NEW YORK APPELLATE DIGEST, LLC

Weekly Newsletter
February 8 – 12, 2021

An Organized Compilation of the Summaries of Selected Decisions Released the Week of February 8 - 12, 2021, by the First, Second and Fourth Departments, as Well as the Court of Appeals. The Entries in the Table of Contents 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.

Contents

Table of Contents

Table of Contents

Table of Contents

APPEALS.

THE TRANSCRIBED RECORD IS WOEFULLY INCOMPLETE; DEFENDANT DID NOT DEMONSTRATE THE RECORD COULD NOT BE RECONSTRUCTED; MATTER REMITTED (FOURTH DEPT).

The Fourth Department, holding the case and reserving decision, remitted the matter for reconstruction of the record which was missing several vital parts:

… [M]issing and otherwise defective transcripts from the trial preclude appellate review of defendant's conviction. Indeed, the present state of the record on appeal is "deplorable" … inasmuch as it is missing, inter alia, three days of jury selection, opening statements, summations, final jury instructions, County Court's handling of a jury note, and the verdict. In addition, the transcription of the testimony of some of the witnesses includes irregularities such as notations stating "omitted," "untranscribable," and "blah, blah," and unintelligible strings of characters that appear to be in code. We reject defendant's contention, however, that summary reversal and a new trial is the appropriate remedy at this point. The "loss of reporter's minutes is rarely sufficient reason in itself for reversing a conviction" … . The Court of Appeals has held that "the right of a defendant to a fair appeal, or for that matter a fair trial, does not necessarily guarantee him [or her] a perfect trial or a perfect appeal" … . "To overcome the presumption of regularity, a defendant must show not only that minutes are missing, but also 'that there were inadequate means from which it could be determined whether appealable and reviewable issues were present' " … . It is only when a defendant shows that a reconstruction is not possible that a defendant is entitled to summary reversal and a new trial … .

Here, we conclude that defendant failed to establish that alternative means to provide an adequate record are not available … .There is no indication that defendant's former attorneys could not participate in a reconstruction hearing, despite the fact that one of them is now employed by the District Attorney's Office. There is also no indication that the now-retired trial judge could not participate as well … . People v Meyers, 2021 NY Slip Op 00919, Fourth Dept 2-11-21

CIVIL PROCEDURE, CPLR 205 (a), COMMENCEMENT AFTER DISMISSAL.

THE JUDGE WHO DISMISSED THE ACTION PURSUANT TO CPLR 205 (a) FOR FAILURE TO PROSECUTE DID NOT PLACE ON THE RECORD THE SPECIFIC CONDUCT CONSTITUTING NEGLECT; THEREFORE THE ACTION WAS TIMELY FILED (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined the action should not have been dismissed because the tolling provisions of CPLR 205 (a) applied. The judge who dismissed the action did not place on the record specific conduct constituting neglect to prosecute demonstrating a general pattern of delay:

… [T]he tolling provisions of CPLR 205 (a) apply inasmuch as the 2012 action was not dismissed for neglect to prosecute. CPLR 205 (a) provides, in relevant part, that "[i]f an action is timely commenced and is terminated in any other manner than by . . . a dismissal of the complaint for neglect to prosecute the action . . . , the plaintiff . . . may commence a new action upon the same transaction or occurrence or series of transactions or occurrences within six months after the termination," even though the new action would otherwise be barred by the statute of limitations. "Where a dismissal is one for neglect to prosecute the action made pursuant to [CPLR 3216] or otherwise, the judge shall set forth on the record the specific conduct constituting the neglect, which conduct shall demonstrate a general pattern of delay in proceeding with the litigation" … .

Here, it is undisputed that the 2012 action was timely commenced and that the instant action was commenced within six months of the termination of the 2012 action. …

Here, the court did not outline a general pattern of delay by plaintiff in its order dismissing the 2012 complaint or in the attached decision … . Broadway Warehouse Co. v Buffalo Barn Bd., LLC, 2021 NY Slip Op 00963, Fourth Dept 2-11-21

CRIMINAL LAW, CONSTRUCTIVE POSSESSION, DRUGS.

THE EVIDENCE OF CONSTRUCTIVE POSSESSION OF DRUGS AND PARAPHERNALIA IN AN APARTMENT IN WHICH DEFENDANT WAS PRESENT WAS INSUFFICIENT; DEFENDANT'S CONVICTION WAS THEREFORE AGAINST THE WEIGHT OF THE EVIDENCE (FOURTH DEPT).

The Fourth Department, reversing defendant's conviction after a bench trial, determined the evidence that defendant constructively possessed drug and paraphernalia was insufficient. The "possession" convictions, therefore, were against the weight of the evidence:

Although defendant was present in the apartment at the time the police executed the search warrant, no other evidence was presented "to establish that defendant was an occupant of the apartment or that he regularly frequented it" … . Two of the police officers testified that they did not discover anything that belonged to defendant on the premises. The clothing, cell phone, and identification found on the premises belonged instead to other men who were present in the apartment during the execution of the search warrant. Photographs found on the premises included the other men but not defendant. While defendant admitted that he had been at the apartment on one other occasion, the evidence did not otherwise specifically connect defendant to the apartment in which the contraband was found. We thus conclude that the weight of the evidence does not support a finding that defendant "exercised dominion and control over the [contraband] by a sufficient level of control over the area in which [it was] found" … . People v Ponder, 2021 NY Slip Op 00923, Fourth Dept 2-11-21

CRIMINAL LAW, EVIDENCE.

ALTHOUGH AN INDICTMENT NEED NOT ALLEGE ACCESSORIAL LIABILITY TO BE LEGALLY SUFFICIENT; WHERE THERE IS NO EVIDENCE A DEFENDANT ACTED AS A PRINCIPAL THE JURY MUST BE INSTRUCTED ON ACCESSORIAL LIABILITY; THE FAILURE TO SO INSTRUCT THE JURY HERE RENDERED THE CONVICTION AGAINST THE WEIGHT OF THE EVIDENCE (FIRST DEPT).

The First Department, reversing defendant's conviction, determined the failure to instruct the jury on accessorial liability rendered the conviction against the weight of the evidence. The defendant and a companion were involved in an altercation with the victim. The companion slashed the victim and struck the victim with a baseball bat. There was no evidence defendant attacked the victim. The court noted that the indictment need not allege accessorial liability to be legally sufficient, but the jury must be instructed on the theory where there is no evidence a defendant acted as a principal:

The circumstances supported the inference that defendant was guilty of acting in concert in the attack, but undisputedly failed to support liability as a principal, that is, for personally attacking the victim. However, the prosecutor did not request, either before or after the court's charge, that the court instruct the jury regarding accessorial liability (see Penal Law § 20.00), and the court did not give such an instruction.

Because there is "no legal distinction between liability as a principal or criminal culpability as an accomplice" … , an indictment need not contain any language relating to accessorial liability. However, this does not mean that a conviction may be sustained on an acting-in-concert theory when no such theory was submitted to the jury … . People v Ballo, 2021 NY Slip Op 00810, First Dept 2-9-21

CRIMINAL LAW, GRAND LARCENY, CREDIT CARDS.

