NEW YORK APPELLATE DIGEST, LLC

Second Department
Quarterly Report
January – March 2021

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The Second Department, reversing Supreme Court, determined defendant WFG, a title insurance company, should not have been granted summary judgment on the "apparent authority" cause of action. WFG had terminated its agency relationship with NMR and had served a temporary restraining order on NMR prohibiting NMR from issuing any title insurance underwritten by WFG. The day after the restraining order was served, NMR issued a policy to plaintiff on property which turned out to have been encumbered with millions of dollars of liens. WFG was able to prove NMR did not have actual authority to issue the policy, but did not demonstrate NMR did not have apparent authority to issue the policy:

In the absence of actual authority, a principal may still be bound by the actions of a person who has apparent authority … . "Essential to the creation of apparent authority are words or conduct of the principal, communicated to a third party, that give rise to the appearance and belief that the agent possesses authority to enter into a transaction" … . The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact … . Failure to make such a showing requires a denial of the motion, regardless of the sufficiency of the opposing papers … .

Here, WFG failed to establish, prima facie, that NMR Realty lacked apparent authority to issue the policy. WFG merely pointed to gaps in the plaintiff's proof, which was insufficient to meet its prima facie burden as the party moving for summary judgment … . Schwartz v WFG Natl. Tit. Ins. Co., 2021 NY Slip Op 01279, Second Dept 3-3-21

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The Second Department, reversing Supreme Court, determined defendants failed to lay a proper foundation for the admissibility of business records (the Matter Ledger Card) which purported to describe the legal work done by defendants for plaintiff:

We agree with the plaintiff that the court should not have considered these documents because the defendants failed to submit them in admissible form … .

The defendants failed to lay a proper foundation for the admissibility of the Matter Ledger Card pursuant to CPLR 4518. "A proper foundation for the admission of a business record must be provided by someone with personal knowledge of the maker's business practices and procedures" … . [Defendant's] affidavit failed to set forth that he "was personally familiar with [the law firm's] record keeping practices and procedures" and, as a result, failed to lay a proper foundation for the admission of the Matter Ledger Card concerning the plaintiff's payment history … . Anghel v Ruskin Moscou Faltischek, P.C., 2021 NY Slip Op 00403, Second Dept 1-27-21

CIVIL PROCEDURE.

THE JUDGMENT LIEN WAS NOT DOCKETED UNDER THE SELLER'S SURNAME; THEREFORE THE BUYER'S ACTION FOR A JUDGMENT QUIETING TITLE WAS PROPERLY GRANTED (SECOND DEPT).

The Second Department determined plaintiff-buyer was entitled to judgment on his quiet title cause of action and to a declaration that the property is not subject to the defendant's judgment lien. The judgment was not docketed under the seller's surname:

… [T]he plaintiff demonstrated, prima facie, his entitlement to judgment as a matter of law on the cause of action to quiet title and for a declaration that the real property at issue is not subject to the defendant's judgment lien. In support of his motion, the plaintiff submitted, among other things, the deposition transcript of a supervisor of the Docket Department of the Kings County Clerk's Office (hereinafter the supervisor). The supervisor testified at her deposition that the judgment at issue was not docketed under "Paul"—the surname of the title owner of the property. Thus, no valid lien against the property was created (see CPLR 5018[c][1] …). Moreover, there is no dispute that the plaintiff had no actual or constructive notice of a judgment lien on the property … .

In opposition, the defendant failed to raise a triable issue of fact. Any alleged defects in the docketing procedure employed by the Kings County Clerk's Office are not attributable to a bona fide purchaser of the property … . Charles v Berman, 2021 NY Slip Op 00542, Second Dept 2-3-21

CIVIL PROCEDURE.

ABSENT A REQUEST FROM A PARTY, SUPREME COURT SHOULD NOT HAVE SUMMARILY DISMISSED THE DECLARATORY JUDGMENT ASPECT OF THIS HYBRID ARTICLE 78/DECLARATORY JUDGMENT ACTION (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, determined the court should not have summarily dismissed the declaratory judgment aspect of this hybrid declaratory judgment/Article 78 action. The Second Department found that Supreme Court had properly affirmed the denial of a special use permit for a dog kennel, but the Second Department reinstated the request for a declaratory judgment on the constitutionality of a related local law:

… [T]he Supreme Court should not have summarily dismissed the cause of action for a judgment declaring that Town of Lewisboro Code § 220-23(D)(7) is unconstitutional. "In a hybrid proceeding and action, separate procedural rules apply to those causes of action which are asserted pursuant to CPLR article 78, on the one hand, and those to recover damages and for declaratory relief, on the other hand" …

. “The Supreme Court may not employ the summary procedure applicable to a CPLR article 78 cause of action to dispose of causes of action to recover damages or seeking a declaratory judgment” … . “‘Thus, where no party makes a request for a summary determination of the causes of action which seek to recover damages or declaratory relief, it is error for the Supreme Court to summarily dispose of those causes of action’” … . Here, since no party made such a request, the court erred in summarily disposing of the cause of action for a judgment declaring that Town of Lewisboro Code § 220-23(D)(7) is unconstitutional. Matter of Muller v Zoning Bd. of Appeals Town of Lewisboro, 2021 NY Slip Op 01416, Second Dept 3-10-21

CIVIL PROCEDURE.

ALTHOUGH DEFENDANTS MISSED THE DEADLINE AND THEREBY WAIVED THE RIGHT TO MEDICAL EXAMINATIONS OF PLAINTIFF, THE MOTION TO STRIKE THE NOTE OF ISSUE AND COMPEL AN EXAM SHOUD HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the defendants’ motion to strike the note of issue and certificate of readiness and compel a medical examination of plaintiff should have been granted. Although the defendants missed the agreed deadline for the exam, they had an adequate excuse and there was no prejudice:

Although a defendant waives the right to medical examinations of the plaintiff by failing to conduct them within the time period set forth in compliance conference orders … , “under certain circumstances and absent a showing of prejudice to the opposing party, the court may exercise its discretion to relieve a party of a waiver of the right to conduct a physical examination” … . Here, a scheduled medical examination of the plaintiff failed to happen due to a clerical error by the vendor that scheduled the examination. Consequently, the defendants did not have the opportunity to conduct an independent medical examination of the plaintiff. Further, no prejudice was shown by the plaintiff. Andujar v Boyle, 2021 NY Slip Op 00400, Second Dept 1-27-21

CIVIL PROCEDURE.

BECAUSE THE ORDER DISMISSING THE INITIAL COMPLAINT DID NOT SPECIFY CONDUCT CONSTITUTING NEGLECT TO PROSECUTE, THE SIX-MONTH TOLL OF THE STATUTE OF LIMITATIONS PURSUANT TO CPLR 205 (a) APPLIED AND THE ACTION WAS TIMELY; THE DISSENT DISAGREED (SECOND DEPT).

The Second Department, over a strong dissent, determined that the foreclosure was timely commenced pursuant to CPLR 205 (a) within six months of the dismissal of the initial complaint. The six-month toll of the statute of limitations pursuant to CPLR 205 (a) does not apply to a dismissal for neglect to prosecute. However, the order dismissing the action for neglect to prosecute must specify the conduct constituting neglect. The majority concluded the order did not include any specific findings of neglect. The dissent disagreed:

Contrary to the defendant's contention and the finding of our dissenting colleague, the 2010 action was not dismissed for neglect to prosecute, a category of dismissal that renders CPLR 205(a) inapplicable. "Where a dismissal is one for neglect to prosecute the action . . . , 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" (CPLR 205[a]). Here, the order dated April 6, 2017, "did not include any findings of specific conduct demonstrating 'a general pattern of delay in proceeding'" … . Moreover, by dismissing the 2010 action without prejudice, the Supreme Court "permitted the plaintiff to avail itself of CPLR 205(a) to recommence the foreclosure action" … . Deutsche Bank Natl. Trust Co. v Baquero, 2021 NY Slip Op 01246, Second Dept 3-3-21

CIVIL PROCEDURE.

DEFENDANTS DID NOT SEEK LEAVE OF COURT TO FILE A LATE MOTION FOR SUMMARY JUDGMENT AND OFFERED AN EXPLANATION FOR THE FIRST TIME IN REPLY PAPERS; THE EXPLANATION SHOULD NOT HAVE BEEN CONSIDERED AND THE MOTION SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendant's late motion for summary judgment should not have been granted. Defendants did not seek permission to make the late motion and only offered an explanation for the delay in reply papers, which should not have been considered:

Pursuant to CPLR 3212(a), unless the trial court directs otherwise, a motion for summary judgment "shall be made no later than one hundred twenty days after the filing of the note of issue, except with leave of court on good cause shown" … . Here, the defendants moved for summary judgment dismissing the complaint more than 120 days after the filing of the note of issue without seeking leave of court or offering an explanation showing good cause for their delay. As a result, the Supreme Court improvidently exercised its discretion in considering the defendants' good cause argument, presented for the first time in reply papers, and in granting their motion … . Rivera v Zouzias, 2021 NY Slip Op 00443, Second Dept 1-27-21

CIVIL PROCEDURE.

FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES IS AN AFFIRMATIVE DEFENSE WHICH CAN BE WAIVED; THE JUDGE, THEREFORE, SHOULD NOT HAVE, SUA SPONTE, DISMISSED THE ARTICLE 78 PETITION ON THAT GROUND; PETITION REINSTATED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the Article 78 proceeding should not have been dismissed, sua sponte, on the ground petitioner had not exhausted his administrative remedies, which is an affirmative defense to be raised by the respondent, not the judge:

The Supreme Court's sua sponte dismissal of the proceeding for the petitioner's failure to exhaust his administrative remedies was error. "Failure to exhaust administrative remedies is not an element of an article 78 claim for relief, but an affirmative defense which must be raised by respondent either in an answer or by preanswer motion or else be deemed waived" … . Matter of Bobar v Transit Adjudication Bur., 2021 NY Slip Op 01255, Second Dept 3-3-21

CIVIL PROCEDURE.

PLAINTIFF SHOULD NOT HAVE BEEN ALLOWED TO AMEND THE BILL OF PARTICULARS AFTER DISCOVERY WAS CLOSED TO RAISE A NEW THEORY OF LIABILITY STEMMING FROM FACTS NOT PREVIOUSLY ALLEGED; DEFENDANT OUT-OF-POSSESSION LANDLORD DEMONSTRATED THE LEASE DID NOT REQUIRE THE LANDLORD TO MAINTAIN THE DOOR WHICH PLAINTIFF ALLEGED CLOSED ON HER HAND (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff's motion to amend the bill of particulars after discovery was complete should not have been granted and defendant out-of-possession landlord's motion for summary judgment should have been granted. Plaintiff alleged the door of a retail store closed on her hand as she was pushing a cart with merchandise through the doorway. She alleged the door was not properly maintained. After discovery she sought to amend her bill of particulars to allege there was a crack in the floor which caused the cart to get stuck as she was attempting to pass through the doorway:

"While leave to amend a bill of particulars is ordinarily to be freely given in the absence of prejudice or surprise" … , "once discovery has been completed and the case has been certified as ready for trial, [a] party will not be permitted to amend the bill of particulars except upon a showing of special and extraordinary circumstances" … . In such a case, leave may properly be granted "where the plaintiff makes a showing of merit, and the amendment involves no new factual allegations, raises no new theories of liability, and causes no prejudice to the defendant" … . However "where a motion for leave to amend a bill of particulars alleging new theories of liability not raised in the complaint or the original bill is

made on the eve of trial, leave of court is required, and judicial discretion should be exercised sparingly, and should be discreet, circumspect, prudent, and cautious" … . "In exercising its discretion, the court should consider how long the party seeking the amendment was aware of the facts upon which the motion was predicated, whether a reasonable excuse for the delay was offered, and whether prejudice resulted therefrom" … .

… [T]he proposed amendment to the bill of particulars raised an entirely new theory of liability well after discovery had been completed, and was advanced only in response to the defendant's motion for summary judgment. Moreover, the plaintiff failed to proffer a reasonable excuse for her delay in seeking the amendment … , and the proposed amendment was prejudicial to the defendant … . * * *

… [T]he defendant [out-of-possession landlord] demonstrated its … entitlement to summary judgment dismissing the complaint by submitting, inter alia, the lease, which established that the tenant enjoyed complete and exclusive possession of the demised premises at the time of the plaintiff's injury and that the defendant was not responsible for maintenance of the door. King v Marwest, LLC, 2021 NY Slip Op 08225, Second Dept 3-17-20

CIVIL PROCEDURE.

RATHER THAN DISMISSING THE COMPLAINT, SUPREME COURT SHOULD HAVE ORDERED THE NECESSARY PARTIES SUMMONED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the motion to dismiss should not have been granted on the ground plaintiffs failed to join necessary parties. The court should have ordered the parties summoned:

Necessary parties are those "who ought to be parties if complete relief is to be accorded between the persons who are parties to the action or who might be inequitably affected by a judgment in the action" (CPLR 1001[a] …). Here, the Supreme Court correctly determined that the Limited Partnership and the third limited partner, Ai Ying Zheng, are necessary parties to this action … . …

… [A]s the Limited Partnership and Ai Ying Zheng are subject to the jurisdiction of the Supreme Court, the court should have "order[ed][them] summoned," rather than granting the motion to dismiss the complaint for failure to join necessary parties (CPLR 1001[b]…). Ji Juan Lin v Bo Jin Zhu, 2021 NY Slip Op 00550, Second Dept 2-3-21

CIVIL PROCEDURE.

MOTION TO AMEND THE CAPTION TO CORRECT THE NAMES OF THE PARTIES SHOULD HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the plaintiffs' cross-motion to amend the caption to reflect the correct name of the defendant and the defendant's church should have been granted:

Where the summons and complaint have been served under a misnomer upon the party which the plaintiff intended as the defendant, an amendment will be permitted if the court has acquired jurisdiction over the intended but misnamed defendant provided that the intended but misnamed defendant was fairly apprised that he or she was the party the action was intended to affect, and the intended but misnamed defendant would not be prejudiced … . Here, the allegations contained in the complaint fairly apprised Sidney Klestov that he was the intended party defendant, and there is no evidence of any prejudice to him. Likewise, the plaintiffs established that the caption should be amended to correct the name of the Parish of the Holy Assumption Russian Orthodox Greek Church Catholic Church, Inc., to The Russian Orthodox Church of the Assumption, Inc. "'[W]here the right party plaintiff is in court but under a defective name or title as party plaintiff, . . . an amendment correcting the title is permissible'" … . Accordingly, the Supreme Court should have granted the plaintiffs' cross motion for leave to amend the caption to correct the names of the parties. Parish of the Holy Assumption Russian Orthodox Greek Church Catholic Church, Inc. v Klestoff, 2021 NY Slip Op 08198, Second Dept 2-24-21

CIVIL PROCEDURE.

SETTLEMENT CONFESSIONS OF JUDGMENT WERE VALID AND SHOULD NOT HAVE BEEN VACATED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the settlement confessions of judgment were valid and should not have been vacated. The Second Department noted that vacating a judgment entered by filing a confession of judgment requires bringing a plenary action, which the defendants did not do. But, because Supreme Court reached the merits, the Second Department reversed on the merits:

"Generally, a person seeking to vacate a judgment entered upon the filing of an affidavit of confession of judgment must commence a separate plenary action for that relief"… . Here, as acknowledged by the Supreme Court in its order, the grounds for vacatur relied upon by the defendants do not fall within an exception to the general rule. Accordingly, the court should have denied the defendants' motion for failure to commence a plenary action … . However, the court did address the merits of the defendants' motion, and in the interest of judicial economy, we also consider the merits.

"Construction of an unambiguous contract is a matter of law, and the intention of the parties may be gathered from the four corners of the instrument and should be enforced according to its terms" … . Here, contrary to the Supreme Court's determination, there is no language in the merchant agreements limiting the plaintiff's authority to file the settlement confessions of judgment. Moreover, the settlement agreement and settlement confessions of judgment clearly and unambiguously permitted the plaintiff to file the settlement confessions of judgment in the event the defendants breached the terms of the settlement agreement. Ace Funding Source, LLC v Myka Cellars, Inc., 2021 NY Slip Op 00538, Second Dept 2-3-21

CIVIL PROCEDURE.

SUPREME COURT DID NOT HAVE SUBJECT MATTER JURISDICTION OVER AN ACTION TAKEN BY THE UNKECHAUG INDIAN NATION TO EXCLUDE A MEMBER OF THE NATION FROM A PARCEL OF NATION LAND (SECOND DEPT).

The Second Department determined Supreme Court properly ruled it did not have subject matter jurisdiction over a land-possession dispute within the Unkechaug Indian Nation. The Nation first sought a Supreme Court ruling on the rightful possessor of the land (claimed to be Curtis Treadwell), thereby waiving sovereign immunity on that issue. Then the Nation, pursuant to its own internal Tribal Rules, determined Danielle Treadwell, who occupied a portion of the land, was an "undisirable person" and, based on that finding, could no longer occupy the property. The Supreme Court did not have subject matter jurisdiction over the "undesirable person" action taken by the Nation:

… [B]y bringing the April 2018 determination that Curtis was the rightful possessor of the subject property before the state Supreme Court, and seeking a declaration and enforcement, the Nation waived its sovereign immunity, though only as to that determination and its enforcement … . Accordingly, so long as the Nation relied on the April 2018 determination as its basis for excluding Danielle from the disputed portion of the subject property, the defendants' counterclaims seeking inverse declarations could proceed along with the Nation's action for declaratory relief. However, once the Nation proceeded to take the undesirability vote in September 2019 and issue the tribal resolution and directives based upon the membership's vote, the Nation, pursuant to its own Tribal Rules, created a new and independent basis, under its sovereign authority, for excluding Danielle from the disputed portion of the subject property. The Supreme Court properly recognized that once it was informed of the 2019 undesirability determination, it could not take any action with respect thereto, as this was a sovereign act of the Nation outside the court's subject matter jurisdiction … . Unkechaug Indian Nation v Treadwell, 2021 NY Slip Op 01286, Second Dept 3-3-21

CIVIL PROCEDURE.

THE BANK'S FAILURE TO REJECT THE LATE ANSWER WITHIN 15 DAYS WAIVED THE LATE SERVICE AND DEFAULT (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the bank waived its objection to a late answer by not timely rejecting it within 15 days. Therefore the default was also waived:

The defendant failed to timely appear or answer the complaint. … On April 30, 2018, the defendant served an answer with counterclaims. Seventeen days later, on May 17, 2018, the plaintiff served a notice of rejection in which it rejected the answer as untimely. …

Pursuant to CPLR 2101(f), "[t]he party on whom a paper is served shall be deemed to have waived objection to any defect in form unless, within fifteen days after the receipt thereof, the party on whom the paper is served returns the paper to the party serving it with a statement of particular objections" … . Here, the plaintiff's undisputed failure to reject the defendant's answer within the fifteen-day statutory time frame constituted a waiver of the late service and the default … . U.S. Bank N.A. v Lopez, 2021 NY Slip Op 01440, Second Dept 3-10-21

CIVIL PROCEDURE.

THE CPLR 3215 REQUIREMENT THAT PROCEEDINGS TO TAKE A DEFAULT JUDGMENT BE COMMENCED WITHIN ONE YEAR OF THE DEFAULT APPLIES TO COUNTERCLAIMS; COUNTERCLAIM DISMISSED AS ABANDONED (SECOND DEPT).

The Second Department noted that the CPLR 3215 requirement that proceedings to take a default judgment be taken within one year of the default applies to a counterclaim and held that the counterclaim here must therefore be dismissed as abandoned:

CPLR 3215(c) provides that if the plaintiff fails to take proceedings for the entry of judgment within one year after the default, the court shall not enter judgment but shall dismiss the complaint as abandoned, upon its own initiative or on motion, unless sufficient cause is shown why the complaint should not be dismissed. While counterclaims are not specifically mentioned in CPLR 3215, the statute applies to claims asserted as counterclaims in addition to those set forth in complaints … . "The language of CPLR 3215(c) is not, in the first instance, discretionary, but mandatory, inasmuch as courts 'shall' dismiss claims (CPLR 3215[c]) for which default judgments are not sought within the requisite one-year period, as those claims are then deemed abandoned" … . "The failure to timely seek a default may be excused if 'sufficient cause is shown why the complaint should not be dismissed' (CPLR 3215[c]), which requires the party to proffer a reasonable excuse for the delay in timely moving for a default judgment and to demonstrate that the cause of action is potentially meritorious" … . …

Where, as here, a party moving for a default judgment beyond one year from the date of default fails to address any reasonable excuse for its untimeliness, courts may not excuse the lateness and "shall" dismiss the claim pursuant to CPLR 3215(c) … . Bazile v Saleh, 2021 NY Slip Op 00286, Second Dept 1-20-21

CIVIL PROCEDURE.

