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STATEMENT FROM PLAINTIFF'S OUT-OF-STATE EXPERT IN THIS DENTAL MALPRACTICE ACTION NOT IN ADMISSIBLE FORM; CPLR 2106 REQUIRES A SWORN AFFIDAVIT FROM A DENTIST LICENSED IN ANOTHER STATE (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the statement by a New Jersey dentist offered by the plaintiff in this dental malpractice action was not admissible because it was not in the form of a sworn affidavit. Therefore plaintiff did not raise a question of fact in opposition to defendants' motions for summary judgment:

In opposition, the plaintiff submitted, among other things, the unsworn affirmation of Martin, who was licensed to practice dentistry in the State of New Jersey. Consequently, the out-of-state dentist's statement did not constitute admissible evidence in that CPLR 2106 only authorizes attorneys, physicians, osteopaths, or dentists licensed in this state to utilize an affirmation in lieu of a sworn affidavit … . …

While an otherwise qualified expert physician, osteopath, or dentist, who is not licensed in this state, may submit a statement in support of or in opposition to a party's position in a case at bar, that statement must be in the form of a sworn affidavit. CPLR 2106(a), which permits such a statement to be in the form of an affirmation, only applies to attorneys, physicians, osteopaths, and dentists licensed to practice in the State of New York. Nelson v Lighter, 2020 NY Slip Op 00420, Second Dept 1-22-20

APPEALS.

THE INTERIM DECISION ISSUED BY SUPREME COURT WAS NOT THE EQUIVALENT OF AN ORDER; THE FIRST DEPARTMENT, THEREFORE, DISMISSED THE APPEAL FOR LACK OF JURISDICTION (FIRST DEPT).

The First Department, dismissing the appeal in this Freedom of Information Law (FOIL) case, determined the "interim decision" was not an appealable paper, depriving the First Department of jurisdiction:

This proceeding stems from Spectrum News NY1's (Spectrum) attempts to gain access to video files from the voluntary body camera experiment. Specifically, Spectrum filed a FOIL request for unredacted videos from the NYPD's voluntary body camera program begun in 2014. NYPD denied the request, claiming that unredacted

files were exempt from disclosure under FOIL. Spectrum then commenced this article 78 proceeding seeking a judgment compelling respondent NYPD to comply with its request. …

… [T]he parties stipulated that out of a disputed 328 videos, only 30 would be the subject of the hearing. Supreme Court then issued "an interim decision," which was not the product of a motion for relief. Instead, the "interim decision," among other things, permitted respondents to redact the faces of persons other than officers from any video footage recorded by the body cameras and to redact certain communications between officers … . …Supreme Court granted petitioner leave to appeal from the "interim decision."

This appeal is thus taken from an "interim decision," which is not an appealable paper. The lack of an appealable paper here deprives the Court of jurisdiction and requires dismissal of Spectrum's appeal, albeit without prejudice. Where, as here, a party brings an appeal from a nonappealable paper, this Court regularly dismisses the appeal for lack of jurisdiction … . While there are instances where this Court has deemed a paper denominated as a "decision" to nonetheless be appealable because it contained all the hallmarks of an order … , that is not the situation here. Matter of Spectrum News NY1 v New York City Police Dept., 2020 NY Slip Op 00521, First Dept 1-28-20

BILLS OF PARTICULARS.

MEDICAL MALPRACTICE ACTIONS REINSTATED AGAINST SEVERAL DEFENDANTS; TWO JUSTICE DISSENT ARGUED THE ACTIONS WERE REINSTATED BASED UPON A NEW THEORY WHICH SHOULD NOT HAVE BEEN CONSIDERED (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, over a two-justice dissent, reinstated the medical malpractice action against several defendants. The dissent argued that evidence submitted in opposition to defendants' motion for summary judgment presented a new theory and should have been rejected on that ground. The dissent argued that the new theory was raised for the first time in a "supplemental" bill of particulars which, the majority concluded, had been properly struck by Supreme Court:

… [W]e conclude that the court properly granted the motions to strike plaintiff's "supplemental" bills of particulars inasmuch as they were actually amended bills of particulars. We further conclude that the amended bills of particulars are "a nullity" inasmuch as the note of issue had been filed and plaintiff failed to seek leave to serve amended bills of particulars before serving them upon defendants … .

From the dissent:

… [P]laintiff's expert's opinions on malpractice and causation cannot create a question of fact because they are based on a new condition and new injury. Plaintiff's expert opined that: plaintiff's son developed Henoch-Schonlein Purpura (HSP) in the days before presenting to the emergency room and was suffering from HSP when he presented to the emergency room; plaintiff's son was misdiagnosed and the correct diagnosis was HSP; as a result of the mistriage, plaintiff's son went into hypovolemic shock; and, if properly triaged, plaintiff's son's condition, i.e., HSP, never would have progressed to hypovolemic shock.

Plaintiff's expert's opinion regarding failure to triage and diagnose relates to a new condition, HSP, and his opinion on proximate cause relates to a new injury, hypovolemic shock, neither of which were included in plaintiff's original bill of particulars and both of which were included in the "supplemental" bills of particulars, which this Court unanimously agrees were properly struck. Inasmuch as plaintiff's expert's opinions regarding the defendants' negligence and proximate cause involve a new condition and new injury not included in plaintiff's original bill of particulars, they constituted a new theory of recovery and thus could not be used to defeat the defendants' motions … . Jeannette S. v Williot, 2020 NY Slip Op 00743, Fourth Dept 1-31-20

CLASS ACTIONS, LABOR LAW.

PLAINTIFF STATED A CAUSE OF ACTION FOR VIOLATION OF LABOR LAW 196-d AGAINST A CORPORATE OFFICER AND A SHAREHOLDER INDIVIDUALLY FOR FAILING TO REMIT SERVICE CHARGES AND GRATUITIES TO THEIR WAITSTAFF EMPLOYEES; REQUEST FOR AN EXTENSION TO SEEK CLASS CERTIFICATION SHOULD HAVE BEEN GRANTED; MOTION TO AMEND THE COMPLAINT SHOULD HAVE BEEN GRANTED; PLAINTIFF'S DISCOVERY DEMANDS WERE PALPABLY IMPROPER (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, determined: (1) plaintiff banquet server had stated a cause of action against the Cortses (an officer and a shareholder in the corporation, Falkirk Management, sued by plaintiff) individually alleging the Cortses were plaintiff's employers within the meaning of Labor Law 196-d and did not remit service charges and gratuities to the waitstaff; (2) corporate shareholders and officers like the Cortes can be liable for corporate violations of the Labor Law; plaintiff's discovery demands were burdensome or immaterial and therefore improper (CPLR 3101(a)); (3) plaintiff's request for an extension to

move for class certification should have been granted (CPLR 901(a); 902); and (4) plaintiff's motion to amend the complaint should have been granted:

… [T]he complaint alleged that the Cortses exercised control over the "day-to-day operations" of "[the Country Club]," including "authority regarding the pay practices" of Falkirk Management. * * *

… [T]he information sought by the plaintiff in her first set of interrogatories and first request for the production of documents was largely burdensome or immaterial, and consequently, palpably improper … . * * *

A plaintiff's need to conduct pre-class certification discovery to determine whether the prerequisites of a class action set forth in CPLR 901(a) can be satisfied constitutes good cause for the extension of the 60-day time period fixed by CPLR 902 … . * * *

[Re: the motion to amend the complaint:] the defendants alleged no surprise or prejudice … . Moreover, the proposed amendments are not palpably insufficient or patently devoid of merit … . Lomeli v Falkirk Mgt. Corp., 2020 NY Slip Op 00115, Second Dept 1-8-20

CLASS ACTIONS, LANDLORD-TENANT.

CLASS ACTION AGAINST NYC HOUSING AUTHORITY FOR BREACH OF THE WARRANTY OF HABITABILITY RE: LOSS OF HEAT AND/OR HOT WATER GOES FORWARD (FIRST DEPT).

The First Department, reversing Supreme Court, determined the breach of the warranty of habitability cause of action should not have been dismissed . The plaintiff's motion for certification of the "damages class" was granted. The class action concerned the loss of heat and/or hot water in NYC Housing Authority properties:

In order to prove a claim for breach of the warranty of habitability, plaintiffs must show the extensiveness of the breach, the manner in which it affected the health, welfare or safety of the tenants, and the measures taken by the landlord to alleviate the violation … .

NYCHA conceded that 80% of its housing units experienced heat and/or hot water outages during the relevant period, which demonstrates that the problems that affected each class member were system-wide. Thus, much of the proof will likely concern NYCHA's overall deficiencies, rather than the breakdown of individual heating systems in individual buildings. The need to conduct individualized damages inquiries does not prevent class certification as long as common issues of liability predominate … .

In any event, the heating systems that failed served multiple housing units, and proof of NYCHA's efforts to repair each system will be common to numerous class members. In order to address any concerns with the size or disparity of the class, the court can designate subclasses consisting of tenants of a particular NYCHA complex, development or building … .

Moreover, class action treatment is the most efficient method for adjudicating the claims of class members who lack the resources to bring individual actions for the small recovery they might obtain … . Diamond v New York City Hous. Auth., 2020 NY Slip Op 00376, First Dept 1-21-20

DEFAULT, WAIVER OF DEFENSES.

DEFENDANTS' FAILURE TO ANSWER THE FORECLOSURE COMPLAINT WAIVED THE STATUTE OF LIMITATIONS DEFENSE (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendants in this foreclosure action, by defaulting, had waived the statute of limitations defense:

CPLR 3211(e) provides that a defense based upon the statute of limitations is waived if not asserted in an answer or in a timely motion to dismiss pursuant to CPLR 3211(a). Such a motion is timely if it is made before service of the answer is required (see CPLR 3211[e]). Here, the defendants never answered the complaint, and their cross motion, inter alia, to dismiss the complaint was served at least six months after service of the answer was required. Thus, unless the defendants' default is vacated or excused, the defendants waived their statute of limitations defense, and in their cross motion, the defendants did not seek relief from that waiver. Accordingly, the Supreme Court should not have granted that branch of the defendants' cross motion which was to dismiss the complaint insofar as asserted against them as time-barred without first determining whether the defendants were properly held in default … . Nestor I, LLC v Moriarty-Gentile, 2020 NY Slip Op 00421, Second Dept 1-22-20

HEARING REQUIRED, FAMILY LAW.

THE EVIDENCE WAS INSUFFICIENT TO JUSTIFY THE RULINGS IN THIS CUSTODY/PARENTAL ACCESS CASE, HEARINGS SHOULD HAVE BEEN HELD; THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT THE IMPOSITION OF SANCTIONS FOR FRIVOLOUS CONDUCT (SECOND DEPT).

The Second Department, reversing Supreme Court in this custody/parental access proceeding, determined Supreme Court should have conducted hearings because the evidence relied upon was insufficient. The Second Department further found there was insufficient evidence to support the sanctions imposed for allegedly frivolous conduct:

We disagree with the Supreme Court's determination (1) awarding the defendant sole legal custody of the parties' child, (2) denying that branch of the plaintiff's cross motion which was to direct therapeutic parental access with the child, (3) directing that parental access between the plaintiff and the child "shall take place in accordance with [the child's] preferences," and (4) granting the defendant's motion for a restraining order prohibiting the plaintiff from interfering with the child's life at school, without first conducting an evidentiary hearing … . …

Here, the record demonstrates unresolved factual issues so as to require a hearing on the issues of custody and parental access … . Moreover, in making its custody and parental access determination, the Supreme Court relied on the hearsay statements and conclusions of the forensic evaluator, whose opinions and credibility were untested by either party … . * * *

… [P]ursuant to 22 NYCRR 130-1.1, sanctions may be imposed against a party or the party's attorney for frivolous conduct. Conduct is "frivolous if: (1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law; (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or (3) it asserts material factual statements that are false" … . "A party seeking the imposition of a sanction or an award of an attorney's fee pursuant to 22 NYCRR 130-1.1(c) has the burden of proof" … .

Here, contrary to the Supreme Court's determination, the defendant failed to establish that the plaintiff's conduct during the underlying motion practice was frivolous … . Brin v Shady, 2020 NY Slip Op 00256, Second Dept 1-17-20

INCONSISTENT VERDICT.

JURY CONFUSION AND THE INCONSISTENT VERDICT IN THIS LABOR LAW 241(6) ACTION REQUIRED A NEW TRIAL; EVEN A WORKER AUTHORIZED TO BE WITHIN THE RANGE OF AN EXCAVATOR BUCKET CAN CLAIM THE PROTECTION OF THE INDUSTRIAL CODE PROVISION WHICH PROHIBITS WORK IN AN AREA WHERE A WORKER MAY BE STRUCK BY EXCAVATION EQUIPMENT (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the inconsistent verdict in this Labor Law 241(6) action required a new trial. The trial court had dismissed the action. The Second Department noted that even though plaintiff was a member of an excavator crew and therefore was authorized to be within range of a moving excavator bucket he still claim the protections provided by 12 NYCRR 23-9.5(k) which provides "[p]ersons shall not be . . . permitted to work in any area where they may be struck . . . by any excavation equipment." Plaintiff's hand was crushed by an excavator bucket:

The jury returned a verdict finding that the City defendants violated Industrial Code (12 NYCRR) 23-4.2(k), but that the violation was not a substantial factor in causing the accident. Although the instructions on the verdict sheet directed the jury to end its deliberations if it found that the violation of Industrial Code (12 NYCRR) 23-4.2(k) was not a substantial factor in causing the accident, the jury further found that the injured plaintiff was negligent and that his negligence was a substantial factor in causing the accident. The jury then proceeded to apportion fault 25% to the City defendants and 75% to the injured plaintiff. After the Supreme Court instructed the jurors to reconsider its verdict, the jury returned a second verdict which was identical to the first verdict, except that the jurors did not answer the questions as to the injured plaintiff's negligence and apportionment of fault. …

"When a jury's verdict is internally inconsistent, the trial court must direct either reconsideration by the jury or a new trial" (…see CPLR 4111[c] …). "On reconsideration, the jury [is] free to substantively alter its original statement so as to conform to its real intention, and [is] not bound by the terms of its original verdict inasmuch as that verdict was not entered by the court" … . "Even after reconsideration by the jury, a trial court has discretion to set aside a verdict which is clearly the product of substantial confusion among the jurors" . "A new trial should be granted where . . . the record demonstrates … substantial confusion among the jurors in reaching a verdict" … . Torres v City of New York, 2020 NY Slip Op 00170, Second Dept 1-8-20

INTERVENTION, STANDING, FORECLOSURE.

PARTY WHICH PURCHASED THE PROPERTY AFTER FORECLOSURE WAS COMMENCED WAS ENTITLED TO INTERVENE IN THE FORECLOSURE PROCEEDINGS BUT DID NOT HAVE STANDING TO ALLEGE PLAINTIFF BANK DID NOT COMPLY WITH NOTICE REQUIREMENTS; THE ESTATE OF THE ORIGINAL BORROWER IS NOT A NECESSARY PARTY (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, determined the party (appellant) which purchased the property after foreclosure was commenced should have been allowed to intervene in the foreclosure proceedings. The Second Department further determined the estate of the original borrower was not a necessary party, the appellant did not have standing to allege plaintiff bank's noncompliance with the notice requirements of Real Property Actions and Proceedings Law (RPAPL) 1304 and plaintiff's failure to serve a notice of default:

On September 10, 2015, the plaintiff commenced this action to foreclose a mortgage on premises owned by the defendant Shawn A. Carrington. Carrington failed to answer the complaint. On March 23, 2016, Carrington sold the premises to the appellant 1698 Management Corp. …

The appellant was entitled to intervene as of right pursuant to CPLR 1012(a) since it established that the representation of its interest by the parties would be inadequate, that the action involved the disposition of title to real property, and that it would be bound and adversely affected by a judgment of foreclosure and sale … . Contrary to the court's determination, the appellant was not limited to continuing the action in Carrington's name pursuant to CPLR 1018. The fact that the appellant obtained its interest in the premises after the action was commenced and the notice of pendency was filed does not definitively bar intervention … , nor does the fact that Carrington defaulted in answering the complaint … . Furthermore, under the circumstances of this case, the appellant's motion, made less than five months after it purchased the premises, and before an order of reference was issued, was timely … . **US Bank N.A. v Carrington, 2020 NY Slip Op 00173, Second Dept 1-8-20**

JURISDICTION, FAMILY LAW.

NEITHER NEW YORK NOR PENNSYLVANIA IS THE HOME STATE OF THE CHILD IN THIS CUSTODY CASE; NEW YORK HAS JURISDICTION BECAUSE OF THE CHILD'S CONNECTIONS TO THE STATE; FAMILY COURT REVERSED (SECOND DEPT).

The Second Department, reversing Family Court, determined neither New York nor Pennsylvania was the "home state" of the child under the statutes and, under the circumstances, New York has jurisdiction to make an initial custody determination:

… [A]lthough the child was living in New York for six consecutive months immediately before this proceeding was commenced, he was not living with a parent in this state for that time period, because the mother did not move to New York until January 2018. Moreover, the maternal great grandmother was not a "person acting as a parent," as that term is defined by statute, because she had not been awarded legal custody of the child by a court and did not claim a right to legal custody of the child … . …

Pennsylvania did not have jurisdiction over the matter. Pennsylvania also did not qualify as the home state of the child, since the child had been living in New York for more than six months prior to the commencement of the proceeding (see Domestic Relations Law § 76[1][a] …). Thus, the child did not have a home state at the time of commencement. In such a case, New York may exercise jurisdiction if "(i) the child . . . and at least one parent . . . have a significant connection with this state other than mere physical presence; and (ii) substantial evidence is available in this state concerning the child's care, protection, training, and personal relationships" (Domestic Relations Law § 76[1][b] …).

The record demonstrates the child's and the mother's significant connection with New York, as well as the availability of substantial evidence in this state, which is where the child and the mother continue to reside with the maternal great grandmother, and where the child is enrolled in school and is seen by a pediatrician … . Matter of Defrank v Wolf, 2020 NY Slip Op 00126, Second Dept 1-8-20

JURISDICTION, FAMILY LAW.

FATHER, WHO WAS INCARCERATED IN PENNSYLVANIA, INFORMED FAMILY COURT HE WISHED TO APPEAR BY TELEPHONE IN THE CUSTODY MATTER; FAMILY COURT DENIED THE REQUEST STATING THE COURT DID NOT HAVE JURISDICTION OVER FATHER; THE 3RD DEPARTMENT HELD FATHER, WHO HAD NOT CHALLENGED THE COURT'S JURISDICTION, SHOULD HAVE BEEN ALLOWED TO APPEAR BY PHONE (THIRD DEPT).

The Third Department, reversing Family Court, determined that father, who was incarcerated in Pennsylvania, should have been allowed to appear in the custody proceeding by telephone. Father had informed the court of his wish to appear and had not challenged the court's jurisdiction and informed Family Court he wished to appear by telephone. Family Court denied father's request stating that the court did not have jurisdiction over father:

"The right to be heard is fundamental to our system of justice" … . Further, "[p]arents have an equally fundamental interest in the liberty, care and control of their children" … . "[E]ven an incarcerated parent has a right to be heard on matters concerning [his or her] child, where there is neither a willful refusal to appear nor a waiver of appearance" … . Here, the father had notice of the proceeding, did not challenge Family Court's jurisdiction and the court could have permitted him to testify telephonically … . Because the record demonstrates that the father was not given an opportunity to participate in the proceedings, we must reverse and remit for a new hearing … . Matter of Starasia E. v Leonora E., 2020 NY Slip Op 00334, Third Dept 1-16-20

JURISDICTION, PARTY DID NOT RECEIVE OF MOTION PAPERS.

DEFENDANT'S ATTORNEY'S AFFIRMATION STATING HE NEVER RECEIVED THE PLAINTIFF'S SUMMARY JUDGMENT MOTION WAS NOT REBUTTED BY PLAINTIFF; THE COURT NEVER HAD JURISDICTION OVER THE MOTION AND THE RESULTING JUDGMENT WAS A NULLITY (SECOND DEPT).

The Second Department, reversing Supreme Court, determined that defendant's (White's) attorney's affirmation stating he never received the bank's summary judgment motion for a judgment of foreclosure deprived to court of jurisdiction and rendered the judgment a nullity:

“The failure to give a party proper notice of a motion deprives the court of jurisdiction to entertain the motion and renders the resulting order void” … . White’s opposition to the plaintiff’s motion, inter alia, for a judgment of foreclosure and sale included his attorney’s affirmation, wherein his attorney stated that the attorney never received the summary judgment motion. In reply, the plaintiff did not submit an affidavit of service or other proof of service demonstrating that the summary judgment motion had been served on White’s counsel. The plaintiff’s assertions are insufficient to raise a presumption that White was served with the summary judgment motion … . At the time White’s attorney brought to the Supreme Court’s attention that the attorney had not received the motion for summary judgment and, in response, the plaintiff failed to submit any proof of service of the motion, the court was presented with evidence that the order … , was a nullity … . Under such circumstances, there was never a default in opposing the motion for summary judgment, and thus, there was no need for White to demonstrate a reasonable excuse or a potentially meritorious opposition to the motion … . Accordingly, the Supreme Court should have denied the plaintiff’s motion, inter alia, for a judgment of foreclosure and sale and vacated so much of the order … as granted the summary judgment motion … . MTGLQ Invs., L.P. v White, 2020 NY Slip Op 00269, Second Dept 1-17-20

JURISDICTION.

AFTER JURISDICTIONAL DISCOVERY, PLAINTIFF DID NOT DEMONSTRATE NEW YORK HAD JURISDICTION OVER THREE OF FOUR NEW JERSEY DEFENDANTS IN THIS MEDICAL MALPRACTICE CASE; WITH RESPECT TO ONE NEW JERSEY DEFENDANT, THE JURISDICTION ISSUE MUST BE DECIDED BY THE JURY (FIRST DEPT).

The First Department, reversing Supreme Court, determined that New Jersey defendant Princeton Radiology Associates (PRO) and the associated defendant doctors (Tsai and Chon) had demonstrated New York did not have jurisdiction over them in this medical malpractice action. With regard to another related New Jersey defendant, Princeton Procure Management, LLC (PPM), the First Department held its lack-of-jurisdiction affirmative defense should not have been dismissed and a jury must decide the issue:

After defendants PPM, PRO, Tsai and Chon moved to dismiss for lack of personal jurisdiction, the motion court found that plaintiff had made a “substantial start” in demonstrating a basis for personal jurisdiction over those defendants. PPM appealed and this Court affirmed, noting the evidence that PPM had identified a principal place of business in New York, and that it “marketed its Somerset, New Jersey, location to target New York residents,

touting its proximity to New York in advertising," and "entered into an agreement with a consortium of New York City hospitals for the referral of cancer patients for treatment at its facility" … . …

Plaintiff did not meet her ultimate burden of establishing that Drs. Tsai and Chon, New Jersey doctors who treated her in New Jersey, projected themselves, on their own initiative, into New York to engage in a sustained and substantial transaction of business related to her claims, such that specific long-arm jurisdiction existed over them under CPLR 302(a)(1) … . …

… [Re: PPM] we conclude that the evidence submitted by plaintiff … does not warrant dismissal of PPM's affirmative defense of lack of jurisdiction. As to general jurisdiction under CPLR 301, plaintiff presented documents in which PPM listed a New York place of business, but PPM submitted an affidavit of its president, who identified PPM's principal place of business as in New Jersey and denied having a New York principal office. …

Plaintiff also failed to establish that specific long-arm jurisdiction exists over PPM under CPLR 302(a)(1). The evidence presented by plaintiff, including various contracts and the radio interviews and billing documents discussed above, provides a "sufficient start" in demonstrating a basis for asserting personal jurisdiction … , but does not warrant dismissal of PPM's affirmative defense … . Robins v Procure Treatment Ctrs., Inc., 2020 NY Slip Op 00047, First Dept 1-2-20

MISLEADING THE COURT.

UPON LEARNING THE STATE, BY EFFECTIVELY MISLEADING THE COURT, OBTAINED A JUDGMENT DETERMINING IT OWNED LAND IN THE ADIRONDACK PARK, THE COURT PROPERLY EXERCISED ITS DISCRETION TO VACATE THE JUDGMENT PURSUANT TO CPLR 5015 (THIRD DEPT).

The Third Department determined Supreme Court properly vacated a judgment pursuant to CPLR 5015 in the interests of substantial justice because plaintiff (the State of New York) had misled the court in proceedings leading to the judgment that it owned land in the Adirondack Park:

Plaintiff argued at trial that, although it could not identify the specific instrument that gave it a superior claim to the parcel at issue, several instruments granted it title to most of Township 40 and that the parcel "was not included within the bounds of any exception" … Plaintiff was aware that the success of this argument would threaten the claims of hundreds of individuals to land in Township 40, and misrepresented to Supreme Court

that it would rely upon a judgment in this action to bring RPAPL article 15 actions against those individuals. Upon succeeding, plaintiff instead enforced the 2001 judgment against defendants alone … . It … became evident that plaintiff sought the 2001 judgment despite the doubts … regarding its ownership claims in Township 40 … . Plaintiff subjected defendants to selectively harsh treatment under a judgment about which it harbored doubts, in other words, and Supreme Court stated that it would not have granted the judgment had plaintiff taken the legal position it later adopted. Supreme Court did not abuse its discretion in finding that these circumstances afforded sufficient reason to vacate the 2001 judgment in the interest of substantial justice … . State of New York v Moore, 2020 NY Slip Op 00008, Third Dept 1-2-10

MUNICIPAL LAW, SCHOOL DISTRICT, NOT CITY, IS PROPER PARTY.

THE TIP OF PLAINTIFF THIRD-GRADER'S FINGER WAS SEVERED WHEN A DOOR IN THE SCHOOL BUILDING SLAMMED SHUT; THE DEFENDANT-SCHOOL'S (DEPARTMENT OF EDUCATION'S [DOE'S]) MOTION FOR SUMMARY JUDGMENT WAS PROPERLY GRANTED; THE DOOR WAS NOT DEFECTIVE, THE SCHOOL HAD NO NOTICE OF A PROBLEM WITH THE DOOR, SUPERVISION COULD NOT HAVE PREVENTED THE ACCIDENT, AND NYC IS NOT LIABLE FOR AN ACCIDENT ON SCHOOL (DOE) PROPERTY (SECOND DEPT).

The Second Department determined defendant school (NYC Department of Education [DOE]) was entitled to summary judgment in this premises liability and negligent supervision action. Plaintiff third-grader alleged a door closed on his finger, severing the tip. The school demonstrated it had no notice of any problems with the door and that supervision could not have prevented the accident. The Second Department noted that the unsigned depositions were properly considered because they were submitted by the DOE and therefore were adopted as accurate, and further noted that, because the accident occurred on school property, the city (NYC) was not liable:

The unsigned deposition transcripts of the school's custodial engineer and the injured plaintiff's teacher, who testified on behalf of their employer, the DOE, were admissible under CPLR 3116(a) because the transcripts were submitted by the DOE and, therefore, were adopted as accurate … . …

The deposition testimony of the building's custodial engineer established that he inspected the door at least twice per week before the accident. Moreover, the school principal provided evidence that a search of the school's

records revealed no "indication of any maintenance, repairs, work orders, or other issues reported" with respect to the door during the two-year time period prior to the accident. This evidence, together with evidence that the subject door was in regular use, including regular use by the infant plaintiff, was sufficient to establish, prima facie, that the door was not defective … . …

When an accident occurs in so short a span of time that even the most intense supervision could not have prevented it, lack of supervision is not the proximate cause of the injury … . E.W. v City of New York, 2020 NY Slip Op 00175, Second Dept 1-8-20

PROHIBITION, WRIT OF, MISTRIAL.

TRIAL JUDGE SHOULD NOT HAVE, SUA SPONTE, DECLARED A MISTRIAL TO ACCOMMODATE A JUROR'S WEEKEND PLANS; WRIT OF PROHIBITION GRANTED; RETRIAL BARRED; INDICTMENT DISMISSED (FIRST DEPT).

The First Department, granting petitioner's application for a writ of prohibition and dismissing the indictment, determined the trial court should not have, sua sponte, declared a mistrial to accommodate a juror's weekend travel plans. Retrial was barred:

The trial court was not compelled by manifest necessity to declare a mistrial and terminate the proceedings …, and accordingly, retrial is barred under the Double Jeopardy Clauses of the Federal and New York State Constitutions … . It was an abuse of discretion to declare a mistrial in order to accommodate a juror's weekend travel plans, including a Friday, which she belatedly informed the court about during deliberations, where the court, as requested by defendant, reasonably could have directed the juror to report for deliberations the following day, and the court also failed to confirm that the jury was hopelessly deadlocked at the time … . Matter of Bannister v Wiley, 2020 NY Slip Op 00522, First Dept 1-28-20

RENEW, MOTION TO.

MOTION TO RENEW SHOULD NOT HAVE BEEN GRANTED, CRITERIA EXPLAINED (SECOND DEPT).

The Second Department, reversing Supreme Court in this foreclosure action, determined the motion to renew should not have been granted, explaining the criteria:

In general, a motion for leave to renew must be based upon new facts not offered on the prior motion that would change the prior determination, and must set forth a reasonable justification for the failure to present such facts on the prior motion … . It is well settled that a motion for leave to renew is not a second chance freely given to parties who have not exercised due diligence in making their first factual presentation … . Indeed, the Supreme Court lacks discretion to grant renewal where the moving party omits a reasonable justification for failing to present the new facts on the original motion … . Successive motions for summary judgment should not be entertained in the absence of good cause, such as a showing of newly discovered evidence. However, evidence is not newly discovered simply because it was not submitted on the prior motion; rather, the evidence must not have been available to the party at the time it made its initial motion and could not have been established through alternate evidentiary means … . Deutsche Bank Natl. Trust Co. v Elshiekh, 2020 NY Slip Op 00570, Second Dept 1-29-20

SANCTIONS, DISCOVERY.

SANCTIONS IMPOSED FOR A DELAYED RESPONSE TO DISCOVERY DEMANDS WERE TOO SEVERE, EFFECTIVELY PRECLUDING PROOF OF COUNTERCLAIMS CENTRAL TO THE DEFENSE; NEW TRIAL ORDERED (FIRST DEPT).

The First Department, reversing the verdict in favor of plaintiff employees, determined the sanctions imposed upon the employer (appellants) for a delayed response to discovery demands were too severe and ordered a new trial. The plaintiffs alleged appellants breached oral employment contracts. The appellants in their counterclaims alleged plaintiffs breached their fiduciary duty by violating Securities and Exchange Commission (SEC) regulations and destroying and replacing handwritten notes about conversations with one of the appellants. The

sanctions effectively prevented the appellants from demonstrating plaintiffs' violation of SEC violations and destruction of evidence:

Pursuant to CPLR 3126, if a party "refuses to obey an order for disclosure or wilfully fails to disclose information which the court finds ought to have been disclosed . . . , the court may make such orders with regard to the failure or refusal as are just." Although "[i]t is within the trial court's discretion to determine the nature and degree of the penalty," "[t]he sanction should be commensurate with the particular disobedience it is designed to punish, and go no further than that" … . Further, "the drastic remedy of striking a party's pleading . . . for failure to comply with a discovery order is appropriate only where [it is] conclusively demonstrate[d] that the non-disclosure was willful, contumacious or due to bad faith" … .

Although the court here did not strike a pleading, its ruling could fairly be viewed as having done so, since the precluded evidence was critical to the fiduciary duty claims. Moreover, the court's drastic sanctions were disproportionate to the alleged discovery malfeasance. It is unclear why a short continuance to give plaintiffs time to review the newly-produced documents would not have been a viable option, or why further curative instructions would not have sufficed. The record as a whole does not support a finding of willfulness or bad faith so as to justify the severe sanctions imposed … . No basis exists to indicate that this was anything other than a disagreement over the scope of discovery. Indeed, the court at trial stated that the alleged discovery omissions "appear[] not to have been in bad faith." Beach v Touradji Capital Mgt., LP, 2020 NY Slip Op 00230, First Dept 1-14-20

SON OF SAM LAW.

PENSION OF POLICE OFFICER CONVICTED OF MURDER AND ATTEMPTED MURDER CAN, UNDER THE SON OF SAM LAW, BE REACHED TO SATISFY A $1 MILLION JUDGMENT OBTAINED BY THE CRIME VICTIM (THIRD DEPT).

The Third Department determined the Son of Sam Law trumped the CPLR, the Retirement and Social Security Law, and the Administrative Code of the City of New York with respect to the pension of a former NYC police officer who was convicted of murder and attempted murder and against whom plaintiff obtained a personal injury judgment of more than $1 million:

"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 allowing 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" … . … [I]n 2001, the Legislature amended the [Son of Sam] law to allow a crime victim to seek recovery from "funds of a convicted person," which includes "all funds and property received from any source by a person convicted of a specified crime," but specifically excludes child support and earned income (Education Law § 632-a [1] [c]). * * *

This Court has found … that CPLR 5205 (c) is superseded by the Son of Sam Law … . Defendant's assertions that Retirement and Social Security Law § 110 and Administrative Code of the City of New York § 13-264 protect his pension from assignment to satisfy plaintiff's money judgment are similarly without merit due to the broad reach of the Son of Sam Law … . Prindle v Guzy, 2020 NY Slip Op 00011, Third Dept 1-2-20

STANDING, DEFAULT, NOTICE, FORECLOSURE.

THE BANK DID NOT PROVE STANDING, DEFENDANT'S DEFAULT, OR COMPLIANCE WITH THE NOTICE REQUIREMENTS OF RPAPL 1304; CRITERIA FOR PROVING EACH ISSUE EXPLAINED IN SOME DETAIL (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff bank's motion for summary judgment should not have been granted because plaintiff's standing, defendants' default, and plaintiff's compliance with the notice provisions of RPAPL 1304 were not proven. The Second Department explained the proof requirements for each:

… [T]he plaintiff failed to show that the note was properly endorsed and thus validly transferred to it … . * * *

… [T]he plaintiff also failed to submit admissible evidence of the defendants' default in making the mortgage payments due under the terms of the note and mortgage … . * * *

The plaintiff also failed to proffer evidence establishing its compliance with the notice requirements of RPAPL 1304. U.S. Bank N.A. v Moulton, 2020 NY Slip Op 00171, Second Dept 1-8-20

STANDING, FORECLOSURE.

PLAINTIFF BANK DID NOT PRESENT SUFFICIENT EVIDENCE OF STANDING TO BRING THE FORECLOSURE ACTION; BANK'S MOTION FOR SUMMARY JUDGMENT IN THIS FORECLOSURE ACTION SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff bank's motion for summary judgment in this foreclosure action should not have been granted. Plaintiff did not demonstrate it had standing to bring the action:

… [T]he plaintiff failed to meet its prima facie burden of establishing that it had standing to commence the action. In support of its motion, the plaintiff relied on the affidavit of Melissa Gallio, the Vice President of Loan Documentation for the plaintiff. Gallio stated that her knowledge of this case was based upon her review of "the books and records" maintained by the plaintiff, and asserted that the plaintiff was "in possession of the Note and Mortgage" "[a]s of January 10, 2007." However, Gallio's assertions as to the contents of the records were inadmissible hearsay to the extent that the records she purported to describe were not submitted with her affidavit … . While a witness may read into the record from the contents of a document which has been admitted into evidence … , a witness's description of a document not admitted into evidence is hearsay … . Wells Fargo Bank, N.A. v Springer, 2020 NY Slip Op 00176, Second Dept 1-8-20

STANDING, FORECLOSURE.

THE BANK DID NOT PROVE IT HAD STANDING TO BRING THE FORECLOSURE ACTION (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff bank's motion for summary judgment in this foreclosure action should not have been granted. Plaintiff bank did not submit sufficient proof of standing to bring the action:

Where, as here, a plaintiff's standing to commence a foreclosure action is placed in issue by a defendant, it is incumbent upon the plaintiff to prove its standing to be entitled to relief … . A plaintiff establishes its standing in a mortgage foreclosure action by demonstrating that, when the action was commenced, it was either the holder or assignee of the underlying note … . Either a written assignment of the underlying note or the physical delivery of the note prior to the commencement of the foreclosure action is sufficient to transfer the obligation, and the

mortgage passes with the debt as an inseparable incident … . Here, the plaintiff failed to meet its burden to establish, prima facie, its entitlement to summary judgment because the affidavit submitted in support of the motion was insufficient to establish standing … . Deutsche Bank Natl. Trust Co. v Conrado, 2020 NY Slip Op 00103, Second Dept 1-8-20

STANDING, FORECLOSURE.

THE PLAINTIFF BANK DID NOT DEMONSTRATE IT HAD STANDING TO BRING THE FORECLOSURE ACTION (SECOND DEPT),

The Second Department, reversing Supreme Court, determined plaintiff bank did not demonstrate standing to bring the foreclosure action:

Wells Fargo failed to establish, prima facie, that it had possession of the note prior to the commencement of the action, and thus failed to establish that it had standing to foreclose the mortgage … . Wells Fargo did not attach a copy of the note and allonge to the complaint when the action was commenced to establish, prima facie, that it had possession of the note at that time … . Moreover, the affidavit of Wells Fargo's vice president of loan documentation was insufficient to establish that Wells Fargo possessed the note at the time the action was commenced … . Wells Fargo Bank, N.A. v Elsman, 2020 NY Slip Op 00321, Second Dept 1-15-20

STANDING, RES JUDICATA, COLLATERAL ESTOPPEL, FORECLOSURE.

PLAINTIFF BANK'S PRIOR FORECLOSURE ACTION WAS DISMISSED FOR FAILURE TO DEMONSTRATE STANDING; RES JUDICATA DOES NOT PRECLUDE THE INSTANT FORECLOSURE ACTION BECAUSE THE PRIOR ACTION WAS NOT DISMISSED ON THE MERITS; COLLATERAL ESTOPPEL DOES NOT PRECLUDE THE INSTANT ACTION BECAUSE THE STANDING ISSUE IS NOT THE SAME (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the prior dismissal of plaintiff bank's foreclosure action for failure to demonstrate standing did not, under the doctrines of res judicata or collateral estoppel, preclude the present action. The prior dismissal was not on the merits and the standing issue in the current procedure is not the same as in the prior proceeding:

Here, as the prior action was dismissed for lack of standing, without reaching the merits of the foreclosure claim itself, the defendants failed to demonstrate that "a judgment on the merits exists between the same parties involving the same subject matter" … . "To accord res judicata effect to the [judgment in the prior action] would bar a court from ever addressing the merits of plaintiff's mortgage foreclosure claim, even if plaintiff became able to demonstrate its standing to sue, and there is nothing in the record to suggest . . . [that there are] exceptional circumstances or an unreasonable neglect to prosecute that would warrant such an extreme sanction" … . …

… [T]the defendants failed to demonstrate that the issue of whether the plaintiff has standing under the circumstances of this action was identical to the issue adjudicated in the prior action … . In the prior action, the plaintiff failed to establish that it had possession of the original endorsed note at the time that action was commenced, while in the present action, the issue is whether the plaintiff had possession of the original endorsed note at the time this action was commenced … . HSBC Bank USA, N.A. v Pantel, 2020 NY Slip Op 00109, Second Dept 1-8-20

STATUTE OF FRAUDS, COMPLAINTS.

PLAINTIFFS' ACTION ALLEGING BREACH OF AN ORAL CONTRACT REGARDING REPAYMENT OF A LOAN SECURED BY A NOTE AND MORTGAGE SHOULD HAVE BEEN DISMISSED AS BARRED BY THE STATUTE OF FRAUDS; THE FRAUD AND UNJUST ENRICHMENT CAUSES OF ACTION MUST BE DISMISSED AS DUPLICATIVE OF THE BREACH OF CONTRACT CAUSE OF ACTION (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiffs' action alleging breach of an alleged oral contract concerning the repayment of a loan secured by a note an mortgage should have been dismissed as barred by the statute of frauds. The fraud and unjust enrichment causes of action must also be dismissed as duplicative of the breach of contract cause of action:

The complaint alleged that contemporaneously with executing the note and mortgage, the plaintiffs and the defendant entered into an oral agreement providing, inter alia, that in exchange for assigning a contract to purchase certain real property to the defendant, the plaintiffs would be responsible for paying only the interest on the loan. The complaint, which asserted causes of action sounding in breach of contract, fraud, and unjust enrichment, sought, among other things, recovery of the settlement amount paid by the plaintiffs in the foreclosure action, less the amount of interest allegedly due pursuant to the oral agreement. The defendant moved pursuant to CPLR 3211(a) to dismiss the complaint. The Supreme Court denied the motion, and the defendant appeals.

Accepting the facts as alleged in the complaint as true, and according the plaintiffs the benefit of every possible inference, dismissal of the breach of contract cause of action should have been granted, since enforcement of the alleged oral agreement, ostensibly to modify the note and mortgage, is barred by the statute of frauds (see General Obligations Law §§ 5-703[1]; 5-1103 …). Dismissal of the causes of action alleging fraud and unjust enrichment should also have been granted as they are duplicative of the unenforceable contractual cause of action and thus constitute an impermissible attempt to circumvent the statute of frauds … . Botanical Realty Assoc. Urban Renewal, LLC v Gluck, 2020 NY Slip Op 00099, Second Dept 1-8-20

SUA SPONTE, CLASS ACTIONS.

SUPREME COURT SHOULD NOT HAVE, SUA SPONTE, GRANTED RELIEF NOT REQUESTED IN PLAINTIFFS' UNOPPOSED MOTION AND SHOULD NOT HAVE CONSIDERED EVIDENCE NOT BEFORE IT; THE ORDER SETTLING A CLASS ACTION FOR UNPAID WAGES AND OVERTIME SHOULD NOT HAVE DECLARED INVALID CERTAIN OPT-OUT STATEMENTS WHICH WERE NOT REFERRED TO IN PLAINTIFFS' MOTION AND WERE NOT OTHERWISE BEFORE THE COURT (SECOND DEPT).

The Second Department, reversing Supreme Court in this class action seeking unpaid wages and overtime, determined Supreme Court should not have. sua sponte, declared certain opt-out statements (opting out of the class action settlement) invalid because the issue was not raised by the plaintiff's motion and the opt-out statements were not properly before the court:

Pursuant to the February 2018 order, all class members who did not opt out were permanently enjoined from asserting, pursuing, and/or seeking to reopen claims that were released pursuant to the settlement agreement. The February 2018 order also contained a handwritten provision declaring that "[t]he opt outs received on 1/26/18 from Lee Litigation Group are deemed invalid as they were dated prior to the Class Notice which was sent 12/27/17, and do not contain the required opt-out language pursuant to the Class-Notice ordered by this court on November 22, 2017." Such relief was not sought in the motion filed by the plaintiffs nor was it contained in the proposed order submitted to the court by the plaintiffs' counsel. …

CPLR 908 provides that "[a] class action shall not be dismissed, discontinued, or compromised without the approval of the court," and that "[n]otice of the proposed dismissal, discontinuance, or compromise shall be given to all members of the class in such manner as the court directs." Contrary to the plaintiffs' contention, the Supreme Court should not have, sua sponte, declared invalid certain opt-out statements that were not part of the plaintiffs' unopposed motion and which relief was not requested in the motion. "[A] court may grant relief that is warranted by the facts plainly appearing on the papers on both sides, if the relief granted is not too dramatically unlike the relief sought, the proof offered supports it, and there is no prejudice to any party" … . Here, the court strayed from this principle … . The relief awarded by the court, sua sponte, in the handwritten provision in the February 2018 order is "dramatically unlike" the relief sought by the plaintiffs and was prejudicial to the appellants … . Moreover, the opt-out statements referred to in the February 2018 order were not among the exhibits submitted on the plaintiffs' motion, and therefore were not properly before the court for consideration … . Robinson v Big City Yonkers, Inc., 2020 NY Slip Op 00447, Second Dept 1-22-20

SUMMARY JUDGMENT, NEW THEORY RAISED IN OPPOSITION.

DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT IN THIS MEDICAL MALPRACTICE ACTION SHOULD HAVE BEEN GRANTED; PLAINTIFF'S EXPERT DID NOT DEMONSTRATE THE NECESSARY EXPERTISE AND THE EXPERT'S AFFIDAVIT WAS CONCLUSORY AND SPECULATIVE; THE COURT NOTED THAT A THEORY RAISED FOR THE FIRST TIME IN OPPOSITION TO SUMMARY JUDGMENT SHOULD NOT BE CONSIDERED (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, determined summary judgment should have been granted to several of the defendants in this medical malpractice action because the plaintiff's expert did not raise a triable issue of fact. The expert did not demonstrate expertise in relevant areas and the expert's opinions were conclusory and speculative with respect to three of the defendants. The Second Department noted that a court should not consider a theory of liability raised for the first time in opposition to a summary judgment motion:

"While it is true that a medical expert need not be a specialist in a particular field in order to testify regarding accepted practices in that field, the witness nonetheless should be possessed of the requisite skill, training, education, knowledge or experience from which it can be assumed that the opinion rendered is reliable" … . "Thus, where a physician provides an opinion beyond his or her area of specialization, a foundation must be laid tending to support the reliability of the opinion rendered" … . Here, the plaintiff's expert, who specialized in general and vascular surgery, did not indicate that he or she had any special training or expertise in orthopaedics or family medicine, and failed to set forth how he or she was, or became, familiar with the applicable standards of care in these specialized areas of practice … . Further, the conclusions of the plaintiff's expert as to Desai, Anand, and Sveilich were conclusory and speculative … , improperly based on hindsight reasoning … , and self-contradictory … . Samer v Desai, 2020 NY Slip Op 00318, Second Dept 1-15-20

SUMMARY JUDGMENT, NEW THEORY RAISED IN OPPOSITION.

PLAINTIFFS CAN NOT RAISE A NEW THEORY OF LIABILITY IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT, SUPREME COURT REVERSED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the defendant hospital's motion for summary judgment in this medical malpractice action should have been granted. The plaintiffs attempted to raise an evidentiary issue and theory of liability for the first time in opposition to the motion:

… [T]he plaintiffs improperly alleged, for the first time, a new theory claiming that other employees of the hospital were negligent in failing to properly administer Decadron and Heparin in accordance with the prescription of the plaintiff's attending physician. " A plaintiff cannot, for the first time in opposition to a motion for summary judgment, raise a new or materially different theory of recovery against a party from those pleaded in the complaint and the bill of particulars'" … . Bacalan v St. Vincents Catholic Med. Ctrs. of N.Y., 2020 NY Slip Op 00561, Second Dept 1-29-20

SUMMARY JURY TRIALS, MISTRIAL.

TRIAL COURT'S DECLARING A MISTRIAL VIOLATED THE PARTIES' STIPULATION PURSUANT TO THE SUMMARY JURY TRIAL RULES (FIRST DEPT).

The First Department, reversing Supreme Court, determined the trial should not have, sua sponte, declared a mistrial in this summary jury trial (SJT) in an attempt to correct an evidentiary error. The mistrial violated the parties' STJ stipulation which constitutes a binding contract:

The SJT rules to which the parties stipulated provide, among other things, that "[p]arties agree to waive any motions for directed verdicts as well as any motions to set aside the verdict or any judgment rendered by said jury" and that the "Court shall not set side any verdict or any judgment entered thereon, nor shall it direct that judgment be entered in favor [of] a party entitled to judgment as a matter of law, nor shall it order a new trial as to any issues where the verdict is alleged to be contrary to the weight of the evidence" … .

The court erred in sua sponte declaring a mistrial and setting aside the verdict. While this was an attempt to correct an admittedly erroneous evidentiary ruling, the parties' stipulation to a summary jury trial, subject to the

applicable rules and procedures for Bronx County, was a legally binding contract … . Since the summary jury trial rules for Bronx County do not provide for any means to correct errors of law committed during trial, the court exceeded the boundaries of the parties' agreement by setting aside the verdict, regardless of whether it in fact did so on its own initiative in the interest of justice … .

… [T]his holding does not proscribe post-trial motions of any kind in connection with summary jury trials; rather, it abides by the parties' own proscriptions made at the time that they stipulated to proceed with a summary jury trial. There was nothing barring the parties from stipulating to reserve their right to appeal or move to set aside the verdict on the ground of an error of law. Vargas v LaMacchia, 2020 NY Slip Op 00556, First Dept 1-28-2o

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