NEW YORK APPELLATE DIGEST, LLC

Summaries of Selected Decisions and Opinions Released in September 2018 by the First, Second, Third and Fourth Departments, and the Court of Appeals. The Summaries Are Linked to the Decisions.

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September 2018

Issue 54

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APPELLATE DIVISION

ANIMAL LAW

ANIMAL LAW.

NEGLIGENCE, AS OPPOSED TO STRICT LIABILITY, THEORY DID NOT APPLY TO INJURY FROM A HORSE WHICH WAS STARTLED WHEN THREE HORSES ESCAPED FROM A PADDOCK AND GALLOPED TOWARD THE BARN WHERE PLAINTIFF WAS GROOMING THE HORSE WHICH INJURED HER (SECOND DEPT).

The Second Department determined strict liability, not negligence, criteria applied to injury from a horse. Because the defendant demonstrated the escaped horses were domesticated animals and plaintiff did not allege the horses had vicious propensities, the complaint was properly dismissed:

> The plaintiff alleges that she was injured while grooming a stallion in the barn at Hidden Brook Farm (hereinafter the farm), when three horses, who had escaped from their paddocks, galloped unaccompanied toward the barn. The stallion was startled and suddenly side-stepped, pinning the plaintiff against the wall. * * *
>
> Contrary to the plaintiff's contention, this case does not fall within the limited exception set forth in Hastings v Suave (21 NY3d 122, 125-126), regarding a farm animal that strays from the place where it is kept onto a public road or other property ... . In carving out this exception, the Court of Appeals recognized "the unique peril that arises from allowing farm animals to wander off a farm unsupervised and unconfined" and the "common expectation among people in general that a 1,500-pound cow, a 400-pound pig or an unruly goat will not be permitted to wander freely into traffic or onto a neighbor's yard, mangling people and property alike" ... . Here, the plaintiff was in the barn grooming a horse, and the presence of horses was not unexpected. **Brinkman v Marshall Field VI, 2018 NY Slip Op 05996, Second Dept 9-12-18**

ANIMAL LAW (NEGLIGENCE, AS OPPOSED TO STRICT LIABILITY, THEORY DID NOT APPLY TO INJURY FROM A HORSE WHICH WAS STARTLED WHEN THREE HORSES ESCAPED FROM A PADDOCK AND GALLOPED TOWARD THE BARN WHERE PLAINTIFF WAS GROOMING THE HORSE WHICH INJURED HER (SECOND DEPT))/HORSES (NEGLIGENCE, AS OPPOSED TO STRICT LIABILITY, THEORY DID NOT APPLY TO INJURY FROM A HORSE WHICH WAS STARTLED WHEN THREE HORSES ESCAPED FROM A PADDOCK AND GALLOPED TOWARD THE BARN WHERE PLAINTIFF WAS GROOMING THE HORSE WHICH INJURED HER (SECOND DEPT))

ARBITRATION

ARBITRATION.

COURT'S LIMITED POWER OF REVIEW OF AN ARBITRATION AWARD EXPLAINED IN DEPTH, VACATION OF AWARD REVERSED (FIRST DEPT).

The First Department, reversing Supreme Court, in a full-fledged opinion by Justice Friedman, determined that Supreme Court did not have the power to order reconsideration of certain portions of the arbitration award (of over $100 million). The opinion is too detailed and comprehensive to fairly summarize here. The importance of the opinion is its detailed explanation of a court's limited power to review an arbitration award, even where the arbitrators got the law wrong:

> The order vacating the award in part cannot be justified under the "emphatic federal policy in favor of arbitral dispute resolution" embodied in the FAA [Federal Arbitration Act], a policy that "applies with special force in the field of international commerce" ... . Under the FAA, even if an arbitral tribunal's legal and procedural rulings might reasonably be criticized on the merits, an award is not subject to vacatur for ordinary errors of the kind the court identified in this case, as opposed to manifest disregard of the law, a concept that ... means "more than a simple error in law"... . "The potential for . . . mistakes [by the arbitrators] is the price for agreeing to arbitration" ... , and, "however disappointing [an award] may be," parties that have bargained for arbitration "must abide by it" (,,, ["Errors, mistakes, departures from strict legal rules, are all included in the arbitration risk"]). Accordingly, we reverse, grant the petition to confirm the award, and deny the cross motion to vacate it. **Matter of Daesang Corp. v NutraSweet Co., 2018 NY Slip Op 06331, First Dept 9-27-18**

ARBITRATION (COURT'S LIMITED POWER OF REVIEW OF AN ARBITRATION AWARD EXPLAINED IN DEPTH, VACATION OF AWARD REVERSED (FIRST DEPT))/FEDERAL ARBITRATION ACT (FAA) (COURT'S LIMITED POWER OF REVIEW OF AN ARBITRATION AWARD EXPLAINED IN DEPTH, VACATION OF AWARD REVERSED (FIRST DEPT))

ARBITRATION.

ARBITRATOR'S AWARD WAS NOT IRRATIONAL, SUPREME COURT SHOULD NOT HAVE VACATED THE AWARD IN THIS REAR-END COLLISION CASE (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined the arbitrator's award in this rear-end collision case should not have been vacated:

> "It is well settled that judicial review of arbitration awards is extremely limited" ... . As relevant here, a court may vacate an arbitration award if it finds that the rights of a party were prejudiced when "an arbitrator . . . exceeded his [or her] power or so imperfectly executed it that a final and definite award upon the subject matter submitted was not made" (CPLR 7511 [b] [1] [iii]).
>
> ... An arbitrator exceeds his or her power where, inter alia, the award is "irrational"... , i.e., "there is no proof whatever to justify the award"... . Where, however, "an arbitrator offers even a barely colorable justification for the outcome reached, the arbitration award must be upheld" ... . Here, the arbitrator's determination is not irrational inasmuch as defendant submitted evidence establishing that plaintiff's injuries were not serious or were not caused by the accident ... .
>
> Plaintiff correctly concedes that the arbitrator did not "imperfectly execute[]" his power (CPLR 7511 [b] [1] [iii]), inasmuch as the arbitration award did not " leave[] the parties unable to determine their rights and obligations,' " fail to " resolve the controversy submitted or . . . create[] a new controversy' " ... .
>
> Additionally, "it is well established that an arbitrator's failure to set forth his [or her] findings or reasoning does not constitute a basis to vacate an award" **... . Whitney v Perrotti, 2018 NY Slip Op 06343, Fourth Dept 9-28-18**

ARBITRATION (ARBITRATOR'S AWARD WAS NOT IRRATIONAL, SUPREME COURT SHOULD NOT HAVE VACATED THE AWARD IN THIS REAR-END COLLISION CASE (FOURTH DEPT))/CPLR 7511(ARBITRATOR'S AWARD WAS NOT IRRATIONAL, SUPREME COURT SHOULD NOT HAVE VACATED THE AWARD IN THIS REAR-END COLLISION CASE (FOURTH DEPT))

ATTORNEYS

ATTORNEYS, EVIDENCE.

PLAINTIFF CAN PRESENT EXPERT TESTIMONY ABOUT THE AMOUNT OF PLAINTIFF'S LEGAL COSTS ATTRIBUTABLE TO DEFENDANT-ATTORNEY'S ALLEGED USE OF AN ALLEGEDLY FORGED DOCUMENT IN LITIGATION IN VIOLATION OF JUDICIARY LAW 487 (FIRST DEPT).

The First Department, reversing Supreme Court, determined plaintiff (Melcher) can present expert testimony (by Lupkin) about the amount of Melcher's legal costs attributable to defendant-attorney's (Corwin's) alleged use of an allegedly forged document in violation of Judiciary Law 487:

> ... [W]e are cognizant of the "evident intent [of Judiciary Law § 487] to enforce an attorney's special obligation to protect the integrity of the courts and foster their truth-seeking function" ... . Accordingly, we exercise our discretion to modify Supreme Court's order to permit Melcher to call Lupkin to testify as an expert witness on damages at trial, with the proviso that his testimony be limited to the assessment of the excess legal costs that Melcher was required to incur, during the period beginning February 17, 2004, and ending May 11, 2009, as the proximate result of any violation of Judiciary Law § 487 by Corwin that the factfinder may find to have occurred, as discussed above. **Melcher v Greenberg Traurig LLP, 2018 NY Slip Op 06310, First Dept 9-27-18**

ATTORNEYS (PLAINTIFF CAN PRESENT EXPERT TESTIMONY ABOUT THE AMOUNT OF PLAINTIFF'S LEGAL COSTS ATTRIBUTABLE TO DEFENDANT-ATTORNEY'S ALLEGED USE OF AN ALLEGEDLY FORGED DOCUMENT IN LITIGATION IN VIOLATION OF JUDICIARY LAW 487 (FIRST DEPT))/EVIDENCE (ATTORNEYS, JUDICIARY LAW 487, PLAINTIFF CAN PRESENT EXPERT TESTIMONY ABOUT THE AMOUNT OF PLAINTIFF'S LEGAL COSTS ATTRIBUTABLE TO DEFENDANT-ATTORNEY'S ALLEGED USE OF AN ALLEGEDLY FORGED DOCUMENT IN LITIGATION IN VIOLATION OF JUDICIARY LAW 487 (FIRST DEPT))/EXPERT OPINION (ATTORNEYS, JUDICIARY LAW 487, PLAINTIFF CAN PRESENT EXPERT TESTIMONY ABOUT THE AMOUNT OF PLAINTIFF'S LEGAL COSTS ATTRIBUTABLE TO DEFENDANT-ATTORNEY'S ALLEGED USE OF AN ALLEGEDLY FORGED DOCUMENT IN LITIGATION IN VIOLATION OF JUDICIARY LAW 487 (FIRST DEPT))/JUDICIARY LAW 487 (ATTORNEYS, PLAINTIFF CAN PRESENT EXPERT TESTIMONY ABOUT THE AMOUNT OF PLAINTIFF'S LEGAL COSTS ATTRIBUTABLE TO DEFENDANT-ATTORNEY'S ALLEGED USE OF AN ALLEGEDLY FORGED DOCUMENT IN LITIGATION IN VIOLATION OF JUDICIARY LAW 487 (FIRST DEPT))

CIVIL PROCEDURE

CIVIL PROCEDURE.

MOTION TO VACATE A DEFAULT JUDGMENT PURSUANT TO CPLR 317 AND 5015 PROPERLY DENIED, CRITERIA EXPLAINED (SECOND DEPT).

The Second Department determined the motion to vacate a default judgment pursuant to CPLR 317 and 5015(a) was properly denied because the defendant did not demonstrate it was not personally served with the summons and complaint. The court explained the criteria under each statute:

> CPLR 317 provides that a person served with a summons, other than by personal delivery to him or her, who does not appear, may be allowed to defend the action within one year after he or she obtains knowledge of entry of the judgment upon a finding of the court that he or she did not personally receive notice of the summons in time to defend and has a potentially meritorious defense ... . However, the "mere denial of receipt of the summons and complaint is not sufficient to establish lack of actual notice of the action in time to defend for the purpose of CPLR 317" ... . Here, the defendant failed to establish that it did not personally receive notice of the summons in time to defend the action. The affidavit of the defendant's "representative," who appears to be its attorney, stated that the complaint was not delivered "personally" to the defendant, but rather, "to an inaccurate address through the Secretary of State," which address had not been valid "for several years." This representative's affidavit does not appear to be based on personal knowledge. Furthermore, there is no allegation contained in this affidavit that the defendant, in fact, never received the summons and complaint, nor is there any detail as to where the defendant moved to and when, nor whether the defendant made any efforts to update its address on file with the Secretary of State. Under these circumstances, the defendant did not demonstrate lack of actual notice of the action ... .
>
> In contrast to a motion pursuant to CPLR 317, on a motion pursuant to CPLR 5015(a)(1), the movant is required to establish a reasonable excuse for his or her default. In general, a defendant's failure to keep a current address on file with the Secretary of State does not constitute a reasonable excuse ... . However, there is no per se rule that a corporation served through the Secretary of State, and which failed to update its address on file there, cannot demonstrate an "excusable default." Rather, a court should consider, among other factors, the length of time for which the address had not been kept current ... . Here, no evidence was presented as to how long the address was not updated. Accordingly, the defendant failed to establish a reasonable excuse for its default. **Dwyer Agency of Mahopac, LLC v Dring Holding Corp., 2018 NY Slip Op 06001, Second Dept 9-12-18**

CIVIL PROCEDURE (DEFAULT JUDGMENT, MOTION TO VACATE A DEFAULT JUDGMENT PURSUANT TO CPLR 317 AND 5015 PROPERLY DENIED, CRITERIA EXPLAINED (SECOND DEPT))/CPLR 317 (DEFAULT JUDGMENT, MOTION TO VACATE A DEFAULT JUDGMENT PURSUANT TO CPLR 317 AND 5015 PROPERLY DENIED, CRITERIA EXPLAINED (SECOND DEPT))/CPLR 5015(a) (DEFAULT JUDGMENT, MOTION TO VACATE A DEFAULT JUDGMENT PURSUANT TO CPLR 317 AND 5015 PROPERLY DENIED, CRITERIA EXPLAINED (SECOND DEPT))/DEFAULT JUDGMENT, MOTION TO VACATE (MOTION TO VACATE A DEFAULT JUDGMENT PURSUANT TO CPLR 317 AND 5015 PROPERLY DENIED, CRITERIA EXPLAINED (SECOND DEPT))

CIVIL PROCEDURE.

MOTION TO COMPEL PLAINTIFF TO ACCEPT A LATE ANSWER, IN RESPONSE TO PLAINTIFF'S MOTION FOR A DEFAULT JUDGMENT, PROPERLY GRANTED (SECOND DEPT).

The Second Department determined defendant's cross-motion to compel plaintiff to accept a late answer, in response to plaintiff's motion for a default judgment, was properly granted:

> The plaintiff allegedly slipped and fell on snow and ice on an exterior walkway located on property owned and operated by the defendants. She subsequently commenced this action and served the defendants with process via the Secretary of State on October 11, 2016, pursuant to Limited Liability Company Law § 303. On November 25, 2016, the plaintiff moved pursuant to CPLR 3215 for leave to enter a default judgment. On December 22, 2016, 42 days after the defendants' time to answer had expired, the defendants cross-moved pursuant to CPLR 2004 and 3012(d) to compel the plaintiff to accept their late answer. Annexed to the defendants' cross motion was their proposed answer. The Supreme Court denied the plaintiff's motion and granted the defendants' cross motion. The plaintiff appeals.
>
> In light of the lack of prejudice to the plaintiff resulting from the defendants' short delay in answering the complaint, the lack of willfulness on the part of the defendants, the existence of a potentially meritorious defense, and the public policy favoring the resolution of cases on the merits, the Supreme Court providently exercised its discretion in denying the plaintiff's motion pursuant to CPLR 3215 for leave to enter a default judgment against the defendants and in granting the defendants' cross motion to compel the plaintiff to accept their late answer ... . **Marcelli v Lorraine Arms Apts., LLC, 2018 NY Slip Op 06006, Second Dept 9-12-18**

CIVIL PROCEDURE (MOTION TO COMPEL PLAINTIFF TO ACCEPT A LATE ANSWER, IN RESPONSE TO PLAINTIFF'S MOTION FOR A DEFAULT JUDGMENT, PROPERLY GRANTED (SECOND DEPT))/CPLR 3215 (MOTION TO COMPEL PLAINTIFF TO ACCEPT A LATE ANSWER, IN RESPONSE TO PLAINTIFF'S MOTION FOR A DEFAULT JUDGMENT, PROPERLY GRANTED (SECOND DEPT))/CPLR 2004 (MOTION TO COMPEL PLAINTIFF TO ACCEPT A LATE ANSWER, IN RESPONSE TO PLAINTIFF'S MOTION FOR A DEFAULT JUDGMENT, PROPERLY GRANTED (SECOND DEPT))/CPLR 3012(d) (MOTION TO COMPEL PLAINTIFF TO ACCEPT A LATE ANSWER, IN RESPONSE TO PLAINTIFF'S MOTION FOR A DEFAULT JUDGMENT, PROPERLY GRANTED (SECOND DEPT))

CIVIL PROCEDURE.

DEFENDANT COULD NOT BRING A SUMMARY JUDGMENT MOTION BEFORE ISSUE WAS JOINED BY SERVICE OF AN ANSWER (SECOND DEPT).

The Second Department noted that a defendant who has not yet served an answer cannot move for summary judgment:

> A motion for summary judgment may only be made after joinder of issue (see CPLR 3212[a]). Where, as here, it is conceded that the defendant had not served an answer before moving for summary judgment, issue was not joined and the defendant was precluded from obtaining summary judgment ... . The requirement that a motion for summary judgment may not be made before issue is joined (see CPLR 3212[a]) "is strictly adhered to" ... . **Cremosa Food Co., LLC v Amella, 2018 NY Slip Op 06077, Second Dept 9-19-18**

CIVIL PROCEDURE (DEFENDANT COULD NOT BRING A SUMMARY JUDGMENT MOTION BEFORE ISSUE WAS JOINED BY SERVICE OF AN ANSWER (SECOND DEPT))/CPLR 3212 (DEFENDANT COULD NOT BRING A SUMMARY JUDGMENT MOTION BEFORE ISSUE WAS JOINED BY SERVICE OF AN ANSWER (SECOND DEPT))/SUMMARY JUDGMENT (CIVIL PROCEDURE, (DEFENDANT COULD NOT BRING A SUMMARY JUDGMENT MOTION BEFORE ISSUE WAS JOINED BY SERVICE OF AN ANSWER (SECOND DEPT))

CIVIL PROCEDURE.

RELATION BACK DOCTRINE SHOULD HAVE BEEN APPLIED IN THE LABOR LAW 200 AND 241 (6) ACTION TO ALLOW PLAINTIFF TO ADD A PARTY AFTER THE STATUTE OF LIMITATIONS HAD RUN (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the relation-back doctrine should have been applied to allow plaintiff to add a party to the Labor Law 200 and 241 (6) complaint after the statute of limitations had run:

> On October 15, 2007, the plaintiff, a construction worker, allegedly was injured while performing demolition work on the roof of a condominium building in Brooklyn. In December 2008, the plaintiff commenced this action against A.T.A. Construction Corp. (hereinafter A.T.A.), the general contractor for the construction project, and Park Slope Condominium (hereinafter Park Slope), the alleged owner of the subject building. The complaint asserted causes of action sounding in common-law negligence and violations of Labor Law §§ 200 and 241(6).
>
> In June 2014, after the expiration of the statute of limitations, the plaintiff cross-moved for leave to amend his complaint to add Flan Realty, LLC (hereinafter Flan), as a defendant in the action. * * *
>
> ...[T]he claims against Flan arise out of the same conduct, transaction, or occurrence as the claims asserted against Park Slope. In addition, the plaintiff demonstrated that, under the particular circumstances presented, Park Slope and Flan are united in interest inasmuch as the two entities, "intentionally or not, often blurred the distinction between them" ... . Moreover, Flan had notice of this action within the applicable limitations period, inasmuch as the Flancraichs jointly operated both Park Slope and Flan, and Flan was designated in the condominium declaration to receive service of process on behalf of Park Slope ... .Finally, the plaintiff demonstrated that the initial failure to add Flan was not intentional, but was the result of an excusable mistake ... . **Uddin v A.T.A. Constr. Corp., 2018 NY Slip Op 06135, Second Dept 9-19-18**

CIVIL PROCEDURE (RELATION BACK DOCTRINE SHOULD HAVE BEEN APPLIED IN THE LABOR LAW 200 AND 241 (6) ACTION TO ALLOW PLAINTIFF TO ADD A PARTY AFTER THE STATUTE OF LIMITATIONS HAD RUN (SECOND DEPT))/RELATION BACK DOCTRINE (RELATION BACK DOCTRINE SHOULD HAVE BEEN APPLIED IN THE LABOR LAW 200 AND 241 (6) ACTION TO ALLOW PLAINTIFF TO ADD A PARTY AFTER THE STATUTE OF LIMITATIONS HAD RUN (SECOND DEPT))

CIVIL PROCEDURE.

AFFIDAVIT AND ATTORNEY AFFIRMATION CONSTITUTED THE FUNCTIONAL EQUIVALENT OF A VERIFIED PETITION IN THIS ARTICLE 78 PROCEEDING, THEREFORE THE PROCEEDING SHOULD NOT HAVE BEEN DISMISSED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined that petitioner's affidavit and attorney affirmation constituted the equivalent of a verified petition. The motion to dismiss the Article 78 actions should not have been granted:

> A verified petition is required to establish a jurisdictional predicate for a special proceeding (see CPLR 304[a]; 7804[c], [d] ...). CPLR 304(a) provides that "[a] special proceeding is commenced by filing a petition." CPLR 7804(c) provides that "a notice of petition, together with the petition and affidavits specified in the notice, shall be served on any adverse party at least twenty days before the time at which the petition is noticed to be heard." However, a document that is not denominated a verified petition may satisfy CPLR 304 and 7804 if it is the functional equivalent of a verified petition ... .
>
> Here, none of the papers filed and served by the petitioner was denominated a verified petition. However, the petitioner's papers, particularly her affidavit and the affirmation of her attorney, gave notice as to what administrative action was being challenged, the events upon which the action was taken, the basis of the challenge, and the relief sought ... . Therefore, the papers fulfilled the purposes of a verified petition and were the functional equivalent of a verified petition ... . **Matter of Levine v Suffolk County Dept. of Social Servs., 2018 NY Slip Op 06242, Second Dept 9-26-18**

CIVIL PROCEDURE (AFFIDAVIT AND ATTORNEY AFFIRMATION CONSTITUTED THE FUNCTIONAL EQUIVALENT OF A VERIFIED PETITION IN THIS ARTICLE 78 PROCEEDING, THEREFORE THE PROCEEDING SHOULD NOT HAVE BEEN DISMISSED (SECOND DEPT))/CPLR 304 (AFFIDAVIT AND ATTORNEY AFFIRMATION CONSTITUTED THE FUNCTIONAL EQUIVALENT OF A VERIFIED PETITION IN THIS ARTICLE 78 PROCEEDING, THEREFORE THE PROCEEDING SHOULD NOT HAVE BEEN DISMISSED (SECOND DEPT))/CPLR 7804 (AFFIDAVIT AND ATTORNEY AFFIRMATION CONSTITUTED THE FUNCTIONAL EQUIVALENT OF A VERIFIED PETITION IN THIS ARTICLE 78 PROCEEDING, THEREFORE THE PROCEEDING SHOULD NOT HAVE BEEN DISMISSED (SECOND DEPT))/VERIFIED PETITION (ARTICLE 78, CIVIL PROCEDURE, AFFIDAVIT AND ATTORNEY AFFIRMATION CONSTITUTED THE FUNCTIONAL EQUIVALENT OF A VERIFIED PETITION IN THIS ARTICLE 78 PROCEEDING, THEREFORE THE PROCEEDING SHOULD NOT HAVE BEEN DISMISSED (SECOND DEPT))

CIVIL PROCEDURE, ATTORNEYS, PRIVILEGE, IMMUNITY, INSURANCE LAW.

LEGAL DOCUMENTS, BILLS FOR LEGAL SERVICES AND AN INSURER'S FILE PROTECTED BY ATTORNEY-CLIENT PRIVILEGE OR CONDITIONAL IMMUNITY, SUPREME COURT SHOULD NOT HAVE ORDERED DISCLOSURE (SECOND DEPT).

The Second Department, reversing Supreme Court, determined that legal documents, bills for legal services, and an insurance carrier's file were not subject to disclosure. All the documents were protected by attorney-client privilege or conditional immunity. The underlying medical malpractice action was against defendant Louis Lasky Memorial Medical and Dental Center and defendant Frederick Ast. The documents were requested by Ast in a proceeding to determine the amount of the settlement to be attributed to Louis Lasky and Ast:

> With respect to the files maintained by Louis Lasky's attorneys, the only documents contained therein that have not already been disclosed are absolutely protected by CPLR 3101(b) and (c), as they are "primarily and predominately legal in nature and, in their full content and context, were made to render legal advice or services" to Louis Lasky ... . Regarding the legal bills, it was improper for the court to order Louis Lasky to produce unredacted copies because such disclosure would reveal factual investigation and legal work done by counsel, which is privileged material ... . As for the insurance carrier's file, the court correctly concluded that this file is protected by a conditional immunity, as it contained material prepared for litigation ... . However, the court erred in finding that Ast met his burden of demonstrating that he had a "substantial need" for the materials in the carrier's file, and that he could not obtain their "substantial equivalent" by other means "without undue hardship" (CPLR 3101[d] ...). **Teran v Ast, 2018 NY Slip Op 06288, Second Dept 9-26-18**

CIVIL PROCEDURE (DISCLOSURE, ATTORNEYS, LEGAL DOCUMENTS, BILLS FOR LEGAL SERVICES AND AN INSURER'S FILE PROTECTED BY ATTORNEY-CLIENT PRIVILEGE OR CONDITIONAL IMMUNITY, SUPREME COURT SHOULD NOT HAVE ORDERED DISCLOSURE (SECOND DEPT))/ATTORNEYS (PRIVILEGE, IMMUNITY, DISCLOSURE, ATTORNEYS, LEGAL DOCUMENTS, BILLS FOR LEGAL SERVICES AND AN INSURER'S FILE PROTECTED BY ATTORNEY-CLIENT PRIVILEGE OR CONDITIONAL IMMUNITY, SUPREME COURT SHOULD NOT HAVE ORDERED DISCLOSURE (SECOND DEPT))/PRIVILEGE (ATTORNEY-CLIENT, DOCUMENTS, BILLS FOR LEGAL SERVICES AND AN INSURER'S FILE PROTECTED BY ATTORNEY-CLIENT PRIVILEGE OR CONDITIONAL IMMUNITY, SUPREME COURT SHOULD NOT HAVE ORDERED DISCLOSURE (SECOND DEPT))/CPLR 3101 (DISCLOSURE, ATTORNEYS, LEGAL DOCUMENTS, BILLS FOR LEGAL SERVICES AND AN INSURER'S FILE PROTECTED BY ATTORNEY-CLIENT PRIVILEGE OR CONDITIONAL IMMUNITY, SUPREME COURT SHOULD NOT HAVE ORDERED DISCLOSURE (SECOND DEPT))/IMMUNITY (INSURER'S FILE, ATTORNEYS, LEGAL DOCUMENTS, BILLS FOR LEGAL SERVICES AND AN INSURER'S FILE PROTECTED BY ATTORNEY-CLIENT PRIVILEGE OR CONDITIONAL IMMUNITY, SUPREME COURT SHOULD NOT HAVE ORDERED DISCLOSURE (SECOND DEPT))/INSURANCE LAW (DISCLOSURE, INSURER'S FILE, ATTORNEYS, LEGAL DOCUMENTS, BILLS FOR LEGAL SERVICES AND AN INSURER'S FILE PROTECTED BY ATTORNEY-CLIENT PRIVILEGE OR CONDITIONAL IMMUNITY, SUPREME COURT SHOULD NOT HAVE ORDERED DISCLOSURE (SECOND DEPT))

CIVIL PROCEDURE, ATTORNEYS, TOXIC TORTS.

SUPREME COURT SHOULD NOT HAVE REFUSED TO VACATE A DISMISSAL AND ALLOW AMENDMENT PLAINTIFF'S BILL OF PARTICULARS, PLAINTIFF'S DELAY IN COMPLYING WITH A CONDITIONAL PRECLUSION ORDER WAS SHORT AND WAS ADEQUATELY EXCUSED BY LAW OFFICER FAILURE (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the delay in complying with a conditional discovery order did not justify Supreme Court's refusing to vacate the dismissal and allow the amendment of plaintiff's bill of particulars. The delay was short and the law office failure excuse was adequate:

> "To obtain relief from a conditional order of preclusion, the defaulting party must demonstrate a reasonable excuse for the failure to produce the requested items and the existence of a potentially meritorious claim or defense" ... . Under the circumstances of this case, the Supreme Court improvidently exercised its discretion in concluding that the law office failure of the plaintiff's former counsel was not a reasonable excuse for the plaintiff's short delay in complying with the directives of the conditional order ... . Moreover, the plaintiff demonstrated the existence of a potentially meritorious cause of action to recover lost wages ... .
>
> Further, the Supreme Court improvidently exercised its discretion in denying that branch of the plaintiff's motion which was for leave to amend her bill of particulars to allege that she had sustained property damage as a result of her alleged exposure to toxic mold and fungi at the defendants' premises. "Generally, in the absence of prejudice or surprise to the opposing party, leave to amend a bill of particulars should be freely granted unless the proposed amendment is palpably insufficient or patently devoid of merit'" ... . "Where this standard is met, [t]he sufficiency or underlying merit of the proposed amendment is to be examined no further'" ... . Here, the proposed amendment is not palpably insufficient or patently devoid of merit, and there is no evidence that it would prejudice or surprise the defendants, since the proposed amendment arose out of the same facts as those set forth in the complaint ... . **Liese v Hennessey, 2018 NY Slip Op 06087, Second Dept 9-19-18**

CIVIL PROCEDURE (SUPREME COURT SHOULD NOT HAVE REFUSED TO VACATE A DISMISSAL AND ALLOW AMENDMENT PLAINTIFF'S BILL OF PARTICULARS, PLAINTIFF'S DELAY IN COMPLYING WITH A CONDITIONAL PRECLUSION ORDER WAS SHORT AND WAS ADEQUATELY EXCUSED BY LAW OFFICER FAILURE (SECOND DEPT))/ATTORNEYS (SUPREME COURT SHOULD NOT HAVE REFUSED TO VACATE A DISMISSAL AND ALLOW AMENDMENT PLAINTIFF'S BILL OF PARTICULARS, PLAINTIFF'S DELAY IN COMPLYING WITH A CONDITIONAL PRECLUSION ORDER WAS SHORT AND WAS ADEQUATELY EXCUSED BY LAW OFFICER FAILURE (SECOND DEPT))/LAW OFFICE FAILURE (SUPREME COURT SHOULD NOT HAVE REFUSED TO VACATE A DISMISSAL AND ALLOW AMENDMENT PLAINTIFF'S BILL OF PARTICULARS, PLAINTIFF'S DELAY IN COMPLYING WITH A CONDITIONAL PRECLUSION ORDER WAS SHORT AND WAS ADEQUATELY EXCUSED BY LAW OFFICER FAILURE (SECOND DEPT))/BILL OF PARTICULARS (SUPREME COURT SHOULD NOT HAVE REFUSED TO VACATE A DISMISSAL AND ALLOW AMENDMENT PLAINTIFF'S BILL OF PARTICULARS, PLAINTIFF'S DELAY IN COMPLYING WITH A CONDITIONAL PRECLUSION ORDER WAS SHORT AND WAS ADEQUATELY EXCUSED BY LAW OFFICER FAILURE (SECOND DEPT))

CIVIL PROCEDURE, CONTRACT LAW, ATTORNEYS, AGENCY.

ATTORNEY HAD APPARENT AUTHORITY TO SIGN STIPULATION OF SETTLEMENT (SECOND DEPT).

The Second Department determined that a stipulation of settlement was properly enforced because the attorney had the apparent authority to sign the stipulation on the client's behalf:

> "An agreement between parties or their attorneys relating to any matter in an action, other than one made between counsel in open court, is not binding upon a party unless it is in a writing subscribed by him [or her] or his [or her] attorney or reduced to the form of an order and entered" (CPLR 2104). A stipulation of settlement signed by an attorney may bind his or her client even if it exceeds the attorney's actual authority if the attorney had apparent authority to act on his or her client's behalf ... . Here, the plaintiff is bound by the stipulation of settlement signed by her former attorney, as the record supports the finding that even if the attorney lacked actual authority to enter into the stipulation of settlement on the plaintiff's behalf, he had apparent authority to do so (see CPLR 2104 ...). **Anghel v Utica Mut. Ins. Co., 2018 NY Slip Op 06073, Second Dept 9-19-18**

CIVIL PROCEDURE (STIPULATION, ATTORNEY HAD APPARENT AUTHORITY TO SIGN STIPULATION OF SETTLEMENT (SECOND DEPT))/CONTRACT LAW (STIPULATION, ATTORNEY HAD APPARENT AUTHORITY TO SIGN STIPULATION OF SETTLEMENT (SECOND DEPT))/ATTORNEYS (STIPULATION, ATTORNEY HAD APPARENT AUTHORITY TO SIGN STIPULATION OF SETTLEMENT (SECOND DEPT))/AGENCY (ATTORNEYS, STIPULATION, ATTORNEY HAD APPARENT AUTHORITY TO SIGN STIPULATION OF SETTLEMENT (SECOND DEPT)/STIPULATION (ATTORNEYS, AGENCY, ATTORNEY HAD APPARENT AUTHORITY TO SIGN STIPULATION OF SETTLEMENT (SECOND DEPT))/APPARENT AUTHORITY (AGENCY, ATTORNEYS, STIPULATION, ATTORNEY HAD APPARENT AUTHORITY TO SIGN STIPULATION OF SETTLEMENT (SECOND DEPT))/CPLR 2104 (STIPULATION, ATTORNEY HAD APPARENT AUTHORITY TO SIGN STIPULATION OF SETTLEMENT (SECOND DEPT))

CIVIL PROCEDURE, CONTRACT LAW, REAL PROPERTY LAW.

PLAINTIFF WAS GRANTED A PRELIMINARY INJUNCTION IN THIS ACTION FOR SPECIFIC PERFORMANCE OF A REAL ESTATE PURCHASE AGREEMENT, ALTHOUGH THE AMOUNT OF THE UNDERTAKING IS WITHIN THE COURT'S DISCRETION, THE COURT MUST REQUIRE PLAINTIFF TO GIVE AN UNDERTAKING (SECOND DEPT).

The Second Department, reversing Supreme Court, noted that a party who has been granted a preliminary injunction must give an undertaking, although the amount is within the court's discretion:

> The plaintiff commenced this action for specific performance of a contract for the sale of certain real property in Queens. The plaintiff moved for a preliminary injunction, inter alia, restraining the defendants from selling, transferring, or encumbering the subject property. In an order entered March 17, 2015, the Supreme Court granted the plaintiff's motion for a preliminary injunction. In the order appealed from, the court determined that an undertaking was not required. The defendants appeal.
>
> "[U]pon the granting of a preliminary injunction, a plaintiff shall give an undertaking in an amount to be fixed by the court"' (...CPLR 6312[b]). Thus, "[w]hile fixing the amount of an undertaking when granting a motion for a preliminary injunction is a matter within the sound discretion of the court, CPLR 6312(b) clearly and unequivocally requires the party seeking an injunction to give an undertaking" ... . **Chao-Yu C. Huang v Shih, 2018 NY Slip Op 06075, Second Dept 9-19-18**

CIVIL PROCEDURE (UNDERTAKING, PLAINTIFF WAS GRANTED A PRELIMINARY INJUNCTION IN THIS ACTION FOR SPECIFIC PERFORMANCE OF A REAL ESTATE PURCHASE AGREEMENT, ALTHOUGH THE AMOUNT OF THE UNDERTAKING IS WITHIN THE COURT'S DISCRETION, THE COURT MUST REQUIRE PLAINTIFF TO GIVE AN UNDERTAKING (SECOND DEPT))/CPLR 6321 (UNDERTAKING, PLAINTIFF WAS GRANTED A PRELIMINARY INJUNCTION IN THIS ACTION FOR SPECIFIC PERFORMANCE OF A REAL ESTATE PURCHASE AGREEMENT, ALTHOUGH THE AMOUNT OF THE UNDERTAKING IS WITHIN THE COURT'S DISCRETION, THE COURT MUST REQUIRE PLAINTIFF TO GIVE AN UNDERTAKING (SECOND DEPT))/UNDERTAKING (CIVIL PROCEDURE, PRELIMINARY INJUNCTION, PLAINTIFF WAS GRANTED A PRELIMINARY INJUNCTION IN THIS ACTION FOR SPECIFIC PERFORMANCE OF A REAL ESTATE PURCHASE AGREEMENT, ALTHOUGH THE AMOUNT OF THE UNDERTAKING IS WITHIN THE COURT'S DISCRETION, THE COURT MUST REQUIRE PLAINTIFF TO GIVE AN UNDERTAKING (SECOND DEPT))/PRELIMINARY INJUNCTION (UNDERTAKING, PLAINTIFF WAS GRANTED A PRELIMINARY INJUNCTION IN THIS ACTION FOR SPECIFIC PERFORMANCE OF A REAL ESTATE PURCHASE AGREEMENT, ALTHOUGH THE AMOUNT OF THE UNDERTAKING IS WITHIN THE COURT'S DISCRETION, THE COURT MUST REQUIRE PLAINTIFF TO GIVE AN UNDERTAKING (SECOND DEPT))/INJUNCTION, PRELIMINARY (UNDERTAKING, PLAINTIFF WAS GRANTED A PRELIMINARY INJUNCTION IN THIS ACTION FOR SPECIFIC PERFORMANCE OF A REAL ESTATE PURCHASE AGREEMENT, ALTHOUGH THE AMOUNT OF THE UNDERTAKING IS WITHIN THE COURT'S DISCRETION, THE COURT MUST REQUIRE PLAINTIFF TO GIVE AN UNDERTAKING (SECOND DEPT))/CONTRACT LAW (SPECIFIC PERFORMANCE, UNDERTAKING, PLAINTIFF WAS GRANTED A PRELIMINARY INJUNCTION IN THIS ACTION FOR SPECIFIC PERFORMANCE OF A REAL ESTATE PURCHASE AGREEMENT, ALTHOUGH THE AMOUNT OF THE UNDERTAKING IS WITHIN THE COURT'S DISCRETION, THE COURT MUST REQUIRE PLAINTIFF TO GIVE AN UNDERTAKING (SECOND DEPT))/REAL PROPERTY LAW (SPECIFIC PERFORMANCE, UNDERTAKING, PLAINTIFF WAS GRANTED A PRELIMINARY INJUNCTION IN THIS ACTION FOR SPECIFIC PERFORMANCE OF A REAL ESTATE PURCHASE AGREEMENT, ALTHOUGH THE AMOUNT OF THE UNDERTAKING IS WITHIN THE COURT'S DISCRETION, THE COURT MUST REQUIRE PLAINTIFF TO GIVE AN UNDERTAKING (SECOND DEPT))

CIVIL PROCEDURE, FORECLOSURE.

STATUTE OF LIMITATIONS DEFENSE WAS WAIVED BECAUSE IT WAS NOT RAISED IN AN ANSWER OR A PRE-ANSWER MOTION TO DISMISS IN THIS FORECLOSURE ACTION (SECOND DEPT).