USING ANOTHER'S CREDIT CARD ACCOUNT NUMBER TO MAKE PURCHASES, WITHOUT PHYSICAL POSSESSION OF THE CARD, SUPPORTS A GRAND LARCENY CONVICTION (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge DiFiore, over a two-judge dissent, determined that using a credit card number without physically possessing the credit card itself supported the grand larceny conviction:

The primary question presented by this appeal is whether the definition of credit card for purposes of Penal Law § 155.00 (7) includes the credit card account number, such that the People need not prove that a defendant physically possessed the tangible credit card in order to support a conviction of grand larceny based upon credit card theft. Here, defendant's conviction of grand larceny in the fourth degree was based on defendant's theft of the victim's credit card account number to purchase goods, although there was no evidence that defendant possessed the physical card itself. We conclude that the definition of credit card in General Business Law § 511 (1), as supplemented by General Business Law § 511-a, is the controlling definition as designated by Penal Law § 155.00 (7) and, as a result, the evidence is legally sufficient to support defendant's conviction of grand larceny for stealing an intangible credit card account number. People v Badji, 2021 NY Slip Op 00897, CtApp 2-11-21

CRIMINAL LAW, GUILTY PLEAS.

THE FAILURE TO INFORM DEFENDANT AT THE TIME OF THE PLEA THAT HIS SENTENCE WOULD INCLUDE A SPECIFIC PERIOD OF POSTRELEASE SUPERVSION REQUIRED VACATION OF THE PLEA; BECAUSE THE DEFENDANT DID NOT RECEIVE TIMELY NOTICE OF THE POSTRELEASE SUPERVISION, PRESERVATION OF THE ERROR WAS NOT NECESSARY (FOURTH DEPT).

The Fourth Department, vacating defendant's guilty plea, determined defendant should have been informed that postrelease supervision (PRS) would be part of his

sentence. Under the circumstances preservation of the error for appeal was not necessary:

Pursuant to the plea agreement, defendant entered his plea in exchange for a promise of youthful offender adjudication and a sentence of probation. Following the entry of the plea, the court informed defendant that, if he violated the terms of the plea agreement, the court would "not keep the promise [it] made regarding [his] sentence" and that it could "impose a much more significant or higher sentence." The court did not specify what that higher sentence could entail, nor did it mention the possibility of postrelease supervision (PRS).

Prior to sentencing, defendant violated the terms of the plea agreement when he failed to cooperate with the probation department and was arrested on new felony charges. The court held a hearing pursuant to People v Outley (80 NY2d 702 [1993]) and determined that there was a valid basis on which to enhance the sentence. The prosecutor then requested that the court sentence defendant as an adult and impose a sentence of 15 years of incarceration with five years of PRS. The court imposed a determinate sentence of 7½ years of incarceration plus five years of PRS.

The court was required "to advise defendant that his enhanced sentence would include PRS, and was also required to specify the length of the term of PRS to be imposed" … . Although defendant did not object to the imposition of PRS or move to withdraw his plea or to vacate the judgment of conviction, this case falls under an exception to the preservation rule inasmuch as "[t]he prosecutor's mention of PRS immediately before sentencing was not the type of notice under People v Murray (15 NY3d 725 [2010]) that would require defendant to preserve the issue" … . People v Stanley, 2021 NY Slip Op 00924, Fourth Dept 2-11-21

CRIMINAL LAW, INDICTMENTS.

THE PEOPLE DID NOT OBTAIN PERMISSION TO PRESENT TO A SECOND GRAND JURY RENDERING THE SECOND INDICTMENT VOID (FOURTH DEPT).

The Fourth Department, reversing County Court, determined the indictment to which defendant plead guilty was void because the People did not obtain the court's permission to present to a second grand jury after the first indictment was dismissed:

… [T]he People failed to seek leave pursuant to CPL 210.20 (4) to resubmit the matter to a second grand jury after County Court granted that part of defendant's omnibus motion seeking to dismiss the original indictment as against him on the ground that the evidence before the first grand jury was legally insufficient. "[T]he failure to obtain leave of court to present a matter to a second grand jury, where required, deprives the grand jury of jurisdiction to hear the matter, thereby rendering the indictment void . . . , which, in turn, deprives the court of jurisdiction" … . Although, here, defendant failed to make a motion to dismiss the indictment issued by the second grand jury pursuant to CPL 210.20 (1), the failure of the People to obtain from the court authorization to submit the matter to the second grand jury deprived the second grand jury of jurisdiction to hear the matter, thereby rendering void the indictment issued by the second grand jury and depriving the court of jurisdiction, and the right to challenge a lack of jurisdiction cannot be waived by defendant … . Under these circumstances, we must dismiss the indictment issued by the second grand jury that is at issue on this appeal … . We note that there is no limit to the number of times that the People may resubmit a charge to a grand jury with leave pursuant to CPL 210.20 (4) … . People v Owens, 2021 NY Slip Op 00958, Fourth Dept 2-11-21

CRIMINAL LAW, INDICTMENTS.

THE TESTIMONY OF THE ACCOMPLICE WAS SUFFICIENTLY CORROBORATED; THE INDICTMENT WAS SUPPORTED BY LEGALLY SUFFICIENT EVIDENCE (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined the indictment should not have been dismissed because there was sufficient corroboration of the testimony of an accomplice:

The People contend that County Court erred in determining that the grand jury testimony of defendant's accomplice was not sufficiently corroborated. We agree. The corroboration requirement is satisfied by evidence that " 'tends to connect the defendant with the commission of the crime in such a way as may reasonably satisfy the jury that the accomplice is telling the truth' " … . Sufficient corroboration may be provided by evidence that " 'harmonize[s]' " with the accomplice testimony, i.e., when "read with the accomplice's testimony, [it] makes it more likely that the defendant committed the offense" … .

Here, the accomplice's testimony that, on a specific date, defendant and the accomplice had a telephone conversation regarding the alleged criminal conduct is corroborated by defendant's cell phone records, which establish "that cell phone calls were made as the accomplice[] testified" … . The accomplice's testimony is also corroborated by, among other things, the testimony of non-accomplices and the transcript of the criminal jury trial during which the charged offenses were allegedly committed … . People v Baska, 2021 NY Slip Op 00947, Fourth Dept 2-11-21

CRIMINAL LAW, PRISON CONTRABAND.

SYNTHETIC MARIJUANA IS NOT "DANGEROUS CONTRABAND" WITHIN THE MEANING OF THE "PROMOTING PRISON CONTRABAND" STATUTES (FOURTH DEPT).

The Fourth Department, reducing defendant's conviction of promoting prison contraband first degree to second degree, determined that synthetic marijuana did not meet the definition of ""dangerous contraband:"

The Court of Appeals has "conclude[d] that the test for determining whether an item is dangerous contraband is whether its particular characteristics are such that there is a substantial probability that the item will be used in a manner that is likely to cause death or other serious injury, to facilitate an escape, or to bring about other major threats to a detention facility's institutional safety or security" … . "Generally, dangerous contraband refers to weapons . . . Items that facilitate escape are also dangerous contraband" (id. [internal quotation marks omitted]). Conversely, small amounts of marihuana, "unlike other contraband such as weapons, are not inherently dangerous and the dangerousness is not apparent from the nature of the item" … . Additionally, we note that the substance at issue here is a synthetic drug that mimics the effects of THC, the active ingredient in marihuana, and "the conclusion that . . . small amounts of marihuana . . . are not dangerous contraband is informed by the Legislature's more lenient treatment of marihuana offenses, as opposed to those involving other drugs" … . People v Mclamore, 2021 NY Slip Op 00926, Fourth Dept 2-11-21

CRIMINAL LAW, REPUGNANT VERDICTS.

