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ARBITRATION, ATTORNEYS, CONTRACT LAW, DEBTOR-CREDITOR.

THE ARBITRATION AWARD IS VALID EVEN IF BASED ON AN ERROR OF LAW OR FACT; THE FAILURE TO PROVIDE A LETTER OF ENGAGEMENT DID NOT PRECLUDE THE ATTORNEY'S ACTION FOR BREACH OF CONTRACT; CPLR 5225 DOES NOT REQUIRE A SPECIAL PROCEEDING TO ENFORCE THE JUDGMENT (FIRST DEPT).

The First Department, reversing Supreme Court, determined (1) the arbitrator's award was valid even if an error of law or fact was made; (2) the failure to provide a letter of engagement did not preclude the petitioner-attorney's action for breach of contract; (3) petitioner was not required to commence a special proceeding to enforce the judgment; (4) the motions to enforce the judgement do not violate the Commercial Division rules:

… [E]ven if the arbitrator had made an error of law or fact in concluding that respondents had breached the retainer agreements, this alone would not justify vacating the award … . …

… [T]he court improperly denied the motions [to enforce the judgment] based upon its finding that petitioner had failed to commence a separate special proceeding to enforce the judgment. The language of CPLR 5225 clarifies that the court had jurisdiction to resolve the turnover motion. While CPLR 5225(a) provides that a judgment creditor seeking turnover of money or personal property "in possession or custody" of the judgment debtor does so "[u]pon motion of the judgment creditor," CPLR 5225(b) provides that a judgment creditor seeking turnover of money or personal property in a third party's possession or custody does so "[u]pon a special proceeding commenced by the judgment creditor" … Given that petitioner brought the motions against the judgment debtor as opposed to a third party, it was not required to commence a separate proceeding. Matter of Gibson, Dunn & Crutcher LLP v World Class Capital Group, LLC, 2021 NY Slip Op 03252, First Dept 5-20-21

ARBITRATION, ATTORNEYS, LEGAL MALPRACTICE.

PLAINTIFF COMMENCED A MALPRACTICE ACTION AGAINST DEFENDANT ATTORNEYS; THE ATTORNEYS COMMENCED AN ARBITRATION PROCEEDING AGAINST PLAINTIFF, BASED ON THE RETAINER AGREEMENT, FOR UNPAID ATTORNEY'S FEES; BOTH THE ARBITRABLE FEE DISPUTE AND THE NONARBITRABLE MALPRACTICE ACTION ARE SUBJECT TO ARBITRATION WHILE THE MALPRACTICE ACTION IS STAYED (FIRST DEPT).

The Frist Department, reversing Supreme Court, determined the retainer agreement which required arbitration of any attorney's-fee dispute, which was entwined in the plaintiff's malpractice action against the attorneys, required that both the arbitrable fee dispute and the nonarbitrable malpractice action be addressed in the arbitration:

There is no dispute that there is a valid agreement between the parties to arbitrate any dispute regarding unpaid fees. Thus, the court must compel arbitration of defendants' claim for unpaid fees and stay this action pending completion of the arbitration (CPLR 7503[a]). Moreover, because plaintiff's nonarbitrable malpractice claim is inextricably intertwined with the arbitrable claim for unpaid fees, the proper course is to stay the action pending completion of the arbitration … . …

To the extent plaintiff argues that it cannot be forced to arbitrate its malpractice claim because it did not explicitly agree to do so, both the First and Second Departments have clearly found that a nonarbitrable issue can be decided in an arbitration when it is inextricably intertwined with an arbitrable issue, particularly where, as here, the determination of the arbitrable unpaid fees claim may dispose of the nonarbitrable malpractice claim … . Protostorm, Inc. v Foley & Lardner LLP, 2021 NY Slip Op 02227, First Dept 4-8-21

ARBITRATION.

THE CONTRACT WAS BETWEEN CORPORATIONS IN DIFFERENT STATES, THEREFORE INTERSTATE COMMERCE WAS IMPLICATED AND THE FEDERAL ARBITRATION ACT (FAA) APPLIED; THE CONTRACT PROPERLY PROVIDED THAT THE ARBIRTRATOR, NOT A COURT, WILL DECIDE GATEWAY ISSUES OF ARBITRABILITY (FIRST DEPT).

The First Department, reversing Supreme Court, determined that the Federal Arbitration Act (FAA) applied to the contract between corporations from different states and the contract properly provided that gateway issues of arbitrability are to be decided by the arbitrator, not the court:

Where "a contract containing an arbitration provision 'affects' interstate commerce, disputes arising thereunder are subject to the FAA" … . The surety agency agreement here between corporations from different states gave rise to a finding of interstate commerce and was subject to the FAA … . Although "a New York court, applying the Federal Arbitration Act, limits its inquiry to whether there is a valid agreement to arbitrate the particular dispute" and all other questions are for the arbitrator … , the parties can agree to arbitrate gateway issues of arbitrability … .

Applying principles of New York state contract law, based on the choice of law provision governing the surety agency agreement … , and reading the contractual clauses together in context … , the provision that "[i]f a dispute or disagreement arises in connection with this Agreement, including a dispute or disagreement as to its formation or validity, such dispute or disagreement shall be submitted to arbitration," refers any disputes over the validity or formation of the arbitration provision in question to arbitration. Accordingly, the matter here should proceed to arbitration. Matter of Bergassi Group LLC v Allied World Ins. Co., 2021 NY Slip Op 02265, First Dept 4-13-21

CIVIL PROCEDURE, BORROWING STATUTE, STATUTES OF LIMITATIONS.

IN THIS RESIDENTIAL-MORTGAGE-BACKED-SECURITIES BREACH OF CONTRACT ACTION, THE LAW OF THE CASE DOCTRINE DID NOT PRECLUDE RAISING THE "BORROWING STATUTE" (STATUTE OF LIMITATIONS) DEFENSE IN AN AMENDED ANSWER SERVED AS OF RIGHT (WITHOUT LEAVE OF COURT); LAW OF THE CASE DOCTRINE EXPLAINED IN SOME DEPTH (FIRST DEPT).

The First Department, in a full-fledged opinion by Justice Gische, reversing (modifying) Supreme Court, determined that the amended answer with counterclaims, alleging for the first time that the action was untimely under the borrowing statute (CPLR 202), was properly served "as of right" (without leave of court) and the inclusion of the borrowing statute defense was not barred by the law of the case doctrine (LOTC). The opinion includes an in-depth discussion of the LOTC. The opinion rejected the arguments that certain contract provisions were conditions precedent as opposed to independent contractual obligations and certain breach of contract claims were really claims for indemnification. All of the contracts stem from residential-mortgage-backed-securities and obligations to cover losses from the alleged breach of "representations and warranties" concerning the underlying mortgages. With regard to the LOTC, the court wrote:

The doctrine of LOTC is a rule of practice premised upon sound policy that once an issue is judicially determined, further litigation of that issue should be precluded in a particular case … . It ends the matter as far as judges and courts of coordinate jurisdiction are concerned … . While it shares some characteristics of a larger family of kindred concepts, including res judicata and collateral estoppel, it is not identical … . All these concepts contemplate that the party opposing preclusion had a full and fair opportunity to litigate the underlying determination. LOTC, however, differs in that it only addresses the potentially preclusive effect of judicial determinations made during a single litigation and before a final judgment is rendered … . In addition, while res judicata and collateral estoppel are "rigid rules of limitation," LOTC has been described as "amorphous" and involving "an element of discretion" … . Discretion, however, is circumscribed where the decision providing the basis for LOTC is by an appellate court. Thus, while LOTC cannot bind an appellate court to a trial court ruling … , it does bind a trial court (and subsequent appellate courts of coordinate jurisdiction) to follow the mandate of an appellate court, absent new

evidence or a change in the law … . Matter of Part 60 RMBS Put – Back Litig., 2021 NY Slip Op 02252, First Dept 4-13-21

CIVIL PROCEDURE, CONDITIONAL ORDER OF DISMISSAL.

THE CONDITIONAL ORDER OF DISMISSAL DIRECTING THE FILING OF A NOTE OF ISSUE DID NOT MEET THE REQUIREMENTS OF CPLR 3216; THE ACTION SHOULD NOT HAVE BEEN DISMISSED (FIRST DEPT).

The First Department, reversing Supreme Court, determined the conditional order of dismissal directing plaintiff to file a note of issue did not meet the statutory requirements of CPLR 3216 and, therefore, the action should not have been dismissed:

The conditional order of dismissal directing plaintiff to file a note of issue by February 28, 2019 or the action would be dismissed failed to adhere to the statutory procedure for dismissing an action for failure to file a note of issue. Specifically, the conditional order of dismissal failed to provide plaintiff with the requisite 90 days to file a note of issue, failed to specify the conduct constituting the neglect demonstrating a general pattern of delay, and did not constitute the requisite written notice because it was not signed by the parties (see CPLR 3216[a], [b][3] …). Flecha v Neira, 2021 NY Slip Op 03548, First Dept 6-8-21

CIVIL PROCEDURE, CONTRACT LAW, UNJUST ENRICHMENT.

WHERE THERE IS A DISPUTE ABOUT THE EXISTENCE OF A CONTRACT A CAUSE OF ACTION FOR UNJUST ENRICHMENT IS NOT DUPLICATIVE (FIRST DEPT).

The First Department, reversing (modifying) Supreme Court noted that where there is a dispute about the existence of an enforceable contract, a cause of actiono for unjust enrichment is not duplicative:

With respect to the unjust enrichment … [t]hese claims should not have been dismissed as duplicative because "where there is a bona fide dispute as to the existence of a contract or the application of a contract in the dispute in issue, a plaintiff may proceed upon a theory of quasi contract as well as breach of contract, and will not be required to elect his or her remedies" … . CIP GP 2018, LLC v Koplewicz, 2021 NY Slip Op 03370, First Dept 5-27-21

CIVIL PROCEDURE, CROSS CLAIMS.

SUBPOENAS RELATING TO CROSS CLAIMS SHOULD NOT HAVE BEEN QUASHED (FIRST DEPT).

The First Department, reversing Supreme Court, determined subpoenas that related to cross claims should not have quashed

[Defendant's] motion to quash the nonparty subpoenas … to obtain information related to … cross claims … (CPLR 3101[a][4]) should have been denied. Although the subpoenaed information was unrelated to the interpleader action, in New York, cross claims "may be asserted between defendants for any cause of action at all, whether or not related to the plaintiff's main claim" (… CPLR 3019[b]). As the requested information is relevant to the pending cross claims, they could be properly subpoenaed. Thus, we remand the matter for discovery to the extent the requested information is "material and necessary" to the cross claims (CPLR 3101[a][4] …). Feiger v Ray Enters., LLC, 2021 NY Slip Op 03525, First Dept 6-3-21

CIVIL PROCEDURE, ELECTRONIC FILING.

DEFENDANTS DID NOT FOLLOW THE PROCEDURES FOR ELECTRONICALLY FILING A VIDEO; THEREFORE THE VIDEO WAS NOT AVAILABLE TO THE COURT AND DEFENDANTS' MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN DENIED (FIRST DEPT).

The First Department, reversing Supreme Court, determined the video evidence relied upon by defendants' expert in this elevator-malfunction personal-injury case was not properly electronically filed and therefore was unavailable for review. Because of the unavailability of the evidence defendants' motion for summary judgment should have been denied:

Defendants failed to establish prima facie that plaintiff was the sole proximate cause of the injuries she sustained when the manual freight elevator that she was operating suddenly stopped moving … . Defendants submitted an affidavit by an expert professional engineer who opined — based on his review of the surveillance footage of plaintiff's accident and still images purportedly extracted therefrom — that plaintiff failed to fully close the elevator car's scissor gate, which then opened while the elevator car was in flight, triggering the elevator's sudden stop. However, they failed to submit the video footage on which their expert relied. Instead, in this electronically filed case, defendants submitted a sheet of paper that read, "Copy of the video to be provided upon the Court's request." The New York County e-filing protocol required parties who wished to submit exhibits "that cannot practically be e-filed," such as videos, to file NYSCEF Form EF 21 and consult with the County Clerk about how best to submit such exhibits … . Because defendants failed to comply with these procedures, the video never became part of the record and thus cannot be reviewed by this Court.

Absent the video, the record evidence does not establish that plaintiff was the sole proximate cause of her injuries. Amezquita v RCPI Landmark Props., LLC, 2021 NY Slip Op 02979, First Dept 5-11-21

CIVIL PROCEDURE, RES JUDICATA, LAW OF THE CASE, INSURANCE LAW.

IN THIS COMPLEX EXCESS INSURANCE CASE, WHICH INCLUDED A REVERSAL BY THE COURT OF APPEALS, THE LAW-OF-THE-CASE AND RES-JUDICATA DOCTRINES DID NOT DICTATE THE OUTCOME AND THE EXCESS INSURANCE CARRIER WAS NOT OBLIGATED TO DEFEND OR INDEMNIFY IN THE UNDERLYING PERSONAL INJURY ACTION (FIRST DEPT).

The First Department, in a full-fledged opinion by Justice Renwick, reversing Supreme Court, determined that RLI, an excess insurance carrier, was not obligated to defend or indemnify in the underlying personal injury action. In the underlying action, plaintiff, an employee of Transel Elevator, was working on an elevator at a hotel and was injured descending stairs at the hotel. The complex relationships among the parties and several insurance carriers cannot be fairly summarized here. What follows in the First Department's summary of the case. In essence the First Department held that prior rulings did not dictate the outcome here under law-of-the-case or res-judicata principles:

Plaintiff Aspen Specialty Insurance Company commenced this action seeking a declaration that the excess insurance policy issued by RLI Insurance Company, Inc. was next in order of coverage for a personal injury action, in which Aspen and RLI's common insured, Alphonse Hotel Corporation, was a defendant. The issue in this case is whether RLI, an excess insurer with a follow form policy, is bound by a prior judicial determination of this Court that the primary policy issued by Ironshore Indemnity Inc., which underlies RLI's excess policy, covers the defendant in the personal injury action, Alphone, as an additional insured. In the prior declaratory judgment action between Aspen and Ironshore, this Court declared that the language in the additional insured endorsement extends coverage broadly to any injury causally linked to the named insured, which was satisfied in this case because the loss involved an employee of the named insured who was injured while performing the named insured's work under the contract with the additional insured. RLI argues that it is not bound by this Court's prior determination because it was not part of the prior declaratory judgment action. In the present declaratory judgment action, RLI wishes to relitigate the issue of whether Ironshore's policy covers Alphonse as an additional insured. RLI relies upon the 2017 Court of Appeals decision in Burlington Ins. Co. v NYC Tr. Auth. (29 NY3d 313 [2017]), which interpreted language in an

additional insured endorsement similar to the language here as covering the additionally insured party, vicariously, only for negligent acts of the named insured. It is undisputed in the instant case that the named insured was not in control of the instrumentality of the accident that caused the underlying personal injuries. … RLI is not bound by our prior determination and that it is entitled to a declaration that it has no obligation to defend or indemnify in the underlying personal injury action. Aspen Specialty Ins. Co. v RLI Ins. Co., Inc., 2021 NY Slip Op 02092, First Dept 4-6-21

CIVIL PROCEDURE, JUDGES, STATUS CONFERENCES.