THE CRITERIA FOR APPOINTMENT OF A TEMPORARY RECEIVER IN THIS PARTITION AND SALE ACTION WERE NOT MET (SECOND DEPT).

The Second Department, reversing Supreme Court, determined that the evidence did not support the appointment of a temporary receiver of a residential building and cooperative apartment that were the subjects of a partition and sale action:

CPLR 6401(a) permits the court, upon a motion by a person with an "apparent interest" in property, to appoint a temporary receiver of that property where "there is danger" that it will be "materially injured or destroyed." However, the appointment of a temporary receiver "is an extreme remedy resulting in the taking and withholding of possession of property from a party without an adjudication on

the merits" … .Therefore, a motion seeking such an appointment should be granted only where the moving party has made a "clear and convincing" evidentiary showing of "irreparable loss or waste to the subject property and that a temporary receiver is needed to protect their interests" … .

Here, the plaintiff failed to make the requisite showing. In particular, the plaintiff's speculative and conclusory allegations that the defendants failed to repair and maintain the subject properties and commingled income derived from the subject properties with their personal income were insufficient to demonstrate that there was a danger of irreparable loss or material injury to the subject properties warranting the appointment of a temporary receiver … . Similarly, without more, the defendants' failure to maintain adequate records does not demonstrate that the plaintiff's interest in the subject properties is in imminent danger of irreparable loss or waste … . Cyngiel v Krigsman, 2021 NY Slip Op 01390, Second Dept 3-10-21

CIVIL PROCEDURE.

THE FAILURE TO ALLEGE SPECIAL DAMAGES WITH PARTICULARITY REQUIRED THE DISMISSAL OF THE PRIMA FACIE TORT AND DEFAMATION CAUSES OF ACTION (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, determined defendant's motion to dismiss the prima facie tort and slander causes of action should have been dismissed because the allegations of special damages were not stated with particularity:

… [I]n a cause of action to recover damages for slander, where the defamation alleged does not fall into one of the per se categories, a plaintiff suing in slander must plead special damages … . Similarly, a plaintiff seeking to recover damages for prima facie tort must allege special damages … . Here, as to both causes of action, the plaintiff's nonspecific conclusory allegations failed to allege special damages with specific particularity … . Mable Assets, LLC v Rachmanov, 2021 NY Slip Op 01759, Second Dept 3-24-21

CIVIL PROCEDURE.

THE MOTION FOR AN ORDER OF ATTACHMENT SHOULD NOT HAVE BEEN GRANTED; CRITERIA EXPLAINED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the motion for an order of attachment should not have been granted:

"In order to be granted an order of attachment under CPLR 6201(3), a plaintiff must demonstrate that the defendant has concealed or is about to conceal property in one or more of several enumerated ways, and has acted or will act with the intent to defraud creditors, or to frustrate the enforcement of a judgment that might be rendered in favor of the plaintiff" … . "Affidavits containing allegations raising a mere suspicion of an intent to defraud are insufficient. It must appear that such fraudulent intent really existed in the defendant's mind" … . The "mere removal, assignment or other disposition of property is not grounds for attachment" … . Cyngiel v Krigsman, 2021 NY Slip Op 01391, Second Dept 3-10-21

CIVIL PROCEDURE.

THE PRIOR APPELLATE DECISION DIRECTING THE COLLECTION OF MORE EVIDENCE IS THE LAW OF THE CASE; THE DIRECTION WAS NOT COMPLIED WITH BY SUPREME COURT UPON REMITTAL (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the decision in the prior appeal was the law of the case and Supreme Court did not follow the instruction to collect additional evidence:

In our prior decision and order, we noted that the issue of the burden that would be imposed upon the DOE [Department of Education] to comply with the petitioner's FOIL request and whether the DOE is able to engage an outside professional service to cull the records sought was not addressed by the Supreme Court and could not be resolved on the record before us … . We noted that "[a]mong other things, it is unclear as to how much time would be involved for an employee at each school to

review the relevant files. Further, although the petitioner has expressed its willingness to reimburse the [DOE] for reasonable costs involved in having the [DOE's] employees, or an appropriate third party, review and copy the [DOE's] records, there is no information in the record as to what that cost would be or whether the petitioner would in fact be willing to reimburse the [DOE] for the full amount of those costs, once those costs are determined" … . Accordingly, we remitted the matter to the Supreme Court for further proceedings, including additional submissions by the parties … .

Our prior decision and order was law of the case and binding on the Supreme Court … . However, the court failed to conduct further proceedings, including the taking of additional submissions on the issues of burden, cost and reimbursement, in accordance with our decision and order. Accordingly, we reverse the judgment and remit the matter for further proceedings in accordance with our decision and order in Matter of Jewish Press, Inc. v New York City Dept. of Educ. (183 AD3d 731). Matter of Jewish Press, Inc. v New York City Dept. of Educ., 2021 NY Slip Op 00173, Second Dept 1-13-21

CIVIL PROCEDURE.

THE REFEREE DID NOT COMPLY WITH THE ORDER OF REFERENCE; SUPREME COURT'S RULINGS BASED UPON THE REFEREE'S ORDER WERE THEREFORE INVALID (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the referee did not comply with the order of reference and the referee's order exceeded the scope of authority given by the order of reference. Therefore the grant of summary judgment, which was based on the referee's order, was reversed:

A referee derives his or her authority from an order of reference by the court … , and the scope of the authority is defined by the order of reference (see CPLR 4311 …). A referee who attempts to determine matters not referred to him or her by the order of reference acts beyond and in excess of his or her jurisdiction … .

Here, the order of reference directed the Referee to hear and determine the issue of the preliminary injunction. The Referee's order, however, did not render a determination on the issue of the preliminary injunction. Brighton Leasing Corp. v Brighton Realty Corp., 2021 NY Slip Op 01384 Second Dept 3-10-21

CONTRACT LAW.

DAMAGES FOR EMOTIONAL DISTRESS ARE NOT AVAILABLE FOR BREACH OF CONTRACT; INSURANCE LAW 2601 DOES NOT CREATE A PRIVATE RIGHT OF ACTION; A GENERAL BUSINESS LAW 349 DECEPTIVE BUSINESS PRACTICES CAUSE OF ACTION WILL SUPPORT A CLAIM FOR PUNITIVE DAMAGES (SECOND DEPT).

The Second Department, modifying Supreme Court, determined emotional-distress damages are not available for breach of contract and Insurance Law 2601 does not create a private right of action. Plaintiff's property was damaged by Hurricane Sandy. Plaintiff and defendant insurers reached a settlement agreement in which defendants agreed to pay plaintiff $1.6 million within 21 days. Defendants paid only about $400,000, claiming that the over $1 million already paid, together with the $400,000, satisfied the $1.6 million agreed to. Supreme Court and the Second Department disagreed finding that the settlement agreement was unambiguous. Plaintiff was therefore entitled to summary judgment on the breach of contract cause of action (the defendants' mutual and unilateral mistake arguments were rejected). The deceptive business practices (General Business Law 349) cause of action, together with the related punitive damages claim, survived defendants' motion to dismiss. With respect to damages for emotional distress, the court wrote:

… Supreme Court should have granted that branch of the defendants' cross motion which was to dismiss the plaintiff's demand for damages for emotional distress. A breach of a contractual duty does not create a right of recovery for damages for emotional distress … . Here, the plaintiff alleges no facts giving rise to a relationship between him and the defendants apart from the insurance contract and settlement agreement. An alleged breach of the implied covenant of good faith and fair dealing does not support an award of damages for emotional distress … . Inasmuch as Insurance Law § 2601 serves to regulate insurers' performance of their contractual

obligations rather than to create a separate duty of care and does not give rise to a private cause of action … , the defendants' alleged violation of their obligations under Insurance Law § 2601 does not support a claim for damages for emotional distress. Perlbinder v Vigilant Ins. Co., 2021 NY Slip Op 00439, Second Dept 1-27-21

CRIMINAL LAW.

A NEW TRIAL IS REQUIRED BECAUSE THE JUDGE DID NOT RESPOND TO A NOTE FROM THE JURY (SECOND DEPT).

The Second Department, reversing defendant's conviction, determined the judge committed a mode of proceedings error by not responding to a note from the jury:

… [A] new trial is required based upon the Supreme Court's failure to comply with CPL 310.30, in accordance with the procedures set forth in People v O'Rama (78 NY2d 270, 279). CPL 310.30 "imposes two responsibilities on trial courts upon receipt of a substantive note from a deliberating jury: the court must provide counsel with meaningful notice of the content of the note, and the court must provide a meaningful response to the jury" … . Where a trial court fails to fulfill its responsibility to provide meaningful notice of the content of the note, "a mode of proceedings error occurs, and reversal is . . . required even in the absence of an objection" … .

Here, the jury submitted a note requesting to view a specific portion of surveillance video taken from the victim's building. The Supreme Court failed to notify the parties regarding the existence of the note, failed to read the contents of the note into the record, and failed to respond to the note. People v Everett, 2021 NY Slip Op 00575, Second Dept 2-3-21

CRIMINAL LAW.

ALTHOUGH THE CO-DEFENDANT WAS SO INFORMED IN DEFENDANT'S PRESENCE, DEFENDANT WAS NOT DIRECTLY INFORMED OF THE POSSIBILITY OF DEPORTATION BY THE JUDGE; MATTER REMITTED TO GIVE DEFENDANT THE OPPORTUNITY TO MOVE TO WITHDRAW HIS GUILTY PLEA (SECOND DEPT).

The Second Department, remitting the matter to allow defendant to move to withdraw his guilty plea, determined, although the co-defendant, in defendant's presence, was informed of the possibility of deportation based upon the plea, the defendant, who did not speak English, was not directly so informed by the judge:

During that proceeding, the court posed a question directly to "Mr. Vidalis," asking if the codefendant understood that he could be deported if he entered a plea of guilty, to which the codefendant answered in the affirmative. The court then stated to the defendant, "Mr. Tapia; do you understand that?" The defendant answered in the affirmative. The court then individually asked the codefendant and the defendant if they had fully discussed "the immigration consequences of this case with your attorney," to which the defendant answered in the affirmative. However, the court did not specifically instruct the defendant, who required a Spanish interpreter to understand the court and had only a sixth-grade education, that he could be deported if he entered a plea of guilty, nor did the court use the words "deported" or "deportation" in any statement posed directly to the defendant. * * *

… [W]hile the plea record demonstrates that the Supreme Court specifically advised the codefendant of the possibility that he could be deported as a consequence of his plea, the court, in addressing the defendant, simply asked, "Mr. Tapia; do you understand that?" … . In light of the defendant's limited education and need for a Spanish interpreter to understand the court's remarks, the court's limited inquiry as to whether the defendant understood "that" did not ensure the defendant's understanding that he could be deported as a consequence of his own plea, as opposed to his mere recognition that the codefendant faced deportation consequences … . People v Tapia, 2021 NY Slip Op 01274, Second Dept 3-3-21

CRIMINAL LAW.

BASED UPON THE RIGHT TO CONFRONT AND CROSS-EXAMINE THE WITNESSES AGAINST HIM, DEFENDANT SHOULD HAVE BEEN PRESENT AT THE IN CAMERA INTERVIEW OF THE STATUTORY-RAPE COMPLAINANT TO DETERMINE THE RELEVANCE OF HER PSYCHIATRIC HISTORY (A MATERIAL STAGE OF THIS PROCEEDING); DEFENDANT'S STATEMENT FOR WHICH NO 710.30 NOTICE WAS PROVIDED SHOULD NOT HAVE BEEN ADMITTED; THE MOLINEUX EVIDENCE OF INTENT, MOTIVE, OR LACK OF MISTAKE WAS NOT RELEVANT TO STATUTORY RAPE (SECOND DEPT).

The Second Department, reversing defendant's conviction, determined: (1) based upon his right to confront and cross-examine the witnesses against him, the defendant should have been present during the judge's in camera interview with the complainant in this statutory rape case to determine the relevance of her psychiatric history (a material stage of this proceeding); (2) the defendant's statement for which no CPL 710.30 notice was provided should not have been admitted on that ground; and (3) that same statement should not have been admitted as "Molineux" evidence of intent, motive or lack of mistake because such evidence is not relevant to statutory rape:

The right of an accused to confront the witnesses against him or her through cross-examination is a fundamental right of constitutional dimension … . The right of cross-examination is an essential safeguard of fact-finding accuracy and "the principal means by which the believability of a witness and the truth of his testimony are tested" … .

Where a primary prosecution witness is shown to suffer from a psychiatric condition, the defense is entitled to show that the witness's capacity to perceive and recall events was impaired by that condition … .

In this case, the defendant's absence during the Supreme Court's in camera interview with the complainant to determine if her psychiatric history was relevant had a substantial effect on his ability to defend the charges against him, and thus, the interview constituted a material stage of the trial for which the defendant should have been present … . Where, as here, the "defendant was absent during a material

part of his trial, harmless error analysis is not appropriate," and a new trial is required … . Moreover, while the scope of cross-examination generally rests within the trial court's discretion … , here, the court improvidently exercised its discretion in striking the complainant's testimony adduced during cross-examination with respect to her psychiatric history. People v King, 2021 NY Slip Op 01996, Second Dept 3-31-21

CRIMINAL LAW.

DEFENDANT AND HIS SON WERE REPRESENTED BY THE SAME ATTORNEY; DEFENDANT ALLEGEDLY PLED GUILTY TO ATTEMPTED ASSAULT BECAUSE HE WAS TOLD HIS SON WOULD DO JAIL TIME IF DEFENDANT DID NOT ENTER THE PLEA; BECAUSE OF THE ATTORNEY'S CONFLICT OF INTEREST, DEFENDANT'S MOTION TO WITHDRAW HIS PLEA SHOULD HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing County Court, determined defendant's motion to withdraw his guilty plea should have been granted. Defendant was called to the scene of his son's (Nicholas's) arrest for DWI. Defendant was charged with assaulting one of the officer's at the scene. Both defendant and his son were represented by attorney Ozman. Although defendant maintained he did not assault the officer, but rather was assaulted by the officer as he was frantically trying to find his son, defendant allegedly agreed to plead guilty to attempted assault in order to ensure a good plea deal for his son. Because defendant maintained his innocence in his interview with probation, however, the judge did not abide by the plea agreement and sentenced defendant to incarceration. Prior to sentencing, defendant had hired a new attorney and moved to withdraw his plea:

… [T]he record as a whole demonstrates that the defendant's plea of guilty was motivated, at least in part, by coercive circumstances. The defendant averred, inter alia, that Ozman urged him to plead guilty despite his protestations of innocence because it was "very likely" that Nicholas would otherwise "face 'jail time.'" The record also reflects that the favorable terms of Nicholas' plea offer were conditioned upon the defendant entering a plea of guilty as part of the same plea agreement … .

Moreover, the defendant demonstrated a significant possibility of a conflict of interest arising from Ozman's joint representation of the defendant and Nicholas. The defendant's maintenance of his innocence was at odds with Ozman obtaining a favorable plea offer for Nicholas as part of the "package deal," which also required the defendant to enter a plea of guilty … . Thus, the record suggests that the defendant's plea of guilty was induced by consideration other than his desire to obtain more favorable sentencing for himself, and that the defendant was deprived of representation that was "singlemindedly devoted to his best interests as required by both the Constitution of the United States and the New York State Constitution" … . People v Wentland, 2021 NY Slip Op 00578, Second Dept 2-3-21

CRIMINAL 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

CRIMINAL LAW.

DEFENDANT TOOK THE GUN FROM THE VICTIM AND KILLED THE VICTIM IN SELF DEFENSE; THE DEFENDANT'S BRIEF, TEMPORARY POSSESSION OF THE WEAPON AFTER THE SHOOTING DID NOT CONSTITUTE CRIMINAL POSSESSION OF A WEAPON SECOND DEGREE (SECOND DEPT).

The Second Department, reversing defendant's possession of a weapon conviction, over a dissent, determined the temporary possession of the gun did not meet the criteria for criminal possession of a weapon second degree. The gun belonged to the victim. During a struggle with the defendant the gun fell to the ground. Both the defendant and the victim dove for the gun. The defendant retrieved it and shot the victim. The defendant held on to the gun very briefly and then disposed of it. The defendant was acquitted of murder:

As reflected by the fact that the jury acquitted the defendant of the murder charge, based upon the defense of justification, the defendant initially took possession of the gun with a valid legal excuse … , and there is no evidence that the defendant retained the gun beyond opportunities to hand it over to the authorities … . The cases cited by our dissenting colleague are clearly distinguishable, involving situations where a defendant retained possession of a gun until it was found by the police … , retained access to the gun after hiding it in a secure location … , acted furtively when confronted by police with a weapon on his person … , or disposed of the weapon during hot pursuit by the police … .

Indeed, our dissenting colleague acknowledges that turning the gun over to authorities is not an element of temporary and lawful possession … . Here, the defendant retained the gun for a brief period while he looked for his brother, and, not finding him, unloaded the gun and disposed of it in the trash. At trial, when he was asked about his intention, the defendant responded, "[m]y intention this is not my gun. Why hold it." The evidence indicated that the defendant retained the gun for a sufficient time to dispose of it. The fact that he disposed of the gun without turning it into the authorities did not convert his temporary and lawful possession of the gun into illegal possession … . People v Rose, 2021 NY Slip Op 00577, Second Dept 2-3-21

CRIMINAL LAW.

DEFENDANT'S MOTION TO WITHDRAW HIS PLEA WAS MADE PURSUANT TO CPL 220.60, NOT CPL 330.30; THEREFORE THE "OUTSIDE THE RECORD" EVIDENCE SUBMITTED IN SUPPORT OF THE MOTION SHOULD HAVE BEEN CONSIDERED; MATTER REMITTED (SECOND DEPT).

The Second Department, reversing County Court and remitting the defendant's motion to withdraw his plea, determined defendant's motion was made pursuant to CPL 220.60, not CPL 330.30. Therefore the evidence submitted by the defendant demonstrating his innocence of the charged crime could properly be considered. County Court had not considered the motion because the supporting evidence was outside the record:

The defendant's motion to withdraw his plea of guilty was clearly made pursuant to CPL 220.60(3), and the County Court should not have deemed it to be a motion to set aside a verdict pursuant to CPL 330.30(1). CPL 220.60(3) provides that "[a]t any time before the imposition of sentence, the court in its discretion may permit a defendant who has entered a plea of guilty . . . to withdraw such plea, and in such event the entire indictment, as it existed at the time of such plea, is restored" … . "The decision as to whether to permit a defendant to withdraw a previously entered plea of guilty rests within the sound discretion of the court and generally will not be disturbed absent an improvident exercise of discretion" … . In general, "such a motion must be premised upon some evidence of possible innocence or of fraud, mistake, coercion or involuntariness in the taking of the plea" … . "When a defendant moves to withdraw a guilty plea, the nature and extent of the fact-finding inquiry 'rest[s] largely in the discretion of the Judge to whom the motion is made' and a hearing will be granted only in rare instances" … .

Here, the County Court, improperly relying upon CPL 330.30(1), determined that the defendant's submissions in connection with his motion to withdraw his plea were outside the record and did not consider them. People v Murphy, 2021 NY Slip Op 08203, Second Dept 2-24-21

CRIMINAL LAW.

DEFENDANT'S MOTION TO WITHDRAW HIS PLEA, AND THE CIRCUMSTANCES SURROUNDING HIS ACCEPTANCE OF THE PLEA OFFER, RAISED THE POSSIBILITY THAT DEFENDANT ACCEPTED THE PLEA OFFER TO MAKE SURE HIS BAIL WOULD NOT BE INCREASED; DEFENDANT WAS WORRIED ABOUT BEING ABLE TO FIND CARE FOR HIS THREE-YEAR-OLD SON; BAIL SHOULD NOT BE A CONSIDERATION IN PLEA NEGOTIATIONS; THE MOTION TO WITHDRAW THE PLEA SHOULD NOT HAVE BEEN DENIED WITHOUT A HEARING (FIRST DEPT).