DEFENDANT WAS CONVICTED OF DIRECTING THE CODEFENDANT TO KILL; THE CODEFENDANT WAS ACQUITTED OF MURDER; THE VERDICTS WERE REPUGNANT; DEFENSE COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO THE REPUGNANT VERDICTS (FOURTH DEPT).

The Fourth Department, reversing defendant's conviction, determined defendant's attorney was ineffective for failing to object to the repugnant verdict. Defendant was convicted of directing the codefendant to shoot and kill the victim. The codefendant was acquitted of the murder charge:

We agree with defendant … that he was denied meaningful representation at trial inasmuch as there is no reasonable and legitimate trial strategy for defense counsel's failure to object to the repugnant verdicts … . …

… "[A] conviction will be reversed [as repugnant] only in those instances where acquittal on one crime as charged to the jury is conclusive as to a necessary element of the other crime as charged, for which the guilty verdict was rendered" … . "The determination as to the repugnancy of the verdict is made solely on the basis of the trial court's charge and not on the correctness of those instructions" … . The repugnancy doctrine also applies when one codefendant is convicted of a crime while another is acquitted of the same crime … . …

By acquitting the codefendant, the jury negated an essential element of the crime for which defendant was charged, i.e., that the codefendant committed the offense at defendant's direction … . People v Jennings, 2021 NY Slip Op 00944, Fourth Dept 2-11-21

CRIMINAL LAW, SEARCH WARRANTS.

THE WARRANT CORRECTLY DESCRIBED THE PREMISES TO BE SEARCHED AS A SINGLE FAMILY RESIDENCE BASED UPON THE INFORMATION AVAILABLE TO THE POLICE; DEFENDANT'S ALLEGATION THE RESIDENCE WAS ACTUALLY THREE SEPARATE APARTMENTS WAS NOT SUPPORTED BY SWORN AFFIDAVITS; THE MOTION TO SUPPRESS WAS PROPERLY GRANTED WITHOUT A HEARING (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Wilson, determined the defendant's motion to suppress, alleging the premises to be searched was not adequately described in the warrant, was properly denied without a hearing. The warrant described a single family residence. Defendant alleged each of the three floors was a separate apartment. The Court of Appeals looked only at the evidence supporting the warrant and held the evidence available to the police established the building was a single residence. The defendant did not submit any sworn affidavits in support of the "three apartments" argument, so the motion court properly denied the motion without holding a hearing:

The warrant's description of the place to be searched as "a private residence," located at a unique, specified street address, was not facially deficient; given a commonsense reading, the warrant clearly commanded a search of "a" single residence, not a multi-unit building, at the marked street address. Because the warrant was facially sufficient, the case does not implicate the U.S. Supreme Court's ruling in Groh v Ramirez that courts may not rely on documents not incorporated and attached to the warrant in order to provide particularity that the warrant, on its face, lacks (see 540 US at 557-558). The motion court did not rely on the unincorporated warrant application materials to cure a facial deficiency in the warrant, which Groh forbids. Rather, the court considered those materials for a different purpose—to determine whether the warrant's description of the place to be searched as a single private residence was supported by the information available to the detective who applied for the warrant and the court that issued the warrant. * * *

In People v Mendoza, we held that a suppression motion's "factual sufficiency should be determined with reference to the face of the pleadings, the context of the motion and defendant's access to information" (82 NY2d at 422; see also People v

Jones, 95 NY2d 721, 729 [2001]). Although [defendant] lacked access to the materials that were before the warrant court, he had ready access to information about the actual conditions of the premises at the time of the search, but failed to provide it in support of his suppression motion. For example, he, his mother, or any other resident of the premises could have provided sworn affidavits or other evidence as to the separateness of the alleged residences on the three floors; the existence of unrelated tenants on the second floor; the obviousness to a visitor that the building contained separate residences—such as allegations that each unit had separate locking entry doors—or a variety of other types of evidence plainly known to residents of the house. People v Duval, 2021 NY Slip Op 00896, CtApp 2-11-21

CRIMINAL LAW, STREET STOPS.

ALTHOUGH DEFENDANT ACTED SUSPICIOUSLY THE POLICE DID NOT HAVE A REASONABLE SUSPICION HE WAS ENGAGED IN CRIMINAL ACTIVITY AT THE TIME DEFENDANT FLED; DEFENDANT'S SUPPRESSION MOTION SHOULD HAVE BEEN GRANTED (FOURTH DEPT).

The Fourth Department, reversing County Court, over a two-justice dissent, determined the police did not have reasonable suspicion defendant was involved in criminal activity at the time he fled and the police pursued him. Therefore his suppression motion (re: a discarded weapon and statements) should have been granted and the indictment dismissed. Defendant was a passenger in the back seat of a car stopped for a traffic infraction. When the occupants were asked to step out of the car, defendant ran:

… [T]he officers stopped the vehicle for a traffic infraction as opposed to a call related to a particular crime. Although defendant appeared to reach toward his waistband, he never touched his waistband and there was no other indication of a weapon, such as a bulge or the visible outline of a gun … . A suspect's action in grabbing at his or her waistband, standing alone, is insufficient to establish reasonable suspicion of a crime … .

Defendant's nervousness, use of a bottle cap, and "blading" do not provide additional specific circumstances indicating that defendant was engaged in criminal activity. There is no doubt that defendant engaged in furtive and suspicious activity and that his pattern of behavior, viewed as a whole, was suspicious, but there is nothing in this record to establish that the officers had a reasonable suspicion of criminal conduct to justify the pursuit … . People v Williams, 2021 NY Slip Op 00983, Fourth Dept 2-11-21

CRIMINAL LAW, STREET STOPS.

AN OFFICER MAY FOLLOW A SUSPECT IN A POLICE VEHICLE; THE OFFICER DID NOT GET OUT OF HIS VEHICLE AND CHASE THE DEFENDANT UNTIL HE SAW THE DEFENDANT DISCARD A WEAPON; THE SEIZURE OF THE WEAPON WAS NOT THE RESULT OF UNLAWFUL POLICE CONDUCT (FOURTH DEPT).

The Fourth Department, reversing County Court, determined defendant did not discard a weapon in response to unlawful police conduct. Therefore the weapon should not have been suppressed. In response to a 911 call a police officer in a car was observing the defendant. The officer pursued the defendant only after he saw the defendant discard a weapon:

As the … officer approached the scene, he observed defendant in a black coat walking westbound on the sidewalk. Upon seeing the third officer in his vehicle, defendant ran down a driveway. The … officer pulled into the driveway of that residence and, while still in the vehicle, observed defendant toss what appeared to be a long-barreled handgun over the fence while he ran. It was at that point that the third officer exited his vehicle and chased defendant, ultimately apprehending him. A loaded .22-caliber firearm was found on the ground in the backyard adjacent to the driveway.