THE JUDGE SHOULD NOT HAVE, SUA SPONTE, DISMISSED THE COMPLAINT BECAUSE PLAINTIFF MISSED A STATUS CONFERENCE; THE SUA SPONTE ORDER IS NOT APPEALABLE; PLAINTIFF CORRECTLY MOVED TO VACATE THE ORDER AND APPEALED THE DENIAL (FIRST DEPT).

The First Department, reversing Supreme Court, determined the judge should not have, sua sponte, dismissed the complaint because plaintiff missed a status conference. The First Department noted that the sua sponte dismissal order was not appealable as of right. Therefore plaintiff correcting moved to vacate the order and then appealed the denial of that order:

Contrary to defendant Hudson's argument, the status conference order sua sponte dismissing the complaint was not appealable as of right (CPLR 5701[a][2] …). Plaintiff followed proper procedure by "apply[ing] to vacate the order and then appeal[ing] from the denial of that motion so that a suitable record [could] be made and counsel afforded the opportunity to be heard on the issues" … .

The court improvidently exercised its discretion in imposing the extreme penalty of dismissal without giving plaintiff notice that such a sanction might be imminent … . Further, the sanction of dismissal was not warranted, and would not have been warranted even upon a motion on notice, based on plaintiff's noncompliance with one order … . MJC Elec., Inc v Hudson Meridian Constr. Group, LLC, 2021 NY Slip Op 03258, First Dept 5-20-21

CIVIL PROCEDURE, SOVEREIGN IMMUNITY, JURISDICTION.

THE RECENT US SUPREME COURT CASE HOLDING THAT A STATE MUST CONSENT TO SUIT AGAINST IT IN A SISTER STATE DID NOT AFFECT THE DOCTRINE OF "WAIVER OF SOVEREIGN IMMUNITY;" HERE NEW JERSEY WAIVED THE DOCTRINE BY PARTICIPATING IN THE FIRST TRIAL OF THIS TRAFFIC ACCIDENT CASE (FIRST DEPT).

The First Department, in a full-fledged opinion by Justice Oing, in a comprehensive discussion which cannot be fairly summarized here, determined the defendant, New Jersey Transit, had waived sovereign immunity by participating in the first trial of this traffic accident case. The fact that, since the first trial, the US Supreme Court (the Hyatt case) held a state may not be sued in a sister state without consent (the "consent to the jurisdiction of a sister state" issue) did not require a different result on the "waiver of sovereign immunity" issue:

There is no dispute that New Jersey Transit did not make a voluntary appearance in this action. It then argues that it made no clear statement by its litigation conduct that it was submitting to the jurisdiction of the courts of this state, pointing out that it has taken a defensive posture from this action's inception because it had no legitimate legal basis for objecting to New York's jurisdiction until seven years after the action was commenced, when Hyatt was decided, in 2019. These arguments are an oversimplification of this substantive constitutional issue. The issue is whether New Jersey Transit undertook a litigation strategy that can be deemed a voluntary waiver of its sovereign immunity. * * *

We reject New Jersey Transit's argument that the sovereign immunity defense was not available at the time it served its answer in this action. The doctrine of sovereign immunity as it applies to states has been available at least since … 1979. The Hyatt Court dramatically altered the sovereign immunity analysis … . Hyatt did not, however, give birth to the doctrine. We cannot help but see the obvious unfair tactical advantage of conceding liability and losing at the first trial on damages and then seeking dismissal of the second trial on damages several years later, based not on the merits of the action but on an alleged "new" defense of sovereign immunity. Belfand v Petosa, 2021 NY Slip Op 03522, First Dept 6-3-21

CIVIL PROCEDURE, STATUTES OF LIMITATIONS, CONTINUING WRONG, CONTRACT LAW.

THE CONTINUING WRONG DOCTRINE APPLIES TO THIS COMPLEX BREACH OF CONTRACT ACTION SUCH THAT EACH BREACH WAS AN ACTIONABLE EVENT; THEREFORE THE STATUTE OF LIMITATIONS DID NOT START RUNNING FOR ALL SUBSEQUENT BREACHES WHEN THE FIRST BREACH OCCURRED (FIRST DEPT).

The First Department, in a full-fledged opinion by Justice Mazzarelli, over a two-justice dissent, reversing Supreme Court, determined the continuing wrong doctrine applied to this breach of contract action such that each breach was actionable and, therefore, the statute of limitations for all subsequent breaches was not triggered by the first breach. The subjects of the contracts were commercial mortgage-backed securities (CMBS). The complaint alleged defendant CWCI breached a collateral management agreement (CMA):

Generally speaking, a claim accrues for statute of limitations purposes when "all of the factual circumstances necessary to establish a right of action have occurred, so that the plaintiff would be entitled to relief" … . However, the mere fact that a claim has accrued and the time to bring an action on it has commenced to run does not mean that a new claim, with a new limitations period, may not arise out of a new set of facts that forms part of a series with the original wrong. [Plaintiff] maintains that the allegations against CWCI comprise such a series of individual wrongs. Thus, it relies on cases such as Bulova Watch Co. v Celotex Corp. (46 NY2d 606 [1979]). There, a new claim, with a new limitations period, was held to have accrued each time the plaintiff, the obligee under a bond that guaranteed that the defendant roofer would make repairs necessary to ensure the watertightness of the plaintiff's roof over the 20-year life of the bond, asked the defendant, to no avail, to repair a leak. Accordingly, the plaintiff's failure to commence suit within the limitations period based on the initial leak did not bar the action. * * *

We find that the continuing wrong doctrine does apply to this case. CWCapital Cobalt VR Ltd. v CWCapital Invs. LLC, 2021 NY Slip Op 02487, First Dept 4-27-21

CIVIL PROCEDURE, STATUTES OF LIMITATIONS, FRAUD, FIDUCIARY DUTY, UNJUST ENRICHMENT.

DEFENDANT ATTORNEY WAS UNABLE TO DEMONSTRATE PLAINTIFFS LEARNED OF DEFENDANT'S ALLEGED FRAUD MORE THAN TWO YEARS BEFORE THE ACTION WAS COMMENCED; THE STATUTE OF LIMITATIONS FOR THE UNJUST ENRICHMENT AND AIDING AND ABETTING BREACH OF FIDUCIARY DUTY IS SIX YEARS BECAUSE OF THE ALLEGATIONS OF FRAUD (FIRST DEPT).

The First Department determined the fraud, unjust enrichment and aiding and abetting breach of fiduciary duty causes of action were timely brought against defendant attorney. Defendant attorney represented a party who was found to have defrauded plaintiffs in an arbitration resulting in a $56,4 million judgment. Plaintiffs alleged the attorney's participation in the fraud was not discovered until the arbitration proceedings:

The limitations period for fraud is the greater of six years from the date of the fraud or two years from the time when, with reasonable diligence, the plaintiff could have uncovered the fraud (CPLR 213[8] …). In order to prevail, the defendant must show that there is no issue of fact under either prong. Here, defendant failed to show dispositively that plaintiffs were in possession of facts that would have triggered inquiry notice under CPLR 213(8) more than two years before the action was commenced … . …

Nor are plaintiff's unjust enrichment or aiding and abetting breach of fiduciary duty claims time-barred. Both claims are subject to the six-year statute of limitations because they are based on allegations of actual fraud (CPLR 213[8] …). Sabourin v Chodos, 2021 NY Slip Op 03392, First Dept 5-27-21

CIVIL PROCEDURE, SUMMARY JUDGMENT IN LIEU OF COMPLAINT, APPEALS.

THE GUARANTEES QUALIFED AS INSTRUMENTS FOR THE PAYMENT OF MONEY ONLY AND SUPPORTED SUMMARY JUDGMENT IN LIEU OF COMPLAINT; ONLY PURELY LEGAL ARGUMENTS RAISED FOR THE FIRST TIME ON APPEAL CAN BE CONSIDERED (FIRST DEPT).

The First Department determined the plaintiffs were entitled to summary judgment in lieu of complaint based upon guarantees which met the definition of instruments for the payment of money only. The court noted that two arguments raised for the first time on appeal (documents not qualified as business records and failure to include a payment schedule) could not be considered because they were not purely legal arguments. A third argument, which was purely legal, was considered:

Defendants' contention that the guaranties do not qualify as instruments for the payment of money only, as required by CPLR 3213, because they guarantee performance as well as payment and reference must be made to documents outside the guaranties to determine if the debt service coverage ratio (DSCR) conditions have been met, is unavailing. Although this argument was raised for the first time on appeal, since these are "legal issues appearing on the face of the record which could not have been avoided" if they had been raised earlier, we will address the argument … .

The guaranty at issue in 27 West 72nd St. qualifies as an instrument for the payment of money only because it guarantees only payment and not performance. … [T]he … operative provision of the guaranty says, "Guarantor guarantees the payment of the Guaranteed Obligations."

The guaranty at issue in 31 East 28th St. also qualifies as an instrument for the payment of money only. Although it says, "Guarantor guarantees the payment and performance of the Guaranteed Obligations as and when due and payable," the mere addition of the words "and performance" does not necessarily remove the guaranty from the category of instruments for the payment of money only, particularly when the sentence ends with "as and when due and payable." 27 W. 72nd St. Note Buyer LLC v Terzi, 2021 NY Slip Op 03364, First Dept 5-27-21

CIVIL PROCEDURE, SUMMARY JUDGMENT, NEW THEORY.

A THEORY ASSERTED FOR THE FIRST TIME IN OPPOSITION TO DEFENDANT'S SUMMARY JUDGMENT MOTION, AFTER DISCOVERY HAD ENDED, SHOULD NOT HAVE BEEN CONSIDERED (FIRST DEPT).

The First Department, reversing Supreme Court, determined the defendants' motion for summary judgment in this breach of contract action should have been granted. Plaintiff raised a new theory in opposition to the motion, after discovery had ended:

Plaintiff Frank Darabont, represented by his agent, plaintiff Creative Arts Associates, entered into an agreement to develop and run the television series The Walking Dead in exchange for fixed payments for each episode of the series, as well as backend compensation contingent upon the show's profitability, as calculated based on "Modified Adjusted Gross Receipts" (MAGR), with defendant AMC Network Entertainment LLC producing the series and exhibiting it on its own cable channel.

Plaintiffs' claim that AMC breached the implied covenant of good faith and fair dealing by crafting the formula for MAGR arbitrarily, irrationally, or in bad faith was improperly asserted for the first time in opposition to defendants' motion for summary judgment … . … [T]here are no allegations in the complaint that AMC engaged in misconduct by formulating the MAGR definition in such a manner as to deprive plaintiffs of contractual benefits. … [I]t would be prejudicial to require AMC to defend against a theory of liability asserted only after discovery had concluded. Darabont v AMC Network Entertainment LLC, 2021 NY Slip Op 02240, First Dept 4-13-21

CONTRACT LAW, TRUSTS, SECURITIES, FIDUCIARY DUTY.

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, ACCUSATORY INSTRUMENTS.

THE COMPLAINT CHARGING FORCIBLE TOUCHING DID NOT ALLEGE THE APPLICATION OF PRESSURE AS AN ELEMENT OF THE TOUCHING RENDERING THE COMPLAINT LEGALLY INSUFFICIENT (FIRST DEPT).

The First Department, vacating the defendant's forcible touching conviction, determined the complaint was legally insufficient because it did not allege the application of pressure as an element of the touching:

The complaint was legally insufficient to support the forcible touching charge; therefore, with respect to that charge only, the prosecutor's information was jurisdictionally defective … . The actus reus of forcible touching (Penal Law § 130.52) is "any bodily contact involving the application of some level of pressure to the victim's sexual or intimate parts" … . Here, the complaint alleged that defendant touched the victim's thighs and genitals by reaching under her skirt, but it failed to allege any facts consistent with the application of pressure … . People v Zaragoza, 2021 NY Slip Op 03915, First Dept 6-17-21

CRIMINAL LAW, ACCUSATORY INSTRUMENTS.

THE SUPERIOR COURT INFORMATION (SCI) WAS JURISDICTIONALLY DEFECTIVE BECAUSE IT INCLUDED OFFENSES FOR WHICH DEFENDANT WAS NOT HELD FOR GRAND JURY ACTION (FIRST DEPT).

The First Department, reversing Supreme Court, determined the superior court information (SCI) was jurisdictionally defective because it included offenses for which defendant was not held for grand jury action:

The initial felony complaint charged defendant with two counts of criminal contempt in the first degree, and one count each of assault in the third degree and harassment in the second degree. Defendant subsequently agreed to waive prosecution by indictment and plead guilty to one count of aggravated criminal contempt, an offense greater than that charged in the original felony complaint. Because the only offense contained in the superior court information was not an offense for which defendant was held for grand jury action, or a lesser included offense, the superior court information was jurisdictionally defective … .

The fact that the felony complaint was amended to include a charge for aggravated criminal contempt does not require a different result. The superior court information is still defective because it included higher offenses for which defendant was not held for grand jury action (see CPL 195.20). People v Angel, 2021 NY Slip Op 03001, First Dept 5-11-21

CRIMINAL LAW, ASSAULT BY POLICE OFFICER.

DEFENDANT, A POLICE OFFICER, WAS PROPERLY CONVICTED OF ASSAULT FOR REPEATEDLY PUNCHING THE VICTIM AFTER THE VICTIM WAS HANDCUFFED AND RESTRAINED FACE DOWN ON THE FLOOR (FIRST DEPT).

The First Department upheld the assault and offering a false instrument for filing convictions of a police officer who unnecessarily repeatedly struck the victim after the victim was handcuffed and restrained:

The evidence supports the court's finding that defendant, an experienced police officer, lacked a reasonable ground to believe that it was necessary to punch the victim repeatedly to prevent the victim from biting him, both when the victim was rear-cuffed and lying face down on the floor of an apartment building lobby and being effectively restrained by defendant and another officer, and after defendant subsequently brought the victim to the building's rear stairwell without seeking the assistance of any of the other officers present (see Penal Law §§ 35.05[1], 35.15[1], 35.30[1][a]). The evidence also supports the conclusion that all of defendant's punches were unjustified, and also supports the alternative conclusion that even if the initial punch were justified, the subsequent punches were unjustified, and these punches caused additional injury … .

The evidence also established that defendant intentionally caused concededly false statements or information to be written on officially filed forms … . People v Saladeen, 2021 NY Slip Op 02760, First Dept 5-4-21

CRIMINAL LAW, AUTOMOBILE EXCEPTION.

