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APPEALS, MOTIONS IN LIMINE.

MOTIONS IN LIMINE WHICH AFFECT THE SCOPE OF THE TRIAL ARE APPEALABLE; TWO-YEAR WRONGFUL DEATH STATUTE OF LIMITATIONS APPLIED TO THE MUNICIPALITIES; PRECLUDING EXPERT TESTIMONY BASED UPON DISCLOSURE DEFICIENCIES WAS AN ABUSE OF DISCRETION (THIRD DEPT).

The Third Department, reversing (modifying) Supreme Court, determined: (1) plaintiff did not allege separate claims for personal injury and wrongful death, therefore the two-year wrongful-death statute of limitations in EPTL 5-4.1, not the one-year-ninety-days statute of limitations for negligence, applied to the actions against the municipalities; (2) motions in limine which limit the scope of the trial are appealable; and (3) preclusion of plaintiff's expert's testimony, based upon deficient disclosure pursuant to CPLR 3101 (d)(1), was an abuse of discretion. The action arose from a gas explosion at the great grandfather's house which killed plaintiff's 15-month-old son. Plaintiff sued the village, the town, the county and the New York State Electric & Gss Corporation (NYSEG). With regard to the motions in limine, the Third Department wrote:

"An order ruling on a motion in limine is generally not appealable as of right or by permission since an order made in advance of trial which merely determined the admissibility of evidence is an unappealable advisory ruling. However, an order that limits the scope of issues to be tried, affecting the merits of the controversy or the substantial rights of a party, is appealable" … . As to plaintiff's objection to that part of the order as allowed evidence of the great grandfather's negligence as a defense to the claim of res ipsa loquiter does not limit the scope of issues or impact a substantial right, such issue is not appealable … . Plaintiff also contends that Supreme Court erred in partially granting NYSEG's motion to preclude the testimony of Reiber, plaintiff's economist. Finding that the expert disclosure lacked reasonable detail as to how the value that Reiber assigned to plaintiff's lost services and support would be calculated, Supreme Court precluded his testimony with regard to said damages. … However, because this ruling restricted plaintiff's ability to prove and recover damages, this issue is appealable … . Reed v New York State Elec. & Gas Corp., 2020 NY Slip Op 03054, 5-28-20

BANKRUPTCY.

ALTHOUGH THE PARTY TWICE FILED FOR BANKRUPTCY WITHOUT LISTING THE MEDICAL MALPRACTICE ACTION AS AN ASSET, THE BANKRUPTCY PROCEEDING WAS SUBSEQUENTLY REOPENED AND THE ACTION WAS ADDED AS AN ASSET; AT THAT POINT THE BANKRUPTCY TRUSTEE BECAME THE PLAINTIFF IN THE MEDICAL MALPRACTICE ACTION AND THE DOCTRINE OF JUDICIAL ESTOPPEL, BASED UPON THE PARTY'S INITIAL FAILURE TO LIST THE ACTION AS AN ASSET, DID NOT APPLY TO THE TRUSTEE (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the defendant's motion to dismiss the medical malpractice complaint on judicial estoppel grounds should not have been granted. Vormnadiryan commenced a medical malpractice action in 2006. In two bankruptcy proceedings in 2008 and 2016 the medical malpractice action was not listed as an asset by Vormnadiryan. In 2017 Vormnadiryan opened the 2008 bankruptcy action and the medical malpractice action was added as an asset, making the bankruptcy trustee the plaintiff in that action. The Second Department determined Vormandiryan's initial failure to list the malpractice action as an asset did not subject the bankruptcy trustee, as the plaintiff in the malpractice action, to the judicial estoppel doctrine:

"The integrity of the bankruptcy system depends on full and honest disclosure by debtors of all of their assets. By failing to list causes of action on bankruptcy schedules of assets, the debtor represents that it has no such claims. Thus, the doctrine of judicial estoppel may bar a party from pursuing claims which were not listed in a previous bankruptcy proceeding" … . "Because the doctrine is primarily concerned with protecting the judicial process, relief is granted only when the risk of inconsistent results with its impact on judicial integrity is certain" … . …

Here, the 2008 bankruptcy proceeding was reopened by the Bankruptcy Court so that the 2006 medical malpractice action could be identified as an asset of the bankruptcy estate. Therefore, judicial estoppel cannot be predicated on Vormnadiryan's failure to list the action as an asset when she originally filed the 2008 bankruptcy petition … . Further, once a bankruptcy proceeding is commenced, all legal or equitable interests of the debtor become part of the bankruptcy estate, including any causes of action (see 11 USC § 541[a][1] …). The trustee in bankruptcy, as representative of the estate, "has capacity to sue and be sued" … . Pereira v Meisenberg, 2020 NY Slip Op 02815, Second Dept 5-13-20

COMPLAINTS.