… "[A]]n officer may use his or her vehicle to unobtrusively follow and observe an individual without elevating the encounter to a level three pursuit" … . A police-civilian encounter will escalate to a level three encounter, i.e., a forcible stop or seizure, "whenever an individual's freedom of movement is significantly impeded .

. . Illustrative is police action which restricts an individual's freedom of movement by pursuing one who, for whatever reason, is fleeing to avoid police contact" … .

Here, the … officer had activated his emergency lights en route to the scene and before he encountered defendant. Upon observing defendant walking on the sidewalk, the third officer stopped his vehicle in a driveway. At no point did the third officer engage in any particularized act toward defendant or restrict his freedom of movement … . People v Moore, 2021 NY Slip Op 00927, Fourth Dept 2-11-21

CRIMINAL LAW, VEHICLE AND TRAFFIC LAW.

DEFENDANT PLED GUILTY TO DRIVING WHILE IMPAIRED BY DRUGS, NOT ALCOHOL; DIRECTION TO INSTALL AN IGNITION INTERLOCK DEVICE APPLIES ONLY TO OFFENSES INVOLVING ALCOHOL (SECOND DEPT).

The Second Department, reversing (modifying) County Court, determined the offense to which defendant pled guilty did not involve alcohol and, therefore, the direction to install an ignition interlock device must be vacated:

… [T]he County Court improperly imposed an ignition interlock device requirement upon the defendant. The defendant pleaded guilty to aggravated driving while intoxicated in violation of Vehicle and Traffic Law § 1192(2-a)(b) for "[d]riving while ability impaired by drugs" (Vehicle and Traffic Law § 1192[4]). A court may impose an ignition interlock device as a condition of probation and conditional discharge only for offenses involving alcohol (see Penal Law § 65.10[2][k-1]). The defendant's conviction here falls outside the scope of the statute authorizing the imposition of such a condition … . People v Miller, 2021 NY Slip Op 00868, Second Dept 2-10-21

DENTAL MALPRACTICE, INFORMED CONSENT.

IN THIS DENTAL MALPRACTICE ACTION, PLAINTIFF RAISED ISSUES OF FACT ABOUT THE APPLICABILITY OF THE CONTINUOUS TREATMENT DOCTRINE TO TOLL THE STATUTE OF LIMITATIONS, THE DEVIATION FROM THE STANDARD OF CARE, AND THE LACK OF INFORMED CONSENT (FOURTH DEPT).

The Fourth Department, reversing Supreme Court in this dental malpractice action, determine there were questions of fact about (1) the applicability of the continuous treatment doctrine to toll the statute of limitations, (2) the deviation from the standard of care, and (3) the lack of informed consent:

The instant case does not involve gaps in treatment longer than the 2½-year statute of limitations … , and "a discharge by a physician [or dentist] does not preclude application of the continuous treatment toll if the patient timely initiates a return visit to complain about and seek further treatment for conditions related to the earlier treatment" … . …

… [B]y submitting the affidavits of her experts, plaintiff raised issues of fact whether defendants deviated from the standard of care and whether such deviation was a proximate cause of plaintiff's injuries … . …

… [P]laintiff raised an issue of fact whether she would have opted for extraction of several teeth and placement of implants had she been fully informed … . Bellamy v Baron, 2021 NY Slip Op 00953, Fourth Dept 2-11-21

DENTAL MALPRACTICE, INFORMED CONSENT.

THE LACK OF INFORMED CONSENT CAUSE OF ACTION IN THIS DENTAL MALPRACTICE CASE SHOULD NOT HAVE BEEN DISMSSED DESPITE PLAINTIFF'S SIGNING A CONSENT FORM (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the lack of informed consent cause of action should not have been dismissed in this dental malpractice action:

To establish a cause of action for malpractice based on lack of informed consent, a plaintiff must prove (1) that the person providing the professional treatment failed to inform the patient of reasonably foreseeable risks and benefits associated with the treatment, and the alternatives thereto, that a reasonable medical practitioner would have disclosed under similar circumstances, (2) that a reasonably prudent patient in the same position would not have undergone the treatment if he or she had been fully informed, and (3) that the lack of informed consent is a proximate cause of the injury (see Public Health Law § 2805-d …). "The mere fact that the plaintiff signed a consent form does not establish the defendants' prima facie entitlement to judgment as a matter of law" … .

Here, although the injured plaintiff signed a consent form, the defendants submitted in support of their motion, inter alia, a transcript of the injured plaintiff's deposition, during which she testified that the defendants never explained the risks of the tooth extraction or whether there were any alternatives … . Xiao Yan Ye v Din Lam, 2021 NY Slip Op 00895, Second Dept 2-10-21

EMPLOYMENT LAW, HUMAN RIGHTS LAW.

WHERE PLAINTIFF'S EMPLOYER IS A BUSINESS ENTITY, HERE BLOOMBERG L.P., AN OWNER OR OFFICER OF THE COMPANY, HERE MICHAEL BLOOMBERG, IS NOT AN EMPLOYER WITHIN THE MEANING OF THE NYC HUMAN RIGHTS LAW; THE EMPLOYMENT DISCRIMINATION ACTION AGAINST MICHAEL BLOOMBERG WAS PROPERLY DISMISSED (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Garcia, over an extensive dissent, determined Michael Bloomberg, in his status as "owner" and officer of the company, Bloomberg L.P., is not an "employer" within the meaning of the NYC Human Rights Law, and therefore cannot be liable for harassment of the plaintiff (Doe) by her supervisor, Ferris. Bloomberg L.P. can be vicariously liable as the employer, but Michael Bloomberg cannot:

Plaintiff, an employee of Bloomberg L.P. using the pseudonym "Margaret Doe," brought suit against defendants Bloomberg L.P., her supervisor Nicholas Ferris, and Michael Bloomberg, asserting several causes of action arising from alleged discrimination, sexual harassment, and sexual abuse. The question before us is whether Bloomberg, in addition to Bloomberg L.P., may be held vicariously liable as an employer under the New York City Human Rights Law (Administrative Code of City of NY, title 8 [City HRL]) based on his status as "owner" and officer of the company. We hold that Bloomberg is not an "employer" within the meaning of the City HRL and accordingly, we affirm the dismissal of plaintiff's claims that seek to hold Bloomberg vicariously liable for Ferris's offending conduct. * * *

The language in the City HRL … requires no external limiting principle exempting employees from individual suit as employers. … [W]here a plaintiff's employer is a business entity, the shareholders, agents, limited partners, and employees of that entity are not employers within the meaning of the City HRL. … [T]hose individuals may incur liability only for their own discriminatory conduct, for aiding and abetting such conduct by others, or for retaliation against protected conduct (Administrative Code of City of NY § 8-107 [1], [6], [7]). This rule [is] consistent with the principles of vicarious and limited liability governing certain business structures (see e.g. Partnership Law §§ 26, 121-303; Limited Liability Company Law § 609; Business

Corporation Law § 719). Doe v Bloomberg, L.P., 2021 NY Slip Op 00898, CtApp, 2-11-21

FAMILY LAW, ATTORNEYS.