THE AUTOMOBILE EXCEPTION TO THE WARRANT REQUIREMENT PROVIDES NO BROADER SCOPE FOR THE SEARCH THAN WOULD A WARRANT ISSUED BASED ON THE SAME FACTS; HERE THE SMALL AMOUNT OF MARIJUANA ON THE CONSOLE OF DEFENDANT'S CAR DID NOT PROVIDE PROBABLE CAUSE TO SEARCH THE TRUNK WHERE A FIREARM WAS FOUND (FIRST DEPT).

The First Department, in a full-fledged opinion by Justice Kapnick, reversing Supreme Court and holding that decisions to the contrary should no longer be followed, determined the odor of marijuana smoke and the small about of marijuana on the console of the defendant's car did not, pursuant to the automobile exception to the warrant requirement, justify the full search of the trunk of the car. Therefore the firearm found in the trunk should have been suppressed:

… "[T]he automobile exception. . . is an exception only to the warrant requirement; it does not, in contrast to the search-incident-to-arrest exception, dispense with the requirement that there be probable cause to search the vehicle" … . * * *

We are left with the question of whether the presence of a small amount of marijuana consistent with personal use provided the requisite probable cause and nexus to justify a search of the trunk. We find that in this case it did not. The only reasonable conclusion supported by the evidence here was that the de minimis amount of unburnt marijuana was for personal use, not for distribution or trafficking. The officer did not find any drug paraphernalia in the car. Indeed, in this case, there was "scant evidence of drugs in the car" … , and there was no probable cause to believe there was contraband in the trunk of the car. Therefore, because a proper search pursuant to the automobile exception "is no narrower-and no broader-than [sic] the scope of a search authorized by a warrant supported by probable cause, [and] otherwise is as the magistrate could authorize" … , we find that here the search of the trunk was not supported by probable cause. Consequently, the gun found therein, and the statements made by defendant thereafter, should have been suppressed. People v Ponder, 2021 NY Slip Op 02880, First Dept 5-6-21

CRIMINAL LAW, BAIL BOND.

THE PEOPLE FAILED TO TIMELY REDUCE THE BOND OBLIGATION TO A JUDGMENT, THEREFORE THE SURETY'S MOTION TO VACATE THE JUDGMENT FORFEITING THE $100,000 BAIL SHOULD HAVE BEEN GRANTED (FIRST DEPT).

The First Department, in a full-fledged opinion by Justice Renwick, determined the surety's motion to vacate a judgment forfeiting $100,000 bail should have been granted. Although the surety's (Empire's) motion was untimely, the People had failed to timely reduce the bond obligation to a judgment. The opinion is too detailed to fairly summarize here:

In this special proceeding brought pursuant to CPLR 5015 by a surety of a defendant in a criminal case, the dispositive question is whether a surety is procedurally precluded from moving to vacate a judgment of bail forfeiture as untimely made. The People argue that the application is precluded because the surety did not move within the one-year time limit applicable to a motion for remission of the forfeiture, which, as set forth in CPL 540.30(2), "must be made within one year after the forfeiture of bail is declared." We answer the question in the negative because the People must first comply with the statutory mandate of CPL 540.10(2) before they can raise the one-year statute of limitations of CPL 540.30(2). The People did not comply with CPLR 540.10(2), which requires the People to reduce a bond obligation to a judgment within 120 days after the forfeiture is declared by the court. People v Empire Bonding & Ins. Co., 2021 NY Slip Op 03120, First Dept 5-13-21

CRIMINAL LAW, BATSON.

THE PROSECUTION'S REASONS FOR EXCLUDING AN AFRICAN-AMERICAN PROSPECTIVE JUROR WERE PRETEXTUAL; NEW TRIAL ORDERED (FIRST DEPT).

The First Department, reversing defendant's conviction, in a full-fledged opinion by Justice Renwick, determined the two explanations offered by the prosecution for excluding an African-American prospective juror were pretextual and should not have been accepted by the court:

On its face, the subject explanation, that an older gentleman with no children living with roommates would not able to appreciate a domestic violence situation, was not a valid trial-related concern at all. "To recognize the proffered explanation as valid and legitimate would, in our view, emasculate the constitutional protection recognized in Batson . . . and we refuse to do so" … . In fact, the prosecutor does not cite to a single case where this Court or any other court has found such a dubious explanation as a valid-race neutral reason. * * *

… [T]he second explanation was equally pretextual. In essence, the prosecution explained that it "selected people who had higher level jobs with all other things being equal," as well as "[p]eople who indicated that they read." According to the prosecutor, those types of jurors had more capacity to follow the instructions and understand the law. The prosecutor's explanation is essentially an attempt to convince this Court with the preposterous proposition that only jurors with "higher level jobs" can effectively consider all the evidence in this case. While a juror's employment status might be an appropriate race-neutral reason for exclusion, it should be related to the facts of the case … . However, if the employment of the potential juror has no connection with the specific facts of the case then an exclusion of such a juror could constitute discrimination … .

… [T]he prosecutor did not relate his concerns about the prospective juror's employment to the factual circumstances of the case. People v Murray, 2021 NY Slip Op 04108, First Dept 6-29-21

CRIMINAL LAW, FOREIGN FELONIES, SECOND FELONY OFFENDER STATUS.

THE SENTENCING COURT CAN LOOK BEYORD THE WORDING OF A FOREIGN STATUTE TO THE CONTENTS OF THE FOREIGN ACCUSATORY INSTRUMENT TO DETERMINE WHETHER A FOREIGN FELONY IS THE EQUIVALENT OF A NEW YORK FELONY RE: SECOND FELONY OFFENDER STATUS (FIRST DEPT).

The First Department, in a full-fledged opinion by Justice Manzanet-Daniels, determined defendant was properly sentenced as a second felony offender even though the Pennsylvania statute at issue did not require knowledge of the precise controlled substance which was possessed. The First Department looked beyond the wording of the statute to the allegations in the accusatory instrument:

The knowledge requirement of the Pennsylvania statute at issue here is satisfied when it is established that the defendant knew he or she possessed an illegal substance, without the necessity of a showing that he or she knew which illegal substance was possessed … . In contrast, the knowledge requirement under the New York Penal Law sections relevant here "demands proof of 'knowledge that the item at issue was, in fact, the controlled substance the defendant is charged with selling or possessing'" … . This presents the possibility that defendant could have been convicted of a felony under the Pennsylvania statute without being guilty of a felony in New York.

However, a sentencing court may go beyond the statute and examine the underlying accusatory instrument when the foreign statute under which the defendant was convicted renders criminal several different acts, some of which would constitute felonies and others of which would constitute only misdemeanors in New York … .

An examination of the underlying accusatory instrument revealed that defendant had "knowingly manufacture[d], deliver[ed] or possess[ed] with intent to manufacture or deliver (crack/cocaine and powder cocaine), a controlled substance." Accordingly, defendant's Pennsylvania conviction was the equivalent of a felony in New York, and defendant was properly adjudicated a second felony offender. People v Simmons, 2021 NY Slip Op 03924, First Dept 6-17-21

CRIMINAL LAW, GUILTY PLEAS.

DEFENDANT WAS TOLD HE FACED A 45-YEAR SENTENCE AFTER TRIAL WHEN THE ACTUAL SENTENCE WOULD HAVE BEEN CAPPED AT 20 YEARS; DEFENDANT'S DECISION TO PLEAD GUILTY WAS NOT KNOWINGLY AND VOLUNTARILY MADE (FIRST DEPT).

The First Department, vacating defendant's guilty pleas, determined defendant's pleas were not knowingly and voluntarily entered because was told he could be sentenced to 45 years after trial when the sentence would have been capped at 20 years:

Defendant was told that he faced the possibility of serving three 15-year sentences, to run consecutively, if he chose to proceed to trial, when at most he was facing 20 years because of the statutory cap … . Thus, he was weighing a 9-year plea offer against what he was told was a maximum of 45 years' imprisonment. Because defendant was not told about the capping statute, he did not have a "full understanding of what the plea connotes and of its consequences" … .

This 25-year disparity between the true legal sentence and the sentence defendant was told he could receive was so significant alone as to render his plea involuntary … . As defendant explained in his affidavit, submitted in support of his CPL 440.10 motion, the prospect of spending 45 years in prison—and dying there—factored into the 42-year-old's calculation of the relative pros and cons of accepting the plea … . People v Buchanan, 2021 NY Slip Op 03386, First Dept 5-27-21

CRIMINAL LAW, LANDLORD-TENANT.

THE LANDLORD AND GENERAL CONTRACTOR RESPONSIBLE FOR THE INSTALLATION OF AN UNAUTHORIZED SYSTEM TO DELIVER GAS TO APPARTMENTS WERE PROPERLY CONVICTED OF MANSLAUGHTER AFTER A GAS EXPLOSION (FIRST DEPT).

The First Department, in a full-fledged opinion by Justice Acosta, affirmed the manslaughter convictions of the landlord (Hrynenko) and general contractor (Kukic) stemming from a gas explosion which killed two and injured 13. The defendants were responsible for installing an unauthorized system for delivering gas to apartments in the building. The evidence was deemed legally sufficient and the verdicts were not against the weight of the evidence:

… [T]he evidence was legally sufficient to prove that defendants recklessly caused the victims' deaths when they deliberately circumvented safety regulations to create and operate the unauthorized system that diverted natural gas from the building at 119 Second Avenue to the apartments in the building at 121 Second Avenue. Contrary to defendants' primary argument, the explosion was a foreseeable result of their actions. There was ample evidence that defendants, who both had ample experience with buildings and the relevant DOB [Department of Buildings] and Con Ed regulations, understood the risk that death would occur when they proceeded with building and operating the unauthorized gas delivery system … . However, Hrynenko needed a gas delivery system to enable her to immediately begin collecting rent for the apartments at 121, so she chose not to wait for Con Ed's permitting and inspection process to be completed for the authorized system and instead had Kukic build an unauthorized and dangerous makeshift system, using unlicensed plumbers, which they hid from Con Ed. The record shows that defendants both had active roles throughout the planning, building and operation of the system. People v Kukic, 2021 NY Slip Op 03996, First Dept 6-22-21

CRIMINAL LAW, MOLINEUX.

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, RECORDING OF INMATE PHONE CALLS,

CONSTITUTIONAL LAW. THE RECORDING AND DISCLOSURE OF INMATE PHONE CALLS DO NOT VIOLATE THE INMATES' RIGHT TO EQUAL PROTECTION (FIRST DEPT).

The First Department reiterated that the recording and disclosure of inmate phone calls do not violate the inmate's constitutional right to equal protection:

… [O]nce an inmate implicitly consents to the recording of his calls, the inmate retains no reasonable expectation of privacy that would prevent the correctional facility from disclosing the recording. "[W]here detainees are aware that their phone calls are being monitored and recorded all reasonable expectation of privacy in the content of those phone calls is lost, and there is no legitimate reason to think that the recordings, like any other evidence lawfully discovered, would not be admissible" (People v Diaz, 33 NY3d 92, 100 [2019] …). Indeed, at the heart of defendant's argument is the contradictory proposition that the warrant requirement should be applied to a statement in which he has no privacy interest at all.

The principle stated in Diaz applies to any person, incarcerated or not, who waives his or her privacy interest in a conversation, whether by consenting to have it recorded or otherwise. To this extent, defendant was similarly situated to defendants awaiting trial while at liberty. While defendant was treated disparately from such defendants in that he was required to either consent to recording or go without telephone use, this differential treatment did not run afoul of the equal protection clause. Furthermore, defendant fails to show that the government action at issue burdens a fundamental right … . People v Jennings, 2021 NY Slip Op 03262, First Dept 5-20-21

CRIMINAL LAW, SPPEDY TRIAL.

DEFENDANT'S SPEEDY TRIAL MOTION SHOULD HAVE BEEN GRANTED; THE CASE COULD BE PRESENTED WITHOUT THE COMPLAINANT, WHO HAD NO MEMORY OF THE INCIDENT; DEFENSE COUNSEL WAS NOT UNAVAILABLE WITHIN THE MEANING OF THE STATUTE BECAUSE A COLLEAGUE WAS IN COURT REPRESENTING DEFENDANT (FIRST DEPT).

The First Department, reversing Supreme Court, determined defendant's speedy trial motion should have been granted. The court noted the issue is the prosecution's readiness for trial, not whether defense counsel is available:

The court erred, firstly, in excluding 93 days of pre-readiness delay in which the prosecution failed to present its case to the grand jury. "[T]he obligation to obtain a proper accusatory instrument is the prosecutor's alone" … , making "the period prior to the People's obtaining an indictment [] chargeable to them, absent the applicability of some exclusion" … . …

… [T]he prosecutor did not and could not establish its inability to proceed with the case since the complainant was not necessary to present its case to the grand jury. The charges against defendant were for leaving the scene of the accident without reporting it. The complainant remembered nothing of the accident, let alone defendant's actions in its aftermath, professing to this lack of memory on the very day of the accident. …

The court also erred in excluding 83 days of post-readiness delay that was due to the prosecutor's improper declaration that its readiness was "moot" because lead defense counsel was on trial. While acknowledging that a colleague of defense counsel was present, the court nonetheless erroneously concluded that "the People's state of readiness is irrelevant where counsel is unavailable," misconstruing the law as to what constitutes "unavailability." …

Because a colleague of defense counsel stood up on the case on July 8, 2015, as the court itself acknowledged, defendant was not without representation on the basis that "counsel was unavailable." People v Alvarez, 2021 NY Slip Op 03286, First Dept 5-25-21

CRIMINAL LAW, WAIVER OF RIGHT TO COUNSEL, JUDGES.

DEFENDANT'S WAIVER OF HIS RIGHT TO COUNSEL WAS INVALID BECAUSE DEFENDANT WAS NOT AWARE OF HIS SENTENCING EXPOSURE AND THE JUDGE DID NOT CONDUCT A SEARCHING INQUIRY; THE EVIDENCE OF CRIMINAL MISCHIEF AND AUTO STRIPPING WAS LEGALLY INSUFFICIENT AND THE CONVICTIONS WERE AGAINST THE WEIGHT OF THE EVIDENCE (FIRST DEPT).

The First Department, reversing defendant's conviction, determined the waiver of defendant's right to counsel was invalid and the evidence of criminal mischief and auto stripping was legally insufficient, and the convictions were against the weight of the evidence:

Defendant's waiver of his right to counsel was invalid, because the record "does not sufficiently demonstrate that defendant was aware of his actual sentencing exposure" … . "The critical consideration is defendant's knowledge at the point in time when he first waived his right to counsel"; the court's subsequent warnings about sentencing "were incapable of retrospectively 'curing' the . . . court's error" … . Moreover, the court "improperly granted defendant's request to proceed pro se without first conducting a searching inquiry regarding defendant's mental capacity to waive counsel" … , in light of his history of mental illness, as well as his statement, in response to the court's reference to the "tremendous pitfalls of representing yourself," that "[n]one of that has been explained," even after the court had warned him of a number of such risks.

