, the prime contractor for general construction (especially in State construction projects) has no authority over the other prime contractors . . . unless the prime contractor is delegated work in such a manner that it stands in the shoes of the owner or general contractor with the authority to supervise and control the work" ... .
>
> Here, Oakgrove and Foit-Albert were both prime contractors, and plaintiff's employer contracted only with Foit-Albert. Oakgrove did not supervise or instruct plaintiff. Rather, plaintiff reported to a supervisor at Foit-Albert. Oakgrove established as a matter of law that it had no control over plaintiff or the work he was performing, and plaintiff failed to raise a triable issue of fact ... .
>
> ... Oakgrove ... established that it did not have control over the work site at the time of plaintiff's accident .... Thus, the court should have dismissed the Labor Law § 200 claim and common-law negligence cause of action ... . **Knab v Robertson, 2017 NY Slip Op 07822, Fourth Department 11-9-17**

LABOR LAW-CONSTRUCTION LAW (INJURY WHILE LIFTING A HEAVY OBJECT FROM A HORIZONTAL TO A VERTICAL POSITION NOT ENCOMPASSED BY LABOR LAW 240 (1) (FOURTH DEPT))

LABOR LAW-CONSTRUCTION LAW.

INJURY WHILE LIFTING A HEAVY OBJECT FROM A HORIZONTAL TO A VERTICAL POSITION NOT ENCOMPASSED BY LABOR LAW 240 (1) (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined defendants' motion for summary judgment in this Labor Law 240 (1) action should have been granted. Plaintiff was injured when a heavy objected being lifted from a horizontal to a vertical position shifted momentarily. The Fourth Department found that the activity during which plaintiff was injured did not involve a risk covered by Labor Law 240 (1):

> "Liability may . . . be imposed under [Labor Law § 240 (1)] only where the plaintiff's injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential' " ... . "Consequently, the protections of [the statute] do not encompass any and all perils that may be connected in some tangential way with the effects of gravity' " ... . Rather, the statute "was designed to prevent those types of accidents in which the scaffold, hoist, stay, ladder or other protective device proved inadequate to shield the injured worker from harm directly flowing from the application of the force of gravity to an object or person" ... .
>
> Here, the harm to plaintiff was not "the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential" ... ; rather, the submissions establish that plaintiff was injured while lifting the heavy switchgear segment when the weight thereof momentarily shifted to his side as a result of instability or a slight downward movement of half an inch on the coworker's side ... . Although plaintiff's back injury "was tangentially related to the effects of gravity upon the [switchgear segment that] he was lifting, it was not caused by the limited type of elevation-related hazards encompassed by Labor Law § 240 (1)" ... . We thus conclude that defendants established as a matter of law that plaintiff's injuries resulted from a "routine workplace risk[]" of a construction site and not a "pronounced risk[] arising from construction work site elevation differentials" ... . **Horton v Board of Educ. of Campbell-Savona Cent. Sch. Dist., 2017 NY Slip Op 07806, Fourth Dept 11-9-17**

LABOR LAW-CONSTRUCTION LAW (PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT ON THE LABOR LAW 240 (1) CAUSE OF ACTION PROPERLY GRANTED, PLAINTIFF'S ACTIONS COULD NOT HAVE BEEN THE SOLE PROXIMATE CAUSE OF THE ACCIDENT (FOURTH DEPT))/SOLE PROXIMATE CAUSE (LABOR LAW-CONSTRUCTION LAW, (PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT ON THE LABOR LAW 240 (1) CAUSE OF ACTION PROPERLY GRANTED, PLAINTIFF'S ACTIONS COULD NOT HAVE BEEN THE SOLE PROXIMATE CAUSE OF THE ACCIDENT (FOURTH DEPT))

LABOR LAW-CONSTRUCTION LAW.

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT ON THE LABOR LAW 240 (1) CAUSE OF ACTION PROPERLY GRANTED, PLAINTIFF'S ACTIONS COULD NOT HAVE BEEN THE SOLE PROXIMATE CAUSE OF THE ACCIDENT (FOURTH DEPT).

The Fourth Department determined Supreme Court properly granted plaintiff's motion for summary judgment on his Labor Law 240 (1) cause of action (as well as a Labor law 241 (6) cause of action). Plaintiff was struck when a bundle of rebar that was being hoisted fell. Plaintiff's actions in placing chokers on the rebar to allow the rebar to be hoisted were not the sole proximate cause of the accident. Others were involved in preparing the rebar for hoisting:

To recover under section 240 (1) for injuries sustained in a falling object case, a plaintiff must establish "both (1) that the object was being hoisted or secured, or that it required securing for the purposes of the undertaking, and (2) that the object fell because of the absence or inadequacy of a safety device to guard against a risk involving the application of the force of gravity over a physically significant elevation differential" ... . Here, we conclude that plaintiff established those factors and therefore met his burden on his motion. We note, in particular, that the deposition testimony and two witness affidavits tendered by plaintiff established "that any safety devices in fact used[, i.e., the chokers] failed in [their] core objective of preventing the [rebar] from falling,' " and that such failure was a proximate cause of the accident... . In opposition, defendants failed to raise a material issue of fact inasmuch as the opinions of their expert were conclusory ... .

Contrary to defendants' further contention, plaintiff's actions were not the sole proximate cause of his injuries. "[W]here a plaintiff's own actions are the sole proximate cause of the accident, there can be no liability" ... . To establish their "sole proximate cause" theory, defendants were required to present "some evidence that the device furnished was adequate and properly placed and that the conduct of the plaintiff [was] the sole proximate cause of his . . . injuries" ... . Here, the record establishes that plaintiff was not alone in rigging the rebar bundle and transporting it to a different area of the construction site, and thus plaintiff's conduct could not be the sole proximate cause of his injuries. We therefore conclude that plaintiff's action in participating in the rigging process raises, at most, an issue concerning his comparative negligence, which is not an available defense under Labor Law § 240 (1) ... . **Flowers v Harborcenter Dev., LLC, 2017 NY Slip Op 08117, Fourth Dept 11-17-17**

LABOR LAW-CONSTRUCTION LAW (DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON PLAINTIFF'S LABOR LAW 240 (1) CAUSE OF ACTION SHOULD NOT HAVE BEEN GRANTED, PLAINTIFF WAS ATTEMPTING TO PUSH A HEAVY DOLLY UP A RAMP WHEN IT ROLLED BACK AND INJURED HIM (SECOND DEPT))

LABOR LAW-CONSTRUCTION LAW.

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON PLAINTIFF'S LABOR LAW 240 (1) CAUSE OF ACTION SHOULD NOT HAVE BEEN GRANTED, PLAINTIFF WAS ATTEMPTING TO PUSH A HEAVY DOLLY UP A RAMP WHEN IT ROLLED BACK AND INJURED HIM (SECOND DEPT).

The Second Department, reversing in part Supreme Court, determined defendants were not entitled to summary judgment on plaintiff's Labor Law 240 (1) cause of action. Plaintiff was attempting to push a dolly carrying sheet rock weighing 1000 pounds up a ramp when the dolly rolled back, injuring him. The Second Department also held that the defendants' motions for summary judgment on the Labor Law 200 and common law negligence causes of action were properly granted because defendants did not have supervisory control over the manner of plaintiff's work:

Contrary to the defendants' contentions, the elevation differential between the worker and the loaded dolly while on a four-to-five-foot-high ramp "cannot be viewed as de minimis, particularly given the weight of the object and the amount of force it was capable of generating" ... . Indeed, in opposition to the defendants' original motion, the plaintiff's expert averred that the 16 pieces of sheetrock loaded onto the dolly weighed more than 1000 pounds. Here, given the amount of force generated by the dolly rolling uncontrollably down the temporary ramp, the defendants failed to establish, prima facie, that Labor Law § 240(1) is not applicable on the ground that the injury did not result from a gravity-related or elevation-related hazard ... . **Kandatyan v 400 Fifth Realty, LLC, 2017 NY Slip Op 07984, Second Dept 11-15-17**

LABOR LAW-CONSTRUCTION LAW (AMONG SEVERAL LABOR LAW, NEGLIGENCE AND INSURANCE ISSUES ADDRESSED IN THIS LABOR LAW 240 (1), 241 (6) AND 200 ACTION, THE SECOND DEPARTMENT DETERMINED SUPREME COURT APPLIED THE WRONG STANDARD IN ITS LABOR LAW 200 ANALYSIS (FIRST DEPT))

LABOR LAW-CONSTRUCTION LAW.

AMONG SEVERAL LABOR LAW, NEGLIGENCE AND INSURANCE ISSUES ADDRESSED IN THIS LABOR LAW 240 (1), 241 (6) AND 200 ACTION, THE SECOND DEPARTMENT DETERMINED SUPREME COURT APPLIED THE WRONG STANDARD IN ITS LABOR LAW 200 ANALYSIS (FIRST DEPT).

The First Department affirmed and reversed several rulings on defendants' motions for summary judgment in this Labor Law 240 (1), 241 (6), 200, and common law negligence action. Plaintiff was injured when he slipped on a loose piece of sprinkler pipe on property owned by defendant One City. The Second Department determined the correct standard for analyzing the Labor 200 cause of action was under the dangerous condition prong, rather than the manner of work prong, of Labor Law 200 and dismissed that cause of action. There was no proof One City created or knew about the dangerous condition. The Labor Law 241 (6) cause of action properly survived summary judgment because there was a question of fact whether the fall occurred in a passageway that should be kept clear and there was a question fact whether plaintiff was cleaning up the area at the time (which would preclude suit). The Second Department further found that there was a question of fact whether another defendant had purchased insurance as required by a contract with One City. The court also addressed indemnification issues. With regard to the Labor Law 200 and common law negligence causes of action, the court wrote:

> Section 200 of the Labor Law is a codification of the common-law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work ... . "Claims for personal injury under the statute and the common law fall into two broad categories: those arising from an alleged defect or dangerous condition existing on the premises and those arising from the manner in which the work was performed" ... ."Where the injury was caused by the manner and means of the work, including the equipment used, the owner or general contractor is liable if it actually exercised supervisory control over the injury-producing work" ... . "Where an existing defect or dangerous condition caused the injury, liability attaches if the owner or general contractor created the condition or had actual or constructive notice of it" ... .
>
> Here, the court finds that the appropriate standard to apply in this case is the dangerous condition standard and not the manner and means standard. The cause of the accident, the piece of loose pipe, was not a condition created by the manner in which the work was performed by plaintiff or his employer but was rather a condition that already existed prior to plaintiff's arrival on the fifth floor that day. **Prevost v One City Block LLC, 2017 NY Slip Op 08303, First Dept 11-28-17**

LABOR LAW-CONSTRUCTION LAW (BECAUSE THERE WAS EVIDENCE PLAINTIFF FELL OFF A BEAM IN THIS LABOR LAW 240(1) ACTION, IN ADDITION TO EVIDENCE HE TRIPPED OVER DEBRIS, THE TRIAL JUDGE ERRED IN REFUSING TO INSTRUCT THE JURY TO DECIDE WHETHER PLAINTIFF FELL OFF THE BEAM, MOTION TO SET ASIDE THE VERDICT IN THE INTEREST OF JUSTICE SHOULD HAVE BEEN GRANTED (SECOND DEPT))/CIVIL PROCEDURE (SET ASIDE VERDICT, BECAUSE THERE WAS EVIDENCE PLAINTIFF FELL OFF A BEAM IN THIS LABOR LAW 240(1) ACTION, IN ADDITION TO EVIDENCE HE TRIPPED OVER DEBRIS, THE TRIAL JUDGE ERRED IN REFUSING TO INSTRUCT THE JURY TO DECIDE WHETHER PLAINTIFF FELL OFF THE BEAM, MOTION TO SET ASIDE THE VERDICT IN THE INTEREST OF JUSTICE SHOULD HAVE BEEN GRANTED (SECOND DEPT))/EVIDENCE (LABOR LAW-CONSTRUCTION LAW, BECAUSE THERE WAS EVIDENCE PLAINTIFF FELL OFF A BEAM IN THIS LABOR LAW 240(1) ACTION, IN ADDITION TO EVIDENCE HE TRIPPED OVER DEBRIS, THE TRIAL JUDGE ERRED IN REFUSING TO INSTRUCT THE JURY TO DECIDE WHETHER PLAINTIFF FELL OFF THE BEAM, MOTION TO SET ASIDE THE VERDICT IN THE INTEREST OF JUSTICE SHOULD HAVE BEEN GRANTED (SECOND DEPT))/VERDICT, MOTION TO SET ASIDE (LABOR LAW-CONSTRUCTION LAW, BECAUSE THERE WAS EVIDENCE PLAINTIFF FELL OFF A BEAM IN THIS LABOR LAW 240(1) ACTION, IN ADDITION TO EVIDENCE HE TRIPPED OVER DEBRIS, THE TRIAL JUDGE ERRED IN REFUSING TO INSTRUCT THE JURY TO DECIDE WHETHER PLAINTIFF FELL OFF THE BEAM, MOTION TO SET ASIDE THE VERDICT IN THE INTEREST OF JUSTICE SHOULD HAVE BEEN GRANTED (SECOND DEPT))/CPLR 4404 (a) (LABOR LAW-CONSTRUCTION LAW, BECAUSE THERE WAS EVIDENCE PLAINTIFF FELL OFF A BEAM IN THIS LABOR LAW 240(1) ACTION, IN ADDITION TO EVIDENCE HE TRIPPED OVER DEBRIS, THE TRIAL JUDGE ERRED IN REFUSING TO INSTRUCT THE JURY TO DECIDE WHETHER PLAINTIFF FELL OFF THE BEAM, MOTION TO SET ASIDE THE VERDICT IN THE INTEREST OF JUSTICE SHOULD HAVE BEEN GRANTED (SECOND DEPT))

LABOR LAW-CONSTRUCTION LAW, CIVIL PROCEDURE, EVIDENCE.

BECAUSE THERE WAS EVIDENCE PLAINTIFF FELL OFF A BEAM IN THIS LABOR LAW 240(1) ACTION, IN ADDITION TO EVIDENCE HE TRIPPED OVER DEBRIS, THE TRIAL JUDGE ERRED IN REFUSING TO INSTRUCT THE JURY TO DECIDE WHETHER PLAINTIFF FELL OFF THE BEAM, MOTION TO SET ASIDE THE VERDICT IN THE INTEREST OF JUSTICE SHOULD HAVE BEEN GRANTED (SECOND DEPT).

The Second Department determined plaintiff's (Duran's) motion pursuant to CPLR 4404 (a) to set aside the verdict in the interest of justice and for a new trial on the cause of action alleging a violation of Labor Law § 240(1) should have been granted. Plaintiff alleged he fell from a beam which was four feet above the ground. There was evidence plaintiff previously alleged in a document that he fell over debris, but there was a question whether plaintiff, who spoke Spanish, understood the statement in the document. Plaintiff's counsel asked that the jury be instructed to decide whether plaintiff fell off the beam, but the trial judge refused that request:

> ... Supreme Court erred in denying the plaintiffs' request to ask the jury to determine not only whether the temple violated Labor Law § 240(1), but also to determine whether Duran fell off the beam ... . Under the particular circumstances of this case, this constituted a fundamental error warranting a new trial because the court's instructions failed to explain to the jury that, in light of arguably inconsistent accounts of how the accident occurred, the jury was entitled to find that Duran did not fall from the beam or, alternatively, that he did fall from the beam but no safety device was required under Labor Law § 240(1). Further, there was sufficient evidence of juror confusion with respect to this issue ... . Notably, the jury requested a readback of Labor Law § 240(1). The court's errors in failing to properly charge the jury and add the interrogatory requested by the plaintiffs prejudiced a substantial right and warrants a new trial ... . **Duran v Temple Beth Sholom, Inc., 2017 NY Slip Op 07708, Second Dept 11-8-17**

LABOR LAW-CONSTRUCTION LAW (COMPLEX DECISION EXPLAINING BLACK LETTER LAW ON LABOR LAW 240(1), 241(6) AND 200 CAUSES OF ACTION, CONTRACTUAL AND IMPLIED INDEMNIFICATION, AND INSURANCE COVERAGE ISSUES (SECOND DEPT))/INSURANCE LAW (LABOR LAW-CONSTRUCTION LAW, COMPLEX DECISION EXPLAINING BLACK LETTER LAW ON LABOR LAW 240(1), 241(6) AND 200 CAUSES OF ACTION, CONTRACTUAL AND IMPLIED INDEMNIFICATION, AND INSURANCE COVERAGE ISSUES (SECOND DEPT))/CONTRACT LAW (LABOR LAW-CONSTRUCTION LAW, COMPLEX DECISION EXPLAINING BLACK LETTER LAW ON LABOR LAW 240(1), 241(6) AND 200 CAUSES OF ACTION, CONTRACTUAL AND IMPLIED INDEMNIFICATION, AND INSURANCE COVERAGE ISSUES (SECOND DEPT))/LADDERS (LABOR LAW-CONSTRUCTION LAW, COMPLEX DECISION EXPLAINING BLACK LETTER LAW ON LABOR LAW 240(1), 241(6) AND 200 CAUSES OF ACTION, CONTRACTUAL AND IMPLIED INDEMNIFICATION, AND INSURANCE COVERAGE ISSUES (SECOND DEPT))

LABOR LAW-CONSTRUCTION LAW, INSURANCE LAW, CONTRACT LAW.

COMPLEX DECISION EXPLAINING BLACK LETTER LAW ON LABOR LAW 240(1), 241(6) AND 200 CAUSES OF ACTION, CONTRACTUAL AND IMPLIED INDEMNIFICATION, AND INSURANCE COVERAGE ISSUES (SECOND DEPT).

The Second Department reversed Supreme Court in a complex action involving Labor Law 240(1), 241(6), 200 and common law negligence causes of action, as well as several contractual and implied indemnification issues, and insurance coverage and duty to defend and indemnify issues. The decision lays out the black letter law on all the issues, illustrates how the appellate courts analyze summary judgment motions, and is well worth reading for an overview of the complexity of a construction accident case involving property owners, several insurance policies, and layers of contractors. Plaintiff fell off a ladder that had been placed on an uneven floor. There are too many substantive issues to fairly summarize them here. With respect to the Labor Law issues, the court wrote:

> The plaintiff established his prima facie entitlement to judgment as a matter of law on the issue of the defendants' liability on the Labor Law § 240(1) cause of action. ... The plaintiff used the last available ladder in his work area. According to the plaintiff, this ladder was missing two of its rubber feet, and was missing the lowest rung. The plaintiff testified that the floor was "not finished" and that it was partially covered in concrete and partially covered in rubble. The plaintiff indicated that there were "all types of things" strewn on the ground and that the floor "was not level." The plaintiff stated that, as he was standing on the ladder to perform his work, the ladder "shook," and he "lost [his] balance" and fell.
>
> The ... defendants failed to establish their prima facie entitlement to judgment as a matter of law dismissing the Labor Law § 241(6) cause of action insofar as it was based on Industrial Code ... . Contrary to their contention, the ...defendants did not make a prima facie showing that the plaintiff's conduct was the sole proximate cause of the accident ... .
>
> "Cases involving Labor Law § 200 fall into two broad categories: namely, those where workers are injured as a result of dangerous or defective premises conditions at a work site, and those involving the manner in which the work is performed" ... . "These two categories should be viewed in the disjunctive" ... . Where, as here, "an accident is alleged to involve both a dangerous condition on the premises and the means and methods' of the work, a defendant moving for summary judgment with respect to causes of action alleging a violation of Labor Law § 200 is obligated to address the proof applicable to both liability standards" ... .
>
> Here, in moving for summary judgment, the defendants failed to address the allegation in the complaint that the plaintiff was injured due to the dangerous or defective premises conditions at the work site. Furthermore, contrary to the Supreme Court's conclusion, the plaintiff was not ultimately required to demonstrate that the Mall defendants actually exercised supervisory control.
>
> "[W]hen the manner and method of work is at issue in a Labor Law § 200 analysis" the issue is "whether the defendant had the authority to supervise or control the work" ... . "A defendant has the authority to supervise or

control the work for purposes of Labor Law § 200 when that defendant bears the responsibility for the manner in which the work is performed" ... .

Here, the defendants failed to establish that they did not have the authority to supervise or control the means and methods of the work performed by the plaintiff. **Poalacin v Mall Props., Inc., 2017 NY Slip Op 08027, Second Dept 11-15-17**

LANDLORD-TENANT

LANDLORD-TENANT (LESSEE DID NOT MOVE FOR A YELLOWSTONE INJUNCTION WITHIN THE CURE PERIOD ALLOWED BY THE LEASE, SUPREME COURT NO LONGER HAD JURISDICTION TO GRANT THE INJUNCTION (SECOND DEPT))/YELLOWSTONE INJUNCTION (LANDLORD-TENANT, ESSEE DID NOT MOVE FOR A YELLOWSTONE INJUNCTION WITHIN THE CURE PERIOD ALLOWED BY THE LEASE, SUPREME COURT NO LONGER HAD JURISDICTION TO GRANT THE INJUNCTION (SECOND DEPT))

LANDLORD-TENANT.

LESSEE DID NOT MOVE FOR A YELLOWSTONE INJUNCTION WITHIN THE CURE PERIOD ALLOWED BY THE LEASE, SUPREME COURT NO LONGER HAD JURISDICTION TO GRANT THE INJUNCTION (SECOND DEPT).

The Second Department determined the commercial lessee was not entitled to a Yellowstone injunction because the motion seeking the injunction was not made before the termination of the cure period set out in the lease:

" A Yellowstone injunction maintains the status quo so that a commercial tenant, when confronted by a threat of termination of its lease, may protect its investment in the leasehold by obtaining a stay tolling the cure period so that upon an adverse determination on the merits the tenant may cure the default and avoid a forfeiture' of the lease"... . " To obtain a Yellowstone injunction, the tenant must demonstrate that (1) it holds a commercial lease, (2) it received from the landlord either a notice of default, a notice to cure, or a threat of termination of the lease, (3) it requested injunctive relief prior to both the termination of the lease and the expiration of the cure period set forth in the lease and the landlord's notice to cure, and (4) it is prepared and maintains the ability to cure the alleged default by any means short of vacating the premises'" ... .

"[A]n application for Yellowstone relief must be made not only before the termination of the subject lease . . . but must also be made prior to the expiration of the cure period set forth in the lease and the landlord's notice to cure" ... . "Where a tenant fails to make a timely request for a temporary restraining order, a court is divested of its power to grant a Yellowstone injunction" ... . **Riesenburger Props., LLLP v Pi Assoc., LLC, 2017 NY Slip Op 08294, Second Dept 11-22-17**

MENTAL HYGIENE LAW

MENTAL HYGIENE LAW (ORDER THAT THE PATIENT INMATE SHOULD BE TREATED WITH A PARTICULAR DRUG FOR SCHIZOPHRENIA OVER HIS OBJECTION SUPPORTED BY CLEAR AND CONVINCING EVIDENCE, ORDER ALLOWING ALTERNATIVE DRUGS, AND A NONDURATIONAL ORDER NOT SUPPORTED (SECOND DEPT))/SCHIZOPHRENIA (MENTAL HYGIENE LAW, CRIMINAL LAW, ORDER THAT THE PATIENT INMATE SHOULD BE TREATED WITH A PARTICULAR DRUG FOR SCHIZOPHRENIA OVER HIS OBJECTION SUPPORTED BY CLEAR AND CONVINCING EVIDENCE, ORDER ALLOWING ALTERNATIVE DRUGS, AND A NONDURATIONAL ORDER NOT SUPPORTED (SECOND DEPT))/CRIMINAL LAW (INMATES, ORDER THAT THE PATIENT INMATE SHOULD BE TREATED WITH A PARTICULAR DRUG FOR SCHIZOPHRENIA OVER HIS OBJECTION SUPPORTED BY CLEAR AND CONVINCING EVIDENCE, ORDER ALLOWING ALTERNATIVE DRUGS, AND A NONDURATIONAL ORDER NOT SUPPORTED (SECOND DEPT))/INMATES (MENTAL HYGIENE LAW, ORDER THAT THE PATIENT INMATE SHOULD BE TREATED WITH A PARTICULAR DRUG FOR SCHIZOPHRENIA OVER HIS OBJECTION SUPPORTED BY CLEAR AND CONVINCING EVIDENCE, ORDER ALLOWING ALTERNATIVE DRUGS, AND A NONDURATIONAL ORDER NOT SUPPORTED (SECOND DEPT))

MENTAL HYGIENE LAW, CRIMINAL LAW.

ORDER THAT THE PATIENT INMATE SHOULD BE TREATED WITH A PARTICULAR DRUG FOR SCHIZOPHRENIA OVER HIS OBJECTION SUPPORTED BY CLEAR AND CONVINCING EVIDENCE, ORDER ALLOWING ALTERNATIVE DRUGS, AND A NONDURATIONAL ORDER NOT SUPPORTED (SECOND DEPT).

The Second Department determined clear and convincing evidence supported the finding that the patient (Radcliffe M.) was unable to make treatment decisions for himself and that a particular medication for schizophrenia should be administered over the patient's objection. However, the evidence did not support the findings that certain alternative drugs could be administered or that the order should be nondurational (no termination date):

> The State may administer a course of medical treatment against a patient's will if it establishes, by clear and convincing evidence, that the patient lacks the capacity to make a reasoned decision with respect to proposed treatment ... , and that "the proposed treatment is narrowly tailored to give substantive effect to the patient's liberty interest, taking into consideration all relevant circumstances, including the patient's best interests, the benefits to be gained from the treatment, the adverse side effects associated with the treatment and any less intrusive alternative treatments"... . Whether a mentally ill patient has the capacity to make a reasoned decision with respect to treatment is a question of fact for the hearing court, the credibility findings of which are entitled to due deference... . Here, the petitioner established by clear and convincing evidence that Radcliffe M. lacks the capacity to make a reasoned decision with respect to continuing a course of treatment of Haldol Deconoate ... . Further, the petitioner established by clear and convincing evidence that the proposed course of treatment with Haldol Deconoate was narrowly tailored to give substantive effect to Radcliffe M.'s liberty interest, taking into consideration all relevant circumstances, including his best interests, the benefits to be gained from the treatment, the adverse side effects associated with the treatment, and any less intrusive alternative treatments ... .
>
> However, the petitioner failed to offer any testimony or evidence at the hearing with respect to the additional medications included in the order as "Reasonable Alternatives" ... .
>
> A nondurational order is appropriate where it is established that treatment will allow the patient to become stabilized and restore the patient's ability to make reasoned decisions regarding the management of his or her mental illness ... . In such circumstances, "the order's forcefulness will end as soon as [the patient] is no longer so incapacitated" ... . The petitioner failed to establish that Radcliffe M.'s ability to make reasoned decisions regarding his own treatment will be restored with treatment and that a nondurational order would therefore be appropriate ... . **Matter of Radcliffe M., 2017 NY Slip Op 08270, Second Dept 11-22-17**

MUNICIPAL LAW

MUNICIPAL LAW (NOTICE OF CLAIM, PLAINTIFF'S MOTION FOR LEAVE TO FILE A LATE NOTICE OF CLAIM IN THIS TRESPASS-NUISANCE ACTION AGAINST THE TOWN SHOULD HAVE BEEN GRANTED, PLAINTIFF DEMONSTRATE ACTUAL NOTICE AND LACK OF PREJUDICE (THIRD DEPT))/NOTICE OF CLAIM (MUNICIPAL LAW, PLAINTIFF'S MOTION FOR LEAVE TO FILE A LATE NOTICE OF CLAIM IN THIS TRESPASS-NUISANCE ACTION AGAINST THE TOWN SHOULD HAVE BEEN GRANTED, PLAINTIFF DEMONSTRATE ACTUAL NOTICE AND LACK OF PREJUDICE (THIRD DEPT))/REAL PROPERTY LAW (TRESPASS, NUISANCE, MUNICIPAL LAW, NOTICE OF CLAIM, PLAINTIFF'S MOTION FOR LEAVE TO FILE A LATE NOTICE OF CLAIM IN THIS TRESPASS-NUISANCE ACTION AGAINST THE TOWN SHOULD HAVE BEEN GRANTED, PLAINTIFF DEMONSTRATE ACTUAL NOTICE AND LACK OF PREJUDICE (THIRD DEPT))/TRESPASS (MUNICIPAL LAW, NOTICE OF CLAIM, MOTION FOR LEAVE TO FILE A LATE NOTICE OF CLAIM IN THIS TRESPASS-NUISANCE ACTION AGAINST THE TOWN SHOULD HAVE BEEN GRANTED, PLAINTIFF DEMONSTRATE ACTUAL NOTICE AND LACK OF PREJUDICE (THIRD DEPT))/NUISANCE (MUNICIPAL LAW, NOTICE OF CLAIM, MOTION FOR LEAVE TO FILE A LATE NOTICE OF CLAIM IN THIS TRESPASS-NUISANCE ACTION AGAINST THE TOWN SHOULD HAVE BEEN GRANTED, PLAINTIFF DEMONSTRATE ACTUAL NOTICE AND LACK OF PREJUDICE (THIRD DEPT))

MUNICIPAL LAW, REAL PROPERTY LAW.