The Second Department, reversing County Court, determined it was an abuse of discretion to deny defendant's motion to withdraw his plea without holding a hearing. The matter was remitted for a hearing. The defendant was given a "last chance" to accept a plea offer just before the suppression hearing began. Defense counsel asked about bail at that time and then defendant met with defense counsel before deciding to take the plea offer. In his motion to withdraw the plea, defendant alleged that, based upon his discussion with defense counsel, he thought his bail would be substantially increased if he didn't take the plea offer and was concerned about taking care of his three-year-old son. He had brought his son to court because he couldn't find a babysitter:

Bail status "has no legitimate connection to the mutuality of advantage underlying plea bargaining because it does not relate either to the more lenient sentence for which the defendant is negotiating or to the waiver of trial and the certainty of conviction the prosecution is seeking" … . Accordingly, "[t]he prospect of an immediate change in bail status, therefore, is an inappropriate consideration in plea negotiations" … .

Here, the plea bargaining process and the defendant's affidavit raise a legitimate question as to the voluntariness of the defendant's plea and, therefore, the defendant's motion should not have been denied without a hearing … . The County Court's response to defense counsel's questions regarding bail, which included a statement that this was the defendant's "last chance" to accept the offer, raise a

legitimate question as to whether the defendant understood that the court's purportedly forthcoming bail decision was contingent on acceptance of the offer. Notably, after the defendant accepted the plea, the court never brought up the issue of changing the defendant's bail status, effectively continuing his release on cash bail without any changes … . People v Swain, 2021 NY Slip Op 01430, Second Dept 3-10-21

CRIMINAL LAW.

DEFENSE COUNSEL'S STATING TO THE COURT THAT DEFENDANT'S MOTION TO WITHDRAW HIS GUILTY PLEA WAS FRIVOLOUS DEPRIVED DEFENDANT OF HIS RIGHT TO EFFECTIVE COUNSEL (SECOND DEPT).

The Second Department, remitting the matter for a report on defendant's motion to withdraw his guilty plea, determined defense counsel, by stating to the court that defendant's motion was frivolous, had taken a position adverse to the client:

The defendant pleaded guilty to assault in the first degree, but at sentencing, the defendant stated that he wished to withdraw his plea, which he claimed had been coerced by his counsel. The County Court relieved defense counsel, and assigned new counsel to represent the defendant. Subsequently, the defendant's new counsel advised the court that after evaluating the evidence, the defendant's allocution, and after speaking to the defendant and his prior attorney, a motion to withdraw the plea of guilty would be frivolous. The court granted the defendant a number of adjournments to permit him to retain private counsel to pursue his motion to withdraw his plea, but when the defendant failed to do so, the court ultimately sentenced him, while he was still represented by the second assigned counsel. …

We agree with the defendant that his right to counsel was adversely affected, and he received ineffective assistance of counsel, when his counsel took a position adverse to his … . The County Court should have appointed new counsel to represent the defendant with respect to the motion to withdraw his plea of guilty … . People v Fellows, 2021 NY Slip Op 01269, Second Dept 3-3-21

CRIMINAL LAW.

THE EVIDENCE DID NOT SUPPORT FINDING THE APPELLANT IN THIS JUVENILE DELINQUENCY PROCEEDING MADE A TERRORISTIC THREAT IN VIOLATION OF PENAL LAW 490.20; THERE WAS NO EVIDENCE OF AN INTENT TO INTIMIDATE THE CIVILIAN POPULATION (SECOND DEPT).

The Second Department, reversing Family Court, determined the evidence in this juvenile delinquency proceeding did not support finding the appellant student made a terroristic threat. The issue was not preserved but the appeal was considered in the interest of justice:

The student testified that one morning during class some of the students were joking and talking when the appellant and another student got into "a little argument," and the appellant told that student that he "[was] going to be 14 years old, chopped up in somebody's backyard, and he's going to get a white person to shoot up the school." * * *

"Penal Law article 490 was enacted shortly after the attacks on September 11, 2001, to ensure that terrorists are prosecuted and punished in state courts with appropriate severity" … . "In construing the statute, courts must be cognizant that 'the concept of terrorism has a unique meaning and its implications risk being trivialized if the terminology is applied loosely in situations that do not match our collective understanding of what constitutes a terrorist act'" … . As relevant here, Penal Law § 490.20 (1) provides that a person is guilty of making a terroristic threat when "with intent to intimidate . . . a civilian population . . . he or she threatens to commit or cause to be committed a specified offense and thereby causes a reasonable expectation or fear of the imminent commission of such offense." We agree with the appellant that the presentment agency presented no evidence of an intent by the appellant to intimidate a civilian population with his statements … . Matter of Jaydin R., 2021 NY Slip Op 00176, Second Dept 1-13-21

CRIMINAL LAW.

THE FEDERAL CONSPIRACY-TO-DEAL-IN-FIREARMS STATUTE HAS DIFFERENT ELEMENTS THAN ITS NEW YORK EQUIVALENT AND THEREFORE CAN NOT BE THE BASIS OF A SECOND FELONY OFFENDER ADJUDICATION (SECOND DEPT).

The Second Department vacated defendant's second felony offender adjudication because the predicate federal felony did not have the same elements as the New York equivalent:

… [T]he defendant's federal conviction of conspiracy to deal in firearms under section 371 of title 18 of the United States Code is not a "predicate felony conviction" .. , because the federal conspiracy statute contains different elements than its equivalent in New York such that it is possible to violate the federal statute without engaging in conduct that is a felony in New York … . People v Mohabir, 2021 NY Slip Op 01789, Second Dept 3-24-21

CRIMINAL LAW.

THE GRAND LARCENY TOOK PLACE IN NEW JERSEY AND IS NOT A "RESULT OFFENSE;" THEREFORE NEW YORK DID NOT HAVE TERRITORIAL JURISDICTION (SECOND DEPT).

The Second Department, reversing County Court, determined the grand larceny indictment should have been dismissed because New York did not have territorial jurisdiction. The grand larceny took place in New Jersey and is not a "result offense:"

Where New York's territorial jurisdiction over an offense is in dispute, the People bear the burden of establishing jurisdiction under CPL 20.20 beyond a reasonable doubt … . Here, the People did not dispute the defendant's claim that none of the elements of the alleged offense occurred in New York, and did not seek to establish, for instance, that the complainant's bank account was located in New York … . Rather, the People argued only that territorial jurisdiction was properly based on CPL 20.20(2)(a) because grand larceny was a "result offense" and the alleged

"result" occurred in New York, and the County Court denied the defendant's jurisdictional challenge on this narrow ground.

"When a specific consequence, such as the death of the victim in a homicide case, is an element of an offense, the occurrence of such consequence constitutes the 'result' of such offense. An offense of which a result is an element is a 'result offense'" (CPL 20.10[3]). The elements of larceny are (1) intent to deprive another of property or to appropriate the same to himself or herself or to a third person, and (2) the wrongful taking, obtaining or withholding of such property … . Contrary to the People's contention, since no "specific consequence" is an element of grand larceny in the fourth degree, it follows that larceny in the fourth degree is not a "result offense" within the meaning of CPL 20.10(3) … . People v Cousar, 2021 NY Slip Op 00573, Second Dept 4-3-21

CRIMINAL LAW.

THE JURY NOTE INDICATED THE REQUEST WAS FOR THE TRANSCRIPT OF THE PHONE CALL, BUT THE JUDGE DESCRIBED THE NOTE AS A REQUEST FOR THE PHONE CALL AND PROVIDED THE JURY WITH THE RECORDING OF THE CALL; NEW TRIAL ORDERED (SECOND DEPT).

The Second Department, reversing defendant's conviction and ordering a new trial, determined that the judge did not inform counsel of the full nature of a note from the jury. The jury note indicated the request was for the transcript of a phone call, but the judge said the note was asking for the phone call:

At trial, a recording of one of the defendant's jail phone calls was introduced into evidence and played for the jury. In addition, the jury was provided with a purported transcript of the call, which was described merely as an aid and was not itself in evidence, and which the Supreme Court instructed should not control in the event of any discrepancy between the recording and the transcript. During deliberations, the jury sent the court a note, marked as court exhibit number 4, which the court stated on the record as "asking for [the defendant's] phone call from jail." This description, however, omitted the word "transcript," which was included at the end of the note

in parentheses. The court then stated to the jury that it would play the call again, but would not provide a copy of the transcript.

Contrary to the People's contention, the jury's request did not only implicate the court's ministerial function, as the request can be interpreted as seeking the transcript of the phone call, rather than the call itself. Notably, there was a discrepancy between the transcript and the phone call, and to the extent that the jury's request implied that the transcript left an impression on the jury, despite the court's instructions … ,counsel for the defendant should have been made aware of the verbatim contents of the request … . Failure to disclose the precise contents of the note deprived the defense of the opportunity to "analyze the jury's deliberations" given the note's ambiguous meaning, "and frame intelligent suggestions for the court's response" … . People v Dennis, 2021 NY Slip Op 01994, Second Dept 3-31-21

CRIMINAL LAW.

THE JURY WAS ERRONEOUSLY ALLOWED TO CONSIDER A THEORY OF BURGLARY WITH WHICH DEFENDANT WAS NOT CHARGED; BURGLARY CONVICTIONS REVERSED (SECOND DEPT).

The Second Department, reversing defendant's burglary convictions, determined the jury should not have been instructed to consider a theory of burglary (intent to assault versus intent to damage property) with which defendant was not charged:

A defendant has a right to be tried only for the crimes charged in the indictment … . "Where the prosecution is limited by the indictment or bill of particulars to a certain theory or theories, the court must hold the prosecution to such narrower theory or theories" … . This rule applies in cases charging burglary, where it is not normally necessary for the People to demonstrate the exact crime which the defendant intended to commit while inside the building … .

Here, we agree with the defendant that the People limited their theory of burglary in their bill of particulars, which incorporated the allegations of the criminal complaint, to the intent to commit property damage and/or theft … . Therefore, the Supreme Court erred in permitting the prosecutor to argue, during summation, and in

permitting the jury to consider, the uncharged theory that the defendant intended to assault the complainant … . People v Petersen, 2021 NY Slip Op 00193, Second Dept 1-13-21

CRIMINAL LAW.

THE PEOPLE DID NOT DEMONSTRATE DEFENDANT PROCURED THE ABSENCE OF A WITNESS; THEREFORE THE WITNESS'S STATEMENT SHOULD NOT HAVE BEEN ADMITTED IN EVIDENCE; ALLOWING THE PEOPLE TO MAKE PEREMPTORY CHALLENGES AFTER THE DEFENSE WAS REVERSIBLE ERROR (SECOND DEPT).

The Second Department, reversing defendant's conviction and ordering a new trial, determined a witness's out-of-count statement should not have been admitted because the People did not demonstrate defendant procured the witness's absence and the failure to follow proper procedure in jury selection was reversible error:

"The purpose of a Sirois hearing is to determine whether the defendant has procured a witness's absence or unavailability through his own misconduct, and thereby forfeited any hearsay or Confrontation Clause objections to admitting the witness's out-of-court statements" … . The People must "present legally sufficient evidence of circumstances and events from which a court may properly infer that the defendant, or those at defendant's direction or acting with defendant's knowing acquiescence, threatened the witness" … . "At a Sirois hearing, the People bear the burden of establishing, by clear and convincing evidence, that the defendant has procured the witness's absence or unavailability" … .

Here, the People failed to establish by clear and convincing evidence that the defendant was responsible for procuring a certain witness's refusal to testify at trial … . Specifically, the People's evidence did not establish that the defendant controlled the individuals who threatened the witness or that the defendant influenced or persuaded any individual to threaten the witness or his family … .

The Supreme Court committed reversible error when it permitted the People to exercise peremptory challenges to prospective jurors after the defendant and his

codefendant exercised peremptory challenges to that same panel of prospective jurors (see CPL 270.15[2] … . This procedure violated "the one persistently protected and enunciated rule of jury selection—that the People make peremptory challenges first, and that they never be permitted to go back and challenge a juror accepted by the defense" … . People v Burgess, 2021 NY Slip Op 01993, Second Dept 3-31-21

The same peremptory challenge issue required reversal in People v Taylor, 2021 NY Slip Op 01998, Second Dept 3-31-21

CRIMINAL LAW.

THE PEOPLE USED DEFENDANT'S PRETRIAL SILENCE AGAINST HIM IN THEIR DIRECT CASE; ALTHOUGH THE ERROR WAS NOT PRESERVED, THE APPEAL WAS CONSIDERED IN THE INTEREST OF JUSTICE; NEW TRIAL ORDERED (SECOND DEPT).

The Second Department reversed defendant's conviction and ordered a new trial because the People "improperly used [defendant's] pretrial silence against him in their direct case." The decision does not explain the facts. Although the error was not preserved, the appeal was considered in the interest of justice:

"[I]t is a well-established principle of state evidentiary law that evidence of a defendant's pretrial silence is generally inadmissible" … . Here, as the defendant correctly contends, the People improperly used his pretrial silence against him on their direct case … . Since this evidence was used by the People on their direct case, their reliance upon cases in which "conspicuous omissions from the defendants' statements to police" had properly been used during cross-examination of the defendants to impeach the credibility of their exculpatory trial testimony is misplaced … . Contrary to the People's contention, the error in admitting evidence of the defendant's pretrial silence during their direct case was not harmless … . Although this issue is unpreserved for appellate review … , we reach it in the exercise of our interest of justice jurisdiction, and on that basis, reverse the judgment and remit the matter … for a new trial. People v DeLaCruz, 2021 NY Slip Op 01785, Second Dept 3-24-21

CRIMINAL LAW.

THE POLICE DID NOT DEMONSTRATE A LAWFUL BASIS FOR IMPOUNDING DEFENDANT'S VEHICLE AND CONDUCTING AN INVENTORY SEARCH; DEFENDANT'S MOTION TO SUPPRESS THE SEIZED EVIDENCE SHOULD HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendant's motion to suppress evidence seized from his vehicle should have been granted. The police did not demonstrate a lawful bas for impounding the vehicle and conducting an inventory search:

… [T]he People failed to establish the lawfulness of the impoundment of the defendant's vehicle and subsequent inventory search … . Although, at the suppression hearing, a police officer testified that the defendant's vehicle was "parked on the corner" at the time of the defendant's arrest, there was no testimony that the vehicle was parked illegally or that there were any posted time limits pertaining to the space where the vehicle was parked. The People presented no evidence demonstrating any history of burglary or vandalism in the area where the defendant had parked his vehicle, and the officer testified that the vehicle was driven to the precinct because it was used in the commission of a crime. Thus, the People failed to establish that the impoundment of the defendant's vehicle was in the interests of public safety or part of the police's community caretaking function … . Moreover, although the officer who performed the inventory search of the defendant's vehicle testified that the policy for conducting such searches was located in the Patrol Guide, the People presented no evidence demonstrating the requirements of the policy for impounding and searching a vehicle, or whether the officer complied with that policy when she conducted the inventory search of the defendant's vehicle … . People v Rivera, 2021 NY Slip Op 08256, Second Dept 3-17-21

CRIMINAL LAW.

THE ROBBERY COULD NOT BE COMMITTED WITHOUT COMMITTING THE ASSAULT; ASSAULT COUNT DISMISSED AS MULTIPLICITOUS; ISSUE CONSIDERED ON APPEAL IN THE INTEREST OF JUSTICE (SECOND DEPT).

The Second Department, reversing defendant's assault first conviction, determined the robbery first and assault first counts were multiplicitous. The redundant count was dismissed in the interest of justice (error was not preserved):

"An indictment is multiplicitous when two separate counts charge the same crime" … . "Multiplicity does not exist where each count requires proof of an additional fact that the other does not" or where "a conviction on one count would not be inconsistent with acquittal on the other" … . "If an indictment is multiplicitous it creates the risk that a defendant will be punished for, or stigmatized with a conviction of, more crimes than he actually committed" … . Here, the record reflects that the jury charges regarding the count of assault in the first degree and the count of robbery in the first degree were essentially identical since one cannot commit robbery in the first degree under Penal Law § 160.15(1) without simultaneously committing assault in the first degree under Penal Law § 120.10(4) … . As such, those charges were multiplicitous … . Although the dismissal of the multiplicitous count will not affect the duration of the defendant's sentence of imprisonment, it is nevertheless appropriate in this case to dismiss the count charging assault in the first degree in consideration of the stigma attached to the redundant convictions … . People v Edmondson, 2021 NY Slip Op 08201, Second Dept 2-24-21

CRIMINAL LAW.

THE TRIAL JUDGE DID NOT CONDUCT AN ADEQUATE INQUIRY BEFORE ALLOWING DEFENDANT TO REPRESENT HIMSELF (SECOND DEPT).

The Second Department, reversing defendant's conviction, determined the trial judge did not conduct an adequate inquiry before allowing defendant to represent himself:

A court must determine that the defendant's waiver of the right to counsel is made competently, intelligently, and voluntarily before allowing that defendant to represent himself or herself … . In order to make that evaluation, the court "must undertake a 'searching inquiry' designed to 'insur[e] that a defendant [is] aware of the dangers and disadvantages of proceeding without counsel'" … . The court's inquiry "must accomplish the goals of adequately warning a defendant of the risks inherent in proceeding pro se, and apprising a defendant of the singular importance of the lawyer in the adversarial system of adjudication" … . "The record should also disclose 'that a trial court has delved into a defendant's age, education, occupation, previous exposure to legal procedures and other relevant factors bearing on a competent, intelligent, voluntary waiver' of the right to counsel" … . Here, although the court obtained certain pedigree information from the defendant, it failed to ascertain that the defendant was aware of the risks inherent in proceeding without an attorney and the benefits of having counsel represent him at trial … . Moreover, the court failed to discuss the potential sentence that could be imposed … . Thus, the court's inquiry was insufficient to ensure that the defendant understood the dangers and disadvantages of self-representation. People v Lemmo, 2021 NY Slip Op 01997, Second Dept 3-31-21

DENTAL MALPRACTICE.

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

EDUCATION-SCHOOL LAW.

PLAINTIFF STUDENT WAS ASSAULTED BY ANOTHER STUDENT AND SUED THE SCHOOL UNDER A NEGLIGENT SUPERVISION THEORY; THE SCHOOL'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the negligent supervision action by a student who was assaulted at school should not have been dismissed:

While the plaintiff testified that he had never been physically assaulted by the other student prior to the subject incident, he testified that the other student always made threatening comments to him during Spanish class, of which seven or eight were serious in nature, and three or four were accompanied by a closed fist motion in an attempt to get the plaintiff to flinch. The plaintiff also testified that he complained about these threats to the Spanish teacher, who had witnessed the other student make a closed fist motion toward the plaintiff on at least one or two occasions, and that he asked the teacher if she could do something about these threats, but she never said anything to the other student. Moreover, while the plaintiff testified that he did not know whether the other student had ever threatened or assaulted other students, the School District failed to submit any affidavit or deposition testimony from its own personnel establishing that it did not have specific knowledge or notice of the dangerous conduct that caused the alleged injuries to the plaintiff … .

With respect to proximate cause, the School District did not demonstrate, prima facie, that the subject incident occurred so quickly and spontaneously "that even the most intense supervision could not have prevented it" … . The plaintiff testified that approximately 10 minutes before the end of class on the date of the assault, while the class was silently working on an assignment, the other student threatened out loud to stab him, which was overheard by the rest of the class and the teacher. Nizen-Jacobellis v Lindenhurst Union Free Sch. Dist., 2021 NY Slip Op 08195, Second Dept 2-24-21

EDUCATION-SCHOOL LAW.

THE FINDING THAT THE COMPLAINANT CONSENTED TO LYING DOWN IN BED WITH PETITIONER FOR THE NIGHT BUT DID NOT CONSENT TO HAVING SEX WAS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE; THE COLLEGE'S DETERMINATION THAT PETITIONER VIOLATED THE STUDENT CODE OF CONDUCT ANNULLED (SECOND DEPT).

The Second Department, annulling the determination of the Campus Appeals Board of SUNY Purchase College, held the Board's conclusion petitioner had sexual intercourse with the complainant without the complainant's consent was not supported by substantial evidence. The Board had found the evidence that complainant was unable to give consent "conflicting and unreliable:"

After the hearing, the Hearing Board found "the complainant's statements to be conflicting and unreliable as it pertained to her inability to give consent." The Hearing Board concluded that "[t]here were considerable gaps in the complainant's memory," and indicated that it was "concerned that some of her statements after her initial report were tainted by reading the reports that were submitted by other witnesses and parties." Nevertheless, the Hearing Board found that although there was consent for lying together in bed, kissing, and the removal of the complainant's pants, the complainant had not consented to the remainder of the sexual activity. …

… [T]he determination that the petitioner violated code C.8 was not supported by substantial evidence. Having rejected the complainant's testimony that she was incapable of giving consent, the Hearing Board was not left with adequate evidence to support the conclusion that while the complainant consented to spending the night in the petitioner's bed, kissing, and removing her pants, she did not consent to the remainder of the sexual activity. The Board indicated that its finding of nonconsensual conduct was based on the statements of the petitioner and the complainant "that clear, affirmative consent for these activities was not given." However, the petitioner, while freely admitting that he did not obtain verbal consent, clearly asserted that the complainant consented with her actions … . Matter of Doe v Purchase Coll. State Univ. of N.Y., 2021 NY Slip Op 01974, Second Dept 3-31-21

EDUCATION-SCHOOL LAW.