Defendant's conviction of third-degree criminal mischief as to one of the vehicles he damaged (count four), and his conviction of first-degree auto stripping, were unsupported by legally sufficient evidence (a claim we review in the interest of justice), and were also against the weight of the evidence … . The People failed to establish that particular charge of criminal mischief because the evidence did not show that "the reasonable cost of repairing the damaged property" … . Such costs "may not be established by hearsay"… . The People relied on a nonexpert witness who was not the owner of the vehicle and did not pay for the repairs, but testified that he looked at a receipt and that the repair costs were $600 … , and the People do not invoke any exception to the hearsay rule. In the absence of admissible evidence as to the repair costs for that vehicle, the People also failed to establish that the aggregate damage to all the vehicles exceeded $3,000, the minimum value for first-

degree auto stripping … . People v Jackson, 2021 NY Slip Op 03288, First Dept 5-25-21

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

EDUCATION-SCHOOL LAW, COVID.

CHARTER SCHOOLS IN NYC ARE REQUIRED TO PROVIDE RANDOM COVID-19 TESTS TO CITY-RESIDENT CHILDREN (FIRST DEPT).

The First Department, reversing (modifying) Supreme Court, determined the NYC Board of Education was required to provide random COVID-19 testing to city-resident students in charter schools, but not to charter-school staff or to nonparty charter schools:

… Supreme Court erred in directing the City to provide Covid testing not only to children but also to charter school staff, and charter schools which are not parties to this proceeding. Section 912 by its terms directs the school district to provide covered services to "resident children who attend" nonpublic schools, to the same extent such services are provided to children attending public schools (Education Law § 912). The statute does not require that such services be provided to staff or anyone else other than resident children. Accordingly, we modify the judgment, to limit relief to children attending petitioners' charter schools, and not to children attending nonparty charter schools, nor to staff at any school. Matter of King v Board of Educ. of the City Sch. Dist. of the City of N.Y., 2021 NY Slip Op 04083, First Dept 6-24-21

EDUCATION-SCHOOL LAW, DISCIPLINARY PROCEEDINGS, COVID.

NYU DID NOT ACT ARBITRARILY AND CAPRICIOUSLY WHEN IT SUSPENDED THREE STUDENTS FOR ATTENDING OFF-CAMPUS ROOFTOP PARTIES IN AUGUST 2020 WHERE THE ATTENDEES DID NOT WEAR MASKS AND DID NOT PRACTICE SOCIAL DISTANCING (FIRST DEPT).

The First Department, reversing Supreme Court, determined the school (New York University NYU) properly suspended three students for attending off-campus, rooftop parties in August 2020 where the attendees did not wear masks or practice social distancing. The First Department found that the general student conduct policies prohibiting behavior which endangers health and safety, the COVID-19 Executive Orders in effect at the time, and emails sent out by the school provided sufficient pre-conduct notice of the prohibited conduct:

… [W]e find that NYU's determination to suspend petitioners was not arbitrary and capricious and was made in the exercise of honest discretion. Petitioners had notice that the gatherings they attended in August 2020 could result in disciplinary action by NYU. Matter of Storino v New York Univ., 2021 NY Slip Op 02087, First Dept 4-1-21

EMPLOYMENT LAW, HUMAN RIGHTS LAW.

PLAINTIFF'S ALLEGATION DEFENDANT SUPERVISOR CONDITIONED HIS SUPPORT OF PLAINTIFF AT WORK ON HER COMPLIANCE WITH HIS DEMANDS FOR SEX SUPPORTED PLAINTIFF'S REQUEST FOR PUNITIVE DAMAGES RE: DEFENDANT SUPERVISOR AND DEFENDANT EMPLOYER (FIRST DEPT).

The First Department, reversing (modifying) Supreme Court, determined the punitive damages request in this employment discrimination action should not have been dismissed:

The request for punitive damages should be reinstated. [defendant] Ravich's conduct in conditioning his support of plaintiff at work on her compliance with his demands for sex, if proven, would be sufficient to demonstrate discrimination "with willful or wanton negligence, or recklessness, or a conscious disregard of the rights of others

or conduct so reckless as to amount to such disregard" … . Punitive damages could also be awarded against the TCW defendants if they are found vicariously liable for this conduct, although they would be entitled to mitigate such damages with proof of policies established to deter discrimination … . Tirschwell v TCW Group Inc., 2021 NY Slip Op 03397, First Dept 5-27-21

EMPLOYMENT LAW, LABOR LAW.

IN AN ACTION BY CATERING WAITSTAFF SEEKING TIPS ALLEGEDLY WITHHELD BY THE EMPLOYER IN VIOLATION OF THE LABOR LAW, THE EMPLOYER CANNOT SEEK INDEMNIFICATION FROM A CONTRACTOR WHICH SUPPLIED CATERING STAFF TO THE EMPLOYER (FIRST DEPT).

The First Department, in a full-fledged opinion by Justice Kern, in a matter of first impression, determined that an employer (Great Performances) cannot seek indemnification from from a contractor (Kensington) for alleged violations of the Labor Law. The plaintiffs alleged Great Performances kept tips which should have gone to tie waitstaff. Kensington had supplied staff to Great Performances for catered events:

We … find that Great Performances' third-party complaint was properly dismissed as against Kensington on the ground that an employer has no right to contractual indemnification from a third party for claims brought pursuant to NYLL [New York Labor Law] 196-d because indemnification under that statute, whether contractual or otherwise, is against public policy. * * *

The policies behind the statute sought to ensure that employers be held accountable for any wage violations and are not permitted to contract away liability. Indeed, holding that an employer has a right to contractual indemnification from a third party for claims brought pursuant to NYLL 196-d would undermine the employer's willingness to comply with its obligations under the statute. Robinson v Great Performances/Artists as Waitresses, Inc., 2021 NY Slip Op 02769, First Dept 5-4-21

EMPLOYMENT LAW, LABOR LAW.

PLAINTIFF STATED CAUSES OF ACTION FOR VIOLATION OF LABOR LAW 193, IMPROPER DEDUCTIONS FROM WAGES, AND LABOR LAW 215, TERMINATION FOR COMPLAINING OF THE IMPROPER DEDUCTIONS (FIRST DEPT).

The First Department, reversing Supreme Court, determined plaintiff had stated causes of action for violation of Labor Law 193 by making improper deductions from earned wages, and Labor Law 215, by firing plaintiff after she complained of unlawful deductions:

… [P]laintiff alleged that defendants "impermissibly and unlawfully made deductions from [her] wages including the operating costs and expenses of OFRM [her employer] such as, among other things, credit card fees, bank services bills and electric bills." She also alleged that her draw and net bonus payments constituted "earned wages," and that defendants had "unlawfully made deductions from [her] [w]ages." …

Under Labor Law § 193(1)(b), "[n]o employer shall make any deduction from the wages of an employee, except deductions which . . . are expressly authorized in writing by the employee and are for the benefit of the employee." In order to state a claim for a violation of § 193, "a plaintiff must allege a specific deduction from wages and not merely a failure to pay wages" … . Additionally, a "'deduction is more targeted and direct than the wholesale withholding' of wages" … . * * *

Labor Law § 215 provides, in pertinent part, that no employer "shall discharge, threaten, penalize, or in any other manner discriminate against any employee (i) because such employee has made a complaint to his or her employer . . . that the employer has engaged in conduct that the employee, reasonably and in good faith, believes violates any provision of [the Labor Law]." Schmidt-Sarosi v Offices for Fertility & Reproductive Medicine, P.C., 2021 NY Slip Op 03564, First Dept 6-8-21

EMPLOYMENT LAW, NONCOMPETE AGREEMENT, ATTORNEYS.

THE PORTION OF THE NONCOMPETE AGREEMENT WHICH PROHIBITED ENGAGING IN A SIMILAR PRACTICE OF LAW WITHIN 90 MILES OF NYC FOR 36 MONTHS WAS NULL AND VOID; HOWEVER THE PORTION WHICH PROHIBITED THE SOLICITATION OF CLIENTS WAS ENFORCEABLE AND SURVIVED SUMMARY JUDGMENT (FIRST DEPT).

The First Department determined that, although part of the noncompete agreement was null and void, the prohibition of soliciting plaintiff's clients was enforceable. Therefore defendants' motion for summary judgment was properly denied.

Plaintiff Feiner & Lavy, P.C., is a law firm that specializes in immigration law. Defendant Gadi Zohar, Esq. was a former associate attorney with plaintiff, and defendant Jihan Asli was its office manager for several years before joining Zohar's law firm, Zohar Law PLLC. … According to plaintiff, the employment agreement prohibited Zohar from engaging in any business that conducts the same or similar business as plaintiff for a period of 36 months, within 90 miles of New York City or in the Israeli community. The agreement also purported to prohibit Zohar from directly or indirectly soliciting any business from customers or clients of plaintiff for a period of 36 months within 90 miles of New York City or in the Israeli community; or advertise on Israeli/Hebrew websites, TV or newspaper ads. * * *

Rule 5.6(a)(1) of the Rules of Professional Conduct … bars lawyers from "participat[ing] in offering or making a partnership, shareholder, operating, employment, or other similar type of agreement that restricts the right of a lawyer to practice after termination of the relationship," except under limited circumstances that are not relevant to this appeal. To the extent the noncompete provision in the employment agreement that Zohar executed with plaintiff seeks to prevent him from "conducting business activities that are the same or similar to those of [plaintiff]" within 90 miles of New York City or in the Israeli community, it is void and unenforceable … .

However, the noncompete clause here may be enforceable to the extent that it prohibits Zohar from soliciting plaintiff's clients … . Feiner & Lavy, P.C. v Zohar, 2021 NY Slip Op 03407, First Dept 6-1-21

FAMILY LAW, ADOPTION.

A CONDITIONAL JUDICIAL SURRENDER OF A CHILD FOR ADOPTION MUST BE REVOKED WHERE THE DESIGNATED ADOPTIVE PARENT DECLINES TO ADOPT AND THE BIRTH PARENT PROMPTLY APPLIES FOR REVOCATION OF THE JUDICIAL SURRENDER (FIRST DEPT).

The First Department, in a full-fledged opinion by Justice Oing, reversing Family Court, determined the conditional judicial surrender of a child for adoption must be revoked where the designated adopting parent declines to adopt the child and the birth parent promptly applies for revocation. The child, now 16 years old, had been in foster care for nine years. Although the First Department revoked the judicial surrender, the court remanded the matter for a quick hearing on the petition to terminate mother's parental rights:

This appeal requires us to resolve an issue not previously addressed by this Court. When the person designated in a conditional judicial surrender as the adopting parent declines to adopt the child must the surrender be revoked upon the birth parent's application? The Family Court was unwilling to vacate the surrender given the undisputed toll on the child's well-being as a result of spending virtually her entire life in foster care. Instead, the court held a best interests hearing and determined that the mother's parental rights remain terminated, and converted her conditional judicial surrender to an unconditional one, which permitted the child to remain free for adoption. This issue pits the basic principle that a parent has a "fundamental liberty interest . . . in the care, custody and management" of his or her child … against this state's statutory framework governing conditional judicial surrenders … . … We conclude that the order of the Family Court should be reversed because the designated person to adopt is a fundamental condition precedent to a surrender such that the person's declination mandates its revocation upon the birth parent's prompt application. * * *

Order, Family Court, … reversed, on the law, … the petition denied and dismissed, and the mother's application granted and the matter remanded for an expeditious continued hearing on the agency's petition to terminate the mother's parental rights."
Matter of L.S. (Diana A.), 2021 NY Slip Op 02085, First Dept 4-1-21

FAMILY LAW, FAMILY OFFENSE, ORDER OF PROTECTION, FIRST AMENDMENT.

THE HARASSMENT-RELATED SPEECH PROHIBITIONS IN THE ORDER OF PROTECTION DID NOT VIOLATE THE FIRST AMENDMENT BUT THE PROVISION PROHIBITING RESPONDENT FROM DISCSUSSING THE PETITIONER OR THE FAMILY OFFENSE PROCEEDING WAS STRUCK FROM THE ORDER OF PROTECTION AS UNNECESSARY (FIRST DEPT).

The First Department affirmed the finding respondent committed the family offense of harassment by sending email about petitioner's personal matters to 53 people. Although the harassment prohibitions in the order of protection did not violate the Firs Amendment, the provision in the order of protection which prohibited respondent from discussing the petitioner or the proceedings was struck as unnecessary:

Respondent contends that the provision of the order prohibiting him from discussing petitioner or the case with anyone familiar with petitioner violated his First Amendment right to freedom of speech. To be sure, respondent's repeatedly sending petitioner emails articulating his unwanted opinions about her, her mother and their family dynamic or making petitioner aware of the emails he sent to several third parties broadcasting those opinions by blind-copying her on those messages is not protected by the First Amendment, because those repeated and unwanted communications serve no legitimate purpose … . However, because the harassment is adequately addressed by the provision that respondent stay away from petitioner and not contact her, we delete the prohibition against his discussing petitioner or the proceeding … . Matter of Sophia M. v James M., 2021 NY Slip Op 03992, First Dept 6-22-21

FAMILY LAW, ORDER OF PROTECTION.

PETITIONER WAS ENTITLED TO A HEARING ON A TEMPORARY ORDER OF PROTECTION (TOP) WHICH BARRED HER FROM HER

OWN APARTMENT WHERE HER CHILDREN LIVED; THE APPEAL WAS HEARD AS AN EXCEPTION TO THE MOOTNESS DOCTRINE (FIRST DEPT).

The First Department, in a full-fledged opinion by Justice Webber, reversing Criminal Court, determined the mandamus action against a Criminal Court judge seeking a hearing on a temporary order of protection (TOP) should have been granted. The First Department found that the matter qualified as an exception to the mootness doctrine and heard the appeal despite the dismissal of the underlying criminal action. Petitioner was charged with assaulting a man with whom she lived in her apartment. The TOP barred her from her own apartment where her children resided:

We find that the Criminal Court's initial failure to hold an evidentiary hearing in accordance with petitioner's due process rights after being informed that petitioner might suffer the deprivation of a significant liberty or property interest upon issuance of the TOP falls within the exception to the mootness doctrine: "(1)[there is] a likelihood of repetition, either between the parties or among other members of the public; (2) [it involves] a phenomenon typically evading review; and (3) [there is] a showing of significant or important questions not previously passed on, i.e., substantial and novel issues" … . Matter of Crawford v Ally, 2021 NY Slip Op 04082, First Dept 6-24-21

FORECLOSURE, STATUTES OF LIMITATIONS.

THE DEFAULT LETTER DID NOT DECLARE THE MORTGAGE DEBT IMMEDIATELY DUE AND PAYABLE; THEREFORE THE LETTER DID

NOT ACCELERATE THE DEBT AND THE FORECLOSURE ACTION WAS NOT TIME-BARRED (FIRST DEPT).

