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An Organized Compilation of the Summaries of Selected Decisions Released the Week of April 19 – 23, 2021, by the First, Second and Third Departments Which Were Posted on the New York Appellate Digest Website on Monday, April 26, 2021. The Entries in the Table of Contents Link to the Summaries Which Link to the Decisions on the Official New York Courts Website. Click on "Table of Contents" in the Header on Any Page to Return There. Right Click to Open the Decisions in a New Tab (So You Don't Lose Your Place in the Newsletter).

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ARBITRATION.

THE ARBITRATORS' AWARD IN THIS RELIGIOUS DIVORCE PROCEEDING WAS NOT INVALID BECAUSE THE ARBRITRATORS DID NOT STATE THE REASONS FOR THE AWARD, AND THE AWARD WAS NOT INDEFINITE AND NONFINAL; SUPREME COURT SHOULD NOT HAVE VACATED THE AWARD (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the arbitration award should not have been vacated. The award, issued by a rabbinical tribunal in a religious divorce proceeding, required the respondent to arrange for the religious divorce (a Get) and required petitioner to accept the religious divorce. A lump sum award and maintenance of $10,000 per month was to be held in escrow until the Get is accepted. Supreme Court held the award was indefinite or nonfinal and the arbitrators failed to state the reasons for the award:

Contrary to the conclusion of the Supreme Court, the arbitrators were not required to give reasons for their arbitration award … . Further, the arbitration award did not leave the parties unable to determine their rights and obligations, resolved the controversy before the arbitrators, and did not create a new controversy; therefore, the arbitration award was not indefinite or nonfinal for purposes of CPLR 7511 … . The respondent's obligation to pay maintenance continued because he failed to arrange for issuance of a Get and termination of the marriage—not because the terms of the arbitration award were not definite. Matter of Rokeach v Salamon, 2021 NY Slip Op 02393, Second Dept 4-21-21

CONTRACT LAW, TRUSTS AND ESTATES.

IT IS NOT CLEAR FROM THE CONTRACT WHETHER DEFENDANT TRUSTEE WAS TO PERFORM A MERELY MINISTERIAL FUNCTION OR A GATEWAY FUNCTION IN ACCEPTING ASSETS FOR THE TRUST FROM A NONPARTY WHICH WAS ACTING FRAUDULENTLY; THERE ARE QUESTIONS OF FACT ABOUT WHETHER THE DAMAGES ASSOCIATED WITH ACCEPTING NON-NEGOTIABLE ASSETS WERE DIRECT OR INDIRECT AND WHETHER A FIDUCIARY DUTY WAS BREACHED (FIRST DEPT).

The First Department, in a full-fledged opinion by Justice Mazzarelli, reversing Supreme Court, determined the breach of contract, breach of fiduciary duty action against defendant trustee, Wilmington, should not have been dismissed. Wilmington acted as a trustee for assets transferred to the trust by a nonparty. The contract stated Wilmington would be responsible only for its own negligence but also stated no non-negotiable assets were to be placed into the trust. The nonparty which transferred assets to the trust acted fraudulently and made risky investments rendering the trust assets out-of-compliance with state law. Plaintiff sued Wilmington for breach of contract and breach of fiduciary duty. Wilmington argued that any damages suffered by plaintiff from the assets transferred by the nonparty were indirect, not direct, and therefore barred by the trust agreements:

… [I]t can be argued that, in light of Wilmington's promise not to accept nonnegotiable assets into the trusts, and to be responsible for its own negligence, maintaining the value of the assets in the trusts was inherent in the service Wilmington agreed to provide. Thus, there is merit to plaintiffs' argument that when the assets proved not to be negotiable, they lost the benefit of their bargain and were entitled to recover as direct damages the diminution in value, and the concomitant costs of restoring the assets to negotiable status, such as professional fees. * * *

… [A]t this stage of the litigation, it is difficult to discern whether the parties contemplated that Wilmington would have to pay the damages sought by plaintiffs if it failed to perform under the trust agreements. Again, the agreements provided that Wilmington would be liable for "its own negligence," which a reasonable factfinder could consider as recognition that Wilmington, if it did not perform its duties in accordance with a minimum level of care, would need to pay more than the nominal damages represented by its fee. * * *

Even though the breach of contract and breach of fiduciary duty claims involved the same conduct, the fiduciary duty claim alleges a breach of a noncontractual duty relating to the trustee's independent duty to perform nondiscretionary ministerial duties with respect to the negotiability of assets. Thus, the fact that Wilmington's

failure to prevent nonnegotiable assets from entering the trusts breached both fiduciary and contractual duties does not bar plaintiffs from seeking damages related to the former … . Bankers Conseco Life Ins. Co. v Wilmington Trust, N.A., 2021 NY Slip Op 02355, First Dept 4-20-21

CRIMINAL LAW, APPEALS.