PLAINTIFF'S MOTION FOR LEAVE TO FILE A LATE NOTICE OF CLAIM IN THIS TRESPASS-NUISANCE ACTION AGAINST THE TOWN SHOULD HAVE BEEN GRANTED, PLAINTIFF DEMONSTRATED ACTUAL NOTICE AND LACK OF PREJUDICE (THIRD DEPT).

The Third Department, reversing Supreme Court, determined that plaintiff's motion for leave to file a late notice of claim should have been granted. Plaintiff alleged defendant town caused water and debris to drain onto his property causing the foundation of his house to cave in. In finding plaintiff should have been allowed to file a late notice of claim, the court explained the factors that should be considered and the flaws in Supreme Court's analysis, which focused on the excuse for the delay and the merits of the underlying action. The most important factors are the defendant's actual notice of the facts of the case within the statutory period and the absence of prejudice:

> While a reasonable excuse for the delay is a statutory factor ... , it is well settled that "'the failure to offer a reasonable excuse for the delay in filing a notice of claim is not fatal where actual [knowledge] was had and there is no compelling showing of prejudice'" ... . Similarly, although Supreme Court was permitted to consider the merits of the underlying claim, leave should only be denied on this basis when the claim is "'patently meritless'" ... , which was not established here.
>
> Upon our consideration of all of the pertinent statutory factors, we find that, although plaintiff did not provide a reasonable excuse for his delay, he adequately set forth proof of actual knowledge and lack of substantial prejudice such that his motion should have been granted. **Daprile v Town of Copake, 2017 NY Slip Op 08243, Third Dept 11-22-17**

MUNICIPAL LAW (CONDEMNATION, REGULATED WETLANDS,OWNER OF REGULATED WETLANDS ENTITLED TO AN INCREASED VALUATION IN CONDEMNATION PROCEEDINGS REPRESENTING THE PREMIUM A KNOWLEDGEABLE BUYER MIGHT PAY FOR A POTENTIAL CHANGE TO A MORE VALUABLE USE (SECOND DEPT))/REAL PROPERTY LAW (CONDEMNATION, REGULATED WETLANDS , OWNER OF REGULATED WETLANDS ENTITLED TO AN INCREASED VALUATION IN CONDEMNATION PROCEEDINGS REPRESENTING THE PREMIUM A KNOWLEDGEABLE BUYER MIGHT PAY FOR A POTENTIAL CHANGE TO A MORE VALUABLE USE (SECOND DEPT))/CONSTITUTIONAL LAW (CONDEMNATION, REGULATED WETLANDS, OWNER OF REGULATED WETLANDS ENTITLED TO AN INCREASED VALUATION IN CONDEMNATION PROCEEDINGS REPRESENTING THE PREMIUM A KNOWLEDGEABLE BUYER MIGHT PAY FOR A POTENTIAL CHANGE TO A MORE VALUABLE USE (SECOND DEPT))/CONDEMNATION (REGULATED WETLANDS, OWNER OF REGULATED WETLANDS ENTITLED TO AN INCREASED VALUATION IN CONDEMNATION PROCEEDINGS REPRESENTING THE PREMIUM A KNOWLEDGEABLE BUYER MIGHT PAY FOR A POTENTIAL CHANGE TO A MORE VALUABLE USE (SECOND DEPT))/REGULATORY TAKING (WETLANDS, CONDEMNATION, OWNER OF REGULATED WETLANDS ENTITLED TO AN INCREASED VALUATION IN CONDEMNATION PROCEEDINGS REPRESENTING THE PREMIUM A KNOWLEDGEABLE BUYER MIGHT PAY FOR A POTENTIAL CHANGE TO A MORE VALUABLE USE (SECOND DEPT))/WETLANDS (CONDEMNATION, REGULATED WETLANDS, OWNER OF REGULATED WETLANDS ENTITLED TO AN INCREASED VALUATION IN CONDEMNATION PROCEEDINGS REPRESENTING THE PREMIUM A KNOWLEDGEABLE BUYER MIGHT PAY FOR A POTENTIAL CHANGE TO A MORE VALUABLE USE (SECOND DEPT))/EMINENT DOMAIN (CONDEMNATION, REGULATED WETLANDS,OWNER OF REGULATED WETLANDS ENTITLED TO AN INCREASED VALUATION IN CONDEMNATION PROCEEDINGS REPRESENTING THE PREMIUM A KNOWLEDGEABLE BUYER MIGHT PAY FOR A POTENTIAL CHANGE TO A MORE VALUABLE USE (SECOND DEPT))

MUNICIPAL LAW, REAL PROPERTY LAW, CONSTITUTIONAL LAW.

OWNER OF REGULATED WETLANDS ENTITLED TO AN INCREASED VALUATION IN CONDEMNATION PROCEEDINGS REPRESENTING THE PREMIUM A KNOWLEDGEABLE BUYER MIGHT PAY FOR A POTENTIAL CHANGE TO A MORE VALUABLE USE (SECOND DEPT).

The Second Department, in a full-fledged opinion by Justice Leventhal, determined that the condemnation of regulated wetlands can be subject to an increased valuation (increment) based upon a reasonable probability a knowledgeable buyer could successfully challenge the taking as unconstitutional. The increment represents the premium that a knowledgeable buyer would be willing to pay for a potential change to a more valuable use. Here Supreme Court found the increment to be $382,190.25. The Second Department, using the City's appraisal, reduced the increment to about $157,000.00. The value of the regulated wetlands was deemed to be $75,000.00:

> In light of the United States Supreme Court's holding in Palazzolo [v Rhode Island, 533 US at 617], we conclude that a subsequent buyer of the property would not be precluded from bringing a successful regulatory takings claim. As a result, we reject the City's argument that no knowledgeable buyer would be willing to pay a premium for the probability of a successful judicial determination that the regulations were confiscatory. We hold that the reasonable probability incremental increase rule still may be applied in valuing regulated wetlands properties taken in condemnation. **Matter of New Cr. Bluebelt, Phase 3., 2017 NY Slip Op 07994, Second Dept 11-15-17**

MUNICIPAL LAW (EMPLOYMENT LAW, CIVIL SERVICE LAW, DEPUTY SHERIFF WAS COERCED INTO RESIGNING WITHOUT A HEARING, SHERIFF SHOULD HAVE ALLOWED DEPUTY TO WITHDRAW HIS RESIGNATION (FOURTH DEPT))/EMPLOYMENT LAW (MUNICIPAL LAW, CIVIL SERVICE LAW, DEPUTY SHERIFF WAS COERCED INTO RESIGNING WITHOUT A HEARING, SHERIFF SHOULD HAVE ALLOWED DEPUTY TO WITHDRAW HIS RESIGNATION (FOURTH DEPT))/CIVIL SERVICE LAW (EMPLOYMENT LAW, DEPUTY SHERIFF WAS COERCED INTO RESIGNING WITHOUT A HEARING, SHERIFF SHOULD HAVE ALLOWED DEPUTY TO WITHDRAW HIS RESIGNATION (FOURTH DEPT))

MUNICIPAL LAW, EMPLOYMENT LAW.

DEPUTY SHERIFF WAS COERCED INTO RESIGNING WITHOUT A HEARING, SHERIFF SHOULD HAVE ALLOWED DEPUTY TO WITHDRAW HIS RESIGNATION (FOURTH DEPT).

The Fourth Department determined Supreme Court properly found that the sheriff abused his discretion when he refused to allow petitioner, a deputy sheriff, to withdraw his resignation. The deputy resigned after the sheriff told him he would be fired if he didn't resign:

> It is well settled that " [a] resignation under coercion or duress is not a voluntary act and may be nullified' " ... . Although a threat to terminate an employee does not constitute duress if the person making the threat has the legal right to terminate the employee ... , such a threat does constitute duress if it is wrongful and precludes the exercise of free will ... . It follows that a resignation obtained under the threat of wrongful termination is involuntary and may be withdrawn upon request, and that it is an abuse of discretion for an officer to deny such a request ... .
>
> Here, petitioner tendered his resignation under the threat of wrongful termination, and we therefore conclude that the Sheriff abused his discretion in refusing to allow petitioner to withdraw the resignation. Civil Service Law § 75 provides that a public employer may not terminate or otherwise discipline certain public employees "except for incompetency or misconduct shown after a hearing upon stated charges" ... . A covered employee "against whom removal or other disciplinary action is proposed shall have written notice thereof and of the reasons therefor, shall be furnished a copy of the charges preferred against him and shall be allowed at least eight days for answering the same in writing" ... . Thereafter, a hearing must be held ... . There is no dispute that petitioner was covered by the statute and that he was not provided with the requisite predisciplinary hearing. Thus, the Sheriff had no legal right to terminate him. **Matter of Ortlieb v Lewis County Sheriff's Dept., 2017 NY Slip Op 08115, Fourth Dept 11-17-17**

NEGLIGENCE

NEGLIGENCE DEFENDANT (PROPERTY OWNER AND DEFENDANT ELEVATOR COMPANY DEMONSTRATED THEY DID NOT HAVE NOTICE OF THE ELEVATOR DEFECT WHICH CAUSED PLAINTIFF'S INJURY, DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED (SECOND DEPT))/ELEVATORS (NEGLIGENCE, PROPERTY OWNER AND DEFENDANT ELEVATOR COMPANY DEMONSTRATED THEY DID NOT HAVE NOTICE OF THE ELEVATOR DEFECT WHICH CAUSED PLAINTIFF'S INJURY, DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED (SECOND DEPT))

NEGLIGENCE.

DEFENDANT PROPERTY OWNER AND DEFENDANT ELEVATOR COMPANY DEMONSTRATED THEY DID NOT HAVE NOTICE OF THE ELEVATOR DEFECT WHICH CAUSED PLAINTIFF'S INJURY, DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendant property owner and defendant elevator company were entitled to summary judgment in this personal injury action. Plaintiff was employed by a building maintenance company and was working in the building when he was injured. The door to the elevator was open. When plaintiff attempted to enter the elevator the cab was below the open door and he fell to the roof of the cab. The building owner demonstrated it did not have notice of the defect. And the elevator company demonstrated it did not have notice and did not have the opportunity to discover the defect:

> Property owners have a duty to maintain their premises in a reasonably safe condition ... . In order to hold a property owner liable for a breach of this duty, a plaintiff must prove not only that a defective condition existed and was a proximate cause of his or her injuries, but also that the property owner either created the defective condition or had actual or constructive notice of its existence ... . Similarly, an elevator company that agrees to maintain an elevator in safe operating condition may be held liable to an injured passenger for failing to correct conditions of which it has knowledge, or its failure to use reasonable care to discover and correct a condition which it ought to have found ... . In order to recover damages resulting from a breach of a property owner's or elevator company's duty, a plaintiff must prove all of the essential elements of the cause of action. By contrast, a defendant property owner or elevator company moving for summary judgment dismissing such a claim meets its prima facie burden by negating a single essential element ... . **Nunez v Chase Manhattan Bank, 2017 NY Slip Op 07610, Second Dept 11-1-17**

NEGLIGENCE (THIRD PARTY ASSAULT, QUESTIONS OF FACT WHETHER PARENTS WERE AWARE OF A PARTY HELD BY THEIR SON AND WHETHER IT WAS FORESEEABLE PLAINTIFF WOULD BE INJURED IN A FIGHT AT THE PARTY (THIRD DEPT))/PARTIES (THIRD PARTY ASSAULT, PROPERTY OWNER LIABILITY, QUESTIONS OF FACT WHETHER PARENTS WERE AWARE OF A PARTY HELD BY THEIR SON AND WHETHER IT WAS FORESEEABLE PLAINTIFF WOULD BE INJURED IN A FIGHT AT THE PARTY (THIRD DEPT))/ASSAULT (NEGLIGENCE, HOMEOWNER LIABILITY, QUESTIONS OF FACT WHETHER PARENTS WERE AWARE OF A PARTY HELD BY THEIR SON AND WHETHER IT WAS FORESEEABLE PLAINTIFF WOULD BE INJURED IN A FIGHT AT THE PARTY (THIRD DEPT))/HOMEOWNERS (NEGLIGENCE, ASSAULT, QUESTIONS OF FACT WHETHER PARENTS WERE AWARE OF A PARTY HELD BY THEIR SON AND WHETHER IT WAS FORESEEABLE PLAINTIFF WOULD BE INJURED IN A FIGHT AT THE PARTY (THIRD DEPT))

NEGLIGENCE.

QUESTIONS OF FACT WHETHER PARENTS WERE AWARE OF A PARTY HELD BY THEIR SON AND WHETHER IT WAS FORESEEABLE PLAINTIFF WOULD BE INJURED IN A FIGHT AT THE PARTY (THIRD DEPT).

The Third Department determined defendant property owners (Richard and Jeannie Denero) were not entitled to summary judgment in this action by a guest at a party held by defendants' son. The plaintiff alleged he was assaulted by a guest at the party. The court determined there were questions of fact whether defendants were aware or should have been aware of the party and whether it was foreseeable that someone would get drunk at the party and engage in a fight:

> Where, as here, a guest is injured by a third party, the landowner may be held responsible only when the landowner has "the opportunity to control [the third party] and [is] reasonably aware of the need for such control" ... . "Without the requisite awareness, there is no duty" ... . The record shows that defendants had prohibited their son from hosting parties on the property and were not present at the party. Defendants testified that they did not learn about the party until November 2010. Their son testified that he did not inform his parents about the party, but rather assured them that he would not have a party on the property. There is, however, record evidence indicating that defendants were either aware or should have been aware that the party, which was attended by upwards of 80 underaged guests consuming alcohol, was being held.
>
> The property was purchased in April 2010, and defendants' son testified that he held between 5 and 10 parties at the site by June 23, 2010. The son explained that guests were invited by word of mouth and through social media. Defendant Richard Denero (hereinafter Denero) acknowledged that he suspected prior to June 23, 2010 that his son might be hosting parties. He also candidly testified that he and his wife, defendant Jeannie Denero, did not trust their son's representation that he would not host parties and put a tracking device on his phone. Denero also confirmed that he inspected the site prior to June 23, 2010 and saw evidence of a bonfire — a finding prompting defendants to be more vigilant of their son's whereabouts. Significantly, Jeannie Denero's sister telephoned defendants to advise them that she learned on Facebook that there was going to be a party on the property. Denero informed the son and reiterated that he did not want anyone on the property. The son responded that he understood, but Denero acknowledged that he did not trust the response. Although Denero was uncertain as to whether this call came before June 23, 2010, viewed in a light most favorable to plaintiffs, the nonmoving parties, we consider this evidence sufficient to raise a question of fact as to whether defendants were aware or should have been aware that a party would take place and "whether it was foreseeable 'that someone would get drunk at the party, engage in a fight, and cause injury to a third party'" ... . **Lathers v Denero, 2017 NY Slip Op 07672, Third Dept 11-2-17**

NEGLIGENCE (PEDESTRIAN ACCIDENT, BUS DRIVER'S GESTURE TO PLAINTIFF TO CROSS THE STREET WAS NOT THE PROXIMATE CAUSE OF PLAINTIFF'S INJURY, PLAINTIFF WAS SUBSEQUENTLY STRUCK BY A DRIVER WHO RAN THE STOP SIGN (SECOND DEPT))/PEDESTRIAN ACCIDENTS (BUS DRIVER'S GESTURE TO PLAINTIFF TO CROSS THE STREET WAS NOT THE PROXIMATE CAUSE OF PLAINTIFF'S INJURY, PLAINTIFF WAS SUBSEQUENTLY STRUCK BY A DRIVER WHO RAN THE STOP SIGN (SECOND DEPT))/TRAFFIC ACCIDENTS (PEDESTRIANS, BUS DRIVER'S GESTURE TO PLAINTIFF TO CROSS THE STREET WAS NOT THE PROXIMATE CAUSE OF PLAINTIFF'S INJURY, PLAINTIFF WAS SUBSEQUENTLY STRUCK BY A DRIVER WHO RAN THE STOP SIGN (SECOND DEPT))/SUPERSEDING CAUSE (PEDESTRIAN ACCIDENT, BUS DRIVER'S GESTURE TO PLAINTIFF TO CROSS THE STREET WAS NOT THE PROXIMATE CAUSE OF PLAINTIFF'S INJURY, PLAINTIFF WAS SUBSEQUENTLY STRUCK BY A DRIVER WHO RAN THE STOP SIGN (SECOND DEPT))

NEGLIGENCE.

BUS DRIVER'S GESTURE TO PLAINTIFF TO CROSS THE STREET WAS NOT THE PROXIMATE CAUSE OF PLAINTIFF'S INJURY, PLAINTIFF WAS SUBSEQUENTLY STRUCK BY A DRIVER WHO RAN THE STOP SIGN (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the defendant bus company's (Trans Express's) motion for summary judgment in this pedestrian accident case should have been granted. At an intersection controlled by a stop sign, the bus driver motioned for plaintiff to cross the street. Plaintiff was struck by a driver (Narian) that did not stop at the stop sign:

> A driver of a motor vehicle may, under certain circumstances, be liable to a pedestrian where the driver "undertakes to direct a pedestrian safely across the road in front of his vehicle, and negligently carries out that duty" ... .
>
> However, even if a pedestrian is injured because he or she relied on a driver's gesture directing him or her to cross a roadway, the acts of another driver may constitute a superseding, intervening act that breaks the causal nexus ... . Whether an intervening act is a superseding cause is generally a question of fact, but there are circumstances where it may be determined as a matter of law ... .
>
> Here, Trans Express established, prima facie, that Narian's failure to stop at the stop sign constituted an unforeseeable, superseding cause of the accident which severed any causal nexus between the plaintiff's injuries and any negligence on the part of Trans Express's bus driver ... . **Esen v Narian, 2017 NY Slip Op 07592, Third Dept 11-1-17**

NEGLIGENCE (TRAFFIC ACCIDENTS, PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED IN THIS TRAFFIC ACCIDENT CASE, DEFENDANT PULLED IN FRONT OF PLAINTIFF AFTER TURNING ON HIS TURN SIGNAL BUT PLAINTIFF ONLY HAD ONE OR TWO SECONDS TO REACT (SECOND DEPT))/TRAFFIC ACCIDENTS (PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED IN THIS TRAFFIC ACCIDENT CASE, DEFENDANT PULLED IN FRONT OF PLAINTIFF AFTER TURNING ON HIS TURN SIGNAL BUT PLAINTIFF ONLY HAD ONE OR TWO SECONDS TO REACT (SECOND DEPT))/COMPARATIVE NEGLIGENCE (TRAFFIC ACCIDENTS, PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED IN THIS TRAFFIC ACCIDENT CASE, DEFENDANT PULLED IN FRONT OF PLAINTIFF AFTER TURNING ON HIS TURN SIGNAL BUT PLAINTIFF ONLY HAD ONE OR TWO SECONDS TO REACT (SECOND DEPT))

NEGLIGENCE.

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED IN THIS TRAFFIC ACCIDENT CASE, DEFENDANT PULLED IN FRONT OF PLAINTIFF AFTER TURNING ON HIS TURN SIGNAL BUT PLAINTIFF ONLY HAD ONE OR TWO SECONDS TO REACT (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff's motion for summary judgment in this traffic accident case should have been granted. Plaintiff had the right of way when defendant (Mack) turned on his turn signal and attempted a u-turn. Plaintiff had only one or two seconds to react and was not, therefore, comparatively negligent:

> The plaintiff established that he was traveling with the right-of-way when Mack, who had stopped in a parking or merging lane to the right of the plaintiff's lane of travel, suddenly attempted to make a U-turn in front of the plaintiff's vehicle and struck the plaintiff's vehicle. Although Mack testified at his deposition that he had activated his left-turn signal before he began to move his vehicle, the plaintiff, who had the right-of-way, was nevertheless entitled to anticipate that Mack would obey the traffic law requiring him to yield ... . The plaintiff testified at his deposition that only one or two seconds passed between the time Mack's vehicle suddenly pulled out and the collision, such that, while he attempted to brake and veer to the left, he could not avoid the collision. Indeed, Mack admitted that only a "[s]plit second" passed between the time he moved his vehicle and the 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" ... . **Criollo v Maggies Paratransit Corp., 2017 NY Slip Op 07704, Second Dept 11-8-17**

NEGLIGENCE (DEFENDANT DRIVER DID NOT DEMONSTRATE FREEDOM FROM COMPARATIVE FAULT AS A MATTER OF LAW IN THIS BICYCLE-CAR COLLISION CASE, DESPITE VIDEO SHOWING PLAINTIFF DARTING INTO TRAFFIC (SECOND DEPT))/TRAFFIC ACCIDENTS (DEFENDANT DRIVER DID NOT DEMONSTRATE FREEDOM FROM COMPARATIVE FAULT AS A MATTER OF LAW IN THIS BICYCLE-CAR COLLISION CASE, DESPITE VIDEO SHOWING PLAINTIFF DARTING INTO TRAFFIC (SECOND DEPT))/COMPARATIVE NEGLIGENCE (TRAFFIC ACCIDENTS, DEFENDANT DRIVER DID NOT DEMONSTRATE FREEDOM FROM COMPARATIVE FAULT AS A MATTER OF LAW IN THIS BICYCLE-CAR COLLISION CASE, DESPITE VIDEO SHOWING PLAINTIFF DARTING INTO TRAFFIC (SECOND DEPT))/BICYCLES (TRAFFIC ACCIDENTS, DEFENDANT DRIVER DID NOT DEMONSTRATE FREEDOM FROM COMPARATIVE FAULT AS A MATTER OF LAW IN THIS BICYCLE-CAR COLLISION CASE, DESPITE VIDEO SHOWING PLAINTIFF DARTING INTO TRAFFIC (SECOND DEPT))

NEGLIGENCE.

DEFENDANT DRIVER DID NOT DEMONSTRATE FREEDOM FROM COMPARATIVE FAULT AS A MATTER OF LAW IN THIS BICYCLE-CAR COLLISION CASE, DESPITE VIDEO SHOWING PLAINTIFF DARTING INTO TRAFFIC (SECOND DEPT).

The Second Department determined defendant driver was not entitled to summary judgment in this traffic accident case. Video showed plaintiff darting out on his bicycle into the street. However defendant driver is obligated to see what can be seen and did not demonstrate freedom from comparative fault as a matter of law:

> "A driver is bound to see what is there to be seen with the proper use of his [or her] senses, and there can be more than one proximate cause of an accident" ... . In order for a defendant driver to establish entitlement to summary judgment on the issue of liability in a motor vehicle collision case, the driver must demonstrate, prima facie, inter alia, that he or she kept the proper lookout, or that his or her alleged negligence, if any, did not contribute to the accident ... .

NEGLIGENCE (ALTHOUGH DEFENDANT'S TRUCK WAS IN THE WRONG LANE, THE POSITION OF THE TRUCK FURNISHED A CONDITION FOR THE ACCIDENT BUT WAS NOT THE PROXIMATE CAUSE OF THE ACCIDENT, PLAINTIFF'S DECEDENT WAS WEAVING IN AND OUT OF TRAFFIC ON HIS MOTORCYCLE AT HIGH SPEED WHEN HE STRUCK A CAR, AND WAS THROWN UNDER THE TRUCK (FIRST DEPT))/TRAFFIC ACCIDENTS (PROXIMATE CAUSE, ALTHOUGH DEFENDANT'S TRUCK WAS IN THE WRONG LANE, THE POSITION OF THE TRUCK FURNISHED A CONDITION FOR THE ACCIDENT BUT WAS NOT THE PROXIMATE CAUSE OF THE ACCIDENT, PLAINTIFF'S DECEDENT WAS WEAVING IN AND OUT OF TRAFFIC ON HIS MOTORCYCLE AT HIGH SPEED WHEN HE STRUCK A CAR, AND WAS THROWN UNDER THE TRUCK (FIRST DEPT))/CONDITION FOR THE ACCIDENT (TRAFFIC ACCIDENTS, PROXIMATE CAUSE, ALTHOUGH DEFENDANT'S TRUCK WAS IN THE WRONG LANE, THE POSITION OF THE TRUCK FURNISHED A CONDITION FOR THE ACCIDENT BUT WAS NOT THE PROXIMATE CAUSE OF THE ACCIDENT, PLAINTIFF'S DECEDENT WAS WEAVING IN AND OUT OF TRAFFIC ON HIS MOTORCYCLE AT HIGH SPEED WHEN HE STRUCK A CAR, AND WAS THROWN UNDER THE TRUCK (FIRST DEPT))/PROXIMATE CAUSE (TRAFFIC ACCIDENTS, PROXIMATE CAUSE, ALTHOUGH DEFENDANT'S TRUCK WAS IN THE WRONG LANE, THE POSITION OF THE TRUCK FURNISHED A CONDITION FOR THE ACCIDENT BUT WAS NOT THE PROXIMATE CAUSE OF THE ACCIDENT, PLAINTIFF'S DECEDENT WAS WEAVING IN AND OUT OF TRAFFIC ON HIS MOTORCYCLE AT HIGH SPEED WHEN HE STRUCK A CAR, AND WAS THROWN UNDER THE TRUCK (FIRST DEPT))

NEGLIGENCE.

ALTHOUGH DEFENDANT'S TRUCK WAS IN THE WRONG LANE, THE POSITION OF THE TRUCK FURNISHED A CONDITION FOR THE ACCIDENT BUT WAS NOT THE PROXIMATE CAUSE OF THE ACCIDENT, PLAINTIFF'S DECEDENT WAS WEAVING IN AND OUT OF TRAFFIC ON HIS MOTORCYCLE AT HIGH SPEED WHEN HE STRUCK A CAR, AND WAS THROWN UNDER THE TRUCK (FIRST DEPT).

The First Department determined defendant trucking company's motion for summary judgment in this traffic accident case was properly granted. Plaintiff's decedent was weaving in and out of traffic at high speed on his motorcycle when he struck the rear of a car, was thrown under and tractor trailer, and run over by the rear wheels. The truck was in a lane where truck traffic was prohibited. The court held the position of the truck furnished the condition for the accident but was not the proximate cause of the accident:

> Defendants made a prima facie showing that decedent's negligent operation of the motorcycle caused the accident... . Further, although defendants acknowledge that the tractor-trailer was unlawfully in the left lane at the time of the accident ... , there is no evidence in the record that would support a finding that the statutory violation was a proximate cause of the accident. The presence of the tractor-trailer in the left lane merely furnished the condition that led to decedent's death, and was not a proximate cause of the accident ... . Nor is there any nonspeculative basis for finding that defendant driver could have avoided the accident.
>
> Plaintiffs failed to present evidence raising a triable issue of fact as to whether any negligence on the part of defendants was a substantial factor in causing the accident. Although plaintiffs did not have an opportunity to depose defendant driver, they failed to demonstrate the existence of any testimony by defendant driver relevant to defendant's summary judgment motion. **Caro v Chesnick, 2017 NY Slip Op 07940, First Dept 11-14-17**

NEGLIGENCE (QUESTIONS OF FACT WHETHER PLAINTIFF'S SON'S INVOLVEMENT IN A DRAG RACE PRECLUDED RECOVERY FOR HIS DEATH IN AN ACCIDENT (FOURTH DEPT))/DRAG RACE (NEGLIGENCE, QUESTIONS OF FACT WHETHER PLAINTIFF'S SON'S INVOLVEMENT IN A DRAG RACE PRECLUDED RECOVERY FOR HIS DEATH IN AN ACCIDENT (FOURTH DEPT))/TRAFFIC ACCIDENTS (QUESTIONS OF FACT WHETHER PLAINTIFF'S SON'S INVOLVEMENT IN A DRAG RACE PRECLUDED RECOVERY FOR HIS DEATH IN AN ACCIDENT (FOURTH DEPT))/BARKER-MANNING RULE (NEGLIGENCE, DRAG RACE, QUESTIONS OF FACT WHETHER PLAINTIFF'S SON'S INVOLVEMENT IN A DRAG RACE PRECLUDED RECOVERY FOR HIS DEATH IN AN ACCIDENT (FOURTH DEPT))/COMPARATIVE NEGLIGENCE (DRAG RACE, QUESTIONS OF FACT WHETHER PLAINTIFF'S SON'S INVOLVEMENT IN A DRAG RACE PRECLUDED RECOVERY FOR HIS DEATH IN AN ACCIDENT (FOURTH DEPT))

NEGLIGENCE.