FAMILY COURT SHOULD HAVE APPOINTED AN ATTORNEY FOR THE CHILDREN IN THIS CONTESTED CUSTODY MATTER (SECOND DEPT).

The Second Department, reversing Family Court, determined an attorney should have been appointed for the children in this contested custody matter:

The appointment of an attorney for the child in a contested custody matter is "the strongly preferred practice" … . An attorney for the child "is tasked with advocating for the child's wishes and best interests, precisely because the child has a real and vital interest in the outcome and a voice that should be heard"… . Nevertheless, the appointment of an attorney for the child "is discretionary, not mandatory" … . In making the determination whether the appointment of an attorney for the child is warranted, courts should consider, inter alia, the age of the child and the possibility of prejudice to the child … .

Here, the Family Court improvidently exercised its discretion in declining to appoint an attorney for the children in light of the ages of the children, ranging from 12 to 16 years old at the time of the hearing, the antagonistic nature of the parties' relationship, and the parties' conflicting assertions regarding each other's conduct … . Matter of Weilert v Weilert, 2021 NY Slip Op 00850, Second Dept 2-10-21

FAMILY LAW, DIVORCE, DEATH OF PARTY.

AN AMENDED STIPULATED ORDER CONCERNING THE WIFE'S INTEREST IN THE HUSBAND'S LIFE INSURANCE AND 401k IN THE CONTEXT OF AN ONGOING DIVORCE ACTION, ISSUED AFTER THE HUSBAND'S DEATH, WAS WITHOUT EFFECT EVEN THOUGH THE ORGINAL STIPULATED ORDER WAS ISSUED ONE DAY BEFORE THE HUSBAND'S DEATH; THE DIVORCE ACTION ABATED UPON THE HUSBAND'S DEATH (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined that the death of the husband abated the divorce action and an "amended stipulated order" issued after the husband's death concerning the wife's interest in the husband's insurance policy and 401k account was without effect. The original stipulated order had been issued one day before the husband's death:

It is well settled that "where one party to a divorce action dies prior to the rendering of a judicial determination which dissolves or terminates the marriage, the action abates inasmuch as the marital relationship between the parties no longer exists" … . "Although an exception to this rule exists where the court has made a final adjudication of divorce but has not performed 'the mere ministerial act of entering the final judgment,' " that exception does not apply here inasmuch as the court had merely granted some pretrial orders but had not made any final adjudication of divorce … . In this instance, the husband's death "abated the . . . action for a divorce and ancillary relief" … . Adams v Margulis, 2021 NY Slip Op 00971, Fourth Dept 2-11-21

FORECLOSURE, CIVIL PROCEDURE.

FAILURE TO INCLUDE THE LACK OF STANDING DEFENSE IN THE ANSWER IS NO LONGER DEEMED A WAIVER OF THE DEFENSE; DEFENDANT IN THIS FORECLOSURE ACTION SHOULD HAVE BEEN ALLOWED TO AMEND HER ANSWER (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendant should have been allowed to amend her answer to add the lack of standing defense. Pursuant to RPAPL 1302-a the failure to include the lack of standing defense in the answer is no longer deemed waiver of the defense:

… [T]he defendant did not waive the affirmative defense of lack of standing. RPAPL 1302-a … provides that, notwithstanding the provisions of CPLR 3211(e), "any objection or defense based on the plaintiff's lack of standing in a foreclosure proceeding related to a home loan, as defined in paragraph (a) of subdivision six of section thirteen hundred four of this article, shall not be waived if a defendant fails to raise the objection or defense in a responsive pleading or pre-answer motion to dismiss." Under the circumstances of this case, the Supreme Court should have granted that branch of the defendant's cross motion which was pursuant to CPLR 3025(b) for leave to amend her answer to assert the affirmative defense of lack of standing … . Further, the defendant's affidavit was sufficient to raise a triable issue of fact as to whether the plaintiff was the holder or assignee of the note at the time the action was commenced … . In response, the plaintiff failed to demonstrate its standing as a matter of law … . US Bank N.A. v Blake-Hovanec, 2021 NY Slip Op 00893, Second Department 2-10-21

FORECLOSURE, CIVIL PROCEDURE.

THE AFFIRMATIONS OF DISCONTINUANCE AND CANCELLATION WERE SILENT ON THE ACCELERATION OF THE MORTGAGE DEBT AND THEREFORE DID NOT STOP THE STATUTE OF LIMITATIONS FROM RUNNING; THE FORECLOSURE ACTION WAS TIME-BARRED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the foreclosure action was time-barred despite the affirmations of discontinuance and cancellation which were silent on the acceleration of the debt:

"A lender may revoke its election to accelerate the mortgage, but it must do so by an affirmative act of revocation occurring during the six-year statute of limitations period subsequent to the initiation of the prior foreclosure action" … . As this Court held in Engel, a lender's mere act of discontinuing an action, without more, does not constitute, in and of itself, an affirmative act revoking an earlier acceleration of the debt … . Rather, in order to be effective as a notice of revocation, the notice must contain an indication that the lender would accept installment payments from the homeowner in satisfaction of his or her prospective monthly payment obligations … .

Here, … the six-year statute of limitations began to run on the entire debt in November 2010, when JP Morgan commenced the prior action to foreclose the subject mortgage. Accordingly, the statute of limitations expired in November 2016, and the instant action, commenced in July 2017, was untimely. Contrary to the Supreme Court's determination, the affirmations of discontinuance and cancellation did not constitute an affirmative act of revocation, since they are silent on the issue of the election to accelerate, and did not otherwise indicate that JP Morgan would accept installment payments from the borrowers … . FV-1, Inc. v Palaguachi, 2021 NY Slip Op 00838, Second Dept 2-10-21

FORECLOSURE, REAL PROPERTY ACTIONS AND PROCEEDINGS LAW (RPAPL).

COMPLIANCE WITH THE NOTICE REQUIREMENT OF RPAPL 1304 WAS NOT PROVEN IN THIS FORECLOSURE ACTION; PROOF REQUIREMENTS EXPLAINED IN SOME DETAIL (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff mortgage company did not demonstrate compliance with the notice requirements of RPAPL 1304:

RPAPL 1304(1) provides that, "at least ninety days before a lender, an assignee or a mortgage loan servicer commences legal action against the borrower . . . , including mortgage foreclosure, such lender, assignee or mortgage loan servicer shall give notice to the borrower." "The statute further provides the required content for the notice and provides that the notice must be sent by registered or certified mail and also by first-class mail to the last known address of the borrower" … . Strict compliance with RPAPL 1304 notice to the borrower is a condition precedent to the commencement of a foreclosure action … . "By requiring the lender or mortgage loan servicer to send the RPAPL 1304 notice by registered or certified mail and also by first-class mail, the Legislature implicitly provided the means for the plaintiff to demonstrate its compliance with the statute, i.e., by proof of the requisite mailing, which can be established with proof of the actual mailings, such as affidavits of mailing or domestic return receipts with attendant signatures, or proof of a standard office mailing procedure designed to ensure that items are properly addressed and mailed, sworn to by someone with personal knowledge of the procedure" … .