APPEAL HELD AND MATTER REMITTED TO ALLOW DEFENDANT TO MOVE TO VACATE HIS GUILTY PLEA ON THE GROUND HE WAS NOT INFORMED OF THE DEPORTATION CONSEQUENCES (SECOND DEPT).

The Second Department held the appeal in abeyance and remitted the matter to give defendant the opportunity to move the vacate his guilty plea on the ground he was not informed of the possibility he would be deported based on his plea:

"A defendant seeking to vacate a plea based on this failure must demonstrate that there is a 'reasonable probability' that he or she would not have entered a plea of guilty and would instead have gone to trial had the court warned of the possibility of deportation" … . Here, in the absence of the warning required under People v Peque (22 NY3d at 176), we remit the matter to the Supreme Court, Queens County, to afford the defendant an opportunity to move to vacate his plea, and thereafter for a report to this Court limited to the Supreme Court's findings with respect to whether the defendant has moved to vacate his plea of guilty and whether he has established his entitlement to the withdrawal of his plea. Any such motion shall be made by the defendant within 60 days after the date of this decision and order, and, upon such motion, the defendant will have the burden of establishing that there is a "reasonable probability" that he would not have pleaded guilty had the court advised him of the possibility of deportation … . We hold the appeal in abeyance pending receipt of the Supreme Court's report. We express no opinion as to the merits of the defendant's motion, should he make one … . People v Torres, 2021 NY Slip Op 02424, Second Dept 4-21-21

CRIMINAL LAW, ATTORNEYS, EVIDENCE.

AT THE HEARING ON DEFENDANT'S MOTION TO VACATE HIS CONVICTION, DEFENDANT PRESENTED SEVERAL WITNESSES WHO SUPPORTED HIS ALIBI DEFENSE; DEFENSE COUNSEL HAD BEEN MADE AWARE OF THE WITNESSES BUT FAILED TO INVESTIGATE; THERE CAN BE NO STRATEGIC JUSTIFICATION FOR SUCH A FAILURE; DEFENDANT'S CONVICTION SHOULD HAVE BEEN VACATED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendant's motion to vacate his conviction based upon ineffective of counsel should have granted. Although defendant did not demonstrate "actual innocence," the defendant presented several witnesses who testified defendant had left the party before the shooting and defendant's hair was short, not braided, at the time of the shooting. The perpetrator was described as having braids:

Although a defendant claiming ineffective representation "bears the ultimate burden of showing . . . the absence of strategic or other legitimate explanations for counsel's challenged actions" … , "[i]t simply cannot be said that a total failure to investigate the facts of a case, or review pertinent records, constitutes a trial strategy resulting in meaningful representation" … . Here, the failure by the defendant's trial counsel to contact and interview these witnesses cannot be characterized as a legitimate strategic decision since, without collecting that information, counsel could not make an informed decision as to whether the witnesses' evidence might be helpful at trial … . The fact that some of these witnesses had criminal records does not excuse trial counsel's failure to investigate since a witness's "'unsavory background[ ]' does not render his or her 'testimony incredible as a matter of law,'" particularly since the People regularly rely on witnesses with criminal backgrounds, and did so in this case … . Moreover, even if the witnesses' criminal records provided a strategic basis for choosing not to present their testimony, it does not provide an excuse for counsel's failure to investigate them as possible witnesses … . People v Davis, 2021 NY Slip Op 02408, Second Dept 4-21-21

CRIMINAL LAW, ATTORNEYS.

DEFENSE COUNSEL EXPLAINED HIS STRATEGIES BEHIND WAIVING THE HUNTLEY HEARING AND REFRAINING FROM CONSULTING AND PRESENTING EXPERTS IN THE DEFENDANT'S FIRST DEGREE RAPE TRIAL; THEREFORE DEFENDANT'S MOTION TO VACATE HIS CONVICTION ON INEFFECTIVE ASSISTANCE GROUNDS WAS PROPERLY DENIED (THIRD DEPT).

The Third Department, over a dissent, determined that defense counsel, at the hearing on defendant's motion to vacate his conviction on ineffective assistance grounds, adequately explained the strategic reasons for waiving the Huntley hearing and not consulting experts in this first degree rape case. Defendant was charged with having sex with a woman who was incapable of consent due to intoxication. Defendant was not read his Miranda rights until well into the police interrogation:

In support of his belief that the admission of the statements would be beneficial, counsel explained that defendant had maintained throughout the interview that the victim was an active and willing participant in the sexual encounter and that, if the statements were suppressed, the jury would only hear about the changes that defendant had made to his story when, as expected, he testified at trial and was cross-examined about them … . In contrast, if the entire interview were put into evidence with appropriate redactions, the defense would benefit from having the jury repeatedly hear defendant's exculpatory version of events and be assured that almost all of his account had remained consistent over time. Counsel further believed that any damage caused by the jury seeing defendant walk back aspects of his story could be ameliorated, reasoning that jurors could be persuaded to sympathize with a "desperate" and "confused" defendant who wavered on a few points after prolonged, increasingly hostile questioning, but remained "adamant that everything that had just happened was consensual and [that the victim] was awake for it." …

