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An Organized Compilation of the Summaries of Selected New York State Appellate Decisions Released the Week of August 23 – 27, 2021, by the Second, Third and Fourth Departments and Posted on the New York Appellate Digest Website on Monday, August 30, 2021. The Entries in the Table of Contents Link to the Summaries Which Link to the Full Decisions on the Official New York Courts Website. Click on "Table of Contents" in the Header on Any Page to Return There. Right Click on the Citations to Keep Your Place in the Newsletter.

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ATTORNEYS, LEGAL MALPRACTICE, CONTIUNUOUS REPRESENTATION DOCTRINE.

PLAINTIFFS RAISED A QUESTION OF FACT WHETHER THE CONTINUOUS REPRESENTATION DOCTINE RENDERED THE LEGAL MALPRACTICE ACTION TIMELY; REFERENCE TO THE "ENFORCEMENT" OF THE LOAN DOCUMENTS INDICATED THE POSSIBILITY OF REPRESENTATION AFTER THE DATE OF THE LOAN TRANSACTION (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined plaintiffs raised a question of fact whether the continuous representation doctrine rendered the legal malpractice action timely:

The continuous representation doctrine tolls the limitations period "where there is a mutual understanding of the need for further representation on the specific subject matter underlying the malpractice claim" … , and " 'where the continuing representation pertains specifically to [that] matter' " … . Here, plaintiffs submitted communication between the Florida attorney and defendants in which the Florida attorney indicated that defendants' role as New York counsel included "enforcement" of the 2014 loan transaction documents. … [W]e conclude that questions of fact exist regarding the extent of defendants' representation of plaintiffs and, more specifically, whether "enforcement" of the loan documents contemplated a continued representation until the loan was paid in full and the transaction completed. Ray-Roseman v Lippes Mathias Wexler Friedman, LLP, 2021 NY Slip Op 04841,, Fourth Dept 8-26-21

CIVIL PROCEDURE, FAMILY LAW.

THE DOCTRINE OF LACHES DID NOT APPLY TO DEFENDANT'S MOTION TO AMEND THE DRO TO SPECIFY PLAINTIFF WAS NOT ENTITLED TO A SHARE OF DEFENDANT'S DISABILITY RETIREMENT BENEFITS; THE TWO-JUSTICE DISSENT WOULD HAVE APPLIED THE LACHES DOCTRINE (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, over a two-justice dissent, determined the doctrine of laches did not apply and defendant could recoup a lump sum disability retirement payment made to plaintiff. Plaintiff and defendant were divorced and a stipulation provided plaintiff would receive her marital share of defendant's retirement benefits under the New York State and Local Retirement System (NYSLRS). A Domestic Relations Order (DRO) was filed in 2010. In 2011 the NYSLRS approved the DRO with respect to ordinary retirement but was silent on disability retirement. In 2019 the NYSLRS approved defendant's 2016 disability retirement application and a retroactive lump sum payment was made to defendant and plaintiff. In 2019 defendant moved to amend the DRO to specify plaintiff was not entitled to the disability retirement benefits. Supreme Court denied the motion applying the doctrine of laches. The dissent apparently agreed the laches doctrine was properly applied:

"Laches is defined as such neglect or omission to assert a right as, taken in conjunction with the lapse of time, more or less great, and other circumstances causing prejudice to an adverse party, operates as a bar in a court of equity . . . The essential element of this equitable defense is delay prejudicial to the opposing party" … . "The mere lapse of time, without a showing of prejudice, will not sustain a defense of laches" … .

Here, the court found that defendant should have sought to amend the DRO in 2011, after receiving the letter from NYSLRS. But at that time, defendant was not eligible for and had not applied for a disability retirement. When his disability retirement application was approved in February 2019 and defendant became aware that plaintiff's distribution would accordingly increase, he promptly moved to amend the DRO. Moreover, even if there was a delay here, plaintiff utterly failed to make a

showing of prejudice … . Taberski v Taberski, 2021 NY Slip Op 04804, Fourth Dept 8-26-21

CIVIL PROCEDURE, JURISDICTION.

THE NONDOMICILIARY DID NOT HAVE MINIMUM CONTACTS WITH NEW YORK; NEW YORK DID NOT HAVE PERSONAL JURISDICTION OVER THIS TRUST LITIGATION (FOURTH DEPT).

The Fourth Department, reversing Surrogate's Court, determined New York did not have jurisdiction over this trust litigation:

In the petition, the settlor and beneficiary of the trust (decedent) sought an accounting and removal of respondent, a Virginia resident, as trustee. The trust was created in 1996 in New Jersey. At the time the trust was created, decedent was a resident of Illinois and respondent was a resident of Georgia. Respondent administered the trust from Georgia until he relocated to Virginia, and he administered the trust from Virginia thereafter. Decedent relocated to New York in 2016. Solely as a consequence of decedent's choice of residence, respondent sent to New York occasional trust-related correspondence, including "five or six" checks disbursing trust assets.

… "Due process requires that a nondomiciliary have 'certain minimum contacts' with the forum and 'that the maintenance of the suit does not offend traditional notions of fair play and substantial justice' " … A nondomiciliary has minimum contacts with New York if he or she "purposefully avails" himself or herself of "the privilege of conducting activities within" New York … . thereby " 'invoking the benefits and protections' " of New York's laws … . Our focus is on " 'the relationship among the [respondent], the forum, and the litigation' "… . We conclude that respondent lacks the requisite minimum contacts with the New York forum. He does not live, own property, or conduct business in New York. The first and only relationship that New York had to the subject trust was 20 years after its creation, when decedent became domiciled in New York and respondent disbursed trust assets to her in New York … . Matter of Murad Irrevocable Trust, 2021 NY Slip Op 04823, Fourth Dept 8-26-21

CIVIL PROCEDURE, NECESSARY PARTIES.

WHEN IT IS ARGUED A NECESSARY PARTY WAS NOT SUED, SUMMARY JUDGMENT SHOULD NOT BE GRANTED ON THAT GROUND; RATHER THE PROCEDURE DESCRIBED IN CPLR 1001 (B) SHOULD BE FOLLOWED (SECOND DEPT).

The Second Department noted that a property owner, R.E. Dowling, was a necessary party in this dispute about the existence of easements and that the denial of summary judgment on that ground was proper pursuant to CPLR 1001 (b). The matter was remitted to determine whether the party can be summoned or whether the action can proceed in that party's absence:

Although the record supports [the]contention that R.E. Dowling is a necessary party, the Supreme Court properly denied that branch of [the] motion which was for summary judgment dismissing the complaint for failure to join R.E. Dowling. Rather than dismissing the action, CPLR 1001(b) requires the court to order the necessary party or parties summoned, where they are subject to the court's jurisdiction, and "[i]f jurisdiction over such necessary parties can be obtained only by their consent or appearance, the court is to determine, in accordance with CPLR 1001(b), whether justice requires that the action proceed in their absence"… . Thus, the matter must be remitted to the Supreme Court, Suffolk County, to determine whether R.E. Dowling, or its successor in interest as owner of the eastern half of Windmill Lane, can be summoned and, if not, whether the action may nevertheless proceed in that party's absence. Sacasa v David Trust, 2021 NY Slip Op 04772, Second Dept 8-25-21

COOPERATIVES, REAL PROPERTY LAW, ATTORNEY'S FEES.