The Second Department, reversing Supreme Court, in this foreclosure action, noted that the statute limitations defense is waived if not raised in an answer or a pre-answer motion to dismiss:

> In July 2014, the plaintiff commenced this mortgage foreclosure action against, among others, the defendant Anthony Palazzotto. Palazzotto defaulted in answering or appearing, and the plaintiff moved for leave to enter a default judgment and for an order of reference. Palazzotto opposed the motion, and cross-moved to dismiss the complaint insofar as asserted against him as time-barred ... . He argued that the debt was accelerated in 2008, when a prior action was commenced to foreclose the same mortgage. The Supreme Court denied the plaintiff's motion, and granted Palazzotto's cross motion. ...
>
> The plaintiff demonstrated its entitlement to a default judgment and an order of reference by submitting proof of service of a copy of the summons and complaint, proof of the facts constituting the causes of action, including that the defendant defaulted on his payment obligations, and proof that neither he nor any of the other defendants had otherwise appeared or answered the complaint within the time allowed (see RPAPL 1321[1]; CPLR 3215[f]...).
>
> Palazzotto waived a statute of limitations defense by failing to raise it in an answer or in a timely pre-answer motion to dismiss (see CPLR 3211[a][5]...). **21st Mtge. Corp. v Palazzotto, 2018 NY Slip Op 06072, Second Dept 9-19-18**

CIVIL PROCEDURE (STATUTE OF LIMITATIONS DEFENSE WAS WAIVED BECAUSE IT WAS NOT RAISED IN AN ANSWER OR A PRE-ANSWER MOTION TO DISMISS IN THIS FORECLOSURE ACTION (SECOND DEPT))/FORECLOSURE (STATUTE OF LIMITATIONS DEFENSE WAS WAIVED BECAUSE IT WAS NOT RAISED IN AN ANSWER OR A PRE-ANSWER MOTION TO DISMISS IN THIS FORECLOSURE ACTION (SECOND DEPT))

CIVIL PROCEDURE, FORECLOSURE, ATTORNEYS.

CONCLUSORY AND UNSUBSTANTIATED ALLEGATION OF LAW OFFICE FAILURE DID NOT JUSTIFY VACATING THE DISMISSAL OF THE FORECLOSURE ACTION (SECOND DEPT).

The Second Department, reversing Supreme Court, determined that the law-office-failure offered as an excuse for failure to comply with a conditional order in this foreclosure action was not sufficient to justify vacating the dismissal of the action:

> To vacate the dismissal, HSBC was required to demonstrate a justifiable excuse for the noncompliance with the conditional order of dismissal and the existence of a potentially meritorious cause of action (see CPLR 3216...). Here, the proffered excuse of law office failure by prior counsel in failing to timely file a note of issue or move for entry of judgment was conclusory and wholly unsubstantiated (see CPLR 2005...). HSBC did not proffer an affidavit from anyone with personal knowledge of the purported law office failure and failed to provide any details regarding such failure. Therefore, the allegation of law office failure did not rise to the level of a reasonable excuse ... . **Fremont Inv. & Loan v Fausta, 2018 NY Slip Op 06084, Second Dept 9-19-18**

CIVIL PROCEDURE (CONCLUSORY AND UNSUBSTANTIATED ALLEGATION OF LAW OFFICE FAILURE DID NOT JUSTIFY VACATING THE DISMISSAL OF THE FORECLOSURE ACTION (SECOND DEPT))/CPLR 3216 (CONCLUSORY AND UNSUBSTANTIATED ALLEGATION OF LAW OFFICE FAILURE DID NOT JUSTIFY VACATING THE DISMISSAL OF THE FORECLOSURE ACTION (SECOND DEPT))/CPLR 2005 (CONCLUSORY AND UNSUBSTANTIATED ALLEGATION OF LAW OFFICE FAILURE DID NOT JUSTIFY VACATING THE DISMISSAL OF THE FORECLOSURE ACTION (SECOND DEPT))/FORECLOSURE (CONCLUSORY AND UNSUBSTANTIATED ALLEGATION OF LAW OFFICE FAILURE DID NOT JUSTIFY VACATING THE DISMISSAL OF THE FORECLOSURE ACTION (SECOND DEPT))/ATTORNEYS CONCLUSORY AND UNSUBSTANTIATED ALLEGATION OF LAW OFFICE FAILURE DID NOT JUSTIFY VACATING THE DISMISSAL OF THE FORECLOSURE ACTION (SECOND DEPT))/LAW OFFICE FAILURE (CONCLUSORY AND UNSUBSTANTIATED ALLEGATION OF LAW OFFICE FAILURE DID NOT JUSTIFY VACATING THE DISMISSAL OF THE FORECLOSURE ACTION (SECOND DEPT))

CIVIL PROCEDURE, FORECLOSURE, ATTORNEYS.

LAW OFFICE FAILURE WAS AN INADEQUATE EXCUSE FOR PLAINTIFF'S FAILURE TO APPEAR AT A SCHEDULED COURT CONFERENCE IN A FORECLOSURE ACTION (SECOND DEPT).

The Second Department determined plaintiff's motion to vacate the dismissal of a foreclosure action was properly denied. Plaintiff failed to appear at a scheduled court conference and the law-office-failure excuse was deemed inadequate:

> In order to vacate a default in appearing at a scheduled court conference, a plaintiff must demonstrate both a reasonable excuse and a potentially meritorious cause of action (see CPLR 5015[a][1]...). The determination of whether an excuse is reasonable lies within the sound discretion of the Supreme Court ... . The court has discretion to accept law office failure as a reasonable excuse (see CPLR 2005) where the claim is supported by a detailed and credible explanation of the default... .
>
> Here, the plaintiff's bare allegation of law office failure was insufficient to demonstrate a reasonable excuse for its default ... . Moreover, the plaintiff failed to provide a reasonable excuse for its lengthy delay in moving to vacate the order of dismissal ... . **Option One Mtge. Corp. v Rose, 2018 NY Slip Op 06023, Second Dept 9-12-18**

CIVIL PROCEDURE (LAW OFFICE FAILURE WAS AN INADEQUATE EXCUSE FOR PLAINTIFF'S FAILURE TO APPEAR AT A SCHEDULED COURT CONFERENCE IN A FORECLOSURE ACTION (SECOND DEPT))/LAW OFFICE FAILURE (CIVIL PROCEDURE, LAW OFFICE FAILURE WAS AN INADEQUATE EXCUSE FOR PLAINTIFF'S FAILURE TO APPEAR AT A SCHEDULED COURT CONFERENCE IN A FORECLOSURE ACTION (SECOND DEPT))/ATTORNEYS (LAW OFFICE FAILURE WAS AN INADEQUATE EXCUSE FOR PLAINTIFF'S FAILURE TO APPEAR AT A SCHEDULED COURT CONFERENCE IN A FORECLOSURE ACTION (SECOND DEPT))/CPLR 5015 (LAW OFFICE FAILURE WAS AN INADEQUATE EXCUSE FOR PLAINTIFF'S FAILURE TO APPEAR AT A SCHEDULED COURT CONFERENCE IN A FORECLOSURE ACTION (SECOND DEPT))/CPLR 2005 (LAW OFFICE FAILURE WAS AN INADEQUATE EXCUSE FOR PLAINTIFF'S FAILURE TO APPEAR AT A SCHEDULED COURT CONFERENCE IN A FORECLOSURE ACTION (SECOND DEPT))

CIVIL PROCEDURE, FORECLOSURE.

FAILURE TO SUBMIT AN ORDER FOR SIGNATURE WITHIN 60 DAYS CONSTITUTED ABANDONMENT (SECOND DEPT).

The Second Department determined the failure to submit an order for signature within 60 days constituted abandonment of the action:

> The Supreme Court declined to sign the plaintiff's proposed order granting it summary judgment and, in the order appealed from, the court vacated the decision entered September 16, 2009, in effect, granted that branch of the motion ... which was pursuant to CPLR 3215 to dismiss the complaint insofar ... as abandoned, and, thereupon, directed dismissal of the complaint in its entirety pursuant to CPLR 1003.
>
> "Proposed orders . . . , with proof of service on all parties where the order is directed to be settled or submitted on notice, must be submitted for signature, unless otherwise directed by the court, within 60 days after the signing and filing of the decision directing that the order be settled or submitted" (22 NYCRR 202.48[a]). "Failure to submit the order . . . timely shall be deemed an abandonment of the motion or action, unless for good cause shown" (22 NYCRR 202.48[b]). These provisions are not applicable where the decision does not explicitly direct that the proposed judgment or order be settled or submitted for signature (see Funk v Barry, 89 NY2d 364). However, the direction to "settle order" "ordinarily entails more complicated relief," and therefore "contemplates notice to the opponent so that both parties may either agree on a draft or prepare counter proposals to be settled before the court" (Funk v Barry, 89 NY2d at 367). Here, the decision entered September 16, 2009, directed the plaintiff to "settle order." **Lasalle Bank N.A. v Benjamin, 2018 NY Slip Op 06005, Second Dept 9-12-18**

CIVIL PROCEDURE (FAILURE TO SUBMIT AN ORDER FOR SIGNATURE WITHIN 60 DAYS CONSTITUTED ABANDONMENT (SECOND DEPT))/CPLR 3215 (FAILURE TO SUBMIT AN ORDER FOR SIGNATURE WITHIN 60 DAYS CONSTITUTED ABANDONMENT (SECOND DEPT))/CPLR 1003 (FAILURE TO SUBMIT AN ORDER FOR SIGNATURE WITHIN 60 DAYS CONSTITUTED ABANDONMENT (SECOND DEPT))/FORECLOSURE (FAILURE TO SUBMIT AN ORDER FOR SIGNATURE WITHIN 60 DAYS CONSTITUTED ABANDONMENT (SECOND DEPT))

CIVIL PROCEDURE, INSURANCE LAW, PRIVILEGE, IMMUNITY, EVIDENCE.

ALTHOUGH DISCLOSURE OF INSURER'S SUPPLEMENTAL UNDERINSURED MOTORIST (SUM) FILE IS NOT LIMITED TO THE TIME BEFORE THE COMMENCEMENT OF THE ACTION, THE ORDER TO DISCLOSE THE WHOLE FILE WAS IMPROPER, A PRIVILEGE LOG SHOULD BE CREATED FOLLOWED BY AN IN CAMERA REVIEW (FIRST DEPT).

The Fourth Department, reversing Supreme Court, determined that complete disclosure of a supplemental underinsured motorist (SUM) file should not have been ordered in this traffic accident case. The court noted that Lalka v ACA Ins.Co., 128 AD3d 1508 (4th Dept 2015), to the extent that it held that disclosure is allowed only up to the date of commencement of an action, should no longer be followed. However, the proper procedure is the creation of a privilege log followed by in camera review:

> ... [D]efendant's motion for a protective order was based upon the assertion that any documents contained in the claim file after the date of commencement were materials protected from discovery. Thus, the sole issue on appeal is whether defendant met its burden of establishing that those parts of the claim file withheld from discovery contain material that is protected from discovery. We conclude that defendant did not meet that burden.
>
> To the extent that Lalka ... holds that any documents in a claim file created after commencement of an action in a SUM case in which there has been no denial or disclaimer of coverage are per se protected from discovery, it should not be followed. Rather, a party seeking a protective order under any of the categories of protected materials in CPLR 3101 bears "the burden of establishing any right to protection" ... . " [A] court is not required to accept a party's characterization of material as privileged or confidential' "... . Ultimately, "resolution of the issue whether a particular document is . . . protected is necessarily a fact-specific determination . . . , most often requiring in camera review' " ... .
>
> Here, we conclude that defendant failed to meet its burden inasmuch as it relied solely upon the conclusory characterizations of its counsel that those parts of the claim file withheld from discovery contain protected material. We nonetheless further conclude that, under the circumstances of this case, the court abused its discretion by ordering the production of allegedly protected documents and instead should have granted the alternative relief requested by defendant, i.e., allowing it to create a privilege log pursuant to CPLR 3122 (b) followed by an in camera review of the subject documents by the court ... . **Rickard v New York Cent. Mut. Fire Ins. Co., 2018 NY Slip Op 06333, Fourth Dept 9-28-18**

CIVIL PROCEDURE (ALTHOUGH DISCLOSURE OF INSURER'S SUPPLEMENTAL UNDERINSURED MOTORIST (SUM) FILE IS NOT LIMITED TO THE TIME BEFORE THE COMMENCEMENT OF THE ACTION, THE ORDER TO DISCLOSE THE WHOLE FILE WAS IMPROPER, A PRIVILEGE LOG SHOULD BE CREATED FOLLOWED BY AN IN CAMERA REVIEW (FIRST DEPT))/CPLR 3101, 3122 (ALTHOUGH DISCLOSURE OF INSURER'S SUPPLEMENTAL UNDERINSURED MOTORIST (SUM) FILE IS NOT LIMITED TO THE TIME BEFORE THE COMMENCEMENT OF THE ACTION, THE ORDER TO DISCLOSE THE WHOLE FILE WAS IMPROPER, A PRIVILEGE LOG SHOULD BE CREATED FOLLOWED BY AN IN CAMERA REVIEW (FIRST DEPT))/INSURANCE LAW (CIVIL PROCEDURE, ALTHOUGH DISCLOSURE OF INSURER'S SUPPLEMENTAL UNDERINSURED MOTORIST (SUM) FILE IS NOT LIMITED TO THE TIME BEFORE THE COMMENCEMENT OF THE ACTION, THE ORDER TO DISCLOSE THE WHOLE FILE WAS IMPROPER, A PRIVILEGE LOG SHOULD BE CREATED FOLLOWED BY AN IN CAMERA REVIEW (FIRST DEPT))/SUPPLEMENTAL UNDERINSURED MOTORIST (SUM) (CIVIL PROCEDURE, ALTHOUGH DISCLOSURE OF INSURER'S SUPPLEMENTAL UNDERINSURED MOTORIST (SUM) FILE IS NOT LIMITED TO THE TIME BEFORE THE COMMENCEMENT OF THE ACTION, THE ORDER TO DISCLOSE THE WHOLE FILE WAS IMPROPER, A PRIVILEGE LOG SHOULD BE CREATED FOLLOWED BY AN IN CAMERA REVIEW (FIRST DEPT))/TRAFFIC ACCIDENTS (CIVIL PROCEDURE, INSURANCE LAW, ALTHOUGH DISCLOSURE OF INSURER'S SUPPLEMENTAL UNDERINSURED MOTORIST (SUM) FILE IS NOT LIMITED TO THE TIME BEFORE THE COMMENCEMENT OF THE ACTION, THE ORDER TO

DISCLOSE THE WHOLE FILE WAS IMPROPER, A PRIVILEGE LOG SHOULD BE CREATED FOLLOWED BY AN IN CAMERA REVIEW (FIRST DEPT))/PRIVILEGE (CIVIL PROCEDURE, INSURANCE LAW, ALTHOUGH DISCLOSURE OF INSURER'S SUPPLEMENTAL UNDERINSURED MOTORIST (SUM) FILE IS NOT LIMITED TO THE TIME BEFORE THE COMMENCEMENT OF THE ACTION, THE ORDER TO DISCLOSE THE WHOLE FILE WAS IMPROPER, A PRIVILEGE LOG SHOULD BE CREATED FOLLOWED BY AN IN CAMERA REVIEW (FIRST DEPT))/EVIDENCE (CIVIL PROCEDURE, INSURANCE LAW, ALTHOUGH DISCLOSURE OF INSURER'S SUPPLEMENTAL UNDERINSURED MOTORIST (SUM) FILE IS NOT LIMITED TO THE TIME BEFORE THE COMMENCEMENT OF THE ACTION, THE ORDER TO DISCLOSE THE WHOLE FILE WAS IMPROPER, A PRIVILEGE LOG SHOULD BE CREATED FOLLOWED BY AN IN CAMERA REVIEW (FIRST DEPT))/IMMUNITY (CIVIL PROCEDURE, INSURANCE LAW, ALTHOUGH DISCLOSURE OF INSURER'S SUPPLEMENTAL UNDERINSURED MOTORIST (SUM) FILE IS NOT LIMITED TO THE TIME BEFORE THE COMMENCEMENT OF THE ACTION, THE ORDER TO DISCLOSE THE WHOLE FILE WAS IMPROPER, A PRIVILEGE LOG SHOULD BE CREATED FOLLOWED BY AN IN CAMERA REVIEW (FIRST DEPT))

CIVIL PROCEDURE, LIMITED LIABILITY COMPANY LAW.

MOTION TO VACATE A DEFAULT JUDGMENT PURSUANT TO CPLR 317 PROPERLY GRANTED, DEFENDANT DEMONSTRATED IT WAS NOT PERSONALLY SERVED AND THE FAILURE TO PROVIDE THE CORRECT ADDRESS TO THE SECRETARY OF STATE WAS NOT A DELIBERATE ATTEMPT TO EVADE NOTICE (SECOND DEPT).

The Second Department determined that defendant's motion to vacate a default judgment pursuant to CPLR 317 was properly granted:

> CPLR 317 provides that a defendant who is not served by personal delivery in an action may vacate its default as long as it demonstrates that it did not personally receive notice of the lawsuit in time to defend against the action and shows that it possesses a potentially meritorious defense ... . The determination of a motion pursuant to CPLR 317 is addressed to the sound discretion of the trial court, "the exercise of which will generally not be disturbed if there is support in the record therefor"... .
>
> Contrary to the plaintiff's contention, the Supreme Court did not improvidently exercise its discretion in granting that branch of 510's motion which was pursuant to CPLR 317 to vacate the judgment of foreclosure and sale on the condition that it pay all amounts owed within 30 days of the date of the order. Service of the summons and complaint in the foreclosure action was made upon 510 by delivering the pleadings to the Secretary of State (see Limited Liability Company Law § 303), which did not constitute personal delivery ... , and 510's submissions in support of the motion established that it did not receive actual notice of the foreclosure action in time to defend... . Moreover, under the circumstances of this case, 510 succeeded in setting forth a potentially meritorious defense to the foreclosure action. Finally, the evidence does not suggest that 510's failure to update its service address with the Secretary of State while its principal offices were undergoing renovations constituted a deliberate attempt to evade notice; hence, that failure did not preclude the granting of relief to it under CPLR 317 ... . **Acqua Capital, LLC v 510 W. Boston Post Rd, LLC, 2018 NY Slip Op 05991, Second Dept 9-12-18**

CIVIL PROCEDURE (MOTION TO VACATE A DEFAULT JUDGMENT PURSUANT TO CPLR 317 PROPERLY GRANTED, DEFENDANT DEMONSTRATED IT WAS NOT PERSONALLY SERVED AND THE FAILURE TO PROVIDE THE CORRECT ADDRESS TO THE SECRETARY OF STATE WAS NOT A DELIBERATE ATTEMPT TO EVADE NOTICE (SECOND DEPT))/LIMITED LIABILITY COMPANY LAW (CIVIL PROCEDURE, MOTION TO VACATE A DEFAULT JUDGMENT PURSUANT TO CPLR 317 PROPERLY GRANTED, DEFENDANT DEMONSTRATED IT WAS NOT PERSONALLY SERVED AND THE FAILURE TO PROVIDE THE CORRECT ADDRESS TO THE SECRETARY OF STATE WAS NOT A DELIBERATE ATTEMPT TO EVADE NOTICE (SECOND DEPT))/DEFAULT JUDGMENT (MOTION TO VACATE A DEFAULT JUDGMENT PURSUANT TO CPLR 317 PROPERLY GRANTED, DEFENDANT DEMONSTRATED IT WAS NOT PERSONALLY SERVED AND THE FAILURE TO PROVIDE THE CORRECT ADDRESS TO THE SECRETARY OF STATE WAS NOT A DELIBERATE ATTEMPT TO EVADE NOTICE (SECOND DEPT))/CPLR 317 (MOTION TO VACATE A DEFAULT JUDGMENT PURSUANT TO CPLR 317 PROPERLY GRANTED, DEFENDANT DEMONSTRATED IT WAS NOT PERSONALLY SERVED AND THE FAILURE TO PROVIDE THE CORRECT ADDRESS TO THE SECRETARY OF STATE WAS NOT A DELIBERATE ATTEMPT TO EVADE NOTICE (SECOND DEPT))

CIVIL PROCEDURE, MEDICAL MALPRACTICE, NEGLIGENCE, INSURANCE LAW.

MEDICAL MALPRACTICE ACTION SHOULD NOT HAVE BEEN CONSOLIDATED WITH AN ACTION TO DETERMINE WHETHER THE MALPRACTICE WAS COVERED BY INSURANCE (SECOND DEPT).

The Second Department, reversing Supreme Court, determined that the medical malpractice action should not have been consolidated with an contract action to determine an insurance-coverage obligation in the malpractice action

> ... Salvatore Leone and Santa Leone (hereinafter together the Leones) commenced an action to recover damages for medical malpractice against Alvin Hershfeld and Medical Office of Howard Beach, P.C. (hereinafter together Hershfeld; hereinafter the malpractice action). ... Hershfeld commenced the instant action against JM Woodworth Risk Retention Group, Inc. (hereinafter JM Woodworth), seeking a declaration that JM Woodworth was obligated to defend and/or indemnify Hershfeld in the malpractice action, and to recover damages for breach of contract, and also named the Leones as defendants. * * *
>
> The Supreme Court improvidently exercised its discretion in consolidating the two actions for the purpose of a joint trial and in amending the caption accordingly. In the malpractice action, the issues involve, inter alia, the alleged negligence of Hershfeld and the alleged damages suffered by the Leones. In the instant action, the issue to be resolved is JM Woodworth's alleged contractual obligation to provide insurance coverage to Hershfeld in the malpractice action. The two actions do not involve common questions of law or fact (see CPLR 602[a]...). Moreover, a joint trial of the two actions could result in substantial prejudice to JM Woodworth. Indeed, it has long been recognized that it is inherently prejudicial to insurers to have the issue of insurance coverage tried before the jury that considers the underlying liability claims, even where common questions of law and fact exist ... . **Hershfeld v JM Woodworth Risk Retention Group, Inc., 2018 NY Slip Op 06229, Second Dept 9-26-18**

CIVIL PROCEDURE (MEDICAL MALPRACTICE ACTION SHOULD NOT HAVE BEEN CONSOLIDATED WITH AN ACTION TO DETERMINE WHETHER THE MALPRACTICE WAS COVERED BY INSURANCE (SECOND DEPT))/MEDICAL MALPRACTICE (CIVIL PROCEDURE, MEDICAL MALPRACTICE ACTION SHOULD NOT HAVE BEEN CONSOLIDATED WITH AN ACTION TO DETERMINE WHETHER THE MALPRACTICE WAS COVERED BY INSURANCE (SECOND DEPT))/CPLR 602 (MEDICAL MALPRACTICE ACTION SHOULD NOT HAVE BEEN CONSOLIDATED WITH AN ACTION TO DETERMINE WHETHER THE MALPRACTICE WAS COVERED BY INSURANCE (SECOND DEPT))/NEGLIGENCE (CIVIL PROCEDURE, MEDICAL MALPRACTICE ACTION SHOULD NOT HAVE BEEN CONSOLIDATED WITH AN ACTION TO DETERMINE WHETHER THE MALPRACTICE WAS COVERED BY INSURANCE (SECOND DEPT))/INSURANCE LAW (CIVIL PROCEDURE, MEDICAL MALPRACTICE ACTION SHOULD NOT HAVE BEEN CONSOLIDATED WITH AN ACTION TO DETERMINE WHETHER THE MALPRACTICE WAS COVERED BY INSURANCE (SECOND DEPT))

CONTRACT LAW

CONTRACT LAW.

CONTRACT PROVISION ABOUT ALLOWED USES OF THE DIOCESE'S PROPERTY BY A CATHOLIC SCHOOL WAS AMBIGUOUS, DIOCESE'S SUMMARY JUDGMENT MOTION SEEKING DAMAGES FOR BREACH SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined a contract provision about the use of property by a Catholic school (CTK) was ambiguous about other allowed uses (daycare, charter school, etc.) and therefore the plaintiff's (the Diocese's) motion for summary judgment should not have been granted:

> It cannot be said that the language of the 1976 Agreement requiring CTK to "maintain and operate a Catholic high school in and upon the entire premises herein described and . . . use the same for no other purpose not customarily or usually associated with such use" has " a definite and precise meaning, unattended by danger of misconception in the purport of the [agreement] itself, and concerning which there is no reasonable basis for a difference of opinion,'" particularly given the time that has passed and the changes in circumstances since the negotiation of the 1976 Agreement... . CTK came forward with evidence of other instances where unused or underused portions of Catholic schools were rented to charter schools, raising a triable issue of fact as to whether such a use is customarily and usually associated with the operation of a Catholic school under the budgetary and enrollment constraints currently facing schools within the Diocese. **Roman Catholic Diocese of Brooklyn, N.Y. v Christ the King Regional High Sch., 2018 NY Slip Op 06130, Second Dept 9-19-18**

CONTRACT LAW (CONTRACT PROVISION ABOUT ALLOWED USES OF THE DIOCESE'S PROPERTY BY A CATHOLIC SCHOOL WAS AMBIGUOUS, DIOCESE'S SUMMARY JUDGMENT MOTION SEEKING DAMAGES FOR BREACH SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT))

CONTRACT LAW.

PLAINTIFF, AS A THIRD PARTY BENEFICIARY OF THE AGREEMENT, HAD STANDING TO BRING THE BREACH OF CONTRACT ACTION, DESPITE THE BOILERPLATE EXCLUSION OF THIRD PARTY BENEFICIARIES (SECOND DEPT).

The First Department, in a full-fledged opinion by Justice Singh too complex to fairly summarize here, reversing Supreme Court, determined that plaintiff was a third-party beneficiary to the contract, despite the boilerplate exclusion of third-party beneficiaries:

> ...[W]e reject defendant's contention that plaintiff does not have standing to sue for breach of the [agreement] because it is not a party to that agreement. Plaintiff is an intended third-party beneficiary of the [agreement], as that agreement explicitly refers to plaintiff and grants it enforceable rights. Accordingly, the [agreement's] boilerplate exclusion of third-party beneficiaries does not apply to plaintiff, and this action may not be properly dismissed for lack of standing ... . **MPEG LA, LLC v Samsung Elecs. Co., Ltd., 2018 NY Slip Op 06147, First Dept 9-19-18**

CONTRACT LAW (PLAINTIFF, AS A THIRD PARTY BENEFICIARY OF THE AGREEMENT, HAD STANDING TO BRING THE BREACH OF CONTRACT ACTION, DESPITE THE BOILERPLATE EXCLUSION OF THIRD PARTY BENEFICIARIES (FIRST DEPT))/THIRD PARTY BENEFICIARY (CONTRACT LAW, PLAINTIFF, AS A THIRD PARTY BENEFICIARY OF THE AGREEMENT, HAD STANDING TO BRING THE BREACH OF CONTRACT ACTION, DESPITE THE BOILERPLATE EXCLUSION OF THIRD PARTY BENEFICIARIES (FIRST DEPT))

CONTRACT LAW.

BREACH OF DUTY CAUSE OF ACTION WAS DUPLICATIVE OF THE BREACH OF CONTRACT CAUSE OF ACTION AND WAS PROPERLY DISMISSED, CRITERIA EXPLAINED (SECOND DEPT).

The Second Department noted that a breach of duty cause of action was duplicative of the breach of contract action and was properly dismissed:

> The cause of action alleging breach of duty was duplicative of the breach of contract cause of action. "[A] simple breach of contract is not to be considered a tort unless a legal duty independent of the contract itself has been violated" ... . **Junger v John V. Dinan Assoc., Inc., 2018 NY Slip Op 06232, Second Dept 9-26-18**

CONTRACT LAW (BREACH OF DUTY CAUSE OF ACTION WAS DUPLICATIVE OF THE BREACH OF CONTRACT CAUSE OF ACTION AND WAS PROPERLY DISMISSED, CRITERIA EXPLAINED (SECOND DEPT))/BREACH OF DUTY (CONTRACT LAW, BREACH OF DUTY CAUSE OF ACTION WAS DUPLICATIVE OF THE BREACH OF CONTRACT CAUSE OF ACTION AND WAS PROPERLY DISMISSED, CRITERIA EXPLAINED (SECOND DEPT))

COURT OF CLAIMS

COURT OF CLAIMS, CIVIL PROCEDURE.

SERVICE OF CLAIM BY REGULAR MAIL VIOLATED COURT OF CLAIMS ACT SECTION 11, CLAIM PROPERLY DISMISSED (SECOND DEPT).

The Second Department determined the claim in this traffic accident case was properly dismissed because it was served by regular mail:

> On March 16, 2011, the claimant was driving on Sunrise Highway and, after missing his exit, attempted to cut across the strip of land separating Sunrise Highway from the exit ramp, losing control of his vehicle and sustaining injuries. After being granted permission to file a late notice of claim, the claimant served the claim on the State of New York by regular mail. The State moved for summary judgment dismissing the claim on the ground that service was improper, as it was not made in accordance with Court of Claims Act § 11. The claimant cross-moved for the court to deem its notice of claim timely served nunc pro tunc. The Court of Claims granted the motion and denied the cross motion. The claimant appeals, and we affirm.
>
> We agree with the Court of Claims' determination to grant the State's motion for summary judgment dismissing the claim, as the claim was improperly served upon the State by regular mail rather than by personal service or certified mail as required by Court of Claims Act § 11 ...
> . **Costello v State of New York, 2018 NY Slip Op 06227, Second Dept 9-25-18**

COURT OF CLAIMS (SERVICE OF CLAIM BY REGULAR MAIL VIOLATED COURT OF CLAIMS ACT SECTION 11, CLAIM PROPERLY DISMISSED (SECOND DEPT))/CIVIL PROCEDURE (SERVICE OF CLAIM BY REGULAR MAIL VIOLATED COURT OF CLAIMS ACT SECTION 11, CLAIM PROPERLY DISMISSED (SECOND DEPT))

CRIMINAL LAW

CRIMINAL LAW.

SENTENCING JUDGE MAY HAVE MISTAKENLY BELIEVED THE MINIMUM PERIOD OF POST RELEASE SUPERVISION (PRS) WAS FIVE YEARS WHEN IT ACTUALLY WAS TWO AND A HALF YEARS, MATTER SENT BACK FOR RESENTENCING (FIRST DEPT).

The First Department, over a dissent, sent the case back for resentencing because it appeared the sentencing judge was under the misimpression the minimum period of post release supervision (PRS) was five years, when the minimum was two and a half years:

> At the time of defendant's plea, the court, counsel, and the prosecution believed defendant was a predicate felony offender. The plea offer contained the mandatory five-year term of PRS for a second felony offender convicted of a first violent felony offense (see Penal Law §§ 70.00[6], 70.45[2][f]). At sentencing, however, when defense counsel stated that defendant was not, in fact, a predicate felon, the sentencing court asked whether defendant's status as a first felony offender "change[d] our circumstances." Defense counsel responded, "I think the minimum is still three and a half." The court later asked, "Is there any reason that I should not impose the sentence of three-and- one-half years plus five years of post-release supervision?" Defense counsel replied, "Even if it was not quote unquote agreed upon, that would have been the best Your Honor could have given." As indicated, the defense counsel's statement was correct as to the prison term, but not as to the period of PRS. **People v Holmes, 2018 NY Slip Op 06055, First Dept 9-13-18**

CRIMINAL LAW (SENTENCING JUDGE MAY HAVE MISTAKENLY BELIEVED THE MINIMUM PERIOD OF POST RELEASE SUPERVISION (PRS) WAS FIVE YEARS WHEN IT ACTUALLY WAS TWO AND A HALF YEARS, MATTER SENT BACK FOR RESENTENCING (FIRST DEPT))/POST RELEASE SUPERVISION (PRS) (SENTENCING JUDGE MAY HAVE MISTAKENLY BELIEVED THE MINIMUM PERIOD OF POST RELEASE SUPERVISION (PRS) WAS FIVE YEARS WHEN IT ACTUALLY WAS TWO AND A HALF YEARS, MATTER SENT BACK FOR RESENTENCING (FIRST DEPT))

CRIMINAL LAW.

DENIAL OF A LATE PEREMPTORY CHALLENGE TO A JUROR WAS AN ABUSE OF DISCRETION, NEW TRIAL ORDERED (SECOND DEPT).

The Second Department determined Supreme Court abused its discretion in denying a late peremptory challenge to a juror and ordered a new trial:

> ... [C]ounsel for codefendant Rodger Freeman stated, "There was one we missed, number eight." The court responded, "We have eight." In response, counsel for codefendant Rodger Freeman stated, "We don't want eight." The court replied, "You already—you told me what the perempts are and who the selected jurors are," and denied the request to challenge prospective juror eight. * * *
>
> Under CPL 270.15, "the decision to entertain a belated peremptory challenge is left to the discretion of the trial court, in recognition that the voir dire process can often be time-consuming and requires practical limitations" ... . Here, the delay in challenging prospective juror eight was de minimis. There was no discernable interference or undue delay caused by the defense's momentary oversight and the voir dire of the second subgroup of prospective jurors was still to be conducted. Under these circumstances, the Supreme Court improperly denied the request to challenge prospective juror eight ... . Since a trial court's improper denial of a peremptory challenge mandates reversal, we reverse the judgment and order a new trial ... . **People v Viera, 2018 NY Slip Op 06043, Second Dept 9-12-18**

CRIMINAL LAW (DENIAL OF A LATE PEREMPTORY CHALLENGE TO A JUROR WAS AN ABUSE OF DISCRETION, NEW TRIAL ORDERED (SECOND DEPT))/JURORS (CRIMINAL LAW, DENIAL OF A LATE PEREMPTORY CHALLENGE TO A JUROR WAS AN ABUSE OF DISCRETION, NEW TRIAL ORDERED (SECOND DEPT))/PEREMPTORY CHALLENGE (JURORS, DENIAL OF A LATE PEREMPTORY CHALLENGE TO A JUROR WAS AN ABUSE OF DISCRETION, NEW TRIAL ORDERED (SECOND DEPT))

CRIMINAL LAW.

HABEAS CORPUS PETITIONS STEMMING FROM THE DENIAL OF BAIL IN AN ATTEMPTED MURDER CASE PROPERLY DENIED (FIRST DEPT).

The First Department, in a full-fledged opinion by Justice Tom, determined the two habeas corpus petitions, stemming from the denial of bail in an attempted murder case, were properly denied. The petitioner was charged with the attempted murder of her husband. It was petitioner's cousin who actually attacked petitioner's husband. The cousin had been convicted after trial before the judge who twice denied petitioner's bail applications, resulting in the two habeas corpus petition's before the First Department:

> ... [W]e find that the habeas court in the first proceeding correctly found that Justice Farber did not abuse his discretion in denying petitioner's initial bail application. The denial of bail was amply supported by the seriousness of the charges including attempted murder, the potential sentence of at least 5 years and up to 25 years in prison for the class B violent felonies of attempted murder in the second degree or first-degree burglary ... , as well as the strength of the evidence. Notably, Justice Farber had just presided over Nolan's trial for carrying out the plot allegedly orchestrated by petitioner ... .
>
> To the extent [petitioner] argues that the court improperly focused on the seriousness of the charges and the sentencing exposure to the exclusion of other factors, the court's failure to explicitly address each statutory factor or every specific argument raised by the parties on the record does not establish that the court abused its discretion. The court implicitly based its ruling on all of the parties' arguments ... . * * *
>
> "Petitioner's position, if accepted, would mandate that bail be granted in every case in which the accused has the financial resources to offer private security and monitoring, thereby depriving the court of its discretion to grant or deny bail on consideration of the factors enumerated in CPL 510.30(2)(a). While petitioner claims that her security package is foolproof and trumps all other factors, the fact remains that no ad hoc arrangement based on keeping a defendant in her private home under the watch of a security firm that she hired could be as secure as remand" ... . **Matter of State of NY ex rel. Fischetti v Brann, 2018 NY Slip Op 06220, First Dept 9-25-18**

CRIMINAL LAW (HABEAS CORPUS PETITIONS STEMMING FROM THE DENIAL OF BAIL IN AN ATTEMPTED MURDER CASE PROPERLY DENIED (FIRST DEPT))/HABEAS CORPUS (HABEAS CORPUS PETITIONS STEMMING FROM THE DENIAL OF BAIL IN AN ATTEMPTED MURDER CASE PROPERLY DENIED (FIRST DEPT))/BAIL (HABEAS CORPUS PETITIONS STEMMING FROM THE DENIAL OF BAIL IN AN ATTEMPTED MURDER CASE PROPERLY DENIED (FIRST DEPT))

CRIMINAL LAW.

INDICTMENT CHARGING CRIMINAL POSSESSION OF A WEAPON WAS JURISDICTIONALLY DEFECTIVE BECAUSE IT DID NOT ALLEGE THE POSSESSION WAS OUTSIDE DEFENDANT'S HOME OR BUSINESS (SECOND DEPT).

The Second Department, reversing defendant's conviction, determined the indictment was jurisdictionally defective. The indictment charged criminal possession of a weapon but did not allege the possession was outside the defendant's home or business:

> The defendant's conviction of criminal possession of a weapon in the second degree under Penal Law § 265.03 must be vacated. Penal Law § 265.03(3) exempts from criminal liability under that subdivision a person's possession of a loaded firearm when such possession takes place in the person's home or place of business. In this case, the indictment charging a violation of Penal Law § 265.03(3) failed to allege that the defendant's possession of the subject weapon was outside of his home or place of business... . As correctly conceded by the People, this omission rendered that count of the indictment jurisdictionally defective, which is a type of defect that is not waivable ... . **People v Tromp, 2018 NY Slip Op 06275, Second Dept 9-26-18**

CRIMINAL LAW (INDICTMENT CHARGING CRIMINAL POSSESSION OF A WEAPON WAS JURISDICTIONALLY DEFECTIVE BECAUSE IT DID NOT ALLEGE THE POSSESSION WAS OUTSIDE DEFENDANT'S HOME OR BUSINESS (SECOND DEPT))/INDICTMENTS (INDICTMENT CHARGING CRIMINAL POSSESSION OF A WEAPON WAS JURISDICTIONALLY DEFECTIVE BECAUSE IT DID NOT ALLEGE THE POSSESSION WAS OUTSIDE DEFENDANT'S HOME OR BUSINESS (SECOND DEPT))/WEAPON, CRIMINAL POSSESSION (INDICTMENT CHARGING CRIMINAL POSSESSION OF A WEAPON WAS JURISDICTIONALLY DEFECTIVE BECAUSE IT DID NOT ALLEGE THE POSSESSION WAS OUTSIDE DEFENDANT'S HOME OR BUSINESS (SECOND DEPT))

CRIMINAL LAW.