QUESTIONS OF FACT WHETHER PLAINTIFF'S SON'S INVOLVEMENT IN A DRAG RACE PRECLUDED RECOVERY FOR HIS DEATH IN AN ACCIDENT (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined plaintiff's motion for summary judgment in this traffic accident case should not have been granted. There was evidence plaintiff's son, who was riding in a pickup truck with defendant's son, may have voluntarily participated in a drag race which led to the accident and the death of plaintiff's son:

> Defendants cross-moved for summary judgment dismissing the complaint on the ground that the accident occurred during an "illegal street race" in which plaintiff's son participated, that his death was the direct result of his own serious violation of the law, and that recovery on his behalf was therefore precluded as a matter of public policy under the rule of Barker v Kallash (63 NY2d 19 [1984]) and Manning v Brown (91 NY2d 116 [1997]). In the alternative, defendants sought summary judgment on the issue whether plaintiff's son had been comparatively negligent. Supreme Court granted plaintiff's motion and denied defendants' cross motion, and defendants appeal.
>
> We agree with defendants that the Barker/Manning rule may apply to a high-speed street race between motor vehicles, i.e., "a drag race as that term is commonly understood" ... , even if the participants did not plan a particular race course and the incident thus did not qualify as a "speed contest" within the meaning of Vehicle and Traffic Law § 1182 (a) (1)... . The record here, however, supports conflicting inferences with respect to whether defendants' son was engaged in a race with other pickup truck drivers ... and, if so, whether plaintiff's son was a "willing participant" in the race ... . Thus, the applicability of the Barker/Manning rule is an issue of fact ... . In addition, there are issues of fact with respect to the alleged comparative negligence of plaintiff's son in choosing to ride with defendants' son, in view of evidence that defendants' son was under the influence of alcohol and had said that he intended to "chase . . . down" the other trucks ... . We therefore conclude that the court properly denied defendants' cross motion but erred in granting that part of plaintiff's motion with respect to the culpable conduct defense, and we modify the order accordingly. **Kovach v McCollum, 2017 NY Slip Op 08121, Fourth Dept 11-17-17**

NEGLIGENCE (BUILDING OWNERS' MOTION FOR SUMMARY JUDGMENT PROPERLY DENIED IN THIS WET-FLOOR SLIP AND FALL CASE (SECOND DEPT))/SLIP AND FALL (BUILDING OWNERS' MOTION FOR SUMMARY JUDGMENT PROPERLY DENIED IN THIS WET-FLOOR SLIP AND FALL CASE (SECOND DEPT))

NEGLIGENCE.

BUILDING OWNERS' MOTION FOR SUMMARY JUDGMENT PROPERLY DENIED IN THIS WET-FLOOR SLIP AND FALL CASE (SECOND DEPT).

The Second Department determined the building owners' (Realty defendants') motion for summary judgment in this slip and fall case was properly denied. The defendants did not eliminate questions of fact whether they had notice of or created the dangerous condition, a wet floor in the area where floor mats had been removed while a tenant was moving in:

> According to the Realty defendants' deposition testimony, the floor in the building lobby was scheduled to be wet mopped on the Friday afternoon prior to the plaintiff's accident on Monday, and the Realty defendants' maintenance personnel were instructed, as part of their process, to remove the floor mats in the lobby and put them back in place after the floor was mopped dry.
>
> ..."To impose liability on a defendant for a slip and fall on an alleged dangerous condition on a floor, there must be evidence that the dangerous condition existed, and that the defendant either created the condition or had actual or constructive notice of it and failed to remedy it within a reasonable time" ... .
>
> A defendant property owner 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 alleged hazardous condition nor had actual or constructive notice of it ... .
>
> Here, the Realty defendants failed to eliminate all triable issues of fact as to whether the alleged accumulation of water on which the plaintiff slipped and fell was created by its maintenance personnel prior to the accident... . **Dow v Hermes Realty, LLC, 2017 NY Slip Op 07974, Fourth Dept 11-15-17**

NEGLIGENCE (TRAFFIC ACCIDENTS, DESPITE PLAINTIFF'S APPARENT VIOLATION OF THE VEHICLE AND TRAFFIC LAW, DEFENDANT'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED IN THIS CAR ACCIDENT CASE (SECOND DEPT))/TRAFFIC ACCIDENTS (DESPITE PLAINTIFF'S APPARENT VIOLATION OF THE VEHICLE AND TRAFFIC LAW, DEFENDANT'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED IN THIS CAR ACCIDENT CASE (SECOND DEPT))/COMPARATIVE FAULT (TRAFFIC ACCIDENTS, DESPITE PLAINTIFF'S APPARENT VIOLATION OF THE VEHICLE AND TRAFFIC LAW, DEFENDANT'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED IN THIS CAR ACCIDENT CASE (SECOND DEPT))

NEGLIGENCE.

DESPITE PLAINTIFF'S APPARENT VIOLATION OF THE VEHICLE AND TRAFFIC LAW, DEFENDANT'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED IN THIS TRAFFIC ACCIDENT CASE (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendant's motion for summary judgment in this car accident case should not have been granted. Plaintiff apparently made a left turn in front of defendant's car which was in the on-coming lane. Defendant struck plaintiff's car:

> "A defendant moving for summary judgment in a negligence action has the burden of establishing, prima facie, that he or she was not at fault in the happening of the subject accident"... . Pursuant to Vehicle and Traffic Law § 1141, the operator of a vehicle intending to turn left within an intersection must yield the right-of-way to any oncoming vehicle which is within the intersection or so close to it as to constitute an immediate hazard ... . A violation of this statute constitutes negligence per se ... .
>
> The operator of an oncoming vehicle with the right-of-way is entitled to assume that the opposing operator will yield in compliance with the Vehicle and Traffic Law ... . A driver is negligent where he or she failed to see that which, through proper use of his or her senses, he or she should have seen ... . The driver traveling with the right-of-way may nevertheless be found to have contributed to the happening of the accident if he or she did not use reasonable care to avoid the accident ... .
>
> Here, in support of the motion, the defendant submitted, inter alia, the deposition testimony of the parties. The defendant attested that she never saw the front of the plaintiff's vehicle and that when she first saw the plaintiff's vehicle, which was "moving like a snail," she saw the middle part of the vehicle directly ahead of her. Viewing the evidence in the light most favorable to the plaintiff as the nonmoving party, the defendant failed to establish, prima facie, her freedom from comparative fault and that the plaintiff's alleged violation of the Vehicle and Traffic Law was the sole proximate cause of the accident ... . **Aponte v Vani, 2017 NY Slip Op 08252, Second Dept 11-22-17**

NEGLIGENCE (FORESEEABILITY, MANNER IN WHICH DECORATIONS WERE STACKED IN A STORE DID NOT PRESENT A FORESEEABLE RISK, RES IPSA LOQUITUR DOCTRINE DID NOT APPLY (THIRD DEPT))/FORESEEABILITY (NEGLIGENCE, MANNER IN WHICH DECORATIONS WERE STACKED IN A STORE DID NOT PRESENT A FORESEEABLE RISK, RES IPSA LOQUITUR DOCTRINE DID NOT APPLY (THIRD DEPT))/SLIP AND FALL (FORESEEABILITY, MANNER IN WHICH DECORATIONS WERE STACKED IN A STORE DID NOT PRESENT A FORESEEABLE RISK, RES IPSA LOQUITUR DOCTRINE DID NOT APPLY (THIRD DEPT))/RES IPSA LOQUITUR (SLIP AND FALL, MANNER IN WHICH DECORATIONS WERE STACKED IN A STORE DID NOT PRESENT A FORESEEABLE RISK, RES IPSA LOQUITUR DOCTRINE DID NOT APPLY (THIRD DEPT))

NEGLIGENCE.

MANNER IN WHICH DECORATIONS WERE STACKED IN A STORE DID NOT PRESENT A FORESEEABLE RISK, RES IPSA LOQUITUR DOCTRINE DID NOT APPLY (THIRD DEPT).

The Third Department determined defendant store's motion for summary judgment in this slip and fall case was properly granted because the manner in which Christmas decorations were stacked did not present a foreseeable risk. Plaintiff was taking down a Christmas decoration when things started to fall from the shelf:

> Plaintiff testified that while taking down garland, she felt a snag on the garland and, when she turned back and saw that the garland was attached to a loop of garland above it, she saw — through her peripheral vision — "stuff" starting to fall and, when she started to move her feet, she fell. Plaintiff further testified that she did not trip over anything and was not struck by anything before she fell, nor did she strike anything on the way down as she fell. In opposition to defendant's motion, plaintiff submitted defendant's Holiday Sales Planner and Stocking Procedural Manual. Plaintiff also submitted an affidavit of plaintiff's expert witness — a retail sales merchandising specialist, consultant and planner — who attested to the proper, correct and safe way to install, stock and display consumer products and merchandise for sale to the public in retail stores. However, such testimony failed to demonstrate how the location and stocking of the garland presented a foreseeable risk. Therefore, plaintiff failed to raise a triable issue of fact that plaintiff's injury was reasonably foreseeable ... . Supreme Court properly found that there was "nothing about the nature of packages of garland falling from above that would lead a reasonable person to foresee said garland knocking a person to the ground and/or breaking a person's wrist." Supreme Court also correctly found that the doctrine of res ipsa loquitur did not apply. "The doctrine cannot be used where, as here, the defendant against whom the doctrine is asserted owes no duty in connection with the mechanism that caused the injury" ... . **Parke v Dollar Tree, Inc.2017 NY Slip Op 08427, Third Dept 11-30-17**

NEGLIGENCE (TRAFFIC ACCIDENTS, QUESTION OF FACT WHETHER DRIVER WITH RIGHT OF WAY HAD TIME TO TAKE EVASIVE ACTION TO AVOID A CAR CROSSING HIS PATH TO MAKE A LEFT TURN (THIRD DEPT))/COMPARATIVE NEGLIGENCE (TRAFFIC ACCIDENTS, QUESTION OF FACT WHETHER DRIVER WITH RIGHT OF WAY HAD TIME TO TAKE EVASIVE ACTION TO AVOID A CAR CROSSING HIS PATH TO MAKE A LEFT TURN (THIRD DEPT))/TRAFFIC ACCIDENTS (COMPARATIVE FAULT, QUESTION OF FACT WHETHER DRIVER WITH RIGHT OF WAY HAD TIME TO TAKE EVASIVE ACTION TO AVOID A CAR CROSSING HIS PATH TO MAKE A LEFT TURN (THIRD DEPT))/RIGHT OF WAY (TRAFFIC ACCIDENTS, COMPARATIVE FAULT, QUESTION OF FACT WHETHER DRIVER WITH RIGHT OF WAY HAD TIME TO TAKE EVASIVE ACTION TO AVOID A CAR CROSSING HIS PATH TO MAKE A LEFT TURN (THIRD DEPT))

NEGLIGENCE.

QUESTION OF FACT WHETHER DRIVER WITH RIGHT OF WAY HAD TIME TO TAKE EVASIVE ACTION TO AVOID A CAR CROSSING HIS PATH TO MAKE A LEFT TURN (THIRD DEPT).

The Third Department determined a question of fact precluded summary judgment in favor of defendant in this truck-car intersection collision case. The defendant truck driver, Head, alleged the driver of the car in which plaintiff was a passenger (Sinclair) made a left turn across the truck's path and Head did not have time to avoid the collision. However an eyewitness, Fuller, testified there was sufficient time for the truck driver to take evasive action:

> In this context, Head "was bound to see what[,] by the proper use of [his] senses[,] [he] might have seen" and, if the circumstances were as described by Fuller, and if Head should have observed Sinclair's car turning left, "then the accident would be a reasonably foreseeable risk and [Head] would have had a duty to avoid striking [Sinclair], if it were possible to do so"... . Fuller's materially different version of the accident, if credited, could support the conclusion that Head had adequate time and opportunity to observe Sinclair's turning car and take evasive action ... . That is, Head had "a duty to use reasonable care to avoid a collision" and, unless he had "only seconds to react" to Sinclair's failure to yield the right-of-way, an issue disputed by plaintiff's evidence, Head may be partly at fault ... . **Debra F. v New Hope View Farm, 2017 NY Slip Op 08429, Third Dept 11-30-17**

NEGLIGENCE (DEFENDANTS FAILED TO DEMONSTRATE THEY DID NOT CREATE OR HAVE NOTICE OF THE ICE-SNOW CONDITION ON THE SIDEWALK IN THIS SLIP AND FALL CASE, DEFENDANT'S SUMMARY JUDGMENT MOTION SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT))/SLIP AND FALL (DEFENDANTS FAILED TO DEMONSTRATE THEY DID NOT CREATE OR HAVE NOTICE OF THE ICE-SNOW CONDITION ON THE SIDEWALK IN THIS SLIP AND FALL CASE, DEFENDANT'S SUMMARY JUDGMENT MOTION SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT))/SIDEWALKS (SLIP AND FALL, DEFENDANTS FAILED TO DEMONSTRATE THEY DID NOT CREATE OR HAVE NOTICE OF THE ICE-SNOW CONDITION ON THE SIDEWALK IN THIS SLIP AND FALL CASE, DEFENDANT'S SUMMARY JUDGMENT MOTION SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT))/ICE AND SNOW (SIDEWALKS, SLIP AND FALL, DEFENDANTS FAILED TO DEMONSTRATE THEY DID NOT CREATE OR HAVE NOTICE OF THE ICE-SNOW CONDITION ON THE SIDEWALK IN THIS SLIP AND FALL CASE, DEFENDANT'S SUMMARY JUDGMENT MOTION SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT))

NEGLIGENCE.

DEFENDANTS FAILED TO DEMONSTRATE THEY DID NOT CREATE OR HAVE NOTICE OF THE ICE-SNOW CONDITION ON THE SIDEWALK IN THIS SLIP AND FALL CASE, DEFENDANTS' SUMMARY JUDGMENT MOTION SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendants' motion for summary judgment in this sidewalk slip and fall case should not have been granted. Defendants failed to show that they did not create the dangerous snow-ice condition or have notice of it:

> Here, the defendants failed to make a prima facie showing of their entitlement to judgment as a matter of law ... . Their own submissions, which included, inter alia, the deposition testimony of the plaintiff and the defendants' superintendent, in addition to a certified weather report for the month of February 2014, failed to eliminate all triable issues of fact as to the whether the defendants caused or exacerbated the alleged icy condition on the subject sidewalk or had notice of it. The plaintiff testified that, at the time of the accident, she slipped on ice on the path which had been shoveled through the snow on the sidewalk adjacent to her apartment building. She also testified that the path was slippery when she had used it the night before and that she did not observe any salt or sand on it. Although the building superintendent testified as to general snow removal procedures for the building, he could not remember what he did on the date of the accident and did not have an independent recollection of removing snow from the outside of the building at any time on either February 3, 2014, or February 4, 2014. His testimony conflicted with statements set forth in his affidavit, submitted in support of the motion, in which he stated that he personally checked the path at issue at the end of his shift at 5:00 p.m. on February 4, 2014, and did not observe any snowy and/or icy condition. Such contradictory statements raise an issue of credibility which cannot be resolved on a motion for summary judgment ... . Further, the certified weather report demonstrated that there was an accumulation of 6.7 inches of snow as of 5:00 p.m. on February 3, 2014, approximately 26½ hours prior to the accident, and that no snow fell on the date of the accident. Consequently, the defendants did not establish, prima facie, that they neither created the alleged hazardous icy condition on the sidewalk nor had actual or constructive notice of its existence for a sufficient length of time to discover and remedy it ... . **Michalska v Coney Is. Site 1824 Houses, Inc., 2017 NY Slip Op 08365, Second Dept 11-29-17**

NEGLIGENCE (SLIP AND FALL, STORM IN PROGRESS, DEFENDANTS SUBMITTED CONFLICTING EVIDENCE ABOUT THE WEATHER IN THIS SLIP AND FALL CASE, SUMMARY JUDGMENT PURSUANT TO THE STORM IN PROGRESS RULE SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT))/SLIP AND FALL (STORM IN PROGRESS, DEFENDANTS SUBMITTED CONFLICTING EVIDENCE ABOUT THE WEATHER IN THIS SLIP AND FALL CASE, SUMMARY JUDGMENT PURSUANT TO THE STORM IN PROGRESS RULE SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT))/STORM IN PROGRESS (SLIP AND FALL, DEFENDANTS SUBMITTED CONFLICTING EVIDENCE ABOUT THE WEATHER IN THIS SLIP AND FALL CASE, SUMMARY JUDGMENT PURSUANT TO THE STORM IN PROGRESS RULE SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT))

NEGLIGENCE.

DEFENDANTS SUBMITTED CONFLICTING EVIDENCE ABOUT THE WEATHER IN THIS SLIP AND FALL CASE, SUMMARY JUDGMENT PURSUANT TO THE STORM IN PROGRESS RULE SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined a question of fact about the storm in progress proof precluded summary judgment in favor of the defendants in this slip and fall case. In support of the motion, defendants submitted plaintiff's deposition testimony and climatological data. Because there was a conflict between those two sources of evidence, summary judgment was not available:

> "Under the storm in progress rule,' a landowner generally cannot be held liable for injuries sustained as a result of slippery conditions that occur during an ongoing storm, or for a reasonable time thereafter'" ... . Here, the defendants failed to demonstrate their prima facie entitlement to judgment as a matter of law dismissing the complaint ... based on the storm in progress rule. The climatological data submitted by the defendants in support of their motion contradicted the plaintiff's deposition testimony, which the defendants also submitted, as to whether precipitation was falling at or near the time of the accident. Since the evidence submitted by the defendants was in conflict and, thus, could not establish, prima facie, that the storm in progress rule applied ... , the court should have denied that branch of their motion which was for summary judgment dismissing the complaint ... regardless of the sufficiency of the plaintiff's opposition papers ... . **Pecoraro v Tribuzio, 2017 NY Slip Op 08386, Second Dept 11-29-17**

NEGLIGENCE (TRAFFIC ACCIDENTS, DEFENDANT ATTEMPTED A TURN IN VIOLATION OF THE VEHICLE AND TRAFFIC LAW WHICH CONSTITUTED NEGLIGENCE PER SE, CO-DEFENDANTS, WHOSE TRUCK COLLIDED WITH THE CAR DRIVEN BY THE DEFENDANT WHO VIOLATED THE VEHICLE AND TRAFFIC LAW, ENTITLED TO SUMMARY JUDGMENT (SECOND DEPT))/TRAFFIC ACCIDENTS (DEFENDANT ATTEMPTED A TURN IN VIOLATION OF THE VEHICLE AND TRAFFIC LAW WHICH CONSTITUTED NEGLIGENCE PER SE, CO-DEFENDANTS, WHOSE TRUCK COLLIDED WITH THE CAR DRIVEN BY THE DEFENDANT WHO VIOLATED THE VEHICLE AND TRAFFIC LAW, ENTITLED TO SUMMARY JUDGMENT (SECOND DEPT))/VEHICLE AND TRAFFIC LAW (NEGLIGENCE PER SE, DEFENDANT ATTEMPTED A TURN IN VIOLATION OF THE VEHICLE AND TRAFFIC LAW WHICH CONSTITUTED NEGLIGENCE PER SE, CO-DEFENDANTS, WHOSE TRUCK COLLIDED WITH THE CAR DRIVEN BY THE DEFENDANT WHO VIOLATED THE VEHICLE AND TRAFFIC LAW, ENTITLED TO SUMMARY JUDGMENT (SECOND DEPT))

NEGLIGENCE.

DEFENDANT ATTEMPTED A TURN IN VIOLATION OF THE VEHICLE AND TRAFFIC LAW WHICH CONSTITUTED NEGLIGENCE PER SE, CO-DEFENDANTS, WHOSE TRUCK COLLIDED WITH THE CAR DRIVEN BY THE DEFENDANT WHO VIOLATED THE VEHICLE AND TRAFFIC LAW, ENTITLED TO SUMMARY JUDGMENT (SECOND DEPT).

The Second Department determined the truck defendants' (Crown and Kumar's) motion for summary judgment in this traffic accident case should have been granted. Another defendant, Ferreira, had cut the truck off attempting to make a right turn from the left lane. Ferreira's actions were the sole proximate cause of the accident:

> Ferreira's testimony indicated that she violated Vehicle and Traffic Law § 1128(a), which states that "[a] vehicle shall be driven as nearly as practicable entirely within a single lane and shall not be moved from such lane until the driver has first ascertained that such movement can be made with safety." Therefore, she was negligent as a matter of law ... . The appellants further established that Kumar was not negligent, since he took prompt evasive action by applying his brakes hard.
>
> Thus, by demonstrating that Ferreira was negligent and that her negligence was the sole proximate cause of the accident, the appellants established their prima facie entitlement to judgment as a matter of law. In opposition, the plaintiff and Ferreira failed to raise a triable issue of fact. Accordingly, the appellants' motion for summary judgment dismissing the complaint and all cross claims insofar as asserted against them should have been granted. **Pipinias v Ferreira, 2017 NY Slip Op 08400, Second Dept 11-29-17**

NEGLIGENCE (PLAINTIFF'S MOTION FOR A JUDGMENT AS A MATTER OF LAW SHOULD HAVE BEEN GRANTED, DESK LEFT UNATTENDED ON A DOLLY BY DEFENDANT MOVER FELL OVER ONTO PLAINTIFF (SECOND DEPT))/CIVIL PROCEDURE (PLAINTIFF'S MOTION FOR A JUDGMENT AS A MATTER OF LAW SHOULD HAVE BEEN GRANTED, DESK LEFT UNATTENDED ON A DOLLY BY DEFENDANT MOVER FELL OVER ONTO PLAINTIFF (SECOND DEPT))/CPLR 4401 (PLAINTIFF'S MOTION FOR A JUDGMENT AS A MATTER OF LAW SHOULD HAVE BEEN GRANTED, DESK LEFT UNATTENDED ON A DOLLY BY DEFENDANT MOVER FELL OVER ONTO PLAINTIFF (SECOND DEPT))

NEGLIGENCE, CIVIL PROCEDURE.

PLAINTIFF'S MOTION FOR JUDGMENT AS A MATTER OF LAW SHOULD HAVE BEEN GRANTED, DESK LEFT UNATTENDED ON A DOLLY BY DEFENDANT MOVER FELL OVER ONTO PLAINTIFF (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff's motion for judgment as a matter of law should have been granted. An employee of defendant moving company (Fisher) left a desk that was upright (on its side) on a dolly unattended. The desk fell over, injuring plaintiff:

> "A trial court's grant of a CPLR 4401 motion for judgment as a matter of law is appropriate where the trial court finds that, upon the evidence presented, there is no rational process by which the fact trier could base a finding in favor of the nonmoving party" ... . In considering the motion, the evidence must be viewed in the light most favorable to the nonmoving party, and the court must afford the nonmoving party "every inference which may properly be drawn from the facts presented" ... .
>
> The defendants do not dispute that they, through their employee, created the condition that the plaintiff alleges existed. There was no evidence, and the defendants did not assert, that Fisher exercised reasonable care when he left the desk unattended on the dolly. The defendants' contention that an issue of fact existed as to whether the accident happened at all is unsupported by the record and based upon speculation ... . Based on this record, the Supreme Court should have granted the plaintiff's motion for judgment as a matter of law pursuant to CPLR 4401, made at the close of the evidence ... . **Canale v L & M Assoc. of N.Y., Inc., 2017 NY Slip Op 07701, Second Dept 11-8-17**

NEGLIGENCE (DUTY ARISING FROM CONTRACT, TRANSMISSION REPAIR COMPANY OWED A DUTY TO PLAINTIFF'S DECEDENT AS A THIRD PARTY BENEFICIARY OF A TRUCK REPAIR CONTRACT WITH PLAINTIFF'S DECEDENT'S EMPLOYER, IF THE TRUCK HAD BEEN EQUIPPED WITH A FUNCTIONING NEUTRAL INTERLOCK SYSTEM IT WOULD NOT HAVE LURCHED BACK, KILLING PLAINTIFF'S DECEDENT (SECOND DEPT))/CONTRACT LAW (NEGLIGENCE, DUTY ARISING FROM CONTRACT, TRANSMISSION REPAIR COMPANY OWED A DUTY TO PLAINTIFF'S DECEDENT AS A THIRD PARTY BENEFICIARY OF A TRUCK REPAIR CONTRACT WITH PLAINTIFF'S DECEDENT'S EMPLOYER, IF THE TRUCK HAD BEEN EQUIPPED WITH A FUNCTIONING NEUTRAL INTERLOCK SYSTEM IT WOULD NOT HAVE LURCHED BACK, KILLING PLAINTIFF'S DECEDENT (SECOND DEPT))/EMPLOYMENT LAW (DUTY TO EMPLOYEE ARISING FROM EMPLOYER'S CONTRACT FOR REPAIR, TRANSMISSION REPAIR COMPANY OWED A DUTY TO PLAINTIFF'S DECEDENT AS A THIRD PARTY BENEFICIARY OF A TRUCK REPAIR CONTRACT WITH PLAINTIFF'S DECEDENT'S EMPLOYER, IF THE TRUCK HAD BEEN EQUIPPED WITH A FUNCTIONING NEUTRAL INTERLOCK SYSTEM IT WOULD NOT HAVE LURCHED BACK, KILLING PLAINTIFF'S DECEDENT (SECOND DEPT))/THIRD PARTY BENEFICIARY (NEGLIGENCE, DUTY ARISING FROM CONTRACT, TRANSMISSION REPAIR COMPANY OWED A DUTY TO PLAINTIFF'S DECEDENT AS A THIRD PARTY BENEFICIARY OF A TRUCK REPAIR CONTRACT WITH PLAINTIFF'S DECEDENT'S EMPLOYER, IF THE TRUCK HAD BEEN EQUIPPED WITH A FUNCTIONING NEUTRAL INTERLOCK SYSTEM IT WOULD NOT HAVE LURCHED BACK, KILLING PLAINTIFF'S DECEDENT (SECOND DEPT))

NEGLIGENCE, CONTRACT LAW, EMPLOYMENT LAW.

TRANSMISSION REPAIR COMPANY OWED A DUTY TO PLAINTIFF'S DECEDENT AS A THIRD PARTY BENEFICIARY OF A TRUCK REPAIR CONTRACT WITH PLAINTIFF'S DECEDENT'S EMPLOYER, IF THE TRUCK HAD BEEN EQUIPPED WITH A FUNCTIONING NEUTRAL INTERLOCK SYSTEM IT WOULD NOT HAVE LURCHED BACK, KILLING PLAINTIFF'S DECEDENT (SECOND DEPT).

The Second Department determined plaintiff's decedent could properly have been found to be a third-party beneficiary of a contract between a transmission repair company (Advanced) and plaintiff's decedent's employer (CCC). CCC owned a garbage truck which was repaired by Advanced. There was no neutral interlock system on the truck. Such a system would have prevented the truck from lurching backward and pinning plaintiff's decedent between the truck and a dumpster:

> ... [T]he record demonstrates that Advanced owed the decedent a duty as a third-party beneficiary of its contractual relationship between itself and CCC ... . If the parties to the contract intended to confer a direct benefit on the decedent, a duty is owed to the decedent... . Although there was no written contract between the contracting parties, an intent to confer a direct benefit on the decedent may also be inferred from the circumstances ... including the parties' oral agreement and course of conduct ... .
>
> An employee is not automatically a third-party beneficiary of a service contract between his or her employer and another party ... . However, if the employer's intent was to benefit its employees, third-party beneficiary status may be inferred ...
>
> At trial, the plaintiffs asserted that a proximate cause of the accident was the absence of a functioning neutral interlock system on the truck. The neutral interlock system would have prevented the truck from going backward while garbage was being loaded in the truck. CCC recognized that a neutral interlock system was an important safety feature of the truck. That system was part of the transmission system, which was serviced by Advanced. At trial, Advanced acknowledged that when the truck was road tested in November 2006, some six months prior to the accident, CCC should have been informed if a neutral interlock system was not working or not present, since this was one of the primary safety features of the truck.
>
> The evidence indicated that Advance and CCC recognized that the neutral interlock system was an important safety feature. Further, it is clear from the record that Advance and CCC recognized that this safety feature's primary benefit was to CCC's employees who loaded the garbage trucks. Accordingly, it could be inferred that the decedent was a third-party beneficiary of the contractual relationship between CCC and Advanced. **Vargas v Crown Container Co., Inc., 2017 NY Slip Op 08297, Second Dept 11-22-17**

NEGLIGENCE (SLIP AND FALL, THICKNESS OF THE ICE RAISED A QUESTION OF FACT ABOUT CONSTRUCTIVE NOTICE IN THIS SIDEWALK SLIP AND FALL CASE, PROMISE TO PURCHASE LIABILITY INSURANCE IS NOT THE SAME AS A PROMISE TO INDEMNIFY (THIRD DEPT))/SLIP AND FALL (THICKNESS OF THE ICE RAISED A QUESTION OF FACT ABOUT CONSTRUCTIVE NOTICE IN THIS SIDEWALK SLIP AND FALL CASE, PROMISE TO PURCHASE LIABILITY INSURANCE IS NOT THE SAME AS A PROMISE TO INDEMNIFY (THIRD DEPT))/SIDEWALKS (SLIP AND FALL, THICKNESS OF THE ICE RAISED A QUESTION OF FACT ABOUT CONSTRUCTIVE NOTICE IN THIS SIDEWALK SLIP AND FALL CASE, PROMISE TO PURCHASE LIABILITY INSURANCE IS NOT THE SAME AS A PROMISE TO INDEMNIFY (THIRD DEPT))/INSURANCE LAW (SLIP AND FALL, PROMISE TO PURCHASE LIABILITY INSURANCE IS NOT THE SAME AS A PROMISE TO INDEMNIFY (THIRD DEPT))

NEGLIGENCE, CONTRACT LAW, INSURANCE LAW.