The First Department, reversing Supreme Court, determined the default letter did not accelerate the debt and, therefore, the foreclosure action was not time-barred:

The appealed case directly on point with the dispositive issue here is Vargas v Deutsche Bank [2021 NY Slip Op. 01090], in which the Court of Appeals set a clear standard for determining whether a default letter constitutes a "clear and unequivocal acceleration of a debt." Applying the long-standing rule … "that a noteholder must effect an 'unequivocal overt act' to accomplish such a substantial change in the parties' contractual relationship," the Court, in Vargas, held that to constitute a "clear and unequivocal" acceleration of a debt, a default letter must demand from a noteholder an immediate repayment of the entire outstanding loan, and must not also refer to acceleration only as a future event, indicating the debt was not accelerated at the time the letter was written.

… The default letter notified plaintiff that the subject mortgage loan was in default as of September 1, 2010. The letter gave plaintiff 30 days to cure the default by payment of the amount due and owing, which was just over $9,000. It also stated: "Unless we receive full payment of all past-due amounts, we will accelerate the maturity of the loan, declare the obligation due and payable without further demand, and begin foreclosure proceedings." Thus, as in Vargas, the default letter did not effectuate an unequivocal acceleration of the debt because it did not seek an immediate repayment of the entire balance outstanding on the loan, but rather "referred to acceleration only as a future event, indicating the debt was not accelerated at the time the letter was written." Kirschenbaum v Wells Fargo Bank, N.A., 2021 NY Slip Op 02073, First Dept 4-1-21

Similar issue and result in Ditech Fin., LLC v Rector 70 LLC, 2021 NY Slip Op 02062, First Dept 4-1-21

FORECLOSURE, STATUTES OF LIMITATIONS.

TWO VOLUNTARY DISCONTINUANCES OF TWO SUCCESSIVE FORECLOSURE ACTIONS TWICE REVOKED THE ACCELERATION OF THE DEBT RENDERING THE THIRD FORECLOSURE ACTION TIMELY (FIRST DEPT).

The First Department, reversing Supreme Court based upon the February, 2021 Court of Appeals ruling, determined two voluntary discontinuances of two successive foreclosure actions twice revoked the acceleration of the debt, rending the third foreclosure action timely:

… [O]n February 18, 2021, the Court of Appeals issued its decision in Freedom Mtge. Corp v Engel, — NY3d —, 2021 NY Slip Op 01090 (2021), holding, inter alia, that "where acceleration occurred by virtue of the filing of a complaint in a foreclosure action, the noteholder's voluntary discontinuance of that action constitutes an affirmative act of revocation of that acceleration as a matter of law, absent an express, contemporaneous statement to the contrary by the noteholder" (Freedom Mtge., at *6). Thus, contrary to defendants' argument, the September 2013 voluntary discontinuance of the 2009 first foreclosure action did constitute an "affirmative act," within six years, thereby revoking the prior election to accelerate. A second foreclosure action was commenced in October 2013 and discontinued in September 2017. To the extent there is a question surrounding plaintiff's reason for discontinuing the second foreclosure action and whether that reason constituted a "contemporaneous statement" that they were not seeking to de-accelerate the debt, it does not change the fact that the third foreclosure action is timely because it was commenced within six years of the date of acceleration, which was October 2013. U.S. Bank Trust, N.A. v Boktor, 2021 NY Slip Op 02124, First Dept 4-6-21

FRAUD, CONTRACT LAW.

THE COMPLAINT STATED A CAUSE OF ACTION FOR FRAUD BASED UPON DEFENDANTS' ALLEGED INFLATION OF THE VALUE OF THE BUSINESS PURCHASED BY PLAINTIFF; AND THE COMPLAINT STATED A CAUSE OF ACTION FOR BREACH OF CONTRACTUAL WARRANTIES WHICH DID NOT DUPLICATE THE FRAUD CAUSE OF ACTION (FIRST DEPT).

The First Department, reversing Supreme Court, determined the complaint adequately alleged fraud (inflating the value of defendants' business which was purchased by plaintiff) and breach of contract:

… [T]he key … element of a claim for fraudulent concealment — duty to disclose — is met here, given the hidden nature of the fraud, which turned on falsified records and bribed auditors, and the practical impossibility of discovering the fraud through ordinary diligence … .

Defendants' alleged deception also breached numerous warranties set forth in the governing stock purchase agreement, including that … financial statements were materially complete and correct, that its [earning] projections were reasonable and made in good faith, that it had no material undisclosed liabilities, and that it conducted its business in compliance with applicable law. Nevertheless, "[a] warranty is not a promise of performance, but a statement of present fact. Accordingly, a fraud claim can be based on a breach of contractual warranties notwithstanding the existence of a breach of contract claim" … . Thus, the fraud claim does not duplicate the contract claim … . VXI Lux Holdco, S.A.R.L. v SIC Holdings, LLC, 2021 NY Slip Op 03294, First Dept 5-25-21

FREEDOM OF INFORMATION LAW (FOIL).

RESPONDENT CITY DID NOT DEMONSTRATE THE FOIL REQUEST WOULD INTERFERE WITH LAW ENFORCEMENT OR JUDICIAL PROCEEDINGS OR WOULD REVEAL A CONFIDENTIAL SOURCE; MATTER REMITTED FOR IN CAMERA REVIEW TO DETERMINE WHETHER THE FOIL REQUEST WAS PROTECTED BY THE INTER- OR INTRA- AGENCY MATERIALS EXEMPTION (FIRST DEPT).

The First Department, reversing (modifying) Supreme Court, determined that two of the grounds for denying the FOIL request were invalid and the third, the inter-agency or intra-agency materials exemption, could not be assessed absent an in camera review of the documents. The matter was remitted:

Respondent failed to meet its burden of establishing that disclosure of any records responsive to petitioner's FOIL request would "interfere with law enforcement investigations or judicial proceedings" … . This exemption "ceases to apply after enforcement investigations and any ensuing judicial proceedings have run their course" … . …

Respondent also failed to establish that disclosure would "identify a confidential source or disclose confidential information relating to a criminal investigation" … , "in the absence of any evidence that [any] person received an express or implied promise of confidentiality'" … . Respondent's assertion that disclosure would reveal nonroutine "criminal investigative techniques or procedures" … is conclusory.

The email messages submitted by petitioner in support of the article 78 petition are covered by the inter-agency or intra-agency materials exemption … because they amount to "opinions, ideas, or advice exchanged as part of the consultative or deliberative process of government decision making"… . However, the applicability of this exemption to any other responsive records cannot be determined on this record in the absence of in camera review … . Matter of Jewish Press, Inc. v New York City Dept. of Investigation, 2021 NY Slip Op 02108, First Dept 4-6-21

INSURANCE LAW, EXAMINATION UNDER OATH.

THE EXAMINATION UNDER OATH (EUO) WAS SCHEDULED BEFORE THE INSURER RECEIVED A CLAIM FORM; THEREFORE THE INSURER DID NOT HAVE TO DEMONSTRATE COMPLIANCE WITH THE NOTICE REQUIREMENTS OF 11 NYCRR 65-3.5 TO BE ENTITLED TO A DEFAULT DECLARATORY JUDGMENT; THE UNDERLYING TRAFFIC ACCIDENT WAS FOUND TO HAVE BEEN STAGED AND CLAIMANT FAILED TO APPEAR AT SCHEDULED EOU'S (FIRST DEPT).

The First Department noted that where an examination under oath (EUO) is scheduled before the insurance company's of a claim form, the insurer need not submit the proof of mailing in compliance with 11 NYCRR 65-3.5 to obtain a default declaratory judgment. It was determined the underlying traffic accident was staged and claimant did not appear at scheduled EOU's:

As to claimant Ronald Marcellus, plaintiff additionally provided sufficient proof that he failed to appear for an examination under oath (EUO) despite receiving proper notice, which vitiates the policy … . Generally, an insurer must provide proof that the EUO requests were timely mailed, within 15 business days of receipt of the prescribed verification forms, in compliance with 11 NYCRR 65-3.5 in order to obtain a default declaratory judgment … . However, that requirement does not apply where, as here, the EUOs are scheduled prior to the insurance company's receipt of a claim form … . Since Marcellus failed to appear on two or more occasions and the EUO requests were sent prior to plaintiff's receipt of a claim form, plaintiff did not need to demonstrate compliance for the verification requests under 11 NYCRR 65-3.5. State Farm Mut. Auto. Ins. Co. v Surgicore of Jersey City, LLC, 2021 NY Slip Op 03536, First Dept 6-3-21

INSURANCE LAW, NO-FAULT, EXAMINATION UNDER OATH.

DEFENDANT DOCTOR'S FAILURE TO APPEAR FOR THE NO-FAULT EXAMINATION UNDER OATH (EUO) REQUESTED BY THE INSURER JUSTIFIED THE DENIAL OF DEFENDANT'S CLAIMS FOR BENEFITS (FIRST DEPT).

The First Department, reversing Supreme Court, determined the surgeon's failure to appear for the no-fault examination under oath (EUO) requested by the insurer voided the insurance policy:

Plaintiff sent defendant a timely request for an examination under oath (EUO) with respect to a claim for benefits in the amount of $6,106.56, for shoulder surgery performed by defendant on an individual that was a passenger in a vehicle involved in an accident, covered by a no-fault insurance policy issued by plaintiff. Defendant failed to appear and plaintiff denied all claims for benefits made by defendant.

The failure to appear for an EUO that was requested in a timely fashion by the insurer is a breach of a condition precedent to coverage and voids the policy ab initio … . The coverage defense applies to any claim and is not determined on a bill by bill basis … . The EUO was timely requested as to the second claim for benefits for the shoulder surgery, accordingly, defendant's failure to appear at that EUO voided the policy ab initio as to all claims, and plaintiff's cross motion for summary judgment should have been granted in its entirety. Unitrin Advantage Ins. Co. v Dowd, 2021 NY Slip Op 03012, First Dept 5-11-21

LABOR LAW-CONSTRUCTION LAW, NEGLIGENCE.

QUESTION OF FACT WHETHER A LADDER WAS INTENDED FOR USE AS A STAGE PROP BY ACTORS AS OPPOSED TO AN OSHA COMPLIANT LADDER; EVEN WHERE A LABOR LAW 200 ACTION WILL NOT LIE, A COMMON-LAW NEGLIGENCE CAUSE OF ACTION MAY BE VIABLE; HERE IT WAS ALLEGED DEFENDANT LAUNCHED AN INSTRUMENT OF HARM BY ALTERING THE LADDER (FIRST DEPT).

The First Department, reversing (modifying) Supreme Court, determined that the Labor Law 200 cause of action against Center Line should have been dismissed but the common law negligence cause of action properly survived summary judgment. Although the decision doesn't spell it out, it appears that defendant Center Line altered the ladder in question by gluing on an extra rung. Apparently the ladder was to be used by actors and Center Line argued it was a stage prop and was not intended for use an OSHA compliant ladder. The viable contract-based "Espinal" negligence theory was based upon launching an instrument of harm (altering the ladder):

Even assuming that Center Line is a proper Labor Law § 200 defendant, it cannot be held liable under the statute. This case is a means and methods of work case, and there is no proof that Center Line had authority to supervise and control plaintiff's work … .

A claim for common-law negligence may lie even though there is no Labor Law § 200 liability … . A triable issue of fact exists as to whether Center Line negligently created or exacerbated a dangerous condition so as to have "launche[d] a force or instrument of harm" … . Although Center Line augmented the ladder as directed by Production Core, a triable issue of fact exists as to whether Center Line could have reasonably anticipated that the gluing of the rung to the top of the ladder would pose a hazard and likely to cause injury … . While plaintiff and the codefendants claim that Center Line dangerously altered the ladder despite knowing that the ladder was structural and climbable, Center Line claims that the ladder was a prop ladder that was not meant to be OSHA compliant, and that it augmented the ladder in reliance on Production Core's assurances that the top portion of the ladder would not be ascended by the actors. Such raises an issue of fact for the jury to decide. Mullins v Center Line Studios, Inc., 2021 NY Slip Op 02756, First Dept 5-4-21

LABOR LAW-CONSTRUCTION LAW.

BECAUSE PLAINTIFF WAS FOLLOWING THE DIRECTIONS OF HIS FOREMAN WHEN INJURED BY AN IMPROPERLY HOISTED LOAD, HE COULD NOT BE THE SOLE PROXIMATE CAUSE OF HIS INJURIES (FIRST DEPT).

The First Department, reversing Supreme Court, determined the plaintiff in this Labor Law 240 (1) and 241 (6) action could not be the sole proximate cause of his injuries because he was following the directions of his foreman when struck by an improperly hoisted load:

Plaintiff Samuel Hayek demonstrated prima facie entitlement to summary judgment on his Labor Law § 240(1) claim, where the undisputed evidence showed that he was injured when struck by an improperly hoisted or inadequately secured load of L-shaped steel rebar weighing between 2000 and 3000 pounds, while doing construction work at defendant Metropolitan Transportation Authority's Eastside Access project … .

In opposition, defendants failed to raise a triable issue as to the statutory violation and whether plaintiff was the sole proximate cause of his injury. Given the undisputed evidence that plaintiff was following the directions of his foreman at the time of his injury, plaintiff cannot be the sole proximate cause of his injuries … . Hayek v Metropolitan Transp. Auth., 2021 NY Slip Op 04103, First Dept 6-29-21

LABOR LAW-CONSTRUCTION LAW.

PLAINTIFF INJURED HIS BACK WHEN HE LIFTED A HEAVY PIECE OF LUMBER TO ALLOW THE BLADES OF A FORKLIFT TO MOVE UNDER THE LUMBER; THERE WERE QUESTIONS OF FACT WHETHER LABOR LAW 240 (1) WAS APPLICABLE (FIRST DEPT).

The First Department, reversing Supreme Court, determined plaintiff's motion for summary judgment on his Labor Law 240 (1) cause of action should not have been granted (but did not explain why). Plaintiff injured his back when he lifted a heavy object to allow the blades of a forklift to be moved under it:

There are issues of fact as to "whether plaintiff's injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential" … .

It appears that plaintiff was placed in a position that required him to lift an extremely heavy piece of lumber without any safety devices such as those listed in Labor Law § 240(1) in order to get the assistance of a forklift. We note, in this regard, that any action on plaintiff's part in lifting the beam goes to the issue of comparative negligence, which is not a defense to a Labor Law § 240(1) claim, because the statute imposes absolute liability once a violation is shown … . Moreover, plaintiff was under no duty to demand an alternate safety device on his own because "[t]o place that burden on employees would effectively eviscerate the protections that the legislature put in place" … . "Indeed, workers would be placed in a nearly impossible position if they were required to demand adequate safety devices from their employers or the owners of buildings on which they work" … . Greene v Raynors Lane Prop. LLC, 2021 NY Slip Op 03114, First Dept 5-13-21

LABOR LAW-CONSTRUCTION LAW.