… [A]lthough defendant complains that counsel failed to consult with experts or present their testimony to rebut proof related to the victim's sexual assault examination, her degree of intoxication and the presence of defendant's genetic material in her anus, the hearing evidence reflected that counsel "had a strategic reason for [that] failure" … . … A finding that the victim was alert and willing would have … resulted in defendant's acquittal on all charges, and counsel made the tactical decision to focus on that issue to the exclusion of murkier battles over whether the alleged anal sexual conduct had occurred or whether some of the conclusions drawn by the People's experts were open to question. Counsel explained that he chose that course because of emotionally charged testimony from the victim, the sexual assault nurse examiner and others, all of whom he realized posed

a real danger of inflaming the sympathies of the jury against defendant. As such, counsel viewed it as essential to present a narrowly tailored defense that kept the jury "singl[ed] in on" concrete facts pointing to the victim as an active participant in the sexual encounter. People v Sposito, 2021 NY Slip Op 02441, Third Dept 4-21-21

CRIMINAL LAW, EVIDENCE.

ALTHOUGH THE MOLINEUX EVIDENCE OF TWO PRIOR BURGLARIES WAS RELEVANT TO THE DEFENDANT'S INTENT TO BURGLARIZE THE BUILDING IN WHICH HE WAS FOUND BY THE POLICE, THE EXTENSIVE, DETAILED EVIDENCE OF THE PRIOR BURGLARIES RENDERED THE EVIDENCE TOO PREJUDICIAL, CONVICTION REVERSED (FIRST DEPT).

The First Department, reversing defendant's attempted burglary conviction, determined the Molineux evidence of two prior burglaries to demonstrate intent, although admissible in principle, was too extensive and detailed to the extent its probative value was outweighed by its prejudicial effect. Defendant was seen by a tenant in a private area where the apartment fire escapes could be accessed. When the police arrived defendant told them he used that area to smoke marijuana while waiting for his girlfriend to get off work. The evidence of two prior burglary convictions was introduced to prove the defendant's intent (to commit burglary):

We find however, that the trial court improvidently exercised its discretion in allowing the People to introduce such a significant quantum of evidence regarding the two burglaries. The trial court permitted the People to call three witnesses to testify regarding the prior two burglaries: the tenant of the apartment that had been burglarized, the investigating police officer and the building's owner. … The court allowed the introduction of still photographs of the burglarized apartment and building. The court also allowed the introduction of a surveillance video from the February 2011 incident and allowed the building owner to testify about the video. That video depicts a male individual standing outside of the locked front door of the building. The male is seen kicking the door several times until the door breaks open. The male is then seen entering the building, ascending the stairway toward the roof, and, after apparently finding the door locked, the male is seen coming back downstairs and leaving the building.

The probative value of this extensive evidence of the two prior burglaries went well beyond the issue of defendant's intent and did not outweigh the prejudicial effect to defendant. The jury could well have imputed propensity as opposed to defendant's intent. Further, the court's limiting instructions were insufficient to minimize its prejudicial effect. People v Rodriguez, 2021 NY Slip Op 02367, First Dept 4-20-21

CRIMINAL LAW, EVIDENCE.

THE STOP OF DEFENDANT'S CAR WAS NOT SUPPORTED BY REASONABLE SUSPICION; THE REPORT THAT A SUSPICIOUS CAR WAS FOLLOWING SOMEONE DID NOT DESCRIBE THE CAR AND DEFENDANT WAS NOT FOLLOWING ANYONE WHEN STOPPED; THE PROOF AT THE SUPPRESSION HEARING DID NOT DEMONSTRATE DEFENDANT WAS TRESPASSING BY DRIVING ON THE PRIVATE ROAD, WHICH WAS THE JUSTIFICATION FOR THE STOP RELIED UPON BY SUPREME COURT (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendant's motion to suppress a gravity knife seized by a police officer after a traffic stop should have been granted. The officer received a report of a "suspicious vehicle following someone" without any description of the vehicle. The officer eventually stopped defendant's car, which was moving slowly but was not following anyone. After the stop the officer saw the knife inside the car, but did not recognize it as a gravity knife until he picked it up. Supreme Court found the stop justified because defendant was trespassing by driving on a private road. However that theory was not raised at the suppression hearing and no evidence other than an ambiguous sign on an open gate suggested driving on the road would constitute trespassing:

The evidence at the hearing established that at the time Officer Paolillo stopped the defendant's vehicle on Valley Road, the defendant was not following anyone, and was merely driving slowly down the road. In the initial call to the police, there was no vehicle description provided, and thus Officer Paolillo could not have known if this was the vehicle which had been observed following someone. Contrary to the Supreme Court's conclusion, the testimony at the hearing did not establish that Valley Road was private property upon which trespass was forbidden. Officer Paolillo did not testify that he suspected the defendant of criminal trespass, or that Valley Road was a private road. When asked who generally uses the road, the officer testified "mainly the residents." When asked how the traffic conditions were on the road, the officer testified "[v]ery light. Like I said, if anybody is down there, it's basically they live down there." The officer described that there were gates on the side of the road, which were open, and a sign which states "North Country Colony, Private Property, No Trespassing." However, the officer was not asked whether this sign referred to the roadway itself or the residential properties located thereon. The officer provided no testimony which could have allowed the court to conclude that if someone was simply driving on Valley Road, it would be an act of trespass. Additionally, based upon the officer's testimony, it was clear that Valley Road is not a dead end, but rather it has outlets to other roads.

Since there was nothing observed by Officer Paolillo which could have allowed him to conclude that criminal activity was at hand, the officer lacked reasonable suspicion to stop the defendant's vehicle … . People v Ahmad, 2021 NY Slip Op 02404, Second Dept 4-21-21

CRIMINAL LAW, JUDGES, ATTORNEYS.

THE JUDGE'S LAW CLERK, A FORMER ASS'T DA, DISCUSSED DEFENDANT'S SENTENCING WITH THE JUDGE; THE JUDGE SHOULD HAVE RECUSED HIMSELF FROM THE SENTENCING, SENTENCE VACATED (SECOND DEPT).

The Second Department, vacating defendant's sentence, determined the sentencing judge should have recused himself because his law clerk, a former assistant DA, was not screened from the case:

… [A]fter the verdict was rendered, but prior to sentencing, the trial justice hired as his law clerk a former Queens County Assistant District Attorney who had been involved in the investigation and the early stages of the defendant's prosecution. "'[A] law clerk is probably the one participant in the judicial process whose duties and responsibilities are most intimately connected with the judge's own exercise of the judicial function'" … .

Under the circumstances of this case, due process principles did not require recusal, as there was no indication that the trial justice had a direct, personal, substantial, or pecuniary interest in the case … . However, since the law clerk was not screened from working on this case and, according to the trial justice, actually discussed the sentencing of the defendant with the justice, the justice should have recused himself "'in a special effort to maintain the appearance of impartiality'" … . People v Hymes, 2021 NY Slip Op 02412, Second Dept 4-21-21

CRIMINAL LAW.

THE RECORD DOES NOT DEMONSTRATE SUPREME COURT CONSIDERED WHETHER DEFENDANT SHOULD BE AFFORDED YOUTHUL OFFENDER STATUS; SENTENCE VACATED (SECOND DEPT).

The Second Department, vacating defendant's sentence, remitted the matter for a consideration of whether defendant should be afforded youthful offender status:

CPL 720.20(1) requires "that there be a youthful offender determination in every case where the defendant is eligible, even where the defendant fails to request it, or agrees to forgo it as part of a plea bargain" … . The Supreme Court was required to determine on the record whether the defendant, whose conviction for robbery in the first degree constituted an armed felony … , was an "eligible youth" … , by considering the presence or absence of the factors set forth in CPL 720.10(3) and, if so, whether he should be afforded youthful offender status … . As the People concede, the record does not demonstrate that the court made that determination. People v Hill, 2021 NY Slip Op 02422, Second Dept 4-21-21

DEFAMATION.

KESHA, A RECORDING ARTIST, MADE PUBLIC STATEMENTS THAT HER MUSIC PRODUCER, GOTTWALD, HAD DRUGGED AND SEXUALLY ABUSED HER; GOTTWALD WAS PROPERLY AWARDED SUMMARY JUDGMENT IN HIS DEFAMATION ACTION; GOTTWALD DID NOT HAVE TO PROVE MALICE BECAUSE HE WAS NOT A GENERAL-PURPOSE OR LIMITED-PURPOSE PUBLIC FIGURE; TWO DISSENTERS DISAGREED (FIRST DEPT).