MISNOMER DID NOT PREJUDICE THE CITY; CITY'S MOTION TO DISMISS SHOULD HAVE BEEN DENIED AND PLAINTIFF'S CROSS MOTION TO AMEND THE SUMMONS AND COMPLAINT SHOULD HAVE BEEN GRANTED (FIRST DEPT).

The First Department, reversing Supreme Court, determined the mis-description of the defendant in the summons and complaint did not prejudice the city, which was notice of the plaintiff's suit:

The summons and complaint were served on Corporation Counsel for the City of New York, which answered on behalf of the City of New York. Defendant's motion to dismiss the complaint should have been denied and plaintiff's cross motion to amend the summons and complaint to correct the misnomer granted. The City was not prejudiced by the mis-description and was on notice that plaintiff intended to seek a judgment against it (see CPLR 305[c] …). Rivera v New York City Dept. of Sanitation, 2020 NY Slip Op 03085, First Dept 5-28-20

COVID-19.

GOVERNOR HAD THE AUTHORITY TO CANCEL THE SPECIAL ELECTION FOR QUEENS BOROUGH PRESIDENT IN RESPONSE TO THE COVID-19 PANDEMIC (SECOND DEPT).

The Second Department, converting the Article 78 proceeding to a declaratory judgment action, determined the Executive Order canceling the June, 2020, special election for Queens Borough President was a valid exercise of the Governor's authority in response to the COVID-19 pandemic:

… [T]he Governor demonstrated, prima facie, that the canceling of the special election, which would have been held pursuant to New York City Charter § 81, was the minimum deviation necessary to assist or aid in coping with the COVID-19 pandemic, and was authorized pursuant to the emergency powers granted to the Governor by Executive Law § 29-a(1). Additionally, to the extent that New York City Charter § 81 required the special election to be held, pursuant to the language of Executive Order (Cuomo) No. 202.3 (9 NYCRR 8.202.3), those provisions of the New York City Charter have been suspended … . Matter of Dao Yin v Cuomo, 2020 NY Slip Op 03046, First Dept 5-28-20

COVID-19.

THE PETITION SIGNATURES WERE GATHERED BEFORE THE DEADLINE SET BY THE COVID-19-RELATED EXECUTIVE ORDER BUT THE SIGNATURES WERE WITNESSED AFTER THE DEADLINE; THE SIGNATURES SHOULD NOT HAVE BEEN INVALIDATED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the witnessing of petition signatures need not be done prior to the deadline for gathering the signatures:

These are unusual times occasioned by the onset of the COVID-19 virus. The State has undertaken various measures to protect the health and safety of its residents by limiting the face-to-face contact of persons and thereby minimizing the extent of human transmission of the virus. Some of the State's measures are set forth in Executive Orders of the Governor, including, as relevant here, Executive Order No. 202.2. Executive Order No. 202.2, dated March 14, 2020, modified article 6 of the Election Law to reduce the number of petition signatures required for placing candidates' names on ballots, and to suspend the "gathering of signatures" after 5:00 p.m. on March 17, 2020. The Executive Order is consistent with the State's policy of limiting social and professional interactions and community contact transmissions of COVID-19 (see Executive Order 202.2). …

The language of the Executive Order plainly directs that only the "gathering of signatures" was subject to the deadline of 5:00 p.m. on March 17, 2020. The signatures contained in the appellant's designating petition were all "gathered" prior to that deadline. The language of the Executive Order provides no truncated deadline for the witnessing of those signatures. Indeed, since the witnessing of signatures is a ministerial task unrelated to the face-to-face interactions that Executive Order No. 202.2 was issued to minimize, there would be no reason for the Governor to have intended, or for the Executive Order itself to provide, that the witnessing of signatures also be suspended as of 5:00 p.m. on March 17, 2020.