PLAINTIFF WAS INJURED ATTEMPTING TO HOLD BACK A HAND TRUCK WITH A 500 POUND LOAD AS HE WAS DESCENDING STAIRS; IT WAS POSSIBLE TO LOWER THE LOAD USING RIGGING IN AN ELEVATOR SHAFTWAY BUT PLAINTIFF WAS DIRECTED TO USE THE STAIRS; PLAINTIFF WAS PROPERLY AWARDED SUMMARY JUDGMENT ON HIS LABOR LAW 240 (1) CAUSE OF ACTION (FIRST DEPT).

The First Department determined plaintiff was properly awarded summary judgment on his Labor Law 240 (1) cause of action. Plaintiff was injured trying to keep a hand truck from descending stairs too fast with a 500 pound load. The load could have been lowered with rigging equipment in an elevator shaftway but was directed to use the stairs:

Plaintiff was not provided with any hoisting equipment to use on the staircase and defendants had previously refused Dunwell's [plaintiff's employer's] requests to bring equipment through the building's lobby and down the shaftway of the lobby elevator, which was already outfitted with rigging equipment. Instead, defendants instructed Dunwell to bring their materials through the courtyard behind the building and down an exterior staircase to the basement. Plaintiff testified that he was holding the hand truck by the handles at the top, while his coworkers held it from the bottom to control its descent, and as the hand truck was going down the first step, one of the coworkers, a helper, "kind of let off the pressure" on his side of the hand truck, causing the hand truck to go down the first step "very fast," which "jerked" plaintiff and caused him to slip on some dirt, gravel, or debris on the step. Plaintiff testified further that at that point he attempted to hold back the weight of the steel bedplate and stop the load's descent. Plaintiff "yelled out a little bit" and the three workers rested for approximately 30 seconds, before continuing the descent down the stairs. All three workers rested at the bottom of the stairs before moving the bedplate into the building. During this break, plaintiff told his coworkers "I pulled my shoulder out and my back is killing me." Agli v 21 E. 90 Apts. Corp., 2021 NY Slip Op 03540, First Dept 6-8-21

LABOR LAW-CONSTRUCTION LAW.

PLAINTIFF WAS PROPERLY AWARDED SUMMARY JUDGMENT ON HIS LABOR LAW 240 (1) CAUSE OF ACTION STEMMING FROM A FALL FROM A SIDEWALK BRIDGE PLAINTIFF WAS DISMANTLING; ALTHOUGH PLAINTIFF WAS SUPPLIED WITH A HARNESS, THERE WAS NO PLACE TO ATTACH THE SAFETY LINE (FIRST DEPT).

The First Department determined plaintiff was properly awarded summary judgment on his Labor Law 240 (1) cause of action based on his fall from a sidewalk bridge he was dismantling. Although plaintiff had a harness, there was no place to attach the safety line:

Plaintiff testified that he was wearing a harness but that the sidewalk bridge did not have a lifeline to which he could attach the safety line, which was seven to nine feet long. The task at hand involved his breaking down the structure's components and carrying them to the end of the sidewalk bridge run, which covered nearly a city block. The expert stated that if plaintiff's movement was limited to nine feet with his lanyard attached to the sidewalk bridge, he could still have performed his job "as described." However, he failed to explain further or indicate where on the bridge a tie-off would have been either practicable or safe, given the maximum range of the harness line. Gomez v Trinity Ctr. LLC, 2021 NY Slip Op 03810, First Dept 6-15-21

LABOR LAW-CONSTRUCTION LAW.

PLAINTIFF WAS STANDING AT THE TOP OF A LADDER WHEN IT WOBBLED AND HE FELL; COMPARATIVE NEGLIGENCE IS NOT A DEFENSE TO A LABOR LAW 240 (1) ACTION; PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED (FIRST DEPT).

The First Department, reversing Supreme Court, determined plaintiff was entitled to summary judgment on his Labor Law 240 (1) cause of action, Plaintiff was standing at the top of a ladder when it wobbled and he fell:

Plaintiff established prima facie entitlement to summary judgment on the Labor Law § 240(1) claim through his testimony that while installing a cover on a sprinkler in a ceiling, he fell to the ground and sustained injury when the unsecured ladder on which he was standing with one foot on the ladder's top, and the other foot one rung below began to wobble and he lost his equilibrium … . …

… [T]here is no requirement that plaintiff identify exactly what caused the ladder to move, or his fall … . While defendants argue that different versions as to why the ladder wobbled preclude summary judgment, under any of the scenarios, plaintiff is entitled to partial summary judgment because he was not supplied with adequate protection under the statute, which was the proximate cause of the accident … .

Given plaintiff's undisputed testimony, any alleged misuse by him constitutes at most comparative negligence, which is not a defense to a Labor Law § 240(1) claim … . Hoxhaj v West 30th HL LLC, 2021 NY Slip Op 03811, First Dept 6-15-21

LABOR LAW-CONSTRUCTION LAW.

PLAINTIFF WAS STRUCK BY A PIECE OF SHEETROCK, THE LADDER HE WAS STANDING ON SHOOK, AND PLAINTIFF FELL TO THE GROUND; THERE WAS NO NEED TO PROVE THE LADDER WAS DEFECTIVE; PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT ON HIS LABOR LAW 240 (1) CAUSE OF ACTION SHOULD HAVE BEEN GRANTED (FIRST DEPT).

The First Department, reversing Supreme Court, determined plaintiff's motion for summary judgment on his Labor Law 240 (1) cause of action should have been granted, Plaintiff stood on an A-frame ladder while attempting to put up a piece of sheetrock on the ceiling. His arm which was holding up the sheetrock became tired, the sheetrock fell striking plaintiff's head and then the ladder shook and moved and he fell to the ground. There was no need to prove the ladder was defective:

The undisputed facts establish that defendants violated Labor Law § 240(1) by failing to properly secure the ladder against movement or slippage and to ensure that it remained steady and erect … . Defendants failed to guard against plaintiff's risk

of falling from a ladder while using one hand over his head to hold the sheetrock in place and the other hand over his head to operate a drill … .

Because we find that the ladder did not provide adequate protection, it is irrelevant that it appeared "very sturdy" to plaintiff. A plaintiff is not required to demonstrate that a ladder is defective in order to establish prima facie entitlement to summary judgment under Labor Law § 240 (1) … . Ping Lin v 100 Wall St. Prop. L.L.C., 2021 NY Slip Op 02605, First Dept 4-29-21

LABOR LAW-CONSTRUCTION LAW.

PLAINTIFF WAS STRUCK BY AN AIR CONDITIONER WHEN TWO OF THE FOUR RODS ATTACHING THE AIR CONDITIONER TO THE CEILING DETACHED AND ONE END OF THE UNIT FELL; QUESTION OF FACT WHETHER THE AIR CONDITIONER WAS A FALLING OBJECT WHICH SHOULD HAVE BEEN SECURED WITHIN THE MEANING OF LABOR LAW 240 (1) (FIRST DEPT).

The First Department, reversing Supreme Court, determined there was a question of fact whether an air conditioner installed by plaintiff's employer was a falling object which should have been secured in this Labor Law 240 (1) action. the air condition was attached to the concrete ceiling by four rods. Two of the rods came out of the ceiling causing one end of the unit to drop, striking plaintiff:

Plaintiff testified that he was standing on the fourth rung of an A-frame ladder, which he had set up on a solid and clean part of the floor and had been using without incident, directly under an air-conditioning unit, while attempting to follow his foreman's instructions by connecting a "canvas" device to air-conditioning duct work, when the air-conditioning unit fell onto his head, causing him to fall off the ladder onto the floor. The air-conditioning unit had recently been installed by plaintiff's employer as part of its work on the project and was not part of the pre-existing building structure as it appeared before the project began. The air-conditioning unit was mounted a few inches below the approximately 12-foot ceiling by four rods. Plaintiff testified that two of those rods detached from the concrete

ceiling, causing one end of the unit to drop, while the other end of the unit remained attached to the ceiling by two bent rods.

There is an issue of fact as to whether the air-conditioning unit constituted a falling object that was required to be secured for the purposes of the undertaking … . Erby v 36 LLC, 2021 NY Slip Op 02065, First Dept 4-1-21

LANDLORD-TENANT, COVID, CONTRACT LAW.

THE COVID-19 PANDEMIC DID NOT ENTITLE PLAINTIFF COMMERCIAL TENANT TO RENT ABATEMENT UNDER THE LEASE OR RESCISSION BASED UPON FRUSTRATION OF PURPOSE OR IMPOSSIBILITY (FIRST DEPT).

The First Department, reversing Supreme Court, determined that the COVID-19 pandemic did not entitle plaintiff to rent abatement under the lease and did support rescission of the lease based upon frustration of purpose or impossibility:

… [P]laintiff is not entitled to a rent abatement under the lease "due to loss of use of all or a portion of the Demised Premises due to [a] Casualty[.]" That portion of the lease refers to singular incidents causing physical damage to the premises and does not contemplate loss of use due to a pandemic or resulting government lockdown … . …

The doctrine of frustration of purpose does not apply as a matter of law where, as here, the tenant was not "completely deprived of the benefit of its bargain" (… 558 Seventh Ave. Corp. v Times Sq. Photo Inc., 194 AD3d 561 [1st Dept 2021] [finding that reduced revenues did not frustrate the purpose of the lease]). Furthermore, plaintiff's assertion that Executive Order 202.8 [re: COVID-related suspension of laws] rendered it objectively impossible to perform its operations as a retail store as required by the lease is unavailing as defendant correctly points out that by the time plaintiff filed its complaint in July 2020, this was no longer the case … . Gap, Inc. v 170 Broadway Retail Owner, LLC, 2021 NY Slip Op 04115, First Dept 6-29-21

LANDLORD-TENANT, RENT-STABILIZED APARTMENT.

THE NYS DIVISION OF HOUSING AND COMMUNITY RENEWAL (DHCR) PROPERLY HELD THE APARTMENT WAS RENT-STABILIZED, BUT DID NOT PROPERLY CALCULATE THE RENT OVERCHARGE (FIRST DEPT).

The First Department, reversing (modifying) Supreme Court, determined the NYS Division of Housing and Community Renewal (DHCR) properly found the apartment in question was rent-stabilized, but used the wrong formula to calculate the rent overcharge. The decision is too detailed to fairly summarize here:

Supreme Court correctly denied AEJ's petition insofar as it seeks reversal of DHCR's determination that the apartment is rent-stabilized. DHCR's examination of the apartment's rental history to determine its regulated status had a rational basis … . DHCR erred, however, in establishing the base date rent by using the last registered rent from 1990 and then adding subsequent rent-stabilized rent increases to bring it up to date as of March 2010. The rent history of the apartment beyond the four year look back should not have been examined to determine the base rent for overcharge purposes … . Rather the base date rent is what [the tenant] actually paid four years prior to the date when [the landlord] filed its request for administrative determination (AD request) with DHCR. Matter of AEJ 534 E. 88th, LLC v New York State Div. of Hous. & Community Renewal, 2021 NY Slip Op 02977, First Dept 5-11-21

MUNICIPAL LAW, NEGLIGENCE, EMPLOYMENT LAW.

MUNICIPAL DEFENDANTS NOT LIABLE FOR INJURY CAUSED BY BICYCLE-RIDING IN PUBLIC PARK, DESPITE REGULATIONS PROHIBITING BICYCLE-RIDING; QUESTION OF FACT WHETHER THE DEFENDANT HIRED TO CARE FOR THE CHILD WHO STRUCK INFANT PLAINTIFF WAS AN EMPLOYEE OF THE CHILD'S FATHER (RESPONDEAT SUPERIOR) OR AN INDEPENDENT CONTRACTOR; QUESTIONS OF FACT WHETHER THE DEFENDANT CARE-GIVER WAS NEGLIGENT IN SUPERVISING THE CHILD (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court determined: (1) the municipal defendants were not liable for injuries to infant plaintiff caused when infant plaintiff was struck by another child (defendant Tully's son) riding a bicycle in a municipal park where bicycle-riding was prohibited; (2) there was a question of fact whether defendant Bhawanie, who was employed by defendant Tully to care for Tully's son, was defendant Tully's employee or an independent contractor; (3) there were questions of fact whether Bhawanie was negligent:

… "[B]icycle riding in a playground . . . constitutes neither an ultrahazardous nor a criminal activity" … . … [T]he municipal defendants are not accountable to the infant plaintiff for their alleged failure to enforce their regulations prohibiting bicycle riding in the playground, since the promulgation and enforcement of such regulations do not constitute the assumption of a special relationship with the infant plaintiff such that a special duty was owed to him … . …

… [T]he evidence demonstrated that Bhawanie had worked for Tully and his wife continuously from 2007 through 2016, Tully and his wife dictated Bhawanie's work schedule, and Bhawanie had to receive permission from Tully and his wife before engaging in certain activities with their children. Under the circumstances, a triable issue of fact exists on the issue of whether Bhawanie was an employee of Tully, such that vicarious liability may be imposed, or whether she was an independent contractor. …

"While a person caring for entrusted children is not cast in the role of an insurer, such an individual is obliged to provide adequate supervision and may be held liable for foreseeable injuries proximately resulting from the negligent failure to do so" …

. C.B. v Incorporated Vil. of Garden City, 2021 NY Slip Op 03158, Second Dept 5-19-21

NEGLIGENCE, ASSUMPTION OF THE RISK.

THERE IS A QUESTION OF FACT WHETHER A 16-YEAR-OLD SOFTBALL PLAYER ASSUMED THE RISK OF STEPPING IN A HOLE ON THE FIELD (FIRST DEPT).

The First Department, reversing Supreme Court, determined there was a question of fact whether a 16-year-old softball player assumed the risk of stepping into a hole on the softball field:

Plaintiff, an experienced 16-year-old softball player was playing softball on an outdoor artificial turf field owned by defendant City of New York (the City). Plaintiff maintained that she sustained injures to her left knee when she stepped into a hole on the turf that had been placed over existing turf. The City contends that the hole was an open and obvious condition and that plaintiff assume the risk of injury. We disagree. The photographs in the record appear to depict a tear or seam in the turf that may have caused a concealed depression relative to the surrounding playing surface.

Accordingly, issues of fact exist whether the City was negligent in maintaining the field in a reasonably safe condition. Although a participant in an athletic activity is deemed to have assumed "those commonly appreciated risks which are inherent in and arise out of the nature of the sport generally and flow from such participation," there remain issues of fact as to whether plaintiff's injuries resulted from concealed or unreasonably increased risks … . A.S. v City of New York, 2021 NY Slip Op 02975, First Dept 5-11-21

NEGLIGENCE, CONTRACT LAW, SLIP AND FALL.

THE CONTRACTOR HIRED TO CLEAN THE HOTEL LOBBY LAUNCHED AN INSTRUMENT OF HARM BY POURING CLEANING SOLUTION ON THE FLOOR AND FAILING TO PUT DOWN MATS OR POST WARNINGS; PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AGAINST THE CONTRACTOR IN THIS SLIP AND FALL CASE SHOULD HAVE BEEN GRANTED (FIRST DEPT).