The Second Department, over a two-justice dissent, determined plaintiff music producer, Gottwald, was entitled to summary judgment on his defamation action against Kesha, a recording artist with whom Gottwald had entered a contract. Gottwald alleged Kesha falsely claimed Gottwald had drugged and sexually abused her in an effort to force Gattwald to release her from the recording contract. The allegations were published in text messages to Lady Gaga and others. The Second Department found that Gottwald was not a general-purpose or a limited-purpose public figure and provided detailed definitions of both. Therefore Gottwald did not have to

prove malice on Kesha's part. The dissent disagreed with the majority's conclusion Gottwald was not a public figure:

A person can only be a general-purpose public figure if "he [or she] is a 'celebrity'; his [or her] name a 'household word' whose ideas and actions the public in fact follows with great interest "and 'invite[s] attention and comment'" … . * * *

To be considered a limited purpose public figure Gottwald must have: (1) successfully invited public attention to his views in an effort to influence others prior to the incident in question, (2) voluntarily injected himself into a public controversy related to the subject of the current litigation, (3) assumed a position of prominence in the public controversy, and (4) maintained a regular and continuing access to the media to influence the outcome of the public controversy.

Gottwald cannot be found to be a limited-purpose public figure because he has not done any of these things. Gottwald v Sebert, 2021 NY Slip Op 02456, First Dept 4-22-21

FAMILY LAW, EVIDENCE.

FAMILY COURT'S DETERMINATION FATHER DID NOT SEXUALLY ABUSE HIS CHILD WAS NOT SUPPORTED BY THE RECORD; THE CHILD'S HEARSAY STATEMENTS WERE CORROBORATED, AND FAMILY COURT'S DECISION TO CREDIT THE TESTIMONY OF FATHER'S EXPERT OVER PETITIONER'S EXPERT WAS NOT SUPPORTED BY THE RECORD (SECOND DEPT).

The Second Department, reversing Family Court, determined the allegations father sexually abused his child, Zamir, were proved by a preponderance of the evidence. The hearsay allegations of the child were corroborated by another child and case workers. Father's expert, relied upon by Family Court, offered speculative testimony about alleged flaws in the approach taken by petitioner's expert, but acknowledged he had not reviewed the petitioner's expert's testimony:

… [W]e find that the petitioner established by a preponderance of the evidence that the father neglected Zamir by sexually abusing him. The Family Court's finding that there was no evidence presented of "age-inappropriate sexual knowledge" by Zamir is not supported by the record, since the then five-year-old child made an "up down" motion with his hands during the interviews with the petitioner's expert to demonstrate how he was made

to touch the father's penis … . Further, the court's finding that there was no evidence presented that the child displayed any "psychological or behavioral characteristics" indicative of having been sexually abused is not supported by the record. The petitioner's expert testified that Zamir was "engaging" when talking about anything other than the sexual abuse, but used "less words per sentence," without maintaining eye contact, and became "squirmy" when discussing the sexual abuse, and that "[i]t was very easy to see that he was not comfortable discussing th[at] topic." In addition, the court's speculation that Zamir fabricated the claims of sexual abuse because he was angry at the father for other matters is not supported by the record. Matter of Zamir F. (Ricardo B.), 2021 NY Slip Op 02391, Second Dept 4-21-21

FAMILY LAW, EVIDENCE.

FATHER'S PETITION FOR A MODIFICATION OF CUSTODY OR INCREASED PARENTAL ACCESS SHOULD NOT HAVE BEEN DENIED WITHOUT AN IN CAMERA INTERVIEW OF THE CHILD (SECOND DEPT).

The Second Department, reversing Family Court, determined father's petition for joint custody or an expansion of parental access should not have been denied without an in camera interview of the child:

A modification of a court-ordered custody arrangement must be based upon a showing of a change in circumstances such that the modification is required to protect the best interests of the child … . A child's changing needs as he or she grows older can sufficiently constitute a change in circumstances … .

Here, in light of the evidence presented by the father and assertions of the attorney for the child, the Family Court should not have determined the father's petition without conducting an in camera interview with the child. "[W]hile the express wishes of children are not controlling, 'they are entitled to great weight, particularly where their age and maturity would make their input particularly meaningful'" … . Matter of Coleman v Lymus, 2021 NY Slip Op 02389, Second Dept 4-21-21

FAMILY LAW, JUDGES.

FAMILY COURT SHOULD HAVE CONDUCTED A HEARING IN THIS CUSTODY/PARENTAL ACCESS PROCEEDING AND SHOULD HAVE MADE FINDINGS OF FACT AS REQUIRED BY CPLR 4213 (SECOND DEPT).

The Second Department, reversing Family Court, determined a hearing should have been held in this custody/parental access proceeding. The court noted Family Cout failed to set forth findings of fact as required by CPLR 4213 (b):

Parental access determinations should "[g]enerally be made only after a full and plenary hearing and inquiry" … . "While the general right to a hearing in [parental access] cases is not absolute, where 'facts material to the best interest analysis, and the circumstances surrounding such facts, remain in dispute,' a hearing is required" … . Here, the record shows that there were disputed factual issues regarding the finding of the children's best interests such that a hearing on the father's parental access was required … . … [W]e note that the decision issued by the Supreme Court failed to comply with CPLR 4213(b) in that it did not set forth findings of fact … . Matter of Vazquez v Bahr, 2021 NY Slip Op 02397, Second Dept 4-21-21

FAMILY LAW.