Here, the only purported evidence submitted by the plaintiff in support of its motion to show that it complied with RPAPL 1304 was a hearsay statement in the affidavit of the plaintiff's legal affairs representative. Moreover, contrary to the plaintiff's assertions, the 90-day notice which was attached to her affirmation does not demonstrate that the mailing requirements of RPAPL 1304 were met … . The plaintiff failed to submit an affidavit of service or proof of first-class mailing by the United States Postal Service evidencing that the defendant was served by first-class mail in accordance with RPAPL 1304 … . The plaintiff not only failed to provide proof of the actual first-class mailing, but its legal affairs representative also lacked

personal knowledge of the purported mailing and did not aver that she was familiar with the mailing practices and procedures of the entity that purportedly sent the notices … . Thus, the plaintiff submitted no evidence that the letter had been sent to the defendant by first-class mail more than 90 days prior to commencement of the action … . 21st Mtge. Corp. v Broderick, 2021 NY Slip Op 00825, Second Dept 2-10-21

FORECLOSURE, REAL PROPERTY ACTIONS AND PROCEEDINGS LAW (RPAPL).

DETAILED EXPLANATION OF HOW MAILING OF THE RPAPL 1304 NOTICE CAN (SHOULD) BE PROVEN (SECOND DEPT).

The Second Department, in affirming the judgment of foreclosure in favor of Nationstar, offered a detailed explanation of how mailing of the RPAPl 1304 notice can be proven:

The Supreme Court … properly determined that … Nationstar proved sufficient mailing of the statutory 90-day preforeclosure notice as required by RPAPL 1304. RPAPL 1304(1) provides that, "at least ninety days before a lender, an assignee or a mortgage loan servicer commences legal action against the borrower . . . , including mortgage foreclosure, such lender, assignee or mortgage loan servicer shall give notice to the borrower." The statute further provides the required content for the notice and provides that the notice must be sent by registered or certified mail and also by first-class mail to the last known address of the borrower (see RPAPL 1304[2]). Strict compliance with RPAPL 1304 notice to the borrower or borrowers is a condition precedent to the commencement of a foreclosure action … . By requiring the lender or mortgage loan servicer to send the RPAPL 1304 notice by registered or certified mail and also by first-class mail, "'the Legislature implicitly provided the means for the plaintiff to demonstrate its compliance with the statute, i.e., by proof of the requisite mailing,' which can be 'established with proof of the actual mailings, such as affidavits of mailing or domestic return receipts with attendant signatures, or proof of a standard office mailing procedure designed to ensure that items are properly addressed and mailed, sworn to by someone with

personal knowledge of the procedure'" … . The notice must also be in 14-point type … . Here, at the framed-issue hearing, Nationstar submitted evidence that a third-party vendor mailed the 90-day preforeclosure notice through the testimony of a witness who had personal knowledge of the vendor's standard business practice with regard to sending the 90-day preforeclosure notice to borrowers, and who affirmed, based on the business records she reviewed regarding the subject loan, that the notices had been sent to the defendant in compliance with the requirements of RPAPL 1304 … . Notwithstanding the use of a third party to mail the 90-day preforeclosure notice, Nationstar tendered sufficient evidence demonstrating strict compliance with RPAPL 1304. Nationstar Mtge., LLC v Paganini, 2021 NY Slip Op 00852, Second Dept 2-10-21

FRAUD, ATTORNEYS, CIVIL PROCEDURE.

FRAUD WAS NOT ADEQUATELY PLED, THE SIX-YEAR STATUTE OF LIMITATIONS DID NOT APPLY TO THE FRAUD ALLEGATIONS, THE JUDICIARY LAW 487 CAUSE OF ACTION WAS NOT ADEQUATELY PLED (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined the fraud and Judiciary Law 487 causes of action should have been dismissed. All of the elements of fraud were not pled with particularity, the six-year statute of limitations did not apply because the fraud allegations were identical to the injurious falsehood and tortious interference claims, and the Judiciary Law 487 causes of actions did not relate to any proceedings before the court:

Although fraud claims are generally governed by a six-year statute of limitations (see CPLR 213 [8]), "courts will not apply the fraud [s]tatute of [l]imitations if the fraud allegation is only incidental to the claim asserted; otherwise, fraud would be used as a means to litigate stale claims" … . "In classifying a cause of action for statute of limitations purposes, the controlling consideration is not the form in which the cause of action is stated, but its substance" … . Inasmuch as the gravamen of plaintiffs' fraud claim is that plaintiffs suffered reputational damages and a loss of goodwill as a result of defendants' conduct and that [plaintiff] lost its contract … as a result of defendants' fraudulent scheme, we conclude that the fraud allegation is

incidental to the injurious falsehood and tortious interference claims, which were dismissed by the court as time-barred.

… [T]he court erred in denying that part of the motion seeking to dismiss the ninth cause of action, for violations of Judiciary Law § 487 … .Under section 487 (1), an attorney who "[i]s guilty of any deceit or collusion . . . with intent to deceive the court or any party," is guilty of a misdemeanor and is potentially liable for treble damages to be recovered in a civil action. A violation of the statute may be established by evidence of the defendant's alleged deceit … but "alleged deceit that is not directed at a court must occur in the course of 'a pending judicial proceeding' " … .

… The complaint failed to allege, however, that [defendant law firm] engaged in egregious misconduct or made a material false statement in the course of a judicial proceeding. The allegedly deceitful memorandum was not directed at the court, and the complaint failed to allege that it was promulgated during a pending judicial proceeding … . Dreamco Dev. Corp. v Empire State Dev. Corp., 2021 NY Slip Op 00952, Fourth Dept 2-11-21

FRAUD, EXECUTIVE LAW 63.

PETITIONERS WERE ENTITLED TO SUMMARY DETERMINATION IN THIS EXECUTIVE LAW 63 SPECIAL PROCEEDING SOUNDING IN FRAUD STEMMING FROM UNCONSCIONABLE EQUIPMENT FINANCE LEASES AND OPPRESSIVE DEBT COLLECTION PRACTICES; RESPONDENTS' REQUEST FOR FURTHER DISCOVERY, WHICH IS DISFAVORED IN SPECIAL PROCEEDINGS, WAS PROPERLY DENIED (FIRST DEPT).