THE SCHOOL TOOK REASONABLE STEPS TO PREVENT A STUDENT, J. P., FROM ASSAULTING AN UNIDENTIFIED STUDENT AFTER THE SCHOOL LEARNED OF A RUMOR THAT J.P. INTENDED TO FIGHT SOMEONE; WHEN CONFRONTED AND WARNED J.P. DENIED THAT HE INTENDED TO ASSAULT ANYONE; TWO DAYS LATER J.P. ASSAULTED PLAINTIFF'S CHILD; THE SCHOOL'S MOTION FOR SUMMARY JUDGMENT DISMISSING THE NEGLIGENT SUPERVISION ACTION SHOULD HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the defendant school district's motion for summary judgment in this negligent supervision case should have been granted. Plaintiff's child was assaulted at school by another child, J.P. The assistant principal had been warned that J.P. was going to fight with someone. The assistant principal warned J.P. of the consequences and alerted school security. When the assistant principal warned J.P. he denied that he intended to fight someone:

A necessary element of a cause of action alleging negligent supervision is that the district knew or should have known of J.P.'s propensity for violence … . The defendant established that the complaint and bill of particulars did not allege that J.P. had a propensity to engage in violence or that the district knew or should have known that J.P. had a propensity for violence … .

The defendant established, prima facie, that it was not made aware of any particularized threat against the child. Furthermore, the evidence presented by the defendant established that the assistant principal took reasonable steps to prevent J.P. from fighting by warning J.P. about the consequences of fighting, informing his mother of the alleged threat and the consequences of fighting, and informing the head of school security that there was an alleged threat that J.P. intended to fight someone, notwithstanding that the assistant principal was not aware of J.P.'s intended target. Under these circumstances, the defendant reasonably responded to a rumor of a threat and could not have anticipated that J.P. would have attacked the child two days later … . Further, the defendant established that "the incident occurred in so short a period of time that any negligent supervision on its part was

not a proximate cause of the infant plaintiff's injuries" … . Wienclaw v East Islip Union Free Sch. Dist., 2021 NY Slip Op 08277, Second Dept 3-17-21

ELECTION LAW.

PETITIONER, A JOURNALIST, UNDER THE ELECTION LAW, DID NOT HAVE THE CAPACITY OR STANDING TO EXAMINE 353 BALLOTS CAST IN THE PRIMARY ELECTION FOR QUEENS COUNTY DISTRICT ATTORNEY, WHICH WAS WON BY ONLY 55 VOTES (SECOND DEPT).

The Second Department, in a full-fledged opinion by Justice Wooten, determined petitioner, a journalist, was not entitled under the Election Law to examine 353 ballots cast in the primary election for Queens County District Attorney which was won by only 55 votes:

Election Law § 16-112 … only empowers the court to direct the examination of a ballot by a candidate whose name appeared thereon (or his or her agent). Thus, insofar as Election Law § 3-222 provides that voted ballots may be examined by court order, the court would not be empowered to direct the examination of ballots by the petitioner, who was not a candidate (or a designated agent of a candidate). Further, the petitioner has not set forth a purpose for examination of the affidavit ballots which could possibly have been intended by the legislature in enacting Election Law § 3-222 … .

Moreover, insofar as the petitioner does not claim to have any interest in the outcome of the primary election, the petitioner has failed to set forth any injury which the subject proceeding is intended to address so as to confer standing. In fact, the petitioner has not set forth any interest different from any other member of the public, aside from his desire to obtain access to information to aid in his career as a journalist. Moreover, any determination that the petitioner has standing to petition the court for access to the affidavit ballots at issue would be in contravention of the legislature's clear intent "to guard against unjustified erosion of the policies of ballot secrecy and finality" … . Matter of Hamm v Board of Elections in the City of New York, 2021 NY Slip Op 08232, Second Dept 3-17-21

EMPLOYMENT LAW.

UNDER THE TERMS OF THE COLLECTIVE BARGAINING AGREEMENT PLAINTIFF MUST ARBITRATE HIS RACIAL DISCRIMINATION CLAIMS; AFTER THE UNION REFUSED TO ARBITRATE THE CLAIMS PLAINTIFF BROUGHT THE INSTANT HUMAN RIGHTS LAW CAUSES OF ACTION; THE COMPLAINT WAS STAYED PENDING ARBITRATION (SECOND DEPT).

The Second Department, in a comprehensive opinion by Justice Christopher, determined plaintiff's racial discrimination claims were subject to mandatory arbitration under the controlling collective bargaining agreement (CBA). The union had declined to pursue the arbitration of the discrimination claims and plaintiff then commenced the instant action pursuant to the NYS and NYC Human Rights Law. The opinion is to detailed to fairly summarize here. The plaintiff's complaint was stayed pending arbitration:

"[A]rbitration must be preferred unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute" … . An agreement to arbitrate must be "clear, explicit and unequivocal" … . "Arbitration is a matter of contract, and arbitration clauses, which are subject to ordinary principles of contract interpretation, must be enforced according to their terms" … . * * *

… [I]n order for the plaintiff to be required to arbitrate his employment discrimination claims, the CBA must "clearly and unmistakably" waive the plaintiff's right to proceed in a judicial forum … . Here, the mandatory arbitration clause "clearly and unmistakably" waives the plaintiff's right to proceed in a judicial forum. It explicitly references the employment discrimination statutes that the plaintiff has alleged were violated, and states that "[a]ll such claims shall be subject to the grievance and arbitration procedure . . . as the sole and exclusive remedy for violations." * * *

The Supreme Court's determination to grant that branch of the defendants' motion which was, in effect, pursuant to CPLR 3211(a) to dismiss the complaint was

improper. “An agreement to arbitrate is not a defense to an action,” and “[t]hus, it may not be the basis for a motion to dismiss” … . However, upon granting that branch of the defendants’ motion which was to compel arbitration pursuant to CPLR 7503(a), the court should have stayed the action …, the order granting a motion to compel “shall operate to stay a pending . . . action.” Wilson v PBM, LLC, 2021 NY Slip Op 00593, Second Dept 2-3-21

FAMILY LAW.

A PLENARY ACTION WAS REQUIRED TO SET ASIDE THE STIPULATION OF SETTLEMENT WHICH WAS INCORPORATED BUT NOT MERGED INTO THE JUDGMENT OF DIVORCE (SECOND DEPT).

The Second Department, reversing Supreme Court, determined Supreme Court did not have the authority to declare certain portions of the stipulation of settlement invalid. A plenary action was necessary:

… [A] plenary action was required to seek to set aside the stipulation of settlement, which was incorporated but not merged into the judgment of divorce … . There are exceptions to this general rule, such as where reformation of a separation agreement is sought to conform the agreement with the intent of the parties … , or where the matrimonial action is still pending and was not terminated with entry of a judgment … , or in certain circumstances where enforcement of child support is sought … . None of these exceptions are applicable here.

In view of the foregoing, those branches of the plaintiff’s cross motion which were to vacate the provisions of the stipulation of settlement concerning equitable distribution and maintenance should have been denied. Jagassar v Deonarine, 2021 NY Slip Op 00549, Second Dept 2-3-21

FAMILY LAW.

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.

FAMILY COURT SHOULD HAVE MADE FINDINGS WHICH WOULD ALLOW THE CHILDREN TO APPLY FOR SPECIAL IMMIGRANT JUVENILE STATUS (SECOND DEPT).

The Second Department, reversing Supreme Court, determined Family Court should have made findings which would allow the children to petition for special immigrant juvenile state (SIJS):

… [B]ased upon our independent factual review, the record supports a finding that reunification of the children with their father is not viable due to the father's abandonment of the children …., and educational neglect of the child … . Further, the record supports a finding that it would not be in the best interests of the children to return to Guatemala, their previous country of nationality or country of last habitual residence … . Matter of Briceyda M. A. X. (Hugo R. A. O.–Maria H. X. C.), 2021 NY Slip Op 00180, Second Dept 1-13-21

FAMILY LAW.

GRANDMOTHER, BASED UPON HER PAST CARE OF THE CHILDREN, WAS THE FUNCTIONAL EQUIVALENT OF A PARENT WHO HAD STANDING TO APPLY FOR A HEARING TO DETERMINE WHETHER THE CHILDREN SHOULD BE RETURNED TO HER, FAMILY COURT REVERSED (SECOND DEPT).

The Second Department, reversing Family Court, determined grandmother's application for a hearing to determine whether the children should be returned to her should have been granted. The children were removed from grandmother's care and placed in a foster home. Grandmother's application for a hearing was denied on the ground she did not have standing. But the Second Department held that grandmother met the definition of a person legally responsible for the care of the children based upon the level of care she had provided when the children were placed with her:

Family Court Act § 1028(a) provides that "[u]pon the application of the parent or other person legally responsible for the care of a child temporarily removed under this part . . . the court shall hold a hearing to determine whether the child should be returned," with two exceptions not relevant here … . …

… [T]he evidence submitted in support of the paternal grandmother's application is sufficient to support a determination that she is a person legally responsible for the care of the children. The evidence demonstrated that the children lived with the paternal grandmother for months at a time, during which time she purchased food and clothes for the children, did their laundry, fed them, brought them to and from school, church, and extracurricular activities, acted as the contact person for the

school in case the children were ill or injured, and attended medical appointments with them. These actions, parental in nature and over an extended period of time, support a determination that the paternal grandmother was the functional equivalent of a parent to the children … . Thus, the paternal grandmother was entitled to a hearing pursuant to Family Court Act § 1028, and the Family Court's denial of her application deprived the paternal grandmother of her due process rights … . Matter of Kavon A. (Kavon A.–Monetta A.), 2021 NY Slip Op 01972, Second Dept 3-31-21

FAMILY LAW.

PLAINTIFF HUSBAND IN THIS DIVORCE ACTION INSTALLED SPYWARE WHICH INTERCEPTED DEFENDANT WIFE'S PHONE CALLS AND THEN DESTROYED THE CONTENTS OF THE INTERCEPTION; THE INTERCEPTION VIOLATED DEFENDANT WIFE'S ATTORNEY-CLIENT PRIVILEGE; SANCTIONS FOR SPOLIATION OF EVIDENCE PROPERLY INCLUDED STRIKING THE CAUSES OF ACTION FOR SPOUSAL SUPPORT, EQUITABLE DISTRIBUTION AND ATTORNEY'S FEES (SECOND DEPT).

The Second Department determined plaintiff husband in this divorce action was properly sanctioned for spoliation of evidence by striking from the complaint the causes of action seeking spousal support, equitable distribution and attorney's fees. The husband had installed spyware which allowed interception of defendant wife's phone calls. Evidence of what was intercepted was destroyed. It was assumed that the interceptions violated defendant wife's attorney-client privilege:

… Supreme Court properly drew the presumption of relevance in connection with the interception by the plaintiff of privileged communications between the defendant and her attorney in view of the plaintiff's invocation of his Fifth Amendment privilege against self-incrimination when questioned about it at his deposition, his intentional destruction of electronic records, and the evidence that he had utilized spyware to record the defendant's conversations when she was in the vicinity of her attorney's office. Although this presumption is rebuttable … the plaintiff did not provide any evidence to rebut it. Further, while the striking of pleadings is a drastic

remedy, the court did not improvidently exercise its discretion in striking the causes of action in the plaintiff's complaint seeking financial relief other than child support. "Under the common-law doctrine of spoliation, a party may be sanctioned where it negligently loses or intentionally destroys key evidence" … . … " … Where appropriate, a court can impose the ultimate sanction of dismissing the action or striking responsive pleadings, thereby rendering a judgment by default against the offending party" … . C.C. v A.R., 2021 NY Slip Op 01243, Second Dept 3-3-21

FAMILY LAW.

THE CUSTODY AWARD SHOULD NOT HAVE BEEN MADE, SUA SPONTE, WITHOUT A PLENARY HEARING; WHERE A CUSTODY AWARD IS MADE WITHOUT A HEARING THE COURT SHOULD ARTICULATE THE FACTORS CONSIDERED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the court should have held a hearing before awarding sole custody of the children to plaintiff. The Second Department noted that, where a hearing is not held, the court should articulate the factors considered:

"The court's paramount concern in any custody and visitation proceeding is to determine, under the totality of the circumstances, what is in the best interests of the child[ren]" … . "Custody determinations should generally be made only after a full and plenary hearing and inquiry. This general rule furthers the substantial interest, shared by the State, the children, and the parents, in ensuring that custody proceedings generate a just and enduring result that, above all else, serves the best interests of the child" … . "[A] court opting to forgo a plenary hearing must take care to clearly articulate which factors were—or were not—material to its determination, and the evidence supporting its decision" … .

Here, the record reflects that the Supreme Court failed to inquire into whether an award of sole legal and physical custody to the plaintiff was in the best interests of the children … . Moreover, the court failed to articulate what factors it considered in awarding custody to the plaintiff … . Indictor v Indictor, 2021 NY Slip Op 01968, Second Dept 3-31-21

FAMILY LAW.

THE JUDGE SHOULD NOT HAVE DELEGATED THE COURT'S AUTHORITY TO DETERMINE MOTHER'S PARENTAL ACCESS; THE JUDGE LEFT IT TO MOTHER AND HER CHILD TO DETERMINE MOTHER'S PARENTAL ACCESS (SECOND DEPT).

The Second Department, reversing Family Court, determined the judge should not not have left it to mother and her child to determine when mother will have parental access. The child lives with stepmother who is married to father. Father, who is incarcerated, did not want mother to have parental access:

"A court may not delegate its authority to determine parental access to either a parent or a child" … . "While a child's views are to be considered in determining custody or parental access, they are not determinative" … . Moreover, "[a]n access provision which is conditioned on the desires of [a] child[ ] tends to defeat the right of parental access" … .

Here, the order appealed from directed that the mother was only entitled to parental access with the child as often as she and the child agree. That provision effectively conditions the mother's parental access on the child's wishes and leaves the determination as to whether there should be any parental access at all to the child. Moreover, the Family Court's directive as to parental access creates the potential for influence upon the child, since the stepmother, with whom he lives, is married to the father, who is opposed to the mother having any parental access with the child. Thus, the court's directive as to parental access must be set aside … . Matter of Clezidor v Lexune, 2021 NY Slip Op 01409, Second Dept 3-10-21

FAMILY LAW.

THE VIRGINIA DIVORCE DID NOT CHANGE THE PARTIES' STATUS FROM TENANTS BY THE ENTIRETY TO TENANTS IN COMMON FOR THEIR NEW YORK MARITAL RESIDENCE; NEW YORK FOLLOWS THE "DIVISIBLE DIVORCE" DOCTRINE (SECOND DEPT).

The Second Department determined that the Virginia divorce did not affect the couple's status as tenants by the entirety for the marital home n New York:

The plaintiff contends that the tenancy by the entirety dissolved by operation of law when the Virginia divorce decree was entered, and that the ownership interest in the subject property transformed from a tenancy by the entirety to a tenancy in common … . New York, however, follows the "divisible divorce" doctrine, pursuant to which the ex parte Virginia divorce decree, obtained without personal jurisdiction over the defendant, terminated the parties' status as husband and wife, but had no effect on the defendant's property rights … . In conformity with this doctrine, it is well established that an ex parte foreign divorce decree cannot divest the nonappearing spouse of his or her rights in a New York tenancy by the entirety … . Contrary to the plaintiff's contention, the full faith and credit clause of the federal constitution requires only that New York recognize that the Virginia divorce decree dissolved the parties' marital status … . Thus, the tenancy by the entirety in which the parties own their marital home has not been terminated. Bernhardt v Schneider, 2021 NY Slip Op 00407, Second Dept 1-27-21

FORECLOSURE.

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.

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

FORECLOSURE.

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.

IN THIS FORECLOSURE ACTION, THE JUDGE SHOULD HAVE FIRST DETERMINED WHETHER ANY DISTRIBUTEES OF THE DECEASED MORTGAGORS WERE NECESSARY PARTIES [RPAPL 1311 (1)] AND, IF SO, SUMMON THEM PURSUANT TO CPLR 1001 [b]; THE MOTION TO DISMISS FOR FAILURE TO JOIN NECESSARY PARTIES SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined there were questions of fact whether any distributees of the deceased mortgagors were necessary parties in this foreclosure action. The motion to dismiss for failure to join necessary parties should not have been granted. The court should have determined whether joinder of any parties was required and then summon them pursuant to CPLR 1001 [b]:

Pursuant to RPAPL 1311(1), "necessary defendants" in a mortgage foreclosure action include, among others, "[e]very person having an estate or interest in possession, or otherwise, in the property as tenant in fee, for life, by the curtesy, or for years, and every person entitled to the reversion, remainder, or inheritance of the real property, or of any interest therein or undivided share thereof, after the determination of a particular estate therein."

"In certain circumstances, the estate of the mortgagor is not a necessary party to a mortgage foreclosure action" … . In particular, "where a mortgagor/property owner dies intestate and the mortgagee does not seek a deficiency judgment, generally a foreclosure action may be commenced directly against the distributees," in whom title to the real property automatically vests … .

Here, the plaintiff did not seek a deficiency judgment. However, questions of fact existed, which should have been resolved by the Supreme Court, as to whether any distributees of the deceased mortgagors, other than the defendants herein, retained an interest in the property such that they were necessary parties to the foreclosure action. Further, to the extent that there were such necessary parties to the action, dismissal of the complaint was not the proper remedy; rather, the property remedy in such instance is to direct the joinder of those parties (see CPLR 1001[b] … . NRZ Pass-Through Trust IV v Tarantola, 2021 NY Slip Op 01423, Second Dept 3-10-21

FORECLOSURE.

ONLY THE HUSBAND TOOK OUT A MORTGAGE AND DEFENDANTS DENIED THE ALLEGATION IN THE COMPLAINT THAT THE WIFE'S INTEREST WAS SUBJECT TO AN EQUITABLE MORTGAGE; THEREFORE THE BANK'S MOTION FOR SUMMARY JUDGMENT IN THIS FORECLOSURE ACTION SHOULD NOT HAVE BEEN GRANTED; THE COURT NOTED THAT "NEITHER ADMITTED NOR DENIED" IN AN ANSWER TO A COMPLAINT IS DEEMED AN ADMISSION (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff bank did not demonstrate its foreclosure action could affect the wife's (Gloria's) interest in the property based on the husband's (David's) mortgage. It was not necessary for defendants to claim that Gloria's interest was not subject to an equitable mortgage as an affirmative defense. [Although not related to the equitable mortgage issue, the Second Department noted that "Neither Admitted nor Denied" in an answer to an allegation in a complaint should be deemed to admit the allegation (*see* CPLR 3018[a] …)]:

… [W]e disagree with the plaintiff's contention that the defendants, by not pleading it as an affirmative defense, waived their defense to the cause of action relating to the alleged equitable mortgage on Gloria Saff's interest in the subject property. "CPLR 3018, which governs responsive pleadings, draws a distinction between denials and affirmative defenses" … . "Denials generally relate to allegations setting forth the essential elements that must be proved in order to sustain the particular cause of action" and "[t]hus a mere denial of one or more elements of the cause of action will suffice to place them in issue" … . A defendant, however, must plead, as an affirmative defense, "all matters which, if not pleaded, would be likely to take the adverse party by surprise or would raise issues of fact not appearing on the face of a prior pleading" … . Here, the defendants, in their answer, denied the allegations in the complaint relating to the existence of an equitable mortgage on Gloria Saff's interest in the subject property. As the denials of an equitable mortgage were in response to allegations in the complaint, they would not take the plaintiff by surprise. * * *

Where spouses own property as tenants by the entirety, a conveyance by one spouse, to which the other has not consented, cannot bind the entire fee … . The mortgage executed by David Saff did not encumber Gloria Saff's interest in the subject property, and the plaintiff failed to submit evidence demonstrating that it held an equitable mortgage on Gloria Saff's interest in the subject property. Thus, the Supreme Court should have denied those branches of the plaintiff's motion which were for summary judgment on the causes of action to foreclose the mortgage and for a judgment declaring that the plaintiff has an equitable mortgage against the interest of Gloria Saff in the subject property. U.S. Bank N.A. v Saff, 2021 NY Slip Op 00590, Second Dept 2-3-21

FORECLOSURE.