THICKNESS OF THE ICE RAISED A QUESTION OF FACT ABOUT CONSTRUCTIVE NOTICE IN THIS SIDEWALK SLIP AND FALL CASE, PROMISE TO PURCHASE LIABILITY INSURANCE IS NOT THE SAME AS A PROMISE TO INDEMNIFY (THIRD DEPT).

The Third Department determined defendant property maintenance company's motion for summary judgment in this ice slip and fall case was properly denied. Plaintiff's testimony about the thickness of the ice raised a question of fact whether defendant had constructive notice of it. The property owner's motion for summary judgment on the breach of contract action against the property maintenance company was properly granted. In the contract, the property maintenance company agreed to purchase liability insurance, which it did not do. An agreement to purchase insurance is not the same as a promise to indemnify and an action on the agreement need not await a judgment in the slip and fall case:

> ... [T]he record ... includes plaintiff's testimony that there was no lighting in the sidewalk area and no witness was able to contradict her account that there was ice in the area at the time that she fell. Further, there was no proof that anyone had performed a routine inspection of the area after 7:00 a.m. on the day of her alleged fall, i.e., at any time within 10 hours of the fall, but also no proof that there had been further accumulation of snow after the snowfall the day before. ... [I]t is clear that plaintiff raised a triable issue of fact with regard to whether defendant had constructive notice of any dangerous conditions... . The key question to be resolved by the trier of fact is whether, during this 10-hour lapse of time ... there was further precipitation that created a dangerous or unsafe condition on the sidewalk and, if so, whether there was sufficient time for defendant[s] ... "to reasonably have discovered and remedied it" ... .Plaintiff's description of the thickness and extent of ice on the sidewalk, if accepted, is relevant to the factual question of how long it was present and whether it was visible and apparent such that it would have been discovered upon routine inspection, with sufficient time to remedy it ... . **Calvitti v 40 Garden, LLC, 2017 NY Slip Op 08241, Third Dept 11-22-17**

NEGLIGENCE (PRIMARY ASSUMPTION OF RISK PRECLUDED RECOVERY FOR INJURY DURING GYM CLASS, INHERENT COMPULSION DOCTRINE INAPPLICABLE (SECOND DEPT))/EDUCATION-SCHOOL LAW (PRIMARY ASSUMPTION OF RISK PRECLUDED RECOVERY FOR INJURY DURING GYM CLASS, INHERENT COMPULSION DOCTRINE INAPPLICABLE (SECOND DEPT))/ASSUMPTION OF RISK (EDUCATION-SCHOOL LAW, PRIMARY ASSUMPTION OF RISK PRECLUDED RECOVERY FOR INJURY DURING GYM CLASS, INHERENT COMPULSION DOCTRINE INAPPLICABLE (SECOND DEPT))/INHERENT COMPULSION DOCTRINE (EDUCATION-SCHOOL LAW, ASSUMPTION OF RISK, PRIMARY ASSUMPTION OF RISK PRECLUDED RECOVERY FOR INJURY DURING GYM CLASS, INHERENT COMPULSION DOCTRINE INAPPLICABLE (SECOND DEPT))/GYM CLASS EDUCATION-SCHOOL LAW, ASSUMPTION OF RISK, PRIMARY ASSUMPTION OF RISK PRECLUDED RECOVERY FOR INJURY DURING GYM CLASS, INHERENT COMPULSION DOCTRINE INAPPLICABLE (SECOND DEPT))

NEGLIGENCE, EDUCATION-SCHOOL LAW.

PRIMARY ASSUMPTION OF RISK PRECLUDED RECOVERY FOR INJURY DURING GYM CLASS, INHERENT COMPULSION DOCTRINE INAPPLICABLE (SECOND DEPT).

The Second Department determined plaintiff's negligence cause of action against the school district and another student were properly dismissed under the doctrine of primary assumption of risk. Plaintiff, a student, was injured in a basketball game during gym class when he was allegedly kicked by the student defendant. Plaintiff chose to play basketball among other possible activities. Therefore he could not take advantage of the "inherent compulsion" doctrine. Plaintiff's assertion at the 50-h hearing that he was intentionally kicked did not raise a question of fact because the pleadings did not include an intentional tort or any mention of intentional conduct:

> 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 plaintiff voluntarily engaged in the activity of basketball and was aware of the risks inherent in the activity, including the possibility of contact or collision with other participants... ...
>
> Also contrary to the plaintiff's contention, he did not raise a triable issue of fact as to the application of the inherent compulsion doctrine, which "provides that the defense of assumption of the risk is not a shield from liability, even where the injured party acted despite obvious and evident risks, when the element of voluntariness is overcome by the compulsion of a superior" ... . The plaintiff testified at his deposition that he chose to play basketball from a number of options. Consequently, the inherent compulsion doctrine is inapplicable ... . **Hanson v Sewanhaka Cent. High Sch. Dist., 2017 NY Slip Op 07711, Second Dept 11-8-17**

NEGLIGENCE (SUPERVISION, SCHOOLS, STUDENT WITH CEREBRAL PALSY COLLIDED WITH ANOTHER STUDENT DURING A SUPERVISED GAME, SUPERVISION WAS ADEQUATE AND INJURY WAS DUE TO A SPONTANEOUS ACT WHICH SUPERVISION COULD NOT PREVENT, SCHOOL'S SUMMARY JUDGMENT MOTION PROPERLY GRANTED (SECOND DEPT))/EDUCATION-SCHOOL LAW (NEGLIGENT SUPERVISION, STUDENT WITH CEREBRAL PALSY COLLIDED WITH ANOTHER STUDENT DURING A SUPERVISED GAME, SUPERVISION WAS ADEQUATE AND INJURY WAS DUE TO A SPONTANEOUS ACT WHICH SUPERVISION COULD NOT PREVENT, SCHOOL'S SUMMARY JUDGMENT MOTION PROPERLY GRANTED (SECOND DEPT))/NEGLIGENT SUPERVISION (EDUCATION-SCHOOL LAW, STUDENT WITH CEREBRAL PALSY COLLIDED WITH ANOTHER STUDENT DURING A SUPERVISED GAME, SUPERVISION WAS ADEQUATE AND INJURY WAS DUE TO A SPONTANEOUS ACT WHICH SUPERVISION COULD NOT PREVENT, SCHOOL'S SUMMARY JUDGMENT MOTION PROPERLY GRANTED (SECOND DEPT))

NEGLIGENCE, EDUCATION-SCHOOL LAW.

STUDENT WITH CEREBRAL PALSY COLLIDED WITH ANOTHER STUDENT DURING A SUPERVISED GAME, SUPERVISION WAS ADEQUATE AND INJURY WAS DUE TO A SPONTANEOUS ACT WHICH SUPERVISION COULD NOT PREVENT, SCHOOL'S SUMMARY JUDGMENT MOTION PROPERLY GRANTED (SECOND DEPT).

The Second Department determined the complaint in this negligent supervision case was properly dismissed. The student plaintiff had cerebral palsy and was being supervised at recess by an aide who was ten feet aware. The student was playing a game which was supervised by an athletic director when the student plaintiff and another student collided:

> The infant plaintiff ... [alleged] that the defendants were negligent in failing to provide adequate supervision, and in allowing the infant plaintiff to participate in the wall ball game. ... [T]he defendants moved for summary judgment ... contending that they provided adequate supervision to the children during recess, that the infant plaintiff's Individualized Education Plan did not restrict him from playing during recess, and that ... any alleged failure to provide adequate supervision was not a proximate cause of the infant plaintiff's injuries because the collision occurred suddenly and unexpectedly.
>
> "Schools are under a duty to adequately supervise the students in their charge and they will be held liable for foreseeable injuries proximately related to the absence of adequate supervision"... . Schools are not, however, insurers of their students' safety, and may not be held liable " for every thoughtless or careless act by which one pupil may injure another'" ... . Moreover, when an accident occurs in so short a span of time that even the most intense supervision could not have prevented it, any lack of supervision is not a proximate cause of the injury ... .
>
> Here, the defendants ... [demonstrated] that they provided adequate supervision to the infant plaintiff during recess... and, in any event, that the accident was caused by a sudden and spontaneous collision which could not have been prevented by more intense supervision ... . **Tzimopoulos v Plainview-Old Bethpage Cent. Sch. Dist., 2017 NY Slip Op 08296, Second Dept 11-22-17**

NEGLIGENCE (SLIP AND FALL, INADEQUATE LIGHTING, DEFENDANTS FAILED TO ELIMINATE QUESTIONS OF FACT RE WHETHER INADEQUATE ILLUMINATION WAS A PROXIMATE CAUSE OF PLAINTIFF'S DECEDENT'S STAIRWAY FALL (FIRST DEPT))/SLIP AND FALL (INADEQUATE LIGHTING, DEFENDANTS FAILED TO ELIMINATE QUESTIONS OF FACT RE WHETHER INADEQUATE ILLUMINATION WAS A PROXIMATE CAUSE OF PLAINTIFF'S DECEDENT'S STAIRWAY FALL (FIRST DEPT))/LIGHTING (SLIP AND FALL, INADEQUATE LIGHTING, DEFENDANTS FAILED TO ELIMINATE QUESTIONS OF FACT RE WHETHER INADEQUATE ILLUMINATION WAS A PROXIMATE CAUSE OF PLAINTIFF'S DECEDENT'S STAIRWAY FALL (FIRST DEPT))/ILLUMINATION (SLIP AND FALL, INADEQUATE LIGHTING, DEFENDANTS FAILED TO ELIMINATE QUESTIONS OF FACT RE WHETHER INADEQUATE ILLUMINATION WAS A PROXIMATE CAUSE OF PLAINTIFF'S DECEDENT'S STAIRWAY FALL (FIRST DEPT))/INADEQUATE LIGHTING (SLIP AND FALL, DEFENDANTS FAILED TO ELIMINATE QUESTIONS OF FACT RE WHETHER INADEQUATE ILLUMINATION WAS A PROXIMATE CAUSE OF PLAINTIFF'S DECEDENT'S STAIRWAY FALL (FIRST DEPT))/STAIRWAY (SLIP AND FALL, INADEQUATE LIGHTING, DEFENDANTS FAILED TO ELIMINATE QUESTIONS OF FACT RE WHETHER INADEQUATE ILLUMINATION WAS A PROXIMATE CAUSE OF PLAINTIFF'S DECEDENT'S STAIRWAY FALL (FIRST DEPT))/EVIDENCE (NEGLIGENCE, SLIP AND FALL, PROXIMATE CAUSE, DEFENDANTS FAILED TO ELIMINATE QUESTIONS OF FACT RE WHETHER INADEQUATE ILLUMINATION WAS A PROXIMATE CAUSE OF PLAINTIFF'S DECEDENT'S STAIRWAY FALL (FIRST DEPT))/PROXIMATE CASE (SLIP AND FALL, INADEQUATE LIGHTING, DEFENDANTS FAILED TO ELIMINATE QUESTIONS OF FACT RE WHETHER INADEQUATE ILLUMINATION WAS A PROXIMATE CAUSE OF PLAINTIFF'S DECEDENT'S STAIRWAY FALL (FIRST DEPT))/SPOLIATION (SLIP AND FALL, VIDEO DESTROYED, INADEQUATE LIGHTING, DEFENDANTS FAILED TO ELIMINATE QUESTIONS OF FACT RE WHETHER INADEQUATE ILLUMINATION WAS A PROXIMATE CAUSE OF PLAINTIFF'S DECEDENT'S STAIRWAY FALL (FIRST DEPT))/VIDEO (SPOLIATION, SLIP AND FALL, VIDEO DESTROYED, INADEQUATE LIGHTING, DEFENDANTS FAILED TO ELIMINATE QUESTIONS OF FACT RE WHETHER INADEQUATE ILLUMINATION WAS A PROXIMATE CAUSE OF PLAINTIFF'S DECEDENT'S STAIRWAY FALL (FIRST DEPT))

NEGLIGENCE, EVIDENCE.

DEFENDANTS FAILED TO ELIMINATE QUESTIONS OF FACT RE WHETHER INADEQUATE ILLUMINATION WAS A PROXIMATE CAUSE OF PLAINTIFF'S DECEDENT'S STAIRWAY FALL (FIRST DEPT).

The First Department, in a full-fledged opinion by Justice Renwick, over a dissenting opinion, determined plaintiff properly survived defendants' summary judgment motion in this stairway fall case. Plaintiff's decedent died before he was deposed. There was a video of the fall but it was destroyed after decedent's daughter requested a copy of it. The motion court held plaintiff was entitled to an adverse inference. The complaint alleged the cause of the fall was inadequate illumination and submitted a supporting affidavit by an expert:

> The dissent contends ... that the issue of proximate cause must be decided as matter of law in favor of defendants because "none of [the witness to the accident or who reviewed the videotape of the accident] claimed that the decedent misstepped or lost his balance due to inadequate lighting." The law, however, does not apply such a stringent requirement. To be sure, a plaintiff's inability to identify the cause of a fall is fatal to an action because a finding that the defendant's negligence proximately caused a plaintiff's injuries would be based on speculation ... . However, this simply requires that the evidence identifies the defect or hazard itself and provides sufficient facts and circumstances from which causation may be reasonably inferred ... .
>
> The dissent cannot and does not dispute that inadequate lighting itself may constitute a dangerous condition where the inadequacy of lighting renders the appearance of premises deceptive. Such deception occurs by the illusion that two areas of the same premises are on the same level whereas, in fact, there is a change in floor level to which the available lighting does not call sufficient attention.
>
> ... [W]e find that the evidence adduced by defendants failed to eliminate all issues of fact as to whether this alleged dangerous condition on the subject stairway contributed to the decedent's fall. **Haibi v 790 Riverside Dr. Owners, Inc., 2017 NY Slip Op 08102, First Dept 11-16-17**

NEGLIGENCE (SLIP AND FALL, PROOF OF GENERAL CLEANING PRACTICES DID NOT DEMONSTRATE LACK OF NOTICE IN THIS SLIP AND FALL CASE, NEGLIGENT LOSS OF VIDEO WARRANTED AN ADVERSE INFERENCE CHARGE (SECOND DEPT))/SLIP AND FALL (PROOF OF GENERAL CLEANING PRACTICES DID NOT DEMONSTRATE LACK OF NOTICE IN THIS SLIP AND FALL CASE, NEGLIGENT LOSS OF VIDEO WARRANTED AN ADVERSE INFERENCE CHARGE (SECOND DEPT))/EVIDENCE (SPOLIATION, SLIP AND FALL, PROOF OF GENERAL CLEANING PRACTICES DID NOT DEMONSTRATE LACK OF NOTICE IN THIS SLIP AND FALL CASE, NEGLIGENT LOSS OF VIDEO WARRANTED AN ADVERSE INFERENCE CHARGE (SECOND DEPT)/SPOLIATION (SLIP AND FALL, VIDEO, PROOF OF GENERAL CLEANING PRACTICES DID NOT DEMONSTRATE LACK OF NOTICE IN THIS SLIP AND FALL CASE, NEGLIGENT LOSS OF VIDEO WARRANTED AN ADVERSE INFERENCE CHARGE (SECOND DEPT))/VIDEO (SLIP AND FALL, SPOLIATION, PROOF OF GENERAL CLEANING PRACTICES DID NOT DEMONSTRATE LACK OF NOTICE IN THIS SLIP AND FALL CASE, NEGLIGENT LOSS OF VIDEO WARRANTED AN ADVERSE INFERENCE CHARGE (SECOND DEPT))

NEGLIGENCE, EVIDENCE.

PROOF OF GENERAL CLEANING PRACTICES DID NOT DEMONSTRATE LACK OF NOTICE IN THIS SLIP AND FALL CASE, NEGLIGENT LOSS OF VIDEO WARRANTED AN ADVERSE INFERENCE CHARGE (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendant store's (Me-Me's) motion for summary judgment in this slip and fall case should not have been granted and plaintiff was entitled to an adverse inference charge because a video of the fall had been negligently LOST. Plaintiff alleged she stepped on a grape. Defendant did not demonstrate a lack of notice by submitting evidence of its general cleaning practices:

> "In a premises liability case, a defendant property owner, or a party in possession or control of real property, who moves for summary judgment has the initial burden of making a prima facie showing that it neither created the alleged defective condition nor had actual or constructive notice of its existence"... . To provide constructive notice, "a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit defendant's employees to discover and remedy it" ... . "To meet its initial burden on the issue of lack of constructive notice, the defendant must offer some evidence as to when the area in question was last cleaned or inspected relative to the time when the plaintiff fell" ... . "Reference to general cleaning practices is insufficient to establish a lack of constructive notice in the absence of evidence regarding specific cleaning or inspection of the area in question" ... . * * *
>
> Since Me-Me's loss of the video recording was negligent rather than intentional, and the loss of the recording does not completely deprive the plaintiff of the ability to prove her case, the appropriate sanction is to direct that an adverse inference charge be given at trial with respect to the unavailable recording ... . **Eksarko v Associated Supermarket, 2017 NY Slip Op 07975, Second Dept 11-15-17**

NEGLIGENCE (TRAFFIC ACCIDENTS, PLAINTIFF'S CROSSING IN FRONT OF DEFENDANT DRIVER IN AN ATTEMPT TO MAKE A RIGHT TURN FROM THE CENTER LANE VIOLATED THE VEHICLE AND TRAFFIC LAW AND CONSTITUTED THE SOLE PROXIMATE CAUSE OF THE TRAFFIC ACCIDENT, PLAINTIFF'S OPPOSING PAPERS RAISED ONLY FEIGNED ISSUES OF FACT (SECOND DEPT))/TRAFFIC ACCIDENTS (NEGLIGENCE, PLAINTIFF'S CROSSING IN FRONT OF DEFENDANT DRIVER IN AN ATTEMPT TO MAKE A RIGHT TURN FROM THE CENTER LANE VIOLATED THE VEHICLE AND TRAFFIC LAW AND CONSTITUTED THE SOLE PROXIMATE CAUSE OF THE TRAFFIC ACCIDENT, PLAINTIFF'S OPPOSING PAPERS RAISED ONLY FEIGNED ISSUES OF FACT (SECOND DEPT))/EVIDENCE (TRAFFIC ACCIDENTS, SUMMARY JUDGMENT, PLAINTIFF'S CROSSING IN FRONT OF DEFENDANT DRIVER IN AN ATTEMPT TO MAKE A RIGHT TURN FROM THE CENTER LANE VIOLATED THE VEHICLE AND TRAFFIC LAW AND CONSTITUTED THE SOLE PROXIMATE CAUSE OF THE TRAFFIC ACCIDENT, PLAINTIFF'S OPPOSING PAPERS RAISED ONLY FEIGNED ISSUES OF FACT (SECOND DEPT))/VEHICLE AND TRAFFIC LAW (NEGLIGENCE, TRAFFIC ACCIDENTS, SUMMARY JUDGMENT, PLAINTIFF'S CROSSING IN FRONT OF DEFENDANT DRIVER IN AN ATTEMPT TO MAKE A RIGHT TURN FROM THE CENTER LANE VIOLATED THE VEHICLE AND TRAFFIC LAW AND CONSTITUTED THE SOLE PROXIMATE CAUSE OF THE TRAFFIC ACCIDENT, PLAINTIFF'S OPPOSING PAPERS RAISED ONLY FEIGNED ISSUES OF FACT (SECOND DEPT))

NEGLIGENCE, EVIDENCE.

PLAINTIFF'S CROSSING IN FRONT OF DEFENDANT DRIVER IN AN ATTEMPT TO MAKE A RIGHT TURN FROM THE CENTER LANE VIOLATED THE VEHICLE AND TRAFFIC LAW AND CONSTITUTED THE SOLE PROXIMATE CAUSE OF THE TRAFFIC ACCIDENT, PLAINTIFF'S OPPOSING PAPERS RAISED ONLY FEIGNED ISSUES OF FACT (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendants' motion for summary judgment in this traffic accident case should have been granted. Defendants were in the far right lane when plaintiff attempted to turn right from the center lane, crossing in front of defendants:

> [The] evidence demonstrated, prima facie, that the plaintiff violated Vehicle and Traffic Law §§ 1128(a) and 1163, and that defendant driver was free from fault in the happening of the accident ... . This evidence also demonstrated, prima facie, that the plaintiff's actions were the sole proximate cause of the subject accident.
>
> In opposition, the plaintiff failed to raise a triable issue of fact. The plaintiff's affidavit, which contradicted admissions he made in the certified motor vehicle report, was insufficient to defeat the defendants' motion for summary judgment because it merely raised what appear to be feigned issues of fact ... . **Park v Sanchez, 2017 NY Slip Op 08279, Second Dept 11-22-16**

NEGLIGENCE (LANDLORD-TENANT, LEASE WITH PLAINTIFF'S EMPLOYER DID NOT REQUIRE LANDLORD TO MAINTAIN THE YARD OUTSIDE THE BUILDING, PLAINTIFF WAS INJURED WHEN HE STEPPED INTO A HOLE DUG BY PLAINTIFF'S EMPLOYER IN THE YARD, LANDLORD'S MOTION FOR SUMMARY JUDGMENT PROPERLY GRANTED (FIRST DEPT))/LANDLORD-TENANT (NEGLIGENCE, LEASE WITH PLAINTIFF'S EMPLOYER DID NOT REQUIRE LANDLORD TO MAINTAIN THE YARD OUTSIDE THE BUILDING, PLAINTIFF WAS INJURED WHEN HE STEPPED INTO A HOLE DUG BY PLAINTIFF'S EMPLOYER IN THE YARD, LANDLORD'S MOTION FOR SUMMARY JUDGMENT PROPERLY GRANTED (FIRST DEPT))

NEGLIGENCE, LANDLORD-TENANT.

LEASE WITH PLAINTIFF'S EMPLOYER DID NOT REQUIRE LANDLORD TO MAINTAIN THE YARD OUTSIDE THE BUILDING, PLAINTIFF WAS INJURED WHEN HE STEPPED INTO A HOLE DUG BY PLAINTIFF'S EMPLOYER IN THE YARD, LANDLORD'S MOTION FOR SUMMARY JUDGMENT PROPERLY GRANTED (FIRST DEPT).

The First Department determined the defendant landlord's motion for summary judgment was properly granted in this personal injury action. The property was leased to plaintiff's employer. Plaintiff's employer was doing construction work in the yard outside the building. Plaintiff fell into a hole dug by his employer in the yard. The lease imposed repair responsibilities on the landlord for the building only, not the yard:

> The subject lease provided that defendant "shall maintain and repair the public portions of the building, both interior and exterior [and that]. . .[t]enant shall, throughout the term of this lease, take good care of the demised premises. . .and at its sole cost and expense, make all non-structural repairs. . .when needed to preserve them in good working order and condition." Here, testimony established that the accident did not occur in a public portion of the building, but rather in the backyard that was exclusively controlled by plaintiff's employer, thereby not implicating an area that defendant had retained the responsibility to maintain ... . Similarly, the evidence demonstrated that, in actual practice, defendant did nothing to show that it had the authority to maintain or repair the accident premises ... .
>
> Furthermore, although the lease states that defendant had the right to reenter the premises to make repairs, plaintiff has failed to show that defendant violated a specific statutory safety provision, or that the hole in which he stepped was a structural defect ... .
>
> Plaintiff's reference to an OSHA provision that was allegedly violated by defendant is unavailing, because defendant was not plaintiff's employer ... . **Martinez v 3801 Equity Co., LLC, 2017 NY Slip Op 07938, First Dept 11-14-17**

NEGLIGENCE (LANDLORD-TENANT, LANDLORD DID NOT HAVE A DUTY TO INSULATE A PIPE BECAUSE IT WAS PART OF THE HEATING SYSTEM, INFANT PLAINTIFF WAS INJURED BY CONTACT WITH THE HOT PIPE (FIRST DEPT))/LANDLORD-TENANT (NEGLIGENCE, LANDLORD DID NOT HAVE A DUTY TO INSULATE A PIPE BECAUSE IT WAS PART OF THE HEATING SYSTEM, INFANT PLAINTIFF WAS INJURED BY CONTACT WITH THE HOT PIPE (FIRST DEPT))/HEATING SYSTEMS (LANDLORD-TENANT, LANDLORD DID NOT HAVE A DUTY TO INSULATE A PIPE BECAUSE IT WAS PART OF THE HEATING SYSTEM, INFANT PLAINTIFF WAS INJURED BY CONTACT WITH THE HOT PIPE (FIRST DEPT))

NEGLIGENCE, LANDLORD-TENANT.

LANDLORD DID NOT HAVE A DUTY TO INSULATE A PIPE BECAUSE IT WAS PART OF THE HEATING SYSTEM, INFANT PLAINTIFF WAS INJURED BY CONTACT WITH THE HOT PIPE (FIRST DEPT).

The First Department determined the landlord was not required to insulate the pipe leading to the radiator because the pipe was part of the heating system (which would have been impeded by insulation). Therefore the personal injury action stemming from infant plaintiff's contact with the hot pipe was properly dismissed:

> Dismissal of the complaint was warranted in this action for personal injuries sustained when infant plaintiff slipped off the bed and fell against hot pipes that conveyed steam to the radiators in the apartment. The court properly concluded that defendant did not violate its common-law duty to plaintiffs in failing to insulate the hot pipes ... . Plaintiffs argue that because the pipes were not the primary source of heat to the apartment, insulation would not have interfered with the functionality of the heating system ... . However, even plaintiffs' expert acknowledged that the pipes were part of the heating system and supplied some heat to the room. **P.R. v New York City Hous. Auth., 2017 NY Slip Op 07955, First Dept 11-14-17**

NEGLIGENCE (OUT OF POSSESSION LANDLORD, THIRD PARTY ASSAULT, OUT OF POSSESSION LANDLORD NOT LIABLE FOR INJURY TO PLAINTIFF WHO WAS SHOT ON THE SIDEWALK OUTSIDE THE LESSEE'S BAR (FIRST DEPT))/ASSAULT, THIRD PARTY (CIVIL, OUT OF POSSESSION LANDLORD NOT LIABLE FOR INJURY TO PLAINTIFF WHO WAS SHOT ON THE SIDEWALK OUTSIDE THE LESSEE'S BAR (FIRST DEPT))/LANDLORD-TENANT (NEGLIGENCE, THIRD PARTY ASSAULT, OUT OF POSSESSION LANDLORD NOT LIABLE FOR INJURY TO PLAINTIFF WHO WAS SHOT ON THE SIDEWALK OUTSIDE THE LESSEE'S BAR (FIRST DEPT))/OUT OF POSSESSION LANDLORD (NEGLIGENCE, THIRD PARTY ASSAULT, OUT OF POSSESSION LANDLORD NOT LIABLE FOR INJURY TO PLAINTIFF WHO WAS SHOT ON THE SIDEWALK OUTSIDE THE LESSEE'S BAR (FIRST DEPT))

NEGLIGENCE, LANDLORD-TENANT.

OUT OF POSSESSION LANDLORD NOT LIABLE FOR INJURY TO PLAINTIFF WHO WAS SHOT ON THE SIDEWALK OUTSIDE THE LESSEE'S BAR (FIRST DEPT).

The First Department determined the out-of-possession landlord (AIMCO) was not liable for plaintiff's injury from a shooting on the sidewalk outside a bar (PJ's)i n the landlord's building:

> Dismissal of the complaint as against AIMCO was proper in this action for personal injuries sustained by plaintiff when, while standing on the sidewalk outside a bar owned and operated by codefendant [PJ's], he was shot in the

foot. The record demonstrates that AIMCO owned the commercial space and had leased it to PJ's, and as a premises owner, AIMCO cannot be held liable in negligence for an assault that occurred on a public street over which it exercised no control ... .