DEFENDANTS PREVAILED IN A SUIT BY PLAINTFF COOPERATIVE PURSUANT TO A PROPRIETARY LEASE; THEREFORE DEFENDANTS WERE ENTITLED TO ATTORNEY'S FEES PURSUANT TO REAL PROPERTY LAW 234 EVEN THOUGH THE ISSUE WAS NOT RAISED IN A COUNTERCLAIM (SECOND DEPT).

The Second Department determined defendants, who prevailed in an action against them by plaintiff cooperative apartment corporation, was entitled to attorney's fees pursuant to Real Property Law 234 even though that theory was not pled as a counterclaim:

As the prevailing parties to the action commenced against them by the plaintiff pursuant to the proprietary lease, which contained a provision entitling the plaintiff, as lessor, to attorney's fees incurred in instituting an action against a lessee based on the lessee's default, the defendants were entitled to attorney's fees pursuant to Real Property Law § 234, which "provides for the reciprocal right of a lessee to recover an attorney's fee when the same benefit is bestowed upon the lessor in the parties' lease" … .

The defendants were entitled to an award of attorney's fees pursuant to Real Property Law § 234, despite their failure to plead that cause of action as a counterclaim in their answer, since the evidence supported the claim and the plaintiff was not misled or prejudiced by their failure to plead the cause of action … . Round Dune, Inc. v Filkowski, 2021 NY Slip Op 04771, Second Dept 8-25-21

CRIMINAL LAW, DISCOVERY.

THE MAJORITY APPLIED THE DISCOVERY STATUTE IN EFFECT AT THE TIME THE ORDER TO TURN OVER THE ROSARIO MATERIAL ONE WEEK BEFORE TRIAL WAS MADE, FINDING THE ORDER PROPER; THE CONCURRENCE AGREED BUT ARGUED THE COURT SHOULD EXPLICITLY RULE THAT THE DISCOVERY STATUTE ENACTED IN 2019 SHOULD ALWAYS BE APPLIED PROSPECTIVELY (FOURTH DEPT).

The Fourth Department, over a concurrence, affirmed defendant's conviction. One of the issues in the appeal was whether it was appropriate for the court to order the prosecution to turn over Rosario material one week before trial. The majority ruled the order was proper under the former law, CPL former 240.45. The concurrence agreed but argued the court should decide whether the current law, enacted in 2019 (see CPL 245.10 [1] [a]; 245.20) should always be applied prospectively:

We reject defendant's contention that he was deprived of a fair trial by the prosecutor's failure to produce a video-recorded statement of the victim until one week prior to trial. Defendant does not dispute that the recording constitutes Rosario material. Under the discovery rules in effect at the time of defendant's trial, "[w]here, as here, [a] witness[is] not called to testify at a pretrial hearing, Rosario material need not be disclosed until '[a]fter the jury has been sworn and before the prosecutor's opening address' " (… CPL former 240.45 [1] [a]). Neither party requested that this Court consider the retroactivity of the new discovery statute now in effect. People v Austen, 2021 NY Slip Op 04798, Fourth Dept 8-26-21

CRIMINAL LAW, GRAND JURY TESTIMONY.

THE DEFENSE REQUEST TO PRESENT THE GRAND JURY TESTIMONY OF AN UNAVAILABLE WITNESS SHOULD HAVE BEEN GRANTED; NEW TRIAL ORDERED (SECOND DEPT).

The Second Department, reversing defendant's conviction and ordering a new trial, determined defendant's request to present an unavailable witness's grand jury testimony should have been granted:

The County Court committed error, however, when it denied the defendant's request to introduce the grand jury testimony of a witness who had since become unavailable to testify at trial. "[A] defendant's constitutional right to due process requires the admission of hearsay evidence consisting of Grand Jury testimony when the declarant has become unavailable to testify at trial, and the hearsay testimony is material, exculpatory, and has sufficient indicia of reliability" … . Here, the proffered grand jury testimony was both material and exculpatory since it consisted of eyewitness testimony that, while positively identifying the codefendant as one of the shooters at the scene of the crime, provided a description of the second shooter that was inconsistent with a description of the defendant. Moreover, a review of the grand jury testimony reveals that the prosecutor had a full and fair opportunity to examine the witness, thus satisfying the "indicia of reliability" prong of the test … , and it was uncontested at trial that the witness was unavailable. People v Johnson, 2021 NY Slip Op 04763, Second Dept 8-25-21

CRIMINAL LAW, GRAND JURY.

DEFENDANT MADE A VALID REQUEST TO APPEAR IN THE GRAND JURY BEFORE THE AMENDED INDICTMENT WAS FILED; THE FACT THAT DEFENDANT HAD PREVIOUSLY DECLINED THE OPPORTUNITY TO TESTIFY WAS OF NO SIGNIFICANCE (FOURTH DEPT).

The Fourth Department, dismissing the indictment, determined defendant should have been allowed to testify before the grand jury:

CPL 190.50 (5) (a) provides that a defendant's request to testify is timely as long as it is made prior to the filing of the indictment" … . Here, defendant's June 8, 2017 notice, which " 'satisfied the statutory requirements for notifying the People of a request to appear before the grand jury' " … , was received by the District Attorney on the same day, prior to the filing of the amended indictment on June 9, 2017. Contrary to the contention of the People and the rationale of the court, it is of no moment under the statute that defendant had previously declined the opportunity to testify … . "Where, as here, defendant's request to testify is received after the grand jury has voted, but before the filing of the indictment, defendant is entitled to a reopening of the proceeding to enable the grand jury to hear defendant's testimony and to revote the case, if the grand jury be so advised" … . People v Royal-Clanton, 2021 NY Slip Op 04856, Fourth Dept 8-26-21

CRIMINAL LAW, HABEAS CORPUS.

THE PEOPLE FAILED TO COMPLETE PROVIDING DISCOVERY BY THE TIME THE CERTIFICATE OF COMPLIANCE WAS FILED PURSUANT TO CPL 30.30 (5); DEFENDANT'S WRIT OF HABEAS CORPUS GRANTED (SECOND DEPT).