FOR CAUSE CHALLENGE TO JUROR, BASED UPON IMPLIED BIAS, SHOULD HAVE BEEN GRANTED, JUROR'S LIFE WAS SAVED BY THE TRAUMA SURGEON WHO TESTIFIED ABOUT THE VICTIM'S WOUNDS, MULTIPLE STAB WOUNDS DID NOT SUPPORT LESSER INCLUDED OFFENSE OF RECKLESS ASSAULT (FOURTH DEPT).

The Fourth Department reversed defendant's conviction finding that the for cause challenge to a juror should have been granted. The trauma surgeon who testified about the wounds suffered by the victim had been the trauma surgeon who saved the juror's life. Because there will be a new trial, the Fourth Department ruled the evidence (multiple stab wounds) did not support charging the jury with the lesser included offense of reckless assault:

> A prospective juror may be challenged for cause on, inter alia, the ground that he or she has some relationship to a prospective witness at trial of a nature that "is likely to preclude [the prospective juror] from rendering an impartial verdict"... . Such a relationship gives rise to what is known as "an implied bias' . . . that requires automatic exclusion from jury service regardless of whether the prospective juror declares that the relationship will not affect her ability to be fair and impartial"... , and "cannot be cured with an expurgatory oath" ... . Not every potential juror-witness relationship necessitates disqualification, but courts are "advised . . . to exercise caution in these situations by leaning toward disqualifying a prospective juror of dubious impartiality' "... . Relevant factors for the court to consider in determining whether disqualification is necessary include the nature of the relationship and the frequency of contact ... . The denial of a challenge for cause has been upheld where the relationship at issue arose in a professional context and "was distant in time and limited in nature" ... . Conversely, the Court of Appeals has required disqualification where the relationship was "essentially professional" but "also somewhat intimate" .
>
> We conclude that the juror's testimony indicated a likelihood that her relationship to the surgeon was of a nature that would preclude her from rendering an impartial verdict. The juror was in the hospital for an extended period of time suffering from an unspecified trauma. During that time, the surgeon was primarily responsible for the juror's care, and they had contact on at least a daily basis. Most significantly, the juror was convinced that the surgeon had saved her life. Thus, although the relationship arose in a professional context, it was, at least from the juror's perspective, something more than a mere professional relationship. **People v Farley, 2018 NY Slip Op 06380, Fourth Dept 9028-18**

CRIMINAL LAW (FOR CAUSE CHALLENGE TO JUROR, BASED UPON IMPLIED BIAS, SHOULD HAVE BEEN GRANTED, JUROR'S LIFE WAS SAVED BY THE TRAUMA SURGEON WHO TESTIFIED ABOUT THE VICTIM'S WOUNDS, MULTIPLE STAB WOUNDS DID NOT SUPPORT LESSER INCLUDED OFFENSE OF RECKLESS ASSAULT (FOURTH DEPT)}/JURORS (CRIMINAL LAW, FOR CAUSE CHALLENGE TO JUROR, BASED UPON IMPLIED BIAS, SHOULD HAVE BEEN GRANTED, JUROR'S LIFE WAS SAVED BY THE TRAUMA SURGEON WHO TESTIFIED ABOUT THE VICTIM'S WOUNDS, MULTIPLE STAB WOUNDS DID NOT SUPPORT LESSER INCLUDED OFFENSE OF RECKLESS ASSAULT (FOURTH DEPT)}/FOR CAUSE CHALLENGE (CRIMINAL LAW, FOR CAUSE CHALLENGE TO JUROR, BASED UPON IMPLIED BIAS, SHOULD HAVE BEEN GRANTED, JUROR'S LIFE WAS SAVED BY THE TRAUMA SURGEON WHO TESTIFIED ABOUT THE VICTIM'S WOUNDS, MULTIPLE STAB WOUNDS DID NOT SUPPORT LESSER INCLUDED OFFENSE OF RECKLESS ASSAULT (FOURTH DEPT)}/ASSAULT (CRIMINAL LAW, FOR CAUSE CHALLENGE TO JUROR, BASED UPON IMPLIED BIAS, SHOULD HAVE BEEN GRANTED, JUROR'S LIFE WAS SAVED BY THE TRAUMA SURGEON WHO TESTIFIED ABOUT THE VICTIM'S WOUNDS, MULTIPLE STAB WOUNDS DID NOT SUPPORT LESSER INCLUDED OFFENSE OF RECKLESS ASSAULT (FOURTH DEPT)}

CRIMINAL LAW.

SENTENCING JUDGE INDICATED HE WAS BOUND BY AN AGREEMENT WITH THE PEOPLE CONCERNING DEFENDANT'S SENTENCE, HOWEVER, A SENTENCING JUDGE HAS DISCRETION IN SENTENCING, MATTER REMITTED FOR RESENTENCING (FOURTH DEPT).

The Fourth Department, vacating defendant's sentence, determined it appeared the sentencing judge mistakenly believed he was bound by his agreement with the People to impose a particular sentence:

> County Court initially imposed a one-year term of interim probation. The court informed defendant that, if he complied with the terms of interim probation, the court would impose a five-year term of probation. Defendant, however, repeatedly violated those terms. At sentencing, the court stated that "the only way" it could secure defendant a plea bargain involving probation was to help negotiate a plea agreement with "specific terms," including a "severe sanction" in the event that he violated the terms of interim probation. The court then stated that it had to "keep [its] word," presumably to the People, because otherwise it would be unable to secure the "same opportunity for another defendant who is in a similar situation." The court further stated that it was "compelled" to impose an indeterminate term of incarceration of 2⅓ to 7 years, which is the maximum legal sentence (see Penal Law § 70.00 [2] [d]; [3] [b]).
>
> Defendant contends that the court failed to exercise its discretion at sentencing. We agree. "[T]he sentencing decision is a matter committed to the exercise of the court's discretion . . . made only after careful consideration of all facts available at the time of sentencing"... . "The determination of an appropriate sentence requires the exercise of discretion after due consideration given to, among other things, the crime charged, the particular circumstances of the individual before the court and the purpose of a penal sanction, i.e., societal protection, rehabilitation and deterrence" ... . Here, the court indicated that it was bound by its agreement with the People to impose a particular sentence ... . **People v Dupont, 2018 NY Slip Op 06392, Fourth Dept 9-28-18**

CRIMINAL LAW (SENTENCING JUDGE INDICATED HE WAS BOUND BY AN AGREEMENT WITH THE PEOPLE CONCERNING DEFENDANT'S SENTENCE, HOWEVER, A SENTENCING JUDGE HAS DISCRETION IN SENTENCING, MATTER REMITTED FOR RESENTENCING (FOURTH DEPT))/JUDGES (CRIMINAL LAW, SENTENCING JUDGE INDICATED HE WAS BOUND BY AN AGREEMENT WITH THE PEOPLE CONCERNING DEFENDANT'S SENTENCE, HOWEVER, A SENTENCING JUDGE HAS DISCRETION IN SENTENCING, MATTER REMITTED FOR RESENTENCING (FOURTH DEPT))/SENTENCING (CRIMINAL LAW, SENTENCING JUDGE INDICATED HE WAS BOUND BY AN AGREEMENT WITH THE PEOPLE CONCERNING DEFENDANT'S SENTENCE, HOWEVER, A SENTENCING JUDGE HAS DISCRETION IN SENTENCING, MATTER REMITTED FOR RESENTENCING (FOURTH DEPT))

CRIMINAL LAW, APPEALS.

POST-JUDGMENT MOTION TO VACATE A SENTENCE IMPOSED UNDER AN INCORRECT PREDICATE-FELONY-DESIGNATION THAT WAS LESS SEVERE THAN THE SENTENCE REQUIRED BY THE CORRECT PREDICATE-FELONY DESIGNATION PROPERLY DENIED (FIRST DEPT).

The First Department determined defendant could not, in a post-judgment motion, contest a predicate-felony-based sentence that resulted in a less severe sentence than the correct predicate-felony-designation would have required. Courts have previously held appeals on this ground could not be brought. The First Department applied the same logic to defendant's post-judgment motion to vacate his sentence pursuant to Criminal Procedure Law 440.20:

> ... 21 years later, defendant claims that he was unlawfully sentenced as a second felony offender, when he should have been sentenced as a second violent felony offender. His argument is that the court erred in his favor by imposing a lesser predicate felony adjudication than the one required by his prior record. It is apparent that defendant seeks a resentencing in order to "to upset sequentiality for purposes of determining whether the conviction . . . can serve as a predicate for multiple felony offender status" ... .
>
> As defendant was not "adversely affected" by any perceived error by the court in sentencing him, and, indeed, benefitted from the imposition of a less serious predicate status, defendant's CPL 440.20 claim must be rejected without consideration of the merits of his argument that the court erred when it pronounced sentence.(CPL 470.15[1] ...).
>
> ... [C]ourts [have relied] upon CPL 470.15(1) to deny direct appeals from sentences that were equal to or shorter than the sentence the defendant would have received if the alleged error in sentence had not occurred. We hold today that CPL 470.15(1) equally bars appeals from motions which challenge such alleged sentencing errors. To do otherwise would lead to the anomalous result that a defendant could achieve a result by motion which could not be obtained on a direct appeal. **People v McNeil, 2018 NY Slip Op 05970, First Dept 9-6-18**

CRIMINAL LAW (POST-JUDGMENT MOTION TO VACATE A SENTENCE IMPOSED UNDER AN INCORRECT PREDICATE-FELONY-DESIGNATION THAT WAS LESS SEVERE THAN THE SENTENCE REQUIRED BY THE CORRECT PREDICATE-FELONY DESIGNATION PROPERLY DENIED (FIRST DEPT))/APPEALS (CRIMINAL LAW, POST-JUDGMENT MOTION TO VACATE A SENTENCE IMPOSED UNDER AN INCORRECT PREDICATE-FELONY-DESIGNATION THAT WAS LESS SEVERE THAN THE SENTENCE REQUIRED BY THE CORRECT PREDICATE-FELONY DESIGNATION PROPERLY DENIED (FIRST DEPT))/VACATE SENTENCE, MOTION TO (POST-JUDGMENT MOTION TO VACATE A SENTENCE IMPOSED UNDER AN INCORRECT PREDICATE-FELONY-DESIGNATION THAT WAS LESS SEVERE THAN THE SENTENCE REQUIRED BY THE CORRECT PREDICATE-FELONY DESIGNATION PROPERLY DENIED (FIRST DEPT))/SENTENCING (POST-JUDGMENT MOTION TO VACATE A SENTENCE IMPOSED UNDER AN INCORRECT PREDICATE-FELONY-DESIGNATION THAT WAS LESS SEVERE THAN THE SENTENCE REQUIRED BY THE CORRECT PREDICATE-FELONY DESIGNATION PROPERLY DENIED (FIRST DEPT))

Similar issues and result in **People v Francis, 2018 NY Slip Op 05971, First Dept 9-6-18.**

CRIMINAL LAW, APPEALS.

TRIAL JUDGE'S HANDLING OF JURY NOTES CONSTITUTED A MODE OF PROCEEDINGS ERROR, REVERSAL REQUIRED DESPITE FAILURE TO PRESERVE THE ERROR (SECOND DEPT).

The Second Department, reversing defendant's conviction, determined the trial judge committed a mode of proceedings error in dealing with jury notes. Therefore reversal was required despite the failure to preserve the error:

> The defendant correctly contends that the Supreme Court's handling of two jury notes failed to comply with CPL 310.30, in accordance with the procedure outlined in People v O'Rama (78 NY2d 270). "[W]henever a substantive written jury communication is received by the Judge, it should be marked as a court exhibit and, before the jury is recalled to the courtroom, read into the record in the presence of counsel"... . " After the contents of the inquiry are placed on the record, counsel should be afforded a full opportunity to suggest appropriate responses. The court should then ordinarily apprise counsel of the substance of the responsive instruction it intends to give so that counsel can seek whatever modifications are deemed appropriate before the jury is exposed to any potentially harmful information. Once the jury is returned to the courtroom, the communication should be read in open court'" ... . "Where a trial court fails to provide counsel with meaningful notice of the precise content of a substantive juror inquiry, a mode of proceedings error occurs, and reversal is therefore required even in the absence of an objection'" ... .
>
> Here, the subject jury notes requested "material evidence" and "Ms. Bernard Testimony read back." The Supreme Court did not read the contents of either note into the record, but rather apprised counsel of the contents of the notes in general terms. The court then convened the jury, and the testimony of the specified witness was read back.
>
> Although the defendant failed to object to the manner in which the Supreme Court handled these notes, under the circumstances of this case, the court violated People v O'Rama and committed a mode of proceedings error, obviating the need for preservation, by failing to provide the defendant with notice of the "precise contents" of the notes prior to giving its responses ... . The jury's requests for "material evidence" and a readback of witness testimony were not mere ministerial inquiries, but rather substantive jury notes, the precise contents of which the court was required to disclose ... . Accordingly, the court's failure to provide counsel with meaningful notice of either of these substantive jury notes requires reversal of the judgment and a new trial. **People v Wood, 2018 NY Slip Op 06277. Second Dept 9-26-18**

CRIMINAL LAW (TRIAL JUDGE'S HANDLING OF JURY NOTES CONSTITUTED A MODE OF PROCEEDINGS ERROR, REVERSAL REQUIRED DESPITE FAILURE TO PRESERVE THE ERROR (SECOND DEPT))/APPEALS (CRIMINAL LAW, TRIAL JUDGE'S HANDLING OF JURY NOTES CONSTITUTED A MODE OF PROCEEDINGS ERROR, REVERSAL REQUIRED DESPITE FAILURE TO PRESERVE THE ERROR (SECOND DEPT))/JURY NOTES (TRIAL JUDGE'S HANDLING OF JURY NOTES CONSTITUTED A MODE OF PROCEEDINGS ERROR, REVERSAL REQUIRED DESPITE FAILURE TO PRESERVE THE ERROR (SECOND DEPT))/MODE OF PROCEEDINGS ERROR (TRIAL JUDGE'S HANDLING OF JURY NOTES CONSTITUTED A MODE OF PROCEEDINGS ERROR, REVERSAL REQUIRED DESPITE FAILURE TO PRESERVE THE ERROR (SECOND DEPT))

CRIMINAL LAW, APPEALS.

2015 MOTION TO REINSTATE THE APPEAL OF A 1986 CONVICTION DENIED (FIRST DEPT).

The First Department determined defendant's appeal should be dismissed because more than 30 had passed between his conviction and the motion to reinstate the appeal. The defendant had absconded from his 1986 trial and then served a long sentence in North Carolina:

> In 1984 defendant absconded during trial, and was tried and convicted in absentia. His attorney filed a notice of appeal, but defendant did nothing to perfect his appeal, which was dismissed in 1998, on the People's motion, for failure to prosecute.
>
> Meanwhile, in 1986, defendant was convicted of serious charges in North Carolina, and he served a lengthy sentence there. Commencing in 2003, nearly 20 years after his conviction, when the New York Department of Correctional Services lodged a detainer in North Carolina based on the instant conviction, defendant filed various pro se motions in connection with his New York conviction. However, defendant did not move to reinstate his appeal until 2015, more than 30 years after his conviction. ...
>
> The People seek to dismiss defendant's appeal based on the "failure of timely prosecution or perfection thereof" pursuant to CPL 470.60(1). Where an absconding defendant's appeal remains pending for a long time, whether the appeal should be ultimately be permitted to proceed is "subject to the broad discretion of the Appellate Division" ... . In exercising its discretion, this Court may consider factors including whether defendant's flight caused "a significant interference with the operation of [the] appellate process"; whether defendant's absence "so delayed the administration of justice that the People would be prejudiced in locating witnesses and presenting evidence at any retrial should the defendant be successful on appeal"; the length of the defendant's absence; whether the defendant "voluntarily surrendered"; and the merits of the appeal ... . **People v Williams, 2018 NY Slip Op 06182, First Dept 9-25-18**

CRIMINAL LAW (APPEALS, 2015 MOTION TO REINSTATE THE APPEAL OF A 1986 CONVICTION DENIED (FIRST DEPT))/APPEALS (CRIMINAL LAW, 2015 MOTION TO REINSTATE THE APPEAL OF A 1986 CONVICTION DENIED (FIRST DEPT))

CRIMINAL LAW, ATTORNEYS.

DEFENSE ATTORNEY TOOK A POSITION ADVERSE TO DEFENDANT STATING THERE WAS NO BASIS FOR DEFENDANT'S PRO SE MOTION TO WITHDRAW HIS PLEA, MATTER REMITTED FOR CONSIDERATION OF THE MOTION WITH NEW DEFENSE COUNSEL (SECOND DEPT).

The Second Department remitted the matter for consideration of defendant's pro se motion to withdraw his guilty plea. His attorney told the judge there was no basis for the motion which adversely affected defendant's right to counsel:

> ...[T]he defendant pleaded guilty to tampering with physical evidence. Thereafter, he moved pro se to withdraw his plea of guilty. When the matter came on for sentencing, the defendant advised the County Court that he wanted to withdraw his plea. His attorney stated that there was no basis for the defendant to withdraw his plea, and the court proceeded to impose sentence. The defendant's right to counsel was adversely affected when his attorney took a position adverse to that of the defendant. The court should have appointed new counsel to represent the defendant with respect to the motion to withdraw his plea of guilty ... . **People v Falls, 2018 NY Slip Op 06110, Second Dept 9-19-18**

CRIMINAL LAW (DEFENSE ATTORNEY TOOK A POSITION ADVERSE TO DEFENDANT STATING THERE WAS NO BASIS FOR DEFENDANT'S PRO SE MOTION TO WITHDRAW HIS PLEA, MATTER REMITTED FOR CONSIDERATION OF THE MOTION WITH NEW DEFENSE COUNSEL (SECOND DEPT))/ATTORNEYS (CRIMINAL LAW, DEFENSE ATTORNEY TOOK A POSITION ADVERSE TO DEFENDANT STATING THERE WAS NO BASIS FOR DEFENDANT'S PRO SE MOTION TO WITHDRAW HIS PLEA, MATTER REMITTED FOR CONSIDERATION OF THE MOTION WITH NEW DEFENSE COUNSEL (SECOND DEPT))/RIGHT TO COUNSEL (DEFENSE ATTORNEY TOOK A POSITION ADVERSE TO DEFENDANT STATING THERE WAS NO BASIS FOR DEFENDANT'S PRO SE MOTION TO WITHDRAW HIS PLEA, MATTER REMITTED FOR CONSIDERATION OF THE MOTION WITH NEW DEFENSE COUNSEL (SECOND DEPT))

CRIMINAL LAW, CIVIL PROCEDURE, APPEALS, CONSTITUTIONAL LAW, EVIDENCE.

DENIAL OF A REPORTER'S MOTION TO QUASH A SUBPOENA FOR EVIDENCE OF HER JAILHOUSE INTERVIEW OF THE DEFENDANT IN A CRIMINAL PROCEEDING IS NOT APPEALABLE (CT APP).

The First Department, upon remittitur from the Court of Appeals, held that the denial of a reporter's motion to quash a subpoena for evidence of her jailhouse interview of the defendant is not appealable:

> "[N]o appeal lies from an order arising out of a criminal proceeding absent specific statutory authorization" (Matter of People v Juarez , _NY3d_, 2018 NY Slip Op 04684 [2018]), quoting People v Santos , 64 NY2d 702, 704 [1984]). As pertinent to the issue in this case, "an order determining a motion to quash a subpoena . . . issued in the course of prosecution of a criminal action, arises out of a criminal proceeding for which no direct appellate review is authorized" (id.; see CPL art 450). **People v Juarez, 2018 NY Slip Op 05969, First Dept 9-6-18**

CRIMINAL LAW (DENIAL OF A REPORTER'S MOTION TO QUASH A SUBPOENA FOR EVIDENCE OF HER JAILHOUSE INTERVIEW OF THE DEFENDANT IN A CRIMINAL PROCEEDING IS NOT APPEALABLE (CT APP))/CIVIL PROCEDURE (DENIAL OF A REPORTER'S MOTION TO QUASH A SUBPOENA FOR EVIDENCE OF HER JAILHOUSE INTERVIEW OF THE DEFENDANT IN A CRIMINAL PROCEEDING IS NOT APPEALABLE (CT APP))/APPEALS (CRIMINAL LAW, DENIAL OF A REPORTER'S MOTION TO QUASH A SUBPOENA FOR EVIDENCE OF HER JAILHOUSE INTERVIEW OF THE DEFENDANT IN A CRIMINAL PROCEEDING IS NOT APPEALABLE (CT APP))/CONSTITUTIONAL LAW (DENIAL OF A REPORTER'S MOTION TO QUASH A SUBPOENA FOR EVIDENCE OF HER JAILHOUSE INTERVIEW OF THE DEFENDANT IN A CRIMINAL PROCEEDING IS NOT APPEALABLE (CT APP))/EVIDENCE (CRIMINAL LAW, DENIAL OF A REPORTER'S MOTION TO QUASH A SUBPOENA FOR EVIDENCE OF HER JAILHOUSE INTERVIEW OF THE DEFENDANT IN A CRIMINAL PROCEEDING IS NOT APPEALABLE (CT APP))

CRIMINAL LAW, EVIDENCE.

ALTHOUGH THE DNA EVIDENCE PRESENTED BY A CRIMINALIST WAS IN PART TESTIMONIAL, THE DEFENDANT'S RIGHT TO CONFRONTATION WAS NOT VIOLATED AND THE EVIDENCE WAS PROPERLY ADMITTED (SECOND DEPT).

The Second Department determined that, although the DNA evidence presented by a criminalist was in part testimonial, it was properly admitted:

> At trial, the Supreme Court admitted DNA profiles and reports, as well as the testimony of an expert in DNA analysis, pertaining to the five victims and the defendant. The expert, Craig O'Connor, testified that he had a Ph.D. in genetics and laboratory sciences, and he was a criminalist level III at the Office of the Chief Medical Examiner. O'Connor testified that he was not the original criminalist on all of the individual cases. The other two analysts who worked on the cases "resigned in previous years to pursue other endeavors." With regard to the case files that he took over from the analysts who resigned, O'Connor testified that he became the custodian of the case files and, in doing so, he "was required to review them all and look at all the paperwork and the reports and everything." Moreover, O'Connor testified that he would "take all of the results and do the analysis and interpretations," and he "review[ed] all the facts and all the data contained in all of the files." When the prosecutor asked O'Connor if he had "review[ed] th[e] data and draw[n] [his] own independent conclusions," O'Connor responded, "Yes, I reviewed the results that were obtained and also the reports, yes." * * *
>
> Here, the DNA evidence is, at least in part, testimonial ... . However, O'Connor's testimony regarding his review and analysis of all of the case files indicated that he independently analyzed the raw data, as opposed to functioning as " a conduit for the conclusions of others'" ... . Moreover, unlike in other cases, the record here demonstrates that, to the extent that O'Connor was not the original criminalist assigned to any of the individual cases, the original criminalists had resigned and, thus, were unavailable ... . Accordingly, the Supreme Court properly admitted the DNA profiles and reports and O'Connor's testimony. **People v Pascall, 2018 NY Slip Op 06037, Second Dept 9-12-18**

CRIMINAL LAW (ALTHOUGH THE DNA EVIDENCE PRESENTED BY A CRIMINALIST WAS IN PART TESTIMONIAL, THE DEFENDANT'S RIGHT TO CONFRONTATION WAS NOT VIOLATED AND THE EVIDENCE WAS PROPERLY ADMITTED (SECOND DEPT))/EVIDENCE (CRIMINAL LAW, EVIDENCE, ALTHOUGH THE DNA EVIDENCE PRESENTED BY A CRIMINALIST WAS IN PART TESTIMONIAL, THE DEFENDANT'S RIGHT TO CONFRONTATION WAS NOT VIOLATED AND THE EVIDENCE WAS PROPERLY ADMITTED (SECOND DEPT))/TESTIMONIAL HEARSAY (ALTHOUGH THE DNA EVIDENCE PRESENTED BY A CRIMINALIST WAS IN PART TESTIMONIAL, THE DEFENDANT'S RIGHT TO CONFRONTATION WAS NOT VIOLATED AND THE EVIDENCE WAS PROPERLY ADMITTED (SECOND DEPT))/CONFRONTATION, RIGHT TO (ALTHOUGH THE DNA EVIDENCE PRESENTED BY A CRIMINALIST WAS IN PART TESTIMONIAL, THE DEFENDANT'S RIGHT TO CONFRONTATION WAS NOT VIOLATED AND THE EVIDENCE WAS PROPERLY ADMITTED (SECOND DEPT))

CRIMINAL LAW, EVIDENCE.

MOTION TO VACATE DEFENDANT'S CONVICTION SHOULD NOT HAVE BEEN GRANTED, EVIDENCE ALLEGEDLY WITHHELD FROM THE DEFENSE WAS NOT *BRADY* MATERIAL (SECOND DEPT).

The Second Department reversed the vacation of defendant's conviction by the motion court, finding that the evidence which defendant alleged had not been turned over to the defense was not *Brady* material:

> The defendant was charged with murder in the second degree, among other crimes, in connection with the shooting death of Tracey Thomas on October 22, 1993. Thomas was shot and killed as he sat in his car outside a game room operated by the defendant, who was known as "Pike."
>
> The evidence at trial, which was conducted in 1998, included the testimony of two eyewitnesses who identified the defendant as the shooter. One eyewitness to the shooting, Marilyn Connor, testified that she heard a gunshot and saw a spark coming from the defendant, who was standing in front of Thomas. Connor stated that she had seen the defendant "[o]nce or twice" before. The other eyewitness, Shawn Newton, testified that the defendant exited the game room, approached Thomas's car, and shot Thomas in the chest. Newton stated that he had known the defendant "all [his] life." * * *
>
> The nondisclosure of the DOCCS record reflecting Newton's apparent suicide attempt did not constitute a Brady violation, inasmuch as the information contained in that record was not favorable to the defense. As set forth in the DOCCS record, Newton, who was observed in the process of tying a bed sheet around a radiator pipe, reported that he was "stressed and [did] not want to go to court in fear of [the] safety of himself and family," and that he "fears [the defendant]." The DOCCS record further indicated that Newton was "[a]ssured that this [would] be noted and that there should be no contact between him and enemy as well as enemy's family." Thus, the DOCCS record attributed the apparent suicide attempt to Newton's fear of the defendant and was therefore not favorable to the defense. ...
>
> Furthermore, that the prosecutor had obtained a material witness order to secure Connor's testimony did not constitute Brady material because that information was not exculpatory ... . To the contrary, the record indicates that Connor's absence was due to her fear of testifying against the defendant. ...
>
> We next turn to the nondisclosure of the Damiani orders, which are orders of the Supreme Court, Kings County, pursuant to which custody of an inmate, with the inmate's consent, is delivered to the police department to be interviewed by the District Attorney's Office ,,, [C]ontrary to the Supreme Court's determination, the orders did not satisfy the materiality standard. **People v Spruill, 2018 NY Slip Op 06041, Second Dept 9-12-18**

CRIMINAL LAW (BRADY MATERIAL, MOTION TO VACATE DEFENDANT'S CONVICTION SHOULD NOT HAVE BEEN GRANTED, EVIDENCE ALLEGEDLY WITHHELD FROM THE DEFENSE WAS NOT BRADY MATERIAL (SECOND DEPT))/EVIDENCE (CRIMINAL LAW, BRADY MATERIAL, MOTION TO VACATE DEFENDANT'S CONVICTION SHOULD NOT HAVE BEEN GRANTED, EVIDENCE ALLEGEDLY WITHHELD FROM THE DEFENSE WAS NOT BRADY MATERIAL (SECOND DEPT))/BRADY MATERIAL (CRIMINAL LAW, MOTION TO VACATE DEFENDANT'S CONVICTION SHOULD NOT HAVE BEEN GRANTED, EVIDENCE ALLEGEDLY WITHHELD FROM THE DEFENSE WAS NOT BRADY MATERIAL (SECOND DEPT))

CRIMINAL LAW, EVIDENCE.

STREET STOP NOT JUSTIFIED UNDER DE BOUR ANALYSIS, SEIZED FIREARM AND STATEMENT SHOULD HAVE BEEN SUPPRESSED (SECOND DEPT).

The Second Department, with a concurring memorandum, determined that defendant's motion to suppress the evidence seized from his person and his statement should have been granted in this street stop case. The majority reversed under a DeBour analysis. The concurring memorandum, although agreeing with the DeBour analysis, would have reversed because the People did not demonstrate the legality of the police conduct at the suppression hearing:

> This encounter began as a level two intrusion, with the officer, while seated in the vehicle, stating "police" and asking the defendant to stop, then exiting his vehicle, walking onto the sidewalk, again stating "police" and asking the defendant to stop. Thereafter, the officer's pursuit of the defendant, by getting "closer to the defendant picking up with his pace," constituted a level three intrusion under De Bour, requiring a reasonable suspicion that the defendant was involved in a felony or misdemeanor ... . However, the circumstances, such as that the defendant had a nondescript bulge in his right jacket pocket, was leaning to the right side, and walked away from the officer without complying with the officer's requests for him to stop, did not support a reasonable suspicion of particularized criminal action. After all, "a bulging jacket pocket is hardly indicative of criminality. As [the Court of Appeals has] recognized, a pocket bulge, unlike a waistband bulge, could be caused by any number of innocuous objects'" (People v Holmes, 81 NY2d at 1058, quoting People v De Bour, 40 NY2d at 221), and "an individual has a right to be let alone' and refuse to respond to police inquiry" ... . Since this level three intrusion was not justified, it cannot be validated by the officer's subsequent observation of the firearm ... .
>
> Moreover, under the circumstances of this case, the defendant's subsequent statement to law enforcement officers must be suppressed as the product of the unlawful police conduct ... . **People v Jones, 2018 NY Slip Op 06114, Second Dept 9-19-18**

CRIMINAL LAW (STREET STOP NOT JUSTIFIED UNDER DE BOUR ANALYSIS, SEIZED FIREARM AND STATEMENT SHOULD HAVE BEEN SUPPRESSED (SECOND DEPT))/EVIDENCE (CRIMINAL LAW, STREET STOP NOT JUSTIFIED UNDER DE BOUR ANALYSIS, SEIZED FIREARM AND STATEMENT SHOULD HAVE BEEN SUPPRESSED (SECOND DEPT))/SEARCH AND SEIZURE (STREET STOP NOT JUSTIFIED UNDER DE BOUR ANALYSIS, SEIZED FIREARM AND STATEMENT SHOULD HAVE BEEN SUPPRESSED (SECOND DEPT))/STREET STOPS (STREET STOP NOT JUSTIFIED UNDER DE BOUR ANALYSIS, SEIZED FIREARM AND STATEMENT SHOULD HAVE BEEN SUPPRESSED (SECOND DEPT))/SUPPRESS, MOTION TO (STREET STOP NOT JUSTIFIED UNDER DE BOUR ANALYSIS, SEIZED FIREARM AND STATEMENT SHOULD HAVE BEEN SUPPRESSED (SECOND DEPT))/DE BOUR (STREET STOP NOT JUSTIFIED UNDER DE BOUR ANALYSIS, SEIZED FIREARM AND STATEMENT SHOULD HAVE BEEN SUPPRESSED (SECOND DEPT))

CRIMINAL LAW, EVIDENCE, APPEALS, ATTORNEYS.

DETECTIVE'S TESTIMONY THAT COMPLAINANT PICKED DEFENDANT OUT OF A LINEUP WAS INADMISSIBLE BOLSTERING, ERROR REVIEWED IN THE INTEREST OF JUSTICE, CONVICTION REVERSED (SECOND DEPT).

The Second Department, reversing defendant's conviction, determined the detective's testimony that the complainant picked the defendant out of a lineup constituted inadmissible bolstering. The issue was reviewed in the interest of justice (error not preserved);

> The defendant has not preserved for appellate review his contention that the prosecutor improperly elicited testimony from a detective stating that he arrested the defendant after the defendant was identified in a lineup by the complainant. However, we nevertheless review this contention in the exercise of our interest of justice jurisdiction (see CPL 470.15[6][a]...). The detective's testimony implicitly bolstered the complainant's testimony by providing official confirmation of the complainant's identification of the defendant ... . A violation of the rule against bolstering may not be overlooked except where the evidence of identity is so strong that there is no serious issue upon that point ... . Here, the evidence that the defendant committed the crime was not so overwhelming as to render the error harmless. This error was compounded by improper comments made during the People's summation regarding the complainant's identification of the defendant as the robber. **People v Ramirez, 2018 NY Slip Op 06120, Second Dept 9-19-18**

CRIMINAL LAW (DETECTIVE'S TESTIMONY THAT COMPLAINANT PICKED DEFENDANT OUT OF A LINEUP WAS INADMISSIBLE BOLSTERING, ERROR REVIEWED IN THE INTEREST OF JUSTICE, CONVICTION REVERSED (SECOND DEPT))/EVIDENCE (CRIMINAL LAW, DETECTIVE'S TESTIMONY THAT COMPLAINANT PICKED DEFENDANT OUT OF A LINEUP WAS INADMISSIBLE BOLSTERING, ERROR REVIEWED IN THE INTEREST OF JUSTICE, CONVICTION REVERSED (SECOND DEPT))/APPEALS (CRIMINAL LAW, DETECTIVE'S TESTIMONY THAT COMPLAINANT PICKED DEFENDANT OUT OF A LINEUP WAS INADMISSIBLE BOLSTERING, ERROR REVIEWED IN THE INTEREST OF JUSTICE, CONVICTION REVERSED (SECOND DEPT))/LINEUPS (CRIMINAL LAW, DETECTIVE'S TESTIMONY THAT COMPLAINANT PICKED DEFENDANT OUT OF A LINEUP WAS INADMISSIBLE BOLSTERING, ERROR REVIEWED IN THE INTEREST OF JUSTICE, CONVICTION REVERSED (SECOND DEPT))/BOLSTERING (CRIMINAL LAW, LINEUPS, DETECTIVE'S TESTIMONY THAT COMPLAINANT PICKED DEFENDANT OUT OF A LINEUP WAS INADMISSIBLE BOLSTERING, ERROR REVIEWED IN THE INTEREST OF JUSTICE, CONVICTION REVERSED (SECOND DEPT))/PROSECUTORIAL MISCONDUCT (DETECTIVE'S TESTIMONY THAT COMPLAINANT PICKED DEFENDANT OUT OF A LINEUP WAS INADMISSIBLE BOLSTERING, ERROR REVIEWED IN THE INTEREST OF JUSTICE, CONVICTION REVERSED (SECOND DEPT))/ATTORNEYS (CRIMINAL LAW, PROSECUTORIAL MISCONDUCT, DETECTIVE'S TESTIMONY THAT COMPLAINANT PICKED DEFENDANT OUT OF A LINEUP WAS INADMISSIBLE BOLSTERING, ERROR REVIEWED IN THE INTEREST OF JUSTICE, CONVICTION REVERSED (SECOND DEPT))

CRIMINAL LAW, IMMIGRATION LAW, EVIDENCE, CIVIL PROCEDURE.

SUPREME COURT LACKED TO POWER TO SUPPRESS DEFENDANT'S PRESENTENCE REPORT IN IMMIGRATION PROCEEDINGS (SECOND DEPT).

The Second Department determined defendant juvenile offender could not move to suppress his presentence report in subsequent Department of Homeland Security proceedings:

> The defendant, an immigrant from Bangladesh, was adjudicated a youthful offender. After completing his sentence, the defendant was detained by the United States Department of Homeland Security (hereinafter the DHS), which, in reliance on the defendant's presentence report, argued that the defendant should be denied a bond due to his youthful offender adjudication. Thereafter, the defendant moved before the Supreme Court in the subject criminal proceeding pursuant to CPLR 3103 for a protective order "enjoining the [DHS's] use" of his presentence report, arguing that it is a confidential record under CPL 720.35(2), which the DHS had improperly obtained. In an order dated June 6, 2017, the Supreme Court denied the defendant's motion. The defendant appeals.
>
> CPLR 3103 " confers broad discretion upon a court to fashion appropriate remedies' to prevent the abuse of disclosure devices" ... . Pursuant to CPLR 3103(c), "[i]f any disclosure under this article has been improperly or irregularly obtained so that a substantial right of a party is prejudiced, the court, on motion, may make an appropriate order, including an order that the information be suppressed" ... . Here, since the DHS did not obtain the presentence report in the course of any disclosure process under CPLR Article 31, there is no basis for the issuance of a protective order pursuant to CPLR 3103(c). Moreover, since "[c]ontrol over immigration and naturalization is entrusted exclusively to the Federal Government, and a State has no power to interfere" ... , the Supreme Court lacked the power to suppress the presentence report in immigration proceedings. **People v Sagline K., 2018 NY Slip Op 06115, Second Dept 9-19-18**

CRIMINAL LAW (SUPREME COURT LACKED TO POWER TO SUPPRESS DEFENDANT'S PRESENTENCE REPORT IN IMMIGRATION PROCEEDINGS (SECOND DEPT))/IMMIGRATION LAW (SUPREME COURT LACKED TO POWER TO SUPPRESS DEFENDANT'S PRESENTENCE REPORT IN IMMIGRATION PROCEEDINGS (SECOND DEPT))/EVIDENCE (IMMIGRATION LAW, SUPREME COURT LACKED TO POWER TO SUPPRESS DEFENDANT'S PRESENTENCE REPORT IN IMMIGRATION PROCEEDINGS (SECOND DEPT))/CIVIL PROCEDURE (IMMIGRATION LAW, (SUPREME COURT LACKED TO POWER TO SUPPRESS DEFENDANT'S PRESENTENCE REPORT IN IMMIGRATION PROCEEDINGS (SECOND DEPT))PRESENTENCE REPORT (IMMIGRATION LAW, SUPREME COURT LACKED TO POWER TO SUPPRESS DEFENDANT'S PRESENTENCE REPORT IN IMMIGRATION PROCEEDINGS (SECOND DEPT))

CRIMINAL LAW, JUDGES.

JUDGE CONDUCTED EXCESSIVE QUESTIONING OF WITNESSES, NEW TRIAL WITH A DIFFERENT JUDGE ORDERED (SECOND DEPT).