THE PARTIES MARRIED IN 1974, STARTED DIVORCE PROCEEDINGS IN 1991, DISCONTINUED THE DIVORCE AND BEGAN LIVING TOGETHER AGAIN IN 1998, CONTINUED LIVING TOGETHER UNTIL THE INSTANT DIVORCE IN 2015; SUPREME COURT ERRED IN FINDING THE ECONOMIC PARTNERSHIP ENDED IN 1991; MATTER REMITTED FOR RECALCULATION OF THE MARITAL PROPERTY AND COUNSEL FEES (SECOND DEPT).

The Second Department, remitting the matter for recalculation of equitable distribution of marital assets and counsel fees, determined Supreme Court erred in finding that the parties ceased to be an economic partnership when they separated and divorce proceedings were commenced in 1991. The parties were married in 1974. The divorce was discontinued in 1998 when defendant moved back into the marital residence. The couple lived together until the instant separation and divorce proceedings in 2015:

… [T]he parties resided together in the marital residence from 1998 until the commencement of the subject action in 2015, and for most of that time, shared the marital residence with the children. During that time, the parties visited relatives and attended social functions together, went on vacations together, and periodically engaged in sexual relations. Although the parties maintained separate bank accounts and credit cards, the parties filed joint tax returns and shared many of the family's expenses, including the children's college tuition and home renovations. Moreover, the parties named each other as executors and beneficiaries in their wills. Thus, the evidence demonstrates that the parties functioned as an "economic partnership" after the discontinuance of the prior divorce action, and the Supreme Court improperly found that the parties "ceased functioning as an economic partnership" and "lived separate financial lives" starting in 1991 … . …

… [T]here was no written agreement to keep the parties' finances separate (cf. Domestic Relations Law § 236[B][1][d][4]). "Marital partners may agree that property they acquire during the marriage will be divided in a particular manner, but that agreement must be in writing" … , or "be part of an oral stipulation placed upon the record in open court and acknowledged in writing to be free from fraud, undue influence and duress" … . Here, the alleged oral agreement between the parties does not constitute such an agreement. Thus, the distribution of marital property "must be based upon the equitable consideration and application of . . . enumerated factors" … , and the court is required to "set forth the factors it considered and the reasons for its decision" … . Potvin v Potvin, 2021 NY Slip Op 02429, Second Dept 4-21-21

FORECLOSURE, EVIDENCE.

DEFENDANT'S ALLEGATION HE DID NOT RECEIVE THE BANK'S LETTER DE-ACCELERATING THE DEBT WAS NOT SUFFICIENT TO SUPPORT HIS MOTION FOR SUMMARY JUDGMENT DISMISSING THE FORECLOSURE ACTION AS TIME-BARRED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the defendant's claim he did not receive plaintiff-bank's letter de-accelerating the debt (thereby stopping the running of the six-year statute of limitations) was not sufficient to warrant dismissal of the complaint as time-barred:

The filing of the summons and complaint in the 2009 action constituted a valid election by the plaintiff to accelerate the maturity of the entire mortgage debt … . This established that the mortgage debt was accelerated in February 2009, and that, without more, the applicable six-year statute of limitations had expired by the time the plaintiff commenced the instant action in March 2016 … .

In opposition, however, the plaintiff produced the January 2015 letter of de-acceleration and alleged that it had been sent to the defendant. Although the defendant claimed that he had never received the letter and had no knowledge of it, the mere denial of receipt was not sufficient to satisfy his burden on his cross motion for summary judgment of establishing that the plaintiff or its loan servicer did not properly send the notice to him … . HSBC Bank USA, N.A. v Hochstrasser, 2021 NY Slip Op 02380, Second Dept 4-21-21

LANDLORD-TENANT, NEGLIGENCE.

THE PROPERTY OWNERS DID NOT HAVE NOTICE OF THE ALLEGED DEFECT IN THE STOVE IN PLAINTIFF'S APARTMENT AND DID NOT HAVE A DUTY TO INSPECT THE STOVE AFTER THEY INSTALLED IT; THE PROPERTY OWNERS WERE ENTITLED TO SUMMARY JUDGMENT DISMISSING THE WRONGFUL DEATH ACTION STEMMING FROM A STOVE TOP FIRE (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the appellant-landlords were entitled to summary judgment dismissing the wrongful death action stemming from a stove top fire. The plaintiff alleged the fire was caused by the faulty installation of the gas stove by the appellants. The appellants demonstrated they did not create or have actual or constructive notice of the alleged dangerous condition:

… [O]n their motion for summary judgment, the appellants established their prima facie entitlement to judgment as a matter of law by demonstrating that they did not create the condition alleged by installing the stove and that they did not have actual or constructive notice of that condition. Contrary to the plaintiff's assertion, where, as here, there was nothing to arouse the appellants' suspicion that there was an issue with the subject stove prior to the accident, the appellants had no duty to inspect the stove … . In opposition, the plaintiff failed to raise a triable issue of fact as to whether the appellants maintained the premises in a reasonably safe condition, including whether they breached any duty to inspect the stove after its installation. Vantroba v Zodiaco, 2021 NY Slip Op 02438, Second Dept 4-21-21

MUNICIPAL LAW, NEGLIGENCE, CIVIL PROCEDURE.