PLAINTIFF BANK PRESENTED INSUFFICIENT PROOF OF COMPLIANCE WITH THE NOTICE REQUIREMENTS OF RPAPL 1304, THE BANK SHOULD NOT HAVE BEEN AWARDED SUMMARY JUDGMENT (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the bank did not present sufficient evidence of compliance with the notice requirements of RPAPL 1304:

[T]he plaintiff submitted the affidavit of April Simmons, an employee of the plaintiff's loan servicer, Nationstar Mortgage, LLC (hereinafter Nationstar), along with copies of two 90-day notices addressed to the defendant. Simmons, however, did not state in her affidavit that she personally mailed these notices to the defendant, and she did not aver that she was familiar with the mailing practices and procedures of the entity which sent the notices … . Moreover, although the envelopes accompanying the 90-day notices state "First-Class Mail" and contain a bar code above a 20-digit number, the plaintiff failed to submit any receipt or corresponding document proving that the notices were actually sent by first-class and certified mail to the defendant more than 90 days prior to the commencement of the action … . U.S. Bank, N.A. v Zientek, 2021 NY Slip Op 02015, Second Dept 3-31-21

FORECLOSURE.

PLAINTIFF BANK PRESENTED INSUFFICIENT PROOF OF COMPLIANCE WITH THE NOTICE REQUIREMENTS OF RPAPL 1304, THE BANK SHOULD NOT HAVE BEEN AWARDED SUMMARY JUDGMENT (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the bank did not demonstrate compliance RPAPL 1304 and therefore was not entitled to summary judgment:

… [T]he plaintiff submitted, inter alia, an affidavit of Tewana Sheriff, a foreclosure administrator for the plaintiff's servicer who, based upon review of "business records maintained for the purpose of servicing plaintiff's mortgage loans," averred that the 90-day notice was sent via first-class and certified mail in accordance with RPAPL 1304. Sheriff did not refer to any specific records demonstrating compliance with RPAPL 1304, did not aver that she had personal knowledge of the subject mailings, and did not set forth personal knowledge of a standard office mailing procedure designed to ensure that items were properly addressed and mailed. Although the plaintiff submitted a signed certified mail receipt and United States Postal Service tracking information, those items do not refer to a 90-day notice, and a copy of the 90-day notice does not include a United States Postal Service tracking number corresponding with the certified mail receipt … . Moreover, the plaintiff failed to, inter alia, submit any proof of mailing the 90-day notice by first-class mail. Therefore, the Supreme Court should have denied those branches of the plaintiff's motion which were for summary judgment on the complaint insofar as asserted against the defendants, to strike their answer, and for an order of reference … . Santander Bank, N.A. v Schaefer, 2021 NY Slip Op 02005, Second Dept 3-31-21

FORECLOSURE.

PLAINTIFF MORTGAGE COMPANY DID NOT DEMONSTRATE STANDING TO BRING THE FORECLOSURE ACTION AND THERE WAS A QUESTION OF FACT WHETHER PLAINTIFF NEGOTIATED IN GOOD FAITH PURSUANT TO CPLR 3408 (f) (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the plaintiff mortgage company did not demonstrate standing to bring the foreclosure action and did not establish it had negotiated in good faith pursuant to CPLR 3408 (f):

The plaintiff was not in possession of the note at the time of commencement of the action. Further, the plaintiff failed to submit evidence establishing, prima facie, that it was authorized to act on behalf of FHLBC to commence the foreclosure action, since the plaintiff did not submit any power of attorney, servicing agreement, or other agreement authorizing the plaintiff to commence this action … . Moreover, the affidavits relied upon by the plaintiff contained only conclusory assertions that the plaintiff was the loan servicer, without asserting the existence of any agreement delegating to the plaintiff the authority to commence this action on FHLBC's behalf in 2012. * * *

… [T]here is no evidence that the plaintiff attempted to obtain a waiver of the investor's self-employment restriction, which, according to the plaintiff's own denial letter, was the reason for its denial of the defendant's first and second loan modification applications. …

Since the defendant's submissions raise a factual issue as to whether the plaintiff failed to negotiate in good faith and deprived him of a meaningful opportunity to resolve this action through loan modification or other potential workout options … , the Supreme Court should have held a hearing to determine this issue before deciding that branch of the defendant's cross motion which was to dismiss the complaint insofar as asserted against him … . Citimortgage, Inc. v Lofria, 2021 NY Slip Op 01026, Second Dept 2-17-21

FORECLOSURE.

RPAPL 1304 AND 1302-a DO NOT APPLY WHERE THE LOAN SUBJECT TO FORECLOSURE IS NOT A "HOME LOAN;" COMPLIANCE WITH RPAPL 1303 IS A CONDITION PRECEDENT TO FORECLOSURE BUT FAILURE TO COMPLY CANNOT BE RAISED FOR THE FIRST TIME ON APPEAL; FAILURE TO PROVIDE NOTICE OF DEFAULT CANNOT BE RAISED FOR THE FIRST TIME ON APPEAL (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff's motion for summary judgment in this foreclosure action should have been granted. The Second Department noted: (1) RPAPL 1304 (re: notice) and 1302-a (re: standing) do not apply where the subject loan is not a "home loan" because the property was not defendant's principal dwelling; (2) compliance with the notice requirements of RPAPL 1303 is a condition precedent to the commencement of a foreclosure action, but the issue cannot be raised for the first time on appeal; (3) the failure to provide notice of default as required by the mortgage cannot be raised for the first time on appeal. Nationstar Mtge., LLC v Gayle, 2021 NY Slip Op 08194, Second Dept 2-24-21

FORECLOSURE.

SUPREME COURT SHOULD NOT HAVE CONFIRMED THE REFEREE'S REPORT; THE REPORT WAS BASED UPON BUSINESS RECORDS WHIDH WERE NOT PRODUCED OR IDENTIFIED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the referee's report should not have been confirmed because it was based on business records which were not produced:

… Supreme Court should have denied Wilmington's motion to confirm the referee's report and for a judgment of foreclosure and sale. "[T]he referee's findings with respect to the total amount due upon the mortgage were not substantially supported by the record inasmuch as the computation was premised upon unproduced business records" … . "Moreover, the referee's report also failed to identify the documents or

other sources upon which the referee based his finding that the mortgaged premises should be sold in one parcel, and failed to answer the court's specific question of whether the mortgaged premises could be sold in parcels" … . Thus, in confirming the report, the court should not have relied on the referee's inadequately supported findings … . Wilmington Sav. Fund Socy., FSB v Mehraban, 2021 NY Slip Op 01802, Second Dept, 3-24-21

FORECLOSURE.

THE 2ND DEPARTMENT REVERSED THE AWARD OF SUMMARY JUDGMENT TO THE BANK BECAUSE ONE OF TWO BORROWERS WAS NOT NAMED IN THE RPAPL 1306 FILING; THIS RULING MAY NOT HOLD UP BECAUSE, ON MARCH 30, 2021, THE COURT OF APPEALS HELD ONLY ONE BORROWER NEED BE NAMED IN THE RPAPL 1306 FILING (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff bank's motion for summary judgment in this foreclosure action should not have been granted because an apparent borrower, Kosin, was not named in the bank's electronic filing required by RPAPL 1306. [Note that the Court of Appeals, on March 30, 2021, held that the bank need only name one borrower in the RPAPL 1306 notice. That holding may or may not apply to this case, which has slightly different facts in that it was not certain Kosin was, in fact, a borrower. See CIT Bank N.A. v Schiffman, 2021 NY Slip Op 01933, CtApp 3-30-21.]:

… [T]he plaintiff's noncompliance with RPAPL 1306 by establishing that the plaintiff only made an RPAPL 1306 filing with respect to [defendant borrower] Hollien, but did not make any such filing with respect to Kosin. In opposition, the plaintiff failed to raise a triable issue of fact as to its compliance with this necessary precondition to commencement of a foreclosure action … . Contrary to the plaintiff's contention, it was still required to comply with RPAPL 1304 and 1306 with respect to Kosin because, although Kosin was not listed as a "borrower" on the note, he was defined as a "borrower" on the mortgage agreement. Since the mortgage agreement refers to Kosin as a "borrower" on both the first page and the signature page, Kosin is a "borrower" for purposes of RPAPL 1304 and 1306 … . Although there is some

ambiguity in the language of the mortgage agreement, any ambiguities in the language of the document must be construed against the plaintiff, as the plaintiff is the party who supplied the document … . Federal Natl. Mtge. Assn. v Hollien, 2021 NY Slip Op 01963, Second Dept 3-31-21

FORECLOSURE.

THE AFFIDAVITS SUBMITTED TO PROVE DEFENDANTS' DEFAULT IN THIS FORECLOSURE ACTION WERE NOT BASED UPON PERSONAL KNOWLEDGE AND DID NOT ATTACH THE BUSINESS RECORDS RELIED UPON (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the plaintiff bank did not submit admissible proof of defendants' default:

"There is no requirement that a plaintiff in a foreclosure action rely on any particular set of business records to establish a prima facie case, so long as the plaintiff satisfies the admissibility requirements of CPLR 4518(a), and the records themselves actually evince the facts for which they are relied upon" … . Here, neither Joanne Orelli, a senior vice president of Flushing Bank, who verified the complaint, nor Mark Levin, the managing member of the plaintiff, who submitted an affidavit in support of the motion, stated that they had personal knowledge of the default. Moreover, to the extent their knowledge was based on their review of business records, they did not identify what records they relied on and did not attach them to the verified complaint or the affidavit … . Flatbush Two, LLC v Morales, 2021 NY Slip Op 00294, Second Dept 1-20-21

FORECLOSURE.

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.

THE BANK'S PROOF OF STANDING TO BRING THE FORECLOSURE ACTION WAS INSUFFICIENT (SECOND DEPT),

The Second Department determined the bank's motion for summary judgment in this foreclosure action should have been denied because the proof the bank has standing was insufficient:

… [T]he plaintiff failed to establish, prima facie, that it had standing to commence this action. Although the plaintiff attached to the complaint copies of the note and an undated purported allonge endorsed in blank, the plaintiff did not demonstrate that the purported allonge, which was on a piece of paper completely separate from the note, was "so firmly affixed thereto as to become a part thereof," as required by UCC 3-202(2) … . U.S. Bank, N.A. v Ainsley, 2021 NY Slip Op 02014, Second Dept 3-31-21

FORECLOSURE.

THE BORROWER'S APPLICATION FOR A LOAN MODIFICATION DID NOT RELIEVE THE BANK OF THE RPAPL 1304 NOTICE REQUIREMENTS IN THIS FORECLOSURE ACTION; THE BANK DID NOT PROVIDE SUFFICIENT PROOF OF THE MAILING OF THE NOTICE (SECOND DEPT).

The Second Department, reversing Supreme Court in this foreclosure action, determined (1) the bank was still required to provide the RPAPL1304 notice despite the application for a loan modification, and (2) the proof of mailing the notice was insufficient. The court noted that proof of mailing submitted for the first time in reply cannot be considered as part of the bank's prima facie case:

When the instant action was commenced, RPAPL 1304(3) provided: "The ninety day period specified in the notice[ ] contained in [RPAPL 1304(1)] shall not apply, or shall cease to apply, if the borrower has filed [an application for the adjustment of debts of the borrower or an order for relief from the payment of debts], or if the

borrower no longer occupies the residence as the borrower's principal dwelling" … . A loan modification was not an adjustment of debts within the meaning of the version of RPAPL 1304(3) then in effect and, in any event, a lender was relieved only from the requirement to provide notice within the "ninety day period" (RPAPL 1304[3]), not from the requirement to provide the notice specified in RPAPL 1304(1) … . …

US Bank failed to establish, prima facie, that it complied with RPAPL 1304. Although Ubinas stated in her affidavit that the RPAPL 1304 notices were mailed by certified and regular first-class mail, and attached copies of those notices, of an envelope addressed to the defendant bearing a certified mail 20-digit barcode, and of an envelope bearing a first-class mail postage stamp, US Bank failed to attach, as exhibits to the motion, any documents to prove that the mailing actually occurred. There is no copy of any United States Post Office document indicating that the notice was sent by registered or certified mail as required by the statute. Further, while Ubinas attested that she had personal knowledge of the record-making practices of Ocwen, and that the 90-day notice was sent in compliance with RPAPL 1304, she did not attest to knowledge of the mailing practices of the Law Offices of McCabe, Weisberg, and Conway, P.C., the entity that allegedly sent the notices to the defendant on behalf of Ocwen. On appeal, US Bank relies upon the signed certified mail return receipt submitted in reply. The moving party, however, cannot meet its prima facie burden by submitting evidence for the first time in reply … . U.S. Bank N.A. v Hammer, 2021 NY Slip Op 01439, Second Dept 3-10-21

FORECLOSURE.

THE ESTATE IS NOT A NECESSARY PARTY IN THIS FORECLOSURE ACTION; THE REFEREE'S FINDINGS WERE BASED UPON UNPRODUCED BUSINESS RECORDS (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the estate was not a necessary party in this foreclosure action and the referee's finding were based on unproduced business records:

“The rule is that a mortgagor who has made an absolute conveyance of all his [or her] interest in the mortgaged premises, including his [or her] equity of redemption, is not a necessary party to foreclosure, unless a deficiency judgment is sought on his [or her] bond” … . Here, [decedent] conveyed all of the interest in the subject property prior to his death, and prior to the commencement of the instant action. Moreover, the plaintiff moved to amend the complaint to remove any language seeking a deficiency, and the court granted that motion.

However, “the referee’s findings with respect to the total amount due upon the mortgage were not substantially supported by the record inasmuch as the computation was premised upon unproduced business records” … . Federal Natl. Mtge. Assn. v Home & Prop. Works, LLC, 2021 NY Slip Op 01031, Second Dept 2-17-21

FORECLOSURE.

THE ESTATE OF THE HUSBAND WAS NOT A NECESSARY PARTY IN THIS FORECLOSURE ACTION; THE PROPERTY PASSED TO THE WIFE UPON THE HUSBAND’S DEATH (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the husband’s (Thomas’s) estate was not a necessary party in this foreclosure action because the property passed to the decedent’s wife (Judy) upon Thomas’s death:

… [T]he plaintiff’s submission of the deed and Thomas’s death certificate established prima facie that Thomas and Judy had held the subject property as a married couple, and that they remained married at the time of his death. Therefore, Thomas’s death “result[ed] in the defeasance of the deceased spouse’s coextensive interest in the property” … , and the surviving spouse automatically inherited his ownership interest in the property. Moreover, the plaintiff explicitly provided that it would not seek a deficiency judgment against Thomas’s estate … . Based upon the foregoing, the plaintiff established that Thomas’s estate was not a necessary party to foreclosure and the plaintiff was entitled to discontinue the action against Thomas, remove his name from the caption, and to vacate the stay which arose upon Thomas’s death … . U.S. Bank N.A. v Auteri, 2021 NY Slip Op 00588, Second Dept 2-3-21

FORECLOSURE.

THE ESTATE OF THE MORTGAGOR WAS NOT A NECESSARY PARTY IN THIS FORECLOSURE ACTION; THE PROPERTY WAS CONVEYED BEFORE HER DEATH AND THE COMPLAINT DOES NOT SEEK A DEFICIENCY JUDGMENT (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the estate of the mortgagor was not a necessary party in the foreclosure proceeding and the complaint should not have been dismissed on that ground:

The estate of the mortgagor was not a necessary party to this action, as it had no interest in the property at the time this action was commenced, inasmuch as the mortgagor conveyed the property that is subject to the mortgage to the defendant prior to her death, and the complaint does not seek a deficiency judgment against her estate … . U.S. Bank N.A. v Apelbaum, 2021 NY Slip Op 02008, Second Dept 3-31-21

FORECLOSURE.

THE REFEREE'S REPORT IN THIS FORECLOSURE ACTION WAS BASED UPON BUSINESS RECORDS WHICH WERE NOT PRODUCED AND SHOULD NOT HAVE BEEN CONFIRMED; ALTHOUGH DEFENDANTS DEFAULTED, THE REFEREE'S REPORT FUNCTIONS AS AN INQUEST ON DAMAGES WHICH THE DEFENDANTS CAN CONTEST (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the referee's report in this foreclosure action should not have been confirmed because it was based upon business records that were not produced. The court noted that the fact that defendants had defaulted did not preclude them from contesting the amount owed:

… [T]he referee's report should not have been confirmed because it was based upon unproduced business records … . The fact that the defendants defaulted in appearing

did not mean that they were precluded from contesting the amount owed … . The referee's report served the function of an inquest on damages, which must be based upon admissible evidence … . Wilmington Sav. Fund Socy., FSB v Moriarty-Gentile, 2021 NY Slip Op 00328, Second Dept 1-20-21

FORECLOSURE.

THE REFEREE'S REPORT IN THIS FORECLOSURE ACTION WAS BASED UPON INADMISSBILE HEARSAY AND THEREFORE SHOULD NOT HAVE BEEN CONFIRMED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the referee's report should not have been confirmed because it was based on inadmissible hearsay:

… [T]he affidavit of an assistant vice president of Rushmore Loan Management Services, LLC, submitted for the purpose of establishing the amount due and owing under the subject mortgage loan, "constituted inadmissible hearsay and lacked probative value because the affiant did not produce any of the business records he purportedly relied upon in making his calculations" … . Thus, the referee's findings with respect to the total amount due upon the mortgage were not substantially supported by the record … . Accordingly, the Supreme Court should have denied the plaintiff's motion to confirm the referee's report … . Wilmington Sav. Fund Socy., FSB v Isom, 2021 NY Slip Op 00203, Second Dept 1-13-21

FREEDOM OF INFORMATION LAW (FOIL).

FIRE DEPARTMENT DOCUMENTS COULD HAVE BEEN REDACTED TO PROTECT PRIVACY AND WERE NOT INTER-AGENCY MATERIALS; THEREFORE THE FOIL REQUESTS FOR THESE DOCUMENTS SHOULD NOT HAVE BEEN DENIED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined certain FOIL requests for NYC Fire Department (FDNY) should have been granted:

… [T]he FDNY withheld the records identified in the petitioner's FOIL request numbers 4, 9, and 16, which sought records concerning requests for religious accommodations and the determinations made thereon, and accommodations from the FDNY dress requirements. The FDNY withheld those records on the grounds that releasing them would be an unwarranted invasion of personal privacy under Public Officers Law § 87(2)(b) and the records were inter-agency materials exempt by Public Officers Law § 87(2)(g). * * *

… [T]he FDNY failed to sustain its burden of proving that the personal privacy exemption applied to the records sought, since it failed to establish that the identifying details could not be redacted so as to not constitute an unwarranted invasion of personal privacy … . Its conclusory assertions that the records fall within the exemption were insufficient to meet its burden of proving that the statutory exemption applies … . The FDNY should have produced the requested records, redacting whatever portions are necessary to safeguard the identities of the individuals who sought the accommodation, and leaving nonidentifying information intact … .

The FDNY also failed to establish that the exemption for inter-agency materials applied, since the agency determinations sought were final on the accommodation requests and therefore not subject to the exemption … . Matter of Aron Law, PLLC v New York City Fire Dept., 2021 NY Slip Op 00556, Second Dept 2-3-21

FREEDOM OF INFORMATION LAW (FOIL).

THE PETITION SEEKING EMAILS AND RECIPIENT LISTS IN ELECTRONIC FORM FROM THE VILLAGE SHOULD NOT HAVE BEEN DISMISSED; THE VILLAGE DID NOT DEMONSTRATE THE REQUEST COULD NOT BE GRANTED WITH REASONABLE EFFORTS; PETITIONER WAS NOT ADVISED OF THE AVAILABILITY OF AN ADMINSTRATIVE APPEAL, THEREFORE THE APPEAL WAS NOT UNTIMELY (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the petition seeking emails and the related recipient lists in electronic form should not have been

dismissed because the denial of the request did not indicate no one employed by the village had the expertise to provide the information in electronic form. In addition, the appeal of the denial of another similar request should not have been deemed untimely because the petitioner was never advised of the availability of an administrative appeal:

Guazzoni {the Village Trustee] stated that he lacked the technical sophistication to manually transfer the email addresses of each of his individual recipients onto an Excel spreadsheet in order to provide an electronically formatted response to the FOIL request. However, Guazzoni did not address whether any other employee of the Village could, with a reasonable degree of time and effort, create an Excel spreadsheet that would comply with the terms of the FOIL request. It cannot be said, therefore, that the amended petition fails to state a cause of action, as it presents a question of fact as to whether reasonable efforts by Village employees could be undertaken to provide an electronically formatted response … . …

Public Officers Law § 89(3)(a) and (4)(a) requires that FOIL requests be granted or denied by an agency within five business days, and that any administrative appeal of a denial, as required for exhausting administrative remedies, be undertaken within 30 days of the denial. 21 NYCRR 1401.7(c) provides that a FOIL request is deemed denied if there is no response to the request within five business days. However, since there was no advisement to the petitioner of the availability of an administrative appeal as required by 21 NYCRR 1401.7(b), the Supreme Court erred in concluding that the petitioner’s administrative appeal, which was filed on July 13, 2017, was time barred … . Matter of Madden v Village of Tuxedo Park, 2021 NY Slip Op 01415, Second Dept 3-10-21

LABOR LAW-CONSTRUCTION LAW.