The Second Department ordered a new trial because the judge conducted excessive questioning of trial witnesses:

> ... [T]here must be a new trial, before a different justice, because the Supreme Court conducted excessive and prejudicial questioning of trial witnesses. Although defense counsel did not object to most instances of judicial interference, we reach this contention in the exercise of our interest of justice jurisdiction (see CPL 470.15[6][a]...). "While neither the nature of our adversary system nor the constitutional requirement of a fair trial preclude a trial court from assuming an active role in the truth-seeking process,' the court's discretion in this area is not unfettered" ... . The principle restraining the court's discretion is that a trial judge's "function is to protect the record, not to make it" ... . Indeed, when the trial judge interjects often and indulges in an extended questioning of witnesses, even where those questions would be proper if they came from trial counsel, the trial judge's participation presents significant risks of prejudicial unfairness ... . Accordingly, while a trial judge may intervene in a trial to clarify confusing testimony and facilitate the orderly and expeditious progress of the trial, the court may not take on "the function or appearance of an advocate" ... .
>
> Here, the Supreme Court interjected itself into the questioning of multiple witnesses, elicited step-by-step details about how the defendant was identified by witnesses as a suspect, and generally created the impression that it was an advocate for the People. Under the circumstances, the court's improper interference deprived the defendant of a fair trial, and a new trial before a different justice is warranted ... . **People v Sookdeo, 2018 NY Slip Op 06040, Second Dept 9-12-18**

CRIMINAL LAW (JUDGE CONDUCTED EXCESSIVE QUESTIONING OF WITNESSES, NEW TRIAL WITH A DIFFERENT JUDGE ORDERED (SECOND DEPT))/JUDGES (CRIMINAL LAW, JUDGE CONDUCTED EXCESSIVE QUESTIONING OF WITNESSES, NEW TRIAL WITH A DIFFERENT JUDGE ORDERED (SECOND DEPT))

CRIMINAL LAW, SEX OFFENDER REGISTRATION ACT (SORA).

DEFENDANT'S LEVEL THREE SEX OFFENDER ADJUDICATION SHOULD NOT HAVE BEEN VACATED, HIS SENTENCE ON A SEX OFFENSE WAS INTERRUPTED WHEN THE PAROLE BOARD DECLARED HIM DELINQUENT, WHEN DEFENDANT RETURNED TO STATE CUSTODY AFTER A SUBSEQUENT MURDER CONVICTION, HIS SEX OFFENSE SENTENCE RESUMED MAKING HIM SUBJECT TO SORA (SECOND DEPT).

The Second Department determined the defendant's level three sex offender adjudication should not have been vacated on the ground that defendant had completed his sex offense sentence in 1980, well before SORA went into effect in 1996. The Second Department held that defendant's sentence had been interrupted in 1979 when the Parole Board declared him delinquent. Defendant was subsequently prosecuted for murder and when defendant returned to state custody after his murder conviction in 1982, his sex offense sentence resumed:

> Contrary to the defendant's contention, his rape and attempted robbery sentences were "automatically interrupted when the Parole Board declared him delinquent" on June 4, 1979 ... . The defendant was not entitled to credit against those interrupted sentences for his time spent in local custody while his murder case was pending, as none of the provisions providing for such credit in Penal Law former § 70.40(3)(c) apply in this case (see Penal Law former § 70.40[3][c]...). The interruption of the defendant's rape and attempted robbery sentences that began on June 4, 1979, continued until the defendant returned "to an institution under the jurisdiction of the state department of correction," which in this case occurred when the defendant was returned to the custody of DOCCS on January 19, 1982 (Penal Law former § 70.40[3][a]...). Upon his return to the custody of DOCCS in 1982, the defendant both commenced serving his murder sentence and resumed serving his interrupted rape and attempted robbery sentences (see Penal Law § 70.30[1]; Penal Law former § 70.40[3][a]...). For the purposes of SORA, the defendant was subject to all of these sentences during his incarceration after January 19, 1982 .... Thus, the defendant was serving his rape, attempted robbery, and murder sentences on SORA's effective date in 1996, and he is subject to SORA ... . **People v Johnson, 2018 NY Slip Op 06045, Second Dept 9-12-18**

CRIMINAL LAW (SEX OFFENSE REGISTRATION ACT, DEFENDANT'S LEVEL THREE SEX OFFENDER ADJUDICATION SHOULD NOT HAVE BEEN VACATED, HIS SENTENCE ON A SEX OFFENSE WAS INTERRUPTED WHEN THE PAROLE BOARD DECLARED HIM DELINQUENT, WHEN DEFENDANT RETURNED TO STATE CUSTODY AFTER A SUBSEQUENT MURDER CONVICTION, HIS SEX OFFENSE SENTENCE RESUMED MAKING HIM SUBJECT TO SORA (SECOND DEPT))/SEX OFFENDER REGISTRATION ACT (SORA) (DEFENDANT'S LEVEL THREE SEX OFFENDER ADJUDICATION SHOULD NOT HAVE BEEN VACATED, HIS SENTENCE ON A SEX OFFENSE WAS INTERRUPTED WHEN THE PAROLE BOARD DECLARED HIM DELINQUENT, WHEN DEFENDANT RETURNED TO STATE CUSTODY AFTER A SUBSEQUENT MURDER CONVICTION, HIS SEX OFFENSE SENTENCE RESUMED MAKING HIM SUBJECT TO SORA (SECOND DEPT))

DEFAMATION

DEFAMATION, PRIVILEGE.

STATEMENTS ABOUT PROBLEMS WITH THE INSTALLATION OF GAS LINES MADE BY DEFENDANT WHO WAS HIRED TO FIND THE CAUSE OF THE GAS LEAKS PROTECTED BY QUALIFIED COMMON-INTEREST PRIVILEGE (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendants' motion for summary judgment in this defamation and injurious falsehood action should have been granted. The allegedly defamatory statements were made by defendant Dimino who was hired to assess the reasons for gas leaks at a school. The defendant concluded the gas leaks were the result of improper installation of the gas lines by plaintiff. Plaintiff was thereafter prohibited from doing any further school-related work for five years. The statements made about plaintiff's work were deemed protected by qualified common-interest privilege:

> ... [T]he defendants made a prima facie showing that the challenged statements were protected by the qualified common-interest privilege ... . The evidence in the record demonstrated that the letter, which does not reference the plaintiff by name, was written by Dimino at the request of the DOE [Department of Education], and that the defendants did not identify the plumbing company that installed the gas piping at the school. In opposition, the plaintiff failed to raise a triable issue of fact as to whether the challenged statements were motivated solely by malice ... . " Mere conclusory allegations, or charges based upon surmise, conjecture, and suspicion are insufficient to defeat the claim of qualified privilege'"... . Although the plaintiff disputes that its workmanship was poor and that it used lamp wick in the gas pipes at the school, the plaintiff failed to submit sufficient evidence to support its claims that the defendants made the statements for the purposes of justifying the cost of their repair work and eliminating the plaintiff as a competitor.
>
> For these same reasons, the defendants demonstrated their prima facie entitlement to judgment as a matter of law dismissing the cause of action alleging injurious falsehood. In opposition, the plaintiff failed to raise a triable issue of fact as to whether the defendants made false statements, maliciously and with the intent to harm it, or recklessly and without regard to their consequences ... . In addition, the defendants established, prima facie, that they did not tortiously interfere with the plaintiff's business relations. In opposition, the plaintiff failed to raise a triable issue of fact as to whether Dimino made the alleged defamatory statements in the letter for the sole purpose of harming the plaintiff or by using unlawful means ... . **Franco Belli Plumbing & Heating & Sons, Inc. v Dimino, 2018 NY Slip Op 06083, Second Dept 9-19-18**

DEFAMATION (STATEMENTS ABOUT PROBLEMS WITH THE INSTALLATION OF GAS LINES MADE BY DEFENDANT WHO WAS HIRED TO FIND THE CAUSE OF THE GAS LEAKS PROTECTED BY QUALIFIED COMMON-INTEREST PRIVILEGE (SECOND DEPT))/PRIVILEGE (DEFAMATION, STATEMENTS ABOUT PROBLEMS WITH THE INSTALLATION OF GAS LINES MADE BY DEFENDANT WHO WAS HIRED TO FIND THE CAUSE OF THE GAS LEAKS PROTECTED BY QUALIFIED COMMON-INTEREST PRIVILEGE (SECOND DEPT))/QUALIFIED PRIVILEGE (DEFAMATION, STATEMENTS ABOUT PROBLEMS WITH THE INSTALLATION OF GAS LINES MADE BY DEFENDANT WHO WAS HIRED TO FIND THE CAUSE OF THE GAS LEAKS PROTECTED BY QUALIFIED COMMON-INTEREST PRIVILEGE (SECOND DEPT))/COMMON INTEREST PRIVILEGE (DEFAMATION, STATEMENTS ABOUT PROBLEMS WITH THE INSTALLATION OF GAS LINES MADE BY DEFENDANT WHO WAS HIRED TO FIND THE CAUSE OF THE GAS LEAKS PROTECTED BY QUALIFIED COMMON-INTEREST PRIVILEGE (SECOND DEPT))

DISCIPLINARY HEARINGS (INMATES)

DISCIPLINARY HEARINGS (INMATES).

PETITIONER, WHO WAS URINATING WHEN A FEMALE CORRECTION OFFICER PASSED HIS CELL, WAS NOT GUILTY OF LEWD CONDUCT (THIRD DEPT).

The Third Department, annulling the determination, held that the petitioner did not engage in lewd conduct merely by urinating in his cell:

> ... [T]he Attorney General concedes, and we agree, that substantial evidence does not support that part of the determination finding petitioner guilty of engaging in lewd conduct... . The female correction officer testified that, while petitioner continued to urinate when she passed his cell, he made no gestures and did not expose his genitals to her ... . **Matter of Burroughs v Annucci, 2018 NY Slip Op 06168, Third Dept 9-19-18**

DISCIPLINARY HEARINGS (INMATES) (PETITIONER, WHO WAS URINATING WHEN A FEMALE CORRECTION OFFICER PASSED HIS CELL, WAS NOT GUILTY OF LEWD CONDUCT (THIRD DEPT))/LEWD CONDUCT (DISCIPLINARY HEARINGS (INMATES), PETITIONER, WHO WAS URINATING WHEN A FEMALE CORRECTION OFFICER PASSED HIS CELL, WAS NOT GUILTY OF LEWD CONDUCT (THIRD DEPT))

DISCIPLINARY HEARINGS (INMATES).

INMATE'S 'THREAT' TO BRING A LAWSUIT WAS NOT AN ACTIONABLE RULE VIOLATION (FOURTH DEPT).

The Fourth Department, annulling the "threats" charge, determined that the "threat" to file a lawsuit was not a proper basis for the charge:

> ... [R]espondent's determination of guilt on the threats charge under inmate rule 102.10 must be annulled. Although respondent correctly notes that "an inmate need not threaten violence in order to be found guilty of [making threats under rule 102.10]" ... , a statement cannot be a "threat" within the meaning of inmate rule 102.10 unless, at the very minimum, it [*2]conveys an intent to do something illegal, improper, or otherwise prohibited ... . Here, petitioner did not convey an intent to do anything illegal, improper, or otherwise prohibited. To the contrary, petitioner merely conveyed his intent to exercise his constitutional right to access the courts ... , and he cannot be penalized for "threatening" to do something, i.e., file a lawsuit, that he has every legal right to do. As the United States Supreme Court has explained, "[t]o punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort, . . . and for an agent of the State to pursue a course of action whose objective is to penalize a person's reliance on his legal rights is patently unconstitutional' " (Bordenkircher v Hayes, 434 US 357, 363 [1978], reh denied435 US 918 [1978], quoting Chaffin v Stynchcombe, 412 US 17, 32 n 20 [1973]). Moreover, respondent's interpretation of the word "threat" in this context would effectively nullify the protections afforded by Correction Law § 138 (4), which bars an inmate from being "disciplined for making written or oral statements, demands, or requests involving a change of institutional conditions, policies, rules, regulations, or laws affecting an institution." **Matter of Gourdine v Annucci, 2018 NY Slip Op 06391, Fourth Dept 9-29-18**

DISCIPLINARY HEARINGS (INMATES) (INMATE'S 'THREAT' TO BRING A LAWSUIT WAS NOT AN ACTIONABLE RULE VIOLATION (FOURTH DEPT))

EDUCATION-SCHOOL LAW

EDUCATION-SCHOOL LAW.

COLLEGE ADEQUATELY ADDRESSED PH.D STUDENT'S LEARNING DISABILITY, STUDENT WAS PROPERLY TERMINATED FROM THE PROGRAM UPON FAILURE OF AN EXAM (FIRST DEPT).

The First Department determined the college adequately addressed petitioner-Ph.D-student's learning disability and petitioner was properly terminated from the program after failing an exam:

> The record establishes that respondents reasonably accommodated the known aspects of petitioner's learning disability by granting him, among other accommodations, double the amount of time (six hours) for a certification exam, with an additional hour for lunch to be used at his discretion. There is no record that respondents were ever apprised, until months after petitioner had twice unsuccessfully sat for the exam, that the resulting length of the test could exacerbate petitioner's disability through fatigue. Petitioner thus failed to meet his burden, under the Americans with Disabilities Act (ADA), of showing that the additional accommodations he sought (i.e., to take the exam home or split the six hours over two days) were facially reasonable... . Moreover, the record establishes that respondents met their duty, in advance of both administrations of the exam, to engage in an interactive dialogue with petitioner ... .
>
> Petitioner's claim for breach of implied contract also fails, as respondents' determination that petitioner did not pass the exam (and the resulting termination from the program) was rationally based in the record and, as an academic evaluation, is beyond further review ... . **Matter of De Jesus v Teachers Coll., 2018 NY Slip Op 06186, First Dept 9-25-18**

EDUCATION-SCHOOL LAW (COLLEGE ADEQUATELY ADDRESSED PH.D STUDENT'S LEARNING DISABILITY, STUDENT WAS PROPERLY TERMINATED FROM THE PROGRAM UPON FAILURE OF AN EXAM (FIRST DEPT))/AMERICANS WITH DISABILITIES ACT (EDUCATION-SCHOOL LAW, COLLEGE ADEQUATELY ADDRESSED PH.D STUDENT'S LEARNING DISABILITY, STUDENT WAS PROPERLY TERMINATED FROM THE PROGRAM UPON FAILURE OF AN EXAM (FIRST DEPT))/LEARNING DISABILITIES (ACCOMMODATIONS, COLLEGE ADEQUATELY ADDRESSED PH.D STUDENT'S LEARNING DISABILITY, STUDENT WAS PROPERLY TERMINATED FROM THE PROGRAM UPON FAILURE OF AN EXAM (FIRST DEPT))/ACCOMMODATIONS (EDUCATION-SCHOOL LAW, COLLEGE ADEQUATELY ADDRESSED PH.D STUDENT'S LEARNING DISABILITY, STUDENT WAS PROPERLY TERMINATED FROM THE PROGRAM UPON FAILURE OF AN EXAM (FIRST DEPT))

EDUCATION-SCHOOL LAW, ATTORNEYS.

STUDENT WAS NOT DEPRIVED OF HIS RIGHT TO HAVE AN ATTORNEY PRESENT AT A COLLEGE DISCIPLINARY HEARING BY THE COLLEGE'S REFUSAL TO ADJOURN THE MATTER FOR THREE HOURS SO THE ATTORNEY COULD ATTEND, STUDENT WAS PROPERLY FOUND RESPONSIBLE FOR THE DISCIPLINARY CHARGES AND WAS PROPERLY EXPELLED (SECOND DEPT).

The Second Department, over a two-justice dissent, determined the student-petitioner's due process rights were not violated when the state college (SUNY Purchase] refused to adjourn a disciplinary hearing because petitioner's attorney could not be present. Petitioner was accused of having sex with another student without her consent. After the hearing the petitioner was found responsible and expelled. The dissent argued that the failure to grant the requested three-hour adjournment so petitioner's counsel could attend the hearing deprived petitioner of due process:

> In disciplinary proceedings at public colleges, " [d]ue process requires that the [accused students] be given the names of the witnesses against them, the opportunity to present a defense, and the results and finding of the hearing'" ... Due process does not require colleges to provide accused students with legal representation at disciplinary hearings ... . Purchase's rules, the legality of which the petitioner does not challenge, allow for an attorney to be present and advise an accused student at a disciplinary hearing, but not to represent the student or interact with anyone at the hearing other than the accused student. Here, the petitioner had hired an attorney as of September 30, 2014. ... [t]he petitioner was notified on September 30, 2014, that the hearing would likely be scheduled for October 6 or 7, and was informed of the exact time of the hearing on October 2, 2014. He alleges that he did not request an adjournment until "on or about" October 5, 2014, which was two days before the date of the hearing. Under these circumstances, contrary to the suggestion of our dissenting colleagues, the petitioner was not denied the opportunity to have an attorney present at the hearing ... .
>
> Purchase's determination that the petitioner committed the charged violations was supported by substantial evidence (see CPLR 7803[4]...).
>
> Contrary to the petitioner's contention, the penalty of expulsion was not so disproportionate to the offenses as to be shocking to one's sense of fairness, thus constituting an abuse of discretion as a matter of law (see CPLR 7803[3]...). **Matter of Bursch v Purchase Coll. of the State Univ. of N.Y., 2018 NY Slip Op 06090, Second Dept 9-19-18**

EDUCATION-SCHOOL LAW (STUDENT WAS NOT DEPRIVED OF HIS RIGHT TO HAVE AN ATTORNEY PRESENT AT A COLLEGE DISCIPLINARY HEARING BY THE COLLEGE'S REFUSAL TO ADJOURN THE MATTER FOR THREE HOURS SO THE ATTORNEY COULD ATTEND, STUDENT WAS PROPERLY FOUND RESPONSIBLE FOR THE DISCIPLINARY CHARGES AND WAS PROPERLY EXPELLED (SECOND DEPT))/ATTORNEYS (EDUCATION-SCHOOL LAW, STUDENT WAS NOT DEPRIVED OF HIS RIGHT TO HAVE AN ATTORNEY PRESENT AT A COLLEGE DISCIPLINARY HEARING BY THE COLLEGE'S REFUSAL TO ADJOURN THE MATTER FOR THREE HOURS SO THE ATTORNEY COULD ATTEND, STUDENT WAS PROPERLY FOUND RESPONSIBLE FOR THE DISCIPLINARY CHARGES AND WAS PROPERLY EXPELLED (SECOND DEPT))/COLLEGES AND UNIVERSITIES (DISCIPLINARY CHARGES, STUDENT WAS NOT DEPRIVED OF HIS RIGHT TO HAVE AN ATTORNEY PRESENT AT A COLLEGE DISCIPLINARY HEARING BY THE COLLEGE'S REFUSAL TO ADJOURN THE MATTER FOR THREE HOURS SO THE ATTORNEY COULD ATTEND, STUDENT WAS PROPERLY FOUND RESPONSIBLE FOR THE DISCIPLINARY CHARGES AND WAS PROPERLY EXPELLED (SECOND DEPT))

EDUCATION-SCHOOL LAW, MUNICIPAL LAW, NEGLIGENCE.

STUDENT WALKING HOME FROM SCHOOL STRUCK BY A CAR, SUIT AGAINST SCHOOL BOARD AND MUNICIPALITY PROPERLY DISMISSED, NO SPECIAL RELATIONSHIP WITH MUNICIPALITY, NO DUTY TO SUPERVISE AFTER DISMISSAL FROM SCHOOL (SECOND DEPT).

The Second Department determined plaintiff-student's action against the school board and municipality stemming from the student's being struck by a car crossing a street after school was properly dismissed. No crossing guard was provided for the street where the student crossed, but a crossing guard was routinely provided for a street a block away and that guard was out sick on the day of the accident. No special relationship with the municipality was demonstrated. Because the student had been dismissed from the school, the negligent supervision cause of action was not viable:

> A municipal defendant is immune from negligence claims arising from the performance of its governmental functions unless the injured person can establish a special relationship with the municipal defendant ... . The elements of a special relationship based on a voluntary assumption of a duty are "(1) an assumption by the municipality, through promises or actions, of an affirmative duty to act on behalf of the injured party; (2) knowledge on the part of the municipality's agents that inaction could lead to harm; (3) some form of direct contact between the municipality's agents and the injured party; and (4) the injured party's justifiable reliance on the municipality's affirmative undertaking" ... .
>
> The municipal defendants' duty was limited to providing a crossing guard at the intersection of 101st Street and Seaview Avenue, and did not extend to the intersection of 100th Street and Seaview Avenue, where no crossing guard was assigned ... . Further, the municipal defendants established, prima facie, that the failure of having a crossing guard at the intersection of 101st Street and Seaview Avenue was not a proximate cause of the injuries allegedly sustained by the infant plaintiff in this case ... .
>
> The municipal defendants also established their prima facie entitlement to judgment as a matter of law dismissing the negligent supervision cause of action. Their submissions demonstrated that the accident occurred after the infant plaintiff was dismissed from school ... , and that they did not release the infant plaintiff into a foreseeably hazardous setting that they had a hand in creating ... . **Ade v City of New York, 2018 NY Slip Op 05993, Second Dept 8-12-18**

EDUCATION-SCHOOL LAW (NEGLIGENCE, STUDENT WALKING HOME FROM SCHOOL STRUCK BY A CAR, SUIT AGAINST SCHOOL BOARD AND MUNICIPALITY PROPERLY DISMISSED, NO SPECIAL RELATIONSHIP WITH MUNICIPALITY, NO DUTY TO SUPERVISE AFTER DISMISSAL FROM SCHOOL (SECOND DEPT))/MUNICIPAL LAW (NEGLIGENCE, STUDENT WALKING HOME FROM SCHOOL STRUCK BY A CAR, SUIT AGAINST SCHOOL BOARD AND MUNICIPALITY PROPERLY DISMISSED, NO SPECIAL RELATIONSHIP WITH MUNICIPALITY, NO DUTY TO SUPERVISE AFTER DISMISSAL FROM SCHOOL (SECOND DEPT))/NEGLIGENCE (EDUCATION-SCHOOL LAW, MUNICIPAL LAW, STUDENT WALKING HOME FROM SCHOOL STRUCK BY A CAR, SUIT AGAINST SCHOOL BOARD AND MUNICIPALITY PROPERLY DISMISSED, NO SPECIAL RELATIONSHIP WITH MUNICIPALITY, NO DUTY TO SUPERVISE AFTER DISMISSAL FROM SCHOOL (SECOND DEPT))/SPECIAL RELATIONSHIP (MUNICIPAL LAW, STUDENT WALKING HOME FROM SCHOOL STRUCK BY A CAR, SUIT AGAINST SCHOOL BOARD AND MUNICIPALITY PROPERLY DISMISSED, NO SPECIAL RELATIONSHIP WITH MUNICIPALITY, NO DUTY TO SUPERVISE AFTER DISMISSAL FROM SCHOOL (SECOND DEPT))/TRAFFIC ACCIDENTS (NEGLIGENCE, STUDENT WALKING HOME FROM SCHOOL STRUCK BY A CAR, SUIT AGAINST SCHOOL BOARD AND MUNICIPALITY PROPERLY DISMISSED, NO SPECIAL RELATIONSHIP WITH MUNICIPALITY, NO DUTY TO SUPERVISE AFTER DISMISSAL FROM SCHOOL (SECOND DEPT))/PEDESTRIANS (NEGLIGENCE, STUDENT WALKING HOME FROM SCHOOL STRUCK BY A CAR, SUIT AGAINST SCHOOL BOARD AND MUNICIPALITY PROPERLY DISMISSED, NO SPECIAL RELATIONSHIP WITH MUNICIPALITY, NO DUTY TO SUPERVISE AFTER DISMISSAL FROM SCHOOL (SECOND DEPT))

EDUCATION-SCHOOL LAW, NEGLIGENCE, MUNICIPAL LAW.

SCHOOL HAD ACTUAL KNOWLEDGE OF THE FACTS OF THE SLIP AND FALL CLAIM WITHIN 90 DAYS AND WAS NOT PREJUDICED BY THE DELAY IN FILING A NOTICE OF CLAIM, PETITION FOR LEAVE TO FILE A LATE NOTICE SHOULD HAVE BEEN GRANTED, DESPITE AN INADEQUATE EXCUSE (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the petition for leave to file a late notice of claim in this slip and fall case should have been granted. Petitioner alleged she tripped and fell over unsecured floor mats as she was leaving the school after her grandson's basketball game. The Second Department noted that the school had done an investigation and thereby had timely notice of the facts of the claim:

> ... [A]lthough the petitioner's notice of claim was not served within 90 days of the accident, the respondent acquired actual knowledge of the essential facts constituting the claim within 90 days of the accident ... . In fact, the respondent conducted an investigation into whether it was a proper defendant in a personal injury action. In addition, the petitioner made an initial showing that the respondent was not substantially prejudiced by the delay, since the respondent acquired timely, actual knowledge of the essential facts constituting the claim within the 90-day period, conducted an investigation, and notified its insurance carrier of the accident ... .
>
> In opposition, the respondent failed to make a particularized evidentiary showing that it would be substantially prejudiced if the late notice was allowed ... . The respondent's contention that it was prejudiced because the particular mats over which the petitioner tripped had been replaced after the accident is without merit. The record shows that the respondent's Director of Facilities sent an email on the morning following the petitioner's accident in which he indicated that he was aware of the fact that the petitioner tripped over the mats in the vestibule. Contrary to the respondent's contention, any prejudice resulting from the replacement of the subject mats was due to the respondent's practice of changing the mats on a weekly basis rather than from the petitioner's delay in serving a notice of claim. Under these circumstances, the failure of the respondent to inspect the mats that were on the ground on the date of the petitioner's accident was not caused by the delay in serving a notice of claim ... .
>
> ...[W]hile the excuses proffered by the petitioner for her failure to file a timely notice of claim were not reasonable, the absence of a reasonable excuse is not in and of itself fatal to the petition where, as here, there was actual notice and an absence of prejudice ... . **Matter of Messick v Greenwood Lake Union Free Sch. Dist., 2018 NY Slip Op 06244, Second Dept 9-26-18**

EDUCATION-SCHOOL LAW (SCHOOL HAD ACTUAL KNOWLEDGE OF THE FACTS OF THE SLIP AND FALL CLAIM WITHIN 90 DAYS AND WAS NOT PREJUDICED BY THE DELAY IN FILING A NOTICE OF CLAIM, PETITION FOR LEAVE TO FILE A LATE NOTICE SHOULD HAVE BEEN GRANTED, DESPITE AN INADEQUATE EXCUSE (SECOND DEPT))/NEGLIGENCE (EDUCATION-SCHOOL LAW, SLIP AND FALL, SCHOOL HAD ACTUAL KNOWLEDGE OF THE FACTS OF THE SLIP AND FALL CLAIM WITHIN 90 DAYS AND WAS NOT PREJUDICED BY THE DELAY IN FILING A NOTICE OF CLAIM, PETITION FOR LEAVE TO FILE A LATE NOTICE SHOULD HAVE BEEN GRANTED, DESPITE AN INADEQUATE EXCUSE (SECOND DEPT))/MUNICIPAL LAW (NOTICE OF CLAIM, SCHOOL HAD ACTUAL KNOWLEDGE OF THE FACTS OF THE SLIP AND FALL CLAIM WITHIN 90 DAYS AND WAS NOT PREJUDICED BY THE DELAY IN FILING A NOTICE OF CLAIM, PETITION FOR LEAVE TO FILE A LATE NOTICE SHOULD HAVE BEEN GRANTED, DESPITE AN INADEQUATE EXCUSE (SECOND DEPT)/NOTICE OF CLAIM (EDUCATION-SCHOOL LAW, SLIP AND FALL, SCHOOL HAD ACTUAL KNOWLEDGE OF THE FACTS OF THE SLIP AND FALL CLAIM WITHIN 90 DAYS AND WAS NOT PREJUDICED BY THE DELAY IN FILING A NOTICE OF CLAIM, PETITION FOR LEAVE TO FILE A LATE NOTICE SHOULD HAVE BEEN GRANTED, DESPITE AN INADEQUATE EXCUSE (SECOND DEPT))/SLIP AND FALL (EDUCATION-SCHOOL LAW, NOTICE OF CLAIM, SCHOOL HAD ACTUAL KNOWLEDGE OF THE FACTS OF THE SLIP AND FALL CLAIM WITHIN 90 DAYS AND WAS NOT PREJUDICED BY THE DELAY IN FILING A NOTICE OF CLAIM, PETITION FOR LEAVE TO FILE A LATE NOTICE SHOULD HAVE BEEN GRANTED, DESPITE AN INADEQUATE EXCUSE (SECOND DEPT))

ELECTION LAW

ELECTION LAW.

"OPPORTUNITY TO BALLOT" REMEDY AVAILABLE WHERE SIGNATURES ON A NOMINATING PETITION INVALIDATED FOR A TECHNICAL DEFECT AND THE PARTY WOULD BE LEFT WITHOUT A CANDIDATE (FOURTH DEPT).

The Fourth Department determined, pursuant to the "opportunity to ballot" remedy, 24 signatures on a nominating petition should not have been invalidated because the signatures had appeared on a prior nominating petition for a candidate who had withdrawn:

> ... [T]he equitable remedy of opportunity to ballot is appropriate here ... . The remedy of an " opportunity to ballot' . . . was designed to give effect to the intention manifested by qualified party members to nominate some candidate, where that intention would otherwise be thwarted by the presence of technical, but fatal defects in designating petitions, leaving the political party without a designated candidate for a given office"... . Here, the Board determined that 24 of the signatures on petitioner's nominating petition were invalid because the signers had previously signed the nominating petition of a candidate who later withdrew from the race. Although the fact that a voter has previously signed another candidate's petition is typically a substantive defect ... , we conclude that such a defect is a technical one where, as here, the candidate with a prior nominating petition withdrew that petition prior to the voters signing the second nominating petition ... . We thus conclude that the registered voters of the Republican Party should be afforded an opportunity to ballot for the office at issue, and we therefore modify the order accordingly. **Matter of Trevisani v Karp, 2018 NY Slip Op 05966, Fourth Dept 9-5-18**

ELECTION LAW ('OPPORTUNITY TO BALLOT' REMEDY AVAILABLE WHERE SIGNATURES ON A NOMINATING PETITION INVALIDATED FOR A TECHNICAL DEFECT AND THE PARTY WOULD BE LEFT WITHOUT A CANDIDATE (FOURTH DEPT))/OPPORTUNITY TO BALLOT (ELECTION LAW,'OPPORTUNITY TO BALLOT' REMEDY AVAILABLE WHERE SIGNATURES ON A NOMINATING PETITION INVALIDATED FOR A TECHNICAL DEFECT AND THE PARTY WOULD BE LEFT WITHOUT A CANDIDATE (FOURTH DEPT))

ELECTION LAW.

PARTY OBJECTING TO CONGRESSIONAL CANDIDATE'S NOMINATING PETITION DID NOT PROPERLY NOTIFY THE CANDIDATE OF THE OBJECTIONS, STATE BOARD OF ELECTIONS SHOULD NOT HAVE INVALIDATED THE PETITION (THIRD DEPT).

The Third Department, reversing the State Election Board, determined the nominating petition of a candidate for the US House of Representatives should not have been invalidated because the objecting party did not comply with the requirements for notifying the candidate of the objections:

> 9 NYCRR 6204.1 (b) provides that "[n]o specifications of objections to any petition will be considered by the [State B]oard unless the objector filing the specifications personally delivers or mails by registered or certified mail a duplicate copy of the specification[s] to each candidate for public office named in the petition . . . on or before the date of filing of [the] specifications with the [State B]oard" ... . Suffice it to say, the elemental prerequisite of any service requirement is that a party is served with the correct documents ... . Plainly, this did not occur. Here, petitioner was not served with "a duplicate copy" of the specifications of objections, but was instead served with specifications of objections related to another candidate. Moreover, even assuming, without deciding, that the service upon petitioner of an order to show cause and supporting papers seeking to invalidate the nominating petition — which contained the specifications of objections related to petitioner — could serve to remedy the original defect, such service was not effectuated "on or before the date of filing of [the] specifications with the [State B]oard" (9 NYCRR 6204.1 [b]). Further, the fact that petitioner thereafter actually received the correct specifications is irrelevant, as "notice received by means other than those authorized . . . cannot serve to bring [the objections] within the jurisdiction of the [State Board]".... Inasmuch as 9 NYCRR 6204.1 (b) is "'mandatory and may not be disregarded,'" we are constrained to conclude that "[Liscum's] failure to abide by the mandatory service provisions thereof deprived the [State] Board of jurisdiction to properly consider the objections and thereafter rule to invalidate the petition" ... . **Matter of Neal v Liscum, 2018 NY Slip Op 06070, Third Dept 9-17-18**

ELECTION LAW (PARTY OBJECTING TO CONGRESSIONAL CANDIDATES' NOMINATING PETITION DID NOT PROPERLY NOTIFY THE CANDIDATE OF THE OBJECTIONS, STATE BOARD OF ELECTIONS SHOULD NOT HAVE INVALIDATED THE PETITION (THIRD DEPT))

ELECTION LAW, FRAUD.

FRAUD WARRANTED INVALIDATION OF THE DESIGNATING PETITION (FOURTH DEPT).

The Fourth Department determined the designating petition was properly invalidated on the basis of fraud:

> "As a general rule, a candidate's designating petition will be invalidated on the ground of fraud only if there is a showing that the entire designating petition is permeated with that fraud" ... . "Even where the designating petition is not permeated with fraud, however, when the candidate has participated in or is chargeable with knowledge of the fraud, the designating petition will generally be invalidated" (id. at 509). Here, petitioners established that multiple subscribing witnesses, including respondent, attested falsely that they had witnessed certain signatures on the designating petition inasmuch as they had allowed third-parties to sign the petition on behalf of the person named as the signatory on the designating petition ... , and that respondent attested to certain signatures although he was not "in the presence of the signatories when [they] signed the [designating] petition" ... . Thus, the court properly determined that respondent's participation in fraudulent acts warranted invalidating the designating petition for the Democratic Party ... . **Matter of Buttenschon v Salatino, 2018 NY Slip Op 05988, Fourth Dept 9-7-18**

ELECTION LAW (FRAUD WARRANTED INVALIDATION OF THE DESIGNATING PETITION (FOURTH DEPT))/FRAUD (ELECTION LAW, FRAUD WARRANTED INVALIDATION OF THE DESIGNATING PETITION (FOURTH DEPT))

FAMILY LAW

FAMILY LAW.

MOTHER'S MENTAL ILLNESS SUPPORTED NEGLECT FINDING (SECOND DEPT).

The Second Department determined that mother's mental illness supported the neglect finding and an order requiring mother to cooperate with medication management by her mental health service providers:

> Mental illness means "an affliction with a mental disease or mental condition which is manifested by a disorder or disturbance in behavior, feeling, thinking or judgment to such an extent that if such child were placed in or returned to the custody of the parent, the child would be in danger of becoming a neglected child as defined in the family court act" (Social Services Law § 384-b[6][a]). "While parental neglect may be based on mental illness, proof of a parent's mental illness alone will not support a finding of neglect"... . Rather, the petitioner must adduce evidence sufficient to "establish a causal connection between the parent's condition, and actual or potential harm to the [child]" ... .
>
> .. [T]the mother's contention that the Family Court acted in excess of its jurisdiction or violated her constitutional right to direct her own medical treatment when it directed that she comply with medication management recommended by her mental health service providers is without merit, since the court did not order the forcible administration of medication ... . **Matter of Nialani T. (Elizabeth B.), 2018 NY Slip Op 06019, Second Dept 9-12-18**

FAMILY LAW (MOTHER'S MENTAL ILLNESS SUPPORTED NEGLECT FINDING (SECOND DEPT))/MENTAL ILLNESS (FAMILY LAW, MOTHER'S MENTAL ILLNESS SUPPORTED NEGLECT FINDING (SECOND DEPT))/NEGLECT (FAMILY LAW, MENTAL ILLNESS, MOTHER'S MENTAL ILLNESS SUPPORTED NEGLECT FINDING (SECOND DEPT))

FAMILY LAW.

OFFICE OF CHILDREN AND FAMILY SERVICES' CHILD-MALTREATMENT FINDING NOT SUPPORTED BY THE EVIDENCE (FIRST DEPT).

The First Department found that the child maltreatment determination by the NYS Office of Children and Family Services (OCFS) was not indicated:

> OCFS's determination that child maltreatment by petitioners was "indicated" is not supported by substantial evidence... . Petitioners were in compliance with the recommendations of the child's pediatrician during the period in question, and there is no evidence that their failure to seek regular visits with a hematologist or to administer a daily dose of penicillin to the child as a prophylaxis either impaired or risked imminently impairing the child's physical condition... . Medical records show that the child's hospitalizations in 2014 and a year later in 2015 were the result of a viral infection, which would not have been prevented by his seeing a hematologist regularly or taking penicillin, an antibiotic. After the 2015 hospitalization, the child's treating physician ratified a course of treatment that did not include a daily antibiotic. Further, petitioners' decision not to further vaccinate the child did not violate the pediatrician's directive ... . **Matter of Charles v Poole, 2018 NY Slip Op 06185, First Dept 9-25-18**

FAMILY LAW (OFFICE OF CHILDREN AND FAMILY SERVICES' CHILD-MALTREATMENT FINDING NOT SUPPORTED BY THE EVIDENCE (FIRST DEPT))/CHILD MALTREATMENT (OFFICE OF CHILDREN AND FAMILY SERVICES' CHILD-MALTREATMENT FINDING NOT SUPPORTED BY THE EVIDENCE (FIRST DEPT))/OFFICE OF CHILDREN AND FAMILY SERVICES (OFFICE OF CHILDREN AND FAMILY SERVICES' CHILD-MALTREATMENT FINDING NOT SUPPORTED BY THE EVIDENCE (FIRST DEPT))

FAMILY LAW.

VISITATION SHOULD NOT HAVE BEEN CONDITIONED ON CHILDREN'S CONSENT (FIRST DEPT).