THE BUILDING AND FIRE CODES DID NOT CREATE A PRIVATE RIGHT OF ACTION AGAINST THE CITY TO CONTEST THE ANNUAL INSPECTION FEES; A NEGLIGENCE ACTION AGAINST A MUNICIPALITY BASED UPON A STATUTORY DUTY WILL NOT FLY UNLESS THE STATUTE PROVIDES A PRIVATE RIGHT OF ACTION; A PRE-ANSWER MOTION TO DISMISS A REQUEST FOR A DECLARATORY JUDGMENT MUST BE DENIED IF IT SETS FORTH A CAUSE OF ACTION, THE MERITS OF THE REQUEST CANNOT BE CONSIDERED (SECOND DEPT).

The Second Department determined the putative class action suit by two realty companies alleging the city charges annual fire and building code inspection fees but does not do the inspections was properly dismissed, with the exception of the request for a declaratory judgment. The suit alleged breach of contract, breach of fiduciary duty and negligence, and requested a declaratory judgment finding the fee violates the NYS Constitution. The Second Department held that the fire and building codes do not give rise to a private right of action. With respect to municipal liability for negligence and the request for a declaratory judgment, the court wrote:

To sustain liability against a municipality engaged in a governmental function, "the duty breached must be more than that owed the public generally" … . The Court of Appeals has recognized that a special duty can arise "when the municipality violates a statutory duty enacted for the benefit of a particular class of persons" … . "To form a special relationship through breach of a statutory duty, the governing statute must authorize a private right of action" … [N]either the Uniform Code nor the Yonkers Fire Code gives rise to a private right of action.
* * *

… [T]he Supreme Court should have denied that branch of the defendants' motion which was to dismiss the sixth cause of action, which sought a declaration, inter alia, that the inspection fees were invalid as an unconstitutional tax. "'A motion to dismiss a declaratory judgment action prior to the service of an answer presents for consideration only the issue of whether a cause of action for declaratory relief is set forth, not the question of whether the plaintiff is entitled to a favorable [disposition]'" … . WMC Realty Corp. v City of Yonkers, 2021 NY Slip Op 02440, Second Dept 4-21-21

MUNICIPAL LAW, NEGLIGENCE, PRODUCTS LIABILITY.

PLAINTIFF POLICE OFFICER WAS INJURED CHANGING THE CARBON DIOXIDE CARTRIDGE FOR AN ANIMAL TRANQUILIZER GUN; THE PRODUCTS LIABILITY CAUSE OF ACTION AGAINST THE MANUFACTURER SURVIVED SUMMARY JUDGMENT; THE GENERAL MUNICIPAL LAW 205-E/LABOR LAW 27-A CAUSE OF ACTION AGAINST THE CITY SHOULD NOT HAVE BEEN DISMISSED (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, determined the negligence and products liability causes of action against NASCO, the manufacturer of an animal tranquilizer gun, properly survived summary judgment, but the General Municipal Law/Labor Law action against the city and the NYPD should not have been dismissed. Plaintiff, a police officer, was injured changing the carbon dioxide cartridge for the gun:

NASCO's expert … opined in mere conclusory fashion that the tranquilizer gun was "appropriately designed." The affidavit did not, for example, contain any explanation of the gun's design, or any discussion of industry standards or costs. Nor did it state whether NASCO had received complaints about any of the other tranquilizer guns it had sold. The conclusory affidavit was insufficient to affirmatively demonstrate, prima facie, that the gun was reasonably safe for its intended use … .

NASCO … failed to demonstrate, prima facie, that the plaintiff's actions were the sole proximate cause of the subject accident … . Triable issues of fact existed, among other things, as to whether the plaintiff was given specific instructions by the NYPD that he failed to follow or whether he used a tool to remove the end cap. …

NASCO, which relied primarily on an instruction sheet produced by the NYPD that the plaintiff testified was never given to him, failed to meet its burden of establishing, prime facie, that the warnings provided to the NYPD were adequate, that no warnings were necessary, or that the failure to give the aforesaid warnings was not a proximate cause of the accident … .