The First Department, reversing (modifying) Supreme Court, determined the defendant cleaning contractor launched an instrument of harm by pouring cleaning solution on the floor in this slip and fall case. Therefore plaintiff was entitled to summary judgment against the contractor:

Plaintiff alleged [the cleaning contractor] poured a large amount of cleaning solution onto the lobby's floor without barricading the location to prevent hotel guests from entering the area while he was cleaning, failed to place down safety mats to provide people with a safe passage through the area while the floor was wet, and failed to post appropriate warning signs.

There is video surveillance footage of the accident; no party disputes that the floor was dry when plaintiff first walked through the area to enter the restroom and that it was wet when he returned about five minutes later.

Plaintiff is entitled to partial summary judgment as against Town House, the outside cleaning contractor, since the evidence showed that Town House's employee launched a force or instrument of harm by negligently mopping or leaving a puddle of water near the guest elevators in the lobby before plaintiff's fall … . Tobola v 123 Wash., LLC, 2021 NY Slip Op 03537, First Dept 6-3-21

NEGLIGENCE, CONTRACT LAW, SLIP AND FALL.

THE PROPERTY OWNER WAS NOT LIABLE FOR THE ACTIONS OF THE INDEPENDENT CONTRACTOR; PLAINTIFF TRIPPED OVER THE HOSE USED BY THE CONTRACTOR TO DELIVER OIL (FIRST DEPT).

The First Department, reversing Supreme Court, determined defendant property owner, Goldner, was not liable for the actions of defendant independent contractor, UMEC, because Goldner did not oversee UMEC's work and, based upon the protective measures taken by UMEC in the past, the incident was not foreseeable. UMEC delivered oil to Goldner and plaintiff allegedly tripped over the hose which ran across the sidewalk. In the past UMEC had set up safety measures to protect pedestrians from the tripping hazard:

"Generally, a party that hires an independent contractor cannot be held liable for the negligence of that independent contractor" … . "The primary justification for this rule is that one who employs an independent contractor has no right to control the manner in which the work is to be done and thus, the risk of loss is more sensibly placed on the contractor" … . There are various exceptions to this general rule, including "(1) [n]egligence of the employer in selecting, instructing, or supervising the contractor"; (2) "[n]on-delegable duties of the employer, arising out of some relation toward the public or the particular plaintiff"; and (3) "[w]ork which is specially, peculiarly, or inherently dangerous" … .

Under the circumstances presented, we disagree with the motion court's finding that triable issues of fact exist as to whether Goldner may be liable for the work of an independent contractor where danger is readily foreseeable. The deposition testimony shows that Goldner did not supervise, monitor, or control UMEC when the oil would be delivered. The evidence also shows that UMEC had a prior history of consistently placing safety measures to prevent a pedestrian from tripping over the oil hose. In light of the preexisting precautions established by UMEC and lack of any complaints from prior oil deliveries, Goldner was not placed on notice of the existence of a dangerous condition … . Here, the danger arose "because of the negligence of the independent contractor or [its] employees, which negligence [was]

collateral to the work and which [was] not reasonably to be expected" … . Linder v United Metro Energy Servs. Corp., 2021 NY Slip Op 02250, First Dept 4-13-21

NEGLIGENCE, EMPLOYMENT LAW, SEXUAL ASSAULT BY EMPLOYEE.

PLAINTIFF ALLEGED SHE WAS SEXUALLY ASSAULTED BY DEFENDANT'S EMPLOYEE; PLAINTIFF'S NEGLIGENT HIRING, TRAINING, SUPERVISION AND RETENTION CAUSE OF ACTION SHOULD NOT HAVE BEEN DISMISSED; THE MOTION TO DISMISS BASED ON DOCUMENTARY EVIDENCE WAS UNTIMELY BECAUSE THE THEORY WAS NOT ASSERTED IN THE ANSWERS; THE MOTION TO DIMSISS FOR FAILURE TO STATE A CAUSE OF ACTION WAS SUPPORTED ONLY BY INADMISSIBLE HEARSAY (FIRST DEPT).

The First Department, reversing Supreme Court, determined: (1) defendant security company's (Kent's) motion to dismiss the negligent hiring, training, supervision and retention cause of action pursuant to CPLR 3211 (a)(1) was untimely because the defendant did not assert a defense based on documentary evidence in its answers; and (2) the defendant's motion to dismiss for failure to state a claim failed because the affidavit submitted by defendant's director of operations was not sworn to have been made on his personal knowledge and did not lay a proper foundation for the admissibility of the documents referred to in the affidavit as business records. Plaintiff, Erin, alleged a security guard employed by defendant (Kent) sexually assaulted her at a hotel where Kent provided security services:

… [T]he affidavit of Kent's director of operations was not sworn to have been made on his own personal knowledge, and therefore was of no probative value as to the issues of fact that he addressed … . Moreover, although "an affidavit from an individual, even if the person has no personal knowledge of the facts, may properly serve as the vehicle for the submission of acceptable attachments which provide evidentiary proof in admissible form, like documentary evidence" … , the affidavit must nevertheless "constitute a proper foundation for the admission of the records"… . Because Kent's director of operations did not establish that the

documents annexed to his affidavit fell within the business records exception to the hearsay rule (CPLR 4518[a]), those documents were inadmissible … .

Contrary to defendant's argument, plaintiffs do have a well-pled negligent hiring claim cognizable at law. Plaintiffs' allegations are sufficient to put Kent on notice of their claim that Kent negligently hired, trained, supervised, and retained the guard who, plaintiffs allege, sexually assaulted Erin, and that Kent knew or should have known of the guard's propensity to commit sexual assault. Moreover, plaintiffs can amplify these allegations in their bill of particulars … . Doe v Intercontinental Hotels Group, PLC, 2021 NY Slip Op 02063, First Dept 4-1-21

NEGLIGENCE, EVIDENCE.

THE JURY'S FINDING THAT PLAINTIFF IN THIS SLIP AND FALL CASE WAS NEGLIGENT BUT THAT DEFENDANT WAS 100% RESPONSIBLE WAS AGAINST THE WEIGHT OF THE EVIDENCE; ALLOWING PLAINTIFF'S DOCTOR TO TESTIFY DEFENDANT'S DOCTOR WAS HIRED BY AN INSURANCE COMPANY, WITHOUT GIVING A CURATIVE INSTRUCTION, WAS REVERSIBLE ERROR (FIRST DEPT).

The First Department, ordering a new trial on liability and damages in this slip and fall case, determined the finding that plaintiff was negligent but that defendant was 100% responsible was against the weight of the evidence. In addition, allowing plaintiff's physician to mention that defendant's physician was hired by an insurance company was reversible error. Both parties had requested Pattern Jury Instruction (PJI) 2:36 on comparative fault. The judge denied that request and instructed the jury with PJI 2:90 which addresses comparative fault. The First Department did not find the denial of the request for PJI 2-36 was error, but noted that the jury clearly misunderstood the concept of comparative fault. Plaintiff alleged she tripped over a stool which was two-feet high:

It is clear that the jury's verdict, finding that plaintiff was negligent, but that her negligence was not a substantial factor in causing the accident was against the weight of the evidence, and indicates that the jury had a fundamental misunderstanding of the concept of comparative negligence. In this case, "the issues of negligence and

proximate cause are so inextricably interwoven as to make it logically impossible to find negligence without also finding proximate cause." * * *

Evidence that a defendant carries liability insurance is generally inadmissible, as it is both collateral and prejudicial … . The passing reference to insurance or similar benefits will not necessarily result in reversal … . However, if the testimony goes beyond mere mention of insurance, then a mistrial may be warranted … . Here, plaintiff's doctor's testimony, together with the court's failure to immediately give a curative instruction was prejudicial, and constituted reversible error, further warranting a new trial. Campbell v St. Barnabas Hosp., 2021 NY Slip Op 03404, First Dept 6-1-21

NEGLIGENCE, LANDLORD-TENANT, PLACEMENT AGENCY.

NFANT PLAINTIFF, H.M., WAS INJURED BY HOT WATER IN THE SHOWER; THE PROPERTY OWNER WHO REPLACED THE WATER HEATER MAY BE LIABLE; THE FOSTER-CARE SERVICE WHICH PLACED H.M. IN THE HOME, HOWEVER, COULD NOT HAVE FORESEEN THE INCIDENT (FIRST DEPT).

The First Department, reversing (modifying) Supreme Court, determined there was a question of fact whether the property owner could be liable for injury to a child, H.M. caused by hot water in the shower. The defendant placement service (Leake) had placed H,M. in the foster care of defendant Butler who lived in a home owned by Alicea. Butler had turned on the shower and was picking up H.M.'s clothes when H.M. climbed into the tub. There was a question of fact whether the property owner, Alicea, was liable because of conflicting expert evidence about the danger posed by the temperature of the water. However, the incident was not foreseeable from the perspective of the placement agency (Leake). Therefore, Leake's motion for summary judgment should have been granted:

… [T]here is an issue of fact as to whether [Alicea] created the dangerous hot water temperature when he replaced the home's hot water heater prior to the accident. …

Leake demonstrated prima facie entitlement to summary judgment dismissing the negligent supervision claim against it because it established that it did not have "sufficiently specific knowledge or notice of the dangerous conduct which caused injury," and "[t]he scalding hot bath water was an intervening act or event that is divorced from and not the foreseeable risk associated with. . .defendant's alleged negligence" … . The excessively hot water was not the foreseeable risk associated with Leake's alleged negligence in placing more than five children in the home, and the momentary inattention of Butler was not an act that should have been foreseeable by Leake in the exercise of reasonable care … . H.M. v City of New York, 2021 NY Slip Op 03376, First Dept 5-27-21

NEGLIGENCE, SLIP AND FALL, EVIDENCE.

CONFLICTING EVIDENCE ABOUT WHETHER THERE WAS VIDEO SURVEILLANCE OF THE AREA WERE PLAINTIFF ALLEGEDLY SLIPPED AND FELL PRECLUDED SUMMARY JUDGMENT (FIRST DEPT).

The First Department determined defendants' motion for summary judgment in this slip and fall case was properly denied. The incident report indicated there was video surveillance of the area where plaintiff allegedly slipped and fell on blueberries on the supermarket (Bogopa's) floor. An employee of defendant testified he did not know of any surveillance cameras in the supermarket:

The Bogopa defendants moved for summary judgment to dismiss the complaint. In support of their motion, the Bogopa defendants submitted, among other things, a store incident report which checked a "yes" box when asked if the incident was captured on video, which should be preserved. * * *

The record presents contradictory statements from the Bogopa defendants regarding whether surveillance videos recording the time and location of plaintiff's fall were available and should have been preserved pursuant to an express video-preservation directive in the incident report prepared by the Bogopa defendants following plaintiff's accident. While the incident report mentions a surveillance recording, the

Bogopa defendant's employee testified that he did not "know of" any surveillance cameras in the supermarket.

The Bogopa defendants argue in their motion for summary judgment that there is no evidence that establishes the existence of surveillance cameras in the supermarket. We disagree. Where, as here, potential video evidence existed of the alleged hazardous location that may have been of assistance to plaintiff in establishing whether defendants created and/or had notice of an alleged slippery, blueberry-strewn floor hazard, the motion by the Bogopa defendants for summary judgment dismissing the complaint against them should be denied. Banks v Bogopa, Inc., 2021 NY Slip Op 02236, Frist Dept 4-13-21

NEGLIGENCE, SLIP AND FALL.

PLAINTIFF TESTIFIED IT HAD RAINED FOR ONLY FIVE MINUTES BEFORE SHE SLIPPED AND FELL ON WATER ON THE FLOOR; THEREFORE HER TESTIMONY ESTABLISHED DEFENDANTS DID NOT HAVE CONSTRUCTIVE NOTICE OF THE CONDITION (FIRST DEPT).

The First Department, reversing Supreme Court, determined defendants' motion for summary judgment in this slip and fall case should have been granted. Plaintiff testified it had only begun raining five minutes before she slipped and fell on water on the floor, which she did not see until after she fell:

Defendants established prima facie that they did not have actual or constructive notice of the water on their lobby floor that plaintiff alleges caused her to slip and fall … . Their property manager stated in an affidavit that she conducted a search of defendants' records for complaints about water on the lobby floor between January 1, 2015 and July 14, 2015, the date of plaintiff's accident, and found none except for the complaint made by plaintiff after she fell. That someone fell in the lobby while it was raining after stepping off a mat about a year before plaintiff's accident does not raise an issue of fact as to whether defendants had actual notice of the water that caused plaintiff to fall. Plaintiff's own testimony established prima facie that defendants did not have constructive notice of water on the lobby floor; she testified

that it was sunny when she left for lunch, that it did not start raining that day until about five minutes before she reentered the building, and that she did not see the water until after she fell … . A general awareness that the lobby floor could become wet during inclement weather is insufficient to raise a triable issue of fact as to whether defendants had constructive notice of the specific condition that caused plaintiff's fall … . Barreto v 750 Third Owner, LLC, 021 NY Slip Op 02868, First Dept 5-6-21

NEGLIGENCE, THIRD-PARTY ASSAULT, LANDLORD-TENANT.

PLAINTIFF, WHO WAS ASSAULTED IN DEFENDANT LANDLORD'S BUILDING, DID NOT RAISE A QUESTION OF FACT WHETHER THE ASSAILANT WAS AN INTRUDER, WHO ENTERED THROUGH AN ALLEGEDLY BROKEN DOOR, OR A TENANT OR AN INVITEE; IF THE ASSAILANT WERE A TENANT OR INVITEE, THE ALLEGEDLY BROKEN DOOR WOULD NOT BE A PROXIMATE CAUSE OF PLAINTIFF'S INJURY (FIRST DEPT).

The First Department, reversing Supreme Court, determined defendant landlord's motion for summary judgment in this third-party assault case should have been granted. Although there was an issue of fact whether exterior doors to the apartment building were operable in the day plaintiff was assaulted, plaintiff did not raise a question of fact about whether the assailant was an intruder, as opposed to a tenant:

While plaintiff raised an issue of fact as to whether the building's entrance doors were operable on the day of the incident, plaintiff failed to raise an issue of fact that the assailant was an intruder who gained access to the building through a negligently maintained entrance. Plaintiff testified that the assailant was masked and hooded, with only his eyes and the tip of his nose visible. Plaintiff admitted that she could not identify the assailant. Although plaintiff saw the assailant flee down the stairs, towards the 19th floor, she did not see him exit the building and does not know where he went … . Under the circumstances, no triable issue of fact exists because there is no evidence from which a jury could conclude, without pure speculation, that the assailant was an intruder, as opposed to a tenant or invitee … . Astupina v West Farms Sq. Hous. Dev. Fund Corp., 2021 NY Slip Op 03542, First Dept, 6-8-21

NEGLIGENCE, THIRD-PARTY ASSAULT, LANDLORD-TENANT.