PLAINTIFF WAS ENTITLED TO SUMMARY JUDGMENT ON HIS LABOR LAW 240 (1) AND 241 (6) CAUSES OF ACTION; DEFENDANTS WERE ENTITLED TO SUMMARY JUDMENT ON THE LABOR LAW 200 CAUSE OF ACTION (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, determined plaintiff's motions for summary judgment on his Labor Law 240(1) and 241(6) causes o action should have been granted. In addition defendants' motion for summary judgment on the Labor Law 200 cause of action should have been granted, Plaintiff was standing on a scaffold with no railing when a piece of concrete fell from the ceiling and knocked him off the scaffold:

… [T]he plaintiff demonstrated his prima facie entitlement to judgment as a matter of law on the issue of liability on the Labor Law § 240(1) cause of action, through his deposition testimony that the scaffold he was using lacked any safety railings and that he tried to grab onto something as he fell from the scaffold but "there was nothing to grab" … . …

Similarly, the plaintiff met his prima facie burden with respect to so much of the Labor Law § 241(6) cause of action as was predicated upon 12 NYCRR 23-5.3(e), by establishing that the scaffold lacked safety railings in violation of that regulation and that such violation was a proximate cause of his injuries … . * * *

[Re; the Labor Law 200 cause of action:] … [T]he defendants … demonstrated … that they did not have the authority to supervise or control the plaintiff's work … . The defendants … further demonstrated … that they did not create or have actual or constructive notice of any alleged defect in the concrete ceiling. Since the concrete ceiling had been covered by a drop ceiling until the drop ceiling was demolished … , any alleged defect in the concrete ceiling was latent and not discoverable upon a reasonable inspection … . Leon-Rodriguez v Roman Catholic Church of Sts. Cyril & Methodius, 2021 NY Slip Op 08228, Second Dept 3-17-21

LABOR LAW-CONSTRUCTION LAW.

PLAINTIFF, AN HVAC WORKER, LEANED ON A PIPE RAILING AS HE WAITED FOR AN ELEVATOR TO TAKE HIM TO THE FLOOR WHERE HIS WORK SITE WAS; THE PIPE RAILING GAVE WAY AND PLAINTFF FELL FOUR OR FIVE FEET TO A CONCRETE SLAB; PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT ON HIS LABOR LAW 240(1) CAUSE OF ACTION SHOULD HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff was entitled to summary judgment on his Labor Law 240(1) cause of action. Plaintiff was at the construction site waiting for an elevator to take him to the floor where he was working (HVAC work) when he leaned back on a pipe railing which gave way and he fell four or five feet to a concrete slab:

… [T]he safety devices prescribed by Labor Law § 240(1) "are for the use or protection of persons in gaining access to or working at sites where elevation poses a risk" … .

… [T]he plaintiff established that he needed to use the elevator, one of two at opposite ends of the construction site, to gain access to the various floors where he would be working throughout the day. Thus, accessing and waiting at the loading dock for the elevator, even before working hours began, was necessary to the plaintiff's work. We therefore conclude that the loading dock from which the plaintiff fell is included under "those parts, which must be accessed by a worker to do his or her job" … . Under the circumstances of this case, the fact that the plaintiff was not engaged in HVAC work at the moment of his accident does not preclude the application of Labor Law § 240(1). Crutch v 421 Kent Dev., LLC, 2021 NY Slip Op 01751, Second Dept 3-24-21

LABOR LAW-CONSTRUCTION LAW.

PLAINTIFF'S FALL FROM A LOW CONCRETE RETAINING WALL TO THE GROUND WAS NOT THE TYPE OF ELEVATION-RELATED INCIDENT COVERED BY LABOR LAW 240(1) (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court determined the Labor Law 240(1) cause of action should have been dismissed. Plaintiff alleged he stepped on a low concrete retaining wall and slipped on oil, which was not the type of elevation hazard covered by section 240(1):

… [T]he defendant established that it was entitled to judgment as a matter of law dismissing the cause of action alleging a violation of Labor Law § 240(1) on the ground that the plaintiff was not exposed to the type of elevation-related hazard contemplated by that statute. The evidence submitted by the defendant established that the height differential from the concrete retaining wall to the ground did not constitute a physically significant elevation differential covered by the statute … . Eliassian v G.F. Constr., Inc., 2021 NY Slip Op 00419, Second Dept 1-27-21

LABOR LAW-CONSTRUCTION LAW.

THE COMPLAINT IN THIS LABOR LAW 200 ACTION ALLEGED INJURY CAUSED BY A DANGEROUS CONDITION AT THE WORK SITE; THE DEFENDANTS IGNORED THAT THEORY IN THEIR MOTION FOR A SUMMARY JUDGMENT AND FOCUSED ON AN INAPPLICABLE THEORY (THE MEANS AND MANNER OF WORK); THE MOTION SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the defendant's motion for summary judgment in this Labor Law 200 action should not have been granted. There are two distinct theories which will support a Labor Law 200 cause of action. If the injury stems from the means and manner of the work, the defendant must have supervisory authority over the way the work is done. If the injury stems from a dangerous condition, the defendant must have control over the work site and must have created or had notice of the dangerous condition. Here plaintiff alleged a

door at the work site was not adequately secured and he was injured when wind blew the door shut. The door therefore was alleged to constitute a dangerous condition. In their motion papers, however, the defendants addressed only the means-and-manner-of-work theory:

… [T]he plaintiff's complaint and verified bill of particulars sounded almost entirely in premises liability, and alleged, inter alia, that the door was not properly constructed, placed, or secured, and that it lacked adequate securing devices. To establish their prima facie entitlement to judgment as a matter of law, the defendants were obligated to address the proof applicable to the plaintiff's dangerous condition theory of liability, or alternatively, to demonstrate, prima facie, that this case fell only within the ambit of the means and methods category of Labor Law § 200 cases … . On their motion, the defendants summarily concluded that the case exclusively implied a means and methods theory of liability, and contended that they only had general supervisory authority over the work site, which would be insufficient to impose liability for common-law negligence and under Labor Law § 200 in a means and methods case … . The defendants, however, failed to address premises liability and whether they either created the alleged dangerous condition or had actual or constructive notice of it … . Rodriguez v HY 38 Owner, LLC, 2021 NY Slip Op 01436, Second Dept 3-10-21

LABOR LAW-CONSTRUCTION LAW.

THE HOMEOWNER AND THE GENERAL CONTRACTOR DID NOT HAVE SUFFICIENT SUPERVISORY AUTHORITY TO BE LIABLE IN THIS LABOR LAW 200 AND COMMON-LAW NEGLIGENCE ACTION STEMMING FROM A SCAFFOLD COLLAPSE (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the Labor Law 200 and negligence causes of action against the homeowners (the Chetrits) and the general contractor (J & S) should have been dismissed in this scaffold-collapse case. Neither defendant had sufficient supervisory authority to trigger liability. Plaintiff worked for a company hired by J & S, the general contractor:

"'Section 200 of the Labor Law merely codified the common-law duty imposed upon an owner or general contractor to provide construction site work[ers] with a safe place to work'" … . "'To be held liable under Labor Law § 200 for injuries arising from the manner in which work is performed, a defendant must have authority to exercise supervision and control over the work'" … . Here, both the Chetrits and J & S demonstrated their prima facie entitlement to judgment as a matter of law dismissing the Labor Law § 200 and common-law negligence causes of action insofar as asserted against each of them, as the record demonstrates that neither the Chetrits nor J & S supervised, directed, or otherwise controlled the plaintiff's work … . In opposition, the plaintiff failed to raise a triable issue of fact. Contrary to the plaintiff's contentions, the fact that Abraham Chetrit, David Chetrit, and J & S's employees often visited the work site to inspect the work, make requests, and ask questions does not preclude summary judgment, as "'[m]ere general supervisory authority at [the] work site for the purpose of overseeing the progress of the work and inspecting the work product is insufficient to impose liability under Labor Law § 200″'" … . Moreover, although J & S employees had the power to stop any unsafe work at the work site, this alone is insufficient to impose liability under Labor Law § 200 … . Debennedetto v Chetrit, 2021 NY Slip Op 00413, Second Dept 1-27-21

LABOR LAW-CONSTRUCTION LAW.

THE REACH OF LIABILITY UNDER LABOR LAW 241 (6) AND THE MEANING OF "OWNER" AS USED IN THAT STATUTE EXPLAINED (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, determined defendant 2 Big Meadows' motion for summary judgment on the Labor Law 241 (6) cause of action should not have been granted. The court explained the reach of liability under Labor Law 241 (6) and the meaning of the term "owner" as used in the statute:

Liability under Labor Law § 241(6) extends to "[a]ll contractors and owners and their agents . . . when constructing or demolishing buildings or doing any excavating

in connection therewith." "[T]he burden placed upon a defendant seeking summary judgment on the ground that it is not an owner is a heavy one" … . * * *

… "[T]he term 'owner' is not limited to the titleholder of the property where the accident occurred and encompasses a person 'who has an interest in the property and who fulfilled the role of owner by contracting to have work performed for his [or her] benefit'" … . "[T]he critical factor in determining whether a party is an 'owner' is whether it 'possessed the right to insist that proper safety practices were followed; that is, the right to control the work'" … . The evidentiary submissions furnished by 2 Big Meadow in support of its motion for summary judgment did not eliminate triable issues of fact as to whether 2 Big Meadow, which clearly benefitted from the renovation of its property, was involved in contracting to have the construction project performed or had the authority to insist on proper safety practices. Cruz v 1142 Bedford Ave., LLC, 2021 NY Slip Op 08220, Second Dept 3-17-21

LANDLORD-TENANT.

IN THIS THIRD-PARTY ASSAULT CASE, THE FACT THAT THE INTRUDER KILLED PLAINTIFF'S DECEDENT, A RESIDENT OF DEFENDANT'S APARTMENT BUILDING, IN A PRE-MEDITATED, TARGETED ATTACK DID NOT, AS A MATTER OF LAW, INSULATE THE LANDLORD FROM LIABILITY BASED UPON AN ALLEGEDLY BROKEN LOCK ON THE BUILDING'S EXTERIOR DOOR; THE 2ND DEPARTMENT DISAGREED WITH A LINE OF 1ST DEPARTMENT CASES (SECOND DEPT).

The Second Department, in a full-fledged opinion by Justice Dillon, disagreeing with a line of First Department decisions, determined a targeted, premeditated attack on a building resident is not necessarily an intervening cause which insulates the landlord from liability. Here plaintiff's decedent was targeted by her former fiance (Boney) who set her, himself and one of her children on fire in the hallway outside plaintiff's decedent's apartment. There was evidence the exterior door to the building did not have a functioning lock. The Second Department held that the defendant landlord (the New York City Housing Authority [NYCHA]) did not

eliminate questions of fact about whether the broken lock was a proximate cause of the attack and whether the attack was foreseeable:

The test in determining summary judgment motions involving negligent door security should … not focus on whether the crime committed within the building was “targeted” or “random,” but whether or not, and to what extent, an alleged negligently maintained building entrance was a concurrent contributory factor in the happening of the criminal occurrence. In examining whether there is a triable issue of fact as to foreseeability and proximate cause requiring trial, a jury could conceivably conclude that the chronically broken lock at the building’s front door provided Boney with an opportunity to attack the decedent, in a manner that might not otherwise have been possible, and that NYCHA could have foreseeably anticipated that its broken front door lock would result in the entry of intruders into the building for the commission of criminal activities against known or unknown specific tenants … . All of these actions should be examined sui generis, recognizing the unique facts of individualized matters, rather than simplistically or arbitrarily channeling them into either “targeted” or “random” criminal boxes that do not accommodate the factual nuances that may vary from case to case. Scurry v New York City Hous. Auth., 2021 NY Slip Op 00447, Second Dept 1-27-21

MEDICAL MALPRACTICE.

ALLEGED ATTORNEY MISCONDUCT DID NOT WARRANT SETTING ASIDE THE OVER $21 MILLION VERDICT IN THIS MEDICAL MALPRACTICE CASE; SUPREME COURT REVERSED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendant’s motion to set aside the verdict based upon the conduct of plaintiff’s counsel should not have been granted in this medical malpractice action. Plaintiff suffered a brain injury rendering him unable to take care of himself and was awarded over $21 million:

… [W]e conclude that the Supreme Court improvidently exercised its discretion in ordering a new trial in the interest of justice based upon attorney misconduct. Some

of the challenged conduct was improper, and we do not condone it … . However, "where counsel, in summing up, exceeds the bounds of legal propriety, it is the duty of the opposing counsel to make a specific objection and for the court to rule on the objection, to direct the jury to disregard any improper remarks, and to admonish counsel from repetition of improper remarks" … . Here, defense counsel did not object to the challenged remarks during summation or request a curative instruction, thus depriving the court of the opportunity to direct the jury to disregard improper remarks or give other curative instructions, and to avoid further error … . "Where no objection is interposed, a new trial may be directed only where the remarks are so prejudicial as to have caused a gross injustice, and where the comments are so pervasive, prejudicial, or inflammatory as to deprive a party of a fair trial" … . The misconduct of the plaintiff's counsel in the instant case was not so pervasive or prejudicial as to have deprived the defendant of a fair trial, or to have affected the verdict, particularly in light of the strength of the plaintiff's case … . Accordingly, we deny that branch of the defendant's motion pursuant to CPLR 4404(a) which was to set aside the verdict and for a new trial in the interest of justice, and reinstate the verdict. Yu v New York City Health & Hosps. Corp., 2021 NY Slip Op 08215, Second Dept 2-24-21

MEDICAL MALPRACTICE.

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

MEDICAL MALPRACTICE.

GALLBLADDER SURGERY WAS PERFORMED ON PLAINTIFF, BUT HER GALLBLADDER HAD BEEN REMOVED YEARS BEFORE; THE DOCTORS APPARENTLY DID NOT REVIEW THE AVAIABLE MEDICAL RECORDS; THE RADIOLOGIST DID NOT DISCOVER THAT THE GALLBLADDER WAS ABSENT; THE DOCTORS' MOTIONS FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined questions of fact precluded summary judgment which had been awarded to an internist (Patil), a surgeon (Jung), and a radiologist (Opsha). Plaintiff underwent gallbladder surgery, but her gallbladder had already been removed. The medical record reflected the prior removal:

The plaintiff's expert opined that Patil departed from the accepted standard of care and contributed to the plaintiff's injuries by failing to review the plaintiff's medical records maintained by SIPP, which indicated that the plaintiff previously had her gallbladder removed. …

At his deposition, Jung testified that, before the surgery, he was not aware that the plaintiff had a previous cholecystectomy and became aware that "[t]here was no

gallbladder" … surgery. He admitted that he "looked at" Patil's notes and reviewed the ultrasound report. Further, although he had access to [the] medical records, he did not recall if he reviewed the plaintiff's medical chart prior to the surgery, but "might have looked at something." Jung admitted that, other than the primary care physician's report and the radiological report, it was "not routine" for him to "look into other documents and charts for a patient." …

Opsha's expert failed to explain the basis for his conclusion as to how Opsha detected a gallbladder in his review of the ultrasound and made findings in his report regarding the plaintiff's gallbladder when that organ had been removed years earlier … . Ruiz v Opsha, 2021 NY Slip Op 01796, Second Dept 3-24-21

MEDICAL MALPRACTICE.

PLAINTIFF'S EXPERT AFFIDAVIT IN THIS MEDICAL MALPRACTICE ACTION DID NOT LAY A FOUNDATION FOR AN OPINION OUTSIDE THE EXPERT'S FIELD AND DID NOT REBUT THE OPINIONS OF DEFENDANT'S EXPERT; DEFENDANT'S MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendant's motion for summary judgment in this medical malpractice case should have been granted. Plaintiff's expert's affidavit did not raise a question of fact because there was no foundation for the expert's opining outside the expert's field of emergency medicine:

The affirmation of the plaintiff's expert, a physician with training in emergency medicine, lacked probative value as it failed to specify that the expert had any specific training or expertise in neurology or in the diagnosis and treatment of strokes, or how she became familiar with the applicable standards of care … . Moreover, the plaintiff's expert failed to rebut the opinions of the defendant's expert or articulate how the defendant's alleged deviations from the accepted standard of care were a proximate cause of the plaintiff's injuries … . Laughtman v Long Is. Jewish Val. Stream, 2021 NY Slip Op 01251, Second Dept 3-3-21

MEDICAL MALPRACTICE.

PLAINTIFF'S SIGNING A CONSENT FORM PRIOR TO SURGERY DID NOT REQUIRE DISMISSAL OF THE LACK OF INFORMED CONSENT CAUSE OF ACTION (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the medical malpractice, lack of informed consent and battery causes of action should not have been dismissed. Plaintiff alleged defendant doctor operated on the wrong site. Defendant testified she removed a cyst from plaintiff's left leg and plaintiff alleged defendant should have removed an abscess. The court noted that plaintiff's signing a consent form did not require dismissal of the lack of informed consent cause of action:

As to the lack of informed consent cause of action, the deposition testimony of the plaintiff and the defendant and the generic consent form signed by the plaintiff presented triable issues of fact as to whether the defendant informed the plaintiff about the procedure, the alternatives thereto, and the reasonably foreseeable risks and benefits of the proposed treatment and the alternatives … . "[T]he fact that the plaintiff signed a consent form does not establish [the defendant's] entitlement to judgment as a matter of law" where, as here, the form was generic, and beyond a barebones handwritten notation of the areas of the body, "Left Bartholin/Left Inguinal Abscess," "did not contain any details about the operation" … . The consent form does not even indicate the procedure to be performed, but merely lists an area of the body, "Left Bartholin," and a condition, "Left Inguinal Abscess." Preciado v Ravins, 2021 NY Slip Op 00441, Second Dept 1-27-21

MEDICAL MALPRACTICE.

PLAINTIFFS' EXPERT'S AFFIDAVIT WAS NOT SPECULATIVE OR CONCLUSORY; DEFENDANT'S MOTION FOR SUMMARY JUDGMENT IN THIS DENTAL MALPRACTICE AND LACK OF INFORMED CONSENT ACTION SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendant's motion for summary judgment in this dental malpractice and lack of informed consent should not have been granted. Plaintiff's expert's affidavits raised questions of fact:

"In order not to be considered speculative or conclusory, expert opinions in opposition should address specific assertions made by the movant's experts, setting forth an explanation of the reasoning and relying on specifically cited evidence in the record" … . In determining a motion for summary judgment, the court must view the evidence in the light most favorable to the nonmoving party … , and "all reasonable inferences must be resolved in favor of the nonmoving party" … . * * *

Summary judgment is not appropriate in a dental malpractice action where, as here, the parties adduce conflicting medical expert opinions, since conflicting expert opinions raise credibility issues which are to be resolved by the factfinder … . …

"[L]ack of informed consent is a distinct cause of action requiring proof of facts not contemplated by an action based merely on allegations of negligence" … . "To establish a cause of action to recover damages based on lack of informed consent, a plaintiff must prove (1) that the person providing the professional treatment failed to disclose alternatives thereto and failed to inform the patient of reasonably foreseeable risks associated with the treatment, and the alternatives, that a reasonable medical practitioner would have disclosed in the same 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" … . Many v Lossef, 2021 NY Slip Op 00165, Second Dept 1-13-21

MEDICAL MALPRACTICE.

PLAINTIFFS' MEDICAL MALPRACTICE ACTION SEEKING RECOVERY OF THE COSTS OF CARING FOR A SEVERELY DISABLED CHILD SHOULD NOT HAVE BEEN DISMISSED; PROOF REQUIREMENTS EXPLAINED (SECOND DEPT).