Thus, we disagree with the Supreme Court's determination granting the petition, inter alia, to invalidate the appellant's designating petition on the ground that the executions of the Statement of Witness on March 19, 2020, violated the signature gathering deadline of Executive Order No. 202.2 … . Matter of Parascando v Monheit, 2020 NY Slip Op 02744, Second Dept 5-7-20

DECLARATORY JUDGMENT, MOTION TO DISMISS.

AN ACTION FOR A DECLARATORY JUDGMENT SHOULD NOT BE DISMISSED AT THE PRE-ANSWER STAGE BASED UPON A FINDING THE PLAINTIFF MAY NOT BE ENTITLED TO THE DECLARATORY RELIEF (SECOND DEPT).

The Second Department, reversing Supreme Court, explained that an action for a declaratory judgment should not be dismissed at the pre-answer stage when the pleading standards are met:

… [T]he plaintiffs alleged that certain provisions of Nassau County Administrative Code, chapter XXI, title D-21-Drycleaners and Laundromats were unconstitutional, unconstitutionally vague, served no legitimate purpose, and lacked any substantial relationship to the legislative intent … . …

" A motion to dismiss a declaratory judgment action prior to the service of an answer presents for consideration only the issue of whether a cause of action for declaratory relief is set forth, not the question of whether the plaintiff is entitled to a favorable disposition'" … . "[W]here a cause of action is sufficient to invoke the court's power to render a declaratory judgment . . . as to the rights and other legal relations of the parties to a justiciable controversy' (CPLR 3001; see CPLR 3017[b]), a motion to dismiss that cause of action should be denied" … .

Here, the complaint was sufficient to invoke the court's power to render a declaratory judgment as to the rights and other legal relations of the parties to a justiciable controversy (see CPLR 3001 …). A complaint will not be dismissed pursuant to CPLR 3211(a)(7) merely because the plaintiffs may not be entitled to a declaration in their favor … . Laundry Palace U, Inc. v Nassau County, 2020 NY Slip Op 03005, Second Dept 5-27-20

DEFAULT JUDGMENT.

DEFENDANT'S EXCUSE WAS NOT REASONABLE; MOTION TO VACATE A DEFAULT JUDGMENT SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendant's motion to vacate a default judgment should not have been granted. The excuse was not reasonable:

A defendant seeking to vacate a default in answering a complaint must show both a reasonable excuse for the default and the existence of a potentially meritorious defense (see CPLR 5015[a][1] …). Here, the defendant's proffered excuse that its president failed to open and review the contents of a package following its personal delivery upon him, and that the summons and verified complaint may inadvertently have been discarded thereafter, were insufficient to demonstrate a reasonable excuse for the default … . Elderco, Inc. v Kneski & Sons, Inc., 2020 NY Slip Op 02766, Second Dept 5-13-20

DEFAULT JUDGMENT. THE STANDARD FOR VACATING A DEFAULT JUDGMENT IS A 'REASONABLE' EXCUSE, NOT A 'PLAUSIBLE' EXCUSE; IF NO REASONABLE EXCUSE IS OFFERED THE MERITS NEED NOT BE CONSIDERED; SUPREME COURT REVERSED (FIRST DEPT).

The First Department, reversing Supreme Court, determined that defendant Swanston's motion to vacate the default judgment should not have been granted. The excuse was not deemed reasonable and, therefore, the merits of the case need not be considered:

The motion court thought that Swanston's excuses might not be valid but that they were "plausible." However, plausibility is not the standard; rather, on a CPLR 5015(a)(1) motion, the movant must show a reasonable excuse for his default … . Swanston's one-sided understanding that plaintiffs would refrain from prosecuting their lawsuit while defendant JackFromBrooklyn Inc. (JFB) negotiated to sell itself did not constitute a reasonable excuse for failing to answer … .

Given the absence of a reasonable excuse, we "need not determine whether a meritorious defense exists" … . Kowal v JackFromBrooklyn Inc., 2020 NY Slip Op 02715, First Dept 5-7-20

E-FILING.

PLAINTIFF'S MOTION FOR A DEFAULT JUDGMENT SHOULD HAVE BEEN DENIED AND DEFENDANT'S CROSS MOTION TO RENEW SHOULD HAVE BEEN GRANTED, CRITERIA EXPLAINED; E-FILING WAS VOLUNTARY IN CHENANGO COUNTY SO FAILURE TO E-FILE WAS NOT A GROUND FOR REJECTION OF DEFENDANT'S MOTION PAPERS (THIRD DEPT).