REJECTING THE 2ND DEPARTMENT'S CRITICISM OF THE 1ST DEPARTMENT'S THIRD-PARTY-ASSAULT JURISPRUDENCE, THE 1ST DEPARTMENT HELD THE BROKEN DOOR THROUGH WHICH THE ASSAILANTS GAINED ACCESS TO THE BUILDING WHERE PLAINTIFF'S DECEDENT WAS SHOT AND KILLED WAS NOT A PROXIMATE CAUSE OF THE SHOOTING BECAUSE THE ASSAILANTS WOULD HAVE FOUND A WAY TO ENTER THE BUILDING EVEN IF THE DOOR LOCK WERE WORKING (FIRST DEPT).

The First Department determined the landlord, New York City Housing Authority (NYCHA), was not liable for the shooting death of plaintiff's decedent, Murphy, despite conclusive video evidence the locking mechanism on the door the assailants used to enter plaintiff's decedent's building was broken. Disagreeing with the Second Department's characterization of the First Department's jurisprudence in similar third-party assault cases, the First Department held that the assailants were intent on shooting plaintiff's decedent and would have gained entrance to the building even if the locking mechanism worked. Therefore the assailants' actions constituted the sole proximate cause of plaintiff's decedent's death:

We disagree with the [Second Department's] implication that under this Court's jurisprudence the fact that a victim was targeted obviates the need for any inquiry into the security measures in place at the subject premises. Indeed, we are aware of no case in the First Department that suggests that a landowner would avoid liability even if minimal precautions would have actually prevented a determined assailant from gaining access. In reality, however, that is hardly ever the case. In Buckeridge v Broadie (5 AD3d 298, 300), … the assailants were "sophisticated" and disguised themselves to gain entry. In Cerda v 2962 Decatur Ave. Owners Corp. (306 AD2d 169, 170 [1st Dept 2003]) … the plaintiff was assaulted by a "team of assassins." … [C]ases confirm that this Court has not abandoned the notion that more than the simple fact that a victim was targeted is necessary to shield a property owner from liability. … [T]he cases confirm that, given the minimal steps a landowner is required to take to secure premises, it has no duty to outwit or outthink those who are determined to overcome those steps.

The record establishes that Murphy's killers were intent on gaining access to the building. … [C]onsidering that at least one other person, by all appearances oblivious to the brouhaha … , entered the building at the same time, it does not take a leap of the imagination to surmise that [the assailants] would have gained access to the building by following another person in or forcing such a person to let them in. This negates the unlocked door as a proximate cause of the harm that befell Murphy, and makes her assailants' murderous intent the only proximate cause. Estate of Murphy v New York City Hous. Auth., 2021 NY Slip Op 02246, First Dept 4-13-21

NEGLIGENCE, THIRD-PARTY ASSAULT.

PLAINTIFF WAS RAPED IN DEFENDANTS' BAR/RESTAURANT AND RAISED QUESTIONS OF FACT ABOUT THE ADEQUACY OF SECURITY AND THE FORESEEABILITY OF THE THIRD-PARTY ASSAULT; DEFENDANTS' MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (FIRST DEPT).

The First Department, reversing Supreme Court, determined plaintiff's third-party-assault-negligence action alleging inadequate security at defendant bar/restaurant should not have been dismissed. The building was owned by Harvard Agency and leased to Turnmill. Plaintiff was raped in a basement restroom. Plaintiff raised questions of fact by evidence a rape had occurred at a nearby bar owned by the same family, the bar was in a high crime area, and there were no security cameras in the basement:

Our courts have long held that "'New York landowners owe people on their property a duty of reasonable care under the circumstances to maintain their property in a safe condition'" … . "Although landlords . . . have a common-law duty to minimize foreseeable dangers on their property, including the criminal acts of third parties, they are not the insurers of a visitor's safety … . …

… [P]laintiff raised an issue of fact by pointing to evidence that Harvard was aware of another assault at a bar owned by the same family and located only a few blocks from Turnmill (… [… '[t]here is no requirement . . . that the past experience relied

on to establish foreseeability be of criminal activity at the exact location where plaintiff was harmed or that it be of the same type of criminal conduct to which plaintiff was subjected"]).

… [P]laintiff submitted a detailed expert affidavit indicating that the bar/restaurant was in a high crime area, and that the security employed was inadequate and a deviation from reasonable security standards … . Jane Doe v Turnmill LLC, 2021 NY Slip Op 02495, First Dept 4-27-21

NEGLIGENCE, TRAFFIC ACCIDENTS.

PLAINTIFF, ON A BICYCLE, WAS STRUCK BY A BUS AND SUFFERED TRAUMATIC BRAIN INJURY, A TORN ROTATOR CUFF AND SEVERAL HERNIATED DISCS; THE JURY'S DAMAGES AWARDS, WHICH INCLUDED $0 FOR FUTURE PAIN AND SUFFERING AND PAST AND FUTURE LOST WAGES, WERE DEEMED UNREASONABLE; NEW TRIAL ON DAMAGES ORDERED (FIRST DEPT).

The First Department vacated several of the jury's damages awards and ordered a new trial on damages. Plaintiff was struck by a bus while on a motorized bike resulting in traumatic brain injury, a torn rotator cuff and several herniated discs:

The jury's award of $0 for future pain and suffering is inconsistent with its award of $250,000 for future medical expenses and, in any event, against the weight of the evidence and materially deviates from what would be reasonable compensation … .

Given the jury's finding that plaintiff sustained a "significant limitation of use," and its award of future medical costs over a period of 25 years, it is clear that the jury found plaintiff to have suffered injuries that will continue to impair his life into the future, and the award of $0 for future pain and suffering is irreconcilable with this finding and cannot stand … .

The award of $750,000 for past pain and suffering deviates materially from what would be considered reasonable compensation in light of plaintiff's shoulder, spine, and traumatic brain injuries … .

The $0 awards for past and future lost earnings were against the weight of the evidence in light of plaintiff's testimony regarding his prior income and current unemployment. Dr. Cornelius E. Gorman testified that plaintiff's "career is lost" and that he "cannot qualify for competitive employment" given his cognitive deficits. The jury had no reasonable basis for depriving plaintiff of damages for past and future loss of earnings … . Scott v Posas, 2021 NY Slip Op 02885, First Dept 5-6-21

PUBLIC HEALTH LAW, NURSING-HOME MALPRACTICE.

THE JURY WAS INSTRUCTED ON THE CRITERIA FOR CONSCIOUS PAIN AND SUFFERING IN THIS NURSING-HOME MALPRACTICE CASE, BUT THE JUDGE DID NOT FIRST DETERMINE PLAINTIFF HAD SOME LEVEL OF COGNITIVE AWARENESS; THE CONSCIOUS PAIN AND SUFFERING CRITERIA ARE THE SAME FOR MALPRACTICE AND FOR VIOLATION OF PUBLIC HEALTH LAW 2801-D; NEW DAMAGES TRIAL ORDERED (FIRST DEPT).

The First Department vacated the $2.5 million pain and suffering award in this nursing-home malpractice case because the jury was instructed on the elements of "conscious" pain and suffering, but the judge did not first determine plaintiff had some level of cognitive awareness. The suit alleged the nursing home's failure to monitor plaintiff-resident's blood sugar level led to brain injury and death. A new trial on damages was ordered. The First Department noted that the criteria for "conscious pain and suffering" damages is the same for malpractice and violation of Public Health Law 2801-d:

The court should not have allowed the jury to award damages for pain and suffering without first determining that the decedent "experienced some level of cognitive awareness following the injury"… . There is no legal basis for applying this rule in the general negligence/malpractice context but not in the context of a violation of PHL 2801-d. Although PHL 2801-d(4) provides that "[t]he remedies provided in this section are in addition to and cumulative with any other remedies available to a patient, . . . including tort causes of action, and may be granted regardless of whether such other remedies are available or are sought," this language has been interpreted as authorizing a separate cause of action, not a separate category of damages …

REAL PROPERTY ACTIONS AND PROCEEDINGS LAW (RPAPL).

PETITIONER'S APPLICATION FOR ACCESS TO RESPONDENT'S NEIGHBORING PROPERTY PURSUANT TO RPAPL 881 SHOIULD NOT HAVE BEEN GRANTED; MATTER REMITTED TO DETERMINE WHETHER LESS INTRUSIVE METHODS FOR ROOF PROTECTION OF RESPONDENT'S PROPERTY COULD BE USED TO FACILITATE FACADE WORK ON PETITIONER'S BUILDING (FIRST DEPT).

The First Department, reversing Supreme Court, determined all the relevant factors had not been considered when granting petitioner's application for access to respondent's neighboring property to install roof and terrace protection related to work on the facade of petitioner's building. The matter was remitted for a determination whether less intrusive methods of roof protection could be used:

Supreme Court improvidently granted petitioner's application for access to respondent's neighboring property in order to effectuate repairs to petitioner's property pursuant to RPAPL 881. "Although the determination of whether to award a license fee is discretionary, in that RPAPL 881 provides that a 'license shall be granted by the court in an appropriate case upon such terms as justice requires,' the grant of licenses pursuant to RPAPL 881 often warrants the award of contemporaneous license fees" … . This is because "'the respondent to an 881 petition has not sought out the intrusion and does not derive any benefit from it. . .Equity requires that the owner compelled to grant access should not have to bear any costs resulting from the access'" … . Furthermore, "[c]ourts are required to balance the interests of the parties and should issue a license when necessary, under reasonable conditions, and where the inconvenience to the adjacent property owner is relatively slight compared to the hardship of his neighbor if the license is refused" … .

In granting access, Supreme Court permitted petitioner to designate a controlled access zone and to place roof protection on respondent's terraces. The roof

protection petitioner seeks to install is placed directly on top of the floors of respondent's terraces and according to respondent would completely prohibit the tenants of the terraced apartments from using any portion of their terraces. Prior to the granting petitioner's application, Supreme Court must consider and resolve the issue as to whether there are less intrusive and equally effective methods of roof protection … . Matter of 400 E57 Fee Owner LLC v 405 E. 56th St. LLC, 2021 NY Slip Op 02587, First Dept 4-29-21

REAL PROPERTY LAW, RECORDING OF MORTGAGE.

ALTHOUGH THE NOTARY STAMP WAS MISSING FROM THE SCANNED MORTGAGE IN THE NYC REGISTER, PLAINTIFF BANK DEMONSTRATED THE MORTGAGE WAS PROPERLY ACKNOWLEDGED WHEN DELIVERED TO THE OFFICE OF THE REGISTER; THEREFORE DEFENDANT'S INTEREST IN THE PROPERTY WAS SUBORDINATE TO THE MORTGAGE (FIRST DEPT).

The First Department, over an extensive concurrence, determined defendant bank demonstrated the mortgage was properly recorded in the NYC Register and, therefore, plaintiff's interest the property was subordinate to defendant's mortgage:

The parties do not dispute that the mortgage, as reflected in the records of the Office of the New York City Register, did not bear a notary stamp or any indication that the mortgage was properly acknowledged as required by Real Property Law §§ 291, 298, 309-a(1), and 333(2). However, the bank proffered evidence establishing that the mortgage was properly acknowledged when submitted for recording. This evidence included the original inked mortgage containing the notary public's information; an affidavit from the notary who affixed her notary stamp at the time; an affidavit from the title company that submitted the mortgage for recording, and an expert affidavit and report by a forensic document examiner in which he concluded that the Register's scanner could have caused the notary stamp to disappear from the imaged mortgage. Plaintiff has failed to show by clear and convincing evidence that the acknowledgment was defective … . Thus, the bank demonstrated that the mortgage was "entitled to be recorded . . . and is considered

recorded from the time of [ ] delivery [to the Office of the New York City Register]" (Real Property Law § 317).

Given that the mortgage was duly acknowledged, delivered and actually recorded, plaintiff is deemed to have constructive notice of it … . 80P2L LLC v U.S. Bank Trust, N.A., 2021 NY Slip Op 03275, First Dept 5-25-21

SEPULCHER, RIGHT OF.

ALLEGED MISHANDLING OF DECEDENT'S BODY BEFORE PLAINTIFF TOOK CUSTODY OF IT SUPPORTED THE RIGHT OF SEPULCHER CLAIM (FIRST DEPT).

The First Department, over a dissent, determined the "right of sepulcher" cause of action properly survived summary judgment:

The record demonstrates that there are factual issues as to whether defendant improperly dealt with the decedent's body. In his deposition testimony, plaintiff described viewing the body of the decedent, his father, in a closet-like room where supplies were kept. Plaintiff testified that his father's hands and feet were bound, his stomach had become bloated, he was dirty and unshaven, and a tube was placed down his throat. The decedent's longtime companion further testified that the area where the body was kept "seemed like [a] garbage dump." This alleged mishandling and presentation of the body is, contrary to our dissenting colleague's view, sufficient to raise a factual issue requiring resolution at trial … . * * *

… [T]he right of sepulcher safeguards the surviving next of kin's right to find "solace and comfort in the ritual of burial" … . Burial rituals involve more than simply placing a body in its final resting place. Indeed, one need only consider the Catholic practice of holding a wake or vigil, or the ritual cleansing of a body following death by Jews and Muslims, as examples of the ways in which human tradition has shown respect to the dead in the moments preceding burial itself… . That plaintiff ultimately took custody of the decedent's body in a timely fashion does not assuage the harm caused by defendant's having allegedly improperly dealt with

it. Almeyda v Concourse Rehabilitation & Nursing Ctr., Inc., 2021 NY Slip Op 03521, First Dept 6-3-21

TRUSTS AND ESTATES, WRONGFUL DEATH.

WRONGFUL DEATH PROCEEDS BELONG TO THE DISTRIBUTEES, NOT THE ESTATE; THEREFORE, RATHER THAN DIVIDING THE PROCEEDS EQUALLY, SURROGATE'S COURT MUST CONDUCT A HEARING AND DISPURSE THE PROCEEDS BASED UPON PECUNIARY LOSS (FIRST DEPT).

The First Department, reversing Surrogate's Court, noted that the proceeds of a wrongful death action belong to the distributees, not the estate. Therefore the proceeds should not be divided equally among the distributees:

Petitioners commenced this proceeding in Surrogate Court seeking judicial allocation and distribution of the settlement proceeds resulting from a Supreme Court wrongful death action. The proceeds of a wrongful death action belong to the statutory distributees of the decedent and not to the estate; therefore, the law does not presume equal distribution of shares (see EPTL 5—4.3 and 5—4.4[a][1]). Instead, each distributee receives damages in proportion to the pecuniary injuries suffered by him or her, as determined after a hearing in Surrogate's Court (see EPTL 5—4.4[a][1]). Here, Surrogate's Court allocated objectant 50% of the settlement proceeds of the wrongful death action without conducting a hearing on the issue of pecuniary loss. Matter of Dixson, 2021 NY Slip Op 02870, First Dept 5-6-21