The First Department, in a full-fledged opinion by Justice Webber, determined the respondents in this Executive Law 63 special proceeding were not entitled to additional discovery, including depositions, and petitioners were entitled to summary determination in this fraud and deceptive business practices action. The petition, brought by the NYS Attorney General, alleged respondents engaged in fraud and deception in having small businesses sign unconscionable equipment

finance leases (EFLs) for credit card processing equipment leading to oppressive debt collection practices. The court noted that discovery in a special proceeding is disfavored and is permitted only on leave of court upon a showing of "ample need:"

Supreme Court correctly found that petitioners demonstrated respondents' liability under Executive Law § 63(12). Under Executive Law § 63(12), "the test for fraud is whether the targeted act has the capacity or tendency to deceive or creates [*5]an atmosphere conducive to fraud" … . "Executive Law § 63(12) was meant to protect not only the average consumer, but also the ignorant, the unthinking, and the credulous" … . "[P]ublic reports and lawsuits of alleged fraud are sufficient to put a plaintiff on inquiry notice of fraud" … . * * *

We held in our prior decision that allegations that the [respondents] created legal obligations through misrepresentations and fraud and then attempted to enforce those obligations through abusive pre-litigation and litigation practices sufficiently demonstrated that the [respondents'] debt collection activities and procuring of default judgments were "objectively baseless" … . Matter of People of the State of New York v Northern Leasing Sys., Inc., 2021 NY Slip Op 00914, First Dept 2-11-21

FREEDOM OF INFORMATION LAW (FOIL), ATTORNEY'S FEES.

PETITIONER WAS ENTITLED TO ATTORNEY'S FEES AS THE PREVAILING PARTY BECAUSE THE POLICE DEPARTMENT TURNED OVER THE REQUESTED BODY CAM VIDEOS VOLUNTARILY WHILE THE PROCEEDING WAS PENDING; THE RESPONDENTS HAD NO REASONABLE BASIS FOR DENYING THE REQUEST (FIRST DEPT).

The First Department, reversing Supreme Court, determined petitioner was entitled to attorney's fees in this FOIL action which sought police body cam videos for an incident involving deadly force. Petitioner was the prevailing party because the respondents voluntarily provided the videos while the proceeding was pending:

… [P]etitioner substantially prevailed when respondents, during the pendency of this proceeding, disclosed the records sought in the FOIL request … . "[T]he

voluntariness of . . . disclosure is irrelevant to the issue of whether petitioner substantially prevailed" … . …

… [R]espondents had no reasonable basis for denying access to the records sought. To invoke the FOIL exemption applicable to records that 'are compiled for law enforcement purposes and which, if disclosed, would . . . interfere with law enforcement investigations' … , an 'agency must identify the generic kinds of documents for which the exemption is claimed, and the generic risks posed by disclosure of these categories of documents' … . 'Put slightly differently, the agency must still fulfill its burden under Public Officers Law § 89(4)(b) to articulate a factual basis for the exemption' … . In response to the FOIL request, NYPD did identify the generic kinds of documents at issue; it is undisputed that the responsive records, which have now been disclosed, were videos recorded by body cameras worn by NYPD officers during an incident in which NYPD used deadly force. However, NYPD's assertions in response to the FOIL request that disclosure would interfere with an ongoing internal investigation into the incident, which was being conducted by the Force Investigation Division at the time, was conclusory in the absence of any factual showing as to how disclosure would have interfered with that investigation." Matter of Dioso Faustino Freedom of Info. Law Request v New York City, 2021 NY Slip Op 00907, First Dept 2-11-21

LABOR LAW-CONSTRUCTION LAW, HOMEOWNER'S EXEMPTION.

THERE WAS A QUESTION OF FACT WHETHER THE LEVEL OF CONTROL EXERCISED BY THE DEFENDANT OVER THE CONSTRUCTION WAS SUCH THAT HE WAS NOT ENTITLED TO THE HOMEOWNER'S EXEMPTION IN THIS LABOR LAW 240(1) AND 241(6 ACTION; COMPLAINT REINSTATED (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined the defendant's motion for summary judgment in this Labor Law 240 (1) and 241 (6) action should not have been granted. Plaintiff fell from an unsecured ladder used to get from the basement to the first floor of the building under construction. Supreme Court had ruled the statutory homeowner's exemption insulated the defendant from liability:

… [P]laintiff testified that defendant supplied the ladders that were used by the contractors, and the nonparty contractor testified that defendant was on site giving direction nearly every day. The nonparty contractor had asked defendant several times prior to plaintiff's accident for permission to build stairs from the basement to the first floor, insisting that it was necessary to allow for safer and easier access to the first floor. Although defendant was aware that workers had been entering the house through the basement and using a ladder to access the first floor, he refused permission to build the stairs until after plaintiff's accident, at which time defendant immediately directed the nonparty contractor to build the stairs. Such participation goes "far beyond '[a] homeowner's typical involvement in a construction project' " … .. Indeed, the nonparty contractor further testified that a real estate limited liability company of which defendant was a member had hired him to perform work on the construction of a six-story building, suggesting that defendant had a degree of "sophistication or business acumen" such that he was in a position to know about and insure himself against his exposure to absolute liability … . O'Mara v Ranalli, 2021 NY Slip Op 00982, Fourth Dept 2-11-21

LANDLORD-TENANT, MUNICIPAL LAW.

THE FOUR-YEAR LOOKBACK CAN BE APPLIED TO DETERMINE WHETHER DEFENDANT ENGAGED IN A FRAUDULENT SCHEME TO DEREGULATE NYC APARTMENTS RECEIVING J-51 TAX BENEFITS (FIRST DEPT).

The First Department, in a full-fledged opinion by Justice Singh, over an extensive dissenting opinion, determined the four-year lookback period can be applied to determine whether there was a fraudulent scheme to deregulate apartments which, under Roberts (12 NY3d 270 [2009]) should not have been deregulated because the landlord was receiving "J-51" tax benefits. Defendant's motion for summary judgment was properly denied and plaintiff's motion to certify a class was properly granted:

… [I]n pre-Roberts cases where landlords relied on DHCR [NYC Division of Housing & Community Renewal] guidance there could be no fraudulent scheme to deregulate. * * *

[W]e have not extended this rule to cases decided after Roberts … . To the contrary, our jurisprudence holds that an owner may not flout the teachings of Roberts. * * *

The hallmarks of a fraudulent scheme to deregulate are present here. … Defendant deregulated the apartment after Roberts was decided and did not re-register with DHCR, despite receiving J-51 tax benefits … . During the four-year period preceding commencement of the lawsuit, plaintiff was still not given a rent-stabilized lease. … Defendant's actions cannot be deemed to be prompt compliance. Rather, at this stage, plaintiff has sufficiently alleged a six-year scheme to illegally deregulate 27 units or approximately 32% of the building. Montera v KMR Amsterdam LLC, 2021 NY Slip Op 00805, First Dept 2-9-21

LANDLORD-TENANT, MUNICIPAL LAW.

THE NYC HOUSING STABILITY AND TENANT PROTECTION ACT OF 2019 PART I, WHICH IMPOSES RESTRICTIONS ON A LANDLORD'S RIGHT TO REFUSE TO RENEW A RENT-STABILIZED LEASE, DOES NOT APPLY TO THIS HOLDOVER PROCEEDING WHICH WAS PENDING WHEN THE LAW WAS ENACTED (FIRST DEPT).

The First Department, reversing the Appellate Term, determined the Housing Stability and Tenant Protection Act of 2019 (HSTPA) Part I did not apply to did not apply to the instant holdover proceeding which was pending when the HSTPA was enacted:

As amended by HSTPA Part I … , Rent Stabilization Law of 1969 [Administrative Code of City of NY] § 26-511(c)(9)(b), which governs an owner's right to refuse to renew a rent-stabilized lease on the ground that the owner seeks the unit for his or her own personal use and occupancy as a primary residence, limits the owner to the recovery of only one dwelling unit in a building, requires proof of "immediate and compelling necessity" for the owner's use, and requires that the owner provide an equivalent housing accommodation for any tenant over the age of 62 and in occupancy for 15 years or more. …

… [F]our months after Appellate Term issued its decision in this proceeding, the Court of Appeals decided Matter of Regina Metro. Co., LLC v New York State Div. of Hous. & Community Renewal (35 NY3d 332 [2020]), holding that HSTPA Part F, relating to rent overcharges, could not be applied to pending cases because "application of these amendments to past conduct would not comport with our retroactivity jurisprudence or the requirements of due process" … .

We conclude that the same reasoning applies with equal measure to HSTPA Part I. Matter of Harris v Israel, 2021 NY Slip Op 00796, First Dept 2-9-21

MEDICAID, CIVIL PROCEDURE.

A CORPORATION OPERATING A SKILLED NURSING FACILITY MAY BRING A PLENARY ACTION BASED UPON THE DENIAL OF MEDICAID BENEFITS FOR ONE OF ITS RESIDENTS; NO NEED TO EXHAUST ADMINISTRATIVE REMEDIES AND NOT SUBJECT TO THE FOUR-MONTH STATUTE OF LIMITATIONS (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined the corporation that operates a skilled nursing facility may bring a plenary action based on the denial of Medicaid benefits for one of its residents:

Plaintiff, a domestic corporation that operates a skilled nursing facility, commenced this action seeking a declaratory judgment or money damages for expenses it allegedly incurred in providing care for one of its residents after the resident was determined to be ineligible for Medicaid benefits during a penalty period of 11.74 months. Defendant moved to dismiss the complaint on the grounds, inter alia, that plaintiff failed to exhaust its administrative remedies and that the statute of limitations had expired … .

… [A]skilled nursing facility such as plaintiff "may bring a plenary action in its own right against the agency designated to declare Medicaid eligibility" … . In such a plenary action, the facility is "not bound by the patient's failure to request an administrative appeal of the local agency's denial of medical assistance" or "by the

four-month Statute of Limitations contained in CPLR 217" … . VDRNC, LLC v Merrick, 2021 NY Slip Op 00945, Fourth Dept 2-11-21

MEDICAID.

CERTAIN TRANSFERS AND LOANS SHOULD NOT HAVE BEEN INCLUDED IN THE CALCULATION FOR THE PERIOD OF MEDICAID INELIGIBILITY (FOURTH DEPT).

The Fourth Department, reversing (modifying) the NYS Department of Health (DOH), determined several transfers and loans made before petitioner was diagnosed with Parkinson's in 2016 should not have been included in the calculation for the period of Medicaid ineligibility. The facts are too complex to summarize here:

… "T]he relevant standard is not whether [petitioner] could or should have foreseen that nursing home placement might eventually become necessary, but whether she made the requisite showing that the transfers were made 'exclusively for a purpose other than to qualify for medical assistance' (Social Services Law § 366 [5] [e] [4] [iii] [B]). The fact that a future need for nursing home care may be foreseeable for a person of advanced age with chronic medical conditions is not dispositive of the question whether a transfer by such a person was made for the purpose of qualifying for such assistance" … . Matter of Underwood v Zucker, 2021 NY Slip Op 00951, Fourth Dept 2-11-21

MEDICAL MALPRACTICE, EVIDENCE.

CVS, A DEFENDANT IN THIS MEDICAL MALPRACTICE ACTION, HAD BEEN AWARDED SUMMARY JUDGMENT WHICH IS THE EQUIVALENT OF JUDGMENT AFTER TRIAL; DEFENDANT DOCTORS SHOULD NOT HAVE BEEN ALLOWED TO PRESENT EVIDENCE THAT CVS'S PROVIDING PLAINTIFF'S DECEDENT WITH THE WRONG DOSAGE OF MEDICINE MAY HAVE CONTRIBUTED TO HIS DEATH (SECOND DEPT).

The Second Department, reversing Supreme Court and ordering a new trial in this medical malpractice case, determined the jury should not have heard evidence that CVS mistakenly gave plaintiff a double dose of a drug. CVS was a defendant but successfully moved for summary judgment prior to the trial:

… [T]he Supreme Court erred in permitting the jury to hear evidence that CVS Pharmacy, Inc. (hereinafter CVS), mistakenly gave the decedent a double dose of digoxin, and testimony from [defendant] Manvar that the double dose of digoxin predisposed the decedent to an arrhythmia that caused his cardiac arrest. CVS, a defendant in this action, was awarded summary judgment based on its argument that its error in giving the decedent a double dose of digoxin was not a substantial factor in causing the decedent's cardiac arrest. As summary judgment is the "functional equivalent" of a trial, the court should have precluded [defendants] Huppert and Manvar from presenting evidence at trial that CVS's negligence may have been a substantial factor in causing the decedent's cardiac arrest … . Raineri v Lalani, 2021 NY Slip Op 00890, Second Dept 2-10-21

NEGLIGENCE, MUNICIPAL LAW.

THE POLICE REMOVED PLAINTIFF'S BOYFRIEND FROM PLAINTIFF'S PREMISES THREE TIMES TELLING PLAINTIFF HE WOULD NOT COME BACK AND SHE WILL BE OKAY; THEN HER BOYFRIEND THREW HER OUT A THIRD FLOOR WINDOW; THERE WAS NO SPECIAL RELATIONSHIP BETWEEN PLAINTIFF AND THE CITY; THE CITY WAS NOT LIABLE (SECOND DEPT).

The Second Department, reversing Supreme Court, determined no special relationship had been created between the plaintiff and the city stemming from police officers' telling plaintiff that her former boyfriend (Gaskin) would be removed from the premises and would not be back. The police responded to plaintiff's calls when Gaskin showed up three times. On the next occasion, Gaskin threw plaintiff out of a third floor window:

"When a cause of action alleging negligence is asserted against a municipality, and the municipality is exercising a governmental function, the plaintiff must first demonstrate that the municipality owed a special duty to the injured person" … . Such a special duty can arise, as relevant here, where the plaintiff belongs to a class for whose benefit a statute was enacted, or where the municipality voluntarily assumes a duty to the plaintiff beyond what is owed to the public generally … . A municipality will be held to have voluntarily assumed a duty or special relationship with a party where there is: "(1) an assumption by the municipality, through promises or actions, of an affirmative duty to act on behalf of the party who was injured; (2) knowledge on the part of the municipality's agents that inaction could lead to harm; (3) some form of direct contact between the municipality's agents and the injured party; and (4) that party's justifiable reliance on the municipality's affirmative undertaking" … .

Here, the defendants established their prima facie entitlement to judgment as a matter of law dismissing the complaint insofar as asserted against them by establishing that no special relationship existed between them and the plaintiff … . Specifically, the defendants established, prima facie, that the officers made no promise to arrest Gaskin, and the plaintiff could not justifiably rely on vague assurances by the officers that she would "be okay" and that Gaskin would not be

returning to the building where both he and the plaintiff lived … . Howell v City of New York, 2021 NY Slip Op 00840, Second Dept 2-10-21