SUPREME COURT SHOULD HAVE GRANTED PLAINTIFF'S MOTION TO AMEND THE COMPLAINT, DESPITE THE PASSAGE OF SIX YEARS SINCE THE ACTION WAS COMMENCED, THE COURT DOES NOT EXAMINE THE MERITS OF THE PLEADING UNLESS THE LACK OF MERIT IS CLEAR AND FREE FROM DOUBT (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff's motion to amend its complaint, which originally stemmed from the alleged encroachment of defendant's pipes (since removed), should have been granted, despite the passage of six years (during which a default judgment was vacated):

> The Supreme Court should have granted that branch of the plaintiff's cross motion which was for leave to amend the complaint. Permission to amend a pleading should be "freely given" (CPLR 3025[b] ...), where the proposed amendment is neither palpably insufficient nor patently devoid of merit, and there is no evidence that the amendment would prejudice or surprise the opposing party ... . Mere lateness is not a basis for denying an amendment; " [i]t must be lateness coupled with significant prejudice to the other side, the very elements of the laches doctrine'" ... . The burden of establishing prejudice is on the party opposing the amendment ... .
>
> Here, notwithstanding the lengthy gap in time between the commencement of the action and the plaintiff's cross motion for leave to amend the complaint, the defendant has made no showing that it was surprised by the new allegations or would be significantly prejudiced ... . Moreover, some portion of that delay is attributable to the defendant's effort to vacate its default and the parties' subsequent motion practice and negotiations, and there is no contention that discovery has been concluded ... .
>
> Contrary to the defendant's contentions, the proposed amendment is not palpably insufficient or patently devoid of merit. "No evidentiary showing of merit is required under CPLR 3025(b)'" ... , and "a court shall not examine the legal sufficiency or merits of a pleading unless [the] insufficiency or lack of merit is clear and free from doubt" ... . The allegations of the proposed amendment and the submissions in support of it adequately set forth the requisite elements for causes of action alleging private nuisance and trespass ... . Krakovski v Stavros Assoc., LLC, 2019 NY Slip Op 05112, Second Dept 6-26-19

NEGLIGENCE AND TRESPASS ACTIONS AGAINST THE TOWN BASED UPON A LANDSLIDE WHICH CAUSED FLOODING OF PLAINTIFF'S LAND SHOULD HAVE BEEN DISMISSED (THIRD DEPT).

The Third Department determined the negligence and trespass action against the town in this lawsuit stemming from a landslide should have been dismissed. The town had issued a permit for the placement of fill. Plaintiff's alleged the landslide blocked a stream and flooded plaintiff's land:

> ... [T]o hold a municipality liable for negligence in the exercise of a governmental function, a plaintiff must show that the municipality owed it a special duty beyond that owed to the public at large ... . As a basis for the Town's negligence, the complaint in this action alleges ... that plaintiff owned land near the ... property that was affected by the landslide and resulting flooding. However, the complaint does not allege that the Town had assumed any duty to act on plaintiff's behalf or that the Town made any representations upon which plaintiff justifiably relied. ...
>
> ... "[A] trespass claim represents an injury to the right of possession, and the elements of a trespass cause of action are an intentional entry onto the land of another without permission. Regarding intent, the defendant 'must intend the act which amounts to or produces the unlawful invasion, and the intrusion must at least be the immediate or inevitable consequence of what he or she willfully does, or which he or she does so negligently as to amount to willfulness'" ... .

Plaintiff alleged that the Town issued the permit for the performance of work, including grading and other land disturbance activities and placement of fill, notwithstanding its knowledge that significant slope failures resulting in landslides had previously occurred in the immediate vicinity, which the complaint alleges constituted a "dangerous recurring condition." Plaintiff further alleged that the Town failed to properly supervise the work that was conducted pursuant to the permit; however, it did not allege that the Town directly participated in placement of the fill that caused the landslide. City of Albany v Normanskill Cr., LLC, 2018 NY Slip Op 07020, Third Dept 10-18-18

MUNICIPAL LAW (NEGLIGENCE AND TRESPASS ACTIONS AGAINST THE TOWN BASED UPON A LANDSLIDE WHICH CAUSED FLOODING OF PLAINTIFF'S LAND SHOULD HAVE BEEN DISMISSED (THIRD DEPT))/NEGLIGENCE (MUNICIPAL LAW, NEGLIGENCE AND TRESPASS ACTIONS AGAINST THE TOWN BASED UPON A LANDSLIDE WHICH CAUSED FLOODING OF PLAINTIFF'S LAND SHOULD HAVE BEEN DISMISSED (THIRD DEPT))/TRESPASS (MUNICIPAL LAW, NEGLIGENCE AND TRESPASS ACTIONS AGAINST THE TOWN BASED UPON A LANDSLIDE WHICH CAUSED FLOODING OF PLAINTIFF'S LAND SHOULD HAVE BEEN DISMISSED (THIRD DEPT))/LANDSLIDE (MUNICIPAL LAW, NEGLIGENCE AND TRESPASS ACTIONS AGAINST THE TOWN BASED UPON A LANDSLIDE WHICH CAUSED FLOODING OF PLAINTIFF'S LAND SHOULD HAVE BEEN DISMISSED (THIRD

DEPT))/FLOODING (MUNICIPAL LAW, NEGLIGENCE AND TRESPASS ACTIONS AGAINST THE TOWN BASED UPON A LANDSLIDE WHICH CAUSED FLOODING OF PLAINTIFF'S LAND SHOULD HAVE BEEN DISMISSED (THIRD DEPT))

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)

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))

PLAINTIFFS' MOTION FOR LEAVE TO REPLEAD WITH AN AMENDED COMPLAINT ALLEGING DEFENDANTS' PLANTING AND WATERING ON DEFENDANTS' SIDE OF PLAINTIFFS' RETAINING WALL CONSTITUTED NEGLIGENCE, TRESPASS AND A PRIVATE NUISANCE SHOULD HAVE BEEN GRANTED (SECOND DEPT

The Second Department, reversing Supreme Court, determined plaintiffs' motion for leave to replead a private nuisance and trespass action should have been granted. Plaintiffs alleged defendants had negligently planted and watered on their side of plaintiffs' retaining wall, damaging the wall:

> … [T]he court improvidently exercised its discretion in denying the plaintiffs' motion, in effect, for leave to replead … . The standard to be applied on such a motion "is consistent with the standard governing motions for leave to amend pursuant to CPLR 3025″… . In particular, such motions "should be freely granted absent prejudice or surprise to the opposing party, unless the proposed amendment is devoid of merit or palpably insufficient"… .
>
> The proposed amended complaint alleged that the defendants had (1) engaged in "digging, excavating, grading and altering the soil, past the property line with [the] plaintiffs' property and abutting [the plaintiffs'] property and wall," (2) planted bushes, shrubs, and trees, and added significant amounts of mulch on the plaintiffs' property, near the property line, and along the plaintiffs' wall, and (3) excessively watered the location where the work was performed. The amended complaint further alleged that the "lateral load and pressure has been increased as a result of the planting of trees, bushes, shrubs and plants and the lack of drainage" so as to damage the plaintiffs' retaining wall. The complaint alleges that this conduct was negligent, and that it constituted a private nuisance and trespass. Contrary to the defendants' contention, these amended causes of action were neither palpably insufficient nor patently devoid of merit … , and no unfair prejudice or surprise to the defendants would arise from permitting the amendment … . Chaikin v Karipas, 2018 NY Slip Op 04525, Second Dept 6-20-18

REAL PROPERTY (PLAINTIFFS' MOTION FOR LEAVE TO REPLEAD WITH AN AMENDED COMPLAINT ALLEGING DEFENDANTS' PLANTING AND WATERING ON DEFENDANTS' SIDE OF PLAINTIFFS' RETAINING WALL CONSTITUTED NEGLIGENCE, TRESPASS AND A PRIVATE NUISANCE SHOULD HAVE BEEN GRANTED (SECOND DEPT))/CIVIL PROCEDURE (PLAINTIFFS' MOTION FOR LEAVE TO REPLEAD WITH AN AMENDED COMPLAINT ALLEGING DEFENDANTS' PLANTING AND WATERING ON DEFENDANTS' SIDE OF PLAINTIFFS' RETAINING WALL CONSTITUTED NEGLIGENCE, TRESPASS AND A PRIVATE NUISANCE SHOULD HAVE BEEN GRANTED (SECOND DEPT))/CPLR 3025 (PLAINTIFFS' MOTION FOR LEAVE TO REPLEAD WITH AN AMENDED COMPLAINT ALLEGING DEFENDANTS' PLANTING AND WATERING ON DEFENDANTS' SIDE OF PLAINTIFFS' RETAINING WALL CONSTITUTED NEGLIGENCE, TRESPASS AND A PRIVATE NUISANCE SHOULD HAVE BEEN GRANTED (SECOND DEPT))/TRESPASS (PLAINTIFFS' MOTION FOR LEAVE TO REPLEAD WITH AN AMENDED COMPLAINT ALLEGING DEFENDANTS' PLANTING AND WATERING ON DEFENDANTS' SIDE OF PLAINTIFFS' RETAINING WALL CONSTITUTED NEGLIGENCE, TRESPASS AND A PRIVATE NUISANCE SHOULD HAVE BEEN GRANTED (SECOND DEPT))/NUISANCE (PLAINTIFFS' MOTION FOR LEAVE TO REPLEAD WITH AN AMENDED COMPLAINT ALLEGING DEFENDANTS' PLANTING AND WATERING ON DEFENDANTS' SIDE OF PLAINTIFFS' RETAINING WALL CONSTITUTED NEGLIGENCE, TRESPASS AND A PRIVATE NUISANCE SHOULD HAVE BEEN GRANTED (SECOND DEPT))/RETAINING WALL (PLAINTIFFS' MOTION FOR LEAVE TO REPLEAD WITH AN AMENDED COMPLAINT ALLEGING DEFENDANTS' PLANTING AND WATERING ON DEFENDANTS' SIDE OF PLAINTIFFS' RETAINING WALL CONSTITUTED NEGLIGENCE, TRESPASS AND A PRIVATE NUISANCE SHOULD HAVE BEEN GRANTED (SECOND DEPT))

PLAINTIFF'S DECEDENT WAS KILLED IN A MOTORCYCLE ACCIDENT DURING RECREATIONAL USE OF A CITY PARKING LOT, CITY NOT LIABLE PURSUANT TO THE GENERAL OBLIGATIONS LAW (FIRST DEPT).

The First Department, reversing Supreme Court, determined the city could not be held liable for a "trespass activity" motorcycle accident in the parking lot at Yankee Stadium. Trespassers have used the parking for motorcycles, dirt bikes and all-terrain vehicles for recreation for years. Plaintiff's decedent was killed in a collision in the parking lot. Under the General Obligations Law the city could not be liable unless its conduct was willful or malicious:

The decedent, who trespassed onto a Yankee Stadium parking lot in the off season together with other trespassers who similarly rode motorcycles, dirt bikes and all-terrain vehicles, suffered fatal injuries in a collision with an all-terrain vehicle operated by defendant Pena. The record shows that the nature of the trespass activity involved was commonplace for the parking lot in question, for at least two years, and that drag racing would sometimes be involved. Plaintiff alleged that the City (as lot owner) and Kinney (as lessee) were negligent for not repairing and/or securing the lot's perimeter fence, and in not employing proper security or supervision to keep trespassers off the premises.

Here, the subject property was physically conducive to the motorcycle activity taking place thereon, and was appropriate for public use in pursuing the activity as recreation (see General Obligations Law § 9-103). As such, the City is immune from liability for any ordinary negligence on its part that may have given rise to the cause of the decedent's accident, and plaintiff has not otherwise demonstrated that the City's challenged conduct was willful or malicious as might preclude the City's reliance on the defense afforded under General Obligations Law § 9-103 ... .

Furthermore, although Kinney has not relied upon General Obligation Law § 9-103 as a potential defense to the action against it, the statute's defense is available to lessees as well as property owners ... . Inasmuch as the issue appears on the face of the record, involves no new facts and could not have been avoided if it were timely raised ... . Rodriguez v City of New York, 2018 NY Slip Op 03821, First Dept 5-29-18

NEGLIGENCE (MUNICIPAL LAW, PLAINTIFF'S DECEDENT WAS KILLED IN A MOTORCYCLE ACCIDENT DURING RECREATIONAL USE OF A CITY PARKING LOT, CITY NOT LIABLE PURSUANT TO THE GENERAL OBLIGATIONS LAW (FIRST DEPT))/MUNICIPAL LAW (NEGLIGENCE, PLAINTIFF'S DECEDENT WAS KILLED IN A MOTORCYCLE ACCIDENT DURING RECREATIONAL USE OF A CITY PARKING LOT, CITY NOT LIABLE PURSUANT TO THE GENERAL OBLIGATIONS LAW (FIRST DEPT))/IMMUNITY (MUNICIPAL LAW, NEGLIGENCE, PLAINTIFF'S DECEDENT WAS KILLED IN A MOTORCYCLE ACCIDENT DURING RECREATIONAL USE OF A CITY PARKING LOT, CITY NOT LIABLE PURSUANT TO THE GENERAL OBLIGATIONS LAW (FIRST DEPT))/TRESPASS ACTIVITY (MUNICIPAL LAW, PLAINTIFF'S DECEDENT WAS KILLED IN A MOTORCYCLE ACCIDENT DURING RECREATIONAL USE OF A CITY PARKING LOT, CITY NOT LIABLE PURSUANT TO THE GENERAL OBLIGATIONS LAW (FIRST DEPT))/GENERAL OBLIGATIONS LAW (MUNICIPAL LAW, IMMUNITY, PLAINTIFF'S DECEDENT WAS KILLED IN A MOTORCYCLE ACCIDENT DURING RECREATIONAL USE OF A CITY PARKING LOT, CITY NOT LIABLE PURSUANT TO THE GENERAL OBLIGATIONS LAW (FIRST DEPT))

PLAINTIFF, PURSUANT TO THE CONDOMINIUM DECLARATION AND OFFERING PLAN, WAS THE OWNER OF THE BASEMENT SPACE USED BY DEFENDANTS, PLAINTIFF WAS ENTITLED TO SUMMARY JUDGMENT ON ITS TRESPASS ACTION, BECAUSE THE DECLARATION AND OFFERING PLAN, AND THE REFERENCE TO IT IN THE DEEDS, WERE UNAMBIGUOUS, PAROL AGREEMENTS TRANSFERRING OWNERSHIP OF THE AREA TO DEFENDANTS WERE NOT ENFORCEABLE (FIRST DEPT).

The First Department determined plaintiff was entitled to summary judgment on its trespass action against defendant condominium owners based on defendants' use of a basement storage area which, according to the Declaration and Offering Plan, was owned by plaintiff. Any attempt to transfer ownership of the basement area to defendants' condominium was ineffectual because there was never a meeting and vote by unit members:

> The Declaration and Offering Plan are unambiguous and clearly state that the disputed basement space was a Limited Common Element of the front unit owned by plaintiff. The deeds to both parties' units were silent on this issue, but provided that each buyer agreed that their ownership was subject to the Declaration. Paragraph Fifth of the Declaration provided that the use of the basement space was deemed conveyed with the conveyance of the front unit, even if the interest was not expressly described in the conveyance. In order to amend the Declaration, pursuant to paragraph Tenth(b), the board was required to execute an instrument upon the affirmative vote of 80% of the unit owners held at a duly called meeting. Moreover, paragraph Tenth(b)(I) provided that an amendment which altered the right to portions of the common elements required the consent of 100% of the affected unit owners.
>
> Here, there was never a duly held meeting of the unit owners at which 80% voted to amend the Declaration to permit transfer of the right to use the basement space from the front unit to the rear unit. Thus, plaintiff retained the right to use the basement space. Parol evidence of the parties' contrary intent is irrelevant in the face of the unambiguous governing documents ... . Plaintiff's acknowledgment in the contract of sale that it was not purchasing the right to use the basement storage space is not controlling because the deed contained a provision that the sale was subject to the provisions of the Declaration, which stated that the storage space was for the use of the front unit. P360 Spaces LLC v Orlando, 2018 NY Slip Op 02749, First Dept 4-27-18

CONDOMINIUMS (PLAINTIFF, PURSUANT TO THE CONDOMINIUM DECLARATION AND OFFERING PLAN, WAS THE OWNER OF THE BASEMENT SPACE USED BY DEFENDANTS, PLAINTIFF WAS ENTITLED TO SUMMARY JUDGMENT ON ITS TRESPASS ACTION, BECAUSE THE DECLARATION AND OFFERING PLAN, AND THE REFERENCE TO IT IN THE DEEDS, WERE UNAMBIGUOUS, PAROL AGREEMENTS TRANSFERRING OWNERSHIP OF THE AREA TO DEFENDANTS WERE NOT ENFORCEABLE (FIRST DEPT))/CONTRACT LAW (CONDOMINIUMS, PLAINTIFF, PURSUANT TO THE CONDOMINIUM DECLARATION AND OFFERING PLAN, WAS THE OWNER OF THE BASEMENT SPACE USED BY DEFENDANTS, PLAINTIFF WAS ENTITLED TO SUMMARY JUDGMENT ON ITS TRESPASS ACTION,

BECAUSE THE DECLARATION AND OFFERING PLAN, AND THE REFERENCE TO IT IN THE DEEDS, WERE UNAMBIGUOUS, PAROL AGREEMENTS TRANSFERRING OWNERSHIP OF THE AREA TO DEFENDANTS WERE NOT ENFORCEABLE (FIRST DEPT))/TRESPASS (CONDOMINIUMS, PLAINTIFF, PURSUANT TO THE CONDOMINIUM DECLARATION AND OFFERING PLAN, WAS THE OWNER OF THE BASEMENT SPACE USED BY DEFENDANTS, PLAINTIFF WAS ENTITLED TO SUMMARY JUDGMENT ON ITS TRESPASS ACTION, BECAUSE THE DECLARATION AND OFFERING PLAN, AND THE REFERENCE TO IT IN THE DEEDS, WERE UNAMBIGUOUS, PAROL AGREEMENTS TRANSFERRING OWNERSHIP OF THE AREA TO DEFENDANTS WERE NOT ENFORCEABLE (FIRST DEPT))

THERE WAS SUPPORT IN THE RECORD FOR THE LOWER COURTS' FINDING THE ARRESTING OFFICERS COMPLIED WITH THE DEBOUR STREET STOP REQUIREMENTS, A MIXED QUESTION OF LAW AND FACT, EXTENSIVE DISSENTING OPINION (CT APP).

The Court of Appeals, in a short memorandum decision, over an extensive two-judge dissenting opinion by Judge Rivera, determined the record supported the trial court's finding that the stop and search of the defendant, in an apartment building, met the DeBour street stop criteria:

> Police were conducting a vertical patrol of a New York City Housing Authority building in a high crime area and interviewing tenants in search of a robbery suspect in an investigation unrelated to this case. Defendant got off the elevator, observed the police officers — who were approximately eight feet away with shields displayed — and immediately retreated into the elevator. Defendant ignored an officer's request that he hold the door and instead "kept pushing the button" and the elevator doors closed. In light of this behavior, as well as the building's history of narcotics and trespass activity, the police followed defendant to determine whether he lived in the building. Rather than respond to the officer's questions, defendant turned away from the police to face the wall, held his head down with the hood of his sweatshirt over his head, and kept his hands hidden inside his sweatshirt. The officer immediately noticed a large bulge in defendant's right arm, which defendant held stiffly and straight down from his body in an unnatural position. ... When the officer touched the defendant's wrist, he felt a metal object, lifted the sleeve of the defendant's shirt, saw the point of a blade, and ordered him to "drop it." Defendant did not comply and officers had to pull the weapon — a two-foot-long machete — from defendant's shirt. Minutes later, the officer learned of a recent robbery in the area involving a machete-wielding suspect wearing clothing matching that worn by defendant.
>
> The issue on appeal to this Court, whether the police conduct conformed to De Bour, presents a mixed question of law and fact ... Accordingly, "our review is limited to whether there is evidence in the record supporting the lower courts' determinations" ... . People v Perez, 2018 NY Slip Op 02118, CtApp 3-27-18

CRIMINAL LAW (STREET STOPS, THERE WAS SUPPORT IN THE RECORD FOR THE LOWER COURTS' FINDING THE ARRESTING OFFICERS COMPLIED WITH THE DEBOUR STREET STOP REQUIREMENTS, A MIXED QUESTION OF LAW AND FACT, EXTENSIVE DISSENTING OPINION (CT APP))/STREET STOPS (CRIMINAL LAW, THERE WAS SUPPORT IN THE RECORD FOR THE LOWER COURTS' FINDING THE ARRESTING OFFICERS COMPLIED WITH THE DEBOUR STREET STOP REQUIREMENTS, A MIXED QUESTION OF LAW AND FACT, EXTENSIVE DISSENTING OPINION (CT APP))/DEBOUR (CRIMINAL LAW, STREET STOPS, THERE WAS SUPPORT IN THE RECORD FOR THE LOWER COURTS' FINDING THE ARRESTING OFFICERS COMPLIED WITH THE DEBOUR STREET STOP REQUIREMENTS, A MIXED QUESTION OF LAW AND FACT, EXTENSIVE DISSENTING OPINION (CT APP))/SEARCH AND SEIZURE (CRIMINAL LAW, STREET STOPS, THERE WAS SUPPORT IN THE RECORD FOR THE LOWER COURTS' FINDING THE ARRESTING OFFICERS COMPLIED WITH THE DEBOUR STREET STOP REQUIREMENTS, A MIXED QUESTION OF LAW AND FACT, EXTENSIVE DISSENTING OPINION (CT APP))/APPEALS (CRIMINAL LAW, COURT OF APPEALS, MIXED QUESTION OF LAW AND FACT, THERE WAS SUPPORT IN THE RECORD FOR THE LOWER COURTS' FINDING THE ARRESTING OFFICERS COMPLIED WITH THE DEBOUR STREET STOP REQUIREMENTS, A MIXED QUESTION OF LAW AND FACT, EXTENSIVE DISSENTING OPINION (CT APP))/MIXED QUESTION OF LAW AND FACT (CRIMINAL LAW, COURT OF APPEALS, THERE WAS SUPPORT IN THE RECORD FOR THE LOWER COURTS' FINDING THE ARRESTING OFFICERS COMPLIED WITH THE DEBOUR STREET STOP REQUIREMENTS, A MIXED QUESTION OF LAW AND FACT, EXTENSIVE DISSENTING OPINION (CT APP))

NUISANCE AND TRESPASS ACTIONS BASED UPON SURFACE WATER WERE NOT CONTINUING TORTS AND WERE THEREFORE TIME-BARRED, CRITERIA FOR CONTINUING TORTS IN THIS CONTEXT EXPLAINED (FOURTH DEPT).

The Fourth Department determined the nuisance and trespass actions based upon the alleged diversion of surface water were not continuing torts and were therefore time-barred:

Defendants established that the nuisance and trespass causes of action accrued, at the latest, in June 2010, which is when plaintiff received the information from the USACE [US Army Corps of Engineers] and the damage to its property was apparent … .

Plaintiff contends that, because the water flows continually onto its property, the torts are continuous in nature and, as a result, plaintiff's causes of action for nuisance and trespass are not time-barred. We reject that contention. Courts will apply the continuing wrong doctrine in cases of " nuisance or continuing trespass where the harm sustained by the complaining party is not exclusively traced to the day when the original objectionable act was committed' "… . Here, plaintiff's allegations establish that its damages may be traced to a specific, objectionable act, i.e., the implementation of the remedial plan. Where, as here, there is an original, objectionable act, "the accrual date does not change as a result of continuing consequential damages" … . EPK Props., LLC v PFOHL Bros. Landfill Site Steering Comm., 2018 NY Slip Op 02085, Fourth Dept 3-23-18

REAL PROPERTY LAW (NUISANCE AND TRESPASS ACTIONS BASED UPON SURFACE WATER WERE NOT CONTINUING TORTS AND WERE THEREFORE TIME-BARRED, CRITERIA FOR CONTINUING TORTS IN THIS CONTEXT EXPLAINED (FOURTH DEPT))/CIVIL PROCEDURE (STATUTE OF LIMITATIONS, CONTINUING TORTS, NUISANCE AND TRESPASS ACTIONS BASED UPON SURFACE WATER WERE NOT CONTINUING TORTS AND WERE THEREFORE TIME-BARRED, CRITERIA FOR CONTINUING TORTS IN THIS CONTEXT EXPLAINED (FOURTH DEPT))/STATUTE OF LIMITATIONS (CONTINUING TORTS, NUISANCE AND TRESPASS ACTIONS BASED UPON SURFACE WATER WERE NOT CONTINUING TORTS AND WERE THEREFORE TIME-BARRED, CRITERIA FOR CONTINUING TORTS IN THIS CONTEXT EXPLAINED (FOURTH DEPT))/NUISANCE (SURFACE WATER, CONTINUING TORTS, NUISANCE AND TRESPASS ACTIONS BASED UPON SURFACE WATER WERE NOT CONTINUING TORTS AND WERE THEREFORE TIME-BARRED, CRITERIA FOR CONTINUING TORTS IN THIS CONTEXT EXPLAINED (FOURTH DEPT))/TRESPASS (SURFACE WATER, CONTINUING TORTS, NUISANCE AND TRESPASS ACTIONS BASED UPON SURFACE WATER WERE NOT CONTINUING TORTS AND WERE THEREFORE TIME-BARRED, CRITERIA FOR CONTINUING TORTS IN THIS CONTEXT EXPLAINED (FOURTH DEPT))/SURFACE WATER (NUISANCE AND TRESPASS ACTIONS BASED UPON SURFACE WATER WERE NOT CONTINUING TORTS AND WERE THEREFORE TIME-BARRED, CRITERIA FOR CONTINUING TORTS IN THIS CONTEXT EXPLAINED (FOURTH DEPT))

FAILURE TO REQUEST THAT THE JURY BE CHARGED ON A LESSER INCLUDED OFFENSE AMOUNTED TO INEFFECTIVE ASSISTANCE OF COUNSEL, THE EVIDENCE OF THE CHARGED OFFENSE WAS WEAK, THE LESSER INCLUDED OFFENSE WAS PLAUSIBLE, AND THE SENTENCING DISPARITY WAS ENORMOUS (SECOND DEPT).

The Second Department determined defense counsel's failure to ask that the jury be charged with the lesser included offense of trespass in this burglary prosecution constituted ineffective assistance. The court noted that, because defendant was a persistent violent felony offender he faced a minimum sentence of 16 to life on the burglary conviction, but a trespass conviction would entail only one year in jail. The evidence that defendant intended to steal something was weak, the mistaken-identification defense put forth by defense counsel was weak, so trespass would have been a viable alternative for the jury:

In deciding whether to ask for submission of the lesser included offense, defense counsel was obligated to consider the possible consequences of that decision for his client. The defendant was a persistent violent felony offender who, upon his conviction of burglary in the second degree (see Penal Law § 70.02[1][b]), faced a minimum sentence of 16 years to life imprisonment… . By contrast, upon conviction of criminal trespass in the second degree, which, like the remaining charge, criminal mischief in the fourth degree, was a class A misdemeanor, the defendant faced a maximum of one year in jail. That is not to say that counsel would have been required to argue the lesser included offense in summation, but it was not reasonable for counsel to deprive the jury of the opportunity to consider it … . Given the weakness of the mistaken-identification defense, the plausibility of the lesser included offense, and the enormous sentencing disparity between a burglary conviction and a criminal trespass conviction, counsel's failure to request submission of the lesser included offense cannot be considered part of a legitimate all-or-nothing strategy. Under the circumstances, counsel's failure to request submission of the lesser included offense deprived the defendant of his right to meaningful representation … . People v Orama, 2018 NY Slip Op 00571, Second Dept 1-31-18

CRIMINAL LAW (ATTORNEYS, INEFFECTIVE ASSISTANCE, FAILURE TO REQUEST THAT THE JURY BE CHARGED ON A LESSER INCLUDED OFFENSE AMOUNTED TO INEFFECTIVE ASSISTANCE OF COUNSEL, THE EVIDENCE OF THE CHARGED OFFENSE WAS WEAK, THE LESSER INCLUDED OFFENSE WAS PLAUSIBLE, AND THE SENTENCING DISPARITY WAS ENORMOUS (SECOND DEPT))/ATTORNEYS (CRIMINAL LAW, INEFFECTIVE ASSISTANCE, FAILURE TO REQUEST THAT THE JURY BE CHARGED ON A LESSER INCLUDED OFFENSE AMOUNTED TO INEFFECTIVE ASSISTANCE OF COUNSEL, THE EVIDENCE OF THE CHARGED OFFENSE WAS WEAK, THE LESSER INCLUDED OFFENSE WAS PLAUSIBLE, AND THE SENTENCING DISPARITY WAS ENORMOUS (SECOND DEPT))/INEFFECTIVE ASSISTANCE (CRIMINAL LAW, FAILURE TO REQUEST THAT THE JURY BE CHARGED ON A LESSER INCLUDED OFFENSE AMOUNTED TO INEFFECTIVE ASSISTANCE OF COUNSEL, THE EVIDENCE OF THE CHARGED OFFENSE WAS WEAK, THE LESSER INCLUDED OFFENSE WAS PLAUSIBLE, AND THE SENTENCING DISPARITY WAS ENORMOUS (SECOND

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