The Third Department, reversing Supreme Court, determined plaintiff's motion for a default judgment should have been denied and defendant's cross motion to renew should have been granted. The court noted that Chenango County is a consensual or voluntary e-filing county and defendant's hard copy filing should not have been rejected by the court (for failure to e-file):

… Supreme Court abused its discretion in granting plaintiff's motion for a default judgment. Although defendant's motion papers lacked specific details of the underlying circumstances for the delay, the delay herein was de minimis — one week — and should be excused … . Defendant timely opposed the motion, offering a meritorious defense. There is no indication that the default was willful or that plaintiff was prejudiced as a result of the late answer. Moreover, defendant appeared in the action when he opposed plaintiff's motion for a preliminary injunction and temporary restraining order. Public policy favors the resolution of cases on the merits … . …

Supreme Court confused the cross motion to renew with a motion to reargue and summarily denied it since it was not made within 30 days. This time period applies solely to motions to reargue (see CPLR 2221 [d] [3] …). Preferred Mut. Ins. Co. v DiLorenzo, 2020 NY Slip Op 02845, Third Dept 5-14-20

JUDGES, SUA SPONTE.

JUDGE SHOULD NOT HAVE SEARCHED THE RECORD AND, SUA SPONTE, GRANTED RELIEF NOT REQUESTED IN THE MOTION PAPERS, INCLUDING THE APPLICATION OF THE RES IPSA LOQUITUR DOCTRINE (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, determined the judge should not have, sua sponte, searched the record to grant relief that was not requested in this Labor Law 200, 240(1), 241(6), negligence action. Plaintiff was injured when a portion of a ceiling fell causing a scaffold to collapse on him. The judge should not have granted summary judgment on a negligence cause of action which was not included in the motions, and should not have granted summary judgment on a res ipsa loquitur theory:

While it is well settled that the Supreme Court has the authority to search the record and grant summary judgment to a nonmoving party with respect to an issue that was the subject of a motion before the court (see CPLR 3212[b] …), here, the court, in effect, searched the record and awarded summary judgment to the movant with respect to an issue that was not the subject of the motion before the court. …

The doctrine of res ipsa loquitur applies when the injury-causing event (1) is "of a kind which ordinarily does not occur in the absence of someone's negligence"; (2) "[is] caused by an agency or instrumentality within the exclusive control of the defendant"; and (3) was not "due to any voluntary action or contribution on the part of the plaintiff" … . Contrary to the Supreme Court's determination, this is not one of "the rarest of res ipsa loquitur cases" where the plaintiff's circumstantial evidence is so convincing and the defendant's response so weak that the inference of the defendant's negligence is inescapable … . Although the first and third elements may be satisfied in the plaintiff's favor, based upon the limited record, this standard was not met as to the second element. Even though courts do not generally apply the requirement of exclusive control as it is literally stated or as a fixed, mechanical or rigid rule … , the plaintiff failed to demonstrate that the plaster ceiling is "structural" and, therefore, the obligation of [defendant] Lexington to maintain pursuant to the terms of the lease it entered into with [defendant] Dover. Moreover, the papers do not establish the plaintiff's entitlement to summary judgment against Dover on this issue, which was raised by the court sua sponte as against Dover, and was not the subject of the plaintiff's motion as against Dover. Zhigue v Lexington Landmark Props., LLC, 2020 NY Slip Op 02948, Second Dept 5-20-20

JURISDICTION.

FAMILY COURT SHOULD NOT HAVE SUMMARILY DISMISSED MOTHER'S PETITION FOR CUSTODY OF CHILDREN LIVING OUT-OF-STATE WITHOUT FIRST DETERMINING WHETHER IT HAD EXCLUSIVE, CONTINUING JURISDICTION OVER CUSTODY ISSUES (SECOND DEPT).