AIMCO also owed plaintiff no duty of care to prevent the incident since the evidence showed that AIMCO was an out-of-possession landlord when the shooting happened ... and while it had the right to reenter the premises for the purpose of effecting repairs, there is no evidence that it retained control over the premises or was involved with how PJ's operated its bar ... .The 2009 stipulation of settlement between nonparty City of New York, AIMCO and PJ's regarding a public nuisance action fails to raise a triable issue, because it expired by its own terms before the shooting and did not require AIMCO to do anything with regard to how the bar was being operated. **Ballo v AIMCO 2252-2258 ACP, LLC, 2017 NY Slip Op 08443, First Dept 11-3017**

NEGLIGENCE (OUT OF POSSESSION LANDLORD (NYC HOUSING AUTHORITY) DEMONSTRATED IT DID NOT HAVE NOTICE OF A DEFECTIVE WINDOW WHICH ALLEGEDLY SLAMMED SHUT SEVERING A PORTION OF PLAINTIFF'S FINGER, LANDLORD'S MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED (SECOND DEPT))/LANDLORD-TENANT (OUT OF POSSESSION LANDLORD (NYC HOUSING AUTHORITY) DEMONSTRATED IT DID NOT HAVE NOTICE OF A DEFECTIVE WINDOW WHICH ALLEGEDLY SLAMMED SHUT SEVERING A PORTION OF PLAINTIFF'S FINGER, LANDLORD'S MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED (SECOND DEPT))/MUNICIPAL LAW (LANDLORD-TENANT, NEGLIGENCE, OUT OF POSSESSION LANDLORD (NYC HOUSING AUTHORITY) DEMONSTRATED IT DID NOT HAVE NOTICE OF A DEFECTIVE WINDOW WHICH ALLEGEDLY SLAMMED SHUT SEVERING A PORTION OF PLAINTIFF'S FINGER, LANDLORD'S MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED (SECOND DEPT))/NOTICE OF CLAIM (MUNICIPAL LAW, THEORIES NOT INCLUDED IN NOTICE OF CLAIM PROPERLY DISMISSED (SECOND DEPT))

NEGLIGENCE, LANDLORD-TENANT, MUNICIPAL LAW.

OUT OF POSSESSION LANDLORD (NYC HOUSING AUTHORITY) DEMONSTRATED IT DID NOT HAVE NOTICE OF A DEFECTIVE WINDOW WHICH ALLEGEDLY SLAMMED SHUT SEVERING A PORTION OF PLAINTIFF'S FINGER, LANDLORD'S MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendant out-of-possession landlord (NYC Housing Authority) should have been granted summary judgment in this personal injury action. Plaintiff alleged a window in his apartment failed to stay open and slammed shut, severing a portion of a finger. Apparently a window had been repaired by the landlord about a year before, but no subsequent complaints about windows were made:

"An out-of-possession landlord that has assumed the obligation to make repairs to its property cannot be held liable for injuries caused by a defective condition at the property unless it either created the condition or had actual or constructive notice of it" ... . Here, with respect to the negligent maintenance claim, the defendant established its prima facie entitlement to judgment as a matter of law by demonstrating that it did not create the alleged injury-producing condition or have actual or constructive notice of the condition ... . The evidence showed that, more than one year prior to the incident, a window in the living room of the subject apartment had been repaired following an inspection by the defendant, and that there had been no complaints about the windows in the apartment following the repair. In opposition, the plaintiff failed to raise a triable issue of fact ... .

The defendant also established its prima facie entitlement to judgment as a matter of law dismissing the remaining theories of liability by demonstrating that they had not been included in the notice of claim ... . **Cotto v New York City Hous. Auth., 2017 NY Slip Op 08258, Second Dept 11-22-17**

NEGLIGENCE (DENTAL MALPRACTICE, DESPITE PLAINTIFF'S SIGNING A CONSENT FORM, DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON THE LACK OF INFORMED CONSENT CAUSE OF ACTION PROPERLY DENIED, PLAINTIFF ALLEGED THE WRONG TOOTH WAS EXTRACTED (SECOND DEPT))/MEDICAL MALPRACTICE (LACK OF INFORMED CONSENT, DENTAL MALPRACTICE, DESPITE PLAINTIFF'S SIGNING A CONSENT FORM, DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON THE LACK OF INFORMED CONSENT CAUSE OF ACTION PROPERLY DENIED, PLAINTIFF ALLEGED THE WRONG TOOTH WAS EXTRACTED (SECOND DEPT))/DENTAL MALPRACTICE (LACK OF INFORMED CONSENT, DESPITE PLAINTIFF'S SIGNING A CONSENT FORM, DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON THE LACK OF INFORMED CONSENT CAUSE OF ACTION PROPERLY DENIED, PLAINTIFF ALLEGED THE WRONG TOOTH WAS EXTRACTED (SECOND DEPT))/INFORMED CONSENT (DENTAL MALPRACTICE, DESPITE PLAINTIFF'S SIGNING A CONSENT FORM, DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON THE LACK OF INFORMED CONSENT CAUSE OF ACTION PROPERLY DENIED, PLAINTIFF ALLEGED THE WRONG TOOTH WAS EXTRACTED (SECOND DEPT))

NEGLIGENCE, MEDICAL (DENTAL) MALPRACTICE.

DESPITE PLAINTIFF'S SIGNING A CONSENT FORM, DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON THE LACK OF INFORMED CONSENT CAUSE OF ACTION PROPERLY DENIED, PLAINTIFF ALLEGED THE WRONG TOOTH WAS EXTRACTED (SECOND DEPT).

The Second Department, affirming Supreme Court, determined defendants' motions for summary judgment on the lack of informed consent cause of action were properly denied. Plaintiff had signed a consent form but alleged the wrong tooth was extracted:

> "[L]ack of informed consent is a distinct cause of action requiring proof of facts not contemplated by an action based merely on allegations of negligence" ... . "To establish a cause of action for malpractice based on lack of informed consent, plaintiff must prove (1) that the person providing the professional treatment failed to disclose alternatives thereto and failed to inform the patient of reasonably foreseeable risks associated with the treatment, and the alternatives, that a reasonable medical practitioner would have disclosed in the same circumstances, (2) that a reasonably prudent patient in the same position would not have undergone the treatment if he or she had been fully informed, and (3) that the lack of informed consent is a proximate cause of the injury" ... . "The mere fact that the plaintiff signed a consent form does not establish the defendants' prima facie entitlement to judgment as a matter of law"... .
>
> ... Supreme Court properly determined that triable issues of fact precluded an award of summary judgment dismissing the cause of action alleging lack of informed consent insofar as asserted against them. The deposition testimony of the parties and the generic consent form signed by the plaintiff revealed a factual dispute as to whether the plaintiff was adequately informed about the extraction, namely which tooth would be removed... . In addition, each of the expert opinions submitted on the summary judgment motions was in agreement that a root canal was a viable alternative treatment to the extraction of tooth number four. Thus, there were triable issues of fact as to whether a reasonably prudent patient in the plaintiff's position would have undergone the extraction of tooth number four if he or she had been fully informed ... . **Godel v Goldstein, 2017 NY Slip Op 08260, Second Dept 11-22-17**

NEGLIGENCE (TRAFFIC ACCIDENTS, POLICE OFFICER DID NOT ACT IN RECKLESS DISREGARD FOR SAFETY IN THIS INTERSECTION ACCIDENT CASE, OFFICER WAS AUTHORIZED TO DRIVE THROUGH A RED LIGHT EVEN IF THE SIREN AND EMERGENCY LIGHTS WERE NOT ACTIVATED (FIRST DEPT))/MUNICIPAL LAW (POLICE OFFICERS, TRAFFIC ACCIDENTS, POLICE OFFICER DID NOT ACT IN RECKLESS DISREGARD FOR SAFETY IN THIS INTERSECTION ACCIDENT CASE, OFFICER WAS AUTHORIZED TO DRIVE THROUGH A RED LIGHT EVEN IF THE SIREN AND EMERGENCY LIGHTS WERE NOT ACTIVATED (FIRST DEPT))//VEHICLE AND TRAFFIC LAW (EMERGENCY OPERATION, POLICE OFFICER DID NOT ACT IN RECKLESS DISREGARD FOR SAFETY IN THIS INTERSECTION ACCIDENT CASE, OFFICER WAS AUTHORIZED TO DRIVE THROUGH A RED LIGHT EVEN IF THE SIREN AND EMERGENCY LIGHTS WERE NOT ACTIVATED (FIRST DEPT))/TRAFFIC ACCIDENTS (EMERGENCY OPERATION, POLICE OFFICER DID NOT ACT IN RECKLESS DISREGARD FOR SAFETY IN THIS INTERSECTION ACCIDENT CASE, OFFICER WAS AUTHORIZED TO DRIVE THROUGH A RED LIGHT EVEN IF THE SIREN AND EMERGENCY LIGHTS WERE NOT ACTIVATED (FIRST DEPT))/POLICE OFFICERS (TRAFFIC ACCIDENTS, POLICE OFFICER DID NOT ACT IN RECKLESS DISREGARD FOR SAFETY IN THIS INTERSECTION ACCIDENT CASE, OFFICER WAS AUTHORIZED TO DRIVE THROUGH A RED LIGHT EVEN IF THE SIREN AND EMERGENCY LIGHTS WERE NOT ACTIVATED (FIRST DEPT))/EMERGENCY OPERATION (TRAFFIC ACCIDENTS, POLICE OFFICER DID NOT ACT IN RECKLESS DISREGARD FOR SAFETY IN THIS INTERSECTION ACCIDENT CASE, OFFICER WAS AUTHORIZED TO DRIVE THROUGH A RED LIGHT EVEN IF THE SIREN AND EMERGENCY LIGHTS WERE NOT ACTIVATED (FIRST DEPT))/RECKLESS DISREGARD (TRAFFIC ACCIDENTS, POLICE OFFICER DID NOT ACT IN RECKLESS DISREGARD FOR SAFETY IN THIS INTERSECTION ACCIDENT CASE, OFFICER WAS AUTHORIZED TO DRIVE THROUGH A RED LIGHT EVEN IF THE SIREN AND EMERGENCY LIGHTS WERE NOT ACTIVATED (FIRST DEPT))/SIREN (TRAFFIC ACCIDENTS, POLICE OFFICER DID NOT ACT IN RECKLESS DISREGARD FOR SAFETY IN THIS INTERSECTION ACCIDENT CASE, OFFICER WAS AUTHORIZED TO DRIVE THROUGH A RED LIGHT EVEN IF THE SIREN AND EMERGENCY LIGHTS WERE NOT ACTIVATED (FIRST DEPT))/EMERGENCY LIGHTS (TRAFFIC ACCIDENTS, POLICE OFFICER DID NOT ACT IN RECKLESS DISREGARD FOR SAFETY IN THIS INTERSECTION ACCIDENT CASE, OFFICER WAS AUTHORIZED TO DRIVE THROUGH A RED LIGHT EVEN IF THE SIREN AND EMERGENCY LIGHTS WERE NOT ACTIVATED (FIRST DEPT))

NEGLIGENCE, MUNICIPAL LAW.

POLICE OFFICER DID NOT ACT IN RECKLESS DISREGARD FOR SAFETY IN THIS INTERSECTION ACCIDENT CASE, OFFICER WAS AUTHORIZED TO DRIVE THROUGH A RED LIGHT EVEN IF THE SIREN AND EMERGENCY LIGHTS WERE NOT ACTIVATED (FIRST DEPT).

The First Department determined the city's motion for summary judgment was properly dismissed in this traffic accident case involving a police car. The court held that the officer was engaged in an emergency operation when he went through a red light at an intersection and struck plaintiff's car. Even if the siren and emergency lights were not on, the officer was authorized to proceed through the intersection:

> Defendants' motion for summary judgment was properly granted since the record shows that defendant Kohler, a police officer, was operating a police vehicle while performing an emergency operation and did not recklessly disregard the safety of others before the accident happened ... . The fact that Koehler was mistaken in believing that plaintiff was stopping her vehicle when he proceeded to pass through the red light did not render his conduct reckless. Koehler testified that as he approached the intersection, he reduced his speed and looked left and right. He was traveling approximately 10 miles above the speed limit when the accident occurred. Koehler attempted to avoid colliding with plaintiff by braking hard and turning the steering wheel to the right upon realizing that plaintiff's vehicle had entered the intersection ... . The fact that there is a question as to whether the police vehicle's lights and siren were activated is not material because Koehler was not required to activate either of these devices in order to be entitled to the statutory privilege of passing through a red light ... . **Lewis v City of New York, 2017 NY Slip Op 07785, First Dept 11-9-17**

NEGLIGENCE (MUNICIPAL LAW, QUESTION OF FACT WHETHER THE RECKLESS DISREGARD OF SAFETY STANDARD WAS MET IN THIS FRONT-END LOADER ACCIDENT CASE, VILLAGE'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (THIRD DEPT))/MUNICIPAL LAW (NEGLIGENCE, QUESTION OF FACT WHETHER THE RECKLESS DISREGARD OF SAFETY STANDARD WAS MET IN THIS FRONT-END LOADER ACCIDENT CASE, VILLAGE'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (THIRD DEPT))/RECKLESS DISREGARD (MUNICIPAL LAW, QUESTION OF FACT WHETHER THE RECKLESS DISREGARD OF SAFETY STANDARD WAS MET IN THIS FRONT-END LOADER ACCIDENT CASE, VILLAGE'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (THIRD DEPT))/HIGHWAYS (MUNICIPAL LAW, QUESTION OF FACT WHETHER THE RECKLESS DISREGARD OF SAFETY STANDARD WAS MET IN THIS PARKING LOT FRONT-END LOADER ACCIDENT CASE, VILLAGE'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (THIRD DEPT))/PARKING LOTS (MUNICIPAL LAW, HIGHWAYS, QUESTION OF FACT WHETHER THE RECKLESS DISREGARD OF SAFETY STANDARD WAS MET IN THIS PARKING LOT FRONT-END LOADER ACCIDENT CASE, VILLAGE'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (THIRD DEPT))/VEHICLE AND TRAFFIC LAW (MUNICIPAL LAW, NEGLIGENCE, RECKLESS DISREGARD, QUESTION OF FACT WHETHER THE RECKLESS DISREGARD OF SAFETY STANDARD WAS MET IN THIS FRONT-END LOADER ACCIDENT CASE, VILLAGE'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (THIRD DEPT))

NEGLIGENCE, MUNICIPAL LAW.

QUESTION OF FACT WHETHER THE RECKLESS DISREGARD OF SAFETY STANDARD WAS MET IN THIS PARKING LOT FRONT-END LOADER ACCIDENT CASE, VILLAGE'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (THIRD DEPT).

The Third Department, reversing Supreme Court, determined the village's motion for summary judgment in this front-end loader/pedestrian accident case should not have been granted. Plaintiff was injured when the front-end loader backed up over her in a municipal parking lot at night. The parking lot was deemed a "highway" for purposes of the applicability of the "reckless disregard for safety" standard for machinery used in highway work. But the Third Department held there were questions of fact about whether the reckless disregard standard was met. The court noted that the usual safety precautions used during the day were not used at night, when the accident occurred:

> Vehicle and Traffic Law § 1103 (b) provides that the safety rules and regulations governing the operation of vehicles upon highways (i.e., the "rules of the road") will "not apply to persons, teams, motor vehicles, and other equipment while actually engaged in work on a highway . . . [or] to hazard vehicles while actually engaged in hazardous operation on or adjacent to a highway" . ... [T]he Legislature has provided vehicles engaged in such road work the benefit of a lesser standard of care ... — rather than having to establish ordinary negligence, an injured plaintiff seeking damages must instead demonstrate that "any person . . . [or] operator of a motor vehicle or other equipment while actually engaged in work on a highway" acted with a "reckless disregard for the safety of others" ... . * * *
>
> While we agree with Supreme Court that the [parking] lot constituted a highway so as to invoke the provisions of Vehicle and Traffic Law § 1103 (b), that determination, standing alone, did not serve to insulate defendants from all potential liability for their actions that evening and entitle them to summary judgment. ... Given [the] acknowledgment that the Village had a safety zone policy in place that called for the establishment of work zones when heavy machinery was being operated in parking lots during the daytime and chose not to implement it during nighttime operations, [the] candid testimony that a flagperson would have been helpful and may have been able to stop plaintiff before she crossed behind the loader and the lack of any admissible expert opinion dispositive of defendants' claim that it did not act with recklessness, defendants failed to establish their entitlement to summary judgment as a matter of law ... . **Freitag v Village of Potsdam, 2017 NY Slip Op 07919, Third Dept 11-9-17**

NEGLIGENCE (TEMPORARY ROAD WORK TRAFFIC CONTROL MAY HAVE FURNISHED THE CONDITION FOR THE ACCIDENT BUT WAS NOT THE PROXIMATE CAUSE OF THE DRIVER STRIKING THE PEDESTRIAN PLAINTIFF, SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED TO THE ROAD WORK DEFENDANTS (FOURTH DEPT))/TRAFFIC ACCIDENTS (PEDESTRIANS, (TEMPORARY ROAD WORK TRAFFIC CONTROL MAY HAVE FURNISHED THE CONDITION FOR THE ACCIDENT BUT WAS NOT THE PROXIMATE CAUSE OF THE DRIVER STRIKING THE PEDESTRIAN PLAINTIFF, SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED TO THE ROAD WORK DEFENDANTS (FOURTH DEPT))/PEDESTRIANS (TRAFFIC ACCIDENTS, TEMPORARY ROAD WORK TRAFFIC CONTROL MAY HAVE FURNISHED THE CONDITION FOR THE ACCIDENT BUT WAS NOT THE PROXIMATE CAUSE OF THE DRIVER STRIKING THE PEDESTRIAN PLAINTIFF, SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED TO THE ROAD WORK DEFENDANTS (FOURTH DEPT))/MUNICIPAL LAW (TRAFFIC ACCIDENTS, ROAD WORK, TEMPORARY ROAD WORK TRAFFIC CONTROL MAY HAVE FURNISHED THE CONDITION FOR THE ACCIDENT BUT WAS NOT THE PROXIMATE CAUSE OF THE DRIVER STRIKING THE PEDESTRIAN PLAINTIFF, SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED TO THE ROAD WORK DEFENDANTS (FOURTH DEPT))/TRAFFIC CONTROL (MUNICIPAL LAW, TRAFFIC ACCIDENTS, TEMPORARY ROAD WORK TRAFFIC CONTROL MAY HAVE FURNISHED THE CONDITION FOR THE ACCIDENT BUT WAS NOT THE PROXIMATE CAUSE OF THE DRIVER STRIKING THE PEDESTRIAN PLAINTIFF, SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED TO THE ROAD WORK DEFENDANTS (FOURTH DEPT))/PROXIMATE CAUSE (TRAFFIC ACCIDENTS, TEMPORARY ROAD WORK TRAFFIC CONTROL MAY HAVE FURNISHED THE CONDITION FOR THE ACCIDENT BUT WAS NOT THE PROXIMATE CAUSE OF THE DRIVER STRIKING THE PEDESTRIAN PLAINTIFF, SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED TO THE ROAD WORK DEFENDANTS (FOURTH DEPT))/HIGHWAYS (TEMPORARY ROAD WORK TRAFFIC CONTROL MAY HAVE FURNISHED THE CONDITION FOR THE ACCIDENT BUT WAS NOT THE PROXIMATE CAUSE OF THE DRIVER STRIKING THE PEDESTRIAN PLAINTIFF, SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED TO THE ROAD WORK DEFENDANTS (FOURTH DEPT))

NEGLIGENCE, MUNICIPAL LAW.

TEMPORARY ROAD WORK TRAFFIC CONTROL MAY HAVE FURNISHED THE CONDITION FOR THE ACCIDENT BUT WAS NOT THE PROXIMATE CAUSE OF THE DRIVER STRIKING THE PEDESTRIAN PLAINTIFF, SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED TO THE ROAD WORK DEFENDANTS (FOURTH DEPT))

The Fourth Department, reversing Supreme Court, determined the traffic control measures taken by the defendants doing work on or near a road furnished the condition for the accident but was not the proximate cause of the accident. Defendant driver swerved to avoid a rear-end collision with a car that made a sudden left turn. The driver struck plaintiff, who was standing in the parking lane getting ready to cross the street:

> Even assuming, arguendo, that the accident occurred within a "work zone" ,,, and defendants-appellants were negligent in the design and placement of temporary traffic control ... , ... we conclude that such negligence was not a proximate cause of the accident ... . "A showing of negligence is not enough; there must also be proof that the negligence was a proximate cause of the event that produced the harm" ... . We reject plaintiffs' contention that the temporary traffic control at the site was a proximate cause of the accident. Any negligence with respect to the construction work merely furnished the condition or occasion for plaintiff being struck by a vehicle while crossing the street and was not a proximate cause of the accident ... . **Gregory v Cavarello, 2017 NY Slip Op 07791, Fourth Dept 11-9-17**

NEGLIGENCE (MUNICIPAL LAW, ROAD SAFETY, ALTHOUGH THE DRIVER WAS INTOXICATED AND WAS DRIVING AT HIGH SPEED, DEFENDANT MUNICIPALITY DID NOT DEMONSTRATE THE FAILURE TO CLOSE THE PARK GATE AND THE FAILURE TO PROVIDE SPEED LIMIT AND ROAD-CURVE SIGNS DID NOT CONSTITUTE NEGLIGENCE, DEFENDANT'S SUMMARY JUDGMENT MOTION SHOULD NOT HAVE BEEN GRANTED (FOURTH DEPT))/MUNICIPAL LAW (NEGLIGENCE, ROAD SAFETY, ALTHOUGH THE DRIVER WAS INTOXICATED AND WAS DRIVING AT HIGH SPEED, DEFENDANT MUNICIPALITY DID NOT DEMONSTRATE THE FAILURE TO CLOSE THE PARK GATE AND THE FAILURE TO PROVIDE SPEED LIMIT AND ROAD-CURVE SIGNS DID NOT CONSTITUTE NEGLIGENCE, DEFENDANT'S SUMMARY JUDGMENT MOTION SHOULD NOT HAVE BEEN GRANTED (FOURTH DEPT))/HIGHWAYS AND ROADS (NEGLIGENCE, MUNICIPAL LAW, ROAD SAFETY, ALTHOUGH THE DRIVER WAS INTOXICATED AND WAS DRIVING AT HIGH SPEED, DEFENDANT MUNICIPALITY DID NOT DEMONSTRATE THE FAILURE TO CLOSE THE PARK GATE AND THE FAILURE TO PROVIDE SPEED LIMIT AND ROAD-CURVE SIGNS DID NOT CONSTITUTE NEGLIGENCE, DEFENDANT'S SUMMARY JUDGMENT MOTION SHOULD NOT HAVE BEEN GRANTED (FOURTH DEPT))/TRAFFIC ACCIDENTS (MUNICIPAL LAW, ROAD SAFETY, ALTHOUGH THE DRIVER WAS INTOXICATED AND WAS DRIVING AT HIGH SPEED, DEFENDANT MUNICIPALITY DID NOT DEMONSTRATE THE FAILURE TO CLOSE THE PARK GATE AND THE FAILURE TO PROVIDE SPEED LIMIT AND ROAD-CURVE SIGNS DID NOT CONSTITUTE NEGLIGENCE, DEFENDANT'S SUMMARY JUDGMENT MOTION SHOULD NOT HAVE BEEN GRANTED (FOURTH DEPT))

NEGLIGENCE, MUNICIPAL LAW.

ALTHOUGH THE DRIVER WAS INTOXICATED AND WAS DRIVING AT HIGH SPEED, DEFENDANT MUNICIPALITY DID NOT DEMONSTRATE THE FAILURE TO CLOSE THE PARK GATE AND THE FAILURE TO PROVIDE SPEED LIMIT AND ROAD-CURVE SIGNS DID NOT CONSTITUTE NEGLIGENCE, DEFENDANT'S SUMMARY JUDGMENT MOTION SHOULD NOT HAVE BEEN GRANTED (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, over a dissent, determined defendant's motion for summary judgment in this fatal car accident case should not have been granted. Plaintiffs' decedent was killed when the car in which he was a passenger entered a park at night and crashed after failing to negotiate a curve in the road. The driver, Benedict, was intoxicated and there was evidence the car was driven at high speed. Although a sign at the park indicated it was closed at dusk, the gate was open, there were no signs indicating an upcoming curve in the road, and there were no speed limit signs. The driver had never been on the road before:

> A municipality has a duty to maintain its roads in a reasonably safe condition "in order to guard against contemplated and foreseeable risks to motorists," including risks related to a driver's negligence or misconduct... . In other words, a municipality is not relieved of liability for failure to keep its roadways in a reasonably safe condition "whenever [an accident] involves driver error" ... . Defendant's duty to maintain the road was therefore not negated by Benedict's intoxication or the fact that the park was closed when the accident occurred ... , and we conclude that defendant did not establish as a matter of law that Benedict's presence under those circumstances was unforeseeable ... . Inasmuch as defendant presented no evidence that the road was reasonably safe at night in the absence of the safety measures proposed by plaintiffs, we conclude that defendant failed to establish as a matter of law that it was not negligent ... .
>
> We further agree with plaintiffs that the court erred in determining as a matter of law that Benedict's actions were the sole proximate cause of the accident. Although defendant presented evidence that Benedict was intoxicated and driving "at high speed," we conclude that its submissions did not establish as a matter of law that Benedict's manner of driving "would have been the same" if the safety measures proposed by plaintiffs had been in place ... . **Stiggins v Town of N. Dansville, 2017 NY Slip Op 08108, Fourth Dept 11-17-17**

PRODUCTS LIABILITY

PRODUCTS LIABILITY (PLAINTIFFS ENTITLED TO SUMMARY JUDGMENT ON THEIR DEFECTIVE DESIGN CAUSE OF ACTION IN THIS PRODUCTS LIABILITY CASE (FIRST DEPT))/NEGLIGENCE (PRODUCTS LIABILITY, PLAINTIFFS ENTITLED TO SUMMARY JUDGMENT ON THEIR DEFECTIVE DESIGN CAUSE OF ACTION IN THIS PRODUCTS LIABILITY CASE (FIRST DEPT))/DESIGN, DEFECTIVE (PRODUCTS LIABILITY, PLAINTIFFS ENTITLED TO SUMMARY JUDGMENT ON THEIR DEFECTIVE DESIGN CAUSE OF ACTION IN THIS PRODUCTS LIABILITY CASE (FIRST DEPT))

PRODUCTS LIABILITY, NEGLIGENCE.

PLAINTIFFS ENTITLED TO SUMMARY JUDGMENT ON THEIR DEFECTIVE DESIGN CAUSE OF ACTION IN THIS PRODUCTS LIABILITY CASE (FIRST DEPT).

The First Department, in a full-fledged opinion by Justice Kern, determined plaintiffs were entitled to summary judgment on their defective design cause of action in this products liability case. The product is a "fire pot" which burns a gel poured into a cup. Apparently the gel exploded. There was expert testimony that it is difficult to see whether the gel is burning and reloading the gel while it is burning will cause it to explode:

> ... [P]laintiffs have established, as a matter of law, that the product at issue, consisting of the fire pot and the fuel gel, was defectively designed so that it was not reasonably safe and that the defective design was a substantial factor in causing plaintiffs' injuries. Plaintiffs have submitted evidence, including expert affidavits, demonstrating that the product has minimal utility, serving a purely decorative purpose, that it poses an extraordinary safety risk in that it can explode and propel flaming fuel gel onto persons in its vicinity and cause them to catch fire when a person attempts to light the fire pot with the fuel gel while the fire pot is already lit or hot, that when the fuel gel in the fire pot is lit but burns down, it has a nearly invisible flame, which can mislead users into perceiving the flame as extinguished and the fuel gel exhausted, that the viscosity of the fuel gel makes it easily adherent to skin and clothing which makes it very difficult to extinguish and that alternative and safer designs are available in that instead of designing the fire pot with a deep-seated stainless steel cup into which the fuel gel is poured, the product could have been designed using fuel gel in nonrefillable metal cans or cartridges that get inserted directly into the fire pot, which would eliminate the design defect that causes an explosion upon refueling the fire pot with the fuel gel as well as the related dangers flowing from the fuel gel flame being difficult to visually discern when the fuel gel burns down and the viscosity of the fuel gel. Finally, the experts opined that the defective design of the product was a substantial factor in causing plaintiffs' injuries.
>
> In opposition, defendant has failed to raise an issue of fact as to whether the product was designed in a reasonably safe manner or whether the defective design was a substantial factor in causing plaintiffs' injuries. **M.H. v Bed Bath & Beyond Inc., 2017 NY Slip Op 07790, First Dept 11-9-17**

REAL ESTATE

REAL ESTATE (BUYER OF PROPERTY WAS UNABLE TO RAISE A QUESTION OF FACT WHETHER SELLER WAS AWARE OF UNDERGROUND GAS TANKS ON THE PROPERTY (FIRST DEPT))/CONTRACT LAW (REAL ESTATE, (BUYER OF PROPERTY WAS UNABLE TO RAISE A QUESTION OF FACT WHETHER SELLER WAS AWARE OF UNDERGROUND GAS TANKS ON THE PROPERTY (FIRST DEPT))/ENVIRONMENTAL LAW (REAL ESTATE, BUYER OF PROPERTY WAS UNABLE TO RAISE A QUESTION OF FACT WHETHER SELLER WAS AWARE OF UNDERGROUND GAS TANKS ON THE PROPERTY (FIRST DEPT))/UNDERGROUND GAS TANKS (REAL ESTATE, BUYER OF PROPERTY WAS UNABLE TO RAISE A QUESTION OF FACT WHETHER SELLER WAS AWARE OF UNDERGROUND GAS TANKS ON THE PROPERTY (FIRST DEPT))

REAL ESTATE, CONTRACT LAW.