The Second Department determined plaintiffs' medical malpractice action seeking recovery of the expenses of caring for their severely disable child should not have been dismissed. The plaintiffs alleged defendants failed to properly diagnose the child's conditions in utero and failed to advise plaintiffs of their options:

Parents may maintain a cause of action on their own behalf for the extraordinary costs incurred in raising a child with a disability … . "To succeed on such a cause of action, which 'sound[s] essentially in negligence or medical malpractice,' [a plaintiff] 'must demonstrate the existence of a duty, the breach of which may be considered the proximate cause of the damages suffered by' [the injured party]" … . "Specifically, the parents must establish that malpractice by a defendant physician deprived them of the opportunity to terminate the pregnancy within the legally permissible time period, or that the child would not have been conceived but for the defendant's malpractice" … . "[T]he claimed damages cannot be based on mere speculation, conjecture, or surmise, and, when sought in the form of extraordinary expenses related to caring for a disabled child, must be necessitated by and causally connected to the child's condition" … . "Since the plaintiffs' recovery is limited to their personal pecuniary loss, expenses covered by other sources such as private insurance or public programs are not recoverable" … . Vasiu v Berg, 2021 NY Slip Op 01798, Second Dept 3-24-21

MUNICIPAL LAW.

PLAINTIFF NYC SANITATION WORKER STEPPED ON A LIVE POWER LINE AFTER HIS SUPERVISOR ALLEGEDLY TOLD HIM THE POWER WAS OFF; QUESTION OF FACT WHETHER THERE WAS A SPECIAL DUTY OWED BY THE CITY DEFENDANTS TO THE PLAINTIFF; CITY DEFENDANTS' MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the NYC and NYC Department of Sanitation's motions for summary judgment in this electrocution case should not have been granted. Plaintiff, a NYC sanitation department employee was doing clean up after Hurricane Sandy when he stepped on a live power line. Plaintiff alleged he was told by his supervisor the power had been turned off. The court applied the usual analysis for municipal liability for negligence: (1) the city was engaged in a governmental function; (2) there may have been a special relationship between the city defendants and the plaintiff; (3) it does not appear that a discretionary act was involved such that governmental immunity would apply:

… [T]he City defendants met their prima facie burden of establishing that they were engaged in a governmental function at the time that the causes of action arose … . However, the City defendants failed to establish, prima facie, the absence of a special duty to the plaintiff.

In this case, the plaintiff had an employer-employee relationship with the New York City Department of Sanitation. Therefore, the plaintiff cannot be equated with a member of the general public. It appears from this record that there exists a triable issue of fact as to whether the City defendants voluntarily assumed a duty to the plaintiff beyond what was owed to the public generally that generated the plaintiff's justifiable reliance … .

This Court has applied the doctrine of governmental immunity to an employee of the New York City Department of Sanitation, but in that case, the issue was whether the City of New York engaged in discretionary governmental actions based upon reasoned judgment in selecting equipment … . On this record, it does not appear that this case involves discretionary determinations … . Lewery v City of New York, 2021 NY Slip Op 01035, Second Dept 2-17-21

MUNICIPAL LAW.

THE COUNTY POLICE OFFICER'S STATEMENT TO PLAINTIFF'S DECEDENT TO THE EFFECT SHE HAD NO REASON TO FEEL UNSAFE DID NOT CREATE A SPECIAL RELATIONSHIP; THEREFORE THE COUNTY WAS NOT LIABLE FOR THE SHOOTING DEATH OF PLAINTIFF'S DECEDENT AT THE HANDS OF THE FATHER OF HER YOUNG CHILD (SECOND DEPT).

The Second Department determined the complaint failed to state a cause of action against the county stemming from the shooting death of plaintiff's decedent at the hands of the father of her child (Jenkins). Plaintiff's decedent had repeatedly requested of the county police that Jenkins be arrested and allegedly was told there was no reason for her to feel unsafe. The officer's statement did not create a special relationship with the county such that the county could be held liable:

"Generally, a municipality may not be held liable for the failure to provide police protection because the duty to provide such protection is owed to the public at large, rather than to any particular individual" … . "A narrow exception to the rule exists where a special relationship exists between the municipality and the injured parties" … . The elements of a special relationship are (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) the injured party's justifiable reliance on the municipality's affirmative undertaking … .

Contrary to the plaintiff's contentions, the complaint fails to allege facts that could establish an affirmative undertaking or justifiable reliance on any such undertaking by the defendants … . The complaint alleged that the decedent was told by an officer, weeks before the killing, that the officer "did not see any reason why Mr. Jenkins would hurt [the decedent or her sister] and that there was no reason for them to feel unsafe." This statement, or statements to that effect, which could not be construed as conveying any promise or intention to protect the decedent, are not a basis on

which a special duty may be premised … . Coleman v County of Suffolk, 2021 NY Slip Op 08219, Second Dept 3-17-21

MUNICIPAL LAW.

THE NYPD IS A DEPARTMENT OF THE CITY AND CANNOT BE SEPARATELY SUED; THE 42 USC 1983 CIVIL RIGHTS VIOLATION CAUSE OF ACTION WAS NOT SUPPORTED BY SUFFICIENT ALLEGATIONS OF AN UNCONSTITUTIONAL CITY CUSTOM OR POLICY; THE OTHER CAUSES OF ACTION AGAINST THE CITY FALL BECAUSE THERE WAS PROBABLE CAUSE FOR PLAINTIFF'S ARREST AND THE FORCE USED BY THE POLICE WAS NOT EXCESSIVE UNDER THE CIRCUMSTANCES (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the 42 USC 1983 violation-of-civil rights, negligence, assault and battery, excessive force, false arrest and false imprisonment causes of action against the New York Police Department (NYPD) and New York City (City) should have been dismissed. Plaintiff was shot when, in the midst of a psychotic episode, she approached the police with a knife. She was indicted, tried and found not responsible by reason of mental disease or defect. The court noted that the NYPD is a department of the City and cannot be sued separately. The court also noted the 1983 action against the City failed to state a cause action because no city policy or custom was identified as violating plaintiff's constitutional rights:

To hold a municipality liable under 42 USC § 1983 for the conduct of employees below the policymaking level, a plaintiff must show that the violation of his or her constitutional rights resulted from a municipal custom or policy … . Here, "[a]lthough the complaint alleged as a legal conclusion that the defendants engaged in conduct pursuant to a policy or custom which deprived the plaintiff of certain constitutional rights, it was wholly unsupported by any allegations of fact identifying the nature of that conduct or the policy or custom which the conduct purportedly advanced" … . * * *

The Supreme Court also should have granted that branch of the defendants' motion which was for summary judgment dismissing the false arrest and false imprisonment causes of action insofar as asserted against the City. The existence of probable cause constitutes a complete defense to a cause of action alleging false arrest and false imprisonment … , including causes of action asserted pursuant to 42 USC § 1983 to recover damages for the deprivation of Fourth Amendment rights under color of state law … . Brown v City of New York, 2021 NY Slip Op 01743, Second Dept 3-24-21

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

PANIC.

PLAINTIFF WAS KNOCKED DOWN WHEN MALL SHOPPERS PANICKED AND FLED BECAUSE A FALLING DISPLAY SOUNDED LIKE GUNSHOTS; QUESTIONS OF FACT CONCERNING THE FORESEEABILITY OF THE PANIC AND THE OPPORTUNITY TO CONTROL THE PANIC PRECLUDED SUMMARY JUDGMENT RE THE OWNERS AND SECURITY COMPANY (SECOND DEPT).

The Second Department determined the owners of a shopping mall and the mall security company did not eliminate questions of fact about whether they owed a duty to prevent harm to plaintiff, who was knocked down when shoppers panicked. Apparently security personnel were struggling with a shoplifter when a display of perfume bottles was knocked over causing a crash which apparently sounded like gunshots:

"'Landowners, as a general rule, have a duty to exercise reasonable care to prevent harm to patrons on their property'" … . An owner's duty to control the conduct of persons on its premises arises when it has the opportunity to control such conduct, and is reasonably aware of the need for such control … . The record demonstrates that the mall defendants and AlliedBarton [the security company] had trained employees to handle mall evacuations and active shooters, including a live drill with other employees assuming the role of panicked shoppers. Thus, the mall defendants

did not eliminate all triable issues of fact as to whether it was foreseeable that a disturbance in the mall, like the one caused by the incident with Darby [the alleged shoplifter], could cause a dangerous panic. Furthermore, contrary to the mall defendants' contention, they failed to establish that they had no notice or opportunity to control the panic or the crowd before it reached [the] store [where plaintiff was shopping] and allegedly ultimately caused the plaintiff's injuries. Grogan v Simon Prop. Group, Inc., 2021 NY Slip Op 01396, Second Dept 3-10-21

PRODUCTS LIABILITY.

THE DEFENSE EXPERT SHOULD NOT HAVE BEEN ALLOWED TO OFFER A SPECULATIVE CONCLUSION ABOUT HOW PLAINTIFF WAS INJURED WHICH WAS NOT SUPPORTED BY ANY EVIDENCE IN THE RECORD; PLANTIFF ALLEGED THE STEP STOOL SHE WAS STANDING ON COLLAPSED; THE DEFENSE EXPERT TESTIFIED SHE COULD HAVE FALLEN ONTO THE STOOL; THE DEFENSE VERDICT SHOULD HAVE BEEN SET ASIDE (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the verdict in this products liability case should have been set aside. Plaintiff alleged she was injured when a step stool collapsed as she stood on it. The defendant's expert testified she could have fallen onto the stool. There was no evidence in the record to support the expert's opinion, which was objected to by plaintiff. The defense verdict, therefore, should have been set aside:

Following the accident, one of the injured plaintiff's coworkers discarded the step stool in the trash. At the trial on the issue of liability, the defendant's expert testified, over the plaintiffs' objection, that the injured plaintiff's accident may have occurred because she slipped and fell onto the step stool. Over the plaintiffs' objection, the jury was asked the question: "Did the subject step stool collapse under the [injured] plaintiff while she was standing on it on October 22, 2013, causing the [injured] plaintiff's accident?" The jury answered "No," thereby finding in favor of the defendant on the ground that the accident did not occur as the injured plaintiff said it did. * * *

We agree with the plaintiffs that the evidence so preponderates in favor of the plaintiffs on the issue of whether the subject step stool collapsed as the injured plaintiff stood on it causing her accident, that the jury could not have reached the verdict it did by any fair interpretation of the evidence … . Moreover, the testimony of the defendant's expert that the accident may have happened because the injured plaintiff fell onto the step stool was speculative, lacked support in the record, and should not have been admitted in evidence … . Montesione v Newell Rubbermaid, Inc., 2021 NY Slip Op 01253, Second Dept 3-3-21

REAL PROPERTY ACTIONS AND PROCEEDINGS LAW.

HOMEOWNERS' ASSOCIATIONS IN THE HAMPTONS DEMONSTRATED OWNERSHIP OF THE BEACH TO THE HIGH WATER MARK; THE TOWNS THEREFORE COULD NOT ISSUE PERMITS ALLOWING VEHICLES ON THE BEACH (SECOND DEPT).

The Second Department, reversing Supreme Court in this action to quiet title pursuant to RPAPL Article 15,, determined the homeowners' associations demonstrated ownership of about 4000 feet of beach in the Hamptons on Long Island. Therefore the towns could not allow vehicles to park on the beach:

In an action pursuant to RPAPL article 15, the plaintiff bears the burden of demonstrating, inter alia, the boundaries of the subject property with "common certainty" (see RPAPL 1515[2] …). Here, contrary to the Supreme Court's determination, we find that Seaview, Dunes, Tides, and Whalers established their title claims by a preponderance of the evidence, and that Ocean established its title claim by a preponderance of the evidence with respect to the westernmost portion of its property. At trial, the plaintiffs produced a land title expert who testified to the homeowners associations' chains of title to their respective properties. Specifically, that expert testified, based on documentary evidence, that Seaview, Dunes, Tides, and Whalers owned fee simple title to their respective properties, extending to the mean high-water mark of the Atlantic Ocean. The expert also testified, in relevant part, that Ocean owned fee simple title extending to the mean high-water mark of the Atlantic Ocean, as to the westernmost 400 linear feet of its property. The plaintiffs produced all of the deeds in those respective chains of title, beginning with

the Benson Deed, which is common to all of the homeowners associations' chains of title. Based on the foregoing evidence, the homeowners associations established, to the extent previously indicated, that they owned title in fee simple absolute to the disputed portion of their respective properties (see RPAPL 1515[2] …). Seaview at Amagansett, Ltd. v Trustees of Freeholders & Commonalty of Town of E. Hampton, 2021 NY Slip Op 00584, Second Dept 2-3-21

REAL PROPERTY LAW.

DESPITE AMBIGUITIES IN THE DESCRIPTION OF THE EASEMENT, THE LOCATION CAN BE DETERMINED AND THE EASEMENT IS THEREFORE VALID (SECOND DEPT).

The Second Department, reversing Supreme Court (referee), determined the easement granted to defendants was valid. The easement related to an area which included a stucco wall and a covered wooden deck. The fact that the area may not have been accurately described by metes and bounds did not defeat the validity of the easement:

"In order to create an easement by express grant, plain and direct language must be used which evidences the grantor's intention to permanently give a use of the servient estate to the dominant estate" … . The extent of an easement claimed under a grant is generally determined by the language of the grant … . The fact that the easement grant does not give the precise location of the easement is not fatal to a finding that an easement was intended … . Where the language of the grant is ambiguous or unclear, the court will consider surrounding circumstances tending to show the grantor's intent in creating the easement … .

… [W]here, as here, the language was ambiguous, the Supreme Court should have considered "the surrounding circumstances and the situation of the parties when it was executed" … . The evidence presented at the hearing, which included the testimony of Emily Mazzuoccola [defendant], surveys, and photographs, demonstrated that the grantor intended to grant a perpetual easement with regard to the disputed area of land … containing improvements of a stucco wall and a covered wooden deck. The easement was specifically referenced on a survey dated July 2,

2002. Accordingly, the court should have determined that the subject easement was valid. Marino v Mazzuoccola, 2021 NY Slip Op 08176, Second Dept 2-24-21

REAL PROPERTY LAW.

THE LANGUAGE OF THE EASEMENT CREATED AN AMBIGUITY ABOUT WHETHER THE EASEMENT WAS INTENDED TO BE USED TO ACCESS A PUBLIC ROAD; DEFENDANT'S MOTION TO DISMISS THE COMPLAINT SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the language in an easement indicating it is to be used for agricultural activities "and any use incidental thereto" did not support a finding, at the motion-to-dismiss stage, the easement could be used to access a public road:

"Easements by express grant are construed to give effect to the parties' intent, as manifested by the language of the grant" … . The extent of an easement claimed under a grant is generally limited by the language of the grant, as a grantor may create an extensive or a limited easement" … .

… [T]he plain meaning of the phrase "and any use incidental thereto" contemplates a use incidental to the agricultural activities on easement A, specifically, not agricultural activities outside of easement A. The record contains no evidence demonstrating that the grantor intended to allow the owner of lot 9 to enter easement A for a reason other than to engage in agricultural activities there, and thus, at the very least, there is an ambiguity as to whether [defendant] may use easement A solely as a thoroughfare, warranting denial of its motion to dismiss pursuant to CPLR 3211(a) … . Strong Real Estate, LLC v 55 Town Line, LLC, 2021 NY Slip Op 01280, Second Dept 3-3-21

SLIP AND FALL.

ALTHOUGH THE VILLAGE CODE MADE THE ABUTTING PROPERTY OWNER RESPONSIBLE FOR MAINTAINING THE SIDEWALK, THE CODE DID NOT IMPOSE TORT LIABILITY ON THE ABUTTING PROPERTY OWNER; THE PROPERTY OWNER'S MOTION TO DISMISS THIS SIDEWALK SLIP AND FALL ACTION SHOULD HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the abutting property owner (Khadu) was not liable in this sidewalk slip and fall case. Although the village code made the abutting property owner responsible for maintenance of the sidewalk, it did not impose tort liability on the property owner:

"Generally, liability for injuries sustained as a result of negligent maintenance of or the existence of dangerous [or] defective conditions to public sidewalks is placed on the municipality and not the abutting landowner" … . "An abutting landowner will be liable to a pedestrian injured by a defect in a public sidewalk only when the owner either created the condition or caused the defect to occur because of a special use, or when a statute or ordinance places an obligation to maintain the sidewalk on the owner and expressly makes the owner liable for injuries caused by a breach of that duty" … .

Here, the evidentiary material submitted by Khadu in support of his motion established as a matter of law that the plaintiffs had no cause of action against him. Khadu demonstrated that he did not create the alleged condition or cause the condition through a special use of the sidewalk. Additionally, although section 180-2 of the Code of the Village of Freeport requires an abutting landowner to keep a sidewalk in good and safe repair, it does not specifically impose tort liability for a breach of that duty … . Daniel v Khadu, 2021 NY Slip Op 00291, Second Dept 1-20-21

SLIP AND FALL.

BECAUSE THERE WAS NO PROOF WHEN THE STAIRWAY IN THIS SLIP AND FALL CASE WAS CONSTRUCTED, THE JURY SHOULD NOT HAVE BEEN INSTRUCTED ON THE BUILDING CODE PROVISION; DEFENSE VERDICT REVERSED AND NEW TRIAL ORDERED (SECOND DEPT).

The Second Department, reversing the defendant's judgment after trial in this slip and fall case, determined the jury should not have been instructed to consider a building code provision because there was not proof when the stairway was constructed:

We agree with the defendant that the Supreme Court should not have charged the jury with regard to certain provisions of the 1925 Administrative Code of the City of New York (hereinafter the Building Code). The plaintiffs failed to submit sufficient proof to establish when the subject stairway was constructed. Thus, the plaintiffs failed to establish which version of the Building Code was applicable … .

Since a general verdict sheet was submitted to the jury, we cannot ascertain whether the jury's verdict was predicated on a finding that the defendant violated the 1925 Building Code. Accordingly, the judgment must be reversed, and the matter remitted to the Supreme Court, Kings County, for a new trial on the issue of liability. Coreano v 983 Tenants Corp., 2021 NY Slip Op 00290, Second Dept 1-20-21

SLIP AND FALL.

DESPITE A SMALL HOME OFFICE, DEFENDANT WAS ENTITLED TO THE LIABILITY EXEMPTION FOR OWNER-OCCUPIED RESIDENCES IN THIS SIDEWALK SLIP AND FALL CASE (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendant property owner's motion for summary judgment in this sidewalk slip and fall case should have been granted. The NYC Administrative Code exempts abutting owner-occupied residential properties from liability. The fact that defendant had a small

office where he edited photos did not change the purely residential nature of the property:

In 2003, the New York City Council enacted section 7-210 of the Administrative Code of the City of New York to shift tort liability for injuries resulting from defective sidewalks from the City to abutting property owners … . This liability shifting provision does not, however, apply to "one-, two- or three-family residential real property that is (i) in whole or in part, owner occupied, and (ii) used exclusively for residential purposes" … . "The purpose of the exception in the Code is to recognize the inappropriateness of exposing small-property owners in residence, who have limited resources, to exclusive liability with respect to sidewalk maintenance and repair" … .

Here, the appellant established, prima facie, that he was exempt from liability pursuant to the subject Code exception, and no triable issue of fact was raised in opposition. The appellant's partial use of a room in his single-family home as an office to edit some photos in relation to his infrequent paid photography ventures was merely incidental to his residential use of the property … . The appellant was a retired photographer, and on occasion he would edit photos on his home computer in relation to two or three paid party photography jobs he did per year. The appellant did not claim a "home office" tax deduction, nor did he use this space in his home to edit these photos with any regularity. Zak v City of New York, 2021 NY Slip Op 01287, Second Dept 3-3-21

SLIP AND FALL.

IN A SLIP AND FALL CASE, PROOF OF A GENERAL CLEANING AND INSPECTION POLICY DOES NOT DEMONSTRATE A LACK OF CONSTRUCTIVE NOTICE OF THE DANGEROUS CONDITION (SECOND DEPT).

The Second Department determined defendant's motion for summary judgment in this slip and fall case should not have been granted. Evidence of a general cleaning and inspection policy does not demonstrate the lack of constructive notice of the dangerous condition:

The defendant also failed to show, prima facie, that it did not have constructive notice of the condition that the plaintiff alleged caused her to fall. “To meet its initial burden on the issue of lack of constructive notice, the defendant must offer some evidence as to when the area in question was last cleaned or inspected relative to the time when the plaintiff fell” … . Although the defendant submitted the transcript of the deposition testimony of the individual who was the managing partner of the restaurant at the time of the accident, the manager testified only as to the restaurant’s general cleaning and inspection policy and not about any inspections that may have occurred prior to the plaintiff’s fall. Piotrowski v Texas Roadhouse, Inc., 2021 NY Slip Op 02000, Second Dept 3-31-21

SLIP AND FALL.