The Second Department granted defendant's application for a writ of habeas corpus releasing him from incarceration or reducing his bail. The speedy trial statute was

violated because discovery had not been completed before the People filed the certificate of compliance pursuant to CPL 30.30 (5):

The current statutory framework of CPL 245.10 "abolishes the prior mechanism for obtaining discovery through serving a demand upon the People and instead requires the People provide the discovery listed in CPL 245.20 'automatically' within the deadlines established" therein … . "As discovery demands are now defunct, the exclusion provided for in [CPL 245.10] subdivision (4)(a) is no longer applicable to the period of time when the defendant is waiting for discovery to be provided by" the People … .

Here, contrary to the People's contention, their filing of the certificate of compliance pursuant to CPL 30.30(5) could not be deemed complete until all of the material and information identified in the certificate as subject to discovery and electronically shared with the defendant was actually produced to the defendant, pursuant to CPL 245.50(1) and (3) … . … [T]he substitution of a different assistant district attorney did not constitute an exceptional circumstance that would render excludable for speedy trial purposes the time period between the date to which the Supreme Court adjourned the matter for the filing of the People's response to the defendant's omnibus motion, and the date upon which the People ultimately filed their response … . Thus, the People are chargeable with the time between the court-imposed deadline to respond to the omnibus motion and the date on which the People actually filed a response … . … [S]ince more than 90 days of delay in bringing [defendant] to trial … are chargeable to the People, CPL 30.30(2)(a) requires that he be released on bail which he is capable of meeting, or upon his own recognizance … . People ex rel. Ferro v Brann, 2021 NY Slip Op 04897, Second Dept 8-27-21

CRIMINAL LAW, INEFFECTIVE ASSISTANCE.

DEFENDANT WAS ENTITLED TO A HEARING ON THE MOTION TO VACATE THE CONVICTION ON INEFFECTIVE ASSISTANCE GROUNDS DESPITE THE ABSENCE OF AN AFFIDAVIT FROM TRIAL COUNSEL (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined defendant was entitled to a hearing on the motion to vacate the conviction on ineffective assistance grounds, despite the absence of an affidavit from trial counsel:

[Defendant's] claim of ineffective assistance of counsel was properly raised on his CPL 440.10 motion inasmuch as it is based on matters outside the trial record … . Here, defendant's submissions on the motion raise factual issues requiring a hearing concerning trial counsel's failure to interview and call the two exculpatory witnesses … , even in the absence of an affidavit from trial counsel … . We thus conclude that defendant is entitled to a hearing on his entire claim of ineffective assistance of counsel inasmuch as " 'such a claim constitutes a single, unified claim that must be assessed in totality' " … . People v Ross, 2021 NY Slip Op 04820, Fourth Dept 8-26-21

CRIMINAL LAW, JUDGES.

THE CONVICTION WAS AFFIRMED BUT A STRONG TWO-JUSTICE DISSENT ARGUED EXCESSIVE INTERVENTION BY THE JUDGE DEPRIVED DEFENDANT OF A FAIR TRIAL (SECOND DEPT).

The Second Department affirmed defendant's conviction over a strong two-justice dissent. The defendant argued on appeal that defendant was deprived of a fair trial by the judge's excessive questioning of witnesses. The issue was not preserved by objection. The majority held the judge's questioning of witnesses did not deprive defendant of a fair trial. The dissenters disagreed in a detailed memorandum which lays out the facts of the case and the judge's interjections:

From the dissent: … [C]ontrary to the position of my colleagues in the majority, I find that the defendant was deprived of a fair trial by the Supreme Court's repeated and egregious questioning of witnesses. Throughout the trial, the court asked more than 200 questions of witnesses which, among other things, assisted the prosecution in eliciting significant testimony and establishing the foundation for the admissibility of evidence, characterized the testimony of witnesses, and served to undermine the defense strategy. Thus, I conclude that a new trial is warranted before a different Justice. * * *

I conclude that in this case, the defendant was deprived of a fair trial, as the trial judge engaged in a pattern of repeatedly interjecting himself into the questioning of witnesses throughout the trial. The trial judge engaged in extensive questioning of witnesses, usurped the role of the prosecutor, elicited significant testimony from the People's witnesses, made statements summarizing and characterizing the testimony of witnesses, undermined the defense's cross-examination of the People's witnesses, and "generally created the impression that [he] was an advocate for the People" … . People v Parker, 2021 NY Slip Op 04766, Second Dept 8-25-21

CRIMINAL LAW, JURORS.

DEFENDANT'S FOR CAUSE JUROR CHALLENGE SHOULD HAVE BEEN GRANTED (FOURTH DEPT).

The Fourth Department, reversing defendant's conviction, determined defendant's for cause challenge to a juror should have been granted:

… [T]he prospective juror in question himself expressed "doubt [as to his] own ability to be impartial in the case at hand" … when he stated during voir dire that he was "not sure" whether he could be fair and impartial due to his family members' experience with domestic violence … . The court erred when it did not obtain thereafter any "unequivocal assurance" from the prospective juror that he could render an impartial verdict … . People v Tillmon, 2021 NY Slip Op 04848, Fourth Dept 8-26-21

CRIMINAL LAW, LAWFUL TEMPORARY POSSESSION OF A WEAPON.

SOMEONE WAS TRYING TO OPEN THE DOOR TO DEFENDANT'S HOME AND SHE SHOT THROUGH THE DOOR, KILLING HER BOYFRIEND; DEFENDANT'S REQUEST FOR A "LAWFUL TEMPORARY POSSESSION OF A WEAPON" JURY INSTRUCTION SHOULD HAVE BEEN GRANTED; STRONG DISSENT (FOURTH DEPT).

The Fourth Department, ordering a new trial on the possession of a weapon charge, over a strong dissent, ,determined defendant was entitled to a "lawful temporary possession of a weapon" jury instruction. Someone was trying to open the door to defendant's home and she shot through the door, killing her boyfriend. She was acquitted of homicide:

Defendant testified that she had inadvertently discovered the firearm while attempting to protect herself in the face of an imminent threat, i.e., a person forcibly trying to enter her home. Specifically, she thought that her estranged husband, who had previously attacked her in her home, was the person attempting to forcibly enter the home. She discovered the firearm while trying to find in her kitchen an object to defend herself, and she did not know beforehand that the firearm was there. When the person at the door continued trying to enter the home, defendant shot through the door to scare him away. Thereafter, defendant saw that she had shot the victim—her boyfriend. She then dropped the firearm, and started to provide first aid. The firearm was not recovered after the shooting, and defendant did not know what happened to it. …

… [W]e conclude that there is a reasonable view of the evidence … that she came into possession of the firearm in a legally excusable manner that was not " 'utterly at odds with [any] claim of innocent possession' " … . …

We also conclude … there is a reasonable view thereof that defendant's use of the firearm did not require a finding that she had used it in a dangerous manner … . People v Ruiz, 2021 NY Slip Op 04827, Fourth Dept 8-26-21

CRIMINAL LAW, ROBBERY.