The Second Department determined Family Court should not have dismissed mother's petition seeking sole custody of the children, who lived out-of-state, without first making a ruling on whether it had continuing jurisdiction over custody issues:

On November 22, 2016, the Family Court issued an order (hereinafter the custody order) awarding, inter alia, joint legal custody of the subject children to the mother and the children's godmother, with primary physical custody and final decision-making authority to the godmother. …

Pursuant to the Uniform Child Custody Jurisdiction and Enforcement Act, codified in article 5-A of the Domestic Relations Law, a court in this State which has made an initial custody determination has exclusive, continuing jurisdiction over that determination until it finds, as is relevant here, that it should relinquish jurisdiction because the child does not have a "significant connection" with New York, and "substantial evidence is no longer available in this state concerning the child's care, protection, training, and personal relationships" (Domestic Relations Law § 76-a[1][a] …). …

… Family Court should not have summarily dismissed the mother's petition on the ground that the children had been living with the godmother in Pennsylvania, without considering whether it had exclusive, continuing jurisdiction pursuant to Domestic Relations Law § 76-a (1) … , and affording the mother an opportunity to present evidence as to that issue … . Matter of Hodge v Hodges-Nelson, 2020 NY Slip Op 02926, Second Dept 5-20-20

JURISDICTION, FORUM SELECTION CLAUSES, JURISDICTIONAL DISCOVERY.

DEFENDANTS' CLOSE RELATIONSHIP WITH SIGNATORIES TO CONTRACTS WITH FORUM SELECTION CLAUSES JUSTIFIED THE EXERCISE OF JURISDICTION OVER DEFENDANTS FOR PURPOSES OF JURISDICTIONAL DISCOVERY (FIRST DEPT).

The First Department, in a full-fledged opinion by Justice Manzanet-Daniels, determined that defendants' close relationship with signatories to contracts with forum selection clauses justified the exercise of jurisdiction, for purposes of jurisdictional discovery:

A non-signatory may … be bound by a forum selection clause where the non-signatory and a party to the agreement have such a "close relationship" that it is foreseeable that the forum selection clause will be enforced against the non-signatory … . The rationale for binding non-signatories is based on the notion that forum selection clauses "promote stable and dependable trade relations," and thus, that it would be contrary to public policy to allow non-signatory entities through which a party acts to evade the forum selection clause … . * * *

… [T]he motion court did not undertake a separate minimum-contacts analysis. However, the concept of foreseeability is built into the closely-related doctrine, which explicitly requires that the relationship between the parties be such that it is foreseeable that the non-signatory will be bound by the forum selection clause. …

Thus, courts have recognized that a consent to jurisdiction by virtue of the "close relationship" between the non-signatory and contracting party obviating the need for a separate analysis of constitutional propriety … . Highland Crusader Offshore Partners, L.P. v Targeted Delivery Tech. Holdings, Ltd., 2020 NY Slip Op 02991, First Dept 5-21-20

RAPE SHIELD LAW.

ALTHOUGH IT IS NOT SETTLED WHETHER THE RAPE SHIELD LAW APPLIES TO A CIVIL PROCEEDING, SUPREME COURT HAD THE AUTHORITY TO PROHIBIT THE QUESTIONING OF PLAINTIFF'S DAUGHTER ABOUT HER SEXUAL HISTORY TO PREVENT EMBARRASSMENT AND HARASSMENT IN THIS NEGLIGENT SUPERVISION CASE (THIRD DEPT).

The Third Department upheld Supreme Court's protective order prohibiting plaintiff's child from being questioned about her sexual history. The complaint alleged the child was raped during a sleep over at defendants' home. The complaint alleged several theories of liability, including negligent supervision. Supreme Court held that the Rape Shield Law applied to this civil case. The Third Department determined it did not need to reach that issue, holding that the court had the authority to prohibit the testimony to protect the child from embarrassment:

… Supreme Court was required to balance plaintiff's concern that the child's sexual history is irrelevant, and that questions of this nature are nothing more than a form of intimidation and embarrassment, against defendants' argument that the child had a motive to fabricate the allegations of the assault because of a purported pregnancy. The record reveals that Supreme Court undertook a balancing of these concerns.

We find that plaintiff met her burden of showing annoyance and embarrassment. The child's sexual history, sexual conduct and pregnancies are not relevant or material to the elements of the causes of action for negligence, battery, intentional infliction of emotional distress or loss of services … . Moreover, it has been determined that there is limited value to testimony concerning the sexual past of a victim of a sexual assault; instead, it often serves only to harass the victim and confuse the jurors … . Lisa I. v Manikas, 2020 NY Slip Op 02846, Third Dept 5-14-20

SET ASIDE VERDICT.

A DEFENSE WITNESS HELD OUT AS DISINTERESTED AND OBJECTIVE WAS IN FACT EMPLOYED BY THE DEFENDANTS; PLAINTIFFS' MOTION TO SET ASIDE THE VERDICT SHOULD HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiffs' motion to set aside the jury verdict in this personal injury case should have been granted. One of the issues in the trial was the identity of the party which left a pipe in a tunnel. Plaintiff alleged he was injured when he tripped over the pipe. Defendants presented a witness, Dudin, who testified the defendants were not responsible for leaving the pipe in the tunnel. Dudin was represented as a disinterested witness when, in fact, he was employed by the defendants:

Pursuant to CPLR 4404(a), a trial court may order a new trial "in the interest of justice." "A motion pursuant to CPLR 4404 (a) to set aside a verdict and for a new trial in the interest of justice encompasses errors in the trial court's rulings on the admissibility of evidence, mistakes in the charge, misconduct, newly discovered evidence, and surprise" … . In considering such a motion, "[t]he Trial Judge must decide whether substantial justice has been done, whether it is likely that the verdict has been affected and must look to his [or her] own common sense, experience and sense of fairness rather than to precedents in arriving at a decision'" … .

Here, the record reveals that the defendants affirmatively represented to the jury that Dudin was a disinterested, objective witness, notwithstanding that he was employed by the defendants at the time of trial. During summation, the defendants' counsel stated that Dudin was "with the construction manager," and that he was "not on [the defendants'] payroll," but rather was a representative of the DEP [Department of Environmental Protection]. Additionally, the defendants' counsel stated that, "you heard from Mr. Dudin, who is with the DEP now, this is not [the defendants'] stuff" in the tunnel. Counsel specifically referred to Dudin as "an objective witness" who "has no dealings with [the defendants]," and stated that he was "there to help the [injured] plaintiff." Under the circumstances, we find that the jury should have had the opportunity to consider Dudin's status as an employee of the defendants in assessing his credibility and in determining whether this relationship biased or influenced the witness's testimony … . D'Amato v WDF Dev., LLC, 2020 NY Slip Op 02761, Second Dept 5-13-20

STATUTE OF LIMITATIONS, FORECLOSURE.

VOLUNTARY DISCONTINUANCES OF PRIOR FORECLOSURE ACTIONS AND THE RELATED CORRESPONDENCE DID NOT UNAMBIGUOUSLY DE-ACCELERATE THE DEBT; THEREFORE THE FORECLOSURE ACTION IS TIME-BARRED; TWO-JUSTICE DISSENT ARGUED THE CORRESPONDENCE DE-ACCELERATED THE DEBT (THIRD DEPT).

The Third Department, reversing Supreme Court, over a two-justice dissent, determined the foreclosure action was time-barred. The initial foreclosure action was in 2010. That action was discontinued and the mortgage was subsequently assigned three times. After a second discontinuance, the third foreclosure action was commenced in 2017. The majority concluded that the discontinuances and related correspondence did not de-accelerate the debt, so the statute of limitations kept running from the initial action in 2010. The dissenters argued the debt had been de-accelerated by correspondence with the defendant:

… [T]he voluntary discontinuance of the first two actions, without more, did not constitute an affirmative revocation of the initial acceleration of the debt … . That is particularly so because plaintiff's predecessors in interest moved to discontinue each action due to title concerns, without addressing the prospect of revoking the acceleration and resuming installment payments … . * * *

[The plaintiffs'] letters do not indicate a clear and unambiguous return to an installment payment plan and, for all practical purposes, do not actually evidence any real intent to de-accelerate the loan. In effect, "plaintiff simply put defendant[s] on notice of its obligation to cure a . . . default and then promptly embarked on the notices required to initiate a [third] foreclosure action" … . In our view, these notices do not constitute affirmative actions to de-accelerate the mortgage … . U.S. Bank Natl. Assn. v Creative Encounters LLC, 2020 NY Slip Op 02844, Third Dept 5-14-20

SUMMARY JUDGMENT.

OUT OF POSSESSION LANDLORD MAY BE LIABLE IN THIS SIDEWALK SLIP AND FALL CASE PURSUANT TO A 2019 COURT OF APPEALS DECISION; VIOLATION OF NYC ADMINISTRATIVE CODE CAN BE RAISED FOR THE FIRST TIME IN OPPOSITION TO SUMMARY JUDGMENT MOTION; QUESTION OF FACT ABOUT THE APPLICABILITY OF THE STORM IN PROGRESS DOCTRINE (FIRST DEPT).

The First Department, reversing Supreme Court in this sidewalk slip and fall case, determined: (1) a 2019 Court of Appeals decision clarified the defendant out-of-possession landlord's duty to keep sidewalks safe, notwithstanding any maintenance arrangement with a tenant; (2) although the plaintiff was required to allege the defendant violated the NYC Administrative Code and failed to do so, plaintiff could rely on the Code provision in opposition to defendant's summary judgment motion; and (3) plaintiff raised a question of fact whether the ice condition existed before the alleged storm in progress at or near the time of the fall:

… [T]he court's determination that defendant was entitled to summary judgment dismissing the complaint on the ground that he is an out-of-possession landlord is no longer sound in light of the Court of Appeals's decision in Xiang Fu He v Troon Mgt., Inc. (34 NY3d 167 [2019]). …[E]ven if … plaintiff was required to plead defendant's violation of Administrative Code of City of New York § 7-210 – which he undisputedly failed to do – plaintiff's reliance thereon for the first time in opposition to defendant's motion for summary judgment was permissible, given that doing so did not raise any new theory of liability or prejudice … . Herrera v Vargas, 2020 NY Slip Op 03082, First Dept 5-28-20

TAX ESTOPPEL.

THE DOCTRINE OF 'TAX ESTOPPEL' PROHIBITED DEFENDANT FROM TAKING A POSITION ON OWNERSHIP OF A CORPORATION WHICH IS CONTRARY TO STATEMENTS MADE IN CORPORATE TAX RETURNS (FIRST DEPT).

The First Department, reversing Supreme Court and clarifying a prior ruling. determined the doctrine of "tax estoppel" applied to preclude defendant Elayan from taking a position contrary to the factual statements in corporate tax returns re: an ownership interest in the corporation, Edgewater:

The court improvidently exercised its discretion in failing to apply the doctrine of "tax estoppel." Under that doctrine, defendants' acts in filing corporate tax returns for the years 2010 through 2014, signed by defendant Elayan, which contained factual statements that plaintiff Jaber had a 75% ownership interest in Edgewater during that time period, and precludes defendants from taking a position contrary to that in this litigation … . To the extent our decision in Matter of Bhanji v Baluch (99 AD3d 587 [1st Dept 2012]) has been interpreted as making the doctrine generally inapplicable with respect to factual statements of ownership in tax returns, we clarify that the doctrine applies where, as here, the party seeking to contradict the factual statements as to ownership in the tax returns signed the tax returns, and has failed to assert any basis for not crediting the statements … . PH-105 Realty Corp v Elayaan, 2020 NY Slip Op 02971, First Dept 5-21-20

TAX FORECLOSURE.

BECAUSE THE HOLDER OF A FIRST MORTGAGE WAS A DEFENDANT IN THE TAX FORECLOSURE PROCEEDINGS, THE MORTGAGE HOLDER DID NOT NEED TO FILE ITS OWN FORECLOSURE ACTION TO ENFORCE ITS LIEN ON THE SURPLUS TAX-FORECLOSURE-SALE PROCEEDS (SECOND DEPT).

The Second Department, in a full-fledged opinion by Justice Scheinkman, determined that HPD, the holder of a first mortgage on property which was the subject of a tax foreclosure, was entitled to the surplus funds from the tax foreclosure sale. The issue was whether HPD's action seeking the surplus was time-barred because it didn't enforce the lien on the surplus within six years of the tax foreclosure sale. The Second Department held

no further action to enforce the lien was necessary because HPD was a defendant in the tax foreclosure proceedings:

… HPD's appearance in the tax lien foreclosure action put [the property owner] and anyone else interested in a potential surplus on notice of HPD's claims. To require HPD to commence a separate foreclosure action, when an action to foreclose the tax lien was already pending, would serve no useful purpose. NYCTL 1997-1 Trust v Stell, 2020 NY Slip Op 02802, Second Dept 5-13-20