PLAINTIFF ALLEGED SHE TRIPPED ON A TWIG ON THE SIDEWALK WHICH WAS NOT ADEQUATELY ILLUMINATED; DEFENDANT, IN HER MOTION FOR SUMMARY JUDGMENT, DID NOT DEMONSTRATE A LACK OF CONSTRUCTIVE NOTICE OF THE CONDITIONS OR THAT THE CONDITIONS WERE NOT A PROXIMATE CAUSE OF THE FALL; DEFENDANT’S MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN DENIED WITHOUT CONSIDERING THE OPPOSING PAPERS (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the defendant property owner’s motion for summary judgment in this slip and fall case should not have been granted. Plaintiff alleged she tripped on a twig on the sidewalk in an area which was not adequately illuminated. The defendant, in her motion papers, did not demonstrate she lacked constructive notice of the conditions or that the conditions were not a proximate cause of the fall:

A property owner, or a party in possession or control of real property, has a duty to maintain the property in a reasonably safe condition … . “In a premises liability case, a defendant [real] property owner, or a party in possession or control of real property, who moves for summary judgment has the initial burden of making a prima facie showing that it neither created the alleged defective condition nor had actual or constructive notice of its existence” … . A defendant has constructive notice of a

hazardous condition on property when the condition is visible and apparent, and has existed for a sufficient length of time to afford the defendant a reasonable opportunity to discover and remedy it … .

Here, the defendant failed to establish, prima facie, that she lacked constructive notice of the alleged dangerous conditions—to wit, the twig on the sidewalk and inadequate lighting on the premises, or that these conditions were not a proximate cause of the plaintiff's fall … . Since the defendant failed to meet her initial burden as the movant, the Supreme Court should have denied the defendant's motion for summary judgment dismissing the complaint, regardless of the sufficiency of the plaintiff's opposition papers … . Wittman v Nespola, 2021 NY Slip Op 00454, Second Dept 1-27-21

SLIP AND FALL.

PLAINTIFF, AN EXTERMINATOR, WAS IN THE ATTIC OF DEFENDANT'S HOUSE; THE ATTIC HAD NO FLOOR AND THE PLAINTIFF WALKED ON THE BEAMS OR JOISTS; THE PLAINTIFF TESTIFIED HE STEPPED ON A SMALLER PIECE OF WOOD LYING ACROSS THE BEAMS, IT GAVE WAY AND HIS LEG WENT THROUGH THE CEILING; THE 2ND DEPARTMENT, OVER A TWO-JUSTICE DISSENT, DETERMINED THERE WAS NO EVIDENCE THE SMALLER BOARD WAS A LATENT DEFECT OR THAT DEFENDANT HAD NOTICE OF ANY DEFECT, SET ASIDE THE PLAINTIFF'S VERDICT AND DISMISSED THE COMPLAINT (SECOND DEPT).

The Second Department, reversing Supreme Court, over a two-justice dissent, determined defendant's motion to set aside the plaintiff's verdict and dismiss the complaint should have been granted. Plaintiff, an exterminator, went into defendant's attic which apparent had no floor, only the beams or joists. Plaintiff testified that there were some smaller boards lying across the joints. According to the plaintiff, when he stepped on one of the smaller boards it gave way and his leg went through the ceiling:

"[T]he issue of whether a hazard is latent or open and obvious is generally fact-specific and thus usually a jury question" … . However, in order to meet his prima

facie burden of proof at trial, the plaintiff was required to submit sufficient evidence to enable the jury to decide this critical issue in a logical manner, based on the inferences to be drawn from the evidence, rather than through sheer speculation or guesswork … . Here, the evidence showed that the main beams were part of the structure of the house, but the function of the smaller pieces of wood was never really made clear, except that the plaintiff offered that they may have been intended to hold the insulation in place. In fact, the jury heard next to nothing about the smaller piece of wood that allegedly caused the plaintiff to fall. There were no pictures of it, no testimony regarding its dimensions, no evidence as to whether such a smaller piece of wood would ordinarily be safe to walk on, no evidence as to whether the smaller piece of wood even appeared reasonably safe to walk on, and no evidence that the smaller piece of wood was in a rotted, deteriorated, or otherwise unsafe condition, other than the plaintiff's testimony that it looked "discolored" and "pretty damp."

Viewing the evidence in the light most favorable to the plaintiff, and affording him every favorable inference which may properly be drawn from the facts presented, there was simply no rational basis upon which the jury could determine, without speculating, that the smaller piece of wood that allegedly caused the plaintiff to fall constituted a latent hazard due to its alleged rotted condition … . Saintume v Lamattina, 2021 NY Slip Op 02004, Second Dept 3-31-21

SLIP AND FALL.

PLAINTIFF'S EXPERT SHOULD HAVE BEEN ALLOWED TO TESTIFY IN THIS SLIP AND FALL CASE; NEW TRIAL ORDERED (SECOND DEPT).

The Second Department, reversing the defendants' verdict in this slip and fall case, determined plaintiff's expert should have been allowed to testify:

The plaintiff Wendy Robins (hereinafter the injured plaintiff) fell after stepping onto a curb adjacent to an unfinished driveway apron leading to an underground parking garage in a condominium building that was under construction … . …

“[E]xpert opinion is proper when it would help to clarify an issue calling for professional or technical knowledge, possessed by the expert and beyond the ken of the typical juror” … . The admissibility and scope of expert testimony is a determination within the discretion of the trial court … .

Here, the Supreme Court improvidently exercised its discretion in precluding the testimony of the plaintiffs’ proposed expert witness as to industry safety standards relating to the construction of sidewalks … . Contrary to the defendants’ contention, the record shows no appreciable difference between the unfinished driveway apron where the injured plaintiff fell, which was left open to pedestrians, and the adjoining unfinished sidewalks, which were barricaded by a fence and barrels. Moreover, the absence of a violation of a specific code or ordinance is not dispositive of the plaintiffs’ allegations based on common-law negligence principles … . Had the plaintiffs’ expert been permitted to testify, he could have addressed whether, under the circumstances presented, the defendants’ failure to barricade the driveway apron or otherwise warn pedestrians of its unfinished condition was a departure from generally accepted customs and practices and whether the defendants were negligent in failing to do so … . Robins v City of Long Beach, 2021 NY Slip Op 01277, Second Dept 3-3-21

SLIP AND FALL.

PROOF OF A REGULAR SNOW REMOVAL ROUTINE IS NOT ENOUGH TO DEMONSTRATE A LACK OF ACTUAL OR CONSTRUCTIVE NOTICE OF THE CONDITION OF THE SIDEWALK AT THE TIME OF THE SLIP AND FALL (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendant lessee (E & Z) failed to demonstrate it did not have actual or constructive notice of the alleged ice and snow on the sidewalk in this slip and fall action. Once again, it was not enough to offer proof of routine snow removal procedures as opposed to specific evidence inspection or cleaning close in time to the fall:

… [T]here was no statute or ordinance which imposed tort liability on E & Z for the failure to maintain the sidewalk abutting the subject property. However, E & Z’s

principal, Hikmatullah Rasul, testified at his deposition that E & Z was required to remove snow and ice from the sidewalk outside the subject property to the curb on both the Jamaica Avenue side and the 104th Street side. Rasul explained that when it snowed either he, his brother, or a restaurant employee would shovel snow, break up any ice, and apply salt. E & Z did not clean at the bottom of the train staircase as that was not its property.

In support of its motion for summary judgment, E & Z failed to establish its prima facie entitlement to judgment as a matter of law dismissing the complaint and all cross claims insofar as asserted against it by demonstrating that it was free from negligence … . Specifically, E & Z failed to eliminate triable issues of fact as to whether it undertook snow and ice removal efforts to clear the sidewalk on the night of the plaintiff's fall, or whether any snow and ice removal efforts undertaken by it created or exacerbated the icy condition which allegedly caused the plaintiff's fall … . Since E & Z failed to establish its prima facie entitlement to judgment as a matter of law, the Supreme Court should have denied E & Z's motion for summary judgment dismissing the complaint and all cross claims insofar as asserted against it. Zamora v David Caccavo, LLC, 2021 NY Slip Op 00329, Second Dept 1-20-21

SLIP AND FALL.

RARE CASE WHERE EVIDENCE OF A ROUTINE PROCEDURE FOR KEEPING A PARKING LOT FREE OF ICE AND SNOW, COMBINED WITH PLAINTIFF'S TESTIMONY, SUPPORTED SUMMARY JUDGMENT IN DEFENDANTS' FAVOR IN THIS SLIP AND FALL CASE (SECOND DEPT).

The Second Department held that evidence of a routine procedure for keeping the parking lot free of ice and snow, together with the plaintiff's testimony she did not see any ice on the parking lot when she arrived at work on the day of the fall, supported summary judgment in defendants' favor in this slip and fall case:

The plaintiff testified that she worked at the premises five days a week, typically from 9:00 a.m. to 5:00 p.m., and that she either came to the premises by car pool or driving herself. The plaintiff indicated that she had not seen any runoff of melting

snow or ice from snow piles in the parking lot to the area where she allegedly fell prior to or on the date of the accident. The plaintiff further testified that during the morning of January 20, 2011, she parked her car at the premises and did not notice any ice on the parking lot surface at that time. The plaintiff indicated that when she left work shortly after 6:00 p.m., she "look[ed] down at the ground" while walking to her car, and she did not see the ice on which she slipped, which she described as being clear, until after she fell. Further, Mauricio Pacheco, a maintenance worker for [defendant] RXR, testified that he checked the parking lot every morning, and if any ice was present, he would have salted the area. Pacheco indicated that if the temperature dropped below freezing or there was any precipitation later in the day, he would have again checked the parking lot for ice. Pacheco also testified that lighting for the parking lot turned on automatically at 6:00 p.m., and that he checked to make sure the lighting was working every morning. Zimmer v County of Suffolk, 2021 NY Slip Op 00331, Second Dept 1-20-21

SLIP AND FALL.

THE CITY DID NOT HAVE WRITTEN NOTICE OF THE SIDEWALK/CURB DEFECT IN THIS SLIP AND FALL CASE BECAUSE THE DEFECT DID NOT APPEAR ON THE BIG APPLE MAP WHICH HAD BEEN SERVED ON THE CITY, DESPITE THE APPARENT EXISTENCE OF ANOTHER BIG APPLE MAP WHICH SHOWED THE DEFECT BUT WAS NOT SHOWN TO HAVE BEEN SERVED ON THE CITY (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the Big Apple map demonstrated the city did not have prior written notice of the sidewalk/curb defect where plaintiff allegedly slipped and fell, despite the apparent existence of another Big Apple map which showed the defect but was not shown to have been served on the city (NYC):

Maps prepared by Big Apple Pothole and Sidewalk Protection Committee, Inc. (hereinafter Big Apple), and filed with the Department of Transportation serve as prior written notice of defective conditions depicted thereon … . Where a plaintiff

relies on a Big Apple map, the map served on the City closest in time prior to the subject accident is controlling … .

Here, the City met its prima facie burden by proffering evidence that the most recent Big Apple map served on it did not show the defect and that it had not received any other prior written notice of the allegedly defective condition … . Although the plaintiff produced a competing Big Apple map which purportedly showed the defect, that map was not accompanied by any evidence showing when it had been served on the City. Abdullah v City of New York, 2021 NY Slip Op 01377, Second Dept 3-10-21

TAX LAW.

PLAINTIFF IN THIS TAX LIEN FORECLOSURE ACTION DID NOT DEMONSTRATE DEFENDANT WAS PROPERLY SERVED WITH THE NOTICE TO REDEEM; THEREFORE PLAINTIFF WAS NOT ENTITLED TO ATTORNEY'S FEES FROM THE DEFENDANT (SECOND DEPT).

The Second Department determined plaintiff was not entitled to attorney's fees in this tax lien foreclosure action because plaintiff did not demonstrate defendant was properly served with the notice to redeem:

Pursuant to Nassau County Administrative Code § 5-51.0(c), prior to the commencement of this action, the plaintiff was required to serve the defendant with a notice to redeem "by personal service, as defined in the Civil Practice Law and Rules of the State of New York" (see Nassau County Administrative Code § 5-51.0[a]). Here, the plaintiff purportedly served the defendant with the notice to redeem by "nail and mail" service (see CPLR 308[4]). However, contrary to the plaintiff's contention, this service was ineffective, as the plaintiff failed to exercise the requisite due diligence in first attempting to serve the defendant pursuant to CPLR 308(1) or (2) … .

Where, as here, a plaintiff fails to properly serve the notice to redeem prior to commencing a foreclosure action, the plaintiff is precluded from recovering attorney's fees from the person to whom the notice was required to be sent, provided

that the person “offers to pay the penalties allowed by law at any time before final judgment is entered” (Nassau County Administrative Code § 5-51.0[f]). Here, the defendant offered to pay the penalties allowed by law in a letter … , nearly one month prior to entry of the final judgment … . DBW TL Holdco 2014, LLC v Kirk, 2021 NY Slip Op 00543, Second Dept 2-3-21

TRAFFIC ACCIDENTS.

THE SNOWPLOW DRIVER DID NOT VIOLATE THE “RECKLESS DISREGARD” STANDARD IN THIS TRAFFIC ACCIDENT CASE (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the reckless disregard standard applied in this traffic accident case involving a municipal snowplow:

“A snowplow operator ‘actually engaged in work on a highway’ is exempt from the rules of the road and may be held liable only for damages caused by an act done in ‘reckless disregard for the safety of others’” … . Reckless disregard requires more than a momentary lapse in judgment … . “This requires a showing that the operator acted in conscious disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow” … .

Oviedo-Mejia [the snowplow driver] testified that he was traveling in reverse at a speed of five to seven miles per hour with the lights and beeping alert of the snowplow vehicle activated. Oviedo-Mejia testified that he kept looking in the mirrors as the snowplow vehicle was moving in reverse, but he did not see the plaintiff prior to the alleged impact. Under the circumstances, the defendants demonstrated, prima facie, that Oviedo-Mejia did not act with reckless disregard for the safety of others … . Kaffash v Village of Great Neck Estates, 2021 NY Slip Op 00159, Second Dept 1-13-21

TRUSTS AND ESTATES.

BECAUSE PETITIONER-WIFE DID NOT COMPLY WITH THE RELEVANT PROVISIONS OF THE EPTL, SHE WAS NOT ENTITLED TO HER ELECTIVE SHARE OF HER DECEASED HUSBAND'S DEATH BENEFIT (SECOND DEPT).

The Second Department, reversing Supreme Court, determined petitioner-wife was not entitled to her elective share of her deceased husband's death benefit from the New York City Employees' Retirement System (NYCERS). Her husband's father was the named beneficiary. Because petitioner did not comply with the relevant provisions of the Estate, Powers and Trusts Law (EPTL), NYCERS was justified in distributing the funds to her husband's father:

A surviving spouse's election to take a share of the decedent's estate "must be made within six months from the date of issuance of letters testamentary or of administration, as the case may be, but in no event later than two years after the date of decedent's death" (EPTL 5-1.1-A[d][1]). A surviving spouse must file written notice of such election in the Surrogate's Court that issued the letters testamentary or of administration (see EPTL 5-1.1-A[d][1]).

The provisions of EPTL 5-1.1-A(b) "shall not prevent a corporation or other person from paying or transferring any funds or property to a person otherwise entitled thereto, unless there has been served personally upon such corporation or other person a certified copy of an order enjoining such payment or transfer made by the surrogate's court having jurisdiction of the decedent's estate or by another court of competent jurisdiction" (EPTL 5-1.1-A[b][4] …]). EPTL 5-1.1-A(b)(4) further provides that a "corporation or other person paying or transferring any funds or property described in clause (G) of subparagraph one of this paragraph," which includes death benefits, "to a person otherwise entitled thereto, shall be held harmless and free from any liability for making such payment or transfer, in any action or proceeding which involves such funds or property."

Here, it is undisputed that the petitioner did not serve NYCERS with an order enjoining it from paying the entirety of the decedent's death benefit to the named beneficiary, Ghulam. Accordingly, pursuant to EPTL 5-1.1-A(b)(4), NYCERS

"shall be held harmless and free from any liability for making such payment" in the instant proceeding. Matter of Baig, 2021 NY Slip Op 01763, Second Dept 3-24-21

TRUSTS AND ESTATES.

THE PETITIONER'S MOTION FOR SUMMARY JUDGMENT DISMISSING THE OBJECTIONS TO PROBATE ALLEGING LACK OF DUE EXECUTION AND UNDUE INFLUENCE SHOULD HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Surrogate's Court, determined the petitioner's motion for summary judgment dismissing the objections to probate alleging lack of due execution and undue influence should have been granted. The objectants were the children of decedent's son, who were excluded from any distribution from the estate. With respect to lack of due execution, the court wrote:

"The proponent of a will has the burden of proving that the propounded instrument was duly executed in conformance with the statutory requirements" … . "Where the will is drafted by an attorney and the drafting attorney supervises the will's execution, there is a presumption of regularity that the will was properly executed in all respects" … . Although the evidence here did not establish that the execution of the will was supervised by an attorney, "a presumption of compliance with the statutory requirements also arises where a propounded will contains an executed attestation clause and a self-proving affidavit" … . Further, "even where the memory of both attesting witnesses is failed or imperfect, a will nevertheless may be admitted to probate" … .

Here, the petitioner established, prima facie, that the 2010 will was duly executed pursuant to EPTL 3-2.1 by submitting a copy of the 2010 will with its executed attestation clause and self-proving affidavit … . At their depositions, both attesting witnesses, who were employees of the drafting attorney's law office, identified their signatures as witnesses to the 2010 will … . Both attesting witnesses testified as to the office's general practice for will executions, which met the statutory requirements. In opposition, the objectants failed to raise a triable issue of fact. Matter of Michels, 2021 NY Slip Op 01978, Second Dept 3-31-21

UNIFORM COMMERCIAL CODE (UCC).

EVEN THOUGH PLAINTIFF MAY HAVE ACCEPTED DEFECTIVE GOODS WITHIN THE MEANING OF THE UCC, THE UCC PROVIDES REMEDIES, INCLUDING THE RIGHT TO BE MADE WHOLE AND THE RIGHT TO REVOKE THE ACCEPTANCE; PLAINTIFF'S VERDICT SHOULD NOT HAVE BEEN SET ASIDE (SECOND DEPT).

The Second Department, in a full-fledged opinion by Justice Christopher, reversing Supreme Court, determined the verdict should not have been set aside in this consumer law case. Plaintiff ordered kitchen cabinets. When they arrived one box was opened by defendant-seller's representative to confirm the color. Plaintiff then signed a "Completion Certificate" which indicated the cabinets had been found satisfactory. In fact the cabinets were not satisfactory as revealed when they were installed. The Second Department noted that, although under the UCC plaintiff, based on the "Completion Certificate," could not reject the goods, the UCC provides that she could be made whole, and, in fact, could revoke her acceptance, in addition to other available remedies. Therefore plaintiff's verdict awarding $30,000 should not have been set aside:

"Acceptance of goods by the buyer precludes rejection of the goods accepted" (UCC 2-607[2]; see Comment 2). However, "acceptance does not of itself impair any other remedy provided by [article 2 of the UCC] for non-conformity" (UCC 2-607[2] …). "Thus, 'acceptance leaves unimpaired the buyer's right to be made whole, and that right can be exercised by the buyer not only by way of cross-claim for damages, but also by way of recoupment in diminution or extinction of the [purchase] price'" … . …

Moreover, after the buyer has accepted allegedly non-conforming goods, the buyer may revoke acceptance of the goods under certain limited circumstances and "obtain the same remedies as are available upon rejection" … . …

… [E]ven if the jury found that the plaintiff did not properly revoke her acceptance of the cabinets, the jury could have found that the plaintiff was entitled to other remedies pursuant to UCC 2-607 … .

… [T]he jury's verdict that … the defendant breached their contract with the plaintiff, breached the implied warranty of fitness, and that the plaintiff was entitled to damages in the amount of $30,000 was supported by a valid line of reasoning and permissible inferences from the evidence at trial … . Campbell v Bradco Supply Co., 2021 NY Slip Op 01745, Second Dept 3-24-21

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