ROBBERY FIRST REDUCED TO ROBBERY SECOND BECAUSE A THREAT TO USE A GUN IS NOT "DISPLAY" OF A GUN; "POSSESSION OF A FORGED INSTRUMENT" COUNTS VACATED BECAUSE THE WARRANTLESS SEARCH OF DEFENDANT'S WALLET WAS IMPROPER (SECOND DEPT).

The Second Department determined the robbery first conviction must be reduced to robbery second because defendant's alleged verbal threat to use a gun was not accompanied hand movement or display of a weapon. In addition, the warrantless search of defendant's wallet was improper and the related "possession of a forged instrument" counts were vacated:

"To sustain a conviction for robbery in the first degree (Penal Law § 160.15[4]), '[t]he People must show that the defendant consciously displayed something that could reasonably be perceived as a firearm, with the intent of forcibly taking property, and that the victim actually perceived the display'"… . "[I]t is the 'display' of what appears to be a firearm, and not the mere threat to use one, which is required" … . "A mere verbal threat is insufficient" as the words must be accompanied by some affirmative action appealing to one or more of the victim's actual senses … . Here, the witness, whose dry cleaning store had been robbed on an earlier occasion, while testifying that the defendant threatened to use the "gun again," denied seeing him make any motions with his hands. …

… [D]efendant's conviction of criminal possession of a forged instrument in the third degree under counts 44 and 45 of the indictment must be vacated. The defendant's wallet was improperly searched at the time of arrest … , rather than later as part of a "stationhouse inspection of an arrestee's personal effects" … . People v Costan, 2021 NY Slip Op 04760, Second Dept 8-25-21

CRIMINAL LAW, SENTENCING, JUDGES.

THE SENTENCING JUDGE DID NOT HAVE THE AUTHORITY TO DIRECT THAT THE SENTENCE RUN CONSECUTIVELY WITH A SENTENCE WHICH HAD NOT YET BEEN IMPOSED BY A DIFFERENT COURT; THE APPROPRIATE APPELLATE REMEDY IS TO STRIKE THE DIRECTIVE (FOURTH DEPT).

The Fourth Department, reversing (modifying) County Court, In a full-fledged opinion by Justice NeMoyer, determined the sentencing court did not have the authority to order the sentence to run consecutively with a sentence that had not yet been imposed by a different court. The appropriate appellate remedy is to strike the directive, rather than send the matter back for resentencing:

A sentencing court has no power to dictate whether its sentence will run concurrently or consecutively to another sentence that has not yet been imposed. When a sentencing court violates that rule and purports to direct the relationship between its present sentence and an anticipated forthcoming sentence, the proper remedy is usually to strike the improper directive, not to remit for a new sentencing proceeding at which the court could exercise the very power it lacked originally. * * *

Rather than remitting for resentencing, the proper remedy under these circumstances is to simply vacate County Court's improper directive with respect to consecutive sentencing. That remedy will put defendant in the same position as if County Court had not issued that illegal directive in the first place. Such a remedy will also adequately "protect" the People's interests, since it will place them in the exact position they would have occupied had County Court not issued its illegal directive. Indeed, because the People had no legitimate right or interest in County Court's original illegal sentence, the People have no right or interest that could be "protected" with a remittal order calculated only to achieve the very outcome — consecutive sentencing — that they had no right to obtain in the first place. People v Barthel, 2021 NY Slip Op 04834, Fourth Dept 8-26-21

CRIMINAL LAW, SENTENCING.

COUNTY COURT SHOULD HAVE DETERMINED WHETHER DEFENDANT WAS A SECOND VIOLENT FELONY OFFENDER BEFORE SENTENCING HIM AS A SECOND FELONY OFFENDER, MATTER REMITTED (FOURTH DEPT).

The Fourth Department determined County Court was obligated to determine whether defendant was a second violent felony offender before sentencing defendant as a second felony offender:

Where it is apparent at the time of sentencing that a defendant may be a second violent felony offender, the People are required to file a second violent felony offender statement in accordance with CPL 400.15 and, if appropriate, the court is then required to sentence the defendant as a second violent felony offender … . Here, no such statement was filed, although the People were aware that, approximately 10 years earlier, defendant had been incarcerated in North Carolina for a period of approximately 38 months on a prior conviction of voluntary manslaughter … . Had the court concluded based on that predicate offense that defendant is a second violent felony offender for this class C violent felony, the court would have been constrained by statute to impose a sentence that includes a determinate term of incarceration of not less than seven years and not more than 15 years … , and thus the six-year term of incarceration that defendant actually received pursuant to his plea agreement would have been illegal. People v Smith, 2021 NY Slip Op 04883, Fourth Dept 8-26-21

CRIMINAL LAW, TRAFFIC STOPS.

THE SMELL OF PCP PROVIDED PROBABLE CAUSE FOR THE SEARCH OF DEFENDANT'S VEHICLE; DEFENDANT'S APPELLATE COUNSEL WAS CHASTISED FOR FAILURE TO CALL THE COURT'S ATTENTION TO CONTRARY AUTHORITY, UNFOUNDED ASSERTIONS THAT THE APPEAL PRESENTED A MATTER OF FIRST IMPRESSION, AND UNFOUNDED ALLEGATIONS OF PERJURY, MISCONDUCT AND CIVIL RIGHTS VIOLATIONS AGAINST AN ARRESTING OFFICER (FOURTH DEPT).

The Fourth Department, in a full-fledged opinion by Justice NeMoyer, determined the police officer's (Dorchester's) testimony at the suppression hearing established probable cause to search defendant's car based upon the smell of PCP, or, as the court described it, "olfactory detection of street-level PCP." The opinion was as much directed to improprieties in the appellate brief as to the "olfactory detection of PCP:"

"[A]s soon as I walked up to the vehicle," Dorchester testified, "I could smell a really strong chemical odor that was familiar to myself as PCP." Dorchester had received PCP training at the police academy; he regularly received updated training on PCP and other drugs; and he had encountered PCP and its distinctive smell "hundreds" of times over the course of his career as a police officer. Based on his training and experience, Dorchester testified, he immediately recognized the odor emanating from defendant's vehicle as PCP. When pressed on whether he could have been smelling something else, Dorchester held firm: the smell of PCP, he explained, was "pretty distinct." * * *