BUYER OF PROPERTY WAS UNABLE TO RAISE A QUESTION OF FACT WHETHER SELLER WAS AWARE OF UNDERGROUND GAS TANKS ON THE PROPERTY (FIRST DEPT).

The First Department determined the seller of the property demonstrated it could not be held liable for the underground gas tanks found on the property. The purchase and sale contract indicated only that the seller was not aware of any underground fuel tanks:

> The court properly found that defendant did not breach the contract by failing to disclose the presence of underground gas tanks on the property. ...[D]efendant guaranteed and warranted only that it had not generated, stored or disposed of hazardous materials and had no knowledge of the previous presence of such materials on the property. Plaintiff failed to present evidence sufficient to raise a triable issue of fact as to whether defendant was responsible for the presence of the gas tanks or had any knowledge of it. The former owner of the property and a managing member of defendant testified that he was unaware of the presence of the gas tanks.
>
> In addition, ... defendant disclaimed and [did not make] any warranties or representations concerning environmental conditions. Plaintiff acknowledged that it was relying solely on its own expertise and consultants in this regard, and was purchasing the property "as is, where is" ... . **West 17th St. & Tenth Ave. Realty, LLC v N.E.W. Corp., 2017 NY Slip Op 08088, First Dept 11-16-17**

REAL PROPERTY LAW

REAL PROPERTY LAW (EASEMENT EXTINGUISHED BY MERGER WHEN BOTH AFFECTED PARCELS OWNED BY THE SAME PARTY, COMPLAINT DID NOT STATE A CAUSE OF ACTION FOR EASEMENT BY NECESSITY (SECOND DEPT))/EASEMENTS (EASEMENT EXTINGUISHED BY MERGER WHEN BOTH AFFECTED PARCELS OWNED BY THE SAME PARTY, COMPLAINT DID NOT STATE A CAUSE OF ACTION FOR EASEMENT BY NECESSITY (SECOND DEPT))/MERGER (REAL PROPERTY LAW, EASEMENTS, EASEMENT EXTINGUISHED BY MERGER WHEN BOTH AFFECTED PARCELS OWNED BY THE SAME PARTY, COMPLAINT DID NOT STATE A CAUSE OF ACTION FOR EASEMENT BY NECESSITY (SECOND DEPT))

REAL PROPERTY LAW.

EASEMENT EXTINGUISHED BY MERGER WHEN BOTH AFFECTED PARCELS OWNED BY THE SAME PARTY, COMPLAINT DID NOT STATE A CAUSE OF ACTION FOR EASEMENT BY NECESSITY (SECOND DEPT).

The Second Department determined an easement had been extinguished when the same party became the owner of both affected parcels and plaintiff was not entitled to an easement by necessity:

> "An easement is not a personal right of the landowner but is an appurtenance to the land benefitted by it (the dominant estate). It is inseparable from the land and a grant of the land carries with it the grant of the easement" ... . Here, the subject property and the adjoining property came under common ownership on October 31, 2008 ... [T]he easement that came into existence in 1974 was extinguished by merger.
>
> * * * [The] ... cause of action, for a declaration that the plaintiff had an easement by necessity, contained only vague and conclusory allegations and failed to allege that an easement over the adjoining property was absolutely necessary for access to the subject property, which fronts on a public street ... . **GDG Realty, LLC v 149 Glen St. Corp., 2017 NY Slip Op 07978, Second Dept 11-15-17**

TAX LAW

TAX LAW (SALES AND USE TAX, INFORMATION ABOUT COMPETITORS' PRODUCT PRICING PROVIDED TO SUPERMARKET CHAIN IS NOT TAXABLE (THIRD DEPT))/SALES AND USE TAX (INFORMATION ABOUT COMPETITORS' PRODUCT PRICING PROVIDED TO SUPERMARKET CHAIN IS NOT TAXABLE (THIRD DEPT))/INFORMATION SERVICES (SALES AND USE TAX, INFORMATION ABOUT COMPETITORS' PRODUCT PRICING PROVIDED TO SUPERMARKET CHAIN IS NOT TAXABLE (THIRD DEPT))

TAX LAW.

INFORMATION ABOUT COMPETITORS' PRODUCT PRICING PROVIDED TO SUPERMARKET CHAIN IS NOT TAXABLE (THIRD DEPT).

The Third Department, reversing the tax tribunal, determined that the information provided by a contractor (RetailData) to petitioner, a supermarket chain, about product-prices charged by competitors, was subject to exclusion from the sales and use tax:

> While there is no question that the pricing information that RetailData collects on petitioner's behalf is information that is available to the public, we agree with petitioner that, under the circumstances presented here, such information does not derive from a singular, widely accessible common source or database as that test has previously been applied and commonly understood in determining the applicability of the subject tax exclusion ... . * * *
>
> ... [W]e find that the information services that petitioner purchased from RetailData were personal or individual in nature and were not substantially incorporated into reports of others such that petitioner's purchase of these information services should have been excluded from taxation pursuant to Tax Law § 1105 (c) (1) ... . In our view, to expand the interpretation of Tax Law § 1105 (c) (1) to allow for the Tribunal's denial of the subject tax exclusion based solely on the fact that the information ultimately furnished derived from a public source would, under the circumstances presented, serve to defeat the purpose of the exclusion ... . **Matter of Wegmans Food Mkts., Inc. v Tax Appeals Trib. of The State of New York, 2017 NY Slip Op 08225, Third Dept 11-22-17**

TAX LAW (SALES TAX, HOTEL NOT ENTITLED TO CREDIT FOR SALES TAX FOR CONTINENTAL BREAKFASTS PURCHASED FROM A THIRD PARTY, CONTINENTAL BREAKFASTS WERE INCLUDED IN THE ROOM RENTAL AND WERE NOT PURCHASED FOR RESALE (THIRD DEPT))/SALES TAX (SALES TAX, HOTEL NOT ENTITLED TO CREDIT FOR SALES TAX FOR CONTINENTAL BREAKFASTS PURCHASED FROM A THIRD PARTY, CONTINENTAL BREAKFASTS WERE INCLUDED IN THE ROOM RENTAL AND WERE NOT PURCHASED FOR RESALE (THIRD DEPT))

TAX LAW.

HOTEL NOT ENTITLED TO CREDIT FOR SALES TAX FOR CONTINENTAL BREAKFASTS PURCHASED FROM A THIRD PARTY, CONTINENTAL BREAKFASTS WERE INCLUDED IN THE ROOM RENTAL AND WERE NOT PURCHASED FOR RESALE (THIRD DEPT).

The Third Department determined the hotel (Washington Square) which included continental breakfast in its room rental was not entitled to a credit for sales tax paid by the hotel for the purchase of the continental breakfasts (from Cafe C-III):

> Generally, sales tax must be paid upon the sale of all tangible personal property ... . However, "[c]ertain purchases which are made for resale are not subject to sales tax" ... . As such, a reseller may claim a tax credit for sales tax it paid upon purchases of personal property that will be resold ... . "Where the question is whether certain purchases are entitled to the resale exemption, the purchaser must show, to avoid imposition of the sales tax on the entire transaction, that each of the items was purchased for one and only one purpose: resale" ... . * * *
>
> We conclude that Washington Square failed to satisfy its burden of establishing its entitlement to the benefit of the resale tax exemption ... . According to the hearing testimony of Washington Square's chief executive officer, Washington Square purchased continental breakfasts from Cafe C-III and such breakfasts were included in the hotel rental fee paid by the guests. Washington Square paid Cafe C-III regardless of whether a guest consumed the continental breakfast. More critically, the chief executive officer also stated that hotel guests would not be separately billed for the continental breakfasts ... .
>
> Nor do we find any merit in Washington Square's equitable estoppel argument. "[T]he doctrine of estoppel does not apply in tax cases unless unusual circumstances support a finding of manifest injustice" ... . The fact that Washington Square, in a prior audit, was not imposed an additional tax assessment where it sought the same tax credit as in this case does not rise to the level of a manifest injustice especially in light of the auditor's testimony that each audit stands on its own and does not bind a future audit ... . Washington Square's reliance on an audit of Cafe C-III is likewise unavailing. **Matter of Washington Sq. Hotel LLC v Tax Appeals Trib. of The State of New York, 2017 NY Slip Op 08422, Third Dept 11-30-17**

TRUSTS AND ESTATES

TRUSTS AND ESTATES (EXECUTOR'S DISCLOSURE OF THE INFORMAL ACCOUNTING OF THE ESTATE TO BENEFICIARIES WAS SUFFICIENT, BENEFICIARY'S MOTION TO SET ASIDE A RELEASE PROPERLY DENIED (SECOND DEPT))/ACCOUNTING (TRUSTS AND ESTATES, XECUTOR'S DISCLOSURE OF THE INFORMAL ACCOUNTING OF THE ESTATE TO BENEFICIARIES WAS SUFFICIENT, BENEFICIARY'S MOTION TO SET ASIDE A RELEASE PROPERLY DENIED (SECOND DEPT))/EXECUTORS (ACCOUNTING, EXECUTOR'S DISCLOSURE OF THE INFORMAL ACCOUNTING OF THE ESTATE TO BENEFICIARIES WAS SUFFICIENT, BENEFICIARY'S MOTION TO SET ASIDE A RELEASE PROPERLY DENIED (SECOND DEPT))/RELEASES (TRUSTS AND ESTATES, INFORMAL ACCOUNTING, EXECUTOR'S DISCLOSURE OF THE INFORMAL ACCOUNTING OF THE ESTATE TO BENEFICIARIES WAS SUFFICIENT, BENEFICIARY'S MOTION TO SET ASIDE A RELEASE PROPERLY DENIED (SECOND DEPT))/INFORMAL ACCOUNTINGS (TRUSTS AND ESTATES, EXECUTOR'S DISCLOSURE OF THE INFORMAL ACCOUNTING OF THE ESTATE TO BENEFICIARIES WAS SUFFICIENT, BENEFICIARY'S MOTION TO SET ASIDE A RELEASE PROPERLY DENIED (SECOND DEPT))

TRUSTS AND ESTATES.

EXECUTOR'S DISCLOSURE OF THE INFORMAL ACCOUNTING OF THE ESTATE TO BENEFICIARIES WAS SUFFICIENT, BENEFICIARY'S MOTION TO SET ASIDE A RELEASE PROPERLY DENIED (SECOND DEPT).

The Second Department determined the executor's informal accounting and disclosures to beneficiaries were sufficient, therefore the release signed by a beneficiary could not be set aside:

> "[A] fiduciary, as an executor or trustee, is obligated to account for his or her decisions and actions in administering an estate or trust" ... . "While formal accountings of an estate are done in the context of a judicial proceeding, [a] fiduciary may also account informally by obtaining receipts and releases from interested parties regarding the handling of the estate or trust'" ... . " [S]uch an informal accounting is as effectual for all purposes as a settlement pursuant to a judicial decree'" ... . " [I]f a fiduciary gives full disclosure in his [or her] accounting, to which the beneficiaries are parties . . . they should have to object at that time or be barred from doing so after the settlement of the account'" ... . "Where the validity of a release is challenged, the fiduciary must affirmatively demonstrate that the beneficiaries were made aware of the nature and legal effect of the transaction in all its particulars'" ... .
>
> Here, the documents provided by [the executor] to ... the ... beneficiaries along with the release made the beneficiaries aware of all the distributions that would be made from the estate. The tax return showed that [the executor] would receive a greater share of the estate as a result of bank accounts she held jointly with the decedent. Thus, the Surrogate's Court correctly denied [the beneficiary's] motion to set aside the release. **Matter of Spacek, 2017 NY Slip Op 07737, Second Dept 11-8-17**

UNEMPLOYMENT INSURANCE

UNEMPLOYMENT INSURANCE (MEDICAL LAB DRIVERS WERE EMPLOYEES ENTITLED TO UNEMPLOYMENT INSURANCE BENEFITS (THIRD DEPT))/DRIVERS (UNEMPLOYMENT INSURANCE, MEDICAL LAB DRIVERS WERE EMPLOYEES ENTITLED TO UNEMPLOYMENT INSURANCE BENEFITS (THIRD DEPT))

UNEMPLOYMENT INSURANCE.

MEDICAL LAB DRIVERS WERE EMPLOYEES ENTITLED TO UNEMPLOYMENT INSURANCE BENEFITS (THIRD DEPT).

The Third Department determined drivers for a medical lab (Empire City) were employees entitled to unemployment insurance benefits:

> Although some of the control exercised by Empire City was occasioned by the regulated nature of the work performed by the drivers, many aspects of control exercised by Empire City went well beyond such regulation ... . Empire City assigned delivery routes based on driver availability, and the drivers were required to make the stops and deliveries along those routes as specified by Empire City. To this end, Empire City provided the drivers with route sheets containing instructions for pickups and, on occasion, imposed pickup times for its clients. Drivers were required to make same-day delivery of any specimens that were picked up and, at the conclusion of each day, drivers were required to submit route sheets to Empire City and confirm that no specimens remained in their vehicles. Empire City also provided the drivers with assistance if they experienced difficulty making a delivery and, if a driver was unable to report to work and find a substitute driver, Empire City asked for advance notice so that it could cover the route by assigning another driver of its choosing to the route. Empire City provided supplies, including ice boxes and ice packs, to facilitate the deliveries and handled client complaints. **Matter of Raupov (Empire City Labs., Inc.--Commissioner of Labor), 2017 NY Slip Op 08068, Third Dept 11-16-17**

UNEMPLOYMENT INSURANCE (CLAIMANT WAS NOT TOTALLY UNEMPLOYED WHEN WINDING UP HIS CORPORATION'S BUSINESS, ACTUAL FINANCIAL GAIN IS NOT A PREREQUISITE TO FINDING A CLAIMANT IS NOT TOTALLY UNEMPLOYED (THIRD DEPT))/CORPORATION LAW (UNEMPLOYMENT INSURANCE, CLAIMANT WAS NOT TOTALLY UNEMPLOYED WHEN WINDING UP HIS CORPORATION'S BUSINESS, ACTUAL FINANCIAL GAIN IS NOT A PREREQUISITE TO FINDING A CLAIMANT IS NOT TOTALLY UNEMPLOYED (THIRD DEPT))

UNEMPLOYMENT INSURANCE, CORPORATION LAW.

CLAIMANT WAS NOT TOTALLY UNEMPLOYED WHEN WINDING UP HIS CORPORATION'S BUSINESS, ACTUAL FINANCIAL GAIN IS NOT A PREREQUISITE TO FINDING A CLAIMANT IS NOT TOTALLY UNEMPLOYED (THIRD DEPT).

The Third Department determined claimant was not totally unemployed and was therefore not entitled to unemployment insurance benefits. Claimant was winding up his corporation's business during the relevant period of time:

"[A] corporate officer who performs activities in connection with the winding up of a corporation will not be considered totally unemployed, even if his or her activities in this regard are minimal" ... . Following the sale of the business, claimant took measures in winding up the business during the time period in question, including changing the company name with the Department of State as required by the purchase agreement, distributing the monthly installment payments received from the purchaser of the business, and writing checks from the company account for accountant and counsel fees, taxes, insurance costs, a charitable contribution, office supplies and other business expenses. Under these circumstances, the Board's determination that claimant was not totally unemployed is supported by substantial evidence and will not be disturbed ... . "Contrary to claimant's assertion, actual financial gain is not a prerequisite to a finding that a claimant is not totally unemployed" ... . **Matter of Lasker (Commissioner of Labor), 2017 NY Slip Op 07924, Third Dept 11-9-17**

WORKERS' COMPENSATION LAW

WORKERS' COMPENSATION (BOARD'S FINDING CLAIMANT WAS CAPABLE OF PERFORMING SEDENTARY EMPLOYMENT NOT SUPPORTED BY SUBSTANTIAL EVIDENCE IN THE RECORD, FINDING OF PERMANENT TOTAL DISABILITY WARRANTED (THIRD DEPT))/SEDENTARY WORK (WORKERS' COMPENSATION, BOARD'S FINDING CLAIMANT WAS CAPABLE OF PERFORMING SEDENTARY EMPLOYMENT NOT SUPPORTED BY SUBSTANTIAL EVIDENCE IN THE RECORD, FINDING OF PERMANENT TOTAL DISABILITY WARRANTED (THIRD DEPT))/PERMANENT TOTAL DISABILITY (WORKERS' COMPENSATION, BOARD'S FINDING CLAIMANT WAS CAPABLE OF PERFORMING SEDENTARY EMPLOYMENT NOT SUPPORTED BY SUBSTANTIAL EVIDENCE IN THE RECORD, FINDING OF PERMANENT TOTAL DISABILITY WARRANTED (THIRD DEPT))

WORKERS' COMPENSATION.

BOARD'S FINDING CLAIMANT WAS CAPABLE OF PERFORMING SEDENTARY EMPLOYMENT NOT SUPPORTED BY SUBSTANTIAL EVIDENCE IN THE RECORD, FINDING OF PERMANENT TOTAL DISABILITY WARRANTED (THIRD DEPT).

The Third Department, reversing the Workers' Compensation Board, over a two-justice dissent, determined claimant should have been found totally disabled:

After injuring her back in October 2007, claimant underwent multiple back surgeries, including a L3-4 and L4-5 spinal fusion in December 2010 and fusions at L4-5 and L5-S1 in August 2012. A spinal cord stimulator was implanted in August 2013. Claimant's physician, Clifford Ameduri, was treating her for postoperative back pain. Ameduri completed a "Doctor's Report of MMI/Permanent Impairment" form C-4.3 in August 2014 that classified her condition as permanent and assigned a class five severity F rating to her lumbar back injury under the New York State Guidelines for Determining Permanent Impairment and Loss of Wage Earning Capacity (2012). Ameduri also rated her functional capacity at "less than sedentary work," a category defined as "unable to meet the requirement of sedentary work."... Nowhere in this record does Ameduri opine that claimant sustained only a permanent partial disability. Guy Corkhill, the physician who conducted an independent medical examination on behalf of the workers' compensation carrier, assigned a class four severity G rating to claimant's back condition. In his testimony, Corkhill agreed with Ameduri that it was "unlikely [claimant] would ever be able to return to meaningful employment." Notwithstanding this medical testimony, both the Workers' Compensation Law Judge and a panel of the Workers' Compensation Board determined that claimant was capable of performing sedentary employment. In adopting Ameduri's severity F rating, the Board further discredited Corkhill's opinion as based

primarily on claimant's subjective complaint, notwithstanding Corkhill's testimony that her subjective complaints comported with his objective findings.

Since the Board's findings as to claimant's ability to perform some type of sedentary work are contrary to the consistent medical proof presented, the Board's finding of a permanent partial disability and a 75% loss of wage-earning capacity is not supported by substantial evidence in the record ... . Claimant maintains, and we agree, that the record actually warrants a finding of a permanent total disability. **Matter of Wohlfeil v Sharel Ventures, LLC, 2017 NY Slip Op 08060, Third Dept 11-16-17**

WORKERS'S COMPENSATION LAW (THE TERMS OF THE SETTLEMENT AGREEMENT DID NOT ALLOW THE COURT TO ALLOCATE ALL THE PROCEEDS OF AN INSURANCE POLICY TO THE WORKERS' COMPENSATION BOARD, RESPONDENT, A FORMER MEMBER OF AN INSOLVENT WORKERS' COMPENSATION TRUST WHICH HAD SETTLED WITH THE BOARD, WAS ENTITLED TO SOME OF THE PROCEEDS AND AN ACCOUNTING PURSUANT TO CPLR 7702 (THIRD DEPT))/CONTRACT LAW (WORKERS' COMPENSATION LAW, SETTLEMENT AGREEMENT, (THE TERMS OF THE SETTLEMENT AGREEMENT DID NOT ALLOW THE COURT TO ALLOCATE ALL THE PROCEEDS OF AN INSURANCE POLICY TO THE WORKERS' COMPENSATION BOARD, RESPONDENT, A FORMER MEMBER OF AN INSOLVENT WORKERS' COMPENSATION TRUST WHICH HAD SETTLED WITH THE BOARD, WAS ENTITLED TO SOME OF THE PROCEEDS AND AN ACCOUNTING PURSUANT TO CPLR 7702 (THIRD DEPT))/CIVIL PROCEDURE (WORKERS' COMPENSATION LAW, SETTLEMENT AGREEMENT, VERIFIED ACCOUNTING, (THE TERMS OF THE SETTLEMENT AGREEMENT DID NOT ALLOW THE COURT TO ALLOCATE ALL THE PROCEEDS OF AN INSURANCE POLICY TO THE WORKERS' COMPENSATION BOARD, RESPONDENT, A FORMER MEMBER OF AN INSOLVENT WORKERS' COMPENSATION TRUST WHICH HAD SETTLED WITH THE BOARD, WAS ENTITLED TO SOME OF THE PROCEEDS AND AN ACCOUNTING PURSUANT TO CPLR 7702 (THIRD DEPT))/CPLR 7702 (WORKERS' COMPENSATION LAW, SETTLEMENT AGREEMENT, VERIFIED ACCOUNTING, (THE TERMS OF THE SETTLEMENT AGREEMENT DID NOT ALLOW THE COURT TO ALLOCATE ALL THE PROCEEDS OF AN INSURANCE POLICY TO THE WORKERS' COMPENSATION BOARD, RESPONDENT, A FORMER MEMBER OF AN INSOLVENT WORKERS' COMPENSATION TRUST WHICH HAD SETTLED WITH THE BOARD, WAS ENTITLED TO SOME OF THE PROCEEDS AND AN ACCOUNTING PURSUANT TO CPLR 7702 (THIRD DEPT))

WORKERS' COMPENSATION LAW, CONTRACT LAW, CIVIL PROCEDURE.

THE TERMS OF THE SETTLEMENT AGREEMENT DID NOT ALLOW THE COURT TO ALLOCATE ALL THE PROCEEDS OF AN INSURANCE POLICY TO THE WORKERS' COMPENSATION BOARD, RESPONDENT, A FORMER MEMBER OF AN INSOLVENT WORKERS' COMPENSATION TRUST WHICH HAD SETTLED WITH THE BOARD, WAS ENTITLED TO SOME OF THE PROCEEDS AND AN ACCOUNTING PURSUANT TO CPLR 7702 (THIRD DEPT).

The Third Department, reversing Supreme Court, determined that Supreme Court should not have allocated all the proceeds of an insurance policy to the Workers' Compensation Board and should have ordered the Board to file an accounting pursuant to CPLR 7702. The Board is seeking compensation from members of a workers' compensation trust which was found to be insolvent. Respondent was a member of the trust and settled with the Board, paying over $1,000,000. Subsequently, in accordance with the terms of the settlement agreement, both the Board and the respondent separately sought to recover funds from an insurance policy. Supreme Court ordered all the recovered proceeds to be paid to the Board and did not order the filing of a verified accounting. The Third Department found that respondent, under the terms of the settlement agreement with the Board, was entitled to some of the funds and an accounting should be filed by the Board. The matter was remitted:

The provision of the settlement agreement governing allocation of damages obtained from third parties by petitioner is unambiguously applicable by its terms only to the share of the jointly-recovered settlement proceeds that are ultimately allocated to petitioner. This interpretation gives full meaning and effect to the material terms at issue, including respondent's reservation of its claims against the parties formerly responsible for administration of the trust, the agreement that allocation of the jointly-recovered settlement proceeds would be made in the instant CPLR article 77 proceeding and the provision precluding respondent from using activities undertaken after May 31, 2012 to justify a claim to allocation of the settlement proceeds. Petitioner's contrary view — that it is entitled to all settlement proceeds because they were insufficient to satisfy the trust's outstanding obligations and, therefore, that no surplus existed for allocation to former trust members, including respondent — is counter to the plain language of the settlement agreement and would impermissibly render meaningless the express reservation to respondent of all of its claims against former trustees, administrators and professionals. For petitioner's argument — that all damages recovered from any third party from any source must first be used to satisfy the trust's outstanding obligations — to prevail, the settling members, like respondent, would have had to have waived their claims against such third parties or subordinated their independent claims to petitioner's claims. The settlement agreement contains no such terms. Thus, the matter must be remitted for allocation of the jointly-recovered settlement proceeds between petitioner and respondent and, as to any such proceeds allocated to petitioner, a determination of whether there are surplus funds remaining for distribution among the settling former trust members, including respondent. **Matter of New York State Workers' Compensation Bd. v Murray Bresky Consultants, Ltd, 2017 NY Slip Op 08244, Third Dept 11-22-17**

WORKERS' COMPENSATION LAW (WORKERS' COMPENSATION TRUST, NEGLIGENCE AND GROSS NEGLIGENCE CAUSES OF ACTION AGAINST AN ACTUARY FOR AN INSOLVENT WORKERS' COMPENSATION TRUST PROPERLY SURVIVED MOTIONS TO DISMISS (THIRD DEPT))/WORKERS' COMPENSATION TRUSTS (NEGLIGENCE AND GROSS NEGLIGENCE CAUSES OF ACTION AGAINST AN ACTUARY FOR AN INSOLVENT WORKERS' COMPENSATION TRUST PROPERLY SURVIVED MOTIONS TO DISMISS (THIRD DEPT))/NEGLIGENCE (ACTUARY, WORKERS' COMPENSATION TRUST, NEGLIGENCE AND GROSS NEGLIGENCE CAUSES OF ACTION AGAINST AN ACTUARY FOR AN INSOLVENT WORKERS' COMPENSATION TRUST PROPERLY SURVIVED MOTIONS TO DISMISS (THIRD DEPT))/ACTUARY (NEGLIGENCE, WORKERS' COMPENSATION TRUST, NEGLIGENCE AND GROSS NEGLIGENCE CAUSES OF ACTION AGAINST AN ACTUARY FOR AN INSOLVENT WORKERS' COMPENSATION TRUST PROPERLY SURVIVED MOTIONS TO DISMISS (THIRD DEPT))

WORKERS' COMPENSATION LAW, NEGLIGENCE.

NEGLIGENCE AND GROSS NEGLIGENCE CAUSES OF ACTION AGAINST AN ACTUARY FOR AN INSOLVENT WORKERS' COMPENSATION TRUST PROPERLY SURVIVED MOTIONS TO DISMISS (THIRD DEPT).