…The City defendants failed to demonstrate their prima facie entitlement to judgment as a matter of law dismissing so much of the General Municipal Law § 205-e cause of action as was predicated upon Labor Law § 27-a. The City defendants failed to demonstrate, prima facie, that the tranquilizer gun, which was purchased by the NYPD in 1976, was not defective due to lack of proper maintenance, as alleged by the plaintiff … . Further "[r]ecovery under General Municipal Law § 205-e 'does not require proof of such notice as would be necessary to a claim in common-law negligence'" … ."Rather, the plaintiff must only establish that the circumstances

surrounding the violation indicate that it was a result of neglect, omission, or willful or culpable negligence on the defendant's part" … . Morales v City of New York, 2021 NY Slip Op 02386, Second Dept 4-21-21

NEGLIGENCE, EVIDENCE, MUNICIPAL LAW.

A VIDEO OF AN ALLEGED ASSAULT BY DEFENDANT'S EMPLOYEES WAS EITHER NEGLIGENTLY OR WILLFULLY LOST; SUPREME COURT PROPERLY RULED DEFENDANTS COULD NOT INTRODUCE ANY EVIDENCE WHICH CONTRADICTED AN AFFIDAVIT DESCRIBING WHAT THE VIDEO DEPICTED (SECOND DEPT).

The Second Department determined the sanction imposed on defendants for spoliation of evidence was appropriate. Defendants did not preserve the video of an incident in which plaintiff was allegedly assaulted by employees of the NYC Department of Homeless Services (DHS). Plaintiff's attorney had specifically requested that the video be preserved. The day after the incident the video was reviewed by a security who described the video in an affidavit. When the video was not produced by the defendants, Supreme Court ruled the defendants could not introduce any evidence which contradicted the affidavit describing the video:

"A party that seeks sanctions for spoliation of evidence must show that the party having control over the evidence possessed an obligation to preserve it at the time of its destruction, that the evidence was destroyed with a culpable state of mind, and that the destroyed evidence was relevant to the party's claim or defense such that the trier of fact could find that the evidence would support that claim or defense" … . "A culpable state of mind for purposes of a spoliation sanction includes ordinary negligence"… . "The Supreme Court has broad discretion to determine a sanction for the spoliation of evidence" … .

Here, contrary to the defendants' contention, the record demonstrates that the relevant video evidence was owned and controlled by DHS, that DHS possessed an obligation to preserve the evidence at the time that it was lost or destroyed, and that DHS negligently or wilfully failed to ensure its preservation … . Furthermore, under the circumstances of this case, the sanction imposed by the Supreme Court provided "proportionate relief" to the plaintiff and was not an improvident exercise of discretion … . Oppenheimer v City of New York, 2021 NY Slip Op 02401, Second Dept 4-21-21

TRUSTS AND ESTATES.

PURSUANT TO THE SURROGATE'S COURT PROCEDURE ACT (SCPA), AN ADMINISTRATOR MAY BE SUSPENDED WITHOUT A PETITION OR ISSUANCE OF PROCESS FOR MISAPPROPRIATING ESTATE PROPERTY (SECOND DEPT).

The Second Department, reversing Surrogate's Court, determined the motion to suspend the administrators of the estate should have been granted. The administrators had allowed the estate to languish for 20 years and there was evidence estate property had been misappropriated by one administrator:

Pursuant to SCPA 719, "the court may make a decree suspending . . . or revoking letters issued to a fiduciary from the court . . . without a petition or the issuance of process" where, among other things, "any of the facts provided in [SCPA] 711 are brought to the attention of the court" (SCPA 719[10] … . The circumstances set forth under SCPA 711 justifying "a decree suspending . . . or revoking those letters" include a fiduciary "having wasted or improperly applied the assets of the estate" … or having "removed property of the estate . . . without prior approval of the court" … . "The removal of a fiduciary pursuant to SCPA 711 and 719 is equivalent to 'a judicial nullification of the testator's choice and may only be decreed when the grounds set forth in the relevant statutes have been clearly established'" … . The grounds set forth under SCPA 711 may be clearly established "by undisputed facts or concessions, where the fiduciary's in-court conduct causes such facts to be within the court's knowledge, or where facts warranting amendment of letters are presented to the court during a related evidentiary proceeding" … . "Thus, revoking a fiduciary's letters . . . pursuant to SCPA 719 will constitute an abuse of discretion 'where the facts are disputed, where conflicting inferences may be drawn therefrom, . . . or where there are claimed mitigating facts that, if established, would render summary removal an inappropriate remedy'" … .

Here, the record contains undisputed evidence of conflict between the administrators, and evidence that the animosity between them has interfered with the expeditious administration of the decedent's estate, which they have allowed to languish for nearly two decades … . Moreover, Menfus [one of the administrators] admitted … he executed a deed to one of the subject properties to himself, and permitted his father to live in the other property rent free. Matter of Steward, 2021 NY Slip Op 02395, Second Dept 4-21-21