[I]t is astoundingly inaccurate for defendant's brief to assert that "[t]his is a case of first impression." Moreover, the representation in defendant's brief that "none of the Appellate Divisions . . . has ever passed upon the question of whether the smell of PCP may, standing alone, constitute probable cause to search" is an unacceptable dereliction of counsel's duty of candor to our Court, for the First Department has done precisely that in two separate cases … . And given that Sanchez [168 AD3d 584] involved a car search, the statement in defendant's brief that "no appellate case

law from this state . . . has approved the search of a vehicle based solely on the smell of PCP" is yet another misrepresentation of the caselaw. We take this opportunity to echo the First Department's monition that "counsel has an obligation to bring adverse authority to [our] attention" … . * * *

… [D]efendant's appellate brief levels serious allegations of perjury, official misconduct, and federal civil rights violations against officer Dorchester. The record, however, lacks any proof to substantiate appellate counsel's accusations. It is one thing to suggest that Dorchester's testimony was legally insufficient to justify the search … . But it is quite another thing to file a brief that directly, repeatedly, and unnecessarily accuses Dorchester of serious crimes without evidentiary support. Counsel's "baseless assertions are shockingly irresponsible" … . People v Fudge, 2021 NY Slip Op 04801, Fourth Dept 8-26-21

EDUCATION-SCHOOL LAW, NEGLIGENCE.

A SCHOOL FACULTY MEMBER WHO YELLED "BE QUIET" INTO A MICROPHONE, THE LOUDNESS OF WHICH WAS ALLEGED TO HAVE INJURED PLAINTIFF'S CHILD, DID NOT BREACH A DUTY OWED TO THE STUDENT; THE SCHOOL DISTRICT'S MOTION FOR A DIRECTED VERDICT SHOULD HAVE BEEN GRANTED (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined defendant school district was entitled to a directed verdict in this action which alleged plaintiff's daughter was injured when a faculty member used a microphone to tell the students to be quiet. It was alleged loudness of the command caused injury:

In order to prevail on a negligence claim, " 'a plaintiff must demonstrate (1) a duty owed by the defendant to the plaintiff, (2) a breach thereof, and (3) injury proximately resulting therefrom' "… . On appeal, defendant disputes the element of breach only. To that end, the standard to which defendant and its employees are held is "that degree of care which a reasonable [parent] of ordinary prudence would exercise under the circumstances, commensurate with the apparent risk involved" … . Further, "[w]hen a duty exists, nonliability in a particular case may be justified on the basis that an injury is not foreseeable" … .

Although the proof at trial reflected that a school faculty member had "yelled" two words into a microphone and "was really loud" in doing so, there was no proof presented that those words were spoken in a manner or at a volume that was unreasonable, foreseeably unsafe, or in violation of any applicable standard of care. In other words, "[w]ithout knowing what is 'too loud'," "there [was] no standard of care by which a jury could determine on the evidence presented that defendant[] had breached a duty owed to plaintiff"… . Because there was no "rational process by which the [jury] could base a finding in favor of [plaintiff]" on the element of breach, we conclude that the court erred in denying defendant's motion for a directed verdict … . Joni C. v Cheektowaga-Sloan Union Free Sch. Dist., 2021 NY Slip Op 04859, Fourth Dept 8-26-21

EDUCATION-SCHOOL LAW, TORTIOUS INTERFERENCE WITH CONTRACT.

THE MAYOR'S STATEMENTS WERE TRUE AND DID NOT EVINCE MALICE; PLAINTIFF'S TORTIOUS INTERFERENCE WITH CONTRACT ACTION SHOULD HAVE BEEN DISMISSED (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined plaintiff's tortious interference with contract cause of action should have been dismissed. Plaintiff, was the head of a charter school, The mayor of Rochester (Warren) criticized the school for refusing to allow the school's first African American valedictorian to give a speech at graduation:

To establish a tortious interference cause of action, a plaintiff must establish "(1) that [the plaintiff] had a business relationship with a third party; (2) that the defendant knew of that relationship and intentionally interfered with it; (3) that the defendant acted solely out of malice or used improper or illegal means that amounted to a crime or independent tort; and (4) that the defendant's interference caused injury to the [plaintiff's] relationship with the third party" … . …

Plaintiff testified that he did not allow the student to speak at the graduation ceremony, and the record establishes that Warren's statements, i.e., that "[the

student's] school did not allow him to give his valedictorian speech. For some reason, his school, in a country where freedom of speech is a constitutional right, in the city of Frederick Douglass[,] turned his moment of triumph into a time of sorrow, and pain," that the student would "never get that moment back," and that "[t]his is not a time to punish a child because you may not like what they say," were substantially true … . Moreover, in her statements, Warren did not mention plaintiff by name and referred only to the conduct of the "school," and the statements were made during Warren's introduction of the student in the context of providing him with an opportunity to present publicly the valedictory speech that the student was not permitted to give at his graduation ceremony. On that evidence, it cannot be said that defendants "acted solely out of malice" toward plaintiff … . Munno v City of Rochester, 2021 NY Slip Op 04830, Fourth Dept 8-26-21

ELECTION LAW, POLLING PLACES.

SUPREME COURT PROPERLY ANNULLED THE ELECTION BOARD'S DESIGNATION OF AN EARLY VOTING POLLING PLACE BECAUSE THE BOARD DID NOT DEMONSTRATE THE LOCATION MET THE ELECTION LAW REQUIREMENTS MANDATING A LOCATION ACCESSIBLE TO CITY RESIDENTS (THIRD DEPT).

The Third Department, in a full-fledged opinion by Justice Garry, determined Supreme Court properly annulled the determination of the Rensselaer County Board of Elections designating an early voting polling pace pursuant to Election Law section 8-600. The 3rd Department also granted the motion to intervene in the Article 78 proceeding brought by the NAACP and three minority and/or disabled residents who argued for a polling place accessible to city residents dependent on public transportation:

… [I]n designating early voting polling places, the Board "shall have at least one polling place" in the City (as Rensselaer County's most populous municipality) and, because the City has public transportation, "such polling place shall be situated along such transportation routes" (Election Law § 8-600 [2] [a]). Election Law § 8-600 (2) (e) further states that any early voting polling place "shall be located so that voters in the county have adequate and equitable access, taking into consideration

population density, travel time to the polling place, proximity to other early voting poll sites, public transportation routes, commuter traffic patterns and such other factors the board of elections deems appropriate" (see 9 NYCRR 6211.1 [c]). * * *

… [W]e conclude that the Board did not adequately address "whether the early voting site[s are] on or near public transportation" (9 NYCRR 6211.1 [c] [2] [iv]). The failure to address that mandatory factor "precludes meaningful review of the rationality of" the Board's siting determination, renders the decision arbitrary and capricious and, by itself, warrants annulment … . The Board failed to meaningfully address most of the other factors as well. Accordingly, Supreme Court properly granted the petition and annulled the Board's determination designating early voting polling places for the 2021 election … . Matter of People of the State of New York v Schofield, 2021 NY Slip Op 04785, Third Dept 8-26-21

FORECLOSURE, DEFAULT.