The Third Department determined several motions to dismiss were properly denied in this action concerning an insolvent workers' compensation trust. Defendant Regnier provided actuarial services and prepared certain actuarial reports on an annual basis for the trust. In addition to many other causes of action not summarized here, the Third Department held that the negligence and gross negligence causes of action properly survived:

We reject Regnier's assertion that the negligence and gross negligence claims should have been dismissed in their entirety because plaintiff failed to allege that it owed the trust a duty of care. "[A]n actuary, possessing special knowledge, can be held liable for the negligent performance of its services" ... . The second amended complaint alleged that Regnier held itself out as a skilled and competent actuary, that Regnier prepared actuarial reports to the trust, and that Regnier failed to provide competent actuarial services. More critically, the second amended

complaint further alleged that Regnier knew that the trust would be relying on the accuracy of such reports and that Regnier was aware that its services were employed to represent the trust's finances. Under these circumstances and viewing the allegations in a light most favorable to plaintiff, we conclude that there were sufficient allegations of near privity to survive a motion to dismiss with respect to the negligence and gross negligence claims ... . **New York State Workers' Compensation Bd. v Program Risk Mgt., Inc., 2017 NY Slip Op 08426, Third Dept 11-30-17**

ZONING

ZONING (ALTHOUGH THE PLANNING BOARD HELD THAT IT HAD JURISDICTION OVER THE PROPOSED DEVELOPMENT, A FINDING WITH WHICH PETITIONERS DISAGREED, THE BOARD ALSO HELD THE PETITIONERS COULD APPLY FOR A HARDSHIP EXEMPTION WHICH WAS NOT DONE, THE ACTION IS THEREFORE PREMATURE (SECOND DEPT))/CIVIL PROCEDURE (RIPENESS, ZONING, ALTHOUGH THE PLANNING BOARD HELD THAT IT HAD JURISDICTION OVER THE PROPOSED DEVELOPMENT, A FINDING WITH WHICH PETITIONERS DISAGREED, THE BOARD ALSO HELD THE PETITIONERS COULD APPLY FOR A HARDSHIP EXEMPTION WHICH WAS NOT DONE, THE ACTION IS THEREFORE PREMATURE (SECOND DEPT))/ENVIRONMENTAL LAW (ZONING, (ALTHOUGH THE PLANNING BOARD HELD THAT IT HAD JURISDICTION OVER THE PROPOSED DEVELOPMENT, A FINDING WITH WHICH PETITIONERS DISAGREED, THE BOARD ALSO HELD THE PETITIONERS COULD APPLY FOR A HARDSHIP EXEMPTION WHICH WAS NOT DONE, THE ACTION IS THEREFORE PREMATURE (SECOND DEPT))

ZONING, CIVIL PROCEDURE, ENVIRONMENTAL LAW.

ALTHOUGH THE PLANNING BOARD HELD THAT IT HAD JURISDICTION OVER THE PROPOSED DEVELOPMENT, A FINDING WITH WHICH PETITIONERS DISAGREED, THE BOARD ALSO HELD THE PETITIONERS COULD APPLY FOR A HARDSHIP EXEMPTION WHICH WAS NOT DONE, THE ACTION IS THEREFORE PREMATURE (SECOND DEPT).

The Second Department determined the action seeking a declaration whether a proposed development was within the jurisdiction of the planning board was premature. Although the board found it had jurisdiction, it also indicated the landowner could obtain a hardship exemption which would allow development:

> Here, the Planning Commission's initial finding that the proposed subdivision constituted "development" within the meaning of the Act (see Environmental Conservation Law § 57-0107[13]; see also Central Pine Barrens Comprehensive Land Use Plan § 4.3.5) did not constitute a final determination prohibiting the petitioners from subdividing the property in accordance with their proposal. As the Planning Commission's determination indicated, the petitioners may still obtain a hardship exemption, which would render the proposed residential use of the property authorized ... . Since the petitioners failed to adequately allege that they suffered an actual concrete injury, the Supreme Court properly granted the respondents' motion to dismiss the proceeding as premature ... . **Matter of Equine Facility, LLC v Pavacic, 2017 NY Slip Op 08371, Second Dept 11-29-17**

ZONING (SCHOOLS ARE NOT IMMUNE FROM ZONING REGULATIONS, ZONING BOARD PROPERLY DENIED SCHOOL DISTRICT'S VARIANCE APPLICATION FOR AN ELECTRONIC SIGN (THIRD DEPT))/EDUCATION-SCHOOL LAW (ZONING, SCHOOLS ARE NOT IMMUNE FROM ZONING REGULATIONS, ZONING BOARD PROPERLY DENIED SCHOOL DISTRICT'S VARIANCE APPLICATION FOR AN ELECTRONIC SIGN (THIRD DEPT))/VARIANCES (SCHOOLS, SIGNS, SCHOOLS ARE NOT IMMUNE FROM ZONING REGULATIONS, ZONING BOARD PROPERLY DENIED SCHOOL DISTRICT'S VARIANCE APPLICATION FOR AN ELECTRONIC SIGN (THIRD DEPT))/SIGNS (ZONING, VARIANCES, SCHOOLS ARE NOT IMMUNE FROM ZONING REGULATIONS, ZONING BOARD PROPERLY DENIED SCHOOL DISTRICT'S VARIANCE APPLICATION FOR AN ELECTRONIC SIGN (THIRD DEPT))

ZONING, EDUCATION-SCHOOL LAW.

SCHOOLS ARE NOT IMMUNE FROM ZONING REGULATIONS, ZONING BOARD PROPERLY DENIED SCHOOL DISTRICT'S VARIANCE APPLICATION FOR AN ELECTRONIC SIGN (THIRD DEPT).

The Third Department, in a full-fledged opinion by Justice McCarthy, rejected the school's argument that it was immune from zoning restrictions. The school had erected an electronic sign which violated the zoning code and the zoning board had denied the school's application for a variance:

> ... [T]he Court of Appeals noted that "... general rules . . . were interpreted by some courts to demand a full exemption from zoning rules for all educational and church uses" — an interpretation that "is mandated neither by the case law of our [s]tate nor common sense" ... . The Court clarified that it never intended to "render municipalities powerless in the face of a religious or educational institution's proposed expansion, no matter how offensive, overpowering or unsafe to a residential neighborhood the use might be," and renewed its rejection of the existence of "any conclusive presumption of an entitlement to an exemption from zoning ordinances" for schools ... . The Court thus concluded that "there are many instances in which a particular educational or religious use may actually detract from the public's health, safety, welfare or morals [and, i]n those instances, the institution may be properly denied" ... . Accordingly, the Court held that the presumed beneficial effects of schools and churches "may be rebutted with evidence of a significant impact on traffic congestion, property values, municipal services and the like," because the "inherent beneficial effects . . . must be weighed against their potential for harming the community" ... . * * *
>
> Because petitioner was not immune from and was, therefore, subject to the Town's zoning ordinances, we must address whether the ZBA [zoning board of appeals] properly denied petitioner's application for a variance. The Town and the ZBA did not refuse petitioner the opportunity to install any sign. Rather, the ZBA rejected an application for permission to install an electronic message center sign, which is prohibited in the Town and which also failed to comply with at least three additional size and location requirements of the signage provisions of the Town's zoning ordinance. The ZBA provided rational reasons for its determination, including a concern for traffic safety due to the sign's brightness and potential to be more distracting and hazardous to passing motorists than an ordinary sign ... . That determination was not arbitrary or capricious. **Matter of Ravena- Coeymans-Selkirk Cent. Sch. Dist. v Town of Bethlehem, 2017 NY Slip Op 08428, Third Dept 11-30-17**

COURT OF APPEALS

CIVIL PROCEDURE (COA)

CIVIL PROCEDURE (SHAREHOLDER DERIVATIVE ACTION, CAYMAN ISLANDS LAW, CAYMAN ISLANDS RULE GOVERNING SHAREHOLDER DERIVATIVE ACTIONS IS PROCEDURAL, NOT SUBSTANTIVE, FAILURE TO COMPLY WITH RULE DOES NOT BAR SUIT IN NEW YORK (CT APP))/CORPORATION LAW (SHAREHOLDER DERIVATIVE ACTION, CAYMAN ISLANDS LAW, CAYMAN ISLANDS RULE GOVERNING SHAREHOLDER DERIVATIVE ACTIONS IS PROCEDURAL, NOT SUBSTANTIVE, FAILURE TO COMPLY WITH RULE DOES NOT BAR SUIT IN NEW YORK (CT APP))/SHAREHOLDER DERIVATIVE ACTION (CORPORATION LAW, CAYMAN ISLANDS RULE GOVERNING SHAREHOLDER DERIVATIVE ACTIONS IS PROCEDURAL, NOT SUBSTANTIVE, FAILURE TO COMPLY WITH RULE DOES NOT BAR SUIT IN NEW YORK (CT APP))/DERIVATIVE ACTION (SHAREHOLDER DERIVATIVE ACTION, CAYMAN ISLANDS LAW, CAYMAN ISLANDS RULE GOVERNING SHAREHOLDER DERIVATIVE ACTIONS IS PROCEDURAL, NOT SUBSTANTIVE, FAILURE TO COMPLY WITH RULE DOES NOT BAR SUIT IN NEW YORK (CT APP))/CAYMAN ISLANDS LAW SHAREHOLDER DERIVATIVE ACTION, CAYMAN ISLANDS LAW, CAYMAN ISLANDS RULE GOVERNING SHAREHOLDER DERIVATIVE ACTIONS IS PROCEDURAL, NOT SUBSTANTIVE, FAILURE TO COMPLY WITH RULE DOES NOT BAR SUIT IN NEW YORK (CT APP))

CIVIL PROCEDURE, CORPORATION LAW.

CAYMAN ISLANDS RULE GOVERNING SHAREHOLDER DERIVATIVE ACTIONS IS PROCEDURAL, NOT SUBSTANTIVE, FAILURE TO COMPLY WITH RULE DOES NOT BAR SUIT IN NEW YORK (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Feinman, reversing the appellate division, determined that a Cayman Islands rule (Rule 12A) governing prerequisites for bringing a shareholder derivative action was procedural, not substantive. Therefore the New York suit, which must apply Cayman Islands substantive law, should not have been dismissed for failure to comply with the rule. Whether plaintiff had standing to sue under substantive Cayman Islands law was not determined by the Court of Appeals:

> In Tanges [93 NY2d 48] we ... described general policy considerations that ought to be weighed when determining whether a rule is substantive or procedural. Specifically, we consider whether our determination would impose a burden on the foreign court (Connecticut in that instance) or federal courts operating under diversity rules and whether it would threaten to cause delay in the "conduct of judicial business and impair judicial efficiency" ... . Here, these factors further weigh in favor of our conclusion that Rule 12A is procedural.
>
> Holding that Rule 12A is procedural does not impose a burden on our courts, or the courts of the Cayman Islands (see Tanges, 93 NY2d at 58). However, were Rule 12A held to be substantive, it is unclear what procedural path a party seeking to bring a derivative action in New York on behalf of a Cayman company would follow to comply with Rule 12A. ...

> Therefore, a Tanges analysis also leads to the conclusion that Rule 12A is procedural in nature. Because the procedural law of the forum typically applies under our conflict of law rules ... , plaintiff's failure to first comply with Rule 12A's leave application procedure does not bar his derivative claims ... . **Davis v Scottish Re Group Ltd., 2017 NY Slip Op 08157, CtApp 11-20-17**

CONSTITUTIONAL LAW (COA)

CONSTITUTIONAL LAW (NYS) (STATUTE REDUCING HEALTH BENEFITS FOR STATE EMPLOYEES DID NOT VIOLATE THE JUDICIAL COMPENSATION CLAUSE OF THE NEW YORK STATE CONSTITUTION (CT APP))/JUDGES (CONSTITUTIONAL LAW, STATUTE REDUCING HEALTH BENEFITS FOR STATE EMPLOYEES DID NOT VIOLATE THE JUDICIAL COMPENSATION CLAUSE OF THE NEW YORK STATE CONSTITUTION (CT APP))/JUDGES (STATUTE REDUCING HEALTH BENEFITS FOR STATE EMPLOYEES DID NOT VIOLATE THE JUDICIAL COMPENSATION CLAUSE OF THE NEW YORK STATE CONSTITUTION (CT APP))/EMPLOYMENT LAW (JUDGES, STATUTE REDUCING HEALTH BENEFITS FOR STATE EMPLOYEES DID NOT VIOLATE THE JUDICIAL COMPENSATION CLAUSE OF THE NEW YORK STATE CONSTITUTION (CT APP))/JUDICIAL COMPENSATION CLAUSE (NYS CONSTITUTION, STATUTE REDUCING HEALTH BENEFITS FOR STATE EMPLOYEES DID NOT VIOLATE THE JUDICIAL COMPENSATION CLAUSE OF THE NEW YORK STATE CONSTITUTION (CT APP))

CONSTITUTIONAL LAW (NYS), JUDGES, EMPLOYMENT LAW.

STATUTE REDUCING HEALTH BENEFITS FOR STATE EMPLOYEES DID NOT VIOLATE THE JUDICIAL COMPENSATION CLAUSE OF THE NEW YORK STATE CONSTITUTION (CT APP).

The Court of Appeals, in a per curiam opinion, with two concurring opinions, determined that the reduction in health benefits provided under the Civil Service Law did not violate the Judicial Compensation Clause of the NYS Constitution:

> The issue presented on this appeal is whether Civil Service Law § 167 (8), as amended, authorizing a reduction of the State's contribution to health insurance benefits for State employees, including members of the State judiciary, violates the Judicial Compensation Clause of the State Constitution ... . We conclude the State's contribution is not judicial compensation protected from direct diminution by the Compensation Clause, and the reductions in contributions do not have the effect of singling out the judiciary for disadvantageous treatment. Therefore, plaintiffs' constitutional challenge fails. **Bransten v State of New York, 2017 NY Slip Op 08168, CtApp 11-21-17**

CRIMINAL LAW (COA)

CRIMINAL LAW (SENTENCING, DEFENDANT HAS THE RIGHT TO BE PRESENT WHERE, IN RESPONSE TO A MOTION TO VACATE BECAUSE THE PERIOD OF POST-RELEASE SUPERVISION (PRS) WAS NOT MENTIONED AT THE ORIGINAL SENTENCING, THE COURT IMPOSES A SENTENCE WITHOUT A PERIOD OF PRS (CT APP))/SENTENCING (DEFENDANT HAS THE RIGHT TO BE PRESENT WHERE, IN RESPONSE TO A MOTION TO VACATE BECAUSE THE PERIOD OF POST-RELEASE SUPERVISION (PRS) WAS NOT MENTIONED AT THE ORIGINAL SENTENCING, THE COURT IMPOSES A SENTENCE WITHOUT A PERIOD OF PRS (CT APP))/POST RELEASE SUPERVISION (SENTENCING, DEFENDANT HAS THE RIGHT TO BE PRESENT WHERE, IN RESPONSE TO A MOTION TO VACATE BECAUSE THE PERIOD OF POST-RELEASE SUPERVISION (PRS) WAS NOT MENTIONED AT THE ORIGINAL SENTENCING, THE COURT IMPOSES A SENTENCE WITHOUT A PERIOD OF PRS (CT APP))

CRIMINAL LAW.

DEFENDANT HAS THE RIGHT TO BE PRESENT WHEN, IN RESPONSE TO A MOTION TO VACATE BECAUSE THE PERIOD OF POST-RELEASE SUPERVISION (PRS) WAS NOT MENTIONED AT THE ORIGINAL SENTENCING, THE COURT IMPOSES A SENTENCE WITHOUT A PERIOD OF PRS (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Wilson, reversing the appellate division, determined a defendant has a right to be present when, after moving to vacate the sentence because the period of post-release supervision (PRS) was not mentioned, the sentencing court imposes the original sentence without a period of PRS:

> There is only one enumerated exception to the statute where the defendant is convicted of a misdemeanor or petty offense, on motion of the defendant the court may sentence the defendant in absentia (CPL 380.40 [2]). We have also previously held that a defendant convicted of a felony may waive the right to be present at sentencing, provided that the waiver is knowing, voluntary and intelligent ... . However, absent such a waiver — or a forfeiture of the right to be present ... — ... "[t]here is no statutory basis for [a] [futility] exception" ... .
>
> Here, the Appellate Division concluded that there was no reason to remand the case because [defendant] was not adversely affected by his re-imposed sentence, citing People v Covington(88 AD3d 486, 486 [1st Dept 2011]), and People v Mills (117 AD3d at 1556). The majority in Mills cited CPL 470.15 [1] for the proposition that the Appellate Division cannot consider a sentence that did not "adversely affect[] the appellant." CPL 470.15 (1) says, "Upon an appeal to an intermediate appellate court from a judgment, sentence or order of a criminal court, such intermediate appellate court may consider and determine any question of law or issue of fact involving error or defect in the criminal court proceedings which may have adversely affected the appellant." Here, as there was no voluntary waiver, [defendant's] absence from the sentencing proceeding was in itself, under our precedents, an error as it constitutes a violation of his right under CPL 380.40. Accordingly, the order of the Appellate Division should be reversed and the case remitted to Supreme Court for further proceedings in accordance with this opinion. **People v Estremera, 2017 NY Slip Op 08036, CtApp 11-16-17**

CRIMINAL LAW (GEORGIA BURGLARY STATUTE WAS EQUIVALENT TO A NEW YORK VIOLENT FELONY DESPITE THE ABSENCE OF AN EXPLICIT INTENT ELEMENT BECAUSE THE LESSER INCLUDED OFFENSE OF CRIMINAL TRESPASS INCLUDED A KNOWINGLY ELEMENT (CT APP))/SENTENCING (SECOND VIOLENT FELONY OFFENDER, GEORGIA BURGLARY STATUTE WAS EQUIVALENT TO A NEW YORK VIOLENT FELONY DESPITE THE ABSENCE OF AN EXPLICIT INTENT ELEMENT BECAUSE THE LESSER INCLUDED OFFENSE OF CRIMINAL TRESPASS INCLUDED A KNOWINGLY ELEMENT (CT APP))/SECOND VIOLENT FELONY OFFENDER (SENTENCING, GEORGIA BURGLARY STATUTE WAS EQUIVALENT TO A NEW YORK VIOLENT FELONY DESPITE THE ABSENCE OF AN EXPLICIT INTENT ELEMENT BECAUSE THE LESSER INCLUDED OFFENSE OF CRIMINAL TRESPASS INCLUDED A KNOWINGLY ELEMENT (CT APP))

CRIMINAL LAW.

GEORGIA BURGLARY STATUTE WAS EQUIVALENT TO A NEW YORK VIOLENT FELONY DESPITE THE ABSENCE OF AN EXPLICIT INTENT ELEMENT BECAUSE THE LESSER INCLUDED OFFENSE OF CRIMINAL TRESPASS INCLUDED A KNOWINGLY ELEMENT (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Fahey, reversing the appellate division, over a two-judge concurring opinion, determined a Georgia burglary statute was equivalent to a New York violent felony and therefore defendant was properly sentenced as and second violent felony offender. The Georgia statute does not explicitly include intent as an element. However, a lesser included offense (the Georgia criminal trespass statute) in the Georgia includes a "knowingly" element:

> Under Georgia statutory law, "[a] crime is included in another crime" ... — i.e., a crime is a lesser included offense of another crime — when, among other things, "[i]t is established by proof of the same or less than all the facts or a less culpable mental state than is required to establish the commission of the crime charged" ... .
>
> Georgia statutory law further provides that "[a] person commits the offense of criminal trespass when he or she knowingly and without authority . . . [e]nters upon the land or premises of another person . . . for an unlawful purpose" ... . Georgia case law, in turn, provides that criminal trespass is (and was at the time defendant violated the subject Georgia statute) a lesser included offense of burglary ... . Inasmuch as the "lesser" Georgia crime of criminal trespass contains a "knowingly" mens rea ... , the "entry" component of the "greater" Georgia burglary statute in question ... necessarily must have a culpable mental state of at least "knowingly." In other words, the mental state for the greater crime logically cannot be less than the mental state for the lesser crime and, for the foregoing reasons, we conclude that the Georgia crime corresponds to a New York violent felony ... . **People v Helms, 2017 NY Slip Op 08160, CtApp 11-20-17**

CRIMINAL LAW (VIOLATION OF PROBATION PETITION FACIALLY INSUFFICIENT, TIME, PLACE AND MANNER OF ALLEGED VIOLATIONS NOT STATED (CT APP))/VIOLATION OF PROBATION (VIOLATION OF PROBATION PETITION FACIALLY INSUFFICIENT, TIME, PLACE AND MANNER OF ALLEGED VIOLATIONS NOT STATED (CT APP))/PROBATION (CRIMINAL LAW, VIOLATION OF PROBATION PETITION FACIALLY INSUFFICIENT, TIME, PLACE AND MANNER OF ALLEGED VIOLATIONS NOT STATED (CT APP))

CRIMINAL LAW.

VIOLATION OF PROBATION PETITION FACIALLY INSUFFICIENT, TIME, PLACE AND MANNER OF ALLEGED VIOLATIONS NOT STATED (CT APP).

The Court of Appeals, reversing the appellate division, determined the violation of probation petition was insufficient on its face and should have been dismissed:

> County Court determined that defendant violated the terms of his probation, which prohibited him from associating with any convicted criminals, when on four occasions he picked up and walked the dog he once shared with his former intimate partner, who had a DWI misdemeanor conviction. The amended violation of probation petition, which listed four dates on which defendant allegedly "had contact with" a convicted criminal, but did not include any additional information, was facially insufficient as it did not comport with the statutory requirement of providing probationer with the time, place, and manner of the alleged violation (CPL 410.70). Here, the defect in the amended petition was not cured by defendant's questions posed to the court at the prior arraignment, the substance of which indicated that he did not have notice of the manner in which he allegedly violated a condition of his probation. **People v Kislowski, 2017 NY Slip Op 08169, CtApp 11-21-17**

CRIMINAL LAW (SEARCH, WHETHER THE PROTECTIVE SEARCH OF A VEHICLE WAS VALID PRESENTED A MIXED QUESTION OF LAW AND FACT AND WAS NOT REVIEWABLE BY THE COURT OF APPEALS (CT APP))/APPEALS (CRIMINAL LAW, COURT OF APPEALS, WHETHER THE PROTECTIVE SEARCH OF A VEHICLE WAS VALID PRESENTED A MIXED QUESTION OF LAW AND FACT AND WAS NOT REVIEWABLE BY THE COURT OF APPEALS (CT APP))/MIXED QUESTIONS OF LAW AND FACT (APPEALS, CRIMINAL LAW, COURT OF APPEALS, WHETHER THE PROTECTIVE SEARCH OF A VEHICLE WAS VALID PRESENTED A MIXED QUESTION OF LAW AND FACT AND WAS NOT REVIEWABLE BY THE COURT OF APPEALS (CT APP))/STREET STOPS (SEARCH, WHETHER THE PROTECTIVE SEARCH OF A VEHICLE WAS VALID PRESENTED A MIXED QUESTION OF LAW AND FACT AND WAS NOT REVIEWABLE BY THE COURT OF APPEALS (CT APP))/SEARCH AND SEIZURE (CRIMINAL LAW, APPEALS, COURT OF APPEALS, WHETHER THE PROTECTIVE SEARCH OF A VEHICLE WAS VALID PRESENTED A MIXED QUESTION OF LAW AND FACT AND WAS NOT REVIEWABLE BY THE COURT OF APPEALS (CT APP))/PROTECTIVE SEARCH (CRIMINAL LAW, STREET STOPS, APPEALS, COURT OF APPEALS, WHETHER THE PROTECTIVE SEARCH OF A VEHICLE WAS VALID PRESENTED A MIXED QUESTION OF LAW AND FACT AND WAS NOT REVIEWABLE BY THE COURT OF APPEALS (CT APP))

CRIMINAL LAW, APPEALS.

WHETHER THE PROTECTIVE SEARCH OF A VEHICLE WAS VALID PRESENTED A MIXED QUESTION OF LAW AND FACT AND WAS NOT REVIEWABLE BY THE COURT OF APPEALS (CT APP).

The majority, over an extensive three-judge dissent, determined whether the search of a vehicle after a street stop was valid presented a mixed question of law and fact that was not reviewable by the Court of Appeals:

From the dissent:

> ... [W]here the issue presented is whether the People have demonstrated "the minimum showing necessary" to establish the legality of police conduct, "a question of law is presented for [our] review" ... .
>
> Accepting the facts as found by the Appellate Division and the suppression court, which are not disputed here, the People failed to adduce the minimum showing required to justify a protective search of defendant's vehicle — namely, a substantial likelihood of the presence of a weapon and an actual and specific threat to officer safety. I, therefore, disagree with the majority's conclusion that the question of whether the protective search was lawful is a mixed question of law and fact reviewable only for record support, and I would hold that the search of defendant's vehicle was unlawful. **People v Hardee, 2017 NY Slip Op 08038, CtApp 11-16-17**

CRIMINAL LAW (APPEALS, BECAUSE NO AFFIDAVIT OF ERRORS WAS FILED AFTER A CONVICTION IN TOWN COURT, COUNTY COURT DID NOT HAVE JURISDICTION TO HEAR THE APPEAL (CT APP))/AFFIDAVIT OF ERRORS (CRIMINAL LAW, APPEALS, BECAUSE NO AFFIDAVIT OF ERRORS WAS FILED AFTER A CONVICTION IN TOWN COURT, COUNTY COURT DID NOT HAVE JURISDICTION TO HEAR THE APPEAL (CT APP))/TOWN COURT (CRIMINAL LAW, APPEALS, BECAUSE NO AFFIDAVIT OF ERRORS WAS FILED AFTER A CONVICTION IN TOWN COURT, COUNTY COURT DID NOT HAVE JURISDICTION TO HEAR THE APPEAL (CT APP))/COUNTY COURT (CRIMINAL LAW, APPEALS, BECAUSE NO AFFIDAVIT OF ERRORS WAS FILED AFTER A CONVICTION IN TOWN COURT, COUNTY COURT DID NOT HAVE JURISDICTION TO HEAR THE APPEAL (CT APP))/APPEALS (CRIMINAL LAW, TOWN COURT, BECAUSE NO AFFIDAVIT OF ERRORS WAS FILED AFTER A CONVICTION IN TOWN COURT, COUNTY COURT DID NOT HAVE JURISDICTION TO HEAR THE APPEAL (CT APP))

CRIMINAL LAW, APPEALS.

BECAUSE NO AFFIDAVIT OF ERRORS WAS FILED AFTER A CONVICTION IN TOWN COURT, COUNTY COURT DID NOT HAVE JURISDICTION TO HEAR THE APPEAL (CT APP).

Defendant was convicted in town court of criminal contempt stemming from anti-drone protests at Hancock Field, an Air National Guard base. The town court proceedings were recorded electronically and no stenographer was present. The defendant filed a notice of appeal, but did not file an affidavit of errors. County Court heard the appeal and reduced defendant's sentence from one year to six months. The Court of Appeals, in a full-fledged opinion by Judge DiFiore, determined County Court did not have jurisdiction to hear the appeal because an affidavit of errors was not filed. However, because defendant had moved for an extension of time to file the affidavit of errors should the transcript of the electronic recording be deemed insufficient (never ruled on by County Court), the matter was sent back to County Court:

> Criminal Procedure Law § 460.10 requires an appellant to file an affidavit of errors with the criminal court in order to take an appeal from a judgment of a local criminal court if the underlying proceedings were not recorded by a court stenographer. We have already held that the filing of the affidavit of errors in this circumstance is a jurisdictional prerequisite ... .[W]e conclude that the failure to file the required affidavit of errors renders the intermediate appellate court without jurisdiction to hear the case. **People v Flores, 2017 NY Slip Op 08037, CtApp 11-16-17**

CRIMINAL LAW (ATTORNEYS, TRIAL JUDGE DID NOT INQUIRE INTO DEFENDANT'S SERIOUS REQUEST FOR ANOTHER ATTORNEY, CONVICTION REVERSED AND NEW TRIAL ORDERED (CT APP))/ATTORNEYS (CRIMINAL LAW, TRIAL JUDGE DID NOT INQUIRE INTO DEFENDANT'S SERIOUS REQUEST FOR ANOTHER ATTORNEY, CONVICTION REVERSED AND NEW TRIAL ORDERED (CT APP))

CRIMINAL LAW, ATTORNEYS.

TRIAL JUDGE DID NOT INQUIRE INTO DEFENDANT'S SERIOUS REQUEST FOR ANOTHER ATTORNEY, CONVICTION REVERSED AND NEW TRIAL ORDERED (CT APP).

The Court of Appeals reversed defendant's conviction and ordered a new trial because the trial judge did not conduct a sufficient inquiry into defendant's request for another attorney:

> We agree with defendant that the trial court failed to adequately inquire into his "seemingly serious request[]" to substitute counsel ... . Defendant's request was supported by "specific factual allegations of 'serious complaints about counsel'" ... , and a "minimal inquiry" into "the nature of the disagreement or its potential for resolution" was warranted ... . Accordingly, the trial court abused its discretion by failing to conduct such an inquiry. **People v Smith, 2017 NY Slip Op 08165, CtApp 11-21-17**

Similar issue and result in **People v Dodson, 2017 NY Slip Op 08171, CtApp 11-21-17**

CRIMINAL LAW (NO CORAM NOBIS RELIEF FOR DEFENDANT WHERE DEFENSE COUNSEL FILED A NOTICE OF APPEAL BUT ALLEGEDLY DID NOT ADVISE DEFENDANT OF THE AVAILABILITY OF POOR PERSON RELIEF AND DID NOT TAKE ANY ACTION ON A MOTION TO DISMISS THE APPEAL, DEFENDANT DID NOT MEET HIS BURDEN OF PROOF ON THE INEFFECTIVE ASSISTANCE CLAIM (CT APP))/ATTORNEYS (CRIMINAL LAW, NO CORAM NOBIS RELIEF FOR DEFENDANT WHERE DEFENSE COUNSEL FILED A NOTICE OF APPEAL BUT ALLEGEDLY DID NOT ADVISE DEFENDANT OF THE AVAILABILITY OF POOR PERSON RELIEF AND DID NOT TAKE ANY ACTION ON A MOTION TO DISMISS THE APPEAL, DEFENDANT DID NOT MEET HIS BURDEN OF PROOF ON THE INEFFECTIVE ASSISTANCE CLAIM (CT APP))/APPEALS (CRIMINAL LAW, (NO CORAM NOBIS RELIEF FOR DEFENDANT WHERE DEFENSE COUNSEL FILED A NOTICE OF APPEAL BUT ALLEGEDLY DID NOT ADVISE DEFENDANT OF THE AVAILABILITY OF POOR PERSON RELIEF AND DID NOT TAKE ANY ACTION ON A MOTION TO DISMISS THE APPEAL, DEFENDANT DID NOT MEET HIS BURDEN OF PROOF ON THE INEFFECTIVE ASSISTANCE CLAIM (CT APP))/CORAM NOBIS (NO CORAM NOBIS RELIEF FOR DEFENDANT WHERE DEFENSE COUNSEL FILED A NOTICE OF APPEAL BUT ALLEGEDLY DID NOT ADVISE DEFENDANT OF THE AVAILABILITY OF POOR PERSON RELIEF AND DID NOT TAKE ANY ACTION ON A MOTION TO DISMISS THE APPEAL, DEFENDANT DID NOT MEET HIS BURDEN OF PROOF ON THE INEFFECTIVE ASSISTANCE CLAIM (CT APP))/INEFFECTIVE ASSISTANCE (CRIMINAL LAW, (NO CORAM NOBIS RELIEF FOR DEFENDANT WHERE DEFENSE COUNSEL FILED A NOTICE OF APPEAL BUT ALLEGEDLY DID NOT ADVISE DEFENDANT OF THE AVAILABILITY OF POOR PERSON RELIEF AND DID NOT TAKE ANY ACTION ON A MOTION TO DISMISS THE APPEAL, DEFENDANT DID NOT MEET HIS BURDEN OF PROOF ON THE INEFFECTIVE ASSISTANCE CLAIM (CT APP))

CRIMINAL LAW, ATTORNEYS, APPEALS.

NO CORAM NOBIS RELIEF FOR DEFENDANT WHERE DEFENSE COUNSEL FILED A NOTICE OF APPEAL BUT ALLEGEDLY DID NOT ADVISE DEFENDANT OF THE AVAILABILITY OF POOR PERSON RELIEF AND DID NOT TAKE ANY ACTION ON A MOTION TO DISMISS THE APPEAL, DEFENDANT DID NOT MEET HIS BURDEN OF PROOF ON THE INEFFECTIVE ASSISTANCE CLAIM (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Stein, over two dissenting opinions, determined that defendant was not entitled to coram nobis relief based upon ineffective assistance for failure to perfect an appeal:

> In People v Syville (15 NY3d 391 [2010]), we held that, in rare circumstances, a defendant may seek coram nobis relief despite failing to move for an extension of time to file a notice of appeal within the one-year grace period provided by CPL 460.30. Specifically, we concluded that coram nobis may be available for a defendant who demonstrated that he or she timely requested that trial counsel file a notice of appeal, the attorney failed to comply, and the omission could not reasonably have been discovered within the one-year time limit ... . Defendant now asks us to expand Syville to situations in which retained trial counsel filed a timely notice of appeal but allegedly failed to advise the defendant of his or her right to poor person relief, or to take any action when served with a motion to dismiss the appeal years after the notice of appeal was filed. Because defendant has not met his burden of proving that counsel was ineffective, we decline to expand Syville under the circumstances presented here. * * *
>
> Given this ... Court's holdings ... that a defendant is not constitutionally entitled to the assistance of counsel in seeking poor person relief as long as he or she is given written notice that is similar to the one defendant received here — defendant has a heavy burden to demonstrate entitlement to a writ of error coram nobis premised on ineffective assistance of counsel for failing to assist in procuring poor person relief. ... He failed to meet that burden here, both in terms of his specific claim that counsel did not advise him of his right to seek poor person relief in connection with his appeal and the more general claim, advanced by both Judge Rivera and Judge Wilson in dissent, that counsel did not consult with him regarding an appeal.
>
> With respect to the other prong of defendant's coram nobis motion (based on failure to respond to the dismissal motion four years after the notice of appeal was filed) defendant and Judge Rivera, in her dissent, essentially seek a rule that trial counsel has a constitutional responsibility in connection with an appeal for an indefinite period of time extending for years after the notice of appeal is filed. Neither defendant nor that dissent cite any legal support for the imposition of such a rule. Moreover, the cases ... do not support imposing either ... an open-ended

obligation on behalf of trial counsel or a rule that counsel is ineffective for failing to assist a defendant in obtaining poor person relief. **People v Arjune, 2017 NY Slip Op 08159, CtApp 11-20-17**

EMPLOYMENT LAW (COA)

EMPLOYMENT LAW (DISCRIMINATION, STANDARD FOR PUNITIVE DAMAGES IN EMPLOYMENT DISCRIMINATION SUIT PURSUANT TO THE NYC HUMAN RIGHTS LAW DETERMINED (CT APP))/HUMAN RIGHTS LAW (NYC) (PUNITIVE DAMAGES, STANDARD FOR PUNITIVE DAMAGES IN EMPLOYMENT DISCRIMINATION SUIT PURSUANT TO THE NYC HUMAN RIGHTS LAW DETERMINED (CT APP))/PUNITIVE DAMAGES (EMPLOYMENT DISCRIMINATION, NYC HUMAN RIGHTS LAW, STANDARD FOR PUNITIVE DAMAGES IN EMPLOYMENT DISCRIMINATION SUIT PURSUANT TO THE NYC HUMAN RIGHTS LAW DETERMINED (CT APP))/DISCRIMINATION (EMPLOYMENT LAW, NYC HUMAN RIGHTS LAW, STANDARD FOR PUNITIVE DAMAGES IN EMPLOYMENT DISCRIMINATION SUIT PURSUANT TO THE NYC HUMAN RIGHTS LAW DETERMINED (CT APP))/GENDER DISCRIMINATION (EMPLOYMENT LAW, NYC HUMAN RIGHTS LAW, STANDARD FOR PUNITIVE DAMAGES IN EMPLOYMENT DISCRIMINATION SUIT PURSUANT TO THE NYC HUMAN RIGHTS LAW DETERMINED (CT APP))/PREGNANCY DISCRIMINATION (EMPLOYMENT LAW, NYC HUMAN RIGHTS LAW, STANDARD FOR PUNITIVE DAMAGES IN EMPLOYMENT DISCRIMINATION SUIT PURSUANT TO THE NYC HUMAN RIGHTS LAW DETERMINED (CT APP))

EMPLOYMENT LAW, (NYC) HUMAN RIGHTS LAW.

STANDARD FOR PUNITIVE DAMAGES IN EMPLOYMENT DISCRIMINATION SUIT PURSUANT TO THE NYC HUMAN RIGHTS LAW DETERMINED (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Garcia, over a dissenting opinion, answering a certified question from the Second Circuit, determined the appropriate standard of proof for the imposition of punitive damages in an employment discrimination (here gender and pregnancy discrimination) suit pursuant to the New York City Human Rights Law (NYCHRL):

> The New York City Human Rights Law makes clear that punitive damages are available for violations of the statute, but does not specify a standard for when such damages should be awarded. The Second Circuit has, by certified question, asked us to determine the applicable standard. We conclude that, consistent with the New York City Council's directive to construe the New York City Human Rights Law liberally, the common law standard as articulated in Home Insurance Co. v American Home Prods. Corp. (75 NY2d 196, 203-204 [1990]) applies. Accordingly, a plaintiff is entitled to punitive damages where the wrongdoer's actions amount to willful or wanton negligence, or recklessness, or where there is "a conscious disregard of the rights of others or conduct so reckless as to amount to such disregard" ... . **Chauca v Abraham, 2017 NY Slip Op 08158, CtApp 11-20-17**

FAMILY LAW (COA)

FAMILY LAW (ONCE THE NEGLECT PETITION WHICH LED TO THE PLACEMENT OF THE CHILD IN FOSTER CARE HAS BEEN DISMISSED, FAMILY COURT LOSES JURISDICTION AND CANNOT ENTERTAIN PERMANENCY HEARINGS TO CONTINUE FOSTER CARE PLACEMENT (CT APP))/NEGLECT (FAMILY LAW, ONCE THE NEGLECT PETITION WHICH LED TO THE PLACEMENT OF THE CHILD IN FOSTER CARE HAS BEEN DISMISSED, FAMILY COURT LOSES JURISDICTION AND CANNOT ENTERTAIN PERMANENCY HEARINGS TO CONTINUE FOSTER CARE PLACEMENT (CT APP))/FOSTER CARE (FAMILY LAW, ONCE THE NEGLECT PETITION WHICH LED TO THE PLACEMENT OF THE CHILD IN FOSTER CARE HAS BEEN DISMISSED, FAMILY COURT LOSES JURISDICTION AND CANNOT ENTERTAIN PERMANENCY HEARINGS TO CONTINUE FOSTER CARE PLACEMENT (CT APP))/PERMANENCY HEARINGS (FAMILY LAW, NEGLECT, ONCE THE NEGLECT PETITION WHICH LED TO THE PLACEMENT OF THE CHILD IN FOSTER CARE HAS BEEN DISMISSED, FAMILY COURT LOSES JURISDICTION AND CANNOT ENTERTAIN PERMANENCY HEARINGS TO CONTINUE FOSTER CARE PLACEMENT (CT APP))/CIVIL PROCEDURE (FAMILY LAW, JURISDICTION, ONCE THE NEGLECT PETITION WHICH LED TO THE PLACEMENT OF THE CHILD IN FOSTER CARE HAS BEEN DISMISSED, FAMILY COURT LOSES JURISDICTION AND CANNOT ENTERTAIN PERMANENCY HEARINGS TO CONTINUE FOSTER CARE PLACEMENT (CT APP))/JURISDICTION (CIVIL PROCEDURE, FAMILY LAW, (ONCE THE NEGLECT PETITION WHICH LED TO THE PLACEMENT OF THE CHILD IN FOSTER CARE HAS BEEN DISMISSED, FAMILY COURT LOSES JURISDICTION AND CANNOT ENTERTAIN PERMANENCY HEARINGS TO CONTINUE FOSTER CARE PLACEMENT (CT APP))

FAMILY LAW, CIVIL PROCEDURE.

ONCE THE NEGLECT PETITION WHICH LED TO THE PLACEMENT OF THE CHILD IN FOSTER CARE HAS BEEN DISMISSED, FAMILY COURT LOSES JURISDICTION AND CANNOT ENTERTAIN PERMANENCY HEARINGS TO CONTINUE FOSTER CARE PLACEMENT (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Wilson, reversing the appellate division, determined that, with respect to a child who has been removed from the home and placed in foster care based upon a pending neglect petition, once the underlying neglect petition has been dismissed, Family Court loses jurisdiction of the matter and cannot entertain permanency hearings to continue the foster care placement:

> Here, the Department seizes on a hyperliteral reading of [Family Court Act] section 1088, divorced from all context, to argue that Family Court's pre-petition placement of Jamie J. under (Family Court Act] section 1022 triggered a continuing grant of jurisdiction that survives the eventual dismissal of the neglect petition. In other words, even if the Family Court removes a child who has not been neglected or abused, it has jurisdiction to continue that child's placement in foster care until and unless it decides otherwise. Section 1088's place in the overall statutory scheme, the legislative history of article 10-A, and the dictates of parents' and children's constitutional rights to remain together compel the opposite conclusion: Family Court's jurisdiction terminates upon dismissal of the original neglect or abuse petition. **Matter of Jamie J. (Michelle E.C.), 2017 NY Slip Op 08161, CtApp 11-20-17**

FREEDOM OF INFORMATION LAW (FOIL) (COA)

FREEDOM OF INFORMATION LAW (FOIL) (SECOND DEPARTMENT USED THE WRONG STANDARD FOR APPLYING THE CONFIDENTIAL SOURCE EXEMPTION TO A FREEDOM OF INFORMATION LAW (FOIL) REQUEST FOR DOCUMENTS, CASE REMITTED, PETITIONER SOUGHT DOCUMENTS RELATING TO A REVIEW OF HIS SEX OFFENSE CASE WHICH WAS PROSECUTED AMID NATIONWIDE HYSTERIA OVER ALLEGATIONS OF RITUAL ABUSE AT DAY CARE CENTERS (CT APP))/CONFIDENTIAL SOURCE EXEMPTION (FREEDOM OF INFORMATION LAW (FOIL), SECOND DEPARTMENT USED THE WRONG STANDARD FOR APPLYING THE CONFIDENTIAL SOURCE EXEMPTION TO A FREEDOM OF INFORMATION LAW (FOIL) REQUEST FOR DOCUMENTS, CASE REMITTED, PETITIONER SOUGHT DOCUMENTS RELATING TO A REVIEW OF HIS SEX OFFENSE CASE WHICH WAS PROSECUTED AMID NATIONWIDE HYSTERIA OVER ALLEGATIONS OF RITUAL ABUSE AT DAY CARE CENTERS (CT APP))

FREEDOM OF INFORMATION LAW (FOIL).

SECOND DEPARTMENT USED THE WRONG STANDARD FOR APPLYING THE CONFIDENTIAL SOURCE EXEMPTION TO A FREEDOM OF INFORMATION LAW (FOIL) REQUEST FOR DOCUMENTS, CASE REMITTED, PETITIONER SOUGHT DOCUMENTS RELATING TO A REVIEW OF HIS SEX OFFENSE CASE WHICH WAS PROSECUTED AMID NATIONWIDE HYSTERIA OVER ALLEGATIONS OF RITUAL ABUSE AT DAY CARE CENTERS (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Rivera, over a two-judge partial dissent, determined that the standard for the confidentiality-source exemption for documents sought under the Freedom of Information Law (FOIL) in the Second Department was incorrect and remitted the matter. The requested documents relate to a review of petitioner's conviction by a panel specifically created for that review. Petitioner had pled guilty to several sex offenses at a time when a hysteria surrounding allegations of ritual child abuse at day care centers was sweeping the country:

> The legislature's policy of broad public access, as expressed in FOIL, dictates that the exemption for confidential sources and information be narrowly circumscribed. Therefore disclosure under FOIL can only be refused pursuant to section 87 (2) (e) (iii) if the agency presents a "particularized and specific justification for denying access" ... , based on an express promise of confidentiality to the source, or by establishing that, under the circumstances of the particular case, the confidentiality of the source or information can be reasonably inferred.
>
> Application of this rule is case and information specific, and depends on the particular facts and circumstances. In determining whether information obtained in the course of a criminal investigation should be treated as confidential or whether a source spoke on the assumption that the source's identity or statements would remain confidential, courts may consider, as they deem relevant, such factors as the nature of the crime, the source of the information in relation to the crime, and the content of the statements or information. Where the content of a statement or information and the circumstances surrounding its compilation by law enforcement convince a court that its confidentiality can be reasonably inferred, it may be withheld or released with appropriate redactions pursuant to section 87 (2) (e) (iii). Otherwise, absent an explicit assurance of confidentiality, it may not be withheld or redacted under that FOIL exemption.
>
> Here, because the Second Department majority misconstrued the FOIL exemption asserted by respondent, the order below must be reversed and the matter remitted for consideration under the correct standard. **Matter of Friedman v Rice, 2017 NY Slip Op 08167, CtApp 11-21-17**

INSURANCE LAW (COA)

INSURANCE LAW (INSURANCE LAW 3240 ALLOWS A DIRECT CAUSE OF ACTION IF THE INSUREDS AND RISKS ARE IN NEW YORK, NOT ONLY WHEN THE POLICY IS ISSUED OR DELIVERED IN NEW YORK (CT APP))/INSURANCE LAW 3240 (INSURANCE LAW 3240 ALLOWS A DIRECT CAUSE OF ACTION IF THE INSUREDS AND RISKS ARE IN NEW YORK, NOT ONLY WHEN THE POLICY IS ISSUED OR DELIVERED IN NEW YORK (CT APP))

INSURANCE LAW.

INSURANCE LAW 3240 ALLOWS A DIRECT CAUSE OF ACTION AGAINST INSURERS IF THE INSUREDS AND RISKS ARE IN NEW YORK, NOT ONLY WHEN THE POLICY IS ISSUED OR DELIVERED IN NEW YORK (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Wilson, over a three judge dissenting opinion, reversing the appellate division, determined several motions to dismiss in this insurance-coverage dispute should not have been granted. Plaintiff's decedent was killed when a DHL delivery truck driven by an employee of another company crossed the center line, causing a head-on crash. At issue was the reach of Insurance Law 3240 with respect to an insurance policy issued to DHL by AAIC. The appellate division held that Insurance Law 3240 did not allow suit because the policy was not "issued or delivered in this state." The Court of Appeals held the suit is allowed under Insurance Law 3240 because the insureds and risks are located in New York (two other issues, whether the DHL truck was a "hired auto" and whether it was driven with "permission" are not summarized here):

> AAIC adopts the Appellate Division's rationale that because AAIC's policy was issued in New Jersey and delivered in Washington and then in Florida, it was neither issued nor delivered in New York, and therefore plaintiff cannot recover from AAIC pursuant to Insurance Law § 3420. ...
>
> Insurance Law § 3420 allows a limited cause of action on behalf of injured parties directly against insurers. Section 3420 applies to policies and contracts "issued or delivered in this state" ... . Insurance Law § 3420 does not define the term "issued or delivered in this state," but other provisions of the Insurance Law are instructive: "[T]he proper interpretation of the term 'issued or delivered in this state' refers both to a policy issued for delivery in New York, and a policy issued for delivery outside of New York" ... . In Preserver, we interpreted section 3420 (d), which then required insurers to provide written notice when disclaiming coverage under policies "issued for delivery" in New York. We held that "[a] policy is 'issued for delivery' in New York if it covers both insureds and risks located in this state" (10 NY3d at 642). Thus, under Preserver, "issued for delivery" was interpreted to mean where the risk to be insured was located — not where the policy document itself was actually handed over or mailed to the insured. We interpreted section 3420 to provide a benefit — deliberately in derogation of the common law — to New Yorkers whenever a policy covers "insureds and risks located in this state" ... . Applying the Preserver standard to the facts of this case, it is clear that DHL is "located in" New York because it has a substantial business presence and creates risks in New York. It is even clearer that DHL purchased liability insurance covering vehicle-related risks arising from vehicles delivering its packages in New York, because its insurance agreements say so. **Carlson v American Intl. Group, Inc., 2017 NY Slip Op 08163, CtApp 11-20-17**

MUNICIPAL LAW (COA)

MUNICIPAL LAW (NOTICES OF CLAIM, PUBLIC BENEFIT CORPORATIONS ARE TREATED LIKE THE STATE FOR DETERMINING THEIR CAPACITY TO CHALLENGE A STATUTE, APPLICABLE DUE PROCESS STANDARD IS WHETHER THE STATUTE WAS ENACTED AS A REASONABLE RESPONSE TO REMEDY AN INJUSTICE, AT ISSUE IS A STATUTE ALLOWING LATE NOTICES OF CLAIM AGAINST BATTERY PARK CITY AUTHORITY TO BE FILED IN A 9-11 CLEANUP PERSONAL INJURY ACTION (CT APP))/CONSTITUTIONAL LAW (PUBLIC BENEFIT CORPORATIONS ARE TREATED LIKE THE STATE FOR DETERMINING THEIR CAPACITY TO CHALLENGE A STATUTE, APPLICABLE DUE PROCESS STANDARD IS WHETHER THE STATUTE WAS ENACTED AS A REASONABLE RESPONSE TO REMEDY AN INJUSTICE, AT ISSUE IS A STATUTE ALLOWING LATE NOTICES OF CLAIM AGAINST BATTERY PARK CITY AUTHORITY TO BE FILED IN A 9-11 CLEANUP PERSONAL INJURY ACTION (CT APP))/9-11 (NOTICES OF CLAIM, PUBLIC BENEFIT CORPORATIONS ARE TREATED LIKE THE STATE FOR DETERMINING THEIR CAPACITY TO CHALLENGE A STATUTE, APPLICABLE DUE PROCESS STANDARD IS WHETHER THE STATUTE WAS ENACTED AS A REASONABLE RESPONSE TO REMEDY AN INJUSTICE, AT ISSUE IS A STATUTE ALLOWING LATE NOTICES OF CLAIM AGAINST BATTERY PARK CITY AUTHORITY TO BE FILED IN A 9-11 CLEANUP PERSONAL INJURY ACTION (CT APP))/BATTERY PARK CITY AUTHORITY (9-11 CLEANUP, (NOTICES OF CLAIM, PUBLIC BENEFIT CORPORATIONS ARE TREATED LIKE THE STATE FOR DETERMINING THEIR CAPACITY TO CHALLENGE A STATUTE, APPLICABLE DUE PROCESS STANDARD IS WHETHER THE STATUTE WAS ENACTED AS A REASONABLE RESPONSE TO REMEDY AN INJUSTICE, AT ISSUE IS A STATUTE ALLOWING LATE NOTICES OF CLAIM AGAINST BATTERY PARK CITY AUTHORITY TO BE FILED IN A 9-11 CLEANUP PERSONAL INJURY ACTION (CT APP))/CAPACITY TO CHALLENGE STATUTE (PUBLIC BENEFIT CORPORATIONS ARE TREATED LIKE THE STATE FOR DETERMINING THEIR CAPACITY TO CHALLENGE A STATUTE, APPLICABLE DUE PROCESS STANDARD IS WHETHER THE STATUTE WAS ENACTED AS A REASONABLE RESPONSE TO REMEDY AN INJUSTICE, AT ISSUE IS A STATUTE ALLOWING LATE NOTICES OF CLAIM AGAINST BATTERY PARK CITY AUTHORITY TO BE FILED IN A 9-11 CLEANUP PERSONAL INJURY ACTION (CT APP))

MUNICIPAL LAW, CONSTITUTIONAL LAW.

PUBLIC BENEFIT CORPORATIONS ARE TREATED LIKE THE STATE FOR DETERMINING THEIR CAPACITY TO CHALLENGE A STATUTE, APPLICABLE DUE PROCESS STANDARD IS WHETHER THE STATUTE WAS ENACTED AS A REASONABLE RESPONSE TO REMEDY AN INJUSTICE, AT ISSUE IS A STATUTE ALLOWING LATE NOTICES OF CLAIM AGAINST BATTERY PARK CITY AUTHORITY TO BE FILED IN A 9-11 CLEANUP PERSONAL INJURY ACTION (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Feinman, over two concurring opinions, answered two certified questions from the Second Circuit. The defendant in the federal suit is Battery Park City Authority (BPCA), a public benefit corporation, which was sued by plaintiffs alleging personal injury caused by 9-11 clean-up of properties owned by BPCA. The legislature had enacted an amendment to the General Municpal Law to allow the plaintiffs to file late notices of claim. BPCA successfully argued in federal district court that the amendment extending the time to file notices of claim was unconstitutional as applied. When the matter came before the Second Circuit on appeal, the Second Circuit asked the Court of Appeals to determine whether the BPCA should be treated like the state for purposes of the capacity to challenge a statute (answer: yes) and asked for clarification of the standard for analyzing due process in this context (answer: whether the statute was enacted as a reasonable response in order to remedy an injustice):

> We ... hold that, under the capacity rule, public benefit corporations have no greater stature to challenge the constitutionality of State statutes than do municipal corporations or other local governmental entities. Of course, our holding today does not mean that public benefit corporations can never raise such constitutional challenges; like municipalities, they may avail themselves of an exception to the general rule ... . However, courts need not engage in a "particularized inquiry" to determine whether a public benefit corporation should first be treated like the State. Unlike in other contexts, for purposes of our capacity bar, every public benefit corporation is the State. * * *

> ... [A] claim-revival statute will satisfy the Due Process Clause of the State Constitution if it was enacted as a reasonable response in order to remedy an injustice. **Matter of World Trade Ctr. Lower Manhattan Disaster Site Litigation., 2017 NY Slip Op 08166, CtApp 11-21-17**

MUNICIPAL LAW (NYC) (NEW YORK CITY CHARTER PROVISION REQUIRES ONLY ONE ATTEMPT AT PERSONAL SERVICE OF NOTICES OF BUILDING CODE VIOLATIONS BEFORE TURNING TO THE NAIL AND MAIL ALTERNATIVE (CT APP))/REAL PROPERTY LAW (NYC, BUILDING CODE VIOLATIONS, NEW YORK CITY CHARTER PROVISION REQUIRES ONLY ONE ATTEMPT AT PERSONAL SERVICE OF NOTICES OF BUILDING CODE VIOLATIONS BEFORE TURNING TO THE NAIL AND MAIL ALTERNATIVE (CT APP))/CIVIL PROCEDURE (NYC, BUILDING CODE VIOLATIONS, NEW YORK CITY CHARTER PROVISION REQUIRES ONLY ONE ATTEMPT AT PERSONAL SERVICE OF NOTICES OF BUILDING CODE VIOLATIONS BEFORE TURNING TO THE NAIL AND MAIL ALTERNATIVE (CT APP))/NOTICES OF VIOLATION (NYC BUILDING CODE, NEW YORK CITY CHARTER PROVISION REQUIRES ONLY ONE ATTEMPT AT PERSONAL SERVICE OF NOTICES OF BUILDING CODE VIOLATIONS BEFORE TURNING TO THE NAIL AND MAIL ALTERNATIVE (CT APP))/NAIL AND MAIL (NYC BUILDING CODE VIOLATIONS, NEW YORK CITY CHARTER PROVISION REQUIRES ONLY ONE ATTEMPT AT PERSONAL SERVICE OF NOTICES OF BUILDING CODE VIOLATIONS BEFORE TURNING TO THE NAIL AND MAIL ALTERNATIVE (CT APP))/NOTICE OF VIOLATION (NOV) (NYC BUILDING CODE VIOLATIONS, NEW YORK CITY CHARTER PROVISION REQUIRES ONLY ONE ATTEMPT AT PERSONAL SERVICE OF NOTICES OF BUILDING CODE VIOLATIONS BEFORE TURNING TO THE NAIL AND MAIL ALTERNATIVE (CT APP))

MUNICIPAL LAW (NYC), REAL PROPERTY LAW, CIVIL PROCEDURE.

NEW YORK CITY CHARTER PROVISION REQUIRES ONLY ONE ATTEMPT AT PERSONAL SERVICE OF NOTICES OF BUILDING CODE VIOLATIONS BEFORE TURNING TO THE NAIL AND MAIL ALTERNATIVE (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge DiFiore, determined that he New York City charter provisions governing service of a Notice of Violation (NOV) of the building code require only one unsuccessful attempt at personal service before the affix and mail provisions kick in. The CPLR nail and mail provisions (which require due diligence in the attempts at personal service) do not apply:

> The question presented is whether, prior to use of the affix and mail procedure, the City Charter requires more than a single attempt to personally serve the NOV at the premises. * * *
>
> ... [T]he plain language of the relevant statute speaks in the singular — "[s]uch notice may only be affixed . . . where a reasonable attempt has been made" at personal delivery — indicating that only one attempt is required ... . * * *
>
> Moreover, the alternate service procedure authorized by the statute — a single attempt to personally deliver the NOV, coupled with affixing the NOV to the property and mailing copies to the owner at the premises and other addresses on file with related City agencies — is reasonably calculated to inform owners of violations relating to their properties. **Matter of Mestecky v City of New York, 2017 NY Slip Op 08162, CtApp 11-20-17**

NEGLIGENCE (COA)

NEGLIGENCE (SLIP AND FALL, DEFENDANT'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED IN THIS SLIP AND FALL CASE (CT APP))/SLIP AND FALL (DEFENDANT'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED IN THIS SLIP AND FALL CASE (CT APP))

NEGLIGENCE.

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED IN THIS SLIP AND FALL CASE (CT APP).

The Court of Appeals, reversing the appellate division, over a dissent, determined defendant's motion for summary judgment in this slip and fall case should not have been granted. Plaintiff tripped over a cord tied to a barrel in a parking lot. The majority offered no factual explanation for the reversal. **Lau v Margaret E. Pescatore Parking, Inc., 2017 NY Slip Op 08170, CtApp 11-21-17**

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