NEW YORK APPELLATE DIGEST, LLC

2019 "Judge, Can You Do That?" Compilation

An Organized Compilation of Summaries of Decisions Released in 2019 Addressing Primarily "Sua Sponte" Judicial Actions Which Were Deemed Reversible Error. The Issues Are Categorized and Described in the Table of Contents. The Table of Contents Entries Link to the Summaries Which Link to the Decisions on the Official New York Courts Website. Click on "Table of Contents" in the Header to Return There.

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BIAS, FAMILY LAW, MISCHARATERIZATION OF EVIDENCE.

THE JUDGE MISCHARACTERIZED THE EVIDENCE AND EXHIBITED BIAS IN FAVOR OF FATHER IN THIS CUSTODY CASE, THE DETERMINATION WAS REVERSED AND THE MATTER SENT BACK FOR ANOTHER HEARING BEFORE A DIFFERENT JUDGE (THIRD DEPT).

The Third Department, reversing the custody determination and remitting the matter for another hearing before a different judge, determined the judge mischaracterized the evidence and exhibited bias in favor of father:

We agree with the mother and the attorney for the child that Family Court's decision and order misstates and mischaracterizes the record evidence and that the determination lacks a sound and substantial basis in the record. For example, the court determined that a "curious" exchange between the child and a therapist "tended to suggest that the child was confused about her feelings toward her father," characterized the testimony by the mother's forensic psychologist who deemed the mother mentally fit as a "brief interlude of comic relief," and lauded the father's willingness to undergo penile plethysmograph testing — characterized as "a colonoscopy of the soul" — as "speak[ing] volumes to his actual innocence." The court went so far as to criticize the forensic expert's testimony concerning the September 2016 visitation as an example of blending incidents by commenting, "The only blending here . . . is that of pseudoscience with the world's oldest profession." The record does not support any of this unfortunate and bizarre commentary.

It is concerning that Family Court wholeheartedly credited the father's testimony, viewed most — if not all — of the evidence in a light least favorable to the mother … and diminished the evidence of domestic violence perpetrated by the father against the mother in the child's presence. Matter of Nicole TT. v David UU., 2019 NY Slip Op 05729, Third Dept 7-18-19

DELEGATION OF AUTHORITY, FAILURE TO HOLD HEARING, FAMILY LAW.

FAMILY COURT SHOULD NOT HAVE DELEGATED ITS AUTHORITY TO DETERMINE PARENTAL ACCESS TO THE PARTIES AND SHOULD NOT HAVE MADE FINDINGS IN THE ABSENCE OF A HEARING (SECOND DEPT).

The Second Department, reversing and remitting the matter to Family Court, determined the court should not have delegated its authority to determine parental access to the parties and should not have made findings without a hearing:

A court may not delegate its authority to determine parental access to either a parent or a child … . While a child's views are to be considered in determining custody or parental access, they are not determinative … . An access provision which is conditioned on the desires of the children tends to defeat the right of parental access … . Here, the Family Court determined that it would not compel either child to visit with the mother. Because the order appealed from effectively conditions the mother's parental access on the children's wishes and leaves the determination as to whether there should be access at all to the children, it must be set aside … . The Family Court made its determination based only upon its review of the papers, the in camera interviews, and the colloquy with the unrepresented parties, which occurred in the absence of the attorney for the children. The court did not conduct a hearing, did not direct a forensic examination, and did not seek information from the clinicians involved in the lapsed therapeutic visits. Although there are indications in the record that the mother's parenting skills may be less than ideal, and she may bear at least some responsibility for her estrangement from the children, the record before us is inadequate to support the Family Court's refusal to order, at the least, the resumption of therapeutic visits. Furthermore, the court's finding that the father had done all that he could to encourage the children to visit with the mother was based solely upon the in camera interviews and was not based on any sworn testimony, and the mother was not afforded the opportunity to challenge, either by her own evidence or through cross-examination, the father's assertions. Matter of Mondschein v Mondschein, 2019 NY Slip Op 06395, Second Dept 8-28-19

DELEGATION OF AUTHORITY, FAMILY LAW.

FAMILY COURT SHOULD NOT HAVE LET A PARTY DETERMINE THE AMOUNT OF SUPERVISED CONTACT MOTHER IS TO BE ALLOWED, AND FAMILY COURT SHOULD NOT HAVE CONDITIONED FURTHER PETITIONS BY MOTHER ON PERMISSION FROM THE COURT (FOURTH DEPT).

The Fourth Department determined Family Court should not have delegated its authority to order the amount of supervised contact with the children mother is to be allowed and should not have conditioned further petitions by mother on permission from the court:

… [T]he court erred in granting her only so much supervised contact as was "deemed appropriate" by petitioners. The court is "required to determine the issue of visitation in accord with the best interests of the children and fashion a schedule that permits a noncustodial parent to have frequent and regular access" … . "In so doing, the court may not delegate its authority to make such decisions to a party" … , which the court did here by delegating to petitioners its authority to set a supervised visitation schedule. We therefore … remit the matter to Family Court to determine the supervised visitation schedule.

… [T]he court erred in ordering that any petition filed by the mother to modify or enforce the custody orders must have a judge's permission to be scheduled. "Public policy mandates free access to the courts" … , and it is error to restrict such access without a finding that the restricted party "engaged in meritless, frivolous, or vexatious litigation, or . . . otherwise abused the judicial process" … . Here, it is undisputed that the mother had not commenced any frivolous proceedings. In the absence of such a finding, it was error for the court to restrict the mother's access to the court … . Matter of Lakeya P. v Ajja M., 2019 NY Slip Op 00761, Fourth Dept 2-1-19

EXCESSIVE INTERVENTION, CRIMINAL LAW, JURY INSTRUCTIONS.

EVIDENCE DEFENDANT HAD BEEN ACCUSED OF FRAUDULENTLY PRACTICING DENTISTRY IN THE PAST WAS NOT RELEVANT TO THE INSTANT PROCEEDING ALLEGING THE UNLICENSED PRACTICE OF DENTISTRY; THE PREJUDICIAL EFFECT WAS EXACERBATED BY REFERENCES TO THE ALLEGED FRAUD BY THE PROSECUTOR IN SUMMATION AND BY THE JUDGE IN THE INSTRUCTIONS TO THE JURY; DEFENDANT'S CONVICTION REVERSED (SECOND DEPT).

The Second Department, reversing defendant's conviction, determined that the probative value of evidence submitted to the jury was outweighed by its prejudicial effect. Defendant was charged under the Education Law with practicing dentistry without a license. Defendant alleged he was legally acting as a clinical director in a dental office. The jury was presented with evidence indicating defendant had been previously accused of practicing dentistry fraudulently:

Evidence that the defendant voluntarily surrendered his license to practice dentistry in 2000 was properly admitted to show that the defendant was unlicensed and was aware that he was unlicensed. However, the evidence submitted to the jury, which consisted of the defendant's "application to surrender license," stated not only that he was voluntarily surrendering his license, but also that he was doing so because he was "under investigation for allegations that [he] practiced the profession of dentistry fraudulently, within the purview and meaning of New York Education Law section 6509(2), and committed unprofessional conduct by engaging in conduct in the practice of the profession of dentistry evidencing moral unfitness to practice." During summation, the prosecutor argued that the defendant had surrendered his license because he "had practiced the profession of dentistry fraudulently." Thereafter, during the Supreme Court's instructions to the jury, the court instructed the jurors that "there was evidence in the case that on another occasion, the defendant engaged in criminal conduct and was convicted of a crime," which was "offered as evidence for [the jurors'] consideration on the questions of whether those facts are inextricably interwoven with the crimes charged, if [they] find the evidence believable, [they] may consider it for that limited purpose and for none other."

The references to fraud and moral turpitude were not relevant to the issue of whether the defendant was unlicensed and was aware that he was unlicensed. Under the circumstances, any probative value of the evidence

of the prior fraud was outweighed by its prejudicial effect … . People v Hollander, 2019 NY Slip Op 07950, Second Dept 11-6-19

EXCESSIVE INTERVENTION, CRIMINAL LAW, JURY INSTRUCTIONS.

PROVIDING WRITTEN INSTRUCTIONS TO THE JURY OVER DEFENDANT'S OBJECTION REQUIRED REVERSAL AND A NEW TRIAL, HOT LIQUID CAN BE A DANGEROUS INSTRUMENT WITHIN THE MEANING OF THE PENAL LAW (FIRST DEPT).

The First Department, reversing defendant's conviction, determined that "defendant is entitled to a new trial because the court provided written instructions to the jury, at its request, but over defendant's objection (see People v Johnson , 81 NY2d 980 [1993])." The court also noted that the jury could have reasonably found that the hot liquid thrown by defendant qualified as a dangerous instrument (see Penal Law §§ 10.00[10],[13]; see also People v Adolph , 299 AD2d 257, 257 [1st Dept 2002], lv denied 99 NY2d 579 [2003])." People v Peralta, 2019 NY Slip Op 03539, First Dept 5-7-19

EXCESSIVE INTERVENTION, CRIMINAL LAW, MARSHALLING THE EVIDENCE.

CELL PHONE COMPANY WITNESS WAS NOT AN ENGINEER AND SHOULD NOT HAVE BEEN ALLOWED TO TESTIFY AS AN EXPERT ABOUT HOW FAR DEFENDANT'S PHONE WAS FROM THE TOWER, POLICE OFFICER SHOULD NOT HAVE BEEN ALLOWED TO TESTIFY ABOUT THE VICTIM'S IDENTIFICATION OF THE DEFENDANT, JUDGE SHOULD NOT HAVE MARSHALED THE EVIDENCE TO FAVOR THE PROSECUTION, THESE ERRORS, AS WELL AS ADDITIONAL JUDICIAL ERRORS, CUMULATIVELY DEPRIVED DEFENDANT OF A FAIR TRIAL (FIRST DEPT).

The First Department, reversing defendant's conviction, described a number of errors which had the cumulative effect of depriving defendant of a fair trial. Those errors include: (1) the witness from the cell phone company

was not an engineer and therefore could not provide competent expert opinion about where defendant's cell phone was in relation to the cell phone tower which picked up the signal; (2) a police officer should not have been allowed to testify that the victim had twice identified the defendant by name; (3) the charge to the jury improperly marshaled the identification evidence in a light favorable to the prosecution; (4) the court should have given the missing witness jury instruction for two lead detectives who had interviewed the victim and a witness; and (5) the judge should not have referenced the defendant's failure to testify (twice). With respect to the cell tower and identification evidence, the court wrote:

"[T]estimony on how cell phone towers operate must be offered by an expert witness" because an analysis of the possible ranges of cell phone towers and how they operate is beyond a juror's day-to-day experience and knowledge … . [The witness] was not an engineer and was not qualified, without an engineering background, to reach further conclusions about why defendant's cell phone hit the Starling Avenue tower, i.e. whether it was because it was closest or strongest … . …

The trial court also permitted a police officer to testify twice, over defense objection, that the victim had identified her attacker as "male Hispanic, bald, by the name of Jose Ortiz." This too was error. "Testimony by one witness (e.g., a police officer) to a previous identification of the defendant by another witness (e.g., a victim) is inadmissible" … . People v Ortiz, 2019 NY Slip Op 00221, First Dept 1-15-19

EXCESSIVE INTERVENTION, CRIMINAL LAW, PARTICIPATION IN READBACK.

DEFENSE COUNSEL'S QUESTIONS WHETHER COMPLAINANTS HAD HIRED LAWYERS AND HAD SUED DEFENDANT-TEACHER AND THE SCHOOL DISTRICT IN THIS CHILD SEX ABUSE CASE DID NOT OPEN THE DOOR TO ALL EVIDENCE OF DEFENDANT'S ALLEGED PRIOR SEXUAL ABUSE OF CHILDREN, CONVICTION REVERSED BECAUSE DEFENDANT WAS DEPRIVED OF A FAIR TRIAL; JUDGE SHOULD NOT HAVE PARTICIPATED IN A READBACK OF TESTIMONY (SECOND DEPT).

The Second Department, reversing defendant's conviction in this child sex abuse prosecution, determined that the trial court should not have allowed the prosecution to present all evidence of defendant's alleged prior sexual abuse of children after defense counsel asked complainants whether they had hired a lawyer and were suing the defendant-teacher and the school district based upon defendant's alleged sexual abuse of children. Re-direct

should have been limited to only the evidence necessary to clarify and explain the reasons for the witness's hiring a lawyer and bringing a lawsuit. The Second Department also noted that the trial judge should have participated in the readback of testimony and the harmless error analysis is not applicable:

… [D]efense counsel asked questions regarding the civil actions in an attempt to impeach credibility and establish that a motivation for some of the complainants' testimony against the defendant was monetary gain or a pecuniary interest. This line of inquiry did not open an unfettered passageway for the People to elicit extensive and prejudicial evidence regarding alleged uncharged complaints. The extraneous testimony of alleged uncharged complaints did not serve to explain or clarify whether the civil actions provided certain complainants with a financial incentive to testify.

Moreover, the admission of evidence of alleged uncharged complaints violated the basic principle underlying Molineux and its progeny that "a criminal case should be tried on the facts and not on the basis of a defendant's propensity to commit the crime charged …". …

The Court of Appeals has explained that "if in any instance, an appellate court concludes that there has been such error of a trial court, such misconduct of a prosecutor, such inadequacy of defense counsel, or such other wrong as to have operated to deny any individual defendant his fundamental right to a fair trial, the reviewing court must reverse the conviction and grant a new trial, quite without regard to any evaluation as to whether the errors contributed to the defendant's conviction" … . People v Watts, 2019 NY Slip Op 07426, Second Dept 10-16-19

EXCESSIVE INTERVENTION, CRIMINAL LAW, PLEA NEGOTIATION.

IT IS REVERSIBLE ERROR FOR A JUDGE TO NEGOTIATE A PLEA DEAL WITH A CODEFENDANT IN EXCHANGE FOR TESTIMONY AGAINST THE DEFENDANT (FOURTH DEPT).

The Fourth Department, reversing defendant's conviction, determined the trial judge should not have negotiated a plea deal with a codefendant in exchange for testimony against the defendant:

… [T]he court committed reversible error when it "negotiated and entered into a [plea] agreement with a codefendant[,] requiring that individual to testify against defendant in exchange for a more favorable sentence" … . Here, "by assuming the function of an interested party and deviating from its own role as a neutral arbiter,

the trial court denied defendant his due process right to [a] fair trial in a fair tribunal' " … . We therefore reverse the judgment and grant a new trial before a different justice on counts one and two of the indictment … . People v Lawhorn, 2019 NY Slip Op 09223, Fourth Dept 12-20-19

EXCESSIVE INTERVENTION, CRIMINAL LAW, PLEA NEGOTIATION.

THE TRIAL JUDGE'S NEGOTIATION OF A PLEA DEAL DIRECTLY WITH THE CO-DEFENDANT, IN RETURN FOR THE CO-DEFENDANT'S ESSENTIAL TESTIMONY IDENTIFYING THE DEFENDANT AS ONE OF THE ROBBERS DEPICTED IN A VIDEO, DEPRIVED DEFENDANT OF HIS RIGHT TO A FAIR TRIAL (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Stein, over a concurrence, reversing the Appellate Division, determined the trial judge had deprived defendant of a fair trial by negotiating a plea agreement directly with the co-defendant in return for the co-defendant's testimony against the defendant. Although the defendant and co-defendant in this robbery case were captured on video, their faces were covered. At trial the co-defendant identified the defendant as the person depicted in the video:

It is undisputed that, as the Appellate Division concluded, the trial court "personally negotiate[ed] and enter[ed] into a quid pro quo cooperation agreement with the codefendant whereby the court promised to sentence the codefendant within a specific range in exchange for his testimony against defendant" (151 AD3d at 1639). In so doing, the trial court improperly "assume[d] the advocacy role traditionally reserved for counsel" … and ventured from its own role as a neutral arbiter "[s]tationed above the clamor of counsel or the partisan pursuit of procedural or substantive advantage" … . Indeed, whatever its subjective intentions, the trial court effectively procured a witness in support of the prosecution by inducing the codefendant to testify concerning statements the codefendant made to police—which identified defendant as one of the robbers—in exchange for the promise of a more lenient sentence. Significantly, by tying its assessment of the truthfulness of the codefendant's testimony to that individual's prior statements to police, the trial court essentially directed the codefendant on how the codefendant must testify in order to receive the benefit of the bargain … . Under these circumstances, the trial court's conduct "conflicted impermissibly with the notion of fundamental fairness" … . That is, by assuming the function of an interested party and deviating from its own role as a neutral arbiter, the trial court denied defendant his due process right to "[a] fair trial in a fair tribunal" (In re Murchison, 349 US at 136). This

error is not subject to harmless error review and requires reversal … . People v Towns, 2019 NY Slip Op 03527, CtApp 5-7-19

EXCESSIVE INTERVENTION, CRIMINAL LAW, VERDICT SHEET ANNOTATIONS.

RAPE THIRD IS NOT AN INCLUSORY CONCURRENT COUNT OF RAPE FIRST; THE VERDICT SHEET INCLUDED AN IMPERMISSIBLE ANNOTATION, MATTER REMITTED TO DETERMINE WHETHER DEFENSE COUNSEL CONSENTED TO THE ANNOTATION (FOURTH DEPT).

The Fourth Department determined: (1) rape third is not an inclusory concurrent count of rape first; and (2) the verdict sheet included an impermissible annotation. The matter was remitted to determine whether defense counsel consented to the annotation:

… [T]he verdict sheet, which states in relevant part "Fourth Count: Rape in the Third Degree (lack of consent/totality of circumstances)," contains an impermissible annotation. Specifically, the "totality of circumstances" language is impermissible because it is not "statutory language" (CPL 310.20 [2]; see Penal Law § 130.25 [3]). Rather, it is language from the pattern jury instructions (see CJI 2d[NY] Penal Law § 130.25 [3]). Supreme Court was therefore required to obtain defense counsel's consent prior to submitting the annotated verdict sheet to the jury … . Although "consent to the submission of an annotated verdict sheet may be implied where defense counsel fail[s] to object to the verdict sheet after having an opportunity to review it' "… , here, the record does not reflect whether defense counsel had that opportunity. We therefore hold the case, reserve decision and remit the matter to Supreme Court to determine, following a hearing if necessary, whether defense counsel consented to the annotated verdict sheet … . People v Wilson, 2019 NY Slip Op 06900, Fourth Dept 9-27-19

EXCESSIVE INTERVENTION, CRIMINAL LAW.

EXCESSIVE INTERFERENCE BY THE TRIAL JUDGE DEPRIVED DEFENDANT OF A FAIR TRIAL; ISSUE CONSIDERED ON APPEAL IN THE INTEREST OF JUSTICE (SECOND DEPT).

The Second Department, reversing defendant's conviction, determined the judge's intervention usurped the roles of the attorneys and deprived defendant of a fair trial. Defense counsel did not object but the issue was considered on appeal in the interest of justice:

"[W]hile a trial judge may intervene in a trial to clarify confusing testimony and facilitate the orderly and expeditious progress of the trial, the court may not take on the function or appearance of an advocate'" … . "The principle restraining the court's discretion is that a trial judge's function is to protect the record, not to make it'"… . Hence, "when the trial judge interjects often and indulges in an extended questioning of witnesses, even where those questions would be proper if they came from trial counsel, the trial judge's participation presents significant risks of prejudicial unfairness" … .

In this case, the Supreme Court engaged in extensive questioning of witnesses, usurped the roles of the attorneys, elicited and assisted in developing facts damaging to the defense on direct examination of the People's witnesses, bolstered the witnesses' credibility, interrupted cross-examination, and generally created the impression that it was an advocate on behalf of the People. People v Ramsey, 2019 NY Slip Op 05571, Second Dept 7-10-19

EXCESSIVE INTERVENTON, CRIMINAL LAW, JURY INSTRUCTIONS, LIMITS ON CROSS-EXAMINATION.

TRIAL JUDGE SHOULD NOT HAVE LIMITED DEFENSE CROSS-EXAMINATION OF A WITNESS TESTIFYING ABOUT DNA TRANSFER, AND SHOULD NOT HAVE INSTRUCTED THE JURY TO ACCEPT A POLICE OFFICER'S EXPLANATION, NEW TRIAL ORDERED (SECOND DEPT).

The Second Department, reversing defendant's conviction, determined the trial judge should not have limited cross-examination of the prosecution's witness about DNA transfer, and should not have instructed the jury, during defense counsel's summation, to accept the testimony of a prosecution witness:

… [T]he defendant's contention that his right to confrontation was violated when the Supreme Court limited cross-examination of a prosecution witness on the issue of DNA transfer is preserved for appellate review … . Furthermore, the court's limitation of defense counsel's cross-examination with regard to DNA transfer was an improvident exercise of discretion, since the testimony defense counsel sought to elicit would have been relevant and would not have confused or misled the jury … . Moreover, under the circumstances presented, the error was not harmless, as there is a reasonable possibility that the error contributed to the defendant's convictions … .

We also agree with the defendant's contention that his right to a fair trial was violated when, during summation, defense counsel attacked the credibility of the testimony of certain police officers regarding wanted posters, and the Supreme Court instructed the jury, "there was testimony on that. The jurors will be bound by its recollection of the testimony and the explanation." Since a "jury is presumed to follow the court's instructions" … , the court's instruction, which bound the jury to accept the officer's explanation, rather than to rely on its recollection of the testimony and the evidence, was erroneous. People v Kennedy, 2019 NY Slip Op 07899, Second Dept 11-6-19

FAILURE TO COMPLY WITH STATUTE, FAILURE TO HOLD HEARING, CORPORATION LAW, DISSOLUTION.

SUPREME COURT SHOULD NOT HAVE IGNORED THE NOTICE REQUIREMENTS IN THE BUSINESS CORPORATION LAW AND SHOULD NOT HAVE DISSOLVED THE CLOSELY HELD CORPORATION WITHOUT A HEARING (SECOND DEPT).

The Second Department determined Supreme Court should not have ignored the statutory notice requirements in this action to dissolve a closely held corporation (VJN) and should not have dissolved the corporation without a hearing:

Business Corporation Law § 1106(a) provides, inter alia, that, upon the filing of a petition for dissolution of a corporation, "the court shall make an order requiring the corporation and all persons interested in the corporation to show cause before it . . . why the corporation should not be dissolved." The statute further provides, in relevant part, that "[a] copy of the order to show cause shall be published as prescribed therein, at least once in each of the three weeks before the time appointed for the hearing thereon, in one or more newspapers, specified in the order," and that a copy of the order be served upon the New York State Tax Commission (hereinafter the Tax Commission) … . Here, it is undisputed that the petitioner's order to show cause contained a provision providing for its publication; however, that provision was stricken, and therefore, the order to show cause ultimately was not published. It is also undisputed that the order to show cause was never served on the Tax Commission. …

… [W]e disagree with the Supreme Court's determination that the petitioner established his entitlement to the dissolution of VJN. The affidavit submitted by the respondent in opposition to the petition raised questions of fact regarding the merits of the petition and the appropriate remedy … . Indeed, there is no indication that the court gave any consideration as to whether a remedy other than dissolution would have been appropriate … . Under these circumstances, the court should not have ordered the dissolution of VJN and the sale of the subject property without conducting a hearing … . Matter of Nicastro v VJN Real Estate Corp., 2019 NY Slip Op 06495, Second Dept 9-11-19

FAILURE TO COMPLY WITH STATUTE, NEGLECT TO PROSECUTE.

JUDGE SHOULD NOT HAVE, SUA SPONTE, DISMISSED THE ACTION FOR NEGLECT TO PROSECUTE WITHOUT MEETING THE REQUIREMENTS OF CPLR 3216 (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the judge should not have, sua sponte, dismissed the case for neglect to prosecute in the absence of the prerequisites mandated by CPLR 3216:

… [T]he court directed the plaintiff to file a note of issue within 90 days, and warned that "[i]f plaintiff does not file a note of issue within 90 days this action is deemed dismissed without further order of the Court (CPLR 3216)." Five months later … the court, sua sponte, in effect, directed dismissal of the action … . …

"A court may not dismiss an action based on neglect to prosecute unless the statutory preconditions to dismissal, as articulated in CPLR 3216, are met" … . "Effective January 1, 2015, the Legislature amended, in several significant respects, the statutory preconditions to dismissal under CPLR 3216" … . One such precondition is that where, as here, a written demand to resume prosecution of the action is made by the court, "the demand shall set forth the specific conduct constituting the neglect, which conduct shall demonstrate a general pattern of delay in proceeding with the litigation" … . Here, the certification order did not set forth any specific conduct constituting neglect by the plaintiff … .

Additionally, before issuing an order dismissing the case based on a party's failure to comply with the 90-day demand, the court must give the party notice so that the party has an opportunity to "show a justifiable excuse for the delay and a good and meritorious cause of action" … . Here, the Supreme Court failed to give the parties notice and an opportunity to be heard prior to, in effect, directing dismissal of the action pursuant to CPLR 3216 … . Sadowski v W. David Harmon, 2019 NY Slip Op 02918, Second Dept 4-17-19

FAILURE TO COMPLY WITH STATUTE, NEGLECT TO PROSECUTE.

JUDGE SHOULD NOT HAVE, SUA SPONTE, DISMISSED THE COMPLAINT FOR FAILURE TO PROSECUTE WITHOUT FOLLOWING THE REQUIREMENTS OF CPLR 3216 (SECOND DEPT).

The Second Department, reversing Supreme Court, determined that the judge should not have, sua sponte, dismissed the complaint for neglect to prosecute without following the procedure required by CPLR 3216:

The Supreme Court should not have, in effect, pursuant to CPLR 3216, sua sponte, dismissed the amended complaint, as the statutory preconditions to dismissal were not met … . A court cannot dismiss an action, sua sponte, pursuant to CPLR 3216(a) unless the conditions set forth in CPLR 3216(b) have been met, including the requirement that: "[t]he court or party seeking such relief . . . shall have served a written demand . . . requiring the party against whom such relief is sought to resume prosecution of the action and to serve and file a note of issue within ninety days after receipt of such demand, and further stating that the default by the party upon whom such notice is served in complying with such demand within said ninety day period will serve as a basis for a motion by the party serving said demand for dismissal as against him or her for unreasonably neglecting to proceed" (CPLR 3216[b][3] [emphasis added] …). Moreover, the court should not have administratively dismissed the amended complaint without further notice to the parties … . Marinello v Marinello, 2019 NY Slip Op 02697, Second Dept 4-10-19

FAILURE TO COMPLY WITH STATUTE, NEGLECT TO PROSECUTE.

JUDGE'S SUA SPONTE DISMSSAL OF THE COMPLAINT IN THIS FORECLOSURE ACTION DEPRIVED PLAINTIFF OF NOTICE AND A CHANCE TO BE HEARD, A VIOLATION OF DUE PROCESS (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the judge should not have, sua sponte, dismissed the complaint as abandoned without giving plaintiff a chance to be heard in this foreclosure action:

… [B]y notice of motion dated August 15, 2014, the plaintiff … moved, inter alia, to extend its time to serve a copy of the order of reference with notice of entry … , nunc pro tunc, to March 23, 2007 (hereinafter the second extension of time motion). In an order dated February 26, 2015 (hereinafter the February 2015 order), the Supreme Court denied the second extension of time motion, and, sua sponte, directed the dismissal of the complaint as abandoned, noting, inter alia, that "[t]he order of reference at issue was signed in 2007" and the appointed referee was no longer on the fiduciary list. …

The Supreme Court's sua sponte determination to direct dismissal of the complaint deprived the plaintiff of notice and opportunity to be heard and amounted to a denial of the plaintiff's due process rights (see CPLR 3216 …). Accordingly, the court should have granted that branch of the plaintiff's motion which was to vacate the February 2015 order. Chase Home Fin., LLC v Plaut, 2019 NY Slip Op 02494, Second Dept 4-3-19

FAILURE TO COMPLY WITH STATUTE, NEGLECT TO PROSECUTE.

SUPREME COURT SHOULD NOT HAVE DISMISSED THE FORECLOSURE COMPLAINT IN THE ABSENCE OF THE PRECONDITIONS REQUIRED BY CPLR 3216 (SECOND DEPT).

The Second Department, reversing Supreme Court, determined that the court was without power to dismiss for neglect to prosecute because the preconditions in CPLR 3216 were not met. Supreme Court dismissed the complaint in this foreclosure action, finding that plaintiff bank had not complied with an oral directive issued at a status conference:

Following settlement conferences held pursuant to CPLR 3408, the action was released from the foreclosure settlement conference part without any resolution. In an order … (hereinafter the dismissal order), the Supreme Court directed dismissal of the action on the ground that the plaintiff failed to comply with an oral directive issued at a status conference … , to resume prosecution of the action. …[T]he plaintiff moved to vacate the dismissal order and to restore the action to the calendar. [T]he Supreme Court … denied the plaintiff's motion. …

"A court may not dismiss an action based on neglect to prosecute unless the statutory preconditions to dismissal, as articulated in CPLR 3216, are met" … . Specifically, issue must have been joined, at least one year must have elapsed since joinder of issue, the defendant or the court must have served on the plaintiff a written demand to serve and file a note of issue within 90 days, and the plaintiff must have failed to serve and file a note of issue

within the 90-day period (see CPLR 3216[b] …). Here, the Supreme Court was without power to direct dismissal of the action on the ground of failure to prosecute because the plaintiff was not served with a written demand to serve and file a note of issue within 90 days … . Citimortgage, Inc. v Ferrari, 2019 NY Slip Op 02847, Second Dept 4-17-19

FAILURE TO CONSIDER ALL AVAILABLE FACTS, CRIMINAL LAW, SENTENCING.

DEFENDANT'S PLEA TO A PROBATION VIOLATION WAS NOT VOLUNTARY AND MUST BE VACATED (THIRD DEPT).

The Third Department, reversing County Court, determined defendant's plea to a probation violation was involuntary and must be vacated:

The record reflects that the People's final plea offer came with a prison sentence of 1½ years followed by six years of PRS. When defendant indicated that he wanted to admit to the probation violation and argue for a more lenient sentence, County Court stated that it could not "override" the recommended sentence unless defendant declined the offer and proceeded to a hearing. The court further told defendant that, if he took the offer, it was "up to the People" as to whether a lesser sentence could be considered. The People then turned down defendant's proposal to cap his sentencing exposure at 1½ years in prison and stated that they would recommend a higher sentence if defendant rejected the offer and were found guilty following a hearing. Defendant thereafter accepted the offer.

The foregoing reflects, and the People concede, that County Court abdicated its responsibility to carefully consider all facts available at the time of sentencing and fashion an appropriate sentence …. Inasmuch as the proceedings were also marred by the People's admittedly inappropriate threat to seek a harsher sentence if defendant rejected the offer and was found guilty after a hearing, however, the plea itself was involuntary. Thus, defendant is entitled to vacatur of his plea … , People v Roberts, 2019 NY Slip Op 07448, Third Dept 10-17-19

FAILURE TO FOLLOW PRIOR RULING, CRIMINAL LAW, SANDOVAL.

TRIAL JUDGE ALLOWED THE PROSECUTOR TO QUESTION DEFENDANT ABOUT THE FACTS UNDERLYING PRIOR CONVICTIONS IN VIOLATION OF THE SANDOVAL RULING, CONVICTIONS REVERSED (SECOND DEPT).

The Second Department, reversing defendant's convictions, determined the trial judge implicitly changed the Sandoval ruling by allowing the prosecutor to cross-examine the defendant about the underlying facts of prior convictions:

Prior to the trial, the Supreme Court conducted a Sandoval hearing (see People v Sandoval, 34 NY2d 371), after which the court ruled that, should the defendant testify on his own behalf, the People would be permitted to ask whether he had two prior felony convictions. However, the People were not permitted to elicit the underlying facts of either of those crimes. …

Without seeking an amendment of the Supreme Court's Sandoval ruling, the prosecutor then asked whether he was being arrested that day in 2008 "because there was a DNA match of [him] committing a burglary." Defense counsel objected, the objection was overruled, and the defendant denied that this was true. The prosecutor persisted in that line of inquiry, and asked whether the defendant had been convicted of burglary in the third degree in 2009. The defendant responded that "[y]es [he] was convicted of a case in 2008." Nonetheless, without asking for a modified Sandoval ruling, the prosecutor brought up, no less than six times, that the 2008 conviction was for burglary and involved DNA, going so far to ask the defendant to "explain" the facts of his 2008 conviction, with the court instructing the defendant to do so. In one instance, after asking the defendant to confirm that he was charged in the instant case with burglary in the second degree, the prosecutor remarked, in effect, that the instant crime was "the same type of DNA hit that happened back in 2008." …

The defendant here was denied … [the right to make an informed choice whether to testify] when, after making what he believed to be an informed judgment and taking the witness stand, the Supreme Court implicitly changed the ruling upon which he relied by allowing the prosecutor to continue her course of prejudicial questioning despite objections from defense counsel. People v Walters, 2019 NY Slip Op 03632, Second Dept 5-8-19

FAILURE TO FOLLOW PRIOR RULING, DISCOVERY, SANCTIONS.

SANCTION FOR PLAINTIFF'S FAILURE TO COMPLY WITH A CONDITIONAL ORDER OF PRECLUSION SHOULD NOT HAVE GONE BEYOND THE PENALTY DESCRIBED IN THE ORDER (SECOND DEPT).

The Second Department, modifying Supreme Court, determined that the sanction imposed for plaintiff's failure to turn over audio files and transcripts she was apparently relying upon to prove employment discrimination should not have gone beyond the terms of the conditional order of preclusion:

"A conditional order of preclusion requires a party to provide certain discovery by a date certain, or face the sanctions specified in the order" … . " With this conditioning, the court relieves itself of the unrewarding inquiry into whether a party's resistance was willful'" … . "When a plaintiff fails to timely comply with a conditional order of preclusion, the conditional order becomes absolute" … .

… [W]here, as here, a conditional order of preclusion specifies a penalty for the failure to comply, absent a change in circumstances, it is inappropriate for the court to impose a harsher penalty … . The Supreme Court improvidently exercised its discretion in barring the plaintiff from offering any evidence for any claim premised on the introduction of or which relies on the audio files the plaintiff failed to produce. Instead, the appropriate sanction was the one set forth in the conditional order of preclusion, which precluded the plaintiff from using the audio files and corresponding transcripts at trial unless she produced these items by a date certain, which she failed to do. Felice v Metropolitan Diagnostic Imaging Group, LLC, 2019 NY Slip Op 02067, Second Dept 3-20-19

FAILURE TO FOLLOW PRIOR RULING, FAMILY LAW, ARREARS AND COUNSEL FEES.

JUDGE DID NOT HAVE THE DISCRETION TO DENY PLAINTIFF'S MOTION FOR ARREARS AND COUNSEL FEES MADE AFTER THE JUDGMENT OF DIVORCE; ANY DISPUTE ABOUT THE AMOUNT MUST BE RESOLVED BY A HEARING (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff's motion for leave to enter a money judgment for arrears and counsel fees should not have been denied. The motion for arrears was properly made after the judgment of divorce and any question of the amount owed should have been resolved by a hearing:

A party to a matrimonial action may make an application for a judgment directing the payment of arrears at any time prior to or subsequent to the entry of a judgment of divorce (see Domestic Relations Law § 244 …). Here, the court did not have the discretion to deny the plaintiff's application for leave to enter a money judgment since she established that arrears were due and unpaid … . Where, as here, there are triable issues of fact as to the amount of arrears, an evidentiary hearing should be held … . Furthermore, upon determining the amount of arrears owed, the court should have considered the plaintiff's request for prejudgment interest … and an award of counsel fees … . Uttamchandani v Uttamchandani, 2019 NY Slip Op 06645, Second Dept 9-18-19

FAILURE TO FOLLOW PRIOR RULING, FAMILY LAW, VACATION OF CONSENT ORDER.

FAMILY COURT DID NOT HAVE AUTHORITY TO SUA SPONTE VACATE A CONSENT ORDER IN THIS SUPPORT PROCEEDING, VACATION OF THE CONSENT ORDER AND THE RESULTING COMMITMENT ORDER REVERSED (SECOND DEPT).

The Second Department, reversing Family Court, determined the court did have the authority to issue a sua sponte order vacating a consent order:

Upon the father's admission to a willful violation of the support order and upon the father's representation that he was employed, an order of disposition was entered upon the parties' consent, finding the father to be in willful violation of the support order and committing him to a term of incarceration of five months, but suspending his commitment on the condition that he complied with the support order (hereinafter the consent order). Shortly

after the consent order was entered, the Family Court received a telephone call, ostensibly from the father's purported employer, informing the court that the father was not, in fact, employed. The court, over the father's objection, sua sponte issued an order vacating the consent order (hereinafter the sua sponte order). The court then proceeded to a willfulness hearing, at the conclusion of which it issued the second order of disposition, finding the father to be in willful violation of the support order and directing that he be committed to the Orange County Jail for a period of six months unless he paid the purge amount of $19,839 (hereinafter the commitment order). …

As the father correctly contends, the Family Court lacked authority to issue the sua sponte order vacating the consent order (see CPLR 5019[a]) …). Moreover, the court issued the sua sponte order on the basis of unsworn statements made during a telephone call between the court and the father's purported employer … . Accordingly, the sua sponte order must be reversed, and the commitment order, which was based in part on the sua sponte order, must be reversed as well. Matter of Schiavone v Mannese, 2019 NY Slip Op 01419, Second Dept 2-27-19

FAILURE TO FOLLOW PRIOR RULING, FORECLOSURE, LAW OF THE CASE.

THE DOCTRINE OF THE LAW OF THE CASE PRECLUDED CONSIDERATION OF WHETHER THE BANK COMPLIED WITH THE NOTICE PROVISIONS OF RPAPL 1304; THE ISSUE HAD BEEN DETERMINED IN THE BANK'S FAVOR AT THE SUMMARY JUDGMENT STAGE AND SHOULD NOT HAVE BEEN RECONSIDERED, SUA SPONTE, WHEN THE BANK MOVED FOR A JUDGMENT OF FORECLOSURE (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the doctrine of the law of the case precluded the court from sua sponte, considering whether the notice requirements of Real Property Actions and Proceedings Law (RPAPL) 1304 were met by the bank in this foreclosure action. The issue was determined in the bank's favor in the initial summary judgment proceeding and should not have been considered again when the bank moved to confirm the referee's report and for a judgment of foreclosure:

… [T]he defendants raised the issue of noncompliance with RPAPL 1304 in their answer, the plaintiff presented evidence of its compliance with the statute on its motion, inter alia, for summary judgment on the complaint, and, in granting that motion, the Supreme Court decided the issue in the plaintiff's favor. Therefore, pursuant to

the doctrine of law of the case … , the court was precluded from reconsidering the issue on the plaintiff's motion to confirm the referee's report and for a judgment of foreclosure and sale … . Moreover, since the defendants did not oppose the plaintiff's motion to confirm the referee's report and, therefore, did not raise the issue of the plaintiff's noncompliance with RPAPL 1304 in opposition to the motion, the court should not have raised the issue sua sponte … . Wells Fargo Bank, N.A. v Morales, 2019 NY Slip Op 08891, Second Dept 12-11-19

FAILURE TO FOLLOW PRIOR RULING, LANDLORD-TENANT, STIPULATION.

SUPREME COURT SHOULD NOT HAVE MODIFIED A SO-ORDERED STIPULATION ENTERED BETWEEN LANDLORD AND TENANT REQUIRING MONTHLY USE AND OCCUPANCY PAYMENTS OF OVER $100,000 DURING THE COURT PROCEEDINGS STEMMING FROM THE LANDLORD'S NOTICE OF TERMINATION OF THE LEASE, SUPREME COURT IMPROPERLY REDUCED THE MONTHLY PAYMENTS TO ZERO BASED UPON THE VALUE OF THE PROPERTY TO THE TENANT WHICH WAS ALLEGED TO HAVE BEEN RENDERED WORTHLESS BY THE NOTICE OF TERMINATION, AS OPPOSED TO THE FAIR MARKET RENTAL VALUE OF THE PROPERTY FROM THE LANDLORD'S PERSPECTIVE (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the stipulation entered by plaintiff tenant and defendant landlord, pursuant to a Yellowstone Injunction, should not have modified by the judge. The defendant landlord notified plaintiff of several alleged defaults under the lease, and subsequently notified tenant of the termination of the lease. Plaintiff tenant sued defendant landlord and moved for a Yellowstone injunction which the court ordered. The parties entered a so-ordered stipulation requiring plaintiff tenant to pay over $100,000 per month for use and occupancy of the property during the court proceedings. More than a year later plaintiff tenant moved to move to modify the stipulation to reduce the monthly use and occupancy payments and the court reduced the payments to zero:

The so-ordered November 2015 stipulation was negotiated by the parties and accepted by the Supreme Court, and, as a result, may be considered a court order … . "Although the Supreme Court retains inherent discretionary power to relieve a party from a judgment or order for sufficient reason and in the interest of substantial justice, [a] court's inherent power to exercise control over its judgment is not plenary, and should be resorted to only to

relieve a party from judgments taken through [fraud], mistake, inadvertence, surprise or excusable neglect" … . Nevertheless, "[u]nder almost any given state of facts, where to enforce a stipulation would be unjust or inequitable or permit the other party to gain an unconscionable advantage, courts will afford relief" … . …

Although the landlord generally has the burden of proving the amount owed by the tenant … , here, it was the plaintiff's burden, on its motion to modify the "September 22, 2015 order, as amended," to demonstrate that the payment of use and occupancy in the amount of $111,041.66 per month was unjust.

In concluding that the subject property had no value "as long as the Notice of Default remains on the property," the Supreme Court erroneously considered the value to the plaintiff of using and occupying the subject property after the lease was purportedly terminated, instead of considering the fair market rental value of the subject property, namely, the amount that a prospective commercial tenant would be willing to pay to lease the subject property from the defendant … . 255 Butler Assoc., LLC v 255 Butler, LLC, 2019 NY Slip Op 04344, Second Dept 6-5-19

FAILURE TO HOLD A HEARING, CRIMINAL LAW, MOTION TO VACATE CONVICTION.

THE COURT SHOULD HAVE HELD A HEARING TO DETERMINE WHETHER DEFENDANT WAS INFORMED BY DEFENSE COUNSEL OF A PLEA OFFER WHICH WAS MORE LENIENT THAN THE OFFER TO WHICH HE PLED (THIRD DEPT).

The Third Department, reversing County Court, determined that the court should have held a hearing to determine whether defendant was informed of a plea offer by defense counsel. Defendant argued the failure to inform him of the plea offer, which was more lenient than the offer to which he pled, constituted ineffective assistance of counsel:

To make out "an ineffective assistance of counsel claim based upon the defense counsel's failure to adequately inform the defendant of a plea offer," a defendant must show "that the People made the plea offer, that the defendant was not adequately informed of the offer, that there was a reasonable probability that the defendant would have accepted the offer had counsel adequately communicated it to him [or her], and that there was a reasonable likelihood that neither the People nor the court would have blocked the alleged agreement" … . …

There is no dispute that the People made a preindictment plea offer more lenient than the one that defendant later accepted — an offer that the People presumably extended "in a fair and honest manner" and believed would pass

muster with County Court … — and that the offer was rejected and withdrawn. Defendant averred that he did not know about this offer and would have accepted it. People v Nitchman, 2019 NY Slip Op 04501, Third Dept 6-6-19

FAILURE TO HOLD A HEARING, FAMILY LAW.

WHEN A PARTY'S ATTORNEY APPEARS THE PARTY IS NOT IN DEFAULT AND MAY THEREFORE APPEAL, FAMILY COURT SHOULD NOT HAVE AWARDED CUSTODY TO NONPARENTS ABSENT A HEARING DEMONSTRATING EXTRAORDINARY CIRCUMSTANCES AND THE BEST INTERESTS OF THE CHILD (FOURTH DEPT).

The Fourth Department determined mother was not in default, because her attorney had appeared, and therefore mother can appeal the award of custody to the nonparent petitioners. The Fourth Department further determined Family Court should have held a hearing to determine whether extraordinary circumstances justified awarding custody to nonparents. The prior consent order of custody in favor of the nonparents does not demonstrate extraordinary circumstances:

"A parent's right to be heard on a matter of child custody is fundamental and not to be disregarded absent a convincing showing of waiver' " … . Moreover, "[i]t is well established that, as between a parent and a nonparent, the parent has a superior right to custody that cannot be denied unless the nonparent establishes that the parent has relinquished that right because of surrender, abandonment, persisting neglect, unfitness or other like extraordinary circumstances" … and further establishes that an award of custody to the nonparent is in the best interests of the child … . "The burden of proving extraordinary circumstances rests on the nonparent, and the mere existence of a prior consent order of custody in favor of the nonparent is not sufficient to demonstrate extraordinary circumstances"… . Inasmuch as the court erred in depriving the mother of custody without conducting the requisite evidentiary hearing … , we reverse and remit the matter to Family Court for a hearing on the custody petition. Matter of Hilton v Hilton, 2019 NY Slip Op 04572, Fourth Dept 6-7-19

FAILURE TO HOLD A HEARING (TRIAL), LIEN LAW, VACATION OF NOTICE OF LIEN.

QUESTIONS OF FACT ABOUT THE TIMELINESS OF THE NOTICE OF LIEN, THE CHARACTER OF THE WORK AND EXAGGERATION PRECLUDED SUMMARY DISCHARGE OF THE NOTICE OF LIEN, SUPREME COURT REVERSED (THIRD DEPT).

The Third Department, reversing Supreme Court, determined that the contractor's notice of lien was valid on its face and should not have been summarily discharged because unresolved questions of fact required trial:

"A court has no inherent power to vacate or discharge a notice of lien except as authorized by Lien Law § 19 (6)" … . Pursuant to that provision, a court may summarily discharge a notice of lien where, among other things, "it appears from the face of the notice of lien that the claimant has no valid lien by reason of the character of the labor or materials furnished" or the notice was not timely filed … . …

"Because the lien was timely on its face, the court was not permitted to summarily discharge it on the basis of untimeliness" … . …

Petitioners attack the character of the labor furnished, asserting that respondent's work in July 2016 was for a water line that was not part of any contract between the parties. This assertion merely "raises a factual issue as to the relationship of the last item of work to the parties' contract … . …

"[A]lthough Lien Law § 39 provides that a willfully exaggerated lien is void, the issue of willful or fraudulent exaggeration is one that also ordinarily must be determined at the trial of [a lien] foreclosure action" … . Matter of Beebe v Liebel, 2019 NY Slip Op 00337, Third Dept 1-17-19

FAILURE TO INQUIRE, CRIMINAL LAW, DEFENDANT'S COMPLAINTS ABOUT COUNSEL.

DEFENDANT COMPLAINED THAT HIS ATTORNEY HAD NOT FILED OMNIBUS MOTIONS BUT DEFENSE COUNSEL SAID HE HAD FILED THEM AND THE COURT SAID IT HAD RECEIVED THEM; IN FACT, HOWEVER NO MOTIONS HAD BEEN FILED; DEFENDANT'S COMPLAINTS ABOUT HIS ASSIGNED COUNSEL WARRANTED FURTHER INQUIRY BY THE COURT; DEFENDANT WAS DEPRIVED OF HIS RIGHT TO COUNSEL, NEW TRIAL ORDERED (FOURTH DEPT).

The Fourth Department, reversing defendant's conviction and ordering a new trial, determined that defendant's complaints about his assigned counsel were sufficient to warrant further inquiry by the court:

… [D]efendant "articulated complaints about his assigned counsel that were sufficiently serious to trigger the court's duty to engage in an inquiry regarding those complaints"… At a pretrial appearance, defendant requested that the court assign him new counsel because, among other things, defense counsel had failed to file discovery demands and omnibus motions. After defendant's request, defense counsel erroneously stated, "[t]hose were filed already," and the court stated, "I have them here. I'm holding them in my hand." However, the People concede that, although certain discovery demands were served on the People, defense counsel never filed any omnibus motions.

Upon being told that omnibus motions had been filed, defendant informed the court that he had never received them. The court replied, "Well, that's a different issue, okay? So you've got to get a copy of your paperwork, all right? What else?" The court never conducted an inquiry into defendant's serious complaint that defense counsel failed to file any omnibus motions and, instead, proceeded under the mistaken belief that they had been filed. Although "[t]he court might well have found upon limited inquiry that defendant's request was without genuine basis, . . . it could not so summarily dismiss th[at] request" based on a mistaken belief that omnibus motions had been filed … . Thus, we conclude that the court violated defendant's right to counsel by failing to make a minimal inquiry concerning his serious complaint, and we therefore reverse the judgment and grant a new trial … . People v Edwards, 2019 NY Slip Op 04537, Fourth Dept 6-7-19

FAILURE TO INQUIRE, CRIMINAL LAW, DEFENDANT'S COMPLAINTS ABOUT COUNSEL.

THE JUDGE SHOULD HAVE ALLOWED DEFENDANT TO EXPLAIN HIS CLAIM THAT HE WAS RECEIVING INEFFECTIVE ASSISTANCE OF COUNSEL AND HIS REQUEST FOR NEW COUNSEL, PLEA VACATED (FOURTH DEPT).

The Fourth Department, vacating defendant's guilty plea, determined defendant should have been given the opportunity to explain his reasons for requesting a new attorney:

… [D]uring the plea colloquy, defendant attempted to inform the court that he was pleading guilty only because he was not receiving effective assistance of counsel. Although vague and conclusory complaints about counsel generally are insufficient to trigger the court's duty to make an inquiry … , the court here "failed to provide defendant with an opportunity to explain his complaints" … . The court refused to accept defendant's pro se letter regarding the matter and did not otherwise allow defendant to expand upon his claim of ineffective assistance of counsel. Defendant's "request may well have been a frivolous delaying tactic" … . Nevertheless, we conclude that the court had "no basis to completely cut off the discussion without hearing any explanation" … . A "defendant must at least be given an opportunity to state the basis for his [or her] application" … . People v Jones, 2019 NY Slip Op 04543, Fourth Dept 6-7-19

FAILURE TO INQUIRE, CRIMINAL LAW, INQUIRY INTO VOLUNTARINESS OF THE PLEA.

DEFENDANT WAS HOUSED FIVE HOURS AWAY FROM THE COURT AND HIS ATTORNEY, REPEATED REQUESTS TO MOVE DEFENDANT CLOSER WERE GRANTED BUT NOT COMPLIED WITH, DEFENDANT MOVED TO WITHDRAW HIS PLEA AT SENTENCING, GIVEN THE POSSIBILITY DEFENDANT HAD EFFECTIVELY BEEN DEPRIVED OF HIS RIGHT TO COUNSEL, INQUIRY INTO THE VOLUNTARINESS OF THE PLEA SHOULD HAVE BEEN CONDUCTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the sentencing judge should have inquired into the voluntariness of defendant's guilty plea before accepting it. The defendant had been housed more than one hundred miles from the court and his attorney. Repeated requests to move the defendant closer to allow consultation with his attorney were granted but not complied with. When the court set the matter down for trial anyway, the defendant pled guilty:

The Supreme Court ordered that the defendant be moved to Rikers Island, or at a minimum, a correctional facility closer to the court. The court issued numerous orders over the following two weeks directing that the defendant be moved, none of which was complied with. Each appearance required the defendant to travel at least five hours each way. Defense counsel continued to argue that the Department of Corrections and Community Supervision was violating the defendant's constitutional rights to consult with his attorney and to defend this case. The court noted that it would be nearly impossible to hold a jury and try the case under these conditions. The court nevertheless stated that the trial would commence, regardless of where the defendant was housed. The very next court date, the defendant agreed to plead guilty.

Two weeks later, at the sentencing, the defendant made an application to withdraw his plea, contending that he had entered the plea involuntarily, given the circumstances and his lack of access to his counsel. The Supreme Court denied the application without engaging in any inquiry of the defendant, other than to comment on the favorable plea offer secured by defense counsel.\

Under the circumstances, it cannot be said that the Supreme Court was able to make an informed determination as to the question of the voluntary nature of the defendant's plea without conducting such an inquiry. The record substantiates the defendant's claim that his plea was effectively coerced by the ongoing violation of his Sixth

Amendment right to counsel and, thus, a genuine factual issue as to the voluntariness of the plea existed that could only be resolved after a hearing. Under these circumstances, the court should have conducted a hearing to explore the defendant's allegations in order to make an informed determination … . People v Hollmond, 2019 NY Slip Op 02354, Second Dept 3-27-19

FAILURE TO INQUIRE, CRIMINAL LAW, SENTENCING.

ALTHOUGH DEFENDANT WAS WARNED HE WOULD BE SENTENCED EVEN IF HE DIDN'T APPEAR AT SENTENCING, THE JUDGE SHOULD NOT HAVE SENTENCED DEFENDANT IN ABSENTIA WITHOUT FIRST INQUIRING INTO THE REASON AND WHETHER DEFENDANT COULD BE LOCATED (THIRD DEPT).

The Third Department, vacating the defendant's sentence, determined defendant should not have been sentenced in absentia:

Defendant had a waivable right to be present at sentencing, and he was indisputably informed of that right "and of the consequences for failing to appear, including the fact that the proceedings would go forward in his . . . absence" … . Nevertheless, "before proceeding in the absence of a defendant who fails to appear, the court must conduct an inquiry into the reason for the absence and consider whether the defendant could be located within a reasonable period of time" … . County Court did not make that inquiry and, indeed, rejected defense counsel's request for an adjournment to look into the reasons for defendant's absence. Thus, County Court erred in sentencing defendant in absentia … . People v Cutler, 2019 NY Slip Op 04504, Third Dept 6-619

FAILURE TO MAKE FINDINGS, FAMILY LAW, CUSTODY.

ATTORNEY FOR THE CHILD CAN APPEAL A CHANGE OF CUSTODY TO WHICH THE CHILD IS OPPOSED, THE CHILD IS AGGRIEVED FOR APPELLATE PURPOSES, FAMILY COURT SHOULD NOT HAVE HELD A FULL CUSTODY HEARING WITHOUT FIRST ASSESSING THE ALLEGATIONS OF A CHANGE IN CIRCUMSTANCES, AN APPELLATE COURT CAN TAKE JUDICIAL NOTICE OF PRIOR MODIFICATION PETITIONS, AND FAMILY COURT MUST GIVE DUE CONSIDERATION TO THE CHILD'S WISHES (SECOND DEPT).

The Second Department, reversing Family Court, determined, in a full-fledged opinion by Justice Scheinkman, that mother's petition for a change in custody should not have been granted. The opinion is too comprehensive to be fairly summarized here. Of particular interest is the Second Department's conclusion that Family Court should have not have held a full custody hearing without first determining whether the allegations warranted it. The Second Department took judicial notice of two prior petitions for modification which were dismissed, the last petition being very close in time to the instant petition. The opinion is well worth reading in its entirety. It addresses several substantive issues and distinguishes some 4th Department authority. The Second Department summarized the issues and holdings as follows:

This appeal raises several important issues pertinent to child custody determinations. We conclude that: (a) the attorney for the child has the authority to pursue an appeal on behalf of the child from an order determining the custody of the child; (b) the child is aggrieved, for appellate purposes, by an order determining custody; (c) the Family Court should not have held a full custody hearing without first determining whether the mother had alleged and established a sufficient change in circumstances to warrant an inquiry into whether the child's best interests were served by the existing custodial arrangement; and (d) the Family Court erred in failing to give due consideration to the expressed preferences of the child, who is a teenager. Matter of Newton v McFarlane, 2019 NY Slip Op 04386, Second Dept 6-5-19

FAILURE TO MAKE FINDINGS, FAMILY LAW, CUSTODY.

FAMILY COURT DID NOT MAKE THE REQUIRED FINDINGS OF FACT IN THIS FAMILY OFFENSE, CUSTODY AND VISITATION CASE, MATTER REMITTED (FOURTH DEPT).

The Fourth Department, sending the matter back to Family Court, determined Family Court did not make the requisite findings of fact in this family offense, custody and visitation case:

… [W]e agree with the father that Family Court failed to adequately set forth its essential findings of fact (see CPLR 4213 [b]; Family Ct Act § 165 [a] …). …[T]he court failed to specify the family offense upon which the order of protection was predicated … . … [T]he court failed to "set forth its analysis of those factors that traditionally affect the best interests of a child, namely, the relative fitness of each party, each parent's ability to provide for the emotional and intellectual development of the child, the ability to provide financially for the child, the quality of the home environment, the length of time and stability of prior custodial arrangements, [and] the need of a child to reside with siblings[, if any] . . . As a result, we are unable to review [the court's] ultimate factual finding regarding each of those factors and the weight it placed upon each factor relative to the best interests of the child[ ]" … . Under the circumstances of these cases, we decline to exercise our discretion to make the requisite findings … . Matter of Benson v Smith, 2019 NY Slip Op 02221, Fourth Dept 3-22-19

FAILURE TO MAKE FINDINGS, FAMILY LAW, VISITATION.

A NEGATIVE INFERENCE SHOULD NOT HAVE BEEN DRAWN BASED UPON MOTHER'S FAILURE TO TESTIFY, SHE HAD NO FIRST-HAND KNOWLEDGE OF THE FACTS UNDERLYING FATHER'S PETITION TO MODIFY VISITATION, FATHER DID NOT DEMONSTRATE A CHANGE IN CIRCUMSTANCES AND DID NOT DEMONSTRATE MODIFICATION WOULD BE IN THE BEST INTERESTS OF THE CHILDREN, JUDGE DID NOT MAKE THE REQUIRED FACTUAL FINDINGS, FATHER'S PETITION SHOULD NOT HAVE BEEN GRANTED (FOURTH DEPT).

The Fourth Department, reversing Family Court, determined father did not demonstrate a change in circumstances that warranted visitation in his home, supervised by his new wife. The modified visitation was not demonstrated to be in the best interests of the children. The existing visitation arrangement, supervised by

grandmother, was long-standing and was working well. In addition, the Fourth Department held that the fact that mother did not testify should not have been the basis of a negative inference. Mother had no knowledge of the circumstances underlying father's petition:

Family Court erred in drawing a negative inference against [mother] based on her failure to testify at the hearing. The mother had no relevant testimony to offer inasmuch as she had no personal knowledge of the allegations in the modification petition … . Thus, we conclude that a negative inference against the mother was unwarranted because she did not "withhold[] evidence in [her] possession or control that would be likely to support [her] version of the case" … . …

Although the court correctly identified in its decision the applicable standard for modification of an existing custody and visitation order and referenced several circumstances that generally may support a court's finding of a sufficient change in circumstances, the court failed to make express findings relative to the change in circumstances alleged by the father in his petition. Notwithstanding that failure, "we have the authority to review the record to ascertain whether the requisite change in circumstances existed' " … . …

Although the father's marriage, new home, and diagnosis with sleep apnea are changes that have occurred since the time of the stipulation, those changes to the father's personal circumstances do not " reflect[] a real need for change to ensure the best interest[s] of the child[ren]' " … . …

… [T]there is no sound and substantial basis in the record to support the court's determination that the children's best interests warranted replacing the visitation supervisor, their grandmother, with the father's new wife and permitting the father to select any location for his visits with the children … . Matter of William F.G. v Lisa M.B., 2019 NY Slip Op 00774, Fourth Dept 2-1-19

FAILURE TO NOTIFY, CRIMINAL LAW, IMPROPER QUESTIONING RE: CITIZENSHIP.

JUDGES SHOULD NOT ASK A DEFENDANT WHETHER HE OR SHE IS A US CITIZEN IN PLEA PROCEEDINGS; RATHER JUDGES SHOULD INFORM ALL DEFENDANTS THE PLEA TO A FELONY MAY RESULT IN DEPORTATION IF HE OR SHE IS NOT A US CITIZEN (SECOND DEPT).

The Second Department, over a concurrence, rejected defendant's argument that his plea was involuntary because he was not informed he would be deported as a consequence of the plea. There was no indication in the

record that plaintiff was not a US citizen. Defendant told the court he was a citizen. And the pre-sentence report indicated defendant was a naturalized US citizen. However, the Second Department took the opportunity to instruct the courts how the citizenship issue should be handled:

… [A] trial court should not ask a defendant whether he or she is a United States citizen and decide whether to advise the defendant of the plea's deportation consequence based on the defendant's answer. Instead, a trial court should advise all defendants pleading guilty to felonies that, if they are not United States citizens, their felony guilty plea may expose them to deportation . This recommendation is consistent… with the Court of Appeals' pronouncement in Peque: "[T]o protect the rights of the large number of noncitizen defendants pleading guilty to felonies in New York, trial courts must now make all defendants aware that, if they are not United States citizens, their felony guilty pleas may expose them to deportation" … . Additionally, this recommendation is consistent with the legislature's pronouncement in CPL 220.50(7). Although that statute, deemed to be repealed September 1, 2020, indicates, in part, that "[t]he failure to advise the defendant pursuant to this subdivision shall not be deemed to affect the voluntariness of a plea of guilty or the validity of a conviction, nor shall it afford a defendant any rights in a subsequent proceeding relating to such defendant's deportation, exclusion or denial of naturalization[,]" it specifically provides, in part, that "[p]rior to accepting a defendant's plea of guilty to a count or counts of an indictment or a superior court information charging a felony offense, the court must advise the defendant on the record, that if the defendant is not a citizen of the United States, the defendant's plea of guilty and the court's acceptance thereof may result in the defendant's deportation, exclusion from admission to the United States or denial of naturalization pursuant to the laws of the United States"… . Moreover, giving a "short, straightforward statement" … regarding deportation will neither add significantly to the length of the plea proceeding nor encroach meaningfully on the trial court's discretion. Whether a defendant receives the Peque warning should not depend on the defendant having to acknowledge, on the record in open court, that he or she is not a United States citizen, particularly since eliciting noncitizen status may raise, in some cases, concerns of compelled self-incrimination … . People v Williams, 2019 NY Slip Op 09303, Second Dept 12-24-19

FAILURE TO NOTIFY, CRIMINAL LAW, SENTENCING, PARKER WARNINGS.

PARKER WARNINGS WERE INADEQUATE BUT THE ERROR WAS NOT PRESERVED FOR APPEAL; HOWEVER DEFENSE COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO THE ENHANCED SENTENCE; SENTENCE VACATED AND MATTER REMITTED (THIRD DEPT).

The Third Department, vacating defendant's sentence, determined the Parker warnings were inadequate. Although the error was not preserved for appeal, defense counsel was deemed ineffective for failing to challenge the enhanced sentence:

Defendant contends that Supreme Court erroneously imposed the enhanced sentence given that it did not specifically inform him as part of the Parker admonishment that a consequence of failing to appear for sentencing was the imposition of a greater sentence. … This claim is unpreserved inasmuch as the record does not reveal that defendant objected to the enhanced sentence or moved to withdraw his guilty plea … . The lack of preservation, however, is attributable to the deficiencies of defendant's trial counsel, who represented him both during the plea proceedings and at sentencing. Counsel was ineffective in failing to challenge the enhanced sentence as there was no strategic reason for failing to do so, particularly in light of the clear omissions that were made by Supreme Court in administering the Parker admonishment … . In view of this, we excuse the lack of preservation and address the merits … . The record reveals that Supreme Court did not provide defendant with a sufficient Parker admonishment that included the sentencing consequences and that it imposed the enhanced sentence without affording him an opportunity to withdraw his plea. Accordingly, we vacate the sentence and remit the matter to Supreme Court to either impose the agreed-upon sentence or provide defendant with an opportunity to withdraw his guilty plea … . People v Barnes, 2019 NY Slip Op 53934, Third Dept 11-27-19

FAILURE TO NOTIFY, CRIMINAL LAW, SEX OFFENDER REGISTRATION ACT (SORA).

JUDGE'S SUA SPONTE ASSESSMENT OF POINTS ON A GROUND OF WHICH THE DEFENDANT WAS NOT NOTIFIED VIOLATED DEFENDANT'S DUE PROCESS RIGHT TO NOTICE AND AN OPPORTUNITY TO RESPOND (FOURTH DEPT).

The Fourth Department, reversing County Court's SORA risk assessment, determined that the judge's assessing points on a ground of which defendant was not given prior notice was a violation of due process. The issue was considered on appeal in the interest of justice (there was no objection at the SORA hearing):

"The due process guarantees in the United States and New York Constitutions require that a defendant be afforded notice of the hearing to determine his or her risk level pursuant to SORA and a meaningful opportunity to respond to the risk level assessment" . As a result, "[a] defendant has both a statutory and constitutional right to notice of points sought to be assigned" … , and "a court's sua sponte departure from the Board's recommendation at the hearing, without prior notice, deprives the defendant of a meaningful opportunity to respond" … . Here, neither the Board nor the People requested the assessment of points for a continuing course of sexual misconduct on the ground that defendant engaged in three or more acts of sexual contact with the victim over a period of at least two weeks … . At the conclusion of the SORA hearing, however, the court proceeded to assign additional points under that category on the ground that the grand jury testimony of the victim's mother established that there was a third uncharged incident of sexual contact. Defendant was never provided any notice that points would be assessed as a result of a third uncharged incident and thus was not given a meaningful opportunity to respond to the court's risk level assessment. People v Chrisley, 2019 NY Slip Op 03505, Fourth Dept 5-3-19

JURY CHALLENGES, CRIMINAL LAW, LATE PEREMPTORY CHALLENGE.

DEFENSE COUNSEL'S PEREMPTORY CHALLENGE TO A JUROR WAS SLIGHTLY LATE; TO DENY THE REQUEST IN THE ABSENCE OF DISCERNABLE INTERFERENCE OR UNDUE DELAY WAS AN ABUSE OF DISCRETION; NEW TRIAL ORDERED (SECOND DEPT).

The Second Department, reversing defendant's conviction, determined the denial of defense counsel's slightly late peremptory challenge to an unsworn juror was an abuse of discretion:

The court named prospective juror number one to be assigned a seat and said, "We now have ten, need two. Looking at Chavez – -," when defense counsel interrupted, stating that he had made an error and had intended to exercise a peremptory challenge to prospective juror number one. Defense counsel acknowledged that the challenge was "a couple of seconds" late, and requested permission to excuse prospective juror number one. The court summarily denied the request.

The defendant contends that the Supreme Court improvidently exercised its discretion in denying his belated peremptory challenge. We agree. Under CPL 270.15, "the decision to entertain a belated peremptory challenge is left to the discretion of the trial court" … . Where a belated peremptory challenge to as-yet unsworn prospective jurors "would interfere with or delay the process of jury selection," it is a proper exercise of the court's discretion to refuse to permit the challenge … . However, where there is "no discernable interference or undue delay caused by defense counsel's momentary oversight that would justify [the court's] hasty refusal to entertain [the] defendant's challenge," it is an improvident exercise of discretion to deny it … . Here, the delay in challenging prospective juror number one was de minimis …. There was no discernable interference or undue delay caused by defense counsel's momentary oversight, and the voir dire of the next subgroup of jurors was still to be conducted … . People v Price, 2019 NY Slip Op 06629, Second Dept 9-18-19

JURY NOTES, CRIMINAL LAW.

NO RECORD OF JUDGE'S DISCUSSION OF A JURY NOTE WITH COUNSEL, MURDER CONVICTION REVERSED; DEFENDANT AUTHORIZED HIS AGENT TO SHOW HIS LETTER TO HIS ATTORNEY TO A THIRD PARTY, NO ATTORNEY-CLIENT PRIVILEGE; SENTENCES CANNOT BE CONSECUTIVE FOR CRIMES WITH THE SAME ACTUS REUS (THIRD DEPT).

The Third Department determined (1) because there was no record of the judge's discussion of a jury note with counsel, the murder conviction (the only count to which the jury note was relevant) must be reversed. (2) although defendant's girlfriend was defendant's agent for the purpose of delivering defendant's letter, which was mailed to her, to his attorney, there was evidence defendant authorized his girlfriend's mother to read the letter. therefore the attorney-client privilege was lost, (3) the unauthorized use of a vehicle charge has the same actus reus as the robbery and grand larceny charges, therefore the sentence for unauthorized use of a vehicle cannot run consecutively with the sentences for robbery and grand larceny, but it can run consecutively to the sentences for the burglary and criminal possession of stolen property charges:

A divided Court of Appeals has held that meaningful notice is not provided where there is no record indicating that counsel was informed of the "precise contents" of the note before the response is given to the jury, or where the trial court paraphrases or summarizes a jury note …. Given the court's statement to the jury that it had an off-the-record conversation with counsel regarding the note, it would not be unreasonable to believe that County Court had informed counsel of the note's precise contents. However, the record contains no specific indication that the court provided counsel with the precise content of the note before it delivered its response to the jury, nor was the note read verbatim on the record before the response was given. Thus, the record fails to establish that counsel had the opportunity to participate in the formation of the court's response to the jury's substantive inquiry. * * *

In these circumstances, we conclude that [defendant's girlfriend] was acting as defendant's agent. Thus, whether the letter was protected by the attorney-client privilege turns on whether defendant had a reasonable expectation of confidentiality when he sent it to [her]. In that regard, there was contradictory evidence regarding whether defendant authorized [her] to share a copy of the letter with her mother, which County Court resolved by determining that defendant had authorized disclosure to [her] mother … . The determination that defendant specifically authorized disclosure of the letter to a third party, i.e., [his girlfriend's] mother, established that defendant had no reasonable expectation of confidentiality and, therefore, defeated the attorney-client privilege.

Thus, County Court did not err in admitting the letter. People v Henry, 2019 NY Slip Op 05024, Third Dept 6-20-19

JURY NOTES, CRIMINAL LAW.

THE JURY NOTES SHOULD HAVE BEEN READ VERBATIM TO COUNSEL, NOT PARAPHRASED BY THE JUDGE; THIS MODE OF PROCEEDINGS ERROR REQUIRES REVERSAL (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the jury notes should have been read verbatim to counsel, not paraphrased:

.. [T]he jury submitted a note stating, "We would like to see the difference between first and second degree murder. (Powerpoint)." The Supreme Court informed counsel, the defendant, and the codefendant that the jurors "want to be recharged on first degree and second degree." …

The jury submitted another note which read, "Phone Records Between Jimmy & Ragene — When Did Communication Start?" During a discussion on the record, the Supreme Court mentioned that the jurors "want to know when did the communications start. And the communications started on June 11. And the stipulation covers it. So we'll read back the stipulation."

The record reveals that the Supreme Court did not read the entire contents of these two jury notes into the record, and there was no indication that the entire contents of the notes otherwise were shared with counsel … . Rather, the court improperly paraphrased the notes … .

Counsel's awareness of the existence of a note does not effectuate the court's proper discharge of its statutory duty … . Although defense counsel may have been made aware of the existence and gist of the second note during an off-the-record discussion, this is insufficient to establish that counsel had been made aware of the precise contents of the note … . Where a trial transcript does not show compliance with O'Rama's procedure, it cannot be assumed that the omission was remedied at an off-the-record conference to which the transcript does not refer … .

As such, the Supreme Court committed a mode of proceedings error when it failed to provide counsel with meaningful notice of the precise contents of substantive juror inquiries, and therefore, reversal is required … . People v Copeland, 2019 NY Slip Op 06507, Second Dept 9-11-19

REFUSAL TO ACCEPT PAPERS, CRIMINAL LAW, MOTION PAPERS.

JUDGE SHOULD NOT HAVE REFUSED TO CONSIDER THE PEOPLE'S LATE RESPONSE TO DEFENDANT'S MOTION TO DISMISS ON SPEEDY TRIAL GROUNDS, NOTWITHSTANDING THE PEOPLE'S FAILURE TO ADHERE TO THE COURT'S MOTION TIMETABLE (FIRST DEPT).

The First Department, reversing Supreme Court, over a two-justice dissent, determined the trial judge should not have refused to consider a late response to the defense motion to dismiss on speedy trial grounds (CPL 30.30):

Clearly, trial courts have considerable discretion in administering litigation and managing their dockets … . We agree with the dissent that parties are obligated to honor court-imposed deadlines. However, it is also axiomatic that justice is best served when cases are decided on the merits. …

Here, the People sought to file their opposition papers on the decision date, some 15 days after the due date. This was not the situation in People v Cole, 73 NY2d 957 [1989], which was cited by the motion court, where the People failed to submit any opposition papers. Further, there is nothing in the record to suggest that there was any history of dilatory conduct or a blatant disregard of court directives on the part of the People. Rather, this appears to be an isolated lapse.

While we are certainly cognizant of the frustration occasioned by the failure of the People to adhere to the motion schedule, summarily granting the defense motion to dismiss without considering the merits of the response the People had prepared was improper. As the People argue, the charges here are serious. Defendant was indicted on numerous weapons possession charges. Dismissal of those charges without a full and complete determination of the motion to dismiss on its merits was unduly harsh. Less drastic remedies, including charging the People for the 15-day delay, were available … . People v Lora, 2019 NY Slip Op 08478, First Dept 11-21-19

REFUSAL TO ACCEPT PAPERS, CRIMINAL LAW, NOTICE OF INTENT.

COUNTY COURT ABUSED ITS DISCRETION BY REFUSING TO ALLOW DEFENDANT TO SUBMIT A LATE NOTICE OF HIS INTENT TO PRESENT PSYCHIATRIC EVIDENCE, CONVICTION REVERSED (SECOND DEPT).

The Second Department, reversing defendant's conviction, determined County Court abused its discretion by not allowing defendant to serve a late notice of his intent to offer psychiatric evidence:

"Psychiatric evidence is not admissible upon a trial unless the defendant serves upon the people and files with the court a written notice of his intention to present psychiatric evidence. Such notice must be served and filed before trial and not more than thirty days after entry of the plea of not guilty to the indictment. In the interest of justice and for good cause shown, however, the court may permit such service and filing to be made at any later time prior to the close of the evidence" (CPL 250.10[2]). Contrary to the defendant's contention, the evidence he proffered, in opposition to the People's motion, for the purpose of negating intent, constituted "psychiatric evidence" under the statute (CPL 250.10[1] …). The defendant failed to provide the People with timely notice of his intent to offer this evidence. However, the determination as to whether late notice should be permitted is a discretionary one, which requires the court to weigh the defendant's constitutional right to present witnesses in his own defense against the prejudice to the People arising from late notice … .

Here, the record indicates that the trial court failed to exercise any discretion over whether to permit the defendant to serve late notice of his intent to offer psychiatric evidence … . Exercising our own discretion, we conclude that, under the particular circumstances of this case, the defendant should have been granted permission to serve late notice, and the People's preclusion motion therefore should have been denied. The evidence that the defendant previously had suffered auditory hallucinations had high probative value to corroborate the defendant's testimony that he entered the home with the intent to aid a woman who was yelling, rather than to damage the house … . Further, the preclusion of testimony regarding those portions of the defendant's conversation with the responding officer which involved his past auditory hallucinations, and his resultant hospitalization, deprived the jury of the full context of the interaction. Any prejudice to the People was substantially outweighed by the defendant's extremely strong interest in presenting the evidence … . People v Morris, 2019 NY Slip Op 05160, Second Dept 6-26-19

RELIEF NOT REQUESTED, CIVIL PROCEDURE, AMEND COMPLAINT.

JUDGE SHOULD NOT HAVE, SUA SPONTE, GRANTED LEAVE TO AMEND THE COMPLAINT IN THE ABSENCE OF A MOTION AND PROPOSED PLEADINGS (FIRST DEPT).

The First Department, reversing Supreme Court, determined the judges should have, sua sponte, granted plaintiff leave to file a second amended complaint in the absence of a motion and a proposed pleading. The leave to amend was vacated:

The motion court should not have sua sponte granted plaintiff leave to file a second amended complaint to assert an unpleaded negligent misrepresentation claim in the absence of a cross motion and an accompanying proposed pleading (CPLR 3025[b]). The lack of a proposed pleading precludes meaningful review of the sufficiency of the allegations, including defendant's contention that such a claim is time barred … . Sutton Animal Hosp. PLLC v D&D Dev., Inc.. 2019 NY Slip Op 08263, First Dept 11-12-19

RELIEF NOT REQUESTED, CRIMINAL LAW, STANDING TO CONTEST SEARCH.

OFFICER DID NOT HAVE PROBABLE CAUSE TO SEARCH THE VAN AFTER HE LEARNED THAT DEFENDANT, WHO WAS SITTING IN THE PASSENGER SEAT, WAS SMOKING A CIGAR, NOT MARIJUANA, SUPREME COURT'S SUA SPONTE FINDING THAT DEFENDANT DID NOT HAVE STANDING TO CONTEST THE SEARCH WAS ERROR, THERE WAS UNCONTRADICTED EVIDENCE THE VAN WAS DEFENDANT'S WORK VEHICLE (SECOND DEPT).

The Second Department, reversing defendant's possession of a weapon conviction and dismissing the indictment, determined that the police officer did not have probable cause to search the van where the weapon was found. The defendant was sitting in the passenger seat smoking a cigar when the officer approached and removed him from the van, apparently because the officer thought defendant was smoking marijuana. At the time the officer searched the van, he know defendant was smoking a cigar. Although defendant was sitting in

the passenger seat, there was no evidence to contradict his claim that the van was his work vehicle. Contrary to Supreme Court's contrary finding (made sua sponte), the defendant had standing to contest the search:

The officer testified that he removed the defendant from the minivan and frisked him out of a fear for the officer's own safety; no weapon was recovered. The officer further testified that, at that time, he realized that the two men were smoking cigars, not marijuana. Nevertheless, the officer went around the minivan to the driver's side and opened the sliding door on that side, whereupon he observed a firearm sticking out of a bag behind the driver's seat.

We disagree with the hearing court's determination, sua sponte, that the defendant lacked standing to challenge the search of the minivan. The defendant, who had told the police at the police station that the minivan was his work van, had standing to challenge the search. Although the defendant had been sitting in the front passenger seat of the minivan, no evidence was presented to contradict his statements that it was his work van. The defendant's statements were sufficient to establish that he exercised sufficient dominion and control over the minivan to demonstrate his own legitimate expectation of privacy therein… .

"[A]bsent probable cause, it is unlawful for a police officer to invade the interior of a stopped vehicle once the suspects have been removed and patted down without incident, as any immediate threat to the officers' safety has consequently been eliminated" … . Contrary to the People's contention, under the circumstances here, where the defendant already had been removed from the minivan and no one else was in the minivan, the police lacked probable cause to conduct a warrantless search by opening the sliding door of the minivan, and the weapon found as a result of the unlawful search should have been suppressed … . People v Dessasau, 2019 NY Slip Op 00456, Second Dept 1-23-19

RELIEF NOT REQUESTED, CROSS-CLAIMS.

JUDGE SHOULD NOT HAVE GRANTED RELIEF WHICH WAS NOT REQUESTED IN THE MOTION PAPERS, QUESTIONS OF FACT PRECLUDED SUMMARY JUDGMENT ON SOME ISSUES IN THIS SLIP AND FALL CASE (FOURTH DEPT).

The Fourth Department, reversing (modifying) Supreme Court, determined questions of fact precluded summary judgment on some issues in this slip and fall case. The decision addresses too many issues to fairly summarize here. The court noted that Supreme Court should not have granted relief (dismissal of cross-claims) not requested in the motion papers. Plaintiff slipped and fell on ice in a delivery area behind defendant Cafe in a plaza owned

by defendant Pixley. There was some evidence the Cafe exercised control over at least part of the delivery area (snow removal):

… [W]e conclude that the court erred in granting that part of the Café's motion for summary judgment dismissing the complaint against it insofar as the complaint alleges that the Café had constructive notice of the icy condition; the court also erred in denying that part of Pixley's motion for summary judgment dismissing the complaint against it insofar as the complaint alleges that Pixley had actual notice of the icy condition. Johnson v Pixley Dev. Corp., 2019 NY Slip Op 01040, Fourth Dept 2-8-19

RELIEF NOT REQUESTED, DEFAULT JUDGMENT.

JUDGE SHOULD NOT HAVE, SUA SPONTE, VACATED A DEFAULT JUDGMENT IN THE ABSENCE OF A MOTION OR REQUEST, NO APPEAL AS OF RIGHT FROM A SUA SPONTE ORDER (FIRST DEPT).

The First Department, reversing Supreme Court, determined that the judge did not have the authority to vacate a default judgment in absence of a request for that relief. The First Department treated the notice of appeal as a motion for leave to appeal, noting that a sua sponte order is not appealable as of right:

While an order entered sua sponte is not appealable as of right … , given the lack of evidence of the timeliness of the service of the answer and given the motion court's failure to identify a legal basis for vacating the prior order, we deem the notice of appeal a motion for leave to appeal, and grant leave … .

The court exceeded its authority in sua sponte vacating the prior order granting plaintiff's motion for a default judgment … . In the absence of a motion or other request for relief from the order, the court's discretion to correct the order was limited to curing any mistake, defect or irregularity "not affecting a substantial right of a party" (CPLR 5019[a]). Betts v Tsitiridis, 2019 NY Slip Op 02970, First Dept 4-22-19

RELIEF NOT REQUESTED, DEFAULT JUDGMENT.

JUDGE SHOULD NOT HAVE, SUA SPONTE, DISMISSED THE COMPLAINT AND VACATED THE DEFAULT JUDGMENT, ALTHOUGH A SUA SPONTE ORDER IS NOT APPEALABLE AS OF RIGHT, THE NOTICE OF APPEAL WAS DEEMED A MOTION FOR LEAVE TO APPEAL (FIRST DEPT).

The First Department, reversing Supreme Court, held that Supreme Court should not have, sua sponte, dismissed plaintiff's complaint and vacated the default judgment as untimely, Plaintiff had timely moved for a default judgment. Although sua sponte orders are not appealable as of right, the First Department deemed the notice of appeal as a motion for leave to appeal:

An order issued sua sponte is not appealable as of right (see Sholes v Meagher, 100 NY2d 333, 335 [2003]). However, given the nature of the motion court's sua sponte relief in dismissing the complaint pursuant to CPLR 3215(c), we deem the notice of appeal to be a motion for leave to appeal, and grant such leave (…CPLR 5701[c]).

The record is clear that plaintiff had moved for a default judgment within one year, and thus, the motion court's sua sponte vacature of the judgment and dismissal of the complaint as untimely was in error … . In view of this decision, the merits of defendant's motion to vacate the default judgment are no longer moot and it is remanded back to the trial court for consideration on the merits. New Globaltex Co., Ltd. v Zhe Lin, 2019 NY Slip Op 04456, First Dept 6-6-19

RELIEF NOT REQUESTED, FAMILY LAW, ADVERSE INFERENCE.

JUDGE SHOULD NOT HAVE, SUA SPONTE, DRAWN AN ADVERSE INFERENCE AGAINST FATHER BASED UPON FATHER'S FAILURE TO CALL HIS GIRLFRIEND AS A WITNESS WITHOUT FIRST INFORMING FATHER AND GIVING FATHER A CHANCE TO EXPLAIN, ERROR DEEMED HARMLESS HOWEVER (FOURTH DEPT).

The Fourth Department determined the judge should not have drawn an adverse inference against father for his failure to call his girlfriend as a witness without first informing father and giving father a chance to explain. The error was deemed harmless however:

"A party is entitled to a missing witness charge when the party establishes that an uncalled witness possessing information on a material issue would be expected to provide noncumulative testimony in favor of the opposing party and is under the control of and available to that party" … . "The party seeking a missing witness inference has the initial burden of setting forth the basis for the request as soon as practicable . . . to[, inter alia,] avoid substantial possibilities of surprise" … . Here, in its written decision, "[t]he court sua sponte drew a negative inference based on the [father's] failure to call [his girlfriend] as a witness, and failed to advise [him] that it intended to do so" … . Thus, the father "lacked the opportunity to explain [his] failure to call [his girlfriend] as a witness, or to discuss whether [his girlfriend] was even available to testify or under [his] control" … . We conclude, however, that the error did not affect the result … . Matter of Liam M.J. (Cyril M.J.), 2019 NY Slip Op 02207, Fourth Dept 3-22-19

RELIEF NOT REQUESTED, FAMILY LAW.

JUDGE SHOULD NOT HAVE, SUA SPONTE, DISMISSED THIS DIVORCE ACTION ON A GROUND NOT RAISED BY THE PARTIES (SECOND DEPT).

The Second Department determined Supreme Court should not have dismissed the complaint in this divorce action, sua sponte, on a ground not raised by the parties:

The Supreme Court should not have granted the defendant's motion for summary judgment on a ground not raised in the defendant's motion … . "[O]n a motion for summary judgment, the court is limited to the issues or defenses that are the subject of the motion before the court"… . The plaintiff had no opportunity to address the issue regarding the allegedly defective summons, and this "lack of notice and opportunity to be heard implicates the fundamental issue of fairness that is the cornerstone of due process" … .

Since the Supreme Court did not consider the merits of the motion and cross motion, the matter must be remitted to the Supreme Court, Richmond County, for a determination of the motion and cross motion on the merits … . Patel v Sharma, 2019 NY Slip Op 00452, Second Dept 1-23-19

RELIEF NOT REQUESTED, FORECLOSURE, DISMISSAL OF COMPLAINT, ISSUE NOT JOINED.

JUDGE WAS WITHOUT AUTHORITY TO DISMISS THE FORECLOSURE COMPLAINT; ISSUE HAD NOT BEEN JOINED AND THERE WAS NO EVIDENCE PLAINTIFF FAILED TO APPEAR AT A SCHEDULED CONFERENCE (SECOND DEPT).

The Second Department, reversing Supreme Court, determined Supreme Court was without authority to dismiss (sua sponte) the complaint in this foreclosure action because (1) issue had not been joined, and (2) there was no evidence plaintiff failed to appear at a conference:

CPLR 3216(b)(1) states that no dismissal should be made under this statute unless issue has been joined. "A court may not dismiss an action based on neglect to prosecute unless the CPLR 3216 statutory preconditions to dismissal are met" … . Here, none of the defendants submitted an answer to the complaint and, thus, issue was never joined (see CPLR 3216[b][1] …). "Since at least one precondition set forth in CPLR 3216 was not met here, the Supreme Court was without power to dismiss the action pursuant to that statute" … . …

Contrary to the defendant's contention, where, as here, a party "appeared as scheduled, [22 NYCRR 202.27] provides no basis for the court to summarily dismiss the action" for failure to prosecute … . In general, "[t]he procedural device of dismissing a complaint for undue delay is a legislative creation, and courts do not possess the inherent power to dismiss an action for general delay where the plaintiff has not been served with a 90-day demand to serve and file a note of issue pursuant to CPLR 3216(b) … . Bank of N.Y. v Harper, 2019 NY Slip Op 07378, Second Dept 10-16-19

RELIEF NOT REQUESTED, FORECLOSURE, DISMISSAL OF COMPLAINT.

JUDGE SHOULD NOT HAVE, SUA SPONTE, DISMISSED THE FORECLOSURE ACTION WHEN PLAINTIFF BANK ATTEMPTED TO BRING PREVIOUSLY FILED PAPERS INTO COMPLIANCE WITH SUBSEQUENT ADMINISTRATIVE ORDERS (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the judge should not have, sua sponte, dismissed the foreclosure action when plaintiff bank attempted to bring previously filed documents into compliance with subsequent administrative orders:

"A court's power to dismiss a complaint, sua sponte, is to be used sparingly and only when extraordinary circumstances exist to warrant dismissal"… . Here, the plaintiff's counsel attempted to comply, in good faith, with Administrative Orders 548/10 and 431/11 of the Chief Administrative Judge, which did not exist at the time of the commencement of the action, or at the time of the plaintiff's prior motion for an order of reference. Under such circumstances, dismissal was not warranted. Nothing in the Administrative Orders requires the dismissal of an action merely because the plaintiff's counsel discovers that there was some irregularity or defect in a prior submission, nor is the plaintiff effectively required to commence an entirely new action … . JP Morgan Chase Bank, N.A. v Laszlo, 2019 NY Slip Op 01205, Second Dept 2-20-19

RELIEF NOT REQUESTED, FORECLOSURE, DISMISSAL OF COMPLAINT.

JUDGE WAS NOT PRESENTED WITH ANY EXTRAORDINARY CIRCUMSTANCES JUSTIFYING, SUA SPONTE, DISMISSAL OF THE COMPLAINT IN THIS FORECLOSURE ACTION (SECOND DEPT)

The Second Department, reversing Supreme Court, determined there was no basis for the judge's, sua sponte, dismissal of the complaint in this foreclosure action:

"A court's power to dismiss a complaint, sua sponte, is to be used sparingly and only when extraordinary circumstances exist to warrant dismissal" … .

Administrative Order 548/10, issued by the Chief Administrative Judge on October 20, 2010, and amended by Administrative Order 431-11 [requiring confirmation of the accuracy of the execution and notarization of an affidavit of merit] … , was not in effect at the time the order of reference and the judgment of foreclosure and sale were issued … . In this case, no substantial right of the defendant would have been affected by the substitution of a new affidavit of merit … . Accordingly, the Supreme Court was not presented with any extraordinary circumstances warranting sua sponte dismissal of the complaint … . LaSalle Bank N.A. v Lopez, 2019 NY Slip Op 00104, Second Dept 1-9-19

RELIEF NOT REQUESTED, FORECLOSURE, EXTENSION OF TIME TO ANSWER.

JUDGE SHOULD NOT HAVE, SUA SPONTE, GRANTED DEFENDANTS AN EXTENSION OF TIME TO ANSWER IN THIS FORECLOSURE ACTION, RELIEF WHICH WAS NOT REQUESTED BY DEFENDANTS (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the judge should not have, sua sponte, granted relief in this foreclosure action which was not requested by the defendant:

"The court may grant relief that is warranted pursuant to a general prayer for relief contained in a notice of motion 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 defendants did not request an extension of time to answer, and the Supreme Court's determination to, sua sponte, grant that relief was an improvident exercise of discretion. Indeed, to extend the time to answer the complaint, a defendant must generally provide a reasonable excuse for the delay and demonstrate a potentially meritorious defense to the action … . Here, the only excuse offered by the defendants for their default was the plaintiff's alleged failure to properly serve them, which excuse was rejected by the Supreme Court. Further, the defendants did not proffer any potentially meritorious defense to the action. We note also that the court's sua sponte determination to extend the time within which the defendants had to answer the complaint is fundamentally inconsistent with its determination to deny that branch of the defendants' motion which was to vacate the judgment of foreclosure and sale. Since the judgment determined the action and the rights of the parties, allowing the defendants to interpose an answer was without practical import. U.S. Bank N.A. v Halevy, 2019 NY Slip Op 07438, Second Dept 10-16-19

RELIEF NOT REQUESTED, FORECLOSURE, STANDING.

DEFENDANT IN THIS FORECLOSURE ACTION DID NOT ASSERT THE BANK LACKED STANDING IN HIS ANSWER AND DID NOT OPPOSE THE BANK'S MOTION FOR SUMMARY JUDGMENT, THE JUDGE SHOULD NOT HAVE, SUA SPONTE, RAISED THE STANDING ISSUE AND DENIED PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT ON THAT GROUND (SECOND DEPT).

The Second Department, reversing Supreme Court, determined that the judge should not have, sua sponte, denied plaintiff bank's motion for summary judgment in this foreclosure action on the ground the bank did not establish standing. The bank need not affirmatively demonstrate standing absent the defendant's assertion that the bank lacked standing. Here the defendant did not address the bank's standing in his answer and did not oppose the motion for summary judgment:

… [A]s a general matter, a plaintiff need not establish its standing (i.e., that it held and/or owned the note at the time the action was commenced) as an essential element of the cause of action. Rather, it is only where the plaintiff's standing is placed in issue by the defendant that the plaintiff must shoulder the additional burden of establishing its standing to commence the action, a burden satisfied by evidence that it was the holder or assignee of the underlying note at the time the action was commenced" … .

In the present case, the defendant did not raise the issue of standing by asserting lack of standing as an affirmative defense in his answer or moving to dismiss the complaint on that ground in a pre-answer motion to dismiss … . Inasmuch as the defendant "failed to . . . raise the issue, it was inappropriate for the Supreme Court to, sua sponte, do so on the defendant['s] behalf" … . The issue of standing was not properly before the Supreme Court … . Deutsche Bank Natl. Trust Co. v Matzen, 2019 NY Slip Op 05386, Second Dept 7-3-19

RELIEF NOT REQUESTED, FORECLOSURE.

JUDGE SHOULD NOT HAVE DENIED, SUA SPONTE, PLAINTIFF'S MOTION FOR A JUDGMENT OF FORECLOSURE ON A GROUND NOT RAISED BY ANY PARTY (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the judge should not have, sua sponte, denied plaintiff's motion for a judgment of foreclosure on a ground not raised by the parties:

… [T]he Supreme Court should not have denied its motion for a judgment of foreclosure and sale upon finding that DLJ [plaintiff] failed to show that the defendants were properly served. The defendants did not oppose DLJ's motion on any ground, including lack of personal jurisdiction. Therefore, the court should not have, sua sponte, raised the issue of the propriety of service …

Moreover, DLJ demonstrated its entitlement to a judgment of foreclosure and sale by submitting evidence establishing the merits of its unopposed motion and the referee's findings and report … . DLJ Mtge. Capital, Inc. v Ramnarine, 2019 NY Slip Op 08392, Second Dept 11-20-19

RELIEF NOT REQUESTED, NOTICE OF CLAIM.

JUDGE SHOULD NOT HAVE, SUA SPONTE, GRANTED RELIEF NOT REQUESTED BY A PARTY, HERE THE ABILITY FOR UNLIMITED AMENDMENT OF A NOTICE OF CLAIM WHICH HAD NOT YET BEEN FILED; SUA SPONTE ORDERS ARE NOT APPEALABLE; LEAVE TO APPEAL GRANTED AS AN EXERCISE OF DISCRETION (SECOND DEPT).

The Second Department, reversing Supreme Court, determined that Supreme Court should not, sua sponte, have granted relief which was not requested by a party. Petitioner allegedly was injured trying to board a subway train. Before filing a notice of claim petitioner commenced a CPLR 3102 (c) proceeding to obtain discovery before starting the action. The court granted the petition and, sua sponte, gave the petitioner permission to amend the notice of claim, which had not yet been filed, within 30 days of filing the note of issue. The Second Department noted that a sua sponte order is not appealable and exercised its discretion to grant leave to appeal (CPLR 5701[a][2]; [c]):

Turning to the merits, "[p]ursuant to CPLR 2214(a), an order to show cause must state the relief demanded and the grounds therefor'" . "However, the court may grant relief that is warranted by the… facts plainly appearing on the papers on both sides, if the relief granted is not too dramatically unlike the relief sought, the proof offered supports it, and there is no prejudice to any party'" … .

Here, the Supreme Court strayed from this principle when, in addition to granting, in effect, that branch of the petition which was for an order preserving material related to the accident, it also sua sponte granted a nearly unlimited prospective right to the petitioner to amend a notice of claim that had not yet been served. This sua sponte relief was dramatically different from the pre-action discovery that was the subject of the petition … . Furthermore, the papers before the court did not support the award of such additional relief, since the absence of a notice of claim rendered it impossible to determine whether the future notice of claim or any amendments thereto would be in compliance with General Municipal Law § 50-e. We also agree with the appellants that they were prejudiced insofar as the court set a permissive timeline for amending the notice of claim that potentially could be, inter alia, beyond the statute of limitations and after the completion of discovery. Matter of Velez v City of New York, 2019 NY Slip Op 05781, Second Dept 7-24-19

RELIEF NOT REQUESTED, PRELIMINARY INJUNCTION.

JUDGE SHOULD NOT HAVE, SUA SPONTE, GRANTED A PRELIMINARY INJUNCTION IN THIS TRADEMARK INFRINGEMENT CASE, CORPORATE OFFICERS PROPERLY SUED IN THEIR INDIVIDUAL CAPACITIES (SECOND DEPT).

The Second Department, modifying Supreme Court, determined that defendants' motion to dismiss the trademark infringement, trademark dilution and unfair competition causes of action was properly denied. The court noted that the complaint properly alleged torts by defendants in their individual capacities without alleging facts supporting piercing the corporate veil. The Second Department held that the judge, sua sponte, should not have granted the preliminary injunction:

" [P]reliminary injunctive relief is a drastic remedy which will not be granted unless a clear right thereto is established under the law and the undisputed facts upon the moving papers, and the burden of showing an undisputed right rests upon the movant'" … . "As a general rule, the decision to grant or deny a preliminary injunction lies within the sound discretion of the Supreme Court" … . "In exercising that discretion, the Supreme Court must determine if the moving party has established: (1) a likelihood of success on the merits, (2) irreparable harm in the absence of an injunction, and (3) a balance of the equities in favor of the injunction" … . " [A]bsent

extraordinary circumstances, a preliminary injunction will not issue where to do so would grant the movant the ultimate relief to which he or she would be entitled in a final judgment'" … .

The plaintiff did not request a preliminary injunction … [T]he record in this case lacks evidence establishing, among other things, irreparable harm or extraordinary circumstances warranting a preliminary injunction that would, in effect, depart from the status quo and grant the plaintiff its ultimate relief … . The evidence at this stage further fails to demonstrate that the plaintiff possesses a likelihood of success on the merits … . The court therefore improvidently exercised its discretion in sua sponte awarding preliminary injunctive relief to the plaintiff. Emanuel Mizrahi, DDS, P.C. v Angela Andretta, DMD, P.C., 2019 NY Slip Op 02315, Second Dept 3-27-19

RELIEF NOT REQUESTED, SERVICE OF PROCESS.

JUDGE SHOULD NOT, SUA SPONTE, HAVE RAISED ISSUES ABOUT THE ADEQUACY OF SERVICE BY MAIL WHICH WERE NOT RAISED OR ADDRESSED BY THE PARTIES; DEFENDANTS' MOTION TO DISMISS THE ORIGINAL COMPLAINT FOR LACK OF JURISDICTION SHOULD NOT HAVE BEEN GRANTED; AMENDED COMPLAINT, FOR WHICH LEAVE OF COURT WAS NOT SOUGHT, WAS A NULLITY (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, determined that the judge should not have raised, sua sponte, issues not raised by the parties in granting defendants' (the Wirths') motion to dismiss the complaint for lack of personal jurisdiction. The process server filed an affidavit stating that the summons and complaint had been timely mailed to defendants. The affidavit did not state that the envelope was marked "personal and confidential" or that the envelope indicated it was from an attorney. There was no proof the envelope was not properly marked and the defendants had not raised these issues. The defendants merely asserted they never received the mailing. The Second Department also determined the amended complaint, adding additional parties, was a nullity because the court did not grant leave to amend:

Given that the Wirths argued that they did not receive the summons and complaint in the mail, the Supreme Court should not have determined, sua sponte, that jurisdiction was not acquired over the Wirths because the process server did not attest that the mailed copies of the summons and complaint were contained in an envelope bearing the legend "personal and confidential" and not indicating on the outside thereof that the communication is from an attorney or concerns an action against the person to be served (see CPLR 308[2] …). Courts are "not

in the business of blindsiding litigants," who expect the courts to decide issues on rationales advanced by the parties, not arguments that were never made … . By raising the CPLR 308(2) envelope requirement on its own, the court deprived the plaintiffs of the opportunity to show compliance with that requirement. …

CPLR 3025(a) provides that a "party may amend his [or her] pleading once without leave of court within twenty days after its service, or at any time before the period for responding to it expires, or within twenty days after service of a pleading responding to it." A plaintiff's failure to seek leave pursuant to CPLR 1003 to add a new defendant is a jurisdictional defect, and an amended complaint that is not filed in accordance with CPLR 1003 and 3025 is a legal nullity … . Hulse v Wirth, 2019 NY Slip Op 06483, Second Dept 9-11-19

RELIEF NOT REQUESTED, SUMMARY JUDGMENT.

RES JUDICATA APPLIES TO ISSUES WHICH COULD HAVE BEEN RAISED IN A SMALL CLAIMS ACTION, NO NEED TO PIERCE THE CORPORATE VEIL TO BRING A BREACH OF FIDUCIARY DUTY ACTION AGAINST A FORMER PARTNER IN A PROFESSIONAL CORPORATION, JUDGE SHOULD NOT HAVE SEARCHED THE RECORD AND RENDERED SUMMARY JUDGMENT WHERE NEITHER PARTY REQUESTED THAT RELIEF (SECOND DEPT).

The Second Department, modifying Supreme Court, determined: (1) although the Small Claims Act provides that collateral estoppel (issue preclusion) does not apply to fact-findings made in a small claims action, the doctrine of res judicata does apply to any issue which could have been, but was not, raised in the small claims action; (2) a breach of fiduciary duty cause of action does not entail piercing the corporate veil in a proceeding against a former partner in a professional corporation; (3) the judge should not have searched the record to render summary judgment when neither party requested that relief:

… "[T]he elements of a cause of action to recover damages for breach of fiduciary duty are (1) the existence of a fiduciary relationship, (2) misconduct by the defendant, and (3) damages directly caused by the defendant's misconduct" … . Contrary to the Supreme Court's finding, it is not necessary to pierce the corporate veil in order to maintain a cause of action alleging breach of fiduciary duty against former partners in a professional corporation. …

Since … neither party moved for summary judgment with respect to the counterclaims and none of the issues raised in the first, second, or third counterclaims were litigated in the summary judgment motion, or the small

claims action, the Supreme Court should not have, in effect, searched the record and awarded the plaintiff summary judgment dismissing those counterclaims … . Weinberg v Picker, 2019 NY Slip Op 03400, Second Dept 5-1-19

RELIEF NOT REQUESTED, SUMMARY JUDGMENT.

SUPREME COURT SHOULD NOT HAVE SEARCHED THE RECORD AND AWARDED SUMMARY JUDGMENT TO THE CITY IN THIS SIDEWALK SLIP AND FALL CASE, NO SUCH MOTION WAS BEFORE THE COURT (SECOND DEPT).

The Second Department determined that Supreme Court should not have searched the record and awarded summary judgment to the city in this sidewalk slip and fall case. No such motion was before the court:

… [T]he Supreme Court should not have, in effect, searched the record and awarded summary judgment to the City, which did not move for such relief. "A court may search the record and grant summary judgment in favor of a nonmoving party only with respect to a cause of action or issue that is the subject of the motions before the court" … . Since no party made any motion with respect to the plaintiff's direct cause of action against the City contained in the amended complaint, the court should not have granted relief with respect to that cause of action … . Cerbone v Lauriano, 2019 NY Slip Op 02056, Second Dept 3-20-29

RELIEF NOT REQUESTED, ZONING.

HARDSHIP WAIVER TO ALLOW CONSTRUCTION OF A SINGLE FAMILY HOME IN THE CORE PRESERVATION AREA OF THE LONG ISLAND CENTRAL PINES BARRENS PROPERLY DENIED, ACCOMPANYING ACTION FOR DECLARATORY JUDGMENT SHOULD NOT HAVE BEEN SUMMARILY DENIED, SUA SPONTE, BY THE JUDGE BECAUSE THERE WAS NO REQUEST FOR THAT RELIEF (SECOND DEPT).

The Second Department, modifying Supreme Court, determined that the Article 78 petition for a hardship waiver to allow petitioner to build a single family residence on property within the core preservation area of the Long

Island Central Pines Barrens was properly denied. However, the accompanying declaratory judgment action (alleging the denial of the waiver was an unconstitutional taking) should not have been summarily dismissed by the judge absent a motion for that relief:

… [C]ontrary to the petitioner's contention, the Commission's determination to deny its application for an extraordinary hardship waiver had a rational basis and was not arbitrary and capricious. In particular, the Commission rationally found, inter alia, that the alleged hardship was not the result of any unique circumstances peculiar to the subject property (see ECL 57-0121[10][a][i] …) and, in any event, that the alleged hardship was self-created (see ECL 57-0121[10][a][ii], [iii] …). The Commission also rationally found that the application did not satisfy the requirements of ECL 57-0121(10)(c) and reasonably distinguished the application from prior applications for which it granted an extraordinary hardship waiver … . …

"In a hybrid proceeding and action, separate rules apply to those causes of action which are asserted pursuant to CPLR article 78, on the one hand, and those to recover damages and for declaratory relief, on the other hand" … . "The Supreme Court may not employ the summary procedure applicable to a CPLR article 78 cause of action to dispose of causes of action to recover damages or seeking a declaratory judgment"… . "Thus, where no party makes a request for a summary determination of the causes of action which seek to recover damages or declaratory relief, it is error for the Supreme Court to summarily dispose of those causes of action" … . Matter of Armand Gustave, LLC v Pavacic, 2019 NY Slip Op 05125, Second Dept 6-26-19

RELIEF NOT REQUESTED, ZONING.

IN THIS HYBRID ARTICLE 78-DECLARATORY JUDGMENT ACTION, THE PORTIONS OF THE PETITION WHICH SOUGHT A DECLARATION THAT AMENDMENTS TO THE ZONING CODE ARE ILLEGAL AND RELATED DAMAGES SHOULD NOT HAVE BEEN DISMISSED, SUA SPONTE, IN THE ABSENCE OF A SPECIFIC DEMAND FOR DISMISSAL (SECOND DEPT).

The Second Department determined that the zoning code provisions enacted by the village board of trustees, which concerned the maximum floor space and coverage on residential lots, were consistent with the village's comprehensive plan and properly enacted. The Second Department further found that the requirements of the State Environmental Quality Review Act (SEQRA) were met. However, the portions of the petition which sought declaratory relief and related damages should not have been summarily dismissed along with the portions which sought Article 78 relief because no demand for dismissal of the declaratory relief portions had been made:

… [I]n the absence of a dispositive motion addressed to the fifth, sixth, seventh, and eighth causes of action, which sought declaratory relief and damages not in the nature of CPLR article 78 relief, the Supreme Court should not have, in effect, dismissed those causes of action. "In a hybrid proceeding and action, separate procedural rules apply to those causes of action which are asserted pursuant to CPLR article 78, on the one hand, and those to recover damages and for declaratory relief, on the other hand. The Supreme Court may not employ the summary procedure applicable to a CPLR article 78 cause of action to dispose of causes of action to recover damages or seeking a declaratory judgment" … . "Thus, where no party makes a request for a summary determination of the causes of action which seek to recover damages or declaratory relief, it is error for the Supreme Court to summarily dispose of those causes of action" … . Matter of Bonacker Prop., LLC v Village of E. Hampton Bd. of Trustees, 2019 NY Slip Op 00432, Second Dept 1-23-19

THERAPY DOG AT TRIAL.

DEFENDANT DID NOT WAIVE HIS RIGHT TO BE PRESENT AT A SIDEBAR DISCUSSION WITH A PROSPECTIVE JUROR; UPON RETRIAL AN ADULT WITNESS SHOULD NOT TESTIFY WHILE ACCOMPANIED BY A THERAPY DOG (FOURTH DEPT).

The Fourth Department, reversing defendant's conviction, determined defendant did not waive his right to be present when a prospective juror told the judge and attorneys that she was not sure she had completely answered a voir dire question. Defendant was not in the courtroom when the judge asked defense counsel if he wanted his client present and defense counsel said he was "okay with it." The juror then said that her son was a convicted felon. The Fourth Department also held that upon retrial an adult witness should not be allowed to testify accompanied by a therapy dog:

Initially, we conclude that the situation at issue here constituted a material stage of trial inasmuch as the prospective juror volunteered information about her son's status as a convicted felon. This information was relevant to a question asked earlier during voir dire: "Have any of you or anyone close to you been a victim of a crime, a witness to a crime, been accused of a crime, or participated in any way in a criminal proceeding?" That question was intended to be relevant to, inter alia, potential bias … . …

We further conclude that, under the circumstances of this case, defendant did not waive his right to be present. It is well established that a defendant has the right to be present at every material stage of a trial, including matters such as questioning prospective jurors regarding bias … . "It is equally clear, however, that such right may be voluntarily waived by a defendant or the defendant's attorney' " and that "a defendant's waiver in this

regard may be either express or implied" … . Here, without defendant being physically present in the courtroom, and with counsel simply stating to the court, "I'm okay with [his absence]," we perceive no basis to conclude that there was either an implicit or explicit waiver. Defendant's absence from the courtroom when the prospective juror raised the issue of potential bias made it impossible for him to knowingly and voluntarily waive his right to be present … . People v Geddis, 2019 NY Slip Op 04819, Fourth Dept 6-14-19