THE DEFENDANT'S CONCLUSORY AFFIDAVIT BLAMING THE DEFAULT JUDGMENT ON HIS PRIOR ATTORNEY WAS NOT A SUFFICIENT BASIS FOR VACATING THE DEFAULT JUDGMENT IN THIS FORECLOSURE ACTION (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the defendant's (Echevarria's) affidavit blaming the default in this foreclosure action on his prior attorney was not sufficient to support vacating the default judgment:

… [W]hile CPLR 2005 allows courts to excuse a default due to law office failure, it was not the Legislature's intent to routinely excuse such defaults, and mere neglect will not be accepted as a reasonable excuse" … . "A conclusory, undetailed and uncorroborated claim of law office failure does not amount to a reasonable excuse" … .

Echevarria submitted an affidavit in which he asserted that his defaults "were due entirely to [the] negligence" of his prior attorney, who, without Echevarria's knowledge, failed to file an answer to the complaint or opposition to the plaintiff's motion for leave to enter a default judgment against Echevarria. According to his

affidavit, Echevarria only learned of the defaults upon receiving notice of the foreclosure sale. We agree with the plaintiff that Echevarria's claim of law office failure, which was based solely on the "conclusory and unsubstantiated" allegations in his affidavit, was insufficient to amount to a reasonable excuse … . Wilmington Sav. Fund Socy., FSB v Rodriguez, 2021 NY Slip Op 04784, Second Dept 8-25-21

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

PLAINTIFF IN THIS FORECLOSURE ACTION DID NOT PRESENT SUFFICIENT PROOF OF COMPLIANCE WITH THE NOTICE REQUIREMENTS OF RPAPL 1304 OR THE MORTGAGE (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the plaintiff's proof of compliance with the notice requirements of RPAPL 1304 and the mortgage in this foreclosure action was insufficient:

RPAPL 1304 provides that "at least ninety days before a lender, an assignee or a mortgage loan servicer commences legal action against the borrower . . . including mortgage foreclosure, such lender, assignee or mortgage loan servicer shall give notice to the borrower" (RPAPL 1304[1]). "Strict compliance with RPAPL 1304 notice to the borrower or borrowers is a condition precedent to the commencement of a foreclosure action" … . RPAPL 1304 requires that the notice be sent by registered or certified mail, and also by first-class mail, to the last known address of the borrower … . The plaintiff can establish strict compliance with RPAPL 1304 by submitting domestic return receipts, proof of a standard office procedure designed to ensure that items are properly addressed and mailed, or an affidavit from someone with personal knowledge that the mailing of the RPAPL 1304 notice actually occurred … .

… [T]he plaintiff failed to establish, prima facie, that the mailing of the RPAPL 1304 notice by first-class mail actually occurred. Graves [document management specialist] did not aver that she had personal knowledge of the mailing, did not describe a standard office procedure designed to ensure that items are properly

addressed and mailed, and did not attach proof of first-class mailing of the RPAPL 1304 notice … . Moreover, the plaintiff failed to establish, prima facie, that the mailing of the notice of default in accordance with the terms of the mortgage agreement actually occurred … . Federal Natl. Mtge. Assn. v Donovan, 2021 NY Slip Op 04748, Second Dept 8-25-21

FORECLOSURE, REPLY PAPERS, BUSINESS RECORDS.

IN THE CONTEXT OF THIS COMPLICATED FORECLOSURE DECISION, THE 2ND DEPARTMENT EXPLAINED (1) WHEN EVIDENCE SUBMITTED IN REPLY CAN BE CONSIDERED AND (2) THE CRITERIA FOR THE BUSINESS RECORDS EXCEPTION TO THE HEARSAY RULE (SECOND DEPT).

The Second Department, reversing Supreme Court in this foreclosure action, addressed (1) when evidence presented in reply can be considered and (2) how to meet the criteria of the business records exception to the hearsay rule:

Supreme Court … should have considered the Lee affidavit … . … [T]he defendant did not object to the plaintiff's submission of the Lee affidavit, despite its being submitted for the first time in reply, and does not raise any objection to its admission on appeal. In any event, "[a]lthough a party moving for summary judgement cannot meet its prima facie burden by submitting evidence for the first time in reply" … , the Lee affidavit was an exception to that rule, as it was submitted in response to a specific argument raised for the first time in opposition to the plaintiff's motion and in support of the defendant's cross motion … , and the defendant could have responded to the Lee affidavit in his reply papers in further support of his cross motion … . * * *

… [W]hile the Lee affidavit was sufficient to lay a proper foundation for the admission of a business record pursuant to CPLR 4518(a) … , Lee failed to identify the records upon which she relied in making the statements, and the plaintiff failed to submit copies of the records themselves. "[T]he business record exception to the hearsay rule applies to a 'writing or record' … . . . [and] it is the business record itself, not the foundational affidavit, that serves as proof of the matter asserted" … .

"While a witness may read into the record from the contents of a document which has been admitted into evidence, a witness's description of a document not admitted into evidence is hearsay" … . Thus, Lee's assertions as to the contents of the plaintiff's records were "inadmissible hearsay to the extent that the records she purport[ed] to describe were not submitted with her affidavit" … . Moreover, while "a witness may always testify as to matters which are within his or her personal knowledge through personal observation" … , Lee did not attest to such personal knowledge regarding the physical whereabouts of the consolidated note during the relevant time … . U.S. Bank N.A. v Pickering-Robinson, 2021 NY Slip Op 04775, Second Dept 8-25-21

FORECLOSURE, STATUTE OF LIMITATIONS, ACCELERATION OF THE DEBT.

THE 2011 ACCELERATION OF THE DEBT WAS REVOKED BY THE 2017 REVOCATION OF THE ACCELERATION RENDERING THE 2018 FORECLOSURE ACTION TIMELY (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the 2018 foreclosure action was timely because the 2011 acceleration of the debt was revoked in 2017:

… [A]lthough the defendants demonstrated … the six-year statute of limitations began to run in July 2011, when the plaintiff accelerated the mortgage debt through its commencement of the 2011 action … , the plaintiff established that the April 2017 de-acceleration notice sent to the defendants revoked the acceleration of the mortgage debt. Since the March 2018 action was commenced within six years of the revocation of the mortage acceleration, the March 2018 action was not time barred … . Accordingly, the defendants' motion for summary judgment dismissing the complaint … should have been denied. U.S. Bank N.A. v Papanikolaw, 2021 NY Slip Op 04777, Second Dept 8-25-21

FORECLOSURE, TRUSTS AND ESTATES, CIVIL PROCEDURE.

