NEW YORK APPELLATE DIGEST, LLC

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

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Major Categories Addressed In The Digest This Month:

Appellate Division:

Administrative Law, Animal Law, Arbitration, Attorneys, Civil Procedure, Contract Law, Cooperatives, Criminal Law, Defamation, Disciplinary Hearings, Education-School Law, Eminent Domain, Employment Law, Environmental Law, Family Law, Foreclosure, Freedom Of Information Law (Foil), Insurance Law, Labor Law-Construction Law, Medical Malpractice, Mental Hygiene Law, Municipal Law, Negligence, Products Liability, Real Estate, Real Property Law, Real Property Actions And Proceedings Law,Tax Law, Unemployment Insurance, Zoning.

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THE INDEX (P. 131) SERVES AS AN OUTLINE OF THE ISSUES ADDRESSED BY THE COURTS THIS MONTH. ALL THE BROAD CATEGORIES (I.E. "CRIMINAL LAW," "NEGLIGENCE," "INSURANCE") ARE COLLECTED IN ONE PLACE IN THE INDEX. ALL NARROWER ISSUES (I.E., "SLIP AND FALL, "TRAFFIC ACCIDENTS") ARE COLLECTED IN ONE PLACE IN THE INDEX AS WELL. USE YOUR PDF READER "NUMBER BOX" TO MOVE TO AND FROM THE INDEX (P. 131). THERE IS ALSO A LINK TO THE INDEX AT THE TOP OF EACH PAGE.

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APPELLATE DIVISION

ADMINISTRATIVE LAW

ADMINISTRATIVE LAW, MUNICIPAL LAW, CORPORATION LAW.

ALTHOUGH PETITIONER-ATTORNEY FORMED THE CORPORATIONS WHICH OWNED THE BUILDINGS ON WHICH HE POSTED SIGNS ADVERTISING HIS LAW PRACTICE, THE ADVERTISING VIOLATED THE NYC ADMINISTRATIVE CODE (FIRST DEPT).

The First Department, in a full-fledged opinion by Justice Tom, over a two-justice dissenting opinion, determined that petitioner (Ciafone), an attorney, who used several buildings owned by his corporate entities for exterior signs promoting his law practice, engaged in unauthorized outdoor advertising and was properly penalized. Ciafone argued that the corporate entitles formed by him which owned the buildings were not "others" within the meaning of the NYC Administrative Code provision which defined an outdoor advertising company as an entity which makes advertising space available to "others:"

> Administrative Code § 28-502.1 states that an OAC [outdoor advertising company] is "[a] person, corporation, partnership or other business entity that as a part of the regular conduct of its business engages in or, by way of advertising, promotions or other methods, holds itself out as engaging in the outdoor advertising business." An Outdoor Advertising Business is "[t]he business of selling, leasing, marketing, managing, or otherwise either directly or indirectly making space on signs situated on buildings and premises within the city of New York available to others for advertising purposes, whether such advertising directs attention to a business, profession, commodity, service or entertainment conducted, sold, or offered on the same or a different zoning lot . . . ." ... .
>
> ... [P]etitioners, which are corporations, made space on signs available to Ciafone's law practice (a professional corporation), a separate and distinct entity. Of course, it is fundamental that individuals, corporations, and partnerships are each recognized as separate legal entities, and in this statutory context constitute "others" regardless of the common principal ownership or connection between the entities. Indeed, "[a]s a general rule, the law treats corporations as having an existence separate and distinct from that of their shareholders"... . ...
>
> ECB [New York City Environmental Control Board] rationally rejected petitioners' argument that they had not made the signs available to "others." The record shows that the building owners are not Ciafone or Ciafone P.C, but separate corporate entities, and that the advertising signs promoted legal services by Ciafone, not any services of the corporate entities that own the buildings. Contrary to petitioners' argument, there is no basis for overturning ECB's determination that, in these circumstances, the advertising space was made available "to others." Nor is ECB's interpretation of the statutory language arbitrary or irrational. **Matter of Franklin St. Realty Corp. v NYC Envtl. Control Bd., 2018 NY Slip Op 05407, First Dept 7-19-18**

ADMINISTRATIVE LAW (MUNICIPAL LAW, ALTHOUGH PETITIONER-ATTORNEY FORMED THE CORPORATIONS WHICH OWNED THE BUILDINGS ON WHICH HE POSTED SIGNS ADVERTISING HIS LAW PRACTICE, THE ADVERTISING VIOLATED THE NYC ADMINISTRATIVE CODE (FIRST DEPT))/MUNICIPAL LAW (NYC, ALTHOUGH PETITIONER-ATTORNEY FORMED THE CORPORATIONS WHICH OWNED THE BUILDINGS ON WHICH HE POSTED SIGNS ADVERTISING HIS LAW PRACTICE, THE ADVERTISING VIOLATED THE NYC ADMINISTRATIVE CODE (FIRST DEPT))/CORPORATION LAW (MUNICIPAL LAW, ALTHOUGH PETITIONER-ATTORNEY FORMED THE CORPORATIONS WHICH OWNED THE BUILDINGS ON WHICH HE

POSTED SIGNS ADVERTISING HIS LAW PRACTICE, THE ADVERTISING VIOLATED THE NYC ADMINISTRATIVE CODE (FIRST DEPT))/ADVERTISING (SIGNS, MUNICIPAL LAW, ALTHOUGH PETITIONER-ATTORNEY FORMED THE CORPORATIONS WHICH OWNED THE BUILDINGS ON WHICH HE POSTED SIGNS ADVERTISING HIS LAW PRACTICE, THE ADVERTISING VIOLATED THE NYC ADMINISTRATIVE CODE (FIRST DEPT))

ANIMAL LAW

ANIMAL LAW.

DEFENDANTS DEMONSTRATED THEY DID NOT HAVE NOTICE OF THE DOG'S VICIOUS PROPENSITIES IN THIS DOG-BITE CASE, DEFENDANTS' MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendants' motion for summary judgment in this dog-bite case should have been granted. The defendants demonstrated they did not have notice of the dog's vicious propensities:

> Aside from the limited exception set forth in Hastings v Sauve (21 NY3d 122, 125-126) regarding a farm animal that strays from the place where it is kept... , which is not at issue here, "New York does not recognize a common-law negligence cause of action to recover damages for injuries caused by a domestic animal" ... .
> To recover upon a theory of strict liability in tort for damages caused by a dog, a plaintiff must establish that the dog had vicious propensities, and that the owner of the dog knew or should have known of the dog's vicious propensities ... . Vicious propensities include the propensity to do any act that might endanger the safety of the persons and property of others ... . "Evidence tending to prove that a dog has vicious propensities includes a prior attack, the dog's tendency to growl, snap, or bare its teeth, the manner in which the dog was restrained, and a proclivity to act in a way that puts others at risk of harm" ... .
>
> Here, the defendants established their prima facie entitlement to judgment as a matter of law by demonstrating that their dog did not have vicious propensities and, in any event, that they neither knew nor should have known that their dog allegedly had vicious propensities ... . **Cintorrino v Rowsell, 2018 NY Slip Op 05446, Second Dept 7-25-18**

ANIMAL LAW (DOG-BITE, DEFENDANTS DEMONSTRATED THEY DID NOT HAVE NOTICE OF THE DOG'S VICIOUS PROPENSITIES IN THIS DOG-BITE CASE, DEFENDANTS' MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED (SECOND DEPT))/DOG-BITE (DEFENDANTS DEMONSTRATED THEY DID NOT HAVE NOTICE OF THE DOG'S VICIOUS PROPENSITIES IN THIS DOG-BITE CASE, DEFENDANTS' MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED (SECOND DEPT))

ARBITRATION

ARBITRATION, EMPLOYMENT LAW, CONTRACT LAW.

THE ARBITRATOR'S DECISION TO OVERLOOK AN INSTANCE OF TARDINESS (ONE MINUTE LATE DUE TO A DISABLED TRAIN BLOCKING TRAFFIC) WHICH OTHERWISE WOULD REQUIRE THE GRIEVANT'S TERMINATION WAS NOT IRRATIONAL AND DID NOT EXCEED THE ARBITRATOR'S ENUMERATED POWERS (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined that the arbitrator's finding there was just cause to overlook the grievant's one-minute tardiness for work. The collective bargaining agreement (CBA) included an eight-step disciplinary procedure for tardiness. Essentially eight instances of tardiness led to termination. Grievant had seven instances of tardiness at the time she was one minute late. She was delayed by a disabled train and she had called 10 minutes before her starting time to say she might be late because of the train:

> We agree with respondent that the arbitrator's award was not irrational. An award is irrational "if there is no proof whatever to justify" it... , and "[a]n arbitration award must be upheld when the arbitrator offer[s] even a barely colorable justification for the outcome reached' " ... . Here, there is a colorable justification for the arbitrator's determination. The attendance policy was a no-fault, straightforward progression of discipline that would be imposed for every incident of tardiness. Nevertheless, the CBA also had the "just cause" provision, and the arbitrator concluded that strict adherence to the attendance policy could be rejected in exceptional cases. ...
>
> We also agree with respondent that the arbitrator did not exceed a specifically enumerated limitation on his power. The CBA provided that the arbitrator "shall have no power or authority to add to, subtract from, modify, change, or alter any provisions of this Agreement." Contrary to petitioner's contention, the arbitrator did not impose any new requirement upon petitioner before it could discipline its employees and thus did not add to or alter the CBA. As explained above, the arbitrator determined, under the specific facts of this case, that the penalty of termination could not be upheld. The arbitrator did not adopt any new rules that petitioner must follow in future disciplinary cases, and we therefore reject petitioner's slippery slope argument ... . **Matter of Lift Line, Inc. (Amalgamated Tr. Union, Local 282), 2018 NY Slip Op 05102, Fourth Dept 7-6-18**

ARBITRATION (THE ARBITRATOR'S DECISION TO OVERLOOK AN INSTANCE OF TARDINESS (ONE MINUTE LATE DUE TO A DISABLED TRAIN BLOCKING TRAFFIC) WHICH OTHERWISE WOULD REQUIRE THE GRIEVANT'S TERMINATION WAS NOT IRRATIONAL AND DID NOT EXCEED THE ARBITRATOR'S ENUMERATED POWERS (FOURTH DEPT))/EMPLOYMENT LAW (ARBITRATION, THE ARBITRATOR'S DECISION TO OVERLOOK AN INSTANCE OF TARDINESS (ONE MINUTE LATE DUE TO A DISABLED TRAIN BLOCKING TRAFFIC) WHICH OTHERWISE WOULD REQUIRE THE GRIEVANT'S TERMINATION WAS NOT IRRATIONAL AND DID NOT EXCEED THE ARBITRATOR'S ENUMERATED POWERS (FOURTH DEPT))/CONTRACT LAW (COLLECTIVE BARGAINING AGREEMENT, THE ARBITRATOR'S DECISION TO OVERLOOK AN INSTANCE OF TARDINESS (ONE MINUTE LATE DUE TO A DISABLED TRAIN BLOCKING TRAFFIC) WHICH OTHERWISE WOULD REQUIRE THE GRIEVANT'S TERMINATION WAS NOT IRRATIONAL AND DID NOT EXCEED THE ARBITRATOR'S ENUMERATED POWERS (FOURTH DEPT))/COLLECTIVE BARGAINING AGREEMENT (THE ARBITRATOR'S DECISION TO OVERLOOK AN INSTANCE OF TARDINESS (ONE MINUTE LATE DUE TO A DISABLED TRAIN BLOCKING TRAFFIC) WHICH OTHERWISE WOULD REQUIRE THE GRIEVANT'S TERMINATION WAS NOT IRRATIONAL AND DID NOT EXCEED THE ARBITRATOR'S ENUMERATED POWERS (FOURTH DEPT))

ARBITRATION, MUNICIPAL LAW, ATTORNEYS, CIVIL PROCEDURE.

COURT EXCEEDED ITS AUTHORITY WHEN IT VACATED AN ARBITRATION AWARD, COURT DID NOT ACQUIRE PERSONAL JURISDICTION OVER A POLICE OFFICER SEEKING MUNICIPAL LAW 207-c BENEFITS BECAUSE THE OFFICER NEVER AUTHORIZED THE UNION ATTORNEY TO REPRESENT HER (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, over a dissent, determined Supreme Court exceeded its authority when it vacated an arbitration award and the court did not acquire personal jurisdiction over the police officer (Lee) seeking Municipal Law 207-c benefits in another arbitration proceeding handled by a union lawyer:

> Lee established that the court failed to acquire personal jurisdiction over her in the proceeding to confirm the arbitration award ... because the City never properly served her ... . Nor did the court acquire personal jurisdiction over Lee by the unauthorized appearance of the Union's attorney "on behalf of Katherine Lee." Contrary to the City's contention, there is no evidence that Lee expressly or implicitly authorized the Union's attorney to represent her at any stage of the proceedings. ...
>
> We further conclude that the court erred in sua sponte vacating its prior order and judgment, which confirmed the arbitration award ... , and directing further arbitration. ... A court has authority to "vacate its own judgment for sufficient reason and in the interests of substantial justice" ... . That authority, however, is not unlimited... . "A court's inherent power to exercise control over its judgments is not plenary, and should be resorted to only to relieve a party from judgments taken through [fraud,] mistake, inadvertence, surprise or excusable neglect" ... .
>
> In vacating the order and judgment, ... the court "exceeded the narrow bounds within which courts are authorized to alter [arbitration] awards" ... . None of the bases in CPLR 7511 (b) or (c) for vacating or modifying an arbitration award applies to the arbitrator's failure to award the City a specific dollar amount for the value of benefits received by Lee, and the court had no power to disturb the award apart from the grounds set forth in those subdivisions ... . **Matter of City of Syracuse (Lee), 2018 NY Slip Op 05077, Third Dept 7-6-18**

ARBITRATION (MUNICIPAL LAW, COURT EXCEEDED ITS AUTHORITY WHEN IT VACATED AN ARBITRATION AWARD, COURT DID NOT ACQUIRE PERSONAL JURISDICTION OVER A POLICE OFFICER SEEKING MUNICIPAL LAW 207-c BENEFITS BECAUSE THE OFFICER NEVER AUTHORIZED THE UNION ATTORNEY TO REPRESENT HER (FOURTH DEPT))/MUNICIPAL LAW (COURT EXCEEDED ITS AUTHORITY WHEN IT VACATED AN ARBITRATION AWARD, COURT DID NOT ACQUIRE PERSONAL JURISDICTION OVER A POLICE OFFICER SEEKING MUNICIPAL LAW 207-c BENEFITS BECAUSE THE OFFICER NEVER AUTHORIZED THE UNION ATTORNEY TO REPRESENT HER (FOURTH DEPT))/ATTORNEYS (MUNICIPAL LAW, COURT EXCEEDED ITS AUTHORITY WHEN IT VACATED AN ARBITRATION AWARD, COURT DID NOT ACQUIRE PERSONAL JURISDICTION OVER A POLICE OFFICER SEEKING MUNICIPAL LAW 207-c BENEFITS BECAUSE THE OFFICER NEVER AUTHORIZED THE UNION ATTORNEY TO REPRESENT HER (FOURTH DEPT))/CIVIL PROCEDURE (ARBITRATION, COURT EXCEEDED ITS AUTHORITY WHEN IT VACATED AN ARBITRATION AWARD, COURT DID NOT ACQUIRE PERSONAL JURISDICTION OVER A POLICE OFFICER SEEKING MUNICIPAL LAW 207-c BENEFITS BECAUSE THE OFFICER NEVER AUTHORIZED THE UNION ATTORNEY TO REPRESENT HER (FOURTH DEPT))

ATTORNEYS

ATTORNEYS.

FEE-SHARING AGREEMENT VIOLATED JUDICIARY LAW 491 AND COULD NOT BE ENFORCED BY A COURT (SECOND DEPT).

The Second Department determined the fee sharing agreement violated Judiciary Law 491 and could not be enforced by a court:

> With respect to the merits of the appeal, Judiciary Law § 491 prohibits any person, partnership, or corporation from sharing any fee or compensation charged or received by an attorney-at-law, in consideration of having placed in the hands of such attorney-at-law a claim or demand of any kind ... .
>
> Under the purported fee-sharing agreement, the plaintiffs would provide the defendant attorneys with proprietary information regarding potential clients, investigate claims, interview potential plaintiffs, and otherwise assist with litigation. In exchange, the defendant attorneys would pay the plaintiffs 20% of their fee for each case. This purported fee-sharing agreement whereby the plaintiffs attempt to recover from the defendant attorneys is illegal, and the plaintiffs are proscribed from seeking the assistance of the courts in enforcing it ... . **Ballan v Sirota, 2018 NY Slip Op 05014, Second Dept 7-5-18**

ATTORNEYS (FEE-SHARING, FEE-SHARING AGREEMENT VIOLATED JUDICIARY LAW 491 AND COULD NOT BE ENFORCED BY A COURT (SECOND DEPT))/FEE-SHARING AGREEMENT (ATTORNEYS, FEE-SHARING AGREEMENT VIOLATED JUDICIARY LAW 491 AND COULD NOT BE ENFORCED BY A COURT (SECOND DEPT))/JUDICIARY LAW 491 (ATTORNEYS, FEE-SHARING AGREEMENT VIOLATED JUDICIARY LAW 491 AND COULD NOT BE ENFORCED BY A COURT (SECOND DEPT))

ATTORNEYS.

ATTORNEY'S MOTION TO WITHDRAW BECAUSE OF CLIENT'S FAILURE TO PAY AND LACK OF COOPERATION SHOULD HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the appellant-attorney's motion for permission to withdraw from representing plaintiff-client should have been granted. The attorney had submitted upwards of $40,000 in bills. Plaintiff did not pay any of the bills and refused to provide documents requested by the attorney. In addition, plaintiff did not oppose the attorney's motion to withdraw:

> " The decision to grant or deny permission for counsel to withdraw lies within the discretion of the trial court, and the court's decision should not be overturned absent a showing of an improvident exercise of discretion'" ... . "An attorney may be permitted to withdraw from employment where a client refuses to pay reasonable legal fees" ... . "Additionally, an attorney may withdraw from representing a client if the client fails to cooperate in the representation or otherwise renders the representation unreasonably difficult for the lawyer to carry out employment effectively'" ... . **Applebaum v Einstein, 2018 NY Slip Op 05437, Second Dept 7-25-18**

ATTORNEYS (ATTORNEY'S MOTION TO WITHDRAW BECAUSE OF CLIENT'S FAILURE TO PAY AND LACK OF COOPERATION SHOULD HAVE BEEN GRANTED (SECOND DEPT))/CLIENTS (ATTORNEYS, ATTORNEY'S MOTION TO WITHDRAW BECAUSE OF CLIENT'S FAILURE TO PAY AND LACK OF COOPERATION SHOULD HAVE BEEN GRANTED (SECOND DEPT))

ATTORNEYS, PRIVILEGE.

MEDICAL JOURNAL KEPT BY PLAINTIFF'S DECEDENT AFTER SHE WAS INJURED AT THE DIRECTION OF HER ATTORNEY PROTECTED BY ATTORNEY-CLIENT PRIVILEGE, MEDICATION LOG IS NOT PROTECTED (THIRD DEPT).

The Third Department determined that a medical journal kept by plaintiff's decedent after an injury at the direction of her attorney was protected by attorney-client privilege, where as a record of her medications were not:

> Upon examination of the notes turned over to Supreme Court for an in camera review, we conclude that they are a mixed collection, some of which are shielded by the attorney-client privilege and some of which are not. The three-page portion labeled "injury journal" is, as described by decedent's attorney, a seamless report of the incident at the health club and the medical care that decedent received shortly thereafter. The medication log is on a separate page and includes other notes of a personal nature. We agree with Supreme Court that the medication log was made for the purpose of keeping a medical record rather than as a confidential communication made for the purpose of legal services. Accordingly, in the absence of evidence that the medication log constituted a communication of legal character between decedent and [her attorney], plaintiff may not invoke the attorney-client privilege to shield its disclosure ... . **Wrubleski v Mary Imogene Bassett Hosp., 2018 NY Slip Op 05256, Third Dept 7-12-18**

ATTORNEYS (PRIVILEGE, MEDICAL JOURNAL KEPT BY PLAINTIFF'S DECEDENT AFTER SHE WAS INJURED AT THE DIRECTION OF HER ATTORNEY PROTECTED BY ATTORNEY-CLIENT PRIVILEGE, MEDICATION LOG IS NOT PROTECTED (THIRD DEPT))/PRIVILEGE (ATTORNEY-CLIENT, MEDICAL JOURNAL KEPT BY PLAINTIFF'S DECEDENT AFTER SHE WAS INJURED AT THE DIRECTION OF HER ATTORNEY PROTECTED BY ATTORNEY-CLIENT PRIVILEGE, MEDICATION LOG IS NOT PROTECTED (THIRD DEPT))/INJURY LOG (ATTORNEY-CLIENT PRIVILEGE, MEDICAL JOURNAL KEPT BY PLAINTIFF'S DECEDENT AFTER SHE WAS INJURED AT THE DIRECTION OF HER ATTORNEY PROTECTED BY ATTORNEY-CLIENT PRIVILEGE, MEDICATION LOG IS NOT PROTECTED (THIRD DEPT))

CIVIL PROCEDURE

CIVIL PROCEDURE.

ALLEGED TORTIOUS ACTS DID NOT OCCUR IN NEW YORK, OUT OF STATE DEFENDANT DID NOT HAVE SUFFICIENT CONTACT WITH NEW YORK TO MEET DUE PROCESS STANDARDS, NO PERSONAL JURISDICTION (FIRST DEPT).

The First Department noted that personal jurisdiction pursuant to CPLR 3O2 (a)(3)(ii) stems from tortious acts which occur in New York, not financial effects felt in New York, and due process requires that an out-of-state defendant have minimum contacts with New York. Neither requirement was met here:

> A plaintiff relying on CPLR 302(a)(3)(ii) must show that (1) the defendant committed a tortious act outside New York; (2) the cause of action arose from that act; (3) the tortious act caused an injury to a person or property in New York; (4) the defendant expected or should reasonably have expected the act to have consequences in New York; and (5) the defendant derived substantial revenue from interstate or international commerce ... . In New York, "the situs of commercial injury is where the original critical events associated with the action or dispute took place, not where any financial loss or damages occurred" ... .
>
> Here, the "original critical events" giving rise to plaintiff's injury were the 2012 and 2015 Transfers. As those transfers occurred outside of New York and did not involve New York assets, the situs of injury was not in New York... . That plaintiff felt economic injury in New York, alone, is an insufficient basis to confer jurisdiction. ...
>
> Furthermore, even if the elements of CPLR 302(a)(3)(ii) have been met, asserting personal jurisdiction would not comport with due process ... . To comport with due process, "[t]here must also be proof that the out-of-state defendant has the requisite minimum contacts' with the forum state and that the prospect of defending a suit here comports with traditional notions of fair play and substantial justice,'" ... . The "minimum contacts" requirement is satisfied where "a defendant's conduct and connection with the forum State' are such that it should reasonably anticipate being haled into court there'" ... . Under the "effects test" theory of personal jurisdiction, where the conduct that forms the basis for the plaintiff's claims takes place entirely out of forum, and the only relevant jurisdictional contacts with the forum are the harmful effects suffered by the plaintiff, a court must inquire whether the defendant "expressly aimed" its conduct at the forum ... . Here, defendants did not expressly aim their tortious conduct at New York, and the foreseeability that the alleged fraudulent conveyances would injure plaintiff in New York is insufficient ... . **Deutsche Bank AG v Vik, 2018 NY Slip Op 04958, First Dept 7-3-18**

CIVIL PROCEDURE (PERSONAL JURISDICTION, ALLEGED TORTIOUS ACTS DID NOT OCCUR IN NEW YORK, OUT OF STATE DEFENDANT DID NOT HAVE SUFFICIENT CONTACT WITH NEW YORK TO MEET DUE PROCESS STANDARDS, NO PERSONAL JURISDICTION (FIRST DEPT))/CPLR 302 (PERSONAL JURISDICTION, ALLEGED TORTIOUS ACTS DID NOT OCCUR IN NEW YORK, OUT OF STATE DEFENDANT DID NOT HAVE SUFFICIENT CONTACT WITH NEW YORK TO MEET DUE PROCESS STANDARDS, NO PERSONAL JURISDICTION (FIRST DEPT))/PERSONAL JURISDICTION (CIVIL PROCEDURE, CPLR 302, ALLEGED TORTIOUS ACTS DID NOT OCCUR IN NEW YORK, OUT OF STATE DEFENDANT DID NOT HAVE SUFFICIENT CONTACT WITH NEW YORK TO MEET DUE PROCESS STANDARDS, NO PERSONAL JURISDICTION (FIRST DEPT))/TORTIOUS ACTS (PERSONAL JURISDICTION, ALLEGED TORTIOUS ACTS DID NOT OCCUR IN NEW YORK, OUT OF STATE DEFENDANT DID NOT HAVE SUFFICIENT CONTACT WITH NEW YORK TO MEET DUE PROCESS STANDARDS, NO PERSONAL JURISDICTION (FIRST DEPT))/MINIMUM CONTACTS (PERSONAL JURISDICTION, ALLEGED TORTIOUS ACTS DID NOT OCCUR IN NEW YORK, OUT OF STATE DEFENDANT DID NOT HAVE SUFFICIENT CONTACT WITH NEW YORK TO MEET DUE PROCESS STANDARDS, NO PERSONAL JURISDICTION (FIRST DEPT))/DUE PROCESS (PERSONAL JURISDICTION, ALLEGED TORTIOUS ACTS DID NOT OCCUR IN NEW YORK, OUT OF STATE DEFENDANT DID NOT HAVE SUFFICIENT CONTACT WITH NEW YORK TO MEET DUE PROCESS STANDARDS, NO PERSONAL JURISDICTION (FIRST DEPT))/OUT OF STATE DEFENDANT (PERSONAL JURISDICTION, ALLEGED TORTIOUS ACTS DID NOT OCCUR IN NEW YORK, OUT OF STATE DEFENDANT DID NOT HAVE SUFFICIENT CONTACT WITH NEW YORK TO MEET DUE PROCESS STANDARDS, NO PERSONAL JURISDICTION (FIRST DEPT))

CIVIL PROCEDURE.

MOTION TO VACATE DEFAULT JUDGMENT MORE THAN A YEAR AFTER THE JUDGMENT WAS ENTERED SHOULD NOT HAVE BEEN GRANTED, ALTHOUGH THE COURT HAD THE POWER TO VACATE THE JUDGMENT IN THE INTEREST OF JUSTICE, DEFENDANT DID NOT OFFER A REASONABLE EXCUSE (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendant nursing home's motion to vacate a default judgment, made more than a year after the default judgment, should not have been granted. The nursing home did not offer a reasonable excuse:

> A defendant moving pursuant to CPLR 5015(a)(1) to vacate a default in appearing or answering the complaint must demonstrate both a reasonable excuse for the default and a potentially meritorious defense to the action ... . "Such motion must be made within one year after service of a copy of the . . . order with written notice of its entry upon the moving party'" . "[A]lthough the Supreme Court has the inherent authority to vacate an order in the interest of justice even where the statutory one-year period under CPLR 5015(a)(1) has expired"... , here, the nursing home failed to demonstrate a reasonable excuse for its delay in moving to vacate the order ... . In any event, the nursing home's claim that its failure to appear or answer the complaint was caused by an internal mishandling of the pleadings was unsubstantiated and insufficient to constitute a reasonable excuse for its default ... . **Hairston v Marcus Garvey Residential Rehab Pavilion, Inc., 2018 NY Slip Op 05021, Second Dept 7-5-18**

CIVIL PROCEDURE (DEFAULT JUDGMENT, MOTION TO VACATE DEFAULT JUDGMENT MORE THAN A YEAR AFTER THE JUDGMENT WAS ENTERED SHOULD NOT HAVE BEEN GRANTED, ALTHOUGH THE COURT HAD THE POWER TO VACATE THE JUDGMENT IN THE INTEREST OF JUSTICE, DEFENDANT DID NOT OFFER A REASONABLE EXCUSE (SECOND DEPT))/CPLR 5015 (DEFAULT JUDGMENT, MOTION TO VACATE DEFAULT JUDGMENT MORE THAN A YEAR AFTER THE JUDGMENT WAS ENTERED SHOULD NOT HAVE BEEN GRANTED, ALTHOUGH THE COURT HAD THE POWER TO VACATE THE JUDGMENT IN THE INTEREST OF JUSTICE, DEFENDANT DID NOT OFFER A REASONABLE EXCUSE (SECOND DEPT))/DEFAULT JUDGMENT (MOTION TO VACATE DEFAULT JUDGMENT MORE THAN A YEAR AFTER THE JUDGMENT WAS ENTERED SHOULD NOT HAVE BEEN GRANTED, ALTHOUGH THE COURT HAD THE POWER TO VACATE THE JUDGMENT IN THE INTEREST OF JUSTICE, DEFENDANT DID NOT OFFER A REASONABLE EXCUSE (SECOND DEPT))

CIVIL PROCEDURE.

MOTION TO VACATE DEFAULT JUDGMENT SHOULD HAVE BEEN GRANTED, PLAINTIFF'S ATTORNEY'S ILLNESS WAS A REASONABLE EXCUSE FOR FAILURE TO APPEAR AT ORAL ARGUMENT, MERITORIOUS ACTION DEMONSTRATED, FIRST MOTION DENIED WITHOUT PREJUDICE, SECOND MOTION ON THE SAME GROUNDS WAS NOT, THEREFORE, PRECLUDED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined that the plaintiff's motion to vacate a default judgment entered when plaintiff did not appear at the argument on defendant's motion to dismiss should have been granted. Plaintiff's attorney's illness was a reasonable excuse. The court noted that, although only one motion to vacate a default judgment is usually allowed, because Supreme Court denied the first motion "without prejudice" the second motion on the same grounds was not precluded:

> ... [T]he plaintiff's excuse that its attorney failed to appear at oral argument due to illness, which excuse was corroborated by medical documentation, was reasonable under the circumstances presented ... .. In addition, the plaintiff demonstrated a potentially meritorious opposition to [defendant's] motion ... .
>
> A party ordinarily is precluded from making a second motion to vacate a default on the same ground raised in a prior motion to vacate the default ... . However, because the Supreme Court denied the plaintiff's first motion to vacate "without prejudice," the plaintiff was not precluded from making a second motion to vacate its default on the same grounds raised in its prior motion. **World O World Corp. v Anoufrieva, 2018 NY Slip Op 05075, Second Dept 7-5-18**

CIVIL PROCEDURE (MOTION TO VACATE DEFAULT JUDGMENT SHOULD HAVE BEEN GRANTED, PLAINTIFF'S ATTORNEY'S ILLNESS WAS A REASONABLE EXCUSE FOR FAILURE TO APPEAR AT ORAL ARGUMENT, MERITORIOUS ACTION DEMONSTRATED, FIRST MOTION DENIED WITHOUT PREJUDICE, SECOND MOTION ON THE SAME GROUNDS WAS NOT, THEREFORE, PRECLUDED (SECOND DEPT))/CPLR 5015 (MOTION TO VACATE DEFAULT JUDGMENT SHOULD HAVE BEEN GRANTED, PLAINTIFF'S ATTORNEY'S ILLNESS WAS A REASONABLE EXCUSE FOR FAILURE TO APPEAR AT ORAL ARGUMENT, MERITORIOUS ACTION DEMONSTRATED, FIRST MOTION DENIED WITHOUT PREJUDICE, SECOND MOTION ON THE SAME GROUNDS WAS NOT, THEREFORE, PRECLUDED (SECOND DEPT))/DEFAULT (MOTION TO VACATE DEFAULT JUDGMENT SHOULD HAVE BEEN GRANTED, PLAINTIFF'S ATTORNEY'S ILLNESS WAS A REASONABLE EXCUSE FOR FAILURE TO APPEAR AT ORAL ARGUMENT, MERITORIOUS ACTION DEMONSTRATED, FIRST MOTION DENIED WITHOUT PREJUDICE, SECOND MOTION ON THE SAME GROUNDS WAS NOT, THEREFORE, PRECLUDED (SECOND DEPT))/WITHOUT PREJUDICE (CIVIL PROCEDURE, MOTION TO VACATE DEFAULT JUDGMENT SHOULD HAVE BEEN GRANTED, PLAINTIFF'S ATTORNEY'S ILLNESS WAS A REASONABLE EXCUSE FOR FAILURE TO APPEAR AT ORAL ARGUMENT, MERITORIOUS ACTION DEMONSTRATED, FIRST MOTION DENIED WITHOUT PREJUDICE, SECOND MOTION ON THE SAME GROUNDS WAS NOT, THEREFORE, PRECLUDED (SECOND DEPT))

CIVIL PROCEDURE.

THE FACT THAT DEFENDANT'S REPRESENTATIVE'S SIGNATURE AND THE JURAT APPEARED ON AN OTHERWISE BLANK PAGE SEPARATE FROM THE AFFIDAVIT WAS NOT A GROUND FOR DENIAL OF DEFENDANT'S UNOPPOSED MOTION FOR SUMMARY JUDGMENT (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendant's unopposed motion for summary judgment should not have been denied on the ground that defendant's representative's signature and the jurat appeared on a page separate from the rest of defendant's affidavit:

> The Supreme Court denied the motion on the ground that, in an affidavit of Charles Dunne, an authorized representative of the defendant, on which the defendant primarily relied in support of its motion, Dunne's signature and the jurat appeared on a separate, otherwise blank page. The defendant appeals.
>
> The Supreme Court erred in denying the defendant's unopposed motion on the ground that Dunne's affidavit was not properly signed. The fact that Dunne's signature and the jurat appeared on a page separate from the rest of the affidavit did not render it inadmissible. If anything, the separate signature page amounted to an irregularity that the court should have disregarded, as doing so did not prejudice the plaintiff (see CPLR 2001...), which was deemed to have waived the issue by failing to timely raise it after service of the defendant's motion papers ... . **Status Gen. Dev., Inc. v 501 Broadway Partners, LLC, 2018 NY Slip Op 05217, Second Dept 7-11-18**

CIVIL PROCEDURE (THE FACT THAT DEFENDANT'S REPRESENTATIVE'S SIGNATURE AND THE JURAT APPEARED ON AN OTHERWISE BLANK PAGE SEPARATE FROM THE AFFIDAVIT WAS NOT A GROUND FOR DENIAL OF DEFENDANT'S UNOPPOSED MOTION FOR SUMMARY JUDGMENT (SECOND DEPT))/AFFIDAVITS (CIVIL PROCEDURE, THE FACT THAT DEFENDANT'S REPRESENTATIVE'S SIGNATURE AND THE JURAT APPEARED ON AN OTHERWISE BLANK PAGE SEPARATE FROM THE AFFIDAVIT WAS NOT A GROUND FOR DENIAL OF DEFENDANT'S UNOPPOSED MOTION FOR SUMMARY JUDGMENT (SECOND DEPT))/CPLR 2001 (THE FACT THAT DEFENDANT'S REPRESENTATIVE'S SIGNATURE AND THE JURAT APPEARED ON AN OTHERWISE BLANK PAGE SEPARATE FROM THE AFFIDAVIT WAS NOT A GROUND FOR DENIAL OF DEFENDANT'S UNOPPOSED MOTION FOR SUMMARY JUDGMENT (SECOND DEPT))/SUMMARY JUDGMENT (CIVIL PROCEDURE, THE FACT THAT DEFENDANT'S REPRESENTATIVE'S SIGNATURE AND THE JURAT APPEARED ON AN OTHERWISE BLANK PAGE SEPARATE FROM THE AFFIDAVIT WAS NOT A GROUND FOR DENIAL OF DEFENDANT'S UNOPPOSED MOTION FOR SUMMARY JUDGMENT (SECOND DEPT))/JURAT (CIVIL PROCEDURE, THE FACT THAT DEFENDANT'S REPRESENTATIVE'S SIGNATURE AND THE JURAT APPEARED ON AN OTHERWISE BLANK PAGE SEPARATE FROM THE AFFIDAVIT WAS NOT A GROUND FOR DENIAL OF DEFENDANT'S UNOPPOSED MOTION FOR SUMMARY JUDGMENT (SECOND DEPT))

CIVIL PROCEDURE.

DISCOVERY VIOLATIONS WARRANTED DISMISSAL OF THE COMPLAINT (SECOND DEPT).

The Second Department determined plaintiff's complaint was properly dismissed because of plaintiff's discovery violations:

> "The nature and degree of the sanction to be imposed on a motion pursuant to CPLR 3126 is within the broad discretion of the motion court" ... . " The drastic remedy of striking a pleading is warranted where the party's failure to comply with court-ordered discovery is willful and contumacious'" ... . "The willful or contumacious character of a party's conduct can be inferred from the party's repeated failure to respond to demands or to comply with discovery orders" ... and the absence of a reasonable excuse for these failures ... . " Absent an improvident exercise of discretion, the determination to impose sanctions for conduct that frustrates the purpose of the CPLR should not be disturbed'" ... .
>
> Here, the willful and contumacious character of the plaintiff's conduct can be inferred, initially, from his inadequate verified bill of particulars and response to the notice for discovery and inspection, both served nearly one year after service of the demand for a verified bill of particulars and the notice for discovery and inspection. Thereafter, the plaintiff failed to comply with the Supreme Court's directive at the January 8, 2016, conference to produce any outstanding discovery within 30 days, and this failure to comply was followed by further noncompliance after the February 24, 2016, conference. Moreover, the plaintiff failed to respond in any manner to the other discovery demands. **Westervelt v Westervelt, 2018 NY Slip Op 05519, Second Dept 7-25-18**

CIVIL PROCEDURE (DISCOVERY VIOLATIONS WARRANTED DISMISSAL OF THE COMPLAINT (SECOND DEPT))/DISCOVERY (DISCOVERY VIOLATIONS WARRANTED DISMISSAL OF THE COMPLAINT (SECOND DEPT))

CIVIL PROCEDURE, CRIMINAL LAW, APPEALS.

NEW YORK CITY DEPARTMENT OF CORRECTIONS WAS A NECESSARY PARTY TO THIS JAIL TIME CALCULATION PROCEEDING, ISSUE CAN BE RAISED FOR THE FIRST TIME ON APPEAL, MATTER REVERSED AND REMITTED (THIRD DEPT).

The Third Department, reversing Supreme Court, determined the New York City Department of Corrections (NYCDOC) was a necessary party in this proceeding contesting a jail time credit calculation. Although the issue was not raised below, a necessary-party issue can be raised for the first time on appeal but may not be corrected by an appellate court.:

> NYCDOC is a necessary party to this proceeding "because petitioner is seeking additional credit for jail time spent in correctional facilities in New York City [under NYCDOC] and, if petitioner is successful, [NYCDOC's] commissioner will be required, pursuant to . . . Correction Law [§ 600-a], to recompute petitioner's jail time and deliver a certified transcript of the record of petitioner's jail time"... .
>
> While respondent did not raise this issue in Supreme Court, it is well-established that "'a court may always consider whether there has been a failure to join a necessary party', including on its own motion, and for the first time on appeal" ... . As this Court "may not, on its own initiative, add or direct the addition of a party[,] . . . the matter must be remitted to Supreme Court to order [NYCDOC] to be joined if [it] is subject to the jurisdiction of the court and, if not, to permit [its] joinder by stipulation, motion or otherwise and, if joinder cannot be effectuated, the court must then determine whether the proceeding should be permitted to proceed in the absence of [a] necessary part[y]" ... . **Matter of Velez v New York State, Dept. of Corr. & Community Supervision, 2018 NY Slip Op 05243, Third Dept 7-11-18**

CIVIL PROCEDURE (NECESSARY PARTY, NEW YORK CITY DEPARTMENT OF CORRECTIONS WAS A NECESSARY PARTY TO THIS JAIL TIME CALCULATION PROCEEDING, ISSUE CAN BE RAISED FOR THE FIRST TIME ON APPEAL, MATTER REVERSED AND REMITTED (THIRD DEPT))/CPLR 1001 (NECESSARY PARTY, NEW YORK CITY DEPARTMENT OF CORRECTIONS WAS A NECESSARY PARTY TO THIS JAIL TIME CALCULATION PROCEEDING, ISSUE CAN BE RAISED FOR THE FIRST TIME ON APPEAL, MATTER REVERSED AND REMITTED (THIRD DEPT))/NECESSARY PARTY (CIVIL PROCEDURE, APPEALS, NEW YORK CITY DEPARTMENT OF CORRECTIONS WAS A NECESSARY PARTY TO THIS JAIL TIME CALCULATION PROCEEDING, ISSUE CAN BE RAISED FOR THE FIRST TIME ON APPEAL, MATTER REVERSED AND REMITTED (THIRD DEPT))/CRIMINAL LAW (JAIL TIME CREDIT CALCULATION, (NECESSARY PARTY, NEW YORK CITY DEPARTMENT OF CORRECTIONS WAS A NECESSARY PARTY TO THIS JAIL TIME CALCULATION PROCEEDING, ISSUE CAN BE RAISED FOR THE FIRST TIME ON APPEAL, MATTER REVERSED AND REMITTED (THIRD DEPT))/NEW YORK CITY DEPARTMENT OF CORRECTIONS (NYCDOC) (JAIL TIME CREDIT CALCULATION, (NECESSARY PARTY, NEW YORK CITY DEPARTMENT OF CORRECTIONS WAS A NECESSARY PARTY TO THIS JAIL TIME CALCULATION PROCEEDING, ISSUE CAN BE RAISED FOR THE FIRST TIME ON APPEAL, MATTER REVERSED AND REMITTED (THIRD DEPT))/APPEALS (NECESSARY PARTY, NEW YORK CITY DEPARTMENT OF CORRECTIONS WAS A NECESSARY PARTY TO THIS JAIL TIME CALCULATION PROCEEDING, ISSUE CAN BE RAISED FOR THE FIRST TIME ON APPEAL, MATTER REVERSED AND REMITTED (THIRD DEPT))

CIVIL PROCEDURE. DEBTOR-CREDITOR, LANDLORD-TENANT.

TENANT DID NOT VIOLATE THE COURT ORDER DIRECTING HIM TO PAY RENT DUE UNDER THE LEASE TO THE LANDLORD'S CREDITOR, TENANT STOPPED PAYING THE RENT TO THE CREDITOR ONLY AFTER THE LANDLORD TERMINATED THE LEASE (SECOND DEPT).

The Second Department, reversing Supreme Court, determined petitioner did not demonstrate the tenant, Cohen, violated a court order directing Cohen to pay his rent directly to the petitioner, who had a judgment against Cohen's landlord. The court order required that Cohen pay any rent due under the lease to petitioner (CPLR 5225). However, the landlord terminated Cohen's lease. Therefore Cohen did not not violate the order and should not have been held in civil contempt:

> Here, the petitioner failed to establish that Cohen disobeyed the ... order, which required him to "pay rent to petitioner as due under the lease" ... . J... Since Cohen's lease ... expired on July 31, 2015, on August 1, 2015, Cohen became a holdover tenant. Damages attributable to Cohen's continued occupation of the premises were not due "under the lease," but rather, were due as use and occupancy for the reasonable value of the premises ... . "The obligation to pay for use and occupancy does not arise from an underlying contract between the landlord and the occupant" ... . "Rather, an occupant's duty to pay the landlord for its use and occupancy of the premises is predicated upon the theory of quantum meruit, and is imposed by law for the purpose of bringing about justice without reference to the intention of the parties" ... . Accordingly, the motion to hold Cohen in contempt should have been denied. **Matter of First Am. Tit. Ins. Co. v Cohen, 2018 NY Slip Op 05306, Second Dept 7-18-18**

CIVIL PROCEDURE (DEBTOR-CREDITOR, CONTEMPT, LANDLORD-TENANT, TENANT DID NOT VIOLATE THE COURT ORDER DIRECTING HIM TO PAY RENT DUE UNDER THE LEASE TO THE LANDLORD'S CREDITOR, TENANT STOPPED PAYING THE RENT TO THE CREDITOR ONLY AFTER THE LANDLORD TERMINATED THE LEASE (SECOND DEPT))/CPLR 5225 (DEBTOR-CREDITOR, CONTEMPT, LANDLORD-TENANT, TENANT DID NOT VIOLATE THE COURT ORDER DIRECTING HIM TO PAY RENT DUE UNDER THE LEASE TO THE LANDLORD'S CREDITOR, TENANT STOPPED PAYING THE RENT TO THE CREDITOR ONLY AFTER THE LANDLORD TERMINATED THE LEASE (SECOND DEPT))/DEBTOR-CREDITOR (CONTEMPT, LANDLORD-TENANT, TENANT DID NOT VIOLATE THE COURT ORDER DIRECTING HIM TO PAY RENT DUE UNDER THE LEASE TO THE LANDLORD'S CREDITOR, TENANT STOPPED PAYING THE RENT TO THE CREDITOR ONLY AFTER THE LANDLORD TERMINATED THE LEASE (SECOND DEPT))/CPLR 5225 (DEBTOR-CREDITOR, CONTEMPT, LANDLORD-TENANT, TENANT DID NOT VIOLATE THE COURT ORDER DIRECTING HIM TO PAY RENT DUE UNDER THE LEASE TO THE LANDLORD'S CREDITOR, TENANT STOPPED PAYING THE RENT TO THE CREDITOR ONLY AFTER THE LANDLORD TERMINATED THE LEASE (SECOND DEPT))/LANDLORD-TENANT (CONTEMPT, LANDLORD-TENANT, TENANT DID NOT VIOLATE THE COURT ORDER DIRECTING HIM TO PAY RENT DUE UNDER THE LEASE TO THE LANDLORD'S CREDITOR, TENANT STOPPED PAYING THE RENT TO THE CREDITOR ONLY AFTER THE LANDLORD TERMINATED THE LEASE (SECOND DEPT))/CPLR 5225 (DEBTOR-CREDITOR, CONTEMPT, LANDLORD-TENANT, TENANT DID NOT VIOLATE THE COURT ORDER DIRECTING HIM TO PAY RENT DUE UNDER THE LEASE TO THE LANDLORD'S CREDITOR, TENANT STOPPED PAYING THE RENT TO THE CREDITOR ONLY AFTER THE LANDLORD TERMINATED THE LEASE (SECOND DEPT))/CONTEMPT (DEBTOR-CREDITOR, LANDLORD-TENANT, TENANT DID NOT VIOLATE THE COURT ORDER DIRECTING HIM TO PAY RENT DUE UNDER THE LEASE TO THE LANDLORD'S CREDITOR, TENANT STOPPED PAYING THE RENT TO THE CREDITOR ONLY AFTER THE LANDLORD TERMINATED THE LEASE (SECOND DEPT))

CIVIL PROCEDURE, EMPLOYMENT LAW, LABOR LAW.

AN UNPLEADED AFFIRMATIVE DEFENSE MAY BE SUCCESSFULLY RAISED TO DEFEAT A MOTION FOR SUMMARY JUDGMENT (FOURTH DEPT).

The Fourth Department noted that an unpleaded affirmative defense may be successfully raised to defeat a motion for summary judgment:

> Defendants allegedly embezzled over $100,000 from plaintiffs, their alleged former employers. Plaintiffs then commenced this action for fraud, conversion, and breach of fiduciary duty. Defendants both counterclaimed for, inter alia, slander per se and the violations of Labor Law §§ 162 (2), 191 (3), 195 (1) (a), and 195 (5). Defendant Carrie Massaro also counterclaimed for a violation of section 198 and for unpaid overtime under the Federal Fair Labor Standards Act (FLSA) ... . * * *
>
> ... [T]he affidavit of plaintiff .... raises triable issues of fact regarding their potential entitlement to the affirmative defense provided by [Labor Law] section 198 (1-b) (ii). Contrary to defendants' contention, " [a]n unpleaded affirmative defense may be invoked to defeat a motion for summary judgment' " ... . Thus, although the court properly refused to dismiss the [Labor Law] section 195 (1) (a) counterclaims, the court erred in granting defendants summary judgment on those same counterclaims given plaintiffs' potential entitlement to the affirmative defense under [Labor Law] section 198 (1-b) (ii) ... . **Salahuddin v Craver, 2018 NY Slip Op 05429, Fourth Dept 7-25-18**

CIVIL PROCEDURE (AN UNPLEADED AFFIRMATIVE DEFENSE MAY BE SUCCESSFULLY RAISED TO DEFEAT A MOTION FOR SUMMARY JUDGMENT (FOURTH DEPT))/SUMMARY JUDGMENT (AN UNPLEADED AFFIRMATIVE DEFENSE MAY BE SUCCESSFULLY RAISED TO DEFEAT A MOTION FOR SUMMARY JUDGMENT (FOURTH DEPT))/AFFIRMATIVE DEFENSE (SUMMARY JUDGMENT, AN UNPLEADED AFFIRMATIVE DEFENSE MAY BE SUCCESSFULLY RAISED TO DEFEAT A MOTION FOR SUMMARY JUDGMENT (FOURTH DEPT))/EMPLOYMENT LAW (AN UNPLEADED AFFIRMATIVE DEFENSE MAY BE SUCCESSFULLY RAISED TO DEFEAT A MOTION FOR SUMMARY JUDGMENT (FOURTH DEPT))/LABOR LAW (AN UNPLEADED AFFIRMATIVE DEFENSE MAY BE SUCCESSFULLY RAISED TO DEFEAT A MOTION FOR SUMMARY JUDGMENT (FOURTH DEPT))

CIVIL PROCEDURE, ENVIRONMENTAL LAW, CORPORATION LAW.

ALTHOUGH THE FOREIGN CORPORATION MIGHT BE LIABLE FOR CONTAMINATION OF PLAINTIFFS' PROPERTY, THE CORPORATION HAS NO PRESENT CONTACTS IN NEW YORK AND THEREFORE IS NOT SUBJECT TO THE COURT'S JURISDICTION (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined that New York does not have jurisdiction over a foreign corporation which might be liable for contamination of plaintiffs' property, but which has no present contacts in New York:

> It is undisputed that defendant, a foreign corporation with no present contacts in this State, is not subject to personal jurisdiction in New York under either CPLR 301 or 302 (a) (see Semenetz v Sherling & Walden, Inc., 21 AD3d 1138, 1139-1140 [3d Dept 2005], affd on other grounds 7 NY3d 194 [2006]). Nevertheless, plaintiffs contend that personal jurisdiction exists over defendant because it ostensibly bears successor liability for a predecessor corporation that was itself subject to personal jurisdiction in New York. The Third Department, however, expressly rejected that jurisdictional theory in Semenetz (see id. at 1140). The "successor liability rule[s]," wrote the Semenetz court, "deal with the concept of tort liability, not jurisdiction. When and if [successor liability] is found applicable, the corporate successor would be subject to liability for the torts of its predecessor in any forum having in personam jurisdiction over the successor, but the [successor liability rules] do not and cannot confer such jurisdiction over the successor in the first instance" (id.) **BRG Corp. v Chevron U.S.A., Inc., 2018 NY Slip Op 05425, Fourth Dept 7-25-18**

CIVIL PROCEDURE (JURISDICTION, ALTHOUGH THE FOREIGN CORPORATION MIGHT BE LIABLE FOR CONTAMINATION OF PLAINTIFFS' PROPERTY, THE CORPORATION HAS NO PRESENT CONTACTS IN NEW YORK AND THEREFORE IS NOT SUBJECT TO THE COURT'S JURISDICTION (FOURTH DEPT))/ENVIRONMENTAL LAW (CIVIL PROCEDURE, ALTHOUGH THE FOREIGN CORPORATION MIGHT BE LIABLE FOR CONTAMINATION OF PLAINTIFFS' PROPERTY, THE CORPORATION HAS NO PRESENT CONTACTS IN NEW YORK AND THEREFORE IS NOT SUBJECT TO THE COURT'S JURISDICTION (FOURTH DEPT))/CORPORATION LAW (CIVIL PROCEDURE, ALTHOUGH THE FOREIGN CORPORATION MIGHT BE LIABLE FOR CONTAMINATION OF PLAINTIFFS' PROPERTY, THE CORPORATION HAS NO PRESENT CONTACTS IN NEW YORK AND THEREFORE IS NOT SUBJECT TO THE COURT'S JURISDICTION (FOURTH DEPT))

CIVIL PROCEDURE, EVIDENCE, APPEALS.

ALTHOUGH, ON A PRIOR APPEAL, THE APPEALS COURT FOUND THAT AN OFFER OF PROOF OF PRIOR ACCIDENTS WAS INADEQUATE, AT THE SUBSEQUENT TRIAL THE COURT SHOULD HAVE CONSIDERED THE PLAINTIFF'S OFFER OF EVIDENCE OF PRIOR ACCIDENTS, THE APPELLATE RULING WAS NOT THE LAW OF THE CASE (THIRD DEPT).

The Third Department, reversing Supreme Court, determined the evidentiary ruling in a prior appeal was not the law of the case and plaintiff's attempt to introduce the same type of evidence in the subsequent trial should have been considered on the merits:

> This matter comes before us for a fourth time ... . In our most recent decision, we affirmed that part of an order of Supreme Court which, after granting a mistrial, precluded plaintiff from offering evidence of prior accidents in a second trial ... . Thereafter, plaintiff again moved to admit evidence of prior similar accidents or, in the alternative, for a hearing on the application. Supreme Court denied the motion, effectively concluding that our prior decision constitutes law of the case. Plaintiff now appeals.
>
> We reverse. The underlying motion in limine speaks to an evidentiary ruling and the law of the case doctrine generally speaks to questions of law, not discretionary rulings of the court ... . That said, we are mindful that "'[a]n appellate court's resolution of an issue on a prior appeal constitutes the law of the case and is binding on the Supreme Court, as well as on the appellate court . . . [and] operates to foreclose reexamination of [the] question absent a showing of subsequent evidence or change of law'"... .
>
> Although defendants contend otherwise, our previous decision was not a definitive ruling as to whether the conditions underlying the prior accidents that plaintiff seeks to admit were substantially similar to the accident at issue. To the contrary, we simply determined that the limited offer of proof that plaintiff then made was inadequate ... . As such, the subject motion should have been addressed on the merits ... . **O'Buckley v County of Chemung, 2018 NY Slip Op 05003, Third Dept 7-5-18**

CIVIL PROCEDURE (APPEALS, LAW OF THE CASE, EVIDENCE, ALTHOUGH, ON A PRIOR APPEAL, THE APPEALS COURT FOUND THAT AN OFFER OF PROOF OF PRIOR ACCIDENTS WAS INADEQUATE, AT THE SUBSEQUENT TRIAL THE COURT SHOULD HAVE CONSIDERED THE PLAINTIFF'S OFFER OF EVIDENCE OF PRIOR ACCIDENTS, THE APPELLATE RULING WAS NOT THE LAW OF THE CASE (THIRD DEPT))/EVIDENCE (APPEALS, LAW OF THE CASE, ALTHOUGH, ON A PRIOR APPEAL, THE APPEALS COURT FOUND THAT AN OFFER OF PROOF OF PRIOR ACCIDENTS WAS INADEQUATE, AT THE SUBSEQUENT TRIAL THE COURT SHOULD HAVE CONSIDERED THE PLAINTIFF'S OFFER OF EVIDENCE OF PRIOR ACCIDENTS, THE APPELLATE RULING WAS NOT THE LAW OF THE CASE (THIRD DEPT))/APPEALS (EVIDENCE, LAW OF THE CASE, ALTHOUGH, ON A PRIOR APPEAL, THE APPEALS COURT FOUND THAT AN OFFER OF PROOF OF PRIOR ACCIDENTS WAS INADEQUATE, AT THE SUBSEQUENT TRIAL THE COURT SHOULD HAVE CONSIDERED THE PLAINTIFF'S OFFER OF EVIDENCE OF PRIOR ACCIDENTS, THE APPELLATE RULING WAS NOT THE LAW OF THE CASE (THIRD DEPT))/LAW OF THE CASES (APPEALS, EVIDENCE, ALTHOUGH, ON A PRIOR APPEAL, THE APPEALS COURT FOUND THAT AN OFFER OF PROOF OF PRIOR ACCIDENTS WAS INADEQUATE, AT THE SUBSEQUENT TRIAL THE COURT SHOULD HAVE CONSIDERED THE PLAINTIFF'S OFFER OF EVIDENCE OF PRIOR ACCIDENTS, THE APPELLATE RULING WAS NOT THE LAW OF THE CASE (THIRD DEPT))

CIVIL PROCEDURE, INDIAN LAW.

SUPREME COURT PROPERLY REFUSED TO DISMISS A COMPLAINT CONCERNING CONTROL OF CERTAIN CAYUGA NATION PROPERTY ON SUBJECT MATTER JURISDICTION GROUNDS, TWO JUSTICE DISSENT (FOURTH DEPT).

The Fourth Department, over a two-justice dissent, determined that Supreme Court properly refused to dismiss the complaint on subject matter jurisdiction grounds. The complaint asserts one faction of the Cayuga Nation, defendants, are improperly in control of and trespassing on certain Nation property. Supreme Court granted to plaintiffs a preliminary injunction based upon a ruling by the Bureau of Indian Affairs (BIA). The dissenting justices argued that the New York courts do not have jurisdiction over tribal affairs and the complaint should have been dismissed on that ground:

> Defendants contend that the court erred in denying their motion because the courts of New York have no power to determine who controls the Nation. Although we agree with defendants that we may not resolve the Nation's leadership dispute, we are not required to do so in this appeal. Rather, we accord due deference to the BIA's conclusion that the Nation, at least with respect to that issue, has resolved the dispute in favor of plaintiff. * * *
>
> We caution that we do not determine which party is the proper governing body of the Nation, nor does our determination prevent the Nation from resolving that dispute differently according to its law in the future. The Nation, as a sovereign body, retains full authority to reconcile its own internal governance disputes according to its laws. Until such action occurs, however, we accord deference to the BIA's determination that plaintiff is the proper body to enforce the Nation's rights, including its rights to control the property at issue in this action. **Cayuga Nation v Campbell, 2018 NY Slip Op 05427, Fourth Dept 7-25-18**

INDIAN LAW (SUPREME COURT PROPERLY REFUSED TO DISMISS A COMPLAINT CONCERNING CONTROL OF CERTAIN CAYUGA NATION PROPERTY ON SUBJECT MATTER JURISDICTION GROUNDS, TWO JUSTICE DISSENT (FOURTH DEPT))/CIVIL PROCEDURE (INDIAN LAW, SUPREME COURT PROPERLY REFUSED TO DISMISS A COMPLAINT CONCERNING CONTROL OF CERTAIN CAYUGA NATION PROPERTY ON SUBJECT MATTER JURISDICTION GROUNDS, TWO JUSTICE DISSENT (FOURTH DEPT))/CAYUGA NATION (CIVIL PROCEDURE, SUPREME COURT PROPERLY REFUSED TO DISMISS A COMPLAINT CONCERNING CONTROL OF CERTAIN CAYUGA NATION PROPERTY ON SUBJECT MATTER JURISDICTION GROUNDS, TWO JUSTICE DISSENT (FOURTH DEPT))

CIVIL PROCEDURE, LANDLORD-TENANT, MUNICIPAL LAW.

CLASS ACTION COMPLAINT BY TENANTS AGAINST LANDLORDS ALLEGING FAILURE TO PROVIDE RENT-STABILIZED LEASES SHOULD NOT HAVE BEEN DISMISSED AT THE PRE-ANSWER STAGE (FIRST DEPT).

The First Department, over a two-justice dissent, determined that the class action complaint by tenants alleging the failure to provide rent-stabilized leases should not have been dismissed at the pre-answer stage:

> "Pursuant to CPLR 902, a motion to determine whether a class action may be maintained is to be made within 60 days after the time to serve the responsive pleading has expired" ... . Because the time to make such a motion had not occurred, it was premature, in this case, for the court to engage in a detailed analysis of whether the requirements for class certification were met ... .
>
> It does not appear conclusively from the complaint that, as a matter of law, there is no basis for class action relief... . For example, plaintiffs allege that some defendants receive J-51 tax benefits and are therefore required to provide tenants with rent-stabilized leases but failed to do so. This claim was also made in Borden (see 24 NY3d at 390), and the Court of Appeals found that the plaintiffs satisfied the class action requirements of numerosity, predominance of common issues of law or fact, typicality of the named plaintiffs' claims, adequate representation, and superiority of class action versus other methods (see id. at 399-400).
>
> Although the instant action involves 11 buildings and 8 owners, all the buildings are allegedly managed by Big City Realty Management, and all the owners are allegedly part of one holding company, Big City Acquisitions. Moreover, Downing — another putative class action about J-51 (see 107 AD3d at 88) — involved "a residential complex owned by defendants" (id.). **Maddicks v Big City Props., LLC, 2018 NY Slip Op 05523, First Dept 7-26-18**

CIVIL PROCEDURE (CLASS ACTION COMPLAINT BY TENANTS AGAINST LANDLORDS ALLEGING FAILURE TO PROVIDE RENT-STABILIZED LEASES SHOULD NOT HAVE BEEN DISMISSED AT THE PRE-ANSWER STAGE (FIRST DEPT))/CPLR 902 (CLASS ACTION COMPLAINT BY TENANTS AGAINST LANDLORDS ALLEGING FAILURE TO PROVIDE RENT-STABILIZED LEASES SHOULD NOT HAVE BEEN DISMISSED AT THE PRE-ANSWER STAGE (FIRST DEPT))/LANDLORD-TENANT (CLASS ACTION COMPLAINT BY TENANTS AGAINST LANDLORDS ALLEGING FAILURE TO PROVIDE RENT-STABILIZED LEASES SHOULD NOT HAVE BEEN DISMISSED AT THE PRE-ANSWER STAGE (FIRST DEPT))/MUNICIPAL LAW (LANDLORD-TENANT, (CLASS ACTION COMPLAINT BY TENANTS AGAINST LANDLORDS ALLEGING FAILURE TO PROVIDE RENT-STABILIZED LEASES SHOULD NOT HAVE BEEN DISMISSED AT THE PRE-ANSWER STAGE (FIRST DEPT))

CIVIL PROCEDURE, LANDLORD-TENANT, MUNICIPAL LAW, REAL PROPERTY LAW, CONVERSION.

CLASS ACTION COMPLAINT ON BEHALF OF TENANTS ALLEGING LANDLORDS' MISHANDLING OF SECURITY DEPOSITS SHOULD NOT HAVE BEEN DISMISSED (FOURTH DEPT).

The Fourth Department, reversing (modifying) Supreme Court, determined the complaint adequately pled a class action concerning defendants-landlords' alleged mishandling of security deposits, including allegations of conversion and co-mingling:

> plaintiffs adequately alleged all of the prerequisites to class certification... . Plaintiffs alleged that the class of tenants consists of more than 200 members, thereby satisfying the numerosity requirement ... . Plaintiffs also alleged that the common issue is whether, by commingling the security deposits of their tenants, defendants acted unlawfully, and that the individual issues are the amount of the security deposit and defendants' entitlement to deductions therefrom... . Thus, we conclude that plaintiffs sufficiently alleged that the common issues predominate (see CPLR 901 [a] [2]). Regarding the typicality requirement, plaintiffs alleged that their claims arise from "the same course of conduct and are based on the same theories as the other class members" ... . Plaintiffs also alleged that they can fairly and adequately protect the interests of the class inasmuch as they do not have conflicting interests with other class members.. . Plaintiffs satisfied the superiority requirement by alleging that the damages likely suffered by each of the tenants range between $475 and $4,500, and "the cost of prosecuting individual actions would deprive many of the putative class members of their day in court" ... .
>
> .. [T]the amended complaint adequately alleges a cause of action for conversion in violation of General Obligations Law § 7-103 ... .
>
> ... [T]he court erred in granting the motion with respect to the second cause of action, alleging that defendants violated Property Conservation Code of the City of Syracuse § 27-125, inasmuch as that section gives rise to a private cause of action ... .
>
> ...[T]the lease includes a clause requiring tenants to pay attorneys' fees if they breach the lease and, pursuant to Real Property Law § 234, the tenant has the "same benefit [to attorneys' fees as] the lease imposes in favor of the landlord" ... . **Rubman v Osuchowski, 2018 NY Slip Op 05416, Fourth Dept 7-25-18**

CIVIL PROCEDURE (CLASS ACTION COMPLAINT ON BEHALF OF TENANTS ALLEGING LANDLORDS' MISHANDLING OF SECURITY DEPOSITS SHOULD NOT HAVE BEEN DISMISSED (FOURTH DEPT))/LANDLORD-TENANT (CLASS ACTION COMPLAINT ON BEHALF OF TENANTS ALLEGING LANDLORDS' MISHANDLING OF SECURITY DEPOSITS SHOULD NOT HAVE BEEN DISMISSED (FOURTH DEPT))/MUNICIPAL LAW (CLASS ACTION COMPLAINT ON BEHALF OF TENANTS ALLEGING LANDLORDS' MISHANDLING OF SECURITY DEPOSITS SHOULD NOT HAVE BEEN DISMISSED (FOURTH DEPT))/REAL PROPERTY LAW (CLASS ACTION COMPLAINT ON BEHALF OF TENANTS ALLEGING LANDLORDS' MISHANDLING OF SECURITY DEPOSITS SHOULD NOT HAVE BEEN DISMISSED (FOURTH DEPT))/CONVERSION (CLASS ACTION COMPLAINT ON BEHALF OF TENANTS ALLEGING LANDLORDS' MISHANDLING OF SECURITY DEPOSITS SHOULD NOT HAVE BEEN DISMISSED (FOURTH DEPT))

CIVIL PROCEDURE, LIMITED LIABILITY COMPANY LAW.

CPLR 311-A REQUIREMENTS FOR SERVICE OF PROCESS ON A LIMITED LIABILITY COMPANY NOT MET, COURT DID NOT OBTAIN JURISDICTION OVER DEFENDANT (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the plaintiff did not comply with the CPLR requirements for service of a summons and complaint upon a limited liability company and the court did not obtain jurisdiction over the defendant:

> Here, the plaintiff commenced the action by the filing of a summons and verified complaint on September 20, 2016. The affirmation of personal service executed by the plaintiff's counsel stated that on September 24, 2016, at the defendant's store located in Hicksville, he personally served the defendant with a copy of the summons and complaint by delivering it to "JANE DOE, A PERSON WHO REFUSED TO PROVIDE NAME." Although this attempt at service occurred within 120 days after the commencement of the action, the defendant correctly contends that the manner of service failed to comply with the requirements of CPLR 311-a, which provides, as relevant here, that personal service upon a limited liability company shall be made by delivering a copy personally to any member or manager of the company, any agent authorized to receive process, or any other person designated by the company to receive process. The defendant, by its evidentiary submissions, demonstrated that the individual purportedly served was not authorized to receive process on behalf of the defendant, and thus, jurisdiction over the defendant was not obtained ... . **Pinzon v IKEA N.Y., LLC, 2018 NY Slip Op 05213, Second Dept 7-11-18**

CIVIL PROCEDURE (CPLR 311-A REQUIREMENTS FOR SERVICE OF PROCESS ON A LIMITED LIABILITY COMPANY NOT MET, COURT DID NOT OBTAIN JURISDICTION OVER DEFENDANT (SECOND DEPT))/CPLR 311-A (CPLR 311-A REQUIREMENTS FOR SERVICE OF PROCESS ON A LIMITED LIABILITY COMPANY NOT MET, COURT DID NOT OBTAIN JURISDICTION OVER DEFENDANT (SECOND DEPT))/LIMITED LIABILITY COMPANY (CPLR 311-A REQUIREMENTS FOR SERVICE OF PROCESS ON A LIMITED LIABILITY COMPANY NOT MET, COURT DID NOT OBTAIN JURISDICTION OVER DEFENDANT (SECOND DEPT))/JURISDICTION (CPLR 311-A REQUIREMENTS FOR SERVICE OF PROCESS ON A LIMITED LIABILITY COMPANY NOT MET, COURT DID NOT OBTAIN JURISDICTION OVER DEFENDANT (SECOND DEPT))

CIVIL PROCEDURE, NEGLIGENCE, INSURANCE LAW.

RECORDS PERTAINING TO PLAINTIFF'S RECEIPT OF NO-FAULT BENEFITS ARE DISCOVERABLE AND MUST BE TURNED OVER TO THE DEFENDANT, EVEN IF PLAINTIFF IS NOT SEEKING RECOVERY OF UNREIMBURSED SPECIAL DAMAGES (SECOND DEPT).

The Second Department, reversing Supreme Court, determined that plaintiff was required to turn over to defendant records pertaining to no-fault benefits in this car accident case. Plaintiff had argued the records were not discoverable because plaintiff was not seeking to recover unreimbursed special damages:

> CPLR 3101(a) provides, in relevant part, that "[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof." "The words, material and necessary,' are . . . to be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity"... .
>
> In an action relating to a motor vehicle accident, a plaintiff's medical records relating to treatment following the accident are material and necessary to the defense of a plaintiff's claim to having sustained a serious injury within the meaning of Insurance Law § 5102, in addition to any claim to recover damages for loss of enjoyment of life ... . Accordingly, since the plaintiff's no-fault records are material and necessary to the defense of this action, the Supreme Court should have denied the plaintiff's motion for a protective order ... .
>
> The plaintiff improperly relies upon CPLR 4545(a) to support his contention that collateral source records are not discoverable where a plaintiff is not seeking to recover unreimbursed special damages. CPLR 4545(a) governs the admissibilityof evidence to establish that damages have been or will be covered in whole or part by a collateral source. By contrast, in the context of discovery, "[a]ny matter which may lead to the discovery of admissible proof is discoverable, as is any matter which bears upon a defense, even if the facts themselves are not admissible" ... . Moreover, whether any of the plaintiff's no-fault records are admissible for purposes other than for showing collateral source payment is not before us at this stage of the action. **Cajamarca v Osatuk, 2018 NY Slip Op 05133, Second Dept 7-11-18**

CIVIL PROCEDURE (NEGLIGENCE, DISCOVERY, RECORDS PERTAINING TO PLAINTIFF'S RECEIPT OF NO-FAULT BENEFITS ARE DISCOVERABLE AND MUST BE TURNED OVER TO THE DEFENDANT, EVEN IF PLAINTIFF IS NOT SEEKING RECOVERY OF UNREIMBURSED SPECIAL DAMAGES (SECOND DEPT))/NEGLIGENCE (CIVIL PROCEDURE, DISCOVERY, RECORDS PERTAINING TO PLAINTIFF'S RECEIPT OF NO-FAULT BENEFITS ARE DISCOVERABLE AND MUST BE TURNED OVER TO THE DEFENDANT, EVEN IF PLAINTIFF IS NOT SEEKING RECOVERY OF UNREIMBURSED SPECIAL DAMAGES (SECOND DEPT))/INSURANCE LAW (NO-FAULT, NEGLIGENCE, DISCOVERY, RECORDS PERTAINING TO PLAINTIFF'S RECEIPT OF NO-FAULT BENEFITS ARE DISCOVERABLE AND MUST BE TURNED OVER TO THE DEFENDANT, EVEN IF PLAINTIFF IS NOT SEEKING RECOVERY OF UNREIMBURSED SPECIAL DAMAGES (SECOND DEPT))/NO-FAULT BENEFITS (NEGLIGENCE, DISCOVERY, RECORDS PERTAINING TO PLAINTIFF'S RECEIPT OF NO-FAULT BENEFITS ARE DISCOVERABLE AND MUST BE TURNED OVER TO THE DEFENDANT, EVEN IF PLAINTIFF IS NOT SEEKING RECOVERY OF UNREIMBURSED SPECIAL DAMAGES (SECOND DEPT))/DISCOVERY (NO-FAULT BENEFITS, RECORDS PERTAINING TO PLAINTIFF'S RECEIPT OF NO-FAULT BENEFITS ARE DISCOVERABLE AND MUST BE TURNED OVER TO THE DEFENDANT, EVEN IF PLAINTIFF IS NOT SEEKING REIMBURSEMENT FOR UNREIMBURSED SPECIAL DAMAGES (SECOND DEPT))/TRAFFIC ACCIDENTS (DISCOVERY, RECORDS PERTAINING TO PLAINTIFF'S RECEIPT OF NO-FAULT BENEFITS ARE DISCOVERABLE AND MUST BE TURNED OVER TO THE DEFENDANT, EVEN IF PLAINTIFF IS NOT SEEKING RECOVERY OF UNREIMBURSED SPECIAL DAMAGES (SECOND DEPT))

CIVIL PROCEDURE, NEGLIGENCE, MEDICAL MALPRACTICE.

PROPERTY DEFENDANTS' MOTION TO JOIN THE SLIP AND FALL ACTION WITH A MEDICAL MALPRACTICE ACTION STEMMING FROM THE SLIP AND FALL INJURY PROPERLY DENIED (SECOND DEPT).

The Second Department determined the property defendants' motion to join the slip and fall action with a medical malpractice action stemming from the slip and fall injury was properly denied. Plaintiff had stepped in a rodent hole and subsequently sued hospitals for malpractice in the treatment of her foot injury:

> "When actions involving a common question of law or fact are pending before a court, the court, upon motion, may order a joint trial of any or all the matters in issue" (CPLR 602[a]...). The determination of such a motion is addressed to the sound discretion of the trial court... . Denial of the motion may be warranted where common questions of law or fact are lacking ... , where the actions involve dissimilar issues or disparate legal theories ... , or where a joint trial would substantially prejudice an opposing party ... or pose a risk of confusing the jury or rendering the litigation unwieldy ... .
>
> Here, the Supreme Court providently exercised its discretion in denying the property defendants' motion for a joint trial given the limited commonality between the two actions, the disparate legal theories and dissimilar issues they involve, the very different procedural stages of the two actions at the time the motion was made, and the potential prejudice to the opposing parties as well as the risks of juror confusion and unwieldy litigation if a joint trial was granted ... . **Cromwell v CRP 482 Riverdale Ave., LLC, 2018 NY Slip Op 05137, Second Dept 7-11-18**

CIVIL PROCEDURE (PROPERTY DEFENDANTS' MOTION TO JOIN THE SLIP AND FALL ACTION WITH A MEDICAL MALPRACTICE ACTION STEMMING FROM THE SLIP AND FALL INJURY PROPERLY DENIED (SECOND DEPT))/NEGLIGENCE (CIVIL PROCEDURE, JOINDER, PROPERTY DEFENDANTS' MOTION TO JOIN THE SLIP AND FALL ACTION WITH A MEDICAL MALPRACTICE ACTION STEMMING FROM THE SLIP AND FALL INJURY PROPERLY DENIED (SECOND DEPT))/MEDICAL MALPRACTICE (CIVIL PROCEDURE, JOINDER, PROPERTY DEFENDANTS' MOTION TO JOIN THE SLIP AND FALL ACTION WITH A MEDICAL MALPRACTICE ACTION STEMMING FROM THE SLIP AND FALL INJURY PROPERLY DENIED (SECOND DEPT))/CPLR 602 (PROPERTY DEFENDANTS' MOTION TO JOIN THE SLIP AND FALL ACTION WITH A MEDICAL MALPRACTICE ACTION STEMMING FROM THE SLIP AND FALL INJURY PROPERLY DENIED (SECOND DEPT))/JOINDER (CIVIL PROCEDURE, (PROPERTY DEFENDANTS' MOTION TO JOIN THE SLIP AND FALL ACTION WITH A MEDICAL MALPRACTICE ACTION STEMMING FROM THE SLIP AND FALL INJURY PROPERLY DENIED (SECOND DEPT))/SLIP AND FALL (CIVIL PROCEDURE, JOINDER, PROPERTY DEFENDANTS' MOTION TO JOIN THE SLIP AND FALL ACTION WITH A MEDICAL MALPRACTICE ACTION STEMMING FROM THE SLIP AND FALL INJURY PROPERLY DENIED (SECOND DEPT))

CIVIL PROCEDURE, TRUSTS AND ESTATES, MEDICAL MALPRACTICE, NEGLIGENCE.

MEDICAL MALPRACTICE ACTION SHOULD NOT HAVE BEEN DISMISSED BASED ON A FINDING THE MOTION TO SUBSTITUTE THE REPRESENTATIVE OF THE ESTATE OF THE PLAINTIFF WAS UNTIMELY (SECOND DEPT).

The Second Department, reversing Supreme Court, determined that the medical malpractice action should not have been dismissed on the ground that a motion to substitute the representative of plaintiff's estate was not timely made:

> In October 2004, Patricia Tokar (hereinafter Patricia) commenced this action to recover damages for medical malpractice based upon treatment she received from 2000 to 2002. Patricia's deposition was taken in September 2006 and again in August 2009, while the defendant's deposition was taken in April 2008. A note of issue was filed in December 2009. The matter was called for trial on 12 separate occasions between 2011 and 2012. By letter dated October 19, 2012, Patricia's attorney informed the defendant's attorney that Patricia had died two weeks before, and that her husband, Stanley Tokar (hereinafter Stanley), would be seeking to be appointed administrator of Patricia's estate after he completed his mourning period. In October 2014, Stanley filed a petition for letters of administration of Patricia's estate. By order to show cause dated May 12, 2015, the defendant moved pursuant to CPLR 1021 to dismiss the complaint for failure to seek a timely substitution of parties on behalf of Patricia. On June 5, 2015, letters of administration were issued to Stanley, who then moved, seven days later, on June 12, 2015, pursuant to CPLR 1012, to be substituted, as administrator of Patricia's estate, as the plaintiff in the action. The Supreme Court denied Stanley's motion and granted the defendant's motion ... .
>
> CPLR 1021 provides, in pertinent part, that "[i]f the event requiring substitution occurs before final judgment and substitution is not made within a reasonable time, the action may be dismissed as to the party for whom substitution should have been made." The determination of reasonableness requires consideration of several factors, including the diligence of the party seeking substitution, prejudice to the other parties, and whether the party to be substituted has shown that the action or defense has potential merit ... .
>
> Here, the record does not support a finding that there was a lack of diligence in the filing of the petition for Stanley to be substituted, or that the defendant was prejudiced by the delay in the appointment of Stanley as administrator, particularly since this case turns on medical records in the defendant's possession ... . Further, Stanley sufficiently demonstrated that the action has potential merit ... . Moreover, there is a strong public policy that matters should be disposed of on the merits ... . **Tokar v Weissberg, 2018 NY Slip Op 05516, Second Dept 7-25-18**

CIVIL PROCEDURE (MEDICAL MALPRACTICE ACTION SHOULD NOT HAVE BEEN DISMISSED BASED ON A FINDING THE MOTION TO SUBSTITUTE THE REPRESENTATIVE OF THE ESTATE OF THE PLAINTIFF WAS UNTIMELY (SECOND DEPT))/TRUSTS AND ESTATES (MEDICAL MALPRACTICE ACTION SHOULD NOT HAVE BEEN DISMISSED BASED ON A FINDING THE MOTION TO SUBSTITUTE THE REPRESENTATIVE OF THE ESTATE OF THE PLAINTIFF WAS UNTIMELY (SECOND DEPT))/MEDICAL MALPRACTICE (MEDICAL MALPRACTICE ACTION SHOULD NOT HAVE BEEN DISMISSED BASED ON A FINDING THE MOTION TO SUBSTITUTE THE REPRESENTATIVE OF THE ESTATE OF THE PLAINTIFF WAS UNTIMELY (SECOND DEPT))/NEGLIGENCE (MEDICAL MALPRACTICE ACTION SHOULD NOT HAVE BEEN DISMISSED BASED ON A FINDING THE MOTION TO SUBSTITUTE THE REPRESENTATIVE OF THE ESTATE OF THE PLAINTIFF WAS UNTIMELY (SECOND DEPT))

CONTRACT LAW

CONTRACT LAW, ARBITRATION, CORPORATION LAW.

ALTHOUGH INDIVIDUAL DEFENDANTS, OFFICERS OR EMPLOYEES OF DEFENDANT CORPORATION, DID NOT SIGN THE AGREEMENT IN THEIR INDIVIDUAL CAPACITIES, THEY ARE ENTITLED TO ENFORCE THE ARBITRATION PROVISION OF THE AGREEMENT (FIRST DEPT).

...

The First Department determined the individual defendants, officers or employees of the corporate defendant, are entitled to enforce the arbitration provision of the contract, even though they were not signatories:

> The individual defendants, who were officers or employees of [defendant corporation] and did not sign the [agreement] in their individual capacities, are nevertheless entitled to enforce the arbitration provision, because any breach of the [agreement] would have to be the result of an action or inaction attributable to them. A rule allowing corporate officers and employees to enforce arbitration agreements entered into by the corporate principal "is necessary not only to prevent circumvention of arbitration agreements but also to effectuate the intent of the signatory parties to protect individuals acting on behalf of the principal in furtherance of the agreement" ... . Further, even a nonsignatory may be estopped from avoiding arbitration where he knowingly accepted the benefits of an agreement with an arbitration clause ... . **Huntsman Intl. LLC v Albemarle Corp., 2018 NY Slip Op 04962, First Dept 7-3-18**

CONTRACT LAW (ARBITRATION, CORPORATION LAW, ALTHOUGH INDIVIDUAL DEFENDANTS, OFFICERS OR EMPLOYEES OF DEFENDANT CORPORATION, DID NOT SIGN THE AGREEMENT IN THEIR INDIVIDUAL CAPACITIES, THEY ARE ENTITLED TO ENFORCE THE ARBITRATION PROVISION OF THE AGREEMENT (FIRST DEPT))/ARBITRATION (CORPORATION LAW, CONTRACT LAW, ALTHOUGH INDIVIDUAL DEFENDANTS, OFFICERS OR EMPLOYEES OF DEFENDANT CORPORATION, DID NOT SIGN THE AGREEMENT IN THEIR INDIVIDUAL CAPACITIES, THEY ARE ENTITLED TO ENFORCE THE ARBITRATION PROVISION OF THE AGREEMENT (FIRST DEPT))/CORPORATION LAW (CONTRACT LAW, ARBITRATION, ALTHOUGH INDIVIDUAL DEFENDANTS, OFFICERS OR EMPLOYEES OF DEFENDANT CORPORATION, DID NOT SIGN THE AGREEMENT IN THEIR INDIVIDUAL CAPACITIES, THEY ARE ENTITLED TO ENFORCE THE ARBITRATION PROVISION OF THE AGREEMENT (FIRST DEPT))

CONTRACT LAW, INSURANCE LAW, FRAUD.

PLAINTIFF DID NOT KNOW HER LEG HAD BEEN BROKEN IN A CAR ACCIDENT AT THE TIME SHE SIGNED A RELEASE FOR $2500, HER COMPLAINT STATED CAUSES OF ACTION FOR INVALIDATING THE RELEASE BASED UPON MUTUAL MISTAKE AND FRAUDULENT INDUCEMENT, SUPREME COURT REVERSED (THIRD DEPT).

The Third Department, reversing Supreme Court, determined plaintiff's complaint stated causes of action for invalidating a release based upon mutual mistake and fraudulent inducement. Plaintiff was injured in a car accident and apparently was told at the hospital that her leg was not broken. The insurer's adjuster went to plaintiff's home where she signed a release in return for $2500. Shortly thereafter plaintiff learned that her leg in fact was broken:

> Although "[t]he signing of a clear and unambiguous release is a significant legal act that ordinarily binds the parties" ... as with any contract, it must be "fairly and knowingly made and thus . . . may be set aside on the basis of fraud or mutual mistake" ... .
>
> While we make no determination as to the validity of the release or whether plaintiff may ultimately succeed in setting it aside at a later juncture due to the circumstances in which it was obtained, she has sufficiently alleged facts indicating that the parties were operating under a mutual mistake with respect to the fibula fracture at the time that the release was executed ... . Likewise, plaintiff sufficiently alleged a cognizable claim of fraudulent inducement in the procurement of the release, which constitutes a basis to deny the motion at this pre-answer phase ... . **Fimbel v Vasquez, 2018 NY Slip Op 05001, Third Dept 7-5-18**

CONTRACT LAW (RELEASES, PLAINTIFF DID NOT KNOW HER LEG HAD BEEN BROKEN IN A CAR ACCIDENT AT THE TIME SHE SIGNED A RELEASE FOR $2500, HER COMPLAINT STATED CAUSES OF ACTION FOR INVALIDATING THE RELEASE BASED UPON MUTUAL MISTAKE AND FRAUDULENT INDUCEMENT, SUPREME COURT REVERSED (THIRD DEPT))/RELEASES (MUTUAL MISTAKE, FRAUDULENT INDUCEMENT, PLAINTIFF DID NOT KNOW HER LEG HAD BEEN BROKEN IN A CAR ACCIDENT AT THE TIME SHE SIGNED A RELEASE FOR $2500, HER COMPLAINT STATED CAUSES OF ACTION FOR INVALIDATING THE RELEASE BASED UPON MUTUAL MISTAKE AND FRAUDULENT INDUCEMENT, SUPREME COURT REVERSED (THIRD DEPT))/INSURANCE LAW (RELEASES, MUTUAL MISTAKE, FRAUDULENT INDUCEMENT, PLAINTIFF DID NOT KNOW HER LEG HAD BEEN BROKEN IN A CAR ACCIDENT AT THE TIME SHE SIGNED A RELEASE FOR $2500, HER COMPLAINT STATED CAUSES OF ACTION FOR INVALIDATING THE RELEASE BASED UPON MUTUAL MISTAKE AND FRAUDULENT INDUCEMENT, SUPREME COURT REVERSED (THIRD DEPT))/FRAUD (INSURANCE LAW, RELEASES, MUTUAL MISTAKE, FRAUDULENT INDUCEMENT, PLAINTIFF DID NOT KNOW HER LEG HAD BEEN BROKEN IN A CAR ACCIDENT AT THE TIME SHE SIGNED A RELEASE FOR $2500, HER COMPLAINT STATED CAUSES OF ACTION FOR INVALIDATING THE RELEASE BASED UPON MUTUAL MISTAKE AND FRAUDULENT INDUCEMENT, SUPREME COURT REVERSED (THIRD DEPT))/MUTUAL MISTAKE (CONTRACT LAW, INSURANCE LAW, RELEASES, PLAINTIFF DID NOT KNOW HER LEG HAD BEEN BROKEN IN A CAR ACCIDENT AT THE TIME SHE SIGNED A RELEASE FOR $2500, HER COMPLAINT STATED CAUSES OF ACTION FOR INVALIDATING THE RELEASE BASED UPON MUTUAL MISTAKE AND FRAUDULENT INDUCEMENT, SUPREME COURT REVERSED (THIRD DEPT))

CONTRACT LAW, MEDICAID, MEDICAL MALPRACTICE, NEGLIGENCE.

HOSPITAL'S SETTLEMENT AGREEMENT WITH PLAINTIFF IN A MEDICAL MALPRACTICE ACTION TO PAY ALL MEDICAID COSTS WAS ENFORCEABLE BY THE MEDICAID ADMINISTRATOR AS A THIRD-PARTY BENEFICIARY OF THE AGREEMENT (FIRST DEPT).

The First Department, reversing Supreme Court, in a full-fledged opinion by Justice Friedman, over a dissenting opinion, determined that Medicaid was a third-party beneficiary of a settlement agreement entered into by a hospital (NYPH) in a medical malpractice action:

> At issue on this appeal is an agreement settling a prior medical malpractice action against a hospital, in which the hospital agreed to "assume full responsibility for any monies which are ultimately found to be due to Medicaid in connection with" the injured patient's lengthy hospitalization. We hold, as a matter of law, that this provision may be enforced against the hospital in this action by plaintiff Commissioner of the New York City Department of Social Services (DSS), the relevant Medicaid administrator, as an intended third-party beneficiary of this aspect of the settlement agreement. We also hold that DSS's claim against the hospital is not barred by the doctrine of res judicata. * * *
>
> The provision of the settlement agreement under which NYPH agreed to "assume full responsibility" for any Medicaid claim in the settlement agreement makes it "apparent from the face of the contract"... that the parties intended to confer a direct benefit on DSS. NYPH's "assum[ption] [of] full responsibility" for any Medicaid claim is more than a promise merely to indemnify [plaintiff]. against such a claim, which would not, by itself, confer third-party beneficiary status on DSS ... . Rather, the settlement agreement, by requiring NYPH to "assume full responsibility for any monies which are ultimately found to be due to Medicaid," plainly contemplates that "performance is to be rendered directly to [the] third party," a reliable indication that "the third party is deemed an intended beneficiary of the covenant and is entitled to sue for its breach" ... . **Commissioner of the Dept. of Social Servs. of the City of N.Y. v New York-Presbyterian Hosp., 2018 NY Slip Op 05524, First Dept 7-26-18**

CONTRACT LAW (HOSPITAL'S SETTLEMENT AGREEMENT WITH PLAINTIFF IN A MEDICAL MALPRACTICE ACTION TO PAY ALL MEDICAID COSTS WAS ENFORCEABLE BY THE MEDICAID ADMINISTRATOR AS A THIRD-PARTY BENEFICIARY OF THE AGREEMENT (FIRST DEPT))/THIRD-PARTY BENEFICIARY (CONTRACT LAW, HOSPITAL'S SETTLEMENT AGREEMENT WITH PLAINTIFF IN A MEDICAL MALPRACTICE ACTION TO PAY ALL MEDICAID COSTS WAS ENFORCEABLE BY THE MEDICAID ADMINISTRATOR AS A THIRD-PARTY BENEFICIARY OF THE AGREEMENT (FIRST DEPT))/MEDICAID (CONTRACT LAW, HOSPITAL'S SETTLEMENT AGREEMENT WITH PLAINTIFF IN A MEDICAL MALPRACTICE ACTION TO PAY ALL MEDICAID COSTS WAS ENFORCEABLE BY THE MEDICAID ADMINISTRATOR AS A THIRD-PARTY BENEFICIARY OF THE AGREEMENT (FIRST DEPT))/MEDICAL MALPRACTICE (MEDICAID, HOSPITAL'S SETTLEMENT AGREEMENT WITH PLAINTIFF IN A MEDICAL MALPRACTICE ACTION TO PAY ALL MEDICAID COSTS WAS ENFORCEABLE BY THE MEDICAID ADMINISTRATOR AS A THIRD-PARTY BENEFICIARY OF THE AGREEMENT (FIRST DEPT))/NEGLIGENCE (MEDICAL MALPRACTICE, MEDICAID, HOSPITAL'S SETTLEMENT AGREEMENT WITH PLAINTIFF IN A MEDICAL MALPRACTICE ACTION TO PAY ALL MEDICAID COSTS WAS ENFORCEABLE BY THE MEDICAID ADMINISTRATOR AS A THIRD-PARTY BENEFICIARY OF THE AGREEMENT (FIRST DEPT))

CONTRACT LAW, REAL ESTATE.

CONTRACT WAS AMBIGUOUS CONCERNING WHETHER PLAINTIFF BROKER WAS ENTITLED TO A COMMISSION, SUMMARY JUDGMENT IN FAVOR OF DEFENDANTS SHOULD NOT HAVE BEEN GRANTED (FIRST DEPT).

The First Department, in a full-fledged opinion by Justice Tom, reversing Supreme Court, determined that a contract concerning plaintiff-broker's entitlement to a commission was ambiguous requiring a trial. The facts are too complex to fairly summarize here:

> Crucially, an agreement can be deemed unambiguous "if the language it uses 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'" ... .
>
> However, a contract is ambiguous when "read as a whole, [it] fails to disclose its purpose and the parties' intent" ... , or when specific language is "susceptible of two reasonable interpretations"... . Moreover, the agreement must be read as a whole "to ensure that excessive emphasis is not placed upon particular words or phrases" ... .
>
> Stated differently, the existence of ambiguity is determined by examining " the entire contract and consider[ing] the relation of the parties and the circumstances under which it was executed,'" with the wording viewed " in the light of the obligation as a whole and the intention of the parties as manifested thereby'" ... . And, importantly, "[i]n construing a contract, one of a court's goals is to avoid an interpretation that would leave contractual clauses meaningless" ... .
>
> We find that the agreement here is ambiguous with regard to which parties are bound to its terms. **Georgia Malone & Co., Inc. v E&M Assoc., 2018 NY Slip Op 05525, First Dept 7-26-18**

CONTRACT LAW (REAL ESTATE, CONTRACT WAS AMBIGUOUS CONCERNING WHETHER PLAINTIFF BROKER WAS ENTITLED TO A COMMISSION, SUMMARY JUDGMENT IN FAVOR OF DEFENDANTS SHOULD NOT HAVE BEEN GRANTED (FIRST DEPT))/REAL ESTATE (BROKER'S COMMISSION, CONTRACT WAS AMBIGUOUS CONCERNING WHETHER PLAINTIFF BROKER WAS ENTITLED TO A COMMISSION, SUMMARY JUDGMENT IN FAVOR OF DEFENDANTS SHOULD NOT HAVE BEEN GRANTED (FIRST DEPT))/BROKERS (REAL ESTATE, CONTRACT WAS AMBIGUOUS CONCERNING WHETHER PLAINTIFF BROKER WAS ENTITLED TO A COMMISSION, SUMMARY JUDGMENT IN FAVOR OF DEFENDANTS SHOULD NOT HAVE BEEN GRANTED (FIRST DEPT))

COOPERATIVES

FIDUCIARY DUTY, BREACH OF, COOPERATIVES, CORPORATION LAW, NEGLIGENCE.

NO CAUSE OF ACTION FOR BREACH OF FIDUCIARY DUTY AGAINST INDIVIDUAL COOPERATIVE BOARD MEMBERS, MEMBERS OF THE BOARD DID NOT PARTICIPATE IN A CORPORATE TORT (FIRST DEPT).

The First Department determined plaintiff shareholder in a cooperative could not bring a "breach of fiduciary duty" cause of action against individual members of the cooperative board. Plaintiff alleged her cooperative apartment was damaged by water from a greenhouse above the apartment. The first department found that that was no corporate tort for which individual members of the board could be liable:

> It is well-settled that a breach of fiduciary duty claim does not lie against individual cooperative board members where there is no allegation of "individual wrongdoing by the members . . . separate and apart from their collective actions taken on behalf of the" cooperative ... . Here, the complaint does not allege that any of the individual board members committed an independent wrong that was distinct from the actions taken as a board collectively. Thus, the breach of fiduciary duty claim is not viable. ...
>
> Contrary to plaintiff's contention, this result is entirely consistent with Fletcher v Dakota, Inc. (99 AD3d 43 [1st Dept 2012]). In Fletcher, we concluded that "although participation in a breach of contract will typically not give rise to individual director liability, the participation of an individual director in a corporation's tort is sufficient to give rise to individual liability" (id. at 47). Thus, we declined to dismiss claims against a cooperative board director who was alleged to have participated in the cooperative's violation of the State and City Human Rights Laws.
>
> Here, in contrast, there is no viable corporate tort alleging breach of fiduciary duty, because a corporation owes no fiduciary duty to its shareholders ... . Thus, in the absence of a corporate tort in which the individual board members could have participated, the breach of fiduciary duty claim as against them was properly dismissed. Indeed, Fletcher made this very point by dismissing the breach of fiduciary duty cause of action against an individual board director, while at the same time sustaining Human Rights Law claims against him. **Hersh v One Fifth Ave. Apt. Corp., 2018 NY Slip Op 05522, First Dept 7-26-18**

FIDUCIARY DUTY, BREACH OF (COOPERATIVES, NO CAUSE OF ACTION FOR BREACH OF FIDUCIARY DUTY AGAINST INDIVIDUAL COOPERATIVE BOARD MEMBERS, MEMBERS OF THE BOARD DID NOT PARTICIPATE IN A CORPORATE TORT (FIRST DEPT))/COOPERATIVES (NO CAUSE OF ACTION FOR BREACH OF FIDUCIARY DUTY AGAINST INDIVIDUAL COOPERATIVE BOARD MEMBERS, MEMBERS OF THE BOARD DID NOT PARTICIPATE IN A CORPORATE TORT (FIRST DEPT))/CORPORATION LAW (COOPERATIVES, NO CAUSE OF ACTION FOR BREACH OF FIDUCIARY DUTY AGAINST INDIVIDUAL COOPERATIVE BOARD MEMBERS, MEMBERS OF THE BOARD DID NOT PARTICIPATE IN A CORPORATE TORT (FIRST DEPT))/NEGLIGENCE (COOPERATIVES, CORPORATE TORT, NO CAUSE OF ACTION FOR BREACH OF FIDUCIARY DUTY AGAINST INDIVIDUAL COOPERATIVE BOARD MEMBERS, MEMBERS OF THE BOARD DID NOT PARTICIPATE IN A CORPORATE TORT (FIRST DEPT))

CRIMINAL LAW

CRIMINAL LAW.

RESENTENCING IN SUPREME COURT AFTER CONVICTION IN COUNTY COURT WAS ILLEGAL (FOURTH DEPT).

The Fourth Department determined defendant, who had been convicted in County Court was illegally resentenced in Supreme Court:

> We agree with defendant ... that he was illegally resentenced in Supreme Court after his trial was conducted in County Court. It is well settled that "in order to remove a criminal action from County Court to Supreme Court, the Uniform Rules for the New York State Trial Courts require that such removal be authorized by the Chief Administrator and that it occur prior to the entry of a plea or commencement of trial" ... . Here, although the case was removed by the Chief Administrator, it did not occur prior to the commencement of trial. Thus, Supreme Court lacked authority to resentence defendant, thereby rendering the resentence illegal ... . **People v Williams, 2018 NY Slip Op 05090, Fourth Dept 7-6-18**

CRIMINAL LAW (RESENTENCING IN SUPREME COURT AFTER CONVICTION IN COUNTY COURT WAS ILLEGAL (FOURTH DEPT))

CRIMINAL LAW.

SPECTATOR'S CLAIM JURORS REFERRED TO DEFENDANT AS A 'SCUMBAG' WAS NOT CREDIBLE, TRIAL JUDGE PROPERLY DECIDED A JUROR-BIAS (BUFORD) HEARING WAS NOT REQUIRED (FOURTH DEPT).

The Fourth Department, upon remittitur from the Court of Appeals, determined that the weight of the evidence supported the trial judge's conclusion a spectator's claim that jurors had referred to the defendant as a "scumbag" was not credible and therefore no juror-bias (Buford) hearing was required:

> Upon exercising our factual review power, we conclude that the weight of the evidence supports the court's implicit factual determination that the spectator was not credible. Initially, we note that the better practice would have been for the court, when making its determination, to make specific factual findings regarding whether and why it found the spectator not credible, and to set forth its determination and the reasons for it. Nevertheless, in view of the evidence regarding the spectator's credibility, including the internal inconsistencies in her testimony as well as the differences between her description of the sequence of events and the court's record of the proceedings, and after according the requisite "[g]reat deference . . . to the fact[]finder's opportunity to view the witness[ ], hear the testimony and observe demeanor" ... , we conclude that the weight of the evidence supports the court's credibility determination. Consequently, the court "was justified in finding the spectator incredible and therefore determining [that] the Buford inquiry was not required" ... . **People v Kuzdzal, 2018 NY Slip Op 05099, Fourth Dept 7-6-18**

CRIMINAL LAW (SPECTATOR'S CLAIM JURORS REFERRED TO DEFENDANT AS A 'SCUMBAG' WAS NOT CREDIBLE, TRIAL JUDGE PROPERLY DECIDED A JUROR-BIAS (BUFORD) HEARING WAS NOT REQUIRED (FOURTH DEPT))/JURORS (CRIMINAL LAW, PECTATOR'S CLAIM JURORS REFERRED TO DEFENDANT AS A 'SCUMBAG' WAS NOT CREDIBLE, TRIAL JUDGE PROPERLY DECIDED A JUROR-BIAS (BUFORD) HEARING WAS NOT REQUIRED (FOURTH DEPT))/BUFORD HEARING (CRIMINAL LAW, JUROR BIAS, SPECTATOR'S CLAIM JURORS REFERRED TO DEFENDANT AS A 'SCUMBAG' WAS NOT CREDIBLE, TRIAL JUDGE PROPERLY DECIDED A JUROR-BIAS (BUFORD) HEARING WAS NOT REQUIRED (FOURTH DEPT))

CRIMINAL LAW.

CONTRARY TO THE TRIAL JUDGE'S RULING, DEFENDANT HAD SATISFIED THE FIRST STEP OF A BATSON CHALLENGE TO THE PEOPLE'S STRIKING OF AN AFRICAN-AMERICAN PROSPECTIVE JUROR, THE BURDEN THEN SHIFTED TO THE PEOPLE TO ARTICULATE A NONDISCRIMINATORY REASON, THE MATTER IS SENT BACK FOR A DETERMINATION OF THE BATSON CHALLENGE USING THE CORRECT PROCEDURE (FOURTH DEPT).

The Fourth Department sent the case back for a determination of a Batson challenge to the People's use of peremptory challenge to strike an African-American prospective juror. The court had not used the correct procedure on first step. The Fourth Department held that defendant had satisfied the first step:

> In order for the moving party to satisfy its burden at step one, it must " show[ ] that the facts and circumstances of the voir dire raise an inference that the other party excused one or more jurors for an impermissible reason' " ... . "A defendant need not show [either] a pattern of discrimination' " ... or, as the court stated here, "a systematic approach by the prosecution." Rather, a defendant may satisfy his or her burden under the first step by demonstrating that "members of the cognizable group were excluded while others with the same relevant characteristics were not" or that the People excluded members of the cognizable group "who, because of their background and experience, might otherwise be expected to be favorably disposed to the prosecution" ... .
>
> We conclude that defendant met his burden under step one by establishing that there is a basis in the record to infer that the People exercised the peremptory challenge in a discriminatory manner. Here, defense counsel explained to the court that the relevant prospective juror was the first African-American male "that's been available without a [for]-cause" challenge and that the prospective juror provided answers during voir dire that were favorable to the prosecution, i.e., that the prospective juror had a number of family members in law enforcement, had a college degree and had at one time been robbed. Defense counsel thus implied that he could not ascertain from the prospective juror's answers a reason for the peremptory challenge other than racial bias. The court did not provide defense counsel with any further opportunity to develop that argument and, instead, interrupted defense counsel and concluded that a pattern of discrimination had not been established.
>
> Inasmuch as there is a basis in the record to infer that the People exercised the peremptory challenge in a discriminatory manner, we conclude that "the burden shifted to the People to articulate a nondiscriminatory reason for striking the juror, and the court then should have determined whether the proffered reason was pretextual" ... . **People v Herrod, 2018 NY Slip Op 05110, Fourth Dept 7-6-18**

CRIMINAL LAW (CONTRARY TO THE TRIAL JUDGE'S RULING, DEFENDANT HAD SATISFIED THE FIRST STEP OF A BATSON CHALLENGE TO THE PEOPLE'S STRIKING OF AN AFRICAN-AMERICAN PROSPECTIVE JUROR, THE BURDEN THEN SHIFTED TO THE PEOPLE TO ARTICULATE A NONDISCRIMINATORY REASON, THE MATTER IS SENT BACK FOR A DETERMINATION OF THE BATSON CHALLENGE USING THE CORRECT PROCEDURE (FOURTH DEPT))/JURORS (CRIMINAL LAW, BATSON, CONTRARY TO THE TRIAL JUDGE'S RULING, DEFENDANT HAD SATISFIED THE FIRST STEP OF A BATSON CHALLENGE TO THE PEOPLE'S STRIKING OF AN AFRICAN-AMERICAN PROSPECTIVE JUROR, THE BURDEN THEN SHIFTED TO THE PEOPLE TO ARTICULATE A NONDISCRIMINATORY REASON, THE MATTER IS SENT BACK FOR A DETERMINATION OF THE BATSON CHALLENGE USING THE CORRECT PROCEDURE (FOURTH DEPT))/BATSON PROCEDURE (CRIMINAL LAW, ONTRARY TO THE TRIAL JUDGE'S RULING, DEFENDANT HAD SATISFIED THE FIRST STEP OF A BATSON CHALLENGE TO THE PEOPLE'S STRIKING OF AN AFRICAN-AMERICAN PROSPECTIVE JUROR, THE BURDEN THEN SHIFTED TO THE PEOPLE TO ARTICULATE A NONDISCRIMINATORY REASON, THE MATTER IS SENT BACK FOR A DETERMINATION OF THE BATSON CHALLENGE USING THE CORRECT PROCEDURE (FOURTH DEPT))

CRIMINAL LAW.

IT IS NOT REVERSIBLE ERROR FOR DEFENDANT TO NOT BE PRESENT AT A SIDEBAR WHICH RESULTS IN GRANTING A PEREMPTORY OR FOR CAUSE CHALLENGE TO A JUROR, AN ORDER OF PROTECTION SHOULD NOT HAVE BEEN ISSUED FOR A FACT WITNESS WHO DID NOT ACTUALLY SEE THE SHOOTING (THIRD DEPT).

The Third Department affirmed defendant's conviction and noted (1) it is not reversible error if defendant is not present at a sidebar which results in the grant of a peremptory or for cause challenge to a juror, and (2) an order of protection cannot be issued on behalf of someone who did not actually witness the crime (here a shooting):

> Even if defendant was erroneously excluded from the sidebar conferences, "the error is not reversible if that potential juror has been excused for cause by the court or as a result of a peremptory challenge by the People"... . Because the record makes clear that juror Nos. 104 and 220 were dismissed for cause, remittal for a reconstruction hearing ... or reversal for a new trial is not necessary ... . * * *
>
> A court may enter an order of protection for the benefit of a witness "who actually witnessed the offense for which defendant was convicted" (...see generally CPL 530.13 [4] [a]). Although Galaska testified that, on the date in question, he saw people screaming and arguing outside his apartment and the victim taking pictures, he further stated that he did not see who shot the victim and also admitted that he did not recognize any of the individuals who were arguing. Because Galaska did not witness the shooting, the order of protection issued in his favor must be vacated. **People v Myers, 2018 NY Slip Op 05225, Third Dept 7-12-18**

CRIMINAL LAW (IT IS NOT REVERSIBLE ERROR FOR DEFENDANT TO NOT BE PRESENT AT A SIDEBAR WHICH RESULTS IN GRANTING A PEREMPTORY OR FOR CAUSE CHALLENGE TO A JUROR, AN ORDER OF PROTECTION SHOULD NOT HAVE BEEN ISSUED FOR A FACT WITNESS WHO DID NOT ACTUALLY SEE THE SHOOTING (THIRD DEPT))/SIDEBARS (CRIMINAL LAW, (IT IS NOT REVERSIBLE ERROR FOR DEFENDANT TO NOT BE PRESENT AT A SIDEBAR WHICH RESULTS IN GRANTING A PEREMPTORY OR FOR CAUSE CHALLENGE TO A JUROR, AN ORDER OF PROTECTION SHOULD NOT HAVE BEEN ISSUED FOR A FACT WITNESS WHO DID NOT ACTUALLY SEE THE SHOOTING (THIRD DEPT))/JURORS (CRIMINAL LAW, (IT IS NOT REVERSIBLE ERROR FOR DEFENDANT TO NOT BE PRESENT AT A SIDEBAR WHICH RESULTS IN GRANTING A PEREMPTORY OR FOR CAUSE CHALLENGE TO A JUROR, AN ORDER OF PROTECTION SHOULD NOT HAVE BEEN ISSUED FOR A FACT WITNESS WHO DID NOT ACTUALLY SEE THE SHOOTING (THIRD DEPT))/ORDERS OF PROTECTION (CRIMINAL LAW, AN ORDER OF PROTECTION SHOULD NOT HAVE BEEN ISSUED FOR A FACT WITNESS WHO DID NOT ACTUALLY SEE THE SHOOTING (THIRD DEPT))

CRIMINAL LAW.

WAIVER OF INDICTMENT AND SUPERIOR COURT INFORMATION (SCI) WERE JURISDICTIONALLY DEFECTIVE, THE SCI DID NOT CONTAIN A CHARGE HELD FOR THE ACTION OF A GRAND JURY OR A LESSER INCLUDED OFFENSE (THIRD DEPT).

The Third Department, reversing defendant's plea to a superior court information (SCI), determined the SCI did not contain a charge held for the action of a grand jury or a lesser included offense. Therefore the SCI was jurisdictionally defective:

> ... [T]he waiver of indictment and SCI were jurisdictionally defective because the crime charged in the SCI was not "an[] offense for which . . . defendant was held for action of a grand jury" ... , nor was it a lesser included offense of the crimes charged in the felony complaints. On this latter point, "a defendant may waive indictment and plead guilty to an SCI that names a different offense from that charged in the felony complaint only when the crime named in the SCI is a lesser included offense of the original charge"... . "A crime is a lesser included offense of a charge of a higher degree only when in all circumstances, not only in those presented in the particular case, it is impossible to commit the greater crime without concomitantly, by the very same conduct, committing the lesser offense"... .
>
> Reckless endangerment in the first degree is not a lesser included offense of either menacing a police officer or criminal possession of a weapon in the second degree because it would be entirely possible to possess or display the weapons required to commit either of the greater crimes, i.e., menacing a police officer (see Penal Law § 120.18) or criminal possession of a weapon in the second degree ... , without concomitantly "recklessly engag[ing] in conduct [that] creates a grave risk of death to another person" — a required element of reckless endangerment in the first degree ... . **People v Hulstrunk, 2018 NY Slip Op 05234, Third Dept 7-12-18**

CRIMINAL LAW (WAIVER OF INDICTMENT AND SUPERIOR COURT INFORMATION (SCI) WERE JURISDICTIONALLY DEFECTIVE, THE SCI DID NOT CONTAIN A CHARGE HELD FOR THE ACTION OF A GRAND JURY OR A LESSER INCLUDED OFFENSE (THIRD DEPT))/WAIVER OF INDICTMENT (WAIVER OF INDICTMENT AND SUPERIOR COURT INFORMATION (SCI) WERE JURISDICTIONALLY DEFECTIVE, THE SCI DID NOT CONTAIN A CHARGE HELD FOR THE ACTION OF A GRAND JURY OR A LESSER INCLUDED OFFENSE (THIRD DEPT))/SUPERIOR COURT INFORMATION (SCI) (WAIVER OF INDICTMENT AND SUPERIOR COURT INFORMATION (SCI) WERE JURISDICTIONALLY DEFECTIVE, THE SCI DID NOT CONTAIN A CHARGE HELD FOR THE ACTION OF A GRAND JURY OR A LESSER INCLUDED OFFENSE (THIRD DEPT))/RECKLESS ENDANGERMENT (WAIVER OF INDICTMENT AND SUPERIOR COURT INFORMATION (SCI) WERE JURISDICTIONALLY DEFECTIVE, THE SCI DID NOT CONTAIN A CHARGE HELD FOR THE ACTION OF A GRAND JURY OR A LESSER INCLUDED OFFENSE (THIRD DEPT))/MENACING A POLICE OFFICER (WAIVER OF INDICTMENT AND SUPERIOR COURT INFORMATION (SCI) WERE JURISDICTIONALLY DEFECTIVE, THE SCI DID NOT CONTAIN A CHARGE HELD FOR THE ACTION OF A GRAND JURY OR A LESSER INCLUDED OFFENSE (THIRD DEPT))

CRIMINAL LAW.

DEFENDANT'S ABSENCE FROM AN IN CAMERA INTERVIEW WITH A JUROR CONCERNING POSSIBLE DISQUALIFICATION WAS NOT SHOWN TO HAVE HAD A SUBSTANTIAL EFFECT ON THE DEFENDANT'S ABILITY TO DEFEND AGAINST THE CHARGES (SECOND DEPT).

The Second Department determined defendant's right to be present at all material stages of the trial was not violated by his absence from an in camera interview with a sworn juror about possible disqualification:

> The defendant's right to be present at all material stages of the trial was not violated by his absence from an in camera interview with a sworn juror, conducted in the presence of the prosecutor and defense counsel, to determine whether there was a possible juror disqualification. Although a defendant has a statutory right to be present at all material stages of the trial ... , this right is only a qualified right where the proceedings involved are ancillary ... . A conference to determine whether a sworn juror should be excluded ... is an ancillary proceeding ... . As such, the defendant's presence is required only if it could have had "a substantial effect on [his or her] ability to defend against the charges" ... , or "where defendant has something valuable to contribute" ... Given that the issue of whether a seated juror is grossly unqualified is, generally, a legal determination... , and, given the circumstances presented here, there is no basis to conclude that the defendant's presence at the in camera interview would have had a substantial effect on the defendant's ability to defend against the charges, or that the defendant would have made a valuable contribution to the proceeding ... . **People v Robinson, 2018 NY Slip Op 05496, Second Dept 7-25-18**

CRIMINAL LAW (DEFENDANT'S ABSENCE FROM AN IN CAMERA INTERVIEW WITH A JUROR CONCERNING POSSIBLE DISQUALIFICATION WAS NOT SHOWN TO HAVE HAD A SUBSTANTIAL EFFECT ON THE DEFENDANT'S ABILITY TO DEFEND AGAINST THE CHARGES (SECOND DEPT))/MATERIAL STAGE (CRIMINAL LAW, DEFENDANT'S ABSENCE FROM AN IN CAMERA INTERVIEW WITH A JUROR CONCERNING POSSIBLE DISQUALIFICATION WAS NOT SHOWN TO HAVE HAD A SUBSTANTIAL EFFECT ON THE DEFENDANT'S ABILITY TO DEFEND AGAINST THE CHARGES (SECOND DEPT))/JUROR DISQUALIFICATION DEFENDANT'S ABSENCE FROM AN IN CAMERA INTERVIEW WITH A JUROR CONCERNING POSSIBLE DISQUALIFICATION WAS NOT SHOWN TO HAVE HAD A SUBSTANTIAL EFFECT ON THE DEFENDANT'S ABILITY TO DEFEND AGAINST THE CHARGES (SECOND DEPT))

CRIMINAL LAW.

ERROR FOR JUDGE TO EFFECTIVELY IGNORE SPECIFIC QUESTIONS IN A JURY NOTE AND TO INSTRUCT THE JURY ON A LEGAL ISSUE THAT HAD NOT BEEN RAISED BEFORE AND COULD NOT, THEREFORE, HAVE BEEN ADDRESSED BY DEFENSE COUNSEL IN SUMMATION (FOURTH DEPT).

The Fourth Department, reversing defendant's conviction on two of three counts, determined the trial court abused its discretion when, in response to a jury note, it instructed the jury, for the first, that the intent to use a weapon may be presumed from possession of a weapon. The jury had asked specific questions concerning the issue of intent and the judge's "presumption" instruction did not address those questions. Rather, the instruction allowed the jury to avoid the questions by applying the presumption:

> The Criminal Procedure Law allows the jury to ask the court to clarify an instruction "[a]t any time during its deliberation" (CPL 310.30). Upon receiving such a request, the court must " perform the delicate operation of fashioning a response which meaningfully answer[s] the jury's inquiry while at the same time working no prejudice to the defendant' " ... . "[T]he court has significant discretion in determining the proper scope and nature of the response"... . In determining whether the court's response constituted an abuse of discretion, " [t]he factors to be evaluated are the form of the jury's question, which may have to be clarified before it can be answered, the particular issue of which inquiry is made, the [information] actually given and the presence or absence of prejudice to the defendant' " ... .
>
> We conclude that the court failed in its duty to fashion a response that meaningfully answered the jury's question and to avoid prejudicing defendant. The jury notes demonstrate that the jury had thoughtful questions about intent and was carefully weighing the conflicting testimony of the witnesses to determine whether and when defendant in fact formed the intent to use the gun unlawfully against another. The court, however, instructed the jury that defendant's possession of the gun was presumptive evidence of intent to use it unlawfully, and that the jury may not need or want to consider additional evidence in light of that presumption. That answer was not responsive to either note. Moreover, the court's response prejudiced defendant by introducing new principles of law after summations, when defense counsel no longer had the opportunity to argue that, despite the presumption, the evidence established that defendant lacked the requisite intent ... . **People v Wood, 2018 NY Slip Op 05422, Fourth Dept 7-25-18**

CRIMINAL LAW (ERROR FOR JUDGE TO EFFECTIVELY IGNORE SPECIFIC QUESTIONS IN A JURY NOTE AND TO INSTRUCT THE JURY ON A LEGAL ISSUE THAT HAD NOT BEEN RAISED BEFORE AND COULD NOT, THEREFORE, HAVE BEEN ADDRESSED BY DEFENSE COUNSEL IN SUMMATION (FOURTH DEPT))/JURY INSTRUCTIONS (CRIMINAL LAW, ERROR FOR JUDGE TO EFFECTIVELY IGNORE SPECIFIC QUESTIONS IN A JURY NOTE AND TO INSTRUCT THE JURY ON A LEGAL ISSUE THAT HAD NOT BEEN RAISED BEFORE AND COULD NOT, THEREFORE, HAVE BEEN ADDRESSED BY DEFENSE COUNSEL IN SUMMATION (FOURTH DEPT))/JURY NOTES (CRIMINAL LAW, ERROR FOR JUDGE TO EFFECTIVELY IGNORE SPECIFIC QUESTIONS IN A JURY NOTE AND TO INSTRUCT THE JURY ON A LEGAL ISSUE THAT HAD NOT BEEN RAISED BEFORE AND COULD NOT, THEREFORE, HAVE BEEN ADDRESSED BY DEFENSE COUNSEL IN SUMMATION (FOURTH DEPT))

CRIMINAL LAW, APPEALS.

WAIVER OF APPEAL INVALID, DESPITE DEFENDANT'S SIGNING OF A WRITTEN WAIVER (SECOND DEPT).

The Second Department determined defendant's waiver of the right to appeal was invalid, despite his signing a written waiver. The court noted that an appellate court cannot exercise its interest of justice jurisdiction where there is a valid waiver of appeal:

> The Supreme Court did not provide the defendant with an adequate explanation of the nature of the right to appeal or the consequences of waiving that right ... . The court failed to advise the defendant that he would ordinarily retain the right to appeal even after pleading guilty, but that in this case he was being asked to voluntarily relinquish that right as a condition of the plea agreement ... . Moreover, the court never elicited an acknowledgment that the defendant was voluntarily waiving his right to appeal ... .
>
> Although the record on appeal reflects that the defendant signed a written appeal waiver form, a written waiver "is not a complete substitute for an on-the-record explanation of the nature of the right to appeal"... . While the written waiver in this case "expressly provided that the court had informed the defendant about the nature of his right to appeal, that representation is contradicted by the oral colloquy"... . Rather, the record reflects that the Supreme Court's colloquy regarding the written waiver amounted to nothing more than "a simple confirmation that the defendant signed [it]"... . The transcript of the plea proceedings shows that the court did not ascertain on the record whether the defendant had read the written waiver or discussed it with defense counsel, or whether he was even aware of its contents... . Under the circumstances here, we conclude that the defendant did not knowingly, voluntarily, and intelligently waive his right to appeal ... . **People v Alston, 2018 NY Slip Op 05327, Second Dept 7-18-18**

CRIMINAL LAW (APPEALS, WAIVER OF APPEAL INVALID, DESPITE DEFENDANT'S SIGNING OF A WRITTEN WAIVER (SECOND DEPT))/APPEALS (CRIMINAL LAW, WAIVER OF APPEAL INVALID, DESPITE DEFENDANT'S SIGNING OF A WRITTEN WAIVER (SECOND DEPT))/WAIVER (APPEALS, CRIMINAL LAW, WAIVER OF APPEAL INVALID, DESPITE DEFENDANT'S SIGNING OF A WRITTEN WAIVER (SECOND DEPT))

CRIMINAL LAW, ATTORNEYS.

DEFENSE COUNSEL INEFFECTIVE FOR FAILING TO MOVE TO DISMISS THE ACCUSATORY INSTRUMENTS ON SPEEDY TRIAL GROUNDS, CONVICTIONS REVERSED (THIRD DEPT).

The Third Department reversed defendant's convictions and dismissed the accusatory instruments because defendant did not receive effective assistance of counsel. Counsel failed to moved to dismiss the prosecution on the ground that defendant's right to a speedy trial had been violated. Had the motion been made, it would have succeeded:

> Where, as here, a class A misdemeanor is the most serious offense of which a defendant is accused, the People have 90 days from the commencement of the criminal action to declare their readiness (see CPL 30.30 [1] [b]...). Compliance with this deadline is determined by "computing the time elapsed between the filing of the first accusatory instrument and the People's declaration of readiness, subtracting any periods of delay that are excludable under the terms of the statute and then adding to the result any postreadiness periods of delay that are actually attributable to the People and are ineligible for an exclusion" ... . Here, although the People declared their readiness 19 days after the accusatory instruments were filed and defendant was arraigned on the charges, they expressly stated at the subsequent appearance on February 9, 2015 that they were not ready for trial and sought an adjournment for the very purpose of trial preparation. The People did not thereafter declare their readiness until June 15, 2015, beyond the 90-day period. Thus, as the People acknowledge, defendant possessed a meritorious statutory speedy trial claim, and defense counsel's failure to raise it in a pretrial motion to dismiss deprived defendant of meaningful representation ... . **People v Smart, 2018 NY Slip Op 04979, Third Dept 7-5-18**

CRIMINAL LAW (ATTORNEYS, INEFFECTIVE ASSISTANCE, DEFENSE COUNSEL INEFFECTIVE FOR FAILING TO MOVE TO DISMISS THE ACCUSATORY INSTRUMENTS ON SPEEDY TRIAL GROUNDS, CONVICTIONS REVERSED (THIRD DEPT))/ATTORNEYS (CRIMINAL LAW, INEFFECTIVE ASSISTANCE, DEFENSE COUNSEL INEFFECTIVE FOR FAILING TO MOVE TO DISMISS THE ACCUSATORY INSTRUMENTS ON SPEEDY TRIAL GROUNDS, CONVICTIONS REVERSED (THIRD DEPT))/INEFFECTIVE ASSISTANCE (CRIMINAL LAW, DEFENSE COUNSEL INEFFECTIVE FOR FAILING TO MOVE TO DISMISS THE ACCUSATORY INSTRUMENTS ON SPEEDY TRIAL GROUNDS, CONVICTIONS REVERSED (THIRD DEPT))/SPEEDY TRIAL (CRIMINAL LAW, ATTORNEYS, INEFFECTIVE ASSISTANCE, DEFENSE COUNSEL INEFFECTIVE FOR FAILING TO MOVE TO DISMISS THE ACCUSATORY INSTRUMENTS ON SPEEDY TRIAL GROUNDS, CONVICTIONS REVERSED (THIRD DEPT))

CRIMINAL LAW, ATTORNEYS.

DEFENDANT NOT GIVEN THE OPPORTUNITY TO EXPLAIN HIS REQUEST TO WITHDRAW HIS GUILTY PLEA, DEFENSE COUNSEL INDICATED THERE WAS NO REASON FOR THE WITHDRAWAL, MATTER REMITTED FOR CONSIDERATION OF THE REQUEST WITH NEW COUNSEL (SECOND DEPT).

The Second Department determined defendant should have been given an opportunity to explain the reasons for his request to withdraw his plea and defense counsel should not have indicated he did not believe there was a basis for the request. Matter was remitted for consideration of the request with new counsel:

> "The nature and extent of the fact-finding procedures prerequisite to the disposition of [motions to withdraw a plea of guilty] rest largely in the discretion of the Judge to whom the motion is made" ... . While in "rare instance[s]" a defendant will be entitled to an evidentiary hearing, often "a limited interrogation by the court will suffice" ... , and when a motion "is patently insufficient on its face, a court may simply deny the motion without making any inquiry" ... . Nevertheless, "[t]he defendant should be afforded reasonable opportunity to present his contentions and the court should [*2]be enabled to make an informed determination" ... .
>
> Moreover, "a defendant has a right to the effective assistance of counsel on his or her motion to withdraw a guilty plea" ... . Counsel "takes a position adverse to his client," depriving him or her of meaningful representation, "when stating that the defendant's motion lacks merit" ... . **People v Caputo, 2018 NY Slip Op 05481, Second Dept 7-25-18**

CRIMINAL LAW (DEFENDANT NOT GIVEN THE OPPORTUNITY TO EXPLAIN HIS REQUEST TO WITHDRAW HIS GUILTY PLEA, DEFENSE COUNSEL INDICATED THERE WAS NO REASON FOR THE WITHDRAWAL, MATTER REMITTED FOR CONSIDERATION OF THE REQUEST WITH NEW COUNSEL (SECOND DEPT))/ATTORNEYS (CRIMINAL LAW, DEFENDANT NOT GIVEN THE OPPORTUNITY TO EXPLAIN HIS REQUEST TO WITHDRAW HIS GUILTY PLEA, DEFENSE COUNSEL INDICATED THERE WAS NO REASON FOR THE WITHDRAWAL, MATTER REMITTED FOR CONSIDERATION OF THE REQUEST WITH NEW COUNSEL (SECOND DEPT))/PLEA, WITHDRAWAL OF (DEFENDANT NOT GIVEN THE OPPORTUNITY TO EXPLAIN HIS REQUEST TO WITHDRAW HIS GUILTY PLEA, DEFENSE COUNSEL INDICATED THERE WAS NO REASON FOR THE WITHDRAWAL, MATTER REMITTED FOR CONSIDERATION OF THE REQUEST WITH NEW COUNSEL (SECOND DEPT))

CRIMINAL LAW, ATTORNEYS, APPEALS.

IMPROPER CROSS-EXAMINATION OF THE SOLE DEFENSE WITNESS DEPRIVED DEFENDANT OF A FAIR TRIAL, REVERSED IN THE INTEREST OF JUSTICE (SECOND DEPT).

The Second Department, reversing defendant's conviction in the interest of justice, determined the prosecutor deprived defendant of a fair trial by improper cross-examination of the sole defense witness:

> The prosecutor repeatedly injected her own credibility into the trial while cross-examining the complainant's grandmother, who was the sole witness for the defense other than the defendant, about pretrial out-of-court statements the grandmother made to the prosecutor concerning the complainant's outcry ... . Given the importance of the grandmother's testimony to the defense, this conduct deprived the defendant of his right to a fair trial ... . **People v Moulton, 2018 NY Slip Op 05203, Second Dept 7-11-18**

CRIMINAL LAW (PROSECUTORIAL MISCONDUCT, IMPROPER CROSS-EXAMINATION OF THE SOLE DEFENSE WITNESS DEPRIVED DEFENDANT OF A FAIR TRIAL, REVERSED IN THE INTEREST OF JUSTICE (SECOND DEPT))/ATTORNEYS (CRIMINAL LAW, PROSECUTORIAL MISCONDUCT, IMPROPER CROSS-EXAMINATION OF THE SOLE DEFENSE WITNESS DEPRIVED DEFENDANT OF A FAIR TRIAL, REVERSED IN THE INTEREST OF JUSTICE (SECOND DEPT))/APPEALS (CRIMINAL LAW, INTEREST OF JUSTICE, IMPROPER CROSS-EXAMINATION OF THE SOLE DEFENSE WITNESS DEPRIVED DEFENDANT OF A FAIR TRIAL, REVERSED IN THE INTEREST OF JUSTICE (SECOND DEPT))/PROSECUTORIAL MISCONDUCT (IMPROPER CROSS-EXAMINATION OF THE SOLE DEFENSE WITNESS DEPRIVED DEFENDANT OF A FAIR TRIAL, REVERSED IN THE INTEREST OF JUSTICE (SECOND DEPT))

CRIMINAL LAW, CONSTITUTIONAL LAW.

COUNTY COURT ABUSED ITS DISCRETION WHEN IT DECLARED A MISTRIAL AFTER ONLY A SHORT PERIOD OF DELIBERATIONS, JEOPARDY ATTACHED AND DEFENDANT CAN NOT BE REPROSECUTED (THIRD DEPT).

The Third Department, reversing defendant's conviction by guilty plea and dismissing the indictment, determined the judge did not sufficiently explore alternatives before declaring a mistrial on the basis the jury was deadlocked. Therefore jeopardy attached the defendant's subsequent guilty plea was vacated:

> Here, the jury had deliberated for a little over two hours — excluding a lunch recess — when County Court received a note from the jury stating that "there appears not to be any way to a unanimous decision" and asking for guidance on how to proceed. Without consulting the parties for input on the appropriate response, County Court summoned the jury into the courtroom, noted that it had not been deliberating for very long, provided an Allen charge and asked the jury to resume deliberations and advise the court if it was unable to arrive at a verdict after a reasonable period of time. Fifty-one minutes after the jury had resumed deliberations, County Court recalled the jury back into the courtroom, on its own accord, and inquired whether the jury was still deadlocked. The foreperson confirmed that it was and, without seeking input from the People or defendant, County Court declared a mistrial.
>
> County Court erred in its recall of the jury by: (1) doing so without first apprising the People and defendant of its intent to do so and seeking their comment; (2) doing so only 51 minutes after it had instructed the jury to resume deliberations; (3) not exploring the possibility of a dinner break or an overnight recess upon learning of the continuing deadlock; and (4) not seeking input from the parties before declaring a mistrial upon learning of the continuing deadlock. Because a mistrial was not manifestly necessary under the collective circumstances, County Court abused its discretion in declaring a mistrial, jeopardy attached and the People were precluded from reprosecuting defendant on the indictment ... . **People v Wilson, 2018 NY Slip Op 04982, Third Dept 7-5-18**

CRIMINAL LAW (DOUBLE JEOPARDY, COUNTY COURT ABUSED ITS DISCRETION WHEN IT DECLARED A MISTRIAL AFTER ONLY A SHORT PERIOD OF DELIBERATIONS, JEOPARDY ATTACHED AND DEFENDANT CAN NOT BE REPROSECUTED (THIRD DEPT))/CONSTITUTIONAL LAW (CRIMINAL LAW, DOUBLE JEOPARDY, COUNTY COURT ABUSED ITS DISCRETION WHEN IT DECLARED A MISTRIAL AFTER ONLY A SHORT PERIOD OF DELIBERATIONS, JEOPARDY ATTACHED AND DEFENDANT CAN NOT BE REPROSECUTED (THIRD DEPT))/MISTRIAL (CRIMINAL LAW, DOUBLE JEOPARDY, COUNTY COURT ABUSED ITS DISCRETION WHEN IT DECLARED A MISTRIAL AFTER ONLY A SHORT PERIOD OF DELIBERATIONS, JEOPARDY ATTACHED AND DEFENDANT CAN NOT BE REPROSECUTED (THIRD DEPT))/DOUBLE JEOPARDY (MISTRIAL, COUNTY COURT ABUSED ITS DISCRETION WHEN IT DECLARED A MISTRIAL AFTER ONLY A SHORT PERIOD OF DELIBERATIONS, JEOPARDY ATTACHED AND DEFENDANT CAN NOT BE REPROSECUTED (THIRD DEPT))

CRIMINAL LAW, DEBTOR-CREDITOR, CIVIL PROCEDURE.

EXECUTIVE LAW DOES NOT PROVIDE FOR THE CIRCUMSTANCE WHERE MORE THAN ONE CRIME VICTIM OBTAINS A JUDGMENT AGAINST THE ASSETS OF THE OFFENDER, HERE THE OFFICE OF VICTIM SERVICES PROPERLY PAID OUT THE ASSETS TO THE FIRST CRIME VICTIM WHO OBTAINED A JUDGMENT (THIRD DEPT).

The Third Department determined the Office of Victim Services (OVS) properly paid out the assets of an incarcerated offender to the first crime victim to obtain a judgment. The statute does not provide for retaining assets for other crime victims who may subsequently obtain a judgment against the offender:

> "Executive Law § 632—a sets forth a statutory scheme intended to improve the ability of crime victims to obtain full and just compensation from the person(s) convicted of the crime" ... by "allow[ing] crime victims or their representatives to sue the convicted criminals who harmed them when the criminals receive substantial sums of money from virtually any source" and protecting those funds while litigation is pending ... .
>
> There is no doubt that OVS complied with its express obligations under the statute. The problem is that the statute provides no guidance as to how OVS is to respond where, as here, multiple crime victims seek to recover and the preserved assets of a convicted person are inadequate ... . OVS viewed its response to be governed by the general rule that, "[w]here two or more . . . orders affecting the same interest in personal property or debt are filed, the proceeds of the property or debt shall be applied in the order of filing," and acted to have the preserved assets released to satisfy the first judgment obtained by a victim (CPLR 5234 [c]). ...
>
> The Legislature could have easily included language in Executive Law § 632-a that substituted a special rule of priority for the one set forth in CPLR 5234 (c), directed OVS to leave any provisional remedies in place until all victims had obtained judgments or created some mechanism for dividing the preserved assets between them. It did not do so, and '"[a] court cannot by implication supply in a statute a provision which it is reasonable to suppose the Legislature intended intentionally to omit"' ... . **Waldman v State of New York, 2018 NY Slip Op 05000, Third Dept 7-5-18**

CRIMINAL LAW (ASSETS OF THE OFFENDER, CRIME VICTIMS, EXECUTIVE LAW DOES NOT PROVIDE FOR THE CIRCUMSTANCE WHERE MORE THAN ONE CRIME VICTIM OBTAINS A JUDGMENT AGAINST THE ASSETS OF THE OFFENDER, HERE THE OFFICE OF VICTIM SERVICES PROPERLY PAID OUT THE ASSETS TO THE FIRST CRIME VICTIM WHO OBTAINED A JUDGMENT (THIRD DEPT))/CRIME VICTIMS (ASSETS OF THE OFFENDER, EXECUTIVE LAW DOES NOT PROVIDE FOR THE CIRCUMSTANCE WHERE MORE THAN ONE CRIME VICTIM OBTAINS A JUDGMENT AGAINST THE ASSETS OF THE OFFENDER, HERE THE OFFICE OF VICTIM SERVICES PROPERLY PAID OUT THE ASSETS TO THE FIRST CRIME VICTIM WHO OBTAINED A JUDGMENT (THIRD DEPT))/OFFICE OF VICTIM SERVICES (OVS) (ASSETS OF THE OFFENDER, CRIME VICTIMS, EXECUTIVE LAW DOES NOT PROVIDE FOR THE CIRCUMSTANCE WHERE MORE THAN ONE CRIME VICTIM OBTAINS A JUDGMENT AGAINST THE ASSETS OF THE OFFENDER, HERE THE OFFICE OF VICTIM SERVICES PROPERLY PAID OUT THE ASSETS TO THE FIRST CRIME VICTIM WHO OBTAINED A JUDGMENT (THIRD DEPT))/DEBTOR-CREDITOR (CRIME VICTIMS, ASSETS OF THE OFFENDER, EXECUTIVE LAW DOES NOT PROVIDE FOR THE CIRCUMSTANCE WHERE MORE THAN ONE CRIME VICTIM OBTAINS A JUDGMENT AGAINST THE ASSETS OF THE OFFENDER, HERE THE OFFICE OF VICTIM SERVICES PROPERLY PAID OUT THE ASSETS TO THE FIRST CRIME VICTIM WHO OBTAINED A JUDGMENT (THIRD DEPT))/CIVIL PROCEDURE (DEBTOR-CREDITOR, CRIME VICTIMS, ASSETS OF THE OFFENDER, PRIORITY OF JUDGMENTS, EXECUTIVE LAW DOES NOT PROVIDE FOR THE CIRCUMSTANCE WHERE MORE THAN ONE CRIME VICTIM OBTAINS A JUDGMENT AGAINST THE ASSETS OF THE OFFENDER, HERE THE OFFICE OF VICTIM SERVICES PROPERLY PAID OUT THE ASSETS TO THE FIRST CRIME VICTIM WHO OBTAINED A JUDGMENT (THIRD DEPT))/CPLR 5234 (DEBTOR-CREDITOR, CRIME VICTIMS, ASSETS OF THE OFFENDER, PRIORITY OF JUDGMENTS, EXECUTIVE LAW DOES NOT PROVIDE FOR THE CIRCUMSTANCE WHERE MORE THAN ONE CRIME VICTIM OBTAINS A JUDGMENT AGAINST THE ASSETS OF THE OFFENDER, HERE THE OFFICE OF VICTIM SERVICES PROPERLY PAID OUT THE ASSETS TO THE FIRST CRIME VICTIM WHO OBTAINED A JUDGMENT (THIRD DEPT))

CRIMINAL LAW, EVIDENCE.

EMERGENCY EXCEPTION TO THE WARRANT REQUIREMENT DID NOT JUSTIFY ENTRY AND SEARCH OF DEFENDANT'S APARTMENT, CONVICTIONS REVERSED (THIRD DEPT).

The Third Department reversed defendant's criminal contempt and violation of probation convictions because the evidence of the offenses was the fruit of an illegal entry and search of defendant's apartment. The attempt to justify the entry and search under the emergency exception to the warrant requirement was rejected. The police officer who entered defendant's apartment, Carmichael, apparently expected that a man named Collins would be in the apartment with defendant. There was an order of protection prohibiting contact between the defendant and Collins.

> We conclude that Carmichael's testimony established that there was not an objectively reasonable basis for him to believe that there was an ongoing emergency in defendant's apartment that required immediate assistance to protect life or property. Carmichael was aware that defendant was no longer incarcerated. There was no evidence that defendant's apartment had been forcibly entered, nor was there any other indication of an ongoing crime or emergency. The low, muffled sound that he heard and the faint light that was seen through the window were consistent with an occupant watching television, a reasonable activity at that hour of night. ... The police had been advised that Collins had been seen in the vicinity of defendant's apartment during the evening in question, and they considered the possibility that he was at her apartment in violation of the order of protection. ...
>
> Further, even had Carmichael's initial entry been lawful, his subsequent search of defendant's apartment was not. A protective sweep is justified only when the police "have articulable facts upon which to believe that there is a person present who may pose a danger to those on the scene" ... . **People v Sears, 2018 NY Slip Op 04980, Third Dept 7-5-18**

CRIMINAL LAW (EMERGENCY EXCEPTION TO THE WARRANT REQUIREMENT DID NOT JUSTIFY ENTRY AND SEARCH OF DEFENDANT'S APARTMENT, CONVICTIONS REVERSED (THIRD DEPT))/WARRANTLESS ENTRY AND SEARCH (EMERGENCY EXCEPTION TO THE WARRANT REQUIREMENT DID NOT JUSTIFY ENTRY AND SEARCH OF DEFENDANT'S APARTMENT, CONVICTIONS REVERSED (THIRD DEPT))/HOME (CRIMINAL LAW, WARRANTLESS ENTRY AND SEARCH, EMERGENCY EXCEPTION TO THE WARRANT REQUIREMENT DID NOT JUSTIFY ENTRY AND SEARCH OF DEFENDANT'S APARTMENT, CONVICTIONS REVERSED (THIRD DEPT))/SEARCH (CRIMINAL LAW, WARRANTLESS ENTRY AND SEARCH, EMERGENCY EXCEPTION TO THE WARRANT REQUIREMENT DID NOT JUSTIFY ENTRY AND SEARCH OF DEFENDANT'S APARTMENT, CONVICTIONS REVERSED (THIRD DEPT))/SUPPRESSION (CRIMINAL LAW, EVIDENCE, EMERGENCY EXCEPTION TO THE WARRANT REQUIREMENT DID NOT JUSTIFY ENTRY AND SEARCH OF DEFENDANT'S APARTMENT, CONVICTIONS REVERSED (THIRD DEPT))/EVIDENCE (CRIMINAL LAW, SUPPRESSION, (EMERGENCY EXCEPTION TO THE WARRANT REQUIREMENT DID NOT JUSTIFY ENTRY AND SEARCH OF DEFENDANT'S APARTMENT, CONVICTIONS REVERSED (THIRD DEPT))

CRIMINAL LAW, EVIDENCE.

ALTHOUGH DEFENDANT WAS PRESENT IN A GARAGE WHERE METHAMPHETAMINE WAS BEING MANUFACTURED, THE EVIDENCE WAS INSUFFICIENT TO DEMONSTRATE SHE CONSTRUCTIVELY POSSESSED THE DRUGS, POSSESSION CONVICTION REVERSED AND INDICTMENT DISMISSED (THIRD DEPT).

The Third Department reversed defendant's conviction of criminal possession of a controlled substance and dismissed the indictment. Defendant's presence in a garage where methamphetamine was being manufactured was not enough to support the People's theory she constructively possessed the drugs. The facts that defendant had admitted to using methamphetamine in the past and had recently purchased a legal allergy drug which can be used in the manufacture of methamphetamine did not demonstrate her exercise of dominion and control over the drugs in the garage:

> As defendant was not found to be in physical possession of methamphetamine, the People proceeded against her on a theory of constructive possession. Thus, it was their burden to establish that she "exercise[d] dominion or control" over the methamphetamine in the one-pot or the area where it was found (Penal Law § 10.00 [8]...) . Defendant's mere presence in the garage where the methamphetamine was found is not enough, standing alone, to establish dominion or control ... . There were no other indicators that defendant had dominion or control over the garage or of the property where it was located; she did not reside there, and there was no evidence that she had keys, kept belongings there or frequently spent time there ... . The People argue that the couch where defendant said she was napping was near the shelf where the one-pot containing methamphetamine was found ... , and they emphasize the one-pot's presence in plain view, the smoke and chemical odor noticed by the police officer and the presence in the garage of various substances and tools used to produce methamphetamine. However, knowledge of the presence of an illegal substance does not, without more, meet the People's burden to demonstrate that a defendant "had the ability and intent to exercise dominion or control over the contraband" ... . **People v Yerian, 2018 NY Slip Op 04981, Third Dept 7-5-18**

CRIMINAL LAW (EVIDENCE, CONSTRUCTIVE POSSESSION, ALTHOUGH DEFENDANT WAS PRESENT IN A GARAGE WHERE METHAMPHETAMINE WAS BEING MANUFACTURED, THE EVIDENCE WAS INSUFFICIENT TO DEMONSTRATE SHE CONSTRUCTIVELY POSSESSED THE DRUGS, POSSESSION CONVICTION REVERSED AND INDICTMENT DISMISSED (THIRD DEPT))/EVIDENCE (CRIMINAL LAW, CONSTRUCTIVE POSSESSION, ALTHOUGH DEFENDANT WAS PRESENT IN A GARAGE WHERE METHAMPHETAMINE WAS BEING MANUFACTURED, THE EVIDENCE WAS INSUFFICIENT TO DEMONSTRATE SHE CONSTRUCTIVELY POSSESSED THE DRUGS, POSSESSION CONVICTION REVERSED AND INDICTMENT DISMISSED (THIRD DEPT))/CONSTRUCTIVE POSSESSION (CRIMINAL LAW, ALTHOUGH DEFENDANT WAS PRESENT IN A GARAGE WHERE METHAMPHETAMINE WAS BEING MANUFACTURED, THE EVIDENCE WAS INSUFFICIENT TO DEMONSTRATE SHE CONSTRUCTIVELY POSSESSED THE DRUGS, POSSESSION CONVICTION REVERSED AND INDICTMENT DISMISSED (THIRD DEPT))/DOMINION AND CONTROL (CRIMINAL LAW, CONSTRUCTIVE POSSESSION, ALTHOUGH DEFENDANT WAS PRESENT IN A GARAGE WHERE METHAMPHETAMINE WAS BEING MANUFACTURED, THE EVIDENCE WAS INSUFFICIENT TO DEMONSTRATE SHE CONSTRUCTIVELY POSSESSED THE DRUGS, POSSESSION CONVICTION REVERSED AND INDICTMENT DISMISSED (THIRD DEPT))/METHAMPHETAMINE (CRIMINAL LAW, CONSTRUCTIVE POSSESSION, ALTHOUGH DEFENDANT WAS PRESENT IN A GARAGE WHERE METHAMPHETAMINE WAS BEING MANUFACTURED, THE EVIDENCE WAS INSUFFICIENT TO DEMONSTRATE SHE CONSTRUCTIVELY POSSESSED THE DRUGS, POSSESSION CONVICTION REVERSED AND INDICTMENT DISMISSED (THIRD DEPT))

CRIMINAL LAW, EVIDENCE.

DVDs SUBMITTED BY THE VICTIM'S FAMILY MEMBERS HAD BEEN SUBMITTED BEFORE IN CONNECTION WITH WHETHER PETITIONER SHOULD BE GRANTED PAROLE, BECAUSE THE DVDs DID NOT PRESENT NEW EVIDENCE, THE PAROLE BOARD SHOULD NOT HAVE RESCINDED ITS DECISION TO SET A RELEASE DATE (THIRD DEPT).

The Third Department, over a two-justice dissent, annulled the parole board's rescission of its decision setting a release date for petitioner. In 1979, when petitioner was 19, he stabbed and killed his 15-year-old friend. The board initially set a release date of August 2016. The victim's family then submitted two DVDs of statements by family members. Apparently the videos had been submitted before but were never made part of the file. Upon viewing the videos, the board rescinded its decision setting the release date. The Third Department found that the DVDs were not new evidence and therefore the rescission of the release date was not authorized:

> Any alleged failure on respondent's part to consider these materials earlier — not due to a failure to communicate with victims or to offer them opportunities to provide statements, but solely as the apparent result of respondent's own inefficient filing system — cannot rationally be found to convert materials that had been provided to it 9 and 15 years before into new information that was not previously available or known.
>
> ... [O]ther challenges to parole rescission determinations based upon victim impact statements have exclusively involved new factual information that had not previously been known to respondent because the victims either had not provided statements or had not been given opportunities to do so ... . Our review of the case law has revealed no other case involving a parole rescission decision that, as here, is based upon additional input from victims or family members who had previously submitted impact statements to respondent — much less multiple submissions of a thorough and extensive nature over many years.
>
> In rescinding petitioner's parole, respondent did not make the required finding that there was substantial evidence of "significant information" that "was not [previously] known by [respondent]" ... . **Matter of Duffy v New York State Bd. of Parole, 2018 NY Slip Op 05002, Third Dept 7-5-18**

CRIMINAL LAW (PAROLE, DVDs SUBMITTED BY THE VICTIM'S FAMILY MEMBERS HAD BEEN SUBMITTED BEFORE IN CONNECTION WITH WHETHER PETITIONER SHOULD BE GRANTED PAROLE, BECAUSE THE DVDs DID NOT PRESENT NEW EVIDENCE, THE PAROLE BOARD SHOULD NOT HAVE RESCINDED ITS DECISION TO SET A RELEASE DATE (THIRD DEPT))/EVIDENCE (CRIMINAL LAW, PAROLE, DVDs SUBMITTED BY THE VICTIM'S FAMILY MEMBERS HAD BEEN SUBMITTED BEFORE IN CONNECTION WITH WHETHER PETITIONER SHOULD BE GRANTED PAROLE, BECAUSE THE DVDs DID NOT PRESENT NEW EVIDENCE, THE PAROLE BOARD SHOULD NOT HAVE RESCINDED ITS DECISION TO SET A RELEASE DATE (THIRD DEPT))/PAROLE (EVIDENCE, DVDs SUBMITTED BY THE VICTIM'S FAMILY MEMBERS HAD BEEN SUBMITTED BEFORE IN CONNECTION WITH WHETHER PETITIONER SHOULD BE GRANTED PAROLE, BECAUSE THE DVDs DID NOT PRESENT NEW EVIDENCE, THE PAROLE BOARD SHOULD NOT HAVE RESCINDED ITS DECISION TO SET A RELEASE DATE (THIRD DEPT))

CRIMINAL LAW, EVIDENCE.

IT WAS REVERSIBLE ERROR TO ALLOW EVIDENCE OF TWO FORGED CHECKS AT THE SECOND FORGERY TRIAL BECAUSE DEFENDANT HAD BEEN ACQUITTED OF THE CHARGES RELATED TO THOSE CHECKS IN THE FIRST TRIAL (FOURTH DEPT).

The Fourth Department, reversing County Court, determined that it was reversible error to allow the jury to hear evidence of two allegedly forged checks in the second forgery trial after defendant had been acquitted of the charges related to those checks in the first trial. The People were collaterally estopped from introducing evidence related to the acquittals:

> At the new trial, notwithstanding that defendant was acquitted of the prior charged criminal conduct involving check numbers 61512 and 61519, the People were permitted to use those checks, over defendant's objection, in their case-in-chief as evidence of, inter alia, defendant's criminal intent and motive with respect to check number 61517. In instructing the jury concerning the purpose for which check numbers 61512 and 61519 could be considered, County Court referred to defendant's alleged involvement with those checks as "uncharged conduct." The court also instructed the jury: "Regarding evidence of other crimes, there may have been evidence that on another occasion the defendant engaged in criminal conduct." Defendant contends, inter alia, that the People were collaterally estopped at the new trial from using check numbers 61512 and 61519 as evidence with respect to count two involving check number 61517, and that the court committed reversible error in permitting such evidence. We agree.
>
> We conclude that it was improper for the court to characterize any evidence concerning defendant's alleged possession of forged checks numbered 61512 and 61519 as "uncharged conduct" or "criminal conduct." Defendant in fact had been charged, tried, and acquitted of criminal possession of a forged instrument in the second degree with respect to those checks. We therefore further conclude that the People were collaterally estopped by the earlier verdict from presenting any evidence related to check numbers 61512 and 61519 at the new trial ... . **People v Williams, 2018 NY Slip Op 05089, Fourth Dept 7-6-18**

CRIMINAL LAW (EVIDENCE, IT WAS REVERSIBLE ERROR TO ALLOW EVIDENCE OF TWO FORGED CHECKS AT THE SECOND FORGERY TRIAL BECAUSE DEFENDANT HAD BEEN ACQUITTED OF THE CHARGES RELATED TO THOSE CHECKS IN THE FIRST TRIAL (FOURTH DEPT))/EVIDENCE (CRIMINAL LAW, IT WAS REVERSIBLE ERROR TO ALLOW EVIDENCE OF TWO FORGED CHECKS AT THE SECOND FORGERY TRIAL BECAUSE DEFENDANT HAD BEEN ACQUITTED OF THE CHARGES RELATED TO THOSE CHECKS IN THE FIRST TRIAL (FOURTH DEPT))/MOLINEUX (CRIMINAL LAW, EVIDENCE, IT WAS REVERSIBLE ERROR TO ALLOW EVIDENCE OF TWO FORGED CHECKS AT THE SECOND FORGERY TRIAL BECAUSE DEFENDANT HAD BEEN ACQUITTED OF THE CHARGES RELATED TO THOSE CHECKS IN THE FIRST TRIAL (FOURTH DEPT))/PRIOR CRIMES AND BAD ACTS (CRIMINAL LAW, EVIDENCE, IT WAS REVERSIBLE ERROR TO ALLOW EVIDENCE OF TWO FORGED CHECKS AT THE SECOND FORGERY TRIAL BECAUSE DEFENDANT HAD BEEN ACQUITTED OF THE CHARGES RELATED TO THOSE CHECKS IN THE FIRST TRIAL (FOURTH DEPT))

CRIMINAL LAW, EVIDENCE.

POLICE DID NOT HAVE A REASONABLE SUSPICION OF CRIMINAL ACTIVITY AT THE TIME DEFENDANT WAS STOPPED ON THE STREET, SHOWUP IDENTIFICATION SHOULD HAVE BEEN SUPPRESSED (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined the show up identification of the defendant should have been suppressed because the police did not have a reasonable suspicion of criminal activity at the time the police approached and stopped the defendant. The police responded to a 911 dispatch indicating three black men, one with a book bag, had robbed a taxi driver on State Street and were headed east. Within two or three minutes a police officer spotted three men dressed in black, one with a book bag walking on a street west of State Street. Two of the men fled, but defendant remained. After defendant was taken into custody he was identified by the victim in a showup procedure. The Fourth Department noted that the three men were half a mile from the area indicated by the unidentified 911 caller and did not appear to be out of breath. The court also noted the fact that two of the men fled was not enough to create a reasonable suspicion of criminal activity on defendant's part. The defendant also moved to suppress a cell phone that was found near where defendant was stopped. Denial of suppression was proper because there was no showing the phone was discarded because of unlawful conduct by the police. A new trial was ordered:

> The necessary predicate for stopping and detaining defendant was that the officer have " at least a reasonable suspicion that [defendant] ha[d] committed, [was] committing, or [was] about to commit a crime' "... . Here, even assuming, arguendo, that the as-yet unidentified 911 caller was reliable and had a sufficient basis of knowledge... , we conclude that the information available to the detaining officer did not provide reasonable suspicion to stop and detain defendant. **People v Spinks, 2018 NY Slip Op 05103, Fourth Dept 7-6-18**

CRIMINAL LAW (STREET STOPS, POLICE DID NOT HAVE A REASONABLE SUSPICION OF CRIMINAL ACTIVITY AT THE TIME DEFENDANT WAS STOPPED ON THE STREET, SHOWUP IDENTIFICATION SHOULD HAVE BEEN SUPPRESSED (FOURTH DEPT))/EVIDENCE (CRIMINAL LAW, SUPPRESSION, STREET STOPS, POLICE DID NOT HAVE A REASONABLE SUSPICION OF CRIMINAL ACTIVITY AT THE TIME DEFENDANT WAS STOPPED ON THE STREET, SHOWUP IDENTIFICATION SHOULD HAVE BEEN SUPPRESSED (FOURTH DEPT))/SHOWUP IDENTIFICATION (STREET STOPS, POLICE DID NOT HAVE A REASONABLE SUSPICION OF CRIMINAL ACTIVITY AT THE TIME DEFENDANT WAS STOPPED ON THE STREET, SHOWUP IDENTIFICATION SHOULD HAVE BEEN SUPPRESSED (FOURTH DEPT))/SUPPRESSION (STREET STOPS, POLICE DID NOT HAVE A REASONABLE SUSPICION OF CRIMINAL ACTIVITY AT THE TIME DEFENDANT WAS STOPPED ON THE STREET, SHOWUP IDENTIFICATION SHOULD HAVE BEEN SUPPRESSED (FOURTH DEPT))/SEARCH AND SEIZURE (STREET STOPS, POLICE DID NOT HAVE A REASONABLE SUSPICION OF CRIMINAL ACTIVITY AT THE TIME DEFENDANT WAS STOPPED ON THE STREET, SHOWUP IDENTIFICATION SHOULD HAVE BEEN SUPPRESSED (FOURTH DEPT))/STREET STOPS (CRIMINAL LAW, POLICE DID NOT HAVE A REASONABLE SUSPICION OF CRIMINAL ACTIVITY AT THE TIME DEFENDANT WAS STOPPED ON THE STREET, SHOWUP IDENTIFICATION SHOULD HAVE BEEN SUPPRESSED (FOURTH DEPT))/DE BOUR (STREET STOPS, POLICE DID NOT HAVE A REASONABLE SUSPICION OF CRIMINAL ACTIVITY AT THE TIME DEFENDANT WAS STOPPED ON THE STREET, SHOWUP IDENTIFICATION SHOULD HAVE BEEN SUPPRESSED (FOURTH DEPT))

CRIMINAL LAW, EVIDENCE.

ALTHOUGH THE SEARCH OF DEFENDANT'S PERSON INCIDENT TO ARREST WAS PROPER, THE SEARCH INSIDE DEFENDANT'S WALLET WAS NOT, CREDIT CARDS SHOULD HAVE BEEN SUPPRESSED (SECOND DEPT).

The Second Department determined defendant's motion to suppress credit cards taken from his wallet after he was placed under arrest after a traffic stop should have been granted. The defendant was arrested after a police officer saw what looked like marijuana in a plastic bag on the floor of the car. Defendant was charged with possessing forged credit cards:

> While the police officer's search of the defendant's pockets was justified since it arose from a search incident to a lawful arrest... , the subsequent search of the defendant's wallet was akin to searching a small bag or change purse and was unlawful. "The protections embodied in article I, § 12 of the New York State Constitution serve to shield citizens from warrantless intrusions on their privacy interests, including their personal effects"... . "[E]ven a bag within the immediate control or grabbable area' of a suspect at the time of his [or her] arrest may not be subjected to a warrantless search incident to the arrest, unless the circumstances leading to the arrest support a reasonable belief that the suspect may gain possession of a weapon or be able to destroy evidence located in the bag"... . The proof adduced at the suppression hearing failed to establish the presence of such circumstances ... . **People v Geddes-Kelly, 2018 NY Slip Op 05195, Second Dept 7-11-18**

CRIMINAL LAW (EVIDENCE, ALTHOUGH THE SEARCH OF DEFENDANT'S PERSON INCIDENT TO ARREST WAS PROPER, THE SEARCH INSIDE DEFENDANT'S WALLET WAS NOT, CREDIT CARDS SHOULD HAVE BEEN SUPPRESSED (SECOND DEPT))/EVIDENCE (CRIMINAL LAW, SUPPRESSION, ALTHOUGH THE SEARCH OF DEFENDANT'S PERSON INCIDENT TO ARREST WAS PROPER, THE SEARCH INSIDE DEFENDANT'S WALLET WAS NOT, CREDIT CARDS SHOULD HAVE BEEN SUPPRESSED (SECOND DEPT))/SEARCH AND SEIZURE (TRAFFIC STOP, ALTHOUGH THE SEARCH OF DEFENDANT'S PERSON INCIDENT TO ARREST WAS PROPER, THE SEARCH INSIDE DEFENDANT'S WALLET WAS NOT, CREDIT CARDS SHOULD HAVE BEEN SUPPRESSED (SECOND DEPT))/SUPPRESSION (TRAFFIC STOP, ALTHOUGH THE SEARCH OF DEFENDANT'S PERSON INCIDENT TO ARREST WAS PROPER, THE SEARCH INSIDE DEFENDANT'S WALLET WAS NOT, CREDIT CARDS SHOULD HAVE BEEN SUPPRESSED (SECOND DEPT))/TRAFFIC STOPS (EVIDENCE, ALTHOUGH THE SEARCH OF DEFENDANT'S PERSON INCIDENT TO ARREST WAS PROPER, THE SEARCH INSIDE DEFENDANT'S WALLET WAS NOT, CREDIT CARDS SHOULD HAVE BEEN SUPPRESSED (SECOND DEPT))/WALLETS (CRIMINAL LAW, SEARCH AND SEIZURE, ALTHOUGH THE SEARCH OF DEFENDANT'S PERSON INCIDENT TO ARREST WAS PROPER, THE SEARCH INSIDE DEFENDANT'S WALLET WAS NOT, CREDIT CARDS SHOULD HAVE BEEN SUPPRESSED (SECOND DEPT))

CRIMINAL LAW, EVIDENCE.

OFFICER HAD A REASONABLE BASIS TO CONDUCT A FRISK OF THE DEFENDANT FOR SAFETY REASONS AFTER A VEHICLE STOP (THIRD DEPT).

The Third Department, over a dissent, determined the officer who stopped the car in which defendant was a passenger had a reasonable basis to frisk the defendant for safety. The frisk resulted in the seizure of a handgun. At the time of the frisk, the officer knew the defendant was out past his parole curfew and suspected defendant had violated his conditions of parole by consuming alcohol. In addition, defendant was riding in an unregistered car and the driver did not have a license:

> A suspect's status as a parolee is a relevant factor to consider when evaluating the reasonableness of a particular search or seizure ... , particularly where, as here, the officer had reason to believe that defendant was then and there violating both the curfew and alcohol conditions of his parole. The hour was late and the driver was driving an unregistered vehicle without a license. Defendant's evasive, if not flippant, "sales" response as to why he was on parole, coupled with his repeated denial of alcohol use, heightened the volatility of the situation. Cumulatively, these factors validate County Court's conclusion that the officer had a reasonable basis to conduct the frisk to assure his own safety ... . **People v Carey, 2018 NY Slip Op 05376, Third Dept 7-19-18**

CRIMINAL LAW (OFFICER HAD A REASONABLE BASIS TO CONDUCT A FRISK OF THE DEFENDANT FOR SAFETY REASONS AFTER A VEHICLE STOP (THIRD DEPT))/EVIDENCE (STREET STOPS, OFFICER HAD A REASONABLE BASIS TO CONDUCT A FRISK OF THE DEFENDANT FOR SAFETY REASONS AFTER A VEHICLE STOP (THIRD DEPT))/STREET STOPS (FRISK, OFFICER HAD A REASONABLE BASIS TO CONDUCT A FRISK OF THE DEFENDANT FOR SAFETY REASONS AFTER A VEHICLE STOP (THIRD DEPT))/PAT DOWN SEARCH (OFFICER HAD A REASONABLE BASIS TO CONDUCT A FRISK OF THE DEFENDANT FOR SAFETY REASONS AFTER A VEHICLE STOP (THIRD DEPT))/EVIDENCE (STREET STOPS, OFFICER HAD A REASONABLE BASIS TO CONDUCT A FRISK OF THE DEFENDANT FOR SAFETY REASONS AFTER A VEHICLE STOP (THIRD DEPT))/SEARCH AND SEIZURE (PAT DOWN SEARCH, OFFICER HAD A REASONABLE BASIS TO CONDUCT A FRISK OF THE DEFENDANT FOR SAFETY REASONS AFTER A VEHICLE STOP (THIRD DEPT))/SUPPRESSION (PAT DOWN SEARCH, OFFICER HAD A REASONABLE BASIS TO CONDUCT A FRISK OF THE DEFENDANT FOR SAFETY REASONS AFTER A VEHICLE STOP (THIRD DEPT))/EVIDENCE (STREET STOPS, OFFICER HAD A REASONABLE BASIS TO CONDUCT A FRISK OF THE DEFENDANT FOR SAFETY REASONS AFTER A VEHICLE STOP (THIRD DEPT))/FRISK (PAT DOWN SEARCH, OFFICER HAD A REASONABLE BASIS TO CONDUCT A FRISK OF THE DEFENDANT FOR SAFETY REASONS AFTER A VEHICLE STOP (THIRD DEPT))

CRIMINAL LAW, EVIDENCE.

AFFIDAVIT IN SUPPORT OF WARRANT FOR A DNA SWAB INSUFFICIENT, MOTION TO SUPPRESS SHOULD HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing defendant's conviction, determined the affidavit submitted in support of a warrant application for a DNA swab was insufficient and the motion to suppress should have been granted:

> To establish probable cause, a search warrant application must provide sufficient information to support a reasonable belief that evidence of a crime may be found in a certain place'"... . Here, as the People correctly concede, the affidavit of the detective submitted in support of the search warrant application was conclusory and insufficient to establish probable cause to issue the warrant ... . The detective stated that he believed evidence related to the victim's murder may be found in the defendant's saliva based on his interview of witnesses, information supplied to him by fellow police officers, and his review of police department records. However, the detective did not identify the witnesses or indicate what information he obtained from them, and did not specify what police department records he reviewed, or what information was contained in the records. **People v Augustus, 2018 NY Slip Op 05480, Second Dept 7-25-18**

CRIMINAL LAW (EVIDENCE, DNA, AFFIDAVIT IN SUPPORT OF WARRANT FOR A DNA SWAB INSUFFICIENT, MOTION TO SUPPRESS SHOULD HAVE BEEN GRANTED (SECOND DEPT))/EVIDENCE (CRIMINAL LAW, AFFIDAVIT IN SUPPORT OF WARRANT FOR A DNA SWAB INSUFFICIENT, MOTION TO SUPPRESS SHOULD HAVE BEEN GRANTED (SECOND DEPT))/DNA (CRIMINAL LAW, AFFIDAVIT IN SUPPORT OF WARRANT FOR A DNA SWAB INSUFFICIENT, MOTION TO SUPPRESS SHOULD HAVE BEEN GRANTED (SECOND DEPT))/EVIDENCE (CRIMINAL LAW, AFFIDAVIT IN SUPPORT OF WARRANT FOR A DNA SWAB INSUFFICIENT, MOTION TO SUPPRESS SHOULD HAVE BEEN GRANTED (SECOND DEPT))/SEARCH AND SEIZURE (DNA, AFFIDAVIT IN SUPPORT OF WARRANT FOR A DNA SWAB INSUFFICIENT, MOTION TO SUPPRESS SHOULD HAVE BEEN GRANTED (SECOND DEPT))/EVIDENCE (CRIMINAL LAW, AFFIDAVIT IN SUPPORT OF WARRANT FOR A DNA SWAB INSUFFICIENT, MOTION TO SUPPRESS SHOULD HAVE BEEN GRANTED (SECOND DEPT))/SUPPRESS, MOTION TO (CRIMINAL LAW, DNA, AFFIDAVIT IN SUPPORT OF WARRANT FOR A DNA SWAB INSUFFICIENT, MOTION TO SUPPRESS SHOULD HAVE BEEN GRANTED (SECOND DEPT))/EVIDENCE (CRIMINAL LAW, AFFIDAVIT IN SUPPORT OF WARRANT FOR A DNA SWAB INSUFFICIENT, MOTION TO SUPPRESS SHOULD HAVE BEEN GRANTED (SECOND DEPT))/SEARCH WARRANT (DNA, AFFIDAVIT IN SUPPORT OF WARRANT FOR A DNA SWAB INSUFFICIENT, MOTION TO SUPPRESS SHOULD HAVE BEEN GRANTED (SECOND DEPT))

CRIMINAL LAW, EVIDENCE, APPEALS.

UPON REMITTITUR FROM THE COURT OF APPEALS, DEFENDANT'S IDENTITY THEFT CONVICTION AFFIRMED, DEFENDANT ATTEMPTED TO PURCHASE ITEMS USING A CREDIT CARD AND DRIVER'S LICENSE WITH A FICTITIOUS NAME (FIRST DEPT).

The First Department, upon remittitur from the Court of Appeals, determined defendant's conviction for identity theft was not against the weight of the evidence. The defendant had tried to purchase items from a store using a credit card and driver's license with a fictitious name. The First Department had reversed the conviction finding that, because the name was fictitious, defendant had not assumed the identity of another. The Court of Appeal held that using a fictitious name was prohibited by the identity theft statute:

> On appeal, we modified to the extent of vacating the conviction for identity theft, and otherwise affirmed ... . We reasoned that in order to establish the crime, a defendant had to both use the victim's personal identifying information and assume the victim's identity. We reasoned that while defendant had used the victim's personal identifying information, he had not assumed her identity, but rather, that of a fictitious person.
>
> The Court of Appeals reversed, reasoning that defendant had assumed the identity of the victim within the meaning of the statute. The Court rejected defendant's argument that "the requirement that a defendant assumes the identity of another is not a separate element of the crime," explaining that the statutory language "simply summarizes and introduces the three categories of conduct through which an identity may be assumed" ... . **People v Roberts, 2018 NY Slip Op 05220, First Dept 7-12-18**

CRIMINAL LAW (UPON REMITTITUR FROM THE COURT OF APPEALS, DEFENDANT'S IDENTITY THEFT CONVICTION AFFIRMED, DEFENDANT ATTEMPTED TO PURCHASE ITEMS USING A CREDIT CARD AND DRIVER'S LICENSE WITH A FICTITIOUS NAME (FIRST DEPT))/EVIDENCE (CRIMINAL LAW, IDENTITY THEFT, UPON REMITTITUR FROM THE COURT OF APPEALS, DEFENDANT'S IDENTITY THEFT CONVICTION AFFIRMED, DEFENDANT ATTEMPTED TO PURCHASE ITEMS USING A CREDIT CARD AND DRIVER'S LICENSE WITH A FICTITIOUS NAME (FIRST DEPT))/APPEALS (CRIMINAL LAW, IDENTITY THEFT, UPON REMITTITUR FROM THE COURT OF APPEALS, DEFENDANT'S IDENTITY THEFT CONVICTION AFFIRMED, DEFENDANT ATTEMPTED TO PURCHASE ITEMS USING A CREDIT CARD AND DRIVER'S LICENSE WITH A FICTITIOUS NAME (FIRST DEPT))/IDENTITY THEFT (CRIMINAL LAW, IDENTITY THEFT, UPON REMITTITUR FROM THE COURT OF APPEALS, DEFENDANT'S IDENTITY THEFT CONVICTION AFFIRMED, DEFENDANT ATTEMPTED TO PURCHASE ITEMS USING A CREDIT CARD AND DRIVER'S LICENSE WITH A FICTITIOUS NAME (FIRST DEPT))

CRIMINAL LAW, EVIDENCE, APPEALS.

HARMLESS ERROR TO ADMIT EVIDENCE OF PRIOR CRIMES, HARMLESS ERROR TO PROHIBIT CROSS-EXAMINATION OF ARRESTING OFFICER ABOUT A SETTLED FEDERAL CIVIL RIGHTS SUIT, STATEMENTS MADE BY DEFENDANT NOT ADMISSIBLE AS PRIOR CONSISTENT STATEMENTS OR AS EVIDENCE OF STATE OF MIND, EVIDENTIARY ARGUMENT NOT RAISED BELOW OR ON APPEAL CANNOT BE CONSIDERED (SECOND DEPT).

The Second Department, over a dissent, affirmed defendant's conviction for possession of a weapon. In a comprehensive decision too detailed to fairly summarize here the court ruled: the stop of the vehicle in which defendant was a passenger was justified by traffic infractions; the officer's noticing pictures of firearms on defendant's phone and the butt of a handgun on defendant's hip justified asking defendant to step out of the car; defendant's statement as he got out of the car that he had a handgun on him was admissible; defendant was not entitled to put in evidence his prior statements about his intent to turn the weapon in at the police station; pictures of handguns from defendant's phone that did not related to the handgun which was the subject of the possession charge should not have been admitted (harmless error); and defense counsel should have been allowed to cross-examine one of the arresting officers about a federal civil rights suit which had been settled which alleged misconduct with regard to an arrest (harmless error). The court rejected the arguments that the prior statements about turning the handgun in should have been admitted as prior consistent statements or under the state of mind exception to the hearsay rule:

> ... [A]s an essential part of its case-in-chief, the prosecution elicited, through the testimony of a police officer, the defendant's statement regarding his intent to surrender the gun. As was his right, the defendant elected not to take the stand and subject himself to cross-examination, instead relying upon the officer's testimony to establish his defense of temporary lawful possession of the weapon. Having so elected, he foreclosed any possibility that the prosecutor would cross-examine him and challenge his defense as a recent fabrication during such questioning. Thus, since the requisite claim of a recent fabrication was absent, the defendant could not adduce evidence of a prior consistent statement to rebut it ... . * * *
>
> .. [O]our dissenting colleague instead primarily argues that [the] proffered testimony regarding the defendant's alleged statement to her of his intention to surrender the gun should have been admitted as evidence of the defendant's state of mind rather than for the truth of its contents, thereby obviating any hearsay objection. However, the defendant never advanced this "state of mind" argument at the trial level, nor does he currently contend on this appeal that his purported statement to Armstrong should have been admitted as evidence of his state of mind. Accordingly, this issue is both unpreserved for appellate review ... and not before this Court for consideration on the present appeal ... . **People v Watson, 2018 NY Slip Op 05342, Second Dept 7-18-18**

CRIMINAL LAW (EVIDENCE, HARMLESS ERROR TO ADMIT EVIDENCE OF PRIOR CRIMES, HARMLESS ERROR TO PROHIBIT CROSS-EXAMINATION OF ARRESTING OFFICER ABOUT A SETTLED FEDERAL CIVIL RIGHTS SUIT, STATEMENTS MADE BY DEFENDANT NOT ADMISSIBLE AS PRIOR CONSISTENT STATEMENTS OR AS EVIDENCE OF STATE OF MIND (SECOND DEPT))/EVIDENCE (CRIMINAL LAW, HARMLESS ERROR TO ADMIT EVIDENCE OF PRIOR CRIMES, HARMLESS ERROR TO PROHIBIT CROSS-EXAMINATION OF ARRESTING OFFICER ABOUT A SETTLED FEDERAL CIVIL RIGHTS SUIT, STATEMENTS MADE BY DEFENDANT NOT ADMISSIBLE AS PRIOR CONSISTENT STATEMENTS OR AS EVIDENCE OF STATE OF MIND (SECOND DEPT))/APPEALS (CRIMINAL LAW, HARMLESS ERROR TO ADMIT EVIDENCE OF PRIOR CRIMES, HARMLESS ERROR TO PROHIBIT CROSS-EXAMINATION OF ARRESTING OFFICER ABOUT A SETTLED FEDERAL CIVIL RIGHTS SUIT, STATEMENTS MADE BY DEFENDANT NOT ADMISSIBLE AS PRIOR CONSISTENT STATEMENTS OR AS EVIDENCE OF STATE OF MIND, EVIDENTIARY ARGUMENT NOT RAISED BELOW OR ON APPEAL CANNOT BE CONSIDERED (SECOND DEPT))/PRIOR CRIMES (EVIDENCE, HARMLESS ERROR TO ADMIT EVIDENCE OF PRIOR CRIMES, HARMLESS ERROR TO PROHIBIT CROSS-EXAMINATION OF ARRESTING OFFICER ABOUT A SETTLED FEDERAL CIVIL RIGHTS SUIT, STATEMENTS MADE BY DEFENDANT NOT ADMISSIBLE AS PRIOR CONSISTENT STATEMENTS OR AS EVIDENCE OF STATE OF MIND (SECOND DEPT))/MOLINEUX HARMLESS ERROR TO ADMIT EVIDENCE OF PRIOR CRIMES, HARMLESS ERROR TO PROHIBIT CROSS-EXAMINATION OF ARRESTING OFFICER ABOUT A SETTLED FEDERAL CIVIL RIGHTS SUIT, STATEMENTS MADE BY DEFENDANT NOT ADMISSIBLE AS PRIOR CONSISTENT STATEMENTS OR AS EVIDENCE OF STATE OF

MIND (SECOND DEPT))/POLICE OFFICERS (CROSS-EXAMINATION, HARMLESS ERROR TO ADMIT EVIDENCE OF PRIOR CRIMES, HARMLESS ERROR TO PROHIBIT CROSS-EXAMINATION OF ARRESTING OFFICER ABOUT A SETTLED FEDERAL CIVIL RIGHTS SUIT, STATEMENTS MADE BY DEFENDANT NOT ADMISSIBLE AS PRIOR CONSISTENT STATEMENTS OR AS EVIDENCE OF STATE OF MIND (SECOND DEPT))/PRIOR CONSISTENT STATEMENT HARMLESS ERROR TO ADMIT EVIDENCE OF PRIOR CRIMES, HARMLESS ERROR TO PROHIBIT CROSS-EXAMINATION OF ARRESTING OFFICER ABOUT A SETTLED FEDERAL CIVIL RIGHTS SUIT, STATEMENTS MADE BY DEFENDANT NOT ADMISSIBLE AS PRIOR CONSISTENT STATEMENTS OR AS EVIDENCE OF STATE OF MIND (SECOND DEPT))/STATE OF MIND (HEARSAY, , HARMLESS ERROR TO ADMIT EVIDENCE OF PRIOR CRIMES, HARMLESS ERROR TO PROHIBIT CROSS-EXAMINATION OF ARRESTING OFFICER ABOUT A SETTLED FEDERAL CIVIL RIGHTS SUIT, STATEMENTS MADE BY DEFENDANT NOT ADMISSIBLE AS PRIOR CONSISTENT STATEMENTS OR AS EVIDENCE OF STATE OF MIND (SECOND DEPT))/HEARSAY (HARMLESS ERROR TO ADMIT EVIDENCE OF PRIOR CRIMES, HARMLESS ERROR TO PROHIBIT CROSS-EXAMINATION OF ARRESTING OFFICER ABOUT A SETTLED FEDERAL CIVIL RIGHTS SUIT, STATEMENTS MADE BY DEFENDANT NOT ADMISSIBLE AS PRIOR CONSISTENT STATEMENTS OR AS EVIDENCE OF STATE OF MIND (SECOND DEPT))

CRIMINAL LAW, EVIDENCE, ATTORNEYS.

PROSECUTOR'S IMPROPER REMARKS DESIGNED TO ELICIT THE JURY'S SYMPATHY FOR THE VICTIM DID NOT DEPRIVE DEFENDANT OF A FAIR TRIAL, HOWEVER A NEW TRIAL ON THE MURDER CHARGE IS REQUIRED BECAUSE THE TRIAL JUDGE ERRONEOUSLY DENIED DEFENDANT'S REQUEST TO INSTRUCT THE JURY ON THE LESSER INCLUDED OFFENSE OF MANSLAUGHTER (SECOND DEPT).

The Second Department, reversing defendant's murder conviction, determined the trial judge should have instructed the jury on the lesser included offense of manslaughter. Although the defendant told the police he went to the victim's house intending to kill him, there was evidence the gun went off when the victim grabbed the gun. The Second Department also noted the prosecutor improperly tried to elicit the jury's sympathy for the victim:

> ... [T]he prosecutor's comments in his opening statement about the grand jury's indictment were improper. The prosecutor's comments in his opening statement about the victim and his family, which could only have been intended to evoke the jury's sympathy, were also improper... . Further, the prosecutor elicited certain testimony from the medical examiner and the victim's father about the victim's personal background and the victim's family that was irrelevant to the issues at trial, and was likewise intended to evoke the jury's sympathy ... . Nonetheless, under the circumstances of this case, the prosecutor's improprieties did not deprive the defendant of a fair trial, and any other error in this regard was harmless, as there was overwhelming evidence of the defendant's guilt and no significant probability that any error contributed to his convictions ... .
>
> Here, the court should have granted the defendant's request to charge manslaughter in the second degree (reckless manslaughter) as a lesser included offense of murder in the second degree (intentional murder). Reckless manslaughter is a lesser included offense of intentional murder in the second degree ... . Moreover, there is a reasonable view of the evidence that the defendant did not intentionally pull the trigger at the time the gun was fired ... . **People v Cherry, 2018 NY Slip Op 05190, Second Dept 7-11-18**

CRIMINAL LAW (PROSECUTORIAL MISCONDUCT, LESSER INCLCUDED OFFENSE, PROSECUTOR'S IMPROPER REMARKS DESIGNED TO ELICIT THE JURY'S SYMPATHY FOR THE VICTIM DID NOT DEPRIVE DEFENDANT OF A FAIR TRIAL, HOWEVER A NEW TRIAL ON THE MURDER CHARGE IS REQUIRED BECAUSE THE TRIAL JUDGE ERRONEOUSLY DENIED DEFENDANT'S REQUEST TO INSTRUCT THE JURY ON THE LESSER INCLUDED OFFENSE OF MANSLAUGHTER (SECOND DEPT))/EVIDENCE (CRIMINAL LAW, LESSER INCLUDED OFFENSE, PROSECUTOR'S IMPROPER REMARKS DESIGNED TO ELICIT THE JURY'S SYMPATHY FOR THE VICTIM DID NOT DEPRIVE DEFENDANT OF A FAIR TRIAL, HOWEVER A NEW TRIAL ON THE MURDER CHARGE IS REQUIRED BECAUSE THE TRIAL JUDGE ERRONEOUSLY DENIED DEFENDANT'S REQUEST TO INSTRUCT THE JURY ON THE LESSER INCLUDED OFFENSE OF MANSLAUGHTER (SECOND DEPT))/ATTORNEYS (CRIMINAL LAW, PROSECUTORIAL MISCONDUCT, PROSECUTOR'S IMPROPER REMARKS DESIGNED TO ELICIT THE JURY'S SYMPATHY FOR THE VICTIM DID NOT DEPRIVE DEFENDANT OF A FAIR TRIAL, HOWEVER A NEW TRIAL ON THE MURDER CHARGE IS REQUIRED BECAUSE THE TRIAL JUDGE ERRONEOUSLY DENIED DEFENDANT'S REQUEST TO INSTRUCT THE JURY ON THE LESSER INCLUDED OFFENSE OF MANSLAUGHTER (SECOND DEPT))/LESSER INCLUDED OFFENSE A NEW TRIAL ON THE MURDER CHARGE IS REQUIRED BECAUSE THE TRIAL JUDGE ERRONEOUSLY DENIED DEFENDANT'S REQUEST TO INSTRUCT THE JURY ON THE LESSER INCLUDED OFFENSE OF MANSLAUGHTER (SECOND DEPT))/JURY INSTRUCTIONS (LESSER INCLUDED OFFENSE, A NEW TRIAL ON THE MURDER CHARGE IS REQUIRED BECAUSE THE TRIAL JUDGE ERRONEOUSLY DENIED DEFENDANT'S REQUEST TO INSTRUCT THE JURY ON THE LESSER INCLUDED OFFENSE OF MANSLAUGHTER (SECOND DEPT))

CRIMINAL LAW, EVIDENCE, ATTORNEYS.

DEFENSE COUNSEL WAS NOT INEFFECTIVE FOR FAILURE TO MOVE TO SUPPRESS THE RESULTS OF THE WARRANTLESS SEARCH OF A GARBAGE BAG AND CELL-SITE LOCATION RECORDS WHICH WERE JUSTIFIED BY EXIGENT CIRCUMSTANCES , AND DEFENSE COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO OBJECT TO THE PROSECUTOR'S MISCHARACTERIZATION OF THE STRENGTH OF DNA EVIDENCE (FOURTH DEPT).

The Fourth Department determined the defendant was not deprived of effective assistance of counsel by (1) the failure to move to suppress evidence found in a garbage bag outside defendant's grandmother's house, (2) the failure to move to suppress cell site location information (CSLI), and (3) the failure to object to the prosecutor's mischaracterization of the the DNA evidence as a match. Exigent circumstances justified the search of the garbage bag and the warrantless search of the cell-site records, and the prosecutorial misconduct was not flagrant and pervasive:

> ... [W]e conclude that, in light of the particular circumstances that led the police officers to the premises in search of a recently missing 17-year-old girl, that limited search (of the garbage bag) fell within the recognized emergency exception to the warrant requirement ... .
>
> The Supreme Court recognized that "case-specific exceptions may support a warrantless search of an individual's cell-site records under certain circumstances" ... . "One well-recognized exception applies when the exigencies of the situation make the needs of law enforcement so compelling that [a] warrantless search is objectively reasonable under the Fourth Amendment . . . Such exigencies include the need to . . . protect individuals who are threatened with imminent harm" ... .
>
> The testimony at trial established that defendant could not be excluded as the source of the DNA found on the victim's nail and that the chance of randomly selecting an unrelated individual as the source of the DNA was less than one in 114,000. Here, ... the sole mischaracterization of the DNA evidence " did not rise to the flagrant and pervasive level of misconduct [that] would deprive defendant of due process,' "... . **People v Lively, 2018 NY Slip Op 05413, Fourth Dept 7-25-18**

CRIMINAL LAW (DEFENSE COUNSEL WAS NOT INEFFECTIVE FOR FAILURE TO MOVE TO SUPPRESS THE RESULTS OF THE WARRANTLESS SEARCH OF A GARBAGE BAG AND CELL-SITE LOCATION RECORDS WHICH WERE JUSTIFIED BY EXIGENT CIRCUMSTANCES , AND DEFENSE COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO OBJECT TO THE PROSECUTOR'S MISCHARACTERIZATION OF THE STRENGTH OF DNA EVIDENCE (FOURTH DEPT))/EVIDENCE (CRIMINAL LAW, DEFENSE COUNSEL WAS NOT INEFFECTIVE FOR FAILURE TO MOVE TO SUPPRESS THE RESULTS OF THE WARRANTLESS SEARCH OF A GARBAGE BAG AND CELL-SITE LOCATION RECORDS WHICH WERE JUSTIFIED BY EXIGENT CIRCUMSTANCES , AND DEFENSE COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO OBJECT TO THE PROSECUTOR'S MISCHARACTERIZATION OF THE STRENGTH OF DNA EVIDENCE (FOURTH DEPT))/ATTORNEYS (CRIMINAL LAW, DEFENSE COUNSEL WAS NOT INEFFECTIVE FOR FAILURE TO MOVE TO SUPPRESS THE RESULTS OF THE WARRANTLESS SEARCH OF A GARBAGE BAG AND CELL-SITE LOCATION RECORDS WHICH WERE JUSTIFIED BY EXIGENT CIRCUMSTANCES , AND DEFENSE COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO OBJECT TO THE PROSECUTOR'S MISCHARACTERIZATION OF THE STRENGTH OF DNA EVIDENCE (FOURTH DEPT))/INEFFECTIVE ASSISTANCE (DEFENSE COUNSEL WAS NOT INEFFECTIVE FOR FAILURE TO MOVE TO SUPPRESS THE RESULTS OF THE WARRANTLESS SEARCH OF A GARBAGE BAG AND CELL-SITE LOCATION RECORDS WHICH WERE JUSTIFIED BY EXIGENT CIRCUMSTANCES , AND DEFENSE COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO OBJECT TO THE PROSECUTOR'S MISCHARACTERIZATION OF THE STRENGTH OF DNA EVIDENCE (FOURTH DEPT))

CRIMINAL LAW, EVIDENCE, EMPLOYMENT LAW, LABOR LAW.

INDICTMENT COUNTS ALLEGING FALSIFYING BUSINESS RECORDS RELATING TO PAYROLL AND THE EMPLOYMENT OF A MINOR IN VIOLATION OF THE LABOR LAW SHOULD NOT HAVE BEEN DISMISSED, LEGAL SUFFICIENCY CRITERIA EXPLAINED (THIRD DEPT).

The Third Department, reversing County Court, determined there was sufficient evidence before the Grand Jury to support several counts dismissed by the motion court. The dismissed counts related to allegedly false information on business records about farm employees' hours and pay and the employment of a minor (a 14-year-old killed operating heavy farm equipment) in violation of the Labor Law:

> "To dismiss an indictment or counts thereof on the basis of insufficient evidence before a grand jury, a reviewing court must consider whether the evidence viewed in the light most favorable to the People, if unexplained and uncontradicted, would warrant conviction by a petit jury" ... . "In the context of grand jury proceedings, 'legal sufficiency means prima facie proof of the crimes charged, not proof beyond a reasonable doubt'" ... . "The reviewing court's inquiry is limited to 'whether the facts, if proven, and the inferences that logically flow from those facts supply proof of every element of the charged crimes,' and whether 'the [g]rand [j]ury could rationally have drawn the guilty inference'" ... . * * *
>
> Viewed most favorably to the People, we find that the evidence before the grand jury provided a prima facie case of falsifying business records in the first degree and offering a false instrument for filing in the first degree. Although there was no proof that defendant himself compiled the relevant time sheets or submitted them to [the bookkeeper], the evidence established that employees reported their hours directly to defendant — who regularly paid them in cash off the books — and that defendant was solely responsible for the accuracy of the payroll information, personally certified the accuracy of two amended [the unemployment insurance] forms and instructed one of his employees to lie about the number of hours he worked. * * *
>
> "[W]here an indictment count incorporates by reference the statutory provision applicable to the crime intended to be charged, it has been repeatedly held that this is sufficient to apprise [a] defendant of the charge and, therefore, renders the count jurisdictionally valid" ... . Here, counts 14 and 15 of the indictment each begin by accusing defendant of the crime of prohibited employment of a minor in violation of Labor Law § 145, which provides that a knowing violation of a provision of article 4 of the Labor Law is punishable by a misdemeanor. While County Court correctly noted that Labor Law § 145 does not state a substantive offense, each count then goes on to specify the particular section of article 4 of the Labor Law which defendant is alleged to have violated, as well as the conduct forming the basis of the charges. **People v Park, 2018 NY Slip Op 04985, Third Dept 7-5-18**

CRIMINAL LAW (EVIDENCE, INDICTMENT COUNTS ALLEGING FALSIFYING BUSINESS RECORDS RELATING TO PAYROLL AND THE EMPLOYMENT OF A MINOR IN VIOLATION OF THE LABOR LAW SHOULD NOT HAVE BEEN DISMISSED, LEGAL SUFFICIENCY CRITERIA EXPLAINED (THIRD DEPT))/INDICTMENTS (EVIDENCE, INDICTMENT COUNTS ALLEGING FALSIFYING BUSINESS RECORDS RELATING TO PAYROLL AND THE EMPLOYMENT OF A MINOR IN VIOLATION OF THE LABOR LAW SHOULD NOT HAVE BEEN DISMISSED, LEGAL SUFFICIENCY CRITERIA EXPLAINED (THIRD DEPT))/GRAND JURY (EVIDENCE, INDICTMENT COUNTS ALLEGING FALSIFYING BUSINESS RECORDS RELATING TO PAYROLL AND THE EMPLOYMENT OF A MINOR IN VIOLATION OF THE LABOR LAW SHOULD NOT HAVE BEEN DISMISSED, LEGAL SUFFICIENCY CRITERIA EXPLAINED (THIRD DEPT))/EMPLOYMENT LAW (CRIMINAL LAW, FALSE BUSINESS RECORDS, INDICTMENT COUNTS ALLEGING FALSIFYING BUSINESS RECORDS RELATING TO PAYROLL AND THE EMPLOYMENT OF A MINOR IN VIOLATION OF THE LABOR LAW SHOULD NOT HAVE BEEN DISMISSED, LEGAL SUFFICIENCY CRITERIA EXPLAINED (THIRD DEPT))/LABOR LAW (CRIMINAL LAW, INDICTMENTS, GRAND JURY, EVIDENCE, INDICTMENT COUNTS ALLEGING FALSIFYING BUSINESS RECORDS RELATING TO PAYROLL AND THE EMPLOYMENT OF A MINOR IN VIOLATION OF THE LABOR LAW SHOULD NOT HAVE BEEN DISMISSED, LEGAL SUFFICIENCY CRITERIA EXPLAINED (THIRD DEPT))/MINORS (EMPLOYMENT LAW, CRIMINAL LAW, LABOR LAW, INDICTMENT COUNTS ALLEGING FALSIFYING BUSINESS RECORDS RELATING TO PAYROLL AND THE EMPLOYMENT OF A MINOR IN VIOLATION OF THE LABOR LAW SHOULD NOT HAVE BEEN DISMISSED, LEGAL SUFFICIENCY CRITERIA EXPLAINED (THIRD DEPT))/UNEMPLOYMENT INSURANCE (CRIMINAL LAW, EVIDENCE, INDICTMENT COUNTS ALLEGING FALSIFYING BUSINESS RECORDS RELATING TO PAYROLL AND

THE EMPLOYMENT OF A MINOR IN VIOLATION OF THE LABOR LAW SHOULD NOT HAVE BEEN DISMISSED, LEGAL SUFFICIENCY CRITERIA EXPLAINED (THIRD DEPT))

CRIMINAL LAW, EVIDENCE, APPEALS.

ALTHOUGH THE EVIDENCE DEFENDANT ACTED AS AN ACCOMPLICE IN THE FATAL SHOOTING OF THE VICTIM WAS LEGALLY SUFFICIENT, THE CONVICTION WAS AGAINST THE WEIGHT OF THE EVIDENCE BECAUSE OF WEAKNESS OF THE EVIDENCE DEFENDANT KNEW OF THE SHOOTER'S INTENT TO KILL THE VICTIM, AS OPPOSED TO AN INTENT TO ROB OR ASSAULT (THIRD DEPT).

The Third Department determined there was legally sufficient evidence to support defendant's conviction that he acted as an accomplice in the fatal shooting of the victim by another man, White-Span. In other words, the elements of the charged offense were supported by some credible evidence. Defendant's conviction was reversed, however, under a weight of the evidence analysis based on the weakness of the evidence that the defendant knew White-Span intended to kill the victim, as opposed to rob or assault the victim:

> "Despite the [necessary] elements being supported by some credible evidence, because a different [verdict] would not have been unreasonable, this Court must independently examine the evidence further, viewing it in a neutral light to see if the verdict is against the weight of the evidence"... . Even if we accept that the evidence proved beyond a reasonable doubt that White-Span intentionally caused the victim's death by shooting him and that defendant intentionally aided White-Span in locating and isolating the victim, the evidence does not prove beyond a reasonable doubt that defendant knew — before the shooting occurred — that White-Span planned to kill the victim, because defendant could have had other equally plausible reasons for wanting access to the victim, such as robbery or assault. ...
>
> In light of the People's failure to establish beyond a reasonable doubt that defendant shared White-Span's intent to kill the victim, the judgment of conviction must be reversed and the indictment against defendant dismissed ... . **People v Croley, 2018 NY Slip Op 04984, Third Dept 7-5-18**

CRIMINAL LAW (EVIDENCE, ALTHOUGH THE EVIDENCE DEFENDANT ACTED AS AN ACCOMPLICE IN THE FATAL SHOOTING OF THE VICTIM WAS LEGALLY SUFFICIENT, THE CONVICTION WAS AGAINST THE WEIGHT OF THE EVIDENCE BECAUSE OF WEAKNESS OF THE EVIDENCE DEFENDANT KNEW OF THE SHOOTER'S INTENT TO KILL THE VICTIM, AS OPPOSED TO AN INTENT TO ROB OR ASSAULT (THIRD DEPT))/EVIDENCE (CRIMINAL LAW, ACCOMPLICE, ALTHOUGH THE EVIDENCE DEFENDANT ACTED AS AN ACCOMPLICE IN THE FATAL SHOOTING OF THE VICTIM WAS LEGALLY SUFFICIENT, THE CONVICTION WAS AGAINST THE WEIGHT OF THE EVIDENCE BECAUSE OF WEAKNESS OF THE EVIDENCE DEFENDANT KNEW OF THE SHOOTER'S INTENT TO KILL THE VICTIM, AS OPPOSED TO AN INTENT TO ROB OR ASSAULT (THIRD DEPT))/ACCESSORIAL LIABILITY (ALTHOUGH THE EVIDENCE DEFENDANT ACTED AS AN ACCOMPLICE IN THE FATAL SHOOTING OF THE VICTIM WAS LEGALLY SUFFICIENT, THE CONVICTION WAS AGAINST THE WEIGHT OF THE EVIDENCE BECAUSE OF WEAKNESS OF THE EVIDENCE DEFENDANT KNEW OF THE SHOOTER'S INTENT TO KILL THE VICTIM, AS OPPOSED TO AN INTENT TO ROB OR ASSAULT (THIRD DEPT))/APPEALS (WEIGHT OF THE EVIDENCE, ACCESSORIAL LIABILITY, ALTHOUGH THE EVIDENCE DEFENDANT ACTED AS AN ACCOMPLICE IN THE FATAL SHOOTING OF THE VICTIM WAS LEGALLY SUFFICIENT, THE CONVICTION WAS AGAINST THE WEIGHT OF THE EVIDENCE BECAUSE OF WEAKNESS OF THE EVIDENCE DEFENDANT KNEW OF THE SHOOTER'S INTENT TO KILL THE VICTIM, AS OPPOSED TO AN INTENT TO ROB OR ASSAULT (THIRD DEPT))/INTENT (CRIMINAL LAW, ACCESSORIAL LIABILITY, ALTHOUGH THE EVIDENCE DEFENDANT ACTED AS AN ACCOMPLICE IN THE FATAL SHOOTING OF THE VICTIM WAS LEGALLY SUFFICIENT, THE CONVICTION WAS AGAINST THE WEIGHT OF THE EVIDENCE BECAUSE OF WEAKNESS OF THE EVIDENCE DEFENDANT KNEW OF THE SHOOTER'S INTENT TO KILL THE VICTIM, AS OPPOSED TO AN INTENT TO ROB OR ASSAULT (THIRD DEPT))/SHARED INTENT (CRIMINAL LAW, ACCESSORIAL LIABILITY, ALTHOUGH THE EVIDENCE DEFENDANT ACTED AS AN ACCOMPLICE IN THE FATAL SHOOTING OF THE VICTIM WAS LEGALLY SUFFICIENT, THE CONVICTION WAS AGAINST THE WEIGHT OF THE EVIDENCE BECAUSE OF WEAKNESS OF THE EVIDENCE DEFENDANT KNEW OF THE SHOOTER'S INTENT TO KILL THE VICTIM, AS OPPOSED TO AN INTENT TO ROB OR ASSAULT (THIRD DEPT))

CRIMINAL LAW, EVIDENCE, ATTORNEYS.

DESPITE RULING THAT NO EVIDENCE OF DEFENDANT'S REQUESTS TO TALK TO COUNSEL COULD BE PRESENTED, TWO TESTIFYING WITNESSES VIOLATED THAT RULING, BECAUSE THAT EVIDENCE CONFLICTED WITH THE DEFENSE STRATEGY A MISTRIAL SHOULD HAVE BEEN DECLARED, NEW TRIAL ORDERED (THIRD DEPT).

The Third Department reversed defendant's conviction of felony leaving the scene of an accident and ordered a new trial. Defendant struck a pedestrian whose body came into defendant's car through the windshield. Defendant did not contact the police for over an hour. Prior to trial defense counsel obtained a ruling from the judge that the People could not introduce any evidence defendant sought to communicate with counsel. That ruling was violated twice by testifying witnesses:

> Defendant's strategy at trial relied in large part upon the fact that she was not at fault in the accident but did witness the victim's body being propelled through her windshield and coming to rest inches away from her. She relied upon this state of affairs to contend that her failure to contact authorities was not because she was "coldly calculating," but because she was in shock and incapable of doing so. Defendant further questioned the proof supporting the People's hypothesis that she left the scene with her sister before the 911 call.
>
> Any indication that defendant sought to consult with counsel would undermine the foundation of this defense by prejudicially suggesting that she was conscious of guilt, rational enough to consider the question of counsel and, perhaps, capable of reporting the accident or taking steps to avoid doing so ... .
>
> In our view, [the] repeated violations of the pretrial ruling, in a case where defendant's capacity to act and her actions after the accident were in serious dispute, caused harm that could not be reliably dissipated. County Court therefore abused its discretion in declining to declare a mistrial ... and, inasmuch as we do not agree with defendant that the People deliberately acted to provoke a mistrial ... we remit for a new trial. **People v Lentini, 2018 NY Slip Op 04983, Third Dept 7-5-18**

CRIMINAL LAW (EVIDENCE, DESPITE RULING THAT NO EVIDENCE OF DEFENDANT'S REQUESTS TO TALK TO COUNSEL SHOULD BE PRESENTED, TWO TESTIFYING WITNESSES VIOLATED THAT RULING, BECAUSE THAT EVIDENCE CONFLICTED WITH THE DEFENSE STRATEGY A MISTRIAL SHOULD HAVE BEEN DECLARED, NEW TRIAL ORDERED (THIRD DEPT))/EVIDENCE (CRIMINAL LAW, DESPITE RULING THAT NO EVIDENCE OF DEFENDANT'S REQUESTS TO TALK TO COUNSEL SHOULD BE PRESENTED, TWO TESTIFYING WITNESSES VIOLATED THAT RULING, BECAUSE THAT EVIDENCE CONFLICTED WITH THE DEFENSE STRATEGY A MISTRIAL SHOULD HAVE BEEN DECLARED, NEW TRIAL ORDERED (THIRD DEPT))/ATTORNEYS (CRIMINAL LAW, EVIDENCE, DESPITE RULING THAT NO EVIDENCE OF DEFENDANT'S REQUESTS TO TALK TO COUNSEL SHOULD BE PRESENTED, TWO TESTIFYING WITNESSES VIOLATED THAT RULING, BECAUSE THAT EVIDENCE CONFLICTED WITH THE DEFENSE STRATEGY A MISTRIAL SHOULD HAVE BEEN DECLARED, NEW TRIAL ORDERED (THIRD DEPT))/MISTRIAL (CRIMINAL LAW, EVIDENCE, DESPITE RULING THAT NO EVIDENCE OF DEFENDANT'S REQUESTS TO TALK TO COUNSEL SHOULD BE PRESENTED, TWO TESTIFYING WITNESSES VIOLATED THAT RULING, BECAUSE THAT EVIDENCE CONFLICTED WITH THE DEFENSE STRATEGY A MISTRIAL SHOULD HAVE BEEN DECLARED, NEW TRIAL ORDERED (THIRD DEPT))

CRIMINAL LAW, IMMIGRATION LAW, ATTORNEYS.

MOTION TO VACATE CONVICTION SHOULD NOT HAVE BEEN SUMMARILY GRANTED WITHOUT A HEARING, THREE CRITERIA FOR VACATING A CONVICTION EXPLAINED, HERE DEFENDANT ALLEGED HE WOULD NOT HAVE PLED GUILTY HAD HE BEEN CORRECTLY INFORMED BY COUNSEL OF THE DEPORTATION CONSEQUENCES OF HIS PLEA (FIRST DEPT).

The First Department, reversing Supreme Court, determined defendant's motion to vacate his conviction should not have been summarily granted and remanded the matter for a hearing. The defendant alleged defense counsel was ineffective for failure to correctly inform him of the deportation consequences of his guilty plea. The First Department offered a detailed explanation of the three criteria for granting a motion to vacate in this context on ineffective assistance of counsel grounds.

> CPL 440.30 authorizes the summary granting of a motion to vacate a judgment of conviction where the moving papers allege a ground constituting a legal basis for the motion (CPL 440.30[3][a]); where that ground, if factually based, is supported by sworn allegations of fact essential to support the motion (CPL 440.30[3][b]); and where the sworn allegations of essential fact are either conceded by the People to be true or are conclusively substantiated by unquestionable documentary proof (CPL 440.30[3][c]). If all three of these statutory criteria are not met, the court may not grant a CPL 440.10 motion without first conducting a hearing (CPL 440.30[5]). ...
>
> ... [T]he People did not concede the essential factual allegations on the issue of prejudice. Indeed, they expressly noted that defendant's allegations of longstanding ties to the United States and lack of any connection to Haiti were entirely unsubstantiated. Neither did defendant proffer documentary proof conclusively substantiating his sworn factual allegations in support of his claim that "but for [his plea] counsel's errors, he would not have pleaded guilty and would have insisted on going to trial" ... .Thus, defendant's CPL 440.10 motion failed to satisfy the third criterion of CPL 440.30(3), and for that reason, the motion court abused its discretion in granting defendant's CPL 440.10 motion without first conducting a hearing and making findings of fact ... . **People v Gaston, 2018 NY Slip Op 05122, First Dept 7-10-18**

CRIMINAL LAW (MOTION TO VACATE CONVICTION SHOULD NOT HAVE BEEN SUMMARILY GRANTED WITHOUT A HEARING, THREE CRITERIA FOR VACATING A CONVICTION EXPLAINED, HERE DEFENDANT ALLEGED HE WOULD NOT HAVE PLED GUILTY HAD HE BEEN CORRECTLY INFORMED OF THE DEPORTATION CONSEQUENCES OF HIS PLEA (FIRST DEPT))/IMMIGRATION LAW (CRIMINAL LAW, MOTION TO VACATE CONVICTION SHOULD NOT HAVE BEEN SUMMARILY GRANTED WITHOUT A HEARING, THREE CRITERIA FOR VACATING A CONVICTION EXPLAINED, HERE DEFENDANT ALLEGED HE WOULD NOT HAVE PLED GUILTY HAD HE BEEN CORRECTLY INFORMED OF THE DEPORTATION CONSEQUENCES OF HIS PLEA (FIRST DEPT))/ATTORNEYS (CRIMINAL LAW, (MOTION TO VACATE CONVICTION SHOULD NOT HAVE BEEN SUMMARILY GRANTED WITHOUT A HEARING, THREE CRITERIA FOR VACATING A CONVICTION EXPLAINED, HERE DEFENDANT ALLEGED HE WOULD NOT HAVE PLED GUILTY HAD HE BEEN CORRECTLY INFORMED OF THE DEPORTATION CONSEQUENCES OF HIS PLEA (FIRST DEPT))/VACATE CONVICTION, MOTION TO (MOTION TO VACATE CONVICTION SHOULD NOT HAVE BEEN SUMMARILY GRANTED WITHOUT A HEARING, THREE CRITERIA FOR VACATING A CONVICTION EXPLAINED, HERE DEFENDANT ALLEGED HE WOULD NOT HAVE PLED GUILTY HAD HE BEEN CORRECTLY INFORMED OF THE DEPORTATION CONSEQUENCES OF HIS PLEA (FIRST DEPT))/DEPORTATION (CRIMINAL LAW, MOTION TO VACATE CONVICTION SHOULD NOT HAVE BEEN SUMMARILY GRANTED WITHOUT A HEARING, THREE CRITERIA FOR VACATING A CONVICTION EXPLAINED, HERE DEFENDANT ALLEGED HE WOULD NOT HAVE PLED GUILTY HAD HE BEEN CORRECTLY INFORMED OF THE DEPORTATION CONSEQUENCES OF HIS PLEA (FIRST DEPT))

CRIMINAL LAW, SEX OFFENDER REGISTRATION ACT (SORA).

INSUFFICIENT EVIDENCE TO SUPPORT ASSESSMENT OF POINTS FOR SUBSTANCE ABUSE (SECOND DEPT).

The Second Department, reversing Supreme Court, determined that the SORA court assessment of points for substance abuse was not supported by the evidence:

> Assessment of points under risk factor 11 may be appropriate if the offender has a "history" of substance abuse or if the offender "was abusing drugs and or alcohol at the time of the offense" ... . Here, the People did not meet their burden of proving the facts underlying the disputed point assessment by clear and convincing evidence ... . The presentence report contained only ambiguous information about the extent of the defendant's use of alcohol and marijuana between the ages of 16 and 20, at least 7 years before the sex offense at issue in this proceeding, and no information about the defendant's use of those substances in the 7 years before the sex offense. Moreover, the evidence at the hearing did not establish that the defendant abused or was under the influence of alcohol or marijuana at the time of the offense ... . **People v Trotter, 2018 NY Slip Op 05211, Second Dept 7-11-16**

CRIMINAL LAW (SEX OFFENDER REGISTRATION ACT (SORA), INSUFFICIENT EVIDENCE TO SUPPORT ASSESSMENT OF POINTS FOR SUBSTANCE ABUSE (SECOND DEPT))/SEX OFFENDER REGISTRATION ACT (SORA) (INSUFFICIENT EVIDENCE TO SUPPORT ASSESSMENT OF POINTS FOR SUBSTANCE ABUSE (SECOND DEPT))/SUBSTANCE ABUSE (SEX OFFENDER REGISTRATION ACT (SORA), INSUFFICIENT EVIDENCE TO SUPPORT ASSESSMENT OF POINTS FOR SUBSTANCE ABUSE (SECOND DEPT)

DEFAMATION

DEFAMATION, CIVIL RIGHTS LAW, PRIVILEGE.

DEFAMATION ACTION PROPERLY SURVIVED PRE-DISCOVERY MOTION TO DISMISS, APPLICABILITY OF THE CIVIL RIGHTS LAW PRIVILEGE FOR REPORTING ON A JUDICIAL PROCEEDING NOT DEMONSTRATED AS A MATTER OF LAW (SECOND DEPT).

The Second Department determined defendant publisher (Bloomberg) was not entitled to dismissal of a defamation action based upon the publication of articles about police investigations of a Hong Kong investment company. The court found that the Civil Rights Law privilege for reporting on a judicial proceeding could not be applied as a matter of law at the pre-discovery stage:

> New York Civil Rights Law § 74 states, in pertinent part: "A civil action cannot be maintained . . . for the publication of a fair and true report of any judicial proceeding, legislative proceeding or other official proceeding." Here, we disagree with the Supreme Court's determination that the privilege is inapplicable to reporting on foreign official proceedings ... . Nevertheless, we agree with the court's denial of that branch of Bloomberg's motion which was to dismiss pursuant to CPLR 3211(a)(7), inasmuch as the challenged statements were not privileged under Civil Rights Law § 74. When the challenged statements are viewed in context, it cannot be said as a matter of law that the statements provide a substantially accurate reporting of the two police investigations ... . Moreover, we agree with the court's determination that the plaintiff, at this pre-discovery stage, adequately alleged the element of gross irresponsibility ... . **Stone v Bloomberg L.P., 2018 NY Slip Op 05515, Second Dept 7-25-18**

DEFAMATION (DEFAMATION ACTION PROPERLY SURVIVED PRE-DISCOVERY MOTION TO DISMISS, APPLICABILITY OF THE CIVIL RIGHTS LAW PRIVILEGE FOR REPORTING ON A JUDICIAL PROCEEDING NOT DEMONSTRATED AS A MATTER OF LAW (SECOND DEPT))/CIVIL RIGHTS LAW (DEFAMATION ACTION PROPERLY SURVIVED PRE-DISCOVERY MOTION TO DISMISS, APPLICABILITY OF THE CIVIL RIGHTS LAW PRIVILEGE FOR REPORTING ON A JUDICIAL PROCEEDING NOT DEMONSTRATED AS A MATTER OF LAW (SECOND DEPT))/PRIVILEGE (DEFAMATION ACTION PROPERLY SURVIVED PRE-DISCOVERY MOTION TO DISMISS, APPLICABILITY OF THE CIVIL RIGHTS LAW PRIVILEGE FOR REPORTING ON A JUDICIAL PROCEEDING NOT DEMONSTRATED AS A MATTER OF LAW (SECOND DEPT))

DISCIPLINARY HEARINGS

DISCIPLINARY HEARINGS (INMATES), EVIDENCE.

HEARSAY NOT DEMONSTRATED TO BE RELIABLE, DISCIPLINARY DETERMINATION ANNULLED AND EXPUNGED (THIRD DEPT).

The Third Department, annulling the disciplinary determination and expunging it, determined the hearsay upon which the determination was based was not demonstrated to be sufficiently reliable:

> "While hearsay evidence in the form of confidential information may provide substantial evidence to support a determination of guilt, the information must be sufficiently detailed to allow the Hearing Officer to make an independent assessment to determine its reliability and credibility" ... . The only witness called to testify at the hearing was the lieutenant who oversaw the investigation. The lieutenant relied upon information provided by other officers, who reported receiving information from unspecified informants that petitioner was involved in this fight. During his confidential and hearing testimony, the lieutenant recounted that the officers informed him that they had received information from informants, whom they had used in the past and found reliable, that petitioner had engaged in this fight. The lieutenant deemed the reports to be "consistent" and "credible," but provided no details of their accounts. Moreover, the lieutenant had not interviewed any of the informants and did not know if any of them had actually witnessed the fight. The questioning of the lieutenant about the officers' and informants' accounts was cursory, rather than "thorough and specific" as required to provide the Hearing Officer with a basis to gauge the informants' "knowledge and reliability" ... .
>
> While the lieutenant relied upon a to/from memorandum from the sergeant who apparently interviewed some of the informants, that memorandum contains no details regarding the basis for their knowledge or any specificity about their accounts, and does not assert that they had witnessed the fight or any information regarding their past reliability. Under these circumstances, the record is devoid of any basis upon which to conclude that the informants ever provided "detailed and specific" accounts, or that the Hearing Officer had information from which to "gauge the basis for the informant[s'] knowledge of the [fight] and [their] reliability" ... . **Matter of Maisonett v Venettozzi, 2018 NY Slip Op 05257, Third Dept 7-12-18**

DISCIPLINARY HEARINGS (INMATES) (HEARSAY NOT DEMONSTRATED TO BE RELIABLE, DISCIPLINARY DETERMINATION ANNULLED AND EXPUNGED (THIRD DEPT))/EVIDENCE (DISCIPLINARY HEARINGS (INMATES) (HEARSAY NOT DEMONSTRATED TO BE RELIABLE, DISCIPLINARY DETERMINATION ANNULLED AND EXPUNGED (THIRD DEPT))/HEARSAY (DISCIPLINARY HEARINGS (INMATES) (HEARSAY NOT DEMONSTRATED TO BE RELIABLE, DISCIPLINARY DETERMINATION ANNULLED AND EXPUNGED (THIRD DEPT))

EDUCATION-SCHOOL LAW

EDUCATION-SCHOOL LAW, ADMINISTRATIVE LAW, EVIDENCE.

COLLEGE'S DISCIPLINARY DETERMINATION REGARDING A STUDENT WAS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE, DETERMINATION ANNULLED AND EXPUNGED (FOURTH DEPT).

The Fourth Department annulled the determination that a SUNY Buffalo student possessed weapons and engaged in harassment because of the poor quality of the proof, a seriously controverted hearsay statement:

> We agree with petitioner that the record is devoid of any evidence, much less substantial evidence, to support respondent's determination... . Instead, respondent's determination rests exclusively on a "seriously controverted" hearsay statement, and that does not, as a matter of law, constitute substantial evidence ... . We therefore annul the determination, grant the petition, and direct respondent to expunge all references to this matter from petitioner's school record ... .
>
> We decline respondent's invitation to remit this matter for a new hearing in light of its failure to transcribe the disciplinary hearing. Annulment and expungement is the prescribed remedy for an administrative determination that is unsupported by substantial evidence... , and it would be anomalous if respondent was afforded a new opportunity to establish petitioner's culpability based on its own procedural error in failing to transcribe the initial hearing. **Matter of Hill v State Univ. of N.Y. At Buffalo, 2018 NY Slip Op 05104, Fourth Deptp 7-6-18**

EDUCATION-SCHOOL LAW (COLLEGE'S DISCIPLINARY DETERMINATION REGARDING A STUDENT WAS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE, DETERMINATION ANNULLED AND EXPUNGED (FOURTH DEPT))/ADMINISTRATIVE LAW (EDUCATION-SCHOOL LAW, COLLEGE'S DISCIPLINARY DETERMINATION REGARDING A STUDENT WAS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE, DETERMINATION ANNULLED AND EXPUNGED (FOURTH DEPT))/EVIDENCE (EDUCATION-SCHOOL LAW, ADMINISTRATIVE LAW, COLLEGE'S DISCIPLINARY DETERMINATION REGARDING A STUDENT WAS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE, DETERMINATION ANNULLED AND EXPUNGED (FOURTH DEPT))

EDUCATION-SCHOOL LAW, ADMINISTRATIVE LAW. EVIDENCE.

DETERMINATION PETITIONER VIOLATED THE COLLEGE'S SEXUAL ASSAULT POLICY AND THE ADMINISTRATIVE PROCEDURE USED BY THE COLLEGE DEEMED PROPER (THIRD DEPT).

The Third Department determined the petitioner was properly disciplined for violation of a college's sexual assault policy and the procedure followed by the college was proper:

> "Where, as here, no hearing is required by law, a court reviewing a private university's disciplinary determination must determine 'whether the university substantially adhered to its own published rules and guidelines for disciplinary proceedings so as to ascertain whether its actions were arbitrary or capricious'" ... . A university's determination will be annulled only where it has failed to substantially comply with its procedures or where its determination lacks a rational basis ... .
>
> With respect to hearing submissions, respondent's procedure permits each party to submit proposed questions or topics for individuals who might testify during the hearing. The procedure specifically grants the chair of the Hearing Panel discretion to "determine which of the parties' requested questions will be asked or topics covered," and permits the chair to disregard questions that are irrelevant, prohibited by applicable procedures or law, unduly prejudicial or cumulative. While the Hearing Panel declined to ask the complainant all of the questions that petitioner proposed prior to the hearing, many of the topics of such questions were addressed elsewhere in the record and were thus available for the Hearing Panel's review. Moreover, as Supreme Court correctly pointed out, the right of confrontation or cross-examination is not directed or guaranteed under respondent's procedures, nor is it required by the Enough is Enough Law ... . Indeed, "[a] student subject to disciplinary action at a private educational institution is not entitled to the full panoply of due process rights," and "[s]uch an institution need only ensure that its published rules are substantially observed" ... . **Matter of Doe v Cornell Univ., 2018 NY Slip Op 05255, Third Dept 7-12-18**

EDUCATION-SCHOOL LAW (DETERMINATION PETITIONER VIOLATED THE COLLEGE'S SEXUAL ASSAULT POLICY AND THE ADMINISTRATIVE PROCEDURE USED BY THE COLLEGE DEEMED PROPER (THIRD DEPT))/ADMINISTRATIVE LAW (EDUCATION-SCHOOL LAW, DETERMINATION PETITIONER VIOLATED THE COLLEGE'S SEXUAL ASSAULT POLICY AND THE ADMINISTRATIVE PROCEDURE USED BY THE COLLEGE DEEMED PROPER (THIRD DEPT))/EVIDENCE (EDUCATION-SCHOOL LAW, DISCIPLINARY PROCEEDINGS, SEXUAL ASSAULT, DETERMINATION PETITIONER VIOLATED THE COLLEGE'S SEXUAL ASSAULT POLICY AND THE ADMINISTRATIVE PROCEDURE USED BY THE COLLEGE DEEMED PROPER (THIRD DEPT))/SEXUAL ASSAULT (EDUCATION-SCHOOL LAW, DISCIPLINARY PROCEEDINGS, SEXUAL ASSAULT, DETERMINATION PETITIONER VIOLATED THE COLLEGE'S SEXUAL ASSAULT POLICY AND THE ADMINISTRATIVE PROCEDURE USED BY THE COLLEGE DEEMED PROPER (THIRD DEPT))

EDUCATION-SCHOOL LAW, CONSTITUTIONAL LAW, CIVIL PROCEDURE.

PARENTS HAD STANDING TO BRING A MANDAMUS ACTION SEEKING A SOUND BASIC EDUCATION FOR THEIR CHILDREN, HOWEVER MANDAMUS LIES ONLY FOR GOVERNMENT ACTIONS WHICH ARE MANDATORY, NOT THE DISCRETIONARY ACTIONS SOUGHT BY THE PETITION HERE (THIRD DEPT).

The Third Department the petitioners, parents of children in the East Ramapo Central School District, had standing to bring an Article 78 (mandamus) proceeding seeking to enforce the children's constitutional right to a sound basic education, but the petition must be dismissed because mandamus lies only for mandatory, not discretionary, actions:

> ... [P]etitioners have sufficiently alleged a threatened harm to the children's constitutional right to receive a sound basic education based upon respondents' alleged failure to take corrective action as identified in the petition's cited reports ... .
>
> Notwithstanding the foregoing, we conclude that the petition was properly dismissed. Mandamus to compel is "an extraordinary remedy that lies only to compel the performance of acts which are mandatory, not discretionary, and only when there is a clear legal right to the relief sought" ... . It is beyond cavil that students are entitled to a sound basic education (see NY Const art XI). The manner in which such goal is achieved, however, involves discretionary decisions by respondents ... . As such, to the extent that petitioners seek to compel respondents to implement specific recommendations set forth in the reports cited in the petition — an act involving "the exercise of reasoned judgment which could typically produce different acceptable results"... — they are not entitled to such relief. **Matter of Curry v New York State Educ. Dept., 2018 NY Slip Op 05393, Third Dept 7-19-18**

EDUCATION-SCHOOL LAW (PARENTS HAD STANDING TO BRING A MANDAMUS ACTION SEEKING A SOUND BASIC EDUCATION FOR THEIR CHILDREN, HOWEVER MANDAMUS LIES ONLY FOR GOVERNMENT ACTIONS WHICH ARE MANDATORY, NOT THE DISCRETIONARY ACTIONS SOUGHT BY THE PETITION HERE (THIRD DEPT))/CONSTITUTIONAL LAW (EDUCATION-SCHOOL LAW, PARENTS HAD STANDING TO BRING A MANDAMUS ACTION SEEKING A SOUND BASIC EDUCATION FOR THEIR CHILDREN, HOWEVER MANDAMUS LIES ONLY FOR GOVERNMENT ACTIONS WHICH ARE MANDATORY, NOT THE DISCRETIONARY ACTIONS SOUGHT BY THE PETITION HERE (THIRD DEPT))/CIVIL PROCEDURE (MANDAMUS, EDUCATION-SCHOOL LAW, PARENTS HAD STANDING TO BRING A MANDAMUS ACTION SEEKING A SOUND BASIC EDUCATION FOR THEIR CHILDREN, HOWEVER MANDAMUS LIES ONLY FOR GOVERNMENT ACTIONS WHICH ARE MANDATORY, NOT THE DISCRETIONARY ACTIONS SOUGHT BY THE PETITION HERE (THIRD DEPT))/MANDAMUS (EDUCATION-SCHOOL LAW, PARENTS HAD STANDING TO BRING A MANDAMUS ACTION SEEKING A SOUND BASIC EDUCATION FOR THEIR CHILDREN, HOWEVER MANDAMUS LIES ONLY FOR GOVERNMENT ACTIONS WHICH ARE MANDATORY, NOT THE DISCRETIONARY ACTIONS SOUGHT BY THE PETITION HERE (THIRD DEPT))

EDUCATION-SCHOOL LAW, NEGLIGENCE, CIVIL PROCEDURE.

ALTHOUGH PLAINTIFF'S FATHER'S PRIOR ATTEMPT TO MOVE FOR LEAVE TO FILE A LATE NOTICE OF CLAIM FAILED BECAUSE OF FLAWED SERVICE, PLAINTIFF, UPON TURNING 18, BECAUSE OF THE TOLLING STATUTE, MADE A TIMELY MOTION FOR LEAVE TO FILE A LATE NOTICE OF CLAIM WHICH SHOULD HAVE BEEN GRANTED, THE SCHOOL HAD TIMELY NOTICE OF THE BULLYING AND HARASSMENT, PLAINTIFF MADE A SHOWING THE SCHOOL SUFFERED NO PREJUDICE FROM THE DELAY, AND THE SCHOOL'S SHOWING OF PREJUDICE WAS SPECULATIVE (THIRD DEPT).

The Third Department, reversing Supreme Court, determined that plaintiff's motion for leave to file a late notice of claim against her school based upon bullying and harassment should not have been denied. Before plaintiff turned 18, her father made a motion for leave to file a late notice of claim which was denied because of improper service. When plaintiff turned 18 she made the motion on her own behalf. Because the statute of limitations was tolled until plaintiff turned 18 (CPLR 208) her motion was timely. The Third Department determined the school had timely notice of the claim, plaintiff had introduced some evidence the school would not be prejudiced, meeting her burden, and the school's demonstration of prejudice was speculative and otherwise inadequate:

> Here, our review of the record reveals that defendant had actual knowledge of the alleged harassment, intimidation and bullying within a reasonable time ... .
>
> ... [P]laintiff was initially required to "present some evidence or plausible argument that supports a finding of no substantial prejudice"... . She did so by submitting the ... evidence that defendant knew of plaintiff's claims and was able to investigate at least one of the incidents shortly after it occurred, as well as screen images taken from defendant's website indicating that relevant school officials were still employed at the time of the motion. ...
>
> The burden thus shifted to defendant "to rebut [plaintiff's] showing with particularized evidence" ... . In this regard, defendant's counsel asserted by affirmation that the incidents were no longer fresh in witnesses' memories as a result of the passage of time and that any witnesses "would likely be children" who might have graduated or whose memories might have faded ... . However, a finding of substantial prejudice "cannot be based solely on speculation and inference; rather, a determination of substantial prejudice must be based on evidence on the record" ... . **Sherb v Monticello Cent. Sch. Dist., 2018 NY Slip Op 05004, Third Dept 7-5-18**

EDUCATION-SCHOOL LAW (NEGLIGENCE, NOTICE OF CLAIM, ALTHOUGH PLAINTIFF'S FATHER'S PRIOR ATTEMPT TO MOVE FOR LEAVE TO FILE A LATE NOTICE OF CLAIM FAILED BECAUSE OF FLAWED SERVICE, PLAINTIFF, UPON TURNING 18, BECAUSE OF THE TOLLING STATUTE, MADE A TIMELY MOTION FOR LEAVE TO FILE A LATE NOTICE OF CLAIM WHICH SHOULD HAVE BEEN GRANTED, THE SCHOOL HAD TIMELY NOTICE OF THE BULLYING AND HARASSMENT, PLAINTIFF MADE A SHOWING THE SCHOOL SUFFERED NO PREJUDICE FROM THE DELAY, AND THE SCHOOL'S SHOWING OF PREJUDICE WAS SPECULATIVE (THIRD DEPT))/NEGLIGENCE (EDUCATION-SCHOOL LAW, NOTICE OF CLAIM, ALTHOUGH PLAINTIFF'S FATHER'S PRIOR ATTEMPT TO MOVE FOR LEAVE TO FILE A LATE NOTICE OF CLAIM FAILED BECAUSE OF FLAWED SERVICE, PLAINTIFF, UPON TURNING 18, BECAUSE OF THE TOLLING STATUTE, MADE A TIMELY MOTION FOR LEAVE TO FILE A LATE NOTICE OF CLAIM WHICH SHOULD HAVE BEEN GRANTED, THE SCHOOL HAD TIMELY NOTICE OF THE BULLYING AND HARASSMENT, PLAINTIFF MADE A SHOWING THE SCHOOL SUFFERED NO PREJUDICE FROM THE DELAY, AND THE SCHOOL'S SHOWING OF PREJUDICE WAS SPECULATIVE (THIRD DEPT))/NOTICE OF CLAIM (EDUCATION-SCHOOL LAW, ALTHOUGH PLAINTIFF'S FATHER'S PRIOR ATTEMPT TO MOVE FOR LEAVE TO FILE A LATE NOTICE OF CLAIM FAILED BECAUSE OF FLAWED SERVICE, PLAINTIFF, UPON TURNING 18, BECAUSE OF THE TOLLING STATUTE, MADE A TIMELY MOTION FOR LEAVE TO FILE A LATE NOTICE OF CLAIM WHICH SHOULD HAVE BEEN GRANTED, THE SCHOOL HAD TIMELY NOTICE OF THE BULLYING AND HARASSMENT, PLAINTIFF MADE A SHOWING THE SCHOOL SUFFERED NO PREJUDICE FROM THE DELAY, AND THE SCHOOL'S SHOWING OF PREJUDICE WAS SPECULATIVE (THIRD DEPT))/CIVIL PROCEDURE (NEGLIGENCE, EDUCATION-SCHOOL LAW, TOLLING PROVISION, ALTHOUGH PLAINTIFF'S FATHER'S PRIOR ATTEMPT TO MOVE FOR LEAVE TO FILE A LATE NOTICE OF CLAIM FAILED BECAUSE OF FLAWED SERVICE, PLAINTIFF, UPON TURNING 18, BECAUSE OF THE TOLLING STATUTE, MADE A TIMELY MOTION FOR LEAVE TO FILE A LATE NOTICE OF CLAIM WHICH SHOULD HAVE BEEN GRANTED, THE SCHOOL HAD TIMELY NOTICE OF THE BULLYING AND HARASSMENT, PLAINTIFF MADE A SHOWING THE SCHOOL SUFFERED NO PREJUDICE FROM THE DELAY, AND THE SCHOOL'S SHOWING OF PREJUDICE WAS SPECULATIVE (THIRD DEPT))/CPLR 208 (NEGLIGENCE, EDUCATION-

SCHOOL LAW, TOLLING PROVISION, ALTHOUGH PLAINTIFF'S FATHER'S PRIOR ATTEMPT TO MOVE FOR LEAVE TO FILE A LATE NOTICE OF CLAIM FAILED BECAUSE OF FLAWED SERVICE, PLAINTIFF, UPON TURNING 18, BECAUSE OF THE TOLLING STATUTE, MADE A TIMELY MOTION FOR LEAVE TO FILE A LATE NOTICE OF CLAIM WHICH SHOULD HAVE BEEN GRANTED, THE SCHOOL HAD TIMELY NOTICE OF THE BULLYING AND HARASSMENT, PLAINTIFF MADE A SHOWING THE SCHOOL SUFFERED NO PREJUDICE FROM THE DELAY, AND THE SCHOOL'S SHOWING OF PREJUDICE WAS SPECULATIVE (THIRD DEPT))

EMINENT DOMAIN

EMINENT DOMAIN, CONDEMNATION, MUNICIPAL LAW, ENVIRONMENTAL LAW.

CITY DID NOT VIOLATE THE PUBLIC USE DOCTRINE AND COMPLIED WITH THE EMINENT DOMAIN PROCEDURE LAW AND THE STATE ENVIRONMENTAL QUALITY REVIEW ACT (SEQRA) IN APPROVING THE TAKING OF LAND FOR A BICYCLE-PEDESTRIAN TRAIL (THIRD DEPT).

The Third Department, in a comprehensive decision describing the relevant law and procedures, determined the city had complied with the State Environmental Quality Review Act (SEQRA), the Eminent Domain Procedure Law and the prior public use doctrine in determining the taking of a strip of land for a bicycle-pedestrian trial would not have a significant adverse impact on the environment:

> ... [P]etitioners have failed to demonstrate how the City's condemnation of the Village's property would "interfere with or destroy the public use" ... . Accordingly, the prior public use doctrine will not prevent the City from condemning the Village's property. * * *
>
> ... [T]he City ... performed the steps required in the SEQRA review process and considered areas of potential environmental concern, but failed to provide an adequate written explanation for its negative declaration. Upon realizing its mistake (albeit after receiving communications from petitioners complaining about the negative declaration), and before approving the condemnation of property in relation to the project, the City held a public meeting and formally adopted the supplemental resolution to remedy the defects in the July 2017 negative declaration ... . Under the circumstances, remittal to the City for further environmental review or explanation of its determination would be redundant ... .
>
> The City did not abuse its discretion in determining the scope of the proposed taking. Although a municipality cannot use the power of eminent domain to take "'property not necessary to fulfill [a] public purpose, it is generally accepted that the condemnor has broad discretion in deciding what land is necessary to fulfill that purpose'" ... . **Matter of Village of Ballston Spa v City of Saratoga Springs, 2018 NY Slip Op 05248, Third Dept 7-12-18**

EMINENT DOMAIN (CITY DID NOT VIOLATE THE PUBLIC USE DOCTRINE AND COMPLIED WITH THE EMINENT DOMAIN PROCEDURE LAW AND THE STATE ENVIRONMENTAL QUALITY REVIEW ACT (SEQRA) IN APPROVING THE TAKING OF LAND FOR A BICYCLE-PEDESTRIAN TRAIL (THIRD DEPT))/CONDEMNATION (CITY DID NOT VIOLATE THE PUBLIC USE DOCTRINE AND COMPLIED WITH THE EMINENT DOMAIN PROCEDURE LAW AND THE STATE ENVIRONMENTAL QUALITY REVIEW ACT (SEQRA) IN APPROVING THE TAKING OF LAND FOR A BICYCLE-PEDESTRIAN TRAIL (THIRD DEPT))/MUNICIPAL LAW (EMINENT DOMAIN, STATE ENVIRONMENTAL QUALITY REVIEW ACT, ITY DID NOT VIOLATE THE PUBLIC USE DOCTRINE AND COMPLIED WITH THE EMINENT DOMAIN PROCEDURE LAW AND THE STATE ENVIRONMENTAL QUALITY REVIEW ACT (SEQRA) IN APPROVING THE TAKING OF LAND FOR A BICYCLE-PEDESTRIAN TRAIL (THIRD DEPT))/ENVIRONMENTAL LAW (EMINENT DOMAIN, STATE ENVIRONMENTAL QUALITY REVIEW ACT, ITY DID NOT VIOLATE THE PUBLIC USE DOCTRINE AND COMPLIED WITH THE EMINENT DOMAIN PROCEDURE LAW AND THE STATE ENVIRONMENTAL QUALITY REVIEW ACT (SEQRA) IN APPROVING THE TAKING OF LAND FOR A BICYCLE-PEDESTRIAN TRAIL (THIRD DEPT))/BICYCLES (CITY DID NOT VIOLATE THE PUBLIC USE DOCTRINE AND COMPLIED WITH THE EMINENT DOMAIN PROCEDURE LAW AND THE STATE ENVIRONMENTAL QUALITY REVIEW ACT (SEQRA) IN APPROVING THE TAKING OF LAND FOR A BICYCLE-PEDESTRIAN TRAIL (THIRD DEPT))/PEDESTRIANS (CITY DID NOT VIOLATE THE PUBLIC USE DOCTRINE AND COMPLIED WITH THE EMINENT DOMAIN PROCEDURE LAW AND THE STATE ENVIRONMENTAL QUALITY REVIEW ACT (SEQRA) IN APPROVING THE TAKING OF LAND FOR A BICYCLE-PEDESTRIAN TRAIL (THIRD DEPT))

EMPLOYMENT LAW

EMPLOYMENT LAW, CIVIL PROCEDURE.

PLAINTIFF STAFFING AGENCY WAS NOT ENTITLED, BASED UPON A BALANCING OF THE EQUITIES, TO A PRELIMINARY INJUNCTION ENFORCING A RESTRICTIVE COVENANT WHICH OSTENSIBLY PROHIBITED DEFENDANT FROM CONTINUING TO WORK AT THE HOSPITAL WHERE PLAINTIFF HAD PLACED HIM AFTER DEFENDANT TERMINATED HIS CONTRACT WITH PLAINTIFF (FOURTH DEPT).

The Fourth Department determined plaintiff staffing agency was not entitled to a preliminary injunction in this action to enforce a restrictive covenant which ostensibly prohibited defendant, for a period of time, from working at the hospital where plaintiff had placed him. Defendant had terminated his contract with plaintiff, contracted with a competitor staffing agency, and continued to work at the same hospital. Defendant demonstrated the alternatives to working at the same hospital would either require a 3 to 4 hour commute, or result in his not working at all while he renewed his credentials in Pennsylvania. Plaintiff alleged allowing defendant to continue to work at the hospital would damage its business model and lead to competitors taking away contracts. The Fourth Department noted that the harm to plaintiff would only occur if the court rules in its favor, not during the pendency of the action:

> It is well settled that " [p]reliminary injunctive relief is a drastic remedy [that] is not routinely granted' " ... . Moreover, "[i]n reviewing an order denying a motion for [a] preliminary injunction, we should not determine finally the merits of the action and should not interfere with the exercise of discretion by [the court] but should review only the determination of whether that discretion has been abused" ... .
>
> "In order to establish its entitlement to a preliminary injunction, the party seeking the injunction must establish, by clear and convincing evidence, . . . three separate elements: (1) a likelihood of ultimate success on the merits; (2) the prospect of irreparable injury if the provisional relief is withheld; and (3) a balance of equities tipping in the moving party's favor' " ... . **Delphi Hospitalist Servs. LLC v Patrick, 2018 NY Slip Op 05100, Fourth Dept 7-6-18**

EMPLOYMENT LAW (RESTRICTIVE COVENANTS, PLAINTIFF STAFFING AGENCY WAS NOT ENTITLED, BASED UPON A BALANCING OF THE EQUITIES, TO A PRELIMINARY INJUNCTION ENFORCING A RESTRICTIVE COVENANT WHICH OSTENSIBLY PROHIBITED DEFENDANT FROM CONTINUING TO WORK AT THE HOSPITAL WHERE PLAINTIFF HAD PLACED HIM AFTER DEFENDANT TERMINATED HIS CONTRACT WITH PLAINTIFF (FOURTH DEPT))/RESTRICTIVE COVENANTS (EMPLOYMENT LAW, PRELIMINARY INJUNCTIONS, PLAINTIFF STAFFING AGENCY WAS NOT ENTITLED, BASED UPON A BALANCING OF THE EQUITIES, TO A PRELIMINARY INJUNCTION ENFORCING A RESTRICTIVE COVENANT WHICH OSTENSIBLY PROHIBITED DEFENDANT FROM CONTINUING TO WORK AT THE HOSPITAL WHERE PLAINTIFF HAD PLACED HIM AFTER DEFENDANT TERMINATED HIS CONTRACT WITH PLAINTIFF (FOURTH DEPT))/CIVIL PROCEDURE (PRELIMINARY INJUNCTION, EMPLOYMENT LAW, RESTRICTIVE COVENANTS, PLAINTIFF STAFFING AGENCY WAS NOT ENTITLED, BASED UPON A BALANCING OF THE EQUITIES, TO A PRELIMINARY INJUNCTION ENFORCING A RESTRICTIVE COVENANT WHICH OSTENSIBLY PROHIBITED DEFENDANT FROM CONTINUING TO WORK AT THE HOSPITAL WHERE PLAINTIFF HAD PLACED HIM AFTER DEFENDANT TERMINATED HIS CONTRACT WITH PLAINTIFF (FOURTH DEPT))/PRELIMINARY INJUNCTIONS (EMPLOYMENT LAW, RESTRICTIVE COVENANTS, PLAINTIFF STAFFING AGENCY WAS NOT ENTITLED, BASED UPON A BALANCING OF THE EQUITIES, TO A PRELIMINARY INJUNCTION ENFORCING A RESTRICTIVE COVENANT WHICH OSTENSIBLY PROHIBITED DEFENDANT FROM CONTINUING TO WORK AT THE HOSPITAL WHERE PLAINTIFF HAD PLACED HIM AFTER DEFENDANT TERMINATED HIS CONTRACT WITH PLAINTIFF (FOURTH DEPT))

EMPLOYMENT LAW, LABOR LAW, CONTRACT LAW, MUNICIPAL LAW.

PLAINTIFF STATED A BREACH OF CONTRACT CAUSE OF ACTION BASED UPON DEFENDANT CONTRACTOR'S ALLEGED FAILURE TO PAY THE PREVAILING WAGE FOR WORK ON PROPERTIES OWNED BY THE NYC HOUSING AUTHORITY (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff had stated a cause of action for violation of the "prevailing wage" requirement of the Labor Law when plaintiff did work for a contractor (Zoria Housing) on properties owned by the NYC Housing Authority (NYCHA):

> ... [T]he plaintiff stated viable breach of contact causes of action based on violations of statutorily mandated provisions in agreements between Zoria Housing and NYCHA, requiring the payment of prevailing wages and overtime pay. "In situations where the Labor Law requires the inclusion of a provision for payment of the prevailing wage in a labor contract between a public agency and a contractor, a contractual obligation is created in favor of the contractor's employees, and an employee covered by or subject to the contract, in his or her status as third-party beneficiary to the contract, possesses a common-law cause of action against the contractor to recover damages for breach of such a contractual obligation" ... . Here, the complaint alleges, in effect, that Zoria Housing failed to pay the plaintiff "prevailing wages" and overtime pay in breach of municipal contracts that included prevailing-wage and overtime provisions pursuant to the Labor Law (see generally Labor Law §§ 220, 231). The complaint thus stated viable breach of contract causes of action ... . **Singh v Zoria Hous., LLC, 2018 NY Slip Op 05513, Second Dept 7-25-18**

EMPLOYMENT LAW (PLAINTIFF STATED A BREACH OF CONTRACT CAUSE OF ACTION BASED UPON DEFENDANT CONTRACTOR'S ALLEGED FAILURE TO PAY THE PREVAILING WAGE FOR WORK ON PROPERTIES OWNED BY THE NYC HOUSING AUTHORITY (SECOND DEPT))/LABOR LAW (PLAINTIFF STATED A BREACH OF CONTRACT CAUSE OF ACTION BASED UPON DEFENDANT CONTRACTOR'S ALLEGED FAILURE TO PAY THE PREVAILING WAGE FOR WORK ON PROPERTIES OWNED BY THE NYC HOUSING AUTHORITY (SECOND DEPT))/CONTRACT LAW (EMPLOYMENT LAW, PLAINTIFF STATED A BREACH OF CONTRACT CAUSE OF ACTION BASED UPON DEFENDANT CONTRACTOR'S ALLEGED FAILURE TO PAY THE PREVAILING WAGE FOR WORK ON PROPERTIES OWNED BY THE NYC HOUSING AUTHORITY (SECOND DEPT))/MUNICIPAL LAW (EMPLOYMENT LAW, PLAINTIFF STATED A BREACH OF CONTRACT CAUSE OF ACTION BASED UPON DEFENDANT CONTRACTOR'S ALLEGED FAILURE TO PAY THE PREVAILING WAGE FOR WORK ON PROPERTIES OWNED BY THE NYC HOUSING AUTHORITY (SECOND DEPT))

EMPLOYMENT LAW, UNIONS.

UNDER THE PUBLIC AUTHORITIES LAW, LAID OFF SEASONAL EMPLOYEES WHO HAD BEEN TRANSFERRED FROM THE DEPARTMENT OF ENVIRONMENTAL CONSERVATION TO A PUBLIC BENEFIT CORPORATION WERE NOT ENTITLED TO REMAIN IN THE COLLECTIVE BARGAINING UNIT OF THE DEPARTMENT OF ENVIRONMENTAL PROTECTION WHEN REHIRED BY THE PUBLIC BENEFIT CORPORATION (THIRD DEPT).

The Third Department determined a seasonal employee of a public benefit corporation who was laid off and re-hired was not entitled to stay with the collective bargaining unit to which he belonged before the lay-off. Petitioner had worked for the Department of Environmental Conservation (DEC) at a ski center. The ski center was transferred from the DEC to Olympic, a public benefit corporation. Under the Public Authorities Law petitioner was entitled to stay with the collective bargaining unit to which he belonged at the DEC. However, after the lay-off, under the terms of the relevant statute, petitioner was properly transferred to the Olympic bargaining unit (with decreased benefits):

> This appeal turns on the meaning of the terms "terminated" and "ceases" within the context of Public Authorities Law § 2629 (2) (a). As neither word is defined in the Public Authorities Law and both are words of ordinary import, we interpret them in a manner consistent with "their usual and commonly understood meaning" ... .
>
> Petitioner argues that a layoff is inconsistent with these definitions and merely constitutes a temporary interruption in a career. We disagree, in light of the express statutory provision that an employee whose employment "is terminated or otherwise ceases, by any means" may not return to his or her prior collective bargaining unit upon subsequent rehire (Public Authorities Law § 2629 [2] [a] [emphasis added]). To interpret the language as petitioner urges would render the phrase "by any means" superfluous ... . **Matter of Civil Serv. Empls. Assn., Inc., Local 1000, AFSCME, AFL-CIO v Olympic Regional Dev. Auth.. 2018 NY Slip Op 04998, Third Dept 7-5-18**

EMPLOYMENT LAW (UNDER THE PUBLIC AUTHORITIES LAW, LAID OFF SEASONAL EMPLOYEES WHO HAD BEEN TRANSFERRED FROM THE DEPARTMENT OF ENVIRONMENTAL CONSERVATION TO A PUBLIC BENEFIT CORPORATION WERE NOT ENTITLED TO REMAIN IN THE COLLECTIVE BARGAINING UNIT OF THE DEPARTMENT OF ENVIRONMENTAL PROTECTION WHEN REHIRED BY THE PUBLIC BENEFIT CORPORATION (THIRD DEPT))/UNIONS (UNDER THE PUBLIC AUTHORITIES LAW, LAID OFF SEASONAL EMPLOYEES WHO HAD BEEN TRANSFERRED FROM THE DEPARTMENT OF ENVIRONMENTAL CONSERVATION TO A PUBLIC BENEFIT CORPORATION WERE NOT ENTITLED TO REMAIN IN THE COLLECTIVE BARGAINING UNIT OF THE DEPARTMENT OF ENVIRONMENTAL PROTECTION WHEN REHIRED BY THE PUBLIC BENEFIT CORPORATION (THIRD DEPT))/PUBLIC BENEFIT CORPORATION (UNDER THE PUBLIC AUTHORITIES LAW, LAID OFF SEASONAL EMPLOYEES WHO HAD BEEN TRANSFERRED FROM THE DEPARTMENT OF ENVIRONMENTAL CONSERVATION TO A PUBLIC BENEFIT CORPORATION WERE NOT ENTITLED TO REMAIN IN THE COLLECTIVE BARGAINING UNIT OF THE DEPARTMENT OF ENVIRONMENTAL PROTECTION WHEN REHIRED BY THE PUBLIC BENEFIT CORPORATION (THIRD DEPT))/PUBLIC AUTHORITIES LAW (UNIONS, UNDER THE PUBLIC AUTHORITIES LAW, LAID OFF SEASONAL EMPLOYEES WHO HAD BEEN TRANSFERRED FROM THE DEPARTMENT OF ENVIRONMENTAL CONSERVATION TO A PUBLIC BENEFIT CORPORATION WERE NOT ENTITLED TO REMAIN IN THE COLLECTIVE BARGAINING UNIT OF THE DEPARTMENT OF ENVIRONMENTAL PROTECTION WHEN REHIRED BY THE PUBLIC BENEFIT CORPORATION (THIRD DEPT))/COLLECTIVE BARGAINING UNIT (UNDER THE PUBLIC AUTHORITIES LAW, LAID OFF SEASONAL EMPLOYEES WHO HAD BEEN TRANSFERRED FROM THE DEPARTMENT OF ENVIRONMENTAL CONSERVATION TO A PUBLIC BENEFIT CORPORATION WERE NOT ENTITLED TO REMAIN IN THE COLLECTIVE BARGAINING UNIT OF THE DEPARTMENT OF ENVIRONMENTAL PROTECTION WHEN REHIRED BY THE PUBLIC BENEFIT CORPORATION (THIRD DEPT))

ENVIRONMENTAL LAW

ENVIRONMENTAL LAW.

STATE PROPERLY SOUGHT OIL SPILL CLEANUP COSTS FROM DEFENDANT PROPERTY OWNER, EVEN THOUGH THOSE COSTS WERE COVERED BY PAYMENT FROM THE LEAKING UNDERGROUND STORAGE TANK FUND, PAYMENT BY THE DEFENDANT WOULD BE USED TO REPLENISH THE FUND AND DID NOT CONSTITUTE DOUBLE RECOVERY BY THE STATE (THIRD DEPT).

The Third Department determined defendant's cross motion in this oil spill action was properly denied. Defendant argued that for the plaintiff (New York State) to recover funds paid out to the plaintiff from the Leaking Underground Storage Trust Fund would not amount to double recovery. The recovery from the defendant would be used to replenish the fund:

> The Navigation Law prohibits the discharge of petroleum and requires a discharger to immediately notify the Department of Environmental Conservation (hereinafter DEC) of the discharge and "undertake to contain such discharge" ... . Where a petroleum discharge has occurred, DEC may retain agents and contractors to clean up and remove the contamination ... , with the cost of such cleanup efforts to be initially paid with money from the Spill Fund ... and/or the Leaking Underground Storage Tank Fund, which contains federal appropriations earmarked for remediating petroleum discharges... . The owner or operator of a major oil storage facility that discharges petroleum is "strictly liable, without regard to fault, subject to [certain defenses], for all cleanup and removal costs and all direct and indirect damages paid by the [Spill F]und" ... . Plaintiff is required to seek recovery of "[c]osts incurred by the [Spill F]und in the cleanup and removal of a discharge when the [discharger] has failed to promptly clean up and remove the discharge to the satisfaction of [DEC]" ... . Plaintiff is also required to seek recovery of remediation costs incurred by the Leaking Underground Storage Tank Fund ... .
>
> By commencing this action, plaintiff fulfilled its obligation to seek recovery of the $221,192 provided by the Leaking Underground Storage Tank Fund to pay for the costs associated with cleaning and removing the alleged petroleum discharges on defendant's alleged property ... . **State of New York v Ronney, 2018 NY Slip Op 05389, Third Dept 7-19-18**

ENVIRONMENTAL LAW (OIL SPILL, NAVIGATION LAW, STATE PROPERLY SOUGHT OIL SPILL CLEANUP COSTS FROM DEFENDANT PROPERTY OWNER, EVEN THOUGH THOSE COSTS WERE COVERED BY PAYMENT FROM THE LEAKING UNDERGROUND STORAGE TANK FUND, PAYMENT BY THE DEFENDANT WOULD BE USED TO REPLENISH THE FUND AND DID NOT CONSTITUTE DOUBLE RECOVERY BY THE STATE (THIRD DEPT))/NAVIGATION LAW (OIL SPILL, STATE PROPERLY SOUGHT OIL SPILL CLEANUP COSTS FROM DEFENDANT PROPERTY OWNER, EVEN THOUGH THOSE COSTS WERE COVERED BY PAYMENT FROM THE LEAKING UNDERGROUND STORAGE TANK FUND, PAYMENT BY THE DEFENDANT WOULD BE USED TO REPLENISH THE FUND AND DID NOT CONSTITUTE DOUBLE RECOVERY BY THE STATE (THIRD DEPT))/OIL SPILL (NAVIGATION LAW, TATE PROPERLY SOUGHT OIL SPILL CLEANUP COSTS FROM DEFENDANT PROPERTY OWNER, EVEN THOUGH THOSE COSTS WERE COVERED BY PAYMENT FROM THE LEAKING UNDERGROUND STORAGE TANK FUND, PAYMENT BY THE DEFENDANT WOULD BE USED TO REPLENISH THE FUND AND DID NOT CONSTITUTE DOUBLE RECOVERY BY THE STATE (THIRD DEPT))

ENVIRONMENTAL LAW, LAND USE, ADMINISTRATIVE LAW.

PLANNING BOARD'S FINDING THE DEVELOPMENT PROJECT WOULD NOT HAVE SIGNIFICANT IMPACT ON THE ENVIRONMENT WAS ARBITRARY AND CAPRICIOUS, MATTER REMITTED FOR PREPARATION OF AN ENVIRONMENTAL IMPACT STATEMENT (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the planning board's finding that a multi-family housing project would not have a significant impart on the environment was arbitrary and capricious. The matter was remitted for preparation of an environmental impact statement:

> ... [T]he full Environmental Assessment Form (hereinafter EAF) prepared by the project sponsor indicated that the proposed action would affect, among other things, aesthetic and historic resources and the character of the existing community, and that the parcel's forestation would be reduced from 2.75 acres to .30 acres. In issuing its negative declaration, the Planning Board listed approximately 29 reasons supporting its determination. The Planning Board noted that the project would not significantly impact the adjacent Dwight Street-Hooker Avenue Historic District (hereinafter the historic district). However, in making that determination, the Planning Board merely relied upon a letter from the New York State Office of Parks, Recreations and Historic Preservation, which stated only that the proposed action would not have an adverse impact on the historic district. Such a conclusory statement fails to fulfill the reasoned elaboration requirement of SEQRA ... .
>
> With regard to the impact on vegetation or fauna, the EAF contemplates the reduction of the 3.4-acre parcel's forestation from 2.75 acres to .30 acres. However, the negative declaration inexplicably stated that "[t]he proposed action will not result in the removal or destruction of large quantities of vegetation or fauna." In the context of this project, the level of deforestation is significant.
>
> In light of the foregoing, it is clear that the proposed action may have significant adverse environmental impacts upon one or more areas of environmental concern... . Thus, the Planning Board's issuance of a negative declaration was arbitrary and capricious. **Matter of Peterson v Planning Bd. of the City of Poughkeepsie, 2018 NY Slip Op 05049, Second Dept 7-5-18**

ENVIRONMENTAL LAW (PLANNING BOARD'S FINDING THE DEVELOPMENT PROJECT WOULD NOT HAVE SIGNIFICANT IMPACT ON THE ENVIRONMENT WAS ARBITRARY AND CAPRICIOUS, MATTER REMITTED FOR PREPARATION OF AN ENVIRONMENTAL IMPACT STATEMENT (SECOND DEPT))/STATE ENVIRONMENTAL QUALITY REVIEW ACT (SEQRA) (PLANNING BOARD'S FINDING THE DEVELOPMENT PROJECT WOULD NOT HAVE SIGNIFICANT IMPACT ON THE ENVIRONMENT WAS ARBITRARY AND CAPRICIOUS, MATTER REMITTED FOR PREPARATION OF AN ENVIRONMENTAL IMPACT STATEMENT (SECOND DEPT))/LAND USE (PLANNING BOARD'S FINDING THE DEVELOPMENT PROJECT WOULD NOT HAVE SIGNIFICANT IMPACT ON THE ENVIRONMENT WAS ARBITRARY AND CAPRICIOUS, MATTER REMITTED FOR PREPARATION OF AN ENVIRONMENTAL IMPACT STATEMENT (SECOND DEPT))/ZONING (PLANNING BOARD'S FINDING THE DEVELOPMENT PROJECT WOULD NOT HAVE SIGNIFICANT IMPACT ON THE ENVIRONMENT WAS ARBITRARY AND CAPRICIOUS, MATTER REMITTED FOR PREPARATION OF AN ENVIRONMENTAL IMPACT STATEMENT (SECOND DEPT))/ADMINISTRATIVE LAW (PLANNING BOARD'S FINDING THE DEVELOPMENT PROJECT WOULD NOT HAVE SIGNIFICANT IMPACT ON THE ENVIRONMENT WAS ARBITRARY AND CAPRICIOUS, MATTER REMITTED FOR PREPARATION OF AN ENVIRONMENTAL IMPACT STATEMENT (SECOND DEPT))

ENVIRONMENTAL LAW, LAND USE, ADMINISTRATIVE LAW.

PLANNING BOARD'S DENIAL OF A WETLAND CONTROL PERMIT AND SITE PLAN APPROVAL PROPERLY ANNULLED, THE DENIAL WAS A DEPARTURE FROM PRIOR DETERMINATIONS AND THE BOARD DID NOT SET FORTH FACTUAL REASONS FOR THE DEPARTURE (SECOND DEPT).

The Second Department determined the town planning board's denial of petitioner's application for a wetland control permit and site plan approval was properly annulled by Supreme Court. The planning board's action departed from many prior determinations and the planning board did not set forth any factual reasons for the departure:

> ... " [A] local planning board has broad discretion in reaching its determination on applications . . . and judicial review is limited to determining whether the action taken by the board was illegal, arbitrary, or an abuse of discretion"'... . " A decision of an administrative agency which neither adheres to its own prior precedent nor indicates its reason for reaching a different result on essentially the same facts is arbitrary and capricious"' ... . Where an agency reaches contrary results on substantially similar facts, it must provide an explanation ... . "An agency's failure to provide a valid and rational explanation for its departure from its prior precedent mandates reversal' regardless of whether the record otherwise supports the determination" ... .
>
> Here, the Planning Board failed to set forth any factual basis in the determination as to why it was departing from numerous prior determinations that, for example, permitted larger encroachments into wetland and wetland buffer areas and permitted encroachments of the same or similar type into those areas within the immediate vicinity of the petitioner's lot. The Planning Board's belated effort to provide such distinctions are not properly before this Court ... . **Matter of Nicolai v McLaughlin, 2018 NY Slip Op 05046, Second Dept 7-5-18**

ADMINISTRATIVE LAW (PLANNING BOARD'S DENIAL OF A WETLAND CONTROL PERMIT AND SITE PLAN APPROVAL PROPERLY ANNULLED, THE DENIAL WAS A DEPARTURE FROM PRIOR DETERMINATIONS AND THE BOARD DID NOT SET FORTH FACTUAL REASONS FOR THE DEPARTURE (SECOND DEPT))/ENVIRONMENTAL LAW (PLANNING BOARD'S DENIAL OF A WETLAND CONTROL PERMIT AND SITE PLAN APPROVAL PROPERLY ANNULLED, THE DENIAL WAS A DEPARTURE FROM PRIOR DETERMINATIONS AND THE BOARD DID NOT SET FORTH FACTUAL REASONS FOR THE DEPARTURE (SECOND DEPT))/LAND USE (PLANNING BOARD'S DENIAL OF A WETLAND CONTROL PERMIT AND SITE PLAN APPROVAL PROPERLY ANNULLED, THE DENIAL WAS A DEPARTURE FROM PRIOR DETERMINATIONS AND THE BOARD DID NOT SET FORTH FACTUAL REASONS FOR THE DEPARTURE (SECOND DEPT))/WETLANDS (PLANNING BOARD'S DENIAL OF A WETLAND CONTROL PERMIT AND SITE PLAN APPROVAL PROPERLY ANNULLED, THE DENIAL WAS A DEPARTURE FROM PRIOR DETERMINATIONS AND THE BOARD DID NOT SET FORTH FACTUAL REASONS FOR THE DEPARTURE (SECOND DEPT))

ENVIRONMENTAL LAW, MUNICIPAL LAW, ADMINISTRATIVE LAW.

PETITION SEEKING TO ANNUL A NEGATIVE DECLARATION UNDER THE STATE ENVIRONMENTAL QUALITY REVIEW ACT (SEQRA) CONCERNING A TRUCK STOP PROJECT PROPERLY DISMISSED FOR FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES, TOWN PLANNING BOARD DID NOT ACT ARBITRARILY AND CAPRICIOUSLY WHEN IT FAILED TO FOLLOW A LOCAL LAW WHICH CONFLICTED WITH SEQRA (FOURTH DEPT).

The Fourth Department determined petitioner did not exhaust administrative remedies before bringing a petition to annul the town's negative declaration under the State Environmental Quality Review Act (SEQRA) for a truck stop project. The court further found that the town planning board did not act arbitrarily and capriciously when it failed to follow a Local Law (which required an environmental impact statement (EIS)) because the Local Law conflicted with SEQRA and was therefore invalid:

> ... [W]e conclude that petitioner failed to exhaust its administrative remedies ... . The record establishes that the Planning Board, as the lead agency on the project, held a public hearing that petitioner's counsel attended, but during which he remained silent. Although petitioner made a FOIL request two days after the public hearing, that request did not alert the Planning Board of any specific concerns. ...
>
> "A local law that is inconsistent with SEQRA' must be invalidated" ... . "[I]nconsistency has been found where local laws prohibit what would have been permissible under State law or impose prerequisite additional restrictions on rights under State law, so as to inhibit operation of the State's general laws" ... . Here, section 59-3 (A) of the Town Code provided that "Type I actions are likely to have an effect on the environment and will, therefore, require the preparation of an environmental impact statement." SEQRA, on the other hand, provides that, "[t]he lead agency must determine the significance of any Type I . . . action . . . [and,] [t]o require an EIS for a proposed action, the lead agency must determine that the action may include the potential for at least one significant adverse environmental impact" ... . Thus, Chapter 59 is inconsistent with SEQRA because SEQRA permits a negative declaration for Type I actions, whereas Chapter 59 effectively precluded a negative declaration in such actions. **Matter of Pilot Travel Ctrs., LLC v Town Bd. of Town of Bath, 2018 NY Slip Op 05082, Fourth Dept 7-6-18**

ENVIRONMENTAL LAW ((PETITION SEEKING TO ANNUL A NEGATIVE DECLARATION UNDER THE STATE ENVIRONMENTAL QUALITY REVIEW ACT (SEQRA) CONCERNING A TRUCK STOP PROJECT PROPERLY DISMISSED FOR FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES, TOWN PLANNING BOARD DID NOT ACT ARBITRARILY AND CAPRICIOUSLY WHEN IT FAILED TO FOLLOW A LOCAL LAW WHICH CONFLICTED WITH SEQRA (FOURTH DEPT)/STATE ENVIRONMENTAL QUALITY REVIEW ACT (SEQRA) (PETITION SEEKING TO ANNUL A NEGATIVE DECLARATION UNDER THE STATE ENVIRONMENTAL QUALITY REVIEW ACT (SEQRA) CONCERNING A TRUCK STOP PROJECT PROPERLY DISMISSED FOR FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES, TOWN PLANNING BOARD DID NOT ACT ARBITRARILY AND CAPRICIOUSLY WHEN IT FAILED TO FOLLOW A LOCAL LAW WHICH CONFLICTED WITH SEQRA (FOURTH DEPT))/MUNICIPAL LAW (ENVIRONMENTAL LAW, PETITION SEEKING TO ANNUL A NEGATIVE DECLARATION UNDER THE STATE ENVIRONMENTAL QUALITY REVIEW ACT (SEQRA) CONCERNING A TRUCK STOP PROJECT PROPERLY DISMISSED FOR FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES, TOWN PLANNING BOARD DID NOT ACT ARBITRARILY AND CAPRICIOUSLY WHEN IT FAILED TO FOLLOW A LOCAL LAW WHICH CONFLICTED WITH SEQRA (FOURTH DEPT))/ADMINISTRATIVE LAW (ENVIRONMENTAL LAW, MUNICIPAL LAW, (PETITION SEEKING TO ANNUL A NEGATIVE DECLARATION UNDER THE STATE ENVIRONMENTAL QUALITY REVIEW ACT (SEQRA) CONCERNING A TRUCK STOP PROJECT PROPERLY DISMISSED FOR FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES, TOWN PLANNING BOARD DID NOT ACT ARBITRARILY AND CAPRICIOUSLY WHEN IT FAILED TO FOLLOW A LOCAL LAW WHICH CONFLICTED WITH SEQRA (FOURTH DEPT))

FAMILY LAW

FAMILY LAW.

ALTHOUGH MOTHER VIOLATED THE TERMS OF HER SUSPENDED JUDGMENT, FAMILY COURT SHOULD NOT HAVE TERMINATED HER PARENTAL RIGHTS WITHOUT A FINDING, BASED UPON A HEARING, THAT TERMINATION WAS IN THE BEST INTERESTS OF THE CHILD (THIRD DEPT).

The Third Department, reversing Family Court, determined that although mother violated the terms of her suspended judgment, her parental rights should not have been terminated without a finding, based upon a hearing, that termination was in the best interests of the child:

> A suspended judgment is intended to provide a parent who has permanently neglected his or her child with a brief period within which to become a fit parent that the child can be returned to in safety ... . "A parent's noncompliance with the terms of the suspended judgment during this grace period, if established by a preponderance of the evidence, may end with revocation of the suspended judgment and termination of his or her parental rights"... .
>
> Family Court determined, and we agree, that numerous violations of the terms of the suspended judgment were established by a preponderance of the evidence. ...
>
> ... [V]iolations that could warrant a revocation of the suspended judgment and termination of parental rights do not automatically have that effect... . It is instead the best interests of the child, which is "relevant at all stages of a permanent neglect proceeding, including at the revocation of a suspended judgment," that determines the appropriate disposition ... . Family Court did not make a best interests finding and, absent hearing evidence relating to "the child[]'s present circumstances and relationship with [respondent] and the effect upon the[] [child] of the termination of [respondent's] parental rights and [the child's] potential adoption," it is unclear how Family Court could have done so ... . **Matter of Cecilia P. (Carlenna Q.), 2018 NY Slip Op 04993, Third Dept 7-5-18**

FAMILY LAW (PARENTAL RIGHTS, ALTHOUGH MOTHER VIOLATED THE TERMS OF HER SUSPENDED JUDGMENT, FAMILY COURT SHOULD NOT HAVE TERMINATED HER PARENTAL RIGHTS WITHOUT A FINDING, BASED UPON A HEARING, THAT TERMINATION WAS IN THE BEST INTERESTS OF THE CHILD (THIRD DEPT))/PARENTAL RIGHTS (ALTHOUGH MOTHER VIOLATED THE TERMS OF HER SUSPENDED JUDGMENT, FAMILY COURT SHOULD NOT HAVE TERMINATED HER PARENTAL RIGHTS WITHOUT A FINDING, BASED UPON A HEARING, THAT TERMINATION WAS IN THE BEST INTERESTS OF THE CHILD (THIRD DEPT))/SUSPENDED JUDGMENTS (FAMILY LAW, PARENTAL RIGHTS, ALTHOUGH MOTHER VIOLATED THE TERMS OF HER SUSPENDED JUDGMENT, FAMILY COURT SHOULD NOT HAVE TERMINATED HER PARENTAL RIGHTS WITHOUT A FINDING, BASED UPON A HEARING, THAT TERMINATION WAS IN THE BEST INTERESTS OF THE CHILD (THIRD DEPT))/NEGLECT (FAMILY LAW, PARENTAL RIGHTS, ALTHOUGH MOTHER VIOLATED THE TERMS OF HER SUSPENDED JUDGMENT, FAMILY COURT SHOULD NOT HAVE TERMINATED HER PARENTAL RIGHTS WITHOUT A FINDING, BASED UPON A HEARING, THAT TERMINATION WAS IN THE BEST INTERESTS OF THE CHILD (THIRD DEPT))

FAMILY LAW.

IN A COMPLEX PATERNITY CASE SPANNING EIGHT YEARS ORDER PRECLUDING CHILD FROM ESTABLISHING ESTOPPEL AND FINDING PETITIONER HAD STANDING TO SEEK CUSTODY AND VISITATION PROPERLY GRANTED (FIRST DEPT).

The First Department, in a complex paternity case spanning eight years, over a comprehensive dissent, determined the order precluding the child, G, from establishing estoppel and finding that petitioner had standing to seek custody and visitation was properly granted. The facts cannot be fairly summarized here:

> ,,, [T]here is no basis to apply the [estoppel] doctrine here, where petitioner has consistently and diligently asserted his paternity; attempted to visit the hospital in time for G.'s birth; attempted to support G. financially; commenced proceedings and consistently appeared in court by telephone or in person, as he was able. By contrast, JAC [mother's partner who acknowledged paternity] failed to appear in court in person after September 21, 2011, and failed to appear by his counsel or any other means in any proceeding after June 18, 2012. Moreover, any delay in bringing the paternity proceedings to a conclusion is not attributable to petitioner, but to respondent and JAC, who failed to appear in court on numerous occasions, and to the AFC [attorney for the child], who waited three years before challenging the 2012 estoppel order.
>
> Moreover, contrary to our dissenting colleague's view, this is not a case where a man may be estopped from claiming to be a child's biological father on the basis of his acquiescence to the establishment of a strong parent-child bond between the child and another man ... . Here, petitioner's efforts to establish his paternity were far from acquiescent. Petitioner sought, and was granted, leave to postpone commencement of his prison sentence for one month in order to allow him to be present at G.'s birth. When he arrived in New York on October 9, 2008 for that purpose, he called respondent's mother, who told him that his daughter had been born but did not disclose the hospital in which the birth had taken place. He was then contacted by JAC, who made clear to him that petitioner should have nothing to do with G. Undaunted by these incidents, upon entering prison, he attempted to send money orders to respondent which he intended for G.'s support, but the money orders were returned to him. While still in prison, he commenced the instant paternity proceeding, consistently appearing before the court by telephone and, upon his release from prison in July 2011, in person. And, approximately one month after the June 2012 estoppel ruling was issued, petitioner commenced the custody/visitation proceeding, repeatedly appearing in person and ultimately hiring private counsel in that proceeding, as well. **Matter of Michael S. v Sultana R., 2018 NY Slip Op 05404, First Dept 7-19-18**

FAMILY LAW (IN A COMPLEX PATERNITY CASE SPANNING EIGHT YEARS ORDER PRECLUDING CHILD FROM ESTABLISHING ESTOPPEL AND FINDING PETITIONER HAD STANDING TO SEEK CUSTODY AND VISITATION PROPERLY GRANTED (FIRST DEPT))/PATERNITY (IN A COMPLEX PATERNITY CASE SPANNING EIGHT YEARS ORDER PRECLUDING CHILD FROM ESTABLISHING ESTOPPEL AND FINDING PETITIONER HAD STANDING TO SEEK CUSTODY AND VISITATION PROPERLY GRANTED (FIRST DEPT))/ESTOPPEL (FAMILY LAW, PATERNITY, IN A COMPLEX PATERNITY CASE SPANNING EIGHT YEARS ORDER PRECLUDING CHILD FROM ESTABLISHING ESTOPPEL AND FINDING PETITIONER HAD STANDING TO SEEK CUSTODY AND VISITATION PROPERLY GRANTED (FIRST DEPT))

FAMILY LAW, ATTORNEYS.

FAMILY COURT'S FAILURE TO CONDUCT A SEARCHING INQUIRY BEFORE ALLOWING FATHER TO PROCEED PRO SE REQUIRED REVERSAL, DESPITE FATHER'S BEING REPRESENTED WHEN THE HEARING CONTINUED (THIRD DEPT).

The Third Department, reversing Family Court in this contempt and modification of custody proceeding, determined Family Court should not have allowed father to represent himself without first making an inquiry to ensure father understood the consequences of going forward without an attorney. Although Family Court informed father that he should obtain counsel because he was misconstruing the law, and father was represented when the hearing resumed, one of the witnesses examined by father pro se was not recalled for examination by father's attorney:

> "A waiver of the right to counsel must be explicit and intentional, and the court must assure that it is made knowingly, intelligently and voluntarily"... . Thus, the hearing court must "perform a searching inquiry to determine whether a party is aware of the dangers and disadvantages of proceeding without counsel, which might include inquiry into the party's age, education, occupation, previous exposure to legal procedures and other relevant factors bearing on a competent, intelligent, voluntary waiver" ... .
>
> Supreme Court erred by commencing the hearing without first ascertaining that the father was unequivocally waiving his right to counsel and, if so, conducting an inquiry into whether that waiver was knowingly, intelligently and voluntarily made ... . Although one of the two witnesses who testified while the father was pro se ultimately was recalled after the father obtained counsel, and was subjected to direct and cross-examination for a second time, the other witness — the caseworker — was not recalled and her testimony supported both of the mother's petitions. Furthermore, the violation of a party's statutory right to counsel "requires reversal, without regard to the merits of the unrepresented party's position" and, therefore, we need not consider whether the mother would have succeeded on her modification petition absent the caseworker's testimony ... . **Matter of Hensley v DeMun, 2018 NY Slip Op 04995, Third Dept 7-5-18**

FAMILY LAW (ATTORNEYS, FAMILY COURT'S FAILURE TO CONDUCT A SEARCHING INQUIRY BEFORE ALLOWING FATHER TO PROCEED PRO SE REQUIRED REVERSAL, DESPITE FATHER'S BEING REPRESENTED WHEN THE HEARING CONTINUED (THIRD DEPT))/ATTORNEYS (FAMILY LAW, FAMILY COURT'S FAILURE TO CONDUCT A SEARCHING INQUIRY BEFORE ALLOWING FATHER TO PROCEED PRO SE REQUIRED REVERSAL, DESPITE FATHER'S BEING REPRESENTED WHEN THE HEARING CONTINUED (THIRD DEPT))/RIGHT TO COUNSEL (FAMILY LAW, FAMILY COURT'S FAILURE TO CONDUCT A SEARCHING INQUIRY BEFORE ALLOWING FATHER TO PROCEED PRO SE REQUIRED REVERSAL, DESPITE FATHER'S BEING REPRESENTED WHEN THE HEARING CONTINUED (THIRD DEPT))/PRO SE (FAMILY LAW, FAMILY COURT'S FAILURE TO CONDUCT A SEARCHING INQUIRY BEFORE ALLOWING FATHER TO PROCEED PRO SE REQUIRED REVERSAL, DESPITE FATHER'S BEING REPRESENTED WHEN THE HEARING CONTINUED (THIRD DEPT))/WAIVER (RIGHT TO COUNSEL, FAMILY LAW, FAMILY COURT'S FAILURE TO CONDUCT A SEARCHING INQUIRY BEFORE ALLOWING FATHER TO PROCEED PRO SE REQUIRED REVERSAL, DESPITE FATHER'S BEING REPRESENTED WHEN THE HEARING CONTINUED (THIRD DEPT))

FAMILY LAW, CIVIL PROCEDURE.

PETITION BY A FORMER ROMANTIC PARTNER SEEKING JOINT CUSTODY OF CHILDREN BORN TO RESPONDENT BASED UPON AN ALLEGED AGREEMENT TO RAISE THE CHILDREN AS A FAMILY SHOULD NOT HAVE BEEN DISMISSED BY THE REFEREE FOR FAILURE TO MAKE OUT A PRIMA FACIE CASE, THE REFEREE SHOULD NOT HAVE MADE CREDIBILITY DETERMINATIONS IN A MOTION PURSUANT TO CPLR 4401 (FOURTH DEPT).

The Fourth Department reversed the dismissal, by a Referee, of the petition brought seeking joint custody of children born to respondent, with whom petitioner had had a romantic relationship, on the basis of an agreement that petitioner and respondent would raise the children as a family. The court noted that a dismissal pursuant to CPLR 4401 for failure to make out a prima facie case can not take into account credibility determinations:

> Petitioner commenced this proceeding seeking joint custody of, and visitation with, the five subject children, all of whom were born to respondent and conceived by the implantation of fertilized eggs. With respect to her standing to commence this proceeding, petitioner alleged that she and respondent had previously been involved in a romantic relationship, and that they entered into an agreement to raise and co-parent the child that was alive when the parties met. Petitioner further alleged that, prior to the conception of the younger four children, the parties also agreed that respondent would conceive additional children and the parties would jointly raise them as a family. The Referee granted a hearing on the issue of petitioner's standing to seek custody of the children, at which petitioner's testimony was consistent with the petition. ... At the conclusion of petitioner's case, the Referee granted respondent's motion pursuant to CPLR 4401 to dismiss the petition. ...
>
> ... "[I]n determining a motion to dismiss for failure to establish a prima facie case, the evidence must be accepted as true and given the benefit of every reasonable inference which may be drawn therefrom . . . The question of credibility is irrelevant, and should not be considered" ... .
>
> Here, the Referee made credibility determinations and weighed the probative value of the evidence in making a determination on the motion to dismiss. Consequently, we reverse the order, reinstate the petition and remit the matter to Family Court to determine, after a full hearing, whether petitioner, by clear and convincing evidence, has established with respect to the four younger children that she "has agreed with the biological parent of the child[ren] to conceive and raise [them] as co-parents" ... , and whether, despite being a "partner without such an agreement [she] can establish standing" with respect to the older child ... . **Matter of deMarc v Goodyear, 2018 NY Slip Op 05095, Fourth Dept 7-6-18**

FAMILY LAW (PETITION BY A FORMER ROMANTIC PARTNER SEEKING JOINT CUSTODY OF CHILDREN BORN TO RESPONDENT BASED UPON AN ALLEGED AGREEMENT TO RAISE THE CHILDREN AS A FAMILY SHOULD NOT HAVE BEEN DISMISSED BY THE REFEREE FOR FAILURE TO MAKE OUT A PRIMA FACIE CASE, THE REFEREE SHOULD NOT HAVE MADE CREDIBILITY DETERMINATIONS IN A MOTION PURSUANT TO CPLR 4401 (FOURTH DEPT))/CUSTODY (FAMILY LAW, PETITION BY A FORMER ROMANTIC PARTNER SEEKING JOINT CUSTODY OF CHILDREN BORN TO RESPONDENT BASED UPON AN ALLEGED AGREEMENT TO RAISE THE CHILDREN AS A FAMILY SHOULD NOT HAVE BEEN DISMISSED BY THE REFEREE FOR FAILURE TO MAKE OUT A PRIMA FACIE CASE, THE REFEREE SHOULD NOT HAVE MADE CREDIBILITY DETERMINATIONS IN A MOTION PURSUANT TO CPLR 4401 (FOURTH DEPT))/CIVIL PROCEDURE (PETITION BY A FORMER ROMANTIC PARTNER SEEKING JOINT CUSTODY OF CHILDREN BORN TO RESPONDENT BASED UPON AN ALLEGED AGREEMENT TO RAISE THE CHILDREN AS A FAMILY SHOULD NOT HAVE BEEN DISMISSED BY THE REFEREE FOR FAILURE TO MAKE OUT A PRIMA FACIE CASE, THE REFEREE SHOULD NOT HAVE MADE CREDIBILITY DETERMINATIONS IN A MOTION PURSUANT TO CPLR 4401 (FOURTH DEPT))/CPLR 4401 (PETITION BY A FORMER ROMANTIC PARTNER SEEKING JOINT CUSTODY OF CHILDREN BORN TO RESPONDENT BASED UPON AN ALLEGED AGREEMENT TO RAISE THE CHILDREN AS A FAMILY SHOULD NOT HAVE BEEN DISMISSED BY THE REFEREE FOR FAILURE TO MAKE OUT A PRIMA FACIE CASE, THE REFEREE SHOULD NOT HAVE MADE CREDIBILITY DETERMINATIONS IN A MOTION PURSUANT TO CPLR 4401 (FOURTH DEPT))/STANDING (FAMILY LAW, CUSTODY, PETITION BY A FORMER ROMANTIC PARTNER SEEKING JOINT CUSTODY OF CHILDREN BORN TO RESPONDENT BASED UPON AN ALLEGED AGREEMENT TO RAISE THE CHILDREN AS A FAMILY SHOULD NOT HAVE BEEN DISMISSED BY THE REFEREE FOR FAILURE TO MAKE OUT A PRIMA FACIE CASE, THE REFEREE SHOULD NOT HAVE MADE CREDIBILITY DETERMINATIONS IN A MOTION PURSUANT TO CPLR 4401 (FOURTH DEPT))

FAMILY LAW, CIVIL PROCEDURE.

CHILD'S REQUEST FOR AN ADJOURNMENT WHEN MOTHER FAILED TO APPEAR AT AN EQUITABLE ESTOPPEL HEARING IN THIS PATERNITY AND CUSTODY PROCEEDING SHOULD HAVE BEEN GRANTED (SECOND DEPT).

The Second Department determined Family Court abused its discretion when it dismissed an equitable estoppel hearing in a paternity and custody proceeding when mother failed to appear and the child requested an adjournment:

> Despite the fact that the mother had appeared on all prior court dates, and was in the middle of her testimony at the hearing, the Family Court denied the child's request for an adjournment, and instead directed dismissal of the petition for failure to prosecute. The child, Malachi S., appeals. ...
>
> Here, as the child and the mother correctly contend, the request for an adjournment was reasonable and there was no indication of intentional default or willful abandonment. Under these circumstances, the Family Court improvidently exercised its discretion in directing the dismissal of the petition for failure to prosecute rather than granting the child's request for an adjournment ... . **Matter of Simmons v Ford, 2018 NY Slip Op 05176, Second Dept 7-11-18**

FAMILY LAW (CHILD'S REQUEST FOR AN ADJOURNMENT WHEN MOTHER FAILED TO APPEAR AT AN EQUITABLE ESTOPPEL HEARING IN THIS PATERNITY AND CUSTODY PROCEEDING SHOULD HAVE BEEN GRANTED (SECOND DEPT))/ADJOURNMENT (FAMILY LAW, CHILD'S REQUEST FOR AN ADJOURNMENT WHEN MOTHER FAILED TO APPEAR AT AN EQUITABLE ESTOPPEL HEARING IN THIS PATERNITY AND CUSTODY PROCEEDING SHOULD HAVE BEEN GRANTED (SECOND DEPT))/PATERNITY (CHILD'S REQUEST FOR AN ADJOURNMENT WHEN MOTHER FAILED TO APPEAR AT AN EQUITABLE ESTOPPEL HEARING IN THIS PATERNITY AND CUSTODY PROCEEDING SHOULD HAVE BEEN GRANTED (SECOND DEPT))/CUSTODY (FAMILY LAW, CHILD'S REQUEST FOR AN ADJOURNMENT WHEN MOTHER FAILED TO APPEAR AT AN EQUITABLE ESTOPPEL HEARING IN THIS PATERNITY AND CUSTODY PROCEEDING SHOULD HAVE BEEN GRANTED (SECOND DEPT))

FAMILY LAW, CIVIL PROCEDURE.

PROPERTY ACQUIRED DURING A VERMONT CIVIL UNION, UNDER PRINCIPLES OF COMITY, IS SUBJECT TO EQUITABLE DISTRIBUTION (FOURTH DEPT).

The Fourth Department, reversing (modifying} Supreme Court, determined property acquired during a civil union entered into in Vermont was, under the principles of comity, subject to equitable distribution in a New York divorce action. The parties were married three years after entering the civil union:

> ... [W]e conclude that comity does require the recognition of property rights arising from a civil union in Vermont. One of the consequences of the parties' civil union in Vermont was that they would receive "all the same benefits, protections, and responsibilities under law . . . as are granted to spouses in a civil marriage" (Vt Stat Ann, tit 15, § 1204 [a]), including rights with respect to "divorce . . . and property division" (§ 1204 [d]...). That rule is consistent with the public policy of New York, inasmuch as the laws of Vermont and New York both "predicate[] [property rights] on the objective evidence of a formal legal relationship," i.e., legal union between the parties... . In other words, under the laws of both Vermont and New York, property acquired during a legal union of two people—in Vermont a civil union or marriage, and in New York, a marriage—is subject to equitable distribution under the governing statutes of the state. The relevant New York and Vermont statutes both provide similar factors for the court to consider when determining the equitable distribution of the property (compare Domestic Relations Law § 236 [B] [5] [c], [d], with Vt Stat Ann, tit 15, § 751 [b]). Thus, we conclude that, under the principles of comity, the property acquired during the civil union and prior to the marriage is subject to equitable distribution, and such property will therefore be equitably distributed after trial, along with the property acquired during the marriage. **O'Reilly-Morshead v O'Reilly-Morshead, 2018 NY Slip Op 05419, Fourth Dept 7-25-18**

FAMILY LAW (DIVORCE, EQUITABLE DISTRIBUTION, PROPERTY ACQUIRED DURING A VERMONT CIVIL UNION, UNDER PRINCIPLES OF COMITY, IS SUBJECT TO EQUITABLE DISTRIBUTION (FOURTH DEPT))/CIVIL PROCEDURE (FAMILY LAW, DIVORCE, EQUITABLE DISTRIBUTION, PROPERTY ACQUIRED DURING A VERMONT CIVIL UNION, UNDER PRINCIPLES OF COMITY, IS SUBJECT TO EQUITABLE DISTRIBUTION (FOURTH DEPT))/EQUITABLE DISTRIBUTION (PROPERTY ACQUIRED DURING A VERMONT CIVIL UNION, UNDER PRINCIPLES OF COMITY, IS SUBJECT TO EQUITABLE DISTRIBUTION (FOURTH DEPT))/COMITY (DIVORCE, EQUITABLE DISTRIBUTION, PROPERTY ACQUIRED DURING A VERMONT CIVIL UNION, UNDER PRINCIPLES OF COMITY, IS SUBJECT TO EQUITABLE DISTRIBUTION (FOURTH DEPT))/CIVIL UNION (DIVORCE, EQUITABLE DISTRIBUTION, PROPERTY ACQUIRED DURING A VERMONT CIVIL UNION, UNDER PRINCIPLES OF COMITY, IS CONSIDERED MARITAL PROPERTY SUBJECT TO EQUITABLE DISTRIBUTION (FOURTH DEPT))

FAMILY LAW, CONTRACT LAW.

DIVORCE SETTLEMENT AGREEMENT WHICH WAS SILENT ON THE DEFINITION OF MAINTENANCE WAS INTERPRETED IN ACCORDANCE WITH THE STATUTORY DEFINITION OF MAINTENANCE IN DOMESTIC RELATIONS LAW 236 (FOURTH DEPT).

The Fourth Department, in a full-fledged opinion by Justice NeMoyer, determined that a divorce settlement agreement which indicated a specific date (2020) when the husband's maintenance obligation ends did not extend the husband's maintenance obligation beyond the wife's remarriage in 2015. Because the agreement was silent on the meaning of "maintenance" the court turned to Domestic Relations Law 236 which indicates that a maintenance obligation terminates upon remarriage:

> A divorce settlement agreement is a contract, subject to standard principles of contract interpretation ... . The agreement at issue does not explicitly define the term "maintenance," and it is silent regarding the effect of the wife's remarriage upon the husband's maintenance obligation. Thus, the plain text of the agreement — which the Court of Appeals says is the best source of the parties' intent ... — is not conclusive of the question on appeal.
>
> "Nevertheless, it is basic that, unless a contract provides otherwise, the law in force at the time the agreement is entered into becomes as much a part of the agreement as though it were expressed or referred to therein, for it is presumed that the parties had such law in contemplation when the contract was made and the contract will be construed in the light of such law" (Dolman v United States Trust Co. of N.Y., 2 NY2d 110, 116 [1956] ...). The Dolman rule is of longstanding vintage, and the "principle embraces alike those [laws in force at the time of a contract's execution] which affect its validity, construction, discharge, and enforcement" ... . By virtue of the Dolman rule, when parties enter into an agreement authorized by or related to a particular statutory scheme, the courts will presume — absent something to the contrary — that the terms of the agreement are to be interpreted consistently with the corresponding statutory scheme ... .
>
> The statutory scheme corresponding to the agreement in this case is Domestic Relations Law § 236, which authorizes divorce settlement agreements and directs that such agreements specify the "amount and duration of maintenance," if any ... . The term " maintenance' " is defined within this statutory scheme as "payments provided for in a valid agreement between the parties or awarded by the court . . . , to be paid at fixed intervals for a definite or indefinite period of time" ... . Critically, the statutory definition includes the following caveat: any maintenance award "shall terminate upon the death of either party or upon the payee's valid or invalid marriage" ... . **Burns v Burns, 2018 NY Slip Op 05411, Fourth Dept 7-25-18**

FAMILY LAW (DIVORCE SETTLEMENT AGREEMENT WHICH WAS SILENT ON THE DEFINITION OF MAINTENANCE WAS INTERPRETED IN ACCORDANCE WITH THE STATUTORY DEFINITION OF MAINTENANCE IN DOMESTIC RELATIONS LAW 236 (FOURTH DEPT))/CONTRACT LAW (FAMILY LAW, DIVORCE SETTLEMENT AGREEMENT WHICH WAS SILENT ON THE DEFINITION OF MAINTENANCE WAS INTERPRETED IN ACCORDANCE WITH THE STATUTORY DEFINITION OF MAINTENANCE IN DOMESTIC RELATIONS LAW 236 (FOURTH DEPT))/MAINTENANCE (FAMILY LAW, DIVORCE SETTLEMENT AGREEMENT WHICH WAS SILENT ON THE DEFINITION OF MAINTENANCE WAS INTERPRETED IN ACCORDANCE WITH THE STATUTORY DEFINITION OF MAINTENANCE IN DOMESTIC RELATIONS LAW 236 (FOURTH DEPT))

FORECLOSURE

FORECLOSURE, REAL PROPERTY ACTIONS AND PROCEEDINGS LAW.

BANK DID NOT DEMONSTRATE COMPLIANCE WITH THE NOTICE PROVISIONS OF RPAPL 1304 AND DID NOT DEMONSTRATE IT HAD STANDING TO BRING THE FORECLOSURE ACTION, BANK'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff bank was not entitled to summary judgment in this foreclosure action. The bank did not demonstrate compliance with the notice requirements of Real Property Actions and Proceedings Law (RPAPL) 1304:

> In moving for summary judgment, the plaintiff submitted the affidavit of Timeka J. Motlow, a representative of its loan servicer, who stated that "[t]he records I have reviewed indicate that the attached 90-day pre-foreclosure notice was mailed to [the defendant] at the property address of the real estate at issue herein and to the last know address of the borrower(s)." However, Motlow did not have personal knowledge of the purported mailing and failed to make the requisite showing that she was familiar with the plaintiff's mailing practices and procedures, and therefore did not establish "proof of a standard office practice and procedure designed to ensure that items are properly addressed and mailed" ... .
>
> Moreover, the plaintiff failed to establish, prima facie, that it had standing to commence the action ... . **U.S. Bank N.A. v Henderson, 2018 NY Slip Op 05071, Second Dept 7-5-18**

FORECLOSURE (BANK DID NOT DEMONSTRATE COMPLIANCE WITH THE NOTICE PROVISIONS OF RPAPL 1304 AND DID NOT DEMONSTRATE IT HAD STANDING TO BRING THE FORECLOSURE ACTION, BANK'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT))/REAL PROPERTY ACTIONS AND PROCEEDINGS LAW (RPAPL) (BANK DID NOT DEMONSTRATE COMPLIANCE WITH THE NOTICE PROVISIONS OF RPAPL 1304 AND DID NOT DEMONSTRATE IT HAD STANDING TO BRING THE FORECLOSURE ACTION, BANK'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT))

FREEDOM OF INFORMATION LAW (FOIL)

FREEDOM OF INFORMATION LAW (FOIL).

DESPITE THE FACT THAT THE PETITION SEEKING REVIEW OF FREEDOM OF INFORMATION LAW (FOIL) REQUESTS WAS MOOT, PETITIONER HAD SUBSTANTIALLY PREVAILED AND WAS ENTITLED TO COSTS AND FEES, MATTER REMITTED (THIRD DEPT).

The Third Department, modifying Supreme Court, determined petitioner was entitled to costs and fees associated with his FOIL request for information about the confidential informant in the case which led to petitioner's conviction and incarceration. The state police did not timely respond to petitioner's requests and eventually provided two police reports and a finding that the remainder of the requested information was exempt from disclosure. The "costs and fees" issue was still viable despite the fact that the proceeding was moot. The Third Department found that the petitioner had substantially prevailed and the state police had not met the time requirements associated with responding to petitioner's requests:

> A court is authorized to award a petitioner "reasonable [counsel] fees and other litigation costs reasonably incurred" where he or she has "substantially prevailed" in the FOIL proceeding and, as relevant here, "the agency failed to respond to a request or appeal within the statutory time" ... . "A petitioner 'substantially prevail[s]' under Public Officers Law § 89 (4) (c) when [he or she] 'receive[s] all the information that [he or she] requested and to which [he or she] is entitled in response to the underlying FOIL litigation'"... , regardless of whether "full compliance with the statute was finally achieved" in the form of disclosure, a certification that responsive documents were exempt from disclosure or some combination thereof ... . Significantly, the voluntariness of an agency's disclosure after the commencement of a CPLR article 78 proceeding will not preclude a finding that a litigant has substantially prevailed ... . **Matter of Cobado v Benziger, 2018 NY Slip Op 04996, Third Dept 7-5-18**

FREEDOM OF INFORMATION LAW (FOIL) (DESPITE THE FACT THAT THE PETITION SEEKING REVIEW OF FREEDOM OF INFORMATION LAW (FOIL) REQUESTS WAS MOOT, PETITIONER HAD SUBSTANTIALLY PREVAILED AND WAS ENTITLED TO COSTS AND FEES, MATTER REMITTED (THIRD DEPT))/PUBLIC OFFICERS LAW (FREEDOM OF INFORMATION LAW (FOIL), DESPITE THE FACT THAT THE PETITION SEEKING REVIEW OF FREEDOM OF INFORMATION LAW (FOIL) REQUESTS WAS MOOT, PETITIONER HAD SUBSTANTIALLY PREVAILED AND WAS ENTITLED TO COSTS AND FEES, MATTER REMITTED (THIRD DEPT))/FEES AND COSTS (FREEDOM OF INFORMATION LAW (FOIL), DESPITE THE FACT THAT THE PETITION SEEKING REVIEW OF A FREEDOM OF INFORMATION LAW (FOIL) REQUESTS WAS MOOT, PETITIONER HAD SUBSTANTIALLY PREVAILED AND WAS ENTITLED TO COSTS AND FEES, MATTER REMITTED (THIRD DEPT))

INSURANCE LAW

INSURANCE LAW, ANIMAL LAW.

QUESTIONS OF FACT ABOUT WHETHER THERE WAS A MISREPRESENTATION BY THE INSURED ABOUT A PRIOR BITE BY A DOG, AND WHETHER THERE ACTUALLY WAS A PRIOR BITE, PRECLUDED SUMMARY JUDGMENT ON WHETHER A CANINE POLICY EXCLUSION APPLIED AND WHETHER THERE WAS A TIMELY DISCLAIMER (THIRD DEPT).

The Third Department, reversing (modifying) Supreme Court, determined there were questions of fact whether the insured made a misrepresentation to the insurer and whether the insurer timely disclaimed coverage for a dog bite. There were questions of fact whether the insured was asked about a prior bite by the dog and gave a false answer, and whether there had actually been a prior bite by the dog which would trigger a policy exclusion:

> "When construing Insurance Law § 3420 (d), which requires an insurer to issue a written disclaimer of coverage for death or bodily injuries arising out of accidents 'as soon as is reasonably possible,' [the Court of Appeals has] made clear that timeliness almost always presents a factual question, requiring an assessment of all relevant circumstances surrounding a particular disclaimer[, and] cases in which the reasonableness of an insurer's delay may be decided as a matter of law are exceptional and present extreme circumstances" ... . "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" ... . The insurer has an obligation not only to promptly provide notice of disclaimer once it has reached that decision, but to promptly investigate and reach a decision on whether to disclaim ... .
>
> [The insurer] argues that it was entitled to rely on [the insured's] statement that the dog had not previously bitten anyone. As noted above, there is a question of fact regarding whether [the insurer's] claims manager actually asked [the insured] if she knew of any prior biting events. If the claims manager never asked that question, the record evidence presents a triable issue of fact as to whether [the insurer] failed to conduct a reasonable and prompt investigation into the potential applicability of the canine exclusion ... . If the claims manager asked that question and received a negative answer, as she averred, then [the insurer] would be justified in relying on the representation by its insured ... ; however, given that the [insured] had owned the dog for only approximately one month, there would still be a triable question of fact regarding the reasonableness of [the insured's] investigation. As neither party established, as a matter of law, the reasonableness or unreasonableness of the delay in [the insured's disclaimer, neither party was entitled to summary judgment ... . **Battisti v Broome Coop. Ins. Co., 2018 NY Slip Op 04992, Third Dept 7-5-18**

INSURANCE LAW (DOG BITES, QUESTIONS OF FACT ABOUT WHETHER THERE WAS A MISREPRESENTATION BY THE INSURED ABOUT A PRIOR BITE BY A DOG, AND WHETHER THERE ACTUALLY WAS A PRIOR BITE, PRECLUDED SUMMARY JUDGMENT ON WHETHER A CANINE POLICY EXCLUSION APPLIED AND WHETHER THERE WAS A TIMELY DISCLAIMER (THIRD DEPT))/ANIMAL LAW (DOG BITES, INSURANCE LAW, QUESTIONS OF FACT ABOUT WHETHER THERE WAS A MISREPRESENTATION BY THE INSURED ABOUT A PRIOR BITE BY A DOG, AND WHETHER THERE ACTUALLY WAS A PRIOR BITE, PRECLUDED SUMMARY JUDGMENT ON WHETHER A CANINE POLICY EXCLUSION APPLIED AND WHETHER THERE WAS A TIMELY DISCLAIMER (THIRD DEPT))/DISCLAIMERS (INSURANCE LAW, DOG BITES, QUESTIONS OF FACT ABOUT WHETHER THERE WAS A MISREPRESENTATION BY THE INSURED ABOUT A PRIOR BITE BY A DOG, AND WHETHER THERE ACTUALLY WAS A PRIOR BITE, PRECLUDED SUMMARY JUDGMENT ON WHETHER A CANINE POLICY EXCLUSION APPLIED AND WHETHER THERE WAS A TIMELY DISCLAIMER (THIRD DEPT))

INSURANCE LAW, CONTRACT LAW, NEGLIGENCE.

NO AGREEMENT TO INCREASE INSURANCE COVERAGE OF HOME DESTROYED BY FIRE AFTER RENOVATIONS, NO SPECIAL RELATIONSHIP BETWEEN THE INSURANCE BROKERS AND THE INSUREDS (THIRD DEPT).

The Third Department determined defendant insurance brokers' motion for summary judgment in this breach of contract-negligence action by the insureds was properly granted. The Insureds alleged there was an agreement to increase the insurance coverage on the insureds' home which was destroyed by fire after renovations had been made and there was a special relationship between the brokers and the insureds. There evidence did not support either theory:

> As a general principle, insurance brokers have a common-law duty to obtain requested coverage for their clients within a reasonable time or inform the client of the inability to do so; however, they have no continuing duty to advise, guide or direct a client to obtain additional coverage" ... . Thus, "[t]o set forth a case for negligence or breach of contract against an insurance broker, a plaintiff must establish that a specific request was made to the broker for the coverage that was not provided in the policy" ... . * * *
>
> Stressing that "special relationships in the insurance brokerage context are the exception, not the norm" ... , the Court of Appeals has identified three "exceptional situations" that may give rise to a special relationship: "(1) the agent receives compensation for consultation apart from payment of the premiums; (2) there was some interaction regarding a question of coverage, with the insured relying on the expertise of the agent; or (3) there is a course of dealing over an extended period of time which would have put objectively reasonable insurance agents on notice that their advice was being sought and specially relied on" ... . **Hefty v Paul Seymour Ins. Agency, 2018 NY Slip Op 05547, Third Dept 7-26-18**

INSURANCE LAW (NO AGREEMENT TO INCREASE INSURANCE COVERAGE OF HOME DESTROYED BY FIRE AFTER RENOVATIONS, NO SPECIAL RELATIONSHIP BETWEEN THE INSURANCE BROKERS AND THE INSUREDS (THIRD DEPT))/CONTRACT LAW (INSURANCE LAW, NO AGREEMENT TO INCREASE INSURANCE COVERAGE OF HOME DESTROYED BY FIRE AFTER RENOVATIONS, NO SPECIAL RELATIONSHIP BETWEEN THE INSURANCE BROKERS AND THE INSUREDS (THIRD DEPT))/NEGLIGENCE (INSURANCE LAW, NO AGREEMENT TO INCREASE INSURANCE COVERAGE OF HOME DESTROYED BY FIRE AFTER RENOVATIONS, NO SPECIAL RELATIONSHIP BETWEEN THE INSURANCE BROKERS AND THE INSUREDS (THIRD DEPT))/SPECIAL RELATIONSHIP (INSURANCE LAW, (NO AGREEMENT TO INCREASE INSURANCE COVERAGE OF HOME DESTROYED BY FIRE AFTER RENOVATIONS, NO SPECIAL RELATIONSHIP BETWEEN THE INSURANCE BROKERS AND THE INSUREDS (THIRD DEPT))

LABOR LAW-CONSTRUCTION LAW

LABOR LAW-CONSTRUCTION LAW.

PLAINTIFF, A HOMEOWNER WHOSE COMPANY HIRED DEFENDANT SUBCONTRACTOR TO WORK AT PLAINTIFF'S HOME, WAS A PROPER PLAINTIFF UNDER LABOR LAW 240 (1) AND 241 (6), QUESTIONS OF FACT WHETHER DEFENDANT WAS IN CONTROL OF THE WORK SITE AND HAD BEEN DELEGATED SITE SAFETY RESPONSIBILITIES (SECOND DEPT).

The Second Department determined plaintiff was a proper plaintiff pursuant to Labor Law 240 (1) and 241 (6). Plaintiff owned a single family home and plaintiff's company hired defendant subcontractor to work on plaintiff's property. Plaintiff was inspecting defendant's work when he slipped and fill on oil which allegedly came from defendant's equipment. In addition, the Second Department determined there were questions of fact whether defendant had control of the work site and was delegated safety responsibilities:

> Labor Law § 240(1) requires that persons "employed in," inter alia, the "alteration" of a building be provided with proper protective devices. Labor Law § 241(6) requires contractors and owners and their agents who are performing excavation work to comply with the provisions of the Industrial Code to protect "the persons employed therein or lawfully frequenting such places." "Employee" is defined in Labor Law § 2(5) as "a mechanic, workingman or laborer working for another for hire." A plaintiff who seeks to recover under Labor Law §§ 240(1) and 241(6) must show that he or she was both permitted to work on a building or structure and was hired by someone ... . Those provisions may apply to the president of the general contractor for the project, who is inspecting work performed by subcontractors ... . Inspecting the work on behalf of a general contractor is a protected activity covered by these Labor Law provision ... .
>
> Here, the plaintiff alleged that the defendant was working alone at the site and the plaintiff was merely on-site to inspect the progress of the work. The plaintiff further claims that he "did not direct or control the work . . . and played no role in implementing safety procedures or taking safety measures," since safety measures were in the exclusive control of the defendant. Thus, although the defendant does not own the property and did not appear to be acting as a general contractor, there are triable issues of fact as to whether the defendant could be liable under Labor Law §§ 240(1) and 241(6) on the ground that it had control of the work site and was delegated the duty to enforce safety protocols at the time the accident occurred. **Eliassian v G.F. Constr., Inc., 2018 NY Slip Op 05020, Second Dept 7-5-18**

LABOR LAW-CONSTRUCTION LAW PLAINTIFF, A HOMEOWNER WHOSE COMPANY HIRED DEFENDANT SUBCONTRACTOR TO WORK AT PLAINTIFF'S HOME, WAS A PROPER PLAINTIFF UNDER LABOR LAW 240 (1) AND 241 (6), QUESTIONS OF FACT WHETHER DEFENDANT WAS IN CONTROL OF THE WORK SITE AND HAD BEEN DELEGATED SITE SAFETY RESPONSIBILITIES (SECOND DEPT))

LABOR LAW-CONSTRUCTION LAW.

PLAINTIFF PROPERLY GRANTED SUMMARY JUDGMENT IN THIS LABOR LAW 240 (1) ACTION STEMMING FROM A FALL FROM A LADDER, DEFENDANT WAS APPARENTLY LIABLE AS AN AGENT OF THE OWNER WITH AUTHORITY OVER SAFETY MEASURES (SECOND DEPT).

The Second Department determined plaintiff was entitled to summary judgment on his Labor Law 240 (1) cause of action stemming from a fall from a ladder which moved for no apparent reason. The court determined that the defendant, Arrow, which had contracted with plaintiff's employer, was liable as an agent of the owner or general contractor because of its supervisory control and authority to enforce safety standards:

> Labor Law § 240(1) applies to "contractors and owners and their agents"... . "A party is deemed to be an agent of an owner or general contractor under the Labor Law when it has supervisory control and authority over the work being done where a plaintiff is injured" ... . "To impose such liability, the defendant must have the authority to control the activity bringing about the injury so as to enable it to avoid or correct the unsafe condition" ... . The determinative factor is whether the defendant had "the right to exercise control over the work, not whether it actually exercised that right" ... . Here, Arrow Steel had the authority to enforce safety standards and choose the subcontractor who did the asbestos work. Additionally, Arrow Steel directly entered into a contract with [plaintiff's employer], and had the authority to exercise control over the work, even if it did not actually do so ... . **Cabrera v Arrow Steel Window Corp., 2018 NY Slip Op 05275, Second Dept 7-18-18**

LABOR LAW-CONSTRUCTION LAW (PLAINTIFF PROPERLY GRANTED SUMMARY JUDGMENT IN THIS LABOR LAW 240 (1) ACTION STEMMING FROM A FALL FROM A LADDER, DEFENDANT WAS APPARENTLY LIABLE AS AN AGENT OF THE OWNER WITH AUTHORITY OVER SAFETY MEASURES (SECOND DEPT))/LADDERS (LABOR LAW-CONSTRUCTION LAW, PLAINTIFF PROPERLY GRANTED SUMMARY JUDGMENT IN THIS LABOR LAW 240 (1) ACTION STEMMING FROM A FALL FROM A LADDER, DEFENDANT WAS APPARENTLY LIABLE AS AN AGENT OF THE OWNER WITH AUTHORITY OVER SAFETY MEASURES (SECOND DEPT))

LABOR LAW-CONSTRUCTION LAW.

PLAINTIFF WAS NOT ENGAGED IN CONSTRUCTION WORK OR IN A CONSTRUCTION AREA WHEN HE WAS INJURED, HE WAS BRINGING IN SUPPLIES WHICH WERE BEING STOCKPILED AND WERE NOT FOR IMMEDIATE USE, THEREFORE THE LABOR LAW 240 (1) AND 241 (6) CAUSES OF ACTION WERE PROPERLY DISMISSED (SECOND DEPT).

The Second Department determined the owner of the building (Sussex) and plaintiff's employer (Berkoff) were entitled to summary judgment in this Labor Law 240 (1), 241 (6) and 200 action. Plaintiff was injured when he fell bringing in boxes of tile and thin set using a hand truck. Plaintiff was not performing construction work within the mean of Labor Law 240 (1) and 241 (6) because the material he was bringing in were not for immediate use. Both defendants established they did not supervise plaintiff's work or have notice of any dangerous condition:

> Sussex and Berkoff each established their prima facie entitlement to judgment as a matter of law dismissing the causes of action alleging violations of Labor Law §§ 240(1) and 241(6) insofar as asserted against Sussex. The evidence supporting the motions established that at the time of the accident, the plaintiff was not engaged in construction work within the meaning of Labor Law § 240(1), and was not working in a construction area within the meaning of Labor Law § 241(6), since the building materials were not being "readied for immediate use" ... , but were instead being "stockpil[ed] for future use" ... .
>
> Sussex and Berkoff each established, prima facie, both that Sussex did not create or have actual or constructive notice of the alleged condition which caused the plaintiff's injury, and that it did not supervise or control the means and methods of the plaintiff's work ... . **Kusayev v Sussex Apts. Assoc., LLC, 2018 NY Slip Op 05458, Second Dept 7-25-18**

LABOR LAW-CONSTRUCTION LAW (PLAINTIFF WAS NOT ENGAGED IN CONSTRUCTION WORK OR IN A CONSTRUCTION AREA WHEN HE WAS INJURED, HE WAS BRINGING IN SUPPLIES WHICH WERE BEING STOCKPILED AND WERE NOT FOR IMMEDIATE USE, THEREFORE THE LABOR LAW 240 (1) AND 241 (6) CAUSES OF ACTION WERE PROPERLY DISMISSED (SECOND DEPT))/CONSTRUCTION (LABOR LAW-CONSTRUCTION LAW, PLAINTIFF WAS NOT ENGAGED IN CONSTRUCTION WORK OR IN A CONSTRUCTION AREA WHEN HE WAS INJURED, HE WAS BRINGING IN SUPPLIES WHICH WERE BEING STOCKPILED AND WERE NOT FOR IMMEDIATE USE, THEREFORE THE LABOR LAW 240 (1) AND 241 (6) CAUSES OF ACTION WERE PROPERLY DISMISSED (SECOND DEPT))

LABOR LAW-CONSTRUCTION LAW.

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT IN THIS LABOR LAW 240 (1) ACTION SHOULD NOT HAVE BEEN GRANTED, PLAINTIFF FELL WHEN A PLANK ON A SCAFFOLD HE WAS ERECTING BROKE (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendant's (MJRB'S) motion for summary judgment in this Labor Law 240 (1) action should not have been granted. Plaintiff fell when a plank on a scaffold he was erecting broke:

> ... [T]he plaintiff established his prima facie entitlement to judgment as a matter of law by submitting evidence that he was not provided with necessary protection from the gravity-related risk of his construction work, and that the absence of the necessary protection was a proximate cause of his injuries ... . In opposition, MJRB failed to raise a triable issue of fact ... . MJRB contends that the plaintiff's failure to use a safety harness was the sole proximate cause of his accident. There was, however, no evidence that the plaintiff was informed as to where the harnesses were kept and that he was instructed in their use ... . Moreover, MJRB's contention that the plaintiff was the sole proximate cause of the accident because the scaffold from which he fell was one which he himself was constructing is without merit ... . **Rapalo v MJRB Kings Highway Realty, LLC, 2018 NY Slip Op 05512, Second Dept 7-25-18**

LABOR LAW-CONSTRUCTION LAW (DEFENDANT'S MOTION FOR SUMMARY JUDGMENT IN THIS LABOR LAW 240 (1) ACTION SHOULD NOT HAVE BEEN GRANTED, PLAINTIFF FELL WHEN A PLANK ON A SCAFFOLD HE WAS ERECTING BROKE (SECOND DEPT))/SCAFFOLDS (LABOR LAW-CONSTRUCTION LAW, DEFENDANT'S MOTION FOR SUMMARY JUDGMENT IN THIS LABOR LAW 240 (1) ACTION SHOULD NOT HAVE BEEN GRANTED, PLAINTIFF FELL WHEN A PLANK ON A SCAFFOLD HE WAS ERECTING BROKE (SECOND DEPT))

LABOR LAW-CONSTRUCTION LAW.

PLAINTIFF ENTITLED TO SUMMARY JUDGMENT ON THE LABOR LAW 240 (1) CAUSE OF ACTION, PLAINTIFF DEMONSTRATED THE FAILURE OF A TOE BOARD WAS AT LEAST A CONTRIBUTING CAUSE OF PLAINTIFF'S FALL FROM A ROOF, CONTRIBUTORY NEGLIGENCE IS NOT A BAR TO RECOVERY AS A MATTER OF LAW (FOURTH DEPT).

The Fourth Department, reversing (modifying) Supreme Court, determined plaintiff was entitled to summary judgment on his Labor Law 240 (1) cause of action. Plaintiff fell from a roof after a toe board became detached from the roof:

> "Plaintiff[s] met [their] initial burden by establishing that [plaintiff's] injury was proximately caused by the failure of a safety device to afford him proper protection from an elevation-related risk" ... . "[T]he question of whether [a] device provided proper protection within the meaning of Labor Law § 240 (1) is ordinarily a question of fact, except in those instances where the unrefuted evidence establishes that the device collapsed, slipped or otherwise failed to perform its [intended] function of supporting the worker and his or her materials" ... . Here, plaintiffs established that, on the morning of the accident, plaintiff had been instructed to work on a pitched roof on which "toe boards," i.e., two- by six-inch boards nailed directly to the roof approximately two to three feet up from the bottom edge of the roof, had already been installed, and defendants failed to submit non-speculative evidence to the contrary. There is no dispute that the toe boards detached from the roof while plaintiff was working, causing him to fall and sustain injuries. The failure of that safety device constituted a violation of Labor Law § 240 (1) as a matter of law ..., and that violation was, at minimum, " a contributing cause of [plaintiff's] fall' "... . Thus, contrary to defendants' contentions, plaintiff's alleged failure to utilize other safety devices available on the job site, including his alleged failure to reinstall the toe boards with additional supporting roof jacks, raises no more than an issue of contributory negligence ... . **Provens v Ben-Fall Dev., LLC, 2018 NY Slip Op 05426, Fourth Dept 7-25-18**

LABOR LAW-CONSTRUCTION LAW (PLAINTIFF ENTITLED TO SUMMARY JUDGMENT ON THE LABOR LAW 240 (1) CAUSE OF ACTION, PLAINTIFF DEMONSTRATED THE FAILURE OF A TOE BOARD WAS AT LEAST A CONTRIBUTING CAUSE OF PLAINTIFF'S FALL FROM A ROOF, CONTRIBUTORY NEGLIGENCE IS NOT A BAR TO RECOVERY AS A MATTER OF LAW (FOURTH DEPT))

LABOR LAW-CONSTRUCTION LAW, CONTRACT LAW, LANDLORD-TENANT, NEGLIGENCE.

VENTILATOR FROM WHICH PLAINTIFF FELL WAS NOT A SAFETY DEVICE, HOWEVER THE FACT THAT PLAINTIFF COULD NOT REACH THE VENTILATOR FROM THE LADDER ENTITLED HIM TO SUMMARY JUDGMENT ON THE LABOR LAW 240 (1) CAUSE OF ACTION, A VIOLATION OF LABOR LAW 240 (1) IS NOT A FINDING OF NEGLIGENCE, LANDLORD ENTITLED TO INDEMNIFICATION UNDER THE LEASE TERMS (FIRST DEPT).

The First Department determined (1) the ventilator on which plaintiff was crouching when it detached and he fell was not a safety device within the meaning of Labor Law 240 (1), (2) plaintiff's testimony that he couldn't reach the ventilator, which he was attempting to remove, from the A-frame ladder he was provided entitled him to summary judgment on the Labor Law 240 (1) cause of action, and (3) the landlord was entitled to summary judgment on the cross-claim for indemnification by the tenant, noting that the indemnification clause in the lease did not require that the tenant be negligent and that a Labor Law 240 (1) violation is not a finding that the tenant was negligent:

> Contrary to plaintiff's contention, the ventilator he was standing on and disassembling when he fell was not a safety device; it was the object of the demolition project on which he was employed, and was not intended to protect him from elevation-related risks ... .
>
> Despite Eight Oranges' [tenant's] argument to the contrary, this indemnification provision does not require a finding of negligence on the part of the tenant before it is triggered. Nor does it violate General Obligations Law § 5-321, "since a finding of liability under Labor Law § 240 is not the equivalent of a finding of negligence and does not give rise to an inference of negligence" ... . It is clear from the contractual language at issue that the landlord ... intended to be indemnified by the tenant, Eight Oranges, for any "damage or injury occurring or arising to any person" on the property, that is caused by the tenant. **Hong-Bao Ren v Gioia St. Marks, LLC, 2018 NY Slip Op 05520, First Dept 7-26-18**

LABOR LAW-CONSTRUCTION LAW (VENTILATOR FROM WHICH PLAINTIFF FELL WAS NOT A SAFETY DEVICE, HOWEVER THE FACT THAT PLAINTIFF COULD NOT REACH THE VENTILATOR FROM THE LADDER ENTITLED HIM TO SUMMARY JUDGMENT ON THE LABOR LAW 240 (1) CAUSE OF ACTION, A VIOLATION OF LABOR LAW 240 (1) IS NOT A FINDING OF NEGLIGENCE, LANDLORD ENTITLED TO INDEMNIFICATION UNDER THE LEASE TERMS (FIRST DEPT))/CONTRACT LAW (LABOR LAW-CONSTRUCTION LAW VENTILATOR FROM WHICH PLAINTIFF FELL WAS NOT A SAFETY DEVICE, HOWEVER THE FACT THAT PLAINTIFF COULD NOT REACH THE VENTILATOR FROM THE LADDER ENTITLED HIM TO SUMMARY JUDGMENT ON THE LABOR LAW 240 (1) CAUSE OF ACTION, A VIOLATION OF LABOR LAW 240 (1) IS NOT A FINDING OF NEGLIGENCE, LANDLORD ENTITLED TO INDEMNIFICATION UNDER THE LEASE TERMS (FIRST DEPT))/CONTRACT LAW (LABOR LAW-CONSTRUCTION LAW VENTILATOR FROM WHICH PLAINTIFF FELL WAS NOT A SAFETY DEVICE, HOWEVER THE FACT THAT PLAINTIFF COULD NOT REACH THE VENTILATOR FROM THE LADDER ENTITLED HIM TO SUMMARY JUDGMENT ON THE LABOR LAW 240 (1) CAUSE OF ACTION, A VIOLATION OF LABOR LAW 240 (1) IS NOT A FINDING OF NEGLIGENCE, LANDLORD ENTITLED TO INDEMNIFICATION UNDER THE LEASE TERMS (FIRST DEPT))/LANDLORD-TENANT (LABOR LAW-CONSTRUCTION LAW VENTILATOR FROM WHICH PLAINTIFF FELL WAS NOT A SAFETY DEVICE, HOWEVER THE FACT THAT PLAINTIFF COULD NOT REACH THE VENTILATOR FROM THE LADDER ENTITLED HIM TO SUMMARY JUDGMENT ON THE LABOR LAW 240 (1) CAUSE OF ACTION, A VIOLATION OF LABOR LAW 240 (1) IS NOT A FINDING OF NEGLIGENCE, LANDLORD ENTITLED TO INDEMNIFICATION UNDER THE LEASE TERMS (FIRST DEPT))/NEGLIGENCE (LABOR LAW-CONSTRUCTION LAW VENTILATOR FROM WHICH PLAINTIFF FELL WAS NOT A SAFETY DEVICE, HOWEVER THE FACT THAT PLAINTIFF COULD NOT REACH THE VENTILATOR FROM THE LADDER ENTITLED HIM TO SUMMARY JUDGMENT ON THE LABOR LAW 240 (1) CAUSE OF ACTION, A VIOLATION OF LABOR LAW 240 (1) IS NOT A FINDING OF NEGLIGENCE, LANDLORD ENTITLED TO INDEMNIFICATION UNDER THE LEASE TERMS (FIRST DEPT))

MEDICAL MALPRACTICE

MEDICAL MALPRACTICE, EMPLOYMENT LAW, NEGLIGENCE.

MEDICAL MALPRACTICE ACTION AGAINST HOSPITAL PROPERLY DISMISSED, THE DEFENDANT PHYSICIANS WERE PRIVATE INDEPENDENT PHYSICIANS, HOSPITAL PERSONNEL WERE NOT NEGLIGENT, AND THE HOSPITAL DEMONSTRATED IT HAD NO REASON TO SUSPECT THE PHYSICIANS WOULD ACT WITHOUT INFORMED CONSENT (SECOND DEPT).

The Second Department determined the medical malpractice action against the hospital (Mount Sinai) was properly dismissed because the physicians involved were not employees of the hospital:

> As a general matter, "under the doctrine of respondeat superior, a hospital may be held vicariously liable for the negligence or malpractice of its employees acting within the scope of employment, but not for negligent treatment provided by an independent physician, as when the physician is retained by the patient"... . Where hospital staff, such as resident physicians and nurses, have participated in the treatment of the patient, the hospital may not be held vicariously liable for resulting injuries where the hospital employees 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 ... .
>
> With respect to a cause of action predicated on lack of informed consent, "where a private physician attends his or her patient at the facilities of a hospital, it is the duty of the physician, not the hospital, to obtain the patient's informed consent"... . It is only where the hospital knew or should have known that the private physician was acting or would act without the patient's informed consent that it may be held liable ... .
>
> Mount Sinai established, prima facie, that private attending physicians were responsible for the entirety of the injured plaintiff's care before, during, and after the surgical procedure, and that a resident physician employed by Mount Sinai acted under the supervision and control of the private attending physicians. Mount Sinai further established, prima facie, that the orders of the private attending physicians, which did not include post-operative antibiotics, were not contraindicated, and that none of Mount Sinai's employees committed any independent acts of negligence. Finally, Mount Sinai established, prima facie, that there was no reason for it to know or suspect that the private attending physicians were acting or would act without the injured plaintiff's informed consent ... . **Cynamon v Mount Sinai Hosp., 2018 NY Slip Op 05448, Second Dept 7-25-18**

MEDICAL MALPRACTICE (MEDICAL MALPRACTICE ACTION AGAINST HOSPITAL PROPERLY DISMISSED, THE DEFENDANT PHYSICIANS WERE PRIVATE INDEPENDENT PHYSICIANS, HOSPITAL PERSONNEL WERE NOT NEGLIGENT, AND THE HOSPITAL DEMONSTRATED IT HAD NO REASON TO SUSPECT THE PHYSICIANS WOULD ACT WITHOUT INFORMED CONSENT (SECOND DEPT))/EMPLOYMENT LAW (MEDICAL MALPRACTICE ACTION AGAINST HOSPITAL PROPERLY DISMISSED, THE DEFENDANT PHYSICIANS WERE PRIVATE INDEPENDENT PHYSICIANS, HOSPITAL PERSONNEL WERE NOT NEGLIGENT, AND THE HOSPITAL DEMONSTRATED IT HAD NO REASON TO SUSPECT THE PHYSICIANS WOULD ACT WITHOUT INFORMED CONSENT (SECOND DEPT))/NEGLIGENCE (MEDICAL MALPRACTICE ACTION AGAINST HOSPITAL PROPERLY DISMISSED, THE DEFENDANT PHYSICIANS WERE PRIVATE INDEPENDENT PHYSICIANS, HOSPITAL PERSONNEL WERE NOT NEGLIGENT, AND THE HOSPITAL DEMONSTRATED IT HAD NO REASON TO SUSPECT THE PHYSICIANS WOULD ACT WITHOUT INFORMED CONSENT (SECOND DEPT))/INFORMED CONSENT (MEDICAL MALPRACTICE ACTION AGAINST HOSPITAL PROPERLY DISMISSED, THE DEFENDANT PHYSICIANS WERE PRIVATE INDEPENDENT PHYSICIANS, HOSPITAL PERSONNEL WERE NOT NEGLIGENT, AND THE HOSPITAL DEMONSTRATED IT HAD NO REASON TO SUSPECT THE PHYSICIANS WOULD ACT WITHOUT INFORMED CONSENT (SECOND DEPT))

MENTAL HYGIENE LAW

MENTAL HYGIENE LAW.

SEX OFFENDER MANAGEMENT PROCEEDING IN THIS HIGH PROFILE CASE SHOULD BE CLOSED TO THE PUBLIC TO PROTECT THE IDENTITIES OF THE VICTIMS (THIRD DEPT).

The Third Department determined the respondent's sex offender management proceeding should be held in a closed courtroom and the record should be sealed to protect the identities of the victims in this high profile sex offense case:

> Here, Supreme Court has taken steps to preserve the victims' anonymity that include orders directing the media to withhold their names, sealing the trial record and granting anonymity to respondent. Nevertheless, our review of the factual details that may be discussed by petitioner's experts persuades us that, in this particular case, media coverage of a public trial could well lead to the identification of the victims in the media, on the Internet or by those who followed the high profile proceedings in the past. The risk is particularly acute in view of the online presence that permits many of today's media outlets to disseminate news beyond their subscribers and their local geographic area, in a form that may foster public discussion in comments or on social media, and which then remains permanently available.
>
> Generally, public policy disfavors "limitations on public access to court proceedings" ... . However, the right to such access is not without limitation and "must be balanced against other interests which might justify the closing of the courtroom to the public" ... . We note that Mental Health Law § 10.08 reflects the strong public policy in favor of protecting the confidentiality of victims of sex offenses by including provisions that prohibit or limit the disclosure of identifying information ... . Further, the controlling regulation cites "the nature of the proceedings and the privacy of the parties" as factors that may justify closing the courtroom during civil management proceedings ... . Upon balancing the competing interests, we find that — in the limited and particular circumstances presented here — there is a significant risk that a public trial may compromise the anonymity of respondent's victims. Thus, good cause has been shown to close the courtroom to the public during respondent's civil management trial ... . **Matter of State of New York v John T.. 2018 NY Slip Op 05012, Third Dept 7-5-18**

MENTAL HYGIENE LAW (SEX OFFENDER MANAGEMENT PROCEEDING IN THIS HIGH PROFILE CASE SHOULD BE CLOSED TO THE PUBLIC TO PROTECT THE IDENTITIES OF THE VICTIMS (THIRD DEPT))/COURTROOM CLOSURE (MENTAL HYGIENE LAW, SEX OFFENDER MANAGEMENT PROCEEDING IN THIS HIGH PROFILE CASE SHOULD BE CLOSED TO THE PUBLIC TO PROTECT THE IDENTITIES OF THE VICTIMS (THIRD DEPT))

MUNICIPAL LAW

MUNICIPAL LAW. ADMINISTRATIVE LAW.

THE CONTROLLING STATUTE DOES NOT PROVIDE THAT THE CITY CAN SUE FOR DAMAGES FOR INJURY TO TREES, THE REGULATION WHICH PURPORTS TO ALLOW SUCH A SUIT DECLARED INVALID (FIRST DEPT).

The First Department, reversing Supreme Court, determined the plaintiff city was not authorized to sue defendant for money damages for defendant's alleged injury to tress during sidewalk repair. Although a regulation allowed the suit, the controlling statute did not. The regulation was declared invalid:

> The motion court erred in ruling that the City has the capacity to sue for the negligent destruction of its property. A municipality does not have a common-law right to bring suit; its right to sue, if any, "must be derived from the relevant enabling legislation or some other concrete statutory predicate" ... . Rules of City of New York Department of Parks and Recreation (DPR) (56 RCNY) § 5-01(c) permits DPR to "seek damages" against persons who "cut, remove, or destroy" its trees without a permit ... . However, the relevant enabling legislation, which authorizes DPR to promulgate rules regarding the cutting, removal, and destruction of its trees, does not authorize a municipal right of action to recover money damages for injury to the trees (see New York City Charter § 533[a][9]; Administrative Code of the City of New York § 18-107[e]). 56 RCNY 5-01(c) is therefore "out of harmony" with the statute, and we hold that it is invalid ... . **City of New York v Tri-Rail Constr., Inc., 2018 NY Slip Op 04954, First Dept 7-5-18**

MUNICIPAL LAW (ADMINISTRATIVE LAW, THE CONTROLLING STATUTE DOES NOT PROVIDE THAT THE CITY CAN SUE FOR DAMAGES FOR INJURY TO TREES, THE REGULATION WHICH PURPORTS TO ALLOW SUCH A SUIT DECLARED INVALID (FIRST DEPT))/ADMINISTRATIVE LAW (MUNICIPAL LAW, THE CONTROLLING STATUTE DOES NOT PROVIDE THAT THE CITY CAN SUE FOR DAMAGES FOR INJURY TO TREES, THE REGULATION WHICH PURPORTS TO ALLOW SUCH A SUIT DECLARED INVALID (FIRST DEPT))/TREES (MUNICIPAL LAW, ADMINISTRATIVE LAW, THE CONTROLLING STATUTE DOES NOT PROVIDE THAT THE CITY CAN SUE FOR DAMAGES FOR INJURY TO TREES, THE REGULATION WHICH PURPORTS TO ALLOW SUCH A SUIT DECLARED INVALID (FIRST DEPT))

MUNICIPAL LAW, LANDLORD-TENANT, CONSTITUTIONAL LAW.

CITY ORDINANCE PROVISIONS REQUIRING A RENTAL PERMIT AND LIMITING OCCUPANCY OF RENTAL UNITS TO A "FAMILY" AS DEFINED IN THE ORDINANCE ARE NOT UNCONSTITUTIONAL (THIRD DEPT).

The Third Department determined that municipal code provisions requiring a rental permit and limiting the occupancy of rental units to a "family" as defined in the code were not unconstitutionally vague:

> The record therefore reflects that the rental occupancy restriction was enacted to, among other things, serve a legitimate governmental interest in diminishing public nuisances created from the overcrowding of dwelling units occupied by transient residents ... . Because the ordinance does not favor certain types of families over others, or restrict the size of unrelated persons living as a functionally equivalent family without also restricting the size of a traditional family, it does not suffer from the same constitutional infirmities as the ordinances in McMinn v Town of Oyster Bay (66 NY2d at 549) or Baer v Town of Brookhaven (73 NY2d 942, 943 [1989]). Moreover, the ordinance here contains objective criteria for rebutting the presumption that four or more persons living together in a single dwelling unit who are unrelated by blood, marriage or legal adoption do not constitute the functional equivalent of a traditional family ... , and the occupancy restriction bears a reasonable relationship to the goals sought to be achieved by the ordinance. In light of the foregoing, plaintiffs have not established that the challenged provisions of the ordinance are unconstitutional ... . **Grodinsky v City of Cortland, 2018 NY Slip Op 05236, Third Dept 7-12-18**

MUNICIPAL LAW (LANDLORD-TENANT, CITY ORDINANCE PROVISIONS REQUIRING A RENTAL PERMIT AND LIMITING OCCUPANCY OF RENTAL UNITS TO A "FAMILY" AS DEFINED IN THE ORDINANCE ARE NOT UNCONSTITUTIONAL (THIRD DEPT))/LANDLORD-TENANT (MUNICIPAL LAW, CITY ORDINANCE PROVISIONS REQUIRING A RENTAL PERMIT AND LIMITING OCCUPANCY OF RENTAL UNITS TO A "FAMILY" AS DEFINED IN THE ORDINANCE ARE NOT UNCONSTITUTIONAL (THIRD DEPT))/CONSTITUTIONAL LAW (MUNICIPAL LAW, LANDLORD-TENANT, CITY ORDINANCE PROVISIONS REQUIRING A RENTAL PERMIT AND LIMITING OCCUPANCY OF RENTAL UNITS TO A "FAMILY" AS DEFINED IN THE ORDINANCE ARE NOT UNCONSTITUTIONAL (THIRD DEPT))

MUNICIPAL LAW, NEGLIGENCE, MEDICAL MALPRACTICE.

LEAVE TO FILE A LATE NOTICE OF CLAIM WAS PROPERLY GRANTED IN THIS CANCER TREATMENT MALPRACTICE ACTION, WHERE THE ALLEGED MALPRACTICE IS APPARENT FROM THE MEDICAL RECORDS, THE RECORDS CONSTITUTE ACTUAL KNOWLEDGE OF THE CLAIM (SECOND DEPT).

The Second Department determined petitioner's motion seeking leave to file a late notice of claim for medical malpractice against the NYC Health & Hospitals Corporation was properly granted. Plaintiff alleged malpractice in the treatment of a cancerous lesion:

> "Where the alleged malpractice is apparent from an independent review of the medical records, those records constitute actual knowledge of the facts constituting the claim'" ... . Here, in support of her petition, the petitioner submitted medical records and an affirmation of a physician who reviewed the medical records and concluded, inter alia, that there had been a departure from accepted medical practice. Inasmuch as the medical records show that the hospital failed to confirm that the plaintiff's tumor had been completely removed, they provided the appellant with actual knowledge of the essential facts constituting the claim ... . Furthermore, the petitioner made an initial showing that the appellant would not suffer any prejudice by the delay in serving a notice of claim, and the appellant failed to rebut the petitioner's showing with particularized indicia of prejudice ... . Finally, the lack of a reasonable excuse is not dispositive where there is actual notice and absence of prejudice ... . In any event, the petitioner demonstrated that her extensive medical treatment during the time period at issue constitutes a reasonable excuse for the delay ... . **Matter of Leon v New York City Health & Hosps. Corp., 2018 NY Slip Op 05165, Second Dept 7-11-18**

MUNICIPAL LAW (NOTICE OF CLAIM, MEDICAL MALPRACTICE, LEAVE TO FILE A LATE NOTICE OF CLAIM WAS PROPERLY GRANTED IN THIS CANCER TREATMENT MALPRACTICE ACTION, WHERE THE ALLEGED MALPRACTICE IS APPARENT FROM THE MEDICAL RECORDS, THE RECORDS CONSTITUTE ACTUAL KNOWLEDGE OF THE CLAIM (SECOND DEPT))/NEGLIGENCE (MUNICIPAL LAW, NOTICE OF CLAIM, MEDICAL MALPRACTICE, LEAVE TO FILE A LATE NOTICE OF CLAIM WAS PROPERLY GRANTED IN THIS CANCER TREATMENT MALPRACTICE ACTION, WHERE THE ALLEGED MALPRACTICE IS APPARENT FROM THE MEDICAL RECORDS, THE RECORDS CONSTITUTE ACTUAL KNOWLEDGE OF THE CLAIM (SECOND DEPT))/MEDICAL MALPRACTICE (MUNICIPAL LAW, NOTICE OF CLAIM, LEAVE TO FILE A LATE NOTICE OF CLAIM WAS PROPERLY GRANTED IN THIS CANCER TREATMENT MALPRACTICE ACTION, WHERE THE ALLEGED MALPRACTICE IS APPARENT FROM THE MEDICAL RECORDS, THE RECORDS CONSTITUTE ACTUAL KNOWLEDGE OF THE CLAIM (SECOND DEPT))/NOTICE OF CLAIM (MUNICIPAL LAW, MEDICAL MALPRACTICE, LEAVE TO FILE A LATE NOTICE OF CLAIM WAS PROPERLY GRANTED IN THIS CANCER TREATMENT MALPRACTICE ACTION, WHERE THE ALLEGED MALPRACTICE IS APPARENT FROM THE MEDICAL RECORDS, THE RECORDS CONSTITUTE ACTUAL KNOWLEDGE OF THE CLAIM (SECOND DEPT))

NEGLIGENCE

NEGLIGENCE.

QUESTION OF FACT WHETHER OPERATOR OF A SKATING RINK PROVIDED PROPER SUPERVISION AND THEREFORE WHETHER THE ASSUMPTION OF RISK DOCTRINE APPLIED, PLAINTIFF ALLEGED SHE WAS PUSHED TO THE ICE BY AN UNRULY SKATER (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the defendant town, owner-operator of a skating rink, did not eliminate all questions of fact about whether it provided proper supervision at the rink. Therefore there was a question of fact whether the doctrine of assumption of the risk applied. Plaintiff alleged she was pushed to the ice by an unruly skater:

> Participants in sports or recreational activities "will not be deemed to have assumed . . . unreasonably increased risks" ... . "Thus, where reckless behavior that is over and above the usual dangers inherent in the activity of skating is claimed to have caused the injury, the issue of whether the proprietor was negligent in supervising the skaters turns on whether the proprietor had sufficient notice of the allegedly reckless conduct so as to permit it to prevent the injury through the exercise of adequate supervision" ... . "The duration and nature of the allegedly reckless conduct are factors that bear on this issue" ... .
>
> Here, the defendant failed to establish, prima facie, that the action was barred by the doctrine of primary assumption of risk ... . The defendant's submissions failed to eliminate all triable issues of fact as to whether the risk was unreasonably increased by the defendant's alleged failure to properly supervise the skaters such that the doctrine of primary assumption of risk would not apply ... . **Laurent v Town of Oyster Bay, 2018 NY Slip Op 05028, Second Dept 7-5-18**

NEGLIGENCE (QUESTION OF FACT WHETHER OPERATOR OF A SKATING RINK PROVIDED PROPER SUPERVISION AND THEREFORE WHETHER THE ASSUMPTION OF RISK DOCTRINE APPLIED, PLAINTIFF ALLEGED SHE WAS PUSHED TO THE ICE BY AN UNRULY SKATER (SECOND DEPT))/ICE SKATING (QUESTION OF FACT WHETHER OPERATOR OF A SKATING RINK PROVIDED PROPER SUPERVISION AND THEREFORE WHETHER THE ASSUMPTION OF RISK DOCTRINE APPLIED, PLAINTIFF ALLEGED SHE WAS PUSHED TO THE ICE BY AN UNRULY SKATER (SECOND DEPT))/ASSUMPTION OF THE RISK (ICE-SKATING, QUESTION OF FACT WHETHER OPERATOR OF A SKATING RINK PROVIDED PROPER SUPERVISION AND THEREFORE WHETHER THE ASSUMPTION OF RISK DOCTRINE APPLIED, PLAINTIFF ALLEGED SHE WAS PUSHED TO THE ICE BY AN UNRULY SKATER (SECOND DEPT))/MUNICIPAL LAW (ICE-SKATING, QUESTION OF FACT WHETHER OPERATOR OF A SKATING RINK PROVIDED PROPER SUPERVISION AND THEREFORE WHETHER THE ASSUMPTION OF RISK DOCTRINE APPLIED, PLAINTIFF ALLEGED SHE WAS PUSHED TO THE ICE BY AN UNRULY SKATER (SECOND DEPT))/SUPERVISION (NEGLIGENCE, ICE-SKATING, QUESTION OF FACT WHETHER OPERATOR OF A SKATING RINK PROVIDED PROPER SUPERVISION AND THEREFORE WHETHER THE ASSUMPTION OF RISK DOCTRINE APPLIED, PLAINTIFF ALLEGED SHE WAS PUSHED TO THE ICE BY AN UNRULY SKATER (SECOND DEPT))

NEGLIGENCE.

QUESTIONS OF FACT WHETHER CLUTTER AT A DAY CARE CENTER WAS A PROXIMATE CAUSE OF PLAINTIFF'S FALL AND WHETHER A BICYCLE RIDDEN BY A THREE-YEAR-OLD WAS A DANGEROUS INSTRUMENT REQUIRING SUPERVISION BY THE OPERATOR OF THE DAY CARE CENTER (THIRD DEPT).

The Third Department, over a two-justice partial dissent, determined there were questions of fact about whether a cluttered area at a day care center was a proximate cause of plaintiff's falling and whether a bicycle ridden by a three-year-old was a dangerous instrument requiring supervision by the operator of the day care center. The plaintiff had picked up her infant when her three-year-old ran into her with the bicycle. Plaintiff alleged that, had the area not been cluttered with toys and furniture, she could have avoided falling. The dissenters argued that the bicycle was not a dangerous instrument and the negligent supervision cause of action failed as a matter of law:

> Here, the actions of the three-year-old child were unquestionably the precipitating factor in plaintiff's accident. However, plaintiff explained that, after being struck by the bicycle, she attempted to regain her balance but was unable to because she was "trapped" between a table and an ottoman and could not take a step in any direction without tripping on one of the various objects scattered about the porch. She further averred that, had the floor not been so cluttered with toys, objects and furniture, she would have been able to regain her balance before falling. Viewing this evidence in the light most favorable to plaintiff and affording her the benefit of every favorable inference that may be drawn therefrom ... , we find a triable issue of fact as to whether the condition of the porch was a proximate cause of plaintiff's injuries ... .
>
> As the Court of Appeals has explained, "[c]hildren might, at various points in their development, be permitted, and properly so, to use bicycles, lawn mowers, power tools, motorcycles, or automobiles, all of which are, in some contingencies, 'dangerous instruments'" ... . "[T]he determination of whether a particular instrument is dangerous 'depends upon the nature and complexity of the allegedly dangerous instrument, the age, intelligence and experience of the child, and his [or her] proficiency with the instrument'"... . **Pineiro v Rush, 2018 NY Slip Op 04994, Third Dept 7-5-18**

NEGLIGENCE (QUESTIONS OF FACT WHETHER CLUTTER AT A DAY CARE CENTER WAS A PROXIMATE CAUSE OF PLAINTIFF'S FALL AND WHETHER A BICYCLE RIDDEN BY A THREE-YEAR-OLD WAS A DANGEROUS INSTRUMENT REQUIRING SUPERVISION BY THE OPERATOR OF THE DAY CARE CENTER (THIRD DEPT))/SLIP AND FALL (QUESTIONS OF FACT WHETHER CLUTTER AT A DAY CARE CENTER WAS A PROXIMATE CAUSE OF PLAINTIFF'S FALL AND WHETHER A BICYCLE RIDDEN BY A THREE-YEAR-OLD WAS A DANGEROUS INSTRUMENT REQUIRING SUPERVISION BY THE OPERATOR OF THE DAY CARE CENTER (THIRD DEPT))/NEGLIGENT SUPERVISION (QUESTIONS OF FACT WHETHER CLUTTER AT A DAY CARE CENTER WAS A PROXIMATE CAUSE OF PLAINTIFF'S FALL AND WHETHER A BICYCLE RIDDEN BY A THREE-YEAR-OLD WAS A DANGEROUS INSTRUMENT REQUIRING SUPERVISION BY THE OPERATOR OF THE DAY CARE CENTER (THIRD DEPT))/BICYCLES (DANGEROUS INSTRUMENTS, NEGLIGENT SUPERVISION, QUESTIONS OF FACT WHETHER CLUTTER AT A DAY CARE CENTER WAS A PROXIMATE CAUSE OF PLAINTIFF'S FALL AND WHETHER A BICYCLE RIDDEN BY A THREE-YEAR-OLD WAS A DANGEROUS INSTRUMENT REQUIRING SUPERVISION BY THE OPERATOR OF THE DAY CARE CENTER (THIRD DEPT))/NEGLIGENT SUPERVISION (DAY CARE, QUESTIONS OF FACT WHETHER CLUTTER AT A DAY CARE CENTER WAS A PROXIMATE CAUSE OF PLAINTIFF'S FALL AND WHETHER A BICYCLE RIDDEN BY A THREE-YEAR-OLD WAS A DANGEROUS INSTRUMENT REQUIRING SUPERVISION BY THE OPERATOR OF THE DAY CARE CENTER (THIRD DEPT))/DAY CARE (NEGLIGENT SUPERVISION, QUESTIONS OF FACT WHETHER CLUTTER AT A DAY CARE CENTER WAS A PROXIMATE CAUSE OF PLAINTIFF'S FALL AND WHETHER A BICYCLE RIDDEN BY A THREE-YEAR-OLD WAS A DANGEROUS INSTRUMENT REQUIRING SUPERVISION BY THE OPERATOR OF THE DAY CARE CENTER (THIRD DEPT))

NEGLIGENCE.

THE SCOPE OF A LANDOWNER'S DUTY TO KEEP PROPERTY IN A SAFE CONDITION IS MEASURED BY FORESEEABILITY, HERE A GRASSY PATH WAS CLEARED OF SNOW BY A SCHOOL CUSTODIAN, SO USE OF THE PATH WAS FORESEEABLE, HOWEVER THERE WAS A QUESTION OF FACT WHETHER THE PATH CONSTITUTED A DANGEROUS CONDITION (THIRD DEPT).

The Third Department, reversing (modifying) Supreme Court, determined there was a question of fact whether a grassy path used to walk from a parking lot to a school building constituted a dangerous condition in this slip and fall case. The path had been cleared of ice and snow by a custodian but the plaintiff described the path as wet and muddy, as opposed to having ice and snow on it. There was a paved walkway to the school and there was testimony the grassy path should not have been cleared of snow:

> "As the party seeking summary judgment, defendant bore the initial burden of demonstrating that it had maintained the property in a reasonably safe condition and that it did not create or have actual or constructive notice of the specific allegedly dangerous condition that resulted in plaintiff's injury" ... . To that end, "the scope of a landowner's duty is measured in terms of foreseeability" ... . "Foreseeability of risk is an essential element of a fault-based negligence cause of action because the community deems a person at fault only when the injury-producing occurrence is one that could have been anticipated" ... .
>
> Here, the evidence shows that defendant created the path on which plaintiff fell and, therefore, the only valid inference is that it was foreseeable that people would use the path once it had been cleared... . Thus, defendant had a duty to maintain the path in a reasonably safe condition ... . However, whether "a dangerous condition exists is generally a question for the jury" ... , unless "only a single inference can be drawn from the undisputed facts" ... . The deposition testimony established that defendant's employee created the path, but there was no testimony regarding whether there was any additional maintenance. Also, although plaintiff testified that the path was wet and muddy, she could not recall if there was snow or ice on it. Therefore, a triable question of fact exists as to whether the path constituted a dangerous condition ... . **Ellis v Lansingburgh Cent. Sch. Dist., 2018 NY Slip Op 05011, Third Dept 7-5-18**

NEGLIGENCE (SLIP AND FALL, THE SCOPE OF A LANDOWNER'S DUTY TO KEEP PROPERTY IN A SAFE CONDITION IS MEASURED BY FORESEEABILITY, HERE A GRASSY PATH WAS CLEARED OF SNOW BY A SCHOOL CUSTODIAN, SO USE OF THE PATH WAS FORESEEABLE, HOWEVER THERE WAS A QUESTION OF FACT WHETHER THE PATH CONSTITUTED A DANGEROUS CONDITION (THIRD DEPT))/SLIP AND FALL (THE SCOPE OF A LANDOWNER'S DUTY TO KEEP PROPERTY IN A SAFE CONDITION IS MEASURED BY FORESEEABILITY, HERE A GRASSY PATH WAS CLEARED OF SNOW BY A SCHOOL CUSTODIAN, SO USE OF THE PATH WAS FORESEEABLE, HOWEVER THERE WAS A QUESTION OF FACT WHETHER THE PATH CONSTITUTED A DANGEROUS CONDITION (THIRD DEPT))/FORESEEABILITY (SLIP AND FALL, THE SCOPE OF A LANDOWNER'S DUTY TO KEEP PROPERTY IN A SAFE CONDITION IS MEASURED BY FORESEEABILITY, HERE A GRASSY PATH WAS CLEARED OF SNOW BY A SCHOOL CUSTODIAN, SO USE OF THE PATH WAS FORESEEABLE, HOWEVER THERE WAS A QUESTION OF FACT WHETHER THE PATH CONSTITUTED A DANGEROUS CONDITION (THIRD DEPT))

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NEGLIGENCE.

CONDUCT OF THE BUFFALO BILLS OR THE COUNTY OF ERIE AS THE OWNER OF THE FOOTBALL STADIUM WAS NOT THE PROXIMATE CAUSE OF AN UNPROVOKED CRIMINAL ASSAULT ON THE PLAINTIFF AT THE STADIUM, NEGLIGENCE ACTION PROPERLY DISMISSED (FOURTH DEPT).

The Fourth Department determined the action against the Buffalo Bills and the County of Erie, the owner of the football stadium where the Bills played, based upon an unprovoked attack on the plaintiff at the stadium, was properly dismissed:

> Contrary to plaintiff's contention, the court properly determined that the conduct of the Bills and the County was not a proximate cause of his injuries. "[A]s an independent act far removed from [the allegedly negligent] conduct [of the Bills and the County], the [assailants' unprovoked] criminal assault broke the causal nexus [between such allegedly negligent conduct and plaintiff's injury]. The attack was extraordinary and not foreseeable or preventable in the normal course of events" ... . Indeed, "[i]t is difficult to understand what measures could have been undertaken to prevent plaintiff's injury except presumably to have had a security officer posted at the precise location where the incident took place or wherever [rival football fans] were gathered, surely an unreasonable burden" ... . We thus conclude that the court properly granted the motion of the Bills and the County and dismissed the amended complaint against them. **Wrobel v Doe, 2018 NY Slip Op 05097, Fourth Dept 7-6-18**

NEGLIGENCE (THIRD PARTY ASSAULT, CONDUCT OF THE BUFFALO BILLS OR THE COUNTY OF ERIE AS THE OWNER OF THE FOOTBALL STADIUM WAS NOT THE PROXIMATE CAUSE OF AN UNPROVOKED CRIMINAL ASSAULT ON THE PLAINTIFF AT THE STADIUM, NEGLIGENCE ACTION PROPERLY DISMISSED (FOURTH DEPT))/ASSAULT (NEGLIGENCE, THIRD PARTY ASSAULT, CONDUCT OF THE BUFFALO BILLS OR THE COUNTY OF ERIE AS THE OWNER OF THE FOOTBALL STADIUM WAS NOT THE PROXIMATE CAUSE OF AN UNPROVOKED CRIMINAL ASSAULT ON THE PLAINTIFF AT THE STADIUM, NEGLIGENCE ACTION PROPERLY DISMISSED (FOURTH DEPT))/THIRD PARTY ASSAULT (NEGLIGENCE, CONDUCT OF THE BUFFALO BILLS OR THE COUNTY OF ERIE AS THE OWNER OF THE FOOTBALL STADIUM WAS NOT THE PROXIMATE CAUSE OF AN UNPROVOKED CRIMINAL ASSAULT ON THE PLAINTIFF AT THE STADIUM, NEGLIGENCE ACTION PROPERLY DISMISSED (FOURTH DEPT))

NEGLIGENCE.

QUESTION OF FACT WHETHER DEFENDANT BUS COMPANY HAD NOTICE OF A PUDDLE OF HYDRAULIC FLUID ON THE FLOOR OF THE BUS IN THIS SLIP AND FALL CASE (FOURTH DEPT).

The Fourth Department noted that the cause of action alleging defendant bus company had notice of the presence of hydraulic fluid on the floor of the bus, which caused plaintiff to slip and fall, properly survived defendants' motion for summary judgment. There was a video from inside the bus which appeared to show that the puddle of fluid had been "tracked through" before plaintiff boarded the bus:

> " [V]iew[ing] the evidence in the light most favorable to the party opposing the motion, [and] giving that party the benefit of every reasonable inference' " ... , we conclude that there is a triable issue of fact because the evidence of the size of the puddle and that the puddle had been "tracked through" before any passengers boarded the bus following the layover constitutes circumstantial evidence that would permit a jury to infer that the puddle had existed for a sufficient length of time for defendants to have discovered and remedied it ... . **Mills v Niagara Frontier Transp. Auth., 2018 NY Slip Op 05098, Fourth Dept 7-6-18**

NEGLIGENCE (SLIP AND FALL, QUESTION OF FACT WHETHER DEFENDANT BUS COMPANY HAD NOTICE OF A PUDDLE OF HYDRAULIC FLUID ON THE FLOOR OF THE BUS IN THIS SLIP AND FALL CASE (FOURTH DEPT))/SLIP AND FALL (QUESTION OF FACT WHETHER DEFENDANT BUS COMPANY HAD NOTICE OF A PUDDLE OF HYDRAULIC FLUID ON THE FLOOR OF THE BUS IN THIS SLIP AND FALL CASE (FOURTH DEPT))/BUSES (SLIP AND FALL, QUESTION OF FACT WHETHER DEFENDANT BUS COMPANY HAD NOTICE OF A PUDDLE OF HYDRAULIC FLUID ON THE FLOOR OF THE BUS IN THIS SLIP AND FALL CASE (FOURTH DEPT))

NEGLIGENCE.

PLAINTIFFS DID NOT ALLEGE THAT DEFENDANT CREATED THE DANGEROUS CONDITION AND DEFENDANT DEMONSTRATED IT DID NOT HAVE NOTICE OF THE CONDITION, THEREFORE DEFENDANT'S MOTION FOR SUMMARY JUDGMENT IN THIS ICE AND SNOW SLIP AND FALL CASE SHOULD HAVE BEEN GRANTED (FIRST DEPT).

The Second Department, reversing Supreme Court, determined defendant's motion for summary judgment in this ice and snow slip and fall case should have been granted. Plaintiffs did not alleged defendant created the dangerous condition and defendant demonstrated it did not have actual or constructive notice of the condition:

> Here, the plaintiffs did not allege that the defendant created the ice condition. By submitting the deposition testimony of the director of the preschool and the injured plaintiff, the defendant established, prima facie, that it did not have actual or constructive notice of the alleged ice that caused the plaintiff to fall ... . The preschool director testified that she entered the building through the rear entrance about 90 minutes prior to the incident, and she did not see any ice on the ground. The injured plaintiff testified that she did not see the ice before she fell. In opposition, the plaintiffs failed to raise a triable issue of fact. General awareness that snow or ice may be present during winter months was legally insufficient to constitute notice of the particular condition that caused the injured plaintiff's fall ... . **Bombino-Munroe v Church of St. Bernard, 2018 NY Slip Op 05131, Second Dept 7-11-18**

NEGLIGENCE (PLAINTIFFS DID NOT ALLEGE THAT DEFENDANT CREATED THE DANGEROUS CONDITION AND DEFENDANT DEMONSTRATED IT DID NOT HAVE NOTICE OF THE CONDITION, THEREFORE DEFENDANT'S MOTION FOR SUMMARY JUDGMENT IN THIS ICE AND SNOW SLIP AND FALL CASE SHOULD HAVE BEEN GRANTED (FIRST DEPT))/SLIP AND FALL (PLAINTIFFS DID NOT ALLEGE THAT DEFENDANT CREATED THE DANGEROUS CONDITION AND DEFENDANT DEMONSTRATED IT DID NOT HAVE NOTICE OF THE CONDITION, THEREFORE DEFENDANT'S MOTION FOR SUMMARY JUDGMENT IN THIS ICE AND SNOW SLIP AND FALL CASE SHOULD HAVE BEEN GRANTED (FIRST DEPT))

NEGLIGENCE.

$1.5 MILLION VERDICT AFFIRMED, PLAINTIFF, A 72-YEAR-OLD WOMAN, WAS INJURED WHEN THE BUS SHE HAD JUST BOARDED ACCELERATED QUICKLY CAUSING HER TO FALL, INJURING HER HEAD, BACK, NERVES AND KNEE (SECOND DEPT).

The Second Department upheld the $1.5 million verdict in favor of plaintiff, a 72-year-old woman who alleged the bus driver accelerated quickly just after plaintiff got on the bus causing her to fall and sustain disk, nerve, knee and head injuries:

> We ... agree with the Supreme Court's determination to deny that branch of the defendant's motion which was for summary judgment dismissing the complaint on the ground that it was not liable for the plaintiff's injuries. The evidence submitted by the defendant in support of that branch of the motion failed to eliminate triable issues of fact as to whether the movement of the bus at issue was unusual and violent ... . Since the defendant did not sustain its prima facie burden, it is unnecessary to determine whether the papers submitted by the plaintiff in opposition were sufficient to raise a triable issue of fact ... .
>
> The award of damages for past and future pain and suffering did not deviate materially from what would be reasonable compensation (see CPLR 5501[c]...). **Castillo v MTA Bus Co.. 2018 NY Slip Op 05134. Second Dept 7-11-18**

NEGLIGENCE (BUSES, $1.5 MILLION VERDICT AFFIRMED, PLAINTIFF, A 72-YEAR-OLD WOMAN, WAS INJURED WHEN THE BUS SHE HAD JUST BOARDED ACCELERATED QUICKLY CAUSING HER TO FALL, INJURING HER HEAD, BACK, NERVES AND KNEE (SECOND DEPT))/BUSES (NEGLIGENCE, $1.5 MILLION VERDICT AFFIRMED, PLAINTIFF, A 72-YEAR-OLD WOMAN, WAS INJURED WHEN THE BUS SHE HAD JUST BOARDED ACCELERATED QUICKLY CAUSING HER TO FALL, INJURING HER HEAD, BACK, NERVES AND KNEE (SECOND DEPT))

NEGLIGENCE.

QUESTIONS OF FACT WHETHER THE PLACEMENT OF A PROPANE HEATER IN DEFENDANT'S STORE CREATED A DANGEROUS CONDITION AND WAS A PROXIMATE CAUSE OF PLAINTIFF'S CLOTHING CATCHING FIRE (THIRD DEPT).

The Third Department determined the defendant lessee's motion for summary judgment in this negligence action based upon the placement of a propane heater in defendant's store was properly denied. Plaintiff's clothing caught fire when she stood near the stove:

> ... [P]laintiff relied upon a section of the then-applicable version of the Fuel Gas Code of New York State providing that an unvented room heater must be installed as directed by the manufacturer (see Fuel Gas Code of NY St § 621.1 [2007]). In turn, the manual for the heater at issue here provided, in accordance with standards established by the American National Standards Institute, that "[d]ue to high temperatures, [the] heater should be kept out of traffic" and should never be installed "in high-traffic areas." The manual further stated that the heater was intended for supplemental use and should never be installed as a primary heat source. Plaintiff submitted defendant's deposition testimony that he chose not to read or refer to the manual, although he was aware that it contained instructions about the safe placement of the heater. Significantly, he acknowledged that the heater was the store's only source of heat. As for whether the heater was kept out of traffic, defendant stated that customers often spent several hours in the store during regularly-conducted gaming tournaments, that customers moving between the bathroom and certain tables and chairs used during these events would "pass right in front of the heater," and that he had seen people walk past the heater to reach the bathroom and stand in front of it to warm themselves. While violations of rules such as the Fuel Gas Code do not establish negligence per se, they "do[] provide some evidence of negligence" ... . Defendant's testimony thus gave rise to triable issues of fact as to whether the heater's placement violated the manufacturer's instructions and whether defendant was negligent in placing it for use in the store. ...
>
> Viewing the facts in the light most favorable to plaintiff, as we must, we find that she demonstrated the existence of a triable issue of fact as to whether defendant's negligence was a proximate cause of her injuries ... . **Palmatier v Mr. Heater Corp., 2018 NY Slip Op 05250, Second Dept 7-12-18**

NEGLIGENCE (QUESTIONS OF FACT WHETHER THE PLACEMENT OF A PROPANE HEATER IN DEFENDANT'S STORE CREATED A DANGEROUS CONDITION AND WAS A PROXIMATE CAUSE OF PLAINTIFF'S CLOTHING CATCHING FIRE (THIRD DEPT))/HEATERS (NEGLIGENCE, QUESTIONS OF FACT WHETHER THE PLACEMENT OF A PROPANE HEATER IN DEFENDANT'S STORE CREATED A DANGEROUS CONDITION AND WAS A PROXIMATE CAUSE OF PLAINTIFF'S CLOTHING CATCHING FIRE (THIRD DEPT))

NEGLIGENCE.

QUESTION OF FACT WHETHER PLAINTIFF, A YOUTH HOCKEY PLAYER INJURED BY A TIPPING BENCH IN THE LOCKER ROOM, WAS IN THE CUSTODY OF THE COACH OR HIS FATHER IN THIS NEGLIGENT SUPERVISION ACTION (THIRD DEPT).

The Third Department determined there was a question of fact whether plaintiff, a youth hockey player (Beninati), was in the custody and control of the coach or plaintiff's father at the time he was injured falling off a tipping bench in the locker room:

> Where a child participates in an athletic activity, such as the youth hockey program involved here, we recognize that the team and its coach owe a duty of care to adequately supervise the child while participating in the event ... . That custodial duty, however, ceases once the child is returned to the care and control of his or her parent ... . "A plaintiff claiming negligent supervision must demonstrate both that the defendant breached its duty to provide adequate supervision [as would a reasonably prudent parent placed in comparable circumstances], and that this failure was the proximate cause of the plaintiff's injuries"... .
>
> The pivotal question presented is whether Beninati was in the custody of his father or the coach at the time that he was injured. **Beninati v City of Troy, 2018 NY Slip Op 05254, Third Dept 7-12-18**

NEGLIGENCE (QUESTION OF FACT WHETHER PLAINTIFF, A YOUTH HOCKEY PLAYER INJURED BY A TIPPING BENCH IN THE LOCKER ROOM, WAS IN THE CUSTODY OF THE COACH OR HIS FATHER IN THIS NEGLIGENT SUPERVISION ACTION (THIRD DEPT))/NEGLIGENT SUPERVISION (QUESTION OF FACT WHETHER PLAINTIFF, A YOUTH HOCKEY PLAYER INJURED BY A TIPPING BENCH IN THE LOCKER ROOM, WAS IN THE CUSTODY OF THE COACH OR HIS FATHER IN THIS NEGLIGENT SUPERVISION ACTION (THIRD DEPT))

NEGLIGENCE.

ALTHOUGH PLAINTIFF INDICATED SHE DID NOT KNOW THE CAUSE OF HER FALL IN HER DEPOSITION, IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT SHE RAISED A QUESTION OF FACT ABOUT WHETHER THE FLOOR WAS WET FROM TRACKED IN SNOW AND DEFENDANT DID NOT PRESENT ANY EVIDENCE ON THE ISSUE OF NOTICE (SECOND DEPT).

The Second Department, reversing Supreme Court, determined that defendant's motion for summary judgment should not have been granted in this slip and fall case. The defendant demonstrated that plaintiff did not know the cause of her fall. In her opposing affidavit plaintiff alleged she felt the back of her coat when she got up and it was wet. Plaintiff also presented evidence it was snowing at the time. The court noted Supreme Court had found that defendant did not have notice of the condition, but the defendant had not presented any evidence on that issue:

> The defendant established its prima facie entitlement to judgment as a matter of law through the deposition testimony of the plaintiff, which demonstrated that she was unable to identify the cause of her fall ... . However, in opposition to the defendant's prima facie showing on this ground, the plaintiff raised a triable issue of fact through her affidavit, in which she averred that when she stood up after falling, she put her hands on the back of her coat to straighten it and felt that the coat was wet. This, coupled with the fact that it had been snowing, led her to believe that she slipped on snow that had been tracked into the bank. Viewing the evidence in the light most favorable to the plaintiff, which included climatological data establishing that it had been snowing that morning, and according her the benefit of all reasonable inferences ... , we find that there are triable issues of fact as to whether a slippery condition was present where the plaintiff allegedly fell... .
>
> We note that although the Supreme Court found that the defendant established that it did not have actual or constructive notice of the allegedly dangerous condition... , the defendant did not move for summary judgment on this ground and did not submit evidence that would eliminate issues of fact on the issue of notice. **Matadin v Bank of Am. Corp., 2018 NY Slip Op 05297, Second Dept 7-18-18**

NEGLIGENCE (SLIP AND FALL, ALTHOUGH PLAINTIFF INDICATED SHE DID NOT KNOW THE CAUSE OF HER FALL IN HER DEPOSITION, IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT SHE RAISED A QUESTION OF FACT ABOUT WHETHER THE FLOOR WAS WET FROM TRACKED IN SNOW AND DEFENDANT DID NOT PRESENT ANY EVIDENCE ON THE ISSUE OF NOTICE (SECOND DEPT))/SLIP AND FALL (ALTHOUGH PLAINTIFF INDICATED SHE DID NOT KNOW THE CAUSE OF HER FALL IN HER DEPOSITION, IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT SHE RAISED A QUESTION OF FACT ABOUT WHETHER THE FLOOR WAS WET FROM TRACKED IN SNOW AND DEFENDANT DID NOT PRESENT ANY EVIDENCE ON THE ISSUE OF NOTICE (SECOND DEPT))

NEGLIGENCE.

ACTION ALLEGING INJURY FROM A FALLING TREE ON DEFENDANT'S PROPERTY SHOULD HAVE BEEN DISMISSED, DEFENDANT DEMONSTRATED A LACK OF NOTICE OF THE CONDITION OF THE TREE (SECOND DEPT).

The Second Department determined a lawsuit alleging injury from a falling tree on defendant's property should have been dismissed. Defendant property owner (Alice) demonstrated a lack of notice of the condition of the tree:

> "In cases involving fallen trees, a property owner will only be held liable if [she or] he knew or should have known of the defective condition of the tree" ... . "Constructive notice in such a case can be imputed if the record establishes that a reasonable inspection would have revealed the dangerous condition of the tree" ... . Here, Alice established her prima facie entitlement to judgment as a matter of law by submitting evidence that she lacked actual or constructive notice of the alleged defective condition of the tree ... . **Pagan v Jordan, 2018 NY Slip Op 05477, Second Dept 7-25-18**

NEGLIGENCE (FALLING TREES, ACTION ALLEGING INJURY FROM A FALLING TREE ON DEFENDANT'S PROPERTY SHOULD HAVE BEEN DISMISSED, DEFENDANT DEMONSTRATED A LACK OF NOTICE OF THE CONDITION OF THE TREE (SECOND DEPT))/TREES (FALLING TREES, NEGLIGENCE, ACTION ALLEGING INJURY FROM A FALLING TREE ON DEFENDANT'S PROPERTY SHOULD HAVE BEEN DISMISSED, DEFENDANT DEMONSTRATED A LACK OF NOTICE OF THE CONDITION OF THE TREE (SECOND DEPT))

NEGLIGENCE.

DEFENDANTS IN THIS SLIP AND FALL CASE DID NOT DEMONSTRATE WHEN THE AREA WAS LAST CLEANED OR INSPECTED, DEFENDANTS' MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court determined defendants did not demonstrate when the area where plaintiff slipped and fell had last been inspected or cleaned and did not demonstrate the handrail was not defective:

> ... [T]he defendants failed to establish, prima facie, that they did not have constructive notice of the alleged hazardous conditions. While the deposition testimony of the premises' porter and an affidavit of its superintendent, submitted by the defendants in support of their motion, demonstrated that the porter and the superintendent inspected and cleaned the premises on a regular basis, the defendants failed to present evidence of when the specific area where the plaintiff fell was last cleaned or inspected before the accident ... . **Quinones v Starret City, Inc., 2018 NY Slip Op 05510, Second Dept 7-25-18**

NEGLIGENCE (SLIP AND FALL, DEFENDANTS IN THIS SLIP AND FALL CASE DID NOT DEMONSTRATE WHEN THE AREA WAS LAST CLEANED OR INSPECTED, DEFENDANTS' MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT))/SLIP AND FALL (DEFENDANTS IN THIS SLIP AND FALL CASE DID NOT DEMONSTRATE WHEN THE AREA WAS LAST CLEANED OR INSPECTED, DEFENDANTS' MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT))

NEGLIGENCE.

PLAINTIFF ENTITLED TO SUMMARY JUDGMENT IN THIS REAR-END COLLISION CASE (SECOND DEPT).

The Second Department, reversing Supreme Court, determined that plaintiff's motion for summary judgment in this rear-end collision case should have been granted. The court noted that a plaintiff is not longer required to demonstrate the absence of comparative fault to be entitled to summary judgment. Plaintiff was in the first stopped car. The car behind plaintiff (CCAP/Rosenthal) was also stopped but was struck from behind by a third car (Auto Mall/Edri):

> A plaintiff in a negligence action moving for summary judgment on the issue of liability must establish, prima facie, that the defendant breached a duty owed to the plaintiff and that the defendant's negligence was a proximate cause of the alleged injuries ... . A plaintiff is no longer required to show freedom from comparative fault in establishing his or her prima facie case ... . A rear-end collision with a stopped or stopping vehicle establishes a prima facie case of negligence on the part of the operator of the rear vehicle, requiring that operator to come forward with evidence of a nonnegligent explanation for the collision in order to rebut the inference of negligence ... .
>
> The plaintiff's affidavit submitted in support of his motion established his prima facie entitlement to judgment as a matter of law. The plaintiff's affidavit demonstrated that he was stopped for between 5 and 10 seconds due to traffic related conditions before his vehicle was struck in the rear by the CCAP/Rosenthal vehicle. The plaintiff's affidavit also demonstrated that the vehicle operated by Edri struck the rear of the stopped vehicle owned by CCAP and operated by Rosenthal, which propelled that vehicle into the rear of the plaintiff's stopped vehicle. In opposition, Auto Mall and Edri failed to raise a triable issue of fact regarding a nonnegligent explanation for the rear-end collision. Furthermore, the contention of Auto Mall and Edri that the plaintiff's motion was premature pursuant to CPLR 3212(f) is unpersuasive. Auto Mall and Edri failed to demonstrate how discovery may lead to relevant evidence or that facts essential to opposing the motion were exclusively within the plaintiff's knowledge or control ... . **Tsyganash v Auto Mall Fleet Mgt., Inc., 2018 NY Slip Op 05517, Second Dept 7-25-18**

NEGLIGENCE (PLAINTIFF ENTITLED TO SUMMARY JUDGMENT IN THIS REAR-END COLLISION CASE (SECOND DEPT))/TRAFFIC ACCIDENTS (PLAINTIFF ENTITLED TO SUMMARY JUDGMENT IN THIS REAR-END COLLISION CASE (SECOND DEPT))/REAR-END COLLISIONS (PLAINTIFF ENTITLED TO SUMMARY JUDGMENT IN THIS REAR-END COLLISION CASE (SECOND DEPT))

NEGLIGENCE, CIVIL PROCEDURE. MUNICIPAL LAW

MOTION FOR A NEW TRIAL UNLESS PLAINTIFF AGREED TO A REDUCTION IN DAMAGES FOR PRE-IMPACT TERROR AND CONSCIOUS PAIN AND SUFFERING IN THIS TRAFFIC-ACCIDENT WRONGFUL DEATH CASE PROPERLY GRANTED (SECOND DEPT).

The Second Department determined Supreme Court properly granted defendants' motion for a new trial (CPLR 4404) in this car-bus-accident wrongful death case if plaintiff did not agree to a reduction of damages for pre-impact terror and conscious pain and suffering:

> Here, the evidence at trial established that the decedent made eye contact with the defendant bus operator, William R. Dortch, for approximately one second before the bus collided with the decedent's vehicle. Under these circumstances, we agree with the Supreme Court's determinations that the $250,000 award for pre-impact terror deviated materially from what would be reasonable compensation and to grant the branch of the defendants' cross motion which was for a new trial on the issue of pre-impact terror unless the plaintiff agreed to an award in the principal sum of $50,000 ... .
>
> Here, we agree with the Supreme Court's determination that the jury award in the principal sum of $1,250,000 deviated materially from what would be reasonable compensation for the decedent's post-impact conscious pain and suffering. The evidence established that the decedent was able to feel pain following the collision, but that she was able to do so for, at most, 11 to 20 minutes and that, during that time, she was minimally conscious (see id. at 460). Under these circumstances, that branch of the defendants' motion which was for a new trial on the issue of conscious pain and suffering unless the plaintiff agreed to an award in the principal sum of $400,000 was properly granted ... . **Vatalaro v County of Suffolk, 2018 NY Slip Op 05352, Second Dept 7-18-18**

NEGLIGENCE (TRAFFIC ACCIDENTS, MOTION FOR A NEW TRIAL UNLESS PLAINTIFF AGREED TO A REDUCTION IN DAMAGES FOR PRE-IMPACT TERROR AND CONSCIOUS PAIN AND SUFFERING IN THIS TRAFFIC-ACCIDENT WRONGFUL DEATH CASE PROPERLY GRANTED (SECOND DEPT))/CIVIL PROCEDURE (MOTION FOR A NEW TRIAL UNLESS PLAINTIFF AGREED TO A REDUCTION IN DAMAGES FOR PRE-IMPACT TERROR AND CONSCIOUS PAIN AND SUFFERING IN THIS TRAFFIC-ACCIDENT WRONGFUL DEATH CASE PROPERLY GRANTED (SECOND DEPT))/CPLR 4404 (MOTION FOR A NEW TRIAL UNLESS PLAINTIFF AGREED TO A REDUCTION IN DAMAGES FOR PRE-IMPACT TERROR AND CONSCIOUS PAIN AND SUFFERING IN THIS TRAFFIC-ACCIDENT WRONGFUL DEATH CASE PROPERLY GRANTED (SECOND DEPT))/TRAFFIC ACCIDENTS (MOTION FOR A NEW TRIAL UNLESS PLAINTIFF AGREED TO A REDUCTION IN DAMAGES FOR PRE-IMPACT TERROR AND CONSCIOUS PAIN AND SUFFERING IN THIS TRAFFIC-ACCIDENT WRONGFUL DEATH CASE PROPERLY GRANTED (SECOND DEPT))/BUSES (TRAFFIC ACCIDENTS, MOTION FOR A NEW TRIAL UNLESS PLAINTIFF AGREED TO A REDUCTION IN DAMAGES FOR PRE-IMPACT TERROR AND CONSCIOUS PAIN AND SUFFERING IN THIS TRAFFIC-ACCIDENT WRONGFUL DEATH CASE PROPERLY GRANTED (SECOND DEPT))/MUNICIPAL LAW (TRAFFIC ACCIDENTS, BUSES, MOTION FOR A NEW TRIAL UNLESS PLAINTIFF AGREED TO A REDUCTION IN DAMAGES FOR PRE-IMPACT TERROR AND CONSCIOUS PAIN AND SUFFERING IN THIS TRAFFIC-ACCIDENT WRONGFUL DEATH CASE PROPERLY GRANTED (SECOND DEPT))/WRONGFUL DEATH (DAMAGES, MOTION FOR A NEW TRIAL UNLESS PLAINTIFF AGREED TO A REDUCTION IN DAMAGES FOR PRE-IMPACT TERROR AND CONSCIOUS PAIN AND SUFFERING IN THIS TRAFFIC-ACCIDENT WRONGFUL DEATH CASE PROPERLY GRANTED (SECOND DEPT))/DAMAGES (WRONGFUL DEATH, MOTION FOR A NEW TRIAL UNLESS PLAINTIFF AGREED TO A REDUCTION IN DAMAGES FOR PRE-IMPACT TERROR AND CONSCIOUS PAIN AND SUFFERING IN THIS TRAFFIC-ACCIDENT WRONGFUL DEATH CASE PROPERLY GRANTED (SECOND DEPT))/PRE-IMPACT TERROR (WRONGFUL DEATH, MOTION FOR A NEW TRIAL UNLESS PLAINTIFF AGREED TO A REDUCTION IN DAMAGES FOR PRE-IMPACT TERROR AND CONSCIOUS PAIN AND SUFFERING IN THIS TRAFFIC-ACCIDENT WRONGFUL DEATH CASE PROPERLY GRANTED (SECOND DEPT))/CONSCIOUS PAIN AND SUFFERING (WRONGFUL DEATH, MOTION FOR A NEW TRIAL UNLESS PLAINTIFF AGREED TO A REDUCTION IN DAMAGES FOR PRE-IMPACT TERROR AND CONSCIOUS PAIN AND SUFFERING IN THIS TRAFFIC-ACCIDENT WRONGFUL DEATH CASE PROPERLY GRANTED (SECOND DEPT))

NEGLIGENCE, CONTRACT LAW.

QUESTION OF FACT WHETHER GENERAL CONTRACTOR'S REMOVAL OF A TANK EXPOSING AN OPENING LAUNCHED AN INSTRUMENT OF HARM IMPOSING CONTRACT-BASED LIABILITY, FACT THAT OPENING WAS OBVIOUS AND KNOWN TO PLAINTIFF SPEAKS TO COMPARATIVE NEGLIGENCE AND DID NOT WARRANT SUMMARY JUDGMENT IN FAVOR OF DEFENDANTS (FIRST DEPT).

The First Department, over a two-justice dissent, determined that the general contractor's (Harbour's) motion for summary judgment in this slip and fall case was properly denied. Plaintiff alleged that Harbour removed a tank and exposed a dangerous opening in a metal plate. Plaintiff alleged, while working at the site, he stepped backwards into the opening and fell, hitting his head on the concrete floor. The First Department held there was a question of fact whether Harbour launched an instrument of harm by not taking remedial measures to make the area safe after removing the tank. The fact that the opening was obvious and plaintiff knew about it did not warrant summary judgment in favor of the defendants:

> Although both defendants argue that the exposed opening in the metal plate was open, obvious, readily observable and known to plaintiff, a property owner has a nondelegable duty to maintain its premises in a reasonably safe condition, taking into account the forseeability of injury to others ... . Moreover, although a defect or hazard may be discernable, this does not end the analysis, or compel a determination in favor of the property owner ... . Plaintiff's awareness of a dangerous condition does not negate a duty to warn of the hazard, but only goes to the issue of comparative negligence ... . Given the exposed opening's proximity to equipment that required service, the circumstances of plaintiff's accident present an issue of fact of not only whether the condition was open and obvious, but also whether it was inherently dangerous... . Some hazards, although discernable, may be hazardous because of their nature and location ... . Defendants did not establish that the exposed opening - given its location in the floor near other mechanical equipment in the pump room - was not only open and obvious, but that there was no duty to warn, and that the condition was not inherently dangerous ... .
>
> A contractual obligation, standing alone, will not give rise to tort liability in favor of a noncontracting third party (Espinal 98 NY2d at 138]). One exception to this broad rule is where the contracting party, in failing to exercise reasonable care in the performance of his duties, "launche[s] a force or instrument of harm" (Espinal at 140). We depart from the dissent in finding that Harbour failed to make a prima facie showing that it did not owe plaintiff a duty of care and that it did not negligently cause, create or exacerbate a dangerous condition. **Farrugia v 1440 Broadway Assoc., 2018 NY Slip Op 05222, First Dept 7-12-18**

NEGLIGENCE (SLIP AND FALL, QUESTION OF FACT WHETHER GENERAL CONTRACTOR'S REMOVAL OF A TANK EXPOSING AN OPENING LAUNCHED AN INSTRUMENT OF HARM IMPOSING CONTRACT-BASED LIABILITY, FACT THAT OPENING WAS OBVIOUS AND KNOWN TO PLAINTIFF SPEAKS TO COMPARATIVE NEGLIGENCE AND DID NOT WARRANT SUMMARY JUDGMENT IN FAVOR OF DEFENDANTS (FIRST DEPT))/CONTRACT LAW (TORT LIABILITY, SLIP AND FALL, QUESTION OF FACT WHETHER GENERAL CONTRACTOR'S REMOVAL OF A TANK EXPOSING AN OPENING LAUNCHED AN INSTRUMENT OF HARM IMPOSING CONTRACT-BASED LIABILITY, FACT THAT OPENING WAS OBVIOUS AND KNOWN TO PLAINTIFF SPEAKS TO COMPARATIVE NEGLIGENCE AND DID NOT WARRANT SUMMARY JUDGMENT IN FAVOR OF DEFENDANTS (FIRST DEPT))/ESPINAL (TORT LIABILITY, SLIP AND FALL, QUESTION OF FACT WHETHER GENERAL CONTRACTOR'S REMOVAL OF A TANK EXPOSING AN OPENING LAUNCHED AN INSTRUMENT OF HARM IMPOSING CONTRACT-BASED LIABILITY, FACT THAT OPENING WAS OBVIOUS AND KNOWN TO PLAINTIFF SPEAKS TO COMPARATIVE NEGLIGENCE AND DID NOT WARRANT SUMMARY JUDGMENT IN FAVOR OF DEFENDANTS (FIRST DEPT))/COMPARATIVE NEGLIGENCE (SLIP AND FALL, QUESTION OF FACT WHETHER GENERAL CONTRACTOR'S REMOVAL OF A TANK EXPOSING AN OPENING LAUNCHED AN INSTRUMENT OF HARM IMPOSING CONTRACT-BASED LIABILITY, FACT THAT OPENING WAS OBVIOUS AND KNOWN TO PLAINTIFF SPEAKS TO COMPARATIVE NEGLIGENCE AND DID NOT WARRANT SUMMARY JUDGMENT IN FAVOR OF DEFENDANTS (FIRST DEPT))/SLIP AND FALL (QUESTION OF FACT WHETHER GENERAL CONTRACTOR'S REMOVAL OF A TANK EXPOSING AN OPENING LAUNCHED AN INSTRUMENT OF HARM IMPOSING CONTRACT-BASED LIABILITY, FACT THAT OPENING WAS OBVIOUS AND KNOWN TO PLAINTIFF SPEAKS TO COMPARATIVE NEGLIGENCE AND DID NOT WARRANT SUMMARY JUDGMENT IN FAVOR OF DEFENDANTS (FIRST DEPT))/OPEN AND OBVIOUS (SLIP AND FALL, QUESTION OF FACT WHETHER GENERAL CONTRACTOR'S REMOVAL OF A TANK EXPOSING AN OPENING LAUNCHED AN INSTRUMENT OF HARM IMPOSING CONTRACT-BASED LIABILITY, FACT THAT OPENING WAS OBVIOUS AND KNOWN TO PLAINTIFF SPEAKS TO COMPARATIVE NEGLIGENCE AND DID NOT WARRANT SUMMARY JUDGMENT IN FAVOR OF DEFENDANTS (FIRST DEPT))

NEGLIGENCE, CONTRACT LAW.

NEGLIGENCE ACTION STEMMING FROM AN ALLEGED BREACH OF CONTRACT SHOULD HAVE BEEN DISMISSED, CRITERIA FOR A VALID NEGLIGENCE CAUSE OF ACTION IN THIS CONTEXT EXPLAINED (SECOND DEPT).

The Second Department determined a negligence cause of action, which was based upon a breach of contract allegation, should have been dismissed:

> "[A] simple breach of contract is not to be considered a tort unless a legal duty independent of the contract itself has been violated" ... . "This legal duty must spring from circumstances extraneous to, and not constituting elements of, the contract, although it may be connected with and dependent upon the contract" ,,, , "Merely charging a breach of a duty of due care', employing language familiar to tort law, does not, without more, transform a simple breach of contract into a tort claim" ... . "[W]here [a] plaintiff is essentially seeking enforcement of the bargain, the action should proceed under a contract theory" ... .
>
> Here, the complaint did not allege facts that would give rise to a duty owed to the plaintiff that is independent of the duty imposed by the parties' agreement. **Ocean Gate Homeowners Assn., Inc. v T.W. Finnerty Prop. Mgt., Inc., 2018 NY Slip Op 05475, Second Dept 7-25-18**

NEGLIGENCE (CONTRACT LAW, NEGLIGENCE ACTION STEMMING FROM AN ALLEGED BREACH OF CONTRACT SHOULD HAVE BEEN DISMISSED, CRITERIA FOR A VALID NEGLIGENCE CAUSE OF ACTION IN THIS CONTEXT EXPLAINED (SECOND DEPT))/CONTRACT LAW (NEGLIGENCE ACTION STEMMING FROM AN ALLEGED BREACH OF CONTRACT SHOULD HAVE BEEN DISMISSED, CRITERIA FOR A VALID NEGLIGENCE CAUSE OF ACTION IN THIS CONTEXT EXPLAINED (SECOND DEPT)

NEGLIGENCE, EDUCATION-SCHOOL LAW.

EIGHT YEAR OLD STUDENT MISSED HIS BUS AND WAS ALLEGEDLY TOLD BY A SCHOOL EMPLOYEE TO WALK HOME, THE STUDENT WAS STRUCK BY A CAR ON HIS WAY HOME, THE NEGLIGENT SUPERVISION COMPLAINT AGAINST THE SCHOOL DISTRICT SHOULD NOT HAVE BEEN DISMISSED (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined that an action brought by an eight year old student against the school district should not have been dismissed. It was alleged the student missed his bus and was told to walk home (two miles away). The student was hit by a car. The court noted that the school district is not off the hook simply because the injury did not occur on school property:

> "[A]lthough a school district's duty of care toward a student generally ends when it relinquishes custody of the student, the duty continues when the student is released into a potentially hazardous situation, particularly when the hazard is partly of the school district's own making" ... . "Thus, while a school has no duty to prevent injury to schoolchildren released in a safe and anticipated manner, the school breaches a duty when it releases a child without further supervision into a foreseeably hazardous setting it had a hand in creating" ... . Contrary to defendants' contention and the court's holding, [precedent] does not limit a school's liability to injuries that occur near school grounds. Rather, a "school district's duty of care requires continued exercise of control and supervision in the event that release of the child poses a foreseeable risk of harm," irrespective of the physical distance between the school and the location of the reasonably foreseeable risk ... .
>
> Here, plaintiff raised a triable issue of fact concerning whether defendants, in violation of their own policies and procedures, released the child into a "foreseeably hazardous setting" partly of their own making and thereby breached their duty of care ... . **Deng v Young, 2018 NY Slip Op 05414, Second Dept 7-25-18**

NEGLIGENCE (EDUCATION-SCHOOL LAW, EIGHT YEAR OLD STUDENT MISSED HIS BUS AND WAS ALLEGEDLY TOLD BY A SCHOOL EMPLOYEE TO WALK HOME, THE STUDENT WAS STRUCK BY A CAR ON HIS WAY HOME, THE NEGLIGENT SUPERVISION COMPLAINT AGAINST THE SCHOOL DISTRICT SHOULD NOT HAVE BEEN DISMISSED (FOURTH DEPT))/EDUCATION-SCHOOL LAW (NEGLIGENCE, EDUCATION-SCHOOL LAW, EIGHT YEAR OLD STUDENT MISSED HIS BUS AND WAS ALLEGEDLY TOLD BY A SCHOOL EMPLOYEE TO WALK HOME, THE STUDENT WAS STRUCK BY A CAR ON HIS WAY HOME, THE NEGLIGENT SUPERVISION COMPLAINT AGAINST THE SCHOOL DISTRICT SHOULD NOT HAVE BEEN DISMISSED (FOURTH DEPT))

NEGLIGENCE, EMPLOYMENT LAW.

THE MEDICAL PROFESSIONALS INVOLVED WITH REVIEWING AN X-RAY OF PLAINTIFF'S DECEDENT'S CHEST ON BEHALF OF DECEDENT'S EMPLOYER DID NOT HAVE A DUTY TO INFORM THE DECEDENT OR HIS PHYSICIAN OF THE CANCER FINDINGS (FOURTH DEPT).

The Fourth Department, in a full-fledged opinion by Justice DeJoseph, reversing Supreme Court, determined that the medical professionals involved with review of an x-ray of plaintiff's decedent's chest on behalf of plaintiff's decedent's employer did not have a duty to report the findings to the decedent or decedent's physician. The mass that was seen on the x-ray apparently was cancer and plaintiff's decedent was not informed. He later asked his employer, NYSEG, about the findings but by then the cancer was incurable:

> The chest x ray was performed at defendant Lockport Memorial Hospital and decedent signed a consent form prior to the procedure. The consent form provided, in pertinent part, the following: "I, [decedent], understand that medical examinations done at this facility are for evaluation purposes for either employment suitability or worker's compensation injury/illness treatment. The examinations done here are not intended to detect all underlying health conditions and do not replace the medical care provided by my personal physician. I hereby consent to the examination for the stated purposes or request the services stipulated of [WNYOM]. Furthermore, I understand that all medical information related to my ability to perform the functions of my job will be reported to the designated employer representatives at my place of employment." ...
>
> "The failure to communicate significant medical findings to a patient or his treating physician is not malpractice but ordinary negligence" ... . * * *
>
> .. [T]there is no dispute that defendants correctly interpreted the results of the x ray and timely conveyed the results to decedent's employer. Notably absent from the record is the identity or even existence of decedent's treating physician. Nor is there any indication that defendants were made aware of any treating physician. Furthermore, the consent form, executed by decedent, specifically indicated that decedent "underst[oo]d that all medical information related to [his] ability to perform the functions of [his] job w[ould] be reported to the designated employer representatives at [his] place of employment." There is also no dispute that defendants adhered to the requirements set forth in the consent form. We therefore conclude that ... there was no duty to decedent and, as stated by the Court of Appeals, "[w]e have been reluctant to expand a doctor's duty of care to a patient to encompass nonpatients. A critical concern underlying this reluctance is the danger that a recognition of a duty would render doctors liable to a prohibitive number of possible plaintiffs" ... . **Kingsley v Price, 2018 NY Slip Op 05088, Fourth Dept 7-6-18**

NEGLIGENCE (THE MEDICAL PROFESSIONALS INVOLVED WITH REVIEWING AN X-RAY OF PLAINTIFF'S DECEDENT'S CHEST ON BEHALF OF DECEDENT'S EMPLOYER DID NOT HAVE A DUTY TO INFORM THE DECEDENT OR HIS PHYSICIAN OF THE CANCER FINDINGS (FOURTH DEPT))/EMPLOYMENT LAW (THE MEDICAL PROFESSIONALS INVOLVED WITH REVIEWING AN X-RAY OF PLAINTIFF'S DECEDENT'S CHEST ON BEHALF OF DECEDENT'S EMPLOYER DID NOT HAVE A DUTY TO INFORM THE DECEDENT OR HIS PHYSICIAN OF THE CANCER FINDINGS (FOURTH DEPT))

NEGLIGENCE, EMPLOYMENT LAW, CIVIL PROCEDURE.

PLAINTIFF ALLEGED HE WAS PUNCHED IN THE FACE BY A BAR EMPLOYEE AND SUED THE BAR FOR BREACH OF A DUTY TO KEEP THE PREMISES SAFE, WHICH WAS PROPERLY DISMISSED AS UNTIMELY, NEGLIGENT HIRING AND SUPERVISION, WHICH SHOULD NOT HAVE BEEN DISMISSED, AND VICARIOUS LIABILITY, WHICH ALTHOUGH INCONSISTENT WITH NEGLIGENT SUPERVISION, CAN BE PLED IN THE ALTERNATIVE (THIRD DEPT).

The Third Department, reversing (modifying) Supreme Court determined plaintiff, who alleged he was punched in the face by defendant bar's employee (Bonawitz), properly pled causes of action against the bar for negligent hiring and supervision, as well as vicarious liability. Although vicarious liability requires the employee to be acting within the scope of his employment, and a negligent hiring and supervision cause of action requires that the employee act outside the scope of employment, pleading inconsistent theories in the alternative is allowed. The court noted that the "breach of the duty to keep the premises safe" cause of action was properly dismissed because it constituted an attempt to plead vicarious liability for an intentional tort as negligence to avoid the one-year statute of limitations for intentional torts:

> The second cause of action alleges that the employer defendants negligently hired and supervised Bonawitz. Supreme Court dismissed this cause of action based on cases holding that, "[g]enerally, where an employee is acting within the scope of his or her employment, the employer is liable under the theory of respondent superior, and the plaintiff may not proceed with a claim to recover damages for negligent hiring, retention, supervision, or training" ... . The rationale for this rule "is that if the employee was not negligent, there is no basis for imposing liability on the employer, and if the employee was negligent, the employer must pay the judgment regardless of the reasonableness of the hiring or retention or the adequacy of the training" ... . As is apparent from these cases, however, this rule applies where the employee is alleged to have acted negligently, not intentionally.
>
> Plaintiff has adequately alleged that the employer defendants negligently hired, supervised and retained Bonawitz even though they knew or should have known of his propensity to assault or intentionally inflict harm on others ... . Moreover, the negligence of an employer is not transformed into intentional conduct simply because the employee's wrongful conduct was intentional ... . Thus, plaintiff's allegations of negligence were timely asserted within the applicable three-year statute of limitations (see CPLR 214 [5] ...).
>
> Plaintiff did not directly allege that Bonawitz was acting within the scope of his employment when he punched plaintiff. Even if such allegations were included, allegations of vicarious liability, though incompatible with a claim of negligent hiring and supervision, do not require dismissal because a plaintiff may plead inconsistent theories in the alternative ... . **McCarthy v Mario Enters., Inc., 2018 NY Slip Op 05006, Third Dept 7-5-18**

NEGLIGENCE (EMPLOYMENT LAW, BARS AND RESTAURANTS, THIRD PARTY ASSAULTS, PLAINTIFF ALLEGED HE WAS PUNCHED IN THE FACE BY A BAR EMPLOYEE AND SUED THE BAR FOR BREACH OF A DUTY TO KEEP THE PREMISES SAFE, WHICH WAS PROPERLY DISMISSED AS UNTIMELY, NEGLIGENT HIRING AND SUPERVISION, WHICH SHOULD NOT HAVE BEEN DISMISSED, AND VICARIOUS LIABILITY, WHICH ALTHOUGH INCONSISTENT WITH NEGLIGENT SUPERVISION, CAN BE PLED IN THE ALTERNATIVE (THIRD DEPT))/EMPLOYMENT LAW (NEGLIGENCE, BARS AND RESTAURANTS, THIRD PARTY ASSAULTS, PLAINTIFF ALLEGED HE WAS PUNCHED IN THE FACE BY A BAR EMPLOYEE AND SUED THE BAR FOR BREACH OF A DUTY TO KEEP THE PREMISES SAFE, WHICH WAS PROPERLY DISMISSED AS UNTIMELY, NEGLIGENT HIRING AND SUPERVISION, WHICH SHOULD NOT HAVE BEEN DISMISSED, AND VICARIOUS LIABILITY, WHICH ALTHOUGH INCONSISTENT WITH NEGLIGENT SUPERVISION, CAN BE PLED IN THE ALTERNATIVE (THIRD DEPT))/CIVIL PROCEDURE (STATUE OF LIMITATIONS, INTENTIONAL TORTS, ,EMPLOYMENT LAW, BARS AND RESTAURANTS, THIRD PARTY ASSAULTS, PLAINTIFF ALLEGED HE WAS PUNCHED IN THE FACE BY A BAR EMPLOYEE AND SUED THE BAR FOR BREACH OF A DUTY TO KEEP THE PREMISES SAFE, WHICH WAS PROPERLY DISMISSED AS UNTIMELY, NEGLIGENT HIRING AND SUPERVISION, WHICH SHOULD NOT HAVE BEEN DISMISSED, AND VICARIOUS LIABILITY, WHICH ALTHOUGH INCONSISTENT WITH NEGLIGENT SUPERVISION, CAN BE PLED IN THE ALTERNATIVE (THIRD DEPT))/CPLR 214 (STATUE OF LIMITATIONS, INTENTIONAL TORTS, ,EMPLOYMENT LAW, BARS AND RESTAURANTS, THIRD PARTY ASSAULTS, PLAINTIFF ALLEGED HE WAS PUNCHED IN THE FACE BY A BAR EMPLOYEE AND SUED THE BAR FOR BREACH OF A DUTY TO KEEP THE PREMISES SAFE, WHICH WAS PROPERLY DISMISSED AS UNTIMELY, NEGLIGENT HIRING AND SUPERVISION, WHICH SHOULD NOT HAVE BEEN DISMISSED, AND VICARIOUS LIABILITY, WHICH ALTHOUGH INCONSISTENT WITH NEGLIGENT SUPERVISION, CAN BE PLED IN THE ALTERNATIVE (THIRD DEPT))/INTENTIONAL TORTS (STATUTE OF

LIMITATIONS, EMPLOYMENT LAW, BARS AND RESTAURANTS, THIRD PARTY ASSAULTS, PLAINTIFF ALLEGED HE WAS PUNCHED IN THE FACE BY A BAR EMPLOYEE AND SUED THE BAR FOR BREACH OF A DUTY TO KEEP THE PREMISES SAFE, WHICH WAS PROPERLY DISMISSED AS UNTIMELY, NEGLIGENT HIRING AND SUPERVISION, WHICH SHOULD NOT HAVE BEEN DISMISSED, AND VICARIOUS LIABILITY, WHICH ALTHOUGH INCONSISTENT WITH NEGLIGENT SUPERVISION, CAN BE PLED IN THE ALTERNATIVE (THIRD DEPT))/THIRD PARTY ASSAULTS (NEGLIGENCE, EMPLOYMENT LAW, BARS AND RESTAURANTS, THIRD PARTY ASSAULTS, PLAINTIFF ALLEGED HE WAS PUNCHED IN THE FACE BY A BAR EMPLOYEE AND SUED THE BAR FOR BREACH OF A DUTY TO KEEP THE PREMISES SAFE, WHICH WAS PROPERLY DISMISSED AS UNTIMELY, NEGLIGENT HIRING AND SUPERVISION, WHICH SHOULD NOT HAVE BEEN DISMISSED, AND VICARIOUS LIABILITY, WHICH ALTHOUGH INCONSISTENT WITH NEGLIGENT SUPERVISION, CAN BE PLED IN THE ALTERNATIVE (THIRD DEPT))

NEGLIGENCE, EVIDENCE.

ALTHOUGH PROOF OF THE STAIRWAY FALL CASE WAS ENTIRELY CIRCUMSTANTIAL BECAUSE OF PLAINTIFF'S DECEDENT'S DEATH, THE EVIDENCE WAS SUFFICIENT TO SUPPORT THE PLAINTIFF'S VERDICT AND THE JURY WAS PROPERLY GIVEN THE NOSEWORTHY INSTRUCTION (THIRD DEPT).

The Third Department determined defendant's motion to set aside the verdict in this stairway-fall case was properly denied. Plaintiff's decedent was found at the bottom of a deteriorating concrete exterior staircase and later died from his injuries. Although plaintiff's decedent made some remarks to emergency personnel about the fall, he died before he could be deposed. The Third Department described the evidentiary standards in such a case and found that the "Noseworthy" jury instruction was properly given:

> ... [P]laintiff had to rely entirely on circumstantial evidence to establish that defendant's negligence was the proximate cause of decedent's fall. In doing so, plaintiff was not "required to rule out all plausible variables and factors that could have caused or contributed to the accident" ... . Rather, plaintiff had to prove that defendant's negligence was the more likely cause of decedent's fall than any other potential cause... . Plaintiff's proof had to "render other causes sufficiently remote such that the jury [could] base its verdict on logical inferences drawn from the evidence, not merely on speculation" ... .
>
> We are also unpersuaded by defendant's contention that Supreme Court erred in giving a jury charge based upon Noseworthy v City of New York (298 NY 76 [1948]), which — in cases where the alleged negligent act or omission resulted in death — imposes a lighter burden of persuasion on the plaintiff by allowing the jury "greater latitude in evaluating such factual issues as the decedent might have testified to had [he or she] lived" ... . The theory behind the Noseworthy charge is "that it is unfair to permit a defendant who has knowledge of the facts to benefit by remaining mute in a wrongful death action where the decedent is unavailable to describe the occurrence" ... . The charge, however, is inapplicable "where the plaintiff and the defendant have equal access to the facts surrounding the decedent's death" ... . **Tyrell v Pollak, 2018 NY Slip Op 05251, Third Dept 7-12-18**

NEGLIGENCE (ALTHOUGH PROOF OF THE STAIRWAY FALL CASE WAS ENTIRELY CIRCUMSTANTIAL BECAUSE OF PLAINTIFF'S DECEDENT'S DEATH, THE EVIDENCE WAS SUFFICIENT TO SUPPORT THE PLAINTIFF'S VERDICT AND THE JURY WAS PROPERLY GIVEN THE NOSEWORTHY INSTRUCTION (THIRD DEPT))/EVIDENCE (NEGLIGENCE, SLIP AND FALL, ALTHOUGH PROOF OF THE STAIRWAY FALL CASE WAS ENTIRELY CIRCUMSTANTIAL BECAUSE OF PLAINTIFF'S DECEDENT'S DEATH, THE EVIDENCE WAS SUFFICIENT TO SUPPORT THE PLAINTIFF'S VERDICT AND THE JURY WAS PROPERLY GIVEN THE NOSEWORTHY INSTRUCTION (THIRD DEPT))/SLIP AND FALL (ALTHOUGH PROOF OF THE STAIRWAY FALL CASE WAS ENTIRELY CIRCUMSTANTIAL BECAUSE OF PLAINTIFF'S DECEDENT'S DEATH, THE EVIDENCE WAS SUFFICIENT TO SUPPORT THE PLAINTIFF'S VERDICT AND THE JURY WAS PROPERLY GIVEN THE NOSEWORTHY INSTRUCTION (THIRD DEPT))/JURY INSTRUCTIONS (NOSEWORTHY, ALTHOUGH PROOF OF THE STAIRWAY FALL CASE WAS ENTIRELY CIRCUMSTANTIAL BECAUSE OF PLAINTIFF'S DECEDENT'S DEATH, THE EVIDENCE WAS SUFFICIENT TO SUPPORT THE PLAINTIFF'S VERDICT AND THE JURY WAS PROPERLY GIVEN THE NOSEWORTHY INSTRUCTION (THIRD DEPT))/NOSEWORTHY (ALTHOUGH PROOF OF THE STAIRWAY FALL CASE WAS ENTIRELY CIRCUMSTANTIAL BECAUSE OF PLAINTIFF'S DECEDENT'S DEATH, THE EVIDENCE WAS SUFFICIENT TO SUPPORT THE PLAINTIFF'S VERDICT AND THE JURY WAS PROPERLY GIVEN THE NOSEWORTHY INSTRUCTION (THIRD DEPT))

NEGLIGENCE, EVIDENCE, APPEALS, CIVIL PROCEDURE.

PLAINTIFF'S EXPERT WITNESS DISCLOSURE SHOULD NOT HAVE BEEN STRUCK AND THE EXPERT SHOULD NOT HAVE BEEN PRECLUDED FROM TESTIFYING ABOUT THE RELEVANT STANDARDS FOR USE OF SLIDES IN SWIMMING POOLS, PLAINTIFF ALLEGEDLY STRUCK HER HEAD ON THE BOTTOM OF THE POOL AFTER SLIDING HEAD FIRST, THE RULING ON THE MOTION IS APPEALABLE BECAUSE IT DEALS WITH THE MERITS AND AFFECTS A SUBSTANTIAL RIGHT (FOURTH DEPT).

The Fourth Department, reversing (modifying) Supreme Court, determined that defendants' motion in limine to strike plaintiff's expert witness disclosure and preclude the expert from testifying should not have been granted. The court noted that the evidentiary motion was appealable because it involved the merits of this swimming pool injury case and affected a substantial right. The disclosure indicated the expert would testify about New York State code provisions and ANSI/INSPI-4 standards for slides used in swimming pools. Plaintiff alleged she was injured when her head struck the bottom of the pool after sliding into the water head first:

> ... [T]he court erred in granting that part of the motion to strike the expert witness disclosure and to preclude the expert from testifying with respect to the 2010 Residential Code of New York State (Residential Code) and the ANSI/NSPI-4 standard for aboveground residential swimming pools, and we therefore modify the order accordingly. Section 1.2 of that standard provides that "[a]boveground/onground residential swimming pools are for swimming and wading only. No . . . slides or other equipment are to be added to an aboveground/onground pool that in any way indicates that an aboveground/onground pool may be used or intended for . . . sliding purposes," and the ANSI/NSPI-4 standard is incorporated in the Residential Code that was in effect at the time of plaintiff's accident (see 2010 Residential Code of New York State §§ R102.6, G109.1). Inasmuch as the ANSI/NSPI-4 standard applies only to residential pools, and the Residential Code applies to family dwellings (see Residential Code § R101.2), we conclude that the Residential Code section adopting the ANSI/NSPI-4 standard applies to private homeowners. Thus, we further conclude that plaintiff's expert may properly rely on any violation of the ANSI/NSPI-4 standard as "some evidence" of defendants' negligence ... . **Redmond v Redmond, 2018 NY Slip Op 05417, Fourth Dept 7-25-18**

NEGLIGENCE (PLAINTIFF'S EXPERT WITNESS DISCLOSURE SHOULD NOT HAVE BEEN STRUCK AND THE EXPERT SHOULD NOT HAVE BEEN PRECLUDED FROM TESTIFYING ABOUT THE RELEVANT STANDARDS FOR USE OF SLIDES IN SWIMMING POOLS, PLAINTIFF ALLEGEDLY STRUCK HER HEAD ON THE BOTTOM OF THE POOL AFTER SLIDING HEAD FIRST, THE RULING ON THE MOTION IS APPEALABLE BECAUSE IT DEALS WITH THE MERITS AND AFFECTS A SUBSTANTIAL RIGHT (FOURTH DEPT))/EVIDENCE (PLAINTIFF'S EXPERT WITNESS DISCLOSURE SHOULD NOT HAVE BEEN STRUCK AND THE EXPERT SHOULD NOT HAVE BEEN PRECLUDED FROM TESTIFYING ABOUT THE RELEVANT STANDARDS FOR USE OF SLIDES IN SWIMMING POOLS, PLAINTIFF ALLEGEDLY STRUCK HER HEAD ON THE BOTTOM OF THE POOL AFTER SLIDING HEAD FIRST, THE RULING ON THE MOTION IS APPEALABLE BECAUSE IT DEALS WITH THE MERITS AND AFFECTS A SUBSTANTIAL RIGHT (FOURTH DEPT))/EXPERT OPINION (PLAINTIFF'S EXPERT WITNESS DISCLOSURE SHOULD NOT HAVE BEEN STRUCK AND THE EXPERT SHOULD NOT HAVE BEEN PRECLUDED FROM TESTIFYING ABOUT THE RELEVANT STANDARDS FOR USE OF SLIDES IN SWIMMING POOLS, PLAINTIFF ALLEGEDLY STRUCK HER HEAD ON THE BOTTOM OF THE POOL AFTER SLIDING HEAD FIRST, THE RULING ON THE MOTION IS APPEALABLE BECAUSE IT DEALS WITH THE MERITS AND AFFECTS A SUBSTANTIAL RIGHT (FOURTH DEPT))/APPEALS (PLAINTIFF'S EXPERT WITNESS DISCLOSURE SHOULD NOT HAVE BEEN STRUCK AND THE EXPERT SHOULD NOT HAVE BEEN PRECLUDED FROM TESTIFYING ABOUT THE RELEVANT STANDARDS FOR USE OF SLIDES IN SWIMMING POOLS, PLAINTIFF ALLEGEDLY STRUCK HER HEAD ON THE BOTTOM OF THE POOL AFTER SLIDING HEAD FIRST, THE RULING ON THE MOTION IS APPEALABLE BECAUSE IT DEALS WITH THE MERITS AND AFFECTS A SUBSTANTIAL RIGHT (FOURTH DEPT))/CIVIL PROCEDURE (PLAINTIFF'S EXPERT WITNESS DISCLOSURE SHOULD NOT HAVE BEEN STRUCK AND THE EXPERT SHOULD NOT HAVE BEEN PRECLUDED FROM TESTIFYING ABOUT THE RELEVANT STANDARDS FOR USE OF SLIDES IN SWIMMING POOLS, PLAINTIFF ALLEGEDLY STRUCK HER HEAD ON THE BOTTOM OF THE POOL AFTER SLIDING HEAD FIRST, THE RULING ON THE MOTION IS APPEALABLE BECAUSE IT DEALS WITH THE MERITS AND AFFECTS A SUBSTANTIAL RIGHT (FOURTH DEPT))

NEGLIGENCE, MUNICIPAL LAW.

A TREE FELL ON THE CAR IN WHICH PLAINTIFF WAS A PASSENGER, TOWN'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED, TOWN DID NOT DEMONSTRATE IT HAD INSPECTED THE TREE AND DID NOT DEMONSTRATE A LACK OF NOTICE OF THE CONDITION OF THE TREE (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the defendant town's motion for summary judgment in this tree-fall accident should not have been granted. Plaintiff alleged a tree near the roadway fell on the vehicle in which plaintiff was a passenger:

> Municipalities have a duty to maintain their roadways in a reasonably safe condition, and this duty extends to trees adjacent to the road which could pose a danger to travelers ... . Municipalities also possess a common-law duty to inspect trees adjacent to their roadways ...
>
> Here, the Town did not establish its prima facie entitlement to judgment as a matter of law because it failed to demonstrate that it met its duty to inspect and maintain the subject tree, or that it lacked constructive notice of the alleged dangerous condition of the tree ... . **Schillaci v Town of Islip, 2018 NY Slip Op 05070, Second Dept 7-5-18**

NEGLIGENCE (MUNICIPAL LAW, A TREE FELL ON THE CAR IN WHICH PLAINTIFF WAS A PASSENGER, TOWN'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED, TOWN DID NOT DEMONSTRATE IT HAD INSPECTED THE TREE AND DID NOT DEMONSTRATE A LACK OF NOTICE OF THE CONDITION OF THE TREE (SECOND DEPT))/MUNICIPAL LAW (NEGLIGENCE, TREES, ROADS AND HIGHWAYS, A TREE FELL ON THE CAR IN WHICH PLAINTIFF WAS A PASSENGER, TOWN'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED, TOWN DID NOT DEMONSTRATE IT HAD INSPECTED THE TREE AND DID NOT DEMONSTRATE A LACK OF NOTICE OF THE CONDITION OF THE TREE (SECOND DEPT))/TREES (MUNICIPAL LAW, HIGHWAYS AND ROADS, A TREE FELL ON THE CAR IN WHICH PLAINTIFF WAS A PASSENGER, TOWN'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED, TOWN DID NOT DEMONSTRATE IT HAD INSPECTED THE TREE AND DID NOT DEMONSTRATE A LACK OF NOTICE OF THE CONDITION OF THE TREE (SECOND DEPT))/HIGHWAYS AND ROADS (NEGLIGENCE, MUNICIPAL LAW, TREES, A TREE FELL ON THE CAR IN WHICH PLAINTIFF WAS A PASSENGER, TOWN'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED, TOWN DID NOT DEMONSTRATE IT HAD INSPECTED THE TREE AND DID NOT DEMONSTRATE A LACK OF NOTICE OF THE CONDITION OF THE TREE (SECOND DEPT))

NEGLIGENCE, MUNICIPAL LAW.

ALTHOUGH DEFENDANT HOMEOWNER MAY HAVE REMOVED ICE AND SNOW FROM THE SIDEWALK, THERE WAS NO SHOWING THE REMOVAL EFFORTS EXACERBATED OR CREATED THE DANGEROUS CONDITION IN THIS SLIP AND FALL CASE, HOMEOWNER'S MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined that the defendant homeowner's motion for summary judgment in this snow-ice sidewalk slip and fall case should have been granted. Under the NYC Administrative Code the owner of a single-family residential home has no statutory duty to maintain the abutting sidewalk. Although there was evidence defendant removed ice and snow from the sidewalk, there was no showing the snow removal efforts exacerbated or created the dangerous condition:

> While there is record evidence that the defendants may have engaged in snow removal efforts prior to the accident, the defendants cannot be held liable for the removal of snow and ice in an incomplete manner ... . Since the plaintiff failed to submit evidentiary facts to show that the defendants' snow removal efforts created or exacerbated an existing hazard, the defendants' motion for summary judgment dismissing the complaint should have been granted. **Wise v Filincieri, 2018 NY Slip Op 05074, Second Dept 7-5-18**

NEGLIGENCE (SLIP AND FALL, ALTHOUGH DEFENDANT HOMEOWNER MAY HAVE REMOVED ICE AND SNOW FROM THE SIDEWALK, THERE WAS NO SHOWING THE REMOVAL EFFORTS EXACERBATED OR CREATED THE DANGEROUS CONDITION IN THIS SLIP AND FALL CASE, HOMEOWNER'S MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED (SECOND DEPT))/MUNICIPAL LAW (SLIP AND FALL, ALTHOUGH DEFENDANT HOMEOWNER MAY HAVE REMOVED ICE AND SNOW FROM THE SIDEWALK, THERE WAS NO SHOWING THE REMOVAL EFFORTS EXACERBATED OR CREATED THE DANGEROUS CONDITION IN THIS SLIP AND FALL CASE, HOMEOWNER'S MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED (SECOND DEPT))/SLIP AND FALL (ALTHOUGH DEFENDANT HOMEOWNER MAY HAVE REMOVED ICE AND SNOW FROM THE SIDEWALK, THERE WAS NO SHOWING THE REMOVAL EFFORTS EXACERBATED OR CREATED THE DANGEROUS CONDITION IN THIS SLIP AND FALL CASE, HOMEOWNER'S MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED (SECOND DEPT))/SIDEWALKS (SLIP AND FALL, ALTHOUGH DEFENDANT HOMEOWNER MAY HAVE REMOVED ICE AND SNOW FROM THE SIDEWALK, THERE WAS NO SHOWING THE REMOVAL EFFORTS EXACERBATED OR CREATED THE DANGEROUS CONDITION IN THIS SLIP AND FALL CASE, HOMEOWNER'S MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED (SECOND DEPT))

NEGLIGENCE, MUNICIPAL LAW.

ALTHOUGH THE NYC ADMINISTRATIVE CODE IMPOSES A DUTY TO KEEP SIDEWALKS SAFE ON ABUTTING PROPERTY OWNERS, IT DOES NOT IMPOSE STRICT LIABILITY, DEFENDANT FAILED TO DEMONSTRATE IT DID NOT CREATE OR HAVE NOTICE OF THE ALLEGED DANGEROUS CONDITION IN THIS SIDEWALK ICE AND SNOW SLIP AND FALL CASE, DEFENDANT'S SUMMARY JUDGMENT MOTION PROPERLY DENIED (SECOND DEPT).

The Second Department determined defendant property owner did not demonstrate that it did not create or have notice of the dangerous condition in this sidewalk snow and ice slip and fall case. The NYC administrative code imposes a duty on abutting property owners to keep sidewalks safe, but it does not impose strict liability:

> Administrative Code of the City of New York § 7-210(a) and (b) imposes a duty upon property owners to maintain the sidewalk adjacent to their property, and shifts tort liability to such owners for the failure to maintain the sidewalk in a reasonably safe condition, including the negligent failure to remove snow and ice ... . However, Administrative Code of the City of New York § 7-210 does not impose strict liability upon the property owner, and the injured party has the obligation to prove the elements of negligence to demonstrate that an owner is liable... . Thus, to prevail on its summary judgment motion, the defendant was required to establish that it neither created the alleged hazardous condition nor had actual or constructive notice of its existence for a sufficient length of time to discover and remedy it ... .
>
> Here, in support of the motion, the defendant submitted, inter alia, the deposition testimony of its custodian, who had no specific recollection as to when it last snowed prior to the incident, what snow and ice removal efforts he undertook prior to the incident, or what the sidewalk at issue looked like within a reasonable time prior to the incident. The custodian's deposition testimony, along with the defendant's other submissions, including its expert evidence, were insufficient to demonstrate, prima facie, that the defendant did not create the alleged ice condition through its snow removal efforts or that it did not have actual or constructive notice of the existence of the condition for a sufficient length of time to discover and remedy it ... . **Muhammad v St. Rose of Limas R.C. Church, 2018 NY Slip Op 05181, Second Dept 7-11-18**

NEGLIGENCE (SLIP AND FALL, MUNICIPAL LAW, ALTHOUGH THE NYC ADMINISTRATIVE CODE IMPOSES A DUTY TO KEEP SIDEWALKS SAFE ON ABUTTING PROPERTY OWNERS, IT DOES NOT IMPOSE STRICT LIABILITY, DEFENDANT FAILED TO DEMONSTRATE IT DID NOT CREATE OR HAVE NOTICE OF THE ALLEGED DANGEROUS CONDITION IN THIS SIDEWALK ICE AND SNOW SLIP AND FALL CASE, DEFENDANT'S SUMMARY JUDGMENT MOTION PROPERLY DENIED (SECOND DEPT))/MUNICIPAL LAW (SLIP AND FALL, SIDEWALKS, ALTHOUGH THE NYC ADMINISTRATIVE CODE IMPOSES A DUTY TO KEEP SIDEWALKS SAFE ON ABUTTING PROPERTY OWNERS, IT DOES NOT IMPOSE STRICT LIABILITY, DEFENDANT FAILED TO DEMONSTRATE IT DID NOT CREATE OR HAVE NOTICE OF THE ALLEGED DANGEROUS CONDITION IN THIS SIDEWALK ICE AND SNOW SLIP AND FALL CASE, DEFENDANT'S SUMMARY JUDGMENT MOTION PROPERLY DENIED (SECOND DEPT))/SIDEWALKS (SLIP AND FALL, ALTHOUGH THE NYC ADMINISTRATIVE CODE IMPOSES A DUTY TO KEEP SIDEWALKS SAFE ON ABUTTING PROPERTY OWNERS, IT DOES NOT IMPOSE STRICT LIABILITY, DEFENDANT FAILED TO DEMONSTRATE IT DID NOT CREATE OR HAVE NOTICE OF THE ALLEGED DANGEROUS CONDITION IN THIS SIDEWALK ICE AND SNOW SLIP AND FALL CASE, DEFENDANT'S SUMMARY JUDGMENT MOTION PROPERLY DENIED (SECOND DEPT))/SIDEWALKS (SLIP AND FALL, MUNICIPAL LAW, ALTHOUGH THE NYC ADMINISTRATIVE CODE IMPOSES A DUTY TO KEEP SIDEWALKS SAFE ON ABUTTING PROPERTY OWNERS, IT DOES NOT IMPOSE STRICT LIABILITY, DEFENDANT FAILED TO DEMONSTRATE IT DID NOT CREATE OR HAVE NOTICE OF THE ALLEGED DANGEROUS CONDITION IN THIS SIDEWALK ICE AND SNOW SLIP AND FALL CASE, DEFENDANT'S SUMMARY JUDGMENT MOTION PROPERLY DENIED (SECOND DEPT))

NEGLIGENCE, MUNICIPAL LAW.

COUNTY DID NOT DEMONSTRATE THAT IT DID NOT CREATE THE DANGEROUS CONDITION, I.E. SNOW PILED AT AN INTERSECTION, PLAINTIFF ALLEGED THE INTERSECTION COLLISION WAS CAUSED BY THE INABILITY TO SEE BECAUSE OF THE PILE OF SNOW, COUNTY'S MOTION FOR SUMMARY JUDGMENT PROPERLY DENIED (SECOND DEPT).

The Second Department determined the county was not entitled to summary judgment in this intersection collision case. Plaintiff alleged her field of vision was blocked by snow piled at the intersection. The county demonstrated it did not have written notice of the condition, but did not demonstrate it did not create the condition:

> Where " a municipality has enacted a prior written notice statute, it may not be subjected to liability for injuries caused by an improperly maintained street . . . unless it has received written notice of the defect, or an exception to the written notice requirement applies'"... . As relevant here, an exception to the prior written notice laws exists where the municipality creates the defective condition through an affirmative act of negligence ... . Here, the plaintiff alleged that the County affirmatively caused or contributed to the dangerous condition through its snow plowing operations, which caused snow to be piled unreasonably high at the intersection. Therefore, to establish its prima facie entitlement to judgment as a matter of law, the County was required to demonstrate, prima facie, that it did not receive prior written notice of the alleged dangerous condition and that it did not create the alleged dangerous condition ... . Although the County demonstrated, prima facie, that it did not receive prior written notice, the County's submissions failed to demonstrate, prima facie, that its snow removal operations did not create a dangerous condition ... . **Manzella v County of Suffolk, 2018 NY Slip Op 05296, Second Dept 7-18-18**

NEGLIGENCE (TRAFFIC ACCIDENTS, MUNICIPAL LAW, COUNTY DID NOT DEMONSTRATE THAT IT DID NOT CREATE THE DANGEROUS CONDITION, I.E. SNOW PILED AT AN INTERSECTION, PLAINTIFF ALLEGED THE INTERSECTION COLLISION WAS CAUSED BY THE INABILITY TO SEE BECAUSE OF THE PILE OF SNOW, COUNTY'S MOTION FOR SUMMARY JUDGMENT PROPERLY DENIED (SECOND DEPT))/MUNICIPAL LAW (NEGLIGENCE, TRAFFIC ACCIDENTS, COUNTY DID NOT DEMONSTRATE THAT IT DID NOT CREATE THE DANGEROUS CONDITION, I.E. SNOW PILED AT AN INTERSECTION, PLAINTIFF ALLEGED THE INTERSECTION COLLISION WAS CAUSED BY THE INABILITY TO SEE BECAUSE OF THE PILE OF SNOW, COUNTY'S MOTION FOR SUMMARY JUDGMENT PROPERLY DENIED (SECOND DEPT))/TRAFFIC ACCIDENTS (NEGLIGENCE, MUNICIPAL LAW, COUNTY DID NOT DEMONSTRATE THAT IT DID NOT CREATE THE DANGEROUS CONDITION, I.E. SNOW PILED AT AN INTERSECTION, PLAINTIFF ALLEGED THE INTERSECTION COLLISION WAS CAUSED BY THE INABILITY TO SEE BECAUSE OF THE PILE OF SNOW, COUNTY'S MOTION FOR SUMMARY JUDGMENT PROPERLY DENIED (SECOND DEPT))

NEGLIGENCE, VEHICLE AND TRAFFIC LAW.

REAR MOST DRIVER RAISED A QUESTION OF FACT ABOUT WHETHER THE DRIVER IN FRONT STOPPED SUDDENLY AND DID NOT SIGNAL (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the rear-most driver (plaintiff) in this rear-end collision case raised a question of fact whether defendant stopped suddenly and did not signal:

> A rear-end collision with a stopped or stopping vehicle establishes a prima facie case of negligence on the part of the operator of the rear vehicle, thereby requiring that operator to rebut the inference of negligence by providing a nonnegligent explanation for the collision ... . There can be more than one proximate cause of an accident ... , and a defendant moving for summary judgment in a negligence action has the burden of establishing, prima facie, that he or she was not at fault in the happening of the subject accident ... . "[N]ot every rear-end collision is the exclusive fault of the rearmost driver. The frontmost driver also has the duty not to stop suddenly or slow down without proper signaling so as to avoid a collision"... .
>
> Here, in support of her motion for summary judgment, the defendant submitted an affidavit in which she averred that she brought her vehicle to a gradual stop to make a left turn onto ... . She activated her left turning signal and had been stopped for at least 35 seconds, waiting for traffic to clear, when her vehicle was struck in the rear by the plaintiff's vehicle. ...
>
> In opposition, the plaintiff averred that the defendant made a sudden stop and failed to give proper signals, as required by Vehicle and Traffic Law § 1163. The plaintiff's affidavit was sufficient to raise a triable issue of fact as to whether the defendant negligently caused or contributed to the accident ... . **Martinez v Allen, 2018 NY Slip Op 05462, Second Dept 7-25-18**

NEGLIGENCE (TRAFFIC ACCIDENTS, REAR MOST DRIVER RAISED A QUESTION OF FACT ABOUT WHETHER THE DRIVER IN FRONT STOPPED SUDDENLY AND DID NOT SIGNAL (SECOND DEPT))/TRAFFIC ACCIDENTS (REAR MOST DRIVER RAISED A QUESTION OF FACT ABOUT WHETHER THE DRIVER IN FRONT STOPPED SUDDENLY AND DID NOT SIGNAL (SECOND DEPT))/REAR END COLLISIONS (TRAFFIC ACCIDENTS, REAR MOST DRIVER RAISED A QUESTION OF FACT ABOUT WHETHER THE DRIVER IN FRONT STOPPED SUDDENLY AND DID NOT SIGNAL (SECOND DEPT))

PRODUCTS LIABILITY

PRODUCTS LIABILITY.

FAILURE TO WARN CAUSE OF ACTION IN THIS PRODUCTS LIABILITY CASE PROPERLY SURVIVED SUMMARY JUDGMENT, PLAINTIFF'S CLOTHES CAUGHT FIRE WHEN SHE STOOD NEAR A PROPANE HEATER, QUESTIONS OF FACT WHETHER THE WARNING WAS ADEQUATE AND WHETHER FAILURE TO WARN WAS A PROXIMATE CAUSE (THIRD DEPT).

The Third Department determined defendants' motion for summary judgment on the "failure to warn" cause of action in this products liability case was properly denied. Plaintiff's clothing caught fire when she stood near a propane heater manufactured and sold by defendants:

> Plaintiff submitted the pertinent ANSI standard for warning labels on unvented propane heaters, which specifies certain language to be used in such warnings and establishes minimum heights for the warning's lettering and a minimum distance at which the warnings must be legible. Plaintiff further submitted photographs of the warning label on an exemplar heater matching the one at issue here, supported by an affidavit from the professional photographer who took the pictures.... Plaintiff's counsel asserted in his affirmation that these letter heights are significantly smaller than the ANSI standard's minimum requirements and are therefore too small and inconspicuous to comply with that standard or to constitute an adequate warning label. * * *
>
> .. .[P]laintiff's testimony that she did not look at the heater immediately before the accident does not establish as a matter of law that she would not have seen and read sufficiently conspicuous warnings on prior occasions and heeded them at the time of the accident. **Palmatier v Mr. Heater Corp., 2018 NY Slip Op 05238, Third Dept 7-12-18**

PRODUCTS LIABILITY (FAILURE TO WARN CAUSE OF ACTION IN THIS PRODUCTS LIABILITY CASE PROPERLY SURVIVED SUMMARY JUDGMENT, PLAINTIFF'S CLOTHES CAUGHT FIRE WHEN SHE STOOD NEAR A PROPANE HEATER, QUESTIONS OF FACT WHETHER THE WARNING WAS ADEQUATE AND WHETHER FAILURE TO WARN WAS A PROXIMATE CAUSE (THIRD DEPT))/FAILURE TO WARN (PRODUCTS LIABILITY, FAILURE TO WARN CAUSE OF ACTION IN THIS PRODUCTS LIABILITY CASE PROPERLY SURVIVED SUMMARY JUDGMENT, PLAINTIFF'S CLOTHES CAUGHT FIRE WHEN SHE STOOD NEAR A PROPANE HEATER, QUESTIONS OF FACT WHETHER THE WARNING WAS ADEQUATE AND WHETHER FAILURE TO WARN WAS A PROXIMATE CAUSE (THIRD DEPT))/PROPANE HEATER (PRODUCTS LIABILITY, FAILURE TO WARN CAUSE OF ACTION IN THIS PRODUCTS LIABILITY CASE PROPERLY SURVIVED SUMMARY JUDGMENT, PLAINTIFF'S CLOTHES CAUGHT FIRE WHEN SHE STOOD NEAR A PROPANE HEATER, QUESTIONS OF FACT WHETHER THE WARNING WAS ADEQUATE AND WHETHER FAILURE TO WARN WAS A PROXIMATE CAUSE (THIRD DEPT))

REAL ESTATE

REAL ESTATE.

PLAINTIFF, WHO LOST HIS JOB AFTER HIS MORTGAGE HAD BEEN APPROVED AND THE MORTGAGE CONTINGENCY IN THE PURCHASE CONTRACT WAS SATISFIED, WAS ENTITLED TO THE RETURN OF THE DEPOSIT, THE REVOCATION OF THE MORTGAGE COMMITMENT WAS NOT DUE TO BAD FAITH ON PLAINTIFF'S PART (SECOND DEPT).

The Second Department determined plaintiff was entitled to return of his deposit in this real estate transaction. The contract allowed the return of the deposit if plaintiff did not qualify for a mortgage within a specified period of time. Plaintiff did qualify within the allowed time. However, he subsequently lost his job and could not obtain the mortgage. Plaintiff asked for the deposit but defendant refused:

> " A mortgage contingency clause is construed to create a condition precedent to the contract of sale'" ... . "The purchaser is entitled to return of the down payment where the mortgage contingency clause unequivocally provides for its return upon the purchaser's inability to obtain a mortgage commitment within the contingency period"... . "However, when the lender revokes the mortgage commitment after the contingency period has elapsed, the contractual provision relating to failure to obtain an initial commitment is inoperable, and the question becomes whether the lender's revocation was attributable to any bad faith on the part of the purchaser"... .
>
> Here, the plaintiff established his prima facie entitlement to judgment as a matter of law for the return of his down payment. He submitted evidence that he acted in good faith in obtaining a mortgage commitment, that the commitment was subject to re-verification of employment, and that the subsequent revocation of the commitment was not attributable to any bad faith on his part ... . **Chahalis v Roberta Ebert Irrevocable Trust, 2018 NY Slip Op 05135, Second Dept 7-11-18**

REAL ESTATE (PLAINTIFF, WHO LOST HIS JOB AFTER HIS MORTGAGE HAD BEEN APPROVED AND THE MORTGAGE CONTINGENCY IN THE PURCHASE CONTRACT WAS SATISFIED, WAS ENTITLED TO THE RETURN OF THE DEPOSIT, THE REVOCATION OF THE MORTGAGE COMMITMENT WAS NOT DUE TO BAD FAITH ON PLAINTIFF'S PART (SECOND DEPT))/DEPOSIT (REAL ESTATE, PLAINTIFF, WHO LOST HIS JOB AFTER HIS MORTGAGE HAD BEEN APPROVED AND THE MORTGAGE CONTINGENCY IN THE PURCHASE CONTRACT WAS SATISFIED, WAS ENTITLED TO THE RETURN OF THE DEPOSIT, THE REVOCATION OF THE MORTGAGE COMMITMENT WAS NOT DUE TO BAD FAITH ON PLAINTIFF'S PART (SECOND DEPT))/MORTGAGE COMMITMENT (REAL ESTATE, PLAINTIFF, WHO LOST HIS JOB AFTER HIS MORTGAGE HAD BEEN APPROVED AND THE MORTGAGE CONTINGENCY IN THE PURCHASE CONTRACT WAS SATISFIED, WAS ENTITLED TO THE RETURN OF THE DEPOSIT, THE REVOCATION OF THE MORTGAGE COMMITMENT WAS NOT DUE TO BAD FAITH ON PLAINTIFF'S PART (SECOND DEPT))

REAL ESTATE, FRAUD.

THERE ARE QUESTIONS OF FACT WHETHER THE BROKER REPRESENTED BOTH SELLERS AND BUYER WITHOUT DISCLOSING THE DUAL REPRESENTATION, A BREACH OF A FIDUCIARY DUTY, AND THERE ARE QUESTIONS OF FACT WHETHER THE SELLERS WERE FRAUDULENTLY INDUCED BY THE BROKER TO ENTER THE PURCHASE AGREEMENT, BROKER'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (FOURTH DEPT).

The Fourth Department, reversing (modifying) Supreme Court, determined there was a question of fact whether defendant real estate broker, JRMR, breached a fiduciary duty owed to the sellers of real property, and whether JRMR fraudulently induced the sellers to enter the purchase agreement. Although JRMR represented the sellers, emails between JRMR and the buyer raised a question of fact whether JRMR was acting on behalf of both the buyer and the sellers without disclosing the dual representation (a breach of a fiduciary duty):

> It is well settled that, "because of a broker's fiduciary duties, he [or she] has the affirmative duty not to act for a party whose interests are adverse to those of the principal, unless he [or she] has the consent of the principal given after full knowledge of the facts . . . Accordingly, he [or she] cannot act as agent for both seller and purchaser of property in a real estate transaction" ... . "Where a broker's interests or loyalties are divided due to . . . [the] representation of multiple parties, the broker must disclose to the principal . . . the material facts illuminating the broker's divided loyalties"... . Indeed, "[a] failure to disclose any interest tending to influence the [broker] . . . constitutes a breach of [the broker's] fiduciary obligation and precludes [the broker] from recovering for services rendered" ... . * * *
>
> ... [The sellers'] evidence raised issues of fact whether [the broker] made misrepresentations to them concerning the value of their properties and the willingness of [the buyer] to purchase different property, and whether [the broker] knew of the falsity of those statements and made them with the intent to induce [the sellers'] reliance on them. [The sellers] also submitted evidence raising triable issues of fact whether they justifiably relied on [the broker's] misrepresentations and suffered damages as a result. **Northland E., LLC v J.R. Militello Realty, Inc., 2018 NY Slip Op 05078, Fourth Dept 7-6-18**

REAL ESTATE (THERE ARE QUESTIONS OF FACT WHETHER THE BROKER REPRESENTED BOTH SELLERS AND BUYER WITHOUT DISCLOSING THE DUAL REPRESENTATION, A BREACH OF A FIDUCIARY DUTY, AND THERE ARE QUESTIONS OF FACT WHETHER THE SELLERS WERE FRAUDULENTLY INDUCED BY THE BROKER TO ENTER THE PURCHASE AGREEMENT, BROKER'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (FOURTH DEPT))/FRAUD (REAL ESTATE, THERE ARE QUESTIONS OF FACT WHETHER THE BROKER REPRESENTED BOTH SELLERS AND BUYER WITHOUT DISCLOSING THE DUAL REPRESENTATION, A BREACH OF A FIDUCIARY DUTY, AND THERE ARE QUESTIONS OF FACT WHETHER THE SELLERS WERE FRAUDULENTLY INDUCED BY THE BROKER TO ENTER THE PURCHASE AGREEMENT, BROKER'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (FOURTH DEPT))/BROKERS (REAL ESTATE, THERE ARE QUESTIONS OF FACT WHETHER THE BROKER REPRESENTED BOTH SELLERS AND BUYER WITHOUT DISCLOSING THE DUAL REPRESENTATION, A BREACH OF A FIDUCIARY DUTY, AND THERE ARE QUESTIONS OF FACT WHETHER THE SELLERS WERE FRAUDULENTLY INDUCED BY THE BROKER TO ENTER THE PURCHASE AGREEMENT, BROKER'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (FOURTH DEPT))/FIDUCIARY DUTY (REAL ESTATE, BROKERS, THERE ARE QUESTIONS OF FACT WHETHER THE BROKER REPRESENTED BOTH SELLERS AND BUYER WITHOUT DISCLOSING THE DUAL REPRESENTATION, A BREACH OF A FIDUCIARY DUTY, AND THERE ARE QUESTIONS OF FACT WHETHER THE SELLERS WERE FRAUDULENTLY INDUCED BY THE BROKER TO ENTER THE PURCHASE AGREEMENT, BROKER'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (FOURTH DEPT))

REAL PROPERTY LAW

REAL PROPERTY.

DEFENDANT DEMONSTRATED CONTINUOUS SEASONAL USE OF A TRAIL WHICH CROSSED OVER ONTO PLAINTIFF'S LAND (TO GO AROUND TWO OBSTACLES) FOR 20 YEARS, DEFENDANT HAD A PRESCRIPTIVE EASEMENT OVER THE TWO CROSS-OVER PORTIONS OF THE TRAIL (THIRD DEPT).

The Third Department determined defendant (TRD) had a prescriptive easement over two portions of a trail that crossed over onto plaintiff's land to go around obstacles. Seasonal use of the trail for hunting was deemed continuous use. The fact that the trail was not used for five years when the party (Cisgay) who testified on behalf of the defendant was in the service (after 20 years of continuous use of the trail) did not constitute abandonment. The trail had been widened by a forester for logging. Supreme Court should have ordered defendant to restore those portions of the trail that are on plaintiff's land to the original width:

> Contrary to plaintiff's argument, when we give the requisite deference to Supreme Court's factual findings and credibility determinations ... , we find that Csigay's unequivocal testimony with regard to his family's use of the entire skidder trail from 1982 to 2002 established TRD's claim for a prescriptive easement over the two crossover areas ... . The element of continuous use may be established where, as here, a party's predecessors used the property for the requisite 10 years ... . Although TRD's predecessors used the property primarily during the hunting season, such use did not negate the existence of a prescriptive easement because TRD established that the use was "continuous and uninterrupted and commensurate with appropriate seasonal use" ... . Further, in the absence of sufficient evidence that plaintiff and TRD's predecessors shared a relationship "of neighborly cooperation and accommodation" ... , we agree with the court's determination that plaintiff failed to meet its burden of establishing that the continuous use was permissive ... . Although the parties agree that the skidder trail was not used from 2002 to 2007, nonuse of an established easement does not equate to abandonment... . Here, the record reveals no intent to abandon the skidder trail, only that Csigay stopped using it due to his military service. **Auswin Realty Corp. v Klondike Ventures, Inc., 2018 NY Slip Op 04997, Third Dept 7-5-18**

REAL PROPERTY (PRESCRIPTIVE EASEMENTS, DEFENDANT DEMONSTRATED CONTINUOUS SEASONAL USE OF A TRAIL WHICH CROSSED OVER ONTO PLAINTIFF'S LAND (TO GO AROUND TWO OBSTACLES) FOR 20 YEARS, DEFENDANT HAD A PRESCRIPTIVE EASEMENT OVER THE TWO CROSS-OVER PORTIONS OF THE TRAIL (THIRD DEPT))/EASEMENTS (PRESCRIPTIVE EASEMENTS, DEFENDANT DEMONSTRATED CONTINUOUS SEASONAL USE OF A TRAIL WHICH CROSSED OVER ONTO PLAINTIFF'S LAND (TO GO AROUND TWO OBSTACLES) FOR 20 YEARS, DEFENDANT HAD A PRESCRIPTIVE EASEMENT OVER THE TWO CROSS-OVER PORTIONS OF THE TRAIL (THIRD DEPT))/PRESCRIPTIVE EASEMENTS (DEFENDANT DEMONSTRATED CONTINUOUS SEASONAL USE OF A TRAIL WHICH CROSSED OVER ONTO PLAINTIFF'S LAND (TO GO AROUND TWO OBSTACLES) FOR 20 YEARS, DEFENDANT HAD A PRESCRIPTIVE EASEMENT OVER THE TWO CROSS-OVER PORTIONS OF THE TRAIL (THIRD DEPT))

REAL PROPERTY LAW, ASSOCIATIONS, UNINCORPORATED ASSOCIATIONS.

COMMUNITY GARDEN ASSOCIATION STATED A CAUSE OF ACTION FOR ADVERSE POSSESSION OF A LOT IN THE LOWER EAST SIDE OF MANHATTAN, THE PERIOD OF TIME THE LAND WAS USED BY THE ASSOCIATION BEFORE IT WAS INCORPORATED IN 2012 WAS PROPERLY TACKED ON (FIRST DEPT).

The First Department, in a full-fledged opinion by Justice Tom, over a concurring opinion, determined plaintiff (Garden) had stated a cause of action for adverse possession of a lot in lower Manhattan used since 1985 as the site of a community garden by an unincorporated association (which was later incorporated in 2012):

> In order to establish a claim of adverse possession, a plaintiff must prove that the possession was: (1) hostile and under a claim of right; (2) actual; (3) open and notorious; (4) exclusive; and (5) continuous throughout the 10-year statutory period... . In addition, where, as here, the claim of right is not founded upon a written instrument, the party asserting title by adverse possession must establish that the land was "usually cultivated or improved" or that the land "has been protected by a substantial enclosure" (see former RPAPL 522...). The only elements in dispute here are the "claim of right" and "continuous" elements.
>
> Defendants argue that plaintiff failed to plead sufficient facts evidencing continuous possession by its predecessor members for the statutory period, through an unbroken chain of privity, by tacking periods between anonymous possessors who are not alleged to have intended to transfer title to the incorporating members. This argument is based on the fact that plaintiff was incorporated in 2012 and defendants' contention that there is no allegation that plaintiff had the necessary privity with Garden members prior to incorporation. This argument fails, particularly at the pleading stage of this litigation.
>
> It is well settled that an unincorporated association may adversely possess property and later incorporate and take title to it because "[a]lthough the unincorporated society could not acquire title by adverse possession, its officers could for its benefit, and when the corporation is duly organized the prior possession may be tacked to its own to establish its title under the statute of limitations" ... . **Children's Magical Garden, Inc. v Norfolk St. Dev., LLC, 2018 NY Slip Op 05223, First Dept 7-12-18**

REAL PROPERTY LAW (ADVERSE POSSESSION, COMMUNITY GARDEN ASSOCIATION STATED A CAUSE OF ACTION FOR ADVERSE POSSESSION OF A LOT IN THE LOWER EAST SIDE OF MANHATTAN, THE PERIOD OF TIME THE LAND WAS USED BY THE ASSOCIATION BEFORE IT WAS INCORPORATED IN 2012 WAS PROPERLY TACKED ON (FIRST DEPT))/ADVERSE POSSESSION (COMMUNITY GARDEN ASSOCIATION STATED A CAUSE OF ACTION FOR ADVERSE POSSESSION OF A LOT IN THE LOWER EAST SIDE OF MANHATTAN, THE PERIOD OF TIME THE LAND WAS USED BY THE ASSOCIATION BEFORE IT WAS INCORPORATED IN 2012 WAS PROPERLY TACKED ON (FIRST DEPT))/ASSOCIATIONS (ADVERSE POSSESSION, COMMUNITY GARDEN ASSOCIATION STATED A CAUSE OF ACTION FOR ADVERSE POSSESSION OF A LOT IN THE LOWER EAST SIDE OF MANHATTAN, THE PERIOD OF TIME THE LAND WAS USED BY THE ASSOCIATION BEFORE IT WAS INCORPORATED IN 2012 WAS PROPERLY TACKED ON (FIRST DEPT))/UNINCORPORATED ASSOCIATIONS (ADVERSE POSSESSION, COMMUNITY GARDEN ASSOCIATION STATED A CAUSE OF ACTION FOR ADVERSE POSSESSION OF A LOT IN THE LOWER EAST SIDE OF MANHATTAN, THE PERIOD OF TIME THE LAND WAS USED BY THE ASSOCIATION BEFORE IT WAS INCORPORATED IN 2012 WAS PROPERLY TACKED ON (FIRST DEPT))

REAL PROPERTY ACTIONS AND PROCEEDINGS LAW (RPAPL)

REAL PROPERTY ACTIONS AND PROCEEDINGS LAW.

PLAINTIFF'S CLAIM FOR TREBLE DAMAGES IN THIS TIMBER TRESPASS ACTION SHOULD NOT HAVE BEEN DISMISSED, THERE EXIST QUESTIONS OF FACT WHETHER DEFENDANT MADE ADEQUATE EFFORTS TO ENSURE IT HAD THE LEGAL RIGHT TO HARVEST THE TIMBER (THIRD DEPT).

The Third Department, reversing (modifying) Supreme Court, determined that plaintiff's claim for treble damages in this timber trespass claim should not have been dismissed. There was a question of fact whether defendant made adequate efforts to ensure the timber was not taken from plaintiff's land:

> Defendant concedes that it trespassed upon the subject property and cleared trees, rendering it liable (see RPAPL 861 ... . Accordingly, in order to avoid an award of treble damages, defendant was obliged to show by clear and convincing evidence that it "had cause to believe . . . [that it had] a legal right to harvest" timber from the subject property (RPAPL 861 [2]...). Defendant endeavored to do so with the deposition of its vice-president, who stated that D'Assy represented that he had obtained permission from plaintiff to remove trees from the subject property. The vice-president acknowledged, however, that no efforts were made to confirm that D'Assy's account was correct. He further admitted that he did not recall if this conversation with D'Assy occurred before or after the actual trespass. The foregoing proof, particularly in view of the aim of RPAPL 861 to encourage timber harvesters to be more diligent in preventing inadvertent timber trespass ... , is not at all clear as to whether defendant had a good faith basis for believing that it had permission from plaintiff to remove timber from the subject property at the time it did so. Defendant therefore failed to meet its initial burden of demonstrating the absence of "factual questions with regard to whether plaintiff is entitled to treble damages pursuant to RPAPL 861" ... .
>
> Finally, plaintiff correctly points out that he is entitled not only to "'the stumpage value or $250 per tree, or both' for an unlawful taking" ... , but also reparations for "any permanent and substantial damage caused to the land or the improvements thereon as a result of such violation" ... . Supreme Court, upon remittal, should consider all of those items in calculating its award of damages. **DiSanto v D'Assy, 2018 NY Slip Op 05007, Third Dept 7-5-18**

REAL PROPERTY ACTIONS AND PROCEEDINGS LAW (TIMBER TRESPASS, PLAINTIFF'S CLAIM FOR TREBLE DAMAGES IN THIS TIMBER TRESPASS ACTION SHOULD NOT HAVE BEEN DISMISSED, THERE EXIST QUESTIONS OF FACT WHETHER DEFENDANT MADE ADEQUATE EFFORTS TO ENSURE IT HAD THE LEGAL RIGHT TO HARVEST THE TIMBER (THIRD DEPT))/TIMBER TRESPASS (REAL PROPERTY ACTIONS AND PROCEEDINGS LAW, PLAINTIFF'S CLAIM FOR TREBLE DAMAGES IN THIS TIMBER TRESPASS ACTION SHOULD NOT HAVE BEEN DISMISSED, THERE EXIST QUESTIONS OF FACT WHETHER DEFENDANT MADE ADEQUATE EFFORTS TO ENSURE IT HAD THE LEGAL RIGHT TO HARVEST THE TIMBER (THIRD DEPT))

TAX LAW

TAX LAW, MUNICIPAL LAW, REAL PROPERTY TAX LAW.

ALTHOUGH THE STATUTE STATES THAT EMPIRE ZONE REAL PROPERTY TAX CREDITS ARE AVAILABLE WHEN THE TAX PAYER MAKES DIRECT PAYMENTS TO THE TAXING AUTHORITY, PETITIONERS WERE ENTITLED TO THE TAX CREDITS EVEN THOUGH THE PAYMENTS WERE MADE FROM A MORTGAGE TAX ESCROW ACCOUNT (THIRD DEPT).

The Third Department, reversing the Tax Appeals Tribunal, determined petitioners were entitled to Empire Zone real property tax credits even though the tax payment were mortgage by Wells Fargo from a mortgage tax escrow account. The Tax Law requires "direct payment" to the taxing authority:

> ... [A]lthough Tax Law § 15 (e) (3) contemplates a "direct payment" of real property taxes from the lessee to the taxing authority, we find that, under the particular circumstances presented here, [the lessee's] use of a mortgage tax escrow account for the payment of real property taxes did not preclude petitioners from claiming the subject [Empire Zone] real property tax credits. **Matter of Balbo v New York State Tax Appeals Trib., 2018 NY Slip Op 05540, Third Dept 7-26-18**

TAX LAW (EMPIRE ZONE, ALTHOUGH THE STATUTE STATES THAT EMPIRE ZONE REAL PROPERTY TAX CREDITS ARE AVAILABLE WHEN THE TAX PAYER MAKES DIRECT PAYMENTS TO THE TAXING AUTHORITY, PETITIONERS WERE ENTITLED TO THE TAX CREDITS EVEN THOUGH THE PAYMENTS WERE MADE FROM A MORTGAGE TAX ESCROW ACCOUNT (THIRD DEPT))/MUNICIPAL LAW (EMPIRE ZONE, ALTHOUGH THE STATUTE STATES THAT EMPIRE ZONE REAL PROPERTY TAX CREDITS ARE AVAILABLE WHEN THE TAX PAYER MAKES DIRECT PAYMENTS TO THE TAXING AUTHORITY, PETITIONERS WERE ENTITLED TO THE TAX CREDITS EVEN THOUGH THE PAYMENTS WERE MADE FROM A MORTGAGE TAX ESCROW ACCOUNT (THIRD DEPT))/REAL PROPERTY TAX LAW (EMPIRE ZONE, ALTHOUGH THE STATUTE STATES THAT EMPIRE ZONE REAL PROPERTY TAX CREDITS ARE AVAILABLE WHEN THE TAX PAYER MAKES DIRECT PAYMENTS TO THE TAXING AUTHORITY, PETITIONERS WERE ENTITLED TO THE TAX CREDITS EVEN THOUGH THE PAYMENTS WERE MADE FROM A MORTGAGE TAX ESCROW ACCOUNT (THIRD DEPT))/EMPIRE ZONE (EMPIRE ZONE, ALTHOUGH THE STATUTE STATES THAT EMPIRE ZONE REAL PROPERTY TAX CREDITS ARE AVAILABLE WHEN THE TAX PAYER MAKES DIRECT PAYMENTS TO THE TAXING AUTHORITY, PETITIONERS WERE ENTITLED TO THE TAX CREDITS EVEN THOUGH THE PAYMENTS WERE MADE FROM A MORTGAGE TAX ESCROW ACCOUNT (THIRD DEPT))

UNEMPLOYMENT INSURANCE

UNEMPLOYMENT INSURANCE.

NURSE PROVIDING HOME HEALTH CARE SERVICES WAS AN EMPLOYEE ENTITLED TO BENEFITS (THIRD DEPT).

The Third Department determined a registered nurse who worked for Human Care which provided home health care services was an employee entitled to unemployment insurance benefits:

> Human Care maintains a list of registered nurses, designated as field nurse supervisors, who provide home health care services to its patients on an on-call basis. Human Care hired claimant as a field nurse supervisor following an interview and screening of her experience and license credentials. Upon hiring claimant, Human Care required claimant to sign a job summary detailing the various duties and responsibilities of a field nurse supervisor, which included completing clinical and progress notes, informing Human Care's Director of Patient Services of any changes in a patient's condition and needs and submitting all required paperwork to the Director within 48 hours of a visit. The job summary further stated that field nurse supervisors reported to the Director and were required to follow Human Care policies and procedures. Claimant was provided with Human Care's handbook of policies and procedures. With respect to individual assignments, the Director would contact claimant when a client needed services and advise what services were to be provided. Claimant was free to accept or decline any assignment and, if she was unable to complete an assignment that she had accepted, Human Care would find a replacement. Claimant was required to complete and submit a written "base assessment" of the client to the Director for review. Additionally, Human Care set the fee paid to claimant for her services, which was not negotiable, and billed its clients or the clients' insurance companies for claimant's services. **Matter of Dillon (Commissioner of Labor), 2018 NY Slip Op 05386. Third Dept 7-19-18**

UNEMPLOYMENT INSURANCE (NURSE PROVIDING HOME HEALTH CARE SERVICES WAS AN EMPLOYEE ENTITLED TO BENEFITS (THIRD DEPT))/NURSES (UNEMPLOYMENT INSURANCE, NURSE PROVIDING HOME HEALTH CARE SERVICES WAS AN EMPLOYEE ENTITLED TO BENEFITS (THIRD DEPT))/HOME HEALTH CARE (UNEMPLOYMENT INSURANCE, NURSE PROVIDING HOME HEALTH CARE SERVICES WAS AN EMPLOYEE ENTITLED TO BENEFITS (THIRD DEPT))

ZONING

ZONING, ADMINISTRATIVE LAW, CIVIL PROCEDURE.

THE COURT REVERSED THE ZONING BOARD OF APPEALS BECAUSE THE BOARD FAILED TO FOLLOW THE PROCEDURE MANDATED BY THE TOWN CODE WHEN IT GRANTED AREA VARIANCES, THE COURT ALSO NOTED THAT A DECLARATORY JUDGMENT IS NOT AN AVAILABLE REMEDY FOR CHALLENGING AN ADMINISTRATIVE DETERMINATION (FOURTH DEPT).

The Fourth Department, modifying Supreme Court, determined the zoning board of appeals (ZBA) did not follow town code procedure when it refused to consider the review and comments submitted by the planning board in connection with area variances of lot-width requirements for a proposed subdivision. The court also noted that a declaratory judgment is not an available remedy for challenging an administrative determination:

> The Town's Zoning Code (Code) provides that "[t]he [ZBA] shall refer applications for variance requests to the Planning Board for review and comments. The Planning Board shall forward comments within 30 days of the close of a public hearing of the [ZBA]" ... . Here, the Planning Board conducted a meeting on June 20, 2016, and voted to approve the relevant variances. On June 27, 2016, the ZBA held a public hearing and postponed its decision on the variance application until certain residents could comment at an upcoming July 18, 2016 Planning Board meeting. At the July 18, 2016 Planning Board meeting, various residents opposed the variances, and the Planning Board reversed its initial June 20, 2016 determination and voted not to approve the area variances. Thereafter, the ZBA determined that the Planning Board did not have the authority to reverse its prior determination and that the July 18, 2016 vote was null and void. The ZBA met on August 22, 2016 and voted to approve the area variances without considering the Planning Board's July 18, 2016 review and comments.
>
> " It is well established that [c]ourts may set aside a zoning board determination only where the record reveals that the board acted illegally or arbitrarily, or abused its discretion, or that it merely succumbed to generalized community pressure' " ... . Here, inasmuch as no ZBA public hearing took place until June 27, 2016, the June 20, 2016 action on the variance application by the Planning Board was procedurally improper ... . The ZBA's refusal to consider the procedurally compliant July 18, 2016 review and comments submitted by the Planning Board therefore violated the procedure set forth in section 302 (G) of the Code. We thus conclude that the ZBA's grant of the area variances was "made in violation of lawful procedure [and] was affected by an error of law" (CPLR 7803 [3]). **Matter of Schulz v Town of Hopewell Zoning Bd. of Appeals, 2018 NY Slip Op 05418, Fourth Dept 7-25-18**

ZONING (THE COURT REVERSED THE ZONING BOARD OF APPEALS BECAUSE THE BOARD FAILED TO FOLLOW THE PROCEDURE MANDATED BY THE TOWN CODE WHEN IT GRANTED AREA VARIANCES, THE COURT ALSO NOTED THAT A DECLARATORY JUDGMENT IS NOT AN AVAILABLE REMEDY FOR CHALLENGING AN ADMINISTRATIVE DETERMINATION (FOURTH DEPT))/ADMINISTRATIVE LAW (ZONING, THE COURT REVERSED THE ZONING BOARD OF APPEALS BECAUSE THE BOARD FAILED TO FOLLOW THE PROCEDURE MANDATED BY THE TOWN CODE WHEN IT GRANTED AREA VARIANCES, THE COURT ALSO NOTED THAT A DECLARATORY JUDGMENT IS NOT AN AVAILABLE REMEDY FOR CHALLENGING AN ADMINISTRATIVE DETERMINATION (FOURTH DEPT))/CIVIL PROCEDURE (ZONING, THE COURT REVERSED THE ZONING BOARD OF APPEALS BECAUSE THE BOARD FAILED TO FOLLOW THE PROCEDURE MANDATED BY THE TOWN CODE WHEN IT GRANTED AREA VARIANCES, THE COURT ALSO NOTED THAT A DECLARATORY JUDGMENT IS NOT AN AVAILABLE REMEDY FOR CHALLENGING AN ADMINISTRATIVE DETERMINATION (FOURTH DEPT))/VARIANCES (ZONING, ADMINISTRATIVE LAW, THE COURT REVERSED THE ZONING BOARD OF APPEALS BECAUSE

THE BOARD FAILED TO FOLLOW THE PROCEDURE MANDATED BY THE TOWN CODE WHEN IT GRANTED AREA VARIANCES, THE COURT ALSO NOTED THAT A DECLARATORY JUDGMENT IS NOT AN AVAILABLE REMEDY FOR CHALLENGING AN ADMINISTRATIVE DETERMINATION (FOURTH DEPT))

ZONING, ENVIRONMENTAL LAW.

TOWN DID NOT VIOLATE THE TOWN CODE OR THE STATE ENVIRONMENTAL QUALITY REVIEW ACT WHEN IT GRANTED A SPECIAL USE PERMIT AND VARIANCES FOR THE CONSTRUCTION OF A CELL TOWER (FOURTH DEPT).

The Fourth Department determined the zoning board of appeals (ZBA) did not violate any provisions of the town code or the State Environmental Quality Review Act when it issued a special use permit and variances allowing the construction of a cell tower (wireless telecommunications facility or WTF):

> "Where, as here, the zoning ordinance authorizes a use permit subject to administrative approval, the applicant need only show that the use is contemplated by the ordinance and that it complies with the conditions imposed to minimize anticipated impact on the surrounding area . . . The [zoning authority] is required to grant a special use permit unless it has reasonable grounds for denying the application" ... .
>
> Although the Planning Department initially concluded that aspects of the application would not be consistent with the Town's comprehensive plan, it recommended approval of the application upon certain conditions, which included employing stealth design to disguise the tower as an evergreen tree and reconfiguring the site plan to move the tower as far away as possible from adjacent residences. After holding a public hearing and formally considering the application, the ZBA approved the application subject to the recommended conditions and issued a written decision to that effect ... . Thus, we conclude that there is no merit to petitioners' contention that the special use permit ultimately granted by the ZBA was inconsistent with the Town's comprehensive plan. ...
>
> ... [W]e conclude that the requirements for area variances set forth in Town Law § 267-b (3) are inapplicable here inasmuch as the ZBA issued waivers pursuant to Town Law § 274-b (5). The record also establishes that Verizon demonstrated by clear and convincing evidence that the waivers would have "no significant effect on the health, safety and welfare of the Town, its residents and other service providers" (ch 203, § 6-7-21). **Matter of Edwards v Zoning Bd. of Appeals of Town of Amherst, 2018 NY Slip Op 05430, Fourth Dept 7-25-18**

ZONING (TOWN DID NOT VIOLATE THE TOWN CODE OR THE STATE ENVIRONMENTAL QUALITY REVIEW ACT WHEN IT GRANTED A SPECIAL USE PERMIT AND VARIANCES FOR THE CONSTRUCTION OF A CELL TOWER (FOURTH DEPT))/ENVIRONMENTAL LAW (TOWN DID NOT VIOLATE THE TOWN CODE OR THE STATE ENVIRONMENTAL QUALITY REVIEW ACT WHEN IT GRANTED A SPECIAL USE PERMIT AND VARIANCES FOR THE CONSTRUCTION OF A CELL TOWER (FOURTH DEPT))/STATE ENVIRONMENTAL QUALITY REVIEW ACT (SEQRA) (TOWN DID NOT VIOLATE THE TOWN CODE OR THE STATE ENVIRONMENTAL QUALITY REVIEW ACT WHEN IT GRANTED A SPECIAL USE PERMIT AND VARIANCES FOR THE CONSTRUCTION OF A CELL TOWER (FOURTH DEPT))/SPECIAL USE PERMIT (TOWN DID NOT VIOLATE THE TOWN CODE OR THE STATE ENVIRONMENTAL QUALITY REVIEW ACT WHEN IT GRANTED A SPECIAL USE PERMIT AND VARIANCES FOR THE CONSTRUCTION OF A CELL TOWER (FOURTH DEPT))/VARIANCES (TOWN DID NOT VIOLATE THE TOWN CODE OR THE STATE ENVIRONMENTAL QUALITY REVIEW ACT WHEN IT GRANTED A SPECIAL USE PERMIT AND VARIANCES FOR THE CONSTRUCTION OF A CELL TOWER (FOURTH DEPT))/CELL TOWERS (TOWN DID NOT VIOLATE THE TOWN CODE OR THE STATE ENVIRONMENTAL QUALITY REVIEW ACT WHEN IT GRANTED A SPECIAL USE PERMIT AND VARIANCES FOR THE CONSTRUCTION OF A CELL TOWER (FOURTH DEPT))

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