The First Department, modifying Family Court, determined visitation should not have been conditioned on the children's consent:

> ... [V]isitation should not have been conditioned on the children's (ages 9 and 11) consent and the parties' agreement. Visitation is a joint right of the noncustodial parent, here the adoptive mother, and of the children ... . Although the children have a fractured relationship with their adoptive mother, a reasonable visitation schedule should have been set with her. At a minimum, supervised visitation would have alleviated the children's concerns. Not only is it untenable for these parties to set up their own visitation schedule, there is an insufficient showing that visitation would be detrimental to the children. "A court may not delegate its authority to determine visitation to either a parent or a child" ... . Consequently, we remand this matter so that Family Court can, at a minimum, establish an appropriate supervised access schedule for the great-grandmother with the children and for the allocation of any other suitable resources to restore their relationship. **Matter of Cornell S.J. v Altemease R.J., 2018 NY Slip Op 06320, First Dept 9-27-18**

FAMILY LAW (VISITATION SHOULD NOT HAVE BEEN CONDITIONED ON CHILDREN'S CONSENT (FIRST DEPT))/VISITATION (FAMILY LAW, VISITATION SHOULD NOT HAVE BEEN CONDITIONED ON CHILDREN'S CONSENT (FIRST DEPT))

FAMILY LAW, IMMIGRATION LAW.

MOTHER'S PETITION FOR GUARDIANSHIP RE: SEEKING SPECIAL IMMIGRANT JUVENILE STATUS FOR HER SON SHOULD NOT HAVE BEEN DISMISSED ON THE GROUND PATERNITY HAD NOT BEEN ESTABLISHED (SECOND DEPT).

The Second Department, reversing Family Court, determined mother's guardianship petition should not have been dismissed simply because paternity had not been established. Mother was seeking special immigrant juvenile status (SIJS) for her child:

> ... [M]other filed a petition ... to be appointed the guardian of the subject child for the purpose of obtaining an order, inter alia, so as to enable the child to petition the United States Citizenship and Immigration Services for special immigrant juvenile status (hereinafter SIJS) ... . In an order dated April 9, 2018, the Family Court dismissed the petition, without a hearing, on the ground that it failed to state a cause of action because the putative father's paternity had not been established. ...
>
> We disagree with the Family Court's determination to dismiss the petition, in which the mother sought to be appointed guardian of her child. A natural parent may be appointed guardian of his or her child (see Family Ct Act § 661[a]...), and the mere fact that paternity has not been established for the putative father does not preclude the mother's guardianship petition ... .
>
> Accordingly, since the Family Court dismissed the guardianship petition without conducting a hearing or considering the child's best interests, the matter must be remitted to the Family Court ... for an expedited hearing and a new determination thereafter of the guardianship petition ...
> . **Matter of Olga L.G.M. (Santos T.F.), 2018 NY Slip Op 06093, Second Dept 9-19-18**

FAMILY LAW (MOTHER'S PETITION FOR GUARDIANSHIP RE: SEEKING SPECIAL IMMIGRANT JUVENILE STATUS FOR HER SON SHOULD NOT HAVE BEEN DISMISSED ON THE GROUND PATERNITY HAD NOT BEEN ESTABLISHED (SECOND DEPT))/IMMIGRATION LAW (FAMILY LAW, MOTHER'S PETITION FOR GUARDIANSHIP RE: SEEKING SPECIAL IMMIGRANT JUVENILE STATUS FOR HER SON SHOULD NOT HAVE BEEN DISMISSED ON THE GROUND PATERNITY HAD NOT BEEN ESTABLISHED (SECOND DEPT))/SPECIAL IMMIGRANT JUVENILE STATUS (FAMILY LAW, (MOTHER'S PETITION FOR GUARDIANSHIP RE: SEEKING SPECIAL IMMIGRANT JUVENILE STATUS FOR HER SON SHOULD NOT HAVE BEEN DISMISSED ON THE GROUND PATERNITY HAD NOT BEEN ESTABLISHED (SECOND DEPT))

FAMILY LAW, INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS.

NEW YORK DOES NOT RECOGNIZE A CAUSE OF ACTION FOR INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS AGAINST A SPOUSE OR FORMER SPOUSE STEMMING FROM EVENTS DURING THE MARRIAGE (SECOND DEPT).

The Second Department noted that, in New York, an intentional infliction of emotional distress cause of action cannot be brought against a spouse or former spouse regarding event occurring during marriage:

> New York does not recognize a cause of action alleging the intentional infliction of emotional distress between spouses or former spouses based upon allegations of events that occurred during the marriage ... . In any event, the conduct complained of does not rise to the level of extreme and outrageous behavior required for a valid claim of intentional infliction of emotional distress ... . **Chen v Dehjung Deborah Wang, 2018 NY Slip Op 06076, Second Dept 9-19-18**

FAMILY LAW (NEW YORK DOES NOT RECOGNIZE A CAUSE OF ACTION FOR INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS AGAINST A SPOUSE OR FORMER SPOUSE STEMMING FROM EVENTS DURING THE MARRIAGE (SECOND DEPT))/INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS (FAMILY LAW, NEW YORK DOES NOT RECOGNIZE A CAUSE OF ACTION FOR INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS AGAINST A SPOUSE OR FORMER SPOUSE STEMMING FROM EVENTS DURING THE MARRIAGE (SECOND DEPT))

FORECLOSURE

DEFAULT NOTICE WAS NOT A CLEAR AND UNEQUIVOCAL ACCELERATION OF THE MORTGAGE, THE STATUTE OF LIMITATIONS FOR A FORECLOSURE ACTION DID NOT START RUNNING FROM THE DATE OF THE NOTICE (SECOND DEPT).

The Second Department determined the language in a letter was not sufficient to trigger the acceleration of the debt, which, in turn, would have started the the running of the statute of limitations for a foreclosure action:

> In June 2005, nonparty Cecilia Adebola executed a promissory note in the sum of $549,000 in favor of Fremont Investment & Loan [FBP] secured by a mortgage encumbering real property located in Brooklyn. After Adebola defaulted under the terms of the note and mortgage, the loan servicer sent her a notice of default dated July 3, 2006. The notice of default stated, in relevant part, that "[i]f the default is not cured on or before August 7, 2006, the mortgage payments will be accelerated with the full amount . . . becoming due and payable in full, and foreclosure proceedings will be initiated at that time." * * *
>
> Here, it is clear from the record that FBP cannot establish that the notice of default letter was a clear and unequivocal acceleration of the mortgage ... . The notice of default "was nothing more than a letter discussing acceleration as a possible future event, which does not constitute an exercise of the mortgage's optional acceleration clause" ... . **Fbp 250, LLC v Wells Fargo Bank, N.A., 2018 NY Slip Op 06082, Second Dept 9-19-18**

FORECLOSURE (DEFAULT NOTICE WAS NOT A CLEAR AND UNEQUIVOCAL ACCELERATION OF THE MORTGAGE, THE STATUTE OF LIMITATIONS FOR A FORECLOSURE ACTION DID NOT START RUNNING FROM THE DATE OF THE NOTICE (SECOND DEPT))/ACCELERATION OF MORTGAGE (DEFAULT NOTICE WAS NOT A CLEAR AND UNEQUIVOCAL ACCELERATION OF THE MORTGAGE, THE STATUTE OF LIMITATIONS FOR A FORECLOSURE ACTION DID NOT START RUNNING FROM THE DATE OF THE NOTICE (SECOND DEPT))

FORECLOSURE, UNIFORM COMMERCIAL CODE (UCC).

A CASH ACCOUNT AGREEMENT WHICH MEMORIALIZED A REVERSE MORTGAGE WAS NOT A NEGOTIABLE INSTRUMENT WITHIN THE MEANING OF THE UNIFORM COMMERCIAL CODE, THEREFORE THE HOLDER OF THE CASH ACCOUNT AGREEMENT DID NOT HAVE STANDING TO FORECLOSE (SECOND DEPT).

The Second Department, in a full-fledged opinion by Justice Chambers, reversing Supreme Court, determined that a Cash Account Agreement memorializing a reverse mortgage was not a negotiable instrument within the meaning of the Uniform Commercial Code and plaintiff, therefore, did not have standing to foreclose after the borrower's death:

> ... [T]o qualify as a negotiable instrument under the UCC, a document must "(a) be signed by the maker or drawer; and (b) contain an unconditional promise or order to pay a sum certain in money and no other promise, order, obligation or power given by the maker or drawer except as authorized by this Article; and (c) be payable on demand or at a definite time; and (d) be payable to order or to bearer" (UCC 3-104[1] ...). * * *
>
> ... [T]he Cash Account Agreement is signed by the borrower and contains an unconditional promise to pay. In addition to this ... the Cash Account Agreement also contains provisions that go well beyond what is permitted under the UCC. Most significantly, the Cash Account Agreement creates an open-end (i.e., revolving) line of credit upon which the borrower could draw a maximum of $806,152. Since the initial advance in this case was only $366,152, the borrower potentially could have drawn down as much as $440,000 more from the lender. Consistent with these terms, the borrower promised to pay when due "all amounts advanced" under the Cash Account Agreement. Although the plaintiff contends that such an agreement constitutes a negotiable instrument, we have found no New York case ...directly on point. In other jurisdictions, however, similar line of credit agreements have been held to be distinct from an agreement to pay a sum certain ... .
>
> Beyond this ... the Cash Account Agreement also provides for the periodic adjustment of the advance limit, and allows the lender, inter alia, to suspend, terminate, or reduce the borrower's right to obtain future advances under certain circumstances. ...
>
> On its face, the Cash Account Agreement does much more than memorialize the borrower's unconditional promise to pay a sum of money. It creates a banking relationship between the lender and the borrower, provides terms and conditions under which the borrower may, from time to time, obtain additional cash advances from the lender, and even contains an arbitration clause. Although the Cash Account Agreement appears to have been signed only by the borrower, section 17.2 specifically acknowledges that it imposes obligations on both the borrower and the lender. The specific language of several provisions of the Cash Account Agreement, read in context of the agreement as a whole, provides compelling evidence that the Cash Account Agreement is not, and was never intended to be, a negotiable instrument ... .
>
> Therefore, the plaintiff cannot establish its standing merely by showing that it possessed the original Cash Account Agreement, indorsed in blank, on the date this action was commenced, and the plaintiff's motion for summary judgment on the complaint should have been denied. **OneWest Bank, N.A. v FMCDH Realty, Inc., 2018 NY Slip Op 06101, Second Dept 9-19-18**

FORECLOSURE (REVERSE MORTGAGE, A CASH ACCOUNT AGREEMENT WHICH MEMORIALIZED A REVERSE MORTGAGE WAS NOT A NEGOTIABLE INSTRUMENT WITHIN THE MEANING OF THE UNIFORM COMMERCIAL CODE, THEREFORE THE HOLDER OF THE CASH ACCOUNT AGREEMENT DID NOT HAVE STANDING TO FORECLOSE (SECOND DEPT))/REVERSE MORTGAGE (A CASH ACCOUNT AGREEMENT WHICH MEMORIALIZED A REVERSE MORTGAGE WAS NOT A NEGOTIABLE INSTRUMENT WITHIN THE

MEANING OF THE UNIFORM COMMERCIAL CODE, THEREFORE THE HOLDER OF THE CASH ACCOUNT AGREEMENT DID NOT HAVE STANDING TO FORECLOSE (SECOND DEPT))/STANDING (FORECLOSURE, REVERSE MORTGAGE, A CASH ACCOUNT AGREEMENT WHICH MEMORIALIZED A REVERSE MORTGAGE WAS NOT A NEGOTIABLE INSTRUMENT WITHIN THE MEANING OF THE UNIFORM COMMERCIAL CODE, THEREFORE THE HOLDER OF THE CASH ACCOUNT AGREEMENT DID NOT HAVE STANDING TO FORECLOSE (SECOND DEPT))/UNIFORM COMMERCIAL CODE (FORECLOSURE, REVERSE MORTGAGE, A CASH ACCOUNT AGREEMENT WHICH MEMORIALIZED A REVERSE MORTGAGE WAS NOT A NEGOTIABLE INSTRUMENT WITHIN THE MEANING OF THE UNIFORM COMMERCIAL CODE, THEREFORE THE HOLDER OF THE CASH ACCOUNT AGREEMENT DID NOT HAVE STANDING TO FORECLOSE (SECOND DEPT))/NEGOTIABLE INSTRUMENT (FORECLOSURE, REVERSE MORTGAGE, A CASH ACCOUNT AGREEMENT WHICH MEMORIALIZED A REVERSE MORTGAGE WAS NOT A NEGOTIABLE INSTRUMENT WITHIN THE MEANING OF THE UNIFORM COMMERCIAL CODE, THEREFORE THE HOLDER OF THE CASH ACCOUNT AGREEMENT DID NOT HAVE STANDING TO FORECLOSE (SECOND DEPT))

HUMAN RIGHTS LAW

HUMAN RIGHTS LAW, EMPLOYMENT LAW, ADMINISTRATIVE LAW.

NYC HUMAN RIGHTS LAW PROTECTS AGAINST TERMINATION BASED UPON AN EMPLOYEE'S MARRIAGE TO A PARTICULAR PERSON WHO HAD LEFT TO WORK FOR A COMPETITOR, THERE WAS NO NEED TO ALLEGE THAT THE EMPLOYER WAS BIASED AGAINST MARRIED COUPLES GENERALLY (FIRST DEPT).

The First Department, in a full-fledged opinion by Justice Acosta, in a matter of first impression, determined that terminating a person the employer (Fidessa) believed was married to another employee who had left to work for a competing employer stated a cause of action for discrimination based upon marital status under the New York City Human Rights Law:

> The City HRL states, in relevant part: "It shall be an unlawful discriminatory practice: (a) For an employer or an employee or agent thereof, because of the actual or perceived . . . marital status . . .(2) To refuse to hire or employ or to bar or to discharge from employment such person or (3) To discriminate against such person in compensation or in terms, conditions or privileges of employment" ... .
>
> From the complaint it appears that Fidessa treated plaintiff and his partner differently from [a] similarly situated couple based on its perception that they were married to one another and the members of the other couple were not. Thus, the question is whether discrimination based on "marital status" encompasses discrimination based on marital status in relation to a person relevant to Fidessa. In other words, is an employer prohibited from discharging an employee because of the employee's marriage to a particular person.
>
> For the purposes of this analysis, the fact that defendant was not alleged to be "biased against" married couples in all circumstances is of no moment: the factor in terminating plaintiff's employment was plaintiff's marital status in relation to the employee who left the company. Thus, plaintiff's termination was based on his marital status. **Morse v Fidessa Corp., 2018 NY Slip Op 05975, First Dept 9-6-18**

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HUMAN RIGHTS LAW (EMPLOYMENT DISCRIMINATION, NYC HUMAN RIGHTS LAW PROTECTS AGAINST TERMINATION BASED UPON AN EMPLOYEE'S MARRIAGE TO A PARTICULAR PERSON WHO HAD LEFT TO WORK FOR A COMPETITOR, THERE WAS NO NEED TO ALLEGE THAT THE EMPLOYER WAS BIASED AGAINST MARRIED COUPLES GENERALLY (FIRST DEPT))/EMPLOYMENT LAW (EMPLOYMENT DISCRIMINATION, NYC HUMAN RIGHTS LAW PROTECTS AGAINST TERMINATION BASED UPON AN EMPLOYEE'S MARRIAGE TO A PARTICULAR PERSON WHO HAD LEFT TO WORK FOR A COMPETITOR, THERE WAS NO NEED TO ALLEGE THAT THE EMPLOYER WAS BIASED AGAINST MARRIED COUPLES GENERALLY (FIRST DEPT))/ADMINISTRATIVE LAW (EMPLOYMENT DISCRIMINATION, NYC HUMAN RIGHTS LAW PROTECTS AGAINST TERMINATION BASED UPON AN EMPLOYEE'S MARRIAGE TO A PARTICULAR PERSON WHO HAD LEFT TO WORK FOR A COMPETITOR, THERE WAS NO NEED TO ALLEGE THAT THE EMPLOYER WAS BIASED AGAINST MARRIED COUPLES GENERALLY (FIRST DEPT))/MARITAL STATUS (EMPLOYMENT DISCRIMINATION, NYC HUMAN RIGHTS LAW PROTECTS AGAINST TERMINATION BASED UPON AN EMPLOYEE'S MARRIAGE TO A PARTICULAR PERSON WHO HAD LEFT TO WORK FOR A COMPETITOR, THERE WAS NO NEED TO ALLEGE THAT THE EMPLOYER WAS BIASED AGAINST MARRIED COUPLES GENERALLY (FIRST DEPT))

INSURANCE LAW

INSURANCE LAW.

INSURER DID NOT DEMONSTRATE THE INSUREDS' LACK OF COOPERATION WITH THE INVESTIGATION INTO THE TRAFFIC ACCIDENT AND DID NOT MAKE A TIMELY DISCLAIMER, PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff's motion for summary judgment against the defendant insurer should have been granted. Plaintiff was involved in an automobile accident with the insureds [Onwuzurulke and Noel]. The defendant insurer disclaimed coverage on the basis of the insureds' alleged lack of cooperation with the investigation. The Second Department held that insurer did not demonstrate the lack of cooperation on the part of one of the insureds and did not make a timely disclaimer:

> "To effectively deny coverage based upon lack of cooperation, an insurance carrier must demonstrate (1) that it acted diligently in seeking to bring about the insured's cooperation, (2) that the efforts employed by the insurer were reasonably calculated to obtain the insured's cooperation, and (3) that the attitude of the insured, after his or her cooperation was sought, was one of willful and avowed obstruction" ... . " [M]ere efforts by the insurer and mere inaction on the part of the insured, without more, are insufficient to establish non-cooperation'" ... .
>
> The defendant met these requirements with regard to Onwuzurulke. The defendant hired an investigator to locate Onwuzurulke, the investigator communicated with him, and Onwuzurulke refused to cooperate. However, with regard to Noel, the defendant failed to meet its "heavy" burden of "proving lack of cooperation"... . defendant repeatedly sent letters to an address where Noel did not reside. Further, the defendant's investigator searched for Noel under an incorrect name.
>
> In any event, the defendant's disclaimer of coverage with regard to both Noel and Onwuzurulke was untimely. Insurance Law § 3420(d)(2) provides that, when an insurer disclaims liability or denies coverage for bodily injury arising out of a motor vehicle accident occurring within the state, "it shall give written notice as soon as is reasonably possible of such disclaimer of liability or denial of coverage to the insured and the injured person or any other claimant." "The timeliness of an insurer's disclaimer is measured from the point in time when the insurer first learns of the grounds for disclaimer of liability or denial of coverage" ... . "[T]he issue of whether a disclaimer was unreasonably delayed is generally a question of fact, requiring an assessment of all relevant circumstances"... . However, "an insurer's explanation [for the delay in disclaiming] is insufficient as a matter of law where the basis for denying coverage was or should have been readily apparent before the onset of delay"... . **Robinson v Global Liberty Ins. Co. of N.Y., 2018 NY Slip Op 06128, Second Dept 9-19-18**

INSURANCE LAW (INSURER DID NOT DEMONSTRATE THE INSUREDS' LACK OF COOPERATION WITH THE INVESTIGATION INTO THE TRAFFIC ACCIDENT AND DID NOT MAKE A TIMELY DISCLAIMER, PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED (SECOND DEPT))/NONCOOPERATION (INSURANCE LAW, (INSURER DID NOT DEMONSTRATE THE INSUREDS' LACK OF COOPERATION WITH THE INVESTIGATION INTO THE TRAFFIC ACCIDENT AND DID NOT MAKE A TIMELY DISCLAIMER, PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED (SECOND DEPT))/DISCLAIMER (INSURANCE LAW, INSURER DID NOT DEMONSTRATE THE INSUREDS' LACK OF COOPERATION WITH THE INVESTIGATION INTO THE TRAFFIC ACCIDENT AND DID NOT MAKE A TIMELY DISCLAIMER, PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED (SECOND DEPT))/TRAFFIC ACCIDENTS (INSURANCE LAW, INSURER DID NOT DEMONSTRATE THE INSUREDS' LACK OF COOPERATION WITH THE INVESTIGATION INTO THE TRAFFIC ACCIDENT AND DID NOT MAKE A TIMELY

DISCLAIMER, PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED (SECOND DEPT))

INSURANCE LAW, ATTORNEYS.

PROPERTY OWNER'S MOTION FOR SUMMARY JUDGMENT DECLARING THAT THE INSURER WAS OBLIGATED TO REIMBURSE THE PROPERTY OWNER FOR COSTS AND ATTORNEY'S FEES INCURRED IN DEFENDING THIS SLIP AND FALL CASE SHOULD HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court in this slip and fall case, determined the defendant property owner's (Medford's) motion for summary judgment declaring that the insurer (NGM) was obligated to reimburse the property owner's costs incurred in defending the action should have been granted:

> ... [T]he plaintiff allegedly was injured when she slipped and fell on ice in a parking lot on property owned by Medford Landing, L.P. (hereinafter Medford). The plaintiff commenced this action against Medford to recover damages for personal injuries. Thereafter, Medford commenced a third-party action against the third-party defendants, which provided snow removal services at the premises pursuant to a contract with Medford. The third-party complaint asserted, inter alia, causes of action based on contractual and common-law indemnification, as well as a cause of action sounding in breach of contract for failure to procure insurance naming Medford as an additional insured. Medford also commenced a second third-party action against NGM Insurance Company (hereinafter NGM), which issued a general liability insurance policy to the third-party defendants. Medford moved for summary judgment on the third-party causes of action for contractual indemnification, for common-law indemnification, and alleging breach of contract, and separately moved for summary judgment dismissing the complaint. Medford also separately moved for summary judgment declaring that it is an additional insured under the NGM policy, and that NGM is obligated to defend and indemnify it in the main action and to reimburse it for costs, disbursements, and attorneys' fees incurred in defending the main action. * * *
>
> ... [T]he Supreme Court should have granted that branch of Medford's motion which was for summary judgment declaring that NGM is obligated to reimburse Medford for costs, disbursements, and attorneys' fees incurred in defending the main action. "An insurer's duty to defend is broader than the duty to indemnify and arises whenever the allegations of the complaint against the insured, liberally construed, potentially fall within the scope of the risks undertaken by the insurer" ... . "If any of the claims against an insured arguably arise from covered events, the insurer is required to defend the entire action"... . "An additional insured is entitled to the same coverage as if it were a named insured" ... . Here, Medford established, prima facie, that the allegations in the complaint suggested a reasonable possibility of coverage ... . In opposition, NGM failed to raise a triable issue of fact as to whether the accident arose from Medford's independent acts so as to preclude coverage under the NGM policy, since there is no requirement that liability must be determined before an additional insured is entitled to a defense ... . Further, there is no merit to NGM's contention that the subject policy provided only excess insurance coverage to Medford. The NGM policy was written as primary coverage for the third-party defendants and added Medford as an additional insured, which entitles Medford to the same coverage rights as the primary insured ... . **McCoy v Medford Landing, L.P., 2018 NY Slip Op 06236, Second Dept 9-26-18**

INSURANCE LAW (PROPERTY OWNER'S MOTION FOR SUMMARY JUDGMENT DECLARING THAT THE INSURER WAS OBLIGATED TO REIMBURSE THE PROPERTY OWNER FOR COSTS AND ATTORNEY'S FEES INCURRED IN DEFENDING THIS SLIP AND FALL CASE SHOULD HAVE BEEN GRANTED (SECOND DEPT))/ATTORNEYS (FEES, INSURANCE LAW, PROPERTY OWNER'S MOTION FOR SUMMARY JUDGMENT DECLARING THAT THE INSURER WAS OBLIGATED TO REIMBURSE THE PROPERTY OWNER FOR COSTS AND ATTORNEY'S FEES INCURRED IN DEFENDING THIS SLIP AND FALL CASE SHOULD HAVE BEEN

GRANTED (SECOND DEPT))/NEGLIGENCE (SLIP AND FALL, INSURANCE LAW, (PROPERTY OWNER'S MOTION FOR SUMMARY JUDGMENT DECLARING THAT THE INSURER WAS OBLIGATED TO REIMBURSE THE PROPERTY OWNER FOR COSTS AND ATTORNEY'S FEES INCURRED IN DEFENDING THIS SLIP AND FALL CASE SHOULD HAVE BEEN GRANTED (SECOND DEPT))/SLIP AND FALL (INSURANCE LAW, ATTORNEY'S FEES, PROPERTY OWNER'S MOTION FOR SUMMARY JUDGMENT DECLARING THAT THE INSURER WAS OBLIGATED TO REIMBURSE THE PROPERTY OWNER FOR COSTS AND ATTORNEY'S FEES INCURRED IN DEFENDING THIS SLIP AND FALL CASE SHOULD HAVE BEEN GRANTED (SECOND DEPT))

INSURANCE LAW, CIVIL PROCEDURE.

SUPREME COURT SHOULD NOT HAVE SEARCHED THE RECORD TO AWARD SUMMARY JUDGMENT ON A GROUND NOT RAISED BY THE PARTIES, HOWEVER, FAILURE TO TIMELY NOTIFY UMBRELLA INSURER OF THE CLAIM WARRANTED SUMMARY JUDGMENT (SECOND DEPT).

The Second Department determined Supreme Court should not have searched the record to award summary judgment on a ground not raised by the parties in this car accident case. However, the Second Department determined summary judgment was properly granted to the umbrella insurer (RLI) on the ground that the owner of the leased car (CFC) did not timely notify RLI of the claim:

> The Supreme Court erred in essentially searching the record and granting relief based upon arguments that were not raised ... . "A motion for summary judgment on one claim or defense does not provide a basis for searching the record and granting summary judgment on an unrelated claim or defense'" ... .
>
> RLI established, prima facie, its entitlement to judgment as a matter of law dismissing the complaint insofar as asserted against it based upon CFC's failure to provide timely notice of the occurrence and suit. "The insured's failure to satisfy the notice requirement constitutes a failure to comply with a condition precedent which, as a matter of law, vitiates the contract'" ... . This rule applies to excess carriers as well as primary carriers ... . "[A] justifiable lack of knowledge of insurance coverage may excuse a delay in reporting an occurrence"... . To establish a valid excuse due to the insured's alleged ignorance of insurance coverage, the insured has the burden of proving "a justifiable lack of knowledge of insurance coverage" and "reasonably diligent efforts to ascertain whether coverage existed" upon receiving information "which would have prompted any person of ordinary prudence to consult either an attorney or an insurance broker" ... . Here, in support of its motion, RLI submitted evidence that counsel for ... CFC in the underlying action performed an investigation and learned the detailed information regarding the umbrella policy in March 2005. Such knowledge is imputed to CFC ... . As such, RLI established that RLI was given no notice of the accident or lawsuit until August 2006, and CFC did not provide notice until ... June 2010. **Daimler Chrysler Ins. Co. v Keller, 2018 NY Slip Op 05999, Second Dept 9-12-18**

INSURANCE LAW (SUPREME COURT SHOULD NOT HAVE SEARCHED THE RECORD TO AWARD SUMMARY JUDGMENT ON A GROUND NOT RAISED BY THE PARTIES, HOWEVER, FAILURE TO TIMELY NOTIFY UMBRELLA INSURER OF THE CLAIM WARRANTED SUMMARY JUDGMENT (SECOND DEPT))/CIVIL PROCEDURE (SUPREME COURT SHOULD NOT HAVE SEARCHED THE RECORD TO AWARD SUMMARY JUDGMENT ON A GROUND NOT RAISED BY THE PARTIES, HOWEVER, FAILURE TO TIMELY NOTIFY UMBRELLA INSURER OF THE CLAIM WARRANTED SUMMARY JUDGMENT (SECOND DEPT))/TRAFFIC ACCIDENTS (INSURANCE LAW, SUPREME COURT SHOULD NOT HAVE SEARCHED THE RECORD TO AWARD SUMMARY JUDGMENT ON A GROUND NOT RAISED BY THE PARTIES, HOWEVER, FAILURE TO TIMELY NOTIFY UMBRELLA INSURER OF THE CLAIM WARRANTED SUMMARY JUDGMENT (SECOND DEPT))

INSURANCE LAW, CONTRACT LAW.

CONSTRUCTION CONTRACT REQUIRING INSURANCE WILL NOT BE INTERPRETED TO REQUIRE ADDITIONAL INSURED COVERAGE ABSENT A SPECIFIC PROVISION (SECOND DEPT).

The Second Department, reversing Supreme Court, determined that the causes of action alleging that parties should have been named as additional insureds in this Labor Law 200 and 241 (6) action should have been dismissed. Contracts which call for the procurement of insurance do not, without specific provisions, require parties to be named as additional insureds:

> "A provision in a construction contract cannot be interpreted as requiring the procurement of additional insured coverage unless such a requirement is expressly and specifically stated. In addition, contract language that merely requires the purchase of insurance will not be read as also requiring that a contracting party be named as an additional insured" ... . **Uddin v A.T.A. Constr. Corp., 2018 NY Slip Op 06136, Second Dept 9-19-18**

INSURANCE LAW (CONSTRUCTION CONTRACT REQUIRING INSURANCE WILL NOT BE INTERPRETED TO REQUIRE ADDITIONAL INSURED COVERAGE ABSENT A SPECIFIC PROVISION (SECOND DEPT))/CONTRACT LAW (INSURANCE, CONSTRUCTION CONTRACT REQUIRING INSURANCE WILL NOT BE INTERPRETED TO REQUIRE ADDITIONAL INSURED COVERAGE ABSENT A SPECIFIC PROVISION (SECOND DEPT))/ADDITIONAL INSURED COVERAGE (CONSTRUCTION CONTRACT REQUIRING INSURANCE WILL NOT BE INTERPRETED TO REQUIRE ADDITIONAL INSURED COVERAGE ABSENT A SPECIFIC PROVISION (SECOND DEPT))/CONSTRUCTION CONTRACTS (ADDITIONAL INSURED COVERAGE, CONSTRUCTION CONTRACT REQUIRING INSURANCE WILL NOT BE INTERPRETED TO REQUIRE ADDITIONAL INSURED COVERAGE ABSENT A SPECIFIC PROVISION (SECOND DEPT))

INSURANCE LAW, CONTRACT LAW, SECURITIES, FRAUD.

INSURER OF RESIDENTIAL MORTGAGE-BACKED SECURITIES NOT ENTITLED TO RECOVER ALL CLAIMS PAID OUT AS A RESULT OF 50% OF THE UNDERLYING MORTGAGES GOING INTO DEFAULT UNDER A FRAUD THEORY, ONLY A BREACH OF CONTRACT THEORY WAS AVAILABLE (FIRST DEPT).

The First Department, modifying Supreme Court, in a full-fledged opinion by Justice Manzanet-Daniels, determined plaintiff insurer's (MBAI's) motion for summary judgment should have been denied in its entirety in this action stemming from the insuring of residential mortgage-backed securities. MBAI sought to recover all the payments made after more than 50% of the mortgages underlying the securities went into default:

> MBIA seeks "Claims Payment Damages" and "Repurchase Damages." The "Claims Payment Damages" consist of "all claims payments that MBIA has made . . . [or] will likely incur," and are designed to put MBIA in the same position it would have been in had the policy never been issued. As such, they constitute rescissory damages and are not recoverable by plaintiff monoline insurer seeking redress under an irrevocable policy. We have made clear that an insurer is "not entitled to damages amounting to all claims payments it made or will make under the policies," inasmuch as such damages are "rescissory damages to which the insurer is not entitled" ... .
>
> "Repurchase Damages" represent the difference between the claims payments MBIA made or is projected to incur, and those MBIA would have made had [defendant] Credit Suisse repurchased nonconforming lines, i.e., those that breached the representations and warranties.
>
> While such repurchase damages are in theory recoverable, the fraud claim was nonetheless correctly dismissed. It has long been the rule that parties may not assert fraud claims seeking damages that are duplicative of those recoverable on a cause of action for breach of contract (see e.g. Manas v VMS Assoc., LLC, 53 AD3d 451, 454 [1st Dept 2008]). As we noted in Manas, fraud damages are meant to redress a different harm than damages on a cause of action for breach of contract. Contract damages are meant to restore the nonbreaching party to as good a position as it would have been in had the contract been performed; fraud damages are meant to indemnify losses suffered as a result of the fraudulent inducement ... . Where all of the damages are remedied through the contract claim, the fraud claim is duplicative and must be dismissed ... . * * *
>
> ... [T]he order of the Supreme Court ... [which] granted defendants' motion for summary judgment dismissing the fraudulent inducement claim, denied so much of plaintiff's motion for summary judgment as sought a ruling that an insurer does not have to prove loss causation in connection with a fraudulent inducement claim, granted so much of plaintiff's motion as sought a ruling on the meaning of the "No Monetary Default" representation and the "Mortgage Loan Schedule" representation in the Pooling and Service Agreement for the subject residential mortgage-backed securitization transaction, and denied plaintiff's motion to supplement the record in opposition to defendants' motion, should be modified, on the law, to deny plaintiff's motion as to the meaning of the representations, and otherwise affirmed ... . **MBIA Ins. Corp. v Credit Suisse Sec. (USA) LLC, 2018 NY Slip Op 06060, First Dept 9-13-18**

INSURANCE LAW (SECURITIES, INSURER OF RESIDENTIAL MORTGAGE-BACKED SECURITIES NOT ENTITLED TO RECOVER ALL CLAIMS PAID OUT AS A RESULT OF 50% OF THE UNDERLYING MORTGAGES GOING INTO DEFAULT UNDER A FRAUD THEORY, ONLY A BREACH OF CONTRACT THEORY WAS AVAILABLE (FIRST DEPT))/CONTRACT LAW (INSURANCE LAW, SECURITIES, INSURER OF RESIDENTIAL MORTGAGE-BACKED SECURITIES NOT ENTITLED TO RECOVER ALL CLAIMS PAID OUT AS A RESULT OF 50% OF THE UNDERLYING MORTGAGES GOING INTO DEFAULT UNDER A FRAUD THEORY, ONLY A BREACH OF CONTRACT THEORY WAS AVAILABLE (FIRST DEPT))/SECURITIES (INSURANCE LAW, INSURER OF RESIDENTIAL MORTGAGE-BACKED SECURITIES NOT ENTITLED TO RECOVER ALL CLAIMS PAID OUT AS A RESULT OF 50% OF THE UNDERLYING MORTGAGES GOING INTO DEFAULT UNDER

A FRAUD THEORY, ONLY A BREACH OF CONTRACT THEORY WAS AVAILABLE (FIRST DEPT))/FRAUD (INSURANCE LAW, SECURITIES, INSURER OF RESIDENTIAL MORTGAGE-BACKED SECURITIES NOT ENTITLED TO RECOVER ALL CLAIMS PAID OUT AS A RESULT OF 50% OF THE UNDERLYING MORTGAGES GOING INTO DEFAULT UNDER A FRAUD THEORY, ONLY A BREACH OF CONTRACT THEORY WAS AVAILABLE (FIRST DEPT))/RESIDENTIAL MORTGAGE BACKED SECURITIES (INSURER OF RESIDENTIAL MORTGAGE-BACKED SECURITIES NOT ENTITLED TO RECOVER ALL CLAIMS PAID OUT AS A RESULT OF 50% OF THE UNDERLYING MORTGAGES GOING INTO DEFAULT UNDER A FRAUD THEORY, ONLY A BREACH OF CONTRACT THEORY WAS AVAILABLE (FIRST DEPT))

INSURANCE LAW, SECURITIES.

A PENALTY OR DISGORGEMENT STEMMING FROM IMPROPER PROFIT-TAKING BY BEAR STEARNS IS NOT AN INSURABLE LOSS, EVEN IF THE BENEFITS OF THE PROFIT-TAKING WENT TO OTHERS AND NOT TO BEAR STEARNS (SECOND DEPT).

The First Department, in a full-fledged opinion by Justice Andrias, determined that the requirement that Bear Stearns repay $160,000,000 constituted a penalty (disgorgement) for improper profit-taking, even where the benefits went to others and not Bear Stearns, and therefore was not a "loss" for which Bear Stearns' insurer was liable:

> The law of the case is applicable to "legal determinations that were necessarily resolved on the merits in a prior decision" ... . On the prior appeal, the Court of Appeals stated that "the Insurers do not earnestly dispute that the claims fall within the policy's definition of Loss" ... , but did not rely on the policy language in denying defendants' motions. Instead it focused on the public policy issue. Furthermore, the doctrine does not apply where a motion for summary judgment follows a motion to dismiss that was not converted to a motion for summary judgment pursuant to CPLR 3212(c)... .
>
> Even if the Court of Appeals' prior determination is viewed as addressing the contractual issue, "while the law of the case doctrine is intended to foster orderly convenience' . . ., it is not an absolute mandate which limits an appellate court's power to reconsider issues where there are extraordinary circumstances, such as subsequent evidence affecting the prior determination or a change of law'" ... . Here, the United States Supreme Court's decision in [Kokesh v Securities and Exchange Commission (_ US_, 137 S Ct 1635 [2017])], characterizing SEC disgorgement as a penalty, represents such a change of law. * * *
>
> ... Kokesh has now provided the missing precedent, establishing that disgorgement is a penalty, whether it is linked to the wrongdoer's gains or gains that went to others. In Kokesh, the Supreme Court, emphasizing that when a sanction "can only be explained as . . . serving either retributive or deterrent purposes," it is a "punishment," rejected the SEC's argument that disgorgement is remedial because it simply puts the defendant back in the position "he would have occupied had he not broken the law." **J.P. Morgan Sec., Inc. v Vigilant Ins. Co., 2018 NY Slip Op 06146, First Dept 9-19-18**

INSURANCE LAW (SECURITIES, A PENALTY OR DISGORGEMENT STEMMING FROM IMPROPER PROFIT-TAKING BY BEAR STEARNS IS NOT AN INSURABLE LOSS, EVEN IF THE BENEFITS OF THE PROFIT-TAKING WENT TO OTHERS AND NOT TO BEAR STEARNS (FIRST DEPT))/SECURITIES (INSURANCE LAW, A PENALTY OR DISGORGEMENT STEMMING FROM IMPROPER PROFIT-TAKING BY BEAR STEARNS IS NOT AN INSURABLE LOSS, EVEN IF THE BENEFITS OF THE PROFIT-TAKING WENT TO OTHERS AND NOT TO BEAR STEARNS (FIRST DEPT))/DISGORGEMENT (INSURANCE LAW, SECURITIES, A PENALTY OR DISGORGEMENT STEMMING FROM IMPROPER PROFIT-TAKING BY BEAR STEARNS IS NOT AN INSURABLE LOSS, EVEN IF THE BENEFITS OF THE PROFIT-TAKING WENT TO OTHERS AND NOT TO BEAR STEARNS (FIRST DEPT))

LABOR LAW-CONSTRUCTION LAW

LABOR LAW-CONSTRUCTION LAW.

PLAINTIFF'S LADDER WAS PLACED ON A MUDDY WATERY SURFACE IN A TUNNEL AND IT SLIPPED OUT FROM UNDER HIM, PLAINTIFFS' SUMMARY JUDGMENT MOTION ON THE LABOR LAW 240 (1) CAUSE OF ACTION SHOULD HAVE BEEN GRANTED (FIRST DEPT).

The First Department determined plaintiff was entitled to summary judgment on his Labor Law 240 (1) cause of action. Plaintiff was using a ladder on a muddy, watery surface in a tunnel when it slipped out from under him:

> ... [P]laintiffs were entitled to summary judgment on the issue of liability on the § 240(1) claim as against the MTA. The record establishes that the ladder that was provided to plaintiff failed to provide proper protection for him to perform the elevation-related task of re-positioning the stadium light, and MTA's opposition failed to raise a triable issue of fact ... . Contrary to the contention that an issue of fact exists as to whether a platform was available to secure the ladder to, there is nothing in the record to support that. In fact the engineer merely testified that there "may or may not have been" platforms available to tie the ladder to. **Gordon v City of New York, 2018 NY Slip Op 05972, First Dept 9-6-18**

LABOR LAW-CONSTRUCTION LAW (PLAINTIFF'S LADDER WAS PLACED ON A MUDDY WATERY SURFACE IN A TUNNEL AND IT SLIPPED OUT FROM UNDER HIM, PLAINTIFFS' SUMMARY JUDGMENT MOTION ON THE LABOR LAW 240 (1) CAUSE OF ACTION SHOULD HAVE BEEN GRANTED (FIRST DEPT))/LADDERS (LABOR LAW-CONSTRUCTION LAW, PLAINTIFF'S LADDER WAS PLACED ON A MUDDY WATERY SURFACE IN A TUNNEL AND IT SLIPPED OUT FROM UNDER HIM, PLAINTIFFS' SUMMARY JUDGMENT MOTION ON THE LABOR LAW 240 (1) CAUSE OF ACTION SHOULD HAVE BEEN GRANTED (FIRST DEPT))

LABOR LAW-CONSTRUCTION LAW.

REMOVING RENTED AIR CONDITIONING EQUIPMENT FROM A HOSPITAL CONSTITUTED A COVERED "ALTERATION" WITHIN THE MEANING OF LABOR LAW 240 (1) (FIRST DEPT).

The First Department, reversing Supreme Court, in a full-fledged opinion by Justice Gesmer, determined that plaintiff's decedent was engaged in an "alteration" within the meaning of Labor Law 240 (1) when he was crushed by an air conditioning unit (a chiller) that was being hoisted. A hospital had rented the chiller as a supplement to the air conditioning system during the warmer months. The chiller was being readied for return to the lessor when the accident happened. The court found that air conditioning is essential to the functioning of the hospital, noting that operating rooms must be kept at 62 degrees:

> Here, the work being performed was a significant change to the hospital's air conditioning system, which the hospital must operate in warm weather in order to meet its regulatory requirements. Like the application of "bomb blast" film to the lobby windows in Belding, the deinstallation and removal of the rented chiller "altered the configuration or composition of the structure by changing the way the [hospital buildings] react to . . . the elements" (Belding, 14 NY3d at 753). Moreover, like the dismantling and removal of the air handlers in [Panek v County of Albany, 99 NY2d 452 (2003)], disconnecting and removing the rented chiller and generator was a significant undertaking, was not simple, routine, or cosmetic, and fundamentally altered the function of a significant building system, the hospital's air conditioning system. As in Panek, the project took more than a day to complete. The qualifying work in both Belding and Panek appears to have been performed by one person. In contrast, here, the work was complex enough that it required the labor of employees of the hospital, the contractor and the multiple subcontractors. It required shutting off the valves on the hospital's chilled water supply and return in the mechanical room, unbolting and unscrewing approximately 125 feet of heavy, nonbending hose from the chilled water supply and riser; draining the water from the hoses and standby chiller; dismantling the scaffolding that served as a bridge carrying the hoses from the mechanical room over the sidewalk to the chiller; dismantling the fencing around the chiller and generator; closing the street outside the hospital; using lifting equipment to lower the hoses from the roof; and using a boom, chains, shackles, slings, and hooks to raise the trailer and chiller so that the decedent and his coworker could remove the wood blocks that leveled the trailer and chiller, in order to allow for the trailer to be removed. Under these circumstances, we find that the work decedent was engaged in constituted an alteration under Labor Law § 240. **Mananghaya v Bronx-Lebanon Hosp. Ctr. 2018 NY Slip Op 06061. First Dept 9-13-18**

LABOR LAW-CONSTRUCTION LAW (REMOVING RENTED AIR CONDITIONING EQUIPMENT FROM A HOSPITAL CONSTITUTED A COVERED "ALTERATION" WITHIN THE MEANING OF LABOR LAW 240 (1) (FIRST DEPT))/ALTERATION (LABOR LAW-CONSTRUCTION LAW, REMOVING RENTED AIR CONDITIONING EQUIPMENT FROM A HOSPITAL CONSTITUTED A COVERED "ALTERATION" WITHIN THE MEANING OF LABOR LAW 240 (1) (FIRST DEPT))/AIR-CONDITIONING EQUIPMENT (LABOR LAW-CONSTRUCTION LAW, REMOVING RENTED AIR CONDITIONING EQUIPMENT FROM A HOSPITAL CONSTITUTED A COVERED "ALTERATION" WITHIN THE MEANING OF LABOR LAW 240 (1) (FIRST DEPT))

LABOR LAW-CONSTRUCTION LAW.

INJURY FROM STEPPING INTO AN OPENING THAT IS NOT BIG ENOUGH FOR A PERSON TO FALL THROUGH IS NOT COVERED BY LABOR 240 (1) OR 241 (6) (SECOND DEPT).

The Second Department determined the defendants were entitled to summary judgment on the Labor Law 240 (1) and 241 (6) causes of action because injury caused by stepping in an opening that is not big enough for a person to fall through is not covered:

> The defendants established, prima facie, their entitlement to judgment as a matter of law dismissing the Labor Law § 240(1) cause of action. The defendants submitted evidence that, although the plaintiff's foot slipped through openings in the rebar grid, the openings were too small for a person's body to fall through. The plaintiff testified at his deposition that his foot could fit through the openings, but not his entire body. The defendants, therefore, established that the openings of the grid did " not present an elevation-related hazard to which the protective devices enumerated [in Labor Law § 240(1)] are designed to apply'" ... . In opposition, the plaintiff failed to raise a triable issue of fact ... .
>
> The defendants also established, prima facie, their entitlement to judgment as a matter of law dismissing the Labor Law § 241(6) cause of action, which was premised upon alleged violations of 12 NYCRR 23-1.7(b)(1) and (d), (e), and (f). The provision pertaining to "hazardous openings" (12 NYCRR 23-1.7[b][1]) does not apply to openings that are too small for a worker to completely fall through ... . **Johnson v Lend Lease Constr. LMB, Inc., 2018 NY Slip Op 06004, Second Dept 9-12-18**

LABOR LAW-CONSTRUCTION LAW (INJURY FROM STEPPING INTO AN OPENING THAT IS NOT BIG ENOUGH FOR A PERSON TO FALL THROUGH IS NOT COVERED BY LABOR 240 (1) OR 241 (6) (SECOND DEPT))

LABOR LAW-CONSTRUCTION LAW.

IN THIS LABOR LAW 240(1), 241(6) AND 200 ACTION, THERE WAS A QUESTION OF FACT WHETHER DEFENDANT WAS AN OWNER OF THE PROPERTY WHERE PLAINTIFF WAS INJURED BY A FALLING OBJECT, DEFENDANT'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined there were questions of fact whether defendant 101 Norfolk was an owner within the meaning of Labor Law 240(1), 241(6) and 200. Plaintiff was injured by a falling object:

> Contrary to the defendant 101 Norfolk's contention, it cannot be said, as a matter of law, that the defendant 101 Norfolk was not an "owner" for purposes of liability under the Labor Law. Rather, the evidence demonstrated that the defendant 101 Norfolk owned the property on which the plaintiff allegedly was injured and there was evidence that the plaintiff was injured in the course of a construction project encompassing both 103-105 Norfolk Street and the defendant 101 Norfolk's property, 101 Norfolk Street. Under the circumstances of this case, triable issues of fact exist as to whether the defendant 101 Norfolk contracted to have the injury-causing work performed, or had a sufficient nexus to that work, so as to support liability under Labor Law §§ 240 and 241 ... . There are also triable issues of fact as to whether the defendant 101 Norfolk had a duty to provide the plaintiff with a safe place to work ... . **Powell v Norfolk Hudson, LLC, 2018 NY Slip Op 06047, Second Dept 9-12-18**

LABOR LAW-CONSTRUCTION LAW (IN THIS LABOR LAW 240(1), 241(6) AND 200 ACTION, THERE WAS A QUESTION OF FACT WHETHER DEFENDANT WAS AN OWNER OF THE PROPERTY WHERE PLAINTIFF WAS INJURED BY A FALLING OBJECT, DEFENDANT'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT))

LABOR LAW-CONSTRUCTION LAW, EVIDENCE.

PLAINTIFF'S TESTIMONY THAT THE STEP LADDER WOBBLED CAUSING HIM TO FALL WAS SUFFICIENT TO SUPPORT SUMMARY JUDGMENT IN PLAINTIFF'S FAVOR IN THIS LABOR LAW 240 (1) ACTION, DESPITE THE LACK OF WITNESSES TO THE FALL, HEARSAY EVIDENCE IN THE ACCIDENT REPORT, AND A CONCLUSORY EXPERT AFFIDAVIT (FIRST DEPT).

The First Department determined plaintiff was properly granted summary judgment in this Labor Law 240 (1) action. Plaintiff alleged the step ladder he was using wobbled causing him to fall. The fact that there were no witnesses to the incident did not preclude summary judgment:

> Plaintiff's testimony that, as he was climbing down a six-foot scaffold, the scaffold wobbled, causing him to fall to the floor, establishes prima facie defendants' liability under Labor Law § 240(1) ... . Plaintiff satisfied his burden of demonstrating that defendants failed to provide adequate safety devices to prevent him from falling when the scaffold moved ... . The fact that plaintiff was the only witness to his accident does not preclude summary judgment in his favor, since nothing in the record controverts his account of the accident or calls his credibility into question... .
>
> Defendants failed to raise an issue of fact in opposition, relying solely on hearsay statements in the accident report and the speculative opinion of their expert... . For the same reason, defendants failed to establish prima facie their freedom from liability. **Rroku v West Rac Contr. Corp., 2018 NY Slip Op 06312, First Dept 9-27-18**

LABOR LAW-CONSTRUCTION LAW (PLAINTIFF'S TESTIMONY THAT THE STEP LADDER WOBBLED CAUSING HIM TO FALL WAS SUFFICIENT TO SUPPORT SUMMARY JUDGMENT IN PLAINTIFF'S FAVOR IN THIS LABOR LAW 240 (1) ACTION, DESPITE THE LACK OF WITNESSES TO THE FALL, HEARSAY EVIDENCE IN THE ACCIDENT REPORT, AND A CONCLUSORY EXPERT AFFIDAVIT (FIRST DEPT))/EVIDENCE (LABOR LAW-CONSTRUCTION LAW, PLAINTIFF'S TESTIMONY THAT THE STEP LADDER WOBBLED CAUSING HIM TO FALL WAS SUFFICIENT TO SUPPORT SUMMARY JUDGMENT IN PLAINTIFF'S FAVOR IN THIS LABOR LAW 240 (1) ACTION, DESPITE THE LACK OF WITNESSES TO THE FALL, HEARSAY EVIDENCE IN THE ACCIDENT REPORT, AND A CONCLUSORY EXPERT AFFIDAVIT (FIRST DEPT))/LADDERS (LABOR LAW-CONSTRUCTION LAW, PLAINTIFF'S TESTIMONY THAT THE STEP LADDER WOBBLED CAUSING HIM TO FALL WAS SUFFICIENT TO SUPPORT SUMMARY JUDGMENT IN PLAINTIFF'S FAVOR IN THIS LABOR LAW 240 (1) ACTION, DESPITE THE LACK OF WITNESSES TO THE FALL, HEARSAY EVIDENCE IN THE ACCIDENT REPORT, AND A CONCLUSORY EXPERT AFFIDAVIT (FIRST DEPT))

LABOR LAW-CONSTRUCTION LAW, NEGLIGENCE.

DEFENDANT PROPERTY OWNERS BORROWED A LIFT FROM DEFENDANT MIS, PLAINTIFF WAS INJURED USING THE LIFT, THE LABOR LAW 200 CAUSE OF ACTION AGAINST MIS WAS PROPERLY DISMISSED AS INAPPLICABLE, BUT THE NEGLIGENCE ACTION AGAINST MIS SHOULD NOT HAVE BEEN DISMISSED (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, determined that summary judgment was properly granted for the Labor Law 200 cause of action, but should not have been granted on the negligence cause of action. Plaintiff was injured using a telescoping lift. The lift belonged to MIS and defendant property owners had borrowed it. The Labor Law 200 action against MIS was dismissed because Labor Law 200 applies only to owners, contractors and their agents. The negligence action against MIS should not have been dismissed because MIS did not demonstrate the lift was not in a defective or dangerous condition:

> We agree with the Supreme Court's determination granting that branch of MIS's motion which was for summary judgment dismissing the cause of action alleging a violation of Labor Law § 200 insofar as asserted against it. "Labor Law § 200 is a codification of the common-law duty imposed on owners, contractors, and their agents to provide workers with a safe place to work"... . The evidence MIS submitted in support of its motion established, prima facie, that MIS was not an owner, contractor, or agent with regard to the plaintiff's work ... . In opposition, the plaintiff failed to raise a triable issue of fact.
>
> The Supreme Court should have denied that branch of MIS's motion which was for summary judgment dismissing the cause of action alleging common-law negligence insofar as asserted against it. Contrary to its sole contention regarding this cause of action, MIS failed to establish, prima facie, that the lift was not in a defective or dangerous condition. **Hill v Mid Is. Steel Corp., 2018 NY Slip Op 06230, Second Dept 9-26-18**

LABOR LAW-CONSTRUCTION LAW (DEFENDANT PROPERTY OWNERS BORROWED A LIFT FROM DEFENDANT MIS, PLAINTIFF WAS INJURED USING THE LIFT, THE LABOR LAW 200 CAUSE OF ACTION AGAINST MIS WAS PROPERLY DISMISSED AS INAPPLICABLE, BUT THE NEGLIGENCE ACTION AGAINST MIS SHOULD NOT HAVE BEEN DISMISSED (SECOND DEPT))/NEGLIGENCE (DEFENDANT PROPERTY OWNERS BORROWED A LIFT FROM DEFENDANT MIS, PLAINTIFF WAS INJURED USING THE LIFT, THE LABOR LAW 200 CAUSE OF ACTION AGAINST MIS WAS PROPERLY DISMISSED AS INAPPLICABLE, BUT THE NEGLIGENCE ACTION AGAINST MIS SHOULD NOT HAVE BEEN DISMISSED (SECOND DEPT))

LANDLORD-TENANT

LANDLORD-TENANT, CIVIL PROCEDURE.

YELLOWSTONE INJUNCTION NOT WARRANTED IN THIS LEASE-TERMINATION CASE, PLAINTIFF NIGHTCLUB DID NOT DEMONSTRATE ITS WILLINGNESS TO CURE AN ALLEGED NOISE-LEVEL VIOLATION OF THE LEASE (SECOND DEPT).

The Second Department, reversing Supreme Court, determined that a *Yellowstone* injunction should not have issued to plaintiff nightclub. The defendant landlord started proceedings to terminate the lease based upon an alleged violation of the noise-level provision 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 plaintiff demonstrates that it has the desire and ability to cure its alleged default by indicating in its motion papers that it is willing to repair any defective condition found by the court and by providing proof of the substantial effort it has already made in addressing the default listed on the notice to cure ... .
>
> In this case, the plaintiff failed to satisfy its burden of adducing evidence that it is willing and able to cure its default. **146 Broadway Assoc., LLC v Bridgeview at Broadway, LLC, 2018 NY Slip Op 05990, Second Dept 9-12-18**

LANDLORD-TENANT (YELLOWSTONE INJUNCTION NOT WARRANTED IN THIS LEASE-TERMINATION CASE, PLAINTIFF NIGHTCLUB DID NOT DEMONSTRATE ITS WILLINGNESS TO CURE AN ALLEGED NOISE-LEVEL VIOLATION OF THE LEASE (SECOND DEPT))/YELLOWSTONE INJUNCTION (LANDLORD-TENANT, YELLOWSTONE INJUNCTION NOT WARRANTED IN THIS LEASE-TERMINATION CASE, PLAINTIFF NIGHTCLUB DID NOT DEMONSTRATE ITS WILLINGNESS TO CURE AN ALLEGED NOISE-LEVEL VIOLATION OF THE LEASE (SECOND DEPT))/CIVIL PROCEDURE (LANDLORD-TENANT, YELLOWSTONE INJUNCTION NOT WARRANTED IN THIS LEASE-TERMINATION CASE, PLAINTIFF NIGHTCLUB DID NOT DEMONSTRATE ITS WILLINGNESS TO CURE AN ALLEGED NOISE-LEVEL VIOLATION OF THE LEASE (SECOND DEPT))

MEDICAL MALPRACTICE

MEDICAL MALPRACTICE, NEGLIGENCE, EMPLOYMENT LAW.

HOSPITAL DID NOT DEMONSTRATE PHYSICIANS ALLEGED TO HAVE COMMITTED MALPRACTICE WERE NOT EMPLOYEES AND WERE NOT NEGLIGENT, MOTION FOR SUMMARY JUDGMENT PROPERLY DENIED (SECOND DEPT).

The Second Department determined the hospital's motion for summary judgment in this medical malpractice action was properly denied. The hospital did not demonstrate that the two physicians alleged to have committed malpractice were not employees of the hospital and did not demonstrate the two physicians did not deviate from the acceptable standards of medical care:

> "In general, a hospital may not be held vicariously liable for the malpractice of a private attending physician who is not an employee" ... . Therefore, when hospital employees, such as resident physicians and nurses, have participated in the treatment of a patient, the hospital may not be held vicariously liable for resulting injuries where the hospital employees have merely carried out the private attending physician's orders ... . These rules shielding a hospital from liability do not apply when: (1) "the staff follows orders despite knowing that the doctor's orders are so clearly contraindicated by normal practice that ordinary prudence requires inquiry into the correctness of the orders'"... ; (2) the hospital's employees have committed independent acts of negligence ... ; or (3) the words or conduct of the hospital give rise to the appearance and belief that the physician possesses the authority to act on behalf of the hospital ... . "Thus, in order to establish its entitlement to judgment as a matter of law defeating a claim of vicarious liability, a hospital must demonstrate that the physician alleged to have committed the malpractice was an independent contractor and not a hospital employee'" ... .
>
> The hospital defendants failed to establish, prima facie, that both physicians alleged to have committed malpractice, the two attending nephrologists, were independent contractors [not emplyees]. **Dupree v Westchester County Health Care Corp., 2018 NY Slip Op 06000, Second Dept 9-12-18**

MEDICAL MALPRACTICE (HOSPITAL DID NOT DEMONSTRATE PHYSICIANS ALLEGED TO HAVE COMMITTED MALPRACTICE WERE NOT EMPLOYEES AND WERE NOT NEGLIGENT, MOTION FOR SUMMARY JUDGMENT PROPERLY DENIED (SECOND DEPT))/NEGLIGENCE (MEDICAL MALPRACTICE, HOSPITAL DID NOT DEMONSTRATE PHYSICIANS ALLEGED TO HAVE COMMITTED MALPRACTICE WERE NOT EMPLOYEES AND WERE NOT NEGLIGENT, MOTION FOR SUMMARY JUDGMENT PROPERLY DENIED (SECOND DEPT))/EMPLOYMENT LAW (MEDICAL MALPRACTICE, HOSPITALS, HOSPITAL DID NOT DEMONSTRATE PHYSICIANS ALLEGED TO HAVE COMMITTED MALPRACTICE WERE NOT EMPLOYEES AND WERE NOT NEGLIGENT, MOTION FOR SUMMARY JUDGMENT PROPERLY DENIED (SECOND DEPT))/HOSPITALS (MEDICAL MALPRACTICE, HOSPITAL DID NOT DEMONSTRATE PHYSICIANS ALLEGED TO HAVE COMMITTED MALPRACTICE WERE NOT EMPLOYEES AND WERE NOT NEGLIGENT, MOTION FOR SUMMARY JUDGMENT PROPERLY DENIED (SECOND DEPT))

MUNICIPAL LAW

MUNICIPAL LAW, CIVIL PROCEDURE.

CITY WAS NOT ESTOPPED FROM ASSERTING THE STATUTE OF LIMITATIONS DEFENSE TO A CHALLENGE TO CITY WATER BILLS, ALTHOUGH AN INACCURATE BILL HAD BEEN ISSUED, THE ERROR WAS CORRECTED AND THE CITY DID NOT ACT IMPROPERLY (SECOND DEPT).

The Second Department determined petitioner's challenge to the city water bills was properly deemed time-barred. Petitioner argued that the city should be estopped from taking advantage of the four-year statute because of a delay in correcting an inaccurate bill:

> The petitioner's contention that DEP and the Water Board should be estopped from applying the four-year limitations period is without merit. " The doctrine of estoppel will be applied against governmental agencies only in exceptional cases'" ... , such as where there is fraud, misrepresentation, or other affirmative misconduct upon which the other party relies to its detriment... . "Generally, the doctrine of estoppel is not available against a governmental agency to prevent it from discharging its statutory duties, even when the results are harsh" ... . Here, the Water Board was performing its statutory duties in, inter alia, establishing, charging, collecting, and enforcing payment for the use of the water and sewer systems (see Public Authorities Law § 1045-f[9]). Although an error had been made resulting in the petitioner being over-billed from June 2000 to April 2015, DEP corrected the error and credited the accounts of the 10 subject properties to the extent allowable under applicable law and the Water Board's rate schedule .... The petitioner failed to demonstrate any improper conduct on the part of DEP or the Water Board that would warrant the application of the doctrine of estoppel. **Matter of Maimonides Med. Ctr. v New York City Water Dept., 2018 NY Slip Op 06094, Second Dept 9-19-18**

MUNICIPAL LAW (CIVIL PROCEDURE, ESTOPPEL, CITY WAS NOT ESTOPPED FROM ASSERTING THE STATUTE OF LIMITATIONS DEFENSE TO A CHALLENGE TO CITY WATER BILLS, ALTHOUGH AN INACCURATE BILL HAD BEEN ISSUED, THE ERROR WAS CORRECTED AND THE CITY DID NOT ACT IMPROPERLY (SECOND DEPT))/CIVIL PROCEDURE (MUNICIPAL LAW, ESTOPPEL, CITY WAS NOT ESTOPPED FROM ASSERTING THE STATUTE OF LIMITATIONS DEFENSE TO A CHALLENGE TO CITY WATER BILLS, ALTHOUGH AN INACCURATE BILL HAD BEEN ISSUED, THE ERROR WAS CORRECTED AND THE CITY DID NOT ACT IMPROPERLY (SECOND DEPT))/ESTOPPEL (MUNICIPAL LAW, CIVIL PROCEDURE, ESTOPPEL, CITY WAS NOT ESTOPPED FROM ASSERTING THE STATUTE OF LIMITATIONS DEFENSE TO A CHALLENGE TO CITY WATER BILLS, ALTHOUGH AN INACCURATE BILL HAD BEEN ISSUED, THE ERROR WAS CORRECTED AND THE CITY DID NOT ACT IMPROPERLY (SECOND DEPT))/WATER BILLS (CIVIL PROCEDURE, ESTOPPEL, CITY WAS NOT ESTOPPED FROM ASSERTING THE STATUTE OF LIMITATIONS DEFENSE TO A CHALLENGE TO CITY WATER BILLS, ALTHOUGH AN INACCURATE BILL HAD BEEN ISSUED, THE ERROR WAS CORRECTED AND THE CITY DID NOT ACT IMPROPERLY (SECOND DEPT))

MUNICIPAL LAW, REAL PROPERTY LAW, IMMUNITY.

LAND HELD BY A MUNICIPALITY IN A PROPRIETARY CAPACITY IS NOT IMMUNE FROM ADVERSE POSSESSION (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the complaint seeking a declaration that plaintiff is the owner, by adverse possession, of land adjacent to municipal railway tracks states a cause of action. The court explained that land held by a municipality in a proprietary capacity, as opposed to a governmental capacity, is not immune from adverse possession:

> Although a municipality cannot lose title through adverse possession to property which it owns in its governmental capacity, or which has been made inalienable by statute... , when a municipality holds real property in its proprietary capacity, there is no immunity against adverse possession ... . Here, the [municipality] did not conclusively establish that the property is not subject to adverse possession on the basis of governmental immunity. **Mazzei v Metropolitan Transp. Auth., 2018 NY Slip Op 06007, Second Dept 9-12-18**

MUNICIPAL LAW (LAND HELD BY A MUNICIPALITY IN A PROPRIETARY CAPACITY IS NOT IMMUNE FROM ADVERSE POSSESSION (SECOND DEPT))/REAL PROPERTY LAW (ADVERSE POSSESSION, MUNICIPAL LAW, (LAND HELD BY A MUNICIPALITY IN A PROPRIETARY CAPACITY IS NOT IMMUNE FROM ADVERSE POSSESSION (SECOND DEPT))/IMMUNITY (MUNICIPAL LAW, ADVERSE POSSESSION, LAND HELD BY A MUNICIPALITY IN A PROPRIETARY CAPACITY IS NOT IMMUNE FROM ADVERSE POSSESSION (SECOND DEPT))/ADVERSE POSSESSION (MUNICIPAL LAW, ADVERSE POSSESSION, LAND HELD BY A MUNICIPALITY IN A PROPRIETARY CAPACITY IS NOT IMMUNE FROM ADVERSE POSSESSION (SECOND DEPT))/PROPRIETARY CAPACITY (MUNICIPAL LAW, ADVERSE POSSESSION, (LAND HELD BY A MUNICIPALITY IN A PROPRIETARY CAPACITY IS NOT IMMUNE FROM ADVERSE POSSESSION (SECOND DEPT))

NEGLIGENCE

NEGLIGENCE.

SIDEWALK DEFECT WAS NOT TRIVIAL AS A MATTER OF LAW, TRIVIALITY IS NOT A QUESTION OF DIMENSIONS ALONE, DEFENDANT'S MOTION FOR SUMMARY JUDGMENT IN THIS SLIP AND FALL CASE PROPERLY DENIED (FIRST DEPT).

The First Department determined that Supreme Court properly denied the defendants' motion for summary judgment in this sidewalk trip and fall case. There was a question of fact, raised by the plaintiff's expert, whether the defect was trivial as a matter of law:

> ... [P]laintiff submitted an affidavit from an expert engineer who ... found that the sidewalk flags had a vertical height differential of over one half inch. ... [P]laintiff's expert opined that this differential and the dimension of the opening at the expansion joint created a "trap-like hazardous condition and [was] a known cause of trip and fall accidents." The expert further opined that the condition of the sidewalk had been in a noticeable state of disrepair for at least one year prior to plaintiff's fall, and therefore, defendants should have been aware of the unsafe condition.
>
> The motion court properly rejected defendants' argument that the sidewalk defect was trivial as a matter of law and denied defendants' motion for summary judgment, finding issues of fact. The Court of Appeals has held "that there is no "minimal dimension test" or per se rule that a defect must be of a certain minimum height or depth in order to be actionable' . . . and therefore [] granting summary judgment to a defendant based exclusively on the dimensions[s] of the . . . defect is unacceptable'"... . Thus, a finding of triviality, as a matter of law, must "be based on all the specific facts and circumstances of the case, not size alone" ... . For this reason, the Court of Appeals has noted that "whether a dangerous or defective condition exists on the property of another so as to create liability . . . is generally a question of fact for the jury" ... .
>
> Here, the crux of defendants' triviality argument is that the defect was physically insignificant. However, as already noted, case law prohibits us from basing a finding of triviality on size alone. Indeed, before the burden can shift to the plaintiff, defendants "must make a prima facie showing that the defect is, under the circumstances, physically insignificant and that the characteristics of the defect or the surrounding circumstances do not increase the risks it poses" ... . **Suarez v Emerald 115 Mosholu LLC, 2018 NY Slip Op 06059, First Dept 9-13-18**

NEGLIGENCE (SIDEWALK DEFECT WAS NOT TRIVIAL AS A MATTER OF LAW, TRIVIALITY IS NOT A QUESTION OF DIMENSIONS ALONE, DEFENDANT'S MOTION FOR SUMMARY JUDGMENT IN THIS SLIP AND FALL CASE PROPERLY DENIED (FIRST DEPT))/SLIP AND FALL (SIDEWALK DEFECT WAS NOT TRIVIAL AS A MATTER OF LAW, TRIVIALITY IS NOT A QUESTION OF DIMENSIONS ALONE, DEFENDANT'S MOTION FOR SUMMARY JUDGMENT IN THIS SLIP AND FALL CASE PROPERLY DENIED (FIRST DEPT))/TRIVIAL DEFECT (SLIP AND FALL, SIDEWALK DEFECT WAS NOT TRIVIAL AS A MATTER OF LAW, TRIVIALITY IS NOT A QUESTION OF DIMENSIONS ALONE, DEFENDANT'S MOTION FOR SUMMARY JUDGMENT IN THIS SLIP AND FALL CASE PROPERLY DENIED (FIRST DEPT))/SIDEWALKS (SLIP AND FALL, SIDEWALK DEFECT WAS NOT TRIVIAL AS A MATTER OF LAW, TRIVIALITY IS NOT A QUESTION OF DIMENSIONS ALONE, DEFENDANT'S MOTION FOR SUMMARY JUDGMENT IN THIS SLIP AND FALL CASE PROPERLY DENIED (FIRST DEPT))

NEGLIGENCE.

PLAINTIFF INJURED WHEN, AFTER CONSUMING ALCOHOL, HE DOVE INTO A SHALLOW PART OF DEFENDANT'S POOL, DEFENDANT'S MOTION FOR SUMMARY JUDGMENT PROPERLY GRANTED (SECOND DEPT).

The Second Department determined defendant property owner's motion for summary judgment was properly granted in this swimming pool injury case:

> After consuming alcohol, the plaintiff ran out of the defendant's house and dove headfirst into the defendants' pool, striking his forehead on the bottom of the pool. The plaintiff commenced this action against the defendants to recover damages for personal injuries, alleging that the defendants were negligent in, among other things, the ownership, operation, and maintenance of their pool. The defendants moved for summary judgment dismissing the complaint, and the plaintiff opposed the motion. The Supreme Court granted the defendants' motion and dismissed the complaint.
>
> The defendants established their prima facie entitlement to judgment as a matter of law by demonstrating that the plaintiff's act of diving headfirst into the defendants' shallow pool was the sole proximate cause of his injuries ... . In support of their motion, the defendants submitted, inter alia, the plaintiff's deposition transcript, in which he testified that he swam in the subject pool once or twice prior to the accident, and that he was aware of the depth of the pool ... . **Carroll v Montalvo, 2018 NY Slip Op 05997, Second Dept 9-12-18**

NEGLIGENCE (PLAINTIFF INJURED WHEN, AFTER CONSUMING ALCOHOL, HE DOVE INTO AN SHALLOW PART OF DEFENDANT'S POOL, DEFENDANT'S MOTION FOR SUMMARY JUDGMENT PROPERLY GRANTED (SECOND DEPT))/SWIMMING POOLS (NEGLIGENCE, (PLAINTIFF INJURED WHEN, AFTER CONSUMING ALCOHOL, HE DOVE INTO AN SHALLOW PART OF DEFENDANT'S POOL, DEFENDANT'S MOTION FOR SUMMARY JUDGMENT PROPERLY GRANTED (SECOND DEPT))

NEGLIGENCE.

EVIDENCE NOT SUFFICIENT TO DEMONSTRATE SIDEWALK DEFECT WAS TRIVIAL, DEFENDANTS' MOTION FOR SUMMARY JUDGMENT IN THIS SLIP AND FALL CASE PROPERLY DENIED (SECOND DEPT).

The Second Department determined the owners of property abutting the sidewalk where plaintiff fell did not present sufficient evidence to warrant summary judgment in this slip and fall case. The defendant-owners (Millers) argued the defect was trivial:

> "A defendant seeking dismissal of a complaint on the basis that the alleged defect is trivial must make a prima facie showing that the defect is, under the circumstances, physically insignificant and that the characteristics of the defect or the surrounding circumstances do not increase the risks it poses" ... . In determining whether a defect is trivial, the court must examine all of the facts presented, including the "width, depth, elevation, irregularity and appearance of the defect along with the time, place, and circumstance of the injury" ... .
>
> The Millers failed to establish their prima facie entitlement to judgment as a matter of law on the ground that the alleged defective condition was trivial as a matter of law ... . In support of their motion, the Millers submitted conflicting evidence as to the dimensions of the alleged defective condition, including the plaintiff's testimony at a hearing pursuant to General Municipal Law § 50-h and measurements taken by the Millers' investigator. Further, "it is impossible to ascertain from the photographs submitted in support of the motion whether the alleged defective condition was trivial as a matter of law" ... . **Coriat v Miller, 2018 NY Slip Op 05998, Second Dept 9-12-18**

NEGLIGENCE (EVIDENCE NOT SUFFICIENT TO DEMONSTRATE SIDEWALK DEFECT WAS TRIVIAL, DEFENDANTS' MOTION FOR SUMMARY JUDGMENT IN THIS SLIP AND FALL CASE PROPERLY DENIED (SECOND DEPT))/SLIP AND FALL (EVIDENCE NOT SUFFICIENT TO DEMONSTRATE SIDEWALK DEFECT WAS TRIVIAL, DEFENDANTS' MOTION FOR SUMMARY JUDGMENT IN THIS SLIP AND FALL CASE PROPERLY DENIED (SECOND DEPT))/SIDEWALKS (SLIP AND FALL, EVIDENCE NOT SUFFICIENT TO DEMONSTRATE SIDEWALK DEFECT WAS TRIVIAL, DEFENDANTS' MOTION FOR SUMMARY JUDGMENT IN THIS SLIP AND FALL CASE PROPERLY DENIED (SECOND DEPT))

NEGLIGENCE.

PLAINTIFF, A TRAFFIC ENFORCEMENT OFFICER, WAS WALKING IN THE STREET WHEN DEFENDANT STRUCK HIM AFTER TAKING HIS EYES OFF THE ROAD, PLAINTIFF DID NOT HAVE TO DEMONSTRATE FREEDOM FROM COMPARATIVE FAULT, PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined that plaintiff's motion for summary judgment in the pedestrian-vehicle accident case should have been granted. Plaintiff, a New York City Police Department traffic enforcement agent, was walking in the road when he was struck by defendant's vehicle. Plaintiff's motion for summary judgment should have been granted because plaintiff did not have demonstrate freedom from comparative fault:

> On April 3, 2018, the Court of Appeals decided Rodriguez v City of New York (31 NY3d 312, 324-325), and held that "[t]o be entitled to partial summary judgment a plaintiff does not bear the double burden of establishing a prima facie case of defendant's liability and the absence of his or her own comparative fault" ... . Reviewing the record in the context of this recent decision, we conclude that the plaintiff established his prima facie entitlement to judgment as a matter of law on the issue of liability by the submission of deposition testimony which demonstrated that as the defendant driver was operating the vehicle, he took his eyes off the road and struck the plaintiff and a parked vehicle. The testimony further demonstrated that the defendant driver did not see the plaintiff prior to impact. **Outar v Sumner, 2018 NY Slip Op 06103, Second Dept 9-19-18**

NEGLIGENCE (PLAINTIFF, A TRAFFIC ENFORCEMENT OFFICER, WAS WALKING IN THE STREET WHEN DEFENDANT STRUCK HIM AFTER TAKING HIS EYES OFF THE ROAD, PLAINTIFF DID NOT HAVE TO DEMONSTRATE FREEDOM FROM COMPARATIVE FAULT, PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED (SECOND DEPT))/TRAFFIC ACCIDENTS (PLAINTIFF, A TRAFFIC ENFORCEMENT OFFICER, WAS WALKING IN THE STREET WHEN DEFENDANT STRUCK HIM AFTER TAKING HIS EYES OFF THE ROAD, PLAINTIFF DID NOT HAVE TO DEMONSTRATE FREEDOM FROM COMPARATIVE FAULT, PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED (SECOND DEPT))/PEDESTRIANS (TRAFFIC ACCIDENTS, PLAINTIFF, A TRAFFIC ENFORCEMENT OFFICER, WAS WALKING IN THE STREET WHEN DEFENDANT STRUCK HIM AFTER TAKING HIS EYES OFF THE ROAD, PLAINTIFF DID NOT HAVE TO DEMONSTRATE FREEDOM FROM COMPARATIVE FAULT, PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED (SECOND DEPT))/COMPARATIVE FAULT (TRAFFIC ACCIDENTS, PEDESTRIANS, PLAINTIFF, A TRAFFIC ENFORCEMENT OFFICER, WAS WALKING IN THE STREET WHEN DEFENDANT STRUCK HIM AFTER TAKING HIS EYES OFF THE ROAD, PLAINTIFF DID NOT HAVE TO DEMONSTRATE FREEDOM FROM COMPARATIVE FAULT, PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED (SECOND DEPT))

NEGLIGENCE.

QUESTION OF FACT WHETHER ICE WAS PRESENT ON THE SIDEWALK IN THIS SLIP AND FALL CASE, SUPREME COURT REVERSED (FIRST DEPT).

The First Department, reversing Supreme Court, determined there were questions of fact whether ice was present on the sidewalk in this slip and fall case:

> Moreover, the parties sharply dispute whether there was an accumulation of old ice in the area of the accident. Defendants presented testimony from their superintendent that he did not see anything out of the ordinary regarding the condition of the sidewalk, and testimony from an expert meteorologist that the ground was bare of snow and that ice could not have formed naturally from the meteorological conditions. In addition, defendants submitted photographs, however they do not clearly show whether or not there was ice in the sidewalk crack. In contrast, plaintiff testified that there was "dirty" ice on the sidewalk which caused her to fall, and submitted public meteorological records showing that there had been a significant snowfall 12 days before and intermittent freezing temperatures since that date. In light of this factual dispute, summary judgment is inappropriate.
>
> Furthermore, defendants failed to make a prima facie showing that they did not have constructive notice of the allegedly dangerous condition. Defendants' superintendent testified that building porters inspected the sidewalk each morning, but failed to provide any specific testimony regarding the inspection on the accident date. Defendants' superintendent also could not recall whether there was ice on the ground, even though he examined the area after the incident. Plaintiff's testimony about "dirty" ice creates a triable issue of fact because it indicates that the icy condition had existed for some time ... . The storm in progress doctrine has no application to this case because plaintiff does not allege that the storm on the accident date caused the dangerous condition ... . **Adario-Caine v 69th Tenants Corp., 2018 NY Slip Op 06180, First Dept 9-25-18**

NEGLIGENCE (QUESTION OF FACT WHETHER ICE WAS PRESENT ON THE SIDEWALK IN THIS SLIP AND FALL CASE, SUPREME COURT REVERSED (FIRST DEPT))/SLIP AND FALL (QUESTION OF FACT WHETHER ICE WAS PRESENT ON THE SIDEWALK IN THIS SLIP AND FALL CASE, SUPREME COURT REVERSED (FIRST DEPT))/SIDEWALKS (SLIP AND FALL, QUESTION OF FACT WHETHER ICE WAS PRESENT ON THE SIDEWALK IN THIS SLIP AND FALL CASE, SUPREME COURT REVERSED (FIRST DEPT))

NEGLIGENCE.

THE DEFENDANT IN THIS REAR-END COLLISION CASE DID NOT RAISE A QUESTION OF FACT ABOUT WHETHER THERE WAS A NONNEGLIGENT EXPLANATION FOR STRIKING PLAINTIFF'S VEHICLE (SECOND DEPT).

The Second Department determined defendant in this rear-end collision case did not raise a question of fact about whether there was a nonnegligent explanation for striking plaintiff's vehicle:

> ... [T]he defendants submitted the affidavit of the defendant driver, which failed to provide a nonnegligent excuse for striking the rear of the plaintiff's vehicle. The defendant driver averred that the plaintiff's vehicle struck a vehicle in front of it and came to a short stop. According to the defendant driver, there was heavy, stop-and-go traffic at the time, and the vehicle he was operating was traveling approximately 5 to 10 miles per hour and was approximately 20 feet behind the plaintiff's vehicle when the plaintiff's vehicle stopped short. The defendant driver asserted that he could not stop his vehicle in time to avoid the impact. "While a nonnegligent explanation for a rear-end collision may include evidence of a sudden stop of the lead vehicle, vehicle stops which are foreseeable under the prevailing traffic conditions must be anticipated by the driver who follows, since he or she is under a duty to maintain a safe distance between his or her vehicle and the vehicle ahead" ... . Given the traffic conditions as related by the defendant driver, his assertion that the plaintiff's vehicle came to a sudden stop was insufficient to raise a triable issue of fact as to whether there was a nonnegligent explanation for the collision between the plaintiff's vehicle and the defendants' vehicle ... . **Arslan v Costello, 2018 NY Slip Op 06221, Second Dept 9-26-18**

NEGLIGENCE (THE DEFENDANT IN THIS REAR-END COLLISION CASE DID NOT RAISE A QUESTION OF FACT ABOUT WHETHER THERE WAS A NONNEGLIGENT EXPLANATION FOR STRIKING PLAINTIFF'S VEHICLE (SECOND DEPT))/TRAFFIC ACCIDENTS (THE DEFENDANT IN THIS REAR-END COLLISION CASE DID NOT RAISE A QUESTION OF FACT ABOUT WHETHER THERE WAS A NONNEGLIGENT EXPLANATION FOR STRIKING PLAINTIFF'S VEHICLE (SECOND DEPT))/REAR-END COLLISIONS (THE DEFENDANT IN THIS REAR-END COLLISION CASE DID NOT RAISE A QUESTION OF FACT ABOUT WHETHER THERE WAS A NONNEGLIGENT EXPLANATION FOR STRIKING PLAINTIFF'S VEHICLE (SECOND DEPT))

NEGLIGENCE.

QUESTION OF FACT WHETHER DEFENDANT ACTED RECKLESSLY IN THIS SKIING ACCIDENT CASE, DEFENDANT'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined defendant's motion for summary judgment in this skiing accident case should not have been granted. Plaintiff was injured in a collision with defendant. The assumption of the risk doctrine did not preclude the suit because a question of fact had been raised about whether defendant acted recklessly:

> ... [P]laintiffs submitted, inter alia, an affidavit from an emergency room physician who was also an 11-year veteran of the National Ski Patrol. Based on his review of the depositions and other records related to the case, the expert opined that, given the nature and extent of plaintiff's injuries, "there [was] no question [that] the force with which [defendant] impacted [plaintiff's] left side and back was immense" and that plaintiff's injuries were "not consistent with [defendant's] deposition testimony" that he had come to or nearly come to a complete stop. The expert further opined that, "[g]iven that [plaintiff] was skiing slowly at the time of the collision, the severe injuries sustained by [both] men, and their unanimous testimony that the collision was severe, it [was] clear [that defendant] was snowboarding at an extremely high rate of speed at the time of the collision." The expert thus concluded that defendant had "unreasonably increased the risk of harm" to plaintiff by cutting across the beginner trail "at an extremely high rate of speed . . . knowing that there would be skiers and snowboarders traveling down [the beginner trail]" and that defendant's conduct constituted "an egregious breach of good and accepted snowboarding practices." * * *
>
> .. [T]the record establishes that the collision was exceedingly violent and, inasmuch as we must accept as true plaintiff's testimony that he was the one who was skiing slowly ... , there is "at least a question of fact . . . whether . . . defendant's speed in the vicinity and overall conduct was reckless" ... . Contrary to defendant's contention, the affidavit of plaintiffs' expert was neither conclusory nor speculative ... . **Sopkovich v Smith, 2018 NY Slip Op 06342, Fourth Dept 9-28-18**

NEGLIGENCE (QUESTION OF FACT WHETHER DEFENDANT ACTED RECKLESSLY IN THIS SKIING ACCIDENT CASE, DEFENDANT'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (FOURTH DEPT))/SKIING (QUESTION OF FACT WHETHER DEFENDANT ACTED RECKLESSLY IN THIS SKIING ACCIDENT CASE, DEFENDANT'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (FOURTH DEPT))/ASSUMPTION OF RISK (SKIING ACCIDENT, QUESTION OF FACT WHETHER DEFENDANT ACTED RECKLESSLY IN THIS SKIING ACCIDENT CASE, DEFENDANT'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (FOURTH DEPT))

NEGLIGENCE.

DEFENDANT OFFERED A NONNEGLIGENT EXPLANATION OF THE REAR-END COLLISION, PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (FOURTH DEPT).

The Fourth Department, reversing (modifying) Supreme Court, determined plaintiffs' motion for summary judgment in this rear-end collision case should not have been granted. Defendant offered a nonnegligent explanation of the accident:

> "It is well settled that a rear-end collision with a stopped vehicle establishes a prima facie case of negligence on the part of the driver of the rear vehicle . . . In order to rebut the presumption [of negligence], the driver of the rear vehicle must submit a non[]negligent explanation for the collision . . . One of several nonnegligent explanations for a rear-end collision is a sudden stop of the lead vehicle . . . , and such an explanation is sufficient to overcome the inference of negligence and preclude an award of summary judgment" ... . Here, defendant averred that he was traveling behind the vehicle in which plaintiff was a passenger when it stopped suddenly at a green light and that, despite his efforts, he could not stop in time to avoid a collision. Plaintiff offered a contrary account in her affidavit. Thus, there is an issue of fact sufficient to defeat plaintiffs' motion with respect to the issue of negligence ... . **Macri v Kotrys, 2018 NY Slip Op 06387, Fourth Dept 9-28-18**

NEGLIGENCE (DEFENDANT OFFERED A NONNEGLIGENT EXPLANATION OF THE REAR-END COLLISION, PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (FOURTH DEPT))/TRAFFIC ACCIDENTS (DEFENDANT OFFERED A NONNEGLIGENT EXPLANATION OF THE REAR-END COLLISION, PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (FOURTH DEPT))/REAR-END COLLISIONS (DEFENDANT OFFERED A NONNEGLIGENT EXPLANATION OF THE REAR-END COLLISION, PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (FOURTH DEPT))

NEGLIGENCE, EVIDENCE.

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT IN THIS SLIP AND FALL CASE WAS PROPERLY DENIED, DEFENDANT DID NOT DEMONSTRATE WHEN THE AREA WAS LAST INSPECTED OR CLEANED AND DID NOT DEMONSTRATE A LACK OF CONSTRUCTIVE NOTICE OF WATER ON THE FLOOR (FIRST DEPT).

The First Department determined that defendant's motion for summary judgment in this slip and fall case was properly denied. Defendant did not demonstrate when the area of the fall was last inspected or cleaned and did not demonstrate a lack of constructive notice of water on the floor:

> Defendant failed to establish its entitlement to judgment as a matter of law in this action where plaintiff slipped and fell on water in the vestibule of defendant's building. Defendant failed to make a prima facie showing that it lacked constructive notice because the superintendent failed to testify or aver that his assistant adhered to a janitorial schedule on the day of the accident or when the area was last inspected prior to plaintiff's fall ... . Since defendant failed to meet its initial burden to establish that it lacked constructive notice of the alleged defect as a matter of law, the burden never shifted to plaintiff to establish how long the condition existed ... .
>
> Defendant also failed to establish that it lacked constructive notice on the basis that the water was not present in the vestibule for a sufficient period to afford defendant an opportunity to discover and remedy the condition ... . Whether the water was present for that sufficient period presents an outstanding factual issue, as the time it took plaintiff and her friend to return to the premises from the store is unclear, and defendant failed to clarify the issue at the deposition. **Hill v Manhattan N. Mgt., 2018 NY Slip Op 06323, First Dept 9-27-18**

NEGLIGENCE (DEFENDANT'S MOTION FOR SUMMARY JUDGMENT IN THIS SLIP AND FALL CASE WAS PROPERLY DENIED, DEFENDANT DID NOT DEMONSTRATE WHEN THE AREA WAS LAST INSPECTED OR CLEANED AND DID NOT DEMONSTRATE A LACK OF CONSTRUCTIVE NOTICE OF WATER ON THE FLOOR (FIRST DEPT))/EVIDENCE (SLIP AND FALL, DEFENDANT'S MOTION FOR SUMMARY JUDGMENT IN THIS SLIP AND FALL CASE WAS PROPERLY DENIED, DEFENDANT DID NOT DEMONSTRATE WHEN THE AREA WAS LAST INSPECTED OR CLEANED AND DID NOT DEMONSTRATE A LACK OF CONSTRUCTIVE NOTICE OF WATER ON THE FLOOR (FIRST DEPT))/SLIP AND FALL (DEFENDANT'S MOTION FOR SUMMARY JUDGMENT IN THIS SLIP AND FALL CASE WAS PROPERLY DENIED, DEFENDANT DID NOT DEMONSTRATE WHEN THE AREA WAS LAST INSPECTED OR CLEANED AND DID NOT DEMONSTRATE A LACK OF CONSTRUCTIVE NOTICE OF WATER ON THE FLOOR (FIRST DEPT))

NEGLIGENCE, EVIDENCE.

HEARSAY IN POLICE REPORT ABOUT THE PROXIMATE CAUSE OF THE TRAFFIC ACCIDENT WAS INADMISSIBLE, DEFENDANT'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined there was a question of fact about whether defendant's (RB Juice's] truck was a proximate cause of the vehicle accident which injured plaintiff. Although the police report indicated the truck was not a proximate cause, the officer did not witness the collision and therefore the officer's conclusions were inadmissible hearsay:

> There can be more than one proximate cause of an accident ... , and "[g]enerally, it is for the trier of fact to determine the issue of proximate cause" ... .
>
> Here, RB Juice failed to establish, prima facie, that its truck was not a proximate cause of the accident. In support of the motion, RB Juice submitted the deposition testimony of the plaintiff, her husband, its employees, and the responding police officer, as well as a copy of the police accident report prepared by the responding police officer. The evidence submitted by RB Juice revealed the existence of triable issues of fact as what its box truck was doing at the time of the accident and how the accident occurred ... . With respect to the deposition testimony of the responding police officer, who did not witness the accident, about the section of the police accident report in which he identified "passing or lane usage improper" by the plaintiff as a contributing factor to the happening of the accident, and attributed no contributing factors to the operation of the box truck, such testimony and the related section of the police accident report constituted inadmissible hearsay. Since the source of the information contained in this section of the police accident report was not identified, it could not be established whether the source of the information had a duty to make the statement or whether some other hearsay exception applied ... . Further, that information bore directly on the ultimate issue to be decided by the factfinder ... . **Ardanuy v RB Juice, LLC, 2018 NY Slip Op 06074, Second Dept 9-19-18**

NEGLIGENCE (TRAFFIC ACCIDENTS, HEARSAY IN POLICE REPORT ABOUT THE PROXIMATE CAUSE OF THE TRAFFIC ACCIDENT WAS INADMISSIBLE, DEFENDANT'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT))/EVIDENCE (NEGLIGENCE, POLICE REPORT, HEARSAY IN POLICE REPORT ABOUT THE PROXIMATE CAUSE OF THE TRAFFIC ACCIDENT WAS INADMISSIBLE, DEFENDANT'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT))/HEARSAY (NEGLIGENCE, POLICE REPORT, HEARSAY IN POLICE REPORT ABOUT THE PROXIMATE CAUSE OF THE TRAFFIC ACCIDENT WAS INADMISSIBLE, DEFENDANT'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT))/POLICE REPORTS (HEARSAY, (TRAFFIC ACCIDENTS, HEARSAY IN POLICE REPORT ABOUT THE PROXIMATE CAUSE OF THE TRAFFIC ACCIDENT WAS INADMISSIBLE, DEFENDANT'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT))/TRAFFIC ACCIDENTS (NEGLIGENCE, POLICE REPORT, HEARSAY IN POLICE REPORT ABOUT THE PROXIMATE CAUSE OF THE TRAFFIC ACCIDENT WAS INADMISSIBLE, DEFENDANT'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT))/PROXIMATE CAUSE (TRAFFIC ACCIDENTS, HEARSAY IN POLICE REPORT ABOUT THE PROXIMATE CAUSE OF THE TRAFFIC ACCIDENT WAS INADMISSIBLE, DEFENDANT'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT))

NEGLIGENCE, EVIDENCE.

IN THIS SIDEWALK SLIP AND FALL CASE, DEFENDANT DID NOT ELIMINATE ISSUES OF FACT ABOUT WHETHER THE PLAINTIFF CAN PROVE THE CAUSE OF PLAINTIFF'S DECEDENT'S FALL, DEFENDANT'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendant in this sidewalk slip and fall case did not eliminate triable issues of fact about whether the plaintiff can demonstrate the cause of plaintiff's decedent's fall:

> "A plaintiff's inability to identify the cause of his or her fall is fatal to a cause of action to recover damages for personal injuries because a finding that the defendant's negligence, if any, proximately caused the plaintiff's injuries would be based on speculation" ... . "Proximate cause may be established without direct evidence of causation by inference from the circumstances of the accident. However, mere speculation as to the cause of an accident, when there could have been many possible causes, is fatal to a cause of action" ... .
>
> Here, the defendant failed to establish, prima facie, that the cause of Estelle's fall was not identifiable. In support of its motion, the defendant submitted the deposition testimony of nonparty witness Laura Acito, who saw the plaintiff fall. While a vehicle was in front of Acito, and she was only able to see Estelle from the waist up, Acito was able to identify the exact spot where the accident occurred. Acito worked in a strip mall which was located next to the defendant's vacant lot, and she was familiar with the area where the accident occurred. Using photographs which she authenticated, Acito stated that the accident occurred in that portion of the sidewalk which was broken up and in a state of disrepair for years. Under the circumstances, the defendant failed to eliminate triable issues of fact as to whether Estelle fell due to the alleged defective condition of the sidewalk ... Since the defendant failed to meet its initial burden, the sufficiency of the plaintiff's opposition papers need not be reviewed ... . **Eisenstein v Block 5298, Inc., 2018 NY Slip Op 06080, Second Dept 9-19-18**

NEGLIGENCE (IN THIS SIDEWALK SLIP AND FALL CASE, DEFENDANT DID NOT ELIMINATE ISSUES OF FACT ABOUT WHETHER THE PLAINTIFF CAN PROVE THE CAUSE OF PLAINTIFF'S DECEDENT'S FALL, DEFENDANT'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT))/EVIDENCE (SLIP AND FALL, IN THIS SIDEWALK SLIP AND FALL CASE, DEFENDANT DID NOT ELIMINATE ISSUES OF FACT ABOUT WHETHER THE PLAINTIFF CAN PROVE THE CAUSE OF PLAINTIFF'S DECEDENT'S FALL, DEFENDANT'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT))/SLIP AND FALL (IN THIS SIDEWALK SLIP AND FALL CASE, DEFENDANT DID NOT ELIMINATE ISSUES OF FACT ABOUT WHETHER THE PLAINTIFF CAN PROVE THE CAUSE OF PLAINTIFF'S DECEDENT'S FALL, DEFENDANT'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT))/SIDEWALKS (SLIP AND FALL, IN THIS SIDEWALK SLIP AND FALL CASE, DEFENDANT DID NOT ELIMINATE ISSUES OF FACT ABOUT WHETHER THE PLAINTIFF CAN PROVE THE CAUSE OF PLAINTIFF'S DECEDENT'S FALL, DEFENDANT'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT))

NEGLIGENCE, EVIDENCE.

QUESTION OF FACT WHETHER THE INADEQUATE HEIGHT OF A GUARDRAIL ALONG THE STAIRWELL WAS THE PROXIMATE CAUSE OF PLANTIFF'S FALL, HEIGHT WAS BELOW THAT MANDATED BY THE NATIONAL FIRE PROTECTION ASSOCIATION (FIRST DEPT).

The First Department determined defendant's motion for summary judgment in this slip and fall case was properly denied. The plaintiff presented evidence that the proximate cause of his stairway fall over the guardrail was the inadequate height of the guardrail:

> ... [P]laintiff raised an issue of fact by submitting an affidavit by an expert engineer who averred that the stairwell violated National Fire Protection Association (NFPA) No. 101. NFPA No. 101, which was listed in the "Generally Accepted Standards Applicable to the State Building Construction Code" in effect at the time of the hotel's construction, advocated the construction of a 42-inch-high guardrail along the stairwell. The record shows that the existing guardrail was no more than 32 inches high. A violation of NFPA No. 101, which was "applicable by reference in the [State] Building Construction Code - not incorporation - would constitute some evidence of negligence and may establish a standard of care" ... .
>
> Defendants failed to establish prima facie that they did not have constructive notice of a dangerous or defective condition. They argue that the stairwell complied with applicable building codes and that they never received any violations regarding the stairwell. However, their claimed compliance with applicable building codes is not dispositive of whether they breached their common-law duty of care ... . Moreover, the existence of a guardrail less than 42 inches high, although not in violation of a particular mandatory code, was obvious and had existed for a sufficient time for defendants to discover and remedy it. Contrary to defendants' argument, plaintiff's inability to identify the cause of his slip or trip on the stairs, which made him lose his balance and go over the rail, is not fatal to his claims, given the evidence supporting his contention that the proximate cause of his ... injuries was the lack of a 42-inch guardrail. In any event, there can be more than one proximate cause of an accident. **Sussman v MK LCP Rye LLC, 2018 NY Slip Op 06143, First Dept 9-19-18**

NEGLIGENCE (SLIP AND FALL, QUESTION OF FACT WHETHER THE INADEQUATE HEIGHT OF A GUARDRAIL ALONG THE STAIRWELL WAS THE PROXIMATE CAUSE OF PLANTIFF'S FALL, HEIGHT WAS BELOW THAT MANDATED BY THE NATIONAL FIRE PROTECTION ASSOCIATION (FIRST DEPT))/EVIDENCE (NEGLIGENCE, SLIP AND FALL, STAIRWELL, QUESTION OF FACT WHETHER THE INADEQUATE HEIGHT OF A GUARDRAIL ALONG THE STAIRWELL WAS THE PROXIMATE CAUSE OF PLANTIFF'S FALL, HEIGHT WAS BELOW THAT MANDATED BY THE NATIONAL FIRE PROTECTION ASSOCIATION (FIRST DEPT))/SLIP AND FALL (STAIRWELL, QUESTION OF FACT WHETHER THE INADEQUATE HEIGHT OF A GUARDRAIL ALONG THE STAIRWELL WAS THE PROXIMATE CAUSE OF PLANTIFF'S FALL, HEIGHT WAS BELOW THAT MANDATED BY THE NATIONAL FIRE PROTECTION ASSOCIATION (FIRST DEPT))/GUARDRAILS (STAIRWELL, SLIP AND FALL, QUESTION OF FACT WHETHER THE INADEQUATE HEIGHT OF A GUARDRAIL ALONG THE STAIRWELL WAS THE PROXIMATE CAUSE OF PLANTIFF'S FALL, HEIGHT WAS BELOW THAT MANDATED BY THE NATIONAL FIRE PROTECTION ASSOCIATION (FIRST DEPT))

NEGLIGENCE, LABOR LAW-CONSTRUCTION LAW, LABOR LAW, TOXIC TORTS, ENVIRONMENTAL LAW.

ACTION ALLEGING LEAD POISONING IN UTERO FROM FATHER'S CLOTHES WHICH WERE SATURATED WITH LEAD AND OTHER HAZARDOUS MATERIALS AT WORK DISMISSED (SECOND DEPT).

The Second Department determined the action based upon exposure to lead in utero was properly dismissed. Plaintiff alleged his father's clothes were saturated with lead at work:

> At common law, employers have a duty to provide a safe workplace, but this duty has been limited to employees (see Labor Law § 200...). It has not, as the plaintiff contends, been extended to encompass individuals who were not employed at the worksite such as the plaintiff or his mother during her pregnancy ... .
>
> While "[a] landowner generally must exercise reasonable care, with regard to any activities which he carries on, for the protection of those outside of his premises'" ... , the facts alleged in this case differ from those to which a landowner's duty to exercise reasonable care for the protection of individuals off site has been held to extend ... .
>
> Contrary to the plaintiff's contention, the alleged violations of Occupational Safety and Health Administration (hereinafter OSHA) regulations ... , the Occupational Health and Safety Act of 1970 , specifically 29 USC § 654(a), and Labor Law § 27-a do not constitute negligence per se. The violation of OSHA regulations provides only evidence of negligence ... . Moreover, neither the plaintiff nor his mother during her pregnancy belonged to the class intended to be protected by OSHA or its implementing regulations, 29 USC § 654(a), or Labor Law § 27-a, namely employees ... . **Campanelli v Long Is. Light. Co., 2018 NY Slip Op 06225, Second Dept 9-26-18**

NEGLIGENCE (ACTION ALLEGING LEAD POISONING IN UTERO FROM FATHER'S CLOTHES WHICH WERE SATURATED WITH LEAD AND OTHER HAZARDOUS MATERIALS AT WORK DISMISSED (SECOND DEPT))/LABOR LAW-CONSTRUCTION LAW (ACTION ALLEGING LEAD POISONING IN UTERO FROM FATHER'S CLOTHES WHICH WERE SATURATED WITH LEAD AND OTHER HAZARDOUS MATERIALS AT WORK DISMISSED (SECOND DEPT))/LABOR LAW (ACTION ALLEGING LEAD POISONING IN UTERO FROM FATHER'S CLOTHES WHICH WERE SATURATED WITH LEAD AND OTHER HAZARDOUS MATERIALS AT WORK DISMISSED (SECOND DEPT))/TOXIC TORTS (ACTION ALLEGING LEAD POISONING IN UTERO FROM FATHER'S CLOTHES WHICH WERE SATURATED WITH LEAD AND OTHER HAZARDOUS MATERIALS AT WORK DISMISSED (SECOND DEPT))/ENVIRONMENTAL LAW (ACTION ALLEGING LEAD POISONING IN UTERO FROM FATHER'S CLOTHES WHICH WERE SATURATED WITH LEAD AND OTHER HAZARDOUS MATERIALS AT WORK DISMISSED (SECOND DEPT))

NEGLIGENCE, LANDLORD-TENANT, EVIDENCE.

IN THIS SLIP AND FALL CASE, THERE WAS A QUESTION OF FACT WHETHER THE OUT-OF-POSSESSION LANDLORD WAS LIABLE FOR AN ALLEGEDLY DEFECTIVE DRAINAGE SYSTEM WHICH RESULTED IN ICE ACCUMULATION. PLAINTIFF'S AFFIDAVITS SHOULD HAVE BEEN CONSIDERED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined that plaintiff lessee's complaint in this slip and fall case against the landlord should not have been dismissed. Although defendant, an out-of-possession landlord, demonstrated it was solely plaintiff lessee's responsibility to remove ice and snow, plaintiff raised a question of fact about whether defendant was responsible for an inadequate drainage system which caused ice and snow to accumulate. The Second Department noted that Supreme Court should have considered the expert affidavit and plaintiff's and his ex-wife's affidavits stating that the ice and snow condition could not be dealt with by normal methods (due to the drainage issue):

> Here, there was no statute imposing a duty on the defendants to maintain the premises in a reasonably safe condition. The defendants also demonstrated that the parties agreed that the plaintiff would be responsible for snow and ice removal and that the plaintiff actually undertook to conduct snow and ice removal. ...
>
> Even in the absence of a duty to repair an allegedly defective condition, liability may attach to an out-of-possession landlord who has affirmatively created a dangerous condition or defect ... . The defendants did not dispute that they installed the drainage system.
>
> Moreover, the defendants failed to establish that they did not have a duty to repair a defective condition in the drainage system.
>
> ... [P]laintiff raised triable issues of fact as to whether the drainage system was defective and, if so, whether such defect contributed to his accident ... . The court should have considered the affidavits of the plaintiff and his former wife, in which they averred that the icy condition on the driveway could not be ameliorated by snowplowing and their daily efforts at salting, sanding, and ashing the driveway, as those averments were consistent with the plaintiff's deposition testimony... . The court also should have considered the affidavit of the plaintiff's expert, in which he stated that defective conditions in the property's drainage system made the driveway area near the entrance prone to the pooling and freezing of water from the roof and surrounding lawn areas. Contrary to the court's determination, there is no requirement that a plaintiff establish the violation of a specific statutory provision where the duty to repair a defective condition is assumed by the landlord by contract or course of conduct ... . **Bartels v Eack, 2018 NY Slip Op 05995, Second Dept 9-12-18**

NEGLIGENCE (IN THIS SLIP AND FALL CASE, THERE WAS A QUESTION OF FACT WHETHER THE OUT-OF-POSSESSION LANDLORD WAS LIABLE FOR AN ALLEGEDLY DEFECTIVE DRAINAGE SYSTEM WHICH RESULTED IN ICE ACCUMULATION (SECOND DEPT))/LANDLORD-TENANT (SLIP AND FALL, NEGLIGENCE, IN THIS SLIP AND FALL CASE, THERE WAS A QUESTION OF FACT WHETHER THE OUT-OF-POSSESSION LANDLORD WAS LIABLE FOR AN ALLEGEDLY DEFECTIVE DRAINAGE SYSTEM WHICH RESULTED IN ICE ACCUMULATION (SECOND DEPT))/OUT OF POSSESSION LANDLORD (SLIP AND FALL, NEGLIGENCE, IN THIS SLIP AND FALL CASE, THERE WAS A QUESTION OF FACT WHETHER THE OUT-OF-POSSESSION LANDLORD WAS LIABLE FOR AN ALLEGEDLY DEFECTIVE DRAINAGE SYSTEM WHICH RESULTED IN ICE ACCUMULATION (SECOND DEPT))/SLIP AND FALL (LANDLORD-TENANT, IN THIS SLIP AND FALL CASE, THERE WAS A QUESTION OF FACT WHETHER THE OUT-OF-POSSESSION LANDLORD WAS LIABLE FOR AN ALLEGEDLY DEFECTIVE DRAINAGE SYSTEM WHICH RESULTED IN ICE ACCUMULATION (SECOND DEPT))/EVIDENCE (SUMMARY JUDGMENT, IN THIS SLIP AND FALL CASE, THERE WAS A QUESTION OF FACT WHETHER THE OUT-OF-POSSESSION LANDLORD WAS LIABLE FOR AN ALLEGEDLY DEFECTIVE DRAINAGE SYSTEM WHICH RESULTED IN ICE ACCUMULATION, PLAINTIFF'S AFFIDAVITS SHOULD HAVE BEEN CONSIDERED (SECOND DEPT))

NEGLIGENCE, MUNICIPAL LAW.

TOWN DID NOT OWE A DUTY TO PLAINTIFF WHO WAS STRUCK BY A CAR CROSSING A STREET AFTER ATTENDING A TOWN FIREWORKS DISPLAY (SECOND DEPT).

The Second Department determined defendant town did not owe a duty to plaintiff who was struck by a car when crossing a county road after attending a town fireworks display:

> On the evening of July 17, 2012, the infant plaintiffs attended a concert and fireworks show held by the Town of Oyster Bay in a Town park. The infant plaintiffs allegedly were injured when they were struck by a car while crossing Merrick Road in the Town, at a site where there was neither a crosswalk nor any traffic control devices. The infant plaintiffs and their father commenced this action to recover damages for the personal injuries sustained by the infant plaintiffs and for loss of services on behalf of their father, against, among others, the Town. ...
>
> "In any negligence action, the threshold issue before the court is whether the defendant owed a legally recognized duty to the plaintiff" ... . "The existence and scope of an alleged tortfeasor's duty is, in the first instance, a legal question for determination by the courts" ... Under the particular circumstances of this case, the Town established, prima facie, that it owed no duty to the infant plaintiffs once they left Town property and decided to cross Merrick Road, which is owned by the County ... . **Janas v Town of Oyster Bay, 2018 NY Slip Op 06086, Second Dept 9-19-18**

NEGLIGENCE (TOWN DID NOT OWE A DUTY TO PLAINTIFF WHO WAS STRUCK BY A CAR CROSSING A STREET AFTER ATTENDING A TOWN FIREWORKS DISPLAY (SECOND DEPT))/MUNICIPAL LAW (TOWN DID NOT OWE A DUTY TO PLAINTIFF WHO WAS STRUCK BY A CAR CROSSING A STREET AFTER ATTENDING A TOWN FIREWORKS DISPLAY (SECOND DEPT))/TRAFFIC ACCIDENTS (TOWN DID NOT OWE A DUTY TO PLAINTIFF WHO WAS STRUCK BY A CAR CROSSING A STREET AFTER ATTENDING A TOWN FIREWORKS DISPLAY (SECOND DEPT))/PEDESTRIANS (TOWN DID NOT OWE A DUTY TO PLAINTIFF WHO WAS STRUCK BY A CAR CROSSING A STREET AFTER ATTENDING A TOWN FIREWORKS DISPLAY (SECOND DEPT))

NEGLIGENCE, MUNICIPAL LAW.

EXPOSED TREE ROOT IN TOWN PARK WAS AN OPEN AND OBVIOUS CONDITION, SLIP AND FALL ACTION PROPERLY DISMISSED (SECOND DEPT).

The Second Department determined that an exposed root in a town park, over which plaintiff tripped and fell, was an open and obvious condition that was not actionable:

> "A landowner has a duty to exercise reasonable care in maintaining [its] property in a safe condition under all of the circumstances, including the likelihood of injury to others, the seriousness of the potential injuries, the burden of avoiding the risk, and the foreseeability of a potential plaintiff's presence on the property" ... . A landowner, however has no duty to protect or warn against an open and obvious condition that is inherent or incidental to the nature of the property, and that could be reasonably anticipated by those using it ... .
>
> Here, the defendant established its prima facie entitlement to judgment as a matter of law dismissing the complaint by demonstrating that the exposed tree root was an open and obvious condition which was inherent or incidental to the nature of the property, and known to [plaintiff] prior to the subject accident ... . Moreover, the location of the exposed tree root in relation to the picnic table was both open and obvious and, as a matter of law, not inherently dangerous ... . **Ibragimov v Town of N. Hempstead, 2018 NY Slip Op 06231, Second Dept 9-26-18**

NEGLIGENCE (SLIP AND FALL, MUNICIPAL LAW, EXPOSED TREE ROOT IN TOWN PARK WAS AN OPEN AND OBVIOUS CONDITION, SLIP AND FALL ACTION PROPERLY DISMISSED (SECOND DEPT))/MUNICIPAL LAW (NEGLIGENCE, SLIP AND FALL, EXPOSED TREE ROOT IN TOWN PARK WAS AN OPEN AND OBVIOUS CONDITION, SLIP AND FALL ACTION PROPERLY DISMISSED (SECOND DEPT))/SLIP AND FALL (EXPOSED TREE ROOT IN TOWN PARK WAS AN OPEN AND OBVIOUS CONDITION, SLIP AND FALL ACTION PROPERLY DISMISSED (SECOND DEPT))/OPEN AND OBVIOUS (SLIP AND FALL, EXPOSED TREE ROOT IN TOWN PARK WAS AN OPEN AND OBVIOUS CONDITION, SLIP AND FALL ACTION PROPERLY DISMISSED (SECOND DEPT))/TREE ROOTS (SLIP AND FALL, EXPOSED TREE ROOT IN TOWN PARK WAS AN OPEN AND OBVIOUS CONDITION, SLIP AND FALL ACTION PROPERLY DISMISSED (SECOND DEPT))

NEGLIGENCE, MUNICIPAL LAW.

MOTION TO AMEND NOTICE OF CLAIM TO ADD THE ADDRESS OF PLAINTIFF'S SLIP AND FALL SHOULD HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined that plaintiff's motion for leave to amend her notice of claim in this slip and fall case should have been granted.

> "[I]n making a determination on the sufficiency of a notice of claim, a court's inquiry is not limited to the four corners of the notice of claim" ... . "A court may consider the testimony provided during an examination conducted pursuant to General Municipal Law § 50-h and any other evidence properly before it to correct a good faith and nonprejudicial technical mistake, omission, irregularity, or defect in the notice of claim" ... . Where the defendant is provided with such evidence correcting the notice of claim within a reasonable time after the accident, there is no prejudice... .
>
> Here, the defendant did not demonstrate, prima facie, that the notice of claim was insufficient. The information contained in the notice of claim, supplemented by the testimony of the plaintiff given a few months thereafter at the General Municipal Law § 50-h hearing, was sufficient to allow the defendant to conduct a meaningful investigation into the plaintiff's claim ... .
>
> Moreover, the defendant did not demonstrate, prima facie, that it would be prejudiced by the plaintiff's proposed amendment to the notice of claim, which was to state the address of the accident. The plaintiff had testified that there were witnesses to the accident. As such, the defendant could have ascertained the location of the accident " with a modicum of effort'" ... . Moreover, the defendant did not submit any evidence demonstrating that it was misled by the error, or that it conducted an investigation at the wrong location ... . Finally, even if the original notice of claim had contained the address of the defect, the plaintiff testified that the road was resurfaced approximately three weeks after her fall, which was prior to service of the notice of claim ... . **Ruark v City of Glen Cove, 2018 NY Slip Op 06286, Second Dept 9-26-18**

NEGLIGENCE (MOTION TO AMEND NOTICE OF CLAIM TO ADD THE ADDRESS OF PLAINTIFF'S SLIP AND FALL SHOULD HAVE BEEN GRANTED (SECOND DEPT))/MUNICIPAL LAW (NEGLIGENCE, NOTICE OF CLAIM, MOTION TO AMEND NOTICE OF CLAIM TO ADD THE ADDRESS OF PLAINTIFF'S SLIP AND FALL SHOULD HAVE BEEN GRANTED (SECOND DEPT))/SLIP AND FALL (MUNICIPAL LAW, MOTION TO AMEND NOTICE OF CLAIM TO ADD THE ADDRESS OF PLAINTIFF'S SLIP AND FALL SHOULD HAVE BEEN GRANTED (SECOND DEPT))/NOTICE OF CLAIM (NEGLIGENCE, SLIP AND FALL, MOTION TO AMEND NOTICE OF CLAIM TO ADD THE ADDRESS OF PLAINTIFF'S SLIP AND FALL SHOULD HAVE BEEN GRANTED (SECOND DEPT))

NEGLIGENCE, MUNICIPAL LAW.

DEFENDANT MUNICIPALITY DEMONSTRATED IT DID NOT RECEIVE WRITTEN NOTICE OF THE SIDEWALK DEFECT IN THIS SLIP AND FALL CASE, MUNICIPALITY'S MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined the municipality demonstrated it did not receive written notice of the sidewalk defect in this slip and fall case:

> Defendant met its initial burden on the motion by establishing that it did not receive prior written notice of the allegedly defective sidewalk as required by Syracuse City Charter § 8-115 ... . Contrary to plaintiff's contention, "it is well established that [a] verbal or telephonic communication to a municipal body that is reduced to writing [does not] satisfy a prior written notice requirement' " ... , and "it is not this Court's prerogative to overrule or disregard a precedent of the Court of Appeals" ... . Contrary to the court's determination, "constructive notice of the allegedly dangerous condition is not an exception to the requirement of prior written notice contained in the [Syracuse] City Charter"... .
>
> In opposition, plaintiff failed to raise a triable issue of fact concerning whether defendant "affirmatively created the defect through an act of negligence . . . that immediately result[ed] in the existence of a dangerous condition" ... , and mere "speculation that [defendant] created the allegedly dangerous condition is insufficient to defeat the motion" ... . **Hernandez v City of Syracuse, 2018 NY Slip Op 06351, Fourth Dept 9-28-18**

NEGLIGENCE (MUNICIPAL LAW, SLIP AND FALL, DEFENDANT MUNICIPALITY DEMONSTRATED IT DID NOT RECEIVE WRITTEN NOTICE OF THE SIDEWALK DEFECT IN THIS SLIP AND FALL CASE, MUNICIPALITY'S MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED (FOURTH DEPT))/MUNICIPAL LAW (SLIP AND FALL, DEFENDANT MUNICIPALITY DEMONSTRATED IT DID NOT RECEIVE WRITTEN NOTICE OF THE SIDEWALK DEFECT IN THIS SLIP AND FALL CASE, MUNICIPALITY'S MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED (FOURTH DEPT))/SLIP AND FALL (MUNICIPAL LAW, DEFENDANT MUNICIPALITY DEMONSTRATED IT DID NOT RECEIVE WRITTEN NOTICE OF THE SIDEWALK DEFECT IN THIS SLIP AND FALL CASE, MUNICIPALITY'S MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED (FOURTH DEPT))

NEGLIGENCE, MUNICIPAL LAW, UTILITIES.

ABUTTING PROPERTY OWNERS AND CITY NOT LIABLE FOR A LAMP POST BASE IN THE SIDEWALK OVER WHICH PLAINTIFF ALLEGEDLY TRIPPED, THERE WAS, HOWEVER, A QUESTION OF FACT WHETHER CON ED INSTALLED THE BASE AND WAS THEREFORE LIABLE (SECOND DEPT).

The Second Department determined the abutting property owners (Lomangino and Joro) and the city were entitled to summary judgment in this sidewalk slip and fall case. The raised concrete with bolts coming out of it, over which plaintiff allegedly tripped, was the base of a lamp post which was never replaced. The object was not part of the sidewalk, so the property owners were not required to maintain it. The city did not have written notice of the defect, so it was not liable. Con Ed, however, was not entitled to summary judgment because it submitted Lomangino's deposition in which he testified Con Ed had installed the object:

> Lomangino and Joro established, prima facie, that the defect upon which the plaintiff tripped was not part of the sidewalk within the meaning of Administrative Code of the City of New York § 7-210... . Lomangino and Joro also established that Lomangino did not create the allegedly dangerous condition, that the condition was not the result of his negligent repair, and that Lomangino did not make any special use of the subject area ... .
>
> The plaintiff also contends that the Supreme Court erred in granting that branch of the City defendants' motion which was for summary judgment dismissing the complaint insofar as asserted against them because (1) the prior written notice law is inapplicable, and (2) there are triable issues of fact as to whether the City defendants created the defective condition by knocking down the former lamppost during snowplow operations in the winter of 1998. "Administrative Code of the City of New York § 7-201(c) limits the City's duty of care over municipal streets and sidewalks by imposing liability only for those defects or hazardous conditions which its officials have been actually notified exist at a specified location"... . Contrary to the plaintiff's contention, the prior written notice rule includes "any encumbrances" or "attachments" to the sidewalk (Administrative Code § 7-201[c][2]), and thus encompasses the lamppost foundation at issue here ... . **Madonia v City of New York, 2018 NY Slip Op 06088, Second Dept 9-19-18**

NEGLIGENCE (ABUTTING PROPERTY OWNERS AND CITY NOT LIABLE FOR A LAMP POST BASE IN THE SIDEWALK OVER WHICH PLAINTIFF ALLEGEDLY TRIPPED, THERE WAS, HOWEVER, A QUESTION OF FACT WHETHER CON ED INSTALLED THE BASE AND WAS THEREFORE LIABLE (SECOND DEPT))/SLIP AND FALL (ABUTTING PROPERTY OWNERS AND CITY NOT LIABLE FOR A LAMP POST BASE IN THE SIDEWALK OVER WHICH PLAINTIFF ALLEGEDLY TRIPPED, THERE WAS, HOWEVER, A QUESTION OF FACT WHETHER CON ED INSTALLED THE BASE AND WAS THEREFORE LIABLE (SECOND DEPT))/SIDEWALKS (SLIP AND FALL, ABUTTING PROPERTY OWNERS AND CITY NOT LIABLE FOR A LAMP POST BASE IN THE SIDEWALK OVER WHICH PLAINTIFF ALLEGEDLY TRIPPED, THERE WAS, HOWEVER, A QUESTION OF FACT WHETHER CON ED INSTALLED THE BASE AND WAS THEREFORE LIABLE (SECOND DEPT))/MUNICIPAL LAW (SIDEWALKS, SLIP AND FALL, ABUTTING PROPERTY OWNERS AND CITY NOT LIABLE FOR A LAMP POST BASE IN THE SIDEWALK OVER WHICH PLAINTIFF ALLEGEDLY TRIPPED, THERE WAS, HOWEVER, A QUESTION OF FACT WHETHER CON ED INSTALLED THE BASE AND WAS THEREFORE LIABLE (SECOND DEPT))/UTILITIES (SLIP AND FALL, SIDEWALKS, ABUTTING PROPERTY OWNERS AND CITY NOT LIABLE FOR A LAMP POST BASE IN THE SIDEWALK OVER WHICH PLAINTIFF ALLEGEDLY TRIPPED, THERE WAS, HOWEVER, A QUESTION OF FACT WHETHER CON ED INSTALLED THE BASE AND WAS THEREFORE LIABLE (SECOND DEPT))

NEGLIGENCE, UTILITIES.

PLAINTIFF DID NOT RAISE A QUESTION OF FACT ABOUT THE GAS COMPANY'S LIABILITY FOR A GAS EXPLOSION TRIGGERED BY A TREE UPROOTED DURING A HURRICANE, GAS COMPANY'S MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the defendant gas company's (appellant's) motion for summary judgment in this negligence action should have been granted. During a hurricane a tree in plaintiff's neighbor's yard uprooted and disturbed a gas line, causing the neighbor's home to explode. Plaintiff allegedly was injured by debris from the explosion. The Second Department held that plaintiff had not raised a question of fact about whether the gas line was negligently maintained or whether the dangerous condition was created by the gas company:

> ... [T]he appellant established, prima facie, that it was not negligent in the installation of the subject gas service line ... . The appellant submitted evidence that the tree that uprooted was not present in 1936 when the gas service line was installed. This evidence included the deposition testimony of a former senior administrator for the appellant's predecessor, who testified that the presence of a tree would have rendered it impossible to install the line where it was placed in 1936. The appellant also submitted an affidavit of an arborist, who opined that the subject tree was a mature tree planted after the construction of the community was completed in 1938, based on the fact that nearly every other house on the subject block had alternating plantings of similar sized trees, thereby demonstrating that the trees were intentionally planted as part of the development of the community. ...
>
> Further, the appellant established, prima facie, that it was not negligent in maintaining the gas service line. The appellants' experts noted that the appellant complied with applicable regulations (see 49 CFR 192.723; 16 NYCRR 255.723) by performing a walking survey of the property on which the tree was located to detect leaks on July 28, 2010, within the three-year period prior to the explosion. The appellant submitted evidence demonstrating that no leaks were detected during that walking survey... . **Deitrick v Long Is. Power Auth., 2018 NY Slip Op 06079, Second Dept 9-19-18**

NEGLIGENCE (PLAINTIFF DID NOT RAISE A QUESTION OF FACT ABOUT THE GAS COMPANY'S LIABILITY FOR A GAS EXPLOSION TRIGGERED BY A TREE UPROOTED DURING A HURRICANE, GAS COMPANY'S MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED (SECOND DEPT))/UTILITIES (GAS EXPLOSION, PLAINTIFF DID NOT RAISE A QUESTION OF FACT ABOUT THE GAS COMPANY'S LIABILITY FOR A GAS EXPLOSION TRIGGERED BY A TREE UPROOTED DURING A HURRICANE, GAS COMPANY'S MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED (SECOND DEPT))/GAS (UTILITIES, NEGLIGENCE, PLAINTIFF DID NOT RAISE A QUESTION OF FACT ABOUT THE GAS COMPANY'S LIABILITY FOR A GAS EXPLOSION TRIGGERED BY A TREE UPROOTED DURING A HURRICANE, GAS COMPANY'S MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED (SECOND DEPT))

PARTNERSHIP LAW

PARTNERSHIP LAW, CONTRACT LAW.

NOTICE PURPORTING TO DISSOLVE A PARTNERSHIP WAS A NULLITY BECAUSE IT DID NOT COMPORT WITH THE RELEVANT PROVISIONS OF THE PARTNERSHIP AGREEMENT (FIRST DEPT).

The First Department determined the notice issued by two partners purporting to dissolve the partnership was a nullity because the notice did not comport with the relevant provisions of the partnership agreement:

> On October 15, 2015, two of the partners issued a notice purporting to withdraw from and dissolve the partnerships, pursuant to New York Partnership Law § 62(1)(b), "which," the notice said, "provides that a partnership is terminable at will on notice." * * *
>
> "New York's Partnership Law creates default provisions that fill gaps in partnership agreements, but where the agreement clearly states the means by which a partnership will dissolve, or other aspects of partnership dissolution, it is the agreement that governs the change in relations between partners and the future of the business" ... . Where, as here, a partnership agreement contains provisions governing the dissolution of the partnership by the will of the partners, ordinary contract principles apply ... , and a notice by a partner or partners to dissolve a partnership in contravention of the partnership agreement's dissolution provisions is a legal nullity and does not effect a dissolution of the partnership. **Wiener v Weissman, 2018 NY Slip Op 06205, First Dept 9-25-18**

PARTNERSHIP LAW (NOTICE PURPORTING TO DISSOLVE A PARTNERSHIP WAS A NULLITY BECAUSE IT DID NOT COMPORT WITH THE RELEVANT PROVISIONS OF THE PARTNERSHIP LAW (FIRST DEPT))/CONTRACT LAW (PARTNERSHIP LAW, NOTICE PURPORTING TO DISSOLVE A PARTNERSHIP WAS A NULLITY BECAUSE IT DID NOT COMPORT WITH THE RELEVANT PROVISIONS OF THE PARTNERSHIP LAW (FIRST DEPT))

PRODUCTS LIABILITY

PRODUCTS LIABILITY, NEGLIGENCE.

FAILURE TO WARN WAS NOT A SUBSTANTIAL CAUSE OF THE INJURIES AND DEATHS IN THIS PRODUCTS LIABILITY ACTION, DEFENDANTS' MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined that the manufacturer of a transformer base was entitled to summary judgment in this failure to warn action. Plaintiffs decedent fell asleep at the wheel, "drove up an embankment, struck a tree, rolled back down the embankment, and ran over a transformer base, which ruptured the gas tank of his vehicle, causing a fire. The decedent was unable to extricate himself and his two infant children from the vehicle, and they all died. "

> The plaintiff alleged that when a pole is attached to the transformer base, the transformer base is designed so that it will break away from its concrete base when it is struck by a vehicle in order to minimize damage to the vehicle. The plaintiff alleged that when the pole was removed from the subject transformer base prior to the accident, the transformer base lost this "breakaway" feature. The plaintiff alleged that the manufacturer of the transformer base and all other entities in the supply chain had a duty to warn the DOT that the transformer base would lose its breakaway capability if it was not attached to a pole. * * *
>
> To recover on a strict products liability cause of action based on inadequate warnings, a plaintiff must prove causation, i.e., that if adequate warnings had been provided, the product would not have been misused... . In other words, "[f]or there to be recovery for damages stemming from a product defective because of the inadequacy or absence of warnings, the failure to warn must have been a substantial cause of the events which produced the injury" ... . "Generally, it is for the trier of fact to determine the issue of proximate cause"... . "However, the issue of proximate cause may be decided as a matter of law where only one conclusion may be drawn from the established facts" ... .
>
> The transformer base at issue in this case was located beyond the clear zone, which is defined as "an area without fixed objects that is adjacent to a highway and intended to provide safe passage and a recovery area for vehicles that veer off the roadway" ... . [Defendants] demonstrated that, as per DOT policy, light poles located beyond the clear zone were not required to have breakaway transformer bases and that the loss of the breakaway feature would not have affected the DOT's decision to remove the light pole from the subject transformer base prior to the accident. Accordingly, [defendants] established, prima facie, that the failure to warn of the loss of the breakaway feature was not a substantial cause of the events which produced the injuries alleged here ... . **Reece v J.D. Posillico, Inc., 2018 NY Slip Op 06048, Second Dept 9-12-18**

PRODUCTS LIABILITY (FAILURE TO WARN WAS NOT A SUBSTANTIAL CAUSE OF THE INJURIES AND DEATHS IN THIS PRODUCTS LIABILITY ACTION, DEFENDANTS' MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED (SECOND DEPT))/FAILURE TO WARN (PRODUCTS LIABILITY, FAILURE TO WARN WAS NOT A SUBSTANTIAL CAUSE OF THE INJURIES AND DEATHS IN THIS PRODUCTS LIABILITY ACTION, DEFENDANTS' MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED (SECOND DEPT))/WARN, FAILURE TO (PRODUCTS LIABILITY, FAILURE TO WARN WAS NOT A SUBSTANTIAL CAUSE OF THE INJURIES AND DEATHS IN THIS PRODUCTS LIABILITY ACTION, DEFENDANTS' MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED (SECOND DEPT))/TRAFFIC ACCIDENTS (PRODUCTS LIABILITY, FAILURE TO WARN WAS NOT A SUBSTANTIAL CAUSE OF THE INJURIES AND DEATHS IN THIS PRODUCTS LIABILITY ACTION, DEFENDANTS' MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED (SECOND DEPT))/HIGHWAYS AND ROADS (PRODUCTS LIABILITY, FAILURE TO WARN WAS NOT A SUBSTANTIAL CAUSE OF THE INJURIES AND DEATHS IN THIS PRODUCTS LIABILITY ACTION, DEFENDANTS' MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED (SECOND DEPT))

REAL PROPERTY LAW

REAL PROPERTY LAW, CONTRACT LAW.

SELLER DID NOT DEMONSTRATE THE TIME OF THE ESSENCE LETTER GAVE BUYER SUFFICIENT TIME AND DID NOT DEMONSTRATE THE ABILITY TO CLOSE ON THAT DATE, SELLER'S MOTION FOR SUMMARY JUDGMENT IN THIS SPECIFIC PERFORMANCE ACTION PROPERLY DENIED (SECOND DEPT).

The Second Department determined (1) seller did not demonstrate the time of the essence letter gave buyer sufficient time and (2) seller did not demonstrate the ability to close on that date. Therefore seller's motion for summary judgment in this specific performance action was properly denied:

> In order to make time of the essence, "there must be a clear, distinct, and unequivocal notice to that effect giving the other party a reasonable time in which to act"... . "What constitutes a reasonable time for performance depends upon the facts and circumstances of the particular case" ... . "Included within a court's determination of reasonableness are the nature and object of the contract, the previous conduct of the parties, the presence or absence of good faith, the experience of the parties and the possibility of prejudice or hardship to either one, as well as the specific number of days provided for performance" ... . "The determination of reasonableness must by its very nature be determined on a case-by-case basis" ... . "[T]he question of what constitutes a reasonable time is usually a question of fact" ... .
>
> Here, the seller failed to establish, prima facie, that the time of the essence letter provided the buyer with a reasonable time within which to close ... . Furthermore, the seller's submissions failed to eliminate triable issues of fact as to whether the property was the subject of ongoing administrative proceedings, in violation of the contract of sale, which could be completely resolved at the scheduled closing or within a reasonable time thereafter ... . Under these circumstances, the seller failed to sustain its burden of demonstrating that it was ready, willing, and able to convey title in accordance with the contract of sale ... . **Rodrigues NBA, LLC v Allied XV, LLC, 2018 NY Slip Op 06129, Second Depy 9-19-18**

REAL PROPERTY LAW (SELLER DID NOT DEMONSTRATE THE TIME OF THE ESSENCE LETTER GAVE BUYER SUFFICIENT TIME AND DID NOT DEMONSTRATE THE ABILITY TO CLOSE ON THAT DATE, SELLER'S MOTION FOR SUMMARY JUDGMENT IN THIS SPECIFIC PERFORMANCE ACTION PROPERLY DENIED (SECOND DEPT))/CONTRACT LAW (REAL PROPERTY, SELLER DID NOT DEMONSTRATE THE TIME OF THE ESSENCE LETTER GAVE BUYER SUFFICIENT TIME AND DID NOT DEMONSTRATE THE ABILITY TO CLOSE ON THAT DATE, SELLER'S MOTION FOR SUMMARY JUDGMENT IN THIS SPECIFIC PERFORMANCE ACTION PROPERLY DENIED (SECOND DEPT))/PURCHASE AGREEMENT (REAL PROPERTY, SELLER DID NOT DEMONSTRATE THE TIME OF THE ESSENCE LETTER GAVE BUYER SUFFICIENT TIME AND DID NOT DEMONSTRATE THE ABILITY TO CLOSE ON THAT DATE, SELLER'S MOTION FOR SUMMARY JUDGMENT IN THIS SPECIFIC PERFORMANCE ACTION PROPERLY DENIED (SECOND DEPT))/TIME OF THE ESSENCE (REAL PROPERTY, SELLER DID NOT DEMONSTRATE THE TIME OF THE ESSENCE LETTER GAVE BUYER SUFFICIENT TIME AND DID NOT DEMONSTRATE THE ABILITY TO CLOSE ON THAT DATE, SELLER'S MOTION FOR SUMMARY JUDGMENT IN THIS SPECIFIC PERFORMANCE ACTION PROPERLY DENIED (SECOND DEPT))/SPECIFIC PERFORMANCE (REAL PROPERTY, SELLER DID NOT DEMONSTRATE THE TIME OF THE ESSENCE LETTER GAVE BUYER SUFFICIENT TIME AND DID NOT DEMONSTRATE THE ABILITY TO CLOSE ON THAT DATE, SELLER'S MOTION FOR SUMMARY JUDGMENT IN THIS SPECIFIC PERFORMANCE ACTION PROPERLY DENIED (SECOND DEPT))

REAL PROPERTY LAW, REAL PROPERTY ACTIONS AND PROCEEDINGS LAW.

CRITERIA FOR ADVERSE POSSESSION AND OUSTER AGAINST A COTENANT NOT MET (SECOND DEPT).

The Second Department determined defendant failed to meet the proof requirements for adverse possession and ouster against a cotenant:

> In order to establish his counterclaim for adverse possession, the defendant was required to prove, by clear and convincing evidence, that his possession of the property was (1) hostile and under claim of right; (2) actual; (3) open and notorious; (4) exclusive; and (5) continuous for the required statutory period... . The defendant could not establish that his possession of Lot 176 was under a claim of right, as he did not have a reasonable basis for the belief that the property belonged to him alone (see RPAPL 501[3]). Even assuming that the defendant had exclusive possession of Lot 176 and that he paid maintenance expenses on that property, these actions are insufficient to establish a claim of right for purposes of adverse possession as against a cotenant ... . RPAPL 541 creates a statutory presumption that a tenant in common in possession holds the property for the benefit of the cotenant ... . The presumption ceases only after the expiration of 10 years of exclusive occupancy of such tenant or upon ouster (see RPAPL 541...).
>
> Actual ouster usually requires a possessing cotenant to expressly communicate an intention to exclude or to deny the rights of cotenants. Ouster may be implied in cases where the acts of the possessing cotenant are so openly hostile that the nonpossessing cotenants can be presumed to know that the property is being adversely possessed against them ... . Here, the defendant did not commit acts constituting either an actual or implied ouster. Absent ouster, the period required by RPAPL 541 is 20 years of continuous exclusive possession before a cotenant may acquire full title by adverse possession ... . Even assuming that the defendant had exclusive possession of the property after the plaintiff went on disability in 1994, the required 20-year statutory period had not elapsed when the defendant asserted his counterclaim for adverse possession in his answer ... . **Fini v Marini, 2018 NY Slip Op 06003, Second Dept 9-12-18**

REAL PROPERTY LAW (CRITERIA FOR ADVERSE POSSESSION AND OUSTER AGAINST A COTENANT NOT MET (SECOND DEPT))/REAL PROPERTY ACTIONS AND PROCEEDINGS LAW (CRITERIA FOR ADVERSE POSSESSION AND OUSTER AGAINST A COTENANT NOT MET (SECOND DEPT))/COTENANTS (REAL PROPERTY LAW, REAL PROPERTY ACTIONS AND PROCEEDINGS LAW, CRITERIA FOR ADVERSE POSSESSION AND OUSTER AGAINST A COTENANT NOT MET (SECOND DEPT))/ADVERSE POSSESSION (CRITERIA FOR ADVERSE POSSESSION AND OUSTER AGAINST A COTENANT NOT MET (SECOND DEPT))/OUSTER (CRITERIA FOR ADVERSE POSSESSION AND OUSTER AGAINST A COTENANT NOT MET (SECOND DEPT))

RETIREMENT AND SOCIAL SECURITY LAW

RETIREMENT AND SOCIAL SECURITY LAW.

FIREFIGHTER'S FALL EXITING AN AMBULANCE WAS AN ACCIDENT WITHIN THE MEANING OF THE RETIREMENT AND SOCIAL SECURITY LAW (THIRD DEPT).

The Third Department determined the incident in which petitioner firefighter was injured constituted an accident within the meaning of the Retirement and Social Security Law:

> Petitioner testified that he had entered and exited ambulances hundreds of times during the course of his career as a firefighter. He was familiar with the folding step located at the rear of the ambulance and indicated that it was usually down and in an open position so that people could safely get in and out of the ambulance. He explained that the step was designed to flip up temporarily when a stretcher was being loaded into the ambulance to keep the wheels from striking the step and then to flip back down. Petitioner stated that, when he entered the ambulance on the date in question, the stretcher had already been removed, so he assumed that the step was down when he went to exit. He indicated that, as he was exiting the ambulance, he placed his foot on the edge of the step, which was a color similar to the bumper, while it was flipped up and flush against the bumper. When he did so, it collapsed downward, causing him to fall to the ground.
>
> Under these circumstances, the precipitating external event, i.e., the flipping down of the folding step, was sudden, unexpected and not a risk inherent in petitioner's ordinary job duties ... . Likewise, petitioner's fall was not attributable to inattention or a mere misstep , but rather to an apparently malfunctioning piece of equipment that was designed, under normal circumstances, to promote safety ... . Accordingly, respondent's denial of petitioner's application on the ground that the incident was not an accident within the meaning of the Retirement and Social Security Law is not supported by substantial evidence and must be annulled. **Matter of Loia v DiNapolil, 2018 NY Slip Op 05984, Third Dept 9-6-18**

RETIREMENT AND SOCIAL SECURITY LAW (FIREFIGHTER'S FALL EXITING AN AMBULANCE WAS AN ACCIDENT WITHIN THE MEANING OF THE RETIREMENT AND SOCIAL SECURITY LAW (THIRD DEPT))/FIREFIGHTERS (RETIREMENT AND SOCIAL SECURITY LAW, FIREFIGHTER'S FALL EXITING AN AMBULANCE WAS AN ACCIDENT WITHIN THE MEANING OF THE RETIREMENT AND SOCIAL SECURITY LAW (THIRD DEPT))

TRUSTS AND ESTATES

TRUSTS AND ESTATES, EVIDENCE.

SUMMARY JUDGMENT DISMISSING THE OBJECTION THAT THE DECEDENT LACKED TESTAMENTARY CAPACITY WAS PROPERLY GRANTED, THE INQUIRY IS CONFINED TO THE TIME AT WHICH THE WILL IS SIGNED, TWO DISSENTERS (THIRD DEPT).

The Third Department, over a two-justice partial dissent, determined that Surrogate's Court properly granted summary judgment dismissing the objection that the decedent lacked testamentary capacity.

> ... [E]vidence of decedent's diagnosis of dementia and declining cognitive abilities "does not, without more, create a question of fact on the issue of testamentary capacity, as the appropriate inquiry is whether the decedent was lucid and rational at the time the will was signed" ... .
>
> **From the dissent:**
>
> ... "[S]ummary judgment is rare in a contested probate proceeding and where, as here, there is conflicting evidence or the possibility of drawing conflicting inferences from undisputed evidence, summary judgment is inappropriate" ... . Although a diagnosis of dementia, standing alone, is insufficient to create a triable issue of fact regarding mental capacity ... , where, as here, there is proof of a progressively worsening mental condition, evidence of specific facts that occur close in time to execution is probative of testamentary capacity at the relevant time and is sufficient to establish a triable issue of fact ... . **Matter of Giaquinto, 2018 NY Slip Op 06065, Third Dept 9-12-18**

TRUSTS AND ESTATES (SUMMARY JUDGMENT DISMISSING THE OBJECTION THAT THE DECEDENT LACKED TESTAMENTARY CAPACITY WAS PROPERLY GRANTED, THE INQUIRY IS CONFINED TO THE TIME AT WHICH THE WILL IS SIGNED, TWO DISSENTERS (THIRD DEPT))/EVIDENCE (TRUSTS AND ESTATES, SUMMARY JUDGMENT DISMISSING THE OBJECTION THAT THE DECEDENT LACKED TESTAMENTARY CAPACITY WAS PROPERLY GRANTED, THE INQUIRY IS CONFINED TO THE TIME AT WHICH THE WILL IS SIGNED, TWO DISSENTERS (THIRD DEPT))/TESTAMENTARY CAPACITY (SUMMARY JUDGMENT DISMISSING THE OBJECTION THAT THE DECEDENT LACKED TESTAMENTARY CAPACITY WAS PROPERLY GRANTED, THE INQUIRY IS CONFINED TO THE TIME AT WHICH THE WILL IS SIGNED, TWO DISSENTERS (THIRD DEPT))/SUMMARY JUDGMENT (TRUSTS AND ESTATES, TESTAMENTARY CAPACITY, SUMMARY JUDGMENT DISMISSING THE OBJECTION THAT THE DECEDENT LACKED TESTAMENTARY CAPACITY WAS PROPERLY GRANTED, THE INQUIRY IS CONFINED TO THE TIME AT WHICH THE WILL IS SIGNED, TWO DISSENTERS (THIRD DEPT))

WORKERS' COMPENSATION

WORKERS' COMPENSATION.

NO SCHEDULE LOSS OF USE (SLU) BENEFITS CALCULATED BASED UPON THE LOSS OF USE OF THE KNEE AND ANKLE SEPARATELY, AS OPPOSED A CALCULATION BASED UPON THE LOSS OF USE OF THE LEG AS A WHOLE (THIRD DEPT).

The Third Department determined claimant was not entitled to schedule loss of use (SLU) benefits calculated on loss of use of his knee and ankle, as opposed to SLU calculated on loss of use of his leg generally:

> Workers' Compensation Law § 15 (3) sets forth SLU awards that the Board may make resulting from permanent injuries to certain body parts, losses of hearing or vision and facial disfigurements. This Court has observed that such awards are not given for particular injuries, but rather "for the residual physical and functional impairments" ... . Consistent with this observation, neither the statute nor the Board's guidelines lists the ankle or the knee as body parts lending themselves to separate SLU awards. Rather, impairments to these extremities are encompassed by awards for the loss of use of the leg ... . **Matter of Genduso v New York City Dept. of Educ., 2018 NY Slip Op 05981, Third Dept 9-6-18**

WORKERS' COMPENSATION (NO SCHEDULE LOSS OF USE (SLU) BENEFITS CALCULATED BASED UPON THE LOSS OF USE OF THE KNEE AND ANKLE SEPARATELY, AS OPPOSED A CALCULATION BASED UPON THE LOSS OF USE OF THE LEG AS A WHOLE (THIRD DEPT))

COURT OF APPEALS

CONSTITUTIONAL LAW (COA)

CONSTITUTIONAL LAW, ELECTION LAW, MUNICIPAL LAW, EMPLOYMENT LAW.

DEPARTMENT OF AGRICULTURE'S RULE PROHIBITING DEPARTMENT INSPECTORS FROM RUNNING FOR PUBLIC OFFICE IS NOT AN UNCONSTITUTIONAL RESTRICTION OF FREE SPEECH (CT APP).

The Court of Appeals, in a one-sentence memorandum, over a two-judge dissent, determined that the Department of Agriculture's regulation which prohibits employees responsible for inspecting agricultural facilities (like milk plants) from seeking public office (i.e., a county legislator) was not an unconstitutional restriction of free speech. **Matter of Spence v New York State Dept. of Agric. & Mkts., 2018 NY Slip Op 06071, CtApp 9-18-18**

CONSTITUTIONAL LAW (DEPARTMENT OF AGRICULTURE'S RULE PROHIBITING DEPARTMENT INSPECTORS FROM RUNNING FOR PUBLIC OFFICE IS NOT AN UNCONSTITUTIONAL RESTRICTION OF FREE SPEECH (CT APP))/ELECTION LAW (DEPARTMENT OF AGRICULTURE'S RULE PROHIBITING DEPARTMENT INSPECTORS FROM RUNNING FOR PUBLIC OFFICE IS NOT AN UNCONSTITUTIONAL RESTRICTION OF FREE SPEECH (CT APP))/MUNICIPAL LAW (DEPARTMENT OF AGRICULTURE'S RULE PROHIBITING DEPARTMENT INSPECTORS FROM RUNNING FOR PUBLIC OFFICE IS NOT AN UNCONSTITUTIONAL RESTRICTION OF FREE SPEECH (CT APP))/EMPLOYMENT LAW (DEPARTMENT OF AGRICULTURE'S RULE PROHIBITING DEPARTMENT INSPECTORS FROM RUNNING FOR PUBLIC OFFICE IS NOT AN UNCONSTITUTIONAL RESTRICTION OF FREE SPEECH (CT APP))/AGRICULTURE, DEPARTMENT OF (DEPARTMENT OF AGRICULTURE'S RULE PROHIBITING DEPARTMENT INSPECTORS FROM RUNNING FOR PUBLIC OFFICE IS NOT AN UNCONSTITUTIONAL RESTRICTION OF FREE SPEECH (CT APP))

CRIMINAL LAW (COA)

CRIMINAL LAW, EVIDENCE, APPEALS.

APPELLATE DIVISION APPLIED THE CORRECT CRITERIA IN ITS WEIGHT OF THE EVIDENCE ANALYSIS, DESPITE CITING SEVERAL DECISIONS THAT SHOULD NO LONGER BE FOLLOWED (CT APP).

The Court of Appeals, over a two-judge dissent, determined that the Appellate Division applied the correct analysis to its weight of the evidence review, despite the Appellate Division's citing of several decisions which should no longer be followed:

> The Appellate Division stated the correct standard of review when it concluded that, "viewing the evidence presented at trial in a neutral light . . . , and weighing the relative probative force of the conflicting testimony and evidence, as well as the relative strength of the conflicting inferences to be drawn therefrom, and according deference to the jury's opportunity to view the witnesses, hear their testimony and observe their demeanor, the jury was justified in finding that the People sustained their burden of disproving defendant's justification defense beyond a reasonable doubt" (157 AD3d 107, 116, 118 [1st Dept 2017]; see People v Romero, 7 NY3d 633, 643-644 [2006]; People v Mateo, 2 NY3d 383, 410 [2004], cert denied 542 US 946 [2004]; People v Bleakley, 69 NY2d 490, 495 [1987]). To the extent the Appellate Division cited to certain prior decisions (see 157 AD3d at 109, citing People v Castillo, 223 AD2d 481, 481 [1st Dept 1996]; People v Bartley, 219 AD2d 566, 567 [1st Dept 1995], lv denied 87 NY2d 898 [1st Dept 1995]; People v Corporan, 169 AD2d 643, 643 [1st Dept 1991], lv denied 77 NY2d 959 [1st Dept 1991]) containing language that is inconsistent with our more recent guidance regarding weight of the evidence (see People v Delamota, 18 NY3d 107, 116-117 [2011]), those decisions should not be followed.
>
> .. .[T]he Appellate Division applied the correct standard from Romero and Bleakley, which involves a "two-step approach" wherein the court must (1) "determine whether, based on all the credible evidence, an acquittal would not have been unreasonable[;]" and (2) "weigh the relative probative force of conflicting testimony and the relative strength of conflicting inferences that may be drawn from the testimony" ... . **People v Sanchez, 2018 NY Slip Op 06052, CtApp 9-13-18**

CRIMINAL LAW (APPELLATE DIVISION APPLIED THE CORRECT CRITERIA IN ITS WEIGHT OF THE EVIDENCE ANALYSIS, DESPITE CITING SEVERAL DECISIONS THAT SHOULD NO LONGER BE FOLLOWED (CT APP))/APPEALS (CRIMINAL LAW, APPELLATE DIVISION APPLIED THE CORRECT CRITERIA IN ITS WEIGHT OF THE EVIDENCE ANALYSIS, DESPITE CITING SEVERAL DECISIONS THAT SHOULD NO LONGER BE FOLLOWED (CT APP))/EVIDENCE (CRIMINAL LAW, APPEALS, APPELLATE DIVISION APPLIED THE CORRECT CRITERIA IN ITS WEIGHT OF THE EVIDENCE ANALYSIS, DESPITE CITING SEVERAL DECISIONS THAT SHOULD NO LONGER BE FOLLOWED (CT APP))/WEIGHT OF THE EVIDENCE (CRIMINAL LAW, APPEALS, APPELLATE DIVISION APPLIED THE CORRECT CRITERIA IN ITS WEIGHT OF THE EVIDENCE ANALYSIS, DESPITE CITING SEVERAL DECISIONS THAT SHOULD NO LONGER BE FOLLOWED (CT APP))

CRIMINAL LAW, EVIDENCE, APPEALS.

WHETHER THE POLICE RECEIVED VOLUNTARY CONSENT TO ENTER AN APARTMENT IS A MIXED QUESTION OF LAW AND FACT WHICH THE COURT OF APPEALS WILL NOT REVIEW, TWO CONCURRING OPINIONS DEALT WITH AN ISSUE WHICH WAS NOT RAISED, WHETHER THE POLICE WENT TO THE APARTMENT INTENDING TO MAKE A WARRANTLESS ARREST (CT APP).

The Court of Appeals, over two concurring opinions, determined that it could not review whether the police received voluntary consent to enter an apartment because it is a mixed question of law and fact and there is support in the record for the motion court's ruling. The concurring opinions dealt with an issue which was not raised below or on appeal---whether the police went to the apartment with the intent to make a warrantless arrest:

> The determination as to whether police received voluntary consent to enter the apartment is a mixed question of law and fact ... . "Although the voluntariness of the consent is open to dispute, our power to review affirmed findings of fact is limited. Since the finding of the trial court is supported by the record, we are precluded from upsetting it"... . As our concurring colleagues acknowledge, defendant did not contend below and does not contend on this appeal that his arrest was unlawful because the police went to his home with the intent of making a warrantless arrest. **People v Xochimitl, 2018 NY Slip Op 06053, CtApp 9-13-18**

CRIMINAL LAW (WHETHER THE POLICE RECEIVED VOLUNTARY CONSENT TO ENTER AN APARTMENT IS A MIXED QUESTION OF LAW AND FACT WHICH THE COURT OF APPEALS WILL NOT REVIEW, TWO CONCURRING OPINIONS DEALT WITH AN ISSUE WHICH WAS NOT RAISED, WHETHER THE POLICE WENT TO THE APARTMENT INTENDING TO MAKE A WARRANTLESS ARREST (CT APP))/EVIDENCE (CRIMINAL LAW, APPEALS, WHETHER THE POLICE RECEIVED VOLUNTARY CONSENT TO ENTER AN APARTMENT IS A MIXED QUESTION OF LAW AND FACT WHICH THE COURT OF APPEALS WILL NOT REVIEW, TWO CONCURRING OPINIONS DEALT WITH AN ISSUE WHICH WAS NOT RAISED, WHETHER THE POLICE WENT TO THE APARTMENT INTENDING TO MAKE A WARRANTLESS ARREST (CT APP))/APPEALS (CRIMINAL LAW, WHETHER THE POLICE RECEIVED VOLUNTARY CONSENT TO ENTER AN APARTMENT IS A MIXED QUESTION OF LAW AND FACT WHICH THE COURT OF APPEALS WILL NOT REVIEW, TWO CONCURRING OPINIONS DEALT WITH AN ISSUE WHICH WAS NOT RAISED, WHETHER THE POLICE WENT TO THE APARTMENT INTENDING TO MAKE A WARRANTLESS ARREST (CT APP))/MIXED QUESTION OF LAW AND FACT (APPEALS, CRIMINAL LAW, WHETHER THE POLICE RECEIVED VOLUNTARY CONSENT TO ENTER AN APARTMENT IS A MIXED QUESTION OF LAW AND FACT WHICH THE COURT OF APPEALS WILL NOT REVIEW, TWO CONCURRING OPINIONS DEALT WITH AN ISSUE WHICH WAS NOT RAISED, WHETHER THE POLICE WENT TO THE APARTMENT INTENDING TO MAKE A WARRANTLESS ARREST (CT APP))

MUNICIPAL LAW (COA)

\MUNICIPAL LAW, NEGLIGENCE.

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT IN PLAINTIFF FIREFIGHTER'S GENERAL MUNICIPAL LAW 205-a ACTION SHOULD NOT HAVE BEEN GRANTED (CT APP).

The Court of Appeals, in a brief memorandum decision with no discussion of the facts, determined the defendant's motion for summary judgment in this General Municipal Law 205-a action by a firefighter should not have been granted:

> With respect to the General Municipal Law § 205-a cause of action, defendant's submissions of a certificate of occupancy and an expert affidavit that did not sufficiently respond to plaintiffs' General Municipal Law § 205-a claim were insufficient, without more, to meet its prima facie burden as the party moving for summary judgment (see Powers v 31 E 31 LLC, 24 NY3d 84, 93 [2014]). **Viselli v Riverbay Corp., 2018 NY Slip Op 05968, CtApp 9-6-18**

MUNICIPAL LAW (DEFENDANT'S MOTION FOR SUMMARY JUDGMENT IN PLAINTIFF FIREFIGHTER'S GENERAL MUNICIPAL LAW 205-a ACTION SHOULD NOT HAVE BEEN GRANTED (CT APP))/NEGLIGENCE (MUNICIPAL LAW, DEFENDANT'S MOTION FOR SUMMARY JUDGMENT IN PLAINTIFF FIREFIGHTER'S GENERAL MUNICIPAL LAW 205-a ACTION SHOULD NOT HAVE BEEN GRANTED (CT APP))/FIREFIGHTERS (MUNICIPAL LAW, NEGLIGENCE, DEFENDANT'S MOTION FOR SUMMARY JUDGMENT IN PLAINTIFF FIREFIGHTER'S GENERAL MUNICIPAL LAW 205-a ACTION SHOULD NOT HAVE BEEN GRANTED (CT APP))

WORKERS' COMPENSATION (COA)

WORKERS' COMPENSATION.

APPELLATE DIVISION REVERSED, WORKERS' COMPENSATION BOARD'S FINDING THAT CLAIMANT HAS A PERMANENT PARTIAL DISABILITY WITH A 75% LOSS OF WAGE-EARNING CAPACITY REINSTATED (CT APP).

The Court of Appeals, in a brief memorandum decision with no discussion of the facts, reversed the Appellate Division and reinstated the decision of the Workers' Compensation Board which found claimant has a permanent partial disability with a 75% loss of wage-earning capacity. **Matter of Wohlfeil v Sharel Ventures, LLC, 2018 NY Slip Op 05967, CtApp 9-6-18**

WORKERS' COMPENSATION (APPELLATE DIVISION REVERSED, WORKERS' COMPENSATION BOARD'S FINDING THAT CLAIMANT HAS A PERMANENT PARTIAL DISABILITY WITH A 75% LOSS OF WAGE-EARNING CAPACITY REINSTATED (CT APP))

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