IN THIS FORECLOSURE ACTION THE DEATH OF THE MORTGAGOR/PROPERTY OWNER DID NOT TRIGGER AN AUTOMATIC STAY BECAUSE THE MORTGAGOR/PROPERTY OWNER DIED INTESTATE AND THE ACTION COULD CONTINUE AGAINST THE DISTRIBUTEES WITHOUT THE APPOINTMENT OF A REPRESENTATIVE (SECOND DEPT).

The Second Department, reversing Supreme Court, determined that the death of the mortgagor/property owner in this foreclosure action did not divest the court of jurisdiction because the mortgagor/property owner died intestate and the suit could continue against the distributees without the appointment of a representative:

"Generally, the death of a party divests a court of jurisdiction to act, and automatically stays proceedings in the action pending the substitution of a personal representative for the decedent" … . "In most instances a personal representative appointed by the Surrogate's Court should be substituted in the action to represent the decedent's estate" … . "However, if a party's death does not affect the merits of a case, there is no need for strict adherence to the requirement that the proceedings be stayed pending substitution" … . "Where a property owner dies intestate, title to real property is automatically vested in his or her distributees" … . Under such circumstances, "a foreclosure action may be commenced directly against the distributees" … . Thus, where a mortgagor/property owner dies intestate and the mortgagee does not seek a deficiency judgment, the mortgagor/property owner's death "does not affect the merits of a case, [and] there is no need for strict adherence to the requirement that the proceedings be stayed pending substitution" … . Wells Fargo Bank, N.A. v Miglio, 2021 NY Slip Op 04780, Second Dept 8-25-21

LABOR LAW-CONSTRUCTION LAW, DANGEROUS CONDITION.

A SUBCONTRACTOR CAN BE LIABLE FOR A DANGEROUS CONDITION ON THE WORK SITE ONLY IF IT EXERCISED SUPERVISORY CONTROL OVER THE WORK SITE; THE LABOR LAW 200 CAUSE OF ACTION AGAINST THE SUBCONTRACTOR SHOULD HAVE BEEN DISMISSED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendant subcontractor's (D'Onofrio's) motion for summary judgment dismissing the Labor Law 200 cause of action should have been granted. D'Onofrio demonstrated it did not have supervisory control over the work site where plaintiff allegedly fell from defective stairs:

Labor Law § 200 is a codification of the common-law duty of owners, contractors, and their agents to provide workers with a safe place to work … . "Where, as here, the plaintiff contends that his or her injuries arose not from the manner in which the work was performed, but rather from an allegedly dangerous condition at the work site, liability under Labor Law § 200 and common-law negligence may be imposed upon a subcontractor where it had control over the work site and either created the allegedly dangerous condition or had actual or constructive notice of it" … .

… D'Onofrio established its prima facie entitlement to judgment as a matter of law dismissing the causes of action alleging a violation of Labor Law § 200 and common-law negligence insofar as asserted against it by establishing that it did not have authority to supervise or control the area of the work site where the accident occurred, and that it did not create a dangerous condition which caused the accident … . Uhl v D'Onofrio Gen. Contrs., Corp., 2021 NY Slip Op 04778, Second Dept 8-25-21

MEDICAL MALPRACTICE, DELAY IN DIAGNOSIS.

WHETHER A DELAY IN DIAGNOSIS AFFECTED PLAINTIFF'S PROGNOSIS IS USUALLY A JURY QUESTION; DEFENDANT'S SUMMARY JUDGMENT MOTION SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff's expert raised questions of fact which precluded summary judgment in favor of defendant. The court noted that whether a delay in diagnosis affected prognosis is usually a question for the jury:

"Summary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions" … . On a motion for summary judgment, the party opposing the motion is entitled to every favorable inference that may be drawn from the pleadings and affidavits submitted by the parties … . "Conflicting expert opinions raise credibility issues which are to be resolved by the factfinder" … . …

Contrary to [defendant] Riegelhaupt's contention, the plaintiffs' expert, who is board certified in internal medicine and gastroenterology, was qualified to give an opinion of Riegelhaupt's care of the injured plaintiff in Riegelhaupt's capacity as the injured plaintiff's primary care physician. Moreover, there are triable issues of fact as to whether Riegelhaupt assumed a duty to assist in the treatment of the injured plaintiff's gastrointestinal issue, and whether Riegelhaupt's alleged departures delayed the diagnosis of the injured plaintiff's ulcerative colitis and decreased his chances of having a better outcome. Whether a diagnostic delay affected a patient's prognosis is typically an issue that should be presented to a jury … . Wiater v Lewis, 2021 NY Slip Op 04783, Second Dept 8-25-21

MUNICIPAL LAW, NUISANCE, TRESPASS, INVERSE TAKING.

NO NOTICE OF CLAIM WAS REQUIRED IN THIS NUISANCE, TRESPASS AND INVERSE TAKING ACTION AGAINST A VILLAGE BECAUSE MONEY DAMAGES WERE INCIDENTAL TO THE DEMAND FOR INJUNCTIVE RELIEF (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined a General Municipal Law notice of claim was not required in this action for nuisance, trespass, inverse taking and injunctive relief against a village. The village had installed drainage pipes in the roadway near plaintiff's property and then repaved the road. Plaintiff alleged water runoff from the roadway flooded his property caused the foundation to collapse. Because the action was essentially for money. No notice of claim was necessary because the money damages were deemed incidental to the demand for injunctive relief. The court noted that a trespass and a taking may be pled in the alternative:

"[I]t is well settled that a notice of claim is not required for an action brought in equity against a municipality where the demand for money damages is incidental and subordinate to the requested injunctive relief" … . Viewing the amended complaint in the light most favorable to plaintiff … , we conclude that the four remaining causes of action alleged continuing harm and primarily sought equitable relief … .

… "[T]he coincidental character of the money damages sought is 'truly ancillary to an injunction suit, i.e., there is a continuing wrong presenting a genuine case for the exercise of the equitable powers of the court' " … . …

Although "[a]n entry cannot be both a trespass and a taking" … , the issue here is the sufficiency of the pleading, and plaintiff sufficiently pleaded both causes of action, albeit in the alternative. Friscia v Village of Geneseo, 2021 NY Slip Op 04793, Fourth Dept 8-26-21

NEGLIGENCE, INMATES.

THE STATE BREACHED ITS DUTY TO PROTECT AN INMATE FROM AN ATTACK BY OTHER INMATES; COURT OF CLAIMS REVERSED OVER A TWO-JUSTICE DISSENT (FOURTH DEPT).

The Fourth Department, reversing the Court of Claims and granting judgment in favor of the claimant, over a two-justice dissent, determined claimant, an inmate, demonstrated the state was negligent in failing to protect him from an attack by other inmates:

… [C]laimant—who had an unblemished disciplinary record—cooperated with an investigation by the Department of Corrections and Community Supervision (DOCCS) into an illegal sexual relationship between a female correction officer (Parkinson) and several male inmates. Among the inmates involved in the illegal relationship was a gang leader inside the prison. During the course of the investigation, a state official left documents evidencing claimant's cooperation where an inmate porter could see them, and the porter shared that information with other inmates, including the gang leader implicated in the investigation. The gang leader then collaborated with other inmates to instigate a brutal assault on claimant. Prior to the attack, one of the inmates informed Parkinson of the plan. * * *

… [T]he trial evidence proves decisively that defendant either knew or should have known that claimant was at serious risk of being attacked as a result of his cooperation. Specifically, defendant knew that claimant had just reported an illegal sexual relationship between Parkinson and an inmate gang leader, and defendant's failure to safeguard the investigatory file allowed that fact to spread through the inmate population. As defendant's own witnesses testified at trial, the risk to an inmate in claimant's position under these circumstances would have been obvious and well-known. Notwithstanding the reasonably foreseeable risk to claimant, defendant failed to take any steps to protect him. In short, given Parkinson's prior retaliation, the gang leader's influence, motive, and ability to instigate an attack, and defendant's failure to safeguard the facility's investigatory file, we conclude that defendant's decision to simply leave claimant in his dormitory, surrounded by

associates of the gang leader and guarded only by Parkinson, constituted a grave breach of its duty to use "reasonable care under the circumstances" to protect an inmate in its custody … . McDevitt v State of New York, 2021 NY Slip Op 04795, Fourth Dept 8-26-21

NEGLIGENCE, SLIP AND FALL, PUBLIC DOCUMENTS EXCEPTION.

ALTHOUGH THE DOCUMENTS SUBMITTED BY DEFENDANT IN THIS SLIP AND FALL CASE MAY HAVE MET THE CRITERIA FOR THE PUBLIC DOCUMENTS EXCEPTION TO THE HEARSAY RULE, THEY WERE INADMISSIBLE BECAUSE THEY WERE NOT AUTHENTICATED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the documentary evidence submitted by defendant (Maspeth) in support of its argument it did not create the depression in the roadway where plaintiff allegedly fell was inadmissible hearsay. Although the documents may have met the criteria for the public document exception to the hearsay rule, the documents were not authenticated:

Maspeth submitted various documents from City agencies … which it claimed were admissible under the common-law public document exception to the hearsay rule. Under the common-law public document exception, "[w]hen a public officer is required or authorized, by statute or nature of the duty of the office, to keep records or to make reports of acts or transactions occurring in the course of the official duty, the records or reports so made by or under the supervision of the public officer are admissible in evidence" since such public official "has no motive to distort the truth" and the writing is prepared in discharge of a public duty … . While the documents are admissible without the testimony of the official who made it, the documents must still be authenticated … . Here, even assuming that the documents submitted by Maspeth would otherwise meet the requirements under the common-law public document exception to the hearsay rule, they were not authenticated (… Alexander, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C4520:2), and were, therefore, not admissible as evidence. As such, Maspeth failed to establish, prima facie, with evidence in admissible form, that its work at the location prior to the date of the subject accident was not the cause of the depression in the roadway

which allegedly caused the plaintiff to fall. Rosenfeld v City of New York, 2021 NY Slip Op 04770, Second Dept 8-25-21

NEGLIGENCE, SLIP AND FALL, REPLY PAPERS.

EVIDENCE DEFENDANTS DID NOT CREATE THE WATER-ON-FLOOR CONDITION IN THIS SLIP AND FALL CASE WAS FIRST PRESENTED IN REPLY PAPERS; THEREFORE DEFENDANTS DID NOT MEET THEIR BURDEN ON THAT ISSUE; ALTHOUGH THERE WAS EVIDENCE THE AREA OF THE SLIP AND FALL WAS INSPECTED AT 7:00 AT THE START OF THE EVENT AND SOMETIME THEREAFTER, THERE WAS NO SPECIFIC EVIDENCE THE AREA WAS INSPECTED CLOSE IN TIME TO THE FALL AT 8:30, NEAR THE END OF THE EVENT (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendants' motion for summary judgment in this water-on-floor slip and fall case should not have been granted. The defendants first addressed whether they created the dangerous conditions in their reply papers, so they did not meet their burden on that issue. In addition they did not demonstrate the lack of constructive notice of the condition because there was no evidence the area was inspected close in time to the alleged fall:

… [T]he defendants were required to demonstrate, prima facie, that they did not create the alleged wet condition … . The defendants failed to make such a showing since they argued only that they lacked actual and constructive notice of the condition. While the defendants addressed the issue of creation for the first time in their reply papers, they failed to make a prima facie showing that they or their agents did not create the alleged wet condition, as it was their obligation to address this issue in their original motion papers … . …

… [T]he defendants' submissions in support of their motion, including the affidavit of Daniel Sullivan … were insufficient to demonstrate … that the defendants lacked constructive notice of the alleged wet condition. According to Sullivan, he was present at the school function but did not witness the injured plaintiff's fall. Although

he stated that he inspected the floor prior to the event beginning at 7:00 p.m. and at times during the event and did not see any debris or water on the floor, he also stated that the injured plaintiff fell at approximately 8:30 p.m. "near the end of the event." Sullivan did not provide specific information as to when the area where the injured plaintiff fell was last cleaned or inspected relative to the time of the accident … . Rivera v Roman Catholic Archdiocese of N.Y., 2021 NY Slip Op 04769, Second Dept 8-25-21

NEGLIGENCE, SLIP AND FALL, SPECIAL USE DOCTRINE.

THERE WAS A QUESTION OF FACT WHETHER A DEFENDANT WHICH DID NOT OWN THE AREA WHERE PLANTIFF SLIPPED AND FELL COULD BE LIABLE UNDER THE SPECIAL USE DOCTRINE (FOURTH DEPT).

The Fourth Department, reversing (modifying) Supreme Court, determined there was question of fact whether defendant Ayer made a "special use" of the area of the pavement defect where plaintiff fell:

Although the Ayer defendants met their initial burden on their motion by establishing that the defect in the pavement was located on a portion of the alley owned by the Benderson defendants, the Benderson defendants raised an issue of fact in opposition with respect to whether Ayer could nevertheless be found responsible for plaintiff's injury under application of the special use doctrine … . Specifically, the Benderson defendants' submissions established that the defect in the pavement was located close to the property line, that an entrance to Ayer's apartments was near the defect, and that fixtures attached to the building on Ayer's property encroached over the property line near the defect. Therefore, the Benderson defendants raised an issue of fact as to whether Ayer had the requisite "access to, and control of," the alley where plaintiff fell to give rise to a duty of care … . Jargiello v Ayer Dev., LLC, 2021 NY Slip Op 04828, Fourth Dept